

A SHORT HISTORY OF ROMAN LAW

OLGA
TELLEGEN-COUPERUS



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Olga Tellegen-Couperus



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PREFACE

This historical introduction to Roman law is written primarily for law students whose course includes legal history. It may also be useful to classicists and historians. Nowadays no lecturer dare assume that law students have a thorough knowledge of classical antiquity. I have therefore given considerable attention to the socio-economic and political factors that influenced the development of the law.

This book was written originally as a textbook for Dutch law students and has been used successfully for a number of years now. Professor P.B.H.Birks (All Souls, Oxford) suggested that an English version of the text might be useful in law courses at universities in the English-speaking world.

As I read through the English translation I became more critical of the original text and decided that certain points needed to be clarified and adapted. In particular the section on the formulary procedure seemed to require more detailed treatment since it played a crucial role in the development of Roman law. I have also compiled some explanatory notes for the English version and I refer to sources and background literature. Because the text is now intended for English-speaking countries I have referred mainly to literature written in English. As a basis for ancient history I have used *A History of Rome* by M.Gary and H.H. Scullard (Macmillan, 1975); for more detailed information about the juridical elements I always refer to *A Historical Introduction to the Study of Roman Law* by H.Jolowicz and B.Nicholas (Cambridge University Press, 1972), but the information given in these books has been supplemented by references to more recent literature.

This work could not have been completed without the help of a number of people. In particular I should like to thank Peter Birks for

PREFACE

encouraging me to publish an English version and Sheila McNab (Utrecht University) for actually producing it. I think she has succeeded in giving an accurate and readable English rendering, while preserving the character of the original text. As a result of our discussions some of the English text is no doubt clearer than the Dutch original. I am indebted to the Law Faculty and the Department of Legal History of Tilburg University for providing the facilities for the preparation of the final version; Marianne Stolp, secretary to the Department of Legal History, meticulously computerised most of the manuscript. Last but not least I am very grateful to my husband, Jan Willem, who lectures in law at Utrecht University. Due to his detailed knowledge and thorough understanding of the subject matter he was able to give me many valuable suggestions.

ABBREVIATIONS

- ANRW *Aufstieg und Niedergang der römischen Welt.*
Geschichte und Kultur Roms im Spiegel der neueren
Forschung, Berlin and New York, de Gruyter, 1972.
- C. Codex Iustiniani.
- C.Th. Codex Theodosianus.
- D. Digesta.
- F.V. Fragmenta Vaticana, in: *FIRA II*, pp. 461–540.
- FIRA *Fontes iuris romani anteiustiniani I, Leges*, ed.
S.Riccobono, Florence, Barbèra, 1941 (reprinted 1968);
II, *Auctores*, I.Baviera and I.Furlani (eds), Florence,
Barbèra, 1940 (reprinted 1964); III, *Negotia*, ed.
V.Arangio-Ruiz, Florence, Barbèra, 1943 (reprinted
with appendix 1968).
- G.E. Gai Institutionum Epitome, in: *FIRA II*, pp. 229–57.
- Inst. *Gai Institutiones*, M.David and H.L.W.Nelson (eds),
Leiden, Brill, 1948.
- RIDA *Revue Internationale des Droits de l'Antiquité*, Brussels.
1st series since 1948, now 3rd series (since 1954).
- SZ *Zeitschrift der Savigny Stiftung für Rechtsgeschichte*,
romanistische Abteilung, Weimar.
- U.E. Tituli ex corpore Ulpiani, in: *FIRA II*, pp. 261–301.

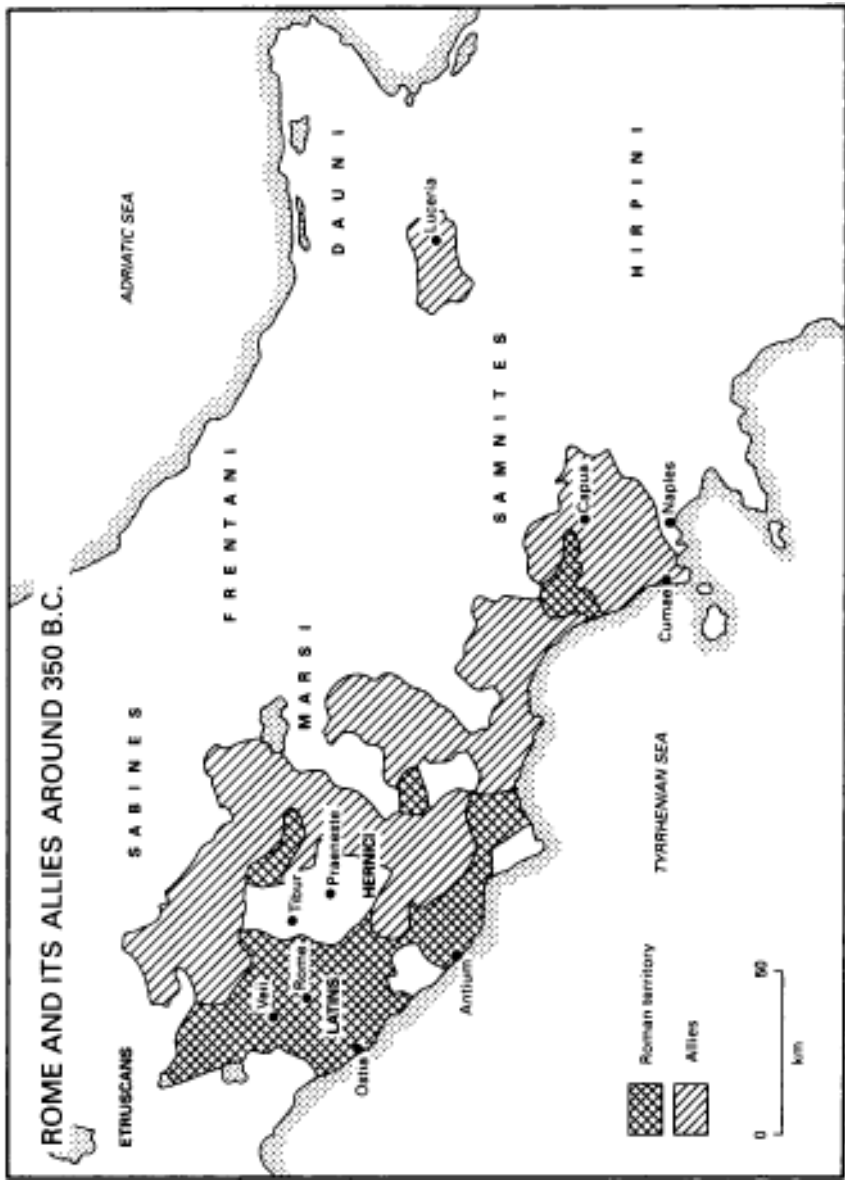
INTRODUCTION

The history of Roman law falls into two distinct periods. Roman law originated and developed in classical antiquity and culminated with the legislation of Justinian in the sixth century. The second period, although beginning in the sixth century, did not really become important until the end of the eleventh century. Then it was 'rediscovered' and began to be studied in the whole of western Europe.

This book concentrates on Roman law in classical Antiquity and covers a period of more than a thousand years. Since this period is really too long to deal with as a whole, it has been divided into a number of shorter periods. However, although Roman law went through many stages of development the stages cannot always be clearly distinguished. The reason is that law generally develops very gradually. In this survey emphasis is on the political structure of the Roman empire. This is the field that scholars have studied the most thoroughly and therefore it provides a suitable framework for the history of law as presented in this book. For each period there is first a brief survey of the sources of our knowledge, of the territory under Roman rule and of the socio-economic situation at the time. Then the political development is discussed. Nearly all these factors influence the way in which law is formed. The last chapter of each part deals with the development of the law during the period in question.

Part I

FROM MONARCHY
TO EARLY REPUBLIC
(-367 BC)



FROM MONARCHY TO EARLY REPUBLIC: GENERAL OUTLINE

1.1. THE SOURCES

Very little factual information is available about the earliest period of Roman history. The oldest historical studies that have survived date from the beginning of the first century AD. The authors of these studies, e.g. Livy, Plutarch and Dionysius of Halicarnassus, made use of the works of older historians who lived in the third to the first centuries BC and described the history of Rome year by year (the so-called annalists). However, the sections of their works relating to the early period of Rome's history were far from reliable. Although the annalists had access to a wealth of source material for the period dating from 387 BC up to their own day, there were practically no written documents left for the period before that year. These documents were lost in 387 BC when Rome was conquered and set on fire by the Celts. In order to fill the gaps in the source material the annalists made use of legends; although these legends may have been based partly on history they were certainly not historically reliable. The annalists elaborated these legends using their imagination and sometimes altered the chronological order of the events. Information about the founding of Rome and its early history therefore has always to be checked against information obtained with the help of other disciplines such as archaeology and linguistics.

Our knowledge of the oldest form of Roman law is also based on sources of later date. These sources include some of the literary sources mentioned above as well as some juridical sources such as the *Enchiridion* of Pomponius and the *Institutes* of Gaius, both dating from the second century AD; legal historians have doubts

about the reliability of these sources as well, but nowadays there is a tendency for some Romanists to regard them as useful nevertheless.

1.2. THE TERRITORY

As from 1000 BC various tribes came from the Danube basin and began to settle on the Italian peninsula. Some of them were to have a special influence on the founding and development of Rome. They were Indo-European tribes who were known collectively as Italians; two of these Italian tribes, the Latins and the Sabines, settled in Latium on the left bank of the Tiber¹. They lived in a number of small settlements and engaged in agriculture and cattle-rearing. Some of these settlements were on the hills in the area where Rome was built later on. In the course of the seventh century BC the inhabitants of these hill-settlements formed an alliance and they gradually obtained a powerful position in Latium. It was easy to cross the Tiber at this spot, so the alliance was able to control the trade between the left bank of the Tiber and the Etruscans on the right bank. It was the Etruscans who ultimately founded Rome.

Until recently it was assumed that the Etruscans came to Italy from Asia Minor about 900–800 BC and settled initially on the coast of modern Tuscany. The latest view, however, is that they settled in Italy much earlier than this and that they formed a complex of eastern, continental and indigenous elements². The Etruscans differed from the Italians in many respects. Unlike Latin, Greek and Celtic, their language, Etruscan, did not belong to the Indo-European group. As a result the Etruscans were long regarded as a mysterious people, but now much more is known about them. Because the Etruscans adopted the Greek alphabet and made only slight changes, Etruscan inscriptions are easy to read. We have known the exact meaning of most of their words for several decades now. Our information about the Etruscans is therefore no longer based solely on the work of Greek and Roman historians and archaeological finds (e.g. the wall-paintings on the graves in Tarquinia and Chiusi). Recently we have also been able to consult about 10,000 inscriptions that have survived. As a result, we know that the Etruscans, unlike the Latins and the Sabines, did not live in small scattered settlements. They lived in independent city-states which formed the centre of local trade and

GENERAL OUTLINE

politics. Until the fifth century BC the city-state was ruled by a king and thereafter by a magistrate. Private law of the Etruscans, and particularly the law of persons, was very different from, for example, Roman private law.³ Their culture was more highly developed than that of the Latins and the Sabines. We know from archaeological finds that the Etruscans had considerable knowledge of architecture and mining and were able to install a drainage system. Like the Italian tribes the Etruscans made their living from agriculture and cattle-rearing, but they also engaged in trade; because of their superior technical knowledge they were able to develop some sort of industry which produced ceramics, materials, implements and utensils, jewellery and ornaments. The Etruscans were also fearsome pirates who plundered ships in the coastal waters of the Mediterranean. In the course of the seventh century BC the Etruscans extended their power in a south-easterly direction, to Latium and Campania, and introduced their way of life to those areas.

According to legend Rome was founded by Romulus in 753 BC; on the basis of archaeological evidence, however, it seems much more likely that Rome was founded by the Etruscans in the seventh century BC. The territory of the Latins and Sabines was of great strategic importance for the Etruscans. This was why they founded the city-state of Rome on that site. They did this in accordance with their own customs: they built temples and reservoirs, cisterns and a city wall; they drained the swamps between the hills, they organised the people into political and military units and let the city-state be governed by a king who was generally of Etruscan origin. Tradition has it that the last Etruscan king was overthrown and driven out of Rome in 509 BC. This event marked the beginning of a new era for Rome. The expansion of the Etruscans towards the south ceased and they even had to withdraw from Campania and Latium. Rome became a republic governed by a senate and magistrates.

The young republic, however, was surrounded by a number of powerful neighbours: the south of Italy was in the hands of some Greek colonies and the Etruscans still constituted a formidable force in the north. In Latium there were some other city-states besides Rome which had joined to form the Latin alliance. In 493 BC Rome came into this alliance too, as an equal partner rather than as a member. As from the end of the fifth century BC the Romans began to extend their territory. First of all they moved

northwards. As a result of a war against the Etruscans (406–396 BC) Rome acquired part of Tuscany; from then onwards the Tiber no longer formed Rome's northern frontier. About this time Celtic tribes settled in the Po valley. They soon decided to extend their territory southwards; they managed to defeat the Romans, capture Rome and set it on fire (387 BC); the citadel, the Capitol, was probably the only building left standing. Finally the Celts were repulsed and they retreated northwards. Throughout the fourth century and at the beginning of the third century BC the Romans fought battles: against the Samnites (a tribe from the Apennine area), against the Latin alliance which rose in revolt, against the Etruscans and the Celts and finally against the Greek colonies in the south of Italy.

By the time these battles were over, the Romans had subjugated the tribes in central and southern Italy. This did not mean that these tribes were governed from Rome: the various tribes were more or less allowed to rule their own areas but they were made subordinate to Rome in very different ways.

1.3. THE POPULATION

1.3.1. *Familia* and *gens*

Roman society was made up of two elements, the *familia* and the *gens*. A *familia* consisted of all those persons who were in some way subject to the power of a *pater familias*.⁴ This power could be based on parentage, marriage or adoption and was in principle unlimited. Religious norms imposed a certain number of constraints and the possible abuse of power by a *pater familias* was kept in check by strong social control. Within the *familia* the *pater familias* was the only person who had any rights in private law.

Being subject to the power of a *pater familias* had nothing to do with age; a person was in this position until the *pater familias* died or relinquished his power in a formal manner, e.g. by means of *emancipation* the person concerned was then independent and could have his own property (*sui iuris*).

Familiae with a common progenitor (even if he was a legendary figure) together founded a *gens* and had a common gens-name.⁵ They could hold meetings and pass resolutions that were binding on the members, and they had a common cult. According to Livy (*Ab urbe condita*, 10.8.9) at first only patricians formed a *gens*, but

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names of old plebeian *gentes* are also mentioned in the sources. The law of the XII Tables of 449 BC contained rules on guardianship and intestate succession for the *gentes*; these rules were applied until the end of the republic. The *gentes* themselves continued to exist during the early empire, but then they no longer had any juridical function.

1.3.2. Patricians and plebeians

This early period of Roman history is characterized by the division of the population into patricians and plebeians. Nobody is quite sure how this division originated; it may have been based on ethnic differences (for instance, the plebeians were of Latin origin and the patricians were the descendants of the Sabines, or vice versa), but we have no proof and such theories can only be speculative.⁶ The sources, however, do demonstrate that the plebeians were not regarded as foreigners but were Roman citizens, just like the patricians. The differences between the patricians and the plebeians were clearly visible from their respective economic and social position. The patricians formed a kind of nobility; they owned a considerable amount of land and kept cattle and slaves. They were entitled to serve as magistrates and priests and because of the voting system had a decisive influence on legislation (see section 2.2.3). The plebeians on the other hand were mainly artisans and small farmers; in times of war they had no slaves to keep their businesses running and this increased their chance of impoverishment. Furthermore, as mentioned already, they were not allowed to hold public office and, as a result of the above-mentioned voting system, they had very little influence on legislation. Finally, in the law of the XII Tables it was stated that intermarriage between patricians and plebeians was forbidden.⁷

In the early years of the republic the number of impoverished plebeians increased whereas some plebeian families became wealthy and sought to have the same rights as the patricians. This gave rise to considerable tensions. In the long struggle between the orders which began about 500 BC and continued until 286 BC the differences in the rights of patricians and plebeians were gradually removed. According to tradition, in 471 BC the plebeians were granted the right to hold their own assemblies (called *concilia plebis*) and choose their own officers, called tribunes; the decisions made by these assemblies (plebiscites) applied exclusively to the

plebeians. The patricians did not consider themselves bound by these decisions. The next important step was the recording of the law in writing in the XII Tables; this enabled the plebeians to become acquainted with the law and to protect themselves more effectively against patricians who, by serving as priests or magistrates, abused their power. The XII Tables will be discussed in more detail in section 3.2. Shortly after this law had come into being, a *lex Canuleia* removed the ban on intermarriage between patricians and plebeians. The *leges Liciniae Sextiae* of 367 BC opened the way for plebeians to serve in the top ranks of the magistrature and become, for instance, consuls. And finally the *lex Hortensia* of 286 BC decreed that the plebiscites were binding for all the Roman people, including patricians. The political distinction between patricians and plebeians had thus disappeared for ever; the only difference that remained was between rich and poor citizens.

1.3.3. Citizenship and *clientela*

Rome, like other city-states in antiquity, observed the personality principle: each person lived according to the law of the town to which he or she belonged. Although the Romans conquered the tribes of central and southern Italy, this did not mean that these tribes were automatically granted Roman citizenship; the various tribes retained their own form of law but were also allowed to use Roman law to a certain extent. In Rome, this situation stimulated, quite early on, a large-scale development of the phenomenon known as *clientela*.

It is not certain how the *clientela* came into being. The *clientes* may originally have been foreigners who had settled in Rome and had placed themselves under the protection of a Roman *gens*. Anyway, in the early republic it was mainly Roman citizens with a weak social and economic position (namely plebeians) who sought the protection of a Roman citizen in high office; this Roman then became their patron. In a juridical sense the *clientes* were free but they were expected to show their patron respect and loyalty and support him in his political ambitions; this meant for instance that in the *comitia* they had to vote in the same way as their patron.⁸ In return a patron had to give his *clientes* the use of a piece of land or assist them in a lawsuit by giving legal advice or appearing for them in court. He was not supposed to take legal action against his *clientes* or to give evidence against them in a trial. The *clientela*

GENERAL OUTLINE

phenomenon continued throughout Roman history, but from the empire onwards it played a less important role.

1.4. ECONOMY

For a long time after its foundation the city-state of Rome occupied quite a small area. About 500 BC, Rome covered an area of only 700–800 km². Agriculture and cattle-rearing were the main means of livelihood. It is not clear whether the Romans at that time were familiar with the principle of private ownership; perhaps at first only ownership of movables such as cattle and implements was possible; ownership of immovables may not have been possible until later.⁹

Because of Rome's favourable situation on the Tiber—and its proximity to the *via Salaria*—the city soon developed as a trading-centre. Until the late fourth century BC the Romans had no coinage, but instead they used pieces of bronze: prices of goods were determined by the weight of an amount of bronze. The weight was determined by a weigher (*libripens*) who weighed the bronze (*aes*) on scales (*libra*). After the introduction of coins, the procedure continued for centuries as a formality for certain legal acts such as the *emancipation* the making of a mancipatory will and property transfer by *mancipatio* of *res Mancipi* (land in Italy, slaves and cattle); these acts were also called acts *per aes et libram*.

In this connection it should be mentioned that a written alphabet and writing were introduced in Rome about the beginning of the fifth century BC. It now became possible for the Romans to record their customs in writing (hitherto these had been handed down orally) and to draw up a deed for certain economic transactions and for last wills and testaments.

FROM MONARCHY TO EARLY REPUBLIC: THE STATE

In the period up to 367 BC Rome had two different forms of government. Until 509 BC there had been a monarchy, the political structure of which consisted of a king, a senate and an assembly. Then Rome became a republic with a political structure consisting of a senate, a magistrature and an assembly.

2.1. THE MONARCHY

It is difficult to construct an accurate picture of the period of the monarchy because it coincided with the earliest period of Roman history. The historians describing the period based their accounts largely on legends; furthermore, they were accustomed to describing the primitive institutions associated with the monarchy in terms that were appropriate for their own times but were not always applicable to the earlier periods. According to these historians the names of the first kings of Rome (Romulus, Numa Pompilius, Tullius Hostilius and Ancus Marcius) showed that they were of Latin-Sabine origin. In the historians' view the senate and the popular assembly were both involved in choosing the king. Tradition has it that the king's task was largely of a religious nature: he was the chief intermediary between the community and the gods. In the course of time he also became head of the army and was involved in settling disputes between citizens. The king performed these tasks in close conjunction with heads of the leading families.

Because Rome was so small in those days it can be assumed that the king was able to combine these various tasks and duties. It is however doubtful whether the first kings of Rome were in fact of

Latin-Sabine origin. As was stated in section 1.2, Rome was not founded until the seventh century BC and the founders were Etruscans. Of the three kings of this period (Tarquinius Priscus, Servius Tullius and Tarquinius Superbus), the first and the third would seem, from their names, to be of Etruscan origin. They stimulated economic life in Rome by building large temples and by installing a drainage system in the swamps between the hills (the famous Cloaca Maxima). Servius Tullius and Tarquinius Superbus also strengthened their own positions considerably. They introduced a new kind of supreme command, the *imperium*, which gave them unlimited power over the army and some control over religious affairs and the administration of justice. According to the Roman historians it was this increase in power which made the Romans drive out Tarquinius Superbus in 509 BC and set up a republic.

Originally the senate (*senatus*, from *senes*=old) seems to have consisted of a hundred citizens who were all leading members of patrician families and were referred to as *patres*. The senators were appointed by the king. Their task was primarily to advise and support the king. If the king died the senate could wield supreme power by means of an *interregnum* until a new king was appointed. The powers of the senate were not laid down officially. The degree of influence exerted by the senate was totally dependent on how powerful a particular king was. About the time when Rome was changing over from a monarchy to a republic the number of senators was increased considerably: up to 300, it is said.

Under the monarchy the usual form of assembly was the *comitia curiata*. When the people assembled they were divided into thirty *curiae*. Originally a *curia* was based on kinship but later it was also determined by place of residence. In the assembly voting was not performed on the basis of a head-count. Voting took place in two stages: first votes were cast in the *curia*, then the votes of the *curiae* were cast in the assembly. According to the Roman historians decisions were made in the *comitia curiata* about matters of war and peace and votes were taken about laws proposed by the king; however, the information is not very reliable. The functions of the *comitia curiata* were probably mainly in the religious field and included the inauguration of the king. When two new forms of popular assembly were introduced at the end of the monarchy the *comitia curiata* continued to exist but were used for other purposes.¹

2.2. THE REPUBLIC

It is also difficult to obtain a reliable picture of the political structure during the first few centuries of the republic; one reason is again the lack of source material; another reason is that constitutional law was based largely on customs and conventions, just as it is today. Modern legal historians have very different views on the crucial question of where power was concentrated during the early republic. Many people support the view expressed by the famous German legal historian Theodor Mommsen, namely that in 509 BC the absolute power of the king was transferred to two high-ranking magistrates and that the senate retained its advisory function.² However, this view is being challenged increasingly, and with good reason. It is unlikely that after overthrowing the king the leading Roman families would have wished to become dependent again on the whims of one or two persons. It is much more likely that the leading citizens, coming together in the senate, took power into their own hands and charged one or more of their fellow-senators with a specific task whenever the need arose. In the first 150 years of the republic all kinds of constructions must have been used to define these tasks; in the sources one comes across various names for magistrates, e.g. praetor, consul, *decemviri legibus scribundis* (ten men whose task was to write down the laws) and *tribuni militum consulari potestate*. The *leges Liciniae Sextiae* of 367 BC were the first to give a ruling about the magistrature, a ruling which was to remain in force for several centuries; both before and after that time supreme power was probably in the hands of the senate.³

2.2.1. The senate

As was stated above, according to tradition at the beginning of the republic the senate consisted of 300 citizens. They were the most highly esteemed members of society and as a symbol of their high position they were entitled to wear a tunic with a purple hem. There was no time limit for membership of the senate: senators were appointed for life. Little is known about the way in which new senators were appointed. We know from a law passed in 312 BC that one magistrate, the *ensor*, usually had the task of forming the senate, but we have no idea how long the senate had been formed in this way or how it was formed earlier.

The senate was not only involved in legislation; it also had all kinds of administrative functions. First of all, the decisions of the assemblies concerning laws, the election of magistrates, etc., were not valid until they had been ratified by the senate. Secondly, it was customary for magistrates to consult the senate in connection with decisions that were of political significance. The senate was in charge of religious affairs in the state. In addition it supervised the *aerarium*, the treasury. Last but not least, the senate was responsible for foreign policy: the senate received envoys, could declare war and make peace. In the first centuries of the republic these activities must still have been of a fairly simple kind.

2.2.2. The magistrature

Before 367 BC there was no general ruling about the magistrature. Until then there had been various magistrates with varying degrees of power; these included the offices mentioned above, namely praetor, consul, *tribunus militum* and *decemviri*, but we know so little about these offices that they will not be considered further here. However, we do have some information about some of the other magistrates of the period.

In 443 BC two magistrates, censors, were appointed for a period of eighteen months for the purpose of performing the *census*. Their task was to estimate the wealth of individual citizens and determine the *census* class. Soldiers were recruited on the basis of the census list, which was revised every five years. The census list also provided information about how much tax each person had to pay. When it became customary to make notes on the census list about a citizen's misconduct—which could have serious consequences for the citizen (e.g. exclusion from the senate or the *comitia*)—the censor had the additional task of supervising morals. The censors were chosen by the *comitia centuriata*; for a long period it was only the patricians who were eligible for these positions. It was not until the middle of the fourth century BC that a censor was chosen from the plebeians. A censor became really important when he was involved in forming the senate; as was stated above, we do not know when this first occurred.

Two magistrates of lower rank, the quaestors, had the task of supervising the treasury. They were elected by the *comitia tributa*; up to 421 BC they were of patrician origin and after that date some

were of plebeian origin. In the early days there had been only two quaestors, but from 421 BC there were four.

In connection with the magistrature, mention should also be made of the *tribuni plebis*, the tribunes of the plebeians, although originally they were not magistrates. As was mentioned above, the function came into existence during the struggle between the orders at the beginning of the fifth century BC. Via the tribunes the plebeians were able to protect themselves from patricians who abused their power. The tribunes, ten in number, were elected in the *concilium plebis*, the assembly of the plebeians; they were able to convene a meeting of the plebeians and to bring a bill before them. In the course of time they also acquired the right to veto the acts of a magistrate and the right to protect the plebeians from punishment inflicted by the (patrician) magistrates. As from 449 BC the tribunes were 'inviolable'; in other words the plebeians outlawed anyone who attacked the tribunes or hindered them in the performance of their duties. The tribunes were assisted by *aediles plebis*, who were also chosen in the *concilium plebis*. When in the course of the fourth century BC the struggle between the orders was drawing to a close the tribunes had taken part in Roman public life for such a long time that no attempt was made to abolish them. They continued to exist throughout the republic and during part of the empire, when they became one of the pillars of imperial power.

2.2.3. The assemblies of the people

As mentioned above, at the end of the monarchy the *comitia curiata* ceased to be the only form of assembly; two new forms were introduced, namely the *comitia centuriata* and the *comitia tributa*. In addition, as from 471 BC the plebeians assembled in the *concilium plebis*, a form of assembly that finally merged completely with the *comitia tributa*. A feature common to these new assemblies and the *comitia curiata* was that voting took place in two phases: first of all within the group (*curia*, *centuria* and *tribus*) and then per group in the assembly; however, these assemblies differed from each other with regard to composition, tasks and powers.

The *comitia centuriata* was originally the assembly of the Roman people in military array but they soon turned into a political assembly. The *comitia centuriata* developed after the penultimate king, Servius Tullius, had drastically reorganised the army and had

adopted a new technique of waging war: in the army the emphasis was no longer on individual soldiers but on units of heavily armed foot-soldiers, known as 'hoplites'.⁴ A hundred hoplites formed a century and there were 197 centuries. In order to recruit and finance these units the citizens were divided into five classes, each of which had to supply a set number of centuries: the first class consisting of the richest citizens had to supply the most; the other classes successively fewer and the citizens without any property together had to supply one century. When in the course of the fifth century BC an assembly was formed in which the centuries had a vote, the well-to-do citizens were again in the majority. Citizens therefore did not have equal political rights in the absolute sense, but, as was customary in cities in antiquity, these rights were determined by the contribution the citizens made to the defence of their city. Consequently Roman women, who were not directly involved in this task, did not have any political rights.⁵

In the *comitia centuriata* the supreme magistrates were elected and votes were cast concerning bills which the magistrates had submitted to the assembly; if the proposed law was approved, then that law (*lex*, plural: *leges*) was given the gens-name (or names) of the magistrate (or magistrates) who had proposed it, e.g. the *lex Valeria* was named after the *gens* of the *Valerii* and the *lex Poetelia Papiria* after the *gentes* of the *Poetelii* and the *Papirii*. From the middle of the fifth century BC the *comitia centuriata* was also involved in judging criminal cases.

The *comitia tributa* was the assembly of the citizens as residents of Rome. In this assembly votes were cast per *tribus*. The Roman people were divided into urban and rural tribes according to their place of residence. There were four urban tribes, consisting largely of people with a fairly low position in society. The twenty-one rural tribes consisted of people who owned land outside Rome and lived on it; these tribes were fairly small and most of their members enjoyed a fairly high social status. It followed therefore that in this assembly too it was the well-to-do citizens who—indirectly—swayed the vote. The tasks of the *comitia tributa* included choosing the minor magistrates, e.g. quaestors, and voting on laws that had little political importance. It is not certain whether the *comitia tributa* had always had to perform these tasks. Little is known about the origin and the history of this form of assembly either; this is partly because yet another type of assembly developed, namely the *concilium pie bis*.

The *concilium plebis* was the assembly of the plebeians. Its development was one of the first results of the above-mentioned struggle between the patricians and the plebeians. Since 471 BC the Roman senate had allowed the plebeians, divided into *tribus*, to assemble to choose their leaders, the tribunes, and to discuss their own affairs. The decisions made by the *concilium plebis*, the *plebiscite* applied only to the plebeians; the patricians were not involved in these decision-making procedures. When, during the republic, there was an extension of Roman territory and an increase in population, the number of patricians declined in relation to the number of plebeians. As a result there were fewer differences between the *concilium plebis* and the *comitia tributa* and between the decisions made by these assemblies.

FROM MONARCHY TO EARLY REPUBLIC: THE LAW

3.1. INTRODUCTION

The law under the monarchy and the early republic is usually referred to as archaic law because it was still in an early stage of development. In primitive Rome social life was regulated by a series of norms, the *mores maiorum*, which the Romans had inherited from their ancestors. Some of these norms were regarded as being of human origin, some as of divine origin, but there had never been any clear distinction between the two categories. Traditional Roman religion was not particularly concerned about the hereafter; it focused chiefly on the maintenance of good relations with all kinds of supernatural powers that were considered to influence human existence; for this purpose prayer meetings and sacrificial services had to be held in accordance with certain rites that were prescribed in great detail. Quite early on, however, at the end of the monarchy, the Romans began to distinguish between human and divine norms, but even then—and for the next 150 years or so—there was still some interaction between human law (*ius*) and divine law (*fas*).¹

Any behaviour that did not violate the rules that regulated the relationship between the gods and man was considered to conform to *fas*. Any behaviour that did violate these rules was considered to be *nefas*; such behaviour could arouse the anger of the gods and the whole community could be afflicted by diseases and disasters. Behaviour that did not offend other citizens was considered to conform to *ius*; behaviour that did contravene the norms of the community was termed *iniuria*.

The link between *ius* and *fas* is evident from the fact that certain types of behaviours that were first designated as *nefas* (e.g. murder or treason) were later regarded as *iniuria*, whereas certain

juridical transactions which had originally come under *ius* acquired a divine dimension (e.g. *sponsio*=a solemn vow to fulfil an obligation, which had nothing to do with divine law; failure to fulfil such an obligation was regarded as particularly reprehensible because it was also interpreted as *nefas*). The concepts of *ius* and *fas* are also linked (a) by the person of the king who was the leader of the state in matters relating to both *ius* and *fas*, and (b) by the fact that during the first 150 years of the republic law-making was in the hands of the college of *pontifices* (=pontiffs). During that period the college consisted of about five patricians. For them the priesthood was not a profession; it was an honorary position which they generally held while they exercised a political function. The pontiffs have always been regarded as guardians of the law; they were primarily concerned with the application of sacral law such as the regulation of the calendar, but at the same time they supervised secular law.

Furthermore, archaic law—like the law of nearly all primitive peoples—was of a formalistic nature. To ensure that a certain transaction would have the desired result, it always had to be performed in accordance with meticulously detailed rituals, e.g. certain words had to be used or certain gestures had to be made. This formalism applied to transactions in both the sacral and the juridical field, and in the latter it applied to both legal transactions and civil procedure. A number of legal transactions which developed in this period (e.g. the *stipulatio* and the *mancipatio*) were still used in the republic and in the empire, but by then the ritual transaction had only a symbolic value.

Archaic Roman law was also called *ius Quiritium*, *Quirites* being the word by which Roman citizens were addressed in the assembly. At this time Roman law applied only to Roman citizens. This was nothing out of the ordinary: the personality principle mentioned above in section 1.3.3 prevailed in antiquity. The *ius Quiritium* was later also referred to as *ius civile* because Roman citizens came to be called *cives Romani*. However, the term *ius civile* is used with yet another meaning. In this early period law was formed in various ways: by custom, legislation, administration of justice and interpretation of the law that had developed in this way. Because Roman citizens were always involved in this development all these rules were referred to collectively as *ius civile*. The development of law by custom will

not be considered here; legislation, administration of justice and interpretation will be discussed below.

3.2. LEGISLATION

According to Pomponius and other authors, already under the monarchy the senate and the people's assembly had been allowed to vote on laws that had been proposed by the king. These authors maintain that these so-called *leges regiae* were collected and written down at the end of the monarchy by a *pontifex maximus*, Sextus Papirius. However, it is very likely that the authors in question took it for granted that laws were made under the monarchy in more or less the same way as in their own time, and therefore their information is not very reliable. From the few fragments that remain of the *leges regiae* it is evident that they were not real laws but were pronouncements made by the king, in which he established certain norms in the religious/juridical field. It is possible that these pronouncements were made known to the people during an assembly and that the relevant texts were stored in the pontifical archives. The fragments that have come down to us—if they are authentic, that is—show that the religious and juridical elements were still very closely linked. According to Plutarch, for instance, Romulus declared that anyone who sold his wife should be sacrificed to the gods of the underworld (*Romulus*, 22.3–4).

The first important piece of legislation in the early republic is the Law of the XII Tables mentioned above (section 1.3.2), which dates from the middle of the fifth century BC. With regard to this law too there is a remarkable difference between what the historians say and what, in all probability, actually happened. Tradition has it that in 462 BC the plebeian tribune C. Terentilius Arsa proposed that the law should be written down in order to prevent it from being applied discriminately by the patrician magistrates. The plebeians struggled for eight years before the patricians gave in and sent a delegation to Athens to copy out the laws of Solon, and to other Greek cities to find out about their legislation. In 451 BC ten citizens were chosen to record the laws (*decemviri legibus scribundis*). They were given supreme political power (*imperium*) for the period in which they performed this task and simultaneously the powers of the magistrates were curtailed. In the following year, 450 BC, the *decemviri* produced a copy of

the laws on ten *tabulae* (tables/tablets) but it was regarded as unsatisfactory, particularly by the plebeians. A second decemvirate is said to have added two further tablets in 449 BC. Then the twelve tables were finally approved by the people's assembly, so we are told.

The account of this part of Roman history, however, contains a number of anachronisms and inaccuracies. As a result legal historians in the early part of this century reached very different conclusions about the origin and character of the XII Tables. Nowadays it is generally assumed that (a) in 451 BC, after a number of years of conflict between the patricians and the plebeians, ten patricians were chosen to produce a written code of customary law—and particularly of the most controversial points—and that (b) this decemvirate temporarily took upon itself the leading functions in Rome. It is considered unlikely that there was a second decemvirate. Furthermore, the question of Greek influence on the XII Tables is still much discussed; no one believes any more that a delegation was sent to Greece, but some think that it may have visited Greek towns in the south of Italy. The XII Tables do have some points in common with the laws of Solon, but these are almost exclusively matters of detail.² It is generally considered unlikely that the XII Tables were approved by the *comitia curiata*; this assembly did not acquire legislative power until 449 BC. The decemvirate probably formulated this law without it being voted upon by the people. The XII Tables seem to be correctly dated. This can be concluded, for example, from the fact that the law mentions that the Tiber is the boundary of Rome—which was the case until the end of the fifth century BC. The purpose of codification was not, as one might think, to achieve complete equality in law for patricians and plebeians; the first step in that direction was the lifting of the ban on marriage between the two orders in 445 BC. It was not until 367 BC that plebeians could be elected as consuls.

The original text of the XII Tables has not been preserved. The tables, which according to Livy were made of bronze, according to Pomponius were made of ivory and according to modern authors were made of wood, stood in the forum.³ They were probably destroyed when Rome was set on fire by the Celts in 387 BC. Our knowledge of the contents is based on various juridical and literary sources, the oldest of which date from the late republic. However, the authors concerned, like Cicero, Gaius and Aulus

Gellius, did not reproduce the contents in their entirety. They simply reproduced fragments that were relevant to their arguments, using a modernised form of Latin. Therefore we do not know how much of the text is missing and we do not know in what order the original clauses were arranged. The nineteenth-century reconstruction which was made on the basis of the fragments that have survived and which still underlies the modern editions of the sources of archaic Roman law can be little more than a hypothesis.⁴

The fragments of the Law of the XII Tables which have survived show that its provisions related to the whole area of legal order at the time. According to Livy (*Ab urbe condita*, 3.34.6), the XII Tables were ‘the source of all public and civil law’, but that was probably an exaggeration: nearly all surviving fragments relate to civil law and particularly to civil procedure (tables 1–8); only two provisions relate to constitutional law (e.g. table 9.1.2 on the prohibition of privileges) and some provisions concern sacral law (e.g. table 10 which prescribes rules for burial). Furthermore, the actual legal principles underlying the clauses relating to civil law were simply assumed and only certain points were covered in the legislation. To what extent do the clauses of the XII Tables restate existing customary law and to what extent do they represent innovations? A large number of clauses probably incorporated norms that already existed; but the law must have been adapted in those areas where social life had changed. A *pater familias*, for example, could acquire greater independence after the *gentes* had lost most of their social function; in table 5.3 the *pater familias* was given the power to dispose of his property by means of a will. In criminal law the *talio* was abolished for some crimes and replaced by a system of fixed penalties (e.g. table 8.3 relating to penalties for causing hurt or injury to another person).

The XII Tables remained relevant for a long period. Even in the second century AD Gaius wrote a commentary on them and in the sixth century some fragments of this commentary have been included in the Digest of Justinian.

3.3. CIVIL PROCEDURE

In the course of its history Roman law has known three forms of civil procedure: the *legis actiones*, the formulary system and the

cognitio extraordinaria. The periods in which these types of procedures were in use overlap to a certain extent; the *legis actiones* were generally used during the republic, the formulary system was in use from the second century BC to the third century AD and the *cognitio extraordinaria* was used in the empire.

The *legis actiones* (literally, actions based on the law) is the oldest known form of lawsuit. It was conducted orally and was divided into two phases. The first phase (*in iure*) originally took place before a pontiff; he decided whether the parties could take legal action, and, if so, in what manner; after the *leges Liciniae Sextiae* were passed in 367 BC his task was entrusted to a magistrate, namely the praetor.⁵ In the second phase (*apud iudicem*) the evidence was presented to the *iudex* who pronounced his verdict. The *iudex* was a citizen appointed as judge by both the pontiff (or praetor) and the parties concerned. No one knows for certain why the proceedings were split into two sections. A possible explanation is that in early Rome the evidence was often obtained with the help of irrational, supernatural methods such as ordeal or the taking of *auspicia* by observing the flight of birds. During the monarchy the king would probably have been responsible for deciding which method would be used to obtain evidence and arrive at the verdict; during the republic this task was probably performed by a *iudex*; the two-phase proceedings possibly developed as a result of this background. For a long time the ‘state’ exerted only a very minor influence. During the republic a new type of procedure, the formulary system, came into being; at first it existed side by side with the *legis actio* procedure, but in time it gradually replaced the *legis actiones*. In about 17 BC the *legis actiones* were abolished, but the procedure was still used in a few exceptional cases.

Various formal rules applied to the first phase of the *legis actio* procedure. First of all, the case could not be heard unless the two parties were present. Consequently, the position of the plaintiff had to be strengthened *vis-à-vis* the defendant; thus, according to the XII Tables (table 1.1) the plaintiff could apparently compel the defendant, by force if necessary, to take part in a lawsuit. As soon as plaintiff and defendant stood facing the pontiff or the praetor, the plaintiff had to open the proceedings by pronouncing his claim in a set form of words prescribed for the case in question. In other words he had to utter a pithy sentence that summarised his claim. The defendant had to reply, also in prescribed phrases, and finally

the pontiff or magistrate intervened, again by means of specific formulas, so the case might be sent for trial before the *iudex*. Gaius tells us in his Institutes (4.12–29) that at the time of the XII Tables there were four different models for *legis actiones* and that later a fifth one was added; three *legis actiones* could be used to open a lawsuit and two could be used to enforce the execution of a verdict. Within these models various claims could be formulated, but only using prescribed phraseology. From the example that Gaius gives in his Institutes we see how strict this formalism was. According to Gaius a man had once instituted a *legis actio* against another man who had chopped down his vines. He lost his case because, in the formula he was required to pronounce, he had used the word ‘vites’ (=vines) instead of the word ‘arbores’ (=trees) which was prescribed by the XII Tables (*Inst.* 4.11).

Although there were formal rules for the *in iure* phase there were none for the second phase before the *iudex*. Both parties were heard and they could produce evidence to support their respective standpoints. It sometimes happened that a prominent citizen delivered a plea in support of one of the parties, but this did not become normal practice until the later republic.⁶ With regard to evidence there were only general rules such as ‘the burden of proof rests on the plaintiff. It was up to the *iudex* to decide how much weight he would attach to the evidence produced. He could seek support for his verdict from a *consilium*, an advisory council which he appointed for that purpose when necessary. He gave the verdict orally in the presence of the two parties. It was not possible to appeal against the verdict by referring the case to a higher authority because both parties had agreed to the choice of the *iudex* and had thereby agreed in advance to accept his verdict.

If the verdict turned out in favour of the plaintiff and the defendant was not prepared to comply, the plaintiff could not turn to the state and ask for the fulfilment of the judgment: the plaintiff himself had to ensure that the sentence was carried out. Therefore he had fairly powerful measures at his disposal; with the help of the pontiff or magistrate he could restrict the personal freedom of the defendant. By using one of the two *legis actiones* formulated for enforcing a judgment he could have the defendant handcuffed until he, or someone else acting on his behalf, had fulfilled the judgment. If that had not happened within sixty days he could kill him or sell him as a slave ‘over the Tiber’, i.e. abroad. In the course of the fourth century BC, however, this was forbidden and

thereafter the situation of the person condemned via a *legis actio* procedure improved slowly but surely.

3.4. THE INTERPRETATION

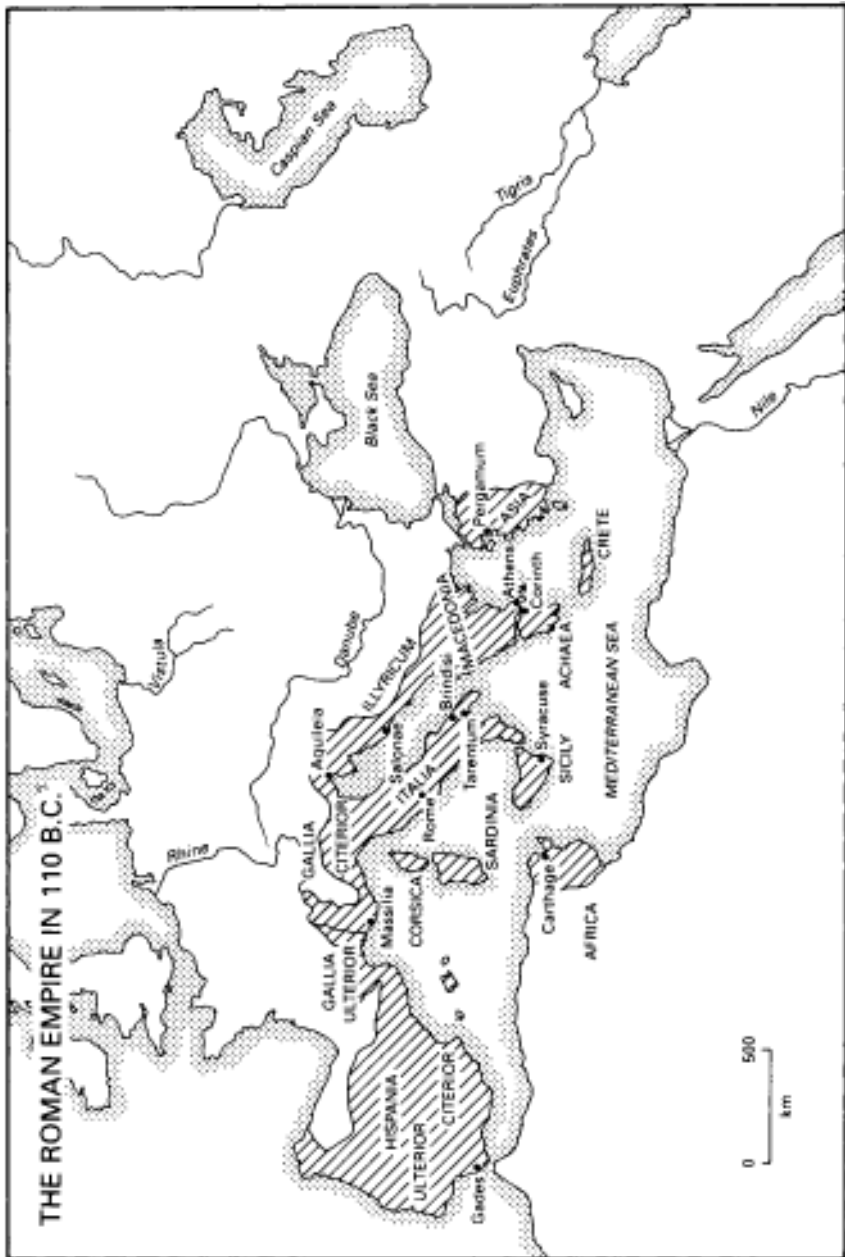
For a century after the Law of the XII Tables had been formulated new law was developed mainly by interpreting this law, later laws and the *legis actiones* based upon them. Because there was still a close link in those days between religious and juridical rules, it is not surprising that the pontiffs were made responsible for the interpretation. As was stated earlier, the pontiffs had control over the first phase of the *legis actio* procedure and could exert considerable influence on the development of the law. They could widen the scope of a *legis actio* by interpreting it broadly or they could restrict its scope by interpreting it narrowly. The pontiffs used their knowledge and power both in procedures and in other ways. They were often consulted by citizens who wanted to know whether there were specific rules of law which applied to their particular case. In their advice, however, the pontiffs not only interpreted existing legal concepts, they also introduced entirely new institutions while pretending to give interpretations. For instance, they used a recognised form of procedure for purposes other than the one for which it was intended. In this way the *in iure cessio*, the words of which originally marked the beginning of a lawsuit concerning ownership, also came to serve as a way of transferring ownership.⁷ Another well-known example of lawmaking through interpretation by the pontiffs is the way in which the *emancipatio* of sons was made possible. The XII Tables did not contain any provision relating to the way in which a father could set his son free from *patria potestas*, but it did contain a clause which was apparently intended to protect a son against abuse of power by his father. A father could mancipate his son to another citizen for money on the understanding that the son would be manumitted after having worked for this other person. As a result of the manumission the son returned automatically into the *potestas* of his father, whereupon the father could sell him again. Table 4.2 limited this right of the father by stating that if the father had sold his son three times, the son would be free from his power. The pontiffs used this provision to free a son from *patria potestas*. The father mancipated the son three times to a friend and the friend manumitted the son after each mancipation.

THE LAW

After the first and second mancipation the son returned to the power of his father; after the third mancipation the *patria potestas* ceased to exist and whenever the son was then manumitted by the buyer he became *sui iuris* (independent). Usually, however, the son was mancipated back to the father who thereupon manumitted the son himself. This was done so that the father acquired patron's rights over his son and thus retained rights of succession with regard to him. A possible reason for this kind of emancipation was that a father might have several sons among whom his estate would have to be divided when he died; he could prevent his estate from being split into small plots by dividing it out among his sons during his lifetime. This example illustrates how a provision in the XII Tables was used for a purpose that was quite different from the original purpose, and how by means of the interpretation of this provision a new institution, namely that of emancipation, was created. Roman legal science eventually developed from the interpretations given by the pontiffs.

Part II

THE LATE REPUBLIC (367–27 BC)



THE LATE REPUBLIC: GENERAL OUTLINE

4.1. THE SOURCES

Considerably more is known about the late republic than about the earliest history of Rome because the sources are more numerous and more reliable. Our knowledge about this period is based mainly on literary sources; for instance, the Greek historian Polybius and the Roman historian Livy, mentioned in Part I, supply us with very valuable information. Works by writers such as Caesar and Sallust contain important information about political developments, particularly during the last few decades of the republic; because these authors write about events that occurred within their own lifetime the information they give is fairly reliable. Of course, the comprehensive works of Cicero have to be mentioned in this connection: his philosophical and rhetorical works and his speeches are important for our knowledge of the political situation in the first century BC and for our knowledge of the law in those days.

In addition to these literary sources all kinds of inscriptions have come down to us; they provide supplementary information. The most important of these are on bronze, stone or copper and reproduce laws, decisions of the senate and other documents; these inscriptions concern for instance rules relating to provincial government. Specifically juridical literature from this period is very scarce and has only come down to us indirectly, via the *Corpus Iuris Civilis* of Justinian.

4.2. THE TERRITORY

In the period between 367 and 27 BC Rome gained control of the entire Mediterranean area. At the end of this period a large part of the world as far as it was known at the time was under Roman rule. This expansion was not the work of one man and cannot be compared to the rapid conquests made by Alexander the Great, but it was the result of several centuries of conflict and persistent effort.¹

4.2.1. The conquest of Italy

When in 367 BC the Romans changed the organisation of the state by means of the *leges Liciniae Sextiae* and thereby practically put an end to the conflicts between patricians and plebeians, they were able to concentrate once more on expansion. First of all, with the help of the Samnites the Romans defeated the Latin league which had been enviously watching the growing power of Rome and had demanded greater political power in the alliance; the alliance was dissolved and in 338 BC Latium came completely under Roman domination. Then, after a number of battles, the Samnites were defeated; their land as well as that of the Etruscans and the Celts who had allied themselves with the Samnites was conquered by Rome. By the beginning of the third century the Romans were the undisputed masters of central Italy.

During this period Rome had acquired more and more influence in the south of Italy; ultimately this was what prompted the largest Greek city, Tarentum, to declare war on Rome. Tarentum received assistance from King Pyrrhus of Epirus (in present-day Greece). King Pyrrhus defeated the Romans several times, but ultimately, after an indecisive battle, left the Tarentines to their fate. Thus the Romans were able to quickly subjugate the south of Italy as well (275 BC). In this way they established their authority over the whole of Italy, i.e. from the Po valley, where the Celtic tribes still lived, down as far as Sicily.

Some of the towns in the south were annexed, and with others Rome made various kinds of treaties and alliances. In addition a large number of new *municipia* and *coloniae* were founded. The administration of these towns was left mainly to local authorities, but the latter were not completely autonomous; for instance, they were forbidden to make alliances with anyone except the Romans.

The Romans treated the inhabitants of *coloniae* and some annexed towns in different ways. Some were granted complete Roman citizenship, some were granted citizenship without voting rights and others were not granted citizenship at all. It was not until 89 BC—and then only after several years of bitter fighting (the so-called Social War or War of the Allies)—that Roman citizenship was granted to all people living in Italy south of the river Po.

4.2.2. The conquest of the Mediterranean area

Of the great powers in the Mediterranean area Carthage (a town on the coast of present-day Tunisia) was the one that ruled the western part. Carthage was founded by the Phoenicians and Rome had had contact with Carthage since the second half of the fourth century BC and was linked to it via various treaties (made between 348–306 BC). Hitherto Rome had had very little contact with the other powerful empires such as Macedonia, Egypt and Syria, which had developed following the collapse of the empire of Alexander the Great (in about 323 BC). It was only in the third century that the Romans began the struggle which eventually—some three centuries later—was to lead to the Roman domination of the entire Mediterranean area. This expansion took place in the following way:

- The first Punic (Phoenician) war (264–241 BC); this gave Rome its first province, Sicily.
- In the second Punic war (215–201 BC) Rome succeeded in breaking the power of Carthage, conquered part of the Iberian peninsula and established control over the western part of the Mediterranean.
- Between 200 and 190 BC Rome subjugated the Celts in Northern Italy.
- After the second Macedonian war (200–197 BC)—the first one was part of the second Punic war—the Romans put an end to the Macedonian control of the Greek city-states and took control themselves.
- War against Antioch III, king of Syria and Asia Minor (192–188 BC). Rome was able to break the power of this king and obtain control of the eastern part of the Mediterranean by means of a system of alliances.
- After the third Macedonian war (171–168 BC) Macedonia

became a Roman province in 148 BC and Achaia in 146 BC.

- At the end of the third Punic war (149–146 BC) Carthage was completely destroyed and Carthaginian supremacy in the field of commerce was crushed.
- Annexation of Pergamum (in the north-west of present-day Turkey) when King Attalus III left it to Rome in his will (133 BC).
- War with Iugurtha (111–105 BC): Numidia in the north of Africa was annexed by Rome.
- Between 88 and 63 BC Rome waged three wars against Mithridates of Pontus (in the north-east of present-day Turkey); he wanted to drive the Romans out of Asia Minor and Greece. Mithridates was defeated, Rome regained control of Greece and gained control of Asia Minor, Armenia, Syria and Judaea.
- Conquest of Gaul by Julius Caesar (58–53 BC).
- Annexation of Egypt by Octavian in 30 BC.

These developments are reflected in the new name given to the Mediterranean: it began to be referred to as *mare nostrum* (our sea), an expression which had originally been reserved for the Tyrrhenian Sea following the Roman conquest of Sicily, Sardinia and Corsica.

Because it turned out to be impossible to govern these newly conquered territories from Rome, the task was entrusted to magistrates appointed for that specific purpose, and from the second century BC to ex-magistrates chosen from and by the senate. These governors, who represented the authority of the Roman state in the province assigned to them, had duties in the military and administrative sectors and were responsible for the administration of justice. Where possible the existing territorial organisation was maintained. During the republic the inhabitants of the conquered territories were not granted Roman citizenship; nevertheless, they had to pay tax to Rome. Although the Romans dominated the conquered peoples militarily and economically they did not always do so culturally. From the second century BC Rome became strongly influenced by Greek culture and particularly by Greek literature, philosophy and the fine arts.

4.3. THE POPULATION

When it was stipulated by the *leges Liciniae Sextiae* in 367 that one of the two consuls had to be a plebeian, the dividing line between patricians and plebeians hardly existed any more: from then on the main distinction was simply between rich citizens and poor citizens. The economic changes which occurred from the third century BC onwards gradually altered the social relationships. New orders developed, but these are not easy to classify because the citizens within the various orders (except for the highest stratum) did not form a homogeneous group. Three orders can be distinguished: the senatorial aristocracy, the *equites* and the middle and lower classes.²

4.3.1. The senatorial aristocracy

Those families which had one or two of their members in the senate enjoyed the highest standing in Roman society. To be a member of the senate one probably had to be very wealthy; in any case it was the task of the two censors—who estimated a person's wealth and on that basis assessed that person's military and financial obligations—to determine who could become a senator; by the end of the fourth century BC the censors could not, without good reason, disregard anybody who had held a high position in the magistrature (e.g. had served as consul, praetor or curule aedile). At the end of the second century BC someone who had been a plebeian aedile or a tribune was also entitled to become a senator. Of course it was also possible to gain admittance to the senatorial aristocracy by letting oneself be adopted by an old senatorial family; for instance, adoption could be in the interests of such a family when it was about to die out.

The wealth of senators consisted mainly of estates in Italy and the provinces; traditionally this was the only known form of wealth in Rome. Since a *lex Claudia* which was passed in 213 BC senators were even forbidden to own ships that could carry more than 300 amphores, i.e. ships of sea-going capacity; they were probably also forbidden to participate in contracts with the state to collect taxes. On the other hand, those senators who held high ranks in the army often received a considerable share of the spoils of war and were able to acquire land in the conquered territories for little or no money.³

4.3.2. The equites

In the later republic the *equites* formed the second class in Roman society. The class originated among the horsemen who had formed the cavalry since the army had been reorganised under King Servius Tullius. During the republic they were chosen by the censor from among the citizens on the basis of their financial, physical and moral strength. For a long time there was no distinction between *equites* and senators: senators often served as cavalrymen. This situation did not change even in the third century BC when the horsemen were found to be less effective in battle.

The *equites* began to form a separate class when the above-mentioned *lex Claudia* forbade senators to engage in commerce. From then on much of the commerce fell into the hands of the *equites*, whereas the senators concentrated on politics. The *equites* did not become a completely separate class until the senators were excluded from the eighteen cavalry centuries in about 120 BC. At that time the position of the *equites* became stronger than that of the senators in many respects.

The *equites* formed a very diverse group from all layers of society: they were made up of officers, large land-owners, *publicani*, members of leading families in the *municipia*, etc. Because the *equites* were allowed to serve as magistrates it was relatively simple for them to become members of the senatorial class; therefore most of the *homines novi* in the senate had first belonged to the class of the *equites*.

4.3.3. The middle and lower classes

The middle and lower classes of the population were formed by all citizens who belonged neither to the senatorial class nor to the *equites*. The small top group, consisting of the aristocracy of the *municipia* and of the towns in the provinces, dominated the political, cultural and economic life of these places; these people were faithful supporters of Rome and gradually strengthened their links with the capital. These were the groups that would provide the senators under the principate.

People slightly lower down in the hierarchy belonged to the lower middle class: in the towns they were mainly artisans and in the country they were the small landowners; people from this group who succeeded in amassing wealth could easily move up to the local

aristocracy or even to the *equites*. This class also included the agricultural workers and—in the cities—the masses who were unable to support themselves. This urban proletariat was completely dependent on the state or on certain very wealthy citizens and because its members readily accepted bribes they constituted a serious threat to political stability; this became particularly obvious in the latter days of the republic.

Finally, as a result of Roman conquests large numbers of slaves streamed into Rome and Italy. In antiquity it was standard practice for prisoners-of-war to become slaves. However, it was not only defeated opponents who became slaves; so did the civilian population of the conquered territories. Moreover, until the first century it often happened that pirates raiding ships and unprotected harbours kidnapped people and sold them as slaves, for instance at the large slave-market on the island of Delos. It is not possible to state precisely what percentage of the population were slaves, but by the end of the republic it must have been quite high. Estimates vary from 25 per cent to 50 per cent of the population of Italy; in the provinces the percentage was generally much lower.⁴ The living conditions and the social standing of these people could differ tremendously; sometimes they were worse than those of free Roman citizens, sometimes they were better. In particular, slaves from the eastern Mediterranean area, who had often been well educated before being sold as slaves, could have a good life: a slave could become a manager of a business, a teacher or a doctor. Others, however, were put to work in agriculture, in the mines or in theatres, and they often had a miserable life. Of course it was possible for all slaves to be manumitted by their masters and then to live on as Roman citizens; this frequently happened, particularly in the second and first centuries.⁵

4.4. ECONOMY

It is impossible to tell whether Rome's imperialistic expansion was the cause or the result of changes in economic conditions. But there was clearly a very strong interaction between economic and political developments.⁶

As Rome extended its power over Italy it was greatly helped by the fighting spirit and discipline of the farmers. Initially Roman control strengthened their economic position. The extensive agricultural areas which were added to Roman territory and

became the property of the Roman state were used to found fortified agrarian settlements. Citizens, if they so wished, could easily obtain land there and by reason of their permanent presence in the conquered territories Roman authority was upheld. In the third century Rome expanded so rapidly that there were not enough people to populate the new territories. The result was that some land remained unallocated. Part of this land could be rented from the state; the rest was divided into large plots and offered for sale at a low price. Because these plots were too large to be worked by one family (in the north of Italy, for instance, plots were fifty hectares), it was only wealthy Romans who were able and willing to exploit this land with the help of tenants and/or slaves. Both in Italy and in the provinces large estates (*latifundia*) developed; the owners, however, often lived in Rome and were interested primarily in high profits. Some small farms survived along with the new *latifundia*. This was mainly because when military campaigns came to an end (small) plots of land were often allocated to veterans who had been honourably discharged from the army after twenty years of service.

In the towns the economic development led to the setting up of all kinds of private businesses which specialised in making things or providing a service. Most of these businesses were run by free Roman citizens working for themselves or working as paid employees of the owner; some were run by slaves. The Romans found it advantageous to use slaves because slaves, unlike Roman citizens, could not be recruited for the army. A plentiful supply of slaves was available and if they were well-trained the results were positive. However, the use of slave labour also had a negative effect: there was less incentive for technical development and the slaves themselves were generally not interested in the results of their work. Most of these businesses were small; in antiquity there were hardly any large-scale industries, mainly due to the high costs of transport by land.

Overseas trade increased, particularly in transport from the provinces to Italy. Seaports developed along the Italian coast, the most important one being Puteoli near Naples. However, the Romans themselves did not engage in this activity, leaving it to the Phoenicians and the Greeks. For a long time the expansion of shipping was hindered by pirates. At the beginning of the first century several actions were undertaken, but it was only Pompey who succeeded in sweeping the Mediterranean clear of them (67

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BC); then the countries around the Mediterranean were able to form a huge common market where trade knew no frontiers.⁷

Another important economic activity was the implementation of government tasks by private individuals. Many kinds of government tasks such as the construction of roads, aqueducts and buildings, the organising of transport, collecting of taxes, supplying the army with food and the exploitation of mines (so-called *publica*) were in fact not performed by the Roman state because it lacked the necessary manpower and resources. Instead these tasks were allocated to private individuals, the so-called *publicani*. Most of them formed a company for the purpose of spreading the risks and raising the huge funds that were often required for these works. The company which received the contract was generally the one which at a public meeting submitted the lowest tender for the works or services concerned. The *publicani*, however, wanted their company to make a good profit and they were often notorious for their greed and cruelty.

Finally it should be mentioned in this connection that the late republic saw the development of money and banks in Rome. Such things were known much earlier in the eastern countries, in Greece and in the Hellenistic world. When the Romans conquered these countries they took possession of the large stocks of gold and silver belonging to their victims, and entered the banking business themselves. Romans became established in the large commercial centres where they provided facilities for people to deposit their money; they also arranged for payments to be made and they granted credit. At the beginning the coins that were used had been minted overseas, e.g. by Greek cities. The oldest known Roman coins date from the beginning of the third century BC. From the second century BC onwards, however, Roman coinage was in general use and it soon even superseded all other types of coinage in the Hellenistic world.

THE LATE REPUBLIC: THE STATE

The political structure of Rome in the second half of the republic did not differ essentially from its political structure in the early republic. Supreme power was in the hands of the senate; the magistrates had to ensure that the various governmental tasks were carried out. In the assembly the magistrates were chosen and votes were taken on bills proposed by the magistrates.¹

5.1. THE SENATE

During the late republic the Roman senate was a paragon of shrewdness, tenacity and perseverance; these qualities made it possible for Rome to conquer and rule the world as it was known at the time. Even though a number of senators could not resist the temptation offered by the newly arrived riches and turned to a life of luxury and ease, the senate as a whole managed to keep control up to about 100 BC.

Very little is known about how the senate was formed. According to a *lex Ovinia* of 312 BC two censors had the task of forming the senate and it is possible that this was also the method used before that time. This law decreed that in forming the senate the censors had to choose the ‘best men from each class’; this is generally taken to mean that both patricians and plebeians had to be chosen and that anyone who had served as a magistrate (a consul, a praetor or an aedile) was a possible candidate. As a result persons who did not belong to the senatorial class but had been chosen as magistrates because of their knowledge and influence could also become senators. Because these *homines novi* had to spend a large amount of money in order to be elected and were therefore generally very wealthy, they had no reason to press

for fundamental social and political changes. Consequently the political character of the senate remained unaltered: conservative and chauvinistic.

The senate met under the leadership of one of the senior magistrates, generally a consul. At the beginning of the meeting the subject for discussion was announced by the consul; he then asked the most important senators for their opinion, in accordance with the seniority of their ranks, and finally a vote was taken. The decisions of the senate were referred to as *senatus consulta*.

During the republic the senate extended its powers. It had long been the rule that decisions made by the assembly with regard to matters such as legislation and the election of magistrates were not valid until they had been approved by the senate. After a *lex Publilia Philonis* had been passed in 339 BC, however, the proposals relating to legislation had to be approved first by the senate. In other words, draft laws could not be submitted to the *comitia* until they had been approved by the senate; this ruling probably did not apply to the *plebiscite*, which came into being in the *concilium plebis*. In the third century BC a *lex Maenia* stipulated that proposals regarding the election of magistrates also had to receive the prior agreement of the senate. Hitherto these changes are usually regarded as a restriction of the powers of the senate because they shifted the final decisions from the senate to the assembly. However, it seems more likely that in fact they strengthened the position of the senate: from then on the *comitia* could only take decisions that were acceptable to the senate.

As Roman power expanded, the tasks of the senate increased; in the field of foreign policy these tasks consisted of appointing Roman envoys and receiving foreign ambassadors, ratifying international treaties, declaring war and making peace. In addition, the senate supervised military operations and the administration of the conquered territories. As a result of these conquests it became increasingly difficult to control the treasury; taxes had to be levied, prices had to be fixed, and Rome's food supply had to be guaranteed. Finally the senate also had to look after the mental well-being of the citizens: if corrupting influences, particularly from non-Roman religions, threatened to undermine the strength and stability of the people the senate took severe counter-measures. A prime example is the action taken by the senate against the sect of the Bacchantes in 186 BC.²

5.2. THE MAGISTRATURE

As mentioned earlier, new rules with regard to the magistrature were introduced in 367 BC by means of the *leges Liciniae Sextiae*. The new rules referred mainly to the highest offices. Two consuls were to hold the highest office in the magistrature and it was stipulated that from then on one of these was to be chosen from the plebeians. At the same time the supervision of civil litigation (*iurisdictio*) was entrusted to a new magistrate, the praetor. Other magistrates were the censor, the aedile and the quaestor. There was no official hierarchy in these functions: each magistrate was responsible for his own decisions. In practice, there emerged an order in which the offices were held; one first became a quaestor, then an aedile or tribune, then a praetor and finally a consul. The office of censor was usually held by someone who had already been consul; it was the most prestigious of all magisterial functions. In addition, it became standard practice to have a gap of several years between magisterial appointments; this was to permit legal action to be taken against an ex-magistrate.

The top magistrates, now called consuls, were chosen by the *comitia centuriata* from the Roman citizens. They were given a variety of powers. First of all, they were given *imperium*; this included command of the army, the authority to recruit troops, appoint officers and distribute the spoils of war. Further, they had the *ius edicendi*, the right to issue binding regulations (*edicta*). A third important power wielded by the consuls was the *coercitio*; this was a general power which helped consuls to maintain public order and impose penalties for civil disobedience. Finally, they could summon the assembly and the senate and put forward proposals to these bodies. The consuls' powers, however, were not unlimited; for instance, like all magistrates they held office for only one year (the annuity principle) and the office was always held by at least two persons who had identical powers (the collegiality principle); furthermore, they could veto each other's actions as well as those of lower magistrates (right of intercession). In the late republic the consuls were mainly active as generals, aspiring to the glamour of victory and seeking a large share in the booty. In times of crisis each consul had the right to appoint a dictator who ranked higher than himself, his colleague and all other magistrates; a dictator however could not remain in office for longer than six months. This form of dictatorship did

not occur after 200 BC. Although both Sulla and Julius Caesar proclaimed themselves dictators in the first century BC they were not appointed in the regular manner and their term of office was not restricted to six months.

The office of praetor could originally be held only by patricians but since 337 BC plebeians had also been eligible. Like the consuls the praetor was elected in the *comitia centuriata*. He also had *imperium* and the right to issue edicts. The praetor's task was *iurisdictio*: he had to do what had traditionally been done by one of the pontiffs, namely decide during the first part of a lawsuit whether the parties were to be allowed to put their case to a judge, whom he (the praetor) had authorised, and, if so, in what way that was to happen.³ In the early days there was only one praetor, but in 242 BC a second one was appointed for the purpose of supervising the civil litigation between Roman citizens and foreigners and between foreigners. He was the *praetor qui inter peregrines ius dicit*, a title which afterwards was shortened to *praetor peregrines*. From then on the other praetor was responsible solely for the *iurisdictio* between Roman citizens; because according to certain laws he could not be absent from Rome for more than ten days during his term of office, he was called *praetor urbanus* (from *urbs*=city).⁴ At the beginning of the first century BC Sulla increased the number of praetors to eight. Six of them were given the task of supervising the newly instituted criminal courts, while the other two praetors, *urbanus* and *peregrinus*, retained the *iurisdictio* in Rome and in Italy; outside the capital they were represented by the *praefecti iure dicundo*.

The two censors occupied a special position in the magistrature: they had no *imperium* and therefore were not top magistrates, but they were not subordinate to the other magistrates. In addition to their original tasks (making up the census list and appointing senators) they were put in charge of the public sales at which *publica* were leased (collection of taxes, exploitation of mines, etc.) or let (in the case of land belonging to the state).

The *leges Liciniae Sextiae* also introduced some changes into the aedileship. Two new aediles were appointed; these were additional to the original two aediles who were assistants to the tribunes. To distinguish them from the original plebeian aediles the new magistrates were referred to as curule aediles. They were chosen by the *comitia tributa*. Although the four aediles did not

have exactly the same rank they had the same tasks, e.g. the maintenance of public roads and buildings in Rome, the supervision of the water supply, the provision of grain and the organisation of certain public games. The curule aediles also had to supervise the functioning of the public markets; this task is particularly interesting since it included *iurisdictio* over the sale of slaves and cattle; by issuing edicts on the law of sale the aediles contributed considerably to the development of Roman private law.

Like the aediles, the quaestors, who were traditionally assistants to the consuls, were chosen by the *comitia tributa*. About 267 BC their numbers were doubled, so then there were eight quaestors and at the beginning of the first century BC Sulla even increased their number to twenty. The quaestors could be required to perform a variety of tasks; these included supervising the aerarium, directing criminal proceedings before the *comitia* and assisting senior magistrates outside Rome.

When the differences between the patricians and the plebeians died down in the course of the fourth century BC the tribunes became magistrates for all the Roman people. They acquired the right to be present at meetings of the senate and later they even acquired the right to summon the senate and make proposals to it; we do not know precisely when this happened. From the end of the second century BC the tribunes, just like the other magistrates, became members of the senate on completing their term of office. From then on even patricians could become tribunes. They were no longer chosen by the *concilium plebis*; their election then took place in the *comitia tributa*. One of the traditional powers of the tribunes was the right to invalidate the actions taken by magistrates and other tribunes. The right of intercession turned out to be a powerful weapon in the political turmoil of the last 100 years of the republic, particularly because among the ten tribunes there was always bound to be at least one who was closely linked to the senate. Apart from a short period under Sulla, the tribunate continued well into the principate. It even formed one of the pillars on which the first emperors based their power.

5.3. THE ASSEMBLIES

Although the assemblies played an important role as from the fourth century BC—they chose the magistrates and voted on draft

legislation—no real democracy developed in Rome as it had done in some Greek cities, e.g. Athens in the fifth and fourth centuries BC. Of the four types of assemblies that existed at the beginning of the republic three were still functioning about 367 BC. The *comitia centuriata*, the *comitia tributa* and the *concilium plebis*. The *comitia curiata* was still in existence but the meetings were no longer attended by all citizens; the earlier tasks of the *comitia curiata* were now performed by the thirty representatives of the *curiae*.

The difference between the two *comitia* on the one hand and the *concilium plebis* on the other hand diminished, slowly but surely. The number of patricians remained more or less constant, whereas the number of plebeians had increased dramatically after the territorial expansion: as a result the patricians in the *comitia* formed a decreasing percentage of the Roman people. When it was decreed by the *lex Hortensia* in 287 BC that from then on the plebiscites would be binding for all Roman citizens and they would thus be equated with the *leges*, this did not cause a large-scale political shift.

By the late republic a remarkable situation had developed. There were three organs with equal powers to make decisions that were binding for the citizens; two of these, the *comitia centuriata* and the *comitia tributa*, consisted of the same people, although they were organised in different ways. The *concilium plebis* was made up of more or less the same people as the two *comitia* and was organised in the same way as one of the *comitia*, namely the *comitia tributa*. Which of the three assemblies was summoned depended on which magistrate it was who wished to put a proposal to the people: it was the consul who summoned the *comitia centuriata*, the consul or the praetors who summoned the *comitia tributa* and a plebeian magistrate who summoned the *concilium plebis*. In practice, it was usual for laws to be formulated in the *concilium plebis*, because the tribunes generally had more time for and more interest in legislation than the consuls who often had military commitments. The various magistrates were still chosen by the assemblies which had traditionally had the right to do this.

5.4. THE FALL OF THE REPUBLIC

At the end of the second century BC there was a crisis in the political and social system of the republic.⁵ The drastic changes in

the socio-economic and political life in Rome in the third and second centuries led to such tension and political instability that the traditional republican regime collapsed. The factors that led to this instability, however, were not identical for the various elements that made up the population of the Roman empire.

In the conquered territories the violence and greed of the Romans fanned the flames of nationalism among the local people and caused large-scale rebellions, particularly in Greece and Asia Minor. Rome's allies in Italy, who had suffered greatly as a result of the second Punic war but had not shared in the spoils of war after Hannibal's defeat, were not satisfied either; they did not even have Roman citizenship but were more or less second-class citizens. Among the Roman citizens themselves conflicting interests in the socio-economic field increased steadily. Members of the senatorial aristocracy wanted to maintain the established order which had allowed them to get rich by sharing in the spoils of war and by acquiring land from the state. Among the senators there was a growing trend towards luxury and individualism; this was in sharp contrast to traditional Roman austerity and readiness to serve the state. Most of the senators lacked the vision required to tackle the problems which were beginning to develop. The same applied to the *equites*; they had been able to feather their own nest in the existing situation and therefore wanted to retain their privileges. The small landowners, on the other hand, were not satisfied; the continuing wars and the long period of compulsory military service (up to thirty years) made it almost impossible for them to keep their businesses running. The owners of large estates, however, did not have this problem because they had their land worked by slaves, who were not eligible for military service. The population of Rome had increased steadily because of the influx of impoverished farming families, veterans from the army, non-Roman merchants and artisans and because of the growing numbers of freed men and women, most of whom were not of Roman origin. Some of these people succeeded in making a reasonable living, others however soon joined the ranks of the unemployed urban proletariat. The latter were very dissatisfied with the existing situation and were therefore inclined to give their support to anyone who suggested that their prospects could be improved. The slaves, who had to do the heavy work and were often very badly treated by their masters, were of course not satisfied with their lot either; slaves rebelled on several occasions

and in several areas, e.g. Sicily and Asia Minor. Military force had to be used to quell these uprisings.⁶

There was considerable discussion in the senate concerning what policy should be pursued. The majority of the senators, who were known as the *optimates* (literally, ‘the best’), were opposed to any radical changes. A minority then tried to force through some changes with the help of the assembly. These senators, who were called *populares* because they relied on the assembly of the people, were led by Tiberius Gracchus.⁷ When Tiberius Gracchus served as a tribune in 133 BC he introduced a bill in the assembly whereby the small rural proprietors would be reinstated and—indirectly—the power of the Roman army would be restored. To achieve this goal, state-owned land would have to be given to the poor. By this time most of the state-owned land had fallen into the hands of the large landowners who for the most part regarded it as their own property. Tiberius Gracchus proposed to re-introduce the norms that had been laid down in an earlier law (which had fallen into disuse) concerning the size of the state-owned piece of land that a citizen could occupy and the number of animals he could graze on that land. If citizens had more than the permitted amount of land, the extra would have to be divided into small sections and allocated to other persons who had no land.

Gracchus’ proposal encountered a great deal of resistance but in the end it was accepted. However, Gracchus manoeuvred so clumsily and overstepped his authority as a tribune to such an extent that he seriously weakened his own position. By continually violating the established constitutional procedure and by basing his actions on the will of the people he gave the impression that he was trying to acquire power for himself. When he tried to get re-elected as a tribune, although that too was against the regulations, he was murdered by a number of senators. His death, however, did not mean the end of the political unrest. Ten years later Tiberius’ brother Gaius Gracchus tried to continue the reforms. He attempted to win the support of the *equites* by promising to strengthen their position *vis-à-vis* the senators. Although he acted more cautiously than his brother and achieved a number of successes Gaius Gracchus failed in the end and, like his brother, had to pay for his exploits with his life (in 121 BC). In the next few years the reforms of the Gracchi were carried out, but in a much altered form. Power in the senate was undoubtedly back in the hands of the *optimates*.

There was no change in the situation until—a decade later—the Roman army experienced a series of defeats. For instance, it was defeated by King Iugurtha in Numidia (North Africa), and by the Cimbri and Teutones in Gaul; the *optimates* were held responsible for these defeats. In 107 BC one of the leaders of the *populares*, C. Marius, succeeded in getting himself elected consul. After defeating King Iugurtha and the Cimbri and Teutones he returned to Rome as a very powerful man. However, when he claimed state-owned land where he could establish some colonies for his ex-soldiers, the senate, which was still dominated by the *optimates*, refused to co-operate.

Marius' strongest opponent was L. Cornelius Sulla. He was appointed consul in 88 BC and was charged by the senate to lead the army against Mithridates VI, king of Pontus in Asia Minor, who had persuaded large parts of Asia Minor and Greece to rise up against the Romans. The assembly, however, decided that Marius must have control of the army. A civil war broke out between Marius and his supporters on the one hand and Sulla and his soldiers on the other. After several years of conflict Marius was defeated. In the years that followed Sulla became a dictator and conducted a reign of terror (82–79 BC). When he died one year later there was a power shift in the senate in favour of the *populares*. One of their most important leaders was Cn. Pompeius (Magnus), a very successful general. Not only did he succeed in eradicating piracy in the Mediterranean area, but he also managed to defeat Mithridates and reorganise the administration of the conquered territory in Asia Minor, Syria and Palestine. When, upon his return to Italy, he tried to look after his veterans, he—like Marius before him—encountered strong opposition from the senate. Thereupon he formed a triumvirate with two senators, C. Julius Caesar and M. Licinius Crassus, his aim being to divide up the power and bypass the senate (60 BC). This triumvirate was renewed in 56 BC but when Crassus was killed in 53 BC in the war against the Parthians, the relations between Pompey and Caesar rapidly deteriorated. In 49 BC another civil war broke out: Pompey was supported by the senate and Caesar by the people. It was not until more than four years later—after the Roman legions had faced each other on several occasions—that Caesar was able to defeat his opponent (45 BC). During this period Caesar had already had himself appointed dictator several times and in 45 BC even for an unlimited period. This dictatorship aroused a great

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deal of opposition in the senate and in 44 BC Caesar was murdered by a number of leading senators. These senators, however, had no alternative plan for governing the Roman empire. It was another seventeen years before Augustus resolved the crisis by creating a new form of government, the so-called principate.

THE LATE REPUBLIC: THE LAW

6.1. INTRODUCTION

Due to the expansion of Roman power and the changes that this expansion brought about in the socio-economic field the old legal system was no longer adequate. Archaic law, as was mentioned earlier, was closely bound up with religion and consequently it was very formalistic and exclusively Roman; the latter was nothing out of the ordinary in view of the fact that Roman territory was still very limited in size. The late republic saw a number of important changes in the law which can be summarised by the terms secularisation, internationalisation and liberalisation.¹

As early as 367 BC the supervision of civil litigation, which had hitherto been in the hands of the pontiffs, was passed to the praetor and, to a limited extent, to the curule aediles; in addition jurists who were not necessarily pontiffs began to give *responsa* to citizens. A change that was remarkable for the times was the internationalisation of Roman law within the frontiers of the Roman territory. The granting of Roman citizenship had certainly not kept pace with the enlargement of the Roman sphere of influence. As a result more and more people belonging to other nations but living in Roman territory did not have Roman citizenship and therefore could not participate in the Roman *ius civile*. Because these foreigners, who were referred to as *peregrini*, had no access to the old *legis actio* procedure the praetor began to adapt the proceedings in the second century BC. The new procedure that developed from this was called the formulary system; it could be used almost equally by Roman citizens and *peregrini*. By virtue of his *ius edicendi* the praetor began to introduce new legal remedies which were available to both Roman

citizens and *peregrini* and also satisfied the new demands of legal practice, for in those days Rome, with its port of Ostia, began to become a very important centre of trade. These changes led to the development of a new complex of Roman private law which came to be known as *ius praetorium* or *ius honorarium* (from *honor*=magistracy).² The *ius honorarium* functioned side by side with and was later even interwoven with the *ius civile*: the relationship between the two types of law was rather like the relationship between equity and common law in English law.

The praetor was not solely responsible for the creation of this new form of private law. At the same time a new way of dealing with Roman law, and particularly Roman private law, known as Roman legal science, developed.³ By giving *responsa* and engaging in several other practices the jurists helped to develop private law; they also began to record the *responsa* they had given in writing, arrange them in a certain order and publish them. This literature has become the most important and most original product of Roman culture: by means of this literature the Roman jurists exerted a worldwide influence on the law, an influence that is still clearly visible today.

It was not until the last century of the republic that penal law began to develop: the number of punishable offences and the number of courts were increased. It is striking that whereas the new elements in penal law were based largely on legislation, private law developed mainly within the framework of the administration of justice and legal science. In the following section something will be said about legislation and about the development of penal law; thereafter civil procedure and legal science will be dealt with in detail.

6.2. LEGISLATION

Traditionally the *comitia centuriata* had been the body that was authorised to make laws that were binding for all citizens. Furthermore, the *concilium plebis* could make general decisions, but originally they were binding only for plebeians. It was not until 287 BC when, due to territorial expansion, there were more plebeians than patricians, that the plebiscites were declared binding for all the people by virtue of the *lex Hortensia*.⁴ From then on legislation was formulated more and more by means of plebiscites and often a plebiscite was even referred to as '*lex*'.

Tradition had it that a law could not come into force until it had been approved by the senate. In 339 BC this rule was reversed and as a result proposed legislation had to be approved by the senate before the magistrate could put it to the assembly. Until 287 BC this may not have applied to plebiscites but then it probably did. In this way legislation passed definitively into the sphere of influence of the senate.

In the first century BC, when the Roman republic was caught up in an administrative crisis and the assembly had lost a good deal of its influence, it sometimes happened that a proposed law which had been approved by the senate was no longer put to the assembly but came into force immediately; on the other hand in those days plebiscites were sometimes formulated which had not been previously approved by the senate and were later declared invalid by the senate. In *Topica* V, 28 Cicero mentions both the senatorial decrees and the *leges* as sources of the law; in an inscription which probably contains fragments of the *lex Iulia municipalis* of 45 BC *leges*, plebiscites and senatorial decrees were put on a par as sources of the law. From the middle of the first century AD hardly any new laws came into being by means of *leges* or plebiscites; senatorial decrees, however, have long been used to create law.

In general the laws rarely had anything to do with private law. A well-known example of a law that did is the *lex Aquilia*, a plebiscite which probably dates from 286 BC; this law dealt with various types of unlawful damage to property obliging the perpetrator to pay a fine to the owner. Most of the laws related to politically disputed issues; a good example is the so-called *Tabula Bembina*, an inscription on a bronze plaque, nine fragments of which have been preserved. On one side of the plaque there is the text of a *lex repetundarum* and on the other side there is the text of a *lex agraria*. Nowadays it is assumed that this bronze plaque was first used about 120 BC for one of the laws to curb extortion by provincial governors and that when this law was superseded by another law, the back of the plaque was used in 111 BC for a law on land reform which was to replace the earlier legislation of the Gracchi with regard to this subject.

6.3. CRIMINAL LAW

So little is known about the criminal law in the early republic that the topic was not discussed in the previous chapter. However, in

order to gain a proper understanding of how criminal justice was administered in the late republic, one needs to have some knowledge of the earlier history. It should be realised that public criminal law in Rome traditionally covered a more restricted area than modern criminal law. A large group of offences was regarded as being harmful to the individual citizen but not to the state; the perpetrators were therefore not prosecuted by the state. These so-called *delicta privata* included theft, defamation of character and since the *lex Aquilia* of 286 BC unlawful damage to someone's property. In such cases the injured party had to institute a civil procedure. If the defendant was found guilty he could be forced to pay a penalty to the injured party. *Delicta privata* were regarded as part of private law.

Offences such as treason or murder had long been part of criminal law. They were referred to by the term *crimina publica*. There are various interpretations and reconstructions of the way in which murder was dealt with. According to Mommsen and Jones the proceedings took place in the presence of a magistrate and anyone who was condemned to death by him could appeal to the *comitia centuriata*? This view has been challenged in various ways.⁶ The most recent view on this subject is the one put forward by Santalucia; he maintains that since the XII Tables, only the *comitia centuriata* had the authority to condemn a person to death after he had been found guilty by a *quaestor parricidii*.⁷ According to Santalucia this was the procedure followed not only in cases of murder but also in cases of treason (against the state), in cases where a judge had conspired with one of the contending parties, in cases where false evidence had been given, if there had been arson or a spell had been cast on someone's harvest. Minor offences, however, like the burial of a corpse within the walls of a city and the holding of nocturnal meetings were punished by the magistrates.

About 100 BC, when Rome had grown into a large town with all the associated problems, this system was no longer adequate. Two measures were taken in order to improve the situation. First of all, low-ranking magistrates were appointed, the *tresviri capitales*, who judged cases, reported by citizens, involving violent crimes, arson, the making and possession of poison, etc. They judged slaves and foreigners and possibly also Roman citizens from the lower strata of society.

Secondly, special permanent courts were set up in connection

with offences which because of their nature or because they involved so many people were regarded as a threat to the security of the state. Initially this happened only occasionally, but in 149 BC the *lex Calpurnia* established the first court for a particular type of offence, namely the *quaestio de repetundis*; its task was to deal with cases of extortion by Roman governors in Italy or the provinces. Thereafter a few more *quaestiones perpetuae* were established. They came under the authority of specially appointed praetors. A court consisted of several scores of jurors who all came from the senatorial élite. One of the reforms instituted by the Gracchi was to recruit jurors for the courts exclusively from the *equites*; Sulla then revoked this revolutionary decision and after much ado Julius Caesar finally stipulated that both senators and *equites* could serve as juror. Furthermore, within the framework of his political reforms Sulla reorganized the permanent courts and increased their number. Thereafter there were six courts: for murder and poisoning, for forgery of wills and other documents, for high treason, for bribery during elections, for extortion in the provinces and finally for embezzlement of public funds.

We know something about the procedure in the criminal courts because some of the speeches made by Cicero when he acted as advocate or prosecutor in such lawsuits have survived. Every respectable citizen, not only the injured party, could lodge a complaint against someone. If the praetor accepted the complaint, a jury was set up by drawing lots. The course of the lawsuit was not determined by the judge, as in English law, but by the parties and their advocates. The plaintiff had to prove that the defendant had committed the crime; if he was unsuccessful he ran the risk of being accused himself because he had knowingly lodged a false complaint. If he was successful he would receive a considerable reward: if, for instance, the defendant was sentenced to death and his property confiscated, then the accuser was entitled to a share of this property. It is not surprising that in time the system was abused and some people even made a profession of accusing rich fellow-citizens. Finally it was the jury who decided whether the accused was guilty or not and what the penalty would be, if it was not evident from the law.

6.4. CIVIL PROCEDURE

6.4.1. The introduction of the formulary procedure

As was mentioned earlier, in the late republic the praetor set about creating a new way of civil litigation, the formulary procedure, and began drawing up new legal norms. We have very little factual information about how or when this happened. We do know however that the introduction of the formulary procedure did not automatically lead to the abolition of the old *legis actio* procedure. The latter was even modernised to a certain extent in the third and second centuries BC and continued to exist until the beginning of the principate.⁸

With regard to the abolition of the *legis actio* procedure, all we know is that according to Gaius (*Inst.* IV, 30) this occurred by virtue of a *lex Aebutia* and two Julian laws. The Julian laws concerned were the *leges Iuliae iudiciorum publicorum et privatorum* of emperor Augustus, dating from 17–16 BC, which are also known from other sources. By one of these laws Augustus abolished the *legis actio* procedure except for jurisdiction by the *centumviri* (see under section 6.4.3) and for some other special procedures. We do not know the date or the purpose of the *lex Aebutia*. It is generally accepted, however, that the law dates from the second century BC. There are various opinions about its purpose. Nowadays it is taken for granted that the *lex Aebutia* was the first law to allow the procedure by *formula* to be used for claims which until then could only be made by means of the *legis actiones*. In these cases—it is not yet possible to ascertain which claims exactly were involved—it was possible for the plaintiff to choose whether he would use the old or the new procedure; however, because the procedure by *formula* was more advantageous and therefore was generally the one chosen, the *lex Aebutia* in fact put an end to those *legis actiones*. A problem, however, was that because these *formulae* were not based on a law, something already settled in a formulary action could be judged again in a *legis actio* procedure. The *leges Iuliae* must have removed this possibility by abolishing nearly all *legis actiones*. Thereafter, all claims protected by the *ius civile* and all claims protected by the praetor could be judged definitively in a procedure by *formula*.

6.4.2. The first phase of the lawsuit: *in iure*

Just like the *legis actio* procedure, the procedure by *formula* consisted of two phases. The first phase took place in the presence of the praetor (*in iure*); the purpose of this phase was to open the case. The second phase took place in the presence of the judge (*apud iudicem*) and its purpose was to obtain a verdict. The most important innovation introduced by the formulary system when compared to the *legis actio* procedure was that the praetor was no longer bound by the words of the (five) *legis actiones*, but could interpret them and make changes, and even introduce new legal remedies for relationships that were not recognised by the *ius civile*. Another important change was that the praetor fixed the legal remedy in a written *formula* and parties no longer had to state their dispute in certain prescribed words, with all the risks that such a procedure involved.

The procedure by *formula* began when parties that had a dispute put their problem to the praetor (or in certain cases to the aedile) requesting him to appoint a judge who could settle their dispute. The praetor first had to check whether the parties were qualified to be a plaintiff or a defendant in a legal action on the basis of the facts they had submitted; if they did not qualify, then the praetor refused the action (*denegatio actionis*); if they qualified, then he consulted the edict. In this edict, which he had issued on the basis of his *ius edicendi* at the beginning of his term of office and which in principle was applicable for the whole year (*edictum perpetuum*), he had collected all the legal remedies that he was prepared to grant together with the text of the associated *formulae*. If the edict contained no action for the dispute in question and the praetor thought that that was as it should be, then he rejected the parties' request. If the edict did contain an action which was already known from the *ius civile* or had been created by a previous praetor or by himself, then he gave permission to initiate the proceedings. The praetor and the opposing parties chose a judge and they prepared a *formula*.

A *formula* generally consisted of three parts: the appointment of the judge, a description of the conflict formulated by the plaintiff (*intentio*) and the authorising of the judge to pass a verdict (*condemnatio*). The *intentio*, other sections and the *condemnatio* were always contained in one sentence which was

drawn up according to a fixed scheme. The *formula* for an action where the cause was a loan of money, for instance, ran as follows:

XX iudex esto. Si paret Numerium Negidium Aulo Agerio sestertium milia dare oportere, condemnato, si non paret absolvito.

XX must be the judge. If it appears that the defendant ought to pay to the plaintiff 1000 sesterces he (the judge) must condemn him; if this does not appear, then he must absolve him.

In this case the judge was charged merely to examine whether the claim of the plaintiff was true; if the praetor considered that this might lead to an unfair result he could, at the request of the defendant, incorporate a defence (*exceptio*) in the *formula*. If, for instance, the defendant did not deny the existence of the debt but asserted that the money was sued for in contravention of an informal agreement, then the *formula* would be worded thus:

XX iudex esto. Si paret Numerium Negidium Aulo Agerio sestertium milia dare oportere, et si inter Aulum Agerium et Numerium Negidium non convenit ne ea pecunia peteretur condemnato, si non paret absolvito.

XX must be the judge. If it appears that the defendant ought to pay to the plaintiff 1000 sesterces and if it has not been agreed between the plaintiff and the defendant that the money should not be sued for, he must condemn him; if this does not appear, then he must absolve him.

The defence ‘and if...not be sued for’ was worded in a conditional clause. This meant that if the judge concluded that the claim was perfectly good according to the *ius civile* but that the defence was justified, he would reject the claim. As soon as the opposing parties agreed that the *formula* reflected their dispute accurately, the *litis contestatio* took place. Parties agreed to accept in advance the verdict passed by the judge named in the *formula* and the praetor pronounced an (oral) decree in which he charged this judge to pass a verdict.

If the edict did not contain an action for the dispute in question but the praetor thought that the parties should nevertheless put their dispute to a judge, then either he could adapt an action set

out for a similar case, for instance by means of a fiction (*actio utilis*) or he could formulate ‘ad hoc’ a new action, for instance by incorporating the actual facts of the dispute in the *formula* (*actio in factum decretalis*). Another important category of new actions was that of the so-called *iudicia bonae fidei*: the praetor assumed that in certain legal relations such as *emptio venditio* (sale), *locatio conductio* (hire), *societas* (partnership) and *mandatum* (mandate) the obligation was not created by the use of ritual words or by the performance of prescribed acts but by *fides*, namely the duty of people to keep their word. The *formula* where the cause of the action was a sale, for instance, ran as follows:

Quod Aulus Agerius de Numerio Negidio hominem quo de agitur emit, qua de re agitur quidquid ob earn rem Numerium Negidium Aulo Agerio dare facere oportet ex fide bona, eius iudex Numerium Negidium Aulo Agerio condemnato si non paret absolvo.

Because the plaintiff bought the slave in question from the defendant which matter is the subject of this action, the judge must condemn the defendant to convey to or do for the plaintiff whatever is in accordance with good faith; if it does not appear he must absolve him.

Clearly, by substituting a word like ‘hired’ for ‘bought’ the praetor could make the same *formula* apply to other contracts.

In this way a new category of contracts was devised which could be concluded purely by agreement, no matter how they were expressed (consensual contracts) and in which the obligations of the parties were determined by *bona fides* (good faith). It is obvious that the legal remedies granted by the praetor for that purpose (*iudicia bonae fidei*) were very important for economic life and that they gave a completely new look to the law of obligations. Literary works such as the plays of Plautus show that this development must have been completed by 200 BC.

The praetor could issue other legal remedies besides actions and exceptions. On the basis of his *imperium* he could issue an order or an injunction; he could, for example, forbid someone to disturb the possession which the plaintiff had acquired in a lawful manner (*interdictum*). Furthermore, if someone had, for instance, been induced by threats to mancipate a slave the praetor could, at that person’s request, grant restitution and thus declare the conveyance

null and void (*in integrum restitutio*). The *formulae* for all the legal clauses were eventually included in the edict and standardized. The strength of the system was that because the *formulae* were worded so pithily they were not only accurate but they could also be adapted to new cases. Standard *formulae* that had proved their value in practice were taken over by successive praetors; in time they formed the firm core of the edict, the so-called *edictum tralaticium*. In about 50 BC the last new action was added to the edict and this brought to an end the creation of new law by means of the praetorian edict.

For a long time the praetor was almost completely free to decide whether he wished to apply, in a specific case, a legal remedy that he had incorporated in his edict. It was only the other senior magistrates and the tribunes who could exercise their veto in such cases, by virtue of their right of intercession. The praetor's freedom of decision was officially curtailed in 67 BC when, at the suggestion of a certain Cornelius, a tribune, a law was passed stipulating that the praetor had to keep to the edict that he had issued at the beginning of his term of office. In spite of this *lex Cornelia de iurisdictione*, however, the praetor was still free to introduce new legal devices in specific cases and to refuse devices which he had promised in the edict.

6.4.3. The second phase of the lawsuit: *apud iudicem*

The purpose of the *apud iudicem* phase was to obtain a verdict. This phase is either not dealt with at all in the literature or it is treated very superficially. However, it deserves fuller treatment because not only was it important for the various parties involved in a trial but it could also serve a general purpose. By accepting or rejecting a claim concluded in a *formula* the judge could make the praetor alter the *formula* concerned and thus contribute to the development of private law.

Generally the second phase of both the *legis actio* procedure and the procedure by *formula* took place in the presence of only one judge; in certain cases, however, there could be a panel of judges. At the end of the third century BC the *legis actio* type of procedure was extended in that two new courts were established; the *centumviri* (literally a hundred men) and the *decemviri stlitibus iudicandis* (ten men for the trial of cases). Emperor Augustus allowed these two courts to continue even after 17 BC

when he abolished the *legis actiones* as the regular kind of procedure. On the basis of scanty evidence from the period of the principate it is assumed that the *centumviri* dealt with claims concerning inheritances with a minimum value of 100,000 sesterces and possibly also with disputes about the ownership of land and about guardianship, whereas the *decemviri* tried cases where someone's liberty was at stake. Hardly anything is known about the way in which these courts functioned. What is certain is that the inheritance trials in the presence of the *centumviri* attracted a great deal of attention. This was not only because of the splendid speeches that were sometimes delivered at these trials but it was also because scandalous revelations were made there about the private lives of wealthy citizens.⁹

The administration of justice was not organised by the state; there was only an official list of Roman citizens who could in specific cases be appointed by the praetor as judges (*album iudicum*). Initially the list contained only senators, but following the reforms instituted by the Gracchi it also included members of the *equites*. In the formulary system the parties were free to choose a judge whose name was not on the official list, provided that person satisfied certain general criteria. Because the judges were private persons they could only give a binding verdict if they had been formally authorised to do so by the praetor; the praetor gave his authorisation at the end of the first phase of the lawsuit via the aforementioned decree.

During the second phase of the formulary procedure the parties could produce evidence and try to convince the judge that they were in the right. Various types of evidence could be used, e.g. statements made by the parties (sometimes under oath), statements by witnesses and written evidence. The general rule still was that: 'the burden of proof rests on the plaintiff', but the judge was free to allow exceptions to the rule. The parties could have their points of view defended by someone else, i.e. an advocate. In principle, all citizens could serve as advocates, but in practice the citizens who performed this task—at least in important cases—belonged to the senatorial class or to the *equites*. Normally the advocates were not paid for their services—although they occasionally received a small token payment—but by serving as advocates they hoped they would win support in the elections to the magistrature or would enhance their reputation in some other way. The advocates usually pleaded in accordance

with the rules of Greek rhetoric which had been taught in Rome since the second century BC. These rules consisted mainly of the status system which had been developed at that time by Hermagoras of Temnos and which included a catalogue of disputes and the speeches relating to them. An important part of the training in rhetoric was to learn what arguments one could use to support a case.¹⁰

The strongest arguments were considered to be based on the facts; for instance, one could deny the stated fact, or one could accept the fact but assert that the law or legal device that had been invoked was inapplicable or one could argue that it was applicable but that there were good reasons that justified the stated fact. If these arguments did not apply in a specific case, then one had to try to find arguments that were based on the law; for instance, perhaps it could be claimed that the words of the law, the will or the contract in question were not clear and should be interpreted more broadly than hitherto. Alternatively, it could be claimed that the words were clear but that they had been written by the legislator, testator or parties for another purpose than stated by the plaintiff; the latter argument could become more convincing if the advocate could refer to precedents, in other words to the fact that in similar cases the law, the will or the contract had also been interpreted in accordance with that purpose. Because in their speeches the advocates gave different interpretations of the remedy that had been included in the *formula*, they demonstrated how wide-ranging this remedy actually was. If the way in which a specific action, exception, etc., was formulated or promised in the edict led in practice to unfair and therefore undesirable verdicts, then the praetor in a subsequent case could word the action differently.¹¹ As soon as a workable formulation was found it could form a definitive part of the praetorian edict. In this way the advocates through their speeches and the judges through their verdicts made an important contribution to the development of Roman law.

At the end of the lawsuit the judge pronounced his verdict, either on his own or with the help of a *consilium*. He was bound by what he was charged to do in the *formula*. For instance, if he had had to find out whether the defendant owed something to the plaintiff, then his verdict had to include a condemnation or an acquittal; in the former case the verdict always led to the payment of a certain sum of money (*condemnatio pecuniaria*). When it was

a question of the dividing up of common property, then the verdict included an adjudgment (*adiudicatio*). Because the parties had agreed to accept the judge's verdict, it was binding and they could not appeal to another judge.

6.5. LEGAL SCIENCE

It is generally accepted that Roman legal science began in the second century BC, under the influence of the Greek philosophers. Until that time there had been interpretation of laws and legal remedies in connection with the administration of justice. The new development was that young Romans from the senatorial class were taught methodically how to compose and deliver various types of speeches; these included political speeches, eulogies and the most difficult type: pleading in court. Initially much of the tuition was given by Greek teachers of rhetoric who gave considerable attention to grammar, style, logic and presentation. It was in that context that the Romans became acquainted with Plato's dialectic method; by means of this method they learnt to divide juridically relevant facts into *genera* and *species* and to define these facts and thus to distinguish and categorise juridical concepts. In addition, they became acquainted with the syllogism (or reasoned conclusions) and in this way learnt to form juridical concepts in a deductive manner. There was soon a small group of leading Roman citizens, the jurists, who belonged to the senate and had a very specialised knowledge of Roman law. These were the people who, following in the wake of the pontiffs, were largely responsible for the development of Roman legal science.¹²

The activities of the Roman jurists are described by Cicero as *respondere*, *agere* and *cavere* (*De oratore* 1.48.212). They show that the jurists did not form a separate class in society that kept aloof from legal practice and from politics, as is often maintained, but that their opinion was regarded as valuable just because they were part of Rome's most powerful constitutional body, the senate. *Cavere* (literally, to take precautions) meant the drafting of texts to be used in legal practice; these could be *formulae* drawn up in connection with a lawsuit by a jurist either serving as magistrate or as a member of the senate advising the magistrate. *Cavere* could also mean the drafting of deeds, for instance deeds of sale and wills. Here the jurists developed standard clauses, for instance the so-called *cautio Muciana*, which seems to have been

drafted by Q.Mucius Scaevola (beginning of the first century BC); the *cautio Muciana* was the promise that the legatee had to make to the heir, namely that he would return the legacy if he were to fulfil the condition which was attached to the legacy.¹³

Agere (literally, to act) meant serving as advocates in a lawsuit. As mentioned earlier (see section 6.4.3), the speeches of the advocates often dealt with the interpretation of laws and legal devices. Unfortunately only very few of the speeches dealing with private law have survived; these include the speeches *pro Tullio* and *pro Caecina* by Cicero. From the oratorical works of Cicero we can follow the main lines of a famous inheritance lawsuit, the so-called *causa Curiana* in which Q.Mucius Scaevola and C.Licinius Crassus served as advocates.¹⁴

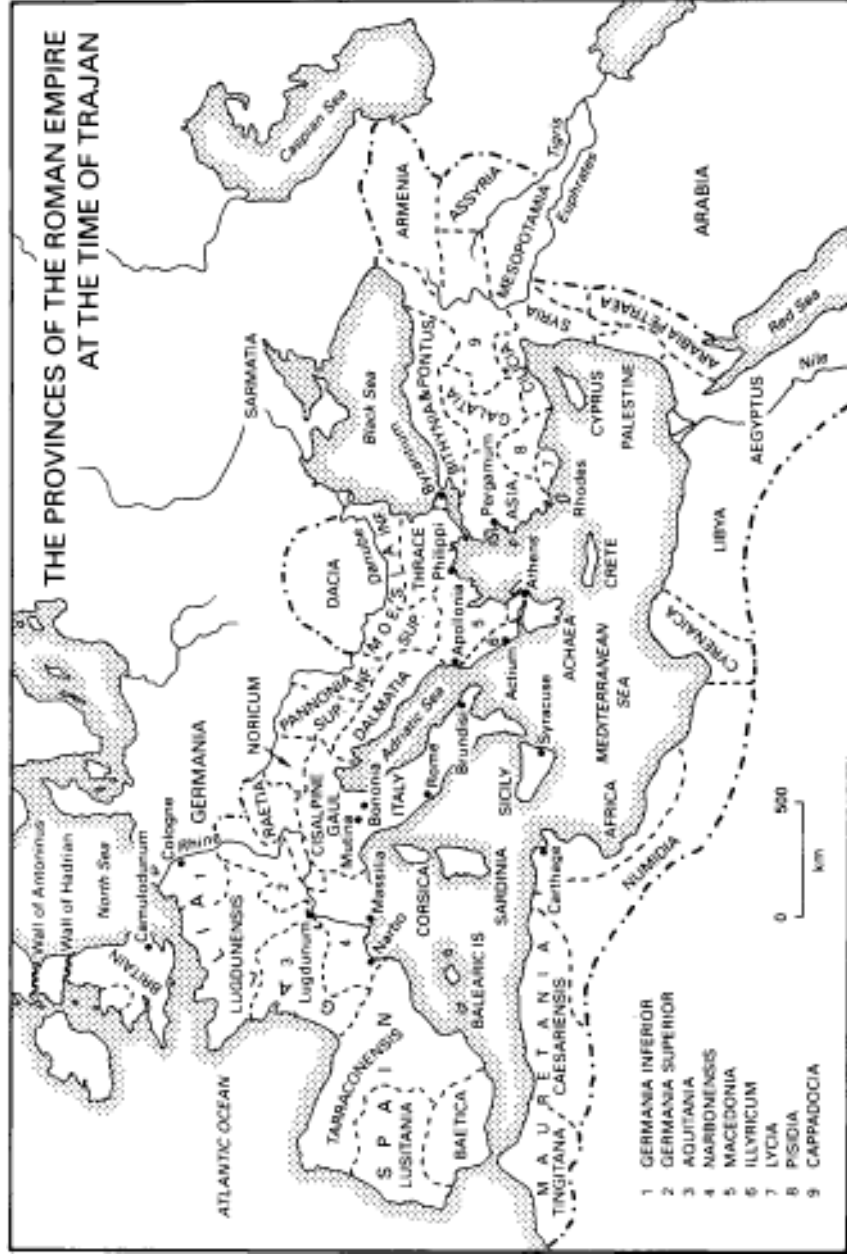
Respondere (literally, to answer) meant giving an opinion on a legal problem to citizens, to jurisdiction magistrates and to judges. Sometimes those opinions were ratified by a verdict, sometimes they were not. Very few of the *responsa* given by the republican jurists have survived either. We know that from the second century BC some leading jurists began making collections of *responsa* that they had given and that had been applied in practice. A need had arisen for such collections because in Rome the administration of justice was not organised by the state (the praetor always appointed an *ad hoc* judge) and consequently the verdicts given by a judge were not collected on behalf of the state. In their collections the jurists sometimes summarised cases that were important in their eyes and reported the verdict or opinion given in those cases; sometimes they also formulated an abstract rule of law on the basis of an actual case. In so doing they often omitted to mention the motives for the verdict because these were not relevant for the purpose for which the collection was made.¹⁵ Hitherto the jurists had collected *formulae* for lawsuits, but now they collected *responsa* and verdicts based on a *responsum* in which new law had been created. Well-known books (or rather scrolls) about the *ius civile* are those by M.P.Cato Licinianus (chosen as praetor for the year 149—he died before taking office), Manius Manilius (consul in 149 BC) and the aforementioned Q.Mucius Scaevola (consul in 95 BC). Other jurists from the last few decades of the republic include C.Aquilius Gallus (praetor in 66 BC), S. Sulpicius Rufus (consul in 51 BC) and P.Alfenus Varus (consul *suffectus* in 39 BC, i.e. chosen as an interim consul upon the death or resignation of one of the consuls); Rufus was the first

of these jurists to use the praetorian edict instead of the *ius civile* as his frame of reference. Unfortunately the works of these jurists have not survived intact, but we do have access to fragments since they are cited by later jurists.¹⁶

As can be seen from the foregoing, Roman legal science developed largely from legal practice. The Roman jurists formulated abstract juridical concepts under the influence of Greek philosophy. However, they were not inspired by a specific theoretical concept and they did not seek to construct systems of abstract theories; they started with an actual case and tried to find a just solution that was acceptable in practice. The reason why Roman jurisprudence developed under the influence of Greek philosophy and yet is clearly Roman in character is that the Greek influence was not effective until the second century BC; by that time Roman law had developed sufficiently to withstand confrontation with Greek law. Finally one may well wonder why it was the Romans rather than the Greeks who developed legal science. A possible reason is that the Greek cities preserved their autonomy and their own legal systems and, as a result, Greek law was greatly influenced by local conditions. The Romans on the other hand founded what for those days was a vast empire in which law played a leading role and helped them achieve their imperial ambitions. The Romans became the founders of legal science because they were able to combine their organising talent and their legal talent with the tenets of Greek philosophy.

Part III

THE PRINCIPATE (27 BC-284)



THE PRINCIPATE: GENERAL OUTLINE

7.1. THE SOURCES

Much more is known about the first three centuries of the empire, usually called principate, than about the republic. The many literary sources of the time provide a great deal of information on this period as do the innumerable inscriptions that have survived. Because the sources are both extensive and varied we can obtain a reasonably reliable picture of the principate.

The political events of the period have been dealt with by historians like Tacitus and Suetonius (end of the first century) and Cassius Dio (beginning of the third century). Their works are important primarily in as much as they relate to the period in which the historians themselves lived. Other literary works such as the poems of Martial and Juvenal and the letters of Pliny the Younger, who were all contemporaries of Tacitus, and the short stories of Aulus Gellius (middle of second century) mainly give information about daily life in Rome.

The inscriptions from the principate relate to a wide variety of subjects. For instance, the political testament of Emperor Augustus, in which he gave an official account of his reign, can still be seen today on the walls of the former temple of 'Roma et Augustus' in Ankara. A large inscription dating from the second half of the first century, which was recently found in Seville in the south of Spain, contains a law relating to the administration and civil procedure in a number of *municipia*. In addition, inscriptions (or parts of inscriptions) are found from time to time in the catacombs underneath the Via Appia in Rome. These inscriptions originally adorned the sepulchral monuments of rich citizens who were buried beside this road, just outside the city boundary. Some of them contain testamentary dispositions of the deceased person

and in one case even a whole testament, providing us with valuable information on the law of succession.

Literature of a specifically juridical nature from this period has come down to us via the *Corpus Iuris Civilis* of Justinian, which dates from the sixth century; the best known juridical literature that has come down to us separately is the Institutes of Gaius, a textbook dating from about 160 AD. Our knowledge about the law in the first three centuries is also based on documents which have been preserved on wax tablets and on papyri which contain, among other things, contracts and wills.

7.2. THE TERRITORY

The Roman empire attained its maximum size in the principate: it included not only the area around the Mediterranean but also large parts of central and western Europe where the Danube and the Rhine formed the principal frontiers.¹ Augustus (27 BC–14 AD) and his successor Tiberius (14–37) conquered Raetia, Noricum, Pannonia and Moesia, which are parts of modern Switzerland, Austria, Hungary and Bulgaria respectively. For a short time, Germany, as far as the Elbe, was also in the hands of the Romans, but when, in 9 AD in the Teutoburgian Forest, a Roman legion was routed by the German tribe of the Cherusci and completely destroyed, the Romans withdrew to the left bank of the Rhine. Thereafter they made the Rhine the northern boundary of their empire. It was not until almost a century later that the Flavian emperors, and particularly Domitian (81–96), again tried to conquer the southern part of Germany, this time successfully. During the reign of Domitian the Romans conquered England and Wales as well. The ‘pacification’ of these regions had already begun in the days of Emperor Claudius (41–54). At that time the local tribes, however, had been able to successfully resist subjugation by the Romans. Finally Agricola managed to subdue them so that they transferred their allegiance to Rome. Scotland was conquered as well, but the northern part was abandoned because keeping it would have required too much man-power. Emperor Trajan (98–117) succeeded in conquering Dacia, present-day Romania, and thereby added a large region north of the Danube to the Roman empire; in addition, in the east of the empire he crossed the Euphrates and subjugated Armenia, Assyria and Mesopotamia, but his

successor Hadrian (117–138) made the river Euphrates the frontier again. This emperor also gained fame by having a stone wall built between England and Scotland to ward off invasions by Scottish tribes.

The emperors themselves organised the administration of the newly conquered territories; the administration of the existing provinces remained with the senate—they were now called senatorial provinces—but the emperors increasingly took over the administration of these provinces as well.

Towards the end of the republic Roman citizenship extended over the whole of Italy.² Thereafter, this right was granted slowly but surely to people in the provinces too, either collectively (e.g. to the population of a town) or individually (e.g. to soldiers given honourable discharge from the army). Partly as a result of this, the differences between Italy and the provinces gradually disappeared. Roman citizenship, which had formerly been a symbol of nationalism, now became a status symbol. At the same time Italy came to be administered more and more like the provinces; Emperor Trajan, for instance, put the towns of Italy under his control. At the end of the second century the only remaining difference between the inhabitants of Italy and the inhabitants of the provinces was that the former were exempt from land tax. Finally, in 212 Emperor Antonine, nicknamed Caracalla, granted Roman citizenship to practically all free inhabitants of the empire. According to Cassius Dio, Caracalla took this step for fiscal reasons: certain taxes which had formerly applied only to Roman citizens would now bring in more revenue. In a political sense this so-called *constitutio Antoniniani* was not so important; in a juridical sense, however, it was important. Not only did it lead to the application of Roman law in the whole empire but it also led to the adaptation of Roman law to local law, which was mainly Greek law, and thus to the merging of Roman and Greek law.

As long as the frontiers of the empire were not seriously threatened from the outside, little effort was required to guard them and the empire could become wealthy and prosperous. At the beginning of the third century, however, the political situation along the Rhine, the Danube and the Euphrates began to change quite suddenly and it then became clear that the frontiers of this extensive empire were too long to be defended adequately. As a result there was a long period of confusion and uncertainty which did not end until Emperor Diocletian (284–305) fundamentally

reorganised the empire and made it defensible and governable again.

7.3. THE POPULATION

The transition from republic to principate, which constituted a political revolution, also brought about changes in the social structure of the Roman empire.³

An upper class was formed by the senatorial aristocracy and the *equites*, whereas the urban aristocracy from outside Rome constituted a middle class; the rest of the population still formed the lower class. These classes were interwoven in the sense that a web of patron-client relationships existed which had developed during the republic and continued on much the same basis into the third century. The centre of the web was now of course formed by the emperor and his court.⁴

7.3.1. The senatorial aristocracy and the *equites*

The senatorial aristocracy and the *equites* together formed the upper class.⁵ During the late republic the senatorial aristocracy consisted of those who had been chosen to serve as quaestors or as higher magistrates, and their agnate descendants up to and including the third generation. From now on, however, the magistrates were no longer chosen by the *comitia* but by the emperor. When Augustus came to power he replaced a number of senators by men from his own ranks; he chose mainly prominent persons from the *municipia* and the *coloniae* in Italy. This policy was continued by his successors, but they also admitted prominent persons from the provinces. In the third century, therefore, the senatorial elite no longer had any connection with the old aristocratic families of the republic or the time of Augustus.⁶

The financial situation of the senators also changed in the principate. In the past most of the senators had been large landowners. At the time of Tiberius (14–37) and Claudius (41–54) and particularly during the reign of Nero (54–68) many of them fell victim to the emperor's greed: their capital was confiscated or had to be left to the emperor in their wills. In this way the emperor became the largest landowner in the empire.

The *equites* now belonged to the upper class too. During the late republic they had been a kind of lower aristocracy of business-

men. They had primarily been engaged in trade, in levying taxes for the state and the like and had preferred to invest their profits in agriculture. During the empire the *equites* began to play a central role in the imperial administrative machinery. Within this class a hierarchy now developed which was determined by the rank persons had reached in the bureaucracy. Those who had held the highest positions in the army or in the administration formed an élite within the *equites* which was comparable to the highest ranks among the senatorial aristocracy. Unlike the regular *equites* in the *municipia* and in Rome itself who formed the lower ranks of the *equites*, the bureaucratic élite were highly esteemed in society and exerted great influence on the government.

From the first century members of the *equites* were also often admitted to the senate. In the long run the difference between the *equites* and the senatorial élite gradually disappeared: members of both classes now took part in the administration. Both classes consisted of well-to-do persons and the *equites* were sometimes even better off than the senators.

7.3.2. The urban aristocracy

The governors of the towns in the Roman empire, together with their families, formed a middle class in Roman society. A town was governed by a senate, called *ordo decurionum*. Members of the *ordo* were not paid by the central administration; they were selected on the basis of their social and financial position. A dishonourable profession or a 'criminal record' was an obstacle to membership and since the time of Tiberius it had been only freeborns who could become *decuriones*. To become a member of the *ordo decurionum* one probably had to have capital over a certain amount. We know that in the town of Comum in northern Italy, for instance, the minimum capital required was 100,000 sesterces. However, whether such a criterion was observed or not, the *decuriones* had to be rather wealthy: they had to share responsibility for public works and magisterial functions and they were personally responsible for the tax that the town was required to pay. Since the *decuriones* were recruited from the wealthy families, their office gradually became a matter of hereditary right and duty. When in the third century the economic and political situation deteriorated and the central administration grew weaker, the *decuriones* were responsible for cohesion and stability at

provincial level. Then the position of *decurio* was no longer so attractive; because of the increasing pressure of taxation the function which had once been an honourable one, became a heavy burden that few people wished to shoulder.

7.3.3. The rest of the population

As in the days of the republic, the rest of the population consisted of all those who did not belong to the upper classes. They included the artisans, the farmers and farm labourers, the masses who could not earn a living and the slaves. But this group too underwent some changes during the principate. First of all, this group no longer consisted solely of citizens who were originally Roman; many of the innumerable slaves who had been brought to Italy during the late republic had in the meantime been manumitted by their owners and had thereby acquired Roman citizenship. Some of them succeeded in holding down reasonably well-paid jobs, and they and their descendants became respectable Roman citizens. Secondly, the number of people who could not earn their own living rose considerably; they moved to the large towns and became part of the urban proletariat. Because these people constituted a potential threat to political stability, food was distributed regularly and games and impressive spectacles were organised. This 'bread and games' treatment was meted out to the urban proletariat in Rome as well as in the other large towns of the empire.⁷

7.4. ECONOMY

In the first two centuries of the principate the Romans experienced a period of great prosperity. Agriculture and industry flourished and as a result a great deal of trading went on. Now that the entire Mediterranean area and a large part of western and central Europe were under Roman rule there was nothing to prevent a free exchange of products.⁸

In about 50 BC much of the large-scale landownership which had been a feature of Italy under the late republic came to an end: large numbers of the *latifundia* were confiscated and split up into medium-sized farms. A certain amount of large-scale landownership continued, but mainly in the provinces. At that time Egypt was the granary of the Roman empire, the main

products of Italy being wine and olive oil. Initially, these were exported in large quantities to Spain, Gaul and Africa. However, in the second half of the first century the Roman colonists in these provinces began to produce and export wine and oil themselves. As a result these countries were no longer a market for Italy. Because the countries in the eastern Mediterranean had long been self-supporting in wine and oil there was no demand for Italian products there either. During the first two centuries of the principate agriculture brought prosperity to the provinces but not to Italy itself.

Because fewer countries were conquered, the supply of slaves dwindled. As a result the price of slaves increased and slave labour became expensive. Consequently large landowners preferred to lease parts of their estates to tenants. A tenant was given a farm and land and sometimes also tools and equipment. The tenancy was usually granted for a period of five years, the rent being paid annually. From the second century onwards the tenant was not required to pay rent that year if there was a poor harvest or the harvest failed due to circumstances beyond his control; in such cases the tenant could be exempted from rent by or on behalf of the emperor. Because a tenant therefore no longer had to run great risks those small farmers who were still independent found it attractive to rent a farm. As a result the number of independent farmers, both in Italy and in the provinces, declined still further.

Artefacts had been manufactured in Italy since the beginning of the second century BC. At the beginning of the principate, there was an enormous increase in the production of artefacts; terracotta pottery (the famous *terra sigillata*), metal pots and pans, glass, woollen materials and toilet requisites were produced in large quantities and exported to all parts of the empire. Nevertheless, Italy was unable to compete with similar products originating in countries in the eastern Mediterranean; the glass from Syria was better, Alexandria supplied the whole known world with papyrus, linen, perfume and similar goods, and finer woollen goods were made in Asia Minor than in Italy. In the second century Italy lost its lead in the west as well: there Gaul, followed by Germany, took over the production of pottery, glass and bronze utensils. In Italy only small workshops survived which supplied goods exclusively for the local market.

As under the republic, most of these goods were transported by sea, and only a few went overland. The land route received a boost

when the Roman emperors extended the network of roads. By the end of the second century it covered the whole empire; the tracks and sometimes even the roads themselves are still visible today. Trade relations extended even beyond the frontiers of the empire; in the second century there must have been well-used trading routes via the North Sea, the Danube and the Vistula. Furthermore, in those days Greek and Syrian merchants even had regular trading contacts with China; of the two routes involved, one being a land route, the other a sea route, it was the one over the Indian Ocean that remained important because ships could use the trade-winds. This sea route led to close contacts with the west coast of India where Roman products were traded for spices, precious stones, etc.

During the republic a number of governmental tasks such as the collection of taxes in the provinces, the construction of roads and the organisation of transport were ‘farmed out’ to private persons, the hated *publicani* and their companies. But by the beginning of the principate the situation had begun to change. In the provinces like Egypt and Gaul, which were under the direct authority of Augustus, the land tax (the most important form of tax) was levied directly by the local administrators supervised by an imperial official; the other tasks were put in the hands of the urban administrators. This system, which had operated long before the Romans arrived in Egypt, was gradually introduced into other provinces and finally into the whole empire. Indirect taxes, however, continued to be collected by tax-farmers well into the third century.⁹

THE PRINCIPATE: THE STATE

The political structure of the Roman empire had changed fundamentally as a result of the civil wars that had swept the country in the last 100 years of the republic. Real power was now in the hands of the emperor. The elements that had formed the political structure during the republic—the senate, the magistrates and the assembly—acquired a different function or they disappeared. The senate, whose experience in administration was almost indispensable, retained its administrative function—though it was far less prominent than before—and acquired an additional task in the field of legislation and the administration of justice. The functions of the magistrates were gradually eroded. The assembly, which had lost its original function since the extension of the empire, hardly convened at all. The administrative tasks that these organs had traditionally performed were gradually taken over by imperial officials. Under the principate the army began to constitute an important element in the political structure of the Roman empire.

8.1. THE EMPEROR

8.1.1. The first princeps

It is impossible and old-fashioned to try and describe the essence of the principate in simple terms. The phenomenon can best be explained by the events which followed the murder of Julius Caesar in 44 BC and which led Augustus to seize power for an indefinite period.¹ In 44 BC the prevailing problem was that the empire could no longer be governed according to the republican constitution. The three most important leaders at the time were

Mark Antony, Gaius Lepidus and Caesar's adopted son Gaius Julius Caesar Octavianus, the later emperor Augustus, who then was still under 20 years of age. In 43 BC Antony, Lepidus and Octavian decided to share power by forming a triumvirate. Since each of them had at his disposal, and was financially responsible for, a fair-sized army it was comparatively easy for them to persuade the assembly to give them power for a period of five years in order 'to restore the republic'. Five years later this power was extended (probably again by the assembly) for another five years. By the end of this second period the relationships between the *triumvires* had changed dramatically. Lepidus was forced by Octavian to accept the less important post of *pontifex maximus* and was thus side-tracked, whereas Antony and Octavian did not relinquish their special powers. At the time Antony was in the eastern Mediterranean with a Roman army and Octavian was in Italy.

The tension came to a head when Antony, although still married to Octavian's sister Octavia, married Cleopatra, Queen of Egypt, and thereby gave people the impression that he wanted to found in the eastern Mediterranean a Hellenistic kingdom that was independent of Rome. At the suggestion of Octavian the senate decided to declare war only on Cleopatra so that formally a civil war between Octavian and Antony could be avoided: Octavian was put in charge of the troops. Before leading his army into battle Octavian made many Italians and inhabitants of the western provinces swear an oath of allegiance to him.² Octavian fought and defeated Antony and Cleopatra at the battle of Actium (Actium being an island off the west coast of Greece) in 31 BC; in the following year Octavian conquered Egypt. For a long time afterwards Egypt was considered so important, and therefore risky, that senators were not allowed to visit it without special permission from the emperor.

Octavian remained for a while in the eastern Mediterranean for organisational reasons. Upon returning to Rome in 27 BC he relinquished his special powers and, as he said later, he gave the republic back to the senate and the Roman people. However, the result of this gesture was that the senate and the assembly began bestowing on Octavian a range of powers and titles which placed him in a unique position. Most of these were already known from the time of the republic but they now acquired a new dimension through their form and number. Some of these powers and titles

were completely new. In any case, the result was that Octavian, who now received the honorary title Augustus, in fact became an absolute monarch, *Caesar Augustus*.

8.1.2. The principles of imperial power

Straightaway, i.e. in 27 BC, Augustus was given responsibility for Spain, Gaul and Syria for a period of ten years; this so-called *imperium proconsular* not only gave him control over these provinces but it also gave him command of the armies in these countries.³ Of the powers that Augustus acquired later two were vitally important: the *imperium proconsulare maius* and the *tribunicia potestas*. Augustus was granted these two powers in 23 BC when he relinquished the consulship which he had held until then. The *imperium proconsulare maius* gave him supreme power in all the provinces and therefore placed him above even the governors of provinces which were still under the authority of the senate; this power was granted to him for life. The *tribunicia potestas* gave Augustus the powers of a tribune, but with two striking differences: this power was not granted for a year but for life and in addition he was immune to intercession on the part of other magistrates. In his capacity as tribune he could summon the assembly and propose laws, he could summon the senate and he could veto decisions taken by the magistrates.

Other duties and powers assigned to Augustus were the *imperium consulare* (19 BC), whereby he acquired just as much power as the consuls in Rome and Italy, and the *cura annonae* (22 BC) whereby he became responsible for the food supply, which was of great political importance, particularly for the city of Rome. On various occasions he was made a censor, which enabled him to have a say in the composition of the senate. Finally, after the death of Lepidus in 12 BC, Augustus also received the title of *pontifex maximus*, a title which gave him honour and dignity rather than power.

Perhaps even more important than all these powers and titles bestowed on Augustus was the personal authority, *auctoritas*, he enjoyed. Augustus had acquired this prestige on the basis of his military and political successes. In his political testament, the *res gestae divi Augusti*, in which Augustus described what he had done for Rome during his life and what honours and powers he had received in return, he stated that he had had just as much

power as the other magistrates but had had more *auctoritas*. Probably it was this combination of legal and extra-legal authority which constituted the strength of his emperorship.

8.1.3. The succession

Because the power of Augustus was formally based on a number of special magisterial functions, a successor could not automatically take office. On the other hand, if the problem of the succession were not settled immediately the stability of the empire could be in jeopardy. This was why Augustus, during his forty years in office, had let the assembly grant special powers such as the *tribunicia potestas* and the *imperium proconsulare* to persons whom he regarded as suitable to succeed him. When Augustus died in 14 AD the only survivor of this group of persons was his adopted stepson Tiberius, and the senate and the people had no hesitation in proclaiming Tiberius as emperor.

During the principate emperorship is always linked with the magistrature. As a result the succession remained problematical for a long time, even when emperorship as such was no longer disputed. In the course of time the succession was dealt with in various ways: by inheritance and by selection of a new emperor by the former emperor, the senate or the army. The dynasty of the Julian-Claudian house, founded by Augustus, came to an end in 68 AD with the suicide of Nero. In the following year the emperorship passed to three persons in succession before the general Vespasian made a successful bid for power. In 79 AD he was succeeded by his son Titus (79–81), who was in time succeeded by his brother Domitian (81–96). When Domitian was murdered he left no son to succeed him; the senate therefore chose, from among its own ranks, a new emperor, Nerva (96–98). Because Nerva was already quite elderly and wanted to have personal control of the army, which was becoming restless, he adopted Trajan, a successful general from Spain; Trajan then succeeded him as emperor. This system of so-called adopted emperors turned out to work exceptionally well. The system was applied well into the second century; there was even one case where an emperor, Antoninus Pius (138–161), excluded his own son from the succession. When Marcus Aurelius (161–180) was succeeded by his son Commodus, who turned out to be insane, political stability came to an end. In the next 100 years one

emperor followed another in quick succession; only Septimius Severus (193–211) and Alexander Severus (222–235) were able to survive for longish periods. Under their rule it was the army who decided who would be emperor. After the death of Alexander Severus it sometimes happened that various legions simultaneously proclaimed their own general as emperor and the final decision had to be made on the battlefield. This state of anarchy did not cease until Diocletian became emperor in 284 AD. His predecessors, Carus, Carinus and Numerianus (282–284), had not even bothered to acquire the *tribunicia potestas*, so formally the principate had then already ended.⁴

8.2. THE SENATE

The position of the senate in the principate was totally different from its position under the republic: whereas the senate had been the most powerful organ in the Roman empire until the first century BC, power was now concentrated in the hands of one person, the emperor. This shift in power, which occurred quite gradually, naturally had a marked influence on the position of the senate: it affected not only its composition and its way of functioning but also its tasks.⁵

In the last 100 years of the republic the composition of the senate was subjected to many changes. On the one hand the patrician families had suffered badly in the civil wars and the number of senators from their ranks was still low; on the other hand the revolution had brought a large number of people from plebeian families into the senate. At the very beginning of his reign Augustus purged the senate at least twice; in 29/28 BC and in 18 BC, by virtue of his powers as censor, he removed fifty and 140 senators respectively, reducing their number to 600. At the same time he filled the ranks of the senate with persons whom he regarded as suitable. He did this not only indirectly by exerting influence on the election of magistrates—performing a magisterial function had long been the only way of becoming a member of the senate—but also directly by admitting to the senate citizens who had not fulfilled any of the prescribed magisterial functions. He chose mainly prominent persons from towns in Italy. The later emperors continued with this policy. Under Vespasian (69–79) it was mainly persons from the *equites*, the urban aristocracy and the western provinces who became senators. In the second half of the

second century new politics based on Hellenistic culture began and prominent persons from the eastern provinces were also admitted to the senate. In the third century, therefore, all parts of the empire, with the exception of Egypt, were represented in the senate.

The form in which the senate met remained basically unchanged during the principate; this was determined by the rules of customary law. We know that Augustus passed a law, *lex lulia de senatu habendo*, introducing some new rules concerning the way the senate should function. Unfortunately, the content of this law has not come down to us directly; our information stems from several authors who mention that among other things the law stated how often the senate should meet, the number of senators required for a quorum and the penalties imposed on senators for failing to attend a meeting.

The emperors had a dramatic influence on the powers of the senate. As stated earlier, in about 25 BC the senate had transferred its most important powers to Augustus; these powers related to home and foreign policy, waging war, the administration, the supervision of legislation and to the magisterial elections. Nevertheless, Augustus and his successors did not discount the senate completely. Tiberius in particular saw to it that the senate was given new tasks to perform in the administrative sphere and acquired new responsibilities with regard to legislation and the administration of justice. Not surprisingly, the part of the administration relating to the senatorial provinces remained in the hands of the senate, as did the control of the *aerarium*, the former treasury. Furthermore, during the reign of Tiberius the task of electing magistrates was transferred from the *comitia* to the senate, and even in the legislative sphere the senate began to play the role formerly played by the *comitia*: the senatorial decree now took the place of the *lex*. The emperors also involved the senate in the administration of justice. Although the senate had been involved in a number of special cases dealt with before the beginning of the principate, in about 20 AD it started to serve regularly as *forum privilegiatum* in criminal cases.

The senate was able to retain its tasks and duties up to the end of the second century. After the death of Marcus Aurelius in 180 AD, however, there were emperors who had little contact with the senate. The administrative functions were entrusted increasingly to the *equites*, i.e. to persons from the class of knights. Although from that time onwards the senate no longer had any real power,

membership of that esteemed institution was still sought after and was regarded by many as the climax of a political career.

8.3. MAGISTRATES AND OFFICIALS

8.3.1. The magistrates

The weak spot in the magistrature was the system of collegiality and annuity and the resultant lack of continuity and decisiveness. Although this system had worked fairly well in the days of the republic when the Roman territory was not so large and the senate formed the binding element, it was no longer effective in the later days of the republic. Changes were called for; these could be accomplished most easily and therefore could be carried out first in the imperial provinces. There the tasks that used to be performed by magistrates were assigned to imperial officials. The other magisterial functions continued to exist, although they were dismantled slowly but surely. Some of them, in particular the consulate and the tribunate, were used by the emperors as a basis for their power and thereby lost their original character.⁶

The only task that the consuls retained was the chairmanship of the senate. As a compensation the consuls were given several tasks connected with imperial jurisdiction.⁷ The emperors hardly interfered at all with the praetorship: of the eight praetors two retained the (civil) *iusdictio* and the other six remained chairmen of the special criminal courts. During the principate another ten praetors were appointed; their task was to apply the new imperial laws. The duties of the censor were now performed by the emperors themselves, either formally if the office had been assigned to the emperors specially, or informally. Just like the consulate, the function of tribune also lost its meaning when the emperors based their power on that office too and as with the consuls the tribunes were given several tasks in the imperial administration of justice. Among the lower magistrates the aediles lost their most important tasks, the *cura urbis* and the *cura annonae*, which passed to the imperial officials; the only duties they retained were the supervision of the market and the *iusdictio* in that area. From the time of Nero the supervision of the aerarium, the state treasury, which had long been the chief task of the quaestors, was entrusted to two officials appointed by the emperor.

8.3.2. The officials

The position of the imperial officials was quite different from that of the magistrates. They were appointed by the emperor but were not granted *imperium* or *potestas*. The only powers they received were those delegated to them by the emperor. As a result the emperor could remove these powers from them at any time; the powers also lapsed upon the death of the emperor. The officials were selected on the basis of their abilities, and came not only from the senatorial élite but also from the *equites*. The principles of collegiality and annuity did not apply to these imperial officials. In addition, the officials were paid for their work according to their rank.

The most important officials were the *praefectus praetorio* and the *praefectus urbi*. From the time of Augustus the praetorian prefect was the head of the imperial bodyguard. He enjoyed the emperor's confidence and was therefore often very influential. During the principate the praetorian prefect also acquired jurisdictional powers in the whole empire except for the area that included Rome and 100 miles beyond its boundary. At first these powers were delegated to him by the emperor; later he exercised these powers in his own right. In the third century leading jurists like Papinian and Ulpian held office as praetorian prefects. The city prefect was originally the representative of the emperor in Rome when the emperor was away. He was quickly made responsible for maintaining public order in Rome and several cohorts were put at his disposal for that purpose. In addition, like the praetorian prefect, he was granted jurisdictional powers, but these powers were for matters in Rome itself and within a 100-mile radius of Rome.

During the reign of Claudius (41–54) the emperor's personal secretariat became so large that he established four departments or chanceries: the *a rationibus* for economic affairs, the *a memoria* for the records, the *ab epistulis* for the emperor's official correspondence and the *a libellis* for dealing with petitions from citizens. Much to the annoyance of the senate, Claudius appointed freedmen as heads of these chanceries. Most of them, however, were very well educated men from the eastern provinces of the empire. Upon their manumission they had acquired the emperor as their patron and as a result owed him respect and allegiance. Emperor Domitian also appointed members of the *equites* to these

functions, but it was not until the reign of Hadrian, when the chanceries were reorganised, that the heads were selected exclusively from the *equites*. The *equites* also played a greater part in the control of the imperial treasury (the *fiscus*), into which flowed the taxes levied in the imperial provinces and from which the emperor paid his officials.

Finally Augustus and his successors also used a traditional Roman device, namely the *consilium* or the advisory council. Before any important decisions were taken with regard to public and private functions Romans were accustomed to consult with family and friends. The emperors did this too; in connection with political and military problems and with problems relating to the administration of justice they always formed an ad hoc *consilium* of trusted friends and experts. Particularly senators whom we know as jurists often participated in the *consilium*; Salvius Julianus, for instance, was a member of Hadrian's *consilium*. By this time the *consilium principis* had become a permanent and salaried body whose members were appointed for life.

8.4. THE ARMY

Whereas in the first two centuries of the principate the political structure was formed mainly by the emperor and his officials and by the senate, the most influential element in the third century was the army. Since about 100 BC the army had no longer consisted exclusively of Roman citizens doing compulsory military service but also included some professionals. The officers, however, as in the past, came from the senatorial aristocracy and the *equites*: they served in the army as part of their political career. The army soon developed into an exceptionally effective but expensive instrument.⁸

Compared to the size of the empire the army was really quite small but its power was so great that in wartime Roman generals considered that a *ratio* of one Roman soldier to two to four enemy soldiers was adequate. The army was usually stationed along the frontiers, the largest concentrations being on the Danube, the Euphrates and the Rhine. For centuries the chief 'weapon' had been the heavy infantry which was organised in legions. The legions were supported by local troops consisting mainly of cavalry. In the third century the main emphasis shifted to heavily armed cavalry. The effectiveness of the army was increased by

strict discipline and thorough training; any legion that gave up a fight or mutinied was ‘decimated’: every tenth soldier was clubbed to death by his fellow-soldiers. In addition, every ordinary Roman soldier was also an engineer and in conquered territories the Romans not only built fortified camps but they also linked them together by a network of military roads which permitted rapid troop movements. The frontiers were strengthened where necessary, e.g. in England, Germany and North Africa. Since the army was so effective it also constituted a dangerous political factor; it could only be properly controlled if the soldiers were paid adequately and on time. When one emperor succeeded another, the army had to be ‘bought over’, which did not always make economic sense.

During the civil wars at the end of the republic and during the first two centuries of the principate the army was occasionally of overriding importance. In a struggle for power the only person who emerged victorious was the one with a loyal army. This became apparent in various ways: directly from the victories of, for example, Augustus and Vespasian, indirectly from the adoption by Emperor Nerva of the successful general Trajan whom he thereby designated as his successor. In the third century and particularly after the death of Alexander Severus in 235 it occurred regularly that generals of various armies were pronounced emperors by their troops and that the decision about who could in fact be emperor was made on the battlefield. Because it often took years for an emperor to defeat his opponents it sometimes came about that tiny realms were formed and managed by a former Roman general; this happened mainly in frontier areas, for example in the north-west of Gaul and in England. In the period between 235 and 285 there were about sixteen official emperors and many more unofficial emperors or usurpers. This period is also referred to as the period of the soldier emperors. Diocletian was the first general who managed to bring the whole Roman empire under his power and keep things that way for at least twenty years. The changes that he introduced into the organisation of the empire and that in many respects had been prepared by his predecessors determined the political structure of the Roman empire in the last few centuries of its existence.

THE PRINCIPATE: THE LAW

9.1. INTRODUCTION

The beginning of the principate was marked by sweeping changes in the law. Whereas under the republic the senate basically had been responsible for lawmaking, power now shifted to the emperor and law too came into his sphere of influence. The process, however, was a gradual one, as can be seen in legislation, the administration of justice and in legal science.¹

Laws were still made by the *comitia* and the senate, but the emperors, by virtue of their special powers, could influence the content of the laws. In the long run the emperors themselves began enacting laws. Ultimately, the republican methods of legislation fell into disuse: the *leges-plebiscites* by the end of the first century and the senatorial decrees by the beginning of the third century.

In the principate justice continued to be administered via the *formula* procedure in the case of disputes coming under private law (and in certain cases by means of *legis actiones*) and by means of the *quaestiones* in the case of criminal offences. At the same time, however, a new form of procedure, called the *cognitio extraordinaria*, developed. This was used by or on behalf of the emperor in connection with both types of case.

Legal science was still in the hands of the jurists. Their activities now concentrated on the giving of opinions. Here too the emperors interfered by granting certain leading senators the right to give, on their behalf, opinions on legal problems (*ius respondendi*); in the case of a lawsuit these opinions were binding for the judge. This *ius respondendi* probably limited the number of jurists giving opinions. In the second century the emperors let

opinions be given in their own name as well. As under the republic, the jurists themselves collected the opinions they gave; a relatively large part of these collections has been preserved via the Digest. In addition, some jurists also published introductory textbooks, the most important one being the Institutes of Gaius.

Nowadays the law of this period is normally referred to as classical law. There are two main reasons for this: firstly, the jurists of the principate did much to develop and elaborate Roman law and, secondly, since the rediscovery of the Digest in the eleventh century the law of this period has been normative for later generations of jurists.

9.2. LEGISLATION

9.2.1. Leges and plebiscites

In the late republic there were no longer any clear-cut distinctions between the various types of assemblies and even the *concilium plebis* hardly differed from the *comitia*. In this period plebiscites were often formulated at the suggestion of the tribunes; these plebiscites were then referred to as *leges*.

As mentioned earlier, the *tribunida potestas* was one of the main pillars on which Augustus—at least formally—based his power; he, and after him in particular also Emperor Claudius (41–54) used their authority as tribunes to make a number of important innovations. Their laws, just like those of the republic, had a political character. In 18 BC, for instance, laws were formulated relating to marriage and divorce (*lex Iulia de maritandis ordinibus*) and to bribery during elections (*lex Iulia de ambitu*); in the *leges Iuliae iudiciorum publicorum et privatorum* of 17 BC the administration of justice was reorganised. In 9 BC the above-mentioned *lex Iulia de senatu habendo* came into being; it regulated the way in which the senate was to meet. Because the law relating to marriage encountered a great deal of resistance Augustus suggested to the consuls M.Papius and Q.Poppaeus that they should propose a new law, so they did. The content of this *lex Papia Poppaea*, which dates from 9 AD, is difficult to distinguish from that of the *lex Iulia de maritandis ordinibus* and often they are referred to in one breath as the *leges Iulia et Papia Poppaea*.² Both laws show, however, that Augustus wanted to encourage the

marriage and procreation of Roman citizens and that he wanted to protect the senatorial élite.

Emperor Claudius, who is known to have been rather fond of old republican forms, abolished the agnatic *tutela* of women by means of a *lex*, i.e. the *lex Claudia*.³ The last *lex*, referred to as such in the sources, is a *lex agraria* of Emperor Nerva (96–98), which assigned land to poor Romans.

9.2.2. The senatorial decrees

In the first century BC, as mentioned earlier, it did occasionally happen that a proposal put forward by one of the magistrates, which had been ratified by the senate, was no longer put to the *comitia* but came into effect immediately. One reason for this was that the *comitia* functioned so badly. At the beginning of the principate more and more laws originated in this way, the senate replacing the *comitia* in this respect. Just as under the republic, a senatorial decree could result from a question put by a magistrate. From now on, however, the senatorial decrees were in most cases drawn up on the initiative of the emperor. It is known, for instance, that Augustus on occasion charged the consuls to ask the senate's opinion on a specific point. From the time of Emperor Claudius the senatorial decrees on juridical matters were usually prepared by the emperor's officials and the proposal concerned was read out in the senate by or in the name of the emperor (*oratio principis*); various senators then expressed their opinions and a vote was taken. Because the emperor exerted so much influence in the senate, the senate never failed to agree to the main lines of the proposal. In the second century the senatorial decrees became a formality whose sole purpose was to ratify the emperor's proposal. The juridical literature of the time often referred only to the proposal. A well-known example is the *oratio Severi* from the year 206, which includes a relaxation of the ban on the exchange of gifts between husband and wife.⁴

At first the senatorial decrees mainly concerned problems pertaining to criminal law. A famous or rather infamous example is the *SC Silanianum* of 10 AD; this decree aimed to repress the frequent killing of masters by their slaves. It stated that when the identity of the murderer (s) was unknown, all the slaves who had lived in the same house as their master had to be tortured and condemned to death; if the victim's heir omitted to have the

murder investigated, he would no longer be entitled to the inheritance.⁵

In the middle of the first century the senate started to introduce innovations into private law: the first known decree of this kind is the *SC Velleianum* which forbade women to stand surety for debts of others, including their husbands.⁶ The number of innovations brought about in this way increased in the middle of the second century and reached a maximum by the end of the century. The senate introduced for instance a legal right of succession between mothers and children.⁷

In the third century emperors no longer submitted their proposals for approval by the senate and in this way the senatorial decrees disappeared formally as a source of law.

9.2.3. Imperial legislation

Not only did the emperors contribute indirectly to legislation by way of *leges* and senatorial decrees, but they themselves also created new law. Because in a formal sense they had no legislative power, at first the emperors had to base this power on the magisterial functions they performed. One of them, the *imperium proconsulare maius*, was particularly suited for this purpose, because it authorised the emperor to issue *edicta* (general pronouncements) and *mandata* (instructions given by the emperor to his officials). The emperors also created new law in another way: whenever citizens put legal problems to the emperor relating to private or criminal matters, the (written) answers, the *rescripta*, were binding because they were given by the emperor. This was also the case when the emperor or his representative acted as judge: the sentences, *decreta*, had the force of law because they were given by the emperor. The edicts, rescripts and decrees are referred to in the sources by the collective name *constitutio*. Nowadays it is normal to add the mandates as a fourth category, because they too sometimes contained new rules of law. Because the decrees and rescripts did not originate within the framework of legislation and at first were not of general validity, they need not be discussed here. They will be treated in sections 9.3.3 and 9.4.1. We will now look more closely at the edicts and mandates.

The edicts of the emperors resembled those of the magistrates with regard to form but differed from them considerably with regard to content. The difference was due to the fact that the

emperor held various magisterial functions simultaneously for life whereas the magistrates usually fulfilled only one function for a year and therefore their power was much more limited. Consequently edicts of magistrates were only valid during the period they were in office, whereas the imperial edicts did not lapse at the end of the emperor's reign, which generally coincided with his death: the latter were of unlimited validity and did not have to be constantly renewed. Another difference between the edicts of the magistrates and those of the emperors was that the magistrates could only issue edicts within their own sphere of power; the imperial edicts referred to everything that had to do with the state. In practice the emperors primarily issued edicts in the field of public law. The most well-known edict is the above-mentioned *constitutio Antoniniana* in which Emperor Caracalla granted Roman citizenship to all free inhabitants of the empire.

The mandates were instructions issued by the emperor to his officials and especially to provincial governors. Because originally the instruction was strictly personal it resembled the contract of mandate in private law. Like the contract it lapsed upon the disappearance of either the principal or the delegate; therefore when the emperor died or the official was replaced, the instruction had to be renewed. In this way gradually a whole body of instructions developed (*corpus mandatorum*) which were more or less of general validity. These mandates mainly concerned the provincial administration and particularly its financial side, and in addition some dealt with matters pertaining to private and criminal law. New rules were introduced particularly in connection with soldiers and administrators; because mandates could be relied upon by other citizens as well, they began to be regarded as a form of legislation. A good example of a mandate is the so-called soldiers' will. Julius Caesar had already allowed soldiers to make a will without being bound by the regulations that applied to the wills of ordinary citizens. In the first century various emperors (e.g. Titus and Nerva) renewed this privilege. Finally Emperor Trajan allowed this informal type of will to retain its validity for a year after the soldier had been honourably discharged from the army. Thereafter the privilege was not renewed, but the soldiers' wills continued to exist.⁸ This indicates that in the second century the mandate was regarded as forming part of imperial legislation.

9.3. THE ADMINISTRATION OF JUSTICE

9.3.1. The criminal trial

At the end of the republic there were two juridical procedures for criminal law: serious crimes were tried by special standing tribunals (*quaestiones perpetuae*), other crimes were dealt with by lower-grade magistrates, the so-called *tresviri capitales*. In the first few decades of the principate the tasks of the *tresviri capitales* were taken over by officials in the service of the emperor; the tribunals continued to exist for quite a long time after they had been reorganised and even expanded by Augustus.⁹

As early as 17 BC Augustus had regulated by law how the tribunals were to be composed and how they were to function. The list of potential jury-members, the *album iudicum*, was composed in a new way, the *equites'* participation being increased. Furthermore the minimum age for jury service was lowered from 30 to 25, so that there would always be enough jury members available. By the end of his reign, probably in 18 AD, Augustus added two new tribunals to the six existing ones: the *quaestio de adulteriis* and the *quaestio de annonae*. The first had to pass judgment in cases of adultery involving a married woman or an otherwise honourable woman and in cases of procurement. The second had to pass judgment in cases of hoarding or speculation which led to a rise in food prices.

The tribunals had a number of disadvantages which were not adequately dealt with by the innovations of Augustus. First of all, a citizen could only lodge a complaint about a crime if there existed a tribunal for that crime. Secondly, it sometimes happened that in one case several persons were involved who had committed various crimes. In such a case it would have been more efficient to have all the persons involved tried by one jury. In addition, the penalties that could be imposed were often regarded as being too mild for the type of crime committed. Therefore, the work of the tribunals was first supplemented but soon taken over by the new criminal court of the emperor and his delegates. In about the year 200 all *quaestiones perpetuae* had disappeared.

9.3.2. The formulary procedure

In the first few centuries of the principate the formulary procedure was still the usual way of taking legal action in disputes relating to private law. The proceedings were also essentially the same as they had been under the republic. In the first phase the praetor decided whether parties could submit their dispute to the judge and if so in what manner. The trial itself took place in the second phase, which consisted of the production of evidence, the pleas by the advocates and finally the judge's verdict. In practice, however, the dividing line between the formulary system and the *cognitio*-procedure was not always observed and now and again elements of the *cognitio*-procedure were applied in a procedure that was conducted by means of formulas. The only thing that altered in the formulary procedure was the function of the praetorian edict.

For a long time the praetorian edict continued to be an important source of law, but no more new legal remedies were incorporated; very occasionally the formulation for a legal remedy was changed and sometimes the edict was altered in accordance with what had been decided by a *lex* or senatorial decree. About the year 130 it became almost impossible to alter the edict, for then Emperor Hadrian gave Salvius Julianus, the most famous jurist of his time, the task of drawing up a definitive version of the praetorian edict; from then on only the emperor would be able to change it. In practice, this measure was probably not very important, for contemporary sources do not mention it. Our oldest sources on the subject date from the end of the fourth century, and their credibility has been questioned. What Emperor Justinian tells us in the sixth century about the measure is unclear and contradictory.¹⁰ Therefore we really know very little about the task assigned to Julian and the way in which he carried it out.¹¹

Although the edict was no longer a source of new law, its importance did not decline. It was used as a source of law for legal practice for a long time, even after the formulary system had fallen into disuse. From the third century the edict was referred to as the *edictum perpetuum*, although the term was no longer used in the former sense of the edict which was issued by the praetor at the beginning of his period of office and which in principle was valid for a whole year; the term was now used in the sense of the definitive version of the edict produced by Julian. The formulary procedure itself was abolished by law in 342.

The edict has not been preserved in its original state and the content can only be reconstructed on the basis of the information given in the juridical literature of the classical period. The leading German Romanist, Lenel, made a plausible reconstruction in 1883; this went through two revisions and from 1927 the second revision has been regarded as the standard edition.¹² Lenel's reconstruction indicates that the clauses of the edict were probably in a certain order which was dictated by the course of the trial, but only in the part involving the praetor. Modern jurists who are not familiar with the rules of the formulary procedure find this order difficult to understand. Lenel's reconstruction also shows that the terminology is not always consistent; the explanation for this is simple, if one realises that the clauses of the edict were formulated by different persons over a period of 150 years and were not adapted by Julian. The reason that the edict was not preserved may be connected with the fact that in their collections of *responsa* the jurists always quoted the relevant words from the edict, with the result that the edict itself became superfluous.

9.3.3. The *cognitio extraordinaria*

The *cognitio extra ordinem* or *cognitio extraordinaria* is a collective name for all those legal procedures in which the trial consists of one stage only and in which judgment is given by the emperor or by an imperial official acting on behalf of the emperor. The disputes that were settled by means of the cognition procedure could be of very different kinds: not only could they be about matters concerning private law and criminal law, but they could also be disputes between citizens and government officials.

The *cognitio* had originated during the republic and was first used in the provinces. One of the tasks of the provincial governor was the administration of justice. Criminal offences were generally dealt with by the governor or his representative, but he could not sentence Roman citizens to capital punishment. In disputes pertaining to private law the governor performed the tasks which in Rome were entrusted to the praetor. Sometimes the governor also passed judgment or he delegated the task to one of his subordinates (*index pedaneus*). This happened for instance in the case of disputes between persons who did not have Roman citizenship or in the case of disputes between Roman citizens when

there were not enough citizens who could serve as judges. When the governor was investigating a case—criminal or private—himself, he did not use the ordinary procedure but applied the *cognitio extraordinaria*.

When in 27 BC the *imperium proconsulare maius* was granted to Augustus a number of provinces came directly under his control. Augustus delegated the day-to-day management, including the administration of justice, to officials in his service (*legati Augusti pro praetore*) and they then exclusively used the *cognitio extraordinaria*. In the senatorial provinces, where the *cognitio* had also sometimes been used, this example was followed increasingly and by the second century the *cognitio* became the normal form of trial there as well. The *cognitio* was used in Italy and in Rome from the beginning of the principate, but as yet not on a regular basis. This happened only in the third century, and by then the *cognitio extraordinaria* had become the ordinary form of procedure in the whole empire.

The decisions of the emperor as judge in the first instance or in the case of an appeal (*decreta*) did not have force of law in a formal sense but—because they emanated from the emperor—they did carry authority and they could be referred to in later trials. Initially a precedent of this kind was not binding for a judge, but since the time of the Severi (end of the second century) the power relationships had changed so radically that an imperial decree had the same status as a law and a judge who had to pass judgment on a similar case could no longer deviate from that decree.

The introduction of the *cognitio extraordinaria* not only meant that judgment was now given by the emperor or one of his officials but it also marked the beginning of many other kinds of changes. With regard to disputes pertaining to private law the judge now played a more active role particularly with regard to the summons. Whenever a defendant refused to appear before the judge, the judge himself could summon him, and if the defendant still refused to comply the judge could condemn him by default; in a formulary procedure, on the other hand, it was the plaintiff who had to see to it that the defendant appeared in front of the praetor and a sentence by default was absolutely out of the question because there could be no trial without the agreement of the defendant. Secondly, in the cognition procedure it was possible for both parties to appeal against the verdict; now that the parties

were no longer allowed to choose their own judge, they could not be expected always to accept his verdict without question. The judge was now an official who worked in a hierarchical structure headed by the emperor, so parties could appeal to a senior judge or to the emperor himself. As mentioned earlier, there was not always a strict distinction between the cognition procedure and the formulary system, and from the beginning of the principate it sometimes happened that parties that had fought each other within the framework of a *formula* procedure appealed to the emperor or his subordinate against the sentence that had been pronounced.

The *cognitio* procedure also brought about a number of changes in criminal law. Tribunals other than the *quaestiones* began to judge criminal cases. The senate, for instance, developed into a tribunal dealing with more or less political cases. At first it was mainly trials connected with *laesio maiestatis* (insulting the Roman people and/or the Roman emperor) or with extortion perpetrated by governors in their provinces which were brought before the senate. Tiberius allowed all kinds of other crimes to be tried by the senate, but the accused were generally senators or members of the senatorial élite. In this way the senate developed into a *forum privilegiatum* for crimes committed by persons from their own class. During such trials the senators fought each other fiercely, but to the world at large they kept an appearance of unity. Fascinating reports of trials before the senate are to be found in Tacitus' work and in the letters of Pliny the Younger who repeatedly took part in such trials, serving as advocate or judge. As from the reign of Commodus the activities of the senate were drastically curtailed and a few decades later the senators were no longer involved in criminal trials at all.

Another tribunal was the court of the emperor and his delegates, particularly the prefects. In Rome and in the zone within a 100-mile radius of Rome the city prefect, by virtue of delegation on the part of the emperor, had his own authority in minor criminal cases. In the course of time his power was extended so much that towards the end of the second century he was entitled to judge all criminal cases. The praetorian prefect became responsible for the punishment of crimes elsewhere in Italy. In the senatorial provinces this task was performed by the governors. They had long been authorised to act as judges in lawsuits against *peregrini*, but in cases against Roman citizens

their authority was fairly limited: they were not entitled to condemn citizens to death unless the latter had first been given the opportunity to have their case judged in Rome. In the imperial provinces the administration of criminal justice was in the hands of special representatives of the emperor (*legati Augusti*). Already in the first century the emperors began to allow those *legati* who were in charge of an army in their province, to condemn to death a soldier, a Roman citizen, without the soldier having the right to bring his case before a tribunal in Rome. When the number of people with Roman citizenship increased and it became practically impossible to deal in Rome with all cases involving capital punishment, this so-called *ius gladii* (literally, the right of the sword) was granted more and more often to other provincial governors and was made applicable to civilians as well. By the beginning of the third century the governors were fully authorised to act as judges in all kinds of penal cases in their provinces, not only in the first instance but also in cases of appeal.¹³

Another difference between the *quaestiones* and the *cognitio extraordinaria* was that the latter had a predominantly inquisitory character. The trial was started by the 'state'; no formal accusation by a citizen was necessary except for the old *crimina publica*. Traditionally any citizen could bring such an accusation. However, the old rules relating to this public accusation were now changed so profoundly that by the end of the principate all that was left was a sort of complaint which could be put forward by the injured party. Furthermore, in the *cognitio* procedure the judge could conduct investigations on his own initiative and by any means at his disposal. Only the senatorial court adhered to the accusatory form of procedure used by the *quaestiones*.

Thirdly the *cognitio* knew no fixed penalties. The judge or court was free to determine the form and measure of the punishment. He could, for instance, take into account the circumstances in which the crime was committed, the personal or social condition of the accused, etc.; but he could not set a convict free, for that was a prerogative of the emperor and the senate.

9.4. LEGAL SCIENCE

9.4.1. The activities of the jurists

There is a certain degree of continuity between the legal science of the late republic and the legal science of the principate. As in the republic the jurists of the principate were leading senators with an exceptionally good knowledge of and great interest in the law. They often held high political office; the new element was that they could function not only as magistrates (e.g. as consul, praetor, governor of a senatorial province) but from the second century they could also be imperial officials (e.g. they could serve as city prefect or as praetorian prefect). Another new feature was that they could now participate in the emperor's *consilium*. As far as legal science was concerned, the jurists were still engaged in *cavere*, *agere* and *respondere*. The fact that the highest power in the Roman empire was now in the hands of the emperor naturally had an influence on these activities.

Cavere, the drafting of texts, underwent some changes at this time. Developing formulas for the formulary procedure was no longer one of the regular tasks of the jurists because the edicts of the praetors and the curule aediles now contained adequate legal remedies. Drawing up formulations for the practice of law was still part of their activities, but only a relatively small part. The classical Roman jurists show their ability to draft texts very clearly in the field of the law of succession, especially in the endless variety of legacies which they invented and which occupy five books of the Digest (D. 30–34.4).

Agere (serving as advocate) remained more or less the same. Whenever jurists interpreted laws and formulas in their pleas it made little difference to them whether they were participating in a formulary procedure or in a lawsuit before an imperial official or the senate. Unfortunately the speeches of the jurists made when serving as advocates have not survived. We do still have access to the *Controversiae* of Seneca the Elder, which are practice speeches from the beginning of the first century, and we can consult *De Institutione Oratoria* of Quintilian, which is the standard work on the training of orators, dating from the year 95; it too deals mainly with forensic speeches. Furthermore, in a number of letters Pliny the Younger describes the speeches he made as advocate during extortion trials in the senate; on some occasions he spoke on

behalf of a province which accused an ex-governor of extortion and on other occasions he spoke in defence of an ex-governor.¹⁴

Respondere (giving opinions) was now the major legal activity of the jurists. As under the republic they themselves collected their opinions; these collections will be dealt with in the next section. We shall now discuss the way in which the jurists gave their opinions. The principal source of information is the aforementioned Enchiridium, the overview of the history of Roman law which the jurist Pomponius compiled in the middle of the second century and which is included in the Digest of Justinian (D. 1.2.47–53). The first change mentioned by Pomponius has to do with the so-called law-school. Under the republic the jurists had formed a *secta* or *schola* in the senate in which they discussed the problems that had been put to them, under the leadership of the person with the greatest authority in law. At the time there were still no rules about the persons who could give *responsa* and no rules about the topics on which or the manner in which *responsa* were given. Pomponius relates that at the time of Augustus a second *schola* emerged in the senate around M. Antistius Labeo in addition to the existing school around Ateius Capito. These two senators had very different characters and consequently they had completely opposing views in the political and juridical field. Capito was a great supporter of Augustus, whereas Labeo did not want anything to do with the politics of Augustus; Capito was a traditional jurist who put into practice what he was taught, whereas Labeo was an innovator and was reputed to be an exceptionally gifted jurist. A vast quantity of literature has appeared over several centuries about the differences between the schools.¹⁵ The resulting theories have one thing in common: they are all based on the hypothesis that the law-schools were ‘schools of thought’; they had to do with legal science, i.e. the theory of law.

The second change mentioned by Pomponius is the introduction by Augustus of the *ius publice respondendi ex auctoritate principis*. This part of Pomponius’ text is generally regarded as corrupt and has been interpreted in many different ways. The discussion concentrates on two questions: how did this privilege work and to whom was it granted? Most authors believe that the *ius respondendi* meant simply that the jurists in question could give opinions in the name of the emperor, i.e. with more authority than other jurists; they were in a sense ‘jurists for the

crown'.¹⁶ According to some other authors, however, this privilege consisted of an exclusive right; only the jurists who were granted this right had the emperor's permission to give opinions which were then binding for the judge. Opinions differ even more regarding the second question: to whom was the privilege granted? Some authors maintain that the *ius respondendi* was granted to only a few jurists and only by the first emperors, Augustus and Tiberius. However, others believe the privilege was granted to various jurists up to the reign of Hadrian; others again think that after Hadrian the number of jurists who received the right increased.

Recently Tellegen has pointed to the fact that Pomponius mentions the *ius respondendi* in the context of the law-schools and suggests that the two are linked: Augustus would have introduced the *ius respondendi* in the *lex Iulia de senatu habendo* of 9 BC for the benefit of the head of the law-school.¹⁷ This jurist would then have the exclusive right to give opinions on his, Augustus', authority on behalf of the senate. Because the opinions would be based on imperial authority, they would be binding for the judge. By coupling his personal authority to the authority of the leader of the law-school Augustus hoped he could restrict the giving of opinions by the jurists and thereby promote unity and security in law. However, there was a problem about who was actually to be granted this right. As leaders of their respective schools both Labeo and Capito were possible candidates for the *ius respondendi*. However, they were such rivals that there was a danger that if they both received the *ius respondendi* they would be constantly at loggerheads and thereby create legal instability. Since the situation was so problematical and since Pomponius remarked that Sabinus was the first to be informally granted by Emperor Tiberius the right to exercise the *ius respondendi*, Tellegen concludes that Augustus himself never granted this privilege to anyone. Tellegen's reconstruction is based on the hypothesis that the law-schools did not have to do with the theory of law but with legal practice. This reconstruction seems plausible because it fully explains Pomponius' text as included in the Digest, and because it solves problems regarding the *ius respondendi* and the law-schools which have hitherto appeared to be insoluble.

After mentioning the introduction of the *ius respondendi*, Pomponius goes on telling about the jurists and their law-schools. Sabinus had succeeded Capito as leader of the traditional school,

although he was not a member of the senate; this was an exceptional situation that is even reported twice by Pomponius. Emperor Tiberius granted him the right to use the *ius respondendi*, possibly by way of experiment. The *ius respondendi* was first granted in a normal way to Sabinus' successor, Cassius, who was a member of the senate; this would explain why in the Roman literature it is Cassius, not Capito or Sabinus, who is called the founder of the traditional school. It is not known which emperor granted him the right; it could have been Nero (54–68). Since about forty controversies developed between Sabinus/Cassius and Nerva/Proculus, the leaders of the other school, it can be concluded that Nerva and Proculus had the *ius respondendi* as well. The other jurists could still give opinions, but since the Digest contains many more opinions given by leaders of the law-schools than by other jurists it would appear that the latter hardly gave opinions any more or, if they did, then less importance was attached to such opinions. It is possible that the later heads of the law-schools also had this privilege, although we only know for certain that Iavolenus Priscus had it (end of the first/beginning of the second century). A probable reason why there were far fewer controversies between the later leaders of the law-schools is that the emperors included these leaders in their *consilium* and involved them in central government. Finally Emperor Hadrian stopped granting the *ius respondendi*; in those days one of the two schools was headed by two jurists, the other by three, so there was a real danger that new schools would be formed, again threatening legal security. It is not clear whether the law-schools in the senate continued to exist after this time; nothing further is heard of them.

Hadrian now began to give opinions (or let opinions be given) in his own name, in the form of rescripts. Even before that time emperors had occasionally issued rescripts, but as far as is known, they were mainly letters addressed to towns or other communities in the province, in which a specific, administrative problem in the province was solved.¹⁸ Hadrian was the first to use the rescript to give juridical advice. He let two chanceries prepare these rescripts: the *scrinium ab epistulis* was to deal with correspondence with officials and important persons, and the *scrinium a libellis* with letters from other citizens. In the first case the reply was sent in a separate letter (*epistula*), in the second case the reply was given at the bottom of the letter from the citizen (*subscriptio*). Probably

both chanceries had registries where copies of the rescripts were kept.¹⁹ The *scrinia* were supervised by jurists who, at least since the last few decades of the second century, were simultaneously members of the emperor's *consilium*. Hadrian and his successors therefore allowed these *scrinia* to perform exactly the same task as the leading senators had performed for a very long time and were still performing. However, since the senators were no longer granted the *ius respondendi* their *responsa* had to compete with the rescripts of the emperor. This caused no problems as long as they were members of a senate that had authority and as long as they were members of the emperor's *consilium*: then they still had sufficient personal authority. However, when in the third century the senate lost all its power and authority to the emperor and his officials and the senators no longer had any influence in the *consilium*, their *responsa* were no longer regarded as authoritative. The reason for this was not—as some writers assert—the spread of the practice of rescripts but it was the decline of the senate: it is via the rescripts that the opinions of the jurists lived on for a long time, namely until the fourth century.

Finally something should be said about the schools in which law was taught from the first century onwards. Tuition in law had always been given individually, but when a kind of civil service developed there was a need for people with a more professional juridical training, and not only at a high level. According to a text by Ulpian (F.V. 204) there must have been a school for teaching law in Rome in the second century; according to other sources there was also a law-school in Berytus, the modern Beirut, at the beginning of the third century.²⁰ Nothing is known about how the tuition was organised, but several textbooks that were used in these schools have survived.

9.4.2. The juridical literature

Only a small part of the collected opinions in which the classical jurists interpreted and created Roman law has come down to us directly; however, we do know about the contents of many of them indirectly, because in the sixth century, upon the order of Emperor Justinian, a comprehensive anthology was compiled from fragments of the classical juridical literature, the Digest, and this has survived. The compilers of the Digest arranged the texts of the classical jurists in a fairly systematic way; they preceded each

fragment with an *inscriptio* which gave the name of the jurist and the work from which the fragment was taken.²¹

The collections of opinions of the classical jurists had different names according to the way in which the opinions were arranged. An arrangement commonly used in the republic followed the *ius civile*, which meant that those opinions were put together which dealt successively with the law of succession, the law of persons, the law of obligations and the law of things. A famous example of a volume arranged in this manner is the *Tres libri iuris civilis* of Massurius Sabinus: in its turn this served as a model for later collections which were then referred to by the title *ad Sabinum*. The opinions could also be arranged according to the rubrics of the praetorian edict, a method that had also been used earlier; the eighty-three *libri ad edictum* by the jurist Ulpian are the best known examples of this. The reason that this work consists of so many volumes is that the older literature is included and it therefore gives a comprehensive picture of the law. Other collections of opinions were, for instance, *Digesta*, *Responsa*, *Quaestiones*, *Epistulae* and *Disputationes*. Most of them consisted of two parts; in the first part the opinions were arranged *ad edictum* and in the second part the opinions were linked with the *leges*, senatorial decrees and imperial constitutions to which they referred. A famous example is the *Digesta* of Julian from the middle of the second century; it was a source of inspiration for many other jurists. Sometimes opinions relating to one theme were collected in one volume, e.g. the *liber singularis* by Modestinus about manumission and the book by Paul about the task of the proconsul; both of these books date from the beginning of the third century. Finally, works called *Regulae*, *Definitiones* and *Sententiae* have also come down to us; they contain short pronouncements about the law, originally delivered in connection with specific cases but later reformulated in the form of an abstract rule, which creates the impression that they have general validity. These works were used mainly in legal practice, for instance by advocates who wished to support their speeches with a general pronouncement of this kind, and were possibly also used in teaching. At the end of the nineteenth century Lenel, who was mentioned earlier, attempted to put back in their original order the texts of the classical jurists, which had been preserved via the Digest and other older collections; in other words he made a reconstruction of these works. This reconstruction was possible because each fragment was preceded by an *inscriptio*.²²

Roman legal science owes its reputation largely to these collections of opinions. The opinions are characterised by the lucidity of the language and the exceptionally clear formulations. They reveal a way of juridical thinking which has been normative for many generations of jurists, right up to the present day. The Roman jurists managed to create a legal system which did not seek to apply the laws as literally as possible to specific cases, but instead they tried to find solutions that were as just and practical as possible.²³

The collections of opinions reveal a number of characteristics that can only be explained by the fact that they originated in legal practice and were intended for use in legal practice. First of all, the opinions usually do not include any specific grounds or motives; instead the jurist often refers to similar cases that he or another jurist has dealt with. In addition, it is striking that the opinions contain very few definitions, not even of elementary juridical concepts like *dominium* (ownership), and *culpa* (negligence). According to D. 50.17.202 the jurist Iavolenus Priscus believed that definitions could even be dangerous because most of them could easily be overthrown, in other words they could nearly always be turned round to mean the opposite. Apparently Priscus was inspired by his experience in the practice of law. Finally, the opinions only rarely include explanations based on legal history; apparently a jurist only referred to law in the past, e.g. the law of the XII Tables (and its later application), if he thought that it would provide useful support for his arguments. The opinions were predominantly practical; this meant that when Roman law was rediscovered in the Middle Ages it could be used as a starting point for the development of a common European legal science.

In addition to these opinions, introductory textbooks on law, called *Institutiones*, have come down to us. The oldest known legal textbook, the Institutes of Gaius, dates from about 160. In this book the law is treated systematically and is divided into law relating to *personae* (law of persons), *res* (law of things, law of succession and law of obligations) and *actiones* (law of actions). After Gaius, other authors including Marcian and Ulpian wrote juridical textbooks that are divided in the same way. Fragments from these books are known via the Digest of Justinian. The Institutes of Gaius have come down to us directly. In 1816 the German historian Niebuhr discovered in the chapter library of Verona that a manuscript containing letters by St Jerome, dating

from the seventh/eighth centuries, also contained another text. His fellow-countryman, Von Savigny, the famous legal historian, recognised this other text to be the Institutes of Gaius. The manuscript turned out to be a palimpsest, i.e. the letters by St Jerome were written on top of the original text. Attempts to reveal the entire text of Gaius were not completely successful (only 80 per cent), but thanks to later discoveries (in Egypt) in 1927 and 1933 of fragments of Gaius' Institutes various gaps could be filled. The Verona manuscript dates from the fifth century, whereas the original dates from the middle of the second century, but recent research has shown that the later manuscript does indeed contain classical Roman law.²⁴

The Institutes of Gaius are of very great importance, for various reasons. First of all, Gaius describes in a systematic way the most important legal concepts of his time with their history. His trichotomy of the law in the law regarding persons, things and actions has become famous. A major problem with Gaius' Institutes, however, is that the text is sometimes very short and compact and was intended for contemporary readers who were familiar with all the facts and circumstances. Because the modern reader lacks this background information, he finds some passages confusing rather than informative. Secondly, Gaius' Institutes is the only juridical work from the principate which has come down to us in practically its original form. It was not adapted by later jurists and still contains descriptions of legal concepts which were no longer applied in the fifth century; for instance, it is mainly through the Institutes of Gaius that we know about the *legis actio* type of lawsuit. Thirdly, the Institutes of Gaius are of indirect importance for later European legal science. They served as a model for the Institutes which Emperor Justinian published in the sixth century and which formed part of the reception of Roman law since the Middle Ages. When private law was systematised in the seventeenth and eighteenth centuries by, for instance, Dutch, German and French lawyers, they generally followed the system of Justinian's Institutes, and therefore indirectly the Institutes of Gaius. The same holds for the French Civil Code of 1804 which was based on their work, and for its derivatives.

9.4.3. The most important jurists

Not much is known about the lives of the classical Roman jurists.

The most important sources of our knowledge are Pomponius' *Enchiridium*, a number of inscriptions and literary works by authors like Tacitus, Pliny the Younger, Aulus Gellius and Cassius Dio.²⁵

Of the early classical jurists (those who lived between the end of the first century BC and about 80 AD), the first one who should be mentioned is M. Antistius Labeo. He lived at the beginning of the principate and was one of the political opponents of Augustus. He held the office of praetor but did not become a consul. According to Pomponius this was because he refused the position when offered it by Augustus; according to others, however, it was because he was *not* offered the position. Labeo was an exceptionally gifted and original jurist and a second *schola* formed around him in the senate; this *schola* was additional to the traditional one led by Ateius Capito. When Labeo died (between the years 5 and 22) he left 400 scrolls; some of them concerned the law of the XII Tables and pontifical law, and others consisted of collected opinions. His opinions were edited and commented upon until the third century by various jurists including Paul.

As mentioned earlier, Massurius Sabinus occupies an exceptional position among the jurists.²⁶ He was not a member of the senate, did not make his career in politics and was not even elevated to the *equites* until later in life. Nevertheless, because he had an exceptionally good knowledge of the law he was the leader of the earlier school of Capito. Emperor Tiberius allowed him to use the *ius respondendi*. He was the first jurist to use this privilege. Sabinus is known mainly because of his *Tres libri iuris civilis* which Pomponius, Paul and Ulpian later used as a framework for their own work.

C. Cassius Longinus belonged to a leading plebeian family. He was a direct descendant of one of the murderers of Julius Caesar, but he was also related by marriage to the imperial house. Cassius liked to boast that, via his mother, he was a great-grandson of the republican jurist S. Sulpicius Rufus. Cassius was praetor, became consul in the year 30 and was a provincial governor several times between 40 and 49. In addition to his important political career Cassius was also a successful jurist: his knowledge of the law was unequalled in those days and he was also the leader of the traditional school. It was probably because he was the first to be granted the *ius respondendi* in a regular way that his school was later called the *schola Cassiana*. Only a few of Cassius' opinions

have come down to us; they have survived because they were cited by later authors.

The first of the jurists in the high classical period (from about 80 to about 180) was Iavolenus Priscus.²⁷ Iavolenus was a very versatile man. He had a career in the army (he was commanding officer of various legions), in politics (he was consul in 86), in administration (he was governor of three provinces) and in law; he was leader of the Cassian school and had the *ius respondendi*. He was also a member of the *consilium* of Emperor Trajan. Iavolenus published his opinions in *Epistulae* (fourteen books) and in his *Libri ex Cassio*; fragments of these are included in the Digest and have therefore survived.

Salvius Julianus was a very important, if not *the* most important, jurist of the second century. On the basis of an inscription he is believed to have been born in Hadrumetum in the province of Africa. Like most of the other jurists, he too had an impressive political career under the emperors Hadrian, Antoninus Pius and Marcus Aurelius. He held many offices including those of praetor, consul, pontifex and governor of various provinces and he was a member of the now permanent *consilium* of the emperor. At the request of Hadrian, Julian produced a definitive edition of the praetorian edict in about 130. He was the last known leader of the Cassian school. Julian gave many *responsa*; they are collected in his *Digesta* which contains ninety scrolls. Apparently this work was considered to be very important, for later jurists like his pupil S. Caecilius Africanus quote liberally from it and those who compiled the Digest of Justinian also used it constantly.

P. Iuventius Celsus (*filius*) also had a brilliant career in politics; in 129 he even became consul for the second time. He took part in the *consilium* of Emperor Hadrian and was governor of Thrace. Like his father, P. Iuventius Celsus (*pater*), he was leader of the Proculian school. He collected his opinions in *Digesta* (thirty-nine books), *Epistulae* and *Quaestiones*. Celsus is famous particularly for his pithy statements. It was he who produced the classical definition of law: *ius est ars boni et aequi* (D. 1.1.1.pr).

Sextus Pomponius is known particularly as the author of the *Enchiridium*. In this work, which dates from the reign of Emperor Hadrian, Pomponius deals with, among other things, the origin and history of Roman law, from the monarchy up to his own day. The fragment in question is incorporated in its entirety in the

Digest of Justinian and is important because it is the only one of its kind. It is not known whether Pomponius had a political career or whether he himself gave opinions. He certainly made some comprehensive compilations of opinions such as those *ad Sabinum* and those *ad edictum*, and he wrote various monographs. Numerous fragments have been preserved in the Digest.

All we know about Gaius as a person is that he lived in the second half of the second century. Interest in Gaius and his life has increased considerably since a manuscript of his Institutes was discovered at the beginning of the nineteenth century (see end of section 9.4.2). There have been all kinds of hypotheses about his origins and the place where he lived and about the question of whether he had any political career, but so far no convincing evidence has been found to support any of the hypotheses. In addition Gaius published various collections of opinions, fragments of which have been preserved in the Digest. Perhaps one can conclude from that that he was a member of the senate.

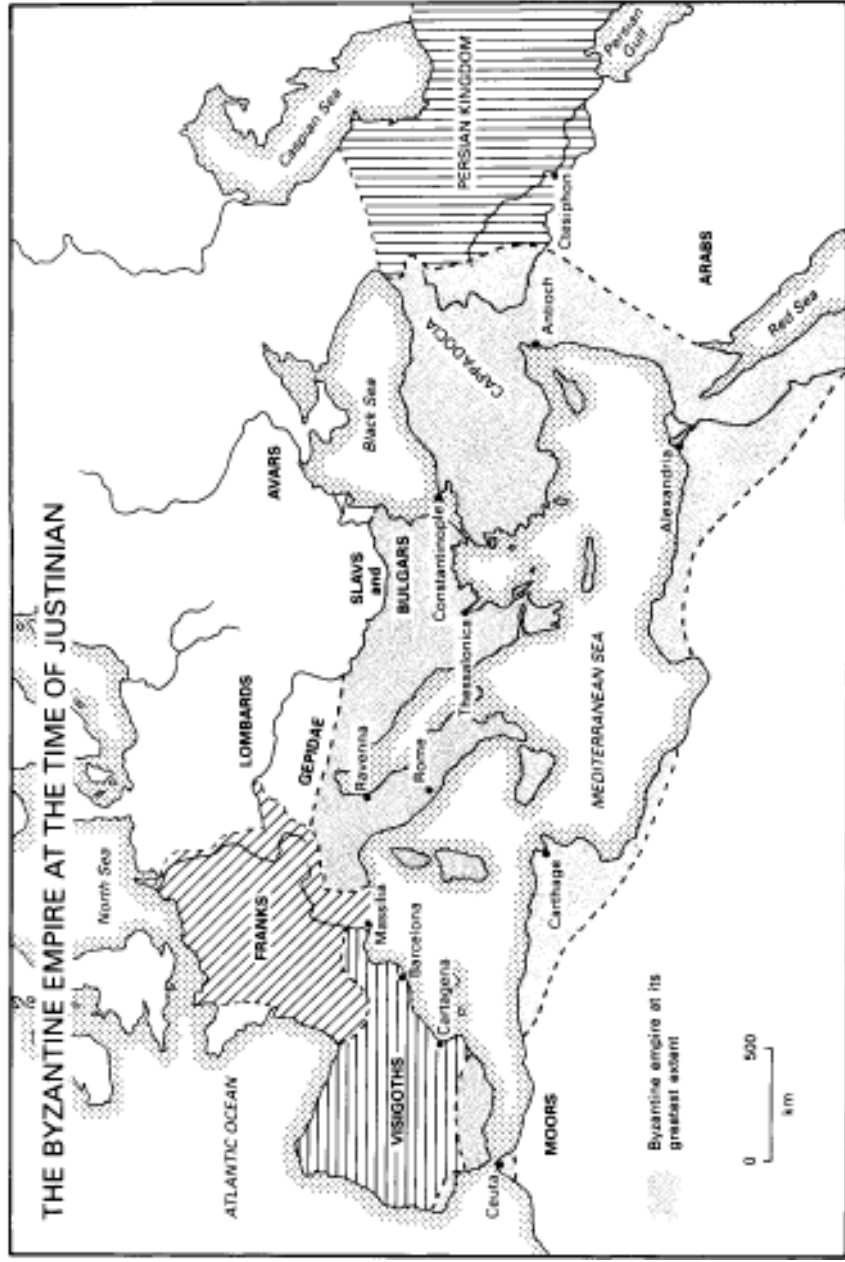
The most highly esteemed of the late classical jurists (about 180 to about 230) is Aemilius Papinianus. All that we know about his political career is that he was head of the chancery *a libellis*, that he was praetorian prefect from 203 until his death in 212 and that by virtue of this function he was a member of the imperial *consilium*. He was murdered upon the order of Emperor Caracalla because, it was rumoured, he refused to condone the fact that Caracalla had had his brother and fellow emperor Geta murdered. Papinian gave opinions on many occasions and these are collected in *Quaestiones* (thirty-seven books) and *Responsa* (nineteen books). In these books he also reported opinions of other jurists and even decisions taken by the emperor and the prefects. In the post-classical period these collections were regarded as the most important source of Roman law. This explains why fragments have survived, over and above those contained in the Digest of Justinian.

Just like Papinian, Julius Paulus held high office; his positions included being head of the chancery *a memoria* and during the reign of Alexander Severus he was praetorian prefect. He too was a member of the emperor's *consilium*. Of his numerous works the most comprehensive are his eighty (!) books *ad edictum*. In addition he published sixteen books *ad Sabinum*, *Responsa*, *Quaestiones* and innumerable monographs concerning, for example, codicils, certain *leges* and the tasks of senior officials and

also a textbook. In the later Roman empire fragments from Paul's work were collected in a book which became known as *Pauli Sententiae* and which must have been very popular. The fact that a large part of the Digest of Justinian, namely one-sixth, consists of texts by Paul indicates the great importance that was attached to his work in the post-classical period.

The last important jurist in the late classical period is Domitius Ulpianus.²⁸ We know that he came from Tyre in Phoenicia. He was a pupil of Papinian and like Papinian made his career according to the official hierarchy; he held several posts including head of the chancery *a libellis*, city prefect and praetorian prefect. When serving as praetorian prefect in 223 he was murdered by members of his own praetorian guard. Like Paul, Ulpian published much juridical literature: eighty-three books *ad edictum*, fifty-one books *ad Sabinum*, numerous monographs and finally *Responsa*. Because he often cites other jurists, one gets the impression that Ulpian was trying to make the older literature superfluous; if that is the case, then he was certainly successful, for the compilers of Justinian's Digest used his work more than the work of any other jurist; almost half of the Digest (41.56 per cent, to be precise) is made up of fragments from Ulpian's work.

Part IV
THE DOMINATE
(284–565)



THE DOMINATE: GENERAL OUTLINE

10.1. THE SOURCES

There is an abundant supply of source material for the dominate, but the information given by these sources is not always complete or reliable.¹ Important historians who wrote about this period of Roman history were Ammianus Marcellinus (fourth century) and Procopius (sixth century). The only part of Marcellinus' work that has survived is his report on the period 359–378 in which he puts special emphasis on the reign of Emperor Julian (361–363), an emperor for whom he had great admiration. Julian is known as the 'Apostate' because he opposed Christianity and tried to restore the old Roman traditions. Procopius described the wars that Emperor Justinian waged against the Persians, the Visigoths and the Vandals between 529 and 553; in addition, in one of his works, which was probably not published officially, he denounced the private lives of several important persons, including Justinian.

The works of Christian authors like Lactantius and Eusebius (third/fourth centuries) form a special category of sources. Lactantius wrote about the persecution of the Christians in the time of Diocletian; Eusebius, who was bishop of Caesarea, wrote a history of the church. In view of the close links between church and state at this time these works also give important information about everyday life. On the other hand, the fact that these authors, because of their religious background, are somewhat prejudiced against certain persons and events means that the information given in their work is less reliable.

Another important source of information is the so-called *Notitia dignitatum*, which dates from the early fifth century; it is an official handbook in which the staffs of the various government departments and army units are listed and therefore it is our chief

source of information on the organisation of the empire under the dominate. Of the various epigraphs and papyrus scrolls that have come down to us from these times the most important is the so-called price-edict of Emperor Diocletian (284–305); in order to combat currency depreciation he stipulated maximum prices for the most common goods and services and saw to it that inscriptions bearing these prices were displayed in many places in the Roman empire. From fragments found in a variety of places, it has been possible to reconstruct the whole text and as a result we can obtain greater insight into the social and economic conditions prevailing in the Roman empire at the time.²

We are also fairly well informed about the development of law and legal science in the dominate. Various juridical manuscripts from the fourth and fifth centuries have survived, some complete, some incomplete; an example of the latter category is the *Fragmenta Vaticana*. Another important source, dating from the sixth century, is the *Leges Romanae Barbarorum*; one of these laws is the *lex Romana Visigothorum* which includes both the legislation of Roman emperors and fragments from works of classical jurists. By far the most important source of our knowledge about the law of this period is, however, the so-called *Corpus Iuris Civilis* which was compiled between 530–534 on the orders of Emperor Justinian. It contains an enormous collection of texts by classical jurists as well as a large quantity of imperial constitutions from the second century up to and including the time of Justinian himself; these collections were arranged in the same way as those of the classical period. In addition, it contains an introductory textbook on law, which is based on the Institutes of Gaius.

10.2. THE TERRITORY

When Diocletian became emperor in 284 the Roman empire was considerably smaller than the area over which Emperor Trajan (95–117) had once ruled. In the north various Germanic tribes like the Franks, the Saxons and the Burgundians tried, with varying degrees of success, to become established within the borders of the empire. The Goths no longer accepted the Danube as the frontier and in the east the Persian kings of the house of the Sassanids conquered large parts of the Roman empire with the help of their heavily armed cavalry. One of Diocletian's greatest achievements

GENERAL OUTLINE

was to reorganise the government and the defence of the empire so efficiently that the Roman empire survived in its entirety for at least another 100 years and the eastern part even for more than 1000 years. Admittedly this stability involved the loss of some territory, but the ultimate frontiers were strategically so much better in that they could be adequately defended in the long term. The Rhine and the Danube formed the northern frontier; in Africa and the Middle East Roman rule was restricted to the coastal areas.

In the course of the fourth century the empire was ravaged by a number of civil wars and by invasions of barbaric tribes. In 395 the empire was finally split into two parts; a western part with Rome as its capital and an eastern part with Constantinople as its capital. The West-Roman empire soon had to cope with invading Germanic tribes. By the beginning of the fifth century Gaul had been conquered by the Franks and the Burgundians, Britain by the Angles and Saxons and Spain and North Africa by the Vandals. In addition, large numbers of Visigoths settled in the West-Roman empire, firstly in Italy but finally in Aquitaine (south-west France) and Spain. About the middle of the fifth century the Huns led by Attila threatened to invade Gaul, but a West-Roman general called Aetius was able to prevent this with the help of the Visigoths. Several decades later, namely in 476, the leader of the Ostrogoths, Odoacer, finally brought the West-Roman empire to an end by defeating the emperor Orestes and by deposing his son Romulus Augustus, nicknamed Augustulus.

As a result of the splitting up of the Roman empire, Italy and the western provinces gradually lost their Roman character. The East-Roman empire, which was much stronger economically, was able to survive. There was still cohesion there due to the common culture, although this was basically Greek, and to the common religion, since Christianity had become the state religion. This last phase of the (East-) Roman history is also called the Byzantine period.³ There was one Byzantine emperor who succeeded in restoring parts of the old empire to its former glory: in the sixth century Emperor Justinian, helped by his generals Belisarius and Narses, reconquered some parts of the former West-Roman empire, namely Italy, southern Spain and North Africa. However, it proved impossible to occupy these territories permanently, and after a few decades most of them were lost again. In the seventh and eighth centuries the Arabs conquered the southern part of the

Byzantine empire, namely Syria, Egypt and North Africa, and in the ninth century they conquered Spain. However, it was not until 1453 that Constantinople, the capital of the Byzantine empire, fell.

10.3. THE POPULATION

The social structure of the later Roman empire is characterised by its exceptional rigidity. This was due to the economic crisis of the third century and the measures taken by the emperors to combat it. The emperors increased the influence of the state, for instance by obliging the citizens to perform all kinds of tasks for the benefit of the state, by making these tasks hereditary and by creating a huge bureaucracy to try and keep things under control. The upper class was less affected by this policy than the lower classes of the population.⁴

The senatorial class no longer consisted mainly of a few families of ex-magistrates and large landowners and their next-of-kin, as it had done under the principate; now it was made up of persons who were or had been senior officials and of their descendants. At the same time it became usual for the emperor to appoint to the senate well-to-do persons who had been active in the provincial government, high-ranking soldiers who had finished their careers, jurists who had held high positions in the administration of justice and other persons of distinction. Senators now came from all parts of the empire and together they formed a very heterogeneous group. When in 357 Constantius II set up a second senate in Constantinople seats were given mainly to citizens from the eastern part of the empire, whereas the Roman senate consisted of persons from Italy and the western provinces. It sometimes came about that certain senators were not even of Roman origin but were Germans, Persians, etc. In the senate in Rome, where a number of members were still proud of the fact that they were descended from old Roman families, there was scarcely any integration. In Constantinople, on the other hand, integration occurred much more smoothly.

In the principate the equites had been involved in the imperial administration and had therefore belonged to the upper class. In the dominate their position was at first strengthened as a result of the administrative reforms of Diocletian, but things changed when Emperor Constantine opened up to the senatorial élite the

functions that originally could be performed solely by equites. As a result the equites lost their political power and their social standing; they were allotted the same status as low-ranking officials and were addressed accordingly.

The urban aristocracy (curiales) theoretically still formed a privileged class, but their position was no longer an enviable one. As urban administrators they had the same rights and duties as before, but as a result of the economic crisis of the third century it became more and more difficult for them to fulfil their obligations. Because of this many curiales tried to evade their duties, but such attempts were severely punished. A number of constitutions were issued for the purpose of preserving the urban administration; for instance, the status of *decurio* was made hereditary in the male line; furthermore, a person could be obliged to become a member of the *curia* when he was 18 years old. Other constitutions were aimed at making the position of *curialis* a little more attractive; for instance, illegitimate sons could be made legitimate by becoming members of the *curia*. To prevent curiales from reducing their financial resources it was stipulated that they could only sell property with the consent of the provincial governor. At the beginning of the fifth century a person could even be made a member of the urban administration by way of punishment! The curiales now formed a kind of caste from which it was difficult to escape.

The dominate brought all kinds of changes for the rest of the population as well. For example, the farmers and the artisans suffered from the economic recession and those who lived in the frontier provinces were subjected to invasions by barbaric tribes as well. Moreover, their freedom was severely restricted by high taxation and the system of compulsory trades and services. They lived in conditions close to slavery. For the urban proletariat in Rome, Constantinople and the other large cities in the empire 'bread and games' were still organised from time to time at the state's expense. The position of the slaves improved somewhat, both in a juridical and in a social sense. For instance, the killing of a slave by his master was now punished as murder. Marriages of slaves, which were invalid in law, were recognised by the church and also accepted by society. Slaves were given more power to acquire capital and increasingly they could serve as plaintiff or defendant in a trial. Although no more lands were conquered the number of slaves did not decline; quite often poverty-stricken

citizens would abandon their children or even sell them into slavery. The authorities tried to counter this practice—as is demonstrated by various legal provisions on the subject—but in fact this turned out to be impossible.

10.4. ECONOMY

The political calamities of the third century brought to an end the prosperity which the Roman empire had enjoyed under the principate. The economic crisis which ensued was aggravated by the devaluation of the coinage and the arbitrary nature of taxation. Diocletian took several hard measures to tackle these problems. To curb inflation he issued an edict of maximum prices and tried to restore a stable, silver currency. Apparently, however, these measures did not have the desired effect. Constantine was more successful in this respect in that he introduced a new currency unit of gold, the solidus; this coin was to retain its weight and purity for seven centuries. To stabilise taxation Diocletian introduced a new tax system which met with more success—at least from the state's point of view. It provided the emperors with huge sums of money and not surprisingly the new system was used throughout the dominate.⁵ In theory it created security and equality before the law because tax was now levied regularly and in accordance with fairly well-defined criteria. In practice, however, it required a huge administrative machinery which was not available, so in the end the new system did not work very fairly and justly. A danger of this was that it was so easy to adapt: if the state had spent too much, it was simpler to raise the rate of tax than to economise. In the long term the disadvantages outweighed the advantages and the area that suffered most was agriculture.

Because tax had now to be paid annually and no account was taken of bad harvests or similar natural disasters, the new tax system was troublesome particularly for the independent farmers. If after a number of bad years a farmer was no longer able to pay his tax he had to sell his farm and become a tenant farmer working for a landowner. Hence the number of independent farmers declined still further in this period.

Trade and industry were affected by the economic crisis as well. Although conditions were still favourable for trade, fewer people now earned their living from it. The main reason was that the

GENERAL OUTLINE

biggest customer, the state, did not use the private sector but had its own firms for producing and transporting goods. All over the empire the state had arms factories to supply the army, marble quarries for public works and mines from which gold and silver were extracted to make coins. These activities, however, were not financed by normal taxes, but they had to be performed by specific groups of citizens in lieu of tax. For instance, the *fiscus* made the *navicularii* responsible for transporting corn from the province of Africa to Rome and from the province of Egypt to Constantinople in connection with the distribution of free food in these cities. These *navicularii* were wealthy people who either financed the construction, repair and operation of sea-going ships or who put their own ships (of a certain minimum size) at the disposal of the *fiscus*. In return, they were exempted from other tasks that were in the public interest.⁶

In spite of the dominant role played by the state in the economic life of the later empire, private individuals still engaged in trade and industry in many fields: utensils were now made chiefly for the home market, but items like woollen cloth and clothes were produced on a large scale in Egypt and Asia Minor and then exported to all parts of the empire; Egyptian corn, and wine and oil from Africa were still very much in demand. Trade did not stop at the frontiers. The markets in large cities like Constantinople, Alexandria and Rome still sold silk from China, precious stones and spices from India and south-east Asia, and slaves from Persia, Armenia and the Caucasus. The official splitting of the empire at the end of the fourth century into a western and an eastern part did not bring about any important changes in this pattern of trade.

THE DOMINATE: THE STATE

After Alexander Severus, the last of the dynasty of that name, had been assassinated in 235 the empire suffered fifty years of confusion and disaster. During that time, usually called the military anarchy, there were more than sixteen official and many more unofficial emperors. It was only Diocletian who succeeded in bringing back stability and peace. His success was due to three major changes. He became an absolute monarch, he divided the empire among four co-rulers and he reorganised the administration.¹ The changes he instigated were worked out by his successor Constantine. The latter also made another important break with the past in that he tolerated Christianity which was later even recognised as the state religion.

11.1. THE EMPEROR

Emperorship in the dominate differed markedly from emperorship in earlier centuries. From Diocletian onwards, the emperor was no longer *primus inter pares*, the first among his peers, namely the senators, but he had become an absolute monarch and was elevated far above all his subjects. Since 282 the emperors had no longer asked the senate to ratify their title. On the other hand the emperors retained their quasi-republican status: they still served as consuls for form's sake and still enjoyed the *tribunicia potestas* at least in name. In fact, however, they wielded their power with the help of the army and their election had normally been arranged by their predecessor. This new type of emperorship was particularly obvious in court ceremonies. Diocletian and particularly Constantine introduced a number of rules which were taken from the instructions for the Persian court. The purpose of these rules

was on the one hand to impress the subjects with imperial majesty and power and on the other hand to guarantee the greatest possible personal safety for the emperor. From then onwards the emperor hardly ever appeared in public, but if he did he wore a diadem of pearls and beautiful clothes embroidered with jewels. In his presence people had to prostrate themselves (*adoratio*) and only a few senior officials were allowed to kiss the hem of his robe. Anything that was linked with the emperor—ranging from official to domestic matters—was regarded as sacred. The emperor was no longer within reach of normal mortals.

The territorial division introduced by Diocletian was not based on any plan worked out beforehand but was the result of solutions to various problems which arose at specific moments. Right at the beginning of his reign Diocletian had to deal with a revolt in Gaul and the threat of war along the Danube and in Syria. In order to solve these problems adequately he appointed his general Maximian as Caesar, under-emperor, and entrusted him with the special task of suppressing the Gallic revolt. Less than a year later, in 286, he even appointed Maximian as Augustus, co-emperor, of Italy, Africa, Spain and the northern frontier provinces. Diocletian, however, as senior-Augustus, retained the supreme power in the empire. Initially this measure seemed to be effective, but in 292 there was another revolt in Egypt and there was considerable unrest in Britain and North Africa. Diocletian therefore decided to appoint more under-emperors, one for Maximian and one for himself. Constantius, the father of the later Emperor Constantine, thus became Caesar for the north-western part of the empire in 293 and Galerius was given the south-eastern part of the empire. Then his new form of government, nowadays referred to as a tetrarchy (literally, rule by four) was complete.

By employing this system Diocletian probably had a dual purpose: he wanted administrative and defence tasks to be effectively distributed and he wanted to safeguard the succession. The first objective was certainly achieved in view of the fact that after 297 the sources make no further mention of revolts. Although Diocletian himself apparently was not an exceptionally talented general he was very good at choosing people who would wage war and govern large areas without questioning his supremacy. The second objective was not achieved. In 305 Diocletian and Maximian, at the initiative of the former, abdicated.² They appointed Constantius and Galerius as Augusti

and chose two new Caesares for them, but neither of the two new Augusti had enough personal authority to keep the other emperors under control. When Constantius died only a year later, in 306, there was a struggle for power among the remaining emperors and the sons of Maximian and Constantius. It was not until 326 that the conflict was settled definitively in favour of Constantius' son Constantine.³

Constantine ruled alone until he died in 337, but from 317 he appointed his sons as Caesares. Three surviving sons succeeded their father in 337, as Augusti. From that time onwards the Roman empire was ruled by one Augustus or by two or sometimes three Augusti, and no more Caesares were appointed; instead, the son of an emperor was often elevated to the rank of Augustus, even at a very early age, in order to safeguard the succession. In this way the empire was ruled for another 150 years by a number of relatively stable dynasties. Often the emperors ruled together, but in fact each was autonomous in his own part of the empire. When the emperor of the West-Roman empire was deposed by the Ostrogoths in 476 this had absolutely no influence on the position of the East-Roman emperor. Of the later East-Roman or Byzantine emperors one in particular was very important for the history of Roman law, namely Justinian I. In section 12.5 more attention will be paid to him and to his activities in the field of law.

11.2. THE SENATE AND THE CONSISTORIUM

Although the senate had lost its power since the end of the second century, for the sake of tradition this illustrious body continued to exist under the dominate. As mentioned earlier, there had even been a second senate in Constantinople since the middle of the fourth century. Both senates were presided over by a senior official, the city prefects of Rome and Constantinople respectively. The two senates functioned mainly as local councils and in addition they had ceremonial tasks, for instance, the inauguration of the new emperor. Although theoretically the senate still had powers in the field of legislation and the administration of justice, as in the principate, it now had very few opportunities to use them. If a senate had proposals concerning legislation the city prefect passed them on to the emperor. Sometimes the emperor consulted the senate, but then it was only for the purpose of

obtaining support for his own plans. Furthermore, the senate no longer functioned as a forum *privilegiatum* for its own members; if a senator had to stand trial, then the trial took place in the presence of the city prefect or a provincial governor. Apparently, however, the senate in Constantinople did function as a lawcourt from time to time.

Even though membership of the senate no longer implied political power it was still greatly sought after. Senators were highly respected in society and they were exempted from difficult financial tasks in the towns from which they came. In addition, they enjoyed certain privileges in lawsuits. In return for these privileges, however, they incurred certain obligations. For instance, senators had to see to it that certain games were held in Rome and, from the middle of the fourth century, in Constantinople.

The advisory function that had been performed by the emperor's *consilium* in the principate was taken over in the fourth century by the so-called *consistorium*. Its members, who no longer sat but stood in the emperor's presence, were high-ranking officials and army officers and a number of unofficial members. The *consistorium* functioned as a kind of council of state and supreme court. It was summoned when there was a threat of a rebellion or when religious problems had arisen. It received foreign envoys and dealt with administrative and political matters. In the middle of the fifth century, however, this advisory body also began to lose its power and by the sixth century it had more or less the same ceremonial status as the two senates.

11.3. THE OFFICIALS

The dominate was characterised not only by the introduction of the absolute monarchy and the territorial division of the empire, but also by the development of a very extensive civil service with a hierarchical structure. The foundation for this was laid by Diocletian, but it was primarily Constantine who extended the bureaucratic system.⁴ The reorganisation of the public administration was linked with the territorial division of the empire introduced by Diocletian. Under the tetrarchy Diocletian had divided the empire into four regions, or prefectures. Each was under the authority of an emperor (Augustus or Caesar). Each of the four emperors had a praetorian prefect to support him in

military, juridical and financial matters. In addition, Diocletian subdivided the four prefectures into dioceses, each of which was governed by a vicarius. The dioceses were subdivided into provinces, each of which was governed by a praeses.

Emperor Constantine did not take over the system of the tetrarchy, but he continued the division of the empire into four sections. He also relieved the prefects of their military duties, but gave them a different task in return. They now had to govern the prefectures themselves. This meant that each praetorian prefect in his part of the empire was, along with the emperor, the highest authority to whom appeals could be made in connection with legal procedures. The praetorian prefect was also responsible for recruiting soldiers, supplying the army (with food/equipment) and in general had to supervise the work of the provincial governors. The vicarius, the representative of the prefect in a diocese, also served as a judge when appeals were made against sentences passed by a provincial governor, and he also supervised the work of the governors. Just as before, the governors of the provinces were required to perform tasks in the field of jurisdiction and administration and were sometimes involved in military matters. They were primarily responsible for the collecting of taxes, they supervised the state post and public works and saw to it that the orders of the central government were carried out. Rome and Constantinople were not included in this system: each was governed by a city prefect.

This hierarchy was in itself clear and easy to understand, but it became complicated because the system was not adhered to consistently. For example, certain provinces, namely Asia and Africa, were governed as before by governors who came directly under the emperor. In addition, the vicarii were sometimes appointed by the emperor personally instead of by the prefects and the emperors regularly passed over the prefects and the vicarii and turned directly to the provincial governors. When in the fifth century various vicariates were abolished and regional prefectures were set up, the administration of the empire seemed more and more like a patchwork quilt, in which the various patches could only be accounted for by history.

This effect was strengthened still further by the fact that parallel to this hierarchy Constantine had set up a separate civil service to serve the central administration in Constantinople. Four senior functionaries with the same rank as the prefects served as

ministers. They were the quaestor sacri palatii, the minister of justice, the magister officiorum, whose various tasks included supervising the imperial secretariat, the state police and the post, the comes sacramm largitionum, a sort of minister of the state finances, and the comes rerum privatarum who was responsible for the imperial treasury. Each of the last three functionaries had an extensive staff.

Not surprisingly, the complicated administrative machinery did not work very efficiently. Another point was that top officials were no longer appointed for indefinite periods, as they had been under the principate, but they now held office for only a couple of years; the city prefects even changed after about a year. Only the low-ranking officials kept their posts for a long time and they therefore provided the experience and continuity which was so often lacking at the top. Senior officials were often appointed by the emperor, either on the basis of his personal preference or upon the recommendation of the imperial household. Because these functions were associated with all kinds of income differentials, privileges and high status, they were greatly sought after. High-ranking officials were repeatedly bribed to put forward someone's name to the emperor. As a result it was not always the most suitable persons who held high office in the empire. On the other hand it sometimes happened that the emperor appointed people from the lower classes to high functions because he knew of their abilities as a result of his own experience. This happened in the case of Justinian's appointment of Belisarius as general. Belisarius had formed part of Justinian's bodyguard before Justinian became emperor. Apparently Belisarius' appointment was justified since he and another general, Narses, succeeded in reconquering parts of the earlier West-Roman empire from the Goths and the Vandals.

11.4. CHRISTIANITY

At the beginning of the principate various new cults and religions developed alongside the traditional Roman religion. They had originated in the eastern part of the empire but soon gained support in other parts, extending even to Britain. Adherents of these new religions worshipped, for instance, Isis, Mithras, the Magna Mater and Jesus Christ. There were various reasons why Christianity finally triumphed over the other religions—which nevertheless survived until the sixth century.⁵ The reasons include

the closely knit organisation of the church, the development of indepth theological literature and the ethical norms that the Christians observed. Until the beginning of the fourth century, however, Christianity encountered opposition, which was often fierce, because the Christians refused to have anything to do with the other religions and tended to isolate themselves. Rumours abounded about their ‘scandalous’ rituals, and their refusal to worship the traditional Roman gods, including the emperor, meant that they could easily be reproached for their lack of solidarity with the Roman state. When times were bad, this occasionally led to acts of aggression being directed against the Christians who were then used as scapegoats. For example, in the middle of the third century, when anarchy was threatening the very existence of the empire, emperors like Decius (249–251) and Valerian (253–260) tried to restore unity and solidarity by forcing the Christians to give up their special position. They were unsuccessful and it is said that thousands of Christians were then put to death. Later emperors refrained from persecuting the Christians. Galerius, the Caesar of Diocletian, was an exception. When Diocletian was seriously ill in 303 Galerius took the opportunity to announce that severe measures would be taken against Christians all over the empire. In some provinces, particularly in the eastern part of the empire where Galerius himself reigned, these measures were in fact carried out and sometimes in a very cruel manner. The other emperors, however, hardly carried out any of these measures.

In 313, the tide definitely turned in favour of the Christians. In that year the two surviving emperors, Constantine (from the west) and Licinius (from the east), decided that thereafter Christians would have complete freedom of worship and that the churches would be rehabilitated. This decision became known as the ‘Edict of Milan’, being named after the place where the decision was taken. In 321 Constantine declared that the church was permitted to receive inheritances and bequests. Although Constantine did not let himself be baptised until he was on his deathbed, he and his successors strongly supported the Christian church; only Julian ‘the Apostate’ (361–363) tried to reinstate Roman rituals but finally he had to admit that Christianity had triumphed. In 391 Emperor Theodosius I declared Christianity to be the state religion.

Since the Edict of Milan, church and state had become

increasingly intertwined. One of the consequences was that the church came to be organised in more or less the same way as the state. Initially Christianity had gained supporters mainly in the towns and particularly among the lower classes. As soon as a Christian community had developed in a town, the faithful chose a bishop who was then consecrated by the bishops of nearby towns. The bishops of a province used to gather regularly in so-called councils (*consilia*). As the bishops increased in number they developed a hierarchy of their own which was parallel to the administrative hierarchy in the state. From the fourth century supreme authority in the church was in the hands of the emperor. In the west he was represented by the patriarch of Rome and the bishop of Carthage, and in the east by the patriarchs of Constantinople, Antioch, Jerusalem and Alexandria. Below them were the bishops of the provincial capitals, and below them again were the bishops of other towns in the provinces concerned; the local priests in their turn were subordinate to these bishops. The areas over which the patriarchs and bishops exercised their ecclesiastical authority were more or less the same as the prefectures, dioceses and provinces ruled by the prefects, vicars and governors appointed by the emperor. Certain aspects of the organisation still exist today in the Roman Catholic church and some of the terminology is still in use there as well.

Because he saw Christianity as a potential binding element within the Roman empire, Constantine regarded it as his task to watch over the unity of the church. He tried to prevent the various doctrinal movements such as those of the Donatists and the Arians from causing schisms in the church. In this connection Constantine was the first to summon a council to which all bishops of the empire were invited; this was the famous Council of Nicaea which met in 325. Later emperors, and in particular Justinian, also tried to settle religious disputes and make their own views prevail. Neither Constantine nor his successors really managed to do this, but they did prevent schisms.⁶

THE DOMINATE: THE LAW

12.1. INTRODUCTION

In the dominate, when the emperors wielded absolute power in the empire, the emperor and his officials were also in complete control of law-making. This period in the history of Roman law has rightfully been characterized as the bureaucratic period.¹

Legislation, which in the principate had been characterized by pluriformity, now stemmed exclusively from the emperor. The content of the laws also differed markedly from the content of the laws of the principate. For instance, the law was no longer strictly Roman, but showed Greek influences. Furthermore, it is striking that imperial legislation reveals traces of so-called vulgar law; this involves a juridical style of thinking which through its simplicity and lack of subtlety is not in keeping with the traditional classical way of thinking.

As in the principate, the administration of justice was closely linked with the government. In civil and penal cases justice was still administered in principle by the emperor and—by delegation—by his officials. This basically simple system was, however, thwarted in various ways because (a) special courts were set up for specific matters and persons, (b) bishops were granted judicial powers and (c) a variety of appeal procedures developed side by side.

In those days legal science was anonymous and lacked creativity. There were no longer any jurists who, in their dual capacity as members of the senate and experts in the field of law, gave opinions on juridical problems and recorded them in writing. Their place was now taken partly by senior officials whose names are hardly known, and by professors at the law-schools. These

people did not give any new opinions but made summaries and anthologies of opinions dating from the principate. At the same time collections were made of imperial legislation.

This period of Roman law culminated with the publication of Justinian's legislation. In the sixth century this emperor ordered new collections to be made of opinions of classical jurists and of imperial constitutions, and he had a new introductory textbook for law prepared. The three resulting books, Digest, Code and Institutes, all had the force of law, and were used in practice as well as in teaching. Because manuscript copies of the Digest, Code and Institutes were preserved in Italy, they could and also did form the basis of later European legal science.

12.2. LEGISLATION

12.2.1. The forms of legislation

In the course of the principate the traditional forms of legislation were ousted to make way for the imperial constitutions. The old *leges* and senatorial decrees remained valid in the *dominate*, but the constitution then became the only source of new law. Of the four types of constitution that had developed since Augustus—edicts, mandates, *rescripts* and decrees—the edicts from the fourth century onwards were the most important. Usually the edicts, now also called *leges generaes*, were prepared by the minister of justice and discussed in the *consistorium*. An edict was generally issued in the form of a letter addressed to the praetorian prefect or to another senior official who then had to ensure that it was publicised. An edict could, however, be directed to a particular people or group of people, for instance to the inhabitants of a certain town. The mandates, which were originally instructions from the emperor to his officials, were incorporated in the edicts. The *rescripts* and decrees, now referred to as *leges speciales*, lost their separate identity. The *rescript*, in which the emperor or his chancery solved a juridical problem submitted by a citizen or an official, continued to be an important source of law until the time of Diocletian.² In 315 Constantine decided that *rescripts* that deviated from the prevailing law were invalid. From the end of the fourth century *rescripts* were no longer considered to have any general validity, so they finally ceased to be a source of new law. The decrees, which were originally decisions of the emperor taken

as judge of first instance or of appeal, gradually disappeared as the emperors more and more often left their officials to deal with such matters.

Under the dominate, however, two new types of constitution appeared, namely the *adnotatio* and the *sanctio pragmatica*. The sources do not tell us precisely what an *adnotatio* was. The term leads one to assume that it was a decision of the emperor in connection with a petition and was placed in the margin of the petition. If this assumption is correct the *adnotatio* must have served almost the same purpose as the earlier *rescript*. No clear definition can be given of the *sanctio pragmatica* either. It generally consisted of a reply by the emperor to a petition, but this reply sometimes had a general purport. The best-known example of such a constitution is the *sanctio pragmatica pro petitione Vigilii* in which Emperor Justinian, at the request of the bishop of Rome, Pope Vigilius, solved a number of juridical problems that had arisen following the re-conquest of Italy and in which Justinian also introduced his legislation into Italy.

The administrative division of the empire into two parts, which had occurred materially since the death of Constantine in 337 and had been formalised since the death of Theodosius I, also led to a division in the legislation. Even when Theodosius I actually ruled alone for several years in the whole empire (because the West-Roman emperor Valentinian II was so young) he enacted separate laws for the two parts of the empire. In fact, it often happened that the emperor of the western part took over a constitution from his East-Roman colleague, but the reverse did not occur. The fact that after 395 the names of the two emperors still appeared in the heading for a law is probably because in a political sense the empire was still regarded as one unit.

12.2.2. The content of the legislation

Legislation in the dominate shows the intrusion of non-Roman elements and of vulgar law into official Roman law. Since Roman citizenship had been granted via the *constitutio Antoniniana* to all free inhabitants of the empire at the beginning of the third century, all these people could now participate in Roman law. However, local laws remained in force. As a result Roman law began to influence local laws and in the long run local laws also influenced Roman law. When in the fourth century the intellectual centre of

the empire shifted from Rome to Constantinople, all kinds of legal concepts particularly of Greek origin appeared in the official Roman legislation. This influence is even visible in the law of persons and in family law, although traditionally that is the part of the law that changes least. For instance, Constantine began to put restrictions on the typical Roman concept of *patria potestas* by acknowledging that in one case persons in potestate could have proprietary rights: when a mother had bequeathed something to her children who were still under the potestas of their father, the father would no longer automatically become the owner but the children would get it (C. 6.60.1). Constantine was apparently making concessions to the much more restricted concept of paternal authority under Greek-Hellenistic law. Later emperors went even further. Justinian finally decreed that a child in potestate became owner of everything it acquired except when it acquired something from its father (C. 6.61.1).

Another difference with regard to the content of the legislation is that from the fourth century elements of vulgar law penetrated into official law. It is self-evident that in every sophisticated legal system the over-simplified interpretation of the law by lay people differs from the official law. This was the case in the Roman empire too, not only in the provinces but also in Italy and in Rome itself, and even under the principate which was the Golden Age of Roman law. The fact that aspects of vulgar law worked their way into official law should not necessarily be regarded as reprehensible and objectionable. The changes which were introduced in the later empire as a result of the vulgarizing trend satisfied the needs of the times. Examples of such changes are: the conferring of a binding force on every agreement confirmed in writing so that people were no longer tied to the traditional way in which agreements had to be drawn up.³ Another change was the removal of the distinction between ownership and usufruct through the recognition of a kind of joint ownership. Nevertheless it is generally agreed that partly as a result of the vulgarization of the law, the intellectual level of the law was lower than in the late republic and the principate. The most striking example of the decline is the blurring of the distinction between ownership and possession, which was and still is typical of lay-thinking about law.⁴

The decline occurred in both the eastern and western parts of the empire, but after the final division in 395 vulgarization

prevailed, particularly in the West-Roman empire. There, for instance, an *interpretatio* was often added to laws which summarized the content of the law in question. Now the laws already deviated from the classical law in various respects, but the interpretation sometimes underlined the content of the law in question in such an awkward manner that the summary totally contradicted classical law. In the East-Roman empire, on the other hand, the intellectual level had not declined so much and in the course of the fifth century classical law, as it had existed in the principate, could again be the centre of attention. Admittedly, this so-called classicist tendency was to be found mainly in the law-schools of the East-Roman empire, but this did not alter the fact that legislation there was at a higher level than in the West-Roman empire.

12.3. THE ADMINISTRATION OF JUSTICE

12.3.1. The courts

Under the dominate the normal administration of justice was largely in the hands of the imperial officials.⁵ These officials were certainly not always professional jurists and therefore they were often assisted by *adessores* who had had a legal training and had usually belonged to the legal profession. The hierarchy that was observed with regard to the administrative tasks performed by these officials also applied to the jurisdictional tasks they performed; it was only in Rome and Constantinople that administration and jurisdiction were organised differently.

The lowest level of jurisdiction was that performed by the urban administrators; their powers were limited. Private law disputes could only be submitted to them if the disputes concerned small amounts of money. However, this restriction could be removed if both parties wished to submit the dispute to the urban magistrates. In the area of penal law the magistrates performed only a kind of policing function.

The provincial governors administered justice in all criminal cases and in important private-law disputes; in addition they could be required to deal with appeals against sentences passed by urban magistrates. Since the provincial governors on the whole had not been given any military tasks since the end of the third century and the areas they governed had become much smaller,

the administration of justice was a very important part of their daily work.

If an appeal was made against a sentence passed by a provincial governor it was handled by the vicarius of the diocese in which the province in question was situated or by the praetorian prefect (if he was nearer) of the prefecture of which the province formed a part. The sentence of a vicarius could be re-submitted to the emperor but the sentence of a prefect could not: the latter was considered to administer justice on behalf of the emperor. In exceptional cases the vicarii and the prefects could serve as judges of first instance, for example if one party in a trial were so powerful that there was a chance the normal judge would be intimidated.

The emperor himself was of course authorised to serve as judge in all types of lawsuit, both of first instance and of appeal, but in fact this hardly occurred. The main reason why the emperor hardly ever served as judge was that he would then come into close contact with his subjects, which was something that the late Roman emperors sought to avoid. Imperial jurisdiction therefore often took place by virtue of delegation by the praetorian prefect and the minister of justice.

In addition to normal jurisdiction there were all kinds of special legal procedures for specific matters and persons. Examples of the former were the tax problems that had to be put to the *rationalis*, the official who represented the public treasury in a diocese; an appeal against the *rationales* could be made to the *comes sacrarum largitionum*, the minister of the state finances. An example of the latter is the privilege enjoyed by the members of the senatorial elite who could only be prosecuted by the city prefect (if they lived in Rome or Constantinople) or by their provincial governor.

In this connection mention should be made of the special procedure available to Christians which in the long term became more important than all other forms of special jurisdiction. Even before Christianity had become a state religion it was normal for Christians to put their private law disputes to a bishop: they did this in accordance with a letter from the apostle Paul to the Corinthians (1 Cor. 6, 1–8). This type of jurisdiction, called *episcopalis audientia*, was officially recognised by Constantine at the beginning of the fourth century because he proclaimed the sentences in question to be legally binding (C.Th. 1.27). The

sources suggest that a person could also be forced by the opposing party to put the dispute to the ecclesiastical judge, but since 398 the consent of both parties had been necessary. This legal procedure differed from normal jurisdiction not only with regard to the court involved but also in another respect: it was not possible to appeal against a sentence passed by the *episcopalis audientia*. Nevertheless, this special form of legal procedure became very popular because the procedures were cheaper and faster than those of the ordinary courts.

12.3.2. The criminal trial

Since the third century the *cognitio extraordinaria* had been the normal procedure for criminal trials. A criminal trial usually began because there was a public prosecution.⁶ It was still possible for citizens to indict someone on a charge, but this hardly ever occurred because of the high risks involved. If the trial demonstrated that the charge was unfounded, then the accuser received the same punishment as the one to which he had exposed the accused; in the principate, on the other hand, it was only the person who had intentionally made a false accusation who was punished.

The range of offences for which prosecution could be instituted was widened considerably. Both the old and the new offences were now based exclusively on imperial constitutions (*leges generales*). The new offences clearly show the changes that occurred in Roman society in the later empire. For instance, the influence of bureaucracy is clearly visible from the fact that corruption perpetrated by provincial governors in the course of their tasks in jurisdiction or in their administrative tasks was made punishable. Furthermore, economic dirigisme can be seen from the fact that the evasion on the part of *decuriones* of fiscal tasks imposed by the state was now regarded as an offence. The recognition of Christianity also gave rise to a number of new penal clauses, particularly in the sphere of marriage and sexuality; for example, Emperor Constantine decreed that a woman could only renounce her husband if he was a murderer, poisoner or desecrator of tombstones. In all other cases she would be punished by deportation and the loss of her dowry (C.Th. 3.16.1). In this connection one should also mention offences against the Christian religion, for instance dissenting from orthodox Catholicism by Manicheans, renegades, pagans and Jews; the persecution of

dissenters had intensified, particularly since the last few decades of the fourth century when Christianity became the state religion.

The judge in the criminal procedure was bound by all kinds of rules relating to the evidence. The confession of a suspect served as proof and the judge could only sentence a suspect to death if the latter had confessed or evidence to this effect had been produced. In addition, the suspect could be tortured during the interrogation, and so could the witnesses, unless the persons involved were senators, dignitaries of the church, decuriones and the like. As in the principate a suspect could only be sentenced if it was absolutely certain that he had committed the crime in question: *in dubiis pro deo*, when there was uncertainty the suspect had to be given the benefit of the doubt.

The criminal trial closed when the judge gave his verdict in which he either sentenced or acquitted the accused. The penalties that a judge could impose were laid down by law and in general were much more severe than those in the principate. The death penalty was imposed frequently. Lower-class citizens and slaves could be sentenced to forced labour in the mines. Other punishments were exile (often for life), confiscation of property, and fines. Lower-class citizens and slaves could also be subjected to corporal punishment. Prison sentences did not exist; as in earlier times prisons were used solely to guard convicts for short periods, not to punish them. Under the influence of Christianity certain punishments like crucifixion and gladiatorial combat were abolished and the treatment of prisoners improved. On the other hand, all kinds of other cruel punishments persisted; these included being burnt alive and *culleus*, whereby the convict was tied up in a leather sack containing a snake or another animal and drowned in the sea.

In general, condemned persons were free to appeal against their sentences. This was impossible when crimes had been committed such as murder, adultery or violence, and if the condemned person had confessed. Condemned persons could not appeal either if it was evident that the sole reason for the appeal was to obtain a stay of execution.

12.3.3. The civil procedure

The way in which civil procedures were conducted in the late empire was characterised by the active role played by the judge in

various stages of the trial. The origin of this procedure can be traced back to the principate when the *cognitio extraordinaria* became increasingly popular. However, it differed in several respects from the cognition procedure of the principate.

To begin a civil procedure it was no longer sufficient for the plaintiff to issue a summons: he now needed the consent of the judge and the co-operation of an official who then made a formal note of the fact. The result of issuing a summons was that the plaintiff and the defendant had to appear in front of the judge within four months. If the defendant failed to appear he could be prosecuted for *contumacia*, insubordination. If the plaintiff failed to appear he lost his case and could only institute proceedings one more time. Under Justinian the rules for issuing a summons were slightly different: the plaintiff had to submit a *libellus conventionis* (statement of claim) to the judge concerned; the defendant had to sign the petition and to guarantee that the case would be put to the judge within two months. If he could not give this guarantee he could be imprisoned.

During the trial itself the evidence was presented as before. There were, however, different rules governing this part of the trial. On the one hand the parties were more or less free to alter the claim and the defence in the course of the trial, and the procedure ran more smoothly than before. On the other hand the judge was no longer free to evaluate the evidence produced by the parties. As an imperial official he was bound by the instructions of his superiors. It was stipulated that more weight should be attached to written evidence than to oral pronouncements and an order was established for the various forms of written evidence. Furthermore, assertions of witnesses had to be evaluated according to the social position of the witnesses concerned. Witnesses who were held in low esteem could even be subjected to torture. In trials in which one of the parties was an orthodox Christian, no heretics or Jews could be accepted as witnesses.

It was also normal in the dominate for parties to be supported by advocates; however, they no longer delivered a speech summarizing the case on behalf of their client but their activities were restricted to supporting their client with advice. Furthermore, at the beginning of the trial they, just like the opposing parties, had to swear that they were defending an honourable case which was not based on false declarations. The advocates were no longer persons from the upper class who had

trained in law and oratory and had served as advocates in order to further their political careers. They were now persons who had followed instruction in law at one of the law-schools and were serving as advocates in a professional capacity. They were tied to one particular court and formed a kind of association or order. They had to obey the rules of their order but also enjoyed all kinds of associated privileges. Their tariffs were laid down by law. The advocates of the dominate were more like modern advocates than the advocates from the late republic and principate.

The proceedings were over as soon as the judge gave his verdict. Just as in the *cognitio extraordinaria*, the judge in the post-classical cognition procedure was free to sentence someone to something other than the payment of damages. The verdict had to be put in writing and made known to both parties. In principle it was now possible to appeal against all sentences, but anyone who took this step without due consideration was severely punished.

12.4. LEGAL SCIENCE

The crisis in the third century, which caused power to fall definitively and exclusively into the hands of the emperor, completely changed the nature of legal science. From the fourth century onwards it was mainly practised at the law-schools. Emphasis was no longer on the creation of new law by means of the interpretation of legal provisions, wills, etc. What was stressed now was the study and explanation of the writings of jurists of the principate. The literature that originated in this period consisted on the one hand of selections of opinions of classical jurists and rescripts from the imperial chancery and on the other hand of simplifications of these. From the fifth century onwards collections of imperial law were compiled on behalf of the state.

12.4.1. The law-schools

The history of the law-schools dates from the principate: the first law-school was probably established in Rome in the second century and followed by another one in Beirut in the third century. The purpose of these schools was to train people for functions in the civil service. When Diocletian and Constantine reorganised the government, state officials began to perform key tasks in the government and law-schools became increasingly important. In

addition to the schools in Rome and Beirut, which were very highly regarded, new schools were founded in places such as Carthage, Alexandria, Caesaraea and Athens, and in 425 in Constantinople. It was particularly at the law-schools in Beirut and Constantinople that classical legal science began to be studied again and it was also at these schools that the foundation was laid for Justinian's codification of the law.

Initially tuition at the law-schools was given in Latin, but about the year 400 Greek replaced Latin as the language of instruction. Legal studies took four to five years and were divided up as follows: in the first year the Institutes of Gaius were dealt with; thereafter a study was made of the collections of opinions *ad ius civile* of the classical jurists, followed by the opinions *ad edictum*; then special attention was given to the opinions of Papinian and Paul published in other books and in the final year the emphasis was on 'modern' law. This involved discussion of the imperial constitutions from the middle of the second century up to the 'present'. The way in which instruction was given was the same as that in which it had been given at the schools of rhetoric: a text from the classical juridical literature was discussed by the teacher or professor and, when possible, compared with parallel texts. On that basis the teacher formulated general principles, posed specific juridical problems and solved them, illustrating his points with examples from juridical practice. This so-called scholastic method is rather similar to the method used by the Glossators in the eleventh century in Bologna. At the end of their studies students who had successfully completed the course were awarded a certificate entitling them to serve as advocates in the courts of urban magistrates and of higher officials up to and including the praetorian prefect.

12.4.2. The juridical literature from the third to the fifth centuries

The juridical literature of the third to the fifth centuries is characterised by its lack of creativity and by the fact that the authors are unknown. The works in question are mainly compilations of opinions and rescripts dating from the principate. Probably these works were intended primarily for use in legal education and replaced the scarce and therefore expensive manuscripts of the classical jurists, but they were also used in

practice. The most important work that can be mentioned in this connection is the so-called *Fragmenta Vaticana*; as the name indicates, this consists of part (probably only a small part) of a comprehensive collection of opinions and rescripts which was discovered in the Vatican library in 1821. The collection is important mainly because it contains texts that have not come down to us in other works or that have survived only in greatly abbreviated versions. The texts are arranged according to the subject matter (for example, there are sections on sale and on usufruct) in titles, seven of which have been preserved and are more or less complete. Each text is headed by a note stating from which work of which jurist it comes or if the text is a rescript the note gives the name of the emperor who issued it. The jurists involved here are Papinian, Paul and Ulpian who lived at the end of the second century and at the beginning of the third century. All the imperial constitutions except three date from the period 205–318. It is probable that this selection was compiled in or shortly after 318 and that the three other constitutions (from 330, 337 and 372) were added later.

Another selection, currently known as the *Collatio legum Mosaicarum et Romanarum* (abbreviated to *Collatio*), also dates from the beginning of the fourth century. The manuscript itself, however, gives the title as *Lex dei quam praecipit dominus ad Moysen*, the law of God which the Lord gave to Moses. This selection closely resembles the Vatican Fragments as regards content and composition but differs from that text in that several sentences from the first five books of the Old Testament, particularly the sayings of Moses, appear at the beginning of every title. In addition it contains texts not only by Papinian, Paul and Ulpian but also by Gaius and Modestinus. Various hypotheses have been put forward regarding the name of the author and the purpose of the work. Because the biblical texts concerned are all taken from the Old Testament and not from the New Testament it is often assumed that the author was of Jewish origin and wanted to demonstrate that Roman law corresponded to or possibly even was taken from Mosaic law.

In this connection the *Sententiae* of Paul and the *Epitome* of Ulpian can be mentioned as well. The *Pauli Sententiae* consist mainly of short pronouncements and rules of this late classical jurist. It is not certain whether Paul himself ever wrote a book called *Sententiae*. It is now generally assumed that the work that

we know as *Pauli Sententiae* appeared at the end of the third century and was compiled by an unknown author on the basis of texts by Paul. The book must have become popular very rapidly, because it is quoted repeatedly in other selections of the time, including the *Lex Romana Visigothorum* and the Digest of Justinian. Furthermore, Constantine mentions it as being one of the few books to which reference can be made in trials. Unfortunately, the work has not come down to us directly; we know of it only via citations in the above-mentioned collections.

The *Ulpiani Epitome* was probably a shortened version of a work by Ulpian, the *liber singularis regularum*. Until recently it was assumed that the *Ulpiani Epitome* was based on the Institutes of Gaius and some other works of classical jurists. Not long ago, however, Nelson demonstrated that this assumption was incorrect.⁷ The *Ulpiani Epitome* originated in about 300. It has come down to us via a manuscript dating from the tenth or eleventh century which is in the Vatican library; unfortunately both the beginning and the end of the text are missing.

12.4.3. The collections of constitutions from the third to the fifth centuries

In the principate the rescripts important for the development of law had been published because the jurists mentioned them in their collections of *responsa*. After the death of the last classical jurist, Modestinus, in the middle of the third century, this method of publication came to an end. When Diocletian had restored peace and order to the empire in about 300 and the imperial chancery could function again reasonably well, a new way of publishing the rescripts was required. This need was satisfied by the compilation of the *Codex Gregorianus* and the *Codex Hermogenianus*. These collections resemble the earlier collections of opinions in that they were not prepared officially on behalf of the state; they are private collections. It is possible, however, that the compilers, Gregorius and Hermogenian, were senior officials who had easy access to the archives of the imperial chancery. The fact that these works are referred to by the term *codex* and not by the previously used term *liber* is connected with the form of publication: after the year 300 literary works were no longer published as scrolls but appeared in modern book form. Neither of the two above-mentioned collections has survived; part of the

contents is known because very many texts from these collections were incorporated in later collections such as the Vatican Fragments and the *Collatio* and particularly in the Code of Justinian. The Gregorian Code must have been the more comprehensive of the two; it contained constitutions from Hadrian up to and including Diocletian. These were divided into books and titles according to the subject matter. The order of the subject matter was the same as that observed by the classical jurists in their *Digesta*. The Gregorian Code was probably published in 291. The *Codex Hermogenianus* contained mainly constitutions from the year 293/294; this much smaller collection was not subdivided into books and titles but only into titles devoted to certain topics; the constitutions in it were in chronological order. The *Hermogenian Code* was probably published in 295.

In spite of the existence of these two collections and of the above-mentioned Vatican Fragments and the *Collatio* there was still a great deal of uncertainty in the practice of law, about which opinions and rescripts could be recognised as being authoritative. First, the texts were sometimes contradictory, and second, it was often difficult for the judges to check whether a specific text was authentic. In an attempt to put an end to this situation of uncertainty Constantine formulated some laws: in 321 he decreed that the critical remarks (*notae*) that Paul and Ulpian had made in connection with the *responsa* collection of Papinian were no longer to be used. A year later, however, he declared that the other works of Paul, and particularly his *Sententiae*, had the force of law (C.Th. 1.4.1 and 1.4.2 respectively). In the end these measures turned out to be insufficient and in 426 the East-Roman emperor Theodosius II and the West-Roman emperor Valentinian III together formulated a new law on the subject (C.Th. 1.4.3); this so-called Law of Citations stipulated that from then onwards the works of the late classical jurists Papinian, Paul, Ulpian and Modestinus and those of Gaius had the force of law and that only these could be cited in a lawsuit. If these jurists had expressed different opinions on a particular topic then the opinion of the majority prevailed; if numbers were equal, then the view of Papinian had to be followed and only if Papinian had expressed no view on the subject was the judge free to make a choice himself. The reason why it was the works of these five jurists that could be cited was probably that a number of good manuscripts of these

authors were readily available; the works of the four late classical jurists were available because they were the most recent and the work of Gaius was available because his work enjoyed great popularity in the dominate.

Very soon, however, it appeared that this Law of Citations was not a definitive solution either; as a result the same emperors, Theodosius II and Valentinian III, charged a committee specially appointed in 429 first to make a collection of all *leges generates* from the time of Constantine and thus produce a supplement to the *Codex Gregorianus* and the *Codex Hermogenianus* and thereafter, from these three collections of constitutions and from the writings of the classical jurists, to compile a Code which contained no contradictions and no repetitions. The execution of this plan, however, encountered insurmountable problems and finally in 435 another committee was set up for the purpose of collecting the constitutions, starting with those issued in the reign of Constantine. These texts had to be shortened and altered where necessary. After three years, in 438, the work was complete and the collection was published under the name *Codex Theodosiantts*. On 1 January 439 the Theodosian Code became law, meaning that from then on only the constitutions in that Code could be cited in a lawsuit. In practice, however, the Gregorian Code and the Hermogenian Code continued to be used. As far as the works of the classical jurists were concerned, the Law of Citations remained in force.

The Theodosian Code is divided into sixteen books which are subdivided into titles according to the subject matter. The constitutions (numbering more than 3000) appear in these titles in chronological order. In these constitutions the emphasis is not on private law (whereas it was in the *responsa* and *rescripts*) but on public law; the Theodosian Code is therefore very important for our knowledge of constitutional and administrative law in the dominate. Most of the Theodosian Code has been preserved; in this case too the content is known only because constitutions from the Theodosian Code were included in later collections, particularly in the *Lex Romana Visigotborum* and in the Code of Justinian. In addition there are two manuscripts, one dating from the fifth and the other from the sixth century, which contain books six to eight and nine to sixteen respectively. Various versions of the Theodosian Code have been published since the sixteenth century;

at present the version that is normally used is the one edited by Mommsen at the beginning of this century.⁸

12.4.4. The *Leges Romanae Barbarorum*

When the last West-Roman emperor was deposed in 476, his empire broke up into several parts; Italy came into the hands of the Ostrogoths, while Spain and the south of France came under the Burgundians. In these areas the personality principle prevailed again; in other words the original population continued to live according to Roman law, while the newly arrived Germanic population used Germanic law. For the Roman part of the population this meant the continuance of the uncertainty concerning the content and authenticity of jurists' law and imperial law. Some Germanic kings therefore had lawbooks published which contained Roman law and applied only to their Roman subjects; examples are the *Lex Romana Visigothorum* and the *Lex Romana Burgundionum*. These lawbooks are very important for our knowledge of Roman law in the dominate, because they contain a number of Roman law texts which have not come down to us anywhere else. The *Lex Romana Visigothorum* was issued in 506 by Alaric II, the king of the Visigoths. It contains, among other things, extracts from the Codes of Gregorius, Hermogenian and Theodosius, an abbreviated version of Gaius' *Institutes*, a *responsum* of Papinian and sections from the *Sententiae* of Paul. Some of these texts are provided with a so-called interpretation, i.e. an explanation which can be anything from a paraphrase to an explanatory remark. The purpose of this lawbook was to make all other sources of law superfluous. In 654 it was superseded by a new lawbook which was to apply both to the Goths and to the Romans. As a result the *Lex Romana Visigothorum* was gradually forgotten about in Spain; in France, on the other hand, it was still applied, although officially it was no longer valid. This is also the reason why knowledge of Roman law survived in that part of western Europe, but only to a very limited extent.

The *Lex Romana Burgundionum* was also promulgated at the beginning of the sixth century, having been drawn up by the Burgundian king Gundobad for his Roman subjects. Unlike the lawbook of the Visigoths it does not consist of extracts from various works but is made up of newly formulated rules which are

systematically ordered and distributed over forty-seven titles. However, these are based on the three Codes, and on the Institutes of Gaius (a shortened version) and the *Pauli Sententiae*. In addition, the lawbook contains some elements of Burgundian law.

The *Edictum Theoderici* can also be mentioned in this connection. This is the work of the king of the Visigoths, Theoderic II, and not of Theoderic the Great, king of the Ostrogoths, as it was long assumed to be. The *Edictum Theoderici* probably originated in the middle of the fifth century in France. It contains 154 legal rules, which, as in the case of the two above-mentioned lawbooks, are taken mainly from the three Codes and the *Pauli Sententiae*. Unlike those lawbooks, however, the *Edictum Theoderici* was applicable to both the Visigoths and the Romans in that area.

12.5. THE LEGISLATION OF JUSTINIAN

When Justinian became emperor of the Byzantine empire in 527 he had three ambitions. He wanted to re-conquer the former West-Roman empire that had been lost fifty years before; he partly succeeded in fulfilling this ambition since Italy, southern Spain and part of North Africa were brought back under Roman rule. Secondly he wanted to restore unity in the church whose existence was threatened by various schisms; he was not very successful in this respect because he was unable to disband sects like that of the Monophysites. One of the reasons he failed may have been that his wife Theodora as a member of this sect energetically defended it. Thirdly he wanted to get things organised in the legal field.⁹

Almost 100 years had passed since the compilation of the Theodosian Code. Over that period a number of constitutions from that Code and from the two older collections had become outdated and many new constitutions had been issued. Furthermore, although the Law of Citations of 426 had reduced the uncertainty concerning the content and authenticity of jurists' law, it had not removed this uncertainty. Therefore Justinian wanted to solve this problem in a definitive way. The fact that he proved so successful in this field is due primarily to two circumstances. Firstly, he had a top official, Tribonian, who had the necessary knowledge and enthusiasm to complete the work; Tribonian was head of the imperial chanceries and since 530 had himself been minister of justice¹⁰. Secondly, it had become a

tradition at the law-schools of Beirut and Constantinople to collect and study the works of the classical jurists and to give them an important place in the curriculum (see section 12.4.1); as a result the law-schools were a storehouse of knowledge about classical law.

12.5.1. The first Code

The legislation project started only a year after Justinian had become emperor, namely in 528.¹¹ He then gave a specially appointed committee the task of making a new collection of imperial constitutions. The committee consisted of ten members, seven being top officials (including Tribonian), two being advocates and one, named Theophilus, being a professor at the law-school in Constantinople. Their task was not simply to prepare a collection of constitutions that had been issued after the Theodosian Code; the new collection was also to replace that Code and even the Codes of Gregorius and Hermogenian. The committee was granted very wide powers; it could delete outdated or unnecessary elements from the texts, remove contradictions and repetitions and could even combine, alter or extend texts. The members of the committee were therefore called ‘compilers’, from the verb *compilare* (literally, to plunder). The constitutions were to be divided according to the subject matter and arranged chronologically in the appropriate titles. On 7 April 529 the new collection was published under the name *Codex Justinianus* and from 16 April of that year it acquired force of law. This Code only remained valid till 534; then, for reasons to be explained more fully later, it was replaced by a revised version. The text of the first Code, also called *Codex vetus* (the old Code) has not survived; an index, however, has been found on a papyrus fragment in Egypt.

12.5.2. The Digest

The next step was to remove the remaining uncertainties about classical law. It is not certain whether Justinian intended from the outset to make a new collection of classical law or whether he only decided to do this later; we do know, however, that the order to compile the Digest was given on 15 December 530, about a year and a half after the first Code had been introduced, and that on 17 November 530 a collection of fifty constitutions was published,

the so-called *quingenta decisiones*. In this work contradictions between the opinions of the classical jurists were resolved and outmoded legal concepts were scrapped. This collection has not come down to us as a separate volume, but the content is included in the revised Code of 534.

The task in question was entrusted to Tribonian who was then the minister of justice. He was allowed to choose the members of the committee that was to support him. Tribonian selected four professors from the law-schools (two from Beirut and two from Constantinople), the new head of the imperial chanceries who was also minister of the state's finances, and eleven leading advocates. The committee was given the task of preparing, within a period of ten years, an anthology of the writings of the classical jurists, i.e. not only of the five jurists mentioned in the Law of Citations. Just like the compilers of the Code they were given very wide powers: they themselves could determine which texts were suitable for inclusion, they could delete superfluous and outdated elements and could resolve contradictions; in other words, they could shorten the texts concerned and alter them as much as they thought necessary. However, they always had to indicate from which work of which jurist a text came; these notes are of great importance for legal history, because they permit historians to reconstruct the works in question and discover how the compilers worked. In addition, Justinian stipulated that the collection was to consist of fifty books subdivided into titles: these titles were to be placed in the same order as in the Code; in other words, they had to follow the order in the edict.

By 533 the committee had already finished its work. Thanks to the zeal and enthusiasm of Tribonian and the unceasing interest of Justinian himself, the work had taken only three years instead of the stipulated ten years. On 16 December 533 the work was published under the name *Digesta* and was given the force of law. From then on the only texts that could be used in a lawsuit were the ones included in the Digest. In the introductory constitution Justinian states that the compilers worked through almost 2000 scrolls containing 3,000,000 lines and that they reduced these to 150,000 lines and thereby made a large number of major changes; however, there is some doubt about whether these remarks should be interpreted literally. On the basis of the contents, however, one can get a better idea of how the compilers tackled their work. Firstly, the headings over the texts show that the texts are taken

from the work of thirty-nine jurists who lived during the period extending from about 100 BC to 300. The number of texts per jurist is extremely variable. There is only one text by Aelius Callus from the first century BC, but there are so many texts by Ulpian that they make up over 40 per cent of the entire Digest. This discrepancy is of course connected with the fact that the works of the late classical jurists like Ulpian were the most recent and therefore the best preserved.

From the order of the texts within the various titles the German legal historian Bluhme deduced—at the beginning of the last century—that the compilers had divided the works of the classical jurists into three categories or ‘masses’ (German ‘Massen’) and that they had divided their committee into three sub-committees, each of which was required to work through one mass.¹² The masses as indicated by Bluhme were first of all the works *ad Sabinum*, i.e. those works of the classical jurists in which the order of the opinions was the same as that followed by Sabinus in his *Libri tres iuris iuris civilis*; this category was referred to by Bluhme as the ‘Sabinian mass’. Second, there were the works *ad edictum*, referred to by Bluhme as the ‘edictal mass’. The third mass was the collection of opinions that had been published under various titles such as *Digesta*, *Responsa* and *Epistulae*; because this mass always begins with a *responsum* of Papinian, Bluhme called it the ‘Papinian mass’. Finally, Bluhme distinguished a fourth, smaller category which he referred to as the ‘appendix mass’; it contains texts from works of various kinds. Although several attempts have been made to correct Bluhme’s ‘mass theory’, the theory is still generally accepted.¹³

Since the sixteenth century many opinions have been expressed about the extent to which the compilers altered the content of the texts. The problem became the focus of attention particularly at the end of the nineteenth century. Many German and Italian legal historians believed they could identify alterations, known as interpolations, on the basis of linguistic arguments. Because this method of textual criticism became almost a campaign it was referred to as the ‘interpolation hunt’. Nowadays the critics are more restrained.¹⁴ Passages are mainly regarded as interpolations in two cases. First, if one and the same text has come down to us not only via the legislation of Justinian but also via another reliable source like the Vatican Fragments and if the former deviates from the latter, then the Justinian text is considered to

have been interpolated. Second, texts referring to legal concepts which are known to have been obsolete at the time of Justinian have often been interpolated because the compilers had to bring the text up to date.¹⁵

Many manuscript copies of the text of the Digest have survived but nearly all of them date from the eleventh century or later when the Glossators began to study Roman law again. However, there is one manuscript that dates from the sixth century. It was probably produced in Constantinople before 550 and is perhaps one of the seventy-five or so copies which were sent in 553 to all important government bodies.¹⁶ According to a note on the manuscript it was in Italy in the ninth or tenth century and it is known to have been in Pisa in the twelfth century. When the people of Florence captured Pisa in 1406 they carried off the manuscript; since then it has been kept in Florence and is generally known as the ‘codex Florentinus’.¹⁷ In the last century Mommsen and Krüger used this manuscript to produce an edition of the Digest which is now regarded as the standard edition.¹⁸

12.5.3. The Institutes

The compilation of the Digest was not only desirable from the point of view of legal practice, but it was also extremely valuable for teaching purposes. The Digest, however, was too difficult for students just beginning their studies. So, in 533, even before the work on the Digest was complete, Justinian decided that a new introductory textbook for law would have to be written. The task was entrusted to Tribonian and to two of the four professors who were helping to produce the Digest, namely Theophilus and Dorotheus. They were asked to produce a new book on the basis of the Institutes of Gaius and using some other introductory works from the principate. This new book was to reflect the law of their own time. Where they considered it advisable, they were permitted to include a historical introduction. In November of the same year (533) their work was published under the name *Institutiones* and came into force along with the Digest on 30 December 533.

The speed with which the Institutes of Justinian were compiled is largely due to the fact that the compilers took over two-thirds of the text more or less word for word from the Institutes of Gaius. Like Gaius they divided the material into three parts: law relating

to persons, law relating to things and law relating to actions. Also like Gaius, the compilers divided the material into four books, but unlike Gaius they subdivided the books into titles. Because a number of the legal concepts described by Gaius had become obsolete by then, the compilers had to adapt the text in a number of places. One of the most radical changes concerned procedural law. In the sixth century legal action was taken only by means of the *cognitio extraordinaria*, so the compilers replaced Gaius' discussion of the *legis actio* procedure and the formulary system in the fourth book of the Institutes by a much shorter description of the currently used procedure and supplemented this with a title about penal law. The Institutes of Justinian became very popular, particularly in the former West-Roman empire; the text has therefore been preserved in many manuscripts. Practically all of these manuscripts, however, date from the eleventh century or later and only one fragment, which is difficult to read, dates from the sixth century. In 1872 Krüger produced a standard edition of Justinian's Institutes.¹⁹

In those days copies of the Digest and the Institutes were made by hand. There was always a danger that spelling mistakes and even textual alterations would occur. To forestall this possibility Justinian took two steps. First of all he forbade the use of abbreviations and the use of figures instead of letters, for this habit had caused great confusion in the past. In addition, no explanatory remarks were to be placed on the manuscripts, because the following copyist might easily think that the remark formed part of the text and thus incorporate it in the text.

12.5.4. The second Code

At the beginning of 534 Justinian decided that a new edition of the Code was needed. The reasons for this were as follows. As the Digest and the Institutes were being compiled all kinds of new constitutions had been issued and various old ones had been abolished, so the first Code was no longer up-to-date. Another reason may have been that during the copying of the first Code abbreviations and figures had been used and because of that the text was not quite reliable. Tribonian was entrusted with the task of producing a new Code. He was assisted by Dorotheus and by some of the advocates who had helped compile the Digest. Again they were given wide powers. They could remove constitutions

that were superfluous or supplement those texts that revealed gaps.²⁰ At the end of the same year a revised version of the Code was published under the name *Codex repetitae praelectionis* and became law. As far as we know, the second Code closely resembled the first with regard to arrangement and systematics. Both are divided into twelve books; the first book is devoted to jurisdiction and ecclesiastical matters, books two to eight to private law, book nine to penal law and the last three books to administrative law. Each of the books is subdivided into titles. In these titles the constitutions are in chronological order. The oldest of the 4000 or so constitutions dates from the time of Hadrian, the majority stem from Diocletian (i.e. about 1200) and about 400 of Justinian's constitutions are included.

The revised Code has suffered a strange fate. Not long after this Code had been introduced, manuscripts began to circulate which, in spite of Justinian's ban, contained numerous abbreviations and remarks of jurists of his day; an example of such a manuscript—at least a part of it—has been preserved on a palimpsest from the sixth or seventh century. Furthermore, between the sixth and ninth centuries the last three books of the Code were published separately, the constitutions in Greek were removed and in general the text was drastically shortened. From the ninth century these abbreviated versions were extended again by the incorporation of elements from complete manuscripts that were apparently still in existence. From the sixteenth century, at the instigation of the humanists, the Greek constitutions were reincorporated in the text. It was not until the end of the nineteenth century that a new complete edition of the Code was produced by Krüger; this is the edition that is in general use today.²¹

12.5.5. The Novels

With the publication of the revised Code Justinian had achieved his aim of putting matters in order in the juridical field. But this was not the end of Justinian's legislative activities. In the period 535–555 he issued many new constitutions; these are generally referred to as 'Novels' (from *Novellae leges*; literally, new laws). Primarily, the Novels contain innovations in the field of administrative and ecclesiastical law, but there were also many changes in private law, particularly in family law and the law of succession upon intestacy. Although Justinian wanted to collect

the Novels and publish them as soon as he had issued enough of them, he was never to achieve his aim. A few private collections were prepared but no manuscript copies of these have survived. We know of these collections only via the following three works that are based on them:

1. The oldest is the so-called *Epitome Juliani*, an abbreviated version of a collection of 122 constitutions, which was produced during the reign of Justinian. The edition was probably intended for use in Italy. This is indicated by two factors: the language of the texts is Latin and the last constitution dates from the year 555, i.e. one year after Justinian had introduced his legislation into Italy.
2. Another work based on a private collection is the *Authenticum*. This is a collection of 134 constitutions from the period 535–556; these have also been translated from Greek into Latin. It is very difficult to ascertain when this collection was published. It may have originated in the sixth century, like the *Epitome Juliani*, but the oldest references date from the eleventh/twelfth centuries. According to reports, one of the Glossators, Irnerius, regarded this as the official collection of Novels which was prepared at Justinian's request for use in Italy, and it is Irnerius who gave it its name *Authenticum*. Nowadays, however, it is assumed that Irnerius' view is incorrect and that the collection is nothing more than a poor-quality translation of a so-called *kata podas*, i.e. a teaching aid used in the Justinian law-schools.
3. The most comprehensive collection of Novels is the so-called *Collectio Graeca*. It consists of 168 constitutions and includes not only constitutions of Justinian but also constitutions of his successors Justin II (565–578) and Tiberius II (578–582). It was probably compiled during the rule of the latter. Our information about this collection is based on two manuscripts from the thirteenth and fourteenth centuries, but the collection itself was not known in western Europe until the fifteenth century. After the fall of Constantinople in 1453 various Byzantine jurists fled to Italy and introduced the collection there. However, it was mainly due to the humanists in the fifteenth and sixteenth centuries that the collection became known. The standard edition of the Novels, which was produced in 1895 by Schöll and Kroll, is based on the *Collectio Graeca*.²²

EPILOGUE

The legislation of Justinian marks the end of the first period of the history of Roman law and the beginning of the second period. Together the Digest, the Code and the Institutes give a comprehensive picture of the way in which Roman law developed from the first century BC up to and including the sixth century. Although the compilers undoubtedly altered the texts in places, adapting them to their own time, they did not make any major changes. Consequently these three works are still the most important source of our knowledge about classical Roman law.

The legislation of Justinian also marks the beginning of the second period of Roman law. It is surprising, however, that this second phase was restricted to the former West-Roman empire and initially only to certain parts of Italy where Justinian law was applied. In the Byzantine empire the legislation of Justinian remained in force until the fall of Constantinople in 1453, although much of it was in the form of Greek translations, summaries and adaptations. The most important of the translations are the so-called *Basilica* (from the Greek ‘ta basilika nomima’—the imperial laws) that date from about 900. In this collection, most of which has survived, texts with related contents from the Digest, the Code and the Novels are grouped in titles. No further Latin texts were incorporated but where necessary Greek summaries dating from the early Byzantine period were added. The Byzantine form of Roman law lasted longest in Greece; not until 1946 was it replaced by a modern civil code based on the German civil code which in turn has its roots in Roman law.

In the former West-Roman empire Roman law continued to exist via the *Leges Romanae Barbarorum*. There was no change in the situation until the end of the eleventh century. During the

EPILOGUE

economic revival and the cultural renaissance that occurred in northern Italy at the time, law-schools were founded in which instruction was given on the basis of the legislation of Justinian. When a manuscript copy of the Digest, dating from the time of Justinian, was discovered in Pisa in 1077 the study of Roman law received a new impetus. Because the content of the Digest is casuistic and therefore sometimes inconsistent, many explanatory remarks (glosses) were made in the margin of the texts. These remarks referred to analogous cases or resolved contradictions. The jurists of the law-school in Bologna, like Irnerius in the twelfth century and Azo and Accursius in the thirteenth century, became particularly famous for their textual comments on the Digest and attracted students from all over Europe. Later European legal science developed out of the school of the so-called Glossators and has left its mark particularly on private law in continental Europe, South and Central America and Africa.

The second period of the history of Roman law is very different from the first. In the second period law-making was influenced not only by Roman law but also by Canon law and Germanic law. From the sixteenth century onwards Justinian law was referred to as the *Corpus Iuris Civilis* to distinguish it from the *Corpus Iuris Canonici*. Another difference is that the Glossators and their successors did not regard the Digest, the Code and the Institutes as the embodiment of seven centuries of development in law with all the associated problems, but instead they regarded it as an authoritative lawbook which they, via their rational methods of interpretation, could prove to be complete in itself. What was missing in this approach was the historical dimension. However, one cannot have a proper understanding of modern law and of the way in which this has developed since the Middle Ages, partly under the influence of Roman law, unless one has some knowledge of the history of Roman law in antiquity.

CHRONOLOGICAL TABLE

	<i>General</i>	<i>Political</i>	<i>Legal</i>
I The monarchy and the early republic			
1000 BC	Latins and Sabines in Latium		
850	Etruscans in Tuscany		
753	Foundation of Rome (according to tradition)	Romulus, first king	<i>Leges regiae</i>
600	Etruscans found Rome		
509	Etruscans driven out of Rome	Beginning of the republic	Private law formulated by <i>pontifices</i>
500	Re-organisation of the army; beginning of the struggle between patricians/plebeians	Besides <i>comitia curiata</i> there are now two new assemblies: <i>comitia centuriata</i> and <i>tributa</i>	
471		Establishment of <i>concilium plebis</i> and tribunate	
450		Tribunes sacrosanct	Law of the XII Tables; criminal jurisdiction by <i>comitia centuriata</i>
387	Celts conquer Rome but allow themselves to be bought off		

CHRONOLOGICAL TABLE

Chronological table *contd.*

	<i>General</i>	<i>Political</i>	<i>Legal</i>
		II The late republic	
367		<i>Leges Licinae Sextiae</i> with re-organisation of magistrature	Praetor and curule aediles become responsible for <i>iurisdictio</i>
339		<i>Lex Publilia Philonis</i> : bills require prior approval of senate	
338	Latin League defeated: central Italy under Roman power		
337		Praetorship open to plebeians	
286	End of struggle between patricians/plebeians		<i>Lex Hortensia</i> : plebiscites – <i>leges</i>
264–241	First Punic war, beginning of expansion in area around Mediterranean		
242			Praetor peregrinus; probable introduction of formulaary procedure
218	<i>Lex Claudia</i> : senatorial aristocracy separated from <i>equestes</i>		
190	West Mediterranean area and Greece under Roman power		Beginning of legal science: first collection of <i>responsa</i> : M. Porcius Cato and Manius Manilius. Setting up of permanent penal courts to deal with certain types of crime

CHRONOLOGICAL TABLE

Chronological table *contd.*

	<i>General</i>	<i>Political</i>	<i>Legal</i>
133	Asia becomes a Roman province. Land reform introduced by Tiberius and Gaius Gracchus		
107-100	Re-organisation of the army by Marius	Marius, autocrat	Q. Mucius Scaevola
91-88	Social war: all free inhabitants of Italy receive Roman citizenship		
82-79	Subjugation of east Mediterranean area	Sulla, dictator	Increase in number of penal courts
60-56		First triumvirate	M. Tullius Cicero, S. Sulpicius Rufus and C. Aquilius Gallus
50			Last new action incorporated in <i>adlet</i>
48-44	Conquest of Gaul	Caesar, dictator	
43-32		Second triumvirate	P. Aferius Varus
31		Battle of Actium: defeat of Antony and Cleopatra	
30	Egypt becomes Roman province		
III The early empire			
27 BC	Conquest of central Europe: development of urban aristocracy in Italy and provinces, extension of Roman citizenship	Augustus, first emperor; <i>Lex Julia</i> concerning the functioning of the senate; officials replace magistrates	Imperial legislation via <i>leges</i> , senatorial decrees and constitutions. <i>Legis actio</i> procedure practically abolished, beginning of imperial jurisdiction via the <i>cognitio</i> procedure.

CHRONOLOGICAL TABLE

Chronological table *contd.*

	<i>General</i>	<i>Political</i>	<i>Legal</i>
			Establishment of second law school; introduction of <i>ius respondendi</i> . M. Anterius Laber and Ateius Capito
14-37 AD		Tiberius	
37-41		Gaius (Calpurnia)	<i>Ius respondendi</i> granted to G. Cassius Longinus and probably to Proculus, leaders of the law schools
41-54		Claudius	
54-68		Nero	
68-69		'Year of the three emperors'	
69-79		Vespasian	
79-81		Titus	
81-96	England and Wales become a Roman province	Domitian	
96-98		Nerva	Last <i>lex (agraria)</i>
98-117	Conquest of Dacia, Assyria and Mesopotamia	Trajan	Isidorus Pisonis, Celsus
117-138	Euphrates once more becomes eastern frontier	Hadrian	Definitive version of praetorian edict by Salvius Julianus. End of the <i>ius respondendi</i> , extension of the practice of rescripts
138-161		Antoninus Pius	Pomponius, Gaius
161-169		Marcus Aurelius and Lucius Verus	
169-177		Marcus Aurelius	
177-180		Marcus Aurelius and Commodus	

CHRONOLOGICAL TABLE

Chronological table *contd.*

	<i>General</i>	<i>Political</i>	<i>Legal</i>
180-192		Commodus; senate loses political power	
193		'Year of the five emperors'	
193-198		Septimius Severus	
198-211		Severus and Antoninus (Caracalla)	Last senatorial decree
211-212	<i>Constitutio Antoniniana</i> : citizenship for all free inhabitants	Caracalla and Geta	Papinian, Paul and Ulpian
212-217		Caracalla	
217-218		Macrinus	
218		Elagabalus	Law-school in Beirut
222-235		Alexander Severus	
235-284	Loss of border areas; devaluation of currency	Crisis, period of the military anarchy	<i>Sententiae</i> of Paul and <i>Epitome</i> of Ulpian probably compiled during this period
IV The dominate			
284-305	Roman empire regains its former frontiers. Re-organisation of government and finances, price edict to prevent inflation	Diocletian and Maximian	<i>Codex Gregorians</i> , <i>Codex Hermogenianus</i> ; imperial legislation and jurisdiction exclusive sources of new law
307-337	Constantinople, new capital	Constantine the Great	
313	Tolerance-edict of Milan relating to Christianity		

CHRONOLOGICAL TABLE

Chronological table *contd.*

	<i>General</i>	<i>Political</i>	<i>Legal</i>
337-340		Constantine II (west)	<i>Fragmenta Vaticana</i> and <i>Collatio legum Mosuarum et Romanarum</i>
337-350		Constantius (central area)	
337-361	Second senate in Constantinople	Constantius II (east)	
361-363		Julian the Apostate	
363-364	Invasion of barbaric tribes	Jovian	
364-375		Valentian I (west)	
364-378		Valens (east)	
367-383		Gratian (west)	
375-393		Theodosius I	
391	Christianity becomes state religion		
395	Division of the empire		
408-450		Theodosius II (east)	(425) Law school Constantinople; (426) Law of Citations; (438) <i>Codex Theodosianus</i>
425-455		Valentian III (west)	<i>Edictum Theoderici</i>
476	End of West-Roman empire	Romulus (west) deposed by Odoacer	
c. 500	Ostrogoths in Italy, Visigoths in Spain and south of France, and Burgundians in northern France		<i>Lex Romana Burgundionum</i> , <i>Lex Romana Visigothorum</i>
527-565		Justinian I	
528			First Justinian Code

CHRONOLOGICAL TABLE

Chronological table *contd*

	<i>General</i>	<i>Political</i>	<i>Legal</i>
533			Introduction of Digest and Institutes
534			Introduction of second Code
535-555			Novels
553	Parts of former West Roman empire re-conquered		
554			Justinian's legislation introduced into Italy
564-578	Italy conquered by the Lombards	Justin II	<i>Collectio Graeca</i> (Novels)
578-582		Tiberius II	
886-911		Leo VI (the Wise)	Basilica
11th-13th centuries			Glossators in Bologna: Imerius (1100), Accursius and Azo (±1230)
1453	Constantinople captured by Turks: end of East-Roman empire		

NOTES

PART I FROM MONARCHY TO EARLY REPUBLIC (–367 BC)

1 General outline

- 1 According to E.Gjerstadt, *Early Rome. The Written Sources*, Lund, Svenska Institutet i Rom, 1973, pp. 35–6, there is archaeological evidence that the Latins did not immigrate into Latium all at one time, forming an organized ethnic unit, but they arrived in at least two separate groups. See for the history of Latium and Rome also M. Gary and H.H.Scullard, *A History of Rome*, 3rd edition, London, Macmillan, 1975, pp. 31–94.
- 2 M.Pallottino, *The Etruscans*, translation from the Italian by J.Cremona, ed. D.Ridgway, revised and enlarged, London, Allen Lane, 1974, p. 79. See for the Etruscan language the more recent work by G. and L.Bonfante, *The Etruscan Language*, Manchester, Manchester University Press, 1983.
- 3 In Etruscan law, for instance, adoption took place when the adoptive mother breastfed the adoptive child; according to U.Manthe, ‘Etruskisches Recht. Die Rechtsordnung einer Minderheit’, in *Minderheiten im Mittelmeerraum*, ed. K.Rother, Passau, Passavia Universitätsverlag, 1989, pp. 22–4, this ritual shows that the Etruscans originally had a matrilinear society.
- 4 The power of a *pater familias* over his wife and, if he had sons who were married, over their wives, was called *manus*, children and grandchildren were in *the potestas* of *the pater familias*. See A.Watson, *Rome of the XII Tables*, Princeton, Princeton University Press, 1975, pp. 47–51.
- 5 For instance, Gaius Julius Caesar belonged to the *gens* Julia, Gaius being his *praenomen* or personal name and Caesar the name of his family within the *gens*.
- 6 E.Ferenczy, *From the Patrician State to the Patricio-Plebeian State*, Amsterdam, Hakkert, 1976, pp. 15–16 gives an overview of the many theories formulated on this subject. According to Ferenczy the current view is that the patricians were the descendants of the early nobility.

- 7 This was probably not a restatement of an existing law but was an innovation whereby the patricians sought to keep well-to-do plebeians out of the senate; cf. Watson, *ibid.*, pp. 20–3 with references.
- 8 It is obvious that in this way the vote could easily be manipulated, cf. E.S.Staveley, *Greek and Roman Voting and Elections*, Ithaca, Cornell University Press, 1972, pp. 193–5. This practice became particularly important during the civil war at the end of the republic. See for the relationship between patron and *clientes* also Watson, *ibid.*, pp. 98–110.
- 9 G.Diósi, *Ownership in Ancient and Preclassical Law*, Budapest, Akadémiai Kiadó, 1970, pp. 19–42.

2 The state

- 1 The main function of the *comitia curiata* then became to confirm the right of a newly elected magistrate to take auspices in his official capacity and on behalf of the Roman people. See Staveley, *ibid.*, pp. 121–3.
- 2 Th. Mommsen, *Römisches Staatsrecht* I, Leipzig, Duncker & Humblot, 1887 (reprinted Graz, Akademische Druck-und Verlagsanstalt, 1971), pp. 6–7. Mommsen's view is supported by, for instance, H.F.Jolowicz and B.Nicholas, *Historical Introduction to the Study of Roman Law*, 3rd edition, Cambridge, Cambridge University Press, 1972, p. 30, and Cary and Scullard, *ibid.*, p. 62, but is rejected by, for instance, W. Kunkel, 'Magistratische Gewalt und Senats Herrschaft', *ANRW* I, 2, Berlin and New York, De Gruyter, 1972, pp. 3–22, particularly p. 14. F.Wieacker, *Römische Rechtsgeschichte* I, Munich, Beck, 1988, pp. 223–4 rejects Mommsen's theory regarding the consuls, but does not make it clear to whom the power of the king was transferred.
- 3 For a description of the republican constitution, see Jolowicz and Nicholas, *ibid.*, pp. 17–57.
- 4 Servius Tullius imported this new technique from Greece. At the beginning of the fourth century this hoplite army underwent two substantial changes which eventually made it possible for the Romans to conquer the Mediterranean world. On this subject see L.Keppie, *The Making of the Roman Army*, London, Batsford, 1984, pp. 17–19.
- 5 Nevertheless women, particularly those from upper-class families, sometimes did have an influence on politics; cf. H.P.Hallet, *Fathers and Daughters in Roman Society: Women and the Elite Family*, Princeton, Princeton University Press, 1984. The many recent publications about women in Roman antiquity deal mainly with their position within the family, cf. J.Gardner, *Women in Roman Law and Society*, London and Sydney, Croom Helm, 1986; S.Dixon, *The Roman Mother*, London and Sydney, Croom Helm, 1988 and S.Treggiari, *Roman Marriage*, Oxford, Clarendon Press, 1991.

3 The law

- 1 On early Roman law, see Jolowicz and Nicholas, *ibid.*, pp. 86–190 and Wieacker, *ibid.*, pp. 185–340.
- 2 The details relate mainly to certain restrictions on display at funerals in table 10, which according to Cicero, *De legibus*, 2.59 and 64, are taken from the laws of Solon. For further information on this subject, see Wieacker, *ibid.*, pp. 300–4 with references. The XII Tables are studied in a wider context by R. Westbrook, ‘The Nature and Origins of the Twelve Tables’, 52 *105* (1988), pp. 74–121. He believes that the idea of recording the law was brought to Italy by the Phoenicians from the eastern Mediterranean area. He found that the method of recording and the content of the XII Tables bear a close resemblance to the Codex Hammurapi (about 1700 BC), the Ten Commandments (700 BC) and other codifications from that area and that period.
- 3 Livy, *Ab urbe condita*, 3.57.10; Pomponius, D. 1.2.2.4; L. Wenger, *Die Quellen des römischen Rechts*, Vienna, Holzhausen, 1953, p. 56, note 11; according to Wieacker, *ibid.*, p. 294, note 47, however, stone was the most likely material to have been used for the XII Tables.
- 4 R. Schöll, *Leges XII tabularum reliquiae*, Leipzig, Duncker & Humblot, 1868; also in P.F. Girard and F. Senn, *Les lois des Romains*, septième édition par un groupe de romanistes, Naples, Jovene, 1977, pp. 25–73; Schöll’s reconstruction is based on the work of H. Dirksen, *Übersicht der bisherigen Versuche zur Kritik und Herstellung des Textes der Zwölf Tafel Fragmente*, Leipzig, Duncker & Humblot, 1824. English translation of the XII Tables in A.C. Johnson, P.R. Coleman-Norton and F.C. Bourne, *Ancient Roman Statutes*, Austin, University of Texas Press, 1961, pp. 9–13.
- 5 I base this statement on the words of Pomponius in D. 1.2.2.6: ‘...Omnium tamen harum et interpretandi scientia et actiones apud collegium pontificum erant, ex quibus constituebatur, quis quoquo anno praeesset privatis. Et fere populus annis prope centum hac consuetudine usus est’. Most romanists regard this text as corrupt and take the view that already in the early republic the first phase of the procedure took place in front of a magistrate; pontiffs were only involved if they gave a *responsum* (advice) to the magistrate or to one of the contending parties. See for instance F. Schulz, *History of Roman Legal Science*, Oxford, Clarendon, 1946, p. 7; M. Kaser, *Das römische Zivilprozessrecht*, Munich, Beck, 1966, p. 22; Jolowicz and Nicholas, *ibid.*, pp. 88–9; Wieacker, *ibid.*, pp. 313–14. The words ‘quis...praeesset privatis’ are generally translated as ‘who should give advice to citizens’. Various translators of the Digest, however, e.g. *Das Corpus Iuris in’s Deutsche übersetzt von einem Vereine Rechtsgelehrter*, in C.E. Otto, B. Schilling and C.F.F. Sintenis (eds), I, Leipzig, Focke, 1839, p. 226; S.P. Scott, *The Civil Law* I, Cincinnati, The Central Trust Company, 1932 (repr. New York, AMS Press, 1973), p. 214; *The Digest of Justinian*, Latin text edited by Theodor Mommsen with the aid of Paul Krüger; English translation edited by Alan Watson, I, Philadelphia, University of Pennsylvania Press, 1985,

ad locum, rendered these words by ‘who should be in charge of private disputes’. To me this seems the correct translation. F.De Martino, *Storia della costituzione romana* I, Naples, Jovene, 1972 (2nd edition), pp. 23–52 also maintained that the pontiffs were the predecessors of the praetor, but on different grounds.

- 6 Unlike lawyers nowadays, these ‘lawyers’ did not act in a professional capacity and they did not represent their ‘clients’ at a trial. Generally they were leading citizens who occasionally assisted persons who could not speak for themselves or who had difficulty in doing so and persons whose words would have little effect because they belonged to a low social class (*clientes*). It was not until the time of the later republic that other people began to make use of legal assistance. On this subject see section 6.4.3.
- 7 The procedure was as follows. As in the case of a real lawsuit concerning ownership, the two parties brought the object to the pontiff (or praetor). The transferee, holding the object, asserted that he was owner. The pontiff (praetor) then asked the transferor whether he made a similar claim. When the transferor remained silent or said ‘no’, the pontiff (or praetor) adjudged the object to the transferee.

PART II THE LATE REPUBLIC (367–27 BC)

4 General outline

- 1 M.Cary and H.H.Scullard, *A History of Rome*, 3rd edition, London, Macmillan, 1975, pp. 84–96 and 113–68.
- 2 Cf. H.F.Jolowicz and B.Nicholas, *Historical Introduction to the Study of Roman Law*, 3rd edition, Cambridge, Cambridge University Press, 1972, pp. 78–85.
- 3 In addition, a senator who was governor of a province could increase his wealth by extorting money from the inhabitants; however, in 149 BC it became possible for the inhabitants to sue him via a special procedure in order to get their money back: see section 6.3.
- 4 Regarding the number of slaves in relation to the population as a whole, see K.Hopkins, *Conquerors and Slaves*, Cambridge, Cambridge University Press, 1978, pp. 99–106, part 101.
- 5 S.Treggiari, *Roman Freedmen during the Republic*, Oxford, Clarendon, 1969, p. 245 demonstrates how important the freedmen were for the development in the arts and in industry and even for the change from republicanism to principate.
- 6 See Cary and Scullard, *ibid.*, pp. 186–90 concerning agriculture, trade and industry in the second century BC.
- 7 See Cary and Scullard, *ibid.*, pp. 250–1.

5 The state

- 1 See Jolowicz and Nicholas, *ibid.*, pp. 17–57; Cary and Scullard, *ibid.*, pp.177–81.

- 2 This basically respectable ancient cult, in which only women participated, had got out of control. Shortly after the second Punic war, when the state was still very vulnerable, the cult won many supporters in Rome. During the meetings, which were attended by a mixture of male and female citizens, freed men and women and slaves, all kinds of offences were committed in an atmosphere of secrecy. The senate thereupon decided to reduce the sect to its traditional form and decreed that those who had committed serious offences should be put to death: more than 4000 people were killed, not only in Rome but also in other parts of Italy. For several centuries these measures were cited as an example of exceptionally harsh action on the part of the senate; cf. Cicero, *De legibus*, 11.37 and Livy, *Ab urbe condita*, 39.8–19.
- 3 According to Pomponius, D. 1.2.2.6. The prevailing view, however, is that it was the consuls who had fulfilled the tasks which were now entrusted to the praetor; cf. Jolowicz and Nicholas, *ibid.*, p. 48 and F. Wieacker, *Römische Rechtsgeschichte*, Munich, Beck, 1988, pp. 429–34. On the other hand, A. Watson, *The Law of the Ancient Romans*, Dallas, Southern Methodist University Press, 1970, pp. 24–5 thinks that until 367 BC it was the pontiffs who were in charge of the supervision of civil litigation.
- 4 As from 242 BC several more praetors were appointed; their task was to govern the newly conquered territories. The first one was appointed for Sicily. In 227 BC another one was appointed for Sardinia and Corsica, and in 197 BC two were appointed for the two Spanish provinces. In the second century it became customary for the provinces to be governed by ex-magistrates; cf. Cary and Scullard, *ibid.*, p. 172.
- 5 Cary and Scullard, *ibid.*, pp. 203–312. See also P.A. Brunt, *The Fall of the Roman Republic and Related Essays*, Oxford, Clarendon, 1988.
- 6 The most well-known rebellion of slaves is the one led by Spartacus which began in Capua in 73 BC and ended in 71 BC in the south of Italy. See Cary and Scullard, *ibid.*, p. 242. Z. Yavetz, *Slaves and Slavery in Ancient Rome*, New Brunswick, Transaction Books, 1988, pp. 83–112 offers in an English translation a complete collection of the Greek and Latin sources that deal with the great slave rebellions in the second and first centuries BC; for the sources dealing with the war against Spartacus, see *ibid.*, pp. 83–112.
- 7 Cf. A.H. Bernstein, *Tiberius Sempronius Gracchus. Tradition and Apostasy*, Ithaca and London, Cornell University Press, 1978.

6 The law

- 1 For a general survey, see A. Watson, *Law Making in the Roman Republic*, Oxford, Clarendon, 1974; Jolowicz and Nicholas, *ibid.*, pp. 191–320; Wieacker, *ibid.*, pp. 388–675.
- 2 The term *ius honorarium* dates from the second century AD; the word *honor* refers to the fact that the praetor, like the other magistrates, did not receive any salary during the year he was in office. Regarding the terms *ius honorarium* and *ius civile* see the article with that title by M. Kaser, in 52, 101 (1984), pp. 1–114.

- 3 The term legal science is a rather vague and modern term—it dates from the nineteenth century—but it can be used in this connection because the writings of the Roman jurists formed the basis for later European legal science.
- 4 The sources do not agree about when and how the *leges* and plebiscites acquired the same status.
- 5 Th.Mommsen, *Römisches Staatsrecht*, 3rd edition, Leipzig, Duncker & Humblot, 1887 (reprinted Graz, Akademische Druck-und Verlagsanstalt, 1952), pp. 163–4, and *Römisches Strafrecht*, Leipzig, Duncker & Humblot, 1899 (reprinted Graz, Akademische Druck-und Verlagsanstalt, 1955, and Darmstadt, Wissenschaftliche Buchgesellschaft, 1961), pp. 56–7; A.H.M.Jones, *The Criminal Courts of the Roman Republic and Principate*, Oxford, Blackwell, 1972, pp. 1–39.
- 6 Particularly by J.L.Strachan-Davidson, *Problems of the Roman Criminal Law I*, Oxford, Clarendon, 1912, pp. 138–40, and by W.Kunkel, ‘Prinzipien des römischen Strafverfahrens’, in *Symbolae David I. Leiden*, Brill, 1968, pp. 111–33=*Kleine Schriften zum römischen Strafverfahren und zur römischen Verfassungsgeschichte*, Weimar, Böhlau, 1974, pp. 11–31.
- 7 B.Santalucia, *Diritto e processo penale nell’antica Roma*, Milan, Giuffrè, 1989, pp. 31–89.
- 8 An important innovation was the introduction of the *legis actio per conditionem* for the recovery of definite sums of money or definite things. Now it was no longer necessary for the parties concerned to make a *sacramentum* (or bet) in front of the praetor concerning the righteousness of their claim or defence so that it also became possible for poor litigants to take part in civil litigation.
- 9 For instance the case of Attia Viriola described by one of the advocates, Pliny the Younger, in his letter VI 33; for a juridical commentary on this letter see J.W.Tellegen, *The Law of Succession in the Letters of Pliny the Younger I*, Zutphen, Terra, 1982, 108–18.
- 10 See G.Kennedy, *The Art of Rhetoric in the Roman World (300 BC-AD 300)*, Princeton, Princeton University Press, 1972, p. 25.
- 11 This is very clear from some of the speeches of Cicero relating to the *interdictum quod vi aut clam*, namely the *Pro Tullio* and the *Pro Caecina*; see in this connection B.Frier, *The Rise of the Roman Jurists*, Princeton, Princeton University Press, 1985, and the review of this book by A.Watson in the *Michigan Law Review*, 85 (1987), pp. 1071–82.
- 12 See on this subject also R.A.Baumann, *Lawyers in Roman Republican Politics. A Study of Roman Jurists in their Political Setting, 316–82 BC*, Munich, Beck, 1983.
- 13 D. 35.1.73; on this matter, see M.Kaser, *Das römische Privatrecht I*, 2nd edition, Munich, Beck, 1971, p. 54.
- 14 Regarding this *cause célèbre*, see F.Wieacker, ‘The Causa Curiana and Contemporary Roman Jurisprudence’, in *The Irish Jurist*, new series, 2 (1967), pp. 151–64. See also J.W.Tellegen, ‘Oratores, Iurisprudentes and the “Causa Curiana”’, in *RIDA*, 3rd series, 30 (1983), pp. 293–311 with a different and more convincing interpretation.

- 15 Cicero, *De oratore*, 2.142 tells us that Cato and Brutus used to mention the names of the parties as well, but he is happy to say that this is no longer done.
- 16 For a reconstruction of the works of the republican jurists see O.Lenel, *Palingenesia iuris civilis*, 2 vols, Leipzig, Tauchnitz, 1889 (reprinted Graz, Akademische Druck-und Verlagsanstalt, 1960), *passim*.

PART III THE PRINCIPATE (27 BC-284)

7 General outline

- 1 M.Cary and H.H.Scullard, *A History of Rome*, 3rd edition, London, Macmillan, 1975, pp. 331–450, *passim*.
- 2 A.N.Sherwin-White, *The Roman Citizenship*, 2nd edition, Oxford, Clarendon, 1973, pp. 221–394.
- 3 H.F.Jolowicz and B.Nicholas, *A Historical Introduction to the Study of Roman Law*, 3rd edition, Cambridge, Cambridge University Press, 1972, pp. 350–2.
- 4 R.P.Sailer, *Personal Patronage under the Early Empire*, Cambridge, Cambridge University Press, 1982.
- 5 See R.Syme, *The Augustan Aristocracy*, Oxford, Clarendon, 1986. He describes how the old nobility, reascent after years of civil war, went down in the embrace of the dynasty, itself from the outset an aristocratic nexus (text from jacket).
- 6 However, as from the second century senators from the provinces were obliged to invest one quarter of their capital in property in Italy, so in a formal sense the senate could still be regarded as the organ of the Roman and Italian aristocracy even if it consisted mainly of persons from the provinces.
- 7 Regarding the transport of food to Rome, see A.J.B.Sirks, *Food for Rome*, Amsterdam, Gieben, 1991. On the functioning of Rome as a city, see O.F.Robinson, *Ancient Rome: City Planning and Administration*, London and New York, Routledge, 1992.
- 8 Cary and Scullard, *ibid.*, pp. 377–82.
- 9 According to P.A.Brunt, 'Publicani in the Principate' in *Roman Imperial Themes*, Oxford, Clarendon, 1990, pp. 354–432.

8 The state

- 1 Cary and Scullard, *ibid.*, pp. 283–312. The most famous book on this subject is undoubtedly by R.Syme, *The Roman Revolution*, Oxford, Clarendon, 1939, who considers Augustus as the corrupter and destroyer of the republic. K.Raaflaub and M.Toehler (eds), *Between Republic and Empire*, Berkeley, Los Angeles and Oxford, University of California Press, 1990, try to give a more balanced and up-to-date account of Augustus and his principate.
- 2 This had been done by other leaders before him and was in fact a variation of the traditional *clientela-relationship*.

NOTES

- 3 Cary and Scullard, *ibid.*, pp. 315–30.
- 4 Regarding the steady detachment of the emperor from the republican institutions of the city of Rome, see F.Millar, *The Emperor in the Roman World*, Ithaca, New York, Cornell University Press, 1977, *passim*. For a biographical survey of the Roman emperors, see M. Grant, *The Roman Emperors. A Biographical Guide to the Rulers of Imperial Rome 31 BC-476 AD*, New York, Scribner, 1985.
- 5 See R.J.A.Talbert, *The Senate of Imperial Rome*, Princeton, Princeton University Press, 1984.
- 6 See Jolowicz and Nicholas, *ibid.*, pp. 326–40.
- 7 It now became customary not to appoint the two consuls for a whole year but to replace them once or several times within the year by other so-called *suffecti*; the first consulate of the year, however, remained the most important one, because the year was still referred to by the name of the first two consuls.
- 8 Cary and Scullard, *ibid.*, pp. 338–9, 448–9, and 492–3.

9 The law

- 1 Jolowicz and Nicholas, *ibid.*, pp. 353–420; see also ANRW II, 13 (1980), 14 (1982) and 15 (1976) containing essays on a variety of aspects of classical Roman law.
- 2 It is certain that they stipulated that all unmarried men aged between 25 and 60 and all unmarried women aged between 20 and 50 were more or less excluded from bequests made via wills and legacies: they could only inherit from next-of-kin; they were also forbidden to attend games organised by the government. People who were married but had no children could only receive half of what was left to them in a will. On the other hand, people who had children were favoured in various ways. In addition, these laws stipulated that members of the senatorial aristocracy could not legally marry manumitted women, i.e. former slaves.
- 3 According to Gaius, *Inst.* 1.157 and U.E. 11.8; see on this subject J. F.Gardner, *Women in Roman Law and Society*, London and Sydney, Routledge, 1986, pp. 14–20.
- 4 The *oratio Severi* stipulates that any (invalid) gift to a husband/wife becomes valid when the donor dies, unless the latter has cancelled the gift.
- 5 Tacitus, *Annales*, 14.42–45 describes how in the year 61 the city prefect Pedanius Secundus had been murdered by one of his 400 slaves and how the jurist Gaius Cassius pleaded successfully in the senate for full application of this senatorial decree. The SC *Silanianum* was still applied even at the beginning of the second century; cf. Pliny the Younger, *Epistula*, 3.14 on the murder of Larcius Macedo and *Epistula*, 8.14 on the death of Afranius Dexter.
- 6 Cf. D. 16.1.2.1. See on this subject Gardner, *ibid.*, pp. 75–6 and 234–5; on p. 234 Gardner erroneously suggests that the praetor could moderate the effect of the SC *Velleianum* by granting an exception to

- the creditor. This cannot, however, be correct because the creditor was a plaintiff and could not be granted an exception. It was the woman who was granted an exception when she had acted contrary to the SC *Velleianum* and was sued by her creditor for the money.
- 7 The SC *Tertullianum* under Hadrian improved the successory position of the mother with regard to the inheritance of her child; the SC *Orfitianum* (of 178) declared that children were the first to succeed to the estate of their mother. S Dixon, *The Roman Mother*, London and Sydney, Groom Helm, 1988, pp. 52–5 explains that these decrees only formalized an existing practice.
 - 8 Cf. Ulp. D. 29.1.1. By the end of the principate most of the formalities relating to the making of a valid will were dropped so there was no longer any justification for the continued existence of soldiers' wills as a special category. See on soldiers' wills in the time of Diocletian, O. E. Tellegen-Couperus, *Testamentary Succession in the Constitutions of Diocletian*, Zutphen, Terra, 1982, pp. 44–8.
 - 9 For the development of criminal law in that period see also the recent monograph by B. Santalucia, *Diritto e processo penale nell'antica Roma*, Milan, Giuffrè, 1989, pp. 91–133 with sources and bibliography.
 - 10 For instance, he declares in the constitution in which he proclaimed the Digest (const. *Tanta*, 18) that the senate gave Emperor Hadrian and his successors the task of adjusting the edict when necessary, but according to the Greek version of this constitution Hadrian entrusted the task to the magistrates.
 - 11 We can, however, make some assumptions. First, the task assigned to Julian must have related not only to the edict of the praetor *urbanus*, as is mentioned in the sources, but also to the edict of the praetor *peregrines* and that of the curule aediles; otherwise these magistrates would have retained a greater degree of freedom than the praetor *urbanus*. What is certain is that Julian introduced one new clause, in the area of the law of succession; since the juridical literature of the time refers to this clause as *nova clausula Juliani* it is probable that Julian did not add many new clauses. Finally, it is unlikely that Julian significantly altered or adapted the system and the terminology of the edict—although this is difficult to demonstrate.
 - 12 O. Lenel, *Das Edictum perpetuum. Ein Versuch seiner Wiederherstellung*, 3rd edition, Leipzig, Tauchnitz, 1927 (reprinted Aalen, Scientia, 1956).
 - 13 In certain cases they could refuse to deal with a case of appeal, for instance when the accused appealed against the verdict in order to delay its execution whereas the verdict was based on his own confession; in the Middle Ages this rule (*confesses non appellat*) again became valid law in continental Europe.
 - 14 In one letter (*Epistula*, 4.9) he explains how he found the arguments for his speech; it is striking that he exactly followed the rules laid down by his tutor, Quintilian. Perhaps it should be mentioned that Pliny has no collection of opinions to his name, so he is not regarded as a jurist.
 - 15 The subject has been dealt with since 1678, but the first monograph is

- by H.E.Dirksen, *Beitrdge zur Kunde des römischen Rechts. Erste Abhandlung: Ueber die Schulen der römischen Juristen*, Leipzig, Duncker & Humblot, 1825. The most recent monograph on this subject is by G.L.Falchi, *Le controversie tra Sabiniani e Proculiani*, Milan, Giuffrè, 1981 with bibliography.
- 16 Most recently F.Wieacker, 'Respondere ex auctoritate principis', in J. A.Ankum, J.E.Spruit and F.B.J.Wubbe (eds), *Satura Roberta Feenstra Oblata*, Fribourg, Switzerland, Fribourg University Press, 1985, pp. 71–94 with sources and bibliography.
 - 17 J.W.Tellegen, 'Gaius Cassius and the Schola Cassiana in Pliny's Letter 7, 24, 8', in *SZ* 105 (1988), pp. 263–311, particularly pp. 278–87.
 - 18 Vespasian, for example, wrote a letter to the Vanacini in Corsica telling them he had written to his procurator and had sent his surveyor to solve the controversy between them and the Mariani about the boundary between their land; cf. S.Riccobono (ed.), *FIRA I*, Leges, 2nd edition, Florence, Barbèra, 1968, pp. 419–20.
 - 19 See E.Posner, *Archives in the Ancient World*, Cambridge, Mass., Harvard University Press, 1972, pp. 192–205. The rescripts were not collected until the end of the third century.
 - 20 B.Kübler, *Geschichte des römischen Rechts*, Leipzig, Dreichertschen Verlagsbuchhandlung, 1927 (reprinted Aalen, Scientia, 1979), pp. 424–33, particularly p. 428. D.Liebs, 'Rechtsschulen und Rechtsunterricht im Prinzipat', in *ANRWII*, 15 (1976), pp. 197–286 distinguishes between elementary and higher education in law, and assumes that the latter was given by the jurists in the law-schools. However, there are no sources to prove this hypothesis.
 - 21 We shall discuss the way in which the Digest was compiled in Part IV.
 - 22 O.Lenel, *Palingenesia iuris civilis*, 2 vols, Leipzig, Tauchnitz, 1889 (reprinted Graz, Akademische Druck-und Verlagsanstalt, 1960, with a supplement by L.E.Sierl).
 - 23 Regarding classical Roman law, see M.Kaser, *Das römische Privatrecht I*, 2nd edition, Munich, Beck, 1971; see also W.W.Buckland and P. Stein, *A Text-Book of Roman Law from Augustus to Justinian*, 3rd edition, Cambridge, Cambridge University Press, 1963, reprinted with corrections and an addition to the bibliography, 1975.
 - 24 Cf. H.L.W. Nelson, *Überlieferung, Aufbau und Stil von Gai Institutiones*, Leiden, Brill, 1981, p. 78.
 - 25 See in particular W.Kunkel, *Herkunft und soziale Stellung der römischen Juristen*, 2nd edition, Graz, Vienna and Cologne, Böhlau, 1967; see also R.Syme, 'Fiction about Roman Jurists', in *SZ* 97 (1980), pp. 78–104. Since the publication of *ANRW II*, 15 (1976), which contains essays on the jurists Celsus, Julian, African, Pomponius, Gaius, Papinian, Paul and Ulpian, a few new monographs have been published; they will be mentioned with the jurists whom they concern.
 - 26 Cf. R.Astolfi, *I libri tres iuris civilis di Sabino*, Padua, Cedam, 1983.
 - 27 Cf. B.Eckhard, *lavoleni Epistulae*, Berlin, Duncker & Humblot, 1978; U.Man the, *Die Libri ex Cassio des lavolenus Priscus*, Berlin, Duncker & Humblot, 1982.
 - 28 Cf. T.Honoré, *Ulpian*, Oxford, Clarendon, 1982.

PART IV THE DOMINATE (284–565)

10 General outline

- 1 The standard work on this part of Roman history is by A.H.M.Jones, *The Later Roman Empire*, 2 vols, Oxford, Blackwell, 1964. See also the more recent book by M.Cary and H.H.Scullard, *A History of Rome*, 3rd edition, London, Macmillan, 1975, pp. 507–58 with sources and bibliography.
- 2 For a well-nigh complete edition, see *Edictum Diocletiani et Collegarum de pretiis rerum venalium*, 2 vols, ed. M.Giacchero, Genoa, Istituto di storia antica e scienze ausiliarie, 1974.
- 3 Byzantium was a Greek city on the Bosporus; there Constantine founded a new city in 324 and named it Constantinople after himself. Nowadays Constantinople is known as Istanbul.
- 4 H.F.Jolowicz and B.Nicholas, *Historical Introduction to the Study of Roman Law*, 3rd edition, Cambridge, Cambridge University Press, 1972, pp. 433–8.
- 5 Diocletian introduced as tax units the *iugum* (literally, yoke, meaning the quantity of land that could be cultivated by one man and support his household) and the *caput* (literally, head, meaning one man). However, the criteria for fixing the amount of *iugum* or *caput* payable varied from place to place. Concerning the imperial census, see T.D.Barnes, *The New Empire of Diocletian and Constantine*, Cambridge, Mass., and London, Harvard University Press, 1982, pp. 226–37; regarding this and the other economic measures of Diocletian see also S.Williams, *Diocletian and the Roman Recovery*, London, Batsford, 1985, pp. 115–39.
- 6 The *navicularii* were organised in *collegia*, in other words in associations set up by the emperors on behalf of the *fiscus*. In the provinces the *collegia* had existed since the first century, while in Rome they had existed since the third century. Because initially membership of a *collegium* had been financially very attractive, sons often succeeded their fathers; in the second century, when the *collegia* began to lose their lucrative character, membership became compulsory and from the third century it even became hereditary. *Collegia* of this kind were also set up, for instance, for artisans like potters, carpenters, blacksmiths and weavers and for millers, bakers and butchers.

11 The state

- 1 See Williams, *ibid.*, pp. 41–114.
- 2 This abdication is almost unique in Roman history; it can only be compared to the retirement of Sulla in 79 BC. Diocletian retired to his palace at Split on the Dalmatian coast, which was built like a military fort. Parts of this palace can still be seen today.
- 3 On the emperors between 284 and 337, see Barnes, *ibid.*, pp. 3–87.
- 4 See Barnes, *ibid.*, pp. 91–191.
- 5 Regarding the relationship between the Christian church and the

- emperors, see F.Millar, *The Emperor in the Roman World*, Ithaca, New York, Cornell University Press, 1977, pp. 551–607. Concerning the relationship between Christianity on the one hand and the Roman state and pagan religions on the other hand, see numerous articles in *ANRW* II 23, 1 (1979) and 2 (1980), and 25, 1 (1982), 2 (1984) and 3 (1985).
- 6 The definitive separation of the Greek Orthodox church from the Roman Catholic church did not take place until 1054.

12 The law

- 1 The qualification is from F.Schulz, *History of Roman Legal Science*, 2nd edition, Oxford, Oxford University Press, 1953, pp. 262–4. Concerning the law of this period see also M.Kaser, *Das römische Privatrecht* II, 2nd edition, Munich, Beck, 1974; Jolowicz and Nicholas, *ibid.*, pp. 439–515, and W.W.Buckland and P.Stein, *A Text-Book of Roman Law from Augustus to Justinian*, 3rd edition, Cambridge, Cambridge University Press, 1963, reprinted with corrections and an addition to the bibliography, 1975.
- 2 The rescripts were granted in the name of the emperor, but they were actually prepared by the head of the chancery *a libellis*. T.Honoré, *Emperors and Lawyers*, London, Duckworth, 1981, has studied the style of about 2000 rescripts dating from 193 to 305 and has tried to identify at least twenty lawyers who headed this chancery.
- 3 For instance G.E. 2.1.2 mentions ‘obligationes de diversis contractibus scriptae’ (written obligations stemming from various contracts) among the incorporeal things, whereas Gaius himself in that connection had mentioned ‘obligationes quoquo modo contractae’ (obligations incurred in whatever way), cf. *Inst.* 2.14.
- 4 For numerous examples see E.Levy, *West Roman Vulgar Law, the Law of Property*, Philadelphia, American Philosophical Society, 1951, pp. 22–3 and 64–6.
- 5 The standard work on this subject is still M.Kaser, *Das römische Zivilprozessrecht*, Munich, Beck, 1966, pp. 410–529.
- 6 Cf. B.Santalucia, *Diritto e processo penale nell’antica Roma*, Milan, Giuffrè, pp. 135–51 with sources and bibliography.
- 7 H.L.W.Nelson, *Überlieferung, Aufbau und Stil von Gai Institutiones* Leiden, Brill, 1981, pp. 80–96.
- 8 *Theodosiani libri XVI cum constitutionibus Sirmondianis*, ed. Th. Mommsen, Berlin, Weidmann, 1904 (reprinted Dublin and Zürich, 1971).
- 9 Cf. A.H.M.Jones, *op.cit.*, pp. 269–302, who emphasises the first two ambitions.
- 10 Regarding the life of Tribonian, see T.Honoré, *Tribonian*, London, Duckworth, 1978, pp. 40–69.
- 11 Concerning the legislation of Justinian see also the recent work of N. van der Wal and J.H.A.Lokin, *Historiae iuris graeco-romani delineatio*, Groningen, Forsten, 1985, pp. 31–8 with literature.
- 12 F.Bluhme, ‘Die Ordnung der Fragmente in den Pandektentiteln’,

- Zeitschrift für geschichtliche Rechtswissenschaft* 4 (1820), pp. 257–472, reprinted in *Labeo* 6 (1960), pp. 50–96, 235–77, 368–404.
- 13 Largely through a numerical and statistical analysis Honoré, op. cit., pp. 139–86 has tried to extend and complete the work of Bluhme. However, his theory has been refuted convincingly by D.Osier, ‘The Compilation of Justinian’s Digest’, *SZ* 102 (1985), pp. 129–84.
 - 14 The fundamental work on this subject is by M.Kaser, *Zur Methodologie der römischen Rechtsquellenforschung*, Vienna, Cologne and Graz, Böhlau, 1972.
 - 15 For instance, the word *mancipatio* has been automatically altered into *traditio* by the compilers. Because the effects of the *mancipatio* differed from those of the *traditio* and because the compilers did not adapt these effects, this alteration is usually easy to recognise.
 - 16 Cf. E.A.Lowe, ‘Greek Symptoms in a Sixth-Century Greek Manuscript of St Augustine and in a Group of Latin Legal Manuscripts’, in *Didascaliae, Studies in Honor of A.M.Albareda*, New York, Rosenthal, 1961, pp. 277–89 (=L.Bieler (ed.), *Palaeographical Papers, 1907–1965* II, Oxford, Clarendon, 1972, pp. 466–75).
 - 17 A photographic copy of the *codex Florentines* has been published recently, namely *Justiniani Augusti Pandectarum codex Florentinus*, 2 vols, eds A.Corbino and B.Santalucia, Florence, Olshcki, 1988.
 - 18 *Digesta Iustiniani Augusti*, eds Th.Mommsen and P.Krüger, 2 vols, Berlin, Weidmann, 1868–70 (reprinted 1962–3); this is the so-called *editio maior* which includes an extensive critical apparatus. Commonly the *editio minor* or *stereotypa* is used: *Iustiniani Digesta*, eds Th. Mommsen and P.Krüger, *Corpus Iuris Civilis* I (pars 2a), 16th edition, Berlin, Weidmann, 1954 (reprinted Dublin and Zürich, 1973). An English translation has been published recently, cf. *The Digest of Justinian*. Latin text ed. by Th.Mommsen with the aid of P.Krüger, English translation edited by A.Watson, 4 vols, Philadelphia, Penn., University of Pennsylvania Press, 1985.
 - 19 *Iustiniani Institutiones*, ed. P.Krüger, *Corpus Iuris Civilis* I (pars 1a), Berlin, Weidmann, 1872. The Institutes have also been translated into English recently, cf. *Justinian’s Institutes*, translated with an introduction by P.B.H.Birks and G.MacLeod, Ithaca, New York, Cornell University Press, 1987.
 - 20 It is clear that Tribonian c.s. removed constitutions because the Law of Citations is not included in the revised Code. We know, however, from a papyrus containing the index to the first Code that this law had been included in the first Code.
 - 21 *Codex Iustinianus*, ed. P.Krüger, Berlin, Weidmann, 1877. This is the *editio maior* with critical apparatus and introduction. For the *editio stereotypa* see *Codex Iustinianus*, ed. P.Krüger, *Corpus Iuris Civilis* II, 11th edition, Berlin, Weidmann, 1954 (reprinted Dublin and Zürich, 1970).
 - 22 *Novellae*, eds R.Schöll and G.Kroll, *Corpus Iuris Civilis* III, 6th edition, Berlin, Weidmann, 1954.

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