LUISS Guido Carli
Global Law,

Introduction to Roman Law
(First part)

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(Short handbook)

Chapter 1 - History of Roman Law

1) Introduction

To date, we are still regularly referring to Romans by using Latin expressions for instance. When referring to Romans, people usually raise names such as Julius Caesar, Augustus and Nero, or even mention stories of gladiator fights or horse races. Yet, it is less likely that the they would refer to the science of Roman jurists, even though this is an essential contribution of the Roman civilisation. Indeed, the Romans are considered to be the inventors of the science of law, which is one of their most remarkable inventions. Prior to getting into the heart of this point, one must first focus on the historical context surrounding such a remarkable invention.

Traditionally, the history of Roman law is divided into the following five periods:

- Ancient Law (753-280 BCE);
- Pre-classical Law (280-27 BCE);
- Classical Law (27 BCE-284 CE);
- Post-classical Law (284-527 CE); and
- Justinian Law (527-565 CE).

The first three chapters of this *syllabus* are dedicated to the historical and political description of these five periods, as well as an explanation of the various legal changes known by the Roman people throughout those periods.

2) Ancient Law (753-280 BCE)

2.1) Historical and Political Contexts

The period of Ancient Law is that of the beginnings of Rome. According to the tradition, the city was founded by Romulus in 753 BCE. As per the legend of the twins Romulus and Remus, raised by a wolf, Romulus would have killed his brother and founded Rome on the Palatine Hill thereafter. Yet, authors like Livy (Titus Livius) – thanks to whom this legend passed through generations – lived many centuries later. The very existence of Romulus is therefore far to be certain. On this point, archaeological research shows in fact that the Palatine was already inhabited in the 8th century BCE.

At the outset, Rome was just a small agricultural village. Therefore, numerous rules of law from that period can be explained precisely by this rural character of the first Romans. For instance, being a landowner mainly meant owning fields and animals. It is only later that Romans became merchants and that, by the same token, trade tainted Roman law.

Due to this agricultural and rural character, the legal needs were very limited and so were the legal reasoning in Rome. At that period, the Romans thus did not yet distinguish themselves from the other peoples of Antiquity in terms of law. For instance, to settle neighbourhood disputes or inheritance issues, a single magistrate sufficed: the pontiff, who was in charge of justice, religion and morality.

On the political level, the early Rome was a Monarchy and, according to the tradition, the following seven kings would have ruled the city successively:

1. Romulus (753-716 BCE);
2. Numa Pompilius (715-673 BCE);
3. Tullius Hostilius (671-640 BCE);

4. Ancus Martius (640-616 BCE);
5. Tarquin the Elder (616-578 BCE);
6. Servius Tullius (575-535 BCE); and
7. Tarquin the Proud (534-509 BCE).

However, when those Kings became dictators, the Romans understood that the system had to be changed and Rome stopped being a Monarchy to become a Republic. From then on, the worst political crime was to take oneself for the king of Rome, and many Romans were blamed for tempting to do so. The best-known example is certainly that of Julius Caesar.

To avoid the return of tyranny, the Republic of Rome was ruled by two consuls, who were elected for a term of one year which could not be renewed. Each consul was therefore watched by his colleague and none of them could settle permanently in power.

Whilst Rome managed to avoid the risk of tyranny, this was still not enough to ensure civil peace. At that time, Rome was a class society, with its nobility on the one side (i.e. the Patricians) and the 'ordinary' people on the other side (i.e. the Plebeians). Insofar as the Patricians had all rights, the Plebs revolted often.

2.2) Legal Changes

Among the reasons that triggered Plebeians to revolt, there was a pure legal one: the publicity of the laws. Given that Roman laws were not public, the Plebeians were in fact judged under rules of law which were unknown to them. The Plebeians consequently requested that these rules of law be made public.

In response to this request, Rome commissioned – between 451 and 449 BCE – ten magistrates, who were in charge of drafting the law of Rome. Called *Decemviri*, those ten men enacted a law, which then passed to posterity under the name 'Law of the XII Tables'.

This was a first major step in the evolution of Roman law since, from then on, the law did no longer belong to a limited caste of pontiffs. Instead, the whole people could become aware thereof. This marked the start of the obligation to publish laws.

Still today, such obligation of publicity remains essential for the laws to enter into force. For instance, in Belgium, the publication is done through the Belgian Gazette ('*Moniteur Belge'*; '*Belgisch Staatsblad*') and in France through the '*Journal Officiel*'.

Back to the Ancient Rome, the Law of the XII Tables was published in the form of twelve tables displayed on the Roman forum, which constituted the centre of Roman public life (e.g., the market was held on the forum and justice was served there).

As to the substance of the Law of the XII Tables, it must be stressed that such law marks a significant step in our legal life. Indeed, some legislative choices made by the *Decemvirs* still govern our legal life today. This is, for example, the case regarding the way to evidence ownership. To evidence ownership is a complex question by nature. One could obviously try to prove that he/she has acquired something from someone but this does not prove ownership itself. Indeed, to prove ownership, it is required to evidence that the person from whom ownership was acquired was her/himself the owner already. Two and a half millennia later, the problem remains the same and the solution adopted by our law is still dependent on the choices made by the Decemvirs in this Law of the XII Tables, namely that ownership is proven by possession*.

This perfectly shows why the Romans could be that proud of their Law of the XII Tables, which was by the way known by heart by numerous Romans.

Next to the Law of the XII Tables, a second important step was taken in 367 BCE when the urban praetor was created. The urban praetor was the magistrate in charge of addressing disputes between Roman citizens. As a consequence, the pontiff was relieved of this category of disputes and could therefore focus exclusively on religious matters. This new distribution of tasks constituted an essential step towards the secularisation of the law as a clear distinction was explicitly made between religious matters on the one side and human and legal rules on the other side.

At the same time, the magistracies of the censor and the curule aediles were probably created. As for the censors, they were in charge of the census as well as of the censorship of behaviours contrary to morality. As for the curule aediles, they held the police power and, thus, intervened in the organization of games and in the regulation of public markets. Some of the rules adopted by these Roman 'policemen' still govern our sales contracts today (e.g., the rules guaranteeing the buyer that what he has purchased is free from hidden effects).

In addition to these two fundamental breakthroughs, a third important step was taken in terms of procedure in ancient Roman Law. This important step related to the way Roman people could assert their rights in court. According to legend, it is Gnaeus Flavius[@] – a scribe of modest origins – who lies behind the publication of the rules of procedure. He achieved this *tour de force* at the end of the 4th century BCE. More concretely, these procedural rules were in the form of formulas, which are stereotyped documents serving both as a starting point and as a guide to the trial. This publication passed to posterity under the name of *ius Flavianum*.

Lastly, ancient Roman law was marked by the adoption of another fundamental law, namely the *Lex Aquilia*. According to the tradition, the adoption of this law dates from 286 BCE but it is now certain that such a date is not exact. Whereas the exact date is still unknown, the form and content of this plebiscite allow us to link this legislation to the Ancient Law.

The name of the law – the *Lex Aquilia* – comes from the magistrate who submitted it to the vote, i.e. the tribune of the plebs *Aquilius*. This piece of law is a masterpiece as it established the principle of tort liability. It was in that frame that, for the first time, Roman jurists associated the three key elements of our law of liability:

- the fault;
- the damage; and
- the causal link between this fault and this damage.

Whilst ancient law is a period during which Roman law evolved slowly, it still distinguished itself very early from the law of other civilizations of Antiquity. This was mainly due to the clear distinction between law and religion, which made Roman law original and innovative. This secularisation of the law was essential. Indeed, if one wants to make a scientific study of it, he/she must be able to criticize the rules, which is hardly thinkable if those rules were attributed to a deity.

3) Pre-classical Law (280-27 BCE)

3.1) Historical and Political Contexts

The period of Pre-Classical Law corresponds to the end of the republican period of Rome. At that time, the Roman farmers became insatiable soldiers, the expansion of Rome continued and went beyond the limits of Italy. This period was essentially marked by the wars between Rome and Carthage over the supremacy of the Mediterranean. These wars against the Carthaginians are called the Punic Wars, in reference to their Phoenician origin.

There were three Punic Wars:

- The first Punic War lasted from 264 to 241 BCE and was maritime.
- The second Punic War lasted from 218 to 202 BCE and left its mark on people's imagination. It is indeed that war that saw Hannibal lead the Carthaginian army on an elephant back: leaving from Spain, the Carthaginians crossed the Alps to attack the Romans from the North and Hannibal sowed trouble and terror throughout Italy. Despite the fact that the Carthaginians won numerous battles, it was Rome that ended up winning the war and repelling the Carthaginians to Africa. Yet, this Roman victory did not prevent the occurrence of an additional war.
- The third Punic war lasted from 149 to 146 BCE and ended with the destruction of Carthage by the Roman army led by Scipio the Emilian; this was intended to give it the *coup de grace*.

At the end of the republican period, profound changes were emerging. The two-headed system of the consulate showed its limits. Crassus, Pompey, and especially Julius Caesar aspired to longer reigns. They thus agreed to divide power between themselves. This was the first Triumvirate. Political collaboration between Crassus, Pompey and Julius Caesar was however proving difficult. This period ended in blood. Octavian became the first Roman Emperor under the name of Augustus. This accession marked a profound change in the political organization of Rome.

The end of the Republic traditionally marks also the end of the pre-classical era of Roman law.

3.2) Legal Changes

At the time of the First Punic War, a new institution besides the urban praetor was created: the peregrine praetor. "Peregrine" means "foreigner living on the Roman soil". Due to the expansion of Rome, the Romans became surrounded by numerous peregrines and commercial contracts between these two were more frequent. Insofar as the law applicable to Romans differed from the one applicable to peregrines, new legal questions arose. A new magistracy, the peregrine praetor, was thus needed.

With respect to the Second Punic War, the Roman victory resulted in important consequences. Whilst such victory brought Spain – which was previously Punic – under Roman domination, it also cost many lives of soldiers which left many orphans. Under the age of fourteen, these orphans were assigned guardians (*tutors*), who were in charge of settling most of the difficulties up to that age. On the other hand, the orphans aged fourteen or more were not given any help and were left to their own devices to manage their assets and their legal life. Such situation entailed risks of abuse. This was the reason why Romans passed the *lex Laetoria*, which was

aimed at helping minors under the age of twenty-five who would be victims of abuses from other unscrupulous Roman citizens. If today the majority has dropped to eighteen, the principles of protection have remained the same as to the ones applicable under the *lex Laetoria*.

In addition, Romans adopted the *lex Aebutia*, which introduced another type of procedure: the formular procedure. More modern, more flexible, such law also gave another role to praetors who were from thereon able to influence the development of law by creating a new body of legal rules called "honorary law" (or *ius honorarium**). Honorary law is opposed to civil law (or *ius civile*), which corresponds to the laws promulgated by the public authority.

During the same period (i.e. around the 2nd century BCE), legal science really took off with the *veteres* – the old men – who are the first real jurists. The first of these *veteres* is Publius Mucius Scaevola@, who is deemed to be one of the founders of civil law. Besides, he exercised political functions as consul, which constituted the highest magistracy of the Roman Republic. His son, Quintus Mucius Scaevola, was also a jurisconsult.

In that respect, it is interesting to note that a jurisconsult was a private individual who studied law for pleasure. This feature was specific to Romans as before them, rules of law were exclusively studied by professionals. These jurisconsults used their experience and knowledge to render important services to their fellow citizens such as gratuitous consultations to help addressing legal problems. Romans were thus a real people of jurists.

In that frame, jurisconsults were also the creators of new legal solutions. For instance, Quintus Mucius Scaevola created the concept of good faith (*bona fides*), which remains an essential legal institution nowadays. Quintus Mucius Scaevola was also the law professor of Cicero@ – who became a universally famous lawyer, and of Aquilius Gallus@ – who became an important jurisconsult.

At the beginning of the 1st century BCE, two important laws were passed: the laws *Iulia* and *Plautia Papiria*, which granted Roman citizenship to the free inhabitants of the Italic peninsula. This was a natural consequence of the geographical expansion of Rome's power.

Moreover, Romans adopted another important law in 67 BCE, namely the *lex Cornelia de iurisdictione*. To understand correctly the content of this law, one must recall the functioning of the formular procedure at that time. Under the formular procedure, formulas were central to the judicial administration. A formula was a text written by the praetor on a wax tablet, whose content depended on the request submitted by the parties to the praetor. Such formula was then given to the judge, who was a mere private individual and not a professional magistrate. The formula had thus to contain an injunction to judge as well as a precise indication of the elements needed to be taken into account to deliver the requested judgment.

Through his edict*, the praetor announced – at the beginning of his office – which formulas he would grant during the year of his office. The novelty brought by the *lex Cornelia de iurisdictione* is that the praetor was bound to comply with the content of his edict. The praetor was therefore required to scrupulously abide by the promises he had made to be elected. Such law brough more stability to the administration of justice in Rome.

One last feature of this period was the drastic increase of jurisconsults. An illustration of this increase is Servius Sulpicius Rufus@. Praetor in 65 and consul in 51 BCE, he was first a pupil

of Aquilius Gallus and then had about ten pupils himself. They were referred as the Servian school. Servius was also prolific in terms of writing, since he is credited with 140 books. In that respect, one must note that what the Romans called *liber* (or book) was in the form of a roll and not a bound book. A bound book was rather called a *codex* (or code), which was much longer than a *liber*.

4) Classical Law (27 BCE – 284 CE)

4.1) Historical and Political Contexts

The period of Classical Law starts at the time the Republic became an Empire with the assassination of Julius Caesar and the accession by Augustus to the reign. Yet, this political rupture should not be overestimated as this modern terminology (i.e. Republic and Empire) does not correspond to the one used by the Romans themselves.

Conscious of the critics raised against Julius Caesar as he took himself for the king of Rome, Augustus was cautious and refrained from upsetting the rules of the Roman Republic. Accordingly, he decided to maintain the two consuls, the censors, the praetors, the pontiffs and the Senate. This was however only appearance as, in practice, Augustus had become all-powerful and exercised power alone by centralizing these three magistracies:

- He was consul perpetually re-elected with a well-chosen colleague;
- He was censor and thus controlled the composition of the Senate; and
- He was tribune of the Plebs and thus benefitted from a significant personal immunity.

In addition, on the death of Lepidus, Augustus became Grand Pontiff. Such concentration of powers is of course totalitarian and far removed from our current vision of democracy. Indeed, the Roman Republic was not a democracy.

The dynasty of the *Severi* ended with the assassination of Severus Alexander in 235 CE. This assassination marked the beginning of a long period of anarchy within Rome, which had lasted until Diocletian's accession, fifty years later.

4.2) Legal Changes

In terms of legal science, the teaching of law is of increasing interest to aspiring jurisconsults.

The Servian school (i.e. the one of Servius Sulpicius Rufus) was succeeded by two new competing and antagonistic schools of law: the one of the Sabinians and the one of the Proculians.

With respect to the Proculian school, it was founded by Labeo[@]. Whilst his political career was successful as he had managed to climb the ladder of the *cursus honorum* one by one, he then found himself opposed to Augustus. Such position was obviously uncomfortable, and even dangerous. Augustus knew, however, how to recognise the value of his political opponents and went as far as to give consulate to Labeo. The latter decided to reject such honour and to renounce to any political ambition. Alternatively, he decided to devote himself to legal science by spending six months a year teaching and spending the other six months in the countryside to write legal works. During his career, Labeo wrote four hundred books, which earned him the general esteem, including from the Emperor even if he was politically opposed.

With respect to the Sabinian school, it was founded by Capito[@]. Unlike Labeo, Capito was close to the Emperor and was, in terms of law, more conservative than Labeo. This might explain why he was less famous among future generations.

The next leaders of these two antagonistic legal schools were Proculus[@] and Sabinus[@], who gave their names to these schools. Despite the undeniable prestige Proculus must have enjoyed, we do not know much about him. This is essentially due to the fact that he decided to devote himself exclusively to his task of jurist and did not undertake any political career. On the other hand, Masurius Sabinus is better known to us notably due to his masterpiece: the *libri tres iuris civilis*, which are three books dedicated to civil law. This masterpiece will be of such significance that any future jurist wishing to comment on civil law would comment on Sabinus.

At the beginning of the 2nd century CE, the antagonism between these two schools weakened. To name but a few, the great jurists of this time are called Celsus[@], Gaius[@], Julian[@], African[@] and Pomponius[@].

Among these few names, there is the greatest professor of Roman law in all history: Gaius. We do not know much about him except his first name. This is therefore extraordinary that Gaius managed to cross generations through his sole name, which is even more true as "Gaius" was a frequent name. Indeed, Julius Caesar's full name is Gaius Iulius Caesar and his first name was usually omitted as it was so frequent. Gaius' course is called "Institutes". This course was revolutionary, especially in respect of its three-parts structure which was transplanted in the Napoleon Code seventeen centuries later.

As for the jurist Julian, he was a contemporary of Gaius and assumed several important functions under the Emperors Hadrian, Antonius Pius and Marcus Aurelius. For instance, Hadrian requested from Julian that he codified the praetor's edict. Until then, the content of the praetor's edict depended on the different praetors, who changed the content over the course of their offices. However, insofar as the Emperors sought to control Rome at all levels, it came as no surprise that they also sought to control such praetor's power. Through the codification of the praetor's edict, Julian gave the edict a final form which could only be modified by the Emperor. This edict's final form was called perpetual edict*. In return of this service, Hadrian decided to double Julian's salary. This shows that the jurisconsults' activities changed from gratuitous services (with the *veteres*) to payable activities, making some jurisconsults high-ranking imperial officials.

Among these high-ranking imperial officials, there were three great Roman jurists from the end of the classical period: Papinian[@], Ulpian[@] and Paul[@]. In terms of political career, these three jurists all served the Emperor Septimius Severus: Papinian was the prefect of the *praetorium*, which is a position that can be compared with our current minister of justice; Ulpian and Paul were his assessors. These latter served in turn as prefects of the *praetorium* under Severus Alexander. In terms of legal legacy, these three Roman jurists have the greatest number of texts that passed through generations. Insofar as classical Roman law is the most sophisticated law, the texts of these classical jurists were discussed for centuries by generations of jurists involved in studying Roman law.

Next to these important legal legacies, it is worth noting that the *constitutio antoniniana** was adopted in 212 CE under the *Severi*, and more precisely under the reign of Antoninus Caracalla. This imperial constitution (*constitutio principis**) granted citizenship to almost all free inhabitants of the Empire, and thus amounted to a massive naturalization operation. Whilst it may echo the *Iulia* ad *Plautia Papiria* laws of the pre-classical period, the *constitutio*

antoniniana pursued less philanthropic goals. Indeed, Caracalla seemed to have pursued political and tax motives instead. The result was however that as of 212 CE, almost all free inhabitants of the Empire were subject to the same Roman law.

The end of the *Severi* dynasty marked the beginning of a certain decline in terms of legal science. On an anecdotical note, it is worth noting that one of Ulpian's pupils under the reign of Severus Alexander was Modestinus@, which may appear emblematic of such decline. With this decline, the classical era of Roman law ended.

5) Late Antiquity Law (284 – 527 CE)

It was the Emperor Diocletian who managed to escape Rome from a long period of anarchy. Diocletian coming from Salona in Illyria (not far from the current city of Split in Croatia), his accession marks the beginning of a shift in the centre of gravity of the Roman Empire. Indeed, Illyria was located at the intersection between the Roman and Greek worlds, not only geographically but also culturally and linguistically.

5.1) Historical and Political Contexts

On the political level, Diocletian reorganised the Empire by inventing the Tetrarchy. He also subdivided the Roman territory into four parts so as to improve its protection against enemy invasions. This subdivision corresponded to the linguistic reality of the region: Latin in the West and Greek in the East. As part of such reorganisation, Diocletian joined Maximian as co-Emperor but Diocletian remained an absolute monarch holding economic and religious control.

On the economical level, Diocletian – eager to stop the severe economic crisis and the accompanying inflation – adopted an edict called the "Edict of the maximum" in 301 CE. The purpose of this Edict was to set a maximum cap, applicable to the whole Empire, for the price of foodstuffs, objects and services. In the same vein, Diocletian introduced the *laesio enormis*, which allowed to annul the sale (*emptio venditio**) of a house when the price obtained by the seller was less than half of the real value of the building. The economic crisis was such that it had pushed starving owners to sell their houses at a low price in order to feed themselves, which the Emperor wanted to prevent.

On the legislative level, the reign of Diocletian saw the introduction of a new type of norms: the compilations of imperial constitutions, which were legislative acts emanating from the Emperors. These compilations were called *Codex Gregorianus* and *Codex Hermogenianus**:

- The Codex *Gregorianus* brings together the imperial constitutions from Hadrian to Diocletian; Gregoranius was probably the name of the individual who was in charge of this compilation;
- The Codex *Hermogenianus* takes up Diocletian's constitutions and completes the previous code; Hermogenianus was a jurist and some of his texts are included in the Digest* of Justinian.

From 303 CE, Diocletian persecuted Christians and Manichaeans. He was the only Emperor to abdicate, which he did in 305 CE. On an anecdotical note, Diocletian – as his health declined – had a palace built for himself near the places of his childhood. This palace is now the centre of the city of Split in Croatia.

5.2) Legal Changes

At the outset of the Post-Classical Law period, the decline in legal science was notable. There were hardly any jurists worth mentioning anymore and legal changes were the responsibility of the imperial chancelleries.

After Diocletian, the next major Emperor was Constantine, who was also from Illyria. With Constantine, the Roman Empire switched from a long polytheistic religious tradition to become Christian. Albeit Christians constituted a small minority among the population, Constantine decided to make Christianity the state religion.

To manage to declare Christianity the state religion of the Roman Empire, Constantine first adopted the edict of Milan in 313 CE to proclaim freedom of worship and put an end to the persecutions of Christians. Then, Constantine declared Sunday as a day of legal rest and convened the Council of Nicaea in 325 CE. This Council – aimed at ending the dissensions between Christian sects – constituted an important moment in the foundation of the Christian Church. Among the decisions taken during this Council, there was the calculation of the date of the feast of Easter, independent of the Jewish Passover: since then, this celebration takes place on the first Sunday after the full moon following the spring equinox.

The Christianity of the Roman state was called into question during the reign of the Emperor Julian. In 361 CE, Julian adopted an edict of tolerance to allow Paganism, Judaism and even other Christian sects. Julian's will was to restore the Roman religion in its polytheistic tradition. He was thus called Julian the Apostate as he renounced to the faith in which he was brought up. However, Julien's reign was too short for this attempt to become a success.

At the end of the 4th century CE, the Emperor Theodosius I – also called Theodosius the Great – removed the Roman polytheists and refused the title of *Pontifex Maximus*. In the same vein, he banned the Olympic Games of 393 CE as the Olympic Games were part of the pagan tradition. It is at that time that the Roman Empire was definitely Christian.

After the reign of Theodosius I, the Roman Empire was divided into the Western and the Eastern Empires, with two different Emperors:

- In the East, the Empire evolved slowly with a Hellenizing influence;
- In the West, the decline was obvious as the Barbarian warlords held the *de facto* power; Alaric, the King of the Visigoths, occupied Rome in 410 CE, and Genséric, the King of the Vandals, looted Rome in 455 CE.

In parallel, the mastery of Roman law was in sharp decline. No more interesting jurisconsults existed in the West and the knowledge of the past jurists' texts was lost as their texts became too difficult to understand.

The Western Emperor Valentinian III adopted an imperial constitution in 426 CE which was called "law of citations*". According to this law, only five jurisconsults could still be cited in court: Gaius, Papinian, Ulpian, Paul and Modestinus.

In the East, Theodosius II adopted this law of citations twelve years later but decided to expand the list of jurisconsults that could be cited in court: in addition to the same five jurisconsults than in the West, the jurisconsults that were cited by these latter could also be cited in court.

Insofar as the knowledge of Roman law was better mastered in the East, there was no need for simplification.

On the legislative level, the imperial constitutions that were adopted after Diocletian had to be compiled in a codex that would pursue the work done with the Gregorian and Hermogenian Codes. As a consequence, Theodosius II compiled the imperial constitutions adopted since Constantine in a *codex Theodosianus**. This codex came into force in the West through a decision from Valentinian III. Despite the separation of the two Empires, legal ties were maintained at the beginning of the 5th century.

The Western Empire officially fell in 476 CE when Odoacer deposed Romulus Augustulus. Somewhat grotesquely, this teenager who was the last Emperor of the West therefore bore the name of both the first King and the first Emperor of Rome.

In legal terms, the Barbarian domination did not immediately mean that the Romans were subject to the law of the barbarians. Indeed, Alaric II – the King of the Visigoths – promulgated an abridgment of Roman law under the name of *Lex Romana Visigothorum*. The purpose of this collection of Roman law, also called the "Breviary of Alaric", was to allow the ancient Romans to continue to apply their law, even under the Visigoth domination.

In a nutshell, the end of the post-classical period of Roman law ended in the East, with Roman law being increasingly subject to Hellenistic influence, and in the West, with Roman law surviving the fall of the Western Roman Empire.

6) Justinian Law (527– 565 CE)

6.1) Legal Changes

Like Diocletian and Constantine, Justinian – the Emperor of the Eastern Empire – was from Illyria, and more precisely from Tauresium, which is located in present-day North Macedonia. Whilst Greek became the *lingua franca* of the Eastern Roman Empire, Latin was still spoken in Illyria and notably by Justinian even if Latin had become a minority and of peasant origin. It was then hard to imagine that Justinian would later become one of the greatest Roman Emperors and certainly the most important legislator of all eras.

At the outset of his reign, Justinian entrusted his legal work to his main legal advisor, Tribonian@, who was from Side (near present-day Antalya in Turkey) and who was probably trained in law in the famous school of Beirut.

The first task that Justinian entrusted to Tribonian and his commission of jurists was the compilation of a code. Pursuing on the tradition started under Diocletian, this Code of Justinian* compiled a new selection of imperial constitutions since the Emperor Hadrian. The Code came into force in 529 CE.

The second task that Justinian entrusted to Tribonian and his commission of jurists was the compilation of the Digest. This time, Tribonian was the chair of the commission, which worked from 530 to 533 CE to complete the task. Unlike the Law of Citations, the Digest selects fragments from the writings of pre-classical and classical jurists and organized such fragments according to the subject dealt with. The Digest also bears the Greek name of "pandektis" (Πανδέκτης) or Pandects, which means "which contains everything". From thereon, only

fragments included in the Digest could be cited in court and could be deemed as the applicable law. The rest definitely belonged to history and lost all its legal validity.

The Digest of Justinian only includes fragments of pre-classical and classical law, and not fragments from postclassical law which form part of the Code of Justinian. Classical law was considered to be the most perfected law as it enclosed discussions pertaining to pre-classical times. Therefore, texts from jurists such as Ulpian or Paul often inform us about the positions of previous jurists as far as the *veteres*. The fragments included in the Digest thus regularly provide a summary of four centuries of legal science.

Justinian was aware of the importance to preserve the classical jurisprudence due to its richness and superiority. Yet, the law of the 6th century CE was very different from that of the classical period. The objective was thus to ensure that the fragments compiled in the Digest complied with the law of the 6th century CE. To that effect, Tribonian's commission selected and adapted the classical texts to ensure compliance with Justinian's law. The consequence was that classical texts suffered multiples changes called "falsifications" or "interpolations". Whilst the existence of such interpolations cannot be called into question, it has been difficult to precisely identify them as they are not qualified as such in the Digest.

Two elements can ease the task of identifying the genuine content of the original classical text:

- The hurry in which the compilers worked; as they completed their work in only three years, inconsistencies were made in the Digest;
- The respect shown by the compilers towards the classical jurists; compilers avoided interpolating fragments even if incoherent; this is notably the case when elements pertaining to the formal procedural can be identified in the Digest, whereas such procedure was abolished at Justinian's times.

In 533 CE, Justinian also issued his Institutes. He instructed Tribonian, Theophile[@] and Dorotheus[@], to write a new handbook of law called to replace the Institutes of Gaius, which became outdated. Yet, Justinian's Institutes are essentially an update of Gaius' handbook since there are many identical points. The peculiarity of Justinian's Institutes is that they were promulgated as a law, which meant that this handbook could be cited in court, unlike Gaius' Institutes.

Due to the changes implied by the promulgation of the Digest and the Institutes, the Code had to be reshuffled to ensure consistence. A new version was therefore promulgated in 534 CE, which is the only version of Justinian's Code that passed through generations.

After 534 CE, Justinian continued to promulgate imperial constitutions, which were not subject to an official and separate collection but rather to private compilations called the Novels of Justinian. These constitutions were written in Greek, the *lingua franca* of the Eastern Empire. Latin became the ancient language of jurists, useful to understand the Code, the Digest and the Institutes but was, for the rest, relegated to the history.

6.2) Historical and Political Contexts

Justinian's army commander was Belisarius. The Emperor not only wanted to restore the legal greatness of Rome but also wanted to reconstitute its territory.

To that end, territories occupied by the Barbarians had to be reconquered. These wars of reconquest notably enabled Justinian to retake Africa from 535 CE and Italy in 553 CE. However, the Lombards managed to take over Italy from 568 CE (i.e. 3 years only after Justinian's death).

Despite a brief Roman presence in Italy, this was sufficient for Justinian to make his law applicable to Italians through the enactment, in 554 CE, of the edict of the Pragmatic Sanction. This allowed the Digest to not to fall into oblivion and, more generally, Roman law to be given a second life. Yet, the work of the Digest's compilers resulted in truncated versions of Roman law. Indeed, the selection made among the classical jurisprudence implied that the texts not selected were subsequently lost. For instance, the works of Ulpian, Proculus and Labeo are no longer known to us except insofar as they were included in the Digest.

On an anecdotical note, it is worth noting that Justinian left an important architectural heritage: the Basilica of Saint Sophia in Constantinople and the Basilica of San Vitale in Ravenna, which provides the most famous portrait of the Emperor.

SUMMARY TABLES

1) Ancient Law

Dates	Political facts	Sources of private law	Science of private law
753	Foundation of Rome: ROYALTY		The pontiffs
510 - 509	REPUBLIC		
451 - 449	The Decemvirs	Law of the XII Tables (*Lex XII Tabularum*)	
367	Creation of the urban praetor, the curule aediles and probably the censors		
Around 300			Cn. Flavius, probable start of the profaned jurisprudence
286?		*Lex Aquilia* (damages)	

2) Pre-classical Law

Dates	Political facts	Sources of private law	Science of private law
264-241	First Punic War: start of the expansion policy		
Around 242	Creation of the peregrine praetor		
206	Province of Spain		
Around 200		*Lex Laetoria* (minors)	The *veteres* (jurisconsults of IInd and Ist c. BCE)
133			P. Mucius Scaevola, consul
104			Q. Mucius Scaevola, consul
90-89		*Lex Iulia and lex Plautia Papiria* (Roman citizenship to Italians)	
(106-43)			M. Tullius Cicero
67		*Lex Cornelia de iurisdictione* (observance of the edict: *edictum perpetuum*)	C. Aquilius Gallus, praetor

60-56	1st Triumvirate (Caesar, Pompey, Crassus)		Servius Sulpicius Rufus
48-44	Dictatorship of Caesar		C. Trebatius Testa
43-32	2nd Triumvirate (Antoine, Octave, Lepidus)		Aulus Ofilius Alfenus Varus, consul
30	Province of Egypt		Aufidius Namusa Q. Aelius Tubero Fabius Mela

3) Classical Law

Dates	Political facts	Sources of private law	Science of private law	
	PRINCIPAT (High-empire)		Sabinians	Proculians
27-14 CE	Augustus		Capito	Labeo
14-37	Tibère		Massurius Sabinus	M. Cocceius Nerva
37-41	Gaius (Caligula)		Cassius Longinus	Proculus
41-54	Claude			
54-68	Néron		M. Cocceius Nerva (son)	
69-79	Vespasien			
79-81	Titus		Iavolenus Priscus	
81-96	Domitien		Decline of the antagonistic schools of law	
96-98	Nerva			
98-117	Trajan		Urseius Ferox Neratius Priscus Titius Aristo	
117-138	Hadrian	Codification of the *edictum perpetuum*	Iuventius Celsus (Celsus) P. Salvius Iulianus (Julian) Sextus Pedius	
138-161	Antoninus Pius		Sextus Caecilius Africanus (African) Sextus Pomponius Gaius	
161-169	*Divi fratres* (M. Aurelius + L. Verus)		Ulpius Marcellus Quintus Cervidius Scaevola	
169-177	Marcus Aurelius			
177-180	Marcus Aurelius + Commode			
180-192	Commode			
193-198	Septimius Severus		Aemilius Papinianus (Papinian)	

198-211	Severus + Caracalla		Iulius Paulus (Paul)
211-217	Antoninus Caracalla		Domitius Ulpianus (Ulpian)
212		*Constitutio Antoniniana* (extension of the citizenship to all ordinary peregrines)	Aelius Marcianus
218-222	Élagabal		
222-235	Severus Alexander		Herrennius Modestinus (Modestin)
235-284	Period of anarchy		

4) Post-classical Law or Late Antiquity Law

Dates	Political facts	Sources of private law	Science of private law
	ABSOLUTE MONARCHY (Law-empire)		
284-305	Diocletian and Maximian	*Codex Gregorianus*	
285-305		*Codex Hermogenianus*	Hermogenian
307-337	Constantine		
379-395	Theodosius I		
395	Division between the Eastern Empire (Arcadius) and the Western Empire (Honorius)		
408-450	Theodosius II (East)		
425-455	Valentinian III (West)	426: Law of citations	
438		*Codex Theodosianus*	
474-491	Zénon (East)		
476	Odoacer: end of the Western Empire		
491-518	Anastase (East)		
493-526	Théodoric le Grand (Ostrogoth) (Italy)		
506		*Lex Romana Wisigothorum*	
518-527	Justin (East)		

5) Justinian Law

Dates	Political facts	Sources of private law	Science of private law
527-565	Justinian (East)	*« Corpus Iuris Civilis »*	Tribonian
533		Digest and Institutes of Justinian	Theophile
534		Codex of Justinian	Dorotheus
535-565		Novels	
535-553	War of Goths: Justinian's army retakes Italy from the Ostrogoths		
554		Justinian's law is introduced in Italy	
(886-911)		The Basilica	

Chapter 2 - The sources of Roman law

1) The Law (lex)

In order to understand Roman law, one must study its sources. When attempting to teach the sources of Roman law to his students, Gaius provided the following structure in his Institutes[@]: the laws, the plebiscites*, the *senatus-consultum**, the imperial constitutions*, the edicts* of the magistrates and the answers of jurists.

1.1) The law

Similarly to the plebiscites and the *senatus-consultum*, the law emanates from assemblies. Gaius defines the law to be what the people decide and enact (see Gaius, Institutes, 1.3).

For the people to establish and prescribe their laws, the following formalism had to be followed: a magistrate of the Roman people holding the right of auspice (i.e. the right to consult Jupiter by the observation of the sky or the birds before any important civil or military action) brought together the people in *comitia* (i.e. in deliberative popular assemblies) and then submitted his bill (*rogatio*) to the people, who had the choice to accept or reject it, but in no case to amend it.

The oldest assembly is the *Comitia Curiata*. These assemblies brought together all Roman citizens (Plebeians and members of the Patrician aristocracy) and were structured according to the archaic division of the Roman people. There were thus 30 *curiae*, which were subdivisions of the three primitive tribes.

During the Royal era, the *Comitia Curiata* ratified the designation of the king by voting a law of investiture and, under the Republic, they ratified the election of magistrates. Through this *curiate* law of investiture, which is closely linked to the auspices previously taken by the magistrate when taking his office, the *Comitia Curiata* conferred on the elected magistrate additional legitimacy by making him a *magistratus iustus*, irreproachable in the eyes of the gods as well as in the eyes of the men. In case of unfavourable auspices when entering office, the *Comitia Curiata* could exercise their right to retract to comply with Jupiter's sovereign opinion. From an undefined period (possibly the Second Punic War), the thirty *curiae* were represented by thirty apparitors called lictors. In addition to the *curiate* law of investiture of magistrates, the *curiae* were assigned – both under the Republic and under the Empire – attributions in religious matters, including some public celebrations as well as attributions in family law matters regarding wills and adoptions.

By the end of the Royal era (or at the beginning of the Republic), the centre of gravity in terms of legislative power shifted towards a new assembly, i.e. the *Comitia Centuriata*. Due to the fact that these *Comitia Centuriata* were composed of the people gathered in arms, these assemblies could not meet inside the *pomerium* (the legal-religious limit of Rome) but only outside the city on the *Champ de Mars* (*Campus Martius*) devoted to the God of War.

Since a reform that is traditionally attributed to the King *Servius Tullius* in 578 BCE, but which more probably dates from the 4th century, the *Comitia Centuriata* divided all Roman citizens (i.e. Plebeians and Patricians) into 193 *centuriatae*. These *centuriatae* were hierarchized according to a census logic:

- There were 18 equestrian *centuriatae*, which were composed of the most honourable and rich citizens, as well as of members of the equestrian and senatorial aristocracy;
- There were 5 classes of infantrymen;
- There were *centuriatae* composed of military musicians and engineering craftsmen;

- There were also proletarian *centuriatae*.

Each *centuria* had one vote and each vote was made according to the hierarchical order of the *centuriae*. Therefore, the 18 equestrian *centuriae* voted first, it was then the turn of the 80 *centuriae* of the first class. Thus, if these *centurtae* alone voted the same way, the absolute majority of 98 *centuriae* was reached and the other *centuriae* were no longer called upon to vote.

From this overview, one can observe that the transition from the *Comitia Curiata* to the *Comitia Centuriata* marked an evolution regarding the criterion allowing Roman citizens to pass their laws. Whilst the *Comitia Curiata* were gathered according to the family origins of the Roman citizens, the *Comitia Centuriata* depended on census criteria, which were regularly assessed by public magistrates, called censors, who focused mainly on the fortune but also on civic and moral virtues.

Far from being a democracy, Rome was an aristocratic *res publica* in which power was held by the richest provided however that they served the city through arms, magistracies or priesthoods. There was thus a somewhat geometric conception of equality where rights were proportionate to duties.

The *Comitia Centuriata* passed laws, elected the superior magistrates of the Roman people (praetors, consuls, censors but not the dictators) and judged capital crimes.

By the end of the 4th century BCE, the *Comitia Tributa* were instituted, which were composed of all Romans citizens (i.e. Plebeians and Patricians) grouped by tribes. From 241 BCE, Rome had 35 territorial tribes, divided into 4 urban tribes – which gathered the poorest citizens – and 31 rustic tribes. Such system seemed again to benefit the great landowners.

The *Comitia Tributa* elected the lower magistrates of the Roman people (the quaestors and the curule aediles) as well as the military tribunes of legions. In addition, 17 of the tribes were chosen by lot to take part in the process of appointing the following priests:

- As of the 3rd century BCE, the *pontifex maximus**; and
- As of 104 or 103 BCE, the pontiffs, the augurs and the *uiri sacris faciundis*.

The *Comitia Tributa* could also pass laws and judge crimes punishable by fines.

The creation of permanent tribunals in 149 BCE – the *quaestiones perpetuae* – gradually diminished the judicial role of the *Comitia Centuriata* and *Tributa*.

Under Tiberius, the *Comitia* lost their electoral powers to the benefit of the Senate, whose freedom of choice was restricted to the sole candidates that had not already been recommended by the Prince.

With respect to the legislative power of the *Comitia*, it remained within their competence but under the close supervision of the imperial power. In particular, the *Comitia* were in charge – at least until Domitian and probably until the 3rd century CE – of ratifying, through one or several laws, all the imperial powers of the new Emperor. In practice, such ratification took place without any debate on the measures previously taken by the army and the Senate, as illustrated by the *lex de imperio* of Emperor Vespasian.

1.2) The plebiscite

Gaius defines the plebiscite to be what the plebeians decide and enact (see Gaius, Institutes, 1.3). He further specifies that "Plebeians and people differ in that the people is the whole citizen body, including the patricians; but the plebeians are the citizens without the patricians (…)".

The assembly in charge of voting the plebiscites was the *Concilium Plebis*. This assembly was created in 471 BCE in the context of the struggles between the Plebs and the Patricians. The *Concilium Plebis* was composed of the Plebeians by tribe and met upon convocation by a tribune or aedile of the Plebs (i.e. magistrates without auspices).

As of the *Lex Hortensia* of 287 BCE, the plebiscites had the force of law and were applicable on the entire population, including the Patricians who did not take part in their vote.

Like the *Comitia Tributa*, the *Concilium Plebis* could judge crimes punishable by fines.

1.3) The senatus-consultum

Gaius defines the *senatus-consultum* to be what is "decided and enacted by the Senate; it has the status of an act, although the point has been questioned" (see Gaius, Institutes, 1.4). Literally, the *senatus-consultum* means the opinion of the Senate.

Under the Royalty, the Senate – as the King's council – brought together the *pater familias* of the archaic gentile organization. Then, under the Republic and the Empire, the Senate included former magistrates, which were at the beginning Patricians but then (after 367 BCE) also Plebeians. For a long time, the senators – who sat for life – were 300. Later, they were 600 (under Sylla), 900 (under Caesar) and again 600 (under Augustus).

It was under the Republic that the Senate's power increased. Such power covered foreign policy, budgetary policy and the *auctoritas patrum*. The latter's competence was a right of control, and thus of rejection, of the decisions of the *comitia*. Accordingly, the *comitia* could not decide anything without the Senate's agreement. On the contrary, the plebiscites were not subject to this *auctoritas partum*.

Still under the Republic, the *senatus-consultum* was a mere recommendation made by the Senate to a magistrate. Initially, this recommendation was not binding but became gradually followed by the magistrates, including the Tribunes of the Plebs.

Under the Principate, the *senatus-consultum* became mandatory to end up replacing laws and plebiscites as the assemblies were hardly held. The *senatus-consultum* thus amounted to the main source of legislation.

However, from the *Severes*, the Senate's approval was purely formal. The Senate became a mere chamber of ratification, whereas the genuine legislative source was the *oratio principis*, which was a prayer made by the Prince to the Senate, the latter accepting at the Emperor's request. During the late Antiquity, the Senate remained an advisory body but was rarely consulted.

It had thus been a long time since the law no longer really emanated from the people.

2) The Edicts of the Magistrates

Gaius writes that the "the magistrates of the Roman people have the right to issue edicts. The right is found most fully in the edicts of the two Praetors, Urban and Peregrine (whose jurisdiction in the provinces is exercised by provincial governors)" (Gaius, Institutes, 1.6).

Initially, edict (*edictum* in Latin) meant any communication from a magistrate to the public. Etymologically, *edictum* derives from *ex-dicere*, which shows that such communication was at first oral before being made through posters.

With this communication to the public at the beginning of their office, the magistrates announced how they would organize their office. Insofar as such edict remained in force for the entire year of the magistrate's office, it was called a permanent edict (*edictum perpetuum**). Therefore, should the magistrate encounter an unforeseen question during his office, he would address it through an unforeseen edict called *edictum repentinum*.

Even if consuls also made edicts, the most important edict in the field of private law was the praetor's edict, which thus constitutes the focal point of this section.

The law resulting from the magistrates' edicts is called honorary law or *ius honorarium** and the law resulting, more particularly, from the praetors' edicts is called praetorian law or *ius praetorium*.

For the record, the praetor's edict included the list of *formulae* that would be granted to litigants during the praetor's office. To introduce legal actions, claimants were required to obtain from the praetor a *formula*. This was notably the case for legal actions introduced to claim a property of which the claimant had been dispossessed, to request payment of a sum due to the claimant under a contract or to request compensation for a damage suffered. In addition, the edict specified the conditions under which these *formulae* would be granted or rejected.

The praetor's edicts can thus be compared to a code of procedure as well as to a civil code. Unlike our modern view, the Romans approached legal questions from an angle of procedure and *formulae* with a focus on the action rather than the right at stake.

Even though the permanent edict was specific to each praetor during his own office, the praetor's edict could not radically change from one year to the next. Therefore, in practice, the praetor used to rely on the edict of his predecessor and any innovations were actually quite sparse. Yet, the praetor's edict evolved throughout the years and this flexibility was a cornerstone for the evolution of Roman law. It was indeed thanks to praetorian law that Roman could advance and evolve in a crucial manner. More particularly, the edict served to fill the gaps of civil law and to adapt the latter to the practical needs of the people.

According to the above-mentioned excerpt from Gaius, there were urban and peregrine praetors. The urban praetor had jurisdiction to settle disputes between Roman citizens, whereas the peregrine praetor settled disputes between a Roman citizen and a peregrine or between two peregrines living in Rome. On the other hand, if the conflict occurred in the provinces (i.e. outside of Rome), it was the governor who had jurisdiction to rule upon this conflict. Insofar as Roman law applied wherever there were Romans, provincial governors were needed to ensure the exercise of the jurisdictional power outside of Rome. Such governors also adopted edicts including *formulae*.

As mentioned in Chapter 1, the praetor's edict received a definitive form under Hadrian's reign thanks to Julian's work. From thereon, only the Emperors were entitled to amend the content of the perpetual edict.

3) The Imperial Constitutions

Gaius writes that "an imperial enactment is law which the Emperor enacts in a decree, edict* or letter. It has never been doubted it has the status of an act, since it is by means of an act that the Emperor himself assumes his imperial authority" (Gaius, Institutes, 1.5).

According to such definition, the imperial constitution can take the following three different forms.

The first form is the edicts (*edicta* in Latin). This term "edict" has already been encountered when dealing with the edict of the praetor, the edict of Milan, the edict of tolerance, etc. These occurrences always refer to the edictal power of their author. Through such edicts, magistrates were entitled to make decisions of general scope. With respect to the imperial constitutions, the Emperor exercised a similar jurisdiction. Indeed and considering that the Emperor's absolute power derived from the addition of several magistracies, it was as a magistrate that he could deliver edicts with a general scope.

The second form is the decrees (*decreta* in Latin). The decrees were the judgments issued by the Emperor. For the record, judgments issued within the framework of the formular procedure were not issued by professional magistrates but by private persons at the praetor's request. It was therefore next to this formular procedure that the imperial power to deliver decrees developed. More particularly and insofar as Emperors sought to gain absolute power, they started to assume judicial power by providing Roman litigants with the possibility to appeal judgements issued within the formal procedure. It was thus in those circumstances that the institution of appeal was born. Yet, Emperors authorized their subjects to directly address legal recourses to them, without having first addressed such legal recourses to the praetor. In terms of scope of application, one must bear in mind that – unlike edicts – decrees issued by the Emperor (in first instance or on appeal) had in principle an effect limited to the suit at stake. However, such scope of application could be extended if the decree was published. In that event, a general rule could be implied from the decree since the Emperor's decision could serve as a precedent.

The third form is the letter (*epistula* in Latin). With these letters, the Emperor provided legal consultations to answer questions raised by magistrates or private individuals. When the Emperor was asked to merely clarify a point of law for a magistrate, a simple letter would be sufficient. On the other hand, when the legal consultation was provided to a private individual, precautionary measures had to be observed. Indeed, to avoid any risk of fraud, both the question and the answer had to be on the same medium so that they could not be dissociated. The private individual had thus to leave the necessary space on the parchment to allow the Emperor to write his answer. In that case, the *epistula* was called a rescript (*rescriptum* in Latin). Through these rescripts, the Emperor seized the power of the jurisconsults. Initially, the rescript had an individual scope: the Emperor's opinion was intended to apply to the sole case for which he was consulted. Yet, if such opinion was then subject to a wider publicity, it could serve as a precedent and have a general scope.

In addition to these three forms of imperial constitutions cited by Gaius, there is a fourth one: the mandate (*mandatum** in Latin), through which the Emperor addressed an order to an

official. The mandate can be compared to our current ministerial circulars. Indeed, the purpose of the mandate was to explain to the official how the law had to be applied. The purpose was not to create law but, depending on the circumstances or the addressees of the mandate, the mandate could still have a general scope. Furthermore, mandates could also receive official publicity from the Emperor. This explains why some mandates can be found in postclassical compilations (i.e. the Gregorian, Hermogenian@ and Theodosian codes).

Insofar as these codes include four types of imperial constitutions, one must acknowledge that Emperors definitely possessed legislative power (*cura legum* in Latin). The question remains however from which legal basis Emperors drew such legislative power.

On this point, Gaius writes that "It has never been doubted it has the status of an act, since it is by means of an act that the Emperor himself assumes his imperial authority". This argument is absurd and it is hardly possible that Gaius himself believed in such argument. Indeed, university professors are appointed by decree, but no one has ever considered that this gives them the power to issue decrees.

Historically, the *cura legum* (i.e. power to make laws) was proposed three times to Augustus, who refused it each time by notably stating the following[1] :

"The dictatorship having been conferred on me in my absence and in my presence by the Senate and the people (…) I did not accept it (…) During my sixth consulship (i.e. in 27 BCE), after having extinguished the civil war by virtue of the absolute powers conferred to me by universal consent, I caused the Republic to pass from my power into that of the Senate and of the Roman people. To honour this meritorious act, by *senatus-consultum*, I was appointed Augustus (…) From then on, I prevailed over all in authority, but I did not have more powers than any of my colleagues in my various magistracies".

In this statement, Augustus took a series of precautions to avoid being blamed for acting as a king. Yet, behind these efforts to show a continuity with the Republic and its magistracies, the reality was that Augustus combined of all these magistracies, which gave him absolute power. Whilst Augustus was still careful to preserve the appearances of continuity, his successors would have fewer scruples in assuming their absolute power.

In practice, the Emperor's legislative power was exercised through an *oratio principis* (i.e. the Prince's prayer) addressed to the Senate. The Senate had then to vote for the reform proposed by the Emperor, with understanding that the Senate could not refuse anything to the Emperor. In other words, the Senate had become a mere ratification chamber of the Emperor's requests. Ultimately, the Senate's vote became unnecessary and the *oratio principis* was immediately adopted as a law.

4) The responsa of the Prudentes

Gaius writes that "juristic answers are the opinions and advice of those entrusted with the task of building up the law. If the opinions of all of them agree on a point, what they thus hold has the status of an act; if, however, they disagree, a judge may follow which opinion he wishes. This is made known in a written reply of the Emperor Hadrian" (Gaius, Institutes, 1.7).

[1] The following text is a free English translation of the excerpt *Res gestae*. It comes from an inscription found by Ancyre in which Augustus reminds what he did for the Roman people.

The responses of the *prudentes* were opinions provided by ordinary citizens during legal consultations. These citizens were prudent men (i.e. scholars) who were trained in "jurisprudence" and who studied law out of taste without assuming any official role in the administration of justice. This voluntary activity started during the 2nd BCE with the *veteres*, who were the first *prudentes* (i.e. the first real jurisconsults). With respect to their legal activity, the jurisconsults assumed four types of functions: *agere*, *cauere*, *scribere* and *respondere*.

In the frame of their *agere* function, jurisconsults represented fellow citizens in court as lawyers do today. Quickly, some jurists specialized in this function of representing citizens in court and, by way of consequence, jurisconsults focussed on their other functions, which were more related to legal issues.

In the frame of their *cauere* function (i.e. to be cautious), jurisconsults helped their fellow citizens by advising them on drafting their wills and contracts in order to avoid any future conflicts.

In the frame of their *scribere* function (i.e. to write), which was probably their favourite function, jurisconsults wrote treatises, institutes, digests and commentaries. When commentaries related to civil law, they were called commentaries *ad Sabinum* as Sabinus@ was the author of the standard work on civil law (i.e. *libri tres iuris civilis*). When commentaries related to praetorian law, they were called commentaries *ad edictum** and usually followed the order of the *formulae* of the edict.

In the frame of their *respondere* function, which was the function dealt with by Gaius when discussing the sources of Roman law, the jurisconsults answered questions of law raised by individuals. Usually, the question was raised by a litigant in relation to a legal doubt in a dispute. The jurisconsult then gave an opinion which would be used by the judge to rule upon the dispute at stake. This activity was again a voluntary one. Insofar as such voluntary activity was of high technicality, this again justifies that the Romans be qualified as a people of jurists.

At the time of the *Veteres*, the number of jurisprudents was still relatively small and there was no restriction since this activity was voluntary and exercised by very distinguished citizens. At the time of Augustus, the first restrictions were introduced. In order to limit the possibility to invoke jurisprudents' opinions in court, only the jurisprudents who had been given the *auctoritas* from the Emperor could be cited in court. These restrictions were regularized under the Emperor Tiberius who created the *ius publice respondendi** (i.e. the right to respond officially). According to this new institution, only the opinions given by jurisconsults who had received the *ius publice respondendi* could be invoked in court. This *ius publice respondendi* had a double purpose: on the one side, the objective was to limit the diversity of opinions and avoid contradictions, and, on the other side, it was a means for the Emperor to take control of a power that had been out of his sphere.

Yet, these restrictions had only a limited effect on the unification of the law. Indeed, at the time of Tiberius, the opposition between the Proculians and the Sabinians was in full swing and the *ius publice respondendi* was granted to members of both schools. The judge had therefore to choose between two opposing doctrinal positions.

Under the Emperor Hadrian, a rescript was adopted to specify that the judges' freedom of choice was limited to the sole cases in which the positions of jurisprudents differed from each other. Accordingly, in the event that all jurisprudents agreed, the judge had to follow their

opinion as such opinion had force of law. Jurisprudents were thus able to create laws and their writings were considered as legal sources.

Later, the Law of Citations* introduced new restrictions. By this law, the Emperor of the West, Valentinian III (426 CE), authorized the use of the writings of five jurisconsults only. Among these five jurisconsults, Gaius was both the oldest (2nd century CE) and the least expected. Indeed, Gaius did not receive the *ius publice respondendi* during his lifetime; the Law of Citations can therefore be regarded as a consecration for Gaius. With respect to the other four lawyers, they were more expected.

Next to the limitation of the jurisconsults whose opinions could be cited in court, the Law of Citations also restricted the judges' freedom of choices between the existing opinions. If the jurisconsults disagreed, the judges had to follow the opinion of the majority. In the case of a tie between the diverging opinions, the judges had to follow Papinian's@ position. It was only if Papinian was mute on the point at stake that the judge could freely decide which opinion to follow.

In 438 CE, the application of the Law of Citations was extended to the Eastern Empire by Theodosius II. Insofar as legal knowledge was better mastered in the East than in the West, the Eastern version of the Law of Citation was less restrictive with regard to the number of jurisconsults that could be cited in court: in addition to the five jurisconsults cited under the Law of Citations of Valentinian III, Theodosius II allowed for the reference to the opinions of the jurists cited by these five jurisconsults. In the East, the Law of Citations was applied until the entry into force of the Digest* of Justinian in 533 CE.

In the frame of the Digest, the selection of the opinions that could be invoked in court was operated differently: rather than selecting individuals whose opinions could be invoked in court, the compilers led by Tribonian@ selected texts without focusing on the jurisconsult who wrote them. The compilers then tried to remove as many contradictions as possible. Despite such efforts, contradictions still remained. This was due to three different factors:

- The rush with which compilers worked;
- The respect compilers owed to classical jurisconsults; and
- The difficulty in choosing between two competing and equally honourable opinions.

In light of the above, one can conclude that the influence of the jurisprudents on Roman law – and therefore on our law as well – was considerable. Today, the Digest is still the richest source of Roman law.

5) Comparison between the Institutes of Gaius and the Institutes of Justinian regarding their respective presentation of the sources of law

The Institutes* of Justinian were written by Tribonian@, Theophilus@ and Dorotheus@ about four centuries after Gaius' Institutes. The comparison between these two handbooks shows an evolution in the way of considering the law and its sources.

5.1) The law

Whilst Gaius defines the law as what the people decide and enact, Justinian writes that the law is that which the Roman people commanded on the question being put by a senatorial magistrate, e.g. the consul*.

Both definitions correspond to their own reality. Yet, they show an ideological evolution. The use by Justinian of the past tense underlines the outdated nature of the system. In the meantime, Justinian appears to be drawing a comparison between the past and the present to demonstrate that, in the previous system either, it was not the people who decided on the content of the law. The preponderance of the magistrates in the voting process of the laws makes it possible for Justinian to avoid legitimising the old system to the detriment of the system in place under him. Therefore, Justinian's definition shows that the content of the laws always depended on the authority's wishes.

5.2) The plebiscite

The main difference between Gaius' definition and Justinian's definition of the plebiscites is that the latter does not refer to the difference between Patricians and Plebeians. Indeed, since the 3rd century CE, such distinction did not play a practical role anymore.

5.3) The senatus-consultum

With respect to the *senatus-consulta*, Gaius merely states that the power of the Senate was subject to debates without any further explanation. As to Justinian, he uses the present tense and explains that the power moved from the people to the Senate because of changes in demographics. Delegation of power became necessary due to an increase in the number of Romans, so that the Roman people had to delegate their power to legislate to the Senate.

Under the Republic, the Senate was composed of former magistrates; it was thus indirectly elected by the people. Under the Principate, one was a senator from father to son and the Emperor could add knights of his choice as well as decide to exclude some senators. Thus, even if the representativeness of the senators was not ideal, Justinian's explanation nevertheless seems to be sufficiently neutral: the size of the Roman people had become such that it required a delegation of power.

Yet, Justinian's explanation is doubtful. Since the *leges Iulia* and *Plautia Papiria* – which date from the beginning of the first century BCE (90-89 BCE) – all citizens of the Italian peninsula had become Roman citizens. At that time thus, the Roman people had already increased. However, the Roman people continued to vote laws at least until the 1st century CE. Accordingly and considering that nearly two centuries separate these two facts, they cannot be considered as the direct consequence of each other. The explanation given in the Institutes of Justinian is therefore totally anti-historical and purely ideological.

5.4) The Imperial Constitutions

To justify the legislative power of the Emperors, Justinian argues that the delegation of power is granted by law. However, the issue is that the law by which the Emperor was vested with his power did not mention any delegation of legislative power. The reasoning is therefore truncated.

The purpose of the explanation given in the Institutes of Justinian was to legitimise the imperial power to make laws. To achieve this goal, all possible arguments were invoked. The justification combines a legal argument (i.e. the delegation of power) with a historical argument (i.e. the legislative process was not more democratic under the Republic) and a factual argument (i.e. in a large society, it is essential to call on a leader).

In addition to being wrong, such arguments contain strange inconsistencies and triggers questions:

- Why does Justinian still justify the Senate's legislative power using the present tense even though it had not taken any more *senatus-consulta* for more than three centuries?
- Why does Justinian still feel the need to justify his legislative power when Emperors have held this power for more than five centuries? This is even more strange that Justinian himself, in the constitution *Deo Auctore* (i.e. the constitution by which he promulgated the Digest), affirms that he received his power from God[2]. This argument of a divine nature was stronger than those included in the Institutes of Justinian as it was widely accepted.

Consequently, it seems that the arguments put forward in the Institutes of Justinian do not date from his time and were written earlier. This is confirmed by a fragment of Ulpian in the Digest, which is similar to the content of the Institutes:

Justinian (I.1.2.6): "But also the will of the Emperor has the force of law since, by the *lex regia* which regulated his imperium, the people conceded to him and conferred upon him all their authority and power. (…)"[3].

Ulpian (D.1.4.1pr.): "A decision given by the Emperor has the force of a statute. This is because the populace commits to him and into him its own entire authority and power, doing this by the *lex regia* which is passed anent his authority"[4].

Assuming that the above excerpt of the Institutes was taken from Ulpian's fragment, everything makes perfectly sense:

- It is normal for plebiscites to be mentioned in the past tense and *senatus-consulta* in the present tense;
- It is normal that the Emperor's legislative power had to be justified since the divine argument could not be invoked at the beginning of the 3rd century when the Roman Empire had not yet become Christian;
- It is understandable that Ulpian tried more seriously to justify the Emperor's power since he was directly in his service, which was not the case of Gaius; Gaius could therefore afford to give a less plausible justification for the legislative power of the Emperor.

In light of the above, one must conclude that any explanation of the sources of law almost always contains a political and ideological message. Considering that the legislative power is exercised by a variety of actors, it is almost impossible for the jurist to avoid showing his position with respect to an attribution of legislative power. For instance, Gaius – not being an imperial official – could take more liberty than Ulpian in trying to legitimise the Emperor's legislative power. Yet, Gaius could not afford criticizing such power overtly. This is why Gaius chose to merely affirm that the Emperor's power to make laws has never been doubted, whilst not attempting to justify it any further.

[2] *Deo auctore nostrum gubernantes imperium, quod nobis a caelesti maiestate traditum est*. Free translation: exercising under divine authority Our power, which was given to us by the celestial majesty.

[3] Translated by J A C Thomas, The Institutes of Justinian, 1975.

[4] Translated by D.N. MacCormick – Edited by A. Watson, The Digest of Justinian, Vol. I, 1994.

TEXTS

Gai. 1.2-7

2. *Constant autem iura populi romani ex legibus, plebiscitis, senatus consultis, constitutionibus principum, edictis eorum, qui ius edicendi habent, responsis prudentium.*

3. *Lex est, quod populus iubet atque constituit. plebiscitum est, quod plebs iubet atque constituit. plebs autem a populo eo distat, quod populi appellatione universi cives significantur, connumeratis et patriciis; plebis autem apellatione sine patriciis ceteri cives significantur*; (...)

4. *Senatus consultum est, quod senatus iubet atque constituit; idque legis vicem optinet, quamvis fuerit quaesitum*.

5. *Constitutio principis est, quod imperator decreto vel edicto vel epistula constituit; nec umquam dubitatum est, quin id legis vicem optineat, cum ipse imperator per legem imperium accipiat*.

6. *Ius autem edicendi habent magistratus populi romani. Sed amplissimum ius est in edictis duorum praetorum, urbani et peregrini, quorum in provinciis iurisdictionem praesides earum habent*; (...)

7. *Responsa prudentium sunt sententiae et opiniones eorum, quibus permissum est iura condere. Quorum omnium si in unum sententiae concurrant, id quod ita sentiunt, legis vicem optinet; si vero dissentiunt, iudici licet quam velit sententiam sequi: idque rescripto divi Hadriani significatur*.

Gaius, Institutes, 1.2-7:

2. The laws of the Roman people are based upon acts, plebeian statutes, resolutions of the Senate, imperial enactments, edicts of those having the right to issue them, and answers given by jurists[5].

3. An act is law which the people decide and enact. A plebeian statute is law which the plebeians decide and enact. Plebeians and people differ in that the people is the whole citizen body, including the patricians; but the plebeians are the citizens without the patricians (…)[6].

4. A resolution of the Senate is law decided and enacted by the Senate ; this also has the status of an act, although this point has been questioned[7].

5. An imperial enactment is law which the Emperor enacts in a decree, edict or letter. It has never been doubted that it has the status of an act, since it is by means of an act that the Emperor himself assumes his imperial authority[8].

6. The magistrates of the Roman people have the right to issue edicts. The right is found most fully in the edicts of the two Praetors, Urban and Peregrine (whose jurisdiction in the provinces is exercised by provincial governors) (…)[9].

7. Juristic answers are the opinions and advice of those entrusted with the task of building up the law. If the opinions of all of them agree on a point, what they thus hold has the status of an act; if, however, they disagree, a judge may follow which opinion he wishes. This is made known in a written reply of the Emperor Hadrian[10].

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[5] Translated by W.M. Gordon and O.F. Robinson, The Institutes of Gaius, 1988.

[6] Translated by W.M. Gordon and O.F. Robinson, The Institutes of Gaius, 1988.

[7] Translated by W.M. Gordon and O.F. Robinson, The Institutes of Gaius, 1988.

[8] Translated by W.M. Gordon and O.F. Robinson, The Institutes of Gaius, 1988.

[9] Translated by W.M. Gordon and O.F. Robinson, The Institutes of Gaius, 1988.

[10] Translated by W.M. Gordon and O.F. Robinson, The Institutes of Gaius, 1988.

Gai.1.3:	**Inst.1.2.4:**
3 *Lex est, quod populus iubet atque constituit. Plebiscitum est, quod plebs iubet atque constituit*.	**4** *Lex est, quod populus romanus senatore magistratu interrogante, veluti consule, constituebat. Plebi scitum est, quod plebs plebeio magistratu interrogante, veluti tribuno, constituebat.(...).*
4 *Senatus consultum est, quod senatus iubet atque constituit ; idque legis vicem optinet, quamvis fuerit quaesitum*.	**5** *Senatus consultum est, quod senatus iubet atque constituit. Nam cum auctus est populus romanus in eum modum, ut difficile sit in unum eum convocare legis sanciendae causa, aequum visum est senatum vice populi consuli.*
5 *Constitutio principis est, quod imperator decreto vel edicto vel epistula constituit; nec umquam dubitatum est, quin id legis vicem optineat, cum ipse imperator per legem imperium accipiat*.	**6** *Sed et quod principi placuit, legis habet vigorem, cum lege regia, quae de imperio eius lata est, populus ei et in eum omne suum imperium et potestatem concessit.(...).*

Institutes of Justinian, 1.2.4:

4 A *lex* is that which the Roman people commanded on the question being put by a senatorial magistrate, e.g. the consul. A plebiscite is that laid down by the plebeians, the question being put by a plebeian magistrate such as the tribune (…)[11].

5 A senatusconsult is that which the Senate orders and directs. For, when the Roman people had become so increased in numbers as to make it difficult to convene it for the enactment of a *lex*, it seemed appropriate instead to invoke the Senate in place of the people[12].

6 But also the will of the Emperor has the force of law since, by the *lex regia* which regulated his imperium, the people conceded to him and conferred upon him all their authority and power. (…)[13].

11 Translated by J A C Thomas, The Institutes of Justinian, 1975.

12 Translated by J A C Thomas, The Institutes of Justinian, 1975.

13 Translated by J A C Thomas, The Institutes of Justinian, 1975.

Chapter 3 - The Second Life of Roman Law

1) The Law applied in the West after the Barbarian Invasions

To talk about the second life of Roman law means that Roman law died at some point. Yet and contrary to what history books usually teach, the Western Roman Empire did not fall brutally, so that Roman Law did not die brutally either. History books usually refer to the date of 476 CE – when Odoacer deposed Romulus Augustulus, the last Western Roman Emperor – to identify the end of the Antiquity and the beginning of the Middle Ages.

From the end of the 4th century CE, the Germanic Kings were already firmly established in the western Roman territory. During the 5th and 6th centuries, and even before the official fall of the Roman Empire, the Germanic peoples established their own kingdoms on the Roman soil. On a technical point of view, Germanic peoples were linked to the Roman State by a treaty which made them allies and respectful of the Roman imperial power. However, this obedience to the Roman imperial power disappeared at the time of the fall of Romulus Augustus.

In terms of law, the Barbarian Kingdoms of the High Middle Ages were ruled as follows.

1.1) Visigoths

The Visigoths were the first of these Germanic peoples to establish – as a people – official and formalized contacts with the Roman Empire by way of a treaty. At the beginning of the 5th century CE, they established their own kingdom on the Roman territory in the South-Eastern Gaul at first and including Spain thereafter. It was around 470 CE that their King Euric – willing to adopt laws that would bind his people following the Roman model – undertook to have the *Edictum Eurici Regis* written. This Code – which was later called *Codex Euricianum* or Code of Euric – was written in Latin and, even though it adopted the Roman legal technique, its content differed from Roman law.

At the beginning of the 6th century CE, the Visigoth King Alaric II codified the law of "his" Romans, namely the former Roman citizens who became Visigoth subjects. This codification was first called *Lex Romana Wisigothorum* and then Breviary of Alaric (*Breviarium Alaricianum*). The content was based on postclassical Roman law but some provisions were modified or omitted. This was notably the case for the imperial law concerning mixed unions, which prohibited marriage between a Roman woman and a Visigoth. Fundamentally hostile to the Barbarians, one can understand why the latter found it unacceptable and subject its application to severe penalties.

During the 7th century CE, the Visigoth King decided to definitely prohibit the application of Roman law. All of his subjects were then subject to the *Lex Wisigothorum*, the law of the Visigoths.

1.2) The Burgundians

At the beginning of the 6th century CE, a codification of Roman law was made in the Burgundian kingdom. Such codification was made at the initiative of a Roman jurist. The result was a small semi-official book initially called *Lex Romana* and later *Lex Romana Burgundiorum*. The content of this book was based on the same Roman law used by the Visigoths but the texts were often modified or worded differently. This reorganization was made to bring the texts closer to the Burgundian law also included in the *Lex Burgundiorum*. This Burgundian law, which had been written about ten years earlier, actually included the Burgundian law applicable to the

Burgundians themselves. The two sets of rules were therefore more easily comparable and applicable. The Franks

1.3) The Franks

In the Frankish Kingdom, the Frankish Kings were not interested in the rights of their Roman subjects. They even tolerated that the Roman subjects be ruled by their own Roman law, provided however that they obeyed to their King and that they paid all taxes previously paid to the Roman Emperor. Insofar as there was no compilation of Roman law made by the Franks, the Romans of the Frankish kingdom applied the Breviary of Alaric.

Around 787-788 CE, Charlemagne authorised the application of the Breviary of Alaric to the Romans of the Gallic part of his Kingdom. Throughout the reign of Charlemagne, the Breviary of Alaric was reproduced many times and received a very good circulation for that time. This therefore created a paradox: whilst the Breviary of Alaric was used in the Carolingian Empire, it was rejected by the Visigoths who had nevertheless compiled it.

1.4) The Italian Peninsula

The Italian peninsula was reconquered by Justinian following the war against the Goths from 535 to 553 CE. Consequently, and by way of the *Pragmatica Sanctio* of 554 CE, Justinian's legislative work was made applicable to all Italians. However, the Emperor already died eleven years later and the Lombards drove out the Byzantines from 568 CE. The fourteen years of application of Justinian's law in Italy did not seem to have been enough for this law to really take root. Indeed, there is no indication to that Justinian's law applied in Italy during the 9th and 10th centuries.

In light of the above, it seems that at the time of the Barbarian Kingdoms of the High Middle Ages, Roman law was in sharp decline. The separation between Romans and Germans faded over time and a differentiated application of Roman law to some and customs of Germanic origin to others was no longer justified. What thus remained of Roman law was far remote from the body of sophisticated rules that had been developed by classical jurisconsults.

2) The rediscovery of the Digest and the Glossators

At the end of the High Middle Ages, the teaching of Roman law was very limited to basic instruments such as the use of the Alaric's Breviary. By contrast, Justinian's massive legislative work was too complex to be understood and to be applied.

Probably during the 11th century, a manuscript of the Digest* of Justinian finally found curious and interested readers; this manuscript was first called the *Littera Pisana* and received, after its move in 1406 to the Laurentiana Library in Florence, the name of *Littera Florentina*, the Florentine.

The first courageous reader whose name came down to us was Pepo, of whom we know little with certainty except that he taught Roman law on the basis of the Digest.

Yet, the real rediscovery of the Digest is often attributed to his pupil, Irnerius, who is more famous than Pepo as he took the care to put his knowledge into writing. Irnerius also played a key role in founding the first European University, i.e. the University of Bologna. As a consequence, Roman law was one of the first disciplines taught at this University and Irnerius' course was based on the Digest of Justinian.

Furthermore, Irnerius is said to be the founder of the School of the Glossators, which name is directly linked to the technique used by Irnerius and his students: the gloss. The gloss is an explanatory annotation written on the margin or between the lines of the Digest's manuscript.

The initial purpose of the Glossators was to merely understand the text of the Digest. Their method was thus called the exegetical method from the Greek "exegesis" (ἐξήγησις), which means "explanation" or "clarification" and which is translated into Latin by *interpretatio*. The exegesis is therefore the philological and doctrinal interpretation of a text by progressing word by word.

The method of the Glossators then gradually evolved towards commentaries. Through these commentaries, the Glossators managed to make links between various fragments of the Digest, to identify analogies and to resolve contradictions stemming from the existence of divergent opinions in the Digest.

At a later stage, the Glossators also created practical examples of the rules contained in the Digest. These practical examples were however not rooted in the ancient Roman society but rather in the Italian reality of the 11th and 12th centuries. In doing so, the Glossators transcended historical study and prepared the ground for a new application of Roman law in Italy. Lastly, the Glossators started to write small summaries of the Digest's fragments and create general principles.

Around 1130-1140 CE, two currents emerged within the School of the Glossators:

- The first current was led by Bulgarus; this school was recognized for its scientific seriousness; it stuck to the text of the Digest and did not take any interpretative liberty;
- The second current was led by Martinus Gosia; this school took more liberties and referred more frequently to equity; Martinus Gosia seemed to be influenced by canon law.

During the 13th century, Accursius – professor at the University of Bologna – wrote the *glossa ordinaria*. This Great Gloss compiles all the previous glosses, which amount to approximately 96,000. Today, this work is still crucial for anyone embarking on a study of Roman law. It is indeed essential to take into account what the Glossators wrote about fragments of the Digest since their degree of knowledge of the Digest has never been overcome.

The success achieved by the Glossators was enormous. This success eventually attracted 10,000 students from all over Europe to Bologna during the 12th century. This was a real intellectual renewal for Europe. Soon after such success, other universities were founded all over Europe and they all adopted the Bolognese model and, thus, the Glossators' way of teaching.

It is undeniable that the success of the Glossators contributed to the birth of a common legal culture in Europe. Indeed, those students who learnt Roman law in Bologna came back to their home countries importing the Roman law they had studied, which was then – at least – applied in a subsidiary way when local law did not provide for any solution to address the issue at stake.

Nevertheless, the Glossators' model reached its limit with the Great Accursian Gloss. It was thus supplemented by a new technique: the commentaries. In that frame, professors at the University of Bologna became more systematic in their teaching of Roman Law. Rather than strictly following the order of the Digest and considering that its content was then well mastered, the objective was to create tools for practice. The jurists that used this new technique were

called the Commentators, the post-Glossators or the Bartolists following the name of their main representative (Bartolus de Saxoferrato). The authority of Bartolus was such that the adage "*Nemo iurista, nisi Bartolista!*"[14] prevailed until the 18th century. The genuine contribution of the Bartolists was not so much to have improved our knowledge of ancient Roman law but to have used the Roman heritage to meet the needs of their time.

The success of the Bartolists was more important than the one of the Glossators. The number of universities had increased and the Bartolists' method was widely spread among them. This strengthened the European jurists' community of spirit and technique. In these circumstances, Roman law could reborn and have a second life. It was from thereon called the *ius commune* (i.e. common law).

3) The Humanists and the *mos gallicus*

Thanks to the creation of the University of Bologna, legal and intellectual renewal spread all over Europe: the Italians disseminated the Bartolist method the same way they previously did with the Glossators. It was also in Italy that the Renaissance started from the end of the 14th century. For the record, the Renaissance is the movement operating a return to the culture of antiquity. It started in northern Italy and, from the 15th century, reached other European countries. With the Renaissance, the development of Roman law could be reinforced. Indeed, a better knowledge of antiquity allowed, in turn, a better mastery of philology and history, which made it possible to understand Justinian's work.

One of the key actors of this period was André Alciat (Andrea Alciati (1494-1550)). Coming from a Milanese family, he was a jurist, philologist and historian. These three features allowed him to better master the meaning of legal terms and to deepen their evolution over the Roman eras. In addition and contrary to the Glossators and Commentators, Alciat knew Greek. Considering that Roman jurists regularly quoted Greek authors in their writings, a good command of Greek was therefore essential to fully understand them. Alciat thus published a small work aimed at completing the Digest's fragments that had been omitted by the Glossators and the Bartolists because they were written in Greek (*Opusculum quo graecae dictiones fere ubique in Digestis restituuntur*, 1515).

Due to his background in history, Alciat wanted to study the Roman sources to get their historical truth. He criticized the Bartolists who sought to develop a *communis opinio* (i.e. a common opinion on questions of law) and thus studied Roman sources with the sole intent to apply them for themselves and not for finding the true thinking of the Roman jurists. Alciat's way of approaching Roman sources let to the creation of a new movement: the legal humanism.

Insofar as Alciat's work was ignored by Italian jurists, he mainly published his work in France where he got recognized by Guillaumé Budé (1467-1540) who, even before Alciat, already advocated for a philological and historical study of Roman law. At the University of Bourges, Alciat taught his new way of studying Roman law. This is the reason why legal humanism is considered to be a French current of thought called the *mos gallicus*, in opposition to the Italian current of thought called the *mos italicus*, which sticks to the traditional study of Roman law as did the Bartolists.

[14] Free translation: No one is a lawyer if he had not studied Bartolus!

Other important French jurists of this period were: François Douaren (1509-1559), Jacques Cujas (1522-1590), Hugues Doneau (1527-1591) and Antoine Favre (1557-1624). It was Jacques Cujas who was the greatest representative of the legal humanism movement.

In essence, the Humanists rejected the amalgams between Roman law and modern law as practised by the Bartolists. In the Humanists' view, Roman law had to be studied as a historical discipline. Consequently, one could not seek legal recipes within the Digest, which should instead also be subject to a historical analysis.

Clearly distinguishing between ancient law, pre-classical law, classical law, post-classical law and the law of Justinian, the Humanists acknowledged the superiority of classical Roman law. Classical Roman law was therefore – for the first time – subject to particular attention. Accordingly, Humanists attempted to identify classical sources within Justinian's work, which led them to an additional methodological innovation: the hunt for *interpolations*. For the record, when compiling the Digest, compilers had to adapt – and thus interpolate – classical sources to the requirements of their time. Identifying such interpolations was a difficult task that was notably undertaken by Antoine Favre, who is considered to be the first hunter of interpolations.

Next to France, the legal humanism movement reached other European countries such as Germany with the jurist Ulrich Zasius (1461-1535), who pleaded for a more historical analysis of Justinian's texts, or the Netherlands with the Professor Gabriel Mudée (1500-1560), who taught Roman Law at the University of Louvain. In the Netherlands however, the practice remained profoundly rooted in the Bartolists' tradition.

In Spain, it was Antonio Agustín (1517-1586) – jurist, humanist and man of the Church – who devoted himself to restoring the most authentic version of Justinian's texts following a scrupulous reading of the *Littera pisana* combined with an exceptional knowledge of the Greek and ancient history. Yet, he did not let aside the legal knowledge of the *mos italicus* and managed to apply the Bartolists' tradition as an auditor to the Tribunal of the Roman Rota.

Antonio Agustín's way of combining different approaches to study Roman law was due to his background: during his literature studies at the University of Salamanca, Agustín was sent to Bologna where he was a student of Alciat. At that time, the University of Salamanca was a real pole of attraction for the brightest minds and sent its alumni all over the world to occupy key positions. The University of Salamanca then became a genuine School, called the School of Salamanca, which combined different currents of interpretation of Roman law (both the Bartolist and the Humanist), without neglecting the contribution of moral theology to understand the world.

An illustration of this combined approach is the work done by Antonio Gómez, who held the chair of Roman law at the University of Salamanca and was the author of a treatise comparing Roman law and Spanish law. His work includes passages from Justinian's texts as well as references to Thomas Aquinas (a 13th century theologian), Bartolus, Zasius, Alciat and Domingo de Soto (one of the great theologians of the School of Salamanca).

Particularly strong in Spain, such hybrid legal culture is characteristic of the 16th and 17th centuries when Roman law experienced a flourishing renaissance while opening up to other currents of thought. This contributed both to spreading Roman law but also to making it more vulnerable: with the Humanism movement and the School of Salamanca, the most diverse texts of Roman law gained interest among an even wider public while losing the absolute authority they had enjoyed under the Bartolists.

4) Enlightenment, Codifications and Roman law

In the courtrooms, Roman law was subject to competition from customary law. Striking the balance between these two bodies of law differed from one region to another in Europe. This created uncertainties since the applicable law was likely to change from one city to another. The following quote from Voltaire is particularly relevant in that respect: "And isn't it absurd and horrible that what is right in one village happens to be wrong in another? How can it be that compatriots don't live under the same rule of law? (…) In our Kingdom, you change jurisprudence as soon as you change horses".

This became unacceptable with the philosophy of the Enlightenment. Considered as the natural evolution of the Renaissance ideas, the Enlightenment philosophy required the removal of any arbitrariness and obscurantism. The law had thus to be unified and to receive a reasoned organisation.

The main hurdle to such reorganisation and unification was to bring customary law closer to Roman law. To that effect, these two sets of rules had to be made comparable. In France, this task was undertaken by Jean Domat (in "The civil laws in their natural order"[15] – 1689) and François Bourjon (in "The common law of France and the custom of Paris, reduced to principles"[16] – 1747), who respectively presented Roman law and French customary law in a reasoned manner.

Later, it was Robert-Joseph Pothier (1699-1772) who summarized these two bodies of law. He then became the first source of inspiration for the authors of the Napoleon Code of 1804. Among these authors, Jean-Etienne-Marie Portalis (1746-1807) explicitly describes his work as a transaction between Roman law and customary law with the intent to accommodate the two sets of rules as much as possible. Yet, with respect to contract law, Portalis states that he only referred to Roman law as he considers that "*we will never go beyond the principles which have been transmitted to us by antiquity*".

The Civil Code of the French (or the Napoleonic Code) includes numerous Roman rules. Although such Code is not the only one nor the first civil code of its time (e.g., the Prussian code of 1794, the Austrian civil code of 1812), it is certainly the one that played the most important role in the civil law codification movement. Indeed, many countries followed the French example and drew inspiration from the 1804 Code.

Despite a real craze for the codification movement in many European countries, there was a current in Germany that stood against these codifications. This current was composed of legal historians as well as roman jurists, and is called the German Historical School.

In the 19th century, German science was at the forefront in many fields, including law. Not yet unified at the time of the Napoleonic Code, the codifications existing at that time did not affect all of Germany (e.g., only Prussia or Bavaria were concerned). The German Historical School, dominant in law faculties, refused that German law be codified. This current of legal thought was first founded by Gustav Hugo (1764-1844) and then led by Friedrich Carl von Savigny (1779-1861). In a controversy that opposed Savigny to his colleague Anton Friedrich Justus

15 Free translation of "Les loix civiles dans leur ordre naturel".

16 Free translation of "Le droit commun de la France et la coutume de Paris, réduits en principes".

Thibaut (1772-1840), the former vividly criticized the codification movement and in particular the French Code.

More particularly, with respect to the study of Roman law in Germany, the "roman jurists" side of the German Historical School sought to extract legal principles from Roman law in order to rationalize them excessively. This "roman jurists" side is called the Pandectist School. This School transformed Roman law from a very casuistical body of law into a dogmatic and logical law.

It was only after having completed this task of rationalization that German law could be codified. This gave rise to the German Code in 1900, which is called *Bürgerliches Gesetzbuch* or BGB. This Code is not qualified as a compromise between Roman law and customary law but rather self-proclaimed as purely Roman.

In light of these developments regarding the codification of the French and German laws, one can observe that Roman law was not killed but rather transformed. Whilst students who have not been trained to recognize the real origins of a provision contained in these conditions may ignore the heritage of ancient Rome, such heritage remains essential to fully grasp the rationality behind our current legal principles.

By placing Roman law in the discipline of history of law, these codifications have fostered research even more, although this freedom was already claimed by legal humanism. There is also an interesting common feature between Antoine Favre and the *iusromanists* of the 20th century: the interpolations. Whilst Antoine Favre was the first to hunt for interpolations in Justinian's texts, this work became an excessive tendency during the first half of the 20th century. Indeed, some authors completely rewrote the Roman sources in a way to make them say what these authors wanted them to say. They even went as far as pretending that Roman jurists were wrong in understanding Roman law. During the second half of the 20th century, the *iusromanists* became a bit more humble and cautious in their interpolations assumptions.

Today, there seems to be two currents of researching and teaching in Roman law:

- The first current requires that Roman law be studied in full disregard for modern law; Roman law must be free of any modern law influences and must be part of history (and not law), which implies that Roman law be studied in the history department rather than in the law department; this current is of minority;
- The second current requires that connections between Roman law and modern law be made; Roman law is to be considered as a legal discipline and must therefore be studied in the law department.

This second current is more widely spread since the majority considers that teaching and studying Roman law pursues a double objective:

- The first one is explanatory: Roman law explains the basis of our current rules of law and helps us to better understand the genuine rationality behind these rules;
- The second one is propaedeutic: Roman law is ideal to start learning private law; it is stable, it has influenced the private law system of multiple countries around the world and does not depend on the legislators' will; Roman law is therefore an essential asset for an effective legal training, including on an international level.

On a more anecdotical note, it is worth bearing in mind that scientific production in Roman law has increased steadily over the centuries, especially since the 20th century. Not only in volume but also in the diversity of languages and countries in which articles about Roman law are being published. Today, Roman law is in fact studied around many different countries, which justifies that we talk about the third life of Roman law.

5) Conclusion

It results from the foregoing developments that Roman law experienced a second life notably through the codification movement, which attempted to combine modern law with Roman law in a written format.

Whilst this codification movement started among European countries, it eventually reached jurisdictions outside Europe.

TEXTS

Text 3.1 – D. 1.1.1pr.

Ulp., 1 inst. (D. 1.1.1pr .) :

Iuri operam daturum prius nosse oportet, unde nomen iuris descendat. Est autem a iustitia appellatum : nam, ut eleganter celsus definit, ius est ars boni et aequi.

Ulpian, Institutes, book 1 (D. 1.1.1pr[17].):

A law student at the outset of his studies ought first to know the derivation of the word *jus*. Its derivation is from *justitia*. For, in terms of Celsus' elegant definition, the law is the art of goodness and fairness[18].

Text 3.2 – D. 1.1.10.1

Ulp., 1 reg. (D. 1.1.10.1) :

Iuris praecepta sunt haec : honeste vivere, alterum non laedere, suum cuique tribuere.

Ulpian, Rules, book 1 (D. 1.1.10.1):

The basic principles of law are: to live honourably, not to harm any other person, to render to each his own[19].

Text 3.3 – D. 1.3.17

Cels., 26 dig. (D. 1.3.17) :

Scire leges non hoc est verba earum tenere, sed vim ac potestatem.

Celsus, Digest, book 26 (D. 1.3.17):

Knowing laws is not a matter of sticking to their words, but a matter of grasping their force and tendency[20].

Text 3.4 – D. 1.1.1.2

Ulp., 1 inst. (D. 1.1.1.2) :

Huius studii duae sunt positiones, publicum et privatum. Publicum ius est quod ad statum rei romanae spectat, privatum quod ad singulorum utilitatem: sunt enim quaedam publice utilia, quaedam privatim.

Ulpian, Institutes, book 1 (D. 1.1.1.2):

There are two branches of legal study: public and private law. Public law is that which respects the establishment of the Roman commonwealth, private that which respects individuals' interests, some matters being of public and others of private interest[21].

Text 3.5 – Gloss *ad singulorum*

Ad singulorum. Scilicet principaliter, secundario ad publicam vtilitatem. expedit enim reipublicæ, ne quis re sua male vtatur: vt inst. de ijs, qui sunt sui vel alie. iur. §. penul. & à. de

17 This reference reads as follows: Digest of Justinian, Book 1, Title 1, lex 1 (or fragment 1), principium.

18 Translated by D.N. MacCormick – Edited by A. Watson, The Digest of Justinian, Vol. I, 1994.

19 Translated by D.N. MacCormick – Edited by A. Watson, The Digest of Justinian, Vol. I, 1994.

20 Translated by D.N. MacCormick – Edited by A. Watson, The Digest of Justinian, Vol. I, 1994.

21 Translated by D.N. MacCormick – Edited by A. Watson, The Digest of Justinian, Vol. I, 1994.

procura. l. servum. §. publice, sic & econtra, quod est publicum principaliter, secûdario pertinet ad vtilitatem singulorum : ut l. j. in fi. C.de cadu.tollen.

Gloss "*ad singulorum*" (private individuals' interests).

This is, of course, primarily, and secondarily (it concerns) the public interest. It is important to the State that noone misuses its assets, as stated in the Inst. 1.8.2 et infra D. 3.3.33.2. Similarly, and conversely, what is primarily in the public interest is of secondary concern to the interests of private individuals, as stated in C. 6.51.1.16[22].

Texte 3.6 – Slaves' abuse – Gai. 1.52-53

Gai. 1.52-53 :

52. *In potestate itaque sunt servi dominorum. Quae quidem potestas iuris gentium est: nam apud omnes peraeque gentes animadvertere possumus dominis in servos vitae necisque potestatem esse; et quodcumque per servum adquiritur, id domino adquiritur.* 53. *Sed hoc tempore neque civibus romanis nec ullis aliis hominibus, qui sub imperio populi romani sunt, licet supra modum et sine causa in servos suos saevire : nam ex constitutione sacratissimi imperatoris Antonini qui sine causa servum suum occiderit, non minus teneri iubetur, quam qui alienum servum occiderit. Sed et maior quoque asperitas dominorum per eiusdem principis constitutionem coercetur : nam consultus a quibusdam praesidibus provinciarum de his servis, qui ad fana deorum vel ad statuas principum confugiunt, praecepit, ut si intolerabilis videatur dominorum saevitia, cogantur servos suos vendere. Et utrumque recte fit : male enim nostro iure uti non debemus; qua ratione et prodigis interdicitur bonorum suorum administratio.*

Gaius, Institutes 1.52-53 :

52. Slaves are in the power of their owners. This power rests on the law of all peoples, for we can observe the same thing everywhere; owners hold the power of life and death over slaves and owners get whatever slaves require. 53. But nowadays neither Roman citizens nor any other men who live under the rule of the Roman people may lawfully inflict immoderate or groundless cruelty on their slaves. A pronouncement of the Emperor Antoninus Pius of blessed memory makes a man who kills his own slave without good grounds no less liable than one who kills someone else's slave. Excessive severity on the part of owners is curbed by a pronouncement of the same Emperor. He was consulted by some provincial governors about slaves who take refuge at the shrines of the gods or at the statutes of the Emperors; he ordered that if the cruelty of the owner was found to have been intolerable, such slaves should be compulsorily sold. Both these are quite right. We ought not to abuse our rights; that is also the reason why spendthrifts are forbidden to administer their own property[23].

22 Free translation.

23 Translated by W.M. Gordon and O.F. Robinson, The Institutes of Gaius, 1988.

Chapter 4 - Procedure and Roman World

1) The Procedure in Ancient Law: *The Legis Actiones*

Procedure is sometimes viewed with a certain disdain. When we talk about a procedural flaw, we often think of a trick used by someone to avoid a deserved conviction. However, this popular view is far from providing a satisfactory picture of what procedure really is. The invention of procedure was a necessary step to move from a society where vengeance was free to an orderly society. Thanks to procedure, the one who had suffered a wrong could no longer take justice into their own hands but had to address an impartial authority to settle the dispute. It is therefore not surprising to learn that Roman procedure evolved over time. From ancient law to the time of Justinian, three types of procedural systems are distinguished: the procedure of actions of the law (*legis actiones*) in ancient law; the formulary procedure in pre-classical and classical law; and the extraordinary procedure (*cognitio extra ordinem*) thereafter.

Let's start with ancient Roman law, during which the procedure was that of actions of the law or *legis actiones*. Just as was the case for archaic Roman law in general, ancient procedure is poorly known to us because we do not have direct legal sources. Our information is based on much later accounts, whose reliability is therefore uncertain. It seems that at the beginning of Roman history, disputes were settled at the level of clans or *gentes*, but it was still in the archaic period that the Romans implemented a procedure for the protection of private rights. It is Gaius who tells us about this procedure called *legis actio*. At the time Gaius wrote, this procedure had long since disappeared, but it is our most complete source on the subject. When Cicero or other classical jurists refer to it, they attribute its regulation to the Law of the Twelve Tables (*Lex XII Tabularum*) or other later laws. But it seems certain that some of these actions were much older than the Law of the Twelve Tables, which would have only confirmed these older actions.

The procedure of the *legis actiones* is based on the use of precise solemn formulas. Strict adherence to these formulas is essential to ensure their effectiveness before the judge. You needed to pronounce exactly the words of the sacramental formulas without hesitation or stuttering. The smallest error or modification of an oral formula resulted in the loss of the trial!

Sources tell us that it was the praetor who held the competence of the Roman state in judicial matters. But the praetorship only became an autonomous administration in 367 BCE. Before that, competence must have belonged to the highest spheres of Roman society, but we have little certainty about its functioning.

In any case, the duty of the judicial magistrate consisted of *iurisdictio*. According to its etymology, it means *ius dicere*, that is, "to say the law" in particular disputes. It can be assumed that originally, it was the master of the court who personally pronounced the judgment. It was only from the Law of the Twelve Tables that it happened that simple citizens were also used to seek the judicial solution and to pronounce the judgment. Granting such power to simple citizens constituted a major change in the nature of the procedure.

Gaius cites five types of actions of the law, five ways of acting in justice, five *modi agendi*, but we will only develop two. The oldest is the *legis actio sacramento*, the action of the law by oath. This action has a residual value. It can therefore be used whenever there is no other more specific action that could be preferred to it.

According to Gaius, the action of the law by oath proceeds as follows:

First, the parties met before the praetor and presented their dispute, announcing their intention to resolve it within the framework of an action of the law by oath (*legis actio sacramento*). Consequently, they deposited a sum of money in the treasury that they would lose in case of condemnation. Then, the praetor appointed a judge who was thus a simple citizen.

Secondly, the hearing took place before the judge. During this, the facts were briefly presented. If the parties were disputing a thing – for example, the ownership of a slave – the first party would say: "I affirm that this man belongs to me by virtue of the law of the *Quirites*" and would place a rod (or stick) (festuca) as a sign of ownership. The other party would then do exactly the same. The judge would then intervene to separate the parties and say "*Mittite ambo hominem*!", release this man both of you. And the parties would comply. They would then challenge each other by oaths, each affirming their right by a *sacramentum*.

The judge would then summon the parties to a second hearing, after examining the facts and determining which of the two had made a false oath. Consequently, the judge would then attribute the thing (in our case the slave) to the winner of the case and order that the loser also lose the promised sum to the public treasury. In the example we just used: the dispute over the ownership of a slave, the subject of the dispute is a thing, a *res* in Latin. In this case, the action is called *legis actio sacramento in rem*. It is a real action (*actiones in rem*). It is opposed to the *legis actio sacramento in personam*, the personal action (*actiones in personam*). In a personal action, the subject of the dispute is no longer a thing, but a duty to be performed by the other party. This party could, for example, have committed to ploughing the plaintiff's field.

But let's return for a moment to the symbolism of the procedure of these actions of the law. The warrior origin of the formalities is not completely erased. The use of the rod to assert one's right is very telling here. Gaius calls this rod (or stick) a *vindicta*, but it is a demilitarized version of the soldier's spear called *hasta*. The Romans considered that there was no more secure property than the spoils of war, the one that was won and protected with a spear. But in the context of actions of the law, the judicial combat is therefore a demilitarized combat. Moreover, after expressing their right, the parties are separated by the judge. Vengeance is rejected and replaced by an impartial procedure.

We also notice that in the formula pronounced by the parties, they invoke the law of the *Quirites*, that is, the law of the Roman ancestors. This shows us that this procedure is reserved for Roman citizens, since only they can invoke the law of the *Quirites*. A foreigner could not. The actions of the law also fall under civil law; remember, it is the law that derives from the laws of the Roman people and is opposed to praetorian law. But in archaic law, praetorian law had not yet developed.

Among the other actions of the law, we will also mention the *legis actio per manus iniectionem*, the action of the law by laying on of hands. This action resembles what we would today call the forced execution of a previous judgment. When the loser of a judgment did not pay the sum to which he had been condemned, the creditor could solemnly lay his hand on his debtor to claim this sum. If the latter did not comply, the judge would adjudge the person of the debtor to his creditor who could chain him and take him home. Within a period of 60 days, he had to exhibit

his debtor three times in the forum, to see if anyone was willing to pay the debt in place of the debtor. If at the expiration of the period, the debt was still not paid, the creditor could do whatever he wanted with his debtor. He could, for example, kill him or sell him as a slave. But it seems that the practice was rather to put the debtor to work, so that he repaid his debt by working.

As we can see, the archaic procedure of actions of the law is a rather rigid and harsh procedure for litigants. While it constitutes a great progress for the organization of disputes between Romans, they nevertheless aspired to a more flexible procedure, in which a small error should not necessarily be fatal for the outcome of the trial. Progress would come during the next period, with the development of the formulary procedure.

2) The Procedure in Pre-Classical and Classical Law: The Formulary Procedure

As previously mentioned, the formulary procedure is closely linked to the evolution of the praetorship, created in 367 BCE.

We have just recalled that within the framework of the procedure of actions of the law, the role of the praetor was quite limited. He granted one of the five actions of the law depending on the circumstances... But soon the circumstances diversified, and the praetor devised granting actions in justice based on a written text: the formula. The formulary procedure took place in two stages: the "*in iure*" phase and the "*in iudicio*" phase.

The "*in iure*" phase – literally "in law" because only legal questions are discussed, without addressing the facts – takes place before the praetor. During this phase, the litigants presented themselves to the praetor to freely explain their dispute. The litigant who had initiated this meeting with the praetor generally demanded that the latter give him a formula. However, the praetor was not obliged to deliver it. If the request was manifestly unfounded or if no formula from the praetor's edict met the request, he could issue a *denegatio actionis*, he could deny the action. But if the request was not manifestly unfounded and corresponded to a formula from the edict, he would give it to the plaintiff.

The recipient of the formula was, however, the judge designated by the praetor in the formula. It was up to this judge to apply the formula. This judge was not a magistrate but a simple citizen. The choice of judge could be made by the parties to the trial themselves... at least if they managed to agree on a name. If they did not have a particular person in mind, the praetor had lists of citizens who had signalled their availability to him to render this service to their fellow citizens. If the parties could not agree on one of the people on the list, it was then the praetor who designated the judge by authority. One might wonder about the motivations of a Roman citizen to serve as a judge, a voluntary and high-risk charge, since the loser of the trial might not be happy with the service rendered. The explanation lies partly in the great sense of civic duty of the Romans. On the other hand, citizens who demonstrated their talents by rendering good justice made a name for themselves, which could be an excellent starting point for a future political career. However, it should be noted that the justice rendered by the citizen-judge remained the justice of Rome, rendered under the supervision of the praetor.

The "*in iure*" phase ended with the delivery of the formula to the judge. This moment is called the *litiscontestatio*. It seals the agreement of the parties to resolve their dispute using the formula given by the praetor and prevents any further attempt to go to court for the same matter. The *litiscontestatio* thus has an extinguishing role for the future. The judgment rendered based on the formula given at this moment will be the only outcome.

The next phase is therefore the "*in iudicio*" or "*apud iudicem*" phase, that is, in court or before the judge. Ordinarily, the parties met at the judge's house designated by the formula the day after the *litiscontestatio*.

In terms of content, the formula was presented, for example, as follows: "Caius shall be judge. If it is proven that the Capenian estate in question belongs to Aulus Agerius according to the law of the Quirites, and if this estate is not returned to Aulus Agerius according to your arbitration, judge, condemn Numerius Negidius to Aulus Agerius for such an amount as this matter is worth; otherwise, absolve him."

This simplified formula can be divided into four parts. The first is the *nominatio*: Let Caius be the judge. This is the designation of the judge mentioned in the "*in iure*" phase. This *nominatio* was usually written outside the formula sealed by the praetor. Thus, the judge received a formula that he could see was addressed to him and whose text could not have been altered by the parties.

The second part is the *intentio*. These are the words: "If it is proven that the Capenian estate in question belongs to Aulus Agerius according to Quiritarian law." The *intentio* transcribes the content of the request expressed by the plaintiff before the praetor. We find two proper names here. The Capenian estate is simply a piece of land located in the city of Capena, not far from Rome. This estate is the object of the dispute between the parties. The name of the plaintiff is Aulus Agerius. This is a generic designation. Literally, it means Aulus who acts in justice. Numerius Negidius is the generic name of the defendant and means "The one who refuses to pay." The opposition between plaintiff and defendant seems quite banal today, but it is a major evolution that we owe to the formulary procedure. In the actions of the law, there were two parties on equal footing, but they were indistinctly designated. In the formulary procedure, the praetor notes that the plaintiff and defendant do not start from an identical position. In our case, if Aulus acts in justice to recover the Capenian estate, it is because it is currently occupied by Numerius. But to assert his right, it will be up to Aulus, the plaintiff, to prove that even if he does not currently possess the Capenian estate, he is nevertheless the Quiritarian owner. The burden of proof therefore falls on the plaintiff.

The third part of the formula is the *clausula arbitraria*, the arbitration clause. It is not systematically found in all formulas. But here, it corresponds to the words: "and if this estate is not returned to Aulus Agerius according to your arbitration." In other words, the judge has listened to the plaintiff and is convinced that he is indeed the Quiritarian owner of the Capenian estate. He then turns to Numerius to suggest that he return the estate to Aulus. If he does so immediately, that is, during the "*in iudicio*" phase of the trial, it will allow him to avoid any condemnation. On the other hand, if Numerius refuses to return the estate, he will be condemned... this is the last part of the formula.

The formula ends with the *condemnatio*, condemnation. These are the words: "judge, condemn Numerius Negidius to Aulus Agerius for such an amount as this matter is worth; otherwise, absolve him." We see that the judge has only two possibilities: either he condemns or he absolves.

He must absolve Numerius Negidius if Aulus Agerius has not succeeded in proving that he was the owner of the Capenian estate or if Numerius has returned the estate during the "*in iudicio*" phase. He must, however, condemn him if Aulus has provided proof and Numerius has not returned the estate.

This condemnation necessarily corresponded to the payment of a sum of money. The formula says "condemn Numerius to such an amount as this matter is worth." How was this value fixed? Perhaps surprisingly for our modern eyes, this sum was fixed by the plaintiff himself. In other words, faced with the defendant who refused to return the thing, the judge addressed Aulus to ask him how much he estimated the Capenian estate to be worth. As one can imagine, this evaluation was naturally an overvaluation. Aulus had every interest in overestimating the estate. Was this overvaluation problematic? On the contrary! This is exactly what was expected of the plaintiff: to overvalue the property. It would have made no sense for him to give a reasonable evaluation of the estate because in that case, it would have been a kind of forced sale. By systematically overvaluing the value of the thing, the defendant was also encouraged to return it within the framework of the procedure, which remained the best solution to the dispute. Such mechanisms that provide a strong incentive for the defendant to perform in kind have somehow been reinvented quite recently. The system of "astreinte", was only introduced in Belgium and France at the end of the 20th century.

The formula used as an example here was the formula of the *rei vindicatio*, the action by which the Quiritarian owner of a thing claims that it be returned to him. As soon as the object of the action in justice is a thing, a *res*, this action is called a real action. Just as was already the case for the *legis actio sacramento*, an action in justice can be *in rem*, that is, a real action, or *in personam*, that is, a personal action.

Finally, I would like to end with a comment on the binary nature of condemnation in the formulary procedure. As we have seen, the judge has only two possibilities: he condemns or he absolves. There is no third way. While this system has the advantage of clarity, it is important to emphasize how much it has influenced our vision of justice. It must be said that even today, the judge is the one who condemns or absolves. It is only with great difficulty that we try to outline alternative modes of resolving our disputes. In this respect, we still think of justice in the Roman way, and we owe it to the formulary procedure!

3) The Procedure in Post-Classical Law: The Extraordinary Procedure

As we mentioned in the module on sources of law, when the Roman emperors seized power, they also took control of justice. However, the evolution of Roman procedure under the emperors goes beyond this aspect related to power.

Specifically, the evolution of the Roman trial begins in the Roman provinces and not in the capital city. Following its numerous wars of conquest, Rome gradually expanded its territory. As a result, the degree of Romanization of the newly conquered provinces could vary greatly depending on the circumstances and the time of conquest. In terms of procedure, the principle was, as we saw in Chapter 2, that the formulary procedure was also applied. Due to the distance, the role of the praetor was assumed by a local Roman magistrate, such as the provincial governor. However, it also happened that some newly annexed provinces did not adopt the formulary procedure or only with certain modifications. Roman justice in the provinces was also often competed with by indigenous justice, as some conquered peoples enjoyed significant autonomy. This justice then operated with its own laws and procedure. Roman law and

procedure remained a privilege reserved for Roman citizens present in the provinces. The practical importance of the formulary procedure was therefore reduced, at least until the granting of Roman citizenship to all inhabitants of the empire in 212 CE by the *Constitutio Antoniniana*. This change could have greatly increased the importance of the formulary procedure, but in practice, it was quite the opposite; it largely contributed to its decline.

In places where the formulary procedure was not applied, there were *cognitiones*, that is, trials during which the magistrate or imperial official took cognizance (*cognitio*) of the case to be judged. In other words, the verification of facts and the judgment were not entrusted to a private judge, but it was the Roman magistrate or an imperial official who handled it. The use of *cognitiones* instead of the formulary procedure was quite common in the Roman provinces. But in Rome as well, *cognitiones* appeared from the beginning of the Principate. This fact is explained by the modification of power relations under the reign of Augustus. This new procedure therefore coexisted with the formulary procedure, in relation to which it was extraordinary. This is why classical jurists called it *cognitiones extra ordinem*.

This new procedural format applied in Rome thus originated from an initiative of Augustus, who intervened in the judicial system by offering to render justice himself in both criminal and civil law. Initially, imperial judgments were first-degree judgments. Appeals were only possible against a judgment rendered in the context of a *cognitio* not emanating from the emperor himself. In practice, emperors rarely judged in person but delegated judgment to judges they chose. In the second century, the emperor often declared that the judgment rendered by such judges was without appeal, as if he had rendered it himself. It should also be noted that this delegation did not mean that the emperor was disinterested in legal matters, as he regularly gave legal opinions through rescripts, which obviously bound the judges.

Emperors apparently began to accept appeals from judgments resulting from the formulary procedure in the course of the first century, but only with the effect of annulling the consequences of the *litiscontestatio*. In other words, it annulled the impossibility of retrying the case and allowed for a new formulary trial. Jurists of the 2nd and 3rd centuries report that the power to judge directly on appeal was recognized to the emperors themselves. The spread of appeals resulted in the establishment of a real judicial apparatus composed of imperial officials. A hierarchy of bodies was also established, according to which the appellate judge depended on the identity of the judge who had rendered the contested judgment. It should be recalled that judgments rendered by or on behalf of the emperor were called *decreta*, decrees.

On a more concrete level, *cognitiones extra ordinem* are defined primarily in a negative way, in that they are not the – ordinary – formulary procedure. However, it is still possible to identify some common and recurring points among *cognitiones*. Here are the three main points in our view:

1. Firstly, the semi-public nature of the *cognitio* can be mentioned. This means that the parties could be required to appear before the magistrate, and the latter could judge them in their absence if a party did not appear. Such a judgment was not possible within the framework of actions of the law and the formulary procedure. The defendant who did not appear was called *contumax*, due to the fact that he did not obey the magistrate's order.
2. Secondly, the term *cognitio*, which indicates that the official takes cognizance of the facts, seems to imply that there is no separation between the *in iure* phase and the *in iudicio* phase. But in reality, this was generally not the case. The use of the *litis contestatio* to fix the content of the dispute and to launch the second phase often persisted in extraordinary procedures.

However, this subdivision was no longer mandatory but optional, and the magistrate or official could waive it at their discretion, that is, without having to justify their choice.

3. Thirdly, the magistrate or official called to pronounce a judgment had greater flexibility than the judge of the formulary trial, whom we recalled had no choice but to follow the text of the formula and absolve or condemn the defendant accordingly. Imperial judges, on the other hand, had great discretion regarding absolution, condemnation, but also regarding the measure of condemnation. It even seems that this condemnation was no longer necessarily a condemnation to a sum of money, although the question is controversial.

As we have said, *cognitiones* were extraordinary as opposed to the formulary procedure, which remained the ordinary procedure in the eyes of classical jurists. As a result, Roman litigants had the choice of resorting to one system or the other. Over time, this choice turned in favour of the imperial judicial system. The determining factors of this evolution are, of course, the growth of the emperor's power, but also the possibility of introducing an appeal, which was specific to the imperial system. This appeal eventually gave hierarchical superiority to the emperor's justice.

In the post-classical period of Roman law, the formulary procedure therefore definitively disappeared.

4) The Roman World: Persons and Things

Roman law is primarily the law of the Romans for the Romans. By Romans, we initially mean the inhabitants of the city of Rome. We have previously seen that following the wars of conquest, some foreigners were able to obtain Roman citizenship. All Italians became Romans in 90-89 BCE (*Leges Iulia et Plautia Papiria*) and other peregrines living in the empire's territory in 212 CE (*Constitutio Antoniniana*).

It is probably useful to recall here that the concept of a foreigner evolved over the centuries for the Romans. Originally, when Rome was just a village, foreigners were necessarily enemies. The word used for foreigner was "*hostis*," which we would translate as enemy today. This conception of the foreigner was not unique to the Romans. It was shared by all ancient peoples. But over time and with the expansion of Rome, more and more foreigners lived on Roman territory without being enemies. It was therefore time to distinguish between the enemy and the foreigner, now called "*peregrinus*" or peregrine in English.

Another important distinction in Roman law is the distinction between persons and things. However, it should be noted from the outset that this distinction is not exclusive. This is how, in Roman law, slaves are both persons and things. How is it possible to be both a thing and a person? It all depends on the legal domain considered. Slaves are things insofar as they are considered the property of their master, like any other thing. Slaves are bought and sold, rented, and lent like any other res. Slaves are therefore objects of real rights.

But in some respects, slaves are also considered persons. This is the case, for example, when they cause damage. Indeed, to determine if a slave has committed a fault, this fault will be evaluated according to the same criteria used for a free person.

Regarding the category of things, Roman jurists subdivided it in two ways. The Law of the Twelve Tables already made the distinction between movable and immovable property. As their names indicate, immovables are things that cannot be moved, like a villa, for example, while

movables are all things that can be moved, like a table, for example, but also a slave or an elephant.

This distinction between movables and immovables is still very important today, but in classical Roman law, it was supplanted by another even more important distinction: the distinction between *res mancipi* and *res nec mancipi*. This latter distinction no longer exists today. In practice, it was abolished by Emperor Justinian. But why was it so important? To simplify, we can say that *res mancipi* were things of superior importance compared to *res nec mancipi*. This superior importance was manifested by the fact that to transfer their ownership, a particular procedure was required: *mancipatio*. *Res nec mancipi*, on the other hand, did not require a particular procedure to transfer their ownership. We will return to the question of property transfer in our next section. But let's specify what *res mancipi* are: immovables located in Rome, slaves, and certain quadrupeds: oxen, horses, mules, and donkeys. All other animals and – more generally – all other movables are *res nec mancipi*.

If we examine the category of persons, we also find two distinctions. The first is what is called a *summa divisio*, that is, an exclusive distinction. It is the distinction between free persons and slave persons. It is a *summa divisio* because every human being is necessarily either free or a slave. However, these categories are not fixed, as a slave can become free and vice versa. A person born a slave can therefore be freed and become free. But the status of the freed slave is not identical to that of the person born free, who is called *ingenuus*, as opposed to the person who became free, called *libertus*. The essential difference lies in the fact that the freedman remains bound by duties of recognition towards his former master. The former master is therefore no longer the owner of the freed slave, but remains his patron.

The second important distinction at the level of persons is the distinction between persons *sui iuris* and persons *alieni iuris*. A person *sui iuris* – literally of his own right – is not subject to the power of any other person. The person *alieni iuris* – literally of someone else's right – is, on the contrary, subject to the power of a person *sui iuris*. Only a person *sui iuris* has legal capacity. This means that only he can perform legal acts, conclude contracts, and go to court. In principle, only the *paterfamilias* is *sui iuris*. It is important here not to confuse the *paterfamilias* with the fact of having children. Indeed, it is not enough to be a father biologically to be a *paterfamilias*. One must also have no living male ancestor. Consequently, if one still has a living male ancestor, one is *alieni iuris* and has no own patrimony or legal capacity.

Nowadays, access to legal capacity depends on one's age. At 18, the age of majority in most countries, everyone becomes legally capable. In Rome, it was not a question of age. One could be 50 years old, have children and grandchildren: if one still had one's father, one was not a *paterfamilias* or *sui iuris*. Conversely, one could also be an orphan of all male ancestors much earlier. In such a situation, the orphan became *sui iuris* even if he was only 3 years old. It goes without saying that at that age, one could not exercise one's legal capacity in person. That is why the orphan was assigned a *tutor* who watched over him and represented him in the performance of legal acts. This guardianship ended when the young *sui iuris* reached the age of 14, the age of puberty for boys. For girls, the age of puberty was 12. As we said earlier: for the Romans as well, this age was particularly early to claim to lead one’s life independently. The problem became very apparent in the wake of the Second Punic War. A *Lex Laetoria* therefore came to protect adolescents until the age of majority, set at 25 years.

But let's return to the usual situation of the person *sui iuris*. He exercises *patria potestas* – paternal power – over his family, which includes sons and daughters, but also slaves. This power was absolute, including the power of life and death. The *paterfamilias* therefore also had

the power to sell not only his slaves but also his children. The phenomenon of selling (*emptio venditio*) children is not particularly rare in human history. It is primarily a reflection of great poverty. If it had to happen in Rome, it does not seem that the practice was very widespread in ancient law. In classical law, Rome was rich, and the practice remained marginal. However, it increased from the 4th century CE, which was a period of severe economic recession. Christian emperors did not prohibit the practice. However, they provided a provision allowing the father to buy back the children he had sold. Justinian further limited the possibility of selling one's children to situations of extreme poverty.

The power that the paterfamilias exercised over his wife was not *patria potestas*; it had another name. In this case, it was called *manus*: he had authority over his wife. The situation of the Roman woman was therefore partially different from that of the children. In the context of a long movement of emancipation of Roman women, Roman law also developed mechanisms allowing them to escape the *manus* of their husband. Women could also be *sui iuris* persons. The sources show us that Roman women often enjoyed great freedom and autonomy that many women today would not deny.

This is a very quickly sketched picture of power relations within the Roman family. In the next section, we will focus more specifically on relations with things and their transfer of ownership.

5) The Roman World: Modes of Property Transfer

We have seen that in Roman law, things were either *res mancipi* or *res nec mancipi*, depending on whether they required a *mancipatio* for the transfer of ownership. This statement immediately calls for an explanation, especially for people living in a legal system inspired by the Napoleonic Code. According to the latter, the transfer of ownership does not require any specific act and occurs automatically. This means, for example, that when one buys something, one automatically becomes the owner through the contract of sale. However, this automaticity is not found in all contemporary legal systems; on the contrary, it is rather an originality of the Napoleonic Code. In Roman law, as in many contemporary laws, the transfer of ownership therefore requires the realization of a specific legal act. In classical Roman law, there are three different ones: *mancipatio*, *in iure cessio*, and *traditio*, and we will consider them one by one.

Mancipatio is a solemn procedure for transferring ownership. If we say that this procedure is solemn, it is to emphasize that it requires the participants to follow a certain number of formalities. If these formalities are not respected, the transfer of ownership does not work and is not valid in law.

One might wonder why the Romans considered such formalities useful. It is probably necessary to see in it a need for certainty regarding the ownership of *res mancipi*, so important in an agrarian and poor environment. At the beginning of Rome, resources were very limited, and it was essential that the ownership of fields, draft animals, and slaves was beyond doubt. In this context, only a solemn procedure, whose existence and legal consequences no one could ignore, could offer such clarity.

How does such a *mancipatio* work in practice? Respecting the ritual requires the presence of 5 witnesses and a balance holder, called the *libripens*. The witnesses are there to attest to the proper conduct of the procedure and to be able to testify in a possible subsequent trial. Until classical law, proof was provided in court by calling witnesses and very rarely with the help of a written document. If ownership was contested, these witnesses would therefore be required

to come to court to testify about the *mancipatio*. The number 5 was probably chosen to increase the chances of maintaining a minimum number of witnesses alive for a useful duration. These witnesses must also be Roman citizens who have reached puberty.

The presence of the balance holder informs us about the origins of this ritual. This balance was originally used to weigh the price paid by the buyer. It should be remembered here that the Romans only began to use money at the earliest from the 3rd century BCE. Before that, payment was made with ingots or pieces whose value depended on the type of metal and its weight, but not on the face value. When the Romans began to use money, they did not abandon the symbolism of the balance. The balance holder was therefore maintained, even if he no longer weighed anything. His role was therefore symbolic, while remaining indispensable.

When all the protagonists of the *mancipatio* are in place, the acquirer – let's say of a slave – scrupulously pronounces the following words: "I affirm that this man belongs to me by virtue of the law of the Quirites. Let him be acquired by me with this bronze coin and this bronze balance." He then strikes the balance with the bronze coin, takes possession of the thing, and carries it away with him. It follows from this description that the alienator plays no active role in the ritual, but also that the alienated thing must be present, as long as it is a movable. Immovables were generally mancipated in their absence.

When Gaius describes this ritual in his law course, he says it is an imaginary sale. It should be understood that the formalities are those of an archaic sale. But *mancipatio* had long ceased to be a sale when Gaius explained it. It had become a mode of alienation of *res mancipi* and also of *alieni iuris* persons. We mentioned the possibility of alienating *alieni iuris* persons in our previous section, in which we said that the *paterfamilias* had the right to sell his children. This alienation was therefore also carried out by *mancipatio*.

We emphasized that this practice was probably uncommon among the Romans. It is useful to highlight the existence of a rule present in the Law of the Twelve Tables in this regard. If the father sells his son three times, the latter is freed from his father. In other words, if a *paterfamilias* sold his son three times – which implied that he bought him back after each sale – he was no longer worthy of exercising his *patria potestas*, his paternal power.

Very interestingly, the Romans also justified being called a people of jurists, as they once again engaged in legal engineering in the use of this rule. We previously hinted that a Roman citizen could be 50 years old, have a long and important political career, and still be *alieni iuris* if his *paterfamilias* was still alive. To remedy this inconvenience, the Romans imagined the following solution: the *paterfamilias* could agree with a friend to alienate his son three times by *mancipatio*. After each alienation, the friend freed the son, who therefore returned under his father's power after the first two *mancipationes*, but it was different after the third, as this one erased the *patria potestas*. Consequently, the son of the family became *sui iuris* and was therefore emancipated. At the same time, this allows us to highlight the etymological origin of emancipation.

Over time, the Romans considered that resorting to *mancipatio* was certainly reassuring but also constraining, given the number of people to gather. They therefore wondered if it was not possible to achieve the same result by using a system involving fewer people. In a new surge of legal engineering, they thought it would be possible to agree between the alienator and the buyer to undertake a fictitious trial. Thus, the buyer would bring an action in court to claim the thing he wanted to acquire as if he were already the owner. Instead of contesting this claim, the alienator confirmed that the plaintiff was indeed the owner, and the praetor attributed the thing

to him. The transfer was therefore carried out with the sole, albeit involuntary, complicity of the praetor. This procedure was of truly ingenious simplicity!

This procedure was called *in iure cessio*. The origin of this name is easy to understand: since the defendant acquiesced and did not contest the plaintiff's claim, it was unnecessary to appoint a judge and move to the *in iudicio* phase. The case therefore ceased at the end of the *in iure* phase.

An interpretation of this procedure was brought to the screen in the series Rome. In this excerpt, two Roman citizens proceed with an *in iure cessio*. Lucius Vorenus donates his Gallic slave Eirene to his friend Titus Pullo. The *in iure cessio* does not follow a sale in this case, but the goal remains the same: the property of the thing must be transferred. I propose to watch this excerpt.

In this excerpt, we see a disillusioned official addressing the alienator and asking him to attest that he is indeed a Roman citizen and that the buyer is the owner of the slave. The fact that the praetor is replaced by an official is not impossible, even if at the end of the republic, the state apparatus is less developed than it will be later. The fact that he appears disillusioned is amusing and highlights that he is not fooled by the fictitious nature of the legal action. He knows well that the legal action deployed before him is diverted for other purposes, that is, the transfer of property. The invocation of Roman citizenship, for its part, was indeed necessary since it is the transfer of Quiritarian property that is in question. Where the series probably deviates from Roman procedure is in the fact that the magistrate immediately addresses the defendant, without even the plaintiff affirming his right of ownership. According to the Institutes of Gaius, the latter had to pronounce the usual phrase: “I affirm that this slave belongs to me by virtue of the law of the Quirites.” In short, if there were a criticism to be made of the series, it would be this omission.

Due to its functioning, *in iure cessio* is obviously not limited to the transfer of ownership of *res mancipi*. It allows many other things to be done, as long as it is enough to affirm something before the praetor and that this affirmation is not contradicted for the thing to become true in law. For example, one can create servitudes (*servitus*), usufructs, free slaves, adopt a person... Conversely, one can also terminate these rights by affirming that they do not exist. It goes without saying that *in iure cessio* also allows the acquisition of *res nec mancipi*, although the transfer of ownership of the latter does not require any particular ritual.

The third mode of property transfer, adapted to *res nec mancipi*, is *traditio*. To carry out the latter, it is sufficient to hand over the alienated thing to the buyer with the intention of alienating it, the buyer having, for his part, the intention of becoming the owner. Unlike the first two modes of property transfer that we have explained, the effectiveness of *traditio* no longer depends on the scrupulous respect of a ritual but on the will of the parties.

In conclusion, we see that classical Roman law knew three modes of property transfer. We will see the practical consequences and evolution in the chapter dedicated to property in Roman law. But let us become aware now of the non-automatic nature of property transfer, which has the advantage of increasing its visibility and simplifying its legal analysis.

TEXTS

Text 4.1

Gai. 4.16 :

Si in rem agebatur, mobilia quidem et moventia, quae modo in ius adferri adducive possent, in iure vindicabantur ad hunc modum : qui vindicabat, festucam tenebat ; deinde ipsam rem adprehendebat, velut hominem, et ita dicebat: hunc ego hominem ex iure Quiritium meum esse aio. Secundum suam causam, sicut dixi, ecce tibi, vindictam imposui, et simul homini festucam inponebat. Adversarius eadem similiter dicebat et faciebat. Cum uterque vindicasset, praetor dicebat : mittite ambo hominem. Illi mittebant. Qui prior vindicaverat, sic dicebat : postulo, anne dicas, qua ex causa vindicaveris? Ille respondebat: ius feci, sicut vindictam inposui. Deinde qui prior vindicaverat, dicebat: quando tu iniuria vindicavisti, D aeris sacramento te provoco; adversarius quoque dicebat similiter: et ego te; aut si res infra mille asses erat, scilicet L asses sacramentum nominabant. Deinde eadem sequebantur, quae cum in personam ageretur. (...).

Gaius, Institutes 4.16 :

If it was a real action, they vindicated before the court moveable and living property, which could be carried out or led into the court, in this way. The claimant would hold a rod; then he would take hold of the actual property, for instance a slave, and say: "I declare that this slave is mine by quiritary right in accordance with my case. As I have spoken, see, I have imposed the claim", and at the same time he laid the rod on the slave. His opponent likewise said and did the same. When each of them had made his claim, the praetor would say: "Both of you, let go the slave." They then let go of him. The first claimant would then put a question to the other in these words: "I demand that you tell me the grounds of your claim." The other replied: "I have exercised my right in imposing the claim." The first claimant would the say: "Inasmuch as you have claimed wrongfully, I challenge you on oath for five hundred 'asses'." His opponent then said likewise: "And I you." If the property was worth less than a thousand 'asses', the sworn penalty that they named would be for fifty. The following stages were the same as for a personal action. (...)[24]

Text 4.2

Gai. 4.17 :

Si qua res talis erat, ut sine incommodo non posset in ius adferri vel adduci, velut si columna aut navis aut grex alicuius pecoris esset, pars aliqua inde sumebatur, eaque in ius adferebatur, deinde in eam partem quasi in totam rem praesentem fiebat vindicatio; itaque / vel / ex grege vel una ovis aut capra in ius adducebatur, vel etiam pilus inde sumebatur et in ius adferebatur; ex nave vero et columna aliqua pars defringebatur; similiter si de fundo vel de aedibus sive de hereditate controversia erat, pars aliqua inde sumebatur et in ius adferebatur, et in eam partem proinde atque in totam rem praesentem fiebat vindicatio, velut ex fundo gleba sumebatur et ex aedibus tegula, et si de hereditate controversia erat, aeque .....

Gaius, Institutes 4.17 :

If the property was of such a kind that it could not be carried or led into the court without inconvenience, for example, a pillar, a ship, or a flock of some herding best, they used to take some part of it and carry that into the court; then the vindication was made on that part as if the

[24] Translated by W.M. Gordon and O.F. Robinson, The Institutes of Gaius, 1988.

whole had been present. So from a flock a single ewe or she-goat would be led into the court, or even a hair would be taken from them and brought into the court, while a piece would be broken off a ship or a pillar. Likewise, if there was a dispute over land or buildings or an inheritance, a part of it would be taken and brought into the court and a vindication would be made on that part, just as if the whole had been present. For instance, a clod of earth was taken form a farm, a roof tile from a house (...)[25]

Text 4.3

REI VINDICATIO

[Nominatio:] *Caius iudex esto*. –
[Intentio:] *Si paret fundum capenatem, quo de agitur, ex iure Quiritium Auli Agerii esse*,
[Clausula arbitraria:] *Neque is fundus arbitrio tuo aulo agerio restituetur*,
[Condemnatio:] *Quanti ea res erit, tantam pecuniam, Iudex, Numerium Negidium Aulo Agerio condemna; si non paret absolve*.

Revendication:
[Nominatio:] Caius shall be the judge.
[Intentio:] If it appears that the Capenian estate in question belongs to Aulus Agerius according to quiritarian law,
[Clausula arbitraria:] and if this estate is not restored to Aulus Agerius according to your arbitration,
[Condemnatio:] Judge, condemn Numerius Negidius to Aulus Agerius for the amount that this matter is worth; if it does not appear, exonerate him.

Text 4.4

CONDICTIO CERTAE CREDITAE PECUNIAE

[N:] *Caius iudex esto*. – [I:] *Si paret Numerium Negidium Aulo Agerio SESTERTIUM decem milia dare oportere*, [C:] *Iudex, Numerium Negidium Aulo Agerio sestertium decem milia condemna; si non paret, absolve*.

Condiction of the sum of money lent:

[N:] Caius shall be judge. [I:] If it appears that Numerius Negidius is under duty to pay Aulus Agerius ten thousand sesterces [C:] Judge, condemn Numerius Negidius to pay ten thousand sesterces to Aulus Agerius; if it does not appear, acquit him.

Text 4.5

10 C(AIUS) BLOSSIUS CELADUS IUDEX ESTO
1 [SI PAR] RET C(AIUM) MARCIUM [SATUR] NINUM
2 [C(AIO)] SULPICIO CINNAM [O] HS I)) m m m
3 [D] ARE OPORTERE Q(UA) [D(E) R(E) AGI] TUR
4 C(AIUS) BLOSSIUS CELADUS [I] UDEX
5 [C(AIUM)]MARCIUM SATU [R] NINUM [HS] m m ((I))
6 [C(AIO)] SULPICIO CINNAM [O CON] DEMNATO

[25] Translated by W.M. Gordon and O.F. Robinson, The Institutes of Gaius, 1988.

7 SI NON PARRET APSOLVITO
8 IUDICARE IUSSIT P(UBLIUS) COSSINIUS PRISCUS IIVIR
9 [ACTU] M PUTEOL [IS]
9A ……..
10 [F] AUSTO CORNELIO SUL [LA FELI] CE
11 [Q(UINTO)] MARCIO BAREA SORANO COS

Caius Blossius Celadus shall be judge;
If it appears that Caius Marcius Saturninus is under duty to pay eight thousand sesterces to Caius Sulpicius Cinnamus, in this matter,
The judge Caius Blossius Celadus shall condemn Caius Marcius Saturninus to pay eight thousand sesterces to Caius Sulpicius Cinnanus; if it does appear, he shall exonerate him.
Publius Cossinius Priscus, duumvir, has commanded to judge.
Made in Puteoli,
.....,
Faustus Cornelius Sulla Felix et Quintus Marcius Barea de Sora being consuls.

Text 4.6

Gai. 3.90:

Re contrahitur obligatio velut mutui datione ; mutui autem datio proprie in his [fere] (?) rebus contingit, quae res pondere numero mensura constant, qualis est pecunia numerata vinum oleum frumentum aes argentum aurum; quas res aut numerando aut metiendo aut pendendo in hoc damus, ut accipientium fiant et quandoque nobis non eaedem, sed aliae eiusdem naturae reddantur. Unde etiam mutuum appellatum est, quia quod ita tibi a me datum est, ex meo tuum fit.

Gaius, Institutes 3.90:

One case where an obligation is contracted by conduct is when a loan is made, of the kind called in Latin "mutuum". This applies only to things identified by weight, number or measure, such as money, wine, oil, corn, bronze, silver, and gold. When we lend such things by number, measure or weight we intend that they should become the property of the recipient and that when the time comes for getting them back we should receive not the very things we gave but others of the same kind and quality. This is the origin of the term "mutuum": I give so as to make my property your property, in Latin "ex meo tuum".[26]

Text 4.7

Ulp., 26 ad ed. (D. 12.1.11.1):

Si tibi dedero decem sic, ut novem debeas, Proculus ait, et recte, non amplius te ipso iure debere quam novem. Sed si dedero, ut undecim debeas, putat Proculus amplius quam decem condici non posse.

Ulpien, book 26 on the Edict (D. 12.1.11.1):

1. If I give you ten on the understanding that you shall owe nine, Proculus holds and rightly that the automatic conclusion of law is that you owe no more than nine. But if the understanding is

[26] Translated by W.M. Gordon and O.F. Robinson, The Institutes of Gaius, 1988.

that you shall owe eleven, Proculus's opinion is that the condictio will not go for more than ten.[27]

Text 4.8

Gai. 1.119:

Est autem mancipatio, ut supra quoque diximus, imaginaria quaedam venditio; quod et ipsum ius proprium civium romanorum est. Eaque res ita agitur: adhibitis non minus quam quinque testibus civibus romanis puberibus et praeterea alio eiusdem condicionis, qui libram aeneam teneat, qui appellatur libripens, is qui mancipio accipit, rem (aes?) Tenens ita dicit: « hunc ego hominem ex iure Quiritium meum esse aio isque mihi emptus esto hoc aere aeneaque libra »; deinde aere percutit libram idque aes dat ei, a quo mancipio accipit, quasi pretii loco.

120. *Eo modo et serviles et liberae personae mancipantur. Animalia quoque, quae mancipi sunt, quo in numero habentur boves, equi, muli, asini, item praedia tam urbana quam rustica, quae et ipsa mancipi sunt, qualia sunt italica, eodem modo solent mancipari*.

121. *In eo solo praediorum mancipatio a ceterorum mancipatione differt, quod personae serviles et liberae, item animalia, quae mancipi sunt, nisi in praesentia sint, mancipari non possunt – adeo quidem ut eum, qui mancipio accipit, adprehendere id ipsum, quod ei mancipio datur, necesse sit: unde etiam mancipatio dicitur, quia manu res capitur – praedia vero absentia solent mancipari*.

122. *Ideo autem aes et libra adhibetur, quia olim aereis tantum nummis utebantur (...) Eorumque nummorum vis et potestas non in numero erat, sed in pondere* (...).

Gaius, institutes 1.119:

Mancipation, then as we have also said earlier, is a sort of imaginary sale; it is also part of the law peculiar to Roman citizens. It is carried out as follows. There are brought together not less than five witnesses, adult Roman citizens, together with another of the same status, who holds bronze scales and is called the "scale-holder" (*libripens*). The person who is taking by mancipation, while holding the object says the following words: "I declare that this man is mine by quiritary right and let him be bought to me with this bronze and bronze scales." Then he strikes the scales with the bronze, and gives it to him from whom he is taking by mancipation by way of a price.

120. Both slaves and free persons are mancipated in this way, as also animals which are capable of mancipation. In this category are counted cattle, horses, mules and donkeys; again, any land, urban and rustic, which is itself capable of mancipation as is Italian land, is customarily mancipated in this way.

121. The mancipation of land differs from the mancipation of other things in this alone, that persons, slaves and frees, and animals which are capable of mancipation, cannot be mancipated unless they are physically present. This is so true that it is necessary for the person who is accepting by mancipation to take hold of whatever is being transferred to him; this, too is why it is called mancipation, because the thing is taken (in Latin, "capitur") by hand (in Latin, "manu"). Land, on the other hand, is customarily mancipated in its absence.

[27] Translated by Peter Birks– Edited by A. Watson, The Digest of Justinian, Vol. I, 1994.

122. The reason, then, for the use of the bronze and the bronze scales, is because in earlier times, men used only copper monies; (...) The force and power of those monies lay not in their number but in their weight; (...).[28]

Text 4.9

Gai. 2.24:

In iure cessio autem hoc modo fit: apud magistratum populi romani vel praetorem [vel apud praesidem provinciae] is, cui res in iure ceditur, rem tenens ita dicit: hunc ego hominem ex iure Quiritium meum esse aio; deinde postquam hic vindicaverit, praetor interrogat eum, qui cedit, an contra vindicet; quo negante aut tacente tunc ei, qui vindicaverit, eam rem addicit; idque legis actio vocatur.

Gaius, institutes 2.24:

Assignment in court, however, is done in this way: in the presence of a magistrate of the Roman people such as the Urban Praetor (or provincial governors) the assignee takes hold of the things and says "I say that this slave is mine by quiritary right"; and then after he has made his vindication the praetor asks the assignor whether he is making a counter-vindication. If he says that he is not or silent the magistrate awards the thing to the person who vindicated; and this is called an action in the law.[29]

Text 4.10

Gai. 2.18-20:

Magna autem differentia est inter mancipi res et nec mancipi. **19.** *Nam res nec mancipi ipsa traditione pleno iure alterius fiunt, si modo corporales sunt et ob id recipiunt traditionem*. **20.** *Itaque si tibi vestem vel aurum vel argentum tradidero sive ex venditionis causa sive ex donationis sive quavis alia ex causa, statim tua fit ea res, si modo ego eius dominus sim*.

Gaius, institutes 2.18-20:

18. Now there is a great difference between things capable of mancipation and those which are not. **19**. For the latter become the full property of someone else by the very act of delivery (*traditio*), provided that they are corporeal and so capable of delivery. **20**. Ans so, if I deliver to you clothing or gold or silver, whether on the basis of a sale or a gift or on any other basis, it immediately becomes yours, provided that I am owner of it.[30]

Text 4.11

Gai. 2.16:

At ferae bestiae nec mancipi sunt, velut ursi leones, item ea animalia quae fere bestiarum numero sunt, velut elephanti et cameli. Et ideo ad rem non pertinet, quod haec animalia etiam

[28] Translated by W.M. Gordon and O.F. Robinson, The Institutes of Gaius, 1988.
[29] Translated by W.M. Gordon and O.F. Robinson, The Institutes of Gaius, 1988.
[30] Translated by W.M. Gordon and O.F. Robinson, The Institutes of Gaius, 1988.

collo dorsove domari solent : nam ne nomen quidem eorum animalium illo tempore fuit, quo constituebatur quasdam res mancipi esse, quasdam nec mancipi.

Gaius, institutes 2.16:

Again, wild beasts such as bears and lions, and also those animals which are to be counted as wild, such as elephants and camels, are not capable of mancipation. It is irrelevant that the latter are also commonly broken in for use as beasts of draught or burden; they were not even known about when it was determined that some things were capable of mancipation and some were not.[31]

[31] Translated by W.M. Gordon and O.F. Robinson, The Institutes of Gaius, 1988.