“Economic Fragmentation in the Legal System of the Late Roman Empire”

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ABSTRACT

The dynastic crisis of the so-called “Crisis of the Third Century” is often associated with a period of economic fragmentation in the Roman Mediterranean. However there have been few attempts to define precisely what is meant by “fragmentation”, or to chart its chronology and its relationship to legal developments taking place in the transition from Principate to Dominate. This thesis traces economic fragmentation to the late second century, during which a “perfect storm” of climate change, disease and de-urbanisation led to the collapse of much long-distance trade. In the longer run, many of the institutions which had supported the integrated trading network also began to disintegrate. Economic “fragmentation” is therefore defined as the disengagement of the agrarian economy from the institutions which made long-distance trade possible, in favour of localised forms of production.

This approach to economic fragmentation can improve our understanding of legal transitions during the second and third centuries CE. The transition away from urban economic and political structures affected the practical significance of the legal privileges enjoyed by citizens. This is a useful context in which to understand the Antonine Constitution, which extended Roman citizenship to most residents of the Empire. This enfranchisement would be a less radical departure from previous constitutional norms than it initially appears if the legal privileges of citizenship had already been significantly eroded. Access to justice therefore came to depend not on the privileges of citizenship but rather on an individual’s access to Imperial courts, which varied depending on local power relationships in the agrarian countryside. This is reflected in the changing structures of civil procedure, which increasingly seek to accommodate the presence of non-elite litigants who do not routinely engage the courts. The presence of these non-elite litigants is also visible in attempts by the Imperial chancelry to address differences in bargaining power between contractual parties, particularly where land was sold under straightened economic circumstances or provincial tenants found themselves unable to meet their obligations to the landholder.

LAY SUMMARY

During the second and third centuries, the Roman Empire went through a period of crisis. This could be seen not just in Roman politics but also in changes which took place in the Roman economy. By looking at a mixture of archaeological and textual evidence, it is possible to see that people began to move away from long distance trade and especially the maintenance of the large Roman cities, in favour of more local economies. This thesis explores this period of transition from the point of view of the legal sources. It focuses on how people could access justice, how the legal system changed over time and how Roman law dealt with situations where people found themselves in distress. In doing so it integrates legal sources into the picture of the economic and social changes taking place during the so-called “Crisis of the Third Century”.

AUTHOR’S DECLARATION

I declare that this thesis has been composed solely by myself and that it has not been submitted, in whole or in part, in any previous degree application. Except where stated otherwise by reference or acknowledgment, the work presented is entirely my own.

Signed: Jonathan Ainslie

Date: 31/09/2021

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TABLE OF CONTENTS

CHAPTER ONE

INTRODUCTION

In the opening paragraph of his *History of the Decline and Fall of the Roman Empire,* Gibbon refers to the period immediately following the death of Marcus Aurelius in 180 CE as "a revolution which will ever be remembered, and is still felt by the nations of the earth".[1] In this he reflected – and in many ways helped to perpetuate – the popular notion of the late second and third centuries CE as a period of manifold crises for the Romans. On a conservative estimate, eighteen different men ruled as Emperor from the death of Severus Alexander in 235 CE until Diocletian's eventual consolidation of power in 284 CE. Governing for an average of no more than three years each, these men witnessed internal military strife, the loss of the Empire's territorial integrity and prolonged disruptions in the population's living standards. More recent scholarship has tended to be more hesitant of grander narratives of a "Crisis of the Third Century", but it continues to be regarded as a "critical century" during which the administrative, political and religious structures of the Roman Empire changed irrevocably.[2]

Until recently, developments in the legal sphere - and especially private legal relationships - have been poorly integrated into our understanding of this complex period. One reason for this has been the tendency to regard Roman law as an autonomous discipline, which although compelled from time to time to acknowledge developments in wider society, was driven to a much greater extent by the professional traditions and priorities of the jurists.[3] Another reason is the argument that Roman law was essentially a law of elites: developed by aristocratic men largely for application by their close peers.[4] On this view, the great mass of the Roman population had little understanding of law and even less engagement with it. Mary Beard outlines the position succinctly: "the sophisticated edifice of Roman law, despite its extraordinary expertise in formulating legal rules and principles, deciding issues of responsibility and determining rights of ownership and contract, had little impact on the lives of those below the elite and offered little help for their problems".[5] McGinn notes that "there was, apart from a very exceptions, no effective means

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[1] Gibbon, E. ([1776] 1997). *History of the Decline and Fall of the Roman Empire.* Vol. 1. London: Folio Society. p.31.
[2] For a recent overview see Ando, C. (2012). *Imperial Rome AD 193 to 284: The Critical Century.* Edinburgh: Edinburgh University Press.
[3] Watson, A. (1985). *The Evolution of Law.* Baltimore: John Hopkins University Press; Watson, A. (1995). *The Spirit of Roman Law.* Athens, GA: University of Georgia Press. pp.64-73.
[4] This is for example the departure point for Frier's analysis of *locatio conductio* in Frier, B. (1980). *Landlords and Tenants in Imperial Rome.* Princeton, NJ: Princeton University Press.
[5] Beard, M. (2015). *SPQR: A History of Ancient Rome.* London: Profile Books. p.80.

to challenge a decision either by a public official or a finder of fact, even in cases of manifest injustice".[6] A third and perhaps more significant reason lies not in historical claims but rather in methodology. Roman law was traditionally a dogmatic subject, which preferred to treat the Roman juristic literature "as a science of its own, with its own approaches and methodology" rather than as a historical phenomenon which could be integrated with other kinds of evidence to produce a more complete picture of life in the ancient world. Traditions, however, change. There is now a growing literature which examines the interrelationship of Roman law and society, including much in the English language.[7] Recent scholarship has also shown a greater sensitivity to the legal literacy of the general Roman population. Law filtered into the literary culture and even the humour of Roman society[8]; the great jurists were accompanied by many "little men of law" who catered to ordinary clients[9]; petitioners to the Roman courts and Imperial chancelry came from a wide range of social backgrounds.[10] Roman legal scholarship is more hospitable to inter-disciplinary contributions than it has ever been.

Any attempt to integrate law into the larger historical picture of the late second and third centuries must answer two questions. How do the legal sources improve our understanding of the "critical" changes taking place in this period? And how does taking account of their social and economic context allow the legal sources themselves to be interpreted in new ways? There are many ways that these questions could be approached. Here the focus shall be on what I have described as the process of fragmentation which the Roman economy underwent in the immediate aftermath of the Antonine Plague and the impact this had both on the exercise of specific legal privileges and modes of access to the Roman legal system generally. This will in turn lay the foundations for an analysis of how these new structures of legal privilege impacted the legislative responses of the late third century Imperial chancelry, with specific regard to the new contractual institution of *laesio enormis* and key evolutions in *remissio mercedis.*

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[6] McGinn, T. (2017). "The True Beneficiaries of Roman Private Law". In McGinn, T. and Kehoe, D. (eds). Ancient Law, Ancient Society. Ann Arbor, MI: University of Michigan. p.135.
[7] Crook, J. (1967). *Law and Life of Rome.* Ithaca, NY: Cornell University Press; Cairns, J. and Du Plessis, P (eds). (2007). *Beyond Dogmatics: Law and Society in the Roman World.* Edinburgh: Edinburgh University Press; Tuori, K., Ando, C. and du Plessis, P. (2016). *The Oxford Handbook of Roman Law and Society.* Oxford: Oxford University Press.
[8] The Philogelos includes several jokes in which the humour turns on an understanding of sales contracts. See Daw, R.D. (2000). *Philogelos.* Berlin: de Gruyter.
[9] Pilipow, R. (2020). *The Little Men of Law: A Social History of the Late Roman Jurist.* PhD Diss. University of Pennsylvania.
[10] Connolly, S. (2010). *Lives Behind the Laws: The World of the Codex Hermogenianus*. Bloomington, IN: Indiana University Press. McGinn, T. (2017). "The True Beneficiaries of Roman Private Law". In McGinn, T. and Kehoe, D. (eds). *Ancient Law, Ancient Society.* Ann Arbor, MI: University of Michigan. pp.133-166.

Recent scholarship has found a variety of methodologies which help to place legal change within an economic framework. Perhaps the best known is the New Institutional Economics (NIE). The NIE approach is concerned with the reduction of transaction costs, which Stigler describes as the "frictions" that operate within an economic system and slow down its level of activity.[11] The size and nature of these costs is determined by a society's economics institutions, which North defines as a "humanly devised constraint that structures political, economic and social interactions".[12] Law is one such institution. It has an especially important role to play in the reduction of bargaining costs, or the costs associated with reaching an agreement. Oliver Williamson has defined law as a "governance structure" which provides "the explicit or implicit contractual framework within which a transaction is located".[13] In recent years there has been a range of scholarship looking at Roman law as a governance structure in the context of economic life in the ancient Mediterranean. For example, Ratzan has analysed contract - as a set of formal rules, derived from contract law, "organising certain kinds of economic transactions" - as a governance structure in Roman Egypt.[14] I build on some of this work to explore how far Williamson's idea of relationship-specific contracts - in which the obligations of the parties stem not just from what they have expressly agreed to in advance, but also from the evolving relationship between them – might improve our understanding of how good faith in contract operated in the late third century.

One key question for any analysis of law in the later Empire is the extent to which the larger population was able to access the legal system and defend its interests against the elite. It has been established that as the Emperor began to adopt a more central role in the administration of law, it became necessary to constrain and legitimise his power by reference to what Ulpian described as "the art of goodness and fairness".[15] To put it another way, the emerging acceptance among professional jurists that the Emperor's mere will was law was tied to a conviction that it should accord with the expectations of his petitioners for justice.[16] The values of the later Imperial legal system did therefore make at least a notional concession to the needs of non-elite litigants. It is more difficult, however, to trace how the

[11] Stigler, G. (1972). "The Law and Economics of Public Policy". *Journal of Legal Studies.* Vol. 1. pp.1-12.
[12] North, D. (1991). "Institutions". *Journal of Economic Perspectives.* Vol. 5(1). pp.97-112 at 97.
[13] Williamson, O.E. (1981). "The Modern Corporation: Origins, Evolution, Attributes". *Journal of Economic Literature*. Vol. 19(4). pp.1537-1568 at 1544.
[14] Ratzan, D.M. (2015). "Transaction Costs and Contract in Roman Egypt". In Kehoe, Ratzan and Yiftach. (eds.). *Law and Transaction Costs in the Ancient Economy.* Ann Arbor: University of Michigan Press. pp.185-231.
[15] D.1.1.1.pr. Watson, A. (trans. ed.). (1985). *The Digest of Justinian.* Philadelphia, PA: University of Pennsylvania Press.
[16] Tuori, K. (2016). *The Emperor of Law: The Emergence of Roman Imperial Adjudication.* Oxford: Oxford University Press. pp.196-197.

presence of litigants from different social backgrounds affected the routine operation of the legal system. I approach this problem from a sociological perspective. In an influential article, Galanter divided litigants into “one-shotters” and “repeat players”. A “one-shotter” is a litigant who only engages with the legal system infrequently; a “repeat player” on the other hand litigates frequently.[17] Galanter approximated the “one-shotter” with the less economically powerful in society. In a Roman context, a good example of a “repeat player” would be a *paterfamilias* in a prominent citizen family, who routinely appears in court to represent himself, his *familias* and his clients. A good example of “one-shotter” is the late Imperial petitioner, who brings his complaint to the Roman court alongside thousands of others to hope for a response. By applying Galanter’s model to the changes which took place in late Imperial civil procedure, I trace the shifting relationship between Roman “repeat players” and “one-shotters”.

Chapter Three, the first substantive chapter, defines and describes the process of economic fragmentation which took place during the late second and third centuries. It begins with a review of the literature on the basic features of the Roman economy. Rome was a pre-modern society, and this entailed constraints that do not apply in the post-industrial world. Scholars have however debated to extent to which these constraints limited the dynamism of the Roman economy over time. Relatively few would now argue that Rome was part of a “*longue durée* where nothing ever changed”[18], but recent work has suggested that there is significantly more space for fluctuations in the level of economic activity than had previously been accepted. In particular, there was a period of efflorescence between the third century BCE and the third century CE in which living standards for the typical Roman were substantially higher than before or after. This was made possible by a “high equilibrium” of urbanisation and trade integration, supported by a range of institutions – law, money and information flows – which helped to buttress an otherwise fragile system. This “high equilibrium” was eventually destabilised by a “perfect storm” of climate change, plague and de-urbanisation. The institutions which had maintained the Roman efflorescence in living standards began to dissolve as Romans looked to more local, pragmatic solutions. An integrated urban economy therefore gave way to a more rural economy dependent on local power relationships.

The subsequent chapters examine the consequences of this process of fragmentation for Roman law. Chapter Four argues that the fragmentation of the Empire into local economies helped to accelerate a decline in the legal value of Roman citizenship, which had first

[17] Galanter, M. (1974). “Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change”. *Law and Society Review.* Vol. 9(1). pp.95-160.
[18] Jongman, W.M. (2014). “Reconstructing the Roman Economy”. In Neal, L. and Williamson, J.G. (eds). *The Cambridge History of Capitalism.* pp.75-100 at 75.

become evident in the earlier Principate but had accelerated by the beginning of the third century. In the late Republic, Roman citizens had enjoyed a range of privileges which gave them superior access to the legal system compared to *peregrines,* or non-citizens. This included the right of *provocatio*: a right of appeal to the public assemblies in Rome which was effective against the *coercito* of a magistrate, or against the outcome of a summary trial. Over the Principate, while these privileges continued to formally exist, they gradually became more difficult to exercise. This deterioration in the legal privileges of citizenship was closely related to the demographic composition of the citizen body. As Garnsey has noted, "*provocatio* probably worked smoothly only when the citizen population abroad had the character of a closely-knit, exclusive, urban elite".[19] The deterioration was accelerated by the economic fragmentation which took place following the Antonine Plague, as citizens found they no longer formed part of an urban elite, but had rather become dispersed throughout the provincial economy and were more easily subject to the oppression of local procurators and land holders. It is argued this is a useful context in which to understand the Antonine Constitution in 212 CE, which extended Roman citizenship to nearly all residents of the Empire.

Chapters Five and Six then examine the role played by the Imperial chancelry in the management of disputes in the new localised economy. Chapter Five outlines the social class distinctions between *honestiores* and *humiliores* which emerges in the second and third centuries CE and argues that the Imperial chancelry took steps, via the *cognitio* procedure, to improve the responsiveness of the legal system to non-elite litigants. Chapter Six examines how the Imperial chancelry intervened in contractual relationships in order to balance the needs of ordinary petitioners against the land holding elite. This was done by utilising the legal concepts of *bona fides and humanitas* to afford greater protection to parties whose weaker bargaining position had been taken advantage of by the other party. *Laesio enormis,* which intervenes in contracts where land has been sold below its market price, makes its first appearance in an Imperial constitution from the late third century. Meanwhile, the rules relating to *remissio mercedis,* or rent abatement, are subtly amended to embrace a wider range of situations in which tenants face economic deprivation. Both of these innovations reflect the specific economic challenges of the more concentrated agrarian economy of the late third century. By encouraging higher levels of trust between contractual parties, they allowed the Imperial chancelry to position itself as a unifying moral force in a fragmented world.

[19] Garnsey, P. (1970). *Social Status and Legal Privilege in the Roman Empire.* Oxford: Oxford University Press. p.269.

CHAPTER TWO
METHODOLOGIES

When placing Roman law in a social and economic framework it can be useful to look to modern developments in the economic and sociological analysis of law. The New Institutional Economics (NIE) can clarify the effect of legal structures on the development of economic relationships between private parties, while a sociological analysis of Roman civil procedure can reveal the structural relationships between different users of the law and the Imperial chancelry.

Section 2.1: The New Institutional Economics

The New Institutional Economics (NIE) concerns itself with the role of law – as well as other social institutions – in overcoming transaction costs, especially transactions carried out over long distances. Stigler describes transaction costs as the "frictions" that operate within an economic system and slow down its level of activity.[1] These frictions can take many different forms. At their simplest they can be physical barriers, such as long distances, mountain ranges or rough waters. They can also be security barriers, such as the risk of piracy. At their most subtle level they are barriers to economic calculation, which fall into three categories:

(a) search and information costs,
(b) bargaining costs,
(c) policing and enforcement costs.[2]

Transaction costs are one of the most important barriers to economic growth, because they influence whether buyers, sellers and many other economic actors choose to enter into transactions with one another. Transaction costs loosely correspond to the intuitive notion of the "cost of doing business", which is added on top of the "real" cost of the goods and services being bought and sold. More precisely Coase describes them as the "cost of using a price mechanism".[3] All societies have a toolkit of both formal and informal institutions for overcoming transaction costs. Douglass North, who was influential in the early development of NIE, defines institutions as "humanly devised constraints that structure political, economic

[1] Stigler, G. (1972). "The Law and Economics of Public Policy". *Journal of Legal Studies.* Vol. 1. pp.1-12.
[2] North, D. (1992). "Transaction Costs, Institutions and Economic Performance". *International Centre for Economic Growth Occasional Papers.* No. 30. pp.14 ff.
[3] Coase, R.H. (1937). "The Nature of the Firm". *Economica.* Vol. 4(16). pp.386-405 at 390.

and social interactions".[4] In a highly complex society, legal rules will usually form part of this toolkit.

To what degree can NIE, which was originally developed for the analysis of modern economies, be applied to a pre-modern economy like Rome? The application of NIE approach to a pre-modern economy like Rome faces several important challenges. The first is that it relies heavily on economic data of the type that is widely collected in a modern economy. Very little economic data has survived from Ancient Rome. Where data, such as a record of prices, does survive, it is often difficult to place in context. It may be influenced by the season in which an exchange took place, a sudden shock – such as a plague - or by local variations in the way economic transactions were carried out. Economic historians are often forced to reconstruct measures of the Roman economy based on only a handful of often questionable data points.[5] Jongman has likened this approach to "reconstructing changes in twentieth century US GDP on the basis of little more than the price of a hamburger in Kentucky in the 1930s, a car in Virginia in the 1960s, an electrician's wage in San Francisco in the 1990s and the tax revenue of a village in Louisiana in the 1940s".[6] Boldizzoni, a firm advocate of the enduring value of what he calls "the Finleyan model" of Ancient economics, goes further, referring to attempts by economic historians such as Morris Silver and Peter Temin to reconstruct the development of ancient economies as a "fanciful world of Clio".[7] In the next section, a different approach will be taken to measuring the performance of the Roman economy, based on a variety of new techniques in archaeology that can throw light on changing real living standards for the larger population of the Roman Empire.

A second challenge faced by NIE in a pre-modern context is the lack of clarity over the prevalence of market exchange in Ancient Rome. According to Boldizzoni, the "fancifulness" of NIE also extends to its tendency to assume that market exchanges are the default kind of transactional mode to be found in an economy, and to treat all other kinds of transactional mode as an imperfect substitute for market exchange.[8] Boldizzoni points in support of this to a passage from Douglass North, in which he refers to a long list of non-market institutions where economic transfers can take place – "families, firms, guilds, manors, trade unions,

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[4] North, D. (1991). "Institutions". *Journal of Economic Perspectives.* Vol. 5(1). pp.97-112 at 97.
[5] One example of a reconstruction is the estimate of the size of Roman GDP provided recently in Scheidel, W. and Friesen, S. (2009). "The Size of the Economy and the Distribution of Income in the Roman Empire". *Journal of Roman Studies.* Vol. 99. pp.61-91.
[6] Jongman, W.M. (2014). "Reconstructing the Roman Economy". In Neal, L. and Williamson, J.G. (eds.). *The Cambridge History of Capitalism.* pp.75-100 at 78.
[7] Boldizzoni, F. (2011). *The Poverty of Clio: Resurrecting Economic History.* Princeton, NJ: Princeton University Press. pp.72-76; Temin, P. (2013). *The Roman Market Economy.* Princeton, NJ: Princeton; Silver, M. (1995). *Economic Structures of Antiquity.* Greenwood Publishing Group. Westport, CT: Greenwood Publishing.
[8] Boldizzoni. (2011). *The Poverty of Clio.* pp.21-25.

cooperatives" – as "substitutes for price-making markets" and goes on seek an explanation for why they allocate resources "in place of markets".[9] The analysis of transactional modes has its roots in Karl Polanyi, who distinguished between "reciprocity, redistribution and exchange".[10] Reciprocity is defined by a rough balance between the goods and services an individual receives and those they give up. In Ancient Rome reciprocal transfers can be found as part of the "enmeshed web of social obligations" between friends, often carried out as a physical display of *beneficia.*[11] Redistribution involves the collection of goods and services by a central authority, to be passed out again according to law, custom or personal discretion. This form of transfer can be observed on a variety of scales, in families, firms or the state. At the household level it is the kind of transfer that characterises Xenophon's *Oeconomicus,* which is discussed extensively by Finley in the opening chapters of the *Ancient Economy.*[12] Exchange is the transfer of goods or services for other products or for money and the only kind of transactional mode capable of allocating resources based on moveable prices. It was Polanyi's view that price-making exchange was vanishingly rare in pre-modern societies, so much so that the emergence of markets in early modern Europe led to economic processes becoming "disembedded" from the social environments in which people lived.[13]

Polanyi's model has since been refined by Pryor, who developed a model specifically for pre-modern economies. Pryor distinguishes between exchanges, were goods or services are rendered for a return, and transfers, where there is no direct return (not counting "invisibles" such as the public services which might be provided out of government revenue from taxes).[14] Transfers can be carried out with a central authority or not, while exchanges can be divided between those where the ratio of goods or services exchanged is variable and those were it is not. Only exchanges which can vary are market exchanges. Where the exchange is for money, a shift in the ratio of goods or services exchanged will express itself as a change in price. Temin has added a behavioural aspect to these categories, pointing out that people will adopt different transactional modes based on their level of personal autonomy, as well as the rate of change in their environment.[15] Where change is slow and personal autonomy is low, people will tend to utilise customary behaviours, which lend themselves to non-centric transfers, or what Polanyi would call reciprocity. Where change is rapid, people

[9] North, D. (1977). "Markets and Other Allocation Systems in History: The Challenge of Karl Polanyi". *Journal of European Economic History.* Vol. 6(3). pp.703-720 at 709.
[10] Polanyi, K. (1977). *The Livelihood of Man.* New York: Academic Press. pp.35-36.
[11] Peachin, M. (2011). *Social Relations in the Roman World.* Oxford: University Press. p.409.
[12] Finley, M. (1985). *The Ancient Economy.* Berkeley: University of California Press pp.17ff.
[13] Polanyi, K. (2002 [1957]). *The Great Transformation.* Boston, MA: Beacon Press. pp.45ff.
[14] Pryor, F.L. (1977). *The Origins of the Economy: A Comparative Study of Distribution in Primitive and Peasant Economies.* New York: Academic Press.
[15] Temin, P. (1980). "Modes of Behaviour". *Journal of Economic Behaviour and Organisation.* Vol. 1(2). pp.175-195.

will tend to command behaviours, which utilise centric transfers. Where personal autonomy is high, and the pace of change is moderate, a society will tend more to market exchange.

The extent to which market exchanges were a feature of the Roman economy is likely impossible to test empirically given the state of the evidence. However, the Romans clearly delineated the kind of instrumental behaviours that Temin associates with market exchange from the reciprocal behaviours associated with friendship among citizens or patronage. Seneca can be found discussing the difference between a commercial transaction - which "settles an account", or releases one party from a debt for goods or services rendered - and the ongoing reciprocal ties of *officia* that undergird the relationship among friends.[16] While the Romans lacked any formal economic model of price movements, they did intuitively grasp the relationship between supply and demand. Calpurnius Piso, writing in first century BCE, reports from a dinner party where one of the guests, Romulus, has drunk very little wine. His fellow guests tell him that "if everyone did as you do, wine would be cheaper", to which he replied, "on the contrary, it would be dear if everyone drank his fill, because I have drunk my fill".[17] Tchernia correctly notes the awareness shown here that "the degree of marginal utility of wine was lower for Romulus than it was for the average consumer".[18] Even while stressing the role of reciprocity and gift exchange in the Ancient world, Mauss noticed that Roman law elucidates many of the fundamental concepts which underpin market exchange: the Romans made "the distinction between rights over things and rights arising from obligations, separated sale from gift and exchange, dissociated moral obligations from contracts, and, above, all conceived the difference that existed between ritual, rights and interests".[19] At the height of the Roman trading system (to be discussed further in ch. 1.3), it was common for goods such as olives or wine to be crushed by machines, packed in manufactured amphorae, shipped across great distances and distributed to city dwellers, who subsequently enjoyed a more varied diet than previous generations.[20] Roman society therefore possessed the conceptual building blocks as well as the behavioural characteristics for market exchange. Romans also engaged in activities requiring concentrated investment, beyond simply levelling out surpluses or shortages between

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[16] Seneca. *De Beneficiis.* VI.14. Further discussion on the use of economic metaphors in Roman literary sources can be found in Vivenza, G. (2012). "Roman Economic Thought." In Scheidel, W. (ed). *Cambridge Companion to the Roman Economy.* Cambridge: University Press. p.35.
[17] Aulus Gellius. *Noctus Atticae.* XI.14.2.
[18] Tchernia, A. (2016). *The Romans and Trade.* Oxford: Oxford University Press. p.75.
[19] Mauss, M. (1954 [1923]). *Forme et Raison de l'Echange dans les Sociétés Archaïques.* Berkeley, CA: University of California Press. p. 139. [In French.] Mauss was also concerned an evolutionary approach to the development of law which regarded market transactions as descendants of earlier "primitive" models. See Pottage, A. (2020*).* "Finding Melanesia in Ancient Rome: Mauss' Anthropology of nexum". In Bell, S.W. and du Plessis, P (eds). *Roman Law Before the Twelve Tables: An Interdisciplinary Approach.* Edinburgh: Edinburgh University Press. pp.171-198.
[20] Greene, K. (2003). "Technological Innovation and Economic Progress in the Ancient World: M.I. Finley Reconsidered". *Economic History Review.* Vol. 53(1). pp.29-59 at 44.

households. It is likely that a wide variety of transactional modes were available to the Romans, which were chosen from depending on the individual needs and circumstances of the parties. This is true even in the modern global economy, where despite the far greater dominance of market exchange, a large share of international trade comprises intra-firm transfers.[21] The estate-based economies of the Imperial household and other aristocratic *familia,* which relied heavily on non-market transactions, were still able to find a symbiosis with market exchange. For example, landholders who shipped food supplies from their own estates to feed city-dwelling members of their *familia* could subsidise commercial cargo and lower its unit price.[22]

More importantly, the NIE approach is less biased towards market exchange than Boldizzoni suggests. NIE scholars have generally focused their efforts on industrial or pre-modern societies such as England or the Netherlands, which were market societies based on agriculture; as a result, the language used can often seem to privilege the market as a mode of transaction. However, the Northian "institution" is not merely a stop-gap designed to fill in the blanks where markets do not operate. In 1990 North described institutions as "the rules of the game in a society, or, more formally, the humanely devised constraints that shape human interaction".[23] In this sense the market itself is a type of human interaction which relies on institutions such as property rights, contract and money to constrain the behaviour of its participants – which is to say, to provide the "rules of the game".[24] Other forms of transactional mode, such as centric transfers within a *familia,* rely on many of the same institutions: for example, the central economic authority of the *paterfamilia* derives from their role as the executor of the property on which the other members of the *familia* rely for their livelihood. There is no opposition between the market on the one hand, and "substitutes" for the market – such as transfers within organised entities like a *familia* or *societas* – on the other hand. "The organization is a group of individuals sharing a collective goal which belongs to the set of opportunities defined by institutions".[25] Likewise, a market contract is made up of two or more individuals who have reached a common goal within that set of opportunities. Roman law provided flexibility in which of these opportunities could be chosen. If sharper incentives to invest were required, a market exchange and coordination by prices might be chosen. If the reduction of uncertainty or the elimination of free-riders and

[21] Mada, V. (2000). "Transfer Prices and the Structure of Intra-Firm Trade". *Canadian Journal of Economics.* Vol. 23(1). pp.53-68.
[22] A good discussion of this symbiosis can be found in Whittaker, C.R. (1985). "Trade and the Aristocracy in the Roman Empire". *Opus.* Vol. 4. pp.1-27.
[23] North, D.C. (1990). *Institutions, Institutional Change and Economic performance.* Cambridge: Cambridge University Press. p.3.
[24] Didry, C. and Vincensini, C. (2011). *Beyond the market-institutions dichotomy: The institutionalism of Douglass C. North in response to Karl Polanyi's challenge.* HAL (online archive). URL: https://halshs.archives-ouvertes.fr/halshs-00601544. pp.9-10.
[25] Didry and Vincensini. *Beyond the market-institutions dichotomy.* p.10.

opportunism was desired, organised centric transfers and coordination by hierarchy might be chosen.

This process of institutional choice-making is the focus of the "Williamsonian" variant of NIE, first developed by Oliver Williamson. The Williamsonian approach also takes the presence of transaction costs, or "frictions" that discourage economic transactions from taking place, as its starting point. Williamson focuses especially on the costs involving in reaching agreement between parties, which he divides into *ex ante* and *ex post* costs. *Ex ante* costs are "the costs of drafting, negotiating and safeguarding an agreement", while *ex post* costs can take several forms:

(1) "the maladaptation costs incurred when transactions drift out of alignment",
(2) "the costs of haggling incurred if bilateral efforts are made to correct ex post misalignments",
(3) "the setup and running costs associated with the governance structures (often not the courts) to which disputes are referred", and
(4) "the bonding costs of effecting secure commitments".[26]

Wiliamsonian NIE presents a range of "governance structures" which can be used to limit these costs, especially the cost of opportunism by parties who wish to take advantage of an absence of clear mechanism for resolving disputes or the lack of a close bond of trust with other parties. Williamson defines a "governance structure" as "the explicit or implicit contractual framework within which a transaction is located (markets, firms, and mixed modes – e.g. franchising – included)".[27] Williamson's own work focuses on the use of governance structures which take a hierarchical form: especially the modern firm and its boundaries.

In the Ancient world, governance structures could take a wide variety of forms. They are not synonymous with organised or quasi-organised entities such as the modern firm, the Roman *societas* or the *familia.*[28] A governance structure, for example, also take the form of customs or pacts in smaller communities. Karayiannis and Hatzis have explored, in an Ancient Athenian context, how moral education and informal social sanctions – such as stigma (στίγμα) – served to underpin the formal legal system by fostering trust between economic actors and avoiding the need for more formal solutions such as additional regulation or litigation.[29] In Rome, public ritual interacted with formal rules to increase public

[26] Williamson, O.E. (1985). *The Economic Institutions of Capitalism: Firms, Markets, Relational contracting.* New York: Free Press. pp.20-21.
[27] Williamson, O.E. (1981). "The Modern Corporation: Origins, Evolution, Attributes." *Journal of Economic Literature*. Vol. 19 (4). pp. 1537-1568 at 1544.
[28] Didry and Vincensini. (2011). *Beyond the market-institutions dichotomy*. p.9.
[29] Karayiannis, A.D. and Hatzis, A.N. (2010). "Morality, Social Norms and the Rule of Law as Transaction Cost Saving Devices: The Case of Ancient Athens". *European Journal of Law and Economics.* Vol. 33(3). pp.621-643.

confidence in the legal system, especially in the *Ius civile*[30] during the early Republican period.[31] Governance structures can also take the form of the formal legal rules which structure the range of bargaining opportunities available to buyers, sellers and others. Using a Williamsonian approach, Ratzan has analysed contract – as a set of formal rules, derived from contract law, "organising certain kinds of economic transactions" – as a governance structure in Roman Egypt.[32] By analysing contract as governance structure, it is possible to break down the barrier between the "state" and the "market" which has tended to prevail in modern economic science. To the Romans there was no clearly visible distinction; the Imperial estate economy was an active participant in exchange, especially in the provinces, where most land was administered directly by the Emperor's representatives and exchange took place in that context.

Williamson's use of the term "contractual framework" points to a difficulty with treating contract as a governance structure in the Ancient Roman world. In Roman literary sources, contracts can usually be found discussed separately according to their form – for example, *muutum,* or loan for consumption of fungible goods – or, from the late Republican period onwards, the type of economic transaction involved, such as sale or lease. In keeping with the absence of a modern economic science, the Roman sources do not refer to contract as a special kind of economic institution for structuring bargaining, separate from its various manifestations. The *Ius civile* did classify contracts as a type of personal obligation rather than as rights arising in property. However, it has been argued that non-Roman legal systems, also in frequent use by citizens and non-citizens throughout the Empire, such as the law of Ptolemaic Egypt, did not even make this distinction.[33] Ancient legal scholarship has followed suit: Ratzan notes that "the divide between *contracts* and *contract*" has been "reified".[34] By this he means that jurisdictions are categorised based on whether they have a unified theory of contract akin to the classical model of offer and acceptance, or instead conceived of multiple contracts based on different kinds of transaction.[35] Ratzan argued that this overlooks the way individual parties perceived the contracts they entered into, as well as how they arrived at decisions about whether to transact, who to contract with, which rules

[30] Where capitalised, this refers to the Roman *Ius civile.* Where uncapitalised, it refers to the civil law of a jurisdiction in a general sense.
[31] For example, a key institution of the *Ius civile* was the mancipatio, carried out via a highly public ritual, which may have originally had a magical or religious function. See MacCormack, G. (1969). "Hagerstom's Magical Interpretation of Roman Law". *Irish Jurist.* Vol. 4(1). pp.153-167.
[32] Ratzan, D.M. (2015). "Transaction Costs and Contract in Roman Egypt". In Kehoe, Ratzan and Yiftach. (eds). *Law and Transaction Costs in the Ancient Economy.* Ann Arbor: University of Michigan Press. pp.185-231.
[33] Wolff, H.J. (1956). "Zur Romanisierung des Vertragsrechtsder Papyri". *ZRG.* Vol. 73. pp.1-28.
[34] Ratzan. (2015). "Transaction Costs and Contract in Roman Egypt". p.191.
[35] Ratzan. (2015). "Transaction Costs and Contract in Roman Egypt". pp.191-192.

they would choose and how they would enforce the transaction if it went wrong.[36] The value of a Williamsonian approach is to focus on this individual decision-making process. All potential parties to a contract must be able to answer two fundamental questions:

(a) Shall I contract?
(b) What is the best way to structure the transaction?

Ratzan re-phrases these decisions in the following way, to reflect the economic forces which underpin these decisions:

(a) Are transaction costs low enough for me to transact?
(b) What are the relative transction costs associatedwith proceeding via one governance structure over another? [37]

The primary sources offer several examples of individuals and families going through exactly this decision-making process: deciding first whether to enter into a contract, then moving on to decide which manifestation of the contract to use. In one example from c.270 CE in Roman Egypt, a wealthy young man called Markos, probably a non-citizen, writes a letter to his mother and gives her advice on whether to accept an offer from a certain Apollonios to lease a parcel of land:

> Apollonios the Blind came to me, saying "Serapiakos has released the arouras[39] back to your mother". If he has released them and you know the character of this Apollonios the Blind, that he is honourable, then lease them to him; if he has not been honourable, then consider giving him the grain instead.[40]

Here, Markos can be seen engaging in a cost-benefit analysis of what kind of transaction his mother should enter. The options are a lease of the land, which Apollonois appears to have asked for, or "[giving] him the grain", by which Markos appears to be referring to a cash sale after the harvest. A lease would provide a more secure and perhaps larger income but carries the risk that Apollonius will not behave "honourably": there is a potential policing cost. A cash sale lessens these risks, but presents other costs, such as the uncertainty of the harvest. Marko's advice is for his mother to ask around and assess the previous character of Apollonios. This simple example shows how an NIE approach can examine the interplay between everyday economic decisions and the law-making process which structured them. The case of Markos and his mother also illustrates the complex interplay between formal and informal approaches to reducing transaction costs. As Karayiannis and Hatzis remind

[36] Ratzan. (2015). "Transaction Costs and Contract in Roman Egypt". pp.191-192.
[37] Ratzan. (2015). "Transaction Costs and Contract in Roman Egypt". p.193.
[39] Egyptian unit of land measurement.
[40] P. Ross. Georg. III.1.19-23.

us, ancient law was underpinned by the status or stigma attached to a potential contractual partner's name.[41]

NIE was first developed to improve the predictive power of modern neoclassical economics in relation to 20th and 21st economies. It is likely that we shall never have access to the high-quality statistical data needed to test the performance of the Roman economy in this way. However, NIE can still be used "indirectly, to help formulate the questions, provide analytical tools with which to analyse the ancient evidence and develop theories that advance the debate".[42] This section has shown that legal rules can be treated as mechanism for reducing costs, alongside other "governance structures" such as organisations, individual status and customs. This kind of analysis does not rely on drawing parallels between Rome and modern market-based economics, nor is it inhibited by the absence of a modern science of economics. Moreover, an NIE approach can help to focus more closely on the experience of those who used the law every day, as opposed to the lawyers who interpreted and helped to make it. It is important, however, not to unduly privilege law as an economic institution: in Ancient Rome it arose from and had a rich and complex relationship with "the basic values of society".[43] These values change only very slowly over time, both influencing and limiting the path of legal development.

Section 2.2: One-Shotters and Repeat Players

Most analyses of legal procedure begin with a system of rules and then examine their effect on the litigants. In a ground-breaking article in 1973, Galanter looked "through the other end of the telescope", focusing on the different types of litigants who might engage with a legal system and their impact on how procedural rules develop over time. Galanter divided litigants "into those […] who have only occasional recourse to the courts" – who he called one-shotters - and repeat players "who are engaged in many similar litigations over time".[44] Examples of a one-shotter in a contemporary legal context would include the accused in criminal cases, personal injury claimants and the parties of a divorce proceeding. Examples of repeat players are usually, though not always, of an institutionalised or hierarchical nature: the prosecution service, insurance firms, large banks and so forth. Galanter was keen to emphasise that not all litigants fall nearly into one or other of these categories. Rather, there

[41] Karayiannis and Hatzis. (2010). "Morality, Social Norms and the Rule of Law as Transaction Cost Saving Devices". pp.621-643.
[42] Kehoe, D.P. and Frier, B. (2007). "Law and Economic Institutions". In Morris, I., Saller, R.P. and Scheidel, W. (eds.). *The Cambridge Economic History of the Greco-Roman World.* Cambridge: Cambridge University Press. pp.113-143 at 142.
[43] Ogilvie, S. (2007). "Economic Institutions in Pre-industrial Europe". *Economic History Review.* Vol. 60(4). pp.649-684.
[44] Galanter. "Why the "Haves" Come Our Ahead". p.168.

is a continuum on which all litigants can be placed, from those with the most routine engagement in the legal on the one hand, to those with only a single one-off engagement on the other.

For ease of analysis, Galanter divided the one-shotter and repeat player into "ideal types" based on the characteristics they can be expected to have based on the frequency of their engagement with the legal system. A repeat player can be expected to anticipate future litigation, will usually have sufficient resources in order to plan for that litigation and pursue their long-term interests, and will on average have low stakes in the outcome of any specific litigation. A one-shotter, on the other hand, will usually have fewer resources. Importantly this does not always imply that the repeat plater will be more affluent or that their advantages are purely financial.[45] They may also include familiarity with rules and existing relationships within the legal system. More recent scholarship has identified that asymmetries in resources may be "official", in the sense that they are "derived from explicitly stated rights or entitlements", or "unofficial", derived from "informal, personal statuses".[46] One-shotters will also have fewer opportunities to anticipate the course of future litigation and plan accordingly. Again, it should be stressed that these "ideal types" will not accurately reflect the characteristics of every litigant who comes before a court. They do, however, express cumulative realities that will shape how various types of litigant are likely to behave. Galanter identifies several of these differences in behaviour between a repeat player and one-shotter:

(1) With the benefit of advance intelligence, a repeat player will be able to structure their transactions in order to maximise their advantage;
(2) Repeat players will cultivate expertise in procedure and are more likely to have access to expert advice;
(3) Repeat players will cultivate informal relationships with "institutional incumbents" such as clerks or officials;
(4) Repeat players are more likely to commit to their bargaining positions in order to protect their "bargaining reputation" and credibility as a combatant in future legal procedure;
(5) Repeat players will seek to maximise gains from litigation in the long-term, whereas one-shotters will seek to minimise losses in the particular instance of litigation they are involved in;

[45] Hoffman, E. (2008). "The "Haves" and the "Have-Nots" Within the Organisation". *Law and Contemporary Problems.* Vol. 71(2). pp.53-64.
[46] Hoffman. "The "Haves" and the "Have-Nots" Within the Organisation". p.55. See also Hoffman, E. (2005). "Dispute Resolution in a Worker Cooperative: Formal Procedures and Procedural Justice". *Law and Society Review.* Vol. 39. pp.51-82.

(6) Repeat players are much more likely than one-shotters to lobby directly for changes in procedural rules;
(7) Repeat players will be more invested in the precedential value of a decision – that is, the aspect of a decision which is likely to influence how the decision-maker will act in the future;
(8) Repeat players, by virtue of their greater familiarity with litigation, will be better able to identify which precedents are more likely to have a lasting impact and which are likely to remain symbolic.[47]

These differences in behaviour are patterned across the various types of litigation in which one-shotters and repeat players are likely to meet one another. In the vast majority of contemporary litigation, the claimant will be a repeat player and the defendant will be a one-shotter. This includes all criminal trials, proceedings brought by landlords against tenants, security proceedings brought by large banks or financial institutions against individuals debtors, and so forth. In this context, "the law is used for routine processing of claims by parties for whom the making of such claims is a regular business activity".[48] Litigation of this type can be expected to have certain basic features. Proceedings will be "stereotyped" and often abbreviated in form. There is likely to be a close synergy between the transaction at question, especially its contractual form, and the procedures which have been developed to resolve disputes. Many cases will be settled extra-judicially, often in a more beneficial manner to the repeat player than might have been achieved in court, given the value to the one-shotter of discounting the time delays, additional costs and risks associated with formal litigation. Other types of litigation are less frequent. One-shotters rarely act as claimants against repeat players, except in narrow contexts such as personal injury or workplace claims. Repeat players will generally not resolve their disputes against each other judicially; "the expectation of continued mutually beneficial interaction would give rise to informal bilateral controls".[49] There are, however, notable exceptions. Government is itself a repeat player. While it is possible to maintain mutually beneficial informal arrangements with government – the phenomenon of regulatory capture is well documented[50] - these relationships are less stable owing to the inability of either party to withdraw from dealing with the other.

Galanter's theory has both a contemporary context and a broader theoretical significance. When he wrote his original article in 1973, by far the most prominent example

[47] Galanter. "Why the "Haves" Come Out Ahead". pp.168-173.
[48] Galanter. "Why the "Haves" Come Out Ahead". p.179.
[49] Galanter. "Why the "Haves" Come Out Ahead". p.181.
[50] For a useful review of the literature see Bó, E. (2006). "Regulatory Capture: A Review". *Oxford Review of Economic Policy.* Vol. 22(2). pp.203-225.

of a “repeat player” was the large corporation and therefore this is where Galanter focused his argument. In his view, the embedded advantages of “repeat players” in the form of large corporations led to a material redistribution towards the “haves” in society, which merited redistributive social change. While Roman law had no direct equivalent of the corporation, there were *societas* which shared some of the characteristics of a large corporate entity. For example, the aristocratic Domitii family controlled a *societas* which exercised a near-monopoly on brick production on the River Tiber during the first and second centuries CE.[51] Access to brick production was initially based on traditional relationships between patrons and clients, but from the mid second century CE, it was instead based on “preferential attachment”, or a close existing relationship with the families already involved in the industry.[52] Galanter’s argument, however, extends beyond the large corporate entity. The trust of his argument was that the behavioural differences between “repeat players” and “one-shotters” have a long-term impact on the “architecture of the legal system”.[53] In this sense, a “repeat player” is any litigant which engages routinely in civil procedure and models its behaviour according to the precedent that each engagement will set for future engagements. A “one-shotter” is any litigant with no or limited previous engagement in civil procedure, whose behaviour is modelled on a specific outcome in the present case. Galanter sought to emphasise the degree to which “changes at the level of parties are most likely to generate changes at other levels”, especially at the level of procedural structure and how litigants are able to access different forums for decision-making.[54] More recently some additional nuance has been introduced to Galanter’s theory and it has been questioned whether the embedded advantages of repeat players will lead them to victory in all circumstances. In particular, while repeat players preserve their advantage in the pre-trial and trial phases of litigation, they appear to be in a weaker position during the execution of judgment phase; repeat players who fail to defend an action on average pay more.[55] However, empirical studies continue to show the benefits of becoming a repeat player: most strikingly, as a firm grows and starts to engage more routinely with the legal system, its

[51] Helen, T. (1975). “Organization of Roman Brick Production in the First and Second Centuries AD. An Interpretation of Roman Brick Stamps*”. Annales Academiae Scientiarum Fennicae- Dissertationes Humanarum Litterarum.* Vol. 5. Helsinki: Academia Scientiarum Fennica. pp.114ff. Among the many surviving brick stamps referring to the Domitii, an interesting example is held in the Harvard Art Museums, object no. 1977.216.3035, available to view online at https://harvardartmuseums.org/art/289695.

[52] Graham, S. (2006). *Ex Figlinis. The Network Dynamics of the Tiber Valley Brick Industry in the Hinterland of Rome.* London: BAR Publishing. pp.101, 114.

[53] Galanter. “Why the “Haves” Come Out Ahead”. p.165.

[54] Galanter. “Why the “Haves” Come Out Ahead”. p.229.

[55] Van Koppen, P. and Malsch, M. (1991). “Defendants and One-Shotters Win After All: Compliance with Court Decisions in Civil Cases”. *Law & Society Review.* Vol. 25(4). pp.803-820.

performance in litigation tends to improve relative to when it was young and less experienced.[56]

In a Roman context, the range of litigants were very different from a contemporary legal system. However, it is possible to differentiate them according to the degree of their involvement in the legal system. Most notably, the *paterfamilias* is likely to have been a repeat player, either appearing in court himself or being represented by his clients. This would especially be the case if he acted at the head of an aristocratic family such as the Domitii which controlled important sectors of commerce. Roman commerce was deeply embedded within the familial structure, with sons-in-power and slaves often acting on behalf of the *familia* as agents or representatives. The structure of the *actiones adiecticiae qualitatis* therefore show a concern for controlling the level of risk to which a *paterfamilias* would be exposed in disputes arising from transactions which a slave or son-in-power had entered.[57] It is often stated that a purely juristic analysis of the *patria potestas* overstates the dominant position of the *paterfamilias* in Roman family: as Gardner notes, "the powers of the paterfamilias were a legal construct and not the essence of Roman family life".[58] While this was true for the everyday social life of the household, at least in the late Republic and early Principate, the *paterfamilias* still embodied the legal personality of his family. This had practical consequences for the structure of Roman litigation, as the prominent *paterfamilias* would be expected to engage routinely in cases where his family, clients or friends had an interest. In Roman litigation, the *paterfamilias* acts as a clearing house for litigation which in contemporary systems would be undertaken by others – not just in the context of his immediate family, but also in a commercial and social context.

In the later Principate the most notable one-shot litigant is the petitioner to the Imperial chancelry. The figure of the Imperial petitioner emerges in tandem with the Emperor as the dominant legislator. Petitioners came from a diverse range of social backgrounds, including women and slaves. Some petitioners acted as individuals; others represented larger groups. As Connolly notes, "possible petitioners could include all adults living in the empire who contemplated legal action, be it in court or arbitrated outside of court, at every financial level in society, and of every legal category too".[59] The majority of petitioners were likely to be what Connolly describes as the "middling sort": those who had sufficient resources to enter into legal transactions in the first place and to defend their interests in the event of a dispute,

[56] Hamzehzadeh, B. (2010). "Repeat Player vs. One-Shotter: Is Victory all that Obvious". Hastings *Bus. L.J*. Vol. 6. pp.239-260.
[57] Van den Bergh, R. (2015). "He's one who minds the boss's business ...". *Fundamina.* Vol. 21(2). pp.359-371. For a general overview of the *actiones adiecticiae qualitatis* see Buckland, W. (2010). The Roman Law of Slavery. Cambridge: Cambridge University Press. pp.214-217.
[58] Gardner, J. (1998). *Family and Familia in Roman Law and Life.* Oxford: Clarendon Press. p.2.
[59] Connolly. *Lives Behind the Laws.* p.68.

as well as those for whom the costs of travel and accessing Imperial justice were not too oppressive.[60] However it is known that at least some petitioners came from very humble backgrounds, although there is often very limited information on the extent to which they received redress. In either case, direct appeal to the Imperial chancelry was likely to be a very infrequent event. There is no direct evidence that the Imperial chancelry discriminated between litigants, although it is possible prevailing social attitudes in the Roman Empire – such as that women were inherently weak or emotional, or that slaves could not be trusted except under torture – affected who within the Imperial chancelry dealt with them and how much time they spent.[61]

[60] Connolly. *Lives Behind the Laws.* p.68-69.
[61] Connolly. *Lives Behind the Laws.* p.70.

CHAPTER THREE

ECONOMIC FRAGMENTATION IN THE ANCIENT ROMAN WORLD

The concept of economic fragmentation in a pre-modern context, and in the third century CE specifically, is poorly defined. By taking an institutional perspective on the pan-Mediterranean trading system in the second century CE, it is possible to arrive at a definition which is decoupled from scholarly debates on the "decline" of the Empire. It them becomes possible to assess the consequences of this process of fragmentation for both urban and provincial economic life.

Section 3.1: Positioning Rome in the Pre-Modern World

The original development of Roman law and the bulk of its later history has played out in pre-modern societies. Life in these societies was very different from the modern industrial world, which can make it difficult for a new student of Roman law to fully appreciate its historical context. A pre-modern society can be defined in two ways. The first is to ask what it is not. On one hand, pre-modern societies can be distinguished from primitive societies by the extent to which labour is specialised. In most cases this will include a group of individuals who specialise in rulership, or the exercise of power; most pre-modern societies are therefore state societies.[1] On the other hand, pre-modern societies are distinguished from industrial societies by the absence of two features: the spread of mechanised technologies and the sustained economic growth that it enables.[2] This does not mean that mechanised industry is wholly unknown to pre-modern society: they may have machines, some of which, like a water wheel, may be powered inanimately rather than by human or animal labour. However, most of the wealth held in a pre-modern society will be generated by agriculture, not industry.

Another way to define pre-modern society is to consider the constraints under which it operates. These include the relative weakness of the state bureaucracy, which is small as a proportion of the population and unable to exercise a monopoly on the legitimate use of force. Pre-modern societies will therefore continue to rely to some degree on self-help responses to violence or crime, although the state will generally be recognised as the final arbiter of whether attempts at self-help are legitimate. A second constraint is the rate of possible consumption. Most people in a pre-modern society will live at or only slightly above subsistence level. This places a low ceiling on the surplus which can be extracted by the state as revenue. Pre-modern societies are confined by a Malthusian dynamic: in the

[1] Crone, P. (2003). *Pre-Industrial Societies: Anatomy of the Pre-Modern World.* Oxford: Oneworld Publications. pp.5-7.
[2] Crone. *Pre-Industrial Societies.* p.13.

absence of modern agricultural technologies, the land can only support a certain number of people. In economic terms, the total factor productivity of a pre-modern economy is low. Therefore, as population rises, the marginal productivity of each worker declines, eventually "squeezing" real incomes back down to subsistence level.[3] A third, related constraint is the lack of urbanisation. People who live in cities are not generally engaged in agricultural production. They rely instead on agricultural surplus, which is very limited in a pre-modern society. Pre-modern society is therefore rural society. Towns, urban occupations and urban production may exist, but they will be marginal both in terms of their share of population and the value of the goods they produce. Most people may not even visit a town over the course of their lives.

Ancient Rome was a pre-modern society. It never approached the spread of technology and sustained economic growth that characterises industrial society. How far Rome approached industrialisation is still debated[4], but that is not a matter for this thesis. Rome did however possess several unusual features for a pre-modern society (to be discussed in ch.1.3), which gives rise to the question of how far modern economic assumptions can be applied. The comparison of pre-modern societies has its roots in Moses Finley, who first proposed a separate discipline for "the comparative study of literate, post-primitive, pre-industrial, historical societies".[5] In the mid to late 20th century, Finley's approach to analysing Roman society was particularly influential on other Ancient historians. Perhaps his most important claim was that Rome did not have "an economic system which was an enormous conglomeration of interdependent markets".[6] Finley also drew attention to the lack of technological innovation in Roman society, as well as the failure of the Roman upper classes to develop a rational economic mindset geared towards the maximisation of profit.[7] Finley drew attention to the high level of urbanisation in Roman society, but considered this to be driven by the upper classes and the military, who combined to create a series of great "consumer cities" that extracted resources from the countryside and produced only artisanal goods.[8]

In terms of methodology, Finley built on the work of substantivist economic anthropologists, notably Polanyi, who did not consider the market analysis of modern economic science to be appropriate for the pre-modern world.[9] In the opening chapter of *The*

[3] Jongman. "Reconstructing the Roman Economy". pp.75-100.
[4] For a discussion see Temin. *The Roman Market Economy*. pp.1-26.
[5] Finley, M. (1975). *The Use and Abuse of History.* London: Chatto and Windus. p.118.
[6] Finley. *The Ancient Economy.* pp.17.
[7] Jongman. "Reconstructing the Roman Economy". p.75.
[8] Finley, M. (1977). "The Ancient City: from Fustel de Coulagnes to Max Weber and Beyond." *Comparative Studies in Society and History.* Vol. 19(3). pp. 305-327.
[9] Polanyi discusses the role of the market in the economic analysis of historical societies in Polanyi. *The Great Transformation.* pp.59-70.

Ancient Economy, Finley describes the history of the term *oikonomikos,* which is the precursor to our "economics", but in the Greco-Roman world referred instead to the management of a landed household.[10] He does this to stress that the Romans themselves had no conception of economic science as the study of market exchange. Finley considers this to reflect not an *intellectual* failure by the Romans, but rather an *institutional* fact of Roman society. Indeed, as part of the "substantivist turn" taken by Ancient historians since the 1970s, they have tended to stress that the price-making market is a social construction peculiar to industrial society and criticised the tendency of modern economic science to treat the economic institutions of the ancient world merely as imperfect alternatives to the market.[11] This anthropological approach represented an advance on the earlier narrative approach taken by "modernist" historians like Rostovtzeff, who were prone to make large claims about Roman society – for example, that "some, or most, Italian cities differ very little from their Roman ancestors" – on the basis of little evidence.[12] The anthropological approach had two major virtues. Firstly, it emphasised the analytical gulf between the modern and pre-modern worlds. Secondly, it rooted itself in the careful analysis of primary sources from the Ancient world.

While it is necessary to understand this background in order to fully appreciate the current state of the literature, the contrast between the anthropological approach and the "modernist" histories it replaced has little relevance to recent attempts to position Rome among pre-modern societies. The anthropological approach has been significantly nuanced, both with respect to the specific claims it made about Roman society and its overall methodology. Greene has challenged what he refers to as the "minimalist interpretation" Finley gives to Roman technology.[13] He draws attention to the appearance of branch workshops for manufactured goods like pottery in regions far beyond the Imperial core, as well as the suffusion of technology such as water mills, wine presses and olive-crushing mills in the Roman agrarian landscape.[14] These formed part of a "technology shelf" from which a farmer could choose depending on their wealth, the nature of the land and other individual circumstances; the presence of a slave economy did not necessary inhibit their use and development.[15] Meanwhile, the notion that Roman cities were, "as Max Weber thought, primarily centres of consumption", in which only artisan goods were produced, has been

[10] Finley. *The Ancient Economy*. pp.17ff.
[11] Boldizzoni. *The Poverty of Clio.* pp.39-41.
[12] Rostovtzeff, M. (1957). *The Social and Economic History of the Roman Empire.* Oxford: Oxford University Press. pp.142-143.
[13] Greene. "Technological Innovation and Economic Progress in the Ancient World". pp. 29-59.
[14] Greene. "Technological Innovation and Economic Progress in the Ancient World". pp.40-49. See also Wikander, O. (1984). *Exploitation of Water-power Or Technological Stagnation? A Reappraisal of the Productive Forces in the Roman Empire.* Lund: Gleerup.
[15] Greene. "Technological Innovation and Economic Progress in the Ancient World". p.42.

criticised.[16] New archaeological evidence has shown significant evidence of urban production and the distribution of manufactured goods from the cities into the countryside.[17] Perhaps more importantly, there was no economic or legal divide between the town and the country: major non-agrarian centres of production, such as mines or manufactories, could be found in either an urban or rural setting.[18] Roman cities were therefore not disconnected from the countryside economy: they served to coordinate the long distance trade of agrarian and non-agrarian goods, while also providing "a complex and sophisticated market for specialised urban goods and services", not just in manufacturing but also construction, finance and transportation.[19] In this way, "the growth of towns helped to liberate more fully the productive capacity of the countryside" and helped to make possible a large non-agrarian population.[20]

The standard cultural explanation for Roman economic stagnation – that the only people with enough wealth preferred agriculture and had an aversion to commerce or investment in new technologies – has also been refined. Slaves and sons-in-power were widely used as commercial agents on behalf of their masters or *paterfamilias*, allowing wealthy landholding citizens to avoid the moral opprobrium attached to investment in commerce.[21] It is therefore better to say that where there was an aversion to commerce, it was "not moral or snobbish" but instead based on the concern that "such investments were *periculosum et calamitosum".*[22] Moreover, it is precisely in agriculture – and other investments in land that were indirectly managed by wealthy citizens, such as mines or quarries – where one finds some of the most striking mechanical advances of the Roman economy.[23] Since Finley Ancient historians have emphasised the absence of a modern "spirit of capitalism" on or "economic rationality" on the part of landholding citizens.[24] However, this approach tends to

[16] Finley. *The Ancient Economy.* p.194. For a good treatment of Weber's ideal city-types see Colognesi, L.C. (1995). "The Limits of the Ancient City and the Evolution of the Medieval City in the Thought of Max Weber". In Cornell, T.J. and Lomas, K. (eds.). *Urban Society in Roman Italy.* London: Routledge. pp.27-37.
[17] For the example of pottery see Pucci, G. (1983). "Pottery and Trade in the Roman Period". In Garnsey, P., Hopkins, P. and Whittaker, C.R. (eds.). *Trade in the Ancient Economy.* Berkeley, CA: University of California Press. pp.105-117.
[18] Erdkamp, P.P.M. (2001). "Beyond the Limits of the Consumer City". *Historia.* Vol. 50(3). pp.332-356.
[19] Jongman. "Reconstructing the Roman Economy". p.93.
[20] Wrigley, E.A. (1978). "Parasite or Stimulus: The Town in a Pre-Industrial Economy". In Abrams, P. and Wrigley, E.A. (eds.). *Towns in Societies.* Cambridge: Cambridge University Press. pp.295-309 at 301.
[21] See for example Watson, A. (1987). *Roman Slave Law.* Baltimore, MD: John Hopkins University Press. pp.46ff.
[22] Paterson, J.J. (1997). "Production and Consumption". In Sidwell, K. and Jones, P. (eds.). *The World of Rome.* Cambridge: Cambridge University Press. pp.189-192.
[23] Greene. "Technological Innovation and Economic Progress in the Ancient World". pp.43-44.
[24] Finley, M. (1965). "Technical Innovation and Economic Progress in the Ancient World". *Economic History Review.* Vol. 18(2). pp. 29-45 at 40.

conflate rationality with a profit maximisation and overlooks the range of economic strategies which can be considered rational even in a modern economy. As Paterson has pointed out, the behaviour of landholding citizens was "profit-satisficing" and "risk averse"; this is entirely rational behaviour given that their primary economic objectives were the maintenance of their household and the avoidance of any threats to the transmission of wealth to their successors in the *familia.*[25] These economic goals were intimately linked with the social desire of landholders to preserve and enhance their social status, both within the *famiia* and society as whole, but it is no longer tenable to claim that they were entirely subordinate to social concerns when investment decisions were made.

The overall framework of the anthropological approach remains: Rome lacked a modern economic science or a clear delineation between economic and non-economic concerns. Technological development and economic growth never approached modern levels and such growth as there may have been was limited to agrarian production rather than industrial. The anthropological emphasis on primary evidence from the Ancient world also remains important. Within this framework, however, there is significantly more space for economic activity than was once permitted. Some of the key ideas underpinning the notion of long-term economic stagnation have not held up to scrutiny. These include the absence of rationality, urbanisation as parasitism and the primacy of social status over economic calculations when investing.[26] Rome did not, from an economic perspective, belong to a "*longue durée* where nothing ever changed"; the intensity of economic activity and corresponding living standards for the typical denizen of the Roman world waxed and waned over time.[27] As will be seen, these economic changes could have major implications for the governance strategies of the Empire as well as the role played within government by law and by lawyers.

Section 3.2: An Archaeological Sketch of the Roman Economy

Since Hopkins broke open the floodgates with his famous but controversial paper on taxes and trade[28], the literature attempting to assess the Roman economy empirically has grown quickly and it is neither possible nor necessary to provide a comprehensive review here. Specifically, much of the discussion on Roman technological development total factor

[25] Paterson. "Production and Consumption". p.192.
[26] A good discussion of all these topics can be found at Andreau, J. (1995). "Presentation: vingt ans apres L'economie antique de Moses I. Finley". *Annales.* Vol. 50. pp.947-960.
[27] Jongman. "Reconstructing the Roman Economy". p.75.
[28] Hopkins, K. (1980). "Taxes and Trade in the Roman Empire". *Journal of Roman Studies.* Vol. 70. pp.101-125.

productivity will be omitted.[29] Focus will instead be placed, briefly, on three key areas: population and consumption, growth and trade integration. This will provide a foundation for the concept of fragmentation which will be introduced at the end of the chapter and form the basis for analysis of legal and literary sources over the rest of the thesis. At times there has been a dispute over the best kind of evidence to use when analysing the Roman economy. Finley commented that "we are too often the victims of that great curse of archaeology, the indestructability of pots".[30] Thirty-five years later, Greene criticised an earlier generation of Ancient historians for taking "abstractions on Aristotle" or Xenophon and generalising them to the everyday experience of the whole Ancient world.[31] This conflict between archaeology and texts is unnecessary: the quality of archaeological techniques, as will be seen, has improved significantly in recent decades, while literary and legal sources remain invaluable to give the material remains of the Ancient world their social context and provide a window into the Romans' own perceptions of the world they lived in. This relationship is mutually beneficial, as the picture of Roman economic life reconstructed by archaeology can open ways of interpreting Ancient texts.

Since the 1980s, several new techniques have emerged in classical archaeology. The first of these is "settlement archaeology", which draws upon data from a large geographical area to assess the way patterns of habitation and land use change over time. The second is the analysis of "aggregate classes of finds" such as amphorae, table wares or shipwrecks.[32] One advantage of these techniques is that they allow comparisons to be made between different regions: it becomes possible, for example, to check whether a trend was confined to the Italian peninsula or if it also took place in provinces further afield. It is also possible to construct data series which show how the Roman economy changed over time. The drawbacks of these techniques mainly rotate around the paucity of the data: the temptation is to analyse based on what is visible to the archaeologist and to overlook what is unseen. The best-known example comes from shipwreck analysis. A change in the most commonly used containers used to carry wine, from amphorae – which can survive many centuries at the bottom of the sea – to wooden containers, which quickly degrade, makes the data series unreliable from the early second century onwards.[33] The relative scale and rapidity of this change serves as a red flag for historians, but the same problem may exist nevertheless at a

[29] For a review of this topic see Wilson, A.I. (2008). "Large Scale Manufacturing, Standardisation and Trade". In Oleson, J.P. (ed.). *The Oxford Handbook of Engineering and Technology in the Classical World.* Oxford: Oxford University Press. pp.393-417.
[30] Finley. "Technical Innovation and Economic Progress in the Ancient World". p.41.
[31] Greene. "Technological Innovation and Economic Progress in the Ancient World". p.40.
[32] Jongman. "Reconstructing the Roman Economy". p.78.
[33] Wilson, A.I. (2011). "Developments in Mediterranean Shipping and Maritime Trade from the Hellenistic Period to AD 1000". In Robinson, D. and Wilson, A.I. (eds.). *Maritime Archaeology and Ancient Trade in the Mediterranean.* Oxford: Oxford University Press. pp.33-59.

more subtle level elsewhere, especially where a wide variety of materials were used. These problems are receding to some degree as the quality of archaeological recording continues to improve and it becomes possible to access larger and more diverse data sets.

It is necessary to mention one source often relied upon by economic historians who focus on the second and third centuries: the *Edictum de Pretiis Rerum Venalium* issued by the Emperor Diocletian in 301. Most recently Allen has drawn upon the Diocletian Edict to make an estimate of real wages and built upon this to estimate Roman real wages at the end of the third century.[34] Scheidel built a similar real wage estimate for Roman Egypt and compared it to other pre-modern economies in the very long run, from 1800 BCE to 1300 CE.[35] This thesis will not rely upon the Diocletian Edict to sketch the Roman economy, for several reasons. Firstly, the effect of the Edict was mostly confined to the Eastern Empire, where Diocletian ruled. The prices given within it for goods and services cannot be easily compared to other regions.[36] Secondly, the Edict set down *maximum* prices: it was not a fixed price control and was not intended to mirror the price equilibrium in actual existence at the time, although it may be possible to draw inferences based on the prices that the drafters considered to be socially dangerous. This speaks to a deeper problem with the Edict as a source of data for economic history: it is an expression of state power, rather than an imprint left from real transactions. Diocletian expanded the Roman state in terms of manpower and the range of functions it performed[37], but it remained too weak to enforce technical regulations such as price controls at the level of granularity one could expect from a modern administrative state. Indeed, the Edict was subject to revisions and reinterpretations almost from the moment it came into force, and by 305 was widely ignored.[38] The Edict is therefore better treated as an excellent source for studying changes in the shape and objectives of public administration under Diocletian, rather than as a reliable source for reconstructing the Roman economy.

Population and Consumption

Advances in settlement archaeology have made it clear that beginning in the late fourth or early third century BCE, the Italian peninsula witnessed a dramatic and mostly uniform

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[34] Allen, R.C. (2009). "How Prosperous Were the Romans? Evidence from Diocletian's Price Edict (AD 301)". In Bowman, A. and Wilson, A. (eds). *Quantifying the Roman Economy: Methods and Problems.* Oxford: Oxford University Press. pp.327-345.
[35] Scheidel, W. (2010). "Real Wages in Early Economies: Evidence for Living Standards from 1800 BCE to 1300 CE". *Journal of the Economic and Social History of the Orient.* Vol. 53. pp.425-462.
[36] But see Koops, E. (2016) "Price Setting and Other Attempts to Control the Economy". In du Plessis et al. *Oxford Handbook of Roman Law and Society.* pp.609-618 at 617.
[37] Corcoran, S. (2004). "The Publication of Law in the Era of the Tetrarchs – Diocletian, Galerius, Gregorius, Hermogenian". In Brandes, W. et al. (eds.). *Diokletian und die Tetrarchie.* Berlin: Walter de Gruyter. pp.56-7 at 56.
[38] Corcoran, S. (2000). *The Empire of the Tetrarchs, Imperial Pronouncements and Government AD 284-324.* Oxford: Oxford University Press. p.14.

increase in population.[39] This can be seen from two separate studies: De Haas et al. on Albenga to the far north and Fentress on the Nettuno Valley, just to the South of the city of Rome. In 300 BCE, the estimated population of Albenga was c.5000; by 100BCE it had risen to c.30,000.[40] Over the same period, the population of the Nettuno Valley jumped from c.25,000 to c.35,000.[41] Both regions maintained these higher populations for around two centuries, then simultaneously experienced a crash starting in the mid second century CE. The proximate cause of this crash was likely the Antonine Plague, but the population never recovered: in 400 CE the population of Albenga was c.10,000 and it continued to fall into the Justinianic period.[42] This flourishing of the Italian population would be easy to explain as the result of population shifts towards the social and economic core of the rising Imperial power in region, if it were not also replicated in provinces some distance from the Mediterranean basin. For example, Zimmermann et al. have found that the population density of the Rhineland was conservatively 10 persons per square kilometre during the Roman period; this compares to fewer than five persons per square kilometre for both the pre-Roman and Merovingian (450-751 CE) periods.[43] The population of Roman provinces tended to increase shortly after conquest and maintain their higher population levels until the mid to late second centuries; population trends therefore moved in tandem across the Empire, in both the Italic core and the provinces. There was a brief recovery in population in some Eastern Roman provinces in the 6th century CE, but this was not replicated in what was by then the former Western Empire.[44]

It is not unusual for the populations of pre-modern societies to fluctuate over time. In Roman society, however, the rising population was accompanied by two unusual trends. The first was a high rate of urbanisation, involving a large proportion of the population released from agricultural labour. Especially unusual, by the standards of the Mediterranean basin both before and after the Roman period, was the presence of very large cities. Rome itself reached a population of conservatively one million people by the Augustan period, a figure which would not be replicated in any other pre-modern society until the Song dynasty in China during the 9th-11th centuries.[45] In addition to that, Carthage, Antioch and Alexandra

[39] Lo Cascio, E. and Malanima, P. (2005). "Cycles and Stability: Italian Population Before the Demographic Transition". *Rivista de Storia Economica.* Vo. 21(3). pp.197-232.
[40] De Haas, T., Tol, G. and Attema, P. (2010). "Investing in the Colonia and Ager of Antium". *Facta.* Vol. 4. pp.225-256.
[41] Fentress, E. (2009) "Peopling the Countryside: Roman Demography in the Albenga Valley and Jerba". In Bowman and Wilson. (eds.). *Quantifying the Roman Economy.* pp.127-161.
[42] Fentress. "Peopling the Countryside". p.130.
[43] Zimmermann, A., Hilpert, J. and Wendt, K.P. (2009). "Estimates of Population Density for Selected Periods Between the Neolithic and AD 1800". *Human Biology.* Vol. 81(2-3). pp.351-380.
[44] Jongman. "Reconstructing the Roman Economy". p.79.
[45] Jongman, W. (2003). "Slavery and the Growth of Rome: The Transformation of Italy in the First and Second Centuries BCE". In Edwards, C. and Wolf, G. (eds.). *Rome the Cosmopolis.* Cambridge: Cambridge University Press. pp.100-122.

each had 200,000-500,000 inhabitants, for a total of one million, with a further half-dozen cities in the range of 100,000-200,000. This meant that under Augustus, around 5% of the Empire's roughly 60 million people lived in cities numbering at least 100,000 people.[46] The presence of very large cities had a marked effect on the lifestyle of the Roman population, especially wealthy landholders and their households who, being able to live from the proceeds of their estates, mainly occupied the cities. Whittaker has stressed the importance of smaller towns: there were several hundred *civitates,* or planned provincial towns, numbering tens of thousands of inhabitants, as well as *vici,* or unplanned provincial towns, which often sprung up to provide goods, services and entertainment to a military fort or to traders and travellers.[47] The distinction between them may have been a purely formal one: some *vici* had larger populations, and incorporated a wider range of industries, than some *civitates.*[48]

The second unusual trend which accompanied the Roman increase in population was significant improvement in the quantity, quality and variety of consumption. This suggests that Roman society was pushing against the outer limits of the Malthusian dynamic, which dictates that as population increases, the marginal productivity of each individual worker must decrease, with a corresponding drop in consumption. A good place to look to identify trends in consumption is the presence of durable consumer goods with high-income elasticity, such as amphorae and table wares. These are goods which households are more likely to buy in large quantities when their income is high, as opposed to low-income elasticity goods like basic foodstuffs, which fulfil a basic need and therefore tend to be bought in similar quantities unless there is a dramatic shift in income. De Haas et al. dated shards of amphorae from the Nettuno Valley and found a significant increase, in both absolute and per capita terms, from the second century BCE onwards.[49] This was accompanied by a sharp per capita increase in fine table ware shards from the late first century BCE onwards, which collapsed in the late second century CE and did not recover. Not only was the quantity and available of table ware increasing: so was its quality. Ward-Perkins has pointed out the high quality of red African slipware in Roman Britain, which could also be found throughout the rest of the Empire, in both wealthy and relatively humble households. This pottery was both wheel-thrown and fired at a high heat, providing a more durable finished product and a cleaner surface on which to eat.[50] Following the departure of the Romans from Britain in the early fifth century CE, this slipware was no longer imported:

[46] Jongman. "Reconstructing the Roman Economy". p.79.
[47] Whittaker, C.R. (1990). "The Consumer City Revisited: The Vicus and the City". *Journal of Roman Archaeology*. Vol. 3. pp.110-118.
[48] Whittaker. "The Consumer City Revisited". p.116.
[49] De Haas et al. "Investing in the Colonia and Ager of Antium". p.245.
[50] Ward-Perkins, B. (2005). *The Fall of Rome.* Oxford: Oxford University Press. pp.87ff.

instead it was replaced by lower quality, friable pottery, made using none of the sophisticated techniques that characterised Roman pottery. A similar trend can be seen in the production of table-lamps, which in a pre-modern society without electricity took on a special importance: they lengthened the hours of the day available for both indoor work and entertainment. The most notable feature of table-lamp production was the extent of their standardisation, which points both to their non-local origin in manufactories and their export through the Empire.[51]

A similar improvement can be observed in the range and quality of diet available to the Romans. The first place to look is consumption of proteins such as meat and fish: this is generally uncommon in pre-modern societies as proteins are more expensive to produce per calorie. King has shown a dramatic increase in animal bone finds on occupied Roman sites, from fewer than 25,000 in the second century BCE to over 100,000 in the first century BCE, eventually reaching an impressive peak of over 250,000 in the second century CE before declining steeply, returning to pre-Roman levels by the sixth century CE.[52] These figures relate to the Empire as a whole and some areas, such as the Italian peninsula, are much better covered than others. However, there is enough data to establish a direct link between conquest by Rome and an increase in consumption of expensive proteins, at least until the third century CE. The greater available of meat is explained to some degree by evidence suggesting that livestock animals were larger during the Roman period, suggesting greater availability of crops to feed them after the subsistence needs of the consumer population were met.[53] Rising consumption of proteins is also found by Wilson, who traces a significant increase in the installed capacity of fish farms and fish-salting facilities in the Mediterranean basin starting in the late Republican period, many of which were clearly designed for mass production and export to other parts of the Empire rather than simply for supplying the local population.[54] In the absence of refrigeration it is possible to salt and trade proteins over long distances; it is not possible to do the same for fresh fruit and vegetables, which are confined to local consumption. Nevertheless, Bakels and Jacomet have shown a significant improvement in the range of fruits and vegetables available to households in north-western and central Europe. They are able to link this directly to conquest by the Roman Empire and

[51] Harris, W.V. (1980). "Roman Terracotta Lamps: The Organisation of an Industry". *Journal of Roman Studies.* Vol. 70. pp.126-145.
[52] King, A. (1999). "Diet in the Roman World: A Regional Inter-Site Comparison of Mammal Bones". *Journal of Roman Archaeology.* Vol. 12. pp.168-202.
[53] Jongman, W. (2007). "Consumption in the Early Roman Empire". In Sheidel, W., Morris, I. and Saller, R.P. (eds.). *Cambridge Economic History of the Greco-Roman World.* Cambridge: Cambridge University Press. pp.592-618.
[54] Wilson, A.I. (2006). "Fishy Business: Roman Exploitation of Marine Resources". *Journal of Roman Archaeology.* Vol. 19. pp.525-537.

also find that dietary diversity did not survive the end of Roman rule in north-west Europe.[55] At least in Roman cities, there is good evidence that by the first century CE, more plentiful and diverse diets had become available to middle and lower income households, not exclusively the households of wealthy landholders able to rely directly on supplies from their estates. In a recent study, Rowan examined biological material preserved in the Cardo V sewer of Herculaneum, which is of an unusually high-quality owing to the depth of volcanic soil under which the city was buried in 79 CE.[56] Cardo V had no outflow point and served as a cesspit for *Insula Orientalis* II, a multi-purpose apartment and shop complex occupied mostly by lower income households. A wide variety of foodstuffs were found including fish, shellfish, eggs and vegetables. The bulk of a poor Roman's diet continued to consist in staple goods such as grains, but these were frequently supplemented by a wide variety of other foods.

Growth

Economic growth is a concept often said to "distinguish the modern period in world history from all past periods".[57] This is due to the accelerating increase in general living standards made possible by industrialisation, first in western Europe during the 18th century and then in other parts of the world. The Roman world did not witness any such accelerated rise in living standards. We also lack the evidence to measure economic growth using the statistical methods that would normally be deployed for a modern society. However, the archaeological evidence presented above is suggestive of a period of efflorescence in Roman living standards, experienced across the geographical extent of the Empire and throughout the social classes from the third century BCE until the late second century CE. It is therefore necessary to ask how economic growth can be measured in the context of a pre-modern society. Some common metrics of growth used for modern societies are inappropriate for Ancient Rome. For example, one approach is to index the place of industry in the economy. This is based on the idea that the larger the proportion of an economy taken up by an industrial sector, the higher the growth rate is likely to be. Wilson discusses some of the machines used in the Ancient Roman economy, including water mills, olive presses and kilns.[58] However, pre-modern societies did not possess an "industrial sector" in the modern sense; there is no reason to think that the relationship between industry and growth

[55] Bakels, C.C. and Jakomet, S. (2003). "Access to Luxury Foods in Central Europe During the Roman Period". *World Archaeology.* Vol. 34. pp.542-557.
[56] Rowan, E. (2016). "Bioarcheological Preservation and Non-Elite Diet in the Bay of Naples: An Anaysis of Food Remains from the Cardo V Sewer at the Roman Site of Herculaneum". *Environmental Archaeology.* Vol. 22(3). pp.318-336.
[57] Cole, W.A. and Deane, P. (1965). "The Growth of National Incomes". In Habakuk, H.J. and Postan, M. (eds.). *the Cambridge Economic History of Europe.* Cambridge: Cambridge University Press. Vol. 6. pp.1-55 at 1.
[58] Wilson. "Fishy Business".(2008). pp.398-406.

in Roman society was fixed. Roman growth was instead mainly driven by improvements in the efficiency of the agricultural sector, which released a large proportion of the population from agricultural labour. Indeed, it is in agriculture where machines and industrial processes can be found most frequently and where they are most deeply embedded into productive activities.

It is better to measure growth according to the average basket of goods and services that a typical inhabitant of Roman society could expect to have access to over their lifetimes. This broadly corresponds to the level of real wages in a modern society, or actual wages controlling for inflation, although it should be borne in mind that remuneration of labour in Rome took a variety of forms, of which hourly wages (*operae*) to free workers was only one. There is very little reliable evidence on which to construct a picture of how Roman real wages changed over time. One notable exception, however, is the Delphi manumission records, which show that as the quantity of slave labour was increasing over the second and first centuries BCE, the average price of manumission – and by implication, the average price of a slave - was also rising steeply.[59] The Delphi records have an advantage over many of the other documents used by economic historians to reconstruct prices, such as the Diocletian Edict, because they represent an imprint of actual economic activity and plentiful enough to be able to construct a time series. Rising slaves prices are also attested to indirectly by legal sources, which show a tendency towards greater protections for the welfare of even rural, uneducated slaves, including a limited right to initiate welfare proceedings.[60] It is unlikely the motive for these reforms was purely humanitarian, especially as the Roman economy came to rely more heavily on positive incentives and less on coercion in order to extract value from slave workers.[61] The cost of slaves represents the net present value of expected future income that they will generate by their labour, minus the cost of feeding and maintaining them. Rising slave prices therefore imply similar increases in the goods and services that even a free labourer could expect to have access to over these centuries.[62]

Under the Malthusian dynamics of a pre-modern society, any increase in real wages will lead to a higher birth-rate and increase the population. As nutrition improves, couple marry earlier, have children earlier and have more children over their lifetimes. This will eventually cause real wages to return to subsistence level, as the greater pressure on food resources – especially staple calories like wheat – squeezes marginal per capita productivity over time.[63]

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[59] Hopkins, K. (1978). *Conquerors and Slaves.* Cambridge: Cambridge University Press. p.161.
[60] Watson. *Roman Slave Law.* pp.115ff. See also Inst. Gai. 1.53.
[61] Temin. *Roman Market Economy.* pp.114ff.
[62] Domar, E. (1970). "The Causes of Slavery of Serfdom". *Economic History Review.* Vol. 30. pp.18-32.
[63] Temin. (2014). *Roman Market Economy.* pp.226ff.

In industrial societies, the Malthusian dynamic was overcome by a combination of rapid economic growth made possible by mechanisation and a falling birth rate as couples began to invest more heavily in the education and lifetime income of each child. This combination of technological and behavioural change did not take place in Ancient Rome. In this limited sense, Cole and Dean were correct: in the very long-run, economic growth in a pre-modern society will lead to an increase in population and only temporary gains in real wages. The key to understanding economic growth in the Roman Empire – and its cessation from the late second century CE - therefore lies in how effectively the Malthusian process can be delayed. There is an ongoing debate over how this was achieved by Roman society. One very simple explanation is that the resource constraints faced by the Romans had loosened: there is some evidence of a warm period starting in the late fourth and early third centuries BCE.[64] This would have made possible an increase in the food supply, allowing a larger population to be fed with the same labour inputs and therefore making possible a substantial urban population. The advantage of this approach is that it explains why initial improvements in agricultural output appeared to take place across the Italian peninsula, not just in Roman territory.[65] However, it does not easily explain how the Romans were able to sustain an increase in population alongside improvements in consumption for such a long period of time. It also does not explain why changes in population and consumption outside of Italy were so closely linked to conquest by the Romans and did not generally survive after the Romans had left.

This sustained period of growth may have been generated in one of two ways. The first of these was trade integration across the whole of the Mediterranean basin and nearby road networks. This made possible a deeper level of specialisation between different parts of the Empire. On this view, favoured by Scheidel, Rome experienced one brief surge of static economic growth around the first two centuries of the Empire, mainly as a result of regional specialisation across the Mediterranean.[66] A second and more controversial explanation focuses on the degree to which machines such as water-wheels and olive presses were embedded in the Roman agricultural economy. Wikander has noted the surprising prevalence of water-wheels during even minor provinces of the early Empire, leading him to "state with confidence that the breakthrough of the water-powered mill did not take place in

[64] McCormick, M. et al. (2012). “Climate Change During and After the Roman Empire: Reconstructing the Past from Scientific and Historical Evidence”. *Journal of Interdisciplinary Studies.* Vol. 43(2). pp.169-220.
[65] Terrenato, N. (2001). “The Auditorium Site and the Origins of the Roman Villa”. *Journal of Roman Archaeology.* Vol. 14. pp.5-32.
[66] Scheidel, W. (2009). "In Search of Roman Economic Growth." *Journal of Roman Archaeology.* Vol. 46. pp.46-70.

the early middle ages, but rather [...] in the first century [CE]."[67] This challenges the view that slavery completely inhibited the adoption of new technologies: there appears to have been a "technology shelf", including both slave labour and mechanised processes from which Roman producers were able to choose depending on their wealth and personal circumstances.[68] It is not possible to explore the role of technology in the Roman economy in detail here, except to say that it did not generate the kind of accelerated growth necessary to overcome the Malthusian dynamic. Rather, it would have built on – and may have been largely prompted by - the growth made possible by gains from trade as the Empire expanded beyond Italy. A combination of trade integration and technological development may have allowed Rome to achieve a "high level equilibrium" which resisted Malthusian pressures for 400 years.[69]

Trade Integration

The above discussion is a theoretical explanation for the archaeological evidence of rising Roman living standards from the fourth century BCE until the mid to late second century CE. It is necessary to provide evidence that a high level of trade integration did exist across the Mediterranean basin. To some degree the literature on this topic has been led astray by what can be called the "conglomeration of independent markets" debate, which stems from a quote Peter Temin took from Moses Finley, who in turn took it from Roll. Finley took the expression to refer to the interdependence of markets across great distances; he argued that the absence of this interdependence helped to explain why the Romans did not conceptualise a modern economic science.[70] Temin adopted this as the central challenge of a 2001 article[71] and later a book.[72] In the meantime, the "conglomeration" debate has attracted the attention of many Ancient historians, some opposing it and others accepting it as the basis for their own work.[73] However, as Tchernia points out, Finley misunderstood Roll's use of the phrase: it was in fact a reference to the constant reordering of different goods and services by consumers, not to the connectedness of markets across different

[67] Wikander, O. (2008). "Sources of Energy and Exploitation of Power". In Oleson, J. E. (ed). *Oxford Handbook of Engineering and Technology in the Classical World.* Oxford: Oxford University Press. pp.136-157.
[68] Greene. "Technological Innovation and Economic Progress in the Ancient World". p.42.
[69] Jongman. "Reconstructing the Roman Economy". pp.86ff.
[70] Finley. *The Ancient Economy.* p.22.
[71] Temin, P. (2001). "A Market Economy in the Early Roman Empire". *Journal of Roman Studies*. Vol. 91. pp.169–181 at 169.
[72] Temin. *Roman Market Economy.* p.4.
[73] An extremely critical account can be found in Bang, P. F. (2008). *The Roman Bazaar: A Comparative Study of Trade and Markets in a Tributary Empire*. Cambridge: Cambridge University Press. pp.30-32. By contrast a sympathetic account can be found in Roman, Y. (2008). "Conclusion". In Roman, Y. and Dalaison, J. (eds.). *L'Économie antique, une économie de marché?* Paris: De Boccard. pp.262-273.

places.[74] Roll's own explanation for the absence of economic science in pre-modern society was that only the Industrial Revolution was able to shift intellectual focus from questions relating to exchange (about which one finds a great Ancient literature) to the maximising of production.[75] Tchernia therefore takes the view that the "conglomeration" debate is a "red herring" for determining the extent of trade integration in the Roman Empire and this thesis will follow that view.

The evidence for trade integration takes several forms. The first comprises the presence of "heavy goods, for mass consumption, being transported across considerable distances".[76] This distinguishes the Roman Mediterranean from trade in previous and later periods, where only merchandise of great value could entice traders to move into long-distance markets, given the high transaction costs and therefore low profit margins involved in such trade. A good example is mechanically pressed oil and salted fish from Baetica, a region in modern-day Spain. This is an area where the analysis of aggregate classes of finds can reveal much about trading activity. Amphorae with stamps from Baetica can be found consistently exported into Germania over a period of approximately four centuries, as late as the second century CE.[77] They have also been found dating over a period of three centuries in Britannia.[78] A similar trend can be found in oil from Istria, a peninsula in the Adriatic sea, over a shorter period stretching into the first century CE.[79] These two oil producing regions became well known throughout the Empire and are attested to in literary sources: Pliny refers to Baetica and Istria as dividing Roman territory outside of Italy between them "on equal terms".[80] It is important to note, however, that the reach of these two great oil producing regions was sharply divided by geography: they were carried on over fixed trade routes that endured over extremely long periods, rather than a dynamic market that stretched across the whole of the Mediterranean. Many regions, such as Gallia Narbonensis in modern-day Southern France, continued to produce oils on a local basis and neither took advantage of exports from the major oil producing regions, nor attempted to compete with them.[81]

Another highly integrated good between different regions was wine. This can be seen following the eruption of Vesuvius in 79 CE, which destroyed a large stretch of vineyard in

[74] Tchernia. *The Romans and Trade.* p.75. The original passage at the heart of this dispute can be found at Roll, E. (1992). *A History of Economic Thought*. 5th edn. London and Boston: Faber and Faber. p.338.
[75] Roll. *A History of Economic Thought.* pp.83-84.
[76] Tchernia. *The Romans and Trade.* p.95.
[77] Ehmig, U. (2003). *Die Römischen Amphoren aus Mainz*. Mönhnesee: Bibliopolis. p.114.
[78] Carreras Monfort, C., and Funari, P.P.A. (1998). *Britannia y el Mediterráneo: Estudios Sobre el Abastecimento de Aceite Bético y Africano en Britannia*. Barcelona: Universitat de Barcelona. p.123.
[79] Ehmig. *Die Römischen Amphoren aus Mainz*. p.110.
[80] Pliny. *Epistulae.* XV.8.
[81] Tchernia. *The Romans and Trade.* p.86.

the modern-day Bay of Naples. Wine amphorae arriving in Rome from other parts of Italy, and even southern Gaul, increased dramatically over the following decade, implying an increase in prices and a drive to plant more vineyards in areas at a great distance from Vesuvius.[82] However, the rush does not appear to have stretched as far as Cisalpine Gaul, where Pliny reports a sharp drop in prices and a loss of income from his estate there.[83] Fault lines like this in the integration of trade could stem from differences in transportation costs, especially if settlements did not have easy access to sea or river transport. However, they could also simply reflect local preferences or relationships of trust and *amicitia* within supply chains that did not extend to other parts of the Empire. One possible explanation is the role of the Empire's very large cities – and above all Rome itself – in structuring trade routes. The high demand in these cities could sustain extremely long supply chains and cross-subsidise secondary cities which could take advantage of "branches" from these chains. For example, the large seaside town of Puteoli took advantage of a branch from the main Tyrrhenian supply lines to Rome, and in turn redistributed its supplies to Pompeii and Herculaneum.[84]

Another form of evidence for trade integration comprises changes in rural production in response to exposure to trade. This is most clearly visible in the transition to the "Hellenistic" villa model of production in Italy, which went hand in hand with urbanisation during the fourth and third centuries BCE.[85] These large farms produced and traded large food surpluses and for that reason were most often located on or near major roads, originally built to facilitate the movement of the army but later adapted as a route for traded goods. A good example is the Via Appia, built to connect Rome to the newly conquered city of Capua in the fourth century BCE: many surplus-producing villas quickly spring up along the road.[86] The key difference in the villa system of production lay in its use of diverse crops, especially wine and olives; this choice is telling as it allows for the production of around five times more calories per hectare and could therefore push up resource constraints and support the growing urban population.[87] This shift towards commercial agriculture appears to predate trade integration across the Mediterranean, but there is evidence that the villa system in Italy adapted itself to the growing volume of cereal imports from elsewhere in the Empire. It should be borne in mind that grain exports from other provinces such as Egypt, except for supplies collected by the *annona* for the grain dole in Rome, were strictly controlled by the Roman government.[88]

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[82] Tchernia, A. (1986). *Le Vin de l'Italie romaine, essai d'histoire économique d'après les amphores*. Rome: École française de Rome. pp.221-232.
[83] Pliny. *Epistulae.* IV.6.
[84] Tchernia. *The Romans and Trade.* p.88.
[85] Terrenato. "The Auditorium Site and the Origins of the Roman Villa". pp.5-32.
[86] Jongman. "Reconstructing the Roman Economy". p.94.
[87] Jongman. "Consumption in the Early Roman Empire". pp.592ff.
[88] De Romanis, F. (2003). "Per una storia del tributo granario africano all'annona della Roma imperial". In Marin, B. and Virlouvet, C. (eds.). *Nourrir les cités de Méditerranée.* Paris: Maisonneuve et Larose. pp.691-738.

Nevertheless, Geraghty has shown that the expansion of the Empire had profound effects on Italian agricultural production, as it built a comparative advantage in wine production while importing grains from elsewhere. These gains from trade existed alongside gains from the expropriation of resources, such as slaves, from other parts of the Empire.[89] There remains intense debate and uncertainty over the precise moment that the villa system in Italy began to collapse and what the causes of that collapse might be. One popular narrative is that more efficient modes of production which had been developed first by Italy were later adopted on in the provinces. The Italian estates, too large, controlled by a landholding elite and over-reliant on slave labour, were unable to adapt to this competition and failed, with the crisis reaching a peak in the late second CE.[90] This interpretation traces its roots, in form or another, to the work of Rostovtzef[91] and has recently come under intense scrutiny on several fronts. It is not clear how quickly the number of villas in Italy did in fact collapse[92], nor that this was the direct result of competition from the provinces.[93] Moreover, there are regions of Italy where there is no clear evidence of a second century crisis: for example, in the inland region of Umbria the number of villas actually seems to have reached a peak in the first and second centuries CE.[94] The precise relationship of the Italian villa system to trade with the provinces – and the success of the villa system in some regions of Italy compared to others - therefore remains uncertain. What is clear however is that by the end of the second century, Italy was no longer totally dominant in the production of high calorie goods.

The overall picture that emerges is a degree of trade integration that was highly unusual by the standards of a pre-modern society, but nevertheless heavily dependent on a narrow set of key “branches” anchored in the supply of the largest cities, and especially the city of Rome. The high level of urbanisation sustained by the Roman Empire created a concentrated demand that justified long-distance trade in mass produced goods for lower and middle income consumers, not just high value merchandise for a small landholding elite. This formed a crucial part of the “high equilibrium” which allowed the Romans to lift the resource constraints of its economy, at least for those settlements that could link themselves

[89] Geraghty, R. M. (2007). "The Impact of Globalisation in the Roman Empire, 200 BC - AD 100”. *Journal of Economic History.* Vol. 67. pp.1036-61.
[90] See for example a particularly strong version of this view in Carandini, A. (1989). “La villa romana e la piantagione schiavistica”. In Schiavone, A. (ed). *Storia di Roma*. Vol. 4. *Caratteri e morfologie*. Turin: Einaudi. pp.101-200.
[91] Rostovtzef explained this process in terms of a shift from *bourgeoisie* to *rentier* control, a view that perhaps reflected his own experience as an exile from the Russian Revolution. Rostovtzeff. *The Social and Economic History of the Roman Empire.* p.194.
[92] Tchernia.*The Romans and Trade.* pp.311-312.
[93] See for example, on the time lapse in the replacement of Italian wine by Hispanic wine in southern Gaul, Berthault, F. (1998). “Vin et vignoble dans le sud-ouest de la Gaule”. In *El vi a l'Antiguitat: economia, producció i comerç al Mediterrani occidental*. Conference Proceeding of the Internacional d'Arqueologia Romana. pp.450–60.
[94] Tchernia. *The Romans and Trade.* p.310.

into a “branch” of the trading network and enjoy the resulting gains from trade. Other regions were less embedded into the trading network and continued to depend on local supplies. The “efflorescence” in Roman living standards was therefore not enjoyed uniformly across the whole of the Empire. The trade network was also highly fragile: it depended on the continuing willingness of rural producers to provide surpluses and faced a combination of transport and institutional costs which could only be imperfectly overcome in a pre-modern society.

Section 3.3: Fragility, Buttressing and Fragmentation

How were the fragile “branches” of the Roman trading network “buttressed” and why, from the late second century CE, do they no longer appear capable of sustaining the living standards to which Romans had become accustomed since the fourth and third centuries BCE? The transaction costs faced by this trading network fell into three broad categories: transport, security and economic calculation costs. The latter two can be broadly grouped into institutional costs. Modern European economies went through two “transport revolutions” which Ancient Rome was either unable to replicate or could only do so to a very limited degree. The first was the coming of the steam-powered railways and ocean liners in the nineteenth century, which served, for example, to reduce transport costs by four-fifths between the south of France and Paris.[95] The second was the arrival of standardised containers in the 1960s, of a type is now ubiquitous in the modern consciousness and massively reduced the cost of offloading and monitoring. It is worth noting that modern transaction cost theory, which focused especially on institutional costs, only appeared after the second of these revolutions, when institutional costs were no longer disguised by the larger problem of distance. It is therefore necessary to assess Roman motivations for long-distance transport and how the cost of transport was brought under a limited degree of control, before any attempt can be made to assess the role of the Roman institutional environment.

Transport Costs

According to the Stanford Geospatial Network Model, a computer simulation for transport in the Roman world, a typical journey from Alexandria to Rome, using the fastest civilian sailing boats in mid-July, would take 14 days and a trader could expect to pay 1.45 *denarii* per kilogram of wheat. A journey in winter would necessitate a different route, take a little over 15 days and cost 1.56 *denarii* per kilogram.[96] The motive to take such a journey rested first and foremost on the concentrated demand that the urban population of a city like Rome

[95] Lachiver, M. (1988). *Vins, vignes et vignerons: Histoire du vignoble français*. Paris: Fayard. p.410.
[96] ORBIS. The Stanford Geospatial Network Model of the Roman World. Website. URL: http://orbis.stanford.edu/.

could offer. However, even relatively short distances along the way could fragment trade routes sufficiently to result in differences in the ways goods were sourced by the occupants of different cities. A vivid example is the River Tiber, which stretched for 35 kilometres between Rome and her main port, Ostia. As a result, there are significant differences in the pattern of amphorae found in the two cities, with more goods arriving in Rome from the interior of Italy, some of which came downstream from further up the Tiber, while Ostia's needs were more often by exports from the Tyrrhenian-facing parts of southern Italy, or even from provinces further afield like southern Gaul.[97] If was true for the port of Rome, it was surely also true for other settlements on major trading routes. The presence of very large cities was therefore essential to the operation of the Roman trading system, but it was not simply a case of smaller settlements taking what they were given: rather, the very large cities served to cross-subsidise the rest of the trading network by laying down key infrastructure, which could then be adapted by other settlements according to their own needs.

The Romans attempted to reduce transport costs in several ways. One was the standardisation of containers. Heslin has traced the growing number of Roman shipwrecks found with *dolia,* large jugs made of fire clay that could hold between 40 and 50 quadrantals, or the amount generally held in one *amphorae*.[98] This challenges a previous interpretation which regarded *dolia* as permanent vessels for the storage of food, rather than as a vessel for transport across great distances. The precise function of *dolia* in maritime commerce remains uncertain: while they could be used for a vast array of goods on land, including staple grains as well as oil, it is possible they developed a specialised function at sea for the carriage of wine. While *dolia* could be found in several different sizes, their chief innovation lies in the separation between containers that were accessory to goods – such as *amphorae* sold along with the wine they contained, then usually disposed of afterwards – and containers that could be re-used over time. Indeed, *dolia* could be used for up to 30 years or longer before they were eventually retired.[99] Brenni notes the degree to which commercial ships were custom-built to be fitted with *dolia,* which remained in place for the entire lifetime of the ship; as time passed ship design changed in order to minimise wasted space and increase the number of dolia that could be transported in a single journey.[100] The extent to which the *dolia* were integrated into the Roman economy and became ubiquitous to the

[97] Rizzo, G. (2012). "Roma e Ostia, un binomio ancora possibile? Di alcuni generi trasportati in anfora in età tardo-antonina". In Keay, S. (ed.). *Rome, Portus and the Mediterranean*. London: British School at Rome. pp.87–104.
[98] Heslin, K. (2011). "*Dolia* Shipwrecks and the Wine Trade in the Roman Mediterranean". In Robinson, D. and Wilson, A. (eds.). *Maritime Archaeology and Ancient Trade in the Mediterranean*. Oxford: Centre for Maritime Archaeology. pp.157–68.
[99] Brenni, G. (1985). "The Dolia and the Sea-Borne Commerce of Imperial Rome." MA Thesis. Texas A&M University. p.71.
[100] Brenni. "The Dolia and the Sea-Borne Commerce of Imperial Rome." p.75.

everyday life of the Romans can be found in both literary and legal sources. Cato gives step-by-step instructions for the preparation of *dolia* before they can be used to carry oil[101], while Varro includes them as one of the essential items needed for olive pressing.[102] The presence of *dolia* is significant for two reasons. Firstly, it indicates a high degree of integration between the land-based and sea economies. Indeed, Brenni suggests that they helped to facitate the activities of organised commercial entities, such as *societas,* which could order large supplies of wine or other commodities and use *dolia* to carry them from the sea to warehouses on land, closer to potential buyers.[103] This points to the second reason: cost of loading and unloading comprises a large share, in some cases even the majority, of the cost of transport. In this way *dolia* represented a significant advance on other forms of container, allowing set quantities of a good to be moved over great distances at minimum cost.

Attempts were also made to improve the efficiency of land transport. As with all pre-modern societies, a gulf lay between Roman settlements with easy access to the coast or a navigable river, and those that relied entirely on land transportation. On the eastern side of the Iberian peninsula, the distribution of *amphorae* from maritime trade was limited to no more than ten kilometres from the coast, after which it becomes very sparse.[104] The literary sources also attest to the difficulties experienced by "inland" settlements in times of shortage. Gregory of Nazianzus, writing from Cappadocia in the fourth century CE, notes that during a famine, there was "no source of assistance from anywhere, not any relief", because "an inland city like ours can neither turns its superfluity to profit, nor supply its need".[105] However, two points must be borne in mind. Firstly, the role of maritime commerce should not be overstated: it was vitally important for long-distance trade but played a far less important role in the operation of the rural agricultural economy which was responsible for supplying that trade. Hopkins has calculated that considering daily interactions between villas, cities and other settlements, a far larger proportion of goods were carried over land each day than by sea or river.[106] Varro notes that "transportation to and from many farms is carried by both […] roads on which carts can be easily driven, or navigable rivers nearby" and notes the importance of close access to either road or river transport for the profitability of a farm.[107] This is reflected in the increased number of villas which appeared after the

[101] Cato. *De Agricultura.* LXIX.
[102] Varro. *De Re Rustica.* I.22.
[103] Brenni. "The Dolia and the Sea-Borne Commerce of Imperial Rome." p.75.
[104] Tchernia. *The Romans and Trade.* p.90.
[105] Gregory of Nazianzus. *Orationes*. 43.34. Translation in Tchernia. *The Romans and Trade.* p.90.
[106] Hopkins, K. (1983). "Models, Ships and Staples". In Garnsey and Whittaker (eds.). *Trade in the Ancient Economy.* London: Chatto and Windus. pp.84–109.
[107] Varro. *De Re Rustica.* I.16. Translation in Adams, C. (2007). *Land Transport in Roman Egypt: A Study of Economics and Administration in a Roman Province.* Oxford: Oxford University Press. p.92.

construction of the Via Appia: what changed was not technology or the productive capacity of the land, but simply improvements in land transport that could integrate the land into the supply network for Rome. Secondly, the fourth-century experience of Cappadocia cannot be generalised to all times and places across the Empire. Much depended in the institutional environment in which land transported was carried out. Adams has explored on the use of innovative techniques in Roman Egypt to maximise the efficiency of animal transport, including part-ownership and hire of animals; this helped traders to lower the costs associated with maintaining animals.[108] Given the presence of a highly navigable river in the form of the Nile, it is clear that the efficiency of land transport rested less on the availability of water-based alternatives than on the presence of markets that needed to be reached by land. The driving force for land transport in Egypt was, once again, the supply of large cities: Alexandria and Memphis, which had populations of around half a million and a quarter of a million respectively. Adams gives the example of Athenodoros, a wealthy grain merchant who lived in the Augustan period and exported significant quantities of grain over land from his estate to Heracleopolis, a city on the Nile, from which it was shipped up to Alexandria and beyond.[109] None of this is to deny the gulf between maritime and land transport, which Rome never escaped: but it does demonstrate active and ongoing attempts by Roman traders to integrate "inland" cities and estates into the main "branches" of the Mediterranean trading system, so far as that was possible in the absence of steam power or other industrial technologies.

Institutional Costs

Transport costs, while still the defining barrier faced by Roman trade, were therefore controlled to the point that some consideration can be given to institutional costs. The greatest of these was security, both external and internal. In an environment where agricultural producers face a constant risk of invasion or raids, they will be less likely to engage with trade and instead strive for autarky. Moreover, the incentive to invest in more efficient forms of agricultural production is greatly undermined if the profits are likely to be destroyed. After storms, piracy represented the greatest risk faced by Mediterranean traders; in most pre-modern economies the increase in price to reflect this risk would be enough to prevent trade in the kind of mass-produced goods we see arriving in Roman cities. Security was perhaps the most visible benefit delivered to the provinces by Roman rule. External security was provided by the Roman army, whose fighting strength was enough not only to win most conflicts but also to deter the organisation of any potential incursions. The cost of training, equipping and maintaining the army represented by far the largest expense incurred

[108] Adams. *Land Transport in Roman Egypt.* pp.92ff.
[109] Adams. *Land Transport in Roman Egypt.* pp.249-250.

by the Roman state, but until the later half of the second century CE they likely "paid for themselves economically" by the external peace they were able to maintain.[110] The *Lex Gabinia* in 67 BCE*,* while also serving as a precedent for the proconsular powers of the Emperor, also marked the beginning of serious attempts by Rome to combat the threat of Mediterranean piracy.[111] It is notable that much of the support for granting proconsular power to Pompey derived from a concern by Plebeians that piracy was disrupting the grain supplies to the cities. This relationship, between the food supply and the expanding powers of a central government bureaucracy, has been put forward as a factor in the later formation of the Principate.[112] By the reign of Augustus, the threat of piracy was much reduced, which partly explains why Roman cities at that time did not have defensive walls.[113] This was the famous *Pax Romana,* which endured until the dynastic breakdown at the end of the Severan period.

The Mediterranean trade network was however also "buttressed" in more subtle ways, as various institutions helped to overcome the cost of economic calculation. It is not possible to discuss all of these in detail here, so focus will be placed on monetisation, law and information flows. The Romans achieved a single integrated monetary system over most of their territory, with stable prices over a period of nearly four centuries until the late second century CE. Kay traces this to the arrival of bullion after the second Punic War, especially silver, which improved liquidity and helped Rome to transform itself into a single economic entity.[114] The other major factor in this liquidity was the expansion in credit money: it became possible to transfer large sums "on paper" from one part of the Empire to another, even if we remain ignorant of the precise mechanics by which this was achieved.[115] In the first century CE the total stock of money, by then comprised of gold, silver and bronze, was likely greater than even the most sophisticated of the early modern European economies and in former provinces such as Britannia, which did not previously have a bullion supply, continued to constitute the primary source of precious metal for centuries after the end of Roman rule.[116] Three further remarkable features of the Roman monetary system should be noted. The first was the sophistication of its internal structure. The silver *denarius,* introduced in 211 BCE, remained the bedrock of the system until the mid-third century CE, but it was complemented

[110] Campbell, J.B. (1984). *The Emperor and the Roman Army.* Oxford: Oxford University Press. p.43.
[111] Abbott, F. (1963). *A History and Descriptions of Roman Political Institutions*. New York: Biblo and Tannen. p.109. See Also Tarwacka, A. (2009). *Romans and Pirates: Legal Perspective.* Warsaw: Wydawn.
[112] Erdkamp, P.P.M. (2005). *The Grain Market in the Roman Empire: A Social, Political and Economic Study.* Oxford: Oxford University Press. p.306.
[113] Jongman. "Reconstructing the Roman Economy". p.89.
[114] Kay, P. (2014). *Rome's Economic Revolution.* Oxford: Oxford University Press.
[115] Harris, W.V. (2006). "A Revisionist View of Roman Money". *The Journal of Roman Studies*. Vol. 96. pp.1-24.
[116] Jongman. "Reconstructing the Roman Economy". p.90.

by a variety of coins that catered to the full range of potential transactions, from small values in bronze up to the *aurei,* a gold coin that broadly represented the value of one person's subsistence needs in grain over the course of a year.[117] Secondly, the penetration of money into everyday transactions, even among lower income households and even in rural or remote parts of the Empire, was unrivalled in the pre-modern world.[118] Thirdly, and perhaps most significantly, the monetary system remained very stable until the later part of the second century CE, with robust price stability even in the absence of a central bank. The sophistication and stability of the monetary system made it easier to calculate and distribute risk for large commercial projects and made trade more readily available to smaller farmers as well as large estates.

The role of law will be returned to later in the thesis, but some of its key economic functions can be touched on here. The shift towards consensual contracting was in large part a response to the influx of foreigners into Rome as the city's territory expanded during the mid to late Republic. It therefore owed much of its early development to the Edict of the Peregrine Praetor.[119] These contracts were characterised by consent between the parties.[120] There were general requirements of form for a consensual contract, such as writing or delivery; instead these depended on the requirements of the transaction which the parties were entering into.This is also the period during which trade across the Mediterranean reached its highest level of integration, so it is no surprise that the four main categories of consensual contract – sale, hire, *mandatum* and *societas* – were each tailored to a specific commercial function. Commercial flexibility was enhanced by certain features of Roman contract law. Majoritarian terms, which followed the general meaning of a word as understood by most traders operating on a particular route, made it easier to predict how obligations of each party would be interpreted by the legal system.[122] More controversially, monetary damages may have allowed parties to more accurately calculate the costs and benefits of performance against non-performance.[123] Both of these features helped to provide a "baseline" for economic calculation before entering a contract. In this way, contracts backed by state authority allow parties to overcome some of the policing and enforcements costs faced in transacting, especially where transactions are carried out over long distances where the parties do not necessarily share a high level of social trust. The

[117] Burnett, A. (1987). *Coinage in the Roman World.* London: Seaby.
[118] Howgego, C. (2009). "Some Numismatic Approaches to Quantifying the Roman Economy". In Bowman and Wilson. *Quantifying the Roman Economy.* pp.287-295.
[119] du Plessis, P. (2015). *Borkoswki's Textbook on Roman Law.* Oxford: Oxford University Press. pp.266-267.
[120] Inst. 3.22.pr-1.
[122] Craswell, R. (2000). "Contract Law: General Theories". In De Geest, G. and Bouckeart, B. (eds). *Encyclopaedia of Law and Economics.* Cheltenham: Edward Elgar. Vol. 3. pp.24-30.
[123] Posner, R.A. and Rosenfield, A.M. (1977). "Impossibility and Related Doctrines in Contract Law: An Economic Analysis". *Journal of Leal Studies.* Vol. 6. pp.83-118.

societas deserves special attention. Boldizzoni points out, correctly, that Roman law had no equivalent to the modern firm.[124] That is not to say, however, that Roman law did not provide a range of choices between bilateral bargaining on one hand and coordination by hierarchy on the other: the forms of hierarchy were simply embedded into extra-legal social orders, such as the *familia,* the "enmeshed web of social obligations" between friends or the relationship between patrons and their freedmen.[125] Nevertheless, *societas* could reach an impressive level of duration and sophistication, especially where high levels of concentrated investment were required. A good example of this is the brick-making industry in Italy. This was eventually bought out by the Imperial household, but before then was based on *societas,* such as the one established by brothers Domitius Lucanus and Domitius Tullus to manage the Italian brick industry in the Flavian period.[126] The law of contract had a supplementary function where extra-legal relations had broken down, which may explain in part why the procedure of the *Ius civile* preserved many of the characteristics of private arbitration until late in the Empire.

Beyond substantive rules, the broader role of legal policy also deserves attention. This helped to maintain the "high equilibrium" of the Roman trading system in two ways. Firstly, while even at its height Roman trade was characterised by inequalities, the Imperial government did not simply protect the interests of large landholders at the expense of other stakeholders in the agrarian economy. Kehoe has outlined the role of legal policy in North Africa during the second to fourth centuries CE in balancing the interests of the *coloni,* small tenant farmers who funded their occupation of the land by share-cropping, and larger land-holders on the Imperial estates.[127] This was not done out of any clearly defined economic theory, but rather to enhance the position of the Imperial government in a complex balance of power with more local sources of power in the provinces, such as landholders based in the major Egyptian cities. Once they had paid landholders with a share of their crops and met their own subsistence needs, the *coloni* were able to take any remaining surplus to market. The degradation of this balancing role is usually dated to tax reforms under Diocletian in the late third century, which left the *coloni* indebted and therefore increasingly dependent on larger landholders.[128] It also represented a reduction in the ability of smaller market actors to participate in long-distance trade and therefore arguably a reduction in the

[124] Boldizzoni. *The Poverty of Clio.* p.31.
[125] Peachin. *Social Relations in the Roman World.* p.409.
[126] Pliny. *Epistulae*. VIII.18.
[127] Kehoe, D.P. (2007). *Law and the Rural Economy in the Roman Empire.* Ann Arbor: University of Michigan Press.
[128] See for example Grey, C. (2007). "Contextualizing Colonatus: The Origo of the Late Roman Empire". Journal of Roman Studies. Vol. 97. pp.155-175.

overall "economic inclusivity" of the Empire.[129] The case of the *coloni* also serves to highlight the way in which legal policy was deeply intertwined with other governance structures, such as the taxation system. A second role of Roman legal policy, which Rathbone explores in the context of the Greek world, was to "foster a general climate of probity and equity in public and private business" across the provinces.[130] This was arguably more important than the spread of the *Ius civile* itself, given that it attached only to citizens. At least until the general grant of citizenship under the *Constitutio Antoniniana,* it was often more convenient for citizens living in the provinces to use local legal orders which the Romans left mostly untouched; Ratzan documents this tendency in the context of Roman Egypt, where most local contracts were based on earlier Ptolemaic rules rather than the consensual contracts of the *Ius civile.*[131]

Information and search costs in a pre-modern society are compounded by the lack of instantaneous communication methods. It has been suggested that the Roman state played a major role in overcoming these costs. Special attention should be given to the Prefect of the *annona,* or the storage and distribution of the grain supply at Rome. At its height, the *annona* was responsible for providing around half the calorific requirements of the city's inhabitants, made up in regular deliveries of grain at well below the market clearing rate.[132] However, the Prefect employed only a very small staff, which suggests that his main function was to gather information on the grain supply and bargain with individual merchants, rather than directly organise the whole of the grain supply.[133] Temin argues that the Prefect's office, which was in Ostia, may therefore have acted as an information-clearing house. "The issuing of certain public contracts could signal private merchants about expected prices and fluctuations in the market, as well as about shortages and surpluses in areas where they did not normally deal".[134] Temin overstates his case, even going so far as to compare these public signals with speeches from the US Federal Reserve Board.[135] It is likely that to the extent the Prefect was able to provide information signals to private merchants, this was limited to the city of Rome, where grains and other goods from different regions interacted to a greater extent than elsewhere in the Empire. Nevertheless, it was large cities that served as the engine of the Roman trading system and large public contracts were a feature of all

[129] Jongman. "Reconstructing the Roman Economy". p.86. For the general theory see Acemoglu, D. and Robinson, J.A. (2012). *Why Nations Fail: The Origins of Power, Prosperity and Poverty.* New York: Random House.
[130] Rathbone, D. (2007). "Merchant Networks in the Greek World: The Impact of Rome." *Mediterranean Historical Review.* Vol. 22. pp.309-320.
[131] Ratzan. "Transaction Costs and Contract in Roman Egypt". pp.18ff.
[132] Jongman. "Reconstructing the Roman Economy". p.89.
[133] Sirks, B. (1991). *Food for Rome.* Amsterdam: Gieben. p.34.
[134] Temin. *Roman Market Economy.* pp.105-106.
[135] Boldizzoni singles this passage out as an example of what he calls "the fanciful world of Clio" in Boldizzoni. *The Poverty of Clio.* p.75.

large cities. The Prefect therefore serves as an example of how state and market activities could overlap to limit the cost of finding new information. Tchernia points out that the contracting decisions of the *annona* relied "on stable contracts with groups of familiar shipowners or traders".[136] It therefore operated on what Williamson would have characterised as relationship-specific contracts rather than case-by-case bargaining.[137] The costs and benefits of relationship-specific bargaining are different: the risk of opportunism is lower, for example, but there are also higher opportunity costs in the sense that parties were slower to adapt to changing commercial circumstances such as the lower prices that a switch in contract may offer. The Roman trading system was much more heavily dependent on relationship-specific bargaining than long-distance trade in a modern economy. Markets "were a space where patronage, connections, and friendship in the Latin sense of the word (*amicitia*) were in their element".[138] This should not be regarded as an inferiority of Roman trade: rather, it reflects the interplay of technology and social relationships in a pre-modern world. In a world of high information costs and limited scope for pre-screening contractual partners, it makes sense to adopt a strategy of satisficing one's needs via close and trusted partners.

Defining "Fragmentation"

It is tempting to associate the fragmentation of the Roman Mediterranean trading system with the "crisis" of the third century, beginning with the death of Severus Alexander in 235 CE. In fact the ultimate origins of economic change lie in the second century and possibly earlier. The "high equilibrium" maintained by the Roman economy was always very fragile, at continual risk of succumbing to a Malthusian logic as the increase in population put pressure on labour incomes. In other pre-modern economies, squeezed labour incomes result in farmers turning to what de Vries famously called the "peasant model of production" in which the larger market is abandoned, and estates try to produce all their own needs themselves.[139] This was not the case for Rome until the later Empire. The high equilibrium was maintained for such a long period due to the level of economic integration achieved across the extent of the Empire and the quality of Roman institutions. From the first century CE onwards, there is a shift away from the villa system, which relied on slave labour and a variety of different crops, including calorie-rich goods, to very large estates, which tended to focus on single crop agriculture or livestock and were increasingly fortified. The diverse choice of crops chosen by villas and their high density along major roads both point to their

[136] Tchernia. *The Romans and Trade.* p.94.
[137] Williamson. *The Economic Institutions of Capitalism.* pp.15ff.
[138] Tchernia. *The Romans and Trade.* p.94.
[139] The "peasant model of production" is one of the key themes running throughout De Vries, J. (1974). *The Dutch Rural Economy in the Golden Age 1500-1700.* New Haven: Yale University Press.

role as exporters of food surplus to the cities. By contrast, very large estates based on single crops can be regarded as an attempt by landholders to compensate for weakening agricultural output by sheer economies of scale. This change in the structure of the Roman agrarian economy may have begun in Italy, during the much contested agricultural "crisis" of the early imperial period, but by the third century very large estates, or *massa,* were also characteristic of wealthy provinces such as Northern Africa, where the villa system had never been as prevalent.[140] One possible explanation is that the villa system was over dependent on a plentiful and cheap supply of slave labour from newly conquered provinces to the Italian core, which then started to dry up as the size of the Empire stabilised from the first century CE. Rural slaves were the "machines" of the Roman villa: indeed, many productive processes in the villas, such as olive pressing or milling, could be fulfilled by either slave labour or by machines depending on the wealth and circumstances of the landholder.[141] In *De Agricutura,* Cato the Elder discusses the feeding, clothing and maintenance of farm hands at the same time as the maintenance of animals, in much the same manner as a modern handbook on agriculture might discuss the maintenance of machines.[142]

Another explanation may be that a fortuitous warm period came to an end.[143] Goods like wine and olives were not only richer in calories, they were also more expensive to produce and to buy per gram: the villa system therefore relied therefore on an underlying improvement in resource output which may have simply been the result of a warm period in the climate. The benefits of this warm period accrued especially to Egypt and the Levant. According to McCormick, Egypt "appears to have enjoyed exceptionally favorable conditions for cereal production" during the Roman "optimum" period, which he defines as 100 BCE to 200 CE.[144] The most favourable floods of the Nile tended to occur between 30 BCE and 155 CE.[145] Meanwhile, Austrian Alpine dendrodata (data gathered from tree rings) indicate consistently warm summer temperatures from 35 BCE, until a cool period from 155 to 180

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[140] Duncan-Jones, R. (2004). "Economic Change and the Transition to Late Antiquity". In Swain, S. and Edwards, M. (eds). *Approaching Late Antiquity: The Transformation from Early to Late Empire.* Oxford: Oxford University Press. pp.20-52.
[141] Greene. "Technological Innovation and Economic Progress in the Ancient World". p.42.
[142] Cato. *De Agricultura.* LIII-LX.
[143] McCormick et al. "Climate Change During and After the Roman Empire". pp.169-220. See also Demandt, A. (1984). *Der Fall Roms: die Auflösung des römischen Reiches im Urteil der Nachwelt*. Munich. p.376; Demandt, A. (2007). *Die Spätantike: römische Geschichte von Diocletian bis Justinian, 284-363.* Munich. p.597; Lamb, H.H. (1995). *Climate, History and the Modern World.* London. pp.156-169,
[144] McCormick et al. "Climate Change During and After the Roman Empire". p.183.
[145] Fraedrich, I. et al. (1997). "Multiscale Detection of Abrupt Climate Changes: Application to River Nile Flood Levels". *International Journal of Climatology.* Vol. 17. pp.1301-1315; Kondrashov, D. et al. (2005). "Oscillatory Modes of Extended Nile River Records (AD 622-1922)". *Geophysical Research Letters.* Vol. 32. L10702.

CE and a gradual, intermittent cooling from 200 CE onwards. Dendrodata therefore suggests that Alpine glaciers experienced a long retreat during this period and were likely much smaller than they are now observed to be in the 21st century.[146] Backing up this technical evidence, an aggregation of written sources by McCormick *et al* finds frequent references to high moisture levels, particularly the flooding of rivers and high level of precipitation.[147] From around 200 CE onwards, evidence suggests a less consistent climate environment. "Overall, the proxy data delineate a shift away from the stability of the first centuries toward a broadly cooling, drier climate as a background factor in the northwestern provinces' turbulent third century".[148] Analysis of the great Aletsch Glacier in modern-day Switzerland suggests a cooling period in the third century CE[149], compounded by more erratic patterns of precipitation and a cluster of major volcanic eruptions which likely made seasonal temperatures less predictable.[150] The combination of these factors would have made food production for export - especially the prediction of yields from one season to the next - on a large scale particularly difficult at a time when the Empire was beginning to undergo significant political, military and monetary crises. "After 155 A.D., when the Empire struggled to face mounting political, military, and economic challenges, the best harvests became substantially more infrequent and the worse ones more common".[151] There is some evidence that climate conditions began to stabilise towards the end of the third century CE, but the reprieve was to be short-lived; there was a severe 40 year drought in the mid-fourth century, followed by increasingly erratic climate conditions in the subsequent centuries.[152] McCormick suggests that this drought may have been a contributing factor in the mobilisation of the Huns to the Don River; a significant event in the later military instability of the Roman Empire.[153]

Duncan-Jones finds that the contraction in the number of properties and the growth of very large estates appears to have accelerated significantly in the aftermath of the Antonine Plague.[154]Indeed, the real emergency for the Roman trading system appears to have been the Antonine Plague, probably of smallpox, the first outbreak of which was from 165 to 180

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[146] Biintgen et al. (2005). "A 1052-Year Tree-Ring Proxy for Alpine Summer Temperatures". *Climate Dynamics.* Vol. 25. pp.141-153.
[147] For complete details on the methodology used for this analysis, see McCormick et al. "Climate Change During and After the Roman Empire". pp.207-209.
[148] McCormick et al. "Climate Change During and After the Roman Empire". p.185.
[149] Nicolussi et al. (2009). "A 91 11 Year Long Conifer Tree-Ring Chronology for the European Alps: A Base for Environmental and Climatic Investigations". *Holocene.* Vol. 19. pp.909-920.
[150] Zielinski et al., A. (1994). "Record of Volcanism since 7000 B.c. from the GISP2 Greenland Ice Core and Implications for the Volcano-Climate System". *Science.* Vol. 264. pp.948-952.
[151] McCormick et al. "Climate Change During and After the Roman Empire". p.189.
[152] Data taken from long tree-ring chronology from Dulan-Wulan in central China. McCormick et al. "Climate Change During and After the Roman Empire". p.220.
[153] McCormick et al. "Climate Change During and After the Roman Empire". pp.190-191.
[154] Duncan-Jones. "Economic Change and the Transition to Late Antiquity". pp.20-52.

CE. According to Dio Cassius, the second outbreak killed 2000 people each day in Rome, or one in four of all people affected.[155] The Plague may have killed up to five million people in total and in some regions may have killed up to a third of the population.[156] According to a Malthusian logic, such a collapse in population ought to lead to higher real wages, as happened after the Black Death in the fourteenth century, but exactly the opposite appears have taken place after the Antonine Plague. Bagnall traces a sharp increase in prices and no corresponding increase in incomes in the period immediately following the Antonine Plague.[157] One potential explanation for this unusual effect is that the population of the large cities collapsed – not just in Rome but also in second-tier cities like Antioch and Alexandria - which took away the concentrated demand driving the incentive to export mass produced goods over great distances. A vicious cycle was created: as urban populations fell, exports fell and prices increased, driving those who had survived the Plague out of the cities in search of a food supply. As the small number of cities above the 100,000 mark shrunk, they ceased to cross-subsidise the many smaller settlements which traded on the "branches" of the wider trading network. Not only was the urban population falling, but the role played by wealthy citizens in civic life was also declining: the threat of infection prompted many wealthy families to return with their households to their rural estates, encouraging the growing trend towards self-sufficiency. The absence of wealthy elites in the cities of Asia Minor was reflected in the number of civic benefactions, which fell steeply during the Plague itself, briefly recovered in the late Severan period and the entered an effective free-fall over the later course of the third century.[158] The evidence that trade routes were impacted by falling urban populations does not only take the form of deteriorating diets and declining consumption. Erickson-Gini outlines a collapse in the manufacturing of products intended for trade in the formerly wealthy region of central Nagev, modern-day Israel, in the late second and third centuries.[159] Nappo also outlines the near-total collapse of the Red Sea trade to the Indian sub-continent.[160]

This perfect storm of climate change, disease and de-urbanisation undermined the incentive to absorb the transport costs of trade. It also had a ricochet effect on the

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[155] Dio Cassius. *History.* LXXII. 14.3–4.
[156] Christer, B. (2007). "The Antonine Plague and the Third-Century Crisis". In Hekster, O., de Kleijn, G. and Slootjes, D. (eds). *Crises and the Roman Empire: Proceedings of the Seventh Workshop of the International Network Impact of Empire.* Leiden: Brill. pp.201–218.
[157] Bagnall, R. (2002). "Effects of Plague: Model and Evidence". *Journal of Roman Archaeology.* Vol. 15. pp.114-120.
[158] Zuiderhock, A. (2009). *The Politics of Munificence in the Roman Empire: Citizens, Elites and Benefactors in Asia Minor.* Cambridge: Cambridge University Press. p.18.
[159] Erickson-Gini, T. (2010). *Crisis and Renewal: Nabataean Settlement in the Central Negev During the Late Rome and Early Byzantine Period.* Oxford: Archeopress.
[160] Nappo, D. (2007). "The Impact of the Third Century Crisis on the International Trade with the East". In Hekster et al. *Crises and the Roman Empire.* pp.183-199.

institutions the Romans had built to overcome the security and economic calculation costs of trade. The Antonine Plague decimated the Roman army and left it unable to contain military pressure from Sassanids on the eastern frontier as well as Germanic peoples on the Rhine. For the first time since the late Republic, the external security of the Empire was not guaranteed. The military unrest and frontier difficulties created by the Plague also made the position of Emperor increasingly unstable. 193-197 CE witnessed a civil war led by competiting military generals, with Septimus Severus ultimately successful. The Severan dynasty he established did not last. Severus Alexander was killed by his own soldiers following an attempt to pacify Germanic armies passing over the Rhine and the Danube. A popular general, Maximinus, was nominated as his replacement, but did not last long; there were at least 26 different claimants to the Imperial throne over the following 50 years.[161] It is not a coincidence that the first major city walls for Rome were built between 271 CE and 275 CE: by that stage, the threat of military incursions, with the attendant threat to supply chains, had returned.

It was also following the Antonine Plague that the monetary system began to degrade. It is tempting to attribute the first signs of inflation in the late second century to debasement of the currency by the Imperial government. It is true that debasements picked up from 160 CE. This was partly prompted by the reduction in revenue following the Plague – there was no system of sovereign debt in Roman society – and partly by the need to finance the army.[162] However, the initial inflation was more likely caused by a very sudden increase in the per capita money stock.[163] Bagnall notes evidence of a sudden doubling in many prices in Roman Egypt in the immediate aftermath of the Plague.[164] This initial burst of inflation would have severely hurt creditors and it does not appear that Romans' rudimentary banking sector every fully recovered: the *argentarii* disappear from literary sources around 260 CE and the *nummularii* follow in 300 CE, although we know that loaning and borrowing continued on a reasonable scale into the fourth century.[165] Debasements became more frequent and more severe during the third century. By 270 CE, not only silver coins but also the gold *aureus* had become significantly lighter. It can be argued that this was simply a continuation of a trend which by then had been ongoing for over a century by then, but this is to overlook the impact that very severe debasements had on overall trust in the monetary system. Harris notes papyrological evidence that traders in Roman Egypt this period began to distinguish between

[161] Potter, D.S. (2004). *The Roman Empire at Bay.* London: Routledge. pp.163ff.
[162] Jongman. "Reconstructing the Roman Economy". p.91.
[163] MV = PT, where M is the money stock, V is the velocity of transactions, T is the number of transactions and P is the price level. The drop in population would reduce T, and with M and V both broadly stable, the result would be for P to increase.
[164] Bagnall. "Effects of Plague". pp.114-120.
[165] Harris. "A Revisionist View of Roman Money". pp.22-23.

"old" money and "new" money, mistrusting the latter.[166] This loss of confidence was replicated across the Empire, to the point that bankers and tax-collectors stopped accepting what had been legitimately minted coins.[167] The inflation of the third century was therefore a more direct of government policy. It was also much worse than the inflation of the second century: prices may have increased by up to tenfold between 270 and 280 CE. Diocletian and later Constantine attempted to stabilise the monetary system by introducing a new coin, the *solidus,* with a high gold content, but by then long-distance trading networks were greatly diminished. This declining trust in the stability of the monetary system would shrink the range of transactions that traders were prepared to use it for and likely restrict monetary transactions to those who already had access to significant cash reserves.

In the longer run, Roman legal policy also appears to have become less inclusive over the second and third centuries. The delicate balance between smaller tenants and large landholders gave way to the increasing indebtment of the *coloni,* to the point that they gradually became legally attached to the land they worked and were cut off entirely from the larger market. The beginning of this process can be traced to the tax policies of Diocletian, which formed part of a larger raft of measures designed to improve the security and overall administration of the Empire.[168] Several Edicts were passed between 284 and 305 CE to reduce the mobility of the *coloni* in order to improve tax revenues. Many of them were also forced into signing contracts binding them to the land in order to transfer the growing burden of their tax obligations – which were not calculated according to ability to pay – to larger landholders. This transformation of legal policy was complete by the fourth century and is reflected in the Justinian Code, which refers to the *coloni adscripticii* as a type of bonded labourer.[169] It is arguable that the position of the *coloni adscripticii* was worse than that of many urban slaves in the early Imperial period, who often had a high degree of mobility and the ability to freely administer economic assets with minimal supervision from their owners.[170] The decline in economic inclusivity within Roman legal policy was also reflected in a decline in the value of citizenship, which had previously been a valuable economic club good as well as the source of a variety of legal privileges, such as freedom from beating or torture. There is an ongoing debate over Caracalla's intentions in passing the *Constitutio Antoniniana*: it may have simply been to increase tax revenues, or to improve recruitment in the army. It may also be, however, that the difference in economic position between citizens,

[166] See for example Sel.Pap. II.230.
[167] Harris. "A Revisionist View of Roman Money". p.23.
[168] Grey. "Contextualising Colonatus". pp.155-175.
[169] C.XI.47. For a review of the Justinianic material relating to the colonate and the important differences between *coloni adscripticii* and the "free" colonate, see Sirks, B. (2008). "The Colonate in Justinian's Reign". *The Journal of Roman Studies.* Vol. 98. pp.120-143.
[170] Temin. *Roman Market Economy.* pp.114 ff.

especially in the provinces, was simply too great for it to mean much as a legal category by the early third century. The devaluing of citizenship was also reflected in the distinction between *honestiores* and *humiliores*, the latter of which lost the much-vaunted protection against beating or torturing. These shifts in legal policy took place over a much longer time frame than the collapse of the monetary system, which took a very sudden turn for the worse in the late third century. They were, however, equally damaging: just landholders were turning the structure of the agrarian economy away from participation in the market, the legal position of those who did the work on the land increasingly limited to them to local estate economies.

Section 3.4: The New Localised Economy

Many of these the new *honestiores* mentioned in the *Pauli Senentiae* would have been land-holders on increasingly large *massa* estates in the provinces. These estates often aimed to be self-sufficient as it became more difficult to import goods. Duncan-Jones charts a contraction in the number of agricultural sites of 52-61% in Italy, one-third in the Rhineland and even up to 19% in Segermes in North Africa, despite the fact it had remained more prosperous compared to other provinces. This contraction is explained partly by a falling rural population and the growing volume of *agri deserti,* or deserted land, following the immediate economic disruption of the Antonine Plague. Concerns about the volume of *agri deserti* can be observed as early as 193 CE, when the Emperor Pertinex issued an Edict encouraging cultivation:

> πρώτον μεν γάρ πασαν την τε Ίταλίαν και έν τοις λοιποΐς έθνεσιν άγεώργητόν τε και παντάπασιν ούσαν άργόν έπέτρεψεν, όπόσην τις βούλεται και δύναται, εί και βασιλέως κτήμα εϊη, καταλαμβάνειν, έπιμεληθέντι τε και γεωργήσαντι δεσπότη είναι, έδωκέ τε γεωργοϋσιν άτέλειαν πάντων εις δέκα έτη και διά παντός δεσποτείας άμεριμνίαν.
>
> To begin with, Pertinax assigned all the land in Italy and the rest of the provinces not under cultivation to anyone willing to care for it and farm it, to be his own private property; he gave to each man as much land as he wished and was able to manage, even if the land were imperial property. To these farmers he granted exemption from all taxes for ten years and freedom from government duties as well.[171]

The exemption from taxes, and the willingness to make land available from the *res privata,* or the private holdings of the Emperor, is an indication of how severe the desire to keep land in productive use had become. It also serves to highlight that the disruption to agrarian production that is most commonly associated with the dynastic crises of the third century in

[171] Herodian. II.4.6. Translation in Echols, E.C. (1961). *Herodian of Antioch's History of the Roman Empire.* Los Angeles, CA: University of California Press.

fact had origins much earlier, in the disruption of the Antonine Plague and the collapse of the urban supply chains that had sustained the business model of pre-plague farming operations. It appears that efforts to incentivise land use were only partly successful, as attempts were later made to maintain a consistent revenue base for the Imperial chancelry even where the land remained deserved. Starting with Aurelian, town councils were made responsible for the revenue which would normally attach to a deserted parcel of land. Constantine allowed relief from this responsibility for up to three years and divided it across all the private landholdings within that *civitas* if the town council was still not able to pay after three years:

> Imperator Constantinus
>
> Cum divus aurelianus parens noster civitatum ordines pro desertis possessionibus iusserit conveniri et pro his fundis, qui invenire dominos non potuerunt quos praeceperamus, earundem possessionum triennii immunitate percepta de sollemnibus satisfacere, servato hoc tenore praecipimus, ut, si constiterit ad suscipiendas easdem possessiones ordines minus idoneos esse, eorundem agrorum onera possessionibus et territoriis dividantur.
>
> aa. capestrino.
>
> The Emperor Constantine
>
> As Our relative, the Divine Aurelian, ordered the decurionates of cities to be responsible for the taxes due on abandoned lands, as well as on those whose owners cannot be found, so We decree that, after the first three years of possession, they shall be exempt from all enforced contributions. We decree that this law shall be observed, and if it should be established that the said decurionates are not able to pay the taxes assessed on said lands, the latter shall be divided among the citizens.
>
> Given to Capestrinus.[172]

Whittaker has suggested that this provision was only intended to apply to Egypt, where there was already a legal tradition of assigning abandoned land to those who could pay.[173] However, it is argued here that while the scope of application for the rescript is unclear, it nevertheless shows a more general Imperial concern for the abandonment of land. One reason for thinking that the burden on town councils applied beyond Egypt is the growing unattractiveness of the position of decurion by the late third century: the benefits of a senior

[172] C.2.59.1. Translation in Blume, F. and Frier, B. (2016). *The Codex of Justinian.* Cambridge: Cambridge University Press.
[173] Whittaker, C.R. (1976). “Agri Deserti”. In Finley, M.I. (ed). *Studies in Roman Property.* Cambridge: Cambridge University Press. pp.147ff.

place in the urban hierarchy were more tenuous, but the fiscal responsibilities also became more onerous.

Where this this thesis agrees with Whittaker is that a widespread abandonment of land was not the primary reason for the contraction in agricultural sites over the late second and third centuries. It also reflected changes in the agrarian structure of the provinces as they recovered from the Antonine Plague. As Duncan-Jones notes, "some of the shrinkage in rural site numbers is evidently due to concentration of landholding into larger units of exploitation and larger units of ownership".[174] These were the *massa* estates that begin to appear in the third century. Jones sets out the process for how these developed over time.[175] The basic unit of land within any Roman *civitas* by the third century was the *fundus,* most of which were stable and named after a distant previous owner. In a list of *fundi* granted by Constantine to the Roman churches in the early fourth century, the typical land rent values of the *fundi* range between 40 and 60 solidi in a season; the largest brings in 120 solidi.[176] The fortunes of a *fundus,* however, depended heavily on the wealth of its current owner. Where a landholder was poor and controlled only one *fundus,* they would often divide it up among their heirs, or sell a portion of their *fundus* in order to buy food and supplies. By contrast, wealthier landholders – those were in a stronger position to be self-sufficient within their own estates – could own several *fundi* and were able to group them into larger conglomerates: the *massae.* These were not necessarily contiguous bodies of land, but rather collections of estates under the same administration; they could even stretch across multiple *civitas*. The same Constantinian list of land grants shows that the typical seasonal rent value of a *massa* in that time was between 300 and 650 solidi, with some reaching values of 1000 solidi or even more. The largest was in Siciily and attracted a rent of 1600 solidus: 30 times the average for a *fundi.* [177]

Rome faced the same constraints as any other pre-modern society. It was nevertheless able to maintain a period of efflorescence in living standards from the fourth and third centuries BCE to the late second century CE. This efflorescence was driven by an unusually high degree of trade integration across the Mediterranean, which was in turn made possible by a high degree of urbanization, especially the presence of very large cities with 100,000 or more people living in them. It was, however, always very fragile: long-distance trade was costly and involved severe risks. It therefore had limited reach beyond a narrow range of

[174] Duncan-Jones, R.P. (2006). "Economic Change and the Transition to Late Antiquity". In Swain, S. and Edwards, M. (eds). *Approaching Late Antiquity: The Transformation from Early to Late Empire.* Oxford: Oxford University Press. pp.50-51.
[175] Jones, A.H.M. (1986). *The Later Roman Empire, 284-602: A Social, Economic, and Administrative Survey.* Baltimore, MA: John Hopkins University Press. pp.781-788.
[176] Jones. *The Later Roman Empire.* p.785.
[177] Jones. *The Later Roman Empire.* p.786.

fixed trading routes. From the late second century onwards, a “perfect storm” of climate change, disease and de-urbanisation led to the collapse of much long-distance trade. In the longer run, many of the institutions which had supported the integrated trading network also began to disintegrate. It is therefore possible to give a precise definition to the process of “fragmentation” in the late second and third centuries CE: it is the disengagement of the agrarian economy from the institutions which made long-distance trade possible, in favour of more localised forms of production and an estate economy.

CHAPTER FOUR
THE MECHANICS OF LEGAL PRIVILEGE

The Roman legal system did not remain unaffected by the transition from a highly urbanised, interconnected society to the more localised estate society of the later third century CE. There were no radical breaks in legal development, but existing trends in who could access the legal system were accelerated by the change in demographic and economic dynamics which followed the Antonine Plague. An understanding of this relationship can throw new light on live scholarly debates such as the political context and motivations of the Antonine Constitution.

Section 4.1: The Erosion of Citizen Privileges

In the late Republic, the legal privileges enjoyed by citizens were substantial. The most notable, known as the *provocatio,* was a right to appeal any decision by a magistrate, particularly a penal decision, to a citizen's assembly in the city of Rome. This appeal could be exercised before a citizen faced flogging or other physical punishment. The *provocatio* had existed since at least the Valerian law in 509 BCE. However, Cicero reports this simply regularised a practice that citizens should not be punished without a right of appeal before their fellow citizens, which had existed since at least the Twelve Tables and perhaps even under the kings:

> Provocationem autem etiam a regibus fuisse declarant pontificii libri, significant nostri etiam augurales, itemque ab omni iudicio poenaque provocari licere indicant duodecim tabulae conpluribus legibus; et quod proditum memoriae est decemviros, qui leges scripserint, sine provocatione creatos, satis ostendit reliquos sine provocatione magistratus non fuisse; Luciique Valerii Potiti et M. Horatii Barbati, hominum concordiae causa sapienter popularium, consularis lex sanxit, ne qui magistratus sine provocatione crearetur ; neque vero leges Porciae, quae tres sunt trium Porciorum, ut scitis, quicquam praeter sanctionem attulerunt novi.
>
> The records of the pontiffs, however, state that the right of appeal, even against a king's sentence, had been previously recognised, and our augural books confirm the statement. Besides, many laws in the Twelve Tables show that an appeal from any judgment or sentence was allowed; and the tradition that the decemvirs who wrote the laws were elected with the provision that there should be no appeal from their decision shows clearly enough that other officials were to this right of appeal. And a law proposed by the consuls Lucius Valerius Potitus and Marcus Horatius Barbatus, men who wisely favoured popular measures to preserve peace, provides that no magistrate

> not subject to appeal shall be elected. Nor indeed did the Porcian laws, which as you know are three in number and were proposed by three different members of the Porcian family, added anything new to the previous except the provision of a penalty for violations.[1]

Cicero did have rhetorical motivations for extending the privileges of citizens before the Republic. Much of *De re publica* is devoted to arguing that the different classes of the Roman people had existed in harmony before the disruption of the late Republic. It was therefore in his interest to stress the continuity of protections for citizens over time. Indeed, he goes on to use the citizen's ancient right of appeal as evidence that the freedom of the people had co-existed with the dominance of the Senatorial elite over political institutions.[2] Nevertheless, his intended audience would have been familiar with his sources, particularly with the rights of appeal contained within the Twelve Tables. Livy also refers to *provocatio* as predating the Twelve Tables, arguing on the basis that it must have existed for the *decemvirs* to release themselves from it.[3] His view was widely accepted by the Severan jurists.[4] Indeed it could be argued that Cicero and Livy's views both reflect a concept of political sovereignty in the Roman Republic defined by the presence of a right of popular appeal. If the people are sovereign, they shall have this right, whereas a tyrant takes it away from them.[5]

Peregrini, meanwhile, could be subject to the unrestricted *coercito,* or summary authority of Roman magistrates. This included the authority to issue the death penalty, corporal punishments, and sentences of hard labour. A perception that Roman magistrates acting within the city of Rome itself had no strong incentive to distinguish between citizens and *peregrini* in their exercise of *coercito* appears to have been a major motivating force for the Porcian laws in the second century BCE. These created harsh penalties – possibly including death, but certainly including relegation to an island – for any magistrate who ignored the *provocatio:*

> Eodem anno M. Valerius consul de provocatione legem tulit diligentius sanctam. Tertio ea tum post reges exactos lata est, semper a familia eadem. Causam renovandae saepius haud aliam fuisse reor quam quod plus paucorum opes quam libertas plebis poterat. Porcia tamen lex sola pro tergo civium lata videtur, quod gravi poena, si quis verberasset necassetve civem Romanum, sanxit; Valeria lex cum eum qui provocasset

[1] Cicero. *De re publica.* II.53. Translation in Keyes, C. (1928). *Cicero. On the Republic. On the Laws.* Cambridge, MA: Harvard University Press. Loeb Classical Library 213.
[2] Cicero. *De re publica.* II.56. Translation in Keyes.
[3] Livius. *Ab Urbe Condita.* III.32.6.
[4] Pomponius. D.1.2.2.4.
[5] Straumann, B. (2016). *Crisis and Constitutionalism: Roman Political Thought from the Fall of the Republic to the Age of Revolution.* Oxford: Oxford University Press.p. 242.

> virgis caedi securique necari vetuisset, si quis adversus ea fecisset, nihil ultra quam "improbe factum" adiecit.
>
> In the same year Marcus Valerius the consul proposed a law of appeal with stricter sanctions. This was the third time since the expulsion of the kings that such a law had been introduced, by the same family in every instance. The reason for renewing it more than once was, I think, simply this, that the wealth of a few carried more power than the liberty of the plebs. Yet the Porcian law alone seems to have been passed to protect the persons of the citizens, imposing, as it did, a heavy penalty if anyone should scourge or put to death a Roman citizen. The Valerian law, having forbidden that he who had appealed should be scourged with rods or beheaded, merely provided that if anyone should disregard these injunctions it should be deemed a wicked act.[6]

Cicero also states that the Porcian laws extended the right of *provocatio* to citizens living in the provinces.[7] This implies that the *coercito* of magistrates in the provinces may have applied equally to citizens and *peregrini* before the second century BCE. The abuse of *coercito* in the provinces is a recurring theme in republican literature: Livy suggests that the need to constrain *coercito* explains the repeated restatement of the right to *provocatio* since the expulsion of the kings. The significance of this issue can arguably be seen in the light of Rome's transformation from city-state to empire: the historical safeguards which Cicero was so keen to stress continuity for had been designed in the context of a small urban community and required adjustment for the effective protection of citizens over a larger body of territory. The Valerian and Porcian laws can be regarded as early attempts to meet this challenge of enforceability.

Other legal privileges unique to citizens included the *reiectio Romam,* which allowed citizens involved in legal disputes before provincial courts, either with other citizens or *peregrini,* to have their cases remitted to a Roman court – that is to say, a court administered according to the Roman *Ius civile*.[8] The historical existence of the *reiectio Romam* has been contested, as has its ability to place formal limits on the freedom of action of a provincial governor. It is possible that it was originally a right to have a case heard before a court in the city of Rome itself. Much of the evidence for the *reiectio Romam* in the republican period rests upon two letters of recommendation from Cicero, which were written on behalf of his former quaestor, Mescinius Rufus, who was facing difficulties coming into an inheritance left to him by his cousin. Cicero's letters were accompanied by a letter from the consul in Rome,

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[6] Livius. *Ab Urbe Condita.* X.9. Translation in Foster, B.O. (1926). *Livy. Books VIII-X With An English Translation.* Cambridge, MA: Harvard University Press. Loeb Classical Library 191.
[7] Cicero. *De re publica.* II.54.
[8] Garnsey. *Social Status and Legal Privilege in the Roman Empire.* pp.263-264.

which requested “ut […] eos […] Romam reieceris”.[9] Some scholars, such as Cotton, dismiss this not as evidence of a right to remit cases from the provinces to Rome, but rather as an exercise of Senatorial “influence and semi-official pressure” in order to ensure the compliant response of a governor, who would otherwise have been fully entitled to try the case himself.[10] Yet others have seen these letters as an example of the *provocatio* with the city of Rome standing in metonymously for its popular assemblies and their judicial functions.[11] In any event, the *reiectio Romam* cannot be clearly identified at all in later Imperial sources and any role that it played by the time of the *Constitutio* is likely to have been marginal.

By contrast, it is probable that the right of *provocatio* survived at least into the third century CE. The Valerian and Porcian laws were renewed by the *lex Julia de vi publica* in 50 BCE. There was formerly a view that *provocatio* was defunct by the rule of Trajan, replaced in the later Principate by a new and distinct right of *appellatio.*[12] On this view, *provocatio* was said to be a right exercised before trial, with the governor only making a preliminary assessment of the facts before passing them on for final determination in the city of Rome. *Appellatio,* on the other hand, was said to be a right of criminal appeal in the modern sense, exercised after conviction but before punishment was carried out. This distinction rested firstly on the account in scripture of Paul the Apostle’s alleged exercise of *provocatio* under the Emperor Nero, in which he avoided a flogging without a conviction by invoking his Roman citizenship.[13] It rested secondly on problems with enforceability: Jones argues that *provocatio* was destroyed by the grant of special unappealable powers to try certain crimes to provincial governors.[14] Garnsey however has maintained that *provocatio* was always an appeal, not a right exercised before trial. He explains the case of Paul as an example of the *reiectio Romam* rather than the *provocatio.* He also argues, more controversially, that both rights were subject to a legitimate field of gubernatorial discretion and did not automatically have to be obeyed, although in practice they usually would be if there was any danger of the governor upsetting Rome.[15] The view adopted in this thesis will be that the citizen’s right of appeal took a consistent *de jure* form from the Republic through to at least the time of the *Constitutio.*

[9] Cicero. *Epistulae ad Familiares.* XII.26, 28.
[10] Cotton, H.M. (1979). “Cicero, Ad Familiares XIII, 26 and 28: Evidence for Revocatio or Reiectio Romae/Romam?” *Journal of Roman Studies.* Vol. 69. pp.39-50 at 50.
[11] Jones, A.H.M. (1960). *Studies in Roman Law and Government.* London: Wiley-Blackwell. pp.76-77.
[12] A full account of this view can be found in Jones. *Studies in Roman Law and Government.* pp.53ff.
[13] Acts. 22:24-29.
[14] Jones. *Studies in Roman Law and Government.* pp.53ff.
[15] For the full discussion see Garnsey, P. (1966). “The *Lex Iulia* and Appeal Under the Empire”. *Journal of Roman Studies.* Vol. 56. pp.167-189.

Other legal privileges enjoyed by citizens included their access to Roman legal actions. Besson highlights that only Roman citizens had access to *dominium* and that there were certain types of goods "whose property was peculiar to Roman citizens".[16] Moreover, only Roman citizens could be bound by contracts under the Roman *Ius civile.*[17] However, as Besson, acknowledges, commercial necessity led to many contracts and proprietary interests becoming available under the *Ius gentium,* which was available to both citizens and peregrines. It is also likely that peregrines who were of instrumental importance in commercial transactions would also have acquired the right of *commercium,* which among other things allowed them to buy *res mancipi* and use the *Ius civile* modes of acquisition.[18] Originally a right of passage which protected *peregrini* from kidnapping while visiting Rome, *commercium* later evolved into "a right which could be granted to non-citizens, and which permitted them the use of certain legal instruments related to trade, otherwise only available to citizens".[19] Perhaps the most significant advantage granted by the *Ius civile* was the ability to make and benefit under a will. This had important practical consequences for families where the parents were Roman citizens, but their children were not.[21] There is evidence of attempts to circumvent these difficulties through the law of trusts, at least until this practice was restricted by a rescript of the Emperor Hadrian.[22] In some ways the emphasis on control of property after death reinforces the role of citizenship as a cultural control mechanism: "Roman laws were oriented toward the conservation and concentration of assets in the hands of Roman citizens".[23]

Over the first and second centuries CE, textual evidence begins to suggest that while the legal privileges of citizens in the provinces continued to exist on a formal level, they were becoming more difficult to enforce in practice. The cases referred to are often isolated and some can be contested on historical grounds, but they nevertheless form a pattern. In his *Roman History,* Dio recounts a story involving Fonteius Capito, a Roman senator who became consul in 67 CE and later governor of Germania Inferior under the Emperors Nero and Galba in c.68 CE:

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[16] Gai.Inst. 2.14-33. Besson, A. (2017). "Fifty Years before the Antonine Constitution: Access to Roman Citizenship and Exclusive Rights". In Cecchet, L. and Busetto, A. (eds). *Citizens in the Graeco-Roman World : Aspects of citizenship from the archaic period to ad 212*. Leiden: Brill. pp.199-218 at p.209.
[17] Gai.Inst. 3.94. Besson. (2017). pp.208ff.
[18] Roselaar, S. (2012). "The Concept of *Commercium* in the Roman Republic". *Phoenix.* Vol. 66(3). pp.381-413.
[19] Roselaar. "The Concept of Commercium in the Roman Republic". p.382.
[21] Pausanias. *Periegesis.* 8.43.5; Besson. "Fifty Years before the Antonine Constitution". p.213.
[22] Gai.Inst. 2.285; Wacke, A. (1993). "Gallisch, Punisch, Syrisch oder Griechisch statt Latein? Zur schrittweisen Gleichberechtigung der Geschäftssprachen im römischen Reich". *ZRG.* Vol. 110. pp.14– 59.
[23] Besson. "Fifty Years before the Antonine Constitution". p.215.

> πάσχουσιν ὑφ᾽ ὅτου ἂν καὶ κακῶνται. ὥστ᾽ εἰ καὶ ἔξω τοῦ τι δεινὸν ποιεῖν ὁ Γάλβας ἦν, ἀλλ᾽ ὅτι ἐκείνοις ἀδικεῖν ἐπέτρεπεν ἢ ὅτι ἠγνόει τὰ γινόμενα, οὐ καλῶς ἤκουε. Νυμφίδιος δέ τις καὶ Καπίτων οὕτως ἐξεφρόνησαν ὑπ᾽ αὐτοῦ ὥστε ὁ Καπίτων, ἐφέντος τινὸς ἀπ᾽ αὐτοῦ ποτε δικάζοντος, μετεπήδησε τε ἐπὶ δίφρον ὑψηλὸν καὶ ἔφη ‘λέγε τὴν δίκην παρὰ τῷ Καίσαρι,’ διαγνούς τε ἀπέκτεινεν αὐτόν. τούτοις μὲν δὴ διὰ ταῦτα ὁ Γάλβας ἐπεξῆλθεν.
>
> For, whereas it is enough for ordinary citizens to abstain from wrong-doing, these, on the other hand, who hold positions of command must see to it that no one else does any mischief, either. For it makes no difference to those who are wronged at whose hands they suffer the injury. Hence it was that, though Galba was not guilty of any violence, he was nevertheless ill spoken of because he allowed these others to do wrong, or else was ignorant of what was going on. A certain Nymphidius and Capito quite lost their heads as a result of this weakness of his. Capito, for instance, when one day a man appealed a case from his jurisdiction, changed his seat to a high chair and then said: ‘Now plead our case before Caesar’. He then passed sentence and put the man to death.[24]

Here, Dio is criticising Galba for allowing unscrupulous officials working under him, such as Capito, to ignore the appeal rights of Roman citizens. On Garnsey's view, the criminal jurisdiction of the governors may have allowed Capito discretion over whether to grant an application for *provocatio*; it is not clear exactly at what stage in the early Principate this criminal jurisdiction would have taken shape.[25] Even if this were true, however – and Capito was guilty of no legal wrongdoing – it would still represent a reversal of the model of sovereignty seen in the republican sources, in which the absence of a right of appeal for the citizen body as a whole was considered a mark of tyranny. In any case, Garnsey acknowledges that Dio's text evinces a tone of disapproval.[26] Much of this disapproval is directed at the image of an Imperial governor simply taking a higher chair to imitate the Emperor; it may be that Dio is partly criticising Galba for allowing the Imperial chancelry and his personal image as Emperor to be abused in this fashion. Dio was writing over a century after Galba's reign came to an end and there are aspects of his history which are contradicted by other Roman historians. Tacitus, in his *Histories,* attributes the death of Capito to a conspiracy against the Emperor involving two legionary commanders, not to a punishment for having disregarded the appeal rights of citizens.[27] It may be that Dio

[24] Dio. LXIV.2.2-3. Translation in Cary, E. (1925). *Dio Cassius. Roman History. Books 61-70.* Cambridge, MA: Harvard University Press. Loeb Classical Library 176.
[25] Garnsey. "The *Lex Iulia* and Appeal Under the Empire". p.167.
[26] Garnsey. *Social Status and Legal Privilege in the Roman Empire.* pp.285-287.
[27] Tacitus. *Histories.* I.7.

fabricated some details of Capito's life in order to support a broader moral parable about the flaws of Galba's rule and the need for rulers to be vigilant about the behaviour of their inferiors. More definite examples of abuses against *provocatio* come from second century CE papyri. A papyrus from Philadelphia in 153 CE records a deposition of seven Roman citizens, stating that they had witnessed a general exercising *coercito* against a soldier who was also a Roman citizen:

> [οἱ σφραγίσα]ντες ὀμόσαντες τὴν Αὐτοκράτορος Καίσαρος {Καίσαρος} Τίτου Αἰλίου Ἀδριανοῦ Ἀντων[είνου Σεβαστοῦ Εὐσεβοῦς τύχην] | [καλῇ πίσ]τει μαρτυρεῖν τὰ ὑπογεγραμμένα ῥήματα· παρόντες ἐν κώμῃ Φιλαδελφείᾳ τοῦ [Ἀρσινοείτου νομοῦ τῆς Ἡρακλείδου] | [μερ]ίδος πρὸς τῷ Καισαρείῳ οὕτως· {τ} ἐθεασάμεθα Γάιον Μηούιον Ἀπελλᾶν οὐετρανὸν εἴ[λης Ἀπριανῆς δερόμενον] τοῦ στρατηγοῦ Ἱέρακος κελεύοντος | [ὑπὸ] φυλάκων δύο ῥάβδοις καὶ κόμμασι· διὸ καλῇ πίστει μαρτυροῦμεν θεωρήσασθ[αι αὐτὸν δερόμενον ἐν κώμῃ] | [Φιλαδελ]φ[ε]ίᾳ· ἔτει ιϚ Ἀντωνείνου Καίσαρους τοῦ κυρίου, Μεχεὶρ ιζ. |
>
> [οἱ σφρ]αγίσαντε[ς ὀμ]όσαντες τὴν Αὐτοκράτορ[ος Καίσαρος] | Τίτου Αἰλίου Ἀδριανοῦ Ἀντωνείνου Σεβαστο[ῦ Εὐσεβοῦς] | [τ]ύχην καλῇ πίστει μαρτυρεῖν τὰ ὑπογεγ[ραμμένα] | [ῥ]ήματα· πα[ρόν]τες ἐν κώμῃ Φιλαδε[λφείᾳ τοῦ Ἀρσινο]-|είτου νομ[οῦ τ]ῆς Ἡρακλείδου μερίδος πρὸ[ς τῷ Καισαρείῳ] | οὕτω[ς· ἐθεασάμ]εθα Γαίον Μηούιον Ἀπ[ελλᾶν οὐε]-|τρανὸ[ν εἴλης Ἀπρ]ιανῆς δερόμενον ὑπ[ὸ φυλάκων] | ḍ̣ύ̣ọ̣ ṯ[οῦ στρατηγοῦ Ἱέρακος κελεύον]ṯọ̣ς [ῥάβδοις -]
>
> The sealers (declare), having sworn by the fortune of the Emperor Caesar Titus Aelius Hadrianus Antoninus Augustus Pius that they give the following testimony in good faith. Being present in the village of Philadelphia in the division of Heraclides in the Arsinoite nome at the Caesareum we in this way beheld Gaius Maevius Apellas, veteran of the ala Apriana, being flogged at the order of the strategus Hierax by two guards with rods and scourgings. Wherefore we in good faith testify that we beheld him being scourged in the village of Philadelphia.[28]

[28] *Testatio ad Commissum Crimen Respiciens.* 153 CE. SB V, 7523. Sel. Pap. II, 254. Translation in Hunt, A.S. and Edgar, C.C. (1934). *Select Papyri. Public Documents.* Cambridge, MA: Harvard University Press. Loeb Classical Library 282. On this papyrus, see Alston, R. (1995). *Soldier and Society in Roman Egypt*, London: Routledge. p.218; Mitthof, F. (2000). "Soldaten und Veteranen in der Gesellschaft des rominischen Ägypten". In Alföldy, G. et al. (eds). *Kaiser, Heer und Gesellschaft in der römischen Kaiserzeit.* Stuttgart: Franz Steiner. p.388; Homoth-Kuhs, C. (2005). *Phylakes und Phylakon-Steuer im griechisch-römischen Ägypten: Ein Beitrag zur Geschichte des antiken Sicherheitswesens*. München: de Gruyter. pp.40-82; van Wees, H. et al. (2007). *The Cambridge History of Greek and Roman Warfare: Rome from the Late Republic to the Late Empire*. Cambridge: Cambridge University Press. p.221; Strassi, S. (2007) "Diffusione e valore simbolico dei Kaisareia nell'Egitto romano". In Haensch, R. and Heinrichs, J. (eds). *Herrschen und Verwalten: Der Alltag der römischen Administration in der Hohen Kaiserzeit*. Vienna: Böhlau. p.410.

There is no indication in this text that Apellas had been charged with any crime or been subject to a hearing; he was whipped on the unilateral orders of a *strategus,* or military general. *Provocatio* was specifically available to a Roman citizen who faced corporal punishment but does not seem to be directly invoked here. It is possible this was an isolated incident, or that the abuse of *provocatio* seen in the Philadelphia papyrus was limited to the activities of the military rather than being typical of civilian authorities. The degree to which citizen privileges in the first and mid second centuries CE were eroding therefore remains contestable.

It is in the later second century CE that clearer evidence comes to light of a citizen's rights of appeal being disregarded by Imperial officials in a routine manner. The *Decretum Commodi de Saltu Burunitano* is an inscription found in Souk-el-Khmis, modern-day Tunisia, dating from between 180 and 183 CE. It records a petition to the Emperor Commodus, written by a group of *coloni,* or tenant farmers on the Burunitan, a large Imperial estate in North Africa. The *Decretum* is too long to present here in its entirety but the relevant section is below:

> ve|rum etiam hoc eiusdem Alli Maximi | [c]onductoris artibus gratiosissimi | […]timo indulserit ut missis militibus | [in eu]ndem saltum Burunitanum ali|[os nos]trum adprehendi et vexari ali|[os vinc]iri nonullos cives etiam Ro|[manos] […] virgis et fustibus effligi iusse|[rit scilic]et eo solo merito nostro qu|[od venientes] in tam gravi pro modulo me|[diocritat]is nostrae tamque manifesta | [iniuria im]ploratum maieatatem tu|[am acerba] epistula usi fuissemus cu|[ius nostrae in]uriae evidentia
>
> He has even been indulgent to the machinations of the most favoured leaseholder, the very same Allius Maximus, so that he sent soldiers to the same *Saltus Burunitanus* and ordered that some of us should be arrested and molested and that some – even Roman citizens – should be beaten with whips and rods, evidently because of this our single action, that we when we, in our humble condition, had come in such a serious situation and [suffering] evident [injustice] had used an [inappropriate] letter to beseech your majesty.[29]

[29] *Decretum Commodi de Saltu Burunitano.* 180-183 CE. FIRA (1). No. 103. p. 496. Col. II. 10 ff. Translation in Hauken, T. (1998). *An Epigraphic Study of Petitions to Roman Emperors 181-249.* Athens: The Norwegian Institute at Athens. On this inscription, see Sirago, V. A. (1987). "Sacco di Roma del 410 e le ripercussioni in Africa". In Attilo, M. (ed). *L'Africa romana: Atti del IV convegno di studio.* Sassari: Università, Dipartimento di storia. p.261; Kehoe D. (1988). *The Economics of Agriculture on Roman Imperial Estates in North Africa*. Göttingen: Vandenhoeck & Ruprecht. pp. 64-69; Flach, D. (1990). *Römische Agrargeschichte*, München: C.H. Beck. pp.110-116; Sünskes Thompson, J. (1990). *Aufstände und Protestaktionen im Imperium Romanum*. Bonn: R Habelt. p.174; Bodel, J. (2001). *Epigraphic Evidence*. London: Routledge. p.112; Kehoe. *Law and the Rural Economy in the Roman Empire*. pp.68-76.

The economic position of these *coloni* would have been extremely vulnerable. By the late second century CE, some *coloni* were already facing restrictions on moving from one estate to another, echoing the increasingly unfree agrarian labour system that would characterise North Africa under Diocletian and later emperors.[30] Further down the inscription, the petitioners describe themselves in very humble terms as *homines rustici tenues,* or "poor countryside men". Their main complaint is that a procurator named Maximus – most likely in this case the Imperial governor of the province - had sent out soldiers to the Burunitan estate to beat them with whips and rods. This beating may have been carried out by the governor to serve the "machinations" of a "favoured leaseholder". This was despite the fact that the governor knew at least some of the petitioners were Roman citizens. It is not stated explicitly but strongly implied in the petition that no hearing had been given, suggesting this was an exercise of procuratorial *coercito.* There is no mention of what offence the petitioners may have committed to merit such a punishment. It is notable that the petitioners appeal to the Emperor directly based on the *manifesta iniuria,* or "manifest injustice" of what the procurator has done, rather than appealing either to their rights of *provocatio* or the *reiectio Romam.*

The reasons for this decline in the enforceable privileges of citizenship are unclear, but they may lie in economic and bureaucratic changes over the course of the second century CE. Garnsey points out that "*provocatio* probably worked smoothly only when the citizen population abroad had the character of a closely-knit, exclusive, urban elite".[31] The *urban* character of the citizen elite in the provinces should be stressed here. In Chapter Three, it was shown that the economic prominence of the cities declined significantly after the Antonine Plague.[32] As Garnsey goes on to highlight, the Imperial chancelry "never evolved a machinery adequate to cope" with appeals from citizens who were now spread out across the countryside in the provinces.[33] Many of these citizens increasingly found themselves as *homines rustici tenues* on large Imperial estates. This changing economic structure accelerated a shift already taking place in the bureaucratic structure of the provinces, especially with respect to gubernatorial power. In the first and early second centuries CE, violations of a citizen's right to *provocatio* still only appear in the sources as isolated incidents or moral parables, looked upon with disapproval. However, by the late second century CE, the Imperial chancelry was increasingly delegating the right to condemn a citizen to death or hard labour to provincial governors.[34] This right to execute, known as the

[30] For a full discussion of the degrading labour freedom of the *coloni* and the fiscal motivations behind their restrictions, see Grey, C. (2007). "Contextualising *Colonatus*: The *Origo* of the Late Roman Empire". *Journal of Roman Studies*. Vol. 97. pp.155-175.
[31] Garnsey. *Social Status and Legal Privilege in the Roman Empire.* p.269.
[32] See p.49.
[33] Garnsey. *Social Status and Legal Privilege in the Roman Empire.* p.269
[34] Ulpian. D.1.18.6.8. Translation in Watson. On the *ius gladii* in detail, see Garnsey, P. (1968). "The Criminal Jurisdiction of Governors". *The Journal of Roman Studies*. Vol. 58. pp.51-58.

ius gladii, was first extended to all Senatorial governors by Hadrian, then later to the *praefectus Aegypti* and eventually all governors of equestrian rank. Marotta explains this as a response to citizen appeals, particularly the *reiectio Romam,* blocking up the urban court system in the city of Rome; this backlog made it "more complex to claim or respect some guarantees connected with the possession of [citizen] status".[35] The creation of new courts, based in Rome and Byzantium, in which appeals from both citizens and peregrines were heard under Imperial authority, likely further eroded the enforceable legal privileges of citizenship.

Section 4.2: The *Constitutio Antoniniana*

The *Constitutio Antoniniana,* passed by the Emperor Caracalla in 212 CE, granted full Roman citizenship to most free men living within the territory of the Roman Empire. It also granted most free women the same rights as a Roman woman. Before the *Constitutio,* only a small proportion of the total population were Roman citizens.[36] One might gain citizenship by birth, via grants – for example, after performing military services – or by virtue of public office. The extension of Roman citizenship brought with it the right to use Roman courts, including those in the city of Rome itself, along with access to Roman legal actions. However, as Eck stresses, it did not cause a major rupture in the legal life of peregrine peoples: local regulations, social rules, institutions and privileges were preserved insofar as they already existed. Roman law served as a parallel to local laws, which were only overridden where it was impossible to harmonise them with Roman legal policy, or where they contained moral assumptions to which the Romans were opposed.[37]The *Constitutio Antoniniana* has not been transmitted to the modern day in complete form. It is known from the Giessen papyrus, a partial reference which dates from third century CE in Roman Egypt.[38] Aside from this papyrus, the other main textual references come from Dio's *History*[39] and an extract from Ulpian in the Digest[40], both of whom mention it only in passing. There have been several speculative attempts to reconstruct the *Constitutio* based on the

[35] Marotta, V. (2015). "St Paul's Death, Roman Citizenship and *Summa Supplica.*" In Barclay, J.M.G. et al. (eds). *The Last Years of Saint Paul.* Essays from the Tarragona Conference. June 2013. pp.236-260 at 257.
[36] Lavan, M. (2016). "The Spread of Roman Citizenship, 14-212 CE: Quantification in the Face of High Uncertainty". *Past and Present.* Vol. 230(1). pp.3-46.
[37] Eck, W. (2018). "Die Wirksamkeit des römischen Rechts im Imperium Romanum und seinen Gesellschaften". In Lo Cascio, E. (ed). *Diritto romano e economia. Due modi di pensare e organizzare il mondo (nei primi tre secoli dell'Impero).* Pavia: Ius Press. pp.747-782.
[38] P. Giss. I. 40. Antonine Constitution at 11.1-17.
[39] Dio. LXXVIII.1-5. Translation in Cary.
[40] Ulpian. D.1.5.17. Translation in Watson.

Giessen papyrus. These have included Heicheilheim[41] and more recently Imrie.[42] Their attempts have both been criticised for their reliance on only a handful of partial letters to reconstruct entire lines of text.[43] No attempt to reconstruct the text of the Giessen papyrus will be made here. The Antonine Constitution, or at least popular perceptions of it, have played an important role in the reception of ideas of citizenship in Europe in the intervening 1800 years.[44]

The gradual erosion in the enforceability of the legal privileges historically afforded to Roman citizens is a useful context in which to analysis the *Constitutio*. If the wider social and political significance of citizenship was in decline by the early third century CE, the extension of *de jure* rights of citizenship to the majority of the Imperial population would be a less dramatic shift in the legal landscape than it initially appears to be. Even allowing for our limited understanding of how the original papyrus is constructed, the *Constitutio*'s near-universalism appears radical against a historical backdrop in which access to citizenship was tightly restricted. Nevertheless, its response in contemporary sources was muted. As Ando notes, "echoes and reactions among contemporary writers were stunningly few. How had it not been an ideological watershed?"[51] Two explanations can be put forward. Firstly, it can be argued that the *Constitutio* was intended primarily as a pragmatic measure, intended not to radically alter the legal status of peregrines but rather to raise revenue and resolve recruitment problems in the army. While there is considerable value in this view, for such a vast extension of citizenship to even be considered as a pragmatic option, this must imply a significant shift in perceptions of citizenship compared to the late Republic. Secondly, it has been argued by Ando that the *Constitutio* did not represent an attempt to Romanise the culture of peregrine peoples living in the Empire, but was rather a response to the growing influence of Roman legal norms on local jurisdictions in the provinces in the second and third centuries CE.

[41] Heilcheilheim, F. (1941). "The Text of the 'Constitutio Antoniniana' and the Three Other Decrees of the Emperor Caracalla Contained in Papyrus Gissensis 40". *Journal of Egyptian Archaeology.* Vol. 26. pp.10-22.
[42] Imrie, A. (2018). *The Antonine Constitution: An Edict for the Caracallan Empire.* Leiden and Boston: Brill. Scholarly debate on the construction of the Giessen papyrus continues in light of new textual and epigraphic evidence. For a new interpretation in light of the *Tabula Banasitana,* see Marotta, V. (2016). "Doppia cittadinanza e pluralità degli ordinamenti. La Tabula Banasitana e le linee 7-9 del Papiro di Giessen 40 col I". In *Archivio Giuridico Filippo Serafini.* Vol. 236. pp.461-491.
[43] See for example the review of Dolganov, A. (2019). "Imrie. The Antonine Constitution: An Edict for the Caracallan Empire". *The Classical Review.* Vol. 69(2). pp.554-556.
[44] Ando, C. (2016). "Introduction". In Ando, C. (ed). *Citizenship and Empire in Europe 200-1900.* Stuttgart: Franz Steiner Verlag.
[51] Ando. *The Critical Century.* p.77.

Pragmatic Considerations

The *Constitutio* is often explained as an attempt by the Emperor Caracalla to levy taxes which previously only citizens had paid. This view fits into a larger narrative surrounding the need of the Severan Emperors to find new sources of revenue to support the Roman army in the face of a declining agrarian economy.[52] Other policies introduced by Caracalla with a fiscal motive include a doubling of the inheritance tax.[53] The best known source for this explanation is the Roman historian Cassius Dio, who was alive to witness the *Constitutio*, in his *Roman History:*

> οὗτος οὖν ὁ φιλαλεξανδρότατος Ἀντωνῖνος ἐς μὲν τοὺς στρατιώτας, οὓς πάνυ πολλοὺς ἀμφ᾽ αὐτὸν εἶχε, προφάσεις ἐκ προφάσεων καὶ πολέμους ἐκ πολέμων σκηπτόμενος, φιλαναλωτὴς ἦν, τοὺς δὲ λοιποὺς πάντας ἀνθρώπους ἔργον εἶχε περιδύειν ἀποσυλᾶν ἐκτρύχειν, οὐχ ἥκιστα τοὺς
>
> Now this great admirer of Alexander, Antoninus, was fond of spending money upon the soldiers, great numbers of whom he kept in attendance upon him, alleging one excuse after another and one war after another; but he made it his business to strip, despoil, and grind down all the rest of mankind, and the senators by no means least. […] This was the reason why he made all the people in his empire Roman citizens; nominally he was honoring them, but his real purpose was to increase his revenues by this means, inasmuch as aliens did not have to pay most of these taxes.[54]

Two objections can be raised to an explanation which stresses fiscal motivations for the *Constitutio*. The first is that the *dediticii,* a lower grade of free person, were excluded from the grant of Roman citizenship. This exclusion reflects the lower status of the *dediticii,* who did not enjoy the same rights afforded to free persons with the Latin right, as well as the danger they were popularly perceived to present to Roman society. This perception is most vividly illustrated by the requirement that the *dediticii* remain at least 100 Roman miles away from the city of Rome; if they came closer, they could be legitimately re-enslaved as punishment.[55] Their exclusion from citizenship would be counter-intuitive if the primary intention of Caracalla was to raise revenue, given the number of potential taxpayers thus exempted from the responsibility to pay citizen taxes. An explanation for this is offered by

[52] On the increasing demand for revenue during the Severan period see Duncan-Jones, R. (1998). *Money and Government in the Roman Empire.* Cambridge: Cambridge University Press. pp.33-46.
[53] White, L. (1973). *The Transformation of the Roman World: Gibbon's Problem After Two Centuries.* Berkeley, CA: University of California Press. p.38.
[54] Dio. LXXVIII.1-5. Translation in Cary.
[55] Gardner, J. (2011). "Slavery and Roman Law". In David, E. et al. (eds). *The Cambridge World History of Slavery.* Vol. 1. Cambridge: Cambridge University Press. pp.414-437.

Moatti in her work on changing notions of the *res publica* before and after the *Constitutio.*[56] Moatti argues that the *Constitutio* marked a transformation of *res publica* in such a way as to reinforce Imperial power. Part of this was spatial: the *res publica* became intermingled with the *imperium romanum.* Part of it, however, was temporal: crimes against the state became imprescriptible and prosecutions could continue even after death.[57] This reflected a larger project in which the definition of a *dediticii* was extended to cover "defeated internal enemies"; a substantial part of this population would have been "marked by infamy" for having taken up arms against Roman Imperial rule.[58] The exclusion of the *dediticii* from citizenship under the *Constitutio* could therefore be explained as part of a narrative project to intensify the repression of internal political enemies. The second objection is that Dio's analysis of the expansion of Roman citizenship may be coloured by his strongly negative perspective on the reign of Caracalla as a whole, which is visible throughout the *Roman History*. Indeed, Cassius discusses the *Constitutio* only towards the end of a long passage in which he criticises Caracalla for taxing the Senatorial class, to which he belonged himself, too heavily. Molin stresses that Dio is writing from the perspective of a conservative senator with a preference for "collaborative" or senatorial monarchy in which the Emperor cooperates closely with the Senate.[59] The *Roman History* constructs an idealised past of the Augustan age in which the senatorial elite were still respected. Caracalla's attempt to reframe the Imperial chancelry around his own individual legacy – and his willingness to tax the upper classes to achieve this – would have flown in the face of this idealised conception of Imperial rule. Imrie has recently offered a more nuanced version of the fiscal explanation, arguing that the death of Caracalla's brother Geta in 211 CE provided him with greater legitimacy as sole ruler of the Empire. This allowed him to begin a rhetorical campaign in which he positioned himself as a militarily strong and generous ruler along the model of Alexander the Great, who Caracalla is known to have admired. In this context the grant of citizenship was intended to simultaneously create the impression of Imperial generosity, or *beneficium* towards new citizens*,* while also building a revenue base to support Caracalla's planned military campaigns in Parthia.[60]

If the *Constitutio* was a pragmatic act, this implies that it had become acceptable to dilute the privileges of citizenship across a larger population. It has been argued that citizenship

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[56] Moatti, C. (2015). "The Notion of *Res Publica* in the Age of Caracalla". In Ando. *The* Constitutio Antoniniani *After 1800 Years.* pp.63-98; Moatti, C. (2019). "La Constitution de Caracalla et l'Imprescriptibilite des Crimes d'Etat". In Chevreau, C., Masi, D. and Rainer. J.M. (eds). *Liber Amicorum. Melanges en l'Honneur de Jean-Pierre Coriat.* Paris: EPA Editions. pp.637-647.
[57] C.9.8.6.1. On the development of prosecutions after death, see Vincenti, U. (1983). "Aspetti procedurali della *congitio senatus*". *BIDR.* Vol. 85. pp.101-106.
[58] Epitome.Gai. 1.1.3. Moatti. "The Notion of *Res Publica* in the Age of Caracalla". p.92.
[59] Molin, M. (2016). "Cassius Dion et la Societe de son Temps". In Fromentin, V. et al. (eds). *Cassius Dion: Nouvelles Lectures.* Bordeaux: Ausonius. pp.469-482 at 469-470.
[60] Imrie. *The Antonine Constitution.* pp.12-29.

had already been massively diffused through the population of the Empire since the end of the first century CE, to the point that the *Constitutio* merely recognised changes which had already taken place. One proponent of this view is Sherwin-White, who has argued that there was a "flood tide" of citizenship in the late first century CE, greatly reducing its political significance. In this context the *Constitutio* is only the "final act" of a process which had been underway for two centuries.[62] In more recent work, Vigorita has also argued that provincials had already been incorporated *en masse* into the citizen body by the time of Caracalla and therefore that neither the Emperor himself nor the recipients of citizenship under the *Constitutio* gave it political significance.[63] Mercogliano also endorses the view that enfranchisement had been spreading gradually – for him as part of a process of Romanisation – until the *Constitutio* simply represented the climax to what was already by then a well-established process.[64] Textual evidence for a great expansion can be drawn from Tacitus:

> Eodem anno Galliarum civitates ob magnitudinem aeris alieni rebellionem coeptavere, cuius extimulator acerrimus inter Treviros Iulius Florus, apud Aeduos Iulius Sacrovir. nobilitas ambobus et maiorum bona facta eoque Romana civitas olim data, cum id rarum nec nisi virtuti pretium esset.
>
> That same year, some states of Gaul, under the pressure of heavy debts, attempted a revolt. Its most active instigators were Julius Florus among the Treveri and Julius Sacrovir among the Ædui. Both could show noble birth and signal services rendered by ancestors, for which Roman citizenship had formerly been granted them, when the gift was rare and a recompense only of merit.[65]

Here, Tacitus is discussing citizenship in the context of a debt rebellion in the Gallic provinces, led by the descendants of men who had once been granted Roman citizenship. His likely intention is to contrast the upstanding moral character of their ancestors with their own conduct in the rebellion, his disapproval of which is clear from his description of their planning councils as including "any to whom poverty or the fear of guilt was an irresistible stimulus to crime".[66] Alongside this, however, is an implication that at an unspecified time in the past, citizenship had only been given for "valor" or for good moral character, while the

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[62] Sherwin-White, A.N. (1973). *The Roman Citizenship*. Oxford: Oxford University Press. p.251 and p.264.
[63] Vigorita, T.S. (1993). "Cittadini e sudditi tra II e III secolo". In Carandini, A., Ruggini, L.C. and Giardina, A. (eds). *Storia di Roma.* Vol 3: *L'età tardoantica, 1, Crisi e trasformazioni*. Turin: Einaudi. pp.12ff.
[64] Mercogliano, F. (2017). *Hostes Novi Cives. Diritti Degli Stranieri Immigranti in Roma Antica.* Naples: Jovene. Ch. 2.
[65] Tacitus. *Annales.* III.40.2. Translation in Church, A.J. (ed). (1942). *Complete Works of Tacitus.* New York: Random House.
[66] Tacitus. *Annals.* III.40.2. Translation in Church.

citizen population in his own day was larger and its moral virtues therefore diluted by numbers. It is possible to regard this attitude as a product of Tacitus's upper-class viewpoint. For example, Folge has studied Tacitus's attitudes towards the lower class through the prism of his use of the term *vulgus* – "crowd", or more loosely "masses" - in the *Annals* and *Histories.* He finds that while the term was rarely used in the context of a violent civilian or plebeian mob and could sometimes indicate support, it is "to some extent conceived along stereotyped lines and the generally negative colouring of epithets add to its somewhat villainous aspect".[67] Folge draws particular attention to Tacitus's preoccupation with the tendency of the *vulgus* to spread rumours or gossip.[68] It is therefore likely that Tacitus regarded the extension of citizenship to the *vulgus* as a negative development and it is with this framing that he celebrates the "rarity" and moral exclusivity of citizenship in an idealised past. Other literary sources have a more positive perspective on the expansion of Roman citizenship: Aristides suggests that citizenship is available to anyone on the basis of merit: "neither does the sea nor a great expanse of intervening land keep one from being a citizen, nor here are Asia and Europe distinguished. But all lies open to all men".[69] It is important to bear in mind the propagandistic quality of sources like these; Aristides was a member of a prominent provincial elite and it was in his interest to present the Roman administration in the best light.

By contrast, Besson emphasises that enfranchisement remained strictly controlled immediately before and after the *Constitutio,* with the intention that Roman citizenship should only be available as a reward.[70] He stresses the carefully delineated incentives for Junian Latins in the city of Rome to acquire citizenship, which were a response to the policy needs of the time. Under the *Lex Aelia Sentia,* Junian Latins who had married a Roman citizen or another Junian Latin were granted the status of a Roman citizen once they had a child who reached the age of one.[71] This was likely to encourage a higher birth-rate in the city. Meanwhile, Junian Latins could also acquire citizenship through investment in the city of Rome, by improving the grain supply, building a substantial house, or working as a miller. If Roman citizenship were truly an effective incentive for such beneficial activities this would imply a degree of scarcity. Besson also highlights evidence from the *Tabula Banasitana* [72]*,*

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[67] Folge, N. (1976). "The *Vulgus* in Tacitus". *Rheinisches Museum für Philologie.* Vol. 119. pp.85-92.
[68] Folge. "The *Vulgus* in Tacitus". p.92.
[69] Aristides. *Regarding Rome.* 26.60. Translation in Behr, C. A. (1981). *P. Aelius Aristides: The Complete Works*. Leiden: Brill.
[70] Besson. "Fifty Years Before the Antonine Constitution". p.208.
[71] Gai.Inst.1.28-35.
[72] *Tabula Banasitana.* 168-177 CE. AE 1971, n. 534. On which see Dench, E. (2005). *Romulus' Asylum: Roman Identities from the Age of Alexander to the Age of Hadrian*. Oxford: Oxford University Press. p.135; Woolf, G. (2005). "Family History in the Roman North West". In George, M. (ed). *The Roman Family in the Empire: Rome, Italy, and Beyond.* Oxford: Oxford University Press. p.232-254 at 251; Swain, S. and Edwards, M. (2006). *Approaching Late Antiquity: The Transformation from Early*

which shows that the Imperial chancelry kept accurate records of grants of citizenship and that interventions from provincial governors were often necessary in order to secure citizenship. Such strict controls and recording of enfranchisement, Besson argues, would be unlikely if by the late second century CE citizenship had become widespread in the provinces.[73] Large grants of citizenship had been given before, notably the grant to the Hispanic provinces by Vespasian, which was the largest known extension of citizenship in between the Social War and the *Constitutio.*[74] However, this again tended to form part of a reward structure. The peoples of Hispania had developed a common provincial identity which was fully compatible with their emerging identity as Romans, in much the same way as the Italian peoples once did; Beltran Lloris sees the extension of Roman citizenship as the natural conclusion to this process.[75] The grant of citizenship by Caracalla was much less discriminating than this.

A variety of attempts have been made to estimate the number of citizens in the provinces before the *Constitutio.* One approach compares the number of citizen and peregrine names recorded in inscriptions and papyri. Jacques and Scheid, reviewing this evidence, reached two conclusions. Firstly, there remained a considerable proportion of peregrines in the provinces, especially in the east, by the early third century CE. Secondly, there appears to have been tremendous variation in the proportion of citizens, not only between the east and west, but also between individual provinces, one *civitas* and another, and even within different parts of the same *civitas.*[76] This onomastic approach has been criticised on several fronts. Firstly, is questionable whether a Roman name-form would have remained in exclusive use among Roman citizens. It is possible that peregrines – perhaps especially upper-class peregrines – adopted Roman name-forms to enhance their status in the local community or perhaps even to improve their relations with Imperial authorities. We know that harsh penalties were in place for those who falsely claimed to be citizens or who adopted the name of a citizen. Suetonius tells us that Claudius had instituted a rule whereby any peregrine who did so would be executed by axe in the fields below the Esquiline Hill.[77] These penalties existed, at least initially, in part to prevent peregrines from claiming citizenship in order to escape a rapid trial, or to prevent themselves from receiving corporal

to Late Empire. Oxford: Oxford University Press. p.5; Harker, A. (2008). *Loyalty and Dissidence in Roman Egypt: the case of the Acta Alexandrinorum*. Cambridge: Cambridge University Press. p.103.
[73] Besson. "Fifty Years Before the Antonine Constitution". p.209.
[74] Pliny. *Natural Historia.* 3.30.
[75] Beltran Lloris, F. (2011). "Una aproximación a Hispania como referente identitario en el mundo romano". In *Roma Generadora de Identidades la Experiencia Hispana.* Madrid: Casa Velazquez. pp.54-77 at 76.
[76] Jacques, F. and Scheid, J. (2010). *Rome et l'intégration de l'Empire (44 av. J.-C.-260 ap. J.-C.).* Vol. 1: *Les structures de l'Empire romain.* Paris: PUF. pp.282-284.
[77] Suetonius. *Claudius.* XXV.3.

punishment.[78] However, it is not unreasonable to suppose that they were also in place for peregrines who adopted Roman names in provinces in order to improve their social standing. The other problem with the onomastic approach is that few papyri survive outside of Egypt. Historians who record names must therefore rely largely on inscriptions, which only provide them with a view of those who were wealthy enough to monumentalise themselves and their families in stone.

A novel approach developed by Lavan proceeds on the basis that citizenship could only be acquired through specific mechanisms, each of which can be measured independently over time.[79] Lavan takes his list of mechanisms from Marotta, who highlights five: (1) grants to peregrines who served in the Roman army, (2) the enfranchisement of magistrates and/or decurions in provincial towns which had been granted a greater or lesser right of Latinity, (3) discretionary grants to individuals, including grants for good or valorous deeds of the type mentioned by Tacitus, (4) block grants to whole urban communities and (5) the manumission of slaves by Roman citizens.[80] These categories broadly map on to the mechanisms for acquiring Roman citizenship outlined in the Institutes of Gaius, which discusses manumission of slaves[81] and also discusses mixed families in which some but not all members have been granted Roman citizenship.[82] Eck stresses the particular importance of urban communities in the spread of Roman citizenship prior to Caracalla. It was under Ceasar that the first large-scale Roman municipalities were set up, in Hispania ulterior and citerior, in the Gallia Narbonensis and the Gallia Comata, in Achaia, Asia, Pontus-Bithynia and in Africa.[83] Later, *coloniae* were established which were settled to a large degree by Roman citizens, either from the army or from the poor urban population of the larger cities, especially Rome. Examples of these *coloniae* include the Caesar-Augustan settlement of Genetiva Iulia Urbanorum, where the use of "urbanorum" in the name indicates that *urbs* from the city of Rome had settled[84], as well as Laus Iulia Corinthiensis, where according to Strabo freedmen from the city of Rome also settled.[85] These *coloniae* were not entirely settled by Roman citizens, but they adopted Roman models of government and almost

[78] Adams, S.A. (2008). "Paul the Roman Citizen: Roman Citizenship in the Ancient World and its Importance for Understanding Acts 22:22-29". In Porter, S.E. (ed). *Paul: Jew, Greek and Roman.* Leiden and Boston: Brill. pp.309-326.
[79] Lavan. "The Spread of Roman Citizenship". See also Lavan, M. (2019). "The Foundation of Empire? The Spread of Roman Citizenship from the Fourth Century BCE to the Third Century CE". In Berthelot, K. and Price, J. (eds). *In the Crucible of Empire.* Leuven: Peeters. pp.21-54.
[80] Marotta, V. (2009). *La cittadinanza romana in età imperiale (secoli I-III d.C.): Una Sintesi.* Turin: Giappicelli. Ch. 3.
[81] Gai.Inst. 1.17-19.
[82] Gai.Inst. 1.74.
[83] Eck. "Die Wirksamkeit des römischen Rechts im Imperium Romanum und seinen Gesellschaften". p.750.
[84] Pliny. *Naturalis Historia*. 3.12.
[85] Strabo. 8.6.23.

certainty applied Roman private law.[86] These were not the only mechanisms. Lavan mentions, for example, that Junian Latins could occasionally earn Roman citizenship by building ships for the *curae annonae* at Rome.[87] However, they were the only mechanisms capable of enfranchising enough individuals to rapidly increase the overall total of citizens by the early third century CE.

The easiest of these variables to calculate is the enfranchisement of the soldiers, which can be based on the total manpower of the Roman army and fleets as well as the likely proportion of soldiers who completed their term of service and were therefore granted citizenship. Even here, however, uncertainties remain. It is not clear what the survival rate of the Roman army was, nor the ratio of recorded or "paper" strength to actual manpower.[88] Other mechanisms are even less clear: it is difficult to estimate, for example, what proportion of local towns were granted the right of *Latium maius* (and who decurions therefore became citizens) in between the creation of this status by Hadrian and the *Constitutio.* The practice of granting citizenship to whole urban communities in the provinces was more common in the western parts of the Empire than in the east, where inherited non-Roman – for example, Ptolemaic - forms of urban governance often persisted and so formed a barrier to Roman status.[89] Existing Roman citizens were also fewer in number in the East. This would have inhibited the development of distinctively Roman forms of urban governance, which likely depended on a critical mass of the population who were already acculturated into Roman civic norms through living in Rome or other cities.[90]The most difficult mechanism to assess is the manumission of slaves by citizens, which raises questions such as the proportion of a manumitted slave's children who were likely to be free as opposed to slaves of their former owners, as well as the proportion of freed slaves who did not become citizens but were instead consigned by the informality of their manumission to the status of a Junian Latin.[91] Indeed, even the total provincial slave population is subject to varied estimates by ancient historians.[92]

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[86] Crawford, M. (1996). *Roman Statutes.* Vol. 1. London: Institute of Classical Studies. pp.400ff.
[87] Lavan. "The Spread of Roman Citizenship". p.8.
[88] Lavan. "The Spread of Roman Citizenship". p.11.
[89] However, there is evidence that Roman forms of governance could come to predominate very quickly. For a discussion see Bowman, A.K. and Rathbone, D. (2012). "Cities and Administration in Roman Egypt". *Journal of Roman Studies.* Vol. 82. pp.107-127.
[90] Eck. "Die Wirksamkeit des römischen Rechts im Imperium Romanum und seinen Gesellschaften". p.750.
[91] For informal manumission see Atkinson, K.M.T. (1996). "The Purpose of the Manumission Laws of Augustus". *Irish Jurist.* Vol. 1(2). pp.356-374; Hirt, M. (2018). "In Search of Junian Latins". *Historia.* Vol. 67(3). pp.288-312.
[92] An early estimate of 40%: Brunt, P. (1971). *Italian Manpower.* Oxford: Oxford University Press. p.124. An estimate of 20%: Harris, W.V. (1999). "Demography, Geography and the Sources of Roman Slaves". *Journal of Roman Studies.* Vol. 89. pp.62-75. An estimate of 6-12%: Scheidel, W. (2011). "Roman Slave Supply". In Bradley, K. and Cartledge, P. (eds). *Cambridge World History of Slavery.* Vol. 1. pp.287-310.

Bearing these difficulties in mind, Lavan is still able to provide a Monte-Carlo simulation for the total proportion of Roman citizens who were living in the provinces by the time of the *Constitutio.*[93] In this model, "only 5 per cent *of all the possible permutations* [emphasis Lavan] of the input variables will produce an outcome outside the range 15–33 per cent".[94] The highest number of possible permutations falls upon a figure of 23 per cent. It is clear from these estimates that the extremely high proportion of provincial citizens envisaged by Sherwin-White and Vigorita is not likely to have materialised by the *Constitutio*, although a figure as high as a quarter or a third of the total provincial population, plus the entirely of the Italian peninsula, would perhaps be enough to provoke elite anxieties of the type evinced by Tacitus. Perhaps more significant than an increase in the proportion of Roman citizens was a decline in the accessibility of the legal privileges which citizens had formerly enjoyed. If citizen status lacked enforceable legal benefits, there would be fewer attempts to seek it and fewer efforts to create new mechanisms by which it might be created. In this sense, the *Constitutio* did recognise a practical reality on the ground, but of a different kind: citizenship may still have been rare, but the gulf that had once existed between citizens and peregrines had vanished.

Roman Legal Norms in the Provinces

Whether Romanisation is an appropriate term for the acculturation of the different peoples living under Imperial rule has been the subject of some dispute. Indeed the notion of a linear acculturation has recently been challenged by Mercogliano, who prefers to characterise the process as a transfer of ideas arising from genuine cosmopolitanisation.[95] Woolf considers Romanisation to be "fundamentally flawed as an heuristic tool".[96] This is partly because it is too simplistic to set up a binary divide between Romans on the one hand and provincials on the other; in many places communities existed along a spectrum of identity. Moreover, the aristocracy in many Roman provinces were required to take on a dual role as mediators between Rome and the local provincial community.[97] Perhaps most importantly, however, the development of Roman culture in the provinces was not always a by-product of the

[93] A Monte-Carlo simulation deals with high levels of uncertainty by sampling a probability distribution of each possible variable to produce a population of many possible outcomes. An introduction can be found at Harrison, R.L. (2010). "Introduction to Monte Carlo Simulation". *AIP Conference Proceedings.* 5th January 2010. Vol. 1204. pp.17-21.
[94] Lavan. "The Spread of Roman Citizenship". p.28.
[95] Mercogliano. *Hostes Novi Cives.* Ch. 1.
[96] Woolf, G. (2009). *Becoming Roman.* Cambridge: Cambridge University Press. p.22.
[97] Curtin, P. D. (1984) *Cross Cultural Trade in World History*. Cambridge: Cambridge University Press; Silverman, S. F. (1965) "Patronage and community-nation relationships in central Italy". *Ethnology.* Vol. 4. pp.172-89; Loffler, R. (1971) "The representative mediator and the new peasant". *American Anthropologist*. Vol. 73. pp.1007-92

imposition of Roman cultural power.[98] The Romans did not always regard it as necessary to promote the adoption of their own cultural patterns and extant cultures within the provinces often retained considerable sophistication in their own right.[99] It must therefore be asked how successful any attempt to foster a common legal culture through universal Roman citizenship could be. It should also be noted that becoming a Roman citizen might only have a very limited impact on the practical obligations of formerly peregrine communities. Marotta has highlighted that grants of Roman citizenship in the second century CE were often given without prejudice to any existing tax liabilities or to the regulatory responsibilities that had previously been imposed on[100]; it is possible that the *Constitutio* itself also included clauses intended to reinforce the existing tax and regulatory responsibilities of newly enfranchised Roman citizens.[101] This would explain, for example, why the Egyptian *laographía* tax was still imposed on newly enfranchised Romans citizens who prior to the *Constitutio* had been Egyptians.[102] This points less towards the creation of a unified legal culture and more towards a dual citizenship in which existing obligations to the provincial administration went alongside the new obligations.

Ando has argued that the *Constitutio* followed growing pressure for legal reform in the second and third centuries CE as Roman legal norms increasingly came to exert influence in the provincial legal orders of conquered peoples. To understand this, it is necessary to briefly discuss how the plural legal orders of the empire related to one another. Access to law in the ancient Mediterranean was determined not by the territory a person occupied, as in modern European jurisdictions, but rather by the people they were attached to. The second century CE jurist Gaius outlines the essentials of this personality principle in his *Institutes*:

> Omnes populi, qui legibus et moribus reguntur, partim suo proprio, partim communi omnium hominum iure utuntur: Nam quod quisque populus ipse sibi ius constituit, id ipsius proprium est vocaturque ius civile, quasi ius proprium civitatis; quod vero naturalis

[98]This was also not always simply a result of limited cultural exchange with the Romans: Millar, F.G.B. (1987) "Empire, Community and Culture in the Roman Near East: Greeks, Syrians, Jews and Arabs". *Journal of Jewish Studies.* Vol. 38. pp.143-64

[99] On the issue of whether the Romans had a policy of Romanisation, see Benabou, M. (1976) "Resistance et romanisation en Afrique du Nord sous le Haut Empire". In Pippidi (ed). *Assimilation et résistance à la culture gréco-romaine dans le monde ancient*. Paris-Bucarest: Les Belles Lettres. pp.367-75; Blagg, T. F. C. and Millett, M. (eds). (1990) *The Early Roman Empire in the West.* Oxford: Oxford University Press.

[100] For example the grant of citizenship given between 168 CE and 177 CE to Julianus, a Mauritanian tribal leader in the *Tabula Banasitana.* AE 1971, n. 534..

[101] Marotta. "Doppia cittadinanza e pluralità degli ordinamenti". pp.486-489.

[102] Montevecchi, O. (1998). "La documentazione papiracea del III secolo d.C. Aspetti e problem". In Daris, S. (ed). *Scripta Selecta.* Milan: Vita e Pensiero. p.377.

> ratio inter omnes homines constituit, id apud omnes populos peraeque custoditur vocaturque ius gentium, quasi quo iure omnes gentes utuntur.
>
> All peoples who are ruled by laws and customs partly make use of their own *ius*, and partly have recourse to to the *ius* which are common to all men; for what every people establishes as *ius* is their own and is called the *ius civile*, just as the ius of their own city; and what natural reason establishes among all men and is observed by all peoples alike, is called the *ius gentium*, as being the *ius* which all nations employ.[105]

The Romans therefore recognised not only their own *Ius civile* as the law peculiar to the Roman people, but also the *ius civile* of other peoples who they conquered in the provinces. Some conquered peoples were given legal autonomy, which is to say the right to use their own *ius civile*, even after becoming part of the Roman Empire, at least for the resolution of internal disputes, the powers of their own magisterial offices and the administration of their native religion. This reflects the looser relationship that existed in the ancient Mediterranean between external sovereignty, in the sense of not being militarily or fiscally subordinate to any outside power, and the internal autonomy of a people over the administration of their own laws.

The likelihood of being granted internal legal autonomy partly depended on the degree to which a people had resisted becoming part of the Empire and were therefore considered an ongoing threat to its internal security. For example, the first century BCE historian Livy gives an account of how the different cities of the Hernici people were treated following their conquest by Rome in the fourth century BCE:

> Hernicorum tribus populis, Aletrinati Verulano Ferentinati, quia maluerunt quam civitatem, suae leges redditae conubiumque inter ipsos, quod aliquamdiu soli Hernicorum habuerunt, permissum. Anagninis quique arma Romanis intulerant civitas sine suffragii latione data: concilia conubiaque adempta et magistratibus praeter quam sacrorum curatione interdictum.
>
> To the three Hernic peoples of Aletrium, Verulae, and Ferentinum their own laws were restored, because they preferred them to Roman citizenship, and they were given the right to intermarry with each other - a privilege which for some time they were the only Hernici to enjoy. The people of Anagnia and such others as had borne arms against the Romans were admitted to citizenship without the right of voting. they were prohibited

[105] Gai. Inst. 1.1. Translation in De Zulueta, F. (ed). (1946). *The Institutes of Gaius. Text with Critical Notes and Translation.* Oxford: Clarendon Press.

> from holding councils and from intermarrying and were allowed no magistrates save those who had charge of religious rites.[106]

The Hernici are no longer mentioned as distinct people after the third century BCE, which suggests that by this time they had either become indistinguishable from other Latin peoples or had been granted full Roman citizenship. Nevertheless, it remained the case during the Imperial period that conquered peoples often preferred to maintain their own personal jurisdiction rather than become Roman citizens. This was especially true if the alternative to maintaining a personal jurisdiction was not full Roman status with its attendant privileges, but rather "citizenship without the franchise", which entailed all the taxation burdens of Roman citizenship but none of the legal or material privileges. Cicero's *In Verrem* contains an account of the *lex Rupilia,* which governed how these jurisdictions related to one another in late Republican Sicily:

> Siculi hoc iure sunt ut, quod civis cum cive agat, domi certet suis legibus, quod Siculus cum Siculo non eiusdem civitatis, ut de eo practor iudices ex P. Rupili decreto, quod is de decem legatorum sententia statuit, quam illi legem Rupiliam vocant, sortiatur […] quod civis Romanus a Siculo petit, Siculus iudex, quod Siculus a civi Romano, civis Romanus datur; ceterarum rerum selecti iudices ex conventu civium Romanorum proponi solent.
>
> The Sicilians are subjects of law as follows: actions of a citizen with a fellow citizen are tried at home, according to their own laws. To adjudicate actions of a Sicilian with a Sicilian not of the same citizen body, the praetor should appoint a judge by lot, in accordance with the decree of Publius Rupilius, which he fixed on the recommendation of the ten legates, which decree the Sicilians call the Rupilian Law. […] When a Roman citizen sues a Sicilian, a Sicilian is assigned to adjudicate; when a Sicilian sues a Roman citizen, a Roman citizen is assigned. In all other matters judges are accustomed to be selected from among the Roman citizens resident in the assize district.[107]

Roman officials in the provinces were expected, where possible, to resolve disputes according to local legal institutions, wherever these had persisted following the Roman conquest. Commenting on this text, Ando notes that "the legal landscape of Roman Sicily is tessellated into jurisdictions, in each of which a different system of civil law is understood to obtain – that is, to use the terms employed by Gaius, a body of law generated by, and governing relations among, a political community whose membership is regulated and

[106] Livius. *Ab Urbe Condita.* IX.43.22-24. Translation in Foster.
[107] Cicero. *In Verrem*. 2.2.32. Translation in Yonge, C.D. (1903). *The Orations of Marcus Tullius Cicero.* London: George Bell & Sons.

tracked by the polity itself".[108] It should be kept in mind that Roman administrators did not recognise the legal orders of all conquered peoples as a civil law, or *ius civile.* Legal practices which were oral or departed significantly from Roman legal norms were less likely to be recognised in this way. In the Imperial province of Britannia, for example, appears to have been governed with little reference to any Brittonic legal customs that predated the Roman settlement. Legal jurisdiction was exercised not only by the governor, but also by a *legatus iuridicus*, or judicial delegate, appointed directly by the Emperor.[110] There is little evidence for the persistence of Brittonic legal institutions after the Roman conquest. Nevertheless, as a general rule, successive emperors were careful to ensure that Roman administrators in the provinces governed the cities to which they were assigned according to local laws. In the early second century CE, Pliny, who was then serving as governor of Bithynia-Pontus in modern-day Turkey, wrote a letter to the Emperor Trajan asking whether decurions should be obliged to pay an admittance fee after their election to the town council. The reply was as follows:

> Honorarium decurionatus omnes, qui in quaque civitate Bithyniae decuriones fiunt, inferre debeant necne, in universum a me non potest statui. Id ergo, quod semper tutissimum est, sequendam cuiusque civitatis legem puto, sed verius eos, qui invitati fiunt decuriones, id existimo acturos, ut praestatione ceteris praeferantur.
>
> I can give no general directions applicable to all the cities of Bithynia, whether those who are made members of their respective councils shall pay an honorary fee upon their admittance or not. It seems best therefore in this case (what indeed upon all occasions is the safest way) to leave each city to its respective laws. But I think, that the censors ought to set the sum lower to those who are chosen into the senate contrary to their inclinations than to the rest.[116]

Imperial constitutions from the third century CE can also be found deferring to local practices on the remission of rent.[117] Trajan's use of language is worth some attention here. He considers it "safer" (tutius) to defer to the respective laws of each city for which Pliny was responsible. By allowing pre-existing local institutions to continue, this practice of the Imperial chancelry may have reduced the risk of a revolt against Roman rule and made the everyday administration of the provinces easier. Maintaining the "tessellation" of local jurisdictions in the provinces also prevented the emergence of solidarity against Roman rule

[108] Ando. *The Critical Century.* pp.80-81.
[110] Richardson, J. (2015). "Roman Law in the Provinces". In Johnston, D. (ed). *The Cambridge Companion to Roman Law.* Cambridge: Cambridge University Press. p.46.
[116] Pliny. *Epistulae*. X.113. Translation in Melmoth, W. (1909). "Letters of Gaius Plinius Caecilius Secundus". In Eliot, C. (ed). *Harvard Classics.* Vol. 9. New York, NY: P.F. Collier and Sons.
[117] C.4.65.18.

among conquered peoples. Ando has therefore described the Roman strategy of provincial rule in the second and third centuries CE as "the cultivation and management of difference" between conquered peoples.[118] There were some clear limitations to this policy: where the security of Roman citizens or the military affairs of the Empire more broadly were concerned, Roman law always prevailed over the *ius civile* of conquered peoples. This had been true since at least the late Republic and applied to peregrine peoples as well as client states tied to Rome by treaty. In his *Pro Balbo,* Cicero argued these peoples must never have "the power of ratifying or declining to ratify measures which concern our republic, our empire, our wars, our victory, and our safety".[120] Legal autonomy was strictly confined to internal affairs of the *peregrini.*

What was the position of former peregrines in the provinces who had been granted Roman citizenship? Evidence for on this issue can be found in the Flavian municipal law, which is contained in the *Lex Irnitana* dating from 91 CE[121] as well as in contemporary fragments from other *municipia* in the Spanish region of Baetica.[122] This area, which was important to the Mediterranean oil trade, had received the *ius Latii* from Vespasian. Accordingly, the Flavian municipal law grants Roman citizenship to former magistrates and certain members of their family (not including adoptees). Roman administrators had also exported the Italian model of *municipia* to the cities of Baetica and in doing so developed a system for the internal resolution of their disputes which Richardson has described as a "mirage of Roman law": that is to say, the Romans developed an *ius civile* for the citizens of Irni which in many respects mirrored that of the Roman *Ius civile*.[123] The provisions of the Flavian municipal law, particularly its reference to the "Latins" of Irni[124], have been subject to different interpretations. Le Roux proposed that the whole population of these *municipia* had been granted a new form of "provincial Latin" status, approximating Roman citizenship in nearly every respect except for the *ius migrationis,* or the right to maintain one's status upon moving to another *municipium.*[125] It has been pointed out by Miller, however, that the *Lex Irnitana* does not present any direct evidence for any wholesale change of status among

[118] Ando. *The Critical Century*. p.81.
[120] Cicero. *Pro Balbo.* XXII. Gardner, R. (1958). *Cicero. Pro Caelio. De Provinciis Consularibus. Pro Balbo.* Cambridge, MA: Loeb Classical Library 447.
[121] Gonzalez, J. (1986). "The Lex lrnitana: a new copy of the Flavian Municipal Law". *Journal of Roman Studies.* Vol. 76. pp.147ff.
[122] Salpensa: FIRA7.30a. Malaga: FIRA7.30b.
[123] Richardson, J.S. (1992). "The reception of Roman law in Spain: the evidence of recent epigraphic discoveries". Unpublished seminar paper, referred to in Gardner, J.F. (1993). *Being a Roman Citizen.* London: Routledge. pp.188-191.
[124] Clause 28: "Si quis munic[eps] municipi Flaui Irnitani, qui Latinus erit […]"
[125] Le Roux, P. (1995). *Romains d'Espagne: cites et politiques dans les provinces, Ile siecle av. J.-c. - IIIe siecle ap. J.-c.* Paris. p.85

those living in the Spanish *municipia*.[126] The better view, set out by Gardner, is that references to "Latins" in the *Lex Irnitina* simply refer to Junian Latins.[127] Meanwhile, those magistrates and their relatives who were given Roman citizenship became dual citizens. This meant they retained the public and private rights of their local citizenship – in the case of the *Lex Irnitana,* this would be citizenship of Irni – while also gaining access tothe Roman *Ius civile.* This helped in turn to resolve the disruption to inheritance and marriage law that would arise if individuals with Roman citizenship were no longer treated as citizens of Irni.[128] In Irni and other *municipia* governed under the Flavian municipal law, it often would have mattered little in practice whether litigants were Roman citizens, given the rules were similar in substance.

The "management of difference" among peregrine peoples continued to characterise Roman Imperial policy into the late second century CE. However, during this period, Roman legal norms did begin to impinge on local jurisdictions, especially where this made it easier for Imperial officials to govern. The use of Roman civil procedure became widespread even where the substantive law applied remained that of a peregrine people. There is evidence that the Roman formulary system, while not applicable among *peregrini,* was widely mimicked by provincial officials. The formulary system was distinctive for its two-stage procedure. At the *in iure* stage, a magistrate would determine the legal issues and grant a formula carrying a set of instructions for the *iudex,* or lay-judge. At the *apud iudicem* stage, the *iudex* would determine the facts and dispose of the case according to the formulary instructions.[129] The jurist Callistratus, who was active at the beginning of the third century CE, makes the following observation about Imperial rescripts under the reign of the Emperor Caracalla: "Generally speaking, whenever the Emperor issues a rescript referring any matter to the Governor of a province […] he must make up his mind whether he will hear it himself or appoint a judge to do so".[130] Ando considers this evidence that two-stage proceedings similar to the *in iure* and *apud iudicem* were routine in the provinces.[131] Callistratus is not referring to the formulary system proper, as that remained part of the Roman *Ius civile* and was confined to Roman citizens. Callistratus also leaves open the option for a governor to deal the matter personally in a single hearing, where he would not only determine which legal issues were raised but also dispose of the case based on its facts. Nevertheless,

[126] Millar, F. (1977). *The Emperor in the Roman World*. London: Bloomsbury. pp.485-6. Cf. Humbert, M. (1981). "Le droit latin imperial: cites latines ou citoyennete latine?". *Ktema*. Vol. 6. pp.207ff.
[127] Gardner, J.F. (2001). "Making citizens: The operation of the lex Irnitana". In de Blois, L. (ed.). *Administration, Prosopography and Appointment Policies in the Roman Empire: Proceedings of the First Workshop of the International Network Impact of Empire.* Amsterdam: Gieben. pp.215–29.
[128] Gardner. "Making Citizens". pp.216, 221.
[129] Metzger, E. (2013). "An Outline of Roman Civil Procedure". *Roman Legal Tradition.* Vol. 9. pp.1-30 at 21-23.
[130] Callistratus. D.1.18.9. Translation in Watson.
[131] Ando. *The Critical Century.* pp.87-89.

aspects of the formulary system are mimicked, with a similar approach to the delegation of decision making.

The growing influence of Roman civil procedure – as well as the possibility that a case in the provinces might be appealed to a court in the city of Rome – also led to Roman cultural norms filtering into the enforcement of public order in the provinces. This applied not only to Roman officials, but also to policing carried out by local peregrine officials. For example, the Severan jurist Marcian reports the following set of rules governing the behaviour of local policemen in Asia Minor:

> Sed et caput mandatorum exstat, quod divus pius, cum provinciae asiae praeerat, sub edicto proposuit, ut irenarchae, cum adprehenderint latrones, interrogent eos de sociis et receptatoribus et interrogationes litteris inclusas atque obsignatas ad cognitionem magistratus mittant. igitur qui cum elogio mittuntur, ex integro audiendi sunt, etsi per litteras missi fuerint vel etiam per irenarchas perducti. sic et divus pius et alii principes rescripserunt, ut etiam de his, qui requirendi adnotati sunt, non quasi pro damnatis, sed quasi re integra quaeratur, si quis erit qui eum arguat. et ideo cum quis anakrisin faceret, iuberi oportet venire irenarchen et quod scripserit, exsequi: et si diligenter ac fideliter hoc fecerit, collaudandum eum: si parum prudenter non exquisitis argumentis, simpliciter denotare irenarchen minus rettulisse: sed si quid maligne interrogasse aut non dicta rettulisse pro dictis eum compererit, ut vindicet in exemplum, ne quid et aliud postea tale facere moliatur.
>
> Hence when an accusation is made, the Irenarch is required to appear and prosecute the charge which he has committed to writing, and if he does so diligently and faithfully, his action should be approved; but if he produces his evidence with little skill, it should be simply noted that the Irenarch had rendered an insufficient report. If, however, it should be ascertained that he has put the questions maliciously, and has not reported the answers as they were given, an example should be made of him, in order that he may not afterwards attempt anything of the same kind.[132]

Here, Roman norms of fairness in police behaviour - and particularly Roman standards of criminal evidence - are expected by the Roman court, which serves as the court of record for criminal cases. These norms do not merely consist of abstract principles with local variation in their application, but rather a series of specific rules and practices which must be observed in a uniform way from one province to another.[133] Many former *peregrini* would therefore have been thoroughly familiar with the impact of Roman law on their everyday lives

[132] Marcian. D.49.3.6.1. Translation in Watson.
[133] Ando. *The Critical Century.* p 89.

well before the *Constitutio* gave them the ability to access Roman courts and Roman legal actions. Cortes-Copete has emphasised the importance of the Imperial chancelry from the time of Hadrian onwards in exercising a harmonising influence over the constitutions and statutes of each provincial city.[134] This was closely related to the emergence of the Imperial chancelry under Hadrian as the sole legitimate source of Roman law. For Cortes-Copete, the Imperial chancelry had dual objectives: the "recuperating and revitalisating" of local laws, but in a "higher legislative framework" which tended towards the harmonisation of those laws for common standards.[135] A good example of this approach can be found in a letter from Hadrian to the city of Delphi, in which he notes his intention to launch an investigation into any Amphictyonic decrees which conflicted with one another or with the common laws.[136] Another example is the Hadrianic "fish law" contained in a letter to Eleusis[137], which seeks to control intermediate sales; in doing so it simply applies the existing common Roman legal principles already contained within the Nicomedian Edict.[138] Cortes-Copete is careful not to overstate his case: he does not argue that Hadrian was systematically bringing provincial legal orders into line with Roman legal practices, but rather that a "grammar of harmonisation" can be detected in the individual decisions of the Imperial chancelry over this time.[139]

It is also important not to regard Roman law purely as an Imperial law, imposed from above by Imperial officials onto the spectrum of peregrine legal practices and complied with only passively. This long-standing dichotomy, between the "legislative" law of the Roman Empire and the "traditional" legal practices of the *peregrini* has its origins in the work of Mitteis.[140] However, it overlooks the agency of individual litigants - the users of the law - to make use of the plurality of legal resources available to them in order to resolve disputes.[141]

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[134] Cortés-Copete, J.M. (2017). "Koinoi Nomoi: Hadrian and the Harmonization of Local Laws". In Hekster, A. and Verboren, K. (eds). *The Impact of Justice on the Roman Empire: Proceedings of the Thirteenth Workshop of the International Network Impact of Empire.* Leiden: Brill.
[135] Cortés-Copete. "Koinoi Nomoi: Hadrian and the Harmonization of Local Laws". p.114.
[136] CID IV, 152. II, 37-40. On which see Oliver, J.H. (1989). *Greek Constitutions of Early Roman Emperors.* Philadelphia, PA: American Philosophical Society. No. 75.
[137] IG II(2). 1103, ll.12-13. On which see Wilhelm, A. (1909). "Inschriften aus Erythrai und Chios". In *Jahreshefte des österreichischen archäologischen Instituts in Wien.* Vol. 12. pp.146–148; Graindor, P. (1918). "Études épigraphiques sur Athènes à l'époque impériale". *Revue des Études Grecques.* Vol. 31. pp.227–237 at 127–129; Oliver. *Greek Constitutions.* No. 77; Cortés-Copete, J.M. (2015). "Adriano y la regulación de los mercados cívicos: una nueva lectura de IG II2 1103". *Habis.* Vol. 46. pp.239–261
[138] TAM IV. I, 3. Hsch. On which see Fournier, J. (2010). *Entre tutelle romaine et autonomie civique. L'administration judiciaire dans les provincies hellénophones de l'Empire romain. (129 av. J.C.–235 apr. J.C.).* Paris: École Française d'Athènes.
[139] Cortés-Copete. "Koinoi Nomoi: Hadrian and the Harmonization of Local Laws". p.116.
[140] Mitteis, L. (1891). *Reichsrecht und Volksrecht in den östlichen Provinzen des römischen Kaiserreichs.* Teubner: Leipzig, B.G.
[141] For a classic discussion of the user theory of law, see Nader, L. (1984). "A User Theory of Law". *Southwestern Law Journal.* Vol. 38. pp.951-963.

As the *peregrini* became increasingly familiar with Roman legal terminology and principles, Roman law took its place in the legal landscape drawn upon in both private negotiations and peregrine courts. For example, papyri from the village of Mazoa on the southern coast of the Dead Sea, which date from the first third of the second century CE, indicate that the mere presence of the Roman governor and the Imperial courts had a substantial influence on the arguments made in private negotiation between litigants. This was true without litigants ever appearing before a Roman court, or seriously intending to do so.[142] In documents from one dispute, a Jewish woman called Babatha is seeking to increase the amount of maintenance provided to her son, Jesus, by his two officially appointed guardians. She petitions the Roman governor to complain that the maintenance is insufficient and later summons one of the guardians to appear before the Roman court in connection with this dispute.[143] On the same day as the summons, however, she also makes a private deposition to both guardians, asking them to transfer Jesus's property to her, offering a hypothec on a share of her own property as security.[144] There is no evidence to say whether this dispute ever did appear before the Roman court, but other papyrological material suggests that the amount of maintenance may have later doubled from one denarii per month from each guardian to two denarii per month from each of them, or a total of four denarii per month.[145] It is therefore suggested by Czajkowski that the threat of involving Roman officials was intended by Babatha as a bargaining chip to increase her likelihood of success in private negotiations.[146] Babatha documents also make reference to Rabbinical law and it is likely she would have been permitted to resolve the dispute in a Jewish court. The "spectre of the Roman court" was nevertheless an important feature in the legal landscape which Babatha and her neighbours were prepared to navigate over the course of their lives.[147] By the late second century CE, then, Roman legal norms were filtering into local jurisdictions not only via the "harmonising grammar" of the Imperial chancelry but also through the actions of provincials themselves.

To summarise, it is legitimate to speak of a gradual decline in the legal value of citizenship from the second century CE onwards. This decline was driven at least in part by changes in the geographical distribution of Roman citizens, as an urban citizen elite which had benefited from close social networks was dispersed from the increasingly troubled cities of the Empire into the countryside. This reduction in the value of citizenship is reflected in the

[142] Czajkowski, K. (2017). *Localized Law: The Babatha and Salome Komaise Archives.* Oxford: Oxford University Press. pp.166-198.
[143] P. Yadin 13; P. Yadin 14.
[144] P. Yadin 15.
[145] P. Yadin 27.
[146] Czajkowski. *Localized Law.* p.190.
[147] Czajkowski. *Localized Law.* p.197.

way that the *Constitutio Antoniana* appears not to have been regarded by contemporary authors as a radical measure. The narrative put forward by Imrie is that Caracalla was motivated by a pragmatic desire to create a larger, unified revenue base and to present himself as a source of *beneficium* for those he ruled.[148] It is not the intention here to dispute a pragmatic explanation for the *Constitutio*, but rather to point out that such pragmatism presupposes a reduction in the significance of the legal barriers between citizens and peregrines. The *Constitutio* also reflected the emerging reality, not of mass enfranchisement, but rather of the gradual penetration of Roman legal norms into the local jurisdictions of the provinces. To the extent the Imperial chancelry did intend to generate a common legal culture across the Empire, this would not have been served by an extension of the franchise, but rather from a continuation of the well-established process of gradual absorption of Roman legal norms.

By the time of the *Constitutio*, the primary mechanism by which one could seek redress for injustice was no longer through asserting one's status as a Roman citizen. It was instead by direct appeal to the Imperial chancelry and the moral authority of the Emperor. As Tuori states, "the *auctoritas* of the Emperor was supremely important, because the Roman Empire was a moral universe, headed by a caring Emperor".[149] Roman law was no longer simply the law peculiar to Romans, as Gaius had once written, but rather an instrument of Imperial governance through which the Imperial chancelry could resolve issues of injustice on behalf of the diverse peoples it ruled. The *Constitutio* simply reflected this new machinery of legal privilege.

[148] Imrie. *The Antonine Constitution.* pp.12-29.
[149] Tuori, K. (2007) "Legal Pluralism and the Roman Empire". In Cairns, J. and du Plessis, P. (eds.). *Beyond Dogmatics: Law and Society in the Roman World.* Edinburgh: Edinburgh University Press. p.48.

CHAPTER FIVE
INEQUALITY AND ACCESS TO JUSTICE

The power relationships of the third century CE are characterised by the now well-known distinction between *honestiores* and *humiliores,* whose differential treatment in criminal law reflected the broader range of social and material privileges enjoyed by families in the upper classes. The Imperial chancelry, however, did not only accommodate the needs of *honestiores;* there is evidence that Roman law could provide a measure of protection to non-elite groups, who are both visible in the textual evidence and whose presence, it is argued here, had shaped the development of important aspects of civil procedure by the early Dominate.

Section 5.1: *Honestiores* and *Humiliores*

The decline in the enforceability of citizen privileges coincided with the growth of legal privileges for *honestiores,* or the higher ranks of society. The *honestiores* were initially mainly citizens, but from the beginning could be peregrines. The scope of the *honestiores* as a class is never given a clear definition in the Roman sources, but there are certain persons who seem to have always been considered to form part of it. These included, in Rome itself, Senators, members of the Equestrian class and the pontiffs. However, the most prominent of the *honestiores* in the provinces were the decurions: members of the local *ordo* or town council. Edmondson points out that decurions were key for "the formation and consolidation of a stable local elite", with local towns providing "the ideal stage on which to maintain their social distinction vis-a`-vis their fellow citizens and to advertise their loyalty towards Rome".[1] To be a decurion, one had generally to be of free birth and could not belong to a dishonourable profession. By the early second century CE there was also often a substantial financial qualification. In his letters Pliny mentions a qualification of 100,000 sesterces for the *ordo* of Novum Comum, on the southern tip of Lake Como, close to his villas Tragedy and Comedy:

> Esse autem tibi centum milium censum, satis indicat quod apud nos decurio es. Igitur ut te non decurione solum verum etiam equite Romano perfruamur, offero tibi ad implendas equestres facultates trecenta milia nummum.
>
> The rank you bear in our province as a local senator is a proof that you are possessed at least of a hundred thousand sesterces; but that we may have the pleased of seeing you

[1] Edmondson, J. (2006). *A Companion to the Roman Empire.* London: Blackwell. pp. 253-255 at 255.

> a Roman knight, give me leave to present you with 300,000 sesterces, in order to make up the sum requisite to entitle you to that dignity.[2]

Decurions had a wide range of political and administrative responsibilities, including the defence arrangements of the town, public building works and in some cases dispute resolution. Crucially from the perspective of the Imperial chancelry, they were responsible for the collection of taxes within the *ordo* and the surrounding countryside, with any shortfall covered from their own private finances. Nevertheless, at the time Pliny was writing, serving as a decurion was clearly considered desirable and a source of respect within the local community: Pliny intends his offer to Romatius Firmus as a gift and a token to reinforce their friendship.

In return for exercising these responsibilities, decurions were afforded a range of legal and non-legal privileges. The non-legal privileges included a right to eat at civic banquets at public expense and better seats at the public entertainments. A late second century CE inscription referring to Suessa Aurunca in Latium also states that decurions could access the public water supply free of charge.[3] These privileges did not indicate financial need – indeed, spending by decurions was often necessary for the financial health of the town – but rather were an indication of the social respect they were entitled to within their local communities, akin to those of an upper-class citizen living in Rome. On one level this was a reciprocal relationship between an *honestrior* and the general population: the decurions funded a town's development and were rewarded with high status. However, it also reflected the same intra-aristocratic competition that took place in Rome. For example, work by Heinrich has demonstrated that the mid second century CE represented a peak in urban construction across Roman Italy. He records a steady increase during this period in the construction of new buildings, including baths, theatres and basilicas, followed by a dip after 170 CE, a brief recovery and a collapse in the early third century CE.[4] These buildings were often funded by Senators, decurions and local aristocrats to indicate their status. Urban construction fell away from 220 CE onwards, as de-urbanisation led to a re-orientation away from acts of patronage in the towns and towards villa construction. After this, the office of decurion rapidly became less desirable. The material goods and social respect available to decurions could no longer justify the pressure of maintaining a consistent revenue stream for the Imperial chancelry, during a period of civil strife and a reduction in the viability of smaller urban communities.

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[2] Pliny. *Epistulae.* I.19.2. Translation in Melmoth.
[3] Suessa Aurunca. 193 CE. CIL 10, 04760. D 06296. EAOR-08, 00017. Gregori-2018-CD1.
[4] Heinrich, F.B.J. (2010). "Publieke constructies in Romeins Italië: een conjuncturele benadering". In Attema, P. and Jongman, W. (eds). *Archeologie en Romeinse economie.* Special issue of *Tijdschrift voor Mediterrane Archeologie.* Vol. 44. pp.14-21.

At the start of the third century CE, the legal privileges of the decurions and other *honestiores* were most striking in the criminal jurisdiction of Imperial officials. Much has been written about the "dual penalty" system that developed in the second century CE, in which the severity of a punishment for the same crime depended on the social status of the convicted. The recent literature has focused particularly on the practice of relegation as a way of limiting the mobility – and therefore political influence – of intransigent members of the Roman elite without requiring the Emperor to use open force.[5] In this way geography served as substitute for military resources, which could then be focused on the Empire's external frontier. While relegation and other elite penalties likely began as a strategy for managing the threat posed by the Emperor's immediate political rivals, they came to be used routinely in the provinces. They can be contrasted with the more severe penalties which were deployed for *humiliores,* including citizens, who did not have the wealth or influence to seriously threaten the Imperial chancelry. Callistratus gives the vivid example of beating with rods, which he states that according to Imperial rescripts is not a punishment local officials may use against "men of higher status".[6] He may have been referring to one of several rescripts, including this one issued by the Emperor Caracalla shortly after coming to power in 199 CE:

> Imperatores Severus, Antoninus
>
> Decuriones quidem, item filios decurionum fustibus castigari prohibitum est: verum si iniuriam te fecisse proconsul vir clarissimus pronuntiavit, ignominia notatus es.
>
> aa. ambrosio. a 198 pp. k. iul. saturnino et gallo conss.
>
> The Emperors Severus and Antoninus
>
> It is forbidden for decurions and their sons to be whipped with rods, but if the illustrious Proconsul should decide that you have committed an injury rendering you liable to such punishment, you will be branded with infamy.
>
> Given to Ambrosius on the Kalends of July, under the Consulate of Saturninus and Gallus, 199 CE.[7]

Callistratus does not clarify who "men of higher status" are, but the rescript makes specific reference to decurions as well as their sons. The alternative punishment specified for these higher status persons is *infamia,* or the deprivation of civil honour. Greenidge, in his classic work on Roman *infamia,* defines it as a series of "special disqualifications, based on moral

[5] See for example Drogula, F.K. (2011). "Controlling Travel: Deportation, Islands and the Regulation of Senatorial Mobility in the Augustan Principate". *Classical Quarterly.* Vol. 61(1). pp.230-266.
[6] Callistratus. D.48.19.28.2. Translation in Watson.
[7] C.2.12.5. Translation in Blume and Frier.

grounds, from certain public or quasi-public functions: by the latter are meant those functions, such as postulation in the praetor's court, which, though based primarily on the rights of the individual in private law, yet necessarily bring him into contact with an official of the state".[8] *Infamia* began as a term of moral censure and appears to have acquired its technical legal meaning gradually, via definitions given in the subsequent edicts of the Praetor. Perhaps unsurprisingly given that it usually arises in a negative sense – i.e. where a person is deprived of it – it is difficult to find a positive definition of *fama* in the juristic texts. However, *fama* is often used interchangeably with *existimatio*: for example, in the *Pro Quinctio,* Cicero uses them as synonyms.[9] *Existimatio* is later defined by Callistratus as the "condition of unimpaired dignity approved by law and custom", which may be reduced by any penalty.[10] In a criminal context, *infamia* either followed automatically on a personal act by the accused or a sentence passed by a judge following a trial. Punishments which might be considered disgraceful in themselves, such as scourging, did not attract *infamia* automatically.[11]

The consequences of *infamia* could affect an individual's status in both public and private law. Public consequences included exclusion from public office, including the magistracies as well as the judicial bench.[12] It is reasonable to assume that on the same principle, a decurion who became subject to *infamia* would then lose their position within the *ordo.* The best attested private law consequence was loss of the ability to postulate for another in court; attempts at advocacy by *infames* in the Praetor's court were punished by a financial penalty.[13] Other private law disabilities as a consequence of *infamia* are more difficult to discern, as it can be difficulty to identidy when a disability imposed following moral disgrace falls within the technical conception of *infamia* as it was developed by subsequent edicts of the Praetor. Ulpian states that disreputable persons could not bring an action for *dolus malus,* the reason being that if successful, such an action would result in *infamia* for the defendant.[14] It seems to follow that a person in *infamia* would not be able to bring any of the *actiones famosae. Infames* were among those banned from appearing as a witness to formal private law acts, such as the opening of a *depositum.*[15] Most strikingly, *infames* were often considered intestabilis: originally this simply meant they were barred from witnessing a testament, but by the time Gaius was writing, those who had been made *intestabilis* were

[8] Greenidge, A.H.J. (1894). *Infamia: Its Place in Roman Public and Private Law.* Oxford: Clarendon Press. pp.39-40. Cf. McGinn, Thomas A.J. (1998). *Prostitution, Sexuality and the Law in Ancient Rome*. Oxford University Press. pp.65ff.
[9] Cicero. *Pro Quinctio.* 5.50.
[10] D.50.13.5.1-2. Translation by Scott.
[11] Greenidge. *Infamia.* p.40.
[12] See for example D.47.7.1; D.47.11.6.
[13] Greenidge. *Infamia*. p.158.
[14] D.4.3.11.
[15] D.16.3.1.36.

also restricted from making a will.[16] This would have seriously disrupted the transmission of wealth in commercial families. The consequences of *infamia* therefore tend to deprive an individual of their ability to engage in public and commercial life. This was a more severe prospect for an *honestior;* the public and civil law disabilities of *infamia* would mean much less to a *humilior* with little prospect of holding public office or engaging in high-value commercial transactions. It is not the intention of this thesis to undermine the significance of *infamia* as a criminal penalty, but rather to highlight that its impact would be relative to the status of the individual: a *humilior* would participate less in civic and commercial life than an *honestior* and therefore have less to lose from the denial of this participation. It was also possible to recover from *infamia*; often it functioned as only a temporary bar from public life, which allowed the elite to enforce standards of moral behaviour more effectively among themselves via the law.

The legal privileges of *honestiores* applied not only to the substance of the criminal penalties they faced but also the forum where these penalties were decided. For example, Ulpian reports that that local decurions could not be sentenced by governors for serious crimes:

> Si quidem in insulam deportandum adnotaverit praeses provinciae et imperatori scripserit, ut deportetur, videamus, quando sit provocandum, utrum cum imperator scripserit an cum ei scribitur? Et putem tunc esse appellandum, cum recipi eum praeses iubet sententia prolata imperatori scribendum, ut deportetur. […] Simili modo et in decurione erit probandum, quem punire sibi praeses permittere non debet, sed recipere eum in carcerem et principi scribere de poena eius.
>
> When the Governor of a province notifies someone that he shall be deported to an island, and writes to the Emperor in order that he may be deported, let us see when an appeal should be taken, whether at the time the Governor wrote to the Emperor, or when the latter wrote to him. I would think the appeal should be made when the governor orders the condemned to be taken into custody, having given sentence that his name must be submitted to the emperor for deportation. […] The same method is to be approved in the case of a decurion, whom a governor ought not to allow himself to punish; but he should put him in prison and write to the Emperor about his punishment.[19]

The intervention of the Imperial chancelry in the case of decurions reflects the importance of the decurions in maintaining an "intermediate layer" of influence in which they both held respect in the local community and advertised their participation in and loyalty to the Roman

[16] D.18.1.26; D.18.1.18.
[19] Ulpian. D.48.4.1.praef. Translation in Watson.

elite.[20] Imperial intervention can also be seen where a decurion is wrongly punished: if a decurion was condemned to the mines, or sentenced to death by hanging or burning alive, the case had be remitted to the Emperor so that he could decide on the way forward.[21] The official who initially made the sentence was not permitted to alter it; by interfering in the privileges of a decurion they lose their right even to make good their mistake. It is also the emperor who chooses whether to allow the decurion to walk free – even after a conviction – or amend their sentence to a punishment more fitting of their social class. It is likely that the choice would have rested partly on how far the error threatened the maintenance of decurion loyalties to Rome. The privileges available to decurions therefore operate on two levels: they are granted protection from the worst punishments, particularly corporal or capital penalties, while also receiving more direct protection from the Imperial chancelry at every stage in the criminal process.

It is important to note that the legal and non-legal privileges enjoyed by *honestiores* during this period cut across the distinction between citizens and peregrines. This is because the system of social respect that had developed in the provinces did not correspond to the mechanisms by which citizenship was extended outside the city of Rome. Gaius highlights that decurions would only become citizens on their election if their town had the status of Greater Latinity:

> Quod ius quibusdam peregrinis civitatibus datum est vel a populo Romano vel a senatu vel a Caesare; aut maius est Latium aut minus; maius est Latium, cum et hi, qui decuriones leguntur, et ei, qui honorem aliquem aut magistratum gerunt, civitatem Romanam consecuntur; minus Latium est, cum hi tantum, qui vel magistratum vel honorem gerunt, ad civitatem Romanam perveniunt. Idque conpluribus epistulis principum significatur.
>
> This right has been granted to certain foreign States, either by the Roman people, or by the Senate, or by the Emperor. The right of Latinity is either greater or less. Greater Latinity is that of those who are elected decurions or administer any honorable office or magistracy, and by this means obtain Roman citizenship. The lesser right of Latinity is where only those who administer the office of magistrate or any other honorable employment attain to Roman citizenship; and this difference is referred to in many Imperial rescripts.[22]

Greater Latinity appears to have been granted only on an ad hoc basis. The “social distinctions” between decurions and the general population, in the form of access to material

[20] Edmondson. *A Companion to the Roman Empire.* pp. 253-255.
[21] Ulpian. D.48.19.9.11. Translation in Watson.
[22] Gai.Inst. 1.96. Translation in Gordon and Robinson.

goods and legal privileges, would be retained even in those towns even where not all decurions were citizens. The legal privileges of *honestiores* did not rest on republican rights of citizenship, but rather on their practical ability to exercise power in the agrarian economy and within the urban governance of the many smaller towns which littered the provincial countryside. As the legal privileges of *honestiores* expanded and came to be articulated by the jurists, the practical enforceability of legal privileges owed to citizens *qua* citizens was simultaneously in decline.

From the later part of the second century CE onwards, specific references to the privileges of individual groups, such as decurions, senators and equestrians, start to appear alongside a more generalised binary distinction between men of the "upper class" (*honestiores*) and men of the "lower class" (*humiliores*). For example, Papinian cites with approval an Imperial rescript issued by the chancelry of Antoninus Pius, who reigned from 138 to 161 CE:

> Nam et divus pius in haec verba rescripsit apollonio: 'ei, qui uxorem suam in adulterio deprehensam occidisse se non negat, ultimum supplicium remitti potest, cum sit difficillimum iustum dolorem temperare et quia plus fecerit, quam quia vindicare se non debuerit, puniendus sit. Sufficiet igitur, si humilis loci sit, in opus perpetuum eum tradi, si qui honestior, in insulam relegari'.
>
> Pius sent a rescript in these words to Appollonius: 'It is possible to remit the aggravated death penalty to a man who does not deny that he killed his wife whom he had caught in adultery, since it is extremely difficult to temper one's just grief, and he is to be punished because he did more [than he should have done] rather than because he ought not to have avenged himself. It will be enough, therefore, if he be of low rank, for him to be handed over to forced labour in perpetuity or, if of higher status, to be relegated to an island'.[23]

This is a text dealing with the penalty for killing an adulterous woman, which is attenuated on account of the "just grief" of her husband. The use of language here is instructive. Relegation is reserved not for decurions, priests or any other specific category of person, but rather for an *honestiore* or any "higher status" man. Meanwhile, the more severe penalty of forced labour was handed down to *humilis loci sit,* or a man of "low rank". This lower-ranked position was defined in a residual way: anyone who was not entitled to the range of elite penalties associated with an *honestiore* would face the more severe penalty by default. Convict labour was usually in the *metallum:* a term which could apply to mines, quarries or in

[23] Papinian. 48.5.39.8. Translation in Watson.

some cases salt-works and lime-kilns.[24] The working conditions in these places meant that death would often follow after a relatively short period of labour. Tertullian in his *Apologeticus*, written in 197 CE, places special emphasis on the fact that convict labour was usually preceded by "tearing with hooks" and other forms of severe physical punishment. Hard labour in the *metallum* was regarded by convict labourers as an extension of this punishment by other means.[25] Millar notes that custodial penalties of this type were always present for the enslaved population in the Empire but are only used routinely for free persons – particularly for Christians and other religious minorities - from the second century CE onwards.[26] However, he does not see an economic rationale for this until the late third century CE, when convict labourers were routinely sent to industrial-scale *pistrina,* or mills, or to state-owned factories. Before then it was deployed "simply where degrading or intensely laborious work was available"[27] and its function was to underscore the lower-class status of the convict.

This tendency to counterpose lighter penalties for higher-ranked men against increasingly harsh physical penalties for the rest of the Imperial population, free or enslaved, reaches its high watermark in the Pauli Senentiae, where the terms *honestiores* and *humiliores* are routinely used in binary opposition to each other. One example can be seen in the penalty for violating tombs:

> Rei sepulchrorum uiolatorum, si corpora ipsa extraxerint uel ossa eruerint, humilioris quidem fortunae summo supplicio adficiuntur, honestiores in insulam deportantur. alias autem relegantur aut in metallum damnantur.
>
> The guilty of violating tombs, if they remove the bodies or scatter the bones, will suffer the supreme penalty if they be of the lower orders; if they be more reputable, they are deported to an island.[28]

Another example can be found at *Pauli Sententiae.* 5.22.5., which concerns the administration of an abortifacient or aphrodisiac. Even where the convicted had no guilty intention, they will still be condemned *in metallum* if they belonged to the lower ranks or relegated to an island with forfeiture of a part of their property if they belong to the higher ranks.[29] There has been an ongoing debate over the date and provenance of the *Pauli*

[24] Ulpian. 48.9.8.8-10. Translation in Watson.
[25] Tertullian. Apologeticus. 12.3-5. Translation in Glover, T.R. and Rendall, G.H. (1931). *Tertullian, Menucius Felix. Apology. De Spectaculis. Minucius Felix. Octavius.* Cambridge, MA: Harvard University Press. Loeb Classical Library 250.
[26] Millar, F. (1984). "Condemnation to Hard Labour in the Roman Empire, from the Julio-Claudians to Constantine". *Papers of the British School at Rome.* Vol. 52. pp.124-147.
[27] Millar. "Condemnation to Hard Labour in the Roman Empire". p.146.
[28] *Pauli Sentantiae.* 5.19A.1. =47.12.11. Translation in Watson.
[29] *Pauli Sententiae.* 5.22.5. =48.19.38.5. Translation in Watson.

Sententiae. It was considered the product of the Severan jurist Paul in an Imperial constitution of Constantine[30] and later considered part of Paul's works for the purposes of the Law of Citations under Valentinian.[31] This helped to ensure its transmission in post-classical collections of Roman legal material, notably the *Lex Romana Visigothorum*. Many modern-day scholars have contested Paul's authorship and proposed a variety of alternatives, with most dating the *Pauli Sententiae* to the late third century.[32] This thesis adopts the view taken by Liebs, who has recently reconstructed the *Pauli Sententiae* based on its surviving sources*,* that they were very likely not written in the Severan period, although it is clear that they were intended to mirror the structure and style of Paul's work. They were more likely produced by a single author in North Africa in the very late third century, possibly for private educational purposes, then later adapted for public use. Liebs bases this assessment on features of the language as well as references to legal institutions that are incongruous with the Severan period.[33] The *Pauli Sententiae* can therefore be said to give us a window into the legal practice of the late third century. Again, the use of language is instructive. In this later collection there are no references to decurions or any specific office meriting legal privilege: instead, the dual-penalty system relies on a binary distinction between *honestriores* and *humiliores* which is never defined in the text, but rather left to the common social understandings of the reader. One possible reason for this is that the specific office of decurion was no longer a desirable one: following the disruption and de-urbanisation of the third century, the system of urban intra-elite competition which had made it an attractive office was no longer clearly present, leaving decurions with only the duty to guarantee revenues.

Many of these the *honestiores* mentioned in the *Pauli Senentiae* would have been landholders on increasingly large *massa* estates in the provinces. Part One outlined that the number of agricultural sites contracted significantly across the Empire in the second and third centuries CE. This contraction is explained partly by a falling rural population and the growing volume of *agri deserti,* or deserted land, following the immediate economic disruption of the Antonine Plague. However, the more powerful explanation lies in changes to the agrarian structure of the Empire. Many of the *massae* which appeared in the third century aimed to be self-sufficient, as it became more difficult to import goods. They were

[30] CTh.1.4.2. Translation in Pharr, C., Davidson, T.S. and Pharr, M.B. (2001). *The Theodosian Code and Novels, and the Sirmondian Constitutions.* Clark, NJ: The Lawbook Exchange.
[31] CTh.1.4.3. Translation in Pharr.
[32] See for example Levy, E. (1930). "Paulus und der Sentenzenverfasser". *Z. Sav. St. RA.* Vol. 50. pp.272-294; Fögen, M.S. (1993). *Die Enteignung der Wahrsager: Studien zum kaiserlichen Wissensmonopol in der Spätantike.* Frankfurt am Main: Suhrkamp; Ruggiero, I. (2017). *Researches on the* Pauli Sententiae*.* Milan: Giuffrè.
[33] Liebs, D. (1995). "Die pseudopaulinischen Sentenzen. Versuch einer neuen Palingenesie". *Zeitschrift der Savigny Stiftung für Rechtsgeschichte. RA.* Vol. 112. pp.151-170.

generally owned by wealthy families who were in a position to buy up multiple *fundi* around them, thus creating conglomerates which could compete with the *civitas* and even the Imperial chancelry for the governance of provincial communities. It is argued here that from the third century, these larger landholders emerged as the most prominent type of *honestiore* in the Roman provinces and it was to them that the Imperial chancelry granted legal privileges in order to secure revenue in the difficult economic conditions following the Antonine Plague. The fact that landholding on this scale was a focus for political and social influence within the local community is reinforced by the fact that tenants on the *massae* were much less likely to be free tenants than tenants in the smaller, more humble *fundi.* The distinction between free and unfree tenants mapped on to non-residential and residential tenants. If a tenant had even a small amount of land of their own, they would be registered with the *civitas.* If they were a residential tenant – as most tenants on the *massae* were – they would be registered on the estate.[34] Many of the *massae,* and some of the larger *fundi,* therefore developed urban centres of their own. As the internal security of the Empire weakened during the third century, some of these urban centres fortified and developed their own standing patrols, funded by the landholder and not by public authorities.[35] Kehoe documents that particularly in North Africa, the *massae* became centres of political influence which the Imperial chancelry increasingly relied upon for revenue, but was nevertheless in tension with.[36]

Evidence of this tension can be seen in the attempts of the Imperial chancelry to suppress private prisons. There had already been an attempt by Hadrian in the earlier part of the second century CE to suppress the *ergastula,* or prison workhouses for slaves in which free persons were sometimes illegally detained, usually because they owed debts to the owner of the prison.[37] However, it appears these measures were not sufficient to suppress private imprisonment in the longer term. Robinson documents several measures from the Imperial chancelry over the course of the later second and third centuries CE which attempted – with only mixed success - to suppress *carceres privatus.* She concludes that these institutions were in widespread use in the rural provinces and associated with a private criminal jurisdiction for the larger *massae* estates.[38] There has recently been a debate on various aspects of Robinson's argument. Firstly, it is contested whether the Imperial chancelry did in fact try to resist the use of private prisons, or whether their rhetorical

[34] Jones, A.H.M. (1986). *The Later Roman Empire, 284-602: A Social, Economic, and Administrative Survey.* Baltimore, MA: John Hopkins University Press. p.798.
[35]Jongman. "Reconstructing the Roman Economy". pp 75-100.
[36] Kehoe, D. (1988). *The Economics of Agriculture on Roman Imperial Estates in North Africa.* Gottingen: Vandenhoeck and Ruprecht. pp.202-205.
[37] Buckland, W.W. (2000). *The Roman Law of Slavery: The Condition of the Slave in Private Law from Augustus to Justinian.* Clark, NJ: Lawbook Exchange. p.37.
[38] Robinson, O. (1968). "Private Prisons". *RIDA.* Vol. 24. pp.327-388.

objections co-existed with a willingness to use *carceres privatus* as a form of "semi-public" criminal jurisdiction, relieving the pressure on Imperial resources.[39] Secondly, it has been questioned whether the *carceres privatus* performed a criminal function at all, or whether – like the earlier *ergastula* - they were primarily intended to enforce debts or other private financial obligations.[40] Finally, it has been questioned whether the term *carcered privatus* consistently and exclusively referred to a physical space for the confinement of prisoners. Hillner argues that it was a looser term intended to encapsulate the custodial powers that private landholders could legitimately exercise in the management of their estates.[41] However, it is not necessary for this thesis to adhere to all aspects of Robinson's original argument in order to make the point that the *carceres privatus* represented an encroachment of the *massae* on coercive functions which in the earlier Principate had been more routinely performed by Imperial officials. At the very least they serve as evidence that the *massae* in the provinces had become focuses of political community, in many cases of greater importance than urban political centres, in a way the smaller *fundi* of the earlier Principate never did. It would follow that the legal privileges extended to these landholders by the Imperial chancelry would reflect both their fiscal importance and the need to maintain their allegiance.

Section 5.2: The Structure of Civil Procedure

At this stage it must be asked to what extent Roman law served the interests of *honestiores* to the exclusion of the general population. In all pre-modern legal systems, both the procedure and substance of the law is heavily influenced by elite interests and Roman law was no different in this regard. However, as McGinn points out, this raises an important question: "how were the Romans able to manage a system of such drastic socioeconomic inequality so successfully for so long?".[42] His tentative answer to this query comes in two parts. Firstly, the "elite", for the purposes of Roman law, did not only embrace the top of Roman society; it also included a wide range of sub-elites. Secondly, the interests of the elites often themselves compelled some recognition of the needs of the general population, especially where they were engaged in agriculture or other activities which were essential to elite wellbeing.

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[39] Remondon, R. (1974). "Les contradictions de la societe egyptienne ä l'epoque byzantine". *Journal of Juristic Papyrology.* Vol. 18. pp.17-37.
[40] Krause, J. (1996). *Gefängnisse im Römischen Reich.* Stuttgart: Franz Steiner Verlag. p.60.
[41] Hillner, J. (2015). *Prison, Punishment and Penance in Late Antiquity.* Cambridge: Cambridge University Press. pp.172ff.
[42] McGinn, T.A.J. (2017). "Cui Bono? The True Beneficiaries of Roman Private Law". In McGinn, T.A.J. and Kehoe, D. (eds). *Ancient Law, Ancient Society.* Ann Arbor, MI: Michigan University Press. pp.133-166 at 133.

Roman Legal "Inequality"

The extent to which Roman law tilted in favour of the elites is the subject of numerous complaints in ancient literary sources.[43] Part of this derived from the quasi-private nature of civil litigation. One difficulty was the lack of any appeal against the verdict of a *iudex* and only a handful of mechanisms by which the propriety of the decision-making process could be challenged. This was because the iudex was not regarded as a magistrate, but rather as "an arbitrator to whom the litigants had submitted their dispute".[44] It is therefore unlikely that the right of *appellatio* applied to civil cases in the same was as it did to the criminal jurisdiction of a magistrate. It was possible for an unsuccessful defendant to challenge the *actio iudicati* brought to execute the judgment; in some cases, this might result in the verdict being impugned. There were also a range of circumstances in which *restitutio in integrum* could be brought to annul the verdict – for example, where the *iudex* had been intimidated, where a witness had been bribed, or where the claimant had demanded more than had been proved in court.[45] While *restitio in integrum* was not formally reformatory, its practical consequence was nevertheless often a new trial. A formal right of appeal did not develop until the early Imperial period, although it was already common by the time of Augustus, who could not deal with all appeals personally.[46] Another difficulty was the intransigent debtor, who was able to use his wealth or social influence in order to delay or escape payment. Some limited redress was provided for this by the *missio in bona* and *missio in possessionem,* whereby the Praetor would grant, respectively, either individual items of the debtor's property or their whole estate if these were already in the possession of the creditor. It should be noted the degree to which these remedies relied upon litigants proactively defending their rights and, in some cases, resorting to self-help with only the retroactive approval of the Praetor. Some additional protections for weaker litigants under the formulary procedure were culturally embedded rather than legal. One of these was the "web of client-patron relationships that offered protection to many of the less-advantaged in Roman

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[43] Petron. *Satyricon.* 14.2. On which see Norr, D. (1974). *Rechtskritik in der romischen Antike.* Munich: CH Beck. p.150. See also Kelly, J.M. (1966). Roman Litigation. Oxford: Clarendon Press. pp.31-68; Garnsey. *Social Status and Legal Privilege*. pp.207-13; MacMullen, R. (1988). Corruption and the Decline of Rome. New Haven, CT: Yale University Press. pp.87-96.

[44] Jones, A. H. M. (1955). "Imperial and Senatorial Jurisdiction in the Early Principate". *Historia.* Vol. 3(4). pp.464-488 at 465. See also Frier, B. (1985). *The Rise of the Roman Jurists.* Princeton, NJ: Princeton University Press. pp.227-30; Licandro, O. (1999). *In magistrate damnari: Ricerche sulla responsabilitd dei magistral romani durante lesercizio delle lorofunzioni.* Turin: Giappichelli. pp.77-136; Metzger, E. (2013). "An Outline of Roman Civil Procedure". *Roman Legal Tradition.* Vol. 9. pp.1-30.

[45] Kelly. *Roman Litigation.* pp.20-30.

[46] The ability to hear appeals was either granted to Octavian by the Senate in 50 BCE (Dio Cassius. *History.* LI. 19.5-7) or was granted in 19 BCE through the *imperium consulare* (Jones. "Imperial and Senatorial Jurisdiction". pp.471-472).

society"[47], although this would have been conditional on a client remaining loyal. It was also possible for misbehaving litigants to suffer a reduction in status, including censorship or Praetorian *infamia.* However, evidence is weak on how far such cultural factors would have mediated the outcome of a highly asymmetrical trial. Kelly does not afford much significance to them.[48]

Metzger has argued that the private trial itself could be structured in such a way as to protect the interests of weaker litigants: "instead of using rules as such, Roman law supervised the conduct of trials by *managing the judge*" [emphasis Metzger].[49] This management was done mainly via the precise instructions to the *iudex* contained within the formula, which control what facts or legal argument he is permitted take notice of in his verdict. Failure to follow these instructions could make the judge personally liable, either under the edictal prohibition against *iudex qui litem suam facit*[50] or under the *lex Iulia de iudiciis privatis*, which Metzger characterises as an Augustan "Judicature Act".[51] Two key examples of how this indirect management of the private trial took place can be discussed here. The first is the duty not to give a verdict if this would be inappropriate given the circumstances of the case. The best-known example was that a *iudex* could not give a verdict if one of the litigants was absent due to an illness.[52] More recently, the discovery of the *lex Irnitana,* a town charter for a *municipia* in Hispania which replicates most of the civil procedure rules as though a trial was being conducted in the city of Rome, has provided further information.[53] Chapter 91 offers the following parenthesis on a *iudex* giving verdicts inappropriately:

> Itaque iis omnibus […] diem diffindendi iudicandi in foro eius municipi aut ubi pacti erunt dum intra fines eius municipi utique ex isdem causis dies diffindatur diffissus sit utique si neque diffissum e lege neque iudicatum sit per quos dies quoque loco ex hac lege

[47] Suetonius. *Augustus.* XXXIII.3.
[48] Kelly. *Roman Litigation.* pp.20-30.
[49] Metzger, E. (2012). "Remedy of Prohibition against Roman Judges in Civil Trials". In Brand, P. and Getzler, J. (eds). *Judges and Judging in the History of the Common Law and Civil Law: From Antiquity to Modern Times.* Cambridge: Cambridge University Press. pp.177-91 at 177.
[50] Inst. 4.5.pr. MacCormack, G. (1982). "The liability of the judge in the republic and principate" In Temporini, H. and Haase, W. (eds). Aufstieg und Niedergang der römischen Welt. Berlin: de Gruyter. pp.3-28.
[51] Metzger. "Remedy of Prohibition". p.181.
[52] Julian. D.42.1.60.
[53] *Lex Irnitana.* CILA, II, 4. n. 1201. On which see González, J. (1986). "The lex Irnitana: A new copy of the Flavian Municipal Law", translated in Crawford M. *Journal of Roman Studies.* Vol. 76. pp.147–243; Lamberti, F. (1993). "Tabulae Irnitanae". In *Municipalità e 'ius Romanorum'*. Naples: Jovene; Metzger, E. (2013). "Agree to Disagree: Local Jurisdiction in the lex Irnitana".In Burrows, A. Johnston, D. and Zimmermann, R. (eds). *Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry*. Oxford: Oxford University Press. pp.209-212; Terpstra, T. (2013). *Trading Communities in the Roman World: A Micro-Economic and Institutional Perspective*. Leiden: Brill. pp.46-47.

> iudicari licebit oportebit, iudici arbitrove lis damni sit […] siremps lex ius causaque esto atque uti si praetor populi Romani inter cives Romanos iudicari iussisset …]
>
> [So in all those matters [i.e. in the private lawsuits treated in this chapter], for dividing the day and for judging in the town forum (or where the parties agree, so long as it is within the town boundaries), the statute, law, and position shall be as if the praetor of the Roman people had ordered adjudication between Roman citizens, so that the day shall be divided, or shall have been divided, for the same reasons [i.e. as obtained in Rome], and so that if the day has not been divided according to the statute and judgment has not been given on those days and in the place which, under this law, is right and appropriate for adjudication, the suit may be against the judge or arbiter for the loss ...][54]

What this parenthesis shows is, firstly, that multiple causes could exist for which a trial had to be adjourned without a verdict.[55] "Causes" are referred to here in the plural. It is also suggested by *diffissum e lege* that these causes may be enumerated somewhere; Metzger suggests the *lex Iulia de iudiciis privatis,* although there is no direct textual evidence to support this.[56] Secondly, it clarifies the basis of the liability for the *iudex.* In a civil trial he must do one of two things: give a verdict or adjourn the trial for one of the statutorily approved causes. If he fails to do either of these things, he may face an action from the litigants, just as a *iudex* in Rome would. There is flexibility for the *iudex* to make a mistake and rectify it by reconvening later. As Metzger notes, the "truly disobedient judge", in the sense of disobeying his formulary instructions, is not one who initially adjourns a trial in error, but rather one who "gives no valid judgment and cannot justify his disobedience by pointing to an adjournment for cause".[57]

The second example of how a private trial could be managed was through suppressing vexatious behaviour of the litigants themselves. Gaius outlines some of these measures in Gai.Inst.171. The text is poorly preserved, but Centola has proposed the following reconstruction:

> *Nunc admonendi sumus, ne facile homines ad litigandum procedant, temeritatem tam agentium quam eorum cum quibus agitur modo* pecuniaria poena modo iurisiurandi religione *modo metu infamiae coërceri*; eaque praetor *quoque tuetur. Et ideo in edicto adversus infitiantes ex quibusdam* causis dupli actio constituitur, veluti si iudicati aut

[54] *Lex Irnitana.* CILA, II, 4. n. 1201. [91]. Translation in Metzger. "Remedy of Prohibition". p.185.
[55] There is an alternative view, which is that a verdict had to be given unless the *iudex* could provide an approved excuse. See Wolf, J.G. "Diem diffindere: Die Vertagung im Urteilstermin nach der Lex Irnitana". In McKechnie, P. (ed). *Thinking Like a Lawyer.* Leiden: Brill. pp.15-41.
[56] Metzger. "Remedy of Prohibition". p.185. See also Mantovani, D. (2001). "La diei diffissio nella lex Irnitana". In *Iuris Vincula: Studi in onore di Mario Talamanca*. Naples: Jovene. pp.245-247.
[57] Metzger. "Remedy of Prohibition". p.187.

> depensi aut damni iniuriae aut legatorum per damnationem relictorum nomine agitur; ex quibusdam causis sponsionem facere permittitur, veluti de pecunia certa credita et pecunia constituta [emphasis Centola].[58]
>
> For the purpose of avoiding vexatious litigation, the parties are sometimes deterred by pecuniary penalties, and sometimes by an oath which is imposed by the Praetor. In certain cases, an action for double damages is brought against a defendant; for instance, in the collection of a judgment debt, or for money expended for a principal, or for unlawful damage to property, or where proceedings are instituted to collect legacies left by condemnation. In some instances, the deposit of a forfeit is permitted to be made, for example, in an action for a certain sum of money which has been lent, or to collect a debt formerly incurred.[59]

Gaius outlines three main control measures here: pecuniary disincentives; the *iusiurandum calumniae,* a state-backed oath; and the *sponsio judicialis*, a wager on the outcome of the litigation. There is an important division here between those penalties which are intended to act solely as a financial disincentive, and those which are intended to act mainly upon the social status rather than the finances of the litigants. As Centola notes, “da un lato abbiamo alcuni, ai quali è connessa una pena pecuniaria, aventi rilevanza su un piano strettamente giuridico, dall'altro vi è il iusiurandum calumniae che ha una rilevanza notevole, soprattutto, su un piano religioso e morale”.[60] The *iusiurandum calumniae* was therefore a legal institution with extra-legal consequences. A related point is that these control measures operate either on the level of behaviour or intent. In the context of a vexatious denial of a claim, Gaius uses both *calumnia* and *infitiato.* These have technical meanings and should not be collapsed into one another. Centola distinguishes between *infitiato* as a specific behaviour a litigant – the denial of a claim – and *calumnia* as the oppressive attitude by which a defendant contests can action even though he is aware of its validity. The *iusiurandum calumniae* is the only measure for control of vexatious litigation which acts directly and specifically upon the *calumnia* of the defendant. The pecuniary disincentives which Gaius discusses, including double damages for certain actions, are directed instead at *infitiato*; they are intended to make the defendant think twice before taking the procedural steps to deny a claim. Meanwhile, the *sponsio* has a dual function. It clarifies the potential cost trade-offs associated with *infitiato,* but also brings into play the relationship of trust between the parties; entering into a wager with an oppressive attitude would bring dishonour

[58] Centola, D. A. (2012). “La disciplina della condotta vessatoria delle parti nel processo romano”. *Teoria estoria del diritto private.* Vol. 5. pp.1-78 at 34.
[59] Gai.Inst.171. Translation in Gordon and Robinson.
[60] Centola. “La disciplina della condotta vessatoria delle parti nel processo romano”. p.39.

on the defendant.[61] It is therefore possible to identify a spectrum of control measures against vexatious litigation: at one end are purely financial disincentives against certain procedural behaviours, while at the other are culturally embedded expectations against certain harmful intents.

Despite the limited and fragmented nature of these protections for weaker litigants, a scholarly consensus is emerging that Roman legal policy did sometimes tend towards the effacement of social and economic differences. It is important here to draw a distinction between a legal system which seeks to place non-elite litigants on an equal plane to elite litigants and one which simply undergoes procedural changes to accommodate their presence. McGinn summarises some of the most important contributions in this regard.[62] The first of these is Kehoe's study of *locatio conductio* between the second and fourth centuries CE, which stresses the importance for legal policy of the indispensability of small-scale cultivators of the land. Appropriately skilled *coloni* were scarce and if the land went uncultivated this would threaten the food supply.[63] As a result, Imperial policy was designed to protect the interests of *coloni* in the Imperial provinces even when these contradicted the economic interests of their *conductores,* who in Kehoe's view collected rent on behalf of the Imperial chancelry but did not sub-let the land. This leads Kehoe to conceive of *locatio conductio* as a relational contract in which the *conductores* were concerned to lay down appropriate incentives to maximise the efficiency of the *coloni* while also keeping the land so far as possible in productive use.[64] In a relational contract, at least some of the duties and rights of the parties arise from a continually renegotiated relationship between them and not solely from their express obligations. This is not to say that the formal terms of the contract were irrelevant: "on the contrary, the formal terms of the contract and the existence of viable institutions to enforce them provided an incentive for landowners to reach mutually satisfactory resolutions of disputes".[65] The formal terms of the contract therefore provided a system of rules for allocating resources in the event that the relationship between the parties had broken down altogether.

Several conclusions can be drawn from Kehoe's work. Firstly, even in very asymmetrical relationships, the more economically powerful party would have good reasons to continually adjust the terms of the contract in order to create a more mutually beneficial situation. Insofar as the law served the interests of the elite, this interest was conceived broadly so as to account for the dependence of the elite on a larger population of small cultivators. Secondly, limited safeguards for weaker litigants that existed within the private trial therefore

[61] Centola. "La disciplina della condotta vessatoria delle parti nel processo romano". p.47.
[62] McGinn. "Cui Bono?". pp.134-142.
[63] Kehoe. *Law and the Rural Economy.* p.54.
[64] Kehoe. *Law and the Rural Economy.* p.97-128.
[65] Kehoe. *Law and the Rural Economy.* p.101.

conceal to some degree the extent to which dispute resolution took place outside of trial. There are however some limits to this analysis. If the relationship between the parties did break down irretrievably, the Imperial chancelry would often apply conventional contractual rules that did not reflect any private understandings contained within the relationship. This tended to work against the interests of the economically less powerful party. Kehoe gives the example of D.19.2.15.5, in which we are told that Antoninus Pius rejects a tenant's claim for rent remission based on the age of his vines. It is likely that the tenant had been involved in a relational contract in which it would have been mutually beneficial for both *conductor* and tenant to negotiate the cost of renewing the vines over time. However, as the relationship has now collapsed, the Imperial chancelry applies conventional rules on the allocation of risk which do not capture any private understandings for the renewal of vines the parties might once have had.[66]

The second contribution highlighted by McGinn is Bannon's work on the law of property in the early Principate. Bannon highlights an Imperial constitution which most likely involved the general Statilius Taurus, who served under the Emperor Augustus, or one of his sons.[67] The case concerned a servitude which ran over Taurus's land in Etruria (modern-day northern Italy), which permitted a local group of who channelled water from his land. This is therefore an example of highly asymmetrical litigation, with the defendant well connected to the highest level of the Imperial government, while the petitioners had no more than local significance. The Emperor's response, which was given to Taurus rather than the petitioners, is recorded in the Digest:

> Et Atilicinus ait Caesarem Statilio Tauro rescripsisse in haec verba: "Hi, qui exfundo Sutrino aquam ducere soliti sunt, adierunt me proposueruntque aquarn, qua per aliquot annos usi sunt exfonte, qui est in fundo Sutrino, ducere non potuisse, quod fons exaruisset, et postea ex eo fonte aquamfluere coepisse: petieruntque a me, ut quod ius non neglegentia aut culpa sua amiserant, sed quia ducere non poterant, his restitueretur. quorum mihi postulatio cum non iniqua visa sit, succurrendum his putavi. itaque quod ius habuerunt tunc, cum primum ea aqua pervenire ad eos non potuit, id eis restituiplacet.
>
> And Atilicinus says that the emperor composed a rescript to Statilius Taurus in the following words: "These men who have been accustomed to channel water from the estate at Sutrium approached me and set forth the following situation of fact. It had become impossible to channel the water from the source on the estate at Sutrium that they had made use of for a number of years because the source had dried up, and

[66] Kehoe. *Law and the Rural Economy.* p.101-103.
[67] Bannon, C. J. (2009). *Gardens and Neighbors: Private Water Rights in Roman Italy.* Ann Arbor, MI: Mighican University Press. pp.125-137.

> afterward water again began to flow from that source. And so they requested me to restore to them that right which they had lost not through negligence or their own fault but because they were physically unable to channel the water. Since their request did not seem unjust to me, I thought that they ought to be helped. So I have decided that the right be restored to them that they held at the point in time when access to this water first became impossible for them.[68]

As Bannon points out, it is possible to find doctrinal reasons to either justify or criticise this decision. For example, it could be justified on the basis that the petitioners were not fault for the loss of access to the water supply on Taurus's land. Capogrossi Colgnesi has also argued in his discussion of the same case that the petitioners were treated as though they had suffered a loss of rights; the rigor of the *Ius civile* is overcome by equitable considerations.[69] On the other hand, the Imperial chancelry has chosen to set aside the general principle that servitudes must be continually used. The choice of doctrinal solution, Bannon suggests, may therefore rest on a pragmatic use of legal-economic policy. There may have been a long-standing custom in favour of sharing access to water within Etruria at that time. If this were the case, upholding a long-recognised rule would serve to reduce transaction costs by lowering uncertainty over access to resources.[70] McGinn suggests that Kehoe and Bannon's position can be seen in light of one another as examples of a "beneficent ruler ideology" which developed over the course of the Principate.[71] In this way, the Imperial chancelry was able to serve two functions. Firstly, it could solve collective action problems in the countryside by preserving rules of common benefit which had developed in specific localities, even when wealthy or powerful individuals sought to overcome them. Landlords and tenants were expected to adhere to the obligations which usually arose from the mutual trust required in their relationship with one another. Likewise, neighbours were expected to adhere to locally developed rules for the sharing of resources. At the same time, the Imperial chancelry was able to package its intervention in these cases as examples of the Emperor's benevolent attitude towards the peoples he ruled. This was related, in McGinn's view, to the attempt by successive Emperors to present themselves as successors to the tribunician power and therefore as heirs to the functions of the tribunes.[72]

Meanwhile, there is also some evidence to suggest that the there was not a sharp binary between elite litigants and the rest of the population, but rather that the differences were

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[68] Ulpian. D.8.3.35. Translation in Watson.
[69] Capogrossi Colgnesi, L. (2011). "Le servitu prediali: Interessi contrastanti e cooperazione tra vicini." *BIDR*. Vol. 1. pp.409-19.
[70] Bannon. *Gardens and Neighbors.* pp.133-135.
[71] McGinn. "Cui Bono?". p.140.
[72] McGinn. "Cui Bono?". p.26. See also Gilbert, R. (1976). *Die Beziehungen zwischen Princeps und stadtromischer Plebs imfriihen Principat.* Bochum: Studienverlag Brockmeyer. pp.136-151.

gradual. As noted in the Introduction, Connolly has highlighted that the individuals most likely to petition the Imperial chancelry during the reign of Diocletian were of the "middling sort"; this meant they "had enough money and property that they could and would undertake legal transactions, but not enough money that they could easily consult a lawyer and subsequently retain him for a court case".[73] Connolly shows that of the petitioners whose identities have been preserved in the *Codex Hermogenianus,* few had an obviously elite status.[74] Several specific groups can be identified. One was veterans. This group tended to have a small amount of property and appear to have routinely entered the legal system in order to defend their interests. Some of the best evidence for this comes from Roman Egypt, where they frequently appear as litigants in surviving papyri.[75] Another discernible group are those engaged in commerce, including ex-slaves. The socio-economic status of such merchants varied greatly, although they all shared in the condescension of the landed upper elite. Whether a merchant could be considered to belong to the lower reaches of the elite may have depended partly on the status of the urban locality in which they did their business. It also depended on whether they had been subject to shaming treatment. While Callistratus states that a merchant who has been beaten with whips should not be excluded from the local *ordo,* this clearly reflected the growing difficulties of recruiting *decuriones;* the preference would be for more honourable men to assume public office if they were locally available.[76]

Two observations should be made here. Firstly, the boundaries of the "middling sort" are difficult to define. This is particularly since the case of Taurus and his neighbours demonstrates that even when individuals were unlikely to act by themselves, they might group together in order to petition the Imperial chancelry. The second is that the petitions for which we have surviving evidence may not be a representative sample of the total number dealt with by the Imperial chancelry. Most of the surviving collections, particularly the *Codex Hermogenianus,* were selected for their inherent legal interest, as an aid to practitioners or students or law. This might suggest that infrequently litigated but intellectually significant areas of law are disproportionately represented. It may be that in these areas of law, the demography of litigants varied from the average. Nevertheless, it is clear that a wide range of litigants beyond the elite sought assistance from the Imperial chancelry and did so with an expectation of relief.

[73] Connolly. *Lives Behind the Laws.* p.68.
[74] Connolly. *Lives Behind the Laws.* pp.73ff.
[75] On this evidence see Lewis, N. (2000). "Judiciary Routines in Roman Egypt." *BASP*. Vol. 37. pp.83-93.
[76] D.50.2.12.

Repeat Players and One-Shotters

The above literature focuses on direct evidence from substantive disputes of the presence of non-elite litigants. A different approach is to look at the structure of Roman legal procedure and how it may have changed over time in response to the shifting balance of elite and non-elite litigants. As Metzger notes, "Roman litigation in the classical period combined private initiative with modest public oversight. Most of the initiative was the plaintiff's: he brought his opponent to the court, informed him of the action he intended to bring, showed him the evidence he intended to rely on at trial, questioned him about facts affecting the action, determined the amount of bail, if any, to demand, and eventually selected an action from the choices the magistrate gave him".[77] This is generally contracted to the *cognitio* procedure, in which the state takes a much more activist approach to both summons and the execution of judgments.

The relatively limited activism of state officials under the Classical form of civil procedure has led to debate on the extent to which the procedure in the Classical period can be described as a form of state-based arbitration.[78] It is possible to state this case is an overly simplistic fashion. The picture offered by earlier scholarly literature is of an orderly procession to trial at a date mutually convenient to the parties, before a ready and waiting judge. Wlassek in particular regarded Classical procedure as representing voluntary participation in arbitration with the state playing only a facilitative role.[79] Such a picture presupposes a very high level of cooperation between the parties as well as a level of court efficiency that is unusual in modern jurisdictions, without the costs of travel and labour faced by pre-modern societies. The alternative view, stated forcefully by Kaser, was that Classical procedure must have evolved from an irrational subjection to kingly or religious power, with its apparently arbitrative features reflecting nothing more than the lack of effective legal enforcement in a pre-modern system.[80] Recent evidence, notably from the *lex Irnitana,* has seriously disrupted Wlassek's picture of an arbitrative process without imputing irrationality to the earliest Roman procedure. It is clear that defendants, far from being willing participants, could be very reluctant to appear. The system of mandatory postponements in the *lex Irnitania* reveals the concern of plaintiffs that if asked to return another day they might

[77] Metzger, E. (2005). *Litigation in Roman Law.* Oxford: Oxford University Press. p.3.
[78] On the republican and classical models of civil procedure see Kelly. *Roman Litigation.* Ch.1; Albanese, B. (1987). *Il processo private romano delle "legis actiones".* Palermo: Palumbo; Kaser, M. (1996). *Das Rominische Zivilprozessrecht.* Munich: K Hackl. pp.222ff.
[79] Wlassek, M. (1891). *Römische Processgesetze.* Leipzig: Duncker and Humblot; Wlassek, M. (1921). "Der Judikationsbefehl del Rominische Prozesse". In *Sitzungsberichte der Kaiserlichen Akademie der Wiener Wissenschaften.* 197.4.
[80] Kaser, M. (1967). "The Changing Face of Roman Jurisdiction". *Irish Jurist.* Vol. 2. 129.

struggle to compel the cooperation of the defendant.[81] The case for regarding civil procedure in the Classical period as a form of state-backed arbitration therefore rests more so on its heavy reliance on the private initiative of the parties rather than any assumption that they are cooperating. More recently Bablitz has stressed that Roman litigants had a wide range of dispute resolution mechanisms available to them, not all of which required reliance on the courts. Several factors influenced the choice of mechanism, including the level of cooperation between the parties as well as their wealth, social prestige and willingness to expose themselves to a high level of publicity.[82] The approach taken here seeks to move beyond the debate on the arbitration-like qualities of Classical Roman civil procedure and instead look at whether its features match what one would expect if litigation were dominated by a particular kind of litigant: the repeat player.

Under the *legis actiones* at the time of the Twelve Tables, the plaintiff was responsible for bringing the defendant to court *in ius vocatio,* by oral summons. It may be given the formalism of the period that a specific form of words was required but this cannot be confirmed. They did not at this stage receive any assistance from the state. If a defendant refused to appear, the plaintiff had to resort to self-help and was permitted to use physical force if necessary, so long as this was done in the presence of bystanders. This has led to the observation that a wealthy or well-connected individual must have often been able to successfully resist summons, as such individuals must have been difficult to compel by force.[83] While the process of summons underwent some innovations in the Classical period, it continued to be based largely on the self-help of the plaintiff, legitimated by the magistrate only later. The principal innovation lay in the evolution of guarantees for the appearance of the defendant. In the event that proceedings *in iure* could not be completed in a single day, a suretor or *vades* had always been required to give bail for the defendant's appearance at a later date. At a later date, possibly after the *lex Aebutia, vadimonium* had been altered from a special form of surety to a stipulation given by the defendant that they would appear at a later date.[84] The defendant could attach to this stipulation a second promise to pay a penalty

[81] Lex Irnitana. tab. IXB, ll. 20–8. [84]. For discussion see Burton, G. P. (1996). "The *Lex Irnitana*, Ch. 84, the Promise of Vadimonium and the Jurisdiction of Proconsuls". *Classical Quarterly.* Vol. 46. pp. 217–221; Johnston, D. (2001). "Vadimonium, the lex Irnitana, and the Edictal Commentaries". In Manthe U. and Krampe, C. (eds). *Quaestiones Iuris. Festschrift für Joseph Georg Wolf zum 70.* Berlin: Geburtstag. pp. 111–23; Metzger. *Litigation in Roman Law.* pp.11-12.
[82] Bablitz, L. (2016). "Roman Courts and Private Arbitration". In du Plessis et al. (eds). *Oxford Handbook of Roman Law and Society.* pp.234-242.
[83] Kelly. *Roman Litigation.* pp.6ff; Garnsey. *Social Status and Legal Privilege in the Roman Empire.* pp.189ff.
[84] On *vadimonium* see Rodger, A. (1997). "Vadimonium to Rome (and Elsewhere)". *ZSS.* 118; Donadio, N. (2011). *Vadimonium e Contendere in Iure. Tra Certezza di Tutela e Diritto alla Difesa.* Milan: Giuffre; Donadio, N. (2018). "Vadimonium deserere: Limiti e Rapporti tra Rimedi a Raganzia dell'Iniziativa Processuale". *Legal Roots.* Vol. 7. pp. 61-11; Fiori, R. (2018). "Il Processo Privato". In Cursi, M.F. (ed). *XII Tabulae. Testo e Commento.* Naples: Edizioni Scientifiche Italiane. pp.45-149.

if they failed to appear, usually secured by one of the regular forms of surety available in the Classical period.

Most of the surviving sources deal with praetorian or "judicial" stipulations which were compelled by the magistrate, usually if business could not be completed *in iure* on a single day. However, it is also evident from literary sources that the defendant could give a stipulation extra-judicially.[85] It had previously been considered that an extra-judicial or "voluntary" *vadimonium* took the form of a private agreement between the parties to appear at a mutually convenient date.[86] This would have eliminated the need for the plaintiff to resort to *in ius vocatio,* which Bethmann-Hollweg argued was an abrupt and inconvenient way of starting a lawsuit.[87] More recent scholarship has tended to stress that stipulatory agreements to appear worked in concert with *in ius vocatio* in order to secure the attendance of the defendant before a court for the first time. This has been prompted by the discovery of new evidence in Herculaneum and Pompeii, which show that the defendant would give stipulation not to appear before the judge, but rather at a place nearby the court.[88] In the following example from Herculaneum, the defendant agrees to appear before the Temple of Mars Ultor:

> Vadimonium factum M. Calatorio Speudonti in III Idus Martias primas Romae in foro Augusto ante aede Martis Ultoris hora tertia. HS 1,000 dari stipulata est ea quae se Petroniam Spurii filiam Iustam esse dicat spopondit M. Calatorius Speudon.

Cloud has suggested that the reference to a place nearby the court must imply the *vadimonium* documents found in Herculaneum and Pompeii must all refer to extra-judicial agreements.[89] However, there are better reasons for expecting that *vadimonium* would refer to a place nearby the court. The defendant was required to demonstrate his presence using witnesses; a process which would be cumbersome if carried out before the magistrate.[90] Pre-trial preparations could also be carried out at a place nearby the court in order to minimise the administrative burden placed on the magistrate once the parties did appear. There is also evidence that magistrates frequently did not appear, or that parties could appear and find themselves in a queue with the magistrate unable to handle their case on a

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[85] Metzger. *Litigation in Roman Law.* p.11ff.
[86] See for example Bethmann-Hollweg, M. (1864). *Der römische Civilprozeß.* Bonn: Adolph Marcus. Vol. 2. p.199. Fliniaux, A. (1912). *Le Vadimonium.* Paris. p.105. Pugliese, G. (1963). *Il processo formulare.* Milan: Giuffre. p.401.
[87] Bethmann-Hollweg. *Der römische Civilprozeß.* p.199.
[88] Metzger. *Litigation in Roman Law.* pp.45-65.
[89] Cloud, D. (2002). "The Pompeian Tablets and Some Literary Texts". In McKechnie, P. (ed). *Thinking Like a Lawyer: Essays on Legal History and General History for John Crook on his Eightieth Birthday.* Leiden: Brill. pp.231–46; Cloud, D. (2002). "Some Thoughts on vadimonium". *ZSS.* Vol. 119. pp.159–60.
[90] Metzger. *Litigation in Roman Law.* p.53.

particular day.[91] Appearing in a place nearby the court would therefore allow the defendant to satisfy his obligations under the *vadimonium* even if it were not possible to appear before a magistrate. As Rodger notes, "a system of *vadimonium* to a specified place is more workable than the supposed system of *vadimonium* to appear in front of a court on a particular day".[92]

How did the *vadimonium* operate alongside *in ius vocatio*? It was previously argued that extra-judicial *vadimonium* were based on Praetorian Edict, or alternatively that by the late Republic, *in ius vocatio* had been supplanted by the usual practice of plaintiffs and defendants to make a private agreement. Their reasons for doing so were typically based on the perceived defects of *in ius vocatio*: its immediacy, its lack of flexibility regarding time and place of appearance, as well as the scope for it to disturb litigants the Praetor wished to be left alone. In this way *vadimonium* was regarded as the preferred mode of initiating litigation for the polite classes of Roman society: as Bethmann-Hollweg notes, *vadimonium* as an extra-judicial contract catered better to the "Anstandsgefühl der gebildeten Classen" than a "unhöfliche Antreten auf offener Straße".[93] The current view, in light of the new evidence from Herculaneum and Pompeii, is that the sensibilities of polite society were better served by the cooperation of these two procedural institutions. Giménez-Candela argued that *in ius vocatio* was preserved as a way to compel performance of the *vadimonium* if a defendant was reluctant.[94] Wolf, by contrast, argued that *vadimonium* took the form of a stipulation only to carry out the pre-trial formalities at a place nearby the court.[95] Once this had been achieved and it was clear that the case could be heard that day, the *in ius vocatio* could be used to bring the defendant before the magistrate. In this light the features of *in ius vocatio* which Bethmann-Hollweg regarded negatively suddenly reveal themselves to be advantages; it is convenient to use an immediate form of summons when the defendant has already presented themselves at the relevant location and it is known that a magistrate is available. This view is also accepted by Metzger[96], as well as Hackl[97], who stresses that the pre-trial meeting at which the defendant stipulates to appear is also a final opportunity to reach a settlement.

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[91] The *lex Irnitana* makes provision, when a case moves from the local court to the gubernatorial court, for the parties to appear where the governor is likely to be: Lex Irni. c. 84, tab. IXB, ll. 20–8. Commentary in Rodger. "Vadimonium to Rome (and Elsewhere)". p.162.
[92] Rodger. "Vadimonium to Rome (and Elsewhere)". p.162.
[93] Bethmann-Hollweg. *Der römische Civilprozeß.* p.199.
[94] Giménez-Candela, T. (1982). "Notas en torno al vadimonium". *SDHI.* Vol. 48. 165.
[95] Wolf, J.G. (1985). "Das sogennante Ladungsvadimonium". In Ankum, J.A. et al (eds). *Satura Roberto Feenstra.* Fribourg. pp.60–65.
[96] Metzger. *Litigation in Roman Law.* p.17.
[97] Hackl, K. (1992). [Review of Puteoli 9/10, 11, 12/13, 1985–9]. *ZSS.* Vol. 109 p.768. See also Bürge, A. (1995). "Zum Edikt De edendo". *ZSS.* Vol. 112. pp.4–5; Camodeca, G. (1999). Tabulae Pompeianae Sulpiciorum. Rome: Quasar. p.49; Cloud. "Some Thoughts on vadimonium". pp.147–149.

Under Classical procedure the initiative of the plaintiff was also required in order to execute judgments. Executory mechanisms were geared towards helping plaintiffs to maximise pressure on reluctant defendants to comply with the terms of the judgment. They had to be authorised by a magistrate, but the magistrate would not step in to act on behalf of the plaintiff. The earliest forms of execution focused on the person of the defendant. *Manus iniectio* permitted the plaintiffs, after thirty days of non-payment, to carry out a ceremonial seizure of the defendant in the presence of a magistrate.[98] They could then be held for sixty days, during which others might make payment for them or present themselves as additional creditors. The main recourse for a defendant in this position was finding a *vindex* who could dispute the matter on their behalf; the *vindex* however did so at their own risk, replacing the liability of the defendant, and under the penalty of double damages if they did not succeed.[99] At the time of the Twelve Tables, if payment was still not forthcoming at the end of sixty days of captivity, it may have been possible for the creditors to sell the defendant into slavery, or alternatively kill them and dissect the body to correspond to each creditor's portion of the outstanding debt.[100]

While a defendant of typical mental fortitude would likely part with all their property to avoid being killed, it must be noted that their death eliminates any future possibility of them directly compensating the plaintiffs. There has been controversy over whether the literary texts which refer to the dissection of the defendant can be taken literally or not.[101] Both Gellius[102] and Quintillian[103] appear to treat the rule as a statement of literal practice, although Gellius notes that he has never heard of anyone being dissected. Much of the controversy over *manus iniectio* is shaped by narratives of "primitive" and "advanced" law, with the former concentrating on delictual, penal understandings of debt in which the goal is to punish the defendant for wrongdoing, while the latter focuses on compensating the plaintiff for their loss. What does seem likely is that wealthy, elite litigants must rarely if ever have been at risk of such a fate, given their greater resources and the ability to minimise the threat of litigation. The *lex Poetelia* mitigated the harsh consequences of *manus iniectio* by making it

[98] Gai. Inst. 4.21.
[99] On the position of any *vindex* who did come forward, see de Zulueta, F. (1946). *The Institutes of Gaius.* Oxford: Clarendon Press. p.243; Jolowicz and Nicholas. *Historical Introduction.* p.189; Kaser. *Das Rominische Zivilprozessrecht.* p.66, 224.
[100] Aulus Gellius. *Noctus Atticae*. XX.1.49.
[101] Those who favour a literal interpretation: Wenger, L. (1940). *Institutes of the Roman Law of Civil Procedure.* New York: O.H. Fisk. p.224ff; Kaser. *Das Rominische Zivilprozessrecht.* p.102. Those who favour a metaphorical interpretation: Radin, M. (1922). "Secare Partis: The Early Roman Law of Execution against a Debtor". *AJPhil.* Vol. 43 pp.40-48; da Nobrega, L. (1959). "Partis secanto". *SZ.* Vol. 76. pp.499-507; Levy-Bruhl, H. (1934). Quelques problèmes du très ancien droit romain. Paris: Les éditions Domat-Montchrestien. pp.152ff.
[102] Aulus Gellius. *Noctus Atticae.* XX.1.49.
[103] Quintillian. *Inst. Or.* 3.6.84.

illegal to kill a defendant or sell them into slavery.[104] It is unclear what the alternative resolution became, but it is most likely that the defendant remained in captivity and could be made to work off the debt.[105] Under Classical procedure the plaintiff was required to bring an *actio iudicati,* or action on judgment, following which the defendant could again be led into captivity.

Execution against property was extremely limited in the Republic and early Principate. The primary mechanism for confiscation of property, *pignoris capio,* was only available in exceptional cases where a religious or state interest was involved. Gaius mentions two religious examples: where an individual had bought an animal for sacrifice and did not pay for it, as well as where an animal had been leased in order to pay the expenses of a religious festival.[106] He also mentions two cases involving a state interest: where an individual was under a duty to provide a soldier with pay or maintenance for their horse[107], as well as the *publicani,* or tax farmers, who were permitted to use *pignoris capio* as a method of applying pressure to taxpayers.[108] It is likely that tax farming was the most widely applied case by the time that Gaius was writing. This may explain why *pignoris capio* never became compensatory in nature; the property taken from the defendant could not later be sold. Rather, it survived into Classical procedure as a means of applying pressure to reluctant taxpayers.[109]

At the same time, however, execution against property did become more prominent in the form of a *missio in bona* authorised by the magistrate, which allowed the creditor to seize the entirety of the debtor's property. The seizure had to be advertised so that other creditors could come forward, after which a *magister* was appointed who would auction the property in mass to the highest bidder; that is to say, to whoever offered the highest percentage against the debts of the creditors.[110] *Missio in bona* represented a clearer avenue than *manus iniectio* for compensating the loss of the creditors, as even a defendant held in captivity remained notionally a free man and retained autonomous control over all of his property. This is not to say, however, that execution against the person became marginal; there is

[104] The main reference is Livius. *Ab Urbe Condita.* VIII.28.8. See also Gai.Inst.4.26-4.29.
[105] The exact effect of the *les Poetelia* is unknown. It may have authorised detention beyond sixty days, cf. Jolowicz and Nicholas. *Historical Introduction.* p.189, or it may have simply acknowledged what was already a long-standing practice of debt bondage instead of killing the defendant, cf. Kaser, M. (1949). *Das Altrömische Ius.* Gottingen: Vandenhoeck & Ruprecht.
[106] Gai.Inst.4.28.
[107] Gai.Inst.4.27.
[108] Gai.Inst.4.28.
[109] A very thorough treatment at Maganzani, L. (2002). "La pignoris capio dei pubblicani dopo il declino delle legis actiones". In Belloni, A. (ed). *Cunabula Iuris. Studi storico-giuridici per Gerardo Broggini.* Milan: Giuffrè. pp.175-227.
[110] Gai.Inst.3.77-3.81.

evidence that it was still routine in the Classical period.[111] Often the imprisonment of the defendant and the confiscation of their property would have been authorised together. It also does not represent the end of the penal character of execution for debts, as *missio* could result in a far greater confiscation of property than was necessary to compensate the creditors. It was necessary, in effect, to undertake a bankruptcy in order to secure even a minor debt. Part of this may be explained by the calculation problems faced by any pre-modern society; liquidating the assets of the defendant and apportioning them to reflect the compensatory interest of the plaintiffs would have required an investment of time and labour beyond that available to the magistracies of the Principate. From the time of Augustus, it became possible for the defendant to surrender their property voluntarily, provided they had assets that were worthwhile handing over to their creditors; by *cessio bonorum* they could avoid imprisonment.[112]

The mechanisms for summons and execution of judgment in the Classical period both suggest a system of procedure in which parties are routinely engaged in litigation. Rather than the magistrate intervening directly to compel the cooperation of the parties, they set up procedural mechanisms in which it in the best interest of the parties to cooperate with one another. This requires parties to be able to come to an assessment of the likely consequences if they do not comply; it also allows parties to assess which actions will place them in the strongest position when they are involved in future litigation. It is the plaintiff's responsibility to bring the defendant to court. If they had to rely upon summons *in ius vocatio* alone, ensuring the appearance of the defendant would be a difficult process, as it requires immediate compliance and the only recourse of the plaintiff if they refuse is a form of state authorised self-help. Instead, the defendant is able to give *vadimonium* for appearance near to where the magisterial court will be held. There is a synergy between *vadimonium* and *in ius vocatio*; it allows the parties to meet the requirement for witnesses and address any preliminary issues before appearing before the magistrate. The defendant and the plaintiff also receive valuable information from the level at which the *vadimonium* is set. This was generally a private negotiation between the litigants without intervention from the magistrate, although the defendant could go to the magistrate if they considered that the amount demanded by the plaintiff was vexatious.[113] The level of the *vadimonium* allowed the

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[111] One of the advantages of *cessio bonorum,* introduced at the time of Augustus, was that it provided the defendant with permanent protection against personal execution, by way of *beneficium competentiae,* cf. D.42.3.4-42.3.7. In the Justinianic law a defendant who had submitted themselves to *cession bonorum* was even allowed to retain enough for subsistence if the plaintiff brought further actions on the same debt. For discussion see Buckland, W.W. (1963). *A Textbook of Roman Law.* Cambridge: Cambridge University Press. pp.694ff.

[112] *Cessio bonorum* was introduced via a *lege Julia,* most likely Augustus's procedural law of 17 BCE. Cf. Jolowicz and Nicholas. *Historical Introduction.* p.217.

[113] Metzger. *Litigation in Roman Law.* p.9.

defendant to judge how much the action was worth to the plaintiff, who in turn could assess the degree to which the defendant was likely to cooperate. *Vadimonium* also forms part of a larger scheme for the exchange of information between the parties before trial. For example, there are texts on *iniuria* which do not permit the plaintiff to assess the value of their claim below the level of the *vadimonium*.[114] This may act as a restraint on making excessive claims, as the defendant will be able to make a counter-claim for one-tenth of the plaintiff's *taxation-sum* in the event the action fails.[115] As litigants engaged in successive actions, they would be able to adapt their approach to the *vadimonium*, and to pre-trial negotiations generally, in order to maximise the strength of their position once they ultimately did appear before the magistrate.

Similarly, the parties are left to make their own cost-benefit analysis about their level of cooperation with a judgment. The magistrate provides the plaintiff with tools in order to pressure reluctant defendants into making payment on the judgment debt but does not step in directly. A defendant unable or unwilling to make payment has several options available to them: they can dispute the validity of the judgment when the *actio iudicati* is brought, surrender their property voluntarily under *cessio bonorum* - thus avoiding the *infamia* associated with having their property seized – or seek a friend to make payment on their behalf or act as a *vindex.* They might also seek to reach a settlement which the plaintiff would accept in lieu of bringing the defendant into captivity until they had worked off the debt. It would be in the interest of a repeat-player to cultivate a reputation as a dependable debtor who complied with judgments, or alternatively as an individual who could rely on friends to assist. The picture that emerges is not necessarily the gentlemanly, arbitrative model proposed by early scholars such as Wlassek - where the parties cooperate fully before and after trial - but rather a system in which parties are routinely engaged in litigation and can therefore assess the likely consequences of their choices with minimal intervention by the magistrate.

By the time of Diocletian, however, civil procedure had evolved to a stage where significantly less emphasis was placed on the initiative of the parties, in favour of greater activism by the state. It is tempting to associate this with the transition from formulary procedure to *cognitio extra ordinem* and to identify this shift with legislative enactments in the late third century CE. Especially important in this regard is C.3.3.2, which requires that governors in the provinces should take cognisance of cases themselves or delegate the responsibility to other officials if the volume of new cases is too great to reconcile with their other public duties. It is better, however, to say that the transition was a gradual one with its

[114] *Collatio.* 2.6.1.
[115] Lenel, O. (1927). "Die taxatio bei der actio iniuriarum". *ZSS*. Vol. 47. pp.381-340. But see an alternative view from Metzger. *Litigation in Roman Law.* pp.89-92.

origins in the early Principate. It was first developed to deal with criminal law cases, initially *pecuniae repetundae,* where public officials were accused of embezzling funds from the state.[116] The driving forces of this innovation were likely the need for professional judges to inquire more deeply into the specific facts of the case, combined with political sensitivity around the behaviour of public officials. It was not contemplated, in the earliest forms of *cognitio*, that it would become a civil procedure, let alone one with general application to civil cases. The first known civil cases handled by *cognitio* were *fideicommissum* under Claudius, which again required intensive enquiry into the facts of the case. Each extension of *cognitio* is associated with an exercise of the powers of the Emperor, who was not confined, as the Praetor and other magistrates were, to the evolved framework of the formulary system. *Cognitio* did not become a general procedure for civil cases until the third century CE.[117] It would therefore be an error to think that all of the procedural features associated with *cognitio* are intrinsic to it; rather they may reflect the social conditions at the time they first develop.

In cases where the *cognitio* procedure replaced the formulary system, both summons *in ius vocatio* and the *vadimonium* system for bailing defendants ceased to apply. This meant that summons no longer relied exclusively on the private initiative of the plaintiff in order to bring the defendant before a court. *In ius vocatio* was replaced initially by *litis denuntiatio*, for which the main source of evidence is the Theodosian Code. The language of *denuntiatio* can be found in the Classical Roman law, where it is clearly distinguished from *in ius vocatio.*[118] Generally it was a means by which a party could be called to appear in a procedure, usually in fulfilment of a pre-existing duty. For example, if real proceedings were brought against a buyer of a thing, they could call upon the seller *denuntiare auctorem,* to assist them in the proceedings in fulfilment of their duties of *auctoritas* towards the buyer.[119] By the early Dominate, however, *denuntiatio* was a general means by which a defendant could be

[116] Good treatments can be found on *pecuniae repetundae* at Cloud, D. (1994). "The Constitution and Public Criminal Law". In Astin, A.E. et al (eds). *The Cambridge Ancient History.* Vol. 9. pp. 491-530; Robinson, O.H. (2007). *Penal Practice and Penal Policy in Ancient Rome.* London: Routledge. pp.78ff.

[117] The search for a single inflection point between formulary and *cognitio* procedure has generated a variety of views. Some identify C.2.57.1 (342 CE). Others identify C.3.3.2 (294 CE). It is however generally agreed that regardless of which date is chosen, formulary procedure ceased to be routine within 50 years of the Severan jurists. For full discussion see Kaser. *Das Rominische Zivilprozessrecht.* pp.517ff; Liva, S. (2007). "Ricerche sul iudex pedaneus: organizzazione giudiziaria e processo". *Studia et Documenta Historiae et Iuris.* Vol. 73. pp.159–196 at pp.168ff; Merola, G. D. (2012). *Per la storia del processo provinciale romano. I papiri del medio Eufrate.* Naples: Satura. p.59.

[118] Ankum, H. (2014). "Problems concerning *laudatio auctoris* and *denuntiatio litis* made by the buyer in classical Roman law". *Fundamina.* Vol. 20(1). pp.1-14.

[119] Ankum. "Problems concerning laudatio auctoris and denuntiatio litis made by the buyer in classical Roman law". p.5.

summoned.[120] The *denuntiatio* was itself later replaced by the libellary procedure, which developed in between the promulgation of the Theodosian Code in 439 CE and Justinian.[121] The plaintiff was initially required to serve notice on the defendant with the authorisation of a magistrate, using a document - the *privata testatio* - which had been drawn up in the presence of witnesses and often with the assistance of court officials.[122] Later, by an Imperial constitution of 322 CE, the plaintiff was additionally required to serve notice in the presence of a public official who would be able to take a public record of what had occurred:

> *Idem Aug. ad Maximum P(raefectum) U(rbi).*
> Denuntiari vel apud provinciarum rectores vel apud eos, quibus actorum conficiendorum ius est, decernimus ne privata testatio mortuorum aut in diversis terris absentium aut eorum, qui nusquam gentium sint, scripta nominibus falsam fidem rebus non gestis adfigat.
> *Dat. x kal. iun. Sirmio Probiano at Iuliano Conss.*
>
> *The Same Augustus to Maximus, Prefect of the City*
> We order that suits that be attested in the court of the governors or before the defenders or before any of the persons in whose office records are composed, so that no one may admit in the attestation of a suit the name of an absent or dead person or of one who cannot be found, and so that no occasion for falsification may thus be derived.
> *Given on the tenth day before the kalends of June at Sirmium in the year of the consulship of Probianus and Julianus [23 May 322 CE]* [123]

The *denuntiatio* which emerges in the Theodosian Code is the first step towards the formal summons by writ which characterised the libellary procedure under Justinian. CTh 2.4.2 demonstrates the desire of the Imperial chancelry to minimise the abuses which had previously been possible when it was the plaintiff's responsibility to bring the defendant to court. It is also possible to see the increased involvement of the state, as the content and circumstances of the summons are more carefully monitored by court-appointed officials.

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[120] There were other means, in proceedings *cognitio extra ordinem,* whereby a defendant could be summoned, but these applied in specific circumstances, e.g. where the defendant was located outside the local jurisdiction (*litterae*) and where the defendant could not be found (*edictum*). *Denuntiatio* became the general (and most commented upon) means of summons for a defendant living in the jurisdiction of the court from which the plaintiff was seeking redress.

[121] In the West: *P. Oxy.* 16.1881. In the East: *Nov.Val.* 35.14. For discussion see Kaser. *Das Rominische Zivilprozessrecht.* p.460.

[122] The precise level of state involvement has been subject to debate. Collinet argued that the magistrate had no role to play in *litis denuntiatio* and the process remained entirely based on private initiative: Collinet, P. (1932). "La procedure par libelle". In *Etudes Historique.* Vol. 4. Paris: Institut historique de France. pp.451ff. Others take the opposite view, arguing that the *denuntiatio* emanated directly from a public official on the request of the plaintiff: Kaser. *Das Rominische Zivilprozessrecht.* p.372.

[123] CTh. 2.4.2. Translation by Pharr, C. et al. (1952). *The Theodosian Code and Novels and the Sirmondian Constitutions.* Princeton, NJ: Princeton University Press.

There is no evidence for the contents of the *denuntiatio,* but it is likely to have been similar to the *libellus* under Justinian, which outlined the nature of the claim and may have stated the action.[124] The *denuntiatio* required the defendant to travel to court and remain there until the case was resolved. It may be that, in a continuation from the *vandimonium* system which preceded it, the *denuntiatio* only required the defendant to present themselves at the place where the court was likely to be and wait until it was available, rather than to appear before the court itself. What is certain is that once the *denuntiatio* had been served on the defendant, a four-month period began, within which the trial had to begin in the presence of both parties:

> *Imp. Constant(inus) a. Iulio Vero Praesedi Tarraconensus*
> Cum semel negotium necessitate vel casu temporibus fuerit exemptum ac postea per indulgentiam clementiae nostrae redintegratio praestetur, intra quattuor menses iudicantis arbitrium, non ulterius, litigatoribus praeberi oportet, etiamsi per obreptionem aliquid a nobis iterata supplicatione meruerint.
> *Dat. Prid. Non. Mai. Viennae Sabino et Rufino Conss.*
>
> *Emperor Constantine Augustus to Julius Verus, Governor of Tarraconensus*
> When any case exceeds the statutory limit of time, by the intervention of any necessity or chance, and a litigant has gained permission by a special grant of Imperial favour to renew the action, judges shall grant to the litigants no more than four months for ending the suit. When these four months have elapsed, a litigant shall by no means be heard, even though he should obtain anything by a special grant of Imperial favour of Our Lords.
> *Given on the day before the nones of May at Vienna in the year of the consulship of Sabinus and Rufinus [6 May 316 CE]* [125]

This four-month period would later be abolished under the libellary procedure. Instead, the *libellus* was served on the defendant by an officer of the court, the *exsecutor,* who would require them to give security for their appearance, failing which they could be imprisoned by the court until the date of the trial.[126] Under *litis denuntiatio,* however, the private initiative of the parties was not yet wholly abandoned; the litigants might reach a settlement within the four-month period, following which the plaintiff simply did not appear. The disappearance of the four-month waiting period before trial is one of the most significant differences between *litis denuntiatio* and the Justinianic libellary procedure. It is also possible to observe the

[124] It has been suggested that by the time of Justinian the name of the action was required: Kaser. *Das Rominische Zivilprozessrecht.* p.468.
[125] CTh.2.6.1. Translation by Pharr.
[126] C.9.4.6.3.

expanding role of the magistrate over time. The process of private negotiation represented by the *vadimonium* system – with *in ius vocatio* serving primarily as a backstop for the plaintiff where the defendant did not cooperate – is gradually replaced by a system in which the state determines the consequences of the defendant's failure to appear. If the defendant did not appear following receipt of the *denuntiatio,* it was possible for the plaintiff to bring proceedings *in contumaciam*. This system of procedure by default would not have been possible under the formulary system, which required the physical presence of all litigants before trial could begin. If the defendant remained absent, judgment could be obtained against them; the merits of the case would still be assessed by the court, but it is unlikely that such cases were often refused.[127]

Execution also underwent significant changes in cases dealt with under the *cognitio* procedure. As in the Classical law, the plaintiff could still bring an *actio iudicati* to initiate execution in most cases. However, the executory mechanisms available to the court are no longer geared towards allowing the plaintiff to maximise pressure on a reluctant debtor. Instead, they take a more targeted approach, in which officers of the court seek to restore to the plaintiff what they are entitled to. This is made possible by the coercive powers of a public official acting under the authorisation of the Emperor. One notable consequence of this is that execution may be carried out by compulsion. This is most prominent in those cases where *cognitio* first became routine: for example, the magistrate may force an heir to accept an inheritance even if it is heavily burdened with *fideicommissa,*[128] or compel the relevant duty-holder to manumit a slave who has been granted their liberty under the terms of a *fideicommissum*.[129] Execution against goods also changed in character. Where a sum of money was owing, it was no longer necessary for the judgment creditors to seize the entirety of the debtor's property, in the manner of bankruptcy. Instead, it became possible for the court to seize a sufficient part:

> In venditione itaque pignorum captorum facienda primo quidem res mobiles et animales pignori capi iubent, mox distrahi: quarum pretium si suffecerit, bene est, si non suffecerit, etiam soli pignora capi iubent et distrahi. Quod si nulla moventia sint, a pignoribus soli initium faciunt: sic denique interloqui solent, si moventia non sint, ut soli quoque capiantur: nam a pignoribus soli initium faciendum non est. Quod si nec quae soli sunt sufficiant vel nulla sint soli pignora, tunc pervenietur etiam ad iura.
>
> They direct that when a sale is being made of pledges which have been taken, movables and animals should first be taken and then sold. If the price that they

[127] C.7.43.1.
[128] D.36.1.4.
[129] D.40.5.26.6.

> raise is enough to satisfy the judgment, all is well. If it is not, then they direct land pledges also to be seized and sold. Where there are no movables, a start is made forthwith with land securities. Hence, their practice is to direct that land be seized when there are no movables; for normally one does not begin by selling land pledges. If what the land raises be inadequate or if there be no land securities, then they turn to the judgment debtor's rights.[130]

Once again, there is a waiting period, of two months, before the property is sold to the highest bidder with proceeds to the creditors. Similarly, if execution is given for a specific thing instead of a sum of money, court-appointed officials may seize it and hand it over to the judgement creditors.[131] There are two key observations to be made about this new model of execution against goods. The first is that, just as in summons, the state begins to take more responsibility for actions that were formerly the sole initiative of the plaintiff – or, on an alternative view, more actively monitors how the plaintiff goes about taking the actions which a public official has authorised. Secondly, the form of execution is designed to restore what is owing to the judgment creditors at minimum impact to the debtor, particularly to their long-term financial viability. It would also be logistically easier for the court to begin with moveables, followed by land. The shift in initiative from the plaintiff to the state brings with it a corresponding shift in emphasis away from maximising pressure on the defendant to comply. The debtor's entire property would only be seized in a true bankruptcy proceeding, but even here, *missio in bona* was replaced by *distractio bonorum,* a sale of individual items rather than a mass sale to whichever bidder offered the highest percentage on the debt. This more sophisticated approach to dealing with bankrupt debtors had its origins in a special procedure first intended for debtors from Senatorial families, but by the third century had been generalised to all bankruptcies.[132] Personal execution, in a much-diluted form, also remained an option in the Dominate. There is no evidence to suggest how routinely it was deployed. What does appear clear is that by the third century, the greatest threats to the person of the debtor operated entirely outside the civil procedure of the Imperial courts. As previously discussed in Chapter Three, private prisons are well evidenced in estates on the provincial countryside, but they were not supported by the Imperial chancelry and were not a legitimate mechanism for the execution of a judgment debt arising from trial under *cognitio* procedure.

Two key shifts therefore accompany the transition from formulary to *cognitio* procedure and are most fully developed by the early Dominate. The first is a more state-orientated

[130] Ulpian. D.42.1.15.2. Translation by Watson.
[131] D.6.1.68.
[132] D.27.10.5.

system of summons, in which default judgments are available where the defendant fails to appear. The second is a more sophisticated approach to executions, where the emphasis is not on maximising pressure on the defendant to comply with the terms of the judgment, but rather on restoring to the judgment creditors what they are entitled to with minimum impact to the debtor. The simplest explanation for these changes is that the "all-pervading power of the Emperor" allowed him to circumvent the constraints of the formulary process to achieve policy goals which had not formerly been possible.[133] Along the same lines, it is likely that the greatly increased size of the Imperial bureaucracy under the Dominate and the corresponding increase in the capacity of the state to monitor civil procedure also played a role.[134] However, it is important to ask how and why this increased state capacity was deployed in this way. The earlier forms of summons and execution had placed a great emphasis on the private initiative of the parties. This was a system well suited to the "repeat-player", who could develop strategies to manage litigation after repeated experience and – where possible – avoid engaging with the court process altogether. A system primarily designed for repeat players works best in a dense, urban social network where litigants are already tied to one another by social and moral expectations which inform the creation of formal rules. It is also a system which lends itself to a very high degree of socio-economic homogeneity: *vadimonium* was a system designed to appeal to the "anstandsgefühl der gebildeten Classen"[135], while the threat of *infamia* following *missio in bona* – and therefore the loss of connections to one's friends and patrons - was likely a greater incentive for a defendant from a wealthy background to cooperate with a judgment than the loss of their current property. It was not a system which worked well for the less advantaged. Wealthy litigants must have often been able to resist summons against plaintiffs who were not well equipped to take the necessary self-help measures to bring them to court. Meanwhile, the heavy reliance of both Republican and Classical procedure on personal execution – including private imprisonment, debt-bondage and the threat of being sold into slavery across the Tiber – attests to the perilous situation that a non-elite litigant faced in the role of defendant.

It is argued here that the procedural reforms which accompanied *cognitio* were shaped in part by the increasing visibility of "one-shotters": those were not as familiar with litigation and did not belong to the complex, elite or quasi-elite social networks on which the functioning of the old system relied. These would have been drawn from the same non-elite

[133] Jolowicz and Nicholas. *Historical Introduction.* p.395.
[134] A useful recent discussion on the size of the Imperial bureaucracy in comparative perspective can be found at Eich, P. (2014). "The Common Denominator: Late Roman Imperial Bureaucracy from a Comparative Perspective". In Scheidel, W. (ed). *State Power in Ancient China and Rome.* Oxford: Oxford University Press. pp.90-149.
[135] Bethmann-Hollweg. *Der römische Civilprozeß.* p.199.

groups who become visible in petitions to the Imperial chancelry which Connolly identifies during the early Dominate.[136] It would have been more difficult for defendants to resist a *denuntiatio* which had either been authorised by a magistrate or possibly delivered by an officer of the court; even if they did fail to appear, the consequences of doing so became more severe. Meanwhile, the range of options available to plaintiffs trying to execute judgements was broadened, with the state offering direct assistance to recover their entitlement in a more targeted way. This likely made it easier for non-elite litigants, where successful in litigation, to extract goods from economically stronger defendants. Indeed, this fits into the picture presented by modern research, which suggests that where the defendant is a "repeat-player", state-backed execution of judgement is usually more successful than when they are a "one-shotter".[137] It is known that under *cognitio* procedure, elite litigants could be subject to the full range of executory mechanisms against goods: *distractio bonorum,* the standard mode of execution for bankruptcy, was originally designed for defendants of Senatorial rank. The harshest forms of personal execution had also been ameliorated by the Dominate. To the extent that personal imprisonment remained a common practice in the provincial countryside, it did so in the face of intense resistance by the Imperial chancelry.

[136] Connolly. *Lives Behind the Laws.* p.68ff.
[137] Van Koppen and Malsch. "Defendants and One-Shotters Win After All: Compliance with Court Decisions in Civil Cases". pp.803-820.

CHAPTER SIX
CORRECTIVE JUSTICE IN THE LATE IMPERIAL PERIOD

Many Roman obligations were underpinned by economic transactions between two or more parties, such as sales of land or leases. It was common for one of these parties to have less economic bargaining power than the others. Here, bargaining power refers to the absence of immediate necessity, or the length of time that party could go without exchanging before encountering severe hardship. This concept was present in classical economic theory: Adam Smith noted in the *Wealth of Nations* that "in the long run the workman may be as necessary to his master as his master is to him; but the necessity is not so immediate".[1] Modern-day economists have developed a rich literature exploring inequality of bargaining power. Trebilcock outlines the premise that the bargaining power of a party depends on whether, if they choose not to enter a transaction, they have access to "a workably competitive range of alternative sources of supply".[2] It is important to note that while modern economic theory often focuses on information asymmetry as a disadvantage faced by contractual parties, bargaining power can still be unequal even in the face of perfect information: "whereas advice as to value will normally save the contract with the 'poor and ignorant person', the master of the ship drifting onto the rocks would still have been open to exploitation even if he had had the entire House of Lords on board to advise him".[3]

In a modern legal context, bargaining power has been applied for the protection of consumers, employees, and tenants. It plays an important, albeit controversial role in the English common law doctrine of unconscionability[4] and in other jurisdictions.[5] In a Roman contract for *locatio conductio rei*, the tenant will usually have less bargaining power than the landlord. In a contract for the sale of immoveable property, a small holder will usually have less bargaining power than the owner of a large estate. *Remissio mercedis,* or rent remission in *locatio conductio*, can be regarded as an attempt to alleviate the former, while *laesio enormis,* or price gouging, can be regarded as an attempt to alleviate the latter. The parallel development of these contractual institutions can be analysed in light of their mutual characteristics and the particular social and economic conditions of the Roman Empire in the third century CE.

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[1] Smith, A. ([1776] 2012). *Wealth of Nations.* Herts: Wordsworth Editions. Book I. Ch 8.
[2] Trebilcock, M.J. (1980). "An Economic Approach to the Doctrine of Unconscionability". *Studies in Contract.* Toronto: Butterworths. For an overview of the literature, see Barnhizer, D.D. (2005). "Inequality of Bargaining Power". *University of Colorado Law Review.* Vol. 76(1). pp.139-242.
[3] Beale, H. (1986). "Inequality of Bargaining Power". *Oxford Journal of Legal Studies.* Vol. 6(1). pp.123-136 at p.127.
[4] See Denning J on a general equitable principle of inequality of bargaining power in *Lloyds Bank v Bundy* [1975] QB 326, but its rejection by the House of Lords in *National Westminster Bank plc. v Morgan* [1985] AC 686.
[5] See, for the US, *Williams v Walker-Thomas Furniture Co.* 350 F.2d 445 (D.C. Cir. 1965).

Section 6.1 The Origins of *Laesio enormis*

Laesio enormis permits the seller of immoveable property to rescind a contract of sale if the value of the exchange has been for less than a certain proportion of its "true" or "actual" value. In Roman law the buyer could either return the property or make good on the "true" value. It held a prominent role in the Medieval *Ius commune* and features in Roman-Dutch law[6], but it has had a chequered modern history. It can be found in Article 1674 of the French *Code civile,* where a seller of immoveable property may apply for rescission if they have lost more than seven-twelfths of the market price; this action is available even if the seller has expressly renounced any right to rescission within the terms of the contract itself.[7] The German BGB, by contrast, excludes *laesio enormis,* although Zimmermann argues that German case law has revived a similar idea via the notions of consumer protection and equality of exchange.[8] The Austrian ABGB does allow recission where one party receives less than half the "fair value" of consideration[9]. The doctrine has come under intense criticism in Austria on economic grounds: Grechenig, for example, argues that it disincentivises parties from gathering as much information as they can about the market price, as any profits that can be obtained from doing so are prohibited by law; this leads in his view to less social welfare.[10] The Lousiana Civil Code allows recission in the sale of an immoveable where the price, or the value of the property it is exchanged for, is less than half "fair market value".[11]

This lack of consistency, both in the definition of the "true" price and the proportion below which the agreement can be rescinded, may be a result of the conflict between multiple theories of the just price developed in the medieval period, as well as the desire of modern economic theory to protect the autonomy of the parties and maximise information gathering.

The Roman Texts

Laesio enormis in its Medieval form relied upon two foundations: an extract from the Code of Justinian, usually attributed to Diocletian and Maximian, as well as the Aristotelian theory of

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[6] See for example Grotius, H. ([1631] 2012). Inleidinge tot de Hollandsche Rechts-geleertheyd. Charleston: Nabus Press. 3.52. Also Grotius, H. ([1625] 1964). *De Jure Belli ac Pacis.* New York: Oceana. 2.12.12. For a general overview of *Laesio enormis* in Roman-Dutch law, see Dias, R. (1959). "Laesio Enormis: The Roman-Dutch Story". In Daube, D. (ed.). *Studies in the Roman Law of Sale.* Oxford: Clarendon Press. pp.46-63.

[7] *Code civile*. Art. 1674.

[8] Zimmermann, R. (1996). *The Law of Obligations: Roman Foundations of the Civilian Tradition.* Oxford: Clarendon Press. pp.268ff.

[9] ABGB. Art. 934.

[10] Grechenig, K.R. (2006). "Die Laesio Enormis Als Enorme Laesion Der Sozialen Wohlfahrt?" *Journal für Rechtspolitik.* Vol. 14. pp.1-14.

[11] Louisiana Civil Code. Art. 2589.

corrective justice, or justice in transacting. To fully appreciate the way *laesio enormis* operated in its original context in the ancient Roman world, these two influences – thoroughly entangled by the later *Ius commune* – must first be outlined and analysed independently. The starting point in any discussion of the Imperial Roman *laesio enormis* is C.4.44.2:

> *Imperatores Diocletianus, Maximianus.*
>
> Rem maioris pretii si tu vel pater tuus minoris pretii, distraxit, humanum est, ut vel pretium te restituente emptoribus fundum venditum recipias auctoritate intercedente iudicis, vel, si emptor elegerit, quod deest iusto pretio recipies. Minus autem pretium esse videtur, si nec dimidia pars veri pretii soluta sit.
>
> *The Emperors Diocletian and Maximian to Lupus.*
>
> If you or your father sold property for less than its value, it is just that you should receive it back, though the authority of the judge upon restoring the price, or that the purchaser, at his election, should pay you what is lacking of the just price (and keep the property). A price is considered too little if one half of the true value is not paid.[12]

This constitution is traditionally associated with the Emperors Diocletian and Maximian. It has been pointed out that other constitutions dealing with unequal transactions show signs of possibly having been interpolated by the Justinian compilers.[13] Building on this observation, Zimmermann has argued that C.4.44.2. was introduced later by Justinian, following taxation reforms which had forced the sale of small hold farms. He argues that "Christian teaching, as well as stoic moral philosophy, demanded an infusion of ethics and of *humanitas* into the law and it was in this spirit that the Emperor was supposed to render aid to the weak and poor".[14] It is argued here, however, that it is not necessary to import either Christian or Hellenistic moral ideas into the legal texts to explain the introduction of *laesio enormis*. The vulnerability of small holding farmers was a live issue in the third century CE as large estates began to appear in the provincial countryside. *Laesio enormis* can be explained purely in terms of governing pragmatism, as a reflection of changes in the agrarian wealth structure of the early Dominate and the response this necessitated from the Imperial chancelry.

C.4.44.2. holds that, *humanum est*, the seller of land should receive what is lacking if the initial sale was for less than half the "true" (*veri*) value of the property. C.4.44.8. adds that

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[12] C.4.44.2. Blume, F.H., Frier, B.W. et al. (trans.). (2016). *The Codex of Justinian.* Cambridge: Cambridge University Press.
[13] Particularly C.4.44.8. and C.4.44.12. For a discussion see Jolowicz, H.F. (1937). "The Origin of Laesio Enormis." *The Juridical Review.* Vol. 49. pp. 47-72 at p.52.
[14] Zimmermann. *Obligations.* p.261.

minor variance from the "true" value is not enough for rescission of the contract, as to do so would only serve to undermine the good faith that protects contracts which have been concluded by mutual consent.[15] Where there is only a minor variance from the "true" price, it is instead necessary to show fraud or duress on the part of the buyer. *Ius commune* scholars considered the "true" value of a thing to be the market price,[16] support for which was based on D.36.1.1.16:

> *Ulpianus libro tertio fideicommissorum.* […] Iulianus autem cavendum non putat, sed aestimandum fundum, quanti valet sine hac cautione, hoc est quanti vendere potest sine cautione: et si potest tanti vendere non interposita cautione, quantum facit quarta pars bonorum, ex trebelliano transituras actiones.
>
> Ulpian. Fideicommissa. Book 3: […] Julian, however, thinks that no *cautio* should be given, but that the farm should be valued at what it is worth without this *cautio*, that is, at the sum for which it might be sold without a *cautio*, and if without any *cautio* it may be sold for a sum which is equal to the value of the fourth part of the estate, the actions will pass under the *Trebellianum*.[17]

Ulpian defines the value of a farm as what it would sell for without a *cautio,* or an indemnity given by the fideicommissary. It may be asked whether this is enough to identify the "true" price as the market price. The Romans themselves did not arrive at a formal notion of a market clearing price. However, it has been shown that they did have an intuitive grasp of the relationship between supply and demand.[18] It is likely they too considered the "true" price of an item to be what it would sell for if all parties had a reasonable degree of access to the marketplace. Penniz further argues that even if a concept of *iustum pretium* in private contractual sales had not yet been developed by the Severan jurists, it was introduced by Diocletian.[19] Pennitz sees this as an evolution of judicial discretion which had already been applied to fiscal sales.[20] Accursius glossed that the reference to what land would sell for is in fact a reference to its "common" sale price.[21] This approach avoided bringing whole markets into moral disrepute.

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[15] C.4.44.8.
[16] See de Roover, R. (1958). "The Concept of Just Price: Theory and Economic Policy". *Journal of Economic History.* Vol. 18(4). pp.418-434. See also Gordley, J. (1980). "Equality in Exchange". *California Law Review.* Vol. 69(6). pp.1587-1656 at 1604. It should be noted that Gordley prefers an Aristotelian account of corrective justice to one based on bargaining power.
[17] D.36.1.1.16. Translation in Watson.
[18] See for example Aulus Gellius. *Noctus Atticae.* XI.14.2. Commentary by Tchernia, A. (2016). *The Romans and Trade.* Oxford: Oxford University Press. p.75.
[19] Pennitz, M. (2002). "Zur Anfechtung wegen laesio enormis im rémischen Recht". In Schermaier, M.J., Rainer, J.M. and Winkel, L.C. (eds). *Jurisprudentia Universalis, Festschrift fiir Theo Mayer-Maly.* Vienna. pp.575-589 at p.580.
[20] Pennitz. "Zur Anfechtung wegen laesio enormis im rémischen Recht". pp.580-581.
[21] Accursius. *Glossa Ordinaria.* Lugduni. (1552). Gl. *legem to* D.35.2.63.

There has been scholarly debate over the origin of the final phrase in C.4.44.2: *minus autem pretium esse videtur, si nec dimidia pars veri pretii soluta sit.* One view, favoured by Sirks, is that this phrase was added later than the third century CE, either by editors in between Diocletian and Justinian, or alternatively by the Justinianic compilers themselves.[22] On this view, the original Diocletian rescript would only have allowed the price to be rescinded where there was *grande damnum,* i.e. a very low price in relation to the true value of the land. *Laesio enormis* is understood by Sirks as a form of the already long-established *in integrum restitutio,* with the one-half rule introduced later to clarify its objectives. In fact, for Sirks, the only innovation that C.4.44.2 truly represents is the choice given the purchaser to avoid restitution of the contract by supplementing the price.[23] The alternative view, supported by Pennitz, is that the final phrase of C.4.44.2 is original to Diocletian and therefore marks a sharp break with the position of the Severan jurists.[24] Pennitz identifies the one-half rule as already having special significance in determining the limits of justice and injustice in Roman contracts. For example, he points to D.18.1.57, in which a house is sold where neither party is aware that it burned down. Neratius proposed, in an effort to salvage as much of the contract as possible, that if half or less of the house had been destroyed, then the sale was valid and the price should be adjusted to reflect the present value of what remains of the house. Pennitz also regards *laesio enormis* as an evolution of *in integrum restitutio,* but unlike Sirks, he sees two innovations by Diocletian: the choice given to the purchaser, and also the introduction of the one-half rule. Lambrini offers an intermediate view: he acknowledges that the Diocletian constitutions have likely undergone some retouching, although it is extremely difficult to establish when this was done and what modifications were made.[25] At minimum, it is likely the texts were summarised.

The "Medievalisation" of Laesio Enormis

The second foundation of the Medieval *laesio enormis* was the Aristotelian theory of corrective justice. In his Nichomachean Ethics, Aristotle makes a distinction between distributive and corrective justice.[26] Distributive justice is geometric: it is "manifested in

[22] Sirks, B. (2003). "Laesio Enormis Again". *RIDA.* Vol. 54. pp.461-469. See also Sirks, B. (1985). "La Laesio Enormis En Droit Romain Et Byzantin." *Tijdschrift voor rechtsgeschiedenis*. Vol. 53(3). pp.291–307; Sirks, B. (1995). "Laesio Enormis Und Die Auflösung Fiskalischer Verkäufe". *ZSS.* Vol. 112(1). pp.411–422

[23] Sirks. "Laesio Enormis Again". p.469.

[24] Pennitz. "Zur Anfechtung wegen laesio enormis im rémischen Recht". p.581.

[25] Lambrini, P. (2018). "Le norme di diritto privato: i contratti e la rescissione per lesione enorme". In Eck, W. and Puliatti, S. (eds). *Diocleziano: La frontiera giuridica dell'impero.* Pavia: Pavia University Press. pp.493-525.

[26] Aristotle. *Nichomachean Ethics*. Book V. McKeon, R. (trans. ed.). *The Basic Works of Aristotle.* Oxford: Oxford University Press. pp.1130b-1133b.

distributions of honor or money or other things which fall to be divided among those who have a share in the constitution".[27] Corrective justice, meanwhile, is arithmetic: it "plays a rectifying part in transactions between man and man".[28] It could be suggested that Aristotle had an impact on the development of the Roman principle of unjust enrichment, articulated here by Pomponius:

> *Pomponius libro non ex uariis lectionibus.* Iure naturae aequum est neminem cum alterius detrimento et iniuria fieri locupletiorem.
>
> Pomponius. Various Readings. Book 9: By the law of nature it is fair that no one become richer by the loss and injury of another.[29]

Coing has argued that even if Aristotle did not influence unjustified enrichment directly, it drew upon a cauldron of philosophical ideas in which Aristotle played a central role.[30] While the influence of Greek philosophy on Imperial Roman law cannot be discounted, there is a danger of failing to examine the legal texts according to their own language and the historical context in which they were written. Roman law did not develop a general principle of unjust enrichment. Rather, it developed specific remedies – notably the *condictio indebiti* and *condictio causa data causa non secuta* – which initially provided relief in a limited set of circumstances and only later were expanded to cover all cases of unjust enrichment at the expense of another. The 14th century jurist Baldus appears to have been the first to draw an explicit connection between D.50.17.206 and the Nichomachean Ethics. He argued that Pomponius's reference to "fairness" should be read in terms of the underlying justification for the transaction itself, which ought to preserve corrective justice between the parties. Baldus went on to frame C.4.44.2. as a vindication of corrective justice: in his view, it ought to be extended beyond its original application to the sale of immoveable property, to all contracts, as this was what was necessary to preserve the underlying justice of a contract of sale.[31]

As Gordley notes, the marriage between Diocletian and Aristotle did not take place until C.4.44.2. had already acquired several post-Classical features of its own.[32] The Glossators do not appear to have had access to the translations of Aristotle that became widely available in the 13th and 14th centuries.[33] They did accept that any vast disparity in the value

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[27] Aristotle. *Nichomachean Ethics.* McKeon. pp.1130b-1131a.
[28] Aristotle. *Nichomachean Ethics.* McKeon. pp.1130b-1131a.
[29] D.50.17.206. Translation by Watson.
[30] Coing, H. (1952). "Zum Einfluß der Philosophie des Aristoteles auf die Entwicklung des römischen Rechts". *ZSS RA.* Vol. 24. pp.24-59. On unjustified enrichment, pp.39-42. See also Diaz, J.A. (2007). "Unjust Enrichment and Roman Law". *Pensar: Revista do Curso de Direito da Universidade de Fortaleza.* pp.114-221.
[31] Baldus. *Commentaria.* C.4.44.2. No. 18.
[32] Gordley. "Equality in Exchange". pp.1638ff.
[33] Gotte, G. (1970). "Die Aristoteleszitate in der Glosse". *ZSS RA*. Vol. 85. 368. On the Glossators and Aristotle, pp.368-393.

of an exchange ought to be corrected by the law but gave a different explanation. To the Glossators, rescission of a contract rested on either casual or incidental fraud. Causal fraud could be whatever induced a party to enter a contract in the first place. Incidental fraud, by contrast, affected the price at which a party contracted. *Laesio enormis,* under this system of classification, was a type of incidental fraud because it led one of the parties to contract at a price which differed from the "true" price. This is a conception of fraud which concentrates on the impact suffered by the victim rather than the alleged conduct of the defrauding party. Indeed, it was acknowledged by the Glossators that in *laesio enormis,* the defrauding party may never possess the intent to deceive*. Laesio enormis* did not result from the intentional conduct of the defrauding party. Instead, it was treated as a form of *dolus ex re ipsa*, or fraud arising from the thing itself.[35] As Gordley puts it, "this unintended fraud was fraudulent only in its effects".[36]

This is little evidence that the Roman Imperial chancelry conceived of *laesio enormis* in this way. The disparity between the Roman texts and the interpretation given to them by the Glossators is best explained as part of a larger attempt to expand C.4.44.2 beyond the sale of immoveable property, to cover any scenario involving a vast disparity in the value of an exchange. It therefore became necessary to reconcile it with D.18.2.22.3, which allowed parties to take advantage of one another when it came to setting the price. As C.4.44.2 – once freed from sale of immoveable property - could no longer be treated as a limited exception to this rule, Accursius was forced to resort to a distinction between "strict law" and "equity" to explain it.[37] The need for this distinction reflected the intellectual framing that the Glossators chose to give to *laesio enormis,* rather than the relationship of the texts in Roman times.

Transplanted Principles?

In its willingness to enquire into the substantive fairness of prices agreed by the parties, C.4.44.2. represents a significant departure from the position held by Roman jurists as late as the Severan period:

> *Paulus libro trigesimo quarto ad edictum.* Quemadmodum in emendo et vendendo naturaliter concessum est quod pluris sit minoris emere, quod minoris sit pluris vendere et ita invicem se circumscribere, ita in locationibus quoque et conductionibus iuris est.

[35] Azo. *Summa Codicis.* C.II.20. No. 9. Lyon 1557. Reprinted in Frankfurt/Main, 1968.
[36] Gordley. "Equality in Exchange". pp.1639.
[37] Accursius. *Glossa Ordinaria.* Lugduni. (1552). Gl. *legem* to C.4.44.2.

> Paul. Edict. Book 34*:* The nature of sale and purchase allowed buying for less what is worth more and selling for more what is worth less, the reciprocal taking of advantage; this is also the rule in leases and hires.[38]

This text is notable for endorsing both the "taking of advantage" by one party and the unequal value of exchange which results. It therefore permits transactions of this type regardless of whether one's analytical focus is on the behaviour of defrauder or the suffering of the victim. This approach coexisted in harmony with the general rule that no one, by the commission of an injury, be enriched at the expense of another.[39] It follows that taking advantage of one's partner in a contractual exchange was not considered a type of injury for which they might be entitled to redress from the courts. Indeed, the Severan principle shows every sign of having survived into the Dominate. There are rescripts in the Theodosian Code which firmly restate that a contract cannot be rescinded merely because an exchange is unequal.[40]

One way of explaining this apparent inconsistency is to say that the Romans did not consider "taking advantage" on the marketplace to be a form of enrichment that was unjust. As Diaz notes, "unjust enrichment has never been a general source of obligations". Rather, "Roman lawyers proceeded more on the basis of the individual case, extending the *condictio* to an increasing number of well-defined situations with the common element that the defendant had no adequate grounds for retaining. It appeared, not as a unified block, but as a kind of mosaic of multiple applications without a definite method".[41] This approach – recognising a general principle but limiting its application – has also been taken in modern jurisdictions. In English law, unjustified enrichment is acknowledged, but benefitting from what one knows to be an unequal exchange is not generally considered to give rise to an action unless there has been misrepresentation or some other behavioural flaw by the party taking advantage.[42]

However, it should also be stressed that C.4.44.2. did not have as broad a scope of application in the late third century CE as it later did under the *Ius commune.* It was strictly confined to cases where land had been sold for less than its "true" value and in that sense can be regarded as an act of policy designed to protect a specific class of small holders at the time it was issued. The question arises as to why Diocletian would depart from the standard principle of Severan (and indeed later) law to offer relief to in this set of circumstances. Westbrook argues that "a concept so alien to Roman law" is unlikely to have

[38] D.19.2.22.3. Translation by Watson.
[39] D.50.17.206.
[40] See C.Th.3.1. and C.Th.4.8.
[41] Diaz. "Unjust Enrichment and Roman Law". p.115.
[42] See generally Bix, B.H. (2012). *Contract Law: Rules, Theory and Context.* Cambridge: Cambridge University Press. pp.43-51.

been created *ex nihilo.*[43] Westbrook joins an emerging line of scholarship arguing that the principle contained within C.4.44.2. must have its origins in a non-Roman legal system; most likely, on this view, one of the extant legal traditions in the Eastern provinces of the Empire.

This argument can be put forward on several levels. The first is that the Roman Imperial chancelry, under either Diocletian or Justinian, was influenced directly by Rabbinic law.[44] The doctrine of *ona'ah* ("over-reaching") in Rabbinic law is said to have its origins in Leviticus: "and if thou sell aught unto thy neighbour, or buy of thy neighbour's hand, ye shall not wrong one another".[45] It may have evolved from a consensus which emerged after the Siege of Jerusalem that Rabbinic courts were entitled to supervise prices and therefore "prevent everyone from charging what he likes".[46] This followed a period of controversy in which Hebrew market commissioners had generally refrained from investigating market prices.[47] *Ona'ah* operates on three levels: where the price varies by less than one sixth from purchase price, where it varies by exactly one-sixth and where it varies by more than one-sixth. In the first case the contract is valid and there is no need to make good the difference. In the second case, the contract is valid, but the disadvantaged party is entitled to the difference between the actual price paid and the "purchase". In the final case, the contract may be rescinded.[48] Like *laesio enormis,* the doctrine of *ona'ah* evolved over time and did not have a fixed form throughout the third century CE. Modern Jewish scholars, like the Glossators with *laesio enormis,* have conceived of *ona'ah* as a special type of fraud based on withholding price information. Kleiman, for example, defines ona'ah as "exploitation through price deceit".[49]

It is contested whether the parties could contract out of the duties of *ona'ah.* A general stipulation against bringing an action for over-reaching is not valid, as it forms part of the Pentateuchal law, which parties are not permitted to contract out of. However, some scholars held that where the parties had specified the exact values of the exchange, it was possible to contract out of *ona'ah,* as the disadvantaged party was aware of the precise amount by which they were waiving their rights to recovery.[50] This would tend to imply that *ona'ah* was easier to contract out of in agreements for specific goods or services, as

[43] Westbrook, R. (2008). "The Origin of *Laesio Enormis*". *RIDA.* Vol. 15. pp.3-52 at p.41.
[44] See Dikstein, P. (1926). "Meh.ir Zedek ve-Ona'ah". *Ha-Mishpat ha-'Ivri.* Vol. 1. pp.115-55. Also, Jolowicz. *Juridical Review.* pp.47-72. More recently on the Ona'ah specifically, see Forster, D. (2017). "La Lesion Enorme en Droit Roman et L'Ona'ah en Droit Juif". *RIDA.* Vol. 64. pp.21-36 and Forster, D. (2018). *Ona'ah und Laesio Enormis: Preisgrenzen im Talmudischen un Roemischen Kaufrecht.* Munich: Beck C.H.
[45] Leviticus. 25.14.
[46] Sh. Ar. HM. 231.20.
[47] Elon, M. (2008). "Hafka'at She'arim". *Encyclopaedia Judaica.* New York, NY: Macmillan Library. p.9.
[48] See Bava Metzia 4.3, in which the example is given of four silver pieces out of a total of 24.
[49] Kleiman, E. (1987). "Just Price in Talmudic Literature". *History of Political Economy.* Vol. 19(1). pp. 23-45 at p.25.
[50] See for example Sh. Ar. ḤM. 227:21.

opposed to contracts in which there might be many transfers of money or goods over time. The doctrine of *hafka'at she'arim* prevented parties from contracting out of *ona'ah* where essential foodstuffs were involved. The purpose of this appears to have been to secure the food supply and it operated more along the lines of a statutory price control than a contractual action. Elon describes *hafka'at she'arim* as a prohibition on those who "[raised] the price of a commodity beyond the accepted level, or that fixed by a competent authority", presumably the Rabbinic courts.[51] It is controversial whether "purchase" in the context of *ona'ah* and *hafka'at she'arim* referred to the market price or to a price promulgated by the public authorities. There is a further problem, as *ona'ah* appears to have mainly applied to transactions for commodities, as to how the parties are supposed to research and identify the "purchase" price without incurring major information costs that would act as a disincentive to trade. Warhaftig argues the consensus view among scholars of Rabbinic law is that the prices of at least certain essential items were fixed by public authorities.[52] Kleiman argues to the contrary that "purchase" simply meant the going market price for a particular good, perhaps in a specific marketplace.[53] Levine and Tamari have opted for a middle way, based on what Tamari calls "communally adjusted" prices, in which the public authorities watched to see whether a general market price for a good had settled in a given place and time, then promulgated that as the official price and treated any deviations as *ona'ah.*[54] This price would then be routinely revised as changes in supply and demand affected conditions on the market.

There are some striking similarities between the two institutions, particularly the choice given between either return of the thing exchanged or payment of the difference from the "true" price or "purchase". However, there are enough differences with C.4.44.2. to make a direct comparison difficult. The choice of remedy in Roman law belongs to the party which has taken advantage; in Rabbinic law it belongs to the victim. This represents a significant shift in the balance of power between the parties and may also suggest a different motivation: in Roman law simply to reallocate the value of assets between the parties and therefore correct the inequality of the exchange, but in Rabbinic law to give special attention to victim's interest in holding on to their land. More seriously, the *ona'ah* in its conventional form specifically excludes land.[55] By the third century, the Rabbi Yohanan may have extended the *ona'ah* to land where there had been "excessive over-reaching", allowing only

[51] Elon. "Hafka'at She'arim". p.9.
[52] Warhaftig, I. (1987), "Consumer Protection: Price and Wage Levels". *Crossroads: Halacha and the Modern World, Vol. 1.* Israel: Zomet Institute. pp.49-77.
[53] Kleiman. "Just Price". p.26.
[54] Levine, A. (2012), *Economic Morality and Jewish Law*. Oxford: Oxford University Press. p.97. Tamari, M, (1987). *With All Your Possessions: Jewish Ethics and Economic Life.* New York, NY: Free Press. p.95.
[55] Bava Metzia 4.9.

recission of the contract as a remedy.[56] However, it is notable that the original exclusion did not just apply to land, but also to slaves. The Diocletian constitution, meanwhile, concerns itself with inequality arising from the structure of the agrarian economy. With both land and a primary source of labour excluded it is difficult to maintain that the original purpose of *ona'ah* as a remedy was similar. Kleiman raises further concerns about the intended function of *ona'ah,* arguing that it "seems to have been intended only to prevent sharp dealers from taking advantage of the customers' lack of information concerning the current market price" and would only be enforced by the courts in instances of this kind.[57] This would appear to explain why parties were able to contract out of *ona'ah* if they stipulated the precise values of the exchange in advance: as Warhaftig explains, "fraud is based on the withholding of information".[58] If the seller concedes that the price he is offering is higher than the market price in that area, and the buyer proceeds anyway, *ona'ah* does not apply. This runs contrary to *laesio enormis,* which applies even in the presence of perfect information; it targets the economic vulnerability of one of the parties, rather than information asymmetries between merchants.

It is also unclear what the interface would be between the *ona'ah* and the development of Roman law by the Imperial chancelry. It is true that Imperial constitutions were often wary of disturbing extant legal arrangements within the provinces. However, when Hebrews petitioned a Roman court, they were expected to frame their arguments in terms of Roman law. As Westbrook points out, where petitions did refer to legal doctrines of a non-Roman origin, the tendency of the Imperial chancelry was to "reaffirm the primacy of Roman law over local traditions".[59] Selb has also emphasised the rejection of local legal traditions in his study of the Syro-Roman Law Book.[60] Where Roman law did receive influences from non-Roman traditions in the provinces, it is more likely to have been via a process of osmosis than the direct transplantation of a doctrine from one legal order into another. Forster also expresses scepticism about a conscious borrowing of Roman law from Jewish law through the Roman emperors.[61] She acknowledges that the two legal systems had coexisted in Judea since the first century BCE, but challenges the idea that freedom to set prices was abandoned due to cultural contact between the Romans and the Jewish population. She points out that the two institutions of *ona'ah* and *laesio enormis* have different legal consequences and were driven by different objectives. In particular, *ona'ah* in her view was intended as a general market

[56] See Rabbi Yohanan at *Bavia Metzia* 57a.
[57] Kleiman. "Just Price". p.29.
[58] Warhaftig. "Consumer Protection". p.72.
[59] Westbrook. "Laesio Enormis". p.43.
[60] Selb, W. (1964). *Zur Bedeutung des Syrisch-Römischen Rechtsbuches.* Munich: Beck C.H. pp.201-202.
[61] Forster. "La Lesion Enorme en Droit Roman et L'Ona'ah en Droit Juif". p.21.

regulation, whereas *laesio enormis* was intended as an aid to the courts for making decisions in particular cases.[62] Forster also highlights the myriad differences in application: *ona'ah* gives the choice to supplement the price to the purchaser, whereas *ona'ah* gives it to the injured party, and *laesio enormis* was intended specifically to protect the seller of land, whereas *ona'ah* could protect either party.[63] To these valuable observations from Forster, it could be added that the two institutions perform different economic functions. *Ona'ah* was designed to deal primarily with cases of information asymmetry; the injustice to be corrected arises because one of the parties is less aware of the condition of the market in which they happen to be operating. Such information asymmetries must have been common in urban commodities markets in Judea, where prices could be volatile and vary from one town market to another. *Laesio enormis,* on the other hand, concerns itself with inequalities in bargaining power. The injustice it addresses arises from the desperate economic position of the seller of land; it does not matter in this context how much information on market conditions they have relative to the buyer.

Some scholars have identified a potential origin for *laesio enormis* in the so-called *volksrecht* of the eastern Roman Empire. This ties into the division between *volksrecht* and *reichsrecht* first outlined by Mitteis in the 19th century.[64] More recently, Crone has developed the concept of *volksrecht* as "a well-documented set of practices shared by many or most of the inhabitants of the Near East from the Nile to the Tigris".[65] It has already been questioned here whether there is validity in a framing of *volksrecht* and *reichsrecht* which portrays Roman law as a "legislative" imposition on the "traditional" legal practices of local peoples. Instead, Roman law - particularly the constant "spectre of the Roman court" as a potential avenue of relief against one's opponents - took its place among the diverse landscape of legal practices that provincial peoples navigated over the course of their lives.[66] In practice the legal doctrines which are usually identified as part of the *volksrecht* were either Hellenistic or Persian in origin and in many cases can be traced back to the Imperial rule of earlier powers. What distinguishes Roman law from the other legal practices of the provinces was not its ostensibly legislative qualities, but rather the presence of the Emperor and the expectations that his peoples in the provinces had of him. The question is therefore not how a "traditional" law might have infiltrated the "legislative" process of the Empire, but rather how expectations of the Emperor might have been shaped by extant legal practices in the

[62] Forster. "La Lesion Enorme en Droit Roman et L'Ona'ah en Droit Juif". p.36.
[63] Forster. "La Lesion Enorme en Droit Roman et L'Ona'ah en Droit Juif". pp.33-35.
[64] Mitteis, L. (1891). *Reichsrecht und Volksrecht in den östlichen Provinzen des römischen Kaiserreichs.* Teubner: Leipzig, B.G.
[65] Crone, P. (1987). *Roman, Provincial and Islamic Law.* Cambridge: Cambridge University Press. p.92.
[66] See Ch 3.

eastern Empire, and how the Imperial chancelry is then likely to have responded to these expectations.

The *volksrecht* identified by Westbrook as a possible antecedent for *laesio enormis* is the right of redemption. This was a "right of a seller, and a seller only, to buy back family land or members of the family sold into slavery under certain circumstances".[67] Westbrook identifies specific examples of this in Mesopotamia during the 18th century BCE and later in the Hebrew Bible. It is significant that this right of redemption appears to have been available not only for land, but also for slaves who were of personal significance to the owner: for example, a slave woman who had borne her owner sons, but not necessarily other slaves in the household.[68] This would suggest that the purpose of redemption was not so much to secure the economic interests of the seller as to prevent personal suffering caused by an unwanted sale.

Westbrook argues that redemption was specifically geared towards cases where the sale had been for less than the "true" or market value.[69] However, there is little suggestion, in the sources cited by Westbrook, that redemption was originally intended to provide relief specifically where property had been sold for less than a certain value. The focus is instead on the circumstances of the sale, especially where the seller has encountered debt and therefore failed to protect the wealth of their ancestors. This is reinforced by the repeated references to sons redeeming on sales by their fathers – the beneficiary of redemption was less the seller themselves than their family as a continuing entity. The emphasis here is not to address the inequity of the transaction, but rather to create an avenue by which families can recover the value of land that historically belonged to them. Two further objections can be raised to the idea that redemption turned upon whether a "true" price had been paid. Firstly, redemption typically operated only when the buyer or their heir intended to sell the property to a third party; it could not be brought simply because there had been an unequal sale.[70] Secondly, in many cases it may have been possible for parties to contract out of the right of redemption altogether, or to make their own arrangements. For example, it was possible for two parties to contract that redemption would be available at any time, but only if the seller used their own funds. The buyer could insert this term into the contract specifically to protect the profit which they achieved through buying the land at an unusually low price. If

[67] Westbrook. "Laesio Enormis". p.44.
[68] See for example Codex Hammurabi. s. 119.
[69] For further discussion of this idea, see Westbrook, R. (1985). "The Price Factor in the Redemption of Land". *RIDA*. Vol. 32. pp.97-127.
[70] Yaron, R. (1988). *The Laws of Eschunna.* Leiden: Brill. p.233.

the seller had been able to obtain new funds from outsiders, the profit attained by the cheap sale would be lost.[71]

Westbrook draws an analogy between the right of redemption and the recovery of an asset under pledge. If a loan is secured by pledge and the debtor is unable to repay their debt, the result is a transfer of ownership. Since the asset pledged will usually be worth more than the value of the debt, the effect is akin to a forced sale at a significantly discounted price. A sale to a third party which has been induced by the pressure of debts will be similarly discounted. The right of redemption, in Westbrook's view, allows the courts to treat a sale as though it were an agreement under pledge and allow the seller to recover their property if they are once again able to repay their debts. "The doctrine of redemption enabled a court to look at the substance of a transaction, not its form".[72] In support of this, Westbrook cites Mesopotamian texts from the 18th-14th centuries BCE which draw a distinction between "pledge, redemption" and "full price" and also require the creditor, if they are to take permanent ownership of land pledged for a debt, to pay the difference between the value of the loan and the full market price of the land.[73] It could be argued that this is an inefficient solution from an economic perspective, as lenders would be less willing to extend credit if on default they would not receive a guaranteed title to whatever asset the debt had been secured on. Meanwhile, a system that could potentially lead to large quantities of land being caught up in disputes would not be conductive to keeping land in productive use – a key priority of the Roman Imperial chancelry.[74] However, the purpose of redemption does not appear to have been economic. It was geared towards the protection of the family as a continuing entity and avoiding the humiliation associated with losing one's ancestral wealth to pressure of debt.

Westbrook brings together legal material from an impressively diverse range of times and places across the eastern Mediterranean. The connection between the right of redemption and *laesio enormis,* however, runs into difficulties. The first is that dependable references to the right of redemption disappear from the third century BCE, when Greek material replaces the earlier cuneiform scripts. It is therefore unclear how this legal tradition, if it survived into the third century CE, interfaced with the legal machinery of the Roman Imperial chancelry. Institutions designed to offer relief to contracting parties who find themselves in economic distress recur independently across many societies and it should not be surprising that many of them share similar features. It is questionable how far the

[71] Yaron. *Laws of Eschunna.* p.233. See also Harris, R. (1955). "The Archive of the Sin Temple in Khafajah". *JCS.* Vol. 9. pp. 31-120 at p.96ff.
[72] Westbrook. "Laesio Enormis". p.46.
[73] Westbrook. "Laesio Enormis". pp.46-49.
[74] See for example Kehoe, D. (2007). *Law and the Rural Economy in the Roman Empire.* Ann Arbor, MI: University of Michigan Press. pp.29-52.

persistence of an Eastern *volksrecht* can be invoked to sustain this bridge between Mesopotamian and Roman Imperial law. Secondly, the conceptual structure of the right of redemption does not lend itself to an easy comparison with *laesio enormis.* There is no suggestion in C.4.44.2. that a sale of land below its "true" value should be treated as analogous to a default on a pledge. Meanwhile, it is disputed whether the right of redemption was primarily concerned with correcting inequalities in the terms of an exchange*,* as opposed to the preservation of wealth within successive generations of a family. What can perhaps be said is that the historical presence of the right of redemption shaped expectations among Eastern provincial peoples about how the Roman Emperor would use his authority.

Price-Setting: A Paradigm Shift

It is not possible to identify a specific institution from a non-Roman tradition from which a continuous causal link can be drawn to *laesio enormis.* At most, doctrines such as the *ona'ah* and the Mesopotamian right to redemption laid down a foundation of expectations about the duties of rulers to the peoples they governed, particularly in times of economic distress. They also give some indication of the level of intervention in exchange which ancient Mediterranean states perceived themselves to have capacity for and were confident would not be rejected. An alternative approach is to compare different legal traditions in their shared socio-economic context rather than seek to find a causal connection between them. Sperber argues that the late third century CE was characterised by a specific set of economic problems to which both C.4.44.2. and changes to the doctrine of *ona'ah* can be viewed as solutions.[75] He begins by pointing out that in the third century CE there were conflicting views between Rabbinic scholars over whether land, slaves and consecrated goods were exempted from *ona'ah* in all circumstances, or whether they were only exempted from *ona'ah* "as normally defined" – over-reaching by more than one-sixth of the "purchase" – but were not exempted where over-reaching was "excessively" beyond one-sixth.[76] He places the statement of the Rabbi Yohanan, that *ona'ah* may apply to land where there has been excessive over-reaching, somewhere between 260 and 270 CE. Sperber argues that this was likely intended as a "practical ruling given out in response to a specific case" rather than a general statement about the law.[77] There is nothing in the Rabbinic material to say how Yohanan defined "excessive over-reaching". Indeed, it is possible that this level of precision was not necessary in the case he was dealing with. Elsewhere,

[75] Sperber, D. (1973). "Laesio Enormis and the Talmudic Law of Ona'ah". *Israel Law Review*. Vol. 8. pp.254-274.
[76] Sperber. "Laesio Enormis". p.257. Reference here to the question of R Ami in *Bava Mezia* 57a. See also the classic discussion of *ona'ah* in Dickstein, P. (1926). "Mehir Zedek ve-Ona'ah". *Ha-Mishpat ha-Ivri.* Vol. 1. pp.15-55 at p.46.
[77] Sperber. "Laesio Enormis". p.258.

Yohanan is found dealing with unequal exchanges between consecrated goods which are clearly implied to be much more than one-sixth, but where there is no suggestion this is "excessive".[78] However, "excessive" over-reaching appears to have later been defined, at least where land was concerned, as a value diverging by over one-third from the "purchase" price.

It was clearly understood by Talmudic compilers that the rule set down by Rabbi Yohanan on "excessive" over-reaching was contrary to the Rabbinic legal position before the third century CE. Sperber explains this divergence from tradition in terms of the economic circumstances of the time. By the 260s, the Imperial mints had lost the confidence of merchants in the Eastern Empire, while Imperial taxes on land had become punitive.[79] "The small plot owner was gradually forced by the twin pressures of inflation and taxation […] to sell his property" to a larger estate which was better able to pay taxes, or at least to come to a "reasonable arrangement" with the authorities concerning the tax burden.[80] Former small holders therefore ended up a tenants on plots which had formerly belonged to them. Yohanan himself, when he was a young man, had been forced to sell land to fund his studies of the Torah. If a small holder did not sell, he might be forced to simply abandon his land, leading to its possible occupation by squatters who moved into *agri deserti.* Sperber stresses that, while the traditional emphasis of *ona'ah* had been on limiting profits for the seller, there is nothing at the theoretical level to stop it applying to either the buyer or the seller. On this basis, Sperber argues that "surely it was to protect the interests of the suffering peasant vendors" Yohanan extended *ona'ah* beyond its original strictures to cover the sale of land.[81]

Rather than arguing for a causal relationship between *ona'ah* and *laesio enormis,* Sperber argues that their contemporaneous development can throw light on the economic conditions to which they were responding. C.4.44.2. was issued no more than two or three decades after Yohanan's reforms to the *ona'ah* and reflects a similar concern for under-selling by small holders who find themselves burdened by taxes or debts. If this view is accepted, it does entail that quite different conceptual frameworks were turned to a similar purpose. *Ona'ah* is frequently characterised as a type of fraud, which arises from the failure of a contracting party (often the seller of moveables in its original formulation) to disclose what they know about the current market price to the other party. By contrast, the petitioner

[78] M. Temura. 55.
[79] For a discussion of the causes of inflation, which covers fiscal practices as well as the impact of the third century civil wars, see Prodromídis, I. (2006). "Another View on an Old Inflation: Environment and Policies in the Roman Empire up to Diocletian's Price Edict". *Centre of Planning and Economic Research.* Working Paper No. 85.
[80] Sperber. "Laesio Enormis". p.266.
[81] Sperber. "Laesio Enormis". p.269.

in C.4.44.8., a father whose son has sold his *fundus* with his knowledge, explicitly argues that the sale should be void on the grounds of "fraud of the purchaser through cunning and trickery […]".[82] This argument is firmly rebuffed by Diocletian on the basis that selling land for less than it is worth is not sufficient by itself to void a contract. There must be a value of exchange less than half the "true" price, and this would only rescind the sale if the buyer chose not to pay the difference between the price agreed with the son and the "true" price. It seems clear that *ona'ah* has its origins as an attempt to correct asymmetries of information and was only later adapted as a response to the economic distress of small holders, whereas *laesio enormis* is borne of those economic conditions and takes the problem of unequal bargaining power as its starting point. Sperber was not the first to suggest that the economic problems of the third century prompted both reforms; Baron had previously argued that *ona'ah* and *laesio enormis* were "similar attempts to deal with essentially the same problems".[83] This is likely true, but the similarity is only a narrowly defined one, based on legal policy choices that were specific to the circumstances or petitions they sought to address rather than any conceptual unity. It is worth remembering that Diocletian had considerably greater flexibility to depart from the law as it had previously been, whereas Rabbi Yohanan was obliged to make only minor changes based on creative interpretation of existing sources.

Several criticisms can be made of this approach. Westbrook argues that both *ona'ah* and *laesio enormis* are framed as *casuistic* responses to the economic distress of specific individuals, not as *policy* responses general economic conditions.[84] Moreover, in the economic crisis in the third century CE, it could be expected that land values would be depressed. Since both institutions measure divergence from market price (or at least from an official price that tracks the market price with a greater or lesser degree of efficiency), a small holder forced to sell at a depressed market price would find no relief from either of them. Westbrook further argues that if it were Diocletian's intention to offer a policy response to the problem of under-selling of land, he would have done so by way of an Edict setting a price floor.[85] Diocletian's Edict of Maximum Prices conspicuously does not concern itself with land prices. A response can be given to this critique on several levels. Firstly, the economic difficulties of the third century CE were multi-faceted. There is an ongoing debate over how severe the problem of unproductive land, or *agri deserti,* may have been, especially outside of the Italian peninsula, but the inflationary and tax difficulties outlined by Sperber have their origins in actions taken by the Imperial chancelry to stabilise its income and therefore

[82] C.4.44.8. Translation by Blume.
[83] Baron, S.W. (1952). *A Social and Religious History of the Jews.* New York, NY: Columbia University Press. p.415.
[84] Westbrook. "Laesio Enormis". pp.43-44.
[85] Westbrook. "Laesio Enormis". p.44.

affected all provinces. The economic distress caused to small holders was more likely to have been the result of expensive commodities and high costs rather than the underlying value of their land. Even if the market value of land was steeply declining, that does not preclude many specific individuals facing their own difficulties, prompting them to sell land well below it – perhaps at prices which more closely reflected the level of their debts and immediate needs. Secondly, the Price Edict was concerned primarily with inflation, which would have been most apparent in urban marketplaces; land may simply have been outside its intended scope. Beyond all of this, however, the distinction between casuistic decision-making and policy was not as clearly defined in the ancient Mediterranean as it is in modern societies. It is difficult to conceive of the Imperial chancelry setting out a general economic policy, beyond what was necessary to meet its revenue needs and avoid the immediate risk of public disorder. It is easier, however, to conceive of the Imperial chancelry's response to individual petitions shifting to reflect economic circumstances and the expectations of the population.

The question remains of the mechanism by which this paradigm shift took place. An answer may be found in the choice of language of C.4.44.2. The recovery of under-sold land (or the difference from the "true" price) is suggested to be in accordance with the demands of *humanitas*. As will be discussed, *humanitas* was originally developed out of the *cognitio* procedure and in its civil law context is closely associated with the moral authority of the Emperor. It serves as a vehicle via which the Imperial chancelry can intervene on behalf of more vulnerable parties.

Section 6.2: The Transformation of *Remissio Mercedis*

Remissio mercedis provided tenants with relief from the obligation to pay rent under a contract of *locatio conductio rei* if some unanticipated disaster had deprived them of the enjoyment of the land. The reciprocal obligation at the centre of this contract was an exchange of *merces,* or rent, for *uti frui,* or enjoyment of a *res.*[86] Indeed the concept of enjoyment is central to *remissio mercedis.* It should be noted that the Roman jurists did not regard *uti frui* as the "content of the obligation" in a technical sense. It did, however, by the late Republic acquire a specialised meaning in contracts of hire where the *conductor* sought to make a profit.[87] This can be seen not just in *locatio conductio rei,* but also in other contracts where one party seeks to make a profit, such as tax farming: the *Lex Iulia Municipalis* mentions that the *conductor* of *vectigalia* was entitled to *uti frui liceat*.[88] This

[86] du Plessis, P.J. (2012). *Letting and Hiring in Roman Legal Thought: 27 BCE - 284 CE*. Leiden: Brill. p.122.
[87] du Plessis. *Letting and Hiring.* pp.121-122
[88] Lex Iulia Municipalis. FIRA I. 146. Lines 73-76.

specialised definition of enjoyment is further evidenced by its general absence in contracts for personal use of a thing, where other language, such as *aut uti,* or usage, was deployed instead.[89] As with many juristic terms, *fruitio* had a colloquial meaning to the Romans as the product of agricultural land, which when gathered by a farmer's own labour became his. It developed later, in both an agrarian and urban context, as any "economic capacity [which] could be exploited to the *conductor'*s advantage".[90] To some degree this mirrors the linguistic evolution of *res* itself from a tangible object to a value-bearing asset.

The origins of *remissio mercedis* are unclear. This is partly because it is often difficult to apply technical meanings to the Latin terminology in the surviving texts. Terms such as *remittere mercedem* do not always have a technical meaning, or in the case of non-juristic literature, even a legal one. *Remissio* can have a colloquial meaning, akin to the waiving of a debt or obligation.[91] What is clear, however, is that following the transition to formulary procedure, impaired enjoyment formed an *exceptio* against any attempt by the landlord to recover rent owed to him under the *actio locati.* It is likely that *remissio mercedis* could also form part of the *lex (contractus)* - the terms privately agreed by the parties - in which case the tenant would have been able to claim judicial determination of rent under the *actio conducti*.[92] While there is no direct evidence for remission of rent forming part of the *lex* in *locatio conductio rei,* there is evidence that remission of *merces* in the event of flooding could be included as part of the *lex* for other contracts. [93] It would seem inconsistent for the same not to be true in this instance. This would also clarify certain aspects of the later Imperial constitutions. For example, in C.4.65.8., the Imperial chancelry appears to state explicitly that it will permit a lower rent even where a right to remission has not been included in the *lex* by the parties in advance.*[94]*

In the Medieval *Ius commune* and particularly in the Dutch-Roman tradition*, remissio mercedis* became closely associated with *laesio enormis,* as both were regarded as an "extraordinary deviation" from general principles of contract, resting ultimately on the equitable jurisdiction of the sovereign.[95] This stood in contrast with the view that *remissio mercedis* simply reflected the standard allocation of risk between the parties, in which the parties are bound *frui licere.[96]* The tenant must have access to the fruits of the land in order

[89] In the Lex Iulia Municipalis, the *conductor* of *ultro tributa* was entitled only to *aut uti.* The same was true for the sub-tenant of an urban apartment.
[90] du Plessis. *Letting and Hiring.* p.124.
[91] de Neeve, P.W. (1983). "Remissio Mercedis". *ZSS.* Vol. 100. pp.296-339.
[92] Ankum, H. (1972). "Remissio Mercedis". *RIDA.* Vol. 19. pp.219-238.
[93] du Plessis. *Letting and Hiring.* pp.142.
[94] For example, C.IV.65.8.
[95] Zimmermann. *Obligations.* p. 373. For the Dutch-Roman view, see for example Grotius. *De Jure Belli ac Pacis.* Lib. II. Cap. XII.
[96] This was the view of the French humanists. See for example Donellus, H. (1589/90). *Commentarli de Jure Civili*. Frankfurt/Main. Lib. XIII, Cap. VII.

to meet his obligations to pay the rent, therefore if this access is totally deprived, it follows that he no longer has to pay the rent. It was the "equitable" interpretation that prevailed in the minds of European codifiers. In both the *Code civile* and the ABGB, *remissio mercedis* is permitted if the fruits of the land are less than half of what can usually be expected.[97] This clearly follows the template of *laesio enormis.* The identification of *remissio mercedis* as an equitable intervention also shaped the decision *not* to include it in the German BGB. It would perhaps have been more attractive to German codifiers if it had been presented as a function of the allocation of risk rather than as intervention by a sovereign. It is interesting to note that when *remissio mercedis* was re-introduced to German law by way of a special statutory provision, it followed a period of economic instability immediately after the First World War.[98] The legislation proved popular and so *remissio mercedis* entered the BGB in 1985.[99]

In Scotland, *remissio mercedis* was received through the Dutch-Roman tradition into the works of the Institutional Writers. George Mackenzie states that the tenant is not obliged to pay rent where there is "absolute sterility", clarifying that there will not be sterility wherever the *enjoyment* of the land is sufficient to cover the labour and seed – that is, the costs of production – in that season. MacKenzie is at pains to point out that if the land "yield some profite, though never so little, the hyre will be due".[100] In its emphasis on the responsibility of the landlord to secure enjoyment of the land as the basis for remission, the position in Scotland pays close attention to the balance of risk and responsibility between the parties. This arguably permits a narrower range of situations in which the tenant will receive relief than had been contemplated by the continental jurists on which the Institutional Writers had drawn[101] and is certainly less generous than the position in the French and Austrian civil codes. The modern status of *remissio mercedis* in Scotland has been attenuated by the perception that the Institutional Writers were dealing with agrarian conditions particular to the 18th century.[102]

The significance of the debate between an equitable and risk-based approach to *remissio mercedis* is that it could have consequences for how remission should be calculated: did it permit release from rent only in the event of total loss of enjoyment, or did it

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[97] *Code civil.* Art. 1796. ABGB. Art. 1105.
[98] *Pachtschutzordnung*. 9.6.1920.
[99] BGB Art. 593.
[100] Mackenzie, G. (1684). *The Institutions of the Law of Scotland.* Edinburgh: John Reid. Text Creation Partnership. I.2. pp.235-236.
[101] Gordon, W. (2013). "Roman Law in a Nineteenth-century Scottish Case: Gowans v Christie". *Roman Law, Scots Law and Legal History: Selected Essays.* Edinburgh: Edinburgh University Press. p.130.
[102] See for example *Gowans v Christie* (1871) 9 M 485. Lord Cairns at 11 doubts whether "it would be possible to deal with labour and seed in the way in which Sir George Mackenzie evidently was dealing with those in his own mind".

permit an equitable *pro rata* remission of rent until the tenant had the chance to recover? The solution ultimately arrived at by the European codifiers was to draw a connection with *laesio enormis* and allow *remissio mercedis* where the fruits of the land were less than half their usual value. This alleged conceptual link between *remissio mercedis* and *laesio enormis* cannot be easily drawn from a reading of the Roman sources, where the two institutions are treated separately and indeed arise from actions available on two different contracts. The modern South African position is a compromise: remission is permitted "either wholly or in part" where use of the property has been prevented "either entirely or to a considerable extent".[103] Debate continues over how loss under *remissio mercedis* was calculated and whether this changed in between the Republican and Imperial variants of the institution.

The existing literature adopts a multitude of views on the foundations of *remissio mercedis*. Frier argues that in the Republican law, *deductio ex mercede* was available based on the allocation of risk between the parties, whereas *remissio mercedis* was later a reflection of the difficult economic position of the tenant.[104] Kehoe assumes risk allocation as the original foundation of the institution, but he also seeks to demonstrate that *remissio mercedis* reflected the existing pattern of economic relationships between landlord and tenant in the Roman provinces – particularly the Eastern Mediterranean provinces – in the later Imperial period. In this sense he does not regard it as an innovation on the part of the Imperial chancelry but rather as an acknowledgment of the expectations that litigants would already be conditioned to have when appearing at a Roman court. [105] Müller, meanwhile, avoids taking a narrow view of *remissio mercedis* as either a reflection of risk-sharing or an equitable intervention by a sovereign. He instead emphasises the structure of *locatio conductio* as a *bona fides* contract, in which the risks taken on by each of the parties are ameliorated by their responsibilities of trust to one another.[106] Du Plessis shares this view, arguing that the abatement of rent, either wholly or in part, was ultimately founded upon the demands of good faith. Du Plessis is critical of explanations which take the allocation of risk as their starting point.[107] It is possible therefore to identify three points of view in the literature: *remissio* based on (1) *periculum* and the management of risk, (2) equitable

[103] *Hansen, Schrader & Co. v. Kopelowitz* 1903 TS 707. Solomon J at 718.
[104] Frier, B.W. (1989/90). "Law, Economics and Disasters Down on the Farm: *Remissio Mercedis* Revisited". *BIDR.* Vol. 31-32. pp.237-370 at p.249
[105] Kehoe, D. (1997). *Investment, Profit and Tenancy: The Jurists and the Roman Agrarian Economy.* Ann Arbor: University of Michigan Press. p.225.
[106] Müller, C.H. (2002). *Gefahrtragung bei der locatio conductio. Miete, Pacht, Dienst- und Werkvertrag im Kommentar römischer Juristen.* Paderborn: Schöningh. p.25.
[107] du Plessis, P.J. (2003). *A History of Remissio Mercedis and Related Legal Institutions.* Rotterdam. p.30.

intervention by a sovereign, or (3) an expectation of *bona fides* which arises from the nature of the contractual relationship.

The Republican Position

The jurist Servius, who lived in the first century BCE, held that the owner should be responsible to the tenant for loss of enjoyment arising from all force against which resistance was impossible:

> *Ulpianus libro trigesimo secundo ad edictum.* Si uis tempestatis calamitosae contigerit, an locator conductori aliquid praestare debeat, uideamus. Seruius omnem vim, cui resisti non potest, dominum colono praestare debere ait, ut puta fluminum graculorum sturnorum et si quid simile acciderit, aut si incursus hostium fiat: si qua tamen uitia ex ipsa re oriantur, haec damno coloni ese, ueluti si uinum coacuerit, si raucis aut herbis segetes corruptae sint.
>
> Ulpian. Edict. Book 32. If the force of a catastrophic storm befalls him, should the lessor be held responsible to the lessee for anything? Servius says that the owner should be held responsible to his tenant farmer for all force against which resistance is impossible, as, for example, that of rivers, jackdaws and starlings, and if some similar event occurs or if there is an enemy invasion; but if flaws arise from the object itself, this loss is the tenant's, for instance, if wine sours or if crops were destroyed by worms or weeds.[108]

The view of Servius was cited by the Classical jurists. Ulpian notes that the grounds for the *actio conducti* are failure to provide enjoyment or any contravention of the *lex contractus;* he cites Servius while discussing cases where enjoyment has been impaired through no fault of either party. This approach to liability in cases where no party is at fault may have begun with Labeo.[109] The key distinction which arises as a result is between loss which arises *cui resisti non potest* or *ex ipsa re oriantur.* The former is to be borne by the landlord; the latter is to be borne by the tenant. *Remissio mercedis* arises not because the landlord is at fault, but rather because he has a continuous obligation to make the enjoyment of the land available to the tenant. This reflects the broader requirement that *consensus* between the parties must be continuous.[110] There has been some controversy over whether these categories were intended to be mutually exclusive: what happens, for instance, when loss arises from the thing itself, but the tenant is powerless to do anything about it? This is arguably the case even in one of the examples Servius gives, where crops are destroyed by worms on the land; it may also be true if a blight takes hold of the crops one season and

[108] D.19.2.15.2. Watson.
[109] Capogrossi Colognesi, L. (2005). *Remissio mercedis: una storia tra logiche di sistema e autorità della norma.* Naples: Jovene. p.37.
[110] du Plessis. *Letting and Hiring.* pp.139-140.

destroys them. The unpredictable agrarian conditions of a pre-modern economy left farmers effectively powerless against a variety of perils that could nevertheless have reasonably been said to arise from the thing itself.

The literature on the definition of *ex ipsa re oriantur* is extensive. Kaser argued that it refers to a flaw which arises from the land itself.[111] Müller agrees, but limits the definition to those flaws which become apparent only after the conclusion of the contract.[112] Other views concentrate on flaws which make the cultivation and harvesting of the land more difficult for the tenant. For example, both de Neeve and Parpaglia argue that any impairment of enjoyment which could be overcome through a diligent cultivation of the land would lie upon the tenant, who would therefore be negligent in failing to anticipate such impairment and compensate for it.[113] On the influential view of Capogrossi Colognesi, the flaws contemplated are those which are "intrinsecamente connessi alla natura dell'attività agricola".[114] This is arguably at its core a factual rather than a legal definition, the content of which will depend upon agricultural practice in a particular time and place. Cardilli also takes a similar perspective, arguing that the landlord will not be liable for "interventions, by human or natural factors, in the productive process of the agricultural crop controlled by the *conductor,* which impedes its product*"*.[115] One issue with this approach is perhaps the fact that a catastrophic storm – a case so central to *remissio mercedis* that it often serves almost as an analogical basis for other cases – is itself a common intervention in the agrarian productive process. Farmers always operate under the threat of a storm that could destroy their crops and continue to do so in modern times.

The solution taken by Capogrossi Cologenisi and Watson is that *vis* in this passage refers exclusively to an unanticipated external force.[116] Watson defines this as a force beyond the intentionality of either party to the contract of hire and which neither of them could have anticipated.[117] This contrasts with *vitium,* which only arises internally. It is implied by this distinction that the kind of events for which *remissio mercedis* was available in the Republic were those that made enjoyment of the land wholly impossible; they were what modern law calls *vis maior* or Acts of God. This is consistent with an assessment of the Republican *remissio mercedis* as simply a juristic reflection of the allocation of risk between

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[111] Kaser, M. (1957). "Periculum locatoris". *ZSS*. Vol. 74. pp.155-200 at p.172.
[112] Müller. *Gefahrtragung.* p.31.
[113] de Neeve. "Remissio Mercedis". p.310. See also Parpaglia, P. (1983). *Vitia ex ipsa re: aspetti della locazione in diritto romano.* Milan: Giuffre. p.27.
[114] Capogrossi Colognesi. *Remissio mercedis.* p.49. See also Fiori, R. (1999). *La Definizione dell 'locatio conductio'. Giurisprudenza romana e tradizione romanistica.* Naples: Jovene. p.91.
[115] Cardilli, R. (2003). "Sopravvenienza e pericoli contrattuali". *Modelli teorici e metodologici nella storia del diritto private.* Vol. 1. Naples: Jovene. p.247.
[116] Capogrossi Colognesi. *Remissio mercedis.* p.49. Watson, A. (1965). *The Law of Obligations in the Later Roman Republic.* Oxford: Oxford University Press. pp.112ff.
[117] Watson. *The Law of Obligations in the Later Roman Republic.* p.112.

the parties, with little evidence of intervention in contract based on equitable considerations. There has, however, been some criticism of a rigid distinction between external *vis* and internal *vitium.* Karlović and Balić argue that Servius did not intend for them to be opposing concepts but rather as a starting point for "delimiting responsibilities in typical cases for which neither party was guilty".[118] Servius has been presented as an important figure in the introduction of a dialectical style of reasoning to Republican Roman law and may therefore have been seeking to find a synthesis between the two concepts in which each case presented to the jurists for advice could be assessed in terms of both its external and internal elements.[119]

Another legal institution which becomes visible in the late Republic is *deductio ex mercede.* Under the *Ius commune,* the rules governing *deduction ex mercede* were absorbed into the larger narrative on *remissio mercedis.*[120] However, there is enough evidence in the Roman texts to discern the outlines of what was regarded by the jurists as a separate legal institution. Frier characterises it as a form of self-help available to urban tenants where circumstances that were not their fault had restricted their usage of the property.[121] If the restriction was minimal, they had the right to remain in the apartment and unilaterally reduce the rent they paid. If the restriction crossed a certain threshold of severity, they had the right to abandon the apartment, unilaterally bringing the lease to an end. The most important primary source for *deductio ex mercede* is attributed to the first century CE jurist Alfensus:

> *Alfenus libro secundo digestorum.* Habitatores non, si paulo minus commode aliqua parte caenaculi uterentur, statim deductionem ex mercede facere oportet: ea enim condicione habitatorem esse, ut, si quid transversarium incidisset, quamobrem dominum aliquid demoliri oporteret, aliquam partem parvulam incommodi sustineret: non ita tamen, ut eam partem caenaculi dominus aperuisset, in quam magnam partem usus habitator haberet.
>
> Alfenus. Digest. Book 2. The occupants, if their use of some portion of an apartment is a bit less comfortable, must not immediately make a deduction from the rent; for [Servius

[118] Karlović, T. and Balić, A. (2020). "Remissio mercedis i utjecaj promijenjenih okolnosti na obveze iz ugovora o zakupu u rimskom pravu." *Zbornik radova Pravnog fakulteta u Splitu.* Vol. 57(4). pp.957-986 at p.971.
[119] Stein, P. (1978). "The place of Servius Sulpicius Rufus in the Development of Roman Legal Science". *Festschrift für Franz Wieacker zum 70. Geburtstag*. Göttingen: Vandenhoeck & Ruprecht. pp.175-184 at p.176.
[120] On the relationship between *remissio mercedis* and *deductio ex mercede*, see Capogrossi Colognesi. *Remissio mercedis.* pp.53-62. Also Sitzia, F. (2007). "D.19.2.15.2: vis maior e vitia ex ipsa re". *Fides, Humanitas, Ius -Studi in onore di Luigi Labruna.* Naples: Editoriale Scientifica. pp.5211–5227.
[121] Frier, B.W. (1980). *Landlords and Tenants in Imperial Rome*. Princeton, NJ: Princeton University Press. pp.150-155

said that] the occupant is subject to the condition that he bear a small part of the discomfort if something unforeseen occurred on account of which the owner had to raze something; but not to the extent that the owner had laid bare a portion of the apartment in which the occupant's main use lay.[122]

In Frier's view, *deductio ex mercede* was designed to balance the interests of landlords against wealthier urban tenants. However, du Plessis has argued that as a remedy it was extremely limited in scope, applying either exclusively or for the most part to situations where a primary tenant has leased a block of apartments and sub-let it for profit, usually paying an annual sum to the landlord and recovering weekly or monthly rents from the sub-tenants.[123] This is based on an analysis of the language used in the surviving texts. From the first century BCE onwards, *habitator* had become a specialised term referring to urban tenants who contracted for personal use.[124] The underlying social dynamic is therefore very different from agrarian leases on land in the provinces, where relationships between landlords and tenants might endure for multiple generations. There is also an important difference in the purpose of the contract: the sub-tenants did not contract for economic exploitation. This explains the absence of terminology related to profit-seeking and particularly the absence of reference to *frui*. While it is possible that in the late Republican period the distinction between *deductio ex mercede* and *remissio mercedis* was not yet concrete, the absence of the technical terminology later used by the Classical jurists to describe legal relationships for exploitation of resources draws a clear line in the sand between the two institutions. Du Plessis suggests that *deductio ex mercede* may have received less attention by the Justinian compilers owing to its limited scope or extra-judicial nature.[125] It might also be pointed out that by the 6th century CE, Roman society had become less urban and the multi-layered contractual relationships for which *deductio ex mercede* was originally developed perhaps less common.

Imperial Replacement?

One scholarly view on *remissio mercedis* has been that it reflected two different institutions over the history of Roman law.[126] On this view, the Republican and early Imperial institution,

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[122] D.19.2.27.pr. Watson.
[123] du Plessis, PJ. (2005). "A New Argument for *deductio ex mercede". Fundamina.* Vol. 2005(1). pp.69-80 at pp.71-73. On the urban rental market in early Imperial Rome, see Frier, B.W. (1977). "The Rental Market in Early Imperial Rome". *JRS.* Vol. 67. pp.27-37.
[124] On *habitators* generally see Amirante, L. (1965). *Locare habitationem in Studi in onore di Biondo Biondi.* Vol. 1. Milan: Giuffrè. pp.457- 465.
[125] du Plessis. "A New Argument". p.79.
[126] See Zimmermann. *Obligations.* p.372; Mayer-Maly, T. (1956). *Locatio conductio: eine Untersuchung zum klassischen römischen Recht.* Vienna: Herold Verlag. pp.140ff; Kaser. "Periculum locatoris". pp.173ff.

which can be found in Servius, referred only to excessive loss of enjoyment, in which case the tenant was entitled to a complete release from the rent. The early Imperial jurists were still concerned exclusively here with preserving the balance of risk in contractual relations. Even in the case of *vis maior,* the tenant had to prove that they had suffered exceptional loss of enjoyment. Gaius, in a commentary on the Provincial Edict, justifies this on the basis that the tenant is also entitled to exceptional benefits – say, in a year where the harvest was particularly good.[127] If the tenant can enjoy exceptional benefits, on this logic, they should also bear exceptional losses. Gaius clarifies that this would only hold true where the tenant paid a fixed rent; in the case of a sharecropper*,* both the benefits and the losses are shared equally as though in a partnership and there is no place for *remissio mercedis.* The allocation of risk is therefore based on how the mutual obligations of the parties are constructed. It is not clear whether Gaius intended that the damage should be total before a tenant has a right to *remissio mercedis.* Karlović and Balić argue that he intended only to clarify the position where *vis maior* led to only very minor damage for which the tenant could not recover.[128] Capogrossi Colognesi expands on this idea, arguing that Gaius was dealing with a "grey area" in the risk to which the tenant ought to be exposed. In his view the criteria for *remissio mercedis* in these circumstances is whether the damage caused was "tolerable" for the tenant.[129]

By contrast the later position, which was based upon Imperial petition rather than formula, permitted a remission *pro rata* following circumstances that fell far below *vis maior,* such as a bad harvest. Evidence for this view was based on a third century CE constitution of Severus Alexander:

> *Imperator Alexander Severus*.
> Licet certis annuis quantitatibus fundum conduxeris, si tamen expressum non est in locatione aut mos regionis postulat, ut, si qua labe tempestatis vel alio caeli vitio damna accidissent, ad onus tuum pertinerent, et quae evenerunt sterilitates ubertate aliorum annorum repensatae non probabuntur, rationem tui iuxta bonam fidem haberi recte postulabis, eamque formam qui ex appellatione cognoscet sequetur.
>
> *The Emperor Alexander to Higinius.*
> Although you rented the farm for a definite, annual sum, still if it was not stated in the contract of letting, or the custom of the country does not demand, that damages which occur through destruction of storm or other bad weather should be at your risk, then if the meagreness of the crop is not shown to have been offset by the abundance of other

[127] D.19.2.25.6.
[128] Karlović and Balić. "Remissio mercedis". p.977.
[129] Capogrossi Colognesi. *Remissio mercedis*. p.76.

years, you rightly and equitably demand that consideration be given you on that account, and the appellate judge will apply that rule.[130]

The Classical jurists also sometimes appear to contemplate a wider range of circumstances than had been conceived by the Republican jurists. Ulpian mentions not only storms, jackdaws, and starlings, as per Servius, but also landslips, blight and even an exceptionally hot season.[131] One way of framing this shift is to say that the law began to differentiate between *ubertas,* or abundance of the land, and *sterilitas,* or barrenness.[132] Abundance became a requirement of the *locator's* ongoing responsibility to make available the enjoyment of the land for the *conductor*. Under this new framework, *remissio mercedis* was no longer restricted to cases involving an unanticipated external force. It was instead available following a wider assessment of whether the events that deprived the *conductor* of enjoyment were part of the ordinary course of agriculture and could therefore have been overcome by the *opus* of the tenant, or unusual and therefore difficult for the tenant to adequately prepare for.[133] *Opus* here refers not just to labour, but also to planning and good management. Kehoe argues that the transition took place the late second century CE, under the Severan Emperors and that it represented nothing more than a refinement of the existing risk regime, to reflect the range of agricultural situations presented to the Imperial chancelry.[134] The difficulty with this view is that it is very difficult to conceptually reconcile *ubertas/sterilitas* with *vis/vitium,* nor is it easy to see how one could have evolved from the other. It is worth highlighting, however, that the situation envisaged in C.4.65.8. is arguably tantamount to a total loss of enjoyment over time. It depends on whether the Imperial chancelry contemplated a prolonged period of bad weather in which there are no abundant harvests at all, such that the effect on the tenant is equivalent to a sudden and total loss of enjoyment from a storm, or merely a paucity of good harvests where the tenant does not lose total enjoyment but nevertheless finds themselves in severely hampered economic circumstances. The former position merely extends the time window of *remissio mercedis*. The latter position expands it to embrace a genuinely new set of circumstances not contemplated by the Republican version of the institution. By the later third century CE, the

[130] C.4.65.8. Blume.
[131] D.19.2.15.2.
[132] On the *ubertas/sterilitas* distinction see du Plessis. *Letting and Hiring.* p.141-142. See also Johne, K.P. (1983). *Die Kolonen in Italien Und Den Westlichen Provinzen Des Roemischen Reiches;* Weinheim: Wiley-VCH. pp. 229–230. Capogrossi Colognesi. *Remissio mercedis*. p.77; Corcoran, S. (2007). *The Empire of the Tetrarchs: Imperial Pronouncements 284–324*. Oxford: Oxford University Press. p.53.
[133] du Plessis. *Letting and Hiring.* pp.141-142.
[134] Kehoe. *Law and the Rural Economy*. pp. 115-116. See also Kehoe. *Investment, Profit and Tenancy*. p.230.

Imperial chancelry was also prepared to pro-actively reverse rents already collected if this had been done contrary to the rights of the tenant:

> *Imperatores Diocletianus, Maximianus.*
> Excepto tempore, quo edaci lucustarum pernicie sterilitatis vitium incessit, sequentis temporis fructus, quos tibi iuxta praeteritam consuetudinem deberi constiterit, reddi tibi praeses provinciae iubebit.
>
> *The Emperors Diocletian and Maximian to Amnus.*
> Excepting the time when there was a failure of crops by reason of the pernicious destructiveness of locusts, the president of the province will order payment to you of the fruits due you, according to past custom, for the time subsequent thereto.[135]

The intervention of the Imperial chancelry has been explained as a policy designed to avert a general agrarian decline on the Italian peninsula.[136] Alternatively, both Mayer-Maly and later Kaser justified the expansion of *remissio mercedis* as an attempt to protect the welfare of the individual tenant.[137] Müller has suggested, interestingly, that the portion of D.19.2.15.2. which expands beyond the situations envisaged by Servius may be a post-Classical addition.[138] It is not clear exactly when this might have been done, or how much time might have passed since the shift in legal practices which the addition may have reflected. Müller has also proposed that the two paradigms may have existed simultaneously at one time, depending on the local custom in each province, with one gradually graining prominence over the other in the late second and third centuries CE, both in the juristic literature and the imperial constitutions.[139] There are echoes here of Westbrook's suggestion that the doctrine of *laesio enormis* may also have been an acknowledgement of an existing set of culturally embedded expectations, particularly in the Levantine provinces.[140] It is sometimes unclear in the Roman sources whether the Imperial chancelry is enacting a policy decision of its own making or merely enforcing local agrarian customs as they had previously existed in the provinces. Once again, this may be a false distinction. Roman governance of the provinces by the late second century CE blended a respect for "positive or customary law […] abstracted from patterns in conventional practice" with "a discourse and practice of evaluating specific local practices".[141] It was pragmatically in the interest of the Imperial

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[135] C.4.65.18. Blume.
[136] This was the position taken by Ankum. "Remissio Mercedis". pp. 237. See also, on agrarian decline in Italy, Visky, K. (1982). "Locazione e crisi economica del III secolo." *Studi Sanfilippo*. Vol. 1. pp.679ff.
[137] Mayer-Maly. *Locatio conductio.* pp.140ff; Kaser. "Periculum locatoris". p.173ff.
[138] Müller. *Gefahrtragung.* pp.37-38.
[139] Müller. *Gefahrtragung.* p.34.
[140] Westbrook. "The Origin of *Laesio Enormis*". p.41.
[141] Ando, C. (2019). "Substantive Justice in Provincial and Roman Legal Argument". *The Impact of Justice on the Roman Empire.* Leiden: Brill. p.152.

chancelry to preserve the local legal heritage where this were beneficial or promoted stability, but this was not done in a neutral or wholly positivistic fashion. If the Imperial chancelry endorsed a local custom – certainly if it went out of its way to *enforce* one – it did so for substantive reasons.

Replacement, Continuity or Transformation?

The approach outlined above – in which *remissio mercedis* is treated as two separate legal institutions, with one replacing the other in the later Imperial period – has come under pressure from multiple angles. Firstly, Watson has argued cogently that the late Republican position, as outlined by Servius, could indeed allow remission of rent *pro rata,* not just a general release from rent*.* The emphasise here is that a *pro rata* release would maximise the prospects of the *locator* collecting rents in the future and therefore serve the interests of *locators* as a class.[142] Watson draws on another passage in the Digest which cites Servius as an authority:

> *Ulpianus libro trigesimo secundo ad edictum*. Si quis dolia vitiosa ignarus locaverit, deinde vinum effluxerit, tenebitur in id quod interest nec ignorantia eius erit excusata: et ita cassius scripsit. aliter atque si saltum pascuum locasti, in quo herba mala nascebatur: hic enim si pecora vel demortua sunt vel etiam deteriora facta, quod interest praestabitur, si scisti, si ignorasti, pensionem non petes, et ita servio labeoni sabino placuit.
>
> Ulpian. Edict. Book 32. If someone unknowingly leases out defective storage jars and wine runs out of them, he will be liable for the [lessee's] interest, nor will his lack of awareness have been excused, so Casius wrote as well. It is quite different if you leased out a pasture in which harmful weeds grew; in this case, if the cattle either died or lost value, the [lessee's] interest is owing if you knew this, but if you were unaware of it, you may not sue for payment of rent, a view that Servius, Labeo and Sabinus also approve.[143]

In this example, the owner is liable to the tenant for any losses which arise from weeds on the land if they knew about these previously. Where they were unaware, they are prevented from bringing an action for rent. This is clearly not a case of *vis maior.* Indeed, according to the scheme of D.18.2.15.2, the loss may arise *ex ipsa re oriantur*. There is no possibility of the tenant being totally released from the obligation to pay rent that season. What Ulpian must therefore mean is that the landlord is prevented from fully exercising his right under the

[142] Watson. *The Law of Obligations.* p.112.
[143] D.19.2.19.1. Watson.

contract to collect rents. In effect this is would be a *pro rata* remission to reflect the loss of cultivation. The type of contract and the content of the obligations it contained was also relevant for the availability of remission. In D.19.2.15.2., it is seen that damage to crops must be borne by the tenant. This would initially seem to contradict D.19.2.19.1., where remission is available for the presence of poisonous herbs. However, in D.19.2.15.2. the hire is only for land, whereas in the other case the hire is specifically for pasture. In a hire for pasture, the presence of poisonous weeds amounts to a deprivation of the basic purpose of the hire; the tenant has not been provided with land capable of yielding crops from which he would then be expected to make payment on the rent. If the hire is only for land, damage to crops may frustrate the tenant's intended use of the land but does not defeat the purpose of the contract.

Secondly, de Neeve argues that evidence for *remissio mercedis* in its late imperial scope can be found in a Republican and early Imperial context.[144] He points to a text from Columella which recommends standards of conduct for landlords to maximise future profits from their land:

> Comiter agat cum colonia facilemque se praebeat, et avarius opus exigat quam pensiones, quoniam et minus id offendit et tarnen in universum magis prodest. Nam ubi sedulo colitur ager, plerumque compendium, numquam, nisi si caeli maio r vis au t praedonu m incessit, detrimentum adfert, eoque remissione m colonus petere non audet.
>
> He should be civil in dealing with his tenants, should show himself affable, and should be more exacting in the matter of work than of payments, as this gives less offence yet is, generally speaking, more profitable. For when land is carefully tilled it usually brings a profit, and never a loss, except when it is assailed by unusually severe weather or by robbers; and for that reason the tenant does not venture to ask for reduction of his rent.[145]

De Neeve argues there is a strong parallel here to the rules set down by Servius in D.18.2.15.2 governing *vis maior.* This is easily accepted. He further argues that Columella's advice to be "more exacting in the matter of work than of payments" reflects a recognition of the principle that remission will only be available where the tenant can demonstrate their losses have not been incurred by insufficient *opus* on their part.[146] He therefore treats it as a vindication of Ankum's supposition that "la condition prévue pour la remise impériale selon laquelle le fermier doit avoir convenablement cultivé sa terre, (fut) appliquée également dans

[144] de Neeve. "Remissio Mercedis". pp.308-318.
[145] Columella. RR. I.7.1. Translation in Ash, H.B. (1954). *De Re Rustica*. Vol. 1 (Books 1-4). Cambridge, MA: Harvard University Press. Loeb Classical Library 361.
[146] de Neeve. "Remissio Mercedis". pp.311-313.

les procédures où les actiones locati et conducti étaient intentées".[147] This may be stretching the source material too far. It is not surprising that even in the Republican period a tenant would not dare to ask for a *pro rata* reduction in rent except in rare circumstances. However, the broader enquiry of the Imperial constitutions into the productivity of the land and the attempts of tenants to compensate for this is not yet in evidence here.

Thirdly - and perhaps most seriously - it has been questioned whether *remissio mercedis,* even in its later Imperial form, ever transcended the standard allocation of risk in a contract for *locatio conducti rei.* Zimmermann points for example to a juristic reference to a constitution of Antoninus Pius:

> *Ulpianus libro trigesimo secundo ad edictum*. Cum quidam de fructuum exiguitate quereretur, non ese rationem eius habendam rescripto diui Antonini continetur. Item alio rescripto ita continetur: 'Nouam rem desideras, ut propter vetustatem uinearum remissio tibi detur'.
>
> Ulpian. Edict. Book 32. When someone complains about the small yield of his crops, a rescript of the deified Antoninus holds that no consideration needs to be taken of this [claim]. Likewise, another rescript holds: "You ask for something unheard of, namely to receive a remission due to the age of your vines".[148]

Zimmermann argues that if a reduction in the fruits of the land is not sufficient reason for a remission in rent, *remissio mercedis* even in its Imperial form goes no further than a simple recognition that that the *conductor* cannot claim rent if he has not upheld his side of the bargain, to provide land capable of enjoyment.[149] Under this allocation of risk, the tenant must bear any losses associated with the normal vagaries of agriculture: it is expected that they will take steps to avoid or at least prepare for this. The landlord is therefore only liable, even under the Imperial *remissio,* for *vis maior,* or external irresistible force, just as they were in the Republic.

It is difficult to resist the conclusion that *remissio mercedis* was a single institution with its ultimate origins in the Republican period. The later *remissio mercedis* was not a novel creation of the Imperial chancelry and it did not offer a different variety of remedies to the formulary *remissio* developed by the jurists. However, Zimmermann goes too far in arguing that the range of situations where the law was prepared to offer relief also remained entirely static. It is possible to identify two respects in which the Imperial chancelry altered the scope of the institution. Firstly, it was prepared to offer relief following bad weather or other vagaries of agriculture which had led to a partial destruction of the harvest; it did not confine

[147] Ankum. "Remissio Mercedis". pp.227-228.
[148] D.19.2.15.5. Watson.
[149] Zimmermann. *Obligations.* p. 372

itself to *vis maior,* such as a storm, leading to a total loss of enjoyment of the land. This reflects an extension of the time window over which *remissio mercedis* could operate, allowing a court or provincial governor to assess whether a loss of fruits would be compensated for by future harvests or not. Secondly, there is evidence of a more flexible approach to the definition of *ex ipsa re oriantur.* Rather than acting as a residual category for all loss not caused by external force, it instead acted as the launching pad for an inquiry into whether the tenant could have anticipated that the productivity of the land would be compromised in some way and taken reasonable steps to prevent the loss.[150] This would have been assessed based on the reasonable skill and competence expected of an agrarian tenant. Relief would be allowed where enjoyment had been impaired in a manner beyond the reasonable control of the tenant and was unlikely to be compensated for by later harvests. These changes may have begun via juristic development but were accelerated by the Imperial chancelry from the Severan period onwards. It is not possible on current evidence to say that there was a conceptual revolution in *remissio mercedis* from *vis/vitium* to *ubertas/sterilitas*. It is possible that these reflect regional variations - perhaps even a shift in the focus of agrarian production from one part of the Empire to another, with corresponding differences in customary practice*.* However, the later Imperial constitutions do evince a more sophisticated approach to the interests of the parties than had been envisaged by the earliest formulary *remissio mercedis*. This does represent a meaningful improvement in the position of the tenant.

Procedure and Policy

Imperial *remissio mercedis*, which was initiated by petition *cognitio extraordinaria*, may have had some procedural advantages over its formulary equivalent. Under formulary procedure, if the tenant paid rent at the end of the season, they would need to wait until the *locator* brought an action under the *actio locati* and then make a claim for remission in the form of an *exceptio.* Under *cognitio* procedure, however, the tenant could petition an Imperial official to fix a lower rent as soon as it became apparent that enjoyment had been impaired. This resulted in a significant economic calculation advantage for the *conductor,* who was able to take the initiative and therefore plan for a reduced rent instead of waiting to defend an action brought against them. This led Ankum to suggest that the advantages of the later Imperial *remissio* for the tenant rested primarily in procedure rather than in any alteration to their substantive rights.[151]

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[150] Parpaglia. *Vitia ex ipsa re.* p. 181.
[151] Ankum, H. (1980). "Haftung und Gefahr bei der publicatio eines verpachteten oder verkauften Grundstücks". *SZ.* Vol. 97. pp.157-180. See also Chorus, J.M.J. (1976). *Handelen in Strijd met de Wet.* Leiden: Brill. pp.152.

De Neeve accepts that the change in procedure improved the tenant's position but questions its practical significance for two reasons. Firstly, he suggests that a petition under *cognitio* procedure would only ever have been brought at the end of the season, to allow time for the full extent of the loss suffered by the *conductor* to become apparent.[152] The only exception to this would be the total and sudden destruction of the crop, which de Neeve argues would be very rare. There is nothing in the primary sources to suggest when a petition under *cognitio* could be brought. However, in several of the circumstances outlined by Ulpian in D.19.2.15.2 – for example, loss caused by a landslip, or perhaps even by a very hot season - the extent of the loss might have become clear well before the end of the season. It is not clear why the *conductor* petitioning for a reduction in rent before the end of the season would have been banned generally, as opposed to simply being impractical in some cases. De Neeve's second argument is that questions of procedure were not of interest to most tenants: if they felt they were entitled to a remission of rent, their first step would be to ask their *locator* for one during the season, only exploring legal avenues if this was refused.[153] In support of this he points to references to informal requests for remission in Pliny and Columella.[154] Moreover, de Neeve argues that all but the wealthiest tenants were unable to access the legal system.[155] While it certainly cannot be denied that much of the juristic literature on letting and hiring was written specifically with wealthier tenants and landlords in mind[156], the proposition that Roman courts had no reach across the majority of contractual parties must be firmly rejected. Recent work on the Imperial constitutions has demonstrated the wide variety of social backgrounds of litigants, including some from very humble backgrounds.[157] It is unlikely that the majority of *conductors* were so poor as to disregard the formal mechanics of law altogether. The mere presence of the Roman courts also structured legal relationships in the provinces, as both *locators* and *conductors* would have held a keen interest in what the best alternative a privately negotiated outcome is likely to have been.

Perhaps more significant than the procedural avenues open to tenants is the fact that the transition to *remissio* by Imperial petition opened its application to policy considerations in a way that had not previously been possible under the formulary system. The Imperial chancelry had acted before to alleviate general economic conditions by the coordination of land rents. A notable example can be seen in a group of documents from Roman Egypt –

[152]de Neeve. "Remissio Mercedis". pp.330-331.
[153] De Neeve. "Remissio Mercedis". pp.331-332.
[154] Plin. Ep. 10.8.5. Columella. RR. I.7.1.
[155] De Neeve. "Remissio Mercedis". pp. 331-332.
[156] De Neeve refers to the argument of Frier. *Landlords and tenants in Imperial Rome*. pp.48-51.
[157] See for example, on the petitioners behind the Hermogenian constitutions, Connolly, S. (2010). *Lives Behind the Laws: The World of the Codex Hermogenianus.* Indianapolis: Indiana University Press.

the Chora documents - dated from 113 to 120 CE, which refer to offers for the lease of Imperial land at reduced rents.[158] These offers were made in compliance with an Edict of the Emperor Hadrian which aimed at alleviating economic pressure on Egyptian tenants. Kruse, in his work on these documents, is careful to emphasise that the valuation of the lease in these documents was based on quite different principles to *remissio mercedis.* There is no suggestion that the value of the land has been reduced following a disaster that impairs the fruits of the land. Rather, it is stated without further explanation that the land is no longer capable of "bearing" the rents which had previously been applied to it.[159] It is not immediately clear whether this refers to a shift in the balance of supply and demand, or simply to the worsening economic circumstances of the Egyptian tenants. Kruse also emphasises that the state tenants referred to in these documents are not asking for a reduction in their rent. It is clear from the language of the documents that they are merely offering themselves for a lease on land which had previously been rented at a higher price.[160] Nevertheless, the policy intention of the Imperial chancelry is clear and demonstrates a willingness to alleviate the position of agrarian tenants and maximise their opportunities to keep up with their rent payments. As Kruse notes, the Edict of Hadrian was motivated not just by a short-term political desire to pacifying the local population in times of economic tension, but also because it served the long-term revenue interests of the Imperial chancelry: it left the door open for new tenants to outbid the incumbents while ensuring the land was productive in the meantime.[161]

At the heart of the existing literature on *remissio mercedis* is what Capogrossi Colognesi refers to as the "grey zone", where factual circumstances do not fall neatly into the categories of risk and responsibility that had been developed by the jurists in the late Republican period.[162] It has been shown here while the Imperial chancelry was never willing to wholly transcend an assessment based on the division of risk between the parties, the evolution of Imperial *remissio mercedis* did represent an advance in some respects on the past. The "grey zone" was increasingly moulded to improve the position of the tenant. What policy motivations were likely to lie behind the increasing flexibility of the Imperial *remissio mercedis*? The traditional explanation, offered by Mayer-Maly and Kaser, is rooted in the unstable political and economic environment of the late Imperial period.[163] More recently, Ernst has also emphasised an economically motivated, late Imperial turn: "sterilitas fügt sich erst in das Recht

[158] P.Alex.Giss.26. P.Brem.36. P.Giss.I.4-5. 6.Kol.I-III. 7.Kol.I-II. P.Lips.II.136-137. P.Ryl.II.96.
[159] Kruse, T. (2017). "Zur Euergesia Hadrians über die Verpachtung des Staatslandes in Ägypten". *Vorträge zur griechischen und hellenistischen Rechtsgeschichte.* Vienna: Österreichische Akademie der Wissenschaften. pp.321-332 at p.328.
[160] Kruse. "Verpachtung des Staatslandes in Ägypten". p.328.
[161] Kruse. "Verpachtung des Staatslandes in Ägypten". p.330.
[162] Capogrossi Colognesi. *Remissio mercedis.* p.83.
[163] Mayer-Maly. *Locatio conductio.* pp.140ff. Kaser. "Periculum locatoris". p.173ff.

der nachklassischen Zeit, das die Zinsbefreiung vom Tatbestand der unabwendbaren, eigentumsimmanenten Sacheinwirkung gelöst und stattdessen an den — aus der Sicht des Pächters — schicksalhaften Ernteverlust geknüpft hat".[164] One important question is whether the policies of the Imperial chancelry were pro-active or re-active. Was it intervening to impose its own construction of an equitable solution to a failed harvest? Or alternatively, was it responding to an existing set of practices and expectations among litigants before the Roman courts? If the imperial *remissio mercedis* was essentially reactive, it also needs to be asked whether it was mainly a response to economic factors or the social values of the parties. On Kehoe's view, the imperial *remissio mercedis* was geared towards encouraging voluntary remission of rent. At the end of the contract period the landlord would still be entitled to insist upon the full value of the rent; the Imperial *remissio mercedis* would therefore have little practical meaning if it did not reflect and facilitate an existing practice of voluntary remission.[165] This arguably represents a similar economic pragmatism to the Edict of Hadrian. However, it is important that C.4.65.8. founded explicitly upon *bona fides* when offering relief in these circumstances. This suggests that the Imperial chancelry in the late second and third centuries CE acknowledged priorities which went beyond simple economic calculation.

Section 6.3: Relational Contracts and the Imperial Chancelry

It has been shown here that the development of *laesio enormis* by the Imperial chancelry was a paradigm shift in price-setting, which may have reflected changing economic conditions and the impact of these on the expectations of petitioners before the courts. Further, *remissio mercedis,* while it had Republican origins, did evolve in the later Imperial period into a more flexible remedy capable of embracing a wider range of economic distress faced by tenants. In both cases, the Imperial chancelry chose to intervene to rectify the injustice of a situation where one party to a contract had less bargaining power than the others. The purpose of this section is to articulate more precisely how this was done and what incentives may have acted upon the Imperial chancelry to utilise the concepts of *bona fides* and *humanitas* to the benefit of more vulnerable contractual parties in the way that it did.

[164] Ernst, W. (1988). "Das Nutzungsrisiko bei der Pacht". *ZSS*. Vol. 105. pp.541-591 at p.571.
[165] Kehoe, D. (2015). "Contracts, Agency, and Transaction Costs in the Roman Economy". *Law and Transaction Costs in the Ancient Economy*. Ann Arbor: University of Michigan Press. pp.231-252 at p.241.

The idea of *bona fides* in contract is closely related to the debate over Roman developments in "the field of commercial law".[166] The Romans did not think of "commerce" as a discrete category of law, but they did arrive pragmatically at a notion of those transactions which had held commercial significance. This was initially achieved through the medium of the *Ius gentium* or "law of nations", which was developed out of a recognition that similar commercial transactions existed across all Mediterranean peoples known to the Romans by the late Republic. Today the concept of *Ius gentium* is closely associated with international law, but to the Romans it came to form an integral part of their jurisdiction available to citizens and peregrines.[167] The direction of influence is significant here: it is likely that the *Ius gentium* recognised in Roman legal actions was simply a reflection of existing commercial practices even before the Romans had risen to power, rather than the product of any attempt to harmonise laws or distil general commercial principles from an observation of real world behaviour. The right of certain privileged *peregrini,* presumably those heavily engaged in commerce, to access Roman courts became known as *commercium.*[168] This was one aspect of a larger body of peregrine rights (*isopoliteia*) which could, depending on the individual, also include the right to inter-marry (*conubium*) and the right to assemble and participate in public life (*suffragium*).[169] Ulpian describes the rights of *commercium* in a somewhat austere fashion:

> Commercium est emendi vendendique invicem ius.
>
> *Commercium* is the right of buying and selling with one another.[170]

In practice the rights of *commercium* extended far beyond this, embracing "the right to make formal contracts, to acquire property, and to resort to courts according to Roman law and procedure".[171] It is not possible to provide a complete list of all the rights that were available under *Ius gentium.* Early Republican treaties, such as between Rome and Carthage, may provide a guide, but the later Imperial concept may have been wider and would certainly

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[166] Cascio, E. (2007). "The Early Roman Empire: The State and the Economy". *The Cambridge Economic History of the Greco-Roman World.* Cambridge: Cambridge University Press. pp.619-648 at p.626. See also Aubert, J. (2015). "Commerce". *The Cambridge Companion to Roman Law.* Cambridge: Cambridge University Press. pp.213-235 at pp.215ff.
[167] Wielgus, S. (1999). "The Genesis and History of the *Ius Gentium* in the Ancient World and the Middle Ages." *Annals of Philosophy.* Vol. 47(2). pp.335-351.
[168] Minaud, G. (2011). *Les gens de commerce et le droit à Rome*. Aix-en-Provence: PU Aix-Marseille. s.35–36.
[169] For a discussion of these concepts and the relationship between them see Capogrossi Colognesi, L. (1994). "Ius commercii, conubium, civitas sine suffragio. Le origini del diritto internazionale privato e la romanizzazione delle comunità latinocampane". *Le strade del potere*. Catania: Libreria Editrice Torre. pp.3-64.
[170] Ulpian Epit.19.5. Scott.
[171] Aubert. "Commerce". p.217.

have been more refined.[172] It is clear, however, that the *Ius gentium* served as a demarcated body of law which, if not strictly a law *of* commerce, was heavily influenced by its response to commercial need.

It was in this commercial context that the concept of good faith was first developed via the Praetorian Edict during the mid-Republic. Title 19 of the Edict introduced the consensual contracts of mandate, partnership, sale, and hire. The requirement of good faith reflected the synallagmatic nature of a consensual contract, as the parties are each dependent on the performance of the other and it is impossible to anticipate all future eventualities. Peter Birks noted that "all contracts require agreement", but "contracts *consensu* differ from the rest only in requiring nothing else".[173] While it is true that a consensual contract lacked the requirements of form found in other Romans contracts, it would be more accurate to say that they are defined by their focus on the cause or justification for a transaction as opposed to the way it has been given legal form. Perhaps the most important differentiating feature of a consensual contract lies in the set of instructions given to the *iudex:* not what ought the defendant to do according to the *lex,* but rather what ought they do *ex fide bona,* or according to the demands of good faith. In the most limited sense this opened up a wider range of *exceptio* to an action on one of the consensual contracts, such as mistake, duress and fraud. However, it also granted a wider ambit of discretion to the *iudex* to consider whether the parties had adhered to expected standards of conduct.

In the early history of consensual sale, the seller was still expected to give warranties against latent defects and eviction; these were not included within the scope of the good faith action.[175] It would follow that a peregrine unfamiliar with Roman law would not find their position much improved by the consensual contracts, as they would still need to know how to secure a stipulation from the buyer to protect themselves against the main risks they would face after the conclusion of the sale. A consensual sale would also not be obviously more commercially expedient, given the formal requirements of a stipulation. Watson has therefore suggested that the origins of consensual sale lie not in a need to cater for peregrines, but rather in the need to "fill the interstices" of sale by stipulation.[176] This was particularly the case where reciprocal obligations – such as delivery of a *res* and payment of the price – were not performed simultaneously. Watson therefore suggests that the good

[172]On the early treaties see Nörr, D. (2005). "Osservazioni in tema di terminologia giuridica predecemvirale e di ius mercatorum mediterraneo: il primo trattato cartaginese-romano". *Le Dodici Tavole. Dai Decemviri agli Umanisti.* Pavia: IUSS Press. pp.147-189.
[173] Birks, P. and Descheemaeker, E. (2014). *The Roman Law of Obligations.* Oxford: Oxford University Press. p.65.
[175] Watson, A. (1964). "The Origin of Consensual Sale: A Hypothesis". *TR.* Vol. 32. pp.245-246. It is particularly significant that assurance against latent defects *was* included in the Aedilician Edict. See Daube, D. (1956). *Forms of Roman Legislation.* Oxford: Oxford University Press. p.134.
[176] Watson. "The Origin of Consensual Sale". p.248.

faith contracts was established as a way of filling out the obligations of the parties once a contractual relationship had already been established by stipulation.[177] It was only in the Classical period that consensual sale could exist independently from *stipulatio.* This account of the consensual contract as a pragmatic response to the deficiencies of stipulation reduces, in Watson's eyes, the significance of commerce and therefore the expectations of good faith that might characterise a commercial contract.[178]

Watson's view of the origins of consensual sale is persuasive, particularly as it avoids expecting too much from juristic *interpretatio* in a formative period of the development of Roman law. A similar pattern may have been followed for the other consensual contracts. Other accounts for the early development of consensual sale do exist. On some views it relied upon a predecessor contract involving a transfer of property for a simultaneous transfer of other property, with the requirement of a cash sale introduced later and becoming essential by the Classical period.[179] In this way *emptio venditio* would have evolved from essentially a contract for barter. Either way, it is not necessary to adopt Watson's view that the early consensual contracts had no commercial significance. A simple sale in which goods are exchanged in them moment for cash is common in any agrarian society. The more complex transactions which *emptio venditio* was developed for – where the obligations of the parties are spread out over time – are characteristic of a society which is engaging more heavily in commerce than before. It is likely that the standards of conduct expected by merchants of each other would shape any contractual remedies developed for what were generally mercantile transactions. Moreover, once it had been conceded that a contract could exist with unenumerated obligations – no matter how narrow the concession at first – it set off a process of evolution in which new obligations could meet the changing expectations of merchants. Birks argues that by altering the instructions given to the *iudex* in this way, consensual contracts acquired a "package of implied obligations" which took effect from the moment the contract was concluded.[180] The Romans, lacking a formal theory of reciprocal obligations, would not have conceived of them as implied terms in the modern sense. However, they did serve as a set of culturally embedded expectations about how each party would behave.

It is worth expanding on how good faith would operate in a formulary action on the two contracts addressed in this chapter: *emptio venditio* and *locatio conductio.* Lenel, in his

[177] Watson. "The Origin of Consensual Sale". p.250.
[178] Watson. "The Origin of Consensual Sale". p.247.
[179] Mousourakis, G. (2012). *Fundamentals of Roman Private Law.* Berlin: Springer. p.220. The Classical jurists refer to barter as an archaic institution: D.XVIII.1.1.
[180] Birks and Descheemaeker. *The Roman Law of Obligations.* p.65.

reconstruction of the *Edictuum Perpetuum,* provides the following template formula for the *actio ex empto*:

> *Quod Aulus Agerius de Numerio Negidio hominem quo de agitur emit, qua de re agitur, quidquid ob eam rem Numerium Negidium Aulo Agerio dare facere oportet* ***ex fide bona****, eius iudex Numerium Negidium Aulo Agerio condemnato; si no paret absolvito.*
>
> Whereas Aulus Agerius bought the man who is the subject of the action from Numerius Negidius, which matter is the subject of the action, whatever on account of that matter Numerius Negidius ought to give to or do for Aulus Agerius **in good faith**, for the value of that let the judge condemn Numerius Negidius to Aulus Agerius; if it does not appear, let him absolve.[181]

The requirement of good faith is attached to the *intentio* of the action. References to good faith are therefore most often found in connection with what the parties are obliged to do after conclusion of the sale. *Laesio enormis,* however, relates to the price, which is one of the constituent elements of the sale. This does not mean, however, that good faith could have no role in juristic discussion of the price. Take, for example, contracts where the parties have agreed that the sum ought to be set by a third party. The question to be addressed is what the *iudex* ought to do if this named third party declines to set a price. Should the contract be held null on the basis that one of its constituent elements is missing? Or should the *iudex* substitute an assessment of what a reasonable price might have been? Underlying this dispute is the question of whether third parties are assumed to act subjectively or in accordance with an objective standard of the reasonable price.[182] Justinian resolved the problem in typically direct fashion, holding in one of the Fifty Decisions that the contract will be null if a specific price has not been set by the named third party.[183] However, this was a very late development, and it is not difficult to find competing views in earlier texts. C.4.3.15 holds that if the named third person has not set a price, the *iudex* should substitute the view of a reasonable person. The justification given is that a *iudex* should be able to eliminate any "guesswork as to whether the parties agreed the term with an eye to one certain person or to *boni viri arbitrium*, a sound man's judgement".[184] It is clear that a contract which allowed a third party unlimited discretion to choose the price was too uncertain and therefore could not have constituted a perfect sale: some kind of objective standard clearly needed to limit what a third party could choose to do. Birks suggests this function was served by "an open-

[181] Lenel, O. ([1883] 2018). *Das Edictum Perpetuum: Ein Versuch Zu Dessen Wiederherstellung.* Buffalo, WY: Creative Media Partners. s.110. Emphasis added.
[182] Birks and Descheemaeker. *The Roman Law of Obligations.* p.70-71.
[183] C.4.38.15.
[184] C.4.3.15. Translation by Blume.

textured stability based on such notions as reasonableness, fairness, sound judgement".[185] Good faith could easily be read into this texture of principles. It should be noted that the emphasis here is on whether the price is true – *verum* – rather than fair. There is no concept at this stage of an equal exchange. An exorbitant or heavily discounted price would still be held valid if it were sincerely intended by the parties. However, as has already been seen, for the Romans, a "true" price was usually the market price.[186] It is not difficult to see how deviations from the market price, given certain circumstances, could eventually be regarded as unfair.

Good faith therefore is therefore present both in how the obligations of the parties are interpreted by the *iudex*, as well as in the construction of the contract itself. A similar point can be made for the contract of *locatio conductio.* This template, also from Lenel, deals with the *actio locati*:

> *Quod Aulus Agerius Numerio Negidio fundum quo de agitur locavit qua de re agitur, quidquid ob eam rem Numerium Negidium Aulo Agerio dare facere oportet* ***ex fide bona****, eius iudex Numerium Negidium Aulo Agerio condemnato; si non paret absolvito.*
>
> Whereas Aulus Agerius let the land which is the subject of this action to Numerius Negidius, which matter is the subject of this suit, whatever on that account Numerius Negidius ought in **good faith** to give to or do for Aulus Agerius, for the value of that let the judge condemn Numerius Negidius to Aulus Agerius; if it does not appear let him absolve.[187]

The circumstances in which the *conductor* could invoke good faith for his own interest depended how the contract had been constructed. In the absence of intervention by the Imperial chancelry, a right to remission on the rent had to form part of the *lex contractus* for the tenant to successfully bring an *actio conducti.* Otherwise, he had to wait for the *locator* to bring an action. The larger principle that the *locator* must secure enjoyment on an ongoing basis does, however, exist independently from the *lex.* This principle manifests itself in a variety of ways. The *locator* must not defraud the tenant out of enjoyment or harass him until he is forced to leave. He must keep the *res* in a good enough condition that it can be enjoyed by the *conductor.* The standard of care which must be exercised is *culpa levis in abstracto.*[188] It follows that the *locator* might have to treat the *res* with a higher degree of

[185] Birks and Descheemaeker. *The Roman Law of Obligations.* p.70-71.
[186] Tchernia. *The Romans and Trade*. p.75.
[187] Lenel. *Das Edictum Perpetuum*. s.11. Emphasis added.
[188] On *culpa* see MacCormack, G.D. (1972). "Culpa". *Studia et Documenta Historiae et Iuris*. Vol. 38. 123. Also Voci, P. (1990). "Diligentia, Custodia, Culpa. I Dati Fondamentali." *Studia et Documenta Historiae Iuris.* Vol. 56. 29.

care than he would have treated had he reserved enjoyment to himself. The *locator* is also liable for eviction:

> *Ulpianus libro 32 ad edictum.* Si quis domum **bona fide** emptam vel fundum locaverit mihi isque sit evictus sine dolo **malo** culpaque eius, Pomponius ait nihilo minus eum teneri ex conducto ei qui conduxit, ut ei praestetur frui quod conduxit licere.
>
> Ulpian. Edict. Book 32. If a man leases to me a house or a farm that he purchased in **good faith** and he is then evicted through no **bad faith** or fault on his part, Pomponius says that he is nonetheless liable to the lessee for presenting to him the enjoyment of what he hired.[189]

In all these instances good faith is explicitly cited as the underlying justification for the *locator*'s duty to maintain preserve the *conductor*'s enjoyment of the *res.* It is therefore not difficult to see how *remissio mercedis* following impairment of enjoyment would be assessed according to the standards of good faith and not merely according to an allocation of risk between the parties.

Issues could arise where the *merces* in a contract of *locatio conducti* had not been fixed in advance. Like sale, Justinian resolved the problem by holding that the hire was conditional until the price had been fixed.[190] The juristic literature however does admit of the possibility for exceptions, at least for *locatio operis faciendi*. Gaius gives an example where a customer takes clothes to a laundry to be washed, or to a tailor to be repaired, but does not fix the *merces* in advance.[191] The same issue would presumably arise whenever a tradesman was hired for a job without the price being agreed in advance, assuming that there was no public list of prices which the customer agreed to by the very act of handing over their property for the work. Gaius is prepared to leave it an open question whether such an arrangement constitutes a hire or not. The underlying question would be whether there is enough certainty in an agreement that the *merces* is fixed later for the essential elements of hire to be met. It could be argued that the level of certainty in an agreement of this kind would depend on whether there was an existing relationship of trust between the customer and the tradesman, so that they either knew approximately what *merces* they were likely to agree, or in the event of a novel job, had confidence that the *merces* would be acceptable to both parties. To put it another way, the "open-textured stability" of a contract of *locatio conducti* depended on this trust between the parties.

[189] D.19.2.9.pr. Translation by Watson.
[190] J.3.24.1.
[191] Gai.Inst.3.143.

From the late second century CE, good faith is no longer limited by the structure of the formulary actions. Here we are concerned with two Imperial constitutions. In C.4.44.2, dated 285 CE, the Imperial chancelry justifies *laesio enormis* on that basis that it is *humanum est* that a seller should receive back property which was sold for less than what it was worth. This transcends earlier discussion of a *true* price to assess directly whether the two sides of an exchange are *equal.* Is this reference to *humanitas,* or the interests of humanity, enough to impute a reference to good faith in *laesio enormis*? A better understanding of how *humanitas* operated can be reached by looking at other instances where it is used to justify a legislative intervention by the Imperial chancelry. As a legal concept *humanitas* is associated with the development of the *cognitio* procedure, which, as was discussed in the previous chapter, developed in part to allow the Imperial chancelry to meet the changing needs of vulnerable litigants. It originated in criminal procedure, but later came to be applied in civil cases. The following rescript was issued under the names of Valens, Gratian and Valentinian Augustuses in 376 CE

> Civiles autem inquisitiones inter utrasque confligentium partes aequali motu ingruit et recurrit humanitas, quum is, qui praeerit quaestioni, intentiones falsas aut conficta crimina ex legibus poenis competentibus possit ulcisci.
>
> But in a civil trial the humanity of the judge moves back and forth between the contesting parties with equal concern for each, since the judge who presides over the trial can punish false charges or proven crimes with competent penalties in accordance with the law.[192]

This rescript is concerned with the forgery of documents, particularly tablets relating to a will or acknowledgement of a debt. Litigants were permitted to choose whether to bring a criminal action for forgery or a civil action to challenge the validity of the document. The concept of *humanitas* had a role to play in both the criminal and the civil action, as a principle governing the way that a judge was expected to evaluate the merits of a case. In criminal cases, *humanitas* came to the aid of vulnerable parties who had suffered because of the actions of the accused. In civil cases, *humanitas* is applied with equal regard to the interests of both parties. *Humanitas* is often found in areas of the law where protection is granted to vulnerable persons, most notably in connection with the rules of succession and trusts. For example, it is on the basis of *humanitas* that future children are protected if their parents were made subject to a substitution without reference to the possibility of such children.[193] Moreover, *humanitas* protected a slave who granted their freedom under the terms of a will subject to a condition. If

[192] CTh. 9.19.4.2. Translation by Pharr.
[193] C.6.25.6.

the condition were deemed to be accidental and the slave only failed to fulfil it due to "the vicissitudes of fortune", they would nevertheless be held to have become free.[194] It should not be surprising that a concept originally developed for *cognitio* procedure in criminal cases came to have a considerable influence on the reasoning of judges in civil cases. Among the first criminal courts under *cognitio* procedure was the *quaestio de repetundis,* which dealt with the failure of public officials to perform the functions entrusted to them by the Roman people.[195] Concepts originally developed for crimes of this type were easily transplanted to civil law matters where one party was deemed to have a responsibility for the welfare of the other on account of their vulnerable position.

Humanitas, along with *bona fides,* therefore belonged to the same family of juristic concepts available to the Imperial chancelry in order to protect the interests of both parties where one of them has suffered a major disadvantage. It is helpful to read the text in conjunction with C.4.44.8., where good faith is said not to provide an action for the rescission of contracts where the price has varied only slightly from the market value, but that rescission will be available for contracts where the price has varied by more than half the market value. In C.4.65.8, dated 231 CE, a tenant whose meagre crop is not offset by abundance in other seasons is entitled, *bonam fidem,* to be released from the rent. This gives a more concrete identity to the principle that the *locator* has a good faith duty to secure enjoyment of the land and the implication of this for rent. In keeping with its origins in *cognitio* procedure, *humanitas* was closely associated with the Emperor and the powers exercised through the Imperial chancelry:

> Cum itaque in utroque casu oportet augusto remedio causam dirimi, cum nihil aliud tam peculiare est imperiali maiestati quam humanitas, per quam solam dei servatur imitatio, in ambobus casibus donationem firmam esse censemus.
>
> Therefore, as in both these instances, the doubt should be removed by an Imperial remedy for there is nothing so peculiar to the majesty of the Empire as humanity, by means of which alone the imitation of God is preserved, We decree that, in both these cases, the donation shall be valid.[196]

By the time of this rescript, issued in 530 CE by Justinian, the moral authority of the Emperor had already been framed in Christian terms, with the Emperor acting as an agent of God's jurisdiction. However, it is clear that even by the time of Diocletian, *humanitas* had

[194] C.6.27.6. Translation by Scott.
[195] A useful discussion of the *repetundae* and the use of concepts such as *humanitas* in dealing with crimes of thie type can be found in Bauman, R.A. (1996). *Crime and Punishment in Ancient Rome.* London: Routledge. pp.26-27.
[196] C.5.16.27. Translation by Scott.

developed from a standard to be used by judges when evaluating the merits of a case, to a general equitable jurisdiction exercised in the name of the Emperor on behalf of vulnerable parties under his rule.

Thus far good faith has been discussed as a reflection of commercial practice in the contracts most heavily used by merchants. It is possible however to articulate in economic terms why a regime of unenumerated obligations is important for any transaction which relies on a relationship of trust between the parties. Modern economic theory has tended to view contracts as a way of either organising discrete transactions between the parties or managing a relationship between the parties in which multiple transactions may take place over time. The former view leads to an essentially plural theory of contract in which each type of transaction – sale, employment, etc – needs to be dealt with individually. At first glance this is the Roman position, albeit with transactions often defined differently from modern theory.[197] The latter view, however, rescues contract as an overarching legal concept, as it seeks to provide a set of governing principles for contractual relations no matter what the transaction. What matters, therefore, is the parties and their evolving expectations of one another over time, not the specific content of their agreed obligations. Chrystal and Lipsey define relational contracts as "contracts in which what is expected by both sides is not written out in detail but develops as an ongoing relationship".[198] This definition is intended for modern societies in which obligations are frequently constituted by writing, but it captures the underlying idea that a relationship of trust and confidence between the parties can necessitate a regime of unenumerated obligations. Good faith can provide this regime. A relational contract will have a tendency to self-enforcement "in the sense that the pay-offs for both parties will usually be greater if the contract or business relationship is continued rather than discontinued".[199] However, the presence of a relational contract is also acknowledged to have an impact on any legal mechanisms through which is it enforced.[200] The parameters of this relationship are shaped not just by economic factors such as the specialisation of labour, but also by the larger social matrix in which the parties operate.[201]

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[197] Ratzan, D.M. (2015). "Transaction Costs and Contract in Roman Egypt". In Kehoe, Ratzan and Yiftach. (eds.). *Law and Transaction Costs in the Ancient Economy.* Ann Arbor: University of Michigan Press. pp.185-231 at p.192.
[198] Chrystal K. and Lipsey, R. (1997). *Economics for Business and Management.* Oxford: Oxford University Press. p.72.
[199] Collins, H. (2016). "Is a Relational Contract a Legal Concept?" *Contract in Commercial Law.* Toronto: Thomson Reuters. p.10. See also Telser, L.G. (1980). "A Theory of Self-enforcing Agreements". Journal of Business Vol. 53. pp.27-44.
[200] Malcomson, J.M. (2012). "Relational Incentive Contracts". *The Handbook of Organizational Economics.* Princeton, NJ: Princeton University Press. Ch. 25 at pp.1014-1015.
[201] MacNeil, I.R. (1973). "The Many Futures of Contracts". *Southern California Law Review.* Vol. 47. pp.691-816.

Two points should be made here about the operation of relational contracts in practice. Firstly, relational contracts are mostly written about in the context of a long-term business relationship, such as a franchise or a contract of employment.[202] This might encourage the view that they form a discrete class of contracts which can be neatly separated from the rest of contract law. However, they are not confined to parties who have known each other a long time, or even who have a relationship which goes beyond their economic transactions. It is enough for their transactions to be mediated by cultural expectations, so long as these are capable of clear definition. MacNeil gives the example of a customer in a shop buying tobacco. Even if he has never visited and will never visit again, the social matrix between shopkeeper and customer ensures that many rights and duties between them, though never verbalised, will nevertheless be respected – such as the duty to accept paper money, to give change and to provide brand consistency.[203] Secondly, relational contracts are orthogonal to the doctrinal categories into which each of the transactions within them may be placed. Two parties may conduct multiple sales, hires or other transactions, each with its own doctrinal criteria, all in the larger context of a relational contract. Ratzan shows that this was common practice in the ancient world as it is in modern times. He points to papyrological evidence from Roman Egypt that parties would first arrive at a view on the relational basis of a contract – especially whether an individual was trustworthy or not – then only later make decision about how to structure the transaction doctrinally.[204] The fact that a relational contract may transcend doctrinal categories might prompt the question of whether it is a legal concept at all or should be confined to the economic analysis of contract. Anticipating this concern, Collins has put forward a legally embedded notion of the relational contract which emphasises two aspects: a contextual approach to interpretation and the presence of implied terms of cooperation and mutual trust and confidence.[205]

Relational contracts have recently received considerable attention in common law jurisdictions, particularly England, where they have been accepted by the High Court in a series of cases as a possible basis for including good faith considerations - which are not generally otherwise acknowledged in modern English law - in the interpretation of a contract. In *Yam Seng Pte Ltd v International Trade Corporation Ltd*[206], the parties had a contract for the distribution and marketing of branded perfumes in duty free shops in East Asia. The defendant had failed prevent the sale of these perfumes at a lower price in other retail

[202] See for example Bird, R.C. (2005). "Employment as a Relational Contract". *University of Pennsylvania Journal of Labor and Employment Law*. Vol. 8. pp.149-218.
[203] MacNeil, I.R. (2003). "Reflections on Relational Contract Theory After a Neoclassical Seminar". *The Implicit Dimensions of Contract*. Oxford: Hart. pp.201-218.
[204] Ratzan. "Transaction Costs and Contract in Roman Egypt". pp.193ff.
[205] Collins. "Is a Relational Contract a Legal Concept?" pp.19-21.
[206] [2013] EWHC 111.

outlets. They also failed to inform the claimant that the under-selling was taking place. Leggatt J held that there had been a breach of an implied term of good faith, clarifying that "the nature of the dishonesty […] was […] such as to strike at the heart of the trust which is vital to any long term commercial relationship, particularly one which is dependent as this relationship was on the mutual trust of two individuals".[207] This insertion of an implied term was based on the identification of a relational contract. The concept has since been used in cases relating to joint contractual ventures[208] and franchises.[209] Most recently, in *Bates v Post Office,* Fraser J set out a non-exhaustive list of nine characteristics which a contract would need to meet before the courts would consider it to be relational and subject to good faith considerations.[210]

Several points should be made about the English approach to relational contracts. Firstly, there is a clear attempt to identify a discrete class of contracts which are relational, and therefore have certain special characteristics that would not feature in the law of contract generally. The emphasis is on long-term business relationships rather than on any relationship which entails a culturally embedded set of expectations. There is a tension here with the socio-economic theory of relational contracts, which does not necessarily lend itself to such a strong demarcation between "relational" and "non-relational" contractual relationships. However, there is a recognition in the decided cases that conduct which violates the nature of a relational contract is that which "in the relevant context would be regarded as commercially unacceptable by reasonable and honest people".[211] A regard for commercial and social expectation in the interpretation of the contract can clearly be read more widely than a long-term business relationship, although the High Court has so far declined to broaden the scope of applicability of the concept. Secondly, the relational contract is given a utilitarian rationale – to promote adherence to a process of constantly adjusting expectations necessary for commercial practice. In the *Yam Seng* case, Leggatt J explicitly draw a parallel between the criteria for identifying obligations in a relational contract and the "business necessity" test long since adopted in English law for the insertion of terms implied in fact.[212] This is quite different from the justification given for good faith in Civilian

[207] *Yam Seng.* Leggatt J at 171.
[208] *Bristol Groundschool Ltd v Intelligent Data Capture Ltd & Ors* [2014] EWHC 2145 (Ch).
[209] *D&G Cars Ltd v Essex Police Authority* [2015] EWHC 226 (QB).
[210] [2019] EWHC 606 (QB). Fraser J at 725. The list was: no express term against good faith; a long-term relationship; an intention to perform with integrity and fidelity; a commitment to collaboration; the "spirits and objectives" of the parties' venture being incapable of enumeration in the contract; a relationship of trust and confidence; a contract which involves "a high degree of communication, co-operation and predictable performance"; "substantial financial commitment" by one party (or both); and exclusivity.
[211] *Bates v Post Office.* Fraser J at 711.
[212] *Yam Seng.* Leggatt J at 134. For the "business necessity" test see *The Moorcock* (1889) 14 PD 64 (CA).

jurisdictions, which in keeping with the *Ius commune* tend to regard it as a moral imperative, albeit one which is always applied by the courts with the interest of a specific party in view. Le Tourneau articulates the French position, for example, that good faith "seems to be a general maxim of law, of ethical inspiration" and a "watered down morality, mixed with a particular interest".[213] The relational contract proposed here as a basis for innovations in Roman law is different in some respects from the emerging English common law notion. It is not limited to long-term business ventures, nor to any specific class of contract. It is not, however, an abstract ethical maxim – it is rooted firmly in the pragmatic realities faced by the parties to a dispute.

The concept of a relational contract helps to overcome the objections which could be raised to unenumerated obligations on transaction cost grounds. It might be argued that if courts acknowledge indeterminate obligations in a contract, the result will be to undermine legal certainty.[214] Where parties are uncertain of the outcome should any disputes be referred to court, they are likely to take measures intended to insure themselves against the risk of loss, such as overly restrictive terms. Negotiations may also take longer as parties seek to protect their interests against any eventuality. Parties may be more inclined to bring disputes to the court, hoping to exploit ambiguities in their obligations to their advantage; this discourages private resolution of disputes between the parties and perhaps makes the emergence of disputes more likely if the parties are less willing to resolve any failures of communication. This reflects an increase in two of the transaction costs anticipated by Williamson:

(5) "the costs of haggling",
(6) "the setup and running costs associated with the governance structures to which disputes are referred".[215]

Such an analysis, however, assumes an atomised relationship. It overlooks the transaction costs that unenumerated obligations can reduce in the context of a relational contract. If the parties have an existing relationship of trust in which many of their obligations are culturally embedded, this will in fact greatly reduce the cost of negotiating a contract or enforcing it. The implicit understanding that parties can rely upon each other to adapt to changing circumstances - or not to take advantage of lopsided circumstances - substitutes for the need to research every eventuality or keep one eye to formal dispute resolution forums. Collins notes that in a relational contract, "the terms […] use indeterminate descriptions of

[213] Le Tourneau, P. (1995). "Bonne foi". *Répertoire de droit civil Dalloz.* Paris: Dalloz. No. 10.
[214] For a discussion of legal certainty see Fenwick, M. and Wrbka, S. (2016). "The Shifting Meaning of Legal Certainty". *Legal Certainty in a Contemporary Context.* Singapore: Springer. pp.1-6.
[215] Williamson, O.E. (1985). *The Economic Institutions of Capitalism: Firms, Markets, Relational Contracting.* New York, NY: Free Press. pp.20-21.

the expected performance obligations, in part because contingencies cannot always be foreseen, but more importantly because the precise needs for co-operation cannot be described clearly in advance".[216] In this context, relational contracts serve, in Williamsonian language, as a "governance structure": by creating a tolerable sphere of indeterminacy in contractual obligations, they provide a framework in which otherwise very costly transactions can take place. The other advantage of conceiving of good faith in terms of a relational contract is that rather than imposing a solution from above onto an existing cultural framework, it can work alongside and refine the already existing expectations that parties have. It follows that it would be wrong to characterise institutions such as *laesio enormis* and *remissio mercedis,* if they arise from good faith in the context of a relational contract, as top-down sovereign acts.

It could be objected that the contracts which *laesio enormis* was intended to address are not relational, in the sense that the sale of land is a single transaction in which the buyer and seller may not previously know one another. That does not mean, however, that each of the parties does not have a set of culturally embedded expectations about how the other will behave. While the proposal that *laesio enormis* was derived from a specific non-Roman legal tradition is not accepted here, institutions such as *ona'ah* and the Mesopotamian right of redemption do speak - particularly in the Levantine parts of the Empire - to expectations around how buyers and sellers are expected to behave if one is placed, by market conditions, at an bargaining advantage over the other.[217] This advantage could be superior information, or, in the case of *laesio enormis,* a lack of meaningful alternatives to entering a transaction. These expectations gave rise to unenumerated obligations, including that the seller of land should not be manipulated out of the market value of their land. This served to protect the interest that provincial farmers held in the land, not just as an asset from which to reap fruits, but as a locus of identity and a point of continuity with their ancestors. It also served to massively reduce the transaction costs associated with a sale where it became necessary, reducing the research each party had to conduct in advance. As buyers and sellers in most cases would remain neighbours, an expectation of good faith - not just to avoid explicit dishonesty, but to behave with integrity in all aspects of their dealings - would serve to pave the way for any transactions entered in the future. This would have a stabilising influence on the community at large.

Cases involving exploitation based on price would only occasionally come before a Roman court (or indeed any court) for judicial determination. In most cases, the social opprobrium that followed a failure to abide by these expectations would be sufficient to ensure compliance.

[216] Collins. "Is a Relational Contract a Legal Concept?". p.16.
[217] Baron. *A Social and Religious History of the Jews.* p.415.

This greatly reduces the costs associated with maintaining forums for dispute resolution. Why, then, did it become necessary for the Imperial chancelry to articulate the principle in the late third century CE? The answer can be found in the specific economic circumstances of the time. Inflation and heavy Imperial taxation were together a powerful force for the concentration of land.[223] The owners of large estates, which were increasingly seeking self-sufficiency, had little incentive to maintain good relations with their neighbours in the future. They were also increasingly adopting private governance structures of their own as whole communities began to develop within the confines of a single estate. This breakdown of the agrarian social dynamics which had previously shaped party expectations created a need for the Imperial chancelry to place what had previously been a social expectation on a legal footing. It is important to stress, as Lambrini does, that it was not Diocletian's intention to make structural changes to landholding in the provinces, or to rescind all purchases which contributed to the concentration of land in a small number of hands.[224] Rather, the economic conditions of the late third century CE affected what the Imperial chancelry was prepared to grant in particular cases where the seller had an exceptional reason to ask for recission of the sale.

Remissio mercedis is more clearly rooted in a relational contract, between tenants and their landlords. Just as ownership of land was often passed down generations of the same family, tenancy relationships could persist over multiple generations on both sides of the contract. In its Republican and early Imperial form, *remissio mercedis* likely reflected the standard allocation of risk between the parties: the *locator* is bound to provide enjoyment of the land and is therefore liable if enjoyment becomes impossible due to an external *vis* which destroys the crops. In its later form, however, the Imperial chancelry was prepared to both extend the time window over which loss of enjoyment was calculated and enquire into whether the *conductor* was able to productively cultivate the land, anticipating any vagaries of agriculture that might befall them. It is from the relationship of trust between the parties that a more expansive reading of the locator's duty to secure enjoyment of the land can be derived. This is, again, a practice which likely stretched further back than its appearance in Imperial constitutions. Kehoe has proposed that Imperial *remissio mercedis* simply reflected an attempt to facilitate an existing practice where voluntary remission of rent was given by landlords in circumstances that transcended the Republican distinction between *vis* and *vitium.*[225] In doing so they would ensure that the land was kept in productive use and therefore secure their longer-term rents. This reflects the fact that the *locator* was ultimately just as dependent for

[223] Sperber. "Laesio Enormis". p.266.
[224] Lambrini. "Le norme di diritto privato: i contratti e la rescissione per lesione enorme". pp.523-525.
[225] On inflation in the later Roman Empire, see Jones, A.H.M. (1953). "Inflation Under the Roman Empire". *Economic History Review.* Vol. 5(3). pp.293-318. More recently, Wassink, A. (1991). "Inflation and Financial Policy under the Roman Empire to the Price Edict of 301 A.D". *Historia: Zeitschrift für Alte Geschichte.* Bd. 40, H. 4. pp.465-493.

their survival on the ability (and willingness) of the *conductor* to cultivate the land productively as they were themselves. If the full implications of the *locator*'s duty to secure enjoyment were not left unenumerated, the result would likely be a higher turnover of tenants. With each new tenant, there would be a degree of uncertainty. The landlord would incur substantial research costs, to mitigate the risk that each new tenant might be unable or unwilling to fulfil their obligations.

If this were a longstanding voluntary practice, why did it need to be enshrined in an Imperial constitution? Again, the answer comes from the economic circumstances of the third century CE. Tenants had become more vulnerable to a variety of interruptions in the cultivation of the land, including the effects of civil war and perhaps labour and supply shortages after the Antonine Plague.[226] More importantly, however, tenants were less able to withstand such interruptions than they had once been. A tenant can usually survive one or two bad harvests on their reserves; if these reserves have been exhausted by taxation and unstable monetary system, the likelihood is increased that the tenant will be forced to default on the rent, or more seriously, abandon the lease and leave the land as *agri deserti,* generating neither taxes nor rents. *Remissio mercedis* created an infrastructure in which landlords and tenants who did enjoy a successful relationship could adapt the timetable of the rent according to conditions at the time. To do this, it was sometimes necessary to go beyond what had been included in the *lex.* Good faith provided a basis for unenumerated obligations in which the *locator* accepted a higher level of uncertainty over some of their duties – especially the duty to secure enjoyment – in return for avoiding the costs associated with the collapse of their existing contractual relationship.

Imperial Legitimisation

So far it has been shown that the changes which took place in *laesio enormis* and *remissio mercedis* in the third century CE owe much to good faith as a set of unenumerated obligations arising from a relational contract. The question remains, however, of why these changes emanated from the Imperial chancelry. What interest did the Emperor have in the plight of struggling tenants and small holders? There are two approaches which can be taken to this issue. The first is to concentrate on the economic self-interest of the Imperial chancelry. Kehoe has outlined that its main priorities were the maintenance of its revenues and, accordingly, the preservation of land in productive use.[227] The Imperial chancelry would therefore be highly responsive to the risk of collapse of any contractual relationships,

[226] On the demographic problems of the Antonine Plague, see Scheidel, W. (2002). "A Model of Demographic and Economic Change in Roman Egypt After the Antonine Plague". *Journal of Roman Archaeology.* Vol. 15. pp.97-114.
[227] Kehoe. *Investment, Profit and Tenancy.* p.225.

including *locatio conducti,* that facilitated the cultivation of the land. It follows that the Imperial chancelry – much like the *locators* themselves – was heavily dependent on the expertise and resources of tenants to ensure the stability of its income. Taken together, these were powerful motives to seek to balance the bargaining position of the parties. This did not necessarily reflect a position of neutrality; the interests of the Imperial chancelry were generally more closely aligned to those of the upper-class *locators* than those of the tenants who farmed the land. It did however reflect a pragmatic recognition that a degree of security was needed for tenants to preserve the privileges which the Roman upper class derived from land ownership.

In support of this position, Kehoe relies on juristic writing, on the basis that jurists, whether upper class themselves or not, "offer a more comprehensive picture of the interests of upper-class Romans" than be gleaned from other sources.[228] He shows that the jurists, especially those who worked in the Imperial chancelry in the late second and third centuries CE, focused on how to manage the relationship of inter-dependence between landlords and tenants in a way that maximised the long-term rents which could be collected. This is partly reflected in a desire to "define more precisely how grants of remissions affected the continuing obligations of landowners and tenants towards one another".[229] It is also seen in the context of improvements to the land. Tenants could claim for both necessary and useful expenses, on very similar lines to expenses claimed by husbands for improvement to dotal immoveables. A necessary expense included the replanting of old vines (a notable exclusion from late Imperial *remissio*), while useful expenses included anything that increased the profitability of the farm, such as the creation of an entirely new vineyard or olive orchard.[230] The common ambition of these measures was to secure the interests of tenants insofar as this increased Imperial revenue and promoted the stability of cultivation from one season to the next.

It might be asked, if the Imperial chancelry was acting only out of economic self-interest, why it presented its interventions as acts of good faith. It is possible to provide a non-economic explanation for why the Imperial constitutions were constructed this way. Imperial constitutions, aside from resolving legal disputes, were also engaged in an ongoing narrative to legitimise Imperial rule. This was particularly notable after Hadrian developed the practice of appointing Imperial magistrates and stabilised the content of the Praetorian Edict, thus positioning the Emperor as the primary source of legal innovation and constitutions as their primary instrument.[231] By the third century CE, Imperial constitutions could serve two

[228] Kehoe. *Investment, Profit and Tenancy.* p.vii.
[229] Kehoe. *Investment, Profit and Tenancy.* p.232.
[230] Treggiari, S. (1991). *Roman Marriage Law.* Oxford: Oxford University Press. pp.354-255.
[231] Tuori, K. (2016). *The Emperor of Law: The Emergence of Roman Imperial Adjudication.* Oxford: Oxford University Press. pp.196-197.

rhetorical functions, both geared towards the legitimisation of the Emperor. The first was his interest and involvement in even the relatively humble concerns of his petitioners. Tuori gives the example of a response given by Septimius Severus and Caracalla while visiting Egypt in 200 CE:

> [Διοσκόρῳ Ἡφαιστίωνος καὶ Πιεσῆϊ Ὁσίριος καὶ ἄλλοις.] ἀργύριον ἀντὶ πυροῦ καταβάλλειν ὑμᾶς ἐκω λύσαμεν
>
> We have forbidden you to pay money in place of grain.[232]

On one level, this is an unremarkable bureaucratic decision which the petitioners had likely expected, given the importance of grain for the subsistence of the Roman cities. What *is* remarkable, as Tuori highlights, is that the Emperors spent several days answering dozens of petitions of this kind. This slotted into a larger identification of the Severan Emperors as accessible rulers, with the "right and the obligation to interpret and modify the law" in the interests of petitioners.[233] It is important once again to recognise the complex relationship between Roman judicial discretion and the plurality of legal cultures which existed in the provinces. It had long been an important matter of Imperial policy to respect the "peregrine laws" of the provinces, even one such as Egypt which had historically lacked a *civitas,* as a reflection of the normative order which actually operated in the territories under Roman rule.[234] Modifications to the law were not therefore framed as an assertion of Roman legal supremacy over "peregrine" law, but rather as a way of preserving a dialogue between the Imperial chancelry and local people. Septimus Severus and Caracalla did not answer this petition because its substance matter was important; they answered as a performance of Imperial attention. The second rhetorical function of Imperial constitutions was to provide local demonstrations of justice. Tuori gives the example of a dispute over the rightful priest of Zeus at Dmeir.[235] The incumbent is accused by the local people of making himself priest illegitimately. The case was not heard in a lower court; the petitioners simply seek out the Emperor in person. Caracalla chooses to hear the case despite the violation of procedure – and not only that but resolves it in favour of the petitioners. This served as an affirmation that the Emperor is the ultimate authority and that he was prepared to put the interests of justice over law.[236]

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[232] P.Columbia. 123, 10. Trans. Tuori.
[233] Tuori. *The Emperor of Law*. p.247.
[234] Alonso, J.L. (2013). "Customary law and legal pluralism in the Roman Empire: The status of peregrine law in Egypt". *The Journal of Juristic Papyrology.* Vol. 43. pp.351-404.
[235] SEG XVII 759. ll.7–17.
[236] See Hauken, T. (1998). *Petition and Response: An Epigraphic Study of Petitions to Roman Emperors, 181-249.* Monographs from the Norwegian Institute at Athens. p.i.

The exercise of the unlimited power of the Emperor needed to be handled very carefully. This was done in two ways. Firstly, by the "separation of the private and the public person of the Emperor". Emperors were rarely trained in law themselves and therefore relied upon a cadre of jurists to manage the work of the Imperial chancelry. Peachin has noted that for the day-to-day operation of the legal system, the Emperor was more important as an institution – a font of authority – than as a physical person.[237] Hence bad Emperors can leave behind sound constitutions. Secondly, the Emperor's legislative power, while theoretically unlimited, was in practice constrained by what Ulpian described as "the art of goodness and fairness".[238] Tuori argues that for Ulpian – and possibly for others working close to the Imperial chancelry – a positivistic belief that the Emperor's mere will was law was tied to a conviction that it should accord with the expectations of his petitioners for justice.[239] In practice this meant that the Emperor should be approachable to any petitioner who travelled to reach him and should demonstrate *megapsykhia*, or "greatness of spirit" when receiving them.[240] It is possible to take this argument too far. Honoré has argued for example that for Ulpian the overriding objective of the Emperor should be to secure the rights of petitioners in accordance with natural law.[241] The textual evidence does not support a normative conception of natural law in the thought of Ulpian. Nevertheless, there was a need for the Imperial chancelry to develop substantive principles to constrain the potentially volatile powers of the Emperor and Ulpian's writing displays a keen desire to apply these in legal practice.

One way to constrain the volatility of the Emperor's powers was to frame it within the already existing practices and expectations of the parties. This is the best explanation for why C.4.44.2 and C.4.65.8. invoke notions of good faith and *humanitas* to justify the legal innovations they introduce. Voluntary rent remissions and protection for sellers who had been manipulated out of the market price for their property were both expectations which arose from the social nexus of the parties. The actions of the Imperial chancelry can be firmly rooted in a pre-existing system of unenumerated obligations, initially designed to meet the needs of commerce, but now re-equipped to balance the interests of the parties in agrarian relational contracts. For the Imperial chancelry, good faith and *humanitas* therefore exist at the boundary of economics and moral expectation: it acknowledges the relationship of trust between the parties as a necessary feature of the contractual regime an agrarian economy undergoing severe instability. An approach based on the modification of good faith

[237] Peachin, M. (1996). *Iudex Vice Caesaris: Deputy Emperors and the Administration of Justice During the Principate.* Stuttgart: Steiner. p.203.
[238] D.1.1.1.pr. Translation by Watson.
[239] Tuori. *The Emperor of Law*. pp.287-288.
[240] Tuori. *The Emperor of Law*. p.289.
[241] Honoré, T. (1982). *Ulpian: Pioneer of Human Rights.* Oxford: Oxford University Press.

to meet the needs of the third century CE also offered the Imperial chancelry with a way of managing the complex relationship between *volksrecht* and *reichsrecht* in the contractual regimes of the Eastern Empire. The institutions of *laesio enormis* and Imperial *remissio* were not derived from any specific non-Roman tradition, nor did they represent a positive imposition of a sovereign using its own concept of equity. Instead, they were a response to – and an attempt to open a dialogue with – the changing expectations of the parties in the time and place they were developed.

CHAPTER SEVEN

CONCLUSION

Despite efforts in more recent scholarship to stress continuities in the development of Roman political and economic structures, the so-called Crisis of the Third Century remains a key inflection point in any narrative history of the Empire.[1] In the traditional version, it was the dynastic instability of this period which finally dislodged the Emperor from the republican framework in which he had until that time purported to operate, centring Roman government on a new Imperial chancelry with greater bureaucratic resources and a greater willingness to intervene in social life. From a legal perspective, the Dominate represents the final victory of the "Emperor of Law", whose word (or at least sanction) alone carries combined legislative and judicial authority, and from whom the authority of all other courts and legal officials must be ultimately derived.[2]

It is not the intention here to challenge this narrative, but rather to augment it with an understanding of how the Roman legal system was embedded in the changing social and economic realities of the second and third centuries CE. The Crisis of the Third Century represented a period of transition not only in political structures, but also in the way that the Roman economy was organised. Chapter Three shows how the economic fragmentation often associated with the Crisis in fact has its origins in a perfect storm of climate change, disease and de-urbanisation, which came to a head during the Antonine Plague in the late second century and had permanent consequences for everyday social and economic life through the following century and beyond. The latest developments in archaeological science have allowed this process of economic fragmentation to be observed at a highly granular level of detail, helping to resolve issues of interpretation of the textual sources which have plagued discussions of the Third Century Crisis. Through a New Institutional approach, it is also possible to give a more precise definition to economic fragmentation. Roman economic actors disengaged from the institutions which had previously supported a highly urbanised, pan-Mediterranean trading system, in favour of more stable localised forms of production. More specifically, the fragile commodity trading networks which sustained the largest Roman cities - whose populations had until then been genuinely unusual for the ancient Mediterranean - could no longer be sustained, with a ricochet effect for smaller settlements which were cross-subsidised by these networks as well as the farms which had supplied them. As Jongman has pointed out, what demands explanation about the political collapse of the third century is not why it took place, but rather why it happened as late as it

[1] Ando. *Imperial Rome AD 193 to 284.* pp.1-17.
[2] Tuori. *Emperor of Law.* pp.293-297.

did; it was only a matter of time before the transitions taking place in other Roman social and economic institutions forced a concurrent transition in the way that the Roman Empire was governed.[3]

As a socially embedded institution, the Roman legal system was also affected by this period of transition. Chapters Four and Five trace a gradual shift in the emphasis of legal privilege, from the primacy of Roman citizenship to power relations in the provincial countryside. Much scholarship has focused on how citizen privileges were formally articulated; most especially whether *provocatio* remained the central protection for citizens facing trial throughout the Principate, or whether it was supplanted by other formal protections such as *appellatio*. There has been less attention on the practical enforceability of citizen privileges. Following a proposal initially made by Garnsley, the position has been taken here that the practical enforceability of citizen privileges rested heavily on a specific nexus of social and economic conditions.[4] Legal protections such as *provocatio* only held significance so long as citizens formed part of an urban elite with regular access to the public assemblies and access to the material resources, either by themselves or through their patrons, to ensure that public officials would continue to respect their formal privileges in practice. There is evidence that this nexus of social and economic conditions has already come under pressure through the Imperial expansion of the Empire, as citizens increasingly found themselves at a distance from the urban social institutions which sustained their legal privileges. The fragmentation of the late second and third centuries served to accelerate this process. This is a useful context in which to understand the Antonine Constitution, under which Caracalla granted full Roman citizenship to the majority of adults living in the territory of the Roman Empire. One the central questions which has to be addressed in this area is why the Antonine Constitution did not seem to be regarded as a radical departure from what preceded it. Recent work by Lavan has shown that the level of citizenship in the general population prior to the reign of Caracalla was lower than had previously been estimated by some scholars; this new evidence challenges the view that the Antonine Constitution did not significantly increase the franchise.[6] However, by shifting the focus from the overall level of citizenship to the practical enforceability of citizen privileges, it is possible to reassert the continuities between the Antonine Constitution and the political situation which preceded it: expanding the franchise was no longer radical because Roman citizenship itself had become less meaningful.

The social distinctions which became most prominent in the third century CE were rooted in the agrarian power relationships of the new localised economy. There had always been

[3] Jongman. “Reconstructing the Roman Economy”. pp.96-97.
[4] Garnsey. *Social Status and Legal Privilege in the Roman Empire*. p.269.
[6] Lavan. “The Spread of Roman Citizenship”. pp.1-28.

certain classes of individual who enjoyed legal privileges which cut across the old distinctions between citizens and peregrines. These included, alongside senators and equestrians, those who held positions of local power such as decurions. From the late second century onwards, it is possible to trace a more generalised binary distinction between the *honestiores* and men of the "lower class", or *humiliores*. The privileges of the *honestiores* are most visible in the legal sources in the realm of criminal punishment, where the dual penalty system reached its high watermark in the Pauli Sententiae, most likely written in the late third century. Beyond this, however, they would have occupied a commanding position in the local agrarian economy, as large-scale provincial landholders with significant practical control over the lives of the local population. This included coercive functions over Roman citizens which in the earlier Principate had been the preserve of republican magistrates, or later officials acting for the Imperial chancelry. How did the Imperial chancelry respond to this shift in the emphasis of legal privilege? Recent scholarship has challenged the view that Roman law operated only to the benefit of elite groups by directing attention to the interdependent relationships between elites and non-elite groups.[7] This work has tended to focus on evidence for the presence of non-elite litigants in textual sources and how they appear to have been treated when in disputes with elite interlocutors. Less attention has been given to how civil procedure accommodated the needs of non-elite parties, at least to the extent that this was necessary to preserve interdependent elite to non-elite relationships. By adopting Galanter's methodology of "one-shotters" and "repeat players", it is possible to show that the Imperial chancelry did respond to the presence of non-elite litigants and their comparative lack of familiarity with the procedure of the Roman courts.[8]

The need to reconcile the interests of elites and non-elites was also visible in substantive private law, particularly in the response which the Imperial chancelry took to the economic policy issues thrown up by the reorientation of the local agrarian economy during the Crisis of the Third Century. Chapter Six examines this with regards to two specific contractual doctrines, *remissio mercedis,* or rent remission, and *laesio enormis,* or price gouging. These doctrines concerned situations where inequality of bargaining power between the parties to a contract had a direct impact on the obligations they undertook. In conditions of unequal bargaining power, one of the parties has greater immediate necessity; they face a greater risk of acute economic distress than the other and are therefore more likely to agree terms which are severely disadvantageous. *Remissio mercedis* and *laesio enormis* can therefore

[7] For an overview of this scholarship see McGinn. "Cui Bono? The True Beneficiaries of Roman Private Law". pp.133-166.
[8] Galanter. "Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change". pp.95-160.

be regarded as instances of corrective justice, or justice in exchange. In both cases, the intention of the Imperial chancelry was to preserve a balance in the interdependent relationships between elite and non-elite groups on which the agrarian economy depended for its productivity. However, its interventions were carefully justified not by a direct appeal to Imperial power but rather through innovative use of the existing legal concepts of *bona fides* and *humanitas*. This augments our understanding of the "Emperor of Law" as a figure whose formally unrestricted ability to intervene in legal questions was in fact pragmatically limited by the expectations of litigants, including non-elite litigants. The centring of Roman law on the figure of the Emperor was driven in part by how these expectations had changed over time. As Roman litigants came to be drawn not from a pan-Mediterranean commercial system based on the needs of an essentially urban culture, but rather from a localised agrarian culture, the need was created for a legal system that could handle the complex elite to non-elite relationships of the new economy. The Imperial chancelry and its system of petitions met this need.

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