

Formula, cognitio, and proceedings extra ordinem

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Roman law was transformed by the acquisition of an empire: rules derived from a deep republican distrust of magisterial powers gave way to those of an authoritarian imperial government. This development has been described as a replacement of the traditional procedures of the Roman Republic by a new administrative procedure, the *cognitio extra ordinem*, and the change is normally ascribed to the Roman emperors. I will argue, however, that there were in fact three distinct developments. First, the traditional Republican procedures were replaced, over time, by a summary investigative procedure that we can legitimately refer to as *cognitio*. Second, the investigative procedure of *cognitio* was itself modified, when special kinds of crimes were investigated according to special rules (*extra ordinem*). Third, this new – and originally extraordinary – investigative procedure came, by the time of Justinian, to be the normal one.

I. Introduction

Litigants under the Republic had an impressive array of rights; a citizen participated in legal proceedings as a more or less voluntary act of submission to his peers, and the role of magistrates was severely limited. In its original form, that of the *legis actio*, civil procedure was nothing more than a mechanism for enforcing individual statutes; the magistrate merely presided over the formalities, and helped the litigants decide on a suitable *iudex*, normally a private citizen, to decide on the facts. In the formulary procedure the praetor had more scope, but investigation of facts and final judgment were still reserved for independent judges. Even a criminal trial (*quaestio*) applied this same concept to one of the “public” wrongs: the praetor presided over selection of the jury and the conduct of the case, but the facts were assessed by a panel of *iudices*. These basic principles were an important part of the Roman political consciousness; Romans inherited not only a deep suspicion of monarchical and magisterial power in general, but a fundamental conviction that lawsuits should be decided by private citizens (1).

The traditional procedures did not survive the acquisition of an empire. The Roman government came to use a more free-form inquisitorial process, in which officials conducted their own investigations and passed judgment, and over which the litigants

1) The devolution of jurisdiction in private matters was attributed to Servius Tullius; Dion. Hal. 4.25.2. See also Cic. *Rep.* 5.3 and *Clu.* 43.120: *Neminem voluerunt maiores nostri non modo de existimatione cuiusquam, sed ne pecuniaria quidem de re minima esse iudicem, nisi qui inter adversarios convenisset.*

themselves had markedly less control. The development is neatly described in the legal textbooks as a transition from the procedures of *legis actio*, *formula* and *quaestio* to a new procedure, known variously as *cognitio*, *cognitio extraordinaria*, or (most commonly) *cognitio extra ordinem*. The change has been explained as the logical consequence of the new political situation: *cognitio extra ordinem* is seen as the tangible manifestation of the new constitutional and legal order initiated by Augustus, and the first emperors thus appear as radical reformers of the Roman legal procedure (2).

I will argue that the impact of the emperors on the law was more limited. The emperors were personally involved in the legal business of the empire, and they introduced important changes in both substance and procedure, but it is only modern jurists who treat their innovations as a coherent whole. The courts of medieval and modern Europe that adopted Roman legal principles were the descendants, paradoxically, not of the traditional Republican courts which are at the heart of Roman legal thinking,

2) E.g. Max KASER, *Das römische Zivilprozessrecht*, 2nd ed. by Karl HACKL (1996), 435 ff.; also KASER, "The Changing Face of Roman Jurisdiction", *IJ* 2 (1967), 129-143, at 137: "In all its forms, the *cognitio* procedure belongs in the particular sphere of activity of the *princeps*. It is in fact an imperial law of actions, quite separate from the traditional constitutional principles of the Republic and from the ordinary divided process, in the same way that the *fiscus* was a treasury under the exclusive authority of the Emperor or that the imperial provinces were governed entirely by the Emperor"; I. BUTI, "La 'cognitio extra ordinem': da Augusto a Diocleziano", *ANRW* II.14 (1982), 29-59, at 31: "La nascita della procedura 'straordinaria' coincide, come è noto, con l'affermarsi del principato ed apparve, nelle sue varie manifestazioni, come una delle espressioni della tendenza del principe a far sentire sempre più la propria presenza con interventi 'creativi' anche nel campo del diritto".

but of the bureaucratic courts in which administrators conducted *cognitiones*. The modern procedures required an appropriate pedigree, and both the expression *cognitio extra ordinem* itself, and the whole conception of a coherent legal system based on a new procedure, were invented in the nineteenth century to provide one (3).

The terminology used by modern scholars varies: they speak of *ius novum* – placed by the emperors alongside the traditional *ius civile* and the *ius honorarium* – and more commonly of a *cognitio* system, of *cognitio extraordinaria* and of *cognitio extra ordinem*. But the Romans themselves were much less categorical; they talked about new law, about *cognitiones*, about extraordinary cases, and about *cognitiones* that were

3) Particularly important were the views of F. K. VON SAVIGNY, *System des heutigen römischen Rechts* 5 (1841), 63ff, adopted by A. F. RUDORFF, *Römische Rechtsgeschichte* 2 (1859), 4-11; the first detailed study was that of Otto Ernst HARTMANN, *Der Ordo Iudiciorum und die Iudicia extraordinaria der Römer* (1859). Objections were raised almost immediately by M. WLASSAK, *Kritische Studien zur Theorie der Rechtsquellen* (1884), esp. 70: “Unsere modernen Juristen betrachten es nicht selten als ihre Aufgabe, auszubauen, was die Römer nur begonnen hatten. Dem Dogmatiker, der für die heutige Praxis arbeitet, wollen wir dies Recht auch keineswegs verkümmern; allein im vorliegenden Falle gebührt nur dem Historiker eine Stimme”. See also the pointed comment by Fergus MILLAR, in his review of A. N. SHERWIN-WHITE, *The Letters of Pliny*, *JRS* 58 (1968), 218-224, at 222: “Discussion of the term’s meaning ... is fruitless; for, firstly, it is not used by any ancient writer, legal or otherwise; and, secondly, it could not have been so used, since 'extra ordinem' is invariably an adverbial phrase. I would submit that there was no such thing as *cognitio extra ordinem*”. See also R. ORESTANO, “La 'cognitio extra ordinem': una chimera”, *SDHI* 46 (1980), 236-237, esp. 237: “La *cognitio extra ordinem*. Non esiste. Esistono le *cognitiones extraordinariae*, esistono gli *extraordinaria iudicia*, esistono le *extraordinariae actiones*. Ma la *cognitio extra ordinem*, nel senso abitualmente attribuito – che tutti attribuiamo – a quest’espressione, ripeto, non esiste. Né nelle fonti, né nella realtà”.

extraordinary, but they did not regard these things as a new system of justice.

The profound gap between the ancient categories and the modern ones is clearest in the case of *ius novum*. The expression has been used by some scholars as an umbrella term for the various legal innovations introduced under the emperors (4). But it is equally clear that this usage is completely without justification in the ancient sources (5). For the Romans themselves *ius novum* was simply new law, without any special connection to the emperor or to anyone else (6). Gaius, for example, uses the term to call attention to new principles in the law of inheritance which had be considered alongside the old ones. His initial formulation does, at first sight, look as though he is using important new categories: “An inheritance pertains to us either under the old law or the new” (7). But in fact this means simply that there were new rules as well as old ones; there had originally been only two ways to succeed to an estate on intestacy, but decisions of the emperor, and the senate, had created other kinds of succession. Other texts talk about *leges*

4) E.g. S. RICCOBONO, “Cognitio extra ordinem: Nozione e caratteri del ‘ius novum’”, *RIDA*³ 3 (1949), 277-293; B. BIONDI, “Ius Novum”, *Novissimo Digesto Italiano* 9 (1957), 385-6. For a brief history of the term see A. A. SCHILLER, *Roman Law: Mechanisms of Development* (1978), 533-537.

5) WLASSAK (above, note 3) 67-8.

6) *Auct. ad Her.* 2.20; Gell. 12.13.3: “*Si aut de vetere*”, *inquam*, “*iure et recepto aut controverso et ambiguo aut novo et constituto descendum esset, issem plane sciscitatum ad istos quos dicis*”.

7) *Dig.* 5.3.1: *Hereditas ad nos pertinet aut vetere iure aut novo*.

novae, and about *ius antiquum* and *ius vetus* (8). The Roman lawyers kept track of the legal changes introduced by imperial decisions, in *senatus consulta*, and in juristic interpretation, but they never spoke of these things as a coherent whole, or as something associated with the emperor.

Much more common in modern discussions is the expression *cognitio extra ordinem*. Some scholars prefer *cognitio extraordinaria*, and others tend to use the words *cognitio* or *extra ordinem* alone, but what they have in mind is the inquisitorial procedure which came to supplant the old two-stage procedures of the civil and criminal courts. The Romans themselves talked of *cognitio extra ordinem* and *cognitio extraordinaria* only rarely, and never in texts of the classical period (9). The expression *cognitio extraordinaria* is attested only in a *Digest* title (10). And the expression *cognitio extra ordinem* does not, strictly speaking,

8) E.g. *Dig.* 4.5.7.pr.; 38.17.1.9; 38.17.2.20. The distinction between novelty and tradition appears as early as the *senatus consultum Orphitianum* of A.D. 9, quoted at *Dig.* 38.17.1.9: "If none of his children, or none of the people who are lawful heirs, wants to say that the inheritance is his, the old law (*ius antiquum*) shall apply".

9) Scholars who use the term *cognitio extra ordinem* are aware that these expressions are rare, e.g. G. I. LUZZATTO, "In tema di origine nel processo 'extra ordinem'", *Studi Volterra* 2 (1971), 665-757, at 672 n. 16 and 673 n. 19. BUTI (above, note 2), 30 n. 5, says that they occur only four times in the *Digest*, but this is not quite accurate; the *Digest* texts cited as examples of *cognitio extra ordinem* in fact use the verb *cognoscere*, not the noun.

10) *Dig.* 50.13, on which see below, note 110. KASER - HACKL (above, n. 2), 436 n. 5 say that the expression occurs in *P. Lips.* 33 (on which see below, pp. 570-573).

occur at all ⁽¹¹⁾. A fourth century papyrus does, apparently, mention “the action called the *extra ordinem cognitio*” ⁽¹²⁾. It is no coincidence that this single occurrence is in Greek: in Latin you are not supposed to modify a noun with an adverbial expression like *extra ordinem* ⁽¹³⁾.

It is not mere pedantry to insist on an accurate description of the language used by the Romans. By the fourth century, at least, there was clearly a procedure which could be called *cognitio extraordinaria* or, at least informally, *cognitio extra ordinem*. But to understand the significance of this new institution it is necessary to consider its constituent elements on their own terms, without assuming that any one part of the expression implies the existence of any other one. It is important to recognize that *cognitio* was one thing, and proceedings *extra ordinem* something else entirely.

II. Traditional procedures

Legal historians have emphasized a fundamental distinction between lawsuits conducted according to the principles of traditional Roman jurisprudence and those which came to government officials as part of their administrative duties. In the former, litigants in both civil and criminal cases had some control

11) KASER - HACKL (above, n. 2), 436 n. 4 offer seven citations, but in none of those passages does the term *cognitio extra ordinem* actually occur.

12) *P. Lips* I. 33.

13) As observed by MILLAR (above, note 3), 222.

over the selection of judges, and the role of the magistrate was confined, at least in theory, to supervising the process; in the latter the rights of litigants were of little importance, and an official administered justice as a part of his military and police functions. This distinction is real enough, but I will argue that its importance has been exaggerated by modern scholars, preoccupied more with constitutional theory than with the Roman experience itself.

The attitude of the Romans to their law was surprisingly inclusive. They might, when talking of edict, formula and *iudex*, think primarily of their own praetors giving justice in cases involving Roman citizens, but they could apply the same language, and the same concepts, in very different contexts. There was nothing particularly special (*extra ordinem*) about giving a formula, publishing an edict, or assigning *iudices*, to non-Romans: officials in courts far from Rome could preside over legal procedures that were in some ways no different from those of the praetors. Modern doctrine does not naturally accommodate this kind of fluidity about the law; we tend to think of legal systems as mutually exclusive, or at least as well-defined. But the Romans were much less rigid. Foreigners for the most part dealt with legal disputes in their own ways, but if they went to the Roman courts they got Roman procedures.

1. *Formula*

The assignment of a lawsuit by means of written instructions holds so central a place in the Roman law tradition that the historical realities of the formula come as something of a shock.

Modern scholars can use the word formula as a shorthand term for one particularly important form of Roman civil procedure. But Roman magistrates were so accustomed to assigning legal decisions to others by means of formulae that they automatically employed the practice when administering justice throughout the empire, to citizens and non-citizens alike. This wider use of the formula has long been recognized, and has received new attention because of new evidence from Spain and Arabia Petreia. But the formulae attested in these contexts have been seen as elements of a procedure which, though parallel to the Roman formulary procedure and derived from it, was legally distinct. The traditional view was that governors with magisterial powers preserved for Roman citizens in the provinces the formulary system that applied at Rome, but that delegates of the emperor, and anyone presiding over the lawsuits of non-citizens, used *cognitio extra ordinem* (14). But it is becoming increasingly clear that this distinction, while reasonable enough in modern terms, was not particularly important to the Romans themselves (15).

The Romans used their own legal formulae to resolve disputes even between foreign communities (16). A dossier of inscriptions of the second century B.C. shows that the Roman senate, when asked to resolve a territorial dispute between two

14) E.g. Erwin SEIDL, *Rechtsgeschichte Ägyptens als römischer Provinz* (1973), 96-97.

15) KASER - HACKL (above, n. 2), 167-169.

16) KASER - HACKL (above, n. 2), 157-158; in general, A. J. MARSHALL, "The Survival and Development of International Jurisdiction in the Greek World under Roman Rule", *ANRW* II.13 (1980), 626-61.

cities on Crete, applied the principles of Roman legal procedure, and even Roman substantive law, to these purely external affairs (17). The senate formulated the terms of the dispute and enshrined them in a document which must have looked very much like a formula, and it was on that basis that a third party, Magnesia on the Meander, decided the case. A similar use of Roman law is attested in the recently discovered *Tabula Contrebiensis*, recording the arbitration in 87 B.C. by Celtiberian senators of Contrebia, in the Ebro valley, of a dispute over water rights between two neighboring cities (18). As in the Cretan dispute they seem to have appealed for help to a Roman general, C. Valerius Flaccus, who apparently assigned the case to judges without any reference back to the senate at Rome. Formally speaking, Flaccus was simply helping resolve the difficulties, but he did so by applying the procedure, the principles and even the documentary language of the legal system he had known as *praetor urbanus*: the inscription consists of two formulae, in good legal Latin, and the judgment rendered on that basis by the judges, selected from among the senators of Contrebia.

Since the Romans could employ their own formulae for disputes between foreign cities, it is not surprising that they could do the same thing for individual litigants. Scholars have

17) *Inscr. Cret.* III.4.9 and III.4.10 = *SEG*³ II no. 511; see now Sheila L. AGER, *Interstate Arbitrations in the Greek World, 337-90 B.C.* (1996), no. 158.

18) For text and commentary J. S. RICHARDSON, "The *Tabula Contrebiensis*: Roman Law in Spain in the Early First Century B.C.", *JRS* 73 (1983), 33-41. See also P. BIRKS, A. RODGER and J. S. RICHARDSON, "Further Aspects of the *Tabula Contrebiensis*", *JRS* 74 (1984), 45-73.

sometimes regarded this process in strictly constitutional terms: on this view, the formulary procedure was available to Roman citizens in the senatorial provinces, as there was magistrate legally empowered to preside, but since governors of imperial provinces were not technically magistrates, they would not have been able to provide Roman citizens with their formulae. Joseph PARTSCH collected evidence for the use of the formula in the senatorial provinces, and concluded that the formulary procedure was the normal one for Roman citizens in those provinces. But he was struck by the absence of evidence for the formula in imperial provinces, and argued that in those provinces governors used *cognitio* instead (19).

Our approach to this question has been dramatically altered by the recent discovery of the Babatha archive, a collection of about sixty private documents deposited by a wealthy Jewish woman in a cave near the Dead Sea, apparently because of the Bar Kokhba revolt of 132-5 (20). Babatha had conducted a fair amount of legal

19) J. PARTSCH, *Die Schriftformel im römischen Provinzialprozesse* (1905), 61: "Soweit bei der Teilung der Provinzen diese unter der Herrschaft des Senates bleiben, trat in den staatsrechtlichen Grundlagen für die Anwendung des republikanischen Formularverfahrens keine Änderung ein. So ist denn auch der Zivilprozess mit den bekannten Gebilden des stadtrömischen Formelverfahrens, mit der obligatorischen Untersuchung durch Geschworene in iudicio in den meisten Provinzen nachweisbar, die dauernd dem Senate unterstellt gewesen sind".

20) The twenty-seven documents in Greek have been published as P. Yadin, in Naphtali LEWIS, ed., *The Documents from the Bar Kokhba period in the Cave of Letters: Greek Papyri* (1989). See, in general, H. COTTON, "The Guardianship of Jesus son of Babatha: Roman and Local Law in the Province of Arabia", *JRS* 83 (1993), 94-108, and now Dieter NÖRR, "Römisches Zivilprozessrecht nach Max Kaser: Prozessrecht und Prozesspraxis in der Provinz Arabia", *ZRG* 115 (1998), 80-98.

business at Petra, capital of the new imperial province of Arabia, and the procedures she used require us to reconsider the legal procedures employed in provinces of the emperor. Just as independent Greek and Spanish cities could be given formulae by the senate or a Roman general, a Jewish woman with no claim to Roman citizenship could apparently expect to use a traditional Roman formula in a hearing before an imperial legate, in a province annexed by the Romans only about twenty-five years previously.

The basic issue in dispute was the level of financial support to be expected by Babatha's son Jesus from his guardians, appointed by the *boule* of Petra on the death of his father. The formula found among Babatha's documents is a Greek version of the Roman formula for an *actio tutelae*:

Between the plaintiff X son of Y and defendant A for up to 2,500 denarii there shall be local judges (*xenokritai*). Since A son of B has exercised the guardianship of orphan X, concerning which matter the action lies, whenever by reason of this matter A is obligated in good faith to give or do [something] to X, the judges of this shall award judgment against A in favor of X up to 2,500 denarii, but if [such obligation] does not appear, they shall dismiss ⁽²¹⁾.

The Greek text clearly reflects the language of Roman formulae, and in substance is consistent with the classical Roman

21) *P. Yadin* 28 is the best preserved text; see also *P. Yadin* 29 and *P. Yadin* 30. The translation given here (by Naphatali LEWIS) is of a composite text based on the three copies.

law on the subject; the only local modification is that the case will be assigned to a panel of *xenocritae* instead of the traditional Roman *iudex* (22). Scholars have not hesitated to accept Babatha's text as an accurate Greek translation of the original Roman formula for an *actio tutelae*, which does not otherwise survive (23). Babatha's formula survives in three copies, of which two are in the same hand, and this suggests that she was planning to submit her text in at least two copies to the court.

The precise purpose of Babatha's formula is unfortunately less clear. Scholars have assumed that it was to be deployed in the lawsuit documented by two other texts in the archive relating to the dispute with Jesus' guardians. *P. Yadin* 14 is an official record of a summons, by which in October of 126 Babatha brought suit against her son's two guardians for not providing him with the support to which he was entitled. It is not certain that Babatha based this claim on Roman legal principles; the document is drafted in a way that owes more to eastern practice than to Roman law (24). But Babatha was, under Roman law, able to petition on behalf of her son for *alimenta*, and she was apparently successful: *P. Yadin* 19 is a receipt of August of 132, acknowledging a payment received by Jesus from his guardians. The problem is that if Babatha used the formula that survives in

22) For the identification of these *xenocritae* as *recuperatores* see NÖRR (above, n. 20), 87-91.

23) The closest parallel is the formula for *depositum* given by Gaius 4.47.

24) For parallels see G. JAHR, "Testatio", *RE Suppl.* 10 (1965), 927-930.

her suit for *alimenta* it will have been in violation of the basic Roman conception of the *actio tutelae* as a retroactive remedy, usable only by the *pupillus* himself on achieving his majority (25). It is of course possible that Babatha simply had bad advice, or that the rules in Arabia were less thoroughly Romanized than the use of the formula itself would suggest (26). But it seems possible that the formula for *actio tutelae* was intended for an entirely different lawsuit, to be instituted by Babatha's son himself on attaining his majority and thus consistent with Roman legal principles. If such a lawsuit ever occurred, it will have been later than the last dated document in the archive (*P. Yadin 27*), in which Jesus is still a minor (27). But it is possible that Babatha was simply planning ahead.

Whatever the explanation for the presence of this formula among Babatha's papers, it shows that the traditional legal categories can be misleading. The formulae we associate with the praetors at Rome could be used in lawsuits to which magistrates and their *imperium* were, constitutionally speaking, utterly irrelevant. The imperial legate at Petra allowed, and possibly encouraged, judges to be assigned to non-citizens by means of formulae familiar to the traditional legal practice at Rome. We do not know for certain that the Romans themselves would have called a case like Babatha's a procedure *per formulas*, but it is hard to believe they would have called it *cognitio extra ordinem*.

25) *Dig.* 27.3.4 pr. (Paul): *nisi finita tutela sit, tutelae agi non potest*.

26) See, e.g., COTTON (above, n. 20), 105.

27) COTTON (above, note 20), 106-7.

What mattered most to the Romans was that judicial authority be devolved. The distinction between proceedings *in iure* and those *apud iudicem* was fundamental to the *legis actio* and the formulary procedure alike, while the use of the formula itself was merely a convenience. Gaius makes clear, in a famous discussion, that the point about the formula was that it allowed the litigants to frame the terms of the dispute in language that was more flexible than that of the *legis actio*:

But all those *legis actiones* gradually came to be hated, since, as a result of the excessive cleverness of the ancients, who had at that time established the law, the situation was so extreme that if anyone made even the smallest mistake, he would lose his case; and so those *legis actiones* were replaced by the *lex Aebutia* and the two *leges Iuliae*, and as a result of this we conduct lawsuits on the basis of words formulated for the purpose (*per concepta verba*), or in other words on the basis of *formulae* (28).

There are many uncertainties as to the details, but Gaius' fundamental point is not in doubt. Whatever the precise scope of the *lex Aebutia*, it neither abolished the *legis actio* procedure itself, nor invented the use of *formulae* out of whole cloth. Despite his emphasis on individual *formulae*, the most important of which he goes on to quote and discuss, Gaius does not regard the triumph of the formula as introducing any important

28) Gaius 4.30.

constitutional changes. A formula simply made it easier for a magistrate to assign a lawsuit to someone else.

2. *Edictum*

Closely related to the question of *formulae* and their employment outside Rome is that of the provincial edict. Here too the evidence is less abundant than we might have expected, but it seems clear that provincial governors would normally publish edicts listing the legal principles that they intended to apply; these provincial edicts relied heavily on the edict of the urban praetor, and they all had enough in common that Gaius could write a commentary *ad edictum provinciale*. Scholars have sometimes questioned whether the provincial edict was in fact so widespread and standardized; it has been argued that the magisterial function of publishing an edict was reserved for governors of the “senatorial” provinces, and that imperial legates confined themselves to *cognitio* (29). But the ancient evidence suggests precisely the opposite: governors in senatorial and imperial provinces alike published edicts based on that of the praetor at Rome, and the procedures based on these edicts were described in the same terms as the normal legal procedures at Rome. The governor’s edict was a single statement of the rules, and despite its heavy reliance on the praetor’s edict at Rome it was intended for Romans and non-Romans alike.

It is clear that every governor was responsible for publishing his own edict for the province, that he could make fundamental

29) W. W. BUCKLAND, “L’edictum provinciale”, *RHDFE*⁴ 13 (1934), 81-96; R. MARTINI, *Ricerche in tema di editto provinciale* (1969); R. KATZOFF, “Sources of Law in Roman Egypt”, *ANRW* II.13 (1980), 809-844, at 825ff.

decisions about how legal disputes would be settled, and that in most cases he would be content to stick to what had worked for other governors. The edict published by Q. Mucius Scaevola as proconsul of Asia acquired a sort of informal authority as a model edict for provincial matters, but provincial governors would also rely on the edict of the urban praetor. Our best evidence for this situation is a letter of Cicero, in which he describes for Atticus the various components of the edict for his new province of Cilicia:

I have followed Scaevola in many details, including the provision which the Greeks hold as the salvation of their freedom, that Greeks are to settle their differences according to Greek laws. But the edict is a short one because of my use of selection (*διαίρεσις*). It seemed to me that the edict needed to address two subjects (*genera*). One subject is the provincial one, on city finances, interest rates, usury, accounts and everything involving the *publicani*; the other is that which cannot be easily dealt with without an edict, namely the taking possession of inheritances, appointment of receivers (*magistri*), sale of property – things which are usually requested and granted on the basis of an edict. A third category on the rest of law-giving I left unwritten (*ἄγραφον*); I said that on this matter I would follow the urban edicts. And so I am careful, and thus far I have given satisfaction to everyone. In fact the Greeks are thrilled that they can use foreign judges (*peregrini iudices*);

you may see them as trivial, but what of that? They see this as liberty. For your people – Turpio the cobbler and Vettius the dealer – are not exactly serious judges ⁽³⁰⁾.

Cicero has sometimes been regarded as a special case, giving more thought to the composition of his edict than ordinary governors would. But the subject came up because some people had been annoyed by Cicero's decision to let Greeks settle their own disputes, not because he was particularly interested in the edict as such. Scaevola's edict for Asia was for the most part good enough, and Cicero's own contribution, mentioned more or less in passing, was merely in the arrangement of materials ⁽³¹⁾.

Two points about this passage deserve emphasis. The first is that Roman provincial government was probably not as cavalier about the law as Cicero's language seems at first to suggest. In theory, no doubt, each provincial governor had the authority to make drastic decisions about how his subjects would handle all their legal business, but in practice this kind of uncertainty is unlikely. There is no need to assume that the Cilicians would wait to see whether each new governor would assign them to a Greek legal system or a Roman one. They will have done most of their litigation without troubling the Roman authorities at all, and they

30) Cic. *Att.* 6.1.15 = SHACKLETON BAILEY no. 115 (24 Feb. 50, Laodicea). SHACKLETON BAILEY emends *vestri* in the last sentence to *nostris*, i.e. *Romani*. But Cicero may be affecting a loyalty to "his" Greeks, treating Atticus as siding with the Romans; his usual joke, of course, is to pretend that Atticus is Greek, but reversing the normal roles seems is perhaps a more sophisticated variation of the same joke.

31) A. J. MARSHALL, "The Structure of Cicero's Edict", *AJPh* 85 (1964), 185-191 is an important discussion of the literary focus of Cicero's remarks.

did not need Cicero to grant them the favor of doing this according to Greek laws. Where Cicero made a change for Cilicia must have been in deciding that provincials would use Greek laws in those disputes among Greeks which were supposed to come to him, above all those involving disputes between cities. Cicero's language is not explicit about this, but the words *ut Graeci inter se disceptent suis legibus* can surely refer to disputes between communities as well as to those between individuals, and the reading is confirmed, I think, by Cicero's words at the end of the passage: the easiest interpretation of *iudices peregrini* is that Cicero is thinking of the sort of international arbitrators we considered above (32).

The second point depends, to an extent, on the first one. If Cicero's decision about "the Greeks" and their laws in fact refers principally to disputes between cities, it is easier to see how his edict can have been intended for the province as a whole, despite its heavy reliance on Roman models (33). In his first category Cicero included rules on various financial matters, including questions of government finances and the financial affairs of individuals. The second category consisted of material intended for private litigation; it was customary, in Rome and elsewhere, to base private actions on specific clauses of an edict, and Cicero seems simply to have incorporated material from the praetor's edict for the convenience of his subjects. For everything else

32) A. J. MARSHALL (above, note 16), 656-8.

33) G. PUGLIESE, "Riflessioni sull'editto di Cicerone in Cilicia", *Synteleia Arangio-Ruiz* 2 (1964), 972-986.

Cicero referred his readers directly to the praetor's edict; anyone wanting a complete overview of the rules Cicero intended to apply would have needed a good working knowledge of the Roman law. For none of these three categories does he distinguish between law for Romans and law for non-citizens. While we might be tempted to conclude that his edict was intended for Romans alone, it is clear from his reference to the "finances of the cities" that he was also thinking about his provincials. In most disputes the Greeks will have used their own legal system. But if they needed Roman law, Cicero's edict made it available to them, without distinguishing between the rules intended for Roman citizens and those intended for everyone else.

The most tangible evidence for the nature of the provincial edict is provided by the *Lex Irnitana* (34). The magistrates of the Latin municipality of Irni, and presumably the magistrates of other non-Roman towns, were responsible for publishing their own versions of the provincial edict:

Whatever edicts, formulae for trials, *sponsiones*, stipulations, *satis actiones*, prescriptions, exceptions or interdicts the person who governs the province will have displayed in that province, whichever of them relates to the jurisdiction of that magistrate who is in charge of the

34) For text, translation and commentary see J. GONZÁLEZ, "The Lex Irnitana: a New Copy of the Flavian Municipal Law", *JRS* 76 (1986) 147-243; the most recent text, with commentary, is F. LAMBERTI, *Tabulae Irnitanae: municipalità e 'ius Romanorum'* (1993).

administration of justice in the *Municipium Flavium Irnitanum*, he is to have all of them displayed and published in that *municipium* during his magistracy every day for the greater part of each day, so that they may be properly read from the ground level, and justice can be given in that *municipium* on the basis of those interdicts, edicts, formulae, *sponsiones*, *stipulationes*, *satis acceptiones*, exceptions and prescriptions, and so that trials can be granted, take place and be conducted, and so that what is not against this law can take place without wrongful intent, as is allowed under this law (35).

It is interesting to learn that the Romans had a system for disseminating the relevant portions of the governor's edict. But more important is the evidence for the edict's contents. Whatever changes were made to accommodate the needs of provincials, the edict seems to have been largely a Roman one, providing citizens and non-citizens alike with the examples of the various documents on which the Roman law was based.

Cicero and the *Lex Irnitana* provide useful background to a crucial passage of Gaius. It looks, at first, as though the only edicts that really mattered to a lawyer, in the provinces as well as at Rome, were the edicts of the praetors:

The right to publish an edict belongs to magistrates of the Roman people; it is to be found in its fullest form in the edicts of the two praetors, the *praetor urbanus* and the

35) *Lex Irnitana*, ch. 85.

praetor peregrinus, whose jurisdiction in the provinces belongs to the provincial governors (*praesides*); it is also to be found in the edicts of the curule aediles, whose jurisdiction belongs in provinces of the Roman people to quaestors, for quaestors are never sent to provinces of Caesar, and therefore this edict is not published in those provinces ⁽³⁶⁾.

But Gaius' focus is on the right to issue edicts, not on the nature of the edicts themselves. All magistrates, including provincial governors, had the *ius edicendi*, but the urban and peregrine praetors were particularly important. Gaius does not discuss the edicts of provincial governors in the detail that we might like, but he clearly assumes that all governors had the right to issue edicts, even if those edicts would probably be based on the edict of the praetor. Moreover the significance of Gaius' sweeping pronouncement about the governors is underlined by the scrupulousness with which he discusses the aediles and quaestors. Because the imperial provinces did not have quaestors, there was no one there to publish edicts based on those of the aediles, but for governors the distinction was unnecessary. Governors of imperial provinces, like governors of the Roman people, would normally publish as their own edicts what they copied from the edicts of the praetors in Rome ⁽³⁷⁾.

36) Gaius 1.6.

37) R. KATZOFF, "The Provincial Edict in Egypt", *TRG* 37 (1969), 415-437 argues that the prefect of Egypt, unlike other governors, did not publish his own edict.

It is their close dependence on their praetorian model that accounts for the minor role of the provincial edicts in our sources. Cicero, as we have seen, both incorporated texts from the praetor's edict and referred his subjects to it, and it is therefore not surprising that Gaius, in his *ad Edictum Provinciale*, did much the same thing⁽³⁸⁾. Gaius' book is the only known work of Roman jurisprudence devoted explicitly to a provincial edict, and its extant fragments conspicuously fail to distinguish between the law applied in the province and that of Rome itself: the praetor, and even the XII Tables, are invoked without apology or explanation, and Justinian's compilers drew on the work just as they used commentaries on the praetor's edict⁽³⁹⁾. There are some significant gaps in our knowledge: we do not know if Gaius discussed explicitly provincial matters, omitted by the *Digest* commissioners as irrelevant to their purposes, and we do not even know whether Gaius was commenting on one provincial edict in particular or on a sort of all-purpose model edict⁽⁴⁰⁾. But for the present argument what matters is the degree to which the edicts at Rome and edicts in the provinces

38) For what remains, see Otto LENEL, *Palingenesia Iuris Civilis* (1889), nos. 53-388; see also F. SCHULZ, *Roman Legal Science* (1946), 191-192.

39) For the praetor and XII Tables see *Dig.* 2.11.1; 9.4.15; 27.10.13. SCHULZ (above, note 38), 192 regards the word "praetor" in these cases as an interpolation.

40) The use of the word *proconsul* might imply that Gaius was writing for a senatorial province, but this cannot be pressed; Ulpian's work *Ad officium proconsulis* contained passages dealing with legal matters arising in imperial provinces. See *Dig.* 47.11.9 (Arabia) and 47.11.10 (Egypt).

overlapped. The Romans brought to the provinces both their forms of procedure and their general legal principles.

3. *Iudex*

There is, in theory, a fundamental difference between a judge assigned to a lawsuit with the consent of the litigants, and one who is chosen by the presiding magistrate. The Romans, however, were remarkably casual about the terms they used to describe various sorts of judges. Scholars have usually distinguished between the *iudex* of the traditional legal procedures, and the *iudex pedaneus* who was simply a delegate assigned to the case by the Roman magistrate⁽⁴¹⁾. The traditional *iudex* (also called the *iudex unus* or *iudex datus* in discussions of civil procedure) was supposedly superseded by the *iudex pedaneus*, who unlike the traditional *iudex* was a mere subordinate of a Roman official applying the new procedures of the *cognitio extra ordinem*. But the ancient evidence points to precisely the opposite conclusion: a *iudex pedaneus* was simply another term for a judge selected for a private lawsuit⁽⁴²⁾. Ulpian, for example, uses the expression in a discussion of

41) E.g. Adolf BERGER, *Encyclopedic Dictionary of Roman Law* (1953), s.v. *Iudex pedaneus*: "A judge to whom as a *iudex delegatus* a judicial official assigned a case in the *cognitio* procedure".

42) This is demonstrable at least for the 3rd and 4th centuries. Cf. Iulius Victor 24, p. 441 HALM: *ceterum si apud pedaneum iudicem sit privata cognitio, ad sermocinationis vicem deprimendam actionem etiam non admonitus intelleges*; P.S. 5.28 = Dig. 48.19.38.10: *Iudices pedanei si pecunia corrupti dicantur, plerumque a praeside aut curia submoventur aut in exilium mittuntur aut ad tempus relegantur*. See KASER - HACKL, (above, n. 2), 169.

actions routinely assigned by the praetor to subordinate judges, and there is no reason to think that the *pedaneus iudex* here is anything other than a judge of the traditional kind ⁽⁴³⁾.

For the jurists of the Classical period the important thing about a *iudex* was not that he was acceptable to the litigants, but that he was “given” by an appropriate official. Roman magistrates traditionally assigned lawsuits to others instead of hearing them in person, and they did not reserve this principle for lawsuits between Roman citizens. As we have seen, both the senate in Rome and a general in Spain could respond to pleas for international arbitration by assigning disputes to independent communities, and the same procedure was used for lawsuits between individual peregrines. A *Senatus consultum* of 78 BC allows three Greeks a choice of legal venue, as one of the rewards for their assistance in the Social War; they could use the local courts of their own cities, or they could ask a Roman magistrate to assign judges, which could be either a jury of local Italians or another Greek city acting as arbitrator ⁽⁴⁴⁾. The Romans could distinguish between legal procedures involving foreigners and those reserved for Roman citizens ⁽⁴⁵⁾, but the

43) *Dig.* 2.7.3.1 (Ulpian, *ad edictum*): *Si quis ad pedaneum iudicem vocatum quem eximat, poena eius edicti cessabit*; *Dig.* 3.1.1.6 (Ulpian, *ad edictum*): *item senatus consulto etiam apud iudices pedaneos postulare prohibetur calumniae publici iudicii damnatus*. *Dig.* 3.1.1 is focussed primarily on who may appear as an advocate before the praetor, and is here extended to judges appointed by the praetor. See W. W. BUCKLAND, *A Textbook of Roman Law*, 3rd ed. (Cambridge, 1963), 91-92.

44) *SC de Asclepiade Clazomenio sociisque*, *FIRA I.* no. 35.

45) Gaius 4.37.

difference receives little emphasis; the term *iudex peregrinus*, which might reasonably be thought to point to such a distinction, is more likely to mean that the judge in question was a foreigner to the litigants themselves ⁽⁴⁶⁾.

The best account of the legal systems available in a Roman province is provided by Cicero's attack on Verres. Among the outrages committed by Verres as praetor in Sicily was his disregard of the conventional arrangements, which Cicero describes in some detail:

Sicilians have the following legal rights: when the citizen of one city has an action against a citizen of the same city, he conducts the dispute according to their local laws; when a Sicilian has an action against another Sicilian from a different city, the praetor selects judges for him by lot, in accordance with the decree of P. Rupilius, which the Sicilians call the *Lex Rupilia*. When a private citizen sues a city, or when a city sues a private citizen, the praetor selects the senate of some [third] city to judge the case, at which point alternate cities are [proposed and] rejected. When a Roman citizen sues a Sicilian, a Sicilian is given as judge, and when a Sicilian sues a Roman, a Roman is given. In other matters it is the custom to suggest designated judges from the *conventus* of Roman citizens, and when there are

46) M. HASSALL, M. CRAWFORD and J. REYNOLDS, "Rome and the Eastern Provinces at the End of the Second Century B.C.: The so-called 'Piracy Law' and a new inscription from Cnidos", *JRS* 64 (1974), 195-220. Also J. A. O. LARSEN, "Foreign judges' in Cicero, *ad Atticum* vi. 1. 15", *CPh* 43 (1948), 187-190.

disputes between farmers and tax-collectors the disputes are settled according to the grain law known as the *Lex Hieronica* (47).

This shows how different legal systems could coexist and interact. But even more important is Cicero's assumption that as far as the Sicilians were concerned, Verres' essential legal function was, when appropriate, to provide them with judges. The details of the selection process varied – sortition seems to have been used only in private disputes between individual Sicilians from different cities – but in a general way the praetor simply “gave judges” to the foreigners, much as he would have done in a dispute between Roman citizens.

Verres, of course, did things his own way, and he was clearly within his rights to do so; Cicero describes his innovations because they set the scene for Verres' outrageous behavior, not because they were illegal. Cicero was particularly outraged that Verres sometimes assigned judges from his own staff, instead of selecting from the traditional sources: “Verres gave as a judge whoever happened to be convenient – his herald, his *haruspex* or his doctor” (48). But lawsuits for both Greeks and Romans followed the traditional bipartite procedure, and the fact that Verres was high-handed in selecting judges did not change that.

47) Cic. *II Verr.* 2.13.32.

48) Cic. *II Verr.* 2.13.33.

The Romans themselves devised elaborate procedures for identifying potential judges (49). At Rome, and in at least some of the provinces, there was an *album* of potential *iudices*, and membership of these *decuriae* was seen both as an honor and an obligation. We most often hear of jury lists in connection with the criminal courts, but the same lists, or perhaps similar ones, could be used to provide judges for private disputes (50). The first emperors made various changes in the organization of the *decuriae* at Rome, and personally reviewed the names on the lists; they were interested in the personal qualities needed to perform the duties of *iudex* effectively, but there were also formal requirements of age, wealth and Roman citizenship.

In private disputes, however, *iudices* did not have to be taken from these lists (51). Litigants would normally propose their own choices to their opponents, who were free to accept the proposal

49) A. STEINWENTER, "Iudex", *RE* 9 (1916), 2464-2473, esp. 2466; KÜBLER, "Equites Romani", *RE* 6 (1909), 272-312, at 299-301; extensive evidence is now provided by the *Lex Irnitana*, chs. 86-7, in GONZÁLEZ (above, note 34).

50) Gell. 14.2.1: *a praetoribus lectus in iudices sum, ut iudicia quae appellantur privata susciperem*. There may have been a special list for *quaestiones*, see *Lex Acilia* lines 14-15. Other texts suggest that there was only a single list: the *senatus consultum* quoted by Frontin. *Aq.* 101 mentions immunity from *iudicia privata publica*, and *CIL* V. 7567 is dedicated to a *iudex de IIII decuriis eques selectorum publicis privatisque*. *BGU* 611, a speech of Claudius, shows that *recuperatores* were selected from the same list.

51) STEINWENTER (above, note 49) 2466; J. MAZEAUD, *La nomination du 'iudex unus'* (1933); J. CROOK, *Law and Life of Rome* (1967), 78. Contra, F. LA ROSA, "Decemviri e centumviri", *Labeo* 4 (1958), 14-54, at 39ff, who argues that *iudices* in civil suits were always drawn from the *decuriae*.

or not (52). It was only when the two sides were unable to agree that the praetor resorted to the jury lists: he apparently put names from the official list into an urn, and drew them out one by one until an acceptable name emerged (53). We do not know how often this procedure was necessary, but it is clear that *iudices* could also be selected privately, and that their decisions had the same legal standing as those of judges taken from the *album*. When *iudices* were selected in this more informal way the criteria were less strict than they were for membership in the *decuriae*. In the classical period litigants could agree on a *iudex* who was younger than 25 (though he had to be at least 18), and in general the rules seem to have been framed merely to set minimum standards of competence (54). According to Paul, people were ruled out for being deaf, mute, insane or too young, or because they had been expelled from the senate; women and slaves were also excluded, not because their judgment was by definition suspect, but because they were traditionally prohibited from public service (55). Originally, however, the rules were more

52) On the right to reject see esp. Cic. *de Or.* 2.70.285; *II Verr.* 3.60.137; *Fin.* 2.35.119.

53) Frontinus, ed. LACHMANN, p. 43, 22: *cum enim modum loci nulla forma praescribit et controversia oritur, solent quidam per inprudentiam mentores arbitros conscribere aut sortiri iudices finium regundorum causa, quando in re praesenti plus quidem quam de fini regundo agatur*. For the possibility of rejecting a *iudex* from the *album* see esp. Pliny, *HN. Praef.* 6-7: *quid te iudicem facis? quom hanc operam condicerem, non eras in hoc albo: maiorem te sciebam quam ut descensurum huc putarem! praeterea est quaedam publica etiam eruditorum reiectio*.

54) For the age limits see *Dig.* 42.1.57 (Ulpian).

55) *Dig.* 5.1.12.2.

flexible, for Quintilian mentions, quite casually, that he once appeared in a case in which the *iudex* was queen Berenice. Scholars usually regard this as an anomaly, but, as we have seen, the Romans extended their legal procedures to non-Romans, and if a foreign city could be asked to adjudicate a dispute there is no reason why a foreign queen should not have done so ⁽⁵⁶⁾. This is at least partly confirmed by Gaius, who reveals that the Roman view of their own legal process, and of their own judges, was remarkably inclusive:

But all lawsuits are either defined by statute or bounded by *imperium*. Lawsuits defined by statute (*iudicia legitima*) are those in the city of Rome or within the first milestone of Rome, between Roman citizens alone, under a single judge; and as laid down by the Julian law on law courts, they have to be settled within eighteen months. And this is why it is popularly said that litigation under the Julian law “dies” in eighteen months. But lawsuits bounded by *imperium* are those with *recuperatores* or a single judge, involving a foreigner either as judge or as litigant. Lawsuits heard beyond the first milestone of Rome, whether between Roman citizens or foreigners are in the same situation. But the reason they are said to be governed by *imperium* is that they last only for as long as the person who ordered them to take place has his *imperium* ⁽⁵⁷⁾.

56) Quint. 4.1.19: *Fuerunt etiam quidam rerum suarum iudices ... et ego pro regina Berenice apud ipsam eam causam dixi.*

57) Gaius 4.103-105. See KASER - HACKL (above, n. 2), 162 n. 76.

Some scholars have understood Gaius' statement in the broadest of terms, as an account of two different constitutional principles for jurisdiction; on this view lawsuits in the provinces, even those between Roman citizens and supervised by proconsuls, derived their legal authority simply from a magistrate's *imperium* (58). But the distinction has also been seen as a consequence of specific historical developments, which indeed are the focus of Gaius' discussion (59). Litigation by formula had been sanctioned by the *Lex Aebutia*, and Augustus abolished the *legis actio* entirely, except for *damnum infectum* and litigation in the centumviral court (60). But these innovations resulted in a sort of two-tiered formulary procedure. The *iudicia legitima* retained some of the strict standards of the *legis actio*, and were reserved for Roman citizens in the city of Rome (61). They seem to have existed prior to Augustus' law, and may have been introduced by the *Lex Aebutia* itself; it is perhaps easiest, therefore, to imagine that Augustus simply gave the various rules

58) BUCKLAND (above, note 43), 687-689.

59) F. BONIFACIO, "Iudicium legitimum' e 'iudicium imperio continens'", *Studi Vincenzo Arangio-Ruiz* 2 (1953), 207-232 is important, but insists too much on the central role of the *Leges Juliae*. See the useful discussion in N. PALAZZOLO, *Processo Civile e Politica Giudiziaria nel Principato* (1980), 21-27.

60) Gaius 4.30-31.

61) For the continued association of *iudicia legitima* with the *legis actio* see *Epit. Ulpiani* 11.27: *Tutoris auctoritas necessaria est mulieribus quidem in his rebus: si lege aut legitimo iudicio agant, si se obligent, si civile negotium gerant, si libertae suae permittant in contubernio alieni servi morari, si rem mancipii alienent. Pupillis autem hoc amplius etiam in rerum nec mancipii alienatione tutoris auctoritate opus est.* See also Gaius 1.184; 3.83; 3.180-181; *Epit. Ulpiani* 11.24; *Frag. Vat.* 47a.

their final shape ⁽⁶²⁾. Gaius' interest, certainly, is in the specific procedural rules that resulted from this obscure history: Augustus specified that *iudicia legitima* had to be completed within eighteen months; the other formulary proceedings required no similar restriction, since they expired with the *imperium* of the official who authorized them.

For our purposes the important thing is that Gaius provides a precise measure of the importance of civic traditions in the Romans' conception of their legal system. Citizen rights, presence in the city, and (presumably) the authority of a Roman magistrate all had legal consequences in the legal procedure that replaced the *legis actio*. But it is equally clear that the new legal procedure could be extended far beyond the world of the Roman citizen: you did not have to be at Rome, or even be a Roman citizen, to get a *iudex* from a Roman official, and for that matter the *iudex* did not have to be a Roman either. It is perhaps surprising to find that there was no practical difference, outside of Rome, between a lawsuit between Roman citizens heard by a Roman judge and one in which foreigners were judged by foreigners. But, as we have seen, the Romans were flexible

62) It follows that the two *leges Juliae* referred to at Gaius 4.30 may have concerned *iudicia legitima* and *iudicia imperio continentia* respectively. See Cic. *Q. Rosc.* 5.15: *perinde ac si in hanc formulam omnia iudicia legitima, omnia arbitraria honoraria, omnia officia domestica conclusa et comprehensa sint, perinde dicemus*, though the relevance of this passage is doubted by BONIFACIO (above, note 59), 221. It is not clear to me that the word *legitimus* has to refer to a specific *lex*; it could presumably have a more general references, like the word *lex* in *legis actio*.

about employing their own legal procedures in situations for which they were not originally designed.

Gaius does not tell us how a *iudex* was appointed, whether at Rome or elsewhere. Traditionally, as we have seen, litigants were assumed to have a say in the selection of a judge, and the loss of this control has been seen by modern scholars as a crucial development in the history of legal procedure. The method by which judges were selected seems to have been left to the discretion of the presiding officials; some provinces had lists of potential jurors, and even an emperor's fiscal procurator could be imagined as selecting the names of potential *iudices* by lot⁽⁶³⁾. But this devotion to tradition was not compulsory, and there is no evidence that its passing was seen as important.

III. *Cognitio*

In the traditional legal procedures of the Republican period a magistrate did not normally investigate the facts of the case or pronounce a final judgment. But some officials, particularly provincial governors, would regularly conduct their own inquiries, and pursue lawsuits to their logical conclusions. An official who presided over this latter form of lawsuit was said to *cognoscere*, and the hearings themselves were called *cognitiones*⁽⁶⁴⁾. It has therefore been customary for scholars to use these words as though they identified, of themselves, a legal procedure

63) Pliny, *Pan.* 36.3-4.

64) See esp. KASER - HACKL (above n. 2), 189.

distinguishable from the traditional Republican ones (65). But the Romans themselves did not use *cognoscere* and *cognitio* in this way. They were aware that some officials would conduct *cognitiones* instead of proceedings *in iure*, but they did not see these officials as part of a different legal system.

There is no doubt that emperors, the senate and imperial administrators were closely associated with *cognitio*. The emperor's judicial activities are regularly referred to as *cognitiones* (66), and he had his own assistant *a cognitionibus* to assist him with his case load (67). The term is used less frequently for legal hearings conducted by the senate, perhaps for aesthetic reasons, but it is clear that the senate, too, was seen as conducting *cognitiones* (68). And for provincial governors the best evidence is perhaps that of Pliny, who obviously thought of his judicial duties as legate as likely to involve *cognitiones*: "I have never been present at *cognitiones* about Christians", he

65) E.g. W. KUNKEL, *An Introduction to Roman Legal and Constitutional History*, 2nd ed. (Oxford, 1973), 143: "all civil and criminal proceedings came under the official *cognitio*, a procedural system which, in the unitary course which it took as well as in the official character of its judges, displays a much closer similarity to a modern system of justice than do the procedural forms of the later Republic or the early Empire".

66) E.g. Pliny, *Ep.* 6.31.2, of his time as assessor to Trajan at Centumcellae: *Fuerunt variae cognitiones et quae virtutes iudicis per plures species experirentur*. See also idem 6.31.8 and *Dig.* 28.5.93.

67) H. O. HIRSCHFELD, *Die Kaiserlichen Verwaltungsbeamten bis auf Diocletian* (1877), 329ff.

68) Tac. *Ann.* 1.75: *Nec patrum cognitionibus satiatas* [sc. Tiberius] *iudiciis adsidebat in cornu tribunalis*. For the Senate as a court, see F. DE MARINI AVONZO, *La funzione giurisdizionale del senato romano* (1957); R. J. A. TALBERT *The Senate of Imperial Rome* (1984), 460-487.

says, “and so I delayed my own *cognitio* and referred the matter to you” (69).

It is not clear, however, that *cognoscere* and *cognitio* mean anything beyond the fact that, in these particular cases, the emperor, senate or governor was investigating the case himself. Even for legal writers the words never lost their original reference to investigation and inquiry (70). It could even be said of the praetors, applying the traditional *ius civile* and *ius honorarium*, that *they* were conducting *cognitiones*; the jurist Aristo, an older contemporary of Pliny, discusses a hearing in which the praetor applied the traditional *ius honorarium*, but describes him simply as “investigating” (*cognoscere*) the matter (71).

It is in fact surprisingly difficult to identify texts in which the Romans identified a *cognitio* procedure distinct from the traditional procedures. Three texts have been understood to make the **distinction** explicitly, but in each case there are difficulties. To some **extent the** problem stems from the lack of the definite article in **Latin: there is** a big difference, after all, between saying “the judge **will employ the** Enquiry Procedure” and saying “the judge will **conduct an enquiry**”.

69) Pliny, *Ep.* 10.96.1 and 8.

70) Thus *inquirere* is a synonym for *cognoscere* at *CTh.* 2.1.2. See also *Coll.* 14.3.1: *frequens est etiam legis Fabiae cognitio in tribunalibus praesidum*; *Dig.* 47.20.3 pr.: *stellionatus accusatio ad praesidis cognitionem spectat*. See M. LEMOSSE, *Cognitio* (1944), 142-147.

71) *Dig.* 29.2.99 (Pomponius). See also *Dig.* 21.2.39 pr. (Julian).

The easiest of the three passages is in Quintilian. In his discussion of complex arguments, Quintilian twice distinguishes between the kinds of lawsuits conducted in traditional Republican procedures, and those which go to *cognitio*, either of senate or emperor. In one passage cases of *cognitio* are contrasted with those *in foro*:

Apollodorus also says that the ἀντικατηγορία is really two distinct *controversiae*, and in the law of the forum there are in fact, two distinct lawsuits. But this kind of case can go to the *cognitio* of the senate or the emperor (72).

This might well be taken, on its own, to reflect a profound contrast between two legal systems: the law of the forum looks like something quite distinct from the law of the *cognitio* procedure. But Quintilian is thinking of a very different contrast, between hearings conducted by the customary legal authorities and those of the senate or emperor. In a related passage his language is clear:

Multiple cases are either like single ones, as in cases of extortion, or they are different, as when a person is accused of both sacrilege and homicide at the same time. This last does not now occur in the *iudicia publica*, since the praetor is selected according to a given statute, but it is common in the *cognitiones* of the emperor and the senate, and was formerly common in those of the people; *iudicia privata*,

72) Quint. 7.2.20.

too, often have a single judge and a variety of formulae (73).

Here, too, the traditional courts – *iudicia privata* and *iudicia publica* – are explicitly contrasted with those of the senate and emperor. But it is clear in this case that the word *cognitio* itself does not make this distinction. The *iudicia publica* and *privata* are contrasted not only with *cognitiones* of the senate and emperor, but also with the *cognitiones*, now obsolete, of the people. If the word *cognitio* can refer to proceedings before the Roman people as a whole (the *legis actio*) it cannot, clearly, be regarded as a technical term for a new imperial procedure.

The same choices in interpretation are presented by texts on the subject of *fideicommissum*, a legal institution fundamental to the modern view of *cognitio* and its scope. *Fideicommissa* were originally informal instructions included in a will, fulfillment of which was left to the good faith of the heirs; there were significant restrictions on who could benefit from wills, and testators had gotten around the problem by leaving property to people who were not subject to the same restrictions, asking them to pass the property along. Until the time of Augustus there was no legal remedy if someone failed to carry out his instructions, but Augustus made it possible to sue (74). He directed the consuls to investigate disputes arising from *fideicommissa*, and his successors created special praetorships to help the consuls with

73) Quint. 3.10.1.

74) Theoph. *Inst.* 2.23.1; Gaius 2.285.

this work. The law on *fideicommissa* was much discussed by the Roman jurists, and Augustus' intervention had a significant impact on that most Roman of legal concerns, inheritance ⁽⁷⁵⁾. But its origins were never forgotten, and litigation over *fideicommissa* remained a thing apart from the traditional law, distinguished, at least in Rome, by the different procedural rules used in prosecuting cases before the magistrates assigned to them.

Augustus' personal intervention is described in a famous passage of Justinian's *Institutes*:

Later on the Deified Augustus was the first who was moved time after time by a sense of personal obligation – either because his own safety was said to have been invoked by the person making the request, or because of the outrageous perfidy of some people – and he ordered the consuls to impose their [or his] authority (*iussit consulibus suam auctoritatem interponere*). And because this seemed just and popular, it was gradually transformed into a regular jurisdiction: there was so much enthusiasm for *fideicommissa* that their own praetor was created, who presided over the law for *fideicommissa*, and whom they called the *praetor fideicommissarius* ⁽⁷⁶⁾.

75) See, in general, David JOHNSTON, *The Roman Law of Trusts* (1988). For a reconsideration of *fideicommissa* prior to the Augustan innovation see Alan WATSON, "The Early History of *fideicommissa*", *Index* 1970, 179-183, rpt. in IDEM, *Legal Origins and Legal Change* (1991), 181-185.

76) *IJ*. 2.23.1.

The emperor's decision has been seen by modern scholars as the first step in the creation of an explicitly imperial law (77). But the Romans would not have described the innovation in these terms.

There is, in the first place, an important question of translation. The crucial passage in which Justinian describes Augustus' intervention is ambiguous: *iussit consulibus suam auctoritatem interponere* can mean either that Augustus ordered the consuls to impose *his* authority or that he told them to employ their own; Theophilus' translation does not clarify things, and scholars are divided on whose authority is at issue (78). But it is hard to imagine that Augustus' *auctoritas* was something that could be officially transferred to the consuls and publicly deployed by them. Augustus' decision was surely implemented within a more traditional constitutional framework: *fideicommissa* became enforceable in Roman law because the consuls, responding to instructions from Augustus, declared that they would enforce them. The logic is precisely the same as that of the subsequent transfer of these cases to a *praetor fideicommissarius*; it may have been the emperor's idea, but officially the new magistracy was a creation of the people (79).

77) E.g. RICCOBONO (above, note 4) 282-3; BUTI (above, note 2) 32.

78) Theoph. *Inst.* 2.23.1: τοῖς ὑπάτοις οὖν ἐκέλευσε τὴν οἰκείαν ἀθροῦν θεῖναι μεσῆν κτλ .. JOHNSTON (above, n. 75), 30 n. 24 notes that the language is ambiguous, but suggests that the context implies that the *auctoritas* is that of Augustus. Contrast the translation of P. BIRKS and G. MCLEOD, *Justinian's Institutes* (1987), 87: "The Emperor Augustus was the first to order the consuls to intervene".

79) See *Dig.* 1.2.2.32 (Pomponius), where Claudius' creation of praetors to deal with *fideicommissa* is described in exactly the same way as the addition of extra praetors by Sulla, Caesar and Augustus. See, in general, R. RÖHLE, "Praetor fideicommissarius", *RIDA*³ 15 (1968), 399-428, esp. for the epigraphic evidence.

Secondly, there is no evidence that the Romans associated this new body of legal doctrine with *cognitio* in particular. A passage from the *Epitome Ulpiani* has been seen as making the connection, since it explains that the procedure in cases of *fideicommissa* involved *cognitio*:

One does not sue for *fideicommissa* by formula, as one does in the case of legacies. Rather, there is a *cognitio*, at Rome by the consuls or by the praetor known as *fideicommissarius*, but in the provinces by the provincial governors (80).

As in the case of Quintilian, however, the point of the distinction need not be in the use, or not, of *cognitio*. The epitomator is in fact rephrasing a passage of Gaius, where there is no mention of *cognitio* at all:

Beside, we sue for legacies by formula; but we pursue (*persequimur*) *fideicommissa* either, at Rome, before a **consul** or the praetor with particular responsibility for **fideicommissa**, or, in the provinces, before the provincial **governor** (81)

80) *Epit. Ulpiani* 25.12.

81) Gaius 2.278.

In the *Epitome*, therefore, the word *cognitio* cannot have the technical meaning that at first sight seems suggested by the contrast with *per formulam*. There was to be merely “an investigation” – by the consuls, the *praetor fideicommissarius*, or provincial governors.

The third author who suggests a distinction between the traditional legal procedures and *cognitio* is Suetonius. In his “Life of Claudius” Suetonius describes an incident in which a *iudex*, or potential *iudex*, was challenged because he had a lawsuit of his own pending, and replied that his case pertained not to *cognitio*, but to *ius ordinarium*.

Another man was challenged by opponents because of a lawsuit of his own, and said that the matter pertained not to (the) *cognitio* but to the ordinary law; Claudius at once compelled him to conduct the case in front of him, so that in dealing with his own affairs he would give evidence for how he would act as a *iudex* (82).

The important question is why one sort of lawsuit, the *cognitio*, would have disqualified the man, and why a matter of *ius ordinarium* would not. If the distinction is one between the law applied in the imperial courts (*cognitio*) and that of the traditional Republican procedures (*ius ordinarium*), the passage is

82) Suet. *Claud.* 15: *alium interpellatum ab adversariis de propria lite negantemque cognitionis rem sed ordinarii iuris esse, agere causam confestim apud se coegit, proprio negotio documentum daturum, quam aequus iudex in alieno negotio futurus esset.* See J. G. WOLF, “Claudius Iudex”, in V. M. STROCKA, ed., *Die Regierungszeit des Kaisers Claudius* (1994), 145-158, at 152.

evidence for a legal system with two independent jurisdictions, with the man claiming that litigation in one system ought not to disqualify him from acting as a judge in the other one.

But there are difficulties. The story is told as the second of two stories about Claudius' supervision of the jury lists⁽⁸³⁾. If we accept Suetonius on this point, we have to conclude that the context of the dispute was the traditional Republican legal system; it is hard to imagine that Claudius was conducting a public inquiry into a list (unattested) of *iudices* to whom he, or his subordinates, were going to delegate their own cases of *cognitio*. But if the man was under consideration for service as a traditional *iudex*, his reply makes no sense: why would a matter of *ius ordinarium* not be relevant? If we are to retain the traditional view of *cognitio* and *ius ordinarium*, we almost have to emend the text: it would make more sense to suppose that, faced with an objection while the emperor was revising the jury lists, our juror replied that his lawsuit pertained *not* to the traditional courts, but the emperor's *cognitio* system; in this case it would have made sense for the emperor to hold a *cognitio* of his own on the matter, to get an idea of how the man would behave as a *iudex* in one of the ordinary courts.

The obvious alternative is to assume that Suetonius' account is highly condensed: although he begins by talking about supervision of the jury lists, Suetonius perhaps shifts his attention to quality control in general. On this view the litigants

83) Suet. *Claud.* 15.1.

(*adversarii*) were faced with a judge assigned to the *cognitio* by the emperor, and objected to him because he had his own lawsuit pending. The man replied that his own lawsuit was irrelevant, because it pertained to the traditional courts rather than the imperial system, but Claudius decided to hear that case himself, so that he would see how the judge conducted himself as litigant. Claudius will then have had himself duly selected as the *iudex* for the man's case, following the traditional procedures for civil litigation (*ius ordinarium*). The arrangements for this hearing will have taken more time than the story tends to suggest, but Suetonius' point is that Claudius made a quick decision (*confestim*), not that the whole problem was resolved quickly. This is the reading offered by most scholars, who of course assume that *cognitio* and *ius ordinarium* constitute distinct legal systems. But even on this view the logic is problematic: either the litigants objected to the judge on the general principle that anyone with a pending lawsuit should be ineligible to act as judge, or (as is more likely) they objected because the lawsuit in question was one in which the judge himself was their opponent. In either case, it is not clear how the judge's reply – that the lawsuit at issue was scheduled for a different court system – could possibly have been satisfactory.

Given these difficulties, we should reconsider what Suetonius means by *cognitio* and by *ius ordinarium*. Although it is tempting to regard both expressions as referring to fully-fledged and complementary legal systems, neither *cognitio* nor (as we have seen) *ius ordinarium* has this kind of technical meaning elsewhere. It seems possible, therefore, that the

distinction Suetonius has in mind is a different one, between ordinary civil proceedings (*ius ordinarium*) and an enquiry into a criminal matter (*cognitio*). The classical jurists could certainly use *ius ordinarium* to distinguish ordinary civil proceedings from those involving criminal charges⁽⁸⁴⁾, and the word *cognitio*, though it does not of itself identify proceedings as criminal ones, clearly could be used in reference to criminal cases⁽⁸⁵⁾. Claudius was, on this view, reviewing the (criminal) jury lists, and was faced with objection that one candidate had his own lawsuit pending. The potential juror replied that his lawsuit was not the kind of lawsuit that should disqualify him: it was not a criminal matter, but merely a civil suit⁽⁸⁶⁾.

This one remark, attributed to an obscure *iudex* about half a century before Suetonius himself was writing, might seem to have received here more than its share of attention. It is worth observing, however, that it is the closest thing we get, in all of ancient literature, to an explicit statement that *cognitio* was distinguished from the ordinary law. For the most part *cognitio* was simply something that some people did more than others:

84) *Dig.* 47.1.3 (Ulpian): *si quidem pecuniariter agere velit, ad ius ordinarium remittendus erit nec cogendus erit in crimen subscribere.*

85) *Cic. Brut.* 22.87: *et cum cognitionis dies esset.*

86) Yet another possibility is suggested by W. KUNKEL, in his review of BLEICKEN *Senatsgericht und Kaisergericht*, *ZRG* 81 (1964), 360-77, at 375. KUNKEL imagines that the case which provoked the question of the judge's competence was one which came before the emperor and his *consilium*; in this case, too, Suetonius' contrast will have been between the ordinary legal processes (*ius ordinarium*) and the imperial hearing in question (*cognitio*).

there is little support for the extended technical meaning given it in modern scholarship.

We can get a better idea of the range of the word *cognitio*, and its limits, by considering the one legal text explicitly devoted to the subject. Callistratus' *de Cognitionibus* has been seen as a new departure in legal writing, in which the author, unlike his more traditional contemporaries like Ulpian and Paul, was willing to address directly the new legal procedure of the *cognitio* (87). But there is a big difference between a book on the subject of the institution of *cognitio* – a *de Cognitione* – and one on the subject of *cognitiones* in general. Callistratus seems to have intended his work as a sort of handbook for government officials, providing basic guidance in the conduct of their lawsuits. The extant fragments never suggest that the *cognitiones* to which the book was devoted amounted to anything like a coherent system. Callistratus says that there were different categories of *cognitiones*: some concerned the undertaking of *honores* and *munera*, some concerned money, in some there was prestige at stake, and some concerned capital charges (88). It is clear that he was thinking primarily of *cognitiones* held by provincial governors, but the word *cognitio* did not, of itself, convey that distinction; he ignored the courts of the senate and the emperor –

87) E.g. KOTZ-DOBZ, "Callistratus", *RE Suppl.* 3 (1918) 225-229, at 228: "die erste systematische Darstellung der *extraordinaria cognitio*". In general, R. BONINI, *I 'libri de cognitionibus' di Callistrato* (1964).

88) *Dig.* 50.13.5 pr.

supposed to be *cognitiones* by definition, just as as he ignored those of the praetors.

A Roman, on hearing the word *cognitio*, or on picking up a book about *cognitiones*, would probably not have thought primarily of the traditional Republican procedures, whether for private disputes or criminal charges. The courts for which the word *cognitio* was most useful, as a general term, were those in which the officials in charge were likely to hear the evidence themselves and render their verdicts. But it does not follow from this that the Romans thought of *cognitio* as a distinct legal procedure, with its own rules and its own consequences; the word *cognitio* was not a blanket term to describe imperial, senatorial or provincial procedure in general.

IV. Proceedings *extra ordinem*

The history of the words *extra ordinem* and *extraordinarius* involves an obvious paradox, in that expressions for something unusual come to be used for a procedure that was, in the end, perfectly normal. This semantic development provides tangible evidence for a significant change in Roman legal procedure, but our understanding of the process is hampered by the weight of scholarly tradition. Clear though it is that the Roman jurists could use *extra ordinem* and *extraordinarius* without any of the procedural implications later attached to these words, modern scholars have treated them as though they were technical terms.

The problem is further complicated by the fact that scholars are divided over what precisely the terms *extra ordinem* and *extraordinarius* are supposed to mean. Some scholars regard the words as referring to a complete legal system; on this view a *ius extraordinarium*, like the *ius novum* discussed above, was an important supplement to the *ius civile* and *ius honorarium* of the Republic. Most scholars, however, regard the words *extra ordinem* and *extraordinarius* as referring not to the substance of the law but to procedure: alongside the traditional procedures for criminal and civil trials, was a special procedure designated by the words *extra ordinem* or *extraordinarius* (89).

The fact that the Romans spoke of *ius extraordinarium* is striking, but when viewed in context the expression clearly does not refer to a complete legal system. Moreover the procedural development by which an “extraordinary” process became the normal one has been seriously misunderstood. Scholars have assumed that the opposite of procedure said to be *extra ordinem* was the *ordo*, a term used for the familiar two-stage processes, both criminal and civil, fundamental to traditional Roman conceptions of the law. I will argue instead that what made the *extra ordinem* process special was the fact that it was different – at first – not just from what went on in the praetor’s court, but from what normally went on in courtrooms all over the empire.

1. *ius extraordinarium*

89) There is a useful survey of the various views in F. DE MARTINO, *La giurisdizione nel diritto romano* (1937), 299ff.

A few texts have been taken as evidence that the Roman lawyers regarded the law as a sort of three-fold entity, consisting of *ius civile*, *ius honorarium*, and a new and imperial *ius extraordinarium* ⁽⁹⁰⁾. But the Roman conception was in fact much less dramatic: although Roman lawyers could talk about an imperial law (distinct from the *ius civile* and the *ius honorarium*), and although they could talk about *ius extraordinarium*, the two things were not the same.

One of the problems we face in approaching the relevant texts is the word *ius*. Given the weight of tradition behind the word, we tend inevitably to give it the broadest possible interpretation: when jurists talk of *ius extraordinarium*, or *ius tripertitum*, we think immediately of obvious comparisons, like *ius civile* and *ius honorarium*. But in fact Roman lawyers could use *ius* in a much more limited way than we would normally expect. WLASSAK showed long ago that the expression *ius extraordinarium* did not refer to a system of law comparable to *ius civile* and *ius honorarium*, but was simply a way of talking about special cases ⁽⁹¹⁾. We should translate *ius extraordinarium* simply as “special rules”, not as something ponderous like “the special law”; it is

90) RICCOBONO (above, note 4); BUTI (above, n. 2), 31: “Si ebbe così un diritto 'imperiale' – non solo processuale ma, naturalmente, anche sostanziale – che si pose accanto allo *ius civile* ed allo *ius honorarium* in posizione autonoma e, infine, dominante”. For the present purposes it is not necessary to decide whether the expressions in question are Justinianic interpolations or not; we begin simply by trying to establish what the texts as preserved by Justinian actually say.

91) WLASSAK (above, n. 3), 75-76.

one thing to say “in this case we apply special rules”, and quite another to say “we invoke The Special Legal System”.

The most important text in this regard is Justinian’s *Institutes*, which explicitly divides the Roman law into three parts (92). The subject under discussion is the history of the will, which though initially a part of the *ius civile* was also recognized, in a different form, by the *ius honorarium*, and which by Justinian’s time had also been modified by imperial decisions:

The law on this subject seems thus to be threefold (*ius tripartitum esse videatur*), since the witnesses and their presence at one place for the creation of a will derives from the *ius civile*, the subscriptions of the testator and the witnesses come from following the sacred constitutions, and the seals and the number of witnesses come from the praetor’s edict (93)

It is certainly striking that Justinian could think of the law in this way: first the civil law, then the law articulated by imperial constitutions, and finally the *ius honorarium*. But it is also clear that this does not amount to a comprehensive theory about the nature of Roman law. The *ius tripartitum*, impressive as the expression may seem, amounts to no more than a statement about

92) On the tendency of Roman lawyers to classify things in threes, sometimes artificially, see H. GOUDY, *Trichotomy in Roman Law* (1910), esp. 61-62.

93) *IJ*. 2.10.3. cf. also Theoph. *IJ*. 2.10.3.

the sources of law, which in this case happen to be of three different kinds (94).

More difficult are the various texts which speak explicitly of a *ius extraordinarium*, but here too it is important to remember that *ius* need not imply a fully-fledged legal system. In a subscription of Alexander Severus, for example, *ius extraordinarium* refers simply to the special rules for cases involving the fisc (95). In other passages, where *ius extraordinarium* is indeed spoken of as a third element, parallel to the *ius civile* and the *ius honorarium*, the reference is simply to the kinds of procedural remedies that might be available. This is clearest in a passage of Marcian: “There is no way for slaves to go to law against their masters, since they are absolutely not recognized by the *ius civile*, by the *ius praetorium*, or *extra ordinem*” (96). And the same point is made by Ulpian, who writes in a way which suggests at first that he regarded the law in general as consisting of three categories:

It is settled that the word “creditors” refers to those to whom something is owed as a result of a lawsuit or a prosecution, either under the *ius civile* (as long as there is not a permanent exception), or under the *ius honorarium*,

94) Note the translation of BIRKS and MCLEOD (above, n. 78), 69: “The law here has three sources”. For a very different conception of *ius tripertitum* see *Dig.* 1.1.2 (Ulpian): *privatum ius tripertitum est: collectum etenim est ex naturalibus praeceptis aut gentium aut civilibus*.

95) *CJ.* 7.73.5 (225).

96) *Dig.* 48.10.7 pr.

or under the *ius extraordinarium*, whether due immediately, or after a certain time has elapsed, or conditionally ⁽⁹⁷⁾.

Having begun with judgments based on the *ius civile* and the *ius honorarium* – products, in other words, of the traditional formulary procedure – he goes on to mention judgments produced in other courts. Despite his invocation of an impressive-sounding *ius extraordinarium*, Ulpian, like Marcian, is talking only about a special kind of legal proceedings.

2. *Ordo* and *extra ordinem*

Most scholars understand the words *extra ordinem* and *extraordinarius* as technical terms for the *cognitio* procedure, in which officials heard lawsuits without the restrictions of the traditional criminal and civil courts. There is a clarity to this picture which is undeniably attractive, but it requires us to give the words *extra ordinem* and *extraordinarius* more weight than they can reasonably bear. Although the words *extra ordinem* and *extraordinarius* did indeed come to acquire, in certain contexts, a specific technical meaning, this usage was derived from discussions of the criminal procedure alone; when matters of the *ius civile* and *ius honorarium* came to be dealt with *extra ordinem*, this was not so much an organic development of the civil law as a widening of the criminal one.

One of the oddest things about the scholarship on the *extra ordinem* procedure is that interpretations differ markedly

97) *Dig.* 50.16.10.

according to whether it is seen as a development of the civil or the criminal law. In accounts of Roman civil procedure, *extra ordinem* proceedings are depicted as the natural successor to the formulary procedure of the urban praetor; the “unusual” thing about them is that they do not maintain the traditional distinction between proceedings *in iure* and those *apud iudicem* (98). But studies of Roman criminal law present the *extra ordinem* procedure as having been special, originally, for the entirely different reason that judges were in these cases not bound by the traditional rules of the criminal *quaestio* (99). It is not clear to me quite how scholars resolve this problem of a double origin, not least because few modern works deal with civil and criminal procedure at the same time. But I suspect that a solution would depend very heavily on the construction of a tangible entity that can be labeled an *extra ordinem* procedure. If we could believe that Augustus invented a new procedure, the problem of double origin would be considerably less urgent, for we could imagine Augustus offering a single supplement to both the criminal and the civil courts already in existence.

The notion that the words *extra ordinem* were used in the early empire to refer to a new legal procedure derives in large part

98) E.g. KASER - HACKL (above, n. 2), 436: “Diese 'amtlichen' Verfahren haben unter dem Prinzipat noch ausserordentlichen Charakter, soweit sie nur ergänzend neben den 'ordentlichen' Formularprozess treten”.

99) E.g. Richard A. BAUMAN, *Crime and Punishment in Ancient Rome* (1996), 50: “The *cognitio extraordinaria* was designed to 'liberate' criminal trials from the shackles of the *ordo iudiciorum publicorum*, that is, from the limitations of the jury-courts”.

from a preoccupation with technical language. Starting from the fact that *extra ordinem* and *extraordinarius* were, in Justinian's day, used to describe the procedure which had replaced the formulary procedure and the *quaestio*, scholars have derived a legal vocabulary which in philological terms is highly problematic. This is most obvious in the case of the word *ordo*. Legal historians use this term as though it were a kind of back-formation from *extra ordinem*: what replaced the formula and the *quaestio* was *extra ordinem*, so the formula and the *quaestio* must be the opposite, the *ordo* ⁽¹⁰⁰⁾.

It is important, therefore, to go back to basics. *Ordo*, in Classical Latin, has a variety of specific meanings, ranging from a row of seats or a class of people to a sequence of events and the proper course of action. In legal contexts the word can be used, like *tavxi*", to refer to the proper order in which lawsuits should take place ⁽¹⁰¹⁾. In its adjectival form, however, *ordo* loses much of its connection with row and sequence; *ordinarius*, except in

100) E.g. Bernardo SANTALUCIA, *Diritto e processo penale nell'antica Roma*, 2nd ed. (1998), 215: "Tale procedimento, definito correntemente col nome di *cognitio extra ordinem*, perché sorge e si sviluppa al di fuori del sistema processuale e criminale dell'*ordo iudiciorum*, e quindi senza i vincoli e le restrizioni formali della giurisdizione ordinaria". Scholars even distinguish between an *ordo iudiciorum publicorum* and an *ordo iudiciorum privatorum* without, as they often observe, any support from the ancient sources at all; SACHERS, "Ordo", *RE Suppl.* VII (1940), 792-7; KASER - HACKL (above, n. 2), 163 n. 1 refers to the "beliebten, aber unrömischen Bezeichnung, 'ordo iudiciorum privatorum'".

101) Servius, *ad Vergil. Aen.* II. 102: *Uno ordine] uno reatu; et est de antiqua tractum scientia, qui in ordinem dicebantur causae propter tumultum festinantum, cum erat annus litium; BGU 628: ordo cognitionum officii nostri.* For *tavxi*", see Fronto, *Epist. Graec.* 5.1; *P.Col.* 123, lines 28-34.

Vitruvius, means not “in rows” but “ordinary, normal”. And *ordo* tends to have this same developed meaning in *extra ordinem*; the expression can sometimes mean “out of sequence”, but it more usually means “in a way that is not the usual one”. The development is at its most extreme in the adjective *extraordinarius*, in which the original implications of “row” and “sequence” are entirely forgotten; *extraordinarius* means simply “unusual” (102).

It is clear that the Roman lawyers could use *extraordinarius* and *extra ordinem* in this very general sense. Iavolenus and Papinian, for example, describe *munera* being imposed *extra ordinem* (103), and Ulpian refers to special holidays as *feriae extra ordinem indictae* (104). In the *Codex Theodosianus* special grants of land are described as being assigned *extra ordinem* (105), and there is much concern for *extraordinaria onera* and *munera* (106).

102) For the general sense of *ordinarius* and *extraordinarius* and related words it is sufficient simply to consult the *Oxford Latin Dictionary*. See also D. DAUBE, *Roman Law: Linguistic, Social and Philosophical Aspects* (1969), 2-10 for analogous linguistic phenomena and their treatment by legal scholars.

103) *Dig.* 50.4.12; 50.5.6.

104) *Dig.* 4.6.26.7.

105) *CTh.* 11.16.13 = *CJ.* 10.48.10.

106) *CTh.* 6.26.14; *CTh.* 11.16 (*de extraordinariis sive sordidis muneribus*); *CTh.* 11.16.1; 4; 5; 6; 9; 12; 15 [= *CJ.* 10.48.12]; 18; 19 [= *CJ.* 10.48.14]; 21; 22; *CTh.* 12.1.30 [= *CJ.* 10.32.21]; *CTh.* 12.6.31 [= *CJ.* 10.72.14]; *CTh.* 13.5.4; *NMaj.* 2 pr. For a Greek translation see *CTh.* 15.2.1 = *CJ.* 11.43.1: *ab extraordinariis oneribus volumus esse immunes* = *Bas.* 58.19.1: ἀτελείς ἔστωσαν ἔξω τῶν διατετυπωμένων βαρῶν καὶ ἐδίκτων. The word is substantivized at *CTh.* 11.16.2; 14.6.2; *CTh.* 16.2.40 = *CJ.* 1.2.5 = *Bas.* 5.1.4; *CTh.* 16.2.14 = *CJ.* 1.3.2; *CTh.* 15.3.1 = *CJ.* 11.65.1. See also *CTh.* 6.35.10 (380): *Rectores provinciarum illicitum esse cognoscant quemquam ... ulli necessitati extra ordinem subiugandum*; *CTh.* 13.5.8: *extraordinaria ... officia*; *CTh.* 11.16.11 = *CJ.* 10.48.8: *Nihil a provincialibus extraordinaria patimur indictione deposci*; *CTh.* 11.16.17:

A *Novel* of Valentinian mentions *ambitio extraordinaria* (107), and on the one occasion *extraordinarius* is used in Justinian's *Novels* the word refers simply to specially imposed burdens (108). Modern scholars however, tend to see *extra ordinem* and *extraordinarius* as referring to a specific legal procedure (109). To some extent the problem is again a linguistic one: the lack of a definite article in Latin means that it is not obvious whether the jurists are talking about something as untechnical as *a* special procedure, or whether what they have in mind is a clearly defined process that might reasonably be called "*the* special procedure". But even more important is the fact that by the fourth century, at least, lawyers demonstrably *could* use the expression in the latter sense; the best evidence comes from a fourth century papyrus, discussed below, with its petition for "the action called the *extra ordinem cognitio*" (ἀγωγὴν δὲ τὴν ἔξτρα ὄρδινεμ κοιτιόνεμ). This development is clearly a significant one, but its

extraordinaria functionum sarcina; CTh. 11.16.23: extraordinariae necessitatis damna.

107) *N.Val.* 13.7.

108) *NJ.* 131.5.

109) Pomponius, for example, says that the praefectus annonae and the praefectus vigilum were not magistrates but rather extraordinary appointments; this is treated by KASER - HACKL (above, n. 2), 436 n. 4 as a reference to *cognitio extra ordinem*. The words *extra ordinem*, applied in the Republic to specially constituted *quaestiones*, have received comparable treatment; see Carlo VENTURINI, "Quaestio extra ordinem", *SDHI* 53 (1987), 74-109.

nature cannot be understood unless we recognize that *extra ordinem* in this case really does mean “special”; the fact that some *cognitiones* were to be handled in a special way means that others were perfectly normal.

3. τὸ ἐξραορδίνεμ

Byzantine commentators were well aware that by their day the ordinary procedures had long been displaced by what had originally been extraordinary ones, and they occasionally offer what look like explanations of the fact. One explanation is usually rejected as simply wrong, while the other has been seen as supporting the traditional view, that *ordo* referred simply to the formulary procedure, in which a case was assigned to a *iudex* acceptable to the litigants, while proceedings *extra ordinem* were direct expressions of governmental authority. But the Byzantine lawyers have, I think, been misunderstood. Instead of offering us information about origins of the *extra ordinem* procedure, they merely provide additional information about it.

For the most part the Byzantine lawyers seem oblivious to the various meanings of the Latin *extraordinarius* and *extra ordinem*. Their translations sometimes duck the words entirely, often simply by transliterating; they also, as we shall see, translate *extra ordinem* as “harshly”. At other times, like their modern successors, the Byzantines look to the root word *ordo*, which they can translate as τῶξις. This is reasonable, but pedantic; it is

surprising, given the normal Latin usage, to discover *extraordinarius* rendered as ἐκτὸς τάξεως⁽¹¹⁰⁾.

The best known of the Byzantine comments on the procedural development is in Justinian's *Institutes*, where it is observed that the extraordinary had become ordinary:

Nowadays it is superfluous to speak of the sequence (*ordo*) and outcome of interdicts. For whenever law is given *extra ordinem*, as is the case nowadays for all lawsuits, there is no need for an interdict to be issued, and cases are decided without interdicts, even if an action has been given on the basis of an interdict⁽¹¹¹⁾.

The author of the *Institutes* does not comment on the irony of the situation, and it is not clear whether or not he sees the word *ordo* as being picked up, by way of contrast, in the expression *extra ordinem*. Theophilus' version, however, suggests there is no obvious connection: he translates *ordo* as τάξις, but deals with *extra ordinem* simply by transliterating. By Justinian's day *extra ordinem* was clearly a technical term, referring to an established, and no longer very special, procedure.

Two anonymous commentators provide what looks like the traditional explanation of *extra ordinem* proceedings. The Turin Gloss to the *Institutes*, explaining a reference to the replacement

110) *Dig.* 50.13: *De variis et extraordinariis cognitionibus et si iudex litem suam fecisse dicetur* = *Bas.* 54.14: <Περὶ διαφορῶν καὶ ἐκτὸς τάξεως διαγνώσεων καὶ ἐὰν ὁ δικαστὴς τὴν δίκην τὴν ἰδίαν πεποιηκέναι λέγεται>.

111) *IJ.* 4.15.8 = Theoph. *IJ.* 4.15.8.

of ordinary procedures with extraordinary ones, comments that “Ordinary lawsuits (*ordinaria iudicia*) are those contained in verbal formulae” (112). A scholion to the Basilica translation of a passage of Ulpian offers a more detailed version of the same explanation. The text that we have is probably post-Justinianic, but it has incorporated an earlier comment, which probably dates to the time of Justinian (113). In the original text, Ulpian was discussing the praetorian interdict known as *de migrandis*; the praetor would under certain circumstances use his authority to prevent landlords from holding onto their tenants’ property (especially slaves) so as to keep them from leaving. Ulpian went on to remark that in fact the interdict was not in common use, since remedies were also available *extra ordinem* (114). His comment was translated into Greek, though *extra ordinem* was retained as a Latin word: “And the matter is pursued *extraordinem*, for which reason the legal prescription is not common (115).

112) *Gl. Taur. ad Inst.*, 3.12 pr.: *Ordinaria iudicia sunt quae formulis verborum continebantur*. For the text see A. ALBERTI, *La 'Glossa Torinese'* (1933), 137; see also H. J. SCHELTEMA, *L'enseignement de droit des antécédents* (1970), 43-6.

113) Dieter SIMON, *Untersuchungen zum Justinianischen Zivilprozessrecht* (1969), 42 argues that the text is not, as previously thought, actually by Dorotheus, but that it is nonetheless basically Justinianic.

114) Dig. 43.32.1.2: *Cui rei etiam extra ordinem subveniri potest: ergo infrequens est hoc interdictum*.

115) Bas. 60.19.1.2: *Καί 'extraordinem δὲ τὸ πρᾶγμα βοησέεται, διὸ οὐκ ἔστι συνεχὲς τὸ νόμιμον παράγγελμα*.

It is this remark, preserved in the Basilica, which prompted a Byzantine lawyer to provide an explanation:

'*extraordinem*] In other words, even if the [interdict of] *de migrandis* is not given to the tenant on the basis of the order of actions (ἐκ τοῦ ὀρδίνου τῶν ἀγωγῶν) and is pursued in the courtroom. For formerly those who wished to undertake actions, and did not know them, approached those who were in charge of the formula and learned the name of the action appropriate for their case. But now the person who wants to pursue a case of change in domicile is helped, rightly, even if he pursues it *extra ordinem* (κἂν ἐξτραορδίνεμ κινήση), in other words not undertaking the action by its proper name. For the name of this particular interdict is not common in the courtrooms because of the fact that the request is understood by the judges even without it. At any rate the scholion has interpreted the *extra ordinem* (τὸ ἐξτραορδίνεμ) as applied to inhabitants who might use it in this way. But formerly the *extra ordinem* (τὸ ἐξτραορδίνεμ) was applied not to inhabitants (*inquilini*) but to tenants (116).

The explanation offered here is an intriguing one, not least because it accords so well with our general impression of Roman legal history: the traditional procedures of Roman law, most useful and best known in the city of Rome itself, were replaced by the more businesslike rules of the provincial courts.

116) *Schol. ad Bas.* 60.19.1, 7.

We can accept these comments as offering a reasonable description of procedural change; in the classical period, as the Turin Gloss says, the normal procedure had involved the use of *formulae*, but eventually, as the Basilica scholiast suggests, the formula was abandoned. And the scholiast may well have thought that he was explaining the origin of the expression *extra ordinem*: because litigants were no longer familiar with the actions they filed suit without them (ἐκ τοῦ ὀρδίνου τῶν ἀγωγῶν). But he need not be pressed this far. A passage of the Pauli Sententiae presents essentially the same point, and offers a useful clue to the precise connection between the formula and the change in legal procedure:

It makes no difference whether someone sues or is sued by *actio directa* or by *actio utilis*, since in *iudicia extraordinaria*, where the precision of *formulae* is not observed, the subtlety of this distinction is superfluous, especially since each action has the same scope and effect (117).

Here the point about abandoning the formula is made not to explain the origins of the *extra ordinem* procedure, but simply as additional information about it. By the end of the third century, when the Pauli Sententiae was probably written, it really did make no practical difference whether a litigant used the *actio directa* or the *actio utilis*, because the formula was no longer in common use. But the loss of the *formula* does not actually

117) *Dig.* 3.5.46.1 = *P.S.* 1.4.10.

explain the transition from *iudicia ordinaria*; the fact is mentioned in the Pauli Sententiae merely in passing. Similarly, I suggest, the Turin Gloss and the Basilica scholion are merely commenting on the change from ordinary to extraordinary procedure, not offering an explanation of it .

A passage of Theophilus offers us essentially the same choices. In the course of a long discussion on the history of remedies for default (not contained in the Latin *Institutes*) he explains that the procedure has changed:

Prior to the universal succession which we discussed in the preceding title there were also other kinds of universal succession, such as *emptio bonorum*, introduced in the matter of sales of a debtor's goods after many detours and delays, which was in force when the courts were *ordinaria*, in other words when the *conventus* was held at regular intervals. (We have explained the *conventus* in Book One of these *Institutes*). Nowadays, however, since the courts are *extraordinaria* and take place at all times, *venditiones bonorum* are appropriately obsolete ⁽¹¹⁸⁾.

For Theophilus, it seems, the difference between “ordinary” and “extraordinary” courts is simply one of scheduling ⁽¹¹⁹⁾. Scholars have understood him to be offering this as an

118) Theoph. *Inst.* 3.12 pr.

119) For the Justinianic procedure see G. WESENER, “Distractio bonorum”, *RE Suppl.* 9 (1962), 27-32.

explanation, and few have taken him seriously (¹²⁰). Theophilus' general understanding of the word *conventus*, which he regards as defined by its strict time tables, is nothing if not eccentric (¹²¹). By the sixth century the traditional practice at Rome was a distant memory, and Theophilus may simply have misunderstood his sources, seeing *ordo* and τάξις in the words *ordinarius* and *extraordinarius*, and guessing that they referred to the rules of scheduling. But it is more likely that Theophilus, like the scholiasts discussed above, was providing additional information about the change rather than explaining it. The *emptio bonorum* had involved, as he tells us, its own elaborate schedule of time limits (¹²²). That schedule depended on the fact that legal

120) An exception is DE MARTINO (above, n. 89), 302-4.

121) Theoph. *Inst.* 1.6.4: "A *consilium* is an assembly of distinguished men which is constituted at a certain time of the year. And this *consilium* takes place not only at Rome, but in the provinces. And it is constituted at the same time as the *conventus*. And what is a *conventus*? A given time established for the settling of lawsuits. For the Romans, since they spent almost the whole year in making war, but at a particular time were prohibited from this by winter and the terrible storms that come with it, since they were not able as citizens of the Republic to remain outside of legal business, would lay aside their arms and spend time on lawsuits. And they established many judges for this business who would settle their disputes, who were called *recuperatores*, because through them every man received what was due to him. And the time for this was called *conventus*, since to come together is *convenire*, and on this day the judges and litigants came together. And the *consilium* took place on the last day of the *conventus*".

122) Theoph. *Inst.* 3.12 pr.: "If anyone, when he was in debt to many people, was a fugitive, and had no one to defend him (*defendeuonta*), the creditors would get together and then approach the *praetor* and accuse him of this fact, and the *praetor* would decide for them according to the law of the goods of the *debitor* and they would take possession of them within a certain number of days. And when this was done, there was a second approach by the same petitioners, who asked that they be allowed to choose one from their number, through whom they would sell the goods. For since it was not easy for everyone to come together on the same day, they selected one of their number, whom they called a *magister*, and who would himself make arrangements with those wanting to buy. And there was notification

proceedings as a whole had a strict timetable; the disappearance of the “ordinary” procedure was thus connected with the loss of the *emptio bonorum*: “all these complexities are now obsolete because of the existence of the extraordinary courts”. The strict schedule for the ordinary procedure and the random timing of the extraordinary one are important to his exposition of the *emptio bonorum*, but they are not offered as definitions of the two types of procedure.

The Byzantine lawyers, then, were not actually trying to explain the change from ordinary to extraordinary procedure; they took the transformation for granted, and commented instead on related developments. We do not have to choose, therefore, between the explanation offered by the scholiasts and that of Theophilus: we are free to disregard the Byzantine comments

(prographv) in obvious places in the city saying: ‘N. who is our debtor has come under a judgment of seizure; we being his *creditores* have appropriated his property; let anyone wishing to be a purchaser come forward’. Then, after a few days had elapsed, there was a third approach (προσέλευσις), in which they were given permission to use the *lex bonorum vendundorum*; for it remained for them to add to the aforementioned notification the following: ‘That the purchaser has to pay the *creditores*, for example, half the debt, so that the person who is owed 100 will accept 50, and the person owed 200 will accept 100’. And when the specified time had elapsed, then the property was granted to the purchaser and the purchaser was called the *emptor bonorum*, and all the actions which were permitted to the person who organized the *venditio bonorum* and to which he was liable were transferred to the *emptor bonorum*, and he could sue and be sued *utile*, just like the *bonorum possessor*; for both are praetorian (*praetorioi*) successors”.

entirely, and concentrate on the explanation suggested by the Roman texts.

4. *Extraordinaria animadversio*

By far the most common use of *extra ordinem* and *extraordinarius* in Roman legal sources is to indicate that punishment is to be of a particularly harsh kind. The words vary; we get *punire*, *vindicare* and *coercere* with *extra ordinem*, and also *plectere*, *multare*, *corrigere*, *animadvertere* and *damnare*. Typical is a passage of Marcian: “If anyone has seized someone else’s inheritance, it is customary for him to receive special punishment (*extra ordinem solet coerceri*)” (123). Justinian in the *Institutes* speaks of an *extraordinaria poena*, for *iniuria*, which Theophilus explains as “imposing a punishment beyond the norm (ε[χ]ω[ρ]η), with whatever penalty the judge wishes, such as exile or division of property” (124). Other authors are more explicit about the powers now given to magistrates; Hermogenianus says that when *iniuria* is punished *extra ordinem* the penalties vary according to the circumstances and the status of the offenders: “Thus slaves are whipped and returned to their masters, free persons of humble station are subjected to beatings, while the

123) *Dig.* 47.19.1 = *Bas.* 60.29.1.

124) Theoph. *Inst.* 4.4.10. The author goes on to cite *CJ.* 9.35.11, a law of Zeno allowing litigants of *illustris* rank or higher to use agents in criminal matters. See also Scholion 1 on *Bas.* 60.22.1 pr., where *extra ordinem* is understood to mean simply “as the judge wishes”.

others are punished either by exile or by being kept from doing a specific thing” (125).

It was not just penalties that were modified, for the Romans identified specific offenses as particularly worthy of punishment. In some cases they were consciously modifying the law to deal with provincial issues; in Egypt the crime of tampering with the banks of the Nile or of other water courses was punishable *extra ordinem* (126), and the Romans had the same legal response to the uniquely Arabian crime of σκοπελισμός, which involved making death threats by means of stones piled up in fields (127). Most of the new crimes, however, were prompted by more universal problems. Sacrilege, for example, was to be punished *extra ordinem* (128), as were statutory rape and sexual harassment (129), abortion (130), and a father’s refusal to acknowledge his child (131). The new penalties could also be imposed for more quotidian offenses, such as the throwing of things out of the window by slaves (132), the intentional burying of a corpse on

125) *Dig.* 47.10.45 = *Bas.* 60.21.43.

126) *Dig.* 47.11.10 = *Bas.* 60.22.10. See also *CTh.* 9.32.1 = *CJ.* 9.38.1.

127) *Dig.* 47.11.9 (Ulpian).

128) *Dig.* 48.13.4.2 (Marcian) = *Bas.* 60.45.5.

129) *Dig.* 47.11.1 pr. = *P.S.* 5.4.5 = *Bas.* 60.22.1.pr: Οἱ ὑπονοθεύοντες ἀλλοτρίους γάμους, εἰ καὶ τοῦ σκοποῦ μὴ τύχῳσι, βαρυτέρως κολάζονται. *Dig.* 47.11.1.2 = *Bas.* 60.22.1.2. See also *Dig.* 48.38.19.3.

130) *Dig.* 47.11.4 = *Bas.* 60.22.4; see also *Dig.* 48.19.38.5, on the punishment of makers of abortifacients (and aphrodisiacs).

131) *Dig.* 25.3.1.4 (Ulpian) = *Bas.* 31.6.1.4.

132) *Dig.* 9.3.1.8.

public land ⁽¹³³⁾, the fouling of persons, water supplies, or the environment in general ⁽¹³⁴⁾, and frightening people with snakes ⁽¹³⁵⁾. There was also a concern with theft, and with various kinds of fraud: people who used false measures ⁽¹³⁶⁾, and those who cornered food supplies ⁽¹³⁷⁾, were to be punished *extra ordinem*, as were those guilty of the new crime of *stellionatus* (literally, acting like a lizard), invented to cover egregious fraud in general ⁽¹³⁸⁾. The government was particularly concerned about misuse of the legal system: anyone who leaked documents to help one side in a legal dispute ⁽¹³⁹⁾, or who intentionally laid false charges ⁽¹⁴⁰⁾ was to be punished *extra ordinem*, as were litigants who abandoned litigation once it was underway, or colluded with their opponents ⁽¹⁴¹⁾.

133) *Dig.* 11.7.8.2.

134) *Dig.* 47.11.1.1; cf. *Bas.* 60.22.1.1: Barevw" timwrou'ntai.

135) *Dig.* 47.11.11 = *Bas.* 60.22.10.

136) *Dig.* 47.11.6.1 = *Bas.* 60.22.6.1.

137) *Dig.* 47.11.6 pr. = *Bas.* 60.22.6.

138) *Dig.* 47.20 is devoted entirely to this crime; see also *Dig.* 13.7.36 pr.; 47.11.3; R. MENTXAKA, "Stellionatus", *BIDR*³ 30 (1988), 277-335.

139) *Dig.* 47.11.8 = *Bas.* 60.22.8; for clarification see *Dig.* 48.19.38.8.

140) *Dig.* 47.10.43: *Qui iniuriarum actionem per calumniam instituit, extra ordinem damnatur: id est exilium aut relegationem aut ordinis amotionem patitur.* = *Bas.* 60.21.41; *Dig.* 48.16.3 = *P.S.* 1.5.2 = *Bas.* 60.1.12.

141) *Dig.* 48.3.4: *Si quis reum criminis, pro quo satisdedit, non exhibuerit, poena pecuniaria plectitur. puto tamen, si dolo non exhibeat, etiam extra ordinem esse damnandum. sed si neque in cautione neque in decreto praesidis certa quantitas compraehensa est, ac nec consuetudo ostenditur, quae certam formam habet, praeses de modo pecuniae, quae inferri oporteat, statuet.* = *Bas.* 60.35.4: Εἰ δὲ κατὰ δόλον οὐ παράστησιν, ἐξτραορδίνεμ καταδικάζεταιται.

What defined these new crimes most obviously was the harshness of the penalties. As well as transliterating the expression *extra ordinem*, or turning it into a new Greek adverb (ἐχτραορδίνως) ⁽¹⁴²⁾, the Byzantines also regularly translated it as “harshly”: βαρυτέρως ἢ σφοδρῶς ⁽¹⁴³⁾. One scholiast provides a useful survey of the texts he regarded as relevant. Commenting on the Basilica translation of a passage from the *Pauli Sententiae*, in which attempted seducers of married women are said to deserve punishment *extra ordinem*, the scholiast refers us to texts concerning the crimes of *stellionatus*, cornering grain supplies, giving false measures, and usurping inheritances, and he singles out Hermogenianus’ statement about *falsum*, quoted above, “where you will learn what extraordinary penalties are” ⁽¹⁴⁴⁾.

The same emphasis on punishments can be also be seen in the original Roman texts. Macer tells us that the penalty for extortion is no longer defined by the original *lex* but is instead

142) Scholion 1 to *Bas.* 60.22.1 pr. = *Dig.* 47.11.1 pr.

143) *Bas.* 60.22.1 pr. = *Dig.* 47.11.1 pr. = *P.S.* 5.4.5; *Bas.* 60.22.10 = *Dig.* 47.11.10

144) Scholion 2 on *Bas.* 60.22.1 pr. = *Dig.* 47.11.1 pr. = *P.S.* 5.4.5; the references are to *Bas.* 60.29.1 = *Dig.* 47.19.1; *Bas.* 60.21.45 = *Dig.* 47.10.45; *IJ.* 4.4.10; *Bas.* 60.30 = *Dig.* 47.20; *Bas.* 60.22.6 = *Dig.* 47.11.6; *Bas.* 60.22.7 = *Dig.* 47.11.7.

imposed *extra ordinem* (145). Other passages reveal how dramatic such a development could be (146). Hermogenianus says that the penalties for harboring slaves had been replaced, in his day, by much more violent ones: “The financial penalties laid down by the *lex Fabia* have become obsolete: people found to have committed this crime are now punished according to the degree of fault, so that most of them are condemned to the mines” (147). And Marcian reveals that the relatively mild punishment imposed by Sulla’s old law on poisoning and assassination were no longer seen as adequate: “The punishment under the *lex Cornelia de sicariis et veneficiis* is deportation to an island and forfeiture of all property. But nowadays offenders usually receive capital punishment, unless they have the status of *honestiores*, in which case they receive the punishment laid down by the statute: *humiliores* are normally given to the beasts, while those of higher

145) *Dig.* 48.11.7.3: *Hodie ex lege repetundarum extra ordinem puniuntur et plerumque vel exilio puniuntur vel etiam durius, prout admiserint.* = *Bas.* 60.43.7.3.

146) The passages that follow do all not use the expression *extra ordinem* but the reference is nonetheless clear. For the increasingly harsh penalties of the Roman legal system, attested particularly in the legal sources from the third century on, see R. MACMULLEN, “Judicial Savagery in the Roman Empire”, *Chiron* 15 (1986), rpt. in IDEM, *Changes in the Roman Empire* (1990), 204-217.

147) *Dig.* 48.15.7: *Poena pecuniaria statuta lege Fabia in usu esse desiit: nam in hoc crimine detecti pro delicti modo coercentur ut plerumque in metallum damnantur.* = *Bas.* 60.48.6. See *Coll.* 14.2.2: *Et olim quidem huius legis poena nummaria fuit, sed translata est cognitio in praefectum urbis, itemque praesidis provinciae extra ordinem meruit animadversionem. Ideoque humiliores aut in metallum dantur aut in crucem tolluntur, honestiores adempta dimidia parte bonorum in perpetuum relegantur.*

status are deported to an island” (148). The same point is made, more generally, in one of the Byzantine scholia, which defines “extraordinary charges” as “those which do not have a penalty laid down by the laws” (149).

The government’s concern for punishment, and its willingness to take responsibility for inflicting it, had transformed the entire Roman legal system. Offenses which **in the traditional Roman law** had been purely civil matters, to **be resolved** only if an injured party was successful in private **litigation, became** matters for which the government made **itself responsible**.

The most striking example of this, and **perhaps the best** documented, is the law of theft (150). In the **traditional Roman law** *furtum* was classed as part of the law **of obligations; it was a delict** rather than a crime. But at least **by the time of the Classical jurists**, the government was taking **much more responsibility** for

148) *Dig.* 48.8.3.5: *Legis Corneliae de sicariis et veneficis poena insulae deportatio est et omnium bonorum ademptio. sed solent hodie capite puniri, nisi honestiore loco positi fuerint, ut poenam legis sustineant: humiliores enim solent vel bestiis subici, altiores vero deportantur in insulam.* The jurists mention other modifications to the penalties laid down by *leges*: *Dig.* 48.19.38.7 = *P.S.* 5.25.7: *Qui vivi testamentum aperuerit recitaverit resignaverit, poena Corneliae tenetur: et plerumque humiliores aut in metallum damnantur aut honestiores in insulam deportantur.* *Dig.* 47.11.6.1: *Onerant annonam etiam staterae adulterinae, de quibus divus Traianus edictum proposuit, quo edicto poenam legis Corneliae in eos statuit, perinde ac si lege testamentaria, quod testamentum falsum scripsisset signasset recitasset, damnatus esset.*

149) Schol. 20 to *Bas.* 60.1.24.1 = *Dig.* 48.16.15.1: Ἐξτραορδινάρια λέγονται ἐγκλήματα τὰ μὴ ἔχοντα ὀρισμένην ἀπὸ τοῦ τῶν νόμων ὀρδίνου τὴν τιμωρίαν. κτλ.

150) See esp. M. BALZARINI, “In tema di repressione 'extra ordinem' del furto nel diritto classico”, *BIDR*³ 11 (1969), 203-311.

enforcement. Paul includes theft in his list of offenses against the public order for which the prefect of the watch was responsible at Rome, and Ulpian says explicitly that a governor should hunt down those who disturb the tranquillity of his province, including not only blasphemers, brigands, and kidnappers but mere thieves as well ⁽¹⁵¹⁾. Left to their own devices the authorities would get involved only in particularly egregious cases; according to Ulpian it was nocturnal thieves, in particular, who were to be punished *extra ordinem* by the proconsul, along with thieves operating in the baths or defending themselves with weapons ⁽¹⁵²⁾, and Marcian states that thieves who worked in the daytime were to be dealt with in ordinary civil proceedings ⁽¹⁵³⁾. But the victims of theft apparently preferred the more effective police powers of the criminal procedure. This is clear from a passage of Julianus, who reveals that victims of theft clearly had a choice: they could bring suit under the traditional rules of the civil law, but only if they had not already made accusations before the prefect of the watch or the provincial governor; in the latter case, a conviction might result in restitution, much as if the

151) *Dig.* 1.15.3.1 (Paul); 1.18.13 pr (Ulpian) = *Bas.* 6.1.46.

152) *Dig.* 47.17.1: *Fures nocturni extra ordinem audiendi sunt et causa cognita puniendi, dummodo sciamus in poena eorum operis publici temporarii modum non egrediendum. idem in balneariis furibus. sed si telo se fures defendunt vel effractores vel ceteri his similes nec quemquam percusserunt, metalli poena vel honestiores relegationis adficiendi erunt.* = *Coll.* 7.4.2 = *Bas.* 60.12.55(54).2: Οἱ ἐν νυκτὶ κλέπτοντες αὐστηρῶς κολάζονται μέχρι τοῦ πρὸς καιρὸν εἰς δημόσιον ἔργον ἐμβληθῆναι· τὸ αὐτὸ καὶ ἐπὶ τῶν ἐν βαλανεῖοις κλεπτόντων.

153) *Dig.* 47.17.2: *Sed si interdiu furtum fecerunt, ad ius ordinarium remittendi sunt.* cf. *Bas.* 60.12.54 fin.

case were a civil one, but the magistrate was also free to impose a harsher sentence if he wanted to ⁽¹⁵⁴⁾. The general situation is stated succinctly in a passage of Ulpian: “It should be remembered that nowadays theft is mostly litigated as a criminal matter and that the person litigating subscribes to a charge (*crime n*), not because the matter pertains to a *iudicium publicu*, but because it seems good to chastise the temerity of the doers with extraordinary punishment (*extraordinaria animadversio*). But this does not mean that it is any less possible, if someone prefers it, to litigate as a civil matter” ⁽¹⁵⁵⁾.

We have evidence for other transformations of the law along similar lines, many of which seem to us as natural as the change of *furtum* from a civil delict to a criminal act. *Iniuria*, which had originally been a purely private matter, came to be punishable *extra ordinem* by the state ⁽¹⁵⁶⁾. In addition, the Romans developed a special criminal charge for those who made off with the contents of an inheritance without proper authorization (the *crimen expilatae hereditatis*), which was like theft except for the technicality that an inheritance could not properly be said to have

154) *Dig.* 47.2.57.1: *Qui furem deducit ad praefectum vigilibus vel ad praesidem, existimandus est eligisse viam, qua rem persequeretur: et si negotium ibi terminatum et damnato fure recepta est pecunia sublata in simplum, videtur furti quaestio sublata, maxime si non solum rem furtivam fur restituere iussus fuerit, sed amplius aliquid in eum iudex constituerit. sed et si nihil amplius quam furtivam rem restituere iussus fuerit, ipso, quod in periculum maioris poenae deductus est fur, intellegendum est quaestionem furti sublatam esse.* = *Bas.* 60.12.56. BALZARINI (above, n. 150), 260ff posits a number of interpolations which seem to me unnecessary.

155) *Dig.* 47.2.93 = *Bas.* 60.12.92.

156) *Dig.* 47.10.45, cited above, n. 125.

an owner⁽¹⁵⁷⁾. Similar, too, are the various developments in the law of fraud and legal corruption, where the remedies of the ordinary civil procedure were increasingly seen as inadequate.

More surprising is the employment of these procedures in matters which seem to us unambiguously private. The most striking example of this is the government's intrusion into labor markets. *Digest* 50.13, entitled "On various and extraordinary *cognitiones*, and if a judge neglects his duty", begins with a long passage of Ulpian regarding litigation over professional fees⁽¹⁵⁸⁾. Governors are to hear suits for non-payment of fees brought by professors of liberal arts subjects, and by practitioners of certain analogous professions (doctors and dentists, for example, but not philosophers or professors of law). Ulpian is careful to lay out which cases might and might not be brought to the governor's court, for treatment *extra ordinem*⁽¹⁵⁹⁾.

The process by which the *extra ordinem* procedure was extended is documented most tangibly in *P.Lips.* 33, of 368 A.D., the only ancient text to describe a *cognitio* as *extra*

157) *Dig.* 47.19.1 cited above, n. 123. See also *Dig.* 47.19.2; *CJ.* 2.11.12 (224). See, most recently, M. LEMOSSE, "Crimen expilatae hereditatis", *RHD* 76 (1988), 255-260.

158) *Dig.* 50.13.1.

159) *Dig.* 50.13.1.1: *Medicorum quoque eadem causa est quae professorum, nisi quod iustior, cum hi salutis hominum, illi studiorum curam agant: et ideo his quoque extra ordinem ius dici debet.* = *Bas.* 54.14.3: *περὶ μισθῶν ἐξτραορδιναρίως ὁ ἄρχων δικαιοδοτεῖ.* See also *Dig.* 50.13.1.7: *Sed ceterarum artium opificibus sive artificibus, quae sunt extra litteras vel notas positae, nequaquam extra ordinem ius dicere praeses debet.*

ordinem, though it does so in Greek (¹⁶⁰). The lawsuit in question had, as so often in the papyri, dragged on for many years, and documents from an earlier stage of the proceedings are embedded within the one we have. The plaintiff, one Sarapiaena, claimed that although she and two sisters had been left all their father's estate, two other sisters had taken shares, although they had been given dowries instead. Sarapiaena had sued both these sisters, but they apparently both died, leaving Sarapiaena to deal with their heirs. She reached a settlement with the heirs of one of the sisters, Dionysia, but the heirs of Nemesilla employed delaying tactics instead, and it is to three of these heirs that the extant summons is addressed.

We do not know when Sarapiaena went to court for the first time. The initial case against her two sisters was already running late when, apparently in 349, she applied to Strategius, *praeses* of the Thebaid, for an extension of the time limits; this extension is quoted in the summons of 368, in the original Latin as well as in Greek (¹⁶¹). It was adduced to support a request that the governor take special steps to remedy the procedural problems, and Flavius Heraclius' favorable decision is quoted as well. With her right to proceed thus established, Sarapiaena's summons continued with the details:

For Paxamus, who was the father of Sarapiaena and Dionysia and Heliodora and Theonina and Nemesilla, left a

160) *P. Lips.* 33 = *FIRA* III. 175 (A.D. 368, Hermopolis).

161) The date of Strategius' governorship is given by *P. Amh.* II. 140; see *PLRE* I (1971), 858.

will in which he ordered Nemesilla and Dionysia to be content with their dowries, and that the other three daughters were to have the inheritance. But since Nemesilla and Dionysia, being older, had begun to take possession, I brought suit against them. And in fact the heirs of Dionysia made a compromise with me, but you and Socraton, the children of Nemesilla, employing unfair delays never returned the things to me. And so for a long time I have been bringing suit within the required time, but since you used pretexts again it seemed that the suit was without a beginning. Wherefore I denounce the case to you about the things written below, vindicating a third part as being undivided, so that you for your part may be condemned according to the sacred law; for in good time I showed the magnanimity of my lord the prefect that Socraton has been found living at Alexandria. Therefore publishing both the title respecting the third part of my paternal inheritance by testament, and the action *extra ordinem cognitio*, I ask that the formal subscription be given me and the case be held on the legal day. (Δηλῶν τίτλον μὲν ἐπὶ τὸ τρίτον ἀπὸ βουλήσεως ἐγγράφου πατρῶας, ἀγωγὴν δὲ τὴν ἔξτρα ὄρδινεμ κοιτιόνεμ, ἀξιῶ ἐκδοθῆναί μοι τὴν συνήθη ὑποσημίωσιν καὶ κατὰ κυρίαν πραχθῆναι τὴν δίκην). And this is the affair, translated from the Latin....

The text breaks off at this point; perhaps what followed was the original and official version of the summons issued by the governor. For our purposes what matters is that the *extra ordinem cognitio* was clearly an established procedure. But it is

also important to note that it was still, in 368, a procedure of last resort: the governor was willing to abandon the rules of the regular procedure and impose his own authority in settling the matter, but only because the ordinary procedures had failed.

The case of Sarapiaena provides important confirmation of the statement made explicitly by the Byzantine lawyers that there had been fundamental changes in the Roman legal procedure. These changes were more dramatic than a mere shift in the principles of civil litigation. The traditional Roman legal procedures, criminal as well as civil, came to be replaced by procedures which were genuinely special: when the ordinary rules proved inadequate they were replaced by extraordinary measures, whether because the prescribed penalties seemed too mild or because, as here, the normal procedures failed to work. The significant fact, from a historical point of view, is that these inadequacies and these failures were clearly becoming more and more common; by the time of Justinian they were the rule rather than the exception.

V. Conclusion

If the foregoing arguments are right, it remains necessary to explain in more detail the change from the traditional Republican procedures to *cognitiones*, and the rise of *cognitiones* deemed to be *extraordinariae*. The objective of this paper is primarily to question the categories normally used in the modern scholarship. Formula, edict and *iudex* were not exclusive to the traditional procedures used by Roman citizens of the Republic, and neither

cognitio nor *extra ordinem* designate a new imperial system that replaced them. What did happen was that officials increasingly came to use *cognitiones* instead of the traditional procedures, that some of these *cognitiones* – particularly in criminal matters – were conducted according to a special set of rules (*extra ordinem*), and that these special *cognitiones* came to be so common that they became the normal form of litigation ⁽¹⁶²⁾.

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