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FOUNDED BY
RAPHAEL TAUBENSCHLAG

EDITED BY
TOMASZ DERDA
ADAM ŁAJTAR
JAKUB URBANIK

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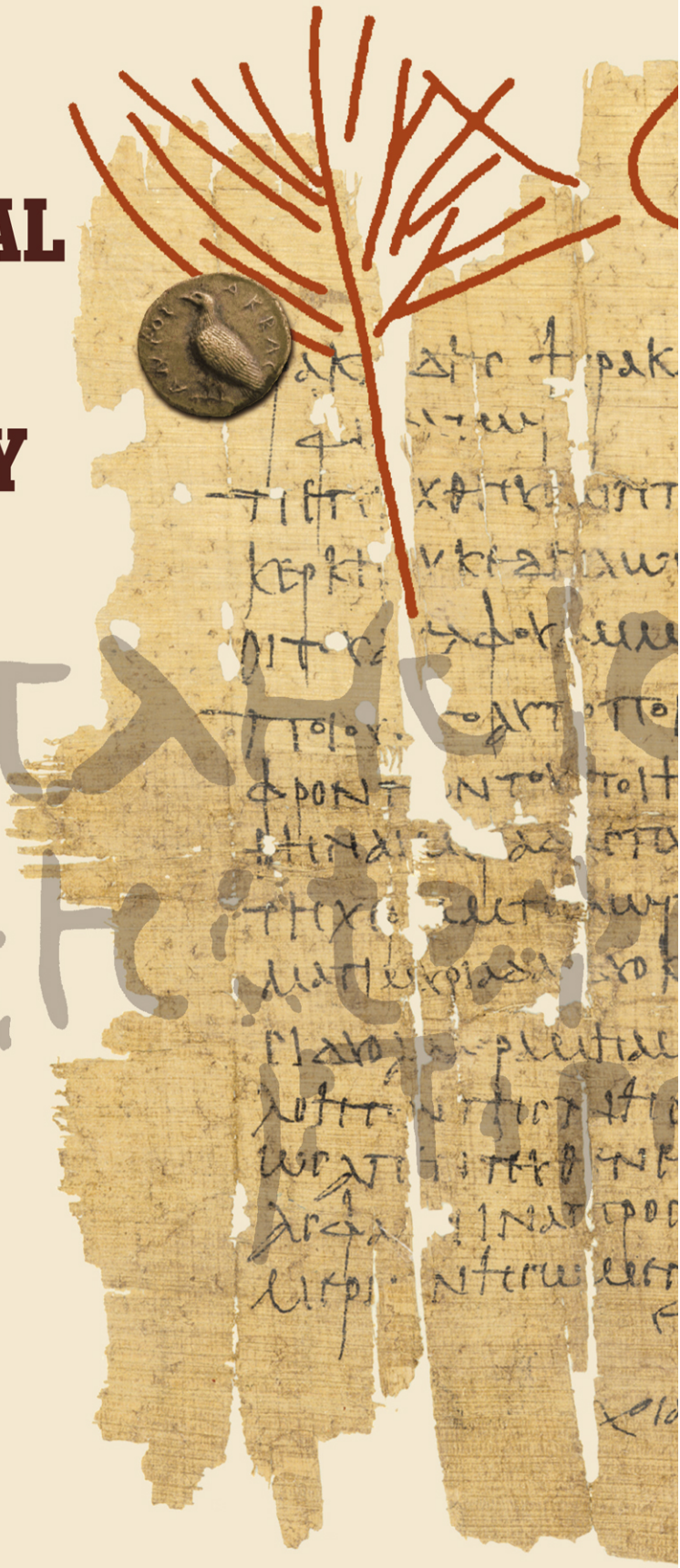

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José Luis Alonso

THE STATUS OF PEREGRINE LAW IN EGYPT: 'CUSTOMARY LAW' AND LEGAL PLURALISM IN THE ROMAN EMPIRE*

1. PEREGRINE LAW IN ROMAN EGYPT

In the last decades of the nineteenth century, the sudden irruption of an enormous mass of new sources on papyrus renewed all branches of the classical studies. For legal scholars, in the eve of the promulgation of the German Civil Code that would close the 'Pandektenzeit', the papyri helped steer Roman law studies into the realm of the historical disciplines. Yet, since Mitteis' foundational *Reichsrecht und Volksrecht*,[1] it became clear that the legal practice of the papyri was mostly not an illustration of the great classical Roman Law, but a continuation of the Greek and Egyptian traditions:[2] from the Roman point of view *iura peregrinorum*, 'peregrine law'. Later evidence has only confirmed this result.

* Thanks are due to my Warsaw colleagues in the Organisation of the 27th Congress of Papyrology for their generous insistence in entrusting me with one of the newly instituted keynote speeches. The text has been expanded, but keeps in the final conclusions its original oral style. Research financed by the National Science Centre of the Republic of Poland (Narodowe Centrum Nauki): Opus Project 2012/05/B/HS3/03819.

[1] L. Mitteis, *Reichsrecht und Volksrecht in den östlichen Provinzen des römischen Kaiserreichs*, Leipzig 1891.

[2] Cf. Mitteis, *Reichsrecht* (cit. n. 1), pp. 1–10; idem, *Aus den griechischen Papyrusurkunden*,

In Egypt, this survival of the local legal traditions did not result from the preservation of autonomous peregrine courts. As far as our sources let us see, in fact, there was in the province no alternative to the Roman jurisdiction. The organs kept from the Ptolemaic order are not expression of an autonomous jurisdiction, but appear fully integrated in the Roman jurisdictional system: this is true for the central officials in Alexandria, like the *idios logos*, the *exegetes*, the *archidikastes*, and also for the officials acting as judges in the *chora*, like *strategoi* and *epistrategoi*.[3] Unlike the rest of the *poleis* in the Eastern Empire, neither Alexandria nor the other cities in Egypt had autonomous jurisdictional institutions.

In the absence of autonomous courts, peregrine private law would not have kept its hold in Egypt without the consistent endorsement of the Roman jurisdiction. The surviving court documentation confirms this assumption.[4] The usual term 'tolerance'[5] is insufficient here. Peregrine law was not merely tolerated but unfailingly applied by the Roman courts, even when it challenged the most basic Roman principles. And thus: (a) sibling marriage; practices close to (b) *materna potestas* and (c) maternal

Leipzig 1900, pp. 19–22; L. Wenger, 'Nationales, griechisches und römisches Recht in Ägypten', *PapCongr*. IV, pp. 159–181. Thus, the founders of legal papyrology became the first generation of legal historians to break a 'Romanocentric' perspective that had prevailed for centuries. For Wenger's project of a general 'Antike' Rechtsgeschichte, cf. his programmatic *Römische und Antike Rechtsgeschichte*, Graz 1905, pp. 16–30.

[3] For an overview of the jurisdictional organisation in Roman Egypt, L. Mitteis, *Grundzüge und Chrestomathie der Papyruskunde*, II.1, Leipzig – Berlin 1912, pp. 24–32; H. J. Wolff, 'Organisation der Rechtspflege und Rechtskontrolle der Verwaltung im ptolemäisch-römischen Ägypten bis Diokletian', *TR* 34 (1966), pp. 32–40. Update of the discussion in this same volume: Andrea Jördens, 'Roms Herrschaft über Ägypten'. Despite E. Seidl, 'Zur Gerichtverfassung in der Provinz Aegypten bis ca. 250 n. Chr.', *Labeo* 11 (1965), pp. 316–328, there is no evidence that Rome allowed for decades a wide network of Ptolemaic autonomous jurisdictional organs: J. Mélèze Modrzejewski, 'Chronique papyrologique', *RHD* 44 (1966), p. 534.

[4] R. Taubenschlag, 'Die Römischen Behörden und das Volksrecht vor und nach der CA', *ZRG RA* 49 (1929), pp. 115–128 = *Opera Minora*, I, Warszawa 1959, pp. 477–493; Barbara Anagnostou-Canas, *Juge et sentence dans l'Égypte romaine*, Paris 1991, pp. 253–268.

[5] The expression is particularly deliberate in H. J. Wolff & H.-A. Rupprecht, *Das Recht der griechischen Papyri Ägyptens in der Zeit der Ptolemäer und des Prinzipats*, I, München 2002, p. 120, *passim*.

guardianship; (d) succession *in stirpes* in the female line; (e) contractual *mortis causa* arrangements; (f) *divisio parentis inter liberos* covering the whole inheritance: all this persisted under Roman rule among peregrines,[6] and was, as long as Romans were not involved, accepted as fully valid by the Roman administration.[7]

In these fields of status, family, and inheritance, in fact, an application of Roman law to the peregrines was in general out of the question:[8] programmatic, in this sense, the prefect's *dictum* in *P. Oxy*. XLII 3015 – '... it is

[6] Cf.: (a) J. Mélèze Modrzejewski, 'Die Geschwisterehe in der hellenistische Praxis und nach romischen Recht', *ZRG RA* 81 (1964), pp. 69–82; (b) R. Taubenschlag, 'Die materna potestas im gräko-ägyptischen Recht', *ZRG RA* 49 (1939), pp. 115–128 = *Opera Minora*, II, Warszawa 1959, pp. 323–337; (c) L. Gagliardi, 'La madre tutrice e la madre *ἐπακολουθήτρια*: osservazioni sul rapporto tra diritto romano e diritti delle province orientali', *Index* 40 (2012), pp. 423–446, with lit.; (d) H. Kreller, *Erbrechtliche Untersuchungen auf Grund der graeco-aegyptischen Papyrusurkunden*, Leipzig – Berlin 1919, pp. 158–164; adde *BGU* XX 2863; (e) *ibidem*, pp. 223–236; U. Yiftach-Firanko, *Marriage and Marital Arrangements: A History of the Greek Marriage Document in Egypt: 4th Century BCE – 4th Century CE*, München 2002, pp. 221–229; (f) Kreller, *Erbrechtliche Untersuchungen* (cit. sub d), pp. 237–245; U. Yiftach-Firanko, 'Deeds of last will in Graeco-Roman Egypt: a case study in regionalism', *BASP* 39 (2002), pp. 149–164.

[7] Lit. in note 6. Cf. the Imperial intervention allowing *peregrines* a *ius representationis* in the female line, in *BGU* I 19, and now also *BGU* XX 2863: cf., together with Kreller, *Erbrechtliche Untersuchungen* (cit. n. 6), pp. 158–164, also V. Arangio-Ruiz, 'Osservazioni sul sistema della successione legittima nel diritto dei papiri' [*Studi Cagliari* 5 (1913), pp. 69 ss.] = *Scritti di diritto romano*, I, Camerino 1974, pp. 477–480, both with lit.

[8] Even in these areas, peregrines could of course fall under Roman law as the indirect result of its application to a Roman citizen: the Roman interdiction of soldiers' marriage, for instance, obviously affected their peregrine 'wives' and children, in that the latter were illegitimate, and the former unable to claim back their dowries, no matter if disguised as deposits: *P. Cattaoui* I recto. A suppletory application of Roman civil law to peregrine freedmen has been conjectured in *P. Oxy*. IV 706: cf. the discussion in J. Mélèze Modrzejewski, *Loi et coutume dans l'Égypte grecque et romaine*, Warszawa 2014, pp. 264–267, with lit. The extensions of Roman law to *peregrines* conjectured in R. Taubenschlag, *The Law of Greco-Roman Egypt in the Light of the Papyri*, 2nd ed., Warszawa 1955, pp. 42, nn. 148–151 and 177, are unconvincing: Wolff & Rupprecht, *Recht*, I (cit. n. 5), p. 135 n. 110 (*ius liberorum*), p. 155 n. 30 (*lex Laetoria*), p. 159 n. 45 (*bonorum possessio*); *SB* XX 14710 col. III, l. 6 is insufficient to hold that *manumissio vindicta* was generally available to peregrines – it is not even certain that the manumittor lacked Roman citizenship; *SB* V 7558 is not evidence of *excusatio tutelae* for peregrines: Gaius Apolinarius Niger was undoubtedly, as his son (*SB* IV 7360), *Ῥωμαῖος καὶ Ἀντινοεύς*.

best that they should judge in accordance with the laws of the Egyptians' – further illustrated by two prefectural decisions adhering to these 'laws of the Egyptians' for the conditions of the peregrines' testamentary freedom. How scrupulous the Roman jurisdiction was in this respect is shown by the frequent recourse to local legal experts (*nomikoi*) in order to ensure a proper interpretation of the peregrine rules.[9] In all our sources, in fact, we find only one unequivocal instance of peregrine law being rejected by the Roman jurisdiction (*P. Oxy.* II 237, the famous 'petition of Dionysia'):[10] a case where, significantly, its application had been protested by one of the parties.[11]

More remarkably: regarding property and contracts, Roman principles were not imposed on any transaction concluded in accordance with peregrine law, even by Romans, no matter how unthinkable under Roman law. Among these: (a) partial manumission of slaves; (b) contractual partition of the inheritance; (c) *communio pro diviso*; (d) contracts of sale with immediate real effect, dependent not on *traditio* but on the payment of the price; (e) fictitious loans as enforceable source of obligations; (f) *contractus in favorem tertii* granting execution rights to the third party; (g) straightforward assignment of credits, in the form of a cession (*parachoresis*) of execution rights (*praxis*); (h) credit instruments enforceable directly through execution; (i) direct agency. All these practices[12] were as common

[9] R. Taubenschlag, 'The legal profession in Greco-Roman Egypt', [in:] H. Niedermeyer & W. Flume (eds), *Festschrift F. Schulz*, II, Weimar 1951, pp. 188–192 = *Opera Minora*, II (cit. n. 6), pp. 159–165; W. Kunkel, *Herkunft und soziale Stellung der römischen Juristen*, 2nd ed., Graz – Wien – Köln 1967, pp. 267–270, 354–365; an updated prosopography, in C. Jones, 'Juristes romains dans l'Orient grec', *Comptes rendus des séances de l'Académie des Inscriptions et Belles-Lettres* 151 (2007), pp. 1331–1359.

[10] It is less certain the verdict in *P. Oxy.* VIII 1102 (AD 146) implies a Roman rejection of peregrine liability *cum viribus hereditatis*: Kreller, *Erbrechtliche Untersuchungen* (cit. n. 6), pp. 43–44.

[11] Claudia Kreuzsaler & J. Urbanik, 'Humanity and inhumanity of law: the case of Dionysia', *JJurP* 38 (2008), pp. 119–155.

[12] Cf.: (a) Mitteis, *Grundzüge* (cit. n. 3), pp. 272–273; (b) Kreller, *Erbrechtliche Untersuchungen* (cit. n. 6), pp. 75–97; (c) E. Weiss, 'Communio pro diviso und pro indiviso in den Papyri', *APF* 4 (1908), pp. 330–365; (d) F. Pringsheim, *The Greek Law of Sale*, Weimar 1950,

under Roman rule as they had been under the Ptolemies, attested for Romans[13] as well as for peregrines, and certainly recognized by the Roman administration.

Peregrine law was not merely applied, but also adopted by the Roman jurisdiction in relevant aspects of its own organisation and procedure.[14] The most striking instance is probably the Roman adoption of the Ptolemaic system of civil execution: well into the third century still referred to as performed according to the Ptolemaic decrees (*κατὰ τὰ προστεταγμένα*, *ἀκολούθως τοῖς προστεταγμένοις*).[15] Although quite complex, it presented the advantage of being formally presided over by the prefect but carried out mostly by officials inherited from the Ptolemaic administration.[16]

pp. 179–232; (e) lit. in J. L. Alonso, '*Πίστις* in loan transactions: a new interpretation of *P. Dion.* 11–12', *JJurP* 42 (2012), p. 27 n. 49; (f) Taubenschlag, *Law* (cit. n. 8), pp. 401–402; (g) H. J. Wolff, 'The praxis-provision in papyrus contracts', *TAPA* 72 (1941), pp. 418–438 = *Beiträge zur Rechtsgeschichte Altgriechenlands und des hellenistisch-römischen Ägypten*, Weimar 1961, pp. 102–128; (h) cf. the sources in P. Jörs, 'Erzrichten und Chrematisten. Untersuchungen zum Mahn- und Vollstreckungsverfahren im griechisch-römischen Ägypten', *ZRG RA* 36 (1915), pp. 230–339, and *ZRG RA* 39 (1918), pp. 52–118; (i) L. Wenger, *Die Stellvertretung im Rechte der Papyri*, Leipzig 1906.

[13] Evidence for Roman citizens in R. Taubenschlag, 'Geschichte der Rezeption des römischen Privatrechts in Ägypten', [in:] *Studi in onore di P. Bonfante*, I, Milano 1930, pp. 367–440 = *Opera Minora*, I (cit. n. 4) , pp. 224–225, and *Law* (cit. n. 8), p. 100 (a), p. 221 n. 8 (b), pp. 240–241 (c), p. 327 n. 25, p. 333 n. 11, p. 335 n. 9 (d), p. 339 n. 5 (e), p. 402 n. 4 (f), pp. 418–419 (g), pp. 310–312 (i). Direct execution involving Roman citizens (h): *P. Berl. Leih.* 10, *BGU* III 888, and, after CA, *P. Flor.* I 56, and *P. Iand.* VII 145.

[14] The phenomenon is not limited to the jurisdiction. The peregrine category of the *katoche*, for instance, is used to discipline the conditions under which *protopraxia* could be enforced against third parties by the *fiscus* in Egypt: §3 of the Edict of Tiberius Julius Alexander (*OGIS* II 669, ll. 21–24).

[15] *Infra* n. 120 *sub* j.

[16] The most comprehensive study on this complex execution procedure, capital also to understand how real securities worked in Egypt, is still P. Jörs, 'Erzrichten und Chrematisten', *ZRG RA* 36 (1915), pp. 230–339, and *ZRG RA* 39 (1918), pp. 52–118. Cf. also H.-A. Rupprecht, 'Zwangsvollstreckung und dingliche Sicherheiten in den Papyri des ptolemäischen und römischen Zeit', [in:] *Symposion 1995*. Köln 1997, pp. 291–302; idem, 'Real security', [in:] J. Keenan, J. Manning, & U. Yiftach-Firanko (eds), *Law and Legal Practice in Egypt from Alexander to the Arab Conquest*, Cambridge 2014, pp. 259–265.

As the example of the executive procedure shows, the survival of the local law was not confined to private legal practice: part of the Ptolemaic legislation maintained its relevance under Roman rule, and part also of the special statute of the citizens of the *poleis* in Roman times can be assumed to go back to their own pre-Roman legislative activity, as well as to the privileges received from the Ptolemies. It is likely that much within these special civic statutes was confirmed by prefects and emperors,[17] and had therefore become, even in the aspects that were not Roman innovations, part of the Roman provincial law. Problematic, instead, remains the formal justification for the survival of the rest of the laws, rules, institutions, conceptions and practices that the Roman administration, as we have seen, left largely untouched.

The political rationale behind this Roman attitude is clear enough: for the administration of the province, it was expedient to observe such policy of minimum intervention and preservation of the local legal order, as long as it did not collide with the Roman interests. But this does not solve the problem of the legal status of these foreign laws and institutions from the point of view of the Roman jurisdiction and administration, in the moment of their application. The problem is only made more pressing by the occasional instances of rejection, as exemplified in the petition of Dionysia. What sort of legal frame can account at the same time for the application and disapplication of a foreign legal system? What was for Rome the status of this peregrine law that made both possible? It is only to a discussion of this problem that the following pages are devoted.

To address this question, many things will have to be left aside. I will limit myself mostly to private law, and to the period before AD 212. I will of course not attempt to describe the evolution of private law in this period. My aim is merely to understand in legal terms the status of an alien legal tradition before the Roman courts, a status that made it possible for the jurisdictional power to apply or reject it. Since the phenomenon itself is out of question, I will deal less with the papyrological evidence than with the theories proposed to account for it.

[17] Cf. the letter of Claudius to the Alexandrians in *P. Lond.* VI 1912, ll. 57–59.

2. LEGAL VACUUM?

The lack in Egypt of autonomous, non-Roman courts is a manifestation of the lack of proper *politeiai* in the province. The *metropoleis* of the *chora* are not *poleis* at all, their inhabitants are not citizens, but *peregrini nullius civitatis*. Alexandria and the other three *poleis* do have citizens, but can hardly be considered *civitates* in the proper sense of the term: only Ptolemais seems to have preserved its *boule* under Roman rule;[18] Alexandria did not recover its own until the visit of Severus in AD 200. Before that, the city seems to have lacked any legislative or jurisdictional autonomy.

This turns the survival of peregrine law in Egypt into a theoretical puzzle. Rome inherited from Greece the conception that links the existence of a *ius civile* to that of a *civitas*. Without *civitas*, there is no civil law, indeed no law proper, but merely the submission to a sovereign. This idea resonates in Tacitus' famous characterization of Egypt in the first book of the *Histories*:

> Aegyptum copiasque, quibus coerceretur, iam inde a divo Augusto equites Romani obtinent loco regum: ita visum expedire, provinciam aditu difficilem, annonae fecundam, superstitione ac lascivia discordem et mobilem, *insciam legum, ignaram magistratuum*, domi retinere.[19]

If we are true to this paradigm, in the absence of proper *civitates*, in the absence of a proper civil law, the law that had been sustained by the Ptolemies ceased to be such with the fall of their kingdom. When Tacitus presents the equestrian prefects as *loco regum*, this is mere scorn, not evidence of a continuation of the Ptolemaic kingdom under Roman rule: from the Roman point of view, the prefect is not a successor of the kings; neither is the emperor, despite Mommsen. Egypt is a mere province,

[18] *SB* VI 9016, cf. *infra* §8 ad nn. 121–124.

[19] Tacitus, *Hist.* I.11: 'Ever since the time of the Divine Augustus Roman knights have ruled Egypt as kings, with the troops to keep it in subjection. It had seemed wise to retain under the direct control of the imperial house a province so difficult of access, so productive of corn, ever volatile and restless because of the fanaticism and licentiousness of its inhabitants, *ignorant of the laws and unused to civic rule*.'

under the *imperium populi romani*, as we read in *Res Gestae* §27, and the prefect is just a governor, with *imperium ad similitudinem proconsulis* (Ulp. 15 *ed.* D. 1.17.1).[20]

From the Roman perspective, there was no political continuity. The continuity in the private legal practice was explained by Ernst Schönbauer as the result of a *forma provinciae* promulgated under Augustus, that would have secured the application of the peregrine law.[21] For Taubenschlag, the various measures that our sources attribute to Augustus regarding Egypt were not isolated enactments, but 'part of a great basic law regulating the legal relations of both the Romans and the peregrines'.[22]

A *lex provinciae* could indeed grant autonomy to provincial *civitates*, and the right of their citizens to live under their own laws. This happened in Sicily, when the provincial system was first created.[23] Similar concessions are attested for numerous Greek *poleis*.[24] But the sources are silent about a *forma* or *lex provinciae* for Egypt – they rather assign different aspects of the Egyptian order to different normative acts under Augustus – and equally silent about any concession of autonomy and *ius proprium* in Egypt. This silence does not seem a coincidence. Such concessions were conceivable only regarding *civitates* and *cives*. They were out of the question for the preservation of the legal order among *peregrini nullius civitatis*, like the inhabitants of the *chora*, and, in Egypt, implausible also for Alexandria, deprived of its autonomy by Augustus, and for the other Egyptian *poleis*, none of which seem to have been exempt from the *imperium* of the prefect.

In the Roman political practice, preservation of *ius proprium* was linked to jurisdictional autonomy. A formal subjection of the Roman jurisdiction

[20] For a discussion of the legal status of Roman Egypt, cf. Wolff & Rupprecht, *Recht* (cit. n. 5), pp. 99–103; Mélèze Modrzejewski, *Loi et coutume* (cit. n. 8), pp. 241–259. Cf. the update by A. Jördens, in this same volume.

[21] E. Schönbauer, 'Untersuchungen über die Rechtsentwicklung in der Kaiserzeit', *JJurP* 9–10 (1956), pp. 21–22.

[22] Taubenschlag, *Law* (cit. n. 8), p. 29.

[23] Cic. 11 *in Verr.* 2.13.32: 'Siculi hoc iure sunt, ut quod civis cum cive agat, domi certet suis legibus'. L. D. Mellano, *Sui rapporti tra governatore provinciale e giudici locali alla luce delle Verrine*, Genova 1977.

[24] Cf., together with the abundant epigraphical evidence, Cic. *Att.* 6.1.15 and 6.2.4.

to a duty to apply peregrine law is never attested in our sources, inside or outside of Egypt, and for a reason: it would have been incompatible with the Roman understanding of the *ius dicere* of the governor as the discretionary power to decide about the law applicable to each specific case.[25] The case-by-case approach to the application of peregrine law in Egypt that is evident in our sources[26] confirms that the prefect had retained its full discretionary power in its respect, and therefore belies the existence of a *forma* or *lex provinciae* securing its application, in the sense imagined by Schönbauer and Taubenschlag. For the same reason, whatever position one takes regarding the existence of a general provincial edict in Egypt, it is clear that the subsistence of the peregrine legal rules and institutions cannot be linked to any conceivable edictal provision regulating their application by the Roman jurisdiction.[27]

Also unlikely is the existence of official Roman codifications of peregrine law, through which its application could be explained. We know that in the second century 'the laws of the Egyptians' (*νόμοι τῶν Αἰγυπτίων*) could be read in court and quoted in petitions,[28] but this merely proves that they existed in written sources, not that these had been subject to a codification.[29] Most unlikely is that such codification would have

[25] *Infra* §9.

[26] Enough here to recall again the petition of Dionysia, with its dossier of court precedents where the peregrine *exousia* of the father over the married daughter is rejected (*supra*, n. 11); the freedom of the judge (almost certainly the prefect, either the same Sulpicius Similis of the other decisions in the papyrus or one of his predecessors) is obvious also in *P. Oxy*. XLII 3015, with its cautious '... it is *best* that they should judge in accordance with the laws of the Egyptians.'

[27] Despite the edictal references in the surviving *agnitiones bonorum possessionis* (all of them 3rd century, in any case), the existence of a provincial edict like the one commented in Gaius' books *ad edictum provinciale* is unlikely: most of such edict was tied to the formulary procedure, of which there is no trace in Egypt. An edict disciplining the provincial *cognitio* is equally unlikely, in the light of the discretion retained by the prefect regarding the organisation of the *conventus* and the application of the law; furthermore, we would expect such edict to be constantly invoked in the numerous surviving petitions and trial records, where there is no trace of it. A fuller discussion with lit. in WOLFF & RUPPRECHT, *Recht* (cit. n. 5), pp. 108–111; MÉLÈZE MODRZEJEWSKI, *Loi et coutume* (cit. n. 8), pp. 286–292.

[28] *P. Oxy*. II 237 col. 6, ll. 17–18, and col. 7, ll. 36–37.

[29] Codifications of the native Egyptian law had been made under the Ptolemies (G.

been promoted by the Roman authority and raised to the value of official legal source. Throughout most of its history, Rome displayed a visible reluctance towards the idea of rigidifying the law in a written code.[30] This reluctance is related to the primacy of the free interpretation of the law by the jurisconsults, and of its discretionary application by the jurisdictional magistrates. Caesar's alleged project to reduce the immensity of the civil law to a few books[31] is the only mention of something more or less akin to a codification in our sources between the Twelve Tables and the compilations of Late Antiquity.[32] It does not seem a coincidence that such project was attributed to someone who perished under the suspicion that he intended to become a monarch of the Hellenistic type. In this context, it is unlikely that a provincial governor, endowed with full *impe-*

Matha & G. H. Hughes, *The Demotic Legal Code of Hermopolis West*, Cairo 1975; Mélèze Modrzejewski, *Loi et coutume* [cit. n. 8], pp. 77–84), but the 'law of the Egyptians' of the Roman period is not to be identified with the native Egyptian law: *Aigyptioi* are in Roman administrative parlance (cf. the *Gnomon* of the *Idios Logos*) all the *peregrini nullius civitatis* within the province, irrespective of their origin and culture. Taubenschlag's hypothesis of a codification of the specific statute of the citizens of the *poleis* – *Law* (cit. n. 8), pp. 17–19 – finds even less support in the sources: the only mention of *astikoi nomoi* in Roman times, in *P. Oxy*. iv 706, may not even refer to such civic statute, but to the Roman *ius civile*, as suggested by H. J. Wolff, 'Plurality of laws in Ptolemaic Egypt', *RIDA* 1 (1960), p. 223 n. 80.

[30] F. Schulz, *Principles of Roman Law*, Oxford 1936, pp. 6–7: 'When ... in the course of the 500 years or so of the highly developed culture (particularly in the sphere of law) in the epoch from the end of the second Punic war to Diocletian, State legislation is found very much in the background and is confined to certain functions, then we may assume that a Roman principle existed which read: Romans are basically opposed to codification and maintain a strict reserve in regard to statutes. The "law-inspired nation" is not statute-inspired'.

[31] Suet., *Div. Iul*. 44.2: 'ius civile ad certum modum redigi atque ex immensa diffusione eius copia optima quaeque et necessaria in paucissimos conferri libros. ... Talia agentem atque meditantem mors praevenit'.

[32] Cicero's lost 'de iure civili in artem redigendo' (Quint. 12.3.10, Gell. 1.22.7) was certainly not an attempt at a codification, but at a proper dialectic treatment of the legal matter into a unified systematic whole: cf. Cicero's ideas in this respect in *de orat*. 1.41–42, 2.19.83, 2.32–33, *Brutus* 41–42. Despite the affinity between Cicero's 'in artem redigere' and Suetonius' 'ad certum modum redigi' for Caesar's plan, the latter, if true, must have been intended by the dictator as an official text, while the former was an academic exercise.

rium ad similitudinem proconsulis, would have been subjected to a compilation of peregrine law.

At this point in the discussion, Hans Julius Wolff took the most extraordinary step. If there is no convincing way of reconciling the survival of peregrine law with the most elementary Greek and Roman political theory, then we may have to accept that peregrine law didn't quite survive after all. By this, Wolff means: with the fall of the Ptolemies all existing law lost its whole binding force; the cases where the Roman jurisdiction rejected a local rule or institution, as exemplified in the petition of Dionysia, are a further proof of it; from the point of view of the Roman jurisdiction, there was in Egypt a legal vacuum, to be filled at discretion.[33]

Certainly, there was an overabundance of legal materials available for the Romans to re-raise the whole local legal system with an appearance of continuity, as in fact they did, for obvious reasons of political opportunity. But from the Roman point of view – so Wolff – these materials were not law, because they lacked all binding force. This is the core of Wolff's theory. The case of Dionysia,[34] where in fact a local institution was rejected by the Roman jurisdiction, is for Wolff the ultimate proof that this so-called 'law of the Egyptians' was no law at all as far as the Roman jurisdiction was concerned – the ultimate proof that it lacked 'binding force'. To this equation between law and binding rules we will return at the end of this paper (§§ 9–10).

For the moment, it is enough to say that Wolff's theory is in many ways perplexing. In Wolff's opinion, still at the time of the Dionysia petition, at the end of the second century, there was no law in Egypt – no law, that is, other than Roman law. Yet this true law hardly ever appears in our doc-

[33] Wolff & Rupprecht, *Recht* (cit. n. 5), pp. 115–116, under the title 'Nichtexistenz einer bindenden Rechtsordnung': 'Nach dem Untergang der lagidischen Monarchie war alledem der staatsrechtliche Boden entzogen. Mit der königliche Autorität war auch die Bindungswirkung ihrer Befehle erloschen. Rechtsetzung wie Rechtsprechung lagen nunmehr ausschließlich in den Händen der Römer ... Von ihrem eigenen Rechtsquellenverständnis her gesehen, fanden die Römer ein juristischen Vakuum vor, das zu füllen ihrem Gutdünken anheimgestellt war.'

[34] *Supra ad* n. 11.

uments and the law that does appear was – so Wolff – no law at all. It is also perplexing that for Wolff the Greek and Egyptian institutions were law while they were upheld by the Ptolemaic monarchy, but for some unexplained reason their being upheld by the Roman jurisdiction (for two centuries!) does not have quite the same effect.

3. MOS REGIONIS

The most successful way out of these paradoxes was formulated at the 12th Congress of Papyrology in Ann Arbor by Joseph Mélèze Modrzejewski,[35] and has been ever since at the core of his approach to the law in Roman Egypt.[36] In a nutshell, his thesis is the following: 'the local laws are kept in Roman Egypt as customs recognized *de facto*, and it is their quality of customs that explains the mechanism of their relations to Roman law'.[37] The relation between peregrine and Roman law would be the same that modern legal theory establishes between customary law and legislation. Namely: the normative rank of local law was inferior to that of Roman law[38] – hence the liberties that the Roman jurisdiction could take in its regard. This conceptual frame would also explain the survival itself of the local law and particularly of the Ptolemaic legislation, why and how they survived – precisely as custom, as *mos regionis*.

This brings us to the doctrine of customary law, both modern and Roman. It is a notoriously problematic field, as Dieter Nörr has

[35] J. Mélèze Modrzejewski, 'La règle de droit dans l'Égypte Romaine', *Pap. Congr. XII*, pp. 317–376.

[36] Cf. now J. Mélèze Modrzejewski, *Loi et coutume* (cit. n. 8), pp. 7–16, 235–240, *passim*.

[37] Mélèze Modrzejewski, 'Règle' (cit. n. 35), p. 318: 'Les droits locaux se maintiennent dans l'Égypte romaine à titre de coutumes admises de facto et c'est leur qualité de coutumes qui explique le mécanisme de leurs relations avec le droit romain'. Cf. now, building in part on the same conceptions, the nuanced reflections of Caroline Humfress, 'Law & Custom under Rome', [in:] A. Rio (ed.), *Law, Custom and Justice in Late Antiquity and the Early Middle Ages*, London 2011, pp. 23–47, especially pp. 40–47.

[38] Mélèze Modrzejewski, 'Règle' (cit. n. 35), p. 367: '... l'inégalité de rang qui permet de situer le droit romain au niveau supérieur de règle légale face à laquelle les droits locaux n'ont que la valeur inférieure de coutume'

warned.[39] The notion of custom itself carries an ambiguity that can very easily vitiate any discussion, including ours. One example: Hans Julius Wolff adopted Modrzejewski's theory as a corollary of his own, that in Egypt there was no binding legal system; the Egyptian *mos regionis* was for the Romans – so Wolff – merely a non-binding mass of traditional forms and behaviour patterns.[40] And yet, if we understand custom not in a sociological but in a normative sense, not as practice but as rule,[41] as Modrzejewski himself has warned we should,[42] both theories seem difficult to conciliate. If there is custom, and custom is law, then there is no legal vacuum. The ambiguity here is related to one that plagues also the modern doctrine of customary law: does custom become law because applied in court, or is it applied because it is law?

Fortunately, we do not need to address this question here. Whether the peregrine traditions became law in Roman Egypt only through their

[39] D. Nörr, 'Zur Entstehung der gewohnheitsrechtlichen Theorie', [in:] *Festschrift für W. Felgentraeger*, Göttingen 1969, pp. 353–366 ['On the genesis of the theory of customary law', *Law and State* 7 (1973), pp. 126–140], especially pp. 353–354. Cf. also D. Nörr, review of B. Schmiedel, *Consuetudo im klassischen und nachklassischen römischen Recht*, Graz – Köln 1966, and G. Stühff, *Vulgarrecht im Kaiserrecht*, Weimar 1966, in *ZRG RA* 84 (1967), pp. 454–466; and, especially, D. Nörr, *Divisio und Partitio. Bemerkungen zur römischen Rechtsquellenlehre und zur antiken Wissenschaftstheorie*, Berlin 1972.

[40] Wolff & Rupprecht, *Recht*, I (cit. n. 5), p. 117: 'Aus ihrem Blickwinkel konnten die Rechtsüberzeugungen und – sitten der Einwohner nicht mehr sein als ein mos regionis, d.h. eine Masse hergebrachter Formen und Verhaltungsweisen, die für die Besatzungsmacht im Prinzip selbst dann unverbindlich waren, wenn sie auf positive Anordnung früherer Herrscher zurückgingen, zu denen die neuen Machthaber jedoch in keinem Sukzessionsverhältnis standen'.

[41] For the distinction and dynamic between 'Brauch' ('usage'), 'Sitte' ('custom'), 'Konvention' ('convention'), and 'Gewohnheitsrecht' ('customary law'), still illuminating M. Weber, *Economy and Society*, Berkeley 1968, pp. 29–31, pp. 33–36, pp. 319–333.

[42] Mélèze Modrzejewski, *Loi et coutume* (cit. n. 8), p. 10: 'Il faut préciser encore que ce qui nous intéresse ici, c'est le seul domaine du droit ... Nous laissons délibérément de côté les règles de conduite qui échappent à ce domaine. Le trait fondamental du droit est son caractère obligatoire, qui vient de la contrainte assurée par la sanction judiciaire'. *Ibidem*, p. 11: 'Le point commun de la loi et de la coutume en tant que règles de droit réside donc dans la garantie de la sanction officielle qui leur confère la qualité de règles juridiques'. *Ibidem*, p. 12: 'la coutume doit avoir une function 'juridiquement normative': sinon, elle ne sera, du point de vue où nous nous plaçons, qu'un règle de conduite normative de facto our par convention sociale, sans implication judiciaire'.

application by the Roman jurisdiction, or, inversely, they were applied because recognized as law in themselves, it does not matter now. It is sufficient to stress that within Modrzejewski's theory their application makes it unquestionable that they are law. From the Roman point of view only customary law, though: that is – so Modrzejewski – law of inferior normative rank, subordinated to Roman law.

The uncertainties surrounding the Roman doctrine of customary law have brought Modrzejewski to warn insistently that he uses the notion in its modern sense.[43] This poses a delicate methodological problem, one that was intensely discussed among legal historians in the second quarter of the twentieth century:[44] to what extent may legal history make use of modern legal categories as tools of analysis? A wise line, borrowed from the late Mario Talamanca,[45] is the following: modern categories *stricto sensu*, those that do not exactly correspond to the ones explicit or implicit in the Roman legal discourse, may only be employed with the awareness that they were not known to the historical agents and therefore cannot have had any influence on them. In other words: we may use them to describe a historical phenomenon, but not to explain it.

[43] Mélèze Modrzejewski, 'Règle' (cit. n. 35), p. 319: 'Précisons tout de suite que la notion de coutume telle que nous l'employons dans cette étude ne prétend pas rendre compte des conceptions des Anciens aus sujet de la loi et de la coutume en tant que facteurs de formation des règles de droit. Les travaux du VIe Congrès International de Droit Comparé (Hambourg, 1962) ont montré combien les déficiences de leurs doctrines en cette matière divisent les opinions des savants modernes. ... Tenant compte de ces difficultés, nous ne chercherons pas la justification de notre méthode dans une doctrine antique déficiente. Mais nous tâcherons, pour autant que cela est possible, de faire coïncider le point de vue des Anciens avec les conclusions que l'examen des sources suggère au juriste moderne. On verra qu'au terme de l'analyse les deux approches se rejoignent'. In the same sense, now, Mélèze Modrzejewski, *Loi et coutume* (cit. n. 8), pp. 9–10.

[44] Central to the debate were the contributions of Emilio Betti: cf. the studies collected in E. Betti, *Diritto, metodo, ermeneutica. Scritti scelti*, Milano 1991; the discussion with Pietro de Francisci, [in:] G. Luraschi & G. Negri (eds), *Questioni di metodo. Diritto Romano e dogmatica odierna*, Como 1997; and the author's own *summae*, in E. Betti, *Interpretazione della legge e degli atti giuridici: teoria generale e dogmatica*, Milano 1949; idem, *Teoria generale dell'interpretazione*, Milano 1955; idem, *Die Hermeneutik als allgemeine Methodik der Geisteswissenschaften*, Tübingen 1962. On Betti's ideas, V. Frosini & F. Riccobono (eds), *L'Ermeneutica giuridica di Emilio Betti*, Milano 1994.

[45] M. Talamanca, *Istituzioni di diritto romano*, Milano 1990, pp. 12–13.

This restriction would deprive Modrzejewski's theory of much of its potential. It would reduce it to a mere description, no longer an explanation of why and how the local law survived, and why its position was the one it was. It may be worthwhile to review the Roman late Republican and early Imperial sources, searching for a doctrine of customary law, however problematic, that may have provided the legal frame for our phenomenon. I will limit myself to some key moments (§§ 4–7), and then return to Modrzejewski's theory (§ 8).[46]

4. CUSTOM AND CUSTOMARY LAW IN THE LATE REPUBLICAN SOURCES

Traceable to the Platonic and Aristotelic discourse on law and cus-

[46] Among the vast literature, together with the contributions of Dieter Nörr (*supra* n. 39): A. Pernice, 'Parerga X. Zum römischen Gewohnheitsrechte', *ZRG RA* 20 (1899), pp. 127–171; idem, 'Parerga X. Nachtrag über Gewohnheitsrecht und ungeschriebenes Recht', *ZRG RA* 22 (1901), pp. 59–61; A. Steinwenter, 'Zur Lehre vom Gewohnheitsrechte', [in:] *Studi in onore di P. Bonfante*, II, Pavia 1929, pp. 419–440; S. Solazzi, 'La desuetudine della legge', *AG* 102 (1929), pp. 3–27 = *Scritti di diritto romano*, III, Napoli 1960, pp. 275 ss.; A. Schiller, 'Custom in classical Roman law', *Virginia Law Review* 24 (1938), pp. 268–282; M. Kaser, 'Mores maiorum und Gewohnheitsrecht', *ZRG RA* 59 (1939), pp. 52–101; G. Lombardi, 'Sul titolo 'quae sit longa consuetudo' (8, 52 [53]) nel codice giustinianeo', *SDHI* 18 (1952), pp. 21–87; J. Gaudemet, 'La coutume au bas-empire. Rôle pratique et notion théorique', *Labeo* 2 (1956), pp. 147–159; G. Scherillo, v. consuetudine, in *NNDI* 4, Torino 1959, pp. 301–310; J. A. C. Thomas, 'Custom and Roman law', *TR* 31 (1963), pp. 39–53; Schmiedel, *Consuetudo* (cit. n. 39); Stühff, *Vulgarrecht* (cit. n. 39), pp. 37–81; L. Bove, *La consuetudine in diritto romano*, I. *Dalla repubblica all'età dei Severi*, Napoli 1971; W. Flume, *Gewohnheitsrecht und römisches Recht*, Opladen 1975; W. Waldstein, 'Gewohnheitsrecht und Juristenrecht in Rom', [in:] *De iustitia et iure. Festgabe für Ulrich von Lübtow*, Berlin 1980, pp. 105–126; H. T. Klami, 'Gewohnheitsrecht als Methodenproblem', [in:] N. Achterberg (ed.), *Rechtsprechungslehre*, Münster 1984, pp. 343–379; F. Gallo, *Interpretazione e formazione consuetudinaria del diritto: Lezioni di diritto romano*, Torino 1993; O. Behrends, 'Die Gewohnheit des Rechts und das Gewohnheitsrecht: die geistigen Grundlagen des klassischen römischen Rechts mit einem vergleichenden Blick auf die Gewohnheitsrechtslehre der historischen Rechtsschule und der Gegenwart', [in:] D. Willoweit & E. Müller-Luckner (eds), *Die Begründung des Rechts als historisches Problem*, Oldenbourg 2000, pp. 19–135.

tom,[47] the merism *ἔθη καὶ νόμοι* became in Hellenistic and Roman times a commonplace to refer to the law in its entirety, or, more often, to the whole social order.[48] The locution, and it Latin equivalent, ***mores et leges***,[49] was perfect to describe the legal order regained by the cities that obtained from Rome the condition of *civitates liberae*. Thus, in the 80 BC decree of the Senate in favour of Chios, reported in *CIG* 2222 (*SIG*^{3} 785; Sherk 70), ll. 14–18, we read:

> |[14] ... ἡ σύνκ[λη]|[15]τος εἰδικῶς ἐβεβαίωσεν, ὅπως νόμοις τε καὶ ἔθεσιν καὶ δικαίοις χ[ρῶν]|[16]ται ἃ ἔσχον ὅτε τῇ Ῥωμαίων φιλίᾳ προσῆλθον, ἵνα τε ὑπὸ μηθ' ὡτινι[οῦν] |[17] τύπῳ ὦσιν ἀρχόντων ἢ ἀνταρχόντων, οἵ τε παρ' αὐτοῖς ὄντες Ῥωμ[αῖ]|[18]οι τοῖς Χείων ὑπακούωσιν νόμοις.

The same triad, *νόμοι καὶ ἔθη καὶ δικαίοι*, can be reconstructed in the 81 BC decree of the Senate in favour of Stratonicea in Caria (*OGIS* 441; Sherk 18; *SEG* XXIX 1076):

> |[49] [δικαίοις τε κ]αὶ νόμοις καὶ ἐθισμ[οῖς τοῖς ἰδίοις, οἷς ἐχρῶν|[50]το ἐπάν]ω, ὅπως χρῶνται, ...

The triad shows the Roman awareness that a legal order is not reduced to mere legislation, but nothing else: it is just a convenient, stereotype way of dealing with this trivial fact. It certainly does not imply a Roman endorsement of custom as an independent legal source, i.e. as sufficient

[47] In Plato, *Leges* 793a–d, customs appear as the moral environment without which the legal system, left to itself, collapses. The locution *νόμοι καὶ ἔθη vel sim.* is used already both by Plato (cf. for instance *Cratylus* 384d, *Politicus* 301b, *Leges* 793d) and Aristotle (*Eth. Nicom.* 1181b., *Politica* 1287b, 1319b).

[48] Paradigmatic, Dion. Hal. 1.8.2: *ἔθη τε τὰ κράτιστα καὶ νόμους τοὺς ἐπιφανεστάτους διηγοῦμαι καὶ συλλήβδην ὅλον ἀποδείκνυμι τὸν ἀρχαῖον βίον τῆς πόλεως* – 'I describe the best customs and the most remarkable laws; and, in short, I show the whole life of the ancient Romans'. It is unnecessary to list examples: the expression, particularly frequent in Philo and Josephus (Bove, *Consuetudine* [cit. n. 46], pp. 67–72), is ubiquitous in Hellenistic and Roman times, and not only in the realm of philosophical, political, historical or legal discussion: cf., for instance, *Acta Johannis* 3.4 (M. Bonnet, *Acta apostolorum apocrypha*, II 1, Leipzig 1898).

[49] Cf., for instance, Cicero, *Part. Orat.* 37.130: 'Atque etiam hoc in primis, ut nostros mores legesque tueamur, quodam modo naturali iure praescriptum est'. A *locus classicus* would of course be Gai. 1.1: 'Omnes populi, qui legibus et moribus reguntur'.

in itself to produce enforceable law: for a *civitas* that shall keep its autonomy, such endorsement would have been out of place; the whole purpose of the clause is that the conditions under which the law is produced and applied shall not depend on Roman conceptions in the future, as they did not in the past.

The Latin original of this Greek clause reappears in the 71 BC *lex Antonia de Termessibus* (*CIL* I 204 = *CIL* I^2 589; Sherk 72; Crawford 19), col. II, ll. 18–22:

> |[18] Quae leges quodque ious quaeque consuetudo L. Marcio |[19] Sex. Iulio co(n)s(ulibus) inter ciueis Romanos et Termenses |[20] maiores Pisidas fuit, eaedem leges eidemque ius |[21] eademque consuetudo inter ceiues Romanos et |[22] Termenses Maiores Pisidas esto.

It is worth noticing that this is not the clause that restored the Termenses' right to live under their own laws. Such clause is also preserved (col. I, l. 8–II), and, in it, no term other than *leges* was deemed necessary to describe the entirety of the preexistent legal order:

> |[8] eique legibus sueis ita utunto, itaque ieis |[9] omnibus sueis legibus Thermensis Maioribus |[10] Pisideis utei liceto, quod aduorsus hanc legem |[11] non fiat.

The triad *leges ius consuetudo* in l. 18, instead, does not refer to the legal order of the Termenses, but to the relation between these and the Roman citizens: an area where much must have depended on custom, and particularly on jurisdictional custom. Since the Termenses were to keep their jurisdictional autonomy, this clause ensured that they would not use it to worsen the situation of future Roman litigants.[50] The triad, therefore, does not imply a Roman acknowledgment of *consuetudo* as an independent source of law, but merely as relevant legal and jurisdictional practice that

[50] This interpretation seems preferable to the usual one, based on the unwarranted assumption that everything in these concessions is intended for the benefit of the local citizens. Thus, for instance, Bove, *Consuetudine* (cit. n. 46), p. 55, who imagines that the clause imposes on the Roman citizens the duty to 'know and respect' the local laws, but also the local customs, these also part of a 'non–derogable territorial law'. On the *lex*, J.-L. Ferrary, 'La Lex Antonia de Thermessibus', Athenaeum 63 (1985), pp. 419–457.

is not to be changed in the future in Termessos to the detriment of the Romans.

Leaving these three epigraphs aside, the earliest traceable evidence of a Roman discourse on custom in a legal context are the late Republican rhetorical treatises. In *Auct. ad Herenn.* 2.13.19–20, we read:

> Absoluta iuridicali constitutione utemur cum ipsam rem quam nos fecisse confitemur iure factam dicemus, sine ulla adsumptione extrariae defensionis. In ea convenit quaeri iurene sit factum. De eo causa posita dicere poterimus si ex quibus partibus ius constet cognoverimus. Constat igitur ex his partibus: natura, lege, consuetudine, iudicato, aequo et bono, pacto. ... His igitur partibus iniuriam demonstrari, ius confirmari convenit, id quod in absoluta iuridicali faciendum videtur.[51]

The *auctor ad Herennium* mentions custom among the *partes iuris*, together with nature, legislation, judicial decisions, equity and private agreements. To a legal mind, this list appears peculiar: legislation, which is law, figures side by side with notions like equity, which are not law in themselves, even if they may be the justification and origin of many legal rules. In contemporary legal parlance, 'material legal sources' – values and forces that shape the law – such as equity, are mixed with 'formal legal sources' – those acknowledged within a legal system as sufficient in themselves to produce enforceable law – such as legislation.

This is not surprising. The *Rhetorica* is not interested in isolating the immediate sources of the law. Its purpose is to present every conceivable way to argue the law in trial. So much can be deduced from the nature of the work itself, but it is also confirmed by its author in the words that

[51] 'We shall be dealing with an Absolute Juridical Issue when, without any recourse to a defence extraneous to the cause, we contend that the act itself which we confess having committed was lawful. Herein it is proper to examine whether the act was in accord with the Law. We can discuss this question, once a cause is given, when we know the departments of which the Law is constituted. The constituent departments, then, are the following: Nature, Statute, Custom, Previous Judgements, Equity, and Agreement. ... These, then, are the divisions of Law by means of which one should demonstrate the injustice or establish the justice of an act – which we see to be the end sought in an Absolute Juridical cause.' [tr. H. Caplan].

close this section: 'these, then, are the parts of the Law by means of which one should demonstrate the injustice or establish the justice of an act'. It is safe to assume, therefore, that custom is included here for its potential to prove the law, leaving completely aside whether or not it has a potential to create it by itself.[52]

In *de Inventione*, 2.22.65–68, Cicero presents a similar catalogue with the same practical aim, but also as a speculation on how the law develops historically and what are its ultimate roots. One of these roots is custom, which Cicero presents as the origin of much law confirmed by legislation and especially, by the praetors in their Edict:

> [65] ... utrisque aut etiam omnibus, si plures ambigent, ius ex quibus rebus constet, considerandum est. initium ergo eius ab natura ductum videtur; quaedam autem ex utilitatis ratione aut perspicua nobis aut obscura in consuetudinem venisse; post autem adprobata quaedam a consuetudine aut vero utilia visa legibus esse firmata. ... [67] ... consuetudine autem ius esse putatur id, quod voluntate omnium sine lege vetustas comprobarit. In ea autem quaedam sunt iura ipsa iam certa propter vetustatem. quo in genere et alia sunt multa et eorum multo maxima pars, quae praetores edicere consuerunt. quaedam autem genera iuris iam certa consuetudine facta sunt; [68] quod genus pactum, par, iudicatum. ...[53]

Custom is here first presented (65) as an intermediate stage, born *utilitatis ratione*, between the pure law of nature and legislation.[54] Then (67) it

[52] Cf. Pernice, 'Nachtrag' (cit. n. 46), pp. 62–64.

[53] '[65] ... For both (positions) or for all (if more are at issue), one must consider the elements which make the law. Its origin seems to be in nature. Certain principles, though, have passed into custom by reason of advantage, either obvious or obscure to us; afterward certain principles approved by custom or deemed to be really advantageous have been confirmed by statute. ... [67] ... Law from custom is thought to be that which lapse of time has approved by the common consent of all without the sanction of statute. In it there are certain principles of law which through lapse of time have become absolutely fixed. Among the many others in this class are by far the largest part of those which the praetors have been accustomed to embody in their edicts. Moreover, certain ideas of law have now become fixed by custom; [68] among these are covenants, equity and judical decisions. ...' [tr. C. D. Yonge, with substantial emendations] Cf. also 2.53.160–162.

[54] The genetic approach is emphasized by the ablative construction, 'consuetudine ... ius'

would seem to emerge more clearly as an autonomous source, 'approved by the common consent of all through lapse of time, without legislative sanction."[55] And yet, when it comes to applying this general notion to the specific Roman legal reality, custom is again reduced to a mere genetic explanation of the content of the praetorian Edict,[56] and (68) to an argument in favour of the legal relevance of informal covenants (*pacta*), equity (*par*), and judicial decisions (*iudicatum*).

5. THE OMISSION OF CUSTOM IN THE JURISPRUDENTIAL SOURCE CATALOGUES

The reference to custom as genetic explanation of certain institutions became frequent later, in the writings of the classical jurisprudence, to account for unlegislated aspects of the older *ius civile*,[57] as *ius moribus*

(parallel to the previous 'natura ius', 'lege ius'), rightly underlined by Lombardi, 'Sul titolo' (cit. n. 46), pp. 31–32.

[55] For Cicero's topos of *consensus*, or *voluntas*, as the basis of all *ius*, whether *lege*, *consuetudine* (cf. *Part. Orat*. 37.130) or *natura* (cf. *Tusc*. 1.13.30), and indeed of human political society (*Re publica* 1.25,39), cf. C. Cascione, *Consensus. Problemi di origine, tutela processuale, prospettive sistematiche*, Napoli 2003, pp. 47–160, *passim*, with lit.; *ibidem*, pp. 129–138, for *mos* as expression of 'communis consensus omnium simul habitantium' in Varro (Serv. *in Aen*. 7.601). For custom, the *topos* was destined to have a long life, as justification of its equivalence to legislation: cf. among the literary sources, Gell. 11.18.4, 12.13.5, 20.10.9; in the Roman jurisprudential tradition, most notably, Iul. 84 *dig.* D. 1.3.32.1 (infra §6); also Herm. 1 *iur. epit*. D. 1.3.35 (*velut tacita civium conventio*); *TUlp.* 1.4 (*tacitus consensus populi*).

[56] In Cicero, the connection between custom and the edict seems to depend not merely on the content of the latter, i.e. on those aspects in which the edict departs from the old *ius civile* in order to accomodate new social mores and negotial practices, but also on the edictal form, i.e. on its annual renovation, that makes the settled part of the edict (*edictum tralaticium*) appear as confirmed jurisdictional custom: n.b. 'quae praetores edicere *consuerunt*'. For the connection between custom and the *ius honorarium* introduced through the edict, cf. already Pernice, 'Gewohnheitsrecht' (cit. n. 46), pp. 128–138, with numerous examples, and 'Nachtrag' (cit. n. 46), pp. 59–61; more recently, F. Gallo, 'Un nuovo approccio per lo studio del ius honorarium', *SDHI* 62 (1996), pp. 1–68.

[57] Cf., among many examples: Gai. 3.82 (*adrogatio* and *conventio in manum* as instances of *successio* not dependent on the Twelve Tables or the edict), Gai. 4.26 (*pignoris capio propter aes militare*, *equestre*, *hordiarium*), Pomp. 5 *Sab*. D. 23.2.8 (lack of *conubium* among freedmen

receptum.[58] In this way, the late Republican and early Imperial political ideal of the *mores maiorum* was reframed as an explanation for institutions which were specific to the Roman legal tradition and could not be accounted for as products of legislation.[59] It is important to underline that none of these texts is concerned with the validity of these institutions – they are all undisputed, ofter cardinal elements of *ius civile*, confirmed by jurisprudence and jurisdiction, sometimes also by legislation – but merely with their origin. In other words: here we have 'law from custom' but not 'customary law' proper: custom seems to appear rather as a force that shapes the law (a 'material' source) than as the reason that makes such law enforceable (a 'formal' source).

In fact, considering the role of custom in shaping the older *ius civile*, and of later changes in legal practice and social mores in shaping the late Republican and early Imperial *ius honorarium*,[60] it is remarkable how reluctant the Roman jurisprudence was towards the idea of customary law as such: that is, towards admitting custom as an independent, self-sufficient legal source.

This reluctance is evident in the catalogues of sources built by the classical Roman jurists. These catalogues are of a very different sort than the ones we found in the *auctor ad Herennium* and in Cicero. They are not speculations about the law in general, but merely refer to the Roman *ius civile* and *ius honorarium*. They do not theorise about the origin of legal rules and institutions, or instruct how to prove them in court. They simply state

due to *cognatio servilis*, cf. also Paul. 6 *Plaut*. D. 23.2.39.1), Ulp. 1 *Sab*. D. 27.10.1 *pr.* (predecemviral *interdictio bonorum* of the *prodigus*, cf. also *PS* 3.4a.7), Ulp. 7 *Sab.* D. 29.2.8 *pr.* (*auctoritas tutoris*).

[58] The expression appears in Ulp. 26 *Sab*. D. 1.6.8 *pr.* (*patria potestas*), and 32 *Sab*. D. 24.1.1 (interdiction of donations between spouses). Cf. also *Paul*. 17 *ed.* D. 5.1.12.2 (exclusion of women and slaves from the *officium iudicis*).

[59] A reassesment of the role of pre-civic *mores* in archaic Roman law in: L. Capogrossi Colognesi, 'Les *mores gentium* et la formation consuetudinaire du droit romain archaïque (7e–4e s. avant J.-C.)', [in:] *Recueils Société Jean Bodin pour l'Histoire Comparative des Institutions* 51 (1990): *La coutume – Custom*, I, pp. 79–90.

[60] The minor role played by legislation in shaping the Roman legal tradition has often led to characterizations of Roman law as fundamentally a product of custom (even if guided by the jurisprudence and controlled by the jurisdictional magistrates). Thus, for ins-

where the law can be found, and comprise only those sources that in the Roman legal tradition were undisputedly self-sufficient to produce it:

> Gai. 1.2: Constant autem iura populi Romani ex legibus, plebiscitis, senatus consultis, constitutionibus principum, edictis eorum, qui ius edicendi habent, responsis prudentium.[61]
>
> Pap. 2 def. D. 1.1.7: Ius autem civile est, quod ex legibus, plebis scitis, senatus consultis, decretis principum, auctoritate prudentium venit.[62]
>
> Pomp. ench. D. 1.2.2.12: Ita in civitate nostra aut iure, id est lege, constituitur, aut est proprium ius civile, quod sine scripto in sola prudentium interpretatione consistit, aut sunt legis actiones, quae formam agendi continent, aut plebi scitum, quod sine auctoritate patrum est constitutum, aut est magistratuum edictum, unde ius honorarium nascitur, aut senatus consultum, quod solum senatu constituente inducitur sine lege, aut est principalis constitutio, id est ut quod ipse princeps constituit pro lege servetur.[63]

The three lists show remarkable consistency:[64] for Gaius, Pomponius, and Papinian, writing from the mid-second to the early third century, the

tance, V. Arangio-Ruiz, 'La règle de droit et la loi dans l'antiquité classique', [in:] *L'Égypte contemporaine* 29 (1938), p. 23, comparing Greece, as 'pays de droit écrit', to Rome, as 'pays de droit coutumier'.

[61] 'The Civil Law of the Roman people consists of statutes, plebiscites, decrees of the Senate, constitutions of the Emperors, the edicts of those who have the right to promulgate them, and the opinions of the legal experts' [tr. S.P. Scott, with minor emendations].

[62] 'Civil Law is that which derives from statutes, plebiscites, decrees of the Senate, decrees of the Emperors, and the authority of the legal experts'.

[63] 'Thus, in our commonwealth either law, that is, a statute, is enacted; or there is the civil law proper, which is not written, but depends on the sole interpretation of the legal experts; or there are the statutory actions, which shape the procedure; or a plebiscite, enacted without the authority of the patres; or the edict of the magistrates, from which honorary law is born; or a decree of the Senate, which the Senate alone enacts without statute; or the imperial constitutions, that is, whatever the Emperor himself establishes to be observed as a law'.

[64] Most idiosincratic is Pomponius' text. The puzzling inclusion of *legis actiones* (the ancient rituals for litigation, no longer in use in Pomponius' time) immediately after *lex* and *interpretatio prudentium* has been long recognized as echoing the structure (*lex – interpretatio – actiones*) of the foundational (ca. 200 BC) *Tripertita* of Sextus Aelius Petus Catus.

sources of *ius civile* are statutes (i.e. comitial laws), plebiscites, decrees of the senate, constitutions of the emperors, and the opinions of the legal experts; to these, only the Edicts of the magistrates are added, as sources of *ius honorarium*.

Many of the *partes iuris* mentioned in the rhetorical treatises are conspicuously absent from all three lists. Equity and nature, that may have informed many institutions, and provide arguments in favour or against certain rules, but are not enforceable law by themselves, are not included. Absent are also private agreements, whose force is limited to the specific case. Judicial decisions are equally omitted: they may serve to prove the law, but in the eyes of the Roman jurisprudence, as it seems, they do not create it by themselves.[65] Crucially for us: custom is absent from all these lists. Despite the ubiquity of commonplace locutions like *ἔθη καὶ νόμοι*, and *mores et leges*, despite how often these same jurists conjecture instances of *ius moribus receptum*, they do not seem ready to acknowledge custom as law in itself.

Dieter Nörr has argued at length that, due to the nature of these 'catalogues', an argument *e silentio* is in this case particularly inconclusive:[66] one must, in fact, take into account the distinction between *divisio* (*διαίρεσις*) and *partitio* (*μερισμός*), as developed in the Hellenistic and Roman philosophical and rhetorical tradition. *Divisio sensu stricto* must perforce comprise all the forms (i.e. *species*) of a given *genus*: 'divisionum autem definitio formas omnis complectitur, quae sub eo genere sunt quod definitur', in Cicero's words (*Top*. 5.28). *Partitio*, instead, is a mere account of the parts of a whole: 'in partitione quasi membra sunt, ut corporis:

[65] This is no doubt related to the ascendance of the formulary procedure in the jurisprudential approach to the law: within the formulary procedure, it was the jurisdictional magistrate who indicated the law to the judge, precisely through the formula. Relevant therefore as legal sources were not the decisions of the judges but the edicts of the magistrates. Within the formulary procedure, verdicts were in principle not binding for future judges even regarding the specific adjudicated case: 'res inter alios iudicatae nullum aliis praeiudicium faciunt' (Ulp. 2 *ed*. D. 44.2.1; discussion of the rich casuistic, with lit., in M. Kaser & K. Hackl, *Das römische Zivilprozessrecht*, München 1996, pp. 378–382).

[66] Nörr, *Divisio und Partitio* (cit. n. 39), *passim*.

caput, umeri, manus, latera, crura, pedes et cetera' (*Top*. 6.30). This means that, unlike *divisio*, *partitio* is not by necessity exhaustive: it cannot be but incomplete, in particular, when it refers to a *res infinita*. In such case, an incomplete *partitio* is admissible – indeed, inevitable (*Top.* 8.33):

> Partitione tum sic utendum est, nullam ut partem relinquas; ut, si partiri velis tutelas, inscienter facias, si ullam praetermittas. At si stipulationum aut iudiciorum formulas partiare, non est vitiosum in re infinita praetermittere aliquid. Quod idem in divisione vitiosum est. Formarum enim certus est numerus quae cuique generi subiciantur; partium distributio saepe est infinitior, tamquam rivorum a fonte diductio.[67]

Among Cicero's illustrations of the difference between proper *divisio* and mere *partitio*, he offers an example of the former for the *genus* '*ius*', and of the latter for the specific '*ius civile*'. 'Species', he writes, describing *divisio* proper (*Top*. 7.31), 'are those forms into which a *genus* is divided, without any single one being omitted; as if anyone were to divide the law (*ius*) into legislation (*lex*), custom (*mos*), and equity (*aequitas*)'.[68] There would be mere *partitio*, instead (*Top*. 5.28), 'if anyone were to say that civil law was that which consists of statutes, decrees of the senate, judicial precedents, the authority of the legal experts, the edicts of the magistrates, custom, and equity'[69] – to which he immediately adds 'divisions instead comprehend all the forms that fall under the *genus* which is being

[67] 'We must employ partition in such a manner as to omit no part whatever. If you wish to partition guardianship, you would act ignorantly if you were to omit any kind. But if you were partitioning off the different formulas of stipulations or of judicial claims, then it is not a fault to omit something, in a matter which is of boundless extent. In division, it is a fault: for there is a settled number of forms which are subordinated to each genus. The distribution of the parts is often more interminable, like the separation of streams from a fountain' [tr. C. D. Jonge, with minor emendations].

[68] *Top*. 7.31: 'Formae sunt igitur eae in quas genus sine ullius praetermissione dividitur; ut si quis ius in legem, morem, aequitatem dividat'. Cf. Quint. *Inst.* 12.3.6 (*infra*, n. 79)

[69] *Top*. 5.28: 'Atque etiam definitiones aliae sunt partitionum aliae divisionum; partitionum, cum res ea quae proposita est quasi in membra discerpitur, ut si quis ius civile dicat id esse quod in legibus, senatus consultis, rebus iudicatis, iuris peritorum auctoritate, edictis magistratuum, more, aequitate consistat. Divisionum autem definitio formas omnis complectitur quae sub eo genere sunt quod definitur'.

defined', which may be understood as implying that this was an example of incomplete *partitio*. The same is true, Nörr argues, of the very similar source catalogues in Gaius, Pomponius and Papinian: they are mere *partitiones*, not *divisiones*, and therefore the omission of custom does not allow any conclusion about its status as a legal source.

That Gaius, Pomponius and Papinian may not have aimed at completeness cannot be excluded. That all three of them were ready to present an incomplete catalogue precisely because the distinction between *partitio* and *divisio*, as presented in the *Topica* by Cicero, allowed them to do so, is more difficult to accept: on one hand, Cicero's distinctions are extremely problematic;[70] on the other, such rigorous adherence to a philosophical model is in general uncharacteristic of the Roman jurists, and seems belied in this particular case by the freedom with which they apply the *genus-species* scheme of the *divisio* in cases where the 'species' are by their own admission infinite.[71] Nörr's thesis also postulates that the Roman jurisprudence – or at least Gaius, Pomponius and Papinian unanimously – treated the law as a *res infinita* (despite Nerva's famous, and maybe not wholly irrelevant here, 'ius finitum et possit esse et debeat'[72]). It actually

[70] For a critical analysis of Cicero's treatment of *divisio* and *partitio*, and of Nörr's assumptions on its relevance for the work of the Roman jurisprudence, M. Talamanca, *Lo schema genus-species nelle sistematiche dei giuristi romani*, Roma 1977.

[71] Paul. 54 *ed.* D. 41.2.3.21: 'Genera possessionum tot sunt, quot et causae adquirendi eius quod nostrum non sit, velut pro emptore: pro donato: pro legato: pro dote: pro herede: pro noxae dedito: pro suo, sicut in his, quae terra marique vel ex hostibus capimus vel quae ipsi, ut in rerum natura essent, fecimus. et in summa magis unum genus est possidendi, species infinitae'. – 'There are as many kinds of possession as there are ways of acquiring property which does not belong to us; as, for example, by purchase, by donation, by legacy, by dowry, as an heir, by surrender as reparation for damage committed, by occupancy, as in the case where we obtain property from the land or the sea, or from the enemy, or which we ourselves create. And, in conclusion, there is but one genus of possession, but the species are infinite in number' [tr. S. P. Scott]. Whatever speculations may suggest the use here of the term '*infinitae*', and its posible connection with the distinctions presented by Cicero, such hypothetical connection would only highlight the freedom with which such distinctions are being subverted.

[72] Nerva 5 *membr.* D. 22.6.2: 'In omni parte error in iure non eodem loco quo facti ignorantia haberi debebit, cum ius finitum et possit esse et debeat, facti interpretatio plerumque etiam prudentissimos fallat'. – 'In no respect should error in law be equated to igno-

postulates, as Franz Horak has observed, that the law was deemed *infinitum* not only in itself, but also in its sources[73] – which seems much more difficult to accept. It is also unclear whether Cicero's (apparently incomplete) *partitio* of *ius civile* in *Top*. 5.28 implies that he considers it a *res infinita*[74] – since this is not the only possible justification for incompleteness, only the most obvious: a consideration that can be extended to the jurisprudential *partitiones*, making ultimately irrelevant much of Nörr's discussion about the finiteness of the law.

In any case, whether or not the notion of *partitio* played a role in the completeness of these catalogues, the crucial question remains: why do all of them consistently choose to omit precisely custom, which is never absent from the rhetorical *partitiones iuris*? Nörr believes that the answer lies merely in its scarce practical relevance. In Antiquity, as today, custom rarely manifests itself directly. More often, it enters the legal sphere through another source: in Rome, Nörr argues, through the jurisprudence and the edicts. In his own words:

rance of fact, since the law can and must be finite, while the interpretation of facts frequently deceives even the wisest of men'. *Ius* may refer here merely to the law applicable to the specific case, though, so that *finitum* would refer to its 'definite', rather than 'finite', character. It must also be observed that the characterization of the law as '*finitum*' appears under a certain tension ('et possit esse et debeat') rather than as a self evident fact. On the text, among others, A. Schiavone, *Studi e logiche dei giuristi romnai. 'Nova negotia' e 'transactio' da Labeone a Ulpiano*, Napoli 1971, p. 148; R. Greiner, *Opera Neratii. Drei Textgeschichten*, Karlsruhe 1973, pp. 47–48; V. Scarano Ussani, 'Ermeneutica, diritto e "valori" in L. Nerazio Prisco', *Labeo* 23 (1977), pp. 146–198; idem, *Valori e Storia nella cultura giuridica fra Nerva e Adriano*, Napoli 1979, pp. 5–28; L. Winkel, *Error iuris nocet*, Zutphen 1985, pp. 43–51; A. Carcaterra, '"Ius finitum" e "facti interpretatio" nella epistemologia di Nerazio Prisco (D. 22.6.2)', [in:] *Studi in onore di A. Biscardi*, V, Milano 1982, pp. 405–436; S. Nappi, 'Ius finitum', *Labeo* 43 (1997), pp. 30–69; idem, *Ius finitum*, Bari 2005.

[73] F. Horak, review of D. Nörr (*Divisio und Partitio*), *TR* 43 (1975), p. 101: 'Mochte das Recht für Cicero eine res infinita sein, so bedeuted das noch nicht, daß alles im ius unabzählbar und uferlos war. Die Rechtsquellen waren es wohl nicht'.

[74] The fact that Cicero himself presents the *genus* '*ius*' as susceptible of *divisio* proper (*Top*. 7.31) does not exclude that he may have treated the specific notion of *ius civile* as *res infinita* in 5.28: a genus, divisible in a finite number of species, may comprise individuals whose parts are in some respect infinite. For Nörr's argument ex Cic. *Leg*. 2.7.18 ('leges autem a me edentur non perfectae – nam esset infinitum – sed ipsae summae rerum atque sententiae'), cf. Flume, *Gewohnheitsrecht* (cit. n. 46), pp. 13–14.

> The Roman jurists were no theoreticians, but practicing lawyers. In practice, customary law, then as today, rarely appeared as such – it manifested itself transformed into something else. Here, above all, mention must be made of the edicts of the praetors and the opinions of the jurists, or – to use a modern, not entirely adequate, terminology – the jurisdictional practice and the legal science. Demanding further legitimation from the edict and the responsa would have been unconceivable for the Roman jurists. That both had legal relevance resulted from the tradition, from a *mos maiorum* accepted without reflection. This made any further question futile.[75]

The emphasis on the role of jurisprudence and jurisdiction is fully convincing. From the 2nd century BC to the 2nd century AD, Roman law depended mainly on the cautelary and consultative practice of the legal experts and on the discretionary jurisdiction of the magistrates. This primacy of jurisprudence and jurisdiction left little room for other legal sources beyond legislation *lato sensu* – *leges* proper and plebiscites in the Republic, *senatusconsulta* and imperial constitutions under the Emperors – whose intervention was rather sporadic. Undisputedly recognized as legal sources in their own right, the opinions of the jurisconsults and the edicts of the magistrates, while expected to accommodate to the scarce legislation, did not need to seek further legitimation in any other source.

Less convincing is the idea that all this merely led to a diminished practical relevance of custom. The implications seem much more profound: the reception of new customs into the legal system was fully in the hands of jurisdiction and jurisprudence, which were not bound by them, and did not need them as justification.[76] How strongly this complete autonomy was perceived by the Roman jurisprudence is shown by Pomponius' characterization of *ius civile proprium* (as opposed to legislation), as that which

[75] Nörr, 'Entstehung' (cit. n. 39), p. 355. Cf. already his review of Schmiedel and Stühff (cit. n. 39), p. 458 and n. 8.

[76] The expression 'hoc iure utimur', so frequent in the jurisprudential discourse, is not a case of justification by custom: in fact, it has nothing to do with custom; it merely underlines that a solution – within a system of *ius controversum* (*infra* §9 i.f.), one among all conceivable – has imposed itself (even regarding solutions that had not been actually controverted). Cf. Flume, *Gewohnheitsrecht* (cit. n. 46), pp. 21–22.

'sine scripto in sola interpretatione prudentium consistit'.[77] Custom was thus wholly unnecessary as a source of law,[78] its imprint reduced to conjectured instances of *ius moribus receptum*.

Its omission in the jurisprudential source catalogues is the result of such state of affairs. From the *Rhetorica ad Herennium* and Cicero to Quintilian,[79] custom had been universally included among the *partes iuris* in the rhetorical treatises. It also figures (as *mos*) in Cicero's examples of *partitio* of *ius civile* and *divisio* of *ius*. This philosophical and rhetorical tradition is so consistent, that it is unconceivable that Gaius, Pomponius and especially Papinian were not aware of it. In such context, their attitude can only be interpreted as conscious reluctance.[80] For them, custom belonged together with the equally omitted equity and nature: it could account for

[77] *Supra* n. 63. 'Sine scripto' borrows from the Greek notion of *agraphos nomos*, but only in order to highlight the fact that the *interpretatio prudentium* is, in the innumerable questions that had not been legislated, not bound by any written law. This implies, in particular: not bound by previous jurisprudential writings, since these are mere formulations of the law – always provisional and revisable – but not the law itself. The fact that the jurisprudential works were written, therefore, does not detract anything from Pomponius' characterization of *ius civile proprium* as 'sine scripto', despite Th. Mayer-Maly, review of B. Schmiedel (*Consuetudo*, [cit. n. 39]), *Gnomon* 41 (1969), pp. 383–389.

[78] In this sense, Flume, *Gewohnheitsrecht* (cit. n. 46), p. 14: 'Lassen wir zunächst einmal dahingestellt, was es mit der angeblichen Transformation des Gewohnheitsrechts in die anderen Rechtsquellen auf sich hat, so ist zu fragen, was nach der Transformation in Edikts- und Responsenrecht dann für das eigentliche Gewohnheitsrecht an Rechtsstoff noch übrig bleibt'.

[79] Quint. *Inst*. 5.10.13: 'quae legibus cauta sunt, quae persuasione, etiamsi non omnium hominum, eius tamen civitatis aut gentis, in qua res agitur, in mores recepta sunt, ut pleraque in iure non legibus, sed moribus constant' – 'those things which are established by law or have passed into current usage, if not throughout the whole world, at any rate in the nation or state where the case is being pleaded: there are many rights which rest not on law, but on custom.' *Inst.* 12.3.6: 'omne ius, quod est certum, aut scripto aut moribus constat, dubium aequitatis regula examinandum est'. – 'For every point of law, which is certain, is based either on written law or accepted custom: if, on the other hand, the point is doubtful, it must be examined in the light of equity' [tr. H. E. Butler]. For the normative role of *consuetudo* on the language (cf. Varro, *LL* 9.8), Quint. *Inst*. 1.6.3.

[80] Cf. A. Guarino, 'La consuetudine e Polonio', *Labeo* 21 (1975), pp. 68–71. Guarino cannot be followed, though, when he claims that the jurisprudential catalogues aim merely at presenting the 'sources of knowledge' ('fonti di cognizione'): the construction 'legis vicem optinet' regarding *senatusconsulta*, imperial constitutions and *responsa prudentium*

the existence and shape of many institutions, principles and rules, but that did not imply that it needed to be recognized as the formal source of their validity.

6. IUL. D. 1.3.32, AND THE ROMAN DOCTRINE OF CUSTOM

The situation would change soon. In Late Antiquity, custom acquired a new visibility.[81] The first title, on legal sources, of the Epitome Ulpiani includes a definition of custom.[82] In the Digest, custom shares a title (D. 1.3) with laws and *senatusconsulta*. Both in the Theodosian and in Justinian's Code, an independent title (*CTh*.: 'de longa consuetudine'; C. 8.52: 'quae sit longa consuetudo') is devoted to custom.[83]

This growing recognition was not the mere work of time. The extinction, in the mid-third century, of the jurisprudential tradition and of the jurisdiction of the praetor left a space for custom that had not existed while the law was in the hands of jurisprudence and jurisdiction.[84] Now that imperial legislation remained as the only living source of law, custom could seem useful to make up for the deficiencies of the legislator[85] (whether this included, as often suggested, the accommodation of local customs that were unorthodox from the point of view of the Reichsrecht,

(Gai. 1.4–5 and 7) evidences that Gaius' intent is not merely to refer where the law can be found, but also who is legitimated to produce it effectively.

[81] G. Scherillo, 'Sul valore della consuetudine nella Lex Romana Wisigothorum', *Rivista di Storia del Diritto Italiano* 5 (1932), pp. 459–491; Lombardi, 'Sul titolo' (cit. n. 46); Gaudemet, 'Coutume' (cit. n. 46).

[82] *TUlp.* 1.4: 'Mores sunt tacitus consensus populi longa consuetudine inveteratus'. – 'Customs are the tacit consent of the people, confirmed by a long practice.'

[83] Neither of them, though, are placed together with the legal sources, as we would expect: in *CTh*., the title on custom does not follow those on sources that open the first book (*CTh.* 1.1–1.4), but appears (in the *breviarium*) after the titles on *coloni* and *inquilini*. In the Justinian Code, it comes after the titles on *patria potestas* and before those on donations.

[84] *Supra* §5, *ad* n. 75.

[85] Gaudemet, 'Coutume' (cit. n. 46), p. 147, *passim*.

shall be discussed in §7). Crucially, the interruption of the jurisprudential tradition blurred in many aspects the previous boundaries between the legal and the rhetorical discourse, and therefore between the legal and the rhetorical *partitiones iuris*.

A first step in this direction, and, as far as our sources go, the first time custom appears in the jurisprudential discourse as law in itself,[86] is a famous passage from the 84th book of Julian's *digesta*, preserved in D. 1.3.32 *pr.*:[87]

> De quibus causis scriptis legibus non utimur, id custodiri oportet, quod moribus et consuetudine inductum est: et si qua in re hoc deficeret, tunc quod proximum et consequens ei est: si nec id quidem appareat, tunc ius, quo urbs Roma utitur, servari oportet.[88]

[86] On Cels. 23 *dig.* D. 1.3.39, cf., Lombardi, 'Celso: D.1.3.39', {in:} *Studi in onore di V. Arangio-Ruiz*, Napoli 1952, pp. 181-187; Bove, *Consuetudine* (cit. n. 46), pp. 101-106, with lit. Outside the jurisprudential realm, a central source is the correspondence between Pliny and Trajan (Plin. *Ep.* 10, 114–115) on the long practice among the Bithynians of admitting to a *boule* citizens of another *polis* against the provisions of the 63 BC *lex Pompeia*. An exchange as fascinating as it is frustrating: a summary of the absolutely disparate conclusions that have been drawn from it, in Flume, *Gewohnheitsrecht* (cit. n. 46), pp. 25–28. The discussion between Pliny and the emperor does not lend itself easily to a juristic autopsy, in part because it is, quite naturally, not framed in strict legal terms, but mediated by considerations of political opportunity. This is particularly evident in Trajan's solution, safeguarding the authority of the law for the future, but accepting what has already been done against it. A similar decision is attested for Domitian in Suet. *Domit.* 9.3: cf. Bove, *Consuetudine* (cit. n. 46), p. 73. Less relevant, despite N. Lewis, 'Domitian's order on requisitioned transport and lodgings', *RIDA* 15 (1968), pp. 135–142, and now Mélèze Modrzejewski, *Loi et coutume* (cit. n. 8), p. 317, seems Domitian's *epistula* in *SEG* XVII 755 (= *IGLSyr.* V 1998): the reference to illegal requisitions as 'an old and tenacious custom that little by little may end in law' (ll. 14–17: *μένει γὰρ μέχρι νῦν παλαι<ὰ>* καὶ *ἔθτονος συνήθεια, κατ' ὀλίγον χωροῦσα εἰς νόμον, εἰ μὴ ἰσχύε[ιν] κωλυθείη δυνάμει)* is a figure of speech that does not presuppose the Emperor's familiarity with any theory of customary law, and even less his acknowledgement that, left alone, such behaviours would need to be respected as a legal rule. Cf. Nörr, *Divisio* (cit. n. 39), p. 15, and Flume, *Gewohnheitsrecht* (cit. n. 46), pp. 24–25. In the diptych devoted by Dio Chrisostom (speeches 75 and 76) to law (*nomos*) and custom (*ethos*), the latter is not presented as enforceable rule, but as followed spontaneously, bringing no punishment but mere disgrace to those who ignore it.

[87] Schmiedel, *Consuetudo* (cit. n. 39), pp. 43–45; Stühff, *Vulgarrecht* (cit. n. 39), pp. 43–49; Flume, *Gewohnheitsrecht* (cit. n. 46), pp. 32–33; Humfress, 'Law & Custom' (cit. n. 37), pp. 26-29.

[88] 'In cases where there are no written laws, we should hold what has been established

Here we don't have a mere list but a hierarchy. Organizing the legal sources in a hierarchical system seems natural to us, but was completely alien to the Roman tradition: also in this respect, Julian's text is a milestone. The hierarchy is built in such a way that each element becomes relevant only in the absence of the former. The order is the following: 1. written law (*scriptae leges*); 2. custom (*mores et consuetudo*); 3. *Quod proximum et consequens ei est*: usually understood as a reference to analogy, although it could merely mean 'whatever is closest and most consistent with it', i.e. with custom, in the aspects for which it provides no direct answer, or even 'whatever is most expedient and adequate'; 4. The law of the city of Rome (*ius quo urbs Roma utitur*).

Since the law of Rome is the last resort, the text must refer to a municipal – or provincial – setting. The postponed position of this 'ius quo urbs Roma utitur' would be quite remarkable if Roman law as such were meant; but, as the expression itself suggests, 'the law used in the city of Rome' is most likely the specific law of the city. The text comes from Julian's commentary (books 68–85 of his *digesta*) on *leges Iulia et Papia*. It must have concerned the application outside of Rome of the penalties and benefits introduced in these *leges*: possibly, as Otto Lenel suggested, concerning the liberation from *munera*,[89] an area disciplined by innumerable local laws[90]. In the absence of such written local laws, Julian deems

by use and custom, and if anything is lacking, then whatever is nearest to and resulting from it should be observed; and if even this is not possible, then the law which is used in the city of Rome must be followed' (tr. S. P. Scott, with emendations).

[89] O. Lenel, *Palingenesia Iuris Civilis*, I, fr. 819 Iul. (col. 480). In n. 2, Lenel suggests as parallels Callist. 1 *cognit*. D. 50.2.11, on the inhability of minors and men older than fifty-five for the decurionate, and Ulp. 3 *op*. D. 50.5.2 *pr*., on the inhability of minors of sixteen for the *munus sitoniae*, i.e. grain purchase. Both texts allow for exceptions, if the local custom establishes otherwise. As in Julian, local custom is given preference, but in respect to the general law (in these cases regarding minimum age for *munera et honores*), not merely to the specific law of the city of Rome.

[90] If Lenel's conjecture is correct, the term 'scriptae leges' must be referred to these local (written) laws (in opposition to the unwritten local administrative practice), and not to *leges Iulia et Papia*, as commonly assumed (with immediate cancellation of 'scriptis' as a postclassical gloss: Julian, in fact, would not have underlined that *leges Iulia et Papia* are

appropriate to follow the local use and custom. If this does not provide, directly or indirectly, a solution, then the law that applies in Rome should be followed.

If Lenel is right, and the text concerns liberation from *munera*, Julian's 'mores et consuetudo' would refer, as so often these terms in the Roman sources, to the administrative practice,[91] rather than to the practices, traditions and conceptions of the population, as would suit Modrzejewski's theory.

In any case, it is certain that custom here is not the mere genetic source of a jurisprudential or edictal *ius moribus receptum*. It is recognized as having legal force on its own (n.b.: 'custodiri oportet'), even if only in a supplementary role: only in the absence of legislation – or in the absence, within a given statute, of specific provisions necessary for its application to a particular case.[92]

The same suppletory role is assigned to *consuetudo* in Ulp. 1 *off. proc.* D. 1.3.33:

> Diuturna consuetudo pro iure et lege in his quae non ex scripto descendunt observari solet.[93]

Consuetudo is here, again, the local – this time, provincial – custom: the fragment comes from Ulpian's *de officio proconsulis*. The text reveals the

scriptae). Cf. Stühff, *Vulgarrecht* (cit. n. 39), p. 49 and n. 216. The problem would have been the integration of a benefit *ex lege Iulia et Papia* with the local regulations and practices on liturgies.

[91] *Infra* nn. 102 and 111–112.

[92] This suppletory and integrative function of custom in the application and interpretation of the public laws (cf. also Paul. 1 *quaest.* D. 1.3.37, and the rescript of Severus in Call. 1 *quaest.* D. 1.3.38), recalls their integrative role in the interpretation of clauses in private legal transactions (*leges privatae*): thus, for bequests (*legata*) of money in a non–specified currency, Ulp. D. 30.50.3, D. 32, 75, and D. 28.1.21.1 i.f.; for the same problem in case of *stipulatio*, Ulp. D. 50.17.34; regarding interest rates, Pap. D. 22.1.1pr, Scaev. D. 33.1.21pr., Ulp. D. 17.1.10.3, D. 26.7.7.10, D. 30.39.1. Cf. also Marcian. D. 32.65.7: 'ex usu cuiusque loci sumendum est'.

[93] 'It is usual for long established custom to be observed as law in those matters which have not come down in writing'. Cf. Schmiedel, *Consuetudo* (cit. n. 39), pp. 27–31, with lit.

ambiguous status of custom still at the end of the classical period. 'Observari solet' is more descriptive than prescriptive; it endorses a practice while not imposing it: the implication being that it lies within the free jurisdiction of the governor to appreciate in each case the opportunity of following or not the specific custom under discussion. In 'pro iure et lege' there is an acknowledgment that custom can take the place of legislation, yet at the same time an implication that it is not law proper even when observed as such.

Also Julian's language in D. 1.3.32 *pr.* betrays a certain reluctance to place *mores* and *consuetudo* squarely at the level of a formal legal source: instead of writing 'mores et consuetudo custodiri oportet' ('use and custom must be observed', as in Ulpian's 'consuetudo observari solet'), Julian chooses a much more elaborate construction: 'id custodiri oportet, quod moribus et consuetudine inductum est' ('it is necessary to observe what has been introduced by use and custom'), where *mores* and *consuetudo* are not the law that must be observed, but the practice from which such law arises. This adherence to the original meaning of *consuetudo* as 'practice', and the tendency to refer the term rather to the practice (often jurisdictional or administrative) that results into law, than to the (customary) law itself, is not restricted to Julian: it is constant in the Roman legal language, and present still in the third century texts that acknowledge the legal force of custom[94].

[94] Hermog. 1 *iur. epit*. D. 1.3.35: 'sed et ea, quae longa consuetudine comprobata sunt ac per annos plurimos observata, velut tacita civium conventio non minus quam ea quae scripta sunt iura servantur' – 'what has been approved by long established custom and has been observed for many years, by, as it were, a tacit agreement of citizens, is no less to be obeyed than the laws that have been committed to writing' (tr. S. P. Scott). *TUlp.* 1.4: 'mores sunt tacitus consensus populi longa consuetudine inveteratus' – 'customs are the tacit consent of the people, confirmed by a long practice'. The triad *consensus – necessitas – consuetudo* in Mod. 1 *reg*. D. 1.3.40 ('ergo omne ius aut consensus fecit aut necessitas constituit aut firmavit consuetudo' – 'thus, all law has been either made by consent, or established by necessity, or confirmed by custom'), places custom in the context of the genetic forces that shape the law ('innere Rechtsfaktoren'), not in that of its formal sources: Th. Mayer-Maly, review of Schmiedel (*Consuetudo*), *Gnomon* 41 (1969), p. 385; idem, 'Necessitas constituit ius', [in:] *Studi in onore di G. Grosso*, I, Torino 1968, pp. 177–199; Flume, *Gewohnheitsrecht* (cit. n. 46), p. 15.

The continuation of Julian's text in §1 contrasts strikingly with *principium*:[95]

> Inveterata consuetudo pro lege non immerito custoditur, et hoc est ius quod dicitur moribus constitutum. Nam cum ipsae leges nulla alia ex causa nos teneant, quam quod iudicio populi receptae sunt, merito et ea, quae sine ullo scripto populus probavit, tenebunt omnes: nam quid interest suffragio populus voluntatem suam declaret an rebus ipsis et factis? Quare rectissime etiam illud receptum est, ut leges non solum suffragio legis latoris, sed etiam tacito consensu omnium per desuetudinem abrogentur.[96]

The cold, technical restraint of *pr.* gives way here to a heightened declamatory pathos. The specific problem discussed in *pr.* is left behind, in the pursue of a theoretical-political justification for the full equation between laws and custom, including the possibility for the latter to abrogate the former through disuse – despite the mere supplementary role that custom had in *pr.* All this has led many to deny Julian's authorship of §1: the text would be a post-classical rhetorical flourish.[97] These doubts,

[95] Cf. Pernice, 'Gewohnheitsrecht' (cit. n. 46), pp. 156–162; Solazzi, 'Desuetudine' (cit. n. 46), pp. 3–27; Steinwenter, 'Gewohnheitsrecht' (cit. n. 46), pp. 419–440; Stühff, *Vulgarrecht* (cit. n. 46), pp. 49–52; F. Gallo, 'Produzione del diritto e sovranità popolare nel pensiero di Giuliano (a proposito di D. 1.3.32)', *Iura* 36 (1985), pp. 70–96; idem, 'La sovranità popolare quale fondamento della produzione del diritto in D. 1.3.32: teoria giulianea o manipolazione postclassica?', *BIDR* 94–95 (1991–1992), pp. 1–40.

[96] Iul. 84 *dig.* D. 1.3.32.1: 'Age-confirmed custom is not improperly kept as if it were a statute – and this is what is called law established by usage. Since the laws themselves bind us for no other reason than that they have been accepted by the judgement of the people, it is certainly fitting that what the people has approved without any writing shall bind everyone. For what difference does it make whether the people declares its will by voting or by their acts and deeds? Therefore, it is absolutely right to accept that laws may be abrogated not only by the vote of the legislator, but also by the silent consent of all through disuse.'

[97] A summary of the case against the text in Kaser, 'Gewohnheitsrecht' (cit. n. 46), p. 54 n. 3. As far as the formal reproaches are concerned, cf. the reservations of Solazzi, 'Desuetudine' (cit. n. 46), pp. 286–287. Contemporary or earlier parallels to the text's *topoi* in Bove, *Consuetudine* (cit. n. 46), pp. 106–113; a reconstruction of the possible roots of the doctrine of customary law as formulated in the text, in Nörr, 'Entstehung' (cit. n. 39), pp. 357–359. In favour of its authenticity, also F. Wieacker, *Römische Rechtsgeschichte*, II, München 2006, p. 81.

in any case, do not affect *pr.*, against whose authenticity no significant arguments can be raised.[98]

Given Julian's enormous authority, the perfect indifference of Gaius, Pomponius, and Papinian in their source catalogues is remarkable.[99] It would be vain to seek there an argument against the authenticity of Julian's text, out of discussion at least for *principium*. Rather, I would say, this indifference carries a warning for us about the relevance of time and perspective. From our perspective, Julian's text is a milestone in the history of customary law. It was one already in Justinian's time, as shown by the extraordinary fact of its being specifically quoted by the Emperor in 'Deo Auctore' (§10), the AD 530 constitution that ordered the compilation of the Digest. From a late 2nd century perspective, it was a small fragment on a rather specific question posed by the application of *leges Iulia et Papia*, lost in the immensity of the ninety books of Julian's *digesta*. The fact that it did not have immediate impact is hardly surprising.

A different question is whether we may assume, as is commonly done,[100] that Julian was truly the first Roman jurist to place custom together with legislation as an independent legal source. There are two arguments that may actually support such assumption:

a) Once custom was granted its own space in the compilations of Late Antiquity, there was a need for sources to give substance to those titles. That the available materials were not very abundant is painfully evident: the title 'de longa consuetudine' in *CTh.* (from the *breviarum*) consists in one short fragment; the title in Justinian's code, 'quae sit longa consuetudo', in three; all four texts seem excerpted from passing mentions in longer constitutions. From the forty one texts that compose D. 1.3 ('de

[98] The problems noted by Flume – the generic *scriptae leges*, when the text should be a commentary on *lex Papia*, and the lack of explicit connection with this statute – are no proof of manipulation: the simple fact that the text has arrived to us detached from its original context is sufficient to account for them. On *scriptae leges*, *supra*, n. 90.

[99] This is particularly noteworthy in the case of Gaius, the faithful Sabinian. All three know Julian's work and quote it frequently. In fact, in Gaius' commentaries *ad edictum provinciale*, Julian is practically the only contemporary authority to be quoted, cf. D. 2.14.28.2, D. 4.8.35, D. 5.3.35, D. 7.2.5, D. 15.1.27.4, D. 29.1.17.1, D. 46.7.7.

[100] Cf. praecipue NÖRR, 'Entstehung' (cit. n. 39), p. 356–359, passim; cf. also WIEACKER, *Rechtsgeschichte*, II (cit. n. 97), p. 81.

legibus senatusque consultis et longa consuetudine'), only nine (32–40) are on custom: here again, the material was brought from the most disparate contexts, as the example of Julian illustrates. Taking all this into account – the visible scarcity of available materials, and the painstaking care with which those included were collected-, it sees safe to assume that, had any of Julian's predecessors written anything in his same direction, the compilers would have kept it.

b) If there had been in the Roman jurisprudence a previous consistent doctrine of custom culminating in Julian's text, the unanimous reluctance of Gaius, Pomponius and Papinian, manifest in their source catalogues, would not have been possible. Some reference to custom would have been included in some, if not all, of these, as it was included in the compilations of Late Antiquity. Its omission, therefore, suggests that Julian's text may indeed have been the point of departure towards a doctrine of customary law within the Roman legal tradition.

7. THE ROMAN DOCTRINE OF CUSTOM AND THE LEGAL PLURALISM IN THE PROVINCES

Julian's text was written in the mid-second century, and it does not seem to have had an impact on the jurisprudential discourse until the early third century. That is more than two hundred years after the beginning of the Roman rule in Egypt; more than four hundred years after the creation of the provincial system in Sicily: too late to have helped the Roman jurisdiction deal with peregrine law and legislation, even if we wished to accept that theoretical constructions of this nature could have influenced the activity of the Roman officials in the provinces.

A reverse influence, the possibility that the growing relevance of custom in the Roman legal doctrine is related to the persistence of peregrine law in the provinces, seems instead at least possible, and has in fact been often taken almost for granted.[101] Some of the crucial texts on *mos* and

[101] Cf., among others, A. Steinwenter, v. 'Mores', *RE* xvi.1, Stuttgart 1933, col. 293; Schiller, 'Custom' (cit. n. 46), pp. 277–279; Mélèze Modrzejewski, 'Règle' (cit. n. 35),

consuetudo, like those of Julian and Ulpian above, refer, in fact, to local custom, and would thus seem to suggest that this new openness towards the idea of customary law may have been stimulated by the legal diversity in the provinces. But this hypothesis is not free from difficulties:

a) In most cases (Julian's text is a probable example), the local customs considered by these jurists are not the legal traditions of the population, but the administrative practices of the local officials[102] (leaving aside the texts that refer to simple factual practices[103]). Most crucially, the available texts do not show any relevant connection between the local customs mentioned by the jurists and private law, be it peregrine law of family and inheritance, or provincial contractual practice.[104]

b) When it comes to how private peregrine law is dealt with, there is a striking contrast between the 'peripheral' approach of the provincial jurisdiction and administration – at least in Egypt, where the papyri show a consistent endorsement of peregrine law: *supra* §1 – and the 'central' approach of the Imperial chancellery and the Roman jurists, including those of provincial origin – as is the case of many of them already in the 2nd century. In this 'central' approach there is no perceivable change between Scaevola's *digesta* and *quaestiones*, where so often peregrine prac-

pp. 354–356; Bove, 'Consuetudine' (cit. n. 46), pp. 113–115, *passim*; Nörr, 'Entstehung' (cit. n. 39), pp. 359–360; J.-P. Coriat, *Le prince législateur,* Rome 1997, pp. 414–415; Wieacker, *Rechtsgeschichte*, II (cit. n. 97), p. 81.

[102] Ulp. 1 *off. proc*. D. 1.16.4.5 (*ingressus in provinciam* of the governor); Paul. 6 *ed*. D. 3.4.6 *pr.* (local *honores*); Paul. 52 *ed*. D. 39.4.4.2 (*vectigalia*); Callist. 1 *cognit*. D. 50.2.11 (decurionate); Callist. 4 *cognit*. D. 22.5.3.6 (witness summons). Also Plin. *Epist*. 10.114–115 (*supra* n. 87) concerns a question of public law.

[103] Ulp. 2 *off. proc*., D. 1.16.7 *pr.* (*feriae*); Ulp. 8 *omn. trib*. D. 50.13.1.10 (*consuetudo fori* regarding advocates' fees); Paul. 1 *ed*. D. 2.12.4 (grape harvest season).

[104] The very few exceptions are too marginal to change the general impression: in Gai. 10 *ed. prov*. D. 21.2.6, the seller must observe the *consuetudo regionis* when giving guarantee for eviction; Papir. Ius. 1 *const*. D. 18.1.71, refers to *consuetudo regionis* on weights and measures; in Ulp. 24 *ed*. D. 25.4.1.15, local customs are to be respected when it comes to the effective enforcement of *inspectio ventris*. Local currency and interest rates also appear in the jurisprudential writings as *mos regionis*: not as customary law, though, but merely to integrate the interpretation of private transactions (*supra* n. 92). Only general, programmatic texts like Ulp. 1 *off. proc*. D. 1.3.33 (*supra* §6 *ad* n. 94), may be read as containing an implicit endorsement of peregrine traditions of private law as customs to be observed 'pro iure et lege'.

tices and conceptions are addressed,[105] and the imperial rescripts of the third century, from Severus to Diocletian:[106] peregrine practices are either translated into Roman categories, or dismissed in the name of the Roman orthodoxy; compromises are infrequent, and always articulated through the categories of Roman law.[107]

Open remains the question whether the growing legal recognition of custom played a role in accommodating the peregrine traditions after the *Constitutio Antoniniana*. The extent to which these traditions survived after AD 212 is well known. It is also unnecessary to recall here the scholarly disputes as to the nature, official or not, of this survival, and the attempts that have been made to account for it.[108] There seems to be a certain consensus that the doctrine of customary law may have helped the Roman tolerance, making it possible to treat peregrine institutions and practices as *mos regionis*, when their unorthodoxy from the point of view of the Reichsrecht did not make them completely unacceptable.[109]

The hypothesis is seductive, but not free from difficulties. Two circumstances, in particular, may recommend a certain skepticism:[110]

a) As Jean Gaudemet[111] has shown, in the imperial constitutions of late

[105] R. Taubenschlag, 'Le droit local dans les Digesta et Responsa de Cervidius Scaevola', *Bulletin de l'Académie Polonaise des Sciences et des Lettres*, 1919–1920, pp. 45–55 = *Opera Minora*, I (cit. n. 4), pp. 505–517.

[106] R. Taubenschlag, 'Le droit local dans les constitutions prédioclétiennes', [in:] P. Collinet & F. de Visscher (eds), *Mélanges de droit romain dédiés à Georges Cornil*, II, Paris 1926, pp. 497–512 = *Opera Minora* I (cit. n. 4), pp. 519–533; idem, 'Das römische Privatrecht zur Zeit Diokletians', *Bulletin de l'Académie Polonaise des Sciences et des Lettres*, 1919–1920, pp. 141–281 = *Opera Minora*, I (cit. n. 4), pp. 104–159 ('Das Volksrecht'); R. Yaron, 'Reichsrecht, Volksrecht und Talmud', *RIDA* II (1964), pp. 282–298..

[107] One such case in J. L. Alonso, 'Algunas consideraciones en torno a la "condictio scripturae"', *RIDA* 46 (1999), pp. 99–122. More possible instances, with different degrees of plausibility, in Taubenschlag, 'Privatrecht' (cit. n. 106) = *Opera Minora*, I (cit. n. 4), pp. 165–170.

[108] A critical summary, in Mélèze Modrzejewski, *Loi et coutume* (cit. n. 8), pp. 299–323.

[109] Mélèze Modrzejewski, 'Règle' (cit. n. 35), pp. 353–357; *Loi et coutume* (cit. n. 8), pp. 313–318; M. Kaser, *Das römische Privatrecht*, I, München 1971, p. 220; Coriat, *Prince* (cit. n. 101), pp. 413–414.

[110] Cf. already Mitteis, *Reichsrecht* (cit. n. 1), pp. 161–165, whose reservations remain relevant to a great extent.

[111] J. Gaudemet, 'Coutume' (cit. n. 46), pp. 149–150.

Antiquity *consuetudo* is usually the administrative practice, very rarely the private legal practice of the population.[112] The evidence is so overwhelming that Gaudemet concludes: 'if custom has an important role in the Later Roman Empire, it is essentially outside the realm of private law'.

b) The rescripts preserved in Justinian's code show that the third-century imperial chancellery implacably applied Roman law when confronted with non-Roman institutions and practices, often thwarting the goals that the parties had believed to secure, at the cost of compromising the predictability of the law and the trust in it of the population. If these peregrine traditions were to be respected as *mos regionis*, that is a doctrine that the jurists of the chancellery, and the emperor himself, seem to ignore. The practice of the provincial jurisdiction and administration was more accommodating, at least in Egypt, even after CA, but certainly not because from the prefect down to the lowest official they all adhered to a doctrine that emperor and chancellery ignored. Much more likely is that they were more flexible simply because, unlike the jurists of the chancellery, they were on the ground, and because such had been the policy in the province for two centuries: after all, both emperors (Alex. C. 8.53.1. Sev. in Call. D. 1.3.38) and lawyers (Ulpian and Paul in D. 1.3.33, 34, and 37) warned not to depart from well established jurisdictional usage.

8. THE MODERN DOCTRINE OF CUSTOMARY LAW AND THE SURVIVAL OF THE PEREGRINE LAW IN EGYPT

The survival of the Greek and Egyptian legal traditions, and of much of the Ptolemaic legislation in Egypt after the Roman conquest cannot be

[112] This prevalence of the administrative practice in the use of the term *consuetudo* is constant since the late Republic: cf. Cic. II *Verr*. 3.6.15, 3.15.38, 3.57.131, 3.62.142, 3.98.227, where consuetudo (*superiorum*, *a maioribus tradita*) refers to the constant practice of Verres' predecessors in the government of Sicily in keeping the collection of the *decuma* in line with the regulations of the *lex Hieronica*. Cf. also II *Verr*. 5.22.57 (number of *laudationes pro reo*), *pro Quinct*. 6.28 (*missio in possessionem*), *pro Balb*. 7.17 (concession of citizenship), *pro Caec*. 8.23 (interdict). Most jurisprudential texts on local customs refer also to administrative practice: *supra* n. 102. Further examples and discussion in Kaser, 'Mores' (cit. n. 46), pp. 76–81.

explained with the aid of a recognition of custom as law in Roman legal thought. As we have seen, such recognition affirmed itself only in the third century. There is, therefore, no alternative but to accept Modrzejewski's own caveat, that in his thesis, according to which peregrine law survived in Egypt as custom, the term 'custom' refers to our own modern doctrine of customary law.

This brings us back to the methodological problem discussed *supra* in §3. In a nutshell: if before the third century AD there was no Roman doctrine of customary law that the Roman jurisdiction could follow, and we replace it by our own modern theory, we are claiming that the Roman jurisdiction followed *avant la lettre* a nineteenth century legal doctrine. This sounds preposterous, but it is actually possible; on one condition, though: the doctrine in question must be so consistent with Roman legal thinking and practice that it could be followed even without ever having been formulated.

This is most emphatically not the case. The modern doctrine of customary law was a creation ('Schoßkind' – 'spoilt child', in Rudolf von Jhering's words,[113] 'Zwittergeburt' – 'hybrid breed' in those of Dieter Nörr[114]) of the so-called historical school of law in nineteenth century Germany. In 1828, Georg Friedrich Puchta, one of the champions of the school, who would become Savigny's successor in Berlin, published a treatise on customary law formulating the conditions under which custom may achieve a normative force like that of legislation.[115] As Dieter Nörr has warned, this doctrine is rooted in legal conceptions that are completely alien to the Roman world, even if argued using the Roman sources.[116]

Puchta's work was the reaction of the historical school to the rise of legal positivism that identified law with legislation. It was a cunning reac-

[113] R. VON JHERING, *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung*, II, 1, Leipzig 1854, p. 23: 'Das Gewohnheitsrecht läßt sich recht eigentlich als das Schoßkind der neuern Jurisprudenz bezeichnen, und es scheint, als ob man sich verpflichtet gefühlt hätte, es für die Vernachlässigung, die es früher erfahren, durch eine blinde Liebe zu entschädigen'.

[114] NÖRR, 'Entstehung' (cit. n. 39), p. 353.

[115] G. F. PUCHTA, *Das Gewohnheitsrecht* I, Erlangen 1828; II, Erlangen 1837.

[116] NÖRR, 'Entstehung' (cit. n. 39), pp. 363–366.

tion, because, in fact, it embraced legal positivism in order to legitimise the role of custom, which had been, as expression of the 'Volksgeist', a totem of the school since Savigny.[117] But this embrace of legal positivism makes the doctrine irredeemably alien to the understanding of the law in the Roman late Republic and early Empire. Legal positivism not only means identifying law with legislation tout court – something that the Roman world came to only in Late Antiquity. It means also the thorough normativisation ('Durchnormierung') of the law,[118] the construction of the entire legal system as a system of imperative, binding norms.

Nothing can be more remote from the Roman legal experience in the late Republic and early Empire. For reasons that we will come back to, law in Rome was not conceived as a system of binding rules: still at the beginning of the Empire it consisted mostly of institutions and principles developed and supported mainly by authority, that is, by expertise: 'proprium ius civile, quod sine scripto in sola prudentium interpretatione consistit' ('the civil law proper, which is not written, and depends on the sole interpretation of the legal experts': Pomp. *ench*. D. 1.2.2.12). This authority-based law was formally binding only as long as the magistrates, whose jurisdiction was discretionary (*infra*, § 9), applied it.

Legal Positivism, instead, stems from the normative monopoly of the sovereign and the subjection of the jurisdiction to the law, as theorized in modern political thinking, from Hobbes onwards. Such normative monopoly and jurisdictional subjection are alien to the Roman political theory and practice of the late Republic and early Empire. The doctrine of custom that all this generated is, in sum, not only not Roman, but deeply incompatible with the Roman legal tradition.

These considerations do not affect the descriptive use of Modrzejewski's theory, but they do compromise its potential to explain the behaviour of the Roman jurisdiction – and they force us to be extremely aware

[117] Cf. in particular, in Savigny's celebrated writing against the codification of the German civil law, *Vom Beruf unsrer Zeit für Gesetzgebung und Jurisprudenz*, Heidelberg 1814, pp. 8–15: 'Entstehung des positiven Rechts'.

[118] Nörr, 'Entstehung' (cit. n. 39), pp. 364–365; cf. also review Schmiedel – Stühff (cit. n. 39), p. 456 sub 1.

of the thin line between description and explanation. One important example will be enough to show how easily the line can be overstepped, and with what consequences.

This test-problem will be the survival of the Ptolemaic legislation, despite the fall of the political regime that sustained it. Here, a description is not enough: we need an explanation for this sort of post-mortem life of the Ptolemaic laws. Modrzejewski's theory clearly wants to be that explanation: both the survival of these laws and the freedom of the Roman jurisdiction to occasionally ignore them would result from their new status as customary law. In his own words:

> Rome did not recognize to these provisions the quality of legal rules: as long as they were not integrated in the provincial Roman law, the provisions of the old Ptolemaic laws were kept in the practice of Roman Egypt merely as local customs.[119]

And yet, the papyri show no trace of this conception, not the slightest hint that the Ptolemaic legislation operated *sub specie consuetudinis*. Ptolemaic *prostagmata* and *diagrammata* are invoked and followed, without this ever being justified in their supposed new status as customs.[120]

[119] Mélèze Modrzejewski, 'Règle' (cit. n. 35), p. 324: 'Rome ne reconnaît pas à ces dispositions la qualité de règles légales: dans la mesure où elles n'ont pas été intégrées dans le droit provincial romain, les dispositions des anciennes lois ptolémaïques ne se maintiennent dans la pratique de l'Égypte romaine qu'a titre de coutumes locales.'

[120] A list of the most relevant cases (all dates AD unless indicated otherwise), from Marie-Thérèse Lénger, *C. Ord. Ptol.*, all. 114–123 (avoiding more uncertain possible instances, as the enigmatic *νόμοι τῶν παραθηκῶν, τῶν ὑποθηκῶν, τῶν ἀρραβώνων*): (a) *BGU* IV 1118 (22 BC): lease of a garden; the payment of the charges is to be made [*κατὰ τὰ*] *προστάγματα καὶ διαγράμματα καὶ τοὺς ἐξ ἀρχῆς ἐθ*[*ισμοὺς*]. (b) *BGU* IV 1156 (15 BC), IV 1053 ii (13 BC), IV 1119 (6–5 BC): the debtors renounce any possible exemption that they may be entitled to as cultivators *μηδ' ἐπὶ πρόσταγμα φιλ*[*α*]*νθρώπων ἢ ἐρχασίας μηδ' ἐπ' ἄλλην μηδεμίαν ἁπλῶς σκέπην*. (c) *PSI* X 1118 (25–37), *P. Ryl.* II 159 (31/2), *PSI* VIII 897 (93): a cession of catoecic land is to be valid forever *ἀκολούθως τοῖς περὶ τούτων προστεταγμένοις καὶ ἐπεσταλμένοις*. (d) *P. Giss.* I 4 (118), *P. Lips.* II 136 (118), Hadrian's Edict is mentioned, whereby the less productive public land shall be taxed in proportion to its value and not any more *ἐκ τοῦ παλαιοῦ π*[*ρο*]*στάγματος*. (e) *P. Mil. Vogl.* 81 = *P. Kron.* I (123) a tax reduction is justified [*κατὰ τὰ προστεταγ*]*μέ*(*να*) *βασι*(*λέως*) *Πτ*[*ο*]*λ*(*εμαίου*). (f) *PSI* VI 690 (1st–2nd cent.), *SB* III 6995 (124), *SB* III 6996 (124–129): declarations of *oikogeneia* and the correlative tax payment made

More significantly: unlike what we would expect for customary law, there is never a discussion on how consistently a provision has been followed in the past. There is not a word in this sense from those who want it applied, nor from those who would claim otherwise in order to avoid its application. The closest we get to something like that is *SB* VI 9016,[121] the famous document that revealed the survival of the *boule* of Ptolemais in Roman times. The papyrus records a trial before the *antarchiereus* Ulpius Serenianus, in April AD 160, concerning the rights of the city of Ptolemais to appoint the *neokoroi* of the temple of the divinized Ptolemy I Soter in Koptos.[122] In the trial, three previous decisions are invoked as precedents: one by the prefect Cn. Vergilius Capito, in AD 48, and two, dated AD 69 and 70, by a Iulius Lysimachus, who was in charge of the *Idios Logos*.[123] The fist of Lysimachus' decisions is explicitly given in accordance with the *prostagmata* of the kings, and the verdicts of the prefects.[124]

ἀκολούθως τ[ῷ] τε ψηφίσματι καὶ προστάγματ[ι]. (g) *P. Ryl.* II 155 (138–161): a donation is done κατὰ τὰ ἐπὶ φιλανθρόπων προσ[τάγματα] (h) *SB* VI 9016 (160) col. I l. 14 (69): a decision of the *idios logos* is mentioned, which had followed royal *prostagmata*, and verdicts of the praefects (vid. *infra* in text): καὶ ἐκ τῶν προστα[γμ]άτων τῶν βασιλικῶν ἃ πολλάκις μου εἰς τὰς χρείας ἦλθεν καὶ ἐκ τῶν κρίσεων τῶν ἡγεμονικῶν. (i) *Gnom.* § 37: confiscation measures against those who violate the *prostagmata* of the kings or the praefects, ex *BGU* V 1210 (150–180) ll. 106–108: οἱ παρὰ προστάγματα βασιλέων ἢ ἐπάρχων τι πράξαντες ἀκα[τα]λήλως ἐζημιώθησαν ὁ μὲν τετάρτῳ μέρει τῆς οὐσίας οἱ δὲ ἡμ[ισεί]ᾳ, οἱ δὲ ἐξ ὅλων. (j) Most impressively (*supra* §1 *ad* n. 16): *P. Flor.* I 55 (88–96), *P. Berl. Leih.* 10 (120), *P. Fam. Tebt.* 29 (133), *BGU* VII 1573 (141/2), *SB* III 6951 recto, col. II (138–161), *BGU* IV 1038 (138–161), *PSI* XII 1237 (162), *PSI* IV 282 (183), *P. Oxy.* IV 712 (end 2nd cent.), *P. Aberdeen* 19 (2nd–3rd cent.), *PSI* XIII 1328 (201), *P. Flor.* I 56 (233/4): the execution of private debts, following the Ptolemaic procedure, is referred to as performed ἀκολούθως τοῖς προστεταγμένοις/κατὰ τὰ προστεταγμένα. Cf. also Marie-Thérèse LÉNGER, 'Les vestiges de la législation des Ptolémées en Égypte à l'époque romaine, *RIDA* 3 (1949), pp. 69–81.

[121] J. SCHERER, 'Le papyrus Fouad Ier Inv. 211', *BIFAO* 41 (1942), pp. 43–73.

[122] Cf. Th. KRUSE, *Der königliche Schreiber und die Gauverwaltung*, II, München – Leipzig 2002, pp. 751–754. Together with the trial record, the papyrus includes, in the second column, the subscription of the *antarchiereus* and his notification to the *strategos* and the *basilikos grammateus* of the Koptites.

[123] For the date of the second decision, believed by Scherer to be AD 88, cf. J. D. THOMAS, 'SB vi 9016 and the career of Iulius Lysimachus', *ZPE* 56 (1984), pp. 107–112.

[124] |[14] ... καὶ ἐκ τῶν προστα[γμ]άτων τῶν βασιλικῶν ἃ πολλάκις μου εἰς τὰς χρεί[15]ας ἦλθεν καὶ ἐκ τῶν κρίσεων τῶν ἡγεμονικῶν, ὁρῶ τὴν βουλὴν τὰς τοιαύτας τάξεις κατὰ

This is the only case where a royal provision is explicitly presented as confirmed by the Roman administration. In the rest of the available sources (n. 120), the Roman jurisdiction, the notarial authorities, the parties involved in transactions, all of them mention directly the Ptolemaic laws as the fundament of their acts and rights, without apparently feeling the slightest need of supporting their claim with any kind of further argument or construction – and this in documents that otherwise show frequent signs of 'completomaniac' anxiety. This ease contrasts strongly with the way in which, when unlegislated institutions are involved, evidence of their previous endorsement (or rejection) by the Roman authorities is anxiously presented by the litigants: as, most notoriously, regarding paternal *exousia*, in the petition of Dionysia.

One could of course still argue that only the content of these legislation is being followed, not the legislation itself: that these laws are relevant not by virtue of any normative value of their own but just by force of custom. But this caveat is so totally absent from the documents, so at odds with their language, that it comes close to a *petitio principii*.

In general, the idea of a 'reduction to custom', that Modrzejewski proposes for the Ptolemaic legislation in Roman Egypt, cannot be further away from a legal tradition, like that of the Romans, which in the second century had barely started its way towards the recognition of customary law as such.[125] Much less artificial seems to speak here simply of a reception of the Ptolemaic legislation into Roman provincial law.[126]

Leaving, therefore, aside the custom-theory as an explanation: how does it work as a description of the legal status of the peregrine law? From this point of view, the theory mainly aims at expressing in legal terms the

|[16] *ψηφίσματα οἷς ἂν κρείνῃ παρέχουσαν τὸν .[...] ἀμφισβητήσαντα Ἰσίδωρον οὐχ ὑπὲρ υἱοῦ τετε*|[17] *λευ[τ]ηκότος λελογοποιημένον ἵνα φιλανθρω[...] ως αὐτὸν ἡ πρὸς τὴν βουλὴν ἔντευξις γένηται* |[18] *δι .[...] ..ε̣ψ̣ηφίσαντο οἱ ἀπὸ τῆς βουλῆς περὶ .[...]άξεως οὕτως μενέτω.*

[125] Expressions like 'secundum leges moresque peregrinorum', in Gai. 1.92 (even though arguably referred as well, if not primarily, to those peregrines that belong to a *civitas*), show how far the conception that reduces peregrine legislation to custom is from Roman legal thought.

[126] In this sense, with some reluctance, Mélèze-Modrzejewski, *Loi et coutume* (cit. n. 8), pp. 256–257.

lower normative rank of the local law with respect to Roman law.[127] The consequence of this lower normative rank would be, in Modrzejewski's construction, the freedom that the Roman jurisdiction shows to reject it, a freedom that the same jurisdiction would probably not exhibit when Roman law is to be applied.

The problem here is that in both the modern and the Roman doctrine of customary law, its subordinate position does not mean a lower binding force, but something quite different: that, as in Iul. D. 1.3.32 *pr.*,[128] customary law has a supplementary role: that it applies only in absence of relevant legislation. But when applied, its binding force is equal to that of legislation. This was the doctrine of Puchta in the nineteenth century, as it had been the doctrine of Julian in the second: unsurprisingly, since Julian's text, and the interpretative tradition around it, provided Puchta with some of the main pieces of his construction.[129]

The Egyptian case does not follow this scheme. Peregrine law obviously did not function as a supplement of Roman law. It was not confined to the cases for which Roman law had no answer. It was applied consistently, even though in most cases there was of course an alternative Roman rule, often widely discrepant.

9. ROMAN CONCEPTIONS OF JURISDICTION AND THE LAW

The difficulties I have tried to bring to light leave Modrzejewski's analysis of the legal situation in Roman Egypt untouched. They concern only the pertinence of the notion of customary law. I am convinced that a reformulation is possible, one that keeps Modrzejewski's vision in the essential, while avoiding the complications that arise from the notion of customary law. My point of departure will be a short reflection on the

[127] *Supra* n. 38.

[128] *Supra* n. 88.

[129] Puchta, *Gewohnheitsrecht*, I (cit. n. 115), pp. 73–74, 84–89, *passim*; idem, *Gewohnheitsrecht*, II (cit. n. 115), pp. 203–215.

nature of Roman jurisdiction and on the Roman conceptions about the law itself.

In the Roman practice, jurisdiction is not the power to apply the law but to determine it – literally a *ius dicere*.[130] The modern notion of a separation between normative and jurisdictional power does not apply here: the *iurisdictio cum imperio* of the magistrates and the provincial governors, enhanced by their *ius edicendi*, is in itself a source of law (cf. Gai. 1.2 and D. 1.2.2.12, *supra* §5). Strictly speaking, such jurisdiction is not bound by the pre-existing law.[131] And in fact, in the late Republic and early Empire, the praetor, for reasons of equity or utility, departed in countless instances from the rules and principles of the older civil law, including many established by legislation.[132] These instances, announced year after

[130] The literature on the matter is inexhaustible. Cf. among many E. Betti, 'La creazione del diritto nella "iurisdictio" del pretore romano', [in:] *Studi di diritto processuale in onore di G. Chiovenda*, Padova 1927, pp. 67–129; M. Lauria, 'Iurisdictio', [in:] *Studi in onore di P. Bonfante*, II, Milano 1930, pp. 479–538; F. de Martino, *La giurisdizione nel diritto romano*, Padova 1937; F. Wieacker, 'Der Prätor: Gerichtsherrschaft und Rechtsgang', [in:] *Vom römischen Recht*, 2nd ed., Stuttgart 1962, pp. 83–127; E. Betti, 'Iurisdictio praetoris e potere normativo', *Labeo* 14 (1968), pp. 7–23; G. Nicosia, 'Giurisdizione nel diritto romano', [in:] *Silloge: Scritti 1956–1996*, Catania 1998, pp. 611–636; F. Gallo, *L'officium del pretore nella produzione e applicazione del diritto*, Torino 1997; G. Nicosia, *Il processo privato romano*, III. *Nascita ed evoluzione della 'iurisdictio'*, I, Catania 2012

[131] Cf. Mommsen's brief characterization of the Roman jurisdiction, in *Staatsrecht*, I, 3rd ed., Leipzig 1887, pp. 187–188: 'Die magistratische Thätigkeit der Jurisdiction und der daran sich anschliessenden Amtshandlungen ist keine Rechtsprechung in unserem Sinn; die Aburtheilung der Prozesse fällt vielmehr dem oder den Geschwornen zu, und der Beamte hat, nachdem diese bestellt sind, von besonderen Fällen abgesehen, selbst die Leitung des Prozesses nicht mehr in der Hand. *Dagegen übt er eine der legislativen verwandte oberleitende Thätigkeit, welche darauf hinausläuft das Landrecht auf den einzelnen concreten Rechtsfall anzuwenden oder auszudehnen*, theils durch Instruction der Geschwornen (formula) oder auch an die Parteien gerichtete Verfüfungen (interdictum, decretum) in dem einzelnen Rechtsfall, theils durch allgemeine an das Publicum gerichtete Festsetzungen (edictum). *Das Civiljurisdiction ist, wie das Commando, ein nothwendiger Bestandtheil nicht bloss der königlichen und der ältesten consularischen Gewalt, sondern des Oberamts überhaupt*' [emphasis mine].

[132] In the areas that had been legislated, the magistrate was expected to follow the laws, but he was not subjected to them in the way in which the jurisdiction is today subjected to the rule of law. When changes in social mores or legal practice made older legislation inadequate, the praetor could simply depart from it, introducing his own remedies to prevent its effective application. Conversely, in many cases he would expand the range of the

year in the edict,[133] became so numerous that they gave rise to a whole new branch of the law, the so-called *ius praetorium* or *ius honorarium*.[134]

By the end of the Republic, this *ius honorarium* included a fully developed system of inheritance, that aided, supplemented and often corrected that of the law of the twelve tables; remedies that protected as if they were owners those who had acquired without the solemnities required by civil law; the primary real securities (pledge and hypothec); and multiple sources of obligations, including major contracts nonexistent in civil law, such as deposit and loan for use, as well as remedies to make informal agreements and bad faith relevant against any civil claim. All in all, there was practically no sector of the law, no institution that was left untouched by the praetor.

To illustrate the singular position of the Roman magistrates, it is instructive to see how Cicero reshapes for the Roman world the Greek

laws, granting remedies in cases not foreseen by the legislator: so, notably, regarding *leges Aquilia*, *Laetoria*, *Aebutia*. Programmatic, in this sense, Iul. 15. *dig*. D. 1.3.12: 'Non possunt omnes singillatim aut legibus aut senatus consultis comprehendi: sed cum in aliqua causa sententia eorum manifesta est, is qui iurisdictioni praeest ad similia procedere atque ita ius dicere debet.' – 'All matters cannot be specifically included in the laws or decrees of the Senate; but when their sense is clear in a given case, he who has jurisdiction can apply it to others that are similar, and in this way administer justice'. Cf. also Ulp. 1 *aed. cur*. D. 1.3.13: Nam, ut ait Pedius, quotiens lege aliquid unum vel alterum introductum est, bona occasio est cetera, quae tendunt ad eandem utilitatem, vel interpretatione vel certe iurisdictione suppleri. – 'For, as Pedius says, whenever anything has been introduced by law there is a good opportunity for extending it by interpretation or jurisdiction to other matters, where the same principle is involved'.

[133] A. Guarino, 'La formazione dell'editto perpetuo, *ANRW* II 13, Berlin – New York, pp. 62–102.

[134] Pap. 2 *def*. D. 1.1.7.1: 'Ius praetorium est, quod praetores introduxerunt adiuvandi vel supplendi vel corrigendi iuris civilis gratia propter utilitatem publicam.' – 'Praetorian Law is that which the Praetors introduced for the purpose of aiding, supplementing, or amending the Civil Law, for reasons of public welfare' [tr. Scott, amended]. Cf., among many, M. Lauria, 'Ius civile – ius honorarium', [in:] *Scritti C. Ferrini Pavia*, Milano 1946, pp. 595–657; G. Grosso, 'Riflessioni su "ius civile", "ius Gentium", "ius honorarium" nella dialettica fra tecnicismo – tradizionalismo giuridico e adeguazione allo sviluppo economico e sociale in Roma', [in:] *Studi in memoria di G. Donatuti*, I, Milano 1973, pp. 439–453; M. Kaser, 'Ius honorarium und ius civile', *ZRG RA* 101 (1984), pp. 1–114; B. Albanese, 'Riflessioni sul *ius honorarium*', [in:] *Estudios en homenaje al prof. F. Hernández Tejero*, II, Madrid 1992, pp. 1–18.

ideal of the supremacy of the laws. Where Plato had written that office should be assigned not to the wealthiest, strongest, or highest born, but to whoever is most obedient to the laws,[135] in Cicero (*Leg.* 3.2), instead, we find the following: 'Videtis igitur magistratus hanc esse vim, ut praesit praescribatque recta et utilia et coniuncta cum legibus' – 'This is the power of the magistrates: to preside and prescribe what is right and useful and *consistent with* the laws'. Connection, rather than subjection, is the key in a system where the magistrate is himself a source of law, and the articulation between sources is not based on hierarchical subordination, but on coordination. And then: 'vereque dici potest, magistratum legem esse loquentem, legem autem mutum magistratum'. Laws and magistrates appear with equal standing, the law a silent magistrate, the magistrate a speaking law, *lex loquens*.[136] Three centuries these words still resonate in Marcian's characterization of *ius honorarium* as 'viva vox iuris civilis'.[137]

Still in the early third century, Paul could write that the praetor renders law even when he issues an unfair decree, not out of consideration for what he has done, but for what he is called to do.[138] The text is notable not so much because the praetor's wrong decision is upheld as valid (this could also be admitted, for the sake of legal certainty, in systems where the jurisdiction is strictly subjected to the law), but because even then it

[135] Plato, *Leges* 715: ... *λέγεται δὲ τοῦδ' ἕνεκα ταῦθ' ἡμῖν, ὡς ἡμεῖς τῇ σῇ πόλει ἀρχὰς οὔθ' ὅτι πλούσιός ἐστίν τις δώσομεν, οὔθ' ὅτι τῶν* [715c] *τοιούτων ἄλλο οὐδὲν κεκτημένος, ἰσχὺν ἢ μέγεθος ἤ τι γένος: ὃς δ' ἂν τοῖς τεθεῖσι νόμοις εὐπειθέστατός τε ᾖ καὶ νικᾷ ταύτην τὴν νίκην ἐν τῇ πόλει, τούτῳ φαμὲν καὶ τὴν τῶν θεῶν ὑπηρεσίαν δοτέον εἶναι τὴν μεγίστην τῷ πρώτῳ, καὶ δευτέραν τῷ τὰ δεύτερα κρατοῦντι, καὶ κατὰ λόγον οὕτω τοῖς ἐφεξῆς τὰ μετὰ ταῦθ' ἕκαστα ἀποδοτέον εἶναι. τοὺς δ' ἄρχοντας λεγομένους νῦν ὑπηρέτας τοῖς νόμοις ἐκάλεσα* ...

[136] It is perhaps no coincidence that it is the same Cicero who uses the expression *lex annua* for the edict: Cic. *II Verr.* 1.109. Illustrative of the relevance that the edict had acquired in Cicero's time is *Leg.* 1.5.17: 'non ergo a praetoris edicto, ut plerique nunc, neque a XII tabulis, ut superiores, sed penitus ex intima philosophia hauriendam iuris disciplinam putas'. The edict was the legal source par excellence, comparable only to what the Twelve Tables had been centuries before.

[137] Marcian. 1 *inst.* D. 1.1.8: 'Nam et ipsum ius honorarium viva vox est iuris civilis'. – 'For honorary law itself is the living voice of the Civil Law' (tr. S. P. Scott).

[138] Paul. 14 *Sab.* D. 1.1.11: '... nec minus ius recte appellatur in civitate nostra ius honorarium. praetor quoque ius reddere dicitur etiam cum inique decernit, relatione scilicet facta non ad id quod ita praetor fecit, sed ad illud quod praetorem facere convenit'.

is deemed 'law rendering' (*ius reddere*): law (*ius*), in sum, is what the praetor declares, even when wrongly – and deliberately so.

To a discretionary jurisdiction, the law does not appear – cannot appear – as a system of binding rules. No rule is strictly binding, and yet it is law, and applied as such: applied, that is, until some pressing reason of *aequitas* or *utilitas* advises otherwise. This has an implication that is frequently overlooked. For the Roman jurisdiction, the fact that something is not binding does not mean that it can be ignored. In other words, the law is not merely considered from the point of view of its normative force (*potestas*) but also from the point of view of its *auctoritas*.[139] *Auctoritas* in this Roman sense is the opposite of *potestas*, of coercion. One may define it, paraphrasing Hannah Arendt, as the respect that makes someone or something be followed without the need of coercion or persuasion.[140]

In fact, throughout the Republic and the early Empire, Roman law had developed largely on the basis of authority. It evolved practically without legislation, through the interpretation of the legal experts and the jurisdictional programme of the magistrate, so it had very little by way of imperative rules. Still in the second century, Pomponius could oppose legislation and civil law proper, defining the latter as consisting solely in the interpretation of the legal experts: 'proprium ius civile, quod sine scripto in sola prudentium interpretatione consistit'.[141]

[139] This Roman tendency to consider the law *sub specie auctoritatis* is so strong that it occasionally emerges even regarding legislation: in Trajan's answer (Pliny *Ep.* 10, 115, cf. *supra*, n. 86) to Pliny's letter on the long practice among the Bithynians of admitting to the *boule* citizens of another *polis*, against the provisions of the 63 BC *lex Pompeia*, the emperor opposes, to the 'consuetudo usurpata contra legem', the 'legis auctoritas': the word choice is highly significant and suggests right away what the imperial decision will be: so, rightly, PERNICE, *Gewohnheitsrecht* (cit. n. 46), p. 151 n. 1.

[140] Hannah ARENDT, 'What is authority?', [in:] *Between Past and Future: Six Exercises in Political Thought*, New York 1961, pp. 91–141.

[141] *Supra* § 5 *ad* n. 64. The balance between legislation and jurisprudence appears so inclined towards the latter in the middle Roman Republic, that the phenomenon of the *leges imperfectae* – statutes that lack in themselves the force to modify civil law, thus requiring the introduction of praetorian remedies to be enforceable – has been regarded as evidence that, Twelve Tables aside, ordinary legislation was initially not admitted as a source of *ius civile*: F. WIEACKER, *Römische Rechtsgeschichte*, I, München 1989, pp. 282–287.

Legal experts, on the other hand, tended to confine their opinions to specific cases, and were reluctant to formulate as general rules the law behind their solutions: 'omnis definitio in iure civili periculosa est'[142]. In any case, their opinions were merely such, and therefore open always to criticism and revision by their peers. A very relevant part of the law they produced was therefore disputed (*ius controversum*): and yet, despite the way in which this situation exasperated the non binding character of each concurring solution, they were all undisputedly acknowledged as law. This state of affairs would become problematic only with the advance of the imperial control over the law, and the related tendencies towards normativisation and harmonisation, that led from Hadrian to the legal absolutism of late Antiquity.[143] The Augustan *ius respondendi* can be considered

[142] Iav. 11 *epist*. D. 50.17.202: 'Every definition is dangerous in civil law'. For this very reason, Paul. 16 *Plaut*. D. 50.17.1 underlines that the law does not result from the rule: conversely, it is from the established law that the rule is created: 'non ex regula ius sumatur, sed ex iure quod est regula fiat.' Rules can therefore be rejected, as any other jurisprudential formulation of the law, as soon as they prove to be inaccurate. The so-called *regula Catoniana* was a notorious example of the problems that a rule could create when its formulation was (or had became) misleading: it is perhaps not a coincidence that alternative formulations had been proposed by both Javolen (10 *epist*. D. 50.17.201) and Paul (8 *Sab*. D. 50.17.29). In the last century of the Republic and the first decades of the Principate, instead, the formulation of *regulae* and *definitiones* seems to have been a central concern of the jurisprudence, to the point that the somewhat forced expression 'regular jurisprudence' has been common since Paul Jörs to refer to this period. Among the rich literature on *regulae* and *definitiones*, cf. A. Carcaterra, *Le definizioni dei giuristi romani*, Napoli 1966; R. Martini, *Le definizioni dei giuristi romani*, Milano 1966; P. Stein, *Regulae iuris*, Edinburgh 1966; B. Schmidlin, *Die römischen Rechtsregeln*, Köln – Wien 1970; D. Nörr, 'Spruchregel und Generalisierung', *ZRG RA* 89 (1972), pp. 18–93; B. Schmidlin, 'Horoi, pithana und regulae. Zum Einfluß der Rhetorik und Dialektik auf die juristische Regelbildung', *ANRW* II 15, Berlin – New York 1975, pp. 101–130.

[143] The shift towards the paradigm of legislation is already visible in Gaius' treatment of the sources (Gai. 1.3–7): their quality as such is formulated through equation to legal enactments – 'legis vicem optinet'. This formulation is used not only for *senatusconsulta* and imperial constitutions, but also for the opinions of the jurists (*responsa prudentium*): 'Responsa prudentium sunt sententiae et opiniones eorum, quibus permissum est iura condere. Quorum omnium si unum sententiae concurrunt, id, quod ita sentiunt, legis vicem optinet; si vero dissentiunt, iudici licet quam velit sententiam sequi; idque rescripto divi Hadriani significatur'. – 'The answers of jurists are the decisions and opinions of those who are authorized to define the law. If the opinions of all of them concur, what they

a first step in this direction, and yet it is still attached to the old paradigm of *auctoritas*.[144]

10. JURISDICTIONAL DISCRETION, AUCTORITAS, AND THE STATUS OF PEREGRINE LAW IN EGYPT

These Roman conceptions, of the jurisdiction as a discretionary power, and of the law in terms of authority rather than absolute binding force, may help place the discussion about the status of peregrine law in Egypt under a new light.

Obviously, the shift from Rome to the province imposes some caveats. The prefect of Egypt is not the Roman praetor. Yet, the provincial jurisdiction was inevitably modelled on that of the magistrates of the *Urbs*, and from a constitutional point of view the nature of their power was identical: in Ulpian's words, a *plenissima iurisdictio*,[145] that the prefect had *ad similitudinem proconsulis*,[146] together with all the attributions of the

agree upon obtains the force of law; if, however, they disagree, the judge has a right to follow whichever opinion he may wish, and this is set forth in a rescript of the Divine Hadrian' [tr. S. P. Scott]. Gaius' treatment is a good illustration of the synergies between Imperial control, normativisation, harmonisation, and the tendency to discipline the phenomenon of the *ius controversum*.

[144] Pomp. *ench*. D. 1.2.2.49: 'Primus divus Augustus, ut maior iuris auctoritas haberetur, constituit, ut ex auctoritate eius responderent: et ex illo tempore peti hoc pro beneficio coepit'. – 'The Divine Augustus, in order to raise the authority of the law, was the first to decree that the jurists might give their opinions as if by virtue of his own authority; and from that time, this began to be requested as a privilege.'

[145] Ulp. 2 *off. proc*. D. 1.16.7.2: 'Cum plenissimam autem iurisdictionem proconsul habeat, omnium partes, qui Romae vel quasi magistratus vel extra ordinem ius dicunt, ad ipsum pertinent'. – 'As the Proconsul has complete jurisdiction, all the authority of those who dispense justice at Rome either in the capacity of magistrates or through the grant of extraordinary power, is vested in him' [tr. S. P. Scott].

[146] Ulp. 15 *ed*. D. 1.17.1: 'Praefectus Aegypti non prius deponit praefecturam et imperium, quod ad similitudinem proconsulis lege sub Augusto ei datum est, quam Alexandriam ingressus sit successor eius, licet in provinciam venerit: et ita mandatis eius continetur'. – 'The Prefect of Egypt does not lay aside his prefectship and the command granted to him by law under Augustus, as the Proconsuls do, before his successor enters the City of Ale-

imperium, including the normative power associated with the *ius edicendi*. Such jurisdictional power was, in the Roman tradition, by nature discretionary (*supra*, § 9).

Most importantly: despite all continuities, the Empire is no longer the Republic. The realities of the imperial power redefined authority, its role and sources, as well as the jurisdictional practice. For the praetor, the turning point was Hadrian, if the so-called codification of the Edict is not entirely a legend.[147] With this 'codification', the praetor lost his main instrument of innovation. Moreover: praetorian discretion, even if theoretically possible, was in practice out of the question regarding imperial constitutions and *senatusconsulta*. The same is true, *a fortiori*, for the provincial governors. Their peripheral position makes it also unlikely that they would use their discretion regarding established principles of civil and praetorian law. For the provincial jurisdiction, the only sphere where one would expect it to keep in practice its original freedom is that of the peregrine law. This is precisely what we seem to find in Egypt.[148]

The Egyptian evidence and sheer common sense make it safe to assume that the prefect felt *de facto* less bound by peregrine law than by Roman – especially imperial – law. But *de iure*, I would not describe the difference between them in terms of binding force. Certainly not in terms of peregrine law being less binding, as the custom theory wanted, because there is not such a thing as a 'less binding' norm. More reasonable could seem to assume that Roman law was absolutely binding, and peregrine law absolutely not: this is H. J. Wolff's thesis of the legal vacuum, and the reason why he reduces Modrzejewski's customary law to a non binding mass of behaviour patterns. But also this is unsatisfactory: if all

xandria; even though he may have already reached the province; and it is so stated in his commission' [tr. S. P. Scott].

[147] F. Cancelli, *La codificazione dell'edictum praetoris: dogma romanistico*, Milano 2010, with lit.

[148] *Supra* n. 26. I leave here aside how much of the original discretion connatural to the *iurisdictio cum imperio* of the prefect subsisted for the subordinate officials who acted as judges but by virtue of their own jurisdiction, like the *iuridicus* or the *idios logos*. If the decision of the *epistrategos* Bassus in *P. Oxy.* 11 237, col. vii, ll. 22–24 is any indication, they seem to have acted with full discretion regarding peregrine law.

we can say from a legal point of view is that peregrine law was absolutely not binding – indeed, that it was not law-, then we leave its actual application unexplained, and we create an additional problem – that Wolff does not address-: when this non-law, if ever, was transformed into law.

My opinion is that from the Roman point of view it was law from the beginning, because the Romans had not read Hobbes, or Montesquieu, or Kelsen, and were not victims of the virus of legal positivism that even we legal historians seem so vulnerable to. It was law, because law in Rome was not merely normative force, but also authority; and tradition, for the Roman mind, carries authority, even when it is an alien tradition. This is what the application – not occasional, but consistent – of the peregrine law demonstrates. Its occasional rejection in the name of certain basic Roman values (notably in the precedents invoked in the petition of Dionysia) shows that, unsurprisingly, it did not carry the same authority as Roman law: Unlike normative force, authority comes in grades, because it is not an absolute, dogmatic category, but a crossroad between the social, the political and the legal.

This authority of the peregrine law, although it comes from tradition, is not the result of its contemplation *sub specie consuetudinis*. A Roman notion of customary law was not available before Julian, and not widespread before the third century; both this later Roman construction and the modern theory of customary law assign custom a supplementary role that is not consistent with what we see in Egypt. Especially relevant here are the documents where the Ptolemaic *diagrammata* and *prostagmata* are directly invoked and applied. What these documents seem to show is that the Roman jurisdiction was ready to ignore the theoretical fall of the Ptolemaic laws with the Roman conquest, and to keep them as part of the Roman provincial law.

The Roman conceptions of jurisdiction (as a discretionary power) and law (as not reduced to legislation) come from the earliest Roman history. Their origin has nothing to do with the necessities of the provincial administration. But when these necessities arose, those conceptions were ready – one is almost tempted to say providentially. And they served well, allowing for a dynamic of inclusiveness and minimum intervention that would have been much more difficult with a normative understanding of

the law. To our time, this example speaks eloquently for the advantages of a flexible conception of the law – today's fashionable term would be soft-law – also from a purely practical, political point of view; and, in general, for the far-reaching practical consequences of prima facie abstruse legal constructions.

José Luis Alonso

Facultad de Derecho
Universidad del País Vasco
P° Manuel de Lardizábal 2
20018 San Sebastián
SPAIN

Department of Papyrology
Institute of Archaeology
University of Warsaw
Krakowskie Przedmieście 26/28
00-927 Warszawa
POLAND

e-mail: *joseluis.alonso@ehu.es*