

## INTRODUCTION

### A. OVERALL CHRONOLOGY

#### I. THE “FIRST LIFE” OF ROMAN LAW

Archaic 500 B.C. – 250 B.C.	451 – 450 B.C. — The Twelve Tables 367 — <i>ll. Lincinae Sextiae</i> (institution of urban praetor) c. 242 — Institution of peregrine praetor
Pre-Classical 250 B.C. – 1 B.C.	c. 125 — <i>l. Aebutia</i> (formular system of procedure) 82-79 — Sulla dictator 44 — Caesar Assassinated
Classical 1 A.D. – 250 A.D.	27 B.C. – 14 A.D. — Augustus <i>princeps</i> c. 138 — Consolidation of the edict under Hadrian 161 — <i>Institutes</i> of Gaius 212 — <i>Constitutio Antoniniana</i> (opens citizenship to all free men in the Empire)
Post-Classical 250 A.D. – 500 A.D.	284-305 — Reign of Diocletian 312 — Conversion of Constantine 438 — Theodosian Code 476 — End of Western Empire 527-65 — Reign of Justinian

#### II. THE “SECOND LIFE” OF ROMAN LAW

1100-1300 — The glossators — Irnerius to Accursius
1300-1500 — The commentators — Bartolus, Baldus
1500-1600 — The humanists — Faber, Cujas, Godofredus
1600-1750 — The natural law school — Grotius, Pufendorf
1750-1850 — The pandectists — Gluck, Voet, Windscheid
1800-1900 — Codification of European law
1825-1925 — The historical school — Mommsen, Savigny
1925-present — The modern historical school

## Section 1. CONSTITUTIONAL HISTORY AND SOURCES OF LAW

### A. TACITUS, *ANNALES* 1.1

in M. Hadas, ed., *The Complete Works of Tacitus* (1942) 3

#### THE ANNALS

#### BOOK I

A.D. 14, 15

1. ROME at the beginning was ruled by kings. Freedom and the consulship were established by Lucius Brutus. Dictatorships were held for a temporary crisis. The power of the decemvirs did not last beyond two years, nor was the consular jurisdiction of the military tribunes of long duration. The despotisms of Cinna and Sulla were brief; the rule of Pompeius and of Crassus soon yielded before Caesar; the arms of Lepidus and Antonius before Augustus; who, when the world was wearied by civil strife, subjected it to empire under the title of "Prince." But the successes and reverses of the old Roman people have been recorded by famous historians; and fine intellects were not wanting to describe the times of Augustus, till growing sycophancy scared them away. The histories of Tiberius, Caius, Claudius, and Nero, while they were in power, were falsified through terror, and after their death were written under the irritation of a recent hatred. Hence my purpose is to relate a few facts about Augustus—more particularly his last acts, then the reign of Tiberius, and all which follows, without either bitterness or partiality, from any motives to which I am far removed.

#### Note

A brief chronology may help to clarify the sweep of this famous opening passage: 753 B.C.—legendary foundation date of Rome; 510 B.C. traditional date of the expulsion of the Kings by Lucius Junius Brutus; 451–449 B.C.—constitution suspended in favor of two groups of ten who prepared the Twelve Tables; 444–367 B.C.—at irregular intervals tribal commanders given consular power; 87–84 B.C.—Lucius Cornelius Cinna consul four times; 82–79 B.C.—Sulla dictator; 60/59–53 B.C.—"First Triumvirate": Pompey, Crassus, Julius Caesar; 49–44 B.C.—Caesar dictator; 43–32 B.C.—"Second Triumvirate": Antony, Octavian (later Augustus), Lepidus.

### B. RES GESTAE DIVI AUGUSTI [THE ACHIEVEMENTS OF THE DIVINE AUGUSTUS]

ed. P. Brunt & T. Moore (1967), 1-14, 34-35 at 19-25, 35-37 (alternate pages)

#### THE ACHIEVEMENTS OF THE DIVINE AUGUSTUS

A copy is set out below of 'The achievements of the Divine Augustus, by which he brought the world under the empire of the Roman people, and of the expenses which he bore for the state and people of Rome'; the original is engraved on two bronze pillars set up at Rome.

1 At the age of nineteen on my own responsibility and at my own expense I raised an army, with which I successfully championed the liberty of the republic when it was oppressed by the tyranny of a faction. 2 On that account the senate passed decrees in my honour enrolling me in its order in the consulship of Gaius Pansa and Aulus Hirtius, assigning me the right to give my opinion among the consulars and giving me *imperium*. 3 It ordered me as a propraetor to provide in concert with the consuls that the republic should come to no harm. 4 In the same year, when both consuls had fallen in battle, the people appointed me consul and triumvir for the organization of the republic.

BC 44

BC 43

2 I drove into exile the murderers of my father, avenging their crime through tribunals established by law; and afterwards, when they made war on the republic, I twice defeated them in battle.

BC 43

BC 43

3 I undertook many civil and foreign wars by land and sea throughout the world, and as victor I spared the lives of all citizens who asked for mercy. 2 When foreign peoples could safely be pardoned I

<sup>1</sup>[THE CONSTITUTIONARIES]<sup>1</sup> (DE CONSTTTUTIONARIIS)

8. Our Lords the Emperors and the Caesars<sup>2</sup> to Flavius Anastasius and Hilarius Martinus.

In the matter concerning which the Illustrious Faustus, Praetorian Prefect, consulted Our Divinity, as the Minutes of the Most August Senate as submitted<sup>3</sup> bear witness, We see that the regulations which were prescribed by the most invincible Emperor, the father<sup>4</sup> of Our Clemency, to provide for the preservation of the Theodosian Code were fortified with greater diligence by the Senate, so that the license to publish copies might be granted to those persons only upon whom the risk was to fall if the published copies contained any falsification. Therefore, tile Illustrious prefect of the City, Our Father<sup>5</sup> and Retainer,<sup>6</sup> whose duty it is to enforce very diligently what the Senate has decided for the security of all, shall know that the license to publish copies has been assigned to you; that the production, also, of copies of the aforesaid body of law<sup>7</sup> shall be provided for at the risk of you<sup>8</sup> alone; that those persons<sup>9</sup> may have no traffic in either the publication or production of copies, since it is certain that the hazard of falsification falls upon you; that both the office staff of the court of inquiry and those who have not obeyed Our laws are constrained by the threat of a fine, as stated in your supplication,<sup>10</sup> and by the penalty of sacrilege,<sup>11</sup> and all surreptitious activity shall cease.

*Given on the tenth day before the kalends of January at Rome in the year of the second consulship of the most noble Maximus and the consulship of the Most Noble Paterius.—December 23, 443.*

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<sup>1-1</sup> The author of this rescript is Valentinian, Min. Sen., n. 21. It is not a part of the Theodosian Code but it is found in most editions, since it is so closely connected with the Code.

<sup>2</sup> It is unusual that the names of the reigning Emperors, Theodosius and Valentinian, are not here given. The reigning Emperors were regularly called *Imperatores* and Augustuses, Min. Sen., n. 3.

<sup>3</sup> *subdita*, appended.

<sup>4</sup> Valentinian, the author of this constitution thus refers to Theodosius, who was his father-in-law and the elder Emperor, Min. Sen., n. 21.

<sup>5</sup> *Parens*, father, near kinsman, cousin, patrician, an honorific title, used by the Emperor when referring to a preceding Emperor or to one of the highest ranking members of the nobility. Cf. the modern usage of the word cousin in this sense. Similarly, the Emperors used the word “Brother” (*Frater*) as a purely honorific title. Storacius was Prefect of the City in 443, NVal. 11, 1.

<sup>6</sup> *Amicus*.

<sup>7</sup> *memoratum corpus*. Some would understand this as referring to guilds of copyists.

<sup>8</sup> You constitutionaries.

<sup>9</sup> About whom you complain. Or: other persons, M.

<sup>10</sup> Min. Sen., n. 57.

<sup>11</sup> Since everything connected with the Emperor was sacred and divine, the violation of any law issued by him could be considered as sacrilege, Min. Sen., n. 15. The punishment for sacrilege was usually death.

## E. DIGEST 1.2.2pr–53

in A. Schiller, trans., in *Roman Law: Mechanisms of Development* (1978), 119–27<sup>†</sup>

POMPONIUS, *Libro singulari enchiridii*:

[Part 1] Accordingly it seems necessary for us to set forth the origin and development of the law itself. **1.** Now at the beginning of our state the people undertook at first to act without fixed statute or fixed law, and everything was personally governed by the kings. **2.** After that, when the state was somewhat enlarged, it is related that Romulus himself divided the people into thirty parts, which parts he called *curiae*, for the reason that he exercised the care (*cura*) of the commonwealth in accordance with the opinions of those parts. Accordingly, he himself proposed to the people certain curiate statutes, and so did succeeding kings. All these exist, written down in the book of Sextus Papirius, who was among the leading men in the time of Superbus, the son of Demaratus of Corinth. This book, as we have said, is

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<sup>†</sup> The text used for translation is that established by Mommsen, with the accepted MS emendations indicated by <>. For conjectured interpolations, see Index Interp. I 3-6, Supp. I 1-2. [CD made some changes in paragraphing and punctuation.]

called *ius civile Papirianum*, not that Papirius added anything of his own therein, but because the statutes which had been unsystematically enacted were compiled into one.

3. Upon the expulsion of the kings by a tribunician statute, all these statutes became obsolete and the Roman people came once again to use uncertain law and mere custom rather than enacted law, and this situation lasted about twenty years. 4. Thereafter, that this should no longer continue, it was decreed that ten men (*decemviri*) should be appointed by public authority through whom legislation was to be sought from the Greek city states, and so establish the Roman state on a statutory basis. These laws, inscribed upon ivory tablets, they set up before the rostra so that the statutes could be more easily seen, and supreme authority in the state in that year was given to them (the ten men) both to amend the statutes, if it should be necessary, and to interpret them, and this without right to appeal from them as there was from other magistrates. They themselves noted that these first statutes were incomplete, and accordingly, in the following year, they added two more to the aforesaid tables; hence, with the addition they have been called the law of the Twelve Tables. Some have said the source of this decemviral legislation was a certain Hermodorus, an Ephesian, an exile in Italy.

5. When these statutes were enacted discussion in the forum (*disputatio fori*) became necessary—as naturally is wont to happen, that interpretation requires the guidance of those learned in the law. This discussion and this law, which without writing was developed by the learned, is not specifically named—as other parts of the law have been designated by names, since special names have been given to other parts—but it is referred to by the general term *ius civile*. 6. Then from these statutes, at about the same time, actions were devised by which men might litigate, and lest these actions be indiscriminately brought by the people, they were required to be in certain and solemn form; and this part of the law is called *legis actiones*, that is, statutory actions. Accordingly, these three branches of law appeared at about the same time: the law of the Twelve Tables, from these came the *ius civile*, and from the same the *legis actiones* were devised. Moreover of all of these, both the science of interpretation and the (conduct of) actions were vested in the college of pontiffs, from among whom one was appointed each year to preside over private causes. And for nearly a hundred years the people conformed to this custom.

7. Afterwards, when Appius Claudius had propounded and fixed the form of these actions, Gnaeus Flavius, his secretary, the son of a freedman, stole the book and delivered it over to the people, and this service was so gratifying to the people that he was made tribune of the plebs, as well as senator and curule aedile. This book, which contains the actions, is called *ius civile Flavianum*, as that other, the *ius civile Papirianum*; nor did Gnaeus Flavius add anything of his own to the book. Since, with the expansion of the state, certain forms of action were lacking, not long afterwards Sextus Aelius compiled additional actions and gave the book to the people which is called the *ius Aelianum*.

8. Then, while there existed in the state the law of the Twelve Tables and the *ius civile*, as well as the *legis actiones*, it happened that the plebs got into dispute with the patricians, seceded and enacted laws for itself, which laws are called *plebiscita*. Soon after the plebs was recalled, and since many disputes developed with respect to these *plebiscita*, it was enacted by the *lex Hortensia* that they should also be observed as statutes. Hence it has resulted that, as between *plebiscita* and statute, the method of enactment differed, but their force was the same. 9. Then, since it became difficult for the plebs to convene, and surely far more difficult for the people considering the great increase in numbers, necessity itself diverted the administration of the commonwealth to the Senate; hence the Senate began to interpose, and whatever it enacted was observed, and this enactment was called *senatus consultum*.

10. During the same period magistrates also administered the laws and published edicts in order that the citizens might know what rule each magistrate would pronounce on each question, and take corresponding precaution. The edicts of the praetors constituted the *ius honorarium*: it is called honorarium because it issued from the office (*honos*) of the praetor. 11. Lastly, as if there had been a gradual transition dictated by events themselves towards fewer methods of creating law, it came to be necessary for the administration of the commonwealth to be discharged by one man—for the Senate could not with equal efficiency provide for all departments of administration; therefore, a first citizen (*princeps*) was established, and the power was given to him that whatever he laid down was binding. 12. Hence in our state a rule depends either on law, that is, upon a statute, or there is our own *ius civile* which consists without writing in the mere interpretation of the learned (*prudentes*), or the *legis actiones* which give the forms for pleading, or plebiscite enacted without the authorization of the Senate, or the edict of the magistrates whence the *ius honorarium* derives, or the *senatus consultum* which takes effect on the mere

resolution of the Senate without statute, or the imperial constitution. that is, what the emperor himself decrees and is observed as a statute.

[Part 2] **13.** After the origin and the development of the law is known, it is in order for us to know the titles and origin of the magistrates because, as we have shown, it is through those who preside over the administration of justice that practical results are obtained; for what value has the existence of law in a state unless there are those who can determine rights? After this, then, we shall speak of the succession of authorities, for law cannot exist unless there be someone skilled in the law by whom it may daily be improved.

**14.** With regard to the magistrates, it is accepted that at the beginning of the state the kings had all the authority. **15.** It is clear that at the same period there was also an officer of cavalry (*tribunus celerum*); moreover, it was he who commanded the knights and took, as it were, second place to the kings. Among these was Junius Brutus who was responsible for the expulsion of the kings. **16.** Then, after the expulsion of the kings, two consuls were constituted, and it was provided by statute that supreme power should be vested in them; they were so named because they, above all others, 'consulted' the interest of the commonwealth. However, that they should not lay claim in all respects to royal power, it was provided by statute that there should be an appeal from them, nor could they impose capital punishment upon a Roman citizen without the order of the people; the only (royal) power left to them was that of coercion and of ordering persons to be imprisoned in the name of the state.

**17.** Later, when the administration of the census required more time and the consuls were not equal to this additional office, censors were created. **18.** Then, as the people increased in numbers and frequent wars arose, some of them being bitterly waged by bordering tribes, it was at times resolved, as the necessity arose, that a magistrate endowed with greater power should be created; so dictators were instituted from whom there was no right to appeal and to whom even the power of capital punishment was given. It was not constitutional that this magistrate, inasmuch as he had supreme power, should be retained above six months. **19.** Masters of the horse (*magistri equitum*) were provided for these dictators in the same way as officers of cavalry (*tribuni celerum*) for the kings; and this office was about the same as that of the praetorian praefects today, except that they were regarded as statutory magistrates. **20.** About the same time, when the plebs had seceded from the patricians some seventeen years after the expulsion of the kings, the plebs created tribunes for itself on Mons Sacer, who were to be plebeian magistrates. They were called tribunes because formerly the people had been divided into three parts and one tribune was created from each part; or because they were created by the vote of the tribes. **21.** Moreover, in order that there should be officers to superintend the temples in which the plebs deposited all its enactments, two members of the plebs were appointed, who were called aediles. **22.** Then, when the treasury of the people had come to be enlarged, in order to provide officers for it, quaestors were appointed to superintend money matters, so called because they were created for the purpose of inquiring into and guarding the finances. **23.** And since, as we have said, the consuls were not permitted by statute to hold court in a capital case involving a Roman citizen without the leave of the people, for this reason quaestors were appointed by the people to preside in capital cases; they were called judges on capital cases (*quaestores parricidii*), of whom the law of the Twelve Tables also makes mention.

**24.** When it was decided that (a body of) statutes should be enacted, it was proposed to the people that all of the magistrates should go out of office so that <ten men should be created for the purpose of drafting the statutes. Accordingly, ten men> were appointed for one year. and when they prolonged their office and acted oppressively and refused to select succeeding magistrates, in order that they themselves and their faction should permanently keep the commonwealth in their own hands, they brought matters to such a point by their excessive and harsh domination that the army seceded from the state. ... From Algidum, where the legions were then waging war, they all deserted their former leaders and carried their standards to the Aventine, and soon after the whole plebs of the city assembled at the same place, and by the common consent of the people, some <of the ten men were driven into exile, some> were put to death in prison. So the commonwealth again returned to its former condition. **25.** Then, several years after the Twelve Tables had been passed, a dispute arose between the plebs and the patricians, the plebs desiring that the consuls should also be chosen from its own body, and the patricians refusing, it was decided that military tribunes with consular power should be created, in part from the plebs, in part from the patricians. These were appointed in various numbers, for sometimes there were twenty, sometimes more, often less. **26.** Later, when it was decided that consuls should also be appointed from the plebs, they came to be instituted from both bodies. Then, that the patricians should have something more, it was resolved that

two from their number should be appointed <to superintend the games>; so the curule aediles were created.

27. And since the consuls were called a way by wars on the borders and there was no one in the state to administer justice, it came to pass that a praetor was also created, who was called *urbanus* because he administered justice in the city. 28. Some years later, as this praetor did not suffice because great numbers of foreigners (*peregrini*) were coming into the state, another praetor was created in addition, who was called *peregrinus* from the fact that for the most part he administered justice to the foreigners. 29. Then when it became necessary for magistrates to preside over the court of the spear (*hasta*), ten men for judging causes (*decemviri in litibus iudicandis*) were constituted. 30. About the same time there were also appointed four men (*quattuorviri*) to take charge of highways, and three men of the mint (*triumviri monetales*) who coined bronze, silver and gold, and three men for capital cases (*triumviri capitales*) who had charge of the prison so that when punishment was to be inflicted it should be done by their agency. 31. And since it was undesirable for magistrates to be engaged in public affairs in the evening, five men (*quinqueviri*) were appointed this side of the Tiber and beyond the Tiber who might act in place of the magistrates. 32. Then with the conquest of Sardinia, later Sicily, then Spain, and finally the province of Narbo, as many praetors were created as provinces had been conquered, some to preside over home affairs, others over provincial matters. Later, Cornelius Sulla instituted state trials (*quaestiones publicae*), for example, for forgery, for murder, for stabbers, and he added four praetors. Then Gaius Iulius Caesar appointed two praetors and two aediles to superintend the grain, <called> *cereales*, from Ceres. So there were created twelve praetors and six aediles. Later divus Augustus instituted sixteen praetors. Still later divus Claudius added two praetors who should have jurisdiction over trusts (*fideicommissum*), one of whom divus Titus suppressed; and divus Nerva added one who should have jurisdiction over cases involving the fisc and private persons. Thus eighteen praetors administer justice in the state.

33. And all this holds good as long as the magistrates are within the state; but whenever they leave, one remains to administer justice, he is called the *praefectus urbi*. The *praefectus* was formerly appointed <when the other left>; later, apparently on account of the Latin festivals, (the regular appointment) was introduced and annually made. However, the *praefecti annonae* and *vigilum* are not magistrates, but were created with special power in the public interest. At the same time, tribunes this side of the Tiber (*Cistiberes*) of whom we have spoken, were afterwards by a *senatus consultum* made aediles. 34. Therefore, on the basis of the above, ten tribunes of the plebes, two consuls, eighteen praetors and six aediles had legal competence in the state.

[Part3] 35. The science of the *ius civile* has been professed by many of the greatest men; mention is to be made at this time of such of them as were of first rank in the estimation of the Roman people in order to set forth by whom and in what way the laws were made and handed down. And indeed, of all of those who acquired the knowledge, it is said that no one publicly professed it before Tiberius Coruncanius; all those before him had either thought to keep the *ius civile* secret and only found time for their consultants rather than putting themselves at the disposal of those wishing (to learn). 36. A learned (jurist) of first rank was PUBLIUS PAPIRIUS who made a compilation of the royal statutes (*leges regiae*). After him came APPIUS CLAUDIUS, one of the ten men who had the chief part in the composition of the Twelve Tables. After him an APPIUS CLAUDIUS, of the same family, possessed the greatest knowledge (of the law); he was called 'the Hundred-handed'; he laid down the Appian Way and constructed the Claudian aqueduct and voted that Pyrrhus should not be admitted into the city, and it was he, it is said, who first wrote (forms of) actions concerning usurpations, which book is not extant; the same Appius Claudius invented the letter R, and it seems to have followed from this that Valesii become Valerii and Fusii became Furii. 37. After these there was SEMPRONIUS, a man of the greatest learning, whom the Roman people called Σοφὸς ('the Wise'), nor has anyone else before or after him received that surname. (Then there was) CAIUS SCIPIO NASICA, who was called by the Senate 'the Best'; besides, a house in the Via Sacra was given to him by the state, so that he could more readily be consulted. Next QUINTUS MUCIUS who, having been sent as envoy to the Carthaginians, had two dice laid before him, one for peace and the other for war, and was given the choice of which he desired to carry back to Rome, took them both and said it was for the Carthaginians to ask which of the two they would rather receive.

38. After these there was TIBERIUS CORUNCANIUS, who, as I have said, first began to profess (the law); however, no writing of his is extant but his *responsa* were many and memorable. Next SEXTUS AELIUS and his brother PUBLIUS AELIUS and PUBLIUS ATILIUS had great learning in professing (the law), so much so that the two Aelii became consuls; Atilius, moreover, was the first called *Sapiens* ('the Wise') by the