# Aequum putavit imperator: imperial representation and juristic self-fashioning in the Decreta and Imperiales Sententiae of Julius Paulus

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# Aequum putavit imperator. Imperial representation and juristic self-fashioning in the Decreta and Imperiales Sententiae of Julius Paulus

Von

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Abstract: This article discusses the content, context and publication of two collections of imperial judgments compiled by the Roman jurist Paul, the Decretorum libri tres and the Imperialium sententiarum in cognitionibus prolatarum libri sex. Based on a legal and contextual analysis of the 37 cases surviving in Justinian's Digest, it is argued that these works served a political purpose and should mainly be regarded as a contribution to the imperial rhetoric and propaganda of its protagonist, the emperor Septimius Severus (193–211 CE). At the same time, the texts from these works also reveal Paul's own desire to present himself as a skilled, knowledgeable and influential jurist.

Key Words: Julius Paulus, Septimius Severus, administration of justice, decreta, imperial representation

## I. Introduction

Scattered through the Digest are excerpts from a work of the Roman jurist Julius Paulus called "Decretorum libri tres" ('Three books of imperial judgments', hereafter referred to as the Decreta), containing a collection of imperial judgments by the emperor Septimius Severus (193–211 CE). In addition, fragments from another collection of imperial judicial decisions dating from the same period and likewise attributed to Paul, entitled "Imperialium

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sententiarum in cognitionibus prolatarum libri sex" ('Six books of imperial decisions made in judicial proceedings', hereafter referred to as the Imperiales Sententiae) have also survived[1]). In total, 38 case reports on 37 cases heard by the emperor have been excerpted into the Digest from these two works[2]). Paul's collections of imperial judgments are a unique phenomenon in Roman legal literature. Unlike modern jurists, Roman jurists were not in the habit of compiling and publishing collections of (imperial) judicial decisions: indeed, no other Roman jurist before or after Paul has ever published a similar type of collection of imperial judgments[3]). Moreover, Paul's description of the judgments is strikingly elaborate. He does not only mention the facts of the case and the imperial judgment, but also regularly describes the proceedings, the full names of the litigants, their arguments before the imperial court and, in the case of a hearing on appeal, the decision of the judge in first instance. He also sometimes reports on the deliberations of the emperor and his *consilium* on the case, taking place after the hearing behind closed doors. From all of this it can be inferred that Paul most likely served as one of Severus' legal councilors during the imperial judicial hearings and his reports can therefore be regarded as an eyewitness account of the proceedings in the emperor's court.

Consequently, the question arises why the Severan jurist did publish such a work on the decisions of Septimius Severus. The present article aims to answer this question by analyzing the cases and judgments included in the

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[1]) Before the publication of my own study into the Decreta and the Imperiales Sententiae in 2018, there existed only one monograph on the subject: C. Sanfilippo, Pauli decretorum libri tres, Milano 1938. Recently, another monograph on the subject has been published by M. Brutti, Iulius Paulus, Decretorum libri tres imperialium sententiarum in cognitionibus prolatarum libri sex, Roma 2020. In addition, individual cases from both works have been studied by V. Wankerl, Appello ad principem, Urteilsstil und Urteilstechnik in kaiserlichen Berufungsentscheidungen (Augustus bis Caracalla), München 2009 and M. Rizzi, Imperator cognoscens decrevit, Profili e contenuti dell'attività giudiziaria imperiale in età classica, Milano 2012.

[2]) Cf. O. Lenel, Palingenesia iuris civilis, vol. I Leipzig 1889, 959–965 (nr. 56–80) and 1111–1112 (nr. 877–880). One case appears twice (D. 10,2,41 and D. 37,14,24).

[3]) Rizzi (n. 1) 132–133 nt. 96; Th. Mommsen, Römisches Staatsrecht, vol. II.2 Leipzig 1888, 875; F. Schulz, Geschichte der römischen Rechtswissenschaft, Weimar 1961, 180–181; W.J. Zwalve, Decreta Frontiana, Some observations on D. 29,2,99 and the 'law reports' of Titius Aristo, Tijdschrift voor Rechtsgeschiedenis 83 (2015) 365–391; D. Mantovani, More than codes, Roman ways of organising and giving access to legal information, in: C. Ando/P.J. du Plessis/K. Tuori (eds.), The Oxford handbook of Roman law and society, Oxford 2016, 34.

Decreta and Imperiales Sententiae and relating them to the historical, institutional and political context in which these decisions and, subsequently, the works of Paul came into being. Sections II and III will first discuss the imperial adjudication process, the nature and role of the *consilium principis* and Paul's position within Severus' judicial *consilium,* thereby offering an institutional background for the decisions included in the Decreta and the Imperiales Sententiae. Section IV gives an overview of the content of both works and deals with the dating and transmission of and the enigmatic relationship between the works. Finally, sections V and VI will discuss the motives behind the publication of Paul's collections of imperial decisions and will relate the publication of the Severan judgments by the jurist to the historical and political context of the Severan era.

## II. The administration of justice by the Roman emperor

### 1. Imperial jurisdiction:

From the reign of Augustus onwards, emperors heard cases between citizens on a regular basis. Although the origins and development of the imperial power to adjudicate cases are much disputed[4]), it is beyond a doubt that at the end of the second century CE the Roman emperor had obtained full jurisdiction in both criminal and civil cases. Although he could act as a judge of first instance[5]), it has generally been accepted that the bulk of the cases heard by the emperor were appeals[6]), which could be brought against sentences of al-

[4]) The obscurity of the origins of the imperial jurisdiction is mainly caused by the scarceness of classical sources on the subject; see for a clear description and overview of the debate M. Peachin, Augustus' emergent judicial powers, the 'crimen maiestatis', and the second Cyrene edict, in: J.-L. Ferrary/J. Scheid (eds.), Il princeps romano, Autocrate o magistrato? Fattori giuridici e fattori sociali del potere imperiale da Augusto a Commodo, Pavia 2015, 500–507. The most recent contribution to the subject is K. Tuori, The emperor of law, The emergence of Roman imperial adjudication, Oxford 2016.

[5]) See for instance F. Millar, The emperor in the Roman world, London 1992, 535. It is usually assumed that the emperor's jurisdiction as a court of first instance was limited to cases for which no *iudicium legitimum* existed under the Leges Iuliae iudiciariae and cases for which the rules of traditional private law did not offer a satisfying solution, see for example A.H.M. Jones, Imperial and senatorial jurisdiction in the early Principate, Historia 3 (1955) 476; J.M. Kelly, Princeps Iudex, Eine Untersuchung zur Entwicklung und zu den Grundlagen der kaiserlichen Gerichtsbarkeit, Weimar 1957, 82–90, esp. 88.

[6]) Mommsen, Röm. Staatsrecht II.2 (n. 3) 978; Kelly (n. 5) 84; T. Rüfner, Imperial cognitio process, in: C. Ando/P.J. du Plessis/K. Tuori (eds.), The Oxford handbook of Roman law and society, Oxford 2016, 260.

most all kinds of lower courts[7]). Illustrative for this practice is a passage from Cassius Dio's Roman History, describing the jurisdiction of the emperor:

> Dio Hist. 52,33,1 Δίκαζε δὲ καὶ αὐτὸς ἰδίᾳ τά τε ἐφέσιμα καὶ τὰ ἀναπόμπιμα, ὅσα ἂν παρά τε τῶν μειζόνων ἀρχόντων καὶ παρὰ τῶν ἐπιτρόπων, τοῦ τε πολιάρχου καὶ τοῦ ὑποτιμητοῦ καὶ τῶν ἐπάρχων τοῦ τε τὸν σῖτον ἐπισκοποῦντος καὶ τοῦ νυκτοφυλακοῦντος, ἀφικνῆται· μήτε γὰρ αὐτόδικος μήτ᾽ αὐτοτελὴς οὕτω τις τὸ παράπαν ἔστω ὥστε μὴ οὐκ ἐφέσιμον ἀπ᾽ αὐτοῦ δίκην γίγνεσθαι[8]).

Since the jurisdiction of the emperor was considered to be *extra ordinem* (extraordinary), in the sense that the procedure at the imperial court was not regulated by the Augustan leges Iuliae iudiciariae of 17 BCE[9]), the exact scope of the appellate jurisdiction of the emperor has been subject of debate. It is self-evident that the emperor could accept appeals against the sentences of judges in extraordinary procedures, since their jurisdiction had been derived from the emperor's own jurisdiction[10]). This principle did, however, not apply to the judgments given in a formulary procedure by a *iudex privatus* deriving his jurisdiction from the leges Iuliae iudiciariae. Mommsen therefore denied the possibility of an appeal to the emperor against this type of judgments[11]). This point of view has, however, been rejected in more recent scholarship on the jurisdiction of the emperor, arguing on the basis of mainly literary sources that the emperors – probably starting with Augustus himself – also accepted appeals against the judgments of *iudices privati*, albeit with

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[7]) Appeal to the emperor was not allowed against the judgments of the senate (D. 49,2,1,2), the decisions of judges who had been appointed by the emperor to judge a case with the explicit prohibition of an appeal (D. 49,2,1,4) and the judgments of the praefectus praetorio; cf. Mommsen, Röm. Staatsrecht II.2 (n. 3) 987; M. Kaser/K. Hackl, Das römische Zivilprozessrecht, 2nd edition München 1996, 464.

[8]) Transl.: "But do you judge by yourself alone the cases which come to you on appeal or reference from the higher officials and the procurators, from the prefect of the city, the sub-censor, and from the prefects in charge respectively of the grain-supply and the night-watch. For none of these should have such absolute jurisdiction and final authority that an appeal cannot be made from him." – For the convenience of the reader, English translations have been provided of all cited literary texts. These have all been derived from the Loeb Classical Library, in this case E. Cary, Dio Cassius, Roman History, vol. 6 Cambridge (MA) 1914, 161–163, making use of the Boissevain edition of the Greek text.

[9]) Cf. Kaser/Hackl (n. 7) 435–436.

[10]) Cf. D. 49,3,1 pr.; in addition, see Kaser/Hackl (n. 7) 502–503. The Decreta contain several examples of appeals against the judgments of this type of judges; see for example D. 4,4,38 pr. (*praefectus urbi*), D. 14,5,8 (*praefectus annonae*), D. 48,18,20 and D. 49,14,48 pr. (*procuratores Caesaris*).

[11]) Mommsen, Röm. Staatsrecht II.2 (n. 3) 980–982.

some restraint[12]). This appellate jurisdiction seemingly converges with the imperial tendency from Hadrian onwards to intervene more frequently in the *iudicia legitima* by means of rescripts as well, as demonstrated by Palazzolo[13]). The involvement of the emperor in the *iudicia legitima* is also clearly visible in the Decreta and Imperiales Sententiae: in his description of the case of a plaintiff named Camelia Pia, for example, Paul makes explicit mention of an appeal against the judgment of a *iudex privatus* in a procedure based on the *actio familiae erciscundae*[14]).

2. Procedure at the imperial court:

A case could be brought before the imperial court by means of a petition to the emperor (a so-called *supplicatio*)[15]). Classical sources do not mention where or to which department of the imperial chancery the petition had to be submitted, but it seems plausible that it was, like all other petitions, presented to the *a libellis*[16]). The petition was subsequently processed by spe-

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[12]) Cf. Kelly (n. 5) 93; Kaser/Hackl (n. 7) 503–504, esp. note 13; R. Orestano, L'appello civile in diritto romano, Torino 1953, 93; cf. Suet. Aug. 33; Suet. Claud. 14; Suet. Ner. 17; Tac. Ann. 14,28.

[13]) N. Palazzolo, Potere imperiale ed organi giurisdizionali nel II secolo D.C., L'efficacia processuale dei rescritti imperiale da Adriano ai Severi, Milano 1974.

[14]) D. 10,2,41 = D. 37,14,24 *Camelia Pia ab Hermogene appellaverat, quod diceret iudicem de dividenda hereditate inter se et coheredem non tantum res, sed etiam libertos divisisse*; resp. *Camelia Pia ab Hermogene appellaverat, quod diceret iudicem de dividenda hereditate inter se et coheredem non tantum res, sed etiam libertos divisisse*; for other examples of cases in the Decreta and the Imperiales Sententiae concerning subject matter of the *iudicia legitima* see D. 14,5,8 (*actio institoria*); D. 20,5,13 (execution of security interests); D. 32,97 (construal of a legacy); D. 46,1,68,2 (liability of sureties); D. 47,2,88(87) (theft of a pledge); D. 48,18,20 (*depositum*); D. 50,16,240 (restitution of a *dos*). It should be noted that in some of these cases (D. 14,5,8 and D. 48,18,20) we are dealing with an appeal against a judgment in first instance given in a *cognitio extra ordinem*.

[15]) D. 28,5,93(92) (first instance) and D. 49,5,5,1 (appeal); see also Mommsen, Röm. Staatsrecht II.2 (n. 3) 965; Millar (n. 5) 525; Kaser/Hackl (n. 7) 449. In case of an appeal, this *supplicatio* could only be made after the judge of first instance had granted leave to appeal; Orestano (n. 12) 364; Kaser/Hackl (n. 7) 507; on the Roman rules concerning appeal and the appeal proceedings in general see in addition to the work of Orestano, for an overview, also W. Litewski, Die römische Appellation in Zivilsachen (ein Abriss), I: Prinzipat, in: Aufstieg und Niedergang der Römischen Welt II.14 (1982) 60–96.

[16]) See in a similar sense Palazzolo, Potere imperiale (n. 13) 61–62 and N. Palazzolo, Processo civile e politica giudiziaria nel principato, Torino 1980, 80, contending that the jurists of the chancery decided whether a petition was settled in the form of a rescript or dealt with in an imperial *cognitio*.

cialized department within the imperial chancery, the *a cognitionibus*. Not much is known about this department, but it seems to have functioned as a modern-day court registry, assisting the emperor in the performance of his judicial duties and charged with the formal aspects of the imperial hearings and the communication with the parties[17]). The emperor and his secretaries were probably swamped with petitions to submit a case for an imperial hearing and it is therefore reasonable to assume that not all of these cases actually reached the emperor and his courtroom[18]). Some cases were either rejected all together on procedural or material grounds[19]) or referred back to lower courts[20]), while others were heard and judged by specially appointed judges (*iudices dati*) or by deputies of the emperor, the so-called *iudices vice Caesaris*[21]).

When a case had been selected for a hearing by the emperor himself, it was entered into the cause list by the officials of the department *a cognitionibus* and parties were summoned to appear on a certain day at a certain place. In the early Principate the emperors were in the habit of conducting court hearings in public places such as the Forum Romanum, the *forum* of Augustus, the *porticus* of Livia and the Pantheon[22]). Consequently, the imperial hearings were open to the public, as had been the case with the administration of justice by the traditional Roman magistrates. In his description of the reign

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[17]) Cf. Philostratus, Vitae Sophistarum 2,30 and 32.

[18]) Palazzolo, Potere imperiale (n. 13) 61; Kaser/Hackl (n. 7) 447; contra Millar (n. 5) 515–516.

[19]) E.g. P.Col. 123, ll. 8–10 and 45–51.

[20]) Cf. D. 49,1,21 pr.–1.

[21]) J.-P. Coriat, L'empereur juge et son tribunal à la fin du principat: un essai de synthèse, in: R. Haensch (ed.), Recht haben und Recht bekommen im Imperium Romanum, Warsaw 2016, 50–51; on the *iudices vice Caesaris* see M. Peachin, Iudex vice Caesaris, Deputy emperors and the administration of justice during the Principate, Stuttgart 1996.

[22]) L. Bablitz, Actors and audience in the Roman courtroom, London 2007, 35; R. Färber, Römische Gerichtsorte, Räumliche Dynamiken von Jurisdiktion im Imperium Romanum, München 2014, 74; for imperial hearings on the Forum Romanum see Dio Hist. 57,7,2 (Tiberius), Dio Hist. 60,4,3 and Tac. Ann. 12,43,1 (Claudius), Dio Hist. 65,10,5 (Vespasian), Suet. Dom. 8,1 (Domitian), Dio Hist. 69,7,1 (Hadrian); for the other locations Suet. Claud. 33,1 (Claudius on the *forum* of Augustus), Dio Hist. 68,10,2 (Trajan on the *forum* of Augustus), Dio Hist. 68,10,2 (Trajan in the *porticus* of Livia) and Hist. 69,7,1 (Hadrian in the Pantheon); on the spaces of imperial justice in general see F. De Angelis, The emperor's justice and its spaces in Rome and Italy, in: idem (ed.), Spaces of justice in the Roman world, Leiden 2010, 127–159.

of Hadrian, Dio stresses the importance of the public nature of the imperial administration of justice:

> Dio Hist. 69,7,1 Ἔπραττε δὲ καὶ διὰ τοῦ βουλευτηρίου πάντα τὰ μεγάλα καὶ ἀναγκαιότατα, καὶ ἐδίκαζε μετὰ τῶν πρώτων τοτὲ μὲν ἐν τῷ παλατίῳ τοτὲ δὲ ἐν τῇ ἀγορᾷ τῷ τε Πανθείῳ καὶ ἄλλοθι πολλαχόθι, ἀπὸ βήματος, ὥστε δημοσιεύεσθαι τὰ γιγνόμενα[23]).

By adjudicating cases in public, the emperor counteracted rumors and suspicions of arbitrariness and at the same time presented himself as accessible, benevolent and just ruler to his subjects[24]). In time, however, the imperial court hearings increasingly took place at the imperial palace on the Palatine Hill or at other imperial residences in and around the city. For the reign of Septimius Severus, no evidence of hearings in a public location exists. However, Dio does mention that Severus made use of two rooms in the palace on the Palatine, specially equipped for court hearings:

> Dio Hist. 76(77),11,1 ἤδει δὲ τοῦτο μάλιστα μὲν ἐκ τῶν ἀστέρων ὑφ᾽ ὧν ἐγεγέννητο (καὶ γὰρ ἐς τὰς ὀροφὰς αὐτοὺς τῶν οἴκων τῶν ἐν τῷ παλατίῳ, ἐν οἷς ἐδίκαζεν, ἐνέγραψεν, ὥστε πᾶσι, πλὴν τοῦ μορίου τοῦ τὴν ὥραν, ὥς φασιν, ἐπισκοπήσαντος ὅτε ἐς τὸ φῶς ἐξῄει, ὁρᾶσθαι· τοῦτο γὰρ οὐ τὸ αὐτὸ ἑκατέρωθι ἐνετύπωσεν) …[25]).

Since the emperor judged cases *extra ordinem,* the proceedings of the imperial court were not restricted to a specific form or any procedural rules, but normally consisted of the same elements as the procedures in the lower imperial law courts[26]). When the litigants entered the courtroom, they would find the emperor seated on a *tribunal*[27]). In most cases he would have been accompanied by a *consilium* of jurists and notable citizens, acting as his (legal) advisors[28]). In addition, the imperial bodyguard and probably a small

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[23]) Transl. by Cary (n. 8) vol. 8, 437: "He transacted with the aid of the senate all the important and most urgent business and he held court with the assistance of the foremost men, now in the palace, now in the Forum or the Pantheon or various other places, always being seated on a tribunal, so that whatever was done was made public"; see also Tac. Ann. 13,4,2, documenting Nero's rejection of the practice of hearing cases in private.

[24]) Millar (n. 5) 229; Färber (n. 22) 73 and 90.

[25]) Transl. by Cary (n. 8) vol. 9, 261: "He knew this [i.e. that he would not return from the military expedition in Britannia – ESD] chiefly from the stars under which he had been born, for he had caused them to be painted on the ceilings of the rooms in the palace where he was wont to hold court, so that they were visible to all, with the exception of that portion of the sky which, as astrologers express it, 'observed the hour' when he first saw the light; for this portion he had not depicted in the same way in both rooms […]."

[26]) Kaser/Hackl (n. 7) 448.

[27]) Bablitz (n. 22) 37; on the *tribunal* in general see Färber (n. 22) 175–233.

[28]) Cf. the use of the word παρακάθημαι in reference to the judicial *consilium* in Dio Hist. 74(75),9,2 τῶν παρακαθημένων σοι καὶ συνδικαζόντων τούτων οὐδένα.

audience of courtiers and other interested persons would be present as well[29]). The litigants were usually represented by lawyers[30]). They were given the opportunity to plead their case, although the length of their argument may have differed from case to case and from emperor to emperor[31]). In addition to this, both the plaintiff and the defendant were probably offered the opportunity to present legal and factual evidence to substantiate their claims (e.g. personal[32]) and legal documents[33]), witness reports[34]) etc.). The debate between parties was usually conducted in Latin, but it was also possible to plead a case in Greek or to present Greek documents as evidence[35]). The emperor could actively intervene during the proceedings and interrogate one or both of the parties or even engage in a debate with them if he wished to do so[36]). After both parties had sufficiently explained their point of view and the emperor had gathered enough information to decide the case, he withdrew with his *consilium* to deliberate behind closed doors[37]). When they had reached a decision, the emperor would deliver the judgment, the *decretum*, orally in the presence of the parties[38]). The litigants could, if they so desired, obtain a written copy of the imperial decision[39]).

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[29]) Bodyguard: Philostratus, Vitae Sophistarum 2,26; audience: Millar (n. 5) 230–232 and Färber (n. 22) 120.

[30]) See for example D. 28,4,3 and the Dmeir inscription, Supplementum Epigraphicum Graecum XVII,759.

[31]) According to Pliny, an oral argument in a regular court case had taken more than forty minutes (two *clepsydrae*) in the past, but in his time, lawyers were accustomed to plead their case in a shorter amount of time (Plin. Ep. 6,2,5). The lawyer of the plaintiffs in the Dmeir inscription, Lollianus, announces that his argument will take thirty minutes, SEG XVII,759, l. 34–35.

[32]) E.g. wills, D. 36,1,76(74) pr., and contracts, D. 46,1,68,1.

[33]) E.g. copies of imperial constitutions, D. 36,1,76(74),1.

[34]) D. 22,5,3,3, which also testifies to the fact that the emperor could question witnesses during the hearing.

[35]) The Dmeir inscription makes clear that the proceedings could be conducted in Greek; see for the introduction of documents in Greek as evidence D. 36,1,76(74) pr. concerning the interpretation of a will drafted in Greek.

[36]) See for examples of imperial interferences D. 28,4,3 (debate between Marcus Aurelius and the parties present); D. 32,97 (Septimius Severus asks a defendant named Antiochos a – rhetorical? – question); and the Dmeir inscription (Caracalla refutes a procedural defense raised by the defendant).

[37]) Färber (n. 22) 84; cf. D. 28,4,3 *Antoninus Caesar remotis omnibus cum deliberasset …;* Suet. Ner. 15 *ad consultandum secederet;* Phil. Leg. 44,350.

[38]) As follows from D. 28,4,3, D. 48,7,7 and D. 32,72; also Millar (n. 5) 239.

[39]) Cf. Suet. Ner. 15.

## III. Paul and the imperial consilium

As mentioned above, the Decreta and the Imperiales Sententiae are the product of Paul's activities as a member of Severus' judicial *consilium*. Very little is known about the rest of his career. It has commonly been accepted that Paul was born around 160 CE and that he worked as a jurist and a legal author from Commodus to Alexander Severus[40]). Just like his teacher Scaevola[41]) he was a well sought-after legal adviser and in addition a prolific legal writer. At the same time Paul possibly also held several administrative positions within the imperial bureaucracy. Unfortunately, the source material on his administrative career is very scarce. The Historia Augusta, a notoriously unreliable source, mentions that Paul held the office of *a memoria* at some point in his career and even reached the position of *praefectus praetorio* during the reign of Elagabalus or Alexander Severus[42]). Since both positions have not been attested in other, more reliable sources, their attribution to Paul remains uncertain[43]). However, from the Digest it can at least be inferred that Paul was not only a part of Severus' judicial *consilium*, but that he also acted as a legal councilor (*assessor*) to Papinian when the latter served as *praefectus praetorio*[44]).

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[40]) On Paul's life and career in general see most extensively in the last 50 years Brutti (n. 1) 3 and 24–31; C.A. Maschi, La conclusione della giurisprudenza classica all'eta dei Severi, Iulius Paulus, in: ANRW II.15 (1976) 667–707; H.T. Klami, Iulius Paulus: comments on a Roman lawyer's career in the III century, in: V. Giuffrè (ed.), Sodalitas, Scritti in onore di Antonio Guarino IV, Napoli 1984, 1829–1841; D. Liebs, § 423, Iulius Paulus, in: K. Sallmann (ed.), Die Literatur des Umbruchs, Von der römischen zur christlichen Literatur 117 bis 284 n. Chr., München 1997, 150–175; W.J. Zwalve, Keizers, soldaten en juristen, The Hague 1998, 115–137; W. Kunkel, Die römischen Juristen, Herkunft und soziale Stellung, 2nd edition Köln 2001, 244–245; D. Liebs, Hofjuristen der römischen Kaiser bis Justinian, München 2010, 55–56, 68–69.

[41]) Paul refers in his works several times to Scaevola as *Scaevola noster*; see for example D. 2,14,27,2, D. 10,2,46 and D. 42,5,6,2.

[42]) Scriptores Historiae Augustae [SHA], Pesc. 7,4 and Alex. Sev. 26,5–6.

[43]) Particularly critical on the Historia Augusta as source for the lives and careers of the Severan jurists is R. Syme, Three jurists, in: idem, Roman papers II, Oxford 1979, 790–804 = Bonner Historia-Augusta-Colloquium 1968–69, Bonn 1970, 309–323; R. Syme, Fiction about Roman jurists, Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung 97 (1980) 78–104; for a discussion of the subject Brutti (n. 1) 28–31; E.S. Daalder, De rechtspraakverzamelingen van Julius Paulus, Recht en rechtvaardigheid in de rechterlijke uitspraken van keizer Septimius Severus, Den Haag 2018, 99–103.

[44]) D. 12,1,40.

At this point some remarks on the imperial *consilium* have to be made. In the past some have argued that the Roman *consilium principis* functioned as a sort of 'Kronrat' or a 'Privy Council': a council with a fixed composition, advising the emperor in all affairs of state[45]). Nowadays however, scholars tend to agree that the Roman emperors were assisted by different *consilia*[46]). This raises the question whether these councils were either composed on an ad hoc basis or consisted of several regular members. With regard to the judicial *consilium* of the emperor, two positions can be distinguished in modern scholarship. Crook has argued that even this type of *consilium*, which dealt with highly specialized subject matter on a daily basis, did not have a fixed composition. It consisted, like all other imperial *consilia*, of senatorial and equestrian advisors selected from the group of *amici principis* on an ad hoc basis[47]). Crook concedes that in practice the emperor would probably often call upon the same persons for the same type of problem, which sometimes resulted in the formation of legal or military 'committees' within the circle of *amici*[48]). However, these committees were of an informal nature and should not be regarded as institutionalized subject-specific *consilia*, according to the British scholar[49]). In contrast to Crook, Mommsen and more recently Kunkel contend that the "Gerichtskonsilium" (the judicial *consilium* of the emperor) was characterized by a fixed composition as opposed to

[45]) É. Cuq, Le conseil des empereurs d'Auguste à Dioclétien, Paris 1884, 344.

[46]) See for example Mommsen, Röm. Staatsrecht II.2 (n. 3) 903; J.A. Crook, Consilium principis, Imperial councils and councellors from Augustus to Diocletian, Cambridge 1955, 104: "THE *consilium principis* never existed"; W. Kunkel, Nachträge zum RAC, s.v. Consilium, Consistorium, Jahrbuch für Antike und Christentum 11/12 (1968/1969) 238; B. Schöpe, Der römische Kaiserhof in severischer Zeit (193–235 n.Chr.), Stuttgart 2014, 316. J.-P. Coriat, Le prince législateur, La technique législative des Sévères et les méthodes de création du droit impérial à la fin du Principat, Roma 1997, 200–245 is not completely clear on the question, but seems to assume that there existed one imperial *consilium*, consisting of several permanent members (*consiliarii* and several high officials) and a group of temporary members selected from the imperial *amici.*

[47]) Crook, Consilium principis (n. 46) 26. He is followed by J. Bleicken, Senatsgericht und Kaisergericht: eine Studie zur Entwicklung des Prozessrechtes im frühen Prinzipat, Göttingen 1962, 85–93; F. Amarelli, Consilia principum, Napoli 1983. The term *amicus principis* is not an official title nor does it refer to a specific type of position or a specific group of people within the imperial court; see Millar (n. 5) 111.

[48]) Crook, Consilium principis (n. 46) 26; for the possible existence of a 'law committee' see 81 and 113.

[49]) Crook, Consilium principis (n. 46) 113–114.

the *consilia* advising the emperor on military and political matters[50]). From the reign of Hadrian onwards jurists dominated this judicial *consilium*[51]). With regard to the Severan judicial *consilium*, classical sources attest to the presence of both jurists and distinguished citizens. For example, Cassius Dio, who lived and worked during the reign of Severus, mentions his presence at imperial court hearings as one of Severus' councilors twice in the Roman History[52]):

> Dio Hist. 76(77),17,1 … εἶτ᾽ ἐδίκαζε, χωρὶς εἰ μή τις ἑορτὴ μεγάλη εἴη. καὶ μέντοι καὶ ἄριστα αὐτὸ ἔπραττε· καὶ γὰρ τοῖς δικαζομένοις ὕδωρ ἱκανὸν ἐνέχει, καὶ ἡμῖν τοῖς συνδικάζουσιν αὐτῷ παρρησίαν πολλὴν ἐδίδου[53]).

> Dio Hist. 75(76),16,4 … ταῦτα τοῦ ῥήτορος εἰπόντος, καὶ προσέτι καὶ αὐτοῦ τοῦ Σευήρου νεανιευσαμένου πρὸς ἡμᾶς τοὺς συνδικάζοντας αὐτῷ καὶ φήσαντος ὅτι "ἀδύνατόν ἐστι κακόν τι ὑπ᾽ ἐμοῦ Πλαυτιανῷ γενέσθαι," οὐδ᾽ ἀπηνιαύτισεν αὐτὸς οὗτος ὁ Πλαυτιανός, ἀλλ᾽ ἐσφαγη καὶ αἱ εἰκόνες αὐτοῦ σύμπασαι διεφθάρησαν[54]).

At the same time, several jurists were present as well. Paul's Decreta and Imperiales Sententiae make mention of interventions by himself, Papinian, Messius and Tryphonin during the deliberations between the emperor and his advisors[55]). Papinian also mentions the presence of jurists in the *consilium* of the same emperor:

> D. 27,1,30 pr. Papinianus libro quinto responsorum. Iuris peritos, qui tutelam gerere coeperunt, in consilium principum adsumptos optimi maximique principes nostri constituerunt excusandos, quoniam circa latus eorum agerent et honor delatus finem certi temporis ac loci non haberet.

From the fact that the jurists acting as legal councilors to the emperor were excused from the administration of a *tutela*, it can be inferred that

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[50]) Mommsen, Röm. Staatsrecht II.2 (n. 3) 903–904 and 988–990; Kunkel, Nachträge (n. 46) 238–242.

[51]) Mommsen, Röm. Staatsrecht II.2 (n. 3) 988; Kunkel, Nachträge (n. 46) 241. Mommsen ibid. 989–990 contends that distinguished senators and equestrians (particularly high-ranking officials such as the *praefectus praetorio*) were also members of the imperial judicial *consilium*.

[52]) See in addition also Dio Hist. 74(75),9,2 and Her. 3,14,9, both suggesting the presence of a group of notable citizens during imperial trials.

[53]) Transl. by Cary (n. 8) vol. 9, 275: "[…] Then he would hold court, unless there were some great festival. Moreover, he used to do this most excellently; for he allowed the litigants plenty of time and he gave us, his advisers, full liberty to speak."

[54]) Transl. by Cary (n. 8) vol. 9, 235–237: "[…] Now though he made this declaration, and though, moreover, Severus himself boldly confirmed it to us who were assisting him in the trial of the case, declaring, 'It is impossible for Plautianus to come to any harm at my hands', nevertheless this very Plautianus did not live the year out, but was slain and all his images destroyed."

[55]) Paul: D. 4,4,38 pr., D. 29,2,97, D. 32,27,1 and D. 49,14,50; Papinian: D. 29,2,97 and D. 49,14,50; Messius and Tryphonin: D. 49,14,50.

they were not called upon on an ad hoc basis to advise the emperor on legal matters, but had a fixed position and functioned as a member of the imperial council over a longer period of time[56]). Indeed, they had to be at the emperor's disposal at any given moment. Consequently, we ought to wonder how the texts of Paul and Papinian, presenting us with a fixed *consilium* composed solely out of lawyers, should be reconciled with Dio's remarks on the subject. The solution might be found in a papyrus from Oxyrhynchus. P.Oxy. XLII 3019 records a case heard by Septimius Severus on 9 March 200 CE concerning a group of pig farmers. The account starts with the sentence: 'After the emperor had taken a seat in the court room with his *amici* and the persons, who were a member of his *consilium*, he ordered the representatives of the Egyptians to enter, who conveyed the communal requests'[57]). From this text it becomes clear that the judicial *consilium* advising Severus in this matter was composed of both *amici* and οἱ τὸ συμβούλειον κεκλημένοι (literal translation: those who have been called to the *consilium*). The parallel between the latter part of the text and the phrase *iuris periti in consilium principum adsumpti* in D. 27,1,30 pr. is striking and suggests that we are dealing with the same group of persons. This implies that the Severan judicial *consilium* had a twofold structure[58]). Severus made use of a 'core' *consilium* of jurists, who were at the emperor's disposal and functioned as a member of the imperial council over a longer period of time[59]). It seems likely that Paul was one of these jurists[60]). Depending on (the circumstances of) the case at hand, the emperor would add other advisers to this core *consilium* on an *ad hoc* basis. These councilors were selected from the circle of imperial *amici* and were not necessarily required to possess any legal knowledge[61]).

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[56]) Cf. Coriat (n. 46) 203–204.

[57]) P.Oxy. XLII 3019, l. 5–13 καῖσαρ κατίσας ἐν τῷ δικαστηρίῳ μετὰ τῶν φίλων καὶ τῶ\ν/εἰς τὸ συμβούλειον κεκλημένων ἐκέλευσεν εἰσκληθῆναι πρέ\σ/βεις Αἰγυπτίων τὰς κοινὰς ἀξιώσεις προφέροντας. The translation and italics are my own.

[58]) As has also been suggested with regard to the imperial *consilium* in general by Coriat (n. 45) 200–209.

[59]) Coriat (n. 46) 203–204. They can possibly be equated to the salaried *consiliarii Augusti*, who we come across in the epigraphic material from this period; see for example Corpus Inscriptionum Latinarum X 6662 = Inscriptiones Latinae Selectae 1455; see Daalder (n. 43) 93–95 on the question; on the *consiliarii Augusti* in general see most recently Liebs, Hofjuristen (n. 40) 153–156.

[60]) Cf. Coriat (n. 46) 203–204.

[61]) Coriat (n. 46) 204–238, adding a list of Severan *amici.*

## IV. Two collections of imperial judgments attributed to Paul: content, dating and transmission

### 1. An overview of the material:

*a) Form:*

This brings us back to the two Pauline collections of imperial judgments: the Decreta and the Imperiales Sententiae. Of the 38 texts transmitted through the Digest, 32 originate from the Decreta[62]), while three other texts are solely attributed to the Imperiales Sententiae[63]). The last three texts were included in both works, according to their inscription[64]). All texts concern reports on imperial court hearings, but their form and specific content differ. Most of the texts (26) do not only mention the imperial judgment, but also contain an account of the facts of the case[65]). In some reports Paul also adds a description of the arguments of one or both of the parties[66]), mentions the judgment of a lower court[67]) and sometimes describes the deliberations on the case between the emperor and his *consilium*[68]). It seems plausible that all reports were originally more or less shaped this way[69]). However, the other 12 texts strongly deviate from this layout. Four of them merely contain the judgment of the emperor without any context: D. 16,2,24 (set-off with the *fiscus*),

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[62]) D. 4,4,38 pr. and 1; D. 10,2,41; D. 14,5,8; D. 16,2,24; D. 20,5,13; D. 22,1,16 pr. and 1; D. 26,5,28; D. 26,7,53; D. 29,2,97; D. 32,27 pr., 1 and 2; D. 32,97; D. 36,1,76(74) pr. and 1; D. 40,5,38; D. 44,7,33; D. 46,1,68 pr., 1 and 2; D. 47,2,88(87); D. 48,18,20; D. 48,19,40; D. 49,14,47 pr. and 1; D. 49,14,48 pr. and 1; D. 49,14,50; D. 50,2,9 pr. and 1.

[63]) D. 35,1,113; D. 40,1,10; D. 50,16,240.

[64]) D. 28,5,93(92); D. 36,1,83(81); D. 37,14,24. The inscription of D. 37,14,24 is somewhat ambiguous: *Paulus imperialium sententiarum in cognitionibus prolatarum sive decretorum ex libris sex libro primo*. In the face of it, it seems to refer to both works.

[65]) D. 4,4,38 pr.; D. 10,2,41; D. 14,5,8; D. 22,1,16,1; D. 26,5,28; D. 26,7,53; D. 28,5,93(92); D. 29,2,97; D. 32,27 pr.; D. 32,27,1; D. 32,27,2; D. 32,97; D. 36,1,76(74) pr.; D. 36,1,76(74),1; D. 36,1,83(81); D. 37,14,24; D. 40,1,10; D. 40,5,38; D. 46,1,68,1; D. 48,18,20; D. 49,14,47 pr.; D. 49,14,47,1; D. 49,14,48 pr.; D. 49,14,48,1; D. 49,14,50; D. 50,16,240.

[66]) D. 10,2,41; D. 14,5,8; D. 26,5,28; D. 26,7,53; D. 32,97; D. 36,1,76(74),1; D. 37,14,24; D. 48,18,20; D. 49,14,47 pr.; D. 49,14,48 pr.; D. 49,14,48,1; D. 49,14,50.

[67]) D. 4,4,38 pr.; D. 10,2,41; D. 14,5,8; D. 36,1,76(74),1; D. 36,1,83(81); D. 37,14,24; D. 48,18,20; D. 49,14,48 pr.

[68]) D. 4,4,38 pr.; D. 14,5,8; D. 29,2,97; D. 32,27,1; D. 36,1,76(74),1; D. 49,14,50; D. 50,16,240.

[69]) E. Volterra, Il problema del testo delle costituzioni imperiali, in: La critica del testo, Atti del II congresso internazionale della Società Italiana di Storia del Diritto, Firenze 1971, 984.

D. 44,7,33 (survival of penalties in extraordinary procedures), D. 46,1,68 pr. (liability of sureties of magistrates) and D. 48,19,40 (relegation and deportation of two citizens)[70]). Eight other texts do not even mention the imperial decision, but only contain an abstract and general statement on a specific legal rule[71]). The most striking example is D. 35,1,113 concerning the payment of a *fideicommissum hereditatis* subject to a condition[72]):

> D. 35,1,113 Paulus imperialium sententiarum in cognitionibus prolatarum ex libris sex libro secundo. Cum filius rogatus fuisset a patre, si, antequam res suas administrare posset, decessisset, hereditatem Titio restituere, et egressus viginti annos decessisset, rescriptum est fideicommissum deberi.

On the basis of this text some have argued that the Decreta and the Imperiales Sententiae also contained other types of imperial legislation besides judgments, such as rescripts[73]). This seems, however, highly unlikely. D. 35,1,113 has been excerpted from the Imperiales Sententiae and the title of this work – *imperiales sententiae in cognitionibus prolatae* – does not leave much room for doubt on its content[74]). Has the verb *rescribere* in that case perhaps been used in a wrong or imprecise way[75])? It seems more probable that the text owes its present form to the compilers of the Digest, who did not include the complete case report of Paul, but excerpted a specific passage (in this case a citation of a *rescriptum*) from his report and added this without any context to the Digest[76]). As has been mentioned in section II, litigants were allowed to present legal documents – such as imperial *constitutiones* – during the hearing in support of their argument. In one of the cases reported by Paul in the Decreta, for example, one of the litigants recited a constitution by Hadrian during the hearing, while Severus himself mentions a *constitutio* of Marcus Aurelius while deliberating on the case with his *consilium*[77]). It

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[70]) On the different terms used to introduce an imperial constitution and, more in particular, an imperial judgment (e.g. *iubere*, *placere* and *decernere*) see Rizzi (n. 1) 32–104.

[71]) D. 4,4,38,1; D. 20,5,13; D. 22,1,16 pr.; D. 35,1,113; D. 46,1,68,2; D. 47,2,88(87); D. 50,2,9 pr. and 1.

[72]) On the legal content of this text see Daalder (n. 43) 393–398 and Brutti (n. 1) 170–171.

[73]) V. Arangio-Ruiz, Una cognitio dell'imperatore Caracalla in Siria, Bullettino dell'Istituto di Diritto Romano 49/50 (1947) 56 nt. 1.

[74]) As opposed to the title *Decretorum libri tres*: the word *decreta* can also refer to imperial constitutions in general; see for example D. 1,1,7 pr.

[75]) As has been contended by P. De Francisci, Per la storia della legislazione imperiale durante il principato, BIDR 70 (1967) 206, esp. note 55.

[76]) Volterra, Il problema (n. 69) 982–983; Rizzi (n. 1) 29.

[77]) D. 36,1,76(74),1; see section V.3 below for a discussion of this text.

seems therefore likely that D. 35,1,113 contains a reference to a rescript cited by one of the parties, (one of) the jurists or the emperor himself and included by Paul in his report[78]), which has been lifted out of its original context by the compilers of the Digest. The same modus operandi probably also underlies the present form of the other 11 texts containing only the judgment of the emperor or just an abstract statement on the law. A convincing example of this practice can be found in D. 50,2,9 pr.[79]):

> D. 50,2,9 pr. Paulus libro primo decretorum. Severus Augustus dixit: 'etsi probaretur Titius in servitute patris sui natus, tamen, cum ex libera muliere sit procreatus, non prohibetur decurio fieri in sua civitate'.

In this text Paul records that Severus said (*dixit*) that persons born to a freeborn mother (*ingenua*) and an enslaved father were also eligible to be admitted to the *ordo decurionum*. Such children were considered *spurii ingenui*, freeborn children born out of wedlock[80]), and even though they were Roman citizens in accordance with the *origo* of their mother[81]), they seem to have had a somewhat inferior position within Roman society[82]). They were, however, already eligible to be admitted to the *ordo decurionum* from the reign of Marcus Aurelius onwards, as is clear from a rescript cited by Ulpian in D. 50,2,3,2[83]). It is therefore likely that D. 50,2,9 pr. does not contain

[78]) This inference is also supported by the fact that D. 35,1,113 is formulated in a passive voice: *rescriptum est*. Comparison with the formulation of the other judgments included in the Decreta and the Imperiales Sententiae points out that Paul tends to use an active rather than a passive voice to introduce the imperial verdict in the case at issue, such as *decrevit*, *pronuntiavit, placuit* and *iussit*.

[79]) On this text see Sanfilippo (n. 1) 15–20; Daalder (n. 43) 585–591; Brutti (n. 1) 90–91; J.-P. Coriat, Les constitutions des Sévères, Règne de Septime Sévère, Roma 2014, 368–369.

[80]) Gai. Inst. 1,82, 83 and 86 in combination with C. 5,18,3. Only if the freeborn mother knew that the father was a slave, the rule of Gai. Inst. 1,86 applied, meaning that the child was born a slave. It is, however, implausible that D. 50,2,9 pr. pertains to these children; on *spurii* see recently M. Nowak, Bastards in Egypt, Social and legal illegitimacy in the Roman era, Leuven 2020, 36–69.

[81]) D. 50,1,9.

[82]) Initially, the Lex Aelia Sentia and the Lex Papia Poppaea prohibited the registration of *spurii* in the public registers of birth, cf. P. Mich. 3.169, 1.3–5. Although this rule was probably altered during the reign of Marcus Aurelius (SHA Marc. 9,7–9), the inferior social position of the *spurii* remained; see for example D. 50,2,3,2 and also J. Evans Grubbs, Making the private public: illegitimacy and incest in Roman law, in: C. Ando/J. Rüpke (eds.), Public and private in ancient Mediterranean law and religion, Berlin 2015, 125.

[83]) *Ulpianus libro tertio de officio proconsulis. Spurios posse in ordinem allegi nulla dubitatio est: sed si habeat competitorem legitime quaesitum, praeferri eum*

an imperial judgment, but an excerpt from Paul's description of the debate between the emperor and his jurists. This assumption is supported by Paul's use of the word *dicere*. In his reports the jurist does not use this word to signpost a judicial decision of the emperor, but only in his descriptions of the debate between the litigants during the proceedings or the deliberations in the *consilium*[84]).

*b) Content:*

Only one of the 37 cases excerpted from the Decreta and the Imperiales Sententiae into the Digest, D. 48,19,40, concerns criminal law. The other 36 cases all deal with matters of private law, as can be inferred from the table below.

| | |
|---|---|
| Law of obligations and property law | 13 |
| – Law of obligations | 10 |
| – Property law | 3 |
| Law of succession | 13 |
| – *Fideicommissa* | 9 |
| – Other subjects | 4 |
| Law of persons and family law | 3 |
| – Guardianship | 2 |
| – Other subjects | 1 |
| Law of procedure | 3 |
| Public/administrative law | 4 |
| Criminal law | 1 |

Most of these cases, about two thirds, concern matters of 'imperial' private law, i.e. areas of private law, (almost) exclusively developed by the emperors themselves. This predicate of course applies to all cases concerning the imperial *fiscus* and fiscal law (11 cases in total)[85]), but for example also to cases dealing with the enforceability of *fideicommissa* and codicils, exemptions from *tutela* and the procedural law of the *cognitio extraordinaria*[86]). With only one third of the cases pertaining to traditional private law, the excerpts from the Decreta and the Imperiales Sententiae seem to support the conten-

*oportet, divi fratres Lolliano Avito Bithyniae praesidi rescripserunt. cessantibus vero his etiam spurii ad decurionatum et re et vita honesta recipientur: quod utique non sordi erit ordini, cum ex utilitate eius sit semper ordinem plenum habere.*

[84]) See for this use of *dicere* in the Decreta: D. 4,4,38 pr.; D. 10,2,41; D. 14,5,8; D. 26,5,28; D. 26,7,53; D. 29,2,97; D. 32,97; D. 36,1,76(74),1; D. 37,14,24; D. 48,18,20; D. 49,14,47 pr.; D. 49,14,48,1.

[85]) D. 16,2,24; D. 22,1,16,1; D. 40,1,10; D. 46,1,68,1; D. 49,14,47 pr. and 1; D. 49,14,50; D. 28,5,93(92); D. 32,27,1; D. 49,14,48 pr. and 1.

[86]) *Fideicommissa* and codicils, private citizens (7 cases): D. 32,27 pr. and 2; D. 35,1,113; D. 36,1,76(74) pr. and 1; D. 36,1,83(81); D. 40,5,38; *fideicommissa* and the *fiscus* (3 cases): D. 32,27,1 and D. 49,14,48 pr. and 1; exemption from *tutela* (1 case): D. 26,5,28; procedural law of the *cognitio extraordinaria* (1 case): D. 44,7,33.

tion that because of the extraordinary nature of the imperial court procedure, the emperor tended to show some restraint in hearing cases concerning traditional private law. In addition, it should be noted that most of the cases from the Decreta and the Imperiales Sententiae that do concern matters of traditional private law probably came to the emperor's court by means of an appeal against the judgment of an imperial official or a *praeses provinciae* appointed by the emperor[87]).

In nine of the reports Paul explicitly mentions the fact that the case was heard by the emperor on appeal[88]). From this we cannot, however, infer that all the other cases were dealt with by the emperor as a court of first instance: as has been mentioned above, twelve reports do not contain a description of the proceedings at all, while the other 16 reports simply do not give any information on the subject. Only in one case, i.e. D. 28,5,93(92), it can be established with a fair amount of certainty, based on the wording of the text, esp. the words '*Pactumeia Magna* [i.e. the plaintiff – ESD] *supplicavit imperatores nostros et cognitione suscepta*, …', that the case was probably heard by the emperor in first instance[89]). When describing an appeal case, Paul sometimes mentions the judge of first instance. We encounter appeals against the judgments of the *praefectus urbi* (D. 4,4,38 pr.), the *praefectus annonae* (D. 14,5,8), a *iudex privatus* (D. 10,2,41 = D. 37,14,24), a *praeses provinciae*

[87]) D. 4,4,38 pr. (*praefectus urbi*); D. 14,5,8 (*praefectus annonae*); D. 32,97 (unknown *praeses provinciae*). An exception, as has already been mentioned above, is D. 10,2,41 = D. 37,14,24, which does contain an appeal against the judgment of a *iudex privatus*. The other four texts concerning matters of traditional private law, D. 20,5,13, D. 46,1,68,2, D. 47,2,88(87) and D. 50,16,240, do not mention the court of first instance.

[88]) D. 4,4,38 pr.; D. 10,2,41 = D. 37,14,24; D. 14,5,8; D. 26,5,28; D. 32,97; D. 36,1,76(74),1; D. 36,1,83(81); D. 48,18,20; D. 49,14,48 pr.

[89]) Cf. Volterra, Il problema (n. 69) 987; Palazzolo, Potere imperiale (n. 13) 66 nt. 127. Sanfilippo (n. 1) 67 argues that the emperor heard the case of Pactumeia Magna on appeal. However, the wording of the text gives no cause for such an assumption. Moreover, the high social status of the persons involved supports the assumption that the emperor heard this case as a judge of first instance. The plaintiff in this case, a woman named Pactumeia Magna, was the daughter of man named Pactumeius Magnus, as Paul relates. This Pactumeius Magnus can be identified as Titus Pactumeius Magnus, an *eques* who held the position of *praefectus Aegypti* from 176 until 179 CE (Prosopographia Imperii Romani² P 39); see also Sanfilippo (n. 1) 67; Rizzi (n. 1) 350 nt. 264; Coriat (n. 46) 300; Liebs, Hofjuristen (n. 40) 53 nt. 204; Brutti (n. 1) 128. He was raised to the rank of senator by Commodus and held the office of *consul* in 183, but was murdered by Commodus in 190 in the aftermath of the downfall of Cleander, according to the Historia Augusta (SHA Comm. 7,6).

(D. 32,97), the *proconsul* of Achaia (D. 36,1,83(81)) and imperial *procuratores* (D. 48,18,20 and D. 49,14,48 pr.), illustrating the broad institutional and geographical scope of the imperial judicial competence.

The texts from the Decreta and the Imperiales Sententiae contain 41 identifiable litigants. As has been mentioned above, in 11 cases the *fiscus* was one of the parties involved. Of the other 30 remaining litigants, 20 are men and 10 are women, which implies that about 30 % of the litigants in the imperial court were female. This number is strikingly high. In her study on the general course of affairs in the Roman law courts, Bablitz for example concludes on the basis of 82 cases from all types of Roman courts derived from literary sources that approximately 19 % of the litigants mentioned was of the female sex[90]). With regard to the social status of the litigants, a prosopographical analysis of the cases included in the Decreta and the Imperiales Sententiae seems to confirm the general assumption voiced in modern literature that a large part of the cases heard by the emperor concerned members of the elite. For example, the protagonist of D. 28,5,93(92), Pactumeia Magna, was probably the daughter of the former *praefectus Aegypti* and consul Titus Pactumeius Magnus, while D. 49,14,50 most likely concerned a high-ranking imperial official named Valerius Patruinus[91]). Paul mentions, however, also several less traditional litigants, such as (female) minors (D. 4,4,38 pr. and D. 36,1,76(74),1)[92]), a veteran (D. 26,7,53[93])), the heir of a simple *colonus*

[90]) Bablitz (n. 22) 72. It should be noted that Bablitz herself is hesitant about this percentage. She suggests that the real percentage of female litigants in the Roman law courts might even have been lower.

[91]) For the prosopographical analysis of D. 28,5,93(92) see note 89; for the identification of the Valerius Patruinus of D. 49,14,50 with the imperial procurator (PIR² V 160) see Liebs, Hofjuristen (n. 40) 53 nt. 204; Rizzi (n. 1) 249 nt. 311; Brutti (n. 1) 154; W.J. Zwalve, Valerius Patruinus' case, Contracting in the name of the emperor, in: L. de Blois/P. Erdkamp/O.J. Hekster (eds.), The representation and perception of Roman imperial power, Amsterdam 2003, 157 nt. 1; see for other examples of senatorial or equestrian disputes the discussion of D. 4,4,38 pr. below; in addition Daalder (n. 43) 226–230 (D. 10,2,41 = D. 37,14,24 Camelia Pia), 340–341 (D. 29,2,97 Clodius Clodianus), 363–365 (D. 32,27,1 Pompeius Hermippus), 519–522 (D. 49,14,47 pr.) and 555–557 (D. 49,14,48,1 Cornelius Felix); modern literature on this topic Coriat (n. 46) 46; Millar (n. 5) 535; Bablitz (n. 22) 74; T. Honoré, Emperors and lawyers, 2nd edition Oxford 1994, 21, who argues that the costs of an appeal to the emperor were too high for most inhabitants of the empire.

[92]) See in addition D. 26,5,28 and D. 26,7,53, which also concern the interests of minors.

[93]) For the prosopography of this text and its protagonist Aemilius Dexter see Daalder (n. 43) 315–318.

(D. 32,27,2), freedmen (D. 40,1,10, D. 32,97 and perhaps D. 46,1,68,1[94])) and even a female slave (D. 40,5,38).

2. Dating:

The cases from the Decreta and the Imperiales Sententiae are traditionally attributed to the reign of Septimius Severus[95]). Since Paul mentions Papinian as a member of Severus' judicial council and the imperial *procurator* Valerius Patruinus as a litigant in one of the cases the *terminus ad quem* for both works can be established with a reasonable amount of certainty. Given that Papinian and Patruinus were probably both murdered by Caracalla in the aftermath of the assassination of his brother Geta[96]), the *terminus ad quem* for both works is 211 or 212 CE. This dating is supported by the fact that Severus is referred to exclusively as *imperator* (and not as *divus*), which suggests a publication date before his death[97]). It is much harder to establish a *terminus a quo* for Paul's works based on the limited information provided by his reports. From the fact that Marcus Aurelius is referred to as *divus Marcus* in D. 36,1,76(74),1 and D. 40,1,10 one can gather that the court cases included in the Decreta and the Imperiales Sententiae must have taken place after his reign. At the same time, texts from both works mention *imperatores nostri*, a phrase that, based on the foregoing, can only refer to Septimius Severus and Caracalla[98]). This means that at least part of the cases reported by Paul occurred during their joint reign from 198 until 211 CE, fixing the publication date in the period after 198, but before 211 CE.

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[94]) On the social status of the plaintiff of D. 46,1,68,1, Petronius Thallus, see Daalder (n. 43) 474–475.

[95]) Modern scholarship traditionally dates both works between 198 and 211 CE, see for example Lenel I (n. 2) 959; Sanfilippo (n. 1) 8 (only the Decreta); Rizzi (n. 1) 109–110; Brutti (n. 1) 45 (although not completely clear); H. Fitting, Alter und Folge der Schriften römischer Juristen von Hadrian bis Alexander, 2nd edition Halle a. S. 1908, 93; P. Krüger, Geschichte der Quellen und Litteratur der römischen Rechts, München 1912, 236; A. Berger, Paulys Realencyclopädie der Classischen Altertumswissenschaft X.1 (1918) s.v. Iulius Paulus, 722.

[96]) Cf. SHA Sev. 21,6 and 8 (Papinian) and Car. 4,1–2 (Papinian and Patruinus).

[97]) Roman legal writers tended to use the word *imperator* when referring to a living and reigning emperor; on the use of imperial titulature for the dating of Roman legal writings see Th. Mommsen, Die Kaiserbezeichnung bei den römischen Juristen, in: idem, Juristische Schriften II, Berlin 1905, 155–171 and esp. 156–157. On p. 170 Mommsen explicitly mentions the Decreta, contending that they were published during the reign of Severus.

[98]) D. 28,5,93(92) and D. 49,14,48 pr.; cf. Brutti (n. 1) 45.

In addition to this, the first book of the Decreta contains a reference to *Severus Augustus* (D. 50,2,9 pr.). Since a dating during the reign of Alexander Severus is impossible because of the *terminus ad quem* established above, it is usually assumed that the phrase *Severus Augustus* refers to Septimius Severus as well[99]). Because the references to multiple emperors only occur in the second and third book of the Decreta, it is tempting to assume that it was composed in a chronological order[100]). This would imply that the first book of the Decreta contained decisions from the years 193 to 198, i.e. Severus' sole reign, while the second and third book were made up of decisions from his joint reign with Caracalla from 198 until 211. However, as becomes abundantly clear from Lenel's Palingenesia, the arrangement of the Decreta was probably based on the order of the Edict[101]), which makes it impossible for the first book to only contain decisions of the first years of Severus' reign. This does, however, not rule out the possibility that some of the decisions included in the Decreta and the Imperiales Sententiae date back to that period. Even though the first years of Severus' reign were characterized by the civil wars against Pescennius Niger (193–194 CE) and Clodius Albinus (197 CE)[102]), figures on the Severan rescript practice show that he issued on average the same amount of rescripts during these years as he did in the remainder of his reign[103]). There is therefore no reason to assume that he was less productive as an administrator and legislator during this period. Although his judicial duties might have suffered under his military activities, it is nonsensical to assume that he did not hear any cases at all. This brings us to the conclusion that some of the cases and court hearings included in the Decreta and the

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[99]) The words *Severus Augustus* are sometimes used in reference to Caracalla, as had been argued for Papinian by U. Babusiaux, Papinians Quaestiones: zur rhetorischen Methode eines spätklassischen Juristen, München 2011, 5–6. Although Paul does not refer to Caracalla in this way in any of his other works, it is tempting to assume that the *Severus Augustus* of D. 50,2,9 pr. is indeed Caracalla. This does not necessarily change the dating of the Decreta and the Imperiales Sententiae proposed in this article, but would – more interestingly – imply that Caracalla actually took part in the deliberations on the cases heard by his father (and himself?), see sec. IV. 1. a.

[100]) Cf. Sanfilippo (n. 1) 9.

[101]) Lenel I (n. 2) 959–965 and esp. nt. 1; in the end Sanfilippo (n. 1) 9–10; F. Schulz, History of Roman legal science, Oxford 1946, 154; for a schematic overview of the order of treatment of the subjects see Daalder (n. 43) 115–116.

[102]) On the subject see A.R. Birley, Septimius Severus, The African emperor, London 1988, 108–128.

[103]) For the exact numbers see Coriat (n. 46) 143–144.

Imperiales Sententiae possibly took place during the first part of Severus' reign, that is, from 193 until 197 CE[104]).

3. Transmission:

The transmission of the collections of imperial judgments attributed to Paul is a complicated – and consequently much debated – matter. This paragraph only intends to give a succinct overview of the *status quaestionis* without getting into the philological debate any further[105]). As early as the 16th century, the French humanist Cujas argued that all the texts included in the Digest originated from the same work to which both titles referred[106]). Although this work consisted of six books, the compilers only used the first three of them, according to Cujas[107]). His theory was successfully contested in the 19th century by Bluhme (in a footnote) in his authoritative article on the compilation and structure of the titles of the Digest, the "Massentheorie"[108]). In contrast to Cujas, Bluhme held that the 38 texts in the Digest originated from two different physical works, which have been included in the Index Florentinus under two different titles; cf. Ind. Flor. XXV,10 decreton βιβλία τρία ('Three books of decrees') and XXV,15 sentention ἤτοι facton βιβλία ἕξ ('Six books of imperial decisions'[109])). On the basis of the placement of the texts excerpted from both works within the titles of the Digest he contended that the works also belonged to two different 'Massen': the Decreta were a part of the Papinianusmasse (BK Ordo nr. 222[110])), whereas the Imperiales

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[104]) Cf. Coriat (n. 46) 95; E. Koops, Moschis' case, On the execution of fiscal debts and the beneficium excussionis, TvR 80 (2012) 284.

[105]) A complete discussion can, however, be found in Daalder (n. 43) 118–140; see for some additional considerations also U. Babusiaux's review thereof, ZRG RA 138 (2021) 683–685.

[106]) Cujas, Observationes II 26 *Iidem namque sunt decretorum et imperialium sententiarum in cognitionibus prolatarum libri.*

[107]) Ibid. *Ex his vero sex libris, usus est Iustinianus trib. duntaxat prioribus.*

[108]) F. Bluhme, Die Ordnung der Fragmente in den Pandectentiteln, Ein Beitrag zur Entstehungsgeschichte der Pandecten, Zeitschrift für Geschichtliche Rechtswissenschaft 4 (1820) 313 nt. 30. It should be noted that Bluhme was not the first to contend that Paul published two collections of imperial *decreta*; see A. Schulting, Jurisprudentia vetus ante-justiniana, Leipzig 1737, 211–213.

[109]) See for the use of the word *factum* (plur. *facta*) in reference to imperial legislation for example SHA Macr. 13,1. The words 'ἤτοι facton' were probably added by the composer of the index to distinguish the Imperiales Sententiae from the Sententiarum libri V of Paul, referred to as 'sententionβιβλία πέντε' in the index; cf. Krüger, Geschichte (n. 95) 236; Sanfilippo (n. 1) 4; Schulz, Geschichte (n. 3) 182 nt. 1.

[110]) On the Bluhme-Krüger Ordo Librorum [BK Ordo] see H. Krüger, Römis-

Sententiae were included in the Appendixmasse (BK Ordo nr. 263)[111]). He attributed both works to Paul himself. Most 19th- and 20th-century romanists have shared Bluhme's view, although the exact relationship between the works was still subject to debate[112]). Some contended that the Decreta were a younger reworking of the Imperiales Sententiae, while others argued that the Imperiales Sententiae were a more elaborate, second edition of the Decreta[113]).

Halfway through the 20th century an alternative theory on the relationship between the two works was formulated by Schulz[114]). Just like Bluhme, Schulz assumed that the compilers possessed two physical works, which were assigned to two different Massen. He rejects, however, the idea that Paul himself published two separate collections of imperial judgments, but argues that both works were abridgements, *epitomae*, of one Pauline original. His argument is without a doubt convincing with respect to the Imperiales Sententiae[115]). On the basis of the inscriptions of

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che Juristen und ihre Werke, in: Studi in onore di Pietro Bonfante nel XL anno d'insegnamento II, Milano 1930, 302–337.

[111]) Bluhme (n. 108) 315 nt. 30; also Krüger, Geschichte (n. 95) 236; Sanfilippo (n. 1) 7; Schulz, Geschichte (n. 3) 183; F. Wieacker, Römische Rechtsgeschichte II, München 2006, 141. The attribution of the Decreta to the Papinianusmasse has gone undisputed. The attribution of the Imperiales Sententiae to the Appendixmasse has been doubted by D. Mantovani, Digesto e masse Bluhmiane, Milano 1987, 109–110. In short, he argues that the Imperiales Sententiae did not belong to any of the Massen. According to him, the compilers compared the texts excerpted from the Decreta and the Imperiales Sententiae when revising the titles of the Digest and, accordingly, inserted excerpts from the Imperiales Sententiae where required. His view is, however, rejected by D.J. Osler, Following Bluhme: a note on Dario Mantovani, 'Digesto e masse Bluhmiana', Iura 39 (1988) 147; W. Kaiser, Digestenentstehung and Digestenüberlieferung, Zur neueren Forschung über die Bluhme'schen Masse und der Neuausgabe des Codex Florentinus, ZRG RA 108 (1991) 339–340; T. Honoré, Justinian's Digest: character and compilation, Oxford 2010, 114–115; for an extensive treatment of the debate see Daalder (n. 43) 122–126.

[112]) See for example Lenel I (n. 2) 654 nt. 1; Fitting (n. 95) 93; Krüger, Geschichte (n. 95) 235–236; Berger (n. 95) 722; Sanfilippo (n. 1) 2–9; Volterra, Il problema (n. 69) 980–981; Rizzi (n. 1) 110–120.

[113]) First view Schulting (n. 108) 212; Bluhme (n. 108) 315 nt. 30; second view Lenel I (n. 2) 959 nt. 1; Berger (n. 95) 722 and 726; Brutti (n. 1) 43–45.

[114]) Schulz, History (n. 101) 154 and 340 and Schulz, Geschichte (n. 3) 181–183. His theory has been generally accepted by most modern scholars, see for example Maschi (n. 40) 677; Liebs, § 423 (n. 40) 172; G. Scherillo, Note critiche su opera della giurisprudenza romana, Iura 1 (1950) 213 nt. 11; T. Honoré, Tribonian, London 1978, 281; idem, Emperors (n. 91) 20.

[115]) See, besides the authors cited in n. 114, also Rizzi (n. 1) 117, Brutti (n. 1) 44.

the texts that have been derived from this work and in particular the use of the phrase *ex libris sex* in these inscriptions (e.g. *'Paulus imperialium sententiarum in cognitionibus prolatarum ex libris sex libro primo/secundo*' – my emphasis), one can safely assume that this work is an *epitome*[116]). For starters, a normal Digest inscription only contains the number of the book from which the text has been derived and does not mention the total number of books of the work, e.g. D. 1,1,1 *Ulpianus libro primo institutionum*[117]). Moreover, we know for a fact that the compilers did not possess an original and complete copy of every work mentioned in the Index Florentinus and excerpted into the Digest. In some cases, they just had an abridgment of the original work, often compiled by a later jurist. One example are the Digesta of Republican jurist Alfenus Verus, of which only an epitome by Paul had survived, according to the inscriptions of the texts excerpted from this work[118]). Another example are the Posteriorum libri X of Labeo, included in the Index Florentinus under the title 'posteriorum βιβλία δέκα', but were only available to the compilers in the form of an epitome compiled by Iavolenus Priscus, as becomes clear from the inscriptions of Digest texts excerpted from this work: 'Labeo libro … posteriorum a Iavoleno epitomatorum' and 'Iavolenus libro … ex posterioribus Labeonis'. Also note the use of the word *ex* in the second type of inscription[119]). From the inscriptions of the texts of the Imperiales Sententiae included in the Digest, we can infer that the original work of Paul probably consisted of six books and was most likely entitled 'Imperiales sententiae in cognitionibus prolatae'. Since all the excerpts from the Im-

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[116]) Cf. Schulz, Geschichte (n. 3) 182; Brutti (n. 1) 43–45.

[117]) Schulz, Geschichte (n. 3) 182. The deviating character of this phrase is underlined by the Codex Florentinus, where three of the six inscriptions mentioned above contain a corrected writing error in the word *libris*, which can probably be explained by the fact that normal inscriptions only include the word *libro*: D. 28,5,93(92) has *libri* with a subsequently added '*s*'. D. 35,1,113 reads *liberis* with a deletion of the '*e*'; and D. 50,16,240 used to read *libro*, but the *o* has been replaced by '*is*'; cf. A. Corbino/B. Santalucia, Justiniani Augusti Pandectarum Codex Florentinus, Firenze 1988.

[118]) Cf. Ind. Flor. IV,1: 'Digeston βιβλία τεσσαράκοντα' vs. '*Paulus libro … epitomatorum Alfeni digestorum*' or '*Alfenus* (*Varus*) *libro … (digestorum) a Paulo epitomatorum*' in the Digest.

[119]) More in general, the word *ex* is often used in the title or inscription of a work to mark the fact that the work in question is either an abridgment or a commentary (or both) made by one jurist of or on the work of another; see for example Iulian's Ex Minicio libri VI and Iavolenus' Ex Cassio libri XV and Ex Plautio libri V.

periales Sententiae have been derived from the first or the second book of the epitome, it seems likely that it consisted of two books[120]).

The inscriptions of the Decreta, on the other hand, lack similarly clear indications to assume we are dealing with an abridgement; and even Schulz himself is therefore less secure on its nature[121]). He bases his argument regarding the Decreta chiefly on the differences in form and content between the *leges geminatae* D. 10,2,41 and D. 37,14,24, two texts from the Digest that deal with the same case on the *divisio* of *liberti* and *alimenta*, one of which originates from the Decreta (D. 10,2,41) and the other from the Imperiales Sententiae (D. 37,14,24)[122]). For the convenience of the reader the texts have been juxtaposed below, the textual differences being underlined for emphasis.

| D. 10,2,41 | D. 37,14,24 |
|---|---|
| Paulus libro primo decretorum. Quaedam mulier ab iudice appellaverat, quod diceret eum de dividenda hereditate inter se et coheredem non tantum res, sed et libertos divisisse et alimenta, quae dari testator certis libertis iussisset: nullo enim iure id eum fecisse. Ex diverso respondebatur consensisse eos divisioni et multis annis alimenta secundum divisionem praestitisse. Placuit standum esse alimentorum praestationi: sed et illud adiecit nullam esse libertorum divisionem. | Paulus imperialium sententiarum in cognitionibus prolatarum sive decretorum ex libris sex libro primo. Camelia Pia ab Hermogene appellaverat, quod diceret iudicem de dividenda hereditate inter se et coheredem non tantum res, sed etiam libertos divisisse: nullo enim iure id eum fecisse. Placuit nullam esse libertorum divisionem: alimentorum autem divisionem a iudice inter coheredes factam eodem modo ratam esse. |

As the table above shows, there are three differences between both texts. First, D. 10,2,41 has been anonymized, while D. 37,14,24 mentions the name of one of the litigants (Camelia Pia) and the *iudex* (Hermogenes). Second, several passages of D. 10,2,41, mainly concerning the division of the *alimenta*, have not been included in D. 37,14,24. And third, the judgment is formulated in a somewhat different way in both texts. Schulz argues that these differences in the form of the texts were caused by the fact that they were abridged by two different epitomators who might have had different interests and working methods[123]). However, they might also have been caused by an editorial inter-

[120]) Scherillo (n. 114) 213; Schulz, Geschichte (n. 3) 183; Liebs, § 423 (n. 40) 172; Honoré, Emperors (n. 91) 20.

[121]) Cf. Schulz, Geschichte (n. 3) 182.

[122]) For a discussion of the legal content of both texts see Sanfilippo (n. 1) 30–34; Wankerl (n. 1) 193–202; M. Peachin, The case of the heiress Camilia Pia, Harvard Studies in Philology 96 (1994) 301–341; Brutti (n. 1) 105–113; Daalder (n. 43) 217–239 with further references in nt. 1.

[123]) Cf. Schulz, Geschichte (n. 3) 183.

ference of the compilers of the Digest, who adapted and reshaped the texts in accordance with the subject and needs of the titles of which they are a part (D. 10,2 on the *actio familiae erciscundae* and D. 37,14 on the *ius patronatus* respectively)[124]). We can therefore conclude that the differences between the *leges geminatae* from Decreta and the Imperiales Sententiae do not provide us with a definite answer for the question whether the Decreta should be regarded as an epitome as well[125]).

Consequently, it is hard to make any statement with a reasonable amount of certainty based solely on the philological evidence provided by the Digest on whether Paul compiled one collection of imperial judgments of which two epitomized versions survived in Justinian's age (or perhaps one original and one epitome) or whether the jurist himself published two separate works during his own lifetime. However, as will be demonstrated in the sections below, the unconventional content of both works gives cause to assume that Paul probably only published one collection of judgments of Septimius Severus.

## V. Motives for the publication of Paul's collection: quod placuit principi, legis habet vigorem

### 1. The traditional view on the publication of Paul's collection:

As has been mentioned in the introduction of this article, Paul's collection of imperial judgments is a unique phenomenon in Roman legal literature. The publication of compilations of imperial judicial decisions, or even more in general, the legal enactments of the emperor, was not part of the traditional genre of legal writing during the Principate[126]). Instead of creating

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[124]) As has been proposed by Rizzi (n. 1) 118–119 and J.A. Ankum, Paulus D. 49,14,18 pr., De beslissing in hoger beroep van keizer Septimius Severus over de nalatenschap van Statius Florus, in: B.C.M. Jacobs (ed.), Een rijk gerecht: opstellen aangeboden aan prof. mr. P.L. Nève, Nijmegen 1998, 2 nt. 9. Justinian had given the compilers of the Digest the authority to remove inaccuracies and superfluous passages from the original juristic texts and had also allowed them to supplement and embellish the texts if needed, cf. Const. Deo Auct. 7; on this aspect of their activities see most recently V. Wankerl, Der Kaiser als Richter: Überlegungen zu D. 4,2,13 / D. 48,7,7 (Call. 5 de cogn.), ZRG RA 129 (2012) 577–587; W. Kaiser, Justinian and the Corpus Iuris Civilis, in: D. Johnston (ed.), The Cambridge companion to Roman law, Cambridge 2016, 128–130.

[125]) Brutti (n. 1) 43–45 contends that the compilers had an original version of the Decreta at their disposal.

[126]) Mommsen, Röm. Staatsrecht II.2 (n. 3) 875 and 913; Schulz, Geschichte (n. 3) 180–181.

separate compilations of imperial enactments, the Roman jurists preferred to incorporate important imperial legal decisions in their works, making them usable for legal practitioners by providing them with a commentary and connecting them to previous (imperial) legislation and existing law on the same subject[127]). Of course, there are some exceptions. Some have contended that the so-called Decreta Frontiana of the jurist Titius Aristo, mentioned in D. 29,2,99 by Pomponius, contained a collection of judgments by either Domitian or the senate[128]). It has, however, recently been argued convincingly that this work probably contained a collection of observations and notes (*notae*) of Aristo on several judicial decisions of a consul named Fronto, Frontonianus or Frontinus[129]). The Constitutionum libri XX of the Antonine jurist Papirius Justus did contain a collection of imperial constitutions, judging from its title[130]). It is hard to say anything with certainty about the exact contents of this work, since only eighteen texts excerpted from three of its books have been included in the Digest. All of these texts are rescripts promulgated by Marcus Aurelius and Lucius Verus[131]). However, whether this work consisted solely of imperial *rescripta* or also contained imperial *decreta* and other types of imperial legislation, as its title seems to suggest, must remain a mystery[132]).

The unique character of the Decreta and the Imperiales Sententiae poses the question why Paul decided to create such an unusual piece of legal writing. Modern scholarship has not often expressed an opinion on this subject. However, the authors that do (indirectly) deal with this question, gather from the fact that Roman jurists awarded general force of law to the *decreta* of

[127]) Schulz, Geschichte (n. 3) 181; Coriat (n. 46) 635–663; A.J.B. Sirks, Making a request to the emperor: rescripts in the Roman Empire, in: L. de Blois (ed.), Administration, prosopography and appointment policies in the Roman Empire, Amsterdam 2001, 128.

[128]) Cf. D. 29,2,99; Domitian: Th. Mommsen, Sextus Pomponius, Zeitschrift für Rechtsgeschichte 7 (1868) 475–476 seemingly followed by Schulz, Geschichte (n. 3) 181; senate: Lenel I (n. 2) 59.

[129]) Zwalve (n. 3).

[130]) On this work see E. Volterra, L'ouvrage de Papirius Justus, constitutionum libri xx, in: J.A. Ankum/R. Feenstra/W.F. Leemans, Symbolae iuridicae et historicae Martino David dedicatae I, Leiden 1968, 215–223; O. Licandro/N. Palazzolo, Papirius Justus Constitutionum Libri XX, Roma 2021.

[131]) Cf. Lenel I (n. 2) 947–952.

[132]) Lenel I (n. 2) 947, Schulz, Geschichte (n. 3) 179, Volterra, L'ouvrage (n. 130) 215–223 and Zwalve (n. 3) 391 nt. 131 assume from the evidence that it only contained rescripts.

the emperor (cf. Gai. Inst. 1,5 and D. 1,4,1,1, cited infra) that either Paul or the emperor himself wanted them to be published for the benefit of the legal practice and thereby enable litigants, lawyers and judges to cite and/or apply these imperial decisions in other procedures in the lower courts[133]). Such an exercise seemed imperative, since the judgments of the emperor were probably not officially published nor disseminated by the imperial administration itself[134]). In principle the only way to take note of the legal content of an imperial *decretum* seems to have been to either be present at the hearing or to request a copy of the judgment from the imperial archives afterwards[135]). The fact that the jurist also mentions the arguments of the litigants and the opinions and solutions put forward by the legal advisors of the emperor is usually regarded by these authors as an attempt by Paul to offer lower judges and other legal professionals a complete picture of all the possible arguments and solutions in similar cases[136]).

2. The legal force of imperial judgments:

The argument of the supporters of the view described above hinges on the assumption that the judicial decisions of the emperor had general force of law. The exact legal force of imperial judgments therefore first deserves some further consideration. There is no denying that some of the classical jurists explicitly award to the *constitutiones principis*, including the judicial

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[133]) Maschi (n. 40) 677–678; Peachin (n. 122) 333–341; Rizzi (n. 1) 133. A more nuanced view can be found in U. Babusiaux, Legal writing and legal reasoning, in: C. Ando/P.J. du Plessis/K. Tuori, The Oxford handbook of Roman law and society, Oxford 2016, 176–186, which will be discussed below.

[134]) F. von Schwind, Zur Frage der Publikation im römischen Recht, Mit Ausblicken in das altgriechische und ptolemaïsche Rechtsgebiet, München 1940, 164–166; A.A. Schiller, The copy of the *apokrimata* subscripts, Bulletin of the American Society of Papyrologists 14 (1977) 75–82. W. Turpin, Apokrimata, decreta, and the Roman legal procedure, BASP 18 (1981) 152 argues that the *decreta* of the emperor were published in the same way as the imperial *rescripta* by posting the judgments outside of the emperor's (temporary) residence. This view is, however, not supported by the source material.

[135]) See for example CIL III 411 (= ILS 338 = Fontes Iuris Romani Antejustiniani I², 435f.), in which Antoninus Pius grants permission to Sextilius Acutianus to make a copy of a *sententia* of Hadrian. In addition, it should be noted that private citizens and municipalities sometimes made public imperial *decreta* containing a decision in their favor by means of a (monumental) inscription. Several examples of this practice are mentioned by Babusiaux in her review (n. 105) 686 nt. 44; see in addition the Dmeir inscription, SEG XVII 759.

[136]) Liebs, Hofjuristen (n. 40) 55–56; Rizzi (n. 1) 133.

decisions of the emperor, the same legal force as that of the traditional *leges* promulgated by the *comitia*; see for example the Institutiones of Gaius:

> Gai. Inst. 1,5 Constitutio principis est, quod imperator decreto vel edicto vel epistula constituit. nec umquam dubitatum est, quin id legis vicem optineat, cum ipse imperator per legem imperium accipiat.

According to Gaius, all of the constitutions of the *princeps*, whether they were shaped in the form of a judgment (*decretum*), an edict (*edictum*) or an imperial letter (*epistula*), had force of law (*legis vicem optineat*). The same principle can be found in the first book of Ulpian's Institutiones:

> D. 1,4,1 pr.–1 Ulpianus libro primo institutionum. Quod principi placuit, legis habet vigorem: utpote cum lege regia, quae de imperio eius lata est, populus ei et in eum omne suum imperium et potestatem conferat. 1. Quodcumque igitur imperator per epistulam et subscriptionem statuit vel cognoscens decrevit vel de plano interlocutus est vel edicto praecepit, legem esse constat. haec sunt quas vulgo constitutiones appellamus.

*Quod principi placuit, legis habet vigorem*, according to Ulpian[137]). Ulpian is even more precise than Gaius when it comes to the different shapes an imperial legal enactment could take. D. 1,4,1,1 mentions imperial letters (*epistulae*), short answers to petitions (*subscriptiones*), decisions issued after a judicial investigation (*decreta*), decisions *de plano* (*interlocutiones de plano*) and edicts (*edicta*) as sources of law (*legem esse constat*)[138]). Modern scholarship has generally accepted that during the Principate the imperial influence on the formation of the law was mainly based on two types of these enactments, namely the *rescripta* (i.e. *subscriptiones* and *epistulae*) and, to a lesser extent, the *decreta* of the emperor[139]). Although rescripts were, in principle, nothing more than a legal opinion by the emperor in an individual case, they often contained authoritative interpretations of the law and could in that case be regarded as binding precedents as long as they were formulated in a sufficiently general way or contained a clear new le-

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[137]) Cf. D. 1,2,2,11 (Pomponius).

[138]) In modern literature the *mandata principis* are often bracketed together with the *epistula, subscriptiones, edicta* and *decreta* of the emperor. Their legal force has, however, even more been the subject of debate; on the question see Coriat (n. 46) 74–77; V. Marotta, Mandata principum, Torino 1991, 69–87; J.H.A. Lokin, Mandata principis, Ars Aequi 62 (2013), 958–959.

[139]) Coriat (n. 46) 77; on the minor importance of *edicta* see Mommsen, Röm. Staatsrecht II.2 (n. 3) 906; Millar (n. 5) 253; Coriat (n. 46) 114–142. The imperial preference for these legislative enactments seems to be in line with Millar's general theory on the style of government of the emperors during the Principate (the model of 'petition-and-response') see Millar (n. 5) 6–7; for a critical discussion of the model see J. Bleicken, Zum Regierungsstil des römischen Kaisers, Eine Antwort auf Fergus Millar, Wiesbaden 1982.

gal rule[140]); see for example D. 47,12,3,5, a text excerpted from Ulpian's Ad edictum praetoris:

> D. 47,12,3,5 Divus Hadrianus rescripto poenam statuit quadraginta aureorum in eos qui in civitate sepeliunt, quam fisco inferri iussit, et in magistratus eadem qui passi sunt, et locum publicari iussit et corpus transferri. quid tamen, si lex municipalis permittat in civitate sepeliri? post rescripta principalia an ab hoc discessum sit, videbimus, quia generalia sunt rescripta et oportet imperialia statuta suam vim optinere et in omni loco valere.

The text concerns several rescripts issued by Hadrian, providing that persons who bury a corpse within the city walls will be fined a penalty of forty gold pieces and that the place of burial should be expropriated and the corpse should be moved. Ulpian poses the question whether these imperial rescripts could be disregarded when a Lex *municipalis* allowed burial within the city. His answer is clear: because these rescripts are of a general nature (*quia generalia sunt rescripta*), they have force of law (*oportet imperialia statuta suam vim optinere*) and should apply anywhere (*in omni loco valere*). From the fact that Ulpian presents the question whether the rescripts of Hadrian should be followed as a debatable matter (*post rescripta principalia an ab hoc discessum sit, videbimus*) and subsequently adds the explicit remark '*quia generalia sunt rescripta*' in his answer, we can infer that the general legal force of *rescripta* was not a given: only when they were of a general scope, they should be regarded as providing binding legal rules. By contrast, rescripts that only concerned a favor, penalty or exemption granted by the emperor and directed at one specific person lacked general force of law, according to Ulpian. After numbering the different types of imperial *constitutiones* in D. 1,4,1,1, the jurist goes on to state in D. 1,4,1,2 that 'plainly, some of these [i.e. imperial constitutions] are of an individual nature and are not followed as setting precedent'[141]):

> D. 1,4,1,2 Plane ex his quaedam sunt personales nec ad exemplum trahuntur: nam quae princeps alicui ob merita indulsit vel si quam poenam irrogavit vel si cui sine exemplo subvenit, personam non egreditur.

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[140]) E.g. Mommsen, Röm. Staatsrecht II.2 (n. 3) 911–912; Krüger, Geschichte (n. 95) 108; Honoré, Emperors (n. 91) 41; Tuori (n. 4) 283–284. By contrast M. Kaser, Zur Problematik der römischen Rechtsquellenlehre, in: idem, Römische Rechtsquellen und angewandte Juristenmethode, Wien 1986, 18, argues that *rescripta* only applied to the parties involved. This view might hold true for the rescripts of the early emperors, but does not do justice to the extensive rescript practice of the Severan emperors.

[141]) Ulpian's use of the word *personalis* in this text shows an interesting similarity to his use of the word *generalis* in D. 47,12,3,5 ('*ex his quaedam sunt personales*' / '*generalia sunt rescripta*').

This general statement is concretized in the next sentence, in which Ulpian provides us with several examples of this type of individual non-binding constitutions, namely when the emperor grants a subject an indulgence because of his (or her) merits or imposes a specific penalty on a subject or comes to a subject's aid without any (legal) precedent.

In theory, these same rules also applied to the *decreta* of the emperor. The statements of Gaius and Ulpian on their general legal force cited above are also confirmed by literary sources, such as the Epistulae ad M. Caesarem of the second century rhetorician Marcus Cornelius Fronto:

> Front. Ad. Marc. 1,6,2–3 In iis rebus et causis quae a privatis iudicibus iudicantur, nullum est periculum, quia sententiae eorum intra causarum demum terminos valent; tuis autem decretis, imperator, exempla publice valitura in perpetuum sanciuntur. … tu, ubi quid in singulos decernis, ibi universos exemplo adstringis[142]).

However, some modern scholars still argue that the judicial decisions of the emperor only applied to the litigants of the case (and possibly third parties involved in the dispute), but did not have force of law[143]). The most plausible explanation for the modern hesitation to accept the general binding force of the imperial *decreta* seems to be the fact that the judicial decisions of the emperor were often closely connected to the specific facts and circumstances of an individual case. Nonetheless, there can be no doubt that even imperial judgments could sometimes hold an authoritative interpretation of the law or even a completely new legal rule, both of which could be applied as precedents in other disputes[144]). This contention is supported by the fact that the Roman jurists themselves sometimes cite the *decreta* of the emperor as a source for a particular legal rule, although not nearly as often as rescripts[145]). It is therefore likely that imperial *decreta*, like *rescripta*, had force of law and could be regarded as binding precedents as long as they contained

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[142]) Transl. by C.R. Haines, Fronto, Correspondence, vol. I, Cambridge (MA) 1919, 157 using the Naber edition of the Latin text: "In those affairs and cases which are settled in private courts, no danger arises, since their decisions hold good only within the limits of the cases, but the precedents which you, O Emperor, establish by your decrees will hold good publicly and for all time. […] you by your decisions in individual cases make precedents binding upon all."

[143]) E.g. von Schwind (n. 134) 139; and Kaser (n. 140) 18; see also F.C. von Savigny, System des heutigen römischen Rechts, 8 vols., Berlin 1840–1851, I.23 sub II; M. Kaser, Das Urteil als Rechtsquelle im römischen Recht, in: idem, Römische Rechtsquellen (n. 140) 52.

[144]) Krüger, Geschichte (n. 95) 103.

[145]) E.g. D. 11,6,7,3; D. 26,7,7,4; D. 30,49 pr./D. 35,1,48.

a sufficiently generally formulated (new) legal rule or authoritative interpretation of existing law[146]).

3. The different types of decisions included in the Decreta and the Imperiales Sententiae:

This brings us to a problematic aspect of the traditional opinion on the publication of the Decreta and the Imperiales Sententiae. When one accepts the binding force of imperial *decreta* during the Principate (or at least the second half of the second century CE), one would expect, based on the foregoing, Paul's collection to consist solely of imperial decisions containing authoritative interpretations of existing law or new legal rules. After all, only these judgments could truly serve as precedents and would therefore be useful to legal practitioners. The analysis of the 38 case reports reveals that this is not the case. The judgments from the Decreta and the Imperiales Sententiae can be broken down into four categories[147]):

1. judgments in which the emperor applies existing law[148]);
2. judgments in which the emperor elucidates an unclear point of law or even creates a new rule[149]);
3. judgments in which the emperor construes specific legal documents, such as wills, codicils and contracts[150]);
4. judgments in which the emperor leaves aside the rules of existing law and decides the case on other grounds, such as *aequitas* (equity), *humanitas* (humanity) or *pietas* (piety). These decisions usually concern 'hard cases', disputes in which strict application of the law would lead to an undesirable or unjust outcome[151]).

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[146]) Cf. Mommsen, Röm. Staatsrecht II.2 (n. 3) 911; Krüger, Geschichte (n. 95) 103.

[147]) As has been mentioned in section IV, eight excerpts from the Decreta and the Imperiales Sententiae do not contain a (clearly marked) imperial judgment. The analysis below is therefore based on the 29 remaining decisions (= 30 texts).

[148]) D. 10,2,41 = D. 37,14,24; D. 36,1,76(74) pr.; D. 40,1,10; D. 46,1,68,1; D. 48,18,20; D. 48,19,40; D. 49,14,47,1; D. 49,14,48 pr.; D. 49,14,48,1.

[149]) D. 14,5,8; D. 16,2,24; D. 22,1,16,1; D. 26,5,28; D. 26,7,53; D. 44,7,33; D. 46,1,68 pr.; D. 49,14,47 pr.

[150]) D. 32,27 pr.; D. 32,27,1; D. 32,27,2; D. 32,97; D. 36,1,76(74),1; D. 36,1,83(81); D. 50,16,240.

[151]) D. 4,4,38 pr.; D. 28,5,93(92); D. 29,2,97; D. 40,5,38; D. 49,14,50; in some respect also D. 32,27,1, an interpretation of a codicil partially based on the *humanitas*, and D. 36,1,76(74),1, an interpretation of a will based on its wording and the *aequitas*. According to Paul's report, the decision of D. 49,14,47 pr. was also based on the *aequitas* (*aequum putavit imperator*) and even though the decision could be applied in other

Only the first two categories of judgments are without doubt suitable for application in other disputes and could therefore be considered as precedents. This is abundantly clear as far as the judgments of the second category are concerned; see for example D. 44,7,33[152]):

> D. 44,7,33 Paulus libro tertio decretorum. Constitutionibus, quibus ostenditur heredes poena non teneri, placuit, si vivus conventus fuerat, etiam poenae persecutionem transmissam videri, quasi lite contestata cum mortuo.

D. 44,7,33[153]) concerns the survival of penalties (*poenae*) after the death of the defendant. It only contains an imperial judgment (marked by the word *placuit*) and does not mention the factual and/or procedural context of the decision[154]). Paul mentions that several imperial constitutions provided that heirs could not be held liable for a *poena* incurred by the deceased. Severus, however, decided that if the deceased had already been sued during his lifetime, the liability for the penalty did devolve on the heirs. Since the term *poena* can have several different meanings, depending on the context it is used in, there has been debate about the interpretation of the text and more specifically, the imperial judgment. Mommsen and Lenel have argued that D. 44,7,33 deals with the survival of criminal *poenae* and have linked the text to the *iudicia publica* of the Republic and the early Principate[155]). However, other texts in the Digest attest to the fact that in the case of the *iudicia publica* the liability for *poenae* only devolved on the heirs if the deceased had already been convicted of a crime – with the exception of extortion (*repetundae*) and treason (*maiestas*):

> D. 48,2,20 Modestinus libro secundo de poenis. Ex iudiciorum publicorum admissis non alias transeunt adversus heredes poenae bonorum ademptionis, quam si lis contestata et condemnatio fuerit secuta, excepto repetundarum et maiesta-

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cases and therefore serve as precedent, there is little proof that its effects exceeded the case of Faria Senilla.

[152]) See for example also C. 11,35,1, in which Caracalla explicitly refers to D. 46,1,68 pr.

[153]) On this case see Sanfilippo (n. 1) 122–125; Brutti (n. 1) 160–161; Daalder (n. 43) 451–461 with further references in nt. 1.

[154]) For this use of the word *placuit* (or *placet*) see D. 10,2,41; D. 32,27,1 and 2; D. 32,97; D. 37,14,24; D. 40,1,10; D. 49,14,48 pr. and D. 48,19,40. Suspicions of interpolations in the texts have been put forward by Sanfilippo (n. 1) 123 and S. Riccobono, Die Vererblichkeit der Strafklagen und die Fiktion der Litiskontestation nach klassischem und justinianischem Rechte [fr. 10 § 2 D. 2,11 und fr. 33 D. 44,7], ZRG RA 47 (1927) 77.

[155]) Th. Mommsen, Römisches Strafrecht, Leipzig 1899, 392; Lenel I (n. 2) 965 nt. 2; on the *iudicia publica* in general see Mommsen o.c. 339–522; A.H.M. Jones, The criminal courts of the Roman Republic and Principate, Oxford 1972, 45–89.

tis iudicio, quae etiam mortuis reis, cum quibus nihil actum est, adhuc exerceri placuit, ut bona eorum fisco vindicentur: adeo ut divus Severus et Antoninus rescripserunt, ex quo quis aliquod ex his causis crimen contraxit, nihil ex bonis suis alienare aut manumittere eum posse. ex ceteris vero delictis poena incipere ab herede ita demum potest, si vivo reo accusatio mota est, licet non fuit condemnatio secuta.

It seems therefore unlikely that D. 44,7,33 deals with this type of *poenae*[156]). According to the last sentence of D. 48,2,20 in the case of other crimes (*cetera delicta*), i.e. crimes adjudicated in extraordinary procedures[157]), the *poena* did devolve upon the heirs once the prosecution had been initiated. There are, however, several reasons to assume that D. 44,7,33 also does not concern this type of *poena*. For starters, the comparison made by the emperor at the end of the judgment between the case at hand and (the effects of) the *litis contestatio* (*quasi lite contestata cum mortuo*, translation: as though a *litis contestatio* had been reached between the litigants) points in the direction of a private-law instead of a criminal-law context, since the existence of a *litis contestatio* in criminal procedures is severely contested[158]). Moreover, the compilers of the Digest seem to have been of the opinion that the *decretum* of D. 44,7,33 related to private law, since they have included the text in Title 44,7 De obligationibus et actionibus and not in books 47 and 48 concerning criminal law and the law of criminal procedure. It follows therefore that D. 44,7,33 most likely concerns *poenae* of a private-law nature, i.e. penal actions (*actiones poenales*) such as the *actio furti*, the *actio iniuriarum* and the *actio ex lege Aquilia*. During the Severan age the rules concerning the survival of this type of actions were already set in stone in the traditional Roman law of civil procedure, i.e. the law concerning the *formula* procedure[159]). In formulary procedures, a *poena* only devolved on the heirs of the liable person if a *litis contestatio* had been reached[160]). Since the emperor draws an analogy with the *litis contestatio* in his judgment, we can conclude that his decision does not concern the formulary procedure itself, but the survival of *poenae* in another type of civil procedure, namely the *cognitio extra ordinem*[161]). At the end of the second century, the *cognitio extraordinaria*

[156]) M. Wlassak, Anklage und Streitbefestigung im Kriminalrecht der Römer, Wien 1917, 192.

[157]) Wlassak ibid. 145.

[158]) Cf. Mommsen, Röm. Strafrecht (n. 155) 392–393. Highly critical on its existence is Wlassak, Anklage (n. 156).

[159]) Cf. Gai. Inst. 4,112: *certissima iuris regula*.

[160]) E.g. D. 27,7,8,1; D. 44,7,59; D. 50,17,139 pr.; D. 50,17,164.

[161]) Wlassak, Anklage (n. 156) 190–191; von Savigny (n. 143) VI.19; Brutti

had gained a lot of ground in the provinces[162]), which must have caused penalties on the ground of traditional delicts such as *furtum* and *iniuria* to be claimed to an increasing degree by means of this type of procedure[163]). However, the rules concerning this relatively new type of procedure were often still unclear and had to be developed by the emperors themselves[164]). Paul's choice of words in D. 44,7,33 also supports the contention that the text deals with *poenae* in extraordinary procedures. According to Ulpian, the word *persecutio* was specifically used to describe a claim in an extraordinary procedure: *Persecutionis verbo extraordinarias persecutiones puto contineri*[165]). The judgment of D. 44,7,33 should be considered as the next step in the development of the law concerning the survival of *poenae* in *cognitiones extraordinariae*, focused on eliminating the procedural differences between the formulary procedure and the extraordinary procedure[166]). Elaborating on constitutions of earlier emperors on the subject completely denying the survival of *poenae* in *cognitiones extraordinariae*, Severus decided that the liability for *poenae* in an extraordinary procedure could in some cases devolve upon the heirs of a deceased offender, but only if he had already been summoned by the injured party (*si vivus conventus fuerat*) during his lifetime[167]).

Besides the judgments of the second category, decisions of the first category could also often serve as precedents, since the application of a certain legal rule to a certain case can regularly be regarded as an authoritative interpretation by the emperor of the content and scope of that rule. This is especially

(n. 1) 160–161; K.A. von Vangerow, Lehrbuch der Pandekten, vol. I Marburg 1863, 218; B. Windscheid, Die Actio des römischen Civilrechts vom Standpunkte des heutigen Rechts, Düsseldorf 1856, 68.

162) Kaser/Hackl (n. 7) 168–171; M. Wlassak, Zum römischen Provinzialprozess, Wien 1919, 11–36; I. Butti, La 'cognitio extra ordinem': da Augusto a Diocleziano, in: ANRW II.14 (1982) 43.

163) Cf. M. Kaser, Das römische Privatrecht, 1. Abschnitt: Das altrömische, das vorklassische und klassische Recht, München 1971, 611.

164) The development of the extraordinary procedure was closely connected to the emperor and the development of the imperial bureaucracy: Butti (n. 162) 31.

165) D. 50,16,178,2.

166) Several authors want to restrict the application of the *decretum* of D. 44,7,33 to fiscal *poenae*, see Savigny (n. 143) VI.19–20; Vangerow I (n. 161) 218; Wlassak, Anklage (n. 156) 193–195. However, such a restriction to fiscal cases cannot be inferred from the text, which is formulated rather broadly.

167) This decision is in line with an earlier rescript of Antoninus Pius on the transmission of the *querela inofficiosi testamenti,* which was also heard in a *cognitio extra ordinem*, see D. 5,2,7; D. 5,2,6,2; C. 3,28,5.

the case with the decisions in which the emperor applies the *ius civile* to his own *fiscus*, such as D. 49,14,47,1[168]):

> D. 49,14,47,1 Paulus libro primo decretorum. Aemilius Ptolemaeus conduxerat a fisco possessionem eamque paulatim pluribus locaverat maiore quantitate quam ipse susceperat: conveniebatur a procuratoribus Caesaris in eam quantitatem quam ipse perciperet. hoc iniquum et inutile fisco videbatur, ut tamen suo periculo ipse eos quibus locaverat conveniret: ideoque pronuntiavit in eam solam quantitatem eum conveniri debere, qua ipse conductor exstiterat.

A man named Aemilius Ptolemaeus had taken the lease of an imperial estate from the *fiscus* for a certain rent[169]). To gain a profit, he had divided this property into smaller pieces, which he leased out to a number of subtenants for a higher total amount of rent than he was obliged to pay to the *fiscus*. The *procuratores Caesaris* sued Ptolemaeus for the sum that he had received from his tenants. The emperor judged that Ptolemaeus could only be sued for the amount for which he himself was liable as a tenant of the *fiscus*. To award the complete revenue of the sublease to the *fiscus* would have been unfair (*iniquum*) and detrimental (*inutile*) to the *fiscus*, since Ptolemaeus had to sue his tenants at his own risk, according to the emperor. That the *fiscus*' claim was *iniquus* hardly needs any explanation: it was a long-standing principle of the *ius civile* that a contract between two parties, in this case Ptolemaeus and his subtenants, could not impose obligations or confer rights upon third parties to that contract, i.e. the *fiscus*[170]). Moreover, if the emperor awarded the complete revenues of the subleases to the *fiscus*, Ptolemaeus would be deprived completely of his benefit under the contract, and since the risk of the insolvency of the tenants lay with him, such a decision would lead to an unfair imbalance between the parties involved[171]). The actions of the *fiscus*

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[168]) On this case see Sanfilippo (n. 1) 55–56; Rizzi (n. 1) 241–247; Daalder (n. 43) 533–538; Brutti (n. 1) 122–123.

[169]) We come across an Aemilius Ptolemaeus in a Syrian funerary inscription from 195 CE (Inscriptions Grecques et Latines de la Syrie 448). He and his wife Ulpia Regilla had erected this inscription for their deceased son Aemilius Reginus, who had been an *adiutor* of a *cornicularius*, one of the secretaries of the provincial governor. After the civil war of 193–194, Septimius Severus had confiscated a lot of land in the eastern part of the Empire after his victory over Pescennius Niger. It seems likely that at least part of these estates was rented out to private individuals. Aemilius Ptolemaeus might have been one of these postwar tenants; see also Rizzi (n. 1) 242 nt. 292; and Liebs, Hofjuristen (n. 40) 52 nt. 204.

[170]) Cf. Brutti (n. 1) 123; see for similar cases specifically concerning the tenancy and subtenancy of *insulae* D. 19,1,53 pr. and D. 19,2,58 pr.; on this principle in general see Kaser (n. 163) 491; R. Zimmermann, The law of obligations, Roman foundations of the civilian tradition, Capetown 1992, 34–40.

[171]) Rizzi (n. 1) 245–246.

were also *inutile* to its own position and by extension, the position of the emperor. If Severus awarded the *fiscus* a legal claim to the profit generated by the sublease of its lands, it would be very unappealing in the future to take on the lease of an imperial estate[172]). Since the lease of imperial estates constituted a large part of the fiscal income, Severus, like other emperors before him, had to secure his interests against the shortsightedness and greed of some officials of the *fiscus*[173]).

Other examples of decisions in which the emperor strictly applied the rules of *ius civile* in cases concerning his own *fiscus* are D. 40,1,10 (manumission of a female slave charged with the general hypothec of the *fiscus*), D. 46,1,68,1 (the limits of the liability of a surety of a tax farmer), D. 49,14,48 pr. (payment of a tacit *fideicommissum*) and D. 49,14,48,1 (liability for the payment of a *fideicommissum hereditatis*)[174]). All of these decisions can be regarded small steps in the development of fiscal law and the law of fiscal procedure and therefore transcend the case at hand.

Yet, only seventeen of the judgments from the Decreta and the Imperiales Sententiae belong to these two categories. The other imperial judgments either hold an interpretation of a legal document (category 3) or a decision on equitable grounds (category 4). These types of decisions are clearly less suitable for application to other cases, since they are frequently too closely connected to the specific wording of a document, the specific interests of the parties involved and other related circumstances. Most judgments of the third category concern the interpretation of wills and codicils and their content was therefore primarily based on the determination of the intention of the testator, the *voluntas testatoris*. They were highly idiosyncratic decisions: the intention of a testator with regard to a certain clause in a will or codicil is completely dependent on the facts, the wording of the specific will, the persons involved and the other circumstances of the case; see for example D. 32,27,2, concerning an ambiguous instruction in the testament of a man named Julianus Severus[175]):

> D. 32,27,2 Paulus libro secundo decretorum. Iulianus Severus decedens institutis quibusdam heredibus alumno suo quinquaginta legaverat eaque a Iulio Mauro

[172]) Gl. *Videbatur* ad D. 49,14,47,1 *quia nemo accederet ad conductionem fiscalium praediorum*; Rizzi (n. 1) 245.

[173]) For a similarly motivated decision by Hadrian concerning the liability of tenants after the termination of their lease see D. 49,14,3,6; also Sanfilippo (n. 1) 245.

[174]) On these cases see Daalder (n. 43) 433–442 (D. 40,1,10), 469–480 (D. 46,1,68,1), 539–553 (D. 49,14,48 pr.) and 555–565 (D. 49,14,48,1).

[175]) On this case see Sanfilippo (n. 1) 77–81; Rizzi (n. 1) 315–321; Daalder (n. 43) 373–382; Brutti (n. 1) 136–137.

colono suo ex pensionibus fundi debitis ab eo praestari voluerat eidemque Mauro quaedam legaverat: cum de hereditate fiscus quaestionem movisset, iussu procuratoris Maurus pecuniam fisco solverat: postea heres scriptus optinuerat fiscum: alumno autem mortuo heres eius fideicommissum ab herede Mauri petebat. Placuit imperatori non videri eius fidei commissum, sed demonstratum, unde accipere posset: et ideo heres Severi haec praestare debet.

Julianus Severus[176]) had completed a will, in which he had appointed several heirs. He had also made a bequest of HS 50.000 to his foster son (*alumnus*), indicating that the sum had to be paid out by his *colonus* Julius Maurus from the rent the tenant still owed to the testator (*eaque a Iulio Mauro colono suo ex pensionibus fundi debitis ab eo praestari voluerat*). In addition, he had made a bequest of several possessions to the same Julius Maurus. After the death of the testator, a legal dispute arose between the *fiscus* and the testamentary heirs. The cause for this dispute remains unclear, but it seems plausible that the *fiscus* claimed the inheritance on the basis of the *indignitas* and/or *(in)capacitas* of the testamentary heirs[177]). During the proceedings, the imperial *procurator* judging the case ordered[178]) Maurus to pay the overdue rent to the imperial treasury and the tenant obliged. In the end, however, the *fiscus* lost the case and the inheritance was awarded to the heirs of Severus. It seems likely that this also meant that the *fiscus* had to pay the already collected rent to the heirs[179]). In the meantime, the *alumnus* and Julius Maurus had both passed away. The heir of the *alumnus* 'X' demanded payment of the legacy from Maurus' heir 'Y'. It is unclear whether the emperor heard the

[176]) We know of one very famous Julianus Severus who died shortly before Severus' reign, namely Septimius Severus' predecessor Didius Julianus Severus. He might be the deceased testator of D. 32,27,2. This would explain the interest of the *fiscus* in the inheritance. However, no evidence can be found in classical sources to corroborate the facts of D. 32,27,1. It seems therefore more likely that the case concerns normal private citizens, not traceable in literary and epigraphical sources.

[177]) On the reasons why the *fiscus* could be entitled to an inheritance see D. 49,14,1 pr.; on *indignitas* as grounds for such a confiscation see P. Voci, Diritto ereditario romano I, 1st edition Milano 1960, 445–471; Kaser (n. 163) 725–727; R. Zimmermann, "Unworthiness" in the Roman law of succession, in: A. Burrows/D. Johnston/R. Zimmermann (eds.), Judge and jurist: essays in memory of Lord Rodger of Earlsferry, Oxford 2013, 325–344; on *capacitas* Gai. Inst. 2,111; UE 17,1; and Voci o.c. 411–445; Kaser (n. 163) 723–725.

[178]) For the use of *iussum/iubere* in reference to a court order see H.G. Heumann/E. Seckel, Handlexikon zu den Quellen des römischen Rechts, Jena 1926, 290; for the fiscal jurisdiction of the *procuratores Caesaris* see Tac. Ann. 12,60 and Suet. Claud. 12,1, who both attribute this conferral of judicial competence to the reign of Claudius. Nerva allegedly created in addition the post of *praetor fiscalis* (D. 1,2,2,32), but this official is only mentioned in classical sources until Hadrian.

[179]) Rizzi (n. 1) 321.

case in first instance or on appeal[180]). Paul also does not mention the legal basis for X's claim, but it has been commonly accepted in modern literature that X must have argued that Julianus Severus had intended to create a *fideicommissum a debitore relictum* in his will[181]). In the case of such a *fideicommissum*, the testator ordered one of his debtors, the *fideicommissarius,* to pay the sum he owed to the testator to a third party, the beneficiary of the *fideicommissum*[182]). Accordingly, the third party acquired an independent right of action to claim the *fideicommissum* from the debtor[183]). To gain effect, a *fideicommissum a debitore relictum* implied the existence of tacit *fideicommissum liberationis*, freeing the debtor from his obligations towards the testator and his heirs[184]). Applied to the case of D. 32,27,2, this meant that X, the heir of the *alumnus*, i.e. the third party, was able to demand the payment of HS 50.000 from Y, the heir of the debtor of the testator[185]). In contrast, Y probably maintained that Julianus Severus had not intended to create a *fideicommissum a debitore relictum*, but had only wanted to indicate the source from which the heirs could extract the money to pay out the legacy to the *alumnus*. Accordingly, he contended that not he, but the testamentary heirs should be held liable for the payment of the legacy. The emperor had to decide on the testator's intentions and more specifically, the meaning of

[180]) Rizzi (n. 1) 316 nt. 154. Brutti (n. 1) 137 nt. 179 assumes that the case was heard by the emperor in first instance. It should, however, be stressed that the imperial hearing was not an appeal against the judgment in the procedure between the *fiscus* and the heirs of Julianus Severus, as has been argued by Coriat (n. 79) 297–298. The case of Digest D. 32,27,2 concerns two different parties, i.e. the heir of Julius Maurus and the heir of the *alumnus* respectively.

[181]) Sanfilippo (n. 1) 78–80; Rizzi (n. 1) 319–320; on the *fideicommissum a debitore relictum* in general see A. Wacke, Das fideicommissum a debitore relictum, Die exceptio doli im Dienste der Rechtsfortbildung, TvR 39 (1971) 257–272. Brutti (n. 1) 136–137 also contends that the plaintiff based his claim on the view that Julianus Severus had intended to create a *fideicommissum*, but does not specifically regard it as a *fideicommissum a debitore relictum*.

[182]) D. 30,77.

[183]) Wacke (n. 181) 260.

[184]) Wacke ibid. 259–260.

[185]) Rizzi (n. 1) 319. Since the inheritance had been awarded to the heirs of Julianus Severus, X could argue that the payment of the rent to the *fiscus* had not cleared Y's debt. In the case of a *fideicommissum a debitore relictum* only payment to the appointed party could relieve X of his obligation. However, the debtor could also choose to reject the *legatum liberationis* corresponding with the *fideicommissum a debitore relictum*. In that case he had to pay off his debt with the heirs of the testator, obligating them to pay out the legacy to the appointed third party on their own account; cf. Wacke (n. 181) 262.

the testamentary reference to Julianus Severus' debtor Julius Maurus and the back rent he owed to the testator[186]). He decided that in this specific case Julianus Severus had only intended to indicate where the money required for the payment of the legacy could be found (*sed demonstratum, unde accipere posset*)[187]) and that it had never been the testator's intention to create a *fideicommissum* at the expense of Julius Maurus (*non videri eius fidei commissum*). Julianus Severus' heir (sic!) was therefore still obliged to pay out the legacy to the heir of the *alumnus*, all the more since Maurus had already paid the overdue rent to the *fiscus* during the previous fiscal procedure, which had resulted in the award of the inheritance probably including the collected rent to Severus' heirs.

The decisions of the fourth category also have a highly incidental character. In all of these cases the emperor was triggered by the specific circumstances of each individual case to leave the rules of existing law aside in favor of a judgment securing a more desirable and just outcome of the case. For example, in D. 40,5,38[188]), the emperor decided on the basis of the *pietas* and the *voluntas testatoris* that two sons were obliged to manumit the beloved *alumna* of their father, even though the will of the father ordering the manumission of the *alumna* had not been completed and was therefore invalid[189]). Another example of this type of decision can be found in D. 4,4,38 pr., relating the somewhat famous case of a girl named Rutiliana:

> D. 4,4,38 pr. Paulus libro primo decretorum. Pr. Aemilius Larianus ab Ovinio fundum Rutilianum lege commissoria emerat data parte pecuniae, ita ut si intra duos menses ab emptione reliqui pretii partem dimidiam non solvisset, inemptus esset, item si intra alios duos menses reliquum pretium non numerasset, similiter esset inemptus. Intra priores duos menses Lariano defuncto Rutiliana pupillaris aetatis successerat, cuius tutores in solutione cessaverunt. Venditor denuntiationibus tutoribus saepe datis post annum eandem possessionem Claudio Telemacho vendiderat. Pupilla in integrum restitui desiderabat: victa tam apud praetorem quam apud praefectum urbi provocaverat. Putabam bene iudicatum, quod pater eius, non ipsa contraxerat: imperator autem motus est, quod dies committendi in tempus pupillae incidisset eaque effecisset, ne pareretur legi venditionis. Dicebam posse magis ea ratione restitui eam, quod venditor denuntiando post diem, quo placuerat esse commissum, et pretium petendo recessisse a lege sua videretur: non me moveri quod dies postea transisset, non magis quam si creditor pignus distraxisset,

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[186]) Rizzi (n. 1) 320–321.

[187]) Sanfilippo (n. 1) 80; Rizzi (n. 1) 320. A similar type of indication in a will of a pecuniary source for a legacy can be found in the Digest of Salvius Julianus: D. 30,96 pr.

[188]) On this case see Sanfilippo (n. 1) 103–105; Rizzi (n. 1) 195–205; Brutti (n. 1) 150–152; Daalder (n. 43) 443–450 with further references in nt. 1.

[189]) Cf. Sanfilippo (n. 1) 105 on the decision: "un caso insomma, in cui l'imperatore deliberamente vuol far prevalere l'equità al diritto, contrapponendo alla regola giuridica un precetto morale".

post mortem debitoris die solutionis finita. Quia tamen lex commissoria displicebat ei, pronuntiavit in integrum restituendam. Movit etiam illud imperatorem, quod priores tutores, qui non restitui desiderassent, suspecti pronuntiati erant.

D. 4,4,38 pr., often called the *causa Rutiliana* after its protagonist, concerns the cancellation of a sale[190]). A certain Aemilius Larianus[191]) had bought a farm from a man named Ovinius[192]). At the conclusion of the contract Larianus had paid only part of the purchase price, while parties had agreed that the rest of the sum would be paid in two instalments and that the seller Ovinius could cancel the sale if Larianus did not pay these instalments in time (a so-called *Lex commissoria*). Before the first instalment was due, Larianus died, leaving his daughter Rutiliana as his only heir[193]). Since the girl was a minor, she had several tutors to manage her affairs and these tutors failed to pay the first instalment. Ovinius, after having demanded payment from the tutors several times, cancelled the contract and sold the

[190]) D. 4,4,38 pr. has drawn the attention of many scholars of Roman law: besides Sanfilippo (n. 1) 22–30, Wankerl (n. 1) 95–110, Rizzi (n. 1) 363–381, Daalder (n. 43) 191–213 and Brutti (n. 1) 94–104 see for example F. Peters, Die Rücktrittsvorbehalte des römischen Kaufrechts, Köln 1973, 77–82; D. Liebs, Der Sieg der schönen Rutiliana, Lex commissoria displicebat, in: D. Medicus/H.H. Seiler (eds.), Festschrift für Max Kaser zum 70. Geburtstag, München 1976, 373–389; B. Kupisch, Rutiliana pupilla – schön oder energisch? (Paul. D. 4,4,38 pr.), ZRG RA 94 (1977) 249–266; F. Musumeci, Ancora sulla 'in integrum restitutio' di Rutiliana, in: A. Belloni (ed.), Cunabula iuris, Studi storico giuridici per G. Broggini, Milano 2002, 245–261; D. Liebs, Vor den Richtern Roms, Berühmte Prozesse der Antike, München 2007, 149–158; M. Di Mario, Lex commissoria e restitutio in integrum in Paul. 1 Decr. D. 4.4.38. PR, Teoría e Storia del Diritto Privato 7 (2014) 1–175; B.J. Choe, Zur Debatte um den Rutiliana-Fall (Paul. D. 4,4,38 pr.), Wie soll man einen Text lesen?, in: U. Manthe/S. Nishimura/M. Igimi (eds.), Aus der Werkstatt römischer Juristen, Vorträge der Europäisch-Ostasiatischen Tagung 2013 in Fukuoka, Berlin 2016, 23–53.

[191]) The name Aemilius Larianus does not occur in Latin epigraphical sources. However, we do find the name Aemilius *Hi*larianus (my italics) in AE 1993, 174, a funerary inscription mentioning the name together with a certain Rutilia Adaucta. It is possible that Aemilius Hilarianus and Rutilia Adaucta were the parents of Rutiliana, but any additional proof for this hypothesis is lacking.

[192]) This might be C. Ovinius Tertullus, a senator from Africa who held the position of governor of Moesia Inferior between 198 and 202 (PIR$^2$ O 191). He is mentioned in D. 38,17,1,3 and D. 49,15,9 as the addressee of a rescript of Severus and Caracalla on the *ius postliminium*. Another possibility is L. Ovinius Rusticus Cornelianus (PIR$^2$ O 190), who probably enjoyed a successful senatorial career during the reign of Septimius Severus.

[193]) For the assumption that Rutiliana was the daughter of Aemilius Larianus see Liebs, Vor den Richtern (n. 190) 152–153.

farm to a third person named Claudius Telemachos[194]). Rutiliana demanded to be restored to her former legal position (*restitutio in integrum*), asking for a second chance to fulfil her duties under the contract and acquire the farm[195]). The remedy of *restitutio in integrum* was only available under specific circumstances: the contract had to have been concluded by a minor, cf. the clause on the restoration of minors in the Edict (D. 4,4,1,1) '*Quod cum minore quam viginti quinque annis natu gestum esse dicetur*'; and the minor had to have suffered some disadvantage because of it[196]). The case of Rutiliana did not fit this description, since her father and not she herself had concluded the contract. For this reason, two different judges had rejected her claim: the *praetor* as the court of first instance and the *praefectus urbi* on appeal[197]). She decided to petition the emperor on the matter. Paul explicitly states that he agreed with the judgments of the *praetor* and the *praefectus urbi*, since it was not Rutiliana, but her father who had concluded the contract: *quod pater eius, non ipsa contraxerat*. The emperor, however, felt differently. He argued that *restitutio* should be granted to the girl, since the fact that she was a minor was the main reason that she (or rather, her *tutores*) had failed to pay the amount due in time[198]). Paul did not agree with the emperor and tried to prove his point by drawing a parallel between the case at hand and that of the sale of pledges after the death of the debtor. He argued that *restitutio in integrum* was not awarded to the underaged heirs of a debtor/pledgor, if the creditor/pledgee executed and sold the pledge after the original debtor had died[199]). After all, just like in the case of Rutiliana,

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[194]) Claudius Telemachos can be identified as the Greek with the same name from Xanthos, who was the first of his family to be raised to the rank of senator by Severus (PIR² C 1037), see Liebs, Vor den Richtern (n. 190) 150.

[195]) Contra Kupisch (n. 190) 253–254 arguing that Rutiliana wished to be restored to the legal position she would have had before the conclusion of the contract of sale, and A. Burdese, Di un particolare caso di applicazione della 'restitutio in integrum', in: V. Arangio-Ruiz/H. Niedermeyer (eds.), Festschrift Fritz Schulz I, Weimar 1951, 81 nt. 1, who contends that she demanded that Claudius Telemachos would transfer the ownership of the *fundus* to her.

[196]) D. 4,4,11,3 and D. 4,4,44.

[197]) This fact alone makes this case exceptional. We know only of one other example of a case being heard by three different judges from the Digest of Scaevola: D. 45,1,122,5; for the possibility of appeal with the court of the *praefectus urbi* see D. 49,1,1,3 and D. 49,3,1 pr.; also see Kaser/Hackl (n. 8) 464–465 and for the competence of the *praefectus urbi* in this specific case L. Raggi, La restitutio in integrum nella cognitio extra ordinem, Milano 1965, 119.

[198]) Cf. Liebs, Vor den Richtern (n. 190) 155.

[199]) Cf. C. 2,82,2 pr. However, if the underaged heirs had concluded the contract

it had not been the underaged heirs, but the debtor who had concluded the contract of pledge. Paul contended that the emperor could, however, come to the girl's aid in a different, but from a legal point of view more consistent way[200]). Since the seller had demanded payment from the tutors several times, he had, according to Paul, waived his right to cancel to sale on the basis of the *Lex commissoria* (*Dicebam posse magis ea ratione restitui eam, quod venditor denuntiando post diem, quo placuerat esse commissum, et pretium petendo recessisse a lege sua videretur*)[201]). The emperor, however, wanted to see the girl restored to her former legal position, even if there existed no legal basis for this outcome. In the end, he passed judgment in this way, because, as Paul adds, he did not like the *Lex commissoria*[202]). The jurist also mentions that the emperor attached a lot of weight to the fact that Rutiliana's former tutors had been found negligent in a court of law (*tutores … suspecti pronuntiati erant*). The judgment in Rutiliana's case is a clear example of an individual imperial decision based on the *aequitas* and the circumstances of the specific case at hand rather than on the rules of the *ius civile*[203]). From his description it becomes clear that Paul was of the opinion that the case should have been decided by adhering to the tra-

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themselves and the execution of the pledge had caused them to suffer a great loss, the remedy of *restitutio in integrum* was of course available to them, cf. C. 2,28,1 and D. 20,5,7,1; see in addition D. 27,9,1,2 i.f.

[200]) Sanfilippo (n. 1) 26; Choe (n. 190) 41.

[201]) Cf. D. 18,3,7. The words *dicebam posse magis ea ratione restitui eam* and in particular the meaning of the word *restitui* have given rise to a debate amongst scholars. It seems unlikely that Paul argued that the *restitutio in integrum* had to be awarded because of the fact that Ovinius had waived his right to cancel the sale, since in that case the contract of sale was still intact and Rutiliana would still be able to fulfill her obligations under contract. Many scholars have therefore been critical about (the authenticity of) this part of the text: Sanfilippo (n. 1) 26–28; Peters (n. 190) 80; Di Mario (n. 190) 100; Liebs, Der Sieg (n. 190) 380–381; Choe (n. 190) 37. This inconsistency can however be explained by assuming that Paul uses the word *restitui* in a non-technical way, as has been suggested by Kupisch (n. 190) 251, Musumeci (n. 190) 257 and Rizzi (n. 1) 375–376. This interpretation is supported by the fact that in the following sentence, containing the imperial judgment, Paul again uses the more explicit phrase *in integrum restituendam*, thereby highlighting the difference between his solution and that of the emperor.

[202]) This sentence probably refers to the contested *lex commissoria* and not to *leges commissoriae* in general, see Sanfilippo (n. 1) 28; Kupisch (n. 190) 261; Liebs, Vor den Richtern (n. 190) 157; Di Mario (n. 190) 116–120; Choe (n. 190) 45–46.

[203]) This is illustrated by the fact that the decision does not seem to have influenced the law on this point after the reign of Severus, as has been pointed out by

ditional legal rules concerning *restitutio in integrum* and that the phrase *gestum esse* should not be interpreted too liberally[204]). He therefore felt that Rutiliana's claim had to be rejected or that it had to be allowed on another legal ground[205]). The emperor, however, passed over Paul's legal objections and awarded the *restitutio* anyway, thereby demonstrating his benevolence and righteousness as a ruler.

Another example of a case resulting in an imperial decision with a highly individual character is D. 36,1,76(74),1, featuring an imperial interpretation of a testamentary disposition based on the *aequitas,* the wording of the will and the *voluntas testatoris*. It thereby combines elements of the decisions of the third and the fourth category[206]).

> D. 36,1,76(74),1 Paulus libro secundo decretorum. Fabius Antoninus impuberem filium Antoninum et filiam Honoratam relinquens exheredatis his matrem eorum Iuniam Valerianam heredem instituit et ab ea trecenta et quasdam res filiae reliquit, reliquam omnem hereditatem filio Antonino, cum ad annum vicensimum aetatis pervenisset, voluit restitui: quod si ante annum vicensimum decessisset filius, eam hereditatem Honoratae restitui praecepit. mater intestata decessit utrisque liberis legitimis heredibus relictis. postea filius annum agens plenum nonum decimum et ingressus vicensimum necdum tamen eo expleto decessit filia herede Fabia Valeriana sua relicta, a qua amita fideicommissum et ex testamento patris portionem hereditatis petebat: et apud praesidem optinuerat. tutores Valerianae filiae Antonini egestatem eius praetendebant et recitabant divi Hadriani constitutionem, in qua quantum ad munera municipalia iusserat eum annum, quem quis ingressus esset, pro impleto numerari. imperator autem noster motus et aequitate rei et verbis testamenti 'si ad annum vicensimum aetatis', quamvis scire se diceret a divo Marco non excusatum a tutela eum qui septuagensimum annum aetatis ingressus fuisset, nobis et legis Aeliae Sentiae argumenta proferentibus et alia quaedam, contra petitricem pronuntiavit.

Fabius Antoninus had two children: a son named Antoninus, who was still a minor, and a daughter called Honorata[207]). In his will he decided, however, to disinherit both his children and appoint their mother Iunia Valeriana as his

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Wankerl (n. 1) 108; Liebs, Vor den Richtern (n. 190) 157f.; Liebs, Hofjuristen (n. 40) 55 nt. 212.

[204]) His colleague Ulpian, however, argued several years later in favor of a more liberal approach to the same words, cf. D. 4,4,44; on the subject see also F. Musumeci, Quod cum minore … gestum esse dicitur – Formulazione edittale e la sua concreta attuazione in età imperiale, Revue Historique de Droit Français et Étranger [RHD] 84 (2006) 523–531.

[205]) The Byzantines seem to have agreed with Paul. The Basilica version of D. 4,4,38 pr. solely mentions Paul's view as the solution of the case, i.e. that Ovinius seemed to have waived his right to cancel the sale; see B. 10,4,38 pr.

[206]) For another example of such a case see the case of Pompeius Hermippus, D. 32,27 pr.

[207]) On this case see Sanfilippo (n. 1) 87–94; Wankerl (n. 1) 153–164; Rizzi (n. 1) 257–266; Daalder (n. 43) 411–422; Brutti (n. 1) 141–146.

only heir (an example of *exheredatio bona mente*[208])). He also requested her to pay their daughter a sum of HS 300.000 and hand over some other possessions, while ordering that the remainder of his inheritance had to be restored to their son Antoninus once he had reached the age of twenty (*cum ad annum vicensimum aetatis pervenisset*). If Antoninus did not live to the age of twenty, he added, the complete inheritance had to be restored to Honorata (a conditional *fideicommissum hereditatis*). After her husband had predeceased, Iunia Valeriana also passed away without leaving a will. In accordance with the SC Orfitianum Honorata and Antoninus both acquired half of her inheritance (including the estate of their father) as her legal heirs[209]). Sometime after, Antoninus also died at the age of nineteen (*filius agens plenum nonum decimum et ingressus vicensimum necdum tamen eo expleto*), leaving his daughter Fabia Valeriana, a minor and probably still very young girl, as his only heir. Since Antoninus had died before reaching the age of twenty, his sister Honorata argued that, according to the *fideicommissum hereditatis* included in the will of their father, she was entitled to her brother's share of the paternal inheritance[210]). She therefore brought a legal action against her niece

[208]) Cf. Sanfilippo (n. 1) 88. A parent could not disregard or disinherit his or her children in their will without consequence. However, if he or she did so without malicious intentions (i.e. *bona mente*), the will could not be contested, as follows from D. 38,2,12,2 and D. 28,2,18. By bequeathing his entire estate to Iunia Valeriana, Fabius Antoninus made her the *de facto* guardian of their children (even though she could not legally be appointed as a *tutor*; see D. 26,4,1,1 and D. 26,1,16): since they did not inherit any material assets, there was no need to appoint 'external' *tutores*; cf. J.F. Gardner, Women in Roman law and society, Bloomington 1986, 153; R.P. Saller, Patriarchy, property and death in the Roman family, Cambridge 2009, 173–174; Kaser (n. 163) 360 stressing that the main task of the tutors was to manage the pupil's estate.

[209]) Sanfilippo (n. 1) 88.

[210]) The other half was probably already in her possession, cf. Wankerl (n. 1) 157; D. Mantovani, Legum multitudo, Die Bedeutung der Gesetze im römischen Privatrecht (transl. by U. Babusiaux), Berlin 2018, 81. It is not completely clear what Honorata was exactly asking for. Paul relates that Honorata claimed *fideicommissum et ex testamento patris portionem hereditatis*, seemingly implying that she was claiming both the *fideicommissum* of HS 300.000 and certain other *res* and in addition her brother's share of the paternal inheritance; cf. Mantovani ibid. 81; Brutti (n. 1) 141. However, Paul's own description of the will of Fabius Antoninus seemingly implies that the *fideicommissum* of HS 300.000 and the other *res* was due and payable from the moment of the testator's death and not subject to the condition regarding Antoninus' age; note the use of two separate main clauses. Perhaps Iunia Valeriana had failed to pay out the *fideicommissum* to her daughter before her own demise?

Fabia Valeriana[211]). The court of first instance, a *praeses* of an unmentioned province, decided in her favor. The girl, or rather her tutors, appealed to the emperor. The proceedings at the imperial court centered on the interpretation of the clause *si ad annum vicensimum aetatis pervenisset*; Fabia Valeriana's tutors must have argued that it was enough for the boy to have reached the age of nineteen, since from a legal point of view in that case the twentieth year of age had to be regarded as completed. To substantiate their claim, they submitted a *constitutio* of Hadrian concerning the *munera municipalia*, in which the emperor had decided with regard to the minimum age for the admittance to some honorary offices that a commenced year could be considered as completed[212]). Since the constitution clearly contains an exception based on imperial favor with regard to a specific group of *honores*[213]) and it moreover concerned public and not private law, it did not offer much support for Fabia Valeriana's claim. The *tutores* therefore also emphasized that the girl was living in poverty (*egestas*). Honorata on the other hand maintained that Antoninus, having never reached the age of twenty, had not completed his twentieth year. Consequently, the *fideicommissum hereditatis*, i.e. Antoninus' share of their father's inheritance, had to be paid out to her. From Paul's report it becomes clear that he and his colleagues were of the opinion that Fabia Valeriana's appeal had to be rejected[214]). According to Paul, they provided supporting arguments based on the Lex Aelia Sentia, which forbade slave owners to manumit their slaves until they had reached the age of 20, and other arguments, perhaps based on other laws[215]). One of these might have been the Lex Iulia de adulteriis coercendis, which stated that persons younger than 25 years of age were not allowed to bring an accusation of adultery. In both cases a commenced, but not completed twentieth or twenty-fifth year respectively did not meet the age requirement set by the

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[211]) The obligation of the payment of the *fideicommissum*, which the testator had charged on Iunia Valeriana, had been transferred via the hereditary succession to Antoninus and his daughter Fabia Valeriana; see Sanfilippo (n. 1) 89; Rizzi (n. 1) 259 nt. 344.

[212]) A paraphrase of this *constitutio* can be found in D. 50,4,8.

[213]) As follows from the description of the constitution in D. 50,4,8, which mentions that the constitution had been promulgated *favoris causa* and only applied to *honores* which did not concern the municipal *res publica*; cf. Rizzi (n. 1) 263.

[214]) Sanfilippo (n. 1) 92–93; Wankerl (n. 1) 159. Less clear is Rizzi (n. 1) 260 nt. 349. Mantovani, Legum multitudo (n. 210) 83 nt. 105 argues that Paul probably agreed with the imperial decision.

[215]) On the use of (the interpretation of) *leges* as a part of the debate in this case see Mantovani, Legum multitudo (n. 210) 83–84.

law[216]). We can infer from the foregoing that the legal reasoning and furnishing of proof in this case by both the parties and the jurists in the imperial *consilium* was of a strikingly objective nature[217]). The emperor, however, did not base his decision on this type of arguments (which were incidentally all related to public law regulations), but focused on the interpretation of the *voluntas testatoris* and the circumstances of the case[218]). He passed judgment in favor of Fabia Valeriana, while giving two different grounds for his judgment: he based his decision on the *aequitas rei*, probably referring to the personal and financial situation of the girl, and on the wording of the testamentary clause, which offered the possibility[219]) of an interpretation of the *voluntas testatoris* in favor of the girl[220]). The reference in the imperial judgment to the *constitutio* of Marcus Aurelius on the maximum age of tutors can best be regarded as a reaction to the different reasoning of the jurists in the *consilium*, who had supported their point of view with reference to the rules of several *leges*. It might be possible that Severus wanted to make clear to his advisors that even though he was well aware of the fact that the same principle had been applied by previous emperors in their constitutions on different subjects, he had decided to resolve the case at hand in a different way[221]). Severus' judgment even deviates from decisions in similar cases of emperors before and after him. He seems to have been unaware of a *decretum* of Marcus Aurelius cited by Marcellus in D. 35,1,48, in which the emperor decided that a *fideicommissum* due *cum ad annum sextum decimum pervenisset* could not be claimed if the beneficiary had commenced, but not completed his sixteenth year of age[222]). It seems plausible that neither the parties nor the

[216]) Lex Aelia Sentia: D. 40,1,1; Lex Iulia de adulteriis coercendis: D. 48,5,16,6.

[217]) Cf. Wankerl (n. 1) 157.

[218]) Rizzi (n. 1) 264–266; A. Schneider, Zur Berechnung der Fristen im römischen Recht, ZRG RA 22 (1901) 147.

[219]) The Latin word *ad* can be translated as 'until' in the context of periods of time; see Oxford Latin Dictionary s.v. *ad* under B.10. The words *si ad annum vicensimum aetatis* can therefore possibly be translated as '[if he has lived] until his twentieth year', i.e. having reached the age of nineteen years old; see for this interpretation of the condition Wankerl (n. 1) 160; Mantovani, Legum multitudo (n. 210) 82.

[220]) The emperor apparently assumed that Fabius Antoninus had intended to provide for his son as well as his son's descendants in his will; cf. Mantovani, Legum multitudo (n. 210) 81–82.

[221]) Cf. Rizzi (n. 1) 264.

[222]) *Non putabam diem fideicommissi venisse, cum sextum decimum annum ingressus fuisset, cui erat relictum, cum ad annum sextum decimum pervenisset: et ita etiam Aurelius imperator Antoninus ad appellationem ex Germania iudicavit*; cf. D. 30,49 pr. (Ulpian).

jurists of the *consilium* had a copy of this *decretum* at their disposal[223]). In later times Severus' successor Alexander Severus confirmed in a rescript that it had been commonly accepted amongst the Roman jurists that this type of condition could only be fulfilled once the year had been completed[224]). We can therefore conclude that Severus' decision in this case was mainly motivated by considerations of equity and the *voluntas testatoris* and constituted an exception to the general rule[225]).

To conclude, it is very unlikely that a sufficiently similar case would arise in which the imperial judgments discussed above could directly be applied as precedents. Indeed, it seems unlikely that the emperor even had the intention of creating a precedent in these cases at all[226]). The same goes for Paul himself, who often seems to have disagreed with the emperor on the solution of exactly this type of case and usually supported a decision based on existing law during the deliberations[227]). They should therefore probably be regarded as imperial enactments that belong to the group of constitutions *quaedam sunt personales nec ad exemplum trahuntur*, as related by Ulpian in D. 1,4,1,2. They are either specific interpretations of certain legal documents mostly based on the unique wording of the document, the intention of the testator and the other circumstances of the case (category 3), or extralegal judgments tailored to the interests of one or more of the individuals involved (category 4). Because of their individual nature and the absence of a generally formulated decision, it is hard to see how these imperial judgments could be regarded as binding precedents. Consequently, we can conclude that the Decreta and Imperiales Sententiae contain two types of decision which were ill-suited to serve as precedents in other cases. One might of course emphasize their rhetorical value for other disputes, arguing that they could serve as general examples to lower judges and might be used by advocates as *argumenta* or *probationes* for their point of view[228]). However, since a direct application

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[223]) Wankerl (n. 1) 159; Rizzi (n. 1) 261–262.

[224]) C. 6,53,5,2.

[225]) Sanfilippo (n. 1) 93–94; Rizzi (n. 1) 266; Coriat (n. 79) 309.

[226]) It should also be noted here that only the emperor was allowed to judge on the equity (*aequitas*) of the law; cf. C. 1,14,1: *Inter aequitatem iusque interpositam interpretationem nobis solis et oportet et licet inspicere.*

[227]) Cf. D. 4,4,38 pr.; D. 28,5,93(92); D. 29,2,97; D. 49,14,50; also D. 32,27,1 and D. 36,1,76(74),1; cf. Brutti (n. 1) 45–49; on Paul's wish to limit the effect of these imperial decisions see also Liebs, Hofjuristen (n. 40) 55.

[228]) In this respect, these imperial judgments did in effect not really differ from the judgments of ordinary Roman judges, whose judgments were not regarded by the jurists as a source of law (they are for example not mentioned as a source of law by

of these decisions in other disputes is seemingly impossible (in contrast to traditional *leges* and, by extension, the judgments of the first two categories and other types of imperial constitution), one can certainly wonder why Paul would include them in a collection of imperial judgments primarily directed towards legal practitioners. Their incorporation in his collection is therefore a strong indication that the publication and dissemination of Severan legislation might not have been the (only) purpose the jurist was pursuing.

4. Other substantive characteristics of the Decreta and the Imperiales Sententiae:

This idea is strengthened by two other characteristics of the Decreta and the Imperiales Sententiae. First, the fact that both works only contain imperial *decreta.* If Paul really intended to make important legal enactments of Septimus Severus accessible to the general legal public, it would have been much more profitable to compile a collection of imperial *rescripta*. As has been mentioned above, although *decreta* and *rescripta* were both decisions in individual cases, rescripts usually contained a specific answer to an abstract legal question. For this reason, they were cited more often as a binding precedent than the judgments of the emperor by the Roman jurists[229]) and had a more profound impact on legal practice, forming the basis for later compilations of imperial law, such as the Codex Gregorianus and the Codex Justinianus[230]). Accordingly, it would have made much more sense for Paul to compose a collection of *rescripta* or at least also include this type of imperial legislation in addition to *decreta* in his work, all the more since it remains unclear up until this day whether and how the rescripts of the emperor were disseminated throughout the empire[231]).

Second, the content of the reports from the Decreta and the Imperiales Sententiae does not seem consistent with the general view on the motives behind the publication of Paul's collection of imperial judgments. If we want to assume that Paul merely intended to make the judicial decisions of Septimius Severus known to legal practitioners, it would be hard to explain why he chose to add so many details to his descriptions. The judgment of the emperor and possibly a concise description of the facts would have sufficed in that

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Gaius in Gai. Inst. 1,1–8), but were regularly used by legal orators to strengthen their argument (e.g. Rhet. ad Her. 2,13–14); cf. Kaser (n. 145) 51–64.

[229]) For the Severan period see Coriat (n. 46) 114–142.

[230]) Cf. L. Wenger, Die Quellen des römischen Rechts, Wien 1953, 430.

[231]) On this question see Millar (n. 5) 648; Tuori (n. 4) 256; C. Ando, Imperial ideology and provincial loyalty in the Roman Empire, Berkeley 2000, 80.

case[232]): all other information on the proceedings, the debate *in consilio* and the grounds for the judgment was to a large extent irrelevant for the use or application of the decision in other cases[233]). After all, the emperor's decision would have had force of law, regardless of the way it came into being and the grounds for the decision[234]). As has been mentioned above, the inclusion of these details is usually explained as an attempt by Paul to offer lower judges and other legal professionals a complete picture of all the possible arguments and solutions in similar cases. This would imply that lower judges were allowed to disregard the imperial judgment and could in a similar case follow the reasoning by Paul or one of the other jurists of the *consilium*. Such a deviating decision would, however, have cost the judge in question dearly: according to PS 5,25,4 and D. 48,10,1,3, a judge who had failed to apply an imperial constitution submitted to him was deported to an island. It is therefore likely that the degree of detail of Paul's reports has a different explanation.

## VI. Motives for the publication of Paul's collection: imperial representation and juristic self-fashioning

### 1. Paul's collection of imperial judgments – tradition and innovation:

It follows from the foregoing that the generally accepted view on the motives for the publication of Paul's collection of imperial judgments is too limited. Its publication was not solely prompted by the desire to make the judicial decisions of Septimius Severus known to the general legal public, but is closely connected to Paul's position as a jurist and an official within Severus' court. Prominent 2nd- and 3rd-century jurists like Paul, Papinian and Ulpian held a special position within the Roman legal order. On the one hand they were still a part of the traditional legal practice: they gave *responsa* to clients and officials seeking legal advice, wrote extensive commentaries and monographs on Roman private law and taught students. On the other hand,

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[232]) See for example the lay-out and content of the texts excerpted from the Constitutionum libri XX of Papirius Justus in Lenel I (n. 2) 947–952.

[233]) Cf. Rizzi (n. 1) 133.

[234]) Cf. Z. Herz, Precedential Reasoning and Dynastic Self-Fashioning in the Rescripts of Severus Alexander, Historia 69 (2020) 106–107, who notes a similar tendency with regard to imperial rescripts. The *rescripta* of the emperor tended to be brief (or even curt) and often lacked a *ratio decidendi*, since they were authoritative simply because of "the extraordinary personhood of their speaker". And therefore, when rescripts are more detailed and mention for example imperial precedents, "something else may well be going on".

they also often held influential positions within the imperial bureaucracy and were a part of the advisory *consilia* of high officials such as the *praefectus praetorio* and the emperor himself. The activities of the Severan jurists within the imperial administration have demonstrably influenced their works and the literary genre of legal writing as a whole. The clearest example of this influence is the emergence of a new (sub)genre within Roman legal literature, namely a group of works focusing on the needs of the imperial bureaucracy, mostly dealing with the legal position and competences of magistrates and imperial officials[235]). Several works of Paul's oeuvre belong to this category, for example De officio proconsulis libri II, De officio praefecti urbi liber singularis, De officio praefecti vigilum liber singularis, De officio assessorum liber singularis and a work on the *praetor tutelaris*[236]). Another example of a legal work resulting from the activities of its author within the imperial chancery are the previously mentioned Constitutionum libri XX of Papirius Justus, who probably worked as a civil servant in the imperial chancery during the reigns of Marcus Aurelius and Commodus[237]). It is unclear whether the jurists wrote these works on their own accord or whether they were encouraged or even requested to do so by their employer, the emperor. Indeed, we know very little about the context in which the works of the Roman jurists came into being: the names of possible commissioners, dedications, introductions and any other passages concerning the methods and purpose of legal authors have usually not survived in the Digest[238]).

In some ways, Paul's collection of imperial judgments can be regarded a continuation of existing types of legal literature, in others as a part of the

[235]) See on this genre in general Schulz, Geschichte (n. 3) 309–324. Babusiaux, Legal Writing (n. 133) 185 rightly argues that these writings should not be regarded as exceptional or completely new types of legal literature, but as continuations of existing literature. It should, however, be stressed that although the narrative structure and overall shape are consistent with more traditional types of legal writing, their subject matter is unconventional and/or new.

[236]) Index Florentinus XXV,19 De officio proconsulis libri II; XXV,38 De officio praefecti vigilum liber singularis; XXV,39 De officio praefecti urbi liber singularis; XXV,40 De officio praetoris tutelaris; not included in the Florentine Index, but mentioned in D. 1,18,21 and D. 3,3,73: De officio assessorum liber singularis.

[237]) The jurist mentioned in the Digest is usually identified as M. Aurelius Papirius Dionysius, a successful jurist and civil servant during the reigns of Marcus Aurelius and Commodus; see Schulz, Geschichte (n. 3) 180; Wieacker (n. 111) 106; for a different view see Kunkel, Römische Juristen (n. 40) 216–217.

[238]) Babusiaux, Legal Writing (n. 133) 176; D. Mantovani, Les juristes écrivains de la Rome antique: Les œuvres des juristes comme littérature, Paris 2018, 37–38.

new bureaucratic genre. His reports show clear similarity to the traditional casuistic works of the Roman jurists, such as their *libri digestorum* and their collections of *responsa, quaestiones* and *disputationes*[239]). Just like the Decreta and the Imperiales Sententiae, these works consist of collections of discussions of individual – and often intricate – legal problems. In addition, both these works and Paul's collection are characterized by their narrative nature[240]). The author usually plays an active and central role in the work and is directly involved in the process of finding the law by offering answers, thoughts and solutions for the legal problem being discussed[241]). A similar role can in some way be discerned for Paul in the case reports from the Decreta and the Imperiales Sententiae. At the same time there is an important difference between Paul's collection and other casuistic works: the presence of the emperor. His detailed case reports offer readers a unique insight into this decision-making process at the top of the imperial bureaucracy with Septimius Severus at its center. Paul's work therefore gave a certain transparency and publicity to the imperial decision-making process, which in the age of Severus usually took place behind closed doors and belonged to the *arcana imperii*. From this point of view, the Decreta and the Imperiales Sententiae go beyond the traditional casuistic genre and might have more in common with the legal writings concerning the functioning of the imperial bureaucracy. They are not just collections of discussions of legal problems or imperial *decreta*, but should be regarded chiefly as a portrait of the emperor Septimius Severus and his *consilium* at work. The picture of Severus painted by Paul is a very favorable one and answers strikingly well to the expectations Roman society imposed on the 'good emperor-judge'. At the same time, Paul's reports also present the jurist himself in a favorable way, demonstrating both his skill and his influence at the imperial court. Both aspects will be discussed below in the following sections.

## 2. Septimius Severus, the good emperor-judge:

### *a) the good emperor-judge in Roman literature:*

The judicial activities of the emperor are a recurring topic in literary and (particularly) in historiographical sources, such as Tacitus, Suetonius, Cassius Dio and Herodian. From these sources a clear and a fairly consistent

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[239]) Cf. Babusiaux, Legal Writing (n. 133) 178 and 185. Schulz, Geschichte (n. 3) 281–309 refers to this group of works as 'the literature of *problemata*'.

[240]) Babusiaux, Legal Writing (n. 133) 184.

[241]) Cf. Babusiaux ibid. 182–183.

picture of the good emperor-judge can be inferred[242]). In general, it was important for the emperor to judge cases on a regular basis[243]). Sources stress the long hours (or rather days) spent hearing cases by emperors such as Augustus and Marcus Aurelius; neglecting this task was considered to be a sign of imperial incompetence[244]). When judging cases, the emperor needed to perform his duties as a judge properly. He was expected to participate actively in the proceedings, allowing the litigants enough time to present their case, listen to their arguments, and come to an accurate and just decision by conscientiously weighing all arguments and interests involved[245]). Classical sources also stress the importance of the presence of an advisory *consilium* of notable citizens and jurists when the emperor judged cases[246]). The attendance of such a council was considered to be a safeguard for the quality and the objectivity of the imperial administration of justice and gave a certain transparency and publicity to the proceedings in the absence of a real audience[247]). A good emperor-judge listened to the advice of his councilors and gave them the opportunity to speak freely, as can be inferred from the famous speech of Maecenas on emperorship in Dio's Roman History:

> Dio Hist. 52,33,6 τήν τε παρρησίαν παντὶ τῷ βουλομένῳ καὶ ὁτιοῦν συμβουλεῦσαί σοι μετὰ ἀδείας νέμε· ἄν τε γὰρ ἀρεσθῇς τοῖς λεχθεῖσιν ὑπ᾽ αὐτοῦ, πολλὰ ὠφελήσῃ, ἄν τε καὶ μὴ πεισθῇς, οὐδὲν βλαβήσῃ[248]).

Since the emperor was considered to be the ultimate source of law and justice, he could decide the case in any way that he saw fit. As we have seen in

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[242]) Cf. Tuori (n. 4), who distinguishes distinctive narratives of good and bad emperor-judges in these sources.

[243]) Suet. Aug. 33,1 (Augustus); Dio Hist. 60,4,2–3 (Claudius); Dio Hist. 65,10,5 (Vespasian); Dio Hist. 71(72),6,1; SHA Ver. 8,9 (Marcus Aurelius); less explicitly Plin. Pan. 77,3 and 6.

[244]) Augustus and Marcus Aurelius: Suet. Aug. 33,1; Dio Hist. 71(72),6,1; SHA Ver. 8,9; for an example of an emperor neglecting to hear cases see Her. 1,11,5 and Dio Hist. 72(73),10,2 on Commodus, discussed by Honoré, Emperors (n. 91) 19 and Tuori (n. 4) 222; cf. also Suet. Ner. 15,1.

[245]) Suet. Iul. 43 (Caesar); Suet. Claud. 14 (Claudius); Dio Hist. 60,4,2 (Claudius); Suet. Vesp. 13 (Vespasian); Suet. Dom. 8 (Domitian); Dio Hist. 71(72),6,1 (Marcus Aurelius); cf. also Phil. Leg. 44,350.

[246]) Suet. Ner. 15 (Nero); Dio Hist. 68,2,3 (Nerva); Dio Hist. 69,7,1–2 (Hadrian); also SHA Hadr. 18,1, SHA Marc. 11,10, and D. 28,4,3, explicitly mentioning the presence of jurists in the judicial *consilia* of Hadrian and Marcus Aurelius.

[247]) Färber (n. 22) 79–80 with more references in nt. 63.

[248]) Transl. by Cary (n. 8) vol. 6, 165: "Grant to every one who wishes to offer you advice, on any matter whatever, the right to speak freely and without fear of the consequences; for if you are pleased with what he says you will be greatly benefited, and if you are not convinced it will do you no harm."

the analysis of some the decisions included in the Decreta and the Imperiales Sententiae, he could even decide to set aside the rules of the existing law to come to a more equitable and just solution for the case. This was his prerogative: as the pinnacle of the Roman legal system, he was not bound by the rules of existing Roman private law including the laws created by other (Republican) legislators, such as the *leges* of the *comitia* and the *senatus consulta* of the senate. In the Roman legal tradition, this principle is expressed by the well-known maxim *princeps legibus solutus est*, which can be found in both legal and literary sources. Although the legal texts only mention this principle with regard to the emperor as an actor in Roman private law (for example regarding the application of the Lex Iulia et Papia or when the emperor acted as the beneficiary of an inheritance or a *fideicommissum*)[249]), literary texts make clear that the principle was also applied in a broader context. The most compelling example can be found in Dio, who already presents the words *princeps legibus solutus est* as a maxim in his own age[250]):

> Dio Hist. 53,18,1 ἤδη δὲ καὶ ἕτερόν τι, ὃ μηδενὶ τῶν πάλαι Ῥωμαίων ἐς πάντα ἄντικρυς ἐδόθη, προσεκτήσαντο, ὑφ᾽ οὗπερ καὶ μόνου καὶ ἐκεῖνα ἂν καὶ τἆλλα αὐτοῖς πράττειν ἐξῆν. λέλυνται γὰρ δὴ τῶν νόμων, ὡς αὐτὰ τὰ Λατῖνα ῥήματα λέγει· τοῦτ᾽ ἔστιν ἐλεύθεροι ἀπὸ πάσης ἀναγκαίας νομίσεώς εἰσι καὶ οὐδενὶ τῶν γεγραμμένων ἐνέχονται[251]).

There seem, however, to have existed certain political limitations to this imperial freedom. Even though the emperor was exempt from the laws, it befitted him to live and act in accordance with them, as Paul writes[252]):

> D. 32,23 Paulus libro quinto sententiarum. Ex imperfecto testamento legata vel fideicommissa imperatorem vindicare inverecundum est: decet enim tantae maiestati eas servare leges, quibus ipse solutus esse videtur.

In other words, even though there were no legal restrictions on the powers of the emperor, moral values and traditions dictated at least some restraint

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[249]) E.g. D. 1,3,31; Just. Inst. 2,17,8; C. 6,23,3 (Alexander Severus); cf. Krüger, Geschichte (n. 95) referring to Mommsen, Röm. Staatsrecht II.2 (n. 3) 751 nt. 3.

[250]) See in addition Plin. Pan. 65,1; Dio Chrys. Or. 3,10.

[251]) Transl. by Cary (n. 8) vol. 6, 241: "And further, they have acquired also another prerogative which was given to none of the ancient Romans outright and unreservedly, and the possession of this alone would enable them to exercise the powers above named and the others besides. For they have been released from the laws, as the very words in Latin declare; that is, they are free from all compulsion of the laws and are bound by none of the written ordinances."

[252]) = PS 5,12,9a; see in addition PS 4,5,3; Just. Inst. 2,17,8; C. 6,23,3 (Alexander Severus); Plin. Pan. 65,1. This principle is still stressed by Theodosius and Valentinian in 429 CE; see C. 1,14,4 *Digna vox maiestate regnantis legibus alligatum se principem profiteri: adeo de auctoritate iuris nostra pendet auctoritas. et re vera maius imperio est submittere legibus principatum.*

in using them[253]). In the case of imperial adjudication, this meant that the emperor was expected to observe laws, *senatus consulta*, and other rules of existing law as much as possible[254]). Literary sources therefore praise emperors for respecting the law and applying it in full to cases brought to their attention (*severitas*)[255]). On the other hand, the emperor also had to be able to show leniency (*lenitas*) when the circumstances of the individual case required a different approach[256]).

*b) Septimius Severus as a judge in the Decreta and the Imperiales Sententiae:*

From the above, it can be inferred that Roman society and in particular its elite (to which authors like Tacitus, Suetonius, Pliny and Cassius Dio belonged) had clear expectations of the way an emperor should fulfil his judicial duties. As mentioned in the previous section, Paul's description of Severus as a judge is strikingly consistent with this image of the good emperor-judge. The jurist depicts Severus as an accessible emperor, available to all of his subjects in their time of need irrespective of their sex or status. Even though the prosopographical analysis of the cases seemingly confirms the modern presumption that a large part of the cases heard by the emperor concerned the elite[257]), Severus' interest was at the same time not limited to the adjudication of spectacular criminal charges and other controversial disputes within the elite. He often heard cases between normal citizens on less sensational and sometimes even highly technical subject matter, which regularly concerned socially disadvantaged persons such as minors, freedmen and even slaves[258]). His attention to the problems and claims of all of these persons of course fits with the image of a good emperor-judge.

Paul's reports also offer their reader the opportunity to get an idea of Severus' conduct during the proceedings, both inside and outside the courtroom. By relating the arguments of one or both litigants in his reports, the

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[253]) Krüger, Geschichte (n. 95) 101; Tuori (n. 4) 236; M. Peachin, Rome the superpower: 96–235 CE, in: D.S. Potter (ed.), A companion to the Roman Empire, Malden (MA) 2006, 147.

[254]) Tuori (n. 4) 236; Peachin (n. 253) 147.

[255]) Suet. Iul. 43 (Caesar); Plin. Pan. 80,1 (Trajan); also note Plin. Pan. 77,3, praising Trajan for his *reverentia legum*.

[256]) Suet. Aug. 33,1 (Augustus); Plin. Pan. 77,3 (Trajan); Her. 2,4,1 (Pertinax).

[257]) See section IV.1 supra.

[258]) For Severus' specific interest in the legal position of minors, also see D. 26,5,2,2 containing a letter of Severus on the subject: *Omnem me rationem adhibere subveniendis pupillis, cum ad curam publicam pertineat, liquere omnibus volo*; cf. also the *oratio principis* of D. 27,9,1 pr.

jurist suggests that the emperor gave the litigants ample opportunity to plead their case in his court and substantiate their claims with evidence[259]). In addition, Severus actively presided over the proceedings and sometimes interrogated the parties, as can be inferred from the discussion between the emperor and one of the litigants related by Paul in D. 32,97[260]). If we are to believe Paul's depiction, Severus' conduct during the deliberations with his *consilium* afterwards met all the expectations imposed on a good emperor-judge as well. As can be inferred from the cases discussed in section IV.3, the legal debate between the emperor and his advisers was of a high quality, partly due to the fact that Severus gave the members of his council the opportunity to speak freely, even if they disagreed with the emperor on the solution of the case. When relating the debate *in consilio*, Paul usually mentions his own point of view and that of his fellow jurists first, before describing the opinion of the emperor, thereby suggesting that the emperor let his advisors give their opinion before he expressed his own thoughts on the matter[261]). The fact that the emperor could participate in these debates shows the emperor's legal skill and competence. An interesting example of this can also be found in D. 36,1,76(74),1, in which Severus seemingly refers on his own accord to a *constitutio* of Marcus Aurelius which (according to Paul's description of the proceedings) had not been mentioned by the litigants or the jurists in the *consilium*.

When deciding on the case, the emperor sometimes followed the opinion of (one of) his councilors[262]). He was, however, in no way obligated to do so[263]). In several cases he was of the opinion that the particular case at hand in the given circumstances demanded a different, more equitable solution than the one proposed by his jurists. These decisions were usually prompt-

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[259]) D. 10,2,41 (= D. 37,14,24); D. 14,5,8; D. 26,5,28; D. 26,7,53; D. 32,97; D. 36,1,76 (74),1; D. 48,18,20; D. 49,14,47 pr.; D. 49,14,48 pr.; D. 49,14,48,1; D. 49,14,50.

[260]) D. 32,97 i.f.: *Imperator interrogavit partem legatarii: 'Quaerendi causa pone', inquit, 'in condito centiens aureorum esse, quae in usum sumi solerent: diceres totum, quod esset relictum in arca, deberi'? et placuit recte appellasse. a parte legatarii suggestum est quaedam a colonis post mortem patris familias exacta. respondit hoc, quod post mortem exactum fuisset, reddendum esse legatario.*

[261]) D. 4,4,38 pr.; D. 14,5,8; D. 29,2,97; D. 32,27,1; D. 49,14,50; cf. Liebs, Hofjuristen (n. 40) 55.

[262]) D. 29,2,97 (Papinian); D. 49,14,50 (2nd decision, Papinian and Messius); D. 50,16,240 (unclear); see in addition Honoré, Emperors (n. 91) 23, contending that the emperor followed Papinian's opinion in his decision in D. 14,5,8 as well.

[263]) Millar (n. 5) 238; A. Lovato, Giulio Paolo e il decretum principis, in: Studi in onore di Remo Martini II, Milano 2008–2009, 497.

ed by the wish to protect the interests of socially disadvantaged persons, such as minors (e.g. D. 4,4,38 pr. and D. 36,1,76(74),1), or civilians engaged in a lawsuit against the *fiscus* (e.g. D. 32,27,1 and D. 49,14,50). In general, one can argue that a clear balance exists between the different types of decisions included in the Decreta and the Imperiales Sententiae; cf. the four categories of decisions mentioned in section V.3. Sometimes Severus acted as a regular judge and simply applied the rules of the *ius civile* to the case presented to him. In other cases, when the specific circumstances of the case required him to interfere, he acted as a benevolent ruler and was willing to bend the rules to come to an equitable decision that best served the interests of all parties involved. Particularly interesting are the judgments in which Severus explicitly applied the rules of the *ius civile* in disputes concerning his own imperial treasury often to the detriment of the latter[264]). He sometimes even went one step further and gave judgment against his own *fiscus*, even if he was not legally bound to do so. An example of such a decision can be found in D. 49,14,47 pr., containing a decision of Severus (based on the *aequitas*) that the *fiscus*, in contrast to private creditors, had to first bring an action against its own debtors before it could enforce its general tacit hypothec on the former goods of its debtors acquired by third parties[265]). The refusal to award a special legal position to the *fiscus* is – of course – characteristic of a good emperor-judge[266]).

3. Imperial representation and Severan self-fashioning in the Decreta and the Imperiales Sententiae:

*a) Septimius Severus as an Antonine emperor:*

The unconventional content of the Decreta and the Imperiales Sententiae justifies the assumption that we are dealing with an extraordinary piece of legal writing with a very specific purpose. Although it cannot be ruled out completely that the compilation and publication of Paul's collection of imperial judgments was prompted by reasons of publicity and accessibility, it seems far more likely that Paul's motives were of a more political nature. As has been demonstrated in the previous section, creating a collection of

[264]) D. 16,2,24; D. 40,1,10; D. 49,14,47,1; D. 49,14,48,1; cf. Brutti (n. 1) 47–48.

[265]) A private secured creditor was free to choose whether he would bring a personal action against the debtor for the payment of the debt or execute his security interest, regardless of whether the pledge was in the possession of the debtor or of a third party; see C. 4,10,14; C. 8,13(14),14; C. 8,13(14),24. Another example of an equitable decision to the detriment the *fiscus* might be D. 28,5,93(92), which, in my opinion, also concerns a procedure against the *fiscus*; cf. Daalder (n. 43) 327–337.

[266]) Cf. Plin. Pan. 80,1.

imperial judgments offered the jurist the opportunity to give his readers a unique insight into the imperial decision-making process and present Septimius Severus as an accessible, dedicated and conscientious judge, administering justice in a fair and just way. His portrait of Severus as a judge must have certainly pleased the emperor[267]), which can also be inferred from the fact that the collection was published during (and not after) the reign of Severus[268]). By publishing his case reports Paul essentially made public the debate *in consilio*, which normally took place behind closed doors. Such a public disclosure of the *arcana imperii* could only have occurred with the knowledge and approval of the emperor himself.

The picture of Severus as a good emperor-judge fitted well into Severus' own imperial rhetoric and propaganda. After coming to power by means of two civil wars, Severus presented himself as the son of Marcus Aurelius[269]) and more in general, as a *bonus princeps*, who would rule the Empire in the same way as the Antonine emperors, and by extension Augustus himself, had done[270]). Since the administration of justice was regarded as one of the most important tasks of the emperor[271]), the way an emperor dealt with it was a substantial aspect of his public image and the general perception of his reign[272]). After all, the imperial adjudication process created an important instance of close contact between the ruler and his subjects and offered the emperor ample opportunity to present himself as their benevolent and just ruler, who showed a keen interest in the (sometimes petty) problems and concerns of regular citizens[273]). It should therefore come as no surprise that 'good emperors' such as Marcus Aurelius and the other adoptive emperors are usu-

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[267]) For other examples of "Herrscherlob" in the writings of the Severan jurists see U. Babusiaux, Lob des Tyrannen? Juristentaktik in der Severerzeit, in N. Jansen/P. Oestmann (eds.), Rechtsgeschichte heute, Religion und Politik in der Geschichte des Rechts, Schlaglichter einer Ringvorlesung, Tübingen 2014, 1–26.

[268]) See section IV.2.

[269]) Cf. Dio Hist. 75(76),7,4; SHA Sev. 10,6; and for example CIL XIV, 112; on the (posthumous) adoption of Severus and its connotations also see Birley (n. 85) 117–118, 122; A.E. Cooley, Septimius Severus: the Augustan emperor, in: S. Swain/S. Harrison/J. Elsner (eds.), Severan Culture, Cambridge 2007, 385–388; S.S. Lusnia, Creating Severan Rome, The architecture and self-image of L. Septimius Severus (A.D. 193–211), Bruxelles 2014, 46–49; O.J. Hekster, Emperors and ancestors, Roman rulers and the constraints of tradition, Oxford 2015, 205.

[270]) Cooley (n. 269) 385; Lusnia (n. 269) 49.

[271]) Millar (n. 5) 528; Färber (n. 22) 67; Coriat (n. 20) 41; Tuori (n. 4) 159.

[272]) Millar (n. 5) 528–529; Färber (n. 22) 67; Tuori (n. 4) 127.

[273]) Millar (n. 5) 229; Tuori (n. 4) 246; Coriat (n. 20) 41; Bablitz (n. 22) 35.

ally depicted as good judges in Roman literary sources; see for example this passage from the Roman History of Dio on Marcus Aurelius:

Dio Hist. 71(72),6,1

Ὁ δ' αὐτοκράτωρ ὁσάκις ἀπὸ τοῦ πολέμου σχολὴν ἦγεν, ἐδίκαζε, καὶ ὕδωρ πλεῖστον τοῖς ῥήτορσι μετρεῖσθαι ἐκέλευε, τάς τε πύστεις καὶ τὰς ἀνακρίσεις ἐπὶ μακρότερον ἐποιεῖτο, ὥστε πανταχόθεν τὸ δίκαιον ἀκριβοῦν. καὶ κατὰ τοῦτο καὶ ἔνδεκα πολλάκις καὶ δώδεκα ἡμέραις τὴν αὐτὴν δίκην, καίπερ νυκτὸς ἔστιν ὅτε δικάζων, ἔκρινε. φιλόπονος γὰρ ἦν, καὶ ἀκριβῶς πᾶσι τοῖς τῇ ἀρχῇ προσήκουσι προσεφέρετο, …[274])

Paul's presentation of Severus as a good emperor-judge was therefore in complete accordance with Severus' own public imagery as a *bonus princeps* and may have served as a welcome addition to it.

The connection between Severus and the Antonine (or adoptive) emperors in the Decreta and the Imperiales Sententiae is also illustrated by the judgments themselves. A good example are the judgements in which Severus shows his leniency in hard cases and decides them on the basis of the *aequitas* or *humanitas*. By dealing with this type of cases in a similar way as his Antonine predecessors, Severus styled himself as a worthy successor to those benevolent rulers. The decision of D. 28,5,93(92), concerning the request of a woman named Pactumeia Magna, and in particular the 'legal' construction employed by Severus in this judgment shows, for example, great similarity to a judgment by Hadrian and a decision of Marcus Aurelius in the same type of case. A man named Pactumeius Androsthenes had initially appointed Pactumeia Magna as his sole heir in his will while instituting her father, Pactumeius Magnus, as her substitute heir[275]). After the rumor had spread that Pactumeia and her father had been murdered, Androsthenes changed his will and named a certain Novius Rufus as his heir. After the death of Androsthenes, Pactumeia Magna resurfaced. She petitioned the emperor and asked for the restitution of Androsthenes' inheritance. It seems that she based her request on the fact that Pactumeius Androsthenes had included the following remark in his will: Since I could not

[274]) Transl. by Cary (n. 8) vol. 9, 21: "The emperor, as often as he had leisure from war, would hold court; he used to allow abundant time to the speakers, and entered into the preliminary inquiries and examinations at great length, so as to ensure strict justice by every possible means. In consequence, he would often be trying the same case for as much as eleven or twelve days, even though he sometimes held court at night. For he was industrious and applied himself diligently to all the duties of his office; […]"

[275]) On this case see Sanfilippo (n. 1) 67–71; Rizzi (n. 1) 349–356; Brutti (n. 1) 128–133; Daalder (n. 43) with further references in nt. 1.

get the heirs that I wanted to have, let Novius Rufus be my heir *(quia heredes, quos volui habere mihi contingere non potui, Novius Rufus heres esto*). Even though such a testamentary disposition based on a wrong consideration was regarded as valid in Roman law (*falsa causa non nocet*), Severus ordered the inheritance to be restored to her anyway, but also compelled her to pay out the legacies included in the second will, thereby creating a tailor-made decision for this specific case[276]). In the matter heard by Hadrian a mother had named several other persons as her heirs in a second will after learning that her son, whom she had named as her only heir in her first will, had died in battle. The son, however, turned out to be alive and Hadrian therefore judged that the inheritance had to be awarded to the son on the condition that he paid out the legacies and manumissions of the second will[277]). The case of Pactumeia Magna also resembles the famous judgment of Marcus Aurelius against his own *fiscus* transmitted in D. 28,4,3[278]). In this case Marcus ordered the legacies and the manumissions included in a will to be carried out, even though the names of the appointed heirs had been stricken in the will, which according to Roman law made it invalid. The same case can also be linked to another judgment from the Decreta, namely D. 32,27,1 concerning the interpretation of the will and codicil of Pompeius Hermippus[279]). In both D. 28,4,3 and D. 32,27,1 the emperor (Marcus Aurelius and Septimius Severus, respectively) explicitly based his decision on a *humanior interpretatio* of the contested will and the *voluntas* of the testator (cf. D. 28,4,3: *Causa praesens admittere videtur humaniorem interpretationem*; D. 32,27,1: *Placuit humanius interpretari*), in both cases resulting in a judgment against the imperial *fiscus*[280]).

In the end the very publication of the collection itself will have contributed to a positive image of Severus' rule. Since imperial court hearings were probably no longer accessible to the general public at the time of Severus' reign, the people of Rome had virtually no insight into the proceedings at the imperial court and the way in which the emperor reached his final decision.

[276]) Cf. Palazzolo, Potere imperiale (n. 13) 65–66.

[277]) D. 5,2,28; for this comparison see also Rizzi (n. 1) 354–355; Brutti (n. 1) 131–132.

[278]) Also Rizzi (n. 1) 355.

[279]) On this case see Sanfilippo (n. 1) 75–77; Rizzi (n. 1) 175–179; Brutti (n. 1) 134–136; Daalder (n. 43) 361–377 with additional references.

[280]) The use of *humanitas* as the ground for imperial judgments probably goes back to Hadrian according to H. Hausmaninger, "Benevolent" and "humane" opinions of classical Roman jurists, Boston University Law Review 61 (1981) 1149–1150.

The detailed descriptions by Paul therefore added a certain amount of transparency to the imperial judicial procedure. Since classical authors valued the public nature of the imperial court sessions as a means to discourage unfair and arbitrary judgments, the sole publication of Paul's work must have contributed to the image of Severus as a good emperor.

Finally, there is another aspect of the reports included in the Decreta and the Imperiales Sententiae, that also must have pleased Severus. While the administration of justice gave the emperor a stage to demonstrate his benevolence, it also offered him the opportunity to communicate his power and, more specifically, assert his position as the ultimate source of law and justice within the Roman legal system[281]). He was the final and sole authority on questions of the content and meaning of the law and on how it should be applied in a specific case. Especially the judgments in which the emperor bypasses the law and decides the case on the basis of *aequitas, humanitas* or *pietas* emphasize his position as an absolute ruler, who is *legibus solutus* and has the power to decide on the equity of the law. From this perspective, Paul's collection of imperial judgments can also be regarded as a confirmation of absolute monarchy.

*b) The audience and readership of the Decreta and the Imperiales Sententiae:*

The most important audience of Paul's work was most likely the emperor himself. It was not uncommon in Roman imperial literature to write a treatise or literary work directed at the emperor with the aim of pleasing him and obtaining imperial favor and support. A good example of this practice from the reign of Severus itself is Cassius Dio's treatise on the dreams and portents foreshadowing the reign of Severus:

> Dio Hist. 73(72),23,1–2 βιβλίον τι περὶ τῶν ὀνειράτων καὶ τῶν σημείων δι᾽ ὧν ὁ Σεουῆρος τὴν αὐτοκράτορα ἀρχὴν ἤλπισε, γράψας ἐδημοσίευσα· καὶ αὐτῷ καὶ ἐκεῖνος πεμφθέντι παρ᾽ ἐμοῦ ἐντυχὼν πολλά μοι καὶ καλὰ ἀντεπέστειλε[282]).

According to Dio, his small work on the divine legitimation of Severus' reign was well received by the emperor[283]); in the end, it won him consider-

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[281]) Tuori (n. 4) 291; Coriat (n. 20) 41; De Angelis (n. 22) 137; also B. Stolte, Jurisdiction and representation of power, or, the emperor on circuit, in: L. de Blois (ed.), The representation and perception of Roman imperial power, Amsterdam 2003, 263.

[282]) Transl. by Cary (n. 8) vol. 9, 117–119: "I had written and published a little book about the dreams and portents which gave Severus reason to hope for the imperial power, and he [i.e. Severus – ESD], after reading the copy I sent him, wrote me a long and complimentary acknowledgment."

[283]) This was no surprise: Septimius Severus was well-known for his belief in (as-

able imperial favor and helped him obtain several positions within the highest regions of Severan political life, such as the consulate and a seat on various judicial *consilia* of the emperor (see section III supra). It is not unlikely that an ambitious 'Hofjurist' like Paul tried to obtain the favor of the emperor in a similar way to further his career within the imperial bureaucracy. However, to have been of real value for Severus' representational program the readership of Paul's work must have been broader than just the emperor and perhaps some of his close relatives and courtiers. As a work of one of the most famous and prolific legal writers of the period, it was probably noticed and read by other jurists in Rome and the provinces, as well as by other professionals involved in the administration of justice, such as orators and imperial officials. Was, however, the readership of Paul's work perhaps even broader than this circle of legal professionals? Unfortunately, relatively little is known about the distribution and circulation of legal literature and their readership outside of the legal profession. It has been argued time and again that the average member of the Roman elite must have had at least basic knowledge of the law and legal concepts, since Roman literary works of poetry, comedy and satire often contain references to the law or legal terms or even employ jokes which cannot be understood without at least some knowledge of the law[284]). But does this mean that the works of the Roman jurists were actually read by 'normal' citizens? Recently, Mantovani has argued for an affirmative answer to this question on the basis of several literary texts[285]). His most compelling source is a text from Ammianus Marcellinus describing the burning of the personal libraries of notable private citizens in Antioch on the order of the emperor Valens in 371 CE:

> Amm. Marc. Hist. 29,1,41 Deinde congesti innumeri codices, et acervi voluminum multi, sub conspectu iudicum concremati sunt, ex domibus eruti variis ut illiciti, ad leniendam caesorum invidiam, cum essent plerique liberalium disciplinarum indices variarum et iuris[286]).

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trological) omens and portents; see Birley (n. 102) 41, 136, 139 and 183, who even repeatedly describes Severus as 'superstitious'.

[284]) See for example J.A. Crook, Law and life of Rome, Ithaca 1967, 8; T. McGinn, Satire and the law: the case of Horace, Proceedings of the Cambridge Philological Society 47 (2001) 81.

[285]) Mantovani, Les juristes écrivains (n. 238) 42–46.

[286]) Transl. by J.C. Rolfe, Ammianus Marcellinus, History, vol. 3, Cambridge (MA) 1939, 211–213, using the edition of the Latin text by C.U. Clark: "Then, innumerable writings (*codices*) and many heaps of volumes (*volumina*) were hauled out from various houses and under the eyes of the judges were burned in heaps as being unlawful, to allay the indignation at the executions, although the greater number were treatises on the liberal arts and on jurisprudence."

From this remark we can infer that the library collections of citizens of considerable wealth and standing in the eastern provinces encompassed not only works of literature, but also books on the liberal arts (*liberales disciplinae*) and the law[287]). There is no compelling reason to assume that this practice was unique for the eastern parts of the Empire. Moreover, the interest in works of legal literature might not even have been limited to the elite. Mantovani mentions the example of the freedman Echion in Patronius' Satyricon[288]), who bought his son several *libra rubricata* so he could study the law by himself and learn more about the areas of law relevant for managing his property[289]). All in all, there seems to be enough evidence to assume that the *libri* of the Roman jurists were at least to some extent used and read by other persons than legal professionals. It seems likely that a legal work like Paul's, which did not contain a dry and highly technical discussion of specific legal rules but a lively description of the inner workings of the imperial court, would have been particularly in demand with such an audience and it would therefore indeed have constituted a valuable addition to the media already employed by Severus to confer his public image to the inhabitants of Rome and the Empire.

*c) A good judge? Paul's collection between representation and reality:*

When we regard Paul's collection of judgments as a work with a clear representational purpose, the question arises whether his reports provide us with a completely distorted picture of Septimius Severus as a judge, entirely prompted by the jurist's wish to please the emperor. This does not seem to be the case. Both in classical sources and modern literature, Severus is generally regarded as an active legislator with at least an above-average and genuine interest in the workings of the law and the legal duties that came with emperorship. This interest might even have started in the emperor's childhood: the Vita Severi in the Historia Augusta contains an anecdote describing how as a child Severus enjoyed 'playing judge' with the other children[290]). Moreover, the same source also mentions in the Vita Caracallae that Severus studied law in his younger years together with Papinian, their teacher being none

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[287]) Mantovani, Les juristes écrivains (n. 238) 43.

[288]) Petr. Sat. 46.

[289]) Mantovani, Les juristes écrivains (n. 238) 44–45; on Roman book trade in general see E.J. Kenney, Books and readers in the Roman world, in: E.J. Kenney (ed.), The Cambridge history of classical literature, II: Latin literature, Cambridge 1982, 19–22; R.J. Starr, The circulation of literary texts in the Roman World, Classical Quarterly 37 (1987) 219–223.

[290]) SHA Sev. 1,4.

other than the famous jurist Quintus Cervidius Scaevola[291]). Of course, as has been mentioned before, the Historia Augusta is an unreliable source when it comes to historical facts. However, considering the long and strong relationship of trust between Severus and Papinian (resulting in Papinian's appointment as *praefectus praetorio*, the most prominent position in the imperial bureaucracy), there might be some truth to these statements[292]). In addition, contemporary sources also describe Severus as a dedicated and conscientious judge. Herodian states in his description of Severus' reign that during his years in Rome (203–208 CE) the emperor spent most of his time administering justice and dealing with other issues of government[293]). Cassius Dio even makes explicit mention of the way Severus adjudicated cases:

> Dio Hist. 76(77)17,1–2 εἶτ᾽ ἐδίκαζε, χωρὶς εἰ μή τις ἑορτὴ μεγάλη εἴη. καὶ μέντοι καὶ ἄριστα αὐτὸ ἔπραττε· καὶ γὰρ τοῖς δικαζομένοις ὕδωρ ἱκανὸν ἐνέχει, καὶ ἡμῖν τοῖς συνδικάζουσιν αὐτῷ παρρησίαν πολλὴν ἐδίδου. ἔκρινε δὲ μέχρι μεσημβρίας; …[294]).

The historiographer's description clearly shows similarities with the picture painted by Paul in his collection. Moreover, it should be noted that both Herodian and Cassius Dio are generally quite critical of the way in which Severus came to power and governed the Empire afterwards. The fact that they mention that Severus performed his duties as a judge frequently and excellently (cf. Dio: καὶ μέντοι καὶ ἄριστα αὐτὸ ἔπραττε) justifies the presumption that the portrait of Severus as a judge emerging from the Decreta and the Imperiales Sententiae might at least have been partially, if not largely, in accordance with reality.

### 4. Juristic self-fashioning in the Decreta and the Imperiales Sententiae:

As has been mentioned at the end of section VI.1, Septimius Severus is not the only person who is represented in a positive way in the case reports of the Decreta and the Imperiales Sententiae. Paul's descriptions of the hearings and the deliberations of the *consilium* also paint a positive picture of the activities of the jurist himself[295]). This kind of authorial self-fashioning is not

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[291]) SHA Car. 8,2.

[292]) For a discussion of Severus' possible legal education see Daalder (n. 43) 15–19.

[293]) Her. 3,10,2; also Dio Hist. 76(77)7,3.

[294]) Transl. by Cary (n. 8) vol. 9, 275: "Then he would hold court, unless there were some great festival. Moreover, he used to do this most excellently; for he allowed the litigants plenty of time and he gave us, his advisers, full liberty to speak. He used to hear cases until noon; […]."

[295]) I would like to thank prof. Olivier Hekster (Nijmegen) and prof. Ulrike Ba-

uncommon in other genres of Roman literature. Many Roman authors use their own writings in one way or another to construct their public *persona,* stress their position within society and underline certain (positive) features of their character and/or identity. Perhaps the most famous example of this practice can be found in the writings of Cicero, whose works have been thoroughly studied with regard to their self-fashioning elements in the last decades[296]). Another example of authorial self-fashioning worth mentioning in this specific context is Book 10 of the Letters of Pliny the Younger, which in many ways resembles Paul's collection of Severan judgments. Book 10 of the Epistulae contains the correspondence between Pliny and the emperor Trajan on issues of government encountered by the former while occupying several administrative posts in Italy (98–102/103 CE) and during his time as governor of the province of Bithynia and Pontus (110–112 CE). Just like the reports of Paul, the letters of Pliny and the replies of the emperor offer the reader an insight in the transaction of imperial daily business, while at the same time giving the reader a positive impression of the two main characters involved: whilst Trajan is depicted as a *civilis princeps*, respectful towards the senatorial elite and actively involved in the administration of the Empire, Pliny is represented as an influential citizen with close relations to the emperor himself[297]). The elements of authorial self-fashioning and imperial representation in Book 10 have often been overlooked in the past, because most scholars assumed that Book 10 was not published by Pliny himself during his lifetime, but only contained a collection of private letters edited and distributed posthumously by someone from Pliny's inner circle of friends and pupils[298]). More recently however, several authors have pointed out that there is actually no compelling reason to reject the possibility that Pliny published or at least intended to publish Book 10 during his lifetime, as is the case with the first nine books of the Letters[299]). If we assume with these authors that

busiaux (Zürich) for their remarks on various occasions with regard to this aspect of Paul's collection. I hope this paragraph does justice to their thoughts.

[296]) See for example J. Dugan, Making a new man: ciceronian self-fashioning in the rhetorical works, Oxford 2005.

[297]) C.F. Noreña, The Social Economy of Pliny's Correspondence with Trajan, American Journal of Philology 128 (2007) 240–261; G. Woolf, Pliny's Province, in: T. Bekker- Nielsen (ed.), Rome and the Black Sea Region: Domination, Romanisation, Resistance, Aarhus 2006, 103.

[298]) Noreña (n. 297) 262; see ibid. nt. 68 for an enumeration of authors supporting this traditional view on the publication of Book 10; for a discussion of the possible posthumous editors see ibid. 263–264.

[299]) Noreña (n. 297) 261–271; Woolf, Pliny's Province (n. 297) 93–108; idem,

Book 10 should be regarded as a literary project, compiled, shaped and disseminated (or intended for dissemination) by Pliny himself, it might serve as a beautiful example of how the publication of a compilation of official documents, in this case imperial letters[300]), can contribute to the (self-)presentation of the public *personae* of the persons involved.

This then brings us to the question of self-fashioning in the writings of the Roman jurists. Modern legal historians have been hesitant to attribute the self-fashioning practices described above to the (works of the) Roman legal writers. Roman jurisprudence is traditionally regarded as a 'science', which amongst other things results in the tendency to regard the works of the Roman jurists as pure objective discussions of the law and therefore to largely ignore the possible inclusion of elements of a more personal nature in their works[301]). This view is strengthened by the fact that most juristic works have only been transmitted to us through the Digest and that the surviving texts have therefore been selected and edited by the Byzantine compilers who were mainly concerned with their legal content. Consequently, it seems plausible that any introductions, statements of purpose, mentions of addressees and other personal elements were deleted during this process. They are, however, not completely absent[302]). A notable example is a text from Ulpian's first book on the census:

> D. 50,15,1 pr. Ulpianus libro primo de censibus. Sciendum est esse quasdam colonias iuris Italici, ut est in Syria Phoenice splendidissima Tyriorum colonia, unde mihi origo est, nobilis regionibus, serie saeculorum antiquissima, armipotens, foederis quod cum Romanis percussit tenacissima: huic enim divus Severus et

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Pliny/Trajan and the poetics of Empire, Classical Philology 110 (2015) 132–151; P.A. Stadter, Pliny and the ideology of Empire: the correspondence with Trajan, Prometheus 32 (2006) 61–76; for a critical appreciation of their views see M. Lavan, Pliny Epistles 10 and imperial correspondence, The Empire of letters, in: A. König/C. Whitton (eds.), Roman literature under Nerva, Trajan and Hadrian. Literary interactions, AD 96–138, Cambridge 2018, 280–301.

[300]) On the similarity between the letters of Book 10 and other examples of imperial correspondence, supporting the contention already voiced by Noreña, Woolf and Stadter that we are not dealing with fictional letters, see Lavan (n. 299) 284–301.

[301]) An exception is M. Peachin, Jurists and the law in the early Roman Empire, in: L. de Blois (ed.), Administration, Prosopography and Appointment Policies in the Roman Empire, Leiden 2001, 109–120, esp. 118–120, who argues that the writings of the Roman jurists might have been 'first and foremost a personal *monumentum*'. Interestingly, he also draws the parallel with Pliny's Letters.

[302]) See for example D. 1,2,1 seemingly containing Gaius' introduction to his commentary on the XII Tables, and D. 27,1,1 pr., mentioning the recipient of Modestinus' Excusationum libri VI. Other examples can be found in Mantovani, Les juristes écrivains (n. 238) 38.

imperator noster ob egregiam in rem publicam imperiumque Romanum insignem fidem ius Italicum dedit.

In this text, Ulpian not only explicitly mentions Tyrus as his place of origin[303]), but also represents this town as one of the noblest and oldest within the region and powerful in arms, while at the same time completely loyal to the Romans. This emphasis on the qualities of Ulpian's hometown of course induces the reader to regard the jurist himself as a noble and loyal person as well[304]). I think a strong case can be made for the view that, like Ulpian's text, some of Paul's reports in the Decreta and the Imperiales Sententiae also include elements of self-fashioning, albeit perhaps somewhat less explicit than Ulpian's statement on his place of origin cited above.

When we take the texts containing a clear statement on both Paul's and the emperor's view on the right solution for a case into consideration, a clear pattern seems to emerge. In all of these cases Paul is depicted as a supporter of the strict application of the law, the *rigor iuris*, while the emperor is usually presented as the benevolent ruler, favoring an equitable application of the law[305]). In D. 4,4,38 pr. for example Paul argues in accordance with the rules of the *ius civile* that in this case the underaged Rutiliana could not be restored to her former position, since her father and not she herself had concluded the *Lex commissoria*. The emperor awarded the *restitutio* anyway. In his description of the case of Pactumeia Magna Paul reveals to his reader in a very subtle way that he did not agree with the imperial judgment, which was clearly based on notions of equity and not on the rules of law. According to Paul, Pactumeia Magna could not claim the inheritance on the basis of the *ius civile*, since the appointment of an heir based on a wrong presumption did not make the appointment legally invalid: *licet modus institutioni contineretur, quia falsus non solet obesse*. Note the use of the word *licet* at the beginning of the sentence to signal the contrast between Paul's opinion and the judgment of the emperor. In D. 36,1,76(74),1 Paul explicitly mentions that he and the other jurists in the *consilium* had put forward several arguments based

[303]) On Ulpian's origin see Kunkel, Römische Juristen (n. 40) 247–254.

[304]) This interpretation of the text has previously been put forward by Ulrike Babusiaux in a paper presented on 4 October 2019 during the conference "Medicine and the law under the Roman Empire" hosted by New York University. I am grateful to her for making the written version of her lecture available to me.

[305]) Cf. D. Nörr, Rechtskritik in der römischen Antike, München 1974, 127–130; see also Honoré, Emperors (n. 91) 21, and Brutti (n. 1) 45–49 with regard to dichotomy between Paul and Severus in the Decreta and the Imperiales Sententiae; in addition Brutti (n. 1) 7–9 and 35–42 for Paul's (conservative) attitude towards the application of the law in general.

on the Lex Aelia Sentia to award the contested *fideicommissum hereditatis* to the claimant Honorata. The emperor, however, was inspired by the *aequitas rei* and therefore rejected Honorata's claim in favor of her underaged niece Fabia Valeriana. Finally, in the case of D. 32,27,1 concerning the interpretation of a codicil attached to the will of Pompeius Hermippus, Paul adhered strictly to the (clear) wording of the codicil and therefore contended that the testator had only intended for the goods mentioned in the codicil to devolve upon his daughter Titiana. The emperor, in contrast, decided to interpret the wording of the codicil in a more humane (*humanior*) way and therefore awarded another *possessio* from the inheritance to the woman. In short, in all of these examples Paul is portrayed as a traditional jurist with thorough knowledge of the law and a strong inclination to solve the matters at hand in accordance with it, while the emperor seems to be more affected by the circumstances of each individual case and tends to look for an – in his eyes – more equitable solution.

Two more reports from the Decreta are worth mentioning in this context, namely D. 29,2,97 and D. 49,14,50. In these two cases we again encounter the dichotomy between Paul and the emperor with regard to the strict application of the law, but what sets them apart from the cases mentioned above is the explicit mention of a third person involved in the decision-making process, namely Papinian. In D. 29,2,97 Paul and Papinian give their opinion on the question whether in the case of two wills by a testator named Clodius Clodianus the acceptance of the inheritance by the appointed heir on the basis of the second invalid drawn up will could be regarded as a renunciation of the valid first will of the same testator, naming the same person as heir[306]). Paul again argues for the application of existing legal rules on the renunciation of inheritances[307]), resulting in the possibility for the heir to still accept the inheritance on the basis of the first will. His colleague Papinian, however, was of the opinion that the acceptance of the inheritance on the basis of the second invalid will had to be regarded as an automatic renunciation of the inheritance on the basis the first. His opinion was followed by the emperor, who decided that the testator Clodius Clodianus had died intestate. D. 49,14,50 concerns the sale of several *praedia* by imperial procurator Valerius Patruinus to a certain Flavius Stalticius subject to an *in diem addictio*[308]). Patruinus

[306]) On this case see Sanfilippo (n. 1) 119–121; Rizzi (n. 1) 356–363; Brutti (n. 1) 158–159; Daalder (n. 43) 339–349 with further references in nt. 1.

[307]) D. 29,2,95 in connection with D. 50,17,76; cf. Brutti (n. 1) 158.

[308]) On this case see Sanfilippo (n. 1) 112–119; Rizzi (n. 1); Brutti (n. 1) 154–158; Daalder (n. 43) 567–583 with further references in nt. 1.

organized a public auction and received a better offer from a third party. Flavius Stalticius matched this offer and the land was therefore awarded to him. After he had acquired the possession and ownership of the *praedia*, a dispute arose concerning the fruits that had been acquired between the first contract of sale and the definitive award of the *praedia* after the auction. Paul argues for a judgment in favor of the vendor on the basis of the *ius civile*[309]), while the emperor in the end decides to award the contested fruits to the buyer, probably for economic reasons. Unfortunately, the imperial decision created a new legal problem. Since the *praedia* had been leased out by the *fiscus* to a *colonus*, the emperor's decision caused the *fiscus* to default on its obligations under the lease contract. As a consequence of the imperial decision, Flavius Stalticius could not only deny the *colonus* access to the *praedia*, but he was now entitled to their entire yield as well. Paul describes that Papinian together with Messius introduced a *nova sententia*, according to which the yield should be given to the *colonus,* while the buyer (to whom the yield had just been awarded) should receive the corresponding rent, just as if such a stipulation had been agreed upon in the contract of sale between the *fiscus* and the buyer. This solution was of course not in accordance with the law, but solved several problems caused by the first imperial decision. The emperor therefore followed the *nova sententia*, seemingly without the approval of Paul, who makes his discontent with the imperial decision clear by the use of the word *tamen* (*pronuntiavit tamen secundum illorum opinionem*). The contrast in these case reports between Paul's and Papinian's opinion on the matter at hand adds an extra dimension to the *persona* Paul is trying to create in his reports. Although the evidence might be a little thin to come to any definite conclusions, the two cases above at least seem to imply that Paul is trying to fashion himself as the more straightforward and in some sense more conservative jurist, while Papinian tends to be depicted as somewhat more liberal when it comes to application of the law[310]). The contrast between the *personae* and methods of both lawyers is illustrative for the purpose Paul is trying the achieve with his collection. Being a rising, ambitious lawyer at the Severan court – as opposed to Papinian, who was already an established jurist and high ranking official in this period –, he is trying to establish a name and reputation by presenting himself as a true, skillful and knowledgeable

[309]) D. 18,2,6 pr. The fact that the first and the second buyer had been the same person, i.e. Flavius Stalticius, should not make any difference according to Paul; cf. D. 49,14,50 *nec moveri deberemus, quod idem fuisset, cui et primo addicta fuerant praedia*.

[310]) Cf. Honoré, Emperors (n. 91) 21.

jurist with great respect for the law and all of its niceties. Moreover, he is a jurist who has the imperial ear and therefore considerable influence on the decision-making process at the top of the imperial bureaucracy. Even though his opinions are not always followed by the emperor, they are presented in his reports as valuable contributions to the legal debate, underlining the importance of the dialectic of legal argument (and, by extension, the presence of lawyers) in the imperial decision-making process[311]).

## VII. Epilogue

During the Principate the Roman legal profession became increasingly intertwined with the imperial bureaucracy. Many of the classical jurists did not just perform the traditional tasks of giving *responsa*, writing monographs and commentaries on the law and training young lawyers, but were also in one way or another part of the imperial government. While most jurists probably occupied insignificant positions within the imperial chancery or the provincial administration, some like Papinian, Paul and Ulpian rose to the highest and most powerful positions within the Empire. The analysis of Paul's Decreta and Imperiales Sententiae demonstrates that the alteration of the social and institutional context in which these jurists operated had a clear impact on (the content of) their writings. It shows how even legal works could be employed for political as well as (self-)representational purposes. Paul's collection of imperial judgments should therefore be regarded as an illustrative example of the increasing entwinement of law, politics and the imperial administration of justice during the Severan era.

[311]) Babusiaux, Legal Writing (n. 133) 183.