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Aims and Methods of Legal History – The Case of the Roman Dictatorship

Special Issue Progress in Legal Scholarship, Marnix Snel, Sanne Taekema & Gijs van Dijck (eds.)

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Abstract

Doctrinal approaches to Roman law are currently often supplemented by contextual legal-historical scholarship that aims to expose Roman law's connections with its socio-political, religious and broader intellectual environment. This article draws attention to the relevance of such contextual research for modern legal problems. An analysis of the Roman dictatorship and its reception history in legal and constitutional scholarship serves as a case in point. Contrary to common belief, the far-reaching powers of the Roman dictator – acting to save the Roman Republic in times of great peril – were controlled by informal rather than formal legal restraints. A corrected understanding of the Roman dictatorship is arguably not only important for an appropriate assessment of the Roman constitution itself but also for current debates on the limits of legality in times of emergency.

Keywords: Roman dictatorship, crisis government, emergency powers, legal historical research.

1. Introduction

The Aymara are an indigenous people who live – for the most part – in the mountainous area of the Altiplano, a region that covers parts of Bolivia, Peru and Chile.¹ When asked about future events, the Aymara tend to point backwards over their shoulder. Such gesturing corresponds to their word for 'future' (*qhipa*), which literally translates as 'behind' or 'back'. To the past, however, they consistently refer as something that lies ahead of them, using a word that also means 'in front' (*nayra*) (Núñez & Sweetser, 2006, p. 402). In order to explain such spatiotemporal referencing, it is often suggested that the Aymara are not really interested in

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1 For a good introduction to the history and culture of the Aymara people, see Osborne (2004).

something like ‘progress’.² Instead of picturing themselves as moving along *with* time, the Aymara (as well as many other peoples around the world) would experience time as an opposing force that constantly uproots what is already known and familiar. With their backs to the future and their eyes fixed to the past, their prime concern would be to preserve the customs and traditions of their ancestors.

The Aymara’s stance towards past and future sharply contrasts with the forward-looking mindset and progressivism that – against all odds, perhaps – is so widely prevalent in modern Western societies.³ Take, for instance, Horizon Europe, a recent research initiative by the European Union with a budget of € 95,5 billion. On flashy websites and in colourful brochures, we learn that ‘new knowledge ... will help us move faster towards a sustainable and prosperous future.’⁴ Whereas ‘breakthrough innovations’ in the sciences are supposed to tackle climate change and other environmental problems while also boosting economic growth, the social sciences and the humanities are expected to ‘shape a better tomorrow’ by making sure that a flourishing economy will go hand in hand with ‘cultural diversity’ and ‘shared values of democracy and human rights’.⁵ Amidst all current threats and insecurities, one thing seems for sure: we have a bright future ahead of us and academic research will have to get us there.

In view of the widespread predominance of such progressivism and academic instrumentalism, it hardly comes as a surprise that the academic discipline of legal history is currently facing serious challenges. Problems especially abound with regard to the tradition of studying Roman law as one of the core elements of legal scholarship and education at continental law schools.⁶ Of course, the relevance of that tradition was evident in times when Roman law was still counted as a valid source of positive law. In times of codification, moreover, the Romanist tradition was widely considered as indispensable in the search for elements that could serve as useful building blocks for modern legal systems. In modern times, and particularly in the past few decades, however, its importance is no longer self-evident. For how could looking back at Roman law and its long and tortuous reception in European legal history ever ‘[d]eliver targeted solutions to societal

2 De la Fuente et al. (2014, pp. 1688-1689), countering the claim (see, e.g., Núñez & Sweetser, 2006, pp. 438-439) that the Aymara’s spatiotemporal referencing should be explained from the fact that the past is partly known while the future is unknown.

3 Jonas (1981, p. 411): ‘The word “Progress” looms large in Western speech and sentiment.’

4 See https://research-and-innovation.ec.europa.eu/strategy/strategy-2020-2024_en, presenting the ‘research and innovation strategy 2020-2024’ of the European Commission (last accessed 10 March 2023).

5 See https://research-and-innovation.ec.europa.eu/research-area/social-sciences-and-humanities_en, where the European Commission considers it necessary to explain ‘[w]hy the EU supports social sciences and humanities research’ (last accessed 10 March 2023).

6 Hallebeek (2020) provides a good overview of the precarious situation of the study of Roman law in Dutch law schools as a representative example of a broader development throughout the European continent and in Scotland. For the broader picture, see also du Plessis (2010) and du Plessis (2022).

challenges⁷ so as to ‘accelerate the transition to a prosperous and sustainable future’⁸?

With regard to the relevance of the Romanist tradition in today’s turbulent world, scholars of Roman law have adopted, basically, two different approaches.⁹ Firstly, there are those who focus on Roman law as a more or less coherent legal system, offering modern lawyers an enormous wealth of doctrinal concepts that could be put to use while solving modern legal problems. Think, for instance, of the prominent role recommended by Reinhard Zimmermann and others for the study of Roman law in the process of the harmonisation of European private law (Zimmermann, 2001, 2011, 2015). Secondly, there are those who argue that before we could learn anything from history that might be relevant for the present, we should first try to let history speak for itself as loud and clear as possible (Lesaffer, 2011, p. 144). Authors such as Paul du Plessis, Randall Lesaffer and Kaius Tuori have proposed an approach to Roman law that does not start out from the perspective of contemporary concerns, but, instead, focuses on a better understanding of Roman law in its original social, political, religious and intellectual context (Cairns & du Plessis, 2007; du Plessis, 2013, 2016; Lesaffer, 2009, 2011; Tuori, 2007).

In this article, my aim will be to show that something like a ‘relevance’ of Roman law in the light of today’s most pressing challenges is – ironically, perhaps – most likely to be found by taking the past very seriously. In order to be ‘ready for the future’, the Aymara may not be giving us such a bad example after all by having their eyes so fixed on the past. Not, of course, because the past would carry some mysterious legitimising authority with regard to present or future legal arrangements. Quite to the contrary, a proper recontextualisation of Roman law – and, indeed, of Roman law’s reception history itself – could serve important critical purposes. As Foucault has it, the intellectual historian more or less resembles the archaeologist, constantly digging up past layers of thought that are somehow foundational for the present (Foucault, 1969).¹⁰ It is only by carefully

7 See the European Commission’s EU research and innovation programme 2021-2027, available at <https://data.europa.eu/doi/10.2777/340354> (last accessed 10 March 2023).

8 See the European Commission’s *Horizon Europe: The strategic plan 2021-2024*, proudly described as ‘an ambitious plan for an ambitious programme’ at <https://data.europa.eu/doi/10.2777/689077> (last accessed 10 March 2023).

9 Cf., e.g., du Plessis (2010) and du Plessis (2022), discerning between a doctrinal and a contextual approach to Roman law. See also Lesaffer (2011), who also discerns between a doctrinal (‘history in law’) and a contextual (‘law in history’) approach and adds a middle position (‘history of law’) in between. Three approaches are also discerned in Winkel (2015), discerning legalistic, ‘neo-humanistic’ and ‘contextual’ approaches to Roman law. Whereas Winkel’s ‘neo-humanistic’ approach focuses on examining the evolution of Roman law in its various stages of development, the ‘contextual’ approach – as described by Winkel – aims primarily at understanding Roman law in its broader historical and intellectual context.

10 See also Simon (1971, p. 201), quoting Foucault’s answer in an interview on his critical work as follows: ‘What I am trying to do is grasp the implicit systems which determine our most familiar behavior without our knowing it. I am trying to find their origin, to show their formation, the constraint they impose upon us; I am therefore trying to place myself at a distance from them and to show how one could escape.’

bringing them back to the surface and dusting them down that we enable ourselves to determine what to think of it (Skinner, 1998, p. 112).

In order to illustrate where a contextual approach to Roman law may bring us, I will focus in this article on the history of emergency government in the Roman Republic as analysed by Dutch legal historian Marc de Wilde. In a series of articles that appeared between 2010 and 2015, de Wilde reveals, for one thing, that the functioning of emergency government in republican Rome should be understood in ways that are dramatically different from its common perception by leading historians and political theorists (de Wilde, 2010, 2011, 2012, 2013, 2015). Additionally and perhaps even more importantly, however, de Wilde also makes clear how his historical analysis may contribute to a better understanding of emergency government more in general (de Wilde, 2010, 2015). Recent events – think, for instance, of the global financial crisis, the spread of COVID-19 and the ongoing ‘war on terror’ – have shown the crucial importance of this. And it certainly seems that a proper understanding of emergency government will remain at least equally valuable in the foreseeable future.¹¹

In this way, de Wilde’s legal-historical analysis of Roman emergency government has a Janus-faced quality that is both important and innovative. On the one hand, it looks backwards and takes history seriously by properly examining its topic in its original historical context. On the other hand, de Wilde’s analysis is also forward-looking in the sense that it helps us to rethink our constitutional systems of power and counter-power so as to be better prepared for emergencies in the future. While explaining and discussing de Wilde’s analysis, I will proceed in the following way. Firstly (Section 2), I will provide a short account of Roman emergency government, focusing especially on the Roman dictatorship as an essential constitutional feature of the Roman Republic (509- – 27 BC). Secondly (Section 3), I will explain how the Roman dictatorship is most commonly understood by political theorists and historians. Thirdly (Sections 4 and 5), I will explain why an analysis of Roman dictatorship such as that of de Wilde deserves our preference. Ultimately (Section 6), I will offer my conclusion.

2. Roman Dictatorship

The ancient Roman Republic provides one of the oldest and most influential practices of emergency government in the history of Western constitutional law. If we can trust our sources, the Romans adopted a republican system after the expulsion of Lucius Tarquinius Superbus as Rome’s final tyrannical king. By inventing an elaborate system of checks and balances, their aim was to prevent oppressive rule by a new autocrat. Key roles in the new system were played by two consuls as chief magistrates who were annually elected and were allowed to hold power for only one year. Each of the consuls was invested with full *imperium*, that is, with supreme power involving command in war and the interpretation and

11 Cf., e.g., Turner (2021), warning for the normalisation and the continued use of emergency powers in the post-COVID-19 era.

execution of law.¹² But each consul also possessed unlimited veto power over the decisions of his colleague. As Livy has it, the establishment of the Roman Republic heralded a ‘new liberty’ that was ‘the more grateful as the last king had been such an enormous tyrant’ (Livy, *History of Rome* 2.1).

However, the Romans were well aware that the republican system of power and counter-power was not without serious problems of its own (Gross & Aoláin, 2006, p. 19). At its worst, the dispersion of power over various offices could result in internal conflict and political deadlock and thus prevent effective government (Mouritsen, 2017, p. 107 ff). In times of extreme peril, therefore, a dictator could be appointed who was entrusted with supreme command in both civil and military matters (Lintott, 1999; Nicolet, 2004). Although the consuls and other magistrates serving under the republican system formally retained their powers, the dictatorship is usually regarded as ‘a temporary revival of the monarchy used in times of emergency’ as it effectively concentrated the whole power of the state in a single person (Jolowicz & Nicholas, 1972, p. 11). Unlike the consuls, the dictator could make decisions that remained unchecked by any other office of government – neither by some fellow magistrate, nor by any political institution such as the senate or the popular assembly.¹³

There is little that we know of dictatorship in the early Roman Republic to any degree of certainty.¹⁴ An ancient historian such as Livy (59 BC-17 AD), our most significant source for this period, was not primarily focused on recounting Roman history as it actually happened (Walsh, 1961).¹⁵ Instead, in the preface to his monumental history of Rome, he describes it as his primary aim to report on Rome’s history in a way that could more or less live up to ‘the great deeds of the world’s foremost people’ (Livy, *History of Rome*, Preface). The many marvellous tales that Livy presents us with seem primarily intended to provide the reader with positive and negative examples of character and citizenship (Chaplin, 2000). Yet, there is a growing tendency in recent scholarship to acknowledge that much of Livy’s writings seem to reflect historical facts.¹⁶ Nevertheless, it is clear that the beginnings of the Roman Republic are largely shrouded in the mists of time, belonging to an age that has been reported to us as a strange mixture of myth, legend and recorded history.¹⁷

Generally, however, it is taken for granted by ancient historians that the origins of the Roman dictatorship date back to the very beginnings of the Roman

12 For the full intricacies of *imperium* as a central notion of Roman public law, see the exhaustive treatment in Vervaeke (2014).

13 As Vervaeke (2014, pp. 11-12) explains, the dictator’s power could not be vetoed by any other magistrate as the dictator’s *imperium* (*dictatorium imperium*) outweighed that of other magistrates. This was symbolically expressed by the number of *fascies* held by the dictator (twenty-four), twice more than the consul (twelve) and four times more than the praetor (six). Also, the dictator’s decisions were exempt from the *provocatio ad populum* as a right to popular appeal by Roman citizens against certain magisterial actions. See Lintott (1999, p. 111).

14 Cf. Rossiter (1948, p. 16): ‘The historical origin of [the Roman dictatorship] is shrouded in the mists of ancient history.’

15 For a more positive account of the historical merit of Livy’s work, see Luce (1977).

16 See, e.g., Cornell (2012), based on a detailed analysis of both written and material sources.

17 See, e.g., the collection of essays in Miano et al. (2023).

Republic itself. In the annals as they have come down to us, the first recorded dictatorship is that of T. Larcus Flavus in 501 BC, appointed in order to ward off the threat of neighbouring Latin tribes conspiring against the newly founded Roman Republic (Livy, *History of Rome* 2.18). Up until Rome's decisive victory against the Carthaginians in 202 BC, eighty-seven other dictatorships would ensue, rescuing Rome from a great variety of internal and external troubles.¹⁸ Standing out as a particularly troublesome time, the years of Hannibal's invasion and occupation of parts of Italy (218-203) counted no less than twelve dictatorships. The reign of Q. Fabius Maximus Cunctator ('the Delayer') is probably most famous in this regard. Rather than engaging with Hannibal in battle, Fabius probably prevented Rome's downfall by employing a scorched-earth tactics instead, resisting the enemy with exemplary patience and restraint (Livy, *History of Rome* 22.9-31).

After Rome's victory in the Hannibalic war, however, the dictatorship fell into disuse for a period of 120 years. The best explanation for this is probably that Rome's military actions moved away from the Italian peninsula to places such as Greece, Africa, Spain and Syria (Wilson, 2021, pp. 267-268). With difficult wars now taking place at far greater distance from the city walls, the need to appoint a dictator in times of crisis in order to prevent Rome's downfall was no longer felt as pressing as before. Instead, perilous circumstances in a distant region were typically left to be dealt with by a governor or *proconsul* – a magistrate, that is, who is granted consular powers without actually being consul and who is thus exempt from the possible veto of any coequal magistrate or any other of the regular checks on consular power (Lintott, 1999, pp. 113-115). Within the bounds of his own province, the office of the proconsul is thus more or less reminiscent to that of the dictator, effectively reigning without any serious counter-power (Wilson, 2021, p. 269).

In the late Roman Republic, however, the Roman dictatorship underwent a remarkable revival. In 82 BC, leading politician and general L. Cornelius Sulla had himself appointed as dictator in order to make an end to a period of political instability and civil war. As historian Velleius Paterculus writes, an 'unlimited cruelty' such as former dictators only applied it to the city's most dangerous external enemies was now directed inwards and practised by Sulla against fellow-Romans who happened to be his personal enemies.¹⁹ Stepping in Sulla's footsteps, C. Julius Caesar sought to legitimise tyrannical rule by utilising the dictatorship, having himself appointed as dictator no less than four times (Wilson, 2021, pp. 308-315). Unlike Sulla, however, he openly dared to break with constitutional precedent by finally holding office as 'dictator in perpetuum', that is, as 'dictator for all time' – a newly invented title that is clearly at odds with the

18 See Wilson (2021, pp. 341-380), for a catalogue listing all recorded Roman dictatorships.

19 Velleius Paterculus, *Compendium of Roman History* 2.28. See also Appian, *Civil War* 1.99, stating that with Sulla's reign, 'the dictatorship became unlimited and so became outright tyranny'. Modern historians tend to provide more balanced value-judgments of Sulla's actions, explaining his bad name in reception history largely from the biasedness of the primary sources. See, e.g., Wilson (2021, pp. 293-302) and Straumann (2016, pp. 74-84).

temporary nature of the Roman dictatorship that was traditionally regarded as one of its essential characteristics.²⁰

3. Reception from Machiavelli to Mommsen

As one of the many constitutional terms dating back to Roman history, the word ‘dictator’ is currently used most often in a pejorative way. According to common understanding, dictators typically gain their despotic political power by force or fraud and subsequently aim to maintain that power through the use of intimidation and terror.²¹ Such pejorative connotations seem to fit the revival of dictatorship under tyrants such as Sulla and Caesar better than its practice in the earlier years of the Roman Republic. In fact, the dictatorship as it had so often come to Rome’s rescue up until Hannibal’s expulsion from Italy has been widely celebrated by a great variety of philosophers and political theorists. American historian and political theorist Clinton Rossiter, for example, hailed the Roman dictatorship as ‘the most unique and successful constitutional emergency institution in all recorded history’ (Rossiter, 1948, p. 28). Accordingly, as Rossiter has it, a quest for constitutional crisis government in modern times could find ‘no more propitious a starting point’ than a careful survey of the Roman dictatorship.²²

Rossiter’s positive evaluation of the Roman dictatorship stands in a long tradition that dates back to Machiavelli’s famous reflections on the Roman Republic in his *Discourses on Livy*. As Machiavelli insists, ‘dictatorial authority did good, and not harm, to the Roman Republic.’²³ For Machiavelli, ‘it was neither the name nor the rank of dictator’ that paved the way for the tyrannical rulership of Sulla and Caesar, but only the ruthless ambition of those generals – relying on the loyalty of their armies – themselves. Furthermore, as Machiavelli points out, an autocrat such as Julius Caesar could not be considered as a Roman dictator in the true sense of that word, because his rule conflicted with two of its most basic conditions. First of all, real dictators were appointed for a time, and not perpetually, as in the case of Julius Caesar. And secondly, Machiavelli remarks that the dictator ‘could not do anything that might diminish the state’, for example, by ‘taking away authority from the senate or from the people’ or by otherwise ‘undoing the old orders of the city and making new ones’.²⁴

Building on Machiavelli’s reflections, the Roman dictatorship received similar praise from authors ranging from Bodin, Montesquieu and Rousseau to Alexander Hamilton and Carl Schmitt and even also – clearly under the inspiration of Clinton

20 Ibid., p. 310.

21 Cf., e.g., de Wilde (2021, p. 140), referring to the entry for ‘dictatorship’ in the *Encyclopaedia Britannica*.

22 Ibid., p. 15.

23 Machiavelli, *Discourses on Livy* 1.34 as translated by Harvey Manfield and Nathan Tarcov (Chicago: The University of Chicago Press, 1996).

24 See also de Wilde (2018), explaining that Machiavelli does not rule out that the dictator may sometimes need to implement new laws that are thought to be necessary in order to restore the state to normality and its initial principles.

Rossiter – to contemporary theorists such as Bruce Ackerman.²⁵ Accounting for their positive evaluation of the Roman dictatorship, all these authors follow Machiavelli in discerning what would soon be considered as ‘the two constitutional limitations’ that the Roman dictator saw himself confronted with: the restricted term of his office and the strict conviction that his job was ‘to maintain the constitutional order’ and not to alter or to subvert it (Rossiter, 1948, p. 24). Rousseau, for example, observes that the dictator’s enormous powers do not include the legal authority to make new laws, while also meticulously confining the dictator’s term at a maximum of six months – a formal temporal boundary, in fact, that is mentioned only very few times in the ancient sources and, in Roman times, does not really seem to have played a significant role.²⁶

A formalised understanding of the Roman dictatorship (and of Roman constitutional law more in general) was further developed like no other by German lawyer and historian Theodor Mommsen (1817-1903) – a scholar whose authority used to be so enormous that most of his colleagues reputedly preferred to ‘err with Mommsen rather than to be right in spite of him’ (Sirks, 2002, p. 256). Surely, no other text than Mommsen’s description of the dictatorship in his magisterial work on Roman constitutional law has had a greater impact on the modern understanding of the Roman dictatorship up until the present day (Wilson, 2021, p. 409). Most in particular, Mommsen is justly admired for his incredible grip on the primary sources of Roman history and jurisprudence. Anecdotes abound on his extraordinary work ethic. Mommsen was often seen reading while commuting to his work – for Berlin tram conductors, it soon became regular practice to tap him on the shoulder as he reached his destination (Farnell, 1934, p. 88). Allegedly, it was only while lying on his deathbed that, for the first time in his life, he allowed himself a couple of hours of unproductivity (Fowler, 1913, p. 131).²⁷

With regard to Roman law, Mommsen devoted his astonishing scholarly talents to do for Roman constitutional law what Savigny and other pandectists had done for Roman private law. For Savigny and his followers, the use of the study of Roman law resided in tracing down its ‘leading principles’ (*leitende Grundsätze*) as they would have been inductively developed in such superb manner by the Roman jurists in close relation to legal practice.²⁸ For the modern jurist, it would be crucial

to familiarise oneself with their modes of thought, and be so thoroughly imbued with them, as to compose in their style, and on their principles, and

25 Ackerman (2004, pp. 1046-1047). For the extraordinary reception history of the Roman dictatorship, see Rossiter (1948), with further references. See also, e.g., de Wilde (2019) (dealing with Bodin, Rousseau and Schmitt) and de Wilde (2021) (most particularly on Montesquieu and Rousseau). For Schmitt, see, e.g., Kivotidis (2021), with further references. A good analysis of Alexander Hamilton’s account of the Roman dictatorship in Federalist 70 is provided by Thomas (2013).

26 Rousseau, *The Social Contract* 4.6. For the limited role of the six-month term, see especially de Wilde (2012).

27 Needless to say, perhaps, these anecdotes (largely from British provenance) do not necessarily reflect reality. For a more realistic account of Mommsen’s work ethic, see Rebenich (2002, pp. 208-211).

28 Savigny (1831, p. 45): ‘[I]n our science, every thing depends upon the possession of the leading principles [die leitenden Grundsätze], and it is this very possession which constitutes the greatness of the Roman jurists.’

thus to continue, in its true spirit, the work they were prevented from consummating. (Savigny, 1831, pp. 139-140).

In a way, the new ‘legal science’ (*Rechtswissenschaft*) advocated by Savigny was thus outspokenly ‘historical’ as it stimulated a renewed interest in the primary ancient sources of Roman law.²⁹ However, Savigny’s approach soon turned out to be rather ahistorical in its tendency to understand Roman law primarily as an ideal supplier of dogmatic building blocks for modern legal systems (Winkel, 2015, p. 9).

Clearly echoing Savigny’s method of ‘legal science’, Mommsen – in the preface to his monumental work on Roman constitutional law – states it as his ultimate aim to provide a systematic analysis of the Roman Republic’s ‘most basic principles’ (*Grundbegriffe*) of constitutional law, matching the ‘rational progress’ (*rationeller Fortschritt*) that would have been made by Savigny and others in private law (Mommsen, 1871-1888, Vol. I, Part 1, p. ix). Eventually, this analysis is aimed at providing a ‘conceptually closed’ (*begrifflich geschlossene*) representation of the Roman constitution, based on ‘consistently implemented basic ideas’ (*consequent durchgeführte Grundgedanken*) as its ‘solid pillars’ (*feste Pfeilern*) (ibid.). As far as the Roman constitution cannot itself be regarded as such a ‘conceptually closed’ system, it could, according to Mommsen, certainly provide us with the principles on the basis of which such a system could be propitiously constructed in the modern era (Hölkeskamp, 1997; Heuss, 1956, pp. 45-57). Serving society not only as a scholar but also as a liberal politician, it comes as no surprise that Mommsen focused his constitutional analysis on the years of the Roman Republic as an era that would have lived up particularly to the idea that ‘all that is good and great comes from civil equality.’ (Mommsen, 1894, Vol. 3, p. 57).³⁰

In Mommsen’s account of the republican constitution, the office of the dictator plays an important role in the preservation of civil liberties while also facilitating effective government in times of crisis. In clear concomitance with Savigny’s pandectist method, Mommsen’s analysis of Roman constitutional law is fundamentally legalistic (Wilson, 2021, p. 410). In the thirty pages that Mommsen specifically devotes to the Roman dictatorship, he focuses his analysis almost exclusively to the distillation of clearly delineated legal powers and other legal formalities from the historical sources – formalities, in fact, on which the extant sources largely remain silent. This approach becomes particularly clear when Mommsen discusses the limitations to the dictator’s power. Providing a formalised account of the principle of temporality, Mommsen writes that ‘for the dictator, there exists a double time limit.’ (Mommsen, 1871-1888, Vol. II, Part 1, p. 143). Whereas a ‘relative time limit’ would entail that the dictatorship ends with the tenure of the consul that appointed him, ‘an absolute time limit’ would require the dictator to step down in any circumstances after six months in office.

29 On Savigny’s influence on the rise of *Rechtswissenschaft* as a new term, replacing older terms such as *Jura*, see Koschaker (1947, p. 210): ‘Der Terminus “Rechtswissenschaft” ist eine Erfindung der deutschen historischen Schule.... Der deutsche Sprachgebrauch erklärt sich aus der Tendenz Savigny’s und seiner Schule, jeder Beschäftigung mit dem Recht wissenschaftlichen Charakter aufzuprägen.’

30 See also Rebenich (2022, p. 85).

4. Fides Publica

In view of Mommsen's ambition to provide a 'conceptually closed' representation of the Roman Republic's constitution, it is not surprising that he emphasises the importance of formal constraints on the dictator's power as the most significant guarantee against its abuse. However, de Wilde's analysis of the Roman dictatorship corroborates the findings of modern scholars who have suggested that informal constraints were probably much more important in that regard (de Wilde, 2011, 2012). Take, for instance, the practice of the dictator's restricted time in office. On the basis of a careful analysis of the available sources, de Wilde concludes that there is no such thing as 'an absolute time limit' to the dictatorship as it has been so confidently reported by Mommsen. Of the ninety-four recorded dictators, six seem to have significantly exceeded a six months' term (de Wilde, 2012, p. 561). The extant sources report no instances in which the overstepping of that formal term was a matter of controversy. Instead, what seems to have been important is the principle that the dictator should not remain in office any longer than strictly necessary.³¹

Whereas de Wilde's analysis focuses especially on the principle of temporal limitation of the dictator's reign, historian and political theorist Nomi Claire Lazar has pointed out that the idea that the Roman dictator was bound by the formal requirement to leave the constitution unaltered is equally inaccurate. In her analysis of the dictatorship, Lazar presents the records of seven dictators who passed legislation that changed the structure of government significantly (Lazar, 2009, pp. 126-127). Instead of being only an exceptionally powerful executive without any law-making powers, Lazar rightly concludes that 'a dictator could and did legislate and indeed even alter the constitution,' particularly when such altering seemed necessary while dealing with pressing civil unrest and other social problems (ibid.). Such observations bring Lazar and others to the conclusion that the importance of informal constraints on the dictator's power outweighs the significance of formal constraints. Or, as historian Marianne Hartfield once put it, '*Mos* not *lex* restrained the dictator's performance.' (Hartfield, 1982, p. 124).

Following authors such as Hartfield and Lazar in their contextualising approach to the Roman dictatorship, de Wilde throws important new light on the way in which informal constraints on the dictator's power functioned in practice. In his analysis of the system of power and counter-power in the Roman Republic, the principle of *fides publica* stands out as particularly important (see most in particular de Wilde, 2011, pp. 458-466). The notion of *fides* is described by Cicero as nothing less than 'the foundation of justice'.³² Whereas *fides* would lie at the basis of what law actually is, Cicero certainly does not understand it only in legalistic terms. 'In matters of *fides*', he writes, 'one should always consider the true meaning and not

31 See also Wilson (2021, pp. 236-260), with particular debunking of 'the myth of the six-month term' at 248-251.

32 Cicero, *On Duties* 1.23: 'The foundation of justice (*fundamentum iustitiae*) is good faith (*fides*) – that is, truth (*veritas*) and fidelity (*constantia*) to promises and agreements.'

the mere words.³³ In modern jurisprudence, the requirement of *fides* is particularly associated with private law, in which the principle of *bona fides* (good faith) still plays an important regulating role (Hesselink, 2011). For the Romans, however, the notion of *fides* was of equal importance in public law, where it is occasionally referred to as *fides publica*.³⁴

In this regard, it is important to recognise that, for the Romans, *fides* was not only a foundational legal concept but also a central value in the spheres of religion and morality (Clark, 2007). Personified as a prominent goddess, Fides possessed a temple on the Capitol, in close vicinity to the temple of Jupiter Optimus Maximus (Appian, *Civil War* 1.16; Valerius Maximus 3.2.17). Whereas the temple of Fides seems to have been built in 254 or 250 BC, her cult has been reported to date back as far as the eighth century BC, when king Numa Pompilius would have erected a wooden shrine on the spot where the temple would be built many centuries later (Livy, *History of Rome* 1.24). In clear correspondence with its centrality in Roman cultic and religious life, the value of *fides* was also crucially significant in the construction of a shared moral identity (Nörr, 1991, pp. 4-12). From the early Roman Republic onwards, the Romans typically took pride in considering themselves as the people of *fides*, whereas other tribes and peoples (most notably the Carthaginians and the Greeks) were commonly designated as utterly perfidious.³⁵

The central importance of *fides* in the concomitant spheres of law, religion and morality is both shaped and reaffirmed by countless stories as they have come down to us in a wide array of literary sources. Both Livy and Plutarch, for example, tell us the wonderful story of the schoolmaster of Falerii, an Etruscan town that was besieged by the Romans in 394 BC (Livy, *History of Rome* 5.27; Plutarch, *Life of Camillus* 10). As Falerii was extremely well fortified, there was little hope for an easy Roman victory. However, a Faliscan schoolmaster – to whom the nobility had entrusted their children for their education – soon provided the Romans with a unique opportunity. Having led the children away from their own city, he offered them as precious hostages to Roman general M. Furius Camillus. Disgusted by the schoolmaster's betrayal, however, Camillus handcuffed the schoolmaster, stripped him of his clothes and provided the children with whips in order to flog their teacher homewards. Astounded by Camillus' sense of justice and his remarkable *fides*, the Faliscans soon surrendered, henceforth quite happy to live under the sway of the Romans as a people of such outstanding morality.³⁶

The great abundance of stories such as these make clear that the Roman notion of *fides* entails much more than a mere legal requirement. As Cicero writes, it is the magistrate's persistent duty

33 Cicero, *On Duties* 1.40: 'Semper autem in fide quid senseris, non quid dixeris, est cogitandum.'

34 On the co-originality of *fides* in Roman private and public law, see also Waelkens (2018, p. 5): 'Les plus anciennes occurrences de *fides* ... se trouvent dans *fides publica*... La *fides* qui apparaît dans le droit civil fait référence à la même entente.'

35 See, e.g., Starks (1999) for an interesting analysis of Punic perfidy as against Roman fidelity in Livy's *History of Rome* and Vergil's *Aeneid*.

36 The story is dealt with in some detail in de Wilde (2011, pp. 463-464). Note that in stories such as these, moral superiority and political effectiveness go hand in hand.

to bear in mind that he represents the state and that it is his duty to uphold its honour and its dignity, to enforce the law, to dispense to all their constitutional rights, and to remember that all this has been committed to him as a sacred trust. (Cicero, *On Duties* 1.124).

Certainly, this means that a serious breach of *fides* could not remain without legal consequences.³⁷ However, a magistrate's disregard of *fides* was also widely felt as a dangerous breach of one of Rome's most basic moral and religious norms. De Wilde's contextual analysis teaches us that the success of the Roman dictatorship – with no reported abuse up until the first century BC – is best explained by a subtle interplay between formal and informal constraints on the dictator's powers, with the binding force of the latter probably outweighing that of the former (Lazar, 2009, p. 114).

5. Modern Emergencies and the Use of Legal History

Contextual analyses of Roman constitutional law and emergency government such as those of de Wilde are tremendously important. First of all, they enhance our understanding of Roman law by exploring its porous boundaries with ethics, morality and religion (Pölönen, 2006, 2016). Traditionally, the study of Roman law has been dominated by scholars who describe Roman law as a relatively coherent set of legal rules and principles that functioned more or less independently from other norms in society (Pölönen, 2016, p. 10). The inadequacy of the abstract 'legal science' of scholars such as Savigny and Mommsen was already pointed out, for example, by Eugen Ehrlich – not only a Romanist himself but also generally recognised as one of the 'founding fathers' of sociological jurisprudence (Hertogh, 2009). According to Ehrlich, Mommsen's approach falls short in explaining 'what Roman constitutional law actually is'. As Ehrlich rightly argues, the many legal propositions that Mommsen arrives at were primarily 'the product of his own intellectual labour, abstracted by him from the facts, but, in Rome, never the rule that regulated the facts'.³⁸

Despite the criticism of Ehrlich and many of his contemporaries, the influence of Mommsen and likeminded scholars on the modern understanding of Roman constitutional law can be felt up until the present day.³⁹ To be sure, the legalistic approach to Roman law is now supplemented by scholarship that aims to study it

37 Explaining that a magistrate's breach of *fides* is not only morally but also legally relevant, de Wilde (2011, p. 461) mentions the example of Servius Sulpicius Galba, a military commander who was prosecuted in 150 BC because of breaching the demands of *fides publica* while fighting some Lusitanian tribes on the Iberian peninsula. See also Nörr (1991, pp. 1-3), where the proceedings are dealt with in more detail.

38 Ehrlich (1913, p. 24): 'Und was ist eigentlich das römische Staatsrecht? ... Mommsen gelangt wohl überall zu allgemeinen Rechtssätzen: aber diese sind, mit verschwindenden Ausnahmen, ein Ergebnis seiner eigenen geistigen Arbeit, sie sind von ihm aus den Tatsachen abgezogen, sie waren in Rom nie eine Regel für die Tatsachen.'

39 See also Wilson (2021, p. 409), arguing that 'no one individual has had a greater impact on the modern understanding' of Roman constitutional law than Mommsen.

in its broader social, religious and intellectual context (Pölönen, 2016, with further references). However, the idea of Roman law as a more or less self-contained doctrinal system continues to appeal to the modern imagination. Leading constitutionalist Bruce Ackerman, for example, writes with misplaced confidence that the Roman dictator's powers were effectively controlled by rigid formal constraints – a view that, as we have seen, has long been proven by historians to be untenable (Ackerman, 2004, pp. 1046-1047). Perhaps, errors such as these are due to what Christoph Möllers has once referred to as 'the weak discursive links' between law and other academic disciplines (Möllers, 2013, p. 18). The contextualising approach to legal history of de Wilde and others is much-needed in order to reinforce those links (van den Berge, 2017, pp. 205-209).

However, the advancement of our understanding of Roman constitutional law as such provides not the only reason why contextual research on the Roman dictatorship is so important. Ever since the terrorist attacks of 11 September 2001, it has been an important discussion among constitutionalists and legal theorists how governments should deal with emergencies (Scheuerman, 2006). In the wake of several terrorist assaults on American soil and elsewhere, various Western governments started to bypass ordinary legal requirements by taking all kinds of emergency measures that would have been necessary in order to combat terrorist threats (Dyzenhaus, 2006, p. 17). A similar recourse to emergency measures was thought to be necessary in order to deal with the global financial crisis between mid-2007 and early 2009 (Kuo, 2014). Eleven years later, the world faced yet another threat. This time, emergency measures were thought to be indispensable in order to control the spread of the coronavirus (Corradetti & Pollicino, 2021). Time and again, it was debated whether such threats can be effectively fought within the boundaries of the rule of law (Turner, 2021).

Critical Italian philosopher Giorgio Agamben, for example, has recently argued that the COVID-19 pandemic 'has caused to appear with clarity ... that the state of exception, to which governments have habituated us for some time, has truly become the normal condition'.⁴⁰ For Agamben, the breakup of normality under the threat of a public health crisis once again reveals that Western governments are only seemingly operating under the rule of law, whereas, in fact, they show their true face while exerting unlimited power in times of crisis.⁴¹ In this regard, Agamben cynically builds on the insights of Carl Schmitt, who famously described the 'state of exception' (*Ausnahmezustand*) as a case of extreme peril in which the government is no longer tied by legal requirements, but, instead, is expected to take up a position 'outside of law' in order to serve public order and security.⁴² For Schmitt as for Agamben, the state of exception is thus a situation in which 'law

40 See <https://itself.blog/2020/03/17/giorgio-agamben-clarifications/> (last accessed 11 March 2023).

41 As previously argued in Agamben (1998) and Agamben (2005). See van den Berge (2020) for an overview of the debate surrounding Agamben's critique on COVID-19 outbreak management.

42 See, e.g., Agamben (1998, pp. 17-23), referring to Schmitt (1922, pp. 19-22) and Agamben (2005), 32-37, referring also to Schmitt (1921).

recedes, leaving the government to act unconstrained by law' (Dyzenhaus, 2006, p. 50).⁴³

A similar conclusion is reached in a series of fascinating articles by American legal theorist Oren Gross (Gross, 2003, 2008, Gross & Aoláin, 2006). As Gross argues, the 2001 terrorist attacks and other emergencies have made clear once again that proper governmental responses to emergency situations can often only be found by side-stepping regular constitutional restraints. Therefore, the model of 'Extra-Legal Measures' (ELM) put forward by Gross informs public officials that 'they may act extralegally when they believe that such action is necessary for protecting the nation and the public in the face of calamity.' (Gross, 2003, p. 1023). For Gross, 'there may be circumstances when it would be appropriate to go outside the legal order, at times even violating otherwise accepted constitutional dictates, when responding to emergency situations.' (ibid., p. 1134).⁴⁴ While going outside the legal order may be 'a little wrong', it would, at the same time, facilitate the attainment of 'a great right' in ways that rigidly staying within the confines of the constitution – or constantly bending the constitution so as to accommodate crises and emergencies – never could.⁴⁵

A contextual analysis of the Roman dictatorship offers an attractive alternative for such recourses to extra-legality (de Wilde, 2015, p. 128). On the one hand, the Roman dictatorship lives up to the need of far-reaching governmental powers in times of crisis. As it is clearly recognised by Roman constitutional practice, such emergency powers cannot be limited by formal legal requirements in a manner that could still facilitate an appropriate governmental response to any possible calamity. On the other hand, however, the example of the Roman dictatorship also shows that effective emergency government does not necessarily have to rely on the idea of governmental discretion as some kind of legal vacuum. In ancient as well as in modern times, there are surely cases in which formal legal boundaries will have to be overstepped. Arguably, however, they remain constrained by principles of justice that underlie the legal order – just as the Roman magistrates were thought to be bound by a fundamental norm of 'public trust' (*fides publica*) even if exceptional circumstances require that they derogate from standard legal formalities.

6. Conclusion: A Janus-Faced Approach to Legal History

In this way, a proper analysis of the Roman dictatorship turns out to be of considerable relevance for current problems of law and politics. In the face of contemporary threats, the normativity of law is frequently regarded as a luxury that one cannot always afford (ibid., p. 129). Consequently, the last two decades

43 See also Agamben (2005, p. 48), where the Schmittian state of exception is described as 'emptiness and standstill of the law'.

44 In similar vein, see also Tushnet (2008), arguing for occasional application of emergency powers under political rather than legal control.

45 Gross & Aoláin (2006, p. 112), obviously referring to Shakespeare's *Merchant of Venice*, 4.1.224: 'To do a great right, do a little wrong.' See also Farnsworth (2001).

have seen a process of normalisation of the governmental use of emergency powers that tends to undermine basic principles of the rule of law. Guantanamo Bay is probably one of the best-known (and certainly one of the most horrible) examples of the legal ‘black holes’ that have recently come into existence, but there are many more (Dyzenhaus, 2006, p. 38). The Roman dictatorship provides a model of emergency government in which any recourse to extralegality is no longer warranted, extending the need for legal accountability also to exceptional circumstances. Such an *intralegal* instead of an *extralegal* conception of emergency government may be significant because it stimulates a ‘culture of justification’ that explicitly demands that the governmental use of power can always be justified.⁴⁶

Importantly, it is only by way of a detailed investigation of the Roman dictatorship in its historical context that we can finally arrive at such contemporary relevance. Once again, it has become clear that those who seek insight into Roman law as a social phenomenon are best served by a careful analysis of the primary sources and not by consulting the giants of nineteenth-century pandectism (Wilson, 2021, p. 421). By itself, the correction of the overly formalist interpretations of Roman law by scholars such as Savigny and Mommsen is important for our understanding of Roman law as a practice that did not take place in splendid isolation but was intrinsically connected with its socio-political, religious and broader intellectual environment. However, the amendment of pandectist anachronisms is perhaps even more important in order to rethink the significance of the study of Roman law – be it either public or private law – for modern societies. Our corrected insight into Roman emergency government and its implications for modern law and politics are only one example of what such rethinking may have to offer.

In view of what has been contended in this article, then, I argue for an approach to legal history that follows the example of Janus, the double-faced Roman god of both all beginnings and endings, typically looking in two opposite directions.⁴⁷ On the one hand, that approach to legal history resembles the people of the Aymara in their obdurate gaze towards the past, carefully examining sources that may provide us with a proper understanding of law in its original social and intellectual context. But on the other hand, it is precisely the approach to law as an inherently contextual phenomenon that may ultimately yield legal history’s most significant relevance to current legal problems. Therefore, the study of legal history may also want to fix its eyes on the future, considering how a better understanding of the legal past may finally contribute to important improvements to law and legal thinking. Perhaps, such an approach to legal history could finally even lead to the ‘progress’ that is currently so avidly desired by research managers and policymakers.

46 The concept of a ‘culture of justification’ as applied to law was coined in Mureinik (1994) and picked up in Dyzenhaus (1998). See, e.g., Möller (2019) for further references and a recent defence of the concept.

47 The image of double-faced Janus as a metaphor of legal-historical research is also used (though in a slightly different sense) by Zwolfe (1988).

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