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The Roman Jurists’ Law during the passage from the Republic to the Empire

Anna Plisecka

The present paper aims at analysing the impact which the centralisation of power at the beginning of the Principate could have exerted on the Roman jurists’ law and in particular on its most important aspect: the *ius controversum*. Since the centralised political power, pursuing control over law-making, generally tends to weaken or eliminate autonomous law-making agencies, modern authors are inclined to trace similar tendencies in Roman politics during its passage from the Republic to the Principate. It seems, however, that these tendencies, although marked in the praetorian and legislative activities of the time, did not have direct impact on jurisprudence, or at least did not have any demonstrable effects, during the first three centuries of the Empire. On the contrary, it is exactly at the beginning of the Principate, when two juristic schools appear, bringing with their constant debates the *ius controversum* to its climax.

The Roman jurists’ law was constituted by the opinions of private legal experts. During the late Republic they created the bulk of what we now call private law and civil procedure. Given that republican as well as imperial legislation did not dispose of sufficient means of publication, the statutes (*leges*) could become properly known only through the works of the jurists. Similarly the praetor’s edict and custom (*mores*) were made useful as legal

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sources and accessible to the public only by means of juristic interpretation.\(^4\)

Responses to juristic problems constituted the most relevant law-making tool of the *iuris periti*. These pieces of advice were, however, formulated not in an authoritative way, but rather as a statement of a certain habit or personal preference, something clearly indicated by expressions like: *respondere solet, placet*.\(^5\) The rule formulated in such a way gained on importance through its acceptance by the community of the jurists.\(^6\) Hence it was usual for several of them to give their opinion on one topic, or even for the same jurist to return to the problem he had already discussed.\(^7\) Such a situation was due to the fact that an opinion was issued only for the particular case and became a *sententia recepta* only if followed by other jurists.\(^8\)

The *ius controversum* was still considered an integral part of the Roman legal order in the middle of the second century AD, as can be deduced from the passage of Aulus Gellius’ *Noctes Atticae*: ‘Si aut de uetere’ inquam ‘iure et recepto aut controverso et ambiguo aut novo et constituendo discendum esset, issem plane seiscitatum ad istos, quos dicas’ (12.13.3).

Gellius, explaining to his teacher Sulpicius Apollinaris,\(^9\) why he is asking a grammarian and not a jurist for the interpretation of the expression *intra Kalendas*, distinguishes three branches of legal knowledge. They are described with three hendiadies, divided by the disjunctive alternative *aut*. So the jurist can be consulted either on *ius vetus et receptum* or on *ius ambiguum et controversum* or, finally, on *ius novum et constituendum*.\(^10\) Not only commonly accepted legal opinions (*ius receptum*), but also those under discussion (*ius controversum*) and those which are about to emerge (*ius...*)

\(^5\) Lombardi: Saggio (as in 2), pp. 17-20
\(^7\) Giaro, Diritto come prassi (as in 2), p. 2247
\(^10\) Bruti, L’indipendenza(as in 1), pp. 425-426; Martini, Remo: comment on Carlo Augusto Cannata: Iura condere. Il problema della certezza del diritto fra tradizione giurisprudenziale e auctoritas principis. In: Milazzo (ed.): Ius controversum (as in 1), p. 77
constituendum) are considered by Gellius integral parts of *ius*,\(^{11}\) which is thus seen not as a set of well defined rules, but as a continuous activity.\(^{12}\)

Whereas the praetorian law ceased to develop at the latest with the definitive redaction of the edict under Hadrian (117-138), jurisprudence continued to play an important role as a factor in law-making.\(^{13}\) Only at the end of the second and the beginning of the third century AD did the tendency develop to reduce the number of controversies through the common acceptance of some opinions, indicated with the expressions *constat, placet, convent, receptum est, hoc inre utimur* etc.\(^{14}\) Some of the juristic debates were closed by compromise solutions, such as the well known *media sententia* in the controversy over *specificatio*, a solution probably proposed by Julian.\(^{15}\) However, these mechanisms already constituted an intrinsic component of *ius controversum* in the Republic and they remained unchanged until well into the Principate. The *commnis opinio prudentium* retained its spontaneous character, it did not limit other jurists in expressing divergent views. In fact, some debates persisted until the times of Justinian.\(^{16}\) A pronounced intervention by an emperor in the field of jurisprudence by deprecation or recognition of certain jurists or their opinions can be seen only from the times of Constantine onwards.\(^{17}\)

The controversial character and the high number of jurisprudential opinions together with the development of neighbouring disciplines (*artes*) made evident a need for the clear and systematic exposition of legal

\(^{11}\)Martini, comment on Cannata (as in 9), p. 77

\(^{12}\)Brutti, L’indipendenza (as in 1), p. 415-422

\(^{13}\)Massei, Massimo: Le citazioni della giurisprudenza classica nella legislazione imperiale. In: Gian Gualberto Archi (ed.): *Scritti di diritto romano in onore di Contardo Ferrini*. Milano 1946, p. 425 n. 3


\(^{17}\)Constantine abolished in AD 321 the commentaries of Paulus and Ulpianus on the works of Papinianus, retaining the opinions of the latter as exclusively valid (C.Th.1.4.1); however, the same emperor confirmed the validity of Paulus’ *sententiae* in AD 327 (C.Th.1.4.2). An intervention of more general character was the well-known Law of Citations issued in AD 426 by Theodosius II and Valentinian III, which heavily limited the possibility of invoking juristic literature in court (C.Th.1.4.3=LRV.1.4.1), cfr. Massei: Le citazioni (as in 12), pp. 434-440
knowledge already by the end of the Republic. It was in this context that the *libri iuris civilis* of Quintus Mucius Scaevola *pontifex* and Cicero’s project of *ius civile in artem redactum* should be seen.\(^{18}\)

The so-called ‘codification plans’ of Roman political leaders of that time, Pompey and Caesar, belong to this same context.\(^{19}\) In the surviving ancient literature there are only two references to these late republican initiatives, both of them, moreover, are centuries after the facts and somewhat enigmatic. The earlier one, dating back to the second century AD, is contained in Suetonius’ *Life of Julius Caesar*. The other one is provided by Isidore of Seville, living at the turn of the sixth and seventh centuries AD. Suetonius, listing various plans which Caesar did not manage to accomplish, mentions that he intended *ius civile ad certum modum redigere atque ex immensa diffusaque legum copia optima quaeque et necessaria in paucissimos conferre libros ... Talia agentem atque meditantem mors praeventi* (Svet. *Jul. Caes.* 44). Isidore tells us, under the title *de auctoribus legum* of his encyclopaedic work *Libri etymologicarum sive originum*, that Caesar’s idea was preceded by a similar one of Pompey: *Leges autem redigere in libris primus consul Pompeius instituere voluit, sed non perseveravit obtrectatorum metu. Deinde Caesar coepit id facere, sed ante interfactus est* (5.1.5). Thus Pompey had to abandon his plan under the impact of harsh criticism,\(^{20}\) whereas Caesar seems to have upheld the idea of his rival, but the project was interrupted by his death.

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\(^{18}\) Whereas according to Mette the use of the diairetic method would help to elevate jurisprudence to an *ars* (cfr. Mette, Hans Joachim: *Ius civile in artem redactum*. Göttingen 1954, pp. 50-64), Bona argues that Cicero intended with his project a simple manual which would facilitate the acquisition of civil law by non-jurists, but not to convince the jurists to abandon the casuistic inductive method for the sake of diairesis (cfr. Bona, Ferdinando: L’ideale retorico ciceroniano ed il ius civile in artem redigere. In: *SDHI* (1980) No. 46, pp. 282-382)


\(^{20}\) Pólay argues that the critics of the Pompeian project were most probably Caesar and his allies (cfr. Pólay: Der Kodifikationsplan (as in 18), p. 95), whereas Behrends identifies them as influential jurists of the time (cfr. Behrends, Okko: Die Gewohnheit des Rechts und das Gewohnheitsrecht. Die geistigen Grundlagen des klassischen römischen Rechts mit einem vergleichenden Blick auf die Gewohnheitsrechtslehre der Historischen Schule und der Gegenwart. In: Dietmar Willoweit (ed.): *Die Begründung des Rechts als historisches Problem*. München 2000, pp. 79, 81-82)
Modern scholarship sees in these plans early attempts of political leaders to diminish the role of jurisprudence. Some authors argue that Caesar’s project was well advanced and identify Aulus Ofilius as the jurist charged with its execution. The texts at our disposal cannot, however, support such hypotheses. As a matter of fact, they contain information neither about the details of the project nor about the stage which it could have reached at the moment of Caesar’s death. Therefore both the scope and the character of these projects remain obscure. Regarding the former, Suetonius mentions in first place the *ius civile*, which in his times signified mainly jurists’ law; however, in the second part of the same text he brings up the *leges*, which are also explicitly referred to by Isidore. In consequence it is unclear if the subject of these intended codifications was the *ius civile*, the statutes (*leges*) or both, as some authors claim.

Considering the character of the projects, it is improbable that Pompey or Caesar could have aimed at a codification intended as a closed normative system limiting the creativity of jurisprudence. Such a project was to be realised only by Justinian six centuries later. Moreover, judging from the verb *redigo*, used by both Svetonius and Isidore, the projects could have been intended as a simple collection of existing legal material. Elmér Pólay argues that the intention was to produce either a collection of responses or a commentary on the edict, provided with the force of *lex*.

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21 Paricio: Los proyectos codificadores (as in 1), pp. 31-43
23 Cfr. Pomp. *enchir.* D.1.2.2.5 and D.1.2.2.39.
24 Pólay argues convincingly that Isidore refers to *leges rogatae*, cfr. Pólay: Der Kodifikationsplan (as in 18), pp. 92-93
25 According to Pólay, Caesar could even have planned two different codifications, one of the jurists’ law and another of the statutes (*leges*). He points out, however, that for Caesar, in his striving for autocracy, it would have been inconvenient to codify public law, therefore the plan would regard principally private law, and in particular the jurists’ law (cfr. Pólay: Der Kodifizierungsplan (as in 1), p. 44 and id.: Der Kodifikationsplan (as in 18), p. 92). Paricio argues, on the contrary, for the codification of *ius civile* (cfr. Paricio, Los proyectos codificadores (as in 2), pp. 39-40), whereas Ducos maintains that Svetonius simply did not distinguish between *ius* and *lex* (cfr. Ducos: Les Romains (as in 18), p. 184, n. 128)
26 Wieacker: RR. vol. I, (as in 21), pp. 412, 568, n. 27
27 Wieacker: RR. vol. I, (as in 21), p. 568, n. 27
28 Pólay, Der Kodifizierungsplan (as in 1), p. 42

376
In fact such projects were not at all revolutionary, because similar attempts had already been undertaken by the jurists, for example in the work written in the year 90 BC by Quintus Mucius Scaevola pontifex, who introduced the systematisation of the *ius civile* in genera, based on the dialectical method of Greek philosophy.\(^{29}\) Such a method was, however, applied only in particular books and chapters (*capita*) of the work without embracing the *ius civile* as a whole.\(^{30}\) The work was already criticised by Mucius’ younger contemporary, Servius Sulpicius Rufus in his *Reprehensa Scaevolae capita*.\(^{31}\) Less than 40 years later Cicero conceived his own idea of the possible organisation of the civil law in order to create a perfect system, which would substitute the previous one, difficult and obscure.\(^{32}\)

In this perspective the projects of Pompey and Caesar, if their objective was in fact jurists’ law, could well have aimed at its redaction or compilation. There are, however, no grounds for interpreting these plans as intended to limit the law-making competence of the *iuris periti*. The lack of such attempts at the end of the Republic is illustrated clearly by the flourishing of jurisprudence during the first century of the Empire.

Although the Principate preserved all republican institutions and on 13\(^{\text{th}}\) January, 27 BC Octavian formally returned his triumviral power to the senate and the people,\(^{33}\) it is commonly acknowledged in modern scholarship that he inaugurated a new political system, characterized by the concentration of power in the hands of the *princeps* through the accumulation of various prerogatives resulting from the bundling of offices, the *prorogatio imperii* and the life-long tribunical power. The change was obvious despite Augustus’ populist slogan of the restitution of the

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\(^{31}\)Pölay, Der Kodifizierungsplan (as in 1), p. 28

\(^{32}\)Cic. *De orat.* 1.41.190: *Hisce ego rebus exempla adiungere, nisi a tum quaec habetur oratio cernere; nunc complectar, quod proposui, brevi: si enim aut mibi facere licerit, quod iam divi cogito, aut alius quispiam aut me impedito occuparet aut mortuo effecerit, ut primum omne ius civile in genera digerat, quae perpauca sunt, deinde eorum generum quasi quaedam membra disperierat, tum propriam cuiusque definitione declarat, perfectam artem iuris civilis habeatis, magis magnum atque ubiorem quam difficilem et obscuram*, cfr. also *Brut.* 41.152-153.

\(^{33}\)Res gest. 34: *In consulatu sexto et septimo, post quam bella civilia extinxeram per consensum universorum politus rerum omnium, rem publicam ex mea potestate in senatus populique Romani arbitrium transtuli.*
Republic (*res publica restituta*), put forward in the propagandistic record of his achievements, the *Res gestae* (v. 34).

Not only the Roman constitution was undergoing a process of centralization: centralized imperial legislation was also gaining relevance, even if Augustus continued to use the republican law-making agencies, especially the popular assembly. He could approach the *comitia* as consul and since 23 BC the *concilia plebis* as tribune. He also resorted to the edict as well as to the *decreta* and the *rescripta*. Without proposing any *senatus consultum*, he managed to secure with his *auctoritas* some senatorial *decreta*. The arrogation of law-making by the emperor was facilitated through the reforms of criminal and civil procedure introduced in the years 18-17 BC by means of Augustan *leges Iuliae iudiciorum publicorum et privatorum*. It might be expected that in this political climate the relevance of jurists’ law would diminish.

Some modern scholars interpret in this sense several initiatives of the emperors from Augustus to Hadrian, relating to the practice of juristic response, contained in a long passage from the *Liber singularis enchiridii* of Sextus Pomponius, subsequently inserted in the title D.1.2 De *origine iuris et omnium magistraturum et successione prudentium* of Justinian’s Digest. In particular the *ius respondendi ex auctoritate principis* is seen by modern legal historians as a reaction to the multiplicity of responses, their controversial character and bad quality.

D.1.2.2.48-50: *Et ita Ateio Capitoni Massurius Sabinus successit, Labeoni Nerva, qui aedibues dissensiones auxerunt. Hic etiam Nerva Caesari familiarissimus fuit. Massurius Sabinus in equestri ordine fuit et publice primus respondit: posteaque hoc coepit beneficium dari, a Tiberio Caesare hoc tamen illi concessum erat. 49. Et, ut obiter sciamus, ante tempora Augusti publice respondendi ins non a principibus dabatur, sed qui fiduciam studiorum suorum habebant, consulentibus respondebant: neque responsa*

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36 Brutti: L’indipendenza (as in 1), pp. 435-436
38 Pólay, Der Kodifizierungsplan (as in 1), p. 39; Brutti, L’indipendenza (as in 1), p. 435
utique signata dabant, sed plerumque indicibus ipsi scribebant, aut testabantur qui illos consulatebant. Primus divus Augustus, ut maior iuris auctoritas haberetur, constituit, ut ex auctoritate eius respondenter: et ex illo tempore peti hoc pro beneficio coepit. Et ideo optimus princeps Hadrianus, cum ab eo viri praetorii peterent, ut sibi liceret respondere, rescripsit eis hoc non peti, sed præstari solere et ideo, si quis fiduciam sui haberet, delectari se populo ad respondendum se praepararet. 50. Ergo Sabino concessum est a Tiberio Caesar, ut populo responderet: qui in equestri ordine iam grandis natu et fere annorum quinquaginta receptus est. Huic nec amplae facultates fuerunt, sed plurimum a suis auditoribus sustentatus est.

The authenticity of the passage has been questioned, as often happens in the field of Roman legal history. However, it must be taken into account that the style of the jurist was somewhat particular and, as Kalb puts it, contained “expressions extraneous to the classicality of any period”. Taking this into account, the linguistic incongruence cannot be taken as a sufficient argument to undermine the authenticity of the text.

The passage describes four phases in the history of the Roman practice of responding, which, in chronological order, regard: a) legal advising before Augustus (§ 49); b) the introduction of the possibility to respond ex auctoritate eius by the latter (§ 49); c) the granting by Tiberius of some kind of beneficium to Sabinus (§§ 48 and 50); d) the rescript delivered by Hadrian to some viri praetorii (§ 49).

a) In his short description of the pre-Augustan responses Pomponius states that publice respondendi ius non a principibus dabatur. It is unclear, however, whether he displays here his lack of historical knowledge, as some scholars suggest, or whether, by contrast, he is alluding to the principes civitatis, as Bauman proposes. Pomponius tells us, moreover, that everybody having confidence in their own expertise gave responses which were not sealed (signata). Therefore it can be presumed that the practice of

41 Tondo argues that the text refers to Tiberius; cfr. Tondo, Salvatore: Note esegetiche sulla giurisprudenza Romana. In: Iura (1979) No. 30, p. 67 and n. 104
issuing the responsa signata was introduced by Augustus and persisted until the mid-second century AD, when Pomponius was writing his handbook. During the Republic, on the contrary, the jurist would have sent his opinion in a letter directly to the judge, or issued the consulting party with a testatio, most probably a kind of written document, produced in the presence of witnesses. Given that the use of responses as simple letters is attested in the papyri from the second century AD, it was clearly not eliminated by the responsa signata, but still persisted during and after the reign of Augustus.

There are only two documents preserving traces of provincial responses: P. Oxy. II 237 col. VIII ll. 2-7 and PSI V 450 r. col. II ll. 45-47. The first is a part of a longer document from 186 AD containing the “Petition of Dionisia to the Prefect”. The responsum of Ulpius Dionysodorus, given for a much earlier case, is quoted in support of Dionisia’s case together with some earlier court decisions in similar issues. It is addressed directly to Salvistius Africanus, a military officer exercising a judicial function, by whom it had also been solicited. The responsum does not report the details of the case nor adduce any reason for the decision, stating simply the law to be applied. The second responsum, from c. 117 AD, is quoted together with other documents in a lawsuit before the prefect Sulpicius Similis. Only the address of the opinion given by Ulpius Diocurides to the former strategos Aelius Horion, involved in the case probably as index pedaneus, is preserved. Both documents are written in the form of a simple letter sent directly to the judge. The practice of quoting responsa prepared for earlier cases allows us to presume the existence of some kind of register, where they could be consulted and copied.

There is no mention of a seal, nor any other qualification of the opinion. It has therefore been conjectured in the modern literature that the responsa to the questions put forward by the judges did not require a signum. It is

44 About the form of such responses cfr. Talamanca, Mario: Pomp. sing. ench. D. 1.2.2.49 e le forme dei responsa dei giuristi repubblicani: una vicenda forse esemplare. In: Fides (as in 2), Vol. VIII, p. 5561 and n. 214
45 According to Talamanca these were, during the Republic, the forms mostly in use, but not the only two, cfr. Talamanca: Pomp. sing. ench. D. 1.2.2.49 (as in 44), p. 5559, in particular concerning testatio cfr. pp. 5551-5557
47 Katzoff, Responsa prudentium (as in 45), p. 532-533
48 Katzoff, Responsa prudentium (as in 45), p. 532-533
also possible, however, that the provincial practice simply diverged from the Roman one or, most probably, that both kinds of responsa, i.e. signata as well as non signata, continued to coexist, the former as ‘qualified’ type.

b) The second piece of information provided by the passage of the *Enchiridion* regards the new practice, introduced by Augustus, which consisted in responding *ex auctoritate eius*. It is unclear whether both these innovations of the princeps were in some way interrelated. The lack of any mention of the *ius respondendi* in the *Res gestae divi Augusti* is in any case striking. If the introduction of the privilege had indeed efficiently solved the difficult problem of legal uncertainty, it is hard to explain why Augustus omitted to use it for his propaganda.

Pomponius states that from the concession to Sabinus onwards it was pleaded for as a privilege (*beneficium*). In consequence, it must be presumed that it could not have been granted to all the jurists indistinctly, as some authors suggest. It is also unclear whether the privilege was granted collectively to a whole group of jurists or to some individuals or, in a more restrictive manner, as an authorisation of the particular responsa. The last solution is scarcely probable because, as Franz Wieacker noted, the verbs *petere* and *concedere* can only refer to future opinions. In addition, the authorisation of Sabinus by Tiberius, the only one recorded by Pomponius, testifies to the practice of individual grants, whereas the petition of *viri praetorii* to Hadrian implies that collective grants were also possible, on the assumption that the privilege did not change its character in the post-Augustan period.

Imperial intervention would have been necessary, among other reasons, because the lay judge was unable to evaluate properly the responses,

49 Doubts about the commonly accepted hypothesis, according to which the *responsum signatum* was introduced by Augustus as the obligatory form for the responsa of the privileged jurists, were expressed recently by Talamanca, cfr. Talamanca: Pomp. sing. ench. D. 1.2.2.49 (as in 44), pp. 5560-5561, n. 211


51 Cannata, *Iura condere* (as in 9), pp. 47-49


traditionally released without adducing reasons. Such a practice is confirmed also by the above-mentioned “petition of Dionisia” (P.Oxy. II 237). The ratio, however, even if not contained in the text of the responsum, was publicly debated by the jurist. Moreover, as Max Kaser pointed out, if Roman jurisprudence were really based only upon auctoritas and not upon ratio, the jurists could also have spared themselves their arguments in their ‘theoretical’ writings.

It is a matter of debate in the Romanist literature whether the ius respondendi precluded legal advice by the jurists who did not obtain the privilege, or brought only an additional authority to those to whom it was granted. The form of beneficium, which indicates a kind of concession in favour of particular individuals or collectivities, implies rather the latter interpretation. The character of this beneficium is, however, problematic, taking into account the thesis of Riccardo Orestano that beneficia, conferred by one emperor, remained valid under his successors. Considering a kind of personal bond which such a privilege created between the princeps and the jurist receiving the privilege to respond ex auctoritate eius, it remains uncertain on whose authority the jurist would respond at the new emperor’s succession. Orestano argues convincingly that the beneficia were not renewed, but simply confirmed, in order to confirm the recipients in their rights, retaining their original content. There was therefore a continuity of the privilege, which would imply that the jurist would respond on the authority of that emperor who first granted him the ius respondendi even under his successors. In consequence, with new concessions a judge could face a very difficult choice not only between two different legal opinions, but also between the implicitly conflicting authorities of two emperors. The difficulty could be overcome by the assumption that auctoritas referred to the office of the princeps and not to the person holding it, but such an interpretation does not seem compatible with the wording of § 49.

54 Sen. Ep. 94.27: *Quid quod etiam sine probationibus ipsa momentis auctoritas prodest? sic quomodo inrisconsultorum valent responsa, etiam si ratio non redditur.*
55 Vacca: Contributo (as in 1), pp. 105-106
58 Orestano: La durata (as in 49), pp. 476-487
According to Pomponius, the *princeps* introduced the privilege in order to strengthen the authority of the law (§ 49 *ut maior iuris auctoritas haberetur*). Accordingly, Ulrich von Lübtow considers it a sign of Augustus’ respect for the *iuris periti*, his authority remaining purely ethical, but not founded upon any constitutional power, so that the legal development remained unhindered. On the contrary, it seems, rather, that by conferring his personal authority to the juristic *responsa* in order to improve the *auctoritas iuris* Augustus clearly superimposed his own authority not only on the jurists, but also on the law.

Carlo Augusto Cannata suggests that the noun *auctoritas* is used in § 49 in two different senses, as ‘authorisation’ stemming from the emperor (*ex auctoritate eius*) and as objective authority in the expression *iuris auctoritas*. *Ex auctoritate* means, however, as Mario Talamanca has pointed out, a transfer of authority. In consequence, the *responsa* had to be regarded as those given by the *princeps* himself and therefore applied in court, whereas the republican jurists responded simply *ex auctoritate sua*. Their authority was a characteristic of the ruling senatorial class, and whoever did not possess it, had to follow the *responsum*. Presumably Augustus intended the substitution of the *auctoritas* of the jurists, as members of the former upper class, with his own authority of the new ruler. Such an interpretation implies that the privileged jurists held no monopoly, because the others could still give legal advice (*responsa*) on their own authority.

It is commonly acknowledged that a *responsum* endowed with the imperial *auctoritas* would have been binding for a judge in the case for which it was

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59 Some authors integrate the phrase aducing the genitive *peritorum* or *consultorum* after *iuris* (Gallo: *Princeps*, (as in 1), p. 289); there are, however, no convincing arguments for this.


61 Vacca: Contributo (as in 1), p. 99

62 Gallo, Princeps (as in 1), p. 289

63 Cannata: Iura condere (as in 9), pp. 50-51; Lombardi, Saggio (as in 2), p. 64 n. 116, however the latter argues that the authorisation would not give, in practice, to juristic responses the same value as imperial rescripts had.


65 Talamanca: comment on Cannata (as in 9), pp. 63-65

66 Wieacker: Respondere (as in 52), pp. 71-94
Highly debatable in this context is the problem of Augustus’ relationship to the most eminent jurist of his time, Marcus Antistius Labeo, and in particular the question of whether he was granted the *ius respondendi*. Augustus might have tried to reduce the distance between him and the famous jurist, because Labeo, despite his republican views, was included by the emperor in 18 BC in the commission for the reissue of the list of the senate’s members. The jurist was also offered a consulate, which he refused. Before him Aulus Cascellius and probably even Trebatius Testa, closely related to the emperor, also rejected similar offers by Augustus. Labeo’s rejection has been explained, however, by the fact that the consulate was offered one year earlier to his younger rival Ateius Capito. According to Tacitus (*Ann. 3.75*) such an office helped Capito to enhance his position against Labeo.

Notwithstanding the latter’s political views, clearly hostile to the new regime, it is largely accepted in Romanist scholarship that he held the *ius respondendi*. The opinion is based on the assumption that the expressions *publice respondere* and *ius respondendi* are synonymous and on the comment of Aulus Gellius that Labeo *consulentibus de iure publice responsitavit* (13.10.1). It is difficult to imagine, however, a jurist so strongly bound to the republican ideals giving *responsa ex auctoritate principis*. Even if such a privilege had been offered on Labeo, it is justified to expect that he would have rejected it, just as he rejected the consulate.

Despite the *ius respondendi*, no fundamental change can be observed as to the authority of jurists’ law and of the *iuris periti* from the times of Augustus.

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67 Vacca: Contributo (as in 1), p. 101; Brutti, L’indipendenza (as in 1), p. 438
68 Fögen: Römische Rechtsgeschichten. (as in 41), pp. 199-212
72 Cannata, Iura condere (as in 9), p. 82; Paricio, Labeo (as in 55), p. 443
73 Differently Paricio, who argues that no acceptance for the *ius respondendi* was required, cfr. Paricio: Labeo (as in 69), pp. 442-443.
onward. In particular, the auctoritas of individual jurists, and more generally of jurists as a class of specialists, continued to be used as a strong argument in juristic debates.  

c) Pomponius mentions twice, in §§ 48 and 50, the same information about a privilege granted to Masurius Sabinus. The jurist was admitted to the equestrian order at the age of fifty and was granted by Tiberius, for the first time, a kind of beneficium indicated in the former paragraph as publice and in the latter as populo respondere. Even if the elder Nerva was familiarissimus to Tiberius, the emperor conceded the ius publice respondendi nonetheless (tamen) to Sabinus. It is a matter of debate whether the privilege granted to Sabinus was identical to the Augustan ius respondendi ex auctoritate principis, or Tiberius introduced some modification.

According to Pomponius, the privilege regarded public consultation in legal matters, but it is very unlikely that Sabinus would have been the first to exercise such an activity. This practice had begun in the middle of the third century BC with Tiberius Coruncanius, prior to whom publice professum neminem traditur (Pomp. ench. D.1.2.2.35). The adverb publice can mean “officially, in virtue of public authorization”, or can be synonymous to populo, that is “disposed for public”. According to Talamanca, publice respondere would be not only a beneficium, but also a kind of moral duty to stay ready to give legal advice. There was a persistent link between teaching and responding, because the former was performed by letting the pupils attend the consultations, as Cicero attests (De or. 3.133; Orat. 143).

Some modern authors claim that publice respondere was a technical expression indicating the practice of legal advising performed exclusively by the jurists provided with the ius respondendi ex auctoritate principis whose responsa were therefore sources of law. However, the ancient texts recalling publice respondere exercised by Labeo (Aul. Gell. 13.10.1), Nerva the younger (Ulp. 6 ad ed. D.3.1.1.3) and Javolenus Priscus (Plin. ep. 6.15.3), most probably do not refer to such a privilege. The first would clearly precede Sabinus in time. Nerva filius is told to respond publicly at the age

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75Bauman: Lawyers and Politics (as in 42), pp. 63-68; Cannata: Iura condere (as in 9), p. 32

76Talamanca: comment on Cannata (as in 9), pp. 63-64

77Kunkel: Das Wesen (as in 36), pp. 423-457

78Cannata: Iura condere (as in 9), p. 51

385
of 17, which makes it unlikely that he was already holding \textit{ius respondendi} by then.\footnote{Ulp. 6 \textit{ad ed.} D.3.1.1.3: \textit{qua aetate aut Paulo maiore fertur Nerva filius et publice de iure responsitasse.}} Javolenus is mentioned in an anecdote related by Pliny the younger as responding \textit{publice}, but it does not seem to imply a professional activity performed on the basis of any official privilege.\footnote{Plin. \textit{ep.} 6.15.3: \textit{est omnino Priscus dubiae sanitatis, interest tamen officiis, adhibetur consiliis atque etiam ius civilis publice respondet: quod magis, quod tunc fecit, et ridiculum et notabile fuit.; cfr. Cancelli, Filippo: \textit{Il presunto ‘ius respondendi’ istituito da Augusto. In: BIDR} (1987) No. 40, pp. 554-56; on the anecdote cfr. Laughton, Eric: \textit{Prisce iubes. In: The Classical Review} (1971) No. N.S. 21, pp. 171-172} In the face of these problems some authors delete, following Theodor Mommsen, the words \textit{fuit et} in § 48 of Pomponius’ text, arguing that Sabinus was the first equestrian jurist to have received the imperial privilege, but not the first jurist to give responses in public.\footnote{Kunkel: Das Wesen (as in 36), p. 429-435} This hypothesis also brings some problems, for it is hard to understand why jurists like Trebatius Testa, Aulus Ofilius and Alfenus Varus, friends of Caesar and after his death strongly related to Augustus, all equally of equestrian origin, were not granted the \textit{beneficium}.\footnote{Wieacker: \textit{RR.} Vol. II, (as in 68), p. 29} One of the explanatory hypotheses is that Augustus introduced the \textit{ius respondendi} in his last years, when none of the mentioned jurists was active any more.\footnote{Kunkel: Das Wesen (as in 36), p. 455}

d) Paragraph 49 of the Pomponian text is concerned with the rescript of emperor Hadrian, issued on request of some \textit{viri praetori}, who asked, \textit{ut sibi liceret respondere}. The enigmatic answer of the emperor is interpreted by some modern authors as a refusal,\footnote{Breton, Mario: \textit{Tecniche ed ideologie dei giuristi romani. Napoli 1984\textsuperscript{2}, pp. 250-254} by some others as an approval in flattering terms and as some kind of encouragement for the praetors to give their advice for the public benefit.\footnote{Daube, David: Hadrian’s rescript to some ex-praetors. In: \textit{ZRG Rom. Abt.} (1950) No. 67, pp. 511-518 (= In: \textit{id.}: Collected Studies in Roman Law, 345-353)}

Mario Bretone argues that Hadrian’s rescript caused a degeneration of the \textit{ius respondendi} and therefore that it was welcomed by Pomponius, who himself lacked the privilege. The \textit{ius respondendi} could not have been claimed any more as a \textit{beneficium}, but was assigned by the emperor at his discretion.\footnote{Breton, Mario: \textit{Tecniche (as in 83), p. 250} Pomponius was, however, inclined to interpret this decision as a return to the pre-Augustan freedom of the legal profession.\footnote{Breton: \textit{Tecniche (as in 83), p. 254} Other modern authors

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claim that Hadrian, who took steps to promote access to justice, e.g. by formulating the definitive version of the praetor’s edict and reorganising the consilium principis, in his restrictive approach to the beneficium intended to depoliticise the institution in order to make it more professional.88

It is difficult to decide whether Hadrian denied the right to give responsa to the viri praetorii or, on the contrary, made that practice accessible to anyone without imperial permission. However, the fact that the former praetors address the emperor with the petition, asking ut sibi liceret respondere, is a sign of the growing relevance of the central power to the practice of giving legal responses.

The great majority of modern legal historians finds a proof that the ius respondendi still existed in a passage of Gaius. This jurist, roughly contemporary to Pomponius, seems to consider law-making through responsa as the exclusive prerogative of the privileged jurists.89

G.1.7: Responsa prudentium sunt sententiae et opiniones eorum, quibus permissum est iura condere. Quorum omnia si in unum sententiae concurrunt, id, quod ita sentiunt, legis vicem optinet; si vero dissentient, iudici licet quam velit sententiam sequi; idque rescripto divi Hadriani significatur.

The fragment of the first book of the Institutes was written a few decades after the Enchiridion. In contrast to Pomponius, Gaius is not providing an historical account, but describing the responsa prudentium as a source of valid law. He includes in his wide definition of responsa both sententiae and opiniones90 of those who were authorised to lay down the law (condere iura).91 The definition embraces therefore all the assertions of the jurists, also the purely literary ones,92 even if the opinions in particular cases

89Vacca: Contributo (as in 1), p. 102; Cannata: Lineamenti (as in 29), pp. 53-54; Tondo: Note esegetiche (as in 33), p. 75; Cannata: Iura condere (as in 9), p. 30; Stolfi: Per uno studio (as in 13), p. 40; Gallo: Princeps (as in 1), p. 291; for a different opinion: Cancelli: Il presunto ‘ius respondendi’ (as in 79), pp. 545-551; Albanese, Bernardo: Nota su Gai. 1,7 e sulla storia del ius respondendi. In: AUPA (2004) No. 49, pp. 17-26
90The definition is expressed in a hendiadis. It is therefore impossible to agree with Emanuele Stolfi, who considers opiniones as “categoria residuale” and interprets the rescript of Hadrian, quoted in the second part of the text, as referring only to sententiae, but not to opiniones or responsa, cfr. Stolfi: Per uno studio (as in 13), pp. 43-44
91About the expression iura condere cfr. Quadrato: “Iuris conditor” (as in 4), pp. 87-106; Nicosia: Iura condere (as in 3), pp. 225-245
92Giaro: Römische Rechtswahrheiten (as in 7), p. 267; cfr. Stolfi, according to whom only the pronouncements of jurists holding the ius respondendi could have been interpreted as responses, cfr. Stolfi: Per uno studio (as in 13), p. 45
(consulta) are left aside. According to Filippo Cancelli, Gaius did not refer to any particular kind of responsa, but rather indicated the whole oeuvre of Roman juristic authors, both deceased and living.\(^{93}\)

Similarly to Gaius, Cicero was already listing *iuris peritorum auctoritas* among the components of the *ius civile*.\(^{94}\) *Auctoritas prudentium* was also mentioned as a source of law by the late classical jurist Papinian (2 def. D.1.1.7 *pr.*) and in a short didactic work of the second century AD, the so-called *Fragmentum Dositheanum*.\(^{95}\)

The words *permissum est iura condere* have induced many modern scholars to interpret the passage of Gaius as related to the *ius respondendi*.\(^{96}\) However, Wieacker rightly rejected this interpretation, because Gaius’ main point was law-making by the jurists throughout all the branches of their activity.\(^{97}\) In fact, the plural *iura* implies, according to Giovanni Nicosia, that Gaius did not specifically refer to the privilege.\(^{98}\) Similarly the expression *quorum omnium* suggests that Gaius indicates all the jurists in general, and not only those holding the *ius respondendi*.\(^{99}\) Furthermore, the interpretation of *permissum est* as referring to the privileged jurists would imply that Gaius excluded from the *iura populi Romani* not only responses of his republican ancestors but also of some first century AD jurists, among them Labeo.\(^{100}\)

In addition, Gaius uses the same expression *condere iura* in the fourth book of the Institutes to describe the activity of the old republican jurists during the period of the *legis actiones*. It is hardly possible therefore that this

\(^{93}\)Cancelli: II presunto ius respondendi (as in 79), pp. 543-568; Nicosia, Iura condere (as in 3), pp. 235-237

\(^{94}\)Cic. *Top.* 28: *Atque etiam definitiones aliae sunt partitionum aliae divisionum; partitionum, cum res ea quae proposita est quasi in membra discerpitur, ut si quis ius civile dicat id esse quod in legibus, senatus consultis, rebus indicatis, iuris peritorum auctoritate, edictis magistratuum, more, aequitate consistat*.

\(^{95}\)FD. 2. *Iuris ciuilis ut qui appositicum appellatur, ex pluribus partibus constat. Sed constitutiones imperatorias similiter honorandum. Quod est et praetoris edictum similiter nel proconsulis. Ex eo enim consensuerunt prudentiam et receptum est responsis et summatim solemnis baece dicere. Lex enim Iulia et Papia ceterae partes institutae appellantur.*

\(^{96}\)Horvat, Marijan: Note intorno allo ius respondendi. In: *Synteleia Arangio Ruiz*, vol. II, Napoli 1964, pp. 710-716; Nörr: Pomponius (as in 70), p. 575; Cannata: Iura condere (as in 9), p. 30

\(^{97}\)Wieacker: Respondere (as in 51), pp. 71-94

\(^{98}\)Nicosia, Iura condere (as in 3), p. 225

\(^{99}\)Lombardi: Saggio (as in 2), p. 71, n. 133 e p. 75; Albanese: D.1.2.2.12 (as in 38), pp. 3-27; *id.*, Appunti su D. 1.2.2.48-50 (as in 38), pp. 5-15

\(^{100}\)De Zulueta, Francis: The Institutes of Gaius. Vol. II, Oxford 1953, pp. 22-23
expression refers to those who were specifically granted the imperial *ius respondendi*. ¹⁰¹

In consequence, the aforementioned passage from the first book of the Institutes provides no information about the Augustan privilege. The expression *quibus permissum est*, referring clearly to the practice of Gaius’ time, probably indicates those jurists who could create law due to their professional skills. On the contrary, the text confirms that in the middle of the second century juristic opinions were still a valid source of law and that the *communis opinio* had the same force as a statute (*lex*). Furthermore, the text implies the existence of controversies, allowing the judge in such a case to follow one of the contrasting opinions. ¹⁰²

At the end of the above-quoted text (G.1.7) Gaius also quotes another rescript of Hadrian relating to the practice of judicial response, according to which the juristic opinions, if unanimous, had the force of a *lex*. ¹⁰³ Fritz Schwind argues that this implies legal binding force only in the case for which the responses were issued. ¹⁰⁴ It has often been claimed in the modern literature that the rescript would attribute such value only to the pronouncements of the jurists holding the *ius respondendi*. ¹⁰⁵ It is, however, difficult to maintain that the judge would not be bound by the opinions, especially if unanimous, of jurists not holding the privilege. It has already been pointed out by Matteo Massei that the text testifies to the great authority of responses at Hadrian’s time, in so far as it clearly shows that it was considered necessary to regulate the matter. ¹⁰⁶

The only link between the passage of Gaius and the problem of the *ius respondendi* is provided by the corresponding fragment of Justinian’s Institutes (I.1.2.8), which forms a hybrid of both Pomponius’ and Gaius’ texts.

I.1.2.8: *Responsa prudentium sunt sententiae et opiniones eorum, quibus permissum erat iura condere. nam antiquitus institutum erat ut essent qui iura publice*

¹⁰¹G.4.30: *Sed istae omnes legis actiones paulatim in odium venerunt. namque ex nimia subtilitate ute-runt, qui tunc iura considerunt.*
⁰¹⁰²Lombardi: Saggio (as in 2), p. 71, n. 133
⁰¹⁰³Max Kaser pointed out that this regulation was greatly superior to the primitive calculating system of the post-classical law on citations of 426 AD, cfr. Kaser: Zur Problematik (as in 55), p. 19, n. 48
⁰¹⁰⁴Schwind: Zur Frage (as in 2), p. 148
⁰¹⁰⁵Cannata: Lineamenti (as in 29), pp. 53-54; Stolfi: Per uno studio (as in 13), pp. 41-42; Gallo: Princeps (as in 1), pp. 291-92, 296
⁰¹⁰⁶Massei: Le citazioni (as in 12), pp. 432-433
interpretarentur, quibus a Caesare ius respondendi datum est, qui inrisconsulti appellabantur. quorum omnium sententiae et opiniones eam auctoritatem tenebant ut indici reedere a responso eorum non liceret, ut est constitutum.

The difference between both texts is immediately visible in their wording. Whereas for Gaius the *responsa* form an integral part of the *iura populi Romani* (G.1.2), in Justinian’s version they belong to the *ius scriptum*. The difference in wording. Whereas for Gaius the *responsa* form an integral part of the *iura populi Romani* (G.1.2), in Justinian’s version they belong to the *ius scriptum*.

Therefore they are not a means of producing new law any more, but merely the sum of writings of all the jurists who in the past had law-making competence (*permissum erat*).

Also, the incorrect identification of the term *inurisconsultus* as indicating exclusively jurists provided with the *ius respondendi* makes the text unreliable as a source of historical information on the Augustan privilege. The changes in respect to Gaius’ text seem anything other than fortuitous; on the contrary, they reflect the changed status of Roman jurisprudence, deprived of its law-making function in the course of the fourth and fifth centuries.

The quotations from earlier jurists, constantly present in the juristic discourse of the Principate, contradict the idea of an *auctoritas* conferred by the emperor to some individuals. The contrary opinion has been put forward recently by Emanuele Stolfi, who argues that particularly frequent quotations of *sententiae* pronounced by some jurists, for example by Sabinus, result from their privilege of *ius respondendi*. The argumentation is however scarcely convincing, firstly because it is based on an arbitrary definition of *sententia*, and secondly because very often the notion of *sententia* appears in contexts which exclude the presence of imperial authority. There are frequently references to *sententiae* of republican jurists

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107 Albanese: D.1.2.2.12 (as in 38), pp. 3-27; *id.*, Appunti su D. 1,2,2,48-50 (as in 38), pp. 5-15
108 Nicosia, Iura condere (as in 3), pp. 232-234
109 Nicosia, Iura condere (as in 3), p. 232 n. 3
110 Stolfi: Per uno studio (as in 13), pp. 21, 27, n. 172, 45; the opinion is so unconvincing that the author himself abandons it at the end of the paper cfr. pp. 46-47
111 The author ascribes to *sententia* a character of qualified opinion, which, although restricted to the case for which it was issued, had, at the same time, more general implications. Moreover, according to Stolfi, the opinions indicated as *sententiae* would have the character of jurisprudential innovation, cfr. Stolfi: Per uno studio (as in 13), pp. 7, 10. There is however no evidence for such an understanding of the notion; on the contrary, there is evidence that the words were used by Gaius and Ulpianus as synonyms cfr. David, Martin; Hein L.W. Nelson: Gai Institutionum Commentarii IV. Leiden 1954, p.16; Giaro: Römische Rechtswahrheiten (as in 7), p. 267
from Sextus Aelius\textsuperscript{112} to Quintus Mucius \textit{pontifex}\textsuperscript{113} and Servius Sulpicius Rufus.\textsuperscript{114} Moreover, even the \textit{sententiae} of Sabinus, the sole jurist mentioned as being granted the \textit{ius respondendi}, are discussed in the same terms as other opinions. Sometimes they are rejected,\textsuperscript{115} or they receive confirmation by an imperial \textit{rescript}, which makes it unlikely that they were already provided with imperial authority.\textsuperscript{116}

Numerous texts confirm that the authority of the jurists, based on their skills and social position, continued to play an important role during the Principate. We recall for example, that due to his juristic authority Trebatius Testa presided over the commission convoked by Augustus c. 4 AD to resolve the problem of the validity of codicils after the death of Cornelius Lentulus (I.2.25 \textit{pr.: dictur Augustus convocasse prudentes, inter quos Trebatium quoque, cuinis tunc auctoritas maxima erat}).\textsuperscript{117} In this case Augustus does not provide the lawyer with his authority, but on the contrary he borrows it from him.\textsuperscript{118}

Imperial constitutions from the third century AD often report jurisprudential opinions. This practice recedes only in the fourth and fifth centuries, to return with renewed force under Justinian.\textsuperscript{119} It is also frequently mentioned by jurists that imperial decisions follow earlier jurisprudential opinion.\textsuperscript{120} Sometimes an emperor simply follows the \textit{communis opinio prudentium}.\textsuperscript{121}
In recalling opinions of their predecessors the Roman jurists never distinguish between different levels of juristic authority, and the expression *auctoritas principis* is not often applied in the juristic argumentation. On the contrary, the jurists demonstrate in their writings some reluctance to accept the emperor’s authority as decisive in legal matters, recalling juristic opinions and imperial decisions without distinction.\(^\text{122}\)

It can be concluded that, despite the noteworthy centralisation of political power as early as the beginning of the Principate, for the first three centuries Roman jurisprudence remained an important factor in law-making. Moreover, this jurisprudence always preserved its controversial character which practically precluded the possibility of political control. No serious and direct attempt to diminish the creativity of legal discourse by the emperors is discernible until the time of Constantine. Only the growth of imperial legislation from Hadrian’s time onwards gradually displaced jurists’ law.

\footnotesize{Pap. D.37.14.17 pr.: *Divi fratres in hac verba rescripsunt: ...et Proculum, sane non levetem iuris auctorem, in hac opinione fuisse ... cuius sententiam nos quoque seuti sumus, cum rescriberemus ad libellum Caesidiae Longinae;* Paul 62 ad ed. D.42.8.7: *rescriptum est secundum Proculi sententiam*, cfr. Cancelli: Il presunto ius respondendi (as in 79), pp. 543-568; Giaro: Römische Rechtswahrheiten. (as in 13), pp. 542-544

\(^\text{121}\) The expression *prudentibus placuit* appears in two constitutions of Alexander Severus C.6.53.5.2 and C. 7.14.1.

\(^\text{122}\) Ulp. 3 ad ed. D. 5.1.2.4: *et Iulianus scribit et divus Pius rescripsit;* D. 28.5.1.5: *divus Pius ... rescripsit ... quod et Iulianus scriptum est;* D.37.10.1.5: *Iulianus scriptum ... quod et divus Pius rescripsit;* Ulp. 46 ad ed. D.27.3.1.15: *Marcellus ... scriptum ... quodque saepe rescriptum est;* Ulp. 13 ad Sab. D.38.17.2.2: *Iulianus scriptum et constitutum est ab imperatore nostro;* I.2.6.9: *Papianus scribit ... et ita divus Pius et divus Severus et Antoninus rescripsunt.*}