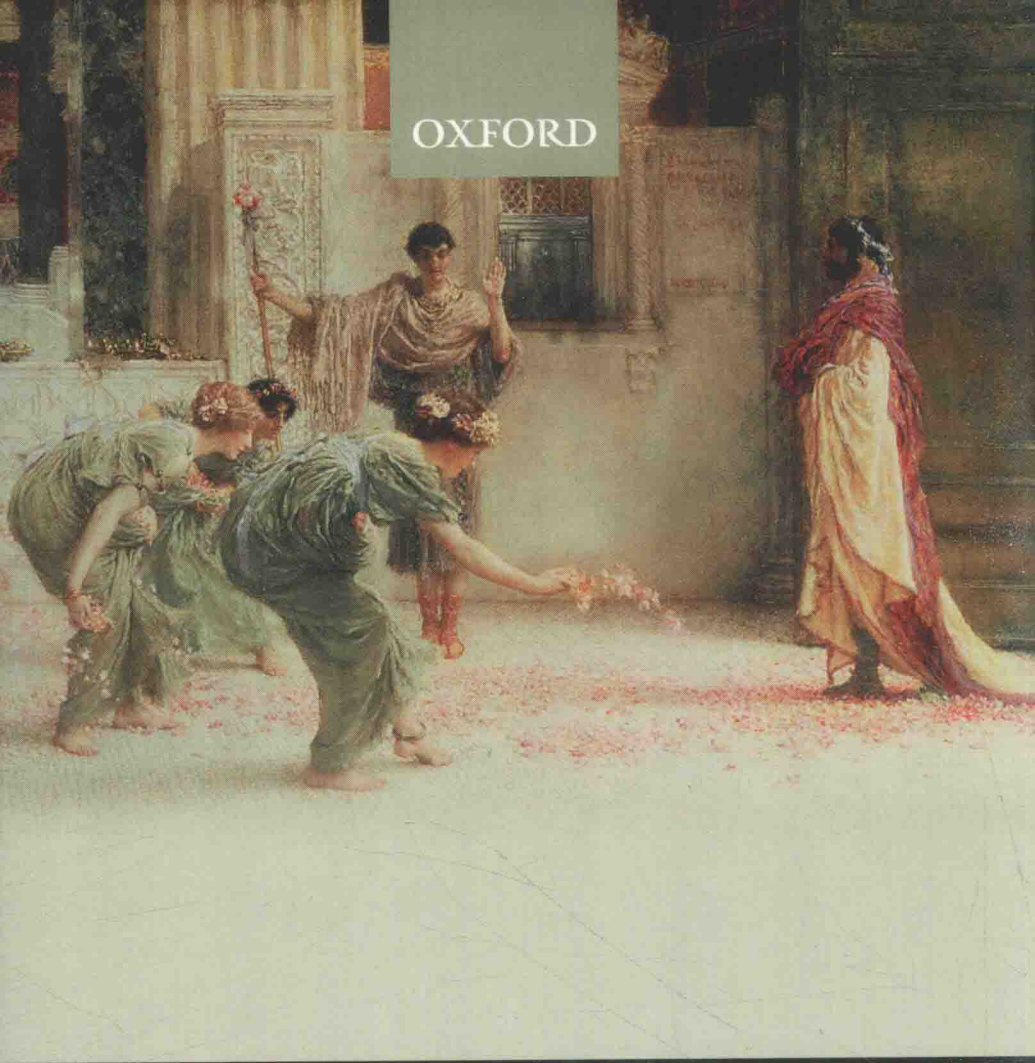

OXFORD STUDIES IN ROMAN SOCIETY AND LAW

THE EMPEROR OF LAW

The Emergence of Roman Imperial Adjudication

Kaius Tuori

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OXFORD
UNIVERSITY PRESS

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Great Clarendon Street, Oxford, OX2 6DP,
United Kingdom

Oxford University Press is a department of the University of Oxford.
It furthers the University's objective of excellence in research, scholarship,
and education by publishing worldwide. Oxford is a registered trade mark of
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First Edition published in 2016

Impression: 1

Published in the United States of America by Oxford University Press
198 Madison Avenue, New York, NY 10016, United States of America

British Library Cataloguing in Publication Data
Data available

Library of Congress Control Number: 2016937253

ISBN 978-0-19-874445-0

Printed in Great Britain by
Clays Ltd, St Ives plc

Preface

This book began with a curiosity concerning the contradictory accounts of imperial adjudication, where the same emperor might appear at one moment as a most diligent judge issuing refined legal opinions, and a raving, murderous lunatic at the next.

Many people helped me along the way in this inquiry. As a research project, it started out as a side project during a post-doctoral period at New York University in 2007–8 (funded by the Hauser Research Scholar Program, the Kone Foundation, the Osk. Huttunen Foundation and the ASLA-Fulbright Graduate Grants Program). In Helsinki, parts of the project were presented at different ancient history, legal history, and classics workshops and colloquia. With funding from the Emil Aaltonen Foundation, a research project was set up on issues of public and private in the Roman house, where I was able to develop the book idea with Laura Nissin, Juhana Heikonen, Heta Björklund, and Samuli Simelius, using the project as a sounding-board, especially for my ideas of the emperor moving between the public/private dichotomy. I would like to thank Juhana Heikonen for producing the illustrations for this volume.

The book project took centre-stage in 2011, as the Academy of Finland was selected me as an Academy Research Fellow. Funded in part by the Foundation's Post-Doctoral Pool, I returned to NYU in 2012–13, where Michael Peachin was my gracious host at the Classics Department and Larissa Bonfante was kind enough to lend her office to me. At NYU, in addition to Mike and Larissa, I would like to thank Benjamin Straumann for our innumerable dinners and discussions, Bill Nelson and Dan Hulsebosch for welcoming me to the NYU Legal History Colloquium, and to the faculty and graduate students at the Classics Department for their warm welcome and friendship. Mike and Benjamin would read the manuscript in its different iterations and offer their constructive criticisms, for which I am thankful.

Back in Helsinki, I was fortunate enough to spin off a part of the project as a European Research Council project (ERC project Found-Law, n. 313100), enabling me to gather my own research group. Jacob Giltaij, Tommaso Beggio, and Ville Erkkilä have had the dubious

benefit of reading the chapters and debating them in our meetings. I would like to thank them for their comments and criticism during the making of this book.

As the work progressed, I pitched the book to OUP, where series editors Paul du Plessis and Tom McGinn worked tirelessly to improve the ideas and their execution. I remain very much in their debt for making this a better book. My editors Charlotte Loveridge and Georgina Leighton have borne the usual queries for extensions and more words with patience and professionalism.

Parts of this study were presented at different conferences over the years (AAH, ASLH, SIHDA, to mention just a few), as well as smaller colloquia such as the NYU Legal History Colloquium or the Tvärminne Late Antiquity workshop. For all of these events, I am ever grateful to all those who took the time to read my work, listen to the presentations, and give their comments. Many others, like Detlef Liebs, gave valuable insights and advice along the way. The book has been immensely improved as a result.

This book has three academic homes: Helsinki, New York, and Rome. In Helsinki, the numerous legal historians have been my primary reference group and commented on my work on many occasions. Janne Pölönen, my co-conspirator in the Finnish study of the history of Roman law, not only shared his wide knowledge but also read the manuscript in full. Joonas Sipilä gave freely from his extensive knowledge of Roman administration, Kai Juntunen from his studies on Dio. Professor Carlo Lo Zio gave his insights on the legal implications of concentrated sovereign power. In Rome, the Finnish Institute in Rome at the Villa Lante has been not only a place to stay but also an academic home. Much of the research literature came from three wonderful libraries, the École Française de Rome, the American Academy in Rome, and the Roman Law Library at La Sapienza.

A note on translations and literature: I have used widely available editions and translations, on some occasions amending an existing text. Word limits have made it impossible to compile comprehensive lists of all literature, but I have attempted to include references to works that allow the reader to have an understanding of the literature.

Help in the research and editing process was provided by Laura Nissin, Phil Katz, Ville Erkkilä, and Heta Björklund. Of those, Heta Björklund did the brunt of the work of editing the text and the notes to house style and preparing the bibliography and the list of cases.

Thank you! Margot Stout Whiting ably corrected my English. Naturally, the responsibility for the views and errors in this book is entirely mine.

This book is dedicated to my mother, who remains confident that I will eventually get a real job.

Kaius Tuori

Helsinki
15 January 2016

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Introduction

Sometimes, the importance of something becomes apparent only when access to it is prevented. The young emperor Severus Alexander (ruled 222–35) wrote to the Greek community in Bithynia, reproaching all who sought to limit the appeals to him by litigants unhappy with the decisions of local judges, saying that 'it is permissible to make use of a better route to the same end and to reach me faster'. He particularly prohibited procurators and provincial governors from using violence and military force to obstruct the approach of petitioners to him, maintaining that 'I care as much for the liberty of my subjects as I do for their goodwill and obedience'.[1] This letter, addressed to a local council in Asia Minor, was not only so well known that it was included in the Digest by the jurist Paul, but copies of it were even found on papyri in Egypt.[2] This demonstrates how vital the emperor considered the upholding, or the appearance of upholding, the connection between himself and faraway petitioners, and equally how important this connection was to the people. The Roman emperor was considered to be the final judge, the supreme court, and the guarantor of justice.

The focus of this book is on the way in which the Roman emperor became a judge, emerging as a 'supreme court' for the Roman Empire through a process of persuasion and assertion, beginning from the Late Republic and ending with the Severan period. This was a momentous change, as John Crook wrote: 'The emergence of the ruler as supreme judge and head of the legal order is the principal formal difference between the Republic and Empire.'[3] Previous works

[1] *Dig.* 49.1.25.
[2] MacMullen, *Response to Crisis* (1976), 81. *POxy.* 17.2104 = *POxy.* 43.3106.
[3] Crook, 'Augustus' (1996), 123.

have approached the process either through laws or through behaviour, seeking to deduce fixed rules from patterns of behaviour. Formalistic scholarship, which viewed the issue as a legal matter, starting from nineteenth-century German Roman lawyers but extending to the present day, assumed that the emperor was formally authorized to act as judge by legislation or by administrative continuity from the Republican magistrates.[4] Functionalistic scholars, on the other hand, looked at the actual behaviour of the emperors as judges and drew general conclusions out of individual cases. The functionalistic adage 'man is what man does' was turned into 'the emperor is what the emperor does'.[5] Both of these viewpoints offer a deceptively clear vision of what the emperor could do and did do, because what they give is an amalgamation of sources that are both contradictory and scarce.[6] The methodology of analytical jurisprudence, which would take into consideration not only rules and behaviour, but also the impact of ideology and belief, has been neglected until recently.[7] This study seeks to present an alternative approach to the problem of imperial jurisdiction through the analysis of narratives.[8] The motto for this study could thus be that: 'The emperor is what the emperor is believed to be.'

Through the examination of narratives, this study seeks to shift focus from an anachronistic understanding of legal change being formulated through rules that may then be examined as laws or behaviour reflecting law, towards the investigation of the changing historical tradition as a sign of the emergence of jurisdiction. By looking at both legal and historical sources, it is argued that the emergence of imperial jurisdiction may be best observed through the manner in which it was discussed instead of through laws or legal

[4] On the contradiction between Mommsenian constitutionalism and its legal formalism against historical and political realism, see Peachin, *Princeps* (2005). For a fruitful combination of the two, see Capogrossi Colognesi, *Law and Power* (2014).

[5] Millar, *Emperor* (1992 [1977]), 6.

[6] This contradiction extends to opposing views of what the Roman Empire was like. Elizabeth Meyer has described the formalistic vision of ancient Rome as an orderly place, something resembling modern Zurich: see Meyer, *Legitimacy and Law* (2004), 3.

[7] By 'the approach of analytical jurisprudence' here is meant sensitivity towards ideological and cultural features in law. For one idea of the implications, see Twining, 'Have Concepts' (2005). On the interplay between law, communication and culture, see Ando, *Imperial Ideology* (2000).

[8] On the emerging field of law and narratives and its uses in pre-modern legal history, see Bartor, *Law as Narrative* (2010), 2–8. On the methodological foundation of this study, see further discussion in this Introduction.

practice. Narratives of jurisdiction that describe the emperor as either exercising jurisdiction or refraining from it, as a holder of power and responsibility created the perception or a shared conviction of a capability to adjudicate, in other words, jurisdiction.[9] Examples of imperial adjudication that were repeated in these narratives reinforced the belief in the imperial authority and, thus, its legitimacy.

Instead of trying to coalesce the contradictory historical sources into a historical narrative, this study seeks to utilize their depictions of imperial adjudication on two levels. First, it will examine the different contemporary narratives of emperors as judges by approaching them as a dialogue in which different actors are presenting their own views of imperial power.[10] For example, three different narratives of Augustus as judge will be discussed. Ovid tells his story of his unexplained banishment by imperial fiat, an abuse of power, even if it was formally legitimate.[11] The provincials who inscribed their stories of Augustus' legal intervention reveal the emperor as supreme court and magistrate of the whole Empire.[12] Augustus' own narrative remains purposefully mute, sticking to the storyline of Republican continuity, where no extraordinary jurisdiction is mentioned. Second, the past is prone to change, since each account of the past also reflects contemporary concerns.[13] What later authors like Suetonius and Dio relate of the first emperors reflects a fairly ahistorical view of the past: the Roman emperor was a creation of Augustus who did not change over time.[14] They both assume that Augustus had the practices and powers of the emperor in their own time. This bias was strengthened by the constant reference to the past in official narratives. Because the past justified the future through *exempla*, the fact that later authors said something of Augustus' actions was also significant in the contemporary setting. Thus, what was said of the emperors adjudicating, settling disputes,

[9] On the importance of constitutional ambivalence and argumentation, see Lintott, *Constitution* (1999), 7.

[10] The importance of narratives was already recognized in Harries, *Law and Empire* (1999), as well as in recent studies such as Sumi, *Ceremony and Power* (2005), Roller, *Constructing Autocracy* (2001), and Gradel, *Emperor Worship* (2002).

[11] Ov. *Tr.* 2.121–40.

[12] *SEG* IX 8; *IG* XII 3.174 = *FIRA* III 185; Chisholm and Ferguson, *Rome* (1981), 132, 134–5.

[13] I have previously written on the flexibility of the past in legal history, for example, in Tuori, *Ancient Roman Lawyers* (2007).

[14] Suet. *Aug.* 33.1; Cass. Dio 53.17.6–7; Bleicken, *Senatsgericht und Kaisergericht* (1962), 74–5.

and acting as judges worked in two ways, both in the contemporary setting and within the historical dimension.[15]

The approach is thus focused on narratives of adjudication and jurisdiction. Instead of rigid notions of law and legal procedure, what it seeks to bring forward is the uniqueness of Roman constitutionalism as a discourse drawing together legalism, historical memory, and narratives.[16]

The questions that this study seeks to answer are:

1) How did imperial adjudication emerge? How was it reflected in the narratives of emperors and how did these narratives change over time?
2) What kind of judge was the Roman emperor? On what kinds of examples and models of rulers, judges, and arbitrators were these convictions founded and how were these narratives constitutive of the power of adjudication?
3) Why did the emperor become an adjudicator? What roles and needs did emperors, petitioners, and administrators emphasize and how did these develop?

The process by which the emperor became the supreme judge and, by extension, the supreme legal authority, has not been adequately studied. In contrast, the development that led to the emperor becoming the head of the legal system at large is well documented. Imperial will, expressed through popular legislation, *senatusconsulta*, edict, letter, and rescript, replaced all other legislative forms. Through the rescript system, imperial justice was available to petitioners from all around the Empire.[17] The imperial legal bureaucracy, such as the appointment of city and praetorian prefects by Augustus to govern and to administer justice on behalf of the emperor, as well as the later appointment of *iuridici* and imperial *legati* to administer law, speak of the way that the legal system was centred around the emperor.[18]

[15] Even in Republican Rome, narratives had a crucial constitutive and constitutional significance as a source of ancestral custom. See Lintott, *Constitution* (1999), 26.

[16] On the emerging debate over Roman constitutionalism, see Ando, 'Republican Constitutionalism' (2013).

[17] Orestano, *Potere normativo* (1962); Marotta, *Mandata principum* (1991); Gallo, *Potere normativo* (1982); Nörr, 'Reskriptenpraxis' (1981); Arcaria, *Referre* (2000).

[18] *Dig.* 1.11, 1.12.1, 1.2.2.33; Capogrossi Colognesi, *Law and Power* (2014), 252–71; Eck, 'Government and Civil Administration' (2000); Vitucci, *Ricerche sulla praefectura urbi* (1956); Rucinski, *Praefectus Urbi* (2009); Woiciech, *Stadtpräfektur* (2010).

In the provinces, governors working under the emperor would run the legal administration. Even in Rome, the introduction of the new *cognitio* process associated with imperial courts would yield justice unconstrained by formalities and economic burdens, its only focus being substantive truth.[19]

The centre of this system, the emperor as judge, has remained an enigma despite important attempts to decipher the way that the system was created and why.[20] The main works are still Millar's 1992 *The Emperor in the Roman World*[21] and Honoré's 1994 *Emperors and Lawyers*,[22] which focus on the activities of the emperors in general and the imperial rescript system, respectively. Other studies have sought to trace the process down to issues like legal procedure, administration, punishment, power, or constitutionality. Some, like Bleicken, traced the growth of imperial jurisdiction by linking it to the Senate's jurisdiction. Others, like Kelly and Jones, see imperial jurisdiction emerging gradually from specific areas such as *maiestas*.[23] In the current debate, there are essentially two schools of thought regarding the emperor as judge, of which Millar and Honoré are good examples. The first emphasizes the factual power of the emperor as a leader, while the second underlines the formal legal aspects of the emperor's adjudicative and legislative activities. Millar writes how the emperor's power to kill, confiscate, and relegate, with or without legal procedure, was an essential part of how he functioned. However, this did not in any way hinder the emperor's active role as a judge adjudicating cases between citizens.[24] Honoré

[19] *Dig.* 48.19.13; Kaser and Hackl, *Zivilprozessrecht* (1996), 435–516.

[20] Two recent studies, Randazzo, *Doppio grado* (2011); Fanizza, *L'amministrazione* (1999), 11–60, illustrate the historical difficulties, both practical and conceptual, that any such attempt must face.

[21] Millar, *Emperor* (1992 [1977]).

[22] Honoré, *Emperors and Lawyers* (1994), similarly on lawyers, Bauman, *Lawyers and Politics* (1989).

[23] Bleicken, *Verfassungs- und Sozialgeschichte* (1978); Bleicken, *Senatsgericht und Kaisergericht* (1962); Kelly, *Princeps Iudex* (1957); Jones, *Criminal Courts* (1972); Jones, 'Imperial and Senatorial Jurisdiction' (1954). Of recent studies, see also Spagnuolo Vigorita, *Le nuove leggi* (1992); Peachin, *Iudex* (1996); Milazzo, *Ordinamenti giudiziari* (1999); Corcoran, *Empire of the Tetrarchs* (2000); Wankerl, *Appello* (2009); Schilling, *Poena extraordinaria* (2010); Connolly, *Lives behind the Laws* (2010); Rizzi, *Imperator cognoscens decrevit* (2012); Masuelli, *Giudice privato* (2012); and most recently Ferrary and Scheid (eds.) *Il princeps romano* (2015).

[24] Millar, *Emperor* (1992 [1977]), 6–7, 527–30: 'the emperor's role in relation to his subjects was essentially that of listening to requests, and of hearing disputes' (p.6).

criticized this view of the unfettered power of the emperor and pointed to the degree to which emperors, almost without exception, relied on lawyers while exercising their legal role as a judge or in answering petitions. According to Honoré, the role of the emperor as a court of appeal and the imperial rescripts as a legal aid show how emperors actively promoted the rule of law for the entire Roman Empire.[25] However, both agree that adjudication was a central task of the emperor. Peachin similarly stresses that the emperor spent a considerable amount of time sitting as a judge, and that the perception of the emperor as the good judge, the final source of justice who corrected unjust laws and unfair decisions, was formed by the second century AD.[26] Dillon demonstrates how imperial jurisdiction was an administrative tool to spread imperial influence, a way of gaining the loyalty of the people and for punishing corrupt officials.[27] Studies on petitioning and appealing to the emperor have recently explored it as a bottom up procedure, emphasizing the agency of the petitioners and their strategies.[28]

In earlier, mainly German, studies regarding the office of the Roman emperor, rigid constitutional theories were presented to illustrate the way the emperor became a judge. This was often through the exposition of the powers of the Roman emperor, beginning with the assumption that there actually was an agreement on what the powers of the emperor were or that there was a fixed constitution.[29] The main problem with the formalistic approach regarding the emperor's jurisdiction is that the sources upon which it could be based are not there and the sources that are there offer no support for this view.[30] The

Hopkins, 'Rules' (1978), 180, already criticized him for overlooking the importance of questions of power, legitimacy, and authority.

[25] Honoré, *Emperors and Lawyers* (1994), 12–16, 28, 33.

[26] Peachin, *Iudex* (1996), 4, 13. See also Kelly, *Princeps Iudex* (1957); Connolly, *Lives behind the Laws* (2010).

[27] Dillon, *Justice of Constantine* (2012).

[28] On the process of petitioning, see Hauken, *Petition and Response* (1998) and especially on the situation in Egypt, where much material has been found, see Kelly, *Petitions* (2011); Bryen, *Violence* (2013); Anagnostou-Canas, *Juge et sentence* (1991).

[29] von Bethmann-Hollweg, *Der Civilprozeß* (1866), 3. 88–103, 325–42; Mommsen, *Staatsrecht* (1871–88), 2.2. 958–988; Puchta, 'Geschichte des Rechts' (1875), 212–34; Kromayer, *Rechtliche Begründung* (1888); Siber, *Führeramt* (1940). See also Arangio-Ruiz, *Augustus* (1938).

[30] This dilemma was raised in many earlier studies, such as McFayden, 'Princeps' Jurisdiction' (1923); Volkmann, *Rechtsprechung* (1969 [1935]); Kelly, *Princeps Iudex* (1957); Bleicken, *Senatsgericht und Kaisergericht* (1962). The same enigma is

primary legacy of this discussion has been the theory that the constitutional legitimation of the normative powers of the emperors was a combination of the powers of the different offices held by the emperor, such as consul or tribune of the plebs.[31] However, since adjudication was not part of those powers, it has remained a dilemma that the formalistic approach has not been able to solve.

As the traditional avenues have been exhausted, the main advance that this book seeks to make is to show how different actors like the emperors, imperial officials, petitioners, and litigants utilized various narratives of adjudication to advance their causes, and while doing so reveal, but also influence, aspects of the understanding of what the emperor could and should do in law. These narratives worked both through references to the concrete situation, and to the numerous traditions on sovereign power and adjudication. Petitioners sought to show themselves as vulnerable but virtuous, to persuade the emperor to act in their interest, while emperors (and their sycophants) presented themselves as righteous rulers and good judges.[32] Critics, naturally, invoked the rhetoric of unjust tyranny.[33] Far from being a mere reflection of the imperial role, this dialogue and the actions of the emperors as part of it were integral in shaping and formulating imperial adjudication by creating custom, hopes, and expectations.[34] What I argue is that imperial adjudication and, by extension, jurisdiction developed as a defining feature of the Principate and that imperial jurisdiction is representative of the Principate itself.

While scholars favouring a formalistic viewpoint might claim that more emphasis should be placed on laws and official sources, that is unavoidable due to a fundamental rift in the understanding of history between the formalistic view and what will be attempted here. The formalistic, descriptive study of constitutional history that gives an account of the development of formal powers and jurisdiction, divided into civil and criminal matters, has been written a number of

recognized in Lintott, 'Crime and Punishment' (2015), 318; Rüfner, 'Imperial *Cognitio* Process' (2016).

[31] Orestano, *Potere normativo* (1962), 19–22; Magdelain, *Auctoritas* (1947); Jones, 'Imperium' (1951).

[32] e.g. *SEG* XVII 759, l. 24–41; Hauken, *Petition and Response* (1998), 58–73. On the imperial style in drafting, see Wankerl, *Appello* (2009).

[33] Cic. *Lig.* 11.

[34] This is increasingly recognized in recent studies on early emperors, e.g. Osgood, *Claudius* (2011); Winterling, *Caligula* (2011).

times.[35] Formal legal matters, such as deriving the jurisdiction of the emperor from the jurisdictional sovereignty of the provincial governor, by extension from the proconsular *imperium maius* or that of the consul, are an important part of the story, as are the traditional jurisdictions of the *paterfamilias*, the magistrate's and the plebeian tribune's duty to provide *auxilium*, or the practice of assigning arbitrators. In this case, the focus is simply different. What this book seeks to offer is a fresh and unconventional approach that sheds new light on a classical question. Formalistic legal history concentrated on the legal sources and excluded sources that it considered legally irrelevant, such as narratives and ideology. What the new narrativist approach demonstrates is that both the formalistic and functionalistic methods lead to a distorted image of the Roman emperor's legal role, focusing either on the rules or the behaviour. Moreover, it shows how complex the process of the development of imperial adjudication actually was and the different elements that influenced it. As will be argued, the existence of formal legal precedents such as the governor's jurisdiction functioned in themselves as narratives that constituted to the development of the shared understanding.

The time-frame of this book is the period between the Late Republic and the advent of the so-called crisis of the third century as the formative period of imperial jurisdiction. The starting-point is a speech by Cicero in 46 BC in front of the dictator Caesar acting as a judge. Through contemporary examples of cases and narratives by Roman authors on emperors as judges, the book follows developments until AD 235, to include the effects of the *Constitutio Antoniniana* of AD 212, which is believed to have granted Roman citizenship to most of the free inhabitants of the Empire, and the writings of Ulpian, the most influential Roman theorist of imperial power over law. Both in theory and in practice, by the end of the period and the beginning of the crisis of the third century, the emperor was seen as the law animate: the supreme judge of the Roman world, whose rulings created new law and amended the old. The story is equally one of tremendous growth, as is evident in the list of cases in the appendix. By the early third century, the emperor would by some estimates handle several cases per day, resulting in an annual tally of perhaps

[35] Volkmann, *Rechtsprechung* (1969 [1935]) shows that even after the most exhaustive research, the formalistic view relies on a leap of faith.

over a thousand. If the idea of the emperor as a kind of a supreme court is correct, one may assume that there would be a process of gradual elimination where cases handled in the local courts would make their way on appeal to the governor or prefect and then to the emperor, while many cases, as we will see, were handled by the emperor in the first instance.[36]

There were many different aspects at work in the creation of imperial adjudication, including both a push and a pull. On the push side, emperors were driven by a need to extend their power and to control the administrative staff. For this purpose, accepting petitions and making binding rulings provided an effective tool. There was a need to respond to the expectations that some of his subjects might have, the need to answer their petitions to appear as a good ruler. There might even have been a need, especially in the legal administration, to use the imperial power to harmonize law. On the pull side, it will be argued that the petitions of subjects invited the emperors to extend their power, to correct injustices in their favour. All of these factors created a dialogue of power and justice, where the participants would each play a role. The emperor would present himself as a good king, the subjects as good and loyal citizens. This dialogue even extended to other actors, such as the Senate, which would present itself as powerful and the emperor as one of its members. Similarly, in the provinces and in Rome the roles played might be completely different.

The argument of the book is developed through a close reading of Roman narratives of imperial adjudication. The aim is to analyse the various ways the emperor's activities and capabilities were seen and commented on by both contemporary commentators, like Ovid, Seneca the Elder, and Pliny the Younger, and historical and biographical authors such as Tacitus, Suetonius, and Dio. While contemporaries offer a picture that is often myopic and biased, later authors tend to depict the emperor according to the understanding of their time, equipped with the capabilities and powers of the emperor then. Through a comparison between the contemporary and historical narratives, the few existing official and legal sources, and the epigraphic and other documentary sources, the book offers an account of

[36] Using comparative material, Pölönen, '*Quadragesima*' (2008), 102 estimates that just 1% of the total number of cases would end up being resolved by the emperor, either directly or via local courts, the governors, and prefects.