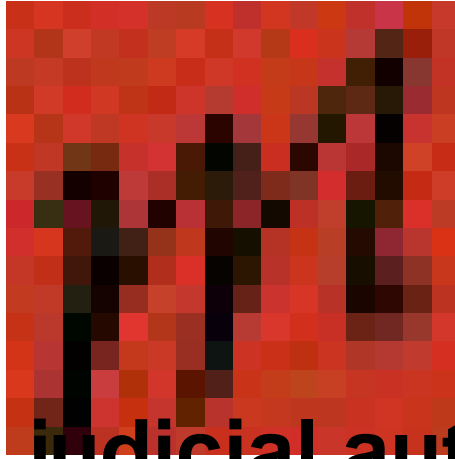


<http://montesquieu.ens-lyon.fr/spip.php?article2742>



# XI.18 On judicial authority in the Roman government

- The Spirit of Law - Book XI. On the laws that constitute political freedom in their relation to the constitution -

Date de mise en ligne : mardi 4 septembre 2018

---

Copyright © Montesquieu - Tous droits réservés

---

## XI.18 On judicial authority in the Roman government

---

The authority to judge was given to the people, to the senate, to the magistrates, and to certain judges. We must see how it was distributed. I shall begin with civil matters.

The consuls judged after the kings, [1] as the prætors judged after the consuls. Servius Tullius had divested himself of the judgment of civil matters ; the consuls did not judge them either, except perhaps in very rare cases, [2] which for this reason were called *extraordinary*. [3] They were content to name the judges and to create the tribunals that were to judge. It seems from the speech of Appius Claudius, in Dionysius of Halicarnassus, [4] that from the year of Rome 259 this was regarded as an established custom among the Romans, and to relate it to Servius Tullius is not to situate it very early.

Every year, the prætor drew up a list or table of those he was choosing to serve as judges during the year of his magistracy. From it a sufficient number were chosen for each cause. This is more or less the way it is practiced in England. And what was very favorable to freedom [5] is that the prætor picked the judges with the consent of the adversaries. [6] The large number of challenges that can be made today in England is the rough equivalent of this practice.

These judges decided only questions of fact [7] : for example, whether a sum had been paid or not, whether an act had been committed or not. But questions of law, [8] which required a certain ability, were taken to the tribunal of the centumvirs. [9]

The kings reserved to themselves the judgment of criminal matters, and the consuls succeeded them in that. It was in function of that authority that the consul Brutus had his children put to death, and all those who had conspired for the Tarquins. This power was exorbitant. The consuls, having the military authority already, extended its exercise even into the affairs of the city ; and their procedures, stripped of the forms of justice, were violent acts rather than judgments.

This caused the creation of the Valerian Law, which authorized the appealing to the people of all consular decrees that would threaten the life of a citizen. The consuls could no longer pronounce capital punishment against a Roman citizen except by the will of the people. [10]

We see in the first conspiracy for the return of the Tarquins that the consul Brutus judges the guilty ; in the second, the senate and the comitia are assembled to judge. [11]

Laws that were called *sacred* gave the plebeians tribunes who formed a body which at first had immense pretensions. There is no telling which was greater, the cowardly brazenness of the plebeians in asking, or the condescension and ready concession of the senate. The Valerian Law had permitted appeals to the people, that is to say, to the people composed of senators, patricians and plebeians. The plebeians decided that it was to them that appeals would be brought. Soon the question was raised whether the plebeians could judge a patrician : this was the subject of a dispute to which the Coriolanus affair gave rise, and which ended with that affair. Coriolanus, accused by the tribunes before the people, maintained against the spirit of the Valerian Law that, being a patrician, he could be judged only by consuls ; the plebeians, against the spirit of the same law, pretended that he should be judged by them alone, and they judged him.

The law of the Twelve Tables modified this. It ordained that the life of a citizen could not be decided upon except in the great assembly of the people. [12] Henceforth the body of plebeians or, which is the same thing, the comitia by tribes, thus judged only crimes punishable by fines. To inflicting capital punishment required a *law* ; to sentence to a fine required only a *plebiscite*.

## XI.18 On judicial authority in the Roman government

---

This provision of the law of the Twelve Tables was most wise. It created an admirable conciliation between the body of the plebeians and the senate. For as the competence of both groups depended on the magnitude of the punishment and the nature of the crime, they needed to concert together.

The Valerian Law removed all that was left in Rome of the government that had some connection to that of the Greek kings of heroic times. The consuls found themselves powerless to punish crimes. Although all crimes are public, one must yet distinguish those that are of more interest to the citizens amongst themselves from those that are of more interest to the state in its relationship to a citizen. The former are called private ; the latter are public crimes. The people themselves judged public crimes ; and with respect to private ones, for each crime, through a special commission, they named a quæstor to prosecute it. It was often one of the magistrates, sometimes a private man, whom the people chose. He was called *quæstor* of parricide. There is mention of him in the law of the Twelve Tables. [13]

The quæstor named what they called the judge of the question, who drew lots for the judges, set up the tribunal, and presided under it at the trial. [14]

It is well to note here the role played by the senate in the designation of the quæstor, so we can see how the authorities in this regard were balanced. Sometimes the senate had a dictator elected to serve the function of quæstor [15] ; sometimes it ordered that the people be convoked by a tribune in order to name a quæstor [16] ; finally, the people sometimes named a magistrate to make his report to the senate on a certain crime, and ask it to provide a quæstor, as we see in the trial of Lucius Scipio [17] in Livy. [18]

In the Roman year 604, several of these commissions were made permanent. [19] Progressively, all criminal matters were divided into various parts, which they called *perpetual questions*. They created various prætors, and one of the questions was assigned to each of them. For one year they were given the authority to judge crimes relative to it, and subsequently they went and governed their province.

In Carthage, the senate of one hundred was made up of judges who were for life. [20] But in Rome the prætors were annual, and the judges not even for a year, because they were appointed for each case. We have seen in chapter vi of this book how much, in certain governments, this provision was favorable to freedom.

The judges were chosen from the order of senators up to the time of the Gracchi. Tiberius Gracchus had it decreed that they should be chosen from the order of knights, such a considerable change that the tribune boasted of having cut the nerves of the order of the senators with a single bill.

It must be observed that the three powers can be well distributed with respect to the freedom of the constitution, although they are not so well distributed with respect to the freedom of the citizen. In Rome, where the people had the greatest share in the legislative authority, a share in the executive authority, and a share in the judicial authority, they were a great power that had to be balanced by another. The senate indeed had a share in the executive authority ; it had some branch of the legislative authority [21] : but that was not enough to counterbalance the people. It had to share the judicial authority, and did so when the judges were chosen from among the senators. When the Gracchi divested the senators of judicial authority, [22] the senate could no longer hold against the people. They therefore struck at the constitution to favor the freedom of the citizen ; but the latter perished with the former.

Infinite harm came of this. The constitution was changed at a time when, in the heat of civil discord, there was barely a constitution. The knights were no longer that intermediate order that joined the people with the senate, and the constitutional chain was broken.

## XI.18 On judicial authority in the Roman government

---

There were even particular reasons that ought to have prevented transferring judgments to the knights. The Roman constitution was based on the principle that those should be soldiers who had enough wealth to answer to the republic for their conduct. The knights, as the richest, made up the cavalry of the legions. When their dignity was increased, they no longer wished to serve in that militia ; another cavalry had to be raised ; Marius took all manner of men into the legions, and the republic was undone. [23]

Besides, the knights were the republic's tax farmers : they were greedy, they sowed miseries upon miseries and produced public needs from public needs. Far from giving such people the authority to judge, they ought to have had judges watching them at all times. That much must be said in praise of the old French laws : they dealt with financiers with the diffidence one maintains for enemies. When judgeships in Rome were transferred to the tax farmers, that was the end of all virtue, all public order, all laws, all magistracies, all magistrates.

There is a most naive depiction of all this in some fragment of Diodorus of Sicily and of Dio. "Mutius Scevola," says Diodorus, "wanted to bring back the old ways and live with frugality and integrity by his own means. For his predecessors, having formed a company with the tax farmers, who at the time were the judges in Rome, had filled the province with all sorts of crimes. But Scevola had the publicans brought to justice, and had those who were dragging others to prison put there themselves." [24]

Dio tells us [25] that his lieutenant Publius Rutilius, who was not less hated by the knights, was accused upon his return of having taken presents, and sentenced to a fine. He immediately turned over his property. His innocence appeared from the fact that he was found to own much less than he was accused of stealing, and he showed the titles to his property ; he no longer wanted to remain in the city with such people.

The Italians, further asserts Diodorus, bought bands of slaves in Sicily to till their fields and tend their flocks ; they refused them food. [26] The wretches were forced to become highway robbers, armed with lances and clubs, clothed in animal skins and surrounded by large dogs. The whole province was laid waste, and the locals could not say they really owned anything that was not within the city walls. There was neither proconsul nor prætor who could or would stand up to such mayhem, and dare to punish those slaves, because they belonged to the knights who were the judges in Rome. [27] It was, however, one of the causes of the slave war. I have only one word for this : a profession that has and can have only profit as its objective, a profession that is always taking, and of which nothing is required, a deaf and inexorable profession that was impoverishing wealth and even misery, ought not to have held the judgeships in Rome.

---

[1] One cannot doubt that the consuls had had the civil judgments before the creation of the prætors. See Livy, first Decade, book II, p. 19 ; Dionysius of Halicarnassus, book X, p. 627, and the same book, p. 645.

[2] Often the tribunes alone judged ; nothing made them more odious (Dionysius of Halicarnassus, book XI, p. 709).

[3] *Judicia extraordinaria*. See the *Institutes*, book IV.

[4] Book VI, p. 360.

[5] "Our ancestors did not wish," says Cicero, "for a man on whom the parties had not agreed to be judge not only of the reputation of a citizen, but even of the slightest pecuniary matter" (*Pro Cluentio*).

[6] See in the fragments of the Servilian law, the Cornelian law, and others, in what manner these laws assigned judges for the crimes they proposed to punish. Often they were selected by choice, sometimes by lot, or finally by lots mixed with choice.

## XI.18 On judicial authority in the Roman government

---

[7] Seneca, *De beneficiis* ['On benefits'], book III, ch. vii *in fine*.

[8] See Quintilian, book IV, p. 54 in fol. edition, Paris, 1541, [Catalogue no. 1954](#).

[9] Law 2, following *De origine juris*. Magistrates called decemvirs presided at the trial, the whole under the direction of a praetor. [*Centumvir* : "Magistrate and officer in ancient Rome established to judge certain civil matters, like testaments, guardianships, and statutes of limitations" ( *Trévoux*).]

[10] *Quoniam de capite civis romani, in jussu populi romani non erat permissum consulibus jus dicere* ['It was thus not permissible for the consuls to sentence a Roman citizen to death without the command of the Roman people']. See Pomponius, Law 2, following *De origine juris*.

[11] Dionysius of Halicarnassus, book V, p. 322.

[12] The *comitia* by centuries. Thus Manlius Capitolinus was judged in these *comitia* (Livy, first Decade, book VI, p. 68).

[13] Says Pomponius in law 2 of the Digest *de origine juris*.

[14] See a fragment of Ulpian, who relates another from the Cornelian Law ; it is found in the *Collation* of the Mosaic and Roman Laws, title 1, *de sicariis et homicidiis* ['on assassins and murderers'].

[15] This was the case especially in crimes committed in Italy, where the senate had first right of inquiry. See Livy, first Decade, book IX on the conspiracies of Capua.

[16] It was so in the prosecution and death of Posthumius, year 340 of Rome. See Livy.

[17] This verdict was rendered in the year of Rome 567.

[18] Book VIII.

[19] Cicero, in *Brutus*.

[20] Proven by Livy (book XLIII), who says that Hannibal made their magistracy annual.

[21] The *senatus consults* held office for a year, although they were not confirmed by the people. Dionysius of Halicarnassus, book IX, p. 595, and book XI, p. 735.

[22] In the year 630.

[23] *Capite census plerosque* ['the most from the poorest citizens'] (Salluste, *Jugurtha*).

[24] Fragment of this author, book XXXVI in the compendium of Constantine Porphyrogenitus of the *Virtues and Vices* [\[p. 395\]](#).

[25] Fragment of his history drawn from *Extracts of Virtues and Vices* [\[p. 636\]](#).

[26] Fragment of book XXXIV in *Extracts of Virtues and Vices* [\[p. 363-367\]](#).

[27] *Penes quos Romæ tum judicia erant, atque ex equestri ordine solerent sortito iudices eligi in causa proprætorum et proconsulum quibus post administratam provinciam dies dicta erat* ['They belonged to the ones who did the judging in Rome, and it was from among the equestrian order that lots were cast to choose judges on the cases involving propraetors and proconsuls, who, after having administered a province, were called to trial'].