

Offences Against the *Res Publica*: The Role of Public Interest Arguments in Cicero's Forensic Speeches

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Abstract By the mid-first century BC, *quaestiones perpetuae* (standing courts) were the principal tribunals before which charges of offences against the Roman *res publica* were tried. The extant writings of the Roman statesman and orator M. Tullius Cicero are our main source as to the arguments which were deployed before these courts as being relevant to their determination of the charges presented to them. Cases of *maiestas* (treason) sometimes raised questions of law as to the relationship among different organs of the *res publica*, but Cicero argued that such cases also required the courts to decide whether defendants had acted against the interests of the *res publica* by reference to substantive policy considerations. Cicero appears also to have argued that wide public interest considerations should be taken into account in relation to other offences tried before the *quaestiones perpetuae*. The courts' willingness to entertain such arguments detracted from the clarity of the rules they were called upon to apply, and altered the nature of their own function, as trials were potentially transformed into arenas of political judgment. In consequence, the *quaestiones perpetuae* did not operate in accordance with a modern understanding of the rule of law. Recognition of these features of the *quaestiones perpetuae* may assist in explaining why these courts were of questionable legitimacy, were ineffective in providing an effective constraint on the exercise of political power, and failed to achieve the purpose which L. Cornelius Sulla may have envisaged for them.

Keywords Cicero · *Quaestiones perpetuae* · Public interest · Rule of law

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1 Introduction

This paper examines the public interest arguments which M. Tullius Cicero advanced before the *quaestiones perpetuae* (standing courts) of the late Roman republic and what they tell us about whether these courts functioned according to a modern conception of the rule of law.¹

In what follows, I provide a thumbnail sketch of the legal and historical context in which the *quaestiones perpetuae* operated; I briefly describe the composition and decision-making procedures in the *quaestiones perpetuae*; I explain the elements of the modern rule of law model by reference to which I will judge their operation; I then look in turn at the kinds of arguments which the Roman statesman and orator M. Tullius Cicero advanced in cases before the various *quaestiones* and what this might tell us about the overall character of the functions performed by the *quaestiones perpetuae*; finally, I draw conclusions as to the extent to which the *quaestiones perpetuae* observed standards contemplated by a modern rule of law model, and what implications this might have for our understanding of the final years of the Roman republic.

Recent scholarship, including Riggsby (1997) and (1999) and Alexander (1990), has done much to show that the arguments presented to *quaestiones perpetuae* were generally directed at what the parties' advocates argued were legally relevant aspects of the case; and advocates expected judges to decide cases according to their merits, by reference to the offence with which the defendant was charged. The scholarship addressing these matters recognises that a wider range of factors were considered relevant in cases before the *quaestiones perpetuae* than would appear appropriate under many modern legal systems, but it does not explore the implications of this feature of the Roman legal system for an assessment of the extent to which the Roman system observed the rule of law, as described in Sect. 4 below. The present paper builds on existing scholarship, by examining the arguments which Cicero advanced before the *quaestiones perpetuae* with a view to ascertaining whether the *quaestiones* operated in accordance with the rule of law and, if not, how they departed from it and with what potential consequences.

2 The Legal and Historical Context

The matters to be examined focus on the years from 80 BC to 50 BC, a period which, in retrospect, is recognised as part of the final decline of the Roman republic towards the civil war which was to end with the principate of Augustus.

It is not practicable to present here, even in summary form, a chronological account of the development of the republican constitutional and legal system, but it is useful to outline certain matters which shaped how Romans of the first century BC regarded certain distinctive elements of the constitutional and legal arrangements of their own time.

¹ I am grateful to Paul Burgess of the University of Edinburgh, and to the anonymous reviewers for their helpful comments on an earlier draft of this paper.

Roman writers of the first century BC placed the foundation of the republic at the end of the sixth century BC, when Rome had expelled the last of its kings, the tyrannical Tarquinius Superbus (Lintott 1999a, pp. 27ff.). In the immediate aftermath of the expulsion, the new republic was dominated by members of the patrician order. Patricians made up the senate, and annual magistrates were elected annually from the patrician order. As the constitution evolved, the consulate and praetorship emerged as the senior magistracies. Additional individuals served in junior magistracies, with individual magistracies carrying specific responsibilities (*provinciae*, i.e. provinces, in the sense of allocated areas of responsibility). For several centuries, the senate and magistrates effectively governed Rome (Lintott 1999a, pp. 65 ff., 94 ff.). Much of responsibility for matters of policy fell to the senate since, under a system of 1-year magistracies, it provided an important element of continuity and, even during their term of office, the consuls were frequently away from Rome, leading Rome's citizen army in the military field. Exceptionally, a dictator might be appointed to lead the community in a particular military or domestic crisis. He enjoyed wider powers than other magistrates but his term of office was strictly limited, reflecting the limited purpose of his appointment, and an apparently deep-seated reluctance to entrust supreme and quasi-monarchical power to a single individual (Lintott 1999a, pp. 109 ff.).

At an early stage in the evolution of the republic, the so-called "struggle of the orders" between the patricians and the much larger plebeian class resulted in the plebeians' winning the right to elect their own representatives, the *tribuni plebis*. The *tribuni plebis* enjoyed powers to intervene in certain public proceedings, or in the exercise of magisterial powers, to protect individual plebeians, and the plebeians generally, from measures that threatened their interests. In time, the plebeians also secured a right of election to the magistracies of the people, and eligibility for membership of the senate. The power to legislate lay with the people in assembly, on the initiative of a magistrate (and from 287 BC, with the *concilium plebis*, an assembly of the plebeians, on the initiative of a *tribunus plebis*). (Lintott 1999a, pp. 33–39).

Throughout its history, the republic had no written constitution, and Roman law comprised a combination of written *leges* (statutes), unwritten law (*ius*) and customary rules, deriving from *consuetudo* and *mos* (custom/practice); no laws were formally entrenched, and the people in assembly could effectively repeal any existing law by passing a new *lex* (statute) making contrary provision (Lintott 1999a, pp. 3 ff., 40 ff.). Senior magistrates were invested with *imperium* (formal power) and, during their year in office, such magistrates enjoyed wide discretionary powers in the government and administration of the city, generally exercised under the guidance of the senate, and subject to certain specific legal constraints (Lintott 1999a, pp. 94 ff.). Though immune from prosecution during his term of office, a magistrate might, after the end of his year in office, be brought before the people in assembly and charged with having exceeded or abused the powers conferred by his office. If condemned, he could face penalties ranging from a monetary fine to a capital penalty.

There is, however, relatively little extant evidence as to the full range of courts and tribunals which enforced the *ius publicum* (public law, in contrast to the *ius*

civile (private law) which regulated dealings between private citizens) prior to the mid-second century BC. Scholars continue to debate what kinds of courts and tribunals were used, their origins, their substantive jurisdiction and the relationship among them.² Some cases were brought before the people in assembly, but these may have been limited to charges against former magistrates, (or other citizens engaged in public life) alleging offences against the community as a whole, which were generally characterised as *perduellio* (treason). Alternatively, conduct which posed a threat to public order was, on occasion, investigated, judged and punished via *ad hoc quaestiones*, established separately on a case by case basis, either by senatorial resolution or by the vote of the people in assembly. The higher magistrates also enjoyed powers personally to investigate, judge and punish private citizens for conduct found to be damaging to the community. Cases of private concern (e.g. accusations of homicide among private citizens) were probably heard by panels of judges under the supervision of a magistrate at the instigation of a private prosecutor.

In combination, these institutions (and others which are of less direct relevance to the present paper) appear to have provided a range of means for the community to enforce compliance with its norms against those who threatened its political stability or public order, and against those who committed wrongs against individual private citizens. But the enforcement of these norms was not confined to such publicly organised institutions. Roman law recognised the possibility that private citizens might take direct action in relation to certain offences without the need for any prior public proceeding. First, from the earliest times, the male head of a Roman household, the *paterfamilias*, had enjoyed the power to punish members of his household without subjecting them to any public trial. In an extreme case, the *paterfamilias* might execute a member of his household (after judging the accused's conduct with a private *consilium* (council)), though there are few attested cases in extant sources (Harris 1986; Westbrook 1999). Secondly, there was an established tradition, based on *exempla* (examples having a form of normative value) dating from the earliest republican times, by which a magistrate or a private citizen might lawfully resort to violence in defence of the essential interests of the *res publica*: the clearest examples were those of citizens who had summarily killed a fellow citizen who aspired to kingship (pejoratively characterised as tyranny), since monarchy/tyranny was fundamentally inconsistent with the values of the *res publica* (commonwealth).³ In Cicero's philosophical dialogue *De Re Publica*, the principal speaker, Scipio, recalls the expulsion of the last of Rome's kings by L. Iunius Brutus. Scipio commends Brutus' action: he was the first to teach the lesson that, when it comes to protecting the liberty of citizens, no one is a private citizen (II. 46). Thus the protection of the *res publica* from serious infringements of its legal norms was not centralised in the hands of the public courts and tribunals, but might also be

² The starting point for modern discussions remains Mommsen (1899). Important elements of his account of the development of Roman penal law have, however, been persuasively challenged by (among others) Kunkel (1962) and Mantovani (1989, 1990). The main issues are discussed in Lintott (1999a, pp. 147 ff.) and Cloud (1994). See also Riggsby (1999, pp. 160 ff.). Robinson (2000) and Harries (2012) provide introductory accounts of Roman criminal law.

³ Lintott (1999a, pp. 35–36) discusses variant accounts of these events.

undertaken by the *paterfamilias* and, in cases of pressing public interest concern, by private citizens (Lintott 1999b).

It was against this general legal background that, in the mid-second century BC, the first *quaestio perpetua* was established by *lex* (statute) to hear and determine cases of *res repetundae* (extortion by provincial governors against those whom they governed).

The precise circumstances attending the creation of this court are not fully known.⁴ But it was clearly a response to dramatic changes in Rome's fortunes which necessitated new legal measures. From its inception, Rome had been involved in repeated wars with its neighbours. By 264 BC, it had secured military ascendancy in peninsular Italy and could call on its Italian allies for military support in longer and larger military campaigns. By the middle of the second century BC, Rome's success in further wars had secured to it an extensive empire. To achieve this, Rome had departed from the simple model under which individual magistrates held office and led Rome's armies in the field for just one year, before resuming their status as private citizens. In some cases, individuals were now elected to successive consular terms; more commonly, their military command was prorogued after the expiry of their year in office, to allow them (as pro-magistrates) to continue to lead armies in specific theatres of war, or to serve as governors of particular provinces. The Roman army had also undergone significant changes, with the admission of poorer men who relied on their military careers to earn a livelihood, and with extensions to the periods for which individual citizens were expected to provide military service. By the mid-second century BC, Rome's population had grown, many of its citizens had completed long periods of military service, and serious tensions arose as to how the fruits of Rome's new empire should be shared. There were repeated attempts to secure the enactment of legislation to allow for the allocation of lands to veteran soldiers and to ensure an affordable supply of grain to feed the population of Rome, and it became necessary to take action to control corruption and extortion by magistrates and pro-magistrates who diverted the spoils of war to their own account, or who, while serving as in the provinces, wrongfully stripped wealthy provincial citizens of their assets by force or by the misuse of their judicial and other powers. An economically important element of society (including members of the equestrian order) had a particular interest in securing the orderly administration of Rome and the provinces to protect their substantial business interests. The first *quaestio perpetua*, created to deal with cases of *res repetundae* (extortion), was apparently designed to provide provincial citizens with a means of redress against extortion, and to provide a route for the punishment of former magistrates or pro-magistrates who had perpetrated such wrongs. Further *quaestiones perpetuae* were then created to deal with *maiestas* (treason) and with various kinds of homicide (under a *lex de sicariis et veneficiis*, covering at least homicide by hired assassins and cases of poisoning).

Meanwhile tensions within Roman society and pressures from its Italian allies worsened. At the beginning of the first century BC, Rome fought the so-called social war with its Italian allies (*socii*). This was followed by civil war, in consequence of

⁴ Discussed in Lintott (1992) and Mantovani (1989, pp. 71 ff.).

which, in 82 BC, L. Cornelius Sulla marched on Rome with the armies under his command, took control of the city and secured for himself appointment as dictator. Sulla's ascendancy was marked by violence and the disregard of usual norms, including the proscription of many of his opponents, entailing the expropriation and redistribution of their assets (Flower 2011, pp. 90 ff.).

As dictator, in 81 BC Sulla introduced various legal reforms. Among other measures, he introduced new members into an enlarged senate; increased the number of junior magistrates who would then be eligible for membership of the senate; reduced the powers of the *tribuni plebis*; and introduced new rules to regulate an individual's ascent of the *cursus honorum* (the scale of elected offices) by interposing compulsory minimum intervals between an individual's election to successive magistracies. At the same time, consuls now began to spend the whole of their consular year in Rome, with military command outside Rome being entrusted to pro-magistrates. The effect of these reforms was to alter the balance of power among the magistrates, senate and people, and thus the practical operation of previous constitutional arrangements. Having completed these matters, Sulla resigned his dictatorship, apparently in the hope that the settlement would provide lasting stability. In the event, however, Sulla's arrangements did not survive intact and did not arrest the fatal decline of the republic: some of his laws were later reversed, and the period after 80 BC continued to be marked by violent interventions in the political process, disruption to annual elections, and, ultimately, renewed civil war (Flower 2011, pp. 135 ff.).

In the remainder of this paper I examine one important aspect of Sulla's reforms, namely his extension of the role of *quaestiones perpetuae*, as a result of which they were to become the principal organ through which important elements of the *ius publicum* (public law) were enforced in Rome.

3 The *Quaestiones Perpetuae*

Sulla's legal reforms had included the adoption of a series of laws establishing or making further provision for the operation of a number of *quaestiones perpetuae*, to handle individual offences ranging from homicide to electoral malpractice. His laws built on those governing the existing *quaestiones perpetuae*, and replicated certain important features of those courts. (Further laws enacted after 81 BC brought changes to the courts which Sulla had established, but they are not material to the matters discussed in this paper.)

Each *quaestio perpetua* was established by a specific *lex* (statute) providing for the composition of the court and specifying the offence which the *quaestio* was to try; a *praetor* (a magistrate elected for a term of 1 year by the Roman people in assembly) was allocated responsibility to supervise the court; and the *lex* also laid down a fixed penalty to be applied to those convicted of the offence to which it related. These penalties ranged from a capital punishment to exclusion from candidacy for public office for a specified period (on conviction of electoral malpractice).

Proceedings were initiated when a prospective prosecutor delivered his indictment to the *praetor*; the *praetor* checked that the charge fell within the jurisdiction of the court; and the *praetor* supervised the ensuing trial. Generally, the judges allocated to a particular case comprised some 50 or so men drawn from a panel of over 400 drawn up by the *praetor*. The trial process allowed prosecution and defence to present their case to the court in accordance with prescribed procedures; the members of the court swore to decide the case according to the law; they decided questions of fact and law; they delivered their verdict by majority vote, without giving reasons for their decision, and probably without prior deliberation.⁵ Under Sulla's laws, panels of judges were to be drawn from the senate. These provisions replaced previous laws which had provided for judges to be drawn from among the equestrian class. And Sulla's settlement was to be further reformed by the *Lex Aurelia iudicaria* of 70 BC, to widen the classes of persons eligible to serve as judges.

The penal sanctions consequent on conviction before the *quaestiones perpetuae* invite comparison of these courts with modern criminal courts. But the *quaestiones perpetuae* did not address many of the kinds of conduct which modern criminal laws might cover, such as theft, and criminal damage to property. These were generally addressed by the *ius civile* (civil law) as matters arising between private parties. The *quaestiones perpetuae* operated as organs of the *ius publicum* (public law); in many cases, the offences they tried were concerned with forms of wrongdoing which directly threatened the conduct of public affairs, including *maiestas* (treason); *vis* (riot/seditious violence); *res repetundae* (extortion); and *ambitus* (electoral malpractice/bribery). But, by Sulla's time, it seems that the *lex de sicariis et veneficiis* was broad enough to deal with cases of homicide having no public element beyond the general public interest in suppressing all kinds of unlawful homicide.⁶

No full text of any of the *leges* establishing the *quaestiones perpetuae* is extant. But there is preserved a substantial part of what is probably a *lex Acilia* of 111 BC, providing for the establishment of a *quaestio perpetua de rebus repetundis* (extortion).⁷

4 A Modern Rule of Law Model

It is unsurprising that Sulla should have wished, after a period of civil war and general lawlessness, to re-invigorate the *quaestiones* charged with deterring violent attacks on political rivals and the disruption of public business. But some modern

⁵ The jurisdiction and operation of the *quaestiones perpetuae* are discussed in Kunkel (1962) and Mantovani (1990). See also Riggsby (1997, 1999, pp. 16 ff.). Levy (1931) discusses the nature of the capital penalties applied under the Sullan laws.

⁶ Riggsby (1999, pp. 55 ff.).

⁷ See Crawford (1996, pp. 39 ff.) for the extant text. Justinian's Digest (put together at the beginning of the sixth century AD) at 48.1–15, also appears to quote or summarise some of the *leges* establishing the *quaestiones perpetuae*, including details of the offences tried, by reference to sources dating, for the most part, from the second century AD or later.

scholars (e.g. Flower (2011, pp. 22, 28, 129, 133) suggest that Sulla's reforms went further: they emphasise the novelty of Sulla's overall constitutional settlement in the reliance which it placed on the use of legal rules—and the extensive use of *quaestiones perpetuae*—as a mechanism to secure compliance with his new constitutional model. It would be wrong to interpret such scholarship as suggesting that the legal system established by Sulla could have been expected rigorously to observe a modern model of the rule of law. But, in substance, it does suggest that the *quaestiones perpetuae* were designed to meet what may be regarded as certain essential elements of the rule of law. In the remaining sections of this paper I examine whether that is so.

It is useful initially to outline the essential elements of the rule of law by reference to which my analysis will proceed. The eight desiderata proposed by Fuller (1969, pp. 33 ff.) as essential characteristics of a system of legal rules provide a good model for the purposes of the present paper. Fuller proposed that the law consists in the enterprise of subjecting human conduct to the governance of rules; rules are to be understood as prescriptions which are general in their terms, are adequately promulgated, are expressed clearly, and in prospective terms, so as to serve as a guide to future action, and to make compliance possible; whether prescriptions are to be regarded as general rules depends too, on whether they are enforced consistently with their terms, and therefore consistently in different individual cases (to achieve what Fuller describes as “congruence” between the rules and their application). Moreover, rules which are amended or replaced so frequently as to make it practically impossible for citizens to keep abreast of which rules remain current will fail to achieve sufficient constancy to meet Fuller's desiderata. Fuller makes clear that it is in the nature of the enterprise which the rule of law entails that perfect attainment of these desiderata is not to be expected. But that does not prevent the identification of arrangements which manifestly fail to achieve the rule of law.

For present purposes, it is also important to note Fuller's argument that a “rule” may fail to achieve adequate clarity if it amounts to no more than an injunction to a court or other tribunal to decide cases fairly having regard to all relevant circumstances: in this regard, Fuller distinguishes situations where an injunction to decide, say, commercial cases in accordance with the demands of “good faith” imports a clearly understood range of factors derived, for example, from clear and established commercial practice, from an injunction to an adjudicator to decide cases by reference merely to general standards of fairness in circumstances where he will have to identify, evaluate and balance the factors to be taken into account, via an exercise in relation to which there are no clear criteria to define his task, and no prospect of the emergence of such criteria (pp. 64–65). A “rule” of the latter kind will probably fail to achieve the clarity required of a legal rule, making it an inadequate guide to the conduct of those subject to it. Fuller sees this as a fault of many regulatory systems applied by specialist regulators, where their application of “rules” is no more than the adoption of non-rule-based (and in that sense, arbitrary) injunctions by reference to considerations the identity, evaluation and weighing of which are unpredictable, and are not practically amenable to expression as a general rule.

Fuller's desiderata contemplate that rules should be enforced in a manner that is consistent with their terms, and via procedures which respect the "internal morality" of the law, by, among other things, allowing all parties to present relevant evidence and arguments, so that the rules can be applied by reference to a sound assessment of the facts, and by reference to relevant arguments as to their application. Waldron, drawing on Fuller's work and on Dicey (1961, pp. 193–195) also emphasises the importance of a genuinely judicial process of enforcement of the law for securing adherence to the rule of law; he also attaches importance to the contribution made to that objective by the provision by judges of reasons for their decisions, and to the recognition of precedent value in previous decisions: the giving of reasons by the judge makes clear that the instant case is being decided by reference to general rules (and, where the rule in question is unclear, interprets that rule by reference to reasons drawn from a wider corpus of legal rules); and, by treating the resulting judgment as having precedent value, later judges apply the rules adopted by the earlier judge, thereby endorsing the rule-based nature of the judicial task and, as a separate matter, contributing to the consistency of judicial decisions in successive, similar cases (Waldron (2012, pp. 8 ff., 20 ff.), Waldron (2008)).

In examining the operation of the *quaestiones perpetuae* of the late Roman republic relative to the rule of law, I have regard to Fuller's desiderata, as further elaborated by Waldron. My examination calls into question whether the *quaestiones*, and the laws under which they operated, conformed to Fuller's requirements that rules should be sufficiently clear to admit of their observance and application by reference to certain and predictable criteria, and should be applied by reference to reasoning reflecting such criteria, so as to facilitate their application in congruence with their terms.

5 Cicero's Forensic Speeches

Much of our evidence as to the way in which cases were conducted before the *quaestiones perpetuae* is derived from the extant forensic speeches of the Roman statesman and orator M. Tullius Cicero (106 BC–43 BC) and from his treatises on forensic oratory, notably *De Inventione* (dating from the late 80s BC) and *De Oratore* (55 BC). The anonymous treatise *ad Herennium* (also believed to date from the late 80s BC) provides additional material. The texts of the ancient works discussed in the remainder of this paper are published in Clark (1905, 1907, 1909, 1918), Peterson (1917), Powell (2006), Stroebel (1915), Wilkins (1902), Marx and Trillitsch (1964) and Lewis (2006).

Lintott (2008, p. 20) and Powell (2010) discuss the relationship between Cicero's published speeches and those delivered in court. For the most part, the published speeches are likely to reflect the substance of the case advanced in court (or which would have been advanced if the case had proceeded), and Cicero's arguments, even if unsuccessful, were ones which he might reasonably have expected judges to accept, as being within the bounds of what they judged to be arguable and relevant as to matters of fact and law.

6 Homicide

The *lex Cornelia de sicariis et veneficiis* dealt with charges of homicide.⁸ References to this law in Cicero's forensic speeches indicate that its main provision directed the conviction of a person who went equipped with a weapon for the purpose of killing another or stealing, or who killed another, or by whose evil design any of these things was done; that it also dealt with those who made, bought, sold, possessed or administered poison; and that it extended to other indirect means of wrongful killing, including so-called "judicial murder", whereby a perpetrator corruptly secured a false conviction of his intended victim on a capital charge. The provisions on "judicial murder" (unlike the other provisions) were expressed to apply only in respect of the actions of a person who was a member of the senate, or who fell within some other defined category of persons, and who had given false testimony or conspired with others wrongfully to secure the conviction of another on a capital offence.

In his speech *Pro Cluentio* of 66 BC, Cicero defended Aulus Cluentius Habitus. Cluentius faced allegations of attempted "judicial murder" and of poisoning. In the published version of his speech, Cicero reminds the judges of their obligation to ignore their preconceptions as to Cluentius' guilt and to decide the case only by reference to the evidence and argument formally presented to them (*Pro Cluentio* 6). Cicero seeks to rebut on factual grounds the allegation that Cluentius had resorted to bribery at an earlier trial to secure the wrongful conviction of the elder Oppianicus (whose son was now prosecuting Cluentius) (9 ff.). But Cicero also argues that, strictly speaking, he need not rebut the allegations of bribery, since Cluentius has a simple defence to a charge of "judicial murder": he is not a senator, and does not fall within any of the other listed classes of persons covered by the offence. There was no dispute that Cluentius fell outwith the specified categories of person covered by the relevant provision of the *lex* and, on this element of the charge, the only issue was therefore whether the judges were permitted to convict only if Cluentius fell within one of these specified classes (149).

It may be, Cicero says, that the prosecutor would prefer to see the statutory provision dealing with "judicial murder" applied to everyone. But, if so, then the law should be changed; it is not for the judge to go beyond the terms of the present law. It is, he says, the role of a wise judge to recognise that the Roman people has entrusted to him a defined task; the judge has been given not just a power but a duty (i.e. to perform his task within its defined limits); the judges' jurisdiction is derived from the law which they are now called upon to apply. And, looking at the more general implications of this argument, Cicero reminds the judges that magistrates are ministers of the laws, judges are interpreters of the laws, and ultimately all citizens are slaves of the laws in order that they may be free. (In his earlier treatise on oratory, *De Inventione*, Cicero had similarly recognised the different functions of the judges and the legislature: he had suggested that, in case of a forensic dispute as to the interpretation of a statute, the party proposing a literal interpretation should

⁸ See the partial reconstruction and commentary at Crawford (1996, pp. 749 ff.), along with Riggsby (1999, pp. 50 ff.).

argue that it is not the task of judges to add exceptions to a statute; to do so would usurp the role of the lawmakers (II.122–133.)

Thus, in his defence of Cluentius, Cicero presents the case as one in which the judges should dispose of the issue by applying a clear statutory provision in accordance with the express limitations of its terms (146–153). The approach which Cicero advocates is, on its face, compatible with essential elements of the rule of law: the law is clearly framed, to apply to a defined class of persons, and the judges' task is to apply it in accordance with its terms.

But an analysis of the *leges* dealing with other offences suggests that the matter was not always so straightforward.

7 Treason

7.1 Scope of the Offence

The *lex Appuleia de maiestate*, and subsequent related laws, provided for a *quaestio perpetua* to hear cases of *maiestas*. *Maiestas* referred to the greatness of the *populus Romanus*; the term was shorthand for *maiestas laesa* or *maiestas minuta*, and the offence consisted, at its core, in conduct which caused damage to the greatness of the Roman people. But what was meant by the *maiestas* of the *populus Romanus* was uncertain. It seems that, by Cicero's time, the statutes governing *maiestas* contained at least a partial definition of the term (e.g. by listing defined actions which were prohibited to be undertaken by a provincial governor outside his province). But the concept was potentially wider and, if other potential acts of *maiestas* were listed in the statutes, a prosecutor probably still needed to show that a defendant who had committed one of the listed acts had done so with an intention, and in circumstances, which met the requirements for the act to amount to an act of *maiestas*. Thus, the statutory wording did not, on its own, capture the whole essence of *maiestas*.⁹

We may identify at least two competing theories as to what was meant by the *maiestas* of the *populus Romanus* and, hence, as to what would amount to an attack on its *maiestas*.

One understanding emphasised the sovereignty of the people meeting in assembly; its legislation trumped all other legal rules and protections; and, when it sat as a court in respect of a matter potentially carrying a capital sentence, its decision was final. On this analysis, the offence of *maiestas* essentially entailed interference with the exercise by the people in assembly of its sovereign powers; conversely, it could not amount to *maiestas* for a citizen to defend the rights of the people to exercise their sovereign right to legislate. On another analysis, the *populus Romanus* was the collective term for the Roman people as a *civitas* (commonwealth); the *civitas* operated according to arrangements under which powers to legislate, to coerce citizens and to judge infringements of the law were allocated

⁹ See, in particular, Bauman (1967), Thomas (1977) and Ferrary (1983), together with the review of Bauman at Sherwin-White (1967).

among different organs of the *civitas* according to a combination of written and unwritten rules. Cicero argued in his treatise *De Re Publica* (as he had in defence of Cluentius) that the *res publica* was a society governed by law, in which the *libertas* (freedom) of the people was derived from the disposition of powers among magistrates, the senate and the people according to law (*De Re Publica* I.39; I.69; II.57; III.45). On this analysis, the offence of *maiestas* consisted in interference with the proper exercise by any organ of the *civitas* of the powers assigned to it: if the constitution conferred powers on a *tribunus plebis* by which he might obstruct the passage of legislation, then it could amount to *maiestas* for a citizen wilfully to interfere with the magistrate's exercise of those lawful powers, even if the purpose of such interference was to allow the people to have a determinative say on the matter.¹⁰

The two different conceptions of the *maiestas* of the *populus Romanus* surfaced in litigation before the *quaestio perpetua*.

I look first at the issues raised in the charges brought against the *tribunus plebis* C. Cornelius in 67 BC. To elucidate the issues raised in the case, it is necessary to consider first the powers of the *tribunus plebis*. As noted in Sect. 2 above, the plebeian assembly was permitted annually to elect *tribuni plebis* (initially two, and later ten) to hold office for 1 year. The *tribunus plebis* was to exercise his powers to protect the interests of the plebeians (and, in practice, the whole *populus*) against the detrimental exercise by other magistrates of their powers. In particular, a *tribunus plebis* could do this by exercising a right of *intercessio* (veto) to impede the another magistrate's proposal of legislation to the people in assembly. For much of the period discussed in this paper, the *tribunus plebis* also enjoyed the right to promote legislation before the plebeian assembly. But, with ten *tribuni plebis* in office in any given year, there was scope for disagreements among them as to what course of action was most apt to promote the interests of the plebeians (and, in practice, the people as a whole) (Lintott 1999a, pp. 26 ff.).

The question as to how the exercise of the powers of the *tribuni plebis* might engage the offence of *maiestas* presented itself starkly in the prosecution of Cornelius.¹¹ The tribune Servilius Globulus supported the senatorial opposition to a bill promoted by Cornelius; Servilius therefore vetoed Cornelius' reading of his bill to the people; Cornelius ignored his fellow tribune's veto; instead, taking the text of the bill from the herald who would ordinarily have read it to the assembly, Cornelius pressed on with reading out his bill himself; he thereby disregarded the exercise of the tribunician veto. Cornelius was subsequently prosecuted for *maiestas*.

Cicero's full speeches in defence of Cornelius are not extant, but an account of the case is preserved in the commentary of the first century AD commentator Asconius (55 ff.). He records that the prosecution argued that Cornelius' action in reading his bill to the assembly himself was unprecedented and amounted to *maiestas*, since he had no right to proceed in the face of his fellow tribune's veto. By implication, the prosecution was arguing that, by ignoring his fellow tribune's veto, Cornelius' conduct diminished the *maiestas* of the *populus Romanus*, since he had

¹⁰ The two conceptions of the *res publica* are discussed more generally by Arena (2012, pp. 73 ff.).

¹¹ Griffin (1973) discusses Cornelius' legislative programme.

attacked the powers of the tribunate, an institution created by the *populus Romanus* for the protection of its more vulnerable members. Extant fragments of Cicero's speeches suggest that he argued that it could not amount to *maiestas* for Cornelius to have insisted on allowing the people to decide whether they wished to enact particular legislation; Cornelius' action gave priority to the interests of the people in being able to choose whether or not to adopt his proposed legislation over the interests of one *tribunus plebis* in having his veto respected (71–72).¹² Thus, Cicero's defence effectively pitted his own definition of the *maiestas* of the Roman people (based on their sovereign right to decide on proposed legislation) against the rival definition proposed by the prosecution (based on the people's right to demand respect for a tribunician veto exercised in accordance with rules designed to operate for their benefit).

Cicero's defence of Cornelius may also have hinted that a *tribunus plebis* who, like Cornelius, faced a veto from one of his colleagues was justified in pressing on with his attempted legislation if the legislation was, in substance, designed to promote the interests of the *res publica*. In comparing Cornelius' actions to those of another tribune, A. Gabinius, who had faced a similar veto from one of his fellow tribunes, Cicero pointedly comments on the merits of Gabinius' bill in salvaging the interests of the *res publica* at a time when it otherwise confronted the prospect of destruction. The merits of Gabinius' bill were, he hints, sufficient to justify his disregard of his colleague's veto (72). But the legislative measures which Cornelius had promoted during his tribunate were controversial, and it may be that Cicero was reluctant to found his defence of Cornelius on the substantive merits of the particular bill which Cornelius had been promoting before the people. If Cicero had founded his defence on the merits of Cornelius' measures, he would have been inviting the court to find that, since Cornelius' actions were, by reference to substantive considerations of public policy, apt to serve the substantive interests of the *res publica*, they did not amount to *maiestas*.

7.2 The Wider Public Interest Defence

In other cases judges were directly invited to decide cases according to their assessment of whether the defendant had been acting in pursuit of a policy objective apt to promote, or to damage, the economic interests of the *populus Romanus* or its social cohesion.

Two cases in which defence advocates are reported to have raised such arguments (or were advised to do so) are discussed in Cicero's treatise *De Oratore* and by the anonymous *Auctor ad Herennium*.

In *De Oratore* (55 BC) Cicero cites Opimius' killing of C. Gracchus in 122 BC as an example of a case which turned on the character/quality (*qualis sit*) of an action, that is, as to whether, on an agreed set of facts, the defendant's action was lawful or unlawful (II.106). The facts were well known: the *tribunus plebis* C. Gracchus had proposed a radical programme of legislation, entailing (among other things) the distribution of land to the plebeians and the buying of grain at the public expense to

¹² Asconius (62) identifies other arguments which, for present purposes, are not relevant.

provide a secure, affordable food supply for the people; when a rival senatorial faction opposed his measures, violence broke out; the senate issued a novel *senatus consultum ultimum* (a final resolution), calling on the consuls to safeguard the *res publica* in the face of what the senate judged to be a threat to its interests; the consul, L. Opimius, killed C. Gracchus; when he was tried before the people, he was acquitted of wrongdoing. Cicero explains that the issue before the people was as to the legal character/quality of Gracchus' action: Opimius' advocate did not deny that Opimius had killed Gracchus, but he argued that the killing was *iure factum* (lawfully done) *pro salute patriae* (for the safety of the country).

At first blush, it seems that Opimius' defence consisted simply in an argument that he had acted in the substantive interests of the *res publica* by resisting what the senatorial party regarded as ruinous economic and social reforms. Such a defence would have required the people, as judges, to decide whether Opimius' action was justified as being in the public interest, by reference to a wide range of policy considerations. But this account may misrepresent Opimius' defence: in killing C. Gracchus, Opimius had acted in reliance on the senate's final resolution, by which it had called upon the consuls to defend the *res publica* against the supposed threat to its interests. It was uncertain what was the legal status and effect of such a resolution. On one analysis, it was no more than advisory/hortatory, and did nothing formally to insulate from the legal consequences of their actions those who acted in pursuance of it and who thereby committed acts punishable under the general law; at most, the senate's recognition of the grave peril facing the *res publica* provided weighty evidence in support a defendant's argument that he had acted in the interests of the *res publica* by removing the threat which the senate had identified. On an alternative analysis, the resolution effectively authorised those whom it addressed to take such action as they judged necessary to protect the *res publica* and thereby protected them from the consequences of their actions under the general law. In referring to Opimius' case a little later in *De Oratore*, Cicero implies that Opimius effectively invited the people to conclude that he had acted lawfully because he had acted in pursuit of the senatorial resolution: Cicero explains that the prosecution and defence disagreed as to the legal status of the senatorial resolution, and the issue before the court was therefore "whether it was lawfully open to Opimius to kill Gracchus on the basis of the senate's resolution for the purpose of preserving the *res publica*" (II.132; II.134). Under this formulation, the issue before the people was what we might classify as essentially a legal issue, as to the status and effect of the *senatus consultum ultimum*.¹³

The anonymous *Rhetorica ad Herennium* also illustrates how issues relating to the public interest could be integral to the question whether the accused's conduct amounted to *maiestas*. When first mentioning the case of L. Saturninus and Q. Servilius Caepio, the writer cites it as one which turned on an issue of definition: in 100 BC, the *tribunus plebis* Saturninus was proposing legislation before the people in assembly to provide for generous distributions of subsidised grain to the people, to be financed out of public resources; as in the case of C. Gracchus, the senate passed a final resolution declaring the proposal to be contrary to the interests of the

¹³ The legal status of the *senatus consultum ultimum* is discussed in Lintott (1999a, pp. 89–93).

res publica; other *tribuni plebis* therefore exercised their rights of *intercessio* to veto Saturninus' proposal; when Saturninus tried to press on, Caepio, an urban quaestor (a junior magistrate) prevented the people from voting on the proposal by breaking up the ballot boxes and the temporary wooden bridges over which citizens walked to cast their votes; Caepio was tried for *maiestas*, and, according to the *Auctor ad Herennium*, the question was one of definition: what is it to diminish the *maiestas* of the *populus Romanus* (I.21).

Later in the same treatise (II.17), the writer suggests how an advocate defending Caepio would address such an issue of definition. He explains that the prosecutor would argue that a citizen diminishes *maiestas* when he destroys those things in which the *amplitudo* (eminence) of the *civitas* (commonwealth) consists; and they are *suffragia* (the people's votes) and their magistrates; therefore Caepio diminished the *maiestas* (sc. of the *civitas*) when he deprived the people of their opportunity to vote and deprived the magistrate of the guidance (*consilium*) of the people. Conversely, he explains, the defence would argue that a citizen diminishes the *maiestas* (sc. of the *civitas*) if he inflicts damage on its greatness; Caepio did not inflict such damage, but prevented damage by protecting the treasury (sc. from the adverse economic effects which would have followed from the adoption of Saturninus' bill), by resisting the cupidity of the malign citizens who favoured such legislation, and by refusing to allow diminution of the *maiestas* (sc. of the *civitas*). The argument proposed for the defence does not rely merely on technical grounds on which Caepio's action might be argued to be *iure factum* (lawfully done), by reference to the veto exercised by the *tribuni plebis* or the senate's resolution. Instead, it invites the judges to engage directly with much wider questions of public policy: the judges are asked to decide whether particular policy proposals for the redistribution of land and for social reform would have so damaging an impact on the *civitas* as to justify actions—in some cases, violent actions—designed to prevent their adoption.

8 Riot/Seditious Violence

8.1 Scope of the Offence

It appears that the offence of *vis* (riot/seditious violence) was not specifically defined in the relevant *lex Lutatia de vi* nor in the later *lex Plautia de vi*. In common parlance, *vis* meant any kind of violence. But it seems clear from Cicero's speeches that the *leges* regulating cases of *vis* were interpreted as covering only violence having some public element, so as to be contrary to the interests of the *res publica* (*contra rem publicam*).¹⁴

Thus, the law applied to those who used violence to disrupt formal public business; it also appears to have extended to violence undertaken by private individuals and gangs, where such action created a danger to public order or to the safety of citizens generally. But purely private cases of individual acts of violence

¹⁴ See Riggsby (1999, pp. 79 ff.); Lintott (1999b, pp. 107 ff.).

were not covered (falling to be pursued under the *ius civile* (private law)). Thus, in his speech *Pro Caelio*, Cicero expresses surprise that a private dispute of no public interest should be thought to justify the bringing of charges of *vis* and the scheduling of an early trial, thereby creating an expectation among the public that the case would air allegations of conduct posing a threat to the very existence of the *civitas* (commonwealth) (*Pro Caelio* 1).

A law directed at actions undertaken *contra rem publicam* was bound to raise issues as to what needed to be shown for the *contra rem publicam* ingredient of the offence to be established. In practice, we might have expected Cicero, in defending allegations of *vis*, to seize any opportunity that presented itself to argue that a defendant's action, though amounting to violence of a kind potentially addressed by the *leges de vi*, was nonetheless undertaken for the benefit of the *res publica* and was not therefore *contra rem publicam*.

8.2 The Public Interest (Non-)Argument in Cicero's *Pro Milone*

It is, however, instructive to consider Cicero's speech *Pro Milone*, in which public interest considerations are elaborated, but are not ultimately relied upon as providing a legal defence to a charge of *vis*.¹⁵ Cicero's precise treatment of the public interest issues is highly sophisticated and suggestive as to what he considered to be the proper limits of the public interest defence.¹⁶

The first century AD commentator Asconius (26ff.) provides useful commentary on some of the issues raised by Cicero's speech. It is helpful first to outline the factual background to the prosecution of Milo, since the prior dealings between Milo and his victim, P. Clodius Pulcher, would appear to have provided Cicero with the material to mount a wide public interest defence, and Cicero's hostility to Clodius suggests that he would not have objected to presenting such an argument. In the light of these considerations, the possible reasons for Cicero's decision not to advance a wide public interest defence invite particular scrutiny.

Milo was a political ally of Cicero's. There was a longstanding enmity between Cicero and P. Clodius Pulcher, stemming, among other things, from an incident in which Clodius had apparently violated a religious ceremony honouring Rome's gods; at his trial, Cicero had given evidence against Clodius, but Clodius had nonetheless been acquitted. Cicero portrays Clodius as an immoral political operator, who routinely resorted to violent and unlawful behaviour to secure his political objectives. During the early 50s BC, Cicero had been driven into exile pursuant to legislation promoted by Clodius before the plebeian assembly. On his return, Cicero made clear that he regarded his period of exile as a time of lawlessness in the city of Rome, when weak consuls had failed to prevent mob rule by Clodius and his cronies. Milo, then a *tribunus plebis*, had been active in securing Cicero's return from exile. In 52 BC, Milo stood as a candidate for the consulship. Before the elections, Clodius and Milo, each accompanied by his own bodyguards and attendants, met on the Via Appia outside Rome. In an altercation between the

¹⁵ Discussed in Riggsby (1999, pp. 105 ff.).

¹⁶ See also Fotheringham (2007).

two parties, Clodius was killed and his body repeatedly stabbed. The corpse was taken back to Rome by his supporters, paraded in public and then burned; there was widespread rioting and the senate house was burned down. The unrest among Clodius' supporters necessitated some formal action. The consul Gn. Pompeius Magnus secured the passage of a law providing for a special court to be convened to try Milo on a charge of *vis*.

Cicero defended Milo. Asconius (36) explains that Cicero was intimidated by the soldiers who surrounded the court and by unrest among the crowd; his performance at trial was lacklustre and Milo was convicted. It was clear that Milo or members of his company had killed Clodius. Many apparently assumed that Milo's guilt was not in doubt, and that a simple judgment to that effect would dispose of the matter. However, Cicero argued at trial that Milo had acted in self-defence in killing Clodius. He cited numerous circumstantial details to support this story. It was, he argued, implicit in the offence of *vis* that a defendant was not guilty if he and those supporting him had acted in self-defence. In other words, Milo's action was *iure factum* (lawfully done).

We know from Asconius (30 ff.) that, having lost the case at trial, Cicero prepared a new and different speech *Pro Milone* for publication, designed to justify Milo's action, exhibit Cicero's true capabilities as an advocate and serve as a political pamphlet defending Cicero's support for Milo.

In the published speech, Cicero continues to advance the argument that Milo acted in self-defence in killing Clodius. He acknowledges that the *lex de vi* made no reference to such a defence, but argues that the law did not criminalise all acts of killing by violence, since Roman law recognised elsewhere that some acts of killing could be lawful; he points out that the Twelve Tables (the earliest partial codification of Roman law, dating from the fifth century BC) had recognised that one citizen might lawfully kill another if he found him attempting theft at night or armed theft during the day; he cites famous cases from Roman history where one citizen had killed another who aspired to tyranny and thereby threatened the interests of the *res publica*, and where the killer had been found to have acted lawfully; accordingly, it was not enough for the prosecution to show that Milo had killed Clodius; they also had to show that Milo had no defence of lawful killing. It was, he argues, self-evident that one citizen might lawfully kill another in self-defence: unless he could do so, he would himself be killed, and would not survive to invoke the protection which the laws were designed to confer on him against such a result (*Pro Milone* 8–11).

Thus Cicero's argument treats self-defence as an example of a potentially open-ended series of grounds on which the defendant might argue that his action was *iure factum* (lawfully done). He thereby lays the foundation for an argument that Milo might also rely on a broad public interest defence. But, even in the more adventurous published version of his speech, Cicero does not directly advance a wider public interest defence based on the substantive merits of Milo's removal of Clodius: he points out that, if Milo had killed Clodius in order to protect the public interest, the whole *res publica* would have thanked him for having relieved it of such a burden; accordingly, it would make no sense to convict Milo for an action

which was welcomed as a public benefit (72–82). But Cicero does not formally argue that, as a matter of law, Milo should be acquitted on this ground.

There are two possible reasons for this approach: first, since Milo's primary argument was that he had acted in self-defence, he could not consistently argue that he had acted in pursuit of some wider public interest; and, secondly, it was arguably not for Milo, on his own initiative, to judge what the public interest demanded, and then to execute his judgment, without allowing Clodius the benefit of a trial in respect of his own alleged wrongdoing. Asconius' commentary proposes that it was for this second reason that Cicero chose not to advance the public interest defence at trial.

It is, however, worth questioning why Cicero might have considered such a defence to be unavailable in law to a private citizen, having regard to the ancient tradition by which the killing of a would-be tyrant by a private citizen was recognised as lawful, as being in the public interest, and to Cicero's portrayal of Clodius as just such a tyrant (noted by Forschner (2016)).

Riggsby (1999, p. 118) suggests that, by the late 50s BC, public opinion in Rome may have shifted against allowing such a defence. It is true that privately-initiated violence had severely damaged Roman public life, and Cicero may well have concluded that it should no longer be open to private citizens to take upon themselves responsibility for identifying and disposing of persons whom they judged to pose a threat to the *res publica*, as tyrannicides of the past had done. The issues which divided society were no longer so clear-cut: Rome's almost-mythical history recorded that, in the early days of the republic, citizens had universally abhorred the prospect of a return to monarchy, so there was little doubt that a tyrannicide served the public interest well. But, in Cicero's generation, issues of the public interest were too complex to be resolved in a similar way. Private resort to violence in support of political policies was now a greater threat to the well-being of society than any of the disputed policies themselves, and it was therefore more appropriate to allow those invested with legal authority (magistrates, perhaps acting pursuant to a *senatus consultum ultimum*, or the courts acting pursuant to a statutorily conferred jurisdiction) to deal with those who posed a threat to the community generally.

It is perhaps for this reason that Cicero's presentation of the public interest argument in his published speech *Pro Milone* is expressed in emphatically hypothetical terms, and positioned not as a potentially effective defence, but as a reason why it would be perverse to convict and punish Milo for securing a wholly desirable outcome (Riggsby (1999, p. 108)). However, if this is the import of Cicero's public interest argument, a question arises as to whether it has any legal relevance to the case at all. The laws under which the *quaestiones perpetuae* operated required the court to decide only the innocence or guilt of the defendant, and a statutorily defined penalty followed if the defendant was convicted. Cicero recognises this in his speech (14–16; 80). (And it was for this reason that the *Auctor ad Herennium* had noted that there was no formal role for any plea in mitigation, or request for clemency, from such a tribunal (II.26).)

Apparently mindful of these considerations, Cicero artfully presents the public interest argument as fortifying his case that Milo acted in self-defence: the gods

whose rites Clodius had violated drove Clodius to such a pitch of irrational anger that he ambushed Milo, thereby forcing Milo to kill him in defence of his own life; the killing occurred close to a shrine to those same gods whose rituals Clodius had violated; the gods who protected Rome had thus brought about Clodius' death, using Milo as their (legally innocent) instrument (84–86). This is a rhetorically inventive way of presenting Milo's action as being motivated by self-defence, but nonetheless orchestrated by the gods as a means of benefiting the *res publica*. But Cicero's formulation of the argument may also suggest that he did not judge it appropriate to argue that the law allowed Milo, as a private citizen, to avail himself directly of a wide public interest defence based on his own assessment of what the public interest demanded: Rome was fortunate to be rid of Clodius, but it was not for Milo to defend his action on that basis.

9 The “Spillover Effect” of the Public Interest Defence

9.1 Electoral Malpractice

Milo's trial was held in 52 BC. But for many years before then, public interest arguments had been deployed in trials for *maiestas* and *vis*, in defence of consuls, *tribuni plebis* and private citizens.¹⁷ The deployment of such arguments had arguably produced wider “spillover” effects: for example, we observe Cicero introducing wider public interest arguments into his defence of charges brought under the laws relating to *ambitus* (electoral malpractice).¹⁸

The point is well-illustrated in Cicero's defence of L. Murena. In 63 BC, during his own consular year, Cicero oversaw the elections of two consuls for 62 BC. The elections were fraught with accusations of *ambitus* from the start. When Murena was elected as one of the two consuls, he was prosecuted on a charge of *ambitus*. Cicero argued in Murena's defence that Murena had not committed any malpractice; there was no reason to infer, from the mere fact of his success, that he must have cheated, since he was, Cicero argued, an altogether more attractive candidate than his unsuccessful rival; his success was therefore explicable without resorting to any suggestion of wrongdoing (15–53). So far as related to Murena's electoral campaign, Cicero argued that Murena had not bought support or lavished gifts indiscriminately on voters, which would have amounted to *ambitus*; the gifts and benefits he had conferred were part of the usual exchange of favours among friends on which Roman social life was based, and did not infringe the law (67–73). (But, in reality, the dividing line between the buying of votes and bribery, on the one hand, and the legitimate calling in of favours from friends and clients, on the other, is likely to have been a difficult one to draw.)

¹⁷ Other cases are cited in Cicero's *De Inventione*, and *De Oratore* and by the *Auctor ad Herennium*.

¹⁸ There were various laws dealing with *ambitus*. Crawford (1996, pp. 761 ff.) provides a partial reconstruction and commentary on the *Lex Tullia de Ambitu* of 63 BC. See also Riggsby (1999, pp. 21 ff.).

But Cicero also introduces a further and quite different element to his argument, based on the pressing need of the *res publica* for the services of two consuls from the start of the new consular year: in the preceding months, Cicero had taken a leading role in suppressing the notorious Catilinarian conspiracy. L. Sergius Catilina, a dissolute nobleman who had fallen into ruinous debt, saw no escape from his troubles short of a general cancellation of debts, to be secured by overthrowing the lawful government and instituting his fellow revolutionaries in their place. Catiline was apparently supported by a large number of disaffected senators, not all of whom had—according to Cicero—been effectively neutralised by the time of Murena’s trial. For this reason, Cicero argues, the republic should not be deprived of one of its two consuls of 62 BC; if Murena’s election were set aside, and the remaining consul were distracted from affairs of state by the necessity of arranging for the election of a new consular colleague, that would play into the hands of the remaining Catilinarian conspirators (78–85).

This was arguably an entirely irrelevant consideration under the law on *ambitus*. It was, of course, worth emphasising to the judges the grave consequences which would ensue if they convicted Murena wrongly and the need for them to exercise the utmost care in deciding on Murena’s innocence or guilt. But Cicero hints that the judges should, in some sense, also weigh the importance of punishing Murena for what he was alleged to have done (which, Cicero intimates, was, at most, a display of excessive generosity to voters) against the detriments to the *res publica* of being deprived of Murena’s support in the office of consul. This was a different kind of public interest argument: Cicero was not arguing that the defendant’s otherwise wrongful conduct had been justified on public interest grounds at the time, but that his conviction would be damaging to the public interest, by virtue of circumstances prevailing at the time of the trial. But it is possible that the judges were more willing to entertain this argument as a variation on the kind of public interest considerations already familiar from cases of *maiestas* and *vis*.

9.2 Extortion

There is also a hint in the evidence that public interest defences may have been deployed as well in respect of charges of *res repetundae* (extortion by a provincial governor of the goods/money of residents of his province).¹⁹

In the published version of his proposed speeches relating to the prosecution of Verres (70 BC), Cicero had provided a devastating account of Verres’ corruption and abuse of power in his role as the Roman governor of the province of Sicily. Cicero also went on to attack Verres’ conduct of military affairs in Sicily, though this formed no part of the charges of *res repetundae*. Cicero explained why he judged it necessary to deal with Verres’ military record: he anticipated that Verres’ defence counsel might argue that the judges should not look narrowly at whether Verres had committed the alleged offences of *res repetundae*, but should instead determine whether his record as a provincial governor was good in the round; on

¹⁹ See Crawford (1996, pp. 39 ff., 769 ff.) dealing with the *Lex Acilia* and the *Lex Iulia de pecuniis repetundis*, and Riggsby (1999, pp. 120 ff.).

that basis, it should not matter that he had extorted goods and money from provincial citizens under his jurisdiction if his success in military conflict within his province outweighed such matters. Cicero made clear that, in strictly legal terms, even the most exemplary military record could not provide Verres with a defence to charges of *res repetundae*; his military record was simply irrelevant to the charges before the court (II. Verr. V.1–4). (Of course, it is quite possible that Verres had no intention of introducing such an argument, and that Cicero’s suggestion that he would do so is designed simply to provide a peg from which to hang his own prejudicial, but otherwise irrelevant, evidence of Verres’ corrupt and incompetent handling of military affairs in Sicily. But, even if that is so, Cicero’s argument nonetheless makes clear his position that there are limits to the potential relevance of wider public interest considerations in relation to a charge of extortion.)

10 Conclusions

10.1 Did the *Quaestiones Perpetuae* Observe the Rule of Law?

Formally, the *quaestiones perpetuae* were charged with deciding whether defendants brought before them were guilty of the statutory offence with which they were charged.

In some cases, there was uncertainty as to precisely how a particular offence was to be interpreted (as discussed in Sect. 6 above in respect of the offence of “judicial murder” and in Sect. 9.1 above in respect of *ambitus*). But such problems arise in many legal systems and, provided that the rules can be adequately clarified, need not detract from the system’s general adherence to the rule of law.

However, other features of the *leges* establishing the *quaestiones perpetuae* and of the functioning of the *quaestiones* call into question their conformity to the rule of law.

First, the offences to be tried before the *quaestiones* were generally ill-defined, so that there was a heavy burden on the courts to determine how the offences should be interpreted and what factors were relevant to establishing a defendant’s guilt. The process by which the parties argued their cases before the *quaestiones* was effective to allow potentially relevant issues to be isolated, but the fact that the judges determined their verdict by voting, without giving reasons, meant that their verdict provided no clear indication of the reasons by reference to which issues of law had been determined. Furthermore, decided cases had no formal precedent value in later cases raising similar issues (though a series of decisions in similar cases could, of course, disclose and promote an emerging consensus on particular points).

Secondly (and partly in consequence of the way in which the courts rendered their verdicts), there was no common understanding of important underlying matters (such as the legal effect of a *senatus consultum ultimum*, or of the extent of the entitlement of one *tribunus plebis* to interfere with another’s exercise of his right of *intercessio*, which were important to determining the scope of the offence of *maiestas*), and no means of resolving disputes as to these matters (short of the adoption of a new *lex* to resolve the issue). Thus, uncertainties as to whether

particular conduct might constitute an offence of *maiestas* (or *vis* or homicide) remained unresolved for many years, to the extent that they arose from the failure to resolve issues of law falling to be determined as matters potentially preliminary to the assessment of the relevant conduct by reference to the offence.

Thirdly, the higher magistrates of the Roman republic enjoyed very wide powers (denoted by their formal investment with *imperium*) subject to few express legal constraints; when political rivals wished to challenge the exercise of magisterial power, the *quaestiones perpetuae* provided the best forum in which they could do so; in these circumstances, prosecutors might well invite the *quaestiones perpetuae* to take a broad approach to their jurisdiction, and to look not only at whether a defendant had acted in disregard of a definite limitation on his power, but also at whether he had misused his power; and defendants were inclined to defend their actions by reference to broad considerations of public policy.²⁰

By accepting that they should entertain these wider public interest arguments as relevant to the determination of cases brought before them, the *quaestiones* operated as a forum for the judgment, after the event, of magistrates' exercise of their powers by reference to substantive considerations of economic, political and social policy. The initiative in encouraging this approach appears to have lain with the parties' advocates, since it was they who invited the judges to entertain defences based on wider public interest considerations. Without evidence as to the practice of other advocates of Cicero's generation, we cannot judge whether Cicero was unusual in the extent of his reliance on public interest defences engaging wide issues of social and political policy. His prominence as a politician, his overall standing as the pre-eminent forensic orator of his day, and the subtlety and sophistication of his deployment of such defences in speeches such as *Pro Murena* and *Pro Milone* suggest that he may have contributed significantly to the acceptance of such arguments as relevant to the determination of charges raised before the *quaestiones perpetuae*. But such arguments are, in any event, likely to have been sympathetically received by the judges of the *quaestiones perpetuae*, as being familiar from the kinds of arguments advanced, from the inception of the republic, in trials before the assembly (such as the trial of Opimius, described in Sect. 7.2 above). In such cases before the assembly, the term *perduellio* (treason) had proved sufficiently elastic to attach to many kinds of conduct judged after the event to be substantially damaging to the interests of the *res publica*. Similarly, some cases brought before the *ad hoc quaestiones* which preceded the era of the *quaestiones perpetuae* would undoubtedly have been determined without reference to any clearly defined rule.

In combination these factors meant that the *leges* defining some of the offences to be tried by the *quaestiones perpetuae*, and the methods adopted by the *quaestiones* in enforcing the laws, arguably failed to fulfil several of Fuller's desiderata for attainment of the rule of law: the "rules" as applied were unclear, were not therefore apt to serve as a guide to conduct, and were not amenable to application in accordance with any general criteria capable of clear expression in advance. Although it is a matter of judgment how serious these deficiencies were, several of the cases examined in Sects. 6–9 above suggest that the *leges* administered by the

²⁰ Discussed in Riggsby (1999, p. 157).

quaestiones perpetuae and the way in which the *quaestiones* performed their role departed substantially from the rule of law. Instead, the *quaestiones perpetuae* took on a function which would, under the constitutional arrangements of the Roman republic, have been better fulfilled by the people in assembly as legislators (e.g. enacting clearer rules to regulate the conduct of magistrates in future cases, or to address uncertainties as to the scope of particular offences), or left to the judgment of the magistrates and senate (as those entrusted with the making and execution of policy, subject to any legal constraints on their powers). That is to say, the problem lay not only in how the *quaestiones perpetuae* performed their functions, but in how they conceived of the scope of the offences and defences which they were called upon to apply.²¹

10.2 Implications

The conclusion that the *quaestiones perpetuae* failed to observe the rule of law may be said to be of little significance, insofar as it merely judges these courts and the laws under which they operated by reference to a modern and potentially anachronistic standard. But modern advocates of the rule of law envisage that adherence to the rule of law is apt to bring benefits which may transcend the circumstances of any individual society, including, potentially, the enhancement of individual autonomy, the restraint of tyranny, and the securing of the benefits of procedural fairness in the trial of alleged offenders; where citizens are also satisfied that constitutional arrangements allow them to participate effectively in the making of laws, the rule of law may also mean that punishments resulting from the enforcement of the laws enjoy greater legitimacy, even if the outcome of individual cases is detrimental to individual interests (Tamanaha 2004, pp. 1 ff., 137 ff.). If that is correct, then we may usefully examine whether and how my observations as to the ways in which the *quaestiones perpetuae* fell short of observing the rule of law might assist in understanding the final years of the Roman republic.

First, my conclusion should prompt a cautious approach to reliance on scholarly works which, without any caveat, present all manner of Roman penal processes as “legal” or “criminal” proceedings, on the basis that they addressed kinds of conduct which we might consider amenable to inclusion in the criminal law, that elements of their procedures resemble those of a modern criminal trial, or that they resulted in the imposition of penal sanctions.²² By assimilating the processes of the Roman republic to modern legal proceedings, we risk obscuring the way in which the Roman processes differed from those contemplated by the rule of law and the potential implications of such differences. It is, of course, difficult to know what other terminology to use to describe and explain “trials” before the people in assembly, the individual exercise of magisterial *imperium* without any procedural formality, and proceedings before various kinds of *quaestiones*, and, for that reason,

²¹ The problem resembles that identified by Fuller (1969, pp. 170 ff.): the conduct of foreign affairs by the US President (on the advice and with the consent of the US Senate) is simply not amenable to being subjected to legal rules; no more is the management of private or public sector economic activity so amenable.

²² A “confusion” of the kind identified by Fuller (1969, pp. 168 ff., 145 ff.).

I have used the traditional “legal” terminology in much of this paper. But, in evaluating the role of the Roman courts in arresting or contributing to the decline of the republic, we should not think of these institutions in terms which assume that their task entailed the genuinely judicial application of general legal rules, and, by implication, that they were adequate to support the attainment of the various other social and political outcomes which are associated with adherence to the rule of law.

Secondly, my analysis may cast some light on why it would have been difficult to convert the *quaestiones perpetuae* into genuinely judicial bodies, interpreting and applying the offences before them as a body of general legal rules: if effective adherence to the rule of law rests to a significant extent on judges’ reaching reasoned judgments, and on having an effective means of definitively deciding unresolved issues of law, then it would have required more than minor tinkering with the *quaestiones perpetuae* to bring the system into conformity with the rule of law. The *ius publicum* of the Roman republic was traditionally enforced by laymen, operating via large judicial panels, and it recognised no formal means of definitively resolving questions of law. It was therefore unable to provide any direct model for the introduction of these features into the operation of the *quaestiones perpetuae*.

Thirdly, whilst not revealing the whole picture, my analysis may cast some light on why there were, in Cicero’s day, repeated criticisms of the composition of the *quaestiones perpetuae*, and why Cicero often reminded judges that, if their judgment went the wrong way, that might trigger attempts to reform the composition of the judicial panels.²³ That is not to say that contemporary observers would all have questioned the legitimacy of the *quaestiones* by drawing a distinction between legal and political questions, and concluding that only the former should be entrusted to the courts. But where the *quaestiones* acquitted members of the governing class of wrongdoing for conduct which many observers condemned as apt to damage, rather than to promote, the interests of the *res publica*, the observation of such questionable outcomes could well have prompted citizens to ask whether such cases should be determined by panels of judges drawn only from a narrow segment of society, who were, for example, in the case of senatorial judges, likely to be influenced by a sense of solidarity with senatorial defendants. Such dissatisfaction reflects one potential implication of the rule of law model: resentment of judges is more likely to emerge if the judges are not merely applying clear rules, in a uniform manner, but are manifestly usurping a function better performed through society’s political processes, and are doing so in a way that lacks transparency or consistency.

It is also to be noted that, even if most contemporary observers would not have analysed the performance of the *quaestiones perpetuae* by reference to a model of rule of law, there were some who appreciated the possibility of a genuine system of legal rules, as envisaged by Sect. 4 above: my discussion of Cicero’s forensic speeches and treatises makes clear that he recognised the different constitutional functions of the magistrates, the legislature and the courts, the function of legal rules in regulating uniformly cases falling within their scope, a distinction between questions of law and questions of fact, and the interpretation of each rule by

²³ See, for example, *In Verr.* I.1–3; *Pro Sexto Roscio* 139, and the wider discussion of the issue in Berry (2003).

reference to the wider body of rules of which it formed part.²⁴ Cicero's analysis of these matters, and that of the anonymous *Auctor Ad Herennium*, suggest that there would have been a significant number of educated citizens in late republican Rome who might have been troubled by the shortcomings of the *quaestiones perpetuae*, relative to some other imaginable model of how they might have operated.

Finally, the genuine uncertainty resulting from the way in which the *maiestas* law was enforced in practice meant that some citizens may well have been deterred from exercising available political freedoms for fear that their conduct could later be subjected to broad policy-based judgments, coupled with a capital sentence, if the actions they had pursued were, in retrospect, found wanting. Conversely, the knowledge that, when challenged, a magistrate might defend his conduct by reference to a broad conception of the public interest allowed politicians on all sides to persuade themselves that their actions in pursuit of their own political ends—however violent those actions, and however disruptive to the orderly discharge of public business—were at least arguably lawful. The prospect of being able to escape conviction on such grounds may have fuelled the violence and disorder which contributed to the final collapse of the republican system. Fuller's model of the rule of law readily explains how the lack of clarity of a "rule" such as that enacted in the *lex de maiestate* prevents it from operating effectively as a guide to citizens' conduct or as a deterrent from conduct damaging to the *res publica* and precludes the possibility of consistent enforcement from one case to another. It is possible that it was Cicero's incipient recognition of this problem that explains his decision not to advance a wide public interest defence to the charge of *vis* in his speech *Pro Milone* (Sect. 8.2 above).

In short, if Sulla had intended the *quaestiones perpetuae* to provide a new kind of court, operating in a manner more closely approximating to the rule of law, we must judge his project a failure. But that failure is attributable not just to the way in which advocates and judges chose to interpret and apply his laws, but to wider features of the Roman political and legal system, which generated among many, if not all, participants expectations which were significantly different from those contemplated by the modern rule of law model.

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²⁴ See the discussions of *Pro Cluentio*, *De Oratore*, the *Rhetorica Ad Herennium* and *Pro Milone* in Sects. 6, 7 and 8 above.

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