Leges regiae: pro et contra

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1. *Fontes.*

Roman tradition relates the origin of the law to the reign of the first seven kings: thus Romulus, allegedly, had established the first political institutions with his legislature (senate, magistratures, army, college of augurs) and had organized the relations inside the Roman family, Numa had laid the foundations of the religious order, Tullus Hostilius followed by Ancus Marcius had regulated the customs relating to the declaration and leading of the war, Tarquinius Priscus had reorganized the senate, Servius Tullius had carried out the judiciary reforms and had established a new form for organizing the citizens according to army principles, while the last king Tarquinius Superbus was credited with the claim of being a tyrant, not respecting former laws and even ordering their removal from the Forum as well as the destruction of some ([1]). However, according to the tradition,

1) BRUNS, *Fontes iuris Romani*[7], Tubingae, 1909, 1-15; RICCOBONO, *Fontes iuris romani anteiustiniani*[2], I, Florentiae, 1941, 1-14; WENGER, *Die Quellen des römischen Rechts*, Wien 1953, 353-357; JOHNSON, *Ancient Roman Statutes*, Austin, 1961, 3-5; GIRARD-SENN, *Les lois des Romains*, *Textes de droit romain*[7], II, Napoli, 1977, 7-22. The testimonies about *leges regiae* are left to us by Dionysius of Halicarnassus, Livy, Tacitus, Pomponius, Plutarch, Pliny the Elder, Marcellus, Gellius, Festus, Cicero, and others. It is important that *iurisprudentes*, with the exception of Marcelllus (D. *2,8,2*), never quote the contents of the "kings' laws". Neither Gaius mentions them in his manual, though his discourse frequently goes back to the very beginnings of Roman legal history.

during his reign, the laws of the kings were collected and published by a person called Papirius, thus giving the name *ius Papirianum* ([2]) to this law. In his work *Enchiridion* (D.*1,2,2,1-3*), Pomponius comments:

> 1. *Et quidem initio civitatis nostrae populus sine lege certa, sine iure certo primum agere instituit omniaque manu a regibus gubernabantur.* 2. *Postea aucta ad aliquem modum civitate ipsum Romulum traditur populum in triginta partes divisisse, quas partes curias appellavit propterea, quod tunc rei publicae curam per sententias partium earum expediebat. Et ita leges quasdam et ipse curiatas ad populum tulit: tulerunt et sequentes reges. Quae omnes conscriptae extant in libro Sexti Papirii, qui fuit illis temporibus, quibus Superbus, Demarati Corinthii filius, ex principalibus viris. Is liber, ut diximus, appellatur ius civile Papirianum, non quia Papirius de suo quicquam ibi adiecit, sed quod leges sine ordine latas in*

2) Cfr. HIRSCHFELD, *Monumenta Manilii e Ius Papirianum,* in *Sitzungsberichten der Berliner Akademie*, I, 1903, *passim*. Paoli, *Le 'ius Papirianum' et la loi Papiria*, RHD 24/25 (1946-47), 157ss. DI PAOLA, *Dalla Lex Papiria al Ius Papirianum*, Studi Solazzi, 1948, 631ss. BRETONE, *Ius Papirianum*, NssDI, IX, 1963, 386ss.

> *unum composuit* ([3]). 3. *Exactis deinde regibus lege tribunicia omnes leges hae exoleverunt iterumque coepit populus Romanus incerto magis iure et consuetudine aliqua uti quam per latam legem, idque prope viginti annis passus est* ([4]).

In the *Annales* Tacitus also comments the legislative activities of the Roman kings:

> *Nobis Romulus, ut libitum, imperitaverat* ([5]), *dein Numa religionibus et divino iure populum devinxit; repertaque quaedam a Tullo et Anco: sed praecipuus Servius Tullius sanctor legum fuit, quis etiam reges obtemperarent* (3,26).

In his book *Ab urbe condita*, Titus Livius records:

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3) However, according to Dionysius of Halicarnassus (*Antiquitates Romanae, 3,36*) the matter collected here were the sacral laws of Numa Pompilius which were by the order of king Marcus Ancius written down by the *pontifices* and which were later collected and published by the first republican *pontifex maximus* Gaius Papirius. Paulus (D.*50,16,166*) calls this collection *de ritu sacrorum.*

4) In contrast to Pomponius, Dionysius (*5,2*) claims that some laws of the kings were restored after the dethroning of Tarquin the Proud. Besides, when Livy (*6,1,10*) speaks of the great restauration of the Roman laws after the Gallic conquest, he mentions the *leges regiae*.

5) It is strange that Tacitus does not connect the passing of any laws with the name of the first king of Rome. On the contrary, Dionysius gave an analytic account of the numerous ordinances of Romulus, painting him with the character of a Greek *nomothetes*, responsible for nearly everything that was fundamental in early Rome. Dion. Hal. *2,7-29*. Cfr. GABBA, *Studi su Dionigi da Halicarnasso, I, La costituzione di Romolo*, Athenaeum, n.s. 38 (1960), 175-225. Also, Plutarch states that Romulus legislated against murder of a father (*parricidium*), about *divortium* etc. Plut., *Romulus*, *22,4*. About 'Romulian' laws v. *infra.*

> *Rebus divinis rite perpetratis (Romulus) vocataque ad concilium multitudine, quae coalescere in populi unius corpus nulla re praeterquam legibus poterat, iura dedit.* (1,8) *Rex (Tullus Hostilius)...concilio populi advocato 'duumviros' inquit, 'qui Horatio perduellionem iudicent, secundum legem facio'. Lex horrendi carminis erat: duumviri perduellionem iudicent... Hac lege duumviri creati* (6) (1,26).

On the legislation of the roman kings Cicero said in *De republica:*

> *Et mihi quidem vivetur Numa noster maxime tenuisse hunc morem veterem Graeciae regum. Nam ceteri... magnam tamen partem bella gesserunt et eorum iura coluerunt. Illa autem diuturna pax Numae mater huic urbi iuris et religionis fuit, qui legum etiam scriptor fuisset, quas scitis extare, quod quidem huius civis proprium, de quo agimus* (5,2,3); *Idemque Pompilius... propositis legibus his, quas in monumentis habemus, ardentis consuetudine et cupiditate bellandi religionum caeremonis mitigavit* (2,14,26).

It seems that the given testimonies of classical writers are sufficient to lead us to the conclusion that the institution of *lex* was already known in Rome during the ancient times. Some

authors are ready to see in that fact the explanation for the later flourishing of the law and its astonishing development (7), while others deny it any degree of historical credibility (8).

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6) Still, we must note that Cicero, when the archaic duoviral *perduelllio* process was resuscitated (in 63 B.C.) in the murder case against C. Rabirius, expressly denied that this *lex regia* could date from the kings. Cic. *pro Rab*. *4,13*; *5,15*.

7) "È noto che la tradizione romana attribuisce molte leggi a tutti i sette re, e persino a Romolo. La quale tradizione mostra che l'istituzione della *lex* era in Roma antichissima. Fu anche questo un elemento della sua posteriore floridezza e del suo posteriore mirabile progresso nel diritto: poté così

2. *Contra leges regias.*

Such denying of the existence of *leges regiae* is characteristic among the adherents of the nineteenth centuries *historical law school* whose doctrine is based on the idea of the evolutionary development of law in three stages: *customary law - scientific law*

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rapidamente separarsi l'*ius* dal *fas*". COGLIOLO, *Filosofia del diritto privato*, Firenze, 1936[3], 52.

8) The tradition of such approach begins with the first serious study on "legislation" of the Roman kings, published by DIRKSEN, *Übersicht der bisherigen Versuche zur Kritik und Herstellung des Textes der Überbleibsel von den Gesetzen der römischen Könige*, in *Versuche zur Kritik und Auslegung der Quellen des römischen Rechtes*, Leipzig, 1823. Relying on the former results of the critical historiography, and especially on the capital work of NIEBUHR on the origin of Rome, this author resolutely rejected the authenticity of the *leges regiae*. The study of DIRKSEN made a strong impact on the romanist doctrine of the nineteenth century, and his fundamental conclusions were accepted completely by RUBINO, SCHWEGLER, LANGE, MOMMSEN et al. The authors of the critical editions of the Roman sources, published in that period, also take the negative attitude towards the testimonies of the tradition. Cfr. SEELEY, *Livy, Book I*, Oxford, 1881[3], 13: "Laws are often referred to the kings, and to particular kings. It seems likely, however, that this signifies really nothing but extreme antiquity". A similar argumentation will be later taken by ROTONDI, *Leges publicae populi romani*, Milano, 1912, 50 et al. On the other hand, many famous romanists simply ignore this problem. For example, PEROZZI in his large two-volume book *Istituzioni di diritto romano*, Roma, 1928, dedicates only one lapidar sentence to this question, puting it in footnote: "Le così dette *leges regiae* sono una certa falsificazione" (I, 45, n.2). The same is done by KUNKEL, *Roman Legal and Constitutional History* [2], Oxford, 1973, 25, n.1.

- *codifications*. According to these theories, primitive law in its original form expresses most clearly the specific features of the "*Volksgeist*" for certain environment, i.e. it faithfully reflects the ancient beliefs and customs that as unwritten norms regulate everyday life of the people. So, at such an early period of the human existence, law would not be created by means of legislation but by calm evolution. That is an unavoidable stage in the development of all archaic societies, including the Roman one, and that is why the possibility of existence of *leges regiae* in the most ancient period of the Roman history does not fit with such a point of view. It is maintained that the constitutional organization such as is attributed to the *regnum* by some ancient sources, generally could not have existed, but is either an invention of the classical writers or represents the legal order of a later period which has been pushed back in time (9).

As a rule, the negative attitude toward "kings' laws" is also present in the works of romanists with the *dialectic-materialistic* approach. Explaining the phenomena connected with the law, they proceed from the presumption that *law* and *state* are inseparable social phenomena appearing as a product of class-struggle, simultaneously, only at a certain stage of social-economic development. The logical consequence of such an

9) Some of the most prominent romanists belong to this school of thought. E.g. GIRARD, *Droit romain*[6], Paris, 1918, 15: "Les Romains de l'époque royale vivent sous l'empire de la coutume. Durant toute cette période, le droit a été exclusivement non écrit, exclusivement coutumier (*ius non scriptum, mos maiorum*). Il n'y avait pas de droit écrit avant les XII Tables".

approach to the earliest period of the Roman history is the conclusion that in the regal time (i.e. in the so called "military democracy") there were no necessary prerequisites for the appearance of any kind of sources of law besides customary law, and even more so in the case of some "laws" created by the kings. That is why the authenticity of *leges regiae* is completely denied, and the testimonies of classical writers are reduced to "mere legends or later forgeries to which are given the features of antiquity for the sake of their authority" ([10]).

Their credibility really appears to be doubtful considering the fact that there is no mention of these laws in the Roman literature till the end of the republican period, and even the later sources are no better in this respect. This silence is hard to explain by taking into consideration the remarkable ties with the past that Romans maintained, as well as their respect of the ancient laws – the best example being their relation to the text of the XII Tables. Another

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10) ROMAC, *Rimsko pravo* (*Roman Law*), Zagreb, 1981, 17. Cfr. STOJČEVIĆ, *Postanak rane rimske države* (*The Formation of the Early Roman State*), Zbornik A. VAJS, Beograd, 1966, 59-74. The romanist school of Naples follows just this methodological orientation. Its coryphaeus DE MARTINO explicitly states: "I comizi curiati non avevano poteri legislativi. Durante la monarchia la legge non era nota come fonte del diritto, il quale riposava su antichissime consuetudini e si riteneva nato con la città stessa, come le sue mura e suoi dei". *Storia della costituzione romana*[2], I, Napoli, 1972, 155-156. The same attitude is taken by COSTA, *Storia delle fonti del diritto romano*, Torino, 1909, 1ss.; BONFANTE, *Storia del diritto romano*[3], I, Milano, 1923, 83; GUARINO, *Il carattere della legislatione nel racconto di Livio, Ann. Catania*, 3 (1948-49), 213ss. ID. *Storia del diritto romano*[4], Napoli, 1969, 119ss; GROSSO, *Storia del diritto romano*[5], Torino, 1965, 44. Among Yugoslav romanists this attitude also prevails, though some authors in their manuals do not reject the possibility of existence of the *leges regiae*: PUHAN (Beograd, 1974, 45, n.3), STANOJEVIĆ (Beograd, 1987, 27), and explicitly by MALENICA (Novi Sad, 1995, 52). V. *infra.*

controversial matter is the claim of classical writers that these laws were voted for in the curiate assembly, even more so because the sacral traits of those regulations would not permit such an action (11). Even the contents of certain laws are not in accord with that archaic period because they reflect the relations and organization of the Roman society from a much later period. The suspicion is also stirred by a phenomenon called "*concentramento storico*" by V. ARANGIO-RUIZ, who understood by that term the attributing to some real or imaginary person all those institutions or activities which are in accordance with his general personal characteristics (12). Thus the figures of Romulus, Numa Pompilius and Servius Tullius would represent three supports of the early Roman "pseudo-historical constitutionality". Into the hands of each one, the tradition has concentrated one of the key branches of "legislature": the first one was credited with the establishing of political institutions, the second one with the founding of sacral law, and the third one with the securing of citizens' liberties. What should be attributed to any of the seven kings, depended largely on their characteristics as "good" or "bad" rulers (13).

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11) GIRARD, *Droit romain*, 15: "(*leges regiae*)... sont pour partie et même principalement des règles religieuses qui, dans les idées romaines, n'ont pu faire l'objet d'un vote populaire". Same: BOTSFORD, *The Roman Assemblies*, New York, 1909, 181. HORVAT, *Rimska pravna poviest* (*The Roman Legal History*), Zagreb, 1943, 75.

12) ARANGIO-RUIZ, *Storia del diritto romano*[7], 1957, 3.

13) CUNLIFFE, *Rome and her Empire*, Maidenhead, 1980, 44-51.

Considering that the numerous facts about the said Roman "kings" have been questionable in historiography for a long time (authenticity of their names, their real number, ethnic origin, and even their existence) (14), it is no wonder that WIEACKER, obviously paraphrasing Socrates, came to the conclusion that we know as good as nothing about the law before the time of decemvirs (15).

However, even those not denying completely the existence of any archaic norms known as *leges regiae*, still deny them the attribute of "law". That was the view held by M. KASER who – proceeding primarily from the characteristics of the *lex curiata de*

14) Among the most severe critics of the testimonies of ancient writers on the regal period is PAIS, *Storia critica di Roma*, Roma, I/2, 1915, 381ss. In recent time, the same attitude was taken by AMIRANTE, *Una storia giuridica di Roma*, Napoli, 1991, 79ss. This author gives far greater importance in that period to priests and their role in the organising of the archaic Roman society, while reducing the competences of the *rex* mainly to a military function. For the period before the Etruscan domination, he even argues that no stable and continuous monarchical regime existed, and concludes: "Gli *interregna*, i periodi nei quali i *patres* reggono questo embrione di comunità, non devono essere stati né pochi né brevi". This point of view is not far from the one that exists among our romanists, and according to which the *rex* was "a military commander without any civil power and whose function terminates with the end of the war": STOJČEVIĆ, *Rimsko privatno pravo* (*Roman Private Law*), Beograd, 1983, 15. A totally different attitude has PUHAN, *Rimsko pravo* (*Roman Law*), Beograd, 1974, 23, who recognizes in the *rex* the lifetime elected leader of the tribal community, who had the functions of the supreme army leader, archpriest, the supreme judge and chief of the whole community. The fact is that the modern historiography takes a less suspicious attitude towards the Roman tradition. H. LAST, for example, concludes that the names of all Roman kings, except Romulus', are authentic. According to him, there were more kings than the tradition mentions, but only the names of the last seven were preserved. *Cambridge Ancient History*, VII, Cambridge, 1928, 370ss.

15) WIEACKER, *Die XII Tafeln in ihrem Jahrhundert*, Entretiens, 13 (1967), 293.

imperio, adrogatio and *testamentum calatis comitiis* – expressed the opinion that the *lex publica* had originally as a rule a casuistic character, so that *leges regiae* could not be considered as the laws for they presented only the rules of a general character ([16]). According to him, the primitive legal consciousness has no ability for establishing general norms, so that in the case of Rome the necessary attributes were not achieved until the regulations of the XII Tables ([17]). That is why KASER reduces the law of the kings exclusively to sacral regulations which the pontiffs "in a time in which legal thinking was advancing, partly even in the time of the kings" abstracted from the concrete individual cases, giving them validity by the power of their authority, so that it was not necessary to confirm them by the *comitia* or by the collective taking of an oath, as in the case of the *leges sacratae* ([18]).

Similar conclusions, reached by a completely different approach, were expounded by MAGDELAIN ([19]). He thinks that the imperative mode of expression, before becoming an attribute of the *lex publica*, was the language of the sacral books of

16) *Das altrömische Ius*, Göttingen, 1949, 65.

17) *Op. cit.*, 66.

18) However, KASER doesn´t think that the activity of the *comitia curiata* was limited to sacral matters and that the beginnings of the secular legislation should be connected with the *comitia centuriata*; on the contrary, for him, there are strong reasons that support the thesis that the centuriate order should be put in the fourth century B.C., so that the *comitiatus maximus* from the XII Tables (Cic. *de leg. 3,4,11*) relates to the *comitia curiata. Loc. cit.* On that see: DE MARTINO, *Storia della costituzione romana*, I^2, 191.

19) MAGDELAIN, *La loi à Rome. Histoire d'un concept*, Paris, 1978.

pontifices and *augures*, i.e. that it was in a broader sense connected with *ius pontificium*, *ius augurium* and *ius fetiale*. According to him, it was just that particular oldest fund of the pontifical archives that should be later falsely referred to kings and designed as *leges regiae*. MAGDELAIN assumes that many of them have not the attributed antiquity, but that this is not the case with the texts using archaic constructions of speech in the imperative form, as in *sacer esto, pa(r)ricidas esto, aram Iunionis ne tangito* etc. Those sacral texts, however, did not represent the "laws", and even less the "regal" ones, but would be only later ascribed to them by way of historical forgery ([20]). This is, actually, the case with *libri pontificii* or *libri augurales* in which the imperative is used even when they don't have a regal origin. Their normative contents were not accessible to the public, and the essential attribute of the term *lex*, as seen by MAGDELAIN, is that it had to be made public: "*Lex* represents *ius* which was made public by solemn proclamation and written announcement" ([21]). On the other hand, however, he does not deny the very existence of the *lex* institution in the time of the kings, but recognizes its presence in the examples of the public announcement of the norms that did not have the form of general regulations, but were limited to special cases – such as the treaty with another city (*leges* as *foedus*), the statute of the temple (*leges templorum*) or the procedure concerning census (*lex censui censendo*), not excluding the existence of other normative

regulations originating from the *rex*, besides those carrying the unmerited title of *leges regiae* ([22]). This logical presumption is, however, still less provable than the others.

What is even more difficult to accept in this author's reflections is the methodological approach he uses while analysing the texts of the "kings' laws": he is primarily, if not

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20) *Op. cit.*, 24, 86.

21) *Op. cit.*, 25.

22) *Op. cit.*, 62, 87.

exclusively, interested in their formal linguistic attributes. However, proceeding from the contents of the preserved texts, the statement, not uncommon among other authors, that the name *leges regiae* covers only the remains of the ancient sacral law preserved in sacred books of the *pontifices* and *augures*, becomes problematic. It is true that a certain number of regulations relates to the religious field, but the part encompassing the norms that could be assigned to the terms "public" and "private" law is not so insignificant.

It particularly relates to "legislative" activities by Romulus: to him was attributed the partition of patricians and plebeians, as well as the establishment of the rights and obligations belonging to them in the political field, by giving the patricians priestly and magisterial functions as well as functions concerning the passing of the judgments; he had ordered the establishing of an advisory body with 100 members from the patrician order that would administer the state affairs, and had authorized the senate's council (*consilium senatus*) to make decisions on any matter the king may have delegated to that body; the *rex* himself had taken

care of the cults, protected the laws and customs of the city and shared the administration of justice with the senate, convoked the popular assembly and had all authority in the war; he had permitted the people to choose magistrates by voting inside of the *comitia curiata*, to ratify laws, and to decide on war whenever the king left the decision to them; he had also established the right of patronate: the patricians should interpret the law to their clients, engage in a lawsuit for them, help them in case of some injustice, attend the making of a contract, while, on the other hand, the clients should help their patron to provide a dowry for their daughters, pay the ransom for him if he or his children were held captive, pay his debts if the patron has been sentenced to pay a compensation in a private lawsuit or to pay his public tributes, not to witness one against the other, nor to vote differently; he had established the lifelong and complete power of the *paterfamilias* over his sons, which he could imprison, flog, sell and even kill; he could drive away his wife if she poisoned the children, lifted her toga or committed adultery ([23]). The name of Romulus is connected with the regulations for alotting *bina iugera* ([24]) and with land assignation (*divisio agrorum*) ([25]).

The laws of the kings attributed to Servius Tullius are also related to what we would call today “civil rights”: he had divided

23) Dion. Hal. *2,9,1*; *2,10,1*; *2,12-14*; *2,15,1*; *2,21,22*; *2,25,1*; *2,25,6*; *2,26,27*.

24) Varro, *de re rust. 1,10,2*. Plin. *nat. hist*. *18,7*.

25) Dion. Hal. *2,7,4; 2,28,3*. Cic., *de rep. 2,14,26*. The similar thing was done by Numa Pompilius. Dion. Hal. *2,62,4;* Plut. *Numa*, 16.

the population according to property census in *classes* and *centuries*; he had enabled manumitted slaves to become *cives*, divided them into four city tribes and had registered them in the censors' list etc. ([26]).

Taken into account the given facts, we could deduce that the contents of these regulations have very little in common with religious law, and that the linking of the *leges regiae* exclusively with the category of ancient *ius sacrum* is not so obvious as it pretends to be ([27]). It is true that the sanctions for disrespecting some of the norms consisted in the ritual sacrifice of the culprit or in some other religious sanction, but it still doesn't affect their "secular" character. When the ancient writers speak of the sacral law in the period of the kings, they obviously include in that term regulations that could be better classified in the category of "private" or "public" law. It only goes to show that the archaic society still has not developed the compulsive mechanism that would base its authority on something else besides the religion itself.

Indeed, we cannot exclude the possibility that some "laws" with an outstanding sacral and archaic character really did have

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26) Dion. Hal. *4,13*; *4,14*; *4,22*; *4,25*. Cfr. Liv. *1,42,5*.

27) BOTSFORD, *The Roman Assemblies*, New York, 1909, 181: "The body of *leges regiae*... was little more than the *ius pontificium* – the customary religious law". DE SANCTIS, *Storia dei Romani*, I, Torino, 1907, 300 also takes as unquestionable that *leges regiae* were in fact sacral norms that were attributed to kings ("al fondatore di Roma, al saggio re Numa, al popolare Servio Tullio") only in order to obtain greater authority. Same: WESTRUP, *Introduction to Early Roman Law*, IV/1, London-Copenhagen, 1950, 56.

their origin in the oldest pontifical collections – *libri (commentarii) pontificii*. To quote some examples, the regulation of the sacrifice to the ancestral deities of a son who beats his father ([28]), or of the sacrifice to Juppiter Terminus of anyone who plows up a boundary stone together with his oxen, points to the old age of those regulations and their obvious connection with religious regulations ([29]). The same applies to the laws of Numa on the length of grieving for the dead depending on the age of the grieved person ([30]), the prohibition of burial for pregnant women ([31]), the obligation of the lamb sacrifice in case a concubine (*paelex*) has touched and so defiled the altar of Juno ([32]), the prohibition of sprinkling wine over the stake ([33]), the treating of the body of person struck by a thunder ([34]), and similar regulations. It is quite possible that some of them were preserved in the codification of the decemvirs, especially on the tenth table

28) Festus, v. *plorare.*

29) Dion. Hal. *2,74,2-3*. Festus, v. *Termino.*

30) Plut. *Numa, 12*.

31) Marcellus, *l. 28 digestorum* (D. *11,8,2*).

32) Festus, v. *paelex*. The very term, belonging to the oldest vocabulary of the Roman language, could point to the antiquity of this precept. Cfr. TONDO, *Leges regiae e paricidas*, Firenze, 1973, 56ss. This author mentions other archaisms in *leges regiae*, e.g. *aliuta, ast, estod, ipsos*, *olle, pa(r)ricidas, plorassit, uerberit* etc.

33) Plin. *nat. hist. 14,12,88*.

34) Festus, v. *occisum*. In this case even two variants of the same law were preserved. BRUNS, *Fontes*, 8. It is believed that the formulation "*hominem fulminibus occisit*" reflects "*la maggiore antichità*". TONDO, *op. cit.*, 66ss.

where we find collected the ancient rules related to the burial ceremony.

Consequently, the possibility that even the kings' laws were not limited to the norms related to religious ritual, but gave some authority to the *rex*, senate, assembly, or chief of the family, should not be completely dismissed. However, from the historical point of view, it is totally unacceptable to attribute to Romulus the establishing of *curiae*, distribution of public services among patricians and plebeians, or even the establishing of division between "the mighty and the subjugate" ([35]). The forming of social strata in archaic communities does not originate by the sheer will of some powerful individuals, but is the result of the economic strength of certain social groups and as a rule happens gradually through a long period of time. The ancient writers frequently sublimate such process in a kind of big "reform", that is later related to real or legendary persons of high standing ([36]). The establishing of the magistratures also could not be attributed to Romulus because it was effectuated no sooner than in the period of the Republic. The law of Tullus Hostilius, determining that anyone to whom are born triplet sons (*trigemini*)

35) Dion. Hal. 2,9: "*potiores ab inferioribus secrevit*".

36) The Greek tradition abounds with lawgivers credited with fundamental social reforms and the establishing of the new legal order: Minos in Crete, Lycurgus in Sparta, in Athens Theseus, Draco, Solon, Clisthenes, and many others. Cicero talks about them when he – quoting Cato – proudly emphasizes (*de rep. 2,1,2*): "*nostra autem res publica non unius esset ingenio, sed multorum, nec una hominis vita, sed aliquot constituta saeculis et aetatibus*". Also: Liv. *3,26*. Cfr. DE FRANCISCI, *Arcana imperii*, II, Milano, 1948, 29ss. ORESTANO, *I fatti di normazione nell'esperienza romana arcaica*, Torino, 1967, 76.

will get public aliment up to their maturity ([37]), provokes some doubt being well known that the relations inside the family stayed out of the reach of the public authorities for a long time. Servius Tullius is attributed with no less than fifty laws on contracts and delicts and, allegedly, with dividing *iudicia publica* from *iudicia privata*, i.e. he separated criminal cases from private lawsuits in such way to retain the first lawsuits for himself, and leaving the latter to the chosen judges from the people ([38]). However, it is hard to imagine that in the course of time that the tradition qualifies as a primitive one, such a great number of laws was already created by the one and only ruler, relating to the regulation of contractual and delictal obligations; such number of laws on this matter has even not been created during the whole period of the Roman legal history ([39]). It is really probable that we are dealing here with anticipations of later republican institutions whose origin was not known to annalists and classical historians and that they attributed them to the "good" king Servius Tullius. He is mainly credited with all democratic ideas that reform the monarchy power in the interest of the people, while Tarquinius Superbus as his extreme opposite is known as the king who abolished such laws by force.

37) Dion. Hal. *3,22.*

38) Dion. Hal. *4,13*; *4,25*.

39) PACCHIONI, *Corso di diritto romano*, I, Torino, 1918, 13. ROTONDI, *Leges publicae populi romani*, Milano, 1912, 50, n.1.

3. *Pro legibus regiis.*

The fact is that there is ample evidence in the Roman tradition witnessing the active role of the Roman kings in the organization of social relations in ancient time. That is why it is hard to deny completely the authenticity of all the informations, particularly those left to us by the writers of the juridical and literary books on *leges regiae* ([40]). It is more difficult to imagine that rather long period of the *regnum*, encompassing almost two and a half centuries, without the existence of any legal norms originating from the *rex* himself. It is certain that the basis of the Roman social life in the oldest times was formed by old customs and religious norms that "told the individual what to do and what not, so that he could live in peace with his deities" ([41]). However, according to many authors, that does not exclude the possibility of making the norms that would confirm the existing customary law by carrying out the "judiciary" function of the *rex*, as well as the existence of regulations made by the king independently of the former *mores* – whether with the help of the assembly, or by authoritative imposition to the people.

40) Cfr. VOIGT, *Über die Leges regiae*, in *Abhandlungen der philologisch-historischen Classe der königlichen sächsischen Gesellschaft*, VII, Leipzig, 1876, 557-825. In this work its author was among the first who tried to defend the authenticity of *leges regiae,* confronting the uncritical rejection of the Roman tradition, especially those coming from Dionysius of Halicarnassus.

41) KASER, *Das altrömische Ius*, 66.

The standpoint giving credit to the king for establishing a certain group of norms by which were regulated the basic relations of common life in the ancient Roman community, no matter how rudimentary or primitive those regulations have been, is held by F. SERRAO ([42]). He is trying to find the reasons for this phenomenon in a larger historical context inside which *leges regiae* make their appearance, giving thus a new dimension to the discussion. SERRAO stresses the point that great changes inside the social structure of the Roman society were brought about under Etruscan influence: the ancient community with federal character (made of *familiae* and *gentes*) was gradually replaced by the unitary social structure resting on the idea of free and equal individuals, i.e. on the category of the *populus Romanus*. That was the way for establishing the dominance of the ideology of an unitary community supported by its members (*plebs*) who were not satisfied with the domination of powerful clans' families (*patres*) in whose hands were already concentrated political, military and religious power. The *rex* now takes over some new and specific characteristics defined by the changed situation in the Roman society: he is no longer the *rex* of the *gens*-federation but the *rex* of one *civitas* whose social base rests on the *populus*. On

42) SERRAO, *Classi, partiti e legge nella repubblica romana*, Pisa, 1974, 17-21. The conclusion of this author is worth mentioning because it is based on the consistent use of the dialectic-materialistic method, which as a rule leads to a complete negation of the *leges regiae.* As an adherent of this approach, DE MARTINO, *op. cit.*, 101, also believes that the function of the king resulted from the need of strong central power which would fortify the federal community of citizens (*cives*), against the centrifugal tendencies of primitive gentes (*plebs*) – but in his final conclusion rejects any possibility of the kings' legislative activity.

the basis of that, the author concludes that the fixed practice and legal customs were gradually formed by uniform activities of the *rex*, leaving no reason to doubt that the former *ius*, originating from the old customs of gentiles (*mores*), was later accompanied by the normative activities of the kings (43). SERRAO is of the opinion that the *leges regiae* rested exclusively on the authority of the *rex* and that the population did not take part in their creation, but he gives no argument for that statement (44).

Therefore, according to this standpoint, while executing his power the *rex* was creating the norm at the same time he was applying it, which is very close to the idea of R. ORESTANO on the "factual creation of the law" in ancient Rome (45). This author proceeds from the category of "*fatti normativi*", understanding them as the facts having by themselves (and not on the basis of some already existing regulations) the ability to effect the establishing, completing or changing of a certain "legal order" (46). In his opinion, *ius* in the beginning does not represent some determined normative system, but means the action in the sense of "the valuation of each concrete set of facts" (*valutazione di singole fattispecie*) on the basis of which the *rex* makes his

43) SERRAO, *op. cit.*, 19-20.

44) SERRAO, *op. cit.*, 21.

45) ORESTANO, *I fatti di normazione*, cit., 69.

46) ORESTANO explicitly remarks that he does not regard "legal order" as a set of positive norms, but as a legal reality in its totality, i.e. he inclines to a "institutional" instead of a "normative" meaning of this notion. *Op. cit.*, 21ss. ID., *Concetto di ordinamento giuridico e studio storico del diritto romano*, Ius 13 (1962), 33ss.

decisions; *ius* comes from the analysis, from case to case, of the specific elements in each individual "situation" (*situazione*). From there results the fundamental importance of his power to *ius dare*, which is realized in the moment of applying the act of "revelation" (*scoperta*) of said elements and their proclamation. The idea that he who applies the law in the concrete case must limit himself with applying the abstract norms only, is according to ORESTANO related to a much later period, to the law practice in the time of the Principate ([47]). In that long period of time the concept of *lex* was transformed: it did no longer represent the unilateral act imposed by his creator (*atto d'imposizione unilaterale*), but was seen as a result of a specific procedure in which took part exactly the same persons that the law regulations apply to (*atto bilaterale*) ([48]). The most ancient law rests exclusively on the unilateral appeal drawing its strength from the personal charisma of the person who *legem dicit*, as well as from the necessary attributes of the very proclamation: precised form, specified place and the fixed time of its pronouncement. In such a way the spoken word gets the "*creative force*" (*forza creatrice*) and becomes itself "*parola creatrice*" ([49]). It means that the constitutive power of the word is not connected only with the

47) *Op. cit.*, 176ss.

48) *Op. cit.*, 185ss.

49) *Op. cit.*, 189ss.

religious activities of the *rex*, because its effects are also reflected in the social and legal realities ([50]).

The conclusions of ORESTANO do not greatly differ from those exposed earlier by Ugo COLI in his well known study dedicated to the Roman *regnum* ([51]). In spite of a different methodological approach, he too has no doubts about the existence of *leges regiae*, and their unilateral character, as well as about the "constitutive power" of the *rex*. He finds no controversy in the fact that *leges regiae* were by their character the *leges datae*, i.e. in that the king imposed them on his subjects in the same way as the magistrate did on those defeated in the war ([52]). Moreover, this is in complete harmony with the institution of *regnum*, because the people would only by becoming *liber* in the time of the Republic take part in passing of *suae leges* and live by them ([53]).

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50) Alla credenza in questa *forza* della parola si ricolegano molteplici *situazioni* archaiche, in cui alla parola pronunziata si attribuiva un potere *costitutivo* di effetti, di modificazioni, di creazioni, sia nella sfera più propriamente religiosa che in quella sociale e giuridica", *op. cit.*, 192-193.

51) COLI, *Regnum*, SDHI 17 (1951), 1-168.

52) *Op. cit.*, 112. Same: MOMMSEN, *Droit public romain*, VI/1, Paris, 1889, 353ss.

53) *Loc. cit.* Such attitude is based on his specific vision of the oldest Roman society: "All'antica monarchia il re era *omnis potestas*, *vitae necisque potestas*, e tutti indistintamente, all'interno del regno, erano *in potestate* (*dictione, arbitrio*) del re" (p.109); "Chi è *in aliena potestate* non può che subire la legge che gli è imposta. Chi, invece, è *in sua potestate* subisce soltanto la legge che egli medesimo si pone. Il popolo nella repubblica è *in sua potestate* e quindi esso soltanto può porre *leges* a se medesimo e alla *sua res* (*res populi*)" (p.114). It is obvious that COLI explaining the organisation of the Roman *regnum*, relies on the parallel with the family community whose chief was the *pater familias*. It is interesting that the same attitude is shared by those authors absolutely rejecting the posibility of the existence of *leges regiae* – e.g. GIRARD (*Droit romain*, 13), who presents this parallel in a very vivid way: "Le roi (*rex*)... est à la tête de la communauté romaine à peu près comme le *pater familias* à la tête de sa maison. Il a comme lui un pouvoir absolu et viager. Soit personnellement, soit par ses préposés, il dirige la cité comme lui sa maison. Il est le chef des citoyens, notamment des citoyens en armes, de l'armée, comme le père est le chef de sa famille. Il est chargé du culte de l'État comme lui du culte de sa maison. Enfin il est juge dans la cité comme lui dans sa maison, et l'on peut même remarquer que, si sa juridiction est à la fois civile et criminelle, c'est encore la juridiction criminelle qui pour lui se détache le mieux". Into that picture fits also the claim of Pomponius (D.*1,2,2,2*) according to which: "*initio civitatis*

COLI, however, devotes much more attention to the clear explanation of the difference between the "legislative" and "judiciary" activities of the *rex*, i.e. to the more precise definition of the meaning of the terms *dare leges* and *dare iura* in ancient Roman law. Though the available sources do not make a clear distinction between them (54), COLI believes that it would be much too simple to identify *dare iura* with the activities of the judge in the classical period. He points to the fact that in the primitive communities the king as a rule had a judiciary function, but finds symptomatic the avoidance of terms *iudex* and *iudicare* in the Roman sources in connection with the activities of the *rex*. That is why COLI disagrees with the opinions of some romanists (GUARINO, LUZZATTO, GIOFFREDI) who uncritically attribute

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nostrae... omnia... manu a regibus gubernabantur". On the meaning of the term *manus* in this fragment, cfr. ORESTANO, *Fatti di normazione*, cit., 77ss.

54) *Op. cit.*, 114. In such a case COLI takes as an argumentation the testimony of Livy (*1,8,1*): "*(Romulus) vocata ad concilium multitudine, quae coalescere in populi unius corpus nulla re praeterquam l e g i b u s poterat, iura dedit*", and the verses of Vergilius (*Aen. 1,507*): "*iura dabat legesque viris*", (*Aen. 7,246*): "*cum iura vocatis more daret populis*", and others.

the expression *ius dicere* to the Roman *rex* ([55]). To the archaic concept of *ius*, this author opposes the category *vis*, supposing that the primal social norms had their basis exclusively in the imposition by force – they were established by the strongest one in that environment. That unlimited force shall be restricted with the appearance of *ius* which follows the establishing of peace and order wherein "the weak and subjugated shall seek their salvation" ([56]). When the king applies *dare iura*, he actually proposes the solutions for the concrete cases, thus preventing *vis*, on the bases of his own evaluation and without established norms or formerly consolidated principles. COLI also points to the absolute analogy with the acting of the *paterfamilias* inside his own family. This "judgement" of the king, however, does not exhaust the contents of the term *dare iura*. The solutions that the *rex* finds for the concrete cases, may also be formulated as norms of a more general character (*precetti generali*) by which the

55) *Op. cit.*, 115. Cfr. DE MARTINO, *Storia della costituzione romana*, I[2], 121. This author believes that the exertion of the judicial power, religious cults, the establishing of the law and its interpretation were committed to sacerdotal organs consisting of patricians, i.e. the college of pontiffs. An absolutely different attitude is taken by CAPOGROSSI who assumes that the authority of the supreme judge (*giudice supremo*) was the exclusive prerogative of the *rex*, independently of his priestly functions. According to him, "*precedentigiudiziari*" presented in great part the basis for the later normative activity of the king, who used *legesregiae* to organise not only the religious life but also the "private" relations between individual *patres.* The colleges of pontiffs were in fact auxiliary organs of the *rex*, directly depending on his initiative and authorities. So, the author sees in them only "un strumento della memoria e della sapienza politica e religiosa della città". CAPOGROSSI, in TALAMANCA, *Lineamenti di storia del diritto romano*, Milano, 1979, 30ss.

56) *Op. cit.*, 115.

notions *dare iura* and *dare leges* are mutually confronted. COLI is of the opinion that *ius* in the time of the kings still does not represent the *law* in its abstract meaning, but rather thinks that in the beginning really exist "so many *iura* as many concrete decisions have been made by the king". He allows the possibility that those decisions were later consacrated by *mos maiorum*, but only after the *rex* had given them the juridical character (*giuridicità*), designing by himself what is *iustus* and what is not. There lies the difference between him and the magistrate who *ius facere non potest* ([57]). With this explanation, COLI moves away from the seemingly similar solutions proposed by other romanists. Thus, for example, even though KASER identifies archaic *ius* with the judgements made by the king in individual cases (*Fallrecht*), he denies the customs any role in the creating of the *ius* ([58]). On the other hand, DE FRANCISCI also finds the source of the oldest *ius* in the judgements of the king, but he explains them as an interpretation of a "transcendental superorder" created by the deity ([59]). COLI, however, thinks that *fas* is the emanation of the divine will, while the *ius* is the creation of the secular power: *fas* reflects that which is permitted (*lecito*), and *ius* that which is just, correct (*giusto*) ([60]).

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57) *Op. cit*., 116-117.

58) KASER, *Das altrömische Ius*, 35ss.

59) DE FRANCISCI, *Arcana imperii*, III/1, 130ss.

60) *Regnum*, 121. This author, however, does not deny the religious character of the oldest law, because for him that fact does not imply its divine origin: "Il sacerdote è pur sempre un mortale, anche se è al servizio degli dei" (121, n.102). On the relation between the oldest Roman law and the religion cfr. ORESTANO, *Dal ius al fas*, BIDR 46 (1939), 194ss. KASER, *Religione e diritto in Roma arcaica*, Ann. Catania 3 (1949), 77ss.

4. *Ius Papirianum.*

If the very existence of *leges regiae* is not suspected, there are further questions as to whether and in what way was carried the announcement of these laws, i.e. how they were transmitted to later generations – whether by oral tradition or by means of writing? Those romanists who categorically deny the existence of any written norms in the time of the kings, consider the XII Tables as the first written text of law in the Roman history. The fact that its proclamation was made only after persistent pleas of the plebeians is taken as a strong argument in favor of this thesis ([61]).

The literacy among the Romans, however, is not so late an advent as is sometimes insinuated ([62]), and this is corroborated by recent archeological findings ([63]). This is also confirmed by

61) GAUDEMET, *Institutions de l´Anti*quité, Paris, 1967, 382.

62) E.g. GIBBON, *The Decline and Fall of the Roman Empire*, London, 1776-1788, chap. 44, 1663, n.2, sees the oldest Rome as an "illiterate city" and denies any veracity to the written documents from that period. On the basis of a detailed linguistic analysis, a completely different conclusion is reached by PERUZZI, *Origini di Roma*, II, Bologna, 1973, *passim*.

63) ERNOUT, *Recueil de textes latins archaïques*^{2} , Paris, 1966, 3ss.

the famous *Lapis Niger* (*Cippus Romanus*) excavated 1889 on the Roman Forum near the alleged tomb of Romulus and close to the place where the *curiae* were assembled for the voting (*comitium*) – due to its archaic inscription the stone has been often dated back to the regal period (64). In spite of severe damage and the unintelligibleness of many words, some investigators do not reject the possibility that it is indeed the oldest legal text (65). Even the claim of the plebeians to have the

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64) PALMER, *The King and the Comitium – A Study of Rome's Oldest Public Document*, Wiesbaden, 1969, 51ss. This conclusion is justified by the very characteristic ancient way of writing in the form of spiral (so called *bustrophedon*), the archaic linguistic style, the type of the letters, but also the term *rex* which is mentioned twice in the text. Some authors, however, connect this word with the title *rex sacrorum* (*sacrificulus*) which was held by the *pontifex maximus* in the beginning of the Republic. Cfr. GIRARD, *Organisation judiciaire des Romains*, I, Paris, 1901, 29ss. MOMIGLIANO, *Il 'rex sacrorum' e l'origine della repubblica*, Studi Volterra 1(1971), 357ss. Nevertheless, the recent archeological excavations confirm that the uppermost stratum of the soil beneath the surviving foundations contains no material later than the sixth century B.C., from which we can conclude that this inscription does belong to the regal period, and that the word *rex* refers to one of the last kings reigning "not very long after the original inauguration of the Forum as a public place (*c.* 575)". GRANT, *Roman Forum*, London, 1974, 53. It is believed that the said inscription is commented by Festus (184L.): "*Niger lapis in Comitio locum funestum significat, ut ali, Romuli morti destinatum, sed non usu ob (...Fau)stulum nutri (... Host)tilium avum Tu(lli ...) cuius familiae (...)tionem eius*".

65) JOHNSON, *Ancient Roman Statutes*, 5: "The Black Stone... may contain some laws of a very early period". The same attitude is taken by GRANT (*op. cit.*, p.50): "The inscription found beneath the black marble... clearly represents a piece of ritual law‹" On the very contents he concludes: "...the opening words are translatable as a warning that a man who damages, defiles or violates the spot will be cursed. One reconstruction of the text interprets it as referring to the misfortune which could be caused if two yoked draught cattle should happen, while passing by, to drop excrement simultaneously. The coincidence would constitute a perilous evil omen". Unfortunately, he gives no argumentation for this interesting reconstruction, neither he points to its author. In contrast to him, PALMER has made a very detailed analysis of every recognizable word and comparing this text with other preserved inscriptions, has given a more serious reconstruction of the contents of this law – dating it back to the very end of the sixth century B.C.: "*Whosoever (will violate) this (grove), let him be cursed. (Let no one dump) refuse (nor throw a body...). Let it be lawful for the king (to sacrifice a cow in atonement) (Let him fine) one (fine) for each (offence). Whom the king (will fine, let them give cows.) (Let the king have a---) herald. (Let him yoke) a team, two heads, sterile... Along the route... (Him) who (will) not (sacrifice) with a young animal...in...lawful assembly in grove...*" (*op. cit.*, p. 49). Contrary: COSTA, *Storia delle fonti del diritto romano*, Torino, 1909, 2, n.3: "...senz'altro rimane certissimo che nulla in essa [i.e. *niger lapis*] accena ad una vera e propria legge".

existing law in a written form does not of necessity lead to the conclusion that the laws could not have been written by the pontiffs themselves (66). It does not mean, however, that the laws were already made in the written form, but is giving us the information on the way they were kept by them from oblivion. It seems that the tradition has confused these two things.

Dionysius of Halicarnassus claims that the greater part of the laws of Romulus were not written down, but that some of them – perhaps the most important ones – were reduced to writing (67). He also states that king Ancus Marcius received from the pontiffs the commentaries on religious rites which were composed by Numa and that he transcribed these sacred laws on the wooden

66) WESTRUP thinks that the records made by different priests, especially by *pontifices*, had to be made by the middle of the sixth century B.C. He finds the reason for that in their way of organising in colleges and in the lifelong functions, so that the early practice of recording made them in general less exposed to the temptation of making deliberate falsifications. WESTRUP, *op. cit.*, IV/1, 21ss. All arguments quoted here, could refer to the eventual legislation from that period.

67) Dion. Hal. *2,24,1*; *2,27,3*.

plates which were set up in the Forum (68). Since the tables in the meantime were destroyed, after the expulsion of the kings they were multiplied again for the public's use by the *pontifex maximus* called Gaius Papirius (69). Cicero also mentions *leges Numae*, commenting that Numa's sacral laws had still existed and had been effective in his time (70), while his contemporary Varro (according to fragments saved by Festus) confirms the existence of "*(Numae) Pompilii regis leges*" (71). It should be recalled that Livy, speaking of the year 389 B.C. when Rome has been conquered and plundered by the Gauls, mentions the order to collect all treaties (*foedera*) and preserved laws, meaning by that "*duodecim tabulae et quaedam regiae leges*". He explicitly states that some of these laws were made public (*edita in vulgus*), while the regulations concerning the cult were kept secret (*suppressa*) by the pontiffs (72). Pomponius also states that the

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68) Dion. Hal. *3,36,4*. Same: Liv. *1,32,2*: "*(Ancus Marcius)... ea ex commentariis regis pontificem in album relata proponere in publico iubet*".

69) Dion. Hal. *3,36,4*. On the other place, however, Dionysius calls him *Manius Papirius* and attributes him the title *rex sacrorum* (*5,1,4*).

70) Cic. *de rep. 2,14,26*; *5,2,3*.

71) Festus, v. *opima spolia*. BRUNS, *Fontes*, II, 19. In Liv. *40,29* are also mentioned *libros Numae Pompilii* which contain *ius pontificium*. They were, allegedly, found by chance on the plot of the public scribe Lucius Petilius, by his cattle driver who was ploughing in the foothill of the Janiculum. He excavated two stone coffins, one inscribed as a tomb of Numa, the second one as a shrine with his books. The first was completely empty, while the other one contained two sealed packs of books: seven in Latin on pontiffs law, and seven in Greek on Pythagorean philosophy. This event is commented by other ancient writers: Varro, *de cultu deorum*, fr.42; Plut., *Numa*, 22; Plin., *nat. hist*. 13,13, 84-87; August., *de civ. dei*, 7, 34.

72) Liv. *6,1,10*. WESTRUP, *op. cit.*, IV/1, 51, n.6, emphasizes that this place is similar to the testimony of Cicero (*de leg. 2,7,18*): "*veteres duodecim sacrataeque leges*". However, it is disputable whether in this case it is possible to identify *leges regiae* with *leges sacratae.*

laws of the kings were collected in one book called *ius civile Papirianum* already in the time of Tarquinius Superbus (73), and in the *Saturnalia* the grammarian Macrobius claims, two centuries later, that this collection is still in use (74).

The discussion on the authenticity of this collection, its authorship and origin, goes on in romanist literature since a very long time. According to some, this compilation has positively existed by the end of the Republic because it was commented on in *De iure Papiriano* by Granius Flaccus, who was most probably a contemporary of Caesar (75). Others consider it older, dating it

73) D.*1,2,2,2*.

74) Macrob., *Sat*. *3,11,5*: "*Ego (Praetextatus) autem quod mihi magistra lectione compertum est publicabo. In Papiriano enim iure evidenter relatum est, arae vicem praestare posse mensam dicatam*". BRUNS, *Fontes iuris Romani*, I[7], 3.

75) Besides Paulus (D. *50,16,144*), the same name is mentioned by Censorinus (*de die natali 3,2*) who claims that certain Granius Flaccus wrote a book *de indigitamentis* and dedicated it to Caesar, the dictator and *pontifex maximus*. As it contains the list of the Roman gods, their titles, as well as the appropriate religious *formulae* for addressing them, he concludes that the very same person could be interested in collecting the sacral law from the regal period. Cfr. WESTRUP, *op. cit.*, IV/1, 49. CARCOPINO thinks that this collection was made between 46 B.C., when Cicero wrote the letter to his friend Papirius Paetus (*ad familiares, 9,21*) from which could be seen that he does not know the *ius Papirianum*, and 7 B.C., when Dionysius published his *Antiquitates Romanae.* CARCOPINO, *Les prétendues "loisroyales"*, MAH 54 (1937), 361, 368ss. SCHULZ remarks that Granius Flaccus could not invent the norms he commented on in his work, because the college of pontiffs – of which he was not a member – would certainly discover such a fraud. SCHULZ even presumes that the collection of the *leges regiae* made by Papirius in the time of the expulsion of the kings, were arranged for public use by Flaccus with the help of the pontiffs themselves, who have kept those ancient laws in their archives. SCHULZ, *Storia della giurisprudenza romana*, Firenze, 1968, 163-164.

back in the second or the very end of the third century B.C. (between the last two Punic wars), when it was allegedly collected by members of the famous *gens Papiria* who took advantage of the publishing of the sacral law and the opening of the pontifical college for plebeians (76). Some authors regard *ius Papirianum* as identical to *lex Papiria*, whose origin is related to the activities of the tribune Quintus Papirius from the fourth century B.C. (77). For some of them, however, *ius Papirianum* is an ordinary apocryphal text, as Papirianus himself is an imaginary person. Favouring such claim is the fact that the sources attribute different *praenomina* to the author (*Sextus*, *Publicus*, *Manlius*, *Gaius*) and that Pomponius makes him contemporary of Tarquinius Superbus, while Dionysius makes him *pontifex maximus* by the beginning of the Republic (78). Incorrectness in testimonies of ancient writers is not such a rare occurrence and these arguments by themselves would not be

76) PAIS, *Ricerche sulla storia e sul diritto pubblico di Roma*, I, Roma, 1918, 243-270.

77) PAOLI, *Le "ius Papirianum" et la loi Papiria*, 11ss. Against said identifying is DI PAOLA, *Dalla Lex Papiria al Ius Papirianum*, 631ss. He believes that the *lex Papiria* (Cic. *de domo*, *127*) should have to be datedafter 287. B.C. (640ss) and that this *lex* represents only the base on which the whole series of norms connected with the sacral ritual in *dedicatio* were grouped. Later, this complex of public and sacral norms will take the name *ius Papirianum*, according to said law, and only after that would the tradition fabricate the legend of Papirius as the author of the collection of *leges regiae* – mentioned for the first time by Dionysius of Halicarnassus (646ss).

78) WESTRUP, *op. cit.*, IV/1, 52.

sufficient for the complete rejection of the authenticity of the collection called *Ius Papirianum.* Even if it was considered highly questionable, that would not necessarily mean that the *leges regiae* themselves were apocryphal texts (79).

In recent romanist literature there are more studies that are free of the exaggerated criticism in relation to the old Roman tradition and are more disposed to rely on the evidence it offers. In the case of the *leges regiae* such approach is most distinct in the studies of S. TONDO, who defends not only the authenticity and antiquity of the collection *Ius Papirianum* but concludes that it contained exclusively the laws of Numa and none of the other Roman kings, and that it should by no means be confused with the later compilation having a similar name, i.e. the *lex Papiria* which he also locates in the third or the second century B.C. (80). This author expresses no doubts about the fact that the *libri Numae* were originally written on wooden tablets, later included in *libri pontificii* and afterwards probably enriched in contents by the priest activity (81). TONDO thinks that the scepticism related to the testimonies of Dionysius and Livy could be qualified as *"un' inveterato pregiudizio"* (82), on account of wich some critics

79) DIRKSEN has the merit of being the first who clearly and resolutely separated the question of the authenticity of *Ius Papirianum* from that of the genuiness of the individual *leges regiae.* DIRKSEN, *op. cit.*, 323ss.

80) *Leges regiae e paricidas*, 35-55. Cfr. DI PAOLA, *Dalla Lex Papiria al Ius Papirianum*, 646ss.

81) *Op. cit.*, 23. Cfr. Liv., *1,20,5*.

82) *Op. cit.*, 38.

accuse him of methodological "fundamentalism" ([83]). However, the fact remains that it is hard to contest the thorough knowledge of this romanist in examining some questions generally ignored by other scientists, and especially his exhaustive analysis of the facts about the original recording of *leges regiae* and their preservation during a long period of time ([84]).

Among the authors giving credibility to the testimonies of Dionysius we should mention A. WATSON ([85]). His approach to the analysis of the testimonies relating to *leges regiae* is very specific and unusual for a romanist. WATSON is focusing his investigation to key institutions of the archaic Roman law, the patronate and the power of the *paterfamilias*, as described by Dionysius, and boldly compares them with similar institutions in medieval English law and the oldest Greek law! Using comparative methods, this author comes to the conclusion that there is a great resemblance in the regulation of relations between clients and patrons in the *leges regiae* and the character of vassal relationship of lord and dependant in feudal English law of the thirteenth century. By this comparison he wanted to prove that

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83) COULD, IVRA 27(1975), 153. This author thinks that TONDO uncritically accepts the testimonies of the tradition according to which the literacy was "nozione corrente già all'epoca d'Amulio e Numitore" (p.16) and that Romulus and Remus in their youth were instructed in Greek grammar (Dion. Hall. *1,84,5*; Plut. *Romulus 6,1*). He rightly suspects the existence of any texts before the invention of the alphabet and the closer connections of the Romans with Greek and Etruscan cultures.

84) Even his most severe critic concludes: "TONDO's defence of antiquity of the *Ius Papirianum* seemed to me convincing". COULD, *loc. cit*.

85) WATSON, *Roman Private Law and the "Leges regiae"*, JRS 62 (1972), 100-105.

Dionysius' consistent system of the relations patron-client was not fabricated, because he could not have such powerful imagination to create from nothing the law that would perfectly correspond to the feudal society of a much later period and in a very different state. This classical writer – claims WATSON – could not borrow the mentioned regulations from the Greek law because the status of plebeians, as described by Dionysius, was not identical with the social status of *thetes* in Athens, nor with the position of *penestes* in Thessaly ([86]). On the other hand, the relation patron-client in a later period is of a far weaker intensity than in the laws of Romulus, while the authority of the *paterfamilias* has become still stronger, which confirms the fact that the legal relations from the period of the Republic could not have been transferred into the past, to the regal period ([87]).

Even without making a concrete analysis of particular arguments, there arises a question of principle – whether it is appropriate to compare the status of subjugated social layers in the mentioned Greek states ([88]) with the status of plebeians in Rome and whether this is sufficiently convincing argumentation for the absence of any influence of this law on Dionysius. It is

86) This author, however, gives no precise picture of the social position of said categories of persons in the Greek society, nor does he refer to appropriate literature.

87) *Op. cit.*, 103.

88) On the legal status of *penestes*, which were the lowest social stratus in Thessaly: AVRAMOVIĆ, *Rano grčko pravo i Gortinski zakonik* (*The Early Greek Law and the Code of Gortyn*), Beograd, 1977, 89. On the position of *thetes*: HANSEN, *The Athenian Democracy in the Age of Demosthenes*, Oxford, 1991, 43ss.

possible to find different arguments in the available literature ([89]). However, the very comparative method has in itself some dangers if not applied carefully, for the analogies would otherwise produce interesting ideas that might look fascinating at a first glance – but hardly anything more ([90]). The conclusions would carry certain weight only if while comparing it is made clear why particular parameters have been chosen for the comparison. It does not seem likely that the Roman *regnum* and the English kingdom of the twelfth century are suitable for such comparisons because we are dealing with societies with completely different social, economic and legal basis. WATSON, however, though well observing that the former law in England rests on specific property relations (*land tenure*), holds that they do not originate directly from the concrete social reality of that

89) WESTRUP, *op. cit.*, thinks that some *leges regiae* are more or less based "on an arbitrary Greek analogy" (p.67). So, in Dionysius' statement (*2,7,4*) that "the *curiae* were again divided by Romulus into ten parts, each commanded by its own leader, who was called *decurio* in the native language", he recognises an invention based on Attic law (p. 103).

90) However, the contemporary Western historiography is mainly based on the anthropological approach, using abundantly comparative methods without stronger scientific criteria. Cfr. e.g. COHEN, *Greek Law-Problem and Methods*, ZSS 106 (1989), 92: "Strictly speaking, for the study of Athenian law, Homer is in no more relevant than the Twelve Tables, or, for that matter anthropological evidence from modern Africa". It seems that WATSON also inclines to this way of thinking. But, a severe critic of such method was clearly made half a century before by VOLTERRA: (SDHI, 1935, 381): "Il metodo comparativo (...) deve essere usato con estrema cautela per lo studio del diritto romano. Le istituzioni di un popolo sono il prodotto naturale di un determinato organismo sociale e non è possiblile per la loro ricostruzione servirsi di elementi tratti da altre legislazioni, a meno che si tratti di società del medesimo tipo e di popoli della medesima razza. Altrimenti si corre il rischio di fondarsi su rassomiglanze puramente fortuite e di appoggiare su questi elementi la verosimiglianza di una ipotesi".

time, but could be found even there where such conditions do not exist (91). It is needless proving that the formal and the material side of any phenomenon, including the legal one, are not identical categories and that their identifying is, therefore, completely unacceptable.

Besides that, WATSON in his short and very inspirational article subjects no fact from Dionysius' work to broader critical analysis, but approaches his assertions as an united and indivisible whole, concluding that the general picture of the private substantive law in the regal time, as represented by our Greek historian, deserve credit though certain doubt might remain as to the veracity of some details (92). Unfortunately, it is not clear to what assertions in Dionysius this remark relates. However, resting as an indisputable value of the investigative method of this American romanist is the conclusion that numerous testimonies on the laws of the kings left to us by Dionysius of Halicarnassus confirm that he knew them far better than any other writer in antiquity and that his assertions, therefore, should not be easily rejected (93).

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91) *Op. cit.*, 101, n.10.

92) *Op. cit*., 103.

93) *Op. cit.*, 104. Therefore, it is difficult to accept the possibility that Dionysius' source was some *Tendenzschrift* which had no origin in an actual legal system, but was designed to glorify the monarchy for the benefit of some important political figure as Sulla, Caesar or Augustus. BALSDON, *Dionysius on Romulus: a Political Pamphlet?*, JRS 61 (1971), 18ss. Cfr. GABBA, *Studi su Dionigi da Halicarnasso*, cit., 175ss. In the same way, WESTRUP's valuation of Dionysius' work is too severe: "The defects of Dionysius as a scientific and critical historian in the modern sense of the word are mainly: his generally erroneous conception of history, his failure of historical discrimination in regard to the use of his materials, his diffuse rhetorical ornamentations of the accounts, his at times arbitrary Greek analogies, his unfortunate misinterpreting the Roman technical terms, his misunderstanding of political institutions of ancient Rome and his frequently tendentious and biased accounts of historical events". *Op. cit.*, V/2, 105. In his judgment of Dionysius' contribution, WESTRUP applies the dogmatic approach of the modern critical historiography – which he stresses himself. He proceeds in the same way with others classical writers who give us the testimonies of *leges regiae*. The famous jurist Pomponius is, according to him, "an extremely uncritical compiler whose testimony cannot *a priori* be credited with any historical value whatsoever" and he is no less severe towards the testimonies of Livy about the kings' laws. *Op. cit.*, IV/1, 50-52.

WATSON also has great confidence in the earlier mentioned testimony of Pomponius (D.*1,2,2,2*) that the laws created by the kings had to be confirmed by the *comitia curiata* (94). Thus he actually rejects the opinion that even this case witnesses the tendency of identifying the primitive institutions from the time of the kings with those from a much later period, on account of which the very mechanism of passing *leges* in the *comitia centuriata* in the time of the Republic is wrongly attributed to the decisions of the kings. Many romanists, however, though not denying the very existence of *leges regiae,* do not think that they were confirmed by the assemblies convoked in *curiae,* but suppose that the decisions of the *rex* were by its character *leges datae,* i.e. that they rested on "*potere di ordinanza*" of the king himself; those authoritatively made decisions were only proclaimed in the solemn form in front of the assembled people

94) WATSON, *op. cit.*, 102.

([95]). Contrary to this dominant point of view, WATSON suggests that the idea of legislative activity in the curiate assembly is perfectly plausible for the regal period ([96]). In such a way he submits to the opinions that practically identify *leges regiae* with *leges curiatae*.

Here we actually have the confrontation of two completely different points of view regarding the oldest history of the Roman society. The authors rejecting the testimonies of classical writers on the voting of the oldest laws in assemblies and their confirmation by the senate, betray the lack of confidence in the democracy of the archaic Roman society and submit in some degree to the theory of the so called "leadership" (*Führertum*) whose characteristic exponent was the romanist F. LEIFER ([97]). This doctrine proceeds from the presumption that in all primitive societies the leader of the community gets to that position not by investiture of the people but because of "his own strength and charismatic power". The sovereign position of a leader (*Führer*, *duce*) presupposes no constitutional order of which he would be just one of the organs, but assumes that his person is "out and beyond" any normative order. The history of the oldest Roman constitutionality was passing through that kind of transformation, where the personal and unlimited authority of the *rex* gradually

95) Cfr. CAPOGROSSI, in TALAMANCA, *Lineamenti di storia del diritto romano*, Milano, 1979, 30ss. MARGETIĆ, *Rimsko pravo* (*Roman Law*), Zagreb, 1980, 12.

96) WATSON, *op. cit.*, 105.

97) LEIFER, *Studien zum antiken Ämterwesen*, I, Leipzig, 1931, 27ss. Cfr. DE MARTINO, *op. cit.*, 97ss.

transformed into a clearly defined function (*officium*), with competences and authorities established in advance: that means that the development went from *Führertum* to *Führeramt*, i.e. from *ductus* to *magistratus* ([98]). In such way, by the passage of time, *rex* himself becomes a *magistratus populi Romani Quiritum* ([99]).

There exists, however, a completely different perception of the whole process and understanding of the king's role in it. The transition of the Roman society from the primitive level to the *civitas* could be seen the other way around: as a movement from tribal community based on democratic principles towards gradual strengthening of the monarchic element personified in the *rex* ([100]). It is assumed that preservation of union of the three tribes constituting the *populus Romanus* would be unthinkable without the consent of their members on some important issues, i.e. without settling of fundamental problems in the assemblies

98) DE MARTINO, *loc. cit*.

99) WILLEMS, *op. cit.*, 45. GUARINO, *Storia del diritto romano*[4], 88. MOMMSEN, *Droit public romain*, I, 10, claims that the *rex* was a magistrate who represented the town. His activity was controlled by the senate and the assembly, by which he gradually formed the function of the republican *magistratus*. Contrary: DE FRANCISCI, *Arcana imperii*, III/1, 5ss.

100) On the nonexistence of the strong central power in the oldest Rome points, according to some authors, the fact that during the festivities of *Septimontium* the representatives from the central part of the town were separated: the inhabitants of *Palatium* (settled on three hills), *Esquilinae* (also settled on three hills) and *Caelius*, had their own individuality from which could be deduced "the weakness of the central power and the strength of the local leaders". MARGETIĆ, *Neka pitanja iz najstarijegdruštvenog i političkog uređenja Rima* (*Some Questions Concerning the Earliest Social and Economic Organisation of Rome*), ZPF, Split, 1973, 166.

characteristic for that time ([101]). This, actually, raises the question of competence of that body in the procedure of passing the appropriate decisions.

5. *Comitia curiata.*

Among the authors accepting the testimonies of classical writers on the participation of the curiate assembly in the passing of the oldest *leges*, there are some who narrow the scope of their role. So E. COSTA ([102]) sees in the *rex* primarily the military chief (*capo militare*) "appointed" to that function by family chiefs themselves (*preposto dai capi dei singoli consorzi*), which means that he came to such a position by election or acclamation and not as an imposed "leader". He was obliged to address himself with the formal proposition to the members of the family communities (*consorzi gentilizi*) fit for the army, in the situation when it was necessary to make decisions relating to common defence or the survival of their *civitas.* In that case, the people gathered in the curiate assembly should have to approve the proposition of the

101) MALENICA, *Rimsko pravo* (*Roman Law*), Novi Sad, 1995, 52. This author gives full confidence to Pomponius' interpretation of the oldest legislative practice because it is "precise and corresponds to everything that is known on the process of transition of the Roman society from the primitive gentile society to the political organising in the form of *civitas*". A similar attitude towards Pomponius is taken by STANOJEVIĆ, *Rimsko pravo* (*Roman Law*), Beograd, 1987, 27: "It is possible that said tradition is based on some historical facts. Perhaps, the assembly, on the proposition of the *rex*, passed some decisions which were later given the name *leges regiae*".

102) COSTA, *Storia delle fonti del diritto romano*, Torino, 1909, 1ss. ID., *Storia del diritto romano privato*, Firenze, 1923, 3ss.

rex who had convoked them, which gave the decision made in such way the characteristics of a *lex rogata* ([103]). It would seem logical that on the questions of war and peace the opinion was asked from the very ones who were under military obligation and had to accept the greatest expenses as well as the risk of fighting activities ([104]). However, it could be assumed that in this case the number of decisions made in such way could not have been great because they were made only in excess situations, i.e. in the time of peace, when there were no calls to arms, this assembly wasn't convoked. In the work of this author, however, it is not possible to discover his attitude towards these questions. On the other hand, it is obvious that in the testimonies of the annalists and classical historians COSTA finds the confirmation for his thesis that the mentioned decisions were authentic laws (*vere e proprie leges*) and that they had the attributes of a legal source besides the existing *mores maiorum*. He denies, however, authenticity to the tradition when it attributes the name of "kings' laws" to the sacral norms whose contents are related exclusively to the religious cult, supposing that it happened because the *rex* was also the chief of the pontifical college. The name *leges regiae* could not have been related to such norms, all the more so because the people made no decisions on religious matters. According to this author, the tradition wrongly attributes that name to the norms which were regulating the relations inside *familia* and *gentes*, the sanctioning of which was provided by the religion.

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103 *Loc. cit.*

104) DE MARTINO, *Storia della costituzione romana*, I[2], 189.

Such point of view is actually very close to MAGDELAIN's who believes in the existence of some other norms besides those which had unjustly taken the name "*leges regiae*" – whose contents he exclusively identifies with sacral norms, but the two authors differ by seeing different things in rules which according to them represent "true" laws of the kings: COSTA is relating them only to the excess situations during the gathering of the army in the case of general danger, while MAGDELAIN relates them to *foedus*, *leges templorum*, *lex censui censendo*, or other similar norms the contents of which are unknown to us because of the lack of appropriate testimonies ([105]).

As for the competence of the curiate assemblies, the observations of WILLEMS ([106]) are very important. In spite of his opinion that in the oldest times the Romans lived according to *mores maiorum* or *ius sacrum*, he concludes that already in the time of the kings the people had to give assent when the decisions were made "*sur toutes les affaires importantes*", such as: assigning *imperium* to the elected king by way of the *lex curiata de imperio*, decisions on war and peace, granting the citizenship, *adrogatio* and trials regarding *provocatio* of the decisions of *duoviri perduellionis* ([107]). In the given cases the *rex* convokes

105) MAGDELAIN, *La loi à Rome*, 54, 63, 87.

106) WILLEMS, *Le droit public romain*[7], Louvain-Paris, 1888, 49ss.

107) WILLEMS, *op. cit*., 52-53. He emphasizes that voting did not exist in *comitia calata* (though they were presided by the *rex*, and later by the *pontifex maximus* or *rex sacrorum*) and that the people had only the role of witness in the solemn religious act of *inauguratio* of the king, *inauguratio flaminis*, *testamentum calatis comitiis*, *detestatio sacrorum*, and the proclamation of *nonae*. However, among the romanists such division between *comitia curiata* and *comitia calata* is the object of the great dispute. Some of them recognize in those terms simple synonyms. Cfr. GUARINO, *Storia del diritto romano*[4], 79: "I *comitia curiata* furono sempre e solo, a nostro parere, *comitia calata*".

the *curiate assembly* and submits *rogatio* asking the people to vote on the submitted proposition (108). However, according to WILLEMS even the decisions made in such way do not represent *leges* because here we have no "legislative power" in the modern meaning of that term (109). He emphasizes that "written laws relating to constitutional structure, civil, criminal and other things, by their origin are not older than the XII Tables", while he regards the expression *leges regiae* as a mere anachronism (110).

We can only regret that WILLEMS gives no argumentation for his claims. One positive fact in his explication is that even in that time the people took an active part in the making of important decisions and that the *rex* could not impose them arbitrarily (111).

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108) The special problem is who had the right to vote in the curiate assembly. While NIEBUHR thinks that the *curiae* had never been accessible to plebeians, MOMMSEN argues that the *clients* and *plebs* were incorporated in the *curiae* since the remote times, but were given the right to vote much later, after the establishing of the *comitia centuriata.* WILLEMS, however, proceeding from the fact that the Roman tradition never mentions the struggle of plebeians for the right to vote, inclines to those romanists who believe that the plebeians and clients had that right from the very beginning. On that see: WILLEMS, *op. cit.*, 49ss.

109) *Op. cit.*, 50.

110) *Op. cit.*, 51-52.

111) GIRARD, *Droit romain*[6], Paris, 1918, 14, also thinks that the *rex* had to convoke *curiae* whenever it was necessary to change the existing order of things: *adrogatio, testamentum calatis comitiis, provocatio ad populum, foedus*. In all those cases he recognizes the beginnings of the sovereignty of the *comitia curiata*, because in the other situations the *rex* convoked *curiae* by himself. The people could only acccept or reject his interrogation, having no right to make propositions and to put the amendments itself. However, GIRARD calls those decisions "laws": "L'adrogation est, comme le testament primitif, une loi spéciale dérogeant à la loi générale de la famille et elle est, comme lui, votée par les plus anciens comices, par les comices par curies" (*op. cit.*, 175). GUARINO, *Storia del diritto romano*[4], 78-79, enumerates similar reasons for the convoking of a curiate assembly as WILLEMS, but, according to him, the people had an absolutely passive role and reasons for its gathering on the Forum were exclusively the announcement (*la presa di conoscenza*) of the already made decisions. So, the curiate assemblies themselves were "riunioni non deliberative", i.e. they did not have "una vera e propria competenza deliberativa".

The fact that for WILLEMS even a *lex curiata de imperio* does not represent the *law* – though he includes this act among the decisions passed on the curiate assembly in the time of the kingdom – is actually the terminological problem as to what is understood by that notion. WILLEMS himself points to the relativity of the term *lex* but does not proceed to its further analysis. Though we can agree with his remark that it is not the case of "*pouvoir législatif dans le sens moderne*", the problem of describing the said normative acts still remains.

It is obvious that we are dealing here with specific "laws" with an archaic character which could be designed in a broader sense as *leges curiatae.* The basis for such an opinion could be found in the very sources ([112]). Judging by known facts, said

112) COLI, *Regnum*, 160, n. 48: "La deliberazione delle curie, si tratti di *lex de imperio* o di *adrogatio* o abbia un contenuto diverso, è detta sempre '*lex curiata*'. Le deliberazioni degli altri comizi non portano mai nelle fonti il nome di *legescenturiatae* o *tributae* (...). D'altra parte, mai la deliberazione delle curie è detta *lex publica*. WATSON, *Roman Private Law and the "Leges regiae"*, 105, rightly concludes that the decisions made by the *comitia curiata* represented "true legislation though of a rather debased kind".

decisions rest on *consensus populi* (that would probably only later become a *iussum populi*) and do not represent ordinances of the king because the people gathered in the *curiate assembly* took part in their passing, no matter how much its role was limited ([113]). The fact is that it would not be more active even in a much later period, when *lex* was voted for in the *comitia centuriata* and *tributa,* and when it was regarded as *generale iussum populi* (Aul. Gell. *10,20,2*).

In the measure that *leges regiae* were the result of the participation of the people in its passing, they were – in form if not in substance – closer by their character to the notion of *leges curiatae* (i.e. *leges rogatae* or *leges latae*, in the terminology of a later time). The claim of Pomponius (D.*1,2,2,2*) that the kings' laws had to get confirmation of the curiate assembly is the best proof for that. We are not dealing here with some casual comment of the ancient annalist or historian, but with an explicit statement of a famous Roman jurist belonging to the best part of Roman jurisprudence and who shows in his work *Enchiridion* marked affinity towards the analyzing of the legal past ([114]).

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113) COLI, *Regnum*, 66: "Il *consensus populi* precedette storicamente il *iussum populi*". On the difference between *consensus* and *iussum populi,* v. MOMMSEN, *op. cit.*, VI/1, 347, n.2. NOCERA, *Il potere dei comizi e i suoi limiti*, Milano, 1940, 162. When and how the primitive acclamation gave way to the orderly vote of the *comitia curiata* cannot be ascertained from the sources. Still, using the comparative method, BOTSFORD (*op. cit.*, 152ss.) made an attempt to determine under what influence the curiate organisation and the systematic vote were introduced into the early Roman assembly.

114) The fragment of Pomponius' *Enchiridion*, incorporated in the Digests' titulus *De origine iuris* etc., begins: "*Necessarium itaque nobis videtur ipsius iuris originem atque processum demonstrare*".

Dionysius also remarks that Servius Tullius passed his laws with the help of the curiate organization: "*leges... per curias tulit*" (*Antiq. Rom. 4,13*). When Livy, too, recounts that Tullus Hostilius "*secundum legem*" appointed *duumviri* to judge Horatius for *perduelio*, the *lex* there referred to is a law passed by a *concilium populi* summoned by the king ([115]). However, there is still a difference in the character of those decisions, on which rightly insist KASER and other romanists: *leges curiatae* (*de imperio*, *de testamento*, *de adrogatione*) were passed *ad hoc* for particular cases and did not have the generality that characterized *leges regiae*. But, we must keep in mind that such conclusions are based on the type of the *leges curiatae* which were preserved in the later period and which really have the features of "*situationsgebundene Gesetze*"; whether they have some time in the past been "*normative Gesetze*", is hard to say, but it is unreasonable to argue that the only type of curiate laws which ever existed were the ones which survived to the late Republic ([116]).

On the other hand – as has been shown earlier – the romanists who absolutely reject the testimonies according to

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115) Cfr. URCH, *The Legendary Case of Horatius (Liv. I, 26)*, CJ 25 (1930), 447ss.

116) Said terminological distinction is introduced by BLEICKEN, *Lex publica, – Gesetz und Recht in der römischen Republik*, Berlin-New York, 1974, *passim*. He thinks that 'situationsgebundene Gesetze' were assemblies' decisions which were consumed in the very pretext for their creation, while 'normative Gesetze' were those comitial acts regulating continually social relations and so, according to this author, were the only ones deserving the attribute of the *lex*. Cfr. rec. by CRAWFORD, JRS 68 (1978), 188.

which *leges regiae* were described as curiate laws, see them most frequently as *leges datae* arbitrarily imposed to the people by the king.

6. *Aut leges curiatae, aut leges datae?*

It seems that in those diametrically opposed theoretical approaches we are dealing with two rigid generalizations that might not necessarily correspond to the historic reality. The realities of life certainly were giving a more complex picture than the one that could be schematically fitted in those two extremes, especially for the whole period of the Roman monarchy. It should be assumed that in Rome of that time – as is the case with other nations, other places and other times – there were rulers differing between themselves by way of governing, by their behavior to their own and to neighbouring nations, by their relations to the tradition, religion and customs. This fact is indirectly confirmed by the ancient writers who reduce the picture of the past, oversimplifying it, to "good" and "bad" rulers. It is also possible that one and the same *rex* sometimes made the decisions by himself and sometimes with the participation of the people, guided by the concrete circumstances that dictated his conduct. It does not mean, however, that the figure of the *rex* was "out and beyond" (LEIFER) any normative system, but only that the same system cannot be comprehended in a way similar to the understanding of the later times. It is difficult to imagine the function of the *rex* as some static category which did not go through deeper qualitative transformations during the two and

half centuries of the Roman history. The dynamics of that change were not influenced only by the existence of assemblies on the level of *curiae*, but also by the role of the senate consisting of chiefs of gentile communities (*patres*) ([117]) By the interweaving of those three factors the "constitutional" order of the oldest Roman community was formed. It certainly was not acquainted with the contemporary system of the division of the power, nor with the strict division of the existing functions. Each of the "state" organs was equally responsible for all the questions of general interest for the community. That is why even the *rex* could not become the absolute master of Rome, for his authority might have been paralyzed by the intervention of other organs. Besides, by making *auspicia* during the ascension to the throne, the king received not only the assent of the gods for his investiture in the new function, but had also accepted the obligation of respecting their will in the future. That is why each of his public activities required a new questioning of gods' favour, as would later be the case with the acts of the highest magistrates. On the other hand, the customs of the ancestors (*mores maiorum*) and the ancient unwritten rules (*consuetudo*), also imposed some limits to his acts. The *rex*, therefore, had to act in accordance with the heavenly and wordly order of things.

117) According to Dionysius the senate had a very important role already in the time of Romulus: *patres* gave majority decisions on all issues placed before them by the king, the concurrence of senate was necessary to give effect to people's decisions voted by *curiae*, the senate judged minor cases in criminal matters etc. Dion. Hal. *2,14,2-4; 4,12,3*. On this question, the opinions are very opposed. Cfr. MANNINO, *L'auctoritas patrum*, Milano, 1979, 1-57, and cit. lit.

Most probably it was the Etruscan domination that would greatly change the character of the power of the *rex* transforming him into the military leader with the attributes of a monarch who seeks the stand for his power among the army leaders and in the newly created *comitia centuriata* instead of the *comitia curiata* ([118]). In such a way begins the process of speed transformation of the archaic Roman community into more coherent forms of social organization, which necessitated the creation of the new norms, thus changing the old customary law and the existing order. So, the role of the *rex* has changed very much in that respect. Cicero describes *regnum* as a period where the king possessed the highest power (*vis*, *potestas*), the senate had the wisdom to advise, whereas the people enjoyed but a limited degree of freedom, right, and power ([119]). However, even the Etruscan *rex* had no chance to turn into some sort of despot or tyrant. When he eventually became one, he was dethroned, and the monarchy was abolished. Describing the reign of Tarquin the Proud, Livy is actually giving us the picture (as in a negative) of the *rex* as he should *not* be: he came to power after executing his political rivals, he governed without the consent of the people and the approval of the senate, he alone passed judgments in capital processes, he was the first king to break off with the customs of

118) Nevertheless, *curiae* will continue its existence in the republican epoch, though its decisions (now on the proposition of the magistrate) will no longer have the importance they had earlier. Than it is reasonable to call *comitia curiata* "an anomalous survival", or "an arcane remnant of the past", as they were described by DEVELIN, *Lex Curiata and the Competence of Magistrate*, Mnemosyne, 30 (1997), 49.

119) Cic., *de rep. 2,28,50.*

the ancestors, he alone declared war and concluded peace, he made leagues and friendships not asking for consent the senate or the people, he associated with strangers to better hold in obedience his own citizens etc. ([120]). Also Dionysius claims that Tarquinius repealed all laws of Servius Tullius which were providing equality in the making of contracts between patrician and plebeians, and that he even ordered the destruction of the tablets on the Forum with said legal text ([121]). It is obvious that Tarquinius, if we are to believe to tradition, abrogated with his decisions many norms that had up till then represented the axis of the order. According to Cicero he overthrew the whole monarchical constitution, not by seizing any new powers, but by his misuse of the powers he already possessed ([122]). Though his commands had tyrannical character, they were themselves the product of the "normative" activity of the *rex*, and as such could be also seen as *leges regiae.* They certainly have nothing in common with *leges curiatae*, being in this case closer to the notion of *leges datae*.

120) Liv. *1,49,2-8*.

121) Dion. Hal. *4,43,1*.

122) Cic., *de rep. 2,29,52*: "*...ut quemadmodum Tarquinius, non novam potestatem nactus, sed, quam habebat, usus iniuste totum genus hoc regiae civitatis everterit*".

7. *Conclusions.*

We can conclude that the time of the kings should not be looked upon as *aurea prima aetas* ([123]), but still less as a dark epoch of lawlessness, as presented by some authors ([124]). Therefore, interpreting the testimonies of the tradition on the participation of the people in the creation of *leges regiae* exclusively as the forgeries based on the "legalism" of the republican epoch, or arguing that the curiate assembly had taken part only in the passing of the *lex curiata de imperio*, would imply reducing the people in the regal period to an amorphous mass of individuals without any significant influence on the normative articulation of the legal, political or religious institutions of that time. The old Roman tradition should be approached critically, without rejecting the testimonies *a priori*, even when they speak of events very distant from the time when

123) According to Tacitus, in the primitive times the people had no cognition of the evil and the crimes, but were living without punishments and repressions: "*Vetustissimi mortalium, nulla adhuc mala libidine, sine probro, scelere eoque sine poena aut coercitionibus agebant. Neque praemiis opus erat, cum honesta suopte ingenio peterentur*" (*Ann*. *3,26*). On this: WENGER, *Quellen,* cit., 355. This author also does not reject the very existence of the legislation in the regal period: "Und wir können (...) selbst bei latinischen Bauernkönigen an eine bewußte Volksgesetzgebung denken – ob auch sobald schon an Aufzeichnung einer solchen, mag weniger sicher sein. Hier sollte nur die Möglichkeit von *leges regiae* zugegeben sein" (p.353).

124) COLI, *op. cit.*, 115. Exaggerated is the attitude of FRAENKEL (*Rome and Greek Culture*, Oxford, 1935, 7ss.) on the lasting economic and cultural backwardness of Rome which, according to this author, until the second century B.C. represented "a barbaric enclave in the hellenistic world".

the classical writers wrote them down. If we reject such testimonies, what are we left with?

It would be asking too much to demand firm proof that the *leges regiae* were actual legislation. But there is no reason to doubt that the part of the texts handed down as "kings' laws" – taking into consideration their contents and archaic features – can be really dated back to early Rome. The comparison with the corresponding rules of laws from early times among other people on the same level of socio-economic development, lead us positively to such conclusion (125). The existence of *leges regiae* could hardly be denied, even for the fact that the Roman tradition has kept much evidence of them, far more than on the kind of assembly decisions called *lex curiata* and on which *concrete contents* there are no preserved fragments or direct citations (126). The mention of the term *curiae* in their name speaks in favour of the ancient writers' claim that these laws had existed already in the time of the kings, though even that is contested by some romanists (127). On the other hand, the very creation of the *comitia curiata* in that remote time leads to conclusion that – besides voting for the leaders of the community and proceedings

125) WESTRUP, *op. cit.*, 68. BOTSFORD, *op. cit.*, 168ss.

126) Some authors see in the fact that the *leges regiae* were preserved mainly as direct citations, one of the key arguments for their authenticity. Cfr. TONDO, *Leges regiae e paricidas*, 11.

127) COLI, *op. cit.*, 66ss. BOTSFORD, *The Roman Assemblies*, 230: "Though under the kings the people may occasionally have been called to vote on a resolution affecting their customs, the *comitia curiata* never acquired a law-making function". This conclusion is by itself contradictory: if they are not *leges*, what then were the decisions voted for on the assemblies?

in the cases of particular significance – certain "legislative" activity should also have taken place there ([128]). Obvious evidence that the *lex curiata* had law-like features is provided by the language of Roman writers who consistently use the curiate law expressions for the passing of genuine proposals ([129]). But, what was the original procedure for passing the curiate laws, since when had those acts carried the attribute of *lex*, what was their relation to *leges regiae*, had they existed simultaneously or successively, had those terms in a certain historical moment been regarded as identical – those are questions to which the sources

128) MOMMSEN, *Droit public romain*, VI/1, 372-373, supposed that under the kings the *comitia* were exclusively legislative, while the elective and judicial functions were republican innovation. Such explanation is unlikely because there is no reason to suppose that the *res publica* brought to *comitia* some completely new functions, but probably the already existing competences have passed from one kind of assembly to another. Cfr. BOTSFORD, *op. cit*., 181-182: "We may accept without hesitation the principle that in form if not in substance under the Republic the *curiae* retained all the powers which they had ever actually possessed". We cannot exclude the possibility that the term *lex* in the time of the kings already designated all three kinds of assemblies' decisions – as is supposed by BOTSFORD for the early period of the Republic: "In the earlier time... *lex* seems to have designated any act of an assembly, elective or judicial as well as law-making in the modern sense" (p.180), and concludes: "it is practically certain that formula for the curiate law ran somewhat like that for an election" (p.184).

129) E.g. Cic., *de rep. 2,13,25*: "*qui [Numa] ut huc venit, quamquam populus curiatis eum comitiis regem esse iusserat, tamen ipse de suo imperio curiatam legem tulit*"; *2,17,31*: "*Mortuo rege Pompilio Tullum Hostilium populus regem interrege rogante comitiis curiatis creavit, isque de imperio suo exemplo Pompili populum consuluit curiatim*" etc. Cfr. NICHOLLS, *The Content of the 'lex curiata'*, AJP 88 (1967), 259. PALMER, *The Archaic Community of the Romans*, Cambridge, 1970, 204, n.6. Contrary: DE MARTINO, *op. cit.*, 155, n.137b.

give no clear answers ([130]). However, on the basis of accessible facts it could be assumed that the inclusion of the people in the procedure of making decisions in the curiate assembly (whether *leges regiae* or *leges curiatae*) presented the most ancient phase in the creation of the notion of *lex*, the historic phase in which the *voluntas* of the people, albeit in a very rudimentary form, in time has become its constitutive element.

130) It is probable that the procedure of passing the curiate laws was similar to the one that was going on inside centuriate and tribal assembly. The proof for this might be the way of performing *adrogatio* before the *comitia calata*, i.e. the curiate assembly on which was presiding the *pontifex maximus*. On the basis of the preserved archaic formula (Aul. Gell. *19,9*), it seems probable that the procedure began with the proposition of the chief priest in the form of interrogation (*rogatio*): "*Velitis iubeatis, uti... Haec ita, uti dixi, ita vos, Quirites, rogo*", and that *curiae* had to accept or reject it (*uti rogas* or *antiquo*). The oral appeal of the leader to the gathered people in order to make decisions concerning the whole community, is confirmed by a similar behaviour among other archaic peoples. PALMER, *op. cit.*, 205, 210, 213. WATSON, *op. cit.*, 105.