

Open-textured legal rules in Cicero's legal argument

Abstract

I discuss a selection of Cicero's forensic speeches with a view to establishing how open-textured were the specifications of the offences tried by the *quaestiones perpetuae* (standing courts) and what kinds of factors Cicero invoked, as an advocate, as being relevant to the determination of particular cases. I conclude that some of the offences - particularly *maiestas* (treason) and *vis* (riot/seditious violence) - incorporated an unwritten "public interest" defence which covered a wide range of different circumstances. The language in which the defence was generally articulated - that the accused's action was *iure factum* (lawfully or rightly done) - was open-textured. Cases in which this defence was invoked sometimes raised what I argue were unresolved questions of constitutional law. In practice, the courts appear to have decided whether an offence had been committed in a manner that entailed determining issues of constitutional law under the cloak of evaluation of public interest factors. Where a "public interest" defence was potentially available, the way in which it was applied may have served to exacerbate the violence which contributed to the fall of the Roman republic by deferring indefinitely any resolution of the embedded constitutional issues and providing politicians with a ground on which they could argue that violence in pursuit of political objectives was legally justified. As a separate matter, in the absence of any agreed formulation of the "public interest" defence (or the rationale for it), there was scope for confusion as to whether a similar defence was available in respect of other offences (such as *ambitus* (electoral corruption)) tried by similar courts. Finally, I propose for discussion potential contemporary parallels to the problems identified in respect of the offences tried by the *quaestiones perpetuae* of the Roman republic.

Context: the *quaestiones perpetuae* of the Roman republic

In the late Roman republic, certain offences committed by Roman citizens of a public or political character were generally tried before *quaestiones perpetuae* (standing courts). Individual *leges* (statutes) established each *quaestio perpetua*, provided for its composition and specified the offence which the *quaestio* was to try. A *praetor* (a magistrate elected for a term of one year by the Roman people in assembly) supervised the court: a would-be prosecutor delivered his indictment to the *praetor*; the *praetor* checked that the charge fell within the jurisdiction of the court; and the *praetor* supervised the trial. Generally, the jury comprised some 50 or so men drawn from a panel of over 400 drawn up by the *praetor*. The members of the court decided questions of fact and law; they voted on a verdict without deliberation; and they gave no reasons for their decision. The judges had no discretion in sentencing: most of the offences covered by the relevant *leges* carried a capital penalty, entailing either death or the loss of all citizenship rights. In practice, a defendant might anticipate an adverse judgment by going into exile¹.

The penal sanctions consequent on conviction might encourage modern lawyers to characterise these *leges* as criminal laws; but they did not address many of the kinds of conduct which modern criminal laws might cover - such as theft, and criminal damage to property. Under Roman law, these were addressed by the *ius civile* (civil law) as matters arising between private parties. The *quaestiones perpetuae* operated as organs of the *ius publicum* (public law); they concerned themselves with forms of wrongdoing which directly threatened the conduct of public affairs - *maiestas* (loosely translated as

¹ For a general discussion of the *quaestiones perpetuae* and the *leges* establishing them, see Riggsby (1999).

treason); *vis* (riot/seditious violence); *res repetundae* (extortion by provincial governors of goods or money from those they were appointed to govern); *ambitus* (electoral malpractice/bribery); and homicide².

The first *quaestio perpetua* (in respect of *res repetundae*) was established by a *lex Calpurnia* of 149 BC. Further *leges* ensued, and, in 81 BC, the dictator L. Cornelius Sulla promoted a series of laws establishing new *quaestiones perpetuae* in respect of most of these offences. It is, for the most part, the *leges Corneliae* under which the prosecutions considered in this paper were brought.

No full text of any these *leges* is extant. But there is preserved a substantial part of what is probably a *lex Acilia* of 111 BC, providing for the establishment of a *quaestio perpetua de rebus repetundis* (extortion). It is probably typical insofar as the bulk of its provisions set out procedures for the selection of judges and the conduct of the trial, with only a few lines devoted to the specification of the offence³. Justinian's Digest (dating from the sixth century AD) also claims to quote or summarise some of the *leges* establishing the *quaestiones perpetuae*, including details of the offences tried⁴.

However, much of our knowledge of the terms, interpretation and application of these *leges* is derived from literary texts and, in particular, from the extant forensic speeches of the Roman statesman and orator, M. Tullius Cicero (106-43 BC), and from contemporary handbooks and treatises on forensic oratory (including Cicero's *De Inventione* and *De Oratore*, and the *Rhetorica Ad Herennium*, the authorship of which is unknown).

Cicero chose to publish some of his speeches, both to advertise his arguments and expertise, and to provide models of argument and style to students of oratory. Generally, his speeches would have been edited before publication, and the extant texts do not generally record the speeches delivered in court. But we may infer that the published speeches generally present the kinds of argument which could have been deployed in court, and the speeches therefore provide useful evidence as to how the various offences tried by the *quaestiones perpetuae* appear to have been interpreted and applied⁵.

In some cases we know from extraneous evidence that the published speeches were not delivered at all: for example, in 52 BC, Cicero defended his friend and political ally, T. Annius Milo, against a charge of *vis* (seditious violence). Milo was convicted and went into exile. Later, for reasons to which I return below, Cicero published a quite different speech in defence of Milo.

² Homicide generally was probably not an offence under the *ius publicum* until the *Lex Cornelia de sicariis et veneficiis* (law regarding knifemen and poisoners) of 81 BC. Previously, the *ius publicum* probably addressed homicide only where it was undertaken on a scale or in circumstances which threatened public order. See Gaughan (2010).

³ Crawford (1996:39) and Lintott (1993).

⁴ Digest, Book 48.

⁵ Discussed in Lintott (2008) and Powell (2010).

Degrees of open-texturedness⁶

Homicide

The *lex Cornelia de sicariis et veneficiis* of 81 BC built on earlier laws directed against those who carried knives with a view to committing homicide, or who committed homicide by poisoning. But the law of 81 BC appears to have extended to all forms of culpable homicide, as well as certain actions preparatory or accessory to homicide (supplying poison, going armed with a knife with the intention of killing).

The key provision apparently read:

"Try for his life any man who has or will have been with a weapon for the purpose of killing or stealing, or who has or will have killed a man, or by whose malicious intent this has been or will have been done."⁷

Similar language was used to deal with those who made, bought or sold, possessed or administered poison. But the law also extended to other indirect means of wrongful killing: in particular, the law covered so-called "judicial murder", whereby a perpetrator corruptly secured a false conviction of his intended victim on a capital charge, to cause the victim to be executed. The relevant provision apparently read:

"...Try for his life any man who, being a tribune of the soldiers for the first four legions, or quaestor or tribune of the plebs ... or who has or will have spoken an opinion in the senate, has or will have conspired, plotted, connived or given false testimony so that someone may be condemned to a capital sentence by a public court."

The wording of these provisions raises a number of interesting questions beyond the scope of this paper⁸; my focus is on the application of the offence of "judicial murder", which arose for consideration in 66 BC in Cicero's defence of Aulus Cluentius Habitus.

Cluentius apparently faced charges of attempted "judicial murder" and of poisoning one Oppianicus. In the published version of his speech *Pro Cluentio*, Cicero seeks to rebut on factual grounds the allegation that Cluentius had bribed judges at an earlier trial in order to secure Oppianicus' conviction. But Cicero goes on to argue that, strictly speaking, he need not rebut the allegations, since Cluentius has a simple defence: he is not a senator, and does not fall within any of the listed classes of persons covered by the offence of "judicial murder"; in other words, the offence of "judicial murder" was

⁶ For the purposes of this paper, I use the term "open-textured" to refer to written legal rules which employ terms of uncertain scope: such uncertainty may arise from the use in statutory language of terms with a clear "core" meaning, but a less certain "penumbra"; or from the use of terms which invite those applying the rules to evaluate multiple factors, or to decide, in the exercise of their individual judgment, whether particular statutory tests are met in particular cases (e.g. terms such as "substantial" or "reasonable"); or from the use of unwritten legal rules which, by virtue of the way in which they are formulated or understood, exhibit similar characteristics.

⁷ Translations adapted from Riggsby (1999).

⁸ Including as to the *mens rea* element of the offences, and as to the extent to which the indirect causing of a death could amount to an offence, both of which issues were discussed by jurists in respect of cases of *iniuria* under the *ius civile*. See, for example, Nörr (1988) and Birks (1994).

expressed to apply only to persons who had held specific public offices, or who served in the senate (and were therefore actively engaged in public life)⁹. The issue was one of law, not fact, since there was no dispute that Cluentius fell into none of the specified categories of person¹⁰.

It may be, Cicero says, that the prosecutor would prefer to see this provision applied to everyone. But the answer to that is that the law should be changed, not that the judge should fail to observe the terms of the present law. It is, he says, the role of a wise judge to recognise that the Roman people has entrusted to him a defined task, and that he has been given not just a power but a duty (i.e. to exercise that function within its defined limits). Looking at the more general implications of this argument, Cicero reminds the judges that magistrates are ministers of the laws, judges are interpreters of the laws, and ultimately all citizens are slaves of the laws in order that they may be free.

Thus, Cicero presents the case as one in which the judges could properly dispose of the issue simply by applying a clear statutory provision in accordance with the express limitations within its terms¹¹. And, indeed, the general terms in which Cicero describes the task of the judges may imply that this was generally how they conceived of the extent of their task: they were not being called upon to make complex value judgments about the scope of particular offences. However, an analysis of the *leges* dealing with other offences suggests that the matter was not so straightforward.

Electoral corruption

We do not know whether or how the offence of *ambitus* (electoral corruption) was defined by the *lex Calpurnia* providing for its prosecution. But some of Cicero's speeches deal with this offence and provide some insight into its scope.

The consuls of the Roman republic were its most senior magistrates, and were elected for a one year term by the people in assembly. In 63 BC, during his own consular year, Cicero oversaw the elections of the consuls for 62 BC. One of the successful candidates was L. Murena. The election of the new consuls for 62 BC had been fraught with accusations of electoral malpractice from the start. There may have been some uncertainty as to what was, or was not, permissible by way of electioneering: *amicitiae* (friendships/alliances) among men of the same social class, or between a social superior and

⁹ In another speech (*Pro Rabirio Postumo* 16-17) addressing a similarly worded offence, Cicero explained that the rationale for imposing greater obligations on senators was that, in return for the rewards of public life, they were expected to observe higher standards of conduct, or to subject themselves to more onerous punishments if they did not meet appropriate standards of conduct.

¹⁰ Issues of fact (*constitutio coniecturalis*), definition (*constitutio definitiva*) and of the quality of a matter (*constitutio generalis*) - i.e. whether it fell within a particular definition, and hence whether it was lawful/unlawful - were recognised in rhetorical theory and routinely distinguished in forensic argument: See *Inv.* I.10; *Caecina* 64-71; *Ad Her.* II.23-24.

¹¹ This also seems to be the approach taken in Cicero's early treatise on oratory, *De Inventione*. Cicero discusses how a forensic advocate might argue that a statutory provision should be interpreted as being subject to implied exceptions, or how one might resist such an argument: in support of the latter position, he suggests that the advocate should argue that it is not the task of judges to add exceptions to a statute; to do so usurps the role of the lawmakers (II.122-133).

his inferior, were an important feature of Roman social and public life. Where men were bound by a relationship of *amicitia*, each was expected to support the other in various ways: a senatorial patron would assist his socially inferior *amicus* (friend/ally) by arguing cases in court for him, by finding suitable wives for his sons, or by assisting his sons in securing public office or a military appointment. In return, he would expect his *amicus* to support him when he stood for elected office, and to attend on him and offer him such assistance as he might require in the discharge of such office or of his private affairs. But, when a man stood for elected office, there was a fine line between the calling in of such favours from his *amici* and the purchase of votes.

One of the consular candidates, Servius Sulpicius, had asked Cicero, as consul in 63 BC, to promote a new law with the object, *inter alia*, of imposing additional penalties on those guilty of electoral malpractice. Cicero duly obliged, with the enactment of the *Lex Tullia*. The candidates had also asked the senate to issue a resolution declaring whether particular kinds of conduct amounted to malpractice under the existing law. This may imply that the offence was not clearly defined in the relevant *lex Calpurnia*. The senate issued a resolution, stating that:

"if [a crowd] had been paid to greet the candidate, if they were hired to follow him around, if the tribes [i.e. voting units in the assembly] were freely (*volgo*) given places at the gladiatorial games, and if feasts were given indiscriminately (*volgo*), then the *lex Calpurnia* has been violated."

Nonetheless, when Murena was elected and Sulpicius was not, Sulpicius and another aggrieved citizen, M. Porcius Cato, prosecuted Murena for malpractice. Cicero defended Murena. At trial, the senatorial resolution was treated as an authoritative statement of the scope of the *lex Calpurnia*¹². In his published speech, Cicero makes clear that he considered the senate's clarification to have been unnecessary, since it was, he claims, already clear what conduct was covered by the law.

Cicero argues, instead, that there was no reason to suspect Murena of malpractice, since he was a more attractive candidate altogether than Sulpicius; his success was therefore explicable without resorting to any suggestion that he must have cheated. And, so far as related to Murena's electoral campaign, Cicero argues that Murena merely entertained his own tribe, which was normal practice; his friends may have paid to secure the services of others to support his campaign, but Murena had no part in it; and his entourage was made up only of his own friends and clients, who had social obligations to support him, but were not paid to do so.

A modern reader may conclude that there was, at best, a fine line between what was permissible and what was electoral malpractice. The kinds of conduct described by the senate as falling within the scope of *ambitus* appear to share a common "core" characteristic that they entailed the buying of services, and the indiscriminate provision of gifts/entertainment to persons outside one's own social network (*volgo*), which distinguished them from the calling in of favours owed under an existing

¹² See Kinsey (1966).

social relationship. But the wording of the statute and the senate's resolution seem to leave uncertainties as to cases falling within the penumbra of the offence. In another context, in describing in a treatise on oratory how a legal advocate should deal with particular kinds of case, Cicero records an eminent orator of an older generation as having said that, where one is defending a charge of electoral malpractice, the only option is generally to deny the charge flatly; it is rarely possible to make legal arguments that particular acts of kindness or generosity (*benignitas/liberalitas*) fall the right side of the line, relative to unlawful *ambitus/largitio*¹³. These comments may suggest either that the limits of *ambitus* were well-understood, and there was little scope for argument as to whether particular conduct fell within or without those limits, or alternatively that, if judges were suspicious as to how a candidate had secured election, they would stretch the meaning of *ambitus* to include whatever questionable means the candidate was alleged to have used, so that it was more important to concentrate on rebutting the prosecution's factual allegations than on debating the scope of the law. In short, the term *ambitus* was somewhat open-textured, but the uncertainties thereby created may have been tolerable and, even potentially desirable, to ensure that marginal cases of corruption could be punished.

Riot/seditious violence and treason

It is helpful to consider together the two offences of *vis* (riot/seditious violence) and *maiestas* (treason) since it appears that, in respect of both these offences¹⁴, it was possible for a defendant to rely on a public interest defence - that is, that his conduct, though apparently constituting an offence, was lawfully justified as being undertaken *rei publicae causa* (to promote the interests of the *res publica*), or as not being *contra rem publicam* (against the interests of the community).

The offence of *vis* (riot/seditious violence) was apparently not specifically defined in the relevant *lex Lutatia de vi* nor in the later *lex Plautia de vi*. In common parlance, *vis* meant any kind of violence. The word was used in the civil law (in the phrase *nec vi, nec clam, nec precario*) to denote one of the grounds on which factual possession of property might be disqualified from amounting to a legally protected form of possession¹⁵. But it seems clear from Cicero's speeches defending those charged with the offence of *vis* that the law was interpreted as covering only violence having some public element, by virtue, for example, of its having been organised to disrupt a formal public assembly.

¹³ *De Oratore* II.105. And the same was also said to be true of charges of homicide and extortion: flat denial was often the only potentially successful strategy.

¹⁴ But, in some cases, also in respect of homicide.

¹⁵ The republican jurist, Q. Mucius Scaevola, offered a definition of *vis*, as used in the *ius civile*: he proposed that a person was to be regarded as occupying land by *vis* if he occupied it without the owner's consent (Digest 50.17.73.2). Stein (1966) points out that Scaevola's definition, which places no emphasis on the use of force, is inferred from decided cases. It provides an example of the way in which a term in common usage could come to bear a different meaning as a "technical" legal term. This is arguably what also happened in respect of the term *vis* as used in the *Lex Lutatia* and the *Lex Plautia de vi* in the context of the *ius publicum*: it came to denote a form of violence that was, by its nature or scale, damaging to the essential interests of the *res publica* in maintaining public order.

Thus, in his speech *Pro Caelio*, Cicero expresses surprise that a private dispute of no public interest should have been thought to justify the bringing of charges of *vis* and the scheduling of an early trial, with all the public excitement occasioned thereby¹⁶.

The *lex Appuleia de maiestate* established a *quaestio perpetua* to hear cases of *maiestas*. The essential concept underlying the offence of *maiestas* is the subject of modern scholarly debate¹⁷. The word *maiestas* is cognate with *magnus* (meaning great) and, potentially, *maior* (meaning greater). On either analysis, the essence of the offence of *maiestas* (short for *maiestas laesa*, or *maiestas minuta*) consists in causing damage, or disrespect, to the *maiestas* or *dignitas* (greatness/superiority/standing/status) of the *populus Romanus* (the Roman people). Before the enactment of the *lex Appuleia de maiestate*, offences against the Roman people would often be tried before the people in assembly. A general offence of *perduellio* (cognate with *perduellis* - enemy) covered essentially any action which an individual might undertake which was damaging to the legal order by which the Roman people operated or to the interests of the Roman people: thus, a military general who wilfully or negligently allowed his army to suffer a defeat, and thereby set back the interests of the Roman people, could be convicted of *perduellio*; or a magistrate who wilfully disregarded the rights of the people (e.g. by executing citizens without the approval of the people in assembly, in breach of their legal rights) might be guilty of *perduellio*. The offence of *maiestas* arguably simply superseded the offence of *perduellio* in respect of such conduct, and was used of cases falling to be heard by the new *quaestio perpetua*.

Like other statutory enactments, the *lex Appuleia de maiestate* took effect as a statutory supplement to Rome's unwritten law (*ius*), including its unwritten constitution. But the constitution was uncertain in some important respects, including as to what was the legal relationship among the various organs of the *res publica*, and hence as to what amounted to respect for, or disregard of, the *maiestas* of the *populus Romanus* or its elected magistrates. Two particular areas of uncertainty, in respect of matters which may fairly be regarded as aspects of the republican constitution, merit mention.

The first relates to the constitutional status of the *tribuni plebis* (tribunes of the plebs).

At an early stage in the history of the republic, the people had secured legal protections against the extensive powers of the magistrates. The protections took two main forms. First, individual citizens enjoyed some specific protections from the exercise by magistrates of their general powers to enforce compliance with their commands: a series of *leges* provided that it was unlawful for a magistrate to

¹⁶ *Pro Caelio* 1.

¹⁷ Bauman (1967); Ferrary (1983); Thomas (2003). Ferrary and Thomas consider that *maiestas* was not further defined in the *leges de maiestate* (other than in the *lex Cornelia de maiestate*, which prohibited provincial governors from undertaking specific actions outside their *provincia*, or without the approval of the Roman people or senate). Bauman argues that specific acts were generally listed as potential acts of *maiestas* in the *leges de maiestate*. But he agrees that it was still necessary for the prosecutor to show that, in the circumstances, the specific acts amounted to *maiestas*. Thus the open-textured nature of the term *maiestas* was not necessarily diminished by the inclusion of specific illustrative acts of potential *maiestas*.

execute a citizen without first allowing him a right of appeal to the people (*provocatio*)¹⁸. Secondly, the plebeian assembly was permitted annually to elect two, and later ten, *tribuni plebis* to hold office for one year. The function of the *tribunus plebis* was, by the exercise of powers conferred upon him by law, to protect the interests of the people against the might of the other magistrates. During his term of office, a *tribunus plebis* was entitled to exercise a right of *intercessio* (veto) against any act of any other magistrate (e.g. the latter's proposal of legislation to the people in assembly, or of a resolution to the senate) and to assist (by *auxilium*) any individual citizen against whom another magistrate was exercising his discretionary powers of judgment and enforcement. The *tribunus plebis* enjoyed protection from any form of violence against his person (*sacrosanctitas*) to ensure that he would not be impeded in the exercise of his functions. By the late republic, the *tribunus plebis* also enjoyed the right to promote legislation before the plebeian assembly. But, with ten *tribuni plebis* in office in any given year, there was scope for disagreements among them as to what course of action was most apt to promote the interests of the people (whose protectors they were); some tribunes might support the conservative senatorial group against the plebeian/popular politicians in the factional disagreements which dominated the domestic political agenda for much of the history of the republic. The relevant constitutional issue presented itself starkly (but not for the first time) in 67 BC, when the tribune Servilius Globulus who supported the senatorial opposition to a bill promoted by his fellow tribune, Gaius Cornelius, vetoed Cornelius' reading of his bill to the people; Cornelius pressed on with reading his bill; he thereby disregarded Globulus' veto and, it was alleged, failed to respect Globulus' sacrosanct status. Cornelius was subsequently prosecuted for *maiestas*. The prosecution apparently argued that his persistence in reading his bill in disregard of Servilius' veto amounted to a disregard of the lawful authority of Servilius, his fellow tribune, and thereby diminished the *maiestas* of the tribune, who was an officer of the Roman people. Cornelius argued that it could not amount to an attack on Servilius' exercise of his and the people's *maiestas* for Cornelius to have insisted on allowing the people to decide whether they wished to enact particular legislation - presumably because Cornelius' was a proper exercise of the tribunician power to promote the people's right of participation, whereas Globulus had misused his power to thwart popular participation in the legislative process. Cornelius was acquitted¹⁹.

This was one of a series of similar cases which aired a long running dispute as to whether the *tribunus plebis* was a delegate of the people, elected to carry out their will as manifested by the people from time to time, or whether he was invested with a power, for the duration of his term of office, to

¹⁸ It seems that decisions of the *quaestiones perpetuae* - established much later - carrying a capital penalty were not appealable to the people, since the people had, by popular enactment, established the *quaestiones perpetuae* to hear cases falling within their conferred jurisdiction.

¹⁹ Asconius 57ff. Lintott (1999:124) points out the tribune's right of *intercessio* may have been limited to intervening to prevent a magistrate from putting a bill to the vote of the people; he may not have been entitled to interfere with the voting, once it had started, since his right of *intercessio* was exercisable only against actions of other magistrates, not against those of the people.

exercise his own judgment as to what was most apt to protect the interests of the people, even in the face of their opposition. If the former analysis was correct, then it amounted to *maiestas* to impede a *tribunus plebis* from seeking the people's opinion on a legislative bill; if the latter was correct, then it amounted to *maiestas* for one *tribunus plebis* to press on with putting his bill to the people in the face of a veto exercised by his fellow *tribunus plebis*²⁰.

The second area of constitutional uncertainty related to the so-called *senatus consultum ultimum* - a "final resolution" of the senate. The senate was the aristocratic council of the *res publica*, which had traditionally sought, by its *auctoritas* (authoritative influence), to advise the magistrates as to the exercise of their powers. But, in 121 BC (and on several further occasions thereafter), the senate adopted a "final resolution", by which it formally declared that the *res publica* faced a serious threat from within the citizenry, and resolved that particular magistrates should take such action as was necessary to safeguard it.

In 121 BC, the *tribunus plebis*, C. Gracchus, had proposed a programme of legislation to which a senatorial opposition took grave objection, characterising it as a threat to the *res publica* by virtue of its radical social and economic implications. When violence broke out, the senate formally resolved that the consuls should take action to safeguard the republic. The consul, L. Opimius, sought to stem the violence by authorising the killing of members of the Gracchan party without trial, and without allowing any right of appeal to the people in assembly. When tried on a charge that he had thereby acted unlawfully, Opimius was acquitted.

Generally, the power to legislate lay with the people in assembly. But Opimius' acquittal might be taken to confirm that the legal effect of the senate's resolution was to suspend the protections which citizens (and *tribuni plebis*) generally enjoyed under laws enacted by the people, and to authorise the execution without trial of any citizen whom the consul judged to pose a threat to the republic. But the effect of the resolution was uncertain; the decision of the court in Opimius' case had no binding precedent value; and it remained an open question whether the senate could effectively immunise the magistrate, or anyone acting on his instructions, from liability for infringing the citizen's legal protection from execution other than on the authority of the people in assembly.

The defence of *iure factum* (lawfully/rightly done)

²⁰ The etymology of the term *maiestas* (from *magnus*/great or *maior*/greater) does not appear to assist: the question is whether the sovereign right of the people to decide on legislative proposals was a matter of greater constitutional significance than the legal *sacrosanctitas* of the *tribuni plebis* who, constitutionally, were the ultimate safeguard of the people's rights. The focus on the offence of *maiestas minuta* as relating to the *maiestas* of the *populus Romanus* also tends to obscure the issues: it was by no means self-evident that the *populus* meant, in this context, the people meeting in assembly; the *populus Romanus* was the totality of the *res publica*, so that the *maiestas* of the *populus Romanus* could be lessened by damage to its legal institutions, and not merely by inhibiting the legislative freedom of the people on a particular occasion.

Cicero's treatises on forensic oratory provide illustrations of how the aspiring orator should identify the issue raised in a particular case: in *De Oratore*, one of the speakers cites, by way of example, the case of Opimius' killing of C. Gracchus: the issue before the court was, he says, an issue as to the legal quality of Gracchus' action: Opimius' advocate did not deny the fact that Opimius had killed Gracchus, but he argued that the killing was undertaken *iure* (lawfully/rightly) because it was undertaken *pro salute patriae* (for the safety of his homeland). Other defences, he explained, also amounted to a plea that the accused had acted lawfully, whether out of necessity, or in ignorance or by accident. Later in the same treatise he suggests that the question was whether the killing was legally permissible, as being done for the good of the *res publica*, in reliance on a senatorial resolution issuing a call to arms²¹.

Opimius was not alone in advancing such a public interest defence. The anonymous writer of the treatise *ad Herennium* illustrated how a case might turn on issues relating to the public interest, which were potentially integral to the question whether the accused's conduct amounted to *maiestas*: the *tribunus plebis* Saturninus was proposing legislation before the people in assembly to provide for generous distributions of land out of public resources. The senate passed a resolution declaring the proposal to be contrary to the interests of the *res publica*. Another *tribunus plebis* therefore exercised his right of *intercessio* to veto Saturninus' proposal; when Saturninus tried to press on, Caepio broke up the ballot boxes and the temporary wooden bridges over which citizens walked to cast their votes, in order to prevent the people from voting on the proposal. Caepio was tried for *maiestas*, and the question was therefore one of definition: what is it to diminish *maiestas*²². Later in the same treatise, the writer elaborates further by explaining that, in this case, the prosecutor would argue that a citizen diminishes *maiestas* when he destroys those things in which the *amplitudo* (eminence) of the *civitas* (commonwealth) consists; and they are *suffragia* (the people's votes) and their magistrates. Therefore Caepio diminished the *maiestas* (sc. of the *civitas*) when he deprived the people of their opportunity to vote and deprived the magistrate of the guidance (*consilium*) of the people. Conversely, the defence would argue that a citizen diminishes the *maiestas* (sc. of the *civitas*) if he inflicts damage on its greatness; Caepio did not inflict such damage, but prevented it by protecting the treasury (sc. from the adverse economic effects which would have followed from the adoption of Saturninus' bill), resisting the cupidity of the malign citizens who favoured such legislation, and refusing to allow the diminution of the *maiestas* (sc. of the *civitas*)²³. It is to be noted that the defence argument proposed here potentially opens up much wider questions of public policy for consideration by the judges: it is no longer simply a matter of deciding what is the formal constitutional position of the *tribunus plebis* relative to those who elect him; or the relative standing of a *lex* and a *senatus consultum*; the judges are here asked to decide whether particular policy proposals would have so damaging an economic

²¹ *De Orat.* II.106; II.132.

²² *Ad Her.* I.21.

²³ *Ad Her.* II.17.

impact on the *civitas* as a whole as to justify intervention by the senate, and those acting pursuant to its guidance, to prevent them from being adopted.

The potential scope of public interest defences

Indeed, it is unclear what limits there were to such public interest defences. It seems that the express terms of the *leges* dealing with *vis* and *maiestas* made no reference to available public interest defences: it was simply inferred that the *leges* took effect alongside Rome's unwritten *ius*²⁴. That *ius* was itself derived from *mores maiorum* (the customs of past generations), as instantiated in innumerable *exempla* (examples). Those *exempla* were regarded as instantiating unwritten rules of law, which admitted of various different formulations according to what substantive norms were regarded as emerging from the events which formed the subject of the *exempla*. In the absence of any agreed formulation (and any scope for reasoned judicial clarification), they were potentially very unclear and often, at the least, were articulated in open-textured terms.

Nor was it entirely clear when particular elements of *ius* had fallen into disuse, or been overtaken by new *exempla* or *leges*²⁵. The position may be illustrated by considering the *exempla*, dating from the earliest republican times, which founded a general rule that it was permissible for a magistrate, and, indeed, for a private citizen, to resort to violence in defence of the essential interests of the *res publica*: the clearest examples, which were frequently cited, were those of the citizens who had summarily executed any citizen who aspired to kingship (pejoratively characterised as tyranny), since monarchy/tyranny was fundamentally at odds with the values of the *res publica*²⁶. In Cicero's *De Re Publica*, the principal speaker, Scipio, recalls the expulsion of the last of Rome's kings, the tyrannical Tarquinius Superbus, by one Brutus. Scipio commends Brutus' action: he was the first to teach the lesson that, when it comes to protecting the liberty of citizens, no one is a private citizen²⁷. But, with the introduction of new constitutional mechanisms to identify and deal with threats to the essential interests of the *res publica* (e.g. the *senatus consultum ultimum*), it was arguable that there was no continuing justification for private citizens to take the law into their own hands; indeed, to do so was contrary to other laws, arguably of more fundamental status, which prohibited the execution of any citizen without the approval of the people in assembly²⁸.

The public interest (non-)argument in Cicero's *Pro Milone*

²⁴ Some *leges* contained a saving provision, specifically stating that the law was not intended to provide for anything that was not *ius*. This saving may have originated at a time when *leges* were regarded as merely declaring what had already been *ius*. But, as *leges* came to be regarded as creating new law, the saving wording might be interpreted as an expression of legislative intent that no implied repeal of any "fundamental" provision of *ius* should be inferred.

²⁵ See Chaplin (2000) for a detailed discussion of reasoning from *exempla*.

²⁶ For example, the killing of Sp. Maelius, cited by Cicero at *In Catilinam* I.3.

²⁷ *Rep.* II.46.

²⁸ The *lex Sempronia de capite civis* of 123 BC. Later, trial before a *quaestio perpetua* took the place of approval of the people in assembly.

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

Milo was a political ally of Cicero's. There was a long standing enmity between Cicero and P. Clodius Pulcher, stemming, among other things, from an incident where Clodius had apparently violated a religious ceremony honouring Rome's gods; at his trial, Cicero had given evidence against him, but Clodius had nonetheless been acquitted. Cicero portrays Clodius as an immoral political operator, who routinely resorted to violent and unlawful behaviour to secure his political objectives. During the early 50s BC, Cicero had been driven into exile pursuant to legislation promoted by Clodius before the plebeian assembly. Milo, then a *tribunus plebis*, was active in securing Cicero's return from exile. In 52 BC, Milo put himself forward as a candidate for the consulship. Before the elections, Clodius and Milo, each accompanied by his own entourage, met on the Via Appia outside Rome. In a fracas between the two parties, Clodius was killed and then stabbed again repeatedly. His body was taken back to Rome by his friends and supporters, paraded in public and then burned; there was widespread rioting and the senate house was burned down. The unrest among Clodius' supporters occasioned by the incident necessitated some formal action. The consul, Gn. Pompeius Magnus, secured the passage of a law providing for a special court to be convened to try Milo on a charge of *vis*.

Cicero defended Milo. The first century AD commentator Asconius explains that Cicero was intimidated by the soldiers who surrounded the court and by unrest among the crowd. He gave a lacklustre performance and Milo was convicted. It was clear that Milo or members of his company had killed Clodius. Many apparently assumed that Milo's guilt was not in doubt, and that a simple summary judgment was required to put the matter to rest. However, Cicero argued that Milo had acted in self-defence in killing Clodius. He argued that it was implicit in the offence of *vis* that a defendant was not guilty if he and those supporting him had acted in self-defence, and he cited a large number of circumstantial details to show that this was what had happened. And, by arguing that unwritten defences were impliedly available to a charge of *vis*, Cicero opened up the possibility of arguing that other, wider public interest defences might also be implied into the *lex de vi*²⁹.

²⁹ Cicero argued that the Twelve Tables (the earliest partial codification of Roman law, dating from the fifth century BC) recognised that one citizen might lawfully kill another if he found him attempting theft at night, or armed theft during the day; he cited the famous cases in Roman history where one citizen had killed another who threatened the interests of the *res publica*, and had been found to have acted lawfully; accordingly, it was necessary for the prosecution to show not only that Milo had killed Clodius, but that he had no defence of lawful killing; it was self-evident that one citizen might lawfully kill another in self-defence: unless he could do so, he would himself be killed, and would not survive to invoke the protection which the laws were designed to confer on him against such a result.

Against this background, it is instructive to consider the wider public interest argument advanced in the published version of Cicero's speech *Pro Milone* (but which was, according to Asconius, omitted from the speech delivered at trial): Cicero argued that, if Milo had killed Clodius in order to protect the public interest, the whole *res publica* would have thanked him; accordingly, it would make no sense to convict Milo for an action which was welcomed as a public benefit. Cicero does not, in the published speech, go so far as to argue that, as a matter of law, Milo should be acquitted on this ground.

There are two possible reasons why he does not do so: first, since Milo's primary argument was that he had acted in self-defence, it was not open to him to argue, in the alternative, that he had killed Clodius for some public interest reason; and, secondly, Cicero may have considered that for Milo, on his own initiative, to have killed Clodius on the basis of his own judgment as to what the public interest demanded could not provide a legal defence: it was not for Milo to judge what the public interest demanded, and then to execute his judgment, without allowing Clodius the benefit of a trial. Asconius' commentary proposes that it was for this second reason that Cicero chose not to advance the public interest defence at trial.

It is, however, worth questioning why Cicero might have considered such a defence to be unavailable in law to a private citizen, having regard to the well-established tradition by which the killing of a would-be tyrant by a private citizen was recognised as lawful, as being in the public interest³⁰.

It is possible that, by the late 50s BC, public opinion had shifted: privately-initiated violence had severely damaged Roman public life, and Cicero may well have concluded that it should no longer be open to private citizens to take the law into their own hands as the tyrannicides of the past had done. The issues which divided society were no longer so clear-cut: Rome's almost-mythical history recorded that, in the early days of the republic, the whole of society had abhorred the prospect of a return to monarchy, so there was little doubt that a tyrannicide served the public interest well. But, in Cicero's generation, issues of the public interest were too complex to be resolved in a similar way. Resort to violence in support of political policies was now a greater threat to the well-being of society than any of the disputed policies themselves.

It is perhaps for this reason that Cicero's presentation of the public interest argument in his published speech *Pro Milone* is expressed in emphatically hypothetical terms, and is positioned not as a potentially effective defence, but as a reason why it would be perverse to convict Milo for securing a wholly desirable outcome.

However, if this is the import of Cicero's public interest argument, a question arises as to whether it has any legal relevance to the case at all. The relevant *lex* required the court to decide only on Milo's

³⁰ And Cicero's supporters had resorted to violence in their attempts to pressure the senate to support calls for his return from exile in 58/57 BC: *Post Reditum in Senatu* 19.

innocence or guilt. It was not for the court to choose what sentence to impose: the only sentence was a capital one, depriving the convicted defendant of his citizenship rights³¹.

Apparently mindful of these considerations, Cicero artfully presents the public interest argument as if it fortifies his case that Milo acted in self-defence: the gods, whose rites Clodius had violated, drove Clodius to such a pitch of irrational anger that he ambushed Milo, thereby forcing Milo to kill him in self defence; the killing occurred close to a shrine to those gods whose rituals Clodius had violated; the gods who protected Rome had brought about Clodius' death, and Milo was their instrument. This is rhetorically inventive, but it suggests that Cicero considered that the laws on *vis* (and potentially, those on homicide and *maiestas* too) did not necessarily admit of a wide public interest defence for private citizens at all.

The "spillover effect" of the defence of *iure factum*

Milo's trial was held in 52 BC. But for many years before then, public interest defences had been formally deployed in trials for *maiestas* and *vis*, in defence of consuls, *tribuni plebis* and private citizens³². The deployment of such arguments had arguably produced wider effects: even in cases arising under laws relating to *ambitus* (electoral malpractice) and *res repetundae* (extortion) we observe Cicero introducing or contemplating the introduction by his opponents of wider public interest arguments, on the basis that the judges should, in some way, take them into account.

Thus, in his speech in defence of Murena on charges of electoral malpractice, Cicero reminds the judges of the vulnerable state of the *res publica*. In the preceding months, Cicero had taken a leading role in suppressing the notorious Catilinarian conspiracy, led by L. Sergius Catilina, a dissolute nobleman who had fallen into a ruinous state of debt, from which he saw no escape, short of a general cancellation of debts, to be secured by overthrowing the lawful government and instituting his fellow revolutionaries in their place. Catiline was apparently supported by a large number of disaffected senators, not all of whom had - according to Cicero - been effectively neutralised by the time of Murena's trial. For this reason, Cicero argues, the republic should not be deprived of one of its two consuls of 62 BC; if Murena's election were set aside, and the remaining consul were distracted from affairs of state by the necessity of arranging for the election of a consular colleague, that would play into the hands of the remaining Catilinarian conspirators.

But, formally, this was simply not a relevant consideration under the law on *ambitus*. It was, of course, worth emphasising to the judges the grave consequences which would ensue if they convicted Murena wrongly. But Cicero artfully hints that the judges should, in some sense, weigh up the importance of punishing Murena for what he is alleged to have done (which, Cicero intimates, would amount, at most, to little more than excessive generosity to voters) against the detriments to the *res*

³¹ The treatise *Ad Herennium* notes that there was therefore no formal role for any plea in mitigation, or request for clemency, from such a tribunal: II.26.

³² Several such cases are cited in Cicero's *De Oratore*, including that of the tribune Norbanus (II.194 ff.).

publica of being deprived of Murena's support in the office of consul. The judges may well have been more willing to entertain this argument because it was the kind of public interest consideration that was routinely advanced in cases of *maiestas* and *vis*³³.

In short, it seems that the possibility that a defendant could – quite properly - avoid conviction on a charge of *maiestas* or *vis* by inviting the court to evaluate whether his action had, in a broad political and social context, been apt to serve the public interest may well have prompted advocates to introduce similar arguments by way of a defence to charges of *ambitus* and other offences in which such defences had originally had no place. Whether this occurred through misunderstanding of the law, or as part of a deliberate attempt to mislead lay judges into misinterpreting their role and the rules they were required to apply, it risked turning the *quaestiones perpetuae* more generally into more “political” tribunals in which the judicious application of adequately defined legal tests was hijacked by the introduction of wider, unconstrained public interest arguments. If that was so, then Cicero's advice to the judges hearing the case against Cluentius, that they should decide the case by reference to the language of the statute, since that was the only task entrusted to them, must be regarded as quite exceptional.

The pros and cons of open-textured rules

Modern legal scholarship identifies situations in which it may be appropriate for a legislature to choose to use open-textured language to frame the questions which courts are to decide (by way of departure from a simple model in which rules should ideally be framed in terms which admit of little or no discretion on the part of judges in determining their scope). For example, it is argued that open-textured provisions (sometimes referred to as “standards” rather than “rules”) may appropriately be preferred in respect of matters where there is overall benefit in entrusting to judges an assessment of the standard of conduct required of the citizen in any particular case, compared with prescribing a uniform standard in advance. This may be appropriate in matters where a more black-letter law approach would be arbitrary (since any strict definition would give a suboptimal answer in some cases), or where a judgment needs to be made on a case by case basis by reference to many incommensurable factors. Similarly, a legislature may prefer to use open-textured language in framing a public office-holder's statutory power in order to entrust to that office-holder the function of

³³ In the Verrine orations, Cicero's wider arguments about Verres' misconduct as a military leader in Sicily are also introduced to rebut the suggestion which Cicero claims he expected Verres' defence counsel to raise, to the effect that the judges hearing charges of *res repetundae* (extortion) should not look narrowly at whether Verres had committed the alleged offences, but should look, in the round, at whether his military success outweighed these considerations (II. Verr. V.1-4). But, since this speech was not delivered, Cicero may have chosen to cite this concern merely to create a “peg” on which to hang the damning evidence which he wished to publish about Verres' corrupt and incompetent handling of military affairs in Sicily. And he makes clear that, in strictly legal terms, even the most exemplary military record could not provide Verres with a defence to charges of *res repetundae*.

exercising a more-or-less wide discretion to decide how cases falling within the scope of the power are to be treated³⁴.

But these approaches do not suggest that it is always appropriate to adopt such open-textured provisions. For example, it would generally not be considered appropriate to expect judges to decide questions as to how important elements of the constitution should operate, by legislating in open-textured terms which effectively characterised such questions as factors falling within the ambit of a widely framed "public interest" test to be applied on a case by case basis.

Application to the *quaestiones perpetuae*

The Roman republic had an unwritten constitution, and there was no complete separation of legislative, executive and judicial powers. Some of the areas of uncertainty which I have described - uncertainty as to the legal effect of a *senatus consultum ultimum* (final resolution), uncertainty as to whether a private citizen could lawfully use violence in defence of the *res publica* without any specific legal authority, and uncertainty as to the nature of the powers of the *tribunus plebis* - may fairly be regarded as giving rise to questions of constitutional law: the first of these uncertainties related to the rules of recognition by which valid legal measures were to be identified, the second to the extent to which the official organs of the *res publica* monopolised the legal use of violence, and the third to the interaction of the powers of different public office-holders, which in turn affected the the legislative processes of the *res publica*. We might expect these matters to have been resolved by the adoption of clarificatory legislation by the people in assembly, or by the emergence of a consensus as to the true legal position, which judges would then have been obliged to observe.

However, when these issues arose in cases before the *quaestiones perpetuae*, they appear not to have been addressed and decided separately, but to have been wrapped up in the assessment of wider public interest arguments, with the result that action taken in pursuance of a final resolution of the senate might on one occasion be found to be unlawful, and on another to be justified by the adoption of the senatorial resolution. Similarly, the use by a private citizen of violence in defence of the *res publica* might sometimes be found to be unlawful, and sometimes not, leaving it uncertain whether the different decisions reflected different "merits" considerations, or different approaches to the essential legality of such private action. Likewise, the disregard of a tribune's veto might sometimes be found to be an unlawful interference with his - and hence the people's - *maiestas*, but on another to be justified as being in the public interest.

By subsuming these issues within an open-textured public interest test, Roman advocates, judges and citizens generally avoided reaching a consensus on how these issues should generally be resolved. It is questionable whether this served the *res publica* well: the continuing uncertainty (or, if you prefer, flexibility) arguably allowed politicians to continue, throughout the final century of the republic, to

³⁴ Sunstein (1995), Waldron (2011), Endicott (1998, 2011), Asgeirsson (2015).

defend their resort to violence against their fellow citizens under the cloak of a heroic defence of the *res publica*.³⁵

In advising aspiring orators as to how to formulate the issues raised in cases such as those of Opimius and Caepio (described on page 10 above), Cicero and the *Auctor ad Herennium* do not consistently isolate for determination distinct questions of law as to the immunising effect of a "final resolution" of the senate, or as to the legality of disregard of a tribunician veto. But that may simply reflect their awareness of how these issues were addressed in practice. (And they may have considered that there was no prospect of resolving these matters, as distinct questions of law, via the emergence of a social consensus, or the passing of a *lex*.)

This suggested deficiency in the rules applied by the *quaestiones perpetuae* does not disclose a problem with using open-textured rules, or unwritten rules, *per se*. But it does perhaps disclose a risk of using open-textured rules to avoid having to legislate in order to resolve difficult constitutional issues (or to avoid having to decide other issues which should preferably be regarded as requiring legislative resolution as a necessary prior step, before judges or other public office-holders are asked to apply a residual open-textured public interest test).

Nor is the "spillover effect" outlined above directly attributable to the use of open-textured rules. It is more probably attributable to the use of unwritten rules which, in the absence of a clear formulation of their scope or rationale, left room for uncertainty as to whether the unwritten rules supplemented all, rather than just some, statutory offences.

In both cases, the uncertainties associated with the *iure factum* defence were exacerbated by the fact that the *quaestiones perpetuae* gave no reasons for their judgments, and created no legal precedents. Their judgments therefore created no body of legal reasoning to help judges in future cases to identify or weigh the factors which might properly be taken into account in applying the *iure factum* test, or to isolate separate questions as to the constitutional rules by reference to which the accused's conduct was to be judged³⁶.

We may reasonably ask why the Romans of the late republic did not identify these difficulties and deal with them differently. Their acceptance of the arrangements which I have outlined may reflect other features of the late republican conception of the constitution, the function of the courts, and the appropriate allocation of legislative and judicial functions. It is arguable that there was no common

³⁵ See Flower (2011) for the effect of continual political violence in fatally undermining the functioning of the *res publica*.

³⁶ And, since the same judges decided questions of law and fact, it was more difficult to isolate "hard-edged" questions of law within the overall public interest test, to which a once and for all definitive legal answer could be provided (in contrast to the English law approach in cases such as *R v MMC ex parte South Yorkshire Transport Limited* [1993] 1 WLR 23). At most, a consensus might emerge over time that particular *res iudicatae* should be followed, as representing the commonly accepted understanding of the law. cf. *Ad Herennium* II.19.

understanding of what amounted to a constitutional rule of the *res publica* and therefore no recognition of any pressing need to resolve what I have characterised as unresolved constitutional questions³⁷. Moreover, the *quaestiones perpetuae* had, in effect, taken over functions which would, in earlier times, have been performed by the people meeting in assembly: such hearings of the people applied minimal procedural rules, and provided, in practice, an opportunity simply to approve or condemn the accused, without reference to formal substantive rules. If the *quaestiones perpetuae* were regarded as successors to such hearings, then citizens might well have entertained relatively low expectations as to the constraints on *quaestiones* deciding individual cases, or as to the clarity of the criteria by reference to which such *quaestiones* should determine the cases argued before them. It was therefore unobjectionable that the *quaestiones* should operate within *leges* which left them a wide discretion to decide, in effect, whether to ostracise a citizen whom they judged to have betrayed the *res publica* and its values³⁸.

Modern parallels?

On reading Cicero's speech *Pro Murena*, one is struck by the candour with which Cicero points out that responsibility for deciding whether Murena should serve as consul has now passed from the people in assembly to the judges³⁹. When a similar issue arose after the US presidential election of 2000, it ultimately fell to the US Supreme Court to decide whether George W. Bush had been validly elected. The case gave rise to substantial disquiet, with claims that it was constitutionally inappropriate for the Supreme Court to decide, in effect, who should be the next President. But some legal theorists argued that there was not necessarily a problem: provided that the Court was not choosing a President in its own discretion, but was merely deciding, by reference to clear rules, whether votes had been counted in compliance with those rules, then the Court's role was entirely consistent with the separation of powers and the rule of law; indeed, the Court was safeguarding the due functioning of electoral law⁴⁰. But imagine if the Court had been asked to apply a public interest test to decide whether a rerun of the election, or the timely installation of a new President, better served the public interest.....

³⁷ Though Cicero argues on several occasions that proposed legislation is objectionable on the grounds that it would depart from established norms which he appears to regard as having some entrenched/constitutional status: see, e.g., his criticisms of Rullus' proposed agrarian bill in his speeches *De Lege Agraria*. Moreover, his draft law code in book III of *De Legibus* comprises a constitution of sorts for the *res publica*. But, notably, it does not entirely resolve the issues identified above. Nor does it make clear whether Cicero favoured the use of *quaestiones perpetuae* to decide these matters, or at all: the parts of *De Legibus* discussing the role of the courts are no longer extant. See Bauman (2000) cf. Riggsby (2015).

³⁸ But see Riggsby (1997) as to the limits of that discretion.

³⁹ *Pro Murena* 1.

⁴⁰ See, for example Waldron (2002) and Zywicki (2003). One key question was whether there were clear rules admitting of mechanistic application to the facts. But, as Waldron points out, reactions to the case may suggest that the whole concept of the rule of law is essentially contested among those commenting on it.

Are there other instances where essential constitutional questions, or policy questions which we might expect an elected legislature to decide, are left to judges to determine, through lying latent in open-textured legal language?

One topical place to look would be within EU law. The CJEU is frequently called upon to decide how best to define such loosely framed concepts as those of ever closer union, the fundamental freedoms, indirect discrimination, equal treatment, subsidiarity, and the permissible grounds on which Member States may justify impediments to the fundamental freedoms of EU law. Critics of the EU argue that these concepts are framed in vague terms in the EU treaties and in EU secondary legislation precisely because the Member States cannot agree *inter se* as to how these various values and objects should be understood and should interact; but they are - at least in part - matters which ought to be resolved by Member States, rather than by the CJEU; instead, too much of the task of completing the legislation is left to the courts. It is perhaps no surprise that the UK's efforts at securing clarification of the Treaties in preparation for its proposed in/out referendum have homed in on some of these concepts, in the hope of securing greater certainty and curtailing the law-making jurisdiction of the CJEU⁴¹.

⁴¹ See, for example, Beck (2012:161).

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