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Introduction

The purpose of this book is twofold. On the one hand it intends to provide a survey and analysis of the colonate in the Roman Empire from the legal point of view, embedded as much as necessary in the social and economic context of Roman society. On the other hand, it is meant to show how to approach the sources in a case like this and, in general, how to work with the codes of Theodosius and Justinian, in a way that does justice to the place of the texts in the whole of these codifications, that is, taking account of their function within a codification. The individual texts have their value as historical sources, yet one must be aware how they have come to us, in which context and to which purpose they were selected and edited, or else their historical value might diminish or even disappear.

This is in the first place a legal-historical work. It means that its first aim is to look for legal rules. Legal rules are meant to arrange life and are imposed if not followed. In order to get a sound notion of a legal phenomenon, here the colonate, it is necessary to collect all rules and to check them against each other until a systematic survey is achieved. This may seem a bit overdone to non-jurists, but the old Byzantine scholia to Justinian's compilation prove that systematisation was all-important to the Byzantine jurists and Justinian's compilation is a product of this drive for systematisation. These jurists did not invent this. They were pupils and successors to a line of jurists, teaching in Constantinople, Beyrouth, and other places the same systematisation. We know only two of their names: Domninos and Patroklos, called the *heroes*. And they in their turn were continuing the same drive which existed in the classical period of Roman law, as the surviving remnants in Justinian's compilation prove. Also, the imposition of rules required consistency. It is thus helpful, if not necessary, to have a good grasp of Roman law and of the exegesis of legal texts. It seems exaggerated, yet it is the warning that counts: search for the system behind it, because those who formulated the law worked in that system. For these reasons it is necessary to check all possible sources and see

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whether such a consistency is present and makes it possible to speak of a rule. Moreover, the codes are embedded in a broader body of law which one should also keep in mind.[1] My research may be boring because of this at some moments, but it is absolutely necessary. I have relegated to footnotes what should be present but was not directly necessary for the main argument. Texts can be found through the index.

Still, since law is meant to register the rules followed and to impose these if not followed, it is connected with the way humans interact and society functions. In one way, it follows what people do and what things they think should be done; in another way, it regulates behaviour, both when that behaviour is deviant and has to be corrected, and when behaviour or circumstances arise which were not yet foreseen. In that case new rules are issued to address such problems. Law is embedded in society and there is no society without law.[2] And although in general society was rather conservative and legislation consequently more reactive and conservative, innovations happened too. Ancient man was not afraid of or averse to new things (like accepting debt acknowledgements in the form of chirographs as negotiable papers). Still, those structures set up to continue for a long time were not changed rashly. For example, the administrative structures of the overseas transportation of grain from Africa and Egypt to Rome and Constantinople remained basically unchanged for two or three centuries, only to be adapted in the east in 409. The same goes for taxation, which under Diocletian was probably more straightened and homogenised than set on a completely new footing and remained so until the Justinianic reforms.

We shall see the same with the colonate: not fallen from the sky, it was incorporated in public law to continue with the necessary adaptations for more than three centuries. Its predecessor was an answer to particular economic needs, it required certain economic conditions, it may have competed with other solutions to the same or similar problems, it evolved under the pressure of changing circumstances, and it was adapted to counter undesirable uses.

Wherever possible, the cause of changes or introduction of new rules will be discussed, but apart from that a final chapter is destined to put the entire history of the colonate in a more historical perspective. It will not

[1] See for an example the table in Sirks 2007, § 24.

[2] I do not refer to the Natural Lawyers like Grotius, but put merely the question whether we can speak of a society if there is no minimum of law, and second, more empirically, I refer to Kramer 1956, *From the tablets of Sumer, Twenty-five firsts in man's recorded history*. As Hesiod said, law distinguishes man from animal.

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always be possible to make quantitative statements about the field of application, for example whether the colonate covered the entire farming population of the Empire (by the way, far from likely). Rules are made or issued when something is simply necessary, such as organising care for insane people, or when something turns up which is sizeable or important enough that it requires regulation. Nobody will assume from the extent of the regulations about the *cura furiosi* that a large part of the population is insane. With theft, it is the same: it is considered such an outrage to property that it cannot be tolerated, regardless of the frequency. However, in the punishment we can also see the value a society (through its courts) attaches to this: the death penalty in archaic times, the death penalty for grand larceny in the Bloody Code in the UK of the late eighteenth century, a few years of imprisonment nowadays. The same applies when we research other ancient laws. The *lex Pompeia de parricidis* expresses the societal horror over parricide by its special punishment (death), but we do not find any application of this.

1 The *Status Quaestionis*: General Approaches

The colonate is part of the antique agricultural exploitation. Perhaps in the archaic Mediterranean world all farmers were working on their own individual plots of land without any assistance (although it seems that, considering the dominant role of the community, anybody would have relied on the community and the community on him); but as early as there existed some division between more and less rich members of a community, there existed also some relation determined by dependency between these richer and poorer members. For Roman society the phenomenon of the *clientela* is known. We can leave aside the questions of when in Republican Rome the large estates came into existence and when and to what extent there existed farmers who no longer tilled their own land but rented land and tilled it in exchange for rent in money or share-cropping.[3] It suffices for the present to state that around AD 200 agriculture in the Roman Empire was done according to various legal and economic models. There existed the farmer who worked his own land, be it alone (with, undoubtedly, the assistance of his family) or with some farm hands (slaves or free persons). There existed the lessee, who paid rent in money (and who might be assisted by a remission in years of dearth) or in kind. If the measure of the rent was expressed as a fraction of the harvest,

[3] See, for example, Scheidel et al. 2007; more specialised is De Neeve 1985.

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it was share-cropping. There were the large estates (*latifundia*) which were tilled by slaves of the estate owner if not issued in plots on lease, sometimes under the supervision of a head slave (*vilicus*). These could be attached to the land as *instrumentum* and live quasi as a family with wife and children. As we know from the Heroninos archive, large landownership did not necessarily mean an extended estate such as a Communist kolkhoz or an East German *Kombinat*: it will rather have consisted of all kinds of plots of land, which were individually administered within a centralised accounting and management system. The guiding economic and managerial principle was to reduce loss as much as possible by reducing costs and using what was available.[4] Investments were made, for example, in improving land and setting up irrigation,[5] but whether this was possible will have depended on the availability of time and capital. Richer people will have been in a better position here, but a dependency relation may have been advantageous in this respect. As somebody who was a freedman of a rich family will have had easier access to investment capital through his dependence on his patron, so a farmer who was a *cliens* of a rich patron will have had easier access to resources too. In both cases they paid a price as well, namely in independence, but the balance may have been advantageous for both sides.

Cities and temples possessed agricultural land and issued this in the form of long leases against a fixed rent (*vectigal*). These lessees enjoyed a right of lease which resembled that of an owner, it being hereditary and they being protected against disturbances by a possessory interdict.[6] The emperor possessed land which he issued in diverse forms. It could be as a normal lease to an individual lessee, or to a head lessee (*conductor*) who would sublet parcels to (under)lessees. It could be done on a more permanent basis through an imperial *conductor* with lease conditions fixed for all, as the *lex Manciana* of Africa shows. In the Later Empire we find another form of land issue, where these lands are called *fundi patrimoniales*. Here the emperor donated Treasury land to somebody under certain conditions, usually that a yearly rent (*canon*) had to be paid. The donee could not dispose of the land by sale or gift, but his right was hereditary. Failure to pay the *canon* resulted in withdrawal of the gift. As such, it resembled the long lease for a *vectigal*, which was also a hereditary tenure. But it could happen that the issue was done *sine canone*, or *iure privato*. In the first case, the donee did not have to pay a *canon*; in the latter case, the donee could

[4] Rathbone 1991, 396. His reflection on the response to his book is in Rathbone 2005.
[5] Cf. CJ 3.34.7, 11.43.4, 11.63.1 for legal evidence. [6] Kaser 1975, 374, 388.

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freely dispose of the land. Often the latter was done *salvo canone* and in that case it must have been almost indistinguishable from private property, albeit that a yearly canon had to be paid – which may have looked like a servitude on the land.[7] Another form of issue was that Treasury land was issued in *emphyteusis* under conditions like a canon. In this case the donee had to ameliorate the land or keep it in good condition; non-compliance could, like non-payment of the *canon*, lead to a recall of the gift. Here also it was possible to alienate land, even manumit the slaves attached to it. As with the *fundi patrimoniales privato iure* it must have been almost like private property, except for the canon. In all these cases the donee had to exploit the land and needed, consequently, farmers. He could use one or more of the forms of exploitations as described above. The emperor Leo (468–484) extended in the east the application of the legal construction of *emphyteusis* to land in private property (CJ 4.66.1). In the west the form of a *locatio conductio in perpetuum* was used.

In all these exploitation forms the basic assumption is that we are dealing with contracts between legally independent persons who may enter and end the contractual relationship, even unilaterally if they see a reason for this and as long as they comply with the legal rules governing this. In practice, many persons, both landlords and lessees, will of course rather have wanted to continue the contract, being both dependent on the returns of the land for their income and life subsistence. But this did not change their personal free status and did not infringe on their legal autonomy as such.

It is therefore rather surprising to see emerge in legal and other texts of the fourth and later centuries the phenomenon of people legally bound to an estate, apparently in an agricultural context. From the fourth century onwards we dispose of imperial constitutions which were issued with the purpose of tying agricultural workers (*coloni*) to the land. Precisely when this began, we do not know, neither do we know precisely why, but it clearly had to do with guaranteeing the cultivation of land and payment of taxes. This system of binding those people to an estate or plot of land is called the (Roman) colonate.

Ancient historians look at this from the perspective of the ancient economy and the agrarian exploitation which is of course an indispensable aspect of the colonate, since it functions in this context, as the texts demonstrate. It is only later, the colonate being a status, that *coloni* are

[7] One wonders whether there remained a distinction: perhaps the gift could be revoked? The texts do not give a clue to this.

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found in other occupations (and can be recalled). Thus the connection with the agrarian setting must be taken into account.

The colonate has generated much literature and many theories, already by Gothofredus and later by Savigny, whose essay 'Über dem römischen Kolonat' includes a reaction to Gothofredus' views, and by other authors.[8] Due to the need to take as many factors as possible into account, the theories are not sharply separated from each other. We can distinguish several approaches.

One view is connected with a shift in the mode of agrarian exploitation. The colonate is seen within the context of agricultural exploitation, as the successor to the tenancy of the Late Republic (when a *colonus* would have been a lessee). The cause of this development would have been an increasing impoverishment of the lessees, making them increasingly dependent on the landowners.[9] The Republican way of many individual lessees and individual farmers-owners made way for a slave-based exploitation on larger estates. By the end of the second century AD, the supply of slaves dwindled and landlords were forced to find new supplies of workers. These they found by subletting their great estates and fixing the sublessees to their land. The fact that the great imperial estates in North Africa (and elsewhere?) were administered by *conductores*, who in their turn sublet parcels, under a general regulation for all (the *Decretum Commodi de saltu Burunitano*, found in 1879, and the *lex colonis fundi Villae Magnae datae ad exemplum legis Mancianae*, found in 1896) seemed only to sustain this view. It led to a change in production method. The farmers/lessees on these gradually came into a state of dependency which needed little to become

[8] Already in the Middle Ages the texts on the *coloni* attracted interest: see Conte 2000; Savigny 1825–50, 1–16. One should be aware that serfdom was abolished in Prussia in 1811, in Mecklenburg in 1822 and in Saxonia in 1832: the colonate was an actual question. For a survey of other nineteenth-century authors, see Heisterbergk 1876, 7–21 and Marcone 1988; further Marcone 1997b on the Italian literature in the nineteenth century on the colonate. A previous summary of the *status quaestionis* is provided by Jones 1974; Cracco Ruggini 1990; Sirks 1993a, n. 1; Whittaker & Garnsey 1998, 287–294; Ward-Perkins 2000, 343–344; Demandt 2007, 398–401 (Seeck 1901 is rather old). Scheidel et al. 2007 does not enter into the subject of the colonate. Johnson 2012 has a chapter by J. Harries, 'Roman law and legal culture' (789–807), which hardly deals with the (private) law as such and has nothing about the colonate, as the entire 'handbook' does not pay special attention to the phenomenon. Banaji thinks *coloni* were bound tenants (2001, 615), Mathisen thinks they were tenant farmers (2012, 752); see also Liebs 2005, 1957–1960. For further literature in addition to what is cited here, see the following: Sirks 1993a, 331 n. 1 and the bibliography in Terre 1997. See, more recently Amarelli 2017 and further Carrié 2017 in the context of a survey on the problems connected with land in Late Antiquity.

[9] An example of this view is Johne 1993. Earlier contributions by Johne in this respect are Johne et al. 1983; Johne 1985, 1986 and 1987.

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the colonate in the following centuries.[10] This view was first put forward by Fustel de Coulanges in 1885.[11] Clausing, following Fustel de Coulanges, thought the farmers got gradually indebted. Together with a tendency to continue tenancies, a diminishing fertility of the land and, with it, diminishing tax revenues led to a legal attachment to the land.[12] Saumagne, in a rather complicated analysis, saw the colonate as a *quasi-servilité juridique*, originating in the fiscality because the *tributum* made him subjected to the landowner. There is an echo of Fustel de Coulanges here, and Saumagne extends it by attributing to the landowner the right to levy the tax owed by his *censibus adscripti*.[13] But these suggestions are not well based, as shall become clear later. Pallasse discerned in the *lex Manciana* and the contracts in the Tablettes Albertini traces of emphyteusis and thus of lease in perpetuity.[14] Weßel assumes that these *conductores* of imperial land of the second century had in Late Antiquity become *emhyteuticarii* and, as the parallel to this, the lease of their lessee-*coloni* had turned into a property right which allowed them to sell it. However, as he himself admits, it has no relation to property.[15] Kolendo has resumed the question of continuity of the colonate in Africa, albeit with some reservation.[16] Santilli thought the same and combined this with a shortage in slave labour.[17] Mirković rejects an introduction through Diocletian's fiscal reforms because the colonate existed before: landowners could already force their *coloni* to remain on the land. She assumes indebtedness forced the *coloni* by way of their lease contract to the land.[18]

[10] *CIL* VIII 10570, 11–13: *non amplius annuas quam binas aratorias binas satorias binas messorias operas debe[a]mus*; *CIL* VIII 25902, IV.24–27: *quodannis in hominibus singulis in arationes operas n(umero) ii et in messem n(umero). et in sarritiones cuiusque generis singulas operas binas*. But that could still be part of the tenancy agreement. So also Lenski 2017, 121.

[11] Fustel de Coulanges 1885. Several publications followed: Wiart 1894; His 1896; Schulten 1896; Beaudouin 1897–98, and the authors mentioned by them.

[12] Clausing 1925, 262–280, 284–296. Clausing mentions antique views that Italy's soil was exhausted (271–272). It would be interesting to check this against modern data.

[13] Saumagne 1937.

[14] Courtois et al. 1952; Pallasse 1955.

[15] Weßel 2003, 109–116 on the legal position of landowner and *colonus*, who is for him a 'Kleinpächter'; here 112–113, *dominium* means more than ownership, cf. Augustine *De civitate Dei* 10.1.2, where *coloni* are *sub dominio possessorum*. There it concerns certainly *coloni originales*.

[16] Kolendo 1991, 1997, 158–161.

[17] Santilli 1975; repeated in Santilli 1999.

[18] Mirković 1997, 15–26. See the critical review by Kränzlein 1999. Also Mirković 1986 and Mirković 1994. The arguments put forward are hard to follow. The assumption that under Verres landowners, liable for the land tax, devolved this burden by transferring this to their tenants by the lease contracts but remained liable in case the tenant fled (Mirković 1997, 20) is perhaps meant to explain why landowners got the authority to keep them on the land, but it is not confirmed by contemporary sources. The link with Ulpian (D. 50.15.4.8) is dubious (the text is much later and it does not follow from this that tenants and land tax were connected), while other texts are from the later Empire. Mirković 1997 cites on 24 P.Oxy. XLVII 3364 (in *J. D. Thomas, A petition to the Prefect of Egypt, JEA 61 (1975) 102–221*) as proof that under Caracalla the person who had sheltered a fugitive *tributarius*

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Another view is that the colonate originated in the fiscal reorganisations which Diocletian (r. 285–305) carried out. At a rather early moment in his reign, Diocletian began to reform the taxation system because, due to the doubling of the number of provinces[19] and increasing the troops,[20] he needed more revenues.[21] This reform built on the previous systems; probably it was more a uniformisation which extended over the Empire. All land was taxed according to its potential yield, resulting in a potential total revenue, after which the expected expenditure was repartitioned proportionally over these assessments. In this process Diocletian would have made landowners responsible for the collection of the taxes their lessees owed, which would alleviate the task of the authorities considerably and, since the landowners were more able to carry the fiscal burden, would give the emperor more stable revenues. In compensation Diocletian introduced the bond to the estate for their farmers so that the landowner could rely on having enough labour.[22] These lessees, the *coloni*, declined by this subjugation and fixation to the land, which resulted in the colonate of the late fourth and fifth century.[23] Under Justinian, a category of *coloni*

was penalised. Unfortunately, she cites Serenus as petitioner, whereas it was Herakleides, Serenus being the lawbreaker, and the editor warns against equalising ὑπόφορος with *tributarius* and taking the term as technical. Also, although the text confirms that taxpayers should reside in their *idia*, either their village or *nomē*, it does not say that landowners had the authority to recall their tenants. And, as a matter of fact, regarding the land tax the edicts pertained to landowners, not tenants. There are more occasions where it is difficult to follow Mirković's arguments.

[19] *CAH* XII, 179–181, introduction of the dioceses presumably in 297. [20] *CAH* XII, 120–124.

[21] *CAH* XII, 172–176. Bott 1928 is an interesting publication, but now outdated.

[22] Giliberti 1999, 86: to prevent migration and thereby a shortage in farmers. Giliberti opposes the idea of a 'genealogy' of the colonate, namely that it evolved out of a class of half-free farmers, or barbarians settled on the land, or of slaves freed with the obligation to remain on the land, or of slave-farmers, or out of hellenistic practice. Farmers, who were lessees, were or gradually became subjected to their landowners. He rejects the idea that the colonate was instituted by the imperial government in its own, and not the landowners' interest. Under Diocletian, lessees underwent the same fate as other groups like the curials and the *navicularii*, whose function was considered essential for life in the Empire: their function became hereditary and they became *obnoxii*. To that came his tax reform. But is there evidence for such a tying to the land and work? Lactantius (ca. 250–ca. 320) *De mortibus persecutorum* 23.1–2 is usually cited for this, but the word *homo*, used here (2 *Agri glebatim metiebantur, vites et arbores numerabantur, animalia omnis generis scribebantur, hominum capita notabantur* . . .), usually means slaves, and slaves were indeed put on the census. It cannot be proof that it concerned free farmers. Also adhering to this fiscalist view: Schipp 2009, 40.

[23] For example, Faure 1961, 127–133, mentioning 305 and 306 as the moments of introduction. Also Marcone 1993, 825–826. I refer further for an overview with literature to Carrié 1993, 292–301 for his fiscal reforms. Fikhman rejects Carrié's fiscal cause of the colonate and stresses that great landlords had an interest in tying labour to their lands: Fikhman 1990, 171, 172, 175 = Fikhman 2006, 270, 271, 274. Harper 2011, 153–155, seems to adhere to the fiscal cause, subjecting long-term tenants, and assumes a different development in the west and east (but his subject is slavery, not the colonate). Similarly Vera 2012 = Vera 2019, 369 does not exclude such a development, assuming that it concerned private landowners/farmers. The proposition of Panitschek 1990, to explain the origin by assuming that the half-free status in peregrine legal systems by the beginning of the fourth

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(the *adscripticii*) is even compared to slaves. Their number would have been considerable but there is no information about their actual size. There is certainly evidence of free labour also in this time.[24] This view differs from the previous ones in that it supposes an active legal change, initiated by the emperor.

To some extent connected with this is the idea that a hereditary tying to their profession led to the situation that the landlords treated their tenants de facto as their property, which led to their being considered *personae alieni iuris*. It is based on the view according to which all functions and professions became from Diocletian onwards hereditary in order to ensure the functioning of the administration and state. The *coloni* made no exception. In that context they were tied to their land by way of the tax registration. As such the colonate would be but one illustration of the decline of the Roman Empire from this emperor onwards by its social petrification and bureaucracy. This theory lacks the proof of a legal transition, which, however, is desirable, since in Antiquity one was very keen on the difference between freedom and slavery.[25] Connected with this is the supposed emergence in Late Antiquity of the great domains as semi-public institutions, which had the right of *autopragia*, that is, to collect taxes themselves.[26]

Another question is whether the colonate was the precursor of medieval servage, villeinage and *Hörigkeit*. I shall deal briefly with this question in Sections 17 and 49, but it requires further research. We are here only concerned with the colonate as established in the Roman Empire.

Finally, there is the stimulating opinion of Carrié that the colonate is nothing more than a nineteenth-century construct.[27] It has encountered criticism.[28] Yet, the question, is there something like 'the colonate'?, is a good question. All too quickly an interpretation becomes absolute, and

century were romanised in the form of the colonate, in the course of his fiscal reforms, is very speculative. There were indeed situations which looked like the half-free status which he mentions (*dominus–libertus*, *patronus–cliens*), but still these people were legally free – and Roman. Did similar dependencies exist elsewhere? What do we know of peregrine half-free statuses? Panitschek does not name one. I could unfortunately not consult Perelman Fajardo 2019.

[24] So CJ 11.48.21.1; Whittaker & Garnsey 1998.

[25] Munzinger 1998. See my review, Sirks 2003. See Sirks 1993b for a refutation.

[26] The idea of the great domains as semi-public institutions, an idea set out before by Gascou 1985, is regarded with scepticism by Banaji 2001, 94–100 (on the rents paid), and by Sarris 2006, 150–154, and n. 85.

[27] Carrié 1982. See below.

[28] Marcone 1993, in his survey *Il lavoro nelle campagne*. As to the question whether in Africa already in the third century emphyteusis existed and was fundamental for the development of the colonate (Marcone 1993, 828–830), on which Vera 1987, I must refrain from entering into this, since it would require a study different from the present one.

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the danger of projecting one's own views is always around the corner, as the work of Waltzing shows. Similar questions were posed by Scheidel: Might the apparent rise of the 'colonate' be a function of the change in evidence rather than of changes in rural labour relations? And if coercion and dependence were the norm in these relations, what is then so extraordinary about the 'colonate'?[29]

What is striking is that in the above views a general shift is assumed, that is, that the supposed changes affected the entire Empire and all farmers. Such a view has found favour with Marxists. Yet it has recently met resistance from some ancient historians specialised in agrarian history. Marcone emphasises that there were regional differences which make it difficult to speak of general developments or a uniform colonate.[30] He leaves the question open, yet in any case is not convinced that there was a continuum as Fustel de Coulanges first proposed, namely that the lease turned slowly into a bondage.[31] Similarly, Giardina has raised the question of continuity.[32] Vera has put forward that various modes of exploitation co-existed during the entire Empire, which reduces the colonate to a phenomenon amongst other exploitation modes. According to him the relation between land and work should be the focus: landowners want their lands cultivated and need farmers, who, in their turn, are because of this not so helpless as it seems. All during the Empire the contractual relationship of lease existed, while the form was predominantly that of métayage (share-cropping). Next to this, other forms of exploitation existed.[33] Such an approach is very useful because the economic foundation not only of the colonate but of antique society in general was agrarian exploitation. Rathbone's research on the Appianus estate has shown how a plurality of small estates could be unified by clever management of the available man- and animal-power and instruments. Useful in this context was the continued presence of manpower, available on demand. To have lessees indebted was a better method than force to keep them on the land. Finally, Banaji has drawn attention to evidence which indicates that there was a very varied supply of labour forces, which does not allow for monolithic descriptions.[34]

None of the above views has been adhered to completely monolithically; it is more a question of where to put the emphasis. The background of the

[29] Scheidel 2000.
[30] A broad survey by Marcone 1988. Also Marcone 1993: an excellent and balanced survey.
[31] Marcone 1997a, 233. [32] Giardina 1997. [33] Vera 2010, 15–16.
[34] Banaji 2001, also in 2009, 76: 'a mixed servile labour force'. See also Grey 2007b, 363–367 on the variety in exploitation of the land; further Grey 2012 for a survey.

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