

《Article》

Ius civile in artem redigere:
Authority, Method and Argument in Roman Legal Science

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Summary

Norm-rationality and authority-based arguments furnish sufficient grounds for legitimizing the activity of professional lawyers and for justifying their decision-propositions whenever there is a state of evaluative identification between the holders of the norm-giving power and the legal profession. This was the case with respect to Roman legal science. Its protagonists were originally members of Rome's ruling aristocratic elite. But during the imperial age the jurists relied increasingly on the power of the emperor whom they were compelled to serve. This paper comments on the development of Roman legal science understood as a move towards a normativist version of legal positivism based on an epistemology and methodology in which law is a set of rules sufficiently justified by reference to the will of the legislator – in the Imperial Age the will of the emperor.

A noteworthy feature of contemporary Roman law studies has been the growing interest in legal argumentation. The present-day study of Roman law shares of course in the general interests of contemporary legal and historical research. As modern legal theory pays a great deal of attention on problems of legal argumentation, it comes as no surprise that scholars of Roman law are trying to do the same with their material. But are they entitled to use some contemporary philosophical or sociological theory as their starting point? There are different answers to this question.

Some Romanist scholars seem to think that modern patterns of explanation are directly applicable to historical material. From this point of view the activity of Roman jurists is explained mainly in terms of an ideology.¹⁾ Such an approach, however, can lead to a misinterpretation of historical sources. This does not mean, of course, that ideological or evaluative schemes

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of rationalization *ex post* cannot be used when the social impact of decisions is elucidated, irrespective of their validity as historical explanations. Other contemporary writers feel justified in using modern patterns of explanation but only as a possible starting-point. They recognise that it is a historical problem whether a decision-maker has been influenced by an ideology and whether he has been conscious of the ideological aspects of his decision-making. At the same time, however, they stress the point that the creation of an ideology is not the main task of legal writing; law in itself is a constituent element of the human community and the interest in law is a necessary and sufficient 'pre-knowledge' in questions of legal history. Indeed, a theoretical pre-knowledge is both useful and also inevitable when historical phenomena are being studied and explained. But it is a different thing to say that evaluation is inherently present in all argumentation and to explain historical argumentation with an ideological scheme. Much of the current analysis of Roman legal thinking is still done with the classical methodology of history as the starting-point. Here the analysis begins from the available sources, minimizing the role of the scholars' philosophical and other preconceived ideas. Writers of this kind include scholars of great eminence, such as Max Kaser, Bruno Schmidlin and Mario Talamanca. But their success is largely due to the fact that the philosophical outlook of the late twentieth century legal positivism, which they represent, shares a great deal with the normativism of classical Roman law.

It is very problematical how the development of Roman law should be divided into epochs. I am following here the pattern set by Fritz Schulz,²⁾ whose work Franz Wieacker describes as the turning point between the hunt for interpolations and the modern-day analysis of Roman legal thinking.

In its earliest, archaic phase Roman law was represented by the so-called priestly or pontifical jurisprudence. As members of Rome's ruling class, the pontiffs represented a unique combination of socio-economic power with religious and political authority. This blend of economic and political power with religious authority provided a sufficient legitimation of their judicial authority. As the guardians of all ancient knowledge and ritual techniques, the pontiffs alone knew all the laws, the forms of actions and documents, the court calendar and the authoritative opinions their predecessors had rendered in the past. Private citizens had to consult them to obtain advice on whether specific rules of law applied to their particular case and the correct procedure in litigation. In the period following the publication of the Law of the Twelve Tables, the earliest compilation of Roman law, new legal norms were developed chiefly through the interpretation of this law and later statutes. Because a close connection still prevailed between the legal and religious spheres, it is unsurprising that the interpretation of the law and its deriving actions lay in the hands of the pontiffs. Despite the emphasis that

archaic law attached to the letter of the law and the deriving forms of action, there was a tendency to permit a slightly greater degree of freedom in legal proceedings than was allowed in purely religious ceremonies. Thus, occasionally the pontiffs employed the pretext of interpretation to expand the law to cover new situations.

A characteristic feature of early Roman law was its extreme formalism, indeed ritualism, manifesting the religious origin and character of many legal rules and institutions. In this context, formalism denotes not only the need for compliance with the forms or rules of procedure characteristic of any legal system. It also emphasizes form in every part of the legal system; the casting of all legal acts into an unchangeable form where successful completion depends upon strict adherence to a set ritual engaging certain words or gestures. Archaic Roman law is perceived as formalistic because legal acts, that is, acts that effected or intended to effect changes in the legal relations of individuals, were accomplished with a complicated array of forms. Further, an individual electing to assert a claim at law against another had to mould the claim within the scope of a particular limited cause of action expressed by means of a strictly prescribed formula – the slightest mistake would entail loss of his case. Interpretation might stretch the meaning of certain words, but the words themselves were immutable: only claims adapted in concordance with the words were possible. This form of procedure offered no opportunity for modifying the issue based on the objections issued by the defendant, who could only admit or deny the plaintiff's claim. This system displays an important feature of Roman legal thinking: its *normativity*. For the Romans, the law consisted of rules similar in manner to their religion. The rules of law, consisting of fact-decision relationships, could not be argued for – similarly, a minister of religion was unable to present a rational justification for his prophecies. In each case the link between the facts (the judicial proof, the flying bird) and the decision (an interpretation of the law or a statement concerning divine law – *fas* and *nefas*) remained an inexplicable norm. This perspective emphasizes the *irrational* aspect of archaic decision-making.

During the republican age, especially in the course of the so-called 'struggle of the orders', the political and economic power of the old patrician nobility gradually declined. However, the fundamentally aristocratic character of the Roman state did not change; what changed was the constitution of the aristocracy in power: the old patrician aristocracy was replaced by a new and exclusive patricio-plebeian nobility based on wealth and office-holding. A parallel phenomenon was an ever-increasing scepticism towards the old religion of the state. As usual, materialistic and ideological aspects were combined to form at least a seemingly unitary explanation. The legitimation of the legal authority of priestly jurisprudence did not vanish, but there was some very symptomatic criticism. Gradually an increasing number of *nobiles*,

members of Rome's wealthy senatorial class, engaged in furnishing legal advice without being members of the *collegium pontificum*. By the end of the second century BC, secular jurists (*jurisprudentes* or *iurisconsulti*) had supplanted the original interpreters of the law. Although Roman jurisprudence remained the preserve of an elite, the composition of that elite changed. Unlike the pontiffs with their control of sacred law, ancient knowledge and rituals, the new secular jurists had no formal institutional backing. There was no recognized group of jurists who could present themselves as the guardians of the *ius civile*. Quite obviously, under the changed conditions a new method of legitimation had to be devised, and the answer was clear. As Cicero declared: *ius civile in artem redigendum*.³⁾ The reference to a scientific method was engaged as an important basis for the legitimation of the authority of legal science. But what kind of 'art' should it be?⁴⁾

Scholars generally endorse the view that since the second century BC Greek philosophy exercised a strong influence on the Roman elite that encompassed the jurists. There is also agreement that the intellectual methods and tools created by Greek science within the framework of logic, grammar and rhetoric became indispensable elements in the education of men from the upper classes in Rome. However, discord exists over the more precise question as to how the evolution of Roman legal science and Roman law was definitely influenced by the Greek theory of the formation of scientific concepts. The theory of science prevailing in that era embraced two principal models: (a) the model of system-building *per genus et differentiam specificam* (the Aristotelian classification); and (b) the rhetoric model, known as 'topical' argumentation, where Aristotelian syllogism was inferred from premises (*topoi*) that were considered acceptable, true or plausible by a certain audience. Romanists have intensely debated the impact of these two models. Many scholars believe that these scientific models had considerable importance, but they did not significantly alter the general perspective of the jurists' activities.⁵⁾ Other scholars argue that either model may be used as a general explanatory scheme for the Roman lawyers' methodology.⁶⁾ In any case, the reference to a scientific method was used as a legitimation of the authority of legal science. But was this reference only meant for an external justification of legal science, i.e. a general justification for outsiders of the lawyers' ability to tell the truth about the right interpretation of law? Or did the scientific method also affect the internal process of justification, i.e. the paradigmatic conditions of the applicability of decisions and decision-propositions?

The jurists of the later republican period chose the scientific method in order to defend their authority. But they did not base their authority on open evaluations. As Franz Wieacker remarks, there were open evaluations in the writings of Roman jurists, but their number and relevance remained relatively small and in many cases their function was not persuasive

but rather explanatory.⁷⁾ Roman lawyers did not discuss legal problems in terms of juristic rhetoric; they did not rely on the *ratio* but rather on the *auctoritas* of the normative arguments, presented in a form of systematic thinking. In general, the role of persuasive argumentation in Roman legal science was relatively small. The arguments used were in most cases explanatory, pedagogical or merely decorative (as, for instance, the well-known etymologies of Labeo).⁸⁾

Roman legal science developed through systematic thinking towards a normativist version of legal positivism. Probably the first jurist who endeavoured to systematize the existing law in a scientific fashion was Quintus Mucius Scaevola, *pontifex maximus* and consul in 95 BC.⁹⁾ Unlike earlier jurists, he did not confine himself to the discussion of isolated cases or questions of law. Rather, he made great efforts towards a higher level of generalization and ventured to introduce more definition and division. In his comprehensive treatise on the *ius civile*, he assembled related legal phenomena and principles under common headings. He also distinguished the various forms of appearance of these broader categories. For instance, he first defined the general features of possession, tutorship and so on, and then described their various individual forms (*genera*) existing in the legal system.¹⁰⁾ He also seems to have written a book that featured brief definitory statements (*horoi*) indicating the decisive factual moment (*horos*) of a certain legal consequence or decision. The scheme appeared in the following style: X is the essential characteristic when the choice between D or non-D must be determined; X is present in the combination of facts A; X is not present in the combination of facts B; X is the *differentia specifica* between the classes A and B, which leads to the conclusion that $A \rightarrow D$, whilst $B \rightarrow \text{non-D}$. This scheme was elaborated further by the great Augustan jurist M. Antistius Labeo. Labeo had adopted the Stoic mode of expressing Aristotelian definitions in the form of implicative statements. His 'hypotheses' (*pithana*) very much resembled legal norms: if F then D; if non-F, then non-D and so on. Such statements were later conceived as and called norms: *regulae iuris*. They were also often designated *definitiones* or *differentia* – terms that reflect their origin in Aristotelian thought. It seems quite natural that Roman jurists used such a method. It is the lawyer's way of viewing reality: to examine the differences between fact combinations from the point of view of decision-making. And it is obvious that Roman lawyers relied heavily on norm-rationality and authority arguments rather than on goal rationality. They were not accustomed to justifying their decision-propositions by evaluative reasoning.

There are two types of juristic method: the *empirical* or *casuistic* and the *deductive*. The Roman jurists were typical representatives of the former method. When dealing with legal problems, they resorted primarily to topical rather than axiomatic argument. If a legal rule or concept is formed by logical reasoning from basic principles or axioms, it invokes axiomatic argument. Topical or problem reasoning, on the other hand, occurs when one proceeds from

the case to identify the premises that would support a solution, and then formulates guiding principles and concepts as a basis for attaining a solution. The rules and concepts devised in this manner are not rigid and inviolable but are subject to change, depending on the circumstances of the relevant case. Moreover, it is generally believed that the Roman jurists reached their conclusions intuitively. This intuitive grasp of the law is attributed to the Romans' innate sense for legal matters, and to the jurists' experience with the everyday practice of the law.

It seems correct to say that one should not envisage Roman jurisprudence as the model of a systematic or axiomatic theory. At the same time, one should not construe it as a merely pragmatic, unprincipled case law or believe that Roman decision-making was based solely on free and creative intuition. Indeed, a unique quality of Roman legal science is that it did not stop at a purely pragmatic and precise casuistry. The greatest achievement of the Roman jurists was their ability to extend beyond the accidental elements of the relevant case to illuminate the essential legal problem as a *quaestio iuris*. By means of the dialectical method¹¹ adopted from the Greeks, the jurists learnt to divide juridically relevant facts into *genera* and *species*. They defined these facts, and distinguished and categorized juridical concepts. At the same time, they were aware of the logical syllogism (or reasoned conclusions) and learned to construct legal concepts in a deductive manner. Naturally, the jurists required time to assimilate and fully engage the new intellectual methods and tools. Quite likely, the relevant thought process varied with the individual problem as well as with the individual jurist. Under these conditions, legal science and literature were gradually molded from their original raw material: the interpretations of laws and legal remedies that were honed by practical experience and sorted and recorded. In this way, the conclusions of a new science were reduced to common denominators. Further, the literary presentation of its professional knowledge was gradually rationalized and systematized. The effect of systematization is easily observed when appraising the social impact of the systematic efforts of the Roman jurists. It is clear that the tendency towards systematization not only allowed them to present their casuistic approach in a more simple and elegant manner, but also helped them to alter their decision-propositions. An improvement of a system implies the possibility of forming *better* decisions. Thus one can understand the importance of the systematic thinking of Roman lawyers. A change of methodology was part of their efforts to formulate better decisions. The improvement in decisions was connected with the requirement for integration in the growing empire and its deriving socio-structural developments. Changes in the methodology of law are socially conditioned, even if they are rarely justified by social arguments.

The new systematic legal science was a more sophisticated version of the old casuistic method used by the early republican jurists. The Roman method was conditioned by the need to

produce normative solutions for decision problems. It was simply a methodical way of treating cases. Yet a clear improvement occurred as now the similarities and differences between cases were studied in a systematic manner. The starting-point of a systematic statement of law was often a settled case that was then compared with other real or fictitious cases.¹²⁾ Other elements contributing to the process were norms (e.g. statutes and juristic *regulae*) as well as various standards used in the normative discourse (e.g. *bona fides*). Often the function of such elements was mainly explanatory, pedagogical or informative rather than persuasive (especially in juridical treatises). The jurists simply sought to illustrate the relevant norm or principle through cases demonstrating its actual operation, usually without immersion in theoretical-evaluative argument.¹³⁾

The jurists of the Principate era, like their republican predecessors, were men who dedicated themselves exclusively or essentially to the interpretation of the extant source material: the old *ius civile* and *ius honorarium* of Rome. They sought to preserve this law, while also developing it by devising new ways for the practical use of its doctrines and institutions in a satisfactory manner. But they did not consider that their tasks should encompass an analysis of the law from ethical, sociological or other more general viewpoints. Nor were these jurists interested in the laws and customs of other nations, save insofar as these could be incorporated into the conceptual framework of their own legal system. The mass of doctrine embodied in the juridical literature is in no sense an application of a general philosophical, ethical or legal theory. On the contrary, it is the rationalization of concrete applications or a case law where cases are related, reconciled, categorized and systematized. The jurists sustained a conservative attitude and demonstrated an almost total lack of interest in legal concepts and norms originating externally or divergent from the Roman legal system as they understood it. For a long time these factors isolated Roman law from foreign influences and were therefore largely responsible for its clarity and systematical coherence.

The conservatism of the jurists is also reflected in their social and ethical attitudes. Reared in traditional Roman ideals and the doctrines of Stoic philosophy, they essentially held the common humane and enlightened views of the ruling classes within the empire. Their tasks and habits of reasoning were influenced by ethical standards such as *humanitas* (respect for human dignity), *pietas* (dutifulness, noblemindedness, respect for ancestral traditions), and respect for authority. But little evidence exists to infer that they consciously and systematically engaged ethical and philosophical precepts in their treatment of the law.

Of particular importance for the jurists was the concept of *aequitas* that was engaged to correct or expand the existing body of law so it could meet the demands of social and commercial life. The significance the jurists assigned to *aequitas* is reflected in the definition of

ius attributed to the jurist Celsus the Younger as ‘the art of doing equity’ or, in other words, a technical device for obtaining that which a good man’s conscience will endorse (*ius est ars boni et aequi*).¹⁴⁾ In determining what constituted equity in the circumstances of the case at hand the jurisdictional magistrate or *iudex* was now aided by the rapidly expanding mass of precedents that were collected, discussed and annotated in juridical literature. To ignore these precedents would have been a psychological impossibility even for radical thinkers (and radical thinkers did not normally obtain *imperium* nor did they easily obtain the *ius respondendi*). The test of the *bonum et aequum* in this era was still the *ius gentium*, the norms governing civilized society as the Romans construed it. But the Roman *ius gentium* was now declared binding because it was also natural law (*ius naturale*), based on natural reason.¹⁵⁾ However, the assumed connection between *ius gentium* and *ius naturale* is far from clear as no generally accepted definition of natural law is revealed in juridical literature. Further, the meaning of the term appears to vary depending on the perspective adopted for its contemplation.¹⁶⁾

The ‘law of nature’ was a familiar concept to many philosophical systems of antiquity but was given a more concrete form by the Stoic school of philosophy. The Stoics had neither a completely consistent nor a fixed and unchanging doctrine, but key ideas detected in their works may be declared to constitute the basis of their philosophy. Their starting-point is the idea that world is an organic whole, an intimate combination of form and matter and an order of interdependent tendencies, governed by a divine, rational principle (*Nous, Logos*) and moving towards a pre-determined end (*telos*).¹⁷⁾ The word ‘nature’ (*physis*) is used to refer to this cosmic order and to the structures of its component parts. All entities, including man as an integral part of nature, participate in divine reason that reveals itself in all things and causes all things to cohere into an animated unity. From this perspective, the Stoics argued that virtue cannot be attained simply through compliance with the laws of the state but through obedience to the natural law of divine reason as it discloses itself in human reason. Natural law, as founded in the natural order of things, is universally valid, immutable and has the force of law *per sé*, i.e. independently of human positivization. If all men, irrespective of race, nationality, social standing and such like, share in the divine reason in the same way, then in principle all are equal and together form one grand universal community governed by the natural moral law. This notion of a universal community, a *cosmopolis*, in which in principle all men are equal and equally capable of achieving the perfect moral life lies at the heart of the Stoic philosophy.

In the transformed cultural and political world of the late Roman Republic and early Empire, the ideas of the Stoic philosophy exercised considerable influence among the members of Rome’s upper classes. However, the Stoics’ philosophical views on the ideal law or the ultimate nature of justice apparently had no profound effect on the way the Roman jurists executed

their traditional tasks.¹⁸⁾ Although the jurists as members of the educated higher classes were familiar with current philosophical theories, they displayed little interest in linking philosophical speculation with everyday legal disputes and practices. There were also apathetic towards questioning the validity of positive law on the grounds that it conflicted with a higher law.¹⁹⁾ Even when the notions of nature and natural reason surface in the jurists' writings, they are often construed as common ornamentals, or possessing a meaning that is contextually variable with little connection to the philosophical idea of natural law. Although the concept of *natura* was vague, it provided an important device for the articulation and systematization of the law. However, the jurists defined its content without reference to divine reason, or to God's plan for the universe. Rather, they engaged references to the qualities of worldly things, states of affairs and modes of thought and action that were commonly accepted as reflecting the realities of everyday life. In other words, the jurists did not juxtapose the law governing social relations in everyday life to a code of ideal natural law functioning as a master model. They developed the content of *natura* in close connection with the practical aspects of legal life and always in response to concrete needs and problems emerging from actual cases. From their viewpoint, discovering the appropriate legal rule or devising an acceptable solution to a legal problem presupposed a reasonable familiarity with both the nature of things on the ground and the ordinary expectations that social and legal relations entailed. Thus, the Roman lawyers alluded to the nature of an obligation (*natura obligationis*), the nature of a contract (*natura contractus*) and such like. A notable factor was the term *natura hominum* or *natura humana* that denoted the physical and mental qualities, and the psychological characteristics and attitudes common to all humans. In this respect, the postulates of nature did not emanate from metaphysical speculation, but from the findings of common sense and the need for order in human relations. In the eyes of the Roman lawyers, certain methods of acquiring ownership were 'natural' or derived from natural law as they appeared to follow inevitably from the facts of life. This encompassed methods such as delivery of possession (*traditio*)²⁰⁾ and occupation (*occupatio*), i.e. the acquisition of the actual control of a *res nullius* (an object belonging to no one).²¹⁾ Of course, such methods of acquisition were regarded as universal and therefore as facets of the *ius gentium*: the law actually observed by all humankind.

The fact that the Roman jurists regarded natural law, in the manner described above, as juridically valid is implied by their identification of *ius naturale* with *ius gentium*. This prevailed even though the former term referred to the supposed origin of a rule or institution and the latter to its universal application. If natural law is interpreted as law that ought to be observed, the identification of *ius naturale* and *ius gentium* is untenable as certain institutions of the law of nations clearly conflicted with natural law precepts. Thus while according to natural law

all people were born free, slavery was widely recognized in antiquity as an institution of the law of nations.²²⁾ In view of this detail, the most one can say from a moral perspective is that the universal recognition of an institution as part of the law of nations could be regarded to constitute *prima facie* evidence that such an institution or principle originates from natural reason.²³⁾ The Roman lawyers, however, never drew a clear distinction between positive law and law as it ought to be, nor did they adopt the philosophical conception of natural law as a higher law capable of nullifying positive law. One cannot locate in juridical literature an assertion that natural law is superior to positive law, in the sense that, in a case of conflict the former should overrule the latter. The jurists were not social reformers and their conception of natural law does not embrace anything resembling a revolutionary principle to support those rights that are termed in the modern era as 'inalienable human rights'. Thus, no matter how such institutions as slavery or the division of property appeared contrary to natural law they were still perceived as perfectly justified and legal. *Ius naturale* significantly contributed to Roman legal thought, but as a professional construction for lawyers it had little relevance to moral philosophy. It was not viewed as a complete and ready-made system of rules but as a means of interpretation. It existed linked with the *ius gentium* to enable the Roman jurists to test the equity of the rules they applied. When the result of this test was deemed inequitable, it justified them in deliberately departing from the rules.²⁴⁾

As previously noted, norm-rationality and authority-based arguments furnish sufficient grounds for legitimizing the activity of professional lawyers and for justifying their decisions or decision-propositions whenever there is a state of evaluative identification between the holders of the norm-giving power and the legal profession. This applied to Roman legal science. As we ascertained earlier, its protagonists were originally members of the ruling senatorial aristocracy (*honorationes*). But during the imperial period the jurists relied increasingly on the power of the emperor whom they were compelled to serve. In this respect, the *ius respondendi ex auctoritate principis* granted to leading jurists during this period may be construed to mean not simply the right of presenting answers in matters of law with the authority of the emperor, but rather the right of presenting authoritative answers in matters of law based on the social power of the emperor. However, this gradually led to the erosion of independent jurisprudence not controlled by or enlisted to serve the imperial government. In its earlier phases the political system of the Principate was supported by the jurists' creative work, but during its later development the very existence of a legally trained imperial bureaucracy undermined and finally annihilated jurisprudence. In the third century AD, as imperial government increasingly assumed the characteristics of an absolute monarchy, the *responsa prudentium* ceased to function as a living source of law, having been superseded by the emperors' rescripts on legal and judicial matters.

There has been a period in the development of Romanist studies during which scholars sought to discover the criterion of evaluating the various features of Roman jurisprudence by means of a quantitative content analysis, following a method once highly fashionable in the field of social sciences. E.g. an effort was made to classify classical Roman jurists into 'post-Sabinians' and 'post-Proculians' by counting their positions in classical legal controversies. However, the general tenor of argument escapes the methods of quantitative content analysis. As far as the Roman sources are concerned, there are some additional factors of uncertainty. There was in Roman law no clear paradigmatic rules governing the argumentation pertaining to decision and decision-propositions in different contexts. Accordingly, in different types of juristic works one is expected to find different degrees of the need for argument and different methods of justifying decisions and decision-proposition. One needs to take into account, moreover, that the destinies of the classical writings in the period prior to the codification of Justinian in the sixth century AD have been different. Some of the writings have undergone a degree of epitomization, and in this process of shortening it is probable that arguments have been sacrificed in order to get clear-cut decision norms. All these unevenly operative factors make a quantitative analysis of Roman legal thinking impossible and any doubts about this vanish when one considers the activity of emperor Justinian and his compilers. They took into their code what they wanted to and felt no need to justify their norms by arguments.

Today, attempts at regulating the complex problems of human coexistence by law engender decisions whose evaluative justification is very often far from self-evident. Although it is important to fathom whether a solution to a legal problem is justified on the strength of an authority, norm or precedent (or a combination of these), equally important is the question as to whether we are prepared to explore the social impact of the various decision alternatives. On the other hand, if the authority of institutions, their conceptual characteristics and the decision-propositions that they support are accepted without an evaluative justification of their social impact, we follow the path of the Roman jurists; we have adopted their institutional way of thinking, which focused on the nature of institutions rather than on the need to justify them by considering their broader social implications. These features are typical of Roman law and still, to some extent, of European civil law. But law does not consist of norms only; it is also a behavioural instrument of ruling. For a lawyer it is easy to forget this and to identify himself with the ruling class, even though the lawyer of today has much less in common with the ruling class than had a Roman *iuris peritus*. It is not very clear whether legal science can learn anything from history. Here it will be sufficient to point out that the Roman jurists' attitude of normative legal positivism proved their undoing.

Notes

- 1) Consider, e.g., Schiavone, A., *Studi sulle logiche dei giuristi romani*, Naples, Jovene, 1971; D'Ippolito, F., *Ideologia e diritto in Gaio Cassio Longino*, Naples, Jovene, 1969; *I giuristi e la città*, Naples, Edizioni Scientifiche Italiane, 1978; *Giuristi e sapienti in Roma arcaica*, Rome, Laterza, 1986.
- 2) Schulz, F., *History of Roman Legal Science*, Oxford, Clarendon, 1967 (original edn 1946).
- 3) Although Cicero was not a jurist, his theoretical works and, where applicable, his speeches show considerable familiarity with both legal technicalities and legal principles. He is said to have contemplated writing, or probably wrote, a work where the civil law was reduced to an art. Quintilian (12. 3. 10) suggests that this work was not finished but perhaps published posthumously.
- 4) Consider on this Mette, H. J., *Ius civile in artem redactum*, Göttingen Vandenhoeck & Ruprecht, 1954. On the development of Roman jurisprudence during the later republican period see Kunkel, W., *Die Römischen Juristen*, Cologne, Weimar and Vienna, Böhlau, 2001; Frier, B., *The Rise of the Roman Jurists*, Princeton, Princeton University Press, 1985; Bauman, R. A., *Lawyers in Roman Republican Politics: A Study of the Roman Jurists in their Political Setting, 316-82 BC*, Munich, Beck, 1983; J. Harries, *Cicero and the Jurists: From Citizens' Law to the Lawful State*, London, Duckworth, 2006.
- 5) This seems to be the opinion of Kaser, Talamanca and Wieacker. And see Kaser, M., *Zur Methode der römischen Rechtsfindung*, Göttingen Nachrichten der Akademie der Wissenschaften, 1962, 54 ff.
- 6) The influence of the Aristotelian systematic thinking is stressed by several scholars. See F. Schulz, *History of Roman Legal Science*, Oxford, Clarendon, 1967 (original edn 1946). Other scholars emphasize the impact of rhetoric. See J. Stroux, *Römische Rechtswissenschaft und Rhetorik*, Potsdam, E. Stichnote, 1949; U. Wesel, *Rhetorische Statuslehre und Gesetzesauslegung der römischen Juristen*, Köln, C. Heymann, 1967.
- 7) Wieacker, F., "Offene Wertungen bei den römischen Juristen", *SZ* 94, 1977, 1-42.
- 8) On Labeo's etymologies see Horak, F., *Rationes decidendi* I, Aalen, Scientia, 1969, 97 ff.
- 9) D. 1. 2. 2. 41 (Pomponius).
- 10) He declared that there were five *genera* of tutorship, and that as many *genera* of possession existed as there were 'causes' for acquiring the property of others.
- 11) This was a form of logical analysis that both distinguished the various concepts and subsumed those sharing the same essential elements under common heads.
- 12) On the details of this methodology see Bund, E., *Untersuchungen zur Methode Julians*, Köln, Wien and Graz, Böhlau, 1965.
- 13) As H. Wolff remarks, '[the jurists'] dislike for theoretical argument went so far that the [jurists] usually hinted at the reasons for their decisions rather than fully explaining them. When they did give reasons they found them in the individual circumstances of the case rather than in the purely logical results deriving from general principles.' *Roman Law, An Historical Introduction*, Norman, University of Oklahoma Press, 1951, 123.
- 14) D. 1. 1. 1 pr. (Ulpianus); 4. 1. 7; 50. 17. 183. (Marcellus).
- 15) It should be noted that the term *ius naturale* does not appear in juridical literature until the time of Hadrian in the second century AD.
- 16) According to the jurist Ulpian: 'Private law is threefold: it can be gathered from the precepts of nature, or from those of the nations, or from those of the city. Natural law is that which nature has taught all animals; for this is not peculiar to the human race but belongs to all animals ... From this law comes the union of male and female, which we call marriage, and the begetting and education of children ... The law of nations is that law which mankind observes. It is easy to understand that this law should differ from the natural, inasmuch as the latter pertains to all animals, while the former is peculiar to men' (D. 1. 1. 1.). A few paragraphs below this quotation from Ulpianus we find the following statement of the second century jurist Gaius: 'All peoples who are governed by law and by custom observe laws which in part are their own and in part are common to all mankind. For those laws which each people

has given itself are peculiar to each city and are called the civil law ... But what natural reason dictates to all men and is most equally observed among them is called the law of nations, as that law which is practiced by all mankind (D. 1. 1. 9; and see G. 1. 1 and *Inst.* 1. 2. 11.). In the next few paragraphs appears this definition of law attributed to Paulus: 'We can speak of law in different senses; in one sense, when we call law what is always equitable and good, as is natural law; in another sense, what in each state is profitable to all or to many, as is civil law' (D. 1. 1. 11.). The divergences between these three accounts are evident: Ulpianus asserts that there is a clear difference between natural law and other human laws, the former being regarded as pertaining to the natural drives that men and animals have in common; Gaius and Paulus, on the other hand, perceive the reason for the universal validity of certain principles in their rational character and their recognition by all mankind, as well as in their inherent utility and goodness.

- 17) The Stoics sought to effect a reconciliation between the seemingly conflicting principles of form and matter by dialectically linking them under one principle: *Nous* or cosmic *Logos*. They perceived meaning to exist in the material world, not in a realm beyond it.
- 18) Cicero, expressing the philosophers' conception of natural law, remarks that [true law] "is the highest reason, fixed deep in our nature, which commands what shall be done and forbids the opposite" (*Leg.* 1. 18b). Once fully evolved in human mind, this 'highest reason' becomes 'law'. This approach to the law of nature was based on what was assumed to be absolute moral values, not social conditioning or expectations. But, as J. Harries observes, "Cicero's elevation of the importance of law as philosophy, over law as jurisprudence, placed him in opposition to the jurists." Although Cicero recognized the contribution of the great jurists to the development of Roman law, he remarked that the goals of these jurists were limited to the practical application of law and this rendered them blind to the 'greatness' of the law as a whole (*Leg.* 1. 14). See J. Harries, *Cicero and the Jurists: From Citizens' Law to the Lawful State*, London, Duckworth, 2006, 56.
- 19) As H. J. Wolff notes, 'the Roman jurists ... for all their philosophical and rhetorical education, never showed more than a superficial interest in purely philosophical problems. The originality of their approach lay in their interest in, and intimate connection with, the practical application of Roman law as it was. Their efforts were directed not at building a purely theoretical jurisprudence, but at demonstrating from every possible angle the practical use to which the institutions of their law could be put'. *The Western Idea of Law*, S. C. Smith and D. Weisstub (eds), London, Butterworth, 1983, 322.
- 20) *Traditio*, the most usual form for transferring ownership, involved the informal transfer of the actual control over a thing on the ground of some lawful cause, such as a contract of purchase and sale. See G. 2. 65: '[S]ome modes of alienation are titles of natural law, as delivery of possession, and others of civil law, as mancipation, surrender, usucapion, for these are titles confined to Roman citizens'. And see D. 41. 1. 9. 3.
- 21) According to Gaius 'another title of natural law, besides delivery of possession, is occupation, whereby things not already subjects of property become the property of the first occupant...' (G. 2. 66). Objects that could be acquired in this way included wild animals, birds and fish (*Inst.* 2. 1. 12), the spoils of war (G. 2. 69), valuable objects found on the seashore (D. 1. 8. 3 and *Inst.* 2. 1. 18), objects abandoned by an owner (*res derelictae*) and hidden treasures.
- 22) D. 12. 6. 64; 1. 5. 4; 1. 1. 4.
- 23) In the words of C. J. Friedrich, 'the most that can be admitted is that there is a presumption in favor of the contention that a legal institution found in diverse *civitates* is part of the law of nature'. *The Philosophy of Law in Historical Perspective*, Chicago and London, University of Chicago Press, 1963, 32.
- 24) As d'Entrevès remarks, 'the real significance of natural law must be sought in its function, rather than in the doctrine itself. Because of that very function, the notion of natural law came to be as it were embodied in the Roman tradition, and was able to exert an influence which it would hardly had exerted had it remained in the regions of philosophical abstraction.' *Natural Law, An Introduction to Legal*

Philosophy, London, Hutchinson's University Library, 1951, 31.