THE TULANE EUROPEAN AND CIVIL LAW FORUM

VOLUME 26 2011

The Natural Freedom of the Human Person and the Rule of Law in the Perspective of the Classical Roman Legal Theory

Okko Behrends[1]

The purpose of this Article is to seek a better understanding of the place that the individual occupied in classical Roman law. In particular, I would like to consider this issue from the perspective of the technical term "*persona*" which was, as we all know, outstandingly successful in western legal culture.

I shall start with a famous definition: "*Libertas est naturalis facultas eius quod cuiusque facere libet*."[2] In English: "Freedom is one's natural power of doing what one pleases," or "Liberty denotes a man's natural ability to do what he wants." Both translations, the first from the late Neil MacCormick,[3] the other from the late Peter Birks,[4] point out correctly that this freedom or liberty is something natural, present in every human person. No inherent restriction is added in the definition.

1. Professor Emeritus of Roman Law, German Private Law and the History of Civil Law at the Institute of Legal History, Legal Philosophy and Comparative Law at Göttingen University. This Article was written as a contribution to the "International Forum of Civil Law" convened under the theme of Protection of Personality Rights, "Legal Protection of Personality Rights: Historical Foundation, Contemporary Development and Challenges," October 14th-16th, 2010, in Suzhou and Shanghai, China. Three institutions participated in the organization: the "Civil Law Office of the Legislative Affairs Commission, National People's Congress Standing Committee", the "Research Center of Civil and Commercial Jurisprudence, International College (Suzhou Research Institut)", and the "Research Group of Civil Law and Intellectual Property Law, Research Center of Civil Law, Roman Law and European Law. East China University of Political Science and Law. Renmin University of China."

2. Florentin 9 institutionum D [digesta] 1, 5, 4 pr.; reproduced in Institutiones Justiniani 1, 2, 1.

3. The Digest of Justinian. English Translations edited by Alan Watson (Philadelphia 1985). Vol. I p. 15.

4. Justinian's Institutes, Translated with an Introduction by Peter Birks and Grant MacLeod (Ithaca NY, 1987) p. 39.

There is not the slightest hint of the well-known philosophical sense that true freedom requires obedience to reason. Rather, freedom is defined in a very outspoken manner as being arbitrary.

The definition is limited by a restriction added to it: "*nisi si quid vi aut iure prohibetur*", which in concise translation[5] means "except when force or law prevent the use of freedom." The limitation is in both instances seen as coming from the outside and is in its approach quite sensible. There is no arbitrary freedom when free movement is suppressed by violence or any other forcible act. Nor is there arbitrary freedom when law opposes its limiting rules, backed by the coercive power provided by the magistracy. The definition presents thus a thought that moves from the liberty of the individual, seen as the natural faculty of self-determined, arbitrary action to the outward restrictions experienced by the naturally free person through force and law. Its analytical character invites us to an in-depth study of the systematic place of this definition in Roman Law.

There is at once an objection to such an endeavour. It is "conventional wisdom"—or shall I say a "*fable convenue*"—that Roman jurists were averse to coherent thinking and did not like to argue theoretically. It is a very common view. But it is erroneous. It has arisen in modern times, due to false assumptions. It is true that Roman lawyers were not interested in a Cartesian or Kantian system of an axiomatic kind. Their thinking did not start from a methodical doubt as regards the existence of reality nor was it their aim to justify the existence of a sovereign power whose commands create law and can, from their height, accord subjective rights and take them away.[6]

But when it comes to clear and lucid legal systematizing of the reality inhabited by mankind, their reasoning could not be more coherent. In the following I will demonstrate it by showing how classical theory managed to keep the free human person at the center of its analytical legal system qualifying all restriction of its freedom as in fact coming

---

5. MacCormick: "save in so far it is ruled out either by coercion or by law"; Birks: "as long as the law or some other force does not prevent him." It is obviously not easy to render the term "*vis*" in English. Neither "coercion" nor the use of the circumlocution "some other force" are satisfying. "*Vis*" is "natural force" without the backing of law, i.e., naked force, whereas law as a justifying rule evaluates a situation as lawful but is not opposed to coercion. Rather, law needs "coercion," or "some other force" in order to be effective. To catch the sense of the exception *nisi rell.*, law has to be seen as a justifying and qualifying addition to force. This would yield a somewhat enriched translation: "save in so far naked force or force justified by law does not prevent him."

6. For a critical view of misplaced modernism in the interpretation of Roman law, *cf.* my essay "Mommsens Glaube. Zur Genealogie von Recht und Staat in der Historischen Rechtsschule" (Göttingen 2005).

from the outside. I will start with the extreme and revealing case of slavery, comparing the classical approach with the quite dissimilar perspective of preclassical law.

The classical legal theory, to which I am referring, is central to the Roman Law and easy to identify because of its continuing contrast with a fundamentally different preclassical legal theory.[7] The classical theory was introduced by Cicero's friend Servius Sulpicius Rufus with the help of others in the time of Sulla's restoration (82–79 BC), replacing the jurisprudence of the *maiores* or *veteres* which had been dominant until then. It was successfully continued and in the Principate defended in the Law School founded by Nerva and Proculus in opposition to the Sabinian Law School, which revived central doctrines of the preclassical jurisprudence. The immediate philosophical and cultural background of the classical legal theory was the scepticism of Philon of Larissa, head of the Academy in Athens.[8] When Philon delivered his much-acclaimed lectures in Rome at the beginning of the second decade of the last century BC (since 88), Cicero (born 106), and Servius (of the same age), then in their first youth, became his most important disciples. Philon had made rhetoric part of higher education and integrated jurisprudence into it with the help of an anthropology that distinguishes man from all the other creatures by his faculty of speech. This concept of rhetoric gave to the philosophically educated orator an outstanding role in the creation and maintenance of human civilization essentially based on the rule of law, both in the myth that described the beginning of statehood as in his contemporary presence. The great alumnus of this rhetoric Servius could therefore set out as an orator and later embrace jurisprudence without any discontinuity.[9]

To this legal doctrine taught by Philon Roman law owes some very significant features. Among them are the term "*persona*", the human person, and "*institutio*" and "*institute*", legal institutions existing in thought, but, although *res incorporales*, they effectively established

---

7. A comprehensive view on the evolution of the scientific Roman law under the influence of two fundamentally different legal theories is given in my farewell lecture "Die geistige Mitte des römischen Rechts. Die Kulturanthropologie der skeptischen Akademie", Savigny Zeitschrift, Rom. Abt. 125 (2008) p. 25-07. The current vivid debate is documented below in footnote 12. The two seminal works that initiated this research work were my inaugural lecture "Institutionelles und prinzipielles Denken" (Göttingen 1976), republished in Behrends, Institut und Prinzip, Ausgewählte Aufsätze I/II (Göttingen 2004) p. 15-50 and the lecture "Les veteres et la nouvelle jurisprudence" (Paris 1976), republished Behrends, Scritti "italiani" con un' appendice "francese" (Napoli 2009) p. 471-97.

8. *Cf.* Charles Brittain, Philo of Larissa, The Last of the Academic Sceptics (Oxford 2001). Philo was in fact the last of those sceptics in Athens, but not in Rome.

9. Cicero, Brutus 41, 151; 89, 306.

entitling and binding legal relationships in corporeal nature. No less significant is the fact that it was only with Philon's disciple Servius that the "Edict" of the praetor, the magistrate responsible for the entire judiciary in private matters, moved to the center of theoretical interest and became as such the object of a scientific commentary.[10] When all these features were received in the 2nd century AD in the Sabinian Law School—particularly through Julian's commentary to the edict (being by far the greatest part of his monumental Digests) and Gaius' Institutes (in which the terms "*institution*" "*persona*" and "*res incorporales*" are central)—it was a clear sign that the preclassical thinking of the Sabinian tradition had succumbed to a large extent to classical thinking, albeit not totally. Ulpian's Institutes preserve it in a distinctly purer form than do the Institutes of Gaius. On the other hand, Ulpian and the classical tradition he represents have, especially since Celsus, also accepted many doctrines based on preclassical natural law and its *bonum et aequum*. Our sources, therefore, offer quite a complex picture.[11] Yet, meanwhile, we have accumulated sufficient expertise[12] to be able to identify the different doctrines wherever they present themselves.

Our current investigation shall start, as I said, with the position which the human person held in slavery. Classical theory tells us that slavery is "against nature"[13] and precisely against "natural law" in the sceptical sense that comprises all the sociobiological instincts that nature has taught all animals, not only human beings.[14] It is a natural law based on empirical observation, in sharp contrast to the preclassical natural law

---

10. Cicero, de legibus I 5, 17.

11. *Cf.* for a systematic overview see my article "Der Schlüssel zur Hermeneutik des Corpus Iuris Civilis. Justinian als Vermittler zwischen skeptischem Humanismus und pantheistischem Naturrecht" in Martin Avenarius (editor), Hermeneutik der Quellentexte des Römischen Rechts (2008) p. 193-299.

12. *Cf.* most recently "Das Geheimnis des klassischen römischen Rechts. Menschliche Freiheit und Würde in schützenden friedlichen Wettbewerb erlaubenden Formen" in Byoung Jo Choe (editor), Law, Peace and Justice. A Historical Survey (2007) p. 3-72; "Das Kunstwerk in der Eigentumsordnung oder: Der Kunstbegriff der vorklassischen Jurisprudenz im Rahmen ihrer Weltdeutung," Gedächtnisschrift für Jörn Eckert (2008) p. 66-100; "Das Schiff des Theseus und die skeptische Sprachtheorie. Die Rationalität der antiken römischen Rechtssysteme und das romantische Rechtsbild Dieter Nörrs", Index 37 (2009) p. 397-452; "Wie haben wir uns die römischen Juristen vorzustellen? Eine Frage, aus Anlaß einer Kontroverse erörtert", Savigny-Zeitschrift, Rom. Abt. (2011) p. 83-129.

13. Florentinus 9 institutionum D 1, 5, 4, 1 *Servitus est constitutio iuris gentium, qua quis dominio alieno contra naturam subicitur*.

14. Ulpian 1 institutionum D 1, 1, 1, 3 *Ius naturale est, quod natura omnia animalia docuit* . . . (D 1, 1, 4, 1) *iure naturali omnes liberi nascerentur*.

of Stoic origin, which was defined by what is always good and fair and presupposed a providential nature.[15]

In this classical view slavery relates to natural law as a zoo and its cages relate to the natural life of wild animals. In both cases the instinct of freedom is violated. But since the same theory acknowledges that it is possible to establish natural possession upon beings endowed with the instinct of freedom,[16] there was room for ownership of humans. Such property established over a fellow man was in fact acknowledged in the classical theory by the universal law of civilization, called *ius gentium*, in the case of the slave under the special term "*servitus*."[17] The fact that the institution of slavery restricted human liberty from the outside is attested in classical theory in respect of body and mind of the slave. The related legal doctrines express the classical view that there is in a living human being an indestructible core, a necessarily reserved area of natural freedom over body and mind, something that possession and property cannot destroy.

When a slave runs away, classical law teaches that the possession of his master ends. The slave regains his natural freedom in the same way as does a wild animal that escapes.[18] The preclassical doctrine is totally different. In the eyes of its supporters a slave cannot shake off the possession exerted over him.[19] Rather, he steals himself and transforms

---

15. Paulus 14 ad Sabinum D 1, 1, 11 . . . *id quod semper aequum ac bonum est ius dicitur, ut est ius naturale*. *Cf.* Cicero, de officiis III 5, 22: III 17, 69.

16. Paulus 54 ad edictum D 41, 2, 1, 1 *Dominiumque rerum ex naturali possessione coepisse Nerva filius ait eiusque rei vestigium remanere in his quae terra, mari caeloque capiuntur. . . . item bello capta . . . . eius fiunt, qui primus possessionem eorum adprehenderint*. Inst. I 3, 1, 4 *Servi . . . fiunt . . . iure gentium . . . ex captivitate*. This kind of natural possession is the same that Julian (44 digestorum D 41, 5, 2, 2) encountered when discussing an opinion of Servius.

17. It is not unlikely that the special term became technical to mark an important difference: Slavery originated in wars and enslaved persons that were before legally free; property in wild animals originates in hunting or trapping and suppresses natural freedom. *Cf.* the previous footnote. It seems therefore consequential that manumission, the means of conferring legal freedom through citizenship, was seen in classical law as a necessary mitigating complement of slavery. Ulpian 1 institutionum D 1, 1, 4: *posteaquam iure gentium servitus invasit, secutum est beneficium manumissionis*.

18. Paulus 54 ad edictum D 41, 12, 1, 14 *Per servum, qui in fuga sit, nihil posse nos possidere*. The fragment Pomponius 31 ad Quintum Mucium D 41, 1, 54, 4 gives the reason: Nobody can retain possession "by a fugitive slave whom he does not possess" (*per fugitivum . . quem non possidet*.) Kaser, Röm. Privatr. I2 p. 393 Anm. 31 acknowledges the existence of a controversy but does not register any attempt to get a proper understanding of its differing rationales. This is not astounding. Traditional romanists do not reckon with disputes that confront different theories.

19. Ulpian 17 ad Sabinum FrVat 89 (= D 7, 1, 12, 4) *retinetur a proprietatis domino possessio, etiamsi in fuga servus sit,* Gaius 26 ad edictum provinciale D 41,2,15 *haec ratio est, quare videamur fugitivum possidere, quod is, quemadmodum aliarum rerum possessionem*

his own body into a stolen thing, a *res furtivae*.[20] There is no question of natural freedom here. It seems at first sight contradictory that in preclassical law the possession persists and nevertheless a theft is committed. But it is the result of an important preclassical distinction. A civil possession (*civilis possessio*) that expressed in this view the formal mastery over the body remained. What was affected by the theft was the natural possession (*naturalis possessio*). In the view of the preclassical jurists natural possession was the use that nature, the preclassical providential nature, bestowed on goods and to which the owner was entitled when he had not disposed otherwise.[21]

The other classical doctrine that respected the indestructible core of the body is not less significant. When a slave mutilates his body, for example through a failed attempt of suicide, the master is not entitled to treat the costs of medical care as a damage suffered on something he owns. The jurist says in the commentary to the edict: "Also the slave is entitled to harm his body" and puts thus, in this respect, the slave on equal footing with a free person.[22] Using the logic of classical natural law we can add: The owner has to accept the damage as a dead loss as he would have to do it in case a wild animal he had kept in a cage had harmed itself. In both instances the body is by nature owned by the slave himself. It is a kind of internal ownership, which is not crushed by external ownership. In running away or mutilating himself the slave uses only the indestructible core of his freedom. The law defending this core of bodily freedom even in the miserable situation of the slave might even have had a beneficial side effect. The owner who had understood the

---

intervertere non potest, ita ne suam (!) *quidem potest.* "His" possession (*sua possessio*), that he, the slave, cannot misappropriate, defines the slave's possession, the use he makes of himself, as merely instrumental and makes it thus appear as the rightful object of the civil possession of his master.

20. African 7 quaestionum D 47, 2, 61 (60) *Ancilla fugitiva . . . sui furtum facere intellegitur*.

21. Julian 44 digestorum D 41, 5, 2, 1 discusses the preclassical distinction. Ulpian 16 ad edictum D 6, 1, 9 applies it when he admits (against the classical tradition, represented by Pegasus) the legal form of a *rei vindicatio* against tenants and other persons who only use the thing and are no possessors in terms of classical law. That the "use" is an object of theft is expressly taught as a content of preclassical natural law (Paulus 39 ad edictum D 47, 2, 1, 3). Theft in classical term required "*rem alienam clam amovere*" and needed therefore a special edict for robbery (Ulpian 56 ad edictum D 47, 8, 2, 23).

22. Ulpian 29 ad edictum D 15, 1, 9, 7 *licet enim etiam* (!) *servis in suum corpus saevire*: The translation in the Pennsylvania Digest: "for slaves are naturally allowed to do themselves an injury" suppresses the essential "etiam" "also," that puts the slave on the same footing as the free person. Both are free to (as the orginal text puts it much more dramatically) to "rage ferociously" against their own body. The question has practical consequences when it comes to evaluate the *peculium*. The owner cannot deduct the costs for medical care from the *peculium*. The rule benefits the creditors whose claims are limited by the value of the *peculium*. *Cf.* also footnote 24.

rationale of this law, would take into account the dangers inherent in this indestructible residue of human freedom and keep up labour conditions that are tolerable and able to prevent such desperate action as running away or attempting suicide. (By the way, the mention of suicide under harsh labour conditions reminds us of a quite recent development in France, where it has been admitted that under extreme conditions a suicide can be qualified as a labour accident[23]). Preclassical logic leads to another solution. In this system, the slave is entirely seen as an asset. He commits a theft of the use of his body when running away; he commits a tort when deteriorating his usefulness by mutilating his body.[24]

Classical theory defended with equal resoluteness an indestructible freedom of the slave's mind. This protection is made visible through a subtle legal doctrine with very harsh consequences for a third person. Classical doctrine accepted that a slave can replace an existing debtor and become a new debtor by means of stipulation, i.e., through the well-known *novatio*. The old debtor is relieved and replaced by a new one. But in the case the new debtor is a slave the creditor has got a debtor who cannot perform (being possessed he does not possess anything of his own) and against whom no action can be brought. The right of creditor expressed in his claim is lost. It is a law determined by logic and the will to acknowledge the intellectual capacity of the slave, so important legally when it comes to the use of slaves as dependent entrepreneurs.[25] The

---

23. We find in the Internet: "Publié le 13 juillet 2010 à 17h39. Après la vague de suicides qui a secoué France Télécom (58 suicides depuis février 2008), Stéphane Richard, le Directeur Général du groupe depuis mars dernier a reconnu ce mardi pour la première fois un suicide comme accident du travail. Il s'agit là d'une grande première dans l'histoire de France Télécom. Malgré des avis défavorables de l'Inspection générale des affaires sociales (Igas), Stéphane Richard endosse donc la responsabilité du décès d'un de ses employés afin "d'assumer un devoir d'assistance et de mémoire vis-à-vis des disparus, de leurs environnements familiaux et professionnels." Le fonctionnaire en question était un homme de 51 ans qui s'était suicidé à son domicile à Marseille le 14 juillet 2009 expliquant dans une lettre: 'je me suicide à cause de mon travail à France Télécom. C'est la seule cause.' Par cette décision, France Télécom reconnaît ne pas avoir pris conscience du danger auquel était exposé cet employé, et ne pas avoir pris les mesures nécessaires pour le préserver. Grâce à la qualification du suicide en accident de service, les ayants droit du défunt bénéficieront d'une rente."

24. *Cf.* for the preclassical theft committed on one's own person footnote 20. That the preclassical law found self-violence of a slave wrongful can be deduced at first from the fact that this thinking imposed on the slave the duty to regard himself as an asset (footnote 30), then with the help of an obvious argumentum e contrario from the very pointed classical law referred in footnote 22 and last not least by the rather typical phenomenon that Ulpian in the fragment cited there tries with a personal opinion (*sed . . . puto*) to repristinate the elder law leaving at the expenses of the owner only the treatment in the case of an illness of the slave.

25. A fine example is the famous case of the slave in Arelate (today's Arles in Southern France) related by Ulpian 28 ad edictum D 14, 3, 13 pr. He was authorized to conduct two different businesses, a bank and an oil trade. A creditor sued the owner for a credit given to the slave, but indicated the wrong business. He risked losing his money because his action was

slave's intellectual freedom is sustained even when it affects a contractual partner with a heavy loss.[26] The radicalism with which the loss of the creditors is accepted implies a sort of reverence for the slave as a person with a mind of his own.[27] The suffering creditor has learned a necessary lesson. He is reminded of the fact that a slave is, notwithstanding his disgraceful status, a rational human being with an effective mind. Gaius tells us that in his days this theory of Servius was rejected, but Gaius is at pains to justify the rejection in a way that maintains the capacity of the slave to conclude contracts, so essential when he was entrusted with the administration of a part of his owner's assets.[28]

A comprehensive look at the classical doctrine of slavery in its initial purity reveals a concept of great coherence. The slave is a human person endowed with body (*corpus*) and mind (*animus*) as any other human being. The fact that he is the object of possession does not take away these basic endowments. In so far as his inner and outer movements are not impaired, he is still the master of his body and his mind. The doctrine impresses through the equilibrated way in which it sees the human as being composed of body and mind, of *corpus* and *animus*, or, to use the Greek original, of *soôma* and *psychée*.

This doctrine gains its historic profile when we compare it with the older and persisting preclassical tradition that neither gave to body and mind an equal value in the maintenance of freedom nor allowed the naturally free body to be the ultimate safe haven of a free individual mind. In the older view, mind was not possessed by the individual but was the medium through which the individual had to accept the reign of reason. What reason told him, depended on his station in life. To a slave, reason as interpreted in this theory teaches that, as an item possessed and

---

consumed and he was unable to prove that he had given the money for the oil trade as he meant to have done. Since formal consumption is restricted to actions with *formulae in ius conceptae* (Gaius IV 107), it follows that the contract with the slave had been treated as producing between the creditor and the slave a full-fledged "*obligation*", acknowledged by the *ius*. Only the "action," the procedure, which had to be directed against the owner, was in so far "pretorian". *Cf.* Gaius IV 71.

26. Gaius III 176 *Servius . . . respondit, si quis id quod sibi L. Titius deberet, a servo fuerit stipulatus, novationem fieri et rem perire, quia cum servo agi non posset.* It is revealing that Gaius has to deal with this—in his days—no longer accepted opinon. It gives a hint to the extent to which the system that Gaius expounds is indebted to Servius's great reform.

27. Paulus 17 ad edictum D 5, 1, 12, 2 . . . *servi . . . habent iudicium* (slaves have judgment).

28. Gaius (III 176) invalidates the "*novatio*" in the case discussed by comparing it to a promise given by a stranger in the form of a *sponsio* which was valid only when used by Roman citizen. This interpretation means that the slave had used a legal form to which he had no access. The comparison used Inst. 3, 29, 3: *ac si postea a nullo stipulatus fuerit* (as if the later stipulation was promised by nobody) expresses the same law only in a harsher form.

owned legally, he has to accept the situation of being an asset. He must accept as a rational being that, by running away, he commits a theft of the utility he represents[29] and that, by mutilating himself, he does injury to a body that is not his own. In a radical form of the same logic the slave must also accept that the owner, as a good and rational steward of his wealth, stops providing food when prices of grain have run too high or sacrifices him in a state of emergency in order to preserve a more valuable horse.[30] It was a complete different perception of freedom. Freedom was seen as obedience to reason. Therefore perfect freedom could in extreme cases triumph at the price of sacrificing the body. The body belonged to a lower level of human existence, the mind to a higher one. Only reason that gives rationality to the world as a whole provided freedom. There was no question of natural liberty in the classical form. Classical human freedom—defined as the power to do what one wants, distributed equally to each member of humanity, and to be exercised by mind and body alike—was rejected.

When classical doctrine appeared in Rome, preclassical jurisprudence was still debated along these lines. There had been a famous discussion that had already started in the middle of 2nd century BC whether the utility of slave, which reason attributes to the owner, must be limited by the principle of humanity which recognizes that the slave is also a member of human society and as such is entitled in his station in life to a fair part of the utilities which the providential nature had bestowed on humanity. This teaching had success in rejecting certain excesses of rational utility. But the main point remained that reason commands the slave to treat the utility of his body as something belonging to his owner, i.e. to live, obedient to reason, with a slave's

---

29. Gaius 26 ad edictum provinciale D 41, 2, 15 *haec ratio est, quare videamur fugitivum possidere, quod is, quemadmodum aliarum rerum possessionem intervertere non potest, ita ne suam potest*. *Cf.* already above footnote 19.

30. Cicero, de officiis III 23, 89. The question was raised: *sitne boni viri in maxima caritate annonae familiam non alere*. Hecaton, the pupil of Panaetius, allowed it (*ad extremum utilitate, ut puta, officium dirigit*). The same was discussed *si in mari iactura facienda sit, equine pretiosi potius iacturam faciat an servuli vilis*. Again the decision subservient to the *res familiaris* prevailed. In both instances is applied what Hecaton wrote in his book De officiis dedicated to the Roman lawyer Q. Tubero (III 51, 63): *sapientis esse nihil contra mores, leges, instituta facientem habere rationem rei familiaris, neque enim solum nobis divites esse volumus, sed liberis, propinquis, amicis maximeque rei publicae. singulorum enim facultates et copiae divitiae sunt civitatis*. Hecaton sides with the liberal position of Diogenes of Babylon against Antipater who would have given in all these cases precedence to humanity (*Cf.* III 12,50—13,57). *See also* footnote 49.

soul.[31] The classical jurist had in fact to reject the idea that slavery creates a different man (*alius homo*) by altering the soul.[32]

The time when the classical perception of man as a being endowed with an indestructible mental and bodily core imposed itself in Rome is documented through the theory of the eleven attributes of the person, *"persona"*, written down as the result of the teaching of Philon of Larissa in Rome by the young Cicero, who had listened together with his friend Servius (as I mentioned already) to the exiled philosopher of Athens. Both Cicero and Servius were eager to become philosophically cultivated rhetoricians, except that Servius contented himself afterwards (if "contented himself" can be accepted as the right word for such a grand choice) with the role of the great professional reformer of Roman jurisprudence.[33]

The eleven attributes of a person (*res personis adtributae*) are expounded in Cicero's manual as an anthropology laid out for the purposes of the all-embracing philosophical rhetoric of academic scepticism. As such they contain necessarily all relevant legal aspects. The eleven attributes are name (*nomen*), nature (*natura*), upbringing and way of life (*victus*), fortune (*fortuna*), acquired abilities (*habitus*), mood (*affectio*), study (*studium*), purpose (*consilium*), deeds (*facta*), unforeseen events (*casus*), and utterances through speech (*orationes*). The system looks on a social world built up from a myriad of centers, called "*personae*", all with their essential attributes that make up their past, present and future biography. There is no trace of an all-embracing reason providing sense for everyone and promising freedom in exchange for obedience. It is left to the attributes of fortune to decide whether someone is free or slave, rich or private, magistrate or private. The only source of what is ascertained as humanly reasonable is the mind of the individual, the "*persona*".

---

31. The most famous result of the debate between the three jurists who paved the way to a new and more human foundation of the ius civile during preclassical law (*Publius Mucius et Brutus et Manilius fundaverunt ius civile*, Pomponius lb sg enchiridii D 1, 2, 2, 39), was that the child of an unfree mother held in usufruct could no longer be treated as a fruit, being himself a human being entitled to the fruits of nature. It meant that the moderate line of Antipater prevailed. *Cf.* the preceding footnote. But the idea that slavery allocates the use of man to another remained untouched although humanity demanded that the "use" of the slave be considerate. Notwithstanding these mitigations in the preclassical tradition the principle remained in force that the slave had to see himself as an asset and behave accordingly.

32. Paulus 15 quaestionum D 46, 3, 98, 8 sustains against Celsus: *si servus effectus sit, alius videtur esse*. *Cf.* as to the context my article "Das Schiff des Theseus" (footnote 7) p. 437.

33. While retaining a—after a Cicero—highly prestigious second (!) place as a rhetor. *See* Brutus, 41, 151 and Pomponius lb sg enchiridii D 1, 2, 2, 43.

The pair "*animus*" and "*corpus*" is mentioned in the system three times, telling us at first that the differences dealt out by nature affect "body and mind",[34] secondly that the abilities we acquire relate either to body or to mind,[35] and thirdly that our mood affects body and mind.[36] The same could of course have been said for upbringing and way of life,[37] for fortune[38] and unforeseen events.[39] And when it comes to deeds (actions) and speech, it goes without saying that they require both parts of the person. In acting, hands and feet are in the service of the mind;[40] in speaking the mind is served by mouth, face and all parts of one's body,[41] expressing body's language.

When we look at the entire classical legal theory as we find it in our sources, there is no doubt that the human person, equally endowed with body and mind, is the primary element from which, beginning in the state of nature, classical law is conceived. Using this perspective we get an approach to which classical theory responds in a perfectly coherent way.

We may start with *naturalis possessio* in the classical sense,[42] famously acquired "*corpore et animo*".[43] It is explained to us in the highly individualistic fashion, as produced by a person's necessity, as old as mankind, to exist in relation to reality. We are told that everyone needs a place of his own to stand or to sit. Therefore, since I cannot sit or stand where another person already sits or stands, it is argued, possession is a relation only conceivable for a single person; possession of one and the

---

34. Cicero, de inventione I 24, 35 *commoda et incommota considerantur ab natura data animo aut corpori; et omnino quae a natura dantur animo et corpori considerabuntur.*

35. Cicero, de inventione I 24, 35 *habitum autem [hunc] appellamus animi aut corporis constantem et absolutam aliqua in re perfectionem.*

36. Cicero, de inventione I 24, 35 *affectio est animi aut corporis ex tempore aliqua de causa commutatio.*

37. Cicero, de inventione I 24, 35.

38. Under the category fortune is also listed what affects the body. A striking example is death (Cic., de inv. I 25, 35 "*quali morte sit affectus*"). The good or bad fortune attributed through one's children (*quales liberos habeas)* affects the mind in particulary compassionate and sometimes psychosomatic intensity. Cicero experienced it when his daughter Tullia died.

39. Cicero, de inventione I 24, 35 *casus . . . quid ipsi acciderit . . . . quid ipsi accidat . . . quid ipsi casurum sit.*

40. Cicero, de inventione I 24, 36 *facta . . . quid fecerit . . . . quid faciat . . . quid facturus sit.*

41. Cicero, de inventione I 24, 36 *orationes . . . quid dixerit . . . quid dicat . . . qua sit usurus oratione.*

42. In the sense first documented for Servius by Julian 44 digestorum D 44, 5, 2, 2. *Cf.* above footnote 17.

43. Fritz Schulz, Classical Roman Law (1951) p. 435: "Possession was acquired *corpore et animo*, 'with body and mind', i.e. by deliberately obtaining physical control of a corporeal thing."

same thing exercised by two or more persons is excluded.[44] It is a definition of possession in which a body's necessity—nobody can in fact tolerate another body on the spot he momentarily stands or sits on—is extended to the mind which feels the same intolerance extended to the rest of a whole plot of land, marked out by boundaries, of which the body is able to occupy physically in a given moment only the one single point on which it happens to stand. The mind is here seen as anticipating the body's action and thus transforming the body's readiness to defend any other point of the given land in real possession. It is a cooperation of body and mind that conceives as possessed also what is under the sway of the body only in form of an immediate and well prepared potentiality. The classical tradition applies the same principle also to movables, for example in case of a severely wounded but not yet physically apprehended animal or a detected but not yet dug out treasure, yet both already firmly fixed by the mind. Both are seen as possessed because the hunter pursues the animal as his prey and the person who found the treasure is willing to defend it against any third person.[45] Mind and body cooperate also in all other instances when necessary objects are seized,[46] either for immediate use or to treasure them for eventual future barter.

It is a theory of an obviously "stylish" and highly constructed or artificial character. There is a reason for it. It owes its sharp individualistic profile to the ideas it wanted to replace, the preclassical theory, in which possession is defined in a diametrically opposed way. Possession in the preclassical view is not mastery, as we have already heard, but use[47] and as such 'social' use by its very nature. It starts by

---

44. *Cf.* Paulus 54 ad edictum D 41, 2, 3, 5 "To lie" is omitted, perhaps to avoid the idea that you can acquire possession by laying yourself to rest somewhere. The theory might have said that, in such a situation, the mind is not sufficiently cooperating in affirming mastery of the entire plot of land including the parts where the body is only potentially present. Rather, in such a leisurely position of the body, the mind is in danger to fall asleep.

45. The controversy related to the wild animal, mortally injured, but still fleeing (Inst 2, 1, 13) is clarified by an analogous controversy relating to a treasure, detected but not dug out and put into custody (Paulus 54 ad edictum D 41, 2, 3, 3). In both cases the classical view accords possession through the mind preceding the body whereas the preclassical view requires in both instances the establishment of corporeal custody allowing the begin of effective use.

46. Or natural material is specified (according to a famous classical teaching) into something new (from wool into cloth and garment, from grain into flour and bred; gold into a ring). *Cf.* Gaius II 79.

47. Festus, ed. Lindsay 260 *Possessio est, ut definit Gallus Aelius, usus quidam agri, aut aedificii, non ipse fundus aut ager. Non enim possessio est est <de iis > rebus quae tangi possunt.* That is the reason, the text proceeds, why possession cannot be claimed as a "*suum*" as it is done for the corporeal property in the *vindicatio*, and has to be protected with the means of the *interdictum uti possidetis*. This opinion presupposes the preclassical conception of the interdict noted in Ulpian 69 ad edictum D 43, 17, 3, 4 with the words *qui colere fundum prohibetur, possidere prohibetur, inquit Pomponius* after having explained at the beginning the classical

providential nature putting mankind collectively in the possession of the world in such a harmonious way that the use of one individual was compatible with the use of everybody else. It was a situation of perfect solidarity that reigned in the mythical youth of mankind.[48] According to the preclassical theory, it was replaced in historical times by a co-operating and exchanging human society which achieved something similar through commerce by making the goods of nature accessible to potentially everyone, thereby retaining the principle of natural solidarity and reciprocity in a society now divided through strict property.[49] The strict distribution of wealth was seen in this same period as attained through civil possession, based on corporeal appropriation and creating as such property, but again created in an intensely socially connected historical process. Civil possession and property that entitled the owner to all benefits of natural possession, that is, to take advantage of all the utilities of a thing, emerged with statehood. It created simultaneously

---

function of the *interdictum uti possidetis* already mentioned as solely limited to the preparation of the *vindicatio* and the determination of the defendant (D 43, 17, 1 pr.—§ 3). The preclassical view is also enounced by Javolenus 4 epistularum D 50, 16, 115: *possessio ergo usus, ager proprietas loci est*. He who used a thing without permission of the owner committed a theft according to preclassical natural law. *Cf.* Paulus 39 ad edictum D 47, 2, 1, 3. For the classical law see above footnote 21.

48. Seneca, epistulae morales 90. 38 *In commune rerum natura fruebatur; sufficiebat illa ut parens in tutelam omnium; haec erat publicarum opum secura possessio*.

49. This initial solidarity did not fade away entirely with the appearance of statehood permitting strict ownership (property), but persisted in the natural law governing human society under the principle (Gaius 2 rerum cottidianarum <sive aureorum> D 22, 1, 28, 1): *omnes fructus rerum natura hominum causa comparaverit*. Gaius cites the principle to remind the reader that it was finally acknowledged in a famous debate of the middle of the 2. century B.C. when it gave victory to the jurist Brutus, who rejected on its grounds the idea that the child of an unfree mother could be regarded as a fruit (Cicero, de finibus I 4, 12: *partus ancillae sitne in fructu habenda disseretur inter principes civitatis, P. Scaevolam Manium Manilium, ab iisque M. Brutus dissentiet*; *cf.* Ulpian 17 ad Sabinum D 7, 1, 68 pr). The power of this principle was most fundamental. When all human beings have to remember that nature has destined its benefits too all members of their kind, excluding nobody, it follows that every human being must be treated accordingly. We see the consequence drawn, when Q. Mucius sees the human society in its manifold relationships under the sway of a caring good faith (Cicero, de officiis III 17, 70). And Cicero gives the entire argument (de officiis I 7, 22 *quoniam . . . ut placet Stoicis, quae in terris gignantur, ad usum hominum omnia creari, homines autem hominum causa esse generatos, ut ipsi inter se aliis alii prodesse possint, in hoc naturam debemus ducem sequi, communes utilitates in medium adferre, mutatione officiorum, dando accipiendo, tum artibus, tum opera, tum facultatibus devincire hominum inter homines societatem*. It is the same view as in the teaching of Q. Mucius, only that Cicero finds simple truthfulness in performing what has been promised to be sufficient (hence he proceeds: *fundamentum autem est iustitiae fides, id est dictorum conventorumque constantia et veritas*). He sides in so far with the elder preclassical jurist whose natural law did not admit the caring good faith dominating the legal system of Mucius pontifex (de officiis III 17, 69; III 5, 23; III 16, 67).

civil possession and property on two different levels,[50] both in the hands of the entire citizenship and in the hands of the representatives of a family.[51] When this latter right passed into the hands of an undivided group of heirs, it created an entitlement that was technically conceived as an at once civic and natural partnership in common possession.[52] In this tradition[53] the idea that natural possession is the individual and exclusive dominion of a single person would have been regarded as an absurdity.

For the classical theory this idea was on the contrary fundamental, because it allowed replacing providential nature through driving forces, only present in the mind and body of the individual human person, starting with natural liberty and natural possession. The same theory adds to the picture sexuality, the drive of both sexes to look for a partner and to raise children.[54] Another important faculty finally is man's ability to come together peacefully with people of his kind when his interest requires it, in the state of nature especially, for primitive barter.[55] All

---

50. The corporeal civil possession and its normal consequence, property, entitled, as intimated before, in the preclassical system to all the advantages of natural possession, provided the owner had not disposed otherwise. The important preclassical distinction is discussed in Julian 44 digestorum D 41, 5, 2, 1.

51. Cicero, de officiis I 7, 20 explaining in preclassical terms the emergence of privat property, unknown to primordial nature, and its different forms concludes that collective property of a city represented by the citizenry as a whole and individual private property based on possession appear simultaneously and as the result of the same historical event: *ex quo fit, ut ager Arpinas Arpinatium dicitur, Tusculanus Tusculanorum; similisque est privatarum possesssionum discriptio.*

52. Gaius III 154a *legitima simul et naturalis societas*. This partnership, either between coheirs or between contractual partners, was treated, as Gaius informs us, in the classical tradition as obsolete. But the idea of common ownership and use (possession) persisted in relation to hereditary rights of immediate descendants. *Cf.* Gaus II 157; Paulus 2 ad Sabinum D 28, 2, 11. Almost pure preclassical natural law is preserved in the *societas omnium bonorum* in which common use of all corporeal goods of the partners was rendered possible by "*tacita traditio*" (Gaius 10 ad edictum provinciale D 17, 2, 2). It had survived the critical attack that Servius had launched against Mucius' concept of partnership (*cf.* Paulus 6 ad Sabinum D 17, 2, 30; Paulus 21 ad edictum D 50, 16, 25, 1). What antagonized them, was the deep divide treated in the text.

53. For a comprehensive appreciation of the preclassical jurisprudence see my article "Che cos' erat il ius gentium antico?" (2006), republished in: Okko Behrends, Scritti 'italiani' con un' appendice 'francese', una nota di lettura di Cosimo Cascione ed una postfazione dell'autore (Napoli 2009) p. 435-468.

54. Ulpian 1 institutionum D 1, 1, 1, 3 *Ius naturale est, quod natura omnia animali docuit . . . . hinc decendit maris atque feminae coniunction, quam nos matrimonium appellamus, hinc liberorum procreatio, hinc educatio: videmus etenim cetera quoque animalia, feras etiam istius iuris peritia censeri.*

55. The existence of barter in the state of nature is implied in the phrase (Paulus 33 ad edictum D 18, 1, 1 pr): *Origo emendi vendendique a permutationibus coepit*. What follows in the fragment explains that barter was the only way to exchange commodities before statehood introduced money and allowed the emergence of the institute of classical sale based on the sustained peacefulness of *pactum conventum*. It is in this context highly significant that, when barter was acknowledged as a contract in classical law (provided that one side had already

these forces are innate and make man fit to survive in the state of nature, as seen by the classical theory.

The same principle that law is solely a product of human potentials can be found in the way in which for the classical theory the threshold to civilization was crossed. It happened under the lead of an orator with superior insight who, in a magnificent address, convinced a crowd which he had convened from their hiding places in the wilderness, to leave the state of nature and to agree to the leading principles of statehood and to the institutions and ethical values essential for a human legal system. The result was a triumph of reasonable speech. In Cicero's last great work that deals with his personal indebtedness to the philosophical rhetorics of the sceptical academy we find the following, very apt appraisal.

> In this one point we human beings excel animals in the highest degree, that we can talk to each other and express reasonable thoughts when speaking. . . . What other faculty could convene dispersed men in one place and lead them from a wild and uncouth lifestyle to this cultivated and civilized human one and devise, when city states were already established, statutes, the judiciary and rights in a systematic way?[56]

Although this myth gives decisive influence to a person with superior insight, the story is told in perfect respect for the values of individual freedom and equality. The principle that maintained respect for human equality even in a situation of obvious intellectual inequality is expressed in Hesiod's Works and Days where the poet makes a wise and correct distinction. He praises the man who "*considers all things by himself and marks what will be better afterwards and at the end*" but adds that "*he who listens to a good adviser is good as well*."[57] It is an essential distinction. It explains the role of the professional and gives him his due, but retains an equal dignity to the layman who accepts sound professional advice. Between persons giving and heeding good advice there is no real inequality.

---

performed), this happened under the generalized term "*conventio*." *Cf.* Ulpian 4 ad edictum D 2, 14, 7 pr—§ 2. It is a clear hint that classical theory derived the transient *conventio* and its use in the case of barter from the state of nature.

56. Cicero, de oratore I 8, 32-33 *Hoc enim uno praestamus vel maxime feris, quod conloquimur inter nos et quod exprimere dicendo sensa possumus. quae vis alia potuit aut dispersos homines in unum locum congregare aut a fera agrestique vita ad hunc humanum cultum civilemque deducere aut iam constitutis civitatibus leges iudicia iura describere*.? *Cf.* also below footnote 58 and 64.

57. Hesiod, Works and Days 293-319: "That man is altogether best who considers all things himself and marks what will be better afterwards and at the end; and he, again, is good who listens to a good adviser; but whoever neither thinks for himself nor keeps in mind what another tells him, he is an unprofitable man." Translated by Hugh G. Evelyn-White.

Thus the great orator could perform his job in full respect of the freedom and equality of the audience. He appealed in his grand speech to minds capable of the same insight that he had already reached.[58] The consent of the convened was given freely, as from persons convinced. It is therefore rooted in the way statehood began, that the leitmotif of classical law was to be *aequitas* in the new classical sense of equality before the law.[59]

The myth that statehood began with an address given to a convened crowd that formerly lived in the wilderness, does not only glorify the civilizing power of the art of rhetoric, but is also related to a specific sense of the term "*persona*". It signifies literally the mask, worn in Greek and Roman theater by the actors and enforcing their voices through a special device, but it is used in this tradition figuratively for the human face. The human face is seen here as the mask that everybody carries in the social interplay of life, not only identifying him in a way that values both individuality and essential equality at the same time (everybody's face is different, everybody has one), but that also extols language, the faculty of speech, as the essential human characteristic. In this theory, *persona* is approximated to *personare*, i.e. to the fact that language passes through one's mouth as through the opening in a mask.[60] It is also indissolubly connected with the three dimensions of speech expressed in the three grammatical persons: I, you, he/she/it and we, you, they. The term "person" denotes therefore in the human being a combination of individuality, equality and ability to establish human relationships with the means of rational language.

---

58. Cicero, de inventione I 2, 2 *quo tempore quidam magnus videlicet vir et sapiens cognovit, quae materia esset et quanta ad maximas res opportunitas in animis* (!) *inesset hominum, si quis eam posset elicere et praecipiendo meliorem reddere*. And he succeeded: *eo in unuam quamque rem inducens utilem atque honestam primo propter insolentiam reclamantes, deinde propter rationem atque orationem* (!) *studiosius audientes ex feris et inmanibus mites reddidit et manusetos*.

59. The name of the new ius humanum was *aequitas* (Cicero, Partitiones oratoriae 37, 129; Topica 23, 90; Ulpian 38 ad edictum D 47, 4, 1, 1). Its central quality was equality in the dispensation of justice. Cicero, Topica 4, 19 *Valeat aequitas, quae paribus in causis paria iura desiderat*. Man in the state of nature did not know the advantages of a rule of law based on the principle of equality (Cicero, de inventione I 2, 2: *non, ius aequabile quid utilitatis haberet, acceperat*). The acceptance of law meant abolition of inequality based on brute force. The Liberty Valance of the state of nature accepted to become an equal to those who he could dominate through his excelling force (loc. cit. § 3): *ut inter quos posset excellere, cum iis se pateretur aequari*. The rule of law accepted human nature, but refined it through peace and appeal to its ethical potentialities and through the introduction of legal institutions. This is expressed in the juxtaposition which we find in the three texts cited above: *aequitas/lex—aequitas/natura; institutio aequitatis—natura, aequitas civilis—aequitas naturalis*.

60. The pertinent sources are discussed in my article "Der römische Weg zur Subjektivität" (1998), republished in Okko Behrends, Institut und Prinzip I (2004) p. 396.

Seen this way, human beings do not only communicate with each other exchanging emotions and reflections but can also agree in the third person on objective reality, on what is the case in the world and that it can be defined and enriched. That is exactly the reason why this tradition could form the idea that language used in a comprehensive public address and finding common agreement of the human crowd convened might have created the city-state and its legal system.[61] In fact, we are informed by the followers of this tradition that the third person is the form to speak of reality.[62] It comprised from the beginning its two great components *ius divinum* and *ius humanum*,[63] both treated as objects clarified by controlled speech in the third person. A legal system is therefore in this view essentially based on an agreement triggered by the convincing power of the rational speech which conveys professional insights as to the best way it should be organized.

The account of the decisive mythical event, the great address that convinced the convened crowd to leave the state of nature law and accept life under the rule of law in a well-systematized statehood is given to us

---

61. Cicero, de oratore I 8, 32, cited above footnote 56.

62. Martian Capella, a late writer culturally very close to "his Cicero" (V, 436: *Tullius meus*) and following him in his adherence to a philosophically enriched rhetoric, informs us that the first and second person are only used for members of mankind (IV 388: *prima persona . . . . in hominem tantum cadit . . . secunda person . . . etiam ipsa in hominem cadit*), whereas the third person is also availabe for other objects (V 389): *tertia vero persona non hominis tantum est, sed aliarum etiam rerum*. It is an information that can be related to the doctrines of the eleven attributes (Cicero, de inventione I 24, 34-25, 36) not only in so far as they all deal with human attributes that are presented in the third person and used by the orator as means to establish objective characteristics of the person in question, but also because the first attribute of the persona, nature, presupposes with the distinction between divine and mortal nature and the subdistinction of mortals in men and animals the existence of "*personae*" who (according to sceptical humanism) can't be addressed in the first and second person, i.e. gods and animals. That for these "persons", placed above or beneath man, because either divine or beastly, only the third person is suitable follows from the observation that real reciprocal communication, using alternatively the first and second person, is reserved for the human species. Gods and animals are only spoken of, not spoken to. Martianus Capella gives an example of the former: In the latin expression "*pluit*" (it rains = "He" lets it rain) the third person (*tertia persona*) is to be understood as "*deus*", because it can be understood only in relation to the divine person who lets it rain (*quod de eo solo potest intellegi*). This system puts man and his kind in a place grounded in physical nature, but in a nature enriched by human reason able to create religion and law. The same system is still manifest in Ulpian 1 institutionum D 1, 1, 1 §§ 2-4, where he distinguishes *ius divinum* and *ius humanum* and finally a *ius naturale* valid for all mortal beings, men and animals alike.

63. Life before statehood was without religion and legal duties (Cicero, de inventione I 2, 2): *nondum divinae religionis, non humani officii ratio colebatur*. The *ratio iuris* brought both. Cicero, Partitiones oratoriae 37, 129 tells us, that the legal system is to be divided in nature and law (*dividitur in duas primas partis, naturam atque legem*) and that this distinction between nature and law is valid for both, divine and human law (*utriusque generis vis in divinum et humanum ius est distributa; quorum aequitatis est unum, alterum religionis*).

three times by Cicero.[64] His vivid descriptions give us at the same time the key for a thorough understanding of the classical system that he exposed to us at least as many times[65] and that recurs in all details in the classical tradition of our legal sources, especially in the commentaries on the classical edict, the medium through which the new system was made effective.[66] Looking at the edict we see in fact the promises made in the mythical address fulfilled. Use, range and quality of natural liberty were substantially ameliorated. This improvement was achieved in three ways: by liberating the individual from the burden of self-help,[67] by giving institutional form to his main interests,[68] and by sanctioning behaviour that infringed liberty as an act that violated ethical values.[69]

The burden of self-help was removed from the contents of the classical sociobiological natural law that entitles everybody to freedom, possession, sexual partnership and children. It was now put under the immediate protection of the magistrate who forbade violence and ordered respect for it. The most famous instance is the *VIM FIERI*

---

64. Cicero, de inventione I 1.2-1, 2, 3; pro Sestio 42, 91-92; De oratore I 8, 32-33 (I 9, 35).

65. Cicero, de inventione II 22, 65-68; II 53, 161—54. 162; Partitiones oratoriae 3 7, 129-130; Topica 23, 90.

66. Cicero informs us (de legibus I 5, 17), that it was under the leading presence of Servius that the centre of the legal science shifted to the edict. Servius wrote in fact the first edict commentary ever and bestowed on this pioneering work with the dedication to the famous Brutus a highly visibile programmatic character. *Cf.* Pomponius lg sg enchiridii D 1, 2, 2, 34.

67. To have ended the state of violence without any violence convincing him who had profited the most from it, was the greatest feat of the orator. Cicero, de inventione I 2,2 *profecto nemo nisi gravi ac suavi commotus oratione, cum viribus plurimum posset, ad ius voluisset sine vi* (!) *descendere, ut inter quos posset excellere, cum iis se pateretur aequari* (!) *et sua voluntate a iucundissima condicione, recederet quae praesertim iam naturae vim optineret propter vetustatem*). It ended a time where body and mind, *corpus* et *animus*, had not yet found a civilized equilibrium. The mind relied excessively on physical force. Cicero, de inventione I 2, 2 *nec ratione animi quicquam, sed pleraque viribus corporis adminstrabant. . . . caeca ac temeraria dominatrix animi cupiditas ad explendam viribus corporis abutebatur.* Decisive was the replacment of violence by the judiciary. Cicero, pro Sestio 42, 92 *Atque inter hanc vitam perpolitam humanitate et illam immanem nihil tam interest quam ius atque vis. Horum utro uti nolumus, altero est utendum. Vim volumus exstingui, ius valeat necesse est, id est iudicia quibus omne ius continetur; iudicia displicent aut nulla sunt, vis dominetur necesse est.* In the same sense Cicero, de legibus III 18, 42 *Nihil est enim exitiosius civitatibus, nihil tam contrarium iuri ac legibus, nihil minus civile et inhumanius, quam composita et constituta re publica quicquam agi per vim.*

68. The example that Cicero uses is the institution of marriage (de inventione I 2, 2): *tempore, cum in agris homines passim bestiarum modo vagabantur . . . nemo nuptias viderat legitimas, non certos quisquam aspexerat liberos.* Classical matrimonial law is famous for its liberal character. Its conviction that "*matrimonia libera esse debent*" is realized especially in the regime of the divorce. See the article cited below footnote 115.

69. The ethical necessity of (Cicero, de inventione I 2, 3) *fidem colere* is part of the promise and a central element of *naturalis aequitas* of the classical edict. Ethics are also touched upon in the term (I 2, 2): "*humani officii ratio*."

VETO (*I forbid acts of force to happen*) in the new edict which protected possession in terms of mastery, not of use.[70] But possession was by no means the only natural element protected this way. The magistrate of the classical edict intervened with his interdicts also when a free person was deprived of his natural freedom (in this case everybody could ask for an interdict to free him)[71] or a spouse[72] or a child was withheld.[73] In these cases the magistrate used his power to command in the most immediate way, just to protect the main social elements of natural freedom and to make the use of self-help superfluous.[74]

The institutional forms were incorporeal institutes existing only as legal thoughts, added to nature, as the legal form of the *civitates* themselves. I name only some essential ones. Natural freedom was made more reliable and certain through liberty derived from citizenship, possession through ownership, sexual partnership through marriage,[75] natural parentage through rightful fatherhood. Many other institutes could be mentioned. These institutes are capable of providing legal certainty and reliability to natural content by putting human persons into entitling and binding structures and by justifying a corresponding legal procedure to ascertain their existence and to realize their content.

The picture becomes particularly vivid when we move on to the ethical layer. On this level, the magistrate is not intent to provide sustained peace through natural basics, such as possession, nor caring to ensure respect for legal institutions in the service of personal freedom. Instead, he is busy evaluating individual conduct, deeds, *facta*, and whether they require a sanction either by granting an exception or an

---

70. *Cf.* Lenel, Edictum perpetuum (1927)3 p. 446-495. The way in which the regime of the interdicts had been developed in the classical edict needs a comprehensive indepth study. It should in the first place establish which interdicts were old so that they received only a new interpretation (this is so in the case of the *interdictum uti possidetis*; *cf.* footnote 47) and which were newly devised.

71. Ulpian 71 ad edictum D 43, 29, 1 pr. *Cf.* "Das Geheimnis" (footnote 12) p. 22 footnote 22.

72. Hermongenian 6 iuris epitomarum D 43, 30, 2; Ulpian 71 ad edictum D 43, 30, 1, 5. *Cf.* "Das Geheimnis" p. 23 footnote 23.

73. Ulpian 71 ad edictum D 43, 30, 1; idem 16 ad edictum D 6, 1, 1 2 *liberae personae quae sunt iuris nostri, ut puta liberi qui sunt in potestate . . . petuntur . . . interdictis*. *Cf.* again "Das Geheimnis" (footnote 12) p. 22 footnote 23.

74. In the regime of the interdicts the magistrate is busy to establish peace confronting in an immediate way natural life either commanding or prohibiting something. Gaius III 139: *aut iubet aliquid fieri aut fieri prohibet*. The question if there had been compliance with the order is controlled with the help of "*formulae in factum conceptae*." Gaius IV 141 *Nec tamen cum quid iusserit fieri aut fieri prohibuerit, statim peractum est negotium, sed ad iudicem recuperatoresve itur et ibi editis formulis quaeritur, an aliquid adversus praetoris edictum factum sit, vel an factum non sit, quod is fieri iusserit*.

75. *Cf.* above footnote 68.

action because they disregard one of the values, innate in the human mind, which had acquired social force and mandatory character under the condition of civilization.

The edict, scientifically organized, distinguishes therefore *formulae in ius conceptae* which presuppose a formal legal institution and *formulae in factum conceptae* which relate only to a *factum*, to a deed or conduct, ethically evaluated. We remember the term *factum* as designating the deed as one of the attributes of a person in the system of philosophical rhetoric in which Servius, the author of the first commentary on the edict was educated.[76] The term *factum* used by the edict when granting an action has the same meaning and is used to hold a person responsible for his or her conduct whenever it seemed necessary. *Factum* in the technical sense of a deed maintained must not be confused with *factum* in the sense of the particular facts to be proven.[77] The alleged and ethically relevant deed is referred to in the *iudicium dabo* of the classical edict as something sustained and not yet proven. The most famous *factum* in the classical judicature, where we can see this technique applied, is malice (*dolus*) which holds someone responsible for the intentional and artful violation of the values of trust and truth in human affairs.[78]

In the context of our examination of the most natural elements of personal freedom, there is another classical edict on which we will focus. The praetor promises under the clause "that nothing be done that is shaming" (*ne quid infamandi causa*) an intervention granted in the form

---

76. *Cf.* footnote 40.

77. Facts alleged with the intent of delivering proof are intended in the famous dictum of Aquilius who rejected "*ad Ciceronem*" when something was questionable only "*de facto*" (Cicero, Topica 12, 51). The same holds true in the case of the term "*facti ignorantia*." (Neratius 5 membranarum D 22, 6, 2). Both concepts, the facts only maintained and the real facts affording proof, are confronted in the phrase (Paulus 71 ad edictum D 44, 4, 1, 2): *Sed an dolo quid factum sit, ex facto intellegitur*. Only the facts maintained to get the action awarded are meant, when Cicero, Topica 9, 40 calls "*genus argumenti in primis firmum*" when the plaintiff has used the definition of Aquilius in a way that shows the malice he has suffered was acknowledged to be included in the definition (*id quod arguas dolo malo factum includere*).

78. Ulpian 11 ad edictum D 4, 3, 1, 1 *Verba autem edicti talia sunt: "Quae dolo malo facta esse dicentur . . . . iudicium dabo*." The action was part of the classical edict initiated by Servius (*cf.* loc. cit. § 2) and defined there in the way his friend Aquilius Gallus had taught him. The authorship of Aquilius is well attested (Cicero, de officiis III 14, 59; de natura deorum III 30, 74). And we are well informed (Pomponius lb sg enchiridii D 1, 2, 2, 43) that Servius had started his literary career as a lawyer with a longer sojourn together with Aquilius on the island of Cercina (to be dated with likelihood before Sulla restablished law and order in the year 82 B.C). The ethical value against whose violation the action reacted was part of the general ethical concept of classical *aequitas naturalis*. *Cf.* Paulus 71 ad edictum D 44, 41, 1 and Ulpian 67 ad edictum D 44, 4, 2 pr. Labeo enlarged the scope of the concept considerably (Ulpian 11 ad edictum D 4, 3, 1, 2) thus operating an evolution inside this concept of *aequitas naturalis*.

of a special *actio iniuriarum* in case someone would act to the contrary (*si quis adversus ea fecerit*).[79] The ethical value protected is everybody's right to defend one's freedom of movement and action under the condition of civilized life.[80]

The casuistry accumulated under this heading strikes us by demonstrating a highly refined attention to the exercise of personal freedom in a legally systematized world. An action based on contumely lies when someone is prevented from using his own property,[81] e.g. to sell his slave[82] or when he is "not allowed to use the public baths or to sit in a theater seat" or still more generally "to conduct business, sit or converse" in "some other place."[83] There is also liability for an insult, when someone is barred from using the coast for fishing.[84] The classical jurists

---

79. Ulpian 57 ad edictum D 47, 10, 15, 25 *Ait praetor: "Ne quid infamandi causa fiat. Si quis adversus ea fecerit, prout quaeque res erit, animadvertam."* The edict, whose presence in the commentary of Servius and Ofilius is attested (footnotes 86 and 87) has been declared by Labeo (loc. cit. § 26) as superfluous because in its content already covered by the general edict *De iniuriis*. Technique, content and its contrast to preclassical thinking characterizes the edict in a way that attributes it to the jurisprudence represented by Servius and his first commentary on the edict. Since we are entitled to believe that Servius himself did not think it redundant, it is a fair guess, that the redundancy was nothing else than the result of Labeo's interpretation of the so called general edict that widely enlarged its scope (Ulpian 57 ad edictum D 47, 10, 1, § 4). *Cf.* Labeo's similar generalizing interpretation of *dolus* above footnote 78. It is very likely that Servius and Ofilius, the elder commentars of the new edict, still observed the difference between injury to the body and injury to the dignity that Labeo abolished in his interpretation that, as it seems, created what became the "general edict" *de iniuriis*. *Cf.* Kaser, Röm. Privatrecht I p. 623.—It may be noted that Kaser, loc. cit. p. 624 footnote 12 misses a "sociological appreciation or evaluation" ("soziologische Auswertung") of the casuistry. It is a statememt that highlights to what extent the theoretical and educational inspiration of Roman Law is misunderstood.

80. The value is called with an old but recoined name "*vindicatio*." It signifies the moral right of every person to protect himself and those near to him with the means availabe in the legal system administrated by the magistrate, Cicero, de inventione II 22, 65 and II 53, 161. These values are described by Cicero as created by "an inborn driving force" (*quaedam innata vis*). These ethical potentials are meant, when Cicero, referring to the address leading to civilization, tells us that the mythic orator relied on forces in the minds of the assembled that could be taught and educated. *Cf.* below footnote 105. The value of *vindicatio* is the expression of freedom refined through civilization. Cicero, Topica 23, 90 describes the same in rougher terms, closer to the state of nature: *tuitionem sui et ulciscendi ius*.

81. Ulpian 57 ad edictum D 47, 10, 13, 7 *si quis re mea uti me non permittat: . . . et hic iniuriarum conveniri potest*.

82. Ulpianus 15 ad edictum praetoris D 47, 10, 24 *Si quis proprium servum distrahere prohibetur a quolibet, iniuriarum experiri potest*.

83. Ulpian 57 ad edictum D 47, 10, 13, 7 *qui in publicum lavare vel in cavea publica sedere vel in quo alio loco sedere conversari non patiatur . . . et hic iniuriarum conveniri potest*.

84. As a law inspired by the spirit of the free republic it was during the principate often disregarded, as we are told by Ulpian 57 ad edictum D 47, 10, 13, 7: *usurpatum tamen et hoc est, tametsi nullo iure, ut quis prohiberi possit ante aedes meas vel praetorium emum piscari: quare si quis prohibeatur, adhuc iniuriarum agi potest*. The emperors did their best to uphold the law of the edict. *Si quem tamen ante aedes meas vel ante pratorium meum piscari prohibeam, quid*

taught in the tradition of the classical edict that all these cases are governed by the same principle.[85] The leading idea is that any inhibition wrought on the freedom of movement in the legally ordered world constitutes an insult. All free space that law attributes to a person has to be respected. It is therefore also an insult to make an intrusion into another person's house or to hinder the owner to reenter it[86] or to treat someone as a debtor who does not owe anything.[87]

This view is very revealing. There is no question that this view could be linked to the modern subjective rights that are thought of as being conferred by a positive legal order. It is always natural liberty protected against encroachment from the outside. It is the same freedom that once had to defend itself by force. It is always the natural freedom of movement that law protects, regardless of whether someone uses the coastline, which in classical law is classified as a *res communis omnium*, belonging to mankind and animals alike,[88] or whether someone uses the market place or other public space which is, as part of the *res publicae*, open to citizen and foreigners alike.

We can gather from all that a clear insight into the way the classical legal system is theoretically conceived. It is an entirely empirical view of nature transformed through the statehood of city states into the legally systematized environment of man. Where man once moved freely in the wilderness, he now moves in a legally systematized world, and by no means less freely. Wherever the legally systematized world affords him free space, he is entitled to use it in an unhindered way. Any hindrance is resented as an actionable contumely.

---

dicendum est? Me iniuriarum iudicio teneri an non? Et quidem mare commune omnium est litora, sicuti aer, et est saepissime rescriptum non posse quem piscari prohiberi: sed nec aucupari.

85. Ulpian 57 ad edictum D 47, 10, 13, 7 *et plerique esse huic similem eum etc.* The phrase cited contains the idea that he who prevents me from fishing is similar to the person who prevents me from using public space or my own property the way I want to.

86. Paulus 4 ad edictum D 47, 10, 23 *Qui in domum alienam invito domino introiret, quamvis in ius vocat, actionem iniuriarum in eum competere Ofilius ait.* Ofilius, a disciple of Servius and the first to continue the scientific commentary on the new edict that Servius had dedicated to Brutus (Pomponius lb sg enchiridii D 1, 2, 2 44), surely applies here a principle already known to Aquilius Gallus, with whom Servius to whose redaction the edict "*ne quis infamdani causa*" is to be attributed, started his literary career on the little island of Cercina (Pomponius loc. cit § 43). *Cf.* already footnote 78.

87. Ulpian 57 ad edictum D 47, 10, 15, 31 *Si quis bona alicuius vel rem unam per iniuria occupaverit, iniuriarum actione tenetur.* 32 *Item si quis pignus proscripserit venditurus, tamquam a me acceperit, infamandi mei causa, Servius ait iniuriarum agi posse.*

88. *Cf.* my study "Die allen Lebewesen gemeinsamen Sachen (*res communes omnium*) nach den Glossatoren und dem klassischen römischen Recht," in: Behrends, Institut und Prinzip II (2004) p. 599-624.

It is again very illuminating to note that the older system had a completely different approach. It protected the freedom of movement under the category of possession, which was in the view of its followers the rightful use by which natural law distributes its benefits. When someone was hindered in his right to fish on the coastline,[89] when he was not allowed to reenter a possession, e.g., return into his house[90] or when his right to use his land was disturbed,[91] he was given a remedy based on his right to possession defined as use, namely the *interdictum uti possidetis* in its preclassical interpretation.[92] This law of the older system gave protection under the principle that everyone is to be protected in the lawful use of things, including the use of one's own body[93] and the value derived from the "use" of his children and his wife.[94] It was the same

89. Ulpian 57 ad edictum D 47, 10, 13, 7 *conductori autem veteres interdictum dederunt, si forte publice hoc conduxit* (sc. *in eo loco in mari piscari*). It is a form of individual possession consisting in a right to use acquired in this system through a contract with the Roman people, entitled as the sovereign possessor of the use of the entire territory including the coastline. *Cf.* above footnote 51. The preclassical law rejected the concept of the *res communes omnium*, where man is seen as an animal among others (*cf.* preceding footnote). In this view nature had given to mankind a universal entitlement over the entire world, including animals, to be allocated by law in different forms of possession.

90. Cicero, pro Caecina 27, 76; 28, 81 defends the utility of the interdict to protect the freedom to enter a plot of land which his client claimed to possess, against the *actio iniuriarum* recommended by Aquilius Gallus (3, 9; 12, 35; 27, 77). Pomponius 23 ad Quintum Mucium D 41, 2, 25, 2 (where "*quasi magis*" is notoriously a corrupt form of Quintus Mucius) attests that this law is based on the conception that possession, being the right to use, persist, when someone else forcibly has taken possession. Classical law denied the possibiliy of the coexistence of two possessions, also in the case of the coincidence of lawful and unlawful possession. Paulus 54 ad edictum D 41, 2, 3, 5.

91. Ulpian 69 ad edictum D 43, 17, 3, 4 *qui colere fundum prohibetur, possidere prohibetur, inquit Pomponius*.

92. *Cf.* above footnote 47.

93. Under the preclassical concept of "utility" the limbs of a person were treated as if they constituted an asset that could be estimated in money. Ulpian 18 ad edictum D 9, 2, 13 pr *Liber homo suo nomine utilem Aquiliae habet actionem: directam enim non habet, quoniam dominus memborum suorum nemo videtur*. (Pennsylvania Digest: "For an injury to himself a freeman has on his own account an *actio utilis* after the manner of the Aquilian action. He cannot have the direct action under the *lex* because no one is deemed to be the owner of his own limbs.") The second phrase enounces the classical point of view.

94. In the cases of "*liberorum hominum furtum*" (Gaius III 199) the value of the stolen object, the spouse or child (the thieve had to pay the double as penalty) was necessarily estimated according to their "use." *Cf.* the preclassical definition of the theft Paulus 39 ad edictum D 47, 2, 1, 3 *Furtum est contrectatio rei fraudulosa lucri faciendi gratia vel ipius rei vel vel etiam usus* (!) *eius possessionisve*. Gaius requires for the housewife an "*uxor in manu*," a condition that reflects the abolition of the idea of *usus* in classical marriage, a form of "possession" that led after a year to the acquisition of the *manus*. *Cf.* Gaius I 111. Before that, at the time of Mucius, when this "*usus*" was still valid law, a husband was assuredly also protected against theft of his spouse not *in manu*. As to the children who were protected against theft only when "*in potestate*" the legal situation of those emancipated was different. They were once and for all liberated from the service in the house. No situation of "*usus*" could be reestablished. We can therefore assume that

system that was able, as we have seen, to derive from possession over a slave in certain cases total subordination to the patrimonial interest of the owner, telling the slave that he commits a theft of his usefulness by running away. In this line of thought the law is not a creation of the human mind but the presence of reason in the world, aiming to allocate its utilities in a just way, first in the youth of mankind in perfect solidarity, then in historical times with the help of added forms of appropriation introduced by the city-states, also seen as the result of experienced reason, and not dominated by the human mind.

The law of the new system was on the contrary seen as the product of man reflecting on his condition and on the possibilities to improve it. It was not unjustly held to be closer to human reality. Cicero tells us that the older system was qualified by critics whom we can identify rather safely as the sceptics, as the result of dreams[95] and hails his friend Servius as the man who brought the light of clear human understanding into the practice of law.[96] Human reason is appreciated in classical teaching as a tool of human freedom so that, if someone uses it in the right way, he is entitled to pride, and when he uses it badly, he has to take the blame.[97]

When we learn that the central aim of the new system was to instil into the minds of people who wanted to be just the respect for human dignity[98] we can be fairly sure that human dignity was essentially seen in

---

in their case the institution of *usureceptio*, that brought back normally a lost right through "*usus*" of a year (Gaius II 59), did not apply.

95. We hear from Cicero, de oratore II 33 144 that, in the days when the final success of the classical system prepared itself, the preclassical jurisprudence was called "*a yawning and sleeping science*" that should be left to the "*leisure of the Scaevolae*." This very harsh and dismissive (even somewhat vulgar) judgment cannot be separated from the general assessment that the legal theory which these jurists defended (Cicero, de officiis III 17, 69) was written down by his author "*like a dream*" (Plutarch, de Alexandri Virtute I 6 p. 329a. *See* Arnim, Stoicorum Veterum Fragmenta I p. 60/61 nr. 362). For it is sleep that provides dream, whereas a sceptic who forms his opinions by scrutinizing, analyzing and structuring the phenomena given in reality is proud of his being fully awake.

96. Cicero, Brutus 41, 153.

97. Cicero, de natura deorum III 36, 87 *virtutem autem nemo umquam acceptam deo rettulit, nimirum recte; propter virtutem enim iure et in virtute recte gloriamur; quod non contingeret, si id donum a deo non a nobis haberemus*. (No one ever credited his virtue to God, and evidently rightly so. We pride ourselves rightly upon our virtue. This would not happen, if we had received it as a gift from God, not from ourselves.)

98. Cicero, De inventione II 53, 160 *Iustitia est habitus animi communi utilitate conservata suam cuique tribuens dignitatem*. (Justice is the state of mind that gives, common interest being preserved, everyone his dignity). The phrase introduces the legal theory that was to become the theory of classical jurisprudence. *Cf.* loc. cit. II 22, 65; Cicero, partitiones oratoriae 37, 129 f. The paramount importance given to the condiction enounced in the words "common interest being preserved" is equivalent to the rule of law. *See also* auctor ad Herennium III 2, 3 *Iustitia est aequitas ius uni cuique re tribuens pro dignitate cuiusque*. (Justice is the sense of equality giving every one his right according to his dignity.) Human dignity is seen here as an

freedom of body and mind and in the human creativity comprised in their combined forces. The proudest expression of this creed at the core of human dignity is announced in the conviction that everyone must search in his own mind for prudence and foresight, seen as the use of reason.[99]

Iudicium hoc omnium mortalium est <. . .>[100] *a se ipso sumendam esse sapientiam . . . haec in nobis ipsis sita videmus*. (This is the judgment of all mortals; practical reason we have to get from ourself. . . . We see it residing in our own selves). Cicero, de natura deorum III 36,88.

It is the creed of sceptical humanism, contradicting the position of the Stoics for whom all reason operating in man is divine,[101] and the ultimate goal of good and virtuous life is to comply with immanent reason, even if one happens to be a slave and reason asks one to think of oneself as an asset. Reason in that tradition was experienced as an objective phenomenon to be accepted when necessary with fatalism. Quite different was the classical approach for whom reason can be used as an instrument for the protection and refinement of natural human freedom (at its core indestructible) and therefore capable when used with insight to make the world a better place.

The condition "when used with insight" is in this view essential. It is sustained by the optimistic belief that man as a reasonable being cannot, in the long run, refrain from agreeing with a well-established truth. The famous sceptical creed that "truth is buried in the depth, all is held together by opinions and institutions" (*in profundo veritatem esse demersam, opinionibus et institutis omnia teneri*)[102] is not to be read as a profession of pessimism as to the social potentialities of sceptically established reason. On the contrary, its message is different. It says: Arguing with the category of fundamental truth is not the right way to convince anyone, because it tends to provoke doubts in human beings

---

indistructible endowment but nevertheless including competition. It is therefore equal in its fundamentals but different in its appearance in social life. *Cf.* my article "Das Geheimnis (footnote 8) p. 44-72.

99. Decisive is the distinction between the origin and the use of reason. Cicero, de natura deorum II 28 71 *a deo tantum rationem habemus, si modo habemus, bonam autem rationem aut non bonam a nobis*. (From God we only got reason, provided we have it; good or bad reason we get from ourselves).

100. *Fortunam a deo petendam* (good luck is to be requested from God).

101. The speaker of the fragments cited was the sceptical pontiff Cotta. His opponent, the Stoic Balbus, had in the preceding book explained that Gods and human beings share (II 31, 79) the "same reason, the same truth and the same law", deducing from it the divine origine of all practical intelligence: *ex quo intellegitur prudentiam quoque et mentem a deis ad homines pervenisse*.

102. Cicero, acad. post. I 12, 44; *cf.* Isidor, Etym. VIII 6, 13.

who are made to use their own judgement.[103] Instead, demonstrating what is very likely, has a fair chance to establish a valid, received opinion, because likelihood appeals to common sense and to the obvious necessity to accept reality and to agree on the essentials of civilized life. This mechanism of course depends highly on the level of learning. And indeed, when the philosophy that inspired the classical jurisprudence defined as an ultimate goal of life "the fruition of the natural fundamentals or principles" (*principiis naturalibus uti*),[104] this statement was aimed at the individual and contained the conviction that everybody loves to develop his or her bodily and mentally abilities through learning and training.

It was this bent in human nature, its eagerness to learn, that made according to classical theory the mythical address a success. The mythical orator approached the convened crowed, as Cicero tells us, in the firm and assured belief gained by observing his equals that in their minds there were substance and potentials for the greatest possibilities if only someone could elicit and improve them.[105] And so he did. He convinced even the Liberty Valance in the crowd who was used to getting his way thanks to his superior physique and had come to love it, that, in

---

103. Nicely put forward in the phrase spoken by the pontifex Cotta, a follower of the sceptical Academy (Cicero, de natura deorum III, 1, 1): "Since everyone has to use his own judgement it is difficult to make me think what you want me to think" (*cum autem suo cuique iudicio sit utendum, difficile factu est me id sentire quod tu velis*). Consensus can be achieved when the opinion proposed is professionally well established as either closest to observed reality or best suited, when introduced into reality, to improve the condition of human life.

104. Cicero, de finibus bonorum et malorum II 11, 35 *Carneadi frui principiis naturalibus esset extremum (extremum= summum bonum*; *cf.* II 3, 42) (For Carneades was the ultimate end [or: the highest goal] <of good life> the fruition of the natural elements).

105. Cicero, de inventione I 2, 2: *quo tempore quidam magnus videlicet vir et sapiens cognovit, quae materia esset et quanta ad maximas res opportunitas in animis inesset hominum, si quis eam posset elicere et praecipiendo meliores reddere*. What the orator intended, is illustrated in the systematic account of the law he introduced, that Cicero gave in the later parts of the same work twice (II 22, 65-22, 68; II 53, 160-54, 162). We can clearly distinguish the ethical tendencies that are awakened immediately (the quotations are taken from the first of quite similar accounts): *naturae quidem ius esse, quod nobis non opinio, sed quaedam innata vis adferat*) and not part of the positive law (*neque in hoc civili iure versantur*) from those that require for their validity that the civitas has been actually founded. This positive law is deduced from various sources, unwritten and written one. The former part is in need in order to become a reliable and certain part of the consuetudinary rule of law (*consuetudine . . . ius*) to be accepted by the consenting will of all (*voluntate omnium sine lege*). This had, as young Cicero informs us (not very elegantly, but with sufficient clarity), in the case of Rome of course already happened, but was in the new perspective (*cf.* above footnote 64 and 67) a result that was for the by far greatest part of this law achieved with the help of the edict: *quaedam iura ipsa sunt iam certa propter vetustatem. quo in genere et alia sunt multa et eorum multo maxima pars quae praetores edicere consuerunt*. It is also in an other instance proven that the legal education, Cicero has recorded in the rhetoric manual of his early youth, insisted on the preeminent importance that the praetor had in his rule of law (de inventione II 19, 57: *in nostra quidem consuetudine*).

the end, he would be better off if his freedom and possessions were protected by the judiciary.[106] And even his more refined arguments, which at first created anger and were resented as arrogant, were finally accepted, so that everybody agreed that institutions like marriage and ethical values like trust and reliability have great advantages.[107]

Appreciated for its theoretical content the myth offers a special and remarkably refined version of the old wisdom that man is by nature a "political" or "civil animal". It is special and refined through the intensity with which it maintains the distinction between natural man and the surrounding civilization and through a connatural openness to evolution. Fully acknowledging the faculty of man to create improved conditions of life through ethics and legal institutions and by accepting the benefits of suppressed self-help, the theory depicts him, however, as remaining fundamentally the same: a social animal led by social instincts which he shares with other social animals, including his yearning for freedom. Some important thinkers, especially from the late Cicero onward, found this very point insufficiently inspired and tried to reconnect the human soul with an inborn relationship to a metaphysical divine, with a remarkable effect on the legal culture of the Principate,[108] but without causing any systematic discontinuity.

Since this analysis is confined to the republican period we can limit ourselves here to one last point, namely to draw closer attention to the—already patent—fact that the mythical address symbolizes the beginning of statehood in general. Technical terms like "law of all nations" (*ius gentium*) and the highly refined distinction between public law, regulating the magistracy to be elected by the Roman citizens,[109] and

---

106. He had falsely come to believe that by living with the help of violent force he was following his true nature. Therefore Cicero, de inventione I 2, 3 observed: "*iam naturae vim optineretur propter vetustatem*."

107. Cicero, de inventione I 2, 2: ". . . *eos in unam quamque rem inducens utilem atque honestam primo propter insolentiam reclamantes, deinde propter rationem atque orationem studiosius audientes ex feris et inmanibus mites reddidit*". Among the useful things are expressly named marriage (*nuptias . . . legitimas*) and trust (*fidem colere*) and the general advantages of an equal law (*ius aequabile*). The distinction between moral education of the crowd and the subsequent actual founding of the city state in which positive law was possible is made with great clarity in the account given by Cicero, de oratore I 8, 33.

108. For a last account with further references *cf.* my article "Die Republik und die Gesetze in den Doppelwerken Platons und Ciceros" in Politisches Denken. Jahrbuch 2008 p. 133-182.

109. Ulpian 1 institutionum D 1, 1, 1: *ius publicum <. . .> in magistratibus consistit*. The contents "*in sacris, in sacerdotibus*", secluded by brackets belonged in the Republican period to the *ius divinum*. *Cf.* Cicero, Partitiones oratoriae 37, 129. They were integrated into public law only during the Principate, whose constitutional power was sustained by priestly and religious attributes.

private law that serves individual interests, for its greater part regardless of citizenship, can be applied to every state.

The citizens of each state are seen from a twofold perspective, one national, the other international and cosmopolitan. On the one hand, each citizenry constitutes a separate entity; on the other hand, it is just an open fraction of civilized humanity. A people or nation is in this view in fact only partly defined as an exclusive political body electing the magistracy within the limits dictated by its public law, and held together by special citizenship, special statutes and customs.[110] At the same time it is defined as an undivided part of mankind accepting in principle any foreigner as their legally equals, protected by the same universal law, composed of natural law liberated from self-help, of ethics and of the private institutions of the law of all nations. And this universal law is rendered effective by a magistrate, whose mandatary power the foreigner can accept since it is founded in the general nature of man, who in civilization wants and needs to be *legally* protected.[111]

As far as public law is concerned, the *ius gentium*, the law of all nations, was with its institutions constitutive of the independent existence of the city states as equals[112] and defended their right to exist and develop

---

110. In classical law a statute was valid only for citizens. The magistrate could only instruct the judge with help of a fiction to treat the foreigner like a citizen extending thereby the scope of a statute. Gaius IV 37. Preclassical law had no methodical problem to find in a statute universally valid law, so, e.g., natural law in the case of theft in a disposition of the Twelve Tables. Paulus 39 ad edictum D 47, 2, 1, 2.

111. We owe to Plutarch, known for his extensive criticism on the doctrines of Stoicism, a defining sentence as to the origin of political power that with likelihood can be attributed to or was at least condivided by the Sceptics. He says (Pelopidas XXIV 3): "*It is in fact the first, as it seems, and the mightiest law that gives in accordance with nature (katà phýsin) to him who is in need to be protected a ruler (árchonta [árchoon = magistrate] capable to protect him*". This power rooted in the sociobiological nature of man must not be confused the institution of the magistracy that confers and limits it (footnote 100 and 103). It would be as bad as confusing property and possession. The power is consequently not tied to the magistracy and can appear, according to sceptical thinking, in the state of emergency also in private hands (the most famous precedent is discussed in my article "Tiberus Gracchus und die Jurisprudenz seiner Zeit" Luig/Liebs, editors, Das Profil des Juristen in der europäischen Tradition, Symposion Franz Wieacker [1980] p. 25-121). This natural power to protect reflects on the other side in civilization the deep change that had occured. It emerges and disappears no longer simply with a transient danger requiring leadership but is destined to serve the rule of law in its double scope, i.e., when it maintains the political body of the citizenry and when it cares for the peaceful life of the open fraction of mankind on its territory. The power conferred to a ruler does no longer simply ward off danger but is busy in the service of the rule of law.

112. The creation of the individual *civitates* is the first and foremost effect of the classical *ius gentium*. *Cf.* Hermogenian 1 iuris epitomarum D 1, 1, 5; Isidor Etym. V 6. In this respect it covers the same field as modern "droit de gens." The *ius publicum* mentioned in Cicero, partitiones oratoriae 37, 130 as belonging to the part of the *ius humanum* where the *propria legis* are delt with (i.e., what is also called the *institutio aequitatis*, the *aequitas/lex or the aequitas civilis*, *cf.* above footnote 51) is still preserved in Ulpian 1 institutionum D 1, 1, 1: *ius publicum*

its culture in an outspoken analogy to the same right of the individual on a personal biography.[113] In private law too the law of all nations knew of some restrictions where the protection of the cultural identity of a city state demanded it. That is why the *ius gentium* of marriage required normally mutual citizenship. But this rule and other of similar kind are exceptions.[114] For the rest, the private part of the classical *ius gentium* was the law of an open civil society, as were the rules of classical law based on universal sociobiological nature and universal ethics.

Classical theory locates at the origin of state and law no empowering contract, but the free acceptance of a legal order destined to improve the individual freedom of the human person. Its validity was based primarily on reason elaborated and recommended by the mythical orator who convinced everywhere the crowds, which he had convened from out of wilderness, of the advantages of the rule of law. This expert and magic master of the legal word was the great model of the rhetor-lawyer, Cicero's friend and rhetorical condisciple, Servius Sulpicius Rufus. For Cicero himself it was the triumph of reasonable and civilizing speech over brutish force.

> In this one point we human beings excel animals in the highest degree, that we can talk to each other and express reasonable thoughts when speaking. . . . What other faculty could convene dispersed men in one place and lead them from a wild and uncouth lifestyle to this cultivated and civilized human one and devise, when city states were already established, statutes, the judiciary and rights in a systematic way?[115]

. . . in magistratibus consistit. *Cf.* footnote above 109. Livius, the historian close to the Ciceronian rhetorical culture, uses (III 4, 1-4) the verb "*instituere*" in relation to the creation of republican magistrates no less than three times, the last time alongside other "*nova . . . iura gentium hominumque*," of whose introduction (*quin . . . . instituantur*) he entertains no doubt.

113. When Ulpian 1 institutionum D 1, 1, 1, 2 refers *ius publicum* to public utility and and *ius privatum* to the utility of the individual this is an echo of the phrase attributed to the great sceptic Carneades (Cicero, de re publica III 15, 25): *eadem ratio iuris in utroque*, saying that practical wisdom (*sapientia*) compels both the private persons and the political nations to develop and promote their wealth, might and honour.

114. *Cf.* my article, "Sessualità riproduttiva e cultura cittadina. Il matrimonio romano fra spiritualità preclassica e consensualismo classic" in Behrends, Scritti 'italiani' (2009) p. 379-434. Another instance is that the *emptio emptio* governed by *ius gentium* required currency of the city states in which it was contracted. The use of foreign currency transformed the sale into barter. *Cf.* my article "Der ungleiche Tausch zwischen Glaukos und Diomedes und die Kauf-Tausch-Kontroverse der römischen Rechtsschulen" (2002), republished in: Behrends, Institut und Prinzip Ausgewählte Aufsätze II (2004) p. 629-653 (p. 643).

115. Cicero, de oratore I 8, 32-33 *Hoc enim uno praestamus vel maxime feris, quod conloquimur inter nos et quod exprimere dicendo sense possumus. <. . .> quae vis alis potuit aut dispersos homines in unum locum congregare aut a fera agrestique vita ad hunc humanum cultum civilemque deducere aut iam constitutis civitatibus leges iudicia iura describere? Cf.* footnote 67.

The peoples of each of the resulting city states were thus partly a political body with particular law (*ius proprium*), partly an open fraction of mankind admitting everybody else as an equal. According to the law of all nations (*ius gentium*), the entire public law, which regulated the election and eligibility of the magistracy, the effect of the statutes, the organization of the judiciary (and the service in the military) was exclusive law. In so far the city states were hospital places for mankind and their citizens seen as a fraction of it, they offered an improved and regular environment for the natural freedom of every human person in three universally valid layers of private law, by 1. providing enduring peace for natural relations formerly defended by force; 2. adding institutional form to natural contents (e.g., ownership to possession); and 3. reacting with adequate sanctions to behaviour that did not respect or violated ethical values with the help of *formulae in factum conceptae*, i.e., instructions to a judge qualifying something done as having legal consequence for the one who did it. The benefits of the civilization of the city states thus extended to every individual. The spirit of this universal law created by human reason is condensed in the phrase: *Hominum causa omne ius constitutum!* All law is established for men's sake.[116]

Compared to the preclassical law this openness was nothing new. It was a revised version of the preclassical law which starting from a providential nature was in this respect a not less open minded and partly cosmopolitan system. The preclassical theory too conceived the multitude of states as being partly in the service of the particular culture of their citizens, partly in the service of a fraction of mankind with an open and by nature hospital character.[117] The basic difference between both traditions did not concern universality and the conviction that every people has (or should have) also an open cosmopolitan side, but the origin of reason: Is it something preordained and to be experienced or something created and continuously controlled by the human mind eager to improve, starting from individual freedom, his condition?

The fact that we find the classical definition of freedom based in biological natural law highlighted at the beginning of both the Digest and Institutes of Justinian is a clear symbol that the classical concept finally prevailed during the Principate and the competing Law Schools. It is true that, due to the contemporary presence of preclassical ideas in the same period, we find the classical approach in the same codification in

116. Hermogenian, Epitome of Law, book 1 [D 1, 5, 2] (translation D. N. MacCormick).

117. *Cf.* for a general account in "Che cos' era il ius gentium antico?" (cited above footnote 53).

many instances counterbalanced by the principle that law is a means to allocate the wealth that nature has given to mankind, and not only in a strict way but also under the social principle of solidarity.[118] This was without any doubt beneficial. Otherwise we would not have learned from Roman Law the principles to take care embedded in good faith and diligence nor the necessity of national and international politics caring for the needy.[119]

But—and with this statement I shall finish my presentation—it was very wise to retain at the center the idea of man as a being free by nature, not by law. It transformed the highly valuable principle of human solidarity into an ethical concept, to be controlled and used by reason in the name of freedom of self-determination and to be promoted for the benefit of those in need. Social politics for the needy are thereby liberated from the suspicion to be in some way averse to natural freedom.

118. *Cf.* again my article "Der Schlüssel zur Hermeneutik des Corpus Iuris Civilis. Justinian als Vermittler zwischen skeptischem Humanismus und pantheistischem Naturrecht" (quoted footnote 11).

119. For an appreciation of the contribution of preclassical law to social justice my article "Das Sozialrecht. Sein Wert und seine Funktion in historischer Perspektive", in: Okko Behrends / Eva Schumann, Gesetzgebung, Menschenbild und Sozialmodell im Familien- und Sozialrecht (2008) p. 1-38.