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The Spirit of the Roman Law Re-Evaluated

Okko Behrends*

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I. PART ONE

Jhering's contributions to jurisprudence have justly affirmed his standing as one of the most important legal minds ever. He was born in East Frisia in 1818 and died in Göttingen in 1892 at the age of seventy-four[1], where he had moved to from Vienna twenty years earlier. He is

* © 2024 Okko Behrends. Professor Emeritus of Roman Law, German Private Law, and the History of Civil Law, Göttingen University; Doctor (honoris causa) Stockholm University. Member of the Academies of Science in Göttingen and Naples. The author has lectured in the U.S. at Cornell as A.D. White Professor-At-Large and at Penn Law as Bok Professor of Law. The following text is the annotated and revised version of the Eason-Weinmann Lecture delivered at Tulane University Law School in 2022. The author wishes to express great thanks to Professor Jan Behrends, his eldest son, for a thorough reading of the last draft of the lecture that yielded many fine adjustments and helpful comments, and a particular gratitude to his dear colleague and friend Vernon Palmer, his host during the lecture, who took care of the text from the beginning to the end improving it step by step linguistically and especially by stimulating advice.

1. See "Biographisches Lexikon für Ostfriesland" I (1993) p. 211-215 and "Göttinger Gelehrte. Die Akademie der Wissenschaften zu Göttingen in Bildnissen und Würdigungen" (1751-2001) p. 258.

often called the father of sociological jurisprudence and even—in some quarters—revered as a legal demi-god. His immense merits are beyond doubt.[2]

The "Spirit of the Roman Law" conjured up by the great Rudolph von Jhering at the conclusion of his work *The Spirit of the Roman Law on the Different Stages of its Development*—the title echoes Montesquieu's *De l'esprit des lois* [*The Spirit of Laws*]—is nevertheless in need of a thorough re-evaluation and—as we shall see at the end—unequivocal rejection.

In a long article written in 2019—due to external circumstances it appeared in print only in 2023[3]—I have already shown that this "Spirit" was in its inspiration not legal or lawyerlike nor historical but purely biblical and without foundation in the reality of Roman history, which tells quite a different story (see Part II *infra*).

Jhering's wording of the incantation resounded in extremely powerful biblical tones, and with good reason.[4] It was meant to correct, even purge Jhering's first analysis, a no-less powerful biblical interpretation of the "Spirit of the Roman Law." Developed in the first three books of *The Spirit of the Roman Law on the Different Stages of its Development*, it taught the exact opposite.[5]

Indeed, as we see, Jhering, in this nevertheless splendid work of legal literature,[6] corrected in the end one unbalanced exaggeration with another; both were put forward in their time under the influence of deeply-felt religious convictions. In his first interpretation, Roman law was the paradigm of the sanctity of entitlements serving individual freedom, conferred by formal concepts of higher origin and therefore to be observed by modern lawyers with unwavering consistency. In the new interpretation, Roman law was the model of the free quest for the "[j]ust," which was believed to have a spiritual presence in every case that life can

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2. For a recent universal appraisal Stephan Meder/Christoph-Eric Mecke (Edd.), Jhering Global. Internationales Symposion zum 200. Geburtstag Rudolf von Jherings (1818-1892), Göttingen 2023.

3. "Jhering heute! Seine Wirkung als Jurist, Rechtsdenker und Rechtshistoriker der Historischen Rechtsschule" in: Jhering Global (2023) p. 185-255.

4. The actual language will be given shortly. *See infra* note 37 and accompanying text.

5. "*Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung*" I; II 1,2; III,1 (1852-1865). There were several later editions, the last one with the exception of the first book already posthumous: ^{4}1887-1888; ^{5}1891-1906. The fourth book (the second volume is divided in two) has retained a special place because it contained the refutation of his older convictions developed in the earlier books. I am citing the *Geist* in the edition that once stood in the library of my teacher Wieacker: I^{4}(1878) II 1^{3}(1874) II 2(1875) III,1^{3}(1877).

6. See Heinz Ludwig Arnold (Ed.), Kindlers Literaturlexikon^{3}(2009) p. 362.

bring about. It was discernible by the Roman lawyers and every modern lawyer raised in their tradition and inspired by this belief.

In the initial vision of the *Spirit of the Roman Law*, Jhering developed the ideas of George Frederic Puchta, a fact that he recognized by reverently dedicating his work to him.[7] He personally met Puchta in Berlin in 1842 when Puchta was nominated as successor to Frederic Carl von Savigny, the founder of the Historical School of Law, but of course Jhering already knew Puchta's famous *Institute*s beforehand. That is why he was able to start his ambitious undertaking as a disciple of Puchta already in 1841.[8]

Puchta, unlike his great predecessor, no longer focused on the Roman republic in search of the founding principles of law, but on the Old Testament and Adam's divine empowerment by God. This empowerment was treated by Puchta as a justification for everyone's subjective rights bestowed by a positive legal order. Through a mysterious "genealogy of concepts" arriving from "above" and without any implication of statehood, it attributed to all individuals the entitlements that the law contains and gave to them divine sanctity[9] As Puchta emphasized in the first title of the *Institutes*, this divine law was not Roman in origin, but made a particularly impressive appearance in the history of the Roman people.[10]

In Jhering's first attempt to capture the Spirit of the Roman law, these ideas reappear in an enriched but finally preserved manner. At that time, Jhering found this Spirit exclusively in what he called the "Second System," which was in his judgment the only truly Roman one. It was heir to a "First System" that was pre-Roman, brought to Rome by settlers from an uncertain Indo-European era. These individuals brought with them the moral fitness ("moralische Ausstattung") of the "first man," i.e. Adam, a

7. It is worthwhile to read the wording of the dedication: To the memory of the great master [*Dem Andenken des großen Meisters*] *Georg Friedrich Puchta*.

8. His first lecture, given in the summer term 1841 as a young Berliner associate professor, was already entitled "Geist des römischen Rechts" ["Spirit of the Roman Law"]. See Rudolf von Jhering, Beiträge und Zeugnisse [2] (1993) p. 65.

9. See G.F. Puchta, Institutionen I [5](1865) p. 16 and p. 101. In the first place, Puchta explains that the empowerment given to the "first man" is transformed for everyone into a legal norm to be derived from the positive law. In the second one, he emphasizes that the notions whose genealogy he describes (his example is a servitude) are "living beings" (Lebewesen). With regard to their ultimate "author," this can be translated into "living thoughts" of divine origin and as such, in its entitling power, accessible to the human mind.

10. The title runs "History of the Law with [!] the Roman people with an introduction to legal science" (Geschichte des Rechts bey [!] dem römischen Volk mit einer Einleitung in die Rechtswissenschaft"). The central feature of the promised legal science was the "genealogy of concepts."

fact that gave to the origin of the Roman world in Jhering's words a certain resemblance to the cosmogony described in the Old Testament. Its center remained the Adamitic empowerment. But Jhering gave it a colorful appearance describing the Second System as a "System of Selfhelp" ("System der Selbsthülfe"), in which the "natural organizing power of the idea of law" ("die natürliche Organisationskraft der Rechtsidee") and the morality of the Adamitic man guided by this law permitted individual "might" to become "right." In this "Golden Age of Self Help," as I have called it, no statehood was needed. It was rather a perfect substitute for a posited legal system since it created a coexistence of many entitlements solely by divinely inspired and moderated energy and willpower. Jhering adored this result. The possibility of such a system that mysteriously unites perfect freedom and planned regularity ("Planmässigkeit") appeared to him as proof of God's guiding hand ("lenkende Hand Gottes"), far more brilliant than what all the beauties of nature have to offer.[11]

The "natural organizing power of the idea of law"—an expression Jhering had coined to explain how a divinely empowered individual will can transform mere factual possession into legal property without any preexisting worldly legal order (and in which we can recognize the effect of Puchta's no less mysterious "genealogy of concepts")—led Jhering in a next step to an observation initially sketched out in the first book and subsequently worked out in great detail in the third (II,2).[12] It was an assumption that did not take away the mystery of legal notions coming from a higher sphere, but derived from it a distinction of great beauty and truth, namely the distinction between imperative law that commands and legal institutes that entitle.[13] Its beauty lies in the fact that law seen as a command treats men merely as beings that must obey, whereas entitling institutes serve their freedom.

In his later treatment, Jhering named the second form "the higher jurisprudence" and the first one, with a small variation, the "lower jurisprudence."[14] He equipped the higher jurisprudence with a very peculiar "naturhistorische Methode," an approach that gave to law a "natural history" that allowed lawyers to discover the entitling institutes

11. For the references *see Jhering heute! supra* note 3 p. 192-194.

12. *See supra* note 5.

13. *See Geist* [4]I (1878) p. 36-39.

14. In *Geist* [3]II,2 (1877) p. 358/9 he attributed to the lower jurisprudence the task to explain the complete content of the purpose of a statute. But already in *Geist* [4]I (1878) he equaled the contrast between command and entitling institute (p. 37) with the contrast of legal norm [*Rechtssatz*], which explains, and the institute, which entitles.

in a "natural" way as legal bodies (Rechtskörper)[15] or as Savigny had had it earlier—Jherings cites him in later editions to defend himself against critics—as "living creatures."[16] Compared to the "natural organizing power of the idea of law," this was merely a new metaphor and did not change the substance of Jhering's conviction, a firm belief in the divine inspiration of legal order that he, as has been justly observed, never really abandoned.[17] And he was right in not changing his conviction. The opinion that entitling contracts have reality in life is useful and well documented in the picturesque language of the Roman lawyers of Jhering's "Third System," which looks at an obligation or bond as being "born" and at contracts like sale as "giving birth" to the obligations of both parties.[18]

Jhering never studied this "Third System," despite the fact that only in this period Roman law was transformed into a proper science as shown masterfully in the pathbreaking *History of Roman Legal Science* by Fritz Schulz. This development occurred, as Schulz correctly discerns (see Part II), first and foremost in the Roman republic due to the "creative geniuses and daring pioneers" of its Hellenistic period. It continued—under the Principate founded by Augustus—in the Classical period, which reached its zenith during the age of Trajan and Hadrian when their "ideas" were "developed to the full and elaborated down to the last detail."[19]

The reason why Jhering never took interest in this last and most fertile stage of the development of Roman law is present in the brief description and evaluation he gave to it in the first book of the *Geist*, where at the beginning of his undertaking, he distinguishes the three

15. *Geist* ^{3}II,2 (1877) p. 359 ss.

16. *See* loc. cit. p. 360 note 506. There Jhering cites Savigny with the affirmation: "Die Begriffe sind den Juristen wirkliche Wesen gewesen, deren Dasein und Genealogie ihnen durch langen vertrauten Umgang bekannt geworden ist."

17. H.J. Hommes (Amsterdam), Rudolf von Jherings naturhistorische Methode, in: Franz Wieacker/Christian Wollschläger, Jherings Erbe. Göttinger Symposion zur 150. Wiederkehr des Geburtstags von Rudolph von Jhering. (1970) p. 102.

18. *See* Ulpian 4 ad edictum D 2,14,7,1 "This is a synallagma (σύναλλαγμα) says Aristo, and hence a civil obligation is born [*nascitur*];" § 5 "a naked agreement does not give birth [*parit*] to an obligation". These are statements in the climate of an "intermediate view" [*media sententia*]. It accepted barter when one party had delivered and thereby created a synallagma. In the older hellenistic jurisprudence, barter was equated with sale and likewise a relationship created by good faith; in the later jurisprudence it was rejected because of its (compared with the contract of sale) lack of commercial rationality.

19. *See* pages 38 and 99 of the book cited in the revised second edition (Oxford at the Clarendon Press 1953; first edition 1946). The text is a translation by Francis de Zulueta. The original text is found in Fritz Schulz' History, *Geschichte der römischen Rechtswissenschaft* (Weimar 1961) p. 44 and 117.

systems. Jhering points out that in the Third System, the Roman law becomes “cosmopolitan,” “international,” and “supranational,” and it therefore loses its roots in the Roman nation. This is correct. The founding principle of this period is the *ius gentium,* the law of all tribes or nations, i.e. of mankind (see Part II). In it Jhering perceived characteristics that led him to conclude that it no longer contained the Spirit of Roman law as he had found it in the “Second System.” He found “a decline of willpower” and with it the loss of the “moral qualification” that had justified the “rigorism of the rigid consistency and one-sidedness” (“den Rigorismus der starren römischen Consequenz und Einseitigkeit”) of Roman law. It had been replaced by the “highest intellectual talent” that “on the solid and indestructible foundations, it had received,” created through “a more liberal and intellectual consideration and treatment” of the law “a masterpiece of juristic art . . . the like of which the world does not know.”[20]

It is a wonderful encomium of the “Third System” condensed in a few suggestive sentences, but it is one that at the same time gives unmistakably to understand—from the beginning of the *Geist*—why Jhering had to leave it aside. With its intellectual refinement, the Third System did not represent the biblical Spirit of the Roman law that Jhering, as a disciple of Puchta, wanted to illustrate. He achieved that purpose in the following pages with the description of the Golden Age of Self Help and the Higher Jurisprudence, both examples of the Adamitic empowerment united by the idea that legally-empowered human will creates entitlements in the first instance through the actions of a postulated, divinely-guided moral will, while in the other instance through justifying legal notions. These notions, when related to Puchta’s genealogy of concepts, appear as ingenious devices that enable lawyers to lend a helping hand to divine empowerment.

Higher Jurisprudence remained the center of Jhering’s first attempt to define the Spirit of the Roman law. He saw it not only as the “indestructible foundation” of the Third System, but also as the universally valid method that had “mysteriously” transformed law into science.[21] It was this historically unexplained but revered Higher

20. *Geist* I [4](1878) p. 81.

21. *Geist* II,2 [3](1875) p.361 Jhering explains that due to the method of the higher jurisprudence, the law posited by statutes can be transformed into a science that can be defined as a natural science [*Naturwissenschaft*] in the field of humanities [*auf geistigem Gebiet*]. “The secret of jurisprudence is rooted in this method” [“Auf dieser Methode beruht das Geheimnis der Jurisprudenz”]. Jhering treated it as mystery because he had no explanation for the appearance of

Jurisprudence that led him to his famous crisis and, in the end, to the abrupt change in his creed and legal confession, which he called his "Umschwung," his turnabout.[22] Interpreting a Roman source still as a fervent disciple of Puchta he had been able to adhere to the "inflexible rigor" and "consistent one-sidedness" that he—erroneously—found in it, although his sense of justice was already rebelling. When asked to give an opinion in a real case and to maintain his former view in favor of the interested party he was—after a long inner struggle—unable to comply.

The entitlement in question was the right to payment, the "obligation" that in his last period was seen as the "child" of a sale contract.[23] This right was governed in this period by the rule that the vendor did not lose it when the item that was effectively sold but still in his hands was destroyed without his fault. The rule is: "Once the sale is perfect, risk is on the purchaser."[24] Jhering firmly believed that he could deduce from a fragment that the rule applied also when the seller had sold the same item twice or several times so that he could harvest the purchase price more than once. This was wrong—an error likely produced by his expectation to find "inflexible rigor" and the "consequential one-sidedness" in a rule of Higher Jurisprudence.

In reality, the rule cited is not formal but belongs within the systems of the refined Hellenistic period to the realm of Good Faith (*Bona fides*), a principle that had no place in Jhering's Higher Jurisprudence. The purchaser is under the rule of Good Faith liable to pay the price not only when he finally has obtained what he has bought, but also when the seller still having possession of it has faithfully done all to preserve it as one of the buyer's assets. The leading idea is that the risk is on the purchaser because under Good Faith, the item sold and still in the possession of the seller is already part of the assets of the purchaser, the seller being seen as his trustee. Consequently, since the seller is only liable when the item is destroyed or harmed by his fault but not when he had behaved faithfully, the loss lies where it falls, namely in the assets of the purchaser. And since trust can attribute the value of a thing only to one person's assets, it is obvious that this rationale holds only *vis à vis* one purchaser.[25]

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the "legal bodies" like obligation (bond), property, easement etc., that he rightly saw as part of life. He could have found it if he had studied the Third System as an historian. *See infra* Part II.

22. The following summarizes and refines the results of my article *Jherings Umschwung*, Savigny Zeitschrift, Rom. Abt. 134 (2017) p.439-557 (with an English summary).

23. *See supra* note 18.

24. Paul, Edict, book 33 (D 18,6,4,8) in: "The Digest of Justinian Volume II" (1985) p. 539 (translation Peter Garnsey).

25. For a closer demonstration of this law and its genesis, see my article cited *supra* note 3 p. 208 ss.

As to the intellectual drama Jhering had to live through, it is of course only important what he himself believed. But it is worthwhile to note that he could have easily avoided his crisis if he had started his enterprise as a disciple of Savigny. In Savigny's System of *Today's Roman Law*, the principal work of the Historical School of Law he founded, the principle of Good Faith is not overlooked. On the contrary: at its very beginning Savigny notes that the principle of Good Faith (*Bona fides*) had gained "a broader importance" alongside another modern evolution that liberated the contract law from the classical rule that its institutes are available only in form of a closed or finite number.[26] And in a later book, in accordance with the spirit of classical Roman law, he assigned the institutes (*instituta*) the task to create in a legal relationship the formal entitlements;[27] but to Good Faith he assigned the power to ensure that in relationships, expectations in the other's behavior, as deduced from his informal bearing, are protected.[28] In Jhering's case this expectation would be that a seller who had breached the first contract with the first buyer by selling the item—afterwards accidentally destroyed—to another one would by good faith feel prohibited from demanding payment from the first buyer.

The reason for the obvious superiority of Savigny's view is simple. As a legal historian he was fully aware of the fact that the Roman law was essentially a product of the free Republic. And his religious justification of the Roman law was inclusive and allowed him to use for the modernization of Roman law whatever he found in its tradition valuable and worthy to be developed. It was the same justification used by emperor Justinian when he codified Roman law. Following in the wake of Constantine, Justinian codified the law in the name of the Holy Trinity. Fully understanding what Constantine had done, he made a profound distinction. The trinity he invoked for the codification was not the one he

26. See "System des heutigen römischen Rechts I" (1840) p. 5, where he emphasizes "*die ausgedehntere Wichtigkeit der* bona fides" and "*die Klagbarkeit aller Vertr*äge."

27. The way Savigny describes the interaction between the (System I § 4) "legal relationship" [*Rechtsverh. . .ltnis*] given by life and the (§ 5) "legal instituts" [*Rechtsinstitute*] given by the law is dominated by the demand that theory and practice should not be seen as separated (p. 11) because in his view law, notwithstanding its higher origin (see what it said in the text), has to be realized as a part of life. The place of good faith is within the legal relationship formed by the institute as its behavior-guiding principle.

28. See System V (1841) p. 109 "the expectancy, we are justified to entertain from the behavior of another one in view of his own comportment are assured through faith and trust (i.e. bona fides)" [*die Erwartung, die wir von der Verhalten eines anderen zu fassen in Folge seiner eigenen Handlung berechtigt sind, wird gesichert durch Treu und Glauben*].

defined to secure Christian orthodoxy,[29] but the one he adored as the spiritual creator of the Roman law and his great helper in the task of purifying it.[30] This conviction had its roots in the fact that well before Constantine, Christians had adopted the belief that as long as the Roman Empire and its law persisted, the end of the world—an event that in early Christianity was believed to be almost imminent—would be postponed. This belief gave to Christendom sufficient worldliness[31] to make possible Constantine's elevation of Christianity—soon to become the official religion of the empire—into a highly privileged status.[32] It was this important precondition brought about by Constantine that integrated Roman law with unaltered content into the Christian creed and caused at the same time the traditional Roman law taught at the universities of Beryt and Constantinople to replace rhetoric—which remained "pagan"—as the discipline that promised a career in the ranks of the empire.[33] Savigny taught that Roman law was revealed to the Romans as a "Spirit" that was justly adopted by many modern nations. Since the "Spirit of a Nation" (*Volksgeist*), which a modern nation is apt to create, was in Savigny's view always the concrete realization of the universally true "spirit of humanity" (*Menschengeist*), Savigny gave intuitively to understand what aspect of the Trinity Justinian had in mind when he ascribed to its action in Roman history the creation of the Roman law.[34] It is a spirit that requires a believer like Savigny to interpret the Roman law as a system

29. *See* Codex Justinianus I 1, the title *De summa trinitate* etc., and the seven constitutions it contains.

30. Constitutio Deo auctore pr. (A.D. 530) Justinian's words "from which (i.e. the trinity) not only proceed all the elements of the world but also their effective disposition in the orbit of our terrestrial planet" [*unde et mundi totius elementa processerut et eorum dispositio in orbem terrarum*] allude to the second name of Justinian's Instituts that is *elementa.* These elements are by their universal content, called *ius naturale* and *ius gentium* and are destined to give to mankind a peaceful order. See Inst. I 2 pr et § 1.

31. *See* A.N. Whitehead, *Adventures of Ideas* (1933, 1967) p. 81: "In its immediate effects, it (Christianity) was a destructive agency. Its disregard of temporal facts, based on apocalyptic prophecy, was too extreme. It was not till its first few centuries were passed that it began to acquire a fortunate worldliness."

32. For a magnificent analysis of this crucial event, called the Constantinean turn, *see* Paul Veyne "Quand notre monde est devenu Chrétien" (312-304). Édition 2007, revue et augmentée.

33. *See* my article *Libanios' Rede Pro Templis in rechtshistorischer Sicht* in. Für Religionsfreiheit, Recht und Toleranz, Scripta Antiquitatis Posterioris ad Ethicam Religionem pertinentia (SAPERE) XVIII (2011) p. 95-126.

34. For a detailed account *see* my study "Savignys Geistigkeit und der Geist der justinianischen Kodifikation" in Stephan Meder/Christoph-Eric Mecke (Edd.), Savigny Global (2016) p. 25-64; *see also* my article *Codex Justinianus—Historisch* in "Lexikon für Kirchen—und Religionsrecht" (2019) p. 509-511.

destined to give the best possible order for the living. Savigny acted accordingly, not without impressive success.

The god of the Adamitic empowerment that Jhering had adopted from Puchta was a spirit of another kind. He was "pure will" who dominated Roman law and limited it to entitling institutes demanding strict adherence to their form. In his first period, Jhering was this God's prophet. In retrospect, he tells us that in those days he was able to trump everyone else, even Puchta himself, in his belief in the absolute validity of the entitling legal concepts found in the Roman tradition and the strict duty to accept all their apparent logical consequences. He was in his own words at this time "a fanatic of the logical method" (*ein Fanatiker der logischen Methode*).[35] When Jhering changed his mind in a turnabout externally triggered by the case I have analyzed, he also changed the face of his divinity. In a profound sense, the event was a spiritual one, dated by Jhering to the first day of the new year 1859 and described with fervor as the birth of a new legal creed, reached after a painful examination of conscience. It was, as Franz Wieacker puts it,[36] a Road to Damascus event that made Jhering, upon completion of the *Geist*, a fervent convert.

The holy disdain that Jhering expresses for any legal reasoning in the final pages of the fourth book of the *Geist* indicates the essence of his new creed. It finds its counterpart only in the profound veneration of the entitling power of legal notions that had dominated Jhering's *Geist* before the turnabout. There, he adored the sanctity of the entitlements derived from the dominion God gave Adam and all his descendants over the world, elevating their protection to the central and holy task of the law. Now he seems inspired by 2. Corinthians 3.6: "The letter kills, but the spirit gives life," making the concrete "[j]ust" the vivifying principle of the law and equating abstract notions with the dead letter that endangers the quest for law's true spirit.

The following words are surely among the most influential ever spoken in the realm of law. It was a farewell not only to the study of the conceptual side of Roman law, but also quite generally to the idea of concepts having value in law at all. The new pivot was life itself and its necessities:

35. *See* his highly entertaining book *Scherz und Ernst in der Jurisprudenz* (1884) p. 338.

36. Franz Wieacker, *A History of Private Law in Europe*, translated by Tony Weir (1995) p. 358 = Privatrechtsgeschichte der Neuzeit [2](1967) p. 541

Life is made not for the sake of concepts,
but concepts are made for the sake of life.
Not what logic,
but what life, business-transactions, the sense of justice demands
has to happen.[37]

The biblical ring of the initial phrase is forcefully present: "The Sabbath was made for man, not man for the Sabbath." Legal notions in this new creed no longer have any intrinsic value. They are now in his words not real money (*nicht wirkliches Geld*), just arithmetic pennies (*Rechenpfennige*) that can help to count but without really counting. Those pennies were coin-like medals produced across Europe from the thirteenth century through the eighteenth century. They were produced only as counter for use in calculation on a counting board, a lined board similar to an abacus.[38] In this passionate proclamation, the pages of the *Geist* in which Jhering had praised the use of logic in law are treated as never having been written.[39]

For his ancient creed, he invented the "Heaven of Concepts"[40] and when telling the public that Puchta was the first to seek admission,[41] he admitted, implicitly, that it was once his own heaven. He painted a portrait of the new Divinity's face in the preface of the first volume of the mature work of his second period *Law as a Means to an End* (*Der Zweck im Recht*), which is devoid of radicalism and has for its inner merits justly been counted among the books that have contributed to shaping the law of our time.[42] The portrait shows a god who in the person of a new Adam had willed humankind, and who in the idea of purpose (*Zweck*) provided

37. *Geist* III [4](1877) p. 312 "Das Leben ist nicht der Begriffe, sondern die Begriffe sind des Lebens wegen da. Nicht was die Logik, sondern das, was das Leben, der Verkehr, das Rechtsgefühl postuliert, hat zu geschehen." The ensuing phrase "möge es logisch nothwendig oder unmöglich sein" [might it be logically necessary or impossible] does not add anything substantial. It only emphasizes the irrelevance of logical thinking by putting consequence and inconsequence on the same level.

38. *See* Wikipedia s.v. Jeton.

39. *See* for instance *Geist* I [3](1878) the section "The logical organism of the law" (Logischer Organismus des Rechts) p. 36-43 and its central affirmation (p.42): "For the trained eye law appears as a logical organism of legal institutes and legal concepts."

40. H.L.A. Hart, *Jhering's Heaven of Concepts and Modern Analytical Jurisprudence*, in: Franz Wieacker und Christian Wollschläger (Edd.), Jherings Erbe. Göttinger Symposion zur 150. Wiederkehr des Geburtstags von Rudolph von Jhering (1970) p.68-78.

41. *See Scherz und Ernst supra* note 35, p. 253.

42. *See* in this sense my contribution to Serge Dauchy, George Maryn et alii (Edd.), *The Formation and Transmission of Western Legal Culture. 150 Books that Made the Law in the Age of Printing* (2016) p. 395-96.

for the continuous evolution of a just legal order, combining individual freedom with social utility required from everyone in his relationships.[43]

In the pages that follow the proclamation of the new creed in the *Geist*, there is no trace of the partial rehabilitation of the entitling Higher Jurisprudence he justly felt necessary when annotating its presentation in later editions.[44] On the contrary, he gave a radical exposition of the conviction that legal notions or concepts are not part of the real life of law.

As part of its life he retained here only human interests and the might of the state that recognizes them as worthy of protection. Entitling notions such as property, easement, and obligation are dethroned. The same happens to the concept of *persona*—the natural person, which in the classical era was the center of human dignity—[45]and the legal person—which as an asset-holder was the equal of the former. The deposition of the latter was substantiated by the extremely naturalistic argument that such an entity is unable to have interests because a lifeless structure existing only in thought has no possibility to have them because unable to enjoy their fulfillment.[46]

The great and patent deficiency of this new view was that Jhering put unlimited confidence in the morality of the will of the state, who in its legislative, judicial, and executive branches had to decide which interest is worthy of protection. It was *mutatis mutandis*, the same confidence that made him invent and retain his belief in the Golden Age of Self Help. Both have the same origin, namely the belief that in law God will guide the use of a free will in the best way.

To underscore his contempt for entitling notions, Jhering expressed at the end of the *Geist* a remark that captured and impressed everyone: "The Roman would have merited to live in Abdera[47] if they had ever kept it otherwise and sacrificed the interest of life to scholarly notions."[48] The

43. Zweck im Recht I 2(1884) p. XII/XIII. The place he gave to all the descendants of the new Adam in every walk of life is summed up in a triad that must be read because it is to be expressed by everyone in terms of reciprocity (p. 67). "I am here for myself." "The world is there for my sake." "You are there for my benefit." [*Ich bin für mich da. Die Welt ist für mich da. Du bist für mich da.*].

44. *See infra* note 51.

45. *See* my article *The Natural Freedom of the Human Person and the Rule of Law in the Perspective of the Classical Roman Legal Theory*, in: The Tulane European and Civil Law Forum 26 (2011) p. 1-31.

46. All this is found in the last pages of the *Geist* [4]III,1(1877) p. 317 354), of which I have given a detailed analysis in the article *Jhering heute supra* note 3, p. 219-230.

47. The dumb Abderans were proverbial in ancient time, although great philosophers like Democritus and Protagoras were sons of the city.

48. "Die Römer hätten verdient in Abdera zu wohnen, wenn sie es je anders gehalten und die Interessen des Leben der Schuldialektik zum Opfer gebracht hätten."

message of this parable is powerful. As the Roman lawyers would have been utter fools and mere pupils incapable of independent judgement if they had thought otherwise and would have in fact derived their decisions from preexisting concepts, so every modern jurist who would continue to apply the concepts he once learned at the law school would necessarily appear a childlike fool. Of course, nobody wants to be seen like that.

Since in the lifetime of Jhering Roman law was still held to be the incarnation of Law itself and the Roman lawyer the great prefiguration of all lawyers to come, Jhering's passionate proclamation—which to all appearances summed up a deep acquaintance with the Spirit of Roman law—had an enormous impact. Under its influence, the common opinion in legal history and jurisprudence adopted as a seemingly deep truth that no Roman jurist ever relied on concepts because being real lawyers, they were able to discern the just and equitable in life itself. In the current literature occupied with the history of Roman law, you will find decision-making by inspired intuition, united with the theory of Self Help in all places where a Romanist tries to explain the phenomenon of Roman private law. It seems to be a law without any preexisting ordering and entitling objectivity, real and admirable only when seen in action.[49]

With the exception of the last pages of the *Geist*, which was written under the immediate impulse of his conversion, Jhering was less radical, and he retained the results of his beautiful Higher Jurisprudence, not explained but instinctively discovered. He did it after his "turnabout" in a long self-critical but also constructive footnote that confirmed Higher Jurisprudence but gave it its necessary counterpart. The result is exemplary and in the end nothing else but a return to Savigny's intuition.[50] The entitlements are still seen as created by formal legal reason (*ratio iuris*). But they are now controlled by values that appear under the heading of the "useful" (*utilitas*) as a means to an end, i.e. to control and limit the exercise of the right that the entitlement has granted.[51] This coexistence in human relationships of Form that protects freedom and Values moderating behavior is the true spirit of the Roman law in a nutshell. On both the side of Form and the side of Values, we can perceive "interest," but interests of a different quality and therefore protected by

49. It may suffice to cite the representative work of my great teacher Franz Wieacker, cited note 36, p. 252 ss with note 80 and p. 572 ss. (576).

50. *See supra* note 28.

51. The footnote was added under the number 528a. Cf. Geist II 2 p. [3](1875) p.386/387. The useful [*utilitas*] that Jhering is citing (without giving a source) appears in the Digest in the term *exceptio utilis*, a defense that is required when the action of the plaintiff has to be barred because of violating behavioral values. See Gaius IV 116.

the law in different ways. The protection of freedom requires Form; the guidance of behavior needs Values.

It is no wonder that the impact Jhering had on the Jurisprudence of Interests—founded by Philipp Heck (1858-1943) who revered Jhering as his inspiring godfather—was at the end stimulating and innocuous. The "*Interessenjurisprudenz*" retained the respect for ordering notions in statutory law when it taught that provisions are best understood when seen as seeking a balance between different interests.[52] The same holds true for the strong echo of Jhering's proclamation in the last pages of his *Geist*. that current research identifies in the opinions and famous sayings of Oliver Wendel Holmes.[53] But there was, alas, another consequence of Jhering's vigorous rejection of the protecting power of concepts. It created the highly influential Free Law Movement[54] that in accordance with Jhering's proclamation demanded freedom whenever it felt constrained by the rules of formal law. Stemming from more playful beginnings, it culminated in the political "movement" ("Bewegung") of the Third Reich.[55] Its disdain for traditional law and the jurists who defended it is notorious, and the consequences remain forever deeply engraved in the consciousness of the world.

As to Jhering's attitude toward the *Freirechtsbewegung*, there was an incident that does him honor. When a famous early torchbearer of this movement extolled Porcia's argument in the *Merchant of Venice* as a model of the coming free law,[56] he replied: "There is still too much in me of the old jurisprudence in the textbooks of the Pandects, to be able to participate in this new era." In defending his view,[57] Jhering said that if

52. *See* for instance Marietta Auer, "Methodenkritik und Interessenjurisprudenz. Philipp Heck zum 150. Geburtstag", in. Zeitschrift für Europäisches Privatrecht (2008) p. 517-533.

53. In this sense, *see* David M. Rabban, Jhering's Influence on American Thought, in Jhering Global (cited note 2) p.147-166 and my essay in "Jhering heute!", also in Jhering Global (cited note 3) p. 239-240

54. The history of this movement is given by Luigi Lombardi-Vallauri, Geschichte des Freirechts (1971).

55. *See* my article "Von der Freirechtsbewegung zum konkreten Ordnungs- und Gestaltungsdenken" (From the Free-Law-Movement to the Thinking in Concrete Legal Ordering and Shaping) in: Ralf Dreier/Wolfgang Sellert (Edd.), Recht und Justiz im" Dritten Reich (1989) p.34-79. The leading author of this culmination of giusliberismo was the famous and infamous Carl Schmitt, who can be regarded in the circle of legal minds as their bourgeois Marquis de Sade. See the long and highly instructive English Wikipedia article, dedicated to his personality.

56. Joseph Kohler, Shakespeare vor dem Forum der Jurisprudenz (1883).

57. Jhering had exposed his view first in the text of his most famous publication "Der Kampf ums Recht" and confirmed it later in a reply to Kohler in a preface of a later edition, after the publication of the two English translations: *The Struggle for Law* (Chicago 1879) and *The Battle for Right* (London 1883). The preface is easily accessible in the very popular edition done

such reasoning would be permitted, a judge could take away a right of way-easement because the contract that granted it did not expressly allow the entitled person to leave footprints in the soil burdened by the servitude. A contract can be void, he argued, because it violates good morals such as the pound of flesh provision. But if a contract is regarded as valid, the right it confers contains necessarily what is implicit for its use or exercise. It is an important statement because Jhering thereby confirmed that his famous statement from his first period—"Form is the twin sister of liberty and the sworn enemy of arbitrariness,"—which in the context where it is made refers to the value of form prescribed for certain contracts[58] also applies to the correct logical handling of entitlements.

But even this beautiful demonstration of sound judgement does not discount the fact that the Free Law Moment with it catastrophic results could feel justified by Jhering's manifesto and the consequential reasoning at the end of the *Geist*. Exaggerations have consequences and a responsibility remains.

In the beginning of the lecture delivered at Tulane I had qualified the result of Jhering's *Geist*, justly regarded and esteemed for his style and stimulating inventiveness, as a genuine work of literature, a grandiose shipwreck, a stranded venture in four splendid volumes. I would now like to give another twist to this maritime parable: Jhering had finally got his ship in port, but it was from the beginning constructed as a vessel unable to carry the full cargo of Rome's legal history. Finally, as far as Roman law is concerned, the ship reached the harbor completely empty because on the way back he felt himself forced to keep her from sinking by jettisoning the Higher Jurisprudence, the only valuable part of the freight he had managed to load.

The main reason for this outcome can be summarized as follows. The inspiration of this intellectual journey was not Roman but biblical, and it remained that way up to the end. It began with the belief in a biblical god whose law wanted the rightful freedom and ended with the veneration of a God who wanted the immediate and concrete "Just." To the first divinity, whose activity Jhering limited to the period of his Second System, he attributed the power to guide human will in such a moral way that Self Help of private individuals could realize a legal order whose

by Rudolf Huch (ReclamsUniversalBibliothek Nr. 6522,6553) Leipzig, no date). Both texts (loc cit. p. 11-14; 78-82) show Jhering at his very best and are definitely worth reading. In the edition of the year 1943 the preface and the pertinent pages in the text from 78 to 88 have been silently cancelled. They were not reinserted in the reprint of 1948 nor in its many following editions. I have so far compared the 8th edition, Frankfurt 2003 by Klostermann.

58. Geist II,2 ^{3}(1875) p. 417

entitling notions thus formed allowed a future application of law that required nothing but logic. The second divinity inspired the emergence of a sense of justice reliably able to discover the Just in the immediacy of a given case.[59] The fact that both successive convictions have no base in Roman law affords with some likelihood an explanation for the fact that Jhering's search for the Spirit of the Roman law had soon become his "Quälgeist" or agony, a tormenting spirit that did not cease to torture and tantalize him.[60]

Now, at the end of this first Part I can only repeat that Jhering in this later period never disavowed the first draft of the *Geist*. In the self-critical footnote *supra* (note 51), he maintained continuity when declaring that the logical element in law still deserves its predominant place, but admitted that it needs mitigation in certain cases by value-laden correctives. Evaluating Jhering's work of his second period all in all, we find in fact a tireless endeavor to lay the foundations of a law centered around the freedom of the socially interacting human person and a professional quest for a sound equilibrium between the necessity of legal certainty and allowance for concrete value judgements which are inherent in Roman law.

With this attitude, Jhering confirmed Montesquieu's statement: "One can never abandon the Romans." [*On ne peut jamais quitter les Romains.*][61] In my lecture, under the impression of the common opinion in Roman history and modern jurisprudence over which Jhering's proclamation in the last book of the *Geist* still holds sway, I inadvertently paraphrased: "One must always return to the Romans." [*Il faut toujours revenir aux Romains*.] Yes, but it must be done in a truly historical way.

II. PART TWO

I have heeded this advice. For many years, I have conducted studies of Roman legal history at my university at Göttingen, sometimes working reverently at Jhering's desk, which had accompanied his entire academic life and had been a treasure of the Göttingen Institute of Roman and

59. At the end of his lecture given in 1884 in Vienna "Über die Entstehung des Rechtsgefühls" (On the Genesis of the Sense of Justice), now published as a separate book in Collana Antiqua 29 Napoli 1986, Jhering summarizes this conviction with an exclamation (p. 54): "The progress of our morality . . that is God in history" (Der Fortschritt unseres Sittlichen—das ist Gott in der Geschichte).

60. He referred to it as his "tormenting spirit" for the first time in the year 1851 in a letter addressed to his friend Gerber. See Mario G. Losano, Der Briefwechsel zwischen Jhering und Berger, Part I (1984) p. 35 nr. 12.

61. De l'esprit des lois XI 13.

Common Law [*Institut für Römisches und Gemeines Recht*] from its beginning.[62]

The pertinent studies have been published in several collections[63] and were recently discussed at an international symposium.[64] They are now also available in a small textbook, an upgraded edition of the booklet that was used for decades to accompany my regular academic lectures.[65]

The result of these studies is that amongst the formative factors of Roman legal history, there is no trace of the divine will that Jhering in his two phases had postulated; no higher will whose commanding presence in the human mind warrants a just behavior, first in self help, then in decision making. As we see in the following Subparts, Roman law in all its stages is characterized by its objectivity, i.e. by its capability to create an existentially meaningful order in the service of a peaceful, free, and socially fruitful human life.

I start with a rapid overview of four stages of Roman legal development and then follow with more detailed examination of each stage.

A. *Overview of Four Stages*

The first stage of Roman law history was dominated by a religion that saw the central means of divine worship in realized law that continuously creates social peace. This stage was by far the most important. The enduring presence of this so-called augural religion in Roman legal thinking allowed in the two following periods, the second and third stages, the incorporation of two important Hellenistic legal

62. *See* its picture, when still in Jhering's private library at Göttingen, in: Beiträge und Zeugnisses (cit. 3) p. 77. Now, sadly to say, it is no longer the pride of the Göttingen Law Faculty. It has been given to the university museum, called "Forum des Wissens," to illustrate the well-known fact that sometimes knowledge is increased at a desk.

63. O. Behrends, Institut und Prinzip, Siedlungsgeschichtliche Grundlagen, philosophische Einflüsse und das Fortwirken der beiden republikanischen Konzeptionen in den kaiserzeitlichen Rechtschulen, in: Cosima. Möller, Martin Avenarius, R.Meyer-Pritzl (Edd.), Ausgewählte Aufsätze I, II (2004); O. Behrends, Scritti italiani " con un appendice 'francese', una nota di lettura di Cosimo Cascione ed una postfazione dell'autore (2009); O. Behrends, Zur römischen Verfassung, C. Möller, M Avenarius, R.Meyer-Pritzl (Edd..), Ausgewählte Schriften (2014).

64. "C. Möller, M Avenarius, R.Meyer-Pritzl (Edd.), Das römische Recht—eine sinnvolle, in Auguralreligion und hellenistischen Philosophien wurzelnden Rechtswissenschaft? Forschungen von Okko Behrends revisited," Abhandlungen der Akademie der Wissenschaft zu Göttingen. Neue Folge 53, Berlin/Boston 2020.

65. O. Behrends, "Römisches Recht. Von den Anfängen bis heute" (2022). For a stimulating assessment *see* José-Domingo Rodríguez Martín, Bryn Mawr Classical Review 2023.04.36, published on the Internet at www.bmcr.brynmawr.edu/2023/2023.04.36.

philosophies into a professional jurisprudence. The first of the two was initiated at the beginning of the third century B.C. with the reception of the legal doctrines of the Stoa, whereas the second followed in Cicero's youth with the adoption of the legal teaching of the third skeptical *Academy*, enriched by Philon of Larissa by means of the central place he gave to the philosophically-educated rhetor for the establishment of statehood. The continuing influence of the augural viewpoint finally enabled Augustus, whose constitution, the Principate, brought about the fourth and final stage of the scientific development of Roman law. In this stage, Augustus admitted to the coexistence of two competing imperial law schools—one favoring the Stoic and the other favoring the skeptical tradition—under the idea that both are united by the quest for the best and most peace-preserving law. Finally, the force of the augural creed, which held that administrating and cultivating the law means worship of the divine, allowed the Christian communities to accept Roman law as the expression of divine evidence that the world was created to last. As mentioned in Part I,[66] it was this profound change in the Christian mind that permitted the emperor Constantine to elevate Christianity to a privileged religion and finally allowed Justinian to codify the Roman law as a creation of the trinity, the Holy Spirit, which he recalled in the name of the famous cathedral Hagia Sophia, Holy Wisdom he built in Constantinople. As Justinian ascertains with great emphasis in the preambles of his codification, it was solely in Roman history that this spiritual force operated as a creative principle of law.

1. The Augural Religion[67]

The augural religion, an exclusively Roman creed, was the product of the so-called neolithic revolution, i.e. the beginning of agriculture. It was born out of the conviction that the radical change of nature, in which woodland and shrubberies were replaced by clean arable land, requires the help of the divinity of light and order that was revered in the clear sky. It was from the beginning a profoundly legal and lawlike religion because it was founded on the conviction that reverence of this divinity had to be

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66. See *supra* notes 29-34 and accompanying text.

67. O. Behrends, Das Vindikationsmodel als „grundrechtliches" System der . . . lltesten römischen Siedlungsorganisation in: O. Behrends/M. Dießelhorst (edd.), Libertas. Grundrechtliche und rechtsstaatliche Gewährungen in Antike und Gegenwart, Symposion aus Anlaß des 80. Geburtstags von Franz Wiecker (1991) p. 1-59; = Institut und Prinzip I p. 465-562 (note 63); Die Gärten in der römischen Feldordnung. Studien zu den Anfängen des römischen Bodeneigentums. in: E. Knobloch, C. Möller (Edd), In den Gefilden der römischen Feldmesser (2013) p. 5-48.

done by constantly offering to it the aspect of a peaceful and well-ordered community.

The power to create such peaceful settlements was in the hands of a charismatic king. To attain the desired aspect of the community, this priestly king first surveyed the territory in a cosmical, sky-reflecting way from a center, the *urbs*, situated in the middle of the field and prepared to receive the homes of the settlers. He then assigned to each settler a portion of the arable soil, defined by boundaries solemnly marked out and religiously protected because they were situated in a divinely purified land.

Its result was the vindication model, the lasting backbone of Rome's societal order, guaranteeing every settler freedom and property in its largest possible sense. But there was a difference between freedom and property. Freedom was the rightful membership in the augural order and represented by the central figure of the vindication model, the *ven, vin, an Indo-European word for friend, like in German "Winfried friend of peace" and in this context the individual settler. This legal status was "vindicated" by an oral formula that constituded a *vindicare*, not a *vindicere*, and whose words initially had to be pronounced by the king himself.[68] It was later pronounced by a vindex appointed by the regal authority because it declared the settler to be a rightful member: vin-dico—I declare you a *ven, something only a representative of the settlement could do. In contrast, property was "vindicated" by an oral formula whose words were from the beginning spoken by the settler because they claimed the rightfulness of an entitlement in his power.

The central quality of the model is *ius*, which originally means the absence of any dispute and quarrel affecting the peaceful purity of the model. Its result is called *pax et venia deum* (*deorum)*, the peace and blessing of natural forces, called *dei*, which is responsible for the growth of the grain and of all the other natural processes that determine the welfare of the settlement. The belief that peaceful order attained and sustained with the help of the revered skylight will strengthen the respective forces and increase their yields is the core of the augural religion and is present in the verb *augere*—increase, enlarge, make grow—and its derivatives *auctoritas* and the name of Augustus. In the

68. As, later on, the *vindicias dicere*. It was a jurisdictional or "regal" decision that protected freedom and property in the vindication-model and initially emanated from the priest-king, who was the original *iudex* and *vindex*. It gave to freedom and property in the event of a legal dispute an interim protection immediately valid in the vindication model (*See* Gaius IV 16) and was, in case the dispute involved freedom, always given in its favor (secundum libertatem) because freedom was derived immediately from the augural order and was therefore privileged.

vindication model, each settler worked independently, and it was even possible in case an extraordinarily rich crop outdid greatly the proceeds of a neighbor that envy produced the suspicion that it might be the result of a magical device with which a settler could move the fertility of another field to his own. The Law of the Twelve Tables still treats it in the provision XII Tab. VIII 8b as a capital crime of magic. It is in this context a very valuable tradition because it is testament to the fact that the vindication model contained no trace of collectivism or collective ownership.

The objectivity of the vindication model was realized publicly by the solemn oral forms in which, in the case of litigation, the assertion of the entitlements and their confirmation by the regal authority was expressed. The procedure was always a little scene staged publicly in Rome on the forum for everyone to see and hear. The texts were prescribed, and in all phases the intent was on pacifying as soon as possible the element of the model touched by a dispute. The jurisdiction required *dies fasti*, days exempt of any impurity that could hinder the divine power exerted by the king. It proceeded uniquely in wording that knew of no command. The famous three words of this oral jurisdiction, the *tria verba*, that made the emperor Claudius stutter, *Do, Dico, Addico*, [I grant, I declare, I assent] are all declarations that bestow or confirm roles and subjective rights of the vindication model. Its character is well described by Livy's words praising an exemplary Roman king (I 7,8): "*auctoritate magis quam imperio regebat loca"* [he maintained order over the places in ownership with authority not with command].[69]

The Greeks called the word *auctoritas* untranslatable because it is rooted in the highly special augural religion, unknown to their tradition. The term *auctorita*s, wherever it is used with legal importance, signifies the strengthening power of peaceful law, whereas *imperium* referred initially exclusively to the military command that was not admitted in the realm of the peaceful vindication model. Created only in case of war, it expired immediately when its holder crossed the boundaries of the urbs, the center of the jurisdiction. It was a taboo-like rule to hinder the contamination of the regal authority by the military. In the oldest period the augural king was even prohibited from looking at the legions in arms.

69. The word *locus* is an old term for a piece of land in private ownership. That's why the *adsiduus*, the stable and well-to-do settler, is called *locuples*, rich in land. With the plural *loca* Livy alludes also to the initial meaning of *regere*, i.e. creating and maintaining the legal boundaries of landed property through *fines regere* in a solemn and peaceful order. The comparative *magis* is here used, as often in Latin, "to reject one idea in favour of another." *See* OXFORD LATIN DICTIONARY sub verbo 6.

The enduring success of this profoundly peaceful model was possible because it became the legal order of the Roman citizens in a tradition called *Quirites*. The name goes back to a union of about twenty settlements united by the cult of Quirinus, which worshipped on the hill still named Quirinalis and was represented by the *patres*. The name Quirites was preserved by the patrician members of the later Senate, each of them being a "founding father" endowed with potential regal power to keep up the vindication model.[70] Whenever in later times there was no magistrate left, each of the *patres* was therefore eligible to fulfill the role of an interim king, an *interrex*, by virtue of which the regal authority he embodied was with the election he had to initiate renewed in the constitutional magistrate.

In the oral ceremonies of litigation and adjudication already mentioned, this union of the founding fathers left its trace by the substitution of the *ven by the Quiris. Freedom and property were now, when vindicated, qualified by the conventional ending *ex iure Quiritium,* according to the law of the *Quirites*. The free citizen was from now on *liber ex iure Quiritium*, his own a *suum ex iure Quiritium*. Both formulae reflected a peaceful and fruitful order of liberty and ownership, present in an objectively entitling way.

The great and comprehensive statute, called the Law of the Twelve Tables, enacted in the middle of the fifth century B.C., represents with its many innovations the adaptation of the vindication model to the necessities of a commercial city, extending its provisions to the urban citizenry that in those days was a plebeian citizenry. It introduced free commerce with landed property, entitling servitudes for the benefit of urban houses and a refined law of obligation. It was intellectually the work of a new powerful urban priesthood, the pontiffs—not the augurs who represented the augural religion. The augurs, under the supervision of the great pontiff, were experts of the augural rules observed when the voting assemblies came together.

The vindication model remained perceptible in the Roman law in all its future stages. It represents the fundamental reason for the distinctive

70. The legal continuity of this union, described in more detail in the textbook *supra* note 65, p. 54 ss, seems present in the metaphorical language that gave to those capable of becoming *interex* two names, *patricii* and *patre*s, the first meaning. "having a father," the second "being a father." This makes sense when the patricians revered the god Quirinus as their "father" and saw themselves because of this descent as the "fathers" of the legal order favored by this divinity. It is a possibility that requires further studies. They will then also answer the question why Romulus who in the official Roman history is the founder of the city, made as we are told (Cicero, de re publica II 10,20) an appearance on the Quirinal hill and wanted to be regarded as the god called Quirinus.

place that this law occupies in legal history. It demonstrated with its augural inspiration that law has a religious dignity of its own when it preserves for a human settlement under the sky a peaceful order allowing fruitful life and work in and between the allocated individual properties. Its rigorous taboo-like rejection of the military declares at the same time that the maintenance of law is not dependent on purposes that only a sovereign command can achieve.

2. The Stoic Stage[71]

The next stage, the Stoic period, enhanced the felt presence of law as the ordering medium of life. This great period is referred to when Seneca says in a letter, "I want you to remember that our believing ancestors were stoics"[72] These ancestral Stoics appeared at the beginning of the third century BCE when the pontifical college was opened to the plebeians, townspeople oriented towards the Hellenistic world. They were immediately represented by great figures such as the pontiff Sempronius—the wise (Sempronius σοφός [sophus]) whose wisdom, as the Greek cognomen tells us, is of Greek origin—and the "great pontiff" Tiberius Coruncanius, who with enduring success elevated law to a matter of public education.[73]

In Stoic belief, it is divine providence that enables man to be instrumental in the creation of statehood. Among the multitude of meaningful possibilities providence has created was the possibility that man can organize mankind into a multitude of republics, distinct by different laws of their own (*ius proprium)* but united by an universal law protecting all of its members (*ius gentium*). These states are seen as individual separate and independent bodies of their citizens and accordingly called *corpora ex distantibus,* i.e. greek *somata ek diestoton* (σῶματα ἐκ διεστώτων). And like a house or a ship, both composite bodies, which approach perfection the more completely they realize the divine possibilities, so too can the body politic made up of individuals try to realize its best possible form. In this case, however, it is much more

71. Che cos' era il "ius gentium" antico? In "Cinquanta anni della Corte costituzionale della Repubblica italiana T. 1 Tradizione romanistica e Costituzione (2006) p. 481-514 = Scritti 'italiani' *supra* note 63, p. 435-466.

72. Seneca, epistulae morales (ad Lucilium) 110, 1 *volo ut memineris maiores nostros qui crediderunt Stoicos fuisse*. The center of their religiosity was their belief in the spiritual existence of a legal system destined for humanity which their prudence could discover. *See* Cicero, de officio III 17,69.

73. Pomponius liber singularis enchiridii D 1,2,2 §§ 37,38.

difficult to reach a decent approximation to perfection[74] As we are informed by Cicero, who was a pupil of their last representatives, the Roman *maiores*, taught a system that had proudly realized all the requirements of the Stoic doctrine: its respect for the special and particular and its universalism rooted in the former. They retained and developed with great diligence and care the *ius Quiritium* codified by the Twelve Tables as the written law, valid only for the Romans. They held it to be the necessary first step to statehood everywhere, but completed it with a universally applicable civil law (Latin *ius civile* or Greek *nomos politikos*), called *ius gentium*, which was unwritten but recognizable for people endowed with real insight as an essential feature of a state eager to come closer to perfection. It is a perfection that requires a state not only to be there for the interest of its citizens, but also for the benefit of the entire fraction of mankind that happens to be on its soil. The *maiores* found themselves privileged in this task because unlike the lawgivers of Athens and Sparta—who were censured as being shortsighted and thoughtless because they believed, against all evidence, that statutory law valid only for the citizenry can be sufficient for the freedom of a great people[75]—the *decemviri*, the legislators of the XII Tables in whose spirit the new system had to be inserted, were in the view of the *maiores* exempt from such criticism; they could be regarded as wise[76] because the vindication model in all its rulings contained the leading principles of individual freedom and peace, universally valid ideas even though its entitlements were still valid only for Roman citizens.

It was therefore already part of the reception of the new system when the *maiores,* led by these ideas, further developed "the freedom of property" (*Verfügungsfreiheit*) present in the great Republican statute exclusively for the benefit of the citizens. This was done by a highly

74. For more details see my article "Species und Qualitas" in: Das römische Recht *supra* note 64, p. 120-150.

75. *See* Philo, Quod omnis probus liber VII 45 = Stoicorum Veterum Fragmenta III p.88,2-6 where Solon, Dracon and Lycurgus are taunted with ἀμβλυωπία (shortsightedness). Plutarch, de repugnantibus Stoicorum 1033, treats in the same vein Cleisthenes, Lycurgus and Solon as φαύλους, i.e. people contrary of the wise, and as thougtless (ἀννοήτους). Cicero, de oratore I 44,197 lends to the son in law of his teacher in the jurisprudence of the *maiores* Mucius augur corresponding words declaring it unbelievable (*incredibile*), after having mentioned the laws of Lycurgus, Dracon and Solon, to what extent every other *ius civile* except the Roman one appears unfounded and nearly ridiculous (*inconditum ac paene ridiculum*).

76. Cicero, de oratore I 13,58 *nostri decemviros . . . qui XII tabulas perscripserunt . . . necesse est fuisse prudentes*. Their *prudentia* was the Stoic *phronesis* whose possession is limited to the sage (*sapientes*), but extended in loose speech to *sapientes <sive boni> secundae notae*, the only quality accessible to mankind as it is. See Seneca, epistulae morales 42,1.

formal, literal interpretation of the written law that ingeniously used the words of single provisions to construe the famous "*nachgeformte Rechtsgeschäfte*" [transactions shaped in the old mold]. The formal cash sale of the statute destined especially for the transfer of landed property was transformed into a one-penny sale that allowed donations and many other transaction transferring rights in the vindication model granting to Roman citizens (with the help of a shrewdly used formality) an extraordinary amount of what can already justly be called "private autonomy."[77] Consequentially, the universally applicable unwritten civil law appeared systematically in the parts where the Twelve Tables conferred entitlement through favoring freedom. Alongside the *suum ex iure Quiritium* (whose transfer required solemn formalities) appeared an *iuris gentium* ownership (called in this jurisprudence *proprietas)* that demanded for its acquisition not more than natural contracts such as barter, sale, or donation. We find the same parallel in the law of obligation. Its formal contract, the *stipulatio*, regulated in the XII Tables, had been by the interpretation of the *maiores* transformed into a verbal contract that was concluded with a sequence of questions and answers using the same words. Valid only for Roman citizens, the *stipulatio* granted special will power to its citizens through the use of the solemn legal verb s*pondere*: *spondesne?-spondeo* The *ius gentium* was content with any other verb respecting the same-word-principle, e.g. *dare: dabisne?-dabo*, even when transposed into foreign languages. The age of this parallel (Gaius III 92-93) is documented by Plautus, who loves to show his profound acquaintance with the jurisprudence of the *maiores* who dominated the legal culture of his time.[78]

The other part of the *ius gentium* was the social principle of trust, the *fides*. It had no roots in the law of the Twelve Tables nor in the vindication model. By its origin a universal principle, it was brought by the *maiores* into the Roman law as a perfect newcomer and treated there with special honors. Under the pontificate of maximus Coruncanius (consul 280, died ca. 243 B.C.), Fides obtained her own temple on Capitol hill alongside the temple of Jupiter,[79] who through this juxtaposition was interpreted as the

77. For an in depth study of this highly formal, but productive interpretation of the provisions of the Twelve Tables see my article "Nexum facere et nectere. Un essai méthodique," in: Hommes, cultures et paysage de l'Antiquité à la période moderne, Mélanges offerts à Jean Peyras (2012) p. 123-149.

78. *See* Plautus, Pseudolus 1076-1078.

79. Cicero, de officiis III 29,104 In Plautus' comedy Aulularia Fides occupies with her temple a central place. Euclio, the famous miser, had all but lost his treasure because he declared his mistrust in the trustworthiness of the goddess in front of her temple in such a loud voice that he was overheard by a thief. *See* verses 582-586 and 608-623.

god of the city states and of the particular and universal civic liberties for whose protection the states were founded.[80] Thus, Jupiter Optimus Maximus, Jove, the Best and Greatest, became the god of the chances of freedom, and Fides became the goddess of the possibilities of human commerce in the widest sense. Its principle governed every social relationship in which a human interest was put into the hands of another person, whether in sale, hire, loan, tutorship, or innumerable other relationships.

The relationship between these two divine principles was characterized in those days by the conviction that human society is primarily governed by freedom and self-interest. A relationship of trust in which one becomes the caretaker for another's benefit was seen as exceptional. It needed no particular form, but it required an express assumption of the interest defining it and the degree of loyalty due. It was seen as putting personal trustworthiness to the test and it was by no means taken for granted that it was reliable. The faith of a purchaser became a good one when he had paid the price[81] and the faith of the seller when he had delivered or had before delivery omitted nothing to preserve the object from injury or destruction. We have already seen the famous result (see Part I) that he was entitled to the price even in the case that it was destroyed without his fault when still in his custody.[82]

In case of non-fulfilment, the buyer's oral action was formulated accordingly: "That I may not be deceived and defrauded through you and your trustworthiness" [*ne propter te tuamve fidem captus fraudatusve sim*]. It was obviously a doubtful trustworthiness expressing the distance between the perfect divinity and the imperfect human being under her sway who was not always able to keep his word and act faithfully.

The formula cited above also marks the central point from which the faith principle was inserted into the system of Roman law. It requested trust in a case accessible only to Roman citizens since the loyalty that was informally given accompanied a conveyance of trust property only

80. *See* Cicero, de officiis III 17.69

81. *See* Plautus, Mostellaria 669-670

82. Fault was seen as breach of duty. This viewpoint allowed the *maiores* in their love for individual responsibility to teach that wine sold from the last harvest could be poured away at the expense of the buyer when he was in delay and the casks were needed for the new vintage. *See* The Digest of Justinian I Ulpian, Sabinus, book 28 (D 18,6,1,2). "The vendor should follow the practice advised by the earlier jurists: Measure the wine <sc. beforehand> through a wicker basket . . . so that it might be apparent how much the purchaser has lost." (translation J.A.C. Thomas).— The more refined younger law is still remembered. It recommended "as the appropriate course": "to sell the wine in good faith" for the buyer and as a rule "to mitigate the purchaser's loss so far as he can without detriment to himself."

available to the citizens. The conveyance was a transaction "shaped in the old mold" that by following the letter of the law gave special power to the "legal" will of the citizens. The purpose of the transfer was either to give a secure surety to a creditor or enable a friend during his absence to act through ownership as a fully empowered safekeeper. Neither wanted a definite alienation. Both expected the object to be transferred back in case of payment or return and in the meantime carefully kept. For a *ius gentium* bound to elementary legal reasoning, no transfer of property was intended. It could find in these transactions only a *pignus* (a pawned surety) or a *depositum* (deposit.). The legal difference is perfectly clear: both laws have their logic, but they diverge in a highly instructive way. Actually, the structure of the entire transaction, called *fiducia* (Gaius II 59-60), is a fine illustration of the fact that in a legal order founded on the law of a city state (*ius proprium*) but embracing at the same time the purely rational law of mankind (*ius gentium*), both laws cooperate in defining the rights and duties. It is a view that allows Plautus citing the wording of the above formula to see in a father who wields in Roman law a quasi-illimited power to be a trustee of his son's education.[83] It explains also why the idea of trust that regards the benefit entrusted to be already in the assets of the beneficiary is a general feature of Fides governing commercially relevant human relationships. It was a social value that gave to the interchange of goods and services a dignified ordering principle but left to the pursuit of self interest its primary place because without a promise or an explicit undertaking there was no truthfulness due.

This changed under the reign of the last two great legal pontiffs, Publius Mucius Scaevola (consul 133 B.C.) and son Quintus Mucius Scaevola (consul 95 B.C.) who was also a teacher of Cicero. Among the changes, subjective fides was transformed into bona fides, an objective standard that imposed its duties in relationships of objective proximity. The new demands on the faithful were cast in the words: "As between honest people there ought to be honest dealing, and no deception" [*ut inter bonos bene agier oportet et sine fraudatione*]. In Latin, the "*boni*" [the good] are in fact the honest people, and the required "*bene agi*" describes an honest behavior. The "good" in Stoic teaching is the highest quality attainable, and as such it is inseparable from the "honest."

Cicero—the incomparable, highly informed but by no means impartial witness of this change—illustrates the two decisive facts. The

83. In his play Bacchides a pedagogue denounces a father for having neglected his duties as a trustee in respect of his son. See verse 413: "Now, because of You and Your trusteeship <sc. my> Pistoclerus has been corrupted." (*nunc propter te tuamque pravus factus est fiduciam/ Pistoclerus)*.

new formula belonged again to the procedure of the technical trusteeship (*fiducia*), which was possible only between citizens[84] and occupied in this position the same central role as its predecessor. Being a central part of the legal proceedings, called *bonae fidei arbitria* or *bonae fidei iudicia*,[85] which was characterized by the new objective good faith, its wording and its spirit governed the interpretation of all of them.

The law of sale occupies in this development the place of a paradigm since it offers nearly perfect examples of its leading principles. In the traditional system taught by the *maiores*, the vendor was allowed to conceal a latent defect by treating the buyer as an independent person to whom he owed nothing before entering into the contract that promised delivery. This changed. His knowledge that the house was ruinous or pestiferous was seen as an interest of the buyer that he had to reveal because good faith had already made him a trustee of the buyer's interest. Cicero disliked the new law profoundly. He called among other people his second teacher in law and the uncontested legal authority of the time—Q. Mucius Scaevola p.m., who taught and acted according to the new law, a "good man" (*bonus vir*), but not a "wise" one (*sapiens*) because he was rendered by his doctrine incapable to realize profits.[86] He remained faithful to his first teacher, Q. Mucius Scaevola augur, the last of the traditional (and also in the view of today's law excessively liberal) *maiores*.[87]

But there was an important political background for Cicero's strict attitude. The novelty of the new principle of *Bona fides* was this: 'another's interest—in Latin the *interesse*—imposes on me in the name of solidarity the duty of a caretaker, a trustee, whenever the meaningful content of the objective social circumstances have put these interests into my hands. This was also seen as valid in the relation of a magistrate to the citizens for whose welfare he was responsible. This new doctrine formed

84. *See* Cicero, de officiis III 15,41 and in particular III 17,70, where both formulae are cited one after another thereby encouraging to a comparison of the human society governed by Bona fides, that Cicero attributes in the following to Quintus Mucius Scaevola consul 95 and the human society still governed by simple Fides, which he had described with great sympathy at the beginning of his work, de off. I 7,22-23.

85. The terms are interchangeable, as the comparison of Cicero, de officiis III 15,61 and III 17, 70 makes clear. *See also* Gaius IV 62.

86. Cicero, de officiis III 7,15,62. He underscores forcefully that the civil law he prefers has no remedy against profitable concealments (III 17,6).

87. Cicero's predilection for the Augur can not only be seen where he compares both in the beginning of his Laelius sive de Amicitia I 1, but also in the unconditional appraisal of his jurisprudence that he has composed and put in the mouth of the Augur's son-in-law, Licinius Crassus, to be given in the presence of the Augur. See De oratore I 43,193-45,200.

in fact the conception of public office with the result that Tiberius Gracchus, with the full backing of the new jurisprudence, saw himself when elected tribune of the plebeians in 133 B.C.—it was the same year the elder Mucius pontifex maximus became consul—as the trustee of the needy people. It was this doctrine that led him to initiate a large-scale settlement project on public land—then in factual possession of landlords—using to the full the means of the state treasury. He actually treated a colleague who intervened against the plebiscite as someone who had forfeited his office by acting against the duty it contained. He accordingly had him removed by another plebiscite so that the intended vote could take place. When he tried to obtain re-election, Tiberius Gracchus was slain by his adversaries in the Senate and their followers as someone who wanted to introduce a monarchy, the gravest possible sin imaginable against the spirit of the Republic. His project was nevertheless pursued because the party of the elder Mucius continued to prevail in the senate. The result was extremely grave. The new interpretation of the office of the tribune, called the *ratio tribunatus*, was resented as revolutionary and had the effect—as Cicero stated in retrospect—that there was for a long time "in one republic two senates and almost already two peoples" [*in una re publica duo senatus et duo paene iam populi*].[88]

3. The Teaching of the Third Skeptical Academy[89]

What ensued was in fact a long-lasting period of civil wars between the optimates, the party of the nobility and their clients, and the populares, the party siding with the needy. A first respite only came with Sulla's reconstitution of the republic, which included the enactment—through an edict—of a new strictly humanistic private law. The central terms of this law were *persona,* valid for every human being, and *instituta*, formal entitlements introduced by the *institutio aequitatis*, the establishment of legal equity via institutes for the citizens [*ius civile proprium*] and every member of mankind [*ius gentium*]. The enforcement, the completion and control of the institutional rights was the task of the magistrate, the praetor, led by a legal ethic called natural equity [*naturalis aequitas*]. The result was that the ethical principles of private law no longer had any impact on the duties of political power. All ethical principles of natural equity served when violated either to enforce the positive entitling private

88. Cicero, de re publica I 19,31

89. "Die ‚Große' und die ‚kleine' conventio, die ratio iuris der skeptischen Akademie und der klasssiche Geldkauf", Index 45 (2017) p. 401-442; "Das römische Recht etc." *supra* note 64, p. 175-81 ; "Römisches Recht" *supra* note 65, p. 87-98.

law or correct or add to it, but it was always related to concrete private duties. The praetor, therefore, used formulae referring in its conception to private behavior implying corresponding duties [*formulae in factum* [!] *conceptae*].

The system was a creation of the skeptical Academy, as refined by Philon of Larissa who had found immense acclaim and approval for the lectures he held as an exile in Rome since eighty-eight B.C., where he expounded a leading idea that revolutionized the Platonic tradition. It said: The founder of law and civilization is the philosophically educated orator who does not believe in transcendental ideas, but in the ordering forms and values discovered by human common sense. The vast rhetorical work of Cicero and the explosion of legal literature beginning with Servius Sulpicius are testament to his universal success. The profound relationship between these historical figures, Servius and Cicero, friends of equal age, has been immortalized in Lord Byron's highly evocative line "the Roman friend of Rome's least mortal mind."[90] Servius, the founder of the new jurisprudence appears here, because of being a great lawyer as the "Roman" par excellence, and Cicero as the panoramic genius who in many instances upheld the memory and glory of his friend.

Fides was now seen as *fides humana*, as human truthfulness, part of civilized morality and as such a part of legal ethics, i.e. principles guiding behavior that according to the skeptical anthropology appear in the human consciousness under the peaceful conditions of legal statehood.[91] It was in its content, notwithstanding a profoundly different justification, a return to the older doctrine of *Fides*. In contrast to the refined form of *Bona fides* that was conceived as a universal principle demanding the proactive furthering of objectively entrusted interests, even from a magistrate it was a part of natural equity, a principle demanding only the fulfillment of what had been promised. The judiciary realized it in private matters by giving actions whenever human behavior did not fulfill its contractual duties. It distinguished between simple human faith (*fides humana*) that natural equity demanded for all contracts and a qualified human faith (*bona fides*) in the case of the contracts protected by *bonae fidei iudicia*, which made the duties in different forms dependent on the principle of fault.[92]

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90. Child Harold's Pilgrimage Canto IV,44.

91. *See* Cicero's description of the mythical persuasion to statehood in De inventione I 2,2—3. It gave everywhere rise to the moral potentials in the minds of the assembled human beings (*in animis . . . hominum)* and enabled them, once the city states are founded (*urbibus constitutis*), to cultivate faith (*fidem colere*).

92. *See* Ulpian 4 ad edictum D 2,14,1 pr where the universal contractual f*ides humana* is praised as the creation of natural equity (and, we can add, as part of the skeptical *ius humanum*;

In the view of this jurisprudence, the purpose of placing power in the hand of a magistrate was limited to the maintenance of peace and the legal order, while in private law the purpose was to create formal and ethical equity to overcome the preexisting natural state held to be full of violence. There was in the office of a magistrate no inherent empowerment or duty to conduct social politics in favor of the needy, as felt by Tiberius Gracchus and his legal advisors.

4. The Auctoritas of Augustus[93]

This distinction between private law and political principles guiding the political power became an essential feature of the last period, characterized by the idea of a "established republic" through which the monarchy of the Augustan principate ruled with great success. The law of the depoliticized civil society, symbolized by the formally reestablished republic, was guaranteed by his authority, his *auctoritas*, which was as augural in its origin as the name Augustus. It was, in consequence, primarily used to empower the leading lawyers of Rome to develop the law *ex auctoritate principis*. The fact that under this new reign two imperial law schools re-enacted—in the form of a professional competition under the authority of the princeps—the difference between the jurisprudence of Mucius and Servius did in no way weaken the new constitution. On the contrary. It reinforced it by thoroughly depoliticizing the private law. The scientific interest of the imperial jurisprudence was reduced to the task of trying to discover through continuous discussion of numerous controversies in the private law a sort of harmony to fit the new constitution.

It was an authorization that left both traditions, as continued in the two imperial law schools, with complete professional freedom as to how they would try to accommodate the law they professed to the new constitution. In contrast, the sovereign military power that Augustus retained as the heir of Caesar was no source of law. In the augural tradition, the highest source of law, now in the hands of Augustus, remained intent on presenting to the divine the best legal order that

see Cicero, Partitiones oratoriae 37,129 -131 and 40,139), and Ulpian 4 ad edictum D 2,14,7,5, where the *bonae fidei iudicia* are introduced protecting the human *bona fides*.

93. "Der Ort des Ius divinum. Vom klassisch-republikanischen Rechtssytem des skeptischen Rationalismus zur Rechtsquellenlehre des religiös legitimierten Kaisertums," in: Bürgerliche Freiheit und christliche Verantwortung, Festschrift für Christoph Link zum 70. Geburtsg (2003) p. 557-585; "Princeps legibus solutus", in: Die Ordnung der Freiheit, Festschrift für Christian Starck zum siebzigsten Geburtstag (2007) p. 3-20 = Zur römischen Verfassung *supra* note 63, p. 493-512.

humankind can achieve. This intention allowed Augustus not only to treat as equals the two legal traditions that had one after another formed the law of the Republic, but also to regard their competing efforts as the best way to achieve what the reestablished republic promised, namely to guarantee peace and wellbeing for the civil society of the Empire.

The praiseworthy fact that these debates were preserved in the codification of Justinian allows us, especially when we use the information provided by Cicero, to trace the opinions of both sides back to their historical origin in the two most influential philosophies of Hellenism—the Stoicism and Philon of Larissa's skeptical Academy—and to follow their discussions and their results with clear understanding.

At the end, both traditions converged and gave to human life two different existential levels. Augustus himself had demonstrated the first level by showing himself without restraint as a very natural being when corresponding with Horace. However, as the founder and guarantor of the reestablished he republic, he was, also in the judgement of Horace, regarded as living in the sphere pf divine principles and duties. [94]

Gaius, a law teacher living in the time of the adoptive emperor, i.e. in the middle of the second century A.D., expressed the two levels of human existence in the title of his book: *Everyday Matters and Golden Rules* (*Res cottidianae sive aurea)*.[95] The same is visible when the law of his time ruled, on the one hand, that seller and purchaser are naturally allowed to take advantage of each other regarding the price,[96] but obliged them, on the other hand, to observe the principle of trust, i.e. responsibility for the interest of the other in a special relationship. The seller had to pay full damages when he knowingly allowed the delivered good to cause harm to the assets of the buyer because of latent defects that he should have declared.[97]

III. CONCLUSION

I cannot go into further detail. Instead I will now try to provide a summary of what the Spirit of the Roman law is when it is historically revisited. It is not—as Jhering proclaimed after his turnabout—a spirit that gives the lead in law to "life" with whatever demands it may present

94. *See*, for the first level, the way Augustus addresses himself to Horace: it betrays a very relaxed friendship (see Sueton, vita Horatii 22-45), for the second *see* Odes of Horace like IV 14 and 15.

95. Where the Golden Rules apply, as in the preclassical usufruct, a child born by a unfree mother cannot be treated as a fruit. *See* Gaius 2 rerum cottidianarum sive aureorum D 22,1,28,1.

96. Ulpian 11 ad edictum D 4,4,16,4; Paul 34 ad edictum D 19,2,22,3.

97. Ulpian 2 ad edictum D 19,1,33 pr. following Julian.

itself to the decision-maker. As we have seen in Part One, this was the even more unfounded exaggeration with which he replaced an earlier one—his youthful devotion to the higher truth of the concepts of Roman Law. It was an exaggeration that was just right for giving his first great work[98] a resounding ending. In all its four stages, Roman law is an inspiring and exemplary instance of the fact that the essence of law lies in its objectivity, in the reliable presence of entitlements that provide freedom on the one hand and in the effectiveness of its values which guide legal behavior on the other. The framework of all this was the peaceful vindication model that attributed subjective rights. It was enhanced by (1) the Stoics who interpreted it as providential; (2) the Skeptics who saw in it a product of human reason; and (3) by Augustus who acted as a providential politician by admitting both traditions.

Looking back to all that has been said, it is obvious that the *Spirit of the Roman Law* cannot be understood when approaching it with an attitude that reduces law to situational decision making. On the contrary, one must always keep in mind that Roman law in antiquity and in modern times up to the Historical School of Law owes its objectivity to the fact that it did not yet divide theology, philosophy, sociology, anthropology and jurisprudence into special disciplines. It saw law and the blessing it bestows on human life as the greatest expression of all of them combined.

98. See what has been said regarding Jhering's second great work in the text above, illustrated by *supra* notes 43 and 44.