"QUOUSQUE TANDEM, QUOUSQUE TANDEM …"

RECHERCHES SUR LA NOTION DE *PATIENTIA* DANS LA VIE POLITIQUE A ROME (DE CESAR A HADRIEN)

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"*Quousque tandem*, *quousque tandem*", disait un occupant du *Domaine des dieux* en entendant le barde chanter … Uderzo et Goscinny s'étaient bien amusés, sans doute, en parodiant ainsi dans un des volumes d'*Asterix* le célèbre début de la *Première Catilinaire*, prononcée par Cicéron en septembre 63. Bien avant eux, nombreux furent les esprits marqués par cette foudroyante entrée en matière*, in medias res*: citons Salluste qui, vingt ans après environ, choisit d'utiliser cette expression dans le discours de Catilina[1] à ses partisans au début de la conjuration. Plus tard, Pline le Jeune marque gentiment son impatience devant un ami poète à ses heures qui ne se décidait pas à faire lire en public ses vers,[2] en jouant sur l'intertextualité.

1 *Cf* Salluste, *CC* 20 9: *Quae quousque tandem patiemini, o fortissumi uiri*?

2 *Cf* Pline le Jeune, *Epist* 2 10 1-2: *Hominem te patientem uel potius durum ac paene crudelem, qui tam insignes libros tam diu teneas! Quousque et tibi et nobis inuidebis, tibi maxima laude, nobis uoluptate*? On pourrait peut-être ajouter Sénèque qui décrit Cicéron comme *aduersarum impatiens*, *cf Breu* 5 1.

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Mais pourquoi évoquer la *patientia* des sénateurs? La question n'a pas suscité beaucoup d'études.[3] À dire vrai, c'est la notion même de patience dans le monde gréco-romain païen qui n'a guère été fouillée avant sa transformation en vertu chrétienne.[4] *A fortiori*, la *patientia* en tant que qualité d'un homme politique ou d'un peuple n'a pas fait l'objet de recherches.[5] Pourtant on la trouve sur une monnaie d'Hadrien,[6] datant des années 128-132, et bien avant elle apparaît dans un contexte politique dans les œuvres de Cicéron, Salluste, César … Mais de quelle *patientia* parle-t-on alors? De l'endurance physique propre aux grands généraux ou de la vertu morale proche de la *constantia*? Le début même de la première *Catilinaire* est construit sur un jeu entre ces deux types de patience. Mais n'y a-t-il pas un troisième sens possible à donner au mot *patientia*?

Nous verrons dans un premier temps l'opposition entre deux types de *patientia*, telle qu'elle apparaît à la fin de la République dans les écrits de César, de Cicéron et de Salluste en particulier. Puis nous nous intéresserons à un autre échange, entre Pline le Jeune qui loue la *patientia* du Prince, et Tacite qui dénigre celle des peuples vaincus. Il ne s'agit pas de proposer une synthèse complète sur cette notion, mais bien plutôt de jeter de petits cailloux sur le chemin pour tenter de cerner la *patientia* afin d'offrir un premier bilan, provisoire et partiel. Notre corpus sera principalement composé des auteurs de la fin de la République et du premier siècle de notre ère, la limite étant le règne d'Hadrien et donc l'œuvre de Tacite qui est probablement mort peu après l'arrivée au pouvoir du successeur de Trajan.

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1 1 De quelle *patientia* parlait Cicéron dans ce fameux temple de Jupiter Stator au jour de son premier discours contre Catilina? Assurément, de la patience morale des sénateurs, celle que J Hellegouarc'h évoque à l'occasion en étudiant des notions proches comme la *fortitudo* ou la *constantia*. Mais il y a fort à parier que beaucoup des présents ont dû songer à un autre type de *patientia*, celui que revendiquait

3 On peut citer J Christensen "A note on *patientia* as a political term in Cicero's *In Catilinam* 1 1" in K Ascani, V Gabrielsen, K Kvist & AH Rasmussen (eds) *Ancient History Matters. Studies Presented to Jens Erik Skydsgaard on His Seventieth Birthday* (Rome, 2002) 242-243.

4 Voir à cet égard la synthèse de M Spanneut *sv* "Geduld" in *Real Lexikon für Antike und Christentum* 9 (1976) 243-294: l'auteur écrit en introduction "Eine monographische Behandlung der G. steht noch aus. Das ist verwunderlich, weil diese Tugend doch sowohl in der griech.-röm Welt des Altertums wie im Christentum dieser Periode eine bedeutende Rolle gespielt hat." Le constat est toujours valable à ce jour dans l'état actuel de nos connaissances.

5 L'article de R Kaster "The taxonomy of patience, or when is *patientia* not a virtue"? (2002) 97 *Classical Philology* 133-144, porte surtout sur les aspects moraux, quand nous nous intéresserons à la valeur de *patientia* en politique.

6 *Cf Roman Imperial Coinage* 2 365 var; *British Museum Coins* Emp III 306, 525; et *Lexicon Iconographicum Mythologiae Classicae* 202-203. Pour avoir une idée, voir en ligne *http://www.fredericweber.com/articl_dieux/article_patientia.htm* et *http://www.sacra-moneta.com/Numismatique-romaine/L-image-de-la-Patience-sur-les-monnaies-romaines.html*.

Catilina justement: la résistance physique. D'autant que Cicéron multiplie les jeux de mots avec le verbe *patere* ensuite,[7] avant d'inviter explicitement son adversaire à quitter Rome pour prouver ses qualités de général:[8] *Habes ubi ostentes illam tuam praeclaram patientiam famis, frigoris, inopiae rerum omnium* … Le démonstratif *ille* et l'adjectif *praeclarus*, ici avec une nuance ironique évidente, tendent à prouver qu'il s'agissait là de choses connues de tous.

Prenons ses différents portraits pour nous en assurer: Salluste souligne son endurance physique dès le début,[9] avec l'expression *corpus patiens inediae, algoris, uigiliae*, renforcée par le superlatif *supra quam cuiquam credibile est*. Dans un Etat militaire comme Rome, il était somme toute logique que la première qualité d'un homme destiné à diriger soit sa résistance à la faim, au froid, au manque de sommeil, tout ce qui était fréquent lors d'une campagne. Cicéron, dans le fameux portrait ambigu du *Pro Caelio*, rappelait déjà dès 54 cette qualité reconnue par tous à Catilina:[10] *quis in laboribus patientior*?

Nous pensons qu'il y a là comme une sorte d'écho à un thème de la propagande en faveur de Catilina qui mettait en avant sa résistance physique. Dans le fond, la vie politique à Rome avait ceci de commun avec la nôtre que les hommes politiques devaient mettre en avant des qualités personnelles justifiant leurs prétentions à se retrouver au sommet de l'Etat et permettant de se distinguer des concurrents: en 64-63 Pompée était loin en Orient et César encore dans l'ombre. Catilina avait eu comme concurrent au consulat Cicéron: il n'allait pas mettre en avant sa probité, ce qui aurait provoqué des fous rires. Il n'allait pas se vanter de son génie intellectuel face à un Cicéron consacré comme le plus grand orateur à Rome depuis les *Verrines*. En revanche, il pouvait justement jouer sur le contraste en soulignant ses qualités exceptionnelles de soldat et de général.

La réponse de Cicéron dans ces conditions était assez prévisible: il avait tout intérêt à faire passer cette *patientia* pour la caractéristique d'une bête sauvage. L'opposition était exagérée, mais loin d'être artificielle: elle reflétait selon nous deux façons de voir Rome, et d'envisager son avenir, soit comme un Empire en perpétuelle extension et donc en guerre permanente avec le besoin d'hommes d'Etat qui seraient d'abord des soldats, soit comme un Etat proche de la stabilité territoriale ayant désormais besoin de civils nourris de droit et de philosophie. De ce point de vue, il y a une cohérence parfaite de Cicéron quand on songe au célèbre *cedant arma togae*: de son point de vue, l'âge des cavernes où l'on passait son temps à se battre contre les voisins était révolu. Et ce choix d'une *patientia* morale se trouve dès le *De Inuentione* avec une première définition de cette qualité.[11]

7 *Cf* Cicéron, *Cat* 1 1: *Patere tua consilia non sentis*? Et plus loin, *cf Cat* 1 5 10: *patent portae* …
8 *Idem* 26.
9 *Cf* Salluste, *CC* 5 3.
10 *Cf* Cicéron, *Cael* 13.
11 *Cf* Cicéron, *Inu* 2 163: *Patientia est honestatis aut utilitatis causa rerum arduarum ac difficilium*

Si l'on songe au portrait d'Hannibal au livre XXI de l'histoire romaine de Tite-Live, on y voit à la fois la défaite de Cicéron et sa victoire: sa défaite, parce que ce sont des généraux qui se sont imposés à la tête de l'Etat et que la *patientia* au sens physique l'a emporté,[12] mais sa victoire également parce que cette qualité est restée ambiguë. Hannibal est une bête féroce, une *belua*, un monstre: il n'appartient plus au règne humain, il est dans l'infra-humain ou le supra-humain, selon le point de vue, mais sa résistance exceptionnelle le rend inhumain. Cicéron a donc réussi à rendre suspects ceux qui mettaient en avant leur endurance, c'est-à-dire leurs qualités d'homme de guerre.

1 2 Voilà pour un premier niveau de sens, mais il y en avait probablement un autre: en effet, comme on peut le constater chez Salluste, la *patientia* au sens moral était la qualité du peuple romain, de la plèbe face aux *Optimates* hautains et cruels. Le tribun Memmius oppose ainsi la *patientia* de la plèbe aux défauts immenses de la *nobilitas*.[13] C'est une vertu plutôt passive, mais qui a permis à l'Etat romain de fonctionner en évitant d'autres sécessions. Or, cette *patientia* se retrouve dans le discours de Catilina lorsqu'il encourage ses partisans à se révolter:[14] ce passage est extraordinaire, parce que Catilina s'adresse surtout à des nobles déclassés de son espèce en détournant des arguments utilisés contre la noblesse par la plèbe. Or Catilina joue les illusionnistes en transformant les descendants des Cornelii et Sergii en pauvres plébéiens victimes de la morgue et de la cruauté d'une nouvelle oligarchie emmenée par un *homo nouus*, Cicéron.

Ainsi donc, les effets d'échos entre l'auteur de la *Première Catilinaire* et celui de la *Conjuration* ne sont pas que le résultat d'une volonté d'intertextualité un peu ironique, mais confirment surtout que Catilina se servait très probablement de la rhétorique des *Populares* contre le Sénat. De fait, on se souvient que certains chefs du parti des *Populares* furent accusés d'avoir participé à cette conjuration, comme Crassus … ou César. Revenons alors à l'*incipit* de la *Première Catilinaire*: il y a de bonnes chances pour que Cicéron ait joué sur ce second niveau de sens pour renverser la situation et attribuer la patience aux sénateurs victimes de Catilina.

Il n'est pas certain d'ailleurs que son intention ait été ironique: il s'agissait bien plutôt de montrer au peuple de Rome que les vertus revendiquées par un camp

uoluntaria ac diuturna perpessio. On trouve une autre définition de la *patientia* chez Cicéron, *cf Part* 77.

12 A titre d'exemple l'adjectif *patiens* chez Salluste est utilisé dans presque tous les cas dans un sens physique: *patiens laborum*. De même chez Tite-Live, la *patientia* est d'abord l'endurance physique. Chez Velleius, on trouve deux fois l'expression *patientia periculorum* (2 41 et 2 78) pour désigner la qualité physique. Puis chez Valère Maxime (six occurrences), tous les exemples choisis au livre III pour illustrer la rubrique consacrée à la *patientia* concernent l'endurance physique.

13 *Cf* Salluste, *BJ* 31 1.

14 *Cf* Salluste, *CC* 20 9.

appartenaient en fait à l'autre auquel il valait mieux se rallier, de ce fait, en cessant d'approuver la conjuration. Cicéron tentait de provoquer une désillusion dans la plèbe de Rome suspectée de sympathies pour Catilina, et jouait à son tour les illusionnistes en présentant le Sénat de Rome comme garant des qualités de son peuple. Néanmoins, si Diderot considérait qu'un acteur, illusionniste par excellence, n'est jamais aussi bon que lorsqu'il ne croit pas du tout à son texte et en reste à distance, nous pensons que Cicéron comme Catilina croyaient en partie au moins à ce qu'ils disaient. A force d'avanies et d'échecs dans sa carrière politique, Catilina avait fini sans doute par s'identifier aux plébéiens des historiens, tout comme Cicéron était convaincu que le Sénat représentait le peuple de Rome et donc possédait sa patience morale.[15]

L'ennui était que finalement, aussi bien dans la bouche de Catilina que dans celle du consul Cicéron, la *patientia* a un petit goût désagréable: c'est une qualité à la limite du défaut, parce que le terme indique que l'on subit des injustices, depuis trop longtemps et en trop grand nombre pour que cela puisse encore durer. En d'autres termes, il désigne une passivité qui ne pouvait guère être bien vue. Il faut se tourner vers le corpus césarien pour mesurer la difficulté réelle qui résidait dans l'emploi de ce terme.

1 3 César s'est lui aussi présenté comme un général endurant, mais son génie fut de mettre en avant cette résistance comme étant celle de son armée. Il est intéressant de relever que la *patientia* n'apparaît pas dans les premiers livres du *De bello Gallico*: il faut attendre le livre VI pour que le terme soit employé, et encore à propos des Germains ou de Quintus Cicéron assiégé par les Gaulois.[16] Au livre VIII, qui fut revu par Hirtius, la *patientia* apparaît au sens d'endurance à propos des soldats de César qui avaient supporté les rigueurs d'une campagne en hiver par des chemins très difficiles,[17] ce qui leur vaut une récompense. On voit donc que dans les années 50 César évite de reprendre un thème cher aux *Populares*.

C'est l'arrivée de la guerre civile qui change tout: face aux *Optimates* qui soutiennent Pompée contre lui, César n'a guère d'autre choix que de reprendre la rhétorique des *Populares* à son avantage. Il réutilise donc le thème de la *patientia*, en jouant sur ses deux sens. Il met en avant sa propre patience au sens moral face aux injustices que lui font subir Pompée et ses alliés, comme on peut le constater au livre I du *Bellum ciuile*,[18] poussant ainsi à une identification de la plèbe romaine – n'a-t-on

15 Nous avions essayé de montrer ailleurs comment il utilise le thème de la *lenitas*, la douceur chère aux *Populares*, dans l'ensemble des *Catilinaires* et dans les discours qui ont suivi cette crise, pour mieux la revendiquer comme sienne, *cf* "D'*iniuria* à *lenitas* dans le *Bellum ciuile* de César" *Vita Latina* 173 (2005) 11-25 et "Les grandes illusions: Catilina, Cicéron et César dans la *Conjuration de Catilina*" *Vita Latina* 175 (2006) 104-118.

16 *Cf* César, *BG* 6 24 (Germains) et 36 (Cicéron frère).

17 *Ibid* 8 4 1.

18 *Cf* César, *BC* 1 32 et 85.

pas d'ailleurs menacé les deux tribuns de la plèbe qui agissaient en sa faveur? − à sa propre cause.

Mais il va également souligner la résistance physique de son armée, avec laquelle il ne fait qu'un: on le voit dans le récit de la bataille d'Ilerda,[19] puis surtout dans la dernière phase de la guerre civile en Grèce. L'acmé se situe là en effet,[20] lorsque les césariens souffrent du manque de vivres mais le supportent en se souvenant de leurs épreuves passées, en Espagne et avant cela en Gaule. La *patientia* est alors l'endurance physique; elle est aussi un témoignage de confiance des soldats envers César qui souffre de la même manière et les sortira de là; elle est la vertu du peuple de Rome sous les drapeaux, dont César est le représentant et le chef évident, partageant le même sort.

Du coup, César fait coup double puisqu'il réunit symboliquement autour de lui la plèbe en toge et la plèbe en armes. Loin de la sécession sur le Mont Sacré, la plèbe fait corps avec César et se bat pour lui dans les conditions les plus difficiles parce que, si l'on suit toujours la propagande césarienne, leurs deux sorts ne font qu'un. Face à eux se trouvent les Pompéiens dont le camp une fois pris ne fait que révéler l'orgueil et le goût du luxe en contraste complet avec les misères endurées par l'armée de César,[21] *summa cum patientia*.

L'appropriation de la *patientia* comme qualité personnelle de César est opérée dans le récit de la guerre en Afrique: la patience de César est d'abord une tactique militaire face aux provocations ennemies, passivité qui provoque le mépris d'un roi barbare ou l'inquiétude des Républicains[22] qui connaissent leur adversaire à sa juste valeur et se méfient. Le plus intéressant est alors la construction directe de *patientia* avec complément du nom qui renvoie à César directement et non plus à son armée. Le sens moral de *patientia* apparaît dans un discours du général à ses soldats:[23] il met en avant sa patience face aux exactions et aux actes d'indiscipline de certains. On a donc une personnalisation achevée de cette qualité, et une disjonction entre César et les mauvais soldats, au rebours de ce que l'on avait pu observer dans le *Bellum ciuile*, ce qui prouve au passage que l'auteur anonyme du *Bellum Africum* était loin de maîtriser les codes de la propagande césarienne mis au point par César lui-même, ou que les temps avaient changé en quelques mois.

2 1 À l'autre bout de la période qui nous intéresse, il y a Pline le Jeune qui se fait thuriféraire de la *patientia* du Prince et Tacite qui joue les grincheux en donnant à ce terme une valeur négative. Quand et comment la *patientia* est devenue vertu du Prince ne sont pas questions aisées. Ce qui est certain, c'est que les choses sont

19 *Idem* 45.
20 *Idem* 3 47 où le terme est d'ailleurs répété comme pour être mieux martelé.
21 *Idem* 3 96: *miserrimus et patientissimus exercitus Caesaris*.
22 *Cf B-Afr* 30 et 35.
23 *Idem* 54.

en place dès le règne de Tibère,[24] puisque l'édit *de Cn. Pisone patre* retrouvé en Espagne[25] nous parle de la *patientia* de cet empereur, avant de louer la patience du Sénat: de nouveau, il s'agit de la qualité de celui qui a supporté le plus longtemps possible le mauvais caractère d'une autre personne, en l'occurrence l'irascible Cn Pison,[26] avant de sévir à juste titre.

Il est curieux de constater que dès cette époque la patience est en même temps la qualité des opposants politiques soumis à la torture – comme on peut le voir chez Valère Maxime – et une vertu princière. Autrement dit, la *patientia* caractérise à la fois les opposants et les dirigeants. Cela n'est pas aussi étonnant qu'on pourrait le croire: c'est l'héritage des débats politiques des dernières années de la République, quand l'auteur du *Bellum Africum* présentait la *patientia* comme une qualité de César alors que, quelques années plus tard, Cicéron l'attribuait à Brutus, le chef de file de l'opposition au "tyran". Il en fit l'homme de la *patientia* dans la dixième *Philippique*, en particulier.[27] A dire vrai, ce faisant il reprenait les termes de la correspondance de la même époque quand Brutus semblait accorder grand crédit à cette qualité, en l'attribuant au fils de Cicéron à Athènes,[28] par exemple. Il était facile d'opposer la patience des "Libérateurs" aux excès de Marc Antoine, et cette capacité autoproclamée à encaisser les affronts participait d'une image de douceur bien utile après le meurtre de César.[29]

Par la suite, sous le règne de Claude, c'est la *constantia* qui est plutôt à l'honneur comme en fait foi le monnayage de ce Prince,[30] mais comme l'a bien souligné J. Hellegouarc'h,[31] ces deux qualités ont partie liée, la *patientia* représentant un pas de plus que la constance. Et ces deux vertus ne sont que des facettes de la douceur en politique, parmi d'autres: de même que la modération ou la clémence, la patience est capacité à se maîtriser sans céder à la colère. On le voit dans le *De Ira* de Sénèque en particulier, lorsqu'il fait l'éloge de la *patientia* de Philippe II de Macédoine comme de celle d'Auguste pour avoir supporté des propos injurieux.[32]

24 Cela nous semble confirmé par le choix de *patientia* pour ce Prince dans la *Consolatio ad Marciam*, quand Sénèque évoque l'attitude de Tibère à la mort de son fils Drusus: *cf Marc* 15 3. Et nous verrons plus loin l'usage détourné de ce terme que fait Tacite pour mieux dénoncer les prétentions, sans doute affichées, de Tibère à se montrer *patiens*.

25 Voir W Eck, A Caballos & F Fernandez *Das senatus consultum de Cn. Pisone patre* (Munich, 1996) 15-18 et 26-27.

26 *RE* 70.

27 *Cf* Cicéron, *Phil* 10 9 et 23.

28 *Cf* Cicéron, *Ad Br* 2 3 6.

29 Cette tradition perdure chez Sénèque, qui cite Caton comme exemple de *patientia*, *cf Const* 14 3 pour ne citer que cet exemple.

30 *Cf Roman Imperial Coinage* I 2, 13, 31, 42, 55, 65, 95 et 11 (114-130).

31 Voir J Hellegouarc'h *Le vocabulaire latin op cit*, 283 sqq.

32 *Cf* Sénèque, *De Ira* 3 23.

Néanmoins, la *patientia* ne concerne pas que les relations humaines: cette vertu stoïcienne concerne aussi les coups du sort comme les accidents, la mort de proches, la maladie, les catastrophes naturelles, les changements brutaux de situation ... Elle est donc une réponse de l'individu à ce qui l'entoure, les autres hommes comme l'univers. Pour un Tibère exilé, puis adopté, comblé d'héritiers puis les voyant tous mourir, ensuite pour un Claude dédaigné de tous, survivant dans la *domus* impériale parce que jugé trop bête pour avoir une chance de régner un jour, puis devenant Prince après avoir eu la frayeur de sa vie en étant emmené plus mort que vif au camp des prétoriens, la capacité à subir et à encaisser les coups du sort avait sans doute un intérêt particulièrement vif. Néanmoins, Claude préféra parler de *constantia*, plus en accord avec la majesté impériale.

2 2 La *patientia* s'impose à nouveau comme vertu du Prince à la fin du premier siècle de notre ère dans l'œuvre de Pline le Jeune. Comment expliquer son intérêt pour cette qualité? On peut considérer que sa formation intellectuelle joua un grand rôle: la *patientia* est très présente dans les déclamations de Quintilien, même si l'étudier ici de façon approfondie nous entraînerait trop loin. Ensuite, Pline le Jeune a été formé en philosophie par le Stoicien Musonius Rufus: or, la patience est une vertu stoïcienne. Enfin, ne négligeons pas l'influence de l'œuvre de Cicéron, le modèle par excellence.

La *patientia* du Prince apparaît dans trois contextes différents chez Pline le Jeune: d'abord, dans la correspondance à caractère "privé", il évoque la patience de Claude devant les caprices de ses affranchis comme le fameux Pallas. La contemplation du monument funéraire de celui-ci l'amène à dénoncer les excès des ministres de Claude:

> *Tanta principis, tanta senatus, tanta Pallantis ipsius ... quid dicam nescio, ut uellent in oculis omnium figi Pallas insolentiam suam, patientiam Caesar, humilitatem senatus*![33]

La *patientia* est ici l'autre visage de la *constantia*, lorsque l'on est trop passif, trop patient en somme, et le terme renvoie à la faiblesse de cet empereur face à ses femmes et à ses affranchis, avec un beau chiasme entre *insolentiam* et *patientiam* pour mieux opposer les deux conduites. Le sens n'est donc peut-être pas complètement positif.

En revanche, dans le *Panégyrique* en l'honneur de Trajan, Pline fait intervenir la *patientia* à plusieurs reprises: il est vrai que ce n'est pas toujours celle du Prince. De fait, pour décrire l'entrée du nouvel empereur à Rome,[34] l'orateur joue sur l'opposition stéréotypée de la *patientia* du peuple romain face à l'*arrogantia* de ses dirigeants, en l'occurrence les prédécesseurs de Trajan et très probablement Domitien dans ce cas précis. Cette opposition se retrouve plus loin[35] lorsque Pline

33 *Cf* Pline le Jeune, *Epist* 8 6.
34 *Cf* Pline le Jeune, *Pan* 22 2.
35 *Idem* 68 2.

souligne le contraste entre la tranquillité dont jouit Trajan, certain de l'affection de son peuple, et les mauvais empereurs inquiets à l'idée que la patience des Romains puisse s'être émoussée à force d'excès de pouvoir.

Mais cette patience se retrouve dans le Prince, qui ne fait donc qu'un avec son peuple. Ainsi, Trajan se montre d'une *patientia* exemplaire lors du procès de Marius Priscus:

> *Iam quam antiquum, quam consulare quod triduum totum senatus sub exemplo patientiae tuae sedit, cum interea nihil praeter consulem ageres*![36]

Il siège comme un magistrat ordinaire pendant trois jours entiers sans s'offrir de régime de faveur. De même, il supporte le départ au loin d'un ami qui renonçait à ses charges sans chercher à l'obliger à demeurer à Rome.[37]

Cependant, après les élans rhétoriques du *Panégyrique*, force est de constater que la *patientia* ne réapparaît quasiment plus dans la correspondance officielle du livre X: on ne la trouve que dans une des dernières lettres du gouverneur de Bithynie, à propos de la requête du centurion Publius Accius Aquila qui demandait la cité romaine pour sa fille. Le texte de cette lettre est très bref:

> *Rogatus, domine, a P. Accio Aquila, centurione cohortis sextae equestris, ut mitterem tibi libellum, per quem indulgentiam pro statu filiae suae implorat, durum putaui negare, cum scirem quantam soleres militum precibus patientiam humanitatemque praestare*.[38]

Nous la citons en entier parce qu'on y trouve trois facettes de la douceur en politique: l'*indulgentia* renvoie en fait au pouvoir absolu du Prince père de ses concitoyens[39] qui décide d'accorder ou non ce qui lui est demandé. La *patientia* nous semble avoir un petit goût amer ici de la part d'un sénateur qui doit constater, avec un peu de regret sans doute, que Trajan se montre particulièrement plus réceptif aux demandes de ses officiers qu'à celles des autres. Et pour tempérer cette pincée d'amertume, Pline associe la *patientia* à une autre qualité beaucoup plus positive, l'*humanitas*. Cela posé, l'*humanitas* renvoie à un sentiment d'appartenance au même corps: cela pourrait donc avoir deux sens, Trajan se sentant membre de la communauté humaine comme ses soldats, ou Trajan se rappelant qu'il a été soldat d'abord et de ce fait privilégiant des compagnons d'armes.

On notera également, dans le même ordre d'idées, un emploi du verbe *pati* qui pourrait renvoyer à la notion de *patientia*, lorsque Trajan autorise son gouverneur à élever une statue en son honneur.[40] Mais la moisson est bien maigre, on en conviendra.

36 *Idem* 76 1.
37 *Idem* 86 5.
38 *Cf* Pline le Jeune, *Epist* 10 106 (107).
39 Là-dessus nous nous permettons de renvoyer le lecteur à notre étude *Du bon usage de la douceur en politique dans l'œuvre de Tacite*, Belles Lettres, Paris, 2011, en particulier 204-230.
40 *Idem* 10 9 (25).

Pourquoi? C'est que dans les lettres officielles entre Pline et son empereur *patientia* est complètement supplantée par *indulgentia* qui a un sens actif et pose Trajan en Prince père omnipotent. *Pati* est en concurrence avec *indulgere* sans l'emporter. La patience était trop connotée négativement: et son meilleur adversaire était Tacite qu'il nous reste à étudier à présent.

2 3 Le terme *patientia* est très présent dans son œuvre, avec plusieurs sens et dans plusieurs contextes, mais presque toujours il est connoté négativement. C'est d'abord l'endurance physique: on ne la retrouve à propos des généraux et de manière positive que pour Corbulon,[41] façon d'indiquer que Rome avait avec lui un commandant digne des anciens temps à l'image d'un César, et pour Germanicus quand ses soldats en train de veiller dressent de lui un portrait très élogieux.[42] Mais dans les autres cas, Tacite annule la valeur positive de ce terme en l'associant à une négation pour mieux refuser cette résistance physique aux barbares par exemple et en particulier aux Germains.[43] Une autre façon de déconsidérer la *patientia* est de lui donner un sens obscène: cela devient la capacité du corps à se plier à toutes sortes de plaisirs sexuels.[44] Tibère avec ses spintries devient l'homme de la *patientia*,[45] à la fin de son règne, mais une *patientia* complètement dévoyée qui montre l'avilissement du pouvoir impérial.

La patience au sens de qualité morale subit le même traitement: cela se voit dès le début de la biographie d'Agricola où Tacite l'associe à la servitude.[46] Les élites romaines, les sénateurs ont subi les mesures révoltantes de Domitien sans se révolter … Cette assimilation de la patience à l'acceptation de la servitude se retrouve dans les *Annales* sous le règne de Tibère, qui en est écoeuré d'ailleurs:

> *Scilicet etiam illum qui libertatem publicam nollet tam proiectae seruientium patientiae taedebat*.[47]

Mais surtout Tacite la dénonce dans les derniers livres des *Annales*, qui décrivent les dernières années de Néron. Ainsi, juste après la mort d'Octavie l'historien fait une allusion aux débordements de servilité de certains sénateurs:

41 *Cf* Tacite, *Ann* 14 24.
42 *Cf Ann* 2 13.
43 *Idem* 2 14 et *Germ* 4 3.
44 Ce sens se trouvait déjà chez Sénèque, *cf Quaest Nat* 1 16.
45 *Cf Ann* 6 1. Le terme est d'ailleurs utilisé à nouveau par Tacite à propos des derniers moments de Tibère, lorsqu'il feint d'être en bonne santé: *cf Ann* 6 46. De même, l'historien dénonce la *patientia* simulée du Prince qui fait lire les écrits critiques d'un sénateur dénonçant les turpitudes de son règne, *cf idem* 6 38. Le mot se trouve donc symboliquement à l'ouverture et à la clôture de ce livre.
46 *Cf Agr* 2 3: *dedimus profecto grande patientiae documentum …*
47 *Cf Ann* 3 65.

Neque tamen silebimus, si quod senatus consultum adulatione nouum aut patientia postremum fuit.[48]

Le livre XVI qui n'en finit pas d'égrener les suicides forcés et autres disparitions de sénateurs contient la même critique contre la *patientia seruilis*[49] qui aboutit à un tel flot de sang et à une si grande perte d'hommes utiles à l'Etat.

Cette servilité est-elle le propre de mauvais règnes de tyrans comme Tibère ou Néron? Il est assez clair que pour Tacite c'est une question de faiblesse humaine; il est également clair que la *patientia* est une conséquence du pouvoir monarchique, particulièrement nette avec de mauvais Princes mais inévitable de toute façon. On peut le constater avec les dirigeants barbares venus à Rome: eux aussi, pourtant habitués à régner dans leur pays, sont contraints à se faire esclaves de l'empereur pour survivre à la cour. Ainsi Tigrane, qui est élevé comme otage à Rome, est amené à devoir faire preuve de servilité, *usque ad seruilem patientiam demissus*,[50] malgré ses origines royales.

Le sort de ce prince nous amène à aborder un dernier aspect de la *patientia*, qui est propre à Tacite: c'est la soumission à Rome des peuples barbares vaincus. Le lien avec la servitude est encore plus éclatant. Passons sur une remarque concernant les Arméniens, peuple pourtant habitué à servir mais qui se révolte devant les excès de Radamiste,[51] ce qui n'est pas sans évoquer une théorie des climats bien présente dans l'Antiquité déjà:[52] *patientia* désigne presque toujours la condition de soumission à Rome.[53] On le voit dans les toutes les parties de l'Empire, quand les Bretons décident de se révolter en avançant que la servilité ne sert à rien sinon à devoir supporter toujours plus d'abus,[54] ou quand les habitants de Judée se révoltent sous le gouvernement de Gessius Florus.[55] *Patientia* a alors, selon nous, le double sens de patience et de soumission au pouvoir romain.

* * *

On a donc vu comment la notion de *patientia* évolue en près de deux siècles, passant d'un sens positif à la fin de la République, qu'elle soit endurance physique ou patience,

48 *Cf Ann* 14 64.

49 *Cf Ann* 16 16. Il est permis de penser que la cible de Tacite était l'opposition stoïcienne nourrie des exemples de Brutus et de Caton: l'historien s'élève ici avec force contre Cicéron et Sénèque.

50 *Cf Ann* 14 26.

51 *Cf Ann* 12 50: cet exemple de révolte est en opposition criante avec la passivité des Romains subissant les excès d'Agrippine et de Claude au même moment.

52 Voir ainsi le bref historique de M Pinna "Un aperçu historique de la 'théorie des climats'", (1989) 547 *Annales de Géographie* 322-325: le panorama qui commence avec un traité fameux du corpus hippocratique est un peu incomplet puisqu'il manque le discours de Manlius Vulso au livre 38 de Tite-Live.

53 *Cf Agr* 16 2 pour la Bretagne qui revient à sa *uetus patientia* après la révolte.

54 *Idem* 15 1: *nihil profici patientia nisi ut grauiora tamquam ex facili tolerantibus imperentur ...*

55 *Cf Hist* 5 10.

à une connotation négative sous Trajan. Les changements qui affectèrent Rome n'y furent pas pour rien, assurément: l'opposition entre les deux aspects de la *patientia* était le fruit de l'histoire d'un Etat qui s'était imposé en ne cessant pas ou presque de faire la guerre. Surtout la *patientia*, comme d'autres notions liées à l'idée de douceur, tend à devenir la vertu d'un homme qui est à la tête d'un peuple personnifiant cette qualité et suit donc le passage d'un régime républicain oligarchique à une monarchie plus ou moins déguisée.

Seulement voilà, la *patientia* n'a pas eu le succès d'autres notions: elle est restée une étoile de taille secondaire dans l'univers des vertus princières. Et pourtant le fait qu'il s'agisse d'une qualité éminemment stoïcienne aurait pu et dû lui garantir un brillant avenir sous le Haut-Empire quand la Stoa devint l'école philosophique la plus importante pour penser le pouvoir et lui offrir des habits sur mesure. Mais elle est restée marquée par un parfum de servitude, de servilité qui empêchait complètement d'en faire une qualité de l'empereur, malgré tous les efforts de Pline le Jeune.

Alors pourquoi Hadrien l'a-t-il choisie pour une de ses monnaies? Certains ont même nié que cela pût être, en considérant que ce Prince n'avait rien eu de patient, oubliant ce faisant que le choix des légendes est affaire de propagande, donc d'image et non de réalité. Que dirait-on avec le même raisonnement du choix des légendes des monnaies de Néron? Revenons à Hadrien: nous aurions tendance à penser que son choix procédait de deux logiques complémentaires. Peut-être a –t-il voulu d'abord puiser dans un fond commun à la manière d'un historien: son monnayage est très original qui revient à des qualités princières négligées par ses prédécesseurs comme la *clementia* ou qui innove avec l'*hilaritas*[56] par exemple.

Mais nous croyons qu'il a choisi la *patientia* surtout par goût de la philosophie grecque, en se référant cependant à la capacité de subir les coups du sort sans se révolter inutilement, comme la mort d'Antinous par exemple qui survient en octobre 130. Or la monnaie portant la légende *patientia* date de ces années-là: elle porte la mention du troisième consulat d'Hadrien, ce qui place la frappe entre 128 et 132. Loin de nous l'idée d'y voir une allusion à cet événement en particulier: c'est un exemple de ces malheurs qui pouvaient toucher un Prince et l'amener à faire preuve de *patientia* …

56 Nous nous étions intéressée à cette légende plus tôt: voir "Y'a d'la joie. Etude sur la place d'*hilaritas* dans la propagande politique romaine de la fin de la République à Hadrien", communication présentée au 64e congrès de la SIHDA (Barcelone, oct 2010), (2010) 57 *Revue Internationale des droits de l'Antiquité* 193-202. L'*hilaritas* est à associer à la *patientia*: non seulement le sage accepte ce qui arrive, mais il offre même un visage radieux au sort, idée stoïcienne très présente chez Sénèque, *cf* par exemple *Const* 9 3.

ABSTRACT

This paper is an attempt to underline the importance of patientia in the political life of ancient Rome, especially during the late Republic and the first century BC. Although the Christian notion of patientia has been well studied, the political quality it could represent is still a new field. The main problem is first to decide what kind of quality it was: in the late Republic, it was the physical endurance a general would need, which explains why Catilina based his propaganda on patientia, but it could also be a moral virtue. Patientia was a plebeian virtue against the pride and cruelty of the Patricians: this contrast was reaffirmed in the Civil War, when Caesar applied it against the Optimates who were acting arrogantly. Under the Julio-Claudians, patientia was a virtue with very much the same meaning as constantia, but it never attained the same importance because it was sometimes connected with servility. Patientia, which was a positive notion in the late Republic, whether physical or moral, came to be employed in a negative context by Tacitus. This study does not pretend to be exhaustive – it would be necessary, for instance, to consider the Stoic influence – but is merely a first step towards a better understanding of patientia before the Christian era.

SOME REMARKS ON *LAESIO ENORMIS* AND PROPORTIONALITY IN ROMAN-DUTCH LAW AND CALVINISTIC COMMERCIAL ETHICS

Jan Hallebeek* **

This article is dedicated to my colleague Laurens Winkel on the occasion of his retirement

1 Introduction

Recently the journal *Ars aequi*, edited by students from various legal faculties in the Netherlands, published a series of articles dealing with institutions and concepts that have their origin in Roman law or legal history and are still relevant in contemporary law. It was entitled *Rode draad "Historische wortels van het recht"*. My contribution to this series concerned the doctrine of *iustum pretium* and proportionality of performances, in other words the idea that all merchandise has a fair price and that not every deviation from that price is acceptable.[1] In Western legal thinking this

1 See Jan Hallebeek "De *iustum pretium*-leer en het evenredigheidsbeginsel" (2013) 62 *Ars Aequi* 59-64. The articles were collected into one volume; see Lukas van den Berge *et al Historische wortels van het recht* (Nijmegen, 2014).

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principle has played, and still plays, a predominant role, which was, for example, acknowledged in Roman-Dutch law.[2] In the Dutch Civil Code of 1838, however, the principle was rejected (art 1486), as it was in the French Code civil of 1804 (art 1118), although the latter did acknowledge an exception. The seller of immovable property was protected when the selling price was lower than five-twelfths (5/12) of the fair price (arts 1674-1685 Code civil). The Dutch legislature decided not to adopt this exception. According to the government, there was no need to do so, since considerable prejudice would anyway include deceit.[3] In the nineteen thirties, some jurists nevertheless defended the proposition that an approximate equivalence of performances should be a cornerstone of the Dutch law of contract.[4] This opinion remained a minority view, while the new Civil Code of 1992 did not make any substantive changes. The principle of proportionality is not acknowledged in the Code and, according to the prevailing view, is no longer in force.[5]

The reason for returning so promptly to the subject is that my conclusions in respect of Roman-Dutch law seemed to be incompatible with some sources referred to and interpreted in an article on the role of Roman law in early modern commerce. This article, entitled "The moral menace of Roman law and the making of commerce: Some Dutch evidence", was published in 1996 by James Whitman (b 1957) of the Yale Law School.[6] In this contribution, I would like to make a more intensive study of the material canvassed in this article and of Whitman's suggestion that there might have been a clash between two approaches to fair pricing, namely the traditional Christian one on the one hand, and that of the jurists and clergymen of the Dutch Republic on the other. Before turning to the early modern period, we must briefly outline the earlier development of the concepts of *iustum pretium* and proportionality of performances in Roman law and the continental *ius commune* of the Middle Ages.

2 *Cf* for an outline of the presence of the principle of *laesio enormis* in the present-day codes of civil law: Piet Abas *Benadeling van de medecontractant* (Deventer, 2003) and Thomas Finkenauer "Zur Renaissance der *laesio enormis* beim Kaufvertrag" in Lutz Aderhold *et al* (eds) *Festschrift für Harm Peter Westermann zum 70. Geburtstag* (Cologne, 2008) 183-207.

3 JC Voorduin *Geschiedenis en beginselen der Nederlandsche wetboeken, volgens de beraadslagingen deswege gehouden bij de Tweede Kamer der Staten-Generaal, V. Deel Burgerlijk Wetboek, art.* 1269-2030 (Utrecht, 1838) 141-158 at 147.

4 PW Kamphuisen "De leer van het *iustum pretium* herleefd" (1933) 3314-3316 *Weekblad voor privaatrecht, notariaat en registratie* 273-275, 281-283, 289-290; CMO van Nispen tot Sevenaer "De herleving van de leer van den rechtvaardigen prijs en haar rechtswijsgerige grondslag" (1937) 98 *Themis. Verzameling van bijdragen tot de kennis van het publiek en privaat recht* 1-22.

5 J Hijma *Mr. C. Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht* 5-I (Deventer, 2007) 220-221. For a discussion of the role of proportionality in contemporary Dutch law see, in general, Hallebeek (n 1) and Igor van Loo *Vernietiging van overeenkomsten op grond van laesio enormis, dwaling of misbruik van omstandigheden* (Rotterdam, 2013).

6 James Q Whitman "The moral menace of Roman law and the making of commerce: Some Dutch evidence" (1996) 105 *Yale Law J* 1841-1889. I thank Konstantin Tanev (Faculty of Law, Sofia) who at the 67th session of the *Société international Fernand de Visscher pour l'Histoire des Droits de l'Antiquité* (Sept 2013, Salzburg, Austria) called my attention to this article.

2 The *iustum pretium* rule: Origin and *ius commune* of the Middle Ages

2 1 Origin

The *iustum pretium* rule originates in the Corpus iuris civilis. On the one hand, Roman law acknowledged that buyer and seller were free to agree on a certain price. In negotiations, it was permissible to be guided by self-interest. Parties might even "circumvent" each other.[7] On the other hand, the fourth book of Justinian's Code contains provisions limiting the possible discrepancy between the value of the merchandise and the selling price. The most important of these for later developments is C 4 44 2, a rescript of Emperor Diocletian (*ca* 244-316) dating from the year 285. The original meaning and purport of the text and the circumstances prompting Diocletian to issue the constitution are disputed, and depend largely on the assumption of interpolations.[8] In all probability, the compilers of the Code partially interpolated the original text and subsequently adopted it in a title dealing with rescission of sale contracts. According to some scholars, the reason for adopting the text in its Justinianic form would have been that, as a result of the tax policy of Justinian (*ca* 482-565), many small farmers were compelled to sell their land and had to be protected economically against the wealthy urban merchants who desired to purchase their land as cheaply as possible. However, this view has been questioned.[9] The constitution of Diocletian, in its Justinianic wording, ruled that if the selling price of a plot of land was less than half the "fair price" (*iustum pretium*), the magistrate might rescind the sale on the ground of extreme prejudice (*laesio enormis*). In such a case, the buyer was entitled to uphold the contract by making an additional payment, namely the shortfall between the selling price and the fair price.

> *Impp. Diocletianus et Maximianus AA. Aurelio Lupo*. Rem maioris pretii si tu vel pater tuus minoris pretii distraxit, humanum est, ut vel pretium te restituente emptoribus fundum venditum recipias auctoritate intercedente iudicis, vel, si emptor elegerit, quod deest iusto

7 D 4 4 16 4 speaks about *circumvenire*; D 19 2 22 3 about *circumscribere*.

8 See, eg, HT Klami "*Laesio enormis* in Roman law?" (1987) 33 *Labeo* 48-63; AJB Sirks "Diocletian's option for the buyer in case of rescission of a sale. A reply to Klami" (1992) 60 *Tijdschrift voor Rechtsgeschiedenis* 39-47.

9 For a survey, see AJB Sirks "La *laesio enormis* en droit romain et byzantine" (1985) 53 *Tijdschrift voor Rechtsgeschiedenis* 291-307, who merely considers C 4 44 2 as allowing the buyer to make a supplementary payment in case of *restitutio in integrum*; AJB Sirks "*Laesio enormis* und die Auflösung fiskalischer Verkäufe" (1995) 112 *Savigny Zeitschrift für Rechtsgeschichte Rom Abt* 411-422; Martin Pennitz "Zur Anfechtung wegen *laesio enormis* im römischen Recht" in Martin Schermaier *et al* (eds) *Iurisprudentia Universalis, Festschrift für Theo Mayer-Maly* (Cologne etc, 2002) 575-589; AJB Sirks "*Laesio enormis* again" (2007) 54 *Revue Internationale des Droits de l'Antiquité 3e s* 461-469.

> pretio recipies. minus autem pretium esse videtur, si nec dimidia pars veri pretii soluta sit. *PP v.k. Nov. Diocletiano A. II et Aristobulo conss*.[10]

2 2 *Iustum pretium* and the doctrine of restitution

The medieval scholars of Roman law, the civilians, believed the Corpus iuris civilis should be what Justinian had intended it to be in his introductory constitutions. His legislation should be coherent and consistent and contain no contradiction whatsoever.[11] For this reason, the civilians interpreted the constitution of C 4 44 2 apart from both the context in which Diocletian issued it and the socio-economic circumstances which may have prompted the compilers to adopt it in the Code. In their approach, it was a provision in a code of law like all other provisions in the Digest and Codex. This approach is reflected in the Accursian Gloss, for example. In D 45 1 36 it was stated that the exception of fraud (*exceptio doli*) might even be brought if there was no fraud (*dolus*) on the part of the stipulator, but the matter itself was intrinsically fraudulent (*sed ipsa res in se dolum habet*) and a claim was subsequently brought on the basis of this stipulation. The Accursian Gloss explained this kind of "fraud", which is present in the matter itself (*dolus re ipsa*) as follows:

> gloss *dolum habet* ad D. 45 1 36: Qui proprie non potest dici dolus, sed ipsa res iniqua est, ut si sine causa promiserit totum, uel pro parte stipulatus sum rem quam minus emi dimidia iusti pretii, superueniente ut supra de excepione doli Apud Celsum § Labeo (D. 44 4 4 7) et l. ii § Item quaeritur (D. 44 4 2 4).[12]

Now, this gloss to D 45 1 36 clearly refers to the rule incorporated in C 44 4 2. From the perspective of the Gloss, considering D 45 1 36 and C 44 4 2 simply as provisions of one and the same code of law, promulgated approximately at the same time by Justinian, this makes sense. However, from the more historical perspective of the humanist jurists, the constitution issued by Diocletian in the year 285 could certainly not have featured in an opinion of the jurist Ulpian († 223) who must have died about sixty years before that. A fine example of such criticism may be found

10 Translation: *The illustrious emperors Diocletian and Maximian to Aurelius Lupus*. If you or your father alienated something of a lower value at a higher price, it is human that you will either through intercession of the authority of the court and after restoring the price to the buyers, recover the tenement sold, or, if the buyer would prefer this, will receive what is lacking in the true value. The price, however, is considered to be too low, if not even half the true value has been paid. *Promulgated on 28 October, during the second consulate of the emperor Diocletian and the consulate of Aristobulus.*

11 Constitution *Deo auctore* § 8.

12 Translation: Which you actually cannot call fraud, but the matter itself is iniquitous, as when someone without a cause promised the whole or I stipulated for a part the thing which I bought for less than half of the fair price or give the example of the later occurring fraud, as in D 44 4 4 7 and D 44 4 2 4.

in a monograph on *laesio enormis* by the Portuguese humanist jurist Arias Piñel (1515-1563). He maintained that the Accursian Gloss and the commentators had been talking gibberish.

> Arias Piñel, *Commentarii ad rub. et l. II Cod. de rescindenda venditione*, Prima pars legis secundae, caput 1, n. 8.
>
> Putarunt hucusque glossa et omnes Vlpianum in dicto paragrapho respexisse ius huius legis et inde apud omnes inualuit frequentissima allegatio dictae legis qua laesionem ultra dimidiam appellant dolum re ipsa, ad differentiam doli ex machinatione. Ego uerius puto doctores cum glossa ad uerbos iurisconsulti hallucinatos fuisse, nihilque minus iurisconsultum in lege ea (D. 45 1 36) sensisse quam de remedio huius legis quod euincitur ex eodem Vlpiano et aliis iurisconsultis in locis supra citatis, dum aperte et indistincte tradunt, laesis in precio nullatenus succurrri, nec dolum ex sola laesione censeri.[13]

Below, we shall return to the distinction that the medieval scholars drew between two categories of fraud; and especially to the concept of *dolus re ipsa*, which is also discussed in the gloss quoted. By now, it will be clear that the civilians, glossators and commentators, interpreted the constitution of C 4 44 2 as if independent of any historical context, but in reality could not dissociate themselves from the socio-legal environment of their own time, which was largely determined by canon law and the competence dispute between secular and ecclesiastical jurisdiction. From the beginning of the thirteenth century, canon law was influenced by the theological teachings on restitution, although this doctrine was primarily intended for the *forum internum*, that is the realm of conscience.

The Church taught that every infringement of the natural order should be rectified by restitution. Infringement was a broad notion. In human intercourse, not only did it cover all extra-contractual damage or enrichment at the expense of another, but also upsetting the balance in contractual relationships, for example by

13 Translation: Thus far the Gloss and all the doctors were of the opinion that Ulpian in this paragraph (the last lines of D. 45 1 36) is referring to the right set out in this provision (C. 4 44 2) and hence among all of them the frequent allegation of this provision gathers weight. On the ground of which provision, they call the prejudice amounting to more than half (of the fair price) fraud in the matter itself (*dolus re ipsa*) as distinct from fraud resulting from slyness (*dolus ex machinatione*). I think, more correctly, that the doctors together with the Gloss talk gibberish as regards the words of the jurist and that the jurist in this provision (D. 45 1 36) pronounces upon nothing else but the remedy of this provision, which is elucidated from the same Ulpian and other jurists in the texts quoted above, while they maintain clearly and without any distinction, that there is no rescue whatsoever for those prejudiced in the price and they do not consider something to be fraud solely because of prejudice. See Arius Pinellus *Ad rubricam et legem II Codicis de rescindenda venditione ... commentarii* (Frankfurt, 1614) 141-142. See, on these teachings of Arias Piñel, also Justo García Sánchez *Arias Piñel, Catedrático de Leyes en Coimbra y Salamanca durante el siglo XVI, La rescisión de la compraventa por laesio enormis* (Salamanca, 2004) and Wim Decock *Theologians and Contract Law. The Moral Transformation of the Ius Commune (ca. 1500-1650)* (Leiden/ Boston, 2013) 572-581.

breach of contract or enforcing unjust agreements. Initially, the duty of restitution was based on an extensive interpretation of the Biblical commandment not to steal, but from the thirteenth century onwards, it was increasingly connected with the concept of commutative justice, derived from Aristotle's *Ethics*, which by that time had become known in the West in its Latin translation. Commutative justice required that in reciprocal agreements the performances should balance each other. If the balance was disturbed, it had to be restored.

There were clear differences between the legal rule of C 4 44 2 and the theological doctrine of restitution which was in force in the forum of the conscience. The *iustum pretium* rule related only to prejudice (*laesio*) suffered by a seller, which had to be considerable (*enormis*). The doctrine of restitution related to disproportion in all mutual performances and deemed any prejudice, even if it did not comply with the standard established by Roman law, to be illicit. The theologians referred to both the coherence and the difference between the two principles. According to human law (*lex humana*) and the law applied by the court (*ius fori*), it is permissible to prejudice the other party to the extent of half the fair price, although not deliberately or by using tricks, the so-called *dolus ex proposito* (see below). According to divine law (*lex divina*) and the law applied in the celestial court (*ius poli*), any deviation from the fair price is a sin and should be rectified by restitution. In this regard, we may refer to the *Summa de animae consiliis* of Peter the Chanter (*ca* 1150-1197)[14] and the *Summa aurea* of William of Auxerre (*ca* 1145-1231).[15] The difference between the legal standard of Roman law and the moral standard of divine law was clearly depicted by Thomas Aquinas (1225-1274), but from the perspective of medieval scholarship, the difference is one of degree. It is not fundamental. In the case of malicious intent, the *forum externum* will demand restitution no matter what the extent of the prejudice. If there is only a slight deviation from the fair price, the *forum internum* will not demand restitution:

> Thomas Aquinas *Summa Theologiae* Secunda secundae q. 77 art. 1 ad 1
>
> (…) Sic igitur habet quasi licitum, poenam non inducens, si absque fraude venditor rem suam supervendat aut emptor vilius emat, nisi sit nimius excessus, quia tunc etiam lex humana cogit ad restituendum, puta si aliquis sit deceptus ultra dimidiam iusti pretii quantitatem. Sed lex divina nihil impunitum relinquit quod sit virtuti contrarium. Unde secundum divinam legem illicitum reputatur si in emptione et venditione non sit aequalitas iustitiae observata. Et tenetur ille qui plus habet recompensare ei qui damnificatus est, si sit notabile damnum. Quod ideo dico quia iustum pretium rerum quandoque non est punctaliter determinatum, sed magis in quadam aestimatione consistit, ita quod modica additio vel minutio non videtur tollere aequalitatem iustitiae.[16]

14 See Karl Weinzierl *Die Restitutionslehre der Frühscholastik* (Munich, 1936) at 144.

15 See Herbert Kalb *Laesio enormis im gelehrten Recht. Kanonistische Studien zur Läsionsanfechtung* [Kirche und Recht 19] (Vienna, 1992) 123. *Cf* Thomas Aquinas *Summa Theologiae* II II q 77 arts 1 and 4.

16 Thomas Aquinas *Opera omnia* (editio leonina) IX (Rome, 1897) 148. Translation: (…) Thus in

2 3 Ecclesiastical practice

Was the doctrine of restitution also applied in the legal practice of the ecclesiastical *forum externum*?[17] As stated above, the duty to make restitution was primarily a matter of conscience. Augustine (AD 354-430) had taught that sin would not be forgiven unless what had been taken away was restored (*restitutio*). Otherwise, repentance would be feigned. This rule was adopted in Gratian's Decree of 1140/45 (C 14 q 6 c 1), but it was not originally applied in ecclesiastical litigation. From two decretals, it appears that the papal chancery preferred to apply Roman law. The first decretal was *Cum dilecti* of Alexander III († 1181), dating from 1170; the second was *Cum causa* of Innocent III (c 1160-1216), dating from 1208, and both were eventually adopted in the *Liber Extra* (X 3 17 3 and X 3 17 6). The cases and decisions show similarities. In the first case, the canons of Beauvais had sold part of a stretch of woodland to a monastery for less than half the fair price. In the second case, the steward of the monastery of San Martino del Monte had sold certain feudal estates to citizens of Viterbo for less than half the fair price. The wording "for less than half the fair price" was reminiscent of C 4 44 2, and the constitution's influence was clearly perceptible in the two papal decisions. The buyers were permitted to uphold the contract by making an additional payment up to the amount of the *iustum pretium*. It was not uncommon for the papal chancery to apply Roman law, as it did here; the reason being the lack of proper canon law standards. Apparently, the doctrine of restitution was not yet considered fit to be applied directly in the *forum externum*.

However, from the thirteenth century onwards it began to infiltrate ecclesiastical litigation. A decretal of Innocent III, dating from 1204 (decretal *Novit ille*, in the *Liber Extra* X 2 1 13), authorised ecclesiastical courts to deal with anyone committing a sinful act. For this purpose, a specific proceeding was instituted, the *denuntiatio evangelica*. The doctrine of restitution, which related primarily to the realm of conscience, could consequently infiltrate the *forum externum*. The ecclesiastical

this way it is considered permissible and no punishment is imposed if a seller without any fraud sells his goods for more or the buyer buys it for less, unless the difference is disproportionate, because then human law also requires restoration, for example when someone is "deceived" into paying more than half the fair price. However, Divine law leaves nothing unpunished that is contrary to virtue. Hence, according to Divine law it is considered unlawful when in buying and selling the consistency of justice is not observed. And the one who has too much should restore to the prejudiced party in a case where the loss is significant. The reason I say this, is that the fair price of things can sometimes not be exactly determined, but rather consists, in a certain assessment, of such a nature that a moderate gain or loss does not seem to cause an imbalance in justice.

17 James W Baldwin *The Medieval Theories of the Just Price. Romanists, Canonists, and Theologians in the Twelfth and Thirteenth Centuries* [Transactions of the American Philosophical Society, New series vol 49, part 4] (Philadelphia, 1959); KS Cahn "Roman and Frankish origins of the just price of medieval Roman and Canon law" (1969) 6 *Studies in Medieval and Renaissance History* 3-52.

courts were thus able to assist the prejudiced party in more instances of unbalanced performance than secular courts using the *iustum pretium* rule of C 4 44 2.

2 4 The *ius commune*: From the *iustum pretium* rule to the principle of proportionality

The civilians were in a quandary: Should they admit that Roman law had no means of coming to the aid of the prejudiced party except when immovable property was sold for less than half the fair price, while the ecclesiastical courts with their doctrine of restitution were able to do so? Alternatively, should they misinterpret the Roman texts and so demonstrate that the Corpus iuris civilis could also offer the desired remedy? They often chose the latter option without, however, disclosing their underlying motives. In the secondary literature, this approach is aptly described as "saving the face of Roman law".[18] From the outset, Roman-law scholarship was no academic *Spielerei*. Long before the large-scale reception of Roman law, the Corpus iuris civilis was already being interpreted with a view to adopting the texts as living law.

The extensive interpretation of the Roman *iustum pretium* rule in medieval legal scholarship was in truth a transformation of this rule into a principle of proportionality of mutual performances. It may be seen as an attempt to bring Roman law into line with what were then the standards of canon law. It should be noted, however, that this did not result in identical standards. The differences so meticulously described by the early scholastic theologians mentioned above were only partially eliminated. The Roman *iustum pretium* rule still tolerated moderate prejudice, at least as long as there was no malicious intent on the part of the party concerned, whereas the obligation of restitution would always demand full recovery. The interpretation of the Roman rule was extended in various ways. Firstly, the text of C 4 44 2 was interpreted so as to provide a remedy not only to the underpaid seller, but also to the buyer who had paid too much. The remedy was by now named after the opening words of the constitution, namely *condictio ex lege rem maioris*. Obviously, the question arose by how much the price paid should exceed the fair price. The Corpus iuris civilis did not answer this question, and the glossators were divided in their views. Eventually they agreed that the buyer should have paid at least fifty per cent more than the fair price. Secondly, C 4 44 2 was applied to the sale of not only immovable property, but also movables. In the third place, the rule of C 4 44 2 was applied to contracts other than sale, initially those resembling sale, such as lease and barter, and in the thirteenth century to all contracts of good faith and subsequently even to those of strict law.[19]

18 Gero Dolezalek "*The moral theologians'* doctrine of restitution and its juridification in the sixteenth and seventeenth centuries" (1992) *Acta Iuridica* (Essays in Honour of Wouter de Vos) 104-114 at 105.

19 See, also, Reinhard Zimmermann *The Law of Obligations. Roman Foundations of the Civilian*

2 5 Dogmatic distinction and terminology

From the gloss *dolum habet ad* D 45 1 36 and the fragment of Arias Piñel, both quoted above, it appears that medieval scholarship distinguished between two kinds of fraud (*dolus*). On the one hand, there was fraudulent behaviour on the part of the other party, thus an act of deceit with malicious intent. This was subjective, intentional fraud, namely fraud in the proper sense of the word. It was termed *dolus ex proposito* or *dolus ex machinatione*. On the other hand, there was the "fraud" inherent in the merchandise itself, which disadvantaged the one party, but was not necessarily caused by an act of deceit on the part of the other party. This was objective, factual "fraud", in the Gloss termed *dolus re ipsa*. D 45 1 36 provided the proof of the existence of such a category of *dolus*, and the gloss *dolum habet* to this text explained the improper use of the term: "in a proper sense this cannot be called fraud (*qui proprie non potest dici dolus*)." The remedy of C 4 44 2 was believed to provide protection against such a type of "fraud" (*dolus re ipsa*). The "fraud" in case of *laesio enormis*, which merely comprised a considerable deviation from the just price, was nevertheless termed *dolus*. In English it is difficult to describe this type of *dolus* in terms of deceit or fraud, but in other languages it can be easier. In Dutch we speak about "een deceptie", in Afrikaans one speaks of "bedroë uitgekom". Neither expression presupposes active fraud by a wrongdoer. Accordingly, the use of terms such as "fraud" (*dolus*), "to deceive" (*decipere*) and "deceived" (*deceptus*) in the writings of the *ius commune* can be misleading. The context should always show whether they refer to subjective, intentional *dolus* (*ex proposito*) or objective, factual *dolus* (*re ipsa*).

This having been said, it should be noted that the "circumventing", which was allowed according to D 19 2 22 3, was not interpreted in the Gloss as an act of intentional fraud (*dolus ex proposito*) but as "fraud" in the matter itself (*dolus re ipsa*). According to the Gloss, the "circumventing" that Roman law allowed in trade was not a type of active deception.

> gloss *quemadmodum circumscribere ad* D. 19 2 22 3 (…) Item hoc intellige dolo non interueniente ab aliqua parte et sic improprie dicitur circumuentio uel deceptio (…).[20]

Similarly, the Gloss interpreted very narrowly the statement in D 4 4 16 4 that "circumventing" is permitted according to nature (*naturaliter*). Firstly it stated that "according to nature" means "according to the law of nations", since despite the "circumventing" the contract is not void. Subsequently a distinction was drawn between *dolus ex proposito* and *dolus re ipsa*. The two kinds of "fraud" had different consequences. In *dolus re ipsa*, that is, "fraud" without malicious intent on the part

Tradition (Cape Town, 1990) 259-270.

20 Translation: Likewise, understand this as without any fraud coming from one of the parties, and thus improperly called circumvention or deceit.

of the one party, the "circumventing" was not absolutely prohibited but severely restricted. Minors were fully protected, while those who had reached majority were protected to a certain extent, namely whenever the "fraud" exceeded half the fair price. In the case of *dolus ex proposito*, where fraud comprised malicious acts by one party, the wrongdoer could be sued on the contract, when the fraud was *incidens*, namely when the error concerned certain incidental features of the contract (*accidentalia*), thereby leaving the contract intact (*dolus incidens*). The case of error concerning the essentials (*essentialia*) of the contract (*dolus dans causam contractui*) was not addressed in this gloss, but it would render contracts of good faith null and void and invalidate contracts of strict law by means of a defence.

> the gloss *naturaliter licere ad* D. 4 4 16 4 id est de iure gentium (...); tenet enim contractus nihilominus; sed deceptus, si quidem re ipsa, minor restituitur pro leui damno etiam, non pro minimo (...) maior non, nisi ultra dimidiam iusti pretii sit deceptus (...). Si autem ex proposito, incidenter tamen agitur ex ea contractu (...).[21]

3 Roman-Dutch law

In early modern times there was a fairly general reception of the *iustum pretium* concept, commonly with a broad application of C 4 44 2, as defended by the medieval civilians. This also holds good for Roman-Dutch law. In his *Inleidinge tot de Hollandsche rechtsgeleerdheid* (published 1631), Hugo de Groot (1583-1645) acknowledged the existence of the *iustum pretium* rule in the Province of Holland. In an "historical" exposition, he explained that the rule was introduced by positive law (the *borgherlicke wetten*). He argued that the phenomenon of barter had emerged because some people had too much, and others too little, of certain things. As the population grew, some made it their task to collect and redistribute all kinds of goods, thus placing themselves at the service of others. It was therefore reasonable for them to gain a certain profit as a reward for their work. Subsequently, positive law allowed parties to a contract freely to stipulate a certain *quid pro quo*. After all, it was not easy to place an exact value on the efforts of the merchants, while the value of the merchandise often fluctuated. However, when the merchants' greed started to exceed all moderation and reasonableness, this freedom had to be restricted by protection of the seller through the *iustum pretium* rule. Practice further extended this protection to the buyer and to other contracts, with the exception of judicial and testamentary sale and sale with the intention of donating.[22]

21 Translation: *allowed according to nature* this means according to the law of nations (...), because the contract nevertheless holds; but "deceived", at least in the matter itself, a minor will be compensated, also for a small loss, not for a marginal loss (...), but not the one of age, unless he is "deceived" for more than half the fair price (...). However, deceived by intention not affecting the essential terms, one can nevertheless sue on the contract (...).

22 Hugo de Groot *Inleidinge tot de Hollandsche Rechtsgeleerdheid* 3 52 1-5.

That the *iustum pretium* rule of C 4 44 2 was received in the various provinces of the Dutch Republic, is also made clear in the lecture notes of Jacobus Voorda (1698-1768) on the law of his time. For Gelderland, he referred to provisions of the Statutes, mentioned by Johan Schrassert (1687-1756) in his *Practicae observationes*. For Holland he referred, apart from the *Inleidinge*, to *De legibus abrogatis* (1649) of Simon Groenewegen van der Made (1613-1652)[23] and the *Censura forensis* of Simon van Leeuwen (1626-1682), and for Utrecht to the *Practyk judicieel* of Gerard van Wassenaer (1589-1664). The *Decisiones Frisicae* of Johan van den Sande (1568-1638) made it clear that the rule was accepted in Friesland. For the validity of the rule in Overijssel and Groningen he referred to various Statutes. This does not mean, however, that there were no differences at all between the provinces. The limitation period of the remedy was not the same everywhere, and there were also differences in exceptions to the rule, namely the types of contracts where appeal to *laesio enormis* was sometimes not allowed, such as sale at auctions and sale by order of the court.[24] Scrutiny of the considerations underlying judgments of the *Hoge Raad van Holland, Zeeland en West-Friesland*, pronounced between 1704 and 1787,[25] also shows that the concept of *iustum pretium* survived into the legal practice of the eighteenth century. Moreover, we also find it even in the very last handbook on civil law edited before the era of codified law, namely the *Regtsgeleerd, practicaal en koopmans handboek* (1806) of the Amsterdam practitioner Johannes van der Linden (1756-1835) which later served as Code of Commerce in the Transvaal Republic (Zuid-Afrikaansche Republiek) for some time.[26]

Although all this may indicate a strong continuation of the medieval principle of proportionality, Whitman is of the opinion that vernacular books on Roman-Dutch law show a different approach. According to him, they declared active fraud, denounced by the Christian tradition, to be permissible, thus appealing to Roman law. They relied on Roman law to justify moral behaviour that was otherwise condemned as "unbrotherly". Moreover, this tendency would be part of a revolutionary change in a critical area of Dutch commercial law, which consisted in the abandonment of the long-standing fair-price principles.[27] In order to demonstrate this, Whitman referred to a treatise on legal practice, entitled *Nederlandtsche Practycke*, which was written by Bernhard van Zutphen († 1685), an attorney at the Provincial Court of Utrecht. One fragment from this work shows Van Zutphen informing his readers that

23 Simon a Groenewegen van der Made *De legibus abrogatis et inusitatis in Hollandia vicinisque regionibus* Pars 3 (Nijmegen, 1663) 151-152 (*ad* C 4 44 2).

24 Jacobus Voorda *Dictata ad ius hodiernum* (ed Margaret Hewett vol 1 654) *ad* D 18 5 § 1.

25 Christian Brom *Urteilbegründungen im „Hoge Raad van Holland, Zeeland en West-Friesland" am Beispiel des Kaufrechts im Zeitraum 1704-1787* [Rechtshistorische Reihe, 377] (Peter Lang, Frankfurt am Main etc, 2007) 234-246.

26 Joannes van der Linden *Regtsgeleerd, practicaal en koopmans handboek* (Amsterdam, 1806) at 160.

27 Whitman (n 6) at 1844, 1853-1854.

they were permitted to trick others in any measure. Moreover, this fragment, just like other vernacular literature on legal practice, breathed an "air of chill immorality".[28]

> Bernhard van Zutphen *Nederlandtsche practycque van verscheyden daghelijcksche soo civile als criminele questien* (Utrecht, 1636) 42:
>
> V. Parthyen contrahenten moghen malcander wel bedriegen in het handelen als maer het bedroch niet en zy boven de helfte van de rechte weerde: Dan so yemandt bedrogen is in de quantiteyt van het goedt alsdan mach hy ageren tot supplement alhoewel het bedroch is beneden de helfte van de rechte prijse (...).[29]
>
> VI. Den vercooper wordt geseydt in bedroch te wesen indien hy verswijght eenige qualiteyt van het goet dewelcke soo hy gheexpresseert hadde den cooper niet en soude gecontraheert ghehadt hebben; ende wort daeromme sodanigen coper ghesuccurreert (...).[30]

The quoted fragment starts with the statement that "circumventing" in trade is allowed. This is more or less what is stated in D 4 4 16 4 and D 19 2 22 3. Subsequently three exceptions are mentioned. The first consists in observing the rule on *laesio enormis* (C 4 44 2). The prejudiced party has a remedy where the detriment exceeds half the fair price. Secondly, there is the prejudice resulting from error regarding the quantity of the merchandise. Here the prejudiced party can claim additional performance irrespective of the scope of the detriment**.** This seems to be the principal rule in the Digest.[31] The third exception has to do with error concerning the quality of the merchandise. The words "*dewelcke soo hy gheexpresseert hadde de cooper niet en soude gecontraheert ghehadt hebben*" indicate two things: A malicious concealment of defects and a mistake concerning the essentials of the transaction. In terms of the *ius commune* the malicious concealment implies a *dolus ex proposito*. Because the buyer's mistake concerns essential contractual terms the deceit is *dolus dans causam contractui*.[32]

But did Bernard van Zutphen concede that parties to a contract might generally use tricks? Firstly, we have to realise that his discussion of "circumventing" and "fraud" was not exhaustive. He did not discuss the situation where there was only *dolus incidens* on the part of the buyer of defective merchandise. He did not refer

28 *Idem* at 1870-1871.

29 Translation: V. Parties to the contract may hoodwink each other in their negotiations, as long as the deceit does not exceed half the fair value. If such a person is deceived in the quantity of the thing, he may claim supplement up to the just value, although the "deceit" does not exceed half of the just price.

30 Translation: VI. The seller is said to be deceiving if he conceals a quality of the thing, which would have prevented the buyer from entering into the contract, had he mentioned it. For this reason such a buyer is rescued. (...).

31 *Cf* D 18 1 40 2; D 19 1 2pr; D 19 1 4 1; and D 21 2 69 6.

32 For the origin of the concepts *dolus dans causam contractui* and *dolus incidens* in Roman law see Andreas Wacke "Circumscribere und dolus" (1977) 94 *Zeitschrift der Savigny-Stiftung Rom Abt* 184-246 at 236-245. For the meaning in the civilian tradition, see Zimmermann (n 19) at 670-677.

to the limitation period of the remedy for *laesio enormis* or the exceptional cases where the rule for *laesio enormis* did not hold. It is clear, however, that he recognised three major exceptions to the permissibility of "*malcander bedriegen*". Secondly, his account of exceptions may not be exhaustive, since nothing is said, for example, about the protection of minors. Beyond any doubt, we may say that "*malcander bedriegen*" was not generally acknowledged here as permissible behaviour. Moreover, it certainly did not set aside the remedy for *laesio enormis*.

More indications about what the permissible "circumventing" or "*malcander bedriegen*" may imply may be found in the *Censura forensis* (1678) of Simon van Leeuwen, one of the few "Old Authorities" who discussed the question specifically.

> Simon van Leeuwen *Censura forensis* (Leiden, 1662) 689 (Pars 1 liber 4 caput 44 n 1)
>
> Quamvis communiter et naturaliter liceat contrahentibus in justo rei pretio se invicem circumuenire, *l.16 § 4 ff. De minorib. (D 4 4 16 4) l.37. ff. De dolo. (D 4 3 37)* &, quod pluris est, minoris emere, aut quod minoris est, pluris vendere, *l.22. §. ult. ff. locat. (D 19 2 22 3) l.8. Cod. De Rescind. vend. (C 4 44 8)*. Si nempe sine aperto dolo & fraude contingat: qui toto jure reprobatur*, l. 1. (D 4 3 1) & tot. tit. ff. De dolo malo (D 4 3)*. Si tamen immodica sit laesio, ut, si ultra dimidiam justi pretii in dando aut accipiendo alteruter fuerit deceptus, potest is adversus alterum agere, ut vel recepto pretio rem restituat, vel id quod justo pretio deest, suppleat aut restituat.[33]

What is said in this fragment reveals the meaning of "permissible circumventing", namely recommendations not intended to deceive the buyer (D 4 3 37), and selling for more than the actual value of the merchandise (D 19 2 22 3 and C 4 44 8); but certainly no slyness (*calliditas*), lies (*fallacia*) or tricks (*machinatio*) (D 4 3 1) – fraudulent acts that Van Leeuwen lumped together as "clear fraud and deceit" (*dolus apertus et fraus*). Accordingly, "*se invicem circumvenire*" was only permissible when parties abstained from these fraudulent acts.[34] Such a kind of "fraud" comes close to the *dolus re ipsa* of the Accursian Gloss. Moreover, permissible "fraud" is anyhow restricted by the general prohibition of fraudulent behaviour as recorded in title D 4 3.

33 Translation: Although it is for parties to a contract generally and according to nature allowed to circumvent each other as regards the fair price, see D 4 4 16 4 and D 4 3 37, and to buy for less what is worth more or sell for more what is worth less, see D 19 2 22 3 and C 4 44 8. As long, of course, as this happens without clear fraud and deceit, which is disapproved by all law, see D 4 3 1 and the entire title D 4 3. However, where there is an immoderate prejudice, as when one of the parties is "deceived" for more than half the fair price in giving or receiving, he may sue the other, so that either the thing is restored when the price is paid back or the shortfall in the fair price is supplemented or made good.

34 See, also, the next line where van Leeuwen used the term "deceived" (*deceptus*), where the "deceit" simply comprised the selling price deviating immoderately from the just price (*dolus re ipsa*).

Van Zutphen's treatment of "permissible circumventing" in contracts is less distinct and clear in this respect, but we should not exclude the possibility that in van Zutphen's view, permissible "fraud" was restricted by the general prohibition against fraudulent behaviour as much as in van Leeuwen's treatise. Extolling the virtues of the merchandise and commercial persuasiveness are allowed; ruse and guile are not. It is certainly not possible to read into van Zutphen's fragment a general licence to use tricks in trading; nor did he devalue or discount the *iustum pretium* rule. The fact that references to the virtue of justice and deliberations of a moral nature are lacking should not surprise us, for we are dealing here with a legal manual. However, this does not mean that this text exudes an "atmosphere of immorality".

4 Fair-price principles and Calvinistic ethics

In support of his conclusion that the Dutch abandoned the long-standing fair-price principles, Whitman also turned to handbooks on ethics, written in Dutch by Calvinistic clergymen and intended for mercantile practice. These books dealt with practical legal questions and provided ethical guidelines from a Calvinistic perspective. Before I consider material from these handbooks that Whitman considered, some preliminary remarks are appropriate. We are dealing here with a category of writings which, as a genre, differed fundamentally from the works of the Old Authorities, since these writings did not describe legal norms, but what ought to be done according to moral standards. In that respect they somewhat resembled the confessors' manuals and the handbooks of early modern scholasticism, used in the Catholic regions of Europe, which describe the rules of the forum of conscience. At the same time, there were important differences. In commercial behaviour, Catholics could rely on the expertise of moral theologians and could put their trust in the pastoral care of the Church, which was supposed to hold the power of the keys. Calvinists, on the other hand, had to use their moral handbooks primarily as guidelines. What their conscience dictated was a matter to be determined by their personal relationship with God. This also explains why the Calvinist manuals concentrated on general principles and deliberations on the proper attitude in commercial intercourse. They spoke only briefly of acts that were to be avoided, whereas the Catholic handbooks provided detailed casuistry, prescribing what had to be done in every possible situation and leaving hardly any room for personal reflection. Moreover, in seeking answers to moral questions, the Calvinists primarily looked for biblical starting points and no longer relied extensively on concepts of natural law or the *ius commune*, as their Catholic predecessors had. What was also absent from the Calvinist manuals was a distinct legal approach towards moral questions, something the Jesuit moral theologians in particular developed from the end of the sixteenth century onwards.

The longstanding fair-price principles might seem to have been rejected in three Dutch commercial handbooks. The first is the "*Vrye jaer-merckt voor den volcke*

Zion", published in Amsterdam (1628) by the Frisian reformed minister Adam Westerman († 1634). The second is "*'t Geestelijck roer van't coopmans-schip*", published in Dordrecht (1638) by Godefridus Cornelisz Udemans (1581/82-1649), who was a reformed minister at Zierikzee. The third is the "*Oeconomia christiana, ofte christelicke huyshoudinge, bestiert near den reghel van het suyvere Woordt Godts*" by the Amsterdam minister Petrus Wittewrongel (1609-1662). It was published in 1655 and reprinted in 1661. We should firstly study the passages from these writings to which Whitman referred, in order to establish whether these clergymen did indeed reject the fair-price principles, and so deviate considerably from the Catholic moral theologians of their time. These are the relevant fragments.

> Adam Westerman *Vrye jaer-merckt voor den volcke Zion* (Amsterdam, 1628) 70-71 Als nu dese in de Marckten ghecomen zijn vergeten wort by haer de spreucke Pauli *dit is de wille Godts, namelijck uwe heylichmaeckinge, dat niemant synen Broeder verdrucke, noch en bedrieghe*. Ghelijck alser ghene handelinghen onder den Menschen ghepleecht en werden sonder dat de zonde sich mede daer onder vertoont soo ist dat dat ooc mede in den Coophandel de zonde geoefent wert (...) ofte in den prijs malcanderen te becoopen (...).[35]
>
> Godefridus Udemans *'t Geestelyck roer van 't coopmans schip* (Dordrecht, 1640) 20 (…) Dese ongherechtigheydt (…) wordt oock ghepleecht (…) met Monopolie, dat is wanneer de Coopluyden tsamen couten om de waren te houden op eenen onbillicken prijs tot last van de goede Gemeynte (…).[36]
>
> Petrus Wittewrongel *Het tweede boeck van de oeconomia christiana* (Amsterdam, 1661), 605 Daer by wy oock op den gemeenen merckt-gangh moeten letten; also nochtans dat een wijs ende verstandigh oordeel naer gelegentheyt van tijdt ende plaetse de schaersheyt ofte overvloet der selven dese koopmanschappen sal konnen schatten; near het welcke oock het af of op-slaen van den selven prijs rechtveerdelicken magh gematight worden. Dit zijnde near het gemeene spreeck-woort, voor een rechtveerdigen prijs te houden als men sijne waren soo veel als die near het gemeene oordeel waerdigh zijn verkoopt ende datse soo veel waerdigh zijn als sy in 't gemeen verkocht worden. De genegentheyt van dese of gene gierigaert en magh hier niet onbepaelt gevolght worden.[37]

35 Translation: If they reach the market, they forget the statement of the apostle Paul "this is the will of God, namely your salvation, that nobody will oppress or deceive his brother". Just as no acts between human beings take place without including sins, also in commerce sin is committed (...) or by deceiving each other as regards the price (...).

36 Translation: Such an injustice (...) is also committed (...) through monopoly, i.e. when merchants agree to preserve for their merchandise an unjust price level to the detriment of the common good (…).

37 Translation: Because we should also consider the common trade intercourse, yet also, that a sensible and prudent judgement will be capable of assessing the shortage or redundancy of the merchandise itself according to the time and place, which may also justly restrict the increase or decrease of the price. According to the common saying, this means that we consider it to be a fair price, when a person sells his goods for the amount which according to the common opinion corresponds with the value and that these goods have the value they are commonly sold for. The tendency of some miser or other should not be followed indiscriminately.

These three texts contributed to the discussion of rules that a decent Christian merchant is morally bound to obey. In that context a series of objectionable acts were mentioned, such as tampering with measures and weights and culpably concealing defects, but also selling merchandise at too high a price.

Adam Westerman, physician and minister, was an early representative of the Further Reformation (*Nadere Reformatie*), a movement that emphasised the enduring influence of the Gospel in all aspects of life. He wrote pietistic manuals, aimed at the spiritual salvation of sailors and merchants. In the fragment quoted above, he referred to the text of 1 Thessalonians 4 verses 3 and 6, which says it is forbidden to oppress or circumvent one's brother. When explaining the meaning of forbidden circumventing in this text, Westerman mentioned, but did not emphasise, unfair pricing which was just one of the many reprehensible acts a merchant should avoid. From this Whitman comprehended that Westerman understood "circumventing", used in 1 Thessalonians 4:6 (Whitman speaks of overreaching), to mean "using tricks", and so did not emphasise fair-price principles. Those principles would accordingly recede into the background, before being discarded.[38]

Earlier in his article Whitman had pointed out that there was a tradition of viewing the text of 1 Thessalonians 4:6 as being in conflict with the text of D 4 4 16 4. Both the Latin Vulgate text of 1 Thessalonians 4:6 and D 4 4 16 4 used the verb *circumvenire*.[39] The former stated that *circumvenire* was prohibited, the latter that it was allowed. Some Catholic authors indeed referred to this contradiction. The Spanish Jesuit Luis de Molina (1535-1600), for example, clearly contrasted the *circumvenire* of D 4 4 16 4 with that of 1 Thessalonians 4:6 in its Vulgate translation.[40] It could well be that Westerman no longer adhered to this tradition. It seems unlikely that the Vulgate Text of the New Testament could have been his starting point. He studied theology at the University of Franeker[41] and quoted the text of 1 Thessalonians from the Deux Aes Bible of 1562, which was commonly used by the members of the Reformed Church until the middle of the seventeenth century. The translation of the New Testament in this Bible was based on that of Johannes Dyrkinus († before 1592), whose own revision of the text was based on the original

38 Whitman (n 6) at 1864-1865.

39 However, circumvenire is not the translation of the Greek ὑπερβαίνειν, but of the verb πλεονεκτεῖν. *Cf* Whitman (n 6) at 1859 n 62. Moreover, it is not clear why the *circumvenire* in the Vulgate text was said to have been used as "a technical Roman contract law term for 'overreaching'". *Cf* Whitman (n 6) at 1859.

40 Ludovicus Molina *De justitia et jure* Tom II (Geneva, 1733) at 235 (Tractatus II disputatio 350 n 5).

41 At the Dutch Universities the Latin Vulgata was no longer used in the study of the New Testament. Calvinist ministers were expected to be able to read the Greek text. See HJ de Jonge *De bestudering van het Nieuwe Testament aan de Noordnederlandse universiteiten en het Remonstrants Seminarie van 1575 tot 1700* (Amsterdam, 1980) *passim*.

Greek.[42] However, this does not mean that Westerman no longer regarded the text of 1 Thessalonians 4:6 as in conflict with fair-price principles.

Godefridus Udemans, who studied theology in Leiden, is regarded as one of the fathers of the Further Reformation and Calvinistic Work Ethic, according to which working hard is agreeable to God and profiting from trading a sign of God's blessing, but profits should be used to honour God. In listing the things a merchant should avoid, Udemans, as regards fair-price principles focused primarily on monopoly. This may be seen in the fragment quoted above and on the following pages, where Udemans' aversion to monopoly is further elaborated. In this fragment, he based his view on two authoritative texts. The first is Isaiah 5:18, again quoted from the Deux Aes Bible: "*Wee den ghenen die hen te samen koppelen, met loosen stricken om onrecht te doen, ende met waghenseelen te sondighen*."[43] The second text is C 4 59 1, the Roman-law prohibition of monopoly. Whitman believed that because in this text fair pricing was discussed with reference to the issue of monopoly only, it showed that the Dutch were discarding the concept of proportionality in contract law and trading.

Petrus Wittewrongel, the third author, also belonged to the Further Reformation. He studied philosophy in Leiden and, compared to the other two, paid greater and more explicit attention to proportionality. He stated that Christian merchants, as a principal rule, should usually contract for a fair price. In addition to the fragment quoted above, Wittewrongel argued that in exceptional cases some deviation from the fair price would be justifiable. Namely, if the seller had to go to great trouble to be able to deliver certain merchandise, or if the seller had to store the merchandise carefully for a considerable period. Whitman suggested that we should read the Wittewrongel fragment with "some literary sensitivity" and compare it to "the fulminations of the non-Dutch literature on price". Then we would see that a critical change was underway.[44]

5 Conclusions

There are no grounds to assume that in early modern times legal thinking in Western Europe faced a conflict between the strict standards of traditional Christian morality and the liberal principles of Roman law. It was in its Christianised, Justinianic form that Roman law had penetrated the Western world, and during the Middle Ages, through interpretation and misinterpretation, it had become even more strongly permeated by Christian values. According to the Scripture people ought not to deceive each other in commercial intercourse, and the few scattered texts of Roman law that seemingly stated the opposite were interpreted in a restrictive sense. The permissible

42 Thereby using the *Editio Regia* (1550) of Robert Estienne (1503-1559).
43 Translation: Woe to those who draw iniquity with false cords, and sin as with cart ropes.
44 Whitman (n 6) at 1866.

"circumventing" of the Digest was supposed to be considerably limited by various general provisions, such as those concerning fair price, error as regards quantity and quality, protection of minors and, last but not least, the general prohibition against the act of fraud itself. This was the legacy that the "Old Authorities" of Roman-Dutch law had received from the medieval *ius commune*. In some ways they may have further adapted this legacy to the world of early modern capitalism, but there is no evidence that in some way they discarded the protection against *laesio enormis*, based on C 4 44 2, in favour of a more liberal commercial approach.

Like the "Old Authorities" who had their precursors in the jurists of the medieval *ius commune*, the Calvinistic ministers who wrote manuals for Christian merchants had their predecessors in the early modern scholastics who wrote about the forum of the conscience. The ministers followed in their footsteps by adhering more strictly to the doctrine of restitution, holding that as a fundamental rule the fair price had to be upheld. In so doing, they did not deviate significantly from their catholic contemporaries.[45] A comparison of Catholic and Calvinistic writings shows differences, but more in approach than in stringency in upholding norms on fair pricing. The main difference is that the ministers relied almost exclusively on biblical arguments to substantiate their views, and did not discuss moral issues in legal terms. Another difference was that in the case of the Catholic authors their extensive casuistry (are these the "fulminations on price" Whitman spoke of?) almost eliminated the need to consult one's own conscience. At the same time the Catholic authors accepted, as Wittewrongel did, that in certain situations a deviation from the fair price was justifiable.

On the basis of the evidence presented by Whitman it is difficult to construe a clash between traditional Christian ethics on the one hand and Roman law on the other. In addition, we cannot say that vernacular handbooks on Roman-Dutch law and those on commercial ethics show the same tendency of abandoning the longstanding just price-principles. The two differed, but on closer examination, neither displays the suggested tendency. The legal works emphasised the technicalities of legal doctrine and practice, whilst the moral handbooks emphasised biblical provisions and deliberations of a more moral nature. However, that does not mean that the legal works favoured immorality, or that the moral handbooks discarded traditional views on fair pricing. To ensure fair prices, legal works largely followed the traditional legal doctrine on *laesio enormis*, and moral works the stricter standard of the forum of the conscience. Nevertheless the standards are compatible. The law determined the standard required for peaceful and efficient coexistence, and Calvinistic morality a standard that was in accord with the will of God. It is not surprising that the latter

45 *Cf*, the treatment of the just-price requirement in the commercial manuals of Juan de Hevia Bolaño (*c* 1570-*c* 1623) and Sigismondo Scaccia (1564-1634). See, too, Juan de Hevia Bolaños *Curia Philipica* (Madrid, 1790) tom II lib 1 cap 12 n 35 (312) and Sigismundus Scaccia *Tractatus de comerciis et cambio* (Cologne, 1738) § 1 q 7 par 2 ampl 10 n 41 (226-227).

set a slightly higher standard. Unfortunately, my findings invalidate Whitman's arguments to some extent. In my view, it is impossible to accept either that in early modern times Roman law was a threat to the moral standards of the time, or that the Dutch, with reference to Roman law, rejected longstanding principles of fair price.

The real attack on concepts of fair price and proportionality was to come from the Schools of Natural Law with their concept of "freedom of contract", which suggested that parties should be free to determine the content of contracts, and not be subject to various restrictions.[46] At a later stage, this idea culminated in the writings of Christian Thomasius (1647-1713) specifically. This is, however, a new chapter, going beyond the scope of this contribution.

ABSTRACT

This contribution contains a continuation of an earlier article dealing with the concepts of *iustum pretium* and proportionality in Roman law and the *ius commune*. Its findings for Roman-Dutch law, however, appear to be incompatible with the conclusions expounded by James Whitman in an article on the role of Roman law in early modern commerce. Whitman maintained that the traditional Christian rule on fair pricing was no longer upheld by the jurists and clergymen of the Dutch Republic. By appealing to Roman law, the Dutch would have abandoned the longstanding just-price principles and would have considered active fraud by malicious salesmen to be permissible. This would appear from vernacular books on Roman-Dutch law, which, as a consequence, exuded an atmosphere of immorality. Moreover, the new commercial attitude was said to be supported by a number of moral handbooks written by Calvinistic clergymen. However, when reinvestigating the sources quoted from the wider perspective of the civilian tradition, other "Old Authorities" of Roman-Dutch law and the true nature and purpose of the Further Reformation, there is no choice other than to query Whitman's findings.

46 Vera Langer *Laesio enormis. Ein Korrektiv im römischen Recht* (Marburg, 2009).

STELLUNG DES GRIECHISCHEN RECHTS IN DER ANTIKEN RECHTSGESCHICHTE

Joachim Hengstl*

1 Betrachtet man das Entstehen, Blühen und Vergehen antiker Kulturen, deren Kontakte untereinander und den damit verbundenen kulturellen Austausch sowie die Vielfalt der wechselseitigen Einflüsse, so drängt sich unter juristischem Blickwinkel schnell der Eindruck auf, daß an diesem Wechselspiel auch das Recht teilgenommen haben muß. Das Bild eines fließenden und wachsenden Stroms rechtlicher Entwicklung, tradiert von Epoche zu Epoche, über die Kulturgrenzen und über die Zeiten hinweg, vielleicht bis heute wirkend, ist ebenso eindruckvoll wie überwältigend. Der Gedanke einer zusammenhängenden Geschichte wenigstens der antiken Rechtsordnungen ist nicht neu. Vor allem L Wenger hat diese These entwickelt, bereits in seiner Wiener Antrittsvorlesung 1904, „Römische und antike

* Akademischer Oberrat aD, Universität Marburg. Siehe H Barta „*Graeca non leguntur*“? *Zu den Ursprüngen des europäischen Rechts im antiken Griechenland. Ein Beitrag zur Wissenschafts- und Kulturgeschichte des Rechts*. Bd 1 (Wiesbaden, 2010) ISBN 978-3-447-06121-6 gr 8; XIX 683 S; 23 Ill; Bd II[1]/II[2] *Archaische Grundlagen* (Wiesbaden, 2011) ISBN 978-3-447-06278-7 gr 8; XVIII 765 S mit 12 Abb, bzw ISBN 978-3-447-06587-0 gr 8; XVIII 522 S mit 8 Abb – Zu Bd I des Werks vgl ferner (durchweg kritisch) S Günther in (2011) 12 *Bryn Mawr Classical Review* 61, sowie Th Finkenauer in *sehepunkte* (2012) 12 Nr 12 [15-12-2012], URL: *http://www.sehepunkte.de/2012/12/18091.html*. Die Besprechungen der Bände sind nacheinander entstanden. Der Versuch einer Angleichung hätte die Fertigstellung unabsehbar verzögert. Es wird daher um Nachsicht bei stilistischen und inhaltlichen Ungleichheiten gebeten.

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Rechtsgeschichte“,[1] und sein ebenso umfassendes wie umfangreiches Meisterwerk *Die Quellen des römischen Rechts*[2] ist von dieser Auffassung geprägt. Andere Rechthistoriker haben aus unterschiedlichen Blickwinkeln den gleichen Gedanken vertreten. Die in der Neuzeit ständig zunehmende Flut an Quellen vor allem aus dem Alltag der verschiedenen antiken Rechtsordnungen scheint die These von Übernahmen und Abhängigkeiten erst recht zu bestätigen. Die Untersuchungen zu den „internationalen“ kulturellen Beziehungen nehmen gleichfalls zu[3] und untermauern den Gedanken, daß das Recht dabei nicht unbeeinflußt geblieben sein kann.[4] In dieser Weise gestärkt, sollte die Idee eines sich ständig entwickelnden Rechtswesens überzeugen – über die Zeiten hinweg, selbst das Rechtsdenken der Römer und die Institutionen des Römischen Rechts nachhaltig beeinflußend und folglich auch noch heutige Rechtssysteme zumindest der westlichen Welt.[5] Der Gedanke einer derartigen, wechselseitigen Beeinflussung in der Rechtsmaterie und einer epochen- und grenzenübergreifenden, stetigen Rechtsentwicklung ist in den letzten Jahrzehnten allerdings nicht mehr artikuliert worden.

Barta, emeritierter Zivilrechtslehrer an der Universität Innsbruck, greift diesen Gedanken auf, erweitert ihn und sucht ihn in einem auf vier Gesamtbände angelegten monumentalen Werk zu verifizieren. Sein Blickwinkel wie seine durchgängig tragende These sind mit dem Titel *Graeca non leguntur* bestens beschrieben: Man habe die literarische Überlieferung der Griechen nicht hinreichend beachtet und deren rechtsgeschichtliche Tragweite folglich völlig verkannt und übergangen. Das griechische Recht habe zwar nicht als Rechtsordnung des Alltags überlebt, wohl aber hätten griechische Rechtsvorstellungen und Rechtseinrichtungen Einfluß auf und über die römische Epoche hinaus gehabt. Darüber hinaus ist Barta bemüht, Verbindungslinien zwischen den griechischen Rechtsinstitutionen und dem Alten Orient einschließlich des Pharaonischen Ägypten zu ziehen. Sein Unterfangen, die zeitlichen und räumlichen Distanzen zwischen den verschiedenen Kulturen zu überbrücken, ist ebenso anspruchsvoll wie weit gespannt. Eine nicht minder schwierige Aufgabe ist es freilich, ein derart umfangreiches und ehrgeiziges Werk angemessen zu beschreiben und zu bewerten, noch dazu, bevor es vollständig vorliegt.

1 Graz, 1905.

2 L Wenger *Die Quellen des römischen Rechts* (Wien, 1953) *passim*.

3 Siehe beispielsweise und vor allem W Burkert *Die Griechen und der Orient. Von Homer bis zu den Magiern* (München, 2003). Das maßgebliche altorientalische Textmaterial findet sich in Umschrift und Übersetzung bei KA Kitchen & PJN Lawrence *Treaty, Law and Covenant in the Ancient Near East* 3 Bde Pt 1: *The Texts*; Pt 2 *Text, Notes and Chronograms*; Pt 3: *Oral Historical Survey* (Wiesbaden, 2012).

4 Zum altorientalischen, altägyptischen, jüdischen Recht uam siehe R Westbrook (ed) *A History of Ancient Near Eastern Law* 2 Bde (Leiden / Boston, 2003).

5 Vgl dazu beispielsweise R David & G Grasmann *Einführung in die großen Rechtsysteme der Gegenwart. Rechtsvergleichung* (München / Berlin, 1966) (Barta bekannt, zB S 191 Anm 830).

Es erscheint sinnvoll, vorab die rechtshistorischen Gegebenheiten zu resümieren, innerhalb deren sich Bartas Darstellung bewegt. Damit läßt sie sich besser einordnen. Die *Graeca*, auf die Barta sich bezieht, sind nämlich im Wesentlichen literarische Quellen aus dem klassischen und hellenistischen Athen. Athen war damals Teil der griechischen Polis-Welt, die ihren Ursprung mitsamt all ihren geistigen Strömungen und Auswirkungen im 8 / 7 Jahrh v Chr gehabt hat. Das ist übrigens auch die Zeit der griechischen Kolonisierungsbewegung gewesen. Die Alltagsquellen dieser wie der späteren Zeit bestehen weitgehend aus Inschriften aus den verschiedenen *poleis* und hernach aus den Papyri des griechisch-römischen Ägypten. Auf dieses Material geht Barta bislang kaum ein.

Das rechtshistorische Umfeld ist rasch skizziert. Die Schrift ist um 3000 v Chr erfunden und alsbald in Ägypten und in Mesopotamien auch zur Aufzeichnung rechtlicher Vorgänge benützt worden. Während Ägypten über die nächsten drei Jahrtausende zumeist isoliert geblieben ist, entwickelten sich in Mesopotamien und seiner Umgebung bis zur Zeitenwende eine Reihe an Reichen, oder diese übernahmen die Herrschaft über mehr oder minder große Regionen. Die Schrift waren in Ägypten die Hieroglyphen, und hieraus wurden die hieratische und von dieser die demotische Schrift abgeleitet. Letztere ist bis in nachchristliche Zeit benutzt und nach kurzer Unterbrechung vom Koptischen abgelöst worden. Man wird nicht fehl gehen, wenn man diese Entwicklung neben Anderem als Manifest ägyptischer Selbstbehauptung ansieht. An Quellen wie an Untersuchungen zum Recht des pharaonischen Ägypten mangelt es nicht, und es liegen sogar Gesamtdarstellungen vor.[6] All das genügt freilich nicht, um Anhaltspunkte für rechtliche Einflüsse zu bieten, die über die Grenzen Ägyptens hinausreichen. Das ist nicht zuletzt durch die Quellenlage bedingt. Rechtlich relevantes Alltagsmaterial gibt es nämlich in nennenswertem Maße erst aus dem Neuen Reich und nur aus einem einzigen Ort, der Siedlung der Arbeiter an den Königsgräbern bei dem heutigen Deir el-Medineh (Oberägypten). Von hier liegen reichlich 10000 hieratische Ostraka und Papyri vor.[7] Verallgemeinern lassen sich die Aussagen der aus einer derartigen Siedlung stammenden Texte nicht.

Aus der Zeit vor dem Neuen Reich fehlt es keineswegs an zahlreichen Rechtsquellen. Sie sind jedoch zeitlich, örtlich und inhaltlich zerstreut und nicht leicht heranzuziehen. Das Bild des Justizwesens muß aus Funktionärstiteln

6 Siehe zuletzt SL Lippert *Einführung in die altägyptische Rechtsgeschichte* (Münster ua, 2008) *passim*, und vgl dazu T Mrsich „Methodisches zur altägyptischen Rechtsgeschichte“ I, II, in (1913) 130 *Zeitschrift der Savigny Stiftung für Rechtsgeschichte* Rom Abt S 507-526; (1914) 131 Rom Abt S 349-369.

7 Siehe dazu ua W Helck *Die datierten und datierbaren Ostraka, Papyri und Graffiti von Deir el-Medineh*, bearbeitet von A Schlott (Wiesbaden, 2002); A Dorn & T Hofmann (eds) *Living and Writing in Deir el-Medine. Socio-historical Embodiment of Deir el-Medine Texts* (Basel, 2006); S Allam „Recht im pharaonischen Ägypten“ in *Die Rechtskulturen der Antike. Vom Alten Orient bis zum Römischen Reich* hrsgg von U Manthe (München, 2003) S 15-54. Vgl ferner <*www.uni-muenchen.de/dem-online*> *oder www.lmu.de/dem-online*.

und den diversen Urkunden einer Administration herausgearbeitet werden, die die Gewaltentrennung noch nicht kennt.[8] Einem Rechtstransfer fehlt damit die Voraussetzung eines umfassend durchgebildeten, vorbildhaften Rechtswesens mit entsprechenden Institutionen. Rechtlich relevantes Material bieten ab der ägyptischen Spätzeit um 700 v Chr die bis ins 2. Jahrh n Chr reichenden demotischen Urkunden.[9] Von diesem Material an Alltagsurkunden lassen sich gleichfalls keine Einflüsse erwarten, die sich auf andere Rechtsordnungen erstreckt haben könnten. Man wird sie grundsätzlich verneinen dürfen. Sachlich liegt das an der geographischen Isolierung des Pharaonenreiches. Kulturelle und gedankliche Strömungen haben diese Schwelle durchaus überwunden. Sowohl archäologische Funde wie das Alte Testament belegen das. Rechtsvorstellungen aber haben sich schwerlich auf vergleichbare Weise zur Kopie angeboten. An dieser Bewertung ändern weder die „persische Reichsautorisation" noch die demotischen Rechtsbücher etwas. Unter der „Reichsautorisation" wird eine ausdrückliche und billigende Anerkennung lokaler Normen unter achämenidischer Herrschaft verstanden.[10] Sie kann also nur nach Ägypten hinein, nicht aber als Vorlage fremder Rechtsordnungen gewirkt haben. Die demotischen Rechtsbücher belegen zwar ein hohes Maß an Jurisprudenz;[11] eine über Ägypten hinausreichende Wirkung ist jedoch nicht zu erkennen und auch nicht zu erwarten.

In Mesopotamien und in seiner Umgebung ist die Keilschrift benützt worden. Der Quellenreichtum der rechtlichen Überlieferung in Keilschrift ist hoch, und die Zahl der dadurch belegten Epochen, Reiche und Regionen ist nicht gering. An literarischen oder philosophischen Äußerungen zum Recht mangelt es gänzlich. Die verschiedenen Rechtsordnungen sind lediglich durch Alltagsurkunden, Herrschererlasse; Briefe und Ähnliches mehr dokumentiert. Zu erwähnen sind ferner die keilschriftlichen Rechtssammlungen, deren Gesetzescharakter umstritten ist.[12] Merkbar sind lokal

8 Siehe beispielhaft A Philip-Stéphan *Dire le droit en Égypte pharaonique. Contribution à l'étude des structures et mécanismes juridictionnels jusqu'au Nouvel Empire* (Bruxelles, 2008) *passim* (vgl dazu die eingehende Besprechung von J Hengstl in (2014) 131 *Zeitschrift der Savigny Stiftung der Rechtsgeschichte* Rom Abt S 424-429).

9 Siehe J Manning „Demotic Law" in Westbrook (o Anm 4) S 819-862.

10 Hierunter ist der Gedanke an eine ausdrückliche und billigende Anerkennung lokaler Normen zu verstehen, grundlegend P Frei „Zentralgewalt und Lokalautonomie im Achämenidenreich" in *Reichsidee und Reichsorganisation im Perserreich* (Freiburg / Göttingen, ²1996) S 5-31; Dies „Die persische Reichsautorisation. Ein Überblick" in (1995) 1 *Zeitschrift für altorientalisches und biblisches Recht* 1-35, jeweils mwN Darauf einzugehen besteht hier kein Anlaß.

11 Siehe SL Lippert *Ein demotisches juristisches Lehrbuch. Untersuchungen zu Papyrus Berlin P 23757 rto* (Wiesbaden, 2004); Dies aaO (o Anm 6); dazu ferner J Hengstl „Gab es Rechtswissenschaft in der außerrömischen Antike?" in R van den Bergh *et al* (eds) *Libellus ad Thomasium. Essays in Roman Law, Roman-Dutch Law and Legal History in Honour of Philip J Thomas* ((2010) 16(1) *Fundamina editio specialis*) S 164-183 (180-182).

12 Vgl dazu die Sammlungen in R Haase *Die keilschriftlichen Rechtssammlungen in deutscher Fassung* (Wiesbaden, ²1979); oder M Roth *Law Collections from Mesopotamia and Asia Minor* (Atlanta, 1995), siehe ferner Kitchen / Lawrence aaO (o Anm 3).

oder zeitlich bedingte Eigenheiten. Die Überlieferungslage erlaubt jedoch keine weitergehenden Schlüsse, da nur selten größere Urkundengruppen vorliegen oder sich zusammenfügen lassen. Für die Annahme, irgendwelche keilschriftlich belegten Rechtsinstitute hätten sich über den keilschriftlichen Bereich ausgewirkt, gibt es keinen zweifelsfreien Anhaltspunkt.

Ein Blick muß an dieser Stelle auch der israelitischen Rechtsüberlieferung gelten, die vor allem das Alte Testament enthält. Die Eigenständigkeit des israelitischen Gedankenguts, aber auch die Verflochtenheit mit den Israel umgebenden Hochkulturen ist überdeutlich. Von einem Einfluß israelitischen Rechtsdenkens oder israelitischer Rechtsinstitute auf die Rechtsordnungen der Umgebung oder der nachfolgenden Zeit ist jedoch zumindest bislang nichts festzustellen.

Mit den Rechtszeugnissen des pharaonischen Ägypten, dem keilschriftlichen Bereich und dem im Alten Testament manifesten Judentum liegt ein über 2000 Jahre umfassendes Quellenmaterial rechtlicher Natur vor. Nicht erfasst sind mit diesen umfangreichen Quellenbeständen mannigfache Kultur- und Rechtsordnungen. Von ihnen gibt es nur geringfügige Quellenbestände, die sich aber ständig vermehren. Beispiele hierfür sind nabatäische oder früharabische Zeugnisse.

Dennoch überlappen sich die Zeugnisse der antiken Hochkulturen lediglich in ihren Endphasen mit den Zeugnissen der frühen griechischen und der frühen römischen Rechtsordnung. Die griechische Poliswelt hat ihre Anfänge im 8. und 7. Jahrh v Chr, und das sagenhafte Gründungsdatum Roms ist 753 v Chr. In Mesopotamien herrschte zu dieser Zeit eine Gemengelage. Seit der Mitte des 2. Jahrt v Chr war nämlich die ethnische Gruppe der Aramäer aus der arabischen Wüste allmählich nach Nordsyrien und Mesopotamien vorgedrungen und hatte dort um die Wende zum 1. Jahrt v Chr verschiedene Kleinstaaten gebildet. Das neuassyrische Reich unterwarf diese Kleinstaaten im 9. und 8. Jahr v Chr. Obgleich das Reich bereits damals durch aramäische Deportierte und Einwanderer aramäisch geprägt gewesen ist, und obgleich es auch anderweitige aramäische Zeugnisse gibt, ist es doch nicht möglich, das Bild einer „aramäischen Rechtsordnung“ zu entwerfen – es hat sie vermutlich nie gegeben.[13] Nicht besser ist es um die Einflußmöglichkeiten einer „ägyptischen Rechtsordnung“ bestellt. In 656 v Chr beginnt die Spätzeit des pharaonischen Ägypten und damit die – bis in das 20. Jh n Chr währende – Fremdherrschaft über das Land. Bereits in der vorausgehenden „3. Zwischenzeit“ (1070-656 v Chr) hat sich Ägyptens politische Lage stark verändert; das Land hatte seine Außenbesitzungen verloren und war in seine eigentlichen geographischen Grenzen zurückgedrängt. Weiterreichende rechtliche Einflüße kann man für die Folgezeit lediglich in zwei Momenten vermuten. Beide sind bereits oben erwähnt worden – die „persische Reichsautorisation“ und die demotischen Rechtsbücher, und beiden ist dort jede außerägyptische Wirkung abgesprochen worden.

13 Zu den Aramäern siehe vor allem E Lipinski *The Aramaeans. Their Ancient History, Culture, Religion* (Leuven / Paris, 2000) mwN.

Diese Feststellung muß auf den ersten Blick erstaunen. An Handelsbeziehungen und kulturellen Einflüssen zwischen den verschiedenen Kulturen und über große Entfernungen hinweg hat es bereits in den vorgeschichtlichen Zeiten nicht gemangelt und erst recht nicht in der Folgezeit. Barta erwähnt und erörtert sie immer wieder, mit weiterführenden Nachweisen. Es ist also unnötig, auf dieses Thema hier weiter einzugehen. Eine andere Frage verlangt aber Beachtung: Weshalb und auf welche Weise sollen Rechtsordnungen unterschiedlicher und zeitlich verschiedener Kulturen auf einander einwirken? Vollends verfehlt und anachronistisch ist es, ein Streben nach Rechtsvereinheitlichung in antiken Rechtsordnungen anzunehmen.[14]

2 Der erste Band von Bartas Werk enthält neben den üblichen Präliminarien und einer „Einleitung“ (S 1-56) lediglich das 1. Kapitel „Perspektiven“ (S 57-561), welches in zehn Unterkapitel unterteilt ist: „1. Zum Buchtitel“; „2. Zum Wert humanistischer Bildung“; „3. Europa und griechisches Recht“; „4. Phasen der römischen Rechtsentwicklung“; „5. ʻAndersheitʼ der griechischen Rechtskultur?“; „6. Gab es ein ʻgemeinesʼ griechisches Recht?“; „7. Olympische Religion und Heroenkulte“; „8. Rechtskollisionen im archaischen Griechenland“; „9. Anfänge des Völkerrechts“; und „10. Rezeption durch Rom?“.

Richtungsweisende Weichen werden bereits in der Einleitung dargestellt. Vor allem ist es der Begriff „Rechtsdenken“, den Barta vertritt (S 11-13). „‘Rechtsdenken’ umfaßt (für ihn) alle Facetten der Beschäftigung mit dem Recht (S. 11).“ Die Fortsetzung definiert Bartas Blickwinkel zweifelsfrei: „(Zum Rechtsdenken) gehört die Rechtspraxis (Gesetzgebung, materielle und formelle Rechtsanwendung aller Art, Vertragspraxis und Kautelarjurisprudenz, Rechtsberatung, rechtspolitische und rechtsethische Diskurse und Dialoge, Gerichtsreden, Urkunden, Schriftsätze) ebenso wie der Beginn einer Rechtstheorie und von Methodenfragen (Lehre von der Rechtsanwendung, Hermeneutik, Lückenfüllung uam.); die Rechtsphilosophie, die Lehre von der Gesetzgebung und den Rechtsquellen ebenso wie das Nachdenken über Billigkeit/Epieikeia und Naturrecht.“ Ob sich ein heutiger Richter, Rechtsanwalt oder Verwaltungsbeamter auf Grund dieser Definition zum „Rechtsdenker“ geadelt fühlen mag? Bartas Sichtweise ist völlig modernistisch. Das muß kein Schade sein, denn irgendeiner Lupe oder Brille muß sich der heutige Rechtshistoriker bedienen, um vergangene Rechtsordnungen zu ergründen.

Vor dem Hintergrund der weiteren Ausführungen fällt bereits in diesem Abschnitt Bartas vorwiegend deskriptive Vorgehensweise auf. Dem entspricht zudem die Art, in der Barta ständig irgendwelche Phänomene zwar umreißt und ihnen Fortwirkungen beimißt, ohne diese aber weiter zu belegen. Ein Beispiel ist

14 So S 61 bei Anm 226. Vgl dazu J Hengstl „Zur Frage von Rechtsvereinheitlichung im frühaltbabylonischen Mesopotamien und im griechisch-römischen Ägypten – Eine rechtsvergleichende Skizze“ in 3e série (1993) 40 *Revue Internationale des Droits de l‘Antiquité* S 27-55.

sein Gedanke, „die griechische Dichtung und auch die Geschichtsschreibung (hätten) immer wieder grundlegende Fragen von Recht und Gerechtigkeit aufgegriffen“ (S 12). Wohl wahr, aber wie hat sich das auf die jeweilige Rechtsordnung ausgewirkt?[15] In entsprechender Weise pauschal und der exegetischen Begründung entbehrend sind Bartas Monita, ältere Literatur sei von den neueren Rechtshistorikern weitgehend oder völlig übergangen worden, und letztere hätten sich so deren Sichtweise entzogen. Der Gedanke taucht nicht auf, daß neue Quellen und Methoden vielleicht erst der eigenständigen Sichtung und Auswertung bedürfen, ehe Altes auf einer neuen Basis bewertet und nötigenfalls integriert werden kann. Soweit vorab!

Die „Einleitung“ gibt im Weiteren einen „Kapitelüberblick“ (S 13-21), informiert „Über Zitate, Zitierweise, Gliederung“ (S 21-25), geht unter dem Titel „Troje ‘Europa und griechisches Recht’“ vor allem mit HJ Wolff ins Gericht (S 25-29),[16] rügt den Verzicht auf „Neue Disziplinen für Rechtswissenschaft und Rechtsgeschichte“ [S 29-31; zB Soziobiologie: „Eine richtig verstandene Rechtsgeschichte wäre in der Lage (gewesen), rechtliche Probleme der Antike, insbesondere auch Griechenlands, in einen antik-gegenseitigen und einen Bezug zur Gegenwart zu bringen“ (S 30)] und die „Neubewertung des griechischen und orientalischen Einflusses“ (S 31-34) zu berücksichtigen, wobei „bereits Erkanntes … systematisch mit dem geltenden Recht in Verbindung zu setzen (wäre)“ (S 33). Eine Auflistung von Topoi, bei denen Barta einen „interkulturellen Vergleich“ vermißt (zu welchem Zweck bleibt unerörtert) und mehrere „Griechische Rechtsfälle“ bilden den nächsten Abschnitt (S 34-49). Die Schilderung der Fälle ist anekdotisch und trägt zur Rechtsgeschichte so wenig bei wie der Rest der Einleitung.

So viel Worte über die 56 Seiten der Einleitung müssen erstaunen. Die Einleitung ist freilich beispielhaft für Bartas (bisheriges) Vorgehensweise insgesamt. Barta agiert vor allem deskriptiv; er resümiert oder zitiert eine Fülle an Lesefrüchten, die seine Belesenheit erweist und sich in dem umfangreichen Literaturverzeichnis spiegelt.[17] Das erfolgt nicht ohne Schärfen zu vorgeblichen Versäumnissen der

15 Zum Verhältnis von Dichtung und Recht vgl zB R Schmitz-Wiegand in *Handwörterbuch zur deutschen Rechtsgeschichte* hrsgg von A Erler / E Kaufmann (Berlin, 1990) Bd 4 Sp 232-249 *sv* „Recht und Dichtung“ (Sp 240ff zu Dichtung als Rechtserkentnisquelle); Dies in *Handwörterbuch zur deutschen Rechtsgeschichte* hrsgg von A Cordes / H Lück / D Werkmüller / R Schmitz-Wiegand (Berlin, [2]2008) Bd 1 Sp 1034-1943, *sv* „Dichtung und Recht“ (Sp 1035-1038 zu Dichtung und Recht in ihrem Wechselbezug; Sp 1038-1041 zu Dichtung als Rechtserkentnisquelle). Allgemeingültiger Grundgedanke ist dabei, daß Recht kein abgesondertes, vom Alltag fein säuberlich geschiedenes Sonderdasein führt, sondern daß die Rechtsvorstellungen das alltägliche Verhalten und eben auch die literarischen Schöpfungen prägen. Naturgemäß vermag jede geistige Entwicklung wiederum das Rechtsdenken zu beeinflussen, aber das Maß ist jeweils nachzuweisen.

16 Siehe HE Troje *Europa und griechisches Recht* (Frankfurt, 1971). Trojes Gedanken scheinen für B nach allem den maßgeblichen Leitfaden – darf man sagen „Evangelium“? – auf seinem Weg in die antike Rechtsgeschichte gebildet zu haben.

17 Der ungewöhnlich Umfang des Literaturverzeichnisses dürfte sich daraus erklären, daß Barta alles Gelesene aufführt und nicht nur das Verwendete.

heutigen antikrechtlichen Disziplin, der Barta die Vernachlässigung sowohl früherer rechtshistorischer Erkenntnisse wie auch neuerer rechtlicher wie außerrechtlicher Methoden vorwirft. Der alte Grundsatz *cui bono* bleibt dabei völlig außer Betracht. Nirgendwo wird nämlich profund, detailliert und anhand sorgsamer Exegesen sowie ausgeführter Beispielen analysiert, in welcher Weise denn jene Erkenntnismöglichkeiten die aktuelle antikrechtliche Forschung fördern könnten. So anschaulich, wenn auch weitschweifig Bartas Darstellung ist, so gerät sie doch nur zu einer Gesamtschau vor allem der antikrechtlichen Sekundärliteratur. Dieses Beginnen ist von einem letztlich anerkennenswerten Eifer getragen: Barta will mit anachronistischer Beweisführung den Lebenswert der antiken Rechtsgeschichte selbst für das heutige Recht nachweisen. Diese Sichtweise ist verfehlt, denn die antike Rechtsgeschichte ist vorrangig Teil der Geschichte, obgleich ihre Erforschung unbedingt auf juristisch fundierter Methodik beruhen muß. Glaubt man freilich, die Geschichtswissenschaft sei, wie vielleicht mehr oder minder die gesamten Geisteswissenschaften, entbehrlich, weil ökonomisch ineffektiv, so gibt es auch für die antike Rechtsgeschichte keine Existenzberechtigung. Selbst die Rechtsprechung läßt sich, wie der Blick auf das spätrömische „Zitiergesetz" zeigt, ohne Rücksicht auf den Gehalt ökonomisieren.[18]

Bereits die Einleitung läßt den weiteren Gang der Darstellung erkennen: Barta will keine Geschichte des griechischen Rechts oder dessen Institutionen schreiben, sondern eine Ideengeschichte mit dem Anspruch, die Fortwirkung der geschilderten Ideen nachzuweisen. Bartas Werk ist sehr anschaulich angelegt. Das detaillierte Inhaltsverzeichnis (S XI-XIV) übernimmt einen guten Teil der zahlreichen Zwischentitel; das Abkürzungsverzeichnis (S XV-XVIII) löst auch Abkürzungen auf, die gewöhnlich unbemerkt benützt werden;[19] 23 Abbildungen illustrieren (Verzeichnis S XIX); ein „Glossar" (S 563-575) erläutert eine Vielzahl an Begriffen; das „Literaturverzeichnis" (S 578-669) ist fast schon eine Bibliographie zur antiken Rechtsgeschichte geworden;[20] der Sachindex („Stichworte" S 671-683) umfaßt Personen, Orte und Begriffe.

18 Nach dem 426 n Chr von Valentinian 3 erlassenen und von Theodosius 2 in *CTh* 1 4 3 eingefügten so genannten „Zitiergesetz" durften in Rechtsstreitigkeiten nur noch die Rechtsmeinungen von Papinian, Paulus, Ulpian, Modestinus und Gajus berücksichtigt werden, so zu sagen aus „ökonomischen Gründen".

19 ZB (auch hier unaufgelöst benützt) „vgl" = „vergleiche". Nachweis ausgefallen zu „ZÄS" = *Zeitschrift für ägyptische Sprache und Altertumskunde* (Berlin).

20 Man vermißt allerdings beispielsweise L Rosetti „Materiali per una storia della letteratura giuridica attica" in *Nomos. Direito e sociedade na Antiguidade Clássica* / *Derecho y sociedade en la Antigüedad Clàsica* ed por DF Leão / L Rosetti / M Céu Fialho (Coimbra / Madrid, 2004) S 51-73; E Volterra *Diritto Romano e diritti orientali* (Napoli, 1983) (Nd d Ausgabe Bologna, 1937); ferner J Hengstl „*Ex oriente lux* in der Rechtsgeschichte?" in *Timai J. Triantaphylopoulou* (Athen, 2000) S 39-57 (peripher gelegentlich und ablehnend zitiert in BII). Nicht aufgenommen ist ferner beispielsweise H Stilett *Montaigne für Lehrer* (Frankfurt/M, 2004) [nv] (zit S 96, Anm 385: korr „Stilettt" → „Stilett"). Leider finden sich in dem an sich so nützlichen Literaturverzeichnis immer

Ungeachtet all dieser durchdachten und nützlichen Hilfen ist Bartas Werk jedoch didaktisch, inhaltlich und in der Gestaltung keineswegs gelungen. Bereits in der Einleitung finden sich Exzerpte, die da wie auch in Kapitel 1 die fachgerechte Analyse und die explizite Argumentation ersetzen. Zwar ist es für den Leser bequem, anderweitige Sekundärbelege auf diese Weise an der Hand zu haben, in extensivem Maße dient es jedoch nicht der Übersicht, und vielfach ist es schlicht entbehrlich. Das gilt auch für die Vielzahl an Zwischentiteln, die keineswegs hierarchisch gegliedert sind. Auch hierin ist Bartas Vorgehensweise anekdotisch – Barta offeriert Alles in Allem eine Menge an (Lese- und Gedanken-)Früchten, ohne daraus aber ein gelungenes Kompott zu fertigen.

Graeca non leguntur ist ein Werk, welches bei künftigen Arbeiten zum griechischen und römischen Recht unbedingt herangezogen werden muß. Dafür bürgt bereits das umfangreiche Literatur-Verzeichnis (S 571-669), das fast zu einer Bibliographie zur griechischen Rechtsgeschichte geraten ist. Die Auswertung des reichlich herangezogenen Materials läßt freilich zu wünschen übrig. Die Quellenanalyse unterbleibt weitgehend, und es findet auch keine eingehende Auseinandersetzung mit der Sekundärliteratur statt. Bartas Argumentationsweise ist rein deskriptiv. Sie beschränkt sich im Wesentlichen auf Zitate und Textübernahmen, deren Zusammenstellung offenkundig dank verbindender Sätze hinreichend aussagekräftig sein soll.

Vor allem aber übersieht Barta bei all seinen Versuchen, über Räume und Zeiten hinweg, rechtliche Verbindungslinien zu ziehen, eine von Th Mayer-Maly vor Langem aufgestellte Prämisse:[21] Es kann für vergleichbare Falllagen nur eine begrenzte Zahl an rechtlich sinnvollen Lösungen geben, und es hat daher Ähnlichkeiten und Gleichheiten in den verschiedenen Rechtsordnungen gegeben, ohne daß sich daraus ein Einfluß erweisen ließe. Ein fremder Einfluß muß also nachgewiesen werden, und dafür genügen Ähnlichkeiten und Gleichheiten durchaus nicht.

3 Auf das Kapitel I „Perspektiven“ näher einzugehen, scheint angesicht der vorstehenden Ausführungen entbehrlich zu sein. Eigentlich ist mit ihnen bereits alles Wesentliche gesagt. Bartas Anspruch, sein enzyklopädisches Anliegen, die Fülle seiner Exzerpte und die umfassende Anlage seines Werks drohen jedoch, gerade Außenstehende in eine falsche Richtung zu weisen, weil ihnen die Kenntnis der realen Hintergründe fehlt. Was Bartas Meinung ist, könnte angesichts des monumentalen Charakters seines Werkes durchaus zu einer über Zitieren weiterwirkende

wieder Mängel, beispielsweise werden Abdrucke mal notiert, mal nicht. – S 511-561 sind allein die Titel der Unterabschnitte in die Kopfzeile übernommen worden; dies verwirrt. Siehe 184 Anm 795 ist eingangs offenbar „Vinogradoff“ (zit bereits Anm 793) ausgefallen. Ungut ergeht es Blass: II² zitiert als „Blaas“, und im Literaturverzeichnis auf 19793 statt auf 1979 datiert.

21 Th Mayer-Maly „Die Wiederkehr von Rechtsfiguren“ in *Juristenzeitung* (1971) S 1-3.

antikrechtliche Darstellung werden. Das freilich ist weder Bartas Anliegen noch – bei allem Respekt vor seiner Arbeit – seinen Ergebnissen angemessen.

„Kapitel I ist bestrebt – die Ausführungen in der Einleitung fortsetzend und vertiefend – auf weitere Grundlagen einzugehen" (S 57). Dieser einleitende Satz beschreibt den Inhalt von Kapitel I bestens. Es begegnet eine Fülle an Namen von Rechtshistorikern, Zitaten, Exzerpten und ausführlichen Textübernahmen. Jeder Gedanke, der eine Brücke vom griechischen zum römischen Recht auszudrücken oder auch nur anzudeuten scheint, wird *in extenso* vorgetragen; die Zeitgebundenheit vieler Auffassungen der Sekundärliteratur wird nicht hinterfragt. Viel wird dabei vor Augen geführt, was zur griechischen Rechtsgeschichte wenig bis nichts beiträgt. Ein Beispiel ist der kleine Unterabschnitt zur „Periodisierung der griechischen Rechtsentwicklung" (S 75-77). Da werden verschiedene Zeitraster vorgestellt, ohne daß Barta Rechtsgeschichtliches über einzelne Schlagwörter hinaus berührte. Wenn man aber schon die Zeit vor 800 v Chr erwähnt, so hätten auch die Linear B-Schrift und deren Zeugnisse erwähnt werden sollen. Dabei handelt es sich vorwiegend um Notizen im Rahmen der zentralisierten Güterverwaltung in frühgriechischer Sprache, die zwar keine Rechtsurkunden enthalten, die aber vielfältige Details zu Wirtschaft und Gesellschaft erkennen lassen und folglich durchaus nicht völlig rechtsfern sind.[22]

Statt dessen konstruiert Barta „Einflußphasen des griechischen auf das römische Recht" (S 77-84), die sich über rund 1000 Jahre hinweg und auf nahezu alle Gebiete der römischen Rechtsordnung erstreckt haben sollen. Wiederum wird mehr behauptet als bewiesen. Die von Barta als „große und frühe griechische Gesetzgebungen" bezeichneten Gesetze des Zaleukos und des Charondas hätten statt eines wenig aussagekräftigen Exzerpts aus einem 90 Jahre alten Werk von GM Calhoun[23] und den Verweis auf Bartas spätere Erörterung doch wohl bereits hier einen wenigstens kursorischen Vermerk zu Historizität, Inhalt und Sekundärliteratur verdient.[24] Barta übersieht übrigens durchaus nicht die Existenz und die Leistung der griechischen Kautelarjurisprudenz. Er thematisiert sie aber (bislang?) nicht eigens, sondern begreift sie als Teil seines oben bereits erwähnten, nahezu grenzenlosen Begriffs des griechischen Rechtsdenkens und mißt ihr „nicht nur hervorragende praktische, sondern immer wieder auch theoretisch wichtige" Bedeutung bei

22 Auf einen Nachweis der bislang nur vereinzelten Beiträge zum Thema wird hier verzichtet. Einen zweckgebundenen Überblick gibt beispielsweise BFr Steinmann *Die Waffengräber der ägäischen Bronzezeit. Waffenbeigaben, soziale Selbstdarstellung und Adelsethos in der minoisch-mykenischen Kultur* (Wiesbaden, 2012).

23 Siehe GM Calhoun „Greek law and modern jurisprudence" in (1923) 9(5) *California Law Review* S 295-312 (302) [nv].

24 Vgl zur Gesetzgebung des Charondas und des Zaleukos K-J Hölkeskamp *sv* „Charondas" in *Der Neue Pauly* Bd 2 (Stuttgart, 1996) Sp 1109/10; Ders *Schiedsrichter, Gesetzgeber und Gesetzgebung im archaischen Griechenland* (Stuttgart, 1999) S 130-144 uö (mwN) R Wolters *sv* „Zaleukos" in *Der Neue Pauly* Bd 12/2 (Stuttgart, 2002) Sp 690. Siehe ferner M Mühl *Die Gesetzgebung des Zaleukos und des Charondas* (Leipzig, 1929); A Szegedy-Maszak „Legends of the Greek lawgivers" (1978) 19 *Greek, Roman and Byzantine Studies* S 199-209.

(vgl S 89). Subjektive Sichtweise und Empfinden charakterisieren auch den 2. Hauptabschnitt „Zum Wert humanistischer Bildung“ (S 93-122), der voll von Lesefrüchten ist, als Essay anregend zu lesen, aber ohne substantiellen Beitrag zur Fortwirkung des griechischen Rechts. Bezeichnend für eine wiederkehrende Unschärfe in der Argumentation ist der Unterabschnitt „Heinrich Mitteis und der Wert der Rechtsgeschichte“ (S 106-109). Lediglich die ersten Sätze reflektieren H Mitteis für den Stellenwert der Rechtsgeschichte wesentliche Studie „*Vom Lebenswert der Rechtsgeschichte*“.[25] Der Rest besteht aus Assoziationen Bartas – Schwerlich zu billigen ist übrigens die mehrfache, unreflektierte, aber auch kritisierte Übernahme des Begriffs „primitives Recht“. Es gibt kein „primitives Recht“. Jede Kulturordnung besitzt vielmehr die ihr gemäße Rechtsordnung, und die jeweilige Kulturordnung als „primitiv“ zu bezeichnen entspringt einem kulturellen Überlegenheitsgefühl und spiegelt folglich Chauvinismus.

Nicht wesentlich weiter führt auch der folgende Abschnitt 3 „‘Europa und griechisches Recht’“ (S 122-129). Wiederum findet sich eine Fülle an gedanklichen Zuordnungen zum „griechischen Rechtsdenken“, ohne daß über die Behauptungen hinaus sachlich belastbare Ausführungen gemacht würden. Bezeichnend ist beispielsweise der Vorwurf, die römische Klassik habe nicht danach gefragt, „ob ein Rechtsinstitut nicht auch anders sinnvoll und gerecht gestaltet werden, oder ob es eine solche Gestaltung verdiente und der Korrektur bedurft hätte.[26] Ganz anders der Zugang bei Platon, Aristoteles und Theophrast und überhaupt im griechischen Rechtsdenken, zu dem wesentlich sowohl die Rhetoren und Logographen als auch die Kautelarjurisprudenz beigetragen hat (*sic*!). Ihr Rechtsdenken beachtetet den gesellschaftlich-politischen und den wirtschaftlichen Zusammenhang des Rechts“ (S 124). Wohl wahr, und an dieser Stelle hätte Barta zwei einschlägige und ihm durchaus bekannte Arbeiten von E Klingenberg anführen können, welche bezeugen, daß den griechischen Philosophen das Recht des Alltags keineswegs fremd gewesen ist.[27] Das gilt auch für andere Aspekte. So berichtet Diogenes Laertios, Aristoteles habe bei seiner Arbeit an der *Athenaion Politeia* 158 Verfassungen griechischer *poleis* herangezogen.[28] Den Bezug zwischen Philosophie und Rechtsdenken haben J Triantaphyllopoulos und E Wolf umfassend aufgezeigt.[29] Das ist letztlich

25 H Mitteis *Vom Lebenswert der Rechtsgeschichte* (Weimar, 1947).

26 Das muß man nicht so sehen, siehe beispielsweise die Beiträge in J-J Aubert / B Sirks (eds) *Speculum Iuris. Roman Law as a Reflection of Social and Economic Life in Antiquity* (Ann Arbor, 2002) (vgl dazu, allerdings höchst kritisch, J Hengstl in (2006) 88 *Klio* S 287-289).

27 Siehe E Klingenberg *Platons* ΝΟΜΟΙ ΓΕΩΡΓΙΚΟΙ *und das positive griechische Recht* (Berlin, 1976); Ɒens „Bemerkungen zum platonischen Bienenrecht“ in *Symposion 1971. Vorträge zur griechischen und hellenistischen Rechtsgeschichte*, in Gemeinschaft mit J Modrzejewski und D Nörr hrsg von HJ Wolff (Köln / Wien, 1973), S 347-354 (vgl das vorstehend angeführte Werk S 40-49).

28 S Diog Laert, *Vita Arist* 27.

29 J Triantaphyllopoulos *Das Rechtsdenken der Griechen* (München, 1985); E Wolf *Griechisches Rechtsdenken* 4 in 6 Bdn (Frankfurt/M, 1950-1970) (beides bei Barta verzeichnet).

nicht anders als der oben bereits erwähnte Bezug zwischen Dichtung und Recht. Den umgekehrten Nachweis, daß Philosophen, Rhetoren und Logographen die Rechtspraxis beeinflußt haben, bleibt B. zumindest einstweilen schuldig. Das ist auch nur schwer vorstellbar: Urkundenschreiber – Kautelarjuristen – hatten weder Zeit noch Anlaß, sich in theoretische Schriften zu vertiefen. Es gilt für den Alltag heutiger Rechtspraktiker nicht minder.

Die Abschnitte, „4. Die Phasen der römischen Rechtsentwicklung" (S 129-139), „5. 'Andersheit' der griechischen Rechskultur" (S. 139-158) und „6. Gab es ein 'gemeines' griechisches Recht?" (S 159-215) bringen noch einmal eher theoretische Reflexionen, während „8. Rechtskollisionen im Archaischen Griechenland" (S 345-441); „9. Anfänge des Völkerrechts" (S 442-511) dem geübten Recht gewidmet sind.

„7. Olympische Religion und Heroenkulte" (S 215-344) ist ein Griff auf philosophisch-theologische Aspekte und deren Verbindung mit dem Recht. Dem einleitenden und auch weiter tragenden Gesichtspunkt, Recht lasse sich von den gesellschaftlichen Rahmenbedingungen („religiöse Welt; Wert- und Moralmaßstäbe; Welt- und Menschenbild", S 218) nicht abschichten, kann man nicht widersprechen. Allerdings: Wer Gras betrachtet, muß der ständig repetieren, wie weit die Sonne entfernt ist, die dieses Gras beleuchtet? Allein enzyklopädische Darstellungen erfordern eine derart umfassende Betrachtungsweise, und dazu gehört eine alltägliche Rechtsordnung durchaus nicht. Wieder einmal erstaunt hingegen Bartas Rückgriff auf ältere Literatur zu einer Problemstellung, zu der es an neueren Ausführungen durchaus nicht fehlt. Zur Entwicklung des Tötungsrechts und dem Verdrängen der Blutrache muß sich Barta zwar später noch eingehend äußern, die vielfach als diesbezüglicher Schlüsselaspekt erörterte Schildszene *Il.* 18.478-508 hätte Barta an dieser Stelle aber nicht stillschweigend übergehen dürfen.[30] Zu blaß bleiben die Bemerkungen zum delphischen Sakralrecht (S 224/5). Im übrigen zeigt gerade dieser religions- und rechtshistorisch geprägte Abschnitt die Problematik von Bartas Vorgehensweise. An handfesten Belegen mangelt es nämlich, und Barta muß sich daher weitgehend darauf beschränken, Meinungen zu referieren und zu addieren. In aller Regel handelt es sich um „Einzelstücke". An einander gereiht ergeben sie durchaus ein plastisches Bild, aber noch lange keinen Beweis. Der läßt sich naturgemäß für die Frühzeit schwerlich erbringen. Allerdings ist zu fragen, ob wirklich alles einen überirdischen Kontext haben muß: Sollte den Menschen der Frühzeit wirklich entgangen und erst „dank göttlicher Hilfe" bewußt geworden sein, daß Räuchern Fleisch konserviert? (S 231). Die Beispiele ließen sich mehren und auch auf andere Komplexe erstrecken. Der gesamte Abschnitt besteht aus kulturhistorisch interessanten Beobachtungen

30 Grundlegend HJ Wolff „Der Ursprung des gerichtlichen Rechtsstreits bei den Griechen" in *Beiträge zur Rechtsgeschichte Altgriechenlands und des hellenistisch-römischen Ägypten* (Weimar, 1961) S 1-90; ferner ua E Ruschenbusch „Der Ursprung des gerichtlichen Rechtsstreits bei den Griechen" in *Symposion* 1977 (Köln-Wien, 1982) S 1-7 (= Ders *Kleine Schriften zur griechischen Rechtsgeschichte* (Wiesbaden, 2005) S 135-140).

und Exzerpten. Sie tragen über das Kulturhistorische hinaus zur Rechtsentwicklung aber wenig bis nichts Substantielles bei. Zudem finden sich auch in diesem Abschnitt Mancherlei nicht Ausgeführtes, nur Erwähntes oder nicht weiter Belegtes. Der (philosophische) „Derveni-Papyrus" ist als in Griechenland gefundener Papyrus selbst außerhalb der papyrologischen Welt sehr wohl bekannt, aber ein Eingehen auf die Fund- und Publikationsgeschichte im vorliegenden Rahmen zweifellos entbehrlich. Wenn der Papyrus jedoch (überflüssigerweise) schon erwähnt wird, sollte wenigstens eine Fundstelle angegeben werden.[31] An gleicher Stelle (S 279) führt die Bemerkung zu „frauenfeindlichen Werten" nicht weiter. Es trifft zu, daß die Stellung der Frau in den verschiedenen Kulturen unterschiedlich gewesen ist. Das ist mit einem Hinweis auf das pharaonische Ägypten freilich keineswegs erledigt. Barta zeigt hierfür wenigstens an dieser Stelle weder Einzelheiten noch Gründe auf. Dabei wäre Vieles zumindest in aller Kürze erwähnenswert gewesen. Jeder Meister vor 100-150 Jahren, bei dem die Gesellen am Tisch der „Meisterin" verköstigt worden sind, hätte da eine andere Meinung gehabt, und kein Bauer der Moderne kann auf die kluge Mitwirkung der Bäuerin verzichten. Dem entsprechend sagt ein Sprichwort „Was der Mann in Leiterwagen in die Scheuer fährt, trägt die Frau in der Schürze hinaus". Sollte das früher wirklich anders gewesen sein? Außerhalb der jeweiligen Oberschicht konnte auf die Mitwirkung der Ehefrau nur schwerlich verzichtet werden und das gilt nicht nur für das pharaonische Ägypten.[32] Die Ehefrau ist beispielsweise ein unabdingbarer Wirtschaftsfaktor im Erwerbsleben der altassyrischen Kaufleute gewesen. Sie hat nämlich das Haus mitsamt den Geschäftsurkunden gehütet, während der Mann auf Geschäftsreisen unterwegs gewesen ist.[33] Auch im klassischen Athen haben die Frauen nicht nur hinter dem Herd verborgen gelebt,[34] und Frauen der römischen Oberschicht fehlte es durchaus nicht an wirtschaftlichem Spielraum.[35] Die Beispiele ließen sich unschwer mehren. Nicht zuletzt in diesem Abschnitt macht B. erneut deutlich, daß und wie sehr es ihm um Rechtsdenken, nicht um Rechtsleben und Rechtspraxis geht. Er mischt all das freilich in Eins. Das Schwergewicht seiner Ausführungen bleibt aber das Rechtsdenken. Sein letztlich unentschiedene Vorgehensweise erlaubt freilich nur, nicht ohne Mühen sein unausgesprochenes

31 Erwähnt S 279. Siehe vor allem *The Derveni Papyrus* (ed with introd and comm by Th Kouremenos, GM Parássoglou & K Tsantsanoglou (Firenze, 2006)).

32 Siehe S 279 unter Hinweis auf S Allam. Zum papyrologisch belegten Ägypten siehe beispielsweise *Emanzipation am Nil Frauenleben und Frauenrecht in den Papyri* hrsgg von H Froschauer & H Harrauer (Wien, 2005).

33 Siehe J Hengstl „Zur Stellung der Frau nach den altassyrischen Urkunden" in *Antike Lebenswelten. Konstanz – Wandel – Wirkungsmacht. Festschrift für Ingomar Weiler zum 70. Geburtstag*, hrsgg von P Mauritsch ua (Wiesbaden, 2008) S 243-263.

34 Siehe Chr Schnurr-Redford *Frauen im klassischen Athen. Sozialer Raum und reale Bewegungsfreiheit* (Berlin, 1996) *passim*. Siehe ferner zB E Ruschenbusch *Untersuchungen zur Geschichte des athenischen Strafrechts* (Köln / Graz, 1968) (abgedruckt in E Ruschenbusch *Kleine Schriften* [so Anm 30, S 75-123]).

35 SK Ermete *Terentia und Tullia – Frauen der senatorischen Oberschicht* (Frankfurt/M, 2003).

Hauptanliegen zu verfolgen. Die Art seiner Gliederung erleichtert das keineswegs. Eben den Abschnitt 7 scheint nämlich eine „Zusammenfassung" zu beschließen, deren Anfang zwar feststeht (S 297), nicht aber deren Ende. Ist es, wie man eigentlich vermuten muß, das Abschnittsende, das dann freilich erst 48 Seiten später kommt? Wie hat man die unbezifferten Unterabschnitte dieser Sequenz gedanklich einzuordnen?

Die dem Abschnitt 7 vorausgehenden Abschnitte 4-6 führen kaum weiter. Abschnitt 4, „Die Phasen der römischen Rechtsentwicklung" (S 129-139) hebt zum einen auf das römische Fremdenrecht ab, zum anderen auf den Konservativismus der römischen Juristen, der sich mit dem römischen Fremdenrecht und erst recht mit griechischen Rechtsinstitutionen nicht leicht verbinden läßt. Was hat die (griechische) Proxenie,[36] so läßt sich beispielsweise fragen, denn mit dem römischen „Fremdenrecht" zu tun? Unschärfen ergeben sich da nahezu zwangsläufig; beispielsweise kennt das attische Recht keine „Einreden".[37] „Platon und andere Philosophen arbeiteten nicht nur als Philosophen, sondern auch juristisch" – wie denn, hatten sie Anwaltskanzleien oder betrieben sie Repetitorien? So einfach ist der Nachweis juristischer Tätigkeit nicht zu machen.[38] Vieles bleibt dabei auf der Strecke, und das kann hier nicht nachgetragen werden. Ein Beispiel ist der Verzicht auf jeglichen Nachweis zu den *artes liberales*.[39] B.unterscheidet vor allem nicht zwischen historisch Verbürgtem und aus unterschiedlichen Gründen tradiertem Erzählgut. Beides hat seine Berechtigung oder Erklärung, besitzt aber einen höchst unterschiedlichen Quellenwert.

Die Abschnitte „5. 'Andersheit' der griechischen Rechtskultur?" (S 139-158) und „6. Gab es ein 'gemeines' griechisches Recht?" (S 159-215) bringen noch einmal eher theoretische Reflexionen. Vor allem setzt sich Barta mit F Pringsheim auseinander. ME schafft Barta hier eine Art Feindbild, welches er dann mit großem Aufwand ausbaut. In der Tat stellt Pringsheim fest, es habe im alten Griechenland keine privatrechtliche Literatur gegeben.[40] Wem hätte sie denn genützt? Das Rechtsdenken der Philosophen[41] haben die Urkundenschreiber gar nicht erst zur Kenntnis genommen;

36 Siehe S 132. Zur Institution siehe ua C Marek *Die Proxenie* (Frankfurt/M, 1984) *passim* – bei Barta aufgeführt, nicht aber S 132 Anm 517.

37 So aber Barta S 134 ohne weitere Ausführung.

38 Im Sommersemester 2012 habe ich eine Lehrveranstaltung zum Thema „Waren sie Juristen? Zu den attischen Gerichtsrednern" durchgeführt, bei der ein Rechtsanwalt während einer Doppelstunde seine Tätigkeit geschildert hat. Vier Studierende erlangten den Grundlagenschein für das 1. Juristische Staatsexamen anhand von Referaten mit Noten von „befriedigend" bis „sehr gut" und dem Ergebnis „Sie waren keine Juristen". Mein Dank bzw meine Anerkennung gelten Herrn RA Zimmermann (Marburg) sowie stud iur L Bappert, L Boecking, A Dursun & S Otte.

39 SK Visky *Geistige Arbeit und die „artes liberales" in den Quellen des römischen Rechts* (Budapest, 1977); ferner J Christes *Bildung und Gesellschaft. Die Einschätzung der Bildung und ihrer Vermittler in der griechisch-römischen Antike* (Darmstadt, 1975).

40 Siehe Barta S 142 sowie F Pringsheim *The Greek Law of Sale* (Weimar, 1950) S 2-5.

41 Vgl vor allem E Klingenberg aaO (o Anm 27).

sie hatten mit dem Recht des Alltags genügend zu tun, und das betraf erstrangig die Beziehungen zwischen Privatpersonen. Ein „Gleichsetzen von Privatrecht und 'Rechtswissenschaft'" (S 143) läßt sich darin nicht sehen – wahr ist freilich, daß die alltägliche Rechtsordnung vor allem durch Rechtsakte unter Privatpersonen repräsentiert worden ist. „Alle anderen Bereiche, also das gesamte öffentliche Recht, das Verfahrensrecht oder das Strafrecht wurden beiseite geschoben." (S 143). Das ist aus heutiger Sicht ein zutreffendes Urteil. Der Polisbürger jener Zeit hätte es wohl schwerlich verstanden und schon gar nicht zu teilen gewußt. Zudem ist diese Feststellung ebenso schwerwiegend wie ungenau. Wie definiert Barta die genannten Bereiche? Ist Strafrecht beispielsweise, was die Rechtsordnung Östereichs, Bartas Heimatland, dem Strafrecht zuordnet? Oder bestimmt die Sanktion, was Strafrecht ist, wie R Haase es für die altorientalischen Rechtssammlungen angenommen hat?[42] Für das pharaonische Ägypten legt R Müller-Wollermann einen anderen Maßstab an, indem sie auf „abweichendes Verhalten" abstellt.[43] Einen modernen Blickwinkel benutzt W Boochs bei seinen diversen Darstellungen zum pharaonischen Recht. Das macht Definitionen entbehrlich, kann aber nur ob der Anschaulichkeit willkommen sein.[44] Auch zum athenischen wie zum römischen Recht sowie zu den gräko-ägyptischen Verhältnissen liegen entsprechende Arbeiten sehr wohl vor.[45] Die Beispiele ließen sich mehren, führen aber ohne sachgerecht entwickelte Grundlage nicht weit. So nämlich bezeugen sie höchstens eine alltägliche Gewaltbereitschaft und deren Bekämpfung durch die Staatsgewalt. Ein Grundkonzept, ein Anspruch des Staates auf alleinige Ausübung der ordnenden Gewalt in seinem Gebiet ist dem nicht zu entnehmen. „Strafrecht" ist demnach inhaltlich nicht einfach vorauszusetzen, sondern bedarf der Definition.

42 Siehe R Haase „Körperliche Strafen in den altorientalischen Rechtssammlungen" in (1963) 10 *Revue Internationale des Droits de l'Antiquité* S 55-75; ferner H Neumann „Zum Strafrecht in den ältesten Gesetzen Mesopotamiens" (1989) 15 *Das Altertum* S 13-22; U Sick *Die Tötung eines Menschen und ihre Ahndung in den keilschriftlichen Rechtssammlungen unter Berücksichtigung rechtsvergleichender Aspekte* (Jur Diss, Tübingen, 1984).

43 R Müller-Wollermann *Vergehen und Strafen: Zur Sanktionierung abweichenden Verhaltens im Alten Ägypten* (Leiden / Boston, 2004).

44 W Boochs *Die Finanzverwaltung im Altertum* (St Augustin, 1985) (keineswegs nur zu Ägypten); Ders Strafrechtliche Aspekte im altägyptischen Recht (Sankt Augustin, 1993); Ders *Altägyptisches Zivilrecht* (St Augustin, 1999) (Überblick über Quellen, Grundsätze und Institutionen des „Zivil"rechts der Pharaonenzeit samt den Grundzügen einer Urkundenlehre und des Gerichtsverfahrens).

45 Siehe E Ruschenbusch „Das Vergehen und dessen Ahndung nach griechischem Recht" in (1988) 95 *Gymnasium* S 369-374 (abgedruckt in E Ruschenbusch *Kleine Schriften* [so Anm 30] S 188-192); B Baldwin „Crime and criminals in Graeco-Roman Egypt" in (1963) 42 *Aegyptus: Revista italiana di Egittologia e di Papirologia* S 256-263; W Kunkel *Kleine Schriften. Zum römischen Strafverfahren und zur römischen Verfassungsgeschichte* (Weimar, 1974). Th Mommsen's Alterswerk *Römisches Strafrecht* (Leipzig, 1899) ist noch immer von großem Wert, in der Sichtweise aber vielfach überholt.

Entsprechendes gilt für die „Andersheit“ des griechischen Rechts wie der Frage, in wie weit man von einem „gemeingriechischen Recht“ sprechen darf oder gar sprechen muß. Geht man nämlich von der Annahme aus, daß jede Kulturordnung das ihr angemessene Recht besitzt, so entbehrt der Gedanke an eine „Andersheit“ des griechischen Rechts, an einen „griechischen Sonderweg“ von vorn herein der Überzeugungskraft. Irgendwie muß die griechische Rechtsordnung ja anders gewesen sein als andere Rechtsordnungen, sofern nicht die Gegebenheiten übereinstimmten und vergleichbare Rechtsfolgen hatten. „Andersheit“ und „Sonderweg“ sowie „gemeingriechisches Recht“ sind die diesbezüglichen Begriffe, denen Barta folgerichtig nachgeht und seinen Ausführungen ist daher zu folgen. Dazu gehört die Frage, in wie weit es ein „griechisches Recht“ gegeben hat – „‘gemeines’ griechisches Recht“ drückt Barta es bewußt altertümelnd aus. Kriterium kann nur sein, wie man „Gemeinsamkeit“ versteht. Hier ist zweifellos Bartas Hinweis auf die moderne Rechtskreislehre angemessen (S 161). Der Gedanke sollte mE dennoch zurückhaltend verwendet werden, denn die antiken „Rechtskreise“ entsprechen nun einmal nicht den modernen Gegebenheiten. Barta sieht das und negiert es dann doch (S 162), offenbar weil er eine bestimmende Leitlinie annimmt (S 160: „Leitpoleis“). Wiederum taucht die Schimäre eines alles umfassenden Rechtsdenkens auf, obgleich Barta Abweichungen (in Maßen) in Rechnung stellt.[46] Eine jede Rechtsordnung, insbesondere eine kulturell entwickelte, muß gesellschaftliche Werte, Familiengliederung, familiäre Vermögensbestimmungen, Erbfolgeregelungen und Anderes mehr kennen – Ähnlichkeiten und Gleichheiten können daher in diesem Bereich wie auch in Wirtschaft, Handel und sonst kein besonderes Merkmal sein.

Viele der von Barta in diesen Abschnitten vorgetragenen Beobachtungen sind unbelegt. ME macht Barta gerade hier die wesentliche, zweifache Schwäche seiner Betrachtungsweise deutlich. Er „verwirkt“ zum einen im wahrsten Sinne des Wortes die rechtskulturellen Aspekte so, daß er im Wechselspiel der Argumentation mal den einen, mal den anderen anspielen kann. Zum anderen compiliert Barta die von ihm als einschlägig erachteten Meinungen der Sekundärliteratur derart, daß das von ihm angestrebte Bild entsteht. Dieses ist ein in vielfältiger Beziehung von griechischen Vorgaben abhängiges römisches Recht. Bartas Argumente können hier nicht im Einzelnen zusammengestellt und widerlegt werden. Einige Beispiele müssen genügen und sollen folgen.

Bezeichnend für Bartas anspielenden statt argumentierenden Vortrag ist beispielsweise (S 174): „Der Freundschaftsvertrag zwischen Ephesos und Sardes ‘aus der Zeit des Prokonsulats des jüngeren Scaevola, Q. Mucius Scaevola P. Fil., aus dem Jahre 98 v. Chr.’ enthielt internationales Strafrecht: forum rei, forum comprehensionis: ‘Solche Vergünstigungen begegnen auch in anderen griechischen

46 Zum syrisch-römischen Rechtsbuch, zit Anm 682, ist der Hinweis auf E Weiss (1923) bibliographisch durch W Selb & H Kaufhold *Das syrisch-römische Rechtsbuch* (Wien, 2002) zu ergänzen.

Staatsverträgen und erinnern an die Fälle, in denen in Rom der Praetor die im Zivilrecht auf den Bürger zugeschnittene Klage ficta civitate den Peregrinen zugesteht.' [Anm 737: Gaius IV 37]". Schreibt so Gaius, und ist jener Vertrag nach Inhalt und Fundstelle einsichtig? Polisgründungen in Ägypten gibt es nur drei bzw vier (Naukratis; Alexandria; Ptolemais, Antinoupolis);[47] dennoch steht Milet als Mutterstadt für „zahlreiche (etwa 80?) Tochterstädte im Schwarzmeergebiet und in Ägypten" (S 174). Von der Rechtsordnung des im pharaonischen Ägypten gegründeten Naukratis ist zwar nahezu nichts bekannt – immerhin: „Eine Facette des kulturellen Hegemoniestrebens einzelner griechischer Poleis – etwa auch Athens – bildete ihr Rechtssystem" (S 175).

Der letzte Abschnitt, „10. Rezeption durch Rom?" (S 511-561), ist offensichtlich die Quintessenz des ersten Bandes. Barta schreibt in diesem Abschnitt, für seine Auffassung und Methodik höchst bezeichnend „Weshalb haben gerade im Rechtsbereich immer wieder Transfers und Rezeptionen stattgefunden?"(S 516). Haben sie wirklich stattgefunden? Barta behauptet das immer wieder, bleibt stichhaltige Nachweise aber letztlich schuldig. Die Möglichkeit der Übernahme ersetzt nicht deren Beweis, und in so weit ist wie so oft in der antiken Rechtsgeschichte auf die von Th Mayer-Maly aufgestellte und oben bereits wiedergegebene Prämisse zu verweisen: Es kann für vergleichbare Falllagen nur eine begrenzte Zahl an rechtlich sinnvollen Lösungen geben. Barta übersieht darüber hinaus, daß eine ganze Reihe von Gegebenheiten, welche der rechtlichen Gestaltung bedurft haben, letztlich überall wenigstens in der Welt des antiken östlichen Mittelmeeres mehr oder minder vergleichbar vorgelegen haben. Das gilt für die Subsistenzwirtschaft, die den Alltag der meisten Menschen bestimmt hat. Es gilt aber auch für die überregionalen Gegebenheiten. Seit vorgeschichtlicher Zeit hat es umfangreiche Handelsbeziehungen gegeben, und die ließen sich keineswegs mit dem Schwert in der Hand durchführen. Selbst kriegerische Auseinandersetzungen bedurften letztlich gewisser Regularien, um zu einem zukunftsfähigen Ende zu gelangen. Die Notwendigkeit eines geregelten Miteinanders hat also in jedem Bereich zu allen Zeiten bestanden. All das bietet hinreichend Spielraum für die Erklärung, es könne für vergleichbare Falllagen nur eine begrenzte Zahl an rechtlich sinnvollen Lösungen geben. Gemeinsame Herkunft, Sprache und Religion begründen zweifellos gemeingriechische Übereinstimmungen, führen aber doch nicht zwingend zur Schaffung eines gemeinsamen Rechts. Die Betonung hier liegt auf „Schaffung" (vgl S 179); die Existenz überkommener gemeingriechischer Rechtsinstitutionen soll damit keineswegs geleugnet werden. Das Gedankenspiel mit Einflüssen der über

47 Allgemein zum Recht der *poleis* im ptolemäischen Ägypten siehe vor allem J Modrzejewski „La règle de droit dans l'Égypte ptolemaïque (État des questions et perspectives de recherches)" in *Essays in Honor of C. Bradford Welles* (New Haven, 1966) S 67-77, sowie Ders *Loi et coutume dans l'Egypte grecque et romaine* (Paris, 1970) S 92-113. Zu Naukratis siehe zB W Helck *sv* „Naukratis" in *Der Kleine Pauly* Bd 4 (München, 1972) Sp 10.

zweitausend Jahre umfassenden ägyptischen bzw. keilschriftlichen Rechtsordnungen ist im Übrigen weder fundiert noch überzeugend (zB S 189). Barta übersieht dabei immer wieder gänzlich, daß die von ihm erwähnten kulturellen Kontakte und von ihm referierten Meinungen der Sekundärliteratur eines nicht belegen, nämlich eine praxiswirksame, zeiten- und länderübergreifende „Rechtspolitik" – die hat es eben nicht gegeben. Es fällt übrigens auf, daß Barta bei all' seinen diesbezüglichen Reflexionen fast nur auf Nichtjuristen zurückgreift. Bartas Fülle an Beobachtungen ist jedoch immer wieder beeindruckend. Im Ergebnis leidet sie aber an der weit weniger analytischen als assoziativen Vorgehensweise.

„8. Rechtskollisionen im Archaischen Griechenland" (S 345-441) und „9. Anfänge des Völkerrechts" (S 442-511) geben eher als die übrigen Abschnitte die tatsächlichen Gegebenheiten wieder. Exzerpieren, Referieren und Katalogisieren beherrschen allerdings auch diese Abschnitte. Quellenwiedergaben oder eigenständige Quellenexegesen sucht man vergeblich. Immerhin sind die Schilderungen der Kolonisation und der Beziehungen zwischen Metropolis und Apoikie sowie damit zusammenhängender Fragen anschaulich, tragen zur Rechtsordnung freilich nicht viel bei, vor allem kaum Substantiertes. So bleibt beispielsweise dunkel, inwiefern die Koloniegründungen „schon die kautelarjuristische Phantasie in den Mutterstädten gefördert, ja beflügelt hatte" (*sic*). Beachtenswerte Bemerkungen von Barta gehen unter diesen Umständen (nicht nur hier) unter. Die Verwendung modernrechtlich geprägter Terminologie hilft zudem kaum weiter. An anachronistischen Wertungen fehlt es in diesem Zusammenhang nicht. „Kollisionsrecht zwischen Mutter- und Tochterstadt ist eine Vorstufe des modernen 'nationalen Privatrechts'" (S 366). Eine derartige Rubrifizierung bringt rechts-ideengeschichtlich ebensowenig weiter wie Bartas Differenzierung in „innerstaatliches" beziehungsweise „intermunizipales" „Kollisionsrecht" (S 348). Daß *municipium* ein Begriff einer außergriechischen Rechtsordnung ist, soll hier nicht thematisiert werden. Wohl aber ist zu fragen, in wie weit derartige Kollisionen tatsächlich gefühlt geworden sind. Schwerlich im ptolemäischen Ägypten, denn da sind die Verträge mal griechisch, mal demotisch abgefaßt worden, bar jeder „Kollision", denn die hat gewöhnlich bereits die Wahl der Sprache vermieden.Und wenn nicht, dann die Kunst der Urkundenschreiber. Das heißt nicht, daß es keine wechselseitigen Einflüsse gegeben haben mag. Nur sind diese erst zu entdecken, und bei Barta findet sich dazu nichts. Bartas Ausführungen unter dem Gesichtspunkt „Kollisionsrecht" müssen nicht nur hier mit Bedacht betrachtet werden. Dies gilt nicht minder für Bartas Ausführungen in den Unterabschnitten „Das 'Internationale Privatrecht' der Antike" (S 368-376) und „'Intermunizipales' Kollisionsrecht zwischen Mutter- und Tochterstadt" (ab S 377; das Abschnittsende ist nicht sicher zu bestimmen). Die denkbaren Möglichkeiten sind umfassend dargestellt. In welchem Maße es eines solchen „Kollisionsrechts" überhaupt bedurft hat, wird jedoch nicht erörtert. Man stelle sich vor: Menschen einheitlichen Herkommens und politischer Überzeugung trennen sich räumlich aus ökonomischen Gründen. Wie tief

wird dann auf absehbare Zeit die rechtliche Trennung sein? An unterschiedlichen Auffassungen und am Bedürfniss, diese beizulegen, wird es nicht gemangelt haben. Aber darf man deren Regelung wirklich als „Kollisionsrecht" bezeichnen, während es im Privatrecht der „Dissenz" ist? Daß es an „internationalen" Konflikten nicht gemangelt hat, belegt wohl die Beiziehung auswärtiger Richter, die vielfach in Inschriften zu ihren Ehren belegt sind.[48] Die – von Barta nicht erörterte – Rolle solcher externer Richter bedarf zweifellos noch eingehenderer Erhellung. Auch sonst benötigt in diesem Zusammhang noch Vielerlei der genauen Analyse. Eine wesentliche Frage kann nur sein, in wie weit das gelebte Recht all' dem entsprochen hat. Aus dem außerägyptischen Bereich lassen uns die Quellen dazu weitgehend im Stich. Besser ist es nur um die Gegebenheiten im ptolemäischen Ägypten bestellt. Aber um die geht es hier kaum.

Schwerlich folgen läßt sich Bartas apodiktischen Feststellungen „Kolonisation fördert Rechtsvereinheitlichung und autochthone Kautelarpraxis" (S 353) oder die Koloniegründungen hätten „schon die kautelarjuristische Phantasie in den Mutterstätten gefördert, ja beflügelt" (S 362). Die „Kautelarjuristen", die Urkundenschreiber, werden an dem Geschehen gedanklich nur teilgenommen haben, sofern sie einen entsprechenden Vertrag aufzusetzen hatten. „Das 'Internationale Privatrecht' der Antike" (S 368) ist gleichfalls eher Schlagwort als weiterführend. „Internationales Privatrecht" bezeichnet im heutigen Recht die Gesamtheit der nationalen Rechtssätze, die bei Auslandsberührung bestimmen, welche von mehreren möglichen internationalen Privatrechtsordnungen anzuwenden ist. Für die griechisch-hellenistischen Gerichte ist das freilich ohne Belang gewesen, denn die Parteien hatten die rechtlichen Bestimmungen, auf die sie sich beriefen, als Beweise vorzulegen. Es blieb dann vor allem dem Geschick der Partei überlassen, was als Recht zur Anwendung kam.

Abschnitt 8 ist wiederum von einer anachronistischen Betrachtungsweise geprägt. Die Kolonisierung scheint – nach Barta – von amtlicher Planung bestimmt gewesen zu sein, und die Ausführungen zum Internationalen Privatrecht vernachlässigen völlig die Beweispflicht der Parteien. Diese Bemerkungen sollen hierzu denn genügen. Ein letzter Blick gilt noch Abschnitt 9 „Anfänge des Völkerrechts". Er enthält eine Fülle an Informationen zum Thema seit den ältesten Zeiten.[49]

4 Es fällt schwer, ein Votum über Bartas Werk anhand des ersten Bandes abzugeben. Fachlich ist es leider leicht. Bartas ständiges Bemühen, jegliche selbst

48 Vgl dazu (ua) K Harter-Uibopuu *Das zwischenstaatliche Schiedsverfahren im achäischen Koinon. Zur friedlichen Streitbeilegung nach den epigraphischen Quellen* (Köln / Weimar / Wien, 1998); D Nörr „'Richter aus der Fremde' und römische Provinzialgerichtsbarkeit. Bemerkungen zu IG. XII 5.722 (IG. XII Suppl p 127)" in (1998) 26 *Index* S 71-87; Ch V Crowther „Aus der Arbeit der 'Inscriptiones Graecae' IV. Koan Decrees for Foreign Judges" in (1999) 29 *Chiron* S 251-319.

49 Bartas Ausführungen zu den „Kodifikationen sumerischer Stadtstaaten" (S 458-461) sollte man nicht kritiklos übernehmen.

nur mögliche griechische Spur über Zeit und Raum hinweg mit der römischen Welt zu verbinden, vermag in aller Regel nicht zu überzeugen. Barta unterscheidet zudem nicht zwischen Rechtsdenken, Rechtsanwendung durch Logographen und Praktikern des Alltags. Entsprechendes gilt für die Durchführung. Barta zitiert und paraphrasiert in einem höchst ungewöhnlichen Maße, verzichtet aber darauf, seine Lesefrüchte inhaltlich zu analysieren. Er stellt sie mit verbindenden Worten nebeneinander und geht offenkundig davon aus, daß sie auf diese Weise überzeugen. Gedanklich vergleichbar sind seine ständig wiederkehrenden Vorwürfe, selbst Koryphäen der Altertumswissenschaften hätten ihm, Barta, wichtig dünkende Aspekte übergangen. Barta übersieht dabei, daß es in der wissenschaftlichen Diskussion eben nicht um „Rundumschläge", sondern um Konzentration auf das Wesentliche geht. Dazu gehört auch, daß eine sich ständig mehrende Fülle an neuen Zeugnissen und Erkenntnissen aufgearbeitet werden muß, ehe man sich an neue Synthesen machen kann. Seine Belesenheit und seinen Gedankenreichtum möchte man freilich ungern missen. Bartas Werk liest sich, da es keine tragende Linie außer dem im Titel ausgedrückten Gedanken gibt, wie eine Fülle an Essays – so sollten sie vielleicht auch künftig veröffentlicht werden! Und Mancherlei hat Barta dem entsprechend anderwärts publiziert.

5 Der zweite Band ist ob seines Umfangs zweigeteilt; er enthält Kapitel II von Bartas umfangreichem Werk. Barta bezeichnet Kapitel II im Titel mit „*Archaische Grundlagen*" und hat es im Text mit „Drakon, Solon und die Folgen" bezeichnet.[50]

Der Titel „Archaischen Grundlagen" verwirrt zunächst, denn mit „Archaischen Grundlagen" verbindet nicht jeder Leser die Gesetzgeber der beginnenden (athenischen) *polis* Solon und Drakon, sondern eher die Zeit der Schriftgewinnung (8. Jh v Chr), der vorausgehenden, sich zunehmend erhellenden „dunklen" Epoche und der Linear-B-Zeit. In der Anlage entsprechen die beiden Teile dem ersten Band, enthalten also insbesondere Glossar, Literaturverzeichnis und Stichwörter; das Quellenverzeichnis hingegen ist neu und willkommen. Nicht recht befriedigen will, daß die beiden Teilbände völlig getrennt angelegt sind, einschließlich der Paginierung. Da hätte eine Aufteilung in zwei selbständige Bände der Übersicht und der Handhabbarkeit wohl eher gedient, zumal Barta sich ohnedies genötigt gesehen hat, den letzten Abschnitt, Abschnitt 23 „Rezeption und Kulturtransfer aus dem Alten Orient", in Band III zu verweisen, um das Erscheinen von Band II nicht zu

50 Band III soll mit den Kapiteln III-VI („Die 'Eumeniden' des Aischylos"; „Der 'Melierdialog' des Thukydides"; „Euripides und das Naturrecht" sowie „Gab es eine griechische Jurisprudenz") den zweiten Teil („Recht, Dichtung und Geschichte") sowie das erste Kapitel des dritten Teils („Praxis und Theorie griechischen Rechtsdenkens") enthalten; der vierte Band die restlichen drei Kapitel des dritten Teils („Gab es eine griechische Jurisprudenz?"; „Platon"; „Aristoteles und Recht") sowie die Teile vier und fünf (Recht, Religion und Gerechtigkeit"; „Ausblick und Ergebnisse"); die Kapitel IX („Recht und Religion") beziehungsweise X („Epilog"; „Zusammenfassung und Thesen") (siehe die detaillierte Inhaltsübersicht S XIII/XIX).

verzögern (BII², S 375). Die übrige Gestaltung entspricht ebenfalls dem ersten Band: eine Vielzahl an Exzerpten und Literaturreferaten sowie umfangreiche Ausführungen in zahlreichen Fußnoten. Auch der zweite Band zeugt von Bartas Belesenheit, seinem enzyklopädischen Wissen und seinem Bemühen, vor allem anhand der in der Sekundärliteratur vertretenen Meinungen assoziativ Verbindungen über das griechische Recht hinaus zu ziehen. Die Quellenlage ist dabei mitunter kärglich, und Barta muß daher vielfach mit Hypothesen arbeiten, deren hypothetischer Charakter freilich oftmals nicht ohne Weiteres zu erkennen ist. Allerdings spiegeln sie zweifellos Bartas Überzeugung.

Vor der inhaltlichen Vorstellung des Bandes II soll zunächst der Blick auf Bartas Sichtweise, Aufbau und Vorgehensweise vertieft werden. Sie entsprechen Band I: B. sammelt Befunde, Lesefrüchte und Exzerpte aus der Sekundärliteratur und verbindet sie derart, daß das Bild einer von der Antike, sogar der vorgriechischen Zeit, bis heute reichenden, zumindest bis heute fortwirkenden Entwicklung entsteht. Bd II[1] umfaßt 10 Abschnitte, Bd. II² die Abschnitte 11-22. Es liegt auf der Hand, daß diese Abschnitte weder dem Umfang noch dem Inhalt nach in vertretbarer Zeit von einem Einzelnen detailliert zu würdigen sind. Der Band wird daher im Folgendenden lediglich vorgestellt, und dabei oder im Anschluß daran werden einzelne Schwerpunkte näher gewürdigt. Barta betont die mit seinem Thema gerade in diesem Band verbundenen Schwierigkeiten in seiner Einleitung (S 1-14) mit Recht. Zugleich unterstreicht diese Einleitung wiederum Bartas Vorgehensweise in positiver wie in negativer Weise.

Revidiert man die beiden ersten Bände, so fällt immer wieder auf, in welch' starkem Maße Barta bemüht ist, Verbindungslinien über das griechische Recht hinaus herauszuarbeiten, so als bedürfe die griechische Rechtsordnung einer Rechtfertigung – einer Rechtfertigung, die vor allem Bartas Werk liefern soll, indem Barta einer Fortwirkung des griechischen Rechts das Wort redet. Ein wichtiges Moment ist, daß Barta – wie bereits erwähnt – alle denkbaren Aspekte in Eins gießt und so nahezu unbeschränkten Manövrierraum hat. Alle denkbaren Aspekte von Was ist zu fragen, und die Antwort kann nur lauten: von Allem, was sich nur irgendwie mit dem Begriff „Recht" in Verbindung bringen läßt. Beispiele drängen sich bereits ab den ersten Seiten immer wieder auf. So beginnt der Persönlichkeitsschutz mit Solon, setzt sich über Kleisthenes und das perikleische Athen fort, um von dort nach Alexandria zu dringen und danach das römische Rechtsdenken zu beeinflussen (BII[1], S 3). Das Gedankenspiel ist reizvoll und theoretisch sogar möglich. Fakten, es zu untermauern, sind jedoch nicht ersichtlich.

Barta scheint freilich weniger bloß Verbindungslinien aufzeigen zu wollen, sondern immer wieder den Fortbestand und das Weiterwirken eines einmal gefaßten und von ihm erkannten Rechtsgedankens. An Beispielen ist kein Mangel, und Barta unterstreicht sie ständig mit Hinweisen auf das moderne, meist österreichische Recht[51]

51 ZB Bd II² S 172: „Die *Hybrisklage* ist rechtlicher *Ur- und Quellgrund des Persönlichkeitsschutzes*;

– teilweise auch als Desiderat.[52] Ein Beispiel sind seine Ausführungen zur ἐπιείκεια „Billigkeit (o.ä.)“ (BII² 13). Barta betrachtet diesen außerhalb der Primäliteratur offenbar nicht besonders oft verwendeten Begriff[53] als weiterwirkendes Urbild eines umfassenden Korrektivs fester Regeln der Rechtsordnung. Entsprechendes kann man zu Bartas Ausführungen zur Hybris erkennen, die im Persönlichkeitsschutz münden (BII² 146).

Der zweite Band bestätigt ferner eine Sichtweise auf die Sekundärliteratur, die einmal mehr Bartas Belesenheit bezeugt, nicht aber irgendein Verständnis dafür, daß Wissenschaftler wie Literaten in ihrer Zeit wie in ihrer Kenntnis zeit- und sachgebunden schreiben. Die von Barta gewünschte Gesamtschau läßt sich nicht einmal in einem derart monumentalen Werk erreichen, wie Barta es bietet beziehungsweise mit den Folgebänden anstrebt. Immer wieder bemängelt Barta die Äußerungen anderer, vorausgehender Vertreter der Antiken Rechtsgeschichte, da diese irgendwelche von Barta als wichtig erachtete Aspekte seiner Meinung nach nicht hinreichend berücksichtigt haben. Bartas Methode, Exzerpte aus der Sekundärliteratur mit verbindenden Worten aneinander zu reihen, um so seine Anschauungen zu entwickeln und zu belegen, ist zudem alles Andere als klar und überzeugend. Um die wiedergegebenen Stellen kritisch zu bewerten, müßte der originale Zusammenhang eingesehen werden. Das wäre zu vermeiden gewesen, wenn Barta die Gedanken der Vorlage in seine Erwägungen eingearbeitet und auf Primär- und Sekundärbelege lediglich verwiesen hätte. Es hätte zudem den Umfang von Bartas Darlegungen stark verringert.

Bartas Umgang mit Primärquellen dürfte gleichfalls in seiner Vorgehensweise begründet sein. Barta zitiert und analysiert bislang keinen Quellentext *in extenso*, sondern bringt Meinungen und Analysen der Sekundärliteratur, gewöhnlich ohne exakte Textbezeichnungen anzugeben. Das ist mitunter bloß frustrierend, etwa wenn „das Beispiel aus dem Fayum im ptolemäischen Ägypten“ (Bd I, S 348) über die Anm 1677 auf die Anm 1786 und Meinungen von H Lewald und E Schönbauer verweist, bar eines jeden Beleges. Gravierender ist Bartas Darstellung der Inschrift SEG XXXIII 690 (S 22). Barta gibt den Kommentar einer Inschriftensammlung wieder. Die Inschrift ist inzwischen allerdings textlich erweitert und erneut publiziert

und zwar des Menschenrechts- und Grundrechtsschutzes, wie des straf- und privatrechtlichen (durch ein allgemeines Persönlichkeitsrecht; siehe die §§ 16 und 17 AGBGB[,] die diesem Vorbild am nächsten kommen und noch mehr zu leisten imstande wären als bisher)[Anm 1065]: „So könnte aus § 17 AGBGB die fehlende Popular-Klagslegitimation in Fällen wie jenem der mißbräuchlichen Verwendung des Namens ‘Einstein’ abgeleitet werden; siehe mein Zivilrecht 2004, I 258. – …“.

52 Siehe beispielsweise zum „Allgemeinen Persönlichkeitsrecht“: „Selbst die dem Wortlaut nach vorhandene Anerkennung durch § 16 [österreichisches] AGBG (das dtBGB kennt einen solchen Schutz bis heute nicht), wurde erst in den späten 1960er und den 1970er Jahren von der Rechtsprechung fruchtbar gemacht und österreichische Rechtsdogmatiker haben sich bis zur jüngsten Jahrtausendwende gegen eine solche Annahme gewehrt“ (BII² S 149 Anm 913).

53 Vgl zB *A Greek-English Lexikon* hrsgg von HG Liddel & R Scott (Oxford, 1996) S 632; Fr Preisigke *Wörterbuch der griechischen Papyrusurkunden* (Heidelberg, 1922 ff) Bd 1 Sp 552/3.

und auf die 2. Hälfte des 5. Jahrh v Chr herunterdatiert worden.[54] Des Weiteren sind fehlende Textbezeichungen wie „Graeca Halensis und Dikaiomata-Papyrus" (S 3) oder „Fayumtexte" (Bd I, S 436) schlicht unbrauchbar. Im ersten Fall handelt es sich um *P Hal* I 1; „Graeca Halensis" bezeichnet die Herausgeber,[55] und *dikaioma* „1) Rechtsanspruch; Rechtstitel; 2) Beweisurkunde" ist ein Terminus, welcher keineswegs allein in *P Hal* I 1, 38 erscheint.[56] Die Großoase Fayum, der antike *nomos* Arsinoites, ist das Herkunftsgebiet einer Unzahl griechischer Papyri aller papyrologisch einschlägigen Entstehungszeiten. Ein unspezifischer Hinweis auf von dort stammende Texte ist daher belanglos. Völlig überflüssig ist ferner die (beleglose) Schilderung der Entnahme von Papyrus-Füllmaterial aus Krokodilmumien (Bd 1, S 375), und Bemerkungen zur Verwendungen von Mumienkartonnage hätten zum Thema ebenso wenig beigetragen, denn gewöhnlich kommt es nicht auf die Fundsituation, sondern auf den Inhalt der Quellen an.

Bartas Umgang mit den Primärquellen ist nicht minder befremdlich. Barta zitiert sie gewöhnlich nur anhand von Sekundärliteratur, ohne den griechischen Text wiederzugeben und vielfach ohne aktuelle Textbezeichnung. Eine nachvollziehende Textkritik oder Bewertung von Bartas Ausführungen ist daher nicht möglich, sofern man sich nicht schlicht an den wiedergegebenen Wortlaut halten will.

6 Auf den Inhalt von Band II = Kapitel 2 soll, wie bereits angekündigt, hier nur kürzer eingegangen werden. Die inhaltliche Darstellung des zweiten Bandes ist wie bei Band I nicht leicht dank der zahlreichen Verweise auf die Folgebände wie auf das Vorausgehende. Barta knüpft insgesamt an Person und Werk von Drakon und Solon, im Wesentlichen an Letzteren.

Im ersten Abschnitt („Von Solon bis Kleisthenes"; BII[1] S 13/15-58) ordnet Barta zunächst Solon in den Kreis der Sieben Weisen ein, sammelt Biographisches und schildert Solons Bedeutung und Wirken.[57] Dabei geht er auch

54 Siehe MN Tod (ed) *A Selection of Greek Historical Inscriptions* (Oxford, 1933) Nr 1, Kommentar aaO S 2. Zum Text siehe nunmehr JH Oliver „Text of the so-called Constitution of Chios from the first half of the sixth century B.C." in (1959) 80 *The American J of Philology* S 296-301.

55 *Dikaiomata: Auszüge aus alexandrinischen Gesetzen und Verordnungen in einem Papyrus des Philologischen Seminars der Universität Halle mit einem Anhang weiterer Papyri derselben Sammlung* Graeca Halensis (ed) (Berlin, 1913). In Bd II² S 174-181 paraphrasiert Barta allerdings *P Hal* I 1 unter dem Gesichtspunkt, der Papyrus enthielte eine „Generalklausel für Hybris". Das, wie bei Barta üblich, nur in Übersetzung wiedergegebene Exzerpt (BII² S 176-177) betrifft freilich nicht die Hybris, sondern ist wohl beispielshalber gemeint. Bartas Ausführungen zur Hybris in *P Hal* I 1 (BII² S 178-181) sind auf eine „Entwicklung eines allgemeinen Persönlichkeitsrechts und eines Schutzes der Menschenwürde im griechischen Rechtskreis" gerichtet.

56 Vgl (ua) Fr Preisigke (so Anm 53), Sp 382/3. Bezeichnend ist, daß HJ Wolff *Das Justizwesen der Ptolemäer* (München, ²1970) den Begriff nicht verzeichnet.

57 Vgl zu diesem Abschnitt DF Leão *Sólon. Ética e Política* (Lisboa, 2001) der in seinem ersten Hauptteil (S 19-212) ua auf die Wirkungsgeschichte von Attitographen und Logographen eingeht, aber auch unter „A formação do conceito de *Patrios Politeia*" (S 43-72) zu den politischen,

auf „Frühe Polissatzungen“ ein, ferner auf „Solons staatsrechtliche Reformen“. Den Unterabschnitt „Entstehung des Rechtssubjekts“ (BII[1] S 37-44) wünschte man sich kürzer und prägnanter. Solons Wirken unter allen nur denkbaren Aspekten gelten die meisten Abschnitte dieses Kapitels. „2. Die Polis – Hüterin des sozialen Ausgleichs“ (BII[1] S 59-76) bezieht sich ebenfalls auf Solon: Barta sieht in Solons Wirken „das Bemühen, einen Ausgleich zwischen den Polisbürgern herbeizuführen, ob reich oder arm, hochgestellt oder nicht“ (S 59). Dieser Feststellung kann man schwerlich widersprechen. Hinzu treten – nach Barta – weitere Momente, welche die klassische Polis ergäben. „Vorbilder für das von den Griechen früh und häufig eingesetzte Instrument ‘Gesetz’ und seine gesellschaftliche Funktion lieferten den Griechen wahrscheinlich Ägypten und Mesopotamien, vermittelt meist über den Vorderen Orient“ (S 61). Naturgemäß hat es allerorten an Rechtssetzung in Form königlicher Dekrete nicht gemangelt, denn Vielerlei bedurfte der Regelung. Hieraus auf allgemeinverbindliche, also gesetzliche Regelungen im heutigen Sinne zu schließen, wäre zweifellos verfehlt. Die Frage, inwieweit es in den Keilschriftrechten oder im pharaonischen Ägypten Gesetze gegeben hat, welche der griechischen Welt als Vorbild hätten dienen können, wird von Barta nicht eigens thematisiert. Eine andere, soweit ersichtlich anderwärts von Niemandem behandelte Frage hätte Barta bei seinem Vergleich vielleicht stellen können: Trat die inschriftliche Publikationsform der griechischen Gesetze als Autorisation an die Stelle der göttlichen Berufung der außergriechischen Herrscher?

Abschnitt 3 ist Drakon gewidmet (BII[1] S 77-129) mit Unterabschnitten zur Person, zur Frage nach möglichen Vorbildern Drakons, dem möglichen Anlaß zu Drakons Tätigwerden, zu frühem Rechtsgang und Selbsthilfe, zur Entstehung des Schuldbegriffs und Einiges mehr. Die folgenden Abschnitte knüpfen daran an. B. umreißt die Entwicklung des Verschuldensprinzips und behandelt dazu Antiphon, Aristoteles und Anaximenes von Lampsakos sowie wiederum Drakon („4. Das Entstehen der Rechtskategorie ‘Zufall’, S 130-212; „5. Vom sakralen Sühnerecht zur säkularen Schuldlehre“, S 213-264; „6. Drakons Gesetz über die Blutrache“, S 265-292). „7. Wegweiser zur ‘Eunomia’“ wendet sich wieder Solon zu und damit einem Thema, auf das B. dann in Abschnitt 17 (BII² S 217-277) weiter eingeht. Solons Rechts- und Gerechtigkeitsvorstellungen sind hier ein vorrangiger Gegenstand der Erörterung. Unter „8. Menschliche Gerechtigkeit und göttliches Gesetz“ (BII[1] S 311-317) verbindet Solons Wirken mit Gedanken von Hesiod. „9. Rechtssubjekt und Demokratie“ (BII[1] S 318-441) weist die Entstehung des „Rechtssubjekts“ den

wirtschaftlichen und sozialen Gegebenheiten jener Epoche. Der zweite Hauptteil (S 213-464) ist Solons Leben und Wirken gewidmet. Siehe ferner JA Almeida *Justice as an Aspect of the Polis Idea in Solon's Political Poems*. *A Reading of the Fragments in Light of the Reasearches of New Classical Archaeology* (Leiden / Boston, 2003) [nv]; sowie neuerdings E Ruschenbusch *Solon: Das Gesetzeswerk – Fragmente. Übersetzung und Kommentar* (hrsgg von K Bringmann) (Stuttgart, ²2014).

Griechen (mit bleibendem Nachwirken) zu. Hieran knüpft Barta seine eingehende Darstellung der damit veranlassten (oder diesbezüglich von Barta erörterten) gesellschaftlichen, wirtschaftlichen und demokratischen Verhältnisse. Hierzu gehört sE auch der Vertrag, und umfangreiche Erörterungen betreffen unter anderem das Synallagma, Schuld und Haftung, den griechischen Vertrag (S 374-438; su). Die meisten der folgenden Abschnitte dieses Kapitels gelten Solons Wirken unter weiteren denkbaren Aspekten. Teilweise drücken das bereits die Abschnittstitel aus: „10. Solons Gesetzgebung" (BII[1] S 442-606; mit Ausführungen zu frühen Gesetzgebern); „15. Solons Bild in der Geschichte" (BII² S 182-189) – „16. Solons Reformdenken" (BII² S 190-216; enthält viele durch Solon veranlaßte rechtspolitische Gedanken.) und weitere knüpfen an Solon an. Dies gilt sowohl für Bartas bereits erwähnte Ausführungen zu „13. Epieikeia" (BII² S 70-145) wie auch für „14. Hybrisklage und Persönlichkeitsschutz" (BII² S 146-189). Wiederum bietet Barta eine Fülle an Lesefrüchten, um zu zeigen, daß die griechische ἐπιείκεια beziehungsweise die Klage wegen Hybris Ansatzpunkte für bis heute wirksame Entwicklungen in Sachen „Billigkeit" beziehungsweise „Persönlichkeitsrecht" gewesen seien. Und wiederum verbieten es der hier verfügbare Raum wie Bartas detaillierter Inhalt, auf Bartas Darlegungen an dieser Stelle im Einzelnen einzugehen. In „17, 'Eunomia' und ägyptische 'Ma'at'" (BII² S 217-277) trägt B. seine Gedanken zum Thema vor, ob Solons Konzept der „Eunomia" (εὐνομία „gesetzlich geregelte Ordnung" oä) ägyptisch beeinflußt sei. Nun könnte man freilich einwenden, daß die Belege zum ägyptischen Rechtsalltag der Pharaonenzeit von einer gelebten „Ma'at" nichts erkennen lassen, aber das ist für philophische Gedanken der Normalfall, und falls für Solons Denken altägyptische Vorbilder in Betracht kämen, so entstammten diese keinesfalls dem Alltag. Über ein (wohlwollendes) *non liquet* kann man ungeachtet von Bartas Bemühen nicht hinauskommen.[58] Auch in diesem Abschnitt exzerpiert Barta in hohem Maße Literaturmeinungen. Das gilt ebenso für die folgenden Abschnitte. „18. Das Stadtrecht von Gortyn" (BII² S 278-295) gibt einen unselbständigen Überblick über diese dem 5. Jahrh v Chr entstammende, höchst umfangreiche Inschrift mit rechtlichen Regelungen (um den Begriff „Gesetz" zu vermeiden). Wie Barta Dokumentieren versteht, zeigt seine Erläuterung zur Auswahl der von ihm angegebenen Monographien und Darstellungen „die wenigstens Ausschnitte des Stadtrechts bringen" (S 279). Damit bleibt Vielerlei unerwähnt, wie Ausgaben des „Codex Gortyn" zeigen, ebenso dessen Abdruck in einer anderweitigen neueren Inschriftensammlung und selbst Monographien.[59] Zwischenzeitliche Inschriftenfunde bleiben gleichfalls unberücksichtigt.

58 Vgl dazu allerdings die BII² S 1420 Anm 1419/20 mit zugehörigem Text wiedergegebene Meinung von S Lippert aaO (oben Anm 6) S 2/3. Darauf kann hier nicht eingegangen werden.

59 SM Guarducci *Inscriptiones Creticae,* 1935-1950, Vol 4 (Rome, 1950); RF Willets *The Law Code of Gortyn* (Berlin, 1967); *Nomima. Recueil d'inscriptions politiques et juridiques de l'archaïsme grec I; II* (hrsgg von H van Effenterre & F Ruzé (Rom, 1994 bzw 1995)); CE Gorlin *The Gortyn*

In „12. Entstehung des Rechtssystems“ (S 46-69) skizziert Barta seine Sicht der Entwicklung der griechischen Rechtsordnung – detailreich und bei aller Kürze umfassend sowie losgelöst vom solonischen Wirken, allerdings mit vielen Verweisungen auf seine eigenen anderweitigen Ausführungen.[60] In den Abschnitten „19. Vom Totenteil zum Individualeigentum“ (BII² S 298-316), „20. Die Seelgerätestiftung“ (BII² S 317-334) und „21. Hellenistische Totenkultstiftung – Römische Stiftungen – Germanisch-christliches ‘Seelgerät’“ (BII² S. 335-343) sucht Barta anhand diverser Thesen des Rechtshistorikers EF Bruck die Entstehung des Privateigentums zu entwickeln. Seine Ausführungen enden folgerichtig in „22. Erwerb und Schutz von Individualeigentum“ (BII² S 344-374), ein Abschnitt, der vor allem auf dem einschlägigen Werk von A Kränzlein beruht.[61] Brucks Bedeutung für die Rechtsgeschichte aus Bartas Sicht machen eine Abbildung (341) und ein Unterabschnittstitel „Bruck – Mentor moderner Rechtsgeschichte“ (S 342) deutlich.

7 Einige weitere Beobachtungen sind anzuschließen. „Mit dem *Entstehen des Rechtssubjekts* ist … die Fähigkeit verbunden, Träger eigener Rechte und Pflichten zu sein: *Rechtsfähigkeit*.“ Hierzu zählt Barta auch die Vertragsfreiheit (II[1], S 360), und das rechtfertigt ihm, rechtsdogmatische Grundgedanken zum griechischen Vertragsrecht zu entwickeln (II[1], S 360/374-440). Barta betont, „unverzichtbare Grundlage des Vertragsschlusses“ war auch in frühen Rechtsordnungen die Willenseinigung der Parteien … (II[1], S 376). Barta nimmt also an, daß ein Vertrag bereits mehr oder minder durch schlichten Konsens zustande gekommen ist. Selbst für das römische Recht trifft das so nicht zu, wie die Libralakte zeigen, und für andere Rechtsordnungen kann es nicht einfach vorausgesetzt werden. Natürlich bedarf es für den Abschluß eines Rechtsgeschäfts eines Grundkonsenses zwischen den Parteien, denn es kann zum Zustandekommen eines Vertrags nicht die eine Seite eine Eheschließung, die andere eine Pacht wollen. Dieser Grundkonsens besagt freilich nicht, daß ein Vertrag bei Übereinstimmung wirksam zustande kommt. Und hieraus ergibt sich die grundlegende Divergenz der Thesen Bartas beziehungsweise von HJ Wolff. Barta verficht den Vertragsschluß durch einen, ggf bezeugten Konsensualvertrag, der in durchaus modernem Sinn ein Leistungsversprechen bedeutet. Die von HJ Wolff entwickelte „Theorie der Zweckverfügung“ hingegen verneint ein solches

Law Code and Roman Crete (Diss PhD, Brown University, 1991); und Andere mehr.

60 Sie sind oft wenig hilfreich, vgl zB Anm BII² 333 „Es ist bekannt, dass sich Rhetoren/Logographen früh spezialisiert haben; siehe bei Anm 417 mwH“ – Anm 417 „Rhetoren und Sophisten fördern neben erster Spezialisierung auch bereits Schulenbildung“ – Text dazu „Antiphon war ein Spezialist für Mord- und Totschlags-, Isaios für Erbrechtsfälle.“ – Das kann natürlich nur für die erhaltenen Reden gelten! – Gegen sich selbst spricht die Formulierung zu Verfügungen auf den Todesfall: „… als erster Schritt zu ihrer Entstehung dient die homerische *donatio mortis causa iminente periculo* ...“ (BII² S 65).

61 A Kränzlein *Eigentum und Besitz im griechischen Recht des fünften und vierten Jahrhunderts vChr* (Berlin, 1963).

verbindliches Leistungsversprechen.[62] Um an Wolffs Wortwahl anzuknüpfen, aber eine eigene Formulierung zu wählen: Eine – naturgemäß einverständliche – auf den Vertragszweck gerichtete (dingliche) Verfügung schafft eine Bindung zwischen den Parteien, kraft der der Verpflichtete haftet, sofern er das Zugesagte nicht leistet; seine Leistung ist also nicht die Erfüllung einer Schuld, sondern vermeidet die Realisierung der Haftung. Die Verfügung bringt die Verbindlichkeit zustande, sagt selbst aber über die Wirkung nichts aus; der Begriff „Verfügung" spiegelt übrigens – allerdings, soweit ich weiß, durchaus unbeabsichtigt – das von Wolff vorausgesetzte reale Element.[63] Es überstiege den Rahmen jeder Besprechung, Bartas Einwände gegen Wolffs Vertragsthese hier widerzugeben und im Einzelnen zu würdigen oder auch nur gewisse Weiterentwicklungen der These zu schildern. Es ist ferner kein Argument, daß Wolffs Thesen von der heutigen juristischen Gräzistik allgemein akzeptiert sind – die Menge macht es nicht, aber auch nicht die Argumente früherer gräzistischer Rechtsliteratur. Wolffs „Theorie der Zweckverfügung" entspricht offenbar dem Quellenbefund bestens. Bezüglich der Homologie (BII² S 383-388) und der δίκη βλάβης (Bd II² S 405-407) lassen sich zwei – allerdings bei HJ Wolff entstandene Untersuchungen – anführen.[64] Wert legt Barta des Weiteren auf eine Dissonanz zwischen A Biscardi und HJ Wolff (BII² S 383-388). Eine gelegentliche Diskussion mit A Biscardi hat freilich seinerzeit ergeben, daß da offenbar ein sprachliches Mißverständnis vorgelegen hat.[65]

Barta erwähnt mehrfach das Verlöbnis. Als Zivilrechtler ist ihm bekannt, daß das Verlöbnis ein Vorvertrag ist, gerichtet auf das Eingehen des Hauptvertrags, der Eheschließung. Einen derartigen Vorvertrag hat es, soweit ersichtlich; weder in den Keilschriftrechten noch im ägyptischen, jüdischen oder griechischen Recht gegeben. Auch hier sei auf Nachweise verzichtet.

62 Grundlegend HJ Wolff „Die Grundlagen des griechischen Vertragsrechts" in (1957) 74 *Zeitschrift der Savigny Stiftung für Rechstgeschichte* Rom Abt S 26-72 (abgedruckt in *Zur griechischen Rechtsgeschichte* (hrsg von E Berneker (Darmstadt, 1968) S 483-533).

63 Ein reales Element setzt auch E Seidl mit seinem „Prinzip der notwendigen Entgeltlichkeit" voraus. Es hat zwar in der Tat wenig Befürworter gefunden. Das darf aber nicht der Anlaß sein, es mit diesem Hinweis abzutun und nicht einmal eine Fundstelle zu nennen; so aber BII² S 381 Anm 2294. Zu dem genannten Prinzip siehe beispielsweise E Seidl *Aegyptische Rechtsgeschichte der Saiten- und Perserzeit* (Glückstadt / Hamburg / New York, ²1968) S 45-50. Vgl dazu T Mrsich aaO (I, o Anm 6) S 513/4 mit Anm 14.

64 Zur Homologie (siehe BII² S 376, Anm 2259) siehe H von Soden *Untersuchungen zur Homologie in den griechischen Papyri Ägyptens bis Diokletian* (Köln / Wien, 1973); vgl dazu (ua) die Besprechung von J Hengstl in (1973) 24 *Iura* S 319-329. Zur δίκη βλάβης siehe H Mummenthey *Zur Geschichte des Begriffs* βλάβη *im attischen Recht* (Jur Diss, Freiburg, 1971).

65 Siehe J Hengstl, Besprechung von *Symposion 1974, Vorträge zur griechischen und hellenistischen Rechtsgeschichte* (Gargnano am Gardasee, 5.-8. Juni 1974) in Gemeinschaft mit HJ Wolff, J Modrzejewski & P Dimakis herausgg von A Biscardi (Köln / Wien, 1979) in (1980) 97 *Zeitschrift der Savigny Stiftung für Rechstgeschichte* Rom Abt S 348-355 (349-350).

Methodisch nicht zu befriedigen vermag die Verwendung der attischen Gerichtsreden. Barta behandelt sie gewöhnlich als statische Belege des griechischen Rechtsdenkens. Tatsächlich aber sind die erhaltenen Gerichtsreden weniger Zeugnisse der Rechtsordnung als der rhetorischen Kunst. Die überlieferten Reden entsprechen einem Kanon, der vor der Mitte des 1. Jahrh v Chr erstellt worden ist und die als die zehn Besten ihrer Zeit erachteten Redner auflistet. Keineswegs alle stammen von den Redenschreibern, denen sie zugeschrieben sind. Doch hierauf kommt es für die Rolle der Reden als Rechtszeugnisse nicht an. Die Gerichtsreden waren zum Vortrag vor dem *dikasterion* bestimmt und entsprachen dessen Verfahren. Die Richterbänke waren allein mit Laienrichtern besetzt, welche ohne Abstimmung ihr Urteil abgaben. Es galt, diese Richter durch den Vortrag zu überzeugen. Diesen prägten daher vor allem rhetorische Mittel. Unter diesem Gesichtspunkt ist auch die Interpretation von Gesetzen im attischen Prozeß zu sehen, und das ist zu berücksichtigen, wenn man attische Gerichtsreden als Rechtsquellen heranzieht.[66]

8 Bartas monumentales Werk ist entgegen allem Anschein weder eine Geschichte des griechischen Rechts noch eine Geschichte der griechischen Rechtsgeschichte als Wissenschaftsdisziplin. Sein wesentliches Anliegen, den Fluß der Rechtsentwicklung von der Antike bis nachgerade heute zu schildern, entspricht keinem von Beidem. Seine Darstellungsweise verdeckt eine Fülle an bemerkenswerten Gedanken und Anregungen. Nur: Wie soll man diese unter der Unzahl an übernommenen Texten finden? Sie verdecken zudem Bartas eigene Gedankengänge. Diese sind nämlich oftmals kaum von den die Textübernahmen verbindenden Worten zu unterscheiden oder diesen zu entnehmen. Immer wieder gibt es eine Vielzahl an Ausführungen, Textübernahmen und Entwicklungs-Schilderungen, die einer eingehenderen Diskussion und der Darstellung von Gegenmeinungen bedürften – zu viele als daß sie hier auch nur aufgezählt werden könnten. Die graphische Gestaltung (Wechsel von Normal zu Petit) trägt dazu keinesfalls bei. Es liegt schließlich ferner auf der Hand, daß die Fülle der wörtlichen Übernahmen die eigene Analyse und Exegese nicht zu ersetzen vermag. Reduziert auf das dem Thema Wesentliche, bar aller fremder Texte, die eigenen Gedanken anhand der exegierten und analysierten Primär- und Sekundärquellen vortragend,

66 Siehe dazu M Hillgruber *Die zehnte Rede des Lysias: Einleitung, Text und Kommentar mit einem Anhang über die Gesetzesinterpretationen bei den attischen Rednern* (Berlin / New York, 1988) S 105-120; ferner HJ Wolff „Methodische Grundfragen der rechtsgeschichtlichen Verwendung attischer Gerichtsreden“ in *La critica del testo*. Atti del II Congresso Internazionale della Società Italiana di Storia del Diritto, Venezia, 18 - 22 Settembre 1967 (Florenz, 1971) Vol 2 S 1123-1135 (abgedruckt in HJ Wolff *Opuscula dispersa* (Amsterdam, 1974) S 27-39); Dens *Demosthenes als Advokat*. Funktionen und Methoden des Prozesspraktikers im klassischen Athen. Vortrag gehalten vor der Berliner Juristischen Gesellschaft am 30 Juni 1967 (Berlin, 1968) und abgedruckt in *Demosthenes* hrsgg von U Schindel (Darmstadt, 1977) S 376-402.

hätte Barta ein für die antike Rechtsgeschichte außerordentlich wichtiges Werk geschaffen.

Nachtrag

H Barta hat mit seinem monumentalen, auf vier Bände angelegten Werk „*Graeca non leguntur*“ wichtige, aber oft anfechtbare Denkanstöße zum griechisch-hellenistischen Recht und zu dessen Auswirkungen gegeben. Nunmehr legt er das erste Buch des wiederum zweifach unterteilten Bandes III (BIII[1]) vor.[67] Der Band irritiert auf den ersten Blick. Seine Gliederung ist mit „Zweiter Teil: Dichtung, Geschichte, Philosophie und Recht“ überschrieben. Ein „Erster Teil“ ist nirgendwo ausgewiesen und kann wohl nur den Inhalt von Band 1 und/oder Band 2 meinen. Darüber hinaus vermißt man den laut BII², S 375 aus zeitlichen Gründen nach Band 3 verwiesenen letzten Abschnitt von Kapitel 2, Abschnitt 23 „Rezeption und Kulturtransfer aus dem Alten Orient“. Aufbau und Vorgehensweise von Band 3[1] entsprechen den vorausgegangenen Bänden. Den üblichen Präliminarien (S I-XXI) folgen die Einleitung (S 1-25) und die Kapitel 3 („Die ‘Eumeniden’ des Aischylos“; S 34-164), 4 („Der ‘Melierdialog’ des Thukydides“; S165-219) und 5 („Euripides und das Naturrecht“; S 220-326). Glossar (S 327-393); Literaturverzeichnis (S 395-522), Stellenregister (S 523-529) und Stichwörter (S 530-547) beschließen den Band. Die Tatsache, daß ein mit jedem Band wachsender Anteil dieser Anhänge nicht nur Platz, sondern auch Aufmerksamkeit des Benutzers beansprucht, läßt Barta’s bandweisen Aufbau der Nachweise verwerfen.

Der Inhalt von Band 3 ist mit dem Untertitel des Bandes bestens umrissen: Es geht um „Das griechische Recht in seinem kulturhistorischen Umfeld – Beispiele aus Dichtung, Geschichtsschreibung, Philosophie und (Kautelar) Jurisprudenz“. Zur Kautelarjurisprudenz, also zu Alltagsurkunden, findet sich, wie auch das Stellenregister ausweist, nichts. Die in den Kapitelüberschriften Genannten – Aischylos, Thukydides und Euripides – sind auch von E Wolf in seiner Darstellung des griechischen Rechtsdenkens berücksichtigt worden.[68] Es ist bezeichend für die unterschiedlich Betrachtungsweise von Barta und Wolf, daß Barta auf Wolf (den Anmerkungen nach zu schließen) überhaupt nicht eingeht. Bartas Vorgehensweise entspricht der in den vorausgehenden Bänden: Barta referiert allzu viel Lesefrüchte, statt in eigenen Ausführungen auf andere Meinungen als Belege zu verweisen; seine Fußnoten sind voll von Bemerkungen und Anspielungen, die zum Thema mal mehr,

67 H Barta *‘Graeca non leguntur’? – Zu den Ursprüngen des europäischen Rechts im antiken Griechenland. Band III/1: Das griechische Recht in seinem kulturhistorischen Umfeld – Beispiele aus Dichtung, Geschichtsschreibung, Philosophie und (Kautelar) Jurisprudenz* (Wiesbaden, 2014) ISBN 978-3-447-10036-6 Gr 8; XXI 547 S.

68 E Wolf *Griechisches Rechtsdenken* 4 in 6 Banden (Frankfurt/M, 1950-1970). Zu Aischylos siehe besonders Bd 1 S 340-424; zu Euripides siehe besonders Bd 2 S 373-481. Als Geschichtsschreiber findet Thukydides bei Wolf keine besondere Berücksichtigung.

mal gar nichts beitragen. Allerdings ist zu vermerken, daß Barta stärker als in den vorhergehenden Bänden seine eigene Meinung zu Wort kommen läßt. Es scheint, als habe Barta hier eine ihm besonders wesensnahe Thematik behandelt. Das umfaßt eine Fülle an eher rechtsphilosophisch einzustufenden Ausführungen. Sie sind ebenso interessant wie diskussionswürdig und enthalten immer wieder rechtshistorisch relevante Topoi. Allerdings macht Barta es dem Leser selbst in diesem Band schwer, das rechtshistorisch Wesentliche nachzuvollziehen. Zu vermischt sind seine diversen Gesichtspunkte und Argumentationen. Man muß sie lesen, und das gilt auch für die zahllosen Anmerkungen. Aber die Lektüre ist zweifellos ein Gewinn, wenn auch weniger für die rechtsgeschichtliche Darstellung und Diskussion.

Abstract

The ancient world saw the rise and fall of many cultures, with accompanying cultural exchanges and reciprocal influences. It seems that such reciprocal influences and exchanges extended to the law as well, and affected legal evolution. Old legal institutions were preserved for future generations but were influenced by newer cultures. This concept is not new, but Barta has revived it. He has embarked on a publication comprising four volumes, of which volumes 1, 2 (pt1/2) and 3 (pt 1) have appeared. The author has set out to prove that the influence of Greek law on Roman law was greater than has been acknowledged up until now, that Greek law was likewise influenced by the Old Orient, and that Roman law also influenced later legal systems. The one concern of this article is to show that Barta's theory is invalid. The other concern is to criticise Barta's approach. He does not cite the extensive literature on which he relies, but quotes it. He fills page after page with texts by other authors but does not discuss nor analyse their content. Thus the reader is provided with a wide range of legal literature of the past, but not with any critical analysis of it. Newer writing is often neglected. Barta himself has interesting ideas, but it is difficult to detect them, hidden as they are amongst the cited literature. This approach is followed in all volumes but is scientifically unacceptable and merits the strongest criticism.

REMARKS ON THE METHODOLOGY OF PRIVATE LAW STUDIES: THE USE OF LATIN MAXIMS AS EXEMPLIFIED BY *NEMO PLUS IURIS*

Franciszek Longchamps de Bérier*

1 Using Roman rules and maxims

Honouring the spoken word was deeply embedded in the Roman mentality and played a significant role in the building of relationships among citizens. The Quirites took pride in *fides Romana*, which distinguished them from the proverbial perfidy of the Carthaginians or fickleness of the Greeks, who considered themselves bound only by the written word, if at all. Keeping one's word, remaining true to one's promises has become part of our legal culture which is rooted in Latin antiquity. This is as valid today as it was then, and is an expression of the constant diligence required when building mutual trust − within the legal order as in other spheres. Indeed, the law as a whole − both that of Rome and of our times − is based on goodwill and a presumption of good intentions on the part of others, since it is a fundamental expectation in interpreting human behaviour. It is words that are first interpreted. We pick our words with great care and, particularly in public discourse, often like to use Latin *dicta.* We do so not only to make our arguments sound more

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sophisticated, but also to support our theses not merely with elegantly worded, classical maxims, but also with well tested, established concepts based on the experience of people who lived in ancient Rome, a consummately practical society, very well versed in the practice of law. The Roman findings have been tested in a variety of social and economic conditions throughout the centuries of legal history and the various epochs during which the European legal tradition has been formed. Indeed, that tradition has never stopped drawing liberally upon Roman law, and still does so, even today. Latin expressions and phrases invoked in legal parlance find their way into written works, including studies on private law. In research works, Latin expressions, whether sentences, maxims, rules, proverbs, or sayings, seem to play the role of *topoi*. Sometimes the sentences denote the *topoi* themselves; at other times, the sentences refer to the *topoi* as the place and substance of interpretation: as elements or premises used in reasoning, developing an argument, and adding depth to analysis.

In the European legal tradition, it is a matter of pride that the foundations of Europe's laws were laid down by the ancients. The best-known quotation expressing such pride may be found in Montesquieu's *Je me trouve fort dans mes maximes lorsque j'ai pour moi les Romains* (I am strongly confirmed in my sentiments upon finding the Romans on my side).[1] The everyday use of Latin legal maxims is a symbolic acknowledgement of the Roman legacy that laid the foundations of our law, especially private law. However, the *dicta* play a far more important role than that: they are a means of communication and mutual understanding. They express values protected by law, and are a sign of universal acceptance of the concepts they express.[2] Some Latin phrases and expressions involve common *topoi – loci communes*, which refer to matters of general concern. They are the points of departure providing the grounds for all persuasive discourse − for instance *audiatur et altera pars* (let the other side be heard too), or *ei incumbit probatio qui dicit, non qui negat* (the burden of proof is on the one who declares, not the one who denies). Most of the *dicta* used in legal practice refer to special *topoi – loci specifici*, related to our specialised legal knowledge.[3] We like to use them because they are a meaningful addition to legal discourse; by supplementing our arguments, they fill the gap between general rules of argumentative discourse and the applicable regulations.

1 Ch-L de Secondat, baron de La Brède et de Montesquieu *De l'esprit de lois* Bk 6 Ch 15 (*http://classiques.uqac.ca/classiques/montesquieu/de_esprit_des_lois/partie_1/esprit_des_lois_Livre_1.pdf* at 105 (accessed 20 Jan 2014); trl into English by Thomas Nugent *The Spirit of Laws* (New York, 1899) at 87.

2 F Longchamps de Bérier "'Audiatur et altera pars.' Szkic o brakującej kolumnie Pałacu Sprawiedliwości" in W Uruszczak, P Święcicka & A Kremer (eds) '*Leges sapere*.' *Studia i prace dedykowane Januszowi Sondlowi w 50 rocznicę pracy naukowej* (Krakow, 2008) 271-283 at 272.

3 *Cf* J Stelmach & B Brożek *Sztuka negocjacji prawniczych* (Warsaw, 2011) at 77-78.

> But how can we best use Latin maxims and sentences? After all, they are used by the contemporary legislator who incorporates them into legal regulations, and are invoked by judges and parties to proceedings. They are bandied about by prosecuting attorneys, solicitors, politicians and publicists in periodicals and newspapers. Here Roman law has proven to be very much alive today, becoming a more or less recognized element of the legal knowledge of contemporary societies, a permanent component of their legal culture.[4]

We should endeavour to use that knowledge in a competent manner, and not only on isolated occasions. As an example of how Latin *dicta* could be used, let us look at *nemo plus iuris*, a phrase that we may recall not only from Roman-law classes.

Today, *nemo plus iuris* is useful in legal deliberations covering a multiplicity of topics. Years ago, Krzysztof Amielańczyk demonstrated its usefulness when answering the following question:

> If a share purchase agreement is concluded for shares in a limited liability company which are in fact non-existent, because they were created as a result of a legal act performed in violation of the formal provisions, thus resulting in an unlawful increase in the company's share capital, whereby the number of rights (shares) in that company did not in fact increase, can such agreement be deemed invalid in view of the *nemo plus iuris* rule?[5]

The seller did not, in fact, have the rights he claimed he had. After an in-depth analysis, Amielańczyk came up with an answer in the negative.

Nemo plus iuris may be invoked in a variety of contexts. A more recent example related to the question whether a legal person has rights if the legal persons that conferred those rights do not themselves have such rights. The Constitutional Tribunal of Poland had to decide whether a constitutional complaint could be brought by a company incorporated by entities not having such capacity, for example local government bodies, or business entities whose activities were funded out of the assets of the State Treasury or local government bodies. Such public entities perform public tasks in the spheres of both *imperium* and *dominium*. Assets are the fundamental criterion differentiating public entities from private entities.

> Pursuant to Article 79 paragraph 1 of the Constitution, everyone whose constitutional freedoms or rights have been violated shall have the right to challenge the Constitutionality of the statute or another normative act on whose basis a court or public administration body has made a final decision on his freedoms or rights or on his obligations specified in the Constitution.[6]

4 H Kupiszewski *Prawo rzymskie a współczesność* 2 ed (Krakow, 2013) at 155.

5 K Amielańczyk "Zastosowanie rzymskiej zasady 'nemo plus iuris ad alium transferre potest quam ipse habet' do oceny skuteczności zbycia nie istniejących udziałów w spółce z ograniczoną odpowiedzialnością" in M Mozgawa, M Nazar, J Stelmasiak & T Bojarski (eds) *Materiały z konferencji 'Polska lat dziewięćdziesiątych. Przemiany państwa i prawa'. Lublin–Kazimierz, 28–30 kwietnia 1997 r.* vol 3 (Lublin, 1997) 355-362 at 356.

6 Ts 13/12 (18.12.2013*, otk.trybunal.gov.pl/orzecznictwo/otk.html* (accessed 28 Feb 2015).

Can the above-mentioned company therefore be considered an entitled entity within the meaning of the term "everyone" as used by the legislator? While leaving the answer to the Polish Tribunal, which came up with a positive answer, we should add that because a matter relates to public law it does not preclude invoking *nemo plus iuris*. In Roman public law it was already a rule, which is particularly visible with reference to the delegation of power and its acquisition. The famous second century AD jurist, Julian, wrote in the first book of his Digest, D 2 15: *More maiorum ita comparatum est, ut is demum iurisdictionem mandare possit, qui eam suo iure, non alieno beneficio habet* (It has been provided by ancestral custom that a person may delegate the administration of justice to another only where he has it by his own right and not through the favour of another). By referring to *mos maiorum,* Julian was stressing the ancient roots of the rule that the scope of delegated power depended on the power held by the delegating party.[7] In referring to the latter as having the power by right, he was emphasising the structural impossibility of delegating power that had been delegated.[8]

From the point of view of legal theory, *nemo plus iuris* is a classic example of the reconstruction of a legal rule by induction, namely by means of an analysis and generalisation of particular regulations, sometimes relating to narrowly defined legal situations. In Polish law, it is not a codified rule: "while never expressed in general terms, it is founded on an analysis of particular solutions which shape the mechanism for transferring various types of individual rights."[9] To establish whether a rule such as one found in current legislation applies at a particular time, it is necessary to establish why it is considered legally binding. And when one resorts to such a rule and wishes to make efficient use of it, it is advisable to invoke not only dogma but also its historical development; not so much to determine whether or not it was binding, but rather how it was understood and perceived at different times in history and under various legal systems.

2 Use maxims competently

When determining how to make competent use of the Latin maxim beginning with the words *nemo plus iuris*, we should first answer the question: what precisely is *nemo plus iuris* – a principle, a rule, a maxim, a definition or an adage? The answer will, above all, help us to introduce the phrase itself properly, for without further clarification *nemo plus iuris* sounds a little awkward. Secondly, particularly when writing, we may need to find a semantically equivalent phrase, so that we do not need

7 D 1 16 4 6 Ulpian *On the Duties of the Proconsul* Bk 1; *cf* D 1 16 5 Papinian *Questions* Bk 1; D 1 16 6 1 Ulpian *On the Duties of the Proconsul* Bk 1.

8 D 1 21 5*pr* Paul *On Plautius* Bk 18; D 1 21 1 1 Papinian *Questions* Bk 1.

9 M Safjan "Zasady prawa prywatnego" in M Safjan (ed) *System Prawa Prywatnego. Prawo cywilne – część ogólna* vol 1 (Warsaw, 2007) 261-308 at 265-266.

to keep repeating *nemo plus iuris* several times in the same sentence or paragraph. Thirdly, we need to determine the meaning of words such as "principle", "rule", "maxim", "adage", so that we know when it is appropriate to use them. For instance, Greek παροιμία – *paroimia*, is a proverb, maxim, saw, and digression.[10] But are these meanings interchangeable?

Another preliminary issue concerns the correctness of the Latin phrase and its origins. Sometimes we may have the impression that a Latin *dictum* we remember or have stored somewhere in the recesses of our mind may reinforce our legal argument. However, before using it we should firstly be sure of the exact wording; secondly, that we understand what it truly means or may mean; and finally, whether it is appropriate to use it in a particular context to support our argument. We must be sure of understanding the entire context and the extent to which we may rely on it to develop our line of reasoning. We certainly do not want to expose ourselves to ridicule, so we need to ensure that using certain expressions will not lead to unpleasant surprises, especially baffling ones. If our adversary is better prepared than we are, he may accuse us of superficiality, or − even worse − refute our arguments by invoking the same Latin phrase in a broader or different meaning. There is nothing worse than having your own weapon turned against you; the easiest way to silence people is to turn their own words against them.

Nemo plus iuris is only part of a maxim of which even the writings on Roman law give different versions: *nemo plus iuris transferre potest, quam ipse habet*;[11] *nemo plus iuris in alium transferre potest quam ipse habet*;[12] *nemo plus iuris in alium transferre potest quam ipse haberet*;[13] and *nemo plus iuris ad alium transferre potest quam ipse haberet*.[14] The phrases differ in length; we see the forms *ad alium* and *in alium*, then *habet* or *haberet* running parallel to one another. We should therefore endeavour to find the original. *Origo* means the beginning, the origin, the source; we should, therefore, try to establish when this Latin phrase first appeared. To do this, we first need to look at ancient legal sources, for even if *nemo plus iuris* did not derive from them, we are interested in the phrase from a legal point of view and in a legal context.

Let us begin with the last and fiftieth book of Justinian's Digest, and last and seventeenth title *De diversis regulis iuris antiqui*. It is here that the compilers collected passages from works by Roman jurists, summarising the legal solutions adopted in ancient pre-classical and classical law. In the fifty-fourth passage, we find the memorable sentence: *nemo plus iuris ad alium transferre potest, quam ipse*

10 HG Liddell & R Scott *A Greek-English Lexicon* 9 ed (Oxford, 1961) at 1342.

11 F Schulz *Principles of Roman Law* (Oxford, 1936) at 259.

12 A Stelmachowski "Nabycie i utrata własności" in T Dybowski (ed) *System Prawa Prywatnego. Prawo rzeczowe* vol 3 (Warsaw, 2003) 303-412 at 315.

13 Kupiszewski (n 4) at 220.

14 A Kacprzak, J Krzynówek & W Wołodkiewicz *'Regulae iuris.' Łacińskie inskrypcje na kolumnach Sądu Najwyższego Rzeczypospolitej Polskiej* (Warsaw, 2001) at 117.

haberet. So now we know it is *ad alium* and *haberet*! Justinian's commission in a prescription indicated the author of the maxim and the work from which it derives: Ulpian, Book 46 *ad edictum* (*Commentary on the Edict*). Now we are certain of our sentence's original wording, and we should keep to it. The compilers treated quotations with respect; we should definitely follow suit. So when quoting the words *nemo plus iuris ad alium transferre potest, quam ipse haberet*, we need to provide an appropriate footnote referring to "D" or "Dig" for the Digest of Emperor Justinian, and to passage 54 in Title 17 of Book 50, as follows: 50 17 54.

3 Be aware of the context of your quotation

The essence of Romanist training includes not only consistent quotation of original sources, but also an in-depth study of the context in which a particular thought appeared. No quotations or collections of thoughts are of any value unless we know exactly who is being quoted and the origin of the quotation. We cannot delight in a quotation if we are uncertain of the accuracy of the wording. In addition, if the source of a passage has been scrupulously recorded, it is mandatory to check the original and thus avoid the errors that may arise if we quote references "second hand." These errors more usually comprise wrong numbers than misspelt words, resulting in a variety of distortions.

We may not always be able to identify the author, the work, or even the period when a particular Latin phrase was formulated. Some *dicta* reflect the Roman-law doctrine or "are substantiated by the legal view as expressed by the Roman jurists".[15] In such cases, even if we are unable to find a particular phrase or expression in ancient legal, or even non-legal sources, we may rely on ancient lore to authenticate our theses by saying: "The Romans used to ..." However, not all Latin *dicta* necessarily come from Roman law. Frequently repeated, they may occur in parallel and equally valid versions.[16] The use of different words in a maxim may result from the author's personal preferences, or the stylistic requirements imposed by the context. The jurist Paul wrote on one occasion: *confessus pro iudicato est* (the confessed is as judged), and on another: *confessus pro iudicato habetur* (the confessed is held to have been judged). Justinian's compilers cited both maxims at the beginning of the same title

15 K Amielańczyk "O rzymskim pochodzeniu zasady 'nemo plus iuris…' i jej aktualności we współczesnym prawie polskim" in W Witkowski (ed) *W kręgu historii i współczesności polskiego prawa. Księga jubileuszowa dedykowana profesorowi Arturowi Korobowiczowi* (Lublin, 2008) 503-517 at 503.

16 This comes as no surprise, but should not make us negligent. At a time when our knowledge of Latin is rather superficial, we should be uncompromisingly faithful to the original wording. In ancient Rome, of course, but also in the Middle Ages and during the Renaissance or Baroque periods, it was more legitimate to attempt to formulate one's own rule or definition in Latin.

of the Digest.[17] There is no point in debating which one is correct, since the content is the same.[18]

Sometimes it is unclear whether a sentence that could not be traced to ancient sources appeared in the Middle Ages, or was formulated much later. Modern thoughts expressed in Latin are usually easy to recognise, and it is even easier to ascertain who authored them. Such was the case with the maxim *lex retro non agit* thought up by Stanisław Wróblewski.[19] A more puzzling example is the old saying *fiat iustitia, pereat mundus*, attributed to either St Augustine or the Holy Roman Emperor Ferdinand I,[20] or to Pope Adrian VI.[21] As the embodiment of ideas held by persons fanatical about justice, it was popular in the sixteenth century. It may be translated as follows: "Let there be justice though the world perish." If *mundus* is understood as meaning the great of this world, the thought sounds very reasonable and timeless, expressing a rather different postulate: "Let justice be served and overcome the haughtiness and pride of the great of this world." The sentence tells us to focus on what is good and just, regardless of what the wealthy and powerful think or are demanding.

Justinian's compilers had the good habit of citing sources: "Ulpian, Book 46 of his *Commentary on the Edict*". Such prescriptions (placed, as the word suggests, at the beginning) before the quoted text showed their respect for the authority being quoted and hid their own thoughts behind his words. Indeed, the whole of the Digest is "written with a pair of scissors": this hefty volume came into being by combining fragments of passages, sometimes even interwoven with one another, selected from the works of pre-classical and classical Roman jurists. Like the works of classical jurisprudence in Justinian's compilation, in the post-classical codes the passages from selected imperial constitutions were also arranged thematically. When we realise that a work compiled in the sixth century AD includes materials dating from between the first century BC and the third century AD, whose legally binding force was thus confirmed, we should ask the serious question what did *nemo plus iuris ad alium transferre potest, quam ipse haberet* mean when Ulpian first used it at the beginning of the third century, and what did it mean in Justinian's time, more specifically in the Digest? This quotation is not the only one which, taken out of context, gives the impression of eloquence and timelessness. The Romans were also aware of that phenomenon. The works and style of Ulpian's peer, the jurist

17 D 42 2 1 Paul *On the Edict* Bk 56; D 42 2 3 Paul *On Plautius* Bk 9.

18 *Cf* C 7 59 1 (Caracalla in AD 211): *Confessos in iure pro iudicatis haberi placet*.

19 W Wołodkiewicz, "'Lex retro non agit'" in W Wołodkiewicz & J Krzynówek (eds) *Łacińskie paremie w europejskiej kulturze prawnej i orzecznictwie sądów polskich* (Warsaw, 2001) 153-192 at 153.

20 C Michalunio *'Dicta.' Zbiór łacińskich sentencji, przysłów, zwrotów, powiedzeń* (Krakow, 2005) at 181.

21 According to D Liebs *Lateinische Rechtsregeln und Rechtssprichwörter* (München, 1998) at 84 the quotation originally comes from *I diarii 33* of Marino Sanuto.

Paul, made it very easy indeed: his phrases conveyed the meaning perfectly and succinctly. He was not particularly insightful or creative in legal terms, but some of his sentences are so succinct and clear that a separate collection has been compiled, under the telling title *Pauli Sententiae*.[22] The maxim *nemo plus iuris* must have been "living a life of its own" ever since it was included in the *Commentary on the Edict*. However, its independent existence was ensured after Justinian's commission chose it in the sixth century AD and entered it in the Digest under a special title on the rules of ancient law.

The prescription that provides information on the origin of a particular passage – more particularly by entering the number of the book in the *Commentary on the Edict* – makes it easier to find the palingenetic context in which the phrase *nemo plus iuris* appeared in Ulpian. Palingenesis (from the Greek words: *palin* – again, and *genesis* – creation) is an attempt to reconstruct a text that has been lost.[23] To judge by the passages found in thematically ordered groupings in the Digest, Otto Lenel made such an attempt in the second half of the nineteenth century. Not only did he group the texts by author and by that author's particular books, but he also suggested the order in which they may have originally appeared in each book. In the case of works discussing a number of issues, such as the many volumes of the *Commentary on the Edict*, passages from the works of jurists were separated according to the compilers' annotations found in the prescriptions. This made it possible to establish which issues a particular jurist discussed in a particular book. Thus, even a cursory glance at all eleven passages[24] in Book 46 of Ulpian's *Commentary on the Edict* shows he was discussing issues related to intestate inheritance under the praetor's edict (*bonorum possessio*).[25] This shows that the comment "no one can transfer greater rights to someone else than he himself possesses" was made in the context of the law of succession, or more precisely in that branch of the law of succession that was developing dynamically as a result of the activities of the jurisdictional magistrate. This should come as no surprise to us, because the law of succession was a driver of progress in Roman law. It avoided theoretical solutions when there was no practical need for them; however, we do find a number of theoretical solutions in the Roman law of succession, which resulted from the complexity and diversity of the issues concerned, as well as the detailed nature and comprehensive scope of the solutions adopted.

Ulpian's short commentary *nemo plus iuris ad alium transferre potest, quam ipse haberet* acquired a general meaning when the compilers highlighted one sentence that

22 F Longchamps de Bérier *L'abuso del diritto nell'esperienza del diritto privato romano* (Torino, 2013) at 149.

23 *Cf*, eg, M Zabłocka *Ustawa XII tablic. Rekonstrukcje doby renesansu* (Warsaw, 1998) at 10.

24 O Lenel *Palingenesia iuris civilis* 2 vols (Leipzig, 1889) vol 2 col 720-723 *Ulpianus 1193-1203*.

25 *Cf* O Lenel *Das 'Edictum perpetuum.' Ein Versuch zu seiner Wiederherstellung* (Leipzig, 1927) at 355-359.

merely defined the scope of transferred rights. According to Lenel, Ulpian's comment may have referred to *in iure cessio hereditatis*,[26] that is, cession of (relinquishing) an inheritance before a praetor. It took place before an heir accepted an intestate inheritance under civil law.[27] "Since *hereditas* is intangible, it can be transferred only in the form of *in iure cessio*. The cessionary of *in iure cessio hereditatis* becomes a universal successor of the testator."[28] This resulted in transmitting eligibility to inherit from one living person to another, providing that while only the *cedens* had been eligible to inherit, the cessionary became the heir with immediate effect.[29] Deliberations on the content and scope of the transferred right related to succession under *ius civile*, which, in the praetorian order, appeared in the second class of intestate eligibility to inheritance, called *unde legitimi*, probably from the first words of that part of the edict. Otto Lenel placed the passage D 50 17 54 at the end of the section devoted to *unde legitimi*, that is, after two other texts concerning that class. There is no further evidence that could help identify the location of *nemo plus iuris* more specifically in that part of Book 46 of the *Commentary on the Edict.*[30] Fritz Schulz went even further and suggested that Ulpian may in fact have worded the phrase a little differently: *Heres non plus iuris ad alium transferre potest quam ipse haberet si hereditatem adisset* (an heir may not transfer greater rights to someone else than he would himself have if he had accepted the inheritance). This phrase was reworded by the compilers who replaced the subject *heres* by the more general *nemo*, while forgetting to change the conjunctive *haberet* into the indicative mood – *habet*; after all, the original text must have had a hypothetical form,[31] which the rule did not need. Henryk Kupiszewski summed it up as follows: "Ulpian wanted to say that if the heir accepted *venditio hereditatis*, this could not encompass anything more than he would inherit on *aditio*."[32]

26 Lenel (n 24) vol 2 col 722 n 1.

27 G 2 35; *cf* F Longchamps de Bérier *Il fedecommesso universale nel diritto romano classico* (Warsaw, 1997) at 90ff.

28 W Dajczak, T Giaro & F Longchamps de Bérier *Prawo rzymskie. U podstaw prawa prywatnego* 2 ed (Warsaw, 2014) at 353.

29 G 3 85.

30 It is only on rare occasions that a maxim is found in its original context and then repeated elsewhere as an existing rule. One example is provided by *res iudicata pro veritate accipitur* (for the judgment of the court is deemed true). Cited in a longer passage D 1 5 25 from Ulpian *On the Lex Julia et Papia* Bk 1, it was then recorded by Justinian's compilers as a rule of ancient law – D 50 17 207. Prescriptions before both passages prove the compilers were quoting from the same source. This made the job easier for the author of the palingenesis; *cf* Lenel (n 24) vol 2 col 940 *Ulpianus 1978*.

31 F Schulz *Classical Roman Law* (Oxford, 1951) at 352. The suggestion that they forgot to change the mood of the verb is doubtful. Would the compilers, working on a passage in order to establish it as a rule, neglect to give it the finishing touches, and ignore a rather simple issue in their mental processes? Ordinary negligence in a chapter as important as D 50 17 amounts to inattention or carelessness on the part of the editors, at the very least.

32 Kupiszewski (n 4) at 226.

The context in which *nemo plus iuris* appeared in the law of succession is confirmed by other passages from the *Commentary on the Edict*. In Book 76 – D 50 17 160 2, Ulpian wrote: *absurdum est plus iuris habere eum, cui legatus sit fundus, quam heredem aut ipsum testatorem, si viveret*, thus finding it "absurd for someone to whom an estate has been bequeathed to have a better right than the heir or the testator himself if he were still living." His contemporary, the jurist Paul, mentioned in Book 12 of his *Commentary on the Edict* – D 50 17 120: *nemo plus commodi heredi suo relinquit, quam ipse habuit*, meaning "no one leaves a greater benefit to his heir than he himself had". Another *regula* stemming from the law of succession was quoted by the compilers in passage 175: *non debeo melioris condicionis esse, quam auctor meus, a quo ius in me transit* (I ought not to be in a better position than the person from whom the right passes to me). The passage we refer to today as D 50 17 175 1 comes from Paul's Book 11 of the *Commentary on Plautius* of which only two passages have survived.[33] Otto Lenel believed the book referred to wills and legacies, and suspected that the jurist was simply discussing *lex Iulia et Papia*,[34] that is, Augustus' regulations relating to marriage. The emperor sanctioned the regulations in the law of succession by depriving the unmarried or childless of their *capacitas* to inherit. To sum up our deliberations on Ulpian's original context, on the basis of the cited sources it has been established beyond doubt that the rule *nemo plus iuris* originates from classical Roman law.

> It may have been formulated by Sabinus,[35] and referred to by Ulpian as an aside on *in iure cessio hereditatis* and *mancipatio*. The compilers gave the statement a universal value. The law of later times and today has assumed it was only an argument, without giving it an absolute meaning.[36]

The third century jurist invoked *nemo plus iuris* in relation to the transfer of an entire estate to another person by means of the formal and abstract act of *in iure cessio hereditatis*: after all, there must have been some questions about the scope of universal succession. Little wonder, therefore, that the phrase was formulated in the context of the law of succession. The *nemo plus iuris* rule "most likely expressed the principle that both the assets and liabilities of an estate were transferred to the acquirer of an inheritance".[37] We know now that eventually it became one of the fundamental principles of property law. This means that in any derivative acquisition, the rights of the acquirer may not exceed those of the transferor. The right passes to the acquirer

33 The other is D 30 85.

34 Lenel (n 24) vol 1 col 1165 *Paulus 1182* n 5.

35 Ulpianus provided the disputed rule in a slightly different lexical form in D 41 1 20*pr*, coming from his *Commentary on Sabinus*, which gives rise to the speculation that in the first century AD he had already formulated the idea that one cannot transfer to another more rights than he himself has.

36 Kupiszewski (n 4) at 227.

37 Kacprzak, Krzynówek & Wołodkiewicz (n 14) at 117.

together with all its possible limitations. In *Prawo rzymskie a współczesność* (*Roman Law and Modernity*), a book that has been a constant source of inspiration and has not lost its relevance over the past twenty-five years, Henryk Kupiszewski gave an example of how part of a statement may be subject to reinterpretation in the history of ancient Roman law as a result of legal development:

> The *regula* talks about *ius transferre*. This phrase had different meanings in classical and Justinian law. Classical jurisprudence did not yet know the concept of *dominium* or of *ius proprietatis transferre*, and used the flexible term *rem mancipare*, *rem in iure cedere*, *rem transferre*, the *res* to jurists at that time meaning *res incorporalis*. Post-classical law used the more general terms *dominium*, *proprietatem transferre*, when the view that the ownership of an object could be transferred gradually became a fixed concept.[38]

And this concerns only one, though crucial, element of *nemo plus iuris*.

What meaning was attributed to the rule by Justinian's compilers? Firstly, it is not surprising they took it out of its original context. It is true that "the original wording does not provide grounds for assigning to it any far-fetched generalisations. The jurist does not seem to be pointing to a universal application, beyond what is to be found within the framework of the law of succession."[39] Because the sentence *nemo plus iuris ad alium transferre potest quam ipse haberet* "expresses a rational obviousness",[40] not only was it a good generalisation, but it simply attracted the attention of Justinian's commission when it was working on the chapter in which legal rules are stated. The chapter summarised the Digest. Indeed, "the obviousness of the idea expressed in Ulpian's statement is so striking that one may feel a more detailed, legal commentary would be superfluous".[41] In this way, the compilers helped save the maxim itself, because had it been limited to its original, narrow context, it would have sunk into oblivion despite its apt and succinct wording. Secondly, earlier on in the same Book 50, Title 17, the compilers cited, as passage 11, an excerpt from Pomponius − a lawyer living in the mid-second century AD: *Id quod nostrum est sine facto nostro ad alium transferri non potest*. Passage D 50 17 11 quoted here comes from Book 5 of the *Commentary on Sabinus*, comprising comments on civil law. Pomponius seems to be saying in more general terms than *nemo plus iuris* that what is ours cannot be transferred to another without any action on our part. The above quotation leads us to the principles of property law. In the post-classical period, a combined reading of the passages from Pomponius and Ulpian gave rise to a phrase that English jurists found more to their taste: *nemo dat qui non habet* (no

38 Kupiszewski (n 4) at 227 n 118.
39 Amielańczyk (n 15) at 504-505.
40 Kupiszewski (n 4) at 225.
41 Amielańczyk (n 5) at 355.

one can give who does not have).[42] Naturally, this short maxim eventually developed into a rule of common law.[43]

In Rome, *nemo plus iuris* came to be used in two senses. One was the sense in which Ulpian used it, the other, the way that Justinian's jurists understood it. It is clear that in both cases, although to a varying extent, the jurists were thinking of a law, a legal rule. At the beginning of the title containing various rules of ancient law, Justinian's compilers recorded what they considered to be a rule. In the opening paragraph D 50 17 1, they cited Paul's definition from Book 16 of his *Commentary on Plautius*:

> *Regula est, quae rem quae est breviter enarrat. Non ex regula ius sumatur, sed ex iure quod est regula fiat. Per regulam igitur brevis rerum narratio traditur, et, ut ait Sabinus, quasi causae coniectio est, quae simul cum in aliquo vitiata est, perdit officium suum.* (A rule is something which briefly describes what a thing is. The law may not be derived from a rule, but a rule must arise from the law as it is. By means of a rule, therefore, a brief description of things is handed down and, as Sabinus says, is, as it were, the element of a case, which loses its force as soon as it becomes in any way defective.)

The passage has been analysed in depth more than once,[44] but that is not our concern now; it is enough to note the two different ways of perceiving a rule: as a criterion and as a normative standard. The above text shows that our perception of it differs from that of jurists in ancient times, since we believe an exception proves the rule. In their view, an exception disproved the rule, because a rule was not a source of law, but only a summary and description of the applicable law. It was a definition, and Javolenus' famous remark was simply a warning against the absolutisation of definitions;[45] the oft quoted passage comes from Book 11 of his *Letters* – D 50 17 202: *Omnis definitio in iure civili periculosa est: parum est enim ut non subverti potest* (every definition in civil law is dangerous; for it is seldom that one cannot be overturned). Justinian's compilers selected that single sentence, and included it in the *regulae* of ancient law in D 50 17 as the tenth passage from the end of the Digest. In the light of the *omnis definitio* warning, even if the *nemo plus iuris* rule was not subject to restrictions under Roman law, its importance must at least not have been exaggerated. Moreover, *apices iuris non sunt iura* (extreme solutions are not laws);[46] which also applies to the interpretation of the rule. Bearing in mind the

42 *Cf* Schulz (n 31) at 351-352.

43 *Cf*, eg, s 21(1) of the Sale of Goods Act 1979 c 54 which only refers to the existence of that maxim.

44 The text was analyzed in detail by Kupiszewski (n 4) at 189ff, but earlier also by P Stein *'Regulae iuris.' From Juristic Rules to Legal Maxims* (Edinburgh, 1966) at 67ff; B Schmidlin *Die römischen Rechtsregeln. Versuch einer Typologie* (Cologne-Vienna, 1970) at 7ff.

45 *Cf* Kupiszewski (n 4) at 204.

46 *Cf* D 17 1 29 4 Ulpian *Disputations* Bk 7. The translation "legal tricks are not law" has been suggested by K Burczak, A Dębiński & M Jońca *Łacińskie sentencje i powiedzenia prawnicze* (Warsaw, 2007) at 13.

above proviso, we may now summarise what was said above and state that both classical and Justinian law held firmly to *nemo plus iuris* as a rule. Thus we have been able to learn both the original meaning attributed to *nemo plus iuris*, and that in which the *regula* was popularised.

4 Do not let yourself be caught by surprise

In Roman law, the said rule was of considerable significance in yet another branch of law − the law of obligations. It appeared in deliberations concerning contracts of sale, and so we should consider a passage from Ulpian in Book 29 of his *Commentary on Sabinus* – D 41 1 20*pr*-1:

> *Traditio nihil amplius transferre debet vel potest ad eum qui accipit, quam est apud eum qui tradit. Si igitur quis dominium in fundo habuit, id tradendo transfert, si non habuit, ad eum qui accipit nihil transfert. Quotiens autem dominium transfertur, ad eum qui accipit tale transfertur, quale fuit apud eum qui tradit.* (Delivery should not and cannot transfer to the transferee any greater title than resides in the transferor. Hence, if someone conveys land of which he is owner, he transfers his title; if he does not have ownership, he conveys nothing to the recipient. Now whenever ownership is transferred, it passes to the transferee to the same extent as it was held by the transferor.)

In the first of the sentences quoted above, the jurist gave a slightly different wording to the *nemo plus iuris* rule. The palingenetic context of the above excerpt clearly indicates that Book 29 was concerned with *emptio venditio*.[47] Incidentally, it is worth noting that the entire fragment confirms that the preposition *ad* was more appropriate than *in* when referring to the transfer of property rights – at least in Ulpian.[48] The text talks of performance in terms of a contract of sale by *traditio*, delivery, but it is clear that originally the third-century jurist was referring to *mancipatio*. In classical law, land could not be alienated through *traditio*.[49] That typical interpolation was made by Justinian's compilers. In addition, one of the passages referring to *nemo plus iuris*, D 50 17 177*pr*, which they included in the rules of ancient law in the last title of their Digest, stems from discussions on contracts of sale. The entire quotation in D 50 17 177 was taken from Book 14 of Paul's *Commentary on Plautius*: *Qui in ius dominiumve alterius succedit, iure eius uti debet. Nemo videtur dolo exsequi, qui ignorat causam, cur non debeat petere* (Whoever succeeds to the legal position or right of property of another must accept his rights. No one is regarded as something by fraud if he is ignorant of the reason why he may not claim). According to Otto Lenel, the first sentence in that passage, designated as "pr", referred to *exceptio rei*

47 Lenel (n 24) vol 2 col 1122 *Ulpianus 2721*.

48 *Cf ad* eg in Ulpianus *On Sabinus* Bk 29 – D 41 1 20 1; but *in* in the same jurist, eg in *On the Edict* Bk 9 – D 3 3 17*pr*. and D 3 3 27 1; and *rem suam in alium transferre* in Gaius *Diurnal Matters* Bk 2 – D 41 1 9 3.

49 Lenel (n 24) vol 2 col 1122 nn 5-9.

venditae ac traditae.[50] The defendant used this *exceptio* because the thing sought had been delivered by the plaintiff in terms of a contract of sale. The beginning of Book 14 relates to matters concerning *exceptiones*, namely pleas.

In terms of the *emptio venditio* contract, the seller was bound to deliver only *vacua possessio* − free and unimpeded possession, into which the purchaser could enter without interference from either the vendor or, more importantly, a third party. The buyer had to continue undisturbed, so that *uti frui habere possidere licere* – he could freely use, derive profits, retain and possess. Thus, what the purchaser owed was not *dare*, that is transfer of ownership, but *facere*, that is making or causing undisturbed possession.[51] Naturally, if goods were transferred to the buyer by way of a formal act of disposal, *mancipatio* or *in iure cessio*, then ownership passed to the buyer. This also usually happened by means of *traditio* – the simple delivery of ordinary things that did not belong to the special category *res mancipi*. Failure to transfer ownership did not give rise to *actio empti* – an action on purchase – on the part of the buyer. It was a different matter if someone effectively vindicated the thing purchased from the buyer by the act of *evictio*. As long as the *emptor*

> retained his *habere licere*, the law did not give him any protection. For a modern lawyer this must sound both surprising and inequitable ... Was the Roman law 'stiff and primitive' in this regard? First of all, we have to remember ... [that in its structure] the contract of sale contained everything that was necessary to transfer ownership except [the act of delivery by] *traditio* (or *mancipatio*). Once the object was handed over (or mancipated), and provided the vendor himself had been owner, ownership passed.[52]

Ulpian attested to this in Book 32 of his *Commentary on the Edict* – D 19 1 11 2: *Et in primis ipsam rem praestare venditorem oportet, id est tradere: quae res, si quidem dominus fuit venditor, facit et emptorem dominum* … (Firstly, the seller must provide the object itself, that is, deliver it. If the seller was its owner, his act [of delivery] also makes the buyer the owner ...). The structure of the *emptio venditio* contract lacked nothing. "Nothing else was necessary. But if that was so, there was neither room nor necessity for postulating a special duty to make the purchaser owner. That would be the automatic consequence of *traditio* (or *mancipatio*), which, in turn, the vendor was bound to perform."[53] Granted, the buyer made the seller the owner of the money he paid, but money was a thing that was publicly available. He was not, after all, bound to deliver specific coins, but expected to pay the price with coins of which the seller then became the owner. Having said that, Reinhard Zimmermann even noted that in Roman law the sale of generic goods was unknown: every sale was a sale of specific goods because of the obligation to deliver them; and such

50 Lenel (n 24) vol 1 col 1167 *Paulus 1196* n 8.
51 R Zimmermann *The Law of Obligations. Roman Foundations of the Civilian Tradition* (Oxford, 1996) at 278.
52 *Ibid*.
53 *Idem* at 279.

goods could be the property of a third party.[54] It is indeed hard to imagine how much economic development would be hindered if one could only sell what one owned. The author only slightly adapted the division of generic and specific things to suit his argument; he wanted to emphasise that the purchaser expected the seller to make every effort to transfer ownership. Indeed, the seller could not be forced to do the impossible, especially since *impossibilium nulla obligatio est* (there is no obligation to do anything which is impossible).[55] Providing all was in order, the seller made the purchaser the owner; at worst, the buyer became the owner after some time by means of *usucapio*, namely usucaption. As a rule, *nemo plus iuris* thwarted the expectation that the seller would transfer ownership whether or not he was the owner of the thing. In particular, it protected ownership of *res furtivae* − stolen things. We learn from the jurist Paul that when both parties knew the thing had been stolen, or when it was known only to the buyer, the obligation did not arise at all. The situation was different when the seller knew that the object of an *emptio venditio* was stolen, but the buyer was unaware of this.[56] In the latter case, the *nemo plus iuris* rule did not prevent the obligation from arising. "Genetically, [the rule] is related solely to dispositive, factual acts. Its operation is as simple as its wording."[57] A question that proved more important concerned the content of the obligation, since the rational condition for its validity was the ability to perform it. The performance of a contract was possible precisely because the seller was not bound to transfer ownership, but only to ensure unimpeded possession. The only snag was that the buyer could not acquire a *res furtiva* by usucaption,[58] even if he purchased it in good faith. The buyer could bring an *actio empti* against a seller who knew he was selling stolen things, not because ownership of the thing had not passed (to the buyer), but on account of bad faith. However, the real problem, to which there was no simple solution, arose when neither the buyer nor the seller knew the thing had been stolen. Both parties were being honest, and someone had to suffer the consequences, because they were still bound by a contractual tie. If the buyer received the object of the sale, which a third party then took from him using eviction, it would be unreasonable to involve the seller too. *Periculum est emptoris* – the risk was borne by the buyer, which became an established principle of Roman law.[59] In English law, a buyer who had not become the owner could resort to the *warranty of title*, but such a remedy was unknown in Roman law.[60] If the seller was not the owner, the *nemo plus iuris* rule prevented him

54 *Ibid*.
55 D 50 17 185 Celsus in his *Digest* Bk 8.
56 D 18 1 34 3 Paul *On the Edict* Bk 34.
57 Amielańczyk (n 5) at 359.
58 A Kacprzak *Sprzedaż rzeczy kradzionej*, (2002) 2(1) *Zeszyty Prawnicze UKSW* 93-104 at 94-95, 102.
59 Dajczak, Giaro & Longchamps de Bérier (n 28) at 506-507.
60 R Powell "Eviction in Roman and English law" in D Daube (ed) *Studies in the Roman Law of Sale Dedicated to the Memory of Francis de Zulueta* (Oxford, 1959) 78-90 at 87-90.

from transferring ownership. Although the contract was valid, transfer of ownership was objectively impossible. Roman law only knew an implied *warranty of peaceable possession*.[61] The thing was transferred to the buyer, and he could enjoy it as long as the owner of the thing sold did not resort to eviction and take it away from the buyer. To summarise the foregoing, we should observe that the Roman-law doctrine was adopted by the *ius commune*: the seller was bound to ensure *vacua possessio*, but was not obliged to make the buyer the owner of the thing sold.[62]

5 Make sure the maxim is established in the law

In the last title of the Digest *De diversis regulis iuris antiqui*, Justinian's compilers included as many as six passages confirming that it was impossible for anyone to transfer more rights to another person than he had himself. These are − in the sequence in which they were referred to above − texts from D 50 17: D 50 17 54; D 50 17 160 2; D 50 17 120; D 50 17 175 1; D 50 17 11; and D 50 17 177*pr*. The number of rules of ancient law to which the compilers referred shows they believed *nemo plus iuris* was a well-established principle of the overall legal order. And because it was a *regula* (a rule), in accordance with the definition provided in D 50 17 1, there were no exceptions to it. Thus Roman law fully respected the *nemo plus iuris* rule.[63]

Exceptions to that rule with regard to derivative acquisition of ownership were only apparent. The academic discussion in Gaius' *Institutes*, G 2 62-64, cannot be taken seriously. The jurist compared the example of an owner who did not have the authority to alienate his property with that of a non-owner who could dispose of another person's property. A husband who owned land that was part of the dowry was prohibited from transferring it in terms of the special *lex Iulia de fundo dotali*. The statutory limitation of an owner's rights does not require any comment. However, if a non-owner was an agnate who, under the Law of the Twelve Tables, had guardianship over a *furiosus*, he could alienate the latter's property; and so could a *procurator* of his estate. The correlation between *agnatio* and ownership in ancient law seems to preclude the existence of a real anomaly here. In addition, a pledge creditor could dispose of the pledged thing although he was not even the possessor of the thing, only a *detentor*, namely a holder. His right to alienate resulted from the *pactum de vendendo* – an informal agreement concerning the case in which a debt secured by a pledge is not repaid. And one can only agree that it is a paradox that *uti frui ius sibi esse solus potest intendere, qui habet usum fructum, dominus*

61 Zimmermann (n 51) at 293-294.

62 *Idem* at 303.

63 Unlike Kupiszewski (n 4) at 225, who wrote: "On close examination it soon turns out that today and in classical or Justinian Roman law it never had an absolute value. For it is neither always true that a right cannot be transferred by a non-owner, nor that it can be transferred by the person who is." Legal intuition correctly takes into account the need for compromise. The examples he provided referring to Roman law in his substantiation are those we consider apparent exceptions.

autem fundi non potest (the only person who can claim by law that he has the right to use and enjoy property is the man who has the usufruct of it). The rule was stated by Ulpian in Book 17 of his *Commentary on the Edict* – D 7 6 5, and followed by the explanation: *quia qui habet proprietatem, utendi fruendi ius separatum non habet: nec enim potest ei suus fundus servire* (the owner of the property cannot do so, because a man who has ownership does not have a separate right of use and enjoyment; the fact is that a man's estate cannot be subject to a servitude in his own favour). In Book 65, the jurist referred to a similarly academic way of reasoning – D 41 1 46: *non est novum, ut qui dominium non habeat, alii dominium praebeat: nam et creditor pignus vendendo causam dominii praestat, quam ipse non habuit* (it is no novelty that one who does not have ownership may still confer ownership upon another; a creditor, for instance, in selling a pledge, gives title to ownership that he does not have himself). We should also add that Paul, in his characteristically concise manner, wrote in a single book *On Exceptional Law* – D 7 1 63: *quod nostrum non est, transferemus ad alios: veluti is qui fundum habet, quamquam usum fructum non habeat, tamen usum fructum cedere potest* (we can transfer to others what we do not ourselves have; for example, if a man has an estate, then even although he does not hold the usufruct, he can still grant usufruct to another). The *nemo plus iuris* rule reverberates in this quotation in the phrase *quod nostrum non est* and the verb *transferemus*. *Ususfructus* is not ownership, and an owner does not actually have usufruct – in the sense that we cannot say he only has a limited right, since the owner's right to the thing is much broader than the right to usufruct. Therefore, formally, the owner establishes something that did not exist before – he isolates from his property the right of *ususfructus*, but does not transfer to another person a right to which he himself would not be entitled. The content of the right of usufruct is contained within the right of ownership. Therefore the conclusion that we can transfer to another what is not our own is a play on words and constructions, an uncomplicated brainteaser and without any substantive value. Legal issues can be constructed or stated in a way that suggest we are dealing with exceptions while in reality there is no exception here at all.

6 Do not neglect related and supporting maxims

The protection of ownership in Roman law went even further than set out above, finding its place in the broader context of securing control over a thing. Hence the counterpart to *nemo plus iuris* in respect of actual control − in the form of *nemo sibi ipsum*. Paul stated in Book 54 of his *Commentary on the Edict* – D 41 2 3 19: *illud quoque a veteribus praeceptum est neminem sibi ipsum causam possessionis mutare posse* (the earliest jurists further laid down that no one can change for himself the title by which he possesses something). When stating the rule, the jurist also invoked the earliest jurists so that we would know how long it had formed part of the law.

The question of its relevance or validity is another matter. We can say a rule is true if it only describes the law of a particular time and its role is then largely one of interpretation. If compliance with a rule is sought, the basis of its current validity should be specified. Legal bases may change, but even when replaced by new ones, they may express an unchanging rule. Thus Roman law, especially by blocking access to *usucapio pro herede*, prevented *detentores* from arbitrarily and covertly becoming rightful possessors. *Nemo sibi ipsum* as the counterpart to *nemo plus iuris* in the protection of possession represented a "systemic block" to changes in control. It protected the possessor and the owner, because strengthening possessory protection helped strengthen ownership.

The rule of *nemo sibi ipsum* was well established and documented in classical Roman law.[64] It was adopted unreservedly by codes of natural law (Arts 2231 and 2240 CC, § 319 ABGB), and the Italian civil code of 1942 (Art 1141 CCI), but rejected by the German and Swiss codes. Polish law, unfortunately, followed their example[65] and adopted a purely factual concept of possession. The Supreme Court of Poland confirmed the rejection of *nemo sibi ipsum* when it allowed, *expressis verbis*, a change in the title of possession by the possessor himself.[66] This, of course, does not apply to the rule that "no one can transfer greater rights to another person than he himself possesses".

7 Take the local context into account

Polish law respects *nemo plus iuris* as a rule in the sense that it perceives it as the Latin wording of the requirement that the seller be the owner or person entitled to dispose of the thing. According to Andrzej Stelmachowski, the rule has not been embodied in any Polish statute because it is obvious. The right of the owner arises from his right to dispose of the thing he owns, and specific legal relationships provide the basis for disposing of the right to ownership of another person. Moreover, the provisions of family law allow spouses to dispose of their joint marital property.[67] From the perspective of Roman law, it is pleasing to note that "in Polish law, the presence of that rule is most conspicuous in the law of succession".[68] It is usually perceived as the foundation of legal transactions in the derivative transfer of ownership.[69] Laws have

64 D 41 3 33 1 and D 41 5 2 1 Julian *The Digest* Bk 44; D 41 2 191 Marcellus *The Digest* Bk 17; D 41 2 3 19-20 Paul *On the Edict* Bk 54.

65 F Zoll & A Szpunar *Prawo cywilne w zarysie* vol 2 (Krakow, 1947) at 306; Stelmachowski (n 12) at 384; J Gołaczyński "Posiadanie" in E Gniewek (ed) *System Prawa Prywatnego. Prawo rzeczowe* vol 4 (Warsaw, 2005) 1-66 at 14-15.

66 I CR 167/59 (12.05.1959, *Orzecznictwo Sądu Najwyższego 1961*, item 8); SN of 12.3.1971, III CRN 516/70 (12.03.1971, *Orzecznictwo Sądów Polskich i Komisji Arbitrażowych 1971*, 11).

67 Stelmachowski (n 12) at 315.

68 Amielańczyk (n 15) at 512.

69 Stelmachowski (n 12) at 336.

created exceptions to this rule, allowing the acquisition of ownership of movable property and even real property from an unauthorised person. These laws were introduced because of the need to compromise in the interests of the reliability of business transactions and respect for good faith. However, a legislative compromise between *nemo plus iuris* and the rival principle of protecting the interests of persons acting in good faith "affects the acquisition of the ownership of real property to a much lesser extent than the acquisition of ownership of movable things".[70] In the former case, *nemo plus iuris* has been waived in order to reinforce confidence in the entry in a land and mortgage register, as the basis of the purchaser's good faith.[71] Usucaption in bad faith is possible in Polish law only in respect of real property, and only after the elapse of thirty years of possession (Art 172 § 2 of the Polish Civil Code). On the other hand, the purchaser of a movable thing who acquires it from a non-entitled person becomes its owner upon taking hold of it, unless he was acting in bad faith (Art 169 § 1 of the Polish Civil Code). When a thing has been mislaid, stolen, or otherwise lost by the owner, a purchaser in good faith may acquire ownership after the elapse of thirty years from the time it was mislaid, stolen, or lost (§ 2). The rule of *nemo plus iuris* is therefore honoured in Polish law; and so the reliability of business transactions and the interests of the purchaser who acquires a thing in good faith from a person who is not the owner counterbalance the protection of ownership.[72] The Polish legal system is based on the protection of ownership as the basis of private law, but the example of *nemo plus iuris* clearly shows that the law should be viewed from the perspective of the values and principles reflected in particular regulations.[73] The rules of construction or interpretation result from legal policy and depend on the objectives, which here are the implemented values.

It is not only in Roman law that the protection of ownership was a general principle, fully applicable to derivative acquisition. *Nemo plus iuris* prevented acquisition from a non-owner: the vendor was either the owner – D 50 17 11, or an authorised person or the owner's representative – G 2 62-64. In such a case, ownership passed to the purchaser immediately and not by usucaption. Because the law had to protect ownership, formal acts were required for the transfer of the most valuable things, namely *res mancipi*. The formal, abstract acts of *mancipatio* and *in iure cessio* caused the owner to consider the transaction carefully. The same applies to the requirement of *iusta causa traditionis*, if a person wanted to transfer

70 *Idem* at 337.

71 *Idem* at 339; Amielańczyk (n 15) at 516.

72 *Cf* W Kowalski "Nabycie własności rzeczy ruchomej 'a non domino' w prawie rzymskim i współczesne zmagania z problemem" in F Longchamps de Bérier, R Sarkowicz & M Szpunar (eds) *'Consul est iuris et patriae defensor.' Księga pamiątkowa dedykowana doktorowi Andrzejowi Kremerowi* (Warsaw, 2012) 77-103 at 85, 93.

73 *Cf* M Kordela "Stanowienie zasad prawa" in A Dębiński, P Sitarz, T Barankiewicz, J Potrzeszcz, W Staszewski, A Szarek-Zwijacz & M Wójcik (eds) *'Abiit, non obiit.' Księga poświęcona pamięci ks. prof. Antoniego Kościa SVD* (Lublin, 2013) 191-199 at 198.

ownership by simple delivery. Further protection was provided by limiting *usucapio*, thus making it rather difficult in practice to acquire ownership of real property through long-term possession. Similarly, if a thing was abandoned, loss of ownership of it was not at all obvious, and certainly far from automatic. It all depended on the owner's will and the claims he made regarding the thing, even a long time after it had been abandoned. This systemic protection of the owner included the *nemo plus iuris* rule, which was at least one legal expression of such protection. In Roman law, ownership was clearly related to and correlated with social perceptions of it. Here we are touching upon the foundations of law. Roman-law regulation of ownership was not as stringent as many people in the nineteenth century claimed.[74] Ownership was nevertheless much more heavily protected than it is today, when the law places equal emphasis on protecting the certainty of business transactions and ownership.

8 Conclusion

Let us now summarise what has been established thus far. A legal *dictum* formulated in Latin is referred to as a rule, maxim, definition, precept, or principle. It is impossible to differentiate these terms clearly, although this has been done, for instance, in the terminology used in contracts in continental private law. Henryk Kupiszewski[75] attempted to identify a fundamental difference between a maxim and a rule in Roman law − but without any success. We can certainly use equivalent terms: sentence, statement, phrase, as well as *dictum*. In the above discussion, the word "rule" has been used with reference to *nemo plus iuris*, because to Justinian's compilers, *nemo plus iuris ad alium transferre potest, quam ipse haberet* was a *regula*, as it was in the title of D 50 17. Furthermore, some writers have concluded that in certain legal contexts *nemo plus iuris* was and still is perceived as a rule. We should therefore decide and clearly state, on a case-by-case basis, what we understand by the terms maxim, rule, or precept at a particular time and in a particular context. For jurists, such Latin phrases and statements refer to rules that are an important tool in interpreting and applying the law. Given the role of Roman private law in the historical formation of the European legal tradition and its contemporary influence and development, its main importance lies in its fundamental rules of private law. Therefore, when considering which *dicta* to use in argument, we should not make do with free association, or uncritically trust our intuition. We should acquaint ourselves with the full phrase as well as the context in which it is known and how it has been used up until now. Only then can we be creative, find other ways of applying it and construct new meanings for it. It is usually pointless to ask what the author meant by it; what he had in mind may be entirely beyond our reach. Once a maxim is formulated, it takes on a life of its own, whether we like it or not. Audiences and

74 Longchamps de Bérier (n 22) at 181-185.
75 Kupiszewski (n 4) at 155-240.

readers of various epochs or even cultures understand it subjectively. They are free to use ancient and contemporary *dicta* as useful tools in interpreting and applying the law. To be effective, however, they need to make an effort and be prepared and competent not only in dogmatic, but in historical terms as well.

Abstract

Lawyers use words with great care and, particularly in public discourse, often like to use Latin *dicta.* They do so not only to make their arguments sound more sophisticated, but also to support their theses not merely with elegantly worded, classical maxims, but also with well tested, established concepts based on the experience of people who lived in ancient Rome, a consummately practical society, very well versed in the practice of law.

A legal *dictum* formulated in Latin is referred to as a rule, maxim, definition, precept, or principle. It is impossible to differentiate these terms clearly, although this has been done for instance in the terminology used in contracts in continental private law.

How can contemporary lawyers best use Latin maxims and sentences? This is explored by using the example of *nemo plus iuris ad alium transferre potest, quam ipse haberet*. The six steps are as follows: use maxims competently; be aware of the context of your quotation; do not allow yourself to be taken by surprise; make sure the maxim is well established in the law; do not neglect related and supporting maxims; and take the local context into account.

BEMERKUNGEN ZUR BEWEISFÜHRUNG IN CICEROS CLUENTIANA

Tamás Nótári*

Die längste uns überlieferte und tatsächlich gehaltene *oratio* Ciceros ist die im Jahre 66, dh im Jahre seiner Prätur für Aulus Cluentius Habitus gehaltene Rede. Aus gewisser Hinsicht ist sie einer der Edelsteine der ciceronianischen Redekunst: Ihre Narrative ist lebhaft und spannend, wie die eines Kriminalromans, die Ereignisse, die Tatorte und die Zeitebenen wechseln sich in ihr gewagt und manchmal scheinbar unlogisch, ergeben aber zum Schluss eine präzis abgerundete, geschlossene, dem Ziel des Redners dienende Einheit. Gegen Cluentius, der dem Ritterstand *(ordo equester)* angehörte, wurde einerseits mit jener Begründung Anklage erhoben, dass er seinen Stiefvater, Statius Albius Oppianicus vergiftet haben soll. Andererseits wurde gegen ihn im Prozess auch vorgebracht, dass er vor acht Jahren in einem Prozess, den er gegen Oppianicus deswegen angestrengt hatte, weil dieser angeblich versucht hatte ihn zu ermorden, die Richter bestochen haben soll, was zur Folge hatte, dass Oppianicus den letzten Teil seines Lebens im Exil zu verbringen hatte. Den gesetzlichen Hintergrund der Anklage wegen Giftmordes bildete die *lex Cornelia de sicariis et veneficiis* aus dem Jahre 81, in der allerdings nur für jene Art der Richterbestechung eine Sanktion festgesetzt war, die von Mitgliedern des Senatorenstandes begangen wurde.

Zuerst sollte der historische Hintergrund der Rede und der gesetzliche Tatbestand, dh die Anwendbarkeit der *lex Cornelia de sicariis et veneficiis* untersucht werden.

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Abschliessend sollen die von Cicero in der *Cluentiana* angewandten rhetorischen Mittel unter die Lupe genommen und aus jener Hinsicht behandelt werden, wie Cicero die Chronologie der Anklagepunkte in seiner auch juristisch brillanten Argumentation behandelt, verändert bzw entstellt hat.

1 Die Rede für Aulus Cluentius Habitus aus dem Jahre 66 wurde von Cicero in seinem zwanzig Jahre später geschriebenen *Orator* als Beispiel für die Verwendung der drei Stilarten in derselben Gerichtsrede erwähnt,[1] und er zitiert daraus[2] diesbezüglich eine äusserst gelungene Formulierung.[3] Als Quintilian über das Urteilsvermögen des Redners schreibt, beruft er sich auf die *Cluentiana* als Musterbeispiel der gut angelegten forensischen Strategie,[4] anderswo stellt er wiederum fest, dass in der *Cluentiana* Cicero den Geschworenen Sand in die Augen gestreut hat.[5] Die Rede für Cluentius wird von Gellius zitiert,[6] Plinius der Jüngere hält sie für die hervorragendste rednerische Leistung Ciceros,[7] von den Juristen beruft sich Claudius Tryphoninus auf sie.[8] Theodor Mommsen würdigt die *Cluentiana* folgendermassen: „Die Criminalstatistik aller Zeiten und Länder wird schwerlich ein Seitenstück bieten zu einem Schaudergemälde so mannichfaltiger, so entsetzlicher und so widernatürlicher Verbrechen, wie es der Prozess des Aulus Cluentius in einem Schoss einer der angesehensten Familien einer italischen Ackerstadt vor uns aufgerollt.“[9]

Der Angeklagte des Prozesses, A Cluentius Habitus ist im nördlichen Apulien, in dem von den miteinander mehrfach verschwägerten Aurii, Albii, Cluentii und Magii dominierten Larinum geboren,[10] das ein Spiegelbild der in Rom wuchernden Lastern zeigte[11] – und es kann nicht einmal behauptet werden, dass der Grösse der Landstadt entsprechend.[12] Seinen Vater, Cluentius den Älteren, verlor er im Jahre 88, als er fünfzehn Jahre alt war,[13] seine Mutter, Sassia heiratete zwei Jahre später ihren

1 Cicero *Orator* 103.
2 Cicero *Pro Cluentio* 199.
3 Cicero *Orator* 108.
4 Quintilianus *Institutio oratoria* 6 5.
5 Quintilianus *Institutio oratoria* 2 17 21: *gloriatus est offudisse tenebras iudicibus Cluentianis.*
6 Gellius *Noctes Atticae* 16 7 10.
7 Plinius *Epistulae* 1 20 4.
8 Tryphoninus D 48 18 39.
9 Th Mommsen *Römische Geschichte (*Berlin, 1875) Bd 3 528.
10 Zum Hintergrund der Vorgeschichte des Verfahrens siehe GS Hoenigswald „The murder charges in Cicero's *Pro Cluentio*" (1962) 93 *Transactions of the American Philological Association* S 109-123.
11 Vö Sallustius *De coniuratione Catilinae* 11, 4.
12 W Kroll „Ciceros Rede für Cluentius“ (1924) 53 *Neue Jahrbücher für das klassische Altertum* S 174-184, 176.
13 Cicero *Pro Cluentio* 11.

Schwiegersohn A Aurius Melinus, den geschiedenen Gatten ihrer Tochter Cluentia.[14] Cicero datiert von hier an das schlechte Verhältnis zwischen dem Angeklagten und seiner Mutter und behauptet, dass ihn Sassias Verhalten dermassen empört hatte, dass er beschloss, mit seiner Mutter keinerlei Kontakt pflegen zu wollen.[15] Aurius fiel – angeblich in Folge der Machenschaften des St Abbius Oppianicus – den sullanischen Proskriptionen zum Opfer.[16] Sassia heiratete Oppianicus, der sich schon von zwei Ehefrauen, von Papia (der Witwe des Magius) und Novia getrennt hatte bzw zwei Gattinnen, Cluentia die Ältere und Magia verloren hatte.[17]

Es ist erwähnenswert, dass Cicero, als er vom Hass zwischen Oppianicus dem Älteren und Cluentius spricht, von jenem Element Gebrauch macht, das er als psychologische Motivation des von Oppianicus auf seinen Stiefsohn verübten Giftmordversuches hätte verwenden können, nämlich dass Cluentius auf die Heirat zwischen Sassia und Oppianicus mit Antipathie und Groll reagiert hat.[18] Oppianicus der Jüngere, der im Jahre 66 gegen Cluentius als Ankläger auftrat, stammte von Magia, einer früheren Gattin des Oppianicus des Älteren. Oppianicus der Ältere wollte angeblich seinen Stiefsohn Cluentius vergiften lassen: Zur Ausführung seines Plans nahm er die Hilfe des C Fabricius in Anspruch, der zusammen mit dem Freigelassenen Scamander, den Sklaven des Cluentius behandelnden Arztes, für sein Vorhaben gewinnen wollte.[19] In wie fern der Mordversuch als bewiesen gelten kann, mag dahingestellt bleiben, Tatsache ist, dass Cluentius zuerst gegen Scamander und Fabricius bzw abschliessend gegen seinen Stiefvater, Oppianicus den Älteren Anklage erhob. Oppianicus wurde vom Gericht mit einer ganz knappen Stimmenmehrheit für schuldig befunden und verurteilt.[20] Den Prozess umgaben mehrere verdächtige Umstände, so zB wurden die Richter nicht vorschriftsgemäss ausgelost[21] und der Bestechungsverdacht[22] betraf mehrere Senatoren, unter anderen C Fidiculanius Falcula,[23] M Atilius Bulbus und Staienus.[24]

Aufgrund all dessen schlug der Verdacht Wurzel, dass das Urteil im Prozess gegen Oppianicus den Älteren von bestochenen Richtern gefällt wurde. Cicero versucht – trotz der Verurteilung des Oppianicus – die Lage so darzustellen, dass die Bestechung von Oppianicus selber vorgenommen wurde, und er nur diesem zu verdanken hatte, dass beinahe die Hälfte der Richter für seinen Freispruch

14 *Idem* 12f.
15 *Idem* 16. Vgl Hoenigswald (Fn 10) S 115.
16 *Idem* 25.
17 *Idem* 27f.
18 Hoenigswald (Fn 10) S 116.
19 Cicero *Pro Cluentio* 47ff.
20 Vgl Cicero *Pro Caecina* 29.
21 Cicero *In Verrem* 2 1 157.
22 *Idem* 1 29.
23 Cicero *Divinatio in Caecilium* 28f.
24 Cicero *In Verrem* 2 2 79.

stimmten, im Gegensatz zur einstimmigen Verurteilung des Scamander und des Fabricius. L Quinctius, der Verteidiger des Oppianicus verdächtigte Cluentius der Richterbestechung, da seiner Anklage im Endeffekt Erfolg beschieden war, und gebrauchte als Volkstribun gerade diesen Fall als Beispiel vor der Volksversammlung, um gegen die senatorischen Gerichtshöfe zu agieren.[25] Der Prozess schlug politische Wellen und mehrere Senatoren, die am Verfahren als Richter beteiligt waren, wurden wegen Korruption verurteilt.[26] Cicero, der im Verfahren im Jahre 74 als Verteidiger Scamanders auftrat, erwähnte den Prozess gegen Oppianicus gerade wegen der Verurteilung des Angeklagten mit einer knappen Stimmenmehrheit, woraus er Beweise, oder zumindest Indizien auf die Bestechung der Richter durch Oppianicus, als Paradebeispiel der Korruptheit des Gerichtswesens bringen wollte.[27]

Zwei Jahre nach seiner Verurteilung, dh im Jahre 72, starb Oppianicus der Ältere in der Nähe von Rom;[28] der Ankläger behauptete, dass ihn Cluentius vergiften liess,[29] aber von den Umständen seines Todes ist uns nichts Genaueres bekannt. Seine Witwe, Sassia, verdächtigte ihren Sohn (dh den Stiefsohn des Oppianicus) damit, dass er Oppianicus vergiftet haben soll, und versuchte ihren Verdacht durch Beweise, in erster Linie durch Geständnisse ihrer Sklaven, die sie einer Tortur unterziehen liess, zu untermauern – allerdings mit wenig Erfolg.[30] Nachdem Cluentius in mehrere Todesfälle, die sich in der Zwischenzeit ereignet haben, verwickelt worden war, erhob im Jahre 66 aufgrund der *lex Cornelia de sicariis et veneficiis* der junge – zum Zeitpunkt des Prozesses ungefähr einundzwanzigjährige[31] – Abbius Oppianicus gegen Cluentius Anklage. Das Mordgesetz Sullas umfasste mehrere Tatbestände: Todschlag, unerlaubtes Tragen von Waffen, Herstellung und Verkauf bzw Verabreichung von Gift in Tötungsabsicht, Brandstiftung und einige Straftaten im Zusammenhang mit dem Kriminalverfahren, so zB die Bestechung von Richtern, um mit deren Beihilfe Unschuldige verurteilen zu lassen – das letztere Tatbestandselement bezog sich allerdings nur auf Magistrate und Senatoren.[32]

25 Cicero *Pro Cluentio* 74ff.

26 CJ Classen *Recht, Rhetorik und Politik, Untersuchungen zu Ciceros rhetorischer Strategie* (Darmstadt, 1985) S 21.

27 Cicero *In Verrem* 1 38-40.

28 Kroll (Fn 12) S 174.

29 Vö Cicero *Pro Cluentio* 161ff.

30 Hoenigswald (Fn 10) S 111; Kroll (Fn 12) S 175.

31 W Stroh *Taxis und Taktik, Die advokatische Dispositionskunst in Ciceros Gerichtsreden* (Stuttgart, 1975) S 195.

32 Vgl Th Mommsen *Römisches Strafrecht* (Leipzig, 1899) S 628; W Kunkel *Untersuchungen zur Entwicklung des römischen Kriminalverfahrens in vorsullanischer Zeit* (München, 1962) S 64-70; JD Cloud „The primary purpose of the lex Cornelia de sicariis“ (1969) 86 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung* S 258-268; CJ Classen „Cicero, Pro Cluentio 1-11 im Licht der rhetorischen Theorie und Praxis“ (1965) 108 *Rheinisches Museum* S 104-142, 140; J Humbert „Comment Cicéron mystifia les juges de Cluentius“ (1938**)** 16 *Latomus, Revue des Etudes Latines* S 275-296, 276.

Cluentius gehörte – wie gesagt – dem Ritterstand an, und hatte kein Amt innegehabt, so hätte er nach dem Wortlaut des Gesetzes keine Bestechung ausüben können, die unter das besagte Gesetz fiel.[33] Das Amt des *iudex quaestionis* versah Q Voconius Naso,[34] als Nebenankläger trat neben Oppianicus Titus Attius, ein junger Ritter aus Pisaurum auf.[35] Die Verteidigung des – in jenen Anklagepunkten, die gegen ihn vorgebracht wurden, mit grösster Wahrscheinlichkeit schuldigen – Cluentius übernahm der im Jahre des Prozesses als Prätor fungierende Cicero, der mit seiner rednerischen Brillanz den Freispruch seines Klienten erwirken konnte.[36] Den Gerichtshof bildeten zweiunddreissig Richter, die nach der im Jahre 70 erbrachten *lex Aurelia iudiciaria* zu je einem Drittel aus dem Senatorenstand, aus dem Ritterstand und dem Stand der Ärartribunen hervorgingen.[37]

Die ciceronianische Verteidigung läuft auf zwei Linien, der Redner wendet sich nicht sofort der Hauptanklage zu, sondern verweilt länger bei der Frage der Richterbestechung. Um seine eigene Theorie von der Richterbestechung zu belegen, behandelt er das Thema der Bestechung wahrscheinlich viel ausführlicher, als der Ankläger darauf eingegangen ist: Er schildert detailliert das üble Vorleben des Oppianicus und widmet jenen zwei Prozessen, die mit dem versuchten Attentat gegen Cluentius in Verbindung stehen, grosse Aufmerksamkeit. In seiner Einleitung kündet Cicero an, dass er der von dem Ankläger angelegten Thematik folgen will, bzw er gibt darüber Rechenschaft, warum er sich viel ausführlicher mit dem ersten, als mit dem zweiten Anklagepunkt auseinander zu setzen beabsichtigt. Hiernach sollte der Anklagepunkt des Giftmordes vollkommen unbegründet sein und könnte mit wenigen Worten abgetan werden, jener der Richterbestechung hätte sich aber in den letzten acht Jahren dermassen im Bewusstsein aller festgesetzt, dass es der einträchtigen Anstrengung der Richter und des Verteidigers bedurfte, diese Nachrede aus der öffentlichen Meinung auszumerzen. Der erste Teil der Rede besteht aus drei grösseren Kapiteln, die sich mit dem Vorleben des Oppianicus des Älteren, mit dem Giftmordprozess aus 74 und mit dem Tatbestand der Richterbestechung befassen. Im zweiten Teil der *Cluentiana*, der nun von dem eigentlichen Anklagepunkt, dh von der Ermordung des Oppianicus durch Cluentius handelt, werden die dunklen Kapitel des Vorlebens des Cluentius und auch die Ermordung des Oppianicus von Cicero in lapidarer Kürze und mit verdächtiger Leichtigkeit abgetan: Eine verhältnismässig längere Ausführung erfährt nur das vom Ankläger als Beweis vorgebrachte Geständnis, das den Sklaven durch Folter entnommen wurde.

33 Stroh (Fn 31) S 196.
34 Cicero *Pro Cluentio* 147f.
35 *Idem* 65 84 156; *Brutus* 271.
36 Kroll (Fn 12) S 174.
37 Stroh (Fn 31) S 202.

2 Gleich im *prooemium* trennt Cicero die Anklage wegen Giftmordes von jener, die von dem Nebenankläger Attius vorgebracht wurde und sich auf die angebliche Bestechung jenes Gerichtshofes bezog, die vor acht Jahren Oppianicus verurteilt hatte.[38] Die genaue Bestimmung der Anklagepunkte, die dem Prozess gegen Cluentius zugrunde gelegen haben müssen, scheint keines Wegs einfach zu sein: Die Anklage hätte sich erstens auf Meuchelmord und Giftmischerei, zweitens auf Giftmordversuch und Bestechung des Gerichts, drittens auf Mordversuch richten können.[39] Die Rekonstruktion der Fakten wird auch noch dadurch erschwert, dass Cicero einerseits manche Umstände, die schlechtes Licht auf seinen Klienten werfen könnten wissentlich verschweigt, und andererseits einige, für den Zeitgenossen selbstverständliche, für den heutigen Leser aber nicht hinreichend bekannte Elemente übergeht. Ciceros Aufgabe war es, da er die Verteidigung des Cluentius übernahm, den Richtern überzeugend darzulegen, dass sein Klient jene Straftat(en), deren er angeklagt worden war, nicht begangen haben kann, dh er hatte gemäss der rhetorischen Theorie nach der zu dem *status coniecturalis* passenden Argumentationsweise vorzugehen.

Aus rechtshistorischer Hinsicht ist eine der interessantesten Fragen, die sich in Verbindung mit der *Cluentiana* ergeben, ob sich jene Anklage, die vom jüngeren Oppianicus gegen Cluentius aufgrund der *lex Cornelia de sicariis et veneficiis* erhoben wurde, nur auf den Giftmord oder aber auch auf die Bestechung der Richter bezog, die Cluentius vor acht Jahren im Prozess gegen Oppianicus den Älteren begangen haben soll. Bei der Klärung dieses Problems stellt sich natürlich die Frage nach der Zuverlässigkeit der Quellenbasis: Die ciceronianische Darstellungsweise und seine Verweise auf den Gesetzestext sind mit grosser Wahrscheinlichkeit tendenziös – selbst wenn er bei der Zitierung des Gesetzes keine wesentlichen Änderungen hat vornehmen können –, und die uns überlieferte Form der sullanischen Gesetze entstammt einer späteren Epoche,[40] was wiederum vermuten lässt, dass der zum Zeitpunkt des Prozesses geltende Gesetzestext mit dem uns bekannten nicht unbedingt als identisch gelten dürfte.[41] Die spätere Fassung der *lex Cornelia de falsis* sanktioniert zwar die aktive Form der Bestechung des Gerichts, es erscheint allerdings als unwahrscheinlich, dass die ursprüngliche *lex Cornelia testamentaria* ebenfalls eine solche Bestimmung enthalten hätte. Beim

38 Cicero *Pro Cluentio* 1-2 11 119. Vgl Humbert (Fn 32) S 287; CJ Classen „Cicero, the Laws, and the Law-Courts“ (1978) 37 *Latomus, Revue des Etudes Latines* S 597-619, 604ff.

39 CJ Classen „Die Anklage gegen A. Cluentius Habitus (66 v. Chr. Geb.)“ (1972) 89 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung* S 1-17; Ch Köhler *Die Proömientechnik in Ciceros Reden: Ein Beitrag zum Verhältnis von rhetorischer Theorie und rednerischer Praxis bei Cicero. Dissertation* (Jena, 1968) S 100-109; G Pugliese „Aspetti giuridici della Pro Cluentio di Cicerone“ (1970) 21 *Iura* S 155-181.

40 Paulus *Sententiae* 5 23; *Collatio legum Mosaicarum et Romanarum* 1 2 3; D 48 8. Vgl Mommsen (Fn 32) S 628ff; Cloud (Fn 32) S 258ff.

41 Classen (Fn 39) S 2.

Bestimmungsversuch der Anklagepunkte darf auch nicht ausser Acht gelassen werden, dass im Quästionsprozess der Ankläger den Richtern alles vortragen durfte, was er gegen den Angeklagten vorbringen konnte, da sein Ziel nur ein allgemeiner Schuldspruch, und nicht die Feststellung der Schuld in den einzelnen Punkten war bzw die Festlegung der Strafe nicht dem Ermessen des Gerichtshofes oblag.[42] Es ist nicht mit Sicherheit zu bestimmen, ob bei der *delatio nominis* neben dem Gesetz, das der Anklage zugrunde gelegt werden sollte, auch die genauen Passagen und die anderen, im Kreise der Anklage vorzubringen gedachten Punkte genannt werden sollten bzw ob diese im weiteren Laufe des Prozesses von zwingender Kraft waren.[43]

Es ist mit gutem Grund anzunehmen, dass bei der Einleitung des Prozesses die Anklage schriftlich fixiert werden musste, was auch in Bezug auf die vorsullanische Periode von Cicero in seinem Werk *De inventione* festgehalten wird.[44] Es lohnt sich, etwas genauer unter die Lupe zu nehmen, in welchem Mass Cicero in seinen Reden die gesetzliche Grundlage des Verfahrens präzisiert bzw auf die Prozesseinleitung *(postulatio, delatio nominis, receptio nominis)* reflektiert. In seinen Gerichtsreden lassen sich direkte Hinweise auf den Tatbestand des *crimen repetundarum*,[45] des *crimen maiestatis*,[46] des *ambitus*,[47] des *peculatus*,[48] des *crimen inter sicarios* und des *crimen veneficii*,[49] der *iniuria*,[50] des *furtum*,[51] der *vis*,[52] der *alea*[53] und des *crimen parricidii*[54] finden.[55] In zahlreichen Fällen beruft er sich auf ein konkretes Gesetz, so zB auf die *lex Plautia de vi*,[56] die *lex Iulia de pecuniis repetundis*,[57] die *lex Papia*,[58] die *lex Acilia*[59] und die *lex Scantinia*.[60] In einigen seiner Reden verweist er direkt auf die gesetzliche Grundlage der Anklagepunkte, so unter anderen in der Rede für

42 *Idem* S 3.
43 Mommsen (Fn 32) S 385[4].
44 Cicero *De inventione* 2 58.
45 Cicero *Divinatio in Caecilium* 76; *In Verrem* 2 2 142; *ad Quintum fratrem* 3 1 15; *ad familiares* 8 8 2 3.
46 Cicero *ad Quintum fratrem* 3 1 15; *De inventione* 2 72; *ad familiares* 3 2 3; *Philippicae* 1 23.
47 Cicero *Pro Caelio* 16 76; *De oratore* 2 274 280; *ad Quintum fratrem* 1 2 15; 2 3 5; 3 2 3; *Pro Cluentio* 114.
48 Auctor ad Herennium 1 22.
49 Cicero *De inventione* 2 58; *Pro Roscio Amerino* 90; *Pro Cluentio* 21; *Auctor ad Herennium* 4, 23.
50 Cicero *De domo sua* 13; *De inventione* 2, 59.
51 Cicero *Pro Cluentio* 163; *ad familiares* 7, 22; *Pro Flacco* 43.
52 Cicero *post reditum in senatu* 19; *ad Quintum fratrem* 2, 3, 5; *Pro Sestio* 90 95.
53 Cicero *Philippicae* 2, 56.
54 Cicero *Pro Roscio Amerino* 28 64.
55 Classen (Fn 39) S 5.
56 Cicero *ad familiares* 8 8 1.
57 Cicero *Pro Rabirio Postumo* 12.
58 Cicero *Pro Balbo* 52.
59 Cicero *In Verrem* 2 1 26.
60 Cicero *ad familiares* 8 12 3; 8 14 4.

Sextus Roscius aus Ameria,[61] in der gegen Verres,[62] in der für Scaurus,[63] in der für Rabirius Postumus[64] und in der für Ligarius.[65]

In der *Cluentiana* bedient sich Cicero einer janusartigen Darstellungsweise. Einerseits erweckt er den Eindruck, als ob das Gerichtshof ausschliesslich für den Giftmord zuständig sei,[66] da jene Passage der *lex Cornelia de sicariis et veneficiis*, die sich mit der Bestechung des Gerichtes durch die Mitglieder des Ritterstandes auseinandersetzt, sich auf Cluentius, der zum *ordo equester* gehört, nicht bezieht;[67] andererseits bringt er den Anklagepunkt der Bestechung immer wieder zur Sprache. Die unter dem Vorsitz des Q Voconius Naso tagende *quaestio* war zweifelsohne in erster Linie für die Giftmorde zuständig – was natürlich nicht ausschloss, dass andere Anklagepunkte nicht hätten vorgebracht werden können –, aber ihre Zuständigkeit konnte auch auf die erwähnten Bestechungsdelikte ausgedehnt werden.[68] Es lohnt sich allerdings, etwas länger bei den von Joachim Classen erwähnten Anklagepunkten zu verweilen, um den in der Anklage erfassten Tatbestand genauer definieren zu können. Trotz der lückenhaften Quellenbasis kann festgestellt werden, dass in anderen Fällen aufgrund der *lex Cornelia de sicariis et veneficiis* keine Anklagen wegen Richterbestechung erhoben wurden, da sich auch andere Möglichkeiten zur Verfolgung dieser Straftat boten. Es ist ausserdem höchst unwahrscheinlich, dass der *iudex quaestionis* eine Anklage angenommen hätte, die dem Wortlaut des Gesetzes zuwiderläuft, oder – mit anderen Worten – zugelassen hätte, dass der Ankläger den Tatbestand des sullanischen Gesetzes mit einer *interpretatio extensiva* auch auf den Ritterstand ausdehnt. Nach Cicero soll sich Attius mehrere Male auf die *aequitas* berufen und für die extensive Interpretation des Gesetzes plädiert haben. Im Gegensatz zu ihm behandelte Cicero – obwohl er bestrebt war Cluentius von den Folgen des Verdachtes der Richterbestechung zu verschonen – die vor acht Jahren angeblich vorgefallene Bestechung des Gerichtshofes an keinem Punkt als ein wirkliches *crimen*, bzw. er zitierte keine einzige Zeugenaussage, die dies widerlegen sollte, sondern tat dieses Element als ein vom Ankläger vorgebrachtes Gerücht ab,[69] das die Gefahr in sich barg, bei den Richtern Antipathie und Voreingenommenheit gegen Cluentius zu generieren.[70]

61 Cicero *Pro Roscio Amerino* 28 61 64 76.
62 Cicero *In Verrem* 2 2 141.
63 Cicero *Pro Scauro* 1.
64 Cicero *Pro Rabirio Postumo* 8 9 37.
65 Cicero *Pro Ligario* 1 4 5 9 11.
66 Cicero *Pro Cluentio* 1 2 148 164.
67 *Idem* 144ff.
68 Classen (Fn 39) S 10f.
69 Vgl Cicero *Pro Cluentio* 142.
70 Classen (Fn 39) S 14f.

3 Die Behandlung der *crimina veneficii*, dh der tatsächlichen, juristisch relevanten Anklagepunkte an erster Stelle konnte in den Richtern jenen Eindruck erwecken, als ob Cicero versuchte, das *iudicium Iunianum*, den juristisch eher irrelevanten, jedoch höchst effektvollen Teil der Anklage zu umgehen und sich – allerdings nur scheinbar, da er nur später auf den Oppianicusprozess zu sprechen kommt[71] – dem von Attius erstellten System zu fügen. Wegen der Zwangswahl zwischen dem *status collectionis* und dem *status coniecturalis* entschloss sich Cicero zu einem halsbrecherischen, jedoch bereits in der *Rosciana* mit Erfolg angewandten[72] Versuch: Er trennte seine eigenen Interessen bzw Forderungen von denen seines Klienten, indem er behauptete, dass er sich als Verteidiger nur auf den Wortlaut des Gesetzes hätte berufen müssen,[73] sich aber dennoch – um den Wunsch des Cluentius, der nicht nur seinen Freispruch erreichen, sondern auch seinen guten Ruf wiederherstellen lassen wollte, nachzukommen[74] – für den schwierigeren Weg entschieden hatte, der darin bestand, die Unschuld des Angeklagten nicht nur formell, sondern auch materiell zu beweisen.[75] Hiermit gelang es ihm, den Eindruck zu erwecken, als ob jeder einzelne der beiden *status* an und für sich genügend Gewicht besessen hätte, den Sieg im Prozess zu sichern.[76]

Die von Cicero angewandte, auf zwei Spuren laufende Argumentation war auch den Erwartungen der Geschworenen angepasst. Einerseits verteidigte er mit der Anwendung des *status collectionis* die Interessen des Ritterstandes, indem er sich an den Wortlaut des Gesetzes hielt, der für sie die Straffreiheit vorsah,[77] und erweckte in ihnen zugleich jene Angst, dass im Falle einer extensiven Interpretation in der Zukunft auch gegen Ritter Anklage wegen Richterbestechung erhoben werden könnte.[78] Andererseits brauchte sich Cicero nicht davor zu fürchten, sich den Zorn der Richter aus dem Senatorenstand zuzuziehen, da er sich mit der Anwendung des *status coniecturalis* ihre Sympathie gesichert hatte, indem er beweisen konnte, dass sich im *iudicium Iunianum* Oppianicus, und nicht Cluentius der Richterbestechung schuldig gemacht hatte bzw. dass nur einige Richter bestochen worden waren und Staienus als einziger Geld erhalten hatte,[79] wodurch es ihm gelang, die durch die Ereignisse des Jahres 74 angeschlagene Ehre des Richterstandes wiederherzustellen.[80] Die Disposition der *Cluentiana* lässt sich – wie Stroh zutreffend festgestellt hat[81]

71 Cicero *Pro Cluentio* 59ff.
72 Cicero *Pro Roscio Amerino* 128ff.
73 Cicero *Pro Cluentio* 145.
74 *Idem* 144.
75 Stroh (Fn 31) S 200.
76 Quintilianus *Institutio oratoria* 6 5 9.
77 Cicero *Pro Cluentio* 150-155.
78 *Idem* 152 157. Zur Gerichtsbestechungs Mommsen (Fn 32) S 634f.
79 Kroll (Fn 12) S 178.
80 Stroh (Fn 31) S 203.
81 *Idem* S 204.

– folgendermassen aufteilen: In der Erörterung des *iudicium Iunianum*[82] werden durch den *status coniecturalis* (dh mit jener Behauptung, dass Cluentius den Giftmord nicht verübt hatte) die Senatoren,[83] durch den *status collectionis* (dh mit jener Argumentation, dass aufgrund des sechsten Paragraphen der *lex Cornelia de sicariis et veneficiis* Cluentius nicht strafbar sei) die Ritter angesprochen,[84] worauf die Behandlung der *crimina veneficii* folgt.[85]

Um der dem jüngeren Oppianicus zuströmenden Sympathie jegliche Bedeutung zu nehmen, greift Cicero zu einem meisterhaften Mittel: Er lässt die Mutter des Cluentius (dh die Witwe des Oppianicus des Älteren bzw die Stiefmutter des Oppianicus des Jüngeren), die gegenüber ihrem eigenen Sohn von *hostile odium* und *crudelitas* erfüllte Sassia, ins Bild treten, in deren Hand – da angeblich sie diejenige sein sollte, die die Fäden der Anklage zog – selbst der von *pietas* geleitete jüngere Oppianicus zum Rachewerkzeug wird.[86] Es lohnt sich, genauer zu untersuchen, an welchen Punkten und in welchem Kontext Sassia von Cicero erwähnt wird.[87]

Unmittelbar nach dem Exordium nennt er Sassia, die von Grausamkeit und Hass geleitete Mutter, als Quelle der Anklage.[88] Jene Frage, ob Sassia (wie Classen behauptet) bei der Verhandlung anwesend war,[89] oder (wie Stroh und Humbert vermuten) nicht,[90] ist – da sie weder von Cicero angesprochen wird, noch wir davon unterrichtet sind, dass sie in den Zeugenstand getreten wäre – nicht zu entscheiden und vielleicht auch nicht von ausschlaggebender Relevanz. Schon hier betont er mit Nachdruck, dass Sassia eine überaus bedeutende Rolle im Prozess spielt[91] und dass er sie – im Interesse des Cluentius – nicht schonen kann,[92] aber worin all dies genau besteht, erfahren wir erst später, nämlich bei der Behandlung der *crimina veneficii*.[93] Das Protokoll vom Sklavenverhör liess Attius vor Gericht vorlesen,[94] es ist jedoch fraglich, ob der Name der Sassia darin vorkam.[95] Diese – mit grosser Wahrscheinlichkeit höchst subjektive und an rhetorischen Übertreibungen reiche – Darstellung der Ereignisse, die wohl kaum als Rekonstruktion genannt werden kann, bot Cicero eine willkommene Gelegenheit, eine effektvolle Invektive gegen Sassia

82 Cicero *Pro Cluentio* 9-160.
83 *Idem* 9-142.
84 *Idem* 143-160.
85 *Idem* 161-187.
86 *Idem* 12ff. Vgl Quintilianus *Institutio oratoria* 6 5 9; 11 1 62.
87 Stroh (Fn 31) S 205ff.
88 Cicero *Pro Cluentio* 12ff.
89 Classen (Fn 26) S 36.
90 Stroh (Fn 31) S 206; J Humbert *Les plaidoyers écrits et les plaidoiries réelles de Cicéron* (Paris, 1925) S 115ff.
91 Cicero *Pro Cluentio* 17.
92 *Idem* 18.
93 *Idem* 176ff.
94 *Idem* 184.
95 Stroh (Fn 31) S 206.

zu beginnen.[96] Jenes frühere Versprechen von einer detaillierten Ausführung[97] löst der Redner nur nach dieser Invektive ein und führt den vom Verhältnis zwischen dem Angeklagten und dessen Mutter vor der Verhandlung mit grosser Wahrscheinlichkeit nichts ahnenden Richtern das Bild der zum Monster stilisierten unmütterlichen Mutter vor Augen. Nach dieser Darstellung war sie schon von Anfang an am Mordversuch gegen Cluentius beteiligt,[98] er machte ihren Stiefsohn zu ihrem Schwiegersohn, um in seiner Person einen geeigneten Ankläger gegen ihren leiblichen Sohn stellen zu können.[99] Nach der kurzen Zusammenfassung des Sklavenverhörs[100] schafft der Redner das Bild der Zeugen manipulierenden, das Verderben ihres Sohnes herbeiführenden, nach Rom geeilten, die Fäden der Anklage in ihrer Hand haltenden und sich vor der Öffentlichkeit im Verborgenen haltenden Sassia.[101]

Da die Ankläger Sassia wahrscheinlich unerwähnt liessen und den Gegensatz vom *pius Oppianicus* und vom *impius Cluentius* den Richtern einzuprägen versuchten, liess Cicero – indem er das Mittel der *retorsio criminis* in Anspruch nahm – mit gutem Gefühl die von den Anklägern erstellte Charakterisierung auf sie zurückfallen: Den jüngeren Oppianicus, der wegen seines jugendlichen Alters bei den Richtern einen guten Eindruck hinterliess, konnte Cicero nicht angreifen, anstatt seiner wählte er Sassia zu seiner Zielscheibe, die zu diesem Zweck umso geeigneter zu sein schien, weil ihre um 86 mit ihrem Schwiegersohn eingegangene Ehe[102] in den Richtern den Topos eines die Gesetze der Natur missachtenden und auch vor Verbrechen nicht zurückschreckenden Weibes bestärkte.[103] Sein Ziel erreicht Cicero mit der genialen Umstrukturierung der Ereignisse, denn ihm wird von dem *ordo artificiosus* ermöglicht, die zweigeteilte *narratio* in die *argumentatio* einzubauen und von hieraus auf geradem Wege zur *peroratio*, die zugleich die Rolle einer Invektive gegen Sassia einnimmt, zu gelangen. Hiernach soll sich die Aufmerksamkeit und das Bestreben der Richter nicht mehr darauf richten, den Fall des für die Verurteilung und den Tod seines Stiefvaters auf Rache sinnenden jüngeren Oppianicus zu erwägen, sondern darauf, Cluentius von der Rache seiner Mutter zu retten, die alle Gesetze des menschlichen Zusammenlebens mit Füssen tritt, und um ihr Ziel zu erreichen, die Justiz hierzu ~~als~~ missbrauchen will.[104]

In dem Teil der Rede, in dem er das *iudicium Iunianum* behandelt,[105] vermischt Cicero die traditionell gut trennbaren Mittel der *narratio* und der *argumentatio*

96 Cicero *Pro Cluentio* 176-187.
97 *Idem* 17.
98 *Idem* 189.
99 *Idem* 190. Vgl Kroll (Fn 12) S 175; Hoenigswald (Fn 10) S 111.
100 Cicero *Pro Cluentio* 191.
101 *Idem* 192ff.
102 *Idem* 12.
103 Hoenigswald (Fn 10) S 113.
104 Stroh (Fn 31) S 210.
105 Cicero *Pro Cluentio* 9-142.

mit grossem Geschick. Nach der *propositio*[106] und der dazwischen geflochtenen Erzählung über Sassia[107] beginnt er eine in der *confirmatio* gipfelnden[108] *narratio*, aber deren gewisse Teile,[109] so zB die Greueltaten des Oppianicus[110] und die *praeiudicia* erzählenden Paragraphen[111] erfüllen den Zweck des *probabile e causa*,[112] da sie jene Behauptung zu unterstreichen berufen waren, dass es nicht Cluentius, sondern Oppianicus im Interesse gestanden hat, das Gericht zu bestechen.[113] Genauso geht die Argumentation über das Bestechungsgeld als *probabile e facto* dem narrativen Teil einerseits voraus,[114] andererseits folgt sie ihm,[115] dh sie umschliesst die hiervon handelnde *narratio*.[116] Jene Argumentation also, in der sich die ungefähre Chronologie der Ereignisse abzeichnet, trägt einen narrativen Charakter.[117]

Dieses komplizierte Vorgehen ist unerlässlich, damit Cicero den Richtern jenen (ziemlich unwahrscheinlichen) Gedankengang akzeptabel machen kann, dass im Prozess des Jahres 74 nicht der obsiegende Cluentius, sondern der für schuldig erklärte Oppianicus den Gerichtshof bestochen hat, und zwar auf jene Weise, dass der von ihm gedungene Mittelsmann, Staienus, den Richtern das Bestechungsgeld zwar versprochen, später aber behauptet hatte, dass der Angeklagte nicht bereit sei, zu zahlen, um die Richter gegen ihn aufzuwiegeln und sichern zu können, dass Oppianicus verurteilt werde und er die ganze Summe behalten könnte. Cicero konnte aber seinen Hörern diese Erzählung nicht ohne Vorbereitung auftischen, so war er gezwungen, die rekonstruktive *narratio* mit der vorausgehenden *argumentatio* zu untermauern und wahrscheinlich zu machen, dass Oppianicus – in Anbetracht seiner zahlreichen Untaten und jener *praeiudicia*, die seinen Fall negativ beeinflussten – gewichtige Gründe gehabt haben muss, das Gericht zu bestechen.[118] Cicero gerät hier in Widerspruch mit jenem Versprechen, dass er in seiner Rede die vom Gegner aufgestellte Gliederung befolgen will,[119] obwohl er sein Versprechen in der eigentlichen *narratio* mehr oder minder einlöst, trotz jenes Umstandes, dass er zuvor auf mehrere, vom Ankläger nicht berührte Punkte zu sprechen kommt. In der langen Einleitung versichert Cicero die Richter dessen, dass er sich nunmehr kurz fassen

106 *Idem* 9-11.
107 *Idem* 11-18.
108 *Idem* 81.
109 *Idem* 21-61.
110 *Idem* 21ff.
111 *Idem* 49ff.
112 Stroh (Fn 31) S 211.
113 Cicero *Pro Cluentio* 62 64 81.
114 *Idem* 64f.
115 *Idem* 82.
116 *Idem* 66-81.
117 Stroh (Fn 31) S 211.
118 *Idem* S 312.
119 Cicero *Pro Cluentio* 1.

will,[120] und kündigt gleich am Anfang der Rede an, dass er vom Tatbestand nichts zu verheimlichen und auf jeden, vom Attius erwähnten Umstand zu reflektieren vorhat.[121]

Das Durchbrechen der Chronologie zeigt sich bei der Behandlung der gegen den Fall des Cluentius sprechenden *praeiudicia* und des Verbrechenskatalogs des Oppianicus am deutlichsten. Der Vorsitzende *(iudex quaestionis)* des Gerichtshofes im Oppianicusprozess, C Iunius wurde im Jahre 74 verurteilt und der Senat erliess noch im selben Jahr einen Beschluss, der es ermöglichte, dass die am *iudicium Iunianum* beteiligten Richter zur Verantwortung gezogen wurden.[122] Im Jahre 73 wurde C Fidiculanius Falcula in zwei Prozessen freigesprochen,[123] 72 wurde P Septimius Scaevola wegen *crimen repetundarum* und zwischen 73 und 70 M Atilius Bulbus wegen *crimen maiestatis* verurteilt, im Jahre 70 erteilten die Zensoren M Aquilius, Ti Gutta, P Popilius und Cluentius eine Rüge, 69 wurden Popilius und Gutta wegen *ambitus* und Staienus wegen anderer Verbrechen verurteilt.[124] Der Ankläger versuchte all diese Urteile von der Art der jeweiligen Anklage unabhängig als Konsequenz des *iudicium Iunianum* darzustellen.[125] Cicero erstellt hiergegen eine künstliche, den Interessen der Verteidigung entsprechende Chronologie, die einerseits die Urteile als Folge der vom Volkstribun Quinctius geschürften *invidia* erscheinen lässt[126] und andererseits mit eine Antiklimax die Aufmerksamkeit von den gewichtigeren Fällen[127] (dh der *litis aestimatio* des Septimius Severus,[128] den als unwichtig abgestempelten zensorischen Rügen,[129] dem Testament des Egnatius[130] und den Senatsbeschlüssen)[131] auf seine eigene in den Verrinen formulierte Meinung lenkt.[132] Hiermit erweckt er in seinen Hörern den Eindruck einer sich legenden *invidia*.[133]

Genauso deutlich wird die von Cicero der forensischen Taktik entsprechend erstellte Chronologie im Hinblick auf die von Oppianicus dem Älteren begangenen und ihm zugeschriebenen Morde und Untaten.[134] Der erste Mord: Oppianicus ermordete

120 *Idem* 19 20 30 36 41.
121 *Idem* 1.
122 *Idem* 136.
123 *Idem* 114.
124 Stroh (Fn 31) S 215f.
125 Cicero *Pro Cluentio* 115.
126 Hoenigswald (Fn 10) S 111; Kroll (Fn 12) S 174ff.
127 Cicero *Pro Cluentio* 89-114.
128 *Idem* 115-116.
129 *Idem* 117-134.
130 *Idem* 135.
131 *Idem* 136-138.
132 *Idem* 138-142.
133 Stroh (Fn 31) S 217.
134 Cicero *Pro Cluentio* 20-41.

seine Ehefrau Cluentia, die Tante des Cluentius.[135] Der zweite und dritte Mord: Oppianicus vergiftete die schwangere Ehefrau seines Bruders, des C Oppianicus und den eigenen Bruder, um an dessen Erbschaft zu kommen.[136] Nach dem Tode seines Schwagers, des Cn Magius, der den jüngeren Oppianicus als Erben eingesetzt hatte, überredete Oppianicus der Ältere die schwangere Witwe zur Abtreibung und heiratete sie.[137] Der vierte Mord und die Testamentsfälschung: Mit der Hilfe eines reisenden Giftmischers ermordete Oppianicus seine ehemalige Schwiegermutter Dianea, die ihn als Erben eingesetzt hatte, und liess das Testament, als er die Legate schon früher hatte tilgen lassen, neu schreiben und mit einem falschen Siegel versehen.[138] Der fünfte Mord: Oppianicus liess M Aurius, den Sohn der Dianea, dem seine Mutter vierhunderttausend Sesterzen vermacht hatte, ermorden, von dem er erfuhr, dass er in Kriegsgefangenschaft geraten war und als Sklave in Gallien lebte.[139] Der sechste, siebte und achte Mord: Oppianicus liess A Aurius, der ihm wegen der Ermordung des M Aurius mit einer Anklage gedroht hatte – und drei weitere Bürger aus Larinum – unter dem Vorwand der Proskriptionen töten.[140] Der zehnte und elfte Mord: Oppianicus wollte Sassia, die Witwe des A Aurius heiraten, die aber nicht die Stiefmutter von dessen drei Söhnen werden wollte, und Oppianicus tötete deswegen zwei von seinen drei Söhnen und liess nur den jüngeren Oppianicus am Leben.[141] Die Testamentsfälschung und der zwölfte Mord: Oppianicus liess, um sich als Erben einsetzen zu lassen, das Testament des Asuvius, eines Bürgers aus Larinum, fälschen und Asuvius ermorden; hiernach bestach er den *triumvir capitalis* Q Manlius, der eine Untersuchung wegen des Falles in die Wege leiten wollte.[142]

Cicero ändert diese Chronologie und gibt von den Verbrechen des Oppianicus in folgender Reihenfolge Rechnung: die Ermordung des M Aurius,[143] des A Aurius und der drei Bürger aus Larinum,[144] der zwei Söhne,[145] der Cluentia,[146] der Schwägerin und des C Oppianicus, des Bruders,[147] die Anstiftung zur Abtreibung,[148] die Testamentsfälschung und die Ermordung des Asuvius,[149] die Ermordung der

135 *Idem* 30.
136 *Idem* 30-32.
137 *Idem* 33-35.
138 *Idem* 40-41.
139 *Idem* 21-23.
140 *Idem* 23-25.
141 *Idem* 26-28.
142 *Idem* 36-39.
143 *Idem* 21-23.
144 *Idem* 23-25.
145 *Idem* 26-28.
146 *Idem* 30.
147 *Idem* 30-32.
148 *Idem* 33-35.
149 *Idem* 36-39.

Dinaea und die Fälschung ihres Testaments.[150] Es stellt sich die Frage, warum Cicero diesen Weg einzuschlagen „gezwungen“ ist.[151] Da die *narratio* in keiner direkten Verbindung mit dem Fall des Cluentius steht, kann der Redner auf die einzelnen Fälle nicht so eingehen, dass er diese mit Urkunden oder Zeugenaussagen zu beweisen versuchen könnte, sondern muss sich damit begnügen, den Anschein einer eingehenden Beweisführung zu erwecken.[152] Eine eventuelle Beweisführung wäre durch die Unwahrscheinlichkeit des von Cicero vorgetragenen Kriminalromans zweifelsohne erschwert worden: Warum sollte der Serienmörder Oppianicus, dem seine eigenen Familienmitglieder zum Opfer fielen, der sich am Vermögen seiner Opfer bereicherte, der die Gattin seines Opfers heiratete, erst fünfzehn Jahre nach seinem ersten Mord zur Verantwortung gezogen worden sein; warum sollte er von mehreren als Erbe eingesetzt worden sein, obwohl es den Testierenden klar gewesen sein muss, dass sie damit ihren baldigen Tod herbeiriefen; warum sollte C Oppianicus den Mörder seiner Gattin zu seinem Erben gemacht haben; warum sollte Oppianicus nur zwei von seinen Söhnen ermordet und den dritten am Leben gelassen haben; warum sollte Oppianicus Aurius ermordet haben, obwohl er dessen Legat schon früher, als er das Testament der Dianea gefälscht hatte, aus dem Testament tilgte?[153]

Der Redner versucht die hier angeführten Gegenargumente erst gar nicht zu widerlegen, sondern er ist vielmehr bemüht, dass diese seiner Hörerschaft gar nicht in den Sinn kommen, dh er arbeitet anstatt mit offensichtlichen Lügen, mit subtilen Verschleierungen und raffiniertem Verschweigen bzw mit der willkürlichen Anordnung der Dramaturgie der Ereignisse. Dass sein Bestreben von Erfolg gekrönt wurde, wird auch dadurch bewiesen, dass auch die späteren Kommentatoren keinen Verdacht geschöpft haben und erst Winfried Stroh versucht hat, den tatsächlichen Hergang der Ereignisse zu rekonstruieren.

Dass Cicero die Ermordung des M Aurius an erster Stelle behandelt hatte, erwies sich als meisterhafter Kunstgriff, da er als „Beweis” für die um den Fall entstandenen Gerüchte und die von A Aurius ausgesprochenen Drohungen[154] bzw für das Ausbleiben des Prozesses den Missbrauch der sullanischen Proskriptionen, dh die Ermordung des A Aurius mit Hilfe politischer Machenschaften vorbrachte.[155] Mit dem politischen Einfluss des Oppianicus konnte der Redner zugleich erklären, warum der Serienmörder Oppianicus erst fünfzehn Jahre nach seinem ersten Mord zur Verantwortung gezogen worden ist.[156] Die Fragen, die in Verbindung mit dem Tod der Dianea und ihrem Testament gestellt werden könnten, umgeht Cicero mit

150 *Idem* 40f.
151 Stroh (Fn 31) S 220.
152 A Michel *Rhétorique et philosophie chez Cicéron. Essai sur les fondaments philosophiques de l' art de persuader* (Paris, 1960) S 257ff.
153 Stroh (Fn 31) S 221.
154 Cicero *Pro Cluentio* 23.
155 Kroll (Fn 12) S 176.
156 Stroh (Fn 31) S 222.

genauso grosser Genialität. Als er Dianea zum ersten Mal erwähnt, spricht er bloss von ihrer Krankheit und ihrem Tod bzw über die Existenz ihres Testaments, übergeht aber die Testamentsfälschung,[157] und bringt erst später – nach einer kataraktartigen Aufzählung der Verbrechen des Oppianicus, was den neuen Mord gleichsam logisch macht – die Ermordung der Dianea und die Tatsache der Testamentsfälschung zur Sprache.[158] Dass Oppianicus bereit war, seine eigenen Söhne zu ermorden, erklärt Cicero nicht aus dem Charakter des Oppianicus, sondern aus dem der Sassia, die zur Eheschliessung nur unter dieser Voraussetzung ihr Einverständnis gab – das von der den Mörder ihres Gatten heiratenden Sassia gezeichnete düstere Portrait[159] schliesst den Mord nicht aus, sondern macht ihn gerade wahrscheinlich.[160] Der Mangel an Beweisen hält Cicero davon nicht ab, aus der Not eine Tugend zu machen und die Richter daran zu erinnern, dass ihre Empörung im Vergleich zur Empörung jener Richter, die vor acht Jahren den Fall des Oppianicus untersucht und die Zeugenaussagen angehört hatten, als gering erscheinen wird.[161]

Die Ermordung der Cluentia (der ersten Gattin des Cluentius), der Schwägerin und des C Oppianicus (des Bruders) tut Cicero – angeblich um seine Rede nicht in die Länge zu ziehen – in aller Kürze ab. Allerdings veranlasst die Erwähnung der Cluentia nach Sassia – von der Cicero nicht behauptet, dass sie bis zu dessen Tod die Gattin des Oppianicus geblieben ist – die Hörerschaft mit gutem Grund zu jener Vermutung, dass Cluentia erst später, nach Sassia zur Gattin des Oppianicus wurde, und es kommt in ihnen der Verdacht nicht hoch, dass der Redner von Ereignissen vor dem Jahre 82 spricht. Es steht ausser Zweifel: Ciceros Ziel muss es gewesen sein, die Chronologie und damit auch die Hörerschaft gänzlich zu verwirren, da er die hier aufgezählten Morde nicht beweisen, höchstens beklagen konnte.[162] Jene Geschenke, die Oppianicus Magia, der Witwe seines Schwagers, gegeben hat, lassen zwar nur auf Heiratsabsichten schliessen, aber Cicero stellt sie als *merces abortionis* dar, indem er sie mit der auf Anstiftung des Oppianicus vorgenommene Abtreibung von Magia in Verbindung bringt.[163] Um die Ermordung der Dianea und die Fälschung ihres Testaments glaubhaft erscheinen zu lassen,[164] fügt hier Cicero die Ermordung des Asuvius ein – in dessen Testament Oppianicus als Haupterbe eingesetzt worden ist –, was durch die Aussage des Avillius, eines Komplizen des Oppianicus unterstützt wird. Hierdurch wird das Beerben seiner Opfer zu einem der Hauptmotive der Untaten des Oppianicus,[165] was die Ermordung der Dianea und die

157 Cicero *Pro Cluentio* 21f.
158 *Idem* 40f.
159 *Idem* 12-16.
160 Stroh (Fn 31) S 222.
161 Cicero *Pro Cluentio* 29.
162 Stroh (Fn 31) S 223.
163 Cicero *Pro Cluentio* 34.
164 *Idem* 40f.
165 *Idem* 36-39.

Fälschung ihres Testaments nur zu einer Steigerung der Motive des Asuvius-Falles macht.[166]

Die *narratio* der *Cluentiana* ist ein Paradebeispiel für den *ordo artificialis* – bzw für den *mos Homericus*[167] –, in der die von der *utilitas causae* bedingte Strategie die Stelle der als Tugend angerechneten *perspicuitas* übernimmt. Aufgrund dieser Strategie werden einerseits bei der Kette, andererseits bei der Darstellung der inneren Struktur der Ereignisse die glaubhafteren und besser belegbaren Elemente vor die schwer beweisbaren – oder gar unbeweisbaren – gestellt, damit gleichsam der Kredit und der Grund für die letzteren geschaffen werden.[168]

4 Um die Bravouren der *Cluentiana* technisch zusammenzufassen: Mit der getrennten Behandlung der Anklagepunkte wegen Bestechung und Giftmord verdoppelt Cicero sowohl die *narratio*, als auch die *argumentatio*; er fügt die normalerweise der *narratio* folgende *propositio* unmittelbar nach dem *prooemium* ein; bei der Behandlung sowohl des ersten, als auch des zweiten Anklagepunktes verschmelzen die *argumentatio* und die *narratio* ineinander; die als Abschluss eingefügte *peroratio* fliesst direkt aus der *narratio*; die *extra causam* eingefügten Erzählungen, die freie Behandlung der Chronologie bzw die gleichzeitige Verwendung des *status collectionis* und des *status coniecturalis* verstärken zusammen die Positionen des Verteidigers. Diese forensische Taktik versetzt den Leser bzw den Hörer gerade deswegen in Erstaunen, weil er kein einziges Mal das Gefühl bekommt, als wäre er das Opfer einer vorsätzlichen Irreführung seitens von Cicero, und was mehr ist: Die Teile der Erzählung reihen sich in einer scheinbar logischen Kette so aneinander, dass ausser Stroh fast alle Kommentatoren der Rede von der von Cicero aufgestellten Ordnung der Ereignisse ausgingen und versuchten, den historischen Tatbestand zu rekonstruieren.[169]

Cicero selbst beruft sich als beispielhaftes Exempel der Mischung der drei Stilarten auf seine *Cluentiana*,[170] in der das in die Länge gezogene Exordium, die nüchtern kurzen Beschreibungen, die präzise Argumentation, die farbigen Erzählungen, die emotionalen Begründungen, der Pathos und die Ironie, der sprachliche Humor und die mit Leidenschaft eingeprägten Stichwörter, die zutreffenden Charakterisierungen, die auch Übertreibungen nicht entbehrenden Verallgemeinerungen, die mit Wucht gestellten Fragen und die invektivenartigen Exkurse in einer sonst nirgends gesehenen Harmonie verflochten werden.[171] Cluentius wurde – dank Cicero – freigesprochen, aber, wie wir es von Quintilian erfahren können, gestand der Redner

166 Stroh (Fn 31) S 224.
167 Quintilianus *Institutio oratoria* 7, 10, 11.
168 Stroh (Fn 31) S 224f.
169 *Idem* S 226f.
170 Cicero *Orator* 103. Vgl Humbert (Fn 32) S 280.
171 Classen (Fn 26) S 105.

auch zu, dass dies nur mit der geschickten Manipulation der Richter erreicht werden konnte.[172] Vielleicht auch deswegen betrachtete Cicero seine Rede für Cluentius als eine der Höchstleistungen seiner rednerischen Laufbahn,[173] wo ihm sowohl Quintilian,[174] als auch Plinius der Jüngere, der diese *oratio* als die hervorragendste Gerichtsrede Ciceros lobpreiste, beipflichteten.[175] Die Rede ist wahrlich beispielhaft gestaltet: Der Redner wechselt meisterhaft die Stilarten, bringt Pathos, einfache Beschreibungen und Humor miteinander in Einklang, stellt mit grosser Präzision abenteuerliche Ereignisse und dramatische Persönlichkeiten dar und verbindet die Zeitebenen und Argumente plastisch miteinander, ohne – ausser es steht in seinem Interesse – den Tatbestand noch rätselhafter zu machen. Er fesselte bis zum Schluss die Aufmerksamkeit seiner Hörerschaft und lenkte die Entscheidung der Richter in die von ihm gewünschte Richtung, da es ihm gelang – wie er es später selber gestand – ihnen Sand in die Augen zu streuen.[176]

Abstract

The speech for the defence in the criminal action (*causa publica*) of Aulus Cluentius Habitus, Cicero's longest surviving speech, dates back to the year 66 when Cicero was *praetor*. In certain respects, it is the jewel in Cicero's *ars oratoria*, since its narrative is vivid and full of twists and turns like a crime story. Events, scenes and time sequences follow one another in a dramatic, sometimes seemingly illogical fashion, but in view of the effect the orator seeks to attain, in an exactly premeditated sequence. One charge against Cluentius was that he had poisoned his stepfather, Statius Albius Oppianicus. Another charge was based on the criminal proceedings that had been instituted eight years previously, when Cluentius had charged Oppianicus with attempting to poison him, which resulted in Oppianicus being forced into exile. In the current lawsuit, however, the prosecution alleged that the court in the previous case had declared Oppianicus guilty purely because Cluentius had bribed the judges. The *lex Cornelia de sicariis et veneficiis* of 81 was applicable with regard to charges of poisoning. However, that law prohibited bribing only those judges who belonged to the order of senators, and Cluentius belonged to the order of knights. First, I outline the historical background of the oration, that is to say, the facts of the case; then, I turn my attention to the possibility of applying the *lex Cornelia de sicariis et veneficiis* to the case. Finally, I examine Cicero's oratorical strategy of addressing, modifying or distorting the charges and their chronology in order to back up his argument, which lawyers, too, will regard as brilliant.

172 Quintilianus *Institutio oratoria* 2 17 21.
173 Cicero *Orator* 107f.
174 Quintilianus *Institutio oratoria* 4 1 35; 6 5 9.
175 Plinius *epistulae* 1 20 4.
176 Quintilianus *Institutio oratoria* 2 17 21.

LIKE A BAD PENNY: THE PROBLEM OF CHRONIC OVERCROWDING IN THE PRISONS OF COLONIAL NATAL: 1845 TO 1910 (PART 1)

Stephen Allister Peté*

1 Introduction

Almost two decades after the end of apartheid, chronic overcrowding remains one of the most serious problems facing the South African penal system. For example, the most recent annual report of the Judicial Inspectorate for Correctional Services in South Africa states as follows:

> The inmate population in South Africa has been characteristically one of the highest per capita in the world as has been written about in numerous publications including in the Inspectorate's Annual Reports. It is accepted that the over-population of inmates per available infrastructure is a problem in certain centres and then, within such centres, largely in the communal cells and, in some instances, single cells where inmates are "doubled-up" or even "tripled-up". These conditions are unacceptable and have been found to be so during our inspections around the country.[1]

1 *Annual Report of the Judicial Inspectorate for Correctional Services for the period 1 Apr 2013 to 31 Mar 2014* at 37. (See website *http://judicialinsp.dcs.gov.za/Annualreports/Annual%20Report%202013%20-%202014%20(2).pdf* (accessed 22 Jan 2015).) Figures setting out the precise

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Overcrowding is, quite simply, a scourge which bedevils efforts to ensure that imprisonment in South Africa is, at the very least, a humane form of punishment. At various times during the post-apartheid period the extent of overcrowding in South African prisons has been sufficiently serious so as to raise doubts as to the constitutionality of this form of punishment. In 2004, for example, Jonny Steinberg conducted research on behalf of the Centre for the Study of Violence and Reconciliation into prison overcrowding and the constitutional right to adequate accommodation in South Africa. At the outset of his paper detailing the results of his research he gave the following sobering assessment:

> At risk of second-guessing a jurisprudence which is yet to emerge, it seems clear that the extent of overcrowding in South Africa's prisons places the incarceration of the vast majority of this country's inmates in violation of constitutional standards, no matter how low these standards are set.[2]

extent of overcrowding are not provided in the 2013/2014 report. An examination of the 2012/2013 report, however, reveals that during that particular year, the total South African prison population amounted to 153,049 prisoners, whereas the system as a whole was designed to accommodate just 119,890 persons (see the *Annual Report of the Judicial Inspectorate for Correctional Services for the period 1 Apr 2012 to 31 Mar 2013* at 40. See website *http://judicialinsp.dcs.gov.za/Annualreports/ANNUAL%20REPORT%202012%20-%202013.pdf* (accessed 4 Feb 2015).) This means that South African prisons were approximately 128% overcrowded during the 2012/2013 year. It is interesting to note that the total prison population in South Africa as at 31 Mar 2014 amounted to 154 648 prisoners (*Annual Report of the Judicial Inspectorate for Correctional Services for the period 1 Apr 2013 to 31 Mar 2014* at 38. See website *http://judicialinsp.dcs.gov.za/Annualreports/Annual%20Report%202013%20-%202014%20(2).pdf* (accessed 22 Jan 2015).) It is further interesting to note certain comments made on 11 Feb 2013 by the Minister of Correctional Services, Sibusiso Ndebele. He was reported as stating that South Africa had the highest prison population in Africa and that the country was "currently ranked ninth in the world in terms of prison population, with approximately 160 000 inmates". (See *Mail & Guardian Online available at http://mg.co.za/article/2013-02-11-south-africa-has-highest-prison-population-in-africa-says-ndebele* (accessed 12 Feb 2013).)

2 J Steinberg *Prison Overcrowding and the Constitutional Right to Adequate Accommodation in South Africa* (Paper commissioned by the Centre for the Study of Violence and Reconciliation) Jan 2005 at 1. Steinberg went on to examine the space available in South African prisons as at 31 Jul 2004, and pointed out that just under 2,1 square metres of floor space was available to each prisoner confined in an average communal cell. He went on to point out that, in Europe, the Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), the body charged with monitoring compliance to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, had set four square metres per prisoner in a communal cell as a bare minimum standard. This meant that, at the time in question, "the average South African prisoner in a communal cell thus occupies just over half the floor space considered a bare minimum in the CPTs jurisdiction" (at 2). Steinberg pointed out that, although the constitutionality of prison accommodation could not be judged simply on the basis of available floor space, "when floor space per prisoner diminishes to the extent that it has in South Africa, even the most reticent and cautious courts have ruled, on an adjudication of floor space alone, that prison conditions are degrading or cruel" (*ibid*).

Clearly, Steinberg's research was conducted at a time of particular crisis in relation to overcrowding within South Africa's penal system. Despite the fact that the gravity of the problem has fluctuated over time, it has remained of serious concern to both the prison authorities and South Africa's leading penologists throughout the post-apartheid period. The dogged persistence of this problem during the post-apartheid period is well illustrated in the following extract from a 2006 research report by Chris Giffard and Lukas Muntingh, in which they summarise trends in overcrowding within South Africa's prisons during the country's first decade of freedom:

> The total number and proportion of prisoners living in prisons that are overcrowded have increased substantially since 1995. It is only the special remissions of 2005 that have brought some respite ... [E]ven though the proportion of prisoners living in conditions of between 100% and 200% occupancy slowly decreased from 1996 to 2004 (a trend ended by the remission), this decrease has been at the expense of the proportion of prisoners living in conditions of occupancy rates more than 200%: those detained in prisons which have more than twice as many prisoners than they were intended for increased from just 1% in 1995 to 36% in 2004 ... Of equally great concern is the proportion of prisoners detained in institutions in which there are three times as many prisoners than capacity allows. There were no prisoners in this category until 1997, but by 2004 as many as 5% of all prisoners (a total of over 9000) were held such facilities. The special remissions reduced this number only slightly, to just less than 8 500.[3]

Prison overcrowding is not, however, solely a feature of the post-apartheid period. During the apartheid period, the problem plagued the National Party government and its prison authorities, providing those opposed to the apartheid system with the

3 See C Giffard & L Muntingh *The Effect of Sentencing on the Size of the South African Prison Population* (Report commissioned by the Open Society Foundation for South Africa) 2006 at 64-65. See, also, in general, J Steinberg (n 2); J Redpath "Unsustainable and unjust − criminal justice policy and remand detention since 1994" (2014) 48 (June) *SA Crime Quarterly* at 25-37; C Ballard *Research Report on Remand Detention in South Africa: An Overview of the Current Law and Proposals for Reform* (Community Law Centre: University of the Western Cape, 2011); S Johnstone-Robertson, SD Lawn, A Welte, L-G Bekker & R Wood "Tuberculosis in a South African prison: A transmission modelling analysis" (2011) 101(11) *South African Medical J* at 809-813; D van Zyl Smit "Swimming against the tide: Controlling the size of the prison population in the new South Africa" in B Dixon & E van der Spuy (eds) *Justice Gained? Crime and Crime Control in South Africa's Transition* (Cape Town, 2004) at 227-258; D van Zyl Smit "National report − South Africa" in D van Zyl Smit & F Dünkel (eds) *Imprisonment Today and Tomorrow − International Perspectives on Prisoners' Rights and Prison Conditions − Second Edition* (Kluwer Law International, 2001) at 589-608; S Peté "The politics of imprisonment in the aftermath of South Africa's first democratic election" (1998) 1 *South African J of Criminal Justice* 51-83 (hereafter Peté "Politics"); S Peté "The good the bad and the warehoused − The politics of imprisonment during the run-up to South Africa's second democratic election" (2000) 13(1) *South African J of Criminal Justice* 1-56 (hereafter Peté "The good"); S Peté "Between the devil and the deep blue sea – The spectre of crime and prison overcrowding in post-apartheid South Africa" (2006) 27(3) *Obiter* 429-453 (hereafter Peté "Devil").

means to launch a series of ideological attacks on the apartheid regime.[4] Aspects of the apartheid system clearly contributed to the problem of prison overcrowding during this period − for example the thousands of people imprisoned under the infamous pass laws.[5] But the problem of prison overcrowding in South Africa did not start with the rise of apartheid. It can be traced back much earlier than this, to the very introduction of this form of punishment into South Africa by the colonial authorities. It is the aim of this article to examine just one of the four British colonies which were joined together to form the Union of South Africa in 1910, in order to illustrate the manner in which chronically overcrowded prisons, as well as countless debates on the problem, remained a feature of colonial life throughout the period during which the colony was in existence. The colony in question is the Colony of Natal and the period under examination is from the time of the introduction of British administration in 1845, following the annexation by the British Empire three years earlier in 1842, until the Union of South Africa came into existence in 1910. By shedding light on this one small part of South Africa's penal history, it is hoped that this article will contribute to a more nuanced understanding of the problem of chronic overcrowding in South African prisons.[6] Part 1 of the article will cover the period 1845 to 1875, while Part 2 will cover the period 1875 to 1910.

4 See, in general, S Peté "Holding up a mirror to apartheid South Africa – Public discourse on the issue of overcrowding in South African prisons 1980 to 1984 – Part One" (2014) 35(3) *Obiter* 485-505. See also Part Two of this article, which is due to be published in (2015) 36(1) *Obiter*. A clear indication of the continued severity of prison overcrowding in South Africa throughout both the apartheid and post-apartheid periods, is the fact that both periods are marked by a succession of "special amnesties" – colloquially known as "bursting" – designed to relieve pressure on an overstretched penal system. Giffard & Muntingh (n 3) at 56-57 summarise the use of special amnesties to reduce severe overcrowding in South Africa from the early 1970s as follows: "In conditions of severe overcrowding (180%) in 1971, about 13 000 sentenced prisoners were given between three and six months amnesty. A further 28 000 sentenced prisoners were released in 1981, and in total, nearly 88 000 more between then and the first democratic elections in 1994. Between 1994 and the end of 2000, a further estimated 49 000 prisoners were released, including 8 000 unsentenced prisoners who had been granted bail of less than R1000, and there were also amnesties for certain politically motivated violent offences. In 2005, a special remission of sentence was granted to prisoners who were serving sentences for non-violent offences. This eventuated in the release of nearly 32 000 sentenced offenders, reducing the total prisoner population from an all-time high of 187 000 to a more manageable 155 000."

5 See, in general, S Peté (n 4). Many must have hoped that the end of apartheid would bring an end to chronic overcrowding in the prisons, but as is indicated by the following comment in Feb 2013 by the Minister of Correctional Services, Sbu Ndebele, this was not to be: "That our offender population has remained constant, whether you remove pass laws, group areas, or apartheid laws, should make us search more urgently for answers to the high prison population in South Africa": see *Mail & Guardian Online* available at *http://mg.co.za/article/2013-02-11-south-africa-has-highest-prison-population-in-africa-says-ndebele* (accessed 12 Feb 2013).

6 For an analysis of prison overcrowding in the context of the African continent as a whole, including a very brief summary of overcrowding in the prisons of colonial Natal, see S Peté "A brief history of human rights in the prisons of Africa" in J Sarkin (ed) *Human Rights in African Prisons* (Cape

2 Background and Early Years 1845-1860

Any discussion of penal policy requires some understanding of the social, political and economic context within which that penal policy is shaped and implemented. The first point to be noted in relation to the penal policy of colonial Natal is that the annexation of Natal by the British in 1842 was carried out, primarily, to thwart the ambitions of Afrikaner Voortrekkers who were intent on establishing control over the area. It was with some reluctance that the Colony of Natal was added to the British Empire, since the British colonial authorities did not believe that the new colony held out much prospect of financial gain for the mother country. Because of this, the administration of the colony was conducted, by and large, "on the cheap", with the Imperial Government determined to keep costs to a minimum.[7] As will be seen in the sections which follow, colonial officials stationed in Natal were forced, time and again, to plead with the Imperial Government in London for the necessary funds to build additional prison accommodation. These pleas were often either rebuffed by the Imperial authorities or else acceded to only in part, in a half-hearted and begrudging manner. The fact that the colonial state was permanently weak due to lack of sufficient finances was a major factor which shaped penal policy in the Colony of Natal and affected the degree of overcrowding in the gaols.

Another major factor which affected penal policy in colonial Natal was the relationship which existed between various political and economic interest groups in the colony. The most important of these interest groups was a large class of African subsistence farmers, who were essentially peasant producers engaged in the homestead system of production.[8] The efficiency of this mode of production meant that peasant producers were well able to produce sufficient surplus to maintain their economic independence. To the British government, it made sound financial sense to retain the system of peasant production, since revenue obtained from these producers could offset expenditure in the new colony. The British government decided, therefore, to adopt a system of "indirect rule", as advocated by Theophilus Shepstone, who later became the Secretary for Native Affairs in the Colony. This allowed the consolidation of Zulu social structures within the colonial system and the continued existence of a strong class of peasant producers.[9] Certain powerful economic interests within the

Town, 2008) 40-66 at 46-48 and 53-55. Further, for an analysis of prison overcrowding during the apartheid period, see, in general, S Peté (n 4). Finally, for an analysis of prison overcrowding during the post-apartheid period, see Peté "Devil" (n 3) at 429-453 *passim*.

7 See EH Brookes & C De B Webb *A History of Natal* (Pietermaritzburg, 1965) at 29-41; D Welsh *The Roots of Segregation – Native Policy in Colonial Natal 1845 to 1910* (Cape Town, 1971) at 7-9.

8 See J Guy "The destruction and reconstruction of Zulu society" in S Marks & R Rathbone (eds) *Industrialisation and Social Change in South Africa: African Class Formation, Culture and Consciousness 1870-1930* (New York, 1982) at 168-169; S Marks & A Atmore *Economy and Society in Pre-Industrial South Africa* (London, 1980) at 113-114.

9 See Welsh (n 7) at 7-30.

white ruling class were also in favour of the continued existence of the Zulu peasant producers. Among these were absentee speculators who owned large sections of land in the colony, and who found that the easiest way to make a profit was to allow the Zulu subsistence farmers to continue utilising the land in return for rent.[10] Due to a desire to maintain trade, merchants in the colony were also inclined to support the continued existence of the Zulu subsistence farmers. With the Imperial government and several powerful economic interest groups on their side, the Zulu subsistence farmers in Natal were able to avoid becoming involved in wage labour for the white colonists for much of the nineteenth century.

The independence of the Zulu subsistence farmers was bitterly resented by the white farmers of the colony, since they were deprived of all the advantages which would be offered by cheap black labour. Over the years these white farmers and their allies waged a bitter struggle to narrow the options available to the black peasant producers, and so force them into the service on their farms.[11] The white stock farmers of the interior were more strident in their views than the coastal sugar farmers, since the latter were somewhat pacified by the importation of Indian indentured labour, from 1860 onwards, to work on the sugar cane fields. According to Shula Marks, the stock farmers were inclined "to be far more radical in their views than the officials, planters, or townsmen" and they "regarded the failure of Africans to work for them virtually as a criminal offence".[12] The white farmers desired a coercive labour system based on racial lines and sought every opportunity to secure a reliable supply of cheap black labour. In general, the social relations between the white colonists and the indigenous population of the colony were deeply coloured by the coercive nature of the economic relationships which the colonists wished to enforce over the reluctant black populace. Generally speaking, the ideology of the white colonists was dominated, on the one hand, by a deeply ingrained fear of the massive Zulu nation on their doorstep and, on the other hand, by racist paternalism towards the childlike black "savages" who needed to be "civilized" by the superior white race.[13]

The powerful mix of fear, racist paternalism, and extreme frustration at the reluctance of the indigenous inhabitants of Natal to become docile and obedient workers, was bound to influence ideologies of punishment within the colony. Whereas penal theory in Britain may have been based on the idea that offenders were to be rehabilitated by means of imprisonment within the so-called "separate system" − discussed further below − the social system of colonial Natal was based

10 See Brookes & Webb (n 7) at 50-57. This practice was known by the racist term "Kafir Farming". See Marks & Atmore (n 8) at 162-163.

11 See Marks & Atmore (n 8) at 158-160.

12 See S Marks *Reluctant Rebellion: The 1906-1908 Disturbances in Natal* (Oxford, 1970) at 15, 17.

13 See S Peté & A Devenish "Flogging, fear and food: Punishment and race in colonial Natal" (2005) 31(1) *J of Southern African Studies* 3-21; S Peté "Punishment and race: The emergence of racially defined punishment in colonial Natal" (1986) 1(2) *Natal University Law and Society Review* 99-114. See, also, Marks (n 12) at 3-26.

upon white domination, meaning that colonial penal theory sought to emphasise white sovereignty through the firm punishment of black offenders. In general, white colonial opinion favoured harsh corporal punishment and forced labour as forms of punishment suitable for black offenders, rather than imprisonment. The latter form of punishment was seen as a "humane" European-style of correction, which did not quite fit the realities of colonial society. Throughout the colonial period there was a conflict between the Imperial authorities on the one hand, constantly urging penal reform in order to bring the colony into line with "accepted penal practice", namely the best practice in England at the time, and the white colonists on the other, who complained bitterly and in racist terms that imprisonment had no effect on the idle and ignorant indigenes. To the white colonists in Natal, the officials in England who prescribed the "proper" forms of punishment for black offenders were guilty of a deeply misguided sentimentalism. The colonial state stood in the middle of these two ideological forces − on the one hand having to implement the instructions handed down by the Imperial authorities, and on the other hand having to resist political pressure brought to bear by the white colonists. Before Natal was granted responsible government status in 1894, the balance of power in this ideological conflict rested with the Imperial authorities, but thereafter it shifted in favour of the white colonists.

An important reason for overcrowding in the prisons of colonial Natal was an explosive growth of the prison population over the years of the colony's existence. One of the main reasons why Natal's prison population grew so rapidly, was the coercive nature of social relations − as sketched above − between the indigenous inhabitants of the region and the white colonists. Resistance on the part of the indigenous inhabitants led to the imprisonment of large numbers of Africans for petty offences. A significant reason for this was that, throughout the colonial period, prisons were used as a means of exercising social control over the indigenous population of the colony.[14] In other words, Natal's gaols were, in general, overcrowded with offenders against social control legislation − such as the Masters and Servants Ordinance; the Pass Laws; and the Borough Bye Laws rather than with "criminals" in the true sense of the word.[15] As was to happen a century later during the apartheid period,

14 This was to become a recurring theme in the penal history of South Africa as a whole. See, eg, in general, Peté (n 4).

15 See, in general, J Riekert *The Natal Master and Servant Laws* (unpublished LLM thesis, University of Natal: Pietermaritzburg, 1983). Similar processes were at work in other parts of the country. C van Onselen makes the following perceptive comment about the close inter-relationship between the mechanisms of economic coercion – in his example the mine compounds of the Witwatersrand – and the mechanisms of social coercion – namely the prisons: "[Economic forces] prised black South Africans off their land, separated them from their families, reduced them to the status of workers, and then ruthlessly reallocated them to the towns. There, on the bureaucratic leash of the pass laws, they were soon exposed to two sociologically similar institutions which served the

countless numbers of ordinary black residents in the Colony became victims of the petty rules and regulations designed by the white colonists to keep control over the black population. Persons swept up in this dragnet of petty rules and regulations were often unable to pay the stipulated fines, and so ended up in the colony's overcrowded gaols. Many prisoners were not criminals but victims of economic forces beyond their control, forced to seek wage labour in towns or on farms controlled by the white colonists, before falling foul of the restrictive legislation designed to keep a tight rein on the black labour force, or some other petty measure aimed at the "protection" of white society. Sometimes low-level strife erupted into all-out war or rebellion − for example, the Langalibalele Rebellion of 1873; the Anglo-Zulu War of 1879; the Anglo-Boer War of 1899; and the Bambata Rebellion of 1906. Each of these events delivered a shock to the penal system of colonial Natal, and led to an influx of prisoners into already overcrowded prisons.

With the above as general background, we turn now to a few brief remarks on prison overcrowding in the first fifteen to twenty years of the colony's existence. Details of the birth of the prison in colonial Natal have been set out elsewhere and need not detain us here, apart from highlighting certain points relating to overcrowding.[16] The first "prisons" in the colony − perhaps better described as lock-up houses − consisted of a few wattle-and-daub cottages, at least one purpose built by the Voortrekkers before the arrival of the British, but others simply rented from local residents.[17] Initially, the number of offenders who had the misfortune to end up in one of these "gaols" was very low. For example, there were only five

rapidly industrialising economic system particularly well – the prisons and the mine compounds": see C van Onselen *Studies in the Social and Economic History of the Witwatersrand 1886 to 1914* (Johannesburg, 1982) at 171.

16 For more details on the birth of the prison in colonial Natal, see S Peté "Falling on stony ground: Importing the penal practices of Europe into the prisons of colonial Natal (Part 1)" (2006) 12(2) *Fundamina* 100-112 at 101-106.

17 The "Tronk" in Pietermaritzburg was described by AF Hattersley as "a wattle-and-daub structure, flanked with sod walls and surrounded by a pleasant garden, – not in the least suggestive of the rigours of prison life": see *Portrait of a City* (Pietermaritzburg, 1951) at 9-10. The Gaol in Durban, a wattle-and-daub building rented from a certain Mr Dand in 1849 (the previous lock-up having been rented from a Mr Benningfield in 1847), was described by the *Natal Witness* as "a low cottage, overgrown with creepers, fronted by a thick, verdant and lofty hedge". See 18 Apr 1851 *Natal Witness*. Despite these idyllic descriptions, life for inmates could clearly be unpleasant. One of the earliest complaints about prison conditions in Natal came from a group of ten traders who were locked up in the Pietermaritzburg "Tronk" in 1842 when the Boers were still in charge of the town. They complained to the Boer Commandant-General *inter alia* as follows: "We humbly submit to you and hope you will take into consideration and kindly ease us of being chained during the day and of the intolerable stench caused by our being obliged to ease ourselves inside the Tronk, this with being confined with closed windows which may soon cause a disease fatal to us and perhaps spread through the whole town." See E Goetzche *The Father of a City: The Life and Times of George Cato, First Mayor of Durban* (Durban, 1967) at 47-48.

prisoners in the Pietermaritzburg Gaol in February 1846.[18] As the years went by, however, the number of prisoners began to rise and the accommodation provided by the rustic cottages became increasingly inadequate. For example, in February 1859, Lieutenant-Governor Scott described the Pietermaritzburg Gaol as "in every respect unsuited for the present wants of the Colony" and informed the Imperial authorities in London that "there is now a pressing need for better provision being made for prisoners, not only in Pietermaritzburg, but also in Durban and elsewhere".[19] On 3 June 1861, in his opening address to the Legislative Council, the Lieutenant-Governor alluded to the fact that growth in the Colony had resulted in "our great deficiency in prison accommodation", which he described as "more and more conspicuous amongst the pressing requirements".[20] Although the construction of purpose built prisons to replace the wattle-and-daub structures of earlier times began in the first half of the 1860s, certain gaols remained dilapidated and overcrowded well into this period.[21] As late as February 1864, for example, the Durban gaoler reported that thirty-six prisoners were forced to occupy the seven rooms which were available in the antiquated gaol. Racial segregation was firmly in place within the Durban Gaol at this time, with white prisoners being kept apart from black prisoners. As was to be expected in a colony dominated by racist ideology, white prisoners were shielded from the very worst effects of the overcrowding. According to the Durban Gaoler, whilst a particular room in the gaol might accommodate as many as nine black prisoners, "there would not be more than six white men in such a room".[22] It is clear, therefore, that the general suffering inflicted on prisoners due to severely overcrowded conditions, was much harsher in the case of black prisoners than their white counterparts.

3 Chronic Overcrowding and the Failure to Introduce the "Separate System" into the Penal System of Colonial Natal in the 1860s and early 1870s

An enduring theme within the discourse surrounding imprisonment in colonial Natal during the 1860s and early 1870s was a series of calls by the Imperial authorities in England, directed at the Government of Natal, to introduce the so-called "separate

18 *Irish University Press Series of British Parliamentary Papers – Colonies Africa* (Shannon, 1971) vol 28 *Natal* at 65: West to Maitland, 24 Feb 1846. Martin West had taken up his duties as the first Lieutenant-Governor of Natal in Dec 1845.

19 NAB (KwaZulu-Natal Pietermaritzburg Archives Repository) Colonial Office (London) 179/51: Scott to Lytton, 4 Feb 1859.

20 7 Jun 1861 *Natal Witness.*

21 Construction of a new Central Gaol in Pietermaritzburg was begun in Jan 1861, while construction of a new gaol in Durban only started in Nov 1864. See 22 Nov 1864 *Natal Witness.*

22 NAB CSO (Colonial Secretary's Office, Natal) 196/327: Report of Durban Gaoler, 12 Feb 1864.

system" into the gaols of the colony.[23] These calls were, however, doomed to failure as a result of the ever increasing prison population, as well as scepticism on the part of the white colonists in general. For the latter, although the "separate system" might be necessary in the punishment of "European" offenders, who needed to be rehabilitated before they could be re-accepted into the fold of white colonial society, in the case of "non-European" offenders the lessons needed could be taught most effectively by the cat-ò-nine-tails, as well as by forced productive labour for the colonial state and/or for white colonial society in general. In the eyes of the white colonists, who lived in a society stratified along strict racial lines and dominated by racist ideology, "rehabilitation" for the latter category of prisoners consisted in knowing who was the "master" and who the "servant", as well as in understanding that the economic future of "non-Europeans" lay in wage labour for the white man.

The insistence of the Imperial authorities that the "separate system" be introduced into the gaols of colonial Natal was based upon what was at the time believed to be "best practice" in the treatment and rehabilitation of offenders in England. During the 1860s an extensive and widespread investigation was conducted by the Imperial authorities in order to determine whether or not the various penal practices of the many British colonies conformed to the model provided by the penal practices of the mother country. In 1863, two reports were sent to the colonies describing what was believed to be the "state of the art" in relation to methods of punishment.[24] The purpose of sending these reports to the colonies was clearly to enable the colonies to copy these state of the art methods.

In 1865, questionnaires were sent to all British colonies in order to gather information on the different penal practices which were in operation across the Empire. The information received was used to compile what came to be known as the "Digest and Summary of Information respecting Colonial Prisons" (hereafter referred to as the Digest).[25] Two principles which were particularly stressed in the Digest were the principle of "strictly penal labour" − for example, non-productive labour on a "treadwheel" or "crank" or at "shot drill" − and the principle of strict separation of prisoners, one from another − the "separate system" − which was regarded as fundamental to prison discipline.[26] The inescapable implication of the

23 For a more general discussion of the penal reforms proposed by the Imperial authorities during the period 1865 to 1867, including in particular the issue of penal labour, see Peté (n 16) at 107-111.

24 These reports were the "Report of the Committee of the House of Lords on the State of Discipline in Gaols" and the "Report of the Royal Commission on Penal Servitude". See NAB Government House, Natal 359/2: Circular Despatch Newcastle to Scott, 19 Oct 1863; and NAB Government House, Natal 358/162: Circular Despatch Newcastle to Scott, 19 Aug 1863.

25 See NAB Imperial Blue Book – Digest and Summary of Information Respecting Colonial Prisons (drawn up and presented to the British Parliament by Command of Queen Victoria in 1867, C3961 of 1867) at 4: Circular Despatch Cordwell to Maclean, 16 Jan 1865.

26 For details on the introduction of strictly penal labour into the prisons of colonial Natal, see Peté (n 16) at 100-112; S Peté "Falling on stony ground: Importing the penal practices of Europe into the prisons of Colonial Natal – Part Two" (2007) 13(2) *Fundamina* 111-125.

latter principle for prison accommodation was that a sufficient number of cells had to be built so as to allow each prisoner be confined in a separate cell.[27] Clearly, in a financially strapped colony such as Natal where the prisons were already overcrowded, this was always going to be a tall order. What made it even more difficult was the fact that the white colonists saw no good reason to treat African prisoners in the same manner that "European" prisoners were treated in England. For their part, the Imperial authorities remained resolutely wedded to the principle of separation.[28]

The response of the authorities in Natal to the insistence of the Imperial authorities in London that the principle of separation as set out in the Digest be implemented in the colony, was very negative.[29] There were not nearly enough cells in the penal system to allow prisoners to be kept apart at night, and during the day most prisoners worked together in gangs on public works. In any event, most colonists believed that the "separate system" would be wasted on "non-European" prisoners, who were not so much in need of being rehabilitated into society, as in need of a swift harsh lesson as to who was in charge of the colony – namely the white colonists − and what the role of "non-Europeans" in the colony actually was − namely to provide a source of cheap labour for the white colonists.[30] To the colonial mind, the "separate system" only made sense if it meant reserving separate cells for white prisoners. In other words, in the overcrowded conditions of a colonial prison, a single cell was something of a "luxury" for selected (white) prisoners, rather than a necessity for all prisoners.

On 19 November 1868 a Commission of Enquiry was appointed to investigate the reform of Natal's penal system. The Commission confirmed that it was impossible to carry out the separate system in either the Durban or the Pietermaritzburg Gaol,

27 M Ignatieff *Just Measure of Pain* (New York, 1978) at 102 describes the attraction of the "separate system" to prison authorities in England as follows: "Solitary confinement was designed to wrest the governance of prisons out of the hands of the inmate subculture. It restored the state's control over the criminal's conscience. It divided convicts so that they would lose the capacity to resist both in thought and action."

28 They clearly believed the following principal stated in the Digest: "It has been recognised too long and too widely to be now disputed that good discipline is impracticable and corruption certain where prisoners are in communication with each other, and that separation is the only basis for a sound penal system." See NAB Imperial Blue Book – Digest and Summary of Information Respecting Colonial Prisons (drawn up and presented to the British Parliament by Command of Queen Victoria in 1867, C3961 of 1867) (n 25) at 65 IV.

29 See, eg, NAB Colonial Office, London 179/89: Keate to Buckingham, 6 May 1868: Enclosure – Report of Colonial Engineer, 26 Dec 1867.

30 A good example of the general rejection of the "separate system" by the colonial authorities is the following opinion of the Colonial Engineer that the separate system would not be "particularly advantageous in the case of Kafirs and Coolies who form the great majority of prisoners in Natal. Provision for enforcing this system, however, in particular cases and especially amongst persons of European blood is very desirable ...": see NAB Colonial Office, London 179/89: Keate to Buckingham, 6 May 1868: Enclosure – Report of Colonial Engineer, 26 Dec 1867.

because of lack of accommodation. In the Pietermaritzburg Gaol at this time, seven cells were occupied by twenty-two white prisoners, whereas forty black prisoners were forced to live in only ten cells.[31] Furthermore, due to financial constraints, there was not much hope of more prison accommodation being built. The Commission pointed out that "in the present financial state of the Colony there is no probability that new gaols would be constructed".[32]

The situation did not improve over the years which followed. In 1872 the Durban Gaol was overcrowded to such an extent that only 176 cubic feet of space was available for each prisoner. The Digest laid down that 900 cubic feet of space per prisoner was suitable for prisoners in England, while even more space was necessary in tropical climates.[33] This was the lowest figure of all the Natal gaols and compared very unfavourably with the figure for the Pietermaritzburg Gaol, namely 696 cubic feet per prisoner.[34] Overcrowding had many adverse effects; for example, since there was no infirmary at the Durban Gaol, the general overcrowding resulted in the cells which were allocated to sick prisoners also being overcrowded. On 5 November 1872, in a chilling comment, the Durban Gaol Board stated that "in some cases it is to be feared that life has been sacrificed for want of proper accommodation for the sick".[35] Of course, with the overcrowding in Natal's gaols, it was impossible to introduce the separate system, although the Imperial authorities continued to urge that this problem be rectified.[36] On 30 July 1873 the Secretary of State, Lord Carnarvon, expressed his concern at the lack of prison accommodation in Natal and recommended that the Lieutenant-Governor give the matter his "early and serious consideration".[37] Within a few months of this despatch being sent, the problem of chronic overcrowding in the two central gaols of the colony was to become worse than ever, as these gaols were flooded with "rebel" prisoners who were captured and incarcerated following the "Langalibalele Rebellion" of 1873.

31 NAB CSO 324/304: Evidence of Superintendent Pietermaritzburg Gaol to Commission of Enquiry appointed on 19 Nov 1868.

32 *Idem* at 3.

33 NAB Imperial Blue Book – Digest and Summary of Information Respecting Colonial Prisons (drawn up and presented to the British Parliament by Command of Queen Victoria in 1867, C3961 of 1867) (n 25) at 84 XVI.

34 NAB Natal Blue Book, 1872: AA8 point IV.

35 NAB CSO 424/2228: Meeting of Durban Gaol Board, 5 Nov 1872.

36 The Natal Blue Book for 1872 stated as follows: "None of the prisons are on the separate system. The separation enforced, where the gaol accommodation admits of it, is that of sexes and races. Prisoners on remand are also, where practicable, kept apart from convicted prisoners. All male prisoners sentenced to hard labour are worked in association." See NAB Natal Blue Book, 1872: AA8 point I.

37 Government House Natal 58/Despatch 350 KwaZulu-Natal Archives Pietermaritzburg Archives Repository: Kimberley to Pine 30 Jul 1873.

4 The Langalibalele Rebellion of 1873 and its Effect on Prison Overcrowding

An infrequent yet important factor contributing over the decades to chronic overcrowding in the prisons of colonial Natal was the outbreak, from time to time, of war or serious rebellion within the colony. An important example of one such "rebellion" was the so-called "Langalibalele Rebellion" of 1873 which led to the imprisonment of a large number of African "rebels" in prisons of the colony. Clearly, the "rebels" were not "criminals" in the strict sense of the word. This being the case, it was inappropriate for them to be confined in gaols of the colony, which were already bursting at the seams with conventional "criminals". After both the Langalibalele Rebellion and the Bambata Rebellion, the Natal governmental authorities took steps to keep the "rebels" out of the penal system. Each rebellion will be examined in turn.

The events which came to be known as the "Langalibalele Rebellion" took place towards the end of 1873. Langalibalele was the chief of the Hlubi tribe which occupied land in the foothills of the Drakensberg mountains near Champagne Castle and Cathkin Peak. Following a dispute with the local magistrate over unregistered guns in the possession of his tribesmen, Langalibalele ignored an order to report in person to the authorities in Pietermaritzburg. In the eyes of the authorities this amounted to open rebellion. A force consisting of 200 British troops, 300 colonial volunteers, and 6 000 African tribesmen was sent to quell the "insurrection". During the ensuing battle, between 150 and 200 of the Hlubi were killed. Langalibalele and one of his sons were banished to Robben Island and 200 Hlubi tribesmen were imprisoned.[38]

The increase in the prison population due to the sudden influx of "rebel" prisoners placed great strain on Natal's already overcrowded gaols. On 30 December 1873, the Pietermaritzburg Gaoler reported that he had been forced to confine the "rebel" prisoners as follows:

> … 24 in the carpenter's shop, 12 in a tent and 9 in a small shed, making in all 45 in the Gaol yard.[39]

He pointed out that "the rebel chief may be expected soon, and the confinement of prisoners in the Gaol yard is to say the least dangerous ...".[40] Forty-eight prisoners were transferred to Durban to make room for the "rebel" prisoners, and five additional staff members were appointed at the Durban Gaol to cater for the increase in the prison population.[41] Langalibalele was subsequently confined in the Pietermaritzburg Gaol for a time, amid intense speculation on the part of the local African population

38 Brookes & Webb (n 7) at 113-123.
39 NAB CSO, 459/3127: Superintendent Pietermaritzburg Gaol to Colonial Secretary, 30 Dec 1873.
40 *Ibid*.
41 NAB CSO 460/97: Superintendent Durban Gaol, 8 Jan 1874.

that he would escape somehow. This speculation was caused by two unusual natural phenomena which happened to occur at this time, namely an eclipse of the sun, followed by a fierce hailstorm. According to the *Natal Witness* the local African population believed both these phenomena to be the work of Langalibalele.[42] The eclipse was seen as an attempt by Langalibalele to bring total darkness to the earth, under cover of which he might be rescued by his followers. He was believed to have caused the hailstorm in an attempt to break open the roof of the gaol in which he was imprisoned. Needless to say, neither Langalibalele nor any of the imprisoned Hlubi tribesmen were able to escape. The overcrowded conditions in the prisons remained of major concern to the authorities at the time.

One of the consequences of the Langalibalele Rebellion was the passing of Law 18 of 1874, with the following self-explanatory title: "To make Special Provision with regard to the Employment of Convicts".[43] Under this law the Lieutenant Governor was authorised to assign any convict who had been sentenced to hard labour, as a servant to any private individual or to the Colonial Engineer, for the term of his sentence.[44] The Lieutenant Governor in Executive Council was empowered to frame rules and regulations for carrying out the new Law, and on 10 April 1874 a set of such rules and regulations was promulgated in the *Government Gazette*.[45] The rules and regulations laid down not only the rights and duties of the "European employer" and the "native convict" who had been assigned to him, but also made provision for the convict's family.[46] Family members were permitted to reside with the convict on the land of his employer.[47] The employer was required to provide both the convict and his family with food and lodging.[48] In return, the employer could demand the services of any unmarried female who was over ten years of age and any male who was over twelve years of age, who belonged to the convict's family and

42 1 May 1874 *The Natal Witness.*

43 Law 18 of 1874 (Natal) "To make Special Provision with regard to the Employment of Convicts".

44 It is interesting to note that there had been a failed attempt to pass similar legislation just over a decade earlier in 1863. In that year a Bill was proposed which sought to give the Lieutenant Governor the power to "permit any person undergoing any sentence of imprisonment to become the servant or apprentice of any house-holder applying for the same ...". (See GN 56 *Government Gazette*, Natal of 21 Apr 1863: Bill "For the Employment of Prisoners on Public Works" at s 10.) Prisoners so assigned were to be subjected to the provisions of the Masters and Servants Ordinance Number 2 of 1850 (*idem* at s 11). However, the punishment for desertion was to be more severe for prisoners assigned as servants, than the punishment for desertion by "normal" servants under the Masters and Servants Ordinance. Prisoners who deserted their masters were to be punished by up to two years' additional punishment plus, at the discretion of the resident magistrate, up to fifty lashes (*idem* at s 7). The Bill was rejected by the Legislative Council and never became law. (See 17 Jul 1863 *The Natal Witness* "Legislative Council 8 July 1863".)

45 NAB Executive Council Vol 9 at 258; and NAB Colonial Office, London 179/117: Pine to Carnarvon, 22 Feb 1875 – Enclosure 1: Government Notice 117 of 1874.

46 *Ibid*.

47 *Idem*: Regulation 1.

48 *Idem*: Regulation 2.

were residing with the convict on the employer's land. Males over eighteen years of age who belonged to the convict's family and were residing with the convict on the employer's land, were not free to work elsewhere until such time as the convict's period of assignment had expired.[49] This did not apply, however, if the employer was unwilling to employ such males and pay them wages equivalent to the going rate at the time. In terms of the regulations, family members were to be remunerated "at such rate of wages as shall in each case be fixed by the magistrate, taking into account the obligations of the employer".[50]

With regard to the convict, the employer was to be entitled to his services "at all reasonable times" and his wages were to be fixed by the magistrate.[51] These wages were not to be paid directly to the convict, except by direction of the Lieutenant Governor.[52] In the normal course of events all such wages were to be paid into an account entitled "The Convict Relief Fund".[53] The Lieutenant Governor was authorised to

> draw upon such fund for the purpose of relieving from want or rewarding for good conduct, or for the purpose of enabling any native convict on expiration of the period of imprisonment to acquire the means of re-establishing himself in the Colony: Provided that in no case shall the amount so granted for relief, reward, or otherwise, exceed the aggregate amount of wages earned by the said convict during his imprisonment.[54]

Law 18 of 1874 was aimed at black political offenders, namely "rebels", who had resisted white domination rather than at "criminals" in the true sense of the word. This is apparent from the circumstances under which the Law was framed and the contents of the Law itself.

Following the Langalibalele Rebellion, 200 tribesmen were imprisoned. Clearly these men were not criminals from whom society would have to be protected, and who would have to be rehabilitated before they could take up their place in society. They were "rebels", political offenders, and once the rebellion had been broken, a punishment was needed which would be sufficiently severe yet would not involve imprisonment, since the prisons were already overcrowded with "real" criminals. In other words, the law had been used as an instrument of political oppression. The penal system was not suitable for dealing with political offenders. In the eyes of the white colonists, Law 18 of 1874 clearly provided the ideal punishment for "rebels", namely compulsory labour for the benefit of the white man. As pointed out earlier in this article, a major theme of the political economy of Natal throughout the colonial period was the constant struggle by the white colonists to force the African tribesmen

49 *Idem*: Regulation 5.
50 *Idem*: Regulation 3.
51 *Ibid*.
52 *Idem*: Regulation 9.
53 *Idem*: Regulation 12.
54 *Idem*: Regulation 13.

into wage labour on white farms. Indeed, certain white farmers viewed the failure of the African tribesmen to work on their farms as tantamount to a criminal offence. To these white colonial farmers, forcing "rebels" into wage labour on white farms was a fitting punishment for those who had dared to challenge white sovereignty. Of course, such punishment would not have been suitable for "criminals" in the strict sense of the word, such as murderers, rapists, thieves and so on. On 21 April 1874, *The Natal Witness,* commenting on the rules and regulations promulgated under Law 18 of 1874, stated that since strong opposition was to be expected from "English negropholists", perhaps it would be better to treat offenders such as Langalibalele's 200 "rebels" as ordinary criminals.[55] As hard labour prisoners they could be employed in the construction of much needed public works. The *Natal Witness* found it difficult to understand why the "Exeter Hall mind ... would rather the Kafirs endured penal servitude, than that they should be restored to their families and be required to work for white employers at fair wages".[56]

Clearly the reason was that the authorities in England feared that, since Law 18 of 1874 was designed to deal with political offenders, it would be used as a means of political oppression. As an official in the Colonial Office in London remarked:

> If the law is intended to apply really to convicts condemned to hard labour, fancy assigning 20 criminals to a farmer without any provision either for his protection or their discipline, while if it is intended to be applied as it really is to political offenders it must inevitably be used as an instrument of oppression.[57]

In his Despatch of 29 April 1875, the Secretary of State, Lord Carnarvon, informed the Lieutenant Governor that Law 18 of 1874 had been disallowed. The following reasons were given for the step that had been taken:

> On a sudden emergency, such as lately arose, where it was imperatively necessary to make instant provision for feeding a large number of prisoners, and the resources of the Government were inadequate for the purpose of lodging and keeping them, such a course as assigning natives for a short period to those who would provide properly for them, might be defensible as a temporary measure resorted to under pressure; but to take a general power of assigning convicts as private servants, would open a door to many objectionable practices, owing, among many other causes, to the impossibility of properly supervising either the employers or the employed.[58]

55 21 Apr 1874 *The Natal Witness*.
56 *Ibid*.
57 NAB Colonial Office, London 179/117: Pine to Carnarvon, 22 Feb 1875: Minute by Colonial Office official, 7 Apr 1875.
58 NAB Government House, Natal 64/Despatch 57: Carnarvon to Wolseley, 29 Apr 1875 at par 3.

5 Conclusion

Throughout the period dealt with in part one of this article, chronic overcrowding remained a pressing problem in the gaols of colonial Natal. Starved of adequate financial resources, the colonial state was unable to provide sufficient prison accommodation to cater for the number of inmates confined within the system. The problem was aggravated by the fact that the prisons were used as a method of social control over the indigenous population of the Colony. Furthermore, as illustrated by the Langalibalele Rebellion, the penal system was vulnerable to external shocks caused by war and civil strife, which greatly increased the number of prisoners requiring accommodation. Finally, the problem of overcrowding in the prisons of colonial Natal came with a nasty racial twist. Due to socio-economic circumstances prevailing in the Colony and the peculiar nature of the racist ideology which dominated white colonial society, most white colonists did not regard imprisonment as a particularly suitable form of punishment for black offenders, preferring harsh corporal punishment combined with forced labour in service of the colonial state and/or white society in general. The result was that conditions were always considerably more overcrowded for "non-European" prisoners than for "European" prisoners in the gaols of colonial Natal. These themes will be further explored in part two of this article, which will examine the period from 1875 until the end of the colonial period in 1910.

ABSTRACT

During recent decades, like the proverbial bad penny, the problem of chronic overcrowding has turned up over and over again to haunt South African prison administrators. As this article indicates, however, overcrowding in South African prisons is not only a recent phenomenon. Overcrowding has been a significant feature of imprisonment in South Africa from the very introduction of this form of punishment into the country. This article examines overcrowding in the prisons of colonial Natal from 1845 until 1910. Through an analysis of the official discourse surrounding this difficult problem throughout the colonial period, this article shows that imprisonment as a form of punishment in South Africa has always been inextricably bound up with the problem of overcrowding. By illustrating the deeply entrenched nature of the problem from a historical perspective, this article hopes to provide present-day prison administrators with useful insights into the nature of their struggle to overcome the problem. The article is in two parts. Part 1 of the article covers the period 1845 to 1875, while Part 2 covers the period 1875 to 1910.

PROTECTION AGAINST FORCED SALE OF A DEBTOR'S HOME IN THE ROMAN CONTEXT

Lienne Steyn* **

Therefore am I called Janus; …
… for my shape … you know
That every door must have a double face;
One views the Lares, one the Populace;
And as your mortal Janitor, who sees
From threshold floor, exits and entrances,
So I, the Janitor celestial, view
Eoan and Hesperian regions too.
Hecat' you know is furnished with fronts three
That she may watch and ward her Trivise,
And I have twain, that, without movement, I
May view alike past and futurity.
Translated extract from Ovid Fasti Book 1***

1 Introduction

The home of a debtor has never enjoyed specific statutory protection in the form of exemption from forced sale in the individual debt enforcement and insolvency

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** This article is based on sections of the author's unpublished LLD thesis entitled *Statutory Regulation of Forced Sale of the Home in South Africa* (University of Pretoria, 2012).

*** JB Rose *The Fasti of Ovid* (London, 1866) at 5.

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procedures in South Africa.[1] Only in the last decade has recognition by the courts of the impact of one of the socio-economic rights included in the Bill of Rights,[2] the right to have access to adequate housing, provided for in section 26 of the Constitution, profoundly affected developments in relation to execution against a debtor's home in the individual debt enforcement process.[3] The combined effect of the Constitutional Court's decisions in *Jaftha v Schoeman*; *Van Rooyen v Stoltz*[4] and *Gundwana v Steko Development CC*,[5] is that it is acknowledged that execution against a debtor's home may constitute an unjustifiable infringement of the right to have access to adequate housing. Further, this may occur even where the home has been mortgaged in favour of the creditor. Therefore, in every case in which execution is sought against a person's home, judicial oversight is required to determine, after considering "all the relevant circumstances", whether execution is justifiable in terms of section 36 of the Constitution.

Given that before the decision in *Jaftha v Schoeman*, the right of a creditor, especially a mortgagee, to execution against the debtor's property had been largely regarded as unassailable, these were ground-breaking changes effected by the Constitutional Court in the course of carrying out constitutional imperatives. However, it should be borne in mind that the fact that judicial oversight is required will not necessarily have the outcome that a court will refuse to grant an order declaring a debtor's home specially executable. It will depend on the degree to which any specific circumstances are exceptional as well as whether judicial officers adopt a more debtor-friendly, as opposed to a creditor-friendly, approach in such matters.[6]

1 Although various statutory provisions regulating the individual debt enforcement and insolvency procedures (such as, eg, s 67 of the Magistrates' Courts Act 32 of 1944, s 39 of the Supreme Court Act 59 of 1959, s 23 and s 82(6) of the Insolvency Act 24 of 1936), and other statutes (such as the Pension Funds Act 24 of 1956, the General Pensions Act 29 of 1979, the Long-Term Insurance Act 52 of 1998 and the Land Reform (Labour Tenants) Act 3 of 1996) place certain assets beyond the reach of creditors, these do not include the debtor's home.

2 Contained in Chapter 2 of the Constitution of the Republic of South Africa, 1996 (hereafter referred to as the Constitution), which came into operation on 4 Feb 1997.

3 See, generally, Steyn (n**) *supra*, and authorities cited there.

4 *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 (2) SA 140 (CC) (hereafter referred to as *Jaftha v Schoeman*).

5 *Gundwana v Steko Development CC* 2011 (3) SA 608 (CC) (hereafter referred to as *Gundwana v Steko*).

6 *Jaftha v Schoeman* concerned unique circumstances in that the debtors were severely impoverished; suffered from poor health; had received minimal primary-level education; and had suffered their government-subsidised homes being sold in execution for non-payment of unsecured debts of minimal amounts of R250 and R190, respectively. Thereafter, cases in which the court refused orders declaring the debtor's home specially executable included *ABSA Bank Ltd v Ntsane* 2007 (3) SA 554 (T), where execution against the home was sought in respect of an arrears mortgage debt of R18.46, and *FirstRand Bank Ltd v Maleke and Three Similar Cases* 2010 (1) SA 143 (GSJ), which was decided at a time when there was a lack of clarity in relation to the application of the newly enacted National Credit Act 34 of 2005 (NCA), and in which the presiding judge

Further, thus far, there has been no equivalent development where the debtor's estate has been sequestrated in terms of the Insolvency Act 24 of 1936.[7] The position is that all of the insolvent debtor's property, including immovable property that constitutes his or her home, vests in the trustee whose duty it is to liquidate the property of the insolvent estate for distribution of the proceeds amongst creditors.[8] Therefore, although specific judicial evaluation of the circumstances is now required in the individual debt enforcement process, this does not necessarily result in prohibition or prevention of, or specific protection for the debtor and his or her family against, forced sale of the home.

Against the South African contextual background set out above, and keeping in mind recent developments in the European Union since the global economic recessions and mortgage crises towards forced sale of the home being permitted only as a last resort,[9] this article explores the ways in which a debtor's home was likely to have been treated according to Roman law, a common source of contemporary legal systems. Initially, substantive and procedural rules relating to debt enforcement permitted execution only against a debtor's person. Thereafter, the law developed to provide for execution against a debtor's property. Rules and procedures regarding collective debt enforcement (or insolvency) evolved as did principles pertaining to mortgage and a creditor's real security rights. Certain types of assets came to be regarded as exempt from execution in the individual and collective debt enforcement processes but there was no formal exemption of the home of a debtor. However, scrutiny of the relevant legal principles and procedures, as applied in their historical and socio-economic context, reveals, it is submitted, the effect, albeit indirect and

distinguished the case from others in which execution had been permitted. *FirstRand Bank Ltd v Seyffert and Three Similar Cases* 2010 (6) SA 429 (GSJ) was also decided in the context of uncertainty relating to the application of the NCA; see pars 18-20 of the judgment. *Cf Standard Bank v Hales* 2009 (3) SA 315 (D); *FirstRand Bank Ltd v Meyer* ECPE Case No 3483/10 [2011] (17 Mar 2011); and, post-*Gundwana v Steko, Nedbank Ltd v Fraser and Four Similar Cases* 2011 (4) SA 363 (GSJ); *FirstRand Bank Ltd v Folscher and Similar Matters* 2011 (4) SA 314 (GNP); *Standard Bank of South Africa Ltd v Bekker and Four Similar Cases* 2011 (6) SA 111 (WCC); *Mkhize v Umvoti Municipality* 2010 (4) SA 509 (KZP) and, on appeal, 2012 (1) SA 1 (SCA); *ABSA Bank Ltd v Petersen* 2013 (1) SA 481 (WCC). For a more detailed discussion of the position, see Steyn (n **), *supra*, ch 15.

7 The only reported judgment involving the sale, at the instance of the trustee of the insolvent estate, of the home of insolvent spouses, is *ABSA Bank Ltd v Murray* 2004 (2) SA 15 (C), which dealt with their eviction from it and the application of the provisions of the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998.

8 See, *inter alia*, ss 20, 69 and 82 of the Insolvency Act 24 of 1936; RD Sharrock *et al Hockly's Insolvency Law* 9 ed (Cape Town, 2012) ch15.

9 See Directive 2014/17/*EU of the European Parliament and of the Council of 4 February 2014 on Credit Agreements for Consumers Relating to Residential Immovable Property* ch 10, Art 28, available at *http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32014L0017* (accessed 23 Apr 2014). In respect of requirements in England and Wales, Scotland and Ireland with which a mortgagee must comply in cases where it seeks to execute against a debtor's home, see Steyn (n **) ch 7.

subtle, of providing protection for an impecunious debtor against the loss of his home at the instance of a creditor.

2 Individual debt enforcement in Roman law

Debt enforcement in Rome initially occurred in the form of "self-help" against the person of the debtor.[10] Written laws, the earliest of which were contained in Table 3 of the Twelve Tables,[11] as well as legal structures and procedural mechanisms came to regulate this.[12] Examples of procedural mechanisms are found in the three successive kinds, or stages in the development, of legal redress – *legis actiones*, the formulary procedure and the *cognitio* procedure – which coincided roughly with the main recognised historical periods of the Monarchy (753 to 510 BC), the Republican period (510 to 27 BC) and the Empire (from 27 BC onwards).[13] Most significant for Roman law were the years from 367 BC onwards, with praetorian influences in the application and supplementation of the civil law,[14] and the period when Justinian, as the Emperor of the Eastern Roman Empire from AD 527 to 565, carried out a comprehensive compilation of the laws and brought about a number of important reforms.

In the *legis actio* procedure, if a judgment debt had not been paid within thirty days, the creditor could arrest and bring the debtor before the praetor.[15] If the debt remained unpaid,[16] the praetor "addicted" the debtor to the creditor who could hold him in chains in a private prison[17] for sixty days during which time they might reach

10 P van Warmelo *An Introduction to the Principles of Roman Civil Law* (Cape Town, 1976) at 271.

11 Promulgated *c* 450 BC; Table 3 dealt with execution of judgments.

12 M Kaser (tr by R Dannenbring) *Roman Private Law* 2 ed (Durban, 1968) at 330 refers to the written laws as "state-restricted and supervised self-redress".

13 See WA Hunter *A Systematic and Historical Exposition of Roman Law*: *In the Order of a Code* 4 ed (London, 1903) at 122-142; 967ff; see, also, R van den Bergh "The *patronus* as representative in civil proceedings and his contribution towards the attainment of justice in Rome" (2009) 15 (2) *Fundamina* 159-173 at 160.

14 See J Thomas *Textbook of Roman Law* (Amsterdam, 1976) at 15.

15 This was called *manus iniectio*, the laying of hands on a person; see Hunter (n 13) at 1030-1031. See, also, AL Stander "Geskiedenis van die insolvensiereg" 1996 (21) TSAR 371-377 at 371; J Calitz "Historical overview of state regulation of South African insolvency law" (2010) 16 (2) *Fundamina* 1-27 at 5ff.

16 A debtor could arrange for a substitute, called a *vindex*, to answer for the debt. However, if the *vindex* lost the case, he was liable for double damages. See XII Tab 3 3; R Sohm *The Institutes: A Textbook of the System of Roman Private Law* (Oxford, 1907) at 235; WW Buckland & P Stein *Buckland's Text-Book of Roman Law from Augustus to Justinian* (Cambridge, 1963) at 619 n 7; Thomas (n 14) at 79; R Lee *The Elements of Roman Law* 4 ed (London, 1956) at 427. JA Crook *Law and Life of Rome* (London, 1967) at 92 states that this legal procedure "weighted the scales of litigation heavily in favour of the rich against the poor". As to who might opt to come to the debtor's rescue by paying the debt on his behalf or by acting as *vindex*, see par 6, *infra*.

17 XII Tab 3 3-4; Aulus Gellius *Noctes Atticae* (tr by JC Rolfe) (Oxford, 1968) at 20 1 46; Lee (n 16)

a compromise.[18] At this stage the debtor was still free, as opposed to being a slave; he was still the owner of his property and capable of contracting.[19] On the last three market days of these sixty days, the creditor was obliged to again bring the debtor before the praetor into the "meeting place" and the amount for which he had been judged liable was declared publicly. This was done in the hope that someone might come forward to pay the debt and release the debtor.[20]

If the debt remained unpaid, the creditor was entitled to sell the judgment debtor as a foreign slave.[21] It is uncertain whether, at this stage, the debtor's property "went with his person to the creditor"[22] although, according to Sohm[23]

> [w]hen the person of the debtor (whom execution placed in the position of a slave in regard to his creditor) passed into the power of the creditor, the same fate befell his whole estate and probably also his whole family, i.e., the aggregate of those who were subject to his potestas [sic]. Thus every personal execution involved necessarily – though only indirectly – an execution against the debtor's property, because it went, in all cases, against the debtor's entire person and estate, quite regardless of the actual amount due.

Where there was more than one creditor, they were entitled to "cut shares".[24] Some commentators regard this as meaning cutting the debtor's body into pieces[25] while others believe it meant that creditors shared the proceeds of the debtor's sale into foreign slavery.[26] The primary purpose of this harsh procedure was to bring pressure

at 427-428; Kaser (n 12) at 338. *Cf* G Mousourakis *Historical and Institutional Context of Roman Law* (Farnham, 2003) at 137-138; H Jolowicz & B Nicholas *Historical Introduction to the Study of Roman Law* (Cambridge, 1972) at 188.

18 XII Tab 3 5; W Burdick *The Principles of Roman Law and their Relation to Modern Law* (Holmes Beach Fla, 1993) at 633, 671; Buckland & Stein (n 16) at 619.

19 See Buckland & Stein (n 16) at 619; Jolowicz & Nicholas (n 17) at 188, 190. *Cf* L Wenger *Institutes of the Roman Law of Civil Procedure* (New York, 1955) at 227; Kaser (n 12) at 338; Sohm (n 16) at 235. The latter sources refer to such a debtor as being a "debt-slave" or "*ipso iure* in the position of a slave".

20 XII Tab 3 5. See Buckland & Stein (n 16) at 619; Thomas (n 14) at 79. *Cf* Gellius *Noctes Atticae* 20 1 48.

21 XII Tab 3 5; see Buckland & Stein (n 16) at 620; Wenger (n 19) at 225.

22 Jolowicz & Nicholas (n 17) at 190.

23 Sohm (n 16) at 287.

24 XII Tab 3 6.

25 Thomas (n 14) at 79. *Cf* A Borkowski *Textbook on Roman Law* (London, 1994) at 65; Kaser (n 12) at 338.

26 Gellius *Noctes Atticae* 20 1 47 and 20 1 48; Wenger (n 19) at 224-225; Buckland & Stein (n 16) at 620; Burdick (n 18) at 633-634, 671; D Johnston *Roman Law in Context* (Cambridge, 1999) at 108-109; Thomas (n 14) at 79; JW Wessels *History of the Roman-Dutch Law* (Grahamstown, 1908) at 661. WW Buckland *The Roman Law of Slavery* (Cambridge, 1908) at 402 states, with reference to Gellius *Noctes Atticae* 20 1 47, that, while a judgment debtor might ultimately be sold into slavery, his position in early law is to some extent obscure and the provisions were, very early on, obsolete.

to bear on the debtor to pay.[27] A debtor who had no assets, who was without access to credit and who did not have anyone to pay the debt on his behalf, would, in most cases, save his "life and freedom" by entering into a transaction of *nexum* in terms of which he would submit to working off his obligation to the creditor.[28]

In the formulary process, if a judgment debt was not paid within thirty days, the creditor could take the debtor before the praetor again and, if the debtor challenged the claim but lost, he would be liable for double the original amount of the debt.[29] The *lex Poetelia*,[30] introduced to improve the judgment debtor's position, prohibited his sale into slavery and his being put to death.[31] However, the creditor could still, with the praetor's permission, take the debtor into confinement[32] to work off the debt[33] in which case the debtor retained rights of property and disposition, as would

27 Van Warmelo (n 10) at 274; Wenger (n 19) at 230. *Cf* Wessels (n 26) at 661 who states that there is "[s]ome doubt whether the debtor was sold as a slave ... [and h]e may have been held as a pledge compellable to redeem the debt by the services of himself and his family".

28 Wenger (n 19) at 222, 226 n 12; Kaser (n 12) at 338; Jolowicz & Nicholas (n 17) at 164-166, 189-190. Although reference is often made to a debtor who surrendered himself to his creditor in *nexum* as a "debt-slave", he did not lose his status as a free person: see Thomas (n 14) at 217. In relation to *nexum*, see Calitz (n 15) at 5; JH Dalhuisen *Dalhuisen on International Insolvency and Bankruptcy* (Deventer, 1986) vol 1 par 1 02[1] 1-4-1-5. Also, on slavery and debt servitude, see H Rajak "The culture of bankruptcy" in P Omar (ed) *International Insolvency Law: Reforms and Challenges* (Farnham, 2008) ch 1 8-11.

29 G 4 9. See Hunter (n 13) at 1031ff; Thomas (n 14) at 109; Buckland & Stein (n 16) at 642; Burdick (n 18) at 671; P Garnsey *Social Status and Legal Privilege in the Roman Empire* (Oxford, 1970) at 204 n 1. Garnsey at 138 points out how it was the poorer section of the population who suffered considerable hardship, being "forced through debt to sell their meagre possessions, take out credit at unfavourable rates, and ultimately fall victim to the savage debt laws and forfeit their freedom".

30 Also referred to as the *lex Poetilia*. It was promulgated in 325 or 326 BC or, according to Sohm (n 16) at 287, in 313 BC.

31 Controversy surrounds its exact provisions. See Hunter (n 13) at 1035; Burdick (n 18) at 634; Jolowicz & Nicholas (n 17) at 164, 190; Sohm (n 16) at 287; Wenger (n 19) at 225, 230-231; Buckland & Stein (n 16) at 620; Van Warmelo (n 10) at 274; Thomas (n 14) at 79. *Mars The Law of Insolvency in South Africa* 9 ed by E Bertelsmann *et al*) (Cape Town, 2008) at 6 refer to W Kunkel *An Introduction to Roman Legal and Constitutional History* 2 ed (tr by J Kelly) (Oxford, 1973) at 31 and the contrary view expressed in M Kaser *Das römische Privatrecht* (München, 1971) vol 1 at 154 n 36.

32 During the later Republic, slavery had been replaced by imprisonment in a public prison for debtors who were unable to pay their debts: see C 7 71 1 and D 42 1 34; Hunter (n 13) at 1035-1036; Buckland & Stein (n 16) at 622.

33 Thomas (n 14) at 109; Lee (n 16) at 454; Wenger (n 19) at 230-231. Buckland & Stein (n 16) at 643 states that "[t]he confinement put pressure on the debtor: perhaps it was used mainly for solvent debtors". Kaser (n 12) at 338 submits that the *lex Poetelia* "regulated in detail rather than introduced" the debtor being able to work off his debt as a debt-slave of the pursuer. See also Johnston (n 26) at 109; Crook (n 16) at 173; AA Schiller *Roman Law Mechanisms of Development* (New York, 1978) at 209.

a person who had pledged himself in a transaction of *nexum*.[34] Wenger explains the position as follows:[35]

> Then it would be comprehensible, if a person, in order to save his little home for himself and his family, incurred a *manus iniectio* in order to wipe out the debt with the work of his hands ... Indeed this *manus iniectio* now meant temporary quasi-slavery … and in truth even beyond the sixty days, especially when the danger of death no longer threatened. Since personal execution also … befell just the poor man who had no property, we understand its continued existence until far beyond the formulary procedure.

In AD 320, Constantine abolished imprisonment for debt unless the debtor "contumaciously refused to pay".[36] Nevertheless, persons often sold themselves into, or stayed in, slavery as an easier alternative.[37] Others hired out themselves or their children as a way of working off a debt, often in transactions which were apparently service contracts in terms of which the servant was bound for life or for a number of years.[38] In Justinian's time, a defaulting debtor could be put to work for four months.[39]

Execution against a debtor's property was a praetorian innovation in the formulary process.[40] The praetor could grant to a creditor *missio in bona* which was an order giving a claimant possession of the entire property of a debtor who was in hiding or who had left the country to evade arrest, imprisonment or slavery.[41] Thereafter, the creditor could sell the debtor's property and apply the proceeds to satisfy his claims.[42]

In terms of the *cognitio* procedure execution could occur against the person[43] or the property of the debtor, the latter being the norm.[44] A later development allowed a court officer to proceed with the execution where judgment was for payment of a sum of money, by seizing part of the judgment debtor's property to be kept as a

34 Wenger (n 19) at 230.
35 *Ibid*. See, also, Jolowicz & Nicholas (n 17) at 190.
36 C 10 19 2; Mars (n 31) at 6; Hunter (n 13). *Cf* C Th 9 11 1 and C 9 5 2 (Justinian) with reference to which Mousourakis (n 17) at 373 states that in practice powerful landowners continued to confine their debtors in private prisons.
37 Crook (n 16) at 59.
38 JE Grubbs *Law and Family in Late Antiquity: The Emperor Constantine's Marriage Legislation* (New York, 1995) at 270; Crook (n 16) at 61.
39 Kaser (n 12) at 366.
40 Wenger (n 19) at 233; Kaser (n 12) at 339, 342.
41 Mousourakis (n 17) at 219; Garnsey (n 29) at 193; Hunter (n 13) at 1037; Buckland & Stein (n 16) at 631, 644; Thomas (n 14) at 110.
42 Kaser (n 12) at 355; Crook (n 16) at 172.
43 As in the formulary process it was initiated by the *actio iudicati*. Buckland & Stein (n 16) at 672 and Thomas (n 14) 122 state that a judgment debtor could be confined in a public prison. Lee (n 16) at 458 states that private imprisonment continued in spite of attempts to suppress it.
44 RG Evans *A Critical Analysis of Problem Areas in Respect of Assets of Insolvent Estates of Individuals* (LLD thesis, University of Pretoria, 2008) at 30.

pledge.[45] If the debtor did not pay within two months after judgment, the property could be sold by auction.[46] If the sale yielded insufficient proceeds to satisfy the claim more property could be seized for the same purpose.[47] Slaves, oxen and agricultural implements were exempt from seizure and sale[48] and movable property was to be exhausted before land could be seized.[49] This became the norm, during the later Empire, where the debtor was not suspected of being insolvent. This state of affairs has been regarded as an indication of the balancing of the interests of the creditor and the judgment debtor.[50]

3 Collective debt enforcement in Roman law

As mentioned above, where there was more than one creditor, they could "cut shares" or at least share in the proceeds of the debtor's sale into foreign slavery.[51] A praetorian innovation, in the late second century BC,[52] permitted creditors, alternatively or in addition to personal execution, to levy execution directly against a debtor's property.[53] Through this process, the debtor was rendered *infamis* and

45 The *pignus ex judicati causa captum.* See B Nicholas *An Introduction to Roman Law* (Oxford, 1962) at xiv; Lee (n 16) at 458; Wenger (n 19) at 313-314; Buckland & Stein (n 16) at 672; Mousourakis (n 17) at 373.

46 D 42 1 31. In Justinian's time, this had been extended to four months: see C 7 54 2. See, also, Thomas (n 14) at 121; Borkowski (n 25) at 74-75.

47 Buckland & Stein (n 16) at 672; Thomas (n 14) at 122.

48 C 8 17 7. See Hunter (n 13) at 1043; Burdick (n 18) at 672.

49 D 42 1 15 8. See Wenger (n 19) at 314; Hunter (n 13) at 1043; Burdick (n 18) at 672; Mousourakis (n 17) at 373.

50 D 42 1 31; D 46 1 6 2. See Burdick (n 18) at 672; Hunter (n 13) at 1043; Buckland & Stein (n 16) at 608; Thomas (n 14) at 122; Sohm (n 16) at 289. Wenger (n 19) at 239-240 and at 314 where he states that it "threaten[ed] … the existence of the debtor no more than … [was] necessary in the interest of the creditor". Crook (n 16) at 178 refers to it as "the intelligent solution".

51 See the text to footnotes 24 and 25 *supra*.

52 The *actio Rutiliana*. See Mars (n 31) at 6; M Roestoff "'n Kritiese Evaluasie van Skuldverligtingsmaatreëls vir Individue in die Suid-Afrikaanse Insolvensiereg" (hereafter "'n Kritiese Evaluasie" (LLD thesis, University of Pretoria, 2002) at 16ff; M Roestoff "Skuldverligtingsmaatreëls vir individue in die Suid Afrikaanse insolvensiereg: 'n Historiese ondersoek" (hereafter "'n Historiese ondersoek" (Deel 1) (2004) 10 *Fundamina* 113-136 at 118ff; Calitz (n 15) at 7-8.

53 This entailed the issue of three decrees, namely the *missio in possessionem*; *proscriptio bonorum*; and *venditio bonorum* (also referred to as *emptio bonorum*; see G 3 78-79). See, also, G 4 35, specifically referred to by Thomas (n 14) at 109; Hunter (n 13) at 1037; Buckland & Stein (n 16) at 643ff; Kaser (n 12) at 356-357; and Sohm (n 16) at 287ff. A *missio in possessionem* was an authorisation by the praetor to take possession either of a particular thing or the whole of a person's property: see Jolowicz & Nicholas (n 17) at 228. Wenger (n 19) at 236 refers to this as *missio in bona* which was an order giving a claimant possession of the whole of a person's property: see Mousourakis (n 17) at 219. Apparently, there was some overlap between these two concepts.

was deemed bankrupt. His property was sold *en masse* to the highest bidder, that is, the person who offered the creditors the highest dividend on their claims.[54] The purchaser succeeded to the entire estate and the proceeds were divided amongst creditors according to a fixed order of preference.[55] This was in effect the Roman equivalent of bankruptcy proceedings.[56]

This process was rarely resorted to against members of the upper class with the result that it probably affected only debtors of lower social standing.[57] Where the proceeds of the sale did not satisfy the creditors' claims in full they could bring proceedings to execute against any assets which the debtor acquired subsequently.[58] However, this was subject to the *beneficium competentiae* which afforded the debtor a period of recovery of one year after the sale during which time he was rendered safe from execution against his person and "articles of necessity", including necessary food, clothing, and movables necessary for agriculture and trade, were exempt from execution.[59] This has been regarded as signifying a shift in policy, to some extent, towards a more humanitarian conception or recognition of a debtor's rights.[60]

A *senatusconsultum*[61] provided that where debtors were *clarae personae*, particularly those of senatorial rank, a curator[62] could be appointed who, subject to the praetor's sanction, sold the debtor's assets, not *en masse*, but in lots. This was known as *distractio bonorum*.[63] This process did not render the debtor *infamis* nor dispossess him of all of his assets. Only assets sufficient to satisfy the creditors' claims were sold and the debtor retained the rest of his estate.[64] With the passing of time, and certainly by the *cognitio* period, *distractio bonorum* became the general mode for realisation of a debtor's assets.[65]

A significant development, presumably in the interests of severely over-indebted nobles, was the introduction of *cessio bonorum*[66] which allowed a debtor,

54 Wenger (n 19) at 237; Buckland & Stein (n 16) at 644; Johnston (n 26) at 109.
55 CH Smith *The Law of Insolvency* (Durban, 1988) at 5; Mars (n 31) at 6-7.
56 Wenger (n 19) at 233; Sohm (n 16) at 288; Johnston (n 26) at 109.
57 Crook (n 16) at 174.
58 Buckland & Stein (n 16) at 403, 644; Wenger (n 19) at 237; Crook (n 16) at 174.
59 Buckland & Stein (n 16) at 693-694; Kaser (n 12) at 357.
60 See Wenger (n 19) at 238 n 39.
61 The date of which is unknown: see Buckland & Stein (n 16) at 645. Garnsey (n 29) at 186 states that this occurred during the early Empire.
62 Instead of a *magister*.
63 Buckland & Stein (n 16) at 645; Johnston (n 26) at 110; Kaser (n 12) at 355, 357; Wenger (n 19) at 238-239; Crook (n 16) at 177-178; Roestoff "'n Kritiese Evaluasie" (n 52) at 29; Calitz (n 15) at 9.
64 Buckland & Stein (n 16) at 645; Thomas (n 14) at 110; Wenger (n 19) at 239; Mars (n 31) at 7.
65 Buckland & Stein (n 16) at 672-673; Thomas (n 14) at 122; Mars (n 31) at 7.
66 With the passing of the *lex Julia*, possibly in 17 BC. See Hunter (n 13) at 1039; Burdick (n 18) at 671; Sohm (n 16) at 288. See, also, Garnsey (n 29) at 186-187; MW Frederiksen "Caesar, Cicero and the problem of debt" 1966 (56) *J of Roman Studies* at 128-141.

probably where insolvency was due to no fault of his own,[67] voluntarily to surrender his property. Transfer of his property to his creditors would exempt a debtor from *infamia*[68] and personal seizure for any debts which remained unpaid.[69] After *cessio bonorum*, *venditio bonorum* took place and the debtor could rely on the *beneficium competentiae* for all time and not merely for a year.[70]

In the *cognitio* procedure execution against all of the property of the debtor occurred only where the debtor was insolvent.[71] On application by the creditors, the judge appointed a *curator bonorum* to manage the bankrupt property.[72] Creditors had to join the proceedings within two to four years.[73] In all instances, *distractio bonorum* took place.[74] The claim of a creditor who was a pledgee was first paid out of the proceeds of the thing pledged to him. Any surplus would then go to the other creditors, with certain claims receiving preference, after which other creditors would receive their respective percentages of the proceeds.[75]

By the time of Justinian, a majority vote by creditors could result in a moratorium being granted to the debtor.[76] It was also possible for the debtor to approach the Emperor for a moratorium "in the face of an impending execution".[77]

4 Debt relief measures available in Roman law

Apart from *cessio bonorum*, and the benefits which it offered, the Roman law of contract presented alternative options for a debtor unable to meet his obligations

67 Buckland & Stein (n 16) at 645; Johnston (n 26) at 110; Crook (n 16) at 174; Kaser (n 12) at 357.

68 C 2 11 11. See Sohm (n 16) at 289.

69 Thus excluding the creditor's choice between executing against the debtor's person, at civil law, or against the debtor's property under praetorian law. See Sohm (n 16) at 288; Wenger (n 19) at 235; Buckland & Stein (n 16) at 645.

70 There is some dispute about this. See Smith (n 55) at 5; Buckland & Stein (n 16) at 645, 693-694; Sohm (n 16) at 289; Thomas (n 14) at 110; Lee (n 16) at 455; Mars (n 31) at 7. *Cf* Wessels (n 26) at 663; Burdick (n 18) at 671-672; Wenger (n 19) at 235, 237-238, 316.

71 Wenger (n 19) at 314; Kaser (n 12) at 366.

72 Wenger (n 19) at 315.

73 Two years if they lived in the same province and four years if they lived in a different province; see Wenger (n 19) at 315. Otherwise, creditors could not share in the proceeds of the seized property and they would be left with only a claim against the debtor.

74 Wenger (n 19) at 315; Kaser (n 12) at 366. See Roestoff "'n Kritiese Evaluasie" (n 52) at 29, who agrees with the submission made by B Swart *Die Rol van 'n Concursus Creditorum in die Suid-Afrikaanse Insolvensiereg* (LLD thesis, University of Pretoria, 1990) 55 that *distractio bonorum* was the origin of the South African insolvency regime.

75 Wenger (n 19) at 315-316.

76 C 7 71 8; Wenger (n 19) at 316, n 23.

77 C 1 19 4. See Wessels (n 26) at 663. See also Wenger (n 19) at 316-317 n 23a who states, with reference to C 1 19 4, that the law at the time of Justinian was that this would only occur if sufficient security was furnished by the debtor. He also mentions that Egyptian provincial law likewise allowed a moratorium for a period of five years. See, further, Roestoff "'n Kritiese Evaluasie" (n 52) at 31.

timeously. These included *solutio per aes et libram* and *acceptilatio*, by which a creditor formally released the debtor from liability; *pactum de non petendo*, an agreement not to sue or take action; and *transactio*, or compromise, which brought an obligation to an end. In Justinian's time, *datio in solutionem* entitled a debtor, who could not meet his obligation to the creditor, and who owned immovable property for which he could not find a buyer, instead of payment to transfer the immovable property to the creditor, even without the latter's consent.[78] Parties could also resort to *remissio*,[79] a partial release, and *dilatio*,[80] by which a moratorium was created if the majority of the creditors were in favour of it.

5 Real security in Roman law

5 1 Forms of real security

Roman law recognised three forms of real security:[81] *fiducia* and, under praetorian law, *pignus* and *hypotheca*.[82]

Fiducia entailed the transfer of ownership[83] of the debtor's property to the creditor who agreed to re-transfer the property to the debtor as soon as the debt was paid.[84] Parties usually also agreed, in a *pactum de vendendo*, on the circumstances in which the creditor could sell the property.[85] Where the seller sold the property either before the debt was due or contrary to their agreement, the sale was nevertheless valid and the purchaser received good title. This meant that the debtor could not

78 Nov 4 3 and 120 6 2. See Roestoff "'n Kritiese Evaluasie" (n 52) at 35-37.

79 D 2 14 7 17; D 2 14 7 18; D 2 14 7 19; D 2 14 8; D 2 14 10; D 17 1 58 1 and D 42 9 23.

80 See Roestoff "'n Kritiese Evaluasie" (n 52) at 31.

81 Real security entails the giving of a real right to a creditor as security for the performance of a debt, the effect being that the creditor has, in addition to the right to claim satisfaction of the debt from the debtor personally, a right to obtain satisfaction of his claim by selling the thing given as security. See Buckland & Stein (n 16) at 473; Sohm (n 16) at 351-352.

82 Hunter (n 13) at 436ff refers to *pignus* as pledge and *hypotheca* as mortgage. Burdick (n 18) at 382 explains that, in Roman law, both *pignus* and *hypotheca* were used for movables and immovables. These three forms co-existed until the time of Constantine. See, also, Buckland & Stein (n 16) at 478; Thomas (n 14) at 330-333; DH van Zyl *History and Principles of Roman Private Law* (Durban, 1983) at 197-198, particularly n 293.

83 Either by *mancipatio* or *in iure cessio*.

84 The agreement to re-transfer was known as *pactum fiduciae*. See Sohm (n 16) at 352; Thomas (n 14) at 329; Jolowicz & Nicholas (n 17) at 301ff; Kaser (n 12) at 127ff; Van Warmelo (n 10) at 113-114.

85 This was required to release the creditor from his fiduciary obligation, arising from the *pactum fiduciae*, to re-transfer the property to the debtor, so that he could obtain satisfaction of his claim by selling the thing; see Sohm (n 16) at 352; Buckland & Stein (n 16) at 474.

recover the property from the purchaser although he had a claim against the creditor for breach of the fiduciary obligation.[86]

Pignus[87] developed out of the praetorian protection of possession.[88] The debtor retained ownership but gave possession of the thing to the creditor who had to restore it to the debtor once the debt was paid.[89] The creditor did not have the right to dispose of the pledged property and, if he did sell it, the debtor as owner could recover it from anyone who had obtained possession of it. From the creditor's perspective, this was unsatisfactory, especially where the debtor was in default, and so the parties usually agreed, in a *pactum de vendendo*, that the creditor could sell the property if the debt was not paid by a certain date.[90]

Hypotheca, also referred to as "mortgage", occurred when the property remained with the debtor but, if the debtor failed to pay the debt, the creditor had a real right to obtain possession of the hypothecated property and, in terms of a *pactum de vendendo*, the right to sell the property in order to satisfy his claim. The debtor as owner could recover his property if a third party obtained possession of it. He could also enter into successive transactions of *hypotheca* with various creditors.[91] Thus *hypotheca* catered for both the debtor's and the creditor's interests and was "more in keeping with the capitalistic character of the time".[92]

5 2 The creditor's rights

Essentially, the effect of the creation of real security was that the creditor acquired the right:

- to obtain (if not already in) possession of the pledged or hypothecated property;

86 Sohm (n 16) at 353; Buckland & Stein (n 16) at 474. In the case of land provided as security, the creditor often left it in the hands of the debtor as a *precarium*; see Thomas (n 14) at 143, 329.

87 Referred to as pledge; see Hunter (n 13) at 436.

88 A *pignus praetorium* granted a creditor "*missio in possessionem*" of the debtor's property by which the creditor gained control of a thing as security for his claim. A *pignus judiciale* arose in the seizure of a debtor's property in the course of a judicial execution; see Sohm (n 16) at 287, 353-356. See, also, Buckland & Stein (n 16) at 475; Thomas (n 14) at 330; Jolowicz & Nicholas (n 17) at 302; Van Warmelo (n 10) at 115-116. In relation to the order in which developments occurred, *cf* Kaser (n 12) at 129.

89 Transfer of possession occurred by *traditio*. The debtor could not use the thing unless by specific agreement with the creditor, that is, by *precario*. See Buckland & Stein (n 16) at 476.

90 Sohm (n 16) at 353-354; Thomas (n 14) at 331; Hunter (n 13) at 437; Jolowicz & Nicholas (n 17) at 302.

91 Sohm (n 16) at 354, 356; Hunter (n 13) at 436ff; Buckland & Stein (n 16) at 475; Thomas (n 14) at 332-333; Van Zyl (n 82) at 198; Kaser (n 12) at 129; Jolowicz & Nicholas (n 17) at 303; Van Warmelo (n 10) at 116-119.

92 Sohm (n 16) at 354-355.

- to sell the property once the secured debt had become due and, in spite of notice or judgment against him, the debt had not been paid; and
- of foreclosure, in which case the property was forfeited to the creditor.[93]

In later classical law, in the absence of a *pactum de vendendo*, the creditor's right to sell the property when the debt became due was implied unless it was expressly excluded.[94] In such a case, three successive notices to the debtor were required.[95] If the proceeds of the sale exceeded the amount of the debt, the surplus had to be paid to the debtor.[96] Although the creditor could not sell the property to himself,[97] the debtor could sell it to him.[98]

Justinian modified the position so that, even where the agreement expressly provided that the creditor could not sell the property, he could do so as long as he gave three successive notices to the debtor.[99] Another significant modification by Justinian was that, where parties agreed that the creditor could sell the property on the debtor's failure to pay the debt by a certain date, no sale could take place until two years after formal notice of his intention to the debtor.[100] If the creditor was not in possession of the property, he had first to obtain a judicial decree authorising it.[101]

Parties could also agree in a *lex commissoria*, or "forfeiture clause", that if the debt was not paid by a certain date the creditor would become the owner of the property.[102] This was known as foreclosure. However, this was disadvantageous to the debtor in circumstances where the value of the property exceeded the amount of the debt. In AD 230, a new kind of foreclosure, called *impetratio dominii*,[103] was introduced whereby the creditor could apply to the court to have ownership granted

93 Sohm (n 16) at 356; Hunter (n 13) at 436-437, where the author describes *fiducia* as "essentially a self-acting foreclosure".

94 Hunter (n 13) at 437; Thomas (n 14) at 331; Kaser (n 12) at 132; Buckland & Stein (n 16) at 476-477.

95 See Buckland & Stein (n 16) at 477 n 1 and Thomas (n 14) at 331. *Cf* G 2 64; *PS* 2 5 1; and C 8 27 14. See, also, Kaser (n 12) at 132. Buckland & Stein (n 16) at 477 states that the creditor did not have to obtain possession before the sale.

96 Sohm (n 16) at 356; Hunter (n 13) at 439.

97 See, also, Kaser (n 12) at 132-133.

98 Buckland & Stein (n 16) at 477; Kaser (n 12) at 132-133; Hunter (n 13) at 438.

99 D 13 7 4. Buckland & Stein (n 16) at 477 state that it might have been some later authority who brought about this modification.

100 If the creditor was in possession of the pledged property; see Hunter (n 13) at 437. See, also, Voet *Commentarius ad Pandectas* (tr P Gane *The Selective Voet Being the Commentary on the Pandects* vol 3, London,1955) 20 5 1.

101 C 8 14 10; C 8 28 5; C 8 34 3 1; Inst 4 7 1; D 13 7 4; D 13 7 5; D 47 2 73. See Buckland & Stein (n 16) at 477; Thomas (n 14) at 331; Hunter (n 13) at 437; Burdick (n 18) at 381-382.

102 Buckland & Stein (n 16) at 477; Sohm (n 16) at 353-354 n 2; Thomas (n 14) at 331; Hunter (n 13) at 438.

103 C 8 33 1. See Kaser (n 12) at 133; Buckland & Stein (n 16) at 477; Thomas (n 14) at 331; Van Warmelo (n 10) at 116; Hunter (n 13) at 438.

to him. The property was valued and, upon notice to the debtor[104] and after the lapse of one year, the creditor became bonitary owner[105] of the pledged property. If the property was worth less than the amount of the debt, the debtor was discharged from liability but, if it was worth more, the creditor had to pay the difference to the debtor.[106] However, the debtor could pay the debt and the interest due and "redeem the pledge"[107] at any time before the creditor's *usucapio* became complete,[108] that is, within two years of uninterrupted possession, in respect of land and houses, and one year, in respect of movables.[109] After Constantine abolished the *lex commissoria*, in AD 320,[110] *impetratio dominii* became the only means of foreclosure available to the creditor.[111]

Justinian permitted foreclosure only where no purchaser, for an adequate price, could be found.[112] If the debtor and creditor lived in the same province, the creditor was obliged to give formal notice to the debtor once two years had elapsed since the debt became due. If they lived in different provinces, the creditor had to apply to the provincial judge who would serve a notice on the debtor, setting a date for payment to occur.[113] Once that date passed without the debt having been paid, the creditor could obtain ownership on petition to the Emperor.[114] A debtor who, within a subsequent period of two years, paid in full, including interest and costs, could nevertheless redeem the property. Failing this, the ownership of the creditor became irrevocable.[115] Further, if the property was sold the creditor had to transfer to the debtor any amount of the proceeds which exceeded that which the debtor had owed.[116] If the proceeds were less than the amount due the creditor could still claim the balance from the debtor.[117]

104 Hunter (n 13) at 438 states that the public had to be notified of the *hypotheca* and there had to be a delay of a year.

105 Buckland & Stein (n 16) at 477 calls bonitary ownership "praetorian ownership". In relation to bonitary ownership, see Sohm (n 16) at 81ff, 311; Buckland & Stein (n 16) at 191ff; Hunter (n 13) at 263ff.

106 Buckland & Stein (n 16) at 477; Sohm (n 16) at 356.

107 Thomas (n 14) at 331. *Cf* Borkowski (n 25) at 290 who does not mention the required initial lapse of a year before approaching the court.

108 In relation to *usucapio*, the acquisition of ownership by uninterrupted possession, see Sohm (n 16) at 318ff; Buckland & Stein (n 16) at 241ff.

109 *Cf* G 2 42. See Thomas (n 14) at 159; Hunter (n 13) at 265.

110 C 8 34 1. See Hunter (n 13) at 438; Kaser (n 12) at 132-133; Sohm (n 16) at 356; Van Warmelo (n 10) at 115.

111 *Cf* C 8 34 3. See Buckland & Stein (n 16) at 477; Thomas (n 14) at 331. See, further Sohm (n 16) at 356.

112 Hunter (n 13) at 438; Buckland & Stein (n 16) at 477; Sohm (n 16) at 356; Kaser (n 12) at 133.

113 Hunter (n 13) at 438. If the debtor could not be found, the court would order the debt to be paid by a certain date.

114 *Cf* C 8 34 1.

115 *Cf* C 8 34 3 3. See Buckland & Stein (n 16) at 477; Thomas (n 14) at 331-332.

116 C 8 33 3.

117 *Ibid.*

Thus significant measures were put in place which, through delaying foreclosure and requiring a judicial decree where the creditor was not in possession of the hypothecated property, effectively protected a defaulting debtor against loss of his immovable property and even enabled him to redeem it within a period of two years after foreclosure had occurred.

6 Significance of the family home in the Roman social and historical context

Understanding the significance of family and the family home in the Roman social and historical context, provides additional insights into the implications for homeowners of the debt enforcement laws. A *familia*, controlled by the *paterfamilias*,[118] was at "the centre of the Roman community".[119] A number of *familiae*[120] formed a gens.[121] The word "*familia*" initially meant "dwelling-place or house"; later it came to mean "the house-community" and, "in a legal sense, the house-property".[122] The family home held great religious significance: it housed the spirits of deceased family members and the obligatory hereditary altar and ancestral tomb.[123] Dupont states that "family and house really were indissoluble" with the house consisting of a family and a single patriarchal head "joined together in veneration of the *lar familiaris*".[124] Generally, during all periods and in every social class, members of the *familia*

118 FM Heichelheim, CA Yeo & AM Ward *A History of Roman People* 2 ed (New Jersey, 1984) at 35. *Familia* included every member of the household who was subject to the power of the *paterfamilias*: The children who were subject to his *potestas*; the wife who was in the position of a child if she had been married *in manus*; adopted members; slaves over whom he had *dominium* and former slaves who had been freed. See, also, F Dupont *Daily Life in Ancient Rome* (London, 1989) at 103.

119 Van Zyl (n 82) at 9; Thomas (n 14) at 410ff.

120 " … with a common progenitor (even if he was a legendary figure)", as stated by O Tellegen-Couperus *A Short History of Roman Law* (London,1993) at 6.

121 A clan.

122 Heichelheim, Yeo & Ward (n 118) at 35.

123 Dupont (n 118) at 103.

124 *Ibid*. The household gods which played a fundamental role in the family's religious life included the *lares* and the *penates* (*s*pirits who inhabited the pantry), Janus (the "spirit of the door", with whom family life began), and Vesta (the "spirit of the hearth" who was "the centre of family life and worship"). See Heichelheim, Yeo & Ward (n 118) at 42; C Scott Littleton *Gods, Goddesses and Mythology* (New York, 2005) at 1100-1101; and WM Short *Sermo, Sanguis, Semem: An Anthropology of Language in Roman Culture* (PhD thesis, University of California, 2007) ch 5, available at *http://books.google.co.za/books?id=f2Jp5y4_TsMC&pg=PA120&dq=lares+penatesque&hl=en&sa=X&ei=AqlYU9bZEqOQ7AbwjYHwAQ&ved=0CEAQ6AEwAw#v=onepage&q=lares%20penatesque&f=false* (accessed 23 Nov 2013).

all lived under the same roof[125] until the death of the *paterfamilias*.[126] All family property, movable and immovable, fell into the estate of the *paterfamilias*.[127] Roman marriages[128] were mostly strategically arranged in order to forge important ties and alliances between families. Slaves were important assets[129] who, if they were freed, continued to constitute invaluable support for their former master in a patron-client relationship.[130]

"Patronage" (*clientela*)[131] was an important institution for economic, political, and social reasons and was fortified by the religious significance of the concept of *fides*.[132] In early Roman times, persons became clients[133] of the *gens*, as a whole, in a symbiotic relationship: the *gens* granted them land, political and financial support, protection in the courts and permission to share in its religion; clients pledged, *inter alia*, loyalty, military service and field work. Later, as the *gens* became less important, clients submitted to the patronage, and became the dependants, of rich and influential families who also established amongst themselves alliances based largely on the concept of *amicitia*.[134] Crook explains the position as follows:[135]

> The wheels of Roman society were oiled – even driven, perhaps – by two notions: mutual services of status-equals (I help you in your affairs; I then have a moral claim on your help

125 Although, sometimes, members of the younger generations might take up lodgings elsewhere or even build or purchase other houses in which to reside. See Dupont (n 118) at 103, 105; Heichelheim, Yeo & Ward (n 118) at 36; Thomas (n 14) at 414; RW Moore *The Roman Commonwealth* (London, 1942) at 93.

126 Upon this event, "the family would split into as many new families as there were men of the subsequent generation", according to Dupont (n 118) at 103.

127 Neither wives married *in manus* nor children could own property, subject to the legal principles regarding *peculium*: Thomas (n 14) at 416-417.

128 Including marriages without *manus*: Wives married without *manus* to the men in the family also lived in the house, but were regarded as merely "'passing through' in order to provide their husband with children" and remained subject to the power of their oldest agnatic relative and part of the latter's *familia*: see Dupont (n 118) at 105.

129 See Dupont (n 118) at 58, 105.

130 G Forsythe *A Critical History of Early Rome* (Berkeley, 2005) at 221; Mousourakis (n 17) at 272; Thomas (n 14) at 404; R van den Bergh "Who was dependent upon whom?" (2005) 11 (1) *Fundamina* at 347-361.

131 The relationship between patron and client. On patronage, see Van den Bergh "The *patronus* as representative" (n 13) at 162-163.

132 Heichelheim, Yeo & Ward (n 118) at 38. Referred to as the "foundation of justice", *fides* embraced "being true to one's word, the paying of one's debts, the keeping of sworn oaths, and the performance of obligations assumed by agreement"; see Heichelheim, Yeo & Ward (n 118) at 46; Van den Bergh (n 13) at 163, esp nn 27 and 28.

133 In early times, clients included foreigners, either from conquered territories or who wished to live in Roman territory and become Roman citizens, freed slaves and Romans who were unable to make a living or protect themselves and their property. See Heichelheim, Yeo & Ward (n 118) at 38-39.

134 Loosely meaning "friendship". See Crook (n 16) at 93-94; Van den Bergh (n 13) at 165.

135 Crook (n 16) at 93.

> in mine) and patronage of higher status to lower ... It was the patron who came to the legal rescue of his client, paid his money down for litigation, paid his debt to prevent him being haled off, stood as his representative; you might hesitate to 'lay the hand' on a humble plebeian with his patron standing by.

The significance of patronage may also be understood in the context of the two social and political classes of Roman citizens, namely the patricians and the plebeians.[136] The patricians were mostly wealthy aristocrats and noblemen,[137] while the plebeians were mostly poor urban and rural persons.[138] Initially, wealthy persons had sumptuous homes in town and villas on country estates.[139] while subsistence farmers and pastoralists, with modest needs, lived comfortably in straw and mud huts on small plots.[140] However, with the expansion of the Roman Empire, continual war took its toll on the economy. In time, many of the wealthy, with their lavish lifestyles, became severely over-indebted.[141] Poor farmers who had been forced to join the army often returned from war to find that their farms had been looted by the enemy or badly managed or even stolen by dishonest neighbours.[142] Those who borrowed money to pay taxes or to buy seed or implements suffered under the harsh debt enforcement laws, emerging as "the landless poor".[143] As a result, many returned to the army, sold or hired themselves out as gladiators or sold or hired out their children or moved to the city.[144]

The influx of the poor to the cities caused high-rise tenement blocks, called *insulae*, designed for letting, to be hastily constructed. Living conditions were overcrowded, unsanitary, and sometimes hazardous due to poor construction. Rentals, food prices and the rate of unemployment were high.[145] These tenants lived an unsettled existence, using the *insulae* as temporary accommodation without a household shrine and gods.[146] At the same time, overseas conquests created new markets which resulted in agricultural operations becoming large-scale and capital-intensive, with some of the wealthy generating even more wealth for themselves.[147] Poverty-stricken Roman citizens and foreigners became the clients of wealthy Roman

136 Differentiation and conflict between these two classes continued from about 500 BC until 287 BC, with the passing of the *lex Hortensia*. See Heichelheim, Yeo & Ward (n 118) at 39; Forsythe (n 130) at 157; Tellegen-Couperus (n 120) at 7; Van den Bergh (n 13) at 162.

137 Who monopolised the senate, held high positions and, as pontiffs, were the custodians and interpreters of the sacred laws in the early Republic: Heichelheim, Yeo & Ward (n 118) at 55.

138 Although some became wealthy and powerful.

139 Moore (n 125) at 86, 87, 93; Dupont (n 118) at 41ff.

140 Heichelheim, Yeo & Ward (n 118) at 131-132; Dupont (n 118) at 32ff; Moore (n 125) at 93.

141 Heichelheim, Yeo & Ward (n 118) at 54; Dupont (n 118) at 41 refers to it as "opulent poverty".

142 Heichelheim, Yeo & Ward (n 118) at 56.

143 Dupont (n 118) at 44-45; Heichelheim, Yeo & Ward (n 118) at 56.

144 Crook (n 16) at 61; Heichelheim, Yeo & Ward (n 118) at 65.

145 Moore (n 125) at 144-145, 150; Heichelheim, Yeo & Ward (n 118) at 134.

146 Moore (n 125) at 150.

147 Heichelheim, Yeo & Ward (n 118) at 132-133.

patrons. Urban clients were at their patrons' "beck and call" and were expected to give them political support in return for food, money, or clothes; rural clients, mostly peasants, were exploited in "humiliating servitude".[148]

Widespread discontent amongst the urban poor in the latter part of the second-century BC caused political upheaval and conflict with access to land being a main issue.[149] As Dupont explains:[150]

> [for a peasant,] loss of his land spelled the loss of his house, his family, his household gods, the tombs of his ancestors, and his dignity … Tiberius Gracchus … spoke on their behalf as follows:
>
> > The wild beasts that roam over Italy have, every one of them, a cave or lair to shelter in; but the men who fight and die for Italy enjoy only the light and air that is common to all above their heads; having neither house nor any kind of home they must wander about with their wives and children … for not a man of them has a hereditary altar; not one of all these many Romans has an ancestral tomb … Though they are styled masters of the world, they have not a single clod of earth to call their own.

This speech portrays the stark realities of poverty and homelessness and the socio-economic necessities of access to land, security of tenure and access to adequate housing and their direct connection with upholding human dignity. It is submitted that it is also strikingly reminiscent in a number of respects of issues which are relevant in the current South African socio-economic context.[151]

7 Comment and conclusion

The harsh Roman debt enforcement laws originally provided for imprisonment, slavery and possibly even death as consequences for defaulting debtors. The developed law permitted execution against assets. Although some types of assets came to be exempted from execution, these never included the home.[152] However, a Roman person's home held not only socio-economic but, more importantly, religious significance for it housed not only the living residents but also the spirits of the ancestors as well as the household gods and it included the mandatory hereditary

148 Mousourakis (n 17) at 271.

149 See Heichelheim, Yeo & Ward (n 118) at 134-135, 155 (for an account of the contributing factors).

150 Dupont (n 118) at 45. *Cf* Plutarch *Tiberius and Gaius Gracchus* 9.

151 See, eg, the facts and circumstances in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) SA 104 (CC); *Schubart Park Residents' Association v City of Tshwane Metropolitan Municipality* 2013 (1) SA 323 (CC). See, also, the comments expressed by D Bilchitz & D Mackintosh "Opinion: Judges sidestep the law and fail to protect the vulnerable" available at *http://www.bdlive.co.za/opinion/2013/03/08/judges-sidestep-the-law-and-fail-to-protect-the-vulnerable* (accessed at 23 Apr 2014).

152 See 2, *supra*.

altar.[153] For these reasons, Roman debtors would very likely have avoided the loss of their home at all costs.

It is evident that, in terms of Roman law, a debtor could avoid the harsh personal and proprietary consequences of the debt enforcement laws and save his home by "working off the debt", often surrendering himself in *nexum*, or contractual bondage, to the creditor.[154] Patron-client relationships often formed between a creditor and his debtors. It was also common for patronage to develop between third parties and debtors to whose aid the former came by paying their debts on their behalf to creditors and thus forming an obligation, in a broader sense, between them. The concept of *amicitia*, between persons of equal status, might also have formed the basis of a third party paying the debt or intervening on the debtor's behalf. These relationships not only arose out of, but also contributed to, the complex but cohesive and, in a large measure, mutually supportive fabric of Roman society.[155]

Debt relief measures which became available to Roman debtors included *cessio bonorum*, the surrender of assets which brought with it the *beneficium competentiae* and which effectively provided immunity from action by creditors for unpaid debts.[156] In the time of Justinian, a majority vote by creditors could bring about the granting of a moratorium to a debtor and it was possible for a debtor to approach the Emperor for a moratorium.[157] Further, forming part of the law of contract, *dilatio* provided a means by which the majority of creditors could grant a moratorium to a debtor.[158] With the development of the legal concept of mortgage, Justinian put protective mechanisms in place to allow for the delay of foreclosure by a creditor for at least two years after judgment had been granted and, in appropriate cases, for foreclosure to occur only by judicial decree and, later, only by imperial decree. Further, a debtor could redeem the property within the two year-period succeeding the creditor having become owner of it, by paying the outstanding debt and other charges.[159] These developments, it is submitted, must have impacted on a debtor's ability to retain or to redeem his home.

Two observations may be made regarding the position in the Roman, relative to the contemporary South African, context. First, submission in a servile relationship to one's creditor to escape the consequences of default, including execution against one's home, is not an option according to the modern South African law. It would be regarded as *contra bonos mores*, as was indicated by the Appellate Division (as it was then called) in *Sasfin* (*Pty*) *Ltd v Beukes*,[160] in relation to the illegality of requiring

153 See 6, *supra*.
154 See 2, *supra*.
155 See 6, *supra*.
156 See 3, *supra*.
157 See 3, *supra*.
158 See 4, *supra*.
159 See 5, *supra*.
160 *Sasfin* (*Pty*) *Ltd v Beukes* 1989 (1) SA 1 (A) (hereafter referred to as *Sasfin v Beukes*).

a person to work solely to service his debt.[161] Secondly, modern societal structures differ markedly from those which existed in Roman times and they lack the support mechanisms, based on familial, religious, cultural, social, economic and political beliefs, concepts and alliances, on which Roman debtors could commonly rely to avoid the forced sale of their homes. Therefore, despite the harsh debt enforcement laws, considering the context within which the laws operated, and not simply the provisions of the laws themselves, may lead one to regard the position in Roman times as tending more towards protection of a debtor's home against forced sale than is the case in terms of current South African law.

However, it is submitted that there are discernible parallels which may be drawn between, on the one hand, aspects of communality and mutual interdependence and support in the concepts of patronage and *amicitia* and, on the other hand, the concept of *ubuntu*, which forms part of the fabric of South African law and society, as acknowledged in this post-Bill of Rights era. Section 39(1)(a) of the Constitution requires a court when interpreting the Bill of Rights "to promote the values that underlie an open and democratic society based on human dignity, equality and freedom".[162] The duty to *promote* emphasises that "transformative constitutionalism" and "a socially interconnected and embodied concept of humanity" are envisaged.[163] Significant, in this context, is the concept of *ubuntu* which is recognised as being one of the values that section 39(1) requires to be promoted.[164]

161 *Sasfin v Beukes* (n 160) at 13H-I. See, also, references to peonage, in K Gross "The debtor as modern day peon: A problem of unconstitutional conditions" (1990) 66 *Notre Dame L Rev* at 165-205.

162 In terms of s 39(1)(a) and (b), a court must also consider international law and it may consider foreign law. In terms of s 39(3), "[t]he Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill". On interpretation of the Bill of Rights, see IM Rautenbach "Introduction to the Bill of Rights" in *Bill of Rights Compendium* (Durban, 1997-) in par 1A9.

163 S Liebenberg *Socio-Economic Rights Adjudication under a Transformative Constitution* (Cape Town, 2010) at 98-99.

164 See L du Plessis "Interpretation of the Bill of Rights" in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (Cape Town, 2002-) at 32-130; TW Bennett "Ubuntu: An African equity" (2011) 14 *PELJ* at 30-61; *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC) in pars 23 and 61. On *ubuntu*, see, also, R English "Ubuntu: The quest for an indigenous jurisprudence" (1996) 12 *SAJHR* at 641-648; Y Mokgoro "Ubuntu and the law in South Africa" (1998) 1 *PELJ* at 15-26; I Kroeze "Doing things with values II: The case of Ubuntu" (2002) 13 *Stell LR* at 252-264; D Cornell "A call for a nuanced jurisprudence: Ubuntu, dignity and reconciliation: Post-apartheid fragments: Law, politics and critique" (2004) 19 *SAPL* at 666-675; and M Pieterse "Traditional African jurisprudence" in CM Roederer & D Moellendorf (eds) *Jurisprudence* (Cape Town, 2004) at 438-462.

In *S v Makwanyane*[165] Mokgoro J associated *ubuntu* with concepts such as "humanity" and "menswaardigheid" ("human dignity")[166] and Langa J described *ubuntu* as capturing, conceptually[167]

> a culture which places some emphasis on communality and on the interdependence of the members of a community. It recognises a person's status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such person happens to be part of. It also entails the converse, however. The person has a corresponding duty to give the same respect, dignity, value and acceptance to each member of that community. More importantly, it regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all.

In *Port Elizabeth Municipality v Various Occupiers*, in a judgment espousing the correct approach to be adopted in relation to eviction of unlawful occupiers from their homes, Sachs J stated:[168]

> The spirit of *ubuntu*, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern.

It is submitted that similar considerations, if applied in the context of forced sale of debtors' homes (given the emphasis placed by South African courts in such matters on the debtor's right to have access to adequate housing as provided by section 26 of the Constitution), would reflect similar societal support to that evident in the Roman context.

This article highlights certain aspects of Roman law and societal values and structures which may be regarded as factors which effectively caused a debtor and his family to remain in their home or at least to continue to have access to one. It is consequently submitted that these aspects of Roman law, which effectively protected the debtor's home from forced sale, have not only historical value as sources of South African law but also significant comparative value. They were aspects of a legal system and procedures that operated in another time, and in a society which, although markedly different, nevertheless reflects at least some similar needs and priorities as those of ours today.

165 *S v Makwanyane* 1995 (3) SA 391 (CC) in pars 130-131, 223-227, 237, 307-313, 516.

166 *S v Makwanyane* (n 165) in par 308. See, also, Rautenbach in par 1A11.

167 *S v Makwanyane* (n 165) in par 224. Mahomed DP also refers to *ubuntu* in his judgment in *S v Makwanyane* (n 165) in par 263.

168 *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) (hereafter referred to as *Port Elizabeth Municipality*), in par 37 (footnotes omitted), cited by Liebenberg (n 163) at 99. See also IM Rautenbach "Fundamental Rights" (revised by L Stone) in *The Law of South Africa* vol 10 (Durban, 2008) in par 286.

Janus, the Roman spirit of the door, is traditionally depicted as having two faces in order that he might simultaneously guard the home against intrusion from without and watch over and protect members of the household within.[169] Casting our eyes abroad, we note that the European Commission Services proposed, with regard to forced sale of a debtor's home, that[170]

> common sense and humanity should always prevail at all levels … and throughout the whole procedure. In particular, the full economic and social situation of the defaulting borrower should be taken into account, and the implications of a given repossession should be carefully assessed, notably when a primary residence is at stake. For example, losing the family home after having lost one's job has intolerable social and human implications for both borrowers and their families. In these critical economic times our society must put the human dimension at its very heart.

As we return our gaze homewards, we are reminded of the constitutional imperative to "infuse elements of grace and compassion into the formal structures of the law"[171] and the spirit of *ubuntu* is brought home to us as a vital key to the building of our nation.

ABSTRACT

In the last decade, the Constitutional Court has recognised that the sale in execution of a debtor's home potentially infringes the debtor's right to have access to adequate housing in terms of section 26 of the Constitution. The position is now that, in every case in which execution is sought against a debtor's home, judicial oversight is required to determine whether execution is justifiable, taking into account "all the relevant circumstances" in terms of section 36 of the Constitution. Last year, the European Union issued a directive to its member states requiring forbearance in matters concerning foreclosure against residential property. Against this contextual background, this article explores the ways in which execution against a debtor's home was dealt with according to Roman law, a common source of many contemporary legal systems. Initially, substantive and procedural rules relating to debt enforcement permitted execution only against a debtor's person. Subsequently, the law developed to provide for execution against a debtor's property. Collective debt enforcement (or insolvency) rules and procedures evolved, as did principles pertaining to mortgage and a creditor's rights of real security. Certain types of assets came to be regarded as exempt from execution in the individual and collective debt enforcement processes,

169 See Rose (n ***) *supra*.

170 See *Commission Staff Working Paper National Measures and Practices to Avoid Foreclosure Procedures for Residential Mortgage Loans* SEC(2011) 357 final available at *http://ec.europa.eu/internal_market/finservices-retail/docs/credit/mortgage/sec_2011_357_en.pdf*. (accessed 31 Mar 2011) at 11. This working paper led to the proposal which culminated in the EU Directive referred to in (n 9) *supra*.

171 See *Port Elizabeth Municipality* (n 168) in par 37.

but there was no formal exemption of the debtor's home. However, it is submitted, a study of the relevant legal principles and procedures as applied in their historical and socio-economic context – especially in light of the revered status of the familia, including the ancestors, the household gods and the requisite hereditary altar as well as the complex societal relationships – reveals the discernible, albeit indirect and subtle, consequence of providing protection for an impecunious debtor against the loss of his home at the instance of a creditor.

DENIS O'BRYEN: (NOMINALLY) SECOND MARSHAL OF THE VICE-ADMIRALTY COURT OF THE CAPE OF GOOD HOPE, 1806-1832

JP van Niekerk* **

1 Introduction

The first marshal of the Vice-Admiralty Court at the Cape of Good Hope having been historically a controversial figure,[1] I was greatly surprised when it turned out that the second and long-serving holder of the office, Denis O'Bryen,[2] was likewise considered to have been a personality of some note. An Irish-born dramatist, political

1 See my "George Rex of Knysna: A civil lawyer from England and first marshal of the Vice-Admiralty Court of the Cape of Good Hope, 1797-1802" (2010) 16(1) *Fundamina* (*editio specialis: Libellus ad Thomasium. Essays in Roman Law, Roman-Dutch Law and Legal History*) 486-513.

2 There are also alternative spellings of his name (Dennis) and surname (O'Brien, O'Bryne and O'Bryan), but O'Bryen himself seems to have preferred the (now) more unusual version.

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** I should like to dedicate this article to the memory of my former colleague, AB (Basil) Edwards, 14 Nov 1930-15 Jan 2014, who wrote so engagingly about Mr Blane's involvement in an episode of jurisdictional head-butting: see "A conflict of jurisdiction" (1972) 12(1) *Codicillus* 42-43 and further nn 23 and 183-184 below.

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pamphleteer, and confidant and aide to the prominent Whig politician Charles James Fox, his life merited a brief entry in the British *Dictionary of National Biography*.

However, I was to discover that there was more to his appointment as Admiralty marshal at the Cape than at first appeared.[3]

2 Background

2 1 The establishment and jurisdiction of the second Cape Vice-Admiralty Court

When the British re-occupied the settlement at the Cape of Good Hope in January 1806, they soon recognised the need to re-establish a local Vice-Admiralty Court; the one that had operated during the First Occupation had been closed down in 1803.[4] In the absence of such a court, several Anglo-Dutch and some purely British prize issues flowing from the Occupation[5] and those likely to arise locally from the war being waged against France at that time, could only be resolved inconveniently and at great expense by the Court of Admiralty in London.[6]

The instructions issued in August 1806 to the first permanent governor of the Cape after re-occupation, the Earl of Caledon, referred to his receiving an Admiralty Commission constituting him Vice Admiral of the settlement at the Cape.[7] The royal instructions, issued in September 1806 by Letters Patent under Privy Seal to the Lords of Admiralty, to appoint a Vice Admiral at the Cape explained that it would be advantageous "to have a Court of Vice Admiralty settled there". It specifically authorised and empowered the Lords to do so (it appeared that they might have

3 I was greatly assisted in my search for the story behind O'Bryen's appointment by correspondence during Apr 2014 with Prof David O'Shaughnessy, School of English, Trinity College Dublin. He provided me with valuable background information on O'Bryen's early life as well as a copy of a draft piece entitled "Making a play for patronage: Dennis O'Bryen's *A Friend in Need Is a Friend Indeed* (1783)" subsequently appeared in (2015) 39 *Eighteenth-Century Life* at 183-211.

4 See AB Edwards *The History of South African Law: An Outline* (Durban, 1996) at 75 n 233 and 79 n 249; DH van Zyl *Geskiedenis van die Romeins-Hollandse Reg* (Durban, 1983) at 449.

5 Some of these were eventually determined by the London Court of Admiralty in 1809 (see, eg, George McCall Theal (ed) *Records of the Cape Colony* 36 vols (Cape Town, 1897-1905) (hereafter *RCC*) vol 7 at 350-351), but even by 1819 others had not yet been finally resolved (*idem* vol 12 at 183).

6 See, eg, *idem* vol 5 at 413, concerning the ship *Fortuna*, sailing under Mecklenburg colours en route to Batavia. She was detained in Table Bay in May 1806 and her papers, together with other supporting documentation, were "transmitted ... to His Majesty's Court of Admiralty [in London] for adjudication". Subsequently Sir David Beard, commandant at the Cape, was compelled to deny in a letter to the secretary of state Viscount Castlereagh that he had taken it upon himself to decide this prize cause and to appropriate the prize property (*idem* vol 6 at 158).

7 *Idem* vol 6 at 15-16.

had no such power in respect of newly conquered territories) by appointing a Vice Admiral and also a Vice-Admiralty judge and other proper officers required for the functioning of a Court of Vice Admiralty at the Cape, and to issue such commissions as would be necessary.[8]

The first Admiralty judge to be appointed and sent out from London after the Second British Occupation of the Cape was Winchcombe Henry Hartley, who served from 1806-1810.[9] The second person to occupy the office was George Kekewich, at the time the King's advocate in the settlement. He sat as judge, at first temporarily,[10] and then permanently, from June 1811 until 1827.[11] Although at times

8 *Idem* vol 6 at 31-32.

9 Hartley, a barrister and fellow of the Honorable Society of Lincoln's Inn and residing in Great Russell Street in Bloomsbury, was appointed to the post in Nov 1806, but only arrived at the Cape the following year (*idem* vol 6 at 51), on the same ship as Alexander du Pré, Earl of Caledon, the first (permanent) governor from May 1807 to Jul 1811. Although his annual salary was £6 000 (paid out of the penalties and forfeitures levied by his Court, or, if that was insufficient, out of the fund arising from the sale of old naval stores), Hartley soon complained to Castlereagh about his income. He had already requested an appointment in any other vacant office in view of the fact that his salary was smaller than that of his predecessor or of Admiralty judges elsewhere (*idem* vol 6 at 64). He had also signed a memorial to governor Caledon requesting that civil servants be paid from the date of their appointment in England rather than only from the date of their arrival at the Cape (see Peter Philip *British Residents at the Cape 1795-1819. Biographical Records of 4 800 Pioneers* (Cape Town, 1981) at 168). In 1808, when Hartley returned temporarily to England "for the arrangement of some Matters essentially affecting his Office", the King's advocate, Andrew Cassels, acted in his place as Admiralty judge despite governor Caledon questioning whether such an absence or substitution was permissible (see Theal *RCC* (n 5) vol 6 at 235-237). The view of the law advisor in London, in the person of Sir (Dr) John Nicoll, was that the judge of the Cape Vice-Admiralty Court did have the right to absent himself without the governor's permission, and that according to the express terms of his patent he could appoint a deputy or surrogate, in which appointment the governor's acquiescence was unnecessary (*idem* vol 6 at 303-304 and 311). Cassels' temporary appointment came at a time when he was seriously ill and he died shortly afterwards, in Jan 1809 (Philip at 62; Theal *RCC* (n 5) vol 6 at 387-388 and 408 and vol 7 at 18-19, 302 and 492).

10 In Jun 1810 the appointment was announced of Kekewich, "Surrogate Judge" of the Vice-Admiralty Court, as assessor to the court of Appeals in criminal cases (Theal *RCC* (n 5) vol 7 at 287) and in a letter written by Governor Caledon in the same month, he is referred to as the King's advocate and "acting Surrogate" in the Admiralty Court (*idem* vol 7 at 301).

11 Kekewich (1778-1862), also a barrister in the High Court of Chancery (he compiled *A Digested Index to the Earlier Chancery Reports* (London, 1804)) and member of the Honorable Society of Lincoln's Inn, arrived at the Cape in Dec 1809 (having been appointed in Jun) as the King's advocate in the settlement. In 1810, he was also appointed as an assessor in civil and criminal cases in the Court of Appeals. His second marriage, in Jan 1812, was to Catharina Cornelia de Waal. Her younger sister was married to Thomas Rowles, a practitioner (proctor and, more specifically, from 1807, the King's proctor) in the local Vice-Admiralty Court from 1800 (he was one of the few barristers to practise in the Court during both British occupations), also active in other courts (including the Court of Appeals), and on occasion also acting judge during his brother-in-law's absences from the colony (see, eg, Theal *RCC* (n 5) vol 31 at 364, 371 and 372 and vol 32 at 181 and 185). On Rowles, see Philip (n 9) at 365. Upon the establishment of

the focus of controversy,[12] the Court was never really busy[13] and the possibility of its discontinuance was even raised.[14]

Upon the creation of the new Cape Supreme Court in 1828,[15] the Chief Justice – the first appointee being Sir John Wylde[16] – was also appointed to serve as the judge

the new Supreme Court in 1828, and the appointment of Chief Justice Wylde as the Admiralty judge, Kekewich (who was not then also appointed as Admiralty judge, as Van Zyl (n 4) at 451 would have it) became the third puisne judge in the new Court (alongside Menzies and Burton), in which capacity he served until his retirement and return to England in 1843. On Kekewich, see Philip (n 9) at 216-217; AA Roberts *A South African Legal Bibliography* (Pretoria, 1942) at 367; Stephen Girvin "The establishment of the Supreme Court of the Cape of Good Hope and its history under the chief justiceship of Sir John Wylde. Parts I and II" (1992) 109 *SALJ* 291-306 and 652-665 at 303-304 and 654-655 and 664 respectively (Girvin observing that Kekewich was the weakest of the four appointments to the Cape bench and that his appointment was anomalous and disappointing "as he had been criticized in his previous position as judge of the Vice-Admiralty court and assessor").

12 In 1814, eg, allegations were levelled at the Court about its perceived improper conduct in slave cases. It was alleged that it had released arrested slavers on their payment of sums of money; had granted local inhabitants the slaves taken from them and, in one case, had withheld a ship's papers until payment of a "gratuity" to the Court even though there was no charge against her. In correspondence between Kekewich and the colonial government, he refuted these "unsubstantiated charges" vigorously (Theal *RCC* (n 5) vol 9 at 487-490).

13 On the death of Thomas Rowles in 1826, the Court of Appeals was left without a secretary or an assessor in civil cases. Governor Somerset temporarily appointed Kekewich – who had served in that capacity in criminal cases – to the vacancy (*idem* vol 26 at 72). The reasons for his permanent appointment were that he was one of few English lawyers in the colony and that although he served in the Vice-Admiralty Court, other tasks, including the proper formulation of local ordinances, could be assigned to him since he had "little or nothing to do in his Court". However, Kekewich declined to offer his assistance in this regard and the appointment of someone from England was requested (*idem* vol 26 at 407-408).

14 Especially after the Peace Treaty of Amiens in 1814, the Court's principal jurisdiction, that in prize matters, became largely dormant, leading the then governor Lord Charles Somerset to suggest in Nov 1816 that the Vice-Admiralty Court might be discontinued at the Cape (*idem* vol 11 at 159). However, London thought otherwise, referring, somewhat obliquely, to the Court's importance to naval officers and men (*idem* vol 11 at 214 and 330). This left Somerset still dissatisfied and in May 1817 he noted the absence of a pertinent reply to his suggestion "relative to the Court of Vice Admiralty here, for the continuance of which I can see no necessity" (*idem* vol 11 at 336).

15 See, generally, Girvin (n 11).

16 Wylde (1781-1859) was Chief Justice and therefore Admiralty judge until his death. He had been judge-advocate of New South Wales from 1816 and had also been appointed to the Vice-Admiralty Court there. On his appointment as Chief Justice of the Cape Supreme Court and also, separately, as judge of the local Vice-Admiralty Court (see, eg, Theal *RCC* (n 5) vol 32 at 25, 152 and 171), Wylde wrote to Viscount Goderich, the secretary of state, in Aug 1827 requesting that he be allowed the fees formerly payable to the Admiralty judge. He mentioned that the business of the Vice-Admiralty Court involved "delicate questions on the subject of slaves" and amounted to a "material addition" to his already extensive duties as Chief Justice. He also referred to the fact that chief justices in other colonies received separate remuneration for performing the duties of Admiralty judge. This request, together with others, was ultimately refused (see *idem* vol 32 at 252-254). Although he enjoyed good health for most of his long legal career, the first signs of

in the local Vice-Admiralty Court. In 1891, when Vice-Admiralty courts were finally abolished,[17] Lord Henry de Villiers was accordingly the last specifically appointed Admiralty judge at the Cape.

At the risk of unnecessary repetition, it may be apposite briefly to identify the main features of Vice-Admiralty courts, including the one at the Cape of Good Hope.[18]

First, they were imperial (British) and not colonial courts and have to be distinguished, in the case of the Cape, from the local Council of Justice (*Raad van Justitie*) and its successor, the Cape Supreme Court. The judge of the local Vice-Admiralty Court was therefore not, as such, a colonial judge, even if, subsequently, the local Chief Justice was also appointed by the British Admiralty as the local Admiralty judge.

Secondly, the Cape Vice-Admiralty Court did not, like the Council of Justice and later the Supreme Court, apply local Roman-Dutch law, but English law. More particularly, it applied English maritime and Admiralty law that, even though it often displayed its civil-law origins, certainly no longer resembled the applicable local law.

Thirdly, Vice-Admiralty courts exercised a permanent instance jurisdiction of variable scope at different times over various questions of maritime law such as the carriage of goods by or collisions at sea, or the claims of seamen and salvors. In addition, it could also exercise a prize jurisdiction, which was unusual in that it was limited in both scope and duration by the terms of the Commission conferring the jurisdiction on it.[19] A Prize court, therefore, was simply an Admiralty (or Vice-Admiralty) court exercising, for the time being, a specially conferred prize jurisdiction.

Fourthly, the permanent Cape Vice-Admiralty Court should be distinguished from an *ad hoc*, temporary court, generally known as a Piracy Court or Commission Court (because it was constituted in every case by a Commission[20] and comprised

his failing health came in his seventy-fifth year, in Sep 1855, when Wylde suffered a stroke while delivering judgment in a slave-trading case as Admiralty judge. On Wylde, see Roberts (n 11) at 384; Girvin (n 11) at 295-298 and 662; and F St LS "Sir Johyn Wylde" (1933) 50 *SALJ* 284-297.

17 See, further, n 220 below.

18 For more detail, with references, see Van Niekerk (n 1) at 499-504.

19 The British authorities seem to have been caught unawares by the War of 1812 with the United States. As a result, the detention of American ships at the Cape in 1813 caused "considerable embarrassment and difficulty" because the local Vice-Admiralty Court received no orders (ie, from a Commission conferring prize jurisdiction on it) enabling it to proceed to their condemnation (Theal *RCC* (n 5) vol 9 at 176-177 and 222).

20 The absence of such a Commission and the Vice-Admiralty Court's perceived lack of criminal jurisdiction caused severe problems and heated debate in 1825. The reason was that British seamen and others accused of mutiny or murder at sea could be, and were, tried by the local colonial court applying "Dutch law" rather than by a (local) British court applying English criminal law (see, eg, Theal *RCC* (n 5) vol 23 at 9, 451-454, 471-472, 481, 485-486 and 497-498). By Apr

a body of Commissioners) but also confusingly referred to simply as an Admiralty Court.[21] This Court had criminal jurisdiction over (serious) offences committed on the high seas, including, therefore, piracy, and was made up of seven Commissioners, the judge of the local Vice-Admiralty Court being but one of the members.

Fifthly, despite its name and the involvement of the Admiralty in its establishment and the appointment of its judges, a Vice-Admiralty court was not a naval court. In this respect, therefore, it should be distinguished from naval courts-martial, which had jurisdiction over naval (as opposed to maritime) matters such as those relating to the discipline of officers and seamen of the Royal Navy.

Despite the differences between the Cape Vice-Admiralty Court and the local colonial courts – first, the Council of Justice and later the Cape Supreme Court – one common but complicating factor was that their jurisdictions overlapped. Some maritime matters could be heard in either court and claimants could often choose in which one to lodge their claims. The success or failure of those claims could well depend on their choice because the courts applied different laws and followed distinct procedures. In addition, if there were several claimants, the same matter could even be heard simultaneously but separately in the two courts.[22]

Even at an early stage many instances of jurisdictional clashes between the two courts were brought to the attention of the authorities,[23] but the problem was

1826, the authorities in London acknowledged "that a competent jurisdiction should be forthwith established" at the Cape and instructed the Admiralty to issue an appropriate Commission for that purpose (*idem* vol 26 at 263). However, that seems not to have happened. In Aug 1827 the report of the Commission of Enquiry into the administration of justice at the Cape observed in respect of criminal law and jurisprudence that the criminal jurisdiction exercised by the Council of Justice over crimes committed in the colony had been extended, on rather doubtful authority, to those committed on ships when at sea or anchored in the harbours of the colony, and that no Commission of Piracy had yet been issued superseding that jurisdictional cognizance (*idem* vol 33 at 53).

21 See Van Zyl (n 4) at 445.

22 To clarify, the Vice-Admiralty Court exercised not only concurrent jurisdiction in some matters, but also a separate and exclusive jurisdiction in others, (see, eg, the instructions to the Commission of Enquiry into the Cape in Theal *RCC* (n 5) vol 15 at 239). The same was, of course, true of the Council of Justice.

23 In May 1808, eg, the Vice-Admiralty Court in the person of its deputy marshal and the Council of Justice represented by the sheriff were involved in a quite undignified judicial boat race across Table Bay when both attempted to be the first to arrest, and hence assert jurisdiction over, a suspected slaver, the Portuguese ship *Rosalia*. On arriving at the ship, the deputy marshal pushed the sheriff away and was thus first on board, but each claimed and, assuming a plea of prior capture, instituted proceedings against the ship in his own court. The Council of Justice complained to the governor that the Admiralty marshal had impeded the sheriff in the execution of his duties. Ultimately the Vice-Admiralty Court ordered the release of the *Rosalia* while the Council of Justice condemned her, but after an investigation, decided not to proceed any further (see Theal *RCC* (n 5) vol 6 at 330-331; Edwards (n 4); and HB Giliomee "Die administrasietydperk van Lord Caledon 1807-1811" in (1966) no 2 *Archives Year Book for South African History* 213-366 at 254-255 (referring to the clash as a "komiese situasie" causing the governor "groot verleentheid").

not addressed and continued to arise from time to time.[24] When the issue was brought to their attention in 1820, the view of the authorities in London was that the Vice-Admiralty Court's jurisdiction over certain matters was settled and could not be contested by the local colonial court, even if it did possess an overlapping jurisdictional power. In short, the prior jurisdiction of any of the two courts could not be superseded. While that seemingly settled the matter in practice,[25] it did not eliminate the continuing concurrency of jurisdiction of the two courts in appropriate cases.[26] A further suggestion, in 1822, that a newly reformed colonial court should be vested with Admiralty jurisdiction "by which means past collisions would be avoided",[27] was not fully realised when the Cape Supreme Court was established in 1827.[28] The Vice-Admiralty Court continued to exist and exercise its distinct jurisdiction as before, but at least now the Chief Justice, who was also as such the Admiralty judge, could himself properly manage any jurisdictional collisions. The conflict continued even when, in 1891, the local colonial court was vested with Admiralty jurisdiction, since that court had to apply different laws, depending on which jurisdiction (civilian or Admiralty) it was exercising.[29]

24 For instance, in 1818, in connection with the jurisdiction over slaves either taken from captured slavers or abandoned by the masters of such ships (see, eg, the correspondence in Theal *RCC* (n 5) vol 11 at 475-480 and vol 12 at 1-4). In 1821, again, the Council of Justice's John Truter complained to the governor about the Vice-Admiralty Court's exercise of its jurisdiction. In consequence, the deputy marshal was prevented from advertising the sale of a vessel that had already been sold by order of the Council of Justice. In response, Admiralty Judge George Kekewich complained about this "prohibition", causing the governor to bring the matter to the attention of the authorities in London, because it not only had judicial implications – appeals, eg, went to different courts – but also financial implications for the colonial government which would get nothing out of Admiralty confiscations but one-third of the value of Council of Justice sales (see *idem* vol 13 at 371-375, 377-384, 421-436, 441-442, 451-453 and 464).

25 In evidence given before the Commission of Enquiry into the judicial system at the Cape in Aug 1825, John Truter of the Council of Justice explained, on the issue of the jurisdictional conflict, that "at present a mutual understanding prevails between myself and the Judge of the Court of Vice Admiralty that we should prevent any open conflict of our jurisdictions in these cases by private conference at the outset" (*idem* vol 33 at 262-263).

26 See *idem* vol 13 at 486-487 and vol 14 at 117-118.

27 *Idem* vol 14 at 86 in a memorandum on the reformation of the judicial structure at the Cape, and *idem* vol 14 at 372 where a letter from Bathurst referred to "the tendency to collision, from a concurrency of Jurisdiction, between the present Colonial, and Vice Admiralty Courts at the Cape". The solution recommended by the Commission of Enquiry in 1826 was that the commencement of action in either of the courts should be sufficient a bar to all other proceedings for the same cause of action (*idem* vol 28 at 9-10 and 21-22).

28 There is no mention of the Vice-Admiralty Court or of Admiralty jurisdiction in the Charter of Justice of 1827 (*idem* vol 32 at 274-292). The reason is readily apparent: the Vice-Admiralty Court was not a colonial court within the purview of the Commission appointed to reform the local judicial system.

29 See, further, Christopher Forsyth "The conflict between modern Roman-Dutch law and the law of Admiralty as administered by South African courts" (1982) 99 *SALJ* 255-270.

The matter was finally resolved only in the late twentieth century when the law to be applied in the resolution of particular maritime issues was prescribed by statute, a compromise solution not acceptable to all, given that South African law, drawing on its subsidiary common law, was retained in respect of some maritime matters.[30]

2 2 The Admiralty marshal

After the judge and the registrar, the Admiralty marshal was the most important official in any Vice-Admiralty court and, by the nature of his duties, also the one most in the public eye.[31]

The marshal's main duty was to serve Admiralty processes. After a plaintiff had met the necessary requirements regarding the nature and, in the case of an action *in rem*, the object of his claim, the Court's registrar issued a warrant to the marshal directing him to arrest the ship or cargo in question or, in the more unusual case of an action *in personam*, to serve it upon the defendant. The marshal or his deputy served the warrant, in the case of a vessel, "in the time-honoured manner of exhibiting the original and holding it to the mainmast, then nailing a copy in its place".[32] He then executed a certificate of service, commonly called the marshal's return, which was filed in the Court's registry together with the original warrant. In the case of an action *in personam*, where the warrant was for the arrest of a person, the marshal exhibited it and took the defendant into custody, from which he was released upon the provision of security.[33]

Once a ship was arrested, the marshal, if necessary left a member of his staff on board to prevent her sailing from the Court's jurisdiction and to protect her from damage or pillage while in custody. In the case of arrested cargo, the marshal had to see to its discharge and warehousing. Failing in his duty to protect arrested property from damage could lay the marshal open to a claim in damages.[34]

30 See s 6(1) of the Admiralty Jurisdiction Regulation Act 105 of 1983 and, eg, John Hare *Shipping Law & Admiralty Jurisdiction in South Africa* 2 ed (Cape Town, 2009) at 14-29.

31 See, further, FL Wiswall *The Development of Admiralty Jurisdiction and Practice since 1800. An English Study with American Comparisons* (Cambridge, 1970) at 12-13, 16, 47-48 and 121; ES Roscoe *A Treatise on the Jurisdiction and Practice of the Admiralty Division of the High Court of Justice* ... (London, 1878) at 7.

32 Wiswall (n 31) at 13. Towards the end of the nineteenth century, it became the practice for the warrant of arrest to be served in actions *in rem* by the plaintiff's legal representative. However, in *The Solis* (1885) 5 Aspinall's Maritime Law Cases 368, the Court observed in passing that only the marshal had the right to board a ship and nail a writ of summons *in rem* to the mast and that the representative might be trespassing if he tried to do so.

33 Later, the defendant was merely served with an instrument called a "monition", addressed to the marshal and commanding him to cite the defendant personally and "admonish" him to appear in court (Wiswall (n 31) at 63).

34 See *The Hoop* (1801) 4 C Rob 145, 165 ER 566 for an instance of a successful claim against the Admiralty marshal for the compensation of loss sustained by pillage and theft whilst the property

Once a ship or other maritime property had been condemned by the Admiralty court, the marshal had the duty of arranging for a sale in execution. He had to appraise, advertise and then sell the property by auction. Before 1840, the Admiralty marshal was not salaried, but received his income from fees, including a brokerage fee that was customarily charged on the sale of maritime property.

The marshal also had other public duties, including appearing at official and public ceremonies – such as piracy executions or judicial processions – where he bore the Court's silver oar mace.[35]

3 O'Bryen's early life

Denis O'Bryen[36] was born in Ireland in 1755. He qualified as a surgeon, moved to London and in the 1780s relinquished the practice of his profession and turned his hand to writing and a political career. As will be apparent, these two pursuits were closely linked.[37]

He first gained notoriety with the publication, in 1782, of a satirical and sarcastic pamphlet entitled *A Defence of ... the Earl of Shelburne, from the Reproaches of His Numerous Enemies ...* .[38] He had written it anonymously but in the hope of preferment from one (the Rockingham) faction of the liberal Whig party and of gaining the attention of one of the party's rising stars, Charles James Fox. It was an immediate success, selling out quickly and necessitating several reprints. In a portent of what

was in his custody. The Court rejected the marshal's defence that he was unable to protect the property properly because his fees were too small. The Court thought that if arrested property were lost or damaged, the marshal had at least to show that this had not been through any default of his own. If indeed his fees were insufficient to enable him to provide proper security, this should be raised with relevant authorities, but could not be relied on as a defence.

35 See my "The story of the silver oar maces of the Vice-Admiralty Court of the Cape of Good Hope" (2012) 18(1) *Fundamina* 135-173.

36 For general biographical details on him, see Thompson Cooper *sv* "O'Bryen, Dennis" in *Dictionary of National Biography* vol 41 (London, 1895) 340 at 340; Gail Baylis *sv* "O'Bryen, Dennis" in *Oxford Dictionary of National Biography* (2004, online ed 2007, accessed 28 Aug 2013); *Biographical Dictionary of the Living Authors of Great Britain and Ireland ...* (London, 1816) *sv* "O'Bryen Denis" at 255-256; and O'Shaughnessy (n 3).

37 O'Shaughnessy (n 3) mentions his blurred transition from political pamphleteer to confidant to the upper echelons of Whig society, and the complicated story of how he made his way as a bankrupt Irish immigrant in a class-conscious metropolitan London.

38 The pamphlet attacked Irish-born William Petty, the Earl of Shelburne, secretary of state from Mar to Jul 1782 and then, succeeding the Marquess of Rockingham, Prime Minister until Apr 1783 during the short-lived Whig administration and the last months of the American War of Independence. Shelburne was, somewhat controversially and in opposition to other Whig luminaries, including Charles James Fox, a friend of America with whom he secured peace. The pamphlet provoked a reply from Petty entitled *A Short but Serious Reply to the Author of A [Mock] Defence of the Earl of Shelburne ...* (London, 1782).

was to transpire later in his life, it brought O'Bryen "a secret pension" from the Duke of Portland in April 1783.[39]

Next came his only play, the comedy *A Friend in Need is a Friend Indeed*, performed nine times at the Haymarket Theatre in London during July and August 1783. Further performances were shelved when O'Bryen fell out publicly with the theatre's manager over financial arrangements. Although unfavourably reviewed and never printed, it did serve O'Bryen well, also financially, given that he had been declared bankrupt in 1780. Containing several "caricatural allusions" to and in defence of the controversial Charles James Fox, it "facilitated his rise to a position of substantial political influence in London" and, more particularly, in Whig inner circles.[40] It was a further attempt to gain the patronage of Fox, a prominent Whig politician, leader and statesman at the time. The latter's hedonistic lifestyle of drinking, gambling and womanising,[41] as well as his opposition to the American war and support of the French revolution, made Fox a controversial public figure.[42] However, as we shall see, O'Bryen's constant support of Fox was to prove fruitful.

In the course of the following decades, O'Bryen wrote and published various works, many of a political nature and showing his liberal alliances. These include *A Gleam of Comfort to This Distracted Empire, demonstrating the Fairness and reasonableness of national Confidence in the present Ministry* ... (1784), another ironical work on and critique of the Tory government that had taken over from the Whigs. This government was headed by William Pitt the Younger, an arch rival of Fox. Another work was *A View of the Treaty of Commerce with France, signed ... . September 20, 1786* ... (1787) concerning a treaty signed by the Pitt administration. In

39 Ralph A Manogue "James Ridgway and America" (1996) 31 *Early American Literature* 264-288 at 265. Portland succeeded Shelburne and served as Whig Prime Minister from Apr to Dec 1783.

40 On the play and O'Bryen's intention of using it to gain political advancement, see, especially, O'Shaughnessy (n 3).

41 During the 1780s and 1790s, Whig supporters met at Devonshire House, the West-End home of Georgiana Cavendish, the Duchess of Devonshire, who was also said to have had an affair with Fox of whom she was at least a close friend (see, generally, Amanda Foreman *Georgiana, Duchess of Devonshire* (London, 1999) and, also for a general background, Arthur Aspinall *Lord Brougham and the Whig Party* (London, 1927)).

42 Elected to Parliament in 1768, Fox gradually gravitated to the radical Whig party in the 1770s. When the reformist Rockingham administration came to power in Mar 1782, Fox became secretary of state for foreign affairs and, with Lord North, leader of the House of Commons in 1783. The Fox-North coalition was in office from Mar to Dec 1783, when it was defeated in the House of Lords after royal interference, the King nominating William Pitt as Prime Minister. As a result of Fox's opposition to measures Pitt sought to push through in the House of Commons, Parliament was dissolved in Mar 1784. Fox lost the election and Pitt was returned with a substantial majority. The surviving supporters of the Whig party increasingly called themselves Foxite, after the leader of the most important faction, rather than Whig. In the 1790s, Fox continued opposing the curtailment of civil liberties by the Pitt government. On Fox (1748-1806), see LG Mitchell *sv* "Fox, Charles James" in *Oxford Dictionary of National Biography* (2004, online ed 2007, accessed 9 Apr 2014).

1788, upon King George III's illness, O'Bryen anonymously published *The Prospect before Us, being a Series of Papers upon the Great Question.* The "great question" was the regency crisis, which continued from October 1788 to March 1789. Not surprisingly, O'Bryen supported the demands of the Prince of Wales that he be given full rights of regency. The prince was a friend and gambling companion of Fox, and the latter's support of parliamentary reform and a curtailment of executive and monarchial power had resulted in deep animosity between Fox and the King.[43]

In addition, O'Bryen was an irrepressible writer of letters to newspapers on various topical and invariably political issues, so much so that he is considered a "journalistic figure" of the period.[44] His political writings reflected his activism as a supporter of the Whig cause and of Fox; and he has been described as being "of some help to Fox and his friends with their newspaper problems", that is, the attacks on Fox's lifestyle and views by the London press.[45] O'Bryen continued to fire off missives to the press throughout his life. In 1820 he admitted being "in the course of my life, and still an occasional correspondent of several papers ... like thousands of others", but denied ever having had any ownership, managerial employment or other concerns in any newspaper.[46]

Then, of course, there are also numerous but scattered pieces of correspondence with and from O'Bryen. There are several references in published sources to archival materials[47] containing correspondence between O'Bryen and Fox and also

43 When the King's "madness" returned in 1810, O'Bryen's pamphlet was reproduced with a new preface under the title *The Regency Question, being a Re-publication of Papers written during His Majesty's Illness in 1788 ...* . Ultimately, the Prince of Wales became regent only in 1811 and succeeded his father as George IV only on his death. On George III (1738-1820), see, generally, Christopher Hibbert *George III. A Personal History* (London, 1998).

44 See Richmond P Bond's review of Lucyle Werkmeister *The London Daily Press 1772-1792* (Lincoln, Neb, 1963) in (1964) 63 *J of English and Germanic Philology* 526-527.

45 Loren Reid "Charles Fox and the London Press" (1961) 47 *Quarterly J of Speech* 390-397 at 391 n 4. O'Bryen was, eg, a "long time associate" of Henry Bate (1745-1824), who was "the most prominent and the most notorious newspaper editor in London during the 1780s" and who "published an unprecedented volume of scurrilous material in his paper", the *Morning Herald*, a newspaper militantly pro-Foxite. Bate's "constant involvement in fist fights and duels won him the nickname the Fighting Parson" and in Sep 1780 O'Bryen was his second in his duel with one of the owners of the paper. See, further, Bonnie Ferrero "The *Morning Herald* and its first three editors" (2005) 11 *Media History* 165-175 at 168; Hannah Barker *sv* "Dudley, Sir Henry Bate" in *Oxford Dictionary of National Biography* (2004, online ed 2007, accessed 19 May 2014).

46 12 Oct 1820 *The Times* at 3.

47 For instance, British Museum Add MSS 46565, 47566, and 47591 (see, eg, Richard E Willis "Fox, Grenville, and the recovery of opposition, 1801-1804" (1972) 11 *J of British Studies* 24-43 *passim*).

other Whig supporters and acquaintances such as Sheridan,[48] Burke,[49] Lord Grey,[50] Thomas Erskine,[51] and the Prince of Wales. O'Bryen had become an important if not completely indispensable cog in the Whig party machinery.[52] Working for the party under the supervision of William Adam, a political manager, O'Bryen, "if not in receipt of regular payments from [Whig] party funds in this period, was a close associate of Fox and was employed by the party for various purposes with great regularity", and continued to act for the party into the next century. His services brought him financial reward, of which he appeared to be in constant and dire need; he had apparently been given "an annuity" out of party funds while it was in office in 1782,[53] and in the first decade of the nineteenth century, the party undertook a subscription to relieve O'Bryen of his debts.

It is not surprising, then, that Denis O'Bryen is today described as being closely connected to Fox and the Whigs: he is variously referred to as "[t]he Foxite Whig pamphleteer",[54] Fox's "secretary",[55] his political and election "agent at

48 Richard Brinsley Butler Sheridan (1751-1816) was an Irish playwright (he is best known for *The Rivals* (1775) and *School for Scandal* (1777) and as the creator of Mrs Malaprop), poet, theatre owner and manager, and politician. An admirer and later friend of Fox, he was a Whig member of Parliament for many years (1780-1812), under-secretary of state (1782-1783) and with Fox the secretary (see n 42) and treasurer of the Navy (1806-1807) in Lord Grenville's government. O'Bryen has been called an "[i]ntimate" of Sheridan's (Manogue (n 39) at 285). In 1806, O'Bryen secured a £400 loan for Sheridan and in 1816, when Sheridan was in ill health and as usual in financial trouble, "a friend", Denis O'Bryen, wrote a letter to the *Morning Post* calling on Sheridan's former fellow politicians to come to his aid (see A Norman Jeffares *sv* "Sheridan, Richard Brinsley" in *Oxford Dictionary of National Biography* (2004, online ed 2008, accessed 9 Apr 2014). In yet another quirk of history, and not unrelated to the story of O'Bryen himself, Sheridan managed to arrange a post for his ailing son Thomas (1775-1817) at the Cape of Good Hope. Thomas arrived in Jun 1815 and was appointed colonial paymaster and assistant deputy adjutant general, which offices he held until his death (see Philip (n 9) at 378). In 1832, his widow received a pension of £300 from colonial funds (R Montgomery Martin *History of the British Colonies Vol IV: Possessions in Africa and Australasia* (London, 1835) at 130).

49 Edmund Burke (1729-1797) was an Irish-born author and politician. He represented the Whigs in Parliament 1765-1794. As a supporter of the American revolutionary cause and, later, an opponent of the French Revolution, he became a leading figure in the conservative faction of the Whig party (the "Old Whigs"), in opposition to the "New Whigs" led by Fox. In Feb 1790, O'Bryen and others arranged a meeting to mend the breach between Burke and the Fox-supporting Sheridan, the outcome of which was an agreement not to discuss the subject of the French Revolution in the House of Commons. On Burke, see Paul Langford *sv* "Burke, Edmund" in *Oxford Dictionary of National Biography* (2004, online ed 2012, accessed 16 Jul 2014).

50 About whom more in due course (see n 81 below).

51 About whom likewise more shortly (see n 60 below).

52 For what follows, see Donald E Ginter "The financing of the Whig party organization, 1783-1793" (1966) 71 *American History Review* 421-440 at 431.

53 Maybe this was the "secret pension" referred to in the text to n 39 above.

54 Manogue (n 39) at 265.

55 *Idem* at 285.

Westminster",[56] and a "zealous political partisan" of Fox with whom he was "on terms of great intimacy".[57] In short, O'Bryen was more than "a bit player in Whiggish politics"; he was "an important figure in the Whig world over a period of decades".[58]

However, in attaining this position of political importance, O'Bryen did more than merely put pen to paper.

In November 1782, for instance, he fought a duel[59] in Brighton with the lawyer, Thomas Erskine, already an established figure in legal and Whig political circles.[60] Their disagreement and its eventual favourable and magnanimous resolution appear to have been carefully calculated by O'Bryen with a view to gaining maximum political advancement in a cliquish Whig world.[61]

In June 1786, O'Bryen was involved as a witness for Fox in a civil trial in the Court of Common Pleas.[62] Fox had demanded compliance from Corbet, the high bailiff of Westminster, with a writ issued by the Court of Exchequer to return himself and another as elected members of Parliament for the City of Westminster, but compliance was delayed. Fox won the case and received the £2 000 damages he had claimed for losses caused and expenses incurred.[63]

56 LG Mitchell "Foxite politics and the Great Reform Bill" (1993) 108 *English Historical Review* 338-364 at 362.

57 Cooper (n 36). According to O'Shaughnessy (n 3) it appears from their correspondence that "Fox lent on O'Bryen for judicious decision-making grounded in their friendship" and that O'Bryen could not only offer "judgment" to accompany Fox's flamboyant personality, but also protect Fox from the frequent personal attacks upon him by the press and political opponents. Correspondence between the two indicates a strong personal friendship going beyond a mere political alliance and involving an exchange of gifts and social invitations to the Fox home.

58 O'Shaughnessy (n 3).

59 His second known involvement in a duel (see n 45 above).

60 Thomas Erskine (1750-1823), who, being the "son of a nobleman ... was entitled to a degree without examination", soon became a prominent junior lawyer in the 1770s. He was a leading member and later leader of the Bar in the 1780s, an associate and supporter of Fox, and gained further prominence defending radical politicians and activists in the 1790s (*cf*, eg, his involvement in the O'Connor treason trial discussed at n 67 below). He was Lord Chancellor from Feb 1806 to Apr 1807. On Erskine, see David Lemmings *sv* "Erskine, Thomas, First Baron Erskine" in *Oxford Dictionary of National Biography* (2004, online ed 2008, accessed 19 May 2014).

61 See O'Shaughnessy (n 3) for this. With O'Bryen's permission, Erskine fired the first shot but missed. O'Bryen then simply fired his pistol into the air. Erskine, relieved to escape unharmed (he had in fact had a will drawn up beforehand in anticipation of an unfavourable outcome), called O'Bryen a man of honour and likewise fired his second pistol into the air.

62 *Fox v Corbet*, reported in 22 Jun 1786 *The Times* at 3.

63 Fox, having lost to Lord Samuel Hood but having beaten Sir Cecil Wray and in the process having gained sufficient seats to become a member of Parliament, was barred from taking his seat until after an official scrutiny. (At the time, it was possible for there to be more than one member per constituency, eg, at Westminster there were two members, Fox with Hood in 1784-1788 and 1790-1797 and with Wray in 1782-1784.) Fox's barring was a delaying tactic by the Pitt government. After several months, the House of Commons intervened and voted to allow Fox his seat. Fox nevertheless sought recompense by bringing the civil action (see Foreman (n 41) at 156).

Many years later, in 1798, O'Bryen was heavily involved in two trials[64] that showed not only his Whig connections but also that he remained "a proud and patriotic Irishman with a fervent interest in promoting his country".[65]

The first was the political trial[66] of Arthur O'Connor[67] and four other Irishmen for high treason.[68] They appeared before the Court held under Special Commission at Maidstone, on 21 and 22 May 1798. At the time, United Irishmen were hoping to receive the help of France in a planned rebellion that ultimately proved unsuccessful. The indictment against the accused included three separate acts of treason: "compassing" the King's death; aiding and comforting the King's enemies; and persuading and engaging the French government and subjects to invade Britain with force. After two marathon sessions,[69] and having heard the evidence for the prisoners from a galaxy of liberal political luminaries – Fox, Sheridan, Erskine, Lord John Russell and Lord Thanet – the jury took just forty minutes to find one of the accused

64 O'Bryen, it seems, may have been personally quite familiar with litigation and may well have been the "Dennis O'Bryen" involved in the following legal proceedings (this information comes from the website of the National Archives (NA), Kew, available at *http://www.nationalarchives.gov.uk* (accessed 10 Apr 2014): (1) 16-19 Sep 1778, Henry William Smallwood, of Staple Inn, and Eleanor his wife (nee Perkins) releases [sic] Dennis O'Bryen, surgeon, of Norfolk Street, Strand: Robert Carter of Market Court, Covent Garden, witnesses the release (MJ/SP/1778/09/080: Middlesex Sessions of the Peace, Session Papers, Sep Gen Sessions, in the London Metropolitan Archives); (2) 1798, *Dennis O'Bryen & Ano v Mary Woodifield & James Speller* (C 12/1426/10 in the NA); and (3) 1800: *Dennis O'Bryen pltf v Francis Dashwood SMP dfdt* (C 13/480/4 in the NA).

65 O'Shaughnessy (n 3). O'Bryen's name is included in Samuel Simms "A select bibliography of the United Irishmen, 1791-8" (1938) 1 *Irish Historical Studies* 158-180 at 166.

66 One of many during the 1790s: see FK Prochaska "English state trials in the 1790s: A case study" (1973) 13 *J of British Studies* 63-82. They often concerned charges of seditious libel and were viewed by the Whigs as attacks on freedom of speech and the press (*idem* at 71 n 30, referring to a letter from Fox to O'Bryen).

67 Arthur O'Connor (1763-1852) was an Irish nationalist and from 1796 a leading member of the United Irishmen, a group planning their own revolution and seeking French aid for this. With Lord Edward Fitzgerald, he acted as an emissary and travelled to France in mid-1796. The result was an abortive landing of the French fleet at Bantry Bay. After being jailed for most of 1797, O'Connor was back in England in Feb 1798, en route to seek further French aid in support of an Irish revolution, but he was arrested with others on charges of treason. O'Connor had a long-lasting friendship with Sheridan and political connections among the Foxites, including with Fox himself. On O'Connor, see James Livesey *sv* "O'Connor [formerly Conner; later Condorcet-O'Connor], Arthur" in *Oxford Dictionary of National Biography* (2004, online ed 2013, accessed 29 May 2014).

68 See *R v O'Coigly, O'Connor, Binns, Allen & Leary* (1798) 26 State Trials 1191, (1798) 27 State Trials 1; also "Trial for High Treason ... Maidstone, Kent in 1798", available at *http://freepages.genealogy.rootsweb.anchestry.com* (accessed 29 May 2014). On how the trial was reported in the press, see CC Barfoot "Reporting a treason trial in 1798" (1994) 2 *Studies in Newspaper and Periodical History* 45-58.

69 Proceedings lasted sixteen hours on the first day (from 7 am to 12 pm) and more than seventeen hours on the second day (from 8 am to 2 am).

guilty[70] and the others, including O'Connor, not guilty. Although he attended the trial, it does not appear that O'Bryen testified.

O'Connor was immediately rearrested and held in custody for more than five years on other charges. His attempt to leave the Court on being found not guilty, viewed by the authorities as an attempt to escape being rearrested, was accompanied by a violent disturbance in the courtroom. O'Bryen was heavily implicated in starting this fracas and consequently charged, together with others, with inciting a riot and with a range of other misdemeanours.

R v Earl of Thanet, Ferguson, Browne, O'Brien & Thompson[71] was tried in the King's Bench on 25 April 1799 and was a high-profile affair. It involved several leading legal lights,[72] and was described, rather hyperbolically, by the attorney-general as concerning the commission of "an offence which appears to me to be one of the most heinous, the consideration of which has been offered, in the history of our law, to the decision of a jury".

There were a number of witnesses for the accused, including Sheridan.[73] With regard to O'Bryen, he stated that he knew him intimately and confirmed that he was "a strong man" who could, had he wanted to, have assisted O'Connor in escaping, but was instead arguing with the officials present.[74] From the evidence presented,[75] so

70 In the absence of mitigating circumstances, James O'Coigley (or Quigley), received the "usual sentence" for high treason and was executed near Maidstone on 7 Jun. The usual sentence, according to Barfoot (n 68) at 54, was for the prisoner "to be hanged, but not until he be dead; to be taken down while still alive, and then to have his heart and bowels taken out and burnt before his face; his head to be severed from his body; and his body to be divided into four quarters".

71 (1799) 27 State Trials 821 (KB). The accused were the Rt Hon Sackville Tufton, the ninth Earl of Thanet; Robert Ferguson, Esq, a barrister; Gunter Browne, Esq; Dennis O'Brien, Esq; and Thomas Thompson.

72 Counsel for the Crown included attorney-general Sir John Scott (afterwards Lord Chancellor Eldon), Mr Law (afterwards Lord Ellenborough and Lord Chief Justice of the King's Bench), Mr Garrow and Mr Wood (both afterwards barons of the Exchequer), and Mr Abbott (afterwards Lord Chief Justice of the King's Bench). Counsel for the defendants included Thomas Erskine (afterwards Lord Chancellor Erskine: see n 60 above), Mr Gibbs (afterwards Lord Chief Justice of the Court of Common Pleas), and Mr Best (afterwards a judge on the King's Bench).

73 Although some sources suggest that Sheridan may have organised the riot, others assert that it was his intervention (asking the judges why, if O'Connor had been acquitted, he was still being held) that restored order in the courtroom, an action that resulted in Sheridan's not being prosecuted with the others.

74 See at 924 of the report.

75 Eg, there was no evidence for the prosecution of any contact between O'Bryen and Thanet in court during the trial (*idem* at 837, 850-851), although he was present in the witness box, standing by Sheridan, Fox and others (*idem* at 862); and although O'Connor had on one occasion leaned on O'Bryen over the bar (*idem* at 839). He had also been present in court at the time of O'Connor's acquittal and had conversed with him (*idem* at 859), and had then enquired from the officials whether there was a (new) warrant against O'Connor after his acquittal (*idem* at 851); however, O'Bryen had left the courtroom just before O'Connor tried to make his alleged escape (*idem* at 865).

the defence argued, it appeared that although present, O'Bryen could not be proved to have been actively involved in any riotous acts.[76]

Although two of the accused were found guilty and two others were acquitted,[77] O'Bryen was found not guilty.

The end of his direct and active involvement with Fox and the Whigs was, however, not many years away. When the Pitt government resigned in February 1801, Fox "returned" to active politics. On Pitts' death in January 1806, he entered into an understanding with the Grenville faction of the Whig party, which took office as the "ministry of all talents" in January 1806, with Fox again being appointed as foreign secretary.

However, by then Fox was already ill and he died in September 1806. On the death of his friend and patron, O'Bryen wrote a letter to *The Times*, modestly putting himself forward by raising the prospect of his being asked to stand for election to the vacant seat in Westminster. He observed that "[a] fit successor to him, who is no more, one cannot expect; for his equal is not in the creation", but nevertheless claimed to be worthy of consideration as such "on the score of the connection that for twenty-five years bound me to the cause and service of that illustrious person".[78]

Nothing came of this. The Whigs were in power for only a few more months but by then O'Bryen had already secured another advancement from his Whig connections.[79]

On 30 August 1806, *The Times*[80] announced that Lord Howick[81] had appointed Denis O'Bryen, Esq, "to the office of Marshal of the Vice Admiralty Court of the

76 More specifically there was no evidence from his conduct in court of any evil design, much less of a concerted one with the other defendants. He was not implicated at all in the riot, nor concerned in any violence or disturbance whatsoever. In short, the defence suggested, as far as O'Bryen was concerned, "there is literally no proof to be answered" (*idem* at 883 and see, also, at 905).

77 Thanet was fined £1 000 and sentenced to one year's imprisonment in the Tower of London; Ferguson was fined £100 and imprisoned for one year, while Browne and Thompson were acquitted with the prosecution's consent. The conviction must be seen in the light of the evidence showing the riotous conduct of Thanet and Ferguson and the explanation by Lord Kenyon in his summing up for the jury. He observed that there was no doubt that O'Connor was not entitled to be discharged, because when a verdict of acquittal is entered, the judge may order the party in question to be detained and compel him to answer other charges that may have been brought against him (*idem* at 940).

78 17 Sep 1806 *The Times* at 2.

79 He had already received an annuity (1782), a pension (1783) and debt relief (early in the nineteenth century) from the Whigs for services rendered (see nn 39 and 53 above).

80 At 2.

81 Charles Grey, the second Earl Grey (1764-1845), known as Viscount Howick from 1806-1807 when he was First Lord of the Admiralty, and first elected to Parliament in 1786, became a member of Fox's Whig party (he supported Fox in the regency crisis 1788-1789), and later one of its leaders in opposition to Pitt. Grey entered the cabinet as the First Lord of the Admiralty in Feb 1806 despite his inexperience in naval affairs. It was in that capacity that he appointed O'Bryen as Admiralty marshal. On Fox's death in Sep 1806, he succeeded him as foreign secretary and

Cape of Good Hope". The report continued that when his lordship had communicated his appointment to O'Bryen, he enhanced its value by the assurance that O'Bryen owed it to "the particular request of Mr Fox, as a return for his long, zealous, and faithful attachment". The office was said, the report continued, to be of considerable emolument "and can be executed by Deputy". By the time O'Bryen gained entry into the *Dictionary of National Biography*, his appointment in 1806 "to the patent office of marshal of the Admiralty [sic] at the Cape of Good Hope, worth, it was said £4 000 per annum", was described as a "lucrative sinecure".[82]

Clearly O'Bryen's appointment as marshal of the Vice-Admiralty Court at the Cape of Good Hope was not an ordinary appointment involving his translocation to the settlement to take up his duties there. Some explanation of sinecure appointments and patent offices is therefore required.

4 Patent offices and colonial appointments

Until well into the nineteenth century, a "complex and unsystematic" system of patronage existed in respect of various public offices and positions in the United Kingdom.[83]

The system included not only the bestowal of honours (knighthoods, peerages, court appointments and nominations to various chivalrous orders), but also the nomination to salaried offices – so-called salaried patronage. Nominations were usually for life and were not revocable, at least not legally. They were for important posts involving the performance of serious and demanding duties, as well as the most glaring of sinecures.[84] Public servants were so appointed, often with no or inadequate qualification for their posts; they received little if any official remuneration or salary and derived their income from fees and gratuities levied on the public for the services

leader of the Foxite faction of the Whigs and hence also of the House of Commons, holding those positions until Mar 1807 when the Whig government resigned. During the "talents ministry", Fox had secured an earldom for Grey's father, Genl Sir Charles Grey (1729-1807). In Apr 1806 Grey himself adopted the "courtesy title Viscount Howick", which he used until his father died in Nov 1807, when he inherited the earldom as the second Earl Grey and entered the House of Lords. There he remained in opposition until his appointment as Whig Prime Minister in Nov 1830 after the resignation of the Duke of Wellington's government, a position he held until Jul 1834. He is the Earl Grey after whom the bergamot-oil flavoured tea blend was named. On Earl Grey, see, further, EA Smith *sv* "Grey, Charles, second Earl Grey" in *Oxford Dictionary of National Biography* (2004, online ed 2009, accessed 10 Apr 2014). On the involvement of the Grey clan in affairs at the Cape of Good Hope, see, further, n 175 below.

82 Cooper (n 36).

83 JM Bourne *Patronage and Society in Nineteenth Century England* (London, 1986) at 13. Much of what follows in the following five paragraphs is drawn from this source.

84 The term "sinecure" is derived from "*sine*" (without) and "*cura*" (care or duty) and refers to an appointment to a salaried office that involves little or no responsibility or active service or labour on the part of the appointee. Originally of ecclesiastical origin (a benefice without the obligation of caring for souls), it was later also applied to secular offices.

they rendered in the performance of their duties.[85] For monarchs and governments the system was a powerful means of distributing patronage or rewarding or securing political support.

There were, broadly, two methods of appointment: by Letters Patent under the Great Seal, or by Warrant under the King's Sign Manual.[86] An appointment to an office by the former method was referred to as an appointment to a patent office.

As from the end of the eighteenth century, hesitant and ineffectual steps were taken to suppress sinecures, reform the system of patronage, and transform the "civil service" in an attempt to eradicate maladministration and inefficiency.[87] Public pressure for reform was kept up by a series of *Black Books* and *Red Books*, the product of the radical press, authored anonymously by "A Commoner". These books were highly critical of complex, secretive and wasteful financial management and state expenditure and included a detailed list of "Pensions, Sinecures, Places, Compensation and Emoluments" in the United Kingdom and the colonies, as well as a financial review of the income and expenditure of the civil list, Britain's finances and debt, and Crown revenues.

The first pertinent step towards reform was the appointment of a House of Commons Select Committee on Sinecures in 1810, about which more shortly. It found that there were 242 sinecures in the Kingdom and the colonies. However, general legislative reform failed and a series of legislative measures dealt in piecemeal fashion with the issue. Nevertheless, by 1834 there had been steady growth in the numbers employed by the government in its executive department or "civil" service, and there were only 108 sinecures left, most of which were already destined for extinction in due course. By 1850, "[s]inecures had lapsed into irrelevance".[88]

Crown and government patronage, even if shorn of sinecures, its most objectionable feature, which continued to be the medium through which public services were recruited, slowly faded from public debate. By the mid-nineteenth century, increased regulation and re-organisation of the public service in the cause of efficiency came to restrain the free exercise of patronage. The result was the

85 Bourne (n 83) at 13-14.

86 This is explained by the guide entitled "Royal grants in Letters Patent and charters from 1199", available at *http://www.nationalarchives.gov.uk/records/research-guides* (accessed 27 Jun 2014) as well as by the several *Parliamentary Papers* referred to below. Letters Patent is a type of legal instrument in the form of a published, written order or proclamation by the Crown or government granting, eg, an office, right, property, monopoly, or title, to a private individual or a public body. The term (*litterae patentes*) refers to "open" or "accessible" letters (in the sense of writing or the letters of a word, and not in the sense of an epistle, hence "letters" not "letter' patent), as opposed to sealed and private letters (*litterae clausae*); letters readable by everyone in that the seal was attached pendent from the document and not "sealing" or "closing" it. Collections of royal Letters Patent were taken up ("enrolled": sheets of parchment were sewn together to form a continuous roll) in Patent Rolls.

87 Bourne (n 83) at 20-24.

88 *Idem* at 167.

appointment of those suitably qualified for office and hence "efficient" patronage.[89] By 1870 the "onslaught of merit" had seen the arrival of "open competitive entry".[90]

Included in the system of patronage and the list of sinecures produced in attaining these reforms, were various judicial offices.[91] They were likewise reformed in the first half of the nineteenth century,[92] as part of a broader reform of the judicial system generally.

Briefly, as far as the superior common-law courts were concerned,[93] numerous inferior offices in these courts were either absolute sinecures in that the appointee himself did no work but earned an income from fees generated by a deputy to whom his duties were delegated, or partial sinecures. Reforms were aimed at the elimination of judicial offices that were sinecures, and the introduction of a greater reliance on salary-based compensation as well as a regulation of the collection of, and a cap on, fees by the holders of such offices. These measures were introduced piecemeal, for instance by the Common Law Courts (England) Act, 1830;[94] the Court of Exchequer

89 *Idem* at 31; there was no advantage "in appointing an idle, incompetent, epileptic, aristocratic bastard to a post of real responsibility" (*idem* at 167).

90 CI Hamilton "John Wilson Croker: Patronage and clientage at the Admiralty, 1809-1857" (2000) 43 *The Historical J* 49-77 at 63.

91 For a description of how – slowly and "extremely burdensome and wearing to both protégé and patron", and with little if any political significance – the patronage system operated at the Admiralty, see *ibid*.

92 See James E Pfander "The chief of the court: Article II and the appointment of inferior judicial officers" (2012) Faculty Working Papers, Northwestern University School of Law, available at *http://scholarlycommons.law.northwestern.edu/facultyworkingpapers/224* (accessed 20 Jun 2014) at 13-18 for a succinct summary of the background to common-law courts. The following exposition is heavily reliant on this source. For the reform of civilian courts, see, eg, Wiswall (n 31) at, eg, 36, 41-42, 57-59 and 80; Anthony Hugh Manchester "The reform of the ecclesiastical courts" (1966) 10 *Am J of Legal History* 51-75; and RB Outhwaite *The Rise and Fall of the English Ecclesiastical Courts, 1500-1600* (Cambridge, 2006) at 104 *et seq*.

93 These were the Court of the King's Bench, the Court of Common Pleas, and the Court of the Exchequer. (Other courts included the Court of Chancery and various civil-law courts such as the various ecclesiastical courts and the Admiralty Court.) Officers of these courts received (1) salaries, paid by Parliament; (2) an income derived from fees (paid by litigants as part of the cost of litigation and irrespective of the outcome of litigation; by contrast, Admiralty judges' judicial fees depended on the outcome, and earned them a substantial fee when condemning a vessel as prize but less otherwise!); and (3) an income from the appointment of individuals to offices within the judge's "gift" or patronage, which grew with the length of the judge's service as offices became vacant and required re-appointment. Unless he decided to keep an office for himself as an additional income, a judge could either sell the relevant office(s) outright (bargaining with the purchaser in the expectation that the appointment to a sinecure would provide an annuity for the individual appointed), or he could appoint a member of his own immediate or extended family or his circle of friends to the post. It is estimated that the relevant chief justices and the Chancellor in particular earned quite considerably more from fees and patronage than from their direct salaries. See, further, Pfander (n 92) at 13-18.

94 11 Geo IV & 1 Will IV c 58. It regulated the receipt and future appropriation of fees and emoluments receivable by officers of the superior courts of common law. The object of the Act,

(England) Act, 1832;[95] the Lord Chancellor's Pension Act, 1832;[96] and the Superior Courts (Officers) Act, 1837.[97]

For present purposes, though, the focus is on the system of patronage in colonial appointments, including judicial patent offices.[98]

At the end of the eighteenth century, most senior colonial officials received no stipends or very small ones and were expected to live on fees levied on the public they served. The fee-earning colonial office was regarded as a form of property, which could be conferred by the Crown or the government on a subject or supporter.

according to the decision in *Clarke & Another v Richards* (1835) 1 Y & C Ex 351, 160 ER 143, was to provide the means of paying the officers of the various courts of justice by salaries instead of fees. See, also, the explanatory and amending Officers of Common Law Courts Act, 1831 (1 & 2 Will IV c 35).

95 2 & 3 Will IV c 110, which sought to better regulate the duties performed by the officers on the plea or common-law side of the Court of Exchequer. The measure was said in the decision in *Clarke & Another v Richards* (1835) 1 Y & C Ex 351, 160 ER 143 to be aimed at distributing the duties of the officers of the Court of Exchequer and giving them appropriate names.

96 2 & 3 Will IV c 111. Despite its (subsequently conferred) title, the Act also abolished certain sinecure offices (they are listed in s 1 and include offices of the keeper or clerk of his Majesty's Hanaper, the patentee of the Subpoena Office, the registrar of affidavits and ten other equally arcane ones) connected with the Court of Chancery. In terms of s 2, though, the Act was not to be construed to determine (abolish) any of these offices at the time held in possession or reversion by any person appointed to them before Jun 1832 until the death or resignation of that person. It was followed by the Lord Chancellor's Offices Act, 1833 (3 & 4 Will IV c 84) which provided for the appointment by the Crown of "competent" persons to perform the duties of certain of those abolished offices connected with the Court of Chancery as and when they became vacant, and also for current and future office-holders to be paid by salary in full satisfaction of their services and expenses incident in its performance.

97 7 Will IV & 1 Vict c 30. The preamble observes that the duties of many officers in these courts have wholly or in part ceased, or are executed by deputy, and that the offices have, because of changes in the law, become useless and inapplicable to present practices and proceedings, but that the fees in respect of those offices continue to be payable by litigants. Further, it noted that the continuance of sinecures and useless offices tends to impair the effective administration of justice and to impose unnecessary burdens and costs on the public and litigants in those courts. The Act therefore abolished certain offices in the superior courts of common law (they are listed in Sched A to the Act and the more than forty-five offices mentioned there include, in the Court of Queen's Bench, eg, those of the clerk of rules, the clerk of papers, the signer of writs, the clerk of declarations, the clerk of errors, the clerk of the outer treasury, and "the bagbearer to the *Custos Breviorum*"), and in the Court of Common Pleas as well as in the Court of the Exchequer, the offices of prothonotary (on the latter, see generally RW Bentham & JM Bennett "The office of prothonotary. Its historical development in England and in New South Wales" (1959) 3 *Sydney LR* 47-70). The Act made provision for a more effective and uniform appointment, at fixed salaries, of masters or principal officers of those courts to perform the duties and exercise the powers and authority connected to the abolished offices.

98 See, in particular, JH Parry "The patent offices in the British West Indies" (1954) 69 *English Historical Review* 200-225 which provides valuable background information on the patent office system as it operated in the colonial context. On patronage in the East India Company, see Bourne (n 83) at 180-185.

The monarch or government ministers regularly used their powers of patronage, at home and abroad, to gratify friends, clients and supporters.[99]

Appointment was without reference to the relevant colonial authorities – either the Colonial Office or the governor of the colony in question – by Letters Patent under the Great Seal. Further, the appointment could not be cancelled except for the gravest cause and by due process of law. In short, a colonial patent office appointment involved no fixed and secure salary but also no ready dismissal.

Nor could the Crown or government always ensure proper or even personal performance, especially in distant colonies. Appointees often arranged for the performance of any duties involved in the office by deputies, so that fee-earning offices in colonies became in effect life sinecures.

Colonial offices were often granted by Letters Patent[100] to men who had obligations or duties in England, had no intention of leaving England and residing abroad, and who performed their colonial duties by deputy. In 1821 the *Red Book*[101] observed sarcastically that "[m]any Honourable and Right Honourable Gentlemen fill the offices of clerks, harbour-masters, naval officers, tide-waiters, collectors, comptrollers, surveyors, &c. in places and countries which they have never seen except on the map, if they have seen them even there". Such deputies either retained a share of the fees of the office and remitted the remainder to their principal in England, or otherwise paid their principals a fixed annual lump sum, giving security for it and for the proper execution of the office.

Offices patented in the colonies covered a wide spectrum, several of them being judicial offices.[102] The only senior officials who remained, as a class, outside the system, were colonial governors and judges, who were appointed by Commissions under the Great Seal, received stipends and were not allowed to serve by deputy.

Clearly the system of patent offices had serious defects.[103] Neither the authorities in London nor the colonial governor and his administration could effectively control

99 Bourne (n 83) at 28 points out that colonial patronage and colonial appointments "were an important addition to the arsenal of ministerial patronage".

100 The procedure for appointing officials by Letters Patent was slow and complicated and involved the patentee in considerable expense, which he sought to recover, directly or through his deputy, from the collection of fees (see Parry (n 98) at 201).

101 *The Extraordinary Red Book: An Account of all Places, Pensions, Sinecures, Grants, &c ... to February 1821* 4 ed (London, 1821) at vii-viii.

102 For example, as appears from Parry (n 98) *passim*, in the West Indies the offices of colonial secretary, provost-marshal, clerk of the naval office, and chief clerk and registrar of the various courts were often patent offices.

103 For an informative decision on how the patent system operated, which also illustrated the many abuses that occurred in connection with it, see *R v Vaughan* (1769) 4 Burr 2494, 98 ER 308. It concerned an attempt to bribe a Privy Councilor (the Duke of Grafton, First Lord of the Treasury at the time) to procure a patent for the reversion of the office of the clerk of the Supreme Court of Jamaica. The Court referred to the office as one that "had been sold, devised, leased, and very badly executed by deputy" (at 2496, 309) and one that "is granted by letters patent under the

the appointment of patent officers or the manner in which they, or their deputies, executed their duties, let alone speedily remove the patentees or their deputies from their offices when that was desirable. Not only were incompetent persons appointed to the offices; they, in turn, often appointed incompetent and corrupt deputies to perform their duties locally. Furthermore, patentees themselves often had little control over or indeed any contact with their deputies. Business between them was increasingly handled by brokers, who charged a commission, for instance for obtaining the services of a deputy who was often merely the highest bidder for the appointment. Finally, patentees were usually well able to defend their privileges and profits against any complaints. They were often supported and defended by the relevant minister or governmental institution that had supported their appointment and had a vested interest in defeating colonial attempts to have patentees removed or controlled. Thus, the Lords of the Admiralty, who appointed Vice-Admiralty judges and court officials in the colonies, and the Commissioners of Customs who appointed customs officers there, could be relied on to support their appointees against gubernatorial censure.[104]

However, growing opposition in the course of the eighteenth century increasingly focused on the abuses inherent in the system such as the appointment of non-resident, absent patentee officers and the tendency of patent officers and their deputies to demand excessive fees for their services.

The first reaction to complaints and the first steps towards reform came in the form of the Colonial Leave of Absence Act, 1782.[105] It provided that every holder of a colonial office conferred by royal Letters Patent had to reside in the colony and perform his duties in person, unless he received leave of absence, which had to be granted by the governor of the colony.[106] However, the Act applied only

Great Seal of England" and therefore governed by the common law (at 2500, 311). In rejecting the defence's contention that "[t]he solicitation to take money for an office in the colonies, is no offence", and finding for the Crown that such an attempt was a misdemeanour at common law and punishable as such, Lord Mansfield thought (*ibid*) that even "[i]f these transactions are believed to be frequent, it is time to put a stop to them. A minister trusted by the King to recommend fit persons to offices would betray that trust, and disappoint that confidence, if he should secretly take a bribe for that recommendation". See, also, eg, *Blankard v Galdy* (1793) 4 Mod 215 and 222, 87 ER 356 and 359; (1794) Holt KB 341, 90 ER 1089; (1795) 2 Salk 411, 91 ER 356, concerning the purchase of the office of provost-marshal in Jamaica and the inapplicability of English statutes prohibiting such an act.

104 Parry (n 98) at 205.

105 22 Geo III c 75. It is also known as Lord Shelburne's Act; he was secretary of state at the time (see n 38 above).

106 Section 1 prevented the granting "in future" of any "Patent Office" to be exercised in any Crown colony for any longer term than during such time as the grantee or appointee discharged the duty concerned in person and behaved well in it. It referred to the practice of "granting offices in colonies to persons residing and intending to reside in Britain that had long been complained of in the colonies as causing inconveniences from a neglect of duty". In terms of s 2, if the patentee was wilfully absent without leave or neglected the duties of his office, the governor was permitted

prospectively[107] and excepted patents already issued. It was resented by those who could benefit by the system; loopholes were soon found[108] and the Act was rendered practically ineffective.

Consequently, the colonial patent office system expanded greatly during the last decades of the eighteenth and first decade of the nineteenth century. It had become an important political tool, frequently used to thank supporters and loyal party members. It was therefore, not surprisingly, increasingly the system's financial implications and its burden on public funds, rather than the abuses linked to it or its administrative inefficiency, which became the focus of those intent on reforming it.

In 1821, the *Red Book*[109] estimated that the value of sinecures in the colonies amounted to nearly £100 000 per annum, "exclusive of those in the Cape of Good Hope, the Isle of France and Malta, which probably amount to as much more".

It was also on the grounds of financial concerns that the first effective attack on colonial patent offices was launched.[110] The House of Commons Select Committee on Public Expenditure of the United Kingdom, appointed in 1806, produced a series of reports. Its third report of 1807 dealt with offices, places, sinecures and pensions,[111] but only in the United Kingdom itself.[112] This and the other reports caused the House of Commons to pass a series of resolutions calling for the abolition or reduction of such sinecures, although regard was to be had to existing interests. It set up a further select committee to consider what offices came within the purview of its resolutions.

This select committee, the Select Committee on Sinecure Offices, was again chiefly concerned with such offices in the United Kingdom itself. However, it

to remove him.

107 Section 4 made it clear that nothing in the Act "shall operate to the prejudice of any subsisting Grant of such Office or Offices".

108 For instance, appointments were made otherwise than by the specifically mentioned Letters Patent (eg, by the seal of the colony) so that they were not covered by the Act, or some high authority in London simply ordered the governor to grant the patentee leave of absence.

109 See (n 101) at vii.

110 The attack on sinecures in the political system, begun by Whigs in order to undermine the Tory King in the 1780s, eventually succeeded through the quite unobtrusive efforts of Tory governments in the nineteenth century (see Bourne (n 83) at 19-21 for considerable detail on the suppression of sinecures).

111 *House of Commons Select Committee on Public Expenditure, Third Report* (1807). This and all the other *Parliamentary Papers* referred to below are accessible online at *http://0-parlipapers.chadwyck.co.uk.*

112 It reported on various forms of patronage. It referred, at various places in its report to, eg, "an ambiguous and middle class, partaking in the nature of Pensions, in as much as no service is performed, but still ranking under the head of Offices, from the name of official business having been continued after the functions are become extinct and obsolete", that is, the appointed official was still remunerated although the functions and office had become obsolete. Such sinecures, it pointed out, were given as pensions ("to secure a honourable retreat"), or as an accompaniment to a peerage for the reward of personal service, and were difficult to distinguish from offices "such as are wholly or chiefly executed by Deputy".

also heard evidence concerning patent offices in the colonies and had before it the voluminous returns of those offices sent by colonial governors in accordance with instructions issued in 1808. This Committee's first report, in 1810,[113] mentioned the colonies in passing and observed that despite the residential requirement of the Act of 1782, the duties attached to many offices continued to be performed wholly by deputy. The patentees, it observed, "enjoy perfect sinecures".[114]

This Committee's second report, in 1811,[115] contained more detail on colonial patent offices, and on[116] colonial officers appointed by the Admiralty, most of whose duties were performed by deputy. These included, in the various colonial Vice-Admiralty courts, seventeen registrars and fourteen marshals,[117] most of whose duties were performed by deputies. The exact amount of their salaries or emoluments, which stemmed from fees and thus depended on the quantity of business transacted in the courts,[118] was unknown but, the Committee pointed out, it was clearly more than enough to remunerate the persons performing the duties of the office. The committee's third report, in 1812,[119] contained further detail on the about 100 colonial patent offices, many of which, including some important ones, were served by deputies.[120]

Although the evidence before the Select Committee on Sinecure Offices afforded the first clear and detailed account of the way in which the patent office system operated, the Committee did not recommend any specific action on colonial patent offices. However, its reports did draw public attention to the many abuses of the system, in particular the repeated evasions of the Act of 1782.

In 1814, after earlier failed attempts in 1812 and 1813, legislation was eventually passed to address the issue. The Public Offices in Colonies Act, 1814[121] sought to address the loopholes in the Act of 1782. First, it required the occupants of all colonial offices, in whatever way granted, to reside in the colonies concerned.[122] Next, it restricted and controlled the power of colonial governors to grant leave

113 *House of Commons, Select Committee on Sinecure Offices, First Report* (1810).

114 Since the income of these colonial offices arose altogether from fees payable in the colonies, the matter was not regarded as within the Committee's scope, which was aimed at reducing public expenditure in the United Kingdom, and it therefore did not make any recommendation to regulate or abolish them.

115 *House of Commons, Second Report from the Select Committee on Sinecure Offices* (1810-1811).

116 At 60.

117 See app 4 at 89-91.

118 I shall return to the information the report provided on the Cape Vice-Admiralty Court shortly (see n 132 below).

119 *House of Commons, Third Report from the Select Committee on Sinecure Offices* (1812).

120 The information on officers of Vice-Admiralty courts abroad contained in app 5 to the third report is essentially the same as that contained in app 4 to the second report.

121 54 Geo III c 61.

122 Section 1 referred to offices "granted, either by Patent under the Great Seal, or by Commission under His majesty's Sign Manual, or by any other Commission, Warrant or Instrument".

of absence by requiring governors, under threat of a financial penalty, to report on any leave granted to the secretary of state, who then had to confirm it.[123] It also required annual reports to be laid before the House of Commons on persons holding offices in the colonies who had been appointed after the passing of the Act but who were not present there to carry out their duties.[124] However, this Act too applied only prospectively and did not affect patent office holders appointed before it was passed.[125]

These strengthened measures ensured the proper enforcement, for the first time, of the requirement that colonial officials reside in the relevant colony and work for a living themselves. So successful was it that the patent office system almost disappeared from colonial appointments in the twenty years following its passage. No fresh patents of the old type were issued, and as existing patent holders died, the successors appointed had to carry out their duties in person. Nevertheless, appointees were still usually remunerated by fees rather than by fixed salaries.

In 1817, the Select Committee on Finance,[126] investigating the United Kingdom's income and expenditure and ways in which the latter could be reduced without any detriment to the public interest, referred to sinecures and the costs incurred "by the continuance of Offices, either wholly useless, or the Salaries of which appear disproportionate to their actual duties". In respect of colonial offices, it observed that it possessed insufficient information to be able to present a full picture.[127] Nevertheless, it thought that the general principles applicable in dealing with them appeared to be, first, enforcing the principal's residence and personal performance, and secondly, reducing remuneration to an amount that was fair and sufficient for the performance of services in the office.

In the years 1833, 1834, and 1835, further select committees were appointed to report on progress in the abolition of sinecures, in both the United Kingdom and the colonies. The first report[128] foresaw the imminent and natural end of the system. In the next year, it was recommended[129] that although very few patentees survived, the

123 Sections 2 and 3.
124 Section 4.
125 Section 5.
126 *House of Commons, First Report from the Select Committee on Finance* (1817).
127 For instance, on the value of such colonial offices, it pointed out that in some cases this depended on fluctuating fees, while for others there were incomplete returns. However, the Committee estimated the annual income then derived from such offices at between £90 000 and £100 000.
128 *House of Commons, Report of Select Committee on Sinecure Offices* (1833).
129 *House of Commons, Report from Select Committee on Sinecure Offices; with Minutes of Evidence and Appendix* (1834). Interesting, given the topic of this article, are the observations in this report (at 5-6) on the office of marshal of the Admiralty Court in England. The office, it appeared, was held by the then possessor under a grant during the pleasure of the Crown, while its duties, both of a constant and important nature, were almost entirely discharged by deputy. The Committee recommended that the office be immediately revised and the marshal be required to perform his duties in person. The remuneration from the marshal's office was derived from fees and varied

abolition of existing patent offices and the provision of a pension for official services in lieu of sinecures should be considered. The figures provided in the last report,[130] as in the earlier ones, clearly highlighted the demise of the colonial patent office system. In 1812, of seventy-one offices in the colonies, some were sinecures and in others, deputies performed the duties. By 1835, twenty-four had been abolished, thirty had been remodelled and new arrangements made, one was vacant and new arrangements for it were contemplated, and of the remainder, none of which was in any Vice-Admiralty court, only four were held by persons not resident in the relevant colony.

Thus, the system of colonial patent offices came to an end, and was replaced by a professional colonial service, staffed by salaried men who devoted themselves fully to colonial administration.

5 O'Bryen's appointment as Admiralty marshal at the Cape

Denis O'Bryen's appointment as marshal of the Vice-Admiralty Court at the Cape of Good Hope in 1806 was therefore a patent office appointment. Throughout the period during which he held the office, until his death in 1832, O'Bryen never visited, let alone resided at, the Cape,[131] but a succession of deputies performed the duties of the office. This much appears from various official sources, as well as from O'Bryen's own accounts.

As far as the former are concerned, the second report by the Select Committee on Sinecure Offices[132] in 1811 contains, in an appendix,[133] a list of colonial offices to which appointments had been made by the Lords Commissioners of the Admiralty, with an indication of whether the duties involved were performed personally or by deputy. In respect of the Cape, there is reference to "Dennis O'Bryen, Gentleman, Marshal, appointed 24 Nov 1806".[134] There is no entry for him under the heading

from year to year, sometimes falling short of a reasonable annual salary and at other times greatly exceeding that standard. It recommended that the marshal receive a fixed salary on a scale not more than adequate to ensure the discharge of the duties of the office by a competent person, and that the fees collected be paid over to a government fund. From an appendix (at 11) it appears that the "marshal and serjeant-at-mace of the Admiralty Court" referred to was Hugh Lindsay, appointed in 1815, and that the emoluments he derived from his office in 1833 amounted to £1 200, subject to the remuneration to be given to his deputy.

130 *Report from the Select Committee on Sinecure Offices* [*in the Colonies and into returns ordered in 1834*]; *with the minutes of evidence* (1835).

131 Even though Philip (n 9) at 307 refers to him as being a British resident there.

132 See n 115 above.

133 Appendix 4 at 89-91.

134 Also listed – as Admiralty appointees – are the Earl of Caledon (as Vice Admiral), Winchcombe Henry Hartley (as judge, also giving details of his salary: see n 9 above), William Grey (registrar, in respect of whom alone there was an entry identifying the deputy who executed his office: see

"by whom [office] executed; and the names of the deputies, where known", but that must be taken to mean that the relevant information was unknown to the Committee at the time, not that there was no deputy and that O'Bryen performed the duties personally.[135]

The *Red Book* published in 1821[136] contains information on sinecure offices connected to the Cape. It mentions "Denis O'Brien" as "Marshal, Cape of Good Hope" [*sic*] and notes that his salary was "believed [to be] about £800".[137]

More informative, though, are O'Bryen's own explanations of his appointment. They provide some insight into the surrounding circumstances and his appreciation of the office, the duties it entailed and the benefits it conferred.

further n 174 below), George Kekewick (King's advocate: see again n 11 above), and William David Jennings (King's proctor, appointed in Jun 1809). The information contained in app 5 to the Committee's third report a year later (see n 120 above) is identical, except that it mentioned that the office of King's advocate at the Cape no longer appeared in the latest return. It was further noted that although the Committee had been informed that several of the office-holders listed were at the time resident in the UK, it did not know precisely how many were, because information on residence or non-residence was not required in the returns from the Office of the Admiralty, a further possible explanation the lack of information on O'Bryen mentioned below (in n 135).

135 A footnote explains that whether the various offices were executed by the principal or by a deputy was known only in the instances so noted in the appropriate column, which were ascertained from returns from the respective Vice-Admiralty courts, and which returns were only periodic.

136 See n 101 above.

137 *Idem* at 190. Earlier editions – 1 ed (1816) and 2 ed (1817) – made no mention of O'Bryen. Other holders of Cape sinecures (not all of whom were necessarily non-resident there) included in the 4 ed were: (1) T Peregrine Courtenay, MP, secretary to the Board of Control, receiving an estimated £750 in respect of the office of agent [in the UK] for the Cape (at 103); (2) F Dashwood, receiver general at the Cape, earning £4 000 (see also Philip (n 9) at 88-89, mentioning that Francis Dashwood was married to Lady Ann, the daughter of the seventh Earl of Lauderdale, had arrived at the Cape in 1797, was receiver of revenue 1807-1819, president of the Lombard Bank 1808-1814, and collector of customs at Cape Town from 1819) (at 109); (3) James Nagle, suppressed deputy commissary of the Cape, earning £100 (at 187); (4) Lord Charles Somerset, governor, who earned an estimated £14 000; (5) R Spencer, vaccinating surgeon (Philip (n 9) at 397 has Richard Spencer as garrison surgeon at the Cape from 1806, surgeon to the governor's household from 1808, and vaccinating surgeon from 1811 until he left the Cape in 1817) (at 220); (6) JA Truter, who earned £6 000 as Chief Justice and £4 000 as president of the Orphan Chamber (at 232); and (7) "Mr Zeerogel, storekeeper", earning £1 500 (at 248). It must be borne in mind that the information contained in the *Red Book* was not always correct or complete. In respect of the last-mentioned appointment, eg, the reference is probably to Aegidius Benedictus Ziervogel (1762-1818), a Swedish immigrant, who was interpreter, translator and vendue master in the Cape Vice-Admiralty Court (and probably elsewhere too) from 1800 and again from 1807. He was the grandfather of EB (Egidius Benedictus) Watermeyer (1824-1867), later a judge in the Cape Supreme Court.

From a letter[138] to William Windham, at the time secretary of state for war and the colonies,[139] written on 11 October 1806, some two months after his appointment in August as Admiralty marshal, it appears that O'Bryen was not quite satisfied and obliquely asked for a further or better appointment in addition to or instead of that one.

He addressed the letter to Windham, although he realised that he obviously had an "abundance of clients for the widest range of your possible patronage". However, O'Bryen explained, the "peculiarities in my misfortune", including the expenses incurred in services rendered to Fox and his party over a period of many years, as well as his advanced age (of fifty-one years) which militated against his seeking a fresh career and fortune, left him no choice but to make such a direct request.

In support of his request for what he termed "proper recompense", O'Bryen referred in his letter to Fox's favourable disposition towards him and to the fact that he had made the same request to Fox[140] in February 1806. He pointed out, further, that "when Lord Howick gave me the office at the Cape" he had added that although Lord Grenville had nothing further to offer him at the time, as soon as something turned up he (O'Bryen) would have it.

As far as "the Marshalship of the Vice Admiralty Court at the Cape" was concerned, O'Bryen stressed that Lord Howick was aware that he was thankful for it, but "even his Lordship's good will cannot make the office better than its nature admits". The office, he pointed out, in time of peace offered little recompense and even in time of war its benefits were doubtful.[141] A better, but probably still inadequate,[142] appointment, he ventured to suggest, was to "a sister but superior office in the same court, that of Registrar", the income from which he had ascertained was greater.

138 This letter is included in app 1, item 2 at ii-viii in his *Narrative*, a pamphlet published around 1820 (see n 155 below for further details).

139 Windham held the post briefly from Feb 1806 to Mar 1807 in Lord Grenville's Whig government. Although he addressed his letter to Windham, O'Bryen suggested elsewhere (see app 4 at xviii-xix in his *Narrative*) that it was aimed "generally at the ministerial survivors of Mr Fox". He alluded in it to the fact that his repeated requests during the previous six months for an answer to his application had produced no response.

140 Also to others who, it seems, had forwarded the correspondence to Windham who had, in turn, asked O'Bryen to state his case. Fox, it should be remembered, died in Sep 1806.

141 O'Bryen was naturally aware that his income from the office depended on fees earned by the marshal and that the Vice-Admiralty Court's main business consisted in the exercise of its prize jurisdiction.

142 He explained that even "if the office of Marshal, inferior in every way, to the Registrar, were equal to the latter in emolument", which it was not, the prospect of getting rid of his financial burdens would not be good. The letter contains several references to his parlous financial state and to the fact that during the previous eight years his general body of creditors had "granted to me three suspensions of all claims", something that had occurred through the intervention of Fox and with the promise that on the change of government his (O'Bryen's) position would change for the better.

Not having had a response to his earlier request, despite having been assured verbally that the matter would be settled soon, O'Bryen again wrote to Windham some months later, on 10 March 1807.[143] He expressed himself "still in hope of a better sinecure appointment" and restated and expanded on his reasons for his request,[144] and also offered to meet with Windham in person.

O'Bryen's entreaties were to no avail. There were, it seems, other more meritorious or, probably, more influential candidates to be considered[145] and, in any event, the Whigs were soon out of office.

An aspect of his appointment that clearly troubled O'Bryen was the low financial return from it and the perception held by others that it was in fact a rather lucrative position, at a time when he constantly had to fight off creditors. In a letter to colonel McMahon, secretary to the Prince of Wales, dated 8 March 1809,[146] he wrote that "my patent office, given to me a few days before Mr Fox's death – this grand provision for a life of service, characterized by Mr Fox as 'admitting no competition on the score of merits' – this valuable appointment that was to sweep away the accumulations of near thirty years difficulties and to be the source of solace in approaching age, has yielded to me, in all, from the first hour to this day, no less a sum than *two hundred* pounds".

A further source of some importance in this regard is the evidence O'Bryen gave to the Select Committee on Sinecure Offices by way of a letter dated 31 March 1811 in response to questions the committee had sent him a few days before.[147] In a general introductory statement, O'Bryen explained that for his services to the government, he had "received in 1806, towards a compensation", the office of Marshal of the Vice-Admiralty Court at the Cape, and then somewhat sarcastically continued that although he had never foreseen that he would be "over-hauled for my treasures hence", he would nevertheless "in respectful obedience" answer the questions posed.

His answers seem to indicate that O'Bryen had but an imprecise idea of the nature of the office to which he had been appointed, but was fully informed of its financial implications. Questioned on the duties of the Admiralty marshal at the Cape, he merely replied that they were the same as, but of a lesser extent than, those

143 This letter is included in app 1, item 3 at viii-ix in his *Narrative* (see n 155 below).

144 He referred again to Lord Howick's statement on 12 Aug 1806 that as soon as Lord Grenville had something to give, he would give it to him (O'Bryen), a statement that was made on the very day after his Lordship had nominated him to the office of Admiralty marshal at the Cape and when he was engaged in sending him his thanks. He also mentioned a remark by Lord Grenville that (the by then seriously ill) Fox's mind should be freed from uneasiness on the score of O'Bryen as soon as possible.

145 In May 1807, the office of registrar of the Cape Vice-Admiralty Court was granted to William Grey (see further nn 134 above and 176 below).

146 It is included in Arthur Aspinall (ed) *The Correspondence of George, Prince of Wales, 1770-1812* vol 6 (London, 1971) at 371. I thank David O'Shaughnessy for this reference.

147 The questions and O'Bryen's answers are included as app 5 at xx-xxiii in his *Narrative* (n 155 below).

of the marshal of the Admiralty Court in Doctors' Commons. He explained that his health, age and private affairs did not allow him to perform any of the duties in person, but that he had availed himself of the power, expressly vested in him by his patent, of providing "a capable deputy". He stressed that that diminished "my own possible gains by a proportionate remuneration to my substitute". He had appointed his deputy himself and in reply to the question whether the appointment had been approved by anyone, he merely and, as will appear, quite prophetically, explained that the nature of this appointment made it probable that the Court "would disapprove of an incompetent delegate". In reply to the question whether he or his deputy had any custody of public money or records, O'Bryen could do no more than respond that he was not aware that any such custody constituted any part of the duties of the office, with the exception of records of the office business. Finally, he indicated that the deputy had given him security for the faithful execution of his deputation, but that he himself had never been asked to give any security.

In regard to the income earned from his office, he stated that neither he nor, as far as he knew, his deputy had ever received one shilling "under the name of salary" as the office did not come with a salary[148] and he was given to understand "that in peace it is not worth one farthing".

The total amount of all the emoluments he had received in the nearly five years since his appointment in August 1806, was £2 193 16s 3d, of which half had been retained by his deputy.[149] The emoluments of his office, he explained further, arose entirely from naval captures and not a shilling came from any other source. In addition, the capture of Mauritius in 1810 and the prospect of a Vice-Admiralty court being established there would ensure that his "office necessarily becomes in most strict and liberal sense of the designation, an office sine cura".

On 12 October 1820, at the time when he faced widely reported criminal charges of conspiracy[150] that had drawn no doubt unwelcome attention to himself, O'Bryen felt obliged to write a letter to the press correcting certain impressions created by earlier reports. One of these was that he held, or had held, "a sinecure place under the present government".[151] "The only office which I possess", O'Bryen explained, "is a colonial appointment, conferred upon me more than 14 years since by Lord

148 The income to be derived from it depended on the fees collected by the marshal, or his deputy, in the performance of his duties.

149 He pointed out that if the regulations introduced into the Admiralty Court in London (unjustifiably, in his view) had been in force during the whole period of his Cape appointment, he would have received less than £700. He further observed that the rights and perquisites of which his office had (contrary to the practice of all other Vice-Admiralty courts) been stripped, had been claimed by his representatives at the Cape, but whether anything would come of that claim depended on the outcome of litigation. I could find no evidence of any such litigation.

150 See, further, n 164 below.

151 See 12 Oct 1820 *The Times* at 3; the same letter had also appeared the previous day in the *Morning Chronicle* (see app 2 at ix-x of his *Narrative* (n 155) below).

[Howick] (when his Lordship was First Lord of the Admiralty), at the instance of Mr Fox".

However, the attacks continued.

In a reply to this letter the following day,[152] one Charles Pearson[153] seemed to suggest that O'Bryen's denial of holding a sinecure office was misleading. "As the place alluded to is a most lucrative situation, and as, if there are any duties belonging to it, they are, or ought to be, performed at the Cape of Good Hope – and as Mr Denis O'Bryen has enjoyed the benefits of the appointment for 14 years, and has not, I believe, been ever near the Cape – I should have conceived myself justified in calling the situation a sinecure place". Nevertheless, he then sarcastically begged O'Bryen's pardon for calling him a "sinecurist" and sought to correct his "error" by admitting that "he fully *earns* all that he *receives*".

On 17 October 1820, there was a personal attack on O'Bryen in the House of Commons,[154] again because of his pending conspiracy trial. In response O'Bryen, perceiving his social and political standing to have been damaged, resorted to his pen and to publication. By the end of November there appeared, in a severely limited run of only six copies, "further circulation ... [to] depend upon circumstances", a pamphlet entitled *A Narrative by Mr Denis O'Bryen, in consequence of the attack made upon him by the Hon HG Bennett, in the House of Commons*. For present purposes I need only focus on the two observations in it on his patent office appointment. O'Bryen explained that a few days after the death of Fox, on 13 September 1806, a political adversary but personal well-wisher of his in Pitt's administration "stated his regret at my position; warned me of certain disappointment from my post at the Cape; and advised me to ask for a particular situation which he described, being in the patronage of the Colonial Secretary of State".[155] This explains, therefore, his correspondence to Windham referred to earlier. Elsewhere[156] he refers again rather disparagingly to "my mockery of an office at the Cape" that he had wished to exchange for "something efficient".

152 See 13 Oct 1820 *The Times* at 3.

153 Who was involved as "the attorney in the cause" in the prosecution of O'Bryen for conspiracy (see n 164 below).

154 By Henry Grey Bennett (1777-1836), an active and radical Whig MP who was at the time involved in the Whig opposition's planned campaign against civil list expenditures and had obtained details of pensions and other benefits so granted. "He pointed to ministerial involvement in sanctioning the scurrilous letters and publications of Denis O'Bryen and others [Franklin] on the queen [Caroline]": see *http://www.historyofparliamentonline.org/volumme/1820-1832* (accessed 26 Jun 2014). For an account of the debate, see, further, *House of Commons, Parliamentary Papers, Hansard* 2nd Ser vol 3 cols 757-783.

155 At 21.

156 At 47.

Even in the year before his death, O'Bryen was still bitter about his appointment. In a letter in August 1831, he again observed that it had "turned out to be a mere mockery".[157]

Clearly, then, O'Bryen's patent office appointment as marshal of the Vice-Admiralty Court at the Cape was a great disappointment to him. He had expected, and had been led to believe, that he would receive something worth much more, an expectation no doubt supported as much by his own evaluation of the services he had rendered to the Whigs as by his always-dire financial situation. The fact that he had to defend this disappointment publicly only added insult to injury.

6 O'Bryen's later life

A recurring theme throughout his life was Denis O'Bryen's continuous financial distress. He perpetually struggled to escape from the clutches of creditors and by 1806 had already done so on three occasions.[158] In 1811 the Whig party had to provide him with financial relief[159] and in 1814 he appears to have landed in the Fleet insolvent debtors' Prison.[160] In May 1832, only a few months before his death, O'Bryen was again in court as a debtor. The newspaper report of his appearance describes him as someone who "had for many years been in the employment of Government" and who had received up to the last quarter of the Duke of Wellington's administration,[161] £1 400 a year, and from that time £500 a year, but who was now unable to account for the manner in which he had disposed of his property.[162]

O'Bryen continued to be indirectly involved in politics and a supporter of the Whig cause,[163] not always without serious consequences.

In February 1821 O'Bryen, together with one Franklin, was charged with conspiracy.[164] The charge involved the production and display of seditious handbills

157 See a letter dated 31 Aug 1831 to Lord Grey, BL Add MSS 51592 fols 53-54, referred to by O'Shaughnessy (n 3) n 13.

158 See n 142 above.

159 See n 53 above.

160 See the Fleet Prison returns to the House of Commons of 29 Jun 1814 where the name of "Denis O'Bryen" appears in a list of fees (being a "[c]opy of the printed table of fees hung up in the said prison") paid, since 10 Jul 1813, in the Fleet Prison by any person who at the time of the payment was confined there: see (1813-1814) *House of Commons, Parliamentary Papers* (320).

161 Wellington's administration resigned in 1830.

162 See 24 May 1832 *The Times* at 4. The report states that although there was some suspicion that a solicitor, Lomax, who had married O'Bryen's niece, had benefited from his connection with the insolvent, that could not be proved, nor could the insolvent's assertion that he had been the victim of a conspiracy.

163 See, eg, 4 Mar 1819 *The Times* at 3.

164 Details of the trial appear from George Henry Borrow *Celebrated Trials*, *and Remarkable Cases of Criminal Jurisprudence: From the Earliest Records to the Year 1825* vol 6 (London, 1825) at 435-443. For further information, see 2 Oct 1820 *The Times* at 3; 13 Oct 1820 *The Times* at 3; 18 Oct 1820 *The Times* at 3 (an editorial); 19 Oct 1820 *The Times* at 4; 28 Oct 1820 The Times at 3;

in 1818 and 1819. A warrant was obtained to search O'Bryen's house and on the evidence obtained from a billsticker, a warrant for his arrest was issued on 17 October 1820. Although he voluntarily appeared before a Bow Street magistrate on 18 October, O'Bryen was too ill to be questioned and the examination was postponed. After an indication that the charge against him might be dropped, the matter nevertheless proceeded and O'Bryen and Franklin were brought to trial on 21 February 1821.[165]

While the production and posting of the treasonable placards and Franklin's role were never in question, O'Bryen's involvement was. His defence admitted that while O'Bryen was intimately acquainted with Franklin whom he had received at home, one could not infer the required guilt from that circumstance alone.[166] Various public figures were then called on to testify to O'Bryen's character.[167] The jury speedily[168] returned a verdict of not guilty.

During the 1820s, O'Bryen remained a paid-up member of the Royal Society for the Encouragement of Arts, Manufactures, and Commerce.[169] For most of the latter part of his life, he resided at various addresses in Craven Street in the Strand.[170]

30 Nov 1820 *The Times* at 2; 22 Feb 1821 *The Times* at 3 (an abbreviated law report: *R v O'Bryen & Another*); and 23 Feb 1821 *The Times* at 3 (the full law report).

165 O'Bryen was charged with "conspiracy to excite sedition and disaffection against the person and government of his late and present Majesty; and in order to effect such conspiracy, for having published divers seditious and treasonable handbills and placards, from the year 1818 to the present period" and "conspiracy to vilify and disgrace certain persons who have been distinguished as friends of her Majesty during the late proceedings". Franklin was also charged with treason, but did not plead.

166 The evidence had simply not connected O'Bryen in any way with Franklin's conduct nor had it established any involvement in the production and display of the handbills. Mere knowledge, or even possession, of the placards was not proof of the required guilt or of a guilty connection. Further, the defence pointed out that one of the placards produced in fact contained a "gross attack on the character" of that great statesman, the late Fox, and observed that the jury was quite aware "that Mr O'Bryen had, for a long time, been intimately connected with Mr Fox, and honoured with his friendship. He had been, and still was, on terms of intimate acquaintance with many eminent men, friends of that great man".

167 These included the Duke of Bedford (John Russell, the sixth Duke of Bedford (1766-1839), Whig politician, MP for Tavistock 1788-1790, member of the "ministry of all talents" under Lord Grenville 1806-1807, and father of Prime Minister John Russell, the first Earl of Russell; Russell Square, WC1, was named after the earls and dukes of Bedford who owned the area in the eighteenth century); Lord Holland; Lord Erskine (see n 60 above); and Sir J Macintosh. However, these witnesses could only testify on their knowledge of O'Bryen as a member of the Whig party before 1806, "not having had any acquaintance with him for several years hence".

168 They did not even leave the courtroom but merely "turned round in the box" and consulted together for a few moments.

169 As appears from its annual *Transactions* during this period, from (1821) vol 39 up to (1831-1832) vol 48 where his name – "O'Bryen, Dennis, Esq, Craven-street" – appears in the list of contributing members.

170 For details, see GH Gater & EP Wheeler (eds) *Survey of London; Volume 18: St Martin-in-the-Fields; II: The Strand* (London, 1937) at 27-39, ch 4: "Craven Street and Hungerford Lane",

Ill[171] and insolvent, Denis O'Bryen, in life nominally the marshal of the Vice-Admiralty Court at the Cape of Good Hope, died at Margate on 13 August 1832 at the age of seventy-seven years. He is remembered not for his marshalship, but rather for his connection to Charles James Fox, one that ultimately brought him far less than he had expected and hoped for.[172]

7 Denis O'Bryen's rival and his deputies

Despite his none too subtle suggestions, O'Bryen was not appointed to the other and more lucrative patent office vacant in the Cape Vice-Admiralty Court at the time, that of registrar. The reason, or at least one of the reasons, was that Lord Howick, who as First Lord of the Admiralty had appointed him to the office of marshal in August 1806, had someone else in mind, someone close to himself and therefore, no doubt, if not more deserving then at least more "appropriate" and "entitled" to appointment as registrar. That someone was his own younger brother, William.

Charles Grey (1763-1845) was known as Lord or Viscount Howick from April 1806 to November 1807. On the death of his father, General Sir Charles Grey (1729-1807), and as eldest surviving son, he inherited the earldom and became the second Earl Grey.[173] He was a member of the prominent Scottish Grey family,[174] which had several connections with the settlement at the Cape.

A younger brother of Charles and third son of Sir Charles, Henry George Grey (1766-1845), was commander of the British forces and lieutenant governor at the Cape from 1807.[175] In May 1807, Charles Grey, Lord Howick, appointed another

available at *http://www.british-history.ac.uk* (accessed 10 Apr 2014). In 1820, in a letter to *The Times*, O'Bryen referred to his "42 years' residence in this street" (see 12 Oct 1820 *The Times* at 3). He appears to have left his final residence (at no 21) shortly before his death (see 24 May 1832 *The Times* at 4, referring to him as "late of Craven St").

171 At the time of the final insolvency proceedings against him, he was reportedly in "a state of apparent imbecility" (see 24 May 1832 *The Times* at 4).

172 His obituary in the (Jul-Dec 1832) 152 pt 2 *Gentleman's Magazine & Historical Chronicle* at 188-189 referred to him merely as "an intimate friend of the Rt Hon J Fox". O'Bryen's political correspondence was sold by auction a year or two after his death and appears to have ended up all over the world. For instance, an undated but autographed letter from O'Bryen concerning his duel with Erskine (see n 59 above) is housed in the Special Collections of the Florida State University Libraries in Tallahassee, Fl (see *http://fsuarchon.fcla.edu/inded* (accessed 9 Apr 2014)).

173 See, again, n 81 above.

174 See, generally, for what follows, William Courthope (ed) *Debrett's Complete Peerage of the United Kingdom* ... (London, 1839) at 172-173; Sir Egerton Brydges *Collins's Peerage of England* ... vol 5 (London, 1812) at 691-693; E Mackenzie *An Historical, Topographical, and Descriptive View of the County of Northumberland* ... 2 ed vol 1 (London, 1825) at 427-429; Paul David Nelson *Sir Charles Grey, First Earl Grey: Royal Soldier, Family Patriarch* (Madison, NJ, 1996) *passim*.

175 Henry George acted as governor from Jan to May 1807, before the arrival of the Earl of Caledon, and again from Jul, after Caledon's departure from the settlement, until Sep 1811, when Grey

younger brother, William, to the office of registrar of the Vice-Admiralty Court at the Cape.[176] William Grey (1777-1817), Sir Charles's sixth son, a lieutenant colonel in the army by 1803,[177] received his appointment as registrar from his elder brother in May 1807, such favouritism not going unnoticed, at least in later years.[178]

William Grey occupied the office of registrar until his death in August 1817. Throughout the period of his appointment as registrar,[179] there was always a deputy at the Cape who performed his duties for him. The deputy registrar from 1807 to 1813 was Henry Buckton,[180] and from 1813 to 1817 it was George Cadogan, who after that became registrar until 1837.[181]

returned to England (see, also, Philip (n 9) at 155). He should be distinguished from the unrelated Henry George Grey (1812-1898), governor of the Cape 1854-1861.

176 Another brother, Sir Charles's fourth son, George (1767-1828), a flag captain in the Royal Navy 1781-1804 and dockyard commissioner at Portsmouth for twenty-two years (1806-1828), was appointed marshal of the Vice-Admiralty Court at Barbados (see his obituary in (Jul-Sep 1828) 144 *Gentleman's Magazine & Historical Chronicle* at 371-372).

177 Nelson (n 174) at 152 observes that when only seventeen and already an army captain, William was created a naval officer of St Lucia through his father's influence and manipulation, which he exercised to advance all his sons' careers.

178 In *The Spectator* of 31 Dec 1831 at 35, in a piece entitled "Spectator's anatomy of the peerage" "Table IV: General view of the distribution of public money and offices among the peerage and its connections" contains lists showing "how the country may be said to have been occupied by the Aristocracy" and how relatives and connections of peers have taken possession of public money and offices, "both laborious and sinecure". The lists are stated to focus on "that patronage which emanates immediately from the Government". Concerning Earl Grey's family (at 39), "there have been in place" the father, Sir Charles Grey, governor of Guernsey; Sir George Grey, Commissioner of the Navy; Sir George Grey, Admiralty marshal of Barbados; and "the Hon W Grey, Principal Registrar of the Court of Admiralty, Cape of Good Hope".

179 In several sources he is described as being the registrar 1807-1808 and then the "principal registrar" 1809-1817 (see, eg, the listings for the relevant years in the *African Court Calendar*) and it is possible that he may in fact have been resident here for the first period: see Philip (n 9) at 155 according to whom he "may have arrived on 21 May 1807 in the suit of Lord Caledon in HMS Antelope".

180 Buckton was appointed a notary public, and deputy registrar and also (for a short period: see n 183 below) deputy marshal and examiner of the Cape Vice-Admiralty Court in Jun 1807, and in Mar 1810 he was appointed commissioner for appraisal and sale in the Court. In the second report of the *Select Committee on Sinecure Offices* (1811) (n 115 above), William Grey's office as registrar is stated to be "executed by Henry Buckton as deputy". Buckton returned to England in Mar 1814, but possibly not permanently as there is mention of a Henry Buckton as a proctor in the local Admiralty Court 1824-1835 and as acting procurator-general 1827-1835 (see Philip (n 9) at 45).

181 Cadogan is mentioned as a proctor in the Court 1809-1813. In Nov 1812, governor Cradock was instructed to recognise him as agent for American (prize) property at the Cape, but in Aug 1813 he was still awaiting his formal commission (see n 19 above). He was appointed notary public at the Cape in Mar 1817 (and had been so appointed in England in 1809) and opened his office at 33 Plein Street in partnership with Francis Lind (see Philip (n 9) at 49).

What, then, may be said about Denis O'Bryen's deputies at the Cape? Their brief story[182] is an example, if any were required, of the defects in the colonial patent office system, at least in those cases where the appointee was not resident in the colony in question.

First there was Henry Buckton. Although deputy registrar of the Court, it appears that Buckton also acted as deputy marshal for a short period from June 1807, maybe before O'Bryen could appoint someone to represent him at the Cape. He appears to have occupied the office until sometime in the following year,[183] when Archibald William Blane became deputy marshal. Blane occupied various offices at the Cape,[184] but will probably be best remembered for his role as deputy Admiralty marshal in the jurisdictional conflict that arose in the *Rosalia* matter in May 1808.

More interesting, and possibly the first deputy marshal appointed by O'Bryen himself, was William Bentinck. He, too, held various colonial offices in Cape Town and later became an influential figure in Cape affairs[185] until his return to England on

182 Background information about the appointments that follow were garnered from the entries of the personnel of the Vice-Admiralty Court under the headings "civil" or "judicial establishment" in the relevant issues of the *African Court Calendar* (1801-1826); the *South African Almanack & Directory* (1827-1839); the *Cape of Good Hope Almanack & Annual Register* (1840-1863); the Cape Town Directory (1865-1869); the *General Directory of the Cape of Good Hope* (1870-c1900); as well as from the *South African Commercial Advertiser* (1824-1856).

183 There is a reference (in a letter from Cradock to Lord Bathurst 17 Apr 1814) to irregular occurrences that took place in Aug 1808, under the Caledon administration, "wherein the name of Mr Buckton, the Deputy Marshal of the Court, is strongly mentioned", irregularities subsequently refuted by George Kekewich (see Theal *RCC* (n 5) vol 9 at 487-490 and n 12 above). Unless Buckton and his successor Blane's (possibly temporary) appointments as deputy marshal overlapped (or rotated?), the date Aug 1808 may be wrong, given Blane's involvement in the *Rosalia* matter in May 1808.

184 Blane arrived in Dec 1807, was immediately appointed as a clerk in the colonial secretary's office, took the oath as a sworn translator in Feb 1808 (see Theal *RCC* (n 5) vol 22 at 451-452), and was appointed in that capacity to the Court of Appeals in Feb 1811. He was also collector of stamp duties from May 1811. Blane left the Cape for Mauritius (where he occupied several governmental posts including those of collector of customs and government secretary: see, eg, *idem* vol 21 at 268) and thence moved to New South Wales where he became deputy governor of the Australian Agricultural Co. He died in Nov 1852, aged sixty-two years at Booral, Port Stephens (see Philip (n 9) at 32; "Blane, AW" at *http://thepeerage.com* (accessed 22 May 2014); and his obituary in 17 Nov 1852 *Maitland Mercury and Hunter River General Advertiser*, NSW, available at *http://trove.nla.gov.au* (accessed 22 May 2014)).

185 Bentinck arrived at the Cape from London in Dec 1808 (Theal *RCC* (n 5) vol 21 at 401) and served as auditor of accounts, later auditor-general, from that time (he was absent on leave for an extended period from 1812) until at least the end of 1827 (see *idem* vol 6 at 318 and vol 35 at 25). He was also the second member of the Council of Justice from Aug 1814 (see I Farlam "The origin of the Cape Bar" (Apr 1988) *Consultus* 36), and a member of the governor's Advisory Council from 1825 (see Theal *RCC* (n 5) vol 21 at 184-185). See, further, Philip (n 9) at 25.

pension in January 1833.[186] Bentinck served as deputy marshal in the Vice-Admiralty Court from 1809 until 1812.[187]

The last but most controversial of the four deputy marshals during O'Bryen's tenure was William James Birkwood. He was appointed to the office in March 1812 and as from 1815 was simultaneously the clerk to the collector of customs. This eventually caused problems for both Birkwood[188] and his principal in London, Denis O'Bryen.

In 1820, a shortfall was discovered in the public revenue "owing to the misconduct and peculation" of "Mr W Birkwood, a clerk in the office of the Collector of Customs".[189] Birkwood was prosecuted before the Council of Justice at

186 In Jun 1827, on being offered an (a further?) appointment?) as auditor-general at the Cape (at a much reduced salary), Bentinck, then "[o]f all the civil officers sent out from England ... the servant of the longest standing at the Cape establishment" (Theal *RCC* (n 5) vol 31 at 442-443), replied (from London) that his state of health was such that he could not accept. He had held the position for nineteen years and had also been a member of the Council of Justice (which was about to be abolished) for thirteen years, and a member of the Advisory Council since its establishment. He therefore expressed the wish to retire. His request was granted and he retired on pension (*idem* vol 32 at 14 and 36; Montgomery Martin (n 48) at 130, mentioning that Bentinck, the "late Auditor-General", received a pension of £500 in 1832).

187 An interesting aside to Bentinck is that he fathered illegitimate twins, Walter and Portland Bentinck, born 9 Dec 1815 (see "Walter Bentinck" *http://www.southafricansettlers.com* (accessed 23 May 2014); VC Malherbe "In onecht verwekt: Law, custom and illegitimacy in Cape Town, 1800-1840" (2005) 31 *J of Southern African Studies* 163-185 at 174). Walter jnr died shortly after birth while Portland was adopted by a local merchant Francis Shortt (himself an interesting and controversial figure as partner in the shipping firm Shortt & Berry (see, further, Philip (n 9) at 380 on his Cape business activities and on the partners' subsequent fate in Australia; see Barry John Bridges *Aspects of the Career of Alexander Berry, 1781-1873* (DPhil thesis, Univ of Wollongong, (1992)). Portland ("Polly") Bentinck, surnamed Shortt (1815-1885), settled outside Pietermaritzburg in Natal on a farm called Shortts' Retreat in the 1840s. The farm became an overnight stop on the ox-wagon route to Durban and became known as Polly Shortt's Place. It is still well known to South Africans as "Polly Shortts", a famous landmark on the Comrades marathon route (see the rather confusing description by Anne Lehmkuhl of the Comrades marathon and the Shortt family in *http://archiver.rootsweb.ancestry.com* (accessed 2 May 2014)). Francis Shortt should be distinguished from the Scottish military physician Thomas Shortt who was on St Helena at the time of Napoleon's death, attended his post-mortem autopsy in 1821 and drew up the official autopsy report on the cause of his death (see Ben Weider & Sten Forshufvud *Assassination at St Helena Revisited* (New York, 1995) at 231, 321, 386 and 395, and Arnold Chaplin *A St Helena Who's Who, or a Directory of the Island during the Captivity of Napoleon* (London, 1919) at 126).

188 On Birkwood, see Philip (n 9) at 28. On occasion he is referred to as Berkwood. Thus, the Vice-Admiralty Court's mandate, dated Mar 1821, which was addressed by registrar Cadogan to "William James Berkwood Esquire, Deputy Marshal of the Vice Admiralty Instance Court at the Cape of Good Hope", authorised him to serve a copy of the warrant of arrest issued by the Court on the captain of an East Indiaman suspected of having breached navigation and customs laws (see Theal *RCC* (n 5) vol 13 at 425-426 and 455-456).

189 There had been similar problems in that office before, eg in 1808 when a customs official had retained and used for the settlement of his private accounts, money collected as customs duties

the instance of the collector of customs Charles Blair[190] and was ordered to render an account and vouchers for the deficiency. The order was confirmed by the Court of Appeals in January 1822, but in September 1825 when he had not complied with it, Birkwood was condemned by the Council to civil imprisonment, with a view to the final resolution of "this long outstanding Case".[191]

Earlier Earl Bathurst, the secretary of state for war and the colonies, had called on Blair to make up the deficiency. Blair requested a delay so that governor Somerset could explain what had happened. It was also pointed out that it was uncertain whether the security he was required to provide to the amount of the deficiency could be furnished.[192]

Blair also wrote an explanatory "Memorial" to the Treasury in August 1826[193] in which he pointed out that he was being called on to make good a shortfall that arose from the delinquency of a clerk he had not nominated or appointed. He did not

after an express order to pay it in (see Basil James Trewin Leverton "Government finance and political development in the Cape 1806-1834" in (1961) *Archives Year Book for South African History* 291-359 at 313-314).

190 Blair was appointed collector of customs in Dec 1808 and served in that capacity and as port captain and harbour master until 1820 (see Philip (n 9) at 30-31). Blair himself was not above shady dealings and was in 1825 implicated by the Commission of Enquiry into the Cape in the exploitation for personal gain of the system of "apprenticing" and distributing among colonists the slaves "liberated" from slave ships condemned as prize by the Vice-Admiralty Court. Between Dec 1808 and Dec 1816, twenty-seven ships were thus arrested and brought before the Vice-Admiralty Court and more than 2 100 slaves were indentured as apprentices by Blair as collector of customs (see, further, Christopher Saunders "Liberated Africans in [the] Cape colony in the first half of the nineteenth century" (1985) 18 *International J of African Historical Studies* 223-239 at 224 and 226-227; Theal *RCC* (n 5) vol 19 at 273 and 279).

191 See the letter written on 8 Sep 1825 by the governor Lord Charles Somerset to Earl Bathurst (Theal *RCC* (n 5) vol 23 at 49-50).

192 See the letter by acting (from Mar 1826-Sep 1828) governor major-general Richard Bourke to Earl Bathurst, 11 Aug 1826 (*idem* vol 27 at 255-256), pointing out that it was uncertain whether on Blair's death any personal security would be available and that a stoppage of his salary, for which authority of the Treasury would be required, would be the only way to provide security. In another letter, dated 4 Aug 1826, Bourke had explained to Sir Richard Plasket, secretary to the government, that on leaving the colony for England (before Bathurst's letter arrived), Somerset had acquainted himself with every circumstance connected with the matter in order to fully explain Blair's position to both Bathurst and the Lords Commissioner of the Treasury on his arrival in London (*idem* vol 27 at 256-257).

193 See *idem* vol 27 at 257-258. Blair pointed out that on arrival after his appointment as Collector of Customs at the Cape in 1808, he had found a clerk and cashier "fixed as part of the establishment". On the death of that officer, the colonial government had named a successor, and on his retirement, it had appointed James Birkwood in April 1815. In November 1819, Birkwood admitted to Blair that there was a shortfall in the cash received from custom dues, in an as yet undetermined amount. Blair then immediately requested a special accountant to examine the books of the Customs House and to report on the amount of the deficiency. This investigation revealed that Birkwood had paid in less than he had collected and received; and that the deficiency amounted to 15 098 rixdollars, 4 skillings and 3 stivers in Cape currency.

consider himself obliged to do so, and the opinions of three eminent counsel (one of whom was the solicitor-general) confirmed his "irresponsibility". In this he was fully supported by the colonial government.[194]

Birkwood himself was dismissed from his customs office by a notice in the *Cape Gazette* on 19 November 1819, and someone else was appointed in his place.

That caused a problem for the colonial government, however, for Birkwood still held the office of deputy marshal of the Vice-Admiralty Court. The governor approached the Admiralty judge, George Kekewich, concerning the damage that might be done to the Court's name if it retained Birkwood in its employment.[195]

However, Kekewich realised that the crux of the problem was that Birkwood had not been appointed by the Court. He explained "that the Office of Marshal is a patent appointment and that by that Patent the Marshal possesses the sole Power of appointing his deputy". In these circumstances, he did not consider himself competent to remove an officer from the Court in which he presided and "against whom there exists no charge of delinquency".[196]

This left the local government in a quandary. Even if it believed that Birkwood ought to be removed as deputy marshal, it did not wish to interfere with the Vice-Admiralty Court "whose freedom from the control of this Government appears to have been recognized by the opinion of the Attorney General contained in [a] despatch to Lord Caledon" as long ago as March 1808. It was also not clear whether the colonial government itself could suspend the deputy appointed by the holder of a patent office, and if so in what circumstances.[197] It accordingly informed Kekewich in August 1826[198] that it had referred the matter to London for advice and instructions.

Some months later, in June 1827, the secretary of state replied that the Lord High Admiral, when the matter was referred to him, had ordered Birkwood's dismissal from his office of deputy marshal of the Vice-Admiralty Court at the Cape of Good

194 Thus, on 17 Nov 1826, with reference to a letter from Bathurst enquiring whether he wanted to make any representation on Blair's liability to make good the shortfall, governor Somerset replied that he had the strongest grounds for considering Blair to be "a gentleman of the most rigid honour and integrity" and that the deficit in question had "occurred solely from the dishonesty of a man who had the art to obtain Blair's fullest confidence which he basely betrayed" (*idem* vol 28 at 329-330).

195 See the letter of 22 Aug 1826 from Richard Plasket, government secretary, to Kekewich (*idem* vol 27 at 332) and the letter of 6 Sep 1826 from major-general Richard Bourke, acting governor, to Earl Bathurst (*idem* vol 27 at 330-331).

196 See the letter of 24 Aug 1826 from Kekewich to government secretary Sir Richard Plasket (*idem* vol 27 at 332). From this, it is not clear whether Kekewich would have removed Birkwood if there had been a charge.

197 See the letter of 6 Sep 1826 from major-general Richard Bourke, acting governor, to Earl Bathurst (*idem* vol 27 at 330-331). Bourke stressed, however, that in the Cape colony it would be "peculiarly inexpedient to retain a defaulter in the public service".

198 See the letter of 31 Aug 1826 from Plasket to Kekewich (*idem* vol 27 at 333).

Hope.[199] In London the Admiralty informed the Colonial Office accordingly,[200] and later also informed it "that it appears by a communication from the Marshal of the Vice-Admiralty Court at the Cape of Good Hope [ie, from Denis O'Bryen], that he will as soon as practicable dismiss Mr Birkwood from his office of Deputy Marshal of that Court, and appoint another in his room".[201]

Whether O'Bryen in fact ever did dismiss his deputy Birkwood, or whether the Admiralty's order in this regards sufficed, is not clear. A new marshal was appointed only in 1837,[202] another indication that at the time the Vice-Admiralty Court was certainly not very busy. Of Birkwood himself little is known, except that he died in July 1847 at the age of 68.[203]

8 O'Bryen's successors and the end of the Vice-Admiralty Court

After the patent office appointment of Denis O'Bryen came to an end on his death in 1832, some five years elapsed before the office of marshal of the Cape Vice-Admiralty Court was filled.

James Bance was appointed in July 1837 in the place of O'Bryen[204] and served as Admiralty marshal until 1852. He was a retired lieutenant in the Royal Navy[205] and had also been, from 1826, the port captain at Cape Town,[206] which was no doubt his main appointment. Married to the eldest daughter, Sarah, of influential local businessman and politician John Bardwell Ebden in 1828,[207] Bance was well connected until his death in 1866 at the ripe old age of eighty-four years.

199 See the letter of 6 Jun 1827 from secretary of state, Viscount Goderich, to acting governor Bourke (*idem* vol 30 at 441).

200 See the letter of 12 Jun 1827 from John Barrow, who was at the Cape from 1797-1804 and who was subsequently second secretary to the Admiralty 1804-1844, to RW Hay, who was permanent under-secretary in the Colonial Office from 1825-1836 (*idem* vol 30 at 524).

201 See the letter of 21 Jun 1827 from Barrow to Hay (*idem* vol 32 at 35).

202 Birkwood's name still appears as deputy marshal in the 1831 *South African Almanack*.

203 See Jul-Sep 1847 *South African Commercial Advertiser*.

204 The (Jan-Apr 1838) 25 (NS) *Asiatic J and Monthly Register* at 47 (in its Register) announced that on 20 Jul 1837 "lieut James Bance, RN" had been appointed to be marshal of the Vice-Admiralty Court of the Cape of Good Hope "in room of Mr Dennis O'Bryan dec. (appointed by Lords Commissioners of the Admiralty)".

205 See William R O'Byrne (ed) *A Naval Biographical Dictionary* (London, 1849) at 44 for his full naval career.

206 See Theal *RCC* (n 5) vol 23 at 493; vol 24 at 63 and 139; vol 28 at 491; vol 30 at 55-56 (where he is described as "zealous, active, intelligent and economical") and at 70 (where it is explained that on the appointment of Bance as port captain, the existing office of deputy port captain had been abolished altogether).

207 See *http://www.geneall.net* (accessed 22 May 2014).They had ten children. On Ebden, see Marian George "John Bardwell Ebden, his business and political career at the Cape, 1806-1849" in (1986) no 1 *Archives Year Book for South African History* 1-99.

Next came Daniel J Cloete, marshal for a brief period from 1853 until 1856, who was also, significantly, high sheriff of the Supreme Court.[208] Apart from his own judicial connection, Cloete's brother was Judge Hendrik Cloete while his daughter Janette married Mr, later Judge, Cole.[209]

Henry Walker, of whom little is known,[210] was the next marshal, until 1873. Significantly, during his tenure of office, there was again a deputy marshal, Samuel Bushell.[211] He was appointed in that capacity in 1864 and is mentioned until at least 1878.[212]

In 1874 another naval man, Jan Marthinus Hoets,[213] was appointed to the office, but appears to have served only until 1878. A well-to-do businessman at the Cape,[214] he was also involved in various shipping matters, for instance as a ship surveyor.[215] It

208 This may have been another step, or at least have aided, in avoiding the jurisdictional conflict between the two courts (see at n 22 *et seq* above). See further, eg, the advertisement of the sale of a ship, in execution of a Supreme Court judgment in Jul 1853, signed by "Daniel J Cloete, High Sheriff" (*http://archiver.rootsweb.ancestry.com* (accessed 26 May 2014)); (Apr-Jun 1854) *South African Commercial Advertiser* in which the marriage on 9 May 1854 is announced of the eldest daughter of "Daniel J Cloete Esq, High Sheriff of the Colony".

209 See F St LS "The Honourable Mr Justice Alfred Whaley Cole" (1935) 52 *SALJ* 1-11 at 10, referring to "Mr DJ Cloete, for many years Deputy Sheriff and brother of Judge Cloete and genl Sir AJ (Josias) Cloete". It is unclear whether our Cloete was the "DJ Cloete" whose insolvent estate resulted in litigation at various times. See *Ebden v Anderson* (1854) 2 Searle 64 (where the trustee of DJ Cloete's insolvent estate had transferred immovable property to the plaintiff in Jun 1851) and *In re Cloete, Ex parte Jones* (1881) 1 SC 85 (which concerned the insolvent estate of DJ Cloete of Cape Town, "since deceased", that had been surrendered as insolvent in Nov 1849, for which a discharge had been obtained in Oct 1850, and that again became insolvent in Dec 1870).

210 A daughter of "Henry Walker" was christened in Mar 1843 (see Jan-Mar 1842 *South African Commercial Advertiser*); his youngest son died in Nov 1855 (see Oct-Dec 1855 *South African Commercial Advertiser*); and *Walker v Executors Walker* (1874) 4 Buch 144 concerned an action to set aside and have declared invalid the will of "the late Henry Walker".

211 Bushell, who was born in Dover in 1811 (see *http://www.southafricansettlers.com* (accessed 23 May 2014)) and whose son was born in Jul 1854 (see Jul-Sep 1854 *South African Commercial Advertiser*), died on 27 Sep 1894 at the age of seventy-three (according to his gravestone in the Mowbray Old Cemetery, Cape Town (see *http://www.eggsa.org* (accessed 23 May 2014)). It is a statistical aberration, surely, that all five deputy Admiralty marshals at the Cape bore surnames starting with "B".

212 There is also mention of a WM Jennings as deputy Admiralty marshal in Port Elizabeth in 1872-1873.

213 Captain Hoets (1821-1881) was married to the daughter of John James Centlivres Chase, an 1820 British settler and attorney and notary at the Cape (see, further, *http://southafricansettlers.com* (accessed 28 May 2014) and (Sep-Dec 1836) 21 (NS) *Asiatic J and Monthly Register* at 117). There is a photo of Hoets and his wife at *http://www.myheritage.com* (accessed 27 May 2014).

214 He was, eg, Turkish vice consul in Simon's Town (see Tom Wheeler *Turkey and South Africa: Development of Relations 1860-2005* (South African Institute of International Affairs Report no 47, nd) at 4); and donated fish specimens to the South African Museum (see the *Catalogue of the Specimens in the Collection of the South African Museum. Part I: The Mammalia* (Cape Town, 1861) at 82).

215 Early in 1864, Hoets surveyed and wrote a report on the American Confederate bark *Tuscaloosa*,

may well have been that he accepted the appointment as Admiralty marshal at a time when his own business fortunes were on the wane.[216]

The last marshal of the Cape Vice-Admiralty Court, from 1881 until 1891, was Hugh Marchant Penfold, again a retired naval officer. A nautical assessor at the Cape and also port captain[217] for seventeen years, Penfold was a friend and roommate of Cecil John Rhodes.[218] He retired in 1896 for reasons of ill health.[219]

In 1891, the system of British Vice-Admiralty courts in colonial possessions came to an end. Vice-Admiralty courts were abolished and in most cases the local Supreme Court was endowed with Admiralty jurisdiction. This was in terms of the Colonial Courts of Admiralty Act, 1890[220] which was passed in July 1890 and which, with a few exceptions, came into force in every British possession, including the

the *Alabama's* tender and formerly a Union vessel *Conrad* captured as a prize by the *Alabama*. The bark and her equipment and cargo were controversially allowed to enter Simon's Town for repairs and supply (see my "The story of the CSS ("Daar kom die ...") *Alabama*: Some legal aspects of her visit to the Cape of Good Hope, and her influence on the historical development of the law of war and neutrality, international arbitration, salvage, and maritime prize" (2007) 13 *Fundamina* 175-250 at 201 and 207-210). The report, dated 13 Jan 1864, was forwarded by the US consul Walter Graham, who had appointed Hoets for that purpose, to governor Wodehouse (see US Dept of State *Correspondence concerning Claims against Great Britain* vol 4 (London, 1869) at 240-241). Ten years later, in *Gifford v Table Bay Dock and Breakwater Management Commission*, The *China* (1874) 4 Buch 96, Hoets gave evidence in a matter concerning the liability of the harbour board for a ship that had fallen off a patent slip. He declared (at 101-102) that he had "assisted at slipping a good many vessels at the Simon's Town patent slip". He conceded that nobody might have been to blame for the accident, but observed that "[s]hips ought to be insured against risks of this sort". See also *Poultney v Van Santen* (1874) 4 Buch 76, from which it appears that Hoets was a ship surveyor in Simon's Town.

216 See *Anderson & Co v Hutton & Co* (1875) 5 Buch 73, in which it appeared on the sequestration of his partnership with John Thomas Hutton in a shipping and landing agency, that Hutton had attended to the paper work while Hoets performed all the outdoor work; and where it was accepted that unlike Hutton, "Hoets honestly, diligently and labouriously [sic] attended to his department".

217 In which capacities he signed the findings of courts of enquiry held in Cape Town into marine accidents.

218 Penfold was born in London in 1840 (see *Armorial Families: A Directory of Gentlemen of Coat-Armour, 1905* vol 5 at 1073 available at *http://www.movaco.com* (accessed 14 Apr 2014)) and came to the Cape at an unspecified date (his second son was stillborn in London in May 1876, and he divorced his second wife in Cape Town in 1885). He shared quarters with Rhodes in Adderley St and taught him to yacht, and it was through Rhodes's intercession that he was appointed as port captain (see "Marchant Penfold (1): Genealogy" at *http://www.werelate.org* (accessed 14 Apr 2014); and "Marchant Hugh Penfold (1840-1902) – Genealogy" at *http://www.geni.com* (accessed 14 Apr 2014)).

219 Penfold suffered from asthma and Rhodes sent him to Kimberley to become a director of the De Beers Consolidated Mining Co. He was involved (trapped) in the siege of Kimberley (*ibid*). He returned to Cape Town where he died in Mar 1902 (see his gravestone in the Maitland Cemetery, available at *http://www.eggsa.org* (accessed 23 May 2014)).

220 53 & 54 Vict c 27. The Act is reproduced in (1890) *Cape JL* 241-252. See, generally, DG Scott "Admiralty jurisdiction in South Africa prior to 1983" (2002) 7 *Fundamina* 204-212.

Cape, on 1 July 1891.[221] As from the latter date, it abolished existing British Vice-Admiralty courts in the colonies,[222] including, therefore, the Vice-Admiralty Court of the Cape of Good Hope.

In the place of the abolished Vice-Admiralty courts came colonial courts exercising an Admiralty jurisdiction. They were to be called Colonial Courts of Admiralty.[223] These courts were part of the ordinary local judicial system – in practice they were the local Supreme Court or its equivalent – and as such independent of any Imperial control. In short, in 1891 the system of British Vice-Admiralty courts was replaced by one of local Admiralty courts.

As regards the Admiralty marshal, an officer of the local Supreme Court[224] then performed the relevant duties where the court exercised that jurisdiction.

Abstract

Denis O'Bryen's appointment as marshal of the Vice-Admiralty Court at the Cape of Good Hope in 1806 resulted from his political activism in England during the preceding decades. It must be understood in the context of the system of colonial patent office appointments that operated at the time.

221 Section 16. The exceptions were provided for in sched 1.

222 Section 17. Specific provision was made for pending proceedings and appeals. In terms of s 9(1), the power was retained lawfully to establish (or re-establish, in the case of abolished courts) ad hoc Vice-Admiralty courts "by commission under the Great Seal".

223 Section 2(1) of the Act provided that every court of law in a British possession which had been declared under the Act to be a court of Admiralty, or if no declaration was in force in the possession, every court with "original unlimited civil jurisdiction", would be a court of Admiralty. It would exercise the jurisdiction mentioned in the Act, and would in respect of such jurisdiction be referred to in the Act as a Colonial Court of Admiralty. Accordingly, in the Cape, where there was no such declaration, the Supreme Court became a Colonial Court of Admiralty when called upon to exercise its Admiralty jurisdiction.

224 Hercules Tenant, high sheriff of the Cape Supreme Court from 1889, was, somewhat belatedly but no doubt in response to the outbreak of the South African War, appointed in 1899 by the Court as marshal "under its admiralty jurisdiction" (see Anon "Mr Hercules Tenant, CMG" (1909) 26 *SALJ* 341-344 at 343).

SUETONIUS ON THE LEGISLATION OF AUGUSTUS (*AUG* 34)

David Wardle*

1 Introduction

In the course of writing a detailed literary and historical commentary on Suetonius' *Augustus* that gives due attention to the biographer's compositional techniques while illuminating his thought and the structuring of his material, I had to pay careful attention to Augustus' short and deceptively simple chapter on legislation. This article sets out the problems of legal and historical interpretation of the biographer's words. It also proposes a possible solution to these problems, based on a broad understanding of how Suetonius assembled his material and a specific study of the moral legislation that interested him.

Suetonius' treatment of the *vita publica* of Augustus contains a lengthy section on the emperor's achievements in the field of law and order.[1] He starts Chapter 32 with some of the major security issues facing the emperor in the mid-thirties BC and immediately after the civil wars. The latter part of Chapter 32 deals with various measures, most of which were contained in the *lex Iulia iudiciaria*, which were introduced by Augustus to improve the delivery of justice in Rome. Chapter 33 then presents a highly selective account of the emperor's own jurisdiction, which

1 The terminology chosen by JM Carter *Suetonius. Divus Augustus* (London, 1982) at 137.

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focuses on two cases heard before his own tribunal under the process *cognitio extraordinaria*.[2] This leads directly into the chapter at issue:

> *leges retractauit et quasdam ex integro sanxit, ut sumptuariam et de adulteriis et de pudicitia, de ambitu, de maritandis ordinibus. hanc cum aliquanto seuerius quam ceteras emendasset, prae tumultu recusantium perferre non potuit nisi adempta demum lenitaue parte poenarum et uacatione trienni data auctisque praemiis. sic quoque abolitionem eius publico spectaculo pertinaciter postulante equite, accitos Germanici liberos receptosque partim ad se partim in patris gremium ostentauit, manu uultuque significans ne grauarentur imitari iuuenis exemplum. cumque etiam inmaturitate sponsarum et matrimoniorum crebra mutatione uim legis eludi sentiret, tempus sponsas habendi coartauit, diuortiis modum imposuit*.[3] (He revised laws and sponsored some from scratch, for example laws on expenditure, adultery and chastity, bribery and what orders should marry. Because he had modified the last more severely than the rest, he was not able to carry it through in the face of the disruption caused by those protesting without in the end removing or reducing part of the penalties, allowing a three-year period of grace and increasing the rewards. Despite this, when the *equites* persistently demanded its repeal at a public entertainment, he summoned the children of Germanicus and exhibited them, taking some of them to himself and with others on their father's lap, by his gestures and expression indicating that they should not consider it a burden to imitate the example of the young man. When he realised that the force of the law was being evaded even by betrothal with immature girls and by frequent changes of wife, he shortened the period allowed for betrothals and limited divorce.)

Good though Carter's commentary is, it tells his readers what Carter thinks they ought to know about a given subject rather than illuminates or evaluates what Suetonius says. Of the three and three-quarter pages of Carter's commentary on Chapter 34 specifically, approximately half discusses the contents of the laws to which Suetonius did not refer, as well as Augustus' intentions with regard to the field of marriage and divorce law, an important topic for anyone studying the reign of Augustus, but again not what Suetonius is interested in here.[4] More recently, in an appendix to his excellent edition of Cassius Dio, Michael Swan provided a skeleton commentary on some lemmata from the chapter, which makes a useful contribution towards understanding Suetonius' version of a subject that Dio treats very differently in his essentially annalistic framework.[5] In his somewhat idiosyncratic piece in the

2 R Orestano "La '*cognitio extra ordinem*': una chimera" (1980) 46 *Studia et Documenta Historiae et Iuris* 236-247: in reality only *cognitiones extraordinariae* and *iudicia extraordinaria* existed.

3 The text is that of M Ihm *C Suetoni Tranquilli de vita Caesarum* (Leipzig, 1907), the standard text; the translation is my own, see D Wardle *Suetonius: Life of Augustus* (Oxford, 2014).

4 Other commentaries are either cursory (MA Levi *C Suetoni Tranquilli. Divus Augustus* (Florence, 1951) or antiquated in many details (ES Shuckburgh *C Suetoni Tranquilli. Divus Augustus* (Cambridge, 1896). The recent larger-scale work by N Louis *Commentatire historique et traduction du Divus Augustus de Suétone* (Brussels, 2010) has no detailed or up-to-date legal bibliography.

5 PM Swan *The Augustan Succession. An Historical Commentary on Cassius Dio's Roman History Books 55-56* (Oxford, 2004) esp at 369-371.

Aufstieg,[6] Leo Ferrero Raditsa rightly highlighted the gap that had emerged by the late 1970s between scholars of Roman history and those of Roman law, making each field harder to understand. From the perspective of the early twenty-first century, the position has improved, for example through the works of Jane Gardner, Thomas McGinn and Susan Treggiari, but their approach is not the historiographical one that I pursue here.[7]

A feature of both Suetonius' *Lives* and the *Historia Augusta* are sections that provide résumés of imperial legislation and illuminate the different authors' competence in dealing with an important aspect of the emperor's work.[8] Richard Bauman has identified two kinds of résumé, which he calls respectively "diffuse" and "concise", Chapter 34 being an example of the latter.[9] Appropriately in the *Augustus*, given that Augustus reigned at an early time in legislative development under the Principate, the emphasis is on *leges rogatae* rather than *senatus consulta*, *edicta*, *decreta* or *rescripta*.[10] Bauman conjectures that Suetonius had access to a comprehensive collection of Augustan legislation in the form of *commentarii* kept in the imperial library, of which Suetonius was putatively librarian before becoming Hadrian's *ab epistulis*.[11] However, this hardly fits in with the general pattern of Suetonius' reading, with its excerption of annalistic histories and use of contemporary sources whose names he parades before his readers.[12] What kind of material the

6 LF Raditsa "Augustus' legislation concerning marriage, procreation, love affairs and adultery" *Aufstieg und Niedergang der Römischen Welt* II 13 (Berlin, 1980) 278-339.

7 Eg, JF Gardner *Family and Familia in Roman Law and Life* (Oxford, 1998); TAJ McGinn *Prostitution, Sexuality, and the Law in Ancient Rome* (Oxford, 1998): *idem* "The Augustan marriage legislation and social practice: Elite endogamy versus male marrying down" in J-J Aubert & B Sirks (eds) *Roman Law as a Reflection of Social and Economic Life* (Ann Arbor, 2002) 46-93; and *idem* "Something old, something new ... Augustan legislation and the challenge of social control" (2008) 22 *Ancient History Bulletin* 1-32; SM Treggiari *Roman Marriage. Iusti coniuges From the Time of Cicero to the Time of Ulpian* (Oxford, 1991).

8 See RA Bauman "The résumé of legislation in Suetonius" (1982) 99 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung* at 81-127.

9 According to Bauman (n 8) at 84-86, Suetonius concentrates his references to *leges* in chapters 32 to 37, mostly treated in his "diffuse" way. Bauman conjectures (at 92-93) that the practice of résumé was known in the late Republic, although the lengthy ramblings of Dionysius of Halicarnassus on family law (2 24 7) are not a good model for Suetonius' practice; and the *periocha* of Livy Book 89, which postdates Suetonius, is no guide to the scale or treatment that Livy accorded Sulla's legislation. In practice, every annalistic historian who included legislation in his works will have had to précis and transform the legal material to meet the genre's requirements; the meagre fragments of the annalists do not permit us to say whether any writer from the Republic or Early Empire preceded Suetonius in treating legislation topically, rather than in its chronological place in his narrative.

10 Bauman (n 8) at 89-91.

11 For the best account of Suetonius' career, see GB Townend "The Hippo inscription and the career of Suetonius" (1961) 11 *Historia* 99-109.

12 See, eg, D Wardle *An Historical Commentary on Suetonius' Life of Caligula* (Brussels, 1994) esp at 62-63, and AF Wallace-Hadrill *Suetonius* (London, 1983) at 63-64, for the particular

annalistic historians could provide on Augustus' legislation, and how they scattered it throughout their narrative, is best demonstrated by Dio.

2 Suetonius' selection of Augustan moral legislation for discussion

As often in Suetonius, the first word of the chapter, *leges*, signals to the reader a change of topic, here from imperial first- and second-instance jurisdiction to *leges rogatae*. When dealing with a period of dominance as long as that of Augustus, fifty-six years by Suetonius' calculation, he could discuss much legislation, comprising perhaps as many as two hundred laws.[13] His opening phrase points to a clear differentiation between *retractavit* and *ex integro sanxit*.[14] The former category relates to laws covering subjects on which there had already been specific legislation: for example, there were several Republican *leges de ambitu*;[15] Sulla had initiated a *lex sumptuaria*, as had Caesar in 46 BC, and Sulla had probably sponsored a *lex de adulteriis et de pudicitia*, if Plutarch's mention of a law περὶ γάμων καὶ σωφροσύνης[16] is reliable. According to the jurist Paul, the *lex Iulia de adulteriis* began with an explicit abrogation of several earlier laws,[17] which suggests that it could be seen as *retractare*, even if the control that Augustus sought to exercise, in an area that had lain mostly in the hands of *patresfamiliae*, was novel. The formulation *quasdam ex integro sanxit* indicates three things: i) these laws were not numerous, ii) they were laws on a novel subject matter, and iii) Augustus was their *rogator*.[18] As far

exuberance of Suetonius' citations in the *Augustus*, displaying the biographer's expertise on the late Republic and early Empire.

13 B Biondi *Scritti Giuridici* vol 2 (Milan, 1965) 83 = *La legislazione di Augusto* (Milan, 1939). *Cf* Tac *Ann* 3 25 2: *multitudinem infinitam ac varietatem legum.*

14 *Cf* Vell Pat 2 89 4: *leges emendatae utiliter, latae salubriter*, for a similar distinction in the legislative programme of 28/27. See AJ Woodman *Velleius Paterculus. The Caesarian and Augustan Narrative* (Cambridge, 1983) at 255-256, who accuses Suetonius of "confusing detail", but himself causes confusion by giving retractare the same meaning as *emendare*. Swan (n 5) at 369 nicely translates the two verbs as "rework" and "enact".

15 On *ambitus* legislation, see J-L Ferrary "La législation *de ambitu* de Sulla à Auguste" in *Iuris Vincula. Studi in onore di Mario Talamanca* (Naples, 2002) 161-196.

16 *Comp Lys et Sull* 3 3.

17 Paul *Coll* 4 2 1-2. Even if this does not prove earlier legislation against adultery, but refers to *stuprum*, because regulations concerning *stuprum* and *lenocinium* were important elements of the *lex Iulia*, we are justified in considering the law as at least a partial *retractatio*. *Cf* G Rizzelli *Lex Iulia de adulteriis. Studi sulla disciplina di adulterium, lenocinium stuprum* (Lecce, 1997) at 270-271.

18 *Sancire* within the *Life* (*cf* 29 2, 35 3, 44 2) indicates a *lex* and points to Augustus' use of his tribunician power in the *concilium plebis*. However, Tacitus uses *sancire* of Augustus' role in introducing the *leges Papia Poppaea* (*Ann* 3 25 1: *de moderanda Papia Poppaea, quam senior Augustus post Iulias rogationes … sanxerat*). In *Res Gestae* (8 5: *legibus novi[s latis complura e]xempla maiorum exolescentia iam ex nost[ro usu reduxi*) Augustus makes a noteworthy claim

as we know, of all the laws passed during Augustus' reign, only a small proportion bore the emperor's *nomen* as *leges Iuliae*.[19] Each of the laws Suetonius lists by title does seem to be a *lex Iulia*, an interpretation shared by the Epitomator of Aurelius Victor, whose reworking of Suetonius reads *leges alias novas alias correctas protulit suo nomine*.[20] Whether only *leges Iuliae* are being discussed here is an issue of some importance for an understanding of the rest of Suetonius' passage; in particular whether any of the provisions that according to Suetonius were initiated by Augustus may stem from the *lex Aelia Sentia* or the *lex Papia Poppaea*, laws passed by the consuls of AD 4 and 9 respectively. In short, it is not possible to take a purist line on Suetonius' usual approach. For example, in his discussion on Augustus' actions concerning manumission, Suetonius attributes to Augustus the provisions of the *leges Aelia Sentia* and *Fufia Caninia*,[21] so we are not justified in restricting the contents of Chapter 34 to the *leges Iuliae* of 18/17 BC only.

Back, however, to the introductory sentence: the *ut* that introduces his list of laws makes it plain that Suetonius is being selective. It seems that the list contains four laws, his *et de adulteriis et de pudicitia* being the full title of what is generally known as the *lex Iulia de adulteriis coercendis*.[22] If this is the case, then only the

to *novae leges* (see H Bellen "*Novus status, novae leges*. Kaiser Augustus als Gesetzgeber" in G Binder (ed) *Saeculum Augustum* vol 1 (Darmstadt, 1987) esp at 308-309), which certainly includes all that Suetonius places in his second category, whatever conclusion we come to on the *lex de adulteriis et pudicitia* (see below). *Cf.* eg, Sen *Ben* 6 32 1: *pater legem de adulteriis tulerat*; Justinian D 48 5 1: *haec lex lata est a divo Augusto*. The striking use of *novae*, for once non-pejorative, suggests that Augustus envisaged his legislation as an entity (see McGinn "Something old" (n 7) esp at 3-4).

19 It is impossible to be precise, given the difficulty of deciding whether to attribute particular *leges Iuliae* to Caesar or Augustus, but the eleven *leges Iuliae* of Augustus posited by G Rotondi *Leges publicae populi Romani* (Hildesheim, 1967) 439-462, form a reasonable core and the right order of magnitude.

20 *Epit* 1 18.

21 *Aug* 40 4. This is a perfectly intelligible consequence of Suetonius' biographical focus and method and does not amount to error or slackness on his part. Were our knowledge of legislation under the empire more complete, further attributions of legislative actions to his subjects by Suetonius might be linked to specific procedures (*cf N* 10 1, the abolition of *vectigalia*).

22 In the *Codex Justiniani* there are two references by Domna and Proculus to a *lex Iulia de pudicitia* in a constitution of Severus Alexander from AD 224 (C 9 9 8-9), but the provision they cite appears to have been part of the *lex Iulia de adulteriis coercendis*. The paired *et*s, which are the only connectives in the list of laws, suggest either that Suetonius is giving the full title of the *lex Iulia de adulteriis et* [*de*?] *pudicitia* or that *et de pudicitia* is a feeble gloss on *de adulteriis*, perhaps reflecting a late version of the title (see Carter (n 1) at 142), of which there are several (see P Csillag *The Augustan Laws on Family Relations* (Bucharest, 1976) at 223 n 72). The full title is more likely, since *pudicitia* was a major concern of the law (*cf* A Mette-Dittmann, *Die Ehegesetze des Augustus. Eine Untersuchung im Rahmender Gesellschaftspolitik des Princeps* (Stuttgart, 1991) at 71). The suggestion of Fitzler and Seeck (*Real Encyclopädie* X 354) that Suetonius is referring to one compendious law is unacceptable. REA Palmer "Roman shrines of female chastity from the caste struggle to the papacy of Innocent I" (1974) 4 *Rivista di Storia*

fourth law, *de maritandis ordinibus*, is an example of Suetonius' second category.[23] All four laws can probably be dated to 18 and 17 BC: the *leges de ambitu* and *de maritandis ordinibus* are given that date by Dio;[24] a possible allusion in Horace's *Carmen saeculare* dates the *lex de adulteriis et pudicitia* to before the middle of 17 BC,[25] another allusion dates it at no later than 16 BC.[26] It is generally held that the *lex de adulteriis coercendis* follows logically on from the *lex de maritandis ordinibus*,[27] so that too seems definitely to belong in 18 or 17 BC. The *lex sumptuaria* is the hardest to date, since we know little about its contents, but a weak case has been made out for 18 BC, on the assumption that Augustus' alleged advice to Livia on dress and adornments, extorted by an eager senate according to Dio, reflect an earlier enactment on the subject.[28] The order in which the laws appear in Suetonius' list is probably not chronological,[29] but determined by the distinction between *retractare* and *ex integro sancire*. Thus the first three laws belong to the first category and the *lex Iulia de maritandis ordinibus* to the second.

3 The *lex Iulia de maritandis ordinibus*

Hanc, with which Suetonius then begins the most debated part of his discourse, one that takes up the rest of the chapter, refers only to the *lex Iulia de maritandis ordinibus*. Suetonius' handling of Augustus' legislation is thus highly selective, concentrating on one aspect of it. We can to some extent justify his choice because of all the new legislation, on which Augustus laid such emphasis in *Res Gestae*, the *lex Iulia de maritandis ordinibus* was the most striking in terms of what it attempted to regulate and the means by which it sought to do so. Moreover, whatever meaning we attribute to Suetonius' words, the frequency with which Augustus was compelled to return to the question of the *lex Iulia de maritandis ordinibus* marked it out as appropriate for particular discussion. Suetonius is not hamstrung by a need to present a flawless Augustus: indeed the *Life* presents examples of unacceptable behaviour not just on

Antica at 138-140 inferred a *lex de pudicitia* from Propertius' *lex sublata* (2 7 12), more plausibly related to a forerunner of the *lex Iulia de maritandis ordinibus* (see below), but there are no known parallels for such laws.

23 Swan's translation ((n 5) at 369) "he reworked the laws, enacting some afresh, for example …" is misleading in that it subordinates *sanxit* rather than according it equal prominence with *retractavit*; for *ex integro* to provide the correct contrast with *retractavit* it must mean "from scratch", and Suetonius' examples are not all from the second group.

24 Dio 54 16 1-2.

25 57-58. See Treggiari (n 7) at 277-278.

26 *Carm* 4 5 21-24.

27 See, eg, P Girard "Les *leges Iuliae iudiciorum publicorum et privatorum*" (1913) 34 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung* at 306 n 1.

28 See S Riccobono *Acta Divi Augusti* (Rome, 1945) at 198.

29 *Contra* Csillag (n 22) at 220 n 55.

the part of the young triumvir but also on the part of the senior statesman.[30] So here we need not be too surprised if the story Suetonius tells focuses more on Augustus' failure to achieve all his aims, on the ways his law was evaded and on the opposition it aroused than on its positive aspect.[31]

It was Paul Jörs who in 1893 first analysed most of the chapter dealing with the *lex Iulia de maritandis ordinibus*. He with great intelligence combined the evidence of Augustan poets with the more obvious historiographical and legal texts.[32] The influence of this work on more than one hundred years of classical scholarship has been traced minutely by Tullio Spagnuolo Vigorita.[33] He shows that English-speaking scholars were hardly influenced at all by Jörs' proposed chronology and its effect on their research on the *lex Iulia de maritandis ordinibus* and the *lex Papia Poppaea* was minimal.[34] This reluctance to interact with Jörs continues in the chapter by Susan Treggiari on Augustus' social legislation in the revised *Cambridge Ancient History* and in her important monograph on Roman marriage.[35] Needless to say, none of the modern commentaries on Suetonius' *Augustus* enters into any debate with Jörs or recognises the consequences of his views for the study of Suetonius. Richard Bauman's brief discussion of Chapter 34 disagrees in every respect with Jörs and fails to mention him,[36] while Michael Swan, whose commentary on Cassius Dio does engage fully with Jörs, denies that Suetonius makes any reference to Augustan marriage legislation of later than 18 BC. I shall attempt to present Jörs' arguments and evaluate them through a close examination of Suetonius and Dio, in the process clarifying Suetonius' references at each stage. The table that follows this article presents a synoptic view of the positions taken by Jörs, Bauman, Swan and myself on each element of Suetonius' argument.

30 See, eg, 27 4, 69 1.

31 I leave only to those who like to resort to psychology, the idea that the biographer whose marriage had proved childless (Plin *Ep* 10 94 2) and had to receive from Trajan a special grant of *ius trium liberorum* (Plin *Ep* 10 95) enjoyed highlighting the difficulties encountered by Augustus in pursuing his matrimonial legislation. In *Augustus* (eg, 35 1 54) Suetonius frequently mentions the obstructions faced by Augustus.

32 P Jörs "Die Ehegeschichte des Augustus" in *Festschrift für Theodor Mommsen zum fünfzigjährigen Doctorjübilaum* (Marburg, 1893) re-issued with lengthy introduction by T Spagnuolo Vigorita *Iuliae rogationes. Due studi sulla legislazione matrimoniale augustea* (Milan, 1985), a collection which also includes Jörs' doctoral thesis *Über das Verhältnis der lex Iulia de maritandis ordinibus zur Lex Papia Poppaea* (Bonn, 1882).

33 T Spagnuolo-Vigorita *Casta domus. Un seminario sulla legislazione matrimoniale augustea*[3] (Naples, 2010). The first edition was published in 1985.

34 The exception is T Rice Holmes *The Architect of the Roman Empire 27 BC-AD 14* (Oxford, 1931) at 151-152, who follows Jörs fully on the putative law of AD 4.

35 (n 5) eg, at 60-61.

36 (n 8) at 84-85.

4 Jörs' argument in favour of three stages of legislation

Jörs rightly asserts that Suetonius describes three stages of legislation, which he identifies as i) the *lex Iulia de maritandis ordinibus*, ii) a drastic revision of the *lex Iulia de maritandis* that Augustus failed to sustain, and iii) a less harsh form of the revision with smaller penalties, higher rewards and a three-year exemption, a measure that was successfully implemented.[37] By using Dio's extensive account of AD 9[38] Jörs creates a scenario for stages ii) and iii): in the spring (μετὰ τὸν χειμῶνα) Tiberius returned to celebrate his successes over the Pannonians, but at the victory celebrations put on by the consuls the *equites* demonstrated, demanding the repeal of the law concerning the unmarried *and* the childless.[39] Augustus responded to this by summoning the *equites* to the forum and addressing them in two groups, separating the minority who were married from the majority who were not. In the course of Dio's version of the address to the latter group Augustus, emphasising his own restrained and generous treatment of the *equites*, mentions two separate periods, totalling five years, during which his marriage regulations had not been implemented.[40] According to Jörs, the *equites* demonstrated when this period of grace (*vacatio*) came to an end, thus indicating a law passed in AD 4.[41] Augustus' response to the protest is set out in the immediate continuation of Dio's narrative:[42]

> ότε μὲν τοιαῦτα ἀμφοτέροις αὐτοῖς διελέχθη, μετὰ δὲ δὴ τοῦτο τοῖς μὲν τὰ τέκνα ἔχουσι τὰ γέρα προσεπηύξησε, τοὺς δὲ γεγαμηκότας ἀπὸ τῶν ἀγύνων τῷ τῶν ἐπιτιμίων διαφόρῳ διεχώρισε, καὶ ἐνιαυτὸν ἑκατέροις ἐς τὸ τοὺς πειθαρχήσαντάς οἱ ἐν τῷ χρόνῳ τούτῳ ἀναιτίους γενέσθαι προσεπέδωκε. τῶν τε γυναικῶν τισι καὶ παρὰ τὸν Οὐοκώνειον νόμον, καθ' ὃν οὐδεμιᾷ αὐτῶν οὐδενὸς ὑπὲρ δύο ἥμισυ μυριάδας οὐσίας κληρονομεῖν ἐξῆν, συνεχώρησε τοῦτο ποιεῖν· καὶ ταῖς ἀειπαρθένοις πάνθ' ὅσαπερ αἱ τεκοῦσαι εἶχον ἐχαρίσατο. κἀκ τούτου ὅ τε Πάπιος καὶ ὁ Ποππαῖος νόμος ὑπό τε Μάρκου Παπίου Μουτίλου καὶ ὑπὸ Κυίντου Ποππαίου Σεκούνδου, τῶν τότε ἐν μέρει τοῦ ἔτους ὑπατευόντων, ἐτέθησαν. καὶ συνέβη γὰρ ἀμφοτέρους σφᾶς μὴ ὅτι παῖδας, ἀλλὰ μηδὲ γυναῖκας ἔχειν· καὶ ἀπ' αὐτοῦ τούτου

37 Jörs (n 32) at 49-51.

38 For the enlarged scale and survival of most of the original, see Swan (n 5) at 223.

39 56 1 2: οἱ ἱππῆς πολλῇ ἐν αὐταῖς σπουδῇ τὸν νόμον τὸν περὶ τῶν μήτε γαμούντων μήτε τεκνούντων καταλυθῆναι ἠξίουν. Swan ((n 5) at 226) argues that μήτε τεκνούντων need not, as Jörs requires, refer to *orbi*, but to *caelibes*, who as a consequence of not being married do not have (legitimate) children, as Augustus mentions in his speech.

40 56 7 3: καὶ οὐδὲ ἐς ταῦτα μέντοι κατήπειξα ὑμᾶς, ἀλλὰ τὸ μὲν πρῶτον τρία ἔτη ὅλα πρὸς παρασκευὴν ὑμῖν ἔδωκα, τὸ δὲ δεύτερον δύο. ἀλλ' οὐδὲν οὐδ' οὕτως οὔτ' ἀπειλῶν οὔτε προτρέπων οὔτ' ἀναβαλλόμενος οὔτε δεόμενός τι πεποίηκα. Jörs notes credibly that the information on the two *vacationes* could not have been invented and that arguments attributed to Augustus on the danger posed by emancipations and foreigners were consistent with his reign and not with Dio's own time.

41 Spagnuolo Vigorita ((n 33) at 74-75) believably identifies this law as a *lex Aelia Sentia* separate from that *de manumissionibus*, passed in the first half of AD 4, verified directly only by a papyrus from AD 138 (*PMich* 7 438).

42 56 10 1-3.

> ἡ ἀνάγκη τοῦ νόμου κατεφωράθη. (Such were his words to the two groups at that time. Afterwards he increased the rewards to those who had children and in the case of the others drew a distinction between married men and unmarried ones by imposing different penalties; furthermore, he granted yet another year's grace to those who were remiss in either respect, in which to obey him and thus escape the penalties. Contrary to the *lex Voconia*, according to which no woman could inherit property to the value of more than one hundred thousand sesterces, he permitted some women to inherit larger amounts; and he granted the Vestal Virgins all the privileges enjoyed by women who had borne children. And thus was enacted the *lex Papia Poppaea* by Marcus Papius Mutilus and by Quintus Poppaeus Secundus, who were consuls at the time for a part of the year. Now it chanced that both of them were not only childless but were not even married, and from this very circumstance, the need for the law was apparent.)

Augustus outlined a series of proposals that were then enshrined in the *lex Papia Poppaea*, introduced by the suffect consuls in the second half of the year: i) increased rewards for those who had produced children; ii) a distinction to be drawn between the penalties imposed on the married who were childless and those who were unmarried;[43] iii) a further period of grace (*vacatio*) of one year for both groups before the provisions of the law came into effect; iv) the exoneration of women from the *lex Voconia*, which had restricted their rights to inherit and make wills; and v) the Vestal Virgins to be granted the privileges secured by women in terms of the *ius trium liberorum*. So Jörs' most important contribution is to have posited a law passed in AD 4 that increased the severity of the terms of the *lex Iulia de maritandis ordinibus*, so much so that Augustus was forced to make a series of concessions, which were incorporated in the *lex Papia Poppaea*. Because Dio's narrative for AD 4 is very abridged, there is no trace of the legislation in it, but every reference in Book 56 to earlier legislation is consistent with such a law.

Ostensibly greater difficulties arise when Jörs applies the framework that he has extracted from Dio's chronological work to Suetonius. He rightly asserts that two *cum*s, *hanc cum ... emendasset* and *cumque etiam ... sentiret*, provide the basic structure for Suetonius' discussion: the law that people tried to evade by extended betrothals and serial divorces was identical with *hanc*, namely the *lex de maritandis ordinibus*, for which he found confirmation in words from Dio's account of 18

43 According to Jörs ((n 32) at 55-57) this is the crucial piece of evidence: he argues that in our existing legal texts, punishment for the *orbi*, that is for the married men who had no children, is associated only with the *lex Papia Poppaea* (eg, Gaius 2 111, 286), not with the *lex Iulia de maritandis ordinibus*, so that the *equites*' protest against the punishment of *orbi* must refer to a law that predates the *lex Papia Poppaea* and which introduced a harsher penalty than the known prescription of the *lex Papia Poppaea: caelebs nihil, orbus dimidium capit.*

BC suggesting the same evasion.[44] The demonstration by the *equites* interrupts the logical flow of the argument.[45]

5 Evaluating Jörs' approach

I propose to consider, through a phrase-by-phrase discussion of Suetonius' account, whether it is Jörs' or alternative approaches that make best use of the literary, legal and historiographical evidence available and how that affects our view of the biographer.

Although the reference of *hanc* to the *lex Iulia de maritandis ordinibus* as enacted in 18 BC is undisputed, the meaning of the rest of the clause *cum aliquanto severius quam ceteras emendasset* and its relationship to the enacted law is wide open to dispute. Jörs has no problem in finding here a reference to a harsher law, but he rightly realises that, once the *cum* clause looks forward to legislation postdating the enacted *lex Iulia de maritandis ordinibus*, then *quam ceteras* becomes problematic, because there is no known reworking by Augustus of any of the laws in Suetonius' list other than the *lex de ambitu*.[46] He therefore considers that these words may be understood as *quam ceterae latae erant* or even be relegated to being a gloss on *severius*. Both these suggestions seem to me to be problematic. Rather, the reference may be taken as looking *backwards* in one of two ways. If Suetonius is saying that Augustus' proposed changes to republican practice in relation to what would become the *lex Iulia de maritandis ordinibus* were harsher than those in relation to *ambitus,* luxury or even sexual misconduct, then the difficulty disappears. Most scholars would agree that the *lex Iulia de maritandis ordinibus* affected more people, particularly the elite, more severely than, for example, the *lex Iulia de adulteriis coercendis*.[47] Alternatively, as Bauman and Swan do, we can take this to mean that Augustus circulated a draft text of the *lex Iulia de maritandis ordinibus* (and his

44 Jörs (n 32) at 37. Dio 54 16 7: ὡς δ' οὖν βρέφη τινὲς ἐγγυώμενοι τὰς μὲν τιμὰς τῶν γεγαμηκότων ἐκαρποῦντο, τὸ δὲ ἔργον αὐτῶν οὐ παρείχοντο, προσέταξε μηδεμίαν ἐγγύην ἰσχύειν μεθ' ἣν οὐδὲ δυοῖν ἐτοῖν διελθόντων γαμήσει τις, τοῦτ' ἔστι δεκέτιν πάντως ἐγγυᾶσθαι τόν γέ τι ἀπ' αὐτῆς ἀπολαύσοντα.

45 Bauman ((n 8) at 85: "irrelevant part") also acknowledges that the demonstration is inserted awkwardly by Suetonius.

46 (n 32) at 49-50; *cf* Csillag (n 22) at 33. With reference to 8 BC Dio (55 5 3) narrates changes to electoral practice that may plausibly be connected with heightened measures against *ambitus*. He does not, however, indicate if the measures of 8 involved a law. Tacitus' plural "ambitus Iuliae leges" (*Ann* 15 20 3) is not conclusive. Jörs sees in the vague reference of Aulus Gellius to an edict of *either* Augustus or Tiberius recorded by Ateius Capito (2 24 14: *esse etiam dicit Capito Ateius edictum – diuini Augusti an Tiberii Caesaris non satis commemini–, quo edicto per dierum uarias sollemnitates a trecentis sestertiis adusque duo sestertia sumptus cenarum propagatus est, ut his saltem finibus luxuriae efferuescentis aestus coerceretur*) a later exacerbation of the *lex Iulia sumptuaria,* but Gellius makes it clear that this edict was a loosening of the restrictions of the lex, not "eine Verschärfung".

47 See PA Brunt *Italian Manpower* (Oxford, 1971) at 560.

other laws) in 18 BC in order to elicit comment.[48] Dio mentions with reference to 27 BC but in a general context, that public comment was elicited regularly.[49] John Rich limits the consultation process to senators, positing that the senatorial advisory committee, Augustus' *consilium*, was initially set up to aid the formulation of the moral legislation.[50] Rich's exclusion of other input is unfounded, unless the *equites*' demonstration in AD 9 at *ludi* is taken as evidence that they had *no* other way of influencing legislation, rather than that such public demonstrations were highly effective. Indeed, Dio's contrast of ἔστι μὲν ἁ καὶ ἐς τὸ δημόσιον and τὸ δὲ δὴ πλεῖστον … would seem to exclude Rich's interpretation. Moreover, Augustus' publication by edict of the speech by Q Caecilius Metellus Macedonicus *de prole augenda*[51] in the context of the *lex Iulia* of 18 BC, if its appearance there in Livy's summary is reliable,[52] demonstrates wide promulgation of Augustus' justifications and, by easy extension, of the proposed measures themselves. Seen in this light *emendasset* can retain its regular sense of revise.[53] So far, then, the balance of difficulties probably lies against Jörs' understanding of *cum ... emendasset*, although his construction does enable us to see that *orbi*, whose *capacitas* to inherit was not affected under the *lex Iulia de maritandis* of 18 BC, were treated more harshly later.[54]

48 Jörs ((n 32) at 50 n 3) rules out any idea that Augustus had treated any of the material of the *lex de ambitu or sumptuaria* earlier. If Jörs means actual legislation, then as long as we cannot analyse the general statement by Velleius Paterculus (2 89 3) his assertion cannot be disproved. See Bauman (n 8) at 84, Swan (n 5) at 370.

49 53 21 3: οὐ μέντοι καὶ πάντα ἰδιογνωμονῶν ἐνομοθέτει, ἀλλ' ἔστι μὲν ἁ καὶ ἐς τὸ δημόσιον προεξετίθει, ὅπως, ἄν τι μὴ ἀρέσῃ τινά, προμαθὼν ἐπανορθώσῃ· προετρέπετό τε γὰρ πάνθ' ὁντινοῦν συμβουλεύειν οἱ, εἴ τίς τι ἄμεινον αὐτῶν ἐπινοήσειεν, καὶ παρρησίαν σφίσι πολλὴν ἔνεμε, καί τινα καὶ μετέγραφε.

50 JW Rich *Cassius Dio: The Augustan Settlement* (Warminster, 1990) at 154.

51 *Aug* 89 2: *populo ... per edictum saepe fecit.*

52 Livy *Per* 59.

53 The only other use of *emendare* in Suetonius is a reference to Domitian sending agents to Alexandria to transcribe and *emendare* manuscripts in Alexandria (*Dom* 20 1), which is not the sense required here. *Thesaurus Linguae Latinae* V 461 24-41 provides few useful parallels of *emendare* used with *lex*, notably Tert *Apol* 4 6: *errare in lege condenda ... Lycurgi leges emendatae; Claudian 8 505-6: priscamque resumunt / canitiem leges, emendantur vetustate / acceduntque novae*; CJ 6 51 1 1: *lex Papia ab anterioribus principibus emendata fuit et per desuetudinem abolita*. Here the main sense seems to be "revise", in the sense of "bring up to date", to suit a new situation. Swan ((n 5) at 370) insists that *emendasset* should be translated as "reform" rather than "amend", whereas Brunt ((n 47) at 559 n 1) notes: "I take this to mean that in Suetonius' view Augustus' law was an 'amendment' of earlier enactments." For its broader use in the *Digest*, see E Grupe *Vocabularium iurisprudentiae Romanae* vol 2 (Berlin, 1933) at 468-469, and in the *Codex Justiniani*, see R Mayr *Vocabularium Codicis Iustiniani* (Hildesheim, 1965) at 921-922.

54 See Swan (n 5) at 231. Dio confirms the legal texts.

6 Does Suetonius refer to legislation before 18/17 BC?

We have next to deal with *hanc ... prae tumultu recusantium perferre non potuit nisi adempta demum lenitive partium poenarum ...* . Bauman leaves open the possibility that the opposition expressed by Suetonius was to a piece of legislation known only from Propertius' elegies: *gavisa est certe sublatam, Cynthia, legem / qua quondam edicta flemus uterque diu / ni nos divideret*.[55] The date, nature and legal status of this measure have been the subject of prolonged debate: whether it belonged to the triumviral period or to the laws enacted by Augustus between 28 and 26 BC at the beginning of his principate proper; whether the measure was primarily financial or sought to regulate the right to marriage of free-born Romans, and whether the measure was a law that was fully enacted (*lex*), and then abrogated, or a bill that was merely promulgated (*rogatio*) but not passed. The key to the debate is the precise meaning of Propertius' *lex* and *edicta*: Badian, perhaps the most influential discussant of the passage in the English-speaking world, argued that Propertius was referring to a triumviral decision with the force of law that imposed financial penalties on the unmarried and that the expression *lex sublata* never refers to a withdrawn *rogatio*.[56] However, in non-legal texts the use of *lex* for *rogatio* is unexceptional and Caesar provides a pertinent example in which *sublata priore lege* means a bill withdrawn in the face of opposition.[57] Although Augustus was prevented from passing this law, he succeeded in transferring some of the clauses of his intended legislation into other measures that were passed in 27 BC: for example, career priority for those who were married and had children was enshrined in the *lex annalis* and/or the *lex de provinciis* of 27 BC.[58] Although the historicity of this earlier Augustan *rogatio* now seems beyond dispute, is this the *rogatio* that Suetonius refers to in *perferre non potuit*?

If that identification is to be accepted, the events of c 27 BC and those of 18/17 BC must in effect be seen as a single piece of legislative activity spread over a long period. The only clue to the duration of the process is *demum*. Unfortunately, Suetonius' usage is so varied as to provide certainty only in respect of the chronological sequence of events discussed.[59] Jörs himself takes *demum* to indicate a lengthy period, which he identifies as that between AD 4, when he believes Augustus enacted his

55 (n 8) at 84. Propertius 2 7 11-12.

56 E Badian "A phantom marriage law" (1985) 129 *Philologus* 82-98.

57 Caes *BCiv* 3 21 1. See P Moreau, "*Florent sub Caesare leges*. Quelques remarques de technique législative à propos des lois matrimoniales d'Auguste" (2003) 81 *Revue Historique de Droit Français et Étranger* at 461-467.

58 See Moreau (n 57) at 468-469.

59 Suetonius uses *demum* frequently (x 33) and sometimes with reference to a short period, eg *Aug* 10 4 of two days. Where there are no other chronological indications the periods in question, where they can be ascertained, may range from a few days (*Tib* 51 2, *Cal* 9) to a few months (*N* 2 3) or even to a year or more (*Iul* 23 1, *Ve* 2 2). Suetonius' other use of *demum*, simply to place events in a sequence may be most relevant here (*Tib* 61 1, *Cal* 38 3, *Cl* 5 1).

severe law, and AD 9, when the *lex Papia Poppaea* was enacted. However, the only protest against the putative law of AD 4 that resulted in changes took place five years after the *passing* of the said law, which is not the sequence that Suetonius envisages. Moreover, *perferre* naturally means "carry [into law]" and Suetonius must be taken to mean that the measure was not "carried into law" in the form Augustus wanted.[60] The most likely time when a *relatio* was withdrawn is the period leading up to the enactment of the *lex Iulia de maritandis ordinibus*, the nineteen months between Augustus' return to Italy in October 19 BC and May 17 BC.[61] This identification provides us with a context in which Augustus himself presented a *rogatio*, withdrew it in its original form, but persisted and passed a *lex* that bore his name (like the other laws explicitly mentioned by Suetonius), although it was not as severe as he had originally intended.

7 Dating Augustus' concessions

Nisi adempta demum lenitive partium poenarum et vacatione trienni data auctisque praemiis according to Jörs refers to the concessions that were incorporated into the *lex Papia Poppaea*, for the alternative view they were incorporated in the *lex Iulia de maritandis ordinibus*. In attempting to evaluate the differing arguments, we face two problems, firstly that Suetonius provides us with insufficient detail on the first and third concessions to enable us to know what he means, and secondly, the equally insurmountable problem that the legal sources providing the bulk of the detailed information on the *lex Iulia de maritandis ordinibus* (whether we take this as the law of 18 BC or that of AD 4) and the *lex Papia Poppaea* for the most part treat them as one law.[62] Likewise, to determine what might have been in the draft version of the *lex*

60 For Jörs it cannot mean "carry into law", because it is fundamental to his case that there was a *lex* (νόμος) in AD 4. It must therefore have a non-technical sense of, for example, "see through to completion" ((n 32) at 50: "Sueton spricht von einem zweiten, die *lex de maritandis ordinibus* verschärfenden Gesetz, und von diesem sagt er, Augustus habe es nicht *durchbringen* können"). Of the eight other uses of *perferre* in Suetonius none has even a vaguely legal sense (see AA Howard & CN Jackson *Index Suetonianus* (Cambridge Mass, 1922), so Jörs' view cannot be excluded on linguistic grounds, but remains improbable.

61 The *termini* are fixed: Augustus' return was commemorated formally on 12 Oct 19 BC (*Fast Amit*); a senatorial decree of 23 May 17 BC contains an explicit mention of the *lex Iulia de maritandis ordinibus* (*CIL* 6 32323 ll 57ff: *qui lege de marita<andis ordinibus tenentur>*).

62 Eg, Bauman (n 8) 85 n 9; Carter (n 1) at 143; Mette-Dittmann (n 22) at 162-165; and above all R Astolfi *La lex Iulia et Papia*[4] (Milan, 1996) esp at 15. Although Spagnuolo Vigorita ((n 32) at xviii-xix) rightly emphasises Jörs' achievement in his doctorate in differentiating the two laws, there are still large gaps in our knowledge. For a handy summary of the various ways the relationship between the two laws can be set out, see AM Kemezis "Augustus the ironic paradigm: Cassius Dio's portrayal of the *lex Julia* and *lex Papia Poppaea*" (2007) 61 *Phoenix* 274 n 14.

Iulia de maritandis ordinibus we would need to work backwards from the provisions of the enacted law.

Key provisions involving restrictions and penalties in the laws were: i) unmarried men aged between twenty-five and sixty and unmarried women between twenty and fifty could not receive inheritances outside the sixth degree of their agnatic family; ii) a disbarred heir had one hundred days in which to acquire a spouse; iii) divorcees within the age limits had six months, and widows a year, in which to remarry under the *lex Iulia de maritandis ordinibus* and twice as long under the *lex Papia Poppaea*; and iv) one surviving child exempted a man from the limitations of the law, and three surviving children exempted a woman. In theory the provisions relating to any of these four topics may have been more severe in the previous version of the legislation required by each view, but it is only in respect of the third provision that we know this was so.

The second specific concession, Suetonius' *vacatio trienni*, was linked by Jacques Cujas with Ulpian's testimony concerning the time within which the *lex Papia Poppaea* allowed a woman to remarry after the death of her husband.[63] His interpretation has been influential, as befits one of the greatest renaissance scholars, but requires an unnecessary emendation of Ulpian[64] and takes us too far from the original *lex Iulia*, whose provisions concerning the period allowed for remarriage are known to have been stricter than those of the *lex Papia Poppaea*. Rather this *vacatio* is a three-year moratorium, or period of grace before the provisions of the *lex* came into effect, a sufficient period for not only marriages but also the birth of children, in order to free couples and individuals from the law's restrictions. Jörs connects this with the three-year *vacatio* that Augustus in AD 9 claimed he had granted after the passing of an earlier law, that of AD 4.[65] The other view connects the *vacatio* with the *lex Iulia de maritandis ordinibus* of 18 BC.[66] Here it seems that Jörs has a stronger case, because the *acta* of the *Ludi Saeculares* contain a *senatus consultum* passed in May 17 BC, permitting those banned in terms of the *lex de maritandis ordinibus* to attend the *Ludi Saeculares*.[67] If a three-year *vacatio* had been incorporated in the law, as Suetonius' text would suggest, then there would have been no need for the Senate

63 J Cujas *Opera omnia* vol 1 (Turin, 1758) at 319; *Tituli Ulpiani* 14: *lex autem Papia a morte viri biennii* [*tribuit vacationem*]. The notion is still held by Treggiari ((n 5) at 73-74) and Mette-Dittmann ((n 22) at 132). Rich ((n 50) at 193) understands three years as the maximum length of an engagement.

64 Astolfi (n 62) at 84 n 59. For the standing of Cujas, see, eg, DR Kelley *Foundations of Modern Historical Scholarship: Language, Law, and History in the French Renaissance* (New York, 1970) at 112-115.

65 56 7 3: ἀλλὰ τὸ μὲν πρῶτον τρία ἔτη ὅλα πρὸς παρασκευὴν ὑμῖν ἔδωκα, τὸ δὲ δεύτερον δύο. See (n 32) at 57-58.

66 See *Real Encyclopädie* X 345; Carter (n 1) at 144; Swan (n 5) at 230-231.

67 *CIL* 6 32323 l 57: *magistri s(acris) f(aciundis) [ed]ent, s(ine) f(raude) s(ua) spectare liceat ieis qui lege de marita[andis ordinibus tenentur]*.

to pass a decree.[68] Moreover, all that Dio can find in the draft *lex Papia Poppaea* is a *vacatio* of one year.[69] To validate Suetonius' testimony, we would need to posit that either the actual *lex Papia Poppaea* contained a *vacatio* of three years or that Augustus subsequently authorised one.[70]

Suetonius discusses the third concession, relating to increased rewards, too briefly to allow us to reach any definite conclusion. The range of *praemia* available under the *lex Papia Poppaea* for the married who produced children was substantial: seniority in collegial offices for the married man with more children; advancement in relation to the *leges annales* for magistracies; exemption from the duty of guardianship or curatorship; the right of husband and wife to inherit from each other, and more than 25% of the amount secured by the *aerarium* for those who initiated prosecutions under the law.[71] Of these *praemia*, only the right of spouses to inherit from each other was probably extended in the *lex Papia Poppaea* and the financial benefits for *delatores* introduced.[72]

8 Identifying and dating the protest by the equestrian order

The next issue is the major demonstration by the *equites*:[73] Do Suetonius and Dio describe different protests and what their likely context is? If, as Swan appears to argue correctly from the similarity of language (*publico spectaculo* = θέας ἐπινικίους; *pertinaciter postulante equite* = οἱ ἱππῆς πολλῇ ... σπουδῇ ... ἠξίουν; *abolitionem* = καταλυθῆναι), Suetonius and Dio refer to the same protest by the *equites*, this incident

68 Swan ((n 5) at 370) argues that not *all* the law's provisions were subject to the moratorium. It would be surprising if the major penalties of the law were suspended, such as the restriction on inheritance, while minor penalties were left intact.

69 56 10 1: καὶ ἐνιαυτὸν ἑκατέροις ἐς τὸ τοὺς πειθαρχήσαντάς οἱ ἐν τῷ χρόνῳ τούτῳ ἀναιτίους γενέσθαι προσεπέδωκε.

70 Such a notice could have appeared in the lacuna in the narrative or in relation to urban affairs in AD 9 and 10. Certainly no reference to a *vacatio* survives in the epitomised versions, but they also omit any mention of the one recorded by Dio at 56 10 1.

71 Treggiari (n 5) at 66-75.

72 *Contra* Carter (n 1) at 144. Priority in the consular *fasces*, attributed by Gellius (2 15 4) to the *lex Iulia* and Ulpian (*Vat fr* 197) generally confirms that priority in magisterial *fasces* was covered by the *lex Iulia de maritandis ordinibus*; advancement in terms of the *leges annales* was *legibus cavetur* according to Ulpian, hence also covered by the lex Iulia; immunity from *tutela* for free women with three children goes back to 18 BC (Gaius 1 145), but for freedwomen with four children only to AD 9 (Gaius 3 44; Ulp 29 3); freedmen were exempted from the *operae* to their *patronus* in 18 BC if they had two children; the married woman who produced the requisite number of children could wear the *toga instita* from 18 BC.

73 Spagnuolo Vigorita ((n 33) at 106) wrongly understands Suetonius' singular *eques* to refer to an individual protestor, but where the biographer uses the singular without an accompanying adjective *Romanus* it refers unequivocally to the order of *equites* (often in contrast with the Senate) (*cf Cal* 26 4, *N* 11 1, 12 3, *Ve* 9 2, *Dom* 4 5, 8 3).

is linked by the clear chronological detail in Dio to the victory parades in honour of Tiberius' Pannonian success. This was celebrated in spring AD 9, before the passing of the *lex Papia Poppaea* at some time during the second half of the year when M Papius Mutilus and Q Poppaeus Secundus were suffect consuls. According to Jörs and Spagnuolo Vigorita, Suetonius had the *equites* protesting against the *lex Papia Poppaea* itself, even though it embodied concessions. Thus the biographer describes a later, different demonstration from the one referred to by Dio, who cannot be held to have dated his demonstration incorrectly.[74] According to Spagnuolo Vigorita, the demonstration took place during the one-year *vacatio* granted after the passing of the *lex Papia Poppaea* in the first half of AD 10.[75] Suetonius' testimony that Germanicus had many children suggests a date some time in AD 9.[76] Thus Augustus would have been able to refer to Germanicus as a perfect example, since Germanicus' marriage to Agrippina probably took place in AD 4 or in AD 5 at the latest, and was splendidly fertile. Jörs' argument that Germanicus did not return to Rome in time for the spring games depends solely on Dio's statement that Germanicus announced the final Tiberian victory over Dalmatia in late summer or early autumn, just before news of the Varus disaster reached Rome, but his presence in Rome earlier in the year is not excluded.[77] Suetonius' opening two words *sic quoque* may indicate where he believed the protests to have taken place. Swan argues convincingly that they must mean "despite this" or "even so", namely despite the concessions.[78] If, according to Swan, the concessions were included in the *lex Iulia de maritandis ordinibus* of 18 BC, Suetonius' reference to a demonstration, which he knew occurred in AD 9, to illustrate opposition to it, involves his "overlook[ing] the chronological leap",[79] and thus the demonstration becomes chronologically separate from the material on both sides of it. In Swan's view, Suetonius' treatment of Augustan legislation on marriage stops in 18 BC, and the law that features most prominently in the literary

74 (n 32) 52. So also S Demougin *L'ordre Equestre sous les Julio-Claudiens* (Rome, 1988) 573.

75 (n 33) 64-66, 77.

76 At this stage Germanicus had at least two children: his sons Nero and Drusus were born in AD 6 and 8 at the latest. Unless *partim ... partim* is rhetorical exaggeration for just two children, another child may well be indicated. Agrippina bore their sixth child Caligula in Aug AD 12; of the intervening three, the third and fourth children died *infantes* and the fifth Gaius survived a little longer (*Cal* 7). Only the third is likely to have been alive in spring AD 9, the baby Tiberius (*CIL* 6 888). See T Mommsen "Die Familie des Germanicus" (1878) 13 *Hermes* at 247-248; JW Humphrey "The three daughters of Agrippina Maior" (1979) 4 *American J of Ancient History* at 137 n 12; and H Lindsay "A fertile marriage: Agrippina and the chronology of her children by Germanicus" (1995) 54 *Latomus* at 6. Spagnuolo Vigorita ((n 33) at 61) conjectures that there may have been four living sons in the first half of AD 10, but the expression may also relate to just three sons.

77 56 17 1. See Swan (n 5) at 239-240 on the interpretation of ἐν τούτῳ (56 11 1) 248.

78 His paraphrase "even though the law was mitigated in this way, the *equites* …"; *cf* Jörs (n 32) at 51: "trotz der Milderungen". In addition to the parallels cited by Swan (*Aug* 78 2, *Tib* 65 2 and *Cl* 24 1); see *Iul* 70.

79 (n 5) at 370.

and legal sources, the *lex Papia Poppaea*, is totally ignored. If, however, the final two parts of Suetonius' discussion refer to the *lex Papia Poppaea* (or the *lex Aelia Sentia*), then the *equites*' demonstration is not isolated in the context of the rest of the chapter: Augustus is portrayed as responding actively and logically to the abuse of his legislation and firmly ignoring protest.

9 Augustus' final measures

Do the measures that Suetonius attributes to Augustus accord with what we know of the *lex Papia Poppaea*? Firstly, Suetonius says that when Augustus realised that men were evading the provisions of the law by entering into betrothals with immature girls, he reduced the period allowed for betrothals (*tempus ... sponsas habendi coartavit*). Dio's treatment of the topic appears inconsistent: for 18 BC he records an order that restricted betrothals to no more than two years and concludes that the minimum age for girls at betrothal was ten;[80] but in the speech he attributes to Augustus in AD 9, Augustus says that he has done nothing to prevent the betrothal of girls too young for marriage.[81] Treggiari argues that there was no restriction before the *lex Papia Poppaea*; Astolfi and Mette-Dittmann assert credibly that changes to the *lex Iulia* were included in the *lex Papia Poppaea*.[82] The latter law certainly set at two years the maximum length of a betrothal that would enable the parties to count as married, which entailed that the minimum age for a fiancée who helped the man evade the penalties of the law became ten years.[83]

Secondly, Augustus imposed some limitation on divorce (*divortiis modum imposuit*). This cannot refer to the number of divorces any man might initiate: "there is no evidence or likelihood that Augustus could restrict freedom to divorce", indeed Seneca complains about frequent and trivial divorces and Martial jokes about the frequent marriages of Telesilla.[84] It is likely that the regulations were tightened up in some way, although it is impossible to know what restrictions were introduced, given the brevity of Suetonius' comment and the absence of any relevant information in the legal sources. Some sources suggest that what is meant is that seven witnesses were needed for a divorce, which would have been a new form of divorce procedure.[85] Other sources refer to a restriction on freedwomen who wanted to divorce their patrons (surely a rare occurrence)[86] or measures concerning the dowry, for example

80 Dio 54 16 7.
81 Dio 56 7 2.
82 Treggiari (n 5) at 65; R Astolfi ("Il fidanzamento nella *lex Iulia et Papia*" in *Studi in onore di Eduardo Volterra* vol 3 (Milan, 1971) esp at 682-685; Mette-Dittmann (n 22) at 163-164.
83 If the testimony of post-classical jurists is relevant, the absolute minimum age for betrothals was seven (D 23 1 14).
84 Treggiari (n 5) at 453; Sen *Ben* 3 16 2-4; Martial 6 7.
85 Jörs (n 32) at 38; Astolfi (n 62) at 194.
86 Eg, E Levy *Der Hergang der römischen Ehescheidung* (Weimar, 1925) at 49-51.

permitting the husband to retain a part of the dowry when either the wife or her *paterfamilias* initiated the divorce,[87] or reducing the time allowed to the ex-husband to repay the dowry when he had initiated the divorce,[88] or limiting the time stipulated before a divorced woman had to remarry or lose the privileges of the married.[89]

10 Conclusion

If this examination of Suetonius' treatment of a key element of Augustus' social legislation has accurately identified the stages and measures that the biographer discussed, then it appears that Suetonius did not focus only on the legislation of 18/17 BC, but, appropriately, demonstrated Augustus' concerns and activities up to AD 9, when the *lex Papia Poppaea* was passed. If this is so then Suetonius' understanding of the provisions of the latter as a tightening up of the *lex Iulia* resembles that of Tacitus, who in a famously cynical survey saw the *lex Papia Poppaea* as a pernicious law that gave free rein to *delatores* and plunged all into terror.[90] The biographer, however, lets no shadow fall on Augustus – there are no comments on the continuing ineffectiveness of the marriage legislation. Rather he depicts the paradigmatic emperor as persisting in upholding traditional morality and above all the institution of marriage, although the weakness of others forced him to be less strict than he would have wished. Suetonius depicted Augustus as remaining resolute, citing examples of good moral conduct that could be followed and closing loopholes when he saw his own legislation being circumvented.

Suetonius	**Jörs/Spagnuolo Vigorita**	**Bauman**	**Swan**	**Wardle**
hanc … prae tumultu recusantium perferre non potuit	successor to *LIMO* (*lex Iulia de maritandis ordinibus*) of 18/17 BC	Final version of *LIMO* or the Propertian legislation	Final version of *LIMO* of 18/17 BC	Final version of *LIMO* of 18/17 BC
cum aliquanto seuerius quam ceteras emendasset	A putative *lex* of AD 4	Draft version of *LIMO* of 18/17 BC	Draft version of *LIMO* of 18/17 BC	Draft version of *LIMO* of 18/17 BC

87 See M Humbert *Le remariage à Rome* (Milan, 1972) at 136-137.
88 A Söllner *Zur Vorgeschichte und Funktion der actio rei uxoriae* (Cologne, 1969) at 117.
89 Treggiari (n 5) at 454.
90 See *Ann* 3 25 1. That Suetonius included among the creditable works of Nero (*N* 10 1) a reduction in the rewards payable to *delatores* under the *lex Papia Poppaea* may suggest a degree of coolness towards that aspect of the law, but no criticism can be discerned in the *Augustus.*

nisi adempta demum lenitaue parte poenarum	*lex Papia Poppaea*	*LIMO* of 18/17 BC	*LIMO* of 18/17 BC	*LIMO* of 18/17 BC
et uacatione trienni data auctisque praemiis	*lex Papia Poppaea*	*LIMO* of 18/17 BC	*LIMO* of 18/17 BC	*LIMO* of 18/17 BC
sic quoque abolitionem eius publico spectaculo pertinaciter postulante equite, accitos Germanici liberos receptosque partim ad se partim in patris gremium ostentauit, manu uultuque significans ne grauarentur imitari iuuenis exemplum	Protest in AD 9 against the enacted *lex Papia Poppaea*		Protest in AD 9 against the draft *lex Papia Poppaea*	Protest in AD 9 against the draft *lex Papia Poppaea*
cumque etiam inmaturitate sponsarum uim legis eludi sentiret, tempus … sponsas habendi coartauit	18/17 BC, shortly after *LIMO*	*lex Papia Poppaea* AD 9	18/17 BC shortly after *LIMO*	*lex Aelia Sentia* AD 4 or *lex Papia Poppaea* AD 9
et matrimoniorum crebra mutatione … diuortiis modum imposuit	18/17 BC, shortly after *LIMO*	*lex Papia Poppaea* AD 9	18/17 BC shortly after *LIMO*	*lex Aelia Sentia* AD 4 or *lex Papia Poppaea* AD 9

Abstract

The Emperor Augustus' so-called social or moral legislation features prominently in legal and historical discussions of his principate. His biographer Suetonius concentrates into one chapter a discussion of Augustus' *leges rogatae*, which has never been analysed phrase by phrase by any scholar of Roman history or law since Paul Jörs in 1893. This article sets out to explain how Suetonius orders his discussion, chooses precise vocabulary, highlights key stages in the legislative programme, and does not conceal opposition to the legislation. The most controversial law, on

which Suetonius centres his discussion, is the *lex Iulia de maritandis ordinibus*, key provisions of which were amended in the *lex Papia Poppaea* of AD 9. I argue that Suetonius comments not only on the *lex Iulia de maritandis ordinibus*, but also on later amendments, whether in the putative *lex Aelia Sentia* of AD 4 or the indisputable *lex Papia Poppaea.* There is, however, no reference to any abortive moral legislation of 27 BC. Suetonius presents an emperor concerned with major social issues, careful in the formulation of his laws, but also suitably responsive to societal pressure.

BOOK REVIEW

Tamás Nótári *Law and Society in Lex Baiuvariorum*

(Schenk Verlag, Passau, 2014, pp 288,
ISBN 978-3944850-25-2, Euro 39.90)

In this monograph, Tamás Nótári investigates certain legal and socio-historical aspects of the *lex Baiuvariorum*, but also gives ample space to a philological analysis of its Medieval Latin.

The first chapter (*Historical and social background − Bavaria in the eighth century*), examines Bavaria's history and society during the first half of the eighth century. Specifically, it deals with Bavaria's home and foreign affairs and church organisation, and certain issues pertaining to the structure of society, namely, the evolution of the Bavarian nobility and the *status* of freemen and slaves. It furthermore analyses the end of the independent Bavarian Dukedom, focusing on the dethronement of Tasilo III, the last duke of the Agilolfing dynasty, and the legal background of the dethronement.[1]

The second chapter deals with the history of the compilation of the *lex Baiuvariorum*; and more specifically discusses such issues as dating it; possible connections between the content of the narrative in the *Prologus* and the process of drawing up the code of laws; the significance of the first two titles of the code in terms of dating it; and problems relating to editing the *lex Baiuvariorum*. In the course of this discussion, with regard to the final version Nótári accepts Peter Landau's hypothesis that monks who compiled it must have belonged to the St Emmeram

1 On the philological aspects of the sources analysed in this chapter see, also, T Nótári *Bavarian Historiography in Early-Medieval Salzburg* (Passau, 2010) (hereafter Nótári *Bavarian Historiography*); T Nótári "An Early-Medieval 'Show Trial' – Tasilo IIIs Dethronement" in L Beck Varela, P Gutiérrez Vega & A Spinosa (eds) *Crossing Legal Cultures* (München, 2009) 141-158 (hereafter Nótári 'Show Trial').

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monastery located at the duke's seat in Regensburg; and that to date the compilation between 737 and 743 is supported by the ecclesiastical influence apparent in the *lex Baiuvariorum*, far exceeding that of Bavarian folk laws. At the same time, the author emphasises that it is almost impossible to draw any conclusions that are appropriate in every respect on the authenticity of the *Prologus*; in other words, its content can hardly enable us to date the code of laws accurately. He does, however, agree with Heinrich Brunner's hypothesis that certain parts of the *lex Alamannorum* and the first two titles of the *lex Baiuvariorum* may be traced back to a lost Merovingian statute. The first two titles of the *lex Baiuvariorum*, on the one hand, constitute an integral whole in terms of their structure and language and the manuscripts left to us, whilst on the other hand these titles and the provisions of the *lex Alamannorum* on the Church and the ruler clearly overlap. It is, therefore, possible that at least these titles were integrated as a single unit from the very start; since the editors of the code could hardly, every time the code was revised, go back to the statutes that were the sources of the first two titles, namely the *Codex Euricianus* and the *lex Alamannorum*.

In the third chapter (*Public and private law in the lex Baiuvariorum*) the author deals with issues of criminal law. In early medieval German laws a dogmatic distinction between criminal and private law was not apparent. The author starts by discussing issues of criminal law in an attempt to extract the "general provisions" (*allgemeiner Teil*) of the criminal law of the Bavarian *lex*. He defines the "special provisions" (*besonderer Teil*) and systematises the sanctions of the code. The section on the private law of the *lex Baiuvariorum* examines procedural law, family law, the law of property and the law of obligations – more specifically, issues concerning sale such as required formalities, validity and warranties. It also touches briefly on other contracts and discusses the law of inheritance as reflected in the sources.[2] In the next chapter the private and criminal-law position of slaves is analysed, with reference to issues of terminology, slaves as the subject of legal transactions, transactions entered into by slaves and the nature of *peculium*, damaging of *servi alieni* and the problems of sanctioning crimes committed by slaves.

The author then states that among German *Volksrechte* it is the *lex Baiuvariorum* that contains the greatest number of contractual provisions – and the most flexible ones, specifically with a view to the requirements of practice. Their prime aim indicated *expressis verbis* in the code is to ensure the continued validity of concluded contracts and the security of transactions. These Bavarian statutory provisions are mainly derived from Visigothic patterns; however, lawmakers did not copy them slavishly, but modified them in accordance with their own experience. With regard to provisions on slaves, it should be made clear that the *lex Baiuvariorum* (in spite of its significant contribution on this subject), as compared to other German folk

2 *Cf* T Nótári "Criminal law in *Lex Baiuvariorum*" (2013) 2/1 *Acta Universitatis Sapientiae Legal Studies* at 67-90; Nótári *Bavarian Historiography* (n 1) *passim*; Nótári 'Show Trial' (n 1) at 141-158.

laws, did not make any significant attempt to improve the position and acknowledge the humanity of persons deprived of their freedom. Thus it seems that the words *mancipium*, *servus* and *ancilla* may also be translated by the word *slave*, instead of the usual terms *servant* and *maidservant* that are further removed from the legal content.[3]

The fourth chapter analysed by Tamás Nótári deals with the language, sources and impact of the *lex Baiuvariorum*. The first section, which discusses the German linguistic elements of the code, focuses on the general characteristics of the German phrases of the *lex Baiuvariorum*; the problems of the *ex asse* Bavarian phrases of the text of the code; further (possible) Bavarian phrases; the scope of Bavarian personal names; expressions corresponding to the *lex Alamannorum*; terms that may be presumed to be of Bavarian origin, and other German phrases. An attempt is then made to draw conclusions from the foregoing discussion. Most of the German phrases of the *lex Baiuvariorum* appear in the text as ancient, extremely characteristic compounds: firstly, they explain or supplement the Latin text; secondly, they convey the appropriate Latin terms, with a German technical term usually constituting an independent part of the sentence*;* and thirdly, they appear as independent phrases with or without a Latin explanation. Several of the German phrases of non-Bavarian origin were borrowed from the *lex Alamannorum*. Certain words are also found in the *lex Salica*. However, it should be pointed out that several Salian Frankish terms, absent from the *lex Salica*, may be found in the *lex Baiuvariorum*. They may derive from later laws, *capitularia*. In addition, numerous words demonstrate the linguistic relation between the *Edictus Rothari* and the *lex Baiuvariorum*, whilst some words overlap only partially. Thus the question remains whether the scales should tilt towards borrowing or towards overlapping because of common German roots.

The analysis of the use of sources by the compilers of the *lex Baiuvariorum* touches on possible secular and ecclesiastical sources of the code, the Visigothic influence and the relationship to Alemannian laws, which make it possible to draw several conclusions. In analysing the sources of the *lex Baiuvariorum*, Nótári points out that the editors of the *lex Baiuvariorum* drew mainly from the *Codex Euricianus* and specifically the *titles De commendatis et commodatis*, *De ventitionibus*, *De furto* and *De terminis ruptis*. Except in the chapter on contract law, it cannot be determined to what extent the compilers of the *lex Baiuvariorum* made use of the *Codex Euricianus*. The editors of the *lex Baiuvariorum* made a conscious selection from the Visigothic prefiguration, and instead of slavishly copying, adapted parts to the circumstances of Bavarian life. However, they modified them with regard to several topics; in accordance, for example, with the *status* of the persons concerned. In respect of other sources, especially the *lex Alamannorum*, Nótári probably presumes that the two codes did not impact on each other, but rather that a common

3 See, also, T Nótári "Personal status and social structure in Early Medieval Bavaria" (2009) 50 *Acta Juridica Hungarica* at 85-110.

antecedent (presumably from the Merovingian period) was used by the editors of both codes. The canon law collections, which cannot be determined specifically, were also used as sources by the compilers of the *lex Baiuvariorum* according to their own needs; in other words, they tried to introduce passages from them into the fabric of the Bavarian code as organic elements.

In the next chapter, Nótári makes a comparative analysis of the factual elements of grave robbery, and considers to what extent elements of Roman law, canon law and especially German customary law are found in specific codes. In this context, the author also analyses the Gothic, Burgundian, Langobardic, Frankish, Alemannian and Bavarian laws. With regard to all these codices Nótári concludes that the formulation of the facts of the robbery or desecration of a grave and the related sanction in the *lex Baiuvariorum* may be traced clearly to Roman and canon-law roots and that neither the system of sanctions, nor the images related to it imply any genuine connection with ancient German (pagan) thought and religion.[4]

In the last chapter on the history of the influence of the *lex Baiuvariorum* one circumstance is highlighted, namely the influence of the Bavarian *lex* on the laws of King Stephen I. The relevant sections analyse the tradition and the surviving texts of King Stephen I and the main characteristics of his legislation; the issues of continuity and discontinuity in the first Hungarian *decreta*; the ways in which eastern and western sources were used; the main subjects of the regulations of the *decreta*, and which text demonstrates the influence of the *lex Baiuvariorum* on the laws of King Stephen I. This analysis shows that where the laws of King Stephen I borrow from the *lex Baiuvariorum*, the two often overlap. This is to be seen partly in the structure, partly in the preamble, and partly in several particular *loci* of the law. Regarding particular *loci* of the law, borrowing seems probable with regard to the topics of Sunday rest and of abduction. Borrowing is certain, however, in respect of arson and high treason; in other words, the treatment of these topics confirms that the author of the first Hungarian laws was familiar with the content of the Bavarian code and made use of it. This makes it highly probable that it was also used in the other cases.[5]

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4 *Cf* T Nótári "The state of facts of robbing a grave in Early Medieval German laws" 2012 (53) *Acta Juridica Hungarica* at 236-254.

5 See also, T Nótári "Remarks on the Decreta of the first Hungarian King, Stephen I" (2012) 18(2) *Fundamina* at 108-118.

BOOK REVIEW

Janwillem Oosterhuis *Specific Performance in German, French and Dutch Law in the Nineteenth Century – Remedies in an Age of Fundamental Rights and Industrialisation*

(Martinus Nijhof, Leyden, 2011, pp 635,
ISBN 9789004202283, US $172)

It is often stated in comparative essays and studies that one of the fundamental differences between the common law and civil law with regard to obligations lies in the remedy of specific performance. According to this view, specific performance is the primary remedy in civil law where there has been a breach of contract, since the innocent party has a right to fulfilment of the contract. In the common law, on the other hand, specific performance is a secondary remedy, the primary remedy being a claim for damages. Against this background, this historical analysis by Oosterhuis is an important addition to the body of work on this subject in the English language. The author also gives an in-depth account of changes to this remedy during the nineteenth century, which was a very formative time for the civil law in Europe, especially the three countries studied in this work.

The description on the book's cover very aptly summarises its contents as follows:

> The current French, German and Dutch law of contract each offer a remedy of specific performance to creditors suffering from breach of contract. This book analyses the alterations to this remedy during the nineteenth century on the substantive, procedural and enforcement levels. Fascinatingly, there is a link between changes to the remedy and the development of early human rights and the mass industrialisation of society. The latter had the effect of actually converging the national remedies of specific performance in the examined systems: damages and rescission became more accessible as remedies at the cost of specific performance. The book demonstrates the interdependency between law and society and

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provides vital background information to the harmonisation of a controversial concept in the European Law of Obligations.

The book is a reworked version of the author's doctoral thesis. Unlike many such works, this one does not read like a typical thesis and has been successfully transformed from a thesis to a monograph, even though it remains a challenging read.

In his introduction, Oosterhuis remarks quite correctly that the choice of remedy for breach of contract will depend on a variety of factors such as the particular rules of the applicable legal system, difficulty of enforcement, the effectiveness of enforcement apparatus in the particular legal system, relative impossibility, social and economic conditions, the scarcity and value of the goods or performance, and lastly the uniqueness of the goods. He then argues that the preference for a particular remedy and how often it is applied in practice may eventually affect its legal functioning and status as a remedy in a particular legal system. This important hypothesis is dealt with in detail, and amply proven in chapters four and five.

Chapter 2 starts with an overview of the remedy of specific performance before the nineteenth century. There is a brief but informative account of it in Roman law, and during the periods of the glossators, commentators and canonists. The author also traces its use in customary European law, especially in France, and developments in Roman-Dutch and Roman-Frisian law. Finally, there is an account of it in early modern natural law and the *usus modernus*. The chapter ends with the conclusion that two conflicting principles had emerged at this time: The first was that all obligations, regardless of their nature or intended object, had to be performed *in specie*. This was the primary remedy. The second principle was that certain obligations were from the outset excluded from the scope of specific performance. The first principle emerged under the influence of early modern natural law; the second under the influence of burgeoning humanism. The first principle also found its way into several codifications and drafts at the end of the eighteenth century.

The third chapter deals with the formative influence of the fundamental changes to society and the economy in Europe during the nineteenth century. Oosterhuis convincingly argues that rising awareness of fundamental rights and the right to personal freedom, as well as the increase in trade through industrialisation of the economy, diminished the status of specific performance as the primary remedy, even though it remained entrenched in practice. However, the discussion of the influence of fundamental rights promised in the title of the work does not fully materialise. This chapter first shows that at the beginning of the nineteenth century, specific performance was regarded as the primary remedy in the three countries that are compared in the book. It then describes how that paradigm came under increasing pressure during the course of the century because of the changes mentioned above. At first, only a few very restricted exceptions were recognised, and the remedy was widely applied in practice. Despite some doctrinal differences in the three systems,

commentators seemed generally agreed on the primacy of the remedy, in accordance with the first principle mentioned above.

Chapter 4, entitled "Damages as Rule", describes how in the course of increasing change in society and the economy, there was a gradual shift from the strict application of specific performance as the primary remedy to the stage where more exceptions were allowed; and the increasing importance of damages as a remedy started to diminish the role of specific performance in practice. During this period, cancellation of the contract together with a claim for damages became the preferred remedy for late performance, particularly in commercial sales law. Oosterhuis remarks that "timely delivery became more important than delivery itself". He traces the development of a choice of remedies in German law under the *Allgemeines Deutsches Handelsgesetzbuch*. In the case of late performance, however, a creditor had to afford the debtor a reasonable period of time (*Nachfrist*) to perform. This particular construction has survived into modern times and even found its way into the provisions of the Vienna Convention for the International Sale of Goods, 1980. The increasing importance of damages as a remedy in France and the Netherlands during this period, despite the prevailing doctrine at the beginning of the century, is also described. In practice it also became commonplace in trade sales to include a specific date for performance, with the intention that the creditor would be entitled to rescind the contract immediately upon default. Increasingly the courts came to recognise and enforce this approach. This review can hardly do justice to the detailed and nuanced discussion in this chapter and the richness of the text. It concludes with the finding that in the course of the societal and especially economic changes during the nineteenth century, damages became the primary remedy in practice, particularly in respect of generic goods. In time, the influence of these practices in the law of sale permeated to other areas in the law of contract as well. Oosterhuis remarks that the change was most obvious in German law, although similar trends could be observed to a lesser extent in French and Dutch law.

Chapter 5 shows that specific performance became an exceptional remedy during the latter part of the nineteenth century. In French and Dutch legal doctrine, specific performance was still viewed as the primary remedy, but no longer in practice. However, specific performance continued to be important in two areas, namely in respect of unique goods and in respect of personal acts. This chapter also describes changes during this period, when awarding damages became increasingly important and sophisticated, not only in practice but also in doctrine. The approaches in the three different systems under review became increasingly diverse, and Oosterhuis manages to convey effectively what he describes as the disintegration of the law of obligations during this period.

The book concludes with a handy summary of the contents and findings. In a way, this overview is a good starting point for the reader who might otherwise get lost in the complex and detailed discussions in chapters 2 to 5. The conclusions

are consistent and provide a fitting end to a fascinating study. I fully agree with the following remarks by Jacques du Plessis (University of Stellenbosch) about this book *(http://www.brill.com/specific-performance-german-french-and-dutch-law-nineteenth-century)*:

> This work contains very interesting insights about the relationship between law and practice, as illustrated by the history of the remedy of specific performance in certain private law systems in the nineteenth century. It is of particular significance that the study is not confined to a mere analysis of statutory provisions and academic literature, but also contains detailed discussions of the relevant case law.

John MacLeod (University of Glasgow), in another review, states correctly ((2012) 16 *Edinburgh LR* 285) that the title of this work sells the range and depth of this study rather short, since its scope is not restricted to the nineteenth century, and the analysis goes beyond mere contract law, in that it also considers relevant aspects of property and civil procedure. There is certainly a depth and breadth of discussion in this book, making it a valuable but challenging read.

It is a valuable contribution to our understanding of modern contract law, and more specifically the remedies that are available, even in South Africa. It will certainly be a valuable read for anyone interested in the law of contract, especially since the remedies for breach have not been as well researched and debated as has contract formation.

Sieg Eiselen
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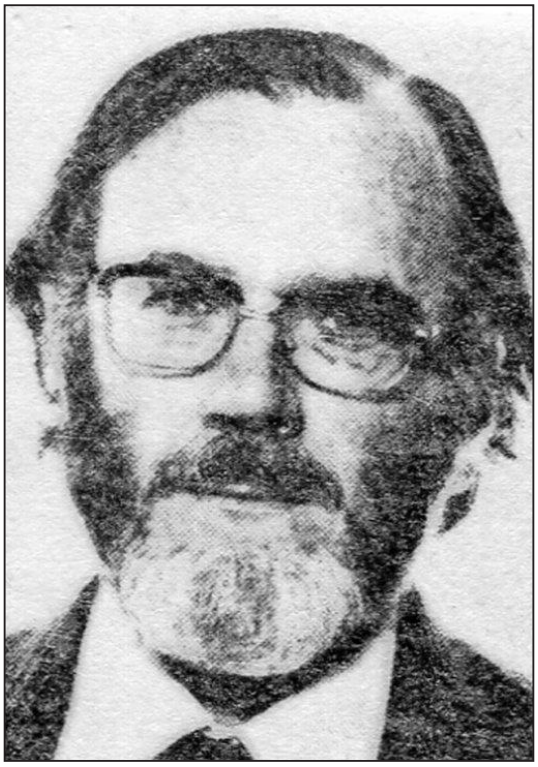
Basil Edwards: A Scholar, a Mentor and a Friend 1930-2014



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With the passing of Professor AB Edwards, South Africa lost a great legal scholar. I lost a mentor and a friend.

I first met Professor Edwards (as I continued to call him after his retirement) in 1984 when I was appointed as a research assistant in the then Department of Legal History, Comparative Law and Legal Philosophy. One of my first tasks was to assist in checking references for his work on Paulus Voet, which would later be published as *The Selective Paulus Voet* (*Fundamina Editio Specialis*, University of South Africa, 2007). During that time, I translated chapters from his PhD Thesis (University of Cape Town, 1984) from English into Afrikaans – a daunting task for a young research assistant, but giving me my first glimpse of the great scholar that he was. Two years later, I became a permanent member of the Department with Professor Edwards as its Head, and sometime later he became my doctoral supervisor. All in all, I had known him for thirty odd years, yet when I was approached to write this obituary, I realised at once how much and how little I knew about him.

Professor Edwards was a very private person. I know very little about his life history, save for a few facts that had emerged through the years. I know that he came to law somewhat late in life, having first trained as a scientist and worked as a pharmacist on the Zambian copper mines. It was during that time that he started studying law through the University of South Africa, where he would later become a Professor of Law. Considering the age difference between us, as well as our very different backgrounds (he being of Scots origin and my having grown up on a farm in the Eastern Cape with Afrikaans as my mother tongue), it is quite remarkable that we forged not only a very good professional relationship, but also a lasting friendship based on what I now know was huge mutual respect.

Professor Edwards was a true scholar. Well versed in legal history, legal philosophy and many other areas of the law, he relished the challenges posed by private international law, a subject area that can be baffling yet immensely rewarding, for the patient researcher. He understood that private international law could not be mastered in a hurry. He once said that Theo van Wijk, erstwhile Vice-Chancellor of Unisa, had written the following comment on one of his assignments (while he was studying for his BA LLB through Unisa): "Read more, think more, write less." Professor Edwards's scholarship in private international law encapsulates this: his writing reveals the intricacies of cross-border litigation, yet he advances his views with the clarity and authority that come from having carefully and systematically thought through a myriad potential permutations. His greatest contribution lies in the thorough historical and comparative research that informed his views on private international law questions. Professor Edwards expected high standards of his students, both undergraduate and postgraduate, but he set the bar much higher for himself.

He made a substantial contribution to South African law and legal literature. He was responsible for the chapters on "The Idea of Law", "Legal Theory", "The

History of South African Law", "Sources of South African Law" and "Public and Private International Law", as well as, in conjunction with Professor Joan Church, the chapter on "Introduction to Indigenous Law and the Comparative Method", in the 1500 page tour de force, *Introduction to South African Law and Legal Theory* (2nd ed, Butterworths, Durban,1995 (repr: 1997)). He also authored the monographic *LAWSA* title, *Conflict of Laws* (Butterworths, Durban, 1993). Apart from numerous articles (including his inaugural lecture, "Choice of law in delict: Rules or approach?" (1979) 96 *SALJ* 48), notes and case comments, he participated in a number of *Festschriften*, which saw him unearth gems like *Hughes v Wrankmore* ((1813-1814) Court of Appeals for Civil Cases at the Cape of Good Hope), an early international insolvency case. *The Selective Paulus Voet* (in collaboration with Dawie Kriel and with assistance from Paul du Plessis, Rena van den Bergh and Gardiol van Niekerk), was his last academic publication and perhaps the greatest of them all. The final published work contains a translation of those sections of Paulus Voet's *De Statutis Eorumque Concursu Liber Singularis* (*Amstelodami*, 1661) that are relevant to modern conflict of laws. These sections are placed in historical perspective within the context of the rise and fall of statutism in Western Europe, Great Britain, the United States of America and South Africa. The work concludes with a brief appraisal of Paulus Voet's legacy in South African law.

Professor Edwards worked very hard – there is no other way to state this fact. When he received funding to travel overseas for research purposes, he spent very little time away from that research. I recall his once explaining to me that he was unable to attend the Wimbledon final, which, having been rained out on the Sunday, had been moved to the Monday. Although he could have gone on the Monday (his ticket was valid), he had to get back to his research. Such was his commitment, though I think in later years he regretted missing that final!

Professor Edwards was my academic mentor. He would probably not have described our professional relationship in those terms, since there was no official appointment as mentor, but the impact he had on my career was immense and his scholarship will continue to influence my writing. He was meticulous in commenting on everything I wrote early on; how I now regret not having saved just one of those handwritten notes. When he decided that the title of my thesis should be all of twenty-two words long, I did not object – although it was quite impossible to print the full title on the back!

In later years, he became a very dear friend, whom I would visit when I was in Cape Town. He loved to reminisce about the "Unisa days" and was still very much interested in everyone's life and career. He remembered my birthday, without fail. I shall miss him.

Elsabe Schoeman
Professor, University of Auckland

Basil Edwards
1930-2014

The passing of Professor AB Edwards in January 2014 was a sad moment − not only for his family, but also for his friends and former colleagues, and particularly those formerly and presently at the University of South Africa. As one of the latter I am honoured to write a tribute in memory of him and the thoughts of him that I share are written in that vein.

As was the convention in the erstwhile faculty of law at Unisa, Basil Edwards, together with compatriots John Middleton and Pierre Brookes (like him they were later to become professors), began his career as an academic assistant in 1969 after successfully completing the then post-graduate LLB degree. Soon afterward he became a lecturer and subsequently senior lecturer and professor in the Department of Legal History, Comparative Law and Legal Philosophy. It was at this time that I met him, first when I was a student in the early seventies and appointed (in the then conventional fashion) as a junior lecturer in Private Law, and later as a colleague of his in the Department of Legal History, Comparative Law and Legal Philosophy. As a junior colleague I particularly valued our conversations concerning his field of expertise which was Private International Law, and under his guidance completed the compulsory dissertation for the LLB on the question of the matrimonial domicile. He was appointed as Head of Department in 1982 and obtained a PhD from the University of Cape Town in 1984. In the same year he and Sybil Meston were married.

The scholarship of the late Professor Edwards has been outlined in a further tribute in this journal and I would like to highlight some more personal moments in my memory of him. He was a fine conversationalist at office get-togethers and

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parties at my home as well as at those held during the meetings of the then Society of University Teachers of Law where in the wee hours of the morning, at late after-parties, his keen sense of humour was shared with colleagues and friends from sister universities.

He retired in 1995, but returned to work in the Department on various research projects, notably as collaborator on the mammoth *The Selective Paulus Voet* of which mention is made elsewhere in this journal. Some two years later he and Sybil moved to Cape Town. Here he continued his research and honed his golf, first at the Clovelly Golf Club and later in the southern suburbs of the Mother City. After a final move to an apartment in Kenilworth, I am told he became a dab hand at the game of croquet. Although Baz and I remained good friends over the years, always remembering one another at Christmas and birthdays, I was able to maintain a more regular and personal contact once we moved to Cape Town some six years ago. While we often revisited the past together, he was always eager to hear the more recent news of his alma mater and erstwhile colleagues there.

I was privileged to keep in touch with Sybil during his short but trying illness and very sad to hear that he had passed on. I am honoured to have known him as a colleague and friend.

Joan Church
Professor Emeritus, University of South Africa