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A Juristocratic Reform in the Roman Empire – The Anamnesis of an Evolutionary Cul-de-Sac

Introduction

This study strives to analyse the state reform attempt carried out by the elite of Roman jurists in the early 2nd century BC.[1] The attempt intended to revitalise the Roman state by applying basically two methods: the deepening of the integration of the centre (Rome) and the provinces, and the creation of a new, normative, law-related "religion" (which was rather a lifestyle or, with the then used expression, a philosophy). The process had been invented and managed by the jurists working at the top levels of bureaucracy, particularly Ulpian. The most striking act of the process of integration was the expansion of Roman citizenship, essentially to all free citizens of the Empire. The new religion, on the other hand, would have been a civil religion based on the primacy of law, where, instead of being just an instrument of power, the law would have been perceived as the norm for individual lifestyle. This attempt failed, partly because, gaining strength, Christianity was much more dynamic in proliferating its own guiding principles concerning people's lives. The relevance of the analysis of this failed juristocratic attempt is given by a current reverse process in Europe: an attempt to replace declining Christianity with new civil life principles and identity, by applying the instrument of law.

First, I attempt to outline the social and economic environment where the idea of the juristocratic reform arose, to show why the elite of the Roman Empire believed in the need for major changes. Second, I shall introduce Ulpian, the jurist who initiated the reform. Strikingly, until now, the reform attempt carried out by one of the most influential jurists of all times has not been considered a reform. One of the main

[1] To raise attention and place the issue at hand into a current context, I use Béla Pokol's apt expression, "juristocracy" for the elite of jurists. For juristocracy see Pokol 2021.

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novelties of the study is the re-evaluation of Ulpian's activities in this interpretational framework. In the third part of this paper, I present the main content elements and the ideological direction of the reform through nine individual cases. The fourth, closing part addresses the question of why this juristocratic lifestyle reform attempt failed and what made the Christian model of community-building more successful.

From the aspect of the state evolution analysis covered by this volume, it is instructive to present a state reform that did not strive to achieve a state-level articulation of the specific interests of the interest group that served as the driving force of the process (and consisted of the leading jurists of the Empire, particularly Ulpian). Instead, the actors tried the reinforce the state and the Empire by an influence on the ideas and the lifestyle of individuals, striving to implement a philosophy in the Hellenistic sense and spread it as a political program.[2]

The economic context of the reform attempt

While life had obviously been completely different, there is one thing that connects the turn of the 2nd and 3rd centuries BC to our era: that was also a time of crisis, even though everything seemed normal at the surface. After the conquests of Traian, "the best" emperor, the Roman Empire had reached its greatest territorial extent.[3] The power of the Roman legions had been well-known from the Persian Gulf to the Atlantic Ocean, from Scotland to Nubia, from Portugal to Mesopotamia. And so were the great Roman roads, allowing not only the soldiers, wearing short swords – *gladii* – to move speedily to their destination, but also allowed for the fast proliferation of goods and, more importantly, ideas throughout the Empire. The Roman network of roads, winding all across the Empire, was approximately 75 thousand kilometres long, almost twice the length of the equator. Rome also had a philosopher as emperor, namely Marcus Aurelius.[4] As a state ruled by a philosopher had been considered the most perfect form of state since Plato,[5] this was

[2] For the connections between politics and philosophy in the period concerned see Millar 2002.

[3] Speidel 2002: 29.

[4] There are several sources to support that, see, for example Philostr. *VS* 2.9.

[5] Pl. *Resp.* 2.56–58.375a–d; 6.180–181.484a–d.

the realisation of an ideal.[6] The philosopher emperor ruled the whole world known at the time, every fourth person on the face of earth was his subject.

Nonetheless, sharp-eyed contemporaries had already observed tiny harbingers of crisis. In the frontiers, along the Danube, the forces of the Empire were kept busy by the troops of the Germanic Marcomanni. And although the legions triumphed against them and were successful also on the eastern front against the Parthians, the victorious troops brought back the deadly disease: the plague. According to the legend it was a Roman soldier who accidently cut a golden box in half somewhere across the Tiber in Seleucia, and that is how the gas contaminated with the plague escaped.[7] The outbreak of the epidemic was merciless, estimates say that there may have been 5–10 million fatalities, which stood for 10 percent of the population of the Empire.[8] And the calamity came in several waves, as it hit again nine years later. The mortality rate was tremendously high, every fourth contaminated person died. At the peak of the disease, Rome saw two thousand deaths per day.[9] Galen, the most outstanding of the physicians of all time described the symptoms as follows:[10] it began with high fever, diarrhoea and a sore throat, and on the nineth day pustules appeared on the skin throughout the body, including the face.[11]

The wars, the epidemic and the arising economic difficulties were joined by political uncertainty. Marcus Aurelius was followed by his son, Commodus on the emperor's throne, less capable of showing the way out of the various threatening crises. Commodus had been raised to be an emperor from the age of five, and that most likely did not direct the development of his personality in the right direction. He fancied himself playing the role of the demigod Hercules, who was famous of his strength and courage. He had gone great lengths to buy himself popularity in the old-fashioned way, giving the people bread and circuses, not sparing the struggling treasury. He taxed the senators mercilessly and widely expanded the power of the praetorian prefect, the head of

[6] For the evaluation of this see Desmond 2011: 109–111.
[7] SHA *Verus* 8.1–2.
[8] For the influence the disease had on the number of the population see Gilliam 1961: 248–250.
[9] Cass. Dio 72.14.3–4.
[10] Galenos's accounts on the epidemic was collected by Hecker 1835.
[11] For the diagnosis see Littman–Littman 1973: 246.

the emperor's guard. Both were measures frowned upon by the members of the elite. Of course, publicly the same senators were the loudest to join the crowds venerating the emperor as the Sun god. Commodus inclined to join the gladiator fights, although not in front of the public. Not that he shied away from public appearance. In the last year of his rule, Commodus named each month of the year and each legion after himself, and even renamed Rome the "joyful city of Commodus". No wonder that, along with Caligula and Nero, he was considered one of the rulers who acted as unrestrained tyrants. He certainly had one merit, however. Despite his personal shortcomings and vices, his greatness as a statesman is shown by the fact that he understood the signs of the times. He was the first to recognise that the senate was no longer able to fulfil its historic task as the governing force of the Roman Empire. After Commodus's death, the Empire found itself at a crossroads: it seemed that the state was about to be stretched apart by the internal and external "entropic" forces.

The question arises: which interests were behind the activities of Ulpian and the juristocratic elite that surrounded him? In my opinion, the assumption that, in addition to a narrow political self-interest, they were driven also by a desire to salvage the state cannot be considered an idealistic exaggeration. First, these bureaucrats, who in part originated from the provinces and reached the highest positions of the Empire, were presumably driven by an intense pressure to align and comply,[12] due precisely to such origins.[13] Second, all of them remembered the period of relative peace and prosperity brought about by the *Pax Romana*.[14] The Roman state ideology inherited an important characteristic from Emperor Augustus, namely that the major, even military interferences within the state must be wrapped in the narrative of peacebuilding and peacekeeping.[15] The new elite arriving from the provinces saw no alternative to the Roman Empire. Consequently, to them the stability of the state did not only mean a political and intellectual challenge but also a crucial individual interest.

[12] For a similar evaluation see Ledlie 1903: 17.
[13] For the origins of Ulpian see Kunkel 2001: 252.
[14] See also Bringmann 2009.
[15] See also Rich 2009; Lavan 2017.

Another factor to consider is the fact that the juristocratic elite had a great political adversary: the military. It is no coincidence that Ulpian died in a minor military revolt in the 220s BC,[16] in the presence of the child emperor, Severus Alexander and his mother.[17] Ulpian's attempt to restore order may have been the reason underlying his conflict with the military, namely the praetorian guard.[18] Street fights, lasting for several days between the guard and the people were not uncommon in Rome at that time.[19] As praetorian prefect, the commander of the guard,[20] Ulpian presumably strove to reduce the guard's growing influence and destructive actions.[21] The situation escalated to the point where Ulpian even had his fellow prefects, Iulius Flavianus and Geminius Chrestus executed.[22] The ruler himself was also at the mercy of his own guard. No wonder that Ulpian considered it one of the most significant hindrances to the stability of the state.

In addition to all that, a further drive that urged Ulpian to codify the existing material of Roman law may be sought in the appalling reality he experienced during the reign of Emperor Caracalla. At a time when the known world was ruled by a "monstrous" figure whose life appeared to be a mockery of human nature,[23] Ulpian strove to restore the order and beauty of human nature by the tool best-known to him: the law. During the period when he was not burdened by the odium of political activity, Ulpian dedicated his time to legal and jurisprudential work. By consolidating the body of law, Ulpian intended to create a work serving both as a codex and a holy book: he worked with the tool of law, in the role of religion, for the sake of the state. It is worth acquainting ourselves with him a little more closely.

[16] For the dating see Bertrand-Dagenbach 1990: 16.
[17] Cass. Dio 80.2.4.
[18] Howe 1942: 75; Pflaum 1960–1961: II, 762ff; Kunkel 1967: 245–254; Syme 1979: 800f; Syme 1991: 216f. On Ulpian and his work see also Zwalve 1998.
[19] See Sünskes Thompson 1990: 41, 81–83.
[20] See Crook 1975: 79.
[21] Bremer 1868: 71ff.
[22] Blois 2003: 135–139.
[23] Also, the sources, such as Cass. Dio 78.22.3; Hdn. 4.9.

Ulpian, the reformer

Great times find their great person. In our case, he arrived from Phoenicia, the distant city of Tyros.[24] Although he was one of the greatest jurists of all times, we do not even know his full name. Possibly, his full name appears solely on a lead pipe among the ruins of a villa northeast of Rome. In any case, he is known as Ulpian from the sources[25] where he left an undeniable mark: approximately one third of the *Codex Iustinianus* originates from him, even though it is the work of an Eastern Roman Emperor who reigned about 300 years after Ulpian's death.[26] This transposition is the main reason underlying his enormous influence on the development of the law of later ages. Posterity has always found what it was looking for in the mass of text originating from Ulpian. In the Middle Ages, he was praised for the view that the emperor is absolved of laws. At the peak of his career, Ulpian was the second in rank in the Empire,[27] an astonishing career even at that time in Rome. Some saw him as a pioneer of human rights, but for us his specific significance lies in his intent to use the law as a compass for well-lived life.

There were two main pillars of Ulpian's masterplan to consolidate the Empire. The first was an enormously significant but occasional state act to extend Roman citizenship. Based on Ulpian's preparatory work,[28] Emperor Caracalla gave the precious Roman citizenship to almost all subjects of the Empire. Odd as it may seem from today's perspective, only a small fraction of the mighty state's population had been Roman citizen before the issuance of the emperor's edict in 212 BC. As Roman citizenship came with several advantages and benefits, many strove to obtain it. And all of a sudden – at one blow, so to speak – this grace fell into everyone's lap in the wake of the legislation. Rumour had it[29] that the real reason for the extension of citizenship was to increase the number of taxpayers. It was taxes levied at inheritances that held the promise of a particularly significant income for the Roman state. Nonetheless, taxes had hardly been the only reason for issuing the edict, no matter how

[24] That is supported also by a primary source: Ulp. 1 *de cens.* D. 50.15.1pr.
[25] For the life of Ulpian see Honoré 1982: 1–36.
[26] For the work of Ulpian see Zwalve 1998.
[27] Bremer 1868: 71–75.
[28] For Ulpian's account on the emperor's edict see Ulp. 22 *ad ed.* D. 1.5.17.
[29] See, for example, Cass. Dio 78.9; 79.9.5.

tough the situation of the treasury was. Most of the new citizens were not considerably wealthy and giving citizenship to so many people diminished the interest in military service. Before the *Constitutio Antoniana,* veterans received Roman citizenship when demobilised after their years in the legions, which had probably been a considerable factor in deciding whether to enlist in the military. Unconditionally received citizenship most likely reduced the thirst for combat among the population of the provinces. Due to all that, we are right to believe that Ulpian's plan was not primarily driven by financial or military causes. Rather, his motives resulted from the wise recognition of the unstoppable change that the Roman Empire no longer belonged to the Romans only. The Gauls, Spaniards, Lusitanians, Numidians, Thracians, Syrians, Egyptians and all peoples of the mighty state embraced their belonging to the Roman Empire at least as much as the founding Romans themselves. The once marshy, small town became the ruler of the world, a global empire. And as such, to live up to the challenges of the era, it not only needed subjects but also citizens.

Of course, however, legislation is not enough to create a people overnight by extending citizenship. What the Empire needed was a spiritual community. Ulpian was well aware of that, and it also explains the other – much more important – part of his plan to salvage the Empire. He believed that he could turn the multitude of new citizens, the diversity of ethnicities, languages, religions and colours into the unity of a people, a community of soul and spirit with the help of the law. To achieve that, during the time when he was forced to put his political activities on hold, over the course of about six years, Ulpian sifted through and consolidated practically the whole body of Roman law. This basically meant juxtaposing the works of earlier jurists, weeding out the outdated solutions, solving certain controversial issues and improving the body of the law. This enormous work of consolidation was the forerunner of the codifications which reached their apogee in the grandiose codex of Emperor Justinian, and which later became the roots of the legal systems of the European continent. All in all, the global empire needed global citizens. And global citizens are created by universal laws that apply uniformly to all.[30]

[30] The extension of the citizenship and the consolidation of the earlier body of law also brought about the increase of the role of the emperor's legislation. This centralisation presumably met Ulpian's intents as well. See also Humfress 2013: 87.

However strong the community-creating power of the law was, Ulpian had no reason to expect that technical rules in themselves would unify the citizens. But he might have had a reason to recall the myth of one of the re-foundations of Rome. Back in the archaic period, the plebeians left the city[31] and marched to the Aventine.[32] Things settled only when the patricians pledged to enshrine the fundamental rights and obligations in a legal act. That was the renown Law of the Twelve Tables, the source of all rights, which Roman youths had to memorise by heart even by the time when Cicero went to school. Thus, in a way, Romans identified law with a unitary state and the concordance between social classes, embodied primarily by the temple dedicated to goddess Concordia, erected in the western end of the *Forum Romanum*. Ulpian intended to achieve this desired concordance with the help of the law. His in-depth understanding of human nature told him that the law striving to create unity among the diversity of peoples populating the Roman Empire cannot simply be a tool serving political and economic interests. It must also fulfil the role of the supreme religion of the state.

Therefore, the law had to take the place of religion. Long-forgotten ancient powers – such as Flora, the goddess of flowers, Silvanus, the god of forests and Faunus who whispered the future into people's ears in their sleep – had to be replaced. By then, indifference had silenced also the deities shared with the Greeks: Jupiter's thundering words, Juno, the goddess of love, Mars, the god of war. This period saw the trend of mystery religions, but only few chosen worshippers were admitted to their secret shrines. Isis who ruled the sun, the moon and the stars, and Serapis who ensured that there was no shortage of grain in the cities, were not suitable to become deities for the masses. Christianity – which was about to triumph in less than two hundred years, eliminating every other cult with murderous determination – was not yet strong enough. As the fanatic sect of a small, rebellious people, the followers of Christ drew no considerable attention. The time when Emperor Justinian would promulgate his great codex "in the name of our Lord Jesus Christ" in 533 BC was still far off. The religion created by Ulpian intended to be everyone's religion, regardless of ethnicity, sex, or language. It strove to be a real state religion, to tie together the countless inhabitants of the

[31] This was the second of the so-called secessions, see Liv. 3.50–54; Dion. Hal. 11.43–44; Flor. 1.17; [Aur. Vict.] *De vir. ill.* 21.

[32] Liv. 2.32.

Roman Empire with a strong spiritual bond, establishing the rule of civil courage, reason, justice and equity among such diverse subjects.

With the law being the religion, jurists were the priests of it. Ulpian took his role very seriously. In his textbook, he proudly declares that jurists are rightly considered priests, as they serve the god of justice, know goodness and equity, can tell wrong from right, and define just and unjust. But jurist-priests would not stop there. By threat or reward, they would arouse the desire for goodness in the citizens entrusted to their care. What the priests of the law would offer is no fake but indeed the true way of life. Ulpian's religion was perhaps the first rational, atheist attempt to define the foundations of human coexistence, and it appeared in the greatest and most powerful state of the time, the Roman Empire. It is uncanny to even entertain the thought of what could have happened had his experiment succeeded. If reason, the rational balance of social interests, and a religion of law based on transparent and verifiable arguments had been reinforced and proliferated in the Empire. If, as a result of all that, Christianity and the "dark" Middle Ages had been non-existent, and Enlightenment had been cancelled due to lack of interest.

As for the conflicts between interest groups, which drove state evolution, it had never occurred to Ulpian that he should worry about a small Jewish sect or women when it came to his ambitious plans. A much bigger concern was the military, ever more unbridled, particularly its elite squad, the Praetorian Guard. In the previous decades, the guard of the emperor participated in every palace coup, on one occasion even the new emperor, namely Macrinus, was selected from their number. Even though the guard used to embody true Romanness, it no longer seemed Roman enough for the Phoenician Ulpian. When he became the commander of the Praetorian Guard, Ulpian's main goal was to restrict the power and influence of this military body.[33] The guard, however, was well aware of these intentions, so Ulpian was stabbed to death in front of the thirteen-year-old[34] emperor, Severus Alexander and his mother.

[33] Jörs 1905: column 1438; Krüger 1888: 215; Wenger 1953: 519.

[34] This would mean that the assassination took place in 223 BC. See *The Oxyrhynchus Papyri* 1966: 102–104, Papyrus No. 2565. That theory is revisited by Modrzejewski–Zawadzki 1967; see also Honoré 1982: 8, 40–41. Others argue that the event took place only in 228 BC. See Jörs 1905: column 1438; Krüger 1888: 215; Wenger 1953: 519; Honoré 1962: 166, 207.

Fate had dealt Ulpian a spectacular career, but also difficult, nearly unsolvable tasks. Even though he did not succeed in achieving his primary goals related to the consolidation of the Empire, and his troublesome attempt to consolidate Roman law and to shape it into a civil state religion of a sort failed, his work still made him immortal. If we were to enumerate those who had the most significant influence on human history, then, in addition to Muhammad, Jesus, Alexander the Great, Napoleon and Hitler, we should also consider Ulpian. If not for him and his legal work, the law we know today would certainly be completely different.[35] As is often the case, the forced caesura in his political and professional career allowed for the jurist and the author to come to the fore instead of the practising lawyer and state official. Ulpian created his great works providing commentaries for the edicts of the praetors, which shaped modern continental law, during the years between 213 and 217 BC when his political career came to a halt. He changed the world in the course of no more than five years! That is the dream of many authors but so far only few have succeeded. During these watershed years, Ulpian wrote 220 books. That was an enormous work. Even if we consider that books at that time were much shorter than those published today, it took feverish dedication and determination. Ulpian believed that as *corrector rei publicae* – reformer of the state – he was destined to salvage the Empire. Translating all that to work results, Ulpian penned a book every week,[36] each approximately 12 thousand words, which would run to thirty typed pages according to today's publishing practices.

Thus, jurists owe a great debt to Ulpian. But this study shows that not only jurists can find his works instructive. A lot can be learned from Ulpian, in terms of how a good citizen is pictured by a humane, rationalist state reformer. He offered a lifestyle that is not only meaningful and comfortable for people but can also revive their state. Of course, unlike today's bestsellers promising prosperity, Ulpian did not give his life advice directly. That can be uncovered from his legal opinions and comments.

To avoid confusion, it is time we clarify the nature of Ulpian's advice. He most likely drew heavily on one of the leading philosophical trends of the time. Yet, expect no self-control techniques or today's trending five-minute wisdom from him. Although Ulpian's message would mostly be incomprehensible without the concepts of stoicism,

[35] Frier 1984: 856.
[36] Honoré 1982: 160.

he cannot be considered a spokesmodel of Stoic doctrines. We find nothing in his works about daily soul-searching, the memorable principle of *memento mori* ("Remember you must die"),[37] or the concept *amor fati,* the acceptance of one's fate.[38] Neither does he tell us to practice *premeditatio malorum*,[39] the constant thought about all the bad things that can happen in life. The self-deceiving *ego* is no enemy for him,[40] and he does not believe that the obstacle is the way.[41] Deep down all that may be hidden behind his legal opinions, but the true value of his wisdom does not lie in a borrowed advice. A closer look reveals that such Stoic guidance, found in today's bestselling books and stoical blogs, offer nothing more than external, purely formal help. They do not tell us what to do but how to do it. That emptiness is precisely what makes these doctrines universal, making them seem useful lifehacks regardless of the time and place. Law, on the other hand, is good for many things but that. We can turn to law to decide which is the right path to take. We do not expect law to provide conflict management techniques but clear, specific answers. What to do and what to refrain from. Any judge who, spreading their arms in a Gallic shrug, said that "I have no idea whether the defendant is guilty or innocent" or "I do not know who is right, the plaintiff or the defendant", would surely be held up to public ridicule. Law must make decisions on the merits. And that is also the reason why Ulpian's work is useful: it gives substantive answers. Ulpian offers something we really need today when many are inclined to blur the lines or avoid clear choices: he tells us which path to choose and which to avoid. That is his true, unfaked philosophy.

Of course, one can preach falsely even from the books of truth. Ulpian's surviving oeuvre is rich enough for everyone to interpret it as they please. My reading is utterly individual and somewhat haphazard, but to make my point clear, I shall briefly summarise Ulpian's axioms on life advice related to the state reform in the following nine "commandments":

- Live honestly, injure no one, give each his own![42]
- Trust fate but do what you can![43]

[37] Sen. *Ep.* 101.7–8.
[38] Epict. *Ench.* 8.
[39] Sen. *Tranq.* 13.3.
[40] Diog. Laert. 7.23.
[41] M. Aur. *Med.* 5.20.
[42] Ulp. 1 *reg.* D. 1.1.10.1.
[43] Ulp. 10 *ad ed.* D. 3.5.9.1.

– Let there be things that you allow others but not yourself![44]
– Maintain your masculine dignity when it comes to women, but do not run afoul of them![45]
– If you have no time to think things through, listen to your heart![46]
– Do not let yourself be bribed with gifts![47]
– What you let go in your soul, never want back![48]
– You may use tricks in business but never be a fraud![49]
– Fear no ghosts![50]

Live honestly, injure no one, give each his own!

According to Ulpian, the fundamental precepts of law[51] can be summarised in the following triple command: *Iuris praecepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere.*[52] Live honestly, injure no one, give each his own.

Indeed, that includes everything that law can contribute to living our lives right. Of course, no further advice would be necessary if the principles[53] were easy to interpret in each case, in all specific situations brought about by life. Nonetheless, Ulpian most likely firmly believed that this triple command must pervade the entire body of the law. Thus, again and again, he reinterpreted the meaning of these impressive but abstract admonitions in a wide variety of situations. The manner of this and the extent of the success of the attempt will be detailed below. It may be obvious, even at first sight, that, being universal commands, the latter two elements of the triad can be easily linked to the world of law and state regulation striving to achieve justice.[54] The principles of "injure

[44] Ulp. 29 *ad ed.* D. 15.1.9.7; Ulp. 13 *ad ed.* D. 4.8.21.11.
[45] Ulp. 36 *ad sab.* D. 24.3.14.1; Scaev. 7 *dig.* D. 18.3.8; Paul. 1 *decr.* D. 4.4.38pr.
[46] Alf. 5 *dig. a paulo epit.* D. 19.2.31.
[47] Ulp. 1 *de off. procons.* D. 1.16.6.3.
[48] Ulp. 38 *ad ed.* D. 13.1.10pr–12.1.
[49] Ulp. 11 *ad ed.* D. 4.4.16.4; Ulp. 48 *ad sab.* D. 45.1.36; Ulp. 11 *ad ed.* D. 4.3.1.2; Ulp. 31 *ad ed.* D. 17.1.6.7.
[50] Ulp. 11 *ad ed.* D. 4.2.9pr.
[51] They are referred to as a maxim by Sandars 1934: Inst 1 1 3.
[52] Ulp. 1 *reg.* D. 1.1.10.1.
[53] The expression *praecepta* is translated as principles by Watson 1985: D.1.1.10.1.
[54] See Diesselhorst 1985: 185.

no one" and "give each his own" appear in human history on several occasions, regardless of the age and place.[55] The latter has occurred in several works, such as those of Luther, the title of a cantata by Bach, and – most horrifyingly – on one of the iron gates of the Buchenwald concentration camp. It was placed there so that the prisoners lining up for daily inspections could easily read it from the inside: "Jedem das Seine", meaning "To Each His Own". Anyone who has the stomach for it, can make out this phrase also on the wobbly fat back of the German politician Marcel Zech, in gothic letters.[56] In any case, refraining from causing damage and the payment of debts can easily be linked to the world of law. But not the imperative of "be honourable". What law has got to do with the way we live our lives if otherwise we abide by the rules? Why should we live honestly instead of happily? And, for that matter, what is the definition of honesty?

Clearly, honesty meant something completely different in ancient Rome than it does today. Mostly because while ancient Rome was a so-called shame culture, today's European culture, due to Christian influence, can still be considered a guilt culture. The difference is obvious. Shame is something external, which is born outside the individual, since it is the community that stigmatises its members who violate certain norms of the given community. Guilt culture, on the other hand, is based on the inner struggles of the individual. In the latter case, the authority prescribing the norms is transformed into an internal factor by the individual, while in the former case, wrongful conduct is sanctioned by an external forum. Accordingly, "living honestly" was not a mere life advise in ancient Rome but a crucial obligation. Those who failed to act honestly, and thus became stigmatised – *infamis,* for instance – were removed from the network of the community that used to hold them, as a protective alliance of interests. Such person was no longer considered a fellow citizen, no one negotiated or did business with them, as if they had become invisible. So, for a Roman citizen, the stakes were high when it came to abiding by Ulpian's life advice wrapped in legal opinions. Obviously, unlike today's trending life advice books based on stoical philosophy, his advice held no specific techniques or "spiritual

[55] Manthe 1997: 25–26.

[56] The politician was handed a six-month suspended sentence for the public display of his tattoo, see *German politician guilty over Auschwitz tattoo* (2015). Online: www.bbc.com/news/world-europe-35162393.

exercises". Even though from time to time, Ulpian's comments reveal certain elements of teaching of the Stoics,[57] his perspective was more external. He mostly sought answer to the question of how to guide people, by reward and punishment, in the direction where they live their life right. In any case, these standards are easy to apply to today's situations and choices, without the need to learn all sorts of spiritual techniques. Thus, Ulpian gives us answers but not methods. On the other hand, for Ulpian, living a good life was essentially just a tool to achieve a much greater goal: the creation of a good state. He believed that a state can only be good if its citizens live their life right. And as we have seen, hit by external and internal crises, the Roman Empire was in great need of a chance to become a good state again.

Let us move on and see the great state reformer's specific life advice.

Trust fate but do what you can!

Ulpian's ideal man is not a passive subject of fate but strives to shape his environment whenever possible. He is aware of and respects the limits of his human abilities and efforts. However, within those limits, he is responsible for doing all that is up to him in a given situation. Let us look at a case where such proactivity and individual responsibility are rather emphatic.

"Is autem qui negotiorum gestorum agit non solum si effectum habuit negotium quod gessit, actione ista utetur, sed sufficit, si utiliter gessit, etsi effectum non habuit negotium. Et ideo si insulam fulsit vel servum aegrum curavit, etiamsi insula exusta est vel servus obit, aget negotiorum gestorum: idque et Labeo probat.

Sed ut Celsus refert, Proculus apud eum notat non semper debere dari. Quid enim si eam insulam fulsit, quam dominus quasi inpar sumptui deliquerit vel quam sibi necessariam non putavit? Oneravit, inquit, dominum secundum Labeonis sententiam, cum unicuique liceat et damni infecti nomine rem derelinquere.

Sed istam sententiam Celsus eleganter deridet: is enim negotiorum gestorum, inquit, habet actionem, qui utiliter negotia gessit: non autem utiliter negotia gerit, qui rem non necessariam vel quae oneratura est patrem familias adgreditur.

[57] Winkel 1988: 669–672; Wollschläger 1985: 49–50.

Iuxta hoc est et, quod Iulianus scribit, eum qui insulam fulsit vel servum aegrotum curavit, habere negotiorum gestorum actionem, si utiliter hoc faceret, licet eventus non sit secutus.

Ego quaero: quid si putavit se utiliter facere, sed patri familias non expediebat? Dico hunc non habiturum negotiorum gestorum actionem: ut enim eventum non spectamus, debet utiliter esse coeptum."[58]

"A person who brings an action of unauthorised administration of affairs will not just use this action if he successfully accomplished the matter he administered; it is enough if he acted usefully, even if he did not accomplish the matter. And so if he propped up an apartment building or took care of a sick slave, he will be given the action of unauthorised administration of affairs (even) if the building burned down or the slave died; and Labeo also approves this.

But, as Celsus reports, Proculus commented on Labeo's view that the action ought not always to be given. For what if he propped up an apartment building that the owner abandoned to avoid the expense, or that he thought he did not need? In Labeo's view, says Proculus, the gestor could burden the owner, though anyone is allowed to abandon property, even in order to avoid giving collateral due to a threatening damage.

But Celsus elegantly mocks this view; for, he says, a person who administered affairs usefully has an action on unauthorised administration of affairs. But someone who undertakes something unnecessary, or that will burden a paterfamilias, does not administer affairs usefully.

Related to this is what Julian writes, that a person who propped up an apartment house or cared for a sick slave has an action on unauthorised administration of affairs if he does this usefully, even if the outcome was unsuccessful.

I ask: What if he thought he acted usefully, but it was not benefitting the paterfamilias? I hold that this man will not have the action on unauthorised administration of affairs; for when we do not look to the outcome, it ought at least to be started usefully."

D. 3.5.9.1 does not clearly reveal Celsus's view on Labeo's arguments, that is, whether Celsus considered that the *actio* is to be given also if the gestor administered the affairs usefully and sufficiently, but the outcome was unsuccessful due to an external cause. It is likely that for Celsus, the decisive factor was whether the gestor's action would have been carried out by a *bonus et diligens* paterfamilias and the outcome also occurred.

[58] D. 3.59.1.

Or at least we can draw this conclusion based on Ulpian's *iuxta hoc est* remark. According to such use of word, Julian's view[59] was related to Celsus's opinion.[60] That is, Julian probably accepted Celsus's objective measure of evaluating usefulness.[61] He, however, added that the *actio* should be given also if the outcome was unsuccessful. *A contrario* it follows that Celsus only recognised successful and objectively useful administration of affairs. By contrast, Julian also considered legitimate the claim of a gestor who acted objectively usefully and appropriately, but not sufficiently, that is, not successfully.[62] On the one hand, his position differs from Labeo's in that he used the term *utiliter* in the sense of "objectively useful", while Labeo limited its meaning to "successfully". Therefore, Julian accepted Labeo's position that the existence of the desired outcome is not decisive from the aspect of granting the claim. However, while Labeo expected the gestor's action to be successful – even though due to another, independent reason, the outcome was later unsuccessful – it was enough for Julian if the action could have been useful based on the objective judgment of the *dominus negotii,* but the realisation of the benefit did not occur due to the unsuccessfulness of the action. This difference of opinion is clearly indicated by the difference between the expressions used when presenting the opinions of the two legal scholars: *effectus* and *eventus.* Julian's view differs from that of Proculus in that, like Celsus, he judged usefulness not from a subjective but from an objective point of view.[63] In other words, he preferred the actual and objectively graspable to subjective value judgments.[64]

It seems that Ulpian basically agreed with Julian's understanding, he only improved it in one aspect.[65] What happens, Ulpian asks, if the

[59] On Julian's position see Benke 1988: 614.

[60] According to Ussani 1987: 145, Ulpian knew the works of both Celsus and Julian well.

[61] Iulian shares Celsus's opinion also in D. 45.1.91.3.

[62] Actuality, that is, the actual occurrence of the result was considered very important by Julian, based, inter alia on Sen. *Ep.* 124.6, and he dedicated more references to it than other jurisprudents. See Mayer-Maly 1974: 227.

[63] The objective perspective serves the public interest more. Julian contrasted the *utilitas publica* also elsewhere with the rationality of the decision, that is, the *ratio disputendi.* See, for example, Iul. 86 *dig.* D. 9.2.51. Cf. Cic. *De or.* 32.113; Cic. *Part. or.* 23.78. In *ratio disputendi* see Stein 1966: 95; Ankum 1995: 23. In certain cases, to allow himself to consider the social and economic reality, Julian consciously intends to depart from the dialectic logic of the argument. Cf. Navarra 2002: 21.

[64] Ussani 1987: 105.

[65] According to Beseler 1930: 173, the term *ego quero* is likely an interpretation, since in Beseler's opinion, citing Labeo's view, Ulpian already provided an answer to the question of law at the

gestor subjectively believed that he was acting usefully,[66] but his action was objectively not useful? This means that for Ulpian, the question of the subjective and objective assessment of the usefulness of the administration of the given matter is not raised from the objective point of view of the *dominus negotii,* but from the point of view of the gestor.[67] At assessing the usefulness of the administration of affairs, instead of considering the *ex post,* objective point of view of the *dominus negotii,* Ulpian considers the gestor's *ex ante*[68] point of view.[69] According to him, it is not necessary to examine whether the administration was objectively useful to the *dominus negotii*,[70] but it should be assessed whether the gestor could, based on objective criteria, believe that his intervention was in line with the interests of the *dominus negotii*.[71] Ulpian argues that the administration of affairs does not have to be successful,[72] but for the *actio* to be given it has to seem objectively useful, appropriate

beginning of the fragment. Finazzi argues that this solution matches the Roman argumentation techniques. See Finazzi 2003: 534. Yet, as we have seen above there is no framework structure: Ulpian draws up a development arch.

[66] According to Babusiaux 2006: 257–258, late classical jurists developed a special method, based on the variety of argument techniques, to find out the will of each party.

[67] The significance of the differentiation between *ex ante* and *ex post* points of view is stressed by Finazzi 2003: 527.

[68] Ulpian argues in favour of the *ex ante* point of view also here: Ulp. 10 *ad ed.* D. 3.5.11.2.

[69] According to Harke, the time of the assessment of *utilitas* is a significant dogmatic issue, as, for instance, the unauthorised nature of the administration of affairs can be easily concluded from the outcome or the lack of it. See Harke 2007: 13. According to Finazzi 2003: 532, the *ex ante* point of view was introduced by Celsus. See also Voci 1990: 98.

[70] Getting away from the subjective point of view of the *dominus negotii* may have been helped by the fact that over time the requirement that the *gestor* should know well the person on whose behalf he intervened faded away. The requirement of this close acquaintance had appeared still in Ulp. 10 *ad ed.* D. 3.5.5.8; Pap. 2 *resp.* D. 3.5.30.2; Paul. 4 *quaest.* D. 3.5.35. See also Seiler 1968: 38–46. Bergmann also assumes that the usefulness of the administration of affairs had been a precondition, see Bergmann 2010: 319; from older literature see Lauterbach 1707: 3, 5, 21; Voet 1704: ad D. 3.5.10.

[71] The importance of the *ex ante* point of view is increased by the fact that once started, the administration of affairs is to be finished according to several authors, see Kortmann 2005: 46; De Colquhoun 1854: 110; Dawson 1961: 819–820; Stoljar 1984: 156. In addition, this "obligation" extended not only to a specific, individual case but also to the administration of all affairs that seemed necessary. See Voet 1704: ad D. 3.5.6; Pothier 1819: 165–175.

[72] According to Finazzi 2003: 535, during the reign of the Severan dynasty, the *negotiorum gestio* and the *actio in rem verso* converged in relation to the regulation of *gestio sine effectu*. This assumption confirms the authenticity of Ulp. 10 *ad ed.* D. 3.5.9.1. See in that regard MacCormack 1982: 355; Chiusi 1999: 124.

and sufficient *ex ante,*[73] at the beginning of the action.[74] Thus, Ulpian shapes the legal incentive, that is, the *actio,* in such a way that it would be given only to those who acted as effectively and usefully as possible in the given situation.

Let there be things that you allow others but not yourself!

Ulpian's ideal citizen is strict with himself but permissive with others. His personal interests cannot jeopardise or corrupt the interests of the social stratum he belongs to. All that is clear from the following case.

"Sed si in aliquem locum inhonestum adesse iusserit, puta in popinam vel in lupanarium, ut Vivianus ait, sine dubio impune ei non parebitur: quam sententiam et Celsus libro secundo digestorum probat. Unde eleganter tractat, si is sit locus, in quem alter ex litigatoribus honeste venire non possit, alter possit, et is non venerit, qui sine sua turpitudine eo venire possit, is venerit, qui inhoneste venerat, an committatur poena compromissi an quasi opera non praebita. Et recte putat non committi: absurdum enim esse iussum in alterius persona ratum esse, in alterius non."[75]

"But if he [the arbiter] ordered them to appear in some disreputable place, for example a pub or a brothel, as Vivianus says, there is no doubt that he may be disobeyed without impunity. Celsus, too, in Book 2 of his Digesta approves this view. He goes on to raise a rather elegant question: if the place is one to which one of the parties could not honourably come, but the other could, and the one who could come there without dishonour fails to do so, and the one for whom it was a dishonour has done so, is the penalty on *compromissum* incurred on the ground that the act promised has not been performed? And Celsus rightly holds that [the penalty] is not incurred, for it is absurd, he says, that the order be valid for one party to the suit but not for the other."

[73] Based on Mod. 2 *resp.* D. 3.5.26, Kortmann 2005: 101 draws a similar conclusion. He argues that in order to assert the claim, it was enough if it seemed *ex ante* that the *dominus negotii* would be enriched by the intervention.

[74] According to Beseler 1930: 173 the *utiliter coeptum* is not original. It is considered to be of Byzantian origin also by Nicosia 1969: 641.

[75] Ulp. 13 *ad ed.* D. 4.8.21.11.

The relevant source says that if an arbiter, in order to conduct the suit, convenes the parties to a disreputable place, for example to a pub[76] or a brothel, the notice can be disobeyed with impunity. That, in itself, is not problematic. But what if the venue designated by the arbiter is one to which one of the parties could come without any difficulty, but the other could not, as it would be dishonourable for him?[77] In such case, the following question may arise: is the party who fails to come to the designated venue, even though he could have done so without dishonour, obliged to pay the penalty for ignoring the subpoena, if the other party, for whom it was a dishonour, has attended to the location?

Ulpian, in agreement with Celsus, answers this question of law in the negative. He justifies his view by arguing that it would be absurd if the command of law be valid for one party to the suit but not the other. He believes that the effect of the norm can only be the same for both parties. And this is so even though the parties presumably belonged to social classes of different ranks.[78] One of them was probably of senatorial rank, while the other may have belonged to the equestrian order or the plebeians. This is indicated by the fact that one of them could visit the disreputable venue without dishonour while the other could not. As a result of the social difference, the parties' financial situation may have also differed. Thus, if the lower-ranking person had to pay the amount imposed for his absence, it would have been more "painful" for him on the one hand, and on the other hand, in terms of its consequences, it would have been accompanied by a kind of moral redistribution in the opposite direction to the material one. Since as a result of the threat of sanctions, both parties would attend to the designated disreputable place in the future, the moral assessment of the party from the senatorial order would be eroded, and the habits of the other, lower-ranking person would gain legal confirmation.

If the Roman jurists had made a decision to the contrary, the sanction would also have to be paid by the person of senatorial rank, had he not attended to the venue below his rank. After all, the sanction either

[76] The Latin expression *popina* is used in the source, which indicated infamous transaction venues from the 2nd century BC. See Monteix 2015: 222.

[77] For such disreputable places *(locus inhonestus)* see Guzzo–Ussani 2006.

[78] Such as McGinn 1989: 329. McGinn may be mistaken when identifying a place undefined in the source as a brothel. That part of the text seems to refer to places different from the indicated examples (pub and brothel).

applies to both of the parties in the same way, or cannot be applied to either of them, in accordance with the tenor of the decision. However, for the senatorial-rank party, this would have meant not only a financial loss, but also a stain on his integrity, while that is not true to the other party. Therefore, if we look beyond the narrowly considered economic effects, the *poena* (punishment) of the same magnitude would not have affected the two parties to the same extent.

The paradoxical nature of the decision lies in the fact that the normative effect attributed to the legal norm, which was equal to both parties, essentially strengthened the social differences between them. Even though the subpoena was applied to the parties in the same way, its effect actually served to consolidate class differences. The jurists' decision to overturn the judge's order ultimately had the effect of excluding locations that can only be visited by lower-ranking persons from the possible venues of litigation.

It is also interesting that the problem of class difference and moral status was related to the financial sanction expressed in the punishment. The examined source emphasises the importance of the moral, or, more precisely, the social aspect over the material one. It does not allow the financial sanction to apply if it involves moral impairment. In this approach, law is not only a tool for balancing material interests, but also a moral compass, and in this function, it contributes to the maintenance of the social *status quo*.

Maintain your masculine dignity when it comes to women, but do not run afoul of them!

The social and legal rules of the relationship between men and women is one of the most telling features of every political regime. Although for Romans discrimination on grounds of sex was part of everyday life, they nonetheless reflected on it. As Papinian put it: "In many parts of our law the condition of women is worse than that of men."[79] The reason for that remark might have been women's levity of disposition *(animi levitas),* or at least that was Gaius's justification as he tried to explain the fact that full aged women were still under legal guardianship.[80] Other sources

[79] Pap. 31 *quaest.* D. 1.5.9. See Péter 2008: 77.
[80] Gai. *Inst.* 1.144.

make references on the weakness of the female sex (*infirmitas, fragilitas* or *imbecillitas sexus, animi levitas*). Such assessment is also a question of power. In a certain sense, women may be more light-hearted due to their nature, but that value judgement was formulated on grounds set up from the perspective of men. If a characteristic is considered negative based on social aspects, that not only tells a lot of the subject of the evaluation, but also of the conditions of those who formulated it. It would be possible to have a social context where women's light-heartedness could be a positive trait. However, Roman law was consistent in that the weakness of the female sex not only served as a justification for legal restrictions but also as a reason for more protection.[81] For example, an error of law could not lead to the infringement of a woman's interests if a *delictum* was committed as a result it.[82] Thus, Roman sources show that discrimination can be realised basically on two levels. Systemic discrimination is where a certain trait that generally characterises a group of people (e.g. women) is assessed as harmful. In this case, discrimination lies in the basis and the specific value base of the assessment. On the other hand, system-immanent discrimination can occur if only disadvantages are linked to the trait perceived as negative, without rights to protection. In this case, the conclusions of the systemic assessment are drawn in an adverse and one-sided manner.

A thousands-of-years old subtype of the discrimination on grounds of sex is where the relationship of the husband and the wife is hierarchical. That issue is analysed by Ulpian in a passage we have already touched upon above.[83]

"Eleganter quaerit Pomponius libro quinto decimo ex Sabino, si paciscatur maritus, ne in id quod facere possit condemnetur, sed in solidum, an hoc pactum servandum sit? Et negat servari oportere, quod quidem et mihi videtur verum: namque contra bonos mores id pactum esse melius est dicere, quippe cum contra receptam reverentiam, quae maritis exhibenda est, id esse apparet."[84]

"Pomponius very properly asks, in the Sixteenth Book on Sabinus, whether an agreement, concluded between a husband and his wife on

[81] Iul. 90 *dig.* D. 16.2.2.

[82] Paul. 1.S. *de iur. et fact. ign.* D. 22.6.9pr. Interestingly, in this text, Paulus does not make reference to women's errors in law related to the conclusion of contracts. Neither does Kaser 1971: 242 nor any of the standard textbooks provide more details in that regard.

[83] Ulp. 36 *ad sab.* D. 24.3.14.1.

[84] Ulp. 36 *ad sab.* D. 24.3.14.1.

that judgment should not be rendered against him to the extent of his resources but for the entire amount, should be observed. He denies that it should be observed. This opinion seems to me to be correct, for it is better to hold that such an agreement was made contrary to good morals, as it appears to have been contrary to the traditional respect that should be shown to husbands."

According to the text, an agreement is contrary to good morals and, therefore, invalid, if in the agreement a husband waived the amount to ensure his subsistence, which he otherwise could have retained after the divorce from the dowry to be given back to his wife.[85]

Ulpian could have chosen several "law-related" arguments instead of this striking moralisation. From today's perspective, for example, it could be held that the agreement was excessively unequal. Or he could also have referred to the fact that the parties essentially circumvented the judicial practice that provided the husband with the benefit of a minimum subsistence. Finally, he could have based his decision on the fact that such a pact is also harmful from the aspect of society, as it leaves divorced husbands without any financial support.

Yet, however obvious they may seem for today's lawyers, those were not the solutions chosen by Ulpian. Instead, he based his judgment on a desirable moral attitude: the respect for husbands. He did this even though he himself was not completely convinced of its truth. In the text no less than three expressions indicate uncertainty: *videtur verum* (seems to be correct), *melius est dicere* (it is better to hold), and *esse apparet* (it appears). However, this is not a matter of certainty. Instead, it is about a relative value judgment, a possible legal opinion of a jurist. Ulpian considered it important not to base legal enforceability on dogmatic reasoning but on a venerable ancient virtue.

The wording has yet another important feature for us. Reading the text thoroughly, we can see that the virtue of respect is not to be demonstrated by the wife, but by the *pactum*. However, the *pactum* is made by two parties, the husband and the wife.[86] If the agreement is disrespectful, then not only the given wife, but also the given husband had failed to grow up to their tasks. The husband deserves no praise for his self-sacrificing efforts to repay the wife's full dowry. On the contrary.

[85] Guarino 1941: 5ff.

[86] According to some, *reverentia* had to be shown by both spouses to one another in a marriage. See Frier–McGinn 2004: 99.

This weak, sentimental man failed to raise to the dignity that befits Roman husbands. The plural form of husbands *(maritis)* makes it clear that this is a general standard. This general standard, the idealised standard of "husbands", is not an intangible ideal. It is both subjective and objective, but it also has an aspect that is not exhausted by the duality of subjective and objective, or facticity and normativity. On the one hand, it is somehow obviously made up by concrete subjects, that is, flesh-and-blood husbands. On the other hand, it goes beyond them, as it is not simply centred around an imaginary average husband. Respect for husbands *(reverentia)*[87] is to be factually shown, but it also must be complied with in an idealistic way.

If you have no time to think things through, listen to your heart!

Situations in which quick decision-making is necessary are often in the focal point of legal regulations. These are situations where typically more harm is generated than usual due to the unexpected, the fact that the participants are unprepared, and the necessity to act. And this is something law must take into account. Modern psychological literature also distinguishes between fast thinking (hereinafter: *System 1*) and slow thinking (hereinafter: *System 2*).[88] Let us look at a specific example, when *System 1* and *System 2* thinking can be sharply separated in connection with a Roman legal case.

"In navem Saufeii cum complures frumentum confuderant, Saufeius uni ex his frumentum reddiderat de communi et navis perierat: quaesitum est, an ceteri pro sua parte frumenti cum nauta agere possunt oneris aversi actione. Respondit rerum locatarum duo genera esse, ut aut idem redderetur (sicuti cum vestimenta fulloni curanda locarentur) aut eiusdem generis redderetur (veluti cum argentum pusulatum fabro daretur, ut vasa fierent, aut aurum, ut anuli): ex superiore causa rem domini manere, ex posteriore in creditum iri. Idem iuris esse in deposito: nam si quis pecuniam numeratam ita deposuisset, ut neque clusam neque obsignatam traderet, sed adnumeraret, nihil alius eum debere apud quem deposita esset, nisi tantundem pecuniae solveret. Secundum quae videri triticum factum Saufeii et recte datum. Quod si separatim tabulis aut Heronibus aut in alia cupa clusum uniuscuiusque triticum fuisset, ita ut

[87] Buckland 1931: 58; for the afterlife of *reverentia* see Duncker 2003: 385.
[88] Kahneman 2013: 20–24. On this theory see also Chaiken–Trope 1999.

internosci posset quid cuiusque esset, non potuisse nos permutationem facere, sed tum posse eum cuius fuisset triticum quod nauta solvisset vindicare. Et ideo se improbare actiones oneris aversi: quia sive eius generis essent merces, quae nautae traderentur, ut continuo eius fierent et mercator in creditum iret, non videretur onus esse aversum, quippe quod nautae fuisset: sive eadem res, quae tradita esset, reddi deberet, furti esse actionem locatori et ideo supervacuum esse iudicium oneris aversi. Sed si ita datum esset, ut in simili re solvi possit, conductorem culpam dumtaxat debere (nam in re, quae utriusque causa contraheretur, culpam deberi) neque omnimodo culpam esse, quod uni reddidisset ex frumento, quoniam alicui primum reddere eum necesse fuisset, tametsi meliorem eius condicionem faceret quam ceterorum."[89]

"After several people piled grain into Saufeius's ship, Saufeius gave one of them his share out of the common heap, and the ship sank: the question arose whether the others could bring action against the master of the ship for their share of the grain on grounds that he diverted the cargo *(actio oneris aversi).* The legal answer is that there are two kinds of the lease of things, either the same thing must be returned (for example, when we give a garment to the fuller for cleaning), or when something of the same kind must be given back (for example, when a mass of silver is given to the goldsmith to make a vase, or gold is given to make a ring): in the first instance, the property still belongs to the owner, in the latter case, it will belong to the transferee with an obligation. The legal situation is the same in the case of a deposit: for where a party has deposited a sum of money without having enclosed it to anything or sealed it up, but simply after counting it, the party with whom it was deposited is not bound to do anything but repay the same amount of money. In accordance with this, the grain seems to have become the property of Saufeius, and he lawfully gave up a portion of it. If, however, the grain of each of the parties had been separated by wooden boards, or in sacks, or in separate, closed barrels, so that what belonged to each could be distinguished, it could not be changed, and then the owner of the grain which the master of the ship had delivered, could bring an action for its recovery. And hence the action on the ground of the diversion of the cargo is inapplicable: as the goods which was delivered to the master of the ship was either all of the same kind and at once became his, and the merchant becomes the creditor, [and therefore] it does not appear that there was a diversion of the cargo, since it became the property of

[89] Alf. 5 *dig. a paulo epit.* D. 19.2.31.

the master of the ship: or the identical article which was delivered must be restored, [and in this instance] the creditor could bring an action for theft, and hence an action on the ground of the diversion of the cargo would be superfluous. Where, however [the merchandise] was delivered with the understanding that the same kind should be returned, the party receiving it would only be liable for negligence *(culpa)* (as liability for negligence exists where the contract is made for the benefit of both parties), and no negligence can exist where the master returned to one of the owners a portion of the grain, since it was necessary for him to deliver his share to one of them before the others, even though he would be in a better condition than the others by his doing so."

The first part of the passage, comprising of a single sentence, is the summary of the facts of the case: several people piled grain into Saufeius's ship.[90] The master of the ship gave one of them his share, then the ship sank.

In part two, Paulus describes the question of law, that is, whether the rest of the merchants can bring an action called *actio oneris aversi* against the master of the ship.

In part three, to answer the question of law, the jurist outlines two analogical arguments that complement each other. The first example of *locatio conductio* is outlined to demonstrate that formally the master of the ship became the owner of the cargo made up of fungible things.[91] Nonetheless, this ownership[92] does not bring about absolute control but entails a burden arising from the law of obligations[93] *(in creditum iri).*[94]

[90] On the legal consequences of piling see De Santis 1946: 111. He argues that the *iusta causa traditionis* was missing as a requirement for the transfer of ownership. In my opinion this argument was based on the contract concluded by the parties and obviously well known by the jurist who formulated an opinion on the matter.

[91] In contrast, Longo argued that the cargo remained in the shared ownership of the merchants. See Longo 1906: 141. As a counterargument, for example Albanese recognises the transfer of ownership, see Albanese 1982: 95–96.

[92] According to Pernice, ownership as a legal construct was necessary due to the underdeveloped nature of the other types of control over things. See Pernice 1963: 97.

[93] Bürge argued that the liability arising from the law of obligations was unaffected by the legal arrangement of the ownership. See Bürge 1994: 400.

[94] Based on the expression "in creditum ire", Longo believes that a twofold legal relationship is established: a loan and a contract for services. See Longo 1906: 148. Arangio-Ruiz firmly rejects the possibility of loan, see Arangio-Ruiz 1978: 312.

This position of control[95] gave the master of the ship the right, inter alia, to distribute the grain[96] among the merchants in accordance with their shares in the port of destination.[97] The second analogy refers to deposit[98] and illustrates that the service provided by the master of the ship was lawful, even though he did not give back the same thing but the same quantity of the same type of thing as performance.

The jurist answers the question of law posed in part four indirectly in the negative: *triticum factum Saufeii et recte datum,* which means that Saufeius became the owner of the grain, and he lawfully gave up a portion of it. Even though it is not explicitly stated, it is clear that the merchants are not entitled to bring the *actio oneris aversi* against the master of the ship in this case.

In part five, the jurist's decision is supported by subtle legal distinctions applied to partly hypothetical cases. First, Paulus declares that if the fungible thing delivered to someone else would have been marked or clearly and physically separated (such as with boards or sacks), then the merchants could have vindicated it, as they clearly would be the owners. Second, he explains that the diversion of cargo does not occur if the master of the ship becomes the owner of the goods at the moment when the cargo is loaded onto the ship and the merchants, in a certain sense, "credit" the goods to the master of the ship.[99] As a result of this legal construct, the carrier obtained an ownership limited by the law of obligations, which is dogmatically not an independent category in modern law. This ownership included the power to distribute piled merchandise,[100] and on its basis the master of the ship was entitled to transfer the ownership of the grain to certain persons validly, without the restriction arising from the principle of *nemo plus iuris.* The merchants could not bring an *actio oneris aversi* against the master of the ship, as

[95] In Földi's explanation, the loading of the cargo onto the ship originally did not result in actual transfer of ownership because Romans were attached to their things. See Földi 1997: 66. A critical opinion was formulated against that argument by Bessenyő 2010: 46.

[96] Such as Benke 1987: 228; Talamanca 1989: 76.

[97] According to Pflüger, the port of destination was not the same for all merchants. See Pflüger 1947: 197. His view does not affect the merits of our conclusions.

[98] Some say that the example of *depositum* is not a mere legal argument, but the legal relationship between the parties was *depositum irregulare.* See Litewski 1974: 215; Bello Rodríguez 2002: 54.

[99] Geiger also argues that "in creditum iri" refers to the transfer of ownership. See Geiger 1962: 28.

[100] Individual solutions applied by the contracting parties could greatly amend the specifics set out in the contracts. See in that regard Watson 1965: 109.

he became the owner of the grain. From the moment of loading the cargo onto the ship, he had the right to decide with which grain *species* he would perform to each merchant, as long as he delivered the right quantity to the right persons. Third, Paulus observes that if the master of the ship fails to deliver the individual thing *(eadem res)* entrusted to him or fails to deliver it to the right person, then the clients can bring an *actio furti* against him. Overall, each example served the purpose of making it clear that Saufeius obtained the ownership of the grain, or, more precisely, the right of purpose-bound disposal.

In part six, Paulus examined more closely the second element of the decision, namely whether the master of the ship preformed lawfully when he delivered one of the merchants his share. He concludes that Saufeius's performance was legally valid *(recte datum),* as he delivered the merchandise, which had not been physically separated, to the right person in the right quantity and with the proper diligence. Delivering one of the clients his share, even if the client was in a better condition than the others by Saufeius's doing so, was certainly not a negligent act *(culpa),* as there had to be a first person to whom Saufeius delivered his share of grain in the course of the performance.

In summary, according to the facts of the case, several merchants piled grain into Saufeius's ship. The master of the ship delivered one of them his share in the port of destination, then the ship sank. The question of law was whether the rest of the injured merchants could bring *actio oneris aversi* against the master of the ship, which was the action for the "diversion" of goods, that is, for delivering the goods to the wrong person. The purpose of this action was to prevent the master of the ship from selling the cargo to third persons, as grain safely delivered to the port of destination was worth much more than grain at the location of loading. In the absence of this action, taking advantage of the significant difference between the two price levels, the master of the ship could have sold the grain to others, and he would have had plenty of remaining profit even after compensating the original merchants. This option had been eliminated by the *actio oneris aversi,* as it allowed the original merchants to bring an action not only for the loading value *(restitutionary damages)* but also for the expected profit *(expectation damages).*

The difficulty for the original merchants was caused by the fact that the master of the ship did not perform to a third party, but to one of them. Therefore, to bring the action against him notwithstanding, they resorted to a sophisticated argument. They claimed that the

master of the ship put one of them in a more advantageous position and thereby discriminated against the others. The justification for the decision refutes this complaint by explaining that in the specific situation someone had to be first, so the conduct would be discriminatory against the others in any case. Thus, the choice made by the master of the ship – in the storm, when he was forced to make an instant decision on the basis of *System 1* thinking – as regards to whom to hand over his share of grain first, enjoyed the protection of the law, regardless of the ethical consideration behind his choice: sympathy for the lucky trader or antipathy towards the others, or just blind chance.[101] Due to the objective external circumstances, in the present case, the act based on *System 1* thinking enjoyed the protection of the law, even though it had essentially the same effect as the malicious diversion of cargo. The latter is clearly the result of a *System 2* type of attitude, and the *actio* was aimed at the latter. It is possible that the master of the ship decided in bad faith against the merchants he disliked and left them for later intentionally. In that case his action was indeed discriminatory, yet it is to be deemed legal. However, if the master of the ship was driven neither by ill will nor by a guilty desire to favour one of the merchants, but by a mere sense of duty, his decision was not discriminatory, despite the fact that his action resulted in discrimination against the majority of merchants.

Do not let yourself be bribed with gifts!

Various gifts were always particularly significant in the relationship between Rome and the provinces.[102] Unlike today, these were not merely gifts of protocol but had a quasi-public-law nature,[103] contributing to the stability of the Empire.[104] In the following, we will examine the guidance given to the governors of the provinces by the centre of the Empire in relation to the acceptance of presents.

"Non vero in totum xeniis abstinere debebit proconsul, sed modum adicere, ut neque morose in totum abstineat neque avare modum xeniorum excedat.

[101] This dilemma is a typical Leibnizian *concursus,* see Leibniz 1666: sec. XIX.
[102] Cf. Coffee 2017: 48.
[103] Veyne 1990: 5–6.
[104] See Mauss 1993: 38.

Quam rem divus Severus et imperator Antoninus elegantissime epistula sunt moderati, cuius epistulae verba haec sunt: »quantum ad xenia pertinet, audi quid sentimus: vetus proverbium est: οὔτε πάντα οὔτε πάντοτε οὔτε παρὰ πάντων. Nam valde inhumanum est a nemine accipere, sed passim vilissimum est et omnia avarissimum.«"[105]

"The Proconsul should not absolutely refuse to receive presents, but he should act with moderation, so as not rudely to reject them altogether, nor avariciously transcend the bounds of reason in their acceptance. Which matter the Divine Severus and the Emperor Antoninus have very properly regulated in an Epistle, the words of which are as follows: »with reference to presents, our declaration is as follows. As the old proverb says: Not all things should be received, nor at all times, nor from all persons. For, indeed, it is inhumane to accept gifts from no one. Yet it is most despicable, and most avaricious to accept without distinction everything that is given«."

This text addresses the issue of how many gifts a *proconsul* who governs a province can accept from provincial residents.[106] According to Ulpian, the *proconsul* should show moderation.[107] He should not refuse every gift, but he should not greedily hoard them either. Regarding the degree of the acceptance of gifts, the emperors Septimius Severus and Caracalla recalled an old Greek saying in an epistle: "Not all things should be received, nor at all times, nor from all persons." For it would be inhumane[108] for the *proconsul* to reject everyone's gifts. However, accepting all gifts would be despicable. And, finally, it would seem most avaricious[109] to accept without distinction everything that is given – says the justification, in Latin again, following the Greek proverb.

These imperial guidelines do not provide a clear answer. That is because the structure of the Greek proverb and the "Latin" explanation (for the sake of simplicity, I shall refer to the Roman imperial explanation as such hereinafter) differ from each other, and the normative massages they convey also differ slightly. The Greek proverb comprises a system of conjunctive conditions consisting of three elements: not all things should be received, nor at all times, nor from all persons.

[105] Ulp. 1 *de off. procons.* D. 1.16.6.3.
[106] On the text see Procchi 2012: 140.
[107] On the proconsul's obligations see Talamanca 1976: 138.
[108] Palma 1992: 172–173; Kreuzsaler–Urbanik 2008: 151.
[109] A similar moral approach is shown in Sen. *Ep.* 94. On greed as excess see Arnese 2003: 41.

The Latin explanation, on the other hand, defines two extreme points of reference: first, rejecting everything is inhumane, and second, accepting everything from everyone is despicable and greedy. It is not entirely clear whether the two guidelines suggest accepting the same quantity of gifts.

Neither do the contents of certain expressions overlap completely. For example, the Greek proverb includes an adverb of time *(οὔτε πάντοτε* – not always), while the Latin explanation includes an adverb of place (*passim* – everywhere). In classical legal terminology, the expression *passim* usually means "without selection" or "without compelling reason". In this text, it may specifically indicate that the *proconsul* should rather not accept gifts from persons of low social status.[110]

However, as regards the dissimilarity between the Greek and Latin texts, the striking difference in style is more important than the difference in content. The Greek sentence is an ordinary proverb, while the Latin is an elevated, moralising text.

By referring to the three sins (inhumanity, despicability, greed) the Latin justification transformed the Greek folk wisdom into a sophisticated moral teaching. The latter is very similar to the Stoic doctrine of moral responsibility inspired by Aristotle. As we know from the work on ethics penned by the late-Stoic Hierocles,[111] who lived in the first half of the 2nd century BC, this doctrine defined the moral obligations of the individual towards himself and others in ever-expanding circles: spirit, body, parents, brothers, wife, further relatives and the genus, fellow citizens and the entire human race. The simplified version of these concentric circles can also be found in the examined fragment. First, as an individual, everyone is responsible for themselves. Second, as a member of society, all individuals are also responsible for their fellow citizens. Finally, as a member of the human race, everyone is linked by a moral bond to the whole of humanity.[112]

In my opinion, the three sins mentioned in the Latin explanation (inhumanity, despicability, greed) refer to the three levels of Stoic cosmopolitanism (individual, state, humanity). On the level of humanity,

[110] The governor of the province was separated from the locals, see Potter 2010: 26.

[111] This is not the Neoplatonic Hierocles from the 5th century BC. The two of them are often confused, see Schibli 2002: 13.

[112] On Hierocles's relevant tenets see Ramelli 2009: lxxix.

it is inhumane *(inhumanum est)* to accept gifts from no one.[113] A *proconsul,* who rejects everyone, cuts himself off from the community of people. As regards the middle, state level, as we have seen, the governor must pay attention to the local social hierarchy. He can only accept gifts from high-ranking people, otherwise he would degrade himself *(vilissimum est).* Finally, at the individual level, the proconsul must overcome his own individual greedy passion *(avarissimum est).*

This beautiful fragment is not only a textbook example of how Ulpian translated an ordinary Greek saying into a practical tool of Roman colonialism. It also excellently illustrates how the most trivial administrative legal problem can be solved on the basis of a comprehensive moral system that regulates the passions.

What you let go in your soul, never want back!

The tenacity of the spirit and the clarity of intentions are crucial characteristics of Ulpian's ideal citizen, who, thus, can also act as a predictable and reliable member of the state. Earnest determination of will was also expected by the law. A fragment from Ulpian's *edictum* commentary provides an apt example for that:

"Tamdiu autem condictioni locus erit, donec domini facto dominium eius rei ab eo recedat: et ideo si eam rem alienaverit, condicere non poterit.

Unde Celsus libro duodecimo digestorum scribit, si rem furtivam dominus pure legaverit furi, heredem ei condicere non posse: sed et si non ipsi furi, sed alii, idem dicendum est cessare condictionem, quia dominium facto testatoris, id est domini, discessit. […]

Et ideo eleganter Marcellus definit libro septimo: ait enim: si res mihi subrepta tua remaneat, condices. Sed et si dominium non tuo facto amiseris, aeque condices.

In communi igitur re eleganter ait interesse, utrum tu provocasti communi dividundo iudicio an provocatus es, ut, si provocasti communi dividundo iudicio, amiseris condictionem, si provocatus es, retineas."[114]

[113] Aulus Gellius understands *humanitas* as being well-mannered, but he also recognises its universal role related to humanity, see Gell. *NA* 13.17.
[114] Ulp. D. 13.1.10pr. – 13.1.12.1.

"There is ground for a *condictio* so long as the ownership of the property has not been lost to the owner by [his own] act: and therefore, if he transfers it to another,[115] he cannot bring suit for its recovery.

Wherefore Celsus states in the Twelfth Book of the Digest, that if the owner bequeaths the stolen property to the thief absolutely [providing a right *in rem*], the heir cannot bring an action against the thief to recover it: and where [the bequest] was not made to the thief himself but to another, the same rule is applicable, and a *condictio* will not lie, as the ownership is lost by the act of the testator; that is to say of the owner.

Consequently, Marcellus very properly states in the Seventh Book of his commentary on the *edictum:* If your property stolen from me still remains yours, you can bring a *condictio.* But if you lose the ownership in some other way than by your own act, you can likewise bring a *condictio.*

Therefore he very aptly says that where the property is held in common, it makes a difference whether you instituted proceedings against your co-owner by an action for partition, or he brought suit against you; if you instituted the proceedings, you will lose the right to bring a *condictio,* but if he did so, you will still retain that right to bring *condictio.*"

The source is a fine example of that in Roman law, the protected position of the owner was made contingent upon the will of the owner, that is, upon the subject, the owner himself. That was so even if the property was stolen from him. Thus, in some cases, not even the deep hatred for thieves felt by the Romans *(odium furum)* allowed for a *condictio* to be brought in addition to the *actio furti,* the obvious action against thieves. As it should be noted that "[t]hrough hatred of thieves, and for the purpose of making them liable to a greater number of actions, the rule has been adopted that, in addition to the penalty of double and quadruple the value of the property obtained, thieves are also liable to the form: *'si paret eos dare oportere',* even though the action by which we seek to recover what belongs to us *('rem suam esse')* may also be brought against him".[116] Because of this, some thieves may have been better off than others simply because of an act of ownership beyond their control. In other words, the will of the owner overrode even the serious penal and preventive action against theft, as well as the dogmatic basic rule, namely the possibility of accumulating claims.

[115] In the terminology of Roman law, the verb *alienare* was not used for a transaction of alienation regulated by the law of obligations *(Verpflichtungsgeschäft),* but rather a transfer of ownership *(Verfügungsgeschäft),* see Heumann–Seckel 1907: 27.
[116] Gai. *Inst.* 4.4.

You may use tricks in business but never be a fraud!

How does the pure moral of a citizen fit the cunning rules of business? Interestingly, Romans found it acceptable for contracting parties to mutually "mislead" one another in terms of their own price preferences. But of course, as we will see, only for the sake of the state.

"Idem Pomponius ait in pretio emptionis et venditionis naturaliter licere contrahentibus se circumvenire."[117]

"Pomponius also says with reference to the price in a case of purchase and sale, that the contracting parties are permitted to naturally outsmart one another."[118]

In this way, the negotiated purchase price was made suitable to ensure the distribution of the surplus value inherent in the goods relatively proportionately between the parties. For example, if the goods that cost the seller 80 are valued by the buyer at 100, a purchase price of 90 ensures the fair sharing of the surplus value inherent in the goods between the parties, and thus the difference between them, as well as the wealth differences within the community remain unchanged. A deal aimed at outwitting each other was automatically – or, as Ulpian put it: naturally[119] – a solution that was not only effective but also served the common good. Trickery could not rise to the level of fraud – an unlawful act – but it was obviously immoral, as it was aimed at "circumventing" the other. However, despite the mutual immorality, moderated bargaining was still deemed ethical. It was considered the duty of a wise person – a person living his life well – not to act excessively altruistically and not to pay more for the goods than what the seller asked for, but also to keep the stability of his country in mind:

"[S]apientis ionem rei fami nihil contra mores, leges, instituta facientem habere rationem rei familiaris. Neque enim solum nobis divites esse volumus, sed liberis, propinquis, amicis maximeque rei publicae. Singulorum enim facultates et copiae divitiae sunt civitatis."[120]

"[I]t is a wise man's duty to take care of his private interests, at the same time doing nothing contrary to the morals, laws and institutions. For we do not aim to be rich for ourselves alone but for our children,

[117] Ulp. 11 *ad ed.* D. 4.4.16.4.
[118] For further source texts with similar content see, for example, Jusztinger 2016: 105f.
[119] Ulp. 11 *ad ed.* D. 4.4.16.4.
[120] Cf. Cic. *Off.* 3.62–63.

relatives, friends, and, above all, for our country. For the private fortunes of individuals are the wealth of the state."

This means that in certain cases, even good motives, namely honesty and magnanimity should be kept at bay in order to serve the interest of the state.

Fear no ghosts!

A Roman citizen was obliged to remain persistent even in the face of a physical threat – at least to a certain extent. Nonetheless, that certain extent required by law is to be examined more closely. It is for certain that the magnitude of the threat was taken into account even by the Romans,[121] but one of Ulpian's fragments[122] reveals that not only such magnitude was considered at the legal assessment of the situation. It appears that the actual fulfilment of the threat may also have been relevant.

To address that issue, let us touch on the field of *delicti* and analyse the following source text:

"Metum autem praesentem accipere debemus, non suspicionem inferendi eius: et ita Pomponius libro vicensimo octavo scribit. Ait enim metum illatum accipiendum, id est si illatus est timor ab aliquo. Denique tractat, si fundum meum dereliquero audito, quod quis cum armis veniret, an huic edicto locus sit? Et refert Labeonem existimare edicto locum non esse et unde vi interdictum cessare, quoniam non videor vi deiectus, qui deici non expectavi sed profugi. Aliter atque si, posteaquam armati ingressi sunt, tunc discessi: huic enim edicto locum facere. Idem ait, et si forte adhibita manu in meo solo per vim aedifices, et interdictum quod vi aut clam et hoc edictum locum habere, scilicet quoniam metu patior id te facere. Sed et si per vim tibi possessionem tradidero, dicit Pomponius hoc edicto locum esse."[123]

"We must understand the threat to be a present one, and not the mere suspicion that it may be exercised: and that is what Pomponius states in the Twenty-eighth Book. For he says that the threat must be understood to have been occasioned, and that is so if fear has been

[121] A fragment from Ulpian clearly states that not just any fear should be deemed relevant, but only that of a greater evil *(timor maioris malitatis).* See Ulp. 11 *ad ed.* D. 4.2.5.
[122] Ulp. 11 *ad ed.* D. 4.2.9pr.
[123] Ulp. 11 *ad ed.* D. 4.2.9pr.

excited by someone. Thereupon, he raises [the question], namely: would the Edict apply if I have abandoned my land, after having heard that someone was coming armed to forcibly eject me? And he states that it is the opinion of Labeo that the Edict would not be applicable in this instance, nor would the *interdictum unde vi* be available, for I do not appear to have been ejected by force, as I did not wait for this to be done but took to flight. It would be otherwise if I had departed after armed men had entered upon the land, for, in this case the Edict could be employed. He also states that if you forcibly erect a building upon my premises by means of an armed band, then the *interdictum quod vi aut clam,* as well as this Edict would apply, because in fact I suffer you to do this through intimidation. If, however, I deliver possession to you because of the employment of force, Pomponius says that there will be ground for this Edict."

In the source text, Ulpian raises the question of whether a person who flees his property upon hearing that he is approached by someone armed would receive legal remedy based on the relevant *edictum*. According to Labeo, neither the *actio quod metus causa* for threat, nor the *interdictum* was available, due to the fact that the owner fled, not waiting to be forcibly removed from his property. The law comes to his aid only if someone enters his territory armed. In this case, he can be sure that the threat must be taken seriously. Such conduct of those posing the threat clearly show that they are ready to fulfil the threat and commit actual violence. Accordingly, the passage clearly focuses on the person who posed the threat instead of the point of view of the one who was threatened.

The criterion of the seriousness of the threat underlies the requirement of the presence of the threat *(metus praesens).* Any threat that is present must obviously be taken seriously. However, the criterion of presence does not mean that the violence must actually be carried out. Illegal entry to property does not necessarily involve open violence: it involves present – that is, serious – but not necessarily actual violence.

According to the other, presumably hypothetical situation, someone demonstrates significant force, and forcibly erects a building on the owner's land. Here, the opinions of legal scholars seem to be divided regarding the available claims. According to Labeo both the *actio* at issue and the *interdictum quod vi aut clam* are available cumulatively, as the owner only tolerated the construction out of fear. Pomponius, however, argues that the owner could bring an action based on the *edictum* if

he surrendered the property as a result of force. The difference can be explained by the fact that while the owner was paralysed by fear caused by aggressive behaviour in the first case, actual violence was committed in the second case. In relation to the cases of erecting a building on someone's land with the demonstration of power *(forte manu adhibita),* the word *vis* most likely did not refer to actual physical violence, but only to the obvious unlawfulness of the act (ruthless disregard of the owner's will), while in the second case the same term may refer to taking possession by an act of violence. How can the difference be explained, that while in the first case, when there was no violence, two legal remedies were available, and in the second, where violence actually took place, they could only sue on the basis of an edict?

It is conceivable that the two legal solutions refer to two independent situations. In the first case, the act of building on the land with the display of force is continuous (which also obviously assumes taking possession), while the other only refers to a one-time, spot-on, violent takeover of possession. However, this explanation is less likely due to the conjunction "but" *(sed).* Had it been two independent situations, this conjunction would not make much sense. On the other hand, it is also suspicious that in the first case the "mere" demonstration of force is emphasised by the text, while in the second that is contrasted with actual violence. It seems that we will not solve this problem so easily.

Perhaps, the answer lies in the fact that, in the first case, fear paralyzed the expression of will that was in line with the owner's interests. In the second case, the rightful owner was able to express his will, but due to violence, his will was not realised. Based on this, it seems that Roman law considered the frustration of the expression of will more dangerous than the violent suppression of the expressed will. This approach is seemingly contrary to the principle observed in modern law where, in the regulation of threat, the decisive factor is not simply the fact or the magnitude of the threat, but whether the implementation of the threat leads to economically or socially harmful consequences.[124] However, the Romans might have had a similar point in mind. If so, the character of steadfastness described by Ulpian also fundamentally serves the interests of the state.

[124] Posner 2003: 115; Cserne 2009: 8.

Summary

What do the above "nine commandments" tell us? Perhaps the most striking common feature of all those pieces of life advice wrapped in legal norms is that each serves the purpose of improving the personality of the addressees. At creating the image of the man behind his legal system, Ulpian pictured a citizen and able warrior of the Roman Empire with solid morals, an idealised *bonus vir* of a kind. This *bonus vir* was nor the reasonable wise man of the Stoics, neither the desire-driven ideal of the Epicureans. Brouwer assumes that there is a difference in level between a Stoic wise man and the Roman ideal. He argues that Roman law does not expect the perfect behaviour envisaged by the Stoics, but a more realistic, more down-to-earth conduct, which may not be flawless but is reasonably justified. In my opinion, however, the difference between the Stoic Greek wise man and the Roman *bonus vir* is not simply a matter of level but of quality. The latter does not intend to create harmony between the actual human action and the occurrences of the world, and between natural law and positive law by choosing perfect rationality or – in another approach – free individual preferences as the standard of human action. The Roman ideal of action is not subjective but objective in nature. Accordingly, it does not primarily expect individual freedom from law, but social stability. This is the only ideological basis on which the Romans could create their approach to law, which we have been preserving to this day.

But why did the Romans succeed in resisting the seductive force of subjectivity, while the Greeks did not? I believe that the reason underlying their success is to be sought in a specifically Roman legal institution, namely the *patria potestas.* Gaius bears witness of the fact that this was indeed a specific legal institution unique to Romans:

"[f]ere enim nulli alii sunt homines, qui talem in filios suos habent potestatem, qualem nos habemus."[125]

"[f]or there are hardly any other men who have such authority over their children as we have."

Paternal power made the Roman ethics of actions past-oriented, in which therefore the great deeds and morals *(mores maiorum)* served as the standard. The greatness of the idealised conduct of the predecessors (the Catonian *nostri maiores*) was justified by the prosperity of the

[125] Gai. *Inst.* 1.55.

Roman state. The Romans were well aware of this connection – or at least Polybius was, whose work reports their success. I do not refer to the renowned concept of the so-called "mixed" constitution *(μικτή πολιτεία),*[126] but to his explanation concerning the masks of the ancestors, borrowed by the Romans from the Etruscan burial rituals. The Roman youths were inspired by the lifelike portrayal of their ancestors to do great deeds just like them, thus contributing to the Roman state becoming a global empire.

Consequently, for Romans, the rightness of individual action was not ensured directly by harmony with the world-ruling reason, but rather by the fact that the given act contributed to the good of the state *(salus rei publicae),* and thus indirectly to the preordained cosmic order. In addition to the systematic Greek thinking, the past-orientation of the *patria potestas* and the intersubjectivity of the state *(consensus iuris)* were the elements required for the birth of the modern-sense objective concept of law and concept of state.

After almost all the inhabitants of the Empire[127] received Roman citizenship[128] thanks to Caracalla's edict[129] issued in the wake of Ulpian's effective intervention, Ulpian intended to extend also the old Roman human ideal to the new citizens. The fact that the granting of Roman citizenship was driven by economic motives[130] can be considered an external, formal expansion of the Roman human ideal. Ulpian's reform intended to implement the counterpart of that: an internal expansion of the ideal's content. Ulpian strove to overcome the entropic forces, threatening to tear the state apart, by the powerful expansion of the Roman human ideal, at a time when such ideal was no more than a fragment historical memory even for the "indigenous" Romans. Christianity, on the other hand, gave an intense response to challenges. Ulpian tried to achieve the goal of good state through good citizens. Yet, he saw citizens as atomised individuals. From his point of view – the perspective of one of the highest-ranking public officials of the Roman Empire – this may not be surprising. From the perspective of power, the relationship between the state and its citizen is primary, preceding even the relationship between people.

[126] See in that regard Hamza 2007: 30.
[127] Except for the so-called *dediticii.* See in that regard De Ruggiero 1910: 1553–1554; Wirth 1997: 32–34; Jones 1960: 140.
[128] Affirmatively Gaudemet 1967: 528–534.
[129] See in that regard De Martino 1975: 777–781.
[130] See Clemente 1977: 270; similarly earlier Rostovtzeff 2003 [1926]: 639–640.

Ulpian's approach may also have been influenced by one of the prevailing spiritual currents of the time, namely Stoic philosophy.[131] In Stoic "political theory", the state consists of virtuous persons, and only virtue makes a person a citizen and free. Instead of focusing on interpersonal relationships, this tenet was centred around the individual as the tiny mirror of the cosmos. When seeking an answer to the question of why did the juristocratic attempt led by Ulpian to salvage the Empire failed to achieve enduring success (or, at least, success that was expected from it, as otherwise the reform attempt had an enormous influence on the development of law in later periods), this aspect may be crucial. It may not only explain the failure of the reform, but – among other reasons – even the fall of the Empire itself; therefore, this aspect may also enrich the views formulated on that matter in the literature. There is a saying based on a Heinian thought:[132] the *Digesta* is the Bible of selfishness. If this is true, then a human ideal based on rational self-interest and ancient Roman virtues were not able to save the Empire. The new world was built on the promise of solidarity and a different book: the *Bible*. As we have seen, Ulpian's effort was to equalise people upwards, picturing a world where almost every subject of the Empire is a Roman citizen, and the behaviour of each of them is adjusted to the ideal Roman patrician of the age of the Republic. Christianity, on the other hand, made a downward gesture to equalise human beings, slaves and free citizens, expecting them "only" to embrace the commandment of love. As Paul says in his Epistle to Philemon:

"διὰ τὴν ἀγάπην"[133]

"yet for love's sake I prefer to appeal to you"[134]

Ulpian failed to recognise that people desired something much more tangible than the intangible law. With its solutions polished to perfection, Roman law was able to handle minor frictions that occurred during the period of economic and military prosperity of the global empire but failed to give answers to the masses concerning their everyday life. Moreover, Roman law was not the main pillar of the building of the Empire. It only assisted the network of the political, military and economic interests that ensured the sufficient level of unity of the

[131] Manthe 1997: 12.
[132] Heine 1970: 149.
[133] Philemon 1:9.
[134] ESV.

diverse provinces. As this sustaining force weakened due to internal crises and external calamities, sophisticated law fell into the sands of oblivion without a safety net. At the same time, Christians organised a state within the state. They established a new identity and lasting moral – and later economic – bonds, initially parallel with the existing power structures. Romans had no clue how to handle Christianity, as for them it was neither a religion nor a philosophy. Perhaps that is why the followers of Jesus could, in a certain sense, subdue the largest empire on earth at that time. And the Christians received unexpected help too. Marginalised politically, legally and economically in Roman patriarchal society,[135] women and slaves were the ones to struck one of the most staggering blows to Ulpian's legal religion intended for salvation. It is less well-known that Heine not only considered Roman law the Bible of selfishness, but also the "Bible of the devil".[136] Considering that, it is only right to ask: Is rationality the greatest enemy of love? Or: Can an empire be stabilised solely on the ground of rationality and individuality? Ulpian, at least, did not succeed in that attempt.

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[135] On the role of women see Stark 1996: 95–128.
[136] Heine 1970: 75.

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