The Fate of the Institutional System

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One of the main features of the modern civil law is that it is presented as a highly organised system, whereas the common law, for example, is hardly seen as a system at all. Students of the civil law study private law as a single whole and progress through the various topics as parts of that whole, whereas students of the common law are presented with the law in discrete boxes, labelled Contracts, Torts, Land Law and so on, with little suggestion that there is any connection between them. The systematic character of the modern civil law has advantages in enabling the lawyer to see how the various topics of private law relate to each other but it also has disadvantages in that the system once established appears to be closed. As a result commercial law, for example, is a separate system outside the regular private law and it is difficult to find a place within that system for new topics, such as labour law and consumer law.

Curiously the Roman law from which much of the civil law derives was not seen by its practitioners as an organised system. The great synthesising works by Paul and Ulpian at the end of the classical period – the commentaries on the praetorian edict and on the civil law following the order of Sabinus' early treatise – are full of examples of subtle reasoning in particular cases, but show very little trace of any sense of the need for orderly treatment. This is equally true of the Digest and Code of Justinian. The only part of his *Corpus Iuris* which does express an interest in systematic presentation is the Institutes, the latest example of a literary genre whose use until then was entirely confined to the schools of law. The law student was allowed the luxury of having the law presented as a systematic whole, but once he had obtained his grounding, he was expected to see that the system was artificial and that the real substance of the law was much less orderly than the institutional scheme suggested.

In modern times, however, the institutional scheme has inspired various attempts to present the substance of private law as a system. Professor Van Warmelo has not only recently analysed the Institutes of Justinian as a students' manual[1] but has him-

1. "The Institutes of Justinian as Students' Manual", in P.G. Stein and A.D.E. Lewis (eds.), *Studies in Justinian's Institutes in memory of J. A. C. Thomas* (1983), 164 ff.

self written an account of Roman law for students, based on the traditional scheme.[2] It is hoped, therefore, that some account of the fate of that scheme will be an appropriate acknowledgement of his life's work in maintaining the study of Roman law in accordance with the highest standards of scholarship.

The well-known tripartite division of private law into persons, things and actions seems to have been introduced by Gaius in his Institutes of the middle of the second century A.D. This scheme, as I have argued elsewhere,[3] was superimposed by Gaius on an earlier arrangement.

For Gaius the category of things is apparently subdivided into three: physical things, inheritances and obligations. This scheme implies certain conceptual ideas: the distinction between corporeal and incorporeal things, the classification of inheritances and obligations as incorporeal things and the linking of contracts and delicts as sources of obligations. However an analysis of the contents of the first subdivision shows that its subject is not so much physical things as the acquisition of particular things as contrasted with acquisition of things *per universitatem*. When he passes to the second sub-division Gaius says that, having dealt with particular things, he will consider how things are acquired *per universitatem* and, although he then treats mainly of inheritances, he also refers to other forms of universal succession, such as arise in adoption. Again in his account of obligations, Gaius does not mention that they are incorporeal things. His treatment suggests that his predecessors regarded obligations not as things but as a separate legal category and perhaps did not regard delict as a source of obligations at all. The emphasis is on how contractual obligations arise and are discharged and delicts are discussed only after the discharge of obligations.

Gaius described a series of established legal phenomena, each with its own legal attributes. His discussion of actions, for example, does not say what procedural steps a litigant should take to enforce his claim, but deals rather with different kinds of legal action, which are indicated by different kinds of formula.

The compilers of Justinian's Institutes chose to follow the model of Gaius' Institutes, although there were alternatives available, not because they shared his views but because they could adapt it to their own ends. They saw the institutes of law more dynamically than did Gaius. For them they were less a set of objective phenomena to be described and more an account of the conditions governing what an individual could do. Between the time of Gaius and that of Justinian two developments in legal thought had begun, which were to have increasing influence in later times.

First, the word *ius*, which for Gaius usually meant "the legal position", increasingly took on the meaning of a "right". In Latin, as in most other European languages, except English, the general word for "the law" and the word for a (subjective) right is the same, so that it is not always easy to detect when the emphasis is switching from one meaning of *ius* to the other, or indeed which is the correct English translation of *ius* in a particular context. There are a number of passages in Justinian's Institutes

2. *An Introduction to the Principles of Roman Private Law* (1976).
3. P. Stein, "The Development of the Institutional System", in Stein and Lewis, *Studies, cit.*, 151 ff.

in which *ius* can only mean a right adhering to an individual, although there are still some where the meaning "the legal position" is more appropriate.

Secondly, the Byzantine lawyers were moving towards a distinction between substantive law and procedural law and a consequent relegation of purely procedural matters from the institutional system. Actions still appear in Justinian's Institutes but whereas in Gaius they occupied a whole book, they now occupy only part of a book. Furthermore obligations are no longer identified clearly as things but are rather connected with actions. The Byzantines saw obligations primarily as causes of actions, and together obligations and actions formed a single category, distinct from things, which was concerned with the conditions under which an action could be brought or defended.

This development is connected with the recognition of subjective rights. The owner of property, the heir to an inheritance, the usufructuary all have rights which have a content distinct from the ability to sue others. They are entitled to do things other than bring actions and they can enforce that entitlement against anyone who interferes with it. These rights came to be seen to be rights *in rem*, enforced by actions *in rem*. Obligations, on the other hand, only entitle the holders to bring actions and those actions can only be brought against particular individuals. They are therefore a distinct form of rights, which came to be seen as rights *in personam*.

Among the Glossators and Commentators of the middle ages there was little interest in the institutional scheme. They knew nothing of Gaius' Institutes in its original form and tended to follow the Byzantine equation of obligations and actions and thus to see the division of law as into persons, things and obligations/actions. Thus Aretinus *ad Inst.* 4.6.pr. says of the law: *versatur circa tria aut circa personas aut circa res aut circa actiones et obligationes*.[4]

It is with the humanists of the sixteenth century that interest in the Institutes revives. One of the ideals espoused by the humanists was that of *ius civile in artem redigere*, a project originally endorsed by Cicero.[5] The humanist jurists produced numerous programmes for studying law systematically[6] and some utilised the tripartite division of the Institutes, sometimes not in the sense that each rule can be allocated to one of the three parts but in the sense that every rule can be looked at from three aspects: from that of the persons affected by it, from that of the subject matter concerned and from that of the remedies that are available. One of the earliest of this group, the German Johan Apel (1486–1536) argued, in his *Dialogus de studio iuris recte instituendo*, that "persons" was not a separate part of the law, like things, but a mere "circumstance", such as time, place and quantity.[7] Another humanist, Fran-

4. Cited by H.F. Jolowicz, *Roman Foundations of Modern Law* (1957), 63, n.1.1.
5. Aulus Gellius, I. 22.7; cf. Cicero, *De Oratore*, I. 90.
6. Cf. the studies of V. Piano Mortari in *Diritto Logica Metodo nel secolo XVI* (1978), especially "Considerazioni sugli scritti programmatici dei giuristi del secolo XVI", originally in (1955) 21 *Studia et Documenta Historiae et Iuris*, 276 ff and "Dialettica e giurisprudenza: studio sui trattati di dialettica legale del secolo XVI", originally in (1957)1 *Annali di Storia del Diritto*, 293 ff; for humanist conjectures on Gaius' Institutes, J. E. Scholtens, "Gaius Studies of the Humanists", (1956) *Butterworths South African L.R.*, 95 ff.
7. Jolowicz, *op. cit.*, 64; on Apel, F. Wieacker, *Gründer und Bewahrer* (1959), 44 ff, especially 59 ff.

cois Connan (1508–51) suggested that "actions" referred generally to human conduct rather than specifically to "legal actions".

As the sixteenth century progressed, the humanists saw the law as a system of rights appertaining to individuals and distinguished those rights from the procedural means for enforcing them. One of the most influential writers was Hugo Donellus (Doneau) (1527–91) in his *Commentarii de iure civili*.[8] At the outset he asserts that civil law consists in the first place in knowing what belongs to each person and in the second place in the procedural means for obtaining it (*in eius quod cuiusque sunt cognitione et eius cogniti obtinendi ratione, Comment.* I.1.2). The main substance of the law is "things" which Donellus sees as "what is ours". He divides things into two parts: what is ours in the proper sense and what is merely owed to us: *quod proprie nostrum est* and *quod nobis debeatur* (II.8.1). This is a classification not of things themselves but of rights that we have in regard to things. Later Donellus makes this clear when he distinguishes *quaedam iura rerum nostrarum* (in effect real rights) and *quaedam rerum nobis debitorum* (personal rights to enforce debts, V.1.17).

What is properly ours depends partly on each individual's legal condition and partly on the character of external things. Certain rights are ours, if we are freemen, even though we lack external things, for example, life, bodily security, liberty, reputation. Donellus carefully observes that mental security (*incolumitas animi*) is also important to us and adds, *sed haec ad defensionem iuris non pertinet* (II.8.3). He then discusses the capacity of persons in different kinds of *status*, before considering rights *in rem* and *in personam* and finally actions, which he understands as the procedural steps that must be taken to enforce those rights.

Already in Donellus, then, the emphasis of the institutional system has changed from what it was even in Justinian's compilation. There it was still based on factual phenomena whose differences had legal consequences. Now the subject matter is exclusively legal phenomena – different kinds of rights.

The recasting of the institutional arrangement received further impetus by the application to it of the logical method developed by the French educationalist Peter Ramus, who exploited the opportunities for clear diagrammatic arrangement, which were offered by the spread of printing.[9] Earlier thinkers had distinguished different kinds of logic according to the material, for example, a mathematical logic leading to necessary and inevitable conclusions and a logic of the probable designed to find the more probable of two opposed positions. Ramus, on the other hand, held that there was only one kind of logic, which was generally applicable and the demonstration of which was characterised by extensive tabulation in diagrammatic form and analysis of material by much division and subdivision.

An example of the application of Ramist methods to law is to be found in the

8. M. Villey, *La formation de la pensée juridique moderne* (1968), 543 ff; cf. R. Feenstra and C. J. D. Waal, *Seventeenth Century Leyden Law Professors* (1975), 16. (Donellus was a Huguenot, exiled from France after the Massacre of St. Bartholomew); S. Strömholm, "Lo sviluppo storico dell'idea di sistema", (1975) 52 *Riv. int. filosofia del diritto*, 468 ff.
9. W. J. Ong, "Ramism", *Dictionary of the History of Ideas* (1973), IV. 42 ff.

Dicaeologicae lib. III of Johannes Althusius (1557–1638),[10] of which the first edition appeared in 1617. The subtitle indicates the aim of the work: "the whole law in force, methodically set out, with parallels from the Jewish law, and supplemented by tables." Althusius' method is descriptive of legal phenomena. He first distinguishes between law and facts, by which he means those transactions between persons, to which the law applies. The primary fact of which the jurist must take cognisance is the *negotium* and this category includes every act which either adds something useful or necessary to social life, or is an obstacle to it: *negotium est prima pars Dicaeologicae, utilia vel necessaria ad vitae socialis humani usum inferens vel impediens, ob quod ius constituitur* (I.6).

The *negotium* can be divided into *partes* and *species*. The *partes* are first the things (*res*) with which the transaction is concerned, and they are classified as singular and universal, corporeal and incorporeal, etc., and secondly, the persons who are involved in the transaction, and they may be classified as singular, collective, etc. The *species* are classified, according to the nature of the transaction, into voluntary acts, such as contracts, and involuntary acts, such as delicts.

Having thus tabulated the various forms of transaction that people get involved in and that are the concern of the law, Althusius comes to analyse the law itself. This is defined as what is laid down on the occasion of a precedent fact, in respect of a person or thing, for the need, utility and right conduct of man. The definition is ambiguous since it can indicate either a set of rules or a set of rights. Further analysis shows, however, that it is the latter that is intended. There are two kinds of *ius: dominium* and *obligatio. Dominium* consists of power over things or over persons. Power over things may be full ownership (*dominium plenum*) or secondary real rights (*dominium minus plenum*); power over persons may be power over oneself (*libertas*) or over another, which may be domestic, such as paternal or marital power, or public, such as sovereignty. The logical method then required that attention be given to the ways in which these rights may be acquired and lost.

The tendencies noted in Althusius can be observed also in his contemporary Hugo Grotius (1583–1645)[11] but, following Donellus, Grotius is rather clearer than Althusius in laying out the law as a system of subjective rights of various kinds. For him these rights are subsumed under the two headings: rights over things and obligations. This is expressed most clearly in the *Inleidinge tot de Hollandsche Rechtsgeleerdheid*, one of the earliest accounts of a national law, as distinct from Roman law, to be written in the vernacular. Since the subject did not purport to be Roman law, Grotius had no obligation to follow the Roman categories. The work is divided into three books. After some remarks about different kinds of written laws, Grotius devotes the bulk of Book I to the legal condition of different classes of men (*Van der Menschen Rechtelicke Gestaltenisse*), with particular reference to their capacity. Book II is headed *Van Beheering* and deals with rights over things: acquisition of ownership, community property of spouses, succession on death, and loss of owner-

10. Villey, *op. cit.*, 588 ff.
11. On Grotius, recently, D. R. Carey Miller (1982) *Acta Juridica*, 66 ff.

ship; then with rights of limited ownership (*gebreckelicken eigendom*), such as praedial servitudes, usufructs, emphyteusis, and hypothecs. Book III is headed *Van Inschuld* and deals with obligations: the creation of obligations, gifts, contracts, quasi-contracts, delicts and the discharge of obligations.

Grotius thus makes a clear division between real and personal rights but, instead of treating them statically, puts the emphasis on how they are respectively acquired and lost. Roughly the same scheme is to be found in Book II of his classic work *De iure Belli ac Pacis* (1625), where there is a sophisticated analysis of the various ways in which power (*imperium* or *dominium*) is acquired, first over persons and then over things. A distinction is made between original acquisition and derivative acquisition. Then obligations arising from contract and from delict are distinguished.

Grotius was interested in the problem of presenting law in a systematic way, and expresses the attraction that the model of mathematics held for jurists. In developing his ideas on law, he said, he had abstracted his mind from every particular fact, in the way that mathematicians consider their figures as abstracted from bodies.[12] Although he recognised that one could deduce the general principles of law *a priori*, by logical deduction from a few basic principles which were accepted as axiomatic, Grotius himself put more trust in the *a posteriori* demonstration of the general validity of the rules he urged the world to recognise, i.e., by showing that those rules were in fact generally recognised in the legal systems of civilised people.[13]

In the middle of the seventeenth century, a division can be discerned among writers offering a systematic presentation of the civil law or of national laws based on the civil law.[14] One group continued to follow essentially the institutional arrangement, but with certain refinements. The other preferred to base their systems on the so-called geometrical method of argument from the general to the particular. The problem for those who wished to proceed in this way was to identify the general principles of law, equivalent to the axioms of mathematics, from which detailed rules could be logically deduced. Such principles were normally presented as arising from the nature of man in society, the implication being that anyone who denied their validity would be denying the rationality of nature itself. Eventually these systems became ideal systems of natural law, although the detailed rules apparently deduced from the general principles often bore a strong similarity to the rules of Roman law, but stripped of what could be regarded as antiquarian details. At first, however, the method was used to present the civil law in a new way.

We will consider first the influence of this new scientific arrangement and then return to those who remained faithful to the institutional arrangement. The first writers to adopt the new method were those who were both mathematicians and jurists, such as Leibniz. He himself produced a *Corpus Iuris Reconcinnatum*, in which the material of the whole of Justinian's compilation was re-arranged to demon-

12. *De iure Belli ac Pacis, prolegomena*, sec. 58.
13. *Prolegomena*, sec. 40; cf. I.1.12.
14. See generally, K. Luig, "The Institutes of National Law in the Seventeenth and Eighteenth Centuries", (1972) 17 *Juridical Review*, 193 ff; A. Watson, *The Making of the Civil Law* (1981) 65 ff; R. Orestano, *Introduzione allo studio storico del diritto romano* (2nd ed. 1961), 71 ff.

strate its inherent rationality as a system, but it has never been published.[15] We may consider two published examples of the genre, Lord Stair's *Institutions of the Law of Scotland*, published in 1681, and Jean Domat's *Les Lois civiles dans leur ordre naturel*, published from 1689 to 1694.

Stair's aim was to summarise the laws and customs of Scotland in a way that would show their conformity with the best contemporary laws.[16] His exposition starts from the proposition that man is essentially free, except to the extent that he is bound by obedience to God, who has implanted in him certain duties, and to the extent that he has voluntarily bound himself by agreement with others. Stair recognises the distinction between "rights called personal or obligations", on the one hand, and "rights real or dominion", on the other, but unlike the institutional writers, he promotes obligations to first place.

Under that head he first discusses "obediential obligations", which "are put upon men by the will of God, not by their own will". (I.3.3). This category includes first, "family" obligations, such as those of husband and wife, parents and children and tutors and their wards; secondly, what Justinian regarded as quasi-contractual obligations, such as the duty to recompense someone who has carried out transactions on one's behalf; and thirdly, the obligation to repair damage resulting from delinquence. After obediential obligations, Stair deals with "conventional obligations" arising from contract and discusses certain particular contracts in detail.

The treatment of rights real is divided first into a discussion of the rights themselves, mainly in connection with feudal land-holding, and then an account of succession on death. Stair deals in some detail with possession as distinct from the right of property and admits that it is "more *facti* than *iuris*", but justifies its inclusion on the ground of its legal consequences.

Domat's arrangement has some similarities with that of Stair and was far more influential.[17] In his preface he says that we can learn from the scientists that one should progress from what is obvious to what is less obvious. "Thus in Geometry we begin by learning that the whole is greater than the parts and that two quantities equal to a third are equal to each other." Applying the method to law, Domat then classifies legal rules under three heads: those that apply to all topics of law, those that are common to several topics and those that are peculiar to one topic. In the first category come general rules derived from the nature of man in society, such as that one must cause harm to no-one and that one should render to each his due. An example of a rule in the second category is that agreements take the place of laws, for it applies to all kinds of contracts but not, for example, to other legal acts, such as wills. The rule of *laesio enormis* is an example of the third category, since it applies only to the particular contract of sale.

Domat's scheme for private law, like Stair's, concentrates on rights. The categories

15. P. Stein, "Elegance in Law", (1961) 77 L.Q.R. 242 at 253.
16. For the *Institutions* themselves see now the "tercentenary edition" ed. D.M. Walker (1981) and P. Stein, "The theory of Law" in D.M. Walker (ed.), *Stair Tercentenary Studies*, Stair Society 33 (1981) 181 ff.
17. A.J. Arnaud, *Les Origines Doctrinales du Code Civil Français* (1969), 142 ff.

of persons and things are reduced to a brief introductory description of different kinds of persons and different kinds of things, both as they exist in nature and according to the civil law. He then divides private law into two main parts, obligations (*engagements*) and successions. The treatment of obligations is subdivided into four sections. First come voluntary obligations, which include not only contracts, but also donations, dowries, usufructs and praedial servitudes. Secondly, Domat places involuntary obligations, which include those obligations categorised by Justinian's Institutes as quasi-contractual, and not only those arising from *negotiorum gestio* and unjustified enrichment, but also the duties of tutors and common owners. This section also includes wrongful causing of harm. Although the natural lawyers had to recognise various particular contracts, each with its own set of rules, in addition to a general theory of contract, they tended to reduce the various kinds of delict to one general principle, viz., sanctioning the causing of harm by wilfulness or fault. The third section deals with additional elements that supplement obligations, such as real and personal security, possession and prescription. The fourth and final section covers the factors which reduce or discharge obligations. The other part of private law, successions, predictably deals with intestacy, wills and legacies, rights of legitim, substitutions and *fideicommissa*.

The schemes of Stair and Domat thus remove property rights from pride of place as the main part of private law and substitute obligations. However, whereas earlier writers had tended to regard obligations from the point of view of the creditor, as assets, Stair and Domat saw them more from the point of view of the debtor, as duties. This was in line with the general emphasis of contemporary natural law theorists, such as Samuel Pufendorf, whose treatise on the duties of man (*De officio hominis et civis iuxta legem naturalem*) appeared in 1673.

The natural order proposed by Domat was developed more in Germany than in France and was an ancestor of the Pandectist schemes which produced the German civil code (BGB) of 1900.[18] The main feature of this type of scheme came to be the prominence given to the opening general part, containing rules common to all kinds of legal transaction. Great emphasis is placed on the concept of the *Rechtsgeschäft*, which is the descendant of Althusius' *negotium*.[19] It indicates any voluntary transaction or expression of will by which a person intends to produce a change in his legal position. Matters of capacity are also dealt with in the general part, which in the BGB is followed by that on obligations, as in Domat's arrangement, but there are then separate parts for family law, things and succession. The separation of family law from persons is thus another feature of this kind of arrangement.

We return now to a consideration of those exponents of the civil law who remained

18. A.B. Schwarz, "Zur Entstehung des modernen Pandekten-systems", (1921) 42 *Zeitschrift der Savigny-Stiftung (Rom. Abt.)*, 578 ff, reprinted in Schwarz, *Rechtsgeschichte und Gegenwart: Gesammelte Schriften* (1960), 1 ff. The Pandectist systems used the general part to deal with matters other than rights, such as the different kinds of persons and things, and the special part could then be exclusively devoted to rights.
19. Villey, *op. cit.*, 594 ff; O. Gierke, *Joh. Althusius und die Entwicklung der naturrechtlichen Staatstheorien* (1880).

faithful to the institutional arrangement. They regarded the civil law as exclusively concerned with rights and so eliminated actions altogether from their schemes and concentrated on persons and things. The question then was the distribution between those two categories. The category of persons came to include three kinds of rules.[20] First, it covered those laying down the conditions under which persons in different kinds of status may be the subject of rights and duties. Secondly, it covered those dealing with the rights of an individual that cannot be quantified in money terms, such as a man's right to his liberty and reputation, i.e., which are not part of his patrimony. Thirdly, it came to include those dealing with rights arising from family relationships, such as those of parents and children and guardian and ward. The problem was that some of these rights were more "absolute" than "relative" in character and had therefore seemed (for example, to Althusius and Grotius) to be more like property rights than personal rights, but it was recognised that rights *in rem* should be confined to *res*, i.e., things which can be quantified in money terms.

An influential figure in this mode was Arnold Vinnius (1588–1657).[21] His first work was *Jurisprudentiae contractae sive partitionum iuris civilis lib. IV*, which was essentially a shorter popularisation of the scheme of Donellus, who had himself taught at Leyden, Vinnius' university. He is better known, however, for his commentary on Justinian's Institutes, which appeared in 1642.

Although he followed the order of the titles of the Institutes, Vinnius imposed on it his scheme of subjective rights. First he classified them into *iura in rem* and *iura ad rem*. *Iura in rem* are subdivided into *dominium* (*plenum* and *minus plenum*), *usus*, *ususfructus*, *iura praediorum*, *ius possessionis* and *pignus seu hypotheca*. *Iura ad rem* are explained as both *obligatio* (from the debtor's angle) and *creditum* (from the creditor's). Vinnius refers to Grotius' *Inleidinge* and observes that his *ius in rem* is Grotius' *Beheering* and his *ius ad rem* is Grotius' *Inschuld*.[22] He stresses that the law is concerned not just with the description of the various kinds of rights but also with how they are acquired and lost, so that it must cover the modes of acquisition of ownership and similar rights, both in regard to single things and in regard to blocks (*universitates*) of things, and also the various modes of contracting, modifying and losing obligations.

In the eighteenth century the institutional schemes include both those based on modes of acquisition, which thus recall the Roman arrangement before Gaius' Institutes and also those that return to Gaius' distinction between corporeal and incorporeal things.

An example of the first group is to be found in the introductory dissertation to François Bourjon's *Le Droit commun de la France et la Coutume de Paris reduits en principes*, which appeared in 1747.[23] Bourjon is concerned with French customary law rather than the civil law. He divides his material into persons and things. Under per-

20. Jolowicz, *op. cit.*, 69.
21. Feenstra and Waal, *op. cit.*, 24 ff; they suggest (p. 17) that Donellus' influence was mediated to Vinnius through Tuningius, pupil of the former and teacher of the latter.
22. *Comment. ad Inst.* I.2.12.
23. Arnaud, *op. cit.*, 159 ff.

sons he deals both with family matters, such as marriage, and with questions of capacity. He treats things under three heads, not according to their character as things but according to what happens to them, and for him a thing is primarily corporeal rather than a subjective right. First, he discusses how things are acquired, and under this head deals with contracts and intestate succession. Secondly, he discusses how things are managed and under this head deals with usufructs and servitudes. Thirdly, he comes to how one disposes of things and here he deals with donations and testamentary dispositions. This is an interesting arrangement but the separation of intestate from testate succession is inconvenient.

Bourjon's contemporary, Robert Joseph Pothier, set out an interesting arrangement of the civil law in the essay entitled *Operis divisio*, attached to the final title of the Digest (50.17: *de diversis regulis iuris antiqui*)[24] in his massive *Pandectae Iustinianeae in novum ordinem digestae* (1748–52).[25] At first his treatment of private law recalls the scheme that Gaius sought to impose, and his account of "things" seems to move away from the emphasis on rights which had been dominant for the two previous centuries. He distinguishes *res in commercio* from *res extra commercium* and subdivides the former into *res corporales* and *res incorporales*. But when he comes to discuss the content of the last two categories he moves into a discussion of rights. Under corporeal things he subsumes only ownership (*proprietas*) and possession, with the result that rights less than full ownership have to be placed in the category of incorporeal things. That category then becomes an enormous rag-bag and includes servitudes, rights of real security (*pignus* and hypothec) and rights to inheritances, as well as rights to debts (*credita seu obligationes*), which are designated *iura ad rem*.

Half a century later the compilers of the French civil code had to produce a set of laws which would supersede both the customary law and the civil law. In choosing an appropriate arrangement, they were influenced both by Bourjon, as an exponent of the customary law, and by Pothier, as an exponent of the civil law. The whole Code Civil consists of 2281 articles, divided into three books of very uneven size. The first book (articles 7–515) deals with "persons" and covers both matters of capacity and family relationships, such as citizenship, marriage, paternal power, adoption and guardianship. Book II (articles 516–710) is headed "things and modifications of ownership", and deals both with ownership and with usufruct and servitudes (rights *in rem* less than ownership). Book III (articles 711–2281) is ostensibly devoted to "different ways of acquiring ownership", but actually covers everything that cannot find a place in the other two books, i.e. succession, gifts and testaments, obligations (contracts, quasi-contracts, delicts), particular contracts, matrimonial property, mortgages and prescription.

24. For the influence of this title on the notion of general principles, P. Stein, "The Digest title *De diversis regulis iuris antiqui* and the general principles of law", in R. A. Newman (ed.), *Essays in Jurisprudence in honor of Roscoe Pound* (1962), 1 ff. and *Regulae Iuris: from juristic rules to legal maxims* (1966), 162 ff.
25. Arnaud, *op. cit.*, 163 ff.

Concubinatus in Roman Law

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Since concubinage in the sense of a durable monogamous cohabitation between a man and a woman has experienced a revival in recent times, it is appropriate to trace the origin and development of this institution in Roman law.*

In early Roman law, matrimony and related affairs were private matters, left to the individual, defined and ruled by custom.[1] The only legally relevant connection between a man and a woman was *matrimonium* and since every marriage in early Roman law was *cum manu*,[2] there was no uncertainty whether the parties were married or not. Moreover, in the small closely-knitted rural society formed by the early Romans, peer-pressure was strong and more effective than detailed later legislation. Consequently, it can be accepted that even in the twilight of Roman history concubinage in the modern sense will have taken place[3] but as an exception rather than the rule, without legal definition or consequences. As a result of rapid urbanisation, the phenomenon which was the primary cause of social disintegration, the Romans discarded the old values and discipline for an urban-centered culture of *panem et cir-*

* I am honoured to have been given the opportunity of contributing an article on Roman law to these essays dedicated to Paul van Warmelo, who alone has stood for Roman law for so many years in South Africa.

1. WW Buckland *A textbook of Roman law* Cambridge 1963, 106; W Hellebrand, Ein Beitrag zur Problematik – matrimonium und mos, 70(1953) ZSS RA, 247 sqq; M Kaser *Das römische Privatrecht* I München 1971, 71 sq; AJM Kunst *Historische ontwikkeling van het recht* I Zwolle 1967, 3; II Zwolle 1968, 47, 50; F Schulz *Prinzipien des römischen Rechts* München und Leipzig 1934, 15.
2. Buckland 118; A Esmein *Mélanges d'histoire du droit et de critique* Paris 1886, 3-36; M Kaser, Ehe und conventio in manum, 1(1950) JURA 64-101; Kaser I 72, 76 sqq; Kunst II 50; Kunkel, R E XIV 2260 s v *Matrimonium;* JAC Thomas *Textbook of Roman law* Amsterdam 1976, 419, 446; JC van Oven *Leerboek van romeinsch privaatrecht* Leiden 1948, 449 sq; P van Warmelo *'n Inleiding tot die studie van die Romeinse reg* Kaapstad 1965, 72 sqq.
3. *Dig* 50, 16, 144. C Castello *In tema di matrimonio e concubinato nel mondo romano* Milano 1940, 37 sqq; P Meyer *Der römische Konkubinat* Leipzig 1895, 9 sqq; EJ Jonkers *Invloed van het Christendom op de Romeinsche wetgeving betreffende het concubinaat en de echtscheiding* Wageningen 1938, 8 sqq.

censes. Thus, the character of Roman society underwent drastic changes and the position of the Roman marriage underwent gradual modification; the *sine manu* marriage became more popular[4] and freedom of divorce was fully exploited.[5]

The expansion of the territory by way of victorious wars, caused a new affluent society which, as it developed, rejected its rural origins.[6] An influx of slaves accompanied this development.[7] The prohibition of marriage between the freeborn and the freed[8] will consequently have led to a larger number of concubinages which together with other extramarital affairs[9] remained ignored by the law.

This situation came to an end when August attempted to regulate the marital and extramarital affairs of his Roman subjects by means of legislation; the *lex Julia de maritandis ordinibus* and the *lex Papia Poppaea* were aimed at stabilizing and promoting marriage and procreation,[10] while the *lex Julia de adulteriis* attempted to restore moral rectitude.[11]

The crimes of *stuprum* and *adulterium* were consequently introduced and it is in this part of the Augustan legislation that *concubinatus* became part of legal terminology. With regard to the particular contents of this legislation we are left to conjecture and thus the notion of *concubinatus* as laid down by the *lex Julia de adulteriis* has to be constructed from provisions dispersed in the *Corpus Juris Civilis*. The first relevant text is *Dig* 25, 7, 3, 1 (Marcianus *libro duodecimo institutionum*) *Nec adulterium*

4. *Gai Inst* I, 111. Buckland 118; Esmein *Mélanges* 3-36; Kaser I 323 sq; Kaser 1(1950) JURA 64-101; Kunst II 51; Kunkel, R E XIV 2261 sq s v *Matrimonium;* Thomas 447; van Oven 450; van Warmelo *Inleiding* 74 sq.
5. Buckland 116 sq; Esmein *Mélanges* 3-36; Jonkers 13; Kaser I 326 sq; Kunst II 52; Thomas 426; van Oven 448, 470 sqq; van Warmelo *Inleiding* 83.
6. A Aymard et J Auboyer *Rome et son empire* Paris 1954, 136 sqq; P Csillag *The Augustan laws on family relations* Budapest 1976, 45 sqq; J Gaudemet *Institutions de l'antiquité* Paris 1967, 298 sqq; BHD Hermesdorf *Schets der uitwendige geschiedenis van het Romeins recht* Nijmegen 1972, 137 sqq, 156 sqq; W Kunkel *Römische Rechtsgeschichte* Köln 1973, 48 sq; Kaser I 178; Meyer 17.
7. Aymard and Auboyer 156; Hermesdorf 151; Jonkers 21 sq; Kaser I 283; Kunkel *Römische Rechtsgeschichte* 49 n 5; Meyer 17; S Treggiari *Roman Freedman during the late republic* Oxford 1969, 1 sqq; van Oven 439.
8. *Dig* 23, 2, 23. Dio Cassius 54, 16, 2 and 56, 7, 2. P. Bonfante *Corso di diritto romano* I *Diritto di famiglia* Milano 1963, 277; Buckland 114; Castello 73 sqq; PE Corbett *The Roman law of marriage* Oxford 1930, 31 sqq; Csillag 97 sqq; Jonkers 24; O Karlowa *Römische Rechtsgeschichte* II Leipzig 1901, 172; Kaser I 315; Kunkel, R E XIV 2262 s v *Matrimonium;* Meyer 18 n 28, 24, 27; Treggiari 81 sqq; Th Mommsen *Römisches Staatsrecht* III Leipzig 1887, 430 sq; Thomas 422; van Oven 454; van Warmelo *Inleiding* 70. Although *Dig* 23, 2, 23 and Dio Cassius are quite explicit, recent legal literature expresses caution with regard to this impediment, since other non-legal sources are rather inconclusive: Cicero *Pro Sext* 52, *Philipp* 2, 2; 3, 6 and 13, 10; Livius 39, 19.
9. Th Mommsen *Römisches Strafrecht* Leipzig 1899, 693 n 2; Kaser I 328; A Watson *The law of persons in the later Roman republic* Oxford 1967, 10.
10. R Astolfi *La lex Julia et Papia* Padova 1970; B Biondi *Istituzioni di diritto romano* Milano 1972, 577; Csillag 81 sqq; Kaser I 318 sqq;. Kunkel, R E XIV 2268 s v *Matrimonium;* Kunst II 53 sq; E T Salmon *A history of the Roman world 30 BC to AD 138* London 1970, 25; JE Spruit *De lex Julia et Papia Poppaea* Deventer 1969; van Oven 454; van Warmelo *Inleiding* 71.
11. Csillag 55, 175 sqq; Esmein *Mélanges* 71-169; Ph Lotmar, Lex Julia de adulteriis und incestum *Mélanges Girard* II Paris 1912, 119-143; Kaser I 319; Mommsen *Strafrecht* 691; Salmon 23 sqq.

per concubinatum ab ipso committitur. nam quia concubinatus per leges nomen assumpsit, extra legis poenam est, . . .

This description of concubinage is a negative one ie concubinage was the extramarital activity which did not qualify as *adulterium*. Therefore, a definition of *adulterium* becomes a necessity and this is found in *Dig* 48, 5, 6, *Dig* 48, 5, 35(34) and *Dig* 50, 16, 101. From these texts the following conclusion may be drawn. Although *adulterium* and *stuprum* were indiscriminately used, *adulterium* was committed on a married woman while *stuprum* was committed on virgins and widows. Thus, *adulterium* differed from adultery in the modern sense in that it could only be committed by and on married women.[12]

From the various kinds of carnal union outside wedlock, the *lex Julia de adulteriis* lifted *adulterium* and *stuprum* from the private sphere and placed them in the sphere of criminal law, leaving fornication and *concubinatus* as the only extramarital heterosexual activities which remained unpunished. As fornication is intercourse with public women against consideration,[13] a further deduction leads to the conclusion that *concubinatus* was a sexual union between a married or unmarried man and a woman who was neither virgin, married, widowed or a prostitute. To find a description of this type of woman is not easy but an indication can be found in *Dig* 25, 7, 3 (Marcianus *libro duodecimo institutionum*) *In concubinatu potest esse et aliena liberta et ingenua et maxime ea quae obscuro loco nata est vel quaestum corpore fecit. Alioquin si honestae vitae et ingenuam mulierem in concubinatum habere maluerit, sine testatione hoc manifestum faciente non conceditur. sed necesse est ei vel uxorem eam habere vel hoc recusantem stuprum cum ea committere.*

Therefore, women *in quas stuprum non committitur* were slaves as well as certain stigmatised unmarried free women.[14] However, the traditional point of view that the Augustan legislation produced and promoted the institution of concubinage by introducing numerous new impediments on marraige[15] is erroneous. The emperor's attempts were aimed at promoting rather than impeding marriage[16] and in this context the probabilities tend in the direction of removing bans to marriage. The only impediments August introduced related to the marriage of members of the senatorial class,[17]

12. *Cod* 9, 9, 1. Csillag 180, 197; Hartmann, R E I 432 s v *Adulterium;* Jonkers 7 n 2; Mommsen *Strafrecht* 688 sq, 694.
13. *Dig* 23, 2, 41, pr; 23, 2, 43. *Cod* 9, 9, 22. Csillag 181.
14. *Dig* 25, 7, 1, 1; 25, 7, 1, 2; 25, 7, 3, pr; 48, 5, 6, pr; 48, 5, 11(10), 2; 48, 5, 14(13), 2; *Cod* 5, 5, 7; 9, 9, 22; 9, 9, 24; *PS* 2, 26, 11; 2, 26, 16. Csillag 144, 181; G Castelli *Scritti Giuridici* Milano 1923 142 sqq; Kaser I 328; Mommsen *Strafrecht* 691 sq; S Solazzi, Il concubinato con l'obscuro loco nata, 13-14 (1947-48) SDHI 269-277.
15. Biondi 590; Bonfante 315 sq; Buckland 128; Castello 73 sqq; Csillag 98; P Jörs W Kunkel L Wenger *Römisches Recht* Berlin 1949, 282; Kaser I 319, 328; Spruit 15; Meyer 23 sqq; F Schulz *Classical Roman law* Oxford 1951, 137 sq; Thomas 433; van Oven 454, 474. This opinion is based on *UR* 13, 2 which text is strongly suspected of postclassical adaptation. See also *infra* n 17.
16. Cf *Dig* 23, 2, 23. Csillag 96 sq; Corbett 33; Kaser I 319 sq; B Kübler 17 (1896) ZSS RA 359 sq; Kunkel, R E XIV 2268 s v *Matrimonium;* Kunst II 53 sq; Meyer 20; Spruit 9 sq; Van Warmelo *Inleiding* 71.
17. *Dig* 23, 2, 16, pr; 23, 2, 23; 23, 2, 27; 23, 2, 42, 1; 23, 2, 43, 10; 23, 2, 44, pr; 23, 2, 44, 1; 23, 2, 49; 23, 2, 58; 24, 1, 3, 1; *Cod* 5, 4, 15; 5, 4, 28; 5, 5, 7; 5, 27, 1. All these texts are explicit

which formed a tiny segment of the population. In other words, the Augustan legislation was aimed at encouraging the citizen to procreate legitimate children and introduced a system of penalties and rewards[18] to achieve this goal. Moreover, sexual relations outside marriage, which threatened the purpose of the legislation, were subjected to penalties but prostitution and concubinage were not seen as threats to marriage or morals.

Concubinage was only possible with a certain type of woman,[19] it was irrelevant whether the man was married or not;[20] more than one concubine could be had at the same time[21] and it follows that *concubinus* and *concubina* did not have to live together as husband and wife. The *concubina* can more appropriately be compared to a mistress.

However, the Augustan legislation did not achieve its goals and its provisions did not obtain efficacy.[22]

Furthermore, in post-Augustan legislation new marriage impediments appeared[23] and the close relationship between marriage and dowry[24] were factors which contributed to a situation where an increasing number of people could not marry or did not bother to marry. These *de facto* households, as well as the mistress, inevitably came into contact with the legal system. The following questions arose: What was the position regarding a donation to a concubine,[25] or a legacy to a concubine;[26] was the *stipulatio* wherein a wife had stipulated a penalty if the husband retook a concubine during their marriage valid;[27] was there an age limit for a concubine;[28] can a concubine have *honor matrisfamiliae*;[29] is *adulterium* or *stuprum* possible against a

but nevertheless the legal literature on the subject is inclined to construe an Augustan restriction to the marriage of *ingenui*. Bonfante 277 sq; Castello 106-138; Corbett 34 sq; Csillag 98; Kaser I 319, 328; Meyer 23. These authors base their point of view on *UR* 13,2, since no other text gives credence to this opinion. See also *supra* n 15.

18. Astolfi 77 sqq; Csillag 146-175; Kaser I 320 sq; Kunst II 54; Spruit 8 sq, 16 sqq, 28 sqq; Van Oven 454 sq; van Warmelo *Inleiding* 72.
19. See *supra* n 14. Meyer 26 sq.
20. *Dig* 45, 1, 121, 1. Kaser I 329; Schulz *Classical Roman law* 138; *contra:* Castello, Csillag, Jonkers, Meyer, Spruit et al who all define *concubinatus* as a durable monogamous relationship between a man and a woman.
21. Biondi 590; Kaser I 329; Schulz *Classical Roman law* 138; *contra:* Castello, Csillag, Jonkers, Meyer et al see *supra* n 20.
22. Csillag 199 sqq; Kunkel, R E XIV 2268 s v *Matrimonium;* Kunst II 54; Spruit 32 sqq; Van Oven 455, 475.
23. *Dig* 23, 2, 36; 23, 2, 38, pr; 23, 2, 57; 23, 2, 59; 23, 2, 63; 23, 2, 65; 23, 2, 66; 24, 1, 3, 1; 48, 5, 7; *Cod* 5, 4, 6; 5, 6, 7; Biondi 581; Buckland 128; Castello 138 sqq; Corbett 39 sqq; Jonkers 41; Kaser I 317; Kunkel, R E XIV 2267 sq s v *Matrimonium;* Meyer 63.
24. *Dig* 23, 2, 19; 23, 3, 2; 23, 3, 3; 37, 6, 6; *PS* 2, 21B, 1; *Cod* 1, 5, 19, 3; 5, 12, 14; 5, 17, 11, pr. Buckland 107, 107 n 5; Corbett 152 sq; Csillag 92 sqq; Kaser I 332 sqq; Van Oven 457; Van Warmelo *Inleiding* 76.
25. *Dig* 24, 1, 3, 1; 39, 5, 31, pr.
26. *Dig* 32, 41, 5; 34, 9, 16, 1.
27. *Dig* 45, 1, 121, 1.
28. *Dig* 25, 7, 1, 4.
29. *Dig* 23, 2, 41, 1. The case of the *patronus'* concubine was treated differently as a result of the patron's rights. Cf Meyer 82-86.

concubine;[30] can a concubine live in concubinage with the son or grandson of her *ex-concubinus/patronus*[31] and finally how does one distinguish between *concubinatus* between an unmarried man and a free woman and *matrimonium*?[32]

The last question in particular indicates the direction in which *concubinatus* developed during the classical period. The main answer to these questions, however, remained the same, that is, that the only legal recognition attached to concubinage was that the parties were not guilty of the crimes of *stuprum* or *adulterium*. Their relationship, whichever form it took, was totally *de facto* without any legal consequences.

The abovementioned character of concubinage ended in 326 AD when Constantine enacted that *Nemini licentia concedatur constante matrimonio concubinam penes se habere.*[33]

This constitution deserves more attention than is traditionally granted to it.[34] Rather than a confirmation of the *status quo*, it must be regarded as an attempt to steer the sexual *mores* of certain segments of the population in a new direction, namely monogamy in the sense of one woman at a time. The imperial edict must, therefore, be seen in a new light as a continuation of the attempt to eliminate the custom of polygamy within the empire.[35] Therefore *Cod* 5, 26, 1, should be read in conjunction with *Cod* 9, 9, 18, pr, *Cod* 5, 5, 2 and *Cod* 1, 9, 7. Geographical indication also leads in this direction, for instance, the promulgation of the *constitutio* in Caesarea. Furthermore, it must be noted that this *constitutio* was not inspired by Christianity, since it took the Church considerable time before a similar enactment was passed at the Council of Toledo in 400 AD.[36]

Constantine enacted further legislation on the subject of concubinage in 336 AD when he introduced *legitimatio per subsequens matrimonium* as a unique method of legitimising the offspring of a concubinage by way of transforming this relationship into a marriage. This opportunity was, however, limited to existing concubinages and coupled with a ban on *adrogatio* of *liberi naturales*, donations to *concubina* and *liberi naturales* or any bequest to these parties.[37] Post-classical imperial legislation relating to concubinage was characterised by ambivalence. On the one hand we find the

30. *Dig* 25, 7, 3, 1; 34, 9, 16, 1; 48, 5, 14(13), pr.
31. *Dig* 25, 7, 1, 3; See also *Dig* 23, 2, 56 and *Cod* 5, 4, 4.
32. *Dig* 23, 2, 24; 24, 1, 32, 13; 25, 7, 4; 32, 49, 4; 39, 5, 31, pr; *Cod* 5, 4, 9. Meyer 86-89; Schulz *Classical Roman law* 139.
33. *Cod* 5, 26, 1 repeated by Justinian in *Cod* 7, 15, 3, 2 and *Nov* 89, 12, 5. See also *PS* 2, 20, 1.
34. For example Buckland 128; Castello 150 sqq; Jonkers 3 sqq; Meyer 28, 127; Van Oven 475. Cf also *supra* n 20.
35. Biondi 581; Csillag 208; J Gaudemet, Originalité et destin du mariage romain *L'Europa e il diritto romano Studi in memoria di Paolo Koschaker* II Milano 1954, 513 sq; Kaser I 315 n 35; Kunst II 70; L Mitteis *Reichsrecht und Volksrecht in den östlichen Provinzen des römischen Kaiserreichs* Leipzig 1891, 221 sqq; Mommsen *Strafrecht* 121, 121 n 3, 701.
36. Mansi 3, 1001. *Decr Grat* c 4 *Dist* 34.
37. *Cod* 5, 27, 1; 5, 27, 5. *Cod Theod* 4, 6, 2; 4, 6, 3; Bonfante 318 sq, 371 sq; Buckland 129; C Dupont, Les Constitutions de Constantin et le droit privé au début du IVe siècle *Studia Juridica* XVII Roma 1968, 123 sqq; Jonkers 60 sqq, 66; M Kaser *Das römische Privatrecht* II München 1975, 183 sq, 221; Meyer 128-133; Van Oven 475; Van Warmelo *Inleiding* 57.

repeated attempts to coax the concubinaries into marriage,[38] while on the other hand we encounter the granting of legal consequences to concubinage.[39]

Finally, Justinian combined both approaches by granting, after trial and error, both *concubina* and her children abintestate succession rights against the *concubinus*;[40] redefining their position regarding donations and testate succession[41] and finalising the various forms of legitimation applicable to the *liberi naturales*.[42]

The repeated attempts of the imperial legislation to stamp out the custom of concubinage raise the following questions: Why did large parts of the population prefer concubinage above marriage and persist in this preference and why did the emperors continue their attempts to transform these concubinages into marriages? The answer should be found in the socio-economic politics of the eastern empire during these centuries rather than in the influence of Christianity. The population was organised into corporations of trades and professions and on each group oppressive burdens were imposed.[43] Hard hit were the urban middle class, the *curiales*,[44] and the rural population, the *coloni*.[45] There were insurmountable barriers between the groups and children had to remain in their father's group.[46] Thus, the only way to avoid a similar

38. *Cod* 5, 27, 5; 5, 27, 6; 5, 27, 7; Meyer 139-142; A Weitnauer *Die Legitimation des ausserehelichen Kindes im römischen Recht und in die Germanenrechten des Mittelalters* Basel 1940, 38 sqq.
39. *Cod Theod* 4, 6, 7 describes concubinage as a "... *legitima coniunctio sine honesta celebratione matrimonii*" and gives the expression *liberi naturales* a new meaning. The legal consequences of concubinage were, however, rather negative. Cf *Cod Theod* 4, 6, 4, which restored a limited right to give or leave property to the concubine or the child, while *Cod Theod* 4, 6, 5 abolished even this right. *Cod Theod* 4, 6, 6; 4, 6, 7 and 4, 6, 8 restored a varying limited right of donation and testation for the *concubinus*. Cf *Cod* 5, 27, 2 and *Nov* 89, 12; Jonkers 67; Kaser II 184; Meyer 134 sq; Weitnauer 39.
40. *Nov* 18, 5; 89, 12, 4; R Danieli, Sul Concubinato in diritto giustinianeo *Studi in onore di Vicenzo Arangio-Ruiz* III Napoli, 175-179; Kaser II 184, 220; Meyer 147 sq, 154 sq.
41. *Cod* 5, 27, 2; 5, 27, 8; *Nov* 18, 5; 89, 12. Jonkers 67; Kaser II 184; Meyer 143, 147, 154; Weitnauer 41.
42. *Cod* 5, 27, 9; 5, 27, 10; 5, 27, 11; *Nov* 12, 4; 18, 11; 74; 89; *Inst* 1, 10, 13; 3, 1, 2a. Bonfante 374 sq; Buckland 129 sq; Danieli 175-179; Jonkers 63, 69 sq, 96 sq, 102 sq; Kaser II 220 sq; F Kogler *Die Legitimatio per rescriptum von Justinian bis zum Tode Karls IV* Weimar 1904, 11; Meyer, 148-152; E Volterra *Mélanges Philippe Meylan* I Lausanne 1963, 367-377; van Warmelo *Inleiding* 57; Weitnauer 41 sqq.
43. Aymard and Auboyer 538 sqq; Gaudemet *Institutions* 707,709 sqq; Hermesdorf 230 sqq; O Karlowa *Römische Rechtsgeschichte* I Leipzig 1885, 913 sqq; Kornemann, R E IV 442 sqq s v *Collegium;* B Kübler *Geschichte des römischen Rechts* Leipzig 1925, 345 sqq; Kunkel *Römische Rechtsgeschichte* 125 sq; E Stein *Histoire du Bas-Empire* I, 1959, 16 sqq; P van Warmelo *Die oorsprong en betekenis van die Romeinse reg* Pretoria 1978, 112.
44. Aymard and Auboyer 539; Gaudemet *Institutions* 707 sqq; Hermesdorf 234; Jonkers 38 sq, 76 sqq; Karlowa II 898 sqq; Kübler 341 sqq; Kübler, R E IV 2343 sqq s v *Decurio;* Kunkel *Römische Rechtsgeschichte* 126; W Schubert, Die rechtliche Sonderstellung der Dekurionen (Kurialen) in der Kaisergesetzgebung des 4.-6. Jahrhunderts, 86(1969) ZSS RA 287 sqq; van Warmelo *Oorsprong* 111.
45. Aymard and Auboyer 548 sqq; Gaudemet *Institutions* 712 sqq; Hermesdorf 234 sq; Jonkers 73 sq; Karlowa II 918 sqq; Kübler 347 sqq; Kunkel *Römische Rechtsgeschichte* 126; Seeck, R E IV 497 sqq s v *Colonatus*; van Warmelo *Oorsprong* 112.
46. Aymard and Auboyer 539; Gaudemet *Institutions* 707; Hermesdorf 233; Jonkers 76; Karlowa II 914 sqq; Kübler 345; Kunkel *Römische Rechtsgeschichte* 125 sq; Schubert 86 (1969) ZSS RA 309 sqq; Stein I 18; van Warmelo *Oorsprong* 112.

burdensome existence for one's children was to procreate outside wedlock. Therefore, the continued popularity of concubinage in post-classical "Roman" society should be regarded as a way of evading the rigid vocational divisions and accompanying burdens.

Finally, it should be kept in mind that intimate human relationships are difficult to word and regulate. Even marriage was and is only partially reflected in the legislation regarding this topic. Therefore, the gap between legal rule and actual fact is always considerable in the law of persons. To this point should be added the circumstance that the literary as well as the legal sources of Roman life dealt mainly with the upper echelons of society relating the life and problems of the haves rather than the tribulations of the have-nots.

Cicero as a Legal Philosopher

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Cicero as a Legal Philosopher

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INTRODUCTION

It is probably no exaggeration to say that more has been written about Cicero than about any other lawyer, ancient or modern. The reason for this interesting phenomenon is not difficult to find, since he was by far one of the most versatile and talented persons in an age which abounded in men of illustrious reputations. Not only was he a highly successful lawyer and orator, but also an idealistic statesman, who made a substantial contribution to Roman statesmanship and politics during a politically confused and confusing era. His greatest fame, however, may be attributed to his writings, rendered in beautiful classical Latin and characterised by simplicity on the one hand, and profound erudition on the other. The subjects on which he wrote were many and varied, the main categories thereof being rhetorical treatises, orations, philosophical treatises and letters, while he even saw fit to dabble in poetry.

Despite the widespread recognition, both laudatory and critical, which Cicero has enjoyed in many spheres, he has not always received recognition as a philosopher of law. Certainly his philosophical works have served to categorise him as a philosopher in general terms, but it was as a legal philosopher that he perhaps played his most important role in the field of philosophy. Throughout his works – and this is not restricted to his philosophical works – his particular approach to law, its practice, ethics and philosophy, runs like the proverbial golden thread.[1]

1. CICERO'S DEVELOPMENT AS A LEGAL PHILOSOPHER

Marcus Tullius Cicero was born on 3rd January 106 BC at Arpinum, a small town in Volscian territory some 100 kilometres south-east of Rome. At an early age he was sent to Rome to commence his education and he soon developed into one of the most gifted personalities ever to grace the eternal city of Rome. He matured in, and ex-

1. It is, one may hope, most fitting and appropriate that this modest contribution on Cicero as a legal philosopher should be dedicated to Paul van Warmelo, who has devoted the greater part of his life to studying, teaching and expounding the intricacies and beauties of Roman law, legal history and legal philosophy.

perienced one of the most exciting periods of Roman history, namely the dying years of the Republic, when Pompey, Caesar, Crassus, Mark Anthony and the budding Octavian (the later Emperor Augustus) were household names, held in awe and reverence by the expectant populace of that vast Italian metropolis.[2]

At an early age Cicero was brought into contact with Greek culture, literature and philosophy by the Greek poet Archias, while he presumably studied the art of oratory under Apollonius Molo of Rhodes. His interest in rhetoric and philosophy, however, was chiefly inspired by Philo the Academic and Diodotus the Stoic. It is not unlikely that he received some grounding in Epicureanism from Phaedrus, but it would appear that he required little prompting to reject this school of thought out of hand. For the most part, Cicero prided himself on being an Academic, the name given to adherents of Plato's famous Academy, but his interest in other schools of thought besides that propounded by the Academics has prompted his being referred to as an eclectic, who allowed himself to be influenced by more than one philosophy. This may be attributed to his educational peregrinations to Greece, where he studied under Antiochus of Ascalon (a Stoic), Asia, where he sat at the feet of Xenocles of Adramyttium, Dionysius of Magnesia and Menippus, the Carian (all famous rhetoricians), and Rhodes, where he was taught oratory by Apollonius and philosophy by Poseidonius. Tradition has it that Apollonius once asked Cicero to declaim in Greek, which he did, whereupon Apollonius remained silent for some time before saying:

> "Certainly, Cicero, I congratulate you and I am amazed at you. It is Greece and her fate that I am sorry for. The only glories that were left to us were our culture and our eloquence. Now I see that these two are going to be taken over in your person by Rome."[3]

Cicero's legal and political career undoubtedly played an important role in his development as a legal philosopher. The starting point of his career as an orator and advocate was, perhaps, the speech *Pro Sexto Roscio Amerino,* which he delivered in 80 BC and by means of which he succeeded in exposing the corruption of Sulla's administration without implicating Sulla directly. This was the first of some fifty-eight extant speeches, most of which were concerned with the defence of clients and were striking examples of Cicero's art of advocacy. On the other hand he was also responsible for certain "political" speeches, such as the *Pro lege Manilia* of 66 BC, which dealt with the command of Pompey against Mithridates and the "Philippics," in which he launched a virulent attack on the political and personal excesses of Mark Anthony and which were the direct cause of Cicero's proscription by the Second Tri-

2. Biographical and specialist works on Cicero abound. Among the more recent publications mention may be made of: J Petersson *Cicero, A Biography* (1963); TA Dorey (ed) *Cicero* (1965); RE Smith *Cicero, The Statesman* (1966); AE Douglas *Cicero* (1968); M Gelzer *Cicero: Ein biographischer Versuch* (1969); EG Sihler *Cicero of Arpinum: A Political and Literary Biography* (1969); K Büchner *Das neue Cicerobild* (1971); DR Shackleton Bailey *Cicero* (1971); D Stockton *Cicero: A Political Biography* (1971); E Rawson *Cicero, A Portrait* (1975); SL Utchenko *Cicerone e il suo tempo* (1975); TN Mitchell *Cicero, The Ascending Years* (1979).
3. Plutarch's life of Cicero (p 280 of R Warner's translation in Penguin Classics). See further RN Wilkin *Eternal Lawyer. A Legal Biography of Cicero* (1947) 1-27.

umvirate in 43 BC. Cicero on occasion also acted as a prosecutor, his most famous speeches in this role being the *In Verrem* of 70 BC, in which he exposed Verres for his maladministration of Sicily and in which he dealt the famous leader of the Roman bar, Hortensius, who was acting on behalf of Verres, a resounding defeat, and the *In Catilinam* of 63 BC, in which he attacked the dissolute young aristocrat, Catiline, for attempting to bring about the downfall of Rome. The death sentence imposed on Catiline and his followers as a result of this speech led to Cicero's banishment from Rome for some sixteen months during the period 58-57 BC. This was a depressing come-down for a man who had successfully followed the *cursus honorum* (*quaestor* in 75 BC, *curulis aedilis* in 70 BC, *praetor* in 66 BC and *consul* in 63 BC) and had achieved great success as a lawyer and orator.

Throughout his political and legal career, Cicero amply illustrated his hatred of the Roman oligarchy and the despotism of Sulla and other dictators, such as Pompey and Caesar. Yet the very Pompey and Caesar were, towards the end of his career, to create in him the greatest confusion and frustration at a time when he was called upon to decide whom he was to support. He preferred Pompey, because of his ostensible attachment to Republican principles, but he soon realised that Caesar had far more potential and would probably emerge victor in the event of confrontation between the two generals. As champion of the Equestrian (*equites*) and Popular Order (*populares*), Cicero directed his attention to the union of such order and the senatorial aristocracy (*optimates*) (the so-called *concordia ordinum*), an ideal which never achieved fruition. Yet his indecision in respect of his relationships with Pompey and Caesar caused him to vacillate politically and might have been among the cardinal reasons for his turning to the writing of rhetorical and philosophical works.[4]

Certain aspects of his private life likewise urged Cicero to pursue his philosophical bent, such as his unhappy marriage to Terentia, from whom he was later divorced, the premature death of his beloved daughter, Tullia, and the disappointment in his son, Marcus, who appears to have been particularly lazy and unresourceful. The estrangement from Terentia was followed up by estrangement from his brother Quintus, while his second marriage, to the youthful Publilia, was shortlived, ostensibly because of her lack of sympathy with Cicero in his bereavement after the death of Tullia, but more probably because he was frustrated and unhappy at the thought that his ideal, the continued existence of the Roman Republic, was dead.[5]

4. On Cicero's legal and political career see in general LA Thompson "Cicero the Politician" in *Studies in Cicero* (1962) 35-79; HH Scullard "The Political Career of a 'Novus Homo' " in TA Dorey *Cicero* (1965) 1-25; F Wieacker *Cicero als Advokat* (1965); R Heinze "Cicero's politische Anfänge" in Heinze *Vom Geist des Römertums* (1972) 87-140; FR Cowell *Cicero and the Roman Republic* (1973) 219-269; E Badian *Cicero as a Politician* (1974); M Bellincioni *Cicero politico nell' ultimo anno di vita* (1974); CA Classen "Cicero, the Laws and the Law-Courts" in *Latomus* 37 (1978) 598-619.
5. Cicero's private life and *modus vivendi* are dealt with in most biographies of the man (see n 2 above). See further J Carcopinod *Les secrets de la correspondance de Cicéron* (1974); J Graff *Ciceros Selbstauffassung* (1963); JPVD Balsdon "Cicero the Man" in TA Dorey *Cicero* (1965) 171-214; G Boissier *Cicéron et ses amis* (1970); WC McDermott "Cicero. The Human Side" in *The Classical Bulletin* 49 (1972) 17-25.

2. THE EVOLUTION OF CICERO'S LEGAL PHILOSOPHY

In order to evaluate Cicero's legal philosophy and its evolution it may be appropriate to make certain observations in respect of his philosophy of life on the one hand and his political philosophy on the other.

2.1 Philosophy of Life

Cicero's philosophy of life was rooted in his youthful encounters with the various philosophies which had emerged from Greek and Asian culture. Endowed with a serious, yet curious and searching nature, he avidly read and studied all he could on the meaning of life and human nature, whereafter he set about formulating, in his own words, the ideas and thoughts produced by such reading and study.

As a youthful, yet highly promising, orator and lawyer, Cicero realised the value of philosophy as a means to achieving success.[6] Yet despite his early interest in philosophy, it was not until late in his life that he turned to the serious writing of philosophy. The decade from approximately 54 to 44 BC witnessed the creation of his major philosophical works, namely the *De re publica, De legibus, De finibus bonorum et malorum, De natura deorum, De officiis, Tusculanae disputationes, De divinatione* and *Academica.* It was also the period in which he produced those gems on friendship and old age, known to every incipient Latin scholar, namely the *De amicitia* and *De senectute.*[7]

The golden thread running through all Cicero's thoughts and ideas on philosophy was the need to achieve the "greatest good" (*summum bonum*) by the application of the cardinal virtues, by the leading of a virtuous, moral and ethically correct life, by bringing man back to his true nature (*natura*) in conformity with reason, justice and equity. He was hence, essentially, a moralist and an idealist, who linked his philosophy of life inextricably to his approach to law and government. In certain respects he inclined to stoicism, by propagating that virtue alone was required for achieving happiness, yet, in peripatetic manner, he was unable simply to dismiss the value of external goods as manifestations of and means of acquiring happiness. The opposing schools of thought pertaining in his time may have caused a certain scepticism in him, but this was countered by his unfailing belief in the strength of moral values and judgment. Such moral values are the fruits of man's nature and are established by general acceptance (*consensus omnium* or *gentium*). He had an implicit belief in the individuality of mankind and in its freedom to recognise its rights and

6. *Orator* 14.43.46; *De inventione* 1.1.1.
7. There is an abundance of literature on Cicero's general philosophy of life, amongst which reference may be made to A Litman *Cicero's Doctrine of Nature and Man* (1930); HAK Hunt *The Humanism of Cicero* (1955); J Ferguson "Cicero's Contribution to Philosophy" in *Studies in Cicero* (1962) 97-111; AE Douglas "Cicero the Philosopher" in TA Dorey *Cicero* (1965) 135-170; W Medeiros "Cicero filósofo" in *Romanitas* 10 (1970) 131-140; O Gigon "Cicero und die griechische Philosophie" in *Aufstieg und Niedergang der römischen Welt* 1.4 (1973) 226-261; W Görler *Untersuchungen zu Ciceros Philosophie* (1974); PL Schmidt "Cicero's Place in Roman Philosophy: A Study of his Prefaces" in *Classical Journal* 74 (1978-1979) 115-127; G Partzig "Cicero als Philosoph, am Beispiel der Schrift De Finibus" in *Gymnasium* 86 (1979) 304-322.

duties, in respect of which decisions could be made without recourse to the gods or to fate. This does not, however, mean that he had no religious convictions of his own: in accordance with Stoic doctrine, he believed that all human beings possess some spark of divinity within themselves. It is this divine spark which allows man to develop the faculty of reason and which binds him to his fellow man in an orderly society. In his doctrine of nature and man, Cicero, in contrast with the Stoics and Epicureans, averred that nature was inherent in man and was, in fact, arranged in his interest. The good man is then one who follows nature in his effort to achieve happiness and the *summum bonum*. The social intercourse of such good men in turn leads to friendship.[8]

The cardinal virtues, derived from the Platonic doctrine and expressed by Cicero as the foundation of moral goodness (*honestum*) or virtue (*virtus*) may be summarised as wisdom (*prudentia* or *sapientia*), justice (*iustitia*), fortitude (*fortitudo*) and temperance (*temperantia*). In his treatise on duties, Cicero describes the fourfold sources of moral goodness as that which is concerned with, firstly, the perception and development of truth, secondly, the preservation of human society by attributing to each his own and adhering to the good faith required by contractual obligations, thirdly, the greatness and strength of an exalted and indomitable spirit, and fourthly, the moderation and temperance required for all orderly speech and deeds.[9]

Cicero's methodology in explaining his philosophy of life turns largely upon the use of definitions to express, in dialectic and dialogue form, certain moral and ethical concepts.[10] Of vast importance in this regard is his emphasis on the virtue of *humanitas* – "humanity" in the sense of human fellowship and philanthropy. Clarke explains this concept graphically:

> "Among the qualities comprehended in the Ciceronian idea of *humanitas* are kindliness, helpfulness and consideration for others. *Humanitas* is joined with *clementia* and *mansuetudo;* it is contrasted with *severitas*. The word also implies tolerance, politeness, easy manners and the social graces generally; witty and polished conversation . . . belong essentially to *humanitas*.[11]

8. See the important contribution of A Litman *Cicero's Doctrine of Nature and Man* (1930) 6-9, 20-21, 24-25 and 32-35. See also F Copleston *A History of Philosophy* 1.2 (1962) 163; K Vörlander *Geschiedenis van de Wijsbegeerte* 1 (1974) 140-141; RN Wilkin *Eternal Lawyer* (1974) 208-213; E Rawson *Cicero, A Portrait* (1975) 230-247. The latter points out, at 236, that "Cicero remained loyal to the outlook of the New Academy, as represented by Philo with certain eclectic, mainly Stoic, modifications." On *natura* as the basis for *virtus* see *De republica* 1.1; 1.2.2-3 and 1.7.12. See also G Liebers *Virtus bei Cicero* (1942).
9. *De officiis* 1.5.15: *Sed omne, quod est honestum, id quattuor partium oritur ex aliqua: aut enim in perspicientia veri sollertiaque versatur aut in hominum societate tuenda tribuendoque suum cuique et rerum contractarum fide aut in animi excelsi atque invicti magnitudine ac robore aut in omnium, quae fiunt quaeque dicuntur, ordine et modo, in quo inest modestia et temperantia.* See also *De inventione* 2.53.159: *Nam virtus est animi habitus naturae modo atque rationi consentaneus . . . Habet igitur partes quattuor: prudentiam, iustitiam, fortitudinem, temperantiam.*
10. J Ferguson "Cicero's Contribution to Philosophy" in *Studies in Cicero* (1962) 97-111.
11. ML Clarke *The Roman Mind. Studies in the History of Thought from Cicero to Marcus Aurelius* (1956) 135. See also J Mayer *Humanitas bei Cicero* (1951); JAK Hunt *The Humanism of Cicero* (1955); NI Barbu "De Ciceronis humanitate" in *Latinitas* 16 (1968) 9-21; P Boyancé "La réponse de l'humanisme cicéronien" in Boyancé *Etudes sur l'humanisme cicéronien* (1970) 342-350.

Numerous further concepts, almost all of which have some moral or ethical signification, occur in general philosophical context in Cicero's works, as will be pointed out below.[12]

2.2 Political Philosophy

As in the case of Cicero's philosophy of life, his political philosophy is of the utmost importance in understanding his approach to law and legal philosophy. As a political philosopher, Cicero strove to develop an ideal constitution for Rome and to achieve harmony between the popular and aristocratic orders (*concordia ordinum*). Under the leadership of the ideal statesman, Rome, as an ideal state, could effect the harmonious co-existence of all Italy (*consensus Italiae*). As a political philosopher Cicero was an eclectic, leaning particularly on Plato but also borrowing from Aristotle, Dicaearchus, Panaetius and Polybius.[13]

Cicero's *res publica* arises from man and his innate *natura*. As a "public thing", the state is something belonging to the people (*res populi*) and consists of a gathering of people linked by agreement as to law and by the needs of common utility. The need for a state is not to be attributed to man's weakness but rather to his natural gregariousness.[14] Each community of people requires to be governed by some or other council which must needs arise from the state (*civitas*) itself.[15]

There are three forms of government, namely that granted to a single person or king (monarchy), that in the hands of a select few citizens (oligarchy or aristocracy) and that exercised by the whole body of citizens (democracy).[16] Cicero himself believes that a fourth form of government, a mixture of the said three forms, is most acceptable.[17] Where people wield the greatest power, there liberty (*libertas*), which

12. See par 2.3.3 below.
13. See in general on Cicero's political philosophy E Costa *Cicerone giureconsulto* (1927) 255-269; WW How "Cicero's Ideal in his 'De re publica' " in *Journal of Roman Studies* 20 (1930) 24-42; A Litman *Cicero's Doctrine of Nature and Man* (1930) 21-24; RN Wilkin *Eternal Lawyer* (1947) 213-223; V Pöschl *Römischer Staat und griechisches Staatsdenken bei Cicero* 1(1962); TN Mitchell *Cicero's Ideas on Statesmanship as seen in his Speeches* (1966); WH Nicgorski *Cicero's Rhetorical Writings and Political Philosophy* (1966); JM Carter "Cicero: Politics and Philosophy" in *Cicero and Virgil* (1972) 15-36; A Heuss *Cicero's Theorie vom römischen Staat* (1976); A Ronconi "Cicerone e la costituzione romana" in *Studi ital fil clas* 54 (1982) 7-28; J Sprute "Rechts- und Staatsphilosophie bei Cicero" in *Phronesis* 28(1983) 150-176.
14. *De re publica* 1.25.39: *Est igitur, inquit Africanus, res publica res populi, populus autem non omnis hominum coetus quoquo modo congregatus, sed coetus multitudinis iuris consensu et utilitatis communione societas. Eius autem prima causa coeundi est non tam imbecillitas quam naturalis quaedam hominum quasi congregatio.* On the concept *iuris consensu* see F Cancelli " 'Iuris consensu' nella definizione ciceroniana di 'res publica' " in *Riv cult class* 14 (1972) 247-267.
15. *De re publica* 1.26.41: *Omnis ergo populus, qui est talis coetus multitudinis, qualem exposui, omnis civitas, quae est constitutio populi, omnis res publica, quae, ut dixi, populi res est, consilio quodam regenda est, ut diuturna sit. Id autem consilium primum semper ad eam causam referendum est, quae causa genuit civitatem.*
16. *De re publica* 1.26.42: *Deinde aut uni tribuendum est aut delectis quibusdam aut suscipiendum est multitudini atque omnibus.*
17. *De re publica* 1.29.45: *Itaque quartum quoddam genus rei publicae maxime probandum est sentio, quod est ex his, quae prima dixi, moderatum et permixtum tribus.*

must be the same for all (otherwise it does not merit the name of liberty), is in evidence.[18] Law (*lex* or *ius*), again, is that which binds society, provided it applies equally to all citizens.[19] When this form of equality and liberty is present, then the monarchy is the best basis for good government, provided that some authority be granted to the leading citizens while certain affairs should be left to the judgment and will of the people as a whole. Such a constitution (*constitutio*) will provide great equality (*aequabilitas*) and stability (*firmitudo*).[20] Stability, Cicero points out later in his dissertation on the commonwealth, relies largely on religion (*religio*) and clemency or tranquility (*clementia*)[21] and the monarchy as the basis for stable government is acceptable only if the safety, equality and tranquillity of the citizens are protected by the enduring power, justice and all-encompassing wisdom of the single ruler.[22] In this way a harmony and concord of the popular and aristocratic orders (*concordia ordinum*) is achieved, subject thereto, however, that such concord cannot be brought about without justice (*sine iustitia nullo pacto esse potest*).[23]

The ideal statesman should be a man of wisdom who is noted for his ability, virtue and excellence of life and character, a man who is familiar with law and justice and who should desire to create a happy life for his fellow citizens.[24] He is drawn from the ranks of the "best" citizens (*optimi*), who have been recognised as such after the harmony of the orders has broken down the previously existing distinction between *optimates* and *populares*. The persons, then, who look to the desires, interests and opinions of such citizens in governing the state, are numbered among the defenders of the *optimates* (in the sense of *optimi*) and are themselves among the most influential and famous of the *optimates*, being the leaders of the state (*principes civitatis*).

18. *De re publica* 1.31.47: *Itaque nulla alia in civitate, nisi in qua populi potestas summa est, ullum domicilium libertas habet; qua quidem certe nihil potest esse dulcius, et quae, si aequa non est, ne libertas quidem est.*
19. *De re publica* 1.32.49: *Quare cum lex sit civilis societatis vinculum, ius autem legis aequale, quo iure societas civium teneri potest, cum par non sit condicio civium? . . . iura certe paria debent esse eorum inter se, qui sunt cives in eadem re publica.*
20. *De re publica* 1.45.69: *Quod ita cum sit, ex tribus primis generibus longe praestat mea sententia regium, regio autem ipsi praestabit id, quod erit aequatum et temperatum ex tribus optimis rerum publicarum modis. Placet enim esse quiddam in re publica praestans et regale, esse aliud auctoritati principum inpartitum ac tributum, esse quasdam res servatas iudicio voluntatique multitudinis. Haec constitutio primum habet aequabilitatem quandam magnam, qua carere diutius vix possunt liberi, deinde firmitudinem.* On this "equality" (*aequabilitas*) see also *De re publica* 1.27.43; 1.34.53; 2.33.42-43; E Fantham "Aequabilitas in Cicero's Political Theory, and the Greek Tradition of Proportional Justice" in *Classical Quarterly* 67 (1973) 285-290.
21. *De re publica* 2.14.27 with reference to king Numa Pompilius, who died after *duabus praeclarissimis ad diuturnitatem rei publicae rebus confirmatis, religione atque clementia.*
22. *De re publica* 2.23.43: *Is autem status, ut unius perpetua potestate et iustitia omnique sapientia regatur salus et aequabilitas et otium civium.* Cf *op cit* 2.33.57: *aequabilis haec in civitate compensatio sit et iuris et officii et muneris.*
23. *De re publica* 2.42.69. See also *op cit* 2.44.70: The ideal state should be "full of justice" (*plenam esse iustitiae*) and cannot function without the "strictest justice" (*sine summa iustitia*).
24. *De re publica* 2.41.68 – 2.42.69; 3.3.5; 5.35-36. See also *De legibus* 3.1.1-3.20.49 on the duties and functions of magistrates (*magistratus*), who likewise have to govern in accordance with what is correct, reasonable and in conformity with the laws.

As governors of the state, they are characterised by their striving for peace and tranquillity accompanied by dignity (*cum dignitate otium*). Those who desire this are all *optimates*, the topmost men and preservers of the state.[25]

2.3 Legal Philosophy

After this brief exposé of Cicero's philosophy of life and political philosophy, attention may now be turned to his legal philosophy as such. An analysis of the primary sources of his philosophy relating to law, justice and analogous concepts, suggests that this subject may best be dealt with by referring, firstly, to Cicero's approach to justice and to the law of nature, secondly, to the concept of equity appearing in his works and, thirdly, to the moral and religious considerations which played a role in the development of his legal philosophy. In this regard it is generally accepted that, as in the case of his philosophy of life and political philosophy, Cicero was an eclectic, borrowing from Plato and Aristotle, from Panaetius and Poseidonius, from the Stoics and the New Academy.[26]

It must be pointed out that Cicero did not recognise a clear distinction between public and private law. As Lombardi observes, the *ius publicum* was, originally, that which had been expressly established by the people and it is this concept which one encounters in Cicero as contrasted with the *ius privatum*, in the sense of the complex of norms and institutions established within the domain where the rules pertaining to legal relationships have been left to the will of the individual.[27]

2.3.1 The Law of Nature: Law and Justice

Throughout his philosophical and other writings, Cicero evinced a high regard for nature (*natura*) as the foundation of law (*ius naturale (naturae)/lex naturae*), legal relationships and, for that matter, all forms of human intercourse. Law (*ius* or *lex*) in its various forms,[28] was inextricably linked to the concept of justice (*iustitia*) by

25. *Pro Sestio* 45.97-98: *Horum qui voluntati, commodis, opinionibus in gubernanda re publica serviunt, defensores optimatium ipsique optimates gravissimi et clarissimi cives numerantur et principes civitatis. Quid est igitur propositum his rei publicae gubernatoribus, quod intueri et quo cursum suum derigere debeant? Id quod est praestantissimum maximeque optabile omnibus sanis et bonis et beatis, cum dignitate otium. Hoc qui volunt, omnes optimates, qui efficiunt, summi viri et conservatores civitatis putantur.* On the concept *cum dignitate otium* see M Fuhrmann "Cum dignitate otium. Politisches Programm und Staatstheorie bei Cicero" in *Gymnasium* 67(1960) 481-500.
26. See in general in Cicero's legal philosophy and approach to law E Costa *Cicerone giureconsulto* (1927) 16-41; G Righi *La filosofia civile e giuridica di Cicerone* (1930); R Harder "Zu Ciceros Rechtsphilosophie" in *Atti Roma* 1(1934-1935) 169-176; MS Izquierdo "Cicerón, filosofo del derecho" in *Estudios Peguedo* (1957) 35-40; O Robleda "Filosofia juridica de Cicerón" in *Studi Biondi* 2 (1965) 467-482; J Blänsdorf "Griechische und römische Elemente in Ciceros Rechtstheorie" in *Würzburger Jahrb* (1976) 135-147; P Stein "The Sources of Law in Cicero" in *Ciceroniana* 3 (1978) 19-31; R del Re "La civitas omnium gentium nel pensiero etico e giuridico di Cicerone" in *Ciceroniana* 3 (1979) 157-159.
27. G Lombardi "Il concetto di ius publicum negli scritti di Cicerone" in *Rend ist lomb* 72 (1939) 465-483. See also F Serrao "Cicerone e la lex publica" in *Ciceroniana* 3 (1978) 79-110.
28. *Leges* were, in ordinary legal parlance, statutory enactments promulgated by the various forms of popular assembly. *Lex* is defined by Gaius in his *Institutiones* 1.3: *Lex est quod populus iubet atque constituit.* See DH van Zyl *History and Principles of Roman Private Law* (1983) 26-27.

virtue of nature and "right reason" (*recta ratio*). Cicero probably had more to say on the subject of law and justice as concomitants of the law of nature than on any other legal subject in his manifold and various works. At the same time the numerous commentators on Cicero's legal philosophy have written volumes on this subject, so that, for purposes of the present contribution, only the most cardinal aspects of Cicero's approach to this highly interesting legal debate, which has occupied the minds of lawyers and philosophers for a very long period of time, may be touched upon.[29]

As a starting point it may be appropriate to allow Cicero himself to define his concept of "true law" as it appears in his discourse on the *res publica*:

> "True law (*vera lex*) is indeed right reason (*recta ratio*) in conformity with nature (*natura*), pertaining to all people, constant and eternal; it calls to duty by commanding and by prohibiting, it deters from wrong-doing. Yet it does not command or forbid upright men in vain or have any effect on men of improbity by its bidding or veto. It is wrongful to abrogate this law nor is it permissible to derogate from any part thereof. Indeed, we are unable, by senate or people, to be rid of this law nor should any other exposition or interpretation thereof be sought. For there is not one law applicable to Rome and another to Athens, or one now and another later but all nations shall at all times be bound by one eternal and immutable law (*una lex et sempiterna et immutabilis*) and God will be the one common author, judge and promulgator of this law, in his role as master and ruler of all . . ."[30]

29. See in general M Voigt *Ius naturale* 1 (1856, reprint 1966) 185-226 and 542-546; E Costa *Cicerone giureconsulto* (1927) 16-41 and 193; A Litman *Cicero's Doctrine of Nature and Man* (1930) 10-35; RN Wilkin *Eternal Lawyer* (1947) 223-233; *idem*, "Cicero, Oracle of Natural Law" in *Classical Journal* 44 (1949) 453-456; H Dieter "Der iustitia-Begriff Ciceros" in *Eirene* 6 (1967) 69-81; T Mayer-Maly "Gemeinwohl und Naturrecht bei Cicero" in *Festschrift Verdross* (1960) 195-206; U Knoche "Ciceros Verbindung der Lehre vom Naturrecht mit dem römischen Recht und Gesetz" in Radke *Cicero, Ein Mensch seiner Zeit* (1968) 38-60; VT Tanzola *A Comparative Study of the Cardinal Virtues in Cicero's De Officiis and in Ambrose's De Officiis Ministrorum* (1975) 88-115; LM du Plessis *Die Juridiese Relevansie van Christelike Geregtigheid* (1978) 127-144; *idem, Westerse Regsdenke tot en met die Middeleeue* (1981) 118-120; RA Horsley "The Law of Nature in Philo and Cicero" in *Harvard Theological Review* 71 (1978) 35-59; H Th Johann *Gerechtigkeit und Nutzen. Studien zur ciceronischen und hellenistischen Naturrechts- und Staatslehre* (1981).

30. *De re publica* 3.22.33: *Est quidem vera lex recta ratio naturae congruens, diffusa in omnes, constans, sempiterna, quae vocet ad officium iubendo, vetando a fraude deterreat; qua tamen neque probos frustra iubet aut vetat nec improbos iubendo aut vetando movet. Huic legi nec obrogari fas est neque derogari ex hac aliquid licet neque tota abrogari potest, nec vero aut per senatum aut per populum solvi hac lege possumus, neque est quaerendus explanator aut interpres eius alius nec erit alia lex Romae, alia Athenis, alia nunc, alia posthac, sed et omnes gentes et omni tempore una lex et sempiterna et immutabilis continebit, unusque erit communis quasi magister et imperator omnium deus, ille legis huius inventor, disceptator, lator . . .* See also *De legibus* 2.4.8: *Hanc igitur video sapientissimorum fuisse sententiam, legem neque hominum ingeniis excogitatam nec scitum aliquod esse populorum, sed aeternum quiddam, quod universum mundum regeret imperandi prohibendique sapientia. Ita principem legem illam et ultimam mentem esse dicebant omnia ratione aut cogentis aut vetantis dei; ex quo illa lex, quam di humano generi dederunt, recte est laudata; est enim ratio mensque sapientis ad iubendum et ad deterrendum idonea.* In *De re publica* 1.17.27 he refers to the "common law of nature" (*communi lege naturae*).

From this definition it hence appears that Cicero sees law (*lex*) as divine, eternal, immutable and universal, with its roots solidly embedded in natural and rational principles. *Lex* in this sense is hence used in an extremely wide connotation and is not restricted to the statutory enactments of the various popular assemblies, as is its usual meaning in Roman law.[31] Furthermore Cicero seems to equate *lex* and *ratio*, as appears to be confirmed in his famous definition of *lex* in his dissertation on the laws, in which *lex* is likewise equated with *prudentia:*

> ". . . Law (*lex*) is the highest reason (*ratio summa*) embedded in nature, which commands what should be done and forbids the contrary. This same reason (*ratio*), when established and completed in the mind of man, is law (*lex*). And so it is believed that law is wisdom (*prudentia*), which has the power to bid rightful conduct and to forbid wrongdoing . . ."[32]

Elsewhere we are told that this *ratio* emanated from the nature of things, impelling men to act rightfully and deterring them from wrongdoing. This *ratio* did not become *lex* when it was reduced to writing but only when it came into existence simultaneously with the divine mind. Hence the true and original law (*lex vera atque princeps*), fashioned to command and forbid, is the right reason (*ratio recta*) of the supreme Jupiter, the king of the gods.[33] Since there is nothing better than reason (*ratio*), which is present in both man and God, it is in fact the first thing which man shares with God. Where reason, however, is a common attribute, so also is right reason (*recta ratio*), which is the same as law (*lex*), so that men likewise share law with the gods. And where there is a community of *lex*, so also is there a community of *ius* and such persons are considered to be members of the same state (*civitas*).[34]

In this way Cicero apparently distinguishes between *lex*, in a wide sense, and *ius* in the narrow sense as that which relates more particularly to the law of members of a state (*civitas*). This distinction, however, is not always clear and it more often than not appears to be a correlation rather than a distinction, since *ius* and *lex* are frequently dealt with on a par, if not interchangeably. Thus he avers that *lex* is the bond linking citizens in a social context and *ius* is on a par with *lex*, so that citizens,

31. See n 28 above.
32. *De legibus* 1.6.18: *. . . Lex est ratio summa insita in natura, quae iubet ea, quae facienda sunt, prohibetque contraria. Eadem ratio cum est in homines mente confirmata et confecta, lex est. Itaque arbitrantur prudentiam esse legem, cuius ea vis sit, ut recte facere iubeat, vetet delinquere . . .* See also *De legibus* 1.7.22, where *ratio* is equated with *sapientia.*
33. *De legibus* 2.4.10: *Erat enim ratio profecta a rerum natura et ad recta faciendum inpellens et a delicto avocans, quae non tum denique incipit lex esse, cum scripta est, sed tum, cum orta est; orto autem est simul cum mente divina. Quam ob rem lex vera atque princeps apta ad iubendum et ad vetandum ratio est recta summi Iovis.* Cf *Pro Milone* 10: *Est igitur haec, iudices, non scripta sed nata lex, quam non didicimus, accepimus, legimus, verum ex natura ipsa adripuimus, hausimus, expressimus, ad quam non docti, sed facti, non instituti, sed imbuti sumus . . .*
34. *De legibus* 1.7.23: *Est igitur, quoniam nihil est ratione melius eaque est et in homine et in deo, prima homini cum deo rationis societas; inter quos autem ratio, inter eosdem etiam recta ratio communis est; quae cum sit lex, lege quoque consociati homines cum dis putandi sumus. Inter quos porro est communio legis, inter eos communio iuris est; quibus autem haec sunt inter eos communia, et civitatis eiusdem habendi sunt.*

to remain thus linked, should likewise be equal. For what, he says, is a state (*civitas*) other than a community based on *ius*?[35] Elsewhere he states that the starting point of *ius* derives from *lex*, since *lex* is the force of nature, the mind and reason (*ratio*) of the wise man and the guiding principle of right (*ius*) and wrong.[36] In this last passage *ius*, in the general sense of "law", is distinguished from *ius* in the sense of "rightfulness" as opposed to "wrongfulness" (*iniuria*). He continues, however, by pointing out, in the same text, that *lex* is popularly defined as that which is sanctioned by writing and which occurs in the form of command and prohibitions, as it may be desired. The origin of *ius*, however, derives from that supreme *lex* which came into existence before any written law did or before any state had been established.[37] This is in accordance with his distinction between individual *leges*, in the sense of statutory enactments, and *lex* in the sense of the general law of nature from which individual rights (*iura*) are derived and in accordance with which they are defined.[38] From this it appears that, in legal philosophical context, *ius* has a general meaning, relating to the body of law pertaining in a particular state which itself is rooted in nature and is hence on a par with *lex*.[39] This is then to be distinguished from *ius* in the sense of a legal right or right as opposed to wrong. It is this *ius*, Cicero says, which people share and communicate in accordance with the tenets of nature, for persons who have received right reason (*recta ratio*) from nature, have also received *lex* and if they have *lex* they also have *ius*: since all persons have been endowed with *ratio*, all persons also have *ius*.[40] In this way Cicero formulates an inextricable link between *ratio (recta)*, *lex* and *ius*, all of which concepts are derived from nature.

In general terms the *lex* or *ius* derived from nature (*ius naturale* or *lex naturae*) may be described as unwritten law (*lex non scripta*), as opposed to the written law (*lex scripta*) which forms the basis of the positive law of a state, referred to at Rome

35. *De re publica* 1.32.49: *Quare cum lex sit civilis societatis vinculum, ius autem legis aequale, quo iure societas civium teneri potest cum par non sit condicio civium? . . . Iura certa paria debent esse eorum inter se, qui sunt cives in eadem re publica. Quid est enim civitas nisi iuris societas?*
36. *De legibus* 1.6.19: *. . . a lege ducendum est iuris exordium; ea est enim naturae vis, ea mens ratioque prudentis, ea iuris atque iniuriae regula.*
37. *Loc cit: Sed quoniam in populari ratione omnis nostra versatur oratio, populariter interdum loqui necesse erit et appellare eam legem, quae scripta sancit, quod vult, aut iubendo aut prohibendo, ut vulgus appellat. Constituendo vero iuris ab illa summa lege capiamus exordium, quae saeclis omnibus ante nata est quam scripta lex ulla aut quam omnino civitas constituta.*
38. *De legibus* 2.4.8: *Videamus igitur rursus, prius quam adgrediamur ad leges singulas, vim naturamque legis, ne, cum referenda sint ad eam nobis omnia, labamur interdum errore sermonis ignoremusque vim rationis eius, qua iura nobis definienda sint.*
39. *De legibus* 1.6.20: *. . . repetam stirpem iuris a natura; op cit* 1.10.28: *. . . natura constitutum esse ius; op cit* 1.12.34: *. . . ius in natura esse positum intellegi possit; op cit* 1.13.35: *. . . ex natura ortum esse ius; op cit* 1.13.36: *. . . natura esse ius; op cit* 1.15.43: *. . . natura fundamentum iuris est.* Cf *op cit* 2.25.62: 3.1.3; 3.18.42.
40. *De legibus* 1.12.33: *Sequitur igitur ad participandum alium alio communicandumque inter omnes ius nos natura esse factos . . . Quibus enim ratio natura data est, isdem etiam recta ratio data est, ergo et lex, quae est recta ratio in iubendo et vetando; si lex, ius quoque; et omnibus ratio; ius igitur datum est omnibus.* Cf *op cit* 1.15.42.

as the *ius civile.*[41] The *ius civile* may hence be regarded as man-made law in contradistinction to the *ius naturae* which is the divine law of nature. In the *Topica* Cicero defines *ius civile* as "the equity constituted for those who belong to the same state so that each may secure his own."[42] It occurs in various forms, namely law (*leges*), resolutions of the senate (*senatus consulta*), judicial decisions (*res iudicata*), the authority of legal experts (*auctoritas iurisperiti*), edicts of magistrates (*edicta magistratuum*), custom (*mos*) and equity (*aequitas*).[43] In another text he makes a general tripartite division of the *ius civile* into *lex, mos* and *aequitas,* thereby broadening the concept of *lex* to include all written enactments, judgments and opinions of jurists.[44] The term *aequitas* will be dealt with below.[45] The *ius naturae* is applicable to all mankind whereas the *ius civile* is restricted to the inhabitants of a particular state, although it must be remembered that the *ius civile* itself is at least partially derived from nature and hence has this in common with the *ius naturae.*[46]

Even closer to the *ius naturae* is the so-called "law of nations" or *ius gentium,* which apparently takes an intermediate position between the *ius civile* and the *ius naturae.* Where a *ius civile* of various states coincides, such law is simultaneously *ius gentium,* in the sense that it is common to all nations (*gentes*). All *ius gentium,* says Cicero, is in fact *ius civile* but not *vice versa.*[47] Justice (*iustitia*) is one of the cardinal virtues dealt with at length by Cicero in various works, but more particularly in the *De officiis.* According to him the preservation of the society and communal life of men rests on two pillars, namely justice (*iustitia*) and kindness (*beneficentia*), the latter also sometimes being referred to as benevolence (*benignitas*) or liberality (*liberalitas*). The first task of justice is to prevent one man from harming another, unless the former has been wrongfully provoked, and the second is to induce men to use common property for common interests and private property for themselves.[48] In another text we are told that justice teaches one to spare all people to act in the interests of the human race, to give each his due (*suum cuique reddere*) and to keep one's hands off sacred or public property, or off that which belongs to another.[49]

41. Costa *op cit* 17-18. See also the definition of *ius naturae* in *De inventione* 2.53.161: *naturae ius est quod non opinio genuit, sed quaedam in natura vis insevit . . .*
42. *Topica* 2.9: *Ius civile est aequitas constituta eis qui eiusdem civitatis sunt ad res suas obtinendas.*
43. *Topica* 5.28: *Ius civile . . . in legibus, senatus consultis, rebus iudicatis, iuris peritorum auctoritate, edictis magistratuum, more, aequitate consistat.*
44. *Topica* 7.31: *ius in legem, morem, aequitatem dividat.*
45. See par 2.3.2 below.
46. Costa *op cit* 22-24.
47. *De officiis* 3.17.69: *Itaque maiores aliud ius gentium, aliud ius civile esse voluerunt; quod civile, non idem, continuo gentium, quod autem gentium, idem civile esse debet.* Cf *op cit* 1.17.53; *De partitione oratoria* 37.130. See also Voigt *op cit* 213-219 and 542-546; Costa *op cit* 25-27.
48. *De officiis* 1.7.20: *De tribus autem reliquis latissime patet ea ratio, qua societas hominum inter ipsos et vitae quasi communitas continetur; cuius partes duae, iustitia, in qua virtutis est splendor maximus, ex qua viri boni nominantur, et huic coniuncta beneficentia, quam eandem vel benignitatem vel liberalitatem appellari licet. Sed iustitiae primum munus est, ut ne cui quis noceat, nisi lacessitus iniuria, deinde ut communibus pro communibus utatur, privatis ut suis.* Cf *op cit* 1.10.31.
49. *De re publica* 3.15.24: *iustitia autem praecipit parcere omnibus, consulere generi hominum, suum cuique reddere, sacra, publica, aliena non tangere.* Cf *De finibus* 5.23.67.

As in the case of *lex* and *ius*, *iustitia* is rooted in nature, as appears from the textbook definition of *iustitia* given in the *De inventione*:

> "*Iustitia* is a state of mind which preserves the common good by recognising the dignity of all men. Its conception proceeded from nature whereafter certain principles became customary by virtue of convenience. Eventually the principles arising from nature and those approved by custom were sanctioned by the fear of laws and religion."[50]

Iustitia is also closely related to other virtues, such as good faith (*fides*), which in turn is described as constancy and truth in respect of promises and agreements.[51] It is likewise the basis of honourable conduct, "since nothing can be honourable (*honestum*) when it is lacking in *iustitia*."[52] Hence it is not strange that Cicero refers to *iustitia* as "a virtue which is the mistress and queen of all virtues."[53]

2.3.2 Equity

During Cicero's time the Roman magistrate known as the *praetor* played an extremely important role in making the strict *ius civile* more flexible by granting remedies in cases where equity (*aequitas*) and good faith (*bona fides*) required it. Thus he granted actions on analogous facts (*actiones in factum*) and actions where the principles of equity and reasonableness demanded it (*actiones utiles*).[54] The importance of *aequitas* became an accepted fact in Roman law[55] and Cicero was not slow in recognising this fact in his discussion of law and legal philosophy.[56]

As pointed out above, Cicero defines *ius* as "the equity constituted for those who belong to the same state so that each may secure his own" and he divides the concept *ius* into *lex*, *mos* and *aequitas*.[57] This link between *ius* and *aequitas* occurs frequently, but it is not restricted thereto.[58] It is also encountered in respect of *lex*, which Cicero

50. *De inventione* 2.53.161: *Iustitia est habitus animi communi utilitate conservata suam cuique tribuens dignitatem. Eius initium est ab natura profectum; deinde quaedam in consuetudinem ex utilitatis ratione venerunt; postea res et ab natura profectas et ab consuetudine probatas legum metus et religio sanxit.* Cf *De officiis* 3.5.24 and 3.6.27.
51. *De officiis* 1.7.23: *Fundamentum autem est iustitiae fides, id est dictorum conventorumque constantia et veritas.*
52. *De officiis* 1.19.62: *nihil enim honestum esse potest, quod iustitia vacat.* Cf *op cit* 1.25.86.
53. *De officiis* 3.6.28: *haec enim una virtus omnium est domina et regina virtutum.*
54. AHJ Greenidge *The Legal Procedure of Cicero's Time* (1971) 202; DH van Zyl *History and Principles of Roman Private Law* (1983) 30-31.
55. Ulpian quotes Celsus' definition of law in D 1.1.1pr: *nam, ut eleganter Celsus definit, ius est ars boni et aequi.* See also *D* 50.17.90: *In omnibus quidem, maxime tamen in iure aequitas spectanda est.*
56. See in general on Cicero and equity M Voigt *Ius Naturale* 1 (1856), 529-541; E Costa *Cicerone giureconsulto* (1927) 29-30; 39-40; O Robleda "La 'aequitas' en Cicerón" in *Humanidades* 2(1950) 31-57; B Riposati "Una singolare nozione di 'aequitas' in Cicerone" in *Studi Biondi* 2 (1965) 445-465; A Zamboni "L'aequitas in Cicerone" in *Archivio giuridico* 170 (1966) 167-203; G Ciulei *L'Equité chez Cicéron* (1972).
57. See notes 42-44 above.
58. See eg *De legibus* 1.18.48: *omnes viri boni ipsam aequitatem et ius ipsum amant; De officiis* 2.12.41; *De partitione oratoria* 28.100.

refers to as the *fons aequitatis*,[59] and likewise in respect of *iustitia*.[60] All these concepts, indeed, spring from nature, as Cicero explains, pointing out that friendship (*amicitia*) also finds its origin in nature.[61] Nor is friendship the only virtue to be related to *aequitas*, but also virtues such as good faith (*fides*),[62] and honour (*honestas*),[63] humanity (*humanitas*)[64] and goodness (*bonitas*).[65] Where there is doubt, he says, as to whether a thing is equitable or inequitable, it should not be done, since equity shines as a light on its own, whereas doubt indicates thoughts about wrong.[66]

The most important passages in Cicero dealing with the concept of *aequitas*, relate to expositions of law in general and the correlation between various forms thereof. Hence in the *De partitione oratoria* it is discussed in Cicero's exposé of the "theory of law" (*ratio iuris*):

> "This (the *ratio iuris*) is divided into two basic categories, namely nature (*natura*) and law (*lex*). The effectiveness of each of these divisions arises from divine law (*divinum ius*) and law (*humanum ius*) respectively, one of which relates to equity (*aequitas*), and the other to religion (*religio*). The force of equity, however, is twofold: on the one hand it rests on the direct principle of truth, justice and, as it is called, the fair and good (*aequum et bonum*) and on the other it pertains to the exchange of a recompense, which in the case of a kindness is called thanks and in the case of a wrong revenge.
>
> These aspects are common to nature (*natura*) and to law (*lex*), but those principles which have been written and also those unwritten principles which have been preserved by the law of nations (*ius gentium*) or by the customs of the forefathers (*mos maiorum*), are peculiar to law (*lex*). A part of the written principles is private and a part public. The public portion refers to law (*lex*), senatorial resolutions (*senatus consultum*) and treaties (*foedus*), whereas the private relates to deeds, formal agreements and contracts by stipulation (*stipulatio*). These principles which are unwritten are observed either by custom or by agreements and, as it were, by consent of men. Moreover it has been particularly prescribed by natural law (*ius naturale*) that we should protect our customs (*mores*) and laws (*leges*). And since the sources of equity (*aequitas*) have, as it were, been briefly disclosed, we should consider, in regard to this class of cases, what should be said in orations relating to nature (*natura*), laws (*leges*) and the ancestral customs (*mos maiorum*), the working of and retribution for wrongful deeds and to every aspect of law (*ius*). If a person has carelessly, by force of necessity or by mistake, done anything which is not permissible, in the case of persons who have acted voluntarily and deliberately, an indulgence

59. *Pro Cluentio* 53.146. See also *De legibus* 1.6.19.
60. *De officiis* 1.16.50; *op cit* 1.19.64: *Topica* 23.90; *De finibus* 1.16.52; *op cit* 2.18.59.
61. *Academica* 1.6.23: *naturae, unde et amicitia exsistebat et iustitia atque aequitas.*
62. *De re publica* 1.3.55; *De officiis* 2.8.27; *De finibus* 1.16.52; *op cit* 2.18.59; *Academica* 2.8.23; *Pro Roscio Amerino* 41.119.
63. *Topica* 24.94.
64. *In Verrem* 2.2.35.86.
65. *De officiis* 1.16.50.
66. *De officiis* 1.9.30: *Quocirca bene praecipiunt, qui vetant quicquam agere, quod dubites aequum sit an iniquum. Aequitas enim lucet ipsa per se, dubitatio cogitationem significat iniuriae.*

> which is taken from several topics of *aequitas*, must be sought with a view to pleading forgiveness for that deed."[67]

Similarly in the *Topica* a somewhat briefer discussion of equity is initiated by an inquiry into "fair" and "unfair":

> "When the concepts of fairness (*aequum*) and unfairness (*iniquum*) are discussed, topics relating to equity (*aequitas*) come to the fore. These are divided into two categories, arising from nature (*natura*) and human institutions (*institutum*) respectively. Nature has two sides, namely the principle of rendering to each his own and the right of retribution. The institutions based on equity are threefold: the one relates to law, the next to agreements and the third to long established custom. Equity itself is said to have three sides: the one pertains to the gods of the upper world, the second to the gods of the lower world and the third to men. The first is called piety (*pietas*), the second sanctity (*sanctitas*) and the third justice (*iustitia*) or equity (*aequitas*)".[68]

From this discussion it appears that Cicero has drawn generously from Greek sources, particularly Plato, Artistotle and the Stoic school.[69] By resorting to the Greek approach, he has elevated the ancient Roman concept of *aequum et bonum* ("fair and good") to the notion of *aequitas*.[70]

In the first passage quoted above, Cicero divides *ius*, in its widest signification, into *ius naturae* and *lex*, the former being equated with divine law (*divinum ius*) and

67. *De partitione oratoria* 37.129-131: *Quod dividitur in duas partes primas, naturam atque legem, et utriusque generis vis in divinum et humanum ius est distributa, quorum aequitatis est unum, alterum religionis. Aequitatis autem vis est duplex, cuius altera directa et veri et iusti et ut dicitur aequi et boni ratione defenditur, altera ad vicissitudinem referendae gratiae pertinet, quod in beneficio gratia, in iniuria ultio nominatur. Atque haec communia sunt naturae atque legis, sed propria legis et ea quae scripta sunt et ea quae sine litteris aut gentium iure aut maiorum more retinentur. Scriptorum autem privatum aliud est, publicum aliud: publicum lex, senatusconsultum, foedus, privatum tabulae, pactum conventum, stipulatio. Quae autem scripta non sunt, ea aut consuetudine aut conventis hominum et quasi consensu obtinentur, atque etiam hoc in primis, ut nostros mores legesque tueamur quodammodo naturali iure praescriptum est. Et quoniam breviter aperti fontes sunt quasi quidam aequitatis, meditata nobis ad hoc causarum genus esse debebunt ea quae dicenda erunt in orationibus de natura, de legibus, de more maiorum, de propulsanda iniuria, de ulciscenda, de omni parte iuris. Si imprudenter aut necessitate aut casu quippiam fecerit quod non concederetur eis qui sua sponte et voluntate fecissent, ad eius facti deprecationem ignoscendi petenda venia est quae sumetur ex plerisque locis aequitatis.*

68. *Topica* 23.90: *Cum de aequo et iniquo disseritur, aequitatis loci colligentur. Hi cernuntur bipertito, et natura et instituto. Natura partes habet duas, tributionem sui cuique et ulciscendi ius. Institutio autem aequitatis tripertita est: una pars legitima est, altera conveniens, tertia moris vetustate firmata. Atque etiam aequitas tripertita dicitur esse: una ad superos deos, altera ad manes, tertia ad homines pertinere. Prima pietas, secunda sanctitas, tertia iustitia aut aequitas nominatur.*

69. G Ciulei "Elements de la philosophie grecque dans la conception cicéronienne de l'équité" in *Études Macqueron* (1970) 201-207.

70. On the concept *aequum et bonum* see *De partitione oratoria* 28.100; *De finibus* 3.21.71 *(aequum iustumque)* and G Ciulei "Note in legatura cu expresia aequum et bonum in opera lui Cicero" in *Studii clasice* 8 (1966) 121-129. Ciulei avers that Cicero converted the expression *bonum et aequum* into *aequum et bonum* and thence related it to the *actiones bonae fidei* before developing his doctrine of *aequitas*.

the latter with man-made law (*humanum ius*). *Aequitas* is then placed on a par with the *ius naturae* as divine law, whereas the law of men is related to *religio,* which signifies the religious aspect and awe men have for law. The twofold division of *aequitas* into the principle upholding truth, justice and *aequum et bonum* on the one hand and the principle of retribution for right and wrong on the other, is of some interest, since it indicates that *aequitas* is a virtue and moral norm as also an instrument to effect retribution for wrongs and gratitude for kindness. Yet in both cases equity shares a common aspect with *ius naturae* and *lex*. The latter (*lex*) refers to written law, *ius gentium* or the *mos maiorum.*

The *Topica* text in turn distinguishes between the *ius naturae* and *institutiones* rather than *lex*. The *ius naturae* preaches the principle of "to each his own" and the right of retribution, whereas *aequitas* is immediately brought under the aegis of an *institutio* (of the man-made *lex*) with a threefold division into *lex, conventum* and *mos maiorum.* As in the previous text, *aequitas* is once again elevated to the status of a virtue from which the principles of retribution and gratitude flow, but, otherwise than in such text, *aequitas* is not merely placed on the same footing as *ius naturae* and *lex,* but is itself the source which engenders *lex, conventum* and *mos maiorum.* Its close relationship with the *ius naturae* is emphasised in the *Topica* in that it is characterised as pertaining to the gods (of upper and nether regions) and to men. The strongly religious aspect of natural law (and hence of *aequitas*) comes to the fore where Cicero refers to *pietas* and *sanctitas* as the equitable principles relating to the upper and nether gods respectively. In the human context, however, he prefers the simple concepts of *aequitas* (in a narrower sense, as pertaining to human affairs) and *iustitia.* The correlation between *aequitas* and *iustitia* further indicates that Cicero virtually equated these concepts, or at least considered them as virtues of equal force and effect.[71]

2.3.3 Moral and Religious Considerations

As pointed out in the discussion of Cicero's philosophy of life, he saw man's chief aim in life as the need and desire to achieve happiness in the form of the "greatest good" (*summum bonum*), in which regard the leading of a virtuous life, in accordance with *humanitas* and the cardinal and other virtues required for such life, was a *sine qua non.*[72] Such moral and ethical considerations formed part and parcel of his philosophy of law, as appears from his approach to equity (*aequitas*), in respect of which concepts such as friendship (*amicitia*), good faith (*fides*), honour (*honestas*), goodness (*bonitas*) and humanity (*humanitas*) were of great importance.[73] Nor were

71. G Ciulei "Les rapports de l'équité avec le droit et la justice dans l'oeuvre de Cicéron" in *RHD* 46 (1968) 639-647, points out that in this text equity is, on the one hand, a more far-reaching notion than justice but, on the other, it has a more restricted meaning and is in fact identified with justice (p 645). He attributes this to an evolution in Cicero's thought on the subject: initially he considered equity as distinct from law and justice but at a later stage he began to draw law and morality closer together as a result of which equity began to merge with law and justice.
72. See par 2.1 above.
73. See par 2.3.2. above.

these the only concepts of a like nature occurring in this context: passages abound in which moral and ethical norms, such as *clementia, constantia, continentia, dignitas, gloria, gravitas, honor, industria, misericordia, modestia, probitas, temperantia, verecundia* and *veritas,* are related to peculiarly legal concepts. Space does not permit of a discussion of such cases, other than to point out that Cicero the lawyer and legal philosopher was never far removed from Cicero the moralist and moral idealist.[74]

In much the same manner religious considerations likewise played a significant part in Cicero's legal philosophy. Whilst recognising that man has been endowed with the capacity to make his own decisions in regard to his exercise of rights and duties, he believed that man, as a social being, is possessed of some form of divinity which urges him to seek fulfilment and happiness in a good and virtuous life. This is in accord with his belief that law (*lex*) in the wide sense, emanating as it does, from *natura* and *recta ratio,* is God-given and hence *ius divinum.*[75]

Cicero's interest in religion and theology was, for the most part, related to its social, political and moral value. He hence felt that "popular religion" should be preserved in the interests of the community as a social entity. He described the totality of moral, religious and legal norms as *fas,* and any conduct in contravention of these norms was *nefas.* Such norms coincide, to a large extent, with those arising from the *ius naturale,* except that that which is permissible in accordance with legal principles is described as *quod licet* whereas that which is permissible according to moral and religious norms is denoted as *quod oportet.*[76] Concepts such as religion (*religio*), piety (*pietas*) and sanctity (*sanctitas*) occur from time to time in legal philosophical context[77] and, to some extent, Cicero has been considered to be a precursor of the Christian doctrine, an attitude which is not entirely without foundation, since great Christian theologians, such as St Jerome and St Augustine, owed much to Cicero in the evolution of their own theological works.[78]

74. Further details will appear, *deo volente,* in chapter 3.3.4 of "Cicero's Legal Philosophy," which is presently in preparation.
75. See par 2.3.1. and *De partitione oratoria* 137.129-130, quoted in n 67 above, and in which divine law *(ius divinum)* is distinguished from man-made law *(ius humanum).* See also *De officiis* 1.8.26, in which it is said that Caesar jettisoned all *iura divina et humana* in his attempt to achieve sovereign power.
76. E Costa *Cicerone giureconsulto* (1927) 30-33. See in general on Cicero's religion and theology CL Beukers *Cicero's Godsdienstigheid* (1942); C Ch Grollios *Cicero's Theology* (1952); M van den Bruwaene *La Théologie de Cicéron* (1937); JE Rexine *Religion in Plato and Cicero* (1959); U Heibges *The Religious Beliefs of Cicero's Time as reflected in his Speeches* (1962); V Guazzoni Foà *I fondamenti filosofici della teologia ciceroniana* (1970); RJ Goar *Cicero and the State Religion* (1972). Book 2 of the *De legibus* deals primarily with religious themes, such as divination, augury, pontifical law, religious practices and so forth.
77. See *Topica* 23.90 (quoted in n 68 above), *De natura deorum* 2.51.153 and *De inventione* 2.53.161.
78. See JN Hritzu "Jerome the Christian Cicero" in *Classical Weekly* 37 (1943-1944) 98-101; M Testard *St Augustin et Cicéron* (1958); A Cameron "Cicero and St Augustine" in *Hermes* 95 (1967) 256.

3. EVALUATION OF CICERO AS A LEGAL PHILOSOPHER

There has been much debate as to the value of Cicero's philosophical works and the overwhelming consensus of opinion appears to be that, although Cicero was not, in general, an original philosopher, his contribution to general, political and legal philosophy was substantial, when evaluated from the point of view of the development of Western philosophy. It is true that he has frequently been considered to be a mere translator and interpreter of Greek philosophy, particularly that of Plato.[79] On the other hand it must be borne in mind that most of the available philosophical material of Cicero's time had been rendered in Greek, in a vocabulary which was, to a large extent, strange to the Roman ear. It was, perhaps, Cicero's greatest contribution to the world of philosophy that he succeeded admirably in transposing Greek philosophy into Roman by his masterful employment of the Latin idiom. He created Latin words and phrases hitherto unknown, at least in the particular context in which he used them, and developed philosophical ideas with reference to his own, and to peculiarly Roman, circumstances, which he amply illustrated by means of Roman examples gleaned from the past and from the contemporary history of his time. The arrangement of his works was his own and he used his own judgment in selecting material for inquiry and comment. The form in which he presented his philosophy of law – the very simplicity of it – was well-nigh unique and he succeeded in popularising a field of thought which had always been considered somewhat cumbersome, if not incomprehensible. This may be attributed partly to the dialogue form which he used for the most part, but the value of his legal and rhetorical training and practical oratorical experience cannot be underestimated. As a master compiler he brought into existence an encyclopaedia of legal philosophy, Greek of nature and character but typically Roman in spirit. His eclectic approach to philosophy allowed him to extract the best from the various schools of thought and to present them as a systematic whole, couched in the impeccable Latin of which he was so truly the master. In this way he in fact created a new genre of literature which must needs have been more than a simple rehash of Greek philosophy. From this point of view it is most unfair to divest Cicero of all originality as a legal philosopher or, for that matter, as a philosopher *per sé*.[80] When the tremendous influence of his work on succeeding generations of intellectuals is borne in mind, Cicero's contribution to law and legal philosophy becomes at once a monument and a beacon for the further development of law and legal thought.

79. See C Atzert *De Cicerone interprete Graecorum* (1908); R Poncelet *Cicéron, traducteur de Platon* (1957); M Puelma "Cicero als Platon-übersetzer" in *Museum Helveticum* 37 (1980) 137-178. In a letter to Atticus *(Ep ad Att* 12.52) he himself says: "Set your mind at rest about the Latin language. You will say: 'When you write such things?' They are copies, effected with little difficulty. I only supply the words, of which I have an abundance."
80. See JC Davies "The Originality of Cicero's Philosophical Works" in *Latomus* 30 (1971) 105-119.