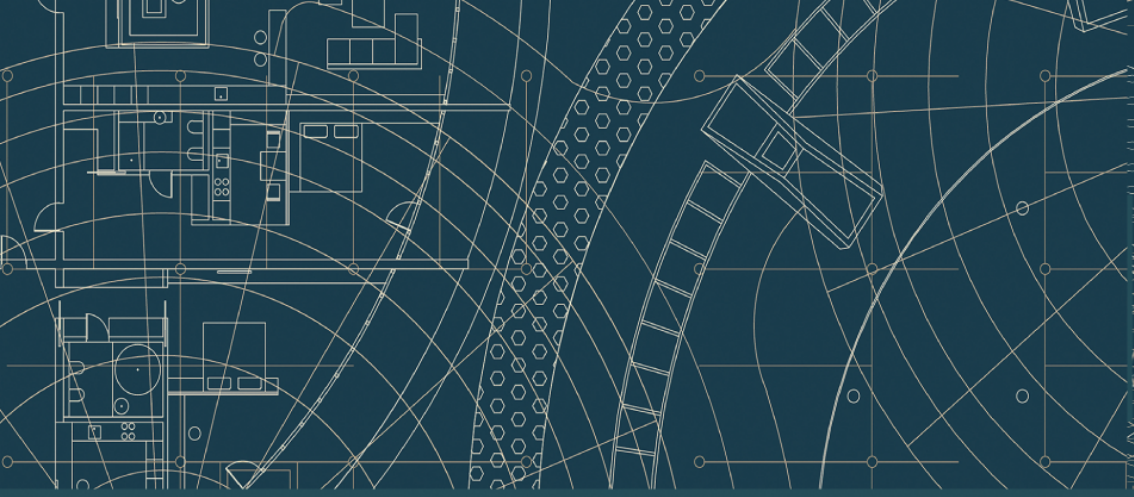

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JURISTS AND LEGAL SCIENCE IN THE HISTORY OF ROMAN LAW

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ROUTLEDGE

PREFACE

This book is connected with the project *Scriptores iuris Romani* (P.I. Aldo Schiavone), funded by the European Research Council, and still in progress at the Sapienza University of Rome. Its aim is to provide a new textual and interpretative basis for the history of Roman law and Roman legal thought. No longer the Justinian codification, the formidable mosaic of the *Corpus iuris*, but the single jurists – profile by profile and work by work – in their dual function as inventors of a science and as creators of a legal system that oriented a global empire.

Thus far, seven volumes have been published by 'L'Erma di Bretschneider' of Rome: Quintus Mucius Scaevola. *Opera* (by J.-L. Ferrary, A. Schiavone, E. Stolfi); Iulius Paulus. *Ad edictum libri I-III* (G. Luchetti, A.L. de Petris, F. Mattioli, I. Pontoriero); *Antiquissima iuris sapientia, saec. VI-III a.C.* (A. Bottiglieri, A. Manzo, F. Nasti, G. Viarengo, V. Marotta, E. Stolfi); Aelius Marcianus, *Instititutionum libri I-IV* (D. Dursi); Callistratus, *Opera* (S. Puliatti); Domitius Ulpianus, *Institutionum libri*; *De censibus* (J.-L. Ferrary, V. Marotta, A. Schiavone); Iulius Paulus, *Decretorum libri* (M. Brutti).

At least ten other works are due to appear before the conclusion of the research in January 2022, including one on P. Mucius Scaevola, M'. Manilius, M. Iunius Brutus (S. Barbati), one on Pomponius, *Enchiridion* (F. Nasti), and one on Cervidius Scaevola, *Quaestionum libri* (A. Spina).

Here we present some articles, both on methodology and the history of historiography, and on the profile of certain jurists, which we partially discussed in a meeting in Rome, at the beginning of our research. These contributions can be considered a useful approach to a type of historical enquiry not very familiar to an English-speaking audience, but which has played a role in the revitalization and new fervour of contemporary studies on the ancient world.

Fara Nasti, Aldo Schiavone

Part I

METHODS AND PATHS

Chapter 1

SINGULARITY AND IMPERSONALITY IN THE THOUGHT OF ROMAN JURISTS

Aldo Schiavone

SUMMARY: 1. Our project. – 2. From Code to jurists. – 3. Singularity and impersonality. – 4. The authoriality of Roman jurists.

1. Our project

The aim of the *Scriptores iuris Romani* Project is to introduce and spread – not only among specialists, but to a broader audience of scholars or even those merely curious about law and history – what we can define as a still uncommon and almost unknown way of viewing Roman law, or at least its most important part. This is a manner that is no longer focused, as is usual, on the Justinian codification – the monumental structure of the *Corpus Juris Civilis*, and in particular the *Digesta* – but directly on the Roman jurists, their single and definite profiles, considered for what they really were: the authentic protagonists of a long and grandiose intellectual journey, which would become a key feature of the West. [1]

With our work – which we have been carrying out for years, long before it became a European Research Council Project, and which had already involved various institutions, including the Istituto Italiano di Scienze Umane, the Scuola Normale Superiore and the University of California, Berkeley – we wish to present a solid textual and interpretative basis for this drastic change in perspective. [2] We have brought out

[1] What I say in these pages is based on my *Ius. L'invenzione del diritto in Occidente. Nuova edizione* (Torino 2017), English translation of first edition, 2005, *The Invention of Law in the West* (Cambridge [Mass.]-London) 2012.

[2] An account of these beginnings can be found in F. Amarelli, A. Schiavone, E. Stolfi, 'Corpus Scriptorum iuris Romani. Nascita di un progetto', in SDHI 71 (2005) 4 ff.; V. Marotta, E. Stolfi, 'L'inizio dei lavori', in SDHI 72 (2006) 587 ff.; C. Giachi, P. Giunti, 'I lavori di Berkeley', in SDHI 73 (2007) 597 ff.; F. Tamburi, 'Montepulciano: una settimana di verifiche e confronti', in SDHI 74 (2008) 923 ff.

a series of volumes through the publisher L'Erma di Bretschneider, each one dedicated to the reconstruction of the work of a jurist (or a part of the work in cases in which we have more ample documentation).

For each author, we have provided: a broad introduction to his life and his thought; reproduction of the Latin (or Greek) text of his writings, rearranging the fragments handed down by the Justinian *Digesta* or by other sources according to the original design – as we are able to reconstruct it today – accompanied by a measured critical apparatus grounded in the Mommsen edition; an Italian translation with a historical-juridical commentary; and finally a complete collection of the quotations made by ancient authors useful to outline the biography of the jurist considered.

An indispensable point of reference is, of course, the work of Lenel, truly pioneering for the era in which it was conceived: a beacon that still stands alone, after almost a century and a half, illuminating a path incredibly neglected, or never even perceived, by subsequent studies on Roman law.[3] Obviously, after such a long time, many results of the German scholar's extraordinary research should be re-examined: and we will not fail to do so when the opportunity arises – even if our main aim is not to replicate his *Palingenesia* but to continue on the road that he foresaw.

2. From Code to jurists

From the point of view of historiographic theory, the enterprise we are undertaking requires the acquisition of a very important preliminary datum: the separation, in the most radical way possible, of the real history of Roman law from the history of its tradition and its fortune from the Justinian age to the twentieth century: a phenomenon of almost incalculable proportions that has still not ceased to influence the legal culture of the West.

At the origin of the tradition is the Justinian codification, the formidable mosaic of the *Corpus Iuris*. Instead, the core of the history of Roman law consists of the jurists in their dual, but almost inextricably interwoven, function as inventors of a science and as creators of a legal system that guided a global empire.

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[3] O. Lenel, *Palingenesia Iuris Civilis*, I-II (Lipsiae 1889; reprint Roma 2002); L.E. Sierl, *Supplementum* (Graz 1960).

The success of the medieval and especially modern tradition of Roman law has decisively contributed to the establishment in the West of the individualistic form of private subjectivity as an intrinsically juridical form: a hugely important result that has accompanied and favoured the triumph of the capitalist organization of the world. Captivated by the force of such an outcome, we have ended up projecting the model of the Code, the basis of that tradition, not only – as was completely legitimate – onto the events subsequent to its formation, that is onto the history that it initiated, but also – which instead was quite misleading – onto those that preceded it, i.e. the real history of Roman law, as if the latter were nothing but its prelude, the anticipation of its realization.

That is how the shadow cast by the Justinian codification obscured the Roman jurists, hiding them for millennia. For too long, their history – which is, in its strongest sense, the actual history of Roman law – has never been told: and this omission, concealing a decisive point of our past, has removed from us a very part of ourselves. While the late medieval and especially modern tradition of Roman law, from the Bolognese masters to the German Pandectists, was developing right before our eyes – and left Europe with a legacy that is unique but whose appraisal has now definitively been made, and there is nothing more to add – the authentic Roman genealogy of that knowledge, so utilized and reworked, has remained a largely unexplored territory from which we still have much to learn.

Today, contemporary juridical thought must perform a crucial task: a leap beyond itself and its old confines to succeed in thinking and disciplining the reality emerging from the great transformation in the last decades of the twentieth century: to construct a legal system of the new global world worthy of the name. But this will be impossible without coming to terms completely – without lacunae – with our past, without first having written all of our history. In this sense, the function of present-day legal historians could be much more important than one might imagine; and it certainly does not consist – as some still insistently believe – in attempting to continue, in an ever more tired manner, a tradition that has now ceased forever. Rather it is to bring to light a part of the past that we had buried without knowing it: to understand it and finally – freer, because to understand is to change – to be able to look ahead.

3. Singularity and impersonality

In the twentieth century, each time some scholar of Roman law tried to deal with the ancient jurists in order to more carefully trace their characters and profiles, it was sooner or later objected that, although the effort was commendable, the history was impossible to recount. According to widespread opinion, two particular obstacles would have hindered it.

The first concerned the state of the texts. It was said that of the works of the ancient jurists, with the sole exception of Gaius, there remained only fragments – those making up the plan of the *Digesta*. Moreover, they were strongly altered by the intervention of the Justinian compilers, when not (according to more recent hypotheses, culminating in the reconstruction by Franz Wieacker)[4] already modified from the originals by the editors who had transcribed them after their first publication (especially by those who had worked between the second part of the third century and the first decades of the fourth).

Today this barrier seems anything but insurmountable. The use of a less destructive philology, less conditioned by classicist prejudices, has left us much more confident about the good preservation of the writings of Roman jurisprudence. After an unprejudiced examination, the great majority of what were thought to be Justinian, or even late antique ('post-classical', as was preferred at the time), interpolations and falsifications turned out to be non-existent, suspected merely on the grounds of very weak evidence, or of a priori *petitio principii*, based on ignorance of the writing styles of the jurists and the richness of their conceptual worlds. Not to mention that the more we carefully study the late antique legal culture, as we have begun to do for some time now, the more we discover that it had other objectives, perspectives and expressive means, that it was not a plan for the systematic rewriting of the works of the old masters.

As for the fragmentary condition of the texts, this is certainly an incontrovertible fact. Yet, we are now able to reconstruct even very complex intellectual histories starting from collections of documents far more incomplete than the ones we have for Roman legal thought: this is what occurs in the history of science, of philosophy, of religion, of material culture. It is sufficient to pose the right questions, using the appropriate tools.

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[4] *Textstufen klassischer Juristen* (Göttingen 1960, reprint 1975).

The second objection raised against the study of the thinking of Roman jurists is much more insidious. Indeed, it leads us directly to the heart of the most important problem posed by this type of historiography.

According to a belief that was widely held in twentieth-century Roman studies, and which we can trace back to an intuition by Lorenzo Valla, and later to a line of studies from Savigny to Schulz,[5] the Roman jurists were intrinsically indistinguishable from one another; in other words, they were all 'fungible people', according to an expression by Savigny himself[6] which then remained exemplary of this position. The specificity of their intellectual work, let us say also the peculiarity of their science and its manner of developing in time, would have meant that those figures lost all definiteness. Their voices would overlap and merge into a single sound, in which it would be impossible to distinguish the contribution of each one: the choir would be their unique destiny.

There is some truth in this statement that cannot be ignored but rather valued if we wish to take a step forward.

The problem that it raises seems to me to be that of the authoriality of the texts of the Roman jurists as literary texts and of its particular condition. Clearly, this question evokes an even broader horizon: the authoriality (in general) of all ancient writing (and not only juridical writing), which, although changing in relation to the different eras and different literary genres, is very far from the modern one, to which we are long accustomed. Indeed, modern writing constitutes its own condition in very close relation to the birth of modern individualism – first Renaissance, then Cartesian and Enlightenment, up to its culmination in the construction of the bourgeois 'I': a form of conscience without

[5] L. Valla: in the preface to the third book of *Elegantiae*, in E. Garin (ed.), *Prosatori latini del Quattrocento* (Milano-Napoli 1952) 607-609; F.C. Savigny, *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* (Heidelberg 1814, 1840[3], reprint Hildesheim 1967) now also in H. Hattenhauer (ed.), *Thibaut und Savigny. Ihre programmatischen Schriften* (München 1973) 95 ff., and in J. Stern (ed.), *Thibaut und Savigny. Ein programmatischer Rechtsstreit auf Grund ihrer Schriften* (Berlin 1914, reprint Darmstadt 1959) 69 ff.: an Italian translation is in G. Marini (ed.), *Thibaut-Savigny, 'La polemica sulla codificazione'* (Napoli 1982) 87 ff.; F. Schulz, *History of Roman Legal Science* (Oxford 1946, 1953[2]) German translation *Geschichte der römischen Rechtswissenschaft* (Weimar 1961) Ital. transl., *Storia della giurisprudenza romana* (Firenze 1968).

[6] *Vom Beruf*, ed. Hattenhauer (n. 5) 189 (but see also 114), Ital. transl., 194 (and 110).

equal in the ancient world, which did not even know the word 'individual' (Aristotle says 'each one of us', the Romans *singulus* or *privus/privatus*, which have completely different meanings in terms of the constitution and recognition of subjectivity – and it is a point that carves out an abyss between ancient and modern).

In the texts of the Roman jurists – beyond differences which nonetheless should not be underestimated, with the change in eras and types of works – the singularity of the authors (hence, I will not say their 'individuality', but the condition of their authoriality as ancient writers) is constantly influenced, as if compressed, by the presence, in the very core of their work, of an irrepressible element of impersonality: the perception of which made Savigny speak, in an improper but shrewd way, of 'fungibility'. An inclination to the impersonal that had a precise explanation: it developed, I believe, from the common awareness of the jurists (or at least of the most important of them, the only ones for whom we have information) that they were participating, with their own intelligence, decision after decision, writing after writing, in the collective formation of a grand ontological architecture, a true metaphysical scheme, in which the social reality they faced – the living set of the 'private' relations of imperial Rome – was transcribed into a world of figures, proportions and abstract and quantifiable (however invisible) measures, provided with their own density and consistency, spectral but unquestionable (*res incorporales* in the language of Gaius, who revisited Seneca).[7] In other words, and in short: an inclination to the unveiling of the law as a form of being, inevitably reflected in what we might call the 'juridical state' of the human mind (I am reworking an expression of James Hillman).[8]

Yet, this was an ontology that developed a metaphysics very different from that which had dominated Greek philosophy from Parmenides to the Stoics: a metaphysics that hypostatized, transfiguring it into archetypes, social relationships rather than naturalistic elements or ethical and cognitive models, as in Greek thought; only relationships of the coexistence among men, observed from the point of view of their regulation. A knowledge of bare facts, pure experience of life, which became an ontological construction: a *phronesis* transformed into an

[7] Gai. 2.12; Sen. *ep*. 58.14. On this point in particular, see *Ius*[2] (n. 1) 197 ff. [these pages are not present in the first edition, Torino 2005, and thus they are not included in the English translation *The Invention* (n. 1)].

[8] J. Hillman, *A Terrible Love of War* (London 2004, reprint 2005), 1: "the martial state of soul".

episteme; *prudentia* changed into *rationes iuris*. Thus, the Roman jurists discovered their theoretical vocation (according to a luminous intuition of Vico),[9] albeit concealing it in the shadow of a merely practical end.

However, the common awareness of an entire group that it was participating in the progressive creation of this grandiose design, accompanied by the sharing of a rigorous specialist vocabulary at the service of an increasingly technicalized and powerful conceptual apparatus – the transcription of the whole universe of private relations spread out under their gaze into a kind of ontological cartography of the sociality of the empire – inevitably ended up attenuating the authoriality of the single jurists, of any particular contribution, tempering the specificity of each impression the more the strictly practised specialism became demanding. In short, there was, in the work of those masters, truly something irreducibly anonymous, linked to the growth – which we could call choral-like – of the ontological structure of *ius* fortified by an almost endless series of cases, accumulated and conserved over time as an encyclopaedia (from the juridical perspective) of human sociality in its relationship with nature and with the production of wealth: whose function was not knowledge, but rules, the uninterrupted creation of norms, which no event could escape.

4. The authoriality of Roman jurists

Nevertheless, concealed under the thickness of this impersonal blanket – the collective knowledge of a group that acted as a very powerful regulating machine – the singularities endure, albeit at a level that we would not call deeper but more decentralized – muffled, and in part as if having changed colour, but preserved. In no intellectual tradition – ancient or modern – does the knowledge it elaborated manage to liberate itself from the historical specificities of its protagonists, which inevitably accompany its formation and growth. Roman juridical thought is no exception: it is only a matter of discovering the functioning of dialectics – which varies in relation to the circumstances and the subjects involved – between singularity and impersonality, between permanence and variability.

Thus, the authoriality of the jurists can finally emerge, dampened but

[9] 'Philosophi autem Romanorum ipsi erant iurisconsulti', as in chapter XI of *De nostri temporis studiorum ratione*, in G. Vico, *Opere*, I (ed. Gentile, Nicolini) (Bari 1914) 101.

not cancelled behind the shield of shared constructions and solutions: it is merely necessary to seek it and find it. And it does not emerge only in the open contrasts between the single persons – the so-called *ius controversum*. Often the latter shows only the most superficial side of the differences. Instead, it is better revealed in the network of connections linking the profile of each author to an environment, to a time, to a world and a circulation of ideas; to a general view of his duties and his role, and of those of the science he cultivates; to a peculiar relationship with political power: all elements that determine and condition even the most technical choices – their axis and their specific curvature, we might say – in a subtle but always decipherable interplay between knowledge merely received and new knowledge personally produced.

At this point, it is clear that rediscovering the jurists is not an exercise in intellectual archaeology, to trace a lost but all in all insignificant context. Instead, it is the only possible way to underline the historical importance of a set of disciplinary devices and the ontological apparatus underlying them, which otherwise were destined to appear – as they have often done and continue to do today in many respects – as structures outside of time, almost as if the social metaphysics that founded them was not – as it is – only the result of a historically determined cultural operation, but proved to be truly an archetypal system over and above history: a fallacy from which we have not yet completely escaped.

Certainly, modern Western law is based on concepts and categories that precede and go beyond modernity: but mistaking this fact for a tendentious projection of the juridical form as such onto the eternal and the absolute of an ahistorical necessity of a vaguely naturalistic flavour is a misunderstanding with catastrophic consequences, which unfortunately does not belong only to our past. Rediscovering the Roman jurists in all their concealed historicity – passing from the system they eventually constructed, highlighted by the architecture of the *Digesta*, to the genealogies that allowed its early development – is the most important way to avoid such a trap.

What is the origin of that character of the West that we call legal science, first singled out by Roman thought? What is the secret of its birth and the extraordinary duration of its syntax? Why was law constituted as a separate rationality, and what are the connections that, despite everything, bind it to the geography of the social powers that accompany it – the economy, technology and above all politics?

These questions, the basis of the historian's work, presume the passage of the interpreter from the plane of forms that seem to overwhelm

and cancel history, to that of the forces that permitted their creation: because the historical transmutation of the forces does not coincide with the history of the forms, even if the two levels continuously refer to each other.

The Roman jurists had a vague but pervasive awareness of the exceptional nature of their work. The coherent dialogue that intertwines the one with the other through the centuries, which establishes the particular compactness of the historical temporality of their thought – no other ancient knowledge ever had anything comparable – with thousands of quotations (but in the whole of their writings there must have been many more) knotted along the thread of a single, interminable discourse; the continuous counterpoint between the cold abstractness of ontology and the burning concreteness of the case history perpetually evoked by them; the jealous defence of one's separate rationality, and at the same time the no less constant search for a direct relationship with politics: all this tells us about their awareness of being at the turning point of an entire civilization, the place in which power – the power of an empire that had unified the world – becomes order, rule, discipline; the flowing line that transforms force into consensus, and justifies it. The intersection where force becomes (can become) form, as I said before.

And it is exactly on these passages and on these intertwinements that today we must interrogate the Roman jurists: it is this lesson – and not others, older and worn out by use and time – that we wish to hear from them, and that we must discover in the impersonality of their knowledge, finally evaluated by the singularity of their persons. The genealogy of a type of equation between order and power which today is certainly outdated but which nonetheless continues to indicate a path: the search for a global rule whose legality opens up, on the one hand, onto the science underlying it and, on the other, onto the consensus that measures its efficacy and effectiveness.

And this – I believe – is the only way to restore to our studies the place they lost, and to return them to the centre of our present thinking.

This is what we are attempting to do.

Chapter 2

STORIES OF LEGAL DOGMAS, STORIES OF ROMAN JURISTS: AN UNCOMPLETED TRANSITION

Massimo Brutti

SUMMARY: 1. Continuity and abstractions. – 2. The history of jurists as 'external' history. – 3. Singularity denied. – 4. Individualizing studies. – 5. Fritz Schulz: autonomy and unity of *iurisprudentia.* – 6. The study on the jurists. – 7. The historiography on Roman legal thought at the end of the twentieth century.

1. Continuity and abstractions

Even today, following a tenacious habit, legal historians often represent the multiplicity of juridical forms by means of a set of concepts constituting a totality, a 'system'. The evolution of law is part of a unitary discourse, which links together disciplines, moments and places that are different and distant in time. The idea of a linear relation between past and present and of a continuity of fundamental juridical schemes, starting from Roman law, concerns especially the relationships between private individuals.

The juridical constitution of persons and the acts contributing to the economic circulation of goods are more or less consciously identified as the basis for an analogy between the ancient and modern experiences of law: for a reflection of images that lends potent legitimacy to the disciplines of today. If there is a distant past that confirms them, this means that they have a force able to go beyond their own time and project themselves into the future. Thus, Ulpian's *utilitas singulorum* is associated with the modern market system. [1]

A quietistic orientation prevails in the doctrines that share continuity. Anchored in tradition, they are incapable of problematically interpreting and conceiving the social rifts and conflicts in which they are participants.

The key concepts of the historiographic narrative are assumed to be

[1] Ulp. 1 *institutionum*, D. 1.1.1.2: … *publicum ius est quod ad statum rei Romanae spectat, privatum quod ad singulorum utilitatem* ….