Roman Law, the Evolution of Ideas, and Writing Technologies

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I. Introduction

(1) With the introduction of the German Civil Code in 1900, Roman law ceased to be applicable in any significant European state. Actually, Roman law no longer plays a role in courts throughout Europe, although in some contexts Roman law occasionally is used to exemplify general legal principles or institutions.

(2) One example is an English case from 1987. This case involved the rights of two parties whose oil had been mixed in the hold of an oil tanker. The judge considered certain old English cases. These cases suggested that where the mixing had been done wrongfully by one of the parties, the other was entitled to the whole of the mixed oil. Having decided that he was not bound by precedent to follow any of the considered cases, the judge stated that he was free to adopt "the rule which justice required". With the meta-rule, "the rule which justice required", the judge accurately meant that he was free to apply the Roman rule of *confusio.*

(3) The rule of *confusio* is contained in the INSTITUTES, a short Roman law textbook from the 6th century AD. *Confusio* is located in the first part of the Second Book of the INSTITUTES. Its first proposition runs as follows:

"If materials belonging to two persons are mixed together by their mutual consent (*ex voluntate*), whatever is thence produced is common to both, as if, for instance, they have intermixed their wines, or melted together their gold or silver."

"Wenn Stoffe zweier Eigentümer mit deren Willen vermischt worden sind, so gehört die ganze Sache, die aus der Vermischung entsteht, beiden gemeinschaftlich, zum Beispiel wenn sie ihre Weine vermischt oder Klumpen von Gold oder Silber zusammengeschmolzen haben."

In other words: The Roman rule of *confusio* obliges the parties to divide the oil between them, according to their respective shares. In the oil case, these respective shares could

be precisely determined. So with the adaptation of the Roman rule of *confusio*, the English judge was capable to deliver the judgement that justice required.

II. Corpus iuris and the Digest

(1) The rule of *confusio* was presumably coined by Gaius, a famous Roman jurist of the 2nd century AD. The INSTITUTES themselves survived as a part of an ancient manuscript, a parchment codex, which had come to light in an Italian library towards the end of the eleventh century. This parchment codex reproduced an enormous collection of legal materials that had been compiled more than five centuries earlier under the Byzantine Emperor Justinian in about 534 AD. The compilation was divided into four parts – the CODE, the DIGEST, the INSTITUTES, and the NOVELS. The term that is usually used to designate the entire content of this compilation is Corpus iuris or Corpus iuris civilis.[1]

(2) Of primary importance within the compilation of the Corpus iuris is the Digest. On more than 2000 pages (in a contemporary English translation), the Digest contains a vast conglomeration of the opinions of Roman jurists on thousands of legal propositions similar to the rule of *confusio*. These legal propositions comprise fields like inheritance, family law, property law, contracts, torts and other branches of law governing the legal relationships between Roman citizens, sometimes also covering parts of criminal law, but excluding almost everything else, for instance international law (*ius gentium*). So, when I speak of Roman law I mean municipal law, the law of the city of Rome, *ius civilis*, civil law, the law that later became equivalent with private law.

(3) The legal propositions that the Digest set forth were very often "holdings" in actual cases – like the rule of *confusio*. Others were statements of magistrates, edicts of the so called roman *praetor*, in which these magistrates declared or spoke out the law (*ius*

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[1] This designation, however, is not quite correct: The idea of *one* corpus iuris did not occur before Accursius and the famous GLOSSA ORDINARIA, and the term "corpus iuris" itself was not coined before the invention of the printing press and the first complete edition of the Corpus iuris by Gothofredus, a French jurist and humanist, in 1583.

dicere). At the same time, these edicts gave plaintiffs and defendants an idea of how the magistrate would rule in prospective cases.

(4) In Digest 42.16 we find an example of this reference function of the magistrates' statements. It is a long juristic discussion of the application of an action which is comparable with actions of trespass in common law. In Roman law, actions of trespass were called *interdicta* (Besitzklagen), from *interdicere*, to prohibit some kind of social action by command or imposing a ban.

"The praetor says: 'If you or your slaves have forcibly deprived anyone of possession that he had at that time, I will grant an action (*iudicium dabo*) only for a year, but after the year has elapsed I will grant one with reference to what has [subsequently] come into the hands of him who dispossessed the complainant by force.'"

„Hat jemand oder ein Sklave jemanden gewaltsam um ein ihm zur fraglichen Zeit gehörende Sachen gebracht, so lasse ich eine Klage nur innerhalb eines Jahres zu, danach aber eine Klage wegen Dingen, die sich der wegen gewaltsamer Aneignung Beklagte [später] angeeignet hat."

(5) The action is then followed by quotations from opinions of various jurists. For instance, on this statement of the praetor, the roman jurist Ulpian is quoted as saying:

"This interdict was established for the benefit of a person who has been ejected by force, as it is perfectly just to come to his relief under such circumstances."

"Diese Besitzklage wurde zugunsten einer Person zugelassen, die gewaltsam vertrieben wurde, denn es ist ja völlig gerecht, daß man ihr unter diesen Umständen einen Rechtsbehelf zubilligt".

(6) The rediscovery of the Digest in the 11th and 12th centuries was perhaps the most significant accident in the evolution of Roman law. It was this unplanned event that made Roman law so influential in Europe and elsewhere. Justinian's text soon became an object of commentary work by the civil law glossators in the upcoming European universities. Transmitted through the Humanists, Roman law and jurisprudence then had an enormous impact on the development of natural law in the 17th century. Later, in the 18th and 19th centuries, Roman law influenced the codification movement.[2] So, one

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[2] It shaped different European Codes, especially as a method of a rational exposition of the legal material. The general part (Allgemeiner Teil) of the German Civil Code, for example,

could reasonably argue that Roman law contributed in a considerable way to modern (civil) law. This argument is particularly true for the continental European strand of modern law but also – at least to some extent – for the Anglo-American common law tradition.

(7) If we speak of a considerable contribution of Roman law to modern (civil) law, one point has to be made clear right away: Roman law did not give rise to the central legal institutions of modern law. It is in some way true that the Romans invented, for instance, the juristic notion of the contract, the separation of possession and property, the difference between contract law and tort law. However, the dependency on a rather formal procedural law was a clear constraint in the evolution of legal institutions. And, probably more important: ancient Rome did not formulate a single one of the legal institutions that became crucial for a modern capital-driven economy: not the fixed-interest bond or other bond papers, not the mortgage, not the bearer share or other types of shares, not the bill of exchange, not the trading company (in the modern capitalistic sense) and so forth and so forth.

But if it was not the content of law, what then was it that made Roman law so influential in Europe since the rediscovery of the Digest in the 12th century?

(8) For Max Weber – and in what follows, I am going to take Max Weber as a starting point – it was the way or mode, the "method" the Roman jurists treated the law. It was a specific epistemic style of legal thinking, a type of legal reasoning that for the first time in history evolved in Rome and, as Weber again and again insisted, solely in Rome: The epistemic spirit of Roman jurisprudence – "die streng juristischen Schemata und Denkformen … des römischen Rechts" (GARS I, 2) – made Roman law so exceptional and incomparable. Because of this legacy, Weber judged Roman law to be a manifestation of "formal rationality" that for him was the motor not only for the

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distinguishes between statutes on persons (*personae*) and statutes on things (*res*). This is a clear adaptation of a distinction that had already been introduced in the INSTITUTES as the differentiation between persons, things and actions.

evolution of modern law, but also for the emergence of modern science, modern music, modern art, the modern state and the modern economy.[3]

III. Empirical vs. logical formalism

(1) In his reflections on the historical structures that made the evolution of Roman law so exceptional, Max Weber distinguished between a law that is based on empirical or apparent formalism (empirischer oder anschaulicher Formalismus) and a law that is based on a logical formalism (logischer Formalismus).

(2) This distinction was not Weber's invention. Differences of this kind were common in evolutionary theories of the 19th century. For example, R. v. Jhering, in his very influential book *The Spirit of Roman Law* (Der Geist des römischen Rechts), draws a distinction between an evolutionary stage in which law was driven by sense and sensibilities (Sinnlichkeit) and a stage in which "spiritness" (Geistigkeit) was at its centre. In the stage of sense and sensibilities or empirical formalism, the distinctive means through which a given state of law can be altered or brought about are external features, like a word spoken out or a symbolic action taking place; the law is generally orientated towards perceivable actions. In contrast, a law is based on "spiritness" (Geistigkeit) or logical formalism when it gets more abstract; when day-to-day casuistic and vague associations about the comparability of cases are replaced by more abstract rules and more abstract patterns of governing the given legal material; when judging from case-to-case is replaced by judging on the basis of more generalized rules; when a mixture of customary law and statutes is replaced by systematic lawmaking; etc.

(2) Empirical formalism and logical reasoning in law have some components in common: both types of law are strictly formal. That is why Weber accentuates the *formal* rationality of Roman law. Weber did not elaborate this point, but his idea

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[3] Weber considered "formal rationality" to be the key in explaining why the take-off to modern society took place in the West, but not in the East; why it happened in England, but not in China, India or in any other high culture of ancient or medieval times.

certainly was that Roman law was strictly formalistic from its beginnings. Legal thinking in Rome always had a formal character. The law of the Roman pontiffs was already considered formalistic and analytical. Or, as Weber said: The jurisprudence of the Roman pontiffs is the mother of all rational juristic thinking.

(3) What did Weber want to describe with the dichotomy between empirical formalism and logical reasoning in law?

Let me give you some examples. The first example is from procedural law.[4]

The Roman procedural law had – as in other ancient legal cultures – a two-stage character. The first stage was concerned with the categorisation of the issue in legal terms and the second with the actual trial of that issue. Essential was the first stage, which was highly formal and technical; there was a limited number of forms of actions, *legis actiones*, which were begun by the oral declaration of set words in the presence of the magistrate and the defendant. A plaintiff who did not follow the precise wording lost his action.

(4) A famous example of this rigid formalism is reported by Gaius (Inst. 4, 11): A Roman citizen was suspected having cut down the vine on his neighbour's ground. The neighbour was claiming a fine for the damage caused, 25 coins a plant. But in formulating the action before the magistrate, the plaintiff spoke of cut vine. Because no action existed for cut vine, the plaintiff lost it. And the argument for this decision simply was: He didn't follow the precise wording. For claiming damages he ought to have been speaking of cut trees (*arbores*), but instead of that he claimed a remedy for cut vine (*vites*).

This is a clear example for what Weber called empirical formalism: The possibility to bring about a certain state of law, here: to win the claim, was dependent on the correct usage of set words. This case does not necessarily reveal the ritualistic, magical

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[4] This selection is not just random, but due to the fact that the Romans considered the law from the standpoint of remedies available. Procedural law, therefore, was the motor in the evolution of Roman law.

character of law in that epoch, but it reveals that the *legis actio* had to be presented empirically, that is spoken out: an action had to be made audible in public!

(5) The second example is from a field that nowadays is classified as legal transactions (Rechtsgeschäfte). One of the most important legal figures of early Roman transactional law was the institution of *mancipatio*. *Mancipatio* derives from *manus*, hand, and *capere*, to seize or to grasp; so, *mancipatio* literally means to grasp something or somebody by hand.

(6) This image of grasping or holding is constitutive for the legal institution of mancipation. A legal transaction by mancipation was a strict formal act. In its oldest form it required the attendance of five witnesses who had to be Roman citizens and also the presence of somebody who had to hold a pair of copper scales: The purchaser grasps the object of transaction with his hand and declares: By the law of the citizens of Rome (*ex iure Quirintium*) this thing now belongs to me (*meum esse aio*) and is bought for this copper and with this pair of copper scales. During this pronouncement, the purchaser had to hit the copper scale with a copper coin and hand it to the seller.

(7) Crucial for the legal transaction were again the words spoken out (*meum esse aio*), yet in this case the wording was complemented by diverse symbolic actions: hitting the copper, handing over the copper coin, and grasping the object of the legal transaction. But again: The law was demonstrated empirically. It was – and had to be – made audible, visible and even tangible.[5] A synaesthetic act: a characteristic example of what Weber named empirical formalism in Roman law.

(8) In the second half of the republic or so, a fundamental change in the administration of justice took place, the invention of the formula (*agere per formulas*). The DIGEST is not very clear about this rupture, but it is not contested among legal scholars that the rearrangement from legal actions to formulas[6] had far-reaching consequences: When the parties now appeared before the praetor, they did not just have to recall the formula of

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5 So, one could reasonably argue that early Roman law represents a case of synaesthesia, insofar as legal actions were based on different kinds of media.

6 Or simply: actions (D. 1.2. 6-7).

the action. Unlike early Roman law, the magistrate now allowed them to express their claims (and defences) in their own words. Then, having discovered what the issue was, the magistrate set it out in hypothetical terms in a written document, the edict, published on whitened wood (*alba*).

(9) The edict of the praetor thus stimulated a new type of civil law. The new law did not substitute the old *ius civile*, but supplemented it (D. 1.1.7.1.). The jurists called it *ius praetorium* or, less commonly, *ius honorarium*. The new civil law was not a product of political administration, as one might suppose at first glance. It was rather the result of professional advice from Roman jurists to the political magistrates. The edict resulted mainly from a new type of expertise (*responsae*) sustained by professional law consultants, called *iuris consulti.* These consultants were mostly local dignitaries (*honoratiores*) in the sense Max Weber gave the word. So jurists like Quintus M. Scaevola, Labeo, Gaius, Ulpian and others were the authors of the legal rules that were then rediscovered in the middle ages.[7]

(10) The new civil law was different for many reasons. In particular, it provided greater flexibility. It allowed the *praetor*, for instance, to invent new remedies and to grant a formula in a situation in which there was no precedent or in which the existing suits didn't fit. Through these changes, new types of actions and new legal institutions evolved. What once had been a highly formal act was now converted into a flexible procedural instrument, and this flexible instrument was now able to contain a wide range of legal agreements.

(11) One of the most significant innovations of that period was probably the invention of remedies based on good faith (Treu und Glauben, the called *bonae fidei iudicia*). These formulas instructed the judge to condemn the defendant to pay whatever sum he ought to pay "according to good faith" (*ex fide bona*). Although I cannot go into details

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[7] So, one can reasonably argue that Roman law as we know it today is a purely juristic law, the materialisation of Roman jurisprudence or Roman legal science (Rechtswissenschaft).

here, the hypothesis may be admitted that this new type of action made possible the legal contract, the *contractus* (*consensus*),[8] in different branches of civil law.

(12) By legal contract I mean the invention of a legal figure that constructs a bilateral or synallagmatic relationship between two parties that is solely based on juristic language: *pacta sunt servanda*.[9] This construction seems to be very simple and the most natural thing in the world, but it isn't at all. It is an evolutionary achievement of extraordinary improbability and an evolutionary quantum jump in relation to early Roman law, but also in relation to Greek and Mesopotamian law.

(13) The contract is constructed as the result of the unification of two different wills. But once the unification of the two wills has taken place, the contract can clearly not be decomposed again into the two wills that made it. One and one is not two but three; that is to say that the act of unification is actually the moment in which a new level emerges, the level of the contract itself. This can be easily seen, if one just recalls that the consensus of both parties is taken for granted in even cases in which their wills were never spoken out and the contract is based solely on the assumption of an implicit agreement. The tacit consent, however, is nothing else than the *ex post* construction of an observer on a secondary level of observation. From this follows that the contract no longer derives from an empirical action taking place in the environment of the legal system, but that the validity of the contract and its synallagmatic obligations, for instance to deliver and to pay, result from the embeddedness of the contract in the medium of legal communication: the contract is the cause of the contractual obligations. Or, as Gaius in D. 44.7.1 says: obligations are born out of the contract, *obligationes aut ex contractus nascuntur*.

(14) If we now turn back to Max Weber and his distinction between empirical and logical formalism in law, the legal contract is a striking example of the latter. The Roman legal contract is the manifestation of a purely abstract form. The reality of the

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8 D 2.14.7 § 1 „emptio venditio, locatio conducto, societas, commodatum, depositium et ceteri similes contractes".

9 D 2.14.7 (Ulpian) § 7 "Pacta conventa … servabo" (Formlose Verträge werde ich anerkennen). Vgl. auch D. 2.14.1.

contract is not the outcome of an empirical action that is audible, visible or sensible, but rather the result of an observer on a secondary level making an abstract reflection about an empirical legal situation. The will to consensus must not be spoken out, no symbolic action has to take place, and no strict contractual form is needed. But nevertheless, the abstraction is real. The juristic construction of the contract has real legal consequences, for example, withdrawal from the contract is impossible once it has been concluded (signed).

IV. The media of jurisprudence

(1) What I am aiming to do in my project is to work out a more elaborate theoretical language to describe this type of evolutionary jumps and unpredictable ruptures (sprunghafte Umbrüche) in the history of jurisprudence and law. I am searching for theoretical tools to transform Max Weber's concepts of "formal rationalisation" of law into a framework that I label a media theory of jurisprudence. The project I have in mind has two main components:
- First, Weber's concept of "developmental history of law" ("Entwicklungsgeschichte des Rechts") has to be reconstructed within an evolutionary theory of law.
- Second, the dichotomy between empirical and logical formalism has to be reframed in a more adequate media and communication theory.

(2) Both components of my project share one underlying idea: Weber's concept of "formal rationality" and "formal rationalisation of law" is based on the assumption of a genetic relationship between both types of formalism he observed in Rome: logical reasoning in Roman law grew out of empirical formalism and were coupled, bound together; they were different stages of *one* history in the development of Roman law. At least his thesis was that logical formalism could evolve in Rome because a favourable environment existed, the high degree of empirical formalism that Weber supposed could be found in the very disparate structures of Roman religion.

(3) Against this background, I argue that Weber and the 19th-century evolutionists were wrong in assuming such a historical continuity. Actually, logical formalism was an indirect and unplanned result of a general evolution of ideas that started in ancient Greece and that was itself only possible before the background of an evolution of writing technologies in the ancient Near East. Seen from an inner legal perspective, the emergence of Roman civil law since republican times was accidental in many senses, dependent on a series of random historical events. However, the increase of internal complexity of legal communication through the invention of the new civil law (*ius praetorium*) would not have been possible without the emergence of writing technologies in antiquity. Writing was an indispensable prerequisite, a pre-adaptive advance, without which Roman jurisprudence never could have evolved.

1. Evolution

(1) Let me explain this framework by starting with some short remarks on the "evolution" of law. Replacing Weber's "developmental history of law" by an evolutionary framework essentially means giving up the idea of a unity of legal history from Roman times till today. For many reasons, Roman law was not the "origin" and "foundation" of modern law. This is a myth of the 19th century. The idea of one history of jurisprudence has to be suspended and replaced by a more restricted type of question. Which evolutionary jumps were decisive for the development of modern jurisprudence? Can these unpredictable upheavals and ruptures be related to similar jumps or ruptures in the evolution of media and media technologies?

2. Formulaic speech and epistemic knowledge

(1) What consequences does this framework have for the 19th-century dichotomy between empirical and logical formalism in law? My answer to that question has two parts, and for the first part the answer I would like to make plausible is: Empirical formalism in law is a case of "formulaic speech".

The concept of “formulaic speech” is rooted in different theoretical contexts. On the one hand, I refer to knowledge or information as the core element of speech or, perhaps better, “communication”. Communication communicates information (or meaning). The communication of information or knowledge is the essential operation of jurisprudence and law if both are seen realistically, that is as self-reproducing social networks or social systems. On the other hand, I am taking up the notion of the “formula”, which the American classicist Milman Parry invented to describe the recurring of “formulaic epithets” attached to proper names in Homer. Parry concentrated on Homer and the specific acoustic structure of Homeric verse making.

(2) However, his idea of the “formula” may be generalised. It may be specified as a linguistic carrier for common knowledge and brought together with some newer theoretical assumptions about cultural commemoration as Jan Assmann, for example, has proposed. In primary oral cultures, in cultures totally untouched by any knowledge of writing or print (Ong, 11), the accumulation of information, that is knowledge, and its storage for re-use in language is only possible if the language is highly standardized; and standardization in orality can only be achieved through sound, rhythm and acoustics. That is the reason why sound and rhythm play such an eminent role in the reproduction of oral cultures: whenever tradition and social identity are concerned, music and speech are not strictly separated. As Eric Havelock and others have shown, this seems having been the case in archaic Greece: its supreme knowledge was bound in “music” (or verses).

(3) Formulaic communication has its origin and roots in oral cultures. It is practical knowledge, an oral sense of “the right thing to do”: “knowing that”, in the terms of analytical philosophy. In the field of law it is often embedded in sayings or proverbs or implicitly contained in narratives about the heroic past. Homer is rich in examples of the latter. With the appearance of a regular administration of justice, the monopolisation of dispute settlements, formulaic knowledge mainly occurs as a matter of propriety and correct procedure. Speaking and doing are often interwoven in the sense Austin had in mind when he coined the term “performative speech act”. Think of the vine case: The plaintiff lost the action because he recited the wrong formula. Security from arbitrary

demands was provided by a jealous scrutiny of the upholding of a correct wording (D. Daube).

(4) But “wording” and “speech act” are terms that can easily activate a wrong conclusion. Both terms are tightly coupled with oral communication. However, the examples from early Roman law reveal that formulaic knowledge does not disappear when writing is introduced. Only the strategies to secure tradition, to reproduce the “identity” of common knowledge, change.

(5) As long as implicit rules have to be reproduced in a fully oral environment, a clear distinction between the formula and its application is not possible. Every speech act is another realisation of the formula, a re-use in a different context. (The chain of such series of events of re-use is normally called “tradition” or “culture”). While in oral societies the preservation of tradition is bound to charismatic persons, this regularly becomes problematic when societies get in touch with writing technologies. If the written word evolves, the monopoly and authority of the oral tradition and its institutions are challenged: The formulaic knowledge can be stored in a medium now, in a written text, and that means: in an object that is without any life and natural sacredness. That is the reason why writing technologies in traditional societies are so often interwoven with political and religious demands of control.

(6) But this does not mean that after the invention of writing technologies formulaic speech flows into a safe harbour in which its identical reproduction is guaranteed. Only a new distinction comes to the fore: the distinction between the written word and its interpretation. And even more. It is not before the introduction of writing technologies that a distinction between signs and its meaning is thinkable. However, since securing tradition remains the primary task of all traditional societies, the production of textual coherence becomes paramount. And that is the point where rules of hermeneutics come into play. Think again of the vine case. The plaintiff lost the suit because he recited the wrong formula. But how did the magistrate know that the vine owner used the wrong formula? Because the correct rule was written on the twelve tables, as Gaius tells us.

(7) The concept of formulaic speech makes clear that strict formalism in law is not at all a specific Roman technique. It is not for at least two reasons:

First reason: Formulaic structures in law are not a specific Roman technique. The transformation of the implicit knowledge embedded in formulaic speech into conditional proposition or explicit rules can be observed everywhere in the Ancient Near East where writing technologies were introduced. Formulaic knowledge was already transformed in conditional propositions in Mesopotamia, as the so called "Codex Hammurabi" reveals (the conditional "if, supposing that-form" is itself a product of so called "deductive divination" and can also, as Stefan has shown us, be found in the field of medicine and is probably even much older). Formulaic knowledge was also converted in apodictic formulas long before this happened in Rome, as for instance, the rules of the Deuteronomy proof ("you shall not murder"; "you shall not steal" etc.). The early written laws in archaic Greek and Minoan cities are another example for the transformation of implicit knowledge into written conditional propositions long before we find written rules in Rome.

(8) Second reason: With the introduction of phonetic writing in the ancient Near East, the need and necessity to secure textual coherence in different places and societies evolved almost simultaneously. Just think of Deuteronomy 4.2: "You shall not add anything to what I command you or take anything away from it!" And Jan Assmann, to give another example, has shown that, in a Hittite written contract from the 13th century BC, we already find almost the same rule: "To this table I didn't add any word neither did I take one away from it". These examples reveal that formulaic knowledge and its transformation into conditional propositions can not be traced back to specific national Roman religious roots, as M. Weber and with him the entire evolutionary theory of the 19th century believed. The re-use of information – the differance, in Derrida's language – is a universal, not a specifically Roman problem. Formulaic speech and its transformation to conditional propositions are clearly the result of the Oriental-Jewish-Greek-Hellenistic-Roman culture. In my view, these achievements were primarily coupled with the emergence of writing systems in the Ancient Near East.

(9) But nevertheless, Rome made a difference in the evolution of law. And the terms I would like to suggest for describing this difference are "epistemic knowledge" and "second-order observation". With epistemic knowledge I mean propositional knowledge, an autonomous sphere of logical reasoning, *knowing that*, in the language of analytical philosophy. And with "second-order observation", I take up a concept invented by the biophysicist Heinz von Foerster. Second-order observation means: observation of observation. With Roman jurisprudence a new type of observation of law emerged: a communicative network that was driven and shaped by professional and specific juristic knowledge. The knowledge about legal rules and institutions was no longer embedded in "deductive divination", entangled with "religious knowledge" or generated by different types of practitioners of law – administrators, legislators, priests, or other wise men – as was the case, for instance, in early Rome, ancient Greece or Mesopotamia. Rather, statements *about* the law as it was practised now emerged (Berman, 271). This new type of second-order observation generated and later guaranteed criteria for the treatment of law that were defined solely by jurisprudence itself. It engendered a form of higher communicative complexity within the networks of legal communications, a reflexive mode of observations that then, as a consequence, had decisive repercussions on the evolution of Roman law itself.

(10) My ideas about epistemic knowledge and second-order observation do not completely contradict M. Weber's concepts of "formal rationality" and "formal rationalisation of law". However, it seems evident that Weber was only able to construct a genetic relationship between the two types of knowledge, because he used the concept of "formalism" for both. But between early Roman law, between the strict formalistic transactions of *mancipatio* (but also for: *stipulatio*, *iure cessio* and *nexum*) and the epistemic approach of the new civil law of the late republic, the *ius praeterium*, lay a quantum jump. How was this quantum jump possible?

3. Evolution of ideas

(1) The answer to this question is relatively easy to give and not contested among legal scholars and historians: the epistemic knowledge came from Greece. The expansionist impulses of the Roman "war machine" (Aldo Schiavone) starting around the 3rd century

BC led not only to new wealth in the form of land and slaves, but also stimulated trade and cultural exchange. That essentially encouraged the import of Greek writing, philosophy, and culture. Since the 2nd century BC or so, the jurists began to adapt epistemic knowledge for their purposes. Although a precise dating and textual reconstruction of this knowledge-import is impossible, the remarks Cicero made about Roman jurisprudence provide evidence that the Roman jurists had access to the main lines of dialectics. They especially had access to the method of diaeresis (*diairesis*, Diärese) that became crucial for the evolution of Roman jurisprudence.

(2) Diaeresis as a concept is basically explored in the late dialogues of Plato. What Plato does in the late dialogues, very simply and briefly, is demonstrate that epistemic knowledge can be generated only in a methodological framework. The method as such is the novelty: a procedure in which assumptions about the world are justified by an argumentation that is based on understandable, non-contradictory reasoning and not just on a given tradition, as was the formulaic knowledge which represented the so called Greek *padeia* since Homer. And the means Plato used for the generation of such knowledge was the analytical method of producing dichotomies: to draw distinctions and explain something through its opposite; and by that to bring forward classifications of possible fields of epistemic knowledge.

(4) The starting point of this method (diaeresis*, diairesis*) is a phenomenon of reality. You have to know what the object of your research is, for instance, fishing with rods. The next step is to find an abstract genus by intuition. In the case of fishing with rods, the most abstract genus that can be found is skill or craftsmanship (*techné*). The next task then is to generate dichotomies, antithetical but not contradictory oppositions, between the genus abstraction and the given case, beginning with the abstract level and ending with a species that does not allow any further differentiation in relationship to the given case (*átomos eidos*). So the procedure of explaining the notion of fishing with rods is not simply isolation, but describing fishing with rods through oppositions: fishing with rods is not fishing with nets; fishing is not hunting; fishing and hunting as skills are different from deliberation, and so on and so forth. And such a method also has repercussions on the organisation of knowledge itself. If we follow a classification

Egil Wyller has suggested, Plato's late dialogues themselves demonstrate the idea of constructing different academic disciplines: Kratylos is on philosophy of language, Theaitetos on epistemology, Sophistes on ontology, Politikos on politics, Parmenides on henology, etc. (Wyller, 8).

(5) As the DIGEST and other sources reveals, Quintus M. Scaevola is the first jurist to adapt this idea of producing classifications and lucid subdivisions (*ius civile primus constituit generatim in libro decim et octo redingendo*). Mucius, for instance, introduced subdivisions between guardianship (*tutela*), ownership (*possession*) and theft (*furtum usus*); and he started to compose rather abstract legal rules, which he called definitions. From that time, a process was initiated out of which Roman law evolved: an abstract law, governed by logical reasoning, fully disentangled from religious thinking. Just recall the concept of the legal contract. The construction of purely contractual obligations, with binding capabilities for a principally unknown future, is only possible if a clear distinction between contractual obligations and torts is given; and torts, as a matter of civil law, have to be strictly separated from criminal law.

(6) But the Roman jurists at that time had even gone further. They accepted the synallagmatic contract only in specific cases, for example in the law of sale (*emptio venditio;* also *locatio conducto*). Thus, contracts for sale were strictly separated from other types of contracts, for instance, from loans (which were classified as *pacta nuda*). In the case of loans, the consensus was accepted as a means of contract making, but the possibility of a remedy was not given. In other words: the legal contract is a clear result of the evolution of Roman jurisprudence. Therefore it is not pure chance that the abstractness and fully self-referential character of the legal contract cannot be found in Mesopotamia and not even in Greece; and also not in Jewish law, at least not before the "civil law" of the Mishna.[10]

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[10] The Mishna itself is, as David Daube has shown, a product of the same Greek influence that played so decisive a role in Roman legal science.

4. Writing technologies

(1) This leads to my final series of questions. Is there a relationship between the adaptation of epistemic knowledge in Roman jurisprudence, the evolution of ideas in Greek philosophy and the emergence of writing technologies in the Ancient Near East? Can a circular link be made plausible between the evolution of the media, the development of ideas, and the evolution of Jurisprudence in Rome?

Putting the problem this way, the first question that comes to the fore is: What does the expression "writing technology" imply? Is writing one genus or do we have to distinguish between different types of writing and writing technologies? And is there only one species of phonetic writing? Do cuneiform or syllabic writings, consonantal alphabets or west semitic syllabaries, and the "full" Greek alphabet not differ at all? Or do we find differences between them, differences that make a difference?

(2) These are very intricate and highly contested questions in the specialized literature. However, for various reasons which I try to explore more precisely in my book, I have a lot of sympathy for a position mainly introduced by I. Gelb in his book "A Study of Writing", first published in 1952 with the subtitle "The Foundations of Grammatology".

(3) If we follow Gelb, the introduction of the Greek vocalic system can and should not be regarded as a new and original creation. Its Semitic origin is beyond any doubt. Even an uninitiated epigrapher, Gelb stated, cannot fail to observe the identity or great similarity of form in the signs of the Greek alphabet and those of the Semitic writings.

(4) However, for Gelb the Greek alphabet makes a difference. Compared with its forerunners, it represents an evolutionary jump in the history of writing. It is the first writing system that really isolated and by that step generated the consonant as a single sign of language. The word "sign" here is of great importance. Why? Because, the consonants do not exist in oral speech. The consonants by strict definition are themselves 'dumb', 'mute', 'unpronounceable', *aphona*, *aphtonga*, as Plato sometimes said. Or, to put it in another way: They are called "con-sonants', *sum-phona*, because they only sound in company with. The consonant therefore has its identity only as a

visual sign. Or, to slightly modify an observation Gilbert Ryle made in 1960: While phonemes like b and c are not phonetic atoms, characters like b and x are graphic atoms (57). That is, in a nutshell, why Gelb considers the Greek alphabet to be the first true and full alphabet, while all other so-called alphabets for him actually remained cases of syllabic writing.

"If the alphabet is defined as a system of signs expressing single sounds of speech, then the first alphabet which can justifiably be so called is the Greek alphabet." (I. Gelb, A Study of Writing, 1952/1965, p.166)

(5) Because of Gelb's lucid reconstruction of the history of writing, many scholars like, for example, the classicist Eric Havelock, in dozens of publications traced the capacity for abstract analysis back to the emergence of the Greek alphabet. For Havelock, it was exactly this difference between alphabetic writing and its forerunners that could help us to understand the emergence of epistemic knowledge in Greek philosophy and dialectics. And for Havelock the linkage between the Greek alphabet and abstract thinking was exactly that the writing technology confronted its observers to written abstractions and by that to go beyond the empiricism of orality.

"The Greek system got beyond empiricism, by abstracting the nonpronounceable, nonperceptible elements contained in the syllables. We now style these elements'"con-sonants' (*sumphona*, …). Their creation separated out an unpronounceable component of linguistic sound and gave it a visual entity."[11]

(6) As I said, I have a lot of sympathy with this standpoint, but I have not fully made up my mind yet. Nevertheless, for me one thing seems to be clear: Gelb's and Havelock's theory have very strong force, not at least because they have been and still are proven again and again tenable (for instance, in a newer linguistic publication by Ch. Stetter). These publications especially confirm that alphabetic-writing can not fully be understood in a concept of representation: The mere consonant, the phoneme as such, is a discovery of script. It does not represent an entity of oral language.

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[11] E. Havelock, The muse learns to write, 1986, p. 60.

(7) If we thus take this path of reconstruction for granted, then it becomes very clear why in Plato's late dialogues considerations about diaeresis are so often connected with considerations about the division and recombination of letters and syllables, nouns and verbs; and why in Plato considerations about divisions are also connected with that entity Plato calls "something great and fair and complete": the proposition (Cratylus, 425 c). The paradigm for epistemic knowledge is the study of grammar (*téchne grammatiké*), but the study of grammar would have never been likely to emerge without the invention of Greek alphabetic writing. So with the adaptation of epistemic knowledge, Roman jurisprudence, for the first time, made sense of a new type of knowledge in the field of law that was invented in Greece. And with the import of epistemic knowledge Roman jurisprudence adapted a type of knowledge that's emergence was intrinsically tied together with the evolution of a new medium: Greek alphabetic writing.