TAMÁS NÓTÁRI

STUDIES IN ROMAN PUBLIC AND PRIVATE LAW

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Table of contents

REMARKS ON THE ORIGIN OF LEGIS ACTIO SACRAMENTO IN REM 3

NUMEN AD NUMINOUSITY—ON THE ROMAN CONCEPT OF AUTHORITY 19

VERBALITY IN ARCHAIC ROMAN LAW 37

IUS VITAE NECISQUE ET EXPONENDI 49

REMARKS ON MARRIAGE AND DIVORCE IN ROMAN LAW 66

SUMMUM IUS SUMMA INIURIA—ON THE HISTORICAL BACKGROUND OF A LEGAL MAXIM 87

ROMAN ELECTIONS AND QUINTUS TULLIUS CICERO'S *COMMENTARIOLUM PETITIONIS* 101

CRIMEN AMBITUS AND AMBITIO IN THE LATE REPUBLIC 118

Remarks on the Origin of legis actio sacramento in rem

Legis actio sacramento in rem has belonged to the most debated issues of literature on Roman Law up to the present day. The literature on the subject would fill a whole library, only its approximate treatment would require a separate monograph.[1] When explaining the origins of *legis actio sacramento in rem* one can distinguish several, more or less clearly isolated trends. For the purposes of the present study the theory of oath and the theory of personal fight are the most important. The fundamentally sacred character of *legis actio sacramento* is emphasised by the theory of oath which sets forth that the principal aim of communal control could be the *expiatio* of the divinity retaliating the perjury, the *sacramentum* of the defeated party. This theory is also corroborated by the text of *vindicatio* that appears as a strictly formalised, religious-magical *carmen*.[2] Although it is much older,[3] the theory of personal fight is traced back to Jhering, and its essence is that in the beginning the parties actually fought against each other for the thing constituting the object of their controversy, but the community (the state) brought the fight under its own control in order to preserve internal peace. Therefore, the fight, in the form of *legis actio sacramento in rem*, as it is known today was enacted only symbolically, by employing the rod (*festuca*) instead of the spear (*hasta*).[4] The aim of the present study is merely to highlight a possibility – based mainly on the primary sources and partly on the findings of the literature on the subject – which will not consider the motifs of sacredness and private fight contradictory in the structure of *legis actio sacramento in rem* but will mingle them as organically complementing components.

The present study wishes to highlight the following aspects of the description of Gaius.[5] The sacred character of *legis actio* procedure is proved by the almost neurotic adherence to the words to be recited,[6] and the same phenomenon is also exemplified by Pliny's account of the *dedicatio* of Ops Opifera's temple. (I.) Traces of private fight and arbitrary action are shown by the origins of the term *vindicatio* as well as by the rod used in the procedure instead of a spear. All the more so, as Gaius also explains this with the fact that what the Romans considered truly their own was the goods taken from the enemy; i.e., obtained by fight. Besides the connection between *iudicium centumvirale* and the *hasta,* the close relation between the spear and the cult of Mars also deserves special attention, as the *hasta* also carried a very important semantic load. (II.) The structure of *ius fetiale,* which regulated the law of war and of peace in the archaic age, a typical example of the intertwining of peaceful and martial elements, and *rerum repetitio* as well as *clarigatio* show remarkable parallel with *legis sacramento in rem.* (III.) In Plautus's comedy, *Casina,* the right to dispose over the

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[1] Cf. Zlinszky, J.: *Gedanken zur legis actio sacramento in rem*. Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung 106. 1989. 107 ff.

[2] Wieacker, F.: *Ius. Die Entstehung einer archaischen Rechtsordnung.* In: Rechtswissenschaft und Rechtsentwicklung. Göttingen 1980. 33 ff.; Kaser, M.: *Über „relatives Eigentum" im altrömischen Recht.* ZSS 102. 1985. 1 ff.; Horvát, M.: *Deux phases du procès romain.* In: Mél. H. Lévy-Bruhl. Paris 1959. 163 ff.; Kaser, M.: *Das römische Privatrecht, I–II.* München 1971–1975. I. 20. 22.

[3] Staszków, M.: *„Vim dicere" im altrömischen Prozeß.* ZSS 80. 1963. 85 ff.

[4] Jhering, R.: *Der Geist des römischen Rechts*. Leipzig 1880–1891. 114. 150. 163; Lévy-Bruhl, H.: *Le simulacre combat dans le „sacramentum in rem"*. In: Studi in onore di P. Bonfante. Milano 1930. III. 83 ff.; Kaser 1971–1975. I. 20.

[5] Gai. *inst*. 4, 16.

[6] Köves-Zulauf, Th.: *Bevezetés a római vallás és monda történetébe (Introduction to the history of Roman Religion and Myth).* Budapest 1995. 249.

protagonist, a slave girl is decided by actual fight, followed by divine judgement. This procedure also shows remarkable similarities with the *vindicatio* mentioned by Gaius. (IV.)

I. It is sufficiently well known that *legis actio sacramento* is strongly text-centred because – as Gaius himself emphasizes – the one who had mispronounced even one word of the text lost the case.[1] In Roman thinking, the belief in the reality constituting character of the spoken word was of utmost importance.[2] It is also very significant that for the Romans the concept of *Fate, fatum*, which determines human life, originally meant the (divine) word, the declared divine decision, thus fate came into being by expressing the decision of higher powers in words.[3] *"The reason is the firm belief of the Romans in the numinous power of the uttered word, their conviction that being was ultimately identical with uttered being, complete reality was only reality expressed in words."*[4] Let us consider an example from the sphere of religious law (the *dedicatio* was part of *ius publicum.*) for the case when the validity of the sacred-judicial act did not depend only on the precise order of the words to be uttered but also on the exact pronunciation of each sound.
Pliny Maior relates that Ops Opifera's temple was consecrated by the *pontifex maximus*, Metellus, but because of his impediments of speech he had to struggle for several months until he was able to pronounce the words of the *dedicatio*.[5] Succinctly, the historical background of the story is as follows: Sometime between 123 and 104 BC. a new, fourth temple was erected for the goddess Ops Opfiera (it cannot be excluded but it seems scarcely probable that her temple on the Capitolium was renovated); and this had to be consecrated by the *pontifex maximus* L. Caecilius Metellus Delmaticus, about whose career nothing else is known than he occupied the office of *pontifex maximus* in 114 BC.[6] Pliny's text mentions Metellus's articulatory difficulties, which do not seem to bear much relevance from a historical point of view, yet its religious aspect highlights a cardinal point in Roman *religio*; namely, the requirement *"that the words to be spoken should follow a pre-determined, precisely ordered, accurate pattern."*[7] Perfect physical integrity was an essential condition for the fulfilment of clerical office in Roman religion,[8] just as in several other religions as well,[9] which does not seem to be striking as this requirement was observed in the case of sacrificial animals[10] as well as the official participants of the sacrifices.[11] The question may arise how it was possible for Metellus to act as *pontifex maximus*, as he is the only *pontifex* whose

[1] Gai. *inst*. 4, 11. 30.
[2] The importance of the sacral elements is pointed out by Kaser, M.: *Das altrömische ius.* Göttingen 1949. 309 ff.
[3] See Pötscher, W.: *Das römische fatum – Begriff und Verwendung.* In: Hellas und Rom. Hildesheim 1988. 490 ff.
[4] Köves-Zulauf, Th.: *Reden und Schweigen. Römische Religion bei Plinius Maior*. München 1972. 312; Köves-Zulauf 1995. 207.
[5] Plin. *nat*. 11, 174.
[6] About the different presumtions of the year of the dedication see Wissowa, G.: *Religion und Kultus der Römer*. München 1912. 203; Latte, K.: *Römische Religionsgeschichte.* München 1976. 73; Broughton, T. R. S.: *The Magistrates of the Roman Republic.* New York 1951/1952. 1960. 532.
[7] Köves-Zulauf 1995. 71.
[8] Wissowa 1912. 491.
[9] Plat. *leg*. 6, 759c; *Lev*. 21, 17 ff.
[10] Sen. *contr*. 4, 2.
[11] Plin. *nat*. 7, 105.

congenital disability is known.[1] On the one hand, the increasing rationality of the age – as a result of which certain religious prescriptions were not taken so seriously, or were somehow evaded – might have played an important part in L. Caecilius Metellus Delmaticus's becoming *pontifex*;[2] on the other hand, the other important reason might have been the fact that the texts that had to be recited by the Roman priesthood were previously-determined, thus even a *pontifex* afflicted with severe articulatory problems could memorize them through long and troublesome rehearsal.[3] Naturally, this would not have been possible in the case of a religion based on spontaneous religious discourse, free preaching, and prophetic prayer.[4]
It is likely that the text of the *dedicatio* contained the name of the goddess Ops Opifera, which probably constituted double challenge for the *pontifex*'s cumbrous tongue (*inexplanata lingua*): the pronunciation of the alliterating name was most likely not an easy task for a person with speech impediments, who was possibly stuttering as well. In addition, the exact naming of the goddess was particularly important in the course of the *dedicatio*, given the fact that Ops Opifera was one of the deities of sowing.[5] (The importance of the goddess Ops was never questionable for the Romans because – as her name also shows[6] – she was related to richness, more precisely to the richness of the harvest; Ops was the incarnation of the rich yield of land, the helpful feature of Mother Earth.[7] As a matter of fact, according to the minutious, hair splitting character of Roman religion, several different divine aspects of the earth were differentiated: it was generally venerated as Tellus, in its life augmenting aspect as Ceres, and in its harvest yielding effect as Ops.[8] However, Roman religion distinguished even between the various aspects of Ops, as it was usual to connect different, so called *Sondergottheiten* to chronologically consecutive elements of various acts and events.[9] On August 25 they celebrated Ops Consiva the goddess who performed *the gathering of the harvest*, two days earlier, on August 23 they celebrated Ops Opifera,[10] from which it can be clearly inferred that by the name Ops Opifera – its second particle being related to the verb *ferre* – "*the goddess bringing the richness of harvest*" should be understood.[11] The was also celebrated on August 23, and its logical connection with the celebration of Ops Opifera becomes clear if one considers that the grain not yet gathered in the granary is the most exposed to the danger of fire and thus it is the most in need of Ops Opifera's help against Volcanus.[12]) Today it is impossible to clarify it in every detail why the Romans thought the naming of the deities of sowing to be particularly dangerous, but the importance of the goddess Ops becomes evident from the fact that during the research for Rome's secret protective deities – the name was kept secret precisely to prevent the *evocatio* by the enemy – she was also a possible candidate to have fulfilled this function.[13]

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[1] Cf. Köves-Zulauf 1972. 76.
[2] Latte 1976. 276.
[3] Latte 1976. 198. 392; Wissowa 1912. 397; Dumézil, G.: *La religion romaine archaïque.* Paris 1966. 53 ff.
[4] Köves-Zulauf 1972. 77.
[5] Köves-Zulauf 1972. 78.
[6] Cf. Walde, A.–Hofmann, J. B.: *Lateinisches etymologisches Wörterbuch, I–II.* Heidelberg 1954. II. 205 f.
[7] Radke, G.: *Die Götter Altitaliens.* Münster 1965. 238 ff.
[8] Köves-Zulauf 1995. 76.
[9] Latte 1976. 51 ff.; Radke 1965. 239 ff.
[10] Radke 1965. 239.
[11] Köves-Zulauf 1995. 77; Köves-Zulauf 1972. 79.
[12] Latte 1976. 73. 129; Köves-Zulauf 1972. 79.
[13] Macr. *Sat*. 3, 9, 3–4.

What conclusion can be drawn from all these regarding the present inquiry? The words of the *vindicatio* of *legis actio sacramento in rem*, developed for real estates, are referred to as *carmen* by Cicero as well.[1] Inferring from the various meanings of the word *carmen*, the words of *legis actio sacramento in rem* qualified as magical, numinous, legal texts.[2]

II. The *in rem actiones* are called *vindicationes* by Gaius,[3] which harmonizes with the terminology of *legis actio sacramento in rem*, and *in iure cessio*, as well as *adoptio, vindicare in libertatem* and *vindicare hereditatem*.[4] From the etymological attempts at defining the origin of the expressions *"vindex"*, *"vindicatio"*, *"vindicta"* the one proposed by Varro,[5] emphasizing the characteristic of force, *"vim dicere"* and relating the verb *"dicere"* to the core **deik* (see also *deiknyō, deiknymi*) seems the most plausible, even if this cannot be undoubtedly demonstrated with modern linguistic evidence.[6] The word *dikē* is traditionally derived from the root **deik* of the verb *deiknymi* (to show, to point at, to explain, to testify); its basic meaning of *direction, way, custom* is supplemented with the meanings *customary procedure, decision, resolution, trial*, and *law*.[7] (These two meanings, traditionally derived from each other are approached from a new aspect by Palmer who asserts that the meaning of *signalling, custom, characteristic, particularity* and the meaning *decision, resolution*, of the word *dikē*, originally the *borderline* drawn between two litigant parties derived from the root **deik*, developed in parallel, independently from each other, and so neither of them can be considered secondary, derived from the other.[8]) When trying to understand the structure of *vindicatio*, Varro's traditionally Roman etymology is of utmost importance, because it demonstrates the most clearly how the Romans themselves experienced and how they subsequently interpreted the most basic one of all the procedures termed as *vindicatio*, i.e., *legis sacramento in rem*.[9]

It can be rightly assumed that in the beginning – and probably later on as well – the spear as weapon was nothing else than a long, sharp rod made of hard wood, and hardened in fire.[10] If the *hasta* was the weapon with which in the course of the fights they could win loot,

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[1] Cic. *Mur*. 26. Cf. Nótári, T.: *Jog, vallás és retorika (Law, Religon and Rhetoric).* Szeged 2006. 52 ff.

[2] Szádeczky-Kardoss S.–Tegyey I.: *Szöveggyűjtemény a régi római irodalomból (Textbook of the Ancient Roman Literature).* Debrecen 1998. 19 ff. (Quoted e.g. Ov. *trist*. 4, 1, 1–14; Tib. 2, 6, 12–26; Porphyr. *ad Hor. epist*. 1, 1, 62; Hor. *ars* 417; Plaut. *Trin*. 349–352; Hor. *epist*. 2, 1, 134–155; Macr. *Sat*. 5, 20, 17–18; Gell. 4, 9, 1–2; Varro *ling*. 6, 21; Plin. *nat*. 27, 12, 131; Quint. *inst*. 1, 6, 40; Varro *ling*. 7, 27; Fest. 325; Cic. *div*. 1, 1, 114–115; Fest. 325; Cic. *div*. 1, 1, 114–115; Paul. Fest. 160; Cic. *Brut*. 19, 75; Liv. 1, 32, 5–14; 10, 38, 2–13.)

[3] Gai. *inst*. 4, 5.

[4] Gai. *inst*. 4, 16–17; 2, 24; 1, 134; Paul. D. 10, 4, 12 pr.; Gai. *inst*. 2, 120. Cf. Düll, R.: *Vom vindex zum iudex.* ZSS 54. 1934. 105.

[5] Varro *ling*. 6, 60.

[6] Cf. Walde–Hofmann 1954. II. 793 f.

[7] Gonda, J.: *ΔEIKNYMI: Semantische Studie over den Indo-Germanische Wortel DEIK*. Paris 1929. 224–232; Benveniste, E.: *Le vocabulaire des institutions indo-européennes*. Paris 1969. II. 107–110; Gagarin, M.: *„Dikē" in the „Works and Days"*. Classical Philology 68. 1973. 82.

[8] Palmer, L. R.: *The Indo-European Origins of Greek Justice.* Oxford 1950. 157 ff.

[9] Nótári, T.: *Festuca autem utebantur quasi hastae loco.* Acta Facultatis Politico-Iuridicae Universitatis Scientiarum Budapestinensis de Rolando Eötvös nominatae 51. 2004. 133 ff.

[10] Cic. *Verr*. 4, 125; Plin. *nat*. 16, 65; Tac. *ann*. 2, 14; Prop. 4, 1, 28; Amm. 31, 7, 12.

recognition, and hence power, it is no wonder that shortly it became the symbol of power.[1] This is also shown by Verrius Festus's definition: *"hasta summa armorum et imperii est"*,[2] and the reference to *imperium*, especially in connection with the spear, reminds one of its magico-religious character, belonging to the sacred sphere.[3] It is not by chance that the expression *subhastatio* means – and this is also mentioned by Gaius[4] – the selling of loot, especially the selling of captives,[5] obtained from the enemy through armed fight, and later meant any kind of auction in general.[6] When presenting the institution of *decemvri stlitibus iudicandis*, Pomponius uses the term *hastae praeesse*[7] which could not mean anything else but the leading of *iudicium centumvirale*. However, *iudicium centumvirale* came into being only one hundred years after the date assumed by Pomponius (242–227 BC.),[8] thus the historical credibility of Pomponius's report becomes doubtful, it can be safely stated that only a *magistratus cum imperio* was entitled to decide the question of *legitimum dominium*.[9] The insignia of *iudicium centumvirale*,[10] founded in the 2nd century BC. was the so-called *hasta centumviralis*. By the end of the republic the presidency of this court of law was fulfilled by a *proquestor*, due to the engagement of the *praetores*.[11] Augustus appointed again a *praetor* as supervisor at the head of the *iudicium centumvirale*.[12] Novellius Torquatus Atticus was the first *praetor hastarius* or *praetor ad hastam* known by name. With this disposition, Augustus probably did not introduce a new rule but revived an older one.[13] If the court was sitting in different parts, the man, chosen by the *praetor hastarius* from among the *decemvirii* to preside the court *ad hoc*, was using his own spear in the *iudicium*,[14] which fact is corroborated by Quintilian's report of *duae hastae* in the case when the *iudicium centumvirale* was functioning divided into two parts.[15] The *iudicium centumvirale*, judging cases of inheritance under the supervision of the *praetor hastarius* was usually sitting in four sections in the *basilica Iulia*.[16]

In Servius's commentary of Vergil's *Aeneid* the description of the following ceremony can be found: *"Is qui belli susceperat curam, sacrarium Martis ingressus primo ancilia commovebat, post hastam simulacri ipsius, dicens: 'Mars vigila!'"*[17] The picture of the deity

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[1] Waele, F. J. M. de: *The Magic Staff or Rod in Graeco-Italian Antiquity.* Gent 1927. 172.
[2] Fest. 55, 3.
[3] See Pötscher, W.: *'Numen' und 'numen Augusti'*. In: Hellas und Rom. Hildesheim 1988. 462; Wagenvoort, H.: *Wesenszüge altrömischer Religion.* In: Aufstieg und Niedergang der römischen Welt, I/2. Berlin–New York 1972. 371 f.
[4] Gai. *inst*. 4, 16. *quod maxime sua esse credebant quae ex hostibus cepissent*
[5] Fest. 55, 9; 90, 19.
[6] C. 10, 3, 1. 2. 5. 6; Liv. 2, 14, 1–4; Dion. Hal. 5, 34, 4; Val. Max. 3, 2, 2; Cic. *off*. 2, 27. 83; *Phil*. 2, 64. 103; Varro *rust*. 2, 10, 4; Sen. *suas*. 6, 3. Vö. Alföldi, A.: *Hasta – Summa Imperii. The Spear as Embodiment of Sovereignty in Rome.* American Journal of Acheology 63. 1959. 3. 8; Waele 1927. 172.
[7] Pomp. D. 1, 2, 2, 29.
[8] Mommsen, Th.: *Römisches Staatsrecht, I–III.* Berlin 1887–1888. I. 275.
[9] Alföldi 1959. 9.
[10] Cf. Mommsen 1887–1888. II. 225.
[11] Suet. *Aug*. 36, 1; Stat. 4, 4, 41.
[12] Mommsen 1887–1888. II. 225; Alföldi 1959. 9.
[13] CIL 6, 1365, 13; 8, 22721, 5; ILS 950; Mon. Ancyr. 8, 5.
[14] Alföldi 1959. 10.
[15] Quint. *inst*. 5, 2, 1; 11, 1, 78.
[16] Plin. *epist*. 5, 9, 1–2. 5; 6, 33, 2–5; Quint. *inst*. 12, 5, 6.
[17] Serv. *in Verg. Aen.* 8, 3.

could not be too old, because the Romans did not represent the image of their gods in the beginning,[1] and Servius's explanation goes back to Varro, just as Plutarch's similar remark.[2] Seemingly, Varro gets into contradiction with the tradition, which has knowledge of several spears in Mars's *sacrarium*. These must have been the spears of the *salii*, which were kept in the *sacrarium Martis*, together with the shields.[3] The plural of shields is not surprising because – as it becomes evident from the aitologian myth explaining the institution of the *salii* – Numa Pompilius ordered the manufacturing of another eleven copies of the *ancile* descending from the sky, in order to prevent the stealing of the original one. During their processions the *salii* were carrying the *ancile* in their left and were beating it with a spear-like rod.[4] The form of these spears was not identical with the form of those that were generally known and actually used for fighting in the Classical Age but they preserved – just like the shields of the *salii* – their archaic shape: They were so-called *hasta pura*, made exclusively of wood without any iron, and their *prodigium* was shown by their movement without any human agency in the *sacrarium*.[5]

Nevertheless, the spears of the *salii* must be distinguished from Mars's spear, which was – as they were venerating Mars's presence in it[6] – surrounded by a cult that was due to a deity,[7] as the veneration of gods (e.g. Iuppiter, Lapis, Terminus) in some material form was usual for the Romans, which can be explained by the concept of the *Person-Bereicheinheit*.[8] (The *Person-Bereichdenken* was a special way of experiencing the world for the man of antiquity, in the course of which he experienced physical reality, objects, processes, or states as such, and, at the same time, he experienced them as divinity as well. The thing and the divinity is often designated with the same word, and sometimes it is considerably difficult to decide, whether in a particular case *themis* or *Themis*, *fortuna* or *Fortuna*, *terminus* or *Terminus* should be written. Naturally, either solution is chosen, the other component is tacitly part of the concept and should be taken into account as well.[9] Designation with the same word seems to suggest juxtaposition but in fact it means the unity of the person and his/her function, the sphere of authority represented by him/her, in which alternatively one or the other aspect comes to the fore.[10]) Iustinius in his *Epitoma Historiarum Pompei Trogi* mentions that, in the beginning, the spear was surrounded by a divine cult.[11] Servius, based on Varro, reports that the beginning of war, after the moving of the *ancilia*, the celebrating priest also moved the *hasta*, as the image of the deity (*simulacrum ipsius*) and in the course of this he awoke Mars with the appeal *"Mars vigila!"* and by this, if we conceive Mars as a *Person-Bereicheinheit*,

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[1] August. *civ*. 4, 31; Plut. *Numa* 8; Latte 1976. 150; Herter, H.: *Zum bildlosen Kultus der Alten.* Rheinisches Museum 74. 1925. 164 ff.

[2] Norden, E.: *Aus altrömischen Priesterbüchern.* Leipzig 1939. 173 ff.; Plut. *Rom*. 29, 1.

[3] Gell. 4, 6, 1–2; Wissowa 1912. 556.

[4] Plut. *Numa* 13, 7; Dion. Hal. 2, 70.

[5] Serv. *in Verg. Aen*. 6, 760; Liv. 40, 19, 2; *Obseq*. 6. (60); 19. (78); 36. (96); 44. (104); 50. (110)

[6] Dumézil, G.: *L'héritage indo-européen à Rome.* Paris 1949. 60.

[7] Arnob. 6, 11. (coluisse) *pro Marte Romanos hastam, Varronis ut indicant Musae*

[8] Wissowa 1912. 144; Latte 1976. 114 ff.; Scholz, U. W.: *Studien zum altitalischen und altrömischen Marskult und Marsmythos.* Heidelberg 1970. 29; Pötscher 457 f.

[9] Cf. Pötscher, W.: *Ares*. Gymnasium 66. 1959. 4 ff.

[10] Pöscher, W.: *Das Person-Bereichdenken in der frühgriechischen Periode.* Wiener Studien 72. 1959. 24.

[11] Iustin. 43, 3, 3. *Nam ab origine rerum pro diis immortalibus veteres hastas coluere.*

he awoke War itself.[1] There is no need of any further explication to see the manaistic, numinous aspect recognized by Wagenvoort in this religious act.[2] The derivation of Quirinus's name, meaning *"spear"* from the word of Sabin origin *quiris-curis* can be found in the works of several authors,[3] and Iuno's name, Quiritis is also explained this way.[4] It is not by chance that Thormann appositely translates the name *Quirites* of the Roman citizens with the expression *Speermänner*.[5]
Hence it becomes clear that Roman thinking connected somehow the concept of the force inherent in the spear, the *numen* both with Mars and with Quirinus, but the exact definition of this connection is encumbered by the fact that the existing sources expound on this numinous force only in the case of *hasta Martis*.[6] The question arises why they were using a rod, the *festuca* instead of the spear meaning *iustum dominium*, in the course of the symbolic fight of *legis actio sacramento in rem*. According to Herman van den Brink the *festuca* and the *hasta* are parts of two completely different symbolic systems.[7] He considers the spear to be an Indo-European symbol of power,[8] whereas he regards the rod as part of the Mediterranean culture.[9] At the same time, he disregards the point that at the time when these symbols were formed, the differences between the spear and the rod most probably had not occurred yet, as both were made of wood; the only minor differences could be the size or that the rod used as a weapon was hardened in fire.[10] The fact that in the ceremony of the *vindicatio* the *festuca* stood for; i.e., represented the *hasta* can be explained by the disposition which from the beginning attempted to restrict the use of the spear within the *pomerium* and to confine it to the sphere of the most necessary rites.[11]

III. Comparing *ius fetiale* and *ius privatum* several valuable parallels can be drawn with regard to the structure of *clarigatio, rerum repetitio*, and *legis actio sacramento*.[12] The norms with a powerfully religious character of *ius fetiale* show close connection with several other Roman legal institutions; all the more so because for the man of the age it is difficult to imagine a bond with more binding power than the oath, including self malediction as well.[13] (According to Dahlheim, due to its strong superstitious-religious determination *ius fetiale*

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[1] Serv. *in Verg. Aen.* 8, 3. *Est autem sacrorum: nam is qui belli susceperat curam, sacrarium Martis ingressus primo ancilia commovebat, post hastam simulacri ipsius, dicens „Mars vigila"*.
[2] Wagenvoort 1972. 352 ff.
[3] Ov. *fast*. 2, 475 ff.; Marc. *Sat*. 1, 9, 16; Dion. Hal. 2, 48, 2–4; Plut. *Rom*. 29, 1.
[4] Fest. 43, 5. *Curitim Iunonem appellabant, quia eandem ferre hastam putabant*.; 55, 6. *Iunonis Curitis ... quae ita appellabatur a ferenda hasta, quae lingua Sabinorum curis dicitur.*
[5] Thormann, K. F.: *Der doppelte Ursprung der mancipatio, ein Beitrag zur Erforschung des frührömischen Rechtes unter Mitberücksichtigung des Nexum.* München 1943. 32. 80 ff.
[6] Alföldi 1959. 19.
[7] Brink, H. v. d.: *Staff laying.* In: *The Charm of Legal History.* Amsterdam 1974. 68.
[8] Cf. Neufeld, E.: *The Hittite Laws*. London 1951.
[9] Brink 1974. 70 ff.; 77.
[10] Waele 1927. 172.
[11] Alföldi 1959. 4.
[12] Donatuti, G.: *La „clarigatio" o „rerum repetitio" e l'instituto paralello dell' antica procedura civile romana*. Iura 6. 1955. 31 ff.; Volterra, E.: *L'instituto della „clarigatio" e l'antica procedura delle „legis actiones"*. In: *Scritti Carnelutti.* Padova 1950. 251 ff.
[13] Ziegler, K.–H.: *Das Völkerrecht der römischen Republik.* In: Aufstieg und Niedergang der römischen Welt, I/2. Berlin–New York 1972. 78; Pólay, E.: *Differenzierung der Gesellschaftsnormen im antiken Rom*. Budapest 1964. 100 ff.

lacks any kind of moral background.[1] However, his view can be contested because legal formalism and legal ethics are not mutually exclusive components.[2]) In the archaic age, the interstate relationships of Rome were governed by a body of twenty priests, called the *fetiales*.[3] Their tasks included the contracting of alliances, the *foedus*, the establishment of the conditions of armistices, and the declaration of war, given the fact that the war could only qualify as *bellum pium ac iustum* if it was declared and started in accordance with the rules of *ius fetiale*.[4] (It is interesting that for the Romans the basic principle of the invulnerability of the envoys was indisputable. Whereas in the case of the Greeks the division of the institution of the *kēryx*, enjoying sacred protection and the *presbeis*, invulnerable as a result of a political agreement took place very early, in Rome the *fetialis* and later the other envoys – even if they did not belong to the *fetiales*[5] – enjoyed sacred protection, even in time of war.[6])
The *foedus* – etymologically related to the expression *fides*[7] –, the Roman state contract implemented by observing the required formalities,[8] as opposed to the *hospitium*,[9] the *amicitia*,[10] the *societas*[11] and the *pax*, does not signify the content of the contract but its form, and its most important element is the ceremonial oath made by the representative of the *populus Romanus*.[12] The ceremony of the *foedus* is presented by Livy. According to him the priest (*pater patratus*), chosen from among the *fetiales*, consecrated by reciting the texts selected for the occasion and being touched with a bunch of sacred grass (*sagmina*), takes the oath after reading out the text of the contract.[13] In the oath he calls Iuppiter, the *pater patratus* of the people making contract with him, and the people themselves to witness that the contract that has been read does not contain any falsity, and that the Roman people will not deviate from the former, and if they did – and here follows the self malediction – then he asks Iuppiter to come down on the Roman people the way he is just knocking down the sacrificial pig. Moreover, he should strike even more severely, as he is more powerful than the priest. Then he stabbed the sacrificial animal.[14] Festus recounts a somewhat different formula, according

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[1] Dahlheim, W.: *Struktur und Entwicklung des römischen Völkerrechts im dritten und zweiten Jahrhundert v. Chr.* München 1968. 173.
[2] Ziegler 1972. 79.
[3] Mommsen 1887–1888. II. 675; Samter: *Fetiales*. In: RE VII. 2. 2260 ff.; Wissowa 1912. 551; Latte 1976. 121 ff.
[4] Cic. *leg*. 2, 21; Dion. Hal. 2, 72, 4; Cic. *off*. 1, 36; *rep.* 2, 31; 3, 35; Varro *ling*. 5, 86. Ziegler 1972. 100 ff.
[5] Cf. Marci. D. 1, 8, 8, 1. *Sanctum autem dictum est a sagminibus: sunt autem sagmina quaedam herba, quas legati populi Romani ferre solent, ne quis eos violaret, sicut legati Graecorum ferunt ea quae vocantur kerykia.*
[6] Liv. 38, 42, 7; Pomp. D. 50, 7, 18.
[7] Walde–Hofmann 1954. I. 494; Latte 1976. 126 ff.
[8] Mommsen 1887–1888. I. 246 ff.; Neumann, K.: *Foedus*. RE VI. 2. 2818 ff.; Heuss, A.: *Abschluß und Beurkundung des griechischen und römischen Staatsvertrages*. Klio 27. 1934. 166. skk.; Frezza, P.: *Le forme federative e la struttura dei rapporti internazionali nell'antico diritto romano.* Studia et documenta historiae et iuris 4. 1938. 363 ff.
[9] About the *hospitium* see Leonhard, P. Hospitium. *RE* VIII. 2. 2493 ff.; Frezza 397 ff.
[10] About the *amicita* see Heuss, A. *Die völkerrechtlichen Grundlagen der römischen Außenpolitik in republikanischer Zeit.* Klio Beiheft 31. Leipzig, 1933. 12 ff.
[11] See Dahlheim 1968. 163 ff.; Kienast, D.: *Entstehung und Aufbau des römischen Reiches.* ZSS 85. 1968. 334 ff.
[12] Ziegler 1972. 90.
[13] Liv. 1, 24, 4–7.
[14] Liv. 1, 24, 7–9.

which the *pater patratus*, after knocking down the pig with a stone, asks Iuppiter to throw him out of his wealth as he is throwing away the stone if he proceeded falsely, but he entreats the god to spare his city.[1] Polybios calls Rome's first contract with Carthago an agreement *per Iovem lapidem*,[2] Cicero ranks the *per Iovem lapidem* oath formula among *ius civile*.[3]

When discussing *ius fetiale* it should be pointed out that the Romans were the first to interpret war as a legal fact and they created the concept of *bellum iustum*, influential up to the present day.[4] Not all armed conflicts counted as war, *bellum* could only take place between peoples (*populi*), only the enemy possessing an organized state counted as *hostis*. In accordance with this, Cicero can state that only the oath given to the enemy obliges, the one given to robbers does not.[5] We can depart from Livy's description in the case of the declaration of war as well. On the border of that people's land from which he demands satisfaction (*rerum repetitio*, or *clarigatio*[6]) the *pater patratus* declares that he presents his demands as an envoy of the Roman people, observing the divine law, and he calls Iuppiter, the borders (*fines*) and the divine law (*fas*) to witness that if he demanded the delivery of the mentioned people or things unrightfully, then Iuppiter should not allow him to return to his country. He recites this at the crossing of the border, and with slight alterations to the first person he encounters, and again, when he enters the town, and finally on the main square.[7] If they do not deliver the things asked by him within thirty-three days – Dionysius Halicarnassensis mentions an interval of thirty days[8] –, after calling Iuppiter, Ianus Quirinius, and all the gods witness, he declares that he did not receive what he demanded, and that on returning to Rome, he wishes to deliberate about how they could take revenge. This means that he declares the possibility of war (*testatio*, or *denuntiatio belli*).[9] Arriving in Rome, the envoy presented the case to the Fathers and if the majority decided for *purum piumque duellum*, the *pater patratus* took an iron tipped or fire-hardened spear (*hastam ferratam aut praeustam sanguineam*) to the enemy's border, and there, making reference to the unrightfulness of the refusal of his demand, he declared war and threw the spear onto the enemy's territory.[10] (Thus the direct *causa* of the war was enemy people's unlawful behaviour, the fact that they did not deliver the things or people demanded by the Romans.[11])

As a matter of fact, there was no need of such declaration of war if the enemy invaded Roman territory. In this case they could immediately and unconditionally begin the counter attack, so the declaration of war implemented by the *fetiales* had any significance only in the case of offensive warfare, initiated by the Romans. The archaic age certainly knew the institution of

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[1] Fest. 239.
[2] Polyb. 3, 25, 6 ff.
[3] Cic. *fam*. 7, 12, 2. Cf. Latte 1976. 122 f.
[4] Cf. Cic. *leg*. 3, 9; Liv. 1, 32, 12; Lammert, F.: *Kriegsrecht*. RE Suppl. VI. 1351 ff.; Ziegler 1972. 101.
[5] Cic. *Phil*. 4, 14; *off*. 3, 107 f.; Ulp. D. 49, 15, 24.
[6] Plin. *nat*. 22, 3, 5; Serv. *in Verg. Aen.* 9, 52; 10, 14; Quint. *inst*. 7, 3, 13.
[7] Liv. 1, 32, 6–8.
[8] Dion. Hal. 2, 72, 8.
[9] Liv. 1, 32, 9–10; Cf. Ogilvie, R. M.: *A Commentary on Livy*. Oxford 1965. 131; Bernhöft, F.: *Staat und Recht in der römischen Königszeit im Verhältnis zu verwandten Rechten.* Amsterdam 1968. 221 f.; Kaser 1949. 22; Haffter, H.: *Geistige Grundlagen römischer Kriegführung und Außenpolitik.* In: Römische Politik und Römische Politiker. Heidelberg 1967. 23.
[10] Liv. 1, 32, 11–14.
[11] Albert, S.: *De vetere iure Romano, de lege duodecim tabularum atque de iure fetiali.*Vox Latina 34. 1998. 218.

personal revenge, but the official declaration of war was only employed if the war was waged by the entire community, the *populus*, against another people, which was clearly distinguished from armed conflict between different groups of the aristocracy.[1] In the course of its expansion Rome did not always have the opportunity to keep this ritual; therefore, the characteristically Roman formal conservatism chose the following fiction: The *pater patratus* threw the spear onto a plot of land declared enemy territory near Bellona's temple and the entire ceremony was performed with respect to that plot of land, but the demands towards the enemy were presented by the *legati* of the *senatus*, and they were the ones to declare war.[2] (Sometimes they sent the spear to the people on whom they wanted to declare war.[3]) However, the *fetiales*'s ritual of the declaration of war considerably contributed to the observation of the requirement that the war had to possess some kind of *iusta causa*, and it is not by chance that Cicero, formulating the theory of just war under the influence of Stoic philosophy, connects *aequitas belli* with *ius fetiale*.[4]

The *hasta ferrata aut praeusta sanguinea*, meaning iron tipped or fire hardened spear, mentioned by Livy,[5] also deserves attention. At the same time, it is not known when the iron-tipped spear was substituted for, or when it accompanied the wooden spear hardened in fire, as the Iron Age goes back to the turn of the 8th and 9th century BC. in Italy. It can be assumed though, that in ritual usage the iron-tipped spear could only take the place of the wooden one when it came to be exclusively used in everyday life.[6] The expression *sanguinea* is particularly problematic: The word itself can be translated as *consecrated in blood* or *coloured with blood*. However, if it is taken for the denomination of the wooden material, it can mean the branch of the cornel tree, the *sanguineae virgae*, which, being hard wood, constituted a perfectly suitable raw material for the spear.[7] Ammianus Marcellinus mentions in connection with the *fetiales*'s spear that besmearing it with blood played an important role in the course of its manufacturing.[8] The spear made of cornel wood counted as *arbor felix*,[9] but the spear used for the declaration of war was *hasta impura*; i.e., *arbor infelix*, dedicated to the forces of the underworld.[10] Thus, whether the *fetiales*'s spear was coloured with real or made of blood coloured cornel wood, the original *hasta praeusta sanguinea* was later changed for *hasta ferrata sanguine infecta*.[11] The *fetialis* ritually predicts the outcome of war at its very beginning because by symbolically taking the enemy territory into possession with the *hasta impura*, dedicated to the gods of the underworld, he delivers the enemy, the *hostis impius*, bereft of the reason for its existence, to the forces of destruction.[12] (In the light of this,

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[1] Ziegler 1972. 103.

[2] Francusci, P. de: *Appunti e considerazioni intorno alla „columna bellica"*. Atti della Pontificia academia romana di archeologia. Ser. III. Rendiconti 27. 1951–1954. 1899 ff.; Dahlheim 1968. 175 ff.

[3] Cf. Fest. 90.

[4] Cic. *off*. 1, 36; Hausmaninger, H.: *„Bellum iustum" und „iusta causa belli" im älteren römischen Recht*. Österreichische Zeitschrift für öffentliches Recht N. F. 11. 1961. 341 ff.

[5] Liv. 1, 32, 12.

[6] Waele 1927. 173 f.

[7] Macr. *Sat*. 3, 20, 3; Plin. *nat*. 16, 176; 19, 180; 24, 73. Cf. Waele 1927. 174.

[8] Amm. 19, 2, 6.

[9] Macr. *Sat*. 3, 20, 2.

[10] Scholz 1970. 32.

[11] Scholz 1970. 32.

[12] Latte 1976. 122; Scholz 1970. 32.

the role of *evocatio*, performed by the Romans before the attack, by which they intended to lure to Rome the gods of the enemy doomed to destruction becomes perfectly clear.[1])
The strongly text-centered nature of *ius fetiale* and *legis actio sacramento* is sufficiently well-known; we know that whoever missed even one word of the text, lost the case.[2] Although in the case of *ius fetiale* we have no *expressis verbis* knowledge of such consequences, it can be rightly assumed that the Romans did not tolerate even the slightest deviation from the text because this would have destroyed the effect of *carmen*, hence it would have endangered the result of the *bellum iustum*, fought with divine help.[3] The oath is an indispensable part of *ius fetiale*. On the one hand, the self malediction of the *pater patratus* on the occasion that he presented unrightful demands in the name of the Roman people; on the other hand, the calling of the gods to witness the lawful procedure of the Romans and the unlawful procedure of the enemy. In the case of *legis actio*, a *sacramentum* corresponds to this oath.[4] The oath-like character of *sacramentum* is clearly shown by the original meaning of the word itself.[5] At the same time, it also incorporates the circumstance that the statement of the party taking the oath – e.g. the plaintiff – is true, and accordingly, the statement of his opponent is false. However, if in the end it were proved that the claim of the plaintiff does not stand, then it becomes evident that he committed perjury; i.e., he performed his own *devotio*.[6] (Kaser also suspects that in the beginning the *sacramentum* was related to the divine judgement, but in his view this cannot be sufficiently documented for the period from which written sources exist.[7] It is still a fact that the character of divine judgement can be traced – by analogy – also in this part of *legis actio sacramento*. References to the role played by the oath in the trial can be found not only in literary sources, but in traces, in later legal documents as well.[8]) It seems a further parallel that both *rerum repetitio* and *legis actio sacramento* are originally aimed at regaining the things unlawfully possessed by the opposing party in a peaceful manner, placing arbitrariness and fight under the control of the state, thus limiting their scope and intensity.[9]
At the same time, it is a clear difference that whereas in the case of *legis actio sacramento* the parties accept the control and decision of a judge recognized by both of them, in the case of *ius fetiale*, this institution is absent. This is demonstrated by the fact that in the so-called international affairs they could not agree on the competence of legal court – this might be the cause of the absence of the *apud iudicem* stage of *ius fetiale* procedure – it can be rightly assumed though that the Romans found the umpire entitled to decide in the conflict of two nations exactly in the higher powers, who were so often called to witness.[10]
Ius fetiale is a clearly religious system of norms and procedures, as this is shown by references made constantly to the persons and gods acting in it. Nevertheless, *legis actio sacramento*, considered to be an institution of *ius privatum* shows close connection with *ius sacrum*: In the beginning *legis actio* was performed in front of the *rex*, who was present, both in his person and his legitimacy, as a representative of the sphere of the sacred. Then the *in iure* stage of the trial took place in front of the *magistratus*; then, *in concreto*, it took place in front of the *praetor*, who was in terms of his jurisdictional responsibilities an inheritor of the

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[1] Latte 1976. 125. About this ritual act see Basanoff, V.: *Evocatio.* Paris 1947.
[2] Gai. *inst*. 4, 11. 30.
[3] Albert 1998. 220.
[4] Kaser 1949. 21.
[5] Walde–Hofmann 1954. II. 459 ff.; Kaser 1949. 18.
[6] Albert 1998. 220.
[7] Kaser, M.: *Das römische Zivilprozeßrecht.* München 1966. 62.
[8] Verg. *Aen*. 8, 262 ff.; Ulp. D. 4, 3, 21.; Ulp. D. 47, 52, 27.
[9] Kaser 1949. 22.
[10] Albert 1998. 222.

rex.[1] The oath, strictly observing the words of the text, was also addressed to the gods, which substantiates the assumption that *legis actio* was closely related to *ius sacrum*.[2] (Certain parallels can be detected between *ius fetiale* and the *leges XII tabularum*;[3] for example the debtor had thirty days to satisfy the demand of the creditor if he admitted his indebtedness, or if the case was settled by legal decision. Similarly, the *pater patratus* had to wait with the *denuntiatio belli* for thirty days after he had announced his demands, according to Dionyssius Halicarnassesensis.[4] The reason of both decrees was to help to find a peaceful solution of the conflict within this interval. In line with the relevant loci of the *leges XII tabularum* order on giving the person who causes damage into *noxa*,[5] *ius fetiale* stipulates the extradition of the person who commits a deed injurious to Rome.[6]) The same intention, meant to restrict the uncontrollable arbitrary enforcement of private demands between the citizens of a state, or between different nations and states, trying to prevent the state of *bellum omnium contra omnes* by placing the act of solving the conflict under some kind of commonly accepted higher instance, might have stood at the origins of both *ius fetiale* and *legis actio sacramento*.[7]

IV. It is sufficiently well known that in Homer's *Iliad* Zeus decides certain armed conflicts with the help of his scales[8] through the so-called *psykhostasia*, and *kerostasia*[9] – this scene can be found with minor modifications in Virgil as well[10] – and it is also known that in certain cases the combatants decide by lot who should start the fight, thus asking for the help of the gods.[11] Naturally, the drawing of lots by *oraculum* was known by the Romans as well.[12] Most often they practiced the version in which the wooden tickets of the persons taking part in the draw were placed in an urn, the *sitella* filled with water. It was bellied but had a narrow neck, and after reciting certain magic words and shaking the urn, they drew conclusions regarding the divine will from the *sortes* sinking or floating on the surface, of which only one could remain above due to the narrow neck of the urn.[13] A similar procedure can be found in Plautus's comedy, entitled *Casina*, which is all the more significant as Plautus, though often used Greek plots, had to adapt the scenes of his comedies to Roman thinking and everyday life, otherwise he could not have expected them to be successful. In *Casina* not merely a common *oraculum* is presented but the decision of a legal conflict by single combat – leading to the employment of actual violence – with the help of *oraculum*. This procedure shows a

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[1] Meyer, E.: *Römischer Staat und Staatsgedanke.* Zürich–Stuttgart 1964. 38. 117; Bleicken, J.: *Die Verfassung der römischen Republik.* Paderborn 1975. 76 f.
[2] Cf. Noailles, P.: *Du Droit sacré au Droit civil.* Paris 1949. 18 ff.
[3] Donatuti 1955. 31 ff.; Hausmaninger 1961. 338; Bernhöft 1968. 221 ff.; Albert 1998. 224.
[4] *XII tab.* 3, 1; Dion. Hal. 2, 72, 8.
[5] *XII tab.* 8, 6. (Ulp. D. 9, 1, 1 pr.); 12, 2b (Gai. *inst*. 4, 75–76.)
[6] Kaser 1949. 185. Cf. Liv. 8, 39, 14; 9, 8, 6; 9, 10, 2 ff.; Cic. *Caecin*. 98; *De orat*. 1, 181; 2, 137; *off*. 3, 108.
[7] Kaser 1966. 19; Kaser 1949. 15.
[8] *Il*. 8, 69 ff.; 16, 657 ff.; 19, 223 ff.; 22, 209–213.
[9] See Wüst, E.: *Die Seelenwägung in Ägypten und Griechenland.* Archiv für Religionswissenschaft 36. 1939. 166 ff.; Dietrich, B. C.: *The Judgement of Zeus.* Rheinisches Museum 1964. 103 ff.; Pötscher, W.: *Schicksalswägungen*. Kairos 15. 1973. 61 ff.; Pötscher, W. *Moira, Themis und τιμή im homerischen Denken.* Wiener Studien 73. 1960. 15 ff.
[10] Verg. *Aen*. 12, 725–727.
[11] *Il*. 316 ff.; 7, 170 ff.
[12] Cf. Cic. *inv*. 1, 18.
[13] Cf. Cic. *nat*. 1, 106; *Corn. fr*. 1, 13. 14; Liv. 25, 3. 1 ff.

special mixture of *oraculum* based on divine decision and archaic *vindicatio*, requiring the employment of *vis*, to the extent that it makes steps towards the repression of violence through *oraculum*, based on the decision of divine forces.[1]

The situation in *Casina* is the following: The Athenian Cleostrata, wife of Lysidamus acquired and brought up the slave girl Casina out of her own fortune. Contradiction arises concerning the right to dispose over Casina. On the one hand, Lysidamus wants to acquire her for himself and his slave, Olympio; on the other hand, Cleostrata also claims the girl for herself and her slave, Chalinus. On behalf of the husband the *vilicus*, Olympio, on behalf of the wife Chalinus take part in the actual dispute.[2] In the course of the dispute physical violence is used by the slaves representing the opposing husband and wife; at the same time, the *oraculum* preceding actual fight also begins. The two *sortes* are placed into the *sitella* and the actual fight takes place simultaneously with the ceremony. Chalinus is defeated in the *oraculum*, Olympio and his master are the winners, and the dispute is decided in favour of Cleostrata by the employment of a trick only in the second part of the play.[3]

At the beginning of the procedure Cleostrata complains that her husband restricts her in her freedom to dispose over her slave, who constitutes her own property,[4] and in reply her neighbour, Myrrhina reminds her of the rule of Roman matrimonial law that guarantees that the husband has the right to dispose over his wife's entire property. In the dispute Lysidamus tries to convince his wife to yield to him, but Cleostrata sticks to her claim that she is entitled to provide for and dispose over her slave.[5] The married couple agrees to entrust two slaves with the fight over Casina, however, both do this in the secret hope that they can force each other's slaves to renounce Casina.[6] The two slaves appear, and Lysidamus tells Chalinus that he promised Cassina to his slave, Olympio, to which Chalinus responds that Cleostrata promised the girl to him.[7] Lysidamus offers to liberate Chalinus, if he renounces Casina, but the slave does not accept that.[8] Lysidamus calls his wife and orders Chalinus to bring a *sitella* full of water and the *sortes* belonging to it, and announces that if the negotiations do not yield any result he will entrust the *oraculum* with the decision.[9] Meanwhile Cleostrata tries to dissuade Olympio from clinging to Casina, but he says that he would not change his mind even at Iuppiter's request.[10] There is nothing left to do but turning to *sortio*, however, the *oraculum*, in which the will of the gods concerning the issue is manifested cannot dispense with *vis*, the actual fight.[11] When Chalinus appears with the *sitella* and the *sortes*, Lysidamus announces that the fight must be fought observing the formal requirements of the procedure, and that he himself, wants to supervise it.[12] However, he makes a final attempt at persuading Cleostrata, but she categorically refuses.[13] So the ceremony begins, and the fact that

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[1] Düll, R.: *Zur Frage des Gottesurteils im vorgeschichtlichen römischen Zivilstreit.* ZSS 58. 1938. 19 ff.
[2] Plaut. *Cas*. 47 ff.
[3] Düll 1938. 20 f.
[4] Plaut. *Cas*. 149. 189 f.; 193 ff.
[5] Plaut. *Cas*. 248 ff.; 260 f.
[6] Plaut. *Cas*. 269 ff.
[7] Plaut. *Cas*. 288. 289.
[8] Plaut. *Cas*. 289 ff.; 293 ff.
[9] Plaut. *Cas*. 295. 298.
[10] Plaut. *Cas*. 323.
[11] Plaut. *Cas*. 342 ff.; 346.
[12] Plaut. *Cas*. 352. 357. 363.
[13] Plaut. *Cas*. 364 f.; 370 ff. 373.

is performed strictly in adherence to the rules receives special emphasis.[1] The *sortes* are marked with inscriptions and they check if there is any other *sors* in the urn, as well as the fact that the two balls are made of the same wood, as the winner of the *oraculum* will be the one whose *sors* will remain above in the urn.[2] Then the urn is placed in front of Cleostrata, her task being to shake it and to draw out the *sors*.[3] The two participants of the *oraculum*, Olympio and Chalinus pray to the gods to help their case and they accurse the adversary.[4] After the prayers Lysidamus calls on the parties to begin the actual combat, he wishes Olympio good luck, and so does his wife to Chalinus. Olympio asks Lysidamus whether he should hit Chalinus with his fist or with his open palm, to which his master replies that he should proceed the way he wants. Then Olympio, calling Iuppiter to help slaps Chalinus in the face, while Chalinus, calling Iuno to help, hits Olympio with his fist.[5] After the outright violence, Cleostrata has to draw the *sors* that has remained above in the urn, and the parties are asked to cease fighting.[6] Cleostrata draws out Olympio's *sors* because that one is above, and announces that Chalinus is the loser, and Lysidamus announces that the gods have supported Olympio, fighting on his behalf. Olympio considers his victory to be a reward for his own, and for his ancestors' *pietas*.[7] So the case is settled with Casina having to marry Olympio, while Cleostrata has to make preparations for the ceremonial feast, which she begins, having accepted the decision of the *oraculum*.[8]

As it becomes evident from the prologue of the play, Plautus modelled his comedy on Diphilus's play, *Klēroumenoi*, and – as it is clearly shown by its title – the Greek play is also centred around a kind of *sortio*, a drawing or casting of lots, which is not in the least surprising taking into account that the *oracula* involving drawing of lots constituted an integral part of Greek religious thinking and religious practice.[9] Plautus is a great master of intermingling Greek elements with Roman everyday life, customs, religion and law, and he explains in the prologue those elements of his play which could be strange to the Roman

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[1] Plaut. *Cas*. 375. (Lys.) *Optumum atque aequissimum istud esse iure iudico.*

[2] Plaut. *Cas*. 378. 380. 384 ff.

[3] Plaut. *Cas*. 387. 395.

[4] Plaut. *Cas*. 389 ff. (Ol.) *Taceo: deos quaeso* – (Chal.) *Ut quidem tu hodie canem et furcam feras. /* (Ol.) *Mihi ut sortio eveniat* – (Chal.) *Ut quidem hercle pedibus pendeas. /* (Ol.) *At tu ut oculos emungare ex capite per nasum tuos.* (Chal.) *Quid times? Paratum oportet esse iam laqueum tibi. /* (Ol.) *Periisti.* 396. (Chal.) *Deos quaeso, ut tua sors ex sitella effugerit.*

[5] Plaut. *Cas*. 401 ff. (Lys.) *Hoc age sis, Olympio.* (Ol.) *Si hic litteratus me sinat.* / (Lys.) *Quod bonum atque fortunatum mihi sit.* (Ol.) *Ita vero, et mihi.* / (Chal.) *non*. (Ol.) *Immo hercle*. (Chal.) *Immo me hercle*. (Cleost.) *Hic. vincet, tu vives miser*. / (Lys.) *Percide os tu illi hodie. Age, ecquid fit? Ne obiexis manum*. / (Ol.) *Compressan palma an porrecta ferio?* (Lys.) *Age ut vis*. (Ol.) *Em tibi.* / (Cleost.) *Quid tibi istunc tactio est?* (Ol.) *Quia Iuppiter iussit meus.* / (Cleost.) *Feri palma, ut ille, rursum*. (Ol.) *Perii, pugnis caedor, Iuppiter*. / (Lys.) *Quid tibi tactio hunc fuit?* (Chal.) *Quia iussit haec Iuno mea.* / (Lys.) *Patiundum est, siquidem me vivo mea uxor imperium exhibet.* / (Cleost.) *Tam huic loqui licere oportet quam isti*. (Ol.) *Cur omen mihi / vituperat?* (Lys.) *Malo, Chaline, tibi cavendum censeo*. / (Chal.) *Temperi, postquam oppugnatum est os.*

[6] Plaut. *Cas*. 412.

[7] Plaut. *Cas*. 417 f. (Cleost.) *Victus es, Chaline*. (Lys.) *Cum nos di iuvere, Olympio, / gaudeo*. (Ol.) *Pietate factum est mea atque maiorum meum.*

[8] Plaut. *Cas*. 427 f. 419.

[9] Plaut. *Cas*. 31 ff. Cf. Düll 1938. 27.

audience. So he does with the motif of the slaves' *'marriage'*,[1] yet he does not consider it necessary to add any explanations to the settlement of the contradiction arising about the right to dispose over a slave by *oraculum* and fight; he is only content to mention the perfect righteousness and legality of the procedure.[2] (The typically Roman character is corroborated by the reference to the decree of the *leges XII tabularum, repudium*.[3]) The fight of the Horatii and the Curiatii, described by Livy can be mentioned as a parallel to the single combat fought under ceremonial circumstances, as well as the form of the interstate contracts, in the course of which they call Iuppiter to help and also as witness, the actual fight being signified by the expression *manum conserere*.[4] The act of *manum conserere* can also be encountered in Cicero's and Gellius's descriptions of the *vindicatio* of plots of land. From the comparison of these sources it becomes evident that the employment of *vis*, the actual – later symbolic – violence constituted a substantial part of *legis actio sacramento*.[5]

The ritual described by Plautus must have constituted a certain intermediary stage between personal fight and *vindicatio*, as it is known today because in this case the parties agree on the rules of the settlement of the conflict, and they accept the control of a third person. The rules to be observed are mainly religious in character, and seem to be suitable to impede boundless and unrestricted violence. Nevertheless, *vis* is unquestionably part of the procedure, but the winner in the actual fight is decided by a higher, transcendental power; therefore, the fight receives the character of ordeal.[6] The conditions of *vindicatio* in *Casina* are given: The right to dispose over the slave girl can be regarded as a kind of property issue, yet the opposing parties are substituted by their slaves in the procedure as taking into account the rules of comedy it would not be advisable to put on stage man and wife, Lysidamus and Cleostrata using violence against each other. However, the fight always concerns the rights and interests of their owners.[7] First the husband announces his claim for the right to dispose over Casina, then, in response the wife does the same.[8] Then – after trying in vain to persuade the opponent's slave to give up their plans concerning Casina – the couple agrees that the decision in the dispute over the right of disposal should be reached in a procedure acceptable for both of them, and they agree to accept the decision as obligatory even if it happens to be unfavourable for them.[9]

The accepted procedure is the *oraculum*, relying on *sortio* as well, which also included actual fight, as it is clearly shown by the expressions *"necessumst vorsis gladiis"*,[10] *"conlatis signis depugnarier"*[11] and *"ire obviam"*.[12] To this extent the procedure is analogous with the *vindicatio* described by Gaius, as the employment of *vis* – in the beginning actual, later

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[1] Plaut. *Cas*. 68 ff. See Pólay, E.: *Rabszolgák „házassága" az ókori Rómában („Marriage" of Salves in Ancient Rome).* Acta Universitatis Szegediensis XXXIV/4. 1984. 9 ff.

[2] Plaut. *Cas*. 375. *Optumum atque aequissimum istud esse iure iudico.* Cf. Hägerström, A.: *Der römische Obligationsbegriff, I.* Uppsala 1927. 572.

[3] Plaut. *Cas*. 207 f. Cf. *XII tab*. 4, 3.

[4] Liv. 1, 24, 7. 25, 5. *Consertis deinde manibus, cum iam non motus tantum corporum agitatioque anceps telorum armorumque, sed volnera quoque et sanguis spectaculo essent ...*

[5] Cic. *Mur*. 26; Gell. 20, 10, 7–9. Cf. Thür, G.: *Vindicatio und deductio im frührömischen Grundstückstreit*. ZSS 94. 1977. 296 ff.

[6] Düll 1938. 29.

[7] Düll 1938. 30.

[8] Plaut. *Cas*. 193. 252 f.; 190. 193 ff.; 261.

[9] Plaut. *Cas*. 269 ff.

[10] Plaut. *Cas*. 344.

[11] Plaut. *Cas*. 352.

[12] Plaut. *Cas*. 357.

symbolic – played an important role in this procedure as well.[1] The command *"age"* calls for the beginning of the fight,[2] which ends with the victory of one of the parties; the defeated one is regarded *victus*, or even *mortuus*.[3] The actual fight – armed, as mentioned by the sources, but actually bare handed[4] – is an essential part of the *vindicatio*; however, the dispute is not decided by the fight itself, but by the divine judgement, the *oraculum*, serving as the frame or background of the fight, somehow involving it into the mechanism of decision. Numerous parallels can be observed between the *vindicatio* in Plautus and the *legis actio sacramento in rem* known from Gaius's *Institutiones*. The parties fight with the same weapons, and they recite the *verba sollemnia* which calls the divinity to help including an oath as well, together with the symbolic enactment of violence by using the *festuca*.[5]

At the end of this brief study, not intended to be exhaustive, only wishing to highlight some aspects and associations, the following conclusions can be drawn: In our view, the opposing theories searching for the origin of *legis actio sacramento in rem* either in personal fight or in the religious sphere can be integrated into a single theory where they augment each other and produce the same result. The sacred element (by which not only the religious world view that names divinities is understood, but also the magic thinking that operates with numinous forces) can be clearly traced in the *vindicatio* procedure in the requirement of the verbatim recital of both the oath, the *sacramentum* and the *carmen*. The motif of the fight appears both in the etymology of the word *vindicatio* and in the employment of the spear. However, it is precisely the *hasta* that carries a religious extra semantic load in Roman imagination (this becomes evident from its role played both in Mars's cult and in the declaration of war, which is a part of *ius sacrum*) which cannot be disregarded in the case of archaic civil law trial. Adapting to the rules of the genre, Plautus presents a quasi-property trial, the result of which is decided by restricted and controlled personal fight, employing the drawing of lots, thus calling for divine judgement. Based on all these, it can be rightly assumed that originally it was the *ordalium,* fought with weapons, that brought *legis actio sacramento in rem* to its form known today.

[1] Düll 1938. 31.
[2] Plaut. *Cas*. 401. 405. 412.
[3] Plaut. *Cas*. 407. 427.
[4] Plaut. *Cas*. 344. 352. 405.
[5] Düll 1938. 33 f.

Numen ad Numinousity—On the Roman Concept of Authority

When scrutinizing the concept of authority, presenting the basic definition of *auctoritas*, the capacity of increase and augmentation, Hannah Arendt appositely quotes the relevant passage of Cicero which asserts that the task of founding the state, human community, as well as the preservation of what has already been founded, highly resembles the function of *numen*, i.e., divine operation;[1] and in connection with this, she claims that in this respect the Romans regarded religious and political activity as being almost identical.[2] The paper will examine various aspects of *numen*, one of the most important phenomena of Roman religion (I.), its etymology (II.), the institution of *triumphus*, a phenomenon that seems to be relevant from this point of view (III.), and the function of *flamen Dialis*, one of the most numinous phenomena of Roman religion (IV.), and finally the concept of *numen Augusti*, which incorporates these elements of the religious sphere into the legitimation of power. (V.)

I. The concept of Augustus's *numen* is of utmost importance from several points of view with respect to the subsequent cult of the emperor since it is not only the former Octavianus who, as a living person, is invested with *numen* exploitable in public life; his given name, Augustus, carries in itself the expression *augus*, which bears religious connotations.[3] The leader who has *imperium* and *auctoritas* in the Roman conceptual sphere represents a certain archetype, because *imperium* originally meant nothing else than *mana*, the charisma of the leader; i.e., one's capacity to implement, give birth to something in other persons.[4] The term *numen*, especially in ancient Roman sources, is mentioned in connection with gods, the senate, the Roman people as well as in relation to the mind on a more abstract, philosophical level as a superhuman force in itself which is nevertheless most frequently connected to a person of some kind. Rose defines the concept in perfect accordance with the meanings that occur in these sources: *"Numen signifies a superhuman force, impersonal in itself but regularly belonging to a person (a god of some kind) or occasionally to an exceptionally important body of human beings, as the Roman senate or people."*[5] This does not seem to be especially surprising as the senate fulfilled numerous religious functions. The religious identity and divine origin of the Quirites was widely accepted as well, and Cicero also drew a parallel between *aminus* and *princeps deus* in *Somnium Scipionis*.[6] Thus, *numen*, especially according to the dynamistic trend associated with Wagenvoort's name, signified—to use this Polynesian expression—a kind of *mana*, a mysterious force that dwells in a thing or in a person.[7]

Numen Augusti, the concept of the charismatic leader, who represents deity in a special way, can be understood precisely by investigating the ambivalent relationship of Roman religion with *epiphany*, the *numinous* experience of the divine presence; at this point it becomes

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[1] Cic. *rep.* 1, 7. *Neque enim est ulla res in qua propius ad deorum numen virtus accedat humana, quam civitatis aut condere novas aut conservare conditas.*

[2] Arendt, H.: *Mi a tekintély?* In: Múlt és jövő között (Between Past and Future). Budapest 1995. 151.

[3] Wagenvoort, H.: *Roman Dynamism. Studies in Roman Literature, Culture and Religion.* Leiden 1956. 12.

[4] Köves-Zulauf, Th. *Bevezetés a római vallás és monda történetébe (Introduction to the history of Roman religion and myth).* Budapest 1995. 31. About the legal aspects of *auctoritas* see Domingo, R.: *Auctoritas.* Barcelona 1999.

[5] Rose, H. J. *Numen and mana.* Harward Theological Review 44. 1951. 109.

[6] Cic. *rep.* 6, 15.

[7] Köves-Zulauf 1995. 29. About the difference between *auctoritas* and *potestas* see Domingo, R.: *Das binom auctoritas—potestas im römischen und modernen Recht.* Orbis Iuris Romani 4. 1998. 7–17; Domingo 1999. 9. ff.

apparent that the germs of certain later developed elements were present as far back as the stage of the most ancient Roman religion.[1] *Triumphus* is the archetypal—numinous event of the embodiment of the deity, *in concreto* Iuppiter, surrounded by numerous preventive rites. It is not by chance that pondering over the role of *numen* in antique religion (*antike, magische, faustische numina*)[2] Oswald Spengler mentions that the Roman cult of the emperor—which must be clearly separated from the oriental cult of the sovereign because of their different origins—is a natural consequence of Roman religion, and the role of the *triumphator* must be regarded as its precedent since Iuppiter's *numen* was embodied in the *consul* who held the *triumphus* during the triumphal procession.[3] It should be noted that the Iuppiter-like role of the presence of the *triumphator*'s embodying the divine *numen* was, among other things, a numinous, awe-inspiring experience for the Romans, because Roman religion—unlike Greek religion—tried to avoid divine presence, epiphany; e.g., this was the reason for the complete turning around, the *circumactio corporis* after finishing the prayer as well as the well-known *fas sit vidisse*[4] formula, which means: *"I should not be blamed for seeing it."*[5]

II. The first occurrence of the word *numen* can be found—*in concreto* in a genitive and an attributive construction belonging to a god's name—in the fragments of Accius,[6] later near the genitives of the words *deus* and *divus*,[7] referring to a particular god, e.g., Ceres[8] or Iuppiter,[9] as well as in an attributive construction with the adjective *divinum*.[10] It characteristically occurs in verbal constructions near the verbs denoting ritual activities,[11] whereas in attributive constructions it appears near adjectives denoting piety, anger, reconcilability, or, on the contrary, implacability.[12] In Augustus's time *numen* can also mean

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[1] Köves-Zulauf 1995. 177.
[2] Spengler, O.: *Der Untergang des Abendlandes*. München 1991. 517–522.
[3] Spengler 1991. 521. f. *Von hier aus wird der Kult vergötterter Menschen als ein notwendiges Element innerhalb dieser religiösen Formenwelt verständlich. Aber man hat scharf zwischen antiken und den oberflächlich ähnlichen orientalischen Erscheinungen zu unterscheiden. Der römische Kaiserkult, d. h. die Verehrung des Genius des lebenden Prinzeps und die der verstorbenen Vorgänger als Divi, ist bisher mit der zeremoniellen Verehrung des Herrschers in vorderasiatischen Reichen, vor allem in Persien, und noch mehr mit der späten ganz anders gemeinten Vergöttlichung der Kalifen, die schon bei Diokletian und Konstantin in voller Ausbildung erscheint, vermengt worden. In der Tat handelt es sich hier um sehr verschiedene Dinge. Mag im Osten die Verschmelzung dieser symbolischen Formen dreier Kulturen einen hohen Grad erreicht haben, in Rom ist der antike Typus unzweideutig und rein verwirklicht worden. Schon einige Griechen wie Sophokles und Lysander, vor allem Alexander, wurden nicht nur von Schmeichlern als Götter ausgerufen, sondern vom Volkstum in einem ganz bestimmten Sinn als solche empfunden. Von der Göttlichkeit eines Dinges, eines Hains, einer Quelle, einer Statue, die den Gott repräsentiert, bis zu der eines hervorragenden Menschen, der erst Heros und dann Gott wird, ist nur ein Schritt. ... Eine Vorstufe war der Konsul am Tage seines Triumphes. Er trug hier die Rüstung des kapitolinischen Iupiter, und in der älteren Zeit waren Gesicht und Arme mit roter Farbe bestrichen, um die ähnlichkeit mit der Terrakottastatue des Gottes, dessen numen sich in diesem Augenblick in ihm verkörperte, zu erhöhen.*
[4] Sen. *epist.* 115, 4.
[5] Latte, K.: *Römische Religionsgeschichte*. München 1967. 41.
[6] 646 R. b. Non. 173, 27. *nomen et numen Iovis*; 692 R. *nomen vestrum numenque*
[7] Cic. *div.* 1, 120; 2, 63; *Phil.* 11, 28; *fin.* 3, 64; *nat.* 1, 3; 2, 95; 3, 92.
[8] Cic. *Verr.* 5, 107.
[9] Cic. *Deiot.* 18; *Tusc.* 2, 23.
[10] Cic. *nat.* 1, 22; *Mil.* 83.
[11] Cic. *Verr.* 2, 4, 111. *expiare*; *div.* 2, 63; *dom.* 140; Caes. *Gall.* 6, 16, 3. *placare*; Verg. *Georg.* 1, 30 *colere*; Ov. *trist.* 5, 3, 46. *flectere*; Hor. *epist.* 17, 3; Verg. *Aen.* 2, 141. *orare*; Verg. *Aen.* 3, 437; Ov. *trist.* 3, 8, 13. *adorare*
[12] Verg. *Aen.* 2, 141. *conscium veri*; Ov. *Met.* 4, 452. *implacabile*; CIL VI. 29944. *iratum*; Verg. *Aen.* 4, 521. *memor*; 4, 382. *pium*; *Culex* 271. *placabile*; Stat. *Theb.* 10, 486. *providum*

the deity himself, although previously it meant only one of his properties or functions[1]—a typical example of this can be found in the *prooemium* of the *Aeneis*,[2] and Servius[3] also defines it in accordance with this thought when recounting Iuno's functions in his commentary.[4] The antique grammarians also tried to explain this expression; e.g., Festus defines it as a divine nodding, and divine power,[5] Varro defines it as *imperium*.[6] These interpretations lead to the basic meaning of the word; i.e., (assenting divine) nodding.[7] Various authors—like Pfister,[8] Wagenvoort[9] and Rose[10]—identify the expression with the *verbum 'to move'*. Interpreting a pregnant locus by Catullus,[11] Pfister also takes position vis-a-vis the orendistic, will-expressing meaning of the word *numen*,[12] which seems to be strongly corroborated not only by the expression *adnuit* in the text of Catullus, but also by other constructions with the verb **nuo*,[13] which reinforce the (personal) expression of the will with the help of the emotionally charged gesture of nodding.[14]
Opinions also differ concerning the age of the term *numen* itself. Pfister ranks it among the most ancient layers of religious terms,[15] Rose prefers not to take sides in this question.[16] Latte's opinion deserves special attention. On the one hand, he claims that the term *numen* can be encountered neither in ancient religious texts nor in the works of Plautus, Ennius or Cato; its first occurrence in the works of Accius and Lucilius can be dated to the second half of the 2nd century BC., so he thinks it is possible that it became part of the Latin language only because of the influence of Stoic philosophy, as a translation of the Greek *dynamis*;[17] the other hand, he notes that it is impossible to explain why this particular word was used to translate the concept of *dynamis theou*.[18] Concerning the first part of Latte's idea, it cannot be disregarded that both Ennius's and Cato's texts are considerably incomplete, so the lack of the word *numen* does not provide sufficient reason for drawing conclusions. Plautus's comedies cannot contain the expression because of their very nature, while in religious texts the term *numen* signifies a concept that refers to the sphere of religious experience rather than to ritual.[19] In connection with Cicero's relevant locus,[20] Latte seems to forget about the important sacred functions of the *senatus*, such as the ordering of the *triumphus*, the consecration of a certain plot of land to gods and later the initiation of the emperor to the divine status. Walter Pötscher also states that through these functions the *senatus* assumed

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[1] Pfister, Fr.: *Numen.* RE XVII. 2. 1937. 1273.
[2] Verg. *Aeneis* 1, 8. *quo numine laeso quidve dolens regina deum*
[3] Serv. *in Verg. Aen*. 1, 8. *Nam Iuno habet multa numina: est Curitis ... est Lucina ... est regina.*
[4] Pötscher, W.: *'Numen' und 'numen Augusti'*. In: Hellas und Rom. Hildesheim 1988. 449.
[5] Fest. 172. *numen quasi nutus dei ac potestas*
[6] Varro *ling.* 7, 85. *numen dicunt esse imperium*
[7] Pötscher 1988a 450.
[8] Pfister 1937. 1289.
[9] Wagenvoort 1956. 74.
[10] Rose, H. J.: *Ancient Roman Religion*. London 1948. 13.
[11] Catull. 64, 204. ff. *Adnuit invicto caelestum numine rector, quo motu tellus atque horrida contremuerunt aequora concussitque micantia sidera mundus.*
[12] Pfister 1937. 1290. *Dies ist also eine unpersönliche Kraft, die da oder dort wirken kann, die orendistische Kraft, die überall da vorhanden ist, wo man vom Göttlichen und Heiligen spricht.*
[13] *adnuere* (Pomp. *Atell.* 25; Plaut. *Asin.* 784; *Bacch.* 186; *Truc. prol*. 4; Varro *rust.* 1, 2, 2; Enn. *ann.* 133.), *adnutare* (Naev. *com.* 1047; Plaut. *Merc.* 437), *abnuere* (Plaut. *Truc. prol*. 6; *Merc.* 50.), *abnutare* (Plaut. *Capt.* 611; Enn. *trag.* 306.), *innuere* (Plaut. *Rud.* 731; Ter. *Eun.* 735; *Ad.* 171. 174.).
[14] Pötscher 1988a 450.
[15] Pfister 1937. 1290.
[16] Rose 1948. 114.
[17] Latte 1967. 57.
[18] Latte 1967. 57.
[19] Pötscher 1988a 451.
[20] Cic. *Phil.* 3, 32. *magna vis est, magnum numen ... idem sentientis senatus.*

certain competencies that belonged to the divine sphere.[1] When Lucretius connects the concept of *numen* to the human mind,[2] he presumably speaks only about the familiar mechanism through which religious concepts *mutatis mutandis* gain philosophical significance.

The question concerning the main operational principle of *numen*, which at the same time means the manifestation of the divine will, is of utmost importance. Pötscher considers **nuere*, the manifestation of the divine will, an ancient component of Roman religion, which avoided epiphany, carefully guarded *pax deorum*, and interpreted the slightest deviation from the order of daily routine as a sign (more precisely as a *symptom*, according to Thomas Köves-Zulauf[3]) without attempting to draw any conclusion with regard to the age of the expression *numen*.[4] Similarities between this expression and Greek terms are striking: the word *numen* can be connected with *neyma*, whereas the meaning of *nutus* can be connected with *neysis*. The common characteristic feature of these latter two is the dynamism inherent in them,[5] but the closest parallel can be drawn between *neyo*[6] and **nuo*, known in its constructions.[7] The concept of divine warning, consent or disapproval appearing in the form of natural phenomena can be encountered in the works of both in Greek and Roman authors.[8] However, the different *omina* cannot be strictly paralelled with the divinity expressing his will with a nod (*nutus*) because in most cases only the Romans' conviction about a certain event being proper or not can be inferred without the possibility of establishing whether or not the given warning was connected to the will of a personal god.[9]

In numerous cases it is not possible to separate the personal energy-component and the one that is manifested only in the course of operation; neither is it possible to define their precise amount and proportion since they are phenomena outside the sphere of logic. At the same time, certain *omina*—e.g., the *augurium* connected to the founding of Rome—were traditionally related to particular gods.[10] Presumably they included both the local, less important divinities manifesting themselves mainly in the form of natural phenomena, conceived as operating natural forces and the more important ones invested with a certain cult and precisely defined personal characteristics, almost a personality—this coincides with the concept of *Person-Bereicheinheit*, the notion of the unity of person and sphere of authority which for the antique man meant the unity and the simultaneity of the material component and the divinity of the given phenomenon.[11] As Kerényi also notes: *"Apollo—and every other Greek god—is a primordial type that was recognised by the Greeks as the*

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[1] Pötscher 1988a 452.

[2] Lucr. 3, 144. f. *Cetera pars animae per totum dissita corpus paret et ad numen mentis momenque movetur.*; 4, 179. *in quem quaeque locum diverso numine tendunt.*

[3] Köves-Zulauf 1995. 61.

[4] Pötscher 1988a 452. *Wir möchten denn angesichts der Eigenart römischer religiöser Haltung, die stets auf der Hut war, der pax deorum sicher zu sein, und das geringste Abweichen vom normalen Gang der Dinge als Zeichen deutete, vie Vorstellung des *nuere als die der göttlichen Willensäußerung für einen alten Bestandteil der römischen Religion halten, ohne nun im einzelnen ausmachen zu wollen, ob die Bildung numen ein ebenso hohes Alter besitzt.*

[5] Cic. *Tusc.* 1, 40. *terrena et humida suopte nutu et suo pondere ad partes angulos terram et in mare ferantur*; Verg. *Aen.* 9, 106; 10, 115. *adnuit et totum nutu tremefecit Olympum.*

[6] *Il.* 3, 337; 13, 133; 9, 223; *Od.* 16, 283; 18, 237.

[7] Pötscher 1988a 453.

[8] Cf. Nielsson, M. P.: *Geschichte der griechischen Religion, I–II*. München 1955; Cook, A. B.: *Zeus. A Study in Ancient Religion*. Cambridge 1914; Jakobsthal, P.: *Der Blitz in der orientalischen und griechischen Kunst. Ein formgeschichtlicher Versuch*. Berlin 1906.

[9] Pötscher 1988a 455.

[10] Liv. 1, 6, 4.

[11] Pötscher, W.: *Das Person-Bereichdenken*. Wiener Studien 72. 1959. 24. ff.; Spengler 1991. 518.

metaphysical form of experienced spiritual and plastically contemplated natural realities."[1] According to the conviction of ancient Romans, the lack of a precise denomination does not mean that the *augurium* would have been the work of chance and not the manifestation of a particular (personal) will. The concept of divinities invested with a concretely defined personality is not excluded by the fact that they are not called by a precise name; it is enough to think of the text and the ritual of *evocatio*,[2] belonging to the sphere of the *ius sacrum*, known from Macrobius,[3] which appeals, without mentioning names, to personal gods and not impersonal forces.[4] The image of Zeus, shaking the skies and the earth with a little movement of his head, as well as the image of Iuppiter can be frequently encountered.[5] It seems to be worth returning to the two oldest occurrences of the term in the constructions *nomen et numen Iovis* and *nomen vestrum numenque* in the fragments of Accius. In both cases the expression *numen* is connected with the word *nomen*. Two widely differing opinions collide here. Wagenvoort thinks that this construction might help to grasp the historic moment when the concept of the personal God comes to existence as a development of the impersonal, magical force, just as the primary expression of *numen* is later associated with the secondary term *nomen* as the result of a kind of evolution.[6] Conversely, Pötscher argues that the expressions *numen* and *nomen* are two different aspects of the same phenomenon without either of them being secondary to the other with regard to both their meaning and their chronology.[7] This view is corroborated by the analogy taken from the functions of the Roman military leader; i.e., *ductus*, *imperium* and *auspicium* are concepts that appear together, in juxtaposition, overlap but do not constitute synonymous at all.[8] These concepts express different aspects of the same office, and it is highly unlikely that they would be only synonyms heaped together—*imperium* primarily signifies the effective power of the commander but is also related to the religious sphere; in *auspicium* the sacred element is dominant, at the same time it implies the executive competence needed for its fulfillment.[9] According to Wagenvoort, in Roman thinking, certain persons disposed of a special *mana* of their own: e.g., the *imperator*—if the origin of the word is considered—has a creative fertilising power,[10] and when, as a general, he ordered his soldiers to occupy a camp of the enemy, he conjured up the force necessary to carry out the order with the help of his magic words; hence it can be inferred that *imperium* is nothing else than a form of transmitting a mysterious force.[11] It cannot be disregarded that according to antique views, the name is never arbitrary but it always, regarding gods as well, constitutes an integral part

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[1] Kerényi, K.: *Halhatatlanság és Apollon-vallás (Immortality and Apollo-religion).* In. Az örök Antigoné (The eternal Antigone). Budapest 2003. 157.
[2] Cf. Basanoff, V.: *Evocatio*. Paris 1947.
[3] Macr. *Sat.* 3, 9, 7–8.
[4] Pötscher 1988a 456. f. Cf. Verg. *Aen.* 8, 347. ff.
[5] Verg. *Aen.* 4, 268. f. *ipse deum tibi me caelo demittit Olympo / regnator, caelum et terras qui numine torquet*; Hor. *Carm.* 3, 1, 5. ff. *Regum timendorum in proprios greges / reges in ipsos imperium est Iovis / clari Giganteo triumpho / cuncta supercilio moventis.* Ov. *Met.* 1, 179. ff. *Ergo ubi marmoreo superi sedere recessu, / celsior ipse loco sceptroque innixus eburno / terrificam capitis concussit terque quaterque / caesariem, cum qua terram, mare, sidera movit.*
[6] Wagenvoort 1956. 78.
[7] Pötscher 1988a 460.
[8] Plaut. *Amph.* 196. *ductu, imperio, auspicio suo*; 192. *imperio atque auspicio eri*; 657. *eos auspicio meo atque ductu vicimus*; Liv. 27, 44, 4. *sine imperio, sine auspicio*; 28, 27, 4. *qui imperium auspiciumque*; Val. Max. 2, 8, 2. *de imperio et auspicio*
[9] Pötscher 1988a 462.
[10] Walde, A.–Hofmann, J. B. *Lateinisches etymologisches Wörterbuch I–II*. Heidelberg, 1938. I. 683.
[11] Wagenvoort, H.: *Wesenszüge altrömischer Religion.* In: Aufstieg und Niedergang der römischen Welt, I/2. Hildesheim–New York 1972. 371. f. *Imperium ist also eine Form der Übertragung geheimnisvoller Kraft.*

of personality; it was not by chance that they proceeded with such caution when precisely naming gods or keeping their names in secret if it was necessary.[1]

III. Payne believes that it is not possible to understand Roman thinking without understanding *triumphus*.[2] Although tradition knows about a very early instance of *triumphus* held by Romulus, the ceremony of *triumphus* is connected to the introduction of the cult of Iuppiter Capitolinus in the year 509 BC.[3] The last *triumphi* corresponding with all religious requirements were held at the end of the 3rd century AD.;[4] the *triumphus* organised later—the custom long survived the fall of the empire—cannot be considered to be the continuation of the religious tradition.[5] Although the political importance of *triumphus* can hardly be overestimated, and countless examples can be found for its *abusus* for profane purposes in Roman history, it must be kept in mind that *triumphus* is originally a religious act[6] both in the magic and the sacred sense of the word[7] because, as it has been mentioned in the introduction, in the course of it the *numen* of the Iuppiter Capitolinus is incarnated in the *triumphator*.[8] In ancient times, the archaic *triumphus*, presumably taken over from the Etruscans, started from the mountains of Alba, and in line with the classic rite formed through historical development it proceeded according to the following itinerary: The procession started from the Campus Martius, entered the city through the Porta Triumphalis, there they presented the prescribed sacrifice, then headed towards the Porta Carmentalis—after the building of Circus Flaminius had been finished, the procession naturally touched it as well—originally they went across the Velabrum towards the Capitolium; later they went round the Palatinus along the Via Sacra to reach the same place.[9] In the procession, the looted treasures, the weapons seized from the enemy, the sacrificial gifts, the group of captives, including captive generals, rulers and their royal household, were followed by the *triumphator* himself escorted by his officers and the soldiers of his army.[10] The *triumphator* was standing on a two-wheeled, horse-drawn *quadriga,* holding an ivory scepter with Iuppiter's bird, the eagle in one hand and a laurel twig in the other; a slave standing behind him on the *quadriga* was holding a golden wreath above his head. He was wearing a laurel wreath on his head and festive clothes on his body, which he put down when he reached the Capitolium[11] and he sacrificed a white bull to Iuppiter there.[12]
The characteristics that make the general similar to Iuppiter, more precisely incarnate Iuppiter in him were the following: the *triumphator*'s face was painted vermilion,[13] the colour of the face of the Iuppiter Capitolinus's clay statue. This red painting on the face did not only serve his identification with Iuppiter, it also symbolised blood investing the general

[1] Cf. Brelich, A.: *Die geheime Schutzgottheit von Rom*. Zürich 1949.
[2] Payne, R.: *The Roman Triumph*. London 1962. 10.
[3] Lemosse, M.: *Les éléments techniques de l'ancient triomphe romain et le problème de son origine*. In: Aufstieg und Niedergang der römischen Welt, I/2. Hildesheim–New York 1972. 443.
[4] Picard, Ch. G.: *Les Triompées Romains. Contribution à l'histoire de la religion et de l'art triomphal de Rome*. Paris 1957. 428.
[5] Köves-Zulauf 1995. 154.
[6] Wissowa, G.: *Religion und Kultus der Römer*. München 1912. 126; Liv. 28, 9, 7; 45, 39, 10.
[7] Köves-Zulauf 1995. 156.
[8] Wissowa 1912. 127. *Der triumphierende Feldherr ist in allen Stücken ein menschliches Abbild des Iuppiter O. M., unter dessen Schutze er den Sieg erfochten hat*.; Taeger, F. *Charisma. Studien zur Geschichte des antiken Herrscherkultes II*. Stuttgart, 1960. 13; Picard 1957. 139.
[9] Altheim, F.: *Römische Religionsgeschichte, II*. Leipzig 1932. 24. f.
[10] Cf. Ehlers, W.: *Triumphus*. In RE XIII. 493. ff.
[11] Plin. *nat.* 15, 133; Sil. *Pun.* 15, 118. ff.
[12] Serv. *in Verg. Georg*. 2, 146; Wissowa 1912. 126. f.; Köves-Zulauf 1995. 156.
[13] Plin. *nat.* 33, 111; Serv. *in Verg. ecl.* 6, 22. 10, 27.

with the magic power dwelling in blood;[1] his clothes did not merely resemble the clothes of Iuppiter's statue but they were identical with them, as they took off the statue's clothes (this meant the *toga palmata*, on the one hand; and the *toga picta* decorated with golden stars that was worn over it, on the other) to dress the *triumphator* in them.[2] The *triumphator* was driving a *quadriga* like the one standing on the top of the temple of the Capitolium, where the above-mentioned statue of Iuppiter was standing too.[3] Many scholars, like Fowler[4] and Deubner[5] attempted to deny that the *triumphator* represented Iuppiter and he was regarded as being Iuppiter for that period, but they could not shake the view that holds them identical regarded as *communis opinio* in the literature on the subject.[6] It is true that it is hard to interpret the duplicity that the *triumphator* in the procession, who, by virtue of the above identification, is none other than Iuppiter during this period, is heading towards Iuppiter's Temple on his *quadriga* in order to present sacrifice to the god there, so Iuppiter's presence is somehow redoubled for this period. However, it must be taken into account that the contradiction that is rationally percieved in the *triumphus* but does not disturb the experience on religious level cannot be reconciled according to the rules of linear logic.[7] It must also be observed that the divine character of the *triumphator* was gradually waning in the course of the ceremony until it completely ceased when he put down his wreath and his clothes at the statue.[8] (The sacrifice presented on the Capitolium was followed by the *ludi magni*, which probably constituted an integral part of the *triumphus*; this seems to be corroborated by the fact that though the independent *ludi magni* separated from the *triumphus* itself appeared only later, the *magistratus* who organised the games still appeared in clothes resembling those of the *triumphator*. The date of the games were connected to the founding ceremony of the Capitolian Temple celebrated on the 13 September.[9])

At the same time, the special position acquired by the *triumphator* through his temporary deification was carrying numerous dangers. The rational core of these dangers was the envy manifested towards the *triumphator*, which was expressed in *malocchio* in terms of magic, and in the ire of Nemesis and Fortuna in a religious interpretation. Against this envy they tried to defend the *triumphator* with the help of various preventive means well-known from antique magic; e.g., amulets put round his neck, bells fastened onto the *quadriga*, which were meant to keep demons away, obscene accessories[10] as well as by singing satirical songs in order to belittle the glory of the triumphant general, so diminishing the danger of divine envy.[11]

However, more important than all these is the rite according to which the slave holding a golden wreath above the *triumphator*'s head was shouting into his ears to remind him that he was a human being, as it is described in a locus of *Naturalis Historia* by Plinius Maior.[12] Köves-Zulauf thoroughly examined both the Plinian and the parallel loci[13]—with special attention to the phrase *hoti antrōpoi eisin* in Arrianos's text and *hominem te memento* in

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[1] Köves-Zulauf 1995. 156.
[2] Liv. 10, 7, 10; Suet. *Aug.* 94; Iuven. 10, 38.
[3] Dion. Hal. 9, 71, 4; Ov. *epist.* 2, 1, 58.
[4] Fowler, W. W.: *Iuppiter and the Triumphator.* Classical Review 30. 1916. 153. ff.
[5] Deubner, L.: *Die Tracht des römischen Triumphators.* Hermes 69. 1934. 316. ff.
[6] About the controversial theses see Köves-Zulauf, Th. *Reden und Schweigen. Römische Religion bei Plinius Maior*. München 1972. 136.
[7] Payne 1962. 57. f.
[8] Köves-Zulauf 1972. 136.
[9] Altheim 1932. II. 25.
[10] Köves-Zulauf 1972. 160.
[11] Suet. *Iul.* 51.
[12] Plin. *nat.* 28, 39.
[13] Arr. *epict.* 3, 24, 85; Tert. *apol.*, 33, 4; Hier. *epist.* 39, 2, 8; Isid. *etym.* 18, 2, 6; Zon.7, 21, 9; Tzetzes *epst.* 97, 86; *hist.* 13, 51–53.

Tertullianus's and Hieronymus's works. Therefore, we took over the *recipere* version in the Plinian text recommended by him instead of the *respicere* version proposed by Ernout.[1] A particular mixture can be identified in Fortuna's character: the Romans regarded Fortuna as an aspect of Nemesis.[2] Accordingly, she entered the Roman pantheon as the enemy of human intemperance and conceit. In this function the *appositio* of *carnifex gloriae* is rightly conferred on her—meaning that she is not only the enemy but the executioner of glory—which *mutatis mutandis* should be taken to refer to both Fortuna and the *servus publicus*; that is, it also contained some kind of concealed threat for the *triumphator* in order to defend him from *hybris* and diminish his glory the way the satirical songs were meant to. The goddess's place in Plinius's text is exactly where the other sources locate the *servus publicus,* which again alludes to their symbolic identificability, to Envy lying in wait and ready to pounce on him.[3] It is a question whether Fortuna and Nemesis had any concrete function in the rites of the *triumphus*, or the Plinian locus was entered in the text as an element of the author's personal style of composition and message. Although there is no knowledge of any cultic prayer or ritual act addressed to Fortuna in the course of the *triumphus,* the fear of the power of Fortuna and Nemesis probably occurred in the *triumphator's* thoughts,[4] as certain references seem to prove that. Plinius's wording verifies that perceiving Fortuna's power both in terms of reality and religious belief was not at all alien to the atmosphere of the *triumphus*.[5] The restraining, moderative character of the *recipere* could be taken *stricto sensu* for the speed of the *quadriga;* i.e., the *triumphator* had to proceed more slowly in his carriage (which was probably not driven by himself taking the ceremonial clothes, the scepter and the laurel stick into account), otherwise he would have got too much ahead of his soldiers, making them rightly feel offended, as the *triumphus* was meant to recognise both the *triumphator*'s and their merits.[6] On the other hand, considering the magical-religious atmosphere of the *triumphus,* it could carry a more abstract, spiritual meaning, fitting into the line of the rites of prevention. It can be righteously asked what the substantial difference between the textual variant *recipe* and that of *respice* is. It is perhaps not necessary to go into a more detailed discussion of the literary history and textual arguments proposed by Köves-Zulauf which make his version more plausible. It seems more important to give an overview of his conclusions drawn from the immanent structure of the *triumphus*.[7]

The inadequacy of looking back is substantiated by other sources as well[8] by emphasizing the rigid, statue-like posture of the *triumphator* modelling Iuppiter Capitolinus meant to evoke the feeling of *tremendum maiestatis,* which completely harmonizes with the description of the Persian ruler's posture that probably influenced the formation of the rite of the *triumphus* relatively early.[9] It is possible to ponder on the fact that the prohibition of looking back is well-known from mythology in cases when a given person is standing at the limit, the meeting point of two spheres, one negative, harmful, demonic,[10] arising from the past, the other positive, fulfilling, pointing to the future. The story of Deucalion who throws stones behind

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[1] Ernout, A.–Beaujeu, J.–Saint-Denis, E. de–Pépin, R.–André, J.–Bonniec, H. Le–Gaullet de Santerre, H.: *Pline l'Ancient, Histoire Naturelle*. Paris 1947; Köves-Zulauf 1972. 123. ff.

[2] CIL III. 1125. *Deae Nemesi sive Fortunae*; Hist. Aug. *Maxim. et Balb*. 8, 6. *Nemesis id est vis quaedam Fortunae*

[3] Köves-Zulauf 1972. 131. ff.

[4] Liv. 5, 21, 15. f.; Plut. *Cam.* 5. 7. 12; Liv. 45, 40, 6–9; 45, 41, 8. f.

[5] Wagenvoort 1956. 69; Köves-Zulauf 1972. 132.

[6] Liv. 26, 21, 4; 39, 7, 3; 45, 36, 5; 45, 37, 3; 45, 41, 3; 45, 43, 8.

[7] Köves-Zulauf 1972. 137. ff.

[8] Amm. Marc. 16, 10, 9–10.

[9] Payne 1962. 14; 202. ff.

[10] Serv. *in Verg. ecl.* 8, 102. *Nec respexeris: nolunt enim se videri numina.*

his back,[1] or the ceremony of the magic digging out of the plant example of the threat of the demonic sphere.[2] Looking back appears as the threat of losing the mission-fulfilling, positive future in numerous texts from both the Old and New Testaments.[3] The equally strong presence of the two spheres is exemplified by the story of Orpheus looking back[4] and by the story of Lot's wife.[5] Several circumstances that prohibit looking back meet in the ceremony of the *triumphus*: The *triumphator* is preparing to perform a religious act, the sacrifice dedicated to Iuppiter Capitolinus, in the most important moment of his life; he is returning from the scene of his triumph to the most sacred place of his motherland; in his back the power of Nemesis, the harmful force of *malocchio* is watching.[6] On the other hand, the prohibition of looking back seems to be corroborated by the circumstance that the *triumphator*, who will take off the divine insignia when reaching the sanctuary of Iuppiter Capitolinus to end his temporary identification with the deity, would hinder his own rehumanisation aimed at actually by the entire ceremony, and would provoke Nemesis even more.

IV. The *flamen Dialis*, Iuppiter's priest is a specifically numinous phenomenon of Roman religion. Among the ancient grammarians, Varro derives the expression *flamen* from the word *filum*,[7] but there is no universally accepted *communis opinio doctorum* concerning the etymology of the word even in the modern literature of the subject.[8] Similarly, the latest attempts at interpretation did not yield any solid and satisfying results. (As later it will become evident—not so much from linguistic but rather from structural considerations—the hypothesis connecting *flamen* to *brahman*, proposed by Dumézil,[9] seems to be the most plausible. Fortunately, the attribute *Dialis* does not present so much difficulty; undoubtedly, it derives from *Diespiter*, i.e., the archaic nominative of Iuppiter.[10] A descriptive treatment of more general source material concerning the three *flamines maiores* (*Dialis, Martialis, Quirinalis*) was carried out by Samter,[11] and Dumézil called attention to the importance of the ancient Iuppiter–Mars–Quirinus triad, on the basis of which the importance of the three *flamines* can be explained, and to the results of this in Roman history besides various other aspects.[12] Our most important antique source that treats the *flamen Dialis*, the prescriptions bestowing certain responsabilities on him, forbidding him various activities, constituting certain taboos is *Noctes Atticae* by Gellius. In what follows, this locus will be the main object of scrutiny.

Before the detailed analysis of particular rules, it is perhaps useful to recapitulate Latte's statement, according to which most rules, taboos and prohibitions meant to defend the magical, numinous power possessed by the *flamen Dialis*.[13] The *flamen Dialis* was not

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[1] Ov. *Met.* 1, 397. ff.
[2] Plin. *nat.* 24, 176.
[3] *Reges* 1, 19, 19–21; *Evang. Lucas* 9, 62.
[4] Ov. *Met.* 10, 56. ff.
[5] Genesis 19, 17. 26.
[6] Köves-Zulauf 1972. 144. f.; Köves-Zulauf 1995. 167. f.
[7] Varro *ling.* 5, 84. *flamen quasi filamen*
[8] Walde–Hofmann 1938. I. 512; Ernout, A.–Meillet, A.: *Dictionnaire étimologique de la langue latine*. Paris 1959. 239.
[9] Dumézil, G.: *Flamen—Brahman.* Annales de Musée Guimet 51. Paris 1935.
[10] Walde–Hofmann 1938. I. 347.
[11] Samter, E.: *Flamines.* In: RE VI. 1909. 2484. ff.
[12] Dumézil, G.: *Jupiter, Mars, Quirinus: essai sur la conception indo-européenne de la société et sur les origines de Rome.* Paris 1941; Dumézil, G.: *Sur quelques expressions sympoliques de la structure religiueuse tripartie à Rome.* Journal de Psychologie et Pathologique 45. 1951. 145. ff.; Dumézil, G.: *Mythe et epopée. I. L'idéologie des trois functions dans les epopées des peuples indo-européens.* Paris 1968; Dumézil, G.: *Archaic Roman Religion*. Chicago 1970.
[13] Latte 1967. 402.

to ride a horse, to mount a horse.[1] At first glance it would seem evident to consider this prohibition as placing the horse, the animal associated with death under taboo[2] as it was also forbidden for this animal to enter Diana's Nemorensis grove; and it is well-known that this cult preserved many archaic elements for later historical periods as well.[3] However, this interpretation would have excluded the possibility for the *flamen Dialis,* strictly obliged to refrain from the chtonic sphere, to travel on a horse-drawn coach in Rome,[4] as the *flamen Dialis* was forbidden both to touch and see the things declared taboo for him. Though there is considerable difference between riding a horse and travelling in a coach, the presence of the horse is essential in both cases.[5] It cannot be excluded that the prohibition of riding a horse may be interpreted on the basis of Meyer's finding that although riding a horse was a widely spread form of transport in ancient Rome, it was not held in very high esteem.[6] On the contrary, travelling on a coach carried in itself a certain sacred element that transcended the human sphere.[7]

The *flamen Dialis* is furthermore forbidden to see a mobilised army or to make an oath.[8] The first requirement is easily understandable as a fighting army is in constant mortal danger, it is potentially in the power of Death, so its sight is a *contangio enervans* for the *flamen Dialis,* a contact that diminishes his *mana*.[9] Whereas in archaic law the oath contains certain elements of self-malediction,[10] and so carries the possibility of decreasing *mana*, the numinous force, which must be definitely avoided by the *flamen Dialis*.[11] Being tied or manacled is in some way characteristic of the slave, who is deprived of the right to dispose over his own life; consequently, it is also a *mana*-diminishing factor. Therefore, the *flamen Dialis* is forbidden to wear any kind of knot or ring,[12] if a manacled person seeks refuge in his house, he should untied,[13] and if someone is being taken to be flogged and he imploringly puts his arms around the *flamen*'s knees, then it is forbidden to punish him on that day.[14] In this last case the convict's physical contact with the *flamen Dialis* presumably played some part too.[15]

The life of the *flamen Dialis* is pervaded by numerous other taboos too, which, although in a less concretely definable manner, are also meant to stop the diminishing of *mana*, the numinous force. So, for example, he may not touch a goat, raw meat, ivy, or beans and he may not even utter these words, nor is he allowed to touch flour or batter made with leaven.[16] The goat, the beans, and the ivy is related to the cult of the dead and as such,[17] and they must

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[1] Gell. 10, 15, 3. *equo Dialem flaminem vehi religio est*; Plin. *nat.* 28, 146; Serv. *in Verg. Aen.* 8, 552.
[2] Cf. Malten, L.: *Das Pferd im Totenglauben.* ArchJb 29. 1914.
[3] Verg. *Aen.* 7, 774. ff. Cf. Pötscher, W.: *Flamen Dialis.* In: Hellas und Rom. Hildesheim 1988. 422.
[4] Liv. 1, 21, 4. *ad id sacrarium flamines bigis curru arcuato vehi iussit*
[5] Pötscher 1988b 422.
[6] Meyer, E.: *Römischer Staat und Staatsgedanke*. Zürich–Stuttgart 1961. 42.
[7] Brelich, A.: *Il mito nella storia di Cecilio Metello.* SMSR 15. 1939. 33. *L' uso del carro, nell' antichitá romana, rientra sempre e senza eccezione in una sfera sacrale, super-umana.*
[8] Gell. 10, 15, 4. *item religio est classem procinctam extra pomerium id est exercitum armatum videre … item iurare Dialem fas numquam est*
[9] Wagenvoort 1972. 371. f.
[10] Cf. Liv. 1, 24, 8; 1, 32, 7.
[11] Pötscher 1988b 423.
[12] Gell. 10, 15, 6. 8. *item anulo uti nisi pervio cassoque fas non est ... nodum in apice neque in cinctu neque in allia parte ullum habet*
[13] Gell. 10, 15, 8. *vinctum si aedes eius introierit, solvi necessum est et vincula per impluvium in tegulas subduci atque inde foras in viam demitti*
[14] Gell. 10, 15, 9. *si quid as verberandum ducatur, si ad pedes eius supplex procubuerit, eo die verberari piaculum est*
[15] Wagenvoort 1972. 372.
[16] Gell. 10, 15, 12. 19. *capram et carnem inoctam et hederam et fabam neque tangere Diali mos est neque nominare ... farinam fermento imbutam adtingere ei fas non est*
[17] Wissowa 1912. 191.

be avoided by the *flamen Dialis* as he cannot step on a place where somebody was buried, nor can he touch a deceased person.[1] This does not contradict the fact that he is allowed to take part in funerals,[2] as he does not get into contact with the deceased, thus he does not enter the chtonic sphere; on the contrary, he facilitates eternal departure from the world of the living. His refraining from raw meat, which is too closely related to the butchered animal is also understandable. The increasing, swelling action of the leaven in the batter permits association with the reluctance towards a new, unknown force and probably tries to keep the *flamen Dialis* within the circumstances of the epoch in which only unleavened bread was known.[3]
The hair of the *flamen Dialis* can be cut only by a free person, his cut hair and nails can only be interred under a certain, fruit-yielding tree.[4] According to antique views hair was the main container of life-force and if it is touched or cut by an unworthy person, then a substantial energy decrease ensues through *contagio enervans*.[5] The concept of *arbor felix*, the tree yielding edible fruit, and that of *arbor infelix*, the barren tree or the tree yielding inedible fruit is also known from archaic law. A citizen found guilty of *perduellio* was hanged on the latter as they did not want to diminish or injure the life force or *numen* of a fertile tree by bringing it into direct or indirect contact with a dead criminal.[6] It is not by chance that the cut hair and nails of the *flamen Dialis*, which even in this state were carrying *mana*, had to be buried in the ground under an *arbor felix* thus enhancing its fertility.[7] The hair had to be cut with a bronze instrument instead of one made of iron.[8] This harmonizes with the prohibition to ride, clearly showing the formal conservatism of the Romans. It can thus be assumed that this prohibition originates from very ancient times, when tools made of iron—due to their modernity—were considered taboo in religious rituals.[9] Taking out fire from the house of the *flamen Dialis* was only allowed for sacral purposes,[10] which was meant to defend the fire pervaded by *numen* was burning in the house of the *flamen Dialis* against abuse. The privileged position of the *flamen Dialis* was emphasized by the provision according to which in a company he could be preceded in the seating arrangement only by the *rex sacrorum*.[11] It is difficult to interpret the provision that he must not walk under the vine-shoots hanging down.[12] According to Pötscher's explanation, this might be due to the fact that the *flamen Dialis* always had to wear an *apex* on his head[13] and the shoots hanging too low could brush it down from his head.[14] Conversely, in his interpretation Kerényi refers to the Dionysian characteristic present in grapes which would have decreased the numinous force of the *flamen Dialis*.[15] This explanation would be satisfactory if there had been knowledge of a rule that prohibited the *flamen Dialis* to drink wine.[16]

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[1] Gell. 10, 15, 24. *locum, in quo bustum est, numquam ingreditur mortuum numquam attingit*
[2] Gell. 10, 15, 25. *funus tamen exsequi non est religio*
[3] Pötscher 1988b 425.
[4] Gell. 10, 15, 11. 15. *capillum Dialis nisi qui liber homo est, non detonset ... unguium Dialis et capilli subter felicem arbore terra operiuntur*
[5] Wagenvoort 1956. 143.
[6] Latte, K.: *Religiöse Begriffe im frührömischen Recht.* Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung 67. 1950. 52.
[7] Pötscher 1988b 427.
[8] Serv. *in Verg. Aen.* 1, 448.
[9] Latte 1967. 203.
[10] Gell. 10, 15, 7. *ignem et flaminia, id est flaminis Dialis domo, nisi sacrum efferi ius non est*
[11] Gell. 10, 15, 21. *super flaminem Dialem in convivio nisi rex sacrificulus, haut quisquam alius accumbi*
[12] Gell. 10, 15, 13. *propagines e vitibus altius praetentas non succedet*
[13] Gell. 10, 15, 17.
[14] Pötscher 1988b 429.
[15] Kerényi, K. *Antike Religion*. München–Wien 1971. 190.
[16] Pötscher 1988b 429.

The prescriptions discussed so far were all meant to defend the *flamen Dialis* from the diminishing of *mana*, the numinous force. The following rules can be organised around a completely different point of consideration, namely in view of the fact that *flamen Dialis cotidie feriatus est*,[1] i.e., the *flamen Dialis* fulfils his cultic service every day. In Karl Kerényi's wording: *"Der zeitliche Ablauf seines Lebens war der Kultakt."*[2] According to Georges Dumézil *"le flamen historique se présente comme une victime qui n'est jamais immoléé"*.[3] Walter Pötscher defines the role of the *flamen Dialis* even more trenchantly. It is a definition which served also as a starting point for the present analysis. It asserts that: *"Der Flamen Dialis darf Priester im engeren Sinne des Wortes genannt werden, nicht so, wie man gelegentlich auch die Pontifices Priester zu nennen pflegt. Er repräsentiert den Gott, er macht den Gott in einer Form präsent."*[4] One must bear this in mind when interpreting the rule that the *flamen Dialis* is not allowed to stay outdoors without wearing the *apex*.[5] Originally he even had to wear it in the house,[6] which presumably refers back to the age when he was not allowed to stay in a house, or under any roof at all. The constant wearing of the apex appears in Roman legal thinking as a result of the fiction that the *flamen Dialis* permanently lives outdoors.[7] It is possibly the remnant of this stage when the ritual was not performed in the temple but in the open air in the sacred grove, that the legs of his bed had to be smeared with clay in order to assure direct contact with the earth.[8] The significance of this prescription becomes evident when analysed together with two further rules concerning the bed of the *flamen Dialis*: It is prohibited for the *flamen Dialis* to sleep in a bed that is not his own for three consecutive days; no other person may sleep in his bed; and beside the clay leg of the table there should be a pot with sacrificial milk loaf and sacrificial honey grist scones.[9] Based on these, it can be conjectured that the bed of the *flamen Dialis* is of certain cultic importance, constituting an integral element of his sacral function.

Although Latte did not fail to observe the parallel that can be drawn between this phenomenon and the Dodonian cult of Zeus,[10] further-reaching conclusions can be found in Pötscher.[11] The basis of the Dodonian cult is the *hieros gamos* taking place between Zeus Naios and Dione, the sacred communion of the Sky and the Earth which is meant to ensure the fertility of the area surrounding Dodona, in this case interpreted as the *Person–Bereicheinheit* of Dione, with the help of rain falling on it, in this case interpreted as the *Person–Bereicheinheit* of Zeus, who fulfils here the function of the god of rain, or generally the god of weather.[12] The priests in the service of this cult, the *hypophētai* were not allowed to wash their feet, and they were not allowed to sleep in bed all their life so that their direct contact with the earth should never be broken.[13] Thus several parallels can be pointed out between the elements of the two cults: For the Greeks the *hypophētai* are the priests of Zeus Naios, whereas the *flamen Dialis* is the priest of Iuppiter; i.e., the priest of the Roman equivalent of the same god. The *hypophētai* may not wash their feet and they have to sleep on the ground all their life, while the *flamen Dialis* sleeps in a bed whose legs are covered with

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[1] Gell. 10, 15, 16.
[2] Kerényi 1971. 198.
[3] Dumézil 1935. 44.
[4] Pötscher 1988b 431.
[5] Gell. 10, 15, 17. *sine apice sub divo licitum non est*
[6] Gell. 10, 15, 16.
[7] Latte 1967. 203.
[8] Gell. 10, 15, 14. *pedes lecti, in quo cubat, luto tenui circumlitos esse oportet*
[9] Gell. 10, 15, 14. *de eo lecto trinoctium continuum non decubat neque in eo lecto cubare alium fas est ... apud eius lecti fulcrum capsulam esse cum strue atque ferto oportet*
[10] Latte 1967. 203.
[11] Pötscher, W.: *Zeus Naios und Dione in Dodona*. In: Hellas und Rom. Hildesheim 1988. 173–208.
[12] Wissowa 1912. 121.
[13] *Il.* 16, 235.

clay so that the direct contact with the earth should be assured. The priests of Zeus Naios continually stay in the sacred grove,[1] while the *flamen Dialis* fulfils unceasing divine service all his life, always wears the *apex*, so he is *de iure* always in the open air, and he cannot leave his bed which ensures constant contact with the earth for more than three consecutive nights.
In the Dodonian cult woman-priests (*promanties*) also take part,[2] and the wife of the *flamen Dialis*, the *flaminica Dialis* plays such an important role in his life that if she dies, the *flamen Dialis* must also resign from his office.[3] Whereas the *promanties* serve as priestesses of Dione, the *flaminica* is present only as the feminine component of the same priestly function.[4] Taking all these into account it can be safely stated that the fact that the *flamen Dialis* sleeps nearly every night of his life in his bed with clay-covered legs, which makes its connection with the earth tighter, and near to it there should be sacrificial milk-loaf—as if enhancing its sanctity—can be regarded as a cultic event. The obligation of the *flamen Dialis*, who is present in his office essentially as a husband since he has to resign from the *flamonium* if the *flaminica* dies, to sleep on the ground night after night should be interpreted as a hierogamic act with the Earth.[5] The hierogamic view[6] need not necessarily be connected with a concrete myth—this would indeed be surprising in the case of Roman religion which is so short of mythical stories and so prone to historicizing the common Indo-European mythic thesaurus.[7] It suffices to transpose the image of the earth's fertilisation with rain to the level of the cult.[8]
Much less is known about the prescriptions concerning the *flaminica Dialis*. Roughly the same rules applied to her as to the *flamen Dialis*.[9] The colour red predominated in her clothing, which again cannot be accidental. Much rather it seems emphatic because it corresponds to the Roman wedding dress, which also accentuates the hierogamic concept. And so does the fact that the *flamen Dialis* had important ritual duties in the most ancient and solemn form of the Roman marriage ceremony, the *confarreatio*.[10] Naturally, the *flamen* and *flaminica* also had to live in a marriage,[11] bound according to this sacral ceremony of the highest order as their marriage constituted an integral part of the *flamen's* office.[12]
The tabooistic prescriptions and prohibitions governing the *flamen*'s life destined to stop the diminishing of *mana*, the numinous force, become intelligible in their structure if approached from this aspect of the priesthood of the *flamen Dialis*; i.e., his cultic connection with the Earth, symbolizing the Earth's fertilisation by the Sky, and in terms of other acts of his life meant to represent Iuppiter. His participation in the *confarreatio* marriage ceremony, which brings the ceremony closer to its purpose merely by his *praesentia Iovialis*, clearly fits into the line of these prescriptions.

V. First let us take a brief overview—following mainly Taeger[13] and Pötscher[14]—of the literature of the *numen Augusti* problem. Somewhat simplifying the question, Toutain

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[1] *Il.* 16, 234. f.
[2] Hdt. 2, 55.
[3] Gell. 10, 15, 22. *uxorem si amisit, flamonio decedit*
[4] Pötscher 1988b 434. ff.
[5] Pötscher 1988b 436.
[6] *Il.* 14, 312. ff.
[7] Latte 1967. 7.
[8] Pötscher 1988b 439.
[9] Gell. 10, 15, 26. *eadem ferme caeremoniae sunt flaminicae Dialis*
[10] Benedek, F.: *Die conventio in manum und die Förmlichkeiten der Eheschließung im römischen Recht.* PTE Dolg. Pécs 1978. 3. ff.; Treggiari, S.: *Roman Marriage. Iusti Coniuges From the Time of Cicero to the Time of Ulpian.* Oxford 1991. 21. ff.
[11] Gai. *inst.* 1, 112.
[12] Ov. *fast.* 6, 232; Pötscher 1988b 441.
[13] Taeger 1960. 145. ff.
[14] Pötscher 1988a 471–483.

regards Augustus's *numen* and person as being basically the same, and substantiates his views by stating that the conceptual separation, especially for provincial usage, is too minute, almost hair-splitting.[1] In his opinion he seems to forget the characteristic Roman religious tendency prone to atomizing and separation, which instead of synthesizing, connected clearly separable divine forces, so-called *Sondergottheiten* with numerous phenomena of everyday life, like the different phases of the life of corn.[2] Pippidi identifies the concepts of *numen Augusti* and *genius Augusti* with each other.[3] His view is challenged by Taeger who, highlighting the fundamental differences between the cult of *numen* and that of the *genius*, categorically rejects the attempt at identifying *numen Augusti* and *genius Augusti*.[4] In his opinion this cult was dedicated to Augustus's *numen*; i.e., the numinous force present in the emperor as Augustus, to obtain a general cultic figure, and not one related to some particular function.[5] Since *numen* is a concept less strictly cultic than *genius*, it is much rather connected with experiencing a given phenomenon as a religious experience.[6] With regard to the problem of *genius* and *numen* Fishwick states that the phrase *numen Augusti* was frequently used instead of the construction *genius Augusti* but this does not mean at all that the term *numen* would have meant the same as the term *genius*.[7] According to Latte, *genius* is the life-giving, personal creative power that dwells in man, which never becomes abstract.[8] This, as a matter of fact, does not mean that a given god, a human being, or a corporation could not have possessed *numen*, on the one hand, and *genius*, on the other, in Roman thinking.[9] *Numen* is much rather a given momentary operation, a (divine) manifestation, involving a kind of extra energy.[10] The divinity *genius*, though it is not itself a *genius*; at the same time, it possesses *numen* and—especially according to the Augustan and the subsequent terminology—is itself *numen*. This, however, does not solve the *numen Augusti–genius Augusti* problem because the term *numen genii* would be possible *de iure*, but it does not *de facto* appear in textual tradition. On the contrary, the construction *genius numinis* is somewhat problematic, especially with respect to the living *princeps*, considering the fact that emperors—at least those of the Augustan age—were not regarded *stricto sensu*; i.e., religiously revered gods in their lifetime.[11]

Consequently, the emperor possessing numinousity remained human throughout his life, even on the highest level of his exaltation, although, as it will be demonstrated, a human being representing divine substance.[12] In Roman thinking, the entry to the pantheon of certain abstract notions (e.g., Concordia, Pax, Salus) might have served as an analogy with

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[1] Toutain, J.: *Les cultes paiens dans l'Empire romain*. Paris 1907. 53. *Pour nous, le culte du numen impérial équivaut pleinement au culte de l'empereur vivant.*

[2] Latte 1967. 50. ff.; Pötscher 1988a 472.

[3] Pippidi, D. M.: *Le 'Numen Augusti'. Observations sur unr forme occidentale du culte impériale.* Revue des Études Latines 9. 1931. 83. ff.; 106. ff.

[4] Taeger 1960. 145.

[5] Taeger 1960. 146. *Man hat diesen Kult also dem numen Augusti geweiht, das heißt der in dem Kaiser als Augustus wesenden numinösen Macht, um eine ganz allgemeine, nicht durch irgendwelche Sonderfunktionen gebundene Kultgestalt zu gewinnen.*

[6] Taeger 1960. 379.

[7] Fishwick, D.: *Genius and Numen.* Harward Theological Review 62. 1969. 358. ff. (Quoted by Pötscher 1988a 473. f.)

[8] Latte 1967. 103.

[9] Pfister 1937. 1286.

[10] Porphyrio *in Hor. Carm*. 1, 35, 2. *Praesentia dicuntur numina deorum, quae se potentiamque suam manifeste tendunt.*

[11] Pötscher 1988a 475.

[12] Taeger 1960. 467.

the *consecratio* following the emperor's death.[1] The veneration of the living and the deceased emperor are two more or less clearly separable mechanisms because the deceased emperor became *de iure* god by the act of *consecratio.*[2] Hence he was entitled to the attribute *divus*—which contained a kind of distinction between the eternally venerated gods and the people who became, or were declared divine after their death, as it is pointed out by Servius,[3] but this distinction was bearing grammatical rather than cultic relevance.[4] Since it is an independent concept, the *numen* attributed to the ruler cannot be considered identical with the ruler's *genius* although, considering its origins, it incorporates some of its aspects.[5] At the same time, to a certain extent, it can be related to the Hellenistic, *eyergetēs* image of the ruler, which can be regarded as one of the sources of the Roman cult of the emperor.

Nevertheless, the most important point remains that by the *numen* of the ruler they invariably meant a special supernatural force and reality and if—as Cicero refers to it as well[6]—the unified, consenting Senate can possess *numen*, than the living *princeps* can possess *numen* as well. The fact that it possesses *numen*, a numinous force—as a result of the unconscious associations evoked by the rites surrounding his person rather than by virtue of the *consecratio* does not necessarily mean that he would become a *numen*; i.e., a divinity. The fact that the *numen Augusti* was cultically venerated as early as during the life of the *princeps* reveals that it was not primarily Augustus's person that partook of religious hommage but the numinous, manaistic force, the *numen praesens*, manifested for his subjects through his person.[7] On the other hand, it is quite difficult to establish a precise borderline because although it is true that Augustus did not become *divus* in his lifetime, he accepted the title *Divi filius* after Caesar, who became *Divus Iulius* in the year 42 BC.[8] It is in perfect accordance with the above that Augustus was first given the right to wear the wreath of the *triumphator* during all his public appearances,[9] then, in the year 19 BC. he obtained the privilege to wear the vestments of the *triumphator* in addition to the wreath on the first day of each year,[10] so he could appear among his subjects as the image of Iuppiter Optimus Maximus. According to Suetonius, the future greatness of the later Augustus was predicted to his father by a Dionysian augury in a dream when he saw his son invested with the ornaments of Iuppiter Optimus Maximus.[11] (It is worth noting that representing as Iuppiter was part of the private cult, but Servius knows of a statue of Augustus which represented the ruler in complete Appollonian vestments.[12])

Therefore, it can be righteously inferred that religious and dynamistic ideas played a role in Octavianus's becoming Augustus in the year 27 BC. because before him this *epitheton* had not been used for persons but only for sanctified things and cultic accessories. The word *augus*[13] originally meant nothing else than *the one that has been augmented*.[14] The construction *augustum augurium* first occurs in the *Annales* by Ennius.[15] On the textile by Athene, described in Ovidius's *Metamorphoses*, twelve Olympian gods can be seen who

[1] Taeger 1960. 242.
[2] Wissowa 1912. 243. ff.
[3] Serv. *in Verg. Aen.* 5, 45.
[4] Pötscher 1988a 479.
[5] Latte 1967. 103.
[6] Cic. *Phil.* 3, 32.
[7] Pötscher 1988a 482.
[8] Altheim 1932. III. 56.
[9] Dio Cass. 51, 20, 1.
[10] Dio Cass. 53, 26, 5.
[11] Suet. *Aug.* 94, 5. f. Cf. Altheim 1932. III. 58. ff.
[12] Altheim 1932. III. 63; Serv. *in Verg. ecl.* 4, 10.
[13] Walde–Hofmann 1938. I. 83.
[14] Wagenvoort 1972. 367; Domingo 1998. 7.
[15] Enn. *ann.* 502.

are sitting on their thrones with *augusta gravitate*; i.e., in human form but with an authority in their personality that exceeds human measure.[1] This expression can be encountered twice in connection with Hercules, who is recognized by Euander in Livius from his supernatural character, his emanation, *habitum formanque*,[2] and who appears in a corresponding shape when rising to heaven in Ovidius as well.[3] The poet explains the expression in accordance with the dynamistic connotations: *"Sancta vocant augusta patres, augusta vocantur templa sacerdotum rite dicata manu. Huius et augurium dependet origine verbi et quodcumque sua Iuppiter auget ope."*[4] This denomination thus immanently carries within itself the substance that stands beyond the human sphere, grows into the divine sphere, and though this is not defined each time the word is uttered.[5] It exerts its influence going deeper and originating deeper than any definition by means of unconscious associations. It is not by chance that in order to illustrate this, Altheim quotes Vitruvius's address to Augustus: *divina tua mens et numen, imperator Caesar*.[6] A reference to the same creative act can be found in Suetonius when he says that the glory of permanent fame, the gift of immortal gods will be received by those who increased the power of the Roman people from the smallest to the greatest measure.[7] So the word *augustus* derives from the verb *augere*, and is cognate with the term *augurium*, synonymous with *sanctus*, and even more with the expression *sacer*,[8] which receives its character from the sanctification performed by the *sacerdos* (cf. *sacer-dare*).[9] However, the sanctification could be carried out only by a person, the *augur*, who had the numinous ability, *the auctoritas* to increase *mana*.[10]

Considering the Roman concept of *religio* one must lay great emphasis on the experience of numinousity that reflects its special relationships, as Carl Gustav Jung (based on Otto Rudolf's views[11]) defines religion as a dynamic (i.e., full of *dynamos*—see also the identifiability of the concept of *numen* with the Greek term *dynamos*) existence or influence that affects the human subject from the outside getting control over it.[12] The main characteristic of the archetype can be found precisely in its numinousity because the archetypal situations and images generate an emotional and temperamental overcharge, and so elicit the feeling of *tremendum maiestatis* from the conscience. Jung defines the origin and gist of *mana* as the archetype being present in the collective unconscious, which appears as a person possessing power and authority; e.g., the hero and the godman: *"Die Mana Persönlichkeit ist aber eine Dominante des kollektiven Unbewußten, der bekannte Archetypus des mächtigen Mannes in Form des Helden, des Häuptlings, des Zauberers, Medizimannes und Heiligen, des Herrn über Menschen und Geister, des Freundes Gottes." "...Beide Figuren entsprechen dem Begriff des 'außergewönlich Wirkungsvollen', welchen*

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[1] Ov. *Met.* 6, 72. f.
[2] Liv. 1, 7, 9. ... *aliquamtum ampliorem augustioremque humana*
[3] Ov. *Met.* 9, 269. *maior ... videri ... et augusta fieri gravitate verendus.*
[4] Ov. *fast.* 1, 609. ff.
[5] Dio Cass. 53, 16, 8.
[6] Altheim 1932. III. 61.
[7] Suet. *Aug.* 31, 5.
[8] Cic. *nat.* 2, 62. 79; Stat. *Theb.* 10, 757; Macr. *Sat.* 1, 20, 7.
[9] Suet. *Aug.* 71. *loca quoque religiosa et in quibus augurato quid consecratur augusta dicuntur*
[10] Wagenvoort 1956. 12. f.
[11] Otto, R.: *Das Heilige*. Breslau 1917.
[12] Jung, C. G.: *Psychologie und Religion*. München 1997. 10. f. *Wenn ich von Religion spreche, muß ich zuvor erklären, was ich mit diesem Wort meine. Religion ist, wie das lateinische Wort religere meint, eine sorgfältige und gewissenhafte Beobachtung dessen, was Rudolf Otto treffend „das Numinosum" genannt hat, nämlich eine dynamische Existenz oder Wirkung, die nicht von einem Willkürakt verursacht wird. Im Gegenteil, die Wirkung ergreift und beherrscht das menschliche Subjekt, welches immer viel eher ihr Opfer denn ihr Schöpfer ist.*

Ausdruck Lehmann in seiner bekannten Monographie[1] *erklärend für Mana setzt. Ich nenne daher eine solche Persönlichkeit einfach Mana-Persönlichkeit. Sie enspricht einer Dominante des kollektiven Unbewußten, einem Archetypus, der sich in der menschlichen Psyche seit unvordenklichen Zeiten durch entsprechende Erfahrung ausgebildet hat. Der Primitive analysiert nicht und gibt sich keine Rechenschaft darüber, warum ein andere ihm überlegen ist. Ist er klüger und stärker als er, so hat er eben Mana, das heißt er hat eben eine größere Kraft; er kann diese Kraft auch verlieren, vielleicht, weil im Schlaf jemand über ihn entwickelt sich historisch zur Heldenfigur un zum Gottmenschen, dessen irdische Figur der Priester ist."*[2] It is in complete harmony with this that the operation of *numinosum* seizes and dominates the human subject, the subject being the victim of this operation rather than its originator, independently of the subject's will.[3]

It is worth taking a quick glance at how the concept of *imperium* is related to the concept of *numen* and to the concept of *auctoritas* that augments and expresses the capacity of numinousity by its creative function even on the level of historical reality. We have seen that the religious and military leader (both functions were fulfilled in the beginning by the *rex* in Rome) possesses *mana* since he activates the archetype of the divine leader and that of the hero on the level of the collective unconscious.[4] His *mana* enables him to increase the fertility of the land as it can be seen from ethnological examples. According to this, in Wagenvoort's interpretation *imperare* originally not meant nothing else but 'to call to life', 'to fertilize', as the general, who ordered (*imperabat*) his soldiers to attack an alien camp, conjured up, created the force necessary to carry out the mission with the help of his magic words; therefore, he draws the conclusion that *imperium* is nothing else than the ability of creating and transmitting a mysterious power.[5] Köves-Zulauf mentions it as a specificity of this that: *"the particular interest of the issue, not to be discussed in great detail here, is that parere (to give birth) is a typically feminine word, whereas imperium was exclusively possessed by men."*[6]

Without endeavouring to thoroughy explain this phenomenon, let us proceed again from C. G. Jung's definition of the *Mana-Persönlichkeit*, according to which it is nothing else than the archetype of the power-possessing man figure that dwells in the collective unconscious which dominates the conscious personality and takes over the autonomous power and value of the *anima*; and later the identification with this figure creates the idea of possessing the *mana* of the *anima*.[7] By this, although the conscious did not prevail over the unconscious, it integrated the power of its representative, the *anima* to such an extent that the possibility of a more direct connection between the *ego* and the unconscious was created, through which the *ego* acquired the identification with its ideal which exercises higher power, the one possessing the power of *mana*, the *außergewöhnlich Wirkungsvolles*, and so it becomes a *mana*-personality.[8] That is, it is through the harmonization of the relation

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[1] Lehmann, F. R.: *Mana*. Leipzig 1922.

[2] Jung, C. G.: *Die Beziehungen zwischen dem Ich und dem Unbewußten*. München 1997. 113; 118. f.

[3] Jung 1997a 11. *Das Numinosum—was immer auch seine Ursache sein mag—ist eine Bedingung des Subjekts, die unabhängig ist von dessen Willen. Jedenfalls erklärt sowohl die religiöse Lehre, als auch der consensus gentium immer und überall, daß diese Bedingung einer Ursache außerhalb des Individuums zuzuordnen sei. Das Numinosum ist entweder die Eigenschaft eines sichtbaren Objektes oder der Einfluß einer unsichtbaren Gegenwart, welche eine besondere Veränderung des Bewußtseins verursacht.*

[4] Wagenvoort 1972. 371.

[5] Wagenvoort 1972. 371. f. *Sehen wir richtig, so bedeutete das Zeitwort imperare ('befehlen', 'herrschen') ursprünglich 'zum Leben erwecken', 'befruchten'; der Feldherr, der seinen Soldaten befahl (imperabat), ein feindliches Lager zu berennen, erzteugte in ihnen durch sein magisches Wort die Kraft zur Erfüllung seines Auftrages. Imperium ist also eine Form der Übertragung geheimnisvoller Kraft.*

[6] Köves-Zulauf 1995. 31.

[7] Jung 1997b 113.

[8] Jung 1997b 114. f.

maintained with the *anima* that one becomes a leader capable of evoking the archetype of the possessor of power, who has the ability in the strictest sense of the word to create, to bear certain ideas of power in others that is designated by a typically feminine word *imperium*. (The leader who lives in disharmony with the *anima* also evokes the archetype of the manaistic personality in his subjects but precisely due to this disharmony, by which the power of the *anima* prevails over him, he becomes destructive, cannot appropriate the *imperium* that is creative, basically due to the word's etymology.)

Augustus achieved the stability of his legitimacy by the superior handling of all these associated points connected to *auctoritas*, *imperium* and *numen* through transferring the formation called—to use Max Weber's formula—charismatic legitimization into the construction called traditional legitimization. The concept of *numen Augusti* organically fits into the Roman religious system as, on the one hand, it evokes in the subjects the concept of *numen*, the divine presence and dynamistic operational mode; on the other hand, it evokes *augus*, the numinous experience of the charismatic leader who possesses the augmenting, creative ability, *mana*. Köves-Zulauf's characterisation constitutes a convenient parallel, it gives a synthesis of the relationship of Roman religion with language: "*Therefore, Roman religion is the religion of discipline, of repression, of anxiety, not of eliberated relief, as the Greek... From here ensues the neurotic relationship of Roman religion with speech.*"[1] As we have seen it is not only the Romans' relationship with speech that is relatively neurotic, but also their general relationship with the numinous experiences of religion as their relationship with the above analyzed archetypal phenomena is basically negative, refusing. This should not necessarily be the case as "*the archetype itself is neither positive nor negative but a morally neutral numen that becomes good or bad only as a result of its collision with the conscience.*"[2] It is precisely this neurosis inherent in Roman religion, constituting its most basic part that is used by the reigning power—so as to ensure its unquestionability—by elevating the concept of authority to numinous regions, generating the feeling of *tremendum maiestatis*.

[1] Köves-Zulauf 1995. 249.
[2] Jung, C. G.: *Pszichológia és költészet (Psychology and Poetry).* Budapest 2003. 100.

Verbality in Archaic Roman Law

Beginning with the well-known fact that one lost a lawsuit if he made even a single verbal mistake in his speech during the process of the *legis action sacramento*, we have to examine through some examples the power of verbality in *ius sacrum*. (I.) We study the development of the concept of *fatum* (II.), a narration of Plinius maior concerning the *dedicatio* of the *templum* of Ops Opifera (III.), another narration based on a source of Plinius related to a special interpretation of *prodigium* (IV.), as well as parallels that can be discovered between *"fruges excantare"* and the ceremony of the *evocatio* (V.). From these one could gain a picture of connection between Roman religion and jurisprudence of the Archaic Age and the spoken word.

I. The description of the ritual of *legis actio sacramento im rem* is provided by Gaius.[1] This is the locus that should be brought into harmony with the explanation of the meaning of *manum conserere* given by Gellius, and with the above presented text. Aulus Gellius in *Noctes Atticae*[2] wants to get an explanation for the origin and meaning of *"ex iure manum consertum"*, an expression coming from the old *legis actio* claims, from a renowned *grammaticus*, who first refuses to answer the question since he deals with *grammatica*, Vergilius, Plautus and Ennius. In reply, Gellius remarks that it was exactly chapter eight of Ennius's *Annales* where he found the phrase; in turn the *grammaticus* asserts that Ennius drew this expression not from legal but poetic language. The actual explanation follows after that.[3] Consequently, according to Gellius, *manum conserere* means grasping the object of dispute manually *(manu prendere)*, which corresponds to Gaius's phrase *rem apprehendere*; however, in view of its purpose it has definitely separated from that in the course of time.[4] According to Gaius's locus, the assertion of "*property*" or "*stronger right to possess*"[5] by

[1] Gai. *Inst.* 4, 16. *Si in rem agebatur, mobilia quidem et moventia, quae modo in ius afferri adducive possent, in iure vindicabantur ad hunc modum: qui vindicabat, festucam tenebat; deinde ipsam rem apprehendebat, velut hominem, et ita dicebat: HUNC EGO HOMINEM EX IURE QUIRITIUM MEUM ESSE AIO SECUNDUM SUAM CAUSAM; SICUT DIXI, ECCE TIBI, VINDICTAM IMPOSUI, et simul homini festucam imponebat, adversarius eadem similiter dicebat: MITTITE AMBO HOMINEM. Illi mittebant. qui prior vindicaverat sic dicebat: POSTULO, ANNE DICAS, QUA EX CAUSA VINDICAVERIS? ille respondebat: IUS FECI, SICUT VINDICTAM IMPOSUI. Deinde qui prior vindicaverat, dicebat: QUANDO TU INIURIA VINDICAVISTI D AERIS SACRAMENTO TE PROVOCO; adversarius quoque dicebat similiter: ET EGO TE; aut si res infra mille asses erat, scilicet L asses sacramentum nominabant. deinde eadem sequebantur, quae cum in personam ageretur. Postea praetor secundum alterum eorum vindicias dicebat, id est interim aliquem possessorem constituebat, eumque iubebat praedes adversario dare litis et vindiciarum, id est rei et fructuum; alios autem praedes ipse praetor ab utroque accipiebat sacramenti causa, quod id in publicum cedebat. Festuca autem utebantur quasi hastae loco, signo quodam iusti dominii, quando iusto dominio ea maxime sua esse credebant, quae ex hostibus cepissent; unde in centumviralibus iudiciis hasta proponitur.*

[2] Gell. 20, 10, 1–10.

[3] Gell. 20, 10, 7. ff. *"Manum conserere." Nam de qua re disceptatur in iure in re praesenti sive ager sive quid aliud est, cum adversario simul manu prendere et in ea re sollemnibus verbis vindicare, id est vindicia. Correptio manus in re atque in loco praesenti apud praetorem ex duodecim tabulis fiebat, in quibus ita scriptum est: 'si qui in iure manum conserunt.' Sed postquam praetores propagatis Italiae finibus datis iurisdictionibus negotiis occupati proficisci vindiciarum dicendarum causa ad longinquas res gravabantur, institutum est contra duodecim tabulas tacito consensu, ut litigantes non in iure apud praetorem manum consererent, sed 'ex iure manum consertum' vocarent, id est alter alterum ex iure ad conserendam manum in rem, de qua ageretur, vocaret atque profecti simul in agrum, de quo litigabatur, terrae aliquid ex eo, uti unam glebam, in ius in urbem ad praetorem deferrent et in ea gleba tamquam in toto agro vindicarent.*

[4] Kaser, M.: *Zur „legis actio sacramento in rem"*. Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung 104. 1987. 57.

[5] Kaser, M.: *Eigentum und Besitz im älteren römischen Recht*. Weimar 1956. 16.

both parties through uttering the sentence *"HUNC EGO HOMINEM EX IURE QUIRITIUM MEUM ESSE AIO"* refers to things present *in iure* and grasped manually. Thus, initially *vindicatio*—just as *mancipatio*[1]–was created for transactions involving chattels of greater value (i.e., slaves and draught animals) since the thought that rule over a single land can be exercised merely by placing a rod or hands on it would suppose considerable abstraction of generally accepted formalism, hardly reconciled with the way of thinking of the archaic age.[2] Therefore, the obligation that the object of dispute should be present before the *magistratus* applied to any and all things; and regarding the things that could be brought there without any difficulty this requirement continued to be in force without any changes.[3] In the event of lands and things, or totality of things that could not be taken to *comitium*—according to Gellius, in order for the proceedings to comply with the provisions of the Twelve Table Law,[4] which stipulated that the act of *manum conserere* had to be implemented *in iure*, i.e., before the law—both the *magistratus* and the parties to the dispute went to the land in order to implement *vindicatio* there by which the given land became *ius*, i.e., venue of jurisdiction. As the power of Rome was extended, the burden on the *magistratus* increased, and so it was no longer possible to apply the above procedure; therefore, a new solution was looked for.

Contrary to the provision of the Twelve Table Law, through tacitus consensus the act of *manum conserere* was no longer implemented *in iure*; instead, to this end the parties called each other from before the law.[5] The party claiming the thing (the latter plaintiff) called the owner of the thing (the later defendant) from the *comitium* to the place where the object of dispute lay; the parties went there together, and took a piece of the thing, then brought it to Rome before the *magistratus* where *vindicatio* described by Gaius was carried out as if the entire land had stood before the law. (Gaius is silent about the procedure of *manum conserere* since the narration of *legis actio* lawsuits provides a historical outlook for those who study *iurisprudentia*, and not an antiquarian who carries out research like Gellius.)[6] So the ritual of *manum conserere* was applied only in the case of certain objects of dispute as it were to prepare *vindicatio*. The reference made to *praetor* in Gellius's text with respect to the time of the Twelve Table Law is, of course, anachronism.[7] The territory of the State of Rome, the *ager Romanus antiquus* did not go beyond a five-six mile strip of land surrounding the *pomerium* on the left bank of the Tiberis;[8] this strip was extended to ten miles only through the occupation of Fidenae in 426;[9] it is probable that merely this increase in territory made it necessary to create the procedure of *ex iure manum consertum vocare* instead of *in iure manum conserere*.[10]

The development described by Gellius perfectly corresponds to the changes in the procedure described in *Pro Murena*, implemented *in iure*; likewise they can be brought into harmony with the ritual of *vindicatio* presented by Gaius, if the sentences bequeathed by Cicero are interpreted as the preparatory procedure of the actual *vindicatio*.[11] Accordingly, for picking up a lump of earth, that is, to implement *manum conserere* the assistance of the *magistratus* was

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[1] Gai. *Inst.* 1, 119.
[2] Thür, G.: *Vindicatio und deductio im frührömischen Grundstückstreit.* Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung 94. 1977. 296.
[3] Kaser 1987. 57.
[4] XII tab. 6, 5/a *SI (QUI) IN IURE MANUM CONSERUNT*
[5] Cf. Cic. *De orat.* 1, 10, 4; *fam.* 7, 13, 2; *Att.* 15, 7.
[6] Kaser 1987. 59.
[7] Wieacker, F: *Die XII Tafeln in ihrem Jahrhundert.* In: Les origines de république Romaine. Entretiens sur l'antiquité classique 13. 1968. 303. ff.
[8] Thür 1977. 298.
[9] Alföldi, A.: *Hasta – Summa Imperii. The Spear as Embodiment of Sovereignty in Rome.* American Journal of Archeology 63. 1959. 304.
[10] Thür 1977. 298.
[11] Kaser 1987. 63.

no longer required since he could set out from the assumption that the witnesses present when the act was carried out[1] would report during the proceedings any irregularity that might have occurred. By that the land no longer represented *ius*, venue of jurisdiction.[2] Now *manum conserere* was used in the meaning of *vindicias sumere*; in the sense of *vindicatio*,[3] i.e., grasping the object of dispute by the parties in the form of *manum conserere* and bringing it before the law. Just as the *magistratus* made his job easier, the parties did the same provided that an agreement was reached between them regarding the issue; if they wanted to bring an action regarding a definite land, they brought a lump of earth from the land needed later for *vindicatio*, and at the instruction of the *magistratus* they only pretended to leave from before the law.[4]

II. The overt insistence on text of *legis actio sacramento* is widely known since—as Gaius himself stressed it—one who misquoted a single word of the text lost the lawsuit.[5] In Roman thinking faith in the impact of spoken words constituting reality bore high significance.[6] *"The reason for that was the Romans' unshakeable faith in the numinous force of uttered words; it is our firm belief that all things considered existence is identical with the existence uttered, complete reality is no other than reality cast into words."*[7]
Regarding the origin of the word *fatum* several Roman authors can be quoted. Varro believes the term *fatum* comes from the fact that the Parcae determine the lifespan of infants by stating their decision;[8] which is confirmed by Fronto who asserts that destiny is called *fatum* after the spoken word. This recognition of Antique people that *fatum* derives from the verb *for, fari, fatus sum* has been confirmed by modern linguistics.[9] The commentary written by Servius on Vergilius's Aeneis helps to go into deeper analysis by asserting that *fatum* is participium, and denotes what the gods have said;[10] consequently, the term itself means *divine word, divine decision (Götterspruch)*.[11] On the other hand, there is a goddess called Fata: on the territory of Lavinium three altar inscriptions from the 4th-3rd c. B.C. were found which prove the cult of the Goddess Fata; her name is Neuna (Nona), which is known from several literary sources. Here, Gellius quotes Varro and Caesellius Vindex, who describes the name of the Parcae, and, on the grounds of Livius Andronicus's quotation from the *Odysseia*, the coming of a day

[1] Fest. 394. *Superstites testes praesentes significat. Cuius rei testimonium est, quod superstitibus praesentibus i, inter quos controversia est, vindicias sumere iubentur.*
[2] Kaser 1987. 64.
[3] Fest. 516. *Vindiciae appellantur res eae, de quibus controversia est. De quo verbo Cincius sic ait: 'Vindiciae olim dicebantur illae, quae ex fundo emptae in ius adlatae erant.' At Ser. Sulpicius vindiciam esse ait qua de re controversia est, ab eo quod vindicatur. … XII: 'Si vindiciam falsam tulit, si velit is … tor arbitros tris dato, eorum arbitrio fructus duplione damnum decidito.'*
[4] Thür 1977. 298.
[5] Gai. *Inst.* 4, 11. *Actiones ... ideo quia ipsarum legum verbis accomodatae erant et ideo inmutabiles proinde atque leges obseervabantur; unde eum qui de vitibus succisi ita egisset, ut in actione vites nominaret, responsum est rem perdidisse, cum debuisset arbores nominare eo quod lex XII tabularum ... generaliter de arboribus succisis loqueretur.;* 30. *Sed istae omnes legis actiones paulatim in odium venerunt, namque ex nimia subtilitate veterum qui tunc iura condiderunt eo res perducta est, ut vel qui minimum errasset litem perderet.*
[6] Kaser, M.: *Das altrömische ius.* Göttingen 1949. 309. ff.
[7] Köves-Zulauf, Th.: *Reden und Schweigen. Römische Religion bei Plinius maior.* München 1972. 312; Köves-Zulauf, Th.: *Bevezetés a római vallás és monda történetébe (Introduction to the History of Roman Religion and Myth).* Budapest 1995. 207.
[8] Varro *ling.* 6.52. *Ab hoc … fari, tempora quod tum pueris constituant Parcae fando, dictum fatum et res fatales.*
[9] Walde, A.–Hofmann, J. B.: *Lateinisches Etymologisches Wörterbuch*. Heidelberg 1954. I. 463. ff.
[10] Serv. *in Verg. Aen.* 2, 54. *Modo participium est, hoc est, quae dii loquuntur.*
[11] Pötscher, W.: *Das römische Fatum – Begriff und Verwendung.* In: Hellas und Rom. Hildesheim 1988. 490.

foretold by Morta.[1] The Parca Morta/Maurtia named by Caesellius Vindex is also known from the inscription from Lavinium;[2] the question arises if the goddess Fata can be called Parca; more specifically: if we are talking abut the same goddess when referring Fata and Parca?[3] Nona is named Fata on the inscriptions, and Parca by literary sources; Morta is referred to as Parca both on inscriptions and in literary sources. On the other hand, the fragment from Livius Andronicus talks about Maurtia with Fata being as it were her interpreter; that is, her scope of activity is *fari*. Through Gellius it is known from Varro that the name of Parca comes from the word *"partus"* by changing one sound thereof,[4] so her name was originally Parica; that is, she was adored as the goddess of delivery, birth. Parca, however, can be also Morta/Maurtia; consequently, she is in close relation with death, which is highly stressed for a goddess of delivery and birth when a child is born dead; but the sources reveal that Morta/Maurtia can stand beside goddess Fata as an interpreter, which is not much surprising when considering Fata's relation to *fatum*, whose meanings include: *death, destruction, perishing*.

In Greek faith the Moirai measured out mortals' *moira*, portion of life; and since they followed up human life, they were active at birth too. Roman thinking split this function into two; goddesses carried out tasks related to birth as Parcae, they made decisions over human fate as Fatae; while the Greek Moirai united both aspects in themselves, Roman religion—using the methodology known from the creation of the image of *Sondergötter*[5]—expressed these two functions through two goddesses (Parca and Fata); the difference between them is based only on shift of emphasis since, as the comparison of the three inscriptions and the literary sources has revealed, the Parca is at the same time Fata, and the Fata is at the same time Parca,[6] depending on which *numen* of which aspect comes to the front.[7]

It is a fact that both the word *fatum*, the *divine word* and *Fata*, the *goddess who has spoken* come from the verb *fari*; their form with their suffix is participium perfectum. In classic Latin this form usually denotes passive voice, except for *deponens* verbs; on the other hand, for certain verbs with form and denotation in the active voice grammar books define participium perfectum as denoting active voice (although this form, as shown above, is primarily passive). Even without exploring the roots of the problem in the history of language it is unambiguously clear that participium perfectum in ancient Indo-German language was exempt from diathesis,[8] it could be used either in active, or passive voice, or in intransitive meaning. For deponens verbs, which include *fari*, active is the primary meaning but passive is also allowed.[9] The relation between *fatum* and *Fata* does not seem to be an accident; what is more, it is quite probable that what they manifest is the active and passive aspects of the same uniform experience;[10] *fatum* is the divine word, *Fata* is the result of the activity of the who utters this word. The act of *fari* is possessed by each god who utters a given divine decision;[11] in line with this interpretation, Isidorus Hispalensis also calls everything that the

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[1] Gell. 3, 16, 10. *Parca ... Nona et Decima a partus tempestivi tempore.*; 11. *Tria nomina Parcarum sunt Nona, Decuma, Morta et versum hinc Livii ponit ex Odysseia: quando dies adveniet, quem profata est Morta?*

[2] Latte, K.: *Römische Religionsgeschichte.* München 1967. 53.

[3] Pötscher 1988. 487.

[4] Gell. 3, 16, 10. *Nam Parca, inquit, inmutata una littera a partu nominata.*

[5] Usener, H.: *Götternamen. Versuch einer Lehre von der religiösen Begriffsbildung.* Bonn 1896. 75.

[6] Pötscher, W.: *Person-Bereichdenken und Personifikation.* Literaturwissenschaftliche Jahrbücher 19. 1978. 481. *Dh. dass die Parca auch Fata und die Fata auch Parca ist (oder sein kann).*

[7] Cf. Pötscher, W.: *Vergil und die göttlichen Mächte – Aspekte seiner Weltanschauung.* Hildesheim–New York 1977. 33. ff.

[8] Brugmann, K.: *Griechische Grammatik.* München 1913. 535.

[9] Vö. Prisc. *Inst.* 2, 379, 11.

[10] Pötscher 1978. 490.

[11] Cic. *fat.* 30. *si ita fatum erit*; Liv. 25, 12, 6. *mihi ita Iuppiter fatus est*; Verg. *Aen.* 10, 621. *cui rex aetherii breviter sic fatur Olympi*

gods tell and Iuppiter says *fatum*.[1] Therefore, *fatum* is the giving of the divine decision uttered; *fari* was not limited to Fataere, or to Parcaere; *fatum* can be given, for example, by Iuppiter,[2] Iuno,[3] Apollo[4] and gods in general.[5]
It was not by accident that the concepts of the Romans formed of destiny, fate were so strongly attached to the uttered divine word's force to create reality; they identified human existence with the formulation of existence, casting existence into words; this fundamental experience may bring closer to understanding the Roman thinking *ex asse*.

III. In his account Plinius maior describes that Ops Opifera's Temple was consecrated by *pontifex maximus* Metellus, but due to his difficulties in speaking fluently he was compelled to suffer for months until he was able to utter the words of the *dedicatio*.[6] Sometime between 123 B.C. and 104 B.C. another, the fourth temple was raised for goddess Ops in Rome—it cannot be excluded but seems not much probable that her temple on the Capitolium was restored—and it was *pontifex maximus* L. Caecilius Metellus Delmaticus who had to consecrate this temple, of whose career no more is known for sure than that he fulfilled the office of the high priest in 114 B.C.[7] Plinius's text gives an account of Metellus's difficulties in using language, which does not seem to have any historical significance, but in terms of religion it turns the attention to a cardinal point of Roman *religio*; specifically, the requirement of *"the pre-determined, accurate form, exact order of the utterance of the words to be spoken"*.[8] Complete physical health was in Rome—as in several other religions—a prerequisite for fulfilling priestly functions,[9] which seems all the less surprising since this requirement held both with respect to sacrificial animals,[10] and the official participants of sacrifices.[11]
The question may arise how come that Metellus acted as *pontifex maximus*; all the more, as he was the only *pontifex* who had some physical disability from birth as sources reveal. (Albeit, tradition maintains the memory of another *pontifex maximus* L. Caecilius Metellus, who fulfilled this office between 243 B.C. and 221 B.C., and who got blind after having been elected, as he saved the Palladium guaranteeing the existence of Rome from Vesta' temple during a fire, which was not allowed to be seen by anybody, including the *pontifex maximus*.[12] After he had got blind, being scrupulously precise in complying with religious requirements, and elected *dictator* seventeen years after he had been alleged to have got blind, this high priest[13] did not resign; because—as rhetoric *controversiae* reveal[14]—a man with physical handicaps *was not permitted to become pontifex*, but in case of accidents that occurred when he had already fulfilled the office he was not obliged to resign.[15] It is, however, highly

[1] Isid. *Etym.* 8, 11, 90. *Fatum dicunt esse, quidquid dii fantur, quidquid Iuppiter fatur.*
[2] Verg. *Aen.* 4, 612. *si ...necesse est, et sic fata Iovis poscunt*
[3] Verg. *Aen.* 7, 294. *fata Iunonis iniquae*
[4] Acc. *trag.* 481. *veter fatorum terminus sic iusserat*
[5] Verg. *Aen.* 2, 54. *et si fata deum si mens non laeva fuisset*
[6] Plin. *nat.* 11, 174. *Metellum pontificem adeo inexplanatae* (sc. linguae) *fuisse accipimus, ut multis mensibus tortus credatur, dum mediatur in dedicanda aede Opi Opiferae dicere.*
[7] Wissowa, G.: *Religion und Kultus der Römer.* München 1912. 203; Latte 1967. 73.
[8] Köves-Zulauf 1995. 71.
[9] Wissowa 1912. 491.
[10] Sen. *contr.* 4, 2. *Sacerdos non integri corporis quasi mali ominis res vitanda est. Hoc etiam in victimis notatur, quanto magis in sacerdotibus?*
[11] Plin. *nat.* 7, 105. (Sc. M. Sergius Silus) *in praetura sacris arceretur a collegis ut debilis*
[12] Plin. *nat.* 7, 139.
[13] Val. Max. 8, 13, 2. *Metellus ... pontifex maximus tutelam caeremoniarum per duo et XX annos neque ore in votis nuncupandis haesitante neque in sacrificiis faciendis tremula manu gessit.*
[14] Sen. *contr.* 4, 2.
[15] Köves-Zulauf 1995. 72.

probable that the narrative on *pontifex maximus* L. Caecilius Metellus's blindness is nothing else but rendering the myth of Caeculus, the ancestor of the *gens Caecilia*, coming from Vulcanus and found next to the public hearth dedicated to Vesta as a historical fact.[1]) L. Caecilius Metellus Delmaticus becoming *pontifex maximus* might have been made possible partly by the growing rationality of the age, on the one hand; as a result of this rationality certain religious requirements were no longer seriously observed, or they tried to evade them in some form or other;[2] and by the fact that most of the texts to be spoken by Roman priests were pre-determined, and so could be learned by heart even by the *pontifex* afflicted with inherent speech difficulty through lengthy and tiring exercise;[3] as a matter of fact, this would not have been possible in a religion based on spontaneous sacred speech, free preaching and prophetic prayer.[4]

The text of the *dedicatio* most probably contained the name of goddess Ops Opifera, which must have posed a double challenge to *pontifex maximus* with his difficulties in speaking fluently *(inexplanata lingua)*: to utter an alliterating name was certainly not an easy task for a man with speech difficulties and perhaps stuttering; furthermore, it was exactly during the *dedicatio* that the accurate naming of the goddess was highly important since Ops Opifera belonged to the deities of sowing.[5] The significance of the goddess Ops was never doubtful to the Romans for—as her name shows[6]—it was attached to richness; more exactly, to the richness of the produce; in other words, Ops incorporated the rich yield of the arable land, manifested the helping aspect of the mother earth;[7] as a matter of fact, in line with the inclination to go into details inherent in Roman religion various forms of manifestation of the soil were distinguished, so the soil was adored in general as Tellus, in its aspect enhancing life as Ceres, and in its capacity to produce crop as Ops.[8]

Roman religion, however, divided the aspects of Ops into further parts, as it was customary for it to assign so-called *Sondergottheiten* to the chronologically succeeding elements of various events and actions.[9] On 25 August, they held the festivity of Ops Consiva, i.e., of the goddess who *"has carried out gathering of the crop"*; and two days earlier, on 23 August, the festivity of Ops Opifera was celebrated,[10] from which it can be unambiguously deduced that the name Ops Opifera—its second part is connected with the verb *"ferre"*—should be interpreted as the goddess[11] *"bringing abundance of heavy crop"*.[12] On that same day, 23 August, they celebrated Volcanalia, and its logical connection with the festivity of Ops Opifera becomes clear when considering that it is wheat not collected yet in pitfalls that is the most exposed to fire, and is in need of Ops Opifera's resolute protection against Vulcanus.[13]

Today it is no longer possible to explore in every detail why the Romans thought it was especially dangerous to call the deities of sowing by their names; however, it indicates the importance of the goddess Ops that in the course of searching for the secret guardian deity of

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[1] Köves-Zulauf 1995. 74.
[2] See Latte 1967. 276.
[3] Latte 1967. 198. 392; Wissowa 1912. 397; Dumézil, G.: *La religion romaine archaïque.* Paris 1973. 53. ff.
[4] Köves-Zulauf 1972. 77.
[5] Köves-Zulauf 1972. 78.
[6] Walde–Hofmann 1954. II. 205. f.
[7] Radke, G.: *Die Götter Altitaliens.* Münster 1965. 238. ff.
[8] Köves-Zulauf 1995. 76.
[9] Latte 1967. 51. ff.; Radke 1965. 23. ff.
[10] Radke 1965. 239.
[11] Köves-Zulauf 1995. 77.
[12] Köves-Zulauf 1972. 79.
[13] Latte 1967. 73. 129; Köves-Zulauf 1972. 79.

Rome—this name was not known by the public just to prevent *evocatio* by the enemy—Ops has also arisen as a deity who might have fulfilled this function.[1]
The findings summed here clearly show that the validity of *dedicatio* as an integral institution of *ius sacrum* was inseparably attached to the exact utterance and proper order of the words to be spoken; as a parallel this phenomenon makes it more definite that *legis actio sacramento in rem* was strongly focused on the text.

IV. A peculiar interpretation of *prodigium* provides an interesting parallel with the reality creating function of the spoken word. First, a brief examination of the significance of *prodigium* will be given. The Romans called the accustomed order, peaceful state of the world *pax de(or)um*, which meant the gods' peaceful relation to humans; and if this order was upset, it was always deducible to the gods' stepping out of this peaceful state.[2] The breakdown of the cosmic order, that is, any extraordinary, new event was considered *prodigium*.[3] The etymology of the word is dubious—in Walde–Hofmann's interpretation *prodigium* derives from the compound *"prod-aio"*; consequently, *prodigium* means foretelling, or pointing ahead. This interpretation does not seem satisfying because *prodigium* was a term that always had to be interpreted, and that is why in Rome they always used the help of *pontifices, libri Sibyllini* or *haruspices* to carry out this task, since *prodigium* itself does not state anything; apparently another interpretation is more proper that asserts that the word derives from the compound *"prod-agere"*, so *prodigium* means the process of moving ahead; accordingly, *prodigium* is nothing else than the act when *"breaking through this shell, transcendental forces hiding behind the surface come forth and become manifest"*.[4]
Among the forms of interpretation of *prodigium* Plinius maior discusses the following case at a highlighted point: when laying the foundations of the Capitolium the Romans found a human head on the Tarpeius Hill; they sent delegates to the most famous oracle of Etruria, Olenus Calenus, who tried to transpose the *prodigium* with fortunate significance to his own people. In front his feet he drew the image of the temple with his cane and said: *"So you say so, Romans? This is where Iuppiter Optimus Maximus's temple will be, we found the head here?"* The oracle's son warned the delegates about his father's trick—if they had given improper answer, the prediction would have passed on Etruria: *"We do not say that the head was found exactly here but in Rome"*, replied the delegates.[5] In his account Plinius refers to the concordant evidence in the *Annales*, and research has established that he took the description from Valerius Antias, who used Piso and Fabius Pictor as sources;[6] accordingly, this legend had existed as early as the 3rd c. B.C.[7] The author does not intend to analyse the symbolism of the head in detail, just notes that the durability of buildings (the Capitolium was the symbol the city of Rome and so the empire itself) was meant to be ensured by people living in Europe since the Neolithic age through the ritual of walling up live persons. As certain versions of the text report not only on a human head but a healthy human body, it can

[1] Macr. *Sat.* 3, 9, 3–4. *Deum in cuius tutela urbs Roma est ... ignotum alii Iovem crediderunt, alii Lunam, sunt qui Ageronam, ... alii autem quorum fides mihi videtur firmior Opem Consivam esse dixerunt.*
[2] Köves-Zulauf 1995. 61.
[3] Zintzen, C.: *Prodigium.* In: Der Kleine Pauly. München 1979. IV. 1151.
[4] Köves-Zulauf 1995. 62.
[5] Plin. *nat.* 28, 15. *Cum in Tarpeio fodientes delubro fundamenta caput humanum invenissent, missis ob id ad se legatis Etruriae celeberrimus vates Olenus Calenus, praeclarum id fortunatumque cernens, interrogatione in suam gentem transferre temptavit, scipione determinata prius templi imagine in solo ante se: 'Hoc ergo dicitis, Romani? hic templum Iovis optimi maxumi futurum est, hic caput invenimus?' Constantissima Annalium adfirmatione, transiturum fuisse fatum in Etruriam, ni praemoniti a filio vatis legati respondissent: 'Non plane hic, sed Romane inventum caput dicimus.'*
[6] Münzer, F.: *Beiträge zur Quellenkritik der Naturgeschichte des Plinius.* Berlin 1897. 149.
[7] Cf. Liv. 1, 55, 5–6.

be made probable that the story intended to refer to such a ritual.[1] The oracle wanted to rob *fatum* from Rome, and pointed at the outlined layout, and tried to convince the Romans to say that the head had been found at the oracle's feet, on the land of Etruria. If the Romans had made such a statement, the impacts of the *prodigium* would have been produced on the Etruscans; the head would have stayed in Rome but not the *fatum* related to it.
So human word in Roman thinking had magical impact creating and changing reality; in this respect it is enough to think of the statements made on *fatum*.[2] In our present way of thinking, we would of course interpret the oracle' words interpreting the *prodigium* in terms of sense and not word for word; the people of the age of the legend, however, did not do so. *"The reason for that was the Romans' unshakeable faith in the numinous force of uttered words; it is our firm belief that all things considered existence is identical with the existence uttered, complete reality is no other than reality cast into words."*[3]

V. Among the norms of table eight of the Twelve Table Law containing criminal law rules several original provisions can be found that are in close connection with verbality: *"QUI MALUM CARMEN INCANTASSIT…",*[4] and related to it there is a norm that imposes capital punishment on those who conjure up *carmen* reviling others.[5] The law also provides for those who enchant and allure others' crop to come to them: *"QUI FRUGES EXCANTASSIT"*[6], *"NEVE ALIENAM SEGETEM PELLEXERIS"*[7] With this latter source it is possible to connect the remark of Servius's commentary on Vergilius,[8] and with the loci 1/a. and 8/a. Plinius maior's thought.[9] It was not by accident that the author of this paper quoted the relevant paragraph in *Naturalis historia*, because Plinius compares the relevant provisions of the Twelve Table Law with the ritual regarding which his source, Verrius Flaccus names several authors: in the siege of a town the Roman priests first of all *"evoked"* the god (this is the so-called *evocatio*) under whose patronage the given town stood, since in Rome they promised the same or greater cult to the god; furthermore, this ceremony had survived in the *pontifices'* science, and that is why they kept the name of the god in secret under whose patronage Rome stood to avoid that the enemy should act the same way.[10] To have better understanding of these provisions of the Twelve Table Law, it is worth making some remarks concerning the locus regarding *evocatio*.
With respect to *evocatio* the text contains two unambiguous statements: on the one hand, the ceremony of *evocatio*; on the other hand, its practice that had existed—in theory—until his own age, i.e., the 1st c. This latter statement on the survival of the custom might be the

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[1] Köves-Zulauf 1995. 205. ff.
[2] Köves-Zulauf 1972. 308. ff.
[3] Köves-Zulauf 1972. 312; 1995. 207.
[4] XII tab. 8, 1/a
[5] XII tab. 8, 1/b (Cic. *rep.* 4, 10, 12.) *Nostrae XII tabulae, cum perpaucas res capite sanxissent, in his hanc quoque sanciendam putaverunt: si quis occentavisset sive carmen condidisset, quod infamiam faceret flagitiumve alteri.*
[6] XII tab. 8, 8/a
[7] XII tab. 8, 8/b
[8] Serv. *in Verg. Aen.* 8, 99. *Atque satas alio vidi traducere messes. Magicis quibusdam artibus hoc fiebat, unde est in XII tabulis: neve – pellexeris.*
[9] Plin. *nat.* 28, 18. *Quid? Non et legum ipsarum in XII tabulis verba sunt: Qui fruges excantassit, et alibi: Qui malum carmen incantassit? Verrius Flaccus auctores ponit, quibus credat in oppugnationibus ante omnia solitum a Romanis sacerdotibus evocari deum cuius in tutela id oppidum esset, promittique illi eundem aut ampliorem apud Romanos cultum. Et durat in pontificum disciplina id sacrum, constatque ideo occultatum in cuius dei tutela Roma esset, ne qui hostium simili modo agerent.*
[10] About *ius fetiale see* Fusinato, G.: *Dei feziali e del diritto feziale.* Macerata 1884; Heuss, A.: *Die völkerrechtlichen Grundlagen der römischen Aussenpolitik in republikanischer Zeit.* Leipzig 1927.

author's own thought and does not go back to the *auctores* referred to above by him;[1] at the same time, it cannot be excluded that Plinius simply took over Verrius's statement without any critical note or comment.[2] Even if presuming that the comment on the survival of the ritual was indeed Plinius's own assertion, it does not necessarily mean that he himself were allowed to inspect pontifical writings, much rather he might have supposed—relying on what he read in Verrius—that it had not changed until his age.[3] Plinius did not disclose the text of the ceremony, but it can be found in Macrobius, who described *in concreto carmen evocationis* applied to Carthago.[4] Concerning *evocatio* Plinius speaks about *oppidum—the ceremony of evocatio* could be used against a town, i.e., *urbs*, founded by complying with sacred rituals similarly to Rome,[5] but as sources reveal it could be used against *oppida* too; the term *"solitum"* seems to imply that *evocatio* occurred much more often in the course of Roman history than the specific cases supported by documentary evidence imply.[6]
Furthermore, the author clearly states that the ceremony of *evocatio* was performed by *sacerdotes*, contrary to the ritual of *devotio urbis* which fell in the competence of the *dictator*, or the *imperator*.[7]
While in Roman beliefs *evocatio*—being *carmen* addressed to a deity having a specifically determined personality—prepared the destruction of the enemy's town as a religious act, *devotio urbis* did that as *consecratio* addressed to magical, that is, impersonal forces of the underworld;[8] most frequently aimed against the town already deprived of its guardian deities.[9] The *carmen* of *devotio urbis* is also known from Macrobius.[10] At the same time, it is not possible to set up unambiguously a *nulla devotio sine evocatione*[11] thesis since *devotio* was frequently applied without *evocatio*—as the latter could be carried out only regarding *urbes*—here Macrobius intended to set a logical sequence only, rather than determine a *cogens* norm of *ius sacrum*. The source cited also states that to avoid *evocatio* carried out by the enemy they kept the identity of the deity who protected Rome in secret. It is in line with Plinius's statements, which can be read in Macrobius[12] and Servius,[13] albeit, regarding the issue if their content corresponds to the facts contradictory views are entertained in the literature because the name of the guardian deity is unknown; some experts brand the ideas about it pure fiction or relatively late borrowing from the East;[14] however, others dismissing this standpoint of supercriticism suppose that it was not to support the ritual of *evocatio* that the sources created a secret deity for Rome but it was the thinking of people of the age—which accepted the notion that enemies' towns could be destructed though *evocatio*—that deemed it necessary to keep Rome's guardian deity's name in secret in order to protect it against possible *evocatio* carried out by enemies.[15]

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[1] Rohde, G.: *Die Kultursatzungen der römischen Pontifices.* Berlin 1936. 26.
[2] Münzer 1897. 38. 47. 60. 121.
[3] Köves-Zulauf 1972. 86.
[4] Macr. *Sat.* 3, 9, 7–8.
[5] Basanoff, V.: *Evocatio.* Paris 1947. 21.
[6] Latte 1967. 125.
[7] Macr. *Sat.* 3, 9, 9.
[8] Wagenvoort, H.: *Roman Dynamism, Studies in Roman Literature, Culture and Religion.* Leiden. 1956. 31. ff.; cf. Cic. *dom.* 128. *…ut imperator agros de hostibus captos consecraret.*
[9] Macr. *Sat.* 3, 9, 6. 9.
[10] Macr. *Sat.* 3, 9, 10–11
[11] Basanoff 1947. 5.
[12] Macr. *Sat.* 3, 9, 3. *propterea … ignotum esse voluerunt*
[13] Serv. *in Verg. Aen.* 2, 351. *inde est, quod … celatum esse voluerunt*
[14] Latte 1967. 125.
[15] Brelich, A.: *Die geheime Schutzgottheit von Rom.* Zürich 1949. 9. ff; Wissowa 1912. 1912. 179. 203. 338; Köves-Zulauf 1972. 95.

Rome's other (secret) name—*nomen alterum*—is referred to by Plinius maior also at other points;[1] the *"nisi"* inserted by Mommsen, held quite uncertain in inherited texts, affects the core of the content of the source,[2] which might make it probable that the secret name of the city of Rome was permitted to be uttered solely in secret ceremonies. This assumption, i.e., Mommsen's addition, is basically in conflict with and made unnecessary by the image of the goddess since she was portrayed both with covered eyes and sealed mouth to indicate complete silence that referred to her name, and with/by the sources that confirm that this secret name was not permitted to be uttered even in religious ceremonies.[3] On the grounds of the above it seems logical to ignore the insertion *"nisi"* when reviewing the text. The source contains three data: first, the existence of the secret name of the city of Rome; secondly, that it was betrayed by Valerius Soranus and the betrayer was punished—Plinius traces this information back to Varro—thirdly, the cult of goddess Angerona; the latter is taken by the author from Verrius; the second and third fact will be touched on only to the extent that they are related to the controversial issue of *nomen alterum.*[4] The existence of the secret name of the city of Rome can be supported from several points of view: dismissing the standpoint of hypercrticism, as in the case of *evocatio,* until the contrary has been proved, the ritual of *devotio urbis* can be accepted as an element actually used and constituting an integral part of Roman religion. Regarding secret names, research has explored several parallels between the names of persons, tribes and towns, whose secrecy in each case was rooted in the belief in the possibility of abusing the name through magical means, and it was meant to protect the bearer of the name against such abuse.[5]

(The phrase *"dicere arcanis caeremoniarum nefas habetur"* raises the question which nominativus the expression *arcanis caeremoniarum* can be deduced to: to the peculiar genitivus partitivus *arcanae caeremoniarum*, or to *arcana caeremoniarum*, where the genitivus allows interpretation either as explicativus, or possessivus or partitivus. That is, does Plinius mean totally secret ceremonies by it, or only rituals that had parts including secret elements but their entirety was performed in public. Whichever interpretation is accepted, it seems certain that the ceremony, or ceremonies mentioned by Plinius was/were somehow connected with the secret name of Rome and the prohibition to utter it.) Although Plinius does not specify here what ceremony he meant, there is only one ritual known considered indeed strictly secret that was so closely related to the secret name of the city as *evocatio* to the secret guardian deities of the city, and that is *devotio urbis*. In a similar spirit Macrobius comments upon the issue.[6] Just as Macrobius somewhat mingles the ceremonies of *evocatio* and *devotio urbis*, Plinius does not clearly separate the two rituals from one another either; it must have been the essential secrecy of both cases that made the author to draw parallel with the portrayal of goddess Angerona, which is involved in the text definitely as the symbol of silent secrecy without making it possible to determine clearly whose secret the goddess preserves.

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[1] Plin. *nat.* 3, 65. *Roma ipsa, cuius nomen alterum dicere nisi in arcanis caeremoniaerum nefas habetur optimaque et salutari fide abolitum enuntiavit Valerius Soranus luitque mox poenas. Non alienum videtur inserere hoc loco exemplum religionis antique ob hoc maxime silentium institutae. Namque diva Angerona, cui sacrificatur a.d. XII kal. Ian., ore obligato obsignatoque simulacrum habet.*

[2] CIL I. 409.

[3] Serv. *in Verg. Aen.* 1, 277. *Urbis … verum nomen nemo vel in sacris enuntiat.*; *Georg*. 1, 498. *Verum nomen eius numinis … sacrorum lege prohibetur.*

[4] About *nomen alterum* see Plin. *nat.* 2, 15; 2, 37; 3, 2; 4, 28; 5, 115; 16, 48; 21, 52; 23, 35.

[5] Wissowa 1912. 69.

[6] Macr. *Sat.* 3, 9, 5–6. 9. *Ipsius vero urbis nomen etiam doctissimis ignoratum est, caventibus Romanis, ne quod saepe adversus urbes hostium fecisse se noverant, idem ipsi quoque hostili evocatione paterentur, si tutelae suae nomen divulgaretur. Sed videndum, ne, quod non nulli male aestimaverunt, nos quoque confundat opinantes uno carmine et evocari ex aliqua urbe deos, et ipsam devotam fieri civitatem. … Urbes vero … sic devoventur iam numinibus evocatis.*

Returning to the quoted loci of the Twelve Table Law, it does not seem unnecessary to recall what meanings the term *carmen* carries when occurring in the sources. The term *carmen* can have very different meanings: work song,[1] children' song, game rhyme,[2] love song,[3] satirical poem, funny song,[4] legend, sentence,[5] magical rhyme, healing song,[6] cultic song, prayer,[7] prophecy,[8] song on the deceased, ancestors,[9] ancient law,[10] entering into an alliance, declaration of war and military oath.[11] On the grounds of this ranking it is possible to accept the interpretation that the relevant provision of the Twelve Table[12] imposed capital punishment on those using abusive songs;[13] in other cases[14] the law uses the term *carmen* in the sense of magical rhyme. The facts of the case *"fruges excantassit"* and *"segetem pellexerit"* are properly highlighted by another locus in Plinius;[15] this source adduces to the three goddesses of harvesting grain without naming two of them (Seia, Segesta), and refers to the third one asserting that it is prohibited to utter her name in a house, or in any roofed place *(sub tecto)*. It is known from other parallel loci that the third goddess bore the name Tutilina.[16] Most probably what we have here is a permanent triad of goddesses. The function of the first two goddesses is quite clear: Seia protects the seed sown and resting in the soil, and Segesta protects grain ripening, still standing, which seems to be confirmed by the etymology of the two names.[17] In the examination of Tutilina's name and role it is most fortunate to set out from the analytical approach quite typical of Roman religion by which it splits certain processes of life into the minutest units, and assigns each phase of these actions or events to the powers of a particular *Sondergott*[18] by naming a Usener, individual deity specially allocated to them.[19]

This triad undoubtedly belongs to the phases of the ripening of grain, and it logically comes from that that having knowledge of the roles of the first and second *Sondergöttin* the role of the third one can be determined; specifically, it is the task of harvesting grain, and bringing it to the barn, and guarding it there. This is in harmony with Augustinus's statement taken over from Varro,[20] which asserts that naming Tutilina in a closed space—just as naming the other two goddess presumably elsewhere, on the meadow which ripens grain—could be connected with the fact that uttering the name was identical with evoking the given *numen*. Naming the deity—which was in a certain aspect identical with the material reality represented by it according to the peculiarly Greek-Roman *Person-Bereichdenken*[21]—might make it possible to

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[1] Tib. 2, 6, 21–26; Verg. *Georg.* 1, 287–294.
[2] Porph. *in Hor. Epist.* 1, 1, 62; *in Hor. ars* 417.
[3] Hor. *Sat.* 1, 5, 14–21.
[4] Suet. *Caes.* 49. 51; Hor. *Epist.* 2, 1, 139–155; Aug. *civ.* 2, 9.
[5] Gell. 4, 9, 1–2; Isid. *Etym.* 6, 8, 12.
[6] Varro *ling.* 6, 21; Plin. *nat.* 28, 2, 29; 28, 2, 10. 17–18.
[7] Quint. *Inst.* 1, 6, 40; Varro *ling.* 7, 27; Cato *agr.* 141, 1–3; Macr. *Sat.* 3, 9, 6.
[8] Fest. 325; Liv. 25, 12, 2–14.
[9] Cic. *Brut.* 19. 75.
[10] Gell. 20, 1, 42–49.
[11] Liv. 1, 24, 4–9; 1, 32, 5–14.
[12] XII tab. 8, 1/b
[13] Cic. *rep.* 4, 10, 12; Cf. Porph. *in Hor. Sat.* 2, 1, 82. *Lege XII tabulis cautum erat, ne quis in quemquam maledicum carmen scriberet.*
[14] XII tab. 8, 1/a; 8/a; 8/b
[15] Plin. *nat.* 18, 8. *Hos enim deos tum maxime noverant, Seiamque a serendo, Segestam a segetibus appellabant, quarum simulacra in circo videmus … tertiam ex his nominare sub tecto religio est.*
[16] Varro *ling.* 5, 163; Macr. *Sat.* 1, 16, 8; Aug. *civ.* 4, 8; Tert. *spect.* 8, 3.
[17] Latte 1967. 51. *Der etymologische Zusammenhang mit semen, bzw. seges, dürfte für die ersten sicher sein.*
[18] Usener, H.: *Götternamen. Versuch einer Lehre von der religiösen Begriffsbildung.* Bonn 1896. 75.
[19] Köves-Zulauf 1972. 81; Latte 1967. 50.
[20] Aug. *civ.* 4, 8. *Frumentis vero collectis atque reconditis … deam Tutilinam praeposuerunt.*
[21] Pötscher 1978. 229.

commit abuse with the grain protected by it; so, for example, enchanting sowing to come to someone else's land, or charming the already harvested grain to come to someone else's building. The independent existence of deities assigned to each phase of the life cycle of the grain shows that their names were not absolutely taboo, instead they were tabooed only under certain circumstances and at certain places since only then and there did they produce their impact. As a matter of fact, it is not possible to separate strictly and systematically the religious and the magical approaches regarding these phenomenon of Antique beliefs for naming the deity implies religious, and the *excantatio* performed by it magical motifs, presumably the co-existence of the two approaches should be reckoned with here too just as in the case of *evocatio* and *devotio urbis*.

What consequences can be drawn with regard to the subject of the investigation of this paper? The words of the *vindicatio* of *legis actio sacramento in rem* developed for real estate properties were called *carmen* also by Cicero.[1] Setting out from the numerous meanings of the the word *carmen* the words of *legis actio sacramento in rem* were qualified as a text with legal content of sacred—magical, numinous—nature.[2] The relation of the Romans to sacred texts, or spoken words is determined by Köves-Zulauf as follows: *"Roman religion is the religion of …discipline, anxiety, suppression, and not of relieved relaxation as the Greek. … That is where, one might say, the neurotic insistence on speech of the Roman religion comes from."*[3]

[1] Cic. *Mur.* 26.
[2] Cf. Eberling, H.: *Lexicon Homericum, I–II.* Hildesheim 1963. I. 172. 585; Muth, R.: *Einführung in die griechische und römische Religion.* Darmstadt 1988. 70.
[3] Köves-Zulauf 1995. 249.

Ius vitae necisque et exponendi

A Roman *pater familias* was entitled to the following positive rights: *ius vitae ac necis*, *ius exponendi*, *ius vendendi* and *ius noxae dedendi.* What follows is an in-depth analysis of the changes in *ius vitae ac necis* and *ius exponendi*. *Ius vitae ac necis* denotes right of disposal over the life and death of a *filius/filia familias*, while *ius exponendi* the right to expose newborn infants. Exposing a child often contained its death or wilful murder; e.g., in case of a deformed child when the aim was to get the family or the community rid of *prodigium* representing ill luck. Therefore, it seems to be more proper to discuss the rights a father had against newborn infants—no matter if they applied to killing or only exposing the child—as part of *ius exponendi* since killing or exposing children was several times limited and sanctioned in a single imperial decree. Originally, *ius vitae ac necis* was sacral and punitive law power. Its sacral character came to the front when killing a deformed child since this right is the component of the father's power over his newborn infant, and this will be discussed under the heading *ius exponendi*; its punitive law aspect will become obvious when it is used against an adult child. This paper, first, intends to describe changes in *ius vitae ac necis,* and dwell on the restrictions and rules of procedure of exercising it (I.). After that, changes in *ius exponendi* will be followed up, with special regard to the regulation of the legal status of the exposed child (II.).

In Roman law *potestas* always denotes some power; *plena in re potestas* is full power of the owner of the thing over the thing, by which "*in his own property everybody can do everything that does not disturb others*".[1] *Pater familias* was entitled to *patria potestas* over his children and *dominica potestas* over his slaves.[2] *Patria potestas*, just as power over one's wife, *manus*, comes from the same full-scope power of the head of the family. This power is total: on the one hand, because free family members, slaves and lifeless things are all subjected to it; on the other hand, because it contains the right to destroy things and kill the above mentioned persons.[3] Consequently, the power over persons and things the head of the family was entitled to (*potestas, manus, mancipium, dominium*) developed from the same ancient power, none of the formations of power served as an example for the other[4], which clearly refutes Mommsen's view that the father had ownership over his children.[5] According to Ulpian, *pater familias* is the one who is entitled to dominion in his house.[6] (*Domus* is also a sacral concept, which had its own household gods (*dii penates*).[7]

It is well known that according to Roman law certain persons have rights of their own, such as the *pater familias*, others are under power, such as the wife (*uxor in manu*), the person in *mancipium* and the family child under *patria potestas*.[8] Several descriptions of *patria potestas*

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[1] Ulp. D. 8, 5, 8, 5.

[2] Paul. D. 50, 16, 215. *'Potestatis' verbo plura significantur*: *In persona magistratuum imperium: in persona liberorum patria potestas: in persona servi dominium.*

[3] Kaser, M.: *Der Inhalt der patria potestas.* Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung 83. 1971. 62.

[4] Kaser 1971. 63. *In Warheit beruht die Gleichartigkeit* der *Gewalten über die Personen und über die Sachen nur darauf, daß sie beide, auch noch lange Zeit nach ihrer Ablösung aus der einheitlichen Urgewalt, gleich total geblieben sind. Keine hat der anderen zum Vorbild gedient, sondern beide sind ebenso ursprünglich, wie die Teilung einer Sache in einheitliche Teile den Teilstücken im gleichen Augenblick ein selbstandiges Dasein verleiht.*

[5] Mommsen, Th.: *Römisches Strafrecht*. Leipzig 1899. 17., 20.

[6] Ulp. D. 50, 16, 195, 2. *Paterfamilias est, qui in domo dominium habet.*

[7] Cic. *dom.* 41. *Quid est sanctius, quid omni religione munitius quam Domus unus cuiusque civium. Hic arae sunt, hic foci, hic dii penates, hic sacra religiones ceremoniae continentur. Hoc profugium est ita sanctum, ut inde abripi neminem fas sit.*

[8] *Inst.* 1, 8.

can be found in the sources of Roman law, e.g. in *Institutiones* of Gaius[1] and Iustian.[2] Almost surprised, Gaius notes that such an extended father's power does not exist anywhere else, perhaps only among the Galatas. (He is presumably wrong on this point since we have information on similar extensive *potestas* in the Antiquity among the Celts in Gaul[3], as it is described by Caesar.[4]) Although several presentations of *patria potestas* can be found in the sources, it was not defined uniformly. Presumably, they considered it unnecessary to determine it exhaustively since *patria potestas* was clearly the product of the Roman spirit, and it owed its existence not to the State's lawmaking as it went back to times long before the State.[5] Only *sui iuris* citizens with full right could be *patres familias*[6], all the persons were under *patria potestas* over whom the *pater familias* exercised his rights not due to *dominica potestas* or *manus*: children begotten in lawful marriage[7], adopted children[8], legitimated children, wives of blood children and adopted children (in case of *manus* marriage), if their father was under *patria potestas*, grandchildren, great-grandchildren etc. and their wives (in case of *manus* marriage).[9] In Watson's definition, *patria potestas* meant the power that in Roman society the male head of the family was entitled to over the free family members subordinated to him (apart from the wife, who was under *manus*).[10]
Pater familias was entitled to the following rights: *ius vitae ac necis*, *ius exponendi*, *ius vendendi* and *ius noxae dedendi.*[11] What follows is an in-depth analysis of the changes in *ius vitae ac necis* and *ius exponendi*.

I. In Antique sources several references can be found to *ius vitae ac necis* that constituted an essential element of the *potestas* of the *pater familias*.[12] One of the royal laws left to us by Dionysius of Halicarnass under the name of Romulus regulates the father's punitive power over his adult child. According to it, the father was entitled to full-scope power over his son during the son's whole lifetime, he was allowed to restrict his personal freedom, beat him, exile him in handcuffs to do rural work, and kill him; thus, the source, listing the canon of

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[1] Gai. *inst*. 1, 55. *Item in potestate nostra sunt liberi nostri quos iustis nuptiis procreavimus. Quod ius proprium civium Romanorum est; fere enim nulli alii sunt homines qui talem in filios suos habent potestatem, qualem nos habemus. Idque divus Hadrianus edicto, quod proposuit de his qui sibi liberisque suis ab eo civitatem Romanam petebant, significavit. Nec me praeterit Galatarum gentem credere in potestate parentum liberos esse.*
[2] *Inst*. 1, 9. *In potestate nostra sunt liberi nostri, quos ex iustis nuptiis procreaverimus. Nuptiae autem sive matrimonium est viri et mulieris coniunctio individuam consuetudinem vitae continens. Ius autem potestatis, quod in liberos habemus, proprium est civium Romanorum: nulli enim alii sunt homines, qui talem in liberos habeant potestatem, qualem nos habemus. Qui igitur ex te et uxore tua nascitur, in tua potestate est: item qui ex filio tuo et uxore eius nascitur, id est nepos tuus et neptis, aeque in tua potestate, et pronepos et proneptis et deinceps ceteri, qui tamen ex filis tua nascitur, in tua potestate non est, sed in patris eius.*
[3] Mitteis, L.: *Reichsrecht und Volksrecht in den östlichen Provinzen des römischen Kaiserreichs*. Leipzig 1891. 24.
[4] Caes. *Gall*. 4, 19, 3–4. *Viri in uxores sicuti in liberos vitae necisque habent potestatem, et cum pater familiae inlustiore loco natus decessit, eius propinqui conveniunt et de morte, si res in suspicionem venit, de uxoribus in servilem modum quaestionem habent, et si conpertum est, igni atque omnibus tormentis excruciatas interficiunt. … omnia quaeque vivis cordi fuisse arbitrantur in ignem inferunt, etiam animalia ac paulo supra hanc memoriam servi et clientes, quos ab iis dilectos esse constabat, iustis funeribus confectis una cremabantur.*
[5] Pólay, E.: *Az atyai hatalom intézményének alapvonalai a római jogban (Principles of patria potestas in Roman Law).* Miskolc 1940. 7.
[6] *Inst*. 1, 9, 1–2.
[7] Gai. *inst*. 1, 55.
[8] Gai. *inst*. 1, 97.
[9] Pólay 1940. 14.
[10] Watson, A.: *The Law of Persons in the Late Roman Republic*. Oxford 1967. 77.
[11] Nótári, T.: *Római köz- és magánjog (Roman Public and Private Law).* Szeged 2011. 176.
[12] Cic. *dom*. 29. 77; *Pis* 40. 97; *fin* 1, 8; *rep* 2, 35; Val. Max. 5, 8, 2-5, 9, 1; 5, 10, 1; 6, 1, 6; Suet. *Tib*. 35; Liv. 1, 26; 2, 41; 8, 7; *epit*. 54; Plin. *nat*. 34, 4, 16; Auct. ad Her. 4, 16, 23; Sall. *Cat*. 39, 5; 52, 30; Sen. *clem*. 1, 11. 50; Quint. *decl*. 317; Dio Cass. 37, 36; Gell. 5, 19, 9.

punishments that could be imposed, refers to the possibility of exercising *ius vitae ac necis* almost as *ultima ratio*.[1] Although the law does not say anything on either the scope of application of these punishments or the procedure necessary for imposing them, it can be made probable that the family child was not at the mercy of the father, if we consider the strict control that the *gens* exercised initially over the internal life of the family and which was later assumed by the *censor*.[2] We know from Dionysius that *censores* controlled how the *pater familias* brought up their children and if they deemed upbringing too strict or too mild, they took firm measures; they acted similarly with regard to disciplining slaves.[3] Presumably, *censores* also took care to ensure that the religious cult of the house community was properly fulfilled.[4] By clear irony, Plutarch notes that *censores* did not leave either marriage or upbringing of children or feasts without control, instead they exercised supervision over everybody's conduct of life and political thinking.[5]

The first proof of the restrictions of exercising *ius vitae ac necis*, which constituted the *content* of *patria potestas*, is provided by the stipulation of the Twelve Table Law that can be more or less safely reconstructed from the Gaius text of *Codex Veronensis* and from *Fragmentum Augustoduniense*: *"Ergo tum praetor corpus te dedere dom ……. parentem putes …… iure uti t……<do> mino vel parenti etiam occidere eum et mortuum dedere in no<xam> ……. ……. patria potestas potest. n ……. cum patris potestas talis est ut habeat vitae et necis po<testatem>. De filio hoc tractari crudele est, sed… non est. … n post r…. <occi>dere sine iusta causa, ut constituit lex XII tabularum, sed deferre iu<dici> debet propter calumniam.*[6] *Fragmentum Augustoduniense* discusses the power of *pater familias* that gives him the right to kill the slave or family child who has caused damage to a third party delictually, and to fulfil the obligation of *noxae deditio* by handing over the corpse or a part thereof. Directly after that, it clearly states that *patria potestas* contains *ius vitae ac necis*, and that in accordance with the provisions of the Twelve Table Law the *pater familias* was not allowed to kill his son *sine iusta causa*. Krüger's reading of the text is not completely certain, however, in spite of these changes it is possible to read the phrase without any doubt *<occi>dere sine iusta causa, ut constituit lex XII tabularum*, i.e., that in accordance with the provisions of the Twelve Table Law the *pater familias* was not allowed to kill his son without *iusta causa*. The authenticity of the quotation would be doubtful if it should or could be presumed that this is only an independent insertion of the jurist who compiled *Fragmentum Augustoduniense* from Gaius's texts. However, in the present case rather fragmentary text of *Codex Veronensis* contains the "*…tabul…*" fragment[7], which can mean nothing else than *leges XII tabularum*, which makes it highly probable that this provision from the Twelve Table Law was contained in the original Gaius text too.[8] Kunkel claims that originally *iusta causa* meant that it was mandatory to prove that the son had committed a crime which made it lawful to apply death penalty.[9] Presumably, demonstration had a determined order where, after the case had been accurately described and investigated, the family child charged with committing the crime was given the opportunity to

[1] Dion. Hal. 2, 26, 4.

[2] Liv. 6, 20; Gell. 9, 2.

[3] Dion. Hal. 20, 13, 3.

[4] Pólay, E.: *A censori regimen morum és az ún. házibíráskodás (Regimen morum of the censors and the so called iudicium domesticum).* Acta Universitatis Szegediensis XII. 1965. 5.

[5] Plut. *Cato mai*. 16.

[6] *Fragmentum Augustoduniense* 85–86.

[7] Gai. *inst*. 4, 80.

[8] Rabello, A. M.: *Effetti personali della „patria potestas"*. Milano 1979. 90; Visscher, F. de: *Le régime romain de la noxalité*. Bruxelles 1947. 175; Kunkel, W.: *Das Konsilium im Hausgericht*. Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung 83. 1966. 243.

[9] Kunkel 1966. 243.

defend himself. This is also implied by the phrases found in the cases to be discussed later *cognita domi causa*[1], *inspecta diligentissime causa*[2], *audita causa* and *quae adulescens pro se dixerat*[3].

The fragment *deferre iu<……..> debet propter calumniam* was read by its first publisher, Chatelain as *hoc*, which was borrowed from him by Krüger too. First, Ferrini and Scialoja read and supplemented it to *iu<dici>*, which version was soon shared by Krüger too. However, as it has been proved by Kunkel[4], the *iu<dici>* reading is not acceptable either in terms of content or textual criticism. Namely, if the translation of *deferre iudici* is "*beim Richter Anklage erheben*" or "*dem Richter anzeigen*", then, by interpreting *iudex* as a body of administration of justice (*öffentliche Justiz*), two opportunities are offered. Either the *pater familias* shall bring a charge against his son before the law to avoid *calumnia*; but this interpretation would fundamentally question the existence or exercisability of *ius vitae ac necis*, which constitutes a cardinal point of *patria potestas*. Or the *pater familias* had to report to the *iudex* the killing carried out by him owing to the *ius vitae ac necis* he was entitled to, and in this case it is difficult to harmonise a mere obligation to report with the prohibition of killing of the *filius familias sine iusta causa*. If we accept the reading *iu<……>* as proper, the addition *iu<dici>* cannot satisfy us because it does not fill up the *lacuna* present in the text. Namely, the edge of the page was cut off in equal width in order to use it again, so, at least seven-eight—and not four—letters are missing from each line; consequently, the addition *iu<dicibus>* instead of *iu<dici>* seems to be more acceptable. This reading will give sense if we interpret *iudices* not as judges of administration of justice but members of the *consilium*, the relatives and friends. At the same time, it is also possible that the reading *iu<…..>* not having been confirmed can be replaced by *nec<essariis>* or *pro<pinquis>*. As the reading of the text raises serious problems, it should not be considered a proof beyond any doubt of the absolute necessity of *consilium necessariorum*, yet, from the above it is absolutely clear that in order to exercise *ius vitae ac necis* the crime of the *filius* had to be proved (*iusta causa*), if the father wanted to avoid the charge of murder. At the same time, other sources provide convincing proofs that to exercise *ius vitae ac necis* it was necessary to hold *iudicium domesticum* and to convene the *consilium necessariorum*: *"Maiores nostri dominum patrem familias appellaverunt, honores in domo gerere, ius dicere, permiserunt et domum pusillam rem publicam esse iudicaverunt."*[5] Seneca, in his letter to Lucilius, mentions that the ancestors made it possible for the *dominus*, i.e., the *pater familias* to fulfil offices in the house community and exercise *iurisdictio*, thus, they considered the home or house community a reduced-sized copy of the State. The *dominus*, exercising punitive power, acted in compliance with *exemplum maiorum*[6] and *priscum institutum* according to Tacitus;[7] in compliance with *mos maiorum* according to Sueton;[8] and in compliance with *consuetudo* according to Cicero[9]. The *iudicium* took place, within certain formalities, usually in the *atrium* of the home of the *pater familias*.[10]

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[1] Liv. 2, 41, 10.
[2] Val. Max. 9, 5, 1.
[3] Sen. *clem.* 1, 15, 3.
[4] Kunkel 1966. 244.
[5] Sen. *epist.* 47, 14.
[6] Tac. *ann*. 2, 50. *Adulterii graviorem poenam deprecatus, ut exemplo maiorum propinquis suis ultra ducentesimum lapidem removeretur suasit.*
[7] Tac. *ann*. 13, 32. *Isque prisco instituto propinquis coram de capite famaque coniugis cognovit et insontem nuntiavit.*
[8] Sue. *Tib*. 35. *ut propinqui more maiorum de communi sententia coercerent*
[9] Cic. *Rosc. Am*. 15, 44. *Quod consuetudine patres faciunt, id quasi novum reprehendis…*
[10] Val. Max 5, 8, 3. *Succurrebant effigies maiorum cum titulis suis ut eorum virtutes posteri non solum legerent, sed etiam immittarentur.*

With regard to the question whether *iudicium domesticum* was real jurisdiction, the literature is rather divided. The view that does not acknowledge *iudicium domesticum* as real jurisdiction can be traced back to Mommsen.[1] He refuses the concept of *iudicium domesticum* for being an *oxymoron*, and speaks about *Hauszucht* only, which can be called *coercitio* or *disciplina* too; so, *iudicium domesticum*, that is, according to him *Hauszucht* is nothing else than a sort of a *Gewissensgericht*.[2] Following Mommsen, Volterra claims that the judgment of the *iudicium domesticum* did not exempt the person under power from the State's court proceedings and the punishment imposed by it[3], and that the existence of State's court set up for judging the crime excludes the existence of *iudicium domesticum* as a legal institution.[4] Guided by a similar thought, Mommsen also misses the accurate description of the scope of crimes to be judged by *iudicium domesticum*.[5] According to Kunkel's opinion, this way of thinking was not typical of the Romans as scopes of authority overlapped in the order of the state administration of justice too, which also proves that the competence of the courts of justices ordered to judge determined crimes had never become exclusive, between domestic jurisdiction and the State's administration of justice, and while they existed side by side a mutual competition of competencies prevailed between them.[6] (A similar situation evolved between the *tresviri capitales* and the *quaestiones perpetuae*[7], and due to certain crimes it was possible to bring a charge before the *quaestio repetundarum*, the *quaestio maiestatis* or the *quaestio de vi* too.[8]) Kaser—although he does not resolutely refuse to give any significance to *iudicium domesticum* as Mommsen and Volterra—emphasises that it did not belong to the scope of *ius*.[9] *Iudicium domesticum* is considered real jurisdiction by those who more or less share Geib's opinion, as Geib claims that the *pater familias* was entitled to the right of punitive jurisdiction over the members of his family.[10] Romans considered the family a reduced-sized copy of the State, in which *pater familias* can be made equal to *magistratus* having *imperium*, and similarly their *iudisdicto* can be made parallel too[11], as Bonfante has already called the attention resolutely to this point.[12] This opinion was shared by Düll, although in his view in *iudicium domesticum* the *pater familias* was not necessarily bound by the opinion of the *consilium*.[13] Kunkel ties the wife's and children's capital culpability by all means to *consilium*, and believes that the *pater familias* could not make himself independent

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[1] Mommsen 1899. 16–26.
[2] Mommsen 1899. 17.
[3] Volterra, E.: *Il preteso tribunale domestico in diritto romano*. RISG 85. 1948. 117.
[4] Volterra 1948. 135. ff.
[5] Mommsen 1899. 20.
[6] Kunkel 1966. 222.
[7] Kunkel, W.: *Untersuchungen zur Entwicklung des römischen Kriminalverfahrens in vorsullanischer Zeit.* München 1962. 76.
[8] Kunkel 1966. 223.
[9] Kaser 1971. 69. *Die Eindordnung der hauslichen Gerichtsbarkeit in den Bezirk der mores läßt vielmehr deutlich erkennen, daß sie bei der Scheidung von Recht und Sitte aus der Rechtsordnung ausschlossen worden ist.*
[10] Geib, G.: *Die Geschichte des römsichen Criminalprozesses*. Leipzig 1842. 82.
[11] Sen. *contr*. 10, 2, 8. *cetera iura puto, paterno imperio subiecta esse*; Gell 10, 23, 4. *Vir… mulieri iudex pro censore est, imperium quod videtur habet*. Sen. *epist*. 47, 14. *Maiores nostri dominum patrem familias appellaverunt, honores illis in domo gerere, ius dicere permiserunt et domum pusillam rem publicam esse iudicaverunt.*
[12] Bonfante, P.: *Corso di diritto romano*. Roma 1925. I. 98. *Tutto quanto il diritto punitivo del paterfamilias non e poi altrimenti spiegabile che come l'esercizio di un impero giurisdizionale. Le forme sono quelle di un giudizio publico; come il magistrato ha un consilium di sua libera scelta, cosi il paterfamilias convoca all'uopo un consilium necessariorum o propinquorum o anche di amici e di persone autorevoli—in un caso, si narra, un paterfamilias chiamo a consiglio quasi tutto il senato—ed ha luogo un vero giudizio, iudicium domesticum.*
[13] Düll, R.: *Iudicium domesticum, abdicatio und apoceryxis*. Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung 63. 1946. 60.

of the majority judgement of the *consilium* with regard to guilt or innocence of the accused.[1] Below we provide a few examples which reveal that if the father wanted to exercise the *ius vitae ac necis* he was entitled to and wanted to be exempted from the charge of murder, he had to deal with the case in *consilium necessariorum*.

Livy discloses two traditions on the conviction and death of Cassius.[2] According to one of them, his father executed the death sentence on him; after he had held the necessary trial at his home, he had his son whipped and executed. He offered the son's property to Ceres, he had a statue made of that and had it written on it that it had been made by Cassius's family. According to the other tradition, *quaestores* Caeso Fabius and L. Valerius brought a charge against Cassisus due to *perduellio* and convicted him in the proceedings conducted before the *comitium* in 486/5 B.C. Livius tends to give credit to the second tradition, however, the impossibility of this version has already been demonstrated by Mommsen too.[3] Therefore, in the tradition that can be considered authentic, an example of *iudicium domesticum* is presented to us. Killing on the father's order is not arbitrary because the cases have been investigated and negotiated. Livy does not expressly refer to *consilium necessariorum*, however, as the other cases published by him reveal this was natural to the writer of the age of Augustus, his intention by giving this account was primarily to highlight the *severitas* and *gravitas* of heads of family of ancient times.[4] According to Voci, the fact that it is the word *familia* and not the word *pater* that can be read on the statue erected for Ceres refers to a *giudizio commune*.[5] In the present case it seems to be proper to translate the word *familia* as *family* and not as *property* because also Livius mentions the *consecratio* of the son's *peculium* only, and *familia (pecuniaque)*[6] was not used as a synonym of *peculium*. The phrase *damnatus*, for that matter, does not prove that the father had adopted the judgment independently, *sine consilio* because the words *condemnare* and *damnare* in classical *quaestio* lawsuits denote the activity of the accuser too.[7]

According to Valerius Maximus L. Gellius (*cos.* 72 B.C.; *censor* 70 B.C.), who charged his son with the intention to kill him and having committed adultery with his stepmother, invited almost the entire *senatus* to the trial to judge his son's crime.[8] He disclosed his suspicion to the accused and allowed him to defend himself; then, after very careful deliberation of the case he acquitted him on the grounds of the judgement of the *consilium* and of his own. The judgment was adopted *de consilii sententia*, so it was based on the votes of the *consilium*; *sua sententia* refers merely to the fact that the father found his son innocent too.[9] Volterra asserts that the father, being convinced of his son's innocence from the outset, convened the

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[1] Kunkel 1966. 249.

[2] Liv. 2, 41, 10–12. *Quem ubi primum magistratu abiit damnatum necatumque contstat. Sunt qui patrem auctorem eius supplicii ferant: eum cognita domi causa verberasse ac necasse peculiumque filii Cereri consecravisse; signum inde factum esse et inscriptum: 'Ex Cassia familia datum.' Invenio apud quosdam, idque propius fidem est, a quaestoribus Caesone Fabio et L. Valerio diem dictam perduellionis, damnatumque populi iudicio, dirutas publice aedes. Ea est area ante Telluris aedem. Ceterum sive illud domesticum sive publicum fuit iudicium, damnatur Servio Cornelio Q. Fabio consulibus.*

[3] Mommsen, Th.: *Römisches Staatrecht, I–III*. Berlin 1887–1888. II. 541.

[4] Kunkel 1966. 225.

[5] Voci, P.: *Storia della patria potestas da Augusto a Diocleziano*. IURA 31. 1980. 53.

[6] See also Zlinszky, J.: *Familia pecuniaque*. Jogtörténeti Tanulmányok VI. Budapest 1986. 395–406.

[7] ThLL IV. 125 *condemno* B *de accusatore*: *efficere ut is quocum agitur condemnetur*; V. 17 *damno* B *de accusatore, efficere ut is quocum agitur damnetur*.

[8] Val. Max. 5, 9, 1. *L. Gellius onmibus honoribus ad censuram defunctus, cum gravissima crimina de filio, in novercam conmissum stuprum et parricidium cogitatum, propemodum explorata haberet, non tamen ad vindictam continuo procucurrit, sed paene universo senatu adhibito in consilium expositis suspicionibus defendendi se adulescenti potestatem fecit inspectaque diligentissime causa absolvit eum cum sonsilii tum etiam sua sententia. Quod si impetu irae abstractus saevire festinasset, admisisset magis scelus quam vindicassset.*

[9] Kunkel 1966. 224.

consilium to clarify his own honesty and to save his son from the popular action proceedings of *parricidium*.[1] Kunkel, however, calls the attention to the point that the source does not contain any reference to that, what is more, it speaks about a highly careful investigation of the charge, and that the state of facts of *parricidium* had never been extended to merely attempted or planned crime and that the assassination attempt was to be punished in certain cases only, even after *lex Cornelia de sicariis*.[2]

According to Seneca L. Tarius Rufus (*cos. suff.* 16 B.C.) punished his son, who tried to kill him, by exile only, and continued to pay him the previously set annuity.[3] If Seneca praised the *bonus pater familias* only, then the description of the case would serve as a proof of the unlimited punitive power of *pater familias*. The philosopher, however, commemorates Augustus too as *bonus princeps*. The praise of the emperor and description of his behaviour clearly reveals that the *filius'*s crime was judged by a *consilium*, and Augustus was its most respected member, however, a member only, because, taking care that the father should conduct the *cognitio*, he did not ask the *consilium* and its members to appear before him, instead, he went to see them at the home of the head of the family. After the *cognitio* had been conducted, in which his son was allowed to defend himself, in accordance with usual order of procedure the persons present cast their vote orally on the issue of the son's guilt, however, Augustus, preventing his own vote cast first as the ballot of the most highly ranked person from influencing the others, proposed voting in writing. After the boards, on which the *sententia*s were written, had been collected but had not been opened yet, he made an oath that he would not accept Tarius's inheritance. So, in this case the issue of guilt was decided in writing, and he did not want to influence them. In imposing the punishment, however, he wanted to urge the *consilium* to adopt a lenient judgment, which was carried out orally. Tarius had to decide on the basis of the majority of the votes cast, because if he had considered the *sententia*s advice only, then Augustus's efforts not to influence anybody by his vote and to count his ballot as equal to the other votes would have been unnecessary.

In the case referred by Marcian, emperor Hadrian sent a father to exile who killed his son while they were hunting because he had an adulterous affair with his stepmother.[4] According to the emperor, the act of assassination is a deed worthy of a rogue and not a father, as the essence of *patria potestas* is *pietas* and not cruelty. The father should not have killed his son even if he had caught him in the act of adultery with his stepmother as he was not entitled to do that by *lex Iulia de adulteriis coercendis*.[5] Whereas, if the above mentioned law would have entitled the *pater familias* to kill his son or wife caught in the act of adultery, here he should not have exercised his such right because this was not a case of being caught in the act but a permanent adulterous affair (the phrase *adulterabat* is used here as *durativum*). In this case in *iudicium domesticum* a *consilium* should have been convened to judge over the offenders. The father did not do that, instead, he assassinated his son. It is more probable that

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[1] Volterra 1948. 133.

[2] Kunkel 1966. 224.

[3] Sen. *clem*. 1, 15, 2–6. *Cogniturus de filio Tarius advocavit in consilium Carsarem Augustum; venit in privatos penates, adsedit pars alieni consilii fuit, non dixit: 'Immo in domum meam veniat', quod si factum esset, Caesaris futura erat cognitio, non patris. Audita causa excussisque omnibus ex his quae adulescens pro se dixerat, et his, quibus arguebatur, petit, ut sententiam suam auisque scriberet, ne ea omium fieret, quae Caesaris fuisset. Deinde priusquam aperientur codicilli, iuravit se Tarii, hominis locupletis, hereditatem non aditurum. Tarius quidem eodem die et alterum heredem perdidit, sed Caesar libertatem sententiae suae redemit; et postquam adprobavit gratuitam esse severitatem suam, quod principi semper curandum est, dixit relegandum, quo patri videretur.*

[4] Marc. D. 48, 9, 5. *Divus Hadrianus fertur, cum in venatione filium suum quidam necaverat, qui novercam adulterabat, in insulam eum deportasse, quod latronis magis quam patris iure eum interfecit: nam patria potestas in pietate debet, non atrocitate consistere.*

[5] D. 48, 5.

here Hadrian punishes the father due to lack of proper punitive proceedings, *iudicium domesticum* and not just *schimpliche Gesinnung*, as Kaser presumes.[1]
Special attention should be paid to the fragment of Ulpian that states that the father shall not kill his son without hearing him; instead, he shall bring a charge against him before the principals of the province.[2] The first part of the text (*indauditum filium pater occidere non potest*) is perhaps the only trace of the existence of *iudicium domesticum* in Iustinian's *Digest*. The originality of the second part of the text (*sed accusare eum apud praefectum praesidemve provinciae debet*) has been questioned by Mommsen already[3], and Bonfante clearly considered it interpolated.[4] Perozzi believed that the description was possibly original because in his view in the times of Severus the rights the father was entitled to had not lost their effect yet, they were subordinated to the obligation to report to the *magistratus* only.[5] Kunkel adds the following explanation to this locus: The first part forbids the father to kill his son without hearing him; the second part, however, clearly refuses to give him the right of killing and thereby entirely and generally orders him to bring a charge before the State's court of justice. Therefore, it is probable that the original text applied to the case of holding the *iudicium domesticum*, and if under it the *filius* was allowed to defend himself, it permitted the killing of the son. Furthermore, in his opinion, the part on *praeses* and *praefectus* is not necessarily interpolated because the father could also waive exercising his punitive power and bring the son's crime before public court of justice, and so, perhaps, the compilers deleted the reference to *iudicium domesticum* only, which might have run as follows: *"sed cognoscere de eo cum amicis vel accusare eum apud praefectum praesidemve provinciae debet."*[6]
In the *Digest*, apart from the above-mentioned case, all traces of *iudicium domesticum* and *consilium necessariorum* had been carefully deleted by the compilers as *patria potestas* had been reduced to a merely instructive, disciplinary power already before Iustinianus, and so the *ius vitae ac necis* exercised in *iudicium domesticum* had completely lost its significance. Consequently, the lack of *iudicium domesticum* and *consilium* cannot be proved by the *argumentum e silentio* that we cannot find any reference to them in Iustinian's codification.[7]
The fact that *iudicium domesticum* was required in order to exercise *ius vitae ac necis* is apparent from the above. In certain exceptional cases the law allowed killing *sine iudicio* too. Among these cases the regulations of *lex Iulia de adulteriis coercendis* had highly great significance. This law provides the father with the right to kill both his daughter caught in the act of adultery and the man committing adultery, with impunity; however, it confines this right to certain terms and limits.[8] The daughter had to be under the father's[9] *potestas*[10], the *adulterium* had to be committed at his own or his son-in-law's house[11], the father had to kill his daughter too, along with the man. If he killed the *correus* only, it was considered

[1] Kaser 1971. 69.
[2] Ulp. D. 48, 8, 2. *Indauditum filium pater occidere non potest sed accusare eum apud praefectum praesidemve provinciae debet.*
[3] Mommsen 1899. 618.
[4] Bonfante 1925. 111.
[5] Perozzi, S.: *Instituzioni di diritto romano*. Roma 1928. I. 424. On the contrary see Kunkel 1966. 248.
[6] Kunkel 1966. 249.
[7] Kunkel 1966. 247.
[8] Cantarella, E.: *Adulterio, omicidio legittimo e causa d'onore in diritto romano*. Studi in onore di G. Scherillo I. Milano 1972. 243–274.
[9] Pap. D. 48, 5, 23. (22) *Nec in ea lege naturalis ab adoptivo pater separatur.*
[10] Pap. D. 48, 5, 21. (20) *Patri datur ius occidendi adulterum cum filia quam in potestate habet: itaque nemo alius ex patribus idem iure faciet: sed nec filius familias pater*. Ulp. D. 48, 5, 24 (23), 2. *Quare non, ubicumque deprehenderit pater, permittitur ei occidere, sed domi suae generive sui tantum, illa ratio redditur, quod maiorem iniuriam putavit legislator, quod in domum patris aut mariti ausa fuerit filia adulterum inducere.*
[11] Paul. Coll. 4, 12, 1. *Permittitur patri tam adoptivo quam naturali, adulterum cum filia cuiusque dignitatis domi suae vel generi sui deprehensum sua namu occidere.*

homicida, and his deed was to be judged in accordance with *lex Cornelia de sicarii*s.[1] The father who killed the *correus* only was not punishable in the event that his daughter stayed alive because she fled and not because the father saved her life.[2] The *rescripta* of emperors Marcus Aurelius and Commodus provided the father with acquittal from the charge of *homicidium* in the case where the father had killed the *correus* but his daughter stayed alive, if the father had seriously wounded the daughter—which reveals that he wanted to kill her—but his daughter recovered owing to pure luck.[3] The father had to catch the offenders *in ipsis rebus Veneris*.[4] He had to kill both offenders at the same time, without any delay (*uno ictu et uno impetu et aequali ira*).[5] If the father killed his daughter only after a certain amount of time has elapsed, it was deemed *homicida*, if, however, the daughter escaped, and the father reached and killed her—as he acted *continuatione animi*—he was acquitted from the charge of *homicidium*.[6] What is the connection between *ius vitae ac necis* arising from *patria potestas* and *ius occidendi* provided by *lex Iulia de adulteriis coercendis*?[7] Papinian, to the question why it was necessary to set forth in law that the father had the power to kill his daughter too although the relevant *lex regia* granted him *vitae necisque potestas* over his children, responds that the law does not vest the father with new power, instead, it obliges him to kill his daughter too together with the man committing adultery because thereby—i.e., if he does not pardon his daughter either—he acts with greater equity. The question might arise why it is necessary to discuss this legal institution in details in the *Digest* and the *Collatio*. As it has become apparent from the above, the father's *ius vitae ac necis* terminated in the 4th c. already and careful compilers deleted almost all references to *iudicium domesticum* necessarily related to it. Thus, it became indispensable to maintain *lex Iulia de adulteriis coercendis*, which continued to operate now without *ius vitae ac necis* arising from *patria potestas*.

Ius occidendi that may be exercised over the daughter caught in the act of adultery is an organic part of *patria potestas*. Probably, here they applied the criminal law principle that punishment—in the present case: killing—of offenders caught in the act (*manifesti*) was permitted without proceedings too.[8] This right would continue to hold against a married

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[1] Paul. Coll. 4, 2, 6. *Sed si filiam non interfecerit sed solum adulterum, homicidii reus est.* Pap. Coll. 4, 9, 1. *Si pater quis adulterum occidit et filiae suae pepercit, quaero quid adversus eum sit statuendum? Respondit: sine dubio iste pater homicida est: igitur tenebitur lege Cornelia se sicariis.*

[2] Pap. Coll. 4, 9, 2. *Plane si filia non voluntate patris, sed casu servata est, non minimam habebit defensionem pater, quod forte fugit filia. Nam lex ita punit homicidam, si dolo malo homicidium factum fuerit, hic autem pater non ideo servavit filiam, quia voluit, sed quia occidere eam non potuit.*

[3] Mac. D. 48, 5, 33. (32) *Nihil interest, adulteram filiam prius pater occiderit an non, dum utrumque occidat: nam si alterum occidit, lege Cornelia reus erit. Quod si altero occiso alter vulreatus fuerit, verbis quidem legis non liberatur: sed divus Marcus it Commodus rescripserunt impunitatem ei concedi, quia licet intermpto adultero mulier supervixerit post tam gravia vulnera, quae ei pater infixerat, magis fato quam voluntate eius servata est.*

[4] Ulp. D. 48, 5, 24 (23) *Quod ait lex 'in filia adulterum deprehenderit', non otiosum videtur: voluit enim ita demum hanc potestatem patri competere, si in ipsa turpitudine filiam de adulterio deprehendat. Labeo quoque ita probat, et Pomponius scripsit in ipsis rebus Veneris deprehensum occidi: et hoc est quod Solo it Draco dicunt en erga.*

[5] Ulp. D. 48, 5, 24 (23), 4. *Quod ait lex 'in continenti filiam occidat', sic erit accipiendum, ne occiso hodie adultero reservet et post dies filiam occidat, vel contra: debet enim prope uno ictu et uno impetu utrumque occidere, aequali ira adversus utrumque sumpta. Quod si non affectavit, sed, dum adulterum occidit, profugit fulia et interpositis horis adprehensa est a patre qui persequebatur, in continenti, videbutur occidisse.*

[6] Paul. Coll. 4, 2, 6–7. *Sed si filiam non interfecerit, sed solum adulterum, homicidii reus est. Et si intervallo filiam interfecerit, tandundem est, nisi persecutus illam interfecerit: continuatione enim animi videtur legis autorictate fecisse.*

[7] Pap. Coll. 4, 8, 1. *Cum patri lex regia dederit in filium vitae necisque potestatem, quod bonum fuit lege conprehendi, ut potestas fieret etiam filiam occidendi, velis mihi rescribere; nam scire cupio. Respondit numquid ex contrario praestat nobis argumentum haec adiectio, ut non videatur lex non habenti dedisse, sed occidi eam adultero iussisse, ut videatur maiore aequitate ductus adulterum occidisse, cum nec filiae pepercerit?*

[8] Kunkel 1966. 240.

daughter too, even if his father had given her *in mariti manum*, which is probably connected with the provisions of *lex Iulia de adulteriis coercendis* that restricted *manus*. Namely, according to *leges regiae,* the husband judged, in the *consilium domesticum* together with relatives, over his wife's acts to be punished by death such as adultery and drinking wine.[1] If, however, he had caught her wife in the act of adultery (*in adulterio uxorem tuam si prehendisses*), according to Cato, he could kill her with impunity (*impune*) and without any special proceedings (*sine iudicio*).[2] The *lex Iulia de adulteriis coercendis*, however, deprived the husband from this right, even in the case where his wife was under *manus*; thereby Augustus weakened *manus* and adjusted it to the current conditions of the age.[3] He argued that whereas father's love encouraged him to give pardon, a husband's rage urged him to take hasty revenge.[4] If the husband nevertheless killed his wife caught in the act of adultery, he had to account for his act under *lex Cornelia de sicariis*.[5]
The father's *ius vitae ac necis* remained untouched until the 4th c. A.D. in spite of minor or greater legal or out-of-law restrictions. Constantine speaks about *ius vitae ac necis* still as a living legal institution.[6] In 365, this right of the *pater familias* weakened to pure punitive power; the emperor's decree determined the father's duty that he should reprimand young people for their blunders, and should prevent them from committing further faults.[7] With a few changes, Iustinianus borrowed Constantine's text from *Codex Theodosianus*. However, he made such changes specifically with regard to *ius vitae ac necis* as he mentioned it merely as the power that the *pater familias* used to be entitled to.[8] This clearly reveals that by the age of Iustinianus *ius vitae ac necis* as a legal institution had long become extinct, and application of the provisions set forth therein was subject to criminal law regulation.

II. *Ius exponendi* and *ius vitae ac necis* exercised over newborn infants had been contained from the outset by *patria potestas*. A *lex regia* left to later ages under the name Romulus obliged the *pater familias* to bring up every male child and firstborn female child, and forbade him to kill children younger than three years, except for deformed children immediately after their birth. It did not forbid exposition of the latter either, however, it set the condition that they had to be shown to five neighbours. On those who might not comply with this law, it imposed the punishment of confiscating half of their property.[9] This norm, which belonged to

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[1] Dion. Hal. 2, 25.
[2] Gell. 10, 23, 4. *Verba Marci Catonis adscripsi ex oratione quae inscribitur De dote, in qua id quoque scriptum est, in adulterio uxores deprehensas ius fuisse maritis necare: 'Vir' inquit 'cum divotium fecit, mulieri iudex pro censore est, imperium quod videtur habet, si quid perverse taetreque factum est a muliere; multiatur si vinum bibit; si cum alieno viro probri quid fecit, condemnatur.' De iure autem occidenti ita scriptum est: 'In adulterio uxorem tuam si prehendisses, sine iudicio impune necares; illa re, si adulterares sive tu adulterare, digito non audetur contingere, neque ius est.'*
[3] Kunkel 1966. 237.
[4] Pap. D. 48, 5, 23 (22), 4. *Ideo autem patri, non marito mulierem et omnem adulterum remissum est occidere, quod plerumque pietas paterni nominis consilium pro liberis capit: ceterum mariti calor et impetus facile decernentis fuit refrenandus.*
[5] Pap. Coll. 4, 10, 1. *Si maritus uxorem suam in adulterio deprehensam occidit, an in legem de sicariis incidat, quaero. Respondit: nulla parte legis marito uxorem occidere conceditur: quare aperte contra legem fecisse eum non ambigitur.*
[6] CTh. 4, 8, 6. *Libertati a maioribus tantum impensum est, ut patribus, quibus ius vitae in liberos necisque potestas permissa est, eripere libertatem non liceret.*
[7] C. 9, 15, 1. *In corrigendis minoribus pro qualitate dilicti senioribus propinquis tribuimus potestatem, ut quos ad vitae decora domesticae laudis exempla non provocant, saltem correctionis medicina compellat. Neque nos in puniendis morum vitiis potestatem in immensum extendi volumus, sed iure patrio auctoritas corrigat propinqui iuvenis erratum et privata animadversione compescat.*
[8] C. 8, 46, 10. *Libertati a maioribus tantum impensum est, ut patribus, quibus ius vitae in liberos necisque potestas olimerat permissa, eripere libertatem non liceret.*
[9] Dion. Hal. 2, 15.

the system of sacral law, had at one time actually restricted *patria potestas*, yet, later on we can find no reference to its application—especially with regard to applying forfeiture of property as sanction in such cases.

After that, we learn from Cicero of a provision of the Twelve Table Law, which probably not only allowed but ordered the *expositio* of deformed children: *"Cito necatus tamquam ex XII tabulis insignis ad deformitatem puer*."[1] Just as Romulus's *lex regia* did not forbid exposition of deformed children, the norm from the Twelve Table Law left to us from Cicero's *De legibus* also permits, what is more, perhaps orders their destruction. *Leges regiae* provides for exposition of children, the Twelve Table Law for killing children, however, presumably these phrases in these sources—even if they are not used as synonyms—denote acts with identical outcome in terms of the child's fate. For, in the case of deformed children nobody thought of adopting and bringing them up, which can be attributed to practical and religious causes. In Roman thinking, a deformed child was considered *prodigium*, which the community had to be get rid of during *procuratio prodigii*. Romans called the usual order, repose of the world *pax deum*, which meant gods' peaceful relation to men, and if this order was upset, it could be always attributed to gods stepping out of this repose.[2] Breaking down of the cosmic order, so every extraordinary, new event was considered *prodigium*.[3] The etymology of the word is dubious; in Walde–Hofmann's interpretation *prodigium* comes from *prod-aio*,[4] accordingly *prodigium* means *foretelling* or *forecastring*. This approach does not seem to be acceptable because "*prodigium itself does not declare anything*"[5], actually, needs to be interpreted, that is why they used the assistance of *pontifex*es, the *Sibylla books* or *haruspex*es.[6] There is a more proper interpretation claiming that the word comes from the compound *prod-agere*, so *prodigium* is nothing else than *"breaking through this shell, supernatural forces hiding behind the surface come forth, become manifest*".[7] Whenever *prodigium* appeared, be it of a private or state kind, after its meaning had been found out, that is, interpreted, *procuratio* had to be carried out, upon the proposal made again by the interpreters; if the same *prodigium* recurred more frequently, the *pontifices* always ordered the same conciliation.[8] (For example, if stone rain was falling, *novemdiale sacrum* had to be held.[9]) Deformed children had to be destroyed[10], and children born on an ominous day were considered *prodigium* too.[11] Sueton describes that on the day of Britannicus's death stones were thrown at the temples, altars were turned over, the Lares were driven to the street, and children were exposed. The *procuratio* of deformed children considered *prodigium* was usually carried out by killing or exposition; however, it should be added that in these cases exposition always meant that the child was destined to die, the outcome of the two acts was eventually identical. The *procuratio* had to be always bloodless, therefore they performed it by drowning.[12]

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[1] XII tab. 4, 1. (Cic. *leg*. 3, 8, 19)

[2] Köves-Zulauf, Th.: *Bevezetés a római vallás és monda történetébe (Introduction into the History of Roman Religion and saga).* Budapest 1995. 61.

[3] Zintzen, C.: *Prodigium.* Der Kleine Pauly. München 1979. IV. 1151–1153.

[4] Walde, A.–Hofmann, J. B.: *Lateinisches etymologisches Wörterbuch I–II*. Heidelberg 1954. II. 368.

[5] Köves-Zulauf 1995. 62.

[6] Zintzen 1979. 1153.

[7] Köves-Zulauf 1995. 62.

[8] Latte, K.: *Römische Religionsgeschichte*. München 1967. 204.

[9] Liv. 1, 33, 4; 30, 38, 9. *In Palatio lapidibus pluit, id prodigium more novemdialisacro, cetera hostiis maioribus expiata.*

[10] Liv. 27, 37, 6; 31, 12, 7; 39, 22, 5.

[11] Suet. *Cal*. 5. *Quo defunctus est die, lapidata sunt templa, subversae deum areae, Lares quibusdam familiares in publicum abiecti, partus expositi.*

[12] Sen. *ira* 1, 15. *Portentosos fetus extinguimus, liberos quoque, si debiles monstrosique editi sunt, mergimus.* Tib. 2, 5, 79. *Prodigia indomitis merge sub aequoribus.*

Data on newer regulation of *ius exponendi* are available from a much later period, the 4th c. A.D. only, so it is possible that this element of *patria potestas* had not been considerably limited until then. Exposition of children could be attributed, as a matter of fact, not only to religious causes, in this period either. Likewise, the father could expose the child that it was not willing to acknowledge as his own due to the mother's alleged or real infidelity or that he did not want to bring up because of his poverty or other economic reasons. In these cases the child was not meant to perish; they exposed it at a place where others could easily find it.[1] As a matter of fact, we know of cases where a child, having been admitted, was meant and instructed to be a prostitute or gladiator (*ad servitutem aut ad lupanar).*[2] It occurred that the father met and got familiar with his formerly exposed daughter now as a prostitute.[3] Several of them were afflicted and forced to beg.[4]

Sources from the age before Constantinus do not provide a uniform picture on the legal status of exposed children. In Plautus's and Terence's plays exposed and then admitted children keep their free *status*.[5] In Plautus's comedy *Casina,* the exposed female child was admitted by the *libertina* Cleostrata, who gave her the name Casina. Casina, having grown up, became the wife of Eutyrichus also having free *status.* In *Cistellaria* by Plautus, the procuress Melaenis admitted and brought up the exposed Selenium born as a free person, who later married the free Alcesimarchus. In Terence's *Heautontimorumenos*, Antiphila, who was exposed by his mother, Sostrata, kept his free *status*, and married the also free Clinia. At the same time it is beyond doubt that several exposed children were forced to live as a slave.[6] Sueton provides information first on M. Antonius Gnipho, who was born free in Gaul (*ingenuus*), however, was exposed as a child, and was then liberated and educated by the person who brought him up. After that he mentions that Gnipho was a highly talented man with outstanding power of memory, who acquired erudition in both Latin and Greek.[7] The second source is about C. Melissus born also free (*ingenuus*) in Spoletium, who was exposed in his childhood due to conflicts between the parents.[8] Thanks to the person who brought him up and admitted him, he was given training in higher sciences, and was recommended to Maecenas as a grammarian. Maecenas made friends with him, and although his mother supported his son's freedom too—using the claim called *adsertio libertatis*—Melissus nevertheless remained *in statu servitutis* because he deemed it more than his original descent. Weiss interpreted the

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[1] Cf. Fest. *s. v. Lactaria columna in foro olitorio dicta, quod ibi infantes lacte alendos deferebant.*

[2] Lact. *inst.* 6, 20, 18; Memmer, M.: *Ad servitutem aut ad lupanar...* Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung 108. 1991. 21–93.

[3] Min. Fel. 31, 4; Iust. *apol.* 1, 27; Boswell, J. E.: *Expositio and Oblatio. The Abandonment of Children in the Ancient and Medieval Family.* American Historical Review 89. 1984. 10–33. *Incest comprised the single most common objection of Christian moralists to expositio, and no solution to this problem presented itself. Few, if any fathers of the church objected to abandonment as a dereliction of parental duty. In the relatively few places where early Christian literature touched on the practice, which it describes as common, authors complained of the possibility that parents might unknowingly use as prostitutes children they once abandoned.*

[4] Sen. *contr.* 10, 4. *Quidam expositos debilitabat et debilitatos mendicare cogebat ac mercedem exigebat ab eis.*

[5] Memmer 1991. 26.

[6] Sen. *contr.* 10, 4, 13. *Deinde, an hoc non licuerit illi facere. Licuit, inquit, expositi in nullo numero sunt, servi sunt.*

[7] Suet. *gramm.* 7. *M. Antonius Gnipho, ingenuus in Gallia natus sed expositus, a nutritore suo manumissus institutusque fuisse dicitur ingenii magni, memoriae singularis, nec minus Graece quam Latine doctus.*

[8] Suet. gramm. 21. C. Melissus, Spoleti natus ingenuus, sed ob discordium parentum expositus, cura et industria educatoris sui altiora studia percepit, ac Maecenati pro grammatico muneri datus est. Cui cum se gratum et acceptum in modum amici videret, quamquam asserente matre, permansit tamen is statu servitutis praesentemque condicionem verae origini anteposuit.

phrases *ingenuus natus* and *manumissus* as opposites, and derived Gnipho's slave status therefrom.[1] According to Coril, in this text *in servitute* denotes merely a *de facto* status and not that the child had been made *servus* also *de iure*.[2] Watson believes that Suetonius does not use the phrases *status servitutis* or *manumissus* as *terminus technicus*, so it would have been unnecessary to pay special attention to them.[3] *Manumissus* not necessarily refers to *status servitutis* since they used *remancipatio* or *manumissio* also in the case of *filius* in *mancipium*.[4] The father could reclaim his exposed child from the *nutritor* after having reimbursed the costs of *alimentatio*.[5]

On the legal status of children born free and then exposed, Pliny the Younger, *propraetor* of Bithynia and emperor Traianus exchanged letters. The letters were presumably dated in Plinius's second year in office, in 111.[6] In his letter, Plinius presents the issue of the *status* and *alimentatio* of children born free and then exposed, called *threptos*, as a problem affecting the entire province to emperor Traianus, as he has not found a rule that applies either expressly to Bithynia or the whole empire and believes that he could not be satisfied with other examples in a matter that can be decided solely by the emperor's authority. Although he knows about certain *epistulae* and *edicta*, such as for example those issued by emperors Augustus, Vespasianus and Titus for Andania, Sparta and Achaia, they all contain particular rules only, and therefore cannot be applied to Pliny's province. Otherwise, he does not send Traianus the copies of the documents referred to because they are probably available in the emperor's archives, which much better text.[7] In his response letter, Traianus precisely formulates the question raised by Pliny: so, the issue addressed concerns children born free who have been exposed by their parents and then have been admitted and brought up as slaves by others. Traianus mentions that his predecessors have indeed settled this issue with general effect extending to each province, and refers to Domitianus's two *epistulae* written to *proconsules* Avidius Negrinus and Armenius Brocchus, which are perhaps not to be fully ignored, however, as they do not have a general scope, cannot be applied to Bithynia. Traianus grants the opportunity of *adsertio in libertatem*, and refuses to give the *nutritor* the right to claim reimbursement of the costs of *alimentatio* and *ius retentionis* that serves to ensure that. The question arises who may enforce plea for freedom. As it was *vindicatio in libertatem* and not *vindicatio in patriam potestatem* that Traianus permitted, according to Cornil, it was not the parents but the child itself that was entitled to the right of *vindicatio*.[8] Yet, because a child living as a slave was not allowed to initiate a lawsuit, action taken by the

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[1] Weiss, E.: *Peregrinische Manzipationsakte*. Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung 37. 1917. 136–176.

[2] Cornil, G.: *Contribution à l'étude de la patria potestas*. Paris 1897. 428.

[3] Watson 1967. 171.

[4] Kaser, M.: *Das römische Privatrecht, I–II*. München 1971–1975. I. 65.

[5] Sen. *contr*. 9, 3. *Expositum qui agnoverit, solutis alimentis recipiat.*

[6] Plin. *epist*. 10, 65. *C. Plinius Traiano Imperatori. Magna, domine, et ad totam provinciam pertinens quaestio est de condicione et alimentis eorum, quos vocant threptus in qua ego auditis constitutionibus principum quia nihil inveniebam aut proprium, aut universale, quod ad Bithynos ferretur, consulendum te existimavi, quid observari velles; neque enim putavi posse me in eo, quod auctoritatem tuam posceret, exemplis esse contentum. Recitabatur autem apud me edictum, quod dicebatur divi Augusti, ad Andaniam pertinens; recitatae epistulae et divi Vespasiani ad Lacedaemonios et divi Titi ad eosdem et Achaeos, et Domitiani ad Avidium Nigrinum et Armenium Brocchum proconsules, idem ad Lacedaemonios, quae ideo tibi non misi, quia et parum emendata et quaedam non certae fidei videbantur, et quia vera et emendata in scriniis tuis esse credebam.*

[7] Plin. *epist*. 10, 66. *Traianus Plinio. Quaestio ista, quae pertinet ad eos, qui liberi nati expositi, deinde sublati a quibusdam et in sevitute educati sunt, saepe tractata est, nec quicquam invenitur in commentariis eorum, qui ante me fuerunt, quod ad omnes provincis sit constitutum. Epistulae sane sunt Domitiani ad Avidium Negrinum et Armenium Brocchum, quae fortasse debeant observari: sed inter eas provincias, de quibus rescripsit, non est Binthya. Et ideo nec adsertationem denegandam iis, qui ex eius modi causa in libertatem vindicabuntur, puto, neque ipsam libertatem redimendam pretio alimentorum.*

[8] Cornil 1897. 430.

adsertor was needed to represent the child in the lawsuit.[1] Consequently, Traianus sets out from the child's *status libertatis* that, accordingly, cannot be lost.[2] The costs of *alimentatio* are not be reimbursed because in the present case regaining freedom is not ransoming from *status sevitutis* but liberation from slavery.[3]

According to Scaevola's fragment, which also bears decisive significance in determining the legal status of exposed children, a Roman citizen divorced his wife and married again.[4] The cast off wife exposed the child, who was brought up by a third party. In his last will and testament the father, as he did not know if his son was alive or not, did not name him as his inheritor and did not disinherit him either. Following his father's death, the son, once he had been recognised by his mother and father's mother, took possession of the estate as legitimus heres. In Scaevola's view, the last will was invalid because the son was under patria potestas, even if his father did not know about it.[5] According to Paulus, the exposed child will retain its status libertatis, even if it might not be aware of it and might consider itself a slave.[6]

In the *rescriptum* of emperors Diocletianus and Maximianus, dated 295, addressed to Rhodonus, the following can be read:[7] Rhodonus admitted and brought up a girl born free and exposed, and after she had grown up, he meant her to marry his son. Before entering into the marriage, the natural father took action and claimed to release his daughter. The father retained his *potestas* over the child, and he could have enforced it through *praeiudicium de patria potestate*.[8] The question, however, concerned only the issue whether the father should reimburse the costs of *alimentatio*. In the *rescriptum*, the rulers decided that if the natural father should be against conclusion of marriage between his daughter and the foster father's son, then he should reimburse the costs of *alimentatio*, if, however, he agreed to it, then he would be exempted from reimbursing the costs.

An exposed slave child also retains its innate *status servitutis*. The issue of ownership over the child was regulated by emperor Alexander Serverus in his *rescriptum* written to A. Claudius in 224:[9] if the child was exposed without the *dominus* being aware of it or against his will, he was entitled to the right of *vindicatio*, however, he had to reimburse the *nutritor* for his costs. On the other hand, if the *dominus* himself had the slave woman's child exposed, then he would not be granted the right of *repetitio*. In accordance with the principle of *derelictio*, the

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[1] Memmer 1991. 33.

[2] See also Bang, M.: *Die Herkunft der römisches Sklaven, II. Die Rechtsgründe der Unfreiheit*. Mitteilungen des kaiserlich deutschen archäologischen Instituts. Röm. Abt. 27. 1912.

[3] Memmer 1991. 34.

[4] Scaev. D. 40, 4, 29. *Uxorem praegnantem repudiaverat et aliam duxerat: prior enixa filium exposuit. Hic sublatus ab alio educatus est nomine patris vocitatus usque ad vitae tempus patris tam ab eo quam a matre, an vivorum numero esset, ignorabatur; mortuo patre testamentoque eius, quo filius neque exheredatus neque heres institutus sit, recitato filius et a matre et ab avia paterna adgnitus hereditatem patris ab intestato quasi legitimus possidet. Quaesitum est hi qui testamento libertatem acceperunt utrum liberi an servi sint. Respondit filium quidem nihil praeiudicii passum fuisse, si pater eum ignoravit, et ideo, cum in potestate et ignorantis patris esset, testamentum non valere. Servi autem manumissi si per quinquennium in libertate morati sunt, semel datam libertatem infirmari contrarium studium favore libertatis est.*

[5] Gai. *inst*. 2, 123.

[6] Paul. D. 22, 6, 1, 2. *Si quis nesciat se cognatum esse, interdum in iure, interdum in facto errat.nam si liberum se esse et ex quibus natus sit sciat, iura autem cognationes habere se nesciat, in iure errat: at si quis (forte expositus) quorum parentium esset ignoret, fortasse et serviat alicui putans se servum esse, in facto magis, quam in iure errat.*

[7] C. 5, 4, 16. *Patrem, qui filiam exposuit, at nunc adultam sumptibus et labore tuo factam matrimonio coniungi filio desiderantis favere voto convenit. Qui si renitatur, alimentorum solutioni in hoc solummodo casu parere debet.*

[8] Memmer 1991. 38.

[9] C. 8, 51 (52), 1. *Si invito vel ignorante te partus ancillae vel adscripciae expositus est, repetere eum non prohiberis. Sed restitutio eius, non a fure vindicaveris, ita fiet, ut, si qua in alindo vel forte ad discendum artificium iuste consumpta fuerint, restitueris.*

slave child so exposed will retain its *status*, yet, will become a child having no *dominus*, and the *collector* will obtain ownership over him through *occupatio*.[1]
Reference to the exposed child's slave *status* can be found also among the contracts of the waxed boards of Dacia:[2] on 17 March 139, in Kartum, purchase of a slave was entered into between Maximus Batonis and Dasius Versonis, its subject was an approximately six-year-old slave girl called Passia. The seller was obliged to name the origin of the slave in negotiating the purchase and sale[3] as it highly influenced what occupation she was suitable for; for this reason, the *aedilisi edictum* also obliged those who sold slaves on the market to name their *natio*.[4] Mommsen claims that the phrase *empta sportellaria* implies that the owner had purchased the girl's mother, and was given the slave girl, Passia as a present since *sportella* means present.[5] Weiss's interpretation seems to be more probable, he asserts that the seller himself had purchased the girl as an exposed child, and he proves it by the following:[6] the papyruses reveal that the phrase *sportellarius* is identical with *koptriaireios*[7], which always denotes the exposed child. Undoubtedly, *sportella* means a small basket, as in Hieronymus's *Vulgata* regarding the exposition of Moses can be read.[8] *Fiscella*, which is the *deminutivum* of *fiscus* that originally meant basket, is the synonym of *sportella*, and refers to the custom that a basket was often used when exposing a child. Therefore, *sportellaria* means a female child exposed in a basket; it is possible to get closer to this interpretation by certain Greek sources, which assert that a child was exposed also in some kind of vessel (*ostrakon, enkhystria*).
Constantine's law dated 17 April 331 brought significant change in the legal status of exposed children, for it extended the regulation pertaining to the fate of slave women's children, adopted by Alexandrus Severus, to free children.[9] Thus, the father who has exposed his child, will lose his *potestas* over the child, and thereby the right to reclaim the child. The *nutritor* freely decides the *status* of the admitted child, irrespective if the child was born as a free person or a slave. The phrase *retineat sub eodem statu, quem apud se collectum voluerit agitare* shows that the father was not given the opportunity of *vindicatio in libertatem* or *adsertio libertatis*.[10] It is quite clear that this law provided highly effective protection for the person who brought up the exposed child.
Restriction or prohibition of *ius exponendi* was implemented on the level of law rather late. In February 374, emperors Valentinianus, Valens and Gratianus ordered to impose death penalty for killing children.[11] A month later Valentinianus declared that exposition of children was to be punished.[12] As Valentinianus referred to an earlier punishment, it cannot be ruled out that he renewed a prohibition of exposition that had existed for a long time. On the contrary, it is

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[1] Memmer 1991. 40.
[2] FIRA III. 284=CIL III. 937. *Maximus Batonis puellam nomine Passiam, sive ea quo alio nomine est, annorum circiter sex plus minus, empta sprotellaria emit mancipioque accepit de Dasio Verzonis Pirusta ex Kavieretio v/v ducentis quinque…*
[3] Lenel, O.: *Das „Edictum Perpetuum"*. Leipzig 1927. 554. *Clausula de natione pronuntianda*.
[4] Pólay, E.: *A dáciai viaszostáblák szerződései (Contracts of the tabulae ceratae from Dacia).* Budapest 1972. 146; Ulp. D. 21, 1, 31, 21. *Nationem cuiusque in venditione pronuntiare debent.*
[5] Pólay 1972. 146.
[6] Weiss 1917. 160.
[7] Aristoph. *ran*. 1190.
[8] Exod. 2, 3. *Sumpsit fiscellam scripeam … posuitque intus infantulum et exposuit eum.*
[9] CTh. 5, 9, 1. *Quicumque puerum vel puellam, proiectam de domo patris vel domini voluntate scientiaque, collegerit ac suis alimentis ad robur provexerit, eundem retineat sub eodem statu, quem apud se collectum voluerit agitare, hoc est sive filium sive servum eum esse maluerit: omni repetitonis inquietudine penitus submovenda eorum qui servos aut liberos scientes propria voluntate domo recens natos abiecerint.*
[10] Memmer 1991. 65.
[11] CTh. 9, 14, 1; C. 9, 16, 8. *Si quis necandi infantis piaculum adgressus adgressave sit, sciat se capitali supplicio esse puniendum.*
[12] C. 8, 51 (52), 2. pr. *Unusque subolem suam nutriat. Quid si exponendam putaveri, animadversioni quae costituta est subiacebit.*

also possible—if we interpret *expositio* as a form of *necatio*, which was not alien from post-classical thinking at all—that Valentinianus referred to the prohibition of killing children dated February of the same year and the item of penalty imposed thereon.[1] The latter standpoint can be supported by the argument that the addressee of both *constitutiones* was the same Probus *praefectus praetorio*. The item of punishment cannot be known from the latter *contitutio*. According to Memmer, the fact that in 442 a person who exposed his child was certainly not sentenced to death yet is confirmed by the proof that the tenth canon of the *Concilium Vasense* held in the same year dealt with ecclesiastical punishment of those who exposed their children.[2] Namely, if a regulation imposing death penalty on exposition had existed, then the discussion of ecclesiastical punishment would have become completely unnecessary.[3] The prohibition of exposition of children of 374 presumably applied to the *pater familias*'s own children only because this law also regulated the *dominus*'s rights over the exposed *colonus* and slave child.[4] Based thereon the *dominus* or the *patronus* who meant the child to die and for this reason exposed it was not entitled to the right of reclaiming it. In 412, emperors Honorius and Theodosius entered a similar regulation into force.[5] Compared to the previous regulation, it appears as a new element that the regulation makes admitting the child subject to meeting two conditions: it had to take place before the bishop and a document had to be made thereon. According to Memmer, this makes it probable that the *collector* had the right in accordance with the norm of 331 to decide the *status* of the child.[6]

In accordance with Iustinianus's regulation of 529 covering the entire empire, it was prohibited to sink the exposed child to the fate of *colonus* or slave, no matter what *status* he was from.[7] So, it ensured freedom to all exposed children, even to slave children who were caused to be exposed by the *dominus*. It forbids the *collector* to gain advantage from bringing up the child; his act is deemed *officium pietatis*.[8] He confirmed the provisions set forth in this regulation in the same year.[9] In 541, he *expressis verbis* guaranteed the freedom of exposed

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[1] Bonfante 1925. 112; Kaser 1971. 79.

[2] *Sacrorum conciliorum nova et amplissima collectio*. Ed. Mansi. Graz 1960. VI. 455. *Sane si quies post hac diligentissimam sanctionem expositorum hoc ordine collectorum repetitor vel calumniator extiterit, ut homicida ecclesiastica distinctione feiatur.*

[3] Memmer 1991. 70.

[4] C. 8, 51 (52), 2, 1. *Sed nec dominis vel patronis repetendi aditum relinqiumus, si ab ipsis expositos quodammodo ad mortem voluntas misericordiae amica collegerit: nec enim dicere suum poterit, quem pereuntem contempsit.*

[5] CTh. 5, 9, 2. *Nullum dominis vel patronis repetendi aditum relinqiumus, si expositos quodammodo ad mortem voluntas misericordiae amica collegerit: nec enim dicere suum poterit, quem pereuntem contempsit; si modo testis episcopalis subscriptio fuerit subsecuta, de qua nulla penitus ad securitatem possit esse cunctatio*.

[6] Memmer 1991. 70.

[7] C. 8, 51 (52), 3. pr. 1. *Sancimus nemini licere, sive ab ingenuis genitoribus puer parvulus procreatus sive a libertina progenie sive servlili condicione maculatus expositus sit, eum puerum in suum dominium vindicare sive nomine dominii sive adscripticiae cive colonariae condicionis: sed neque his, qui eos nutriendos sustulerunt, licentiam concedi penitus (cum quadam distintione) eos tollere et educationem eorum procurare, sive masculi sint sive feminae, ut eos vel loco servorum aut colonorum aut adcsripticiorum habeant. Sed nullo discrimine habito hi, qui ab huiusmodi hominibus educati sunt, liberi et ingernui appareant et sibi adquirant et in posteritatem suam vel extranenos heredes omnia quae habierint, quomodo voluerint, transmittant, nulla macula vel servitutis vel adscripticiae aut colonariae condicionis imbuti: nec quasi patronatus iura in rebus eorum concedi, sed in omnen terram, quae Romanae dicioni supposita est, haec obtinere.*

[8] C. 8, 51 (52), 3, 2. *Neque enim oportet eos, qui ab initio infantes abegerunt et mortis forte spem circa eos habuerunt, incertos constitutos, si qui eos susceperunt, hos iterum ad se revocare conari et servlili necessitati subiugare: neque hi, qui eos pietatis ratione suadente sustulerunt, ferendi sunt snuo suam mutatnes sententiam et in servitutem eos retrahentes, licet ab inito huiumodi cogitationem habentes ad hoc prosiluerint, ne videantur quasi mercimonio contracto ita pietatis officium gerere.*

[9] C. 1, 4, 24.

children too[1], and he allowed the *dominus* to prove his ownership over the child only in the event that the child had been exposed without him being aware of it or in spite of his will.
Coming to the end of this analysis, it is necessary to add a few remarks in summary on the two legal institutions of *patria potestas*, discussed in this paper. *Ius vitae ac necis*, that is, the punitive power of *pater familias* against an adult child meant a right that actually existed until the 4th c. A.D., based on which the father himself could kill his children. The exercise of this right, however, was confined to meeting certain rules of procedure and limits. Consequently, he had to conduct the proceedings within the frameworks of *iudicium domesticum*, in which the *consilium necessariorum* investigated the charge and heard the defence of the accused, and, then, in the event that the offence seemed to be a crime that deserved death penalty indeed, it decided guilt by majority of the votes cast, which decision had absolutely binding force upon the *pater familias*. By *lex Iulia de adulteriis coercendis*, Augustus further narrowed the scope of application of *ius vitae ac necis*. *Ius exponendi*, that is, the right of the *pater familias* over the newborn infant was a living legal institution also in practice until 374 A.D. Two sides of its exercise are distinguished. One of them is basically ecclesiastical, in this case the exposition of the child as *procuratio prodigii* was aimed at the child's death and was not separated from killing the newborn infant. In the other case the reason was merely that the family or the *pater familias* did not want to bring up the child; yet, they could reckon that somebody would find and bring up the child. If the latter opportunity occurred, then the issue of the *status* of the brought up child arose as a question. During the centuries this showed rather variable picture until the law of the age of Iustinian reached the stage where it ensured free *status* to almost all exposed and brought up children.

[1] N. 153, 1. *Quicunque igitur in ecclesiis, vel vicis, vel aliis locis expositi probantur, eos omnibus modis liberos esse iubemus, licet actori manifesta probatio suppetat, qua personam illam ad suum dominium pertinere ostendat. Se enim legibus nostris praeceptum est, ut servi aegrotantes, qui a dominis neglecti, quum de valetudine eorum desperarent, tamquam cura a dominis digni non habiti omnino in libertatem rapiantur, quanto magis eos, qui in ipso vitae initio aliorum hominum pietati relicti, et ab ipsis enutriti sunt, in iniustam servitutem trahi non patiemur? His igitur et sanctissimum Thessalonicensium archiepiscopum et sanctam dei ecclesiam, quae sub illo constituta est, et gloriam tuam opem ferre, libertatemque illis adiudicare sancimus. Neque illi, qui haec faciunt, legum nostrarum poenas effugient, ut qui omni inhumanitate et crudelitate repleti sunt, domnique homicido tanto deteriore, quanto miserioribus id afferunt.*

Remarks on Marriage and Divorce in Roman Law

Roman law acknowledged two kinds of civil law marriage: marriage generating *manus*, that is, husband's power, and marriage without *manus*. In this paper we shall confine our investigation to marriage with *manus*, and as part of that we intend to expound the following issues in detail: the forms of the conclusion of engagement (I.), of marriage, and of obtaining *manus*, specifically *confarreatio*, *coemptio* and *usus* (II.), the relation of *uxor in manu* to *agnatio* (III.), the husband's punitive power over the wife under *iudicium domesticum* and on the grounds of *lex Iulia de adulteriis coercendis* (IV.), and the forms of divorce and the termination of *manus*, paying special regard to *remancipatio uxoris* (V.).

I. In the archaic age the engagement was concluded through *sponsio*,[1] as Varro's *De lingua Latina* reveals,[2] where the term *sponsus* denotes commitment of one of the parties,[3] and *sponsio* arises after the *sponsus* has been carried out by both of the parties.[4] Festus asserts the sacred character of the engagement, *sponsalia*, and states that the terms *sponsus* and *sponsa* just as the word *sponsio* itself come from the Greek terms *spondē* (drink sacrifice), and *spondō* (to offer drink sacrifice), and denote this ceremony and the implementors thereof:[5] *"Deinde oblitus inferiore capite sponsum et sponsam ex Graeco dicta ait, quod ii spondas interpositis rebus divinis faciant."*[6] Consequently, *sponsio* was initially the act of making a promise [7] confirmed by an oath,[8] and was customarily performed as part of certain rituals, e.g., in requesting *auspicium* that served to manifest gods' will[9] and calling the same gods to witness[10] that the oath was true.[11] The person taking the oath (*iusiurandum*,[12] *sacramentum*) as it were delivered him/herself to the said higher powers, and by breaking the oath incurred their punishment,[13] i.e., became a *sacer* and had to suffer all of its social consequences, namely, full expulsion from the community, and the option of being killed by anybody, what is more, the act of killing this person was considered a kind of expiatory sacrifice, *piaculum* offered to the deity.[14]

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[1] Kaser, M.: *Das altrömische ius.* Göttingen 1949. 259.
[2] Varro, *De lingua Latina* 6, 69–71. *Qui idem facit obligatur sponsu ... quae pecunia inter se contra sponsum rogata erat, dicta sponsio ... non enim si volebat, dabat, quod sponsu erat alligatus.*
[3] Cf. Gaius, *Institutiones* 3, 179. *Sed in utroque casu alio iure utimur: nec magis his casibus novatio fit, quam si id quod tu mihi debeas, a peregrino cum quo sponsus communio non est, SPONDES verbo stipulatus sim.*; Ulpianus D. 21, 1, 19, 2. *Dictum a promisso sic discernitur: dictum accipimus, quod verbo tenus pronuntiatum est nudoque sermone finitur: promissum autem potest referri et ad nudam possessionem sive pollicitationem vel ad sponsum.*; Paulus D. 50, 16, 7. *'Sponsio' appellatur non solum quae per sponsus interrogationem fit, sed omnis stipulatio promissioque.*
[4] Hägerström, A.: *Der römische Obligationsbegriff, I–II.* Uppsala 1927–1941. I. 258.
[5] Kupiszewksi, H.: *Das Verlöbnis im altrömischen Recht.* Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung 77. 1960. 128.
[6] Festus, *De verborum significatione* 329.
[7] Cf. Cicero, *De officiis* 3, 111. *Nullum vinculum ad adstringendam fidem iure iurando maiores artius esse voluerunt.*
[8] Kaser 1949. 256; Hägerström 1927–1941. II. 108.
[9] Cf. Cicero, *De divinatione* 1, 46. 104.
[10] Dionysius Halicarnassensis, *Antiquitates* 1, 40.
[11] Kaser 1949. 259; Kupiszewski 1960. 129.
[12] Cf. Gaius, *Institutiones* 3, 96. *Item uno loquente et sine interrogatione alii promittente contrahitur obligatio, si libertus patrono aut operas se daturum esse iuravit, sed haec sola causa est, ex qua iureiurando contrahitur obligatio.*
[13] Kaser 1949. 260.
[14] Nótári T.: *Római köz- és magánjog. (Roman Public and Private Law.)* Kolozsvár 2011. 401. f.

In the inter-state relations of the early period *sponsio* was an agreement made before the contract to be concluded at a later point of time, aimed at entering into the *foedus* in the future, that is, a kind of bond for title, which was, however, binding not the *populus Romanus* itself but only the *sponsores* taking part in it, who were threatened by *noxae deditio* in case the *foedus* failed, or more precisely, if the *senatus* dismissed its conclusion.[1] Livy describes the relevant formula in connection with the case when the *consul* Postumius and his *consponsores* promised the Samnites in 321 B.C. at Caudium to enter into a peace treaty, but the motion for the contract was dismissed by the *senatus*, and Postumius was handed over under *noxae deditio* by the *fetiales* to the Samnits.[2] Later in Gaius's *Institutiones* it was the *princeps* who promised the leader of the foreign people to enter into a peace treaty under *sponsio;*[3] in this case it was presumably compelling public interest that justified that the aliens were exceptionally allowed to use the verb *spondere* which could be used solely by Roman citizens specifically due to its sacred nature.[4] The specification *noxae deditio* implies that this procedure of the *sponsores* was considered *delictum*, and the fact that they believed their commitment was supposed to be fulfilled towards the deity rather than to the other party can be inferred from Livy calling their procedure *impium scelus*, an act of violating the divine order; so *noxae deditio* was most probably meant to be addressed both to the other people and the higher powers—and if the enemy had the persons handed over executed, then in the interpretation of the generally accepted ideas of the period the deity obtained redress he was entitled to because of the oath broken.[5]

Initially the persons subjected to the *patria potestas* to be engaged were most probably not allowed to play an active part in entering into the *sponsalia* since their transaction capacity was limited[6] as it can be unambiguously inferred from the sources with respect to the fiancée.[7] To the question whether the fiancé himself was merely the subject of the transaction entered into by the person exercising power in the conclusion of the engagement, or an active participant, Kupiszewski tries to give an answer on the basis of a relevant locus in Varro: *"Qui dicit a sua sponte 'spondeo', spondet est sponsor; qui idem faciat obligatur sponsu, consponsus; hoc Naevius significat cum ait 'consponsi'."*[8] First, it was presumably the finacée's father, or the person exercising power over her who made a promise to conclude the marriage, so it is him the source calls *sponsor*; then a promise was made by the other party too regarding the same subject (*idem*)—this other party is called *consponsus* by Varro, which might make it probable that this term was meant to denote the fiancé, who is referred to as *sponsus* in another context, and that the denomination *consponsus* came from *sponsus*. The term *sponsor*, however, is beyond any doubt in active voice, and it would be hard to explain why Varro would have used within the same sentence now the word *sponsor* (the fiancée's father pledging himself to hand her over) and then *consponsus* (the fiancé making a promise) to denote the implementors of the same act. Now if we consider the term *consponsus* the *participium perfectum* of the verb *spondeo*, it becomes clear that the fiancé did not play an

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[1] Kaser 1949. 261.

[2] Livius, *Ab urbe condita* 9, 10, 9. *Quoandoque hisce homines iniussu populi Romani Quiritium foedus ictum iri spoponderunt atque ob eam rem noxam nocuerunt, ob eam rem, quo populus Romanus scelere impio sit solutus, hosce homines vobis dedo.*

[3] Gaius, *Institutiones* 3, 94. *Unde dicitur uno casu hoc verbo peregrinum quoque obligari posse, veluti si imperator noster principem alicuius peregrini populi de pace ita interroget: PACEM FUTURAM SPONDES? vel ipse eodem modo interrogetur.*

[4] Kaser 1949. 263.

[5] Kaser 1949. 261.

[6] Nótári 2011. 212. ff.

[7] Cf. Varro, *De lingua Latina* 6, 70; Gellius, *Noctes Atticae* 4, 4, 2; Plautus, *Aulularia* 217. sqq; *Trinummus* 1157. skk; *Poenulus* 1277; Terentius, *Andria* 100. 951. ff.; 980. ff.

[8] Varro, *De lingua Latina* 6, 69.

active part in the conclusion of the engagement, it was not he himself who made the promise, instead it was him who was promised to the other party, that is, to the fiancée's father—Kupiszewski holds the view that *consponsus* is simply a synonym of *sponsor*.[1] (This explanation is supported by the fact that in the period when it was now the fiancé himself who concluded the engagement[2] neither the word *sponsor*, nor the word *consponsus* occur in this context.[3]) Based on a different interpretation, i.e., if the term *consponsus* simply came from *sponsus*, Varro could not have referred to the point that Naevius called both of the parties exercising power who made a promise regarding the same subject, namely, the marriage of their children, *consponsi*.[4]

One of the most important sources for specifying further changes in the institution of *sponsalia* is the following locus of Aulus Gellius's work entitled *Noctes Atticae* quoting Servius Sulpicius Rufus's *De dotibus*.[5] The parties taking part in the conclusion of the engagement are the fiancée's father, or guardian, that is, the person who exercises power over her, and the fiancé—although this source does not reveal if the engagement was allowed to be concluded independently only by the *sponsus* having rights of his own or by the person subjected to the *patria potestas* too. In Plautus's comedies we find plenty of examples for the engagement being entered into both by the fiancé himself[6] and by the fiancé's father;[7] in Terentius's *Andria* the parents conclude the *sponsalia* for the benefit of their children,[8] and Cicero writes concerning Galba that he had Crassus's daughter engaged to his son Crassus.[9] The differences can be most probably deduced from the different *status familiae* of the given fiancé: a *sui iuris* fiancé acted by himself, and even his father could not force him to conclude a marriage unacceptable for him;[10] on behalf of the *filius familias* subjected to the *patria*

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[1] Kupiszewski 1960. 132.

[2] Vö. Cicero, *ad familiares* 8, 7, 2. *Cornificius adulescens Orestillae filiam sibi despondit.*

[3] Kupiszewski 1960. 133.

[4] Cf. Festus, *De verborum significatione* 36. *consponsos antiqui dicebant fide mutua conligatos*

[5] Gellius, *Noctes Atticae* 4, 4, 1–4. *Sponsalia in ea parte Italiae, quae Latium appellatur, hoc more atque iure solita fieri, scripsit Servius Sulpicius in libro, quem scripsit de dotibus: Qui uxorem, inquit, ducturus erat, ab eo, unde ducenda erat, stipulabatur, eam in matrimonium daturum; (ductum) iri, qui ducturus erat, itidem spondebat. Is contractus stipulationum sponsionumque dicebatur sponsalia. Tum, quae promissa erat, sponsa appellabatur, qui spondebat ducturum, sponsus. Sed si post eas stipulationes uxor non dabatur, aut non ducebatur, qui stipulabatur, ex sponsu agebat. Iudices cognoscebant. Iudex, quamobrem data acceptave non esset uxor, quaerebat. Si nihil iustae causae videbatur, litem pecunia aestimabat, quantique interfuerat eam uxorem accipi aut dari, eum, qui spoponderat, ei, qui stipulatus erat, condemnabat. Hoc ius sponsaliorum observaturum dicit Servius ad id tempus, quo civitas universo Latio lege Iulia data est. Haec eadem Neratius scripsit in libro, quem de nuptiis composuit.*

[6] Plautus, *Aulularia* 217. ff. *Quoniam tu me et ego te qualis sis scio, quae res recte vortat mihique tibique tuaeque filiae, filiam tuam mi uxorem posco. Promitte hoc fore.*; 237. ff. *Tu condicionem hanc accipe, ausculta mihi, atque eam desponde mi.*; *Poenulus* 1155. ff. *Audin tu, patrue? Dico, ne dictum neges: tuam mihi maiorem filiam despondeas.*; *Trinummus* 1157. *Sponden ergo tuam gnatam uxorem mihi?*; *Truculentus* 840. ff. *Quid vis in me ire? Tu es praetor mihi. Verum te opsecro ut tuam gnatam des mihi uxorem, Callicles.*

[7] Plautus, *Cistellaria* 100. f. *Ei nunc alia deducendast domum, sua cognata Lemniensis, quae habitat hic in proxumo. Nam eum pater eius subegit.*; 498. *Sei illam uxorem duxero umquam, mihi quam despondit pater!*; *Trinummus* 447. ff. *Homo ego sum, homo tu es: ita me amabit Iuppiter, neque te derisum advenio neque disnum puto. Verum hoc quod dixi: meu' me oravit filius ut tuam sororem poscerem uxorem sibi.*; 499. *Sine dote posco tuam sororem filio.*; 571. *Nunc tuam sororem filio posco meo.*; 1183. *Haec tibi pactast Callicli filia. Ego ducam, pater, et eam et si quam aliam iubebis.*; *Truculentus* 848. *Iam illi remittam nuntium adfini meo, dicam ut aliam condicionem filio inveniat suo.*

[8] Terentius, *Andria* 99. ff. *Hac fama impulsus Chermes ultro ad me venit, unicam gnatam suam cum dote summa filio uxorem ut daret. Placuit: despondi.*

[9] Cicero, *De oratore* 1, 239. *Equidem hoc saepe audivi: cum aedilitatem P. Crassus peteret eumque maior natu et iam consularis Ser. Galba adsectaretur, quod Crassi filiam Gaio filio suo despondisset, accessisse ad Crassum consulendi causa quendam rusticum...*

[10] Seneca, *Controversiae* 2, 3, 2. *Habui patrem sanae mentis nec tam severum quam pater iusserat et tamen nec tam indulgentem ut incautus; duxi uxorem quam pater iusserat et tamen nuptiarum mearum me poenitet.*

potestas his father entered into the transaction,[1] and the *pater familias* was not only allowed to have his say on his conclusion of marriage but the act of disregarding his command and the lack of his permit involved *infamia*.[2] It follows from all the above that the *sponsus* referred to by Servius Sulpicius was a person having his own rights, i.e., was allowed to conclude the engagement by himself.[3]

Similarly to earlier periods, the fiancée did not play an active part in entering into the *sponsalia*, she continued to be the one who was promised to the fiancé, a *sponsa*. (In certain sources she is named *pacta*, *dicta*, or *sperata*,[4] from which terms it might be concluded—especially setting out from the definition given by Arnobius,[5] where the denominations *sperata* and *pacta* are opposed to the denomination *sponsa*—that in these cases the engagement was entered into not through *sponsio*, or *stipulatio*.[6] Whereas, Servius considers the word *pacta* in the relevant line of the Aeneis [7] a synonym of *sponsa*.[8] It cannot be ruled out that this uncertainty in terminology can be traced back to the fact that in the age of Servius Arnobius *sponsio* and *stipulatio*, and the conclusion of the engagement through them were no longer applied;[9] however, in the age of Plautus engagements were made through *sponsio-stipulatio*, or *pactum* confirmed by them, and in *Trinummus*, after describing the completion of the act,[10] the author calls the fiancée[11] *pacta*.[12]) The mutual promise set forth in the engagement *sponsio* contained the following acts:[13] the fiancée's father made a promise to marry off his daughter (*in matrimonium dare*), and the fiancé made a promise to marry the girl (*in matrimonium ducturum esse*),[14] as it is clear from the references made in the explanations of Florentin and Ulpian.[15]

II. As specified by Gaius, *manus* arises in three forms: *usus*, *confarreatio* and *coempio*;[16] by using the term *olim* he unambiguously implies that these institutions were applied not in his

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[1] Cf. Plautus, *Cistellaria* 98. ff. *At ille conceptis iuravit verbis apud matrem meam me uxorem ducturum esse, ei nunc alia ducendast domum, sua cognata Lemniensis, quae habitat hic in proxumo. Nam eum pater eius subegit.*; *Trinummus* 1183. *Ego ducam, pater, et eam et si quam aliam iubebis.*

[2] Iulianus D. 3, 2, 1. *Praetoris verba dicunt: 'Infamia notatur ... quis uxorem duxerit non iussu eius, in cuius potestate est.*; Ulpianus D. 3, 2, 11, 4. *Notatur etiam 'qui eam duxit', sed si sciens: ignorantia enim excusatur non iuris, sed facti. Excusatur qui iussu eius, in cuius potestate erat, duxerit, et ipse, qui passus est ducere, notatur, utrumque recte: nam et qui obtemperavit, venia dignus est et qui passus est ducere, notari ignominia.*; Papinianus D. 23, 2, 35. *Filius familias miles matrimonium sine patris voluntate non contrahit.*

[3] Kupiszewski 1960. 138.

[4] Varro, *De lingua Latina* 6, 73; Servius, *Comm. in Verg. Aen.* 10, 79.

[5] Arnobius, *Adversus nationes* 4, 20. *Habent speratas, habent pactas, habent interpositis stipulationibus sponsas.*

[6] About the connection between *sponsio* and *stipulatio* see Kaser 1949. 267.

[7] Vergilus, *Aeneis* 10, 77–79. *Quid face Troianos atra vim ferre Latinis, / arva aliena iugo premere atque avertere praedas, / quid soceros legere et gremiis abducere pactas.*

[8] Servius, *Comm. in Verg. Aen.* 10, 79. *'gremiis abducere pactas' id est sponsas*

[9] Kupiszewski 1960. 139.

[10] Plautus, *Trinummus* 1157. ff. (Ly.) *Sponden ergo tuam gnatam uxorem mihi?* (Ch.) *Spondeo et mille auri Philippum dotis.* (Ly.) *Dotem nihil moror.* (Ch.) *Si illa tibi placet, placenda dos quoque est quam dat tibi. Postremo quod vis non duces, nisi illud quod non vis feres.* (Ca.) *Ius hic orat.* (Ly.) *Impetrabit te advocato arbitro. Istac lege filiam tuam spondem mi uxorem dari?* (Ch.) *Spondeo.* (Ca.) *Et ego spondeo idem hoc.*

[11] Plautus, *Trinummus* 1183. *Haec tibi pactast Callici filia.*

[12] Kupiszewski 1960. 139.

[13] Isidorus, Etymologiae 9, 7, 3. *Cautiones sibi invicem emittebant in quibus spondebant se invicem consentire in iura matrimonii.*

[14] Cf. Plautus, *Cistellaria* 98. ff. *At ille conceptis iuravit verbis apud matrem meam me uxorem ducturum esse.*

[15] Ulpianus D. 23, 1, 2. *Sponsalia autem dicta sunt a spondendo: nam moris fuit veteribus stipulari et spondere sibi uxores futuras.*

[16] Gaius, *Institutiones* 1, 110. *Olim tribus modis in manum conveniebant, usu farreo coemptione.*

own age but in ancient times, and, contrary to other sources,[1] he clearly formulates that they are the forms of obtaining *manus* and not the forms of concluding the marriage itself.[2] The order of the development is disputed, in the literature no *communis opinio doctorum* on the subject has been established until now that can be regarded reassuring. Concerning *confarreatio* we can infer Etruscan origin from its highly sacred character, on the one hand; and from the more liberal status possessed by women among the Etruscans, on the other,[3] which is confirmed by the celebration of the conclusion of marriage under *confarreatio,* as we shall see, to the extent that in this procedure the woman is an equal acting party who actively takes part in the rite, while in *coemptio* she is only the subject of the procedure.[4] Although not taking a firm position confirming the Etruscan origin, Kaser[5] regards *confarreatio* an alien body in the system of Roman *ius sacrum,* since in the procedure it is the religious act itself that leads to legal consequences affecting *ius privatum* without being produced by the joint impact of *ius sacrum* and *ius privatum* usual in other legal institutions, since it does not require the assistance of either persons who might exercise power, or the meeting of the people.[6]

From Gaius's description of *confarreatio* it becomes clear that this ritual comprised a sacrifice offered to Iuppiter Farreus, including *farreum libum*,[7] that is, the joint consumption of *panis farreus*, and offering a part of it to Iuppiter (the term *confarreatio* comes from this), in the first place, and reciting certain ceremonial, sacred texts in the compulsory presence of ten witnesses; Gaius describes this ritual as one generally used in his age, since both the *rex sacrorum* and the *flamines maiores (flamen Dialis, flamen Martialis, flamen Quirinalis)* had to come from a marriage under *confarreatio*, and in order to fulfill their priestly office they had to live in marriage of such kind.[8] The comments made on the ritual itself in Ulpian's *Liber singularis regularum* corresponds to Gaius's description.[9] From the explanation given by Servius on the relevant locus in Vergil's *Georgics* it can be ascertained that in the ritual certain fruits and the aforesaid sacrificial fan made of ground spelt with salt (*mola salsa*) were used, and that the marriage was concluded in the presence of the *pontifex maximus* and the *flamen Dialis*.[10] Also in Servius's commentaries on Vergil's *Aeneid* two additional points are made concerning the *confarreatio*: *dextrarum iunctio*[11] and *in manum conventio* to be

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[1] Servius, *Comm. in Verg. Georg.* 1, 31; *Comm. in Verg. Aen.* 4, 103. 374; Boethius, *Comm. in Cic. top.* 3, 14; Arnobius, *Adversius nationes* 4, 20.

[2] Benedek, F.: *Die conventio in manum und die Förmlichkeiten der Eheschliessung im römischen Recht*. Pécsi Tudományegyetem. Dolgozatok az állam- és jogtudomány köréből. Pécs 1978. 8.

[3] Ferenczy, E.: *Eherecht und Gesellschaft in der Zeit der Zwölftafeln.* Oikumene. Studia ad historiam antiquam classicam et orientalem spectantia, II. Budapest 1978. 156.

[4] Zlinszky J.: *Állam és jog az ősi Rómában. (State and Law in Ancient Rome.)* Budapest 1996. 106.

[5] About the connections between *manus* and *mancipium* see Kaser 1960. 61.

[6] Kaser, M.: *La famiglia romana archaïca*. In: Conferenze Romanistiche. Trieste–Milano 1960. 343.

[7] Dionysius Halicarnassensis, *Antiquitates* 2, 25.

[8] Gaius, *Institutiones* 1, 112. *Farreo in manum conveniunt per quoddam genus sacrificii quod Iovi Farreo fit; in quo farreus panis adhibetur, unde etiam confarreatio dicitur; complurae praeterea huius iuris ordinandi gratia cum certis et sollemnibus verbis, praesentibus decem testibus, aguntur et fiunt. Quod ius etiam nostris temporibus in usu est; nam flamines maiores, id est Diales Martiales Quirinales, item reges sacrorum, nisi ex farreatis nati non leguntur; ac ne ipsi quidem sine confarreatione sacerdotium habere possunt.*

[9] Ulpianus, *Liber singularis regularum* 9. *Farreo convenitur in manum certis verbis et testibus X praesentibus et sollemni sacrificio facto, in quo panis quoque farreus adhibetur.*

[10] Plinius, *Naturalis historia* 18, 3, 3, 10; Servius, *Comm. in Verg. Georg.* 1, 31. *Farre, cum per pontificem maximum et Dialem flaminem per fruges et molam salsam coniungebantur, unde confarreatio appellabatur, ex quibus nuptiis patrimi et matrimi nascebantur.*

[11] Vergilius, *Aeneis* 4, 102–104. *Communem hunc ergo populum paribusque regamus / auspiciis, liceat Phrygio servire marito / dotalisque tuae Tyrios permittere dextrae.*

interpreted in the literal sense of the phrase,[1] the act of linking the right hands of the couple to be married was carried out over the fire burning on the altar; during the celebration a sacred torch was burning, and there was water in a pitcher to symbolize the two most important elements and their joint presence; that is how the marriage was concluded between the *flamen* and his wife, the *flaminica*.[2] During the ritual the couple to be married were sitting with covered head on two chairs covered with the skin of sacrificial lamb placed close to each other,[3] which was meant to confirm the relation to be established between them.[4] The priestly functions enumerated in the sources, the offices of the *rex sacrorum*, the *flamen* (and the *flaminica*) *Dialis*, the *flamen Martialis* and the *flamen Quirinalis* were allowed to be fulfilled only by patricians; and as the so-called *communicatio sacrorum*, that is, offering sacrifice under the supervision of the *pontifex maximus* and with the assistance of the *flamen Dialis*, was not permitted between patricians and plebeians, it is highly probable that plebeians were *ab ovo* barred from the ritual of *confarreatio*, and it was reserved for the conclusion of marriage of patricians having sacred consequences that cannot be disregarded.[5]

The question arises how long the institution of *confarreatio* can be considered a living practice. Towards the end of the age of the Roman republic patricians took it rather burdensome to assume the office of the *flamen Dialis* heavily delimited by taboos[6] and consequently preventing them from making a political career, and that is how this priestly function was left vacant for a longer period from 87 B.C.; although both the dignity of the *flamines* and *confarreatio* were reinstated by a *senatus consultum* attached to the name of Augustus dating from 12 B.C.,[7] this measure could not bring long lasting results since Tiberius had to deal with the problem again in 23.[8] What happened was that they wanted to elect a new *flamen Dialis* to replace the deceased Servius Malugiensis, but the required conditions—stipulating that the proper person was to be selected from three persons coming from marriages concluded under *confarreatio*—were missing because the patricians willingly refrained from concluding such a marriage as in the procedure the wife would have been removed from the subjection to the *patria potestas*, and would have been forced under to husband's *manus*. Eventually, Servius Malugiensis's son became his successor, simultaneously a resolution was adopted on the subject that the *flaminica Dialis* would be subjected to her hasbund's power only with respect to the *sacra*, otherwise she was entitled to rights equal to rights other women had.[9]

The conclusion of marriage had a web of rituals around it belonging to the scope of *fas* but adopted by *ius* too. For example, certain days and periods were regarded absolutely ineligible for concluding a marriage: such as *Kalendae* and *Idus (dies feriati)* every month, since on these days it was forbidden to use force against anybody, and the conclusion of marriage

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[1] Benedek, F.: *Die conventio in manum und die Förmlichkeiten der Eheschliessung im römischen Recht*. Pécsi Tudományegyetem. Dolgozatok az állam- és jogtudomány köréből. Pécs 1978. 10.

[2] Servius, *Comm. in Verg. Aen.* 4, 103. *Quid est enim aliud 'permittere dextrae', quam in manum convenire? Quae conventio eo ritu perficitur, ut aqua et igni adhibitis, duobus maximis elementis, natura coniuncta habeatur, quae res ad farreatas nuptias pertinet, quibus flaminem et flaminicam iure pontifico in matrimonium necesse est convenire.*

[3] Servius, *Comm. in Verg. Aen.* 4, 374. *Mos enim apud veteres fuit flamini et flaminicae ovilla pelle superiniecta poni eius ovis, quae hostia fuisset, ut ibi nubentes velatis capitibus confarreatione flamen et flaminica residerent.*

[4] Latte, K.: *Römische Religionsgeschichte.* München 1967[2]. 96.

[5] Benedek 1978. 12.

[6] About these taboos see Gellius, *Noctes Atticae* 10, 15.

[7] Dio Cassius, *Historia* 54, 36; Suetonius, *Augustus* 31; Tacitus, *Annales* 3, 58.

[8] Benedek 1978. 14.

[9] Tacitus, *Annales* 4, 16. *Sed lata lex, qua flaminica Dialis sacrorum causa in potestati viri, cereta promiscuo feminarum iure ageret.*

involved a kind of violence to be committed against the *virgo*;[1] likewise, no marriage was concluded on the days following *Kalendae*, *Nonae* and *Idus*, which were deemed *dies atri*, such as the first half of February and the second half of March and the whole month of May; on the contrary, in this respect the second half of June and the whole of July were held fortunate periods.[2] Marriage rites were designed to serve two key purposes: they were to protect marriage from infertility, on the one hand; and to make the fiancée's passage from one house community cult to another secure, on the other.[3] The fiancée was seated in Mutinus Titinus's *fascinus*, whom she offered sacrifice while being covered with a veil and wearing a *toga praetextata*,[4] then she offered her toys from childhood and the *toga praetextata* that she had to take off once and for all on the day of her marriage to the *lar familiaris*[5] (in other tradition to Venus,[6] or Fortuna virginalis[7]). The fiancée's hair was arranged with the tip of a spear a man had been killed with so that its vital force should increase that of the fiancée.[8] The marriage celebration commenced with *auspicium*, then sacrifice was offered (at a later point of the ritual having arrived at the fiancé's house the bride would grease the gatepost of her husband-to-be with the fat or suet of the sacrificial animal, initially a pig, then a lamb); the wedding dinner *(coena nuptialis)* following the offering of sacrifices lasted until the evening star rose.[9]

The *coena nuptialis* was followed by the most important part of the ritual, *deductio in domum mariti*, the act of being introduced to the husband's house,[10] whose starting act was the symbolical kidnapping of the fiancée from her mother's lap,[11] which custom is traced back by Plutarch to the abduction of Sabine women,[12] and which was undoubtedly backed by the memory of the one-time custom of abduction of women as a form of generating marriage.[13] The procession was opened by a boy holding a torch, two other lads were leading the fiancée,[14] who was followed by people carrying a spinning wheel, a reel, a basket and pots, which referred to her later household duties (the fiancée brought three *asses* from her parents' house, she gave one of them to her husband, put the other one on the altar of the *lar familiaris*, and placed the third one in the sanctuary of the *lares* protecting the abode of her husband-to-be); the members of the procession were carrying torches made of hawthorn,[15] they were singing wedding songs, and were throwing money and nuts[16] among the spectators; all these and the *fescennina iocatio*[17] were meant to keep misfortune away.[18] In the course of this the ritualistic shout *talassa* or *talassio* with a meaning having obscured by the time of the historical age was sounded.[19]

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[1] Macrobius, *Saturnalia* 1, 15, 21. *Feriis autem vim cuiquam fieri piaculare est: ideo tunc vitantur nuptiae in quibus vis fieri virgini videtur.*
[2] Benedek 199. 25.
[3] Latte 1967. 96.
[4] Arnobius, *Adversus nationes* 4, 7. 11; Tertullianus, *Apologeticum* 25; *Ad nationes* 2, 11, 12; Augustus, *De civitate Dei* 4, 11.
[5] Varro, *Menippeae* 463; Porphyrius, *Comm. in Hor. Sat.* 1, 5, 65.
[6] Persius, *Saturae* 2, 70.
[7] Arnobius, *Adversus nationes* 2, 67.
[8] Plinius, *Naturalis historia* 28, 33. 34.
[9] Cicero, *ad Quintum fratrem* 2, 3, 7; Gellius, *Noctes Atticae* 2, 24, 14.
[10] Cf. Nótári 2011. 409; Pomponius D. 23, 2, 5; Ulpianus D. 35, 1, 15; Scaevola D. 24, 1, 66 pr.
[11] Festus, *De verborum significatione* s. v. *rapi simulatur*
[12] Plutarchus, *Quaestiones* 31.
[13] Benedek 1978. 25.
[14] Latte 1967. 96.
[15] Servius, *Comm. in Verg. Ecl.* 8, 29.
[16] Catullus 61, 128; Servius, *Comm. in Verg. Ecl.* 8, 30.
[17] Plinius, *Naturalis historia* 15, 86.
[18] Plautus, *Casina* 118; Terentius, *Andria* 907.
[19] Servius, *Comm. in Verg. Aen.* 1, 651; Plutarchus, *Quaestiones* 271. *Romulus* 15.

Having arrived in their would-be home the bridegroom asked the bride: *"Quaenam vocaris?"*, and the bride replied *"Ubi tu Gaius, ego Gaia."*, by which they testified *expressis verbis* their intention to marry to their environment too.[1] This part of the ritual and the false conclusion drawn from it asserting that every fiancée should have been called Gaia in the ritual were used by Cicero in his speech in defence of Murena to mock the awkwardness of the formalities of archaic law.[2] Modern scholars also understood *gaius* and *gaia* as *praenomina*, and extraced some symbolic significance from this formula. But there are no evidence, that Roman women upon marriage ever changed their *nomen*, escpecially their *praenomen*. Gary Forsythe interpreted *gaius* and *gaia* as adjectives from the Latin etymon **ga-* (see also *gavideo*, *gavidere* and Greek *ganymai* and *gayros*), and translated the sentence as *"where thou art happy, I am happy"*. *Gaius* and *gaia* must have been an archaic Latin adjective meaning "happy", and used as a *praenomen* from very early times. The use of *gaius* and *gaia* (=happy) as adjectives in this legal formula suggests nothing more, than one important expectation on marriage was the happiness of the husband and wife, albeit the latter expressed the subordination of her happiness to that of her husband.[3]
The fiancée greased the doorpost, and tied a piece of wool to it.[4] After that the young men following them lifted the fiancée over the threshold of the house, because Vesta guarded every beginning, so the doorstep too, and to touch it would have been regarded an ill omen.[5] Into the *atrium* a burning torch and a pitcher of water were brought, and so welcoming the bride they admitted her into the family cult;[6] even Q. Mucius Scaevola considered this part of the ritual as one of the most certain signs of the conclusion of marriage;[7] housekeeping was assigned by the husband to his wife through handing over the key of the house;[8] in the event of the termination of the marriage one of the symbolic elements of *repudium*, ousting was just the act of taking the keys away.[9]
The bulk of our knowledge of *coemptio* also comes from Gaius's *Institutiones*. In *coemptio* a man obtains manus over the woman with *mancipatio*, i.e., a kind of sham purchase—in this sham purchase the husband is the buyer and the subject of the purchase is the wife—which had to be carried out in the presence of five adult Roman citizens as witnesses and of the holder of the scales;[10] however, the text to be recited in the course of it, which has been unfortunately not preserved by Gaius for us, was not identical with the one customarily used in slaves' *mancipatio*, or when obtaining *mancipium* over a free person.[11] The literary sources, the texts of Sevius, Isidorus and Boethius we can quote regarding *coemptio* are at least two centuries older than Gaius's description, and at several points they misunderstood

[1] Plutarchus, *Quaestiones* 30; Quintilianus, *Institutio oratoria* 1, 7, 28.
[2] Cicero, *Murena* 27.
[3] Forsythe, G.: *Ubi tu gaius, ego gaia. New Light on an Old Roman Legal Saw.* Historia 45. 1996. 250. f.
[4] Servius, *Comm. in Verg. Aen*. 4, 458; Isidorus, *Etymologiae* 9, 7, 12.
[5] Catullus 61, 171.
[6] Latte 1967. 97.
[7] Scaevola D. 24, 1, 66, 1. (About the *aqua et igni interdictio* see Mommsen, Th.: *Römisches Strafrecht*. Leipzig 1899. 72. ff.; 971. ff.)
[8] Benedek 1978. 26; Zlinszky 1996. 104.
[9] Vö. Cicero, *Philippica* 2, 28.
[10] Gaius, *Institutiones* 1, 113. *Coemptione vero in manum conveniunt per mancipationem, id est per quandam imaginariam venditionem; nam adhibitis non minus quam V testibus civibus Romanis puberibus, item libripende, emit vir muliertem, cuius in manum convenit.*
[11] Gaius, *Institutiones* 1, 123. *Illa quidem, quae coemptionem fecit non deducitur in servilem condicionem; at a parentibus et coempionatoribus mancipati mancipataeve servorum loco constituuntur. ... Sed differentiae ratio manifesta est, cum a parentibus et a coemptionatoribus isdem verbis mancipio accipiantur, quibus servi; quod non similiter fit in coemptione.*

the essence and process of *coemptio*: namely, Servius[1] and Isidorus Hispalensis following him[2] believed that the husband and wife mutually bought each other, which would, however, result in the wife also obtaining some kind of power over the husband, and the reciprocal question and answer mentioned by Boethius[3] most probably did not belong to *coemptio* itself, it might have been some kind of preparatory process thereof allowing the parties to make it clear that that they wanted to conclude the marriage by their free will.[4] The question arises that if the fiancée constituted the subject of the purchase and sale, even if in a sham transaction, who should be considered the seller? Opinions expressed in the literature are highly divided on the matter. Many hold the position that the woman, especially the *mulier emancipata* should be regarded the seller, so she is entitled to the sham purchase price, the *nummus unus*; usually they base their view on two loci from Gaius's *Institutiones*[5] and one locus from *Collatio*;[6] convincingly Benedek expounds why this view based on these sources is totally unacceptable.

The two loci from Gaius does not describe the *coemptio* aimed at the actual conclusion of marriage *(coemptio matrimonii causa)* but the *coemptio* designed to terminate guardianship *(coemptio tutelae evitandae causa)*, from which it would be hard to draw conclusions on *coemptio* that generates husband's power if the guard's duty had actually been only to grant *auctoritas*; the third text of Paulus, as we shall see later on, is about *lex Iulia de adulteriis coercendis*, and in this context *auctoritas* should be interpreted not as a technical term, but only as a term denoting the father's consent to the conclusion of the marriage.[7] Furthermore, Benedek quotes an inscription which can be dated from the end of the age of the Roman republic that sets forth that the girl to be married off to the husband was handed over to the fiancé by the father,[8] and remarks that the relevant passage of *Laudatio Turiae* written between 8 and 2 B.C.[9] does not support the thesis of the *mancipatio* carried out by the woman herself either; finally, he adds that should the woman receive *mummus unus*, the symbolic purchase price from the fiancé, her later husband in the course of *mancipatio*, then having subjected to the husband's *manus*, she would obtain such purchase price also for the benefit of the husband, which would seem to be rather inconsistent. *Coemptio* was no longer part of generally adopted practice probably at the same time when *confarreatio* went out of use approximately at the end of the 1st c. B.C.; additional informative data is supplied in this respect both by the aforesaid *Laudatio Turiae*, in which the husband left a widower recalling his own marriage without *manus* mentions his sister-in-law's marriage concluded with *coemptio*, and by Cicero's statement that the orators who were not well-versed in the depths

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[1] Servius, *Comm. in Verg. Aen.* 4, 103. *Coemptio est, uti libra atque aes adhibetur, et mulier atque vir inter se quasi emptionem faciunt. Coemptione facta mulier in potestate viri cedit, atque ita sustinet condicionem liberae servitutis.*; Serv. *in Verg. Georg*. 1, 31. *Ait 'emat', ad antiquum nuptiarum pertinet ritum, quo se maritus et uxor invicem 'coemebant', sicut habemus in iure.*

[2] Isidorus, *Etymologiae* 5, 26. *Nam antiquus nuptiarum erat ritus, quod se maritus et uxor invicem emebant, ne videretur uxor ancilla, sicut habemus in iure.*

[3] Boethius, *Comm. in Cic. top.* 3, 14. *Coemptio vero certis sollemnitatibus peragebatur, et sese in coemendo invicem interrogabant: an sibi mulier materfamilias esse vellet? Illa respondebat velle. Item mulier interrogabat: an vir sibi paterfamilias esse vellet? Ille respondebat velle. Quam sollemnitatem in suis institutis Ulpianus exponit.*

[4] Kaser 1949. 318.

[5] Gaius, *Institutiones* 1, 115. *Quod est tale: si qua velit quos habet tutores deponere et alium nancisci, illis auctoribus coemptionem facit.*; 195a *Item si a masculo manumissa fuerit et auctore eo coemptionem fecerit...*

[6] *Collatio legum Mosaicarum et Romanarum* 4, 2, 3. *Secundo vero capite permittitur patri, si in filia sua, quam in potestate habet, aut in ea, quae eo auctore, cum in potestate esset, viro in manum convenerit, adulterum domi suae generive sui deprehenderit isve in eam rem socerum adhibuerit, ut is pater eum adulterum sine fraude occidat, ita ut filiam in continenti occidat.*

[7] Benedek 1978. 17.

[8] *Pulbius Claudius ... Antoniam Volumniam virginem volentem ... a parentibus suis coemit et ... vir domum duxit.*

[9] *Sororem omnium rerum fore expertem quod emancupata esset Cluvio.*

of jurisprudence, albeit the place of their operation was identical with that of *iuris consultii* giving advice on the *forum*, were no longer fully aware of what words were uttered when concluding *coemptio*.[1] And the form of expounding his point, i.e., that Gaius speaks about *coemptio* in the present tense, should be most probably interpreted in view of the fact that in the enumeration of the forms of the generation of *manus* he makes a reference to former times (*olim*) at the outset.[2] Benedek ranks the following institutions among the types of *coemptio* still used in the age of Gaius.

Coemptio tutelae evitandae causa[3] was to ensure that if the woman having her own rights but necessarily being under guardianship[4] wanted to get rid of her guardian, then with his *auctoritas* she was allowed to enter into *coemptio fiduciaria* with somebody who later remancipated her for a person selected for a new guardian; this new guardian emancipated her with *manumissio vindicta*, and she became his *tutor fiduciariusa*.[5] *Coemptio testamenti faciendi causa* was meant to make up for the lack of the testamentary capacity of the woman having her own rights, the procedure was similar to the previous procedure, after entering into the *coemptio* the husband remancipated his wife for one of his fiduciary persons, who subsequently released her from *mancipium.*[6] This institution, however, was made unnecessary by a *senatus consultum* adopted during the reign of Hadrian, which acknowledged the testamentary right[7] of women having their own rights. Through the *coemptio sacrorum interimendorum causa* the woman was relieved of the burden of the house community's religious celebrations; to attain this goal usually the assistance of elderly, childless men was used whose death terminated the house community cult once and for all too. It should be added that this type of *coemptio* had to be clearly distinguished from actual *coemptio* as far as the rituals and external features of the application were concerned, which proves that it was still used, albeit not too often, in the age of Cicero.[8]

The act of obtaining *manus* through *usus* is dealt with by three important sources, the first of them comes from Gaius,[9] the second one from Servius's commentaries on Vergil's the third one from Boethius's explanations of Cicero's *Topica*[11]. These loci reveal that cohabitation maintained with the given man for one year without any interruption a woman

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[1] Cicero, *De oratore* 1, 237. *Nam neque illud est mirandum, qui quibus verbis coemptio fit, nesciat, eundem eius mulieris, quae coemptionem fecerit, causam posse defendere.*

[2] Benedek 1978. 18.

[3] Gaius, *Institutiones* 1, 114. *Potest autem coemptionem facere mulier non solum cum marito suo, sed etiam cum extraneo, scilicet aut matrimonii causa facta coemptio dicitur, aut fiduciae; quae enim cum marito suo facit coemptionem, ut apud eum filiae loco sit, dicitur matrimonii causa fecisse coemptionem; quae vero alterius rei caua fecit coemptionem aut cum viro suo aut cum extraneo, veluti tutelae evitandae causa, dicitur fiduciae causa fecisse coemptionem.*

[4] Cf. Gaius, *Institutiones* 1, 144–145. *Veteres voluerunt feminas, etiamsi perfectae aetatis sint, in tutela esse; exceptis virginibus Vestalibus, quas liberas esse voluerunt; itaque etiam lege XII tabularum cautum est.*

[5] Benedek 1978. 19.

[6] Gaius, *Institutiones* 1, 115a *Olim etiam testamenti faciendi gratia fiduciaria fiebat coemptio; tunc enim non aliter feminae testamenti faciendi ius habebant, exceptis quibusdam personis quam si coemptionem fecissent remancipataeque et manumissae fuissent; sed hanc necessitatem coemptionis faciendae ex auctoritate divi Hadriani senatus remisit.*

[7] Nótári 2011. 368.

[8] Benedek 1978. 19.

[9] Gaius, *Institutiones* 1, 111. *Usu in manum conveniebat, quae anno continuo nupta perseverabat; quia enim velut annuo possessione usucapiebatur, in familiam viri transibat filiaeque locum optinebat. Itaque lege XII tabularum cautum est, ut si qua nollet eo modo in manum mariti conveire, ea quotannis trinoctio abesset atque eo modo cuiusque anni usum interrumperet. Sed hoc totum ius partim legibus sublatum est, partim ipsa desuetudine obliteratum est.*

[10] Servius, *Comm. in Verg. Georg*. 1, 31. *Tribus enim modis apud veteres nuptiae fiebant: ... usu, si verbi gratia mulier anno uno cum viro, licet sine legibus, fuisset.*

[11] Boethius, *Comm. in Cic. top.* 3, 14. *Tribus modis uxor habebatur: usu farreo coemptione*.

was subjected to his power without *confarreatio* and *coemptio* too, and their community of life was regarded marriage simply due to the intention to conclude a marriage (*affectio maritalis*), before the one year has elapsed.[1] So the commencement of marriage was clearly separated from the date of the generation of *manus* since the husband prescribed it only after one year; and if the wife did not want to become subjected to her husband's *manus*, then spending three consecutive nights each year away from home *(trinoctium)*, this institution was introduced, asserts Gaius, by the Twelve Table Law, she could interrupt the prescription of the husband's power.[2] Thus, the act of obtaining *manus* through *usus* is nothing else but prescribing the husband's power,[3] which was implemented by proper application of the *usus–auctoritas* rule[4] of the Twelve Table Law.[5] The act of obtaining the husband's power through *usus*, however, disappeared from practice partly through *desuetudo*, partly through certain statutes (most probably Augustus's laws on marriage).

III. For a long time it was a generally accepted view in the literature that the *uxor in manu* was regarded agnate kin;[6] however, Brósz convincingly proved that the *uxor in manu* did not belong to *agnatio*—what follows is a brief account of his argumentation.[7] In view of the occurrences of the terms *agnatus* and *agnascor*, in the most general and widest sense of word they denote increase, growth through birth, more specifically through *postumi*, the successors who are born after the death of the *pater familias*.[8] In addition to that, *agnatus* occurs, as a matter of fact, in the sense of artificial kinship created by law *(legitima cognatio)*,[9] that is why Paulus remarks that the person adopted with *adoptio* joins, "is born to" the members of the family of the *pater familias* and by that becomes their *cognatus*;[10] in sources concordant with the above we can find the short word *quasi* supplementing the term *agnatio* used regarding adoption.[11] The relevant locus of *Sententiarum libri* states that the main difference between *agnati* and *cognati* is that *agnati* are at the same time *cognati*, however, *cognati* are not necessarily *agnati*.[12] Consequently, on the grounds of the above it can be ruled out that the

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[1] Benedek 1978. 20.
[2] Nótári 2011. 213.
[3] Ferenczy 1978. 158.
[4] *XII tab.* 6, 3. (Cicero, *Topica* 4, 23.) *Usus auctoritas fundi biennium est, ceterarum rerum omnium annuus est usus*. Cf. Zlinszky 1996. 59.
[5] Kaser 1949. 319.
[6] Cf. Bonfante, P.: *Instituzioni di diritto romano*. Milano 1912. 146; Kaser, M.: *Das römische Privatrecht, I–II.* München 1971–1975. I. 52. ff.
[7] Brósz, R.: *Ist die uxor in manu ein Agnat?* Annales Universitatis Scientiarum Budapestinensis de Rolando Eötvös nominatae. Sectio iuridica 18. 1976. 1. ff. (In Hungarian literature Magdolna Gedeon recently published her arguments against the theory of Róbert Brósz. Cf. Gedeon, M.: *Még egyszer arról, vajon agnát rokon-e az uxor in manu? (Again on that question, whether the uxor in manu could be regarded as an agnat kin?)* Publicationes Universitatis Miskolciensis. Sectio Iuridica et Politica 27/1. 2009. 323. ff.)
[8] Ulpianus, *Liber singularis regularum* 22, 18. *Postumi quoque liberi cuiuscumque sexus omissi, quod valuit testamentum, agnatione rumpunt.*
[9] Gaius, *Institutiones* 3, 10. *Vocantur autem angati qui legitima cognatione iuncti sunt: legitima autem cognatio est ea quae per virilis sexus personas coniungitur. Itaque eodem patre nati fratres agnati sibi sunt, qui etiam consanguinei vocantur, nec requiritur an etiam matrem eandem haberint.*; Ulpianus D. 23, 2, 12, 4. *Adoptivae sororis filiam possum uxorem ducere: cognata enim mea non est filia eius, quia avunculus nemo fit per adoptionem et eae demum cognationes contrahuntur in adoptionibus, quae legitimae essent, id est quae adgnatorum ius haberent.*
[10] Paulus D. 1, 7, 23. *Qui in adoptionem datur, his quibus adgnascitur et cognatus fit, quibus vero non adgnascitur nec cognatus fit: adoptio enim non ius sanguinis, sed ius adgnationis adfert.*
[11] Gaius, *Institutiones* 2, 138. *Si quis post factum testamentum adoptaverit sibi filium aut per populum eum qui sui iuris est, aut per praetorem eum qui in potestate parentis fuerit, omni modo testamentum eius rumpitur quasi agnatione sui heredis.*
[12] Paulus, *Sententiae* 4, 8, 14. *Inter agnatos et cognatos hoc interest, quod in agnatis etiam cognati continentur, inter cognatos vero agnati non comprehenduntur.*

uxor is an agnate kin, since the law forbids for a blood relation,[1] that is, a cognate kin of the husband to become his wife.[2] Several definitions of *agnatio*, differing mostly in their formulation while being concordant in their content, can be found in sources, the most well-known definition comes from Gaius: *"sunt autem agnati per virilis sexus personas cognatione iuncti, quasi a patre cognati"*,[3] i.e., *"agnate relatives are those who are linked by kinship passed on by men, that is, they are relatives (descending)*[4] *from the (same) father"*.[5] In each case the basis is decent from the same father, therefore, *agnatio* can be passed on only in this form; and the members of the same family, more specifically as the loci stress those in the descending line, belong to the *agnatio*, that is, agnate relatives are relatives in the father's line of descent (the agnation) who belong to the same family; and none of the texts mentions either the wife or the institution of *manus*.[6]

This is supported by Gaius when he states that while men obtain the inheritance falling to them from women pursuant to *iure agnationis*, women can obtain inheritance that falls to them from men only as *legitima heres*, and this applies also to a mother or step-mother concluding a marriage with *manus*, who inherit *sororis loco*, that is, not *agnationis iure*.[7] In what capacity does the *uxor in manu* inherit? Gaius emphasizes at several points that the *uxor in manu* inherits not as an agnate relative, and *manus* makes her only *filiae loco quasi sua heres*,[8] elsewhere he asserts that being *filiae loco* she obtains the inheritance as *sua heres*;[9] The *Liber singularis regularum* compiled from the works of Ulpian calls the wife under *manus sua heres*,[10] the enumeration in *Sententiarum libri*, however, does not even include her among them.[11] So when the *uxor in manu* is referred to as *sua heres*, the sources do not justify it with *agnatio* but with the husband's power; presumably it was the *adoptivus* who was first admitted to the row of *sui heredes* through *interpretatio extensiva*, and later on the *uxor* standing *filiae loco* in the place of the female child, initially ranked with the term *quasi* that

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[1] Gaius, *Institutiones* 1, 59–62.
[2] Brósz 1976. 4.
[3] Gaius, *Institutiones* 1, 156.
[4] Nótári 2011. 208.
[5] Ulpianus, *Liber singularum regularum* 11, 4. *Agnati sunt (a patre) cognati virilis sexus per virilem sexum descendentes eiusdem familiae.* Cf. Ulpianus, *Liber singularis regularum* 26, 1; *Gaius, Institutiones* 3, 10; *Epitoma Gai* 2, 8, 3; *Collatio legum Mosaicarum et Romanarum* 16, 2, 10; 16, 3, 13; 16, 4, 1; 16, 7, 1; Paulus, *Sententiae* 4, 8, 14; *Institutiones Iustiniani* 1, 15, 1; 3, 5, 4; D. 26, 4, 7; 38, 8, 4; 38, 10, 4, 2; 38, 10, 10, 2; 38, 10, 10, 6; 38, 16, 2, 1.
[6] Brósz 1978. 5; 10; cf. Gaius, *Institutiones* 3, 10; *Collatio legum Mosaicarum et Romanarum* 16, 2, 10.
[7] Gaius, *Institutiones* 3, 14. *Quod ad feminas tamen attinet, in hoc iure aliud in ipsarum hereditatibus capiendis placuit, aliud in ceterorum (bonis) ab his capiendis: nam feminarum hereditates proinde ad nos agnationis iure redeunt atque masculorum; nostrae vero hereditates ad feminas ultra consanguineorum gradum non pertinent. Itaque soror fratri sororive legitima heres est, amita vero et fratris filia legitima heres esse non potest. Sororis autem nobis loco est etiam mater aut noverca quae per manum conventionem apud patrem nostrum iura filiae nacta est.*
[8] *Gaius, Institutiones* 1, 115b *...fiduciae causa cum viro suo fecerit coemptionem, nihilo minus filiae loco incipit esse; nam si omnino quaelibet ex causa uxor in manu viri sit, placuit filiae iura nancisci*. 2, 139. *Idem iuris est, si cui post factum testamentum uxor in manum conveniat, vel quae in manu fuit nubat; nam eo modo filiae loco esse incipit et quasi sua*.
[9] *Gaius, Institutiones* 3, 3. *Uxor quoque in manu viri est, ei sua heres est, quia filiae loco est.*
[10] Ulpianus, *Liber singularis regularum* 22, 14. *Sui autem heredes sunt liberi, quos in potestate habemus, tam naturales, quam adoptivi: item uxor, quae in manu est, et nurus, quae in manu est filii, quem in potestate habemus.*; 29, 1. *Sed ex edicto praetoris, seu testatus libertus moriatur, ut aut nihil aut minus quam partem dimidiam bonorum patrono relinquat, contra tabulas testamenti partis dimidiae bonorum possessio illi datur, nisi libertus aliquem ex naturalibus liberis successorem sibi relinquat, sive intestato decedat, et uxorem forte in manu vel adoptivum filium relinquat, eaque partis mediae bonorum possessio contra suos heredes patrono datur.*
[11] Paulus, *Sententiae* 4, 8, 4. 7.

allows minute distinction.[1] Brósz demonstrates that the Romans did not know the concept of agnate family, i.e., *familia agnata*, since *agnatio* is not one of the forms of *familia proprio iure*,[2] and it follows from this that belonging to *familia proprio iure* is not subject to agnate relation.[3] *Agnatio* usually arises in a natural way, through birth, but in an exceptional case it may be generated by *adoptio*, as it can be read in several loci of the *Digest* and in one locus of Iustinian's *Institutiones*;[4] and the paragraph of *Liber singularis regularum* which expounds the cases of becoming *suus heres* enumerates the changes in the range of possible inheritors pursuant to *ius civile* rather than the cases when *agnatio* arises:[5] *"Agnascitur suus heres aut agnascendo, aut adoptando, aut in manum conveniendo, aut in locum sui heredis succedendo, velut nepos mortuo filio vel emancipato vel manumissione, id est si filius ex prima secundave mancipatione manumissus reversus sit in patris potestatem."*[6] On the grounds of these it can be unambiguously pointed out that the *uxor in manu* does not belong to *agnatio*.[7]

IV. Of the husband's right and obligation to hold *iudicium domesticum* with the relatives because of the wife's capital offences, adultery and wine drinking, and of the husband's option to punish his wife at his discretion in cases of delinquencies of lower weight Dionysius of Halicarnass gives an account. The husband and his relatives passed a judgment on his wife in the event of adultery and if a woman was found guilty of drinking wine since a *lex regia* attributed to Romulus allowed to punish both cases with death sentence.[8] The locus of Dionysus describes the investigation of the relatives to be conducted together with the husband, so it is the husband and the relatives (and friends) who take part in the procedure, the latter constitute the *consilium necessariorum*. The term e*dikadzon* can be translated into the Latin word *cognoscebant*,[9] which is a technical term of the investigation of Roman criminal procedure; apparently the author knowingly uses a term of Roman law, which supports what can be read in the text of Cato passed on to us by Seneca (*illis ius dicere permiserunt*) and Gellius: *"Verba Marci Catonis adscripsi ex oratione quae inscribitur De dote, in qua id quoque scriptum est, in adulterio uxores deprehensas ius fuisse maritis necare: 'Vir', inquit, 'cum divortium fecit, mulieri iudex pro censore est, imperium quod videtur habet. Si quid pervorse taetreque factum est a muliere, multitatur; si vinum bibit, si cum alieno viro probri quid fecit, condemnatur.' De iure autem occidendi ita scriptum: 'In adulterio uxorem tuam si prehensisse, sine iudicio impune necares; illa te, si tu adulterares sive tu adulterare, digito non auderet contingere, negque ius est.'"*[10] This excerpt comes from

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[1] Brósz 1978. 7. f.

[2] Ulpianus D. 50, 16, 195, 2. *Iure proprio familiam dicimus plures personas, quae sunt sub unius potestate aut natura aut iure subiectae. ... Communi iure familiam dicimus omnium agnatorum: nam etsi patre familias mortuo singuli familias habent, tamen omnes qui sub unius potestate fuerunt, recte eiusdem familiae apellabuntur, qui ex eadem domo et gente proditi sunt.*

[3] Brósz 1978. 9.

[4] Ulpianus D. 38, 16, 2, 3. *Parvi refert, adgnatus nativitate an adoptione sit quaesitus. Nam qui adoptatur iisdem fit adgnatus, quibus pater ipsius fuit.* Cf. D. 1, 7, 7. 23.

[5] Brósz 1978. 11.

[6] Ulpianus, *Liber singularis regularum* 23, 3. Cf. Paulus, *Sententiae* 4, 8, 7. *Post mortem patris natus vel ab hostibus reversus aut ex primo secundove manciio manumissus, cuiusve erroris causa probata est, licet non fuerint in potestate, sui tamen patri heredes efficiuntur.*

[7] Brósz 1978. 13; Nótári 2011. 208.

[8] Dionysius Halicarnassensis, *Antiquitates* 2, 25. *De his cognoscebant cognati cum marito: de adulteriis et si qua vinum bibisse argueretur; hoc utrumque enim morte punire Romulus concessit.*

[9] Girard, F.: *Textes de droit romain.* Paris 1923. 6.

[10] Gellius, *Noctes Atticae* 11, 23, 4–5. *Verba Marci Catonis adscripsi ex oratione quae inscribitur De dote, in id quoque scriptum est, in adulterio uxores deprehensas ius fuisse maritis necare: 'Vir', inquit, 'cum divortium fecit, mulieri iudex pro censore est, imperium quod videtur habet. Si quid pervorse taetreque factum est a muliere, multitatur; si vinum bibit, si cum alieno viro probri quid fecit, condemnatur.' De iure autem occidendi*

Marcus Porcius Cato's oration entitled *De dote*, of which unfortunately only this fragment has been left to us without any other information available to us. The reference to the husband's rights is not enough to give a clue to the purpose and type of the *oratio.* The use of the second person *singularis* does not necessarily mean that the second person *singularis* generally and impersonally used in Latin is usual and quite frequent regarding any of the participants of the lawsuit.[1]

Here Cato gives a fairly clear-cut formulation of the husband's power over his wife, compares it to the magistrate's power, authority over citizens. So in divorce the husband shall have the right, provided that his wife has engaged an immoral conduct during the term of the marriage *(propter mores)*, to make certain deductions from the endowment that he must return as it were in the form of moral adjudication, *regimen morum* (moral adjudication). So for the woman the husband substitutes the *censor (vir iudex pro censore est)* since he has primary power, *imperium* over the wife *(imperium quod videtur habet)*. This imperium holds, as a matter of fact, during the marriage, and does not enter into force on the date of divorce like the *censor's regimen morum* the husband is entitled to in this case instead of the *censor.*[2] Just as the magistrate may exercise his punitive power in two different forms owing to the *imperium* he is entitled to, the husband has the same alternatives: in the case of the wife's wrongs of less significance *(si quid pervorse factum est a muliere)* he was allowed to punish her independently *(multitat)*—this corresponds with the disciplinary right of the magistrate under *coercitio*; in the case of the wife maintaining a relation with another man, or when the woman had drunk wine, in compliance with the exercise of the jurisdiction of law of the magistrate the husband also exercised *iurisdictio* (*comdemnat*). Consequently, *multitare* and *condemnare* are technical terms of *coercitio* and *iurisdictio* respectively, and as an author well-versed in law Cato used these two terms not at all accidentally as the opposites of one another. Cato's text sets forth, that *multitare* was applied in the divorce procedure, consequently, upon and after the termination of *manus*, here the husband's *imperium.* Whereas the magistrate was allowed to exercise this disciplinary right during the term of his office, i.e., while he possessed *imperium*; on the other hand, it cannot be ruled out at all that by *multitare* Cato meant the disciplinary punishment imposed by the husband on the wife during the term of the marriage. After describing the process of condemning the wife for adultery or drinking wine *(condemnatio)*, the author expressly underlines the unequal legal status of the spouses since while the husband was allowed to kill his wife caught in the act of adultery with impunity without convening *consilium necessariorum*—in the text of Dionysius of Halicarnass *syngeneis*—and without conducting *iudicium domesticum (sine iudicio impune necares)*, the wife was not allowed to touch her husband with a finger. If the husband was allowed to kill his wife caught in the act of adultery with impunity, this means that the principle in place in the ciriminal law of the state was enforced that set forth that the offender caught in the act of the offence *(manifestus)* might be punished without judicial proceedings too; so, e.g., the Twelve Table Law did not punish the killing of a night time thief or a thief defending himself with weapon it being lawful self-power.[3]

On the grounds of the sources we can state the following as a brief summary of *iudicium domesticum*: in his letter addressed to Lucilius Seneca remarks that the people of ancient times allowed the *dominus*, i.e., the family head to fulfill offices in his house community and

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ita scriptum: 'In adulterio uxorem tuam si prehensisse, sine iudicio impune necares; illa te, si tu adulterares sive tu adulterare, digito non auderet contingere, negque ius est.'

[1] Menge, H.: *Repetitorium der lateinischen Syntax und Stilistik, I–II*. Darmstadt 1995. II. 1.

[2] Kunkel, W.: *Das Konsilium im Hausgericht*. Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung 83. 1966. 234.

[3] *Collatio legum Mosaicarum et Romanarum* 7, 3, 3. *Et si quis noctu furem occiderit, non dubitamus, quin lege Aquilia non teneatur: sin autem, cum posset adprehendere, maluit occidere, magis est, ut iniuria fecisse videatur; ergo etiam lege Cornelia tenebitur.*

exercise *iurisdictio*; consequently, they believed that the home and the house community was a reduced-size copy of the state.[1] While exercising his punitive power, the *dominus*, explains Suetonius, proceeded pursuant to *mos maiorum*.[2] The *iudicium* usually took place in a formal procedure in the *atrium* of the *pater familias*'s home.[3] To hold a *iudicium domesticum* in cases of the wife's and the family child's punishment for capital delinquency was both a moral and actual legal obligation the *pater familias* was bound to fulfil, which can be traced back to the limitations of *manus* and *patria potestas* made right from the outset. It was obligatory to involve the relatives in the *iudicium* necessary for punishing more serious acts committed by the wife. The exercise of the *ius vitae ac necis* in force over the family child was not left to the father's arbitrariness either; according to the locus of Gaius's *Institutiones* left to us in the fragment from Autun quoting the Twelve Table Law death sentence was not allowed to be imposed unless a legal cause *(iusta causa)* existed,[4] and to prove the existence of this *iusta causa* a *consilium necessariorum* constituting *iudicium domesticum* was indispensable. As a matter of fact, it was possible to dispense with these proceedings if the person under power confessed his/her guilt *(confessus)*, or was caught in the act of such guilt *(manifestus)*.[5] The *consilium necessariorum* was logically composed of relatives and friends, whose circle was, however, determined presumably by the *pater familias*, albeit he had to accept the judgment of the persons invited into and involved in the *consilium* regarding the guilt or innocence of the accused—he was unambiguously bound by this decision; the members passing a judgment in the *iudicium* usually voted orally in the order determined by their rank.[6] First of all, they had to decide guilt; however, they were allowed to make a statement on the form of punishment too. For example, they could expressly protest against imposing death sentence even if the accused had been found guilty.[7] How did this element of the husband's power change later on and in cases where the husband was not obliged to hold *iudicium domesticum*?

The *lex Iulia de adulteriis coercendis* contains not exclusively and perhaps not primarily new norms created by Augustus[8] but rules taken over from former laws.[9] Let us make a brief survey to what extent and to whom the law gives right to kill adulteresses/adulterers.[10] The *pater familias*—in this respect the law does not distinguish blood father from adoptive father[11]—may kill his daughter caught in the act of adultery,[12] but only in the event that he caught her in the act at his own or at his son-in-law's house,[13] since the *legislator* regards it greater daring, greater recklessness shown by the woman if she has committed adultery at her

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[1] Seneca, *Epistulae* 47, 17. *Maiores nostri dominum patrem familias appellaverunt, honores illis in domo gerere, ius dicere permiserunt et domum pusillum rem publicam esse iudcaverunt.*

[2] Suetonius, *Tiberius* 35. *...ut propinqui more maiorum de communi sententia coercerent.*

[3] Valerius Maximus, *Dicta et facta memorabilia* 5, 8, 3. *Succurrebant effigies maiorum cum titulis suis, ut eorum virtutes posteri non solum legerent, sed etiam imitarentur.*

[4] Gaius, *Institutiones (Fragmenta Augustodunensia)* 86. *De filio hoc tractari crudele est, sed ... non est ... post ... occidere sine iusta causa, ut constituit lex XII tabularum, sed deferre iudicibus debet propter calumniam.*

[5] Kunkel 1966. 249.

[6] Seneca, *De clementia* 1, 15, 2–6.

[7] Iosephus Flavius, *Antiquitates Iudaicae* 6, 356.

[8] Mommsen 1899. 624; Kunkel 1966. 122.

[9] *Collatio legum Mosaicarum et Romanarum* 4, 2, 2. *Et quidem primum caput legis (Iuliae de adulteris) prioribus legis pluribus obrogat.*

[10] See Cantarella, E.: *Adulterio, omicidio legitimo e causa d'onore in diritto romano*. In: Studi in onore di Gaetano Scherillo. Milano 1972. 244. ff.

[11] Papinianus D. 48, 5, 23 (22) pr. *Nec in ea lege naturalis ab adoptivo patre separatur.*

[12] Papinianus D. 48, 5, 21 (20). *Patri datur ius occidendi filiam quam in potestate habet; itaque nemo alius ex patribus idem iure faciet: sed nec filius pater familias.*; Ulpianus D. 48, 5, 22 (21) *(Sic eveniet ut nec pater nec avus possint occidere) nec immerito: in sua enim potestate non videtur habere, qui non est suae potestatis.*

[13] *Collatio legum Mosaicarum et Romanarum* 4, 12, 1. *Permittitur patri tam adoptivo quam naturali adulterum cum filia cuiuscumque dignitatis domi suae vel generi sui deprehensum sua manu occidere.*

father's or husband's house.[1] The father, however, was obliged to kill also his daughter when killing the adulterer because if he killed only the *adulter*, and left her own daughter alive, he would incur the charge of *homicidium*, that is, murder;[2] but if the father was not able to kill his daughter because she had fled, and not because he wanted to save her life, then he was not to be punished for murder.[3] Although the law makes no difference as to who the *pater familias* must kill first, but if he kills one of them and only injures the other one, he will be held responsible for it pursuant to the *lex Corneia de sicariis et veneficiis.*[4] Nevertheless, Marcus Aurelius's and Commodus's rescript does not let the father be punished in the case when the adulteress—after she has been so seriously injured that she should have died—is left alive not by the father's intention but by as it were fatal accident.[5] A prerequisite for exercising this right was that the father had to catch the adulteress/adulterer in the act *in flagranti*, that is, *in ipsis rebus Veneris* indeed;[6] and he had to kill both of them as it were at one blow *(uno ictu et uno impetu)*, so after killing the adulterer he was not allowed to wait several days before killing his daughter. But it did not interrupt the continuity of *ictus unus* (or *animus*[7]) if the father killed his daughter, who had fled, several hours later when he caught her up or found her.[8]

Consequently, the *pater familias* was supposed to catch the adulteress/adulterer either at his own or at his son-in-law's house, and had to immediately attack them, and if he wanted to exercise *ius occidendi*, he had to kill both the man and his daughter.[9] A locus in Ulpian asserts that in order for the father to be able to exercise this right, the daughter had to be subjected to his *potestas*,[10] but two fragments of *Collatio* do not strictly tie the right of killing to the father's power; it provides the father with the option of exercising this right also in the case when his daughter has already been subordinated to the husband's power.[11] Behind this legislative extension most probably stood the highly practical reason that Augustus was aware

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[1] Ulpianus D. 48, 5, 24 (23), 2. *Quare non, ubicumque deprehenserit pater, permittitur ei occidere, sed domi suae generive sui tantum, illa ratio redditur, quod maiorem iniuriam putavit legislator quod in domum patris aut mariti ausa fuerit filia adulterum inducere.*

[2] *Collatio legum Mosaicarum et Romanarum* 4, 2, 6. *Sed si filiam non interfecerit sed solum adulterum, homicidi reus est.*

[3] *Collatio legum Mosaicarum et Romanarum* 4, 9, 1. *Si pater quis adultrum occidit et filiae suae pepercit, quaero quid adversus eum sit statuendum? Respondit: sine dubio iste pater homicida est: igitur tenebitur lege Cornelia de sicariis. Plane si filia non voluntate patris, sed casu servata est, non minimam habet defensionem pater, quod forte fugit filia. Nam lex ita punit homicidam, si dolo malo homicidium factum fuerit, hic autem pater non ideo servavit filiam, quia voluit, sed quia occidere eam non potuit.* Cf. Quint. *inst.* 5, 10, 104.

[4] Cantarella 1972. 246.

[5] Macer D. 48, 5, 33 (32) pr. *Nihil interest, adulteram filiam prius pater occiderit an non, dum utrumque occidat: nam si alterum occidit, lege Cornelia reus erit. Quod si adultero occiso alter vulneratus fuerit, verbis quidem legis non liberatur: sed divus Marcus et Commodus rescripserunt impunitatem ei concedi, quia, licet interempto adultero mulier supervixerit pst tam gravia vulnera, quae ei pater infixerat, magis fato quam voluntate eius servata est.*

[6] Ulpianus D. 48, 5, 24 (23) pr. Cf. Cantarella 1972. 247.

[7] *Collatio legum Mosaicarum et Romanarum* 4, 2, 6–7. *Sed si filiam non interfecerit, sed solum adulterum, homicidii reus est. Et si intervallo filiam interfecerit, tantumdem est, nisi persecutus illam interfecerit: continuatione enim animi videtur legis auctoritate fecisse.*

[8] Ulpianus D. 48, 5, 24 (23), 4.

[9] Cantarella 1972. 248.

[10] Ulpianus D. 48, 5, 24, 1. *Sufficit patri, si eo tempore habeat in potestate, non in quo in matrimonium collocavit.*; Papinianus D. 48, 5, 21 (20); Ulpianus D. 48, 5, 22 (21).

[11] *Collatio legum Mosaicarum et Romanarum* 4, 2, 3. *Secundo vero capite permittitur patri, si in filia sua, quam in potestate habet, aut in ea, quae eo auctore, cum in potestate esset, viro in manum convenerit, adulterum domi suae generive sui deprehenderit isve in eam rem socerum adhibuerit, ut is pater eum adulterum sine fraude occidat, ita ut filiam in continenti occidat.*; 4, 7. *Quaerebatur, an pater emancipatam filiam iure patris accusare possit. Respondi: occidendi quidem facultatem lex tribuit eam filiam, quam habet in potestatem aut quae eo auctore in manum convenit sed accusare iure patris ne quidem emancipatam filiam pater prohibetur.*

of the libertine marital conditions of his age, on the one hand; and that is why he put *ius occidendi* in the father's hand even for the period after the term of the *potestas*; and through that he wanted to ensure to the soldiers stationed permanently within the boundaries of the empire that in their absence their wives would continue to be under strict control.[1]

A *filius familias* under power is not entitled *expressis verbis* to the right to kill his wife caught in the act of adultery if she is under her father-in-law's *potestas*, yet the legislator provides him with this option, since he does not order that his act should be punished.[2] The husband was not entitled to the right of killing the *adulter* and his wife jointly, which the law justified by the consideration that while the father would deliberate with more *pietas* if he wanted to exercise this right, the husband would make the decision much sooner driven by his temper.[3] Pursuant to the provisions of *lex Iulia* if the husband kills his wife caught in the act of adultery, he will be responsible for murder, *homicidium*, so he had the right to kill "only" the *adulter*, the "seducer".[4] Notwithstanding, the law definitely narrowed the range of adulteresses/adulterers on the basis of their social standing who could be killed by virtue of the above,[5] since out of them only slaves, *infamis* persons—in this category the law emphasized, among others, those condemned to gladiator's and animal fights, convicts sentenced under *iudicio publico*, actors/actresses and prostitutes—and certain *libertinii* could be killed by the husband with impunity.[6] The father's right was further narrowed to the extent that the husband was allowed to take such action only in the case of adultery that took place at his own house.[7] After killing the *adulter*[8] he had to immediately dismiss his wife, and had to report the case in three days to the competent person exercising *iurisdictio*.[9] And if the husband killed his wife caught in the act of adultery, Commodus—referring to a *rescriptum* of Antoninus Pius—stipulated that it was not necessary to impose death sentence on the husband pursuant to *lex Cornelia de sicariis*, because he had committed his act in his righteous pain, driven by sudden passion, it was sufficient to sentence him to forced labour if he was ranked among the *humiliores*, or to *relegatio* if he belonged to the *honestiores*.[10] Likewise, referring to *iustus dolor*[11] Alexander Severus ordered less severe adjudication.[12]

To sum up the elements of the state of facts of *lex Iulia de adulteriis coercendis*, the *pater familias* is entitled wihout limitation to *ius occidendi* with respect to *uxor in manu* and his daughter caught in the act of adultery—regarding the female child also in the event that she has aleady lived under her husband's *manus*. Although *filius familias* under power shall have

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[1] Schaub, V.: *Der Zwang zur Entlassung aus der Ehegewalt und die remancipatio uxoris.* Zeitschrift der Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung 82. 1965. 123.

[2] *Collatio legum Mosaicarum et Romanarum* 4, 12, 2. *Filiusfamilias pater si filiam in adultero deprehenderit, verbis quidem legis prope est, ut non possit occidere: permittitur tamen etiam ei, ut occidat.*; Paulus, *Sententiae* 2, 26, 2.

[3] Papinianus D. 48, 5, 23 (22), 4. *Ideo patri non marito mulierem et omnem adulterum remissum est occidere, quod plerumque piertas paterni nominis consilium pro liberis capit: ceterum mariti calor et impetus facile decernentis fuit refrenandus.*

[4] *Collatio legum Mosaicarum et Romanarum* 4, 10, 1. *Si maritus uxorem suam in adultrio deprehensam occidit, an in legem de sicariis incidat, quaero. Respondit: nulla parte legis marito uxorem occidere conceditur: quare aperte contra legem fecisse eum non ambigitur.*

[5] Cantarella 1972. 249.

[6] Macer D. 48, 5, 25 (24) pr.; Paulus, *Sententiae* 2, 26, 4 = *Collatio legum Mosaicarum et Romanarum* 4, 12, 3; Coll. 4, 3, 1–4.

[7] Macer D. 48, 5, 25 (24) pr.; *Collatio legum Mosaicarum et Romanarum* 4, 3, 2.

[8] About the *adulter* see Horatius, *Saturae* 1, 2, 41–46. *Hic se praecipitem tecto dedit, ille flagellis / ad mortem caesus, fugiens hic dedit acrem / praedonum in turbam, dedit hic pro corpore nummos, / hunc permixerunt calones; quin etiam illud / accidit ut quidam tectis caudamque salacem / demeteret ferro.*

[9] Paulus, *Sententiae* 2, 26, 6; *Collatio legum Mosaicarum et Romanarum* 4, 3, 5.

[10] Papinianus D. 48, 5, 39 (38), 8; *Collatio legum Mosaicarum et Romanarum* 4, 3, 6.

[11] Cf. Cantarella 1972. 260. ff.

[12] *Codex Iustinianus* 9, 9, 4.

no right to kill his wife in this case, he has the option to do that *de facto* without being punished. If he does not exercise power over his wife, the husband has no *ius occidendi* either *de iure*, or *de facto*, but if he should kill his wife driven by *iustus dolor*, his act will be less severely adjudged.[1] From this Schaub draws the conclusion that the existence and extent of *ius occidendi* holding in the case of *adulterium* is determined by the fact of being under power rather than by the exercise or possession of power: the *maritus*, whose interest does not deserve less protection by law than that of the *pater familias*, may not kill his wife if she is not under power; although not having power over his wife the *filius familias* as husband yet may kill his wife because she is under her father-in-law's *potestas*; and the *pater familias* may kill his daughter even if she is no longer under his *potestas* but under her husband's *manus*.[2] So the structure of power existing during the marriage is more closely linked to adultery than adultery to the marriage itself, as it comes from the basically and primarily power based nature of Roman family relations. In the event that the husband does not divorce his wife caught in the act of adultery, the relevant loci do not reveal whether a marriage with *manus* or without *manus* is concerned,[3] pursuant to *lex Iulia de adulteriis coercendis* he shall be punished because of *lenocinium*;[4] in this context the *uxorem retinere* appears as the opposite of *uxorem dimittere*, which occurs several times in loci[5] expounding *lenocinium*.[6] The term *dimittere* carries a wider sense than the phrases *nuntium remittere*, *repudiare*, or *divortium facere* that can be read in similar contexts, because it expresses not only the fact of divorce but implies reference to actual ousting in a much wider sense. If the husband wanted to avoid the charge of *lenocinium*, then he had to break all the ties that linked him through *dimittere* to his wife and the ties that linked his wife to him, so he had to release her from his *manus* too. A terminologically more precise phrase would have been *repudiare et remancipare*, but due to its somewhat complicated structure the legislator chose the verb *dimittere* that embraces these two aspects.[7]

V. A marriage without *manus* was terminated without any other assistance by the authorities both by *divortium*, which was carried out with the parties' common will, and *repudium* implemented with an unilateral statement,[8] which was referred to as early as in the Twelve Table Law.[9] The *lex Iulia de adulteriis coercendis* stipulated that the husband who intended to oust his wife should declare his such intention in the presence of seven witnesses; Constantinus made the application of *repudium* subject to the existence of certain ground for divorce.[10] The husband ousting his wife without legal ground was ordered to be punished by Romulus, one half of his properties had to be offered to Ceres, and the other half fell to his wife.[11] A marriage with *manus* was terminated by the termination of the *manus*.[12] It was out in the form of *contrarius actus*, that is, the opposite of the legal act generating *manus*, so

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[1] Schaub 1965. 126.
[2] Schaub 1965. 126.
[3] Schaub 1965. 119.
[4] Ulpianus D. 48, 5, 2, 2. *Lenocinii quidem crimen lege Iulia de adulteriis praescriptum est, cum sit in eum maritum poena statuta, qui de adulterio uxoris suae quid ceperit, item in eum, qui in adulterio deprehensam retinuerit.*; Ulpianus D. 48, 5, 30 pr. *Mariti lenocinium lex coercuit, qui deprehensam uxorem in adulterio retinuit adulterumque dimisit.*
[5] About the *lenocinium* see Mommsen 1899. 700.
[6] Papinianus D. 48, 5, 12, 13; Ulpianus D. 48, 5, 2, 6; Ulpianus D. 38, 11, 1, 1; *Codex Iustinianus* 9, 9, 25.
[7] Schaub 1965. 120.
[8] Nótári 2011. 214.
[9] *XII tab.* 4, 3. (Cicero, *Philippicae* 2, 28.) *Illam suam suas res sibi habere iussit, ex XII tabulis claves ademit, exegit.*
[10] *Codex Theodosianus* 3, 16, 1.
[11] Plutarchus, *Romulus* 22. (Cf. Zlinszky 1996. 48.)
[12] Nótári 2011. 213.

the *manus* generated through *confarreatio* was terminated by *diffarreatio,*[1] which was implemented also with the assistance of the *pontifex* and in the presence of witnesses, and as part of that the *panis farreus* held out to the parties who intended to divorce was refused by them, and they recited some alien, hateful and terrific formula as we know from Plutarch's account,[2] the text of which has unfortunately not been left to us. The *manus* obtained with *coemptio*, or *usus* was terminated by *remancipatio*.[3] The reference made in *leges regiae* coming also from Plutarch that sets forth that the husband who sells his wife shall be sacrificed in serious cases to the gods of the underworld[4] mentions sale together with unlawful ousting, so most probably it pertains to divorce without legal ground, that is, *remancipatio,* from which the general prohibition of *remancipatio* cannot be inferred.[5]
Remancipatio, however, did not serve divorce as its only purpose since it provided the husband with the option to remancipate his wife under the *potestas* of an earlier exerciser of power, usually the *pater familias* on condition that he was to pass on the wife with *mancipatio* to a third party determined by the husband; later this became the basis of the aforesaid *coemptio fiduciara* that furthered the process of making women have their own rights.[6] Regarding the law of the archaic age there are indeed certain accounts available to us which assert that the husband handed over his wife through *mancipatio* to a third party who was bound to return her after the purpose had been achieved; it is an especially interesting case when the husband was allowed to deliver his wife to another husband for a period in order for her to give birth to a successor, and after it had taken place—as it was stipulated by a *pactum fiduciae (ut remancipetur)* during *mancipatio*—the wife was returned to him.[7]
Accordingly, *remancipatio* terminated the marriage and the second husband was granted *manus* over the wife, which held until the first husband demanded the wife to be returned to him on the grounds of the *pactum* set forth in the *mancipatio*; regarding this point Düll mentions several sources on the law of Sparta that give accounts of legal practices which can be compared to similar Roman customs. [8] Polybios asserts that it was a generally accepted custom for three or four, or if they were brothers, even more men to live together with a single woman, who gave birth to a child for all of them, and if one of the men believed she had given birth to a sufficient number of children, he was allowed to hand over his wife to his friend so that she should give birth to children for him.[9] Pausanias gives an account of king Anaxandridés's double marriage, namely, the king's first marriage was childless, and the *ephorii* requested him to divorce his wife but the king was not willing to do that, instead he obtained another wife beside the first one.[10] Plutarch also describes the Spartian practice that although the husband continued to live with his wife to maintain the marriage but was allowed to hand her over to another man who asked him to do so in order to beget children; in Rome this custom was maintained in the form where a man who had enough children could be asked by any childless man to assign his wife to him either once and for all or on condition that he would return her to him later.[11] Of the existence of this marital institution in the last decades of the age the Roman republic we can learn from Plutarch's biography on Marcus

[1] Festus, *De verborum significatione* s. v. *diffareatio*
[2] Plutarchus, *Quaestiones* 50.
[3] Düll 1944. 210.
[4] Plutarchus, *Romulus* 22.
[5] Düll, R.: *Studien zur Manusehe*. In: Festschrift für Leopold Wenger, I. München 1944. 213.
[6] Cf. *Gaius, Institutiones* 1, 115a
[7] Düll 1944. 213. f.
[8] Düll 1944. 214.
[9] Polybius, *Historiae* 12, 6b, 8.
[10] Pausanias, *Perihegesis* 3, 3, 9.
[11] Plutarchus, *Comparatio Lycurgi et Numae* 3, 1–2.

Porcius Cato minor.[1] Referring to Lucius Thrasea Paetus, the historian living during the reign of Nero, Plutarch narrates that Q. Hortensius, an excellent orator of his age, wanted to confirm his friendship with Cato through some kind of kinship; therefore, he asked Cato to marry off his daughter, Porcia to him, who was at that time Bibulus's wife, whom she had presented with two children; and if Bibulus insisted on having Porcia, then he would return her to her former husband after she had given birth to children for him too. Cato did not consent to his daughter becoming Hortensius's wife; then Hortensius demanded that Marcia herself, Cato's wife should be married off to him, although he knew that they had not got estranged from each other since Marcia was just expecting a child from her husband. Seeing that Hortensius's resolution was quite firm, Cato having asked for the consent of Marcia's father, Philippus gave consent to the marriage of his wife, Marcia and Hortensius. He himself was also present at the enagegment, which was expressly requested by Hortensius.[2]
When Hortensius died, Marcia became a widow, then Cato married her again, for which Caesar reproached Cato for considering marriage a source of profiteering since in his last will and testament Hortensius bequeathed his properties to Marcia.[3] Appianos also touches upon this case,[4] and Strabón establishes in line with the comparison of Lykurgos with Numa Pompilius made by Plutarch [5] that Cato's procedure complied with ancient Roman customs.[6] In the same spirit, that is, deeming it being in harmony with ancient Roman morals and the interest of the state, Augustine recalls this event of Cato's life,[7] and Tertullian demonstrates the differences between Roman and Christian values with this case; nevertheless, he connects the history of Marcia's marriage erroneously to Cato Censorius and not to Cato Uticensis.[8] It proves that this case was part of public knowledge that Quintilian states that the Cato–Marcia–Hortensius marriage could serve as proper grounds for argumentation and counter-argumentation in orator's training.[9] Undoubtedly, this marriage must have been a marriage with *manus* since that is why the consent of Marcia's father, Philippus was required because Cato's *manus* was terminated by the *remancipatio* for the *pater familias*, and in the conclusion of the marriage to be concluded with Hortensius, most probably entered into with *coemptio*, the assistance of the exerciser of power could not be dispensed with.[10] This is supported by the locus of Lucan's *Pharsalia* which asserts that Marcia was the subject of these transactions as *iussa*, that is, a person fulfilling an order and not as an active participator; the phrase *conubii pretium mercesque soluta* and another expression *tertia iam suboles* concerning Marcia also refer to *coemptio* and *mancipatio*,[11] since as *prima filia* she

[1] See Berthold, H.: *Cato von Utica im Urteil seiner Zeitgenossen*. In: Acta Conventus XI. Eirene 1968. Warschau 1971. 133. ff.
[2] Plutarchus, *Cato minor* 25.
[3] Plutarchus, *Cato minor* 52.
[4] Appianus, *Bella civilia* 2, 99.
[5] Plutarchus, *Comparatio Lycurgi et Numae* 3, 1–2.
[6] Strabo, *Geographica* 11, 515.
[7] Augustinus, *De fide et operibus* 7. *Non liceat viro uxorem suam alteri tradere: quod in re publica tunc Romana non solum minime culpabiliter, verum etiam laudabiliter Cato fecisse perhibetur.*
[8] Tertullianus, *Apologeticum* 39, 12. *Qui uxores suas amicis communicaverunt, quas in matrimonium duxerant liberorum et alibi creandorum. Nescio quidem ain vitas... O Romanae gravitatis exemplum: leno est philosophus et censor.*
[9] Quintilianus, *Institutio oratoria* 3, 5, 8. 11. 13; 10, 5, 13.
[10] Düll 1944. 220. ff.
[11] Lucanus, *Pharsalia* 2, 326–339. *Interea, Phoebo gelidas pellente tenebras, / pulsatae sonuere fores: quas sancta relicto / Hortensi moerens irrupit Marcia busto: / quondam virgo toris melioris iuncta mariti: / mox, ubi, conubii pretium mercesque soluta est / tertia iam suboles, alios fecunda penates / impletura datur, geminas ex sanguine matris / permixtura datos. Sed postquam condidit urna / supremos cineres, miserando concita vultu, / effusas laniata comas, concussaque pectus / verberibus crebris, cineresque ingesta sepulcri, / non aliter placitura viro, sic moesta profatur: / 'Dum sanguis inerat, dum vis materna peregi / iussa, Cato, et geminos excepi foeta maritos.'*

was Philippus's daughter, being *filiae loco* as *secunda filia* she was a wife in the marriage with *manus* concluded with Cato, and she became *filiae loco tertia filia* again under Hortensius's *manus*.[1] The former husband's right to demand his wife to be returned to him from under the second husband's *manus* was ensured by *muncupatio* related to *mancipatio*, which was in terms of its content a *pactum fiduciae* that could be claimed through the courts[2] with the infamous *actio fiduciae*.[3]

[1] Düll 1944. 221.
[2] Nótári 2011. 275.
[3] Düll 1944. 222.

Summum ius summa iniuria—On the Historical Background of a Legal Maxim

Interpretation based on maxims of legal logic occupies an honourable place among the possible methods of legal interpretation; this is done most frequently by using basic concepts originating from the classical period of Roman law, which faciliate orientation among contradictory decrees and help to clarify the meaning of legal rules. Here belong the following principles, widely known in Modestinus's formulation but dating from the period of the *leges XII tabularum*: *"lex posterior derogat legi priori"*,[1] the Papinian *"lex specialis derogat legi generali"*,[2] and the *"lex primaria derogat legi subsidiariae"*. It is a basic interpretive principle, that the legal rule should be interpreted in its integrity, not by extracting certain parts of it.[3] Following the letter of the law often leads to its evasion,[4] during interpretation the legislator's intention should be taken into account,[5] and if this is doubtful, the more lenient solution should be preferred.[6] All these can be traced back into a highly philosophical, Celsian principle—also widely accepted in contemporary legal thinking—which declares that the vocation of the Law is to implement Justice, asserting that *"ius est ars boni et aequi"*,[7] the Law is an art of the Good and the Just. Out of these, the procedure called *in fraudem legis* is related to the statement that enforcing the letter of the law often leads to inequity contradictory with the spirit of the law; i.e., to injustice. Cicero also quotes this *proverbium*, widely spread as early as in the age of the Republic, which remained in use in his formulation until today: *"summum ius summa iniuria"*;[8] i.e., the utmost enforcement of the law leads to the greatest injustice.

The present paper has a modest aim; it does not offer a general survey, much rather an introspection into the problem. First, it enumerates the occurrences of this proverb in the sources of Roman literature (I.); then, it outlines the development and semantic changes of the concept of *interpretatio* (II.); after that, it investigates the meaning of *summum ius* in relation to the principle *ars boni et aequi* and the concept of Justice in legal sources and Cicero's works (III.); finally, it will consider the further-reaching consequences of this *proverbium* in *Adagia* by Erasmus of Rotterdam, one of the most important humanists (IV.).

I. This idea first occurs in Terence's comedy, *Heautontimoroumenos*: *"Neque tu scilicet / illuc confugies: 'Quid mea? Num mihi datumst? Num iussi? Num illa oppignerare filiam meam me invito potuit?' Verum illuc, Cherme, / dicunt: Ius summum saepe summast malitia."*[9] The situation is the following: Syrus asks Chermes for money, so that he could help his young master, but in order to get the sum he claims that he needs it for Chermes's daughter. The law is indubitably on Chermes's side, but unconditioned clinging to the law cannot be reconciliated with the *pietas* and *clementia* expected from a Roman *pater familias*. In order to analyse the *summa malitia* turning point it is useful to peruse some meanings and the most typical occurrences of the *summus–summa–summum* adjective and the different

[1] XII tab. 12, 5; Mod. D. 1, 4, 4.
[2] Pap. D. 48, 19, 41; 50, 17, 80.
[3] Cels. D. 1, 3, 24.
[4] Paul. D. 1, 3, 29.
[5] Cels. D. 1, 3, 19.
[6] Marc. D. 28, 4, 3 pr.
[7] Ulp. D. 1, 1, 1.
[8] Cic. *off.* 1, 33.
[9] Ter. *Heaut.* 792. ff.

connotations of the word *malitia*. In its original meaning *summus* is the Latin equivalent of the Greek *hypathos*.[1] Varro[2] and Isidorus Hispalensis[3] use it as a grammatical technical term for the explanation of the *superlativus*, Quintilian applies it for the description of rhetorical amplification.[4] Used figuratively, it can be encountered in many places, both with temporal meaning[5] and in relation to social status;[6] e.g., applied to the *optimates* and the *nobiles*[7] as the contradiction of the *humiles*, the *infima plebs*[8] and the *infimus ordo*.[9] Isidorus describes the word *malitia*, deriving from the word *malus*, as the evil thought of mind;[10] it is used by many authors as the synonym of *astutia* and *calliditas*.[11] In the prologue of *Heautontimorumenos* Terence mentions *expressis verbis* the Greek type of his comedy,[12] which, with regard to the above cited *proverbium*, can most probably be identified with two lines by Menander,[13] though the two ideas do not correspond word for word. Terence speaks about *ius*, whereas Menander mentions *nomoi*; i.e., the laws and not *dikaion*. The *synkhophantēs* carries a slightly wider semantic load than *malitia*, which could be translated into Latin as *damnum*, *calumnia* or *malum*, in any way designating a content in contradiction with the spirit and destination of *ius*;[14] *lian akribōs* can be equally translated by the phrase *summo iure* or *nimis exacto quodam studio*.[15] Hence it becomes obvious that Terence heavily altered the Menandrian thought and adapted it to the circumstances of Roman legal life but preserved its basic message.[16]

Hieronymus takes his version from this Terentian *locus*: *"O vere ius summum summa malitia."*[17] A statement with similar content (*summum ius summa crux*) is formulated by Columella, when he speaks about the responsibilities of the *pater familias* and the *dominus*: *"comiter agat cum colonis facilemque se prebeat, …sed nec dominus in unaquaque re, cui colonum obligaverit, tenax esse sui iuris debet, sicut in diebus pecuniarum vel lignis et ceteris paucibus accessionibus exigendis, quarum cura maiorem molestiam quam impensam rusticis adfert. Nec sane vindicandum nobis quidquid licet, nam summum ius antiqui summam putabant crucem."*[18] So it is forbidden to deal too harshly with the *colonii*, and the master should exercise the virtues of meekness and consideration.[19]

The *proverbium* passed into legal common knowledge in Cicero's formulation in *De officiis*: *"Existunt saepe iniuriae calumnia quadam et nimis callida, sed malitiosa iuris*

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[1] Walde, A.–Hofmann, J. B.: *Lateinisches Etymologisches Wörterbuch, I–II.* Heidelberg 1954. II. 630.
[2] Varro *ling.* 8, 75.
[3] Isid. *etym.* 1, 7, 27.
[4] Quint. *inst.* 7, 10.
[5] Plaut. *Asin.* 534; *Persa* 33; *Pseud.* 374; Cic. *Cato* 78; Suet. *Tib*. 64, 4.
[6] Plaut. *Cist.* 516; *Amph.* 77; *Capt.* 279; *Merc.* 694; *Stich.* 409; *Persa* 418; Cic. *Tusc.* 2, 144.
[7] Plaut. *Stich.* 492 f.; *Cist.* 23 f.; *Pseud.* 70; *Merc.* 604; Ter. *Heaut.* 227. 609; *Ad.* 502.
[8] Plaut. *Cist.* 24 f.; Ter. *Eun.* 489; *Hec.* 380; Cic. *Att.* 4, 1, 5; *Phil.* 2, 3.
[9] Carcaterra, A.: *'Ius summum saepe summast malitia'*. In: Studi in onore di E. Volterra. Milano 1971. IV. 631 ff.
[10] Isid. *diff.* 1, 358.
[11] Isid. *etym.* 10, 6. Cf. Carcaretta 1971. 638.
[12] Ter. *Heaut.* 4–5.
[13] Menandr. Nr. 545.
[14] Don. *Comm. in Ter. Heaut.* 792 ff. *Summum ius saepe summa est malitia id enim, quod datum est, utique reddendum est, sed iure cautum est, ut filia quidquid acceperit vel filiae nomine datum fuerit, quae in familia est, non recte datum videatur. Itaque aequitatis est ut debitum solvi debeat, ius est ut sic datum reddatur: ita summum ius summa malitia.*
[15] Carcaterra 1971. 641.
[16] Carcaterra 1971. 644.
[17] Hier. *epist.* 1, 44.
[18] Colum. *rust.* 1, 7, 1 f.
[19] Fuhrmann, M.: *Philologische Bemerkungen zur Sentenz 'Summum ius, summa iniuria'*. In: *Studi in onore di E. Volterra*. Milano 1971. II. 74.

interpretatione. Ex quo illud 'summum ius summa iniuria' factum est iam tritum sermone proverbium."[1] Consequently, it is not *ius* itself that results in *iniuria*, but the malevolent enforcement of a seemingly lawful claim is the case when injustice is committed under the mask of law enforcement.[2] Examining the bequeathing of the *proverbium*, one can safely assert that the versions of Terentius and Columella are more closely connected with each other than with the Ciceronian *antithesis*, and that they represent an earlier stage in the formulation of this thought.[3] In these two authors' works the clash of the legal and moral norms becomes foregrounded; i.e., the action permitted and approved by *ius* becomes contestable from the side of *mos*.[4] The Ciceronian formulation goes even further: it is not only the legal and ethical norm that conflict here, but the collision takes place within the legal system.[5] The claim is made not only for a morally correct decision but also for the right and just application of the law. The proverb objects to the abuse of the law, to its literal and not sensible interpretation.[6] (The phrase *factum etiam tritum sermone proverbium* could refer to the fact that Cicero himself took over the idea of *summum ius summa iniuria* from an earlier *auctor* or the practice on the *forum*, or it can be assumed that he is referring to his own rhetorical practice when he emphasises the great familiarity of the proverb, as he frequently used the phrases *summo iure agere* and *summo iure contendere* too.[7])

However, he greatly exceeds the requirement of equitable legal interpretation in *De legibus*, where, among other things, he analyses the connection between natural law and positive law.[8] In this work Cicero appears as legislator—as his model Plato[9] does in *Nomoi*[10]—a thing which must have seemed extremely new, almost provoking indignation, because doing this he intended to reform and replace the venerated *leges XII tabularum*,[11] thus occupying the place of the nation who made these laws.[12] The first book contains considerations of legal theory, which was practically unknown in Rome in the 1st century BC. It aims at harmonizing *ius civile* with *ius naturale* because this was the only way Roman law could lay claim to universality.[13] From the demand of *ius naturale* neither the *comitia*, nor the *senatus* can give exemption, this being eternal and unchanging. The fundamental task of the legislator and the judge is to proceed in accordance with it,[14] and the task of the law is to separate the lawful from the unlawful.[15] *Ius* and *ratio* are inseparably connected; moreover, they are each other's synonyms in a certain respect; so law must originate directly from philosophy and not from

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[1] Cic. *off.* 1, 33.
[2] Bürge, A.: *Die Juristenkomik in Ciceros Rede Pro Murena*. Zürich 1974. 53.
[3] Stroux, J.:*'Summum ius, summa iniuria' Ein Kapitel der Geschichte der interpretatio iuris*. Berlin–Leipzig 1926. 21; Fuhrmann 1971. 74.
[4] Stroux 1926. 49.
[5] Fuhrmann 1971. 75.
[6] Büchner, K.: *Summum ius summa iniuria.* In: *Humanitas Romana*. Heidelberg 1957. 102; Tomulescu, C. S.: *Der juristische Wert des Werkes Ciceros.* In: Gesellschaft und Recht im griechisch-römischen Altertum, I–II. Berlin 1968. I. 230.
[7] Cic. *Verr.* 6, 4. *Non agam summo iure tecum, non dicam id quod debeam forsitan obtinere, cum iudicium certa lege sit.*; *Att.* 16, 15, 1. *Ego ... dubitassem fortasse utrum remissior essem an summo iure contenderem.*
[8] Tomulescu 1968. 230.
[9] Cic. *leg.* 1, 15.
[10] Cf. Görgemanns, H.: *Beiträge zur Interpretation von Platons Nomoi*. München 1960; Morrow, G. R.: *Plato's Cretan City*. Princeton 1960.
[11] Cic. *leg.* 2, 23. 59.
[12] Knoche, U.: *Ciceros Verbindung der Lehre vom Naturrecht mit dem römischen Recht und Gesetz.* In: Radke, G. (Hrsg.): Cicero ein Mensch seiner Zeit. Berlin 1968. 41.
[13] Hamza, G.: *A ius naturale a Corpus Ciceronianumban (Ius naturale in the Corpus Ciceronianum).* In: Hereditas Ciceroniana. Debrecen 1995. 75 ff.
[14] Cic. *rep.* 3, 22.
[15] Cic. *leg.* 2, 13.

the pretorial edict or the *leges XII tabularum*, therefore, it can never lose its validity.[1] He formulates in a strictly imperative mood the demand never written down before in Rome: *"Lex iusta esto!"*[2] Law must be based on Justice, which might seem trivial in itself, but Cicero himself had felt the lack of this condition; so law depends solely on Justice, and social cohabitation depends only on the law—this conclusion must have seemed considerably bold in ancient Rome.[3] Appearing as a great system originator in philosophy, Cicero wanted to encompass law in a system as well as in his work—unfortunately lost since then—entiteled *De iure civili in artem redigendo*, which does not seem to have exerted much influence on legal scholars in Rome.[4]

Returning to *summum ius summa iniuria*: it was quite common that certain maxims formulated in everyday life and transmitted through literary sources were appropriated by Law as rules of universal validity. For example, here are a couple of *proverbia* that became *regulae iuris*.[5] Aquila Romanus quotes the sentence *"cui quod libet, hoc licet"*,[6] which can be found in the fragment of Ulpianus as *"non omne quod licet honestum est"*.[7] Publius Syrus's thought, *"lucrum absque damno alieno fieri non potest"*[8] resonates with Pomponius's rule: *"iure naturae aequum est neminem cum alterius detrimento fieri locupletiorem"*.[9] Seneca maior's sentence *"tacite loquitur; silentium videtur confessio"*[10] corresponds with Paulus's *"qui tacet, non utique fatetur: sed tamen verum est eum non negare"*.[11]

II. In order to highlight the origin and the meaning of the word *interpretatio*, let us examine the loci to see in what context the concepts *interpres* and *interpretari* are used by Plautus, and other authors of archaic Roman literature bequeathed to us mainly in fragments. In *Poennulus* the slave says that the speech of his master could only be made intellegible by Oedipus, who solved the enigma of the Sphinx too.[12] In *Pseudolus* the content of an undecipherable letter could be solved only by the Sybilla.[13] Both cases are concerned with deciphering the meaning of extremely intricate texts, which can be done exclusively by *oracula*, the solvers of great predictions, of mythical secrets, so the author draws the activity of *interpretari* into the circle of religious mysteries and endows it with the meaning of decoding, of solving an enigma.[14] In *Bacchides*, the importunate messenger is made to leave in a comic fashion but quite resolutely, with palpable means,[15] so the messenger, who interpreted the highly paraphrased threat for himself, thought it better to proceed more cautiously.[16] In *Cistellaria* a father gathers from the words of the *hetaira* speaking with him that she seduced her son.[17] In this case it is not the enigmatic words and composition of the interlocutor where one should draw conclusions from, it is much rather the conclusion drawn from the situation, the subjective

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[1] Cic. *leg.* 1, 18; 2, 14.
[2] Cic. *leg.* 1, 18.
[3] Knoche 1968. 46 ff.
[4] Lübtow, U. v.: *Cicero und die Methode der römischen Jurisprudenz*. In: Festschrift für L. Wenger. München 1944. I. 232.
[5] Carcaterra 1971. 663.
[6] Aquila Rom. *fig.* 27.
[7] Ulp. D. 50, 17, 144.
[8] Publ. Syr. *Sent.* L, 6.
[9] Pomp. D. 50, 17, 206.
[10] Sen. *contr.* 10, 2, 6.
[11] Paul. D. 50, 17, 142.
[12] Plaut. *Poen.* 443 f.
[13] Plaut. *Pseud.* 25 f.
[14] Fuhrmann, M.: *Interpretatio—Notizen zur Wortgeschichte.* In: Sympotica F. Wieacker. Göttingen 1970. 82.
[15] Plaut. *Bacch.* 595 f.
[16] Plaut. *Bacch.* 597.
[17] Plaut. *Cist.* 316 ff.

opinion that is denominated by the word *interpretor*.[1] Refreshing the interlocutor's memory, recalling a certain event can also be signified by the verb *interpretari*;[2] elsewhere the revealer, the solver of a doubtful situation, or the implementor of a plan is called the *interpres*; whereas in the last case it is the synonym of *internuntius*.[3] So Plautus uses the expressions *interpres* and *interpretari* with two connotations: on the one hand, in their original sense, meaning mediation, on the other hand, in the sense of understanding, making to understand, a more abstract and indirect meaning; this latter meaning implies a kind of irrational activity related to the realm of *religio*.[4] This seems to be corroborated by the fragments after Plautus and before Cicero.

A Pacuvian fragment connects the task of the *interpres* with the interpretive activity of the *augures* and *haruspices* and it mentions a sinister *prodigium*,[5] placing the interpretive activity within the context of Roman religious institutions.[6] A fragment from a Latin translation of the *Ilias* contains a line from Agamemnon's reply to Calchas's premonition; comparing it to the Homeric text it becomes evident that *interpres* here stands for the Greek *mantis*.[7] It is also a fragment by Pacuvius according to which the activity of the *interpretari* in the course of interpreting obscure texts is at times doomed to highly uncertain guesses.[8] Based on this, we can assume that in the beginning the *interpres* mediated not only between humans but also between the human and the divine sphere, so in the course of fulfilling his task, besides everyday logic he had to employ certain means that belonged to the realm of the irrational as well.[9]

For the religious usage of these expressions one can find ample evidence in the *Corpus Ciceronianum* and other authors from contemporary Roman literature. *Augures*, *haruspices*, *decemviri* and Persian *magi* are mentioned as *interpretes*;[10] premonitions, miraculous and sinister signs, thunderbolts, dreams, religious phenomena, and generally the will of the gods, all pertaining to the sphere of *religio*, constitute the object of *interpretari*.[11] In many cases the expressions *interpres* and *coniector* serve as each other's explanation, highlighting each other.[12] According to Cicero, this interpretive activity is needed because of the obscure and doubtful nature of certain religious phenomena, so it is not surprising that the concept of *interpretatio* was eagerly associated with obscure and polisemic contents outside the circle of *religio* too; e.g., in philosophical polemic.[13]

In addition to its sacred connotations, the most common, practical usage of *interpres* can also be found; it occurs in diplomatic, administrative, military and commercial fields too. In these cases *interpres* is none other than interpreter or translator. In the sources the interpreter translates word for word, *verbum pro verbo*, and in this respect he can be regarded the contrary of the *orator*, who possibly takes over a thought from somebody else, but enriches

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[1] Fuhrmann 1970. 84.
[2] Plaut. *Epid.* 552.
[3] Plaut. *Mil.* 798. 951 f.; 962.
[4] Fuhrmann 1970. 84.
[5] Pacuv. *v.* 80 ff. *Cives, antiqui amici maiorum meum, consilium socii, augurium atque extum interpretes, postquam prodigium horriferum, portentum pavos.*
[6] About the *aurures* and *haruspices* see Latte, K.: *Römische Religionsgeschichte*. München 1967. 141. 158.
[7] Mat. *frg*. 2. *Obsceni interpres funestique ominis auctor*. Cf. *Il*. 1, 106 f.
[8] Pacuv. *v*. 151 f. *Nil coniectura quivi interpretarier, quorsum flexiloqua dictio contenderet.*
[9] Fuhrmann 1970. 85.
[10] Cic. *leg.* 2, 20; *Phil.* 13, 12; *nat.* 2, 12; 3, 5; *div.* 1, 3. 4. 46; 2, 110; Liv. 10, 8, 2; Gell. 4, 1, 1.
[11] Cic. *leg.* 2, 20. 30; *div.* 1, 3. 45. 92. 93. 116; *Scaur.* 30; *dom.* 107; Quint. 3, 6, 30; Plin. *nat.* 2, 141; 7, 203; Gell. 4, 1, 1; Val. Max. 1, 5. 6.
[12] Cic. *nat.* 2, 12; *div.* 1, 118; 2, 62. 66. 144; Quint. 3, 6, 30.
[13] Cic. *div.* 1, 1166; *nat.* 1, 39; Quint. 3, 4, 3.

and embellishes it with elements of style when delivering it to the audience.[1] Cicero himself used these possibilities of individualisation when he translated the speeches of Greek rhetors into Latin, an in his philosophical works on the employment of Greek models.[2] Giving advice to poets in his *Ars poetica*, Horace is against translation word for word performed in the manner of the *interpres*.[3] Quintilian challenges a poet's originality precisely because of his being an *interpres*.[4] *Interpretatio* as a technical term first occurs in rhetorics, namely in *Auctor ad Herennium*'s discourse concerning rhetoric figures, which claims that a kind of *geminatio*, the *conduplicatio* differs from *interpretatio* only to the extent that the *verbum pro verbo* translation is a form-and-content true transfer of a train of thought from a different language whereas *conduplicatio* is the same activity within a single language.[5] Quintilian does not consider *interpretatio* to be a rhetoric figure as it was previously by Cornificius, but sees in it only an exercise to be used in the course of rhetoric training.[6] In certain cases *interpretatio* means the etymological analysis of words and the most precise rendering of Greek technical terms in Latin, in course of which, as Cicero warns, one should avoid excessive hair splitting.[7]

It can be concluded that in the Ciceronian age the expression *interpres* was used in two clearly separable meanings. On the one hand, it was used as *interpres deorum*, as the definition of the person who enlightens phenomena from the sphere of *religio*, transmits the divine will towards the human realm. On the other hand (as the religious semantic content did not entirely occupy this concept), it was used for denoting the interpreter and translator who mediates in human communication by bridging linguistic impediments.[8]

As a scientific technical term, the word *interpres* became widely used first in the fields of philology and legal science. Cicero does not call the philologists *interpretes*.[9] According to Suetonius's account, however, Cornelius Nepos already refers to them as *poetarum interpretes*.[10] In the field of legal science Livius remembers Tullus Hostilius as "*clemens legis interpres*",[11] though this wording is slightly anachronistic as the king did not interpret or translate the law, concerning *provocatio*, he only faciliated its implementation.[12] In Pliny's *Naturalis Historia* the Ephesian Hermodoros appears as the *interpres* of the *leges XII tabularum* but it means only translator,[13] just as in Pomponius's text the reference to Hermodoros as *auctor* means the same.[14] However, in connection with *lex Valeria*, dating from 449 BC., Livius already speaks about the *interpretes* as a genuine legal technical term, as they tried to establish the correct interpretation of this law in long legal debates.[15] Both the explanators of the *leges XII tabularum*, driven by an archeological interest, usually searching for the meaning of a forgotten word, and the *iuris prudentes* of the near past are mentioned as

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[1] Cic. *fin.* 3, 15; Hier. *epist.* 57, 5.
[2] Cic. *opt. gen.* 14; *leg.* 2, 17; *off.* 1, 6; 2, 60; *De orat.* 1, 23; *Ac* 2, 1, 6; *fin.* 1, 6.
[3] Hor. *Ars* 133 f. *Nec verbum pro verbo curabis reddere fidus interpres.*
[4] Quint. 10, 1, 87.
[5] *Auct. ad Her.* 4, 38. Cf. Fuhrmann 1970. 88.
[6] Quint. 9, 3, 98; 10, 5, 5.
[7] Cic. *div.* 1, 1; *top.* 35; *off.* 2, 5; *fin.* 3, 15; Liv. 1, 44, 4; Sen. *ben.* 1, 3, 6; Gell. 4, 9, 9; Quint. *Inst.* 5, 10, 8. Cf. Fuhrmann 1970. 89; Flashar, H.: *Formen der Aneingnung griechischer Literatur durch die Übersetzung.* Arcadia 3. 1968.
[8] Fuhrmann 1970. 91.
[9] Cic. *div.* 1, 34.
[10] Suet. *Gramm.* 4.
[11] Liv. 1, 26, 8.
[12] Fuhrmann 1970. 92.
[13] Plin. *nat.* 43, 21.
[14] Pomp. D. 1, 2, 2, 4.
[15] Liv. 3, 55, 8.

interpretes in the sources form the 1st century BC.[1] Cicero does not simply call the lawyers of his time *interpretes iuris*—as it was later used by Quintilian as the equivalent of *iuris consultus*[2]—instead, he defines the task of *interpretari* as a basic component of the *iuris consultus*'s activity, sometimes narrowing its scope by using synonyms.[3] In *De oratore*, in the parts concerned with establishing the place and importance of the auxiliary sciences of rhetorics from the point of view of the theory of science and dialectics, Cicero does not mention *interpretatio*.[4] In his work entitled *Brutus*, which deals with the history of Roman rhetorics, in the loci dedicated to his friend, Servius Suplicius, one of the most outstanding lawyers of the age,[5] Cicero makes some remarks concerning certain cases of *interpretatio* (primary highlighting its task to clarify and order obscure and doubtful states of affairs), but neglects to make its methodology and inner construction an object of scrunity. In the course of this he fails to mention the instances of *interpretatio iuris* when the *iuris consultus* is dealing with the applicability and modes of application of perfectly clearly formulated legal texts that contain decrees of general validity.[6]

In legal texts, the expression *interpres* can seldom be encountered, and not as a technical term. It usually means translator or interpreter here[7] and only in specific cases does it signify the person doing the interpretation, the one searching for the meaning of texts.[8] The derivations *interpretari* and *interpretatio* beyond doubt mean the interpretive activity performed by lawyers and forums administrating justice. Following Fuhrmann's thematisation, this interpretive activity could refer to different legal transactions (e.g., *testamenta*, *stipulationes*, *contractus*), to the laws in general, to criminal laws, to verdicts in criminal cases, imperial privileges, and certain concrete decrees resulting from the *leges XII tabularum*, other laws, the pretorial edict, *senatus consulta* and *constitutiones*.[9] In certain cases the meaning of *interpretari* ranges from interpretation to assumption and establishing.[10] Based on this, the formational and developmental process of the meaning of *interpretari* becomes visible. In the preclassical age, *interpretatio* often occurs in the spheres of religion and mantics; i.e., indicating the mediation between the divine and human spheres. However, from Cicero's time the latest, it became to mean the translator's and interpreter's activity; i.e., a secularised activity, mediating between humans only; from this time both grammar and rhetorics, and on their analogy jurisprudence, began to use it as their own technical term.[11]

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[1] Cic. *De orat.* 1, 193; *leg.* 2, 59; *Brut.* 144; *Phil.* 9, 10. Cf. Fuhrmann 1970. 92 f.
[2] Quint. 3, 6, 59; Cf. C. 1, 14, 12, 5; 7, 4, 17 pr.; 6, 29, 4 pr.; 6, 23, 30.
[3] Cic. *Balb.* 20; *Caec.* 70; *De orat.* 1, 199; *leg.* 1, 14; *off.* 2, 65.
[4] Cic. *De orat.* 1, 185–192; cf. Barwick, K.: *Das rednerische Bildungsideal Ciceros*. Berlin 1963. 7 ff.
[5] About Servius Sulpicius Rufus see Schulz, F.: *Geschichte der römischen Rechtswissenschaft*. Weimar 1961. 65; Stein, P.: *The place of Servius Sulpicius Rufus in the development of Roman legal science*. In: Festschrift für F. Wieacker. Göttingen 1978. 176 ff.
[6] Cic. *Brut.* 152. Cf. Fuhrmann 1970. 96 f.
[7] Ulp. D. 45, 1, 1, 6; Pomp. D. 49, 15, 5, 3; Gai. *inst.* 3, 93.
[8] Paul. D. 1, 3, 37.
[9] *Testmenta*: Iav. D. 32, 29 pr.; Nerva D. 40, 7, 17; Pomp. 50, 16, 123; Afr. D. 28, 5, 48, 2; Gai. D. 35, 1, 16; Scaev. 40, 5, 41, 10; Pap. D. 35, 1, 72 pr.; 50, 17, 12; Ulp. D. 7, 8, 12, 2; Mod. 31, 34, 1. *Stipulationes*: Proc. D. 50, 16, 125; Cels. 45, 1, 99 pr.; Nerva D. 2, 11, 14; Pomp. D. 23, 4, 9; Maecen. D. 35, 2, 32, 2; Pap. D. 2, 15, 2; Ulp. D. 45, 1, 38, 18. *Contractus*: Iav. D. 18, 1, 77, 80 pr.; Nerva D. 2, 14, 58; Marc. D. 13, 5, 24; Pap. D. 17, 2, 81; Paul. D. 50, 17, 172 pr.; Ulp. D. 23, 4, 11. *Laws in general*: Cels. D. 1, 3, 18; Iul. D. 1, 3, 11; Paul. D. 1, 3, 23. 37; Ulp. 1, 3, 13; Mod. D. 1, 3, 25. *Criminal laws and criminal cases*: Paul. 50, 17, 155, 2; Herm. D. 48, 19, 42. *Privilegs*: Iav. D. 1, 4, 3; Paul. D. 28, 6, 43 pr. *Leges XII tabularum*: Pomp. D. 40, 7, 21 pr.; 50, 16, 120. *Leges*: Gai. D. 23, 5, 4; Scaev. D. 28, 2, 29, 6. 13; Pap. D. 48, 3, 2, 1; Paul. D. 49, 14, 40. *Edicta*: Paul. D. 13, 5, 17; Ulp. D. 12, 1, 1 pr.; 13, 5, 18, 1; 13, 6, 1, 1; 25, 4, 1, 11; 37, 12, 1, 2; 43, 3, 1, 11. *Senatus consulta*: Ulp. D. 5, 3, 20, 6; 36, 1, 1 pr.; 38, 17, 1, 6. *Constitutiones*: Marc. D. 29, 1, 25; Paul. D. 50, 15, 8, 7.
[10] Cels. D. 48, 19, 21; Nerva D. 25, 1, 15; Iul. D. 50, 16, 201; Afr. D. 47, 2, 62, 6; Pomp. D. 50, 16, 246, 1; Pap. D. 22, 1, 1, 3; Herm. D. 5, 3, 52; Gai. *inst.* 4, 72a; Pap. D. 50, 17, 79; Ulp. D. 13, 5, 5, 6.
[11] Fuhrmann 1970. 99 f.

III. Celsus's famous statement *"ius est ars boni et aequi"*—transmitted by Ulpianus—occurs as the opening idea of Iustinian *Digesta.* It claims that whoever intends to deal with law should first know where its name comes from. *Ius* got its name from *iustitia*, and—as Celsus astutely defines—law is the art of the good and the just/equitable. Following this train of thought, Ulpianus states that lawyers should exercise their profession as a priestly vocation, because they must respect justice, propagate the knowledge of the good and the equitable, separating the legal from the illegal, the permissible from the forbidden.[1] Later Ulpianus defines justice as an unceasing and eternal effort to give everybody their due right. Therefore, the commandments of the law are the following: to live decently, not to hurt anyone, to give everybody their due.[2] Since this definition is considerably well known, there is no need for further explanation. In concordance with this, Ulpianus *expressis verbis* calls the magistrates' attention to the fact that unlawful procedures are forbidden. As far as judges are concerned—for whom it is also forbidden to proceed with partiality, prejudice, or in general incorrectly—they must keep the principle of *aequitas* in mind, especially in the cases where their personal consideration is of greater importance.[3] The mere memorization of the legal material is not equivalent with the genuine knowledge of law, as Celsus emphasises; and he strongly blames the lawyers who do not want to consider the entire law when solving a case, and who only present an arbitrarily selected portion even while justifying their *responsa*.[4] The principle *"suum cuique tribuere"* remarkably harmonises with that locus of Cicero's *Topica* which defines *ius civile* as *aequitas* established for the people living in the same state with the scope of preserving their goods.[5] Regarding the *Corpus Ciceronianum*, in the speech delivered in defence of L. Licinius Murena, this contradiction is thoroughly highlighted: in connection with certain legal institutions of marital law (*coemptio tutelae evitandae causa*, *coemptio sacrorum interimendorum causa*),[6] which became empty and troublesome by the time of Cicero, the rhetor formulates:[7] *"In omni denique iure civili aequitatem relinquerunt, verba ipsa tenuerunt"*.[8] So, criticism is not directed against the keystone of the state, the laws,[9] but only against legal practitioners and their methods of interpretation.

The loci from the *Corpus Ciceronianum* referring to *aequitas*—with special regard to Cicero's theoretical works—can be classified in the following categories.[10] In certain cases *aequitas* appears as the opposite of *ius*,[11] in other cases one can find the trinity of *aequitas–ius–lex*, which divides the concept of law in a very special way.[12] On the one hand, it divides

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[1] Ulp. D. 1, 1, 1. *Iuri operam daturum prius nosse oportet, unde nomen iuris descendat. Est autem a iustitia appellatum: nam, ut eleganter Celsus definit, ius est ars boni et aequi. Cuius merito quis nos sacerdotes appellet: iustitiam namque colimus, et boni et aequi notitiam profitemur, aequum ab iniquo separantes, licitum ab illicto discernentes, bonos non solum metu poenarum, verum etiam praemiorum quoque exhortatione efficere cupientes, veram nisi fallor philosophiam, non simulatam affectantes.*

[2] Ulp. D. 1, 1, 10. *Iustitia est constans et perpetua voluntas suum cuique tribuendi. Iuris praecepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere.*

[3] Ulp. D. 47, 10, 32; 5, 1, 15, 1; Gai. D. 50, 13, 6; C. 3, 1, 13, 6; Tryph. D. 16, 3, 31 pr.

[4] Cels. D. 1, 3, 17. 24; cf. Polaček, A.: *Ius est ars aequi et boni.* In: Studi in onore di A. Biscardi. Milano 1982. II. 27 f.

[5] Cic. *top.* 2, 9. *Ius civile est aequitas constituta eis, qui eiusdem civitatis sunt ad res suas obtinendas.*

[6] Cf. Benedek, F.: *Die conventio in manum und die Förmlichkeiten der Eheschließung im römischen Recht*. PTE Dolg. Pécs 1978. 19 ff.

[7] Cic. *Mur.* 27.

[8] Cic. *Mur.* 27.

[9] Cic. *leg.* 1, 14.

[10] Ciulei, G.: *Les rapports de l'équité avec le droit et la justice dans l'oeuvre de Cicéron.* Revue historique de droit français et étranger 1968. 640 ff.

[11] Cic. *inv.* 32; *part.* 28; *Caec.* 36; *De orat.* 1, 56.

[12] Cic. *top.* 5. 7.

justice into a *ius* based on *lex*, on the other hand, into a *ius* based on *aequitas*.[1] Elsewhere—e.g., in *Pro Caecina—aequitas* is none other than the means of *interpretatio iuris*.[2] A third different group is constituted by the loci where *aequitas* is referred to as a synonym of *ius*.[3] In his philosophical works *aequitas* appears in many thoughts as a projection, a form of *iustitia*, being the foundation of human relationships.[4] It brings us closer to our present topic of discussion if we try to trace the occurrences of *aequitas* in Cicero's speeches and his correspondence. In certain characterisations it appears as a personal characteristic feature.[5] This is the way he characterises Scipio[6] and Servius Sulpicius,[7] and as he expects every Roman in office to possess this quality, he finds it particulary desirable in the case of judges.[8] At the same time *iustitia* appears only as an exception as somebody's personal feature in Ciceronian characterisations.[9] *Aequitas*, often mentioned together with *ius* not only as its complementary, is considered an ethical norm that plays an important role in the administration of law,[10] so it does not appear as the kind of equity that would give the judge the possibility to reach a decision in contradiction with written law because this way the verdict could easily become unjust, coming to a result contradictory with its aim.[11]

Let us take a quick view—following Pringsheim's statements—to the changes that the concept of *aequitas* underwent after Cicero, as the complementary and opposite of *ius*, and see how the concepts of *ius aequum* and *ius strictum* are formed.[12] The *ius aequum* adjectival construction does not imply an equity based legal interpretation used in an abstract sense, but, in accordance with the original meaning of the adjective *aequus*, it denotes *equal* right *identical* for everybody both in literary and legal sources.[13] Basically, it is not *ius* that is divided into *ius aequum* and *ius strictum*, but it is *aequitas* that appears as a principle which regulates, at times aids, corrects *ius*, at times harmonises with it, at times constitutes a contradictory principle, which, however, was never defined at the level of an abstract definition, probably due to a lack of effort.[14] During the period of the dominate *aequitas* kept gaining terrain from *ius*. A turning point in this was Constantinus's legislation who, on the one hand, declared that it is the emperor alone who is entitled to interpret the difference between *ius* and *aequitas*, on the other hand, he made *aequitas* the synonym of *iustitia* and *ius iustitiaque*, ranking these above *ius* (*strictum*).[15] This idea was later taken over by Iustinian legal science, so the sources reflect the clear dominance of *aequitas*, with which the concepts of *humanitas*, *iustitia*, *benignitas*, *utilitas* and *bona fides* are associated,[16] leaving to *ius* the meaning of strict, limited and—*sit venia verbo*—narrow-minded law, clinging to a rigid, word for word interpretation.[17] The expression *ius strictum* cannot be found in the literary sources

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[1] Ciulei 1968. 642.
[2] Cic. *part.* 39; *rep.* 5, 2.
[3] Cic. *top.* 2. 24; *part.* 37.
[4] Cic. *rep.* 1, 2; *Lael.* 22; *off.* 1, 19; *top.* 23.
[5] Cic. *ad Q. fr.* 1, 1, 45.
[6] Cic. *Verr.* 5, 81.
[7] Cic. *fam.* 4, 4, 3; *Phil.* 9, 10.
[8] Cic. *leg. agr.* 2, 102; *Tull.* 8; *Flacc.* 49; *Cluent.* 5. 159.
[9] Cic. *fam.* 13, 28A, 2; 13, 66, 2; cf. Bürge 1974. 49 ff.
[10] Cic. *De orat.* 1, 86. 173. Cf. Schulz 1961. 90; Pringsheim, F.: *Ius aequum und ius strictum.* Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung 42. 1921. 643 ff.
[11] Cic. *Phil.* 5, 20; *imp. Cn. Pomp.* 58. Cf. Bürge 1974. 52.
[12] Pringsheim 1921. 643 ff.
[13] Cic. *Verr.* 3, 118; Liv. 38, 50, 9; Tac. *ann.* 3, 27; Sen. *epist.* 86, 2; Tryph. D. 29, 1, 18, 1; Paul. D. 46, 1, 55; C. 3, 36, 11; 6, 58, 15, 1.
[14] Paul. D. 50, 17, 90; 44, 4, 1, 1; Ulp. D. 2, 14, 52, 3. Cf. Pringsheim 1921. 644.
[15] C. 1, 14, 1; C. Th. 1, 5, 3; 3, 1, 8.
[16] Ulp. D. 15, 1, 32 pr.; Pap. D. 26, 7, 36; Paul. D. 39, 3, 25; Pap. D. 46, 6, 12.
[17] Pringsheim 1921. 648.

of the classical period; *iudicium strictum* is used as a technical term of rhetorical works.[1] In Statius's *Silvae strictae leges* are opposed to *aequum*;[2] *ius strictum* becomes an unquestionable technical term only in Iustinian's legal work.[3]

Returning to Cicero, the expressions *"summo iure agere"* and *"summo iure contendere"* indicate the use of the whole range of possibilities offered by law,[4] which itself does not mean legal practice contradictory with *aequitas*; whether it is proper or improper becomes clear only in the concrete situation. At times Cicero has the possibility to be lenient, but the hostile behaviour of the opponent can make him legitimately act against it with the strictest means of the law, keeping in mind not only his personal interests but the interests of the state as well.[5] (Concerning the point that *summum ius* depends on the specific situation, both Stroux[6] and Bürge[7] quote as a literary example, the scene from Shakespeare's *Merchant of Venice* in which, Portia as judge uses, instead of the rational, the literal interpretation of the law against Shylock, who is reluctant to accept the doge's more equitable proposal. She turns the situation inside out and finally makes him withdraw.[8]) *Aequitas* as the principle of *interpretatio* is not formulated *expressis verbis* in connection with the *causa Curiana*, treated by Cicero. However, since basically it expounds the contradiction between *interpretatio restrictiva* and *interpretatio extensiva*, in its content *aequitas* seems to belong to its essence. The basic question concerning the facts of the case is whether *substitutio pupillaris*[9] can also be regarded as *substitutio vulgaris,*[10] and, in relation to this point, the question whether the alternate heir so ordered is also the heir of the bequeather should also be answered.[11] Q. Mucius Scaevola argued for the restrictive, L. Licinius Crassus for the extending interpretation. Consequently, both of them referred to *auctores* substantiating their opinion. Moreover, Crassus, employing the weapon of humor, made fun of the obsolete formulation of the legal text, thus ridiculing its restrictive interpretation.[12] (The decision made in the *causa Curiana* did not prove to be long-lasting in legal science, as we know about several later *sententiae* contradictory with this.[13])

As we have seen, neither Cicero, nor other Roman legal scientists, basically reluctant to formulate abstract definitions,[14] determined the uncontradictory concept of *aequitas*. Therefore, the decisiveness of the attempt to solve the *scriptum–voluntas* contradiction, emphasised by Stroux in connection with the *causa Curiana,*[15] loses its validity because *aequitas* worked as a rhetorical ornament rather than a basic principle of judgement.[16] Crassus, who acted as *patrocinium aequitatis* in the *causa Curiana*, proved to be the advocate of *ius strictum* in another case. M. Marius Gratidianus sold a plot to C. Sergius Orta, from

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[1] Sen. *contr.* 1. *praef.* 23; 4. *praef.* 3; Quint. 12, 10, 52.
[2] Stat. *Silv.* 3, 5, 87 f. *Nulla foro rabies aut strictae in iurgia leges; morum iura viris solum et sine fascibus aequum.*
[3] C. 4, 31, 14, 1; 5, 13, 1, 2; Pap. D. 5, 3, 50, 1; Paul. 13, 5, 30; Tryph. D. 23, 2, 67, 1; Pap. D. 29, 2, 86 pr.; Iav. D. 40, 7, 28 pr.; C. 3, 42, 8, 1; Gai. *inst.* 3, 18.
[4] Cic. *Verr.* 6, 4.
[5] Cic. *Att.* 16, 15, 1.
[6] Stroux 1926. 57.
[7] Bürge 1974. 54.
[8] Shakespeare, *The Merchant of Venice* 4, 1, 300 ff.
[9] Gai. *inst.* 2, 179. Cf. Finazzi, G.: *La sostituzione pupillare*. Napoli 1997.
[10] Gai. *inst.* 2, 174 ff.
[11] Cf. d'Orta, M.: *Saggio sulla 'heredis institutio', Problemi di origine*. Torino 1996.
[12] Cic. *De orat.* 1, 180. Cf. Bürge 1974. 58; Schulz 1961. 95.
[13] Treb. D. 26, 2, 33; Mod. D. 28, 6, 4 pr.
[14] Iav. D. 50, 17, 202.
[15] Stroux 1926. 57.
[16] Bürge 1974. 54.

whom he had bought the same plot a few years earlier. The plot was loaded with *servitutes*,[1] about which Sergius Orta, as the former owner must have had knowledge. However, when signing of the contract, Gratidianus did not mention the *servitutes*, though this would have been his duty.[2] In the case of *actio empti* the seller is responsible for the *dolus*, the judge had to decide whether Gratidianus proceeded *dolose* or not. The *advocati* of the parts had a great opportunity to influence the *iudex*, using rhetoric devices based on legal science.[3] As Cicero remarks too, in this case Antonius based his reasoning on *aequitas*; opposed to him, Crassus clung to the more restrictive interpretation. The appearance of these poles in the same case unequivocally harmonises with the training practice of rhetoricians, where the *magister* divided the case to be discussed among the students in a way that half of them had to defend their point of view based on *aequitas*, the other half based on *ius strictum*, then they changed roles.[4]

In as much as we do not consider *aequitas* to be an abstract idea in these cases, but as a freely applicable rhetoric device, Cicero's rather liberal handling of the concept of *aequitas* harmonises with other statements that deal with the essence of eloquence.[5] Within the boundaries designated by legal science—which in a given case can mean the facts of the case, determined by the *iuris consultus*—the *orator* can freely move while concentrating his attention on the task of defence; all the more so, as he is not striving to prove the truth, but to convince the audience of the *veri simile*.[6] (To illustrate this, Cicero tells the following example. A simple man from the country wanted to ask *iuris consultus* P. Crassus for advice, but the jurist sent him away as he thought that he could do nothing for him. However, Servius Galba, the rhetor, presented him so many examples, parallels, arguments interlarded with humor, based on *aequitas*, and not on *ius*, in support of the *rusticus*, that the jurist—still not sharing the rhetor's point of view—had to admit that his arguments were so probable that they almost sounded like truth.[7]) The freedom of movement of the rhetor is considerably greater than that of the jurist; as Gellius puts it, he is not closely tied to the truth content of the facts.[8] The rhetor had to be able to argue for or against the same case, as this technique constituted a substantial part of rhetoric studies.[9] The difference between legal and rhetorical methods was long preserved in Rome, as Quintilian admits in his *Institutio oratoria*, in the chapter in which he emphasises the importance of the rhetor's acquiring legal knowledge.[10] In the course of time, this difference became even wider, when, at the beginning of the Principate, political eloquence faltered, whereas eloquence lost its connections with jurisprudence by dealing with fictitious examples and solving more and more artificial rhetorical situations.[11]

IV. Investigating the use and explanation of the *proverbium "summum ius summa iniuria"* in the works of Erasmus of Rotterdam seems to be substantiated not so much by the historical and dogmatic depth of the Erasmian interpretation—as this idea was made the object of much more intensive and exhaustive legal theory scrutiny by numerous humanists; e.g., Claudius Cantiuncula, Bonifacius Amerbach or Symon Grynaeus (if only due to Erasmus's slighter

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[1] About the *servitutes* see Grosso, G.: *Le servitù prediali nel diritto romano*. Torino 1969.
[2] Cic. *off.* 3, 67.
[3] Bürge 1974. 61.
[4] Cic. *De orat.* 1, 244; Quint. 7, 6, 1. Cf. Schulte, H. K.: *Orator—Untersuchungen über das ciceronianische Bildungsideal*. Frankfurt am Main 1935. 37 ff.
[5] Bürge 1974. 63.
[6] Cic. *part.* 90; *off.* 2, 51.
[7] Cic. *off.* 2, 40.
[8] Gell. 1, 6, 4.
[9] Cic. *De orat.* 2, 30.
[10] Quint. 12, 3, 2 ff.
[11] Norden, E.: *Die antike Kunstprosa*. Leipzig 1909. I. 126 ff.

interest in historical studies)—but because of the immense influence produced by this excellent humanist over the centuries enhanced by his enormous authority, which is hard to underestimate.[1] Without any need to enter a more meticulous study of the genesis and influence of Erasmus's *Adagia*, it can be stated that from its first edition in the 16th century until the end of the 18th century, it was used as a widely appreciated scholary text book, so it can be safely assumed that the *"summum ius summa iniuria" paroemia* gained considerable popularity among humanists, theologians, philosophers, as it is proved by it being frequently quoted in the most various contexts.[2]

As Erasmus had been making an effort to perfect the *Adagia* until the end of his life, several versions and explanations of this idea can be encountered in the Erasmian corpus. The first edition dating from 1500 refers to the proverb in two places;[3] first in connection with the Terentian quotation *"summum ius summa malitia"*;[4] later with regard to Plato and Cicero under the title of *"ad vivum summo iure"*.[5] The text appearing in Basel in 1540[6] but dating from 1536 synthetises all the known occurrences of this idea in Latin authors.[7] Before enumerating and analysing the loci, trying to avoid the charge that he includes *sententiae* instead of *adagia*; i.e., proverbs, Erasmus gives a long explanation, and eventually finds his acquittal in quoting the Terentian *nominatim*.[8]

Not being a jurist, Erasmus dedicated less attention to the legal *paroemia*, except for a few explanations referring to Iustitia. Only four years before his death, in 1532 did Erasmus become interested in juridic regulations, and asked his friend, Bonifacius Amerbach in a letter to send him some material, suitable for the completion of the *Adagia*. Then, after receiving

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[1] Cf. Appelt, T. C.: *Studies in the Contents and Sources of Erasmus' Adagia, with Particular Reference to the First Edition, 1500, and the Edition of 1526*. Chicago 1942.

[2] Kisch, G.: *Summum ius summa iniuria*. In: Aequitas und bona fides. Festgabe Simonius. Basel 1955. 211.

[3] *Desyderii Herasmi Roterdami veterum maximeque insignium paroemiarum id est adagiorum collectanea*. Parrhisiis M. Iohanne Philippo Alamanno diligentissimo impressore Anno MVc.

[4] *Summum ius summa malicia. Non asscripturus eram, ut sententias non adagia dicerer conscribere, ni a servo Comino nominatim pro adagio referretur. Verum illud Cherme dicunt „Ius summum sepe summa malicia est." Quo proverbio monemur equitatem potius quam legum litteras sequi.*

[5] *Ad vivum summo iure. Id est ad cutem usque, ita loquimur nimis exactam rationem significantes, videlicet quum rem nimis acriter urgemus. Thrasymachus apud Platonem Socratem Sicophantam appellat, id est, calumniatorem, quia orationem suam ad nimis arctam rationem exigat, depravans potius recte dicta quam incautius dicta in meliorem sensum trahens. Additque. Quare sequundum exactam rationem, quando et tu ad vivum resecas, nullus artifex peccat. Nec huic dissimile illud apud Ciceronem pro Cecinna (§ 65). Nam caeteri, inquit tum ad istam orationem decurrunt, quum se in causa putant habere equum et bonum quod defendant, si contra, verbis et literis et (ut dici solet) summo iure contenditur, solent eiusmodi iniquitanti et boni et aequi nomen dignitatemque opponere. Est igitur summo iure contendere, leges ad vivum et nimis severam rationem exigere, und et illud: Summum ius summa malicia.*

[6] *Des. Erasmi Rot. Operum Secundus Tomus Adagiorum Chiliades Quatuor cum Sesquicenturia Complectens, ex postrema ipsius auctoris recognitione accuratissima, quibus non est quod quicquam imposterum vereare accessurum*. Basileae ex Officina Frobeniana AN. M.D.XL.

[7] *Summum ius summa iniuria. Summum ius summa iniuria, hoc est, tum maxime disceditur ab aequitate, cum maxime superstitiose haeretur legum literis. Id enim summum ius appellant, cum de verbis iuris contenditur, neque spectatur quid senserit is qui scripsit. Nam voces ac litterae, quasi legum summa cutis est, Eam ineptiam quorundam superstitiosorum iuris interpretum, copiose simul et eleganter illudit M. Tullius in actione pro Murena (§§ 25–27). Terentius (IV, 5, 47; v. 796), Verum illud Cherme dicunt, ius summum saepe summa malitia est. M. Tullius Officiorum libro primo (10, 33): Ex quo illud, summum ius, summa iniuria, factum est iam tritum sermone proverbium. Columella primo rei rusticae libro (7, 2): Nec sane est vindicandum nobis, quicquid licet. Nam summum ius antiqui summam putabant crucem. Citatur et Celsus adolescens libro Pandect. Quadragesimo quinto, titulo De verborum obligatione, Cap. Si servum Stichum (D. 45. 1. 91. 3, i. f.): qui scripserit quaestionem esse de bono et equo, in quo genere plerunque sub auctoritate iuris scientiae periculose erratur. Itidem Paulus libro quinquagesimo, titulo, De regulis iuris (D. 50. 17. 90): In omnibus quidem, maxime tamen in iure aequitas spectanda est. Simili figura Seneca libro De ira primo dixit, summo animo. Si intelligis non ex alto venire nequitiam, sed summo, quod aiunt, animo inhaerere.*

[8] Kisch 1955. 207.

the two-page-long collection, he urged his friend to send him some more. It is highly probable that this was how the quotations from the Roman sources found their way into the 1540 edition of the *Adagia*.[1]

In Erasmus's interpretation *aequitas* often mentioned to highlight the *paroemia "summum ius summa iniuria"* probably did not actually mean equity as a legal interpretive principle, much rather justice that should be enforced even against the letter of the law.[2] For the explanations Erasmus usually refers to antique authors generally with the exact documentation of the sources but at times without summarizing their content. Most often the concept *aequitas* is simply used in the sense of *aequum et bonum*, as the opposite of *iniquitas*, placing the spirit of the law above its letter. One can find the type of the Ciceronian pair of concepts in the Aristotelian *Ethica Nicomachea*, which asserts that a man can be regarded equitable, if he is satisfied with less, even if the law is on his side, and does not stick to his own justice in the detriment of others, so equity is none other than a kind of justice.[3] It is interesting though, that that Erasmus does not make any reference to Aristotle in the early editions of the *Adagia*, and only the 1536 and 1540 editions allow us to assume that probably he had the specific locus from *Ethica Nicomachea* in mind. In these latter editions reference is made to Cicero's *Pro Murena*, instead of *Pro Caecina*; naturally, together with the classic formulation of the *proverbium*, which can be read in *De officiis*. We can suspect Aristotelian influence—on an ideological level rather than in the concrete wording—in the reference to the intention of the legislator opposed to the letter of the law.[4] The image *"voces …quasi legum cutis est"*; i.e., the words constitute the skin, the outward layer, is presumably Erasmus's own. Erasmus's attention to the two legal fragments by Celsus and Paulus respectively from the *Digesta* by Iustinian was probably called by Bonifacius Amerbach, but he used them merely as a kind of illustration without examining either their historical or dogmatic background.[5]

Reaching the end of our introspection, we can draw the following conclusions. From the maxims of legal logic as means of legal interpretation, in the present work we made the proverb *"summum ius summa iniuria"* the object of our scrutiny, enumerating its occurrences in antique literary sources, namely in Terence, Columella and then in Cicero. In this last formulation the meaning of the proverb became the most clearly crystallized. It signifies the excessive, malevolent legal practice in the course of *interpretatio iuris*, which plays off the letter of the law against its spirit. Following this we tried to trace the different meanings, formation and the stages of development of the expression *interpretatio* itself, in the course of which *interpretatio* combined *mutatis mutandis* the nuances of the religious sphere, on the one hand, and those of the grammatical field, on the other, until it reached the semantic content of interpretive activity, and became a determining factor by the classical age. The Celsian *sententia "ius est ars boni et aequi"* formulates one of the most general, all-encompassing basic principles of *interpretatio* meant to offer protection against the too strictly interpreted and applied *summum ius*. Although jurists never clearly defined the concept of *aequitas*, it became a very important means of legal development as a thought emerging from the interaction of jurisprudence and eloquence. By presenting the relevant loci from Erasmus of Rotterdam's *Adagia* as a typical example of the persistence of the *paroemia "summum ius summa iniuria"*, we wanted to show the way a proverb turning into *regula iuris*—apart from its direct legal application—became an integral part of today's legal common knowledge.

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[1] Kisch 1955. 208.
[2] Büchner 1957. 13 f.
[3] Aristot. *NE* 1138a
[4] Aristot. *rhet.* 1374b
[5] Kisch 1955. 210.

Roman Elections and Quintus Tullius Cicero's *Commentariolum petitionis*

The *Commentariolum petitionis* written in 64 B.C. is the oldest campaign strategy document that has been preserved for us. In this handbook Quintus Tullius Cicero, younger brother of the most excellent orator of the Antiquity, Marcus Tullius Cicero, gives advice to his elder brother on how Marcus can win *consul*'s elections, that is, how he can rise to the highest position of the Roman Republic. In the present paper *Commentariolum* will be analysed in detail examining the following aspects: *the Antique genre commentary* (I.); *the issue of authorship of Commentariolum* (II.); *the characterisation of the competitors, Antonius and Catilina, provided in Commentariolum* (III.); the system of elections in Anciet Rome and the crime of election fraud/bribery, i.e. the *crimen ambitus* (IV.) and *the role of associations and clients in Roman elections* (IV.).

I. The Latin genre commentary *(commentarius)* comes from the Greek *hypomnema*. *Hypomnemata* were meant to support memory *(mimneskesthai)*, either in form of lists and invoices on business transactions, or private notes not intended for publication.[1] Given a wide scope of meaning, the genre of *hypomnema* was suitable for being extended in several directions; so for denoting descriptions of noteworthy events as autobiographical notes or practical guidelines.[2] From the age of Hellenism, *hypomnema* served more and more to denote exegetic comments on literary texts; the locus quoted was followed by explanation and various interpretations. Later, especially in the last century of the Roman Republic, plain presentations confined to sheer description of facts were called *commentarius*, which could be elaborated into annals *(libri annales)* or historical works *(historia)* by historians. At the same time, the notion of *commentarius* used in the sense of notes meant for private use, or at least not for being made public in the given form, did not vanish completely.[3]
The question arises which literary genre *Commentariolum petitionis* is the closest to. The form with diminutive suffix in the title *(commentariolum)* gives the impression that the author intended to sum up his views on applying for office merely in minor notes rather than in an exhaustive writing. At the beginning of the work one can read the greetings addressed to Marcus Tullius Cicero,[4] on the other hand, it implies that he wanted to send this writing as a letter.[5] Both in the opening lines and in the last paragraph of the work Quintus Tullius Cicero speaks to his brother Marcus in a fairly direct, fraternal tone, and at the end of the letter he asks him to share his comments on, supplementing, correcting the writing with him so that it could be published as a genuine *commentarius*.[6] By that the author made it clear that his writing in the form sent by him was not to be considered real commentary, but the improved text he wanted to publish as such. Furthermore, most of the manuscripts of *Commentariolum petitionis* bequeath this work as Quintus Tullius Cicero's work included in books 9–16 of Marcus Tullius Cicero's correspondence with his kin and friends *(ad familiares)*. On the other hand, the text cannot be considered a letter in the strict sense for the structure, introduction and closure of the writing as well as its attention to detail imply that the author considered the work to be made public later completed in most of its parts. Except for its private aspects and

[1] Laser, G.: *Quintus Tullius Cicero: Commentariolum petitionis.* Darmstadt 2001. 3; Rüpke, J.: *Commentarii.* In: Der Neue Pauly III. Stuttgart–Weimar 1997. 99. ff.
[2] Gellius, *Noctes Atticae* 1, 12, 6; 20, 6, 3; Plutarchus, *Sulla* 5. ff.
[3] Laser 2001. 3. f.
[4] *Commentariolum petitionis* 1.
[5] Waibel, L.: *Das commentariolum petitionis – Untersuchungen zur Frage der Echtheit.* München 1969. 58. ff.
[6] *Commentariolum petitionis* 1. 58.

greetings, the text, or a significant part thereof that can be published as *commentarius*, is fully presented to us.[1]
It is rather dubious if Quintus published—could have published—this work after it had been revised by Marcus, in which he outlines the organisation and management of the election campaign since he explored the details of the fight for votes with relentless honesty. Günter Laser sums up the core of Quintus's writing as follows: in order to obtain the *consul*'s office the applicant should not shrink back from any tricks, false promises, lies, pretence and approaching/flattering any group that fits the purpose.[2]
Even more important than discrediting opponents is to win as many friends as possible.[3] It is important to appear in the company of popular people, even if they do not support the candidate since those who can see them together will not necessarily know that.[4] Quintus lists three kinds of ways of how to arouse sympathy: when one does good to somebody; when people hope that we will do good to them, or when people likes us.[5] One should send the message to the friends of our friends that one will not be ungrateful if they support us. One should promise them offices since the worst that could happen is that we might possibly not keep our promise once having won the *consul's* office.[6] The most important thing, however, is that when one appears in a village, everybody who counts must be called by their name.[7] Quintus asserts that a candidate should keep the map of entire Italy in his mind so that there should be no village where he has no sufficient support.[8] Each electoral district should be covered by a web of friendly relations.[9] The most important thing, however, is that when one appears in a village, everybody who counts must be called by their name. However, so many names to keep in mind is an impossible task for anybody. To this end, *nomeclatores* (name reminders) were used, who whispered who was who into one's ears.[10] In Quintus Cicero's view, to contact those who are hesitating between political sides three things are needed: generosity, attention and, occasionally, some pretension and flattery.[11] One should let everybody to have access to him day and night; everybody should be helped; or at least one's help should be promised but all this in such manner that one does not hurt self-esteem of those whom one helps.[12]

II. The issue of authorship of the *Commentariolum petitionis* has many times divided researchers. At the turn of the 19th and 20th centuries, G. L. Henderson questioned the originality of *Commentariolum* but his assertion drew no significant responses, either for or against, in the literature;[13] and in his entry on Quintus Cicero Fr. Münzer took the position the work was original.[14] In the middle of the 20th century, W. S. Watt, the publisher of

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[1] Laser 2001. 4. f.
[2] Laser 2001. 5; Németh Gy.–Nótári T: *Hogyan nyerjük meg a választásokat? Quintus Tullius Cicero: A hivatalra pályázók kézikönyve. (How to Win Elections? Quintus Tullius Cicero: Handbook for Applicants for Offices.)* Szeged 2006. 149. ff.; Takács A.: *Election Campaign in the Antiquity.* Acta Juridica Hungarica 50. 2009/1. 111. ff.
[3] *Commentariolum petitionis* 16. ff.
[4] *Commentariolum petitionis* 24.
[5] *Commentariolum petitionis* 21.
[6] *Commentariolum petitionis* 20.
[7] *Commentariolum petitionis* 31.
[8] *Commentariolum petitionis* 30.
[9] *Commentariolum petitionis* 29.
[10] *Commentariolum petitionis* 31. f.
[11] *Commentariolum petitionis* 42.
[12] *Commentariolum petitionis* 44. ff.
[13] See Schanz, M.–Hosius, C.: *Geschichte der römischen Literatur I.* München 1927. 551.
[14] Münzer, F.: Q. Tullius Cicero. In: *Paulys Realencyclopädie der classischen Alterthumswissenschaft VIIa.* Stuttgart–München 1943. 1288.

Commentariolum expressed his amazement that this work could have ever been considered by anybody Quintus Cicero's letter written to his brother, Marcus;[1] and refusing the standpoint of hypercriticism. The recent publisher, G. Laser alleged the text was Q. Cicero's work.[2] Against Quintus's authorship the following arguments have been put forward. They deem it exaggerated naivety that the younger brother, Quintus would have made notes for his elder brother, Marcus on what strategy he should follow while applying for the *consul*'s office, and in these notes—as he himself confessed—he would not have made known anything to his brother that he had not already known, or could have known. Also, it might definitely give rise to suspicion that the arguments against the competitors, Antonius and Catilina put forth in the *Commentariolum* return almost word for word in Marcus's oration registered under the tile *In toga candida* handed down to us by Asconius in fragments. On the grounds of the above, they qualify the *Commentariolum* forgery compiled from *In toga candida* and *Pro Murena* and Marcus's letter written on the public administration of the provinces addressed to Quintus.[3]

These arguments have been denied by several experts, including R. Till, with the following reasons. The inherited manuscripts of Cicero's works can hardly give an answer to the question of originality. Quintus's four letters preserved for us, three of them addressed to Tiro and one to Marcus, cannot support any linguistic or stylistic conclusions drawn with regard to his author profile. On the other hand, it is highly improbable that his style would have been greatly different from the language of his brother's letters who was almost the same age as him and had the same education. The assumption claiming that *Commentariolum* can be dated as well to the late period of the Age of Augustus can be refused by putting the question whether who could have been the person in the last years of the reign of Augustus that deemed it was in his interest to give a detailed description on the election and campaign secrets of the year 64 B.C. And even if somebody had decided to do that why would he have chosen Quintus Cicero, a rather grey figure both in literary and political terms, as the authority of what he wanted to expound. What benefit could he have gained from using Quintus's name after Marcus's death for revealing his brother's policy of opportunism? Who could have been the author who had such exact knowledge of the conditions and events of the given year that no errors whatsoever were made in his writing? Why would he have chosen just the period as the subject of his description when Catilina had not been swept off the scene of public life? Finally, what forger would have been so modest to emphasise right at the beginning of his writing that the fictitious addressee could not learn anything new from his summary?[4]

The author hardly wanted to win rhetor's laurel since his style is dry, his sentences have an unpleasant ring.[5] The *Commentariolum* provides formidable knowledge of the events of the years discussed in it, so its author must have by all means been a contemporary who experienced these events from quite close. References made to Marcus's situation and background[6] give account of such knowledge that it can be bravely assumed that from words let drop or sentences left unfinished the addressee exactly understood what the author meant. As a matter of fact, Marcus was not lacking knowledge of the process of applying for offices either, however, it can justify Quintus's effort to sum up relevant experience that he had also applied for minor offices *(magistratus minores)*, and so he could add his personal

[1] Watt, S. W.: *M. Tulli Ciceronis epistulae III.* Oxford 1958. 179.
[2] Laser 2001. 5. ff.
[3] Cicero, *Epistulae ad Quintum fratrem* 1, 1.
[4] *Commentariolum petitionis* 1.
[5] Till, R.: *Ciceros Bewerbung ums Konsulat. (Ein Beitrag zum commentariolum petitionis.)* Historia 11. 1962. 316.
[6] Cf. *Commentariolum petitionis* 29.

observations to his brother's strategy.[1] The plural used in sentences with more personal tone[2] also indicates that the writer of the letter might have had a direct relation with the addressee. The fact that certain sentences from *Commentariolum* return almost word for word in *In toga candida* cannot be an argument against originality. Quintus sent his notes to his brother with a view to have them supplemented and corrected,[3] from which one can draw the conclusion that later on he wanted to make his writing public—at a later point of time, in May 59, he forwarded his work entitled *Annales* to Marcus also for correction with the intention to publish it.[4] As a matter of fact, the *Commentariolum* was not published by Marcus either in 64 or later since by doing that he would have allowed to have an insight into his own political intentions and opportunism, but the charges against Antonius and Catilina gathered in these notes he could use with clear conscience and comfortably in his later oration, *In toga candida*.[5] The publication of the work later was just as against Marcus's purposes as the publication of several of his letters addressed to Atticus. Taking all the above into consideration, albeit for lack of direct evidence we are forced to dismiss the standpoint of hypercriticism and until the contrary is proved unambiguously we need to allege that Quintus Tullius Cicero is the author of *Commentariolum petitionis*.[6]

Quite openly, Quintus explores his brother's far from favourable situation in applying for the *consul*'s office. In the eye of the nobility he is considered 'a new man' *(homo novus)*,[7] who is not backed either by a proper group of *clientes*, or sufficient financial support; while his competitors, Antonius and Catilina are abounding in all these.[8] Although the term *homo novus* was never defined exactly, it was used in a dual sense: as a narrower denotation it meant all of those who did not have any *consul* among their ancestors; in a wider sense it denoted those whose forefathers, even if not having obtained the highest rank, did obtain some office or were allowed to be the members of the *senatus*. The *optimates* used this term properly since for them it meant only the parvenu; however, Cicero declared about himself quite proudly that he had obtained all possible offices at the youngest age permitted by law *(in suo anno)*, although he did not come from the aristocracy of the *senatus*. A similar thought can be read in *Pro Murena* too.[9]

For Marcus his own character and view of life must have meant a disadvantage too since being a Platonist it was alien to him to apply pretence *(simulatio)* indispensably necessary for application[10] and the ability to make friends with people in order to adjust to voters.[11] His key weapon was his oratory skills that helped him to make himself popular among the people *(popularis)*.[12] On the other hand, he had to beware of appearing a populist politician since it was not the urban masses *(urbana multitudo)* that would decide the outcome of the election.[13] Interestingly, Quintus did not attribute any special significance to the help Marcus had recently given to populists (C. Fundanius, Q. Gallus, C. Cornelius and C. Orchivius), regarding the election he considered it simply a useful step to win the relevant associations *(sodalitates)*.[14] From first to last, Marcus attempted to avoid appearing a populist but in his

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[1] Laser 2001. 7.
[2] Cf. *Commentariolum petitionis* 56.
[3] *Commentariolum petitionis* 58.
[4] Cicero, *Epistulae ad Atticum* 2, 16, 4; *Epistulae ad Quintum fratrem* 2, 12, 4.
[5] Till 1962. 317; Laser 2001. 6.
[6] Laser 2001. 7.
[7] *Commentariolum petitionis* 2. 13.
[8] *Commentariolum petitionis* 55.
[9] Cicero, *Pro Murena* 17.
[10] *Commentariolum petitionis* 1. 45.
[11] *Commentariolum petitionis* 42. 45. 54.
[12] *Commentariolum petitionis* 2. 55.
[13] *Commentariolum petitionis* 52.
[14] *Commentariolum petitionis* 19. 50.

efforts he got several times in unpleasant situations; so, for example, when he undertook C. Manilius's case.[1] What happened was that the urban masses forced Marcus to live up his word to undertake the defense of C. Manilius;[2] the proceedings were not held in early 65 due to the political situation, and so Cicero escaped from being forced to make an unambiguously clear political statement in public.[3] Although Quintus does not consider the aforesaid statements of defense a standpoint of especially great weight, he deems the action taken for the benefit of Pompeius in 67 even after such a long time an act that could cast shadow on his brother's career.[4] The reason for that can be most probably looked for in the fact that while statements of defense made in court of justice were considered events soon forgotten in the turmoil of everyday life, Marcus himself protested against being confronted with his standpoints formulated in statements of defense later on as his own opinion.[5] This oration made in the popular assembly for the first time as *praetor* entering office represented an unambiguous confrontation with the *senatus* since it was the popular assembly and not the *senatus* that was competent to decide the superior commander's authority *(imperium)* to be granted to Pompeius. To promote his popularity, Cicero gave free rein to diminuting the authority of the *senatus*, and subsequently many were very much offended by his act—so he had to manoeuvre quite skilfully during the process of application not to alienate Pompeius and his adherents, on the one hand, and not to worsen his chances in the circles of *senatores* by asserting his commitment to Pompeius, on the other.[6]

How does Quintus in early 64 evaluate his brother's chances in the election, and what opinions does he formulate on the competitors? He considers it a fortunate circumstance that his brother does not have any respectful competitors who come from the nobility *(nobilitas)*, and he points out that C. Coelius Caldus, the *consul* of the year 94—the last *homo novus* who fulfilled the *consul*'s office before Cicero—must have had quite a difficult job since he had to overcome outstanding figures of the nobility.[7] The nobility of the age considered the *consulatus* their own monopoly;[8] they believed that electing Cicero *consul* would defile and desecrate this office.[9] After that, Quintus enumerates the four possible opponents, of whom Galba and Cassius albeit coming from high-born families had no chances because they do not have enough persistence and drive.[10] The criminal procedure against Catilina turned out favourably in spite of anticipations,[11] although somewhat earlier, in July 65 Marcus did not think it was possible, and was pondering over possibly undertaking Catilina's defense as by that he wanted to win Crassus and Caesar standing behind Catilina for his later election campaign.[12] Eventually, Marcus did not undertake to defend Catilina, and after the verdict of acquittal Catilina entered into an election alliance with Antonius, which was approved by the aforesaid influential political factors too. All this unambiguously shows that political alliances of the period were formed accidentally based on current interests, and that in order to increase his chances Cicero would have been willing to enter into alliance even with Catilina, and after

[1] *Commentariolum petitionis* 51.
[2] Cicero, *De imperio Cnaei Pompei* 69. 71.
[3] Till 1962. 318.
[4] *Commentariolum petitionis* 5.
[5] Cicero, *Pro Cluentio* 130.
[6] Till 1962. 319.
[7] *Commentariolum petitionis* 7.
[8] Sallustius, *De bello Iugurtino* 63, 3.
[9] Sallustius, *De coniuratione Catilinae* 23, 6.
[10] *Commentariolum petitionis* 7.
[11] *Commentariolum petitionis* 10.
[12] Cicero, *Epistulae ad Atticum* 1, 2, 1.

their election most probably he would have applied the same tactic against him as against Antonius—these assumptions, however, are on the verge of unhistorical speculations.[1]

III. The characterisation of the competitors, Antonius and Catilina[2] is perhaps the most remarkable part of the *Commentariolum* both in terms of language and the palpable description. Quintus considers both persons unpleasant for his brother; at the same time, he is compelled to see them as factors that must be reckoned with—regarding both of them he states that their past is obscure and sinful, both of them live to fulfil his desires, and none of them has the necessary financial means to be able to conduct the election campaign successfully[3] (with this last remark he opposes them to the wealthy upper and middle classes who want to protect their wealth).[4] At the end of the presentation he underlines as their common feature that it is not so much their origin from high-born families but their sins that make them well-known, and those casting their votes on them would stab two daggers at the same time into the state.[5] The use of the term dagger *(sica)* is not by chance, by that Quintus lets Marcus associate it with Antonius's and Catilina's aforesaid characterisation, in particular, that both of them are assassins *(sicarii)*.

C. Antonius, son of M. Antonius, the orator, who taught Cicero too,[6] bore the sobriquet Hybrida (bastard), and is kept in evidence among others as the uncle and father-in-law of the later triumvir M. Antonius. Quintus adduced against him that in 70 the *censores* excluded him from the *senatus*[7] because he sold his plots and property in auction due to his debts.[8] As the next charge he mentions the lawsuit successfully brought against him by the inhabitants of Achaia in 76 before M. Licinius Lucullus *praetor peregrinus* as a competent forum having jurisdiction in the disputes of Roman citizens and aliens:[9] they charged him with looting them as the commander of the cavalry during Sulla's rule of terror.[10] The counsel for the prosecution was the then twenty-four year old Caesar,[11] and although Antonius withdrew himself from the *praetor's* jurisdiction, six years later it was this act due to which the *censores* excluded him from the *senatus.* Nevertheless, he was admitted to the *senatus* again in 66 as *praetor*, and later in 42 he fulfilled the *censor*'s office too.[12] When elected *praetor* he was not able to name friends in sufficient rank for counting and checking the ballots, only the ill-famed Sabidius and Panthera.[13] His father's name was probably of great help to him in successfully applying both for the *praetor*'s and later the *consul*'s office; however, Quintus does not mention that in his election to be *praetor* Antonius got from the third place to the first with Cicero's help[14] —this fact also shows that election alliances were short-term partnerships based on interests of the moment.[15] Concubinage with a slave woman *(concubinatus)* itself was not considered a rare thing or an exceptionally scandalous act.[16] What caused dissatisfaction in the case of Antonius was that he bought the slave girl whom he

[1] Till 1962. 322.
[2] *Commentariolum petitionis* 8–12.
[3] *Commentariolum petitionis* 8.
[4] Till 1962. 322.
[5] *Commentariolum petitionis* 12.
[6] Cicero, *Tusculanae disputationes* 5, 55.
[7] *Commentariolum petitionis* 8.
[8] Cf. Asconius, *Commentarius* 84, 23. ff.
[9] *Commentariolum petitionis* 8.
[10] Cf. Asconius, *Commenarius* 83, 26; 84, 18.
[11] Plutarchus, *Caesar* 4, 2. ff.
[12] Till 1962. 323. ff.
[13] *Commentariolum petitionis* 8.
[14] Asconius, *Commentarius* 85, 21. ff.
[15] Till 1962. 324.
[16] Plutarchus, *Cato maior* 24, 1; *Crassus* 5, 2; Mommsen, Th.: *Römisches Strafrecht.* Leipzig 1899. 693.

kept beside him in an open auction *(de machinis)* as a *praetor* in office, and by doing so he injured the dignity of the office he fulfilled.[1]

When the application procedure commenced Antonius did not stay in Rome but we do not know where his journey took him.[2] On official missions *(legatio libera)* the traveller was entitled to reimbursement of travel expenses and accommodation and board; also he had the opportunity, in addition to compulsory benefits, to make the innkeepers hosting him pay tributes—the fleeced innkeeper *(copo compilatus)* as a proverbial phrase was used by Petronius too.[3] On official missions one could get enormously rich as it is proved by a locus from one of Cato maior's orations on his own costs and expenses *(De sumptu suo)*.[4] In 59 Caesar made an attempt to eliminate the abuse of public funds by statutory instrument *(lex Iulia de repetundis)*; and in Cilicia Cicero waived even the reimbursement of expenses he was entitled to.[5] On his official journey mentioned by Quintus, Antonius substantially replenished his financial resources to accumulate proper funds for generous distribution of gifts during the election campaign *(largitio)*; on the other hand, he injured the people of Rome too—points out the author—since he failed to fulfil his obligation to ask for the support of the people of Rome personally during the process of application *(populo Romano supplicare)*.[6] Later, Cicero was yet compelled to exercise his *consul*'s office in concordance with *(concordia)* him[7] since the popular assembly *(comitia centuriata)* elected Antonius *consul* on the second place after Cicero—it praises Marcus's sense of tactic that by doing favours to him he was able to make the competitor attacked earlier stand by him as an associate in the office during the times when he had to cope with the dangers of the Catilina plot.[8]

Expressing his indignation over Catilina's past and way of life Quintus took to more powerful means as in the characterisation of Antonius, which can be clearly identified in the series of pathetic poetic questions.[9] At the same time, these questions and exclamations do not lack irony as he sharply questions the nobleness of Catilina's origin, on the one hand—although in theory Catilina was more high-born than Antonius, his ancestors obtained only the *praetor*'s office while Antonius's father was one of the leading personalities of the State—and the lack of nobleness of his character, on the other.[10] Contrary to Antonius who was frightened even by his own shadow, Quintus characterises Catilina in general as an uninhibited scoundrel who despises and defames the law;[11] then, he turns to the list of his outrageous deeds.[12] He underlines his poor family conditions, also referred to by Sallustius,[13] as it was only through Sulla's proscriptions that Catilina took possession of considerable wealth,[14] and the fact that his rakish and violent sexual nature was reinforced by what he experienced at home, seeing his elder sister's conduct.[15] The greatest part of the crimes in the presentation comprises the murders committed during Sulla's rule of terror against Roman citizens.[16] Quintus enumerates the names of the murdered Roman knights, who supported Cinna and by doing so evoked

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[1] *Commentariolum petitionis* 8.
[2] *Commentariolum petitionis* 8.
[3] Petronius, *Satyricon* 62, 12.
[4] *Oratorum Romanorum Fragmenta*, Frgm. 173.
[5] Cicero, *Epistulae ad Atticum* 5, 16, 3.
[6] *Commentariolum petitionis* 8.
[7] Cicero, *De lege agraria* 2, 103.
[8] Till 1962. 326.
[9] *Commentariolum petitionis* 9.
[10] *Commentariolum petitionis* 9.
[11] Cf. Asconius, *Commentarius* 86, 24. ff.; Cicero, *In Catilinam* 1, 18.
[12] *Commentariolum petitionis* 9.
[13] Sallustius, *De coniuratione Catilinae* 5, 7.
[14] Till 1962. 328.
[15] Cf. Sallustius, *De coniuratione Catilinae* 15, 1.
[16] *Commentariolum petitionis* 9; Asconius, *Commentarius* 83, 26. ff.

Sulla's revenge, in a generalising plural even if Catilina's bloodlust demanded only one victim from the given clan.[1] As one of the most outrages examples of these murders he recalls the murder of Q. Caecilius, Catilina's own brother-in-law, who played no political role at all, and considering his age the only thing he wanted was quiet old age;[2] it is highly weird that to the best of our knowledge Marcus never mentions the murder of relatives committed by Catilina.[3]

Quintus gives a longer pathetic description not shrinking back from depicting naturalistic details of the brutal murder of Catilina's wife, Gratidia's sister, by M. Marius Gratidianus Catilina.[4] This murder must have affected the brothers closely since through their grandmother they were relatives of Gratidianus.[5] This man highly dear to the people of Rome *(homo carissimus populo Romano)* was very popular among others because during the two consecutive years, in 85 and 84 when he fulfilled the *praetor*'s office he took several measures to prevent the people from being injured; so at several points of the city they erected statues of him, which were respected with cultic ceremonies.[6] On the other hand, both Quintus and Marcus conceals that in 87 Gratidianus as a popular tribune and as Cinna's adherent threatened Q. Lutatius Catulus with crucifixion, who escaped into suicide—the *Commentariolum* renders the merciless revenge of Catulus's son and especially Catilina perceptible.[7] Quintus demonstrates Catilina's corruptness and dangerous nature when he does not fail to mention that Catilina lived together with actors and gladiators—both occupations were inflicted by loss of honour *(infamia)* in Roman law[8]—and while actors satisfied only his lust, gladiators meant grave threat to all the citizens.[9] Since the Spartacus uprising, contacts with gladiators represented threat to the peace of the State—Catilina obtained a troop of gladiators from Q. Gallus.[10] The danger implied by it is indicated also by the resolution of the *senatus (senatus consultum)* dated 12 October 63, twelve days before Cicero's first oration against Catilina, claiming that Catilina's gladiators must be dispersed to Capua and other provincial towns.[11]

Catilina committed sacrilege *(sacrilegium)* both when he washed his hands besmeared with blood in the holy water basin of the Apollo temple after murdering Gratidianus,[12] and later by other acts. However, Quintus puts it quite obliquely and speaks about defiling only one sacred place and some other persons who became the innocent victims of Catilina's crime.[13] Quintus's vague description is understandable since the case is from 73 when Clodius charged Catilina with incest, *incestum*, committed with Fabia (Fabia was a Vesta priestess and half-sister of Cicero's wife, Terentia). Owing to Catulus's help, Catilina was acquitted but the case left the reputation of Fabia, and by that of Terentia's and Cicero's family in tatters. There are a few loci available on the case; e.g., Sallustius[14] and Plutarch[15] asserts Catilina's outrageous deed as a fact, but Cicero, should he refer to the fact, never associated his sister-in-law's name with him. After that Quintus enumerates some persons by name who belonged to the circle of

[1] Cf. Asconius, *Commentarius* 84. 5. ff.
[2] *Commentariolum petitionis* 9.
[3] Till 1962. 329.
[4] *Commentariolum petitionis* 10.
[5] Cicero, *De officiis* 3, 67.
[6] Cicero, *De officiis* 3, 80.
[7] Cf. Asconius, *Commentarius* 84, 9. ff.; Till 1962. 330.
[8] Cf. Nótári T.: *Római köz- és magánjog. (Roman Public and Private Law.)* Kolozsvár 2011. 202. f.
[9] *Commentariolum petitionis* 10.
[10] Asconius, *Commentarius* 88, 2. ff.
[11] Sallustius, *De coniuratione Catilinae* 30, 7.
[12] Plutarchus, *Sulla* 32.
[13] *Commentariolum petitionis* 10; Asconius, *Commentarius* 91, 16. ff.
[14] Sallustius, *De coniuratione Catilinae* 15, 1.
[15] Plutarchus, *Cato minor* 19, 3.

Catilina's close friends *(amicissimi)*;[1] this, however, cannot be interpreted to imply that Marcus or Quintus suspected as early as that anything about the plot prepared by Catilina[2]—nevertheless, certain names (Q. Curius, L. Vettius) related later to the plot already appeared here.[3]

To make the list of crimes complete, Quintus points out that Catilina seduced free-born boys almost in their parents' lap—Sulla's legislation and the *lex Sca(n)tinia* imposed a fine of ten thousand *sestertius* on this state of facts—[4] which was public knowledge all over the city,[5] and was absolutely contrary to Cicero's relation to youth several times underlined by Quintus too.[6] To cover Catilina's recent scandal, Quintus adduces to the case well-known to his brother: the acquittal from the charge brought against him for robbing goods from the province Africa *(crimen repetundarum)*.[7] This lawsuit could have prevented Catilina from applying for the *consu*l's office[8] but in late 65 at Catilina's demand the purportedly biased jurors were recalled with the prosecutor's, P. Clodius Pulcher's consent, and the newly set up jury acquitted Catilina.[9] Quintus, and later Marcus spoke about the corrupt jurors with contempt.[10] On the other hand, Quintus does not talk about Crassus and Caesar who supported Catilina from the background.[11]

Most probably Quintus summed up the negative features of the two competitors well-known to his brother to help Marcus to make the citizens aware of them in a concise form,[12] or to make him able to properly threaten Catilina and Antonius with charging them with their outrageous deeds.[13] Against Antonius he enumerates the following acts, in brief summary: his debts; selling his estates; his contempt of the court; his exclusion from the *senatus*; his suspicious acquaintance with Sabidius and Panthera; defiling the dignity of the office by buying the girl friend on the slave market; and, from the recent period, looting the innkeepers; and despising the people of Rome by not attending the application in person. Legally, it was only the abuse of the rights of official mission—or his participation in Sulla's proscriptions—that could give proper grounds for calling him to account for his deeds.[14]

In the description of Catilina's past, when Quintus enumerated the names of the knights killed by him, and pathetically described the murder of Gratidianus, he must have had kept current political issues in view and not just the requirements of historical authenticity as that was the time when those who committed murders during Sulla's reign of terror were called to account for their deeds[15] —in spite of the fact that pursuant to the *dictator*'s regulations the killers of proscribed persons should have enjoyed impunity.[16] As part of this process, a short time the election of the *consules*, L. Liscius, Sulla's well-known captain and Bellienus, Catilina's uncle were sentenced due to murdering proscribed persons during Sulla's rule, although both of them were quite ignorant persons and they could have said that they had committed all that

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[1] *Commentariolum petitionis* 10.
[2] Cf. Cicero, *Pro Caelio* 14.
[3] Till 1962. 333.
[4] *Commentariolum petitionis* 10; Asconius, *Commentarius* 86, 23.
[5] Cicero, *In Catilinam* 1, 13; *Pro Caelio* 12. f.; Sallustius, *De coniuratione Catilinae* 14, 5. f.
[6] *Commentariolum petitionis* 3. 33.
[7] *Commentariolum petitionis* 10.
[8] Sallustius, *De coniuratione Catilinae* 18, 3; Asconius, *Commentarius* 89, 1. ff.
[9] Asconius, *Commentarius* 87, 13. ff.
[10] Cicero, *De haruspicum responso* 42; *In Pisonem* 23; *Epistulae ad Atticum* 2, 1, 8; Asconius, *Commentarius* 85, 8. ff.; 87, 5. ff.; 89, 17, 92, 4. ff.
[11] Till 1962. 335.
[12] *Commentariolum petitionis* 27.
[13] *Commentariolum petitionis* 55.
[14] Asconius, *Commentarius* 88, 26.
[15] Asconius, *Commentarius* 90, 25. ff.; Dio Cassius 37, 10, 2.
[16] Suetonius, *Divus Iulius* 11.

on the orders of Sulla.[1] At the end of 64, Catilina was also brought to the court of justice competent to pass judgment on homicide *(quaestio inter sicarios)*, the investigator's office *(quaesitor)* was fulfilled by Caesar, the chairman's office by L. Lucceius, known as a historian, who was good friends with Cicero.[2] In spite of the fact that Catilina could not give an excuse for his deeds by saying that he acted on the orders of the *dictator*, he was acquitted because Caesar and Cassius backed him.[3] Furthermore, he could have been charged with seducing boys and unlawfully keeping gladiators; and many people demanded retrial of the case of looting the province. Although the first lawsuit ended with acquittal, the public opinion of the period evaluated it as a scandalous outcome. So owing to Quintus's instructions, Marcus had sufficient material for being able to threaten both of his competitors, primarily Catilina with possibly charging them.[4]

Marcus amply used the material compiled by his brother in his oration entitled *In toga candida* handed down to us by Asconius in fragments: what happened was he claimed to make the law motioned by C. Calpurnius Piso to sanction election fraud in 67 *(lex Calpurnia de ambitu)* stricter when the amount of the bribery monies distributed by Antonius and Catilina went far beyond any usual extent.[5] Q. Maucius Orestinus exercised his right of veto *(intercessio)*, and Marcus heavily attacked his competitors before the *senatus* enumerating the following deeds. Regarding Antonius: looting Achaia and despising the court; his own favour he did to Antonius in the election of the *praetor*; assigning his goods; and holding back the shepherds who worked on his estate in order to organise an army from them; Antonius's participation in Sulla's proscriptions and the role taken by him when driving a cart *(quadrigarius)* in Sulla's triumphal procession.

In the rest of the speech, he attacked Catilina: he charged him with murdering Roman citizens; financial abuses and crimes; immorality and debauchery; despising the law; killing Marius Gratidianus; gathering gladiators and seducing the Vesta priestess—and called both of them a dagger pointed against the State.[6] The two competitors made efforts to defend themselves; however, not being able to come up with anything against Cicero's personality and conduct of life, the only thing they cast on his eyes was that he was 'a new man' *(homo novus)*.[7] The oration produced its impact: it seemed more prudent to elect an applicant who did not have noble descent from the old times but was eligible for each layer of society and the masses than Catilina.[8] Antonius achieved the second place after Cicero, and his father's former authority was of great help to him.[9]

IV. The Republic of Rome recognised four kinds of popular assemblies; three of them played a part in the elections. The *comitia centuriata* based on property *census* elected the prime leaders of the Empire, the *consules* and the *praetores* who carried out administration of justice as well as the *censores* who implemented property estimation. The point of the system was that based on their property status, income the population was ranked among military/political *centuriae*. The *centuriae* of the wealthier as a matter of fact did not amount to one hundred persons while the number of persons in a single *centuria* of the pauper was at least as large as the whole first class; that is, the total of the eighty *centuriae* of the aristocracy. *Equites* constituted eighteen *centuriae*. The wealthier the people recruited were, the higher the number

[1] Asconius, *Commentarius* 91, 6. ff.
[2] Suetonius, *Divus Iulius* 11.
[3] Till 1962. 336.
[4] *Commentariolum petitionis* 56.
[5] Asconius, *Commentarius* 83, 5. ff.
[6] Till 1962. 337.
[7] Asconius, *Commentarius* 93, 24. ff.
[8] Cf. *Commentariolum petitionis* 53.
[9] Asconius, *Commentarius* 94, 3. ff.; Cicero, *De officiis* 2, 59.

of *centuriae* was; i.e., the number of citizens classified in each *centuria* was steadily increasing when the given *centuria* consisted of less and less wealthy people. Through that it was possible to attain that people without any property were represented only by five *centuriae*. Elections were held in a process per *centuriae*—and ”from up to down”. This means that first wealthier people cast their vote and after that the poorer, finally the pauper, who constituted the major part of the population. Although the ballots cast by each citizen were equal but their ballots were aggregated per *centuria* and their *centuria* eventually represented only a single ‘yes’ or ‘no’ vote, depending on which response the majority of the ballots was cast in the *centuria*. If a case had to be decided or an official had to be voted for, voting was carried out only up to the stage where the *centuriae* that had already cast their vote had reached fifty percent plus one ballot. As the eighty votes of the eighteen votes of the *equites* and the eighty votes of the first class of the patricians/the aristocracy themselves were more than half of the one hundred and ninety-three *centuriae* in total, it can be clearly realised that even the twenty *centuriae* of the second property class had to cast their ballots only in the very rare case that the *centuriae* of the knights and the first class had not reached accord for some reason. As, however, the first ninety-eight *centuriae* actually represented merely a fraction of the whole of the citizens, the election was far from reflecting the will of the majority of the citizens.[1]

The day of the election of the consuls always fell on the second half of July. The electors went out to the Mars field early morning and gathered by *centuriae*. The persons controlling the elections announced the names of the candidates; and, after that voting began. The identity of the voters appearing per *centuriae* was verified by the guards at the gateway to the voting bridge. Voters wrote the initials of the name of the candidate they supported on a wax covered piece of wooden board. At the other end of the voting bridge a ballot-box was set up where they cast their boards. Once one *centuria* has cast their votes, ballots were aggregated in the ballot counting chamber, and the names of the candidates were written in a predetermined order, with the decisions of the *centuriae* added beside the names. When a candidate had reached fifty percent plus one vote of the ballots of the *centuriae*, voting was discontinued, and the result was proclaimed. The institution of campaign silence was unknown to the Romans since agents tried to convince voters to vote for specific candidates even at the gate of the bridge. If it was foreseen that the result would be unfavourable for patricians, then the voting bridge collapsed ”accidentally”, and the voting had to be interrupted—and be postponed for several days. Then, in some cases, *augures* showed up, who stated that they were seeing ill *omina*, and this allowed declaring the whole procedure null and void.[2]

Just as the election of magistrates was a necessary part of the order of the state of the Republic of Rome, in these elections election fraud/bribery *(ambitus)* played a part too. Very soon after the making of the Twelve Table Law, in 432, the first statutory provision was published, which prohibited for applicants to call their fellow citizens’ attention to themselves with specially whitened clothes made shining.[3] Initially, *ambitus* (walking around) indicated not more than the activity when the applicant for the office walked around among electors to secure their votes for him.[4] It is linked with the name of C. Poetelius *tribunus plebis* that in 358 a *plebiscitum* prohibited for the applicants to walk around on markets and in villages among electors,[5] which provision was obviously intended to prevent unethical practices to obtain votes outside Rome. In accordance with Roman terminology, it was always only

[1] Németh–Nótári 2006. 136. ff.
[2] Németh–Nótári 2006. 144. f.
[3] Livius, *Ab urbe condita* 4, 25.
[4] Varro, *De lingua Latina* 5, 28; Festus, *De verborum significatione* 16.
[5] Livius, *Ab urbe condita* 17, 25, 13.

ambitus that violated legal order, *ambitio* did not;[1] the latter was often used in the sense of *petitio*, its meaning was sometimes undoubtedly pejorative but it never became a legal term.[2] It should be noted, however, that the aforesaid two *plebiscita* cannot be considered punitive statutes.[3]

From the second half of the second century we know of the existence of two acts that sanctioned *ambitus* – they are *lex Cornelia Baebia* from 181[4] and an act from 159,[5] but their content is not known. In the age between C. Gracchus and Sulla, the system of *quaestiones perpetuae* was already quite extended. The first news provided on a lawsuit specifically on the charge of *ambitus* is dated to this period: in 116 one of the *consul*'s offices for the year of 115 was won by a *homo novus* Marcus Aemilius Scaurus, who was charged by his rival having lost the election, P. Rutilius Rufus with *ambitus*. In turn Scaurus did the same against Rufus; otherwise both of the accused—who were prosecutors at the same time—were acquitted.[6] The existence of *lex Cornelia de ambitu* made by Sulla is somewhat disputed;[7] our understanding of *leges Corneliae* is not complete since there are two sources on these acts available. First, Cicero's speeches; secondly, the writings of the lawyers of late principate, which are known only in the form bequeathed in the *Digest*. Cicero refers to these acts only to the extent his interests manifested in the given speech, that is, the rhetoric situation makes it necessary; so in no way does he make an effort to be exhaustive as it is not his duty. The lawyers of the principatus dealt with only those acts of Sulla that remained in force after Augustus's reforms. The following reference, however, gives ground for considering the existence of *lex Cornelia de ambitu* possible. It asserts that in earlier ages the convicted were condemned to refrain from applying for magistrates for ten years. The aforesaid *lex Cornelia* can be hardly the *lex Cornelia Baebia* from 181 since between his speech delivered in defense of Publius Cornelius Sulla and *lex Cornelia* more than ten years had passed, and as in this period other laws sanctioning *ambitus* were also made, it cannot be supposed that the extent of punishment would have remained the same.[8]

In the periods after Sulla, *quaestio de ambitu* was usually headed by a *praetor*, so for example in 66 C. Aquilius Gallus fulfilled the office of *praetor ambitus*.[9] On the laws following this stage, information is supplied by Cicero in *Pro Murena*. At the request of C. Cornelius *tribunus plebis*, in 67, *lex Calpurnia* was born;[10] what can be known about its sanctions is as follows. It contained expulsion from the *senatus*, banning from applying for offices for life (contrary to the ten years' term defined under *lex Cornelia*) and certain pecuniary punishments.[11] A *senatus consultum* from 63 emphatically sanctioned a part of the acts regulated under *lex Calpurnia*; so for example, the act of recruiting party adherents for money upon the reception of the applicant in Rome; the act of distributing a great number of free tickets and seats for gladiators' games; and the act of hospitality to an excessive extent;[12] this *senatus consultum* probably interpreted and specified the aforesaid law.[13] The events of the

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[1] Plauts, *Trinummus* 1033.
[2] Mommsen 1899. 866; Jehne, M.: *Die Beeinflußung von Entscheidungen durch „Bestechung": Zur Funktion des ambitus in der römischen Republik.* In: Jehne, M. (Hrsg.): Demokratie in Rom? Die Rolle des Volkes in der Politik der römischen Republik. Historia Einzelschriften 96. Stuttgart 1995. 51. ff.
[3] Mommsen 1899. 866; Adamietz, J.: *Marcus Tullius Cicero: Pro Murena.* Darmstadt 1989. 24.
[4] Livius, *Ab urbe condita* 40, 19, 11.
[5] Livius, *Epitoma* 47.
[6] Gruen, E. S.: *Roman Politics and the Criminal Courts 149-78 B.C.* Cambridge 1968. 120. ff.
[7] Kunkel, W.: *Quaestio.* In: Kleine Schriften. Weimar 1974. 61.
[8] Mommsen 1899. 867.
[9] Cicero, *Pro Cluentio* 147.
[10] Cicero, *Pro Murena* 46; Dio Cassius 36, 38, 39.
[11] Cicero, *Pro Murena* 47; Jehne 1995. 66. f.
[12] Cicero, *Pro Murena* 67. Cf. Laser 2001. 14. ff.; 22. ff.
[13] Adamietz 1989. 25.

year 64, however—primarily the increasing losses of Antonius and Catilina—made it necessary to make a new law. This law became *lex Tullia* enacted in 63, supported by all the candidates applying for the *consulatus* of the year 62,[1] which threatened with ten years' exile as a new punishment, and took firmer action against distributing money, and punished absence from legislation due to alleged illness. Furthermore, it banned the arrangement of gladiators' games during two years before applying, with the only exemption from such ban being an obligation to do so as set forth in a last will and testament. That is how the law wanted to prevent paying money directly to voters, and intended to limit the number of the entourage of the applicants (as an increasingly great entourage almost appearing to be a triumphal procession might have suggested sure victory to voters). It is a fact however—as Joachim Adamietz's witty and quite to the point remark reveals—that the actual limits of *ambitus* were determined by nothing else than the confines of the financial possibilities of the candidates.[2]

V. The associations founded by private persons, usually called *collegium*, held together the communities providing protection and assistance for persons living at the same settlement and belonging to the same religious cult but were primarily not meant to serve everyday political fights.[3] To cover their expenses certain associations claimed admission fees *(capitulare*) or regular monthly membership fees *(stips menstrua),*[4] which of course limited the number of members; that is, most often the members of the *collegia* were from the wealthier layers of urban common people *(plebs urbana),* traders, craftsmen, ship owners and not from simple labourers.[5] If an association, which did not claim any membership fees, was not able to finance its expenses from its own resources, it could rely on the generosity of its leaders, or a *patronus* but if it engaged a conduct which was contrary to the maintainer's intentions, then it could lose the support.[6] The political significance of *collegia* increased during periods of applications for magistrates; however, even then it was enough for the applicant to win over the leading personalities of the *collegium* to his goals, the rest of the members obediently followed the opinion leaders.[7] Clodius's activity added a peculiar element to the political operation of certain associations. Clodius definitely raised the number of *collegia* that did not claim any membership fees and brought together the scum of the city, which highly shocked Cicero.[8] The maintenance and "representation" expenses of these associations were most probably covered by Clodius himself, and in return the members could express their gratitude to their *patronus* in several ways and forms; consequently, in theory Clodius could easily mobilise masses.[9] These *collegia* lead by Clodius were actually gangs operated by keeping the appearance of legality but used as tools to raise riots; and it was not in the interest of decent citizens to risk their reputation, proceeds and life—by closing their shops and leaving their daily jobs—for the sake of Clodius.[10] Later, Clodius made efforts to use the *collegia*

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[1] Cicero, *Pro Murena* 5.
[2] Adamietz 1989. 27.
[3] Kornemann, E.: *Collegium.* In: Paulys Realencyclopädie der classischen Alterthumswissenschaft, IV. 1. München–Stuttgart 1900. 380; Laser, G.: *Populo et scaenae serviendum est. Die Bedeutung der städtischen Masse in der Späten Römischen Republik.* Trier 1997. 102.
[4] Marcianus D. 47, 22, 1; CIL 14, 2112.
[5] Ausbüttel, F. M.: *Untersuchungen zu den Vereinen im Westen des Römischen Reiches.* Frankfurter Althistorische Studien 11. Kallmünz 1982. 42. ff.
[6] Laser 1997. 103.
[7] *Commentariolum petitionis* 30.
[8] Cicero, *In Pisonem* 9.
[9] Laser 1997. 104.
[10] Cicero, *De domo sua* 13. 54. 89; *Academici libri* 2, 144; Sallustius, *De coniuratione Catiline* 50, 1; *De bello Iugurtino* 73, 6.

maintained by him as a kind of private army,[1] which were, looking at their "results", sufficient for Clodius achieving his short-term plans and disturbing the privacy of the public for a short while, but for seizing power for a longer period (which was perhaps not included in Clodius's intentions) both financial resources and proper motivation were missing. After Clodius's death, the *collegia* lost their impact produced on political events; nevertheless, later on the leaders of the State were very careful in their ways with associations.[2]

The question arises what proportion of the population the institution of the *clientela* covered—Gelzer believes it was the common people of the city *(plebs urbana)* who belonged to the *clientela*[3] —and as part of that what services the *clientes* were obliged to provide for their *patronus*; and to what extent the wider masses could be manipulated and mobilised through the *clientela*. Since the early period of the Republic the relation between the *patronus* and the *cliens* had been based on mutual trust *(fides)*, under which patricians having outstanding authority *(auctoritas)*, dignity *(dignitas)* and wealth *(vires)*, and later plebeians undertook to protect citizens in need of and asking for protection[4] as well as travelling aliens *(hospites)* in the form of various benefits and favours *(beneficia, merita)* both financially and before the law.[5] In spite of their dependant relation to their *patronus* the *clientes* preserved their personal freedom, and were not compelled to waive their right to political activity or participation in public life; what is more, their patrons promoted them to do so.[6] In addition to expressing esteem *(reverentia)* and gratitude *(gratia)* the *clientes* were obliged to provide several services for their *patronus*.[7] So, for example, they arranged for accommodation for their patron or his friends,[8] shared the payment of penalties,[9] supported their *patronus* in court proceedings,[10] during the period of applying for or fulfilling offices they provided spiritual and financial support for their patron,[11] in danger they undertook to protect him personally,[12] as a foreign *cliens* they supplied goods to the *patronus*,[13] and preferably they informed as many people as possible about the generosity of their patron.[14] On the grounds of all the above, the *clientes* were in many cases meant to articulate the *patronus*'s interests and views to the wider masses clearly and efficiently.[15] Although the *clientela* provided an essential basis of support for the *patronus*, the citizens fulfilling *patronatus* were far from relying only on *clientes* in search of tools that could be used for their political purposes since the attachment of the *clientela* was of ethical rather than legal nature, on the one hand—consequently, the patron was not able to enforce support given to him through legal means, or he could get this support only by holding out the prospect of appropriate consideration—and

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[1] Cicero, *Pro Milone* 25; *Post reditum in senatu* 33; *Pro Sestio* 34. 85; *In Pisonem* 11. 23.
[2] Laser 1997. 105. f.
[3] Gelzer, M.: *Die Nobilität der römischen Republik.* Leipzig–Berlin 1912. 134. ff.
[4] Spielvogel, J.: *Amicitia und res publica. Ciceros Maxime während der innnenpolitischen Auseinandersetzungen der Jahre 59–50 v. Chr.* Stuttgart 1993. 10; Laser 1997. 111; Cicero, *Brutus* 97; *Pro Roscio Amerino* 5. 58; *In Verrem* 2, 4, 41. 80; *Pro Quinctio* 2. 34; *Pro Cluentio* 51. 109; *Pro Caecina* 57; *Pro Murena* 10; *Pro Plancio* 75; *Pro Scauro* 26; *Philippicae in Marcum Antonium* 6, 15; *De finibus bonorum et malorum* 4, 56; *Commentariolum petitionis* 2; Proculus D. 49, 15, 7, 1.
[5] Cicero, *Pro Roscio Amerino* 106; *In Catilinam* 4, 23; *Pro Sestio* 10; *Cato maior de senectute* 32; Livius, *Ab urbe condita* 3, 16, 5; 4, 13, 2.
[6] Spielvogel 1993. 11; Laser 1997. 112.
[7] Livius, *Ab urbe condita* 3, 44, 5. 57, 3.
[8] Livius, *Ab urbe condita* 39, 14, 3.
[9] Livius, *Ab urbe condita* 38, 60, 9.
[10] Livius, *Ab urbe condita* 3, 58, 1.
[11] Plutarchus, *Cicero* 8, 2.
[12] Sallustius, *De coniuratione Catilinae* 19, 5; 26, 4; Livius, *Ab urbe condita* 23, 3, 2.
[13] Cicero, *Epistulae ad Atticum* 1, 20, 7; Livius, *Ab urbe condita* 4, 13, 2.
[14] Laser 1997. 113.
[15] Cf. *Commentariolum petitionis* 17.

the *clientes*, pursuing their own occupation, could not always be available to the *patronus*, on the other.

The social significance of the *clientela* depended to a great extent on the social position of the *cliens*, and, therefore, the *patronus–ingenuus* (free-born citizen) relation and the *patronus–libertus* (freedman, liberated slave) relation must be clearly separated from each other. A part of free-born *clientes* belonged to a social and economic layer identical with or similar to that of the *patronus*, and needed the *patronus*'s support only for the sake of strengthening their own position, or for obtaining an office[1]—in this case the *clientela* meant friendship between persons of equal rank *(amicitia)*.[2] These *clientes* belonged to the higher *census* class, and so at the *comitia centuriata* and in a provincial *tribus* they could articulate their opinion and advance their *patronus*'s interests as competent persons.[3] As a matter of fact, not all free-born citizens belonged to the wealthier layers, and they turned to the *patronus* primarily for urgent legal or financial help, but they could hardly return the favours did to them as due to the peculiar features of the Roman election system they did not have the opportunity to cast their votes and these votes were not evaluated unless the elections were expected to produce a dubious outcome.[4] Compared to the latter, the applicant for the office appreciated the support of men with greater prestige much more; so, for example, the support of the leaders of *collegia (principes)*, who in the given case did not constitute a part of the *clientela* but produced major influence in their association, district and their entire place of living, and had considerable impact on changes in the morale of voters.[5]

The representation of the institution of salutation *(salutatio)* casts interesting light on the applicant's social relations: saluters from lower layers of society *(salutatores)* visited several applicants on the same day *(plures competitores)*, so the conduct engaged by them during the election could not be considered secure and stable *(communes/fucosi suffragatores)*. Therefore, the *patronus* applying for the office ought to have appeared grateful to them, and had to praise their activity both to their face and in front of their friends as by doing so he could expect them to leave their other *patroni* and become firm and committed voters *(proprii/firmi suffragatores)*—the applicant was not supposed to bring up his suspicion arising or proved regarding their loyalty, and against his better conviction he had to assert his trust in them.[6] The *patronus* could never be absolutely sure of the support and gratitude of *salutatores* for they could compare the goods and benefits received from him to the allowances granted by other applicants they had also visited—i.e., economically independent citizens seemed more secure voter's base. The endeavour to recruit and hold inconstant *salutatores* and *clientes* becomes understandable when one considers that the *patronus* applying for an office could produce the appearance of popularity and influence by having a lot of people crowding around him during salutation.[7]

More important and more respectful *salutatores* were allowed to have a word directly with the *patronus*; their presence made the masses aware that the applicant was worthy of more extensive support.[8] The *salutatio* provided opportunities for the applicant for gathering information on the morale and desires of common people, which their close circle of friends *(amici)* did not provide insight into; consequently, the *patronus–cliens* relation served mostly exchange of information. The relation between the *patronus* and the freedmen *(liberti)* developed somewhat differently: their relation remained closer even after liberation

[1] Cicero, *De officiis* 1, 122. f.
[2] Cicero, *Laelius de amicitia* 26.
[3] *Commentariolum petitionis* 29.
[4] Laser 1997. 115.
[5] *Commentariolum petitionis* 30.
[6] *Commentariolum petitionis* 42. 35.
[7] Laser 1997. 117.
[8] *Commentariolum petitionis* 30.

(manumissio) but this relation was based as much on the requirements of moral standards than on the requirements of legal norms: In 118 Rutilius Rufus's *praetor edictum* limited the range of services that could be demanded by the *patronus*,[1] but a freedman was not allowed to take legal action against the *patronus*,[2] and it was only Augustus's *lex Aelia Sentia* that formulated statutory sanctions against ungrateful freedmen.[3]

Accordingly, the *clientela* made up of free-born citizens and freedmen cannot be considered uniform in terms of the strength of their attachment to the *patronus* since it was exactly due to the moral nature of the attachment that the *patronus* did not have any legal means to collect outstanding claims and unfulfilled obligations. Although a *patronus* deceitfully acting against his *clientes* became the object of the contempt of society, this did not mean that he was deprived of his rights. Servius's commentary quoting the text of the Twelve Table Law attached to the relevant locus of Vergil's *Aeneis*[4] —which asserted that the *patronus* deceiving his *cliens* should be damned *(sacer)*—implied ethical offence and not criminal law facts. In this case the term *sacer* presumably meant the person who engaged culpable, that is, despiseable conduct[5] rather than a person who could be sacrificed to the gods or freely killed.[6] Most probably Servius followed the tendency of the late period of the Age of the Republic that idealised the Roman past.[7] Even if we presume close *patronus–cliens* relations regarding the archaic age, the significance of *clientelae* dramatically diminished by the 3rd c. B.C., and owing to the growth of the number of citizens we can no longer reckon with stable *clientelae* during Sulla's rule of terror, much rather ad hoc *patronus–cliens* relations organised for specific purposes should be presumed under which fulfilment of moral obligations was no longer of great account.[8] If there had been no mobility of such a great extent within and between *clientelae*, then the *patroni* and applicants for offices would not have been compelled—even at the expense of *ambitus* (election fraud)—to recruit *clients*.[9] *Clientes* from lower layers of society became important to the *patronus* not so much for getting their votes—which sometimes they were not even allowed to cast in the elections—much rather for their capacity to mediate the opinion of the masses to him, which helped him to prepare for what opinion they would like to hear from him in public appearances.[10]

With the loosening of the *patronus–cliens* relation, or owing to the fact that the *cliens* would seek a *patronus* that represented his interests better, and the *patronus* would seek *clientes* in his environment who had more considerable influence and so had greater capital of relations, this process reached the stage where the lower layers of society, which constituted a considerable part of *clientes*, were able to produce direct influence on political leaders. A grand entourage represented the acknowledgement of the politician and his legitimisation by the citizens,[11] whereas a decreasing number of people forced him to revise his views entertained so far.[12] On the other hand, it was just due to the unstable and unreliable nature of the *clientela* that in the last century of the Republic applicants for offices relied, in addition to their *clientes*, on their relatives, friends, neighbours in the district, their freedmen and slaves

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[1] Paulus D. 38, 1, 1.
[2] Cf. Cicero, *Epistulae ad Atticum* 7, 2, 8; Suetonius, *Claudius* 25, 1.
[3] Paulus D. 37, 14, 19, 1.
[4] Servius, *Commentarius in Verg. Aen.* 6, 609.
[5] Festus, *De verborum significatione* 467; Dionysius Halicarnassensis, *Antiquitates* 2, 9–11. 10, 3; Brunt, P.: *Italian Manpower 225 B. C.–A. D. 14*. Oxford 1971. 403.
[6] Plautus, *Poenulus* 88; Vergilius, *Aeneis* 3, 57.
[7] Laser 1997. 120.
[8] Brunt 1971. 32; Laser 1997. 121.
[9] *Commentariolum petitionis* 40. 47.
[10] Cicero, *Pro Roscio Amerino* 19. 96; *De oratore* 3, 225; Sallustius, *De bello Iugurtino* 71, 5.
[11] Dionysius Halicarnassensis, *Antiquitates* 2, 10, 4.
[12] Laser 1997. 124.

when compiling the urban accompaniment—this diversity enriched not only the spectacular entourage but opened roads to each layer of society and created relations for the applicant.[1] So the *clientela* was only one of the means of political fight, and far from being the only or the most important one;[2] all the more as Livius's description asserts that the purpose of the *clientes* taking action before the court of justice was not to raise sympathy with the defendant much rather to prevent a larger mass from getting together.[3]

The exploration of uninhibited opportunism and manoeuvring described in Commentariolum petitionis by Quintus Tullius Cicero was in no way in the interest of the ruling class of the late Republic, and it would have put especially Marcus Tullius Cicero in an unpleasant situation since he could not have shielded himself from the shadow of the suspicion that—especially as *homo novus*—he was able to win *consulatus* because he used all these tools in practice. In the mirror of all the above, it can be ascertained that the *Commentariolum petitionis* was produced primarily as a personal writing addressed to Marcus, in which his brother, Quintus wanted to give him help by summing up the key aspects and tools of the election campaign to win the *consul*'s office.

[1] Cicero, *Pro Cluentio* 94; *Pro Murena* 69; *Pro Roscio Amerino* 93; *Philippicae in Marcum Antonium* 6, 12; 8, 26; Brunt: *op. cit.* 415. f.
[2] Laser 1997. 125. f.
[3] Livius, *Ab urbe condita* 2, 35, 4.

Crimen ambitus and ambitio in the Late Republic

Cicero delivered his speech in November 63 in defence of Lucius Licinius Murena, an applicant for the office of the next year's consul, who was charged by his competitors with election fraud, *ambitus*. The condemnation of Murena would have broken not only the commander's political carreer, it would have driven the Republic into serious danger. So, it was not only the honesty of a member of the Roman political elite but the stability of the Roman State that Cicero was destined to defend, as he clearly states it in his speech. In his statement of defence, it is not primarily the personal merits of the competitors, Licinius Murena and Sulpicius Rufus that the orator compares, it is their career, the commander's, the jurist's activity that he puts on the scales of public good, and provides a fairly humorous, witty assessment of these. The outcome of the lawsuit is known, the court acquitted Murena, who thus was able to start his service as a consul, and take over the office from the previous year's consul and his own counsel for defence, Cicero.

The speech in defence of Cnaeus Plancius was delivered in early autumn 54, immediately before or after the speech in defence of M. Aemilius Scaurus. Cn. Plancius won the office of aedil of the year 54 by winning the election, and, as it was not rare in Rome, his competitor, who lost in the election, M. Iuventius Laterensis charged him of election bribery/fraud. As co-prosecutor L. Cassius Longinus took sides with him, defence was provided by Cicero (and as quite often Hortensius), who—as was his custom—rose to speak as the last one. The court of justice was chaired by C. Alfius Flavus, of whom—in spite of his people's party affiliation—Cicero made positive statements elsewhere. The close relation between Cicero and his defendant was highly influenced by the fact that Plancius, who acted in Macedonia as quaestor, gave shelter to the exiled politician, which was equal to saving his life in the orator's interpretation. Cicero responds to the allegations of general significance made by the prosecution, in not too exhaustive details; however, he turns the attention from the accused and his acts to his own person, and the style of the speech here is elevated to hymn of gratitude addressed to his friend and saviour, Plancius, who stood by the orator-statesman from first to last even during his exile. As on several occasions earlier and later, he convincingly hammered the conviction into his audience that his voluntary and self-sacrificing exile saved the people of Rome from terrible civil war and bloodshed, and he tried to clarify his relation with the triumvirs far from being free from contradictions, yet stylised into a harmonic relation in the given situation. By describing his exile and escape in vivid colours and presenting a stylised figure of Plancius as a heroic saviour, he aroused the audience's compassion with the accused in a pathetic *peroratio*—and not without impact since, as it is known, in the proceedings Plancius was acquitted.

First, we shall analyse the historical background of *Pro Murena,* describing the political events surrounding the delivery of the speech in details as the *oratio* was made just at the time of revealing Catilina's plot, and so it cannot be taken out of the context of the stormy political conditions of the those months. (I.) After that, we shall discuss the rhetorical tactics used in *Pro Murena*, *contentio dignitatis*, that is, the strategy typically used in *ambitus* lawsuits by which Cicero compared development of the career and personality of the competing candidates to enable him to demonstrate—not so much his defendant's innocence in the charge of election bribery—much rather eligibility of Murena, who won the election, and ineligibility of his opponent, Sulpicius Rufus, to the consul's dignity. (II.) After brief description of the historical background of the lawsuit of Plancius (III.), we analyse *Pro Plancio* more profoundly to investigate the rhetorical handling of the facts of the case, which will be compared to *Pro Murena* examined earlier at several points to ensure better understanding. (IV.) Although the case was not one of the events that stirred huge political

storms in the last century of the Republic, and so it was soon forgotten, it can be considered important among charges brought due to election bribery and lawsuits conducted on this subject to the extent that, after *Pro Murena, Pro Plancio* is the second—and the last—speech delivered by Cicero in *ambitus* lawsuits that have been left to us, which provides us with the opportunity for profound and comparative analysis of the Ciceronian handing of the facts of the case that he usually applied in *crimen ambitus*.

I. In 63 Lucius Licinius Murena and Decimus Iunius Silanus were elected consuls for the year of 62. Apart from them, however, Lucius Sergius Catilina and Servius Sulpicius Rufus, the most excellent jurist of his age also applied for this office. Before the election, M. Porcius Cato made an oath that he would charge anybody who had won the election with *ambitus*, except for his brother-in-law,[1] Silanus.[2] In Rome it was far from being a rare thing to charge the magistrates elected with *ambitus*. In 66 both *consules designati*, P. Cornelius Sulla and P. Antonius Paetus were actually condemned, and in 54 none of the four applicants managed to avoid the proceedings taken due to *ambitus*.[3] The act of condemning a *consul designatus*, as a matter of fact, was likely to shake the stability of the Republic to a considerable extent.[4] The fact that the charge made by Sulpicius and Cato went far beyond the usual extent of the possible danger to the *res publica* was justified by the events taking place in the year of 63. The delivery of *Pro Murena* can be dated to November 63; that is, one of the periods burdened with the greatest crisis of the Roman Republic. The year of 63—when Marcus Tullius Cicero and Caius Antonius Hybrida became consuls—saw the second Catilina's plot.[5] What follows is a brief summary of the key events of the conspiracy.[6]
The lawsuit involved four prosecutors (Ser. Sulpicius Rufus, M. Porcius Cato, Ser. Sulpicius Rufus minor and a certain C. Postumius not specifically known) and three counsels for defence (Q. Hortensius Hortalus, M. Licinius Crassus and Cicero). The proceedings were terminated with the acquittal of Murena.[7]

II. The structure of the speech can be outlined as follows.[8] Cicero replies to the reproaches addressed to him for having undertaken defence.[9] In antique rhetoric it is not rare for the counsel of defence to apply the strategy to clear himself first. His style is solemn right in the first sentence both in terms of vocabulary and rhythm, the use of *creticus*.[10] In the main part[11] he follows the disposition of the charge divided into three parts. In the first very short part, he refuses the charges brought against Murena's conduct of life *(deprehensio vitae)*. In the second part, he deals with the chances of the election of the two competitors.[12] This was required because the charge subsequently stressing the point that Murena had no chance intended to prove that he had won owing to nothing else but dishonest means: that was what Cicero wanted to reply to. He emphasises that social background and the office obtained through it are equal in the case of both parties,[13] by virtue of this none of them could

[1] Plut. *Cato min.* 21, 3.
[2] Cic. *Mur*. 43–46.
[3] Adamietz, J: *M. T. Cicero, Pro Murena*. Darmstadt 1989. 1.
[4] Cic. *Mur*. 79. 82.
[5] See Meier, Chr.: *Ciceros Consulat.* In: Radke, G. (Hrsg.): *Cicero, ein Mensch seiner Zeit.* Berlin 1968. 61. ff.
[6] Drexler, H.: *Die Catilinarische Verschwörung*. Darmstadt 1976. 124. ff.
[7] Cic. *dom*. 134.
[8] Classen, C. J.: *Recht, Rhetorik und Politik. Untersuchungen zu Ciceros rhetorischer Strategie.* Darmstadt 1985. 124. ff.; Adamietz 1989. 83. ff.
[9] Cic. *Mur*. 1–10.
[10] Quint. *inst*. 9, 4, 107.
[11] Cic. *Mur*. 11–83.
[12] Cic. *Mur*. 15–53.
[13] Cic. *Mur*. 15–17.

overcome the other. Murena obtained esteem with his career till then and achieved victory for himself by using this esteem.[1] He compares the glory of the orator's and the soldier's career to to the lawyer's career,[2] in which competition *(studiorum atque artium contentio)*—as the rhetorical situation required—as a matter of fact the eloquence and the *res militaris* become the winner. After that, however, Cicero puts forth more compelling reasons to support Murena:[3] for example, the *ludi* that he arranged as praetor.[4] The fact that, contrary to Sulpicius Rufus,[5] he undertook to administer a province,[6] and finally that his election was supported also by commander Lucullus and his troops, who returned from the third war with Mithritades to Rome. Then he launches an attack against Servius:[7] he criticises the tactics followed by him, in particular that instead of advancing his own victory Sulpicius prepared the evidence of the charge of *ambitus* against his enemies right from the outset, and by that involuntarily drove those who were afraid of Catilina's victory to Murena's camp.[8] It is in the the third part[9] where he comes to the actual charges. First, he replies to the charges brought by by Cato, and the consideration thereof,[10] since it was Cato's excessively exercised firmness that made him support the charge.[11] As earlier pettiness and certain out-of-date institutions of the jurisprudence,[12] now he makes the sometimes exaggerating strictness of Stoic ethics the subject of scorn.[13] This charge is followed by his factual but rather narrow and not too convincing disproof.[14] Emphasis is laid not so much on production of evidence but on the assertion that the lawsuit itself is a highly false step and that anyone who wanted to attain through it that next January only one consul should enter office would deliver the *res publica* in the hands Catilina and his accomplices.[15] Thus, his aim is to protect the State and his citizens.[16] In the *peroratio*[17] he calls the judges' attention to the point that in their decisions they should keep public interest in view.[18]

In *Pro Murena* Cicero—in addition to emphasising the political weight of the lawsuit—achieved success, that is, Murena's acquittal by comparing the career of the two applicants (*studiorum atque artium contentio* and *contentio dignitatis*), in which he was helped by moderately used humour and irony as the most important tools. In the *Orator* Cicero provides theoretical foundations for all the three kinds of style, however, he points out that, in addition to its other attributes (avoiding prose rhythm and complex sentence, dropping hiatus, use of *munditia* and *elegantia*, moderation in applying both ornament and tropes, figures)[19] the most characteristic trait of simple style is witticism and irony. When using them the orator is to make sure that he should not cause irreparable harms; should thrust stings only into his enemies; should do that with moderation and not ceaselessly; and should not hurt all of them

[1] Cic. *Mur*. 18–21.
[2] Cic. *Mur*. 22–30.
[3] Cic. *Mur*. 37–42.
[4] Cic. *Mur*. 38.
[5] Cic. *Mur*. 42.
[6] Cic. *Mur*. 42.
[7] Cic. *Mur*. 43–52.
[8] Cic. *Mur*. 52.
[9] Cic. *Mur*. 54–83.
[10] Cic. *Mur*. 61–66.
[11] Cic. *Mur*. 64.
[12] Cic. *Mur*. 22–30.
[13] Classen 1985. 163. ff.; Adamietz 1989. 203. ff.
[14] Cic. *Mur*. 66–77.
[15] Cic. *Mur*. 78.
[16] Cic. *Mur*. 78.
[17] Cic. *Mur*. 83–90.
[18] Cic. *Mur*. 86.
[19] Adamik T.: *Antik stíluselméletek Gorgiastól Augustinusig. (Theories of Style from Gorgias to Augustine)* Budapest 1998. 130.

and not in any way. Regarding temperance to be followed by the orator—and actually complied with by Cicero in *Pro Murena*—Quintilian notes that the orator should not ever want to hurt anybody, and especially should not have the slightest intention of being compelled to give up a friend rather than a witty remark.[1] It is worth observing that Cicero behaved in a very similar spirit towards Sulpicius too: he states of Sulpicius *expressis verbis* that owing to his other merits, i.e., self-control, dignity, justness, loyalty and all his other merits he has always considered him especially worthy of consul's and any other dignity,[2] and and he deems it highly praiseworthy that he has acquired erudition in civil law, kept awake, worked a lot, helped many people.[3] Ironic remarks are in each case aimed only at *iurisprudentia*.[4] In the light of that, we should survey the career of the two competitors, Murena defended by Cicero for political reasons and Sulpicius Rufus, the opponent in the lawsuit, who otherwise maintained a friendly relation with the orator, and the orator's relation to the field represented by them, *res militaris* and *iurisprudentia.*

Lucius Licinius Murena was born in 105, and fulfilled war service under his father's commandership between 83 and 81 in Asia Minor, and took part in his triumphs too.[5] In 75, he fulfilled quaestorship together with Sulpicius.[6] In 74, with consul L. Lucullus he returned to the war against Mithridates ignited again in the meantime.[7] In 65, he was again Sulpicius's *collega*, and as praetor urbanus he had plenty of occasions to become quite popular through organising the pompous *ludi Apollinares*.[8] As a propraetor in 64 he was given Gallia Narbonensis as his class. The prosecutors reproached him with the newness of his clan,[9] but Murena was not *homo novus* in the traditional sense of the word since he was the fourth in the row of generations who attained the office of *praetor*, and this term was used for those whose family members had not obtained any of the *magistratus curules* providing *ius imaginum*.[10] One of the pillars of his success was his strong financial background proved among others by the games organised by him as *praetor*, and improved by his activity as propraetor in Gallia. Also, the current political situation was grist that came to his mill: against the danger Catilina was threatening with a well organised combat ready army was required, and among the applicants only Murena had such an army.[11] No significant acts taken by him are known from the period after his consulate. The life work of Servius Sulpicius consisting of one hundred and eighty volumes, irrespective of the given political situation and the results of the election, properly shows the jurist's intellectual superiority over Lucius Licinius Murena, who was a rather colourless character.[12]

The Romans considered war a natural part of life, and were fully aware that they can thank their imperium to their military virtue, *virtus militartis*. So in their mind the craft/art of war, *res militaris* preceded any other activity, and the conditions under which they could be exercised were created by the peace won/forced by *res militaris*. *Corpus Ciceronianum*, however, does not include plenty of loci that express this view: although Cicero acknowledges that the glory bequeathed by the ancestors to the people of Rome is present in

[1] Quint. *inst*. 6, 3, 28.
[2] Cic. *Mur*. 23.
[3] Cic. *Mur*. 19.
[4] See Bürge, A.: *Die Juristenkomik in Ciceros Rede Pro Murena*. Zürich 1974. 80. ff.
[5] Cic. *Mur*. 11. Cf. Münzer, F.: *Römische Adelsparteien und Adelsfamilien*. Stuttgart 1920. 446.
[6] Cic. *Mur*. 18.
[7] Cic. *Mur*. 20. 89.
[8] Cic. *Mur*. 38.
[9] Cic. *Mur*. 17.
[10] Adamietz 1989. 15.
[11] Adamietz 1989. 18.
[12] Adamietz 1989. 19.

many things, almost in everything, especially military affairs.[1] When praising the statesman's vision and perfect orator's skills of Cn. Pompey he points out that it is exactly these traits that constitute the essence of a commander's dignity.[2] In *De officiis* he further elaborates the traditional Roman view proclaiming the priority of *res militaris*: it is true, he says, that for a young man the best recommendation for glory is given by his war merits,[3] but it is necessary to review and deny the opinion supported by many which asserts that deeds of war are greater and more glorious than deeds of peace—he warns.[4] Then, drawing the conclusion he takes the the position that if we want to judge properly, we must acknowledge that several deeds of peaceful civil life have appeared greater and more excellent than deeds of war.[5] Convinced and convincingly, he quotes the sentences, which some evil and envious people dare to attack,[6] proving that brave deeds of peaceful civil life are of not less importance than deeds of of war, what is more we must make greater efforts to carry out the former than the later.[7]

Servius Sulpicius Rufus came from a patrician clan but his family did not play an important part in public life of Rome.[8] His grandfather did not attain any significant position in *cursus honorum*, and his father belonged to the order of knights.[9] As a young man he pursued studies studies just like Cicero; he studied rhetoric in Rhodes. Then, having returned from there he turned from elocution to jurisprudence.[10] He fulfilled quaestor's office in Ostia, presumably in 75,[11] in 65, he became praetor and chaired the *quaestio peculatus*.[12] He fulfilled both of the offices in the same year as Murena.[13] After he acted as praetor he did not accept any province but stayed in Rome and continued to act as *iuris consultus*.[14]

As it is known, in 63 he lost the elections. What were the reasons for that? Servius Sulpicius did not have proper social background and relations. Cicero notes regarding the orator's activity that with these abilities men without noble origin also won consul's dignity since they had obtained considerable influence, highly strong friendly relations and great support.[15] With the phrase *homines non nobiles* Cicero refers to his own career too, which was not unprecedented but highly rare as the six hundred consuls of the last three centuries of the Republic included only fifteen *homines novi*.[16]

G*ratia* was sine qua non of Roman public life, which a politician had to have by all means among its adherents and the people,[17] and was indispensable when obtaining an office.[18] Although today the means of obtaining *gratia* would be assigned to the scope of corruption,[19] Cicero also clearly distinguished *gratia* from fraud/bribery.[20] Without this strong social

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[1] Cic. *imp. Cn. Pomp.* 6.
[2] Cic. *imp. Cn. Pomp.* 42.
[3] Cic. *off.* 2, 45.
[4] Cic. *off.* 1, 74.
[5] Cic. *off.* 1, 74.
[6] Cic. *off.* 1, 77.
[7] Cic. *off.* 1, 78.
[8] Cic. *Mur*. 16.
[9] Cic. *Mur*. 16.
[10] Cic. *Brut*. 151. *Nam et in isdem exercitationibus ineunte aetate fuimus et postea una Rhodum ille etiam profectus est, quo melior esset et doctior, et inde ut rediit, videtur mihi in secunda arte primus esse maluisse quam in prima secundus.*
[11] Cic. *Mur*. 18.
[12] Cic. *Mur*. 35. 42.
[13] Cic. *Mur*. 18.
[14] Cic. *Mur*. 42.
[15] Cic. *Mur*. 24.
[16] Bürge 1974. 100. ff.
[17] Cic. *inv*. 2, 161. *off.* 1, 48. Cf. Bürge 1974. 101.
[18] Cic. *Planc*. 9.
[19] Bürge 1974. 103.
[20] Cic. *Att*. 1, 16, 12.

intertwining several institutions of Roman law—for example *mandatum, negotiorum gestio, commodatum*—would have become inoperable,[1] and if *gratia* and *amicitia* had not tied leading Roman circles together, then a much greater public administration apparatus would have been needed to govern the empire.[2] Cicero points out that in jurisprudence none of these *(gratia, amicitia, studium)* can be found.[3] It is, of course, questionable to what extent this statement can be considered Cicero's own opinion and to what extent a necessity generated by this particular political situation. *Beneficentia* and *liberalitas* (just as *gratia, amicitia* and *studium* referred to in *Pro Murena*)[4] are not purely ethical categories but also tools of success in public life.[5] Once cultivating jurisprudence had become proper means to achieve that, the first men of the State held it in their possession, but in the troublesome present age it has lost its shining. The great jurist of the age means Servius Sulpicius Rufus; it is with him that the order of knights starts to enter the field of jurisprudence. So the statement that claims that jurisprudence does not provide proper background for acting in public was dictated only by the given political situation and not by Cicero's own conviction. Similarly, the statement that by no means does a safe path lead from jurisprudence to consulate is only partly true.[6] In 63 the *res publica* no longer lived in times when jurists often got to the top of *cursus honorum*. On the other hand, until 95 we know of eighteen lawyers who occupied consul's office (Appius Claudius Caecus and Cornelius Scipio Nasica even twice); the twenty consulates so produced took place between 201—95.[7] The next year after 95 in which the consul's office was fulfilled by a jurist was 51, and the jurist was Servius Sulpicius Rufus.[8]

Sulpicius's failure in 63 was due to personal reasons too. Not being a quite determinant character he saw his competitors' initial success, gave up fighting too early, and instead of working hard to achieve his own victory, he made efforts to come up with charges against the would-be winners.[9] This tactics—in view of Murena's popularity based on his activity as praetor, and the general fear from Catilina—as it were predestined Sulpicius to lose.

When in 51—winning over Cato, who fought on his side in 63[10]—he finally attained consulate, he was not able to take firm and determinant actions in that highly stormy period.[11] He died in 43 as an intermediary of peace in the civil war flaring up. Cicero highly acknowledged the merits of Servius Sulpicius both in his life,[12] and after his death[13]—he did not doubt his personal excellence in the *Pro Murena* either.[14] He demanded public funeral ceremony and the erection of his statue before the *rostra;* both acts of paying last honours took place as Cicero requested.[15]

Servius Sulpicius's jurist activity deserved to be praised by Cicero since his life work was quite extensive and composite. He bequeathed a *responsum* collection consisting of one hundred and eighty books,[16] which was made public by his disciples, Aufidius Namusa[17] and

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[1] Schulz 1934. 106.
[2] Bürge 1974. 103.
[3] Cic. *Mur*. 24.
[4] Cic. *Mur*. 24.
[5] Kunkel, W.: *Herkunft und soziale Stellung der römischen Juristen.* Graz–Wien–Köln 1967. 38.
[6] Cic. *Mur*. 23.
[7] Kunkel 1967. 41.
[8] In case Cicero is not regarded as a jurist.
[9] Cic. *Mur*. 43.
[10] Plut. *Cato min*. 49, 2; Dio Cass. 40, 53.
[11] Cic. *fam*. 8, 10, 3.
[12] Cic. *Brut*. 150–157; Cic. *off*. 2, 65.
[13] Cic. *Phil*. 9, 10.
[14] Cic. *Mur*. 23.
[15] Pomp. D. 1, 2, 2, 43.
[16] Pomp. D. 1, 2, 2, 43.
[17] Pomp. D. 1, 2, 2, 44.

Alfenus Varus,[1] and he is noted for the creation of three new genres. He was the one among the lawyers of the age of the Republic on whom the influence produced by Greek philosophy was the most manifest.[2] His achievement in establishing a school is characterised by the fact that ten of his disciples are known.[3] Cicero himself praised this method applied by Servius when walking on new roads in jurisprudence surpassing his predecessors,[4] and pointed out that through his philosophical education he was able to create a coherent system often missed by Cicero from earlier jurisprudence.

In the analysis of Cicero's relation to jurisprudence we should dispense with the description of the literature of the subject area of *Cicero iuris consultus*, now accumulated to an immense extent. Following the system of Gábor Hamza's[5] analysis it seems to be more appropriate to look for an answer in the mirror of the sources to the question what role Cicero meant to assign to legal knowledge, jurisprudence in his own activity, rhetorical training and steering the ship of State.

In his letter written to *iuris consulti*, citing examples of the technical elements of jurisprudence he uses the terms *vos soletis*[6] and *in vestris libris*,[7] i.e., clearly separates himself himself from those who pursue this craft in practice. It is with reason to attribute similar meaning to the phrases used in *Topica*—offered to and created at the urging of Trebatius[8]—*in in vestris actionibus*,[9] and *vestris mysteriis* in *Pro Murena*,[10] *vestris formulis atque actionibus*[11] and *vestrae exercitationi*.[12] Likewise, he proudly cites Gallus's statement that the given topic is subject not to law but to the field of Cicero.[13] In *Digest* several references are made to Cicero. In the fragments of Pomponius's *Enchiridion* Cicero is quoted primarily as *exemplum*,[14] and his sentences are of rhetorical-political weight rather than having legal *auctoritas*.[15] In *Digest* one can find quotations from non-legal authors at several points;[16] e.g., in Marcianus[17] and Pomponius.[18] Apart from *Enchiridion*, Cicero is quoted in *Digest* at four points,[19] regarding each legal case in the aforesaid spirit. So these references do not prove that classic *iuris consulti* considered Cicero a *collega*.[20]

All this, however, does not justify to handle Cicero as an alien body in jurisprudence, or to consider jurisprudence a field basically far from Cicero since the opinion. *"Nihil hoc ad ius; ad Ciceronem"* was indeed shared only by *iuris consulti*, and emphasises no more than pursuing law in practice, in the technical sense was alien to Cicero. Legal practice is, however, only one branch of *iurisprudentia*, its usefulness in everyday life does not provide evidence of its primate in an absolute sense. It is a fact, on the other hand, that during his

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[1] Schulz, F.: *Geschichte der römischen Rechtswissenschaft.* Weimar 1961. 254.
[2] Paul. D. 26, 1, 1 pr.=*Inst*. 1, 13, 1; Ulp. D. 15, 1, 9, 2–3; Ulp. D. 34, 2, 27, 3; Gai. D. 50, 16, 30 pr.
[3] Pomp. D. 1, 2, 2, 44.
[4] Cic. *Brut*. 152.
[5] Hamza, G.: *Cicero és a jogtudomány kapcsolatának kérdései (Questions of the Relationship between Cicero and Jurisprudence).* In: Jogtörténeti Tanulmányok, V. Budapest 1983. 59.
[6] Cic. *fam*. 13, 21, 1.
[7] Cic. *fam*. 7, 17, 3.
[8] Cic. *top*. 1.
[9] Cic. *top*. 64.
[10] Cic. *Mur*. 25.
[11] Cic. *Mur*. 29.
[12] Hamza 1983. 60.
[13] Cic. *top*. 51.
[14] Nörr, D.: *Rechtskritik in der römischen Antike*. München 1974. 50.
[15] Hamza 1981. 149.
[16] Nörr 1974. 50.
[17] Marci. D. 32, 65, 4.
[18] Pomp. D. 1, 2, 2, 38.
[19] Ulp. D. 42, 4, 7, 4; Pap. D. 48, 4, 8; Tryph. D. 48, 19, 39; Cels. D. 50, 16, 96 pr.
[20] Hamza, G.: *Cicero és a római jog (Cicero and the Roman Law).* Antik Tanulmányok 28. 1981. 150.

whole life Cicero maintained a quite close relation with those who pursued jurisprudence in practice. He considered the two Scaevolae, the augur and the pontifex as two of his masters. In *Laelius de amicitia* he gives an account that after he had put on *toga virilis*, his father took him to Mucius Scaevola, the augur, and from then on he never leaved his side; then, after his death he went to pontifex Scaevola, whom he calls one of the most talented and most diligent men of the Roman State.[1]

Furthermore, it is worth surveying what role or significance Cicero attributed to legal knowledge in orators' training. In Cicero's values eloquence definitely preceded jurisprudence, which is quite obvious from the statement he made regarding Servius Sulpicius Rufus that he wanted to be the first in the second science rather than the second in the first;[2] that is why he elected to pursue eloquence instead of jurisprudence. The field of jurisprudence is narrower than that of elocution, and due to its nature elocution is subtler than jurisprudence since a *iuris consultus* can act successfully without any knowledge of *ars oratoria*, but an orator cannot do without certain legal knowledge. Thus, orators' training must include legal studies,[3] as an orator—and specifically a *perfectus orator* defined in *De oratore*—may not despise any science since they are all associates and servants of an orator's speech.[4]

This formulation of this conclusion Cicero puts in the mouth of Crassus, his master, one of the protagonists of the dialogue in *De oratore*.[5] He emphatically underlines the use of legal knowledge in the later stages of the dialogue too. In particular, by asserting that people would need to undertake the burden of studying, even if understanding law were a great and hard task, because of the great benefit that they can win by acquiring it, but in his view there is no science that could be more easily acquired than jurisprudence.[6] In *Brutus*, when praising his only worthy, at that time already dead, opponent, colleague, Hortensius, Cicero underlines his legal knowledge;[7] and in *Pro L. Valerio Flacco* he makes his opponent, who is not well versed in law, the target of scathing irony.[8] Furthermore, he points out that for him—contrary to most of the orators—the knowledge of *ius civile* had always been very important.[9]

As a summary of *studiorum atque artium contentio* it is possible to quote Quintilian's opinion on the entire *Pro Murena* when he praises Cicero's procedure stating that, albeit, he acknowledged all the merits of Sulpicius and praised him, yet advised him not to apply for the consulate.[10] Cicero takes the edge of Sulpicius's and Cato's charges by the weapons of humour and irony. While doing so, to increase the comic effect aimed against lawyers he often uses Grecisms, proverbs, terms taken from legal jargon, quotations from *(legis actio)* procedure, and adds comments in standard language, in a chattering tone to them. On the contrary, when he turns to *res militaris* and eloquence, his style becomes ceremonially high-flown. It is, however, quite apparent that a considerable part of his statements are rhetorical topoi, repetition of widespread critical comments regarding a specific occupational group (in this case lawyers)—of which several comments are made as righteous criticism. Praise is always addressed to the given person, Sulpicius, whereas carping affects only his occupation. In *Pro Murena* Cicero does not deny the general importance of jurisprudence and the law as a system of norms, the importance of the role they play in the life of the public and the State,

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[1] Cic. *Lael*. l.
[2] Cic. *Brut*. 151.
[3] Cic. *De orat*. 1, 18. 159.
[4] Cic. *Orat*. 120.
[5] Cic. *De orat*. 1, 75.
[6] Cic. *De orat*. l, 185.
[7] Cic. *Brut*. 322.
[8] Cic. *Flacc*. 35.
[9] Cic. *part*. 100.
[10] Quint. *inst*. 11, 1, 68. *Quam decenter tamen Sulpicio, cum omnes concessisset virtutes, scientiam petendi consulatus ademit! quam molli autem articulo tractavit Catonem!*

but makes a (successful) attempt in a given—and as we have seen highly critical—political situation to avoid the Scylla of the condemnation of Murena and by that the flaring up of Catilina's plot and the Charybdis of insulting alienation from his dear friend, Sulpicius. Throughout the speech he refrains from shaking the bases of law and order; his criticism remains on the surface; and this criticism—just as the praising of *res militaris*—is not inevitably Cicero's own conviction but merely a necessity dictated by the oratorical situation.

III. Cnaeus Plancius came from a family in the order of knights; he was born presumably in 96 as the son of an honourable and wealthy publican (tax farmer). After he acted as military tribune and quaestor, he applied for aedil's office in 55, running together with Iuventius Laterensis, somewhat younger than him, as his opponent. At that time, he won the majority of the votes cast; however, the election was postponed, and was repeated in the following year.[1] Plancius and A. Plotius won, Laterensis and Q. Pedius—the latter obtained very few votes—lost the election.[2] Laterensis did what many people did in such a case in Rome: he brought a charge of *ambitus*, i.e., election fraud/bribery against Plancius. Beside Laterensis, L. Cassius Longinus, brother of one of Caesar's later assassins, acted as co- or secondary accuser; the defence was provided by Hortensius and Cicero. As the basis of the charge he did not choose *lex Tullia de ambitu* created in 63 during the period of Cicero's consulship but *lex Licinia de sodaliciis* created in 55 on Crassus's initiative to sanction use of associations set up for distributing bribes during election campaigns. This law seemed to be more favourable to the prosecutor not because of its sanction—since earlier laws held out the prospect of properly strict punishment: ten year exile, expulsion from the senate, being barred from applying for offices for life and a certain fine—but because of its procedural law aspect. For, in accordance with this law, the prosecutor could determine the four *tribus* from whom the judges had to be selected and the accused could refuse only one *tribus*, that is, his right of *reiectio*—right to refer to bias and to expel certain judges without any special reason—was considerably impaired compared to usual *quaestio* proceedings. In the procedure, actually used in practice, first the accused had to name the judges whom he was related to by marriage and kinship or confidential relation as a member of the same *sodalicium* or collegium, in twenty days. Then, the prosecutor selected one hundred from among the four hundred and fifty judges *(editio)*, who were not allowed to maintain the above-mentioned relations with the prosecutor; after that, as part of his right of *reiectio*, the accused was allowed to reject fifty from among the designated one hundred judges, within forty days.[3]
Since it evolved in relation to winning the office of aedil and not consul, the lawsuit did not have great political significance; however, Cicero had to cope with a rather critical situation due to his personal relations with the accused and the accuser[4] because both Plancius and Laterensis and his family did significant services and favours to him during his exile.[5] As he was more indebted to Plancius, whom he had supported during his election campaign already, due to the outstanding *officium* to him he had to undertake his defence.[6] Laterensis obviously took it in bad part,[7] and tried to lessen Plancius's services done to and merits obtained regarding Cicero.[8] It was not by chance that Cicero noted at the beginning of his speech that he hoped that in passing judgment the judges would appreciate the merits that Plancius obtained with regard to the one-time consul, all the more because the court of justice

[1] Cic. *Planc.* 50.
[2] Cic. *Planc.* 17.
[3] Kunkel, W.: *Quaestio.* In: *Kleine Schriften.* Weimar 1974. 69.
[4] Cf. Cic. *Planc.* 79.
[5] See Cic. *Planc.* 73. 78.
[6] Kroll, W.: *Ciceros Rede für Plancius.* Rheinisches Museum 86. 1937. 128.
[7] Cic. *Planc.* 72.
[8] Cic. *Planc.* 4. 95.

consisted of mostly Cicero's friends and good acquaintances, which gave hopes for the acquittal of the accused from the first;[1] it was just their emotions that the orator wanted to move in his[2] *peroratio* formulated with huge pathos as usual.

IV. To the best of our knowledge, Cicero acted as counsel for the defence at least on eight occasions in criminal actions due to *ambitus*, however, not all the speeches were published and only two of them have been left to us: the *oratio* delivered in 63 in defence of Lucius Licinius Murena elected consul and Cnaeus Plancius elected aedil in 54. It is striking in both lawsuits that Cicero deals with the state of facts of *ambitus* and tries to refute the allegations made by the prosecution in merely one-fourth[3] and one-fifth[4]—or, in the latter case, *stricto sensu*, one-twentieth[5]—of the *oratio*. This similarity allows to infer that what we have here is a rhetorical tactics independent of the specific case, which the judges and the audience actually expected the advocate to come up with in *ambitus* lawsuits.[6] It might also arouse the attention that in both speeches Cicero speaks about himself at length, which is not justified by the legal facts of the case at all. The explanation for this is found in the practice of Roman orators/advocates as in Rome it was not only his rhetorical competence but his entire authority that an advocate or a patron made available to the accused or client brought before court and thereby guaranteed the authenticity of the case undertaken and the person defended, by full weight of his personality to the judges—what is more, he identified himself with his acts and fate.[7] Accordingly, the opponent, as a matter of fact, worked towards attacking and shaking the authenticity of both the accused and his defending counsel; therefore, in the two particular cases the prosecution considered it necessary to speak exhaustively about Cicero too. This custom can be seen again, for example, in *Pro Cluentio*[8] and is explained in *De oratore*.[9]
In *Pro Murena*, the orator feels it necessary in the *prooemium* already to respond to reproaches against him for having undertaken the case at all.[10] As one of the four accusers, beside Servius Sulpicius Rufus, who lost the elections, and S. Sulpicius Rufus junior and C. Postumius, not known specifically, M. Porcius Cato—who took an oath in public before the elections that if the election would be won by any other person than his brother-in-law, Silanus, he would bring a charge of *ambitus* against him[11]—criticised Cicero (although as a consul he created *lex Tullia de ambitu*[12] which held out the prospect of ten year exile as a new punishment and took firmer action against those who distributed money) for having undertaken the defence of Murena charged of election bribery. Cicero was highly criticised also by Servius Sulpicius Rufus, the most significant jurist of the age, who considered Murena's defence a betrayal of their friendship. All this was meant to undermine the authenticity of Cicero as a defending counsel, which would have weakened his defendant's position too.[13]

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[1] Cic. *Planc*. 2. 4.
[2] Cf. Cic. *Or*. 128. ff.
[3] Cic. *Mur.* 54–77.
[4] Cic. *Planc.* 36–57.
[5] Cic. *Planc.* 53b–57.
[6] Adamietz, J.: *Ciceros Verfahren in den Ambitus-Prozessen gegen Murena und Plancius.* Gymnasium 93. 1986. 102. f.
[7] Thierfelder, A.: *Über den Wert der Bemerkungen zur eigenen Person in Ciceros Prozeßreden.* Gymnasium 72 (1965) 385. ff.
[8] Cic. *Cluent.* 140. f.
[9] Cic. *De orat.* 2, 220. ff.
[10] Cic. *Mur.* 2b–10.
[11] Plut. *Cato min.* 21, 3.
[12] Cic. *Mur*. 5.
[13] Adamietz 1986. 104. f.

In *Pro Plancio*, Cicero notes that in their statement for the prosecution M. Iuventius Laterensis and L. Cassius Longinus spoke more about him than about Plancius;[1] accordingly, in the third third of his speech Cicero discusses solely his own person and the services and favours done to him by Plancius.[2] Several allegations of the prosecutors were involved in the statement of the defence in the form of remarks; for example, the allegation that in the description of his own exile Cicero went too far in praising Plancius's merits.[3] The merits obtained by the accused with regard to the defending counsel are described in details not only in *Pro Plancio*:[4] *Pro Sestio* also contains longer arguments with such content.[5] Obviously, the the prosecutors' intention must have been to separate Plancius completely from the judges' sympathy towards Cicero owing to his exile, that is why Laterensis insisted on his allegation that the merits Plancius had obtained regarding Cicero's exile—if they were true at all—should not have any weight in the Judges' eyes.[6] In harmony with that, the prosecutors recalled scornfully that Cicero had begged in tears to the judges in vain in defence of Cispius, who also did several services to him.[7]

The rather trivial commonplaces brought up as argument by Laterensis included the point that Cicero had earlier as a consul caused to involve exile in the sanctions ordered by *lex Tullia de ambitu* for no other reason than to be able to make the *peroratio* of his defence speeches more efficient.[8] Also, he reproaches the orator for his years of study on Rhodes in order to point out out that the moral looseness of eastern provinces must have been dear to Cicero.[9] It is rather double-edged criticism by the prosecutor that Cicero failed to exploit the point inherent in Laterensis's stay on Crete: the play on the words island and chalk *(creta)*.[10] For applicants for offices made their clothes more shining and white by chalk, which was prohibited by law very early, in 432.[11] Furthermore, he condemns Cicero for addressing a letter on his consulate to Pompey, the commander, probably with unpleasant content, highly stressing his own merits, which circulated in Rome—we have no further information on its content as it has not been left to us.[12] Similarly, he criticises Cicero's decision that he had gone into exile instead of undertaking fight—attributing all this to Cicero's cowardice.[13] He does not omit to emphasise that Cicero is not acting by free will at the time when the speech is delivered either—suggesting dependence on Pompey.[14] All this, although has nothing to do with the facts of the case, served to undermine the authority of the defending counsel and thereby the authority of his defendant.[15]

The personal motivation of the prosecution is clear since in Rome a prosecutor did not have to be objective and unbiased at all.[16] In the charge of *ambitus* the accusers who had lost the elections might have been driven by the motive that if the accused elected for the given office

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[1] Cic. *Planc.* 3. 58.
[2] Cic. *Planc.* 68. ff.
[3] Cic. *Planc.* 4. 68. 71. 72. 95.
[4] Cic. *Planc.* 87. ff.; 90. ff.
[5] Cf. Cic. *Sest.* 45. ff.; 49. ff.
[6] Cic. *Planc.* 4.
[7] Cic. *Planc.* 75. f.
[8] Cic. *Planc.* 83.
[9] Cic. *Planc.* 84.
[10] Cic. *Planc.* 85.
[11] Cf. Liv. 4, 25.
[12] Cic. *Sulla* 67.
[13] Cic. *Planc.* 86–90.
[14] Cic. *Planc.* 91–94.
[15] Adamietz 1986. 105.
[16] See Mommsen, Th: *Römisches Strafrecht.* Leipzig 1899. 366. ff.; Kunkel, W.: *Untersuchungen zur Entwicklung des römischen Kriminalverfahrens in vorsullanischer Zeit.* München 1962. 11. 131. f.; 136. f.

were convicted, they could take their place[1] as it did happen in 65 in the case of L. Aurelius Cotta and T. Manilius Torquatus after P. Cornelius Sulla and P. Autronius Paetus elected consul had been convicted. There were good chances for Servius Suplicius Rufus and Marcus Iuventius Laterensis hoping for the same in the event that Murena and Plancius were convicted. Anyone who decided to bring a charge, as a matter of fact, exposed himself to personal attack by the defending counsel.[2] It was not by chance that Torquatus referred to Cicero's tyranny and autocracy *(regnum)* in court of justice in the lawsuit against Sulla[3] as Cicero was not sparing with attacks against the prosecutor, tribune L. Labienus in *Pro Rabirio perduellionis*.[4]

The attacks against Cicero were of great weight in the Plancius lawsuit and in several cases hit Cicero in sensitive points: Cassius brought up Cicero's attempt at entering into alliance with Pompey, which, however, failed,[5] Iuventius reproached Cicero for undertaking Cispius's Cispius's defence, and in connection with that he parodied the famous *"quo usquem tandem"* passage[6] of the first *Catilinarian oration*;[7] similarly, they ridiculed his pathetic perorations.[8] perorations.[8] All this, however, was dwarfed by their suspecting him of leaving Rome in 58 and going into exile out of cowardice and sacrificing his freedom to flatter the triumvirs—the orator responded to it in natural and deep indignation.[9] Briefly but resolutely, he attacked his enemies at the time, Clodius, Gabinius and Piso.[10]

Furthermore, in both lawsuits against Murena and Plancius, Cicero had to cope with the difficulty that the adverse parties in the lawsuit, that is, the prosecutors, were his good friends. He supported Sulpicius in his election struggles, and maintained relations with Labienus's family since his exile, however, Murena's acquittal was definitely in the interest of the State because that was the only way to ensure that at the beginning of the year two dynamic consuls could take over control over the state organisation undermined by the conspiracy, and it is an undeniable fact that Plancius did much greater service to Cicero by providing him with shelter in Thessaloniki than Labienus's family. Therefore, the orator could not use the well-tried strategy of stressing his defendant's merits by dealing the opponent a devastating blow; instead, he had to find some middle-of-the-road solution by which he could both clear the accused and was not compelled to start a serious attack against the prosecutor.[11] It was not by chance that Quintilian noted that in *Pro Murena* Cicero acknowledged Sulpicius's all virtues and although he praised him, he advised him not to apply for consulate.[12]

The *fundamentum ac robur totius accusationis*,[13] that is, the attack against Cato was justified just by the unquestionableness of his motifs and singular authority. It was just this authority that made the senators at the session of the senate held a few days after *Pro Murena* was delivered, on 5 December 63, in the Concordia temple[14] join what Cicero summed up in the fourth *Catilinarian oration*, in opposition to Caesar, who proposed life imprisonment of the conspirators,[15] after Cato had also demanded death penalty for the traitors,[1] which was

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[1] Jones, A. H. M.: *The Criminal Courts of the Roman Republic and Principate*. Oxford 1972. 62.
[2] Adamietz 1986. 106. f.
[3] Cic. *Sulla* 21. ff.
[4] Cic. *Rab. perd*. 6. 9. 11. 20. ff.; 25. 29. ff.; 35.
[5] Cic. *Planc.* 85.
[6] Cf. Cic. *Cat.* 1, 1.
[7] Cic. *Planc.* 75.
[8] Cic. *Planc.* 76. 83.
[9] Cic. *Planc.* 90. f.
[10] Cic. *Planc.* 86. f. Cf. Kroll 1937. 131.
[11] Adamietz 1986. 107.
[12] Quint. *inst.* 11, 1, 68.
[13] Cic. *Mur.* 58.
[14] Cf. Plut. *Cic*. 21.
[15] Cf. Sall. *Cat.* 51, 1–43.

executed that evening in Tullianum. It was just this that Cicero tries to defend against in his ironic attack against Cato's cold stoicism so that the statesman's unbelievable authority, that is, purely his name should not be detrimental to the accused.[2] Acknowledging Cato's moral greatness, he endeavours to present his standpoint taken in the particular matter as a trait alien to life, alien to the spirit of Roman people in order to take the edge of the charge and ruin the image in the judges that anyone Cato has resolved to bring a charge against must be by all means guilty.[3] It is not by chance that the edited version of *Pro Murena* left to us does not contain detailed refutation of the charges made by Servius Sulpicius junior and Postumus—as the arguments brought up by them were not backed by moral authority similar to that of Cato, Cicero was not compelled to take the sting out of their argument by delicate shading.[4]

In legal terms, it does not belong to the charge and its refutation either to compare the life and activity of the competitors, having lost in the election struggle, acting as accusers in the *ambitus* lawsuit, to that of the winners of the election, the accused parties of the lawsuit. Cicero, however, in response to the allegations of the prosecution, touches on the conduct of life of the accused parties *(reprehensio vitae)*,[5] the comparison of the eligibility, authority and worthiness of the office of the accused parties having won and the accusers having lost in the elections *(contentio dignitatis)*.[6] Only after that does he deal with the crime of election bribery/fraud rather briefly and try to refute the relevant charges *(crimina ambitus)*—in the case of *Pro Murena*, also by inserting, before the fact-based, yet rather taciturn and not really convincing refutation,[7] the response to the motifs of the charges brought up by Cato.[8]

The examination of the conduct of life of the accused parties *(vita anteacta)* is of a highly critical tone in the statement of the prosecution in both cases. Cato reproached Murena for his stay in Asia and the presumption that he took pleasure in eastern luxury,[9] his sympathy for dancing, which was not worthy of a free Roman citizen in the eyes of the Romans[10]—however, none of these criticisms was connected with the crime of *ambitus*. The prosecutors reproached Plancius for the charge of bigamy, ravishing an actress, Atinia,[11] releasing a prisoner from prison unlawfully[12] and the too resolute action taken by his father, Plancius senior for the sake of publicans *(publicani)*.[13] These allegations were not connected either directly or indirectly with the actual charge, *ambitus*. However, accumulation of charges not supported by facts—more exactly, as Cicero often stressed it: abusive language and defamation—was general practice in any lawsuit, not just *ambitus* lawsuits, as a tool of influencing the climate of opinion against the accused.[14]

In *ambitus* lawsuits it was traditional to compare the competitors' dignity, eligibility for office *(contentio dignitatis)* both by the prosecution and the defence. In *Pro Murena* this constitutes a rather lengthy, independent part;[15] in *Pro Plancio*—referring to the sensitivity of just the accuser, Laterensis[16]—Cicero rejects the use of this tool;[1] later on, however, albeit,

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[1] Cf. Sall. *Cat.* 52, 2–36.
[2] Cic. *Mur.* 67.
[3] Cic. *Mur.* 60–66.
[4] Adamietz 1986. 108.
[5] Cic. *Mur.* 11–14; *Planc.* 30–35.
[6] Cic. *Mur.* 15–53; *Planc.* 5. 58–67.
[7] Cic. *Mur.* 66–77.
[8] Cic. *Mur.* 54–77; *Planc.* 53–57.
[9] Cic. *Mur.* 12.
[10] Cic. *Mur.* 13.
[11] Cic. *Planc.* 30.
[12] Cic. *Planc.* 31.
[13] Cic. *Planc.* 32.
[14] Cf. Cic. *Cael.* 3–25; *Sest.* 6–14; *Sulla* 69–75; *Rab. Post.* 7–9; *Font.* 41.
[15] Cic. *Mur.* 15–53.
[16] Cf. Kroll 1937. 129.

emphatically in response to Crassus's counts of the indictment, he uses them anyway.[2] By all that, the defending counsel tries to achieve a double result: on the one hand, he wants to prove his defendant's high eligibility for the office to be filled; on the other hand, he explains the causes of his election victory. Simultaneously, he gives explanation for the accuser's election defeat, arguing that it was due to the defeated party's fault and not to his defendant's acts, even less to possible bribe.[3] Accordingly, in the part of *Pro Murena* that can be called *contentio dignitatis*, discussion of Sulpicius's defeat was given an important place too,[4] and in *Pro Plancio* it is after the seeming rejection of the opportunity of *contentio*[5] that the orator comes to Laterensis's election defeat on two occasions.[6] The structure of *contentio* is identical in both speeches: Cicero discusses the career of the competitors in chronological order.[7]

In *Pro Murena*, in response to Sulpicius's argument that he outdoes Murena in social background, the orator underlines the significance of individual achievements,[8] and to the fact that he was announced first in the election of the quaestor he opposes the point that what must and can be investigated on the merits is nothing else than the achievements attained in office filled in the same year—and in this respect none of them excelled.[9] In response to Suplicius's argument that he would have been more worthy of consul's office because he stayed in Rome from first to last, while Murena stayed in the east as commander, Cicero points out that it is not presence but merits that count.[10] At this point, in *studiorum atque artium contentio*, the orator opposes soldier's activity to lawyer's activity and involves the art of rhetoric as a third element in the comparison, and this way jurisprudence as a profession dealing with unnecessarily overcomplicated, insignificant matters is given the third place only.[11] Praise of *res militaris* is a response to Cato's criticism that Murena's merits as commander are insignificant, if for no other reason, because the war in Asia was fought against women and not men.[12] Cicero beats off the argument of victory obtained in the first place in the election of praetors by the topos of the unpredictableness of public opinion,[13] and underlines the magnificence of the games arranged by Murena, and opposes it to the fact that Sulpicius had not arranged any.[14]

Furthermore, Cicero emphasises that the electors appreciated Murena's role fulfilled in administration of justice, contrary to the severity engaged by Sulpicius in this respect, which arose from the nature of the field he controlled, and that the commander's activity in the provinces also provided him with great support, whereas the jurist was not willing to assume any task outside Rome.[15] After discussing the causes of Murena's victory, he comes to the direct causes of Sulpicius's defeat. Electors clearly noticed that Sulpicius did not strive for winning the elections in the first place, instead, he dealt with the opportunity of bringing a charge in case he would lose and collecting evidence against his rivals, which suggested that he did not see many chances for victory.[16] Furthermore, he fought for making *lex Calpurnia*,

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[1] Cic. *Planc.* 6. 16. 17.
[2] Cic. *Planc.* 58–67.
[3] Cf. Adamietz 1986. 109.
[4] Cic. *Mur.* 43–53.
[5] Cic. *Planc.* 6.
[6] Cic. *Planc.* 7–30. 49–53.
[7] Adamietz 1986. 110.
[8] Cic. *Mur.* 15.
[9] Cic. *Mur.* 18.
[10] Cic. *Mur.* 19. ff.
[11] Cic. *Mur.* 22–30.
[12] Cic. *Mur.* 31.
[13] Cic. *Mur.* 35. f. Cic. *Planc.* 7. f.
[14] Cic. *Mur.* 37–42.
[15] Cic. *Mur.* 42.
[16] Cic. *Mur.* 43. ff.

which sanctioned *ambitus*, stricter, and in this effort he was supported by Cicero as consul and friend by creating *lex Tullia de ambitu*—yet, this had not made him sympathetic to electors either.[1] Finally, the critical political situation, i.e., general fear of Catilina's possible victory, favoured Murena, whom citizens considered a firm support against threatening danger, while they did not presume that the anxious and hesitating Sulpicius would take such a firm action.[2] To sum it up: Cicero took the position that Murena's victory arose from his own excellence and the faults made by his rival, Sulpicius but by no means from unlawful practices and bribery.[3]

In the Plancius lawsuit Cassius criticised and condemned Cicero's defendant,[4] while he appreciated Laterensis's merits and competencies.[5] Whereas the opponent underlined Laterensis's *nobilitas* and deemed him worthy of the aedil's office owing to his social background, Cicero (just as Plancius in Murena's lawsuit) emphasised individual *virtus*, merits, aptitude in the case of *homo novus*.[6] A *homo novus*, in other words, a person whose ancestors did not get higher offices *(cursus honorum)*, was in certain respects in a disadvantageous position in the struggle for winning given offices compared to the members of the nobility because the latter could proudly refer to their ancestors' deeds carried out for the benefit and greatness of the people of Rome. The *homines novi* who achieved the highest degree of public dignity, in several cases—as it can be observed in the example of Cato the Elder or Cicero—followed ancient ideals more consistently and, one should say, with neophyte enthusiasm. Prior to Cicero, it was in 94 when a *homo novus*, more specifically, C. Coelius Caldus, was elected consul. At the same time, Cicero—in order to win the people's support and make advantage out of disadvantage—voiced the rather populist view that members of the nobility handled the consul's office as their own privilege, and proudly emphasised his own merits, by which he was able to get the highest dignity of the State even against the nobility.[7]

Anyway, regarding Laterensis he used the tools of *humanitas* and *urbanitas* as the accuser did not belong to his personal enemies.[8] In the case of Plancius, Cassius challenged lack of *triumphus*es, military achievements, rhetorical and jurist competencies—that is, there are good chances that he used the arguments that Cicero formulated in *Pro Murena* with regard to various professions. In response, Cicero as defending counsel expounded that the opportunity of triumphs would become available, for that matter, through holding given offices, and that by his activity on Crete and in Macedonia he did prove his military aptitude, and that he had never claimed to have knowledge obtained in rhetoric and jurisprudence, instead, he could show prominence in character, which was much more appreciated by the people of Rome than professional knowledge.[9] At the same time, Cicero lessens the weight of Laterensis's merits obtained in Cyrene also to his detriment by an ironical dialogue narrated in relation to his activity as proquaestor in Sicily, with the morals that Laterensis would believe in vain that he had carried out significant deeds in remote provinces, the public might have not even heard of his being away from Rome.[10]

To take care of the sensitivity of the opponent who otherwise maintained good relations with him, Cicero discusses the reasons for Laterensis's election defeat separately from *contentio*

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[1] Cic. *Mur.* 46. ff.
[2] Cic. *Mur.* 48. ff.
[3] Adamietz 1986. 110. f.
[4] Cf. Cic. *Planc.* 58. ff.
[5] Cf. Cic. *Planc.* 63.
[6] Cic. *Planc.* 59. f.
[7] Cic. *leg. agr.* 2, 3.
[8] Kroll 1937. 129.
[9] Cf. Cic. *Planc.* 61. ff.
[10] Cic. *Planc.* 65.

dignitatis,[1] and gets down with it primarily by the topos of the unpredictableness of public opinion and unreliability of public judgment.[2] The tricks of winning mercy of the people were were discussed in details by his brother, Quintus in *Commentariolum petitionis* where he expounded that applicants should formulate what they have got to say in accordance with electors' desires and needs rather than their own conviction, and pointed out that promises made kindly are more important than keeping such promises.[3] Apparently, it was just this that that Plancius forgot about, and before the court of justice consisting of senators and knights Cicero could safely refer to the shaky and unreliable value judgment of the people,[4] and, to completely reduce the edge of the attack against Laterensis, he declared that if the people had had firm conviction, had orientated themselves in terms of merits and values in forming their opinion, then they would have elected Laterensis aedil.[5]

The people blamed Laterensis for not making efforts to win their favour and for relying on the advantages provided by his social background only in winning the election.[6] Similarly, giving giving up the fight for tribune's office already commenced in 59 was to his detriment because the public considered it indifference,[7] and asserting his high-born origin might have evoked antipathy instead of sympathy in the *plebs*.[8] Later on, Cicero returns again to the thought that Laterensis's defeat was caused by lack of humbleness to be engaged to the mercy of the people *(supplicare, se submittere).*[9] The consequences of Laterensis's faults were increased by the circumstances that supported Plancius: the support of his home town,[10] the commitment of publicans ranged on his side by his father, the leader of the publicans,[11] and Cicero's help, who thereby thanked Plancius for the favours he had done to him during his exile.[12] Furthermore, his activity in Africa, on Crete and in Macedonia,[13] and his successful tribune's activity was in favour of Plancius.[14]

It should be noted with regard to publicans that they made it possible that state administration with a low headcount had to be maintained in Rome because well-to-do *publicani*, most often from the order of knights, constituted a company for the economic implementation of important goals in the life of the State (for example, construction of water pipes, providing the army with arms). The late age of the Republic used the terms knights and publicans often as synonyms; however, overlapping between the two categories by no means meant identity: some publicans had assets between forty thousand and one hundred thousand *sestertii*, while the extent of knights' *census* was set as four hundred thousand *sestertii*. In the company of publicans the members assumed burdens and shared benefits in proportion to their share; the most propertied were accountable to the State for implementing the enterprise usually by their landed estate; on behalf of the State the magistrate entered into a contract with them. The key task of publicans was their role assumed in taxation in the provinces: they paid the amount of tax determined for the given province to the state treasury in advance, and on the leased territory during the lease period they could freely collect the amount they had paid in advance. The governors, as a matter of fact, often abused their position and imposed unlawful burdens

[1] Cic. *Planc.* 7–30.
[2] Cic. *Planc.* 8. ff.
[3] Cf. *Comm. pet.* 45.
[4] Cf. Cic. *Planc*. 9.
[5] Cic. *Planc.* 7.
[6] Cic. *Planc.* 13. ff.
[7] Cic. *Planc.* 13.
[8] Cic. *Planc.* 16. ff.
[9] Cic. *Planc.* 49–53.
[10] Cic. *Planc.* 19. ff.
[11] Cic. *Planc.* 23.
[12] Cic. *Planc.* 24. ff.
[13] Cic. *Planc.* 27. ff.
[14] Cic. *Planc.* 28. 61.

on provinces; so, inhabitants were compelled to take out loans from publicans, who usually disbursed the amount demanded at usurious interest rates. Accordingly, judgement of publicans was disputed; in his letter to his brother—as a matter of fact, in a statement not addressed to the general public—Cicero himself called them the greatest burden of provincial administration.[1] In several cases publicans supported the election of persons favourable to them by covering a major part of their campaign costs—it was not by chance that Cicero's brother, Quintus tried to convince him that he should win publicans' benevolence to support his own consul campaign.[2] Cicero called publicans the flower of the order of knights of Rome,[3] the knights themselves strong support of the rest of the orders.[4] C. Gracchus already relied on knights actually as an order, and entrusted Asia province to them as publicans.

In *Pro Plancio* a peculiar element of *contentio dignitatis* is the projection of the personality of the two candidates to their hometown, Tusculum in the case of Laterensis and Atina in the case of Plancius. Tusculum was a distinguished settlement south-east of Rome, where several consuls' families came from. Therefore, it is understandable that the inhabitants of Tusculum—as numerous men who had held consulship lived in the town—did not attribute special significance to Laterensis's aedil's office; consequently, they did not make many efforts to help him to win the desired office. Atina, lying not far from Cicero's hometown, Arpinum, was far from being so respectful and notable; so, its inhabitants made more efforts to help one of the citizens born at their settlement to win the aedil's office since thus glory fell on them too, which the inhabitants of Tusculum had plenty of.[5]

Therefore, by *contentio dignitatis* Cicero tried to shed light primarily on the fact in both speeches—by analysing both the virtues and strengths of the winner/accused and the faults and failures of the loser/accuser—that his defendants had not been in need at all of trying to influence the outcome of the election by bribery as there were sufficient arguments that made them sure of their victory. Thereby he indirectly proved that the charge of *ambitus* was unfounded. Secondly, however, *contentio dignitatis* served to enable him to prove to the judges, as public opinion representing electors, that the winner of the election was by all means more suitable for the given office than his opponent—the enumeration of faults and failures committed during the election campaign was also meant to support the above as reasons for the train of thoughts that a person who controls his election campaign with more aptitude will hold the office more efficiently. Based on all that it can be inferred that the orator wanted to convince the judges also of the point that not only should the winner be acquitted for lack of crime but the results of the elections should not be invalidated due to the person's eligibility and the accuser's ineligibility either.[6]

Refutation of the charge of *ambitus* on the merits is very short, almost insufficiently concise in both speeches.[7] The reason for that can be looked for, on the one hand, in the fact that from from both lawsuits only Cicero's speeches have been left to us, so neither the statements of the prosecution, nor the rest of defence speeches are known to us, and as in both lawsuits Cicero rose to speak as the last one as was his custom, we could presume that the defending counsels taking the floor before him had already refuted the legally relevant counts of the indictment on the merits of the case, point by point. At the same time, it can be presumed that Cicero would have somehow referred or alluded to these refutations—however, no traces of that can be found. It is highly probable that both the prosecution and the defence set out from

[1] Cic. *Q. fr.* 1, 1, 32.
[2] *Comm. pet.* 3.
[3] Cic. *Planc.* 23.
[4] Cic. *Verr.* 2, 2, 7.
[5] Cic. *Planc.* 19. ff.
[6] Adamietz 1986. 113.
[7] Kroll 1937. 132.

arguments related to person, and counts of the indictment that could be specifically supported and refuted did not play any considerable part—if for nothing else, due to the low number of proofs arising from the character of the cases. Defending counsels much rather tried to prove—all the more because the dividing line between *ambitus* sanctioned by law and morally contestable and legally acceptable *ambitio* could not be sharply drawn—that in the course of winning the electors' favours no scandalous, exaggerating steps contrary to traditions and customs were taken.[1] Due to the indistinct dividing line between *ambitus* and *ambitio* we can possibly accept Wilhelm Kroll's statement that these Ciceronian speeches can be considered, for that matter, praise of properly and moderately exercised *ambitus* too.[2]

In *Pro Murena* Cicero argued that whereas Cato disapproved any kind of search for electors' favours, that is, entourage, hospitality and distribution of free tickets to circus and theatre performances, Murena, in the course of all these steps, took care of complying with and respecting generally accepted customs to sufficient extent: he recruited entourage not for money and theatre seats and feasts were made possible by his friends' generosity, which was not prohibited by law or unwritten law either.[3] In *Pro Plancio* he could simply respond to the charge that Plancius entered into *coitio*, that is, alliance allowed by law with the other winning candidate, Plotius: originally it was Laterensis who wanted to enter into alliance with Plancius, however, it failed. At this point, it is possible to presume the cause behind the argument of the prosecution: it was not Laterensis that the agreement set out in the *coitio* favoured.[4] The circumstances of distributing money in Circus Flaminius, the origin and function of the money could not be determined exactly and could not be proved, so this charge seemed to be weightless too[5]—at least in Cicero's narrative. And for lack of proper evidence, Cicero could easily consider all the other statements gossip and defamation.[6]

Thus, based on all that, Plancius did not amount to the state of facts of *lex Licinia*, and demanding the application of this law was nothing else than a bad faith manoeuvre from the first by the prosecution to make the situation of the accused more difficult.[7] The provision of *lex Licinia* that set forth that the prosecution could designate four *tribus*, of which the judges were selected, was used by Laterensis contrary to the spirit of the law,[8] since he left out just the Voltinia district where bribes had purportedly taken place, and whose judges for this reason could have judged the case with greater overview—Cicero's above opinion was obviously shared by Hortensius too, who expounded it in his own defence speech on the day before Cicero's oration was delivered.[9] It was undoubtedly impossible to prove Plancius guilty of *communis ambitus* because this would have required to certify that distribution of money was carried out in an organised form, directly launched by the candidate—in other words, *gratia* and *observantia* of allowed extent only helped Plancius on the side of his friends and supporters.[10]

Basically, *Pro Murena* and *Pro Plancio* are made of identical elements, although the elements are arranged somewhat differently. Both the prosecution criticises the defending counsel, Cicero and Cicero resolutely criticises and attacks the accusers, Cato, Suplicius and Laterensis, not sparing sarcasm. On the one hand, the prosecution endeavours to make the person of the accused, having won the elections, inauthentic during *reprehensio vitae*, and

[1] Adamietz 1986. 114.
[2] Kroll 1937. 132.
[3] Cic. *Mur.* 68–77.
[4] Kroll 1937. 133.
[5] Cic. *Planc.* 55.
[6] Cic. *Planc.* 53–57.
[7] Kroll 1937. 134.
[8] Cic. *Planc.* 42.
[9] Cic. *Planc.* 37.
[10] Cic. *Planc.* 44. f.

thereby support the necessity of *ambitus*. On the other hand, the defence tries to prove ineligibility of the defeated accuser through *contentio dignitatis* to convince the judges thereby that the losing party can reproach nobody else than himself for his defeat, and for this reason the winner had not only not committed any fraud or bribery during the election campaign, but he was not in need of it either. It clearly explains this tactics when we consider that in case the winner was convicted, then the loser placed behind obtained the office that constituted the subject of the dispute; that is, if the counts of the indictment proved true, it guaranteed, in addition to conviction and punishment of the accused, that the accuser, having lost the elections, could win the office not obtained by votes. The fact-based refutation of *crimina ambitus* crowned this argument only but had no exclusive value for the outcome of the lawsuit, all the less as the judgment in the action-at-law unambiguously contained a political decision too. The jurors voted not only on guilt and innocence but on the fate of the office to be fulfilled; therefore, their vote was influenced, in addition to the case of *ambitus*, by their conviction developed of the eligibility of the accuser and the accused, that is, the parties opposed as competitors in the election struggle.[1]

In both cases the orator builds his statement by combining these elements in accordance with the circumstances. In the *prooemium* of *Pro Murena* he immediately responds to the objections of the prosecution that are aimed at Cicero undertaking the defending counsel's tasks as a consul in office and thereby betraying his friendship maintained with Sulpicius,[2] and in the *peroratio* he uses the dignity of his office as a weapon that can be used for the sake of his defendant.[3] Before addressing specific charges, he believes it is useful to convince the judges that Murena's conduct of life is irreproachable and he is eligible for the office,[4] which he emphasises in a lengthy *contentio dignitatis* in an enlarged form by stressing Murena's merits and questioning Sulpicius's aptitude, and by underlining the faults and failures made by him during the election campaign.[5] The attack against Cato, cast in humorous form, takes the edge of the charges, by which he presents the objections brought up against Murena as the outcome of the philosopher-statesman's too anxious conscience and approach alien to life.[6] Emphasis of the imminence by Catilina—which Suplicius, otherwise having excellent traits and values deserving acknowledgement by all means from a human viewpoint, would not be able to efficiently oppose—reinforces Murena's position. So, Cicero as a consul defends his elected successor in office—as the verdict of acquittal shows—successfully, and the defence rests on three pillars: Murena's aptitude, Sulpicius's ineligibility and failures, and realistic recognition of the dangers of the situation in current politics.

In Plancius's lawsuit the prosecution also started a co-ordinated attack against the counsel for the defence and former consul, Cicero because the accusers believed that they could achieve their goal against Plancius only by weakening Cicero. Accordingly, Cicero highlights Plancius's merits and services by which he supported him during his exile, in the *prooemium* already, and builds the entire third part of the speech: the refutation of the charges made by Cassius[7] and Laterensis[8] and the *peroratio*[9] on them. Thus, the significance of the identity of of the defending counsel far surpasses that of his defendant in this case too, and it can be stated that Plancius's acquittal was owing almost exclusively to Cicero's moral weight, independently of the acts and failures of the accused. From among *contentio dignitatis* and

[1] Adamietz 1986. 115.
[2] Cic. *Mur.* 1–10.
[3] Cic. *Mur.* 86. 90.
[4] Cic. *Mur.* 11–15.
[5] Cic. *Mur.* 15–53.
[6] Cic. *Mur.* 60–66.
[7] Cic. *Planc.* 68–71.
[8] Cic. *Planc.* 72–100.
[9] Cic. *Planc.* 101–104.

exploration of the causes of Laterensis's election defeat, first, the second element appears,[1] on on the one hand, to take care of Laterensis's sensitivity, and, on the other hand, to reduce his accuser's drive by enumerating the faults committed. Only after that comes Cicero to clearing his defendant's conduct of life,[2] as it were forcing the accuser into defence position, because he—according to Cicero's argument—attacked Plancius by distorting the provisions of *lex Licinia de sodaliciis*, that is, in unfair manner.[3] This tactics highly reminds one of the criticism against Cato—Cicero strives to convince the judges that the prosecutors' action, although it might seem to be lawful, is by all means seriously unfair. Laterensis's accuser's position could have been by no means strengthened by the somewhat condescending, patronising encouragement by which Cicero urged him not to give up hope: successes in public life will certainly not keep him waiting in the future if he learns a lesson from his faults and takes the advice he has just received.[4] After having properly prepared the field, the orator refutes the actual charge of *ambitus* by lapidary conciseness, all the more because—as Cicero argues henceforth in the *contentio dignitatis*—Plancius's favourable opportunities and aptitude, and the support provided by him, among others, to him as exiled former consul,[5] made it unjustified from the first for his defendant to use unlawful tools.[6]

From the Ciceronian practice of *ambitus* lawsuits it can be unambiguously ascertained that the judgment and, as its antecedents, the role of the prosecution and the defence orientated itself primarily in terms of political aspects. The party who brought the charge was often a competitor beaten in the elections, who could not only expect the proceedings to impose sanctions on unlawful practices through the conviction of his one-time competitor, the accused in the lawsuit, but, based on Roman practice, could certainly count also on obtaining the office that he had not been able to obtain by winning the electors over, as a benefit of the lawsuit. Consequently, when deciding the issue of guilt or innocence, the judges deliberated the past, conduct of life of the accuser and the accused, i.e., the winner and loser of the elections, the necessities demanded by the situation of current politics, the eligibility of the parties concerned and—as *Pro Murena* and *Pro Plancio* convincingly proves it—the political weight of the patron who took action for the sake of the accused.[7]

[1] Cic. *Planc.* 5–30.
[2] Cic. *Planc.* 30–35.
[3] Cic. *Planc.* 36–48.
[4] Cic. *Planc.* 49–53.
[5] Cic. *Planc.* 68–71.
[6] Cic. *Planc.* 58–67.
[7] Adamietz 1986. 117.