Scriptores ivris Romani
direzione di Aldo Schiavone
Svbsidia 4

M. Brutti, V. Marotta,
F. Nasti, A. Schiavone, E. Stolfi

ROMAN JURISTS AT WORK

FOUR PORTRAITS

«L'ERMA» di BRETSCHNEIDER

Scriptores ivris Romani
– Svbsidia 4 –

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Aldo Schiavone, Emanuele Stolfi

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1. Diritto romano

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This book...

This book collects six essays that have already appeared in Italian in some volumes of the "Scriptores iuris Romani", all published by L'Erma di Bretschneider between 2018 and 2023, in the framework of a research funded by the European Research Council and carried out at the University of Rome La Sapienza. Translated into English, the texts have been somewhat modified from the original version.

Roman law is—together with Greek philosophy and Christian doctrine—one of the great legacies of the classical world. Without it, the entire history of Western civilisation would have been very different from what we know.

Our aim has been to make English-speaking readers increasingly familiar with a significant shift that has characterised in recent decades the study of this crucial aspect of our past. A radical change of perspective that has placed at the centre of modern attention no longer only the Justinian's *Corpus iuris civilis* through which to reconstruct 'classical Roman law' as an organic totality out of time in its purity, but the figures of the single jurists and the contents of their writings in their specific historicity and in the context of the epoch to which they belonged: science and power; ideas and politics; successes and failures.

It was in fact the jurists who, over at least three centuries of uninterrupted work, were the authentic creators of Roman law: as we can read in a lapidary statement by Ronald Syme. Our book is dedicated to four of the most important of them—Quintus Mucius Scaevola, Sextus Pomponius, Julius Paulus, Domitius Ulpianus, along with their thoughts, their lives, their intellectual strategies.

Aldo Schiavone
Naples, June 2024

The two essays on Quintus Mucius by Aldo Schiavone and Emanuele Stolfi, are taken from the first volume of the "Scriptores iuris Romani", *Quintus Mucius Scaevola. Opera*, Rome 2018. The one on Pomponius, by Fara Nasti, from vol. IV of the parallel series "Subsidia", *L'Enchiridion di Sesto Pomponio. Una ricostruzione*, Rome - Bristol (CT) 2023. That of Massimo Brutti on Paul, from vol. VI of the "Scriptores", *Iulius Paulus. Decretorum libri tres*, *Imperialium Sententiarum libri sex*, Rome - Bristol (CT) 2020. And finally, the last two on Ulpianus, by Aldo Schiavone and Valerio Marotta, from vol. VIII of the "Scriptores", *Cnaeus Domitius Ulpianus. Institutiones*, *De Censibus*, Rome - Bristol (CT) 2021.

Vols. I and VIII of the "Scriptores" also saw the participation of Jean-Louis Ferrary, along with the authors already mentioned.

Quintus Mucius Scaevola

Legal Science and Theological Order

Aldo Schiavone

Summary: 1. The game-changer. - 2. Greece and Rome. - 3. Capita iuris civilis. - 4. Building through genera. - 5. History and system. - 6. The quest for abstraction. - 7. Forms and ontology. - 8. An archaeology of concepts. - 9. Political theology and republican order. - 10. The exception and the rule.

1. *The game-changer*

With Quintus Mucius Scaevola we are not at the dawn of Roman legal thought. At the time when he was active, a body of legal knowledge unequalled in any other ancient culture had already existed in the city for centuries. But his work represented a turning point, giving that tradition an indelible imprint destined to become one of the defining features of the West.[1] In this respect, his place in the history of law perhaps resembles Plato's in the history of philosophy: it does not mark a beginning as such, but more the end of a beginning. Building a profile of this figure is a fascinating task of intellectual archaeology and sheds unexpected light on our own provenance.

We have no reason to doubt that Quintus Mucius was regarded by the learned men of his generation and the one immediately following it, between the beginning and the middle of the first century B.C., as the greatest jurist of his time. This view was first reported by Cicero, who in his youth actually knew him personally, and he certainly was not overstating it, especially as he did not fully share it.[2] In a passage from *Brutus* in 46—Mucius had died almost forty years earlier—Cicero in fact did not hesitate to rank him after the character and work

[1] Schiavone 2012, 177 ff.
[2] Schiavone 2012, 187 ff.

of Servius Sulpicius Rufus, to whom he was bound by a lifetime friendship, despite being perfectly aware that his opinion might appear surprising given the prevailing view of Quintus Mucius.[3] And nine years earlier, in *de oratore*, while not naming him directly, Cicero had already made it clear that he did not regard Mucius' work as an absolute milestone, though he did on several occasions accord him genuine respect and consideration.[4]

The regard of his contemporaries was never questioned in later ages—Cicero's reservations did not find fertile ground in which to take root and spread—and indeed it was confirmed by an appraisal, as far as we know accepted unanimously, that placed Mucius in an entirely singular position in the history of legal thought—as a genuine game-changer, the leading light of a full-blown beginning, the only one that really counted; a line that was later embraced with conviction, as we shall see, by Pomponius in the *enchiridion* (more on this shortly).

Roman jurists were accustomed to engaging closely with their discipline's past: a solid and uninterrupted tie that proved to be one of the great constants of that thought and defined its peculiar historic time: a compactness that seems to ignore chronologies and leaves no space for perceiving the distances between interlocuters (even when they were centuries apart): a continuity that never crumbled, but inserted authors and doctrines (including contrasting ones) into the horizon of a single, long, and interminable present.[5] Later jurists would preserve only a hazy and uncertain memory of everything that went on in republican legal wisdom prior to Quintus Mucius (since the age of the Twelve Tables). It was as if this period consisted of definitively remote episodes and thoughts that had not really become part of the common legacy of shared knowledge: an age from which the trace of an isolated name or a view shorn of any context barely surfaced. Admittedly, it had still largely been an oral tradition (this had happened, for example, with the works of the pontifices), of which it would therefore have been arduous if not impossible to preserve a specific recollection. But even on the few occasions when clearly identified writings did exist, the attitude of posterity did not change. If we take the legal literature that can still be read today as a whole, the theses and doctrines of authors from the period until the beginning of the first century B.C.—Sextus Aelius, Cato, Manilius, Brutus, P. Mucius—are only cited around fifteen times, and very few of these references suggest a direct knowledge of the originals on the part of the writer making the quotation. It was a definitively lost world.[6]

That all changed with Quintus Mucius. His most important work, the eighteen books on the *ius civile*, was still read in the Severan age at the beginning of the third century A.D., and continued to have a wide and consolidated circulation, as shown by dozens of citations by the likes of Labeo, Julianus, Gellius (who was not a jurist but knew a lot about law), and Ulpian.[7] Even just a few decades after his death Servius Sulpicius Rufus had made him the exclusive subject of a systematic and (purportedly) innovative critique.[8] In the years between

[3] *Brut.* 152-153.

[4] *De orat.* 1.41.186–42, 191.

[5] Schiavone 2012, 182 f.

[6] An overall view can be found in Bremer 1896.I, 13–47.

[7] Ferrary, Schiavone, Stolfi 2018, 120 ff.

[8] In his *reprehensa Scaevolae capita* (the title is deduced from Gell. *n.A.* 4.1.20: *hoc etiam putavi Servium Sulpicium in reprehensis Scaevolae capitibus scripsisse* (...); but Paul. 21 *ad ed.*, in D. 50.16.25.1 recalls it as *notata Mucii*).

Augustus and Tiberius, Sabinus took him as a point of departure for a synthesis of the whole of *ius civile* that would be fundamental for subsequent legal thought.[9] And in the second century A.D. three jurists addressed his work in detail: Laelius Felix (about whose writings, possibly still utilised by Paul, we know nothing); Gaius, probably with a lemmatic commentary (also entirely lost); and Pomponius, also within a commentary structured in lemmata, of which over a hundred fragments can be read in Justinian's *Digesta*.[10]

The brief period since the age of Publius Mucius—from the 140s to the 90s—had therefore sufficed to bring about a great transformation. With his son Quintus we are in the presence of a genuine leap in quality: a change that would be assimilated not just by Roman jurists, but by the very character of law in the West.

2. *Greece and Rome*

Those few decades were actually crucial for the entire history of Rome, and not just for legal thought. Two increasingly tumultuous series of closely connected, though at first sight contradictory, events unfolded, destined to have incalculable consequences. On the one hand, the definitive stabilisation of a world power (at least according to the Graeco-Roman idea of the world) that had already taken Roman armies to both ends of the Mediterranean; and on the other, the irreversible crumbling of the social and institutional framework which, in the course of the two previous centuries, had enabled the republican aristocracy to achieve that primacy—an empire stretching across three continents.

The first sequence of events is admirably recounted—almost "live", at least in the final part—by Polybius, when he describes what appeared to him to be the Roman unification of the world: a phenomenon judged to be unprecedented and outlined in the *Histories* with succinct lucidity.[11] Behind the rise of every empire (according to Polybius) lay a remorseless will to power, and it was this that marked the history of Rome: employed here was a scheme evidently inspired by Thucydides, tested out on a much vaster stage—not Greece but the whole Mediterranean.

Polybius did not live to see the second succession of events play out fully, namely the collapse of the institutional backbone of the republic in the years of the Gracchi and the social war; the outcome of a rupture that affected the very fabric of Roman society as it had been taking shape after the patrician-plebeian oligarchic compromise already realised between the fourth and third century. The crumbling of the broad grouping of small peasant landowners who for centuries had formed the recruitment base for the Roman legions; the countryside of the peninsula now populated (in the desolate view of the first of the Gracchi) almost only by slaves;[12] the laceration of the Italic-Roman alliances (which were social prior even to being political); the increasingly bitter contrasts between the nobility and the equestrians, and even

[9] Schiavone 2012, 344 ff., 334 ff. See also Mantovani 2017, 249 ff.
[10] Schiavone 2012, 182 f., 500 n. 22, and Ferrary, Schiavone, Stolfi 2018, 106 ff.
[11] Pol. 1.3–4.
[12] Plut. *Ti. Gracchus* 8.

within the nobility itself: everything, then, was slipping towards a crisis from which there seemed to be no way out, and which was leading to the degeneration of political struggle into a bloody civil war. Playing out against the simultaneously rousing and dramatic backdrop of these interlocking elements—the dawn of a world dominion ruled by a republic at its "sunset" (to use Cicero's term),[13] the great theme of Sallustian historiography—was an important cultural transformation. Though by now wholly conquered and brought within the orbit of imperial power, Greece burst onto the Roman scene with its philosophy, rhetoric, historiography, art, and libraries. In a certain sense, Rome had always been a "Greek city": but now that cultural heritage was no longer, as it had been for centuries, merely foreign knowledge. It had become the most extraordinary and admired of the spoils of war; the object of rapid and granular appropriation: of a voracious, pilfering philhellenism practised systematically by the most refined sections of the capital's ruling orders. Notions, forms, and communicative styles were absorbed and reused with total freedom, projecting onto them a kind of mastery effect stemming from the conquerors' position of total pre-eminence. The result was the birth of a previously unseen Roman-Hellenistic imperial culture, which would seek to shape a new world according to its measure.[14] Captive Greece did not even things out by conquering the mind of the victors, as a conciliatory—and studiedly misleading—Horatian maxim would have it:[15] instead, it was captured two times over, with arms and in thought, enabling the victors to usher in a previously unseen civilisation.

It is in this context, in Rome between 90 and 60 B.C., that a small group of writings saw the light of day which would profoundly alter the terms of the city's intellectual life (and not just that): Quintus Mucius Scaevola's eighteen books of the *iuris civilis*, which open the brief sequence and in all likelihood appeared at the end of the 90s;[16] the treatise on rhetoric known to us as the *rhetorica ad Herennium*, dating to between 86 and 75 (more probably around 86, and therefore very close in time to Quintus Mucius' books),[17] preceded by another composition on rhetoric, by Marcus Antonius, consul in 99, published almost certainly in the 90s (and therefore in close temporal proximity to the work of Mucius), but of which nothing has survived;[18] and finally the *de rerum natura* of Titus Lucretius Carus, in the final years of the 60s or probably in 59.[19] In all these works—which we are not accustomed to seeing linked with each other but which, together, open the new world dimension of imperial culture—the Greek-language world is present to a crucial degree: more openly and visibly in the rhetorical work (Aristotle, Hermagoras of Temnos, though often contested, Crates of Mallus, Stoic traditions, Alexandrine grammar, and so on) and in poetry (Epicurus, Democritus, Empe-

[13] *Fam.* 4.1.1.

[14] Important studies include Ferrary 2014; Canfora 1994, 5 ff. See also Musti 1988, 39 ff.

[15] *Ep.* 2.1.156: *Graecia capta ferum victorem cepit*.

[16] Schiavone 2012, 178–180.

[17] Calboli 1993, 12 ff.

[18] Calboli 1993, 20.

[19] The first edition of the work was in any case by Cicero, in the second half of the 50s, as we learn from Saint Jerome (in the additions to the *chronicon* of Eusebius), borne out to some extent in one of Cicero's letters (*ad Quintum fr.* 2.9 [10].3): Conte 1990, 8 ff., 53. See also Pizzani 1959.

docles); less so in the books of the jurist, though even in these, as we shall see, it played an essential role. But it was always a very particular presence, in line with what we have just said: the use of Greek models and materials was directed toward constructing and expressing specifically Roman content, which did not reflect a subaltern adaptation to a foreign legacy, experienced as invasive and crushing, but rather an original and mature reworking of a tradition that was certainly precious but which was to be handled with independent mastery—in short, Greece, but just to give complete form to Rome.

Legal thinking was the field in which, thanks to Quintus Mucius, the distinctive nature of this relationship was most powerfully delineated.

3. *Capita iuris civilis*

For a long time—during its most important phase—Roman law was what is referred to as "jurisprudential law": a form of law with a marked case structure, oriented by a restricted circle of aristocratic jurists (and by magistrates with jurisdictional responsibilities). This characteristic was already fully developed by Mucius' age. But now it was acquiring a new feature: shifting from an almost completely oral (though far from crude or primitive) tradition to a configuration based on written texts composed by the jurists themselves. A few decades on from Publius Mucius Scaevola's generation, the new custom of writing had become a solidly established part of the work of legal experts, and Quintus Mucius devoted himself to it with unprecedented intensity. The ordering force, as well as the conceptual potential, of the written word had already partially emerged some decades earlier with the works of Publius Mucius, the father of Quintus, and also of Brutus and Manilius, all recalled by Pomponius.[20] But the whole of Roman culture was now becoming highly literised, prompting an even more rapid and incisive change in legal thought as well. This need for textuality emerged above all in relation to what until then had been the magmatic and largely oral sedimentation of *ius civile*: the original trunk of the whole of Roman law, rooted in the city's most remote past and including (as the sole written document) the Law of the Twelve Tables, in the oral reinterpretation of it by those steeped in *ius* between the fourth and third century. But it also sprang from comparison with what was going on in the daily life of the most important Roman institutions: with the (written) edicts of the praetors and other magistrates in the capital and in the provinces, with the now numerous (written) statutory laws voted through in assemblies in Rome or promulgated in municipal settings. A close relationship seemed to be forming between writing and prescriptiveness, between text and rule. The jurists had to take account of this. And it was against this background that the book on civil law came into being.

At the time Quintus Mucius was writing, the city's *ius* already had a relatively complex history behind it: the Twelve Tables; the interpretation of them by the pontifices; then that of the early non-sacerdotal legal wisdom; the work of Sextus Aelius in the *tripertita*; the texts of the previous generation, including the most significant one—that of his father Publius;

[20] Also in the *enchiridion*, in D. 1.2.2.39: Schiavone 2012, 163 ff., Nasti 2023, 122 ff.

and finally, the increasingly dense web arising from the interweaving of this tradition with the jurisdictional activity of the praetors in their edicts. How could this tangle be unravelled?

There are clues suggesting that Quintus Mucius tried to solve the issue by arranging his materials, whenever possible, in three layers: the Twelve Tables, the commentary of Sextus Aelius, the books of Publius and other authors from that generation. That this expository criterion does not appear distinctly (as we shall see in Emanuele Stolfi's reconstruction) in the lemmata transcribed by Pomponius in his commentary is just a sign of the work—something akin to a full-blown "montage"—performed by the later jurist on the writing of the older master.[21]

Quintus Mucius did not stop there. He also introduced a new structure, which was very effective though apparently merely extrinsic. As we learn unequivocally from Cicero, confirmed by a recollection of Gellius,[22] he arranged his treatment into *capita*, "chapters": in other words, he imposed on the exposition of *ius civile* a measure and cadence that turned, in the mind of readers, into a genuine ordering principle (as perceived by Cicero himself). In the late republican juridical lexicon, *caput* unequivocally referred to the form of the *lex*. *Capita legis* ("the chapters of the statutory law") was a common expression, still used by Cicero, and it denoted the parts of a *lex publica*, the articulation of its provisions.[23] To structure a work of jurisprudence into *capita* was to give it an expository framework that established the prescriptions of *ius* according to a module reminiscent of the incisiveness of bills passed by the assembly. In brief, it attracted the rules deposited in the oral tradition of *ius civile* into the magnetic field of a form of writing that openly alluded to the legislative order. It was as if, through the new written word of the jurists, the old legislator of the Twelve Tables was now being renewed.

4. *Building through genera*

In his *enchiridion,* Pomponius succinctly remarked that Quintus Mucius "the son of Publius, *pontifex maximus*, first established the civil law in *genera*, gathering it together in eighteen books".[24] The name of the republican master is linked, then, to the use of an analytic device never previously seen in the world of law, identified with the modules of the division of content into *genera* and *species*.

We know that it was a paradigm familiar to Quintus Mucius, who also drew on it outside of the sphere of legal knowledge. It had been fully developed for the first time in two of Plato's dialogues, the *Sophist* and the *Statesman*, and it was connected to the very foundation of dialectics and ontology (two cornerstones of Platonic thought).[25] Appearing for the first time in these texts is a terminology—centring on the notion of *diairesis*, "division"—that would continue to be used for centuries, and would lie at the heart of Roman translations and readaptations.

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[21] See Ferrary, Schiavone, Stolfi 2018, 106 ff.
[22] Cic. *ad fam.* 7.22; Gell. *n.A.* 4.1.20.
[23] Cic. *de lege agr.* 2.7.16 and 3.2.4.
[24] In D. 1.2.2.41.
[25] Schiavone 2012, 183 ff.

A decisive shift had taken place though in the passage from Plato to Aristotle: dialectic—considered in Platonic vision to be the highest and most profound level of thought—became, for Aristotle, a subaltern and less significant form of logic compared to the scientificity of demonstrable knowledge. Detached from its original context, *diairesis* lived on simply as a descriptive method. While its use was codified, albeit with oscillations that would still impinge on the work of Cicero, Aristotle confined it to a marginal role well away from the main components of his conceptual system. Nor would the Stoics alter this framework to any significant degree.

Diairesis was not forgotten though. Chrysippus certainly paid it attention, as did, at a later date, Diogenes of Babylon, the philosopher who, together with Carneades, was part of the Athenian embassy to Rome in 155 B.C. It continued to be quite widely employed in rhetorical literature as well, for systematic and classificatory purposes, for instance by Hermagoras, and later extensively by the author of the *rhetorica ad Herennium*—and we are already into the world of Mucius.

But why did Mucius decide, making a choice without precedent in the legal culture, to use this technique so widely, to the point that it became the distinguishing feature—at least in the eyes of Pomponius—of his most important work? For a long time, the customary way of trying to explain this novelty was to refer generically to the intellectual climate of the age, which influenced a couple of generations of jurists—in other words, little more than an ephemeral fashion.[26]

Such interpretation is unsatisfactory to say the least, and it neglects an essential point: the relationship between the use of diairesis and the epistemological quality of the content developed for the first time by means of this method. In other words, the problem of the kind of material and notions through which, in Mucius' books, the experience of *ius* was pieced together and conceived. If we do not keep our eyes firmly on this connection, we will lose the thread of any plausible understanding. Above all, we run the risk of measuring the work of the Roman jurists with the criteria adopted to evaluate the Greek and Hellenistic debate from Plato through to late Stoicism, influenced solely by the superficial trace of some of Roman jurisprudence's evident debts to Greek philosophy, and by a few sporadic contiguities of lexis or of categories. If we take this path, the only conclusion we can draw is that the logical pattern of classical thought was seriously impoverished in the passage from the Greek philosophers to the Roman jurists, and that jurisprudential thinking was hopelessly inferior and lacked any speculative vocation. But such a view would be completely unfounded.

In reality, there was neither a reduction nor an impoverishment, nor a straightforward transposition of a methodological technique with no particular substantive significance. Instead, there was a delicate process of integration that projected Roman legal knowledge beyond the horizons it had mastered until then, but without losing its own very strong and distinct identity—in a certain way, it was revolutionised in order to be completed. The result would be a new way of conceiving law, whereby its logical procedures were transmuted into those of a science without equal in the ancient world, and which was no less dense and con-

[26] This is the well-known position of Schulz 1946, 38 ff.

ceptually compact than the great classical philosophy. From then on, this achievement would always make it potentially possible to keep legal regulation (at least partially) separate from the naked acts of will, of constituted powers, entrusting it to the rigorous, impersonal, and formalised syntax of abstract acts of knowledge.[27]

5. *History and system*

The Mucius' *Opera* presented in the first book of *Scriptores iuris Romani* provided for the first time an overall—albeit inevitably partial and fragmentary—view of the *libri iuris civilis*. It confirms a surprise finding somewhat at odds with the unequivocal judgment of Pomponius. No more than a cursory glance at the series of topics is required to see that it is impossible to deduce, from the sequence of themes, the presence of a systematic framework arranged in *genera* and *species* according to the diairetic device. In short, Mucius' books are not the *Institutiones* of Gaius (written over two centuries later and which made this way of proceeding familiar).[28] On the other hand, there are no lack of examples—and these will be identified one by one in our reconstruction — of an extensive (and perhaps even granular) use of diairetic techniques by Mucius within the single themes he tackled, in keeping with Pomponius' claim. So why does this matter?

We must thus conclude that Mucius made a deliberate choice not to use classificatory techniques beyond the threshold of each topic. For him, the order of *ius*, beyond a certain point, had to rest on something different than a simple classificatory method.

But in those decades, there were others who thought differently.

Less than forty years later, in the first book of *de oratore,* Cicero outlined —in a passage that the fiction of the dialogue attributes to the orator Lucius Licinius Crassus, Mucius' colleague in the consulate of 95[29]—what the tasks of a legal knowledge finally suited to the new age should be. In the literary construct, Crassus is speaking one day in September of 91. We have no way of knowing if Mucius' books had already been published by then, and whether, therefore, Cicero composed the dialogue on the presupposition that Crassus was familiar with them. One thing is however certain: the program he proposes (and there is no reason to doubt that his words basically reflected Cicero's opinion) was nothing like the idea followed by Quintus Mucius. It moved in precisely the opposite direction, stating that *diairesis* could be used to construct a general system of *ius civile*; a kind of anticipation of Gaius, but a drastic though silent criticism of the work of Mucius (who is never directly named—and this silence is in itself surprising), the outcome of which was completely contradicted.

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[27] The relationship between knowledge and will in the construction of the juridical order has been analysed in an important line of thought stretching from Thomas Aquinas, *Summa Theologiae* (ed. Paul 1988[2]), q. 17, aa. 1 and 5, to Heidegger 1982.

[28] The comparison between Mucius and Gaius can already be found in Schulz 1946, 159 ff., though expressed in unacceptable terms. It is entirely legitimate (to the extent that it is possible) but must start from a full identification of the differences between the models used by the two jurists.

[29] Cic. *de orat*. 1.41.186-42.191. See Schiavone 2012, 187 ff.

The testimony of *de oratore* does not just demonstrate the existence of an alternative position to the one pursued by Mucius. It shows how the possibility excluded by the jurist manifestly belonged to the intellectual legacy of his generation, and clarifies the full extent of the problematic nature of the choice. In those years there really were two paths that Roman legal knowledge could go down, two different ways of responding to the new times.

The route taken by Quintus Mucius was undoubtedly less linear than the one outlined by Crassus-Cicero in *de oratore*. It adhered much better to the historical characteristics of legal knowledge, heading towards a difficult yet highly productive mediation. He was willing to introduce a new logical order into the weft of the *ius civile*, but then blocked it on the threshold of the construction of an overall architecture, using it only to structure the topics within each *caput*. Within the inevitable compositional tension this generated, there was already a glimpse of a proposed new equilibrium which would support subsequent developments in Roman legal thought for centuries. Nine years later, in the text from *Brutus*, Cicero rendered the dissent present but concealed in *de oratore* explicit: Servius, and not Mucius, was the real author of a decisive turning point in the juridical thinking of the time, the only figure truly capable of fruitfully employing the body of doctrines and instruments contributed by Greek philosophy.

At first sight, it would appear the complete opposite of what would be Pomponius' judgement and that of the whole of subsequent legal science. In actual fact the play is probably more subtle. Cicero could not have failed to grasp the importance of the innovations made by Mucius, and the significance of the use he made of diairetic tools in his work; however, he polemically devalued this aspect, because it seemed to him that, compared to Servius, Mucius had not reached the point of no return of a radical transformation of legal knowledge, and that he was still unduly indebted to a tradition from which Servius seemed to have freed himself entirely.

Tradition, the history of the city and its aristocracy, as reflected in the long story of its law—it was precisely this development and this bond that Mucius believed should not be renounced. The risk for him was that a 'philosophical' and excessively Hellenizing 'normalization' of *ius civile*—like the one expounded in *de oratore*—might destroy a distinctive feature to which the very primacy of Rome was linked (Servius actually managed to avoid this danger as well, but his stance rightly appeared to Cicero to be less indebted to the past).[30]

We do not know to what degree the overall order of the *ius civile* was dependent on models already existent in Roman legal culture: the Twelve Tables, the scheme of Sextus Aelius' *tripertita*, the sequences present in Marcus Porcius Cato or in Publius Mucius, or in ancient oral memorisations of *responsa*. It can however be said with some confidence that not only did Mucius' framework not reflect any diairetic mechanism, it was not even bestowed with a precise systematic value, at least not in the classificatory-constructive sense of the term. To understand its significance, we must turn not to logic but, once again, to history. The key relates in fact to the progressive stratification of *ius* in the city, and to the functional hierarchies of Roman society that must still have been in place at the height of the republic, before the great changes between the third and second centuries, and therefore in an epoch that no

[30] Schiavone 2012, 245 ff.

longer corresponded to Mucius' time but which, reproposed, must have retained a prescriptive and exemplary force. The centre—the genuine producer of meaning of the whole order—consisted of the kinship and potestative structure of the family and its relation, as the specific place of origin of all the community's social life, and as the essential presupposition of citizenship (and therefore of politics). It was around the family—the *pater*, his powers, and his functions—and above all its preservation over time, that everything else had to revolve, often arranged according to topical clusters that in some cases dated far back.[31]

But Quintus Mucius did not hesitate to develop a new kind of logical weave from this material, which went far beyond the use just of *diairesis*. In fact, this model presupposed another and even more decisive novelty. And it is to this that we must now turn.

6. *The quest for abstraction*

It is not upward that we need to look, to the conscious non-achievement of a real systematic structure, but rather downward, to the legal content that was ordered into *genera*. If we stick to this perspective, a new horizon immediately opens up. We realise that an essential condition had to be met if division according to *genera* was to be used to the full: namely, that it could be exercised on notions consisting of abstract concepts. It is impossible to arrange horses or oratorial qualities according to *genera* without already possessing an abstract concept of horseness or oratory. This necessarily holds true for legal notions as well: breaking down their parts into *genera* necessarily presupposed the abstract level of their construction. And abstraction as the intrinsic dimension of legal thought was Mucius' great invention.[32]

In the Platonic dialectic the connection was evident on what we might call a genetic or genealogical level: division by *genus* and *species* was inextricably bound up with the development of a preexisting ontological foundation. In Aristotle as well, in the Stoic tradition, and in Hellenistic encyclopedism (from rhetoric to geometry), the dependency was taken for granted: the abstraction of content was always a prerequisite for the use of *diairesis*. But this was not the condition that prevailed in Roman legal knowledge before the change introduced by Mucius. Here, the whole path from the work of the pontifices to the jurists of the second century—as far as we can ascertain from the few available sources—displayed the difficult and as yet incomplete striving to move beyond the strictly case-based character of *ius*.[33]

With the benefit of a retrospective viewpoint, we can of course confidently state that by the end of the second century, through the long and painstaking application of an increasingly refined technique and with close collaboration between jurists and praetors, the core elements of Roman private law had already all been roughly delineated, ranging from rights concerning goods and commodities to obligations and the law of succession. Their substantive presence was only apparent however in the discipline of single responses, in the norma-

[31] Ferrary, Schiavone, Stolfi 2018, 101 ff.
[32] Schiavone 2012, 196 ff.
[33] Schiavone 2012, 85 ff., 154 ff.