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Human rights, Roman law and Stoicism: rephrasing the question

Introduction: human rights, Roman law and Stoicism

In 2011, I obtained my doctorate for research into the possibility of the existence of a precursor for the modern idea of human rights in Roman law.[1] I have approached this question using the method of anachronistic research as advocated by Hoetink.[2] This means that it is possible to use the modern concept of human rights to perhaps gain a better understanding of Roman law and society, even though human rights as such may not be present in

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1. J. Giltaij, *Mensenrechten in het Romeinse recht?* (dissertation Erasmus University Rotterdam), Nijmegen 2011.

2. H.R. Hoetink, "Les notions anachroniques dans l'historiographie du droit", *Tijdschrift voor Rechtsgeschiedenis* 23 (1955), p. 1-20, p. 4: 'Si l'on ne veut pas les (notions anachroniques, JG) voir, il faudrait conclure que partout où nous ne rencontrons pas le mot, la notion ou la chose a fait défaut, a manqué. Nous savons tous que cela va trop loin.'; p. 16: "D'autre part, elles (notions anachroniques, JG) sont, en principe, admises à titre heuristique, pour nous fournir des desseins précis, des problèmes à résoudre, des hypothèses de travail à vérifier comme une instigation à chercher de ce qu'il en était dans le passé." Also:, G. Crifò, Per una prospettiva romanistica dei diritti dell'uomo, in: *Menschenrechte und europäische Identität-Die antiken Grundlagen* (hrsg. K.M. Girardet, U. Nortmann), Stuttgart 2005, p. 246: 'Ed è altrettanto troppo semplice affermare a priori che nell'antichità i diritti dell'uomo erano del tutto ignoti e che sarebbero apparsi solo nel XVIII secolo, giacché nel mondo antico possono mancare i nomi ma quel che conta è che ci siano le cose.'

this period. For this purpose, according to Hoetink two conditions have to be met: firstly, the concept of human rights used must properly reflect the modern notion of human rights, human rights as they exist in the current legal order. In my understanding as a legal scholar, human rights in modern law are primarily those rights incorporated in the Universal Declaration of Human Rights (1948) and the European Convention on Human Rights (1950). Yet, there seems to be more to the notion of human rights than merely a legal conception. Also, they appear to carry social, political and ideological functions outside the scope of the law.[3] Hence, I have reasoned from the content of the rights stated in the UDHR and ECHR, but have also constantly referred to an "idea of human rights" to take the social, political and ideological functions into account. Secondly, following Hoetink, the main purpose of employing the method of anachronistic research is to pose the problem, not to attempt to resolve it in any way by attributing psychological motives to the actions and behavior of the Romans.[4] In other words, inasmuch as these can be separated, the social, political and ideological reason for the existence of a precursor to the modern idea of human rights is secondary to the problem of the possibility of its existence as a legal entity.

To illustrate this method, in this article I would like to reiterate the arguments from my dissertation with respect to one specific aspect of my research. Nearly all Roman legal scholars, and many scholars outside this discipline, who have conducted research into the possibility of the existence of a precursor to the modern idea of human rights refer to the importance of a link between Roman law and Greek philosophy. As we shall see, this mainly concerns the presence of Stoicism in various Roman legal texts, the more general influence of Stoicism on individual Roman jurists, and the employment of Stoicism in the Roman legal order as a whole. Oestreich, for instance, saw a precursor for the modern idea of human rights in Roman (popular) Stoic philosophy, specifically in its conception of natural law[5], while Pohlenz emphasized the role of Stoicism in regarding the humanizing

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3. Compare M. Villey, "Note critique sur les droits de l'homme", in: *Europäisches Rechtsdenken in Geschichte und Gegenwart. Europäisches Rechtsdenken in Geschichte und Gegenwart: Festschrift für Helmut Coing zum 70. Geburtstag* I (hrsg. N. Horn), München 1982, p. 700-701.

4. Hoetink, *Notions anachroniques*, p. 10: 'Il me semble absolument légitime pour le romaniste de partir de quelque conception empruntée au droit moderne pour chercher ce qui en est dans les sources romaines (...). Je crois que pour *poser les problèmes* les notions soi-disant anachroniques sont absolument admissibles, tandis qu'elles ne sont certainement pas admissibles quand il s'agit d'expliquer de manière psychologique les actions et la conduite des hommes d'autrefois.'

5. G. Oestreich, *Geschichte der Menschenrechte und Grundfreiheiten im Umriss* (2. Auflage), Berlin 1978, p. 15-17.Though not in the works of the Roman jurists: p. 18.

tendencies in the works of various Roman jurists.[6] More recently, Brouwer devoted an article to the question whether or not the Stoics knew philosophical concepts akin to the modern idea of human rights.[7] Also, text-books on the history of human rights tend to treat Stoicism as particularly relevant.[8] Finally, several Roman law scholars have also singled out Stoicism as highly relevant for the possibility of the existence of the modern idea of human rights in Roman law. Prime examples of these are Gaudemet[9], Honoré[10], Talamanca[11] and Crifò.[12]

The research questions I would like to ask in this article simply are: why the Stoa? What aspects of Stoicism lead to singling out this current in Greek philosophy with regard to the possibility of a precursor to the modern idea of human rights? And why does the presence of Stoicism in the texts of the Roman jurists matter in this regard? To reflect on these questions, firstly I shall go into the notion of "nature" in Stoicism compared to that in the texts of various Roman jurists. Secondly, as I have in my dissertation, I will lay emphasis on the relation between forms of legal protection in Roman law with regard to both free non-citizens, meaning people in the Roman Empire lacking Roman citizenship, and slaves, who lacked both Roman citizenship and their freedom. Finally, I shall conclude by attempting to rephrase the question based on the literature concerning the relation between human rights, Roman law and Stoicism.

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6. M. Pohlenz, *Die Stoa. Geschichte einer geistigen Bewegung* (5. Auflage, Band I), Göttingen 1978, (e.g.) p. 114-115.

7. R.R. Brouwer, "Over de klassieke oorsprong van de rechten van de mens", *Rechtsfilosofie en rechtstheorie* 2 (2011), p. 98-117.

8. E.g. M.R. Ishay, *The history of human rights. From ancient times to the globalization era*, Berkeley/Los Angeles/London, 2008, primarily p. 1-10 and p. 23-41 for Antiquity

9. J. Gaudemet, "Des "droits de l'homme" dans l'Antiquité?", in: *Collatio iuris romani: études dédiées à Hans Ankum à l'occasion de son 65e anniversaire* I (éd. R. Feenstra, A.R. Hartkamp, J.E. Spruit, P.E. Sijpestein, L.C. Winkel), Amsterdam 1995, p. 108-110; J. Gaudemet, "Le monde antique et les droits de l'homme. Quelques observations", in: *Le monde antique et les droits de l'homme* (éd. H. Jones), Bruxelles 1998, p. 182.

10. A.M. Honoré, "Les droits de l'homme chez Ulpien", in: *Le monde antique et les droits de l'homme* (éd. H. Jones), Bruxelles 1998, p. 239-240; A.M. Honoré, *Ulpian: pioneer of human rights* (2nd ed.), Oxford 2002, p. 79-82.

11. M. Talamanca, "L'Antichità e i 'diritti dell'uomo'", *Atti di convegni lincei* 174 (Convenzione del consiglio d'Europa per la protezione dei diritti umani e delle libertà fondamentali in onore di Paolo Barile, Roma 2000), Roma 2001, p. 66-89, though critically.

12. Crifò, *Prospettiva*, p. 266-267.

Ius naturale, ius gentium and ius civile

Until now, I have only referred to 'the Stoa' and 'Stoicism' in a very general sense. To properly conduct research into a shared history between the Roman Stoa and Roman law in its classical period, it may prove useful to start by briefly sketching the origin and development of this current in ancient philosophy. The Στοά (Ποικιλή) derives its name from a painted portico in Athens. There, a group led by the founder of the current Zeno of Citium convened in the late 4th and early 3rd century BC.[13] At first, these ideas were heavily influenced by Cynicism, seeing for example the rejection of worldly institutions in Zeno's *Politeia*,[14] but they were restated and adapted in the course of time by figureheads like Chrysippus (3rd century BC)[15] and Panaetius (2nd century BC)[16] in sufficient measure to be able to speak of an autonomous current in ancient philosophy. This implies certain core elements had remained unchanged. Concerning Stoic ethical doctrine, the core element is the definition of the human τέλος as ὁμολογουμένως τῇ φύσει ζῆν, 'to live in accordance with nature'.[17] The term 'φύσις' in itself is a highly problematic notion,[18] yet in Stoicism the term is even used in two senses: as 'nature in general' and referring to 'human nature' specifically.[19] Moreover, φύσις in both senses seems to be strongly related to an idea of λόγος, 'reason', particular to human φύσις.[20] Bluntly stated, Stoic ethical doctrine formulated on the basis of the maxim 'to live in accordance with nature' may be characterized as aiming to conform the human λόγος to φύσις in its general sense.

There are two reasons this characterization is important: first, from these rather abstract ideas the current draws several practical consequences, consequences applicable in daily life as it were. Second, there may have been a degree of 'reception' of this construction in Rome in the late Republic.

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13. Pohlenz, *Die Stoa* I, p. 24; F.H. Sandbach, *The Stoics*, London 1975, p. 20.
14. Pohlenz, *Die Stoa* I, p. 23; Sandbach, *The Stoics*, p. 24-26.
15. Pohlenz, *Die Stoa* I, p. 28-30; Sandbach, *The Stoics*, p. 112-115.
16. Pohlenz, *Die Stoa* I, p. 191-207; Sandbach, *The Stoics*, p. 123-129.
17. Pohlenz, *Die Stoa* I, p. 112-118; Sandbach, *The Stoics*, p. 31-38: the sources for Stoic ethical doctrine are mainly Diogenes Laertius VII and Cicero, *De finibus* III. Chrysippus formulates 'to live in accordance with nature' as referred to by Arius Didymus in Stobaeus, *Eclogae* II (,7), the third main source for Stoic ethics: Pohlenz, *Die Stoa* I, p. 118; Sandbach, *The Stoics*, p. 53-59.
18. For example Pohlenz, *Die Stoa* I, p. 119; Sandbach, *The Stoics*, p. 31-32.
19. Pohlenz, *Die Stoa* I, p. 118-119; Sandbach, *The Stoics*, p. 32.
20. M. van Straaten, *Panétius. Sa vie, ses écrits et sa doctrine avec une édition des fragments*, Amsterdam 1946, p. 139-144; Pohlenz, *Die Stoa* I, p. 118; Sandbach, *The Stoics*, p. 33-34. Similarly, λόγος carries general and specific meanings, the latter as unique to human beings, the former as a divine will proper to general φύσις.

The philosopher Panaetius of Rhodos possibly played a large part in both developments. When the heads of the three great Athenian schools came to Rome in 155 BC, it constituted the first contact between the Roman elite and the various currents in Greek Hellenistic philosophy.[21] Greek philosophy appears to have been in vogue in Rome from this moment on: the sources, for instance, suggest a relation between the philosopher Panaetius and political leaders such as Scipio Aemilianus,[22] and a possible influence on the thinking on Tiberius Gracchus[23] and, later, Cicero, whose *De officiis* is a Roman adaptation of Panaetius's Περὶ τοῦ καθήκοντος.[24] Similarly, various Roman jurists such as Quintus Mucius Scaevola *augur*, Quintus Mucius Scaevola *pontifex*, Quintus Aelius Tubero and Publius Rutilius Rufus[25] may have to a certain degree used Stoic doctrine[26] in their legal method.[27]

Even more debatable is the question whether these jurists made use of Stoicism in the content of their decisions. In this regard, various authors refer to the discussion surrounding the *partus ancillae*, concerning the question of the ownership of the child of a female slave. In the legal texts, the answer to this question appears to have depended on whether this child should be seen as a person or a fruit, which is concurrent with a similar discussion

21. Pohlenz, *Die Stoa* I, p. 259: M. Griffin, "Philosophy, politics and politicians at Rome", in: *Philosophia togata I* (ed. M. Griffin, J. Barnes), Oxford 1989, p. 2-5: among whom was Panaetius's teacher and head of the Stoic school, Diogenes of Babylon.

22. Van Straaten, *Panétius*, p. 10-16; Pohlenz, *Die Stoa* I, p. 261; A.E. Astin, *Scipio Aemilianus*, Oxford 1967, p. 296-299.

23. Pohlenz, *Die Stoa* I, p. 261; with a critical overview, Griffin, *Philosophy, politics and politicians*, p. 25-28.

24. 'On moral duties'. Van Straaten, *Panétius*, p. 29-33; J.-L. Ferrary, *Philhéllenisme et impérialisme. Aspects idéologiques de la conquête romaine du monde hellénistique*, Rome 1988, p. 395.

25. On these jurists and their philosophical inspiration, see B. Kübler, "Griechische Einflüsse auf die Entwicklung der römischen Rechtswissenschaft gegen Ende der republikanischen Zeit", in: *Atti del congresso internazionale di diritto romano* I, Pavia 1934, p. 79-98, with literature from the 16th century onwards in nt. 4 (p. 84); F. Senn, "De l'influence grecque sur le droit romain de la fin de la République", in: *Atti del congresso internazionale di diritto romano* I, Pavia 1934, p. 101-110; E. Bund, "Rahmenerwägungen zu einem Nachweis stoischer Gedanken in der römischen Jurisprudenz", in: *De iustitia et iure. Festgabe für Ulrich von Lübtow* (hrsg. M. Harder, G. Thielmann), Berlin 1980, p. 127-145.

26. Bv. M. Voigt, *Das ius naturale, aequum et bonum und ius gentium der Römer* Band I-IV, Aalen 1966, I, p. 252-255. The exact manner in which the Stoic doctrine is used is debatable: J. Stroux, *Summum ius summa iniuria*, Leipzig 1926, p. 35-36 for the rhetorical branch; J. Miquel, "Stoische Logik und römische Jurisprudenz", *SZ r.A.* 87 (1970), p. 90-118 for the logical branch.

27. Pohlenz, *Die Stoa* I, p. 261-263; E.J.H. Schrage, *Libertas est facultas naturalis. Menselijke vrijheid in een tekst van de Romeinse jurist Florentinus* (diss. UL), Leiden 1975, p. 39.

in contemporary literary sources, mainly Cicero, *De finibus* I,12 en *De officiis* I,22.[28] A Stoic solution to this problem seems to have prevailed among the jurists, seeing for instance D. 7,1,68pr. A more general influence of Stoic ethical doctrine on the works of the late Republican jurists remains highly problematic. Furthermore, it appears that even if there had been such an influence, it was probably short-lived.[29] Similarly, some authors hold a second point of contact between Stoicism and classical Roman law during the course of the early Empire. Possibly from Servius Sulpicius Rufus on, the jurists debated the possibility of the existence of a *debitum naturale* of a master to his slave.[30] The sources indicate Javolenus[31] was the first jurist to provide a positive answer to this question.[32] The text is important, because shortly before, the philosopher Seneca had treated the same matter in his work *De beneficiis* (III,18,1-III,22,1). There, Seneca reaches a similar conclusion as the jurist, namely the existence of a *beneficium servile* as a natural debt based on the *ius humanum*.[33] In this regard Mantello argued that Javolenus knew and studied Seneca's works.[34] The circumstances surrounding the discussions on the *partus ancillae* in the late Republic and the *beneficium servile* in the early Empire lead to several queries: for example, should we assume a resurgence

28. F. Schulz, *Prinzipien des römischen Rechts*, Berlin 1954, p. 147-148 ('griechischen Humanitätsphilosophie'); O. Behrends, "Prinzipat und Sklavenrecht", in: *Rechtswissenschaft und Rechtsentwicklung* (hrsg. U. Immenga), Göttingen 1980, p. 73-85; W. Waldstein, "Entscheidungsgrundlagen der klassischen römischen Juristen", in: *ANRW* II.15, Berlin/New York 1976, p. 50-51; M. Kaser, *Ius gentium*, Köln/Weimar/Wien 1993, p. 79-80: also D 22,1,28,1 and Just. Inst. 2,1,37; S. Knoch, *Sklavenfürsorge im römischen Reich*, Hildesheim/Zürich/New York 2005, p. 22-24.

29. If the law regarding slaves is crucial; Behrends, *Prinzipat und Sklavenrecht*, p. 85-89.

30. Also: Gai. Inst. II, 244: A. Mantello, *Beneficium servile-debitum naturale*, Milano 1979, p. 203, p. 225-256.

31. Seeing Javolenus's source, Labeo may have provided this answer previously: F. Horak, *Rationes decidendi*, Innsbruck 1969, p. 105, nt. 9; Mantello, *Beneficium servile-debitum naturale*, p. 264-269; F. Horak, "Review of 'beneficium servile-debitum naturale', *Tijdschrift voor Rechtsgeschiedenis* 53 (1985), p. 165.

32. D. 35,1,40,3: M. Kaser, *Das römische Privatrecht. I. Abschnitt: Das altrömische, das vorklassische und klassische Recht*, München 1971; p. 155-156; Mantello, *Beneficium servile-debitum naturale*, p. 334-359; Horak, *Review 'Beneficium servile-debitum naturale'*, p. 166; Kaser, *Ius gentium*, p. 157-162.

33. For instance, Pohlenz, *Die Stoa* I, p. 316. For a different conclusion, see Mantello, *Beneficium servile-debitum naturale*, p. 153-182, p. 395-430.

34. Mantello, *Beneficium servile-debitum naturale*, p. 431-451; Horak, *Review of 'Beneficium servile-debitum naturale'*, p. 167, who does not assume a direct influence. According to D. Nörr, "Mandatum fides, amicitia", in: *Mandatum und Verwandtes. Beiträge zum römischen und modernen Recht* (hrsg. D. Nörr, S. Nishimura), Berlin/Heidelberg/New York 1993, p. 34, the jurist Paul also appears to employ philosophical notions.

of Stoicism in the time of Javolenus, or is there simply a continuity between the jurists of the late Republic and those in the early Empire in this respect? Moreover, in what measure was Seneca actually the one inspiring this resurgence? And finally, why are the legal controversies concerning the children of female slaves and the benefits afforded to slaves regarded by modern scholars as the debates which reflect a change in certain preconceptions held amongst the jurists?

Regarding the latter question, this appears to have something to do with several hallmarks of Stoic ethical doctrine in particular. As has been pointed out, in Stoicism the notion of 'nature' (φύσις) actually functions on multiple levels: there is 'nature' in its general sense, and the 'nature' that is proper to every being separately. Man's specific nature entails him to be a λογικὸν ζῷον, a being gifted with reason, λόγος.[35] If the τέλος of man is 'living in accordance with nature', every man therefore is in equal measure able or obliged to fulfill his καθήκοντα, his 'moral duties'. What exactly the content of this duty entails depends on the specific nature of the individual in question.[36] Certainly, slaves are also endowed with reason, and as such are similarly subject to performing and receiving moral duties, contrary to animals specifically. Slaves are a part of the human community.[37] Against this background modern authors understandably have sought the reason for a change in the preconception of slaves as humans and the possibility of the existence of obligations between slaves and masters in the employment of Stoic ethical doctrine.[38].

However, it is problematic to presume the classical Roman jurists more generally used *natura* synonymously with the Stoic notion of φύσις. Even considering their legal context, the two examples I have mentioned seem to regard qualifications in the sphere of morals, not matters of law of any kind.[39] Then again, *natura* in the legal texts occurs as a type of legal category apparently relevant to the Stoic concept of φύσις, even in a more general sense.[40] Several

35. Pohlenz, *Die Stoa* I, p. 56.

36. Van Straaten, *Panétius*, p. 140; Pohlenz, *Die Stoa* I, p. 133-134.

37. Cicero, *De finibus* III,67 (SVF III,371): Pohlenz, *Die Stoa* I, p. 115, p. 135-136; Schrage, *Libertas est facultas naturalis*, p. 35.

38. Recently, Knoch, *Sklavenfürsorge*, p. 34-40.

39. For example, Mantello, *Beneficium servile-debitum naturale*, p. 72-98 (p. 74): Seneca himself appears to refer to this in *De beneficiis* III,15,1.

40. Several authors emphasize a background in Sabinus, albeit with a different meaning: P. Stein, "The development of the notion of 'Naturalis ratio'", in: *Daube noster: Essays in legal history for David Daube* (ed. A. Watson), Edinburgh/London 1974, p. 308f; L.C. Winkel, "Einige Bemerkungen über ius naturale und ius gentium", in: *Ars boni et aequi: Festschrift für Wolfgang Waldstein zum 65. Geburtstag* (hrsg. M.J. Schermaier, Z. Végh), Stuttgart 1993, p. 449; Kaser, *Ius gentium*, p. 56, p. 61.

scholars have conducted research into the notion of *natura* as employed by the jurist Gaius both in his Institutes as well as in his commentary on the provincial Edict.[41] Similarities to the Stoic conception are primarily assumed with regard to the group of texts involving *naturalis ratio*.[42] Kaser and Winkel indicate a measure of concurrence between *natura* and the Stoic notion of φύσις, in the sense of both being related to a shared rationality[43] particular to human beings.[44] This appears to lead to the formulation of specific norms.[45] However, it is harder to determine whether this conception of *natura* also entails a corrective function with regard to other legal notions.[46] In Stoicism, φύσις does carry this connotation.[47] It seems this is not the case. Gaius does employ *naturalis ratio* elsewhere in his Institutes, indicating the universal usage of specific legal notions.[48] In one text, *natura* is even used as a form of 'Rechtskritik', but with *potest corrumpere naturalia iura* in Inst. I,158 Gaius does not mean to argue for a violation of 'natural rights', but rather the 'natural fact' of a family relation.[49] As such, law cannot change what nature has established in a factual sense.

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41. Stein, *Naturalis ratio*, p. 305.

42. H. Wagner, *Studien zur allgemeinen Rechtslehre des Gaius. Ius gentium und ius naturale in ihrem Verhältnis zum ius civile*, Zutphen 1978, p. 59-69; Winkel, *Einige Bemerkungen*, p. 448-449. Stein, *Naturalis ratio*, p. 306 (Cicero referring to Chrysippus in *De divinatione* II,61), p. 314. Aristotle: E. Levy, "Natural law in Roman thought", in: *Gesammelte Schriften* (1er Band), Köln/Graz 1963, p. 10.

43. Kaser, *Ius gentium*, p. 61. Stein argued for two meanings of *naturalis ratio* in Gaius: as deduced from natural facts (Chrysippus in Cicero, *De divinatione* II,61, by way of Sabinus) (*Naturalis ratio*, p. 306f.) and as a reason common to all human beings (the 'technical philosophical sense', *Naturalis ratio*, p. 314-315).

44.And not applicable to animals: Winkel, *Einige Bemerkungen*, p. 449.

45. Kaser, *Ius gentium*, p. 61. However, D. Nörr, *Rechtskritik in der römischen Antike*, München 1974, p. 98-99; G.G. Archi, "'Lex' e 'natura' nelle Istituzioni di Gaio", in: *Festschrift W. Flume zum 70. Geburtstag am 12. September 1978* I (H.H. Jakobs), Köln 1978, p. 6; and Stein, *Naturalis ratio*, p. 315.

46. Apparently suggested by Gaius's definition of *lex* in Inst. III,104, but not really used elsewhere in the Institutes: Archi, *Lex e natura*, p. 8.

47. As argued by Pohlenz: *Die Stoa* I, p. 264.

48. Levy, *Natural law in Roman thought*, p. 10; Stein, *Naturalis ratio*, p. 314; Kaser, *Ius gentium*, p. 87: Gai. Inst. I,189: *Sed inpuberes quidem in tutela esse omnium civitatium iure contingit; quia id naturali rationi conveniens est, ut is, qui perfectae aetatis non sit, alterius tutela regatur, nec fere ulla civitas est, in qua non licet parentibus liberis suis inpuberibus testamento tutorem dare; quamvis, ut supra diximus, soli cives Romani videantur tantum liberos suos in potestate habere*. Also: Gai. Inst. III,154-154a.

49. *Quia civilis ratio quidem iura corrumpere naturalia vero non potest*: Levy, *Natural law in Roman thought*, p. 8; Nörr, *Rechtskritik*, p. 99; Archi, *Lex e natura*, p. 9-10; Waldstein, *Entscheidungsgrundlagen*, p. 86-87; Wagner, *Studien*, p. 114; Kaser, *Ius gentium*, p. 81; Talamanca, *L'antichità*, p. 77-80.

Yet, Gaius almost[50] constantly places *naturalis ratio* in a context of *ius gentium*.[51] I have not been able to determine a legal precursor for this. But Cicero may have inspired Gaius in two areas. In *De officiis* III,23 Cicero like Gaius associates *naturalis ratio* with self-defence, and presents a similar connection between *naturalis ratio* and *ius gentium* by separating this law from the specific laws of particular peoples.[52] Moreover, this association in which *ius gentium* is the law of a universal community is repeated in *De officiis* III,69.[53] Not only is the notion of *ius gentium* as the law of a universal community present in Gaius,[54] but also in the texts of various contemporary jurists, such as Florentinus in D. 1,1,3.[55] Primarily dealing with self-defence, the text refers to another concept probably derived from Stoic ethical doctrine. Apart from forming a universal community, Florentinus actually emphasizes a common bond between all human beings. By stating this common bond, Florentinus may have envisioned a very specific theory regarding the manner in which the universal community comes into being and is maintained. Stoic ethical doctrine sees the emergence of a community as a natural impulse, stemming from perceiving the 'first parts of the self' (τὰ πρῶτα κατὰ φύσιν) after birth.[56] When in the course of one's life one's faculty of reason develops,

50. Levy, *Natural law in Roman thought*, p. 10. Levy describes the difference between *naturalis ratio* and *ius gentium* as: 'The one stated the fact of universal usage, the other its motivation.'

51. Stein, *Naturalis ratio*, p. 314. Arguably, (Levy, *Natural law in Roman thought*, p. 10) '*naturalis ratio* never obtained an organic status in their (the Romeinse jurists, JG) reasoning' and (Kaser, *Ius gentium*, p. 79) '(...) die beide *ius*-Begriffe bei ihnen keine Systemfunktion zu erfüllen haben.' However, in the Institutes both terms appear to be constantly used and related in this sense, the sense stated in Gai. Inst. I,1.

52. *Legibus populorum quibus in singulis civitatibus res publica continetur*: P.A. Vander Waerdt, "Philosophical influence on Roman jurisprudence? The case of Stoicism and natural law", in: *ANRW* 36.7, Berlin/New York 1994, p. 4882-4883; self-defence in Cicero: *Pro Milone* IV,10, *De Inventione* II,161; self-defence as *naturalis ratio* in Gaius: D. 9,2,4 (also: Stein, *Naturalis ratio*, p. 313). Self-defence as a part of *ius naturale* by Cassius in Ulpian D. 43,16,1,27: Waldstein, *Entscheidungsgrundlagen*, p. 85.

53. Vander Waerdt, *Philosophical influence on Roman jurisprudence?*, p. 4883 (nt. 127): vgl. Cicero, *De legibus* I,28-30, in the rest of the text Cicero actually presents *ius civile* as *naturalis*.

54. Bv. Gai. Inst. III,154: *sed ea quidem societas, de qua loquimur, id est, quae nudo consensu contrahitur, iuris gentium est; itaque inter omnes homines naturali ratione consistit.*

55. Pohlenz, *Die Stoa* I, p. 264; Schrage, *Libertas est facultas naturalis*, p. 41; L.C. Winkel, "Die stoische οἰκείωσις-Lehre und Ulpians Definition der Gerechtigkeit", *SZ r.A.* 105 (1988), p. 677-678, and Vander Waerdt, *Philosophical influence on Roman jurisprudence?*, p. 4890-4891.

56. Pohlenz, *Die Stoa* I, p. 114; C.O. Brink, "Οἰκείωσις and οἰκειότης. Theophrastus and Zeno on nature in moral theory", *Phronesis* I (1956), p. 143.

this perception of self evolves from protection of one's own person, to care of one's offspring, and eventually care for other people.[57] The name of this process is οἰκείωσις, in which a kinship and eventually a shared justice[58] among the whole human community is built.[59] Cicero translates the process in Latin as *commendatio* en *conciliatio*, and Florentinus may have referred to the process in his text.[60]

Although Cicero may have functioned as an inspiration to several second-century jurists, the question remains whether these jurists reflect a purely Stoic ethical doctrine in their texts. This has to do with an eclectic tendency both in Cicero and the later classical Roman jurists.[61] The literature stresses the importance of Ulpian's subdivision of *ius naturale*, *ius gentium* and *ius civile* for the possibility of the existence of a precursor to the modern idea of human rights in Roman law.[62] In D. 1,1,1,3, the jurist applies the *ius naturale* to all living beings, contrary to the Stoic conception that argues for rationality shared solely amongst humans.[63] According to Wagner, Ulpian's subdivision would rather reflect conceptions from Justinian's era: in stating

57. Pohlenz, *Die Stoa* I, p. 115.

58. Porphyry, *De abstinentia* III,19 (SVF I,197).

59. The process from self-perception to care for one's offspring to justice is described by Brink, *Οἰκείωσις and οἰκειότης*, p. 135-139, E.G. Pembroke, "Oikeiosis", in: *Problems in Stoicism* (ed. A.A. Long), London 1996, p. 122-125 and T. Engberg-Pedersen, *The stoic theory of oikeiosis. Moral development and social interaction in early Stoic philosophy*, Aarhus 1990, p. 122-126. The development of the theory was almost certainly influenced by the Peripatos (Brink, *Οἰκείωσις and οἰκειότης*, p. 144; Winkel, *Ulpians Definition der Gerechtigkeit*, p. 675-676) and the Sceptic Academy (Pembroke, *Oikeiosis*, p. 123). I will not treat the origins of the theory, for this see Pembroke, *Oikeiosis*, p. 132-141 and Winkel, *Ulpians Definition der Gerechtigkeit*, p. 675-676. However, even though both the Peripatos and Stoa reason from 'kinship' (for example, Brink, *Οἰκείωσις and οἰκειότης*, p. 126), Stoic *οἰκείωσις* leads to stronger ethical duties than the more biologically flavoured Peripatetic *οἰκειότης*: Pohlenz, *Die Stoa* I, p. 115; R. Sorabji, *Animal minds and human morals. The origins of the Western debate*, Ithaca, NY 1993, p. 122-133.

60. Cicero, *De officiis* I,149. Moreover, Cicero, *De finibus* III,21 and III,63: Winkel, *Ulpians Definition der Gerechtigkeit*, p. 674, p. 677-678.

61. For instance, Winkel, *Einige Bemerkungen*, p. 448.

62. Primarily Gaudemet, *Des droits de l'homme*, p. 108; Gaudemet, *Des "droits de l'homme"*, p. 181-182; Honoré, *Les droits de l'homme*, p. 238-240; and Talamanca , *L'antichità*, p. 69-70.

63. Also: Voigt, *Ius naturale* I, p. 258-260 (Pythagoras); Pohlenz, *Die Stoa* I, p. 263 (Theophrastus and the neo-Pythagoreans); Levy, *Natural law in Roman thought*, p. 16; Nörr, *Rechtskritik*, p. 80, nt. 150 (Peripatos); Schrage, *Libertas est facultas naturalis*, p. 43-44, nt. 4; Winkel, *Ulpians Definition der Gerechtigkeit*, p. 678 (Theophrastus); Vander Waerdt, *Philosophical influence on Roman jurisprudence?*, p. 4892; U. Manthe, "Beiträge zur Entwicklung des antiken Gerechtigkeitsbegriffes II: Stoische Würdigkeit und die iuris praecepta Ulpians", *SZ r.A.* 114 (1997), p. 14-22.

his categories, Ulpian does not only deviate from Gaius, but also from the thought of contemporary jurists such as Marcian and Tryphoninus, who do not seem to fundamentally distinguish between *ius naturale* and *ius gentium*.[64] In any case, not unlike with regard to Cicero, it is possible to argue for elements that are specifically Stoic or inspired by Stoicism in various texts of the Roman jurists. These seem to primarily be those texts in which the jurists express themselves in a more reflective manner. For example, Ulpian's definition of *iustitia* is similar to Cicero's in *De inventione* II,160.[65] Both definitions probably reproduce the Latinized version of the Stoic definition of justice (δικαιοσύνη).[66] Yet, defining justice as 'to each his own' cannot be attributed solely to Stoic ethical doctrine.[67] Then again, one text provides an indication that Ulpian employs Stoic sources for his definition, namely the definition of *ius gentium* in D. 1,1,1,4.[68]

Since a shared rational nature is unique to mankind, in Stoic ethical doctrine *ius* and therefore justice is only shared amongst humans. The matter whether Ulpian's definition of justice actually has a background in Stoicism thus depends on the question whether the jurist who applies justice conforms to Stoic ethical doctrine, meaning with regard to all human beings without exception.[69] From a viewpoint of consistency, the same should be valid in Gaius and Florentinus.[70] To test this hypothesis, we shall look at

64. Wagner, *Studien*, p. 135-139, 144-150: D. 1,1,6pr. would reflect the thought of Ulpian himself; *naturali vel gentium* separated from the *ius civile*.

65. Ulpian adds *voluntas* to the definition, and replaces *dignitas* with *ius*; D. 1,1,10pr.: *Iustitia est constans et perpetua voluntas ius suum cuique tribuendi*. See, for example, F. Senn, *De la justice et du droit. Explication de la definition traditionelle de la justice*, Paris 1927, p. 19-39.

66. Compare Aristo of Chios in Galenus, SVF I,374; Cicero, *De legibus* I,19; Arius Didymus in Stobaeus, *Eclogae* II,84 (SVF III,125); II,59 (SVF III,262): Schulz, *Prinzipien*, p. 58; Waldstein, *Zu Ulpians Definition der Gerechtigkeit*, p. 214-215; Winkel, *Ulpians Definition der Gerechtigkeit*, p. 672-673.

67. A similar shared tradition with the Peripatos is in play here. Compare, for instance, *Rhetorica ad Herennium* 3,3; Winkel, *Ulpians Definition der Gerechtigkeit*, p. 672; Manthe, *Entwicklung*, p. 8-12.

68. *Ius gentium est, quo gentes humanae utuntur. Quod a naturali recedere facile intellegere licet, quia illud omnibus animalibus, hoc solis hominibus inter se commune sit*: Winkel, *Ulpians Definition der Gerechtigkeit*, p. 678.

69. Winkel, *Einige Bemerkungen*, p. 447-448: Cicero, *De finibus* III,67 (SVF III,371) and, on the other hand, Cicero, *De re publica* III,19.

70. Taking the references to *libertas naturalis* in Gaius en Florentinus by Talamanca, *L'antichità*, p. 72-75 into account. But these do not necessarily have to contradict a Stoic influence. Compare, for example, M.F. Laferrière, *De l'influence du stoïcisme sur la doctrine des jurisconsultes romains*, Paris 1860, p. 20: Cicero, *De finibus* III,19 and Seneca, *Epistula* 4 on *vis* and *lex naturae*, even though these do not entail a large measure of 'humanity'. Critically: Wagner, *Studien*, p. 136.

forms of legal protection for individuals as practical applications of this theory of justice. Stoic ethical doctrine itself provides the ground for this method, seeing that the Stoic theory of justice is aimed at the individual rather than the community.[71]

The legal position of free non-citizens

Research into possible precursors for the modern idea of human rights in classical Roman law has mainly been conducted with regard to the legal position of slaves. Yet, if a philosophical concept of equality did manifest itself in a legal order, other groups of legal subjects would have been affected. For example, scholars have pointed to Ulpian denying animals the faculty of proper conduct due to their lack of reason.[72] Nor has the legal position of non-citizens garnered much attention in this respect. This seems curious, since generally speaking the development of the legal position of this group shows some similarities to specific aspects of Stoic ethical doctrine.[73] Lombardi, Villey, Gaudemet, and Bauman have all argued for a more direct connection between the notion of *ius gentium* and the modern idea of human rights.[74] Mainly this is due to *ius gentium* entailing a law common to all human beings.[75] In classical Roman law, there appear to be two periods in which the sources stress this meaning. The first period concerns the late Republic. Cicero relates the *ius gentium* as the law governing a *consociatio humana* to the office of the *praetor peregrinus*.[76] Developed primarily by the *maiores* such as Quintus Mucius Scaevola,[77] this idea was probably widespread among the jurists of the 1st century BC.[78] According to Nörr, the idea has no clear precursor in Greek philosophy.[79] The second period commences

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71. Winkel, *Ulpians Definition der Gerechtigkeit*, p. 672, and the examples in Waldstein, *Zur Ulpians Definition der Gerechtigkeit*, p. 221-225.

72. In D. 9,1,1,3: Wagner, *Studien*, p. 135-137; Kaser, *Ius gentium*, p. 72-73; Sorabji, *Animal minds*, p. 115-116: the text does not state *sensus* as instinct, but rather λόγος. Compare, on the other hand, D. 9,1,1,7: Honoré, *Ulpian*, p. 82.

73. For instance, E. Weiss, *Ius gentium*, RE X, 1221 (1919): SVF III, 327-329.

74. G. Lombardi, "Diritto umano e 'ius gentium', *SDHI* 16 (1950), p. 254-257; Villey, *Note critique*, p. 700-701; Gaudemet, *Des "droits de l'homme"*, p. 109; R.A. Bauman, *Human rights in Ancient Rome*, London 2000, p. 29-30.

75. Kaser, *Ius gentium*, p. 4-5.

76.F. Wieacker, *Römische Rechtsgeschichte* I, München 1988, p. 444; M. Ducos, *Les romains et la loi. Recherches sur les rapports de la philosophie grecque et de la tradition romaine à la fin de la République*, Paris 1984, p. 261.

77. *De officiis* III,70: Voigt, *Ius naturale* I, p. 241; Kaser, *Ius gentium*, p.16-17, p. 139-140.

78. Kaser, *Ius gentium*, p. 8.

79. D. Nörr, *Aspekte des römischen Völkerrechts. Die Bronzetafel von Alcántara*, München

in the second century AD with the jurist Gaius: similarities between his thought and Cicero's have been indicated earlier.[80] Possibly, Gaius made use of philosophical conceptions, such as *naturalis ratio*. Ulpian also refers to philosophical notions, particularly in defining *ius gentium* as a *ius quo gentes humanae utuntur*. Finally, in 212 AD by virtue of the *Constitutio Antoniniana* the law reserved for Roman citizens had become the law common to all known peoples.

With regard to the first period, there is a possibility of a relation between the emergence of the notion of a 'common law' or the law in a *consociatio humana*, and the creation or duties of the *praetor peregrinus*.[81] Generally speaking, a Greek influence on the creation and functioning of the office is uncertain, but not impossible.[82] If, for example, the creation of the office was the result of the existence of mutual 'Rechtshilfe' treaties or *symbolae* in the Mediterranean area, certainly there is some reason to suspect a connection with Greek thought: the question then remains whether this influence was carried through Greek law or Greek philosophy. These *symbolae* as an indication for a δίκαιον κοινὸν may even have been an inspiration for early Stoic doctrine.[83] Furthermore, the literature provides instances of praetorian *formulae* possibly containing Stoic ethical doctrine. As a *proconsul Asiae*, Quintus Mucius Scaevola *pontifex* may have incorporated a *formula* with an *exceptio doli*-type clause in the provincial edict,[84] a *formula* transported to Rome by

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1989, p. 116-117; but see L.C. Winkel, "Symbola/Rechtshilfeverträge-Parallele Entwicklungen in Griechenland und Rom?", in: *Festschrift für Rolf Knütel zum 70. Geburtstag* (hrsg. H. Altmeppen, I. Reichard, M.J. Schermaier), Heidelberg 2009, p. 1456.

80. According to Wagner, *Studien*, p. 72, Gaius is the first jurist to do so.

81. Wieacker, *Römische Rechtsgeschichte* I, p. 444-445 ('Die Anwendung eines Weltrechts als solchen lag natürlich dem Fremdenprätor ganz fern. '); Kaser, *Ius gentium*, p. 8 ('Daβ diese Rechtsgedanken auch anderen Völkern nicht fremde sind, erleichtert es den Prätoren, in ihrer Gerichtsbarkeit das *ius gentium* auch auf Peregrine anzuwenden. ').

82. Wieacker, *Römische Rechtsgeschichte* I, p. 381-382; Winkel, *Einige Bemerkungen*, p. 444-445; Winkel, *Symbola/Rechtshilfeverträge*, p. 1449-1457, but compare Van Straaten, *Panétius*, p. 208.

83. E. Weiss, *Ius gentium*, RE X, 1221-1224 (1919); Voigt, *Ius naturale* II, p. 643; Winkel, *Symbola/Rechtshilfeverträge*, p. 1455-1456 : there is evidence of theoretical reflections in an early stage, for instance in Aristotle (σύμβολον περὶ τοῦ μὴ ἀδικεῖν: *Politeia* III 9, 1280a 39) and Theophrastus (possibly writing περὶ συμβολαίων). Moreover, a definition of justice has been transmitted in which ἀρετή (virtue) regards commercial traffic based on *symbolae*: Voigt, *Ius naturale* I, p. 140 (Aristo of Chios in Plutarchus, *Moralia* II,9). Finally, reference can be made to the extensive treatment by Polybius of various treaties, for example those between Rome and Carthage in *Historiae* III,24.

84. Kübler, *Griechische Einflüsse*, p. 87-88: with the goal of strictly defining *fides*, compare. Pohlenz, *Die Stoa* I, p. 264. *Fides* is however used to legitimize breaches of contract: Nörr, *Mandatum, fides, amicitia*, p. 35.

the *praetor* C. Aquilius Gallus.[85] Wagner has critically examined the innovations made by the *praetor* and individual jurists in this period, and came to the conclusion that the sources are insufficiently clear to assume a decisive philosophical influence on the administration and method of magistrates and jurists.[86] Apart from lacking source material, the ad hoc character of the adjudication of Roman magistrates and jurists also seems problematic for more generally determining a legal mentality or inspiration.

In the second period, we do come across a measure with a general effect on the legal position of free non-citizens, the *Constitutio Antoniniana* of 212 AD. This leads Honoré to argue for the *Constitutio Antoniniana* as a legal corollary to the Stoic cosmopolis.[87] As such, the latter notion may also be viewed as a precursor to the modern idea of human rights.[88] According to Pohlenz, the idea of a cosmopolis consists of man not only being a λογικὸν ζῷον, gifted with reason, but also a πολιτικὸν ζῷον, a being functioning in a community.[89] Individual human beings must live in accordance with nature in a general sense: yet, human communities have to conform to their laws (νόμοι) if these are to be regarded as the laws of nature in a general sense. In this theory, nature in a general sense is presented as an all-encompassing community of rational beings, a κοσμόπολις.[90] Thus, two legal orders come into being, the rational legal order of the community of human beings and gods, and the legal orders of the individual πόλεις.[91] In this sense, the idea of a cosmopolis and the notion of *ius gentium* as a law common to all human beings seem related. However, a relation between the idea of a cosmopolis and classical Roman law or the *Constitutio Antoniniana* in particular is problematic. In the course of the second and third centuries AD, specific texts could have contained reflections on the cosmopolitan idea.[92] The first problem is not primarily a credible con-

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85. Cicero, *De officiis* III,60, but see Kübler, *Griechische Einflüsse*, p. 88 and p. 93: the text itself is inconclusive, and the Stoic background of Gallus may be doubted, even though he was a student of Scaevola *pontifex*. The notion of an *exceptio doli*, or *actio de dolo* to legally enforce moral duties appears to have been derived from Stoicism.

86. 'Sekundär': Wagner, *Studien*, p. 20. The same appears to apply to the fiction of citizenship. See Bund, *Untersuchungen*, p. 97-101, p. 124; Wagner, *Studien*, p. 65, nt. 1: mostly dealing with the application of 'πολιτικοὶ νόμοι'.

87. Honoré, *Ulpian*, p. 84-85; similarly, Stuurman, *Uitvinding*, p. 139.

88. Honoré, *Les droits de l'homme*, p. 241-243; Honoré, *Ulpian*, p. 84-85.

89. Or a κοινωνικὸν ζῷον: Pohlenz, *Die Stoa* I, p. 115.

90. Pohlenz, *Die Stoa* I, p. 133-139.

91. Compare Pohlenz, *Die Stoa* I, p. 133, p. 137.

92. Apart from the texts of Gaius and Ulpian, see primarily (Chrysippus in) Marcianus D. 1,3,2: Pohlenz, *Die Stoa* I, p. 132-133; Schrage, *Libertas est facultas naturalis*, p. 34; M. Gigante, *Nomos basileus*, New York 1979, p. 265, nt. 2; Kaser, *Ius gentium*, p.16-17, p. 139-

nection between certain texts and the idea of a cosmopolis, but rather the academic character of these texts.[93] Moreover, both the effect and motive of the enactment of the *Constitutio Antoniniana* are debatable.[94] Finally, even if a connection between classical Roman law and the idea of a cosmopolis as I have described it existed, the idea seems to suggest a more abstract relation between a cosmopolis and the legal orders of the individual πόλεις. The relevant sources do not provide a definitive answer to the question whether they concern a more abstract division between 'general' and 'local' laws. It remains unclear if an effect was envisioned on the concrete legal position of free non-citizens.

On the other hand, the *Constitutio Antoniniana* actually may have confirmed an earlier development on the level of the *civitates*[95] and the legal position of free non-citizens.[96] This development had already been manifested in law long before 212 AD,[97] and shows parallels with the idea of a cosmopolis. In the Roman sources, the idea of a cosmopolis is attested in the late Republic by Cicero and Arius Didymus,[98] and in the course of the Empire by Seneca,[99] Marcus Aurelius,[100] and the Sophist philosophers Aelius Aristides

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140; P. Mitsis, "The Stoic origin of natural rights", in: *Topics in Stoic philosophy* (K. Ierodiakonou), Oxford 2001, p. 163-164; Honoré, *Ulpian*, p. 88: SVF III,314; Long/Sedley 67R.

93. Wieacker, *Römische Rechtsgeschichte* I, p. 444, characterized as 'academic', but discussed on p. 488, p. 511 etc.Various spheres of influence are treated on p. 642-662.

94. Concerning the precursor to the modern idea of human rights, see mainly Talamanca, *L'antichità*, p. 69-75.

95. For example, sparing the local legal orders, e.g. Voigt, *Ius naturale* II, p. 786-829; Nörr, *Imperium und Polis*, p. 28.

96. A.N. Sherwin-White, *The Roman citizenship* (2nd. ed.), Oxford 1973, p. 392-393. For an emphasis on social class rather than citizenship, see Winkel, *Einige Bemerkungen*, p. 104; F. Wieacker, J.G. Wolf, *Römische Rechtsgeschichte* II, München 2006, p. 165; K. Buraselis, *Theia dorea (Das göttlich-kaiserliche Geschenk). Studien zur Politik der Severer und zur Constitutio Antoniniana*, Wien 2007, p. 195-196.

97. Mostly by expanding citizenship and forms of legal protection, because the *praetor peregrinus* made specific parts of the *ius civile* accessible to *peregrini*; by granting Roman citizenship to *civitates* or their individual inhabitants; and by establishing Roman magistratures charged with governing and adjudicating in the provincial *civitates*.

98. M. Schofield, *The Stoic idea of the city*, Chicago 1999, p. 64-67; Cicero, *De natura deorum* II,154; *De legibus* I,22-23; Arius Didymus in Eusebius of Caesarea, *Praeparatio evangelica* 15,15. The texts in SVF III,308-348 (*De iure et lege*) and Long/Sedley 67 (primarily 67 H-L, R en S) all seem to carry this connotation, such as Cicero, *De re publica* III,33 (SVF III,325, Long/Sedley 67S). Chrysippus probably invented the idea. Panaetius does not mention it: Van Straaten, *Panétius*, p. 203-211; M. Goulet-Cazé/B. von Reibnitz, *Kosmopolitismus*, NP 6, 779 (1996): '...einen Schritt zürück...'.

99. Seneca, *De otio* 4: Schofield: *The Stoic idea*, p. 93.

100. *Τὰ εἰς ἑαυτὸν* IV,4: Schofield, *The Stoic idea*, p. 68, nt. 13; Pohlenz, *Die Stoa* I, p. 351.

and Dio Chrysostomos.[101] Several authors have argued for a relation between the idea of a cosmopolis and the development of a legal position particular to free non-citizens in various periods during the Republic and Empire.[102] The literary sources of the late Republic, for instance, point to a *societas humana* constructed and based on an idealized constitution transmitted via Polybius and Panaetius in the first century BC to Rome, and specifically to Cicero's works, *De re publica* and *De legibus*.[103] Gaudemet considers this development to be an indication for the existence of a possible precursor to the modern idea of human rights, since this allowed for the qualification of 'part of the law of the *societas humana*' to be given to certain legal notions, such as the *bonae fidei iudicia*.[104] This development was then carried through to the third century AD. For example, Bauman in his work on human rights in ancient Rome refers to an interesting text in the *Panegyricus Romae*: in the text, the second century orator, Aelius Aristides, considers specific Roman legal institutions, as well the division between social classes rather than citizens and non-citizens, to belong to a δίκαιον κοινὸν as part of a cosmopolis. Also, the text appears to mention a legal action accorded to residents of local *civitates* in the provinces in the case of abuse of power by a Roman magistrate.[105]

Nörr, however, views the ideological value of the idea of a cosmopolis in the development of Roman law in general, and Aelius Aristides in particular, with skepticism.[106] This skepticism is due to the connection between the

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101. *Λόγος Βορυσθενίτικος* 21-26: Schofield, *The Stoic idea*, p. 57-64. Compare Cassius Dio in Aelius Aristides in Voigt, *Ius naturale* II, p. 786-788.

102. Honoré, *Ulpian*, 88-93; and Buraselis, *Theia dorea*, p. 47-66 regarding Ulpian and Septimius Severus; Wagner, *Studien*, p. 83-98, p. 248-256: negative on a possible influence of the idea on Gaius, particularly his division of *ius gentium* and *ius civile*, and a relation to the *Constitutio Antoniniana*, but see p. 235-236: there seems to have been a measure of equal treatment of free non-citizens before the law; F. Casavola, *Giuristi Adrianei*, Napoli 1980, p. 56: generally speaking regarding the jurists in Hadrian's era. Similar statements could be made on the penal actions accessible through the praetor and the fiction of citizenship: T.J. Chiusi, "Das Bild des Fremden in Rom. Juristische Mosaiksteine", in: *Menschenrechte und europäische Identität-Die antiken Grundlagen* (K.M. Girardet, U. Nortmann), Stuttgart 2005, p. 72-80.

103. Van Straaten, *Panétius*, p. 203-211, see Cicero, *De re publica* I,34 (fragm. 119 on p. 367); Pohlenz, *Die Stoa* I, p. 204-207, p. 269; Ferrary, *Philhéllenisme et impérialisme*, p. 351, p. 363-381: with philosophical eclecticism and Ciceronian invention playing a part. Compare Polybius, *Historiae* VI: Astin, *Scipio Aemilianus*, p. 288-293.

104. Gaudemet, *Des "droits de l'homme"*, p. 109.

105. Bauman, *Human rights*, p. 96. In the edition of R. Klein, *Die Romrede des Aelius Aristides*, Darmstadt 1983: Aelius Aristides, *Panegyricus Romae* 59, 65 and 102.

106. D. Nörr, "Imperium und Polis in der hohen Prinzipatszeit," in: *Historiae Iuris Antiqui* I (T.J. Chiusi, W. Kaiser, H.-D. Spengler), Goldbach 2003, p. 387-395: the idea of a cosmopolis in Aelius Aristides should be seen as an excuse for the Roman expansion towards the Eastern *civitates liberae*.

idea of a cosmopolis and the Emperor as the ruler of the known world by Aelius Aristides, Dio Chrysostomos and perhaps Marcus Aurelius himself. The power of the Emperor is without limits: it is curbed only by his personal character, not through legal regulations.[107] As such, the existence of a modern idea of human rights seems structurally at odds with the procedure conducted by or on behalf of the Emperor, the *cognitio extra ordinem*. For example, Gaudemet and Bauman state the relevance of the notion of *humanitas* in the Imperial chancery for the existence of a precursor for the modern idea of human rights. Possibly the notion is rooted in Greek philosophy,[108] possibly the choice for this specific term serves to indicate the philosophical inspiration of a jurist or Emperor.[109] Yet, applying *humanitas* in the *cognitio extra ordinem* is limited to what Mommsen terms the 'monarchistische Willkür' of the magistrate, instead of a constitutional framework stated by Pugliese and Crifò as a prerequisite for a possible precursor to the modern idea of human rights.[110]

Early on, Seneca discusses the notion of Stoic moral duties as limiting the power of the Emperor in the *cognitio extra ordinem* procedure.[111] Following Wirszubski, I could take this a step further and suggest that the emphasis in Seneca on natural rights, *ius humanum*, *ius animantium* etc. is an aspect of the deterioration of the legal guarantees against the Roman government, at least those afforded to Roman citizens.[112] In that regard, the Stoic connotation of notions such as natural law and *humanitas* not only does not lead to as-

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107. Ch. Wirszubski, *Libertas as a political idea at Rome during the late republic and the early principate*, Cambridge 1950, p. 130-136, p. 168, discussing Plinius's *Panegyricus* to Trajanus.

108. See I. Heinemann, *Humanitas*, RE Suppl. V, 284 (f.) (1931), W. Schadewaldt, "Humanitas Romana", in: *ANRW* I.4, Berlin/New York 1973, p. 45, p. 50, p. 57, p. 59 and the Stoic definition in SVF III,292 (Clemens of Alexandria, *Stromata* II). Similarly, *clementia* and φιλανθρωπία in Seneca may be seen as synonymous: T. Adam, *Clementia principis. Der Einfluß hellenistischer Fürstenspiegel auf den Versuch einer rechtlichen Fundierung des Principats durch Seneca*, Stuttgart 1970, p. 35-36; M. Griffin, *Seneca. A philosopher in politics*, Oxford 1992, p. 149.

109. Compare F. Pringsheim, "The legal policy and reforms of Hadrian", in: *Gesammelte Abhandlungen*, Heidelberg 1961, p. 91-93; P. Noyen, "Princeps prudentissimus et iuris religiosissimus", *RIDA* 3me série 1 (1954), p. 350-371.

110. For example, this term would indicate the emergence of a more rhetorical, but also more auotcratic style in the imperial constitutions from Hadrian on: E. Vernay, "Note sur le changement de style dans les constitutions impériales de Dioclétien a Constantin", in: *Études Girard* II, Paris 1913, p. 263-267.

111. Wirszusbski, *Libertas*, p. 150-153; Griffin, *Seneca*, p. 154-171. This is a position in between K. Büchner, "Aufbau und Sinn von Senecas Schrift über die Clementia", *Hermes* 98 (1970), p. 210-215, p. 222-223 and Adam, *Clementia principis*, p. 26, p. 97.

112. Wirszubski, *Libertas*, p. 146-147: 'The constitutional implications of the right of man materialized only after many centuries.'

suming a precursor to the modern idea of human rights in the Roman legal order, but even contradicts it. Then, Talamanca is right in stating that even in later legal texts these notions do not imply legal protection.[113] However, two remarks need to be made: firstly, even though Wirszubski indicates the period of Seneca in the first century AD as a turning point, the Romans had already created their more or less constitutional framework in the first century BC. It is an open question whether opinions such as Seneca's arrived too late or too early on the scene to influence this framework.[114] The idea of a cosmopolis and *ius gentium* as the law governing a *consociatio humana* had been formulated in Rome in the late Republic, and probably before that. Secondly, the sources confirm a measure of equality before the law in the Imperial *cognitio extra ordinem* between citizens and free non-citizens, and even between citizens and slaves. If this is evidence of an influence of the idea of a cosmopolis, then this equality was maintained, albeit not adapted, in a significant manner, and was perhaps promoted by subsequent Emperors. The relation is dependent on the existence of similarities between the general legal order in the Roman Empire and the exact content of the idea of a cosmopolis, possibly from the creation of the constitutional framework on. Therefore, further research into the content of the idea of a cosmopolis and its relation to the Roman general legal order is necessary to determine the existence of a possible precursor to the modern idea of human rights in Roman law.

The legal position of slaves

The discussion surrounding possible constitutional effects of natural rights as precursors to the modern idea of human rights has primarily been conducted with regard to the legal position of slaves.[115] Several Roman legal notions exist that are perhaps exemplary for the existence of an idea of natural equality, and are relevant for a possible precursor to the modern idea of human rights, such as the *favor libertatis* and the *actio iniuriarum*.

113. Talamanca, *L'antichità*, p. 50-51. Compare D. Nörr, *Die Fides im römischen Völkerrecht*, Heidelberg 1991, p. 35: 'Die Suche nach der richtigen Entscheidung in einer konreten Situation wird nicht so sehr durch Gerechtigkeitsprinzipien bestimmt als durch das Bestreben, die jeweilige Entscheidung als Bestandteil der Überlieferung (*mos maiorum*) zu legitimieren.'

114. Wirszubski, *Libertas*, p. 147.

115. Compare the nineteenth-century discussion between. Laferrière, *De l'influence du stoïcisme*, p. 26-28 and A.P.Th. Eyssell, "De stellingen van den heer Laferrière, omtrent den invloed van de Stoische wijsbegeerte op het Romeinsche Regt onderzocht", *Nieuwe Bijdragen voor Regtsgeleerdheid en Wetgeving* 11 (1861), p. 308-314.

Indeed, it seems these legal notions in the literature have led to presuming the presence of a legal corollary to an idea of equality. Moreover, several Roman jurists seem to be of the opinion that slaves share in a concept of natural reason. This follows from certain legal texts I have referred to previously in this article, for instance Brutus in *De officiis* I, 22/D. 7,1,68pr. A Stoic conception of reason entails the faculty to perform or be subjected to moral duties.[116]. Similarly, this conception may have had a legal pendant in Javolenus D. 35,1,40,3. I shall even go as far as to say that Roman jurists deemed that notions of law and justice were also applicable to slaves. Texts by Florentinus (D. 1,5,4pr.-1) and Ulpian (D. 1,1,4; D. 1,1,10) appear to provide some ground for this assumption.

The difficulties regarding a philosophical influence on the legal position of slaves are highly comparable to a similar influence on the legal position of free non-citizens. Generally speaking, one objection is the academic character of the references to certain philosophical concepts in the texts of the Roman jurists, or, even when these are given a substantial effect, the lack of a legal connotation. Rather, it seems the jurists mean to state moral qualifications given in individual cases. Therefore, my research results mostly confirm what has already been offered concerning the philosophical references in the works of the Roman jurists.[117] Similar problems to those associated with a philosophical influence on the legal position of free non-citizens emerge when looking into a philosophical influence on the actions of specific magistrates. For example, I could ask whether certain magistrates saw themselves as bound to ethical notions such as *humanitas* and *pietas*, and therefore felt justified in providing legal protective measures to slaves. In the Republic, the sources on the administration of the offices of the censor[118] and the *praetor*[119] do not confirm this thesis. However, from the late Republic on these ethical

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116. Pohlenz, *Die Stoa* I, p. 115, p. 135-136.

117. Primarily Talamanca, *L'antichità*, p. 50-51.

118. Research has been conducted into the relation between the *censor* Scipio Aemilianus and the philosopher Panaetius: Astin, *Scipio Aemilianus*, p. 302-306; Schrage, *Libertas est facultas naturalis*, p. 38-39; Ferrary, *Philhéllenisme en impérialisme*, p. 515-516, but see also p. 589-610: this does not have to lead to the existence of a 'Scipionic circle'. On Scipio Aemilianus as *censor*, see J. Suolahti, *The Roman censors: A social study*, Helsinki 1963, p. 393-397; Astin, *Scipio Aemilianus*, p. 115-124 and the texts on p. 253-257. Scipio's attacks and measures on luxury may have been inspired by Stoic philosophy, but could also be explained through upholding *mores maiorum*: p. 117-118. *Humanitas* does not appear to feature in Panaetius: Van Straaten, *Panétius*, p. 174-176 (*studia scientiae cognitionisque*); J. H. Waszink, *Humanitas*, Leiden 1946, p. 11-16. However, see also I. Heinemann, *Humanitas*, RE Suppl. 5, 293-296 (1931); Van Straaten, *Panétius*, p. 178-179; Schadewaldt, *Humanitas*, p. 52-61 and the statement of Griffin, *Seneca*, p. 178-181.

119. As stated by Schulz, *Prinzipien*, p. 146.

notions, whether or not philosophically inspired, may have been employed in a legal context as *mores maiorum*. Moreover, from Hadrian on these notions may have been applied to the relation between master and slave.[120]

As is the case with *humanitas* afforded to free non-citizens, this seems of lesser importance for the existence of a precursor to the modern idea of human rights than for instance Bauman holds.[121] In Crifò, Stoicism as an ethical doctrine focused on moral duties is the primary inspiration for a system of social imperatives functioning comparable to modern human rights in the Roman era. Yet, even if by their usage and content these notions are indicative of a general philosophical influence, Talamanca's criticism that these notions did not result in the creation of forms of legal protection hits home.[122] On the other hand, through these notions access to the legal procedure was given where this would not have been ordinarily possible. Perhaps the best example of this is the concept of *favor libertatis*.

Concurrently to the development of the legal position of free non-citizens, the existence of more general legal measures on the legal position of slaves should be deemed crucial, rather than the decisions of individual jurists or magistrates. This conforms to the emphasis Pugliese and Crifò place on the relation between a constitutional framework and a possible precursor to the modern idea of human rights in classical Roman law. Based on research into the legal position of slaves within this constitutional framework, I have made several distinctions, primarily one between the legal position of slaves with regard to the master, and vis-à-vis third parties, apparently from early on mainly various magistrates.[123] Furthermore, I refer to the difficulties concerning the difference indicated by Buckland between the slave as a legal subject or *persona*, and the humane treatment of slaves before the law.[124] A third distinction entails slaves as legal subjects or *persona* in the sense of culprits, victims, and arguably parties in specific legal procedures. I have provided examples of texts indicating the existence of each of these ways in which slaves appear as legal subjects. At this point, I could reiterate these examples, and judge their philosophical background.

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120. Knoch, *Sklavenfürsorge*, p. 64-89, p. 229-232, p. 240-249.

121. Apart from Bauman, *Human rights*, p. 20-21, p. 32-48, p. 68-71, p. 96-99 see also R.A. Bauman, "'The Leges iudiciorum publicorum' and their interpretation in the Republic, Principate and Later Empire", in: *ANRW* II.13, Berlin/New York 1980, p. 166-179.

122. Crifò, *Prospettiva*, p. 263-266.

123. For example, F.X. Affolter, *Die Persönlichkeit des herrenlosen Sklaven*, Leipzig 1913, p. 82f: somewhat related to the difference in position between the *ius privatum* and *ius publicum*.

124. W.W. Buckland, *The Roman law of slavery*, Cambridge 1908, p. 2. Also: Schulz, *Prinzipien*, p. 146-147.

However, this has been done before in the literature, with mixed results.[125] Furthermore, even when this would prove an unequivocal bond between law and philosophy, it still does not lead to the existence of a precursor to the modern idea of human rights per se. Another possibility is to regard the recognition of slaves as a legal subject or *persona* as a – not necessarily progressive – development. Then, the various ways in which Roman legal texts present the position of the slave should be considered as interrelated.

Several authors suggest a development in an expansive legally sanctioned humane treatment of slaves by their masters, and an influence of Stoic ethical doctrine on various jurists and Emperors in this context.[126] Pringsheim and Casavola, for example, relate this development to the creation of more general limitations on the rights of owners, particularly done during and after the reign of Hadrian in the second century AD.[127] In turn, Honoré connected these limitations to a precursor to the modern idea of human rights in Ulpian's works, due to his discussion of several rescripts of Hadrian and Antoninus Pius in *Duties of proconsul*.[128] In the light of the existing literature with regard to the legal position of slaves in Roman law, the starting point for the expansion of forms of legal protection afforded to slaves has to lie somewhere in the early Empire.[129] Inasmuch as in the course of the Republic the *nota censoria* should be regarded as a sanction in the context of legal proceedings, the sources do not provide enough ground to assume the *nota* at any point had been used for the legal protection of slaves. On the other hand, the role of the *SC Silanianum* which is often regarded as the prime

125. Concerning the discussion surrounding a Stoic influence on the application of the *actio iniuriarum* to the physical abuse of slaves and the development of a procedure *ad statuam confugere*: *actio iniuriarum*; in favour: J.H. van Meurs, "Iniuria ipsi servo facta", *Tijdschrift voor Rechtsgeschiedenis* 4 (1923), p. 285-286; Honoré, *Ulpian*, p. 85-88; opposed: R. Wittmann, "Der Entwicklungslinien der klassischen Injurienklage", *SZ r.A.* 90 (1974), p. 339; M. Hagemann, *Iniuria: von den XII-Tafeln bis zur Justinianischen Kodifikation*, Köln/Weimar/Wien 1998, p. 84-87; the rescript of Antoninus Pius in Gaius, *Institutiones* I ,53; in favour: Van Meurs, *Iniuria ipsi servo facta*, p. 293-294; D. Liebs, *Römisches Recht* (6. Auflage), Göttingen 2004, p. 162-163; opposed: Hagemann, *Iniuria*, p. 86, R. Gamauf, *Ad statuam licet confugere*, Frankfurt/Berlin/Bern/New York/Paris/Wien 1999, p. 122-126.

126. For instance, W.L. Westermann, *The slave systems of Greek and Roman antiquity*, *Memoirs of the American Philosophical Society* vol. 40, Philadelphia 1955, p. 77-84, p. 116; Kaser, *RPR* I, p. 284.

127. See Pringsheim, *Hadrian*, and Casavola, *Giuristi* as referred to earlier on.

128. Honoré, *Les droits de l'homme*, p. 237, nt. 15 en 16; Honoré, *Ulpian*, p. 86-87.

129. See Vedius Pollio in Seneca, *De clementia* I,18,2; the *lex Petronia* of 19 AD (D. 48,8,11,2) and the edict of Claudius (Suetonius, *Claudius* 25,2). Compare, for example, Westermann, *Slave systems*, p. 109, p. 116-117.

instance of institutionalized cruelty towards slaves is equally doubtful, seeing the difficulties concerning the existence of a *vetus mos* in the Republic, the underlying procedure under the *lex Cornelia de sicariis et veneficis* and other subsequent *Senatus Consulta*. Yet, based on the enactment of the *SC Cottianum*, the creation of a legal position for slaves in public criminal law could be argued. The *senatus consultum* represented in D. 48,2,12,3 appears to state slaves and free men are to be given the same treatment in a public criminal trial. The same complex of legal measures may have given rise to limits on the rights of owners and on the treatment of slaves as culprits. For example, Voigt's reconstruction of the *lex Iulia iudiciorum publicorum*, enacted under Augustus, presents all these aspects as parts of a single body of law.[130] Then again, the method Voigt employs has been subject to criticism.[131]

However, the sources indicate that under Augustus a new regime regarding slaves came into being: in this era, the office of *praefectus urbi* was (re)introduced, and the *cognitio extra ordinem* with a novel form of *appellatio* as a legal procedure was created.[132] Slaves at some point gained a degree of access to both the latter procedures,[133] in which in any case more than before the *tresviri capitales* of the Republic the guilt or innocence of the slave was central. The measure in which it was possible for a slave to be seen as a victim of criminal manslaughter or physical abuse, perhaps related to a procedure before the *praefectus urbi*, is crucial. The sources do not connect the office and the flight to a temple before the third century AD. Yet, the *lex Cornelia de sicariis et veneficis* is certainly applied to the manslaughter of slaves in the second century AD.[134] With regard to the first century AD, an edict of the Emperor Claudius might be relevant, but the edict is probably

130. Since the master is obliged to institute an *accusatio* or *postulatio* against his slave instead of punishing him himself: M. Voigt, *Über die leges Iuliae iudiciorum privatorum und publicorum*, Leipzig 1893, p. 522, based on the *SC Cottianum*, read in conjunction with *Vita Hadriana* 18,7, D. 48,3,2pr. and 48,2,12,4. Therefore, a basis in law could have existed for Augustus intervening in the Pollio case. The *lex Iulia iudiciorum publicorum* did, however, prohibit a slave from accusing his master. O.F. Robinson, "Slaves and the criminal law", *SZ r.A.* 98 (1981), p. 216-217 and L. *Fanizza, Giuristi, crimini, leggi, nell'età degli Antonini*, Napoli 1982, p. 58-59, p. 63-64 suggest not only D. 48,2,12,2 but also the two subsequent texts by Venuleius Saturninus (in any case the *SC Cottianum*) reflect the content of the *lex Iulia iudiciorum publicorum*.

131. P.-F. Girard, "Les leges Iuliae iudiciorum publicorum et privatorum", *SZ r.A.* 34 (1913), p. 299, nt. 1 and recently J. Giltaij, "The problem of the content of the lex Iulia iudiciorum publicorum", *Tijdschrift voor Rechtsgeschiedenis* 81 (2013), p. 507-525.

132. Actually through *leges Iuliae iudiciorum*: Voigt, *Über die leges Iuliae*, p. 488: see Cassius Dio 52, 21.

133. Compare Kaser, *RPR I*, p. 286-287 and texts such as D. 1,12,1, D. 49,1,15 etc.

134. Gai. Inst. III,213.

antedated.[135] Then again, D. 47,10,7,1 does not constitute a decisive counterargument, and may be used to support my thesis depending on the exact content of the text. Even the physical abuse of a slave could have been regarded as a criminal offence at some point. This follows from several texts that are often referred to in the literature, such as Antoninus Pius in Gai. Inst. I,53. Paramount is the terminology these texts employ as regards punishable behaviour towards slaves, primarily flagellation *contra bonos mores* and castration. As such, a solid connection between punishing these types of behaviour towards slaves and an institutionalized procedure before the *praefectus urbi* could be the closest we get to a precursor to the modern idea of human rights in classical Roman law.

Then again, this does not mean a philosophical influence played a part in making this behaviour punishable or shaping the procedure before the *praefectus urbi*. In a general theoretical sense, Stoic ethical doctrine probably frowned upon killing a slave.[136] Seneca then connects an institutional legal protection of slaves in the early Empire to philosophical doctrine in *De beneficiis* III,22,3. According to Griffin, the text presents a reversed relation between law and philosophy: Seneca uses the procedure before the *praefectus urbi* to prove a philosophical line of thought, instead of the other way around. Thus, both law and practice would exceed what the contemporary philosophical writings suggest concerning a humane treatment of slaves.[137] This raises the question what exactly Stoic ethical doctrine advises on the treatment of slaves. In his article on the matter, Manning reasons from two starting points in Stoicism; there are no slaves by nature, since all human beings are endowed with reason, and the juxtaposition of slavery and freedom is a paradox, because only the wise man is truly free.[138] Consequently, for the treatment of slaves by their masters, Stoic ethical doctrine presents the slave primarily as a day labourer for life.[139] The value of this qualifica-

135. In Suetonius, *Claudius* 25.2: Th. Mommsen, *Römisches Strafrecht*, Graz 1899, p. 617; Buckland, *Roman law of slavery*, p. 36; E. Volterra, "Intorno a un editto dell'imperatore Claudio", in: *Scitti Giuridici* II, Napoli 1991, p. 417-431, p. 424-425; B. Santalucia, *Diritto e processo penale nell'antica Roma* (2a ed.), Milano 1998, p. 210, nt. 80.

136. For example, Cicero, *Paradoxa Stoicorum* 22-25, as part of the paradox *omnia peccata paria esse*.

137. Griffin, *Seneca*, p. 261.

138. C.E. Manning. "Stoicism and slavery in the Roman Empire", in: *ANRW* II.36.3, Berlin/New York 1989, p. 1520-1523, Philo in SVF III,352 and Diogenes Laertius in SVF III,355 respectively. Cicero and Seneca also relate both starting points.

139. *Perpetuus mercennarius*: Manning, *Stoicism and slavery*, p. 1523. Apart from Seneca, *De beneficiis* III,22,1, also Cicero, *De officiis* I,41.

tion is debatable,[140] however, and adherents to Stoicism probably included the relation between master and slave more generally in their discussions of justice.[141] The sources before Seneca suggest various positions. Posidonius probably frowned upon excessive cruelty of masters towards their slaves, whereas when grain is expensive, Hecato is of the opinion that *utilitas* as a moral duty supersedes a *humanitas* in feeding slaves, and, moreover, the philosopher values the lives of expensive horses higher than cheap slaves.[142] As such, Seneca's conception of the existence of mutual *beneficia* between master and slave seems a change with regard to a previous doctrine. On the other hand, the texts indicate the discussion on these moral duties had taken place before Seneca in similar terms.

After Seneca we lack the sources on a philosophical development that admonished masters to treat their slaves well. Seeing the texts in the SVF in the third book, the title *De nobilitate et libertate* mostly contains texts of Philo of Alexandria and Dio Chrysostomos, in which the inexistence of slaves by nature and the paradox of slavery and freedom are discussed.[143] Similar conclusions could be drawn regarding Epictetus and Marcus Aurelius.[144] Because the law on the matter is ambiguous, Manning states that the magistrates favouring a humane treatment of slaves in the legal texts is primarily the result of considerations of public order and the interest of slave owners.[145] Only through certain specific legal suppositions, such as the inexistence of slaves by nature, could a measure of Stoic influence on law be assumed.[146]

Yet, even though the treatment of slaves might be indicative of the existence of a precursor to the modern idea of human rights, it does not necessarily have to follow from it. In this regard, two recent works by Sorabji and Mitsis on the presence of the idea of human rights in Stoicism are highly relevant. As Oestreich already pointed out, the possible existence of a precursor to the modern idea of human rights is suggested by the universal applicability of Stoic ethical doctrine equally to all human beings. This is doubted by neither Sorabji,[147] nor Mitsis.[148] However, the two scholars do relate

140. For instance, Mantello, *Beneficium servile-debitum naturale*, p. 126-134.

141. Griffin, *Seneca*, p. 256-257: compare (nt. 2) Seneca, *Epistula* 94,1.

142. Cicero, *De officiis* III,89: Manning, *Stoicism and slavery*, p. 1524; Bauman, *Human rights*, 23-27; Knoch, *Sklavenfürsorge*, p. 57-64.

143. SVF III, 349-366. Vgl. Schrage, *Libertas est facultas naturalis*, p. 21-23, p. 35.

144. Manning, *Stoicism and slavery*, p. 1529-1530.

145. Manning, *Stoicism and slavery*, p. 1533-1540.

146. Manning, *Stoicism and slavery*, p. 1540-1541.

147. Sorabji, *Animal minds*, p. 134-138, p. 144-145, p. 150-152.

148. Mitsis, *Stoic origin*, p. 174.

various difficulties in this regard, such as a systematic emphasis on divine providence.[149] Perhaps, more importantly, both scholars state that there is a lack of a clear notion of subjective or individual rights in Stoic doctrine.[150] In philosophical terms, this notion depends on a mutual relation between moral duties (*καθήκοντα*), indifferents (*ἀδιάφορα*) and law or justice.[151] In these terms lies part of the problem, namely a Stoic emphasis on the one who fulfills the duty instead of the one in favour of whom the duty has to be fulfilled for. Moreover, the objects of moral duty such as health and capital are stated as being indifferent (*ἀδιάφορον*, *indifferens*) to the duties value or character. Finally, justice appears to be concerned with attributing to each their own according to their dignity (*κατ' ἄξιαν*, *cuius dignitas*), not their rights or similar conceptions.[152] With this, I am confronted with a whole new research question, one that is not primarily focused on the legal position of free non-citizens and slaves.

Conclusion: rephrasing the question

The main question of this article was a relatively simple one: why the Stoa? Why does the literature single out Stoic philosophy when it comes to possible precursors to the modern idea of human rights? To this question, there actually appear to be various answers. Reasoning from several essential tenets of Stoic philosophy as they appear in Roman legal texts, but taking the possibility of a high degree of philosophical eclecticism into account, first of all there are the incarnations of the notion of "nature". In its specific Stoic sense, the term is central and very consequential for the presence of concepts akin to the modern idea of human rights, such as human equality seeing its application with regard to slaves (Cic. Fin. I,12/Off. I,22/D. 7,1,68pr./Se. Ben. III,18,1-III,22,1/D. 35,1,40,3), and "natural reason" indicating a universally shared human rationality (Cic. Div. II,61/Gai. Inst. I,1). Moreover, the notion of a universally shared rationality itself is strongly related to other possibly distinctly Stoic concepts to be found in the Roman legal sources, such as natural liberty (D. 1,5,4), self-defence (Off. III,23/D. 1,1,3) and justice as defined in Cic. Inv. II,160 and D. 1,1,10pr.. Though a precursor to the modern idea of human rights could on this basis be argued, the true test however for the more general presence of such an idea in Roman law lies in the institutional consequences. Like modern-day human rights, these institutional

149. Sorabji, *Animal minds*, p. 143-144; Mitsis, *Stoic origin*, p. 164.
150. Sorabji, *Animals minds*, p. 140, p. 153-155.
151. Sorabji, *Animal minds*, p. 139-141; Mitsis, *Stoic origin*, p. 164-170.
152. Sorabji, *Animal minds*, p. 143.

consequences play out in a number of contexts, prominently the creation, application and distribution of certain well-defined types of legal remedies, the relation between a legal order thought of as universal and several variations of local ones, and the complex question of ethical, procedural and otherwise binding norms regulating the decisions of individual magistrates.

The literature reiterated in this article has offered a myriad of debatable examples regarding each of these consequences. The more interesting matter however is what these examples imply. Apart from the obvious differences in moral outlook and world-view that come with a 2000-year time gap, the question of human rights in Roman law touches on more fundamental controversies as well, the conundrums of structure, policy and ideology vis-a-vis the basically casuistic character of the Roman legal order, the possible employment of Greek philosophy as a science by the Roman jurists, and the separation between the state and the individual as a quintessential 18th-century innovation. I do not purport to have solved or even have begun to answer any of these queries in this piece. What I can do, however, is submit some starting-points for further research reasoning from these problems and examples given in this article. From the perspective of a possible precursor to the modern idea of human rights, central to the question of policy seems to be the *Constitutio Antoniniana* of 212 AD, the measure in which it may relate to earlier developments of Roman institutions, and the link to the Stoic idea of a world-city or community termed *commendatio* in both legal and non-legal texts. To this, I would add Ulpian's work on the office of the provincial governor as a source, seeing the work came about only a few years after 212 AD, and the jurist is the only legal source for the constitution in the Digest. Second, the relation between Greek philosophy and Roman law in general seems to be deserving of both deeper and more general treatment than has been hitherto the case. If we take seriously the idea that Greek philosophy served as a more or less scientific theory used by various Roman jurists to solve problems of law, would it be that outrageous to suggest this employment went beyond logic and rhetoric into the realms of physics and ethics as well? Philosophical terminology in Roman legal texts might be the key here, with the Stoic theory of the individual as a starting-point.

Key-words: Roman law, Stoicism, Human rights.

ΠΕΡΙΛΗΨΗ

J. GILTAIJ: *Ανθρώπινα δικαιώματα, ρωμαϊκό δίκαιο και στωϊκισμός: Μία επαναδιατύπωση του προβληματισμού*

Στο πλαίσιο της ευρύτερης προβληματικής που έχει αναπτυχθεί στην επιστήμη σχετικά με την ενσωμάτωση στοιχείων του φιλοσοφικού ρεύματος του στωϊκισμού στο ρωμαϊκό δίκαιο, η παρούσα μελέτη επικεντρώνεται στην πιθανή εμφάνιση μίας πρόδρομης προσέγγισης της σύγχρονης έννοιας των ανθρωπίνων δικαιωμάτων στο ρωμαϊκό δίκαιο. Προς τον σκοπό αυτό διερευνώνται ζητήματα όπως η στωϊκή έννοια της *φύσεως* στις ρωμαϊκές νομικές πηγές καθώς και η ενδεχόμενη συμβολή του στωϊκού ηθικού δόγματος κατά τη διαμόρφωση πρώϊμων αντιλήψεων για τη νομική προστασία των προσώπων που δεν διέθεταν την ιδιότητα του ρωμαίου πολίτη, ή ακόμη και των δούλων, στη ρωμαϊκή έννομη τάξη.

Λέξεις-κλειδιά: Ρωμαϊκό δίκαιο, Στωϊκισμός, Ανθρώπινα δικαιώματα.