Knowledge of Law as Knowledge of Facts. The Roman Experience

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Roman Law and Legal Knowledge

Studies in Memory of Henryk Kupiszewski

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**Knowledge of Law as Knowledge of Facts.**
The Roman Experience

I. Generalities on law and fact.  II. Interpretation of law and interpretation of fact. III. The fuzzy border between law and fact. IV. Factual description of legal rules. V. Factual interpretation of legal rules VI. Factual justification of legal rules. VII. Induction of legal rules from facts?

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I. Generalities on law and fact

Apart from legal rules and concepts, an element of Roman law which undoubtedly retained its actuality up to the present time is the juristic method\(^1\). Henryk Kupiszewski, to whose memory this volume is dedicated, frequently defined doctrine and method as the chief Roman contributions to contemporary legal culture. Indeed, the jurists of the Principate are the sole representatives of the legal profession in Antiquity. They refined the legal method, eliminating from their discourse all arguments of a moral, religious or personal nature\(^2\). Within this context of isolating purely legal considerations, there obviously emerged the distinction between law and fact.

Statements of fact are descriptions of particular events which either occurred or not, whereas statements of law usually imply the normative interpretation of legal rules decisive for the resolution of future cases\(^3\). Both types of statements are, thus far, interconnected, since “legal development consists in the increasingly detailed consideration of facts”, being limited above all by the number and extension of states of affairs presented for legal handling\(^4\). Indeed, factual questions outside a courtroom scenario must be ignored by the legal system, which offers no solution for them. Accordingly, if legal categories of a given system are poor, they do not allow a detailed consideration of facts which, as a rule, necessitate a differentiated body of legal concepts\(^5\).

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A famous Roman example is supplied by the provision of the Twelve Tables which mentioned the tort of cutting down trees (*arbores*) so that a plaintiff whose vines (*vineae*) were cut down was nonetheless expected to mention “trees” in his claim (G. 4,11). Obviously, since such fictions have their limits, it is in the long run the juristic interpretation which conditions the growth of legal doctrine, creating still more possibilities of conceptual qualification and distinction of facts. The regulatory power of the legal system augments in a process which is similar to the growth of the explanatory power of scientific theories.

Consequently, it is no wonder that Roman jurisprudence, defined by Ulpian as a knowledge of justice (D. 1,1,10,2 *iusti atque iniusti scientia*), founds its identity upon the exclusion of purely factual issues. They are relegated to the status of rhetoric, according to the motto of the republican jurist Gaius Aquilius Gallus who, a friend of the famous orator Marcus Tullius Cicero, used to counsel some clients: “this matter has nothing to do with the law; go to Cicero!” (Cic. top. 51 *nil hoc ad ius, ad Ciceronem*). Two centuries later another Roman jurist, Cervidius Scaevola (D. 33,7,20,9), acknowledged his incompetence in factual matters with the help of a very similar rebuttal: *non de iure quaeritur*.

Indeed, a professional western jurisprudence presupposes a distinction between questions of law and questions of fact. Using the language of the theory of systems, in order to perform any observation the legal system must be able to distinguish between itself and its surrounding environment, i.e. between law and fact. The legal profession can only emerge once legal problems have been identified as such, which implies their previous classification and abstraction. Both features result from the process of putting law into writing, which is concurrently a process of generalization.

In consequence, an advanced legal culture uses a greater variety of terms designating questions of law, whereas less developed systems rely to a larger extent on factual terms describing events of ordinary life. The merits of Roman jurisprudence in isolating legal problems and enriching the respective terminology of European legal tradition are evident from a comparative perspective. To consider briefly both remaining high cultures of antiquity, both Jewish rabbis and Greek legal philosophers failed to achieve this task. Jewish law was too closely intertwined with religion, whereas Greek law existed in the shadow of the intellectual disciplines of rhetoric and philosophy, as well as democratic politics.

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The overwhelming ideal of democracy is probably the main reason why the ancient Athenians very strictly identified their legal order with statutes (*nomoi*)\(^{11}\). Their great popular assemblies and courts needed rather skilled orators\(^2\), who abundantly utilized arguments *ad hoc* and *ad hominem*, than jurists who in Rome, on the contrary, eliminated such arguments from their discourse. Legal experts, such as *logographoi* and *exegetai*, were also admittedly known in ancient Athens, but their expertise displayed descriptive, as contraposed to normative, character. They followed the statutes of the city too closely, unable to create a productive legal doctrine\(^3\).

As opposed to scientific argument, used for instance in geometry or arithmetics, the logic of juristic discourse has always been informal. However, its fallible modes of reasoning, which in the realm of exact sciences appeared only as heuristic devices, acquired higher dignity in Roman jurisprudence. In this field they contributed to development of the legal system. For example, analogical reasoning was well known to the Attic orators, but nonetheless they dealt with it at an exclusively descriptive level.

Conversely, Roman jurists could more fruitfully deploy the same reasoning because they were vested with the competence of lawmaking which during the Principate became formalized as the right of speaking with imperial authority (*ius respondendi*). Within this framework the content of usual juristic utterances, the so-called *solita dicta*, frequently distinguished with such expressions as *solemus dicere* (Ulp. D. 5,1,61pr.) or *solet dici* (Paul. D. 46,2,29)\(^4\), was not only a description of valid law, but expressed also directly the law itself\(^5\).

However, already in the old republican ordinary court procedure (*ordo iudiciorum*), which was divided into two distinct stages – a preliminary hearing before the magistrate (*in iure*) and the full trial before the private judge (*apud iudicem*) – questions of law were strictly separated from questions of fact. Only in the extraordinary procedure (*cognitio extra ordinem*), introduced at the beginning of the Principate, were both types of questions mingled together. Nonetheless, within the scope of the extraordinary procedure a new process known as *per rescriptum* emerged, where – under the proviso that the facts were correctly stated – solely isolated matter of law was examined.

The imperial rescript therefore followed in its structure the juristic *responsum*, which permitted a relatively strict distinction between law and fact. Indeed, with reference to the *cognitio extra ordinem* Ulpian also stresses that the province governors can help the lower judges only in deciding their doubts of law (*de iure dubitantibus*), but not in ascertaining questions of fact (*de facto consulentibus*), because

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the latter activity could easily promote partiality and favouritism (D. 5,1,79,1)\textsuperscript{16}. According to a \textit{responsum} of Papinian (D. 50,1,15pr.), transmitted also by Marcian (D. 48,16,1,4), the investigation of facts (\textit{facti quaestio}) remains within the competence of judges, whereas legal problems are always reserved to the authority of law itself (\textit{iuris auctoritas})\textsuperscript{17}.

In modern times, the ancient Roman distinction between fact and law appears in various forms in both civil and common law legal systems, even if in the latter ones the role of facts is generally considered to be more important than in the former\textsuperscript{18}. However, in the pleadings of the English common law, questions of law were strictly separated from questions of fact. Only before the Court of the Chancery which, not bound by the traditional forms of action and more closely resembling the structure of a civil law tribunal, were both questions intermingled\textsuperscript{19}.

Nevertheless, at least since Edward Coke (1552-1634), the maxim has been adhered to that judges answer only questions of law, whereas jurors deal only with questions of fact: \textit{ad quaestionem legis respondeant iudices, ad quaestionem facti respondeant iuratores}\textsuperscript{20}. On the continent, the distinction was already emphasised during the 13\textsuperscript{th}-14\textsuperscript{th} centuries by French lawyers called \textit{Ultramontani} and subsequently by the Commentators of the 14\textsuperscript{th}-15\textsuperscript{th} centuries\textsuperscript{21}. In the later civilian tradition, dominated by the learned judge trained at a university, the proverb \textit{facta sunt probanda, iura novit curia} emerged, according to which law could never be the object of proof, since it was assumed to be known by the court\textsuperscript{22}.

\section*{II. Interpretation of law and interpretation of fact}

As stated by Paul in his edictal commentary (D. 41,2,1,3), the difference between problems of law and problems of fact was already consciously applied by the late republican jurist Aulus Ofilius, a friend of Caesar. In contrast to the majority of his colleagues Ofilius decided, followed only by the younger Nerva (\textit{Nerva filius}), that a ward (\textit{pupillus}) could acquire possession even without the consent of his guardian, because this was a matter of fact and not of law: \textit{rem facti, non iuris esse}\textsuperscript{23}.

\begin{itemize}
\item \textsuperscript{16} Francesco Arcaria, \textit{`Referre ad principem'}, Milano 2000, pp. 250-253.
\item \textsuperscript{17} Lauro Chiazzese, \textit{`Iusiurandum in litem'}, Milano 1958, p. 90.
\item \textsuperscript{19} Diethelm, Law and Fact (supra n. 5) pp. 18, 34.
\item \textsuperscript{20} Herbert Broom, \textit{A Selection of Legal Maxims}, Philadelphia 1854, pp. 103-108.
\end{itemize}
The classification of possession as a factual issue, known also to Labeo (D. 41,2,3,5), as well as to the late classical jurists Papinian (D. 4,6,19) and Ulpian (D. 41,2,29), was subsequently resumed once more by Paul (D. 41,2,1,4) who added that such an issue may never be invalidated by any regulations of civil law: *res facti infirmari iure civili non potest*\textsuperscript{24}. This observation reveals the naturalistic conception of fact as something by far more substantial in comparison with the conventional world of legal rules.

Conversely, the same distinction may signify an advancement from mere fact to law as superior entity. According to this conception it is, on the contrary, the fact which is unable to modify the legal rule. In this sense, one jurist of the early Principate, Proculus, distinguished between what is really done (D. 1,18,12 *factum est*) and what ought to be done (*fieri debet*)\textsuperscript{25}. Two centuries later, Ulpian (D. 2,12,1,1) stressed the nullity of an illegal sentence pronounced against a person absent from the court during the harvest or vintage time, since a praetor’s act ought not to derogate from the law: *neque enim praetoris factum iuri derogare oportet*.

In the same time, Paul (D. 2,14,27,2) attributed a greater legal force to the verbal contract of *stipulatio*, which operates by the act of the law itself (*ipso iure*), then to the informal agreement (*pactum*), which necessitates always a praetorian remedy. The reason given by Paul is that the former involves questions of law, whereas the latter concerns mere facts: *in stipulationibus ius continetur, in pactis factum versatur*\textsuperscript{26}. Does this distinction represent two different kinds of juristic rationality: factual and normative?

At the beginning of the 2\textsuperscript{nd} century AD, the jurist Neratius Priscus (D. 22,6,2) connects the distinction between law and fact with the problem of certainty. He underlines that, whereas the law should be definite (*ius finitum*), the fallacious interpretation of facts (*facti interpretatio*) was capable of baffling even the most prudent of people\textsuperscript{27}. The concepts of law and fact stood for the distinction between normative and factual rationality, or between jurisprudence and science, as disciplines which faced the problem of under-determination in different ways\textsuperscript{28}. Discussions on scientific method, inaugurated in the Hellenistic period by the Stoics and the Sceptics, were still alive during the 1\textsuperscript{st} century BC.

In particular, debate continued on the value of induction, as testified by the treaty written by Philodemus of Gadara “On Methods of Inference”\textsuperscript{29}. However, during


\textsuperscript{26} Babusiaux, ‘Id quod actum est’ (supra n. 14) pp. 84-85.


the debate between the stoic dogmatism and the academic skepticism, ancient philosophers never distinguished between factual and normative knowledge, even if this distinction was proclaimed fundamental by the jurist Neratius. In reality, in reference to the problem of acquisitive prescription (D. 41,10,5,1 *usucapio*), Neratius declares the ignorance of alien facts a *tolerabilis error*. Such a mistake of a possessor, convinced that his slave bought for him a thing subject to prescription, is far easier excusable than a mistake as to the content of the law.\(^{30}\)

This approach was subsequently condensed into a famous legal rule (*regula iuris*), announced particularly by Paul (D. 22,6,9pr.), according to whom ignorance of law, but not of fact, prejudices: *ignorantia iuris nocet*. Therefore, in contrast to the uncertain realm of facts, capable of being known only with some verisimilitude, Roman jurists considered legal rules to be definite and certain (ep. 94,16 *finita et certa*), exactly in the same way as the Roman philosopher Seneca, mainly active during the reign of Claudius and Nero (41-65 AD), stated about the precepts of wisdom (*sapientia*)\(^{31}\).

In the same sense, emperor Antoninus Pius, who reigned from 138 to 161 AD, defined in a rescript the question whether a particular debtor was in default, as a question rather of fact than of law (Marci. D. 22,1,32pr. *magis facti quam iuris*), incapable of being decided either by imperial enactment (*constitutio*) or by scholarly debate (*auctorum quaestio*)\(^{32}\). Furthermore, problems concerning the means of evidence needed to prove particular facts, according to a rescript of emperor Hadrian, do not allow for a precise definition (Call. D. 22,5,3,2 *nullo certo modo satis definiri potest*) and must therefore be satisfied with the frequency criterion which is valid often, though not always: *sicut non semper, ita saepe*.

The distinction between law and fact appears regularly, especially in the version *quaestio iuris* – *quaestio facti*, since both eminent jurists of the mid 2nd century AD: Celsus and Julian. According to Celsus (D. 24,1,47), it is a question of fact, whether a husband makes expenses for his wife as her unauthorized agent or in furtherance of his marital duty to do so: *facti, non iuris est quaestio*. According to Julian (D. 39,5,2,7), a sum of money received in order to buy a slave, who dies before being purchased, may be recovered if the payer expressed not merely a reason for his gift (*causa*), but a regular condition thereof (*conditio*), which is rather a question of fact: *facti magis quam iuris*\(^{33}\).

The difference of language applied by the ancient empirical disciplines (*artes coniecturales*), which obviously studied only the facts, and by Roman jurisprudence, which treated the facts exclusively as a prerequisite for particular legal sanctions, was peculiarly evident in doubtful cases. Both disciplines then resorted to the concept


\(^{31}\) Giaro, Rechtswahrheiten (supra n. 14) pp. 186, 315.


\(^{33}\) Mayer-Maly, Nachdenkliches (supra n. 24) pp. 495-497; id., Juristische Reflexionen (supra n. 30) pp. 15-17.
of the likely (*verisimile*). Indeed, for the Roman jurists *verisimile* and cognate words indicated merely factual doubts, referred to as either *quaestio* (Paul. D. 20,4,13; Pap. D. 48,5,12,12) and *res facti* (Paul. D. 3,5,33) or *quaestio* (Pap. D. 28,6,41,5; D. 31,66pr.) and *coniectura voluntatis* (Tryph. D. 15,1,57,2; Ulp. D. 33,7,12,43)\(^{34}\).

In contrast, uncertainty as to points of law is expressed solely in cautious truth judgments, such as *verum mihi videtur, verius est* or *verius puto*\(^{35}\). In jurisprudence, the qualification of certain questions as questions of fact shifts them consequently from the realm of legal certainty into that of factual doubt. In this respect the linguistic usage of Roman jurists corresponds to that of Latin orators who confine the concept of *verisimile* to an assessment of facts by way of *coniectura* as one of the rhetorical *status rationales* and by way of *ambiguitas* as one of the *status legales* which resolves doubts related to the legislator’s intention\(^{36}\).

A mixed question of law and fact occurs when the facts of the case and the corresponding legal rule are undisputed, but uncertainty remains as regards the application of the rule to the facts. In this sense Papinian exempts from the suspicion of adultery a woman who remarried, induced by false rumours about the death of her absent husband. The jurist qualifies the question as one rather of fact than of law (D. 48,5,12,12 *non tam iuris quam facti*)\(^{37}\), stressing that the woman was probably deceived: *quod verisimile est, deceptam eam fuisse*.

In some questions examined by Julian the distinction is also made according to the mixed maxim *facti magis quam iuris* (D. 27,10,7,3; D. 39,5,2,7). More resolutely, Ulpian (D. 1,5,16) qualifies the status of twins, born to a female slave who was expected to bear three children to be free, but had already given birth to twins: *quaestio facti potius, non iuris*. Finally, in an unclear context of gifts between husband and wife, emperor Justinian condemns (C. 5,16,25,2) the distinction between law and fact as an unnecessary doctrinal complication: *subtilis divisio*\(^{38}\).

In a comparable sense, the concept of *verisimile* elucidates in Roman jurisprudence the unclear content of private statements, such as a testamentary interpretation, rejected as improbable by Labeo (lav. D. 32,30,4 *quia verisimile non esset ita testamentum esse*), or of implied legal transactions. For example, Ulpian interprets the mortal hatred between the beneficiary and testator as a probable reason which induced the latter to revoke the legacy (D. 34,9,9pr. *verisimile esse coeperit ... noluisse*); correspondingly the jurist rejects the beneficiary’s claim with the cautious expression *magis est*\(^{39}\).

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According to Paul (D. 50,17,114), both explicit and implied transactions are to be interpreted using the criterion of the more likely \((quod verisimilius est)\) or the usual \((quod plerumque fieri solet)\).  

III. The fuzzy border between law and fact

Within the Roman legal order, the distinction between law and fact is, however, rather untidy. Indeed, the transition from mere patterns to norms of behaviour, from factual regularities to legal rules or from actual usage to customary law is gradual or even imperceptible. For instance, the concept of natural duty \((obligatio naturalis)\), and other legal phenomena recognized as natural, such as possession \((possessio naturalis)\) or blood relationships \((cognatio naturalis)\), are closer to the realm of facts than the corresponding normative phenomena defined as \(possessio\) or \(cognatio civilis\).

Nonetheless, from the late Republic onwards, the Romans acknowledged a terminological distinction between the normal and the normative. In this sense, Cicero qualifies in his “Tusculan Disputations” the reference to the best authors as argument which “ought to have its weight and usually has it” (Tusc. 1,26 et debet et solet valere), whereas in his treaty “On Duties” he stresses that, in a particular context, the Stoic Panaetius applied the statistical verb \(solere\) instead of the deontic \(oportere\) (off. 3,18). As theorist of the judicial rhetoric, based to a large extent upon the distinction between law and fact (de or. 1,173), Cicero distinguished precisely the modalities of possible, obligatory and usual (part. 104): \(potest aut debet aut solet\).

However, Roman jurisprudence was also conscious of the categorial distinction between legal rules and social practices. The jurists indicated the transition from empirical observations of custom to normative decisions by means of truth judgements. Gaius modified the time limit for a buyer to accept wine if the vendor, a merchant who usually handles wine \((vendere solet)\), needs the vessels for a new vintage: \(ita verum est, si … si vero mercator est …\) (D. 18,6,2pr.). Interpreting alimentary legacies, Nerva the Elder and, in his wake, Aburnius Valens (D. 34,1,22pr.) and Ulpian (D. 33,1,14), resorted to the criterion of what the testator was accustomed \((solitus fuerat)\) to provide during his lifetime. Thereby, Ulpian finally determined the extent of the legacy, praising Nerva’s opinion as \(verior sententia\) (D. 33,1,14).

In neither case was the concept of the likely \((verisimile)\) capable of reasonable application, since the Romans precluded legal rules of probable validity. Nonetheless, as already noted, the distinction between legal and factual problems often appears

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43 Wieling, Testamentsauslegung (supra n. 39) p. 89; Antonio Palma, ‘*Humanior interpretatio*’, Torino 1992, pp. 199-200; Giaro, Rechtswahrheiten (supra n. 14) p. 248.
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Problematic, since legally relevant facts are susceptible to a value-based interpretation. For example, Proculus establishes a categorical legal rule about the influence of divorce on a legacy in favour of the wife, verified later by Ulpian, “because separation dissolves the legacy” (D. 32,49,6 separatio enim dissolvit legatum). However, Celsus (D. 34,2,3) had considered the same occurrence to be a question of fact, susceptible to various interpretations, as the husband may have nonetheless intended to uphold the legacy: nam potest nec repudiatae adimere voluisse.

In a similar sense, somewhat later Papinian hesitantly recognised as correct (D. 35,1,72,6 verius) the legal rule according to which a false motive should not impede a legacy: falsam causam legato non obesse. Nevertheless, Papinian added in the same sentence that an exception of fraud will usually be available (plerumque locum habebit) to the the heir, namely in case he is able to prove that without this motive the testator would have refrained from making the bequest: alias legaturus non fuisse.

As regards the contract of partnership (societas), Labeo had already declared liable a partner who withdrew from the contract to the detriment of another partner. According to Paul, however, Proculus accepted this decision as correct (D. 17,2,65,5 hoc ita verum esse ait) only where it was the interest of the partnership not to be terminated, since greater consideration is always used to be shown (semper … servari solet) to the partnership itself than to the private interests of particular partners.

In the same way, Pomponius criticized Servius Sulpicius Rufus, who assumed that the testamentary appointment of guardians “for my son and my sons” (D. 50,16,122 filio filiisque) embrace only the males. Even if the plural substantive filis may also indicate “daughters”, the testator is considered to have referred to the sex previously mentioned, i.e. to male issue. Pomponius qualifies the question, however, as one of fact, for it might have been possible that in a particular case the testator had in mind all of his children.

Similar decisions are rendered by some late classical jurists. For instance, Paul corrects a rigid interpretation of a pledge agreement, given by both older lawyers Nerva the Elder and Proculus (D. 20,4,13 facti quaestio est, sed verisimile est id actum, ut …), as well as Ulpian corrects Papinian who assumed that the natural children also defeat the condition to transfer the inheritance in case of a childless death (D. 36,1,18,4), because within the framework of voluntatis quaestio the real intention of the testator is decisive.

Such short circuits between questions of law and questions of fact happened to Roman jurisprudence not only during the interpretation of private wills and other legal

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44 Michele Taruffo, Values Judgements in the Judgement of Fact, AIC 18 (1985) pp. 45-57, 47.
46 Giaro, Rechtswahrheiten (supra n. 14) p. 367.
47 Giaro, Rechtswahrheiten (supra n. 14) p. 384.
48 Massimo Miglietta, Servius respondit, Trento 2010, pp. 304-305.
49 Babusiaux, Id quod actum est (supra n. 14) pp. 201-203; Lucetta Desanti, Restitutionis post mortem onus, Milano 2003, pp. 75-78.
transactions, but also when interpreting public statutes (leges publicae), where the legally relevant law making fact is constituted by the actual intention of the legislator. In cases of this kind, the jurists considered it fairly consequential, and therefore exceptionally allowed, to interpret the statutory law with the assistance of factual judgments of verisimilitude.

Correspondingly, Ulpian extended the praetorian action substituting the actio furti against the slave manumitted by testament who fraudulently diluted the dormant inheritance (E. 135), because probably the praetor substituted this action wherever an action for theft would lie: verisimile est in omnibus causis ... substituisse (D. 47,4,1,10). Paul restrictively interprets the imperial permission of testamentary substitution for the adult mute son who, following the father's death, married and procreated a legitimate heir, because such a case was probably left unconsidered by the emperor: nec enim ... principem de hoc casu cogitasse verisimile est (D. 28,6,43pr.)50.

The juristic judgments of verisimilitude which refer not to the facts of the case, but to their legal consequences, appear somewhat irregular, namely Javolen's prae- sumptionem ad filii debitum spectare verisimile est (D. 23,3,57), Pomponius' verisimile est ... eum liberum esse, nam hoc mortuum sensisse (D. 40,4,41pr.) and Tryphoninus' verosimilius esse id legatum quod ... in peculio fuerit (D. 15,1,57,2). However, they all concern the interpretation of legal transactions, whereby Tryphoninus hints even expressly at the coniectura voluntatis. Hence, it is possible that the private declaration of will, defined by the Twelve Tables (T. 5,3 ita ius esto) as source of law, became during the Principate a pure question of factual interpretation51.

Obviously, Roman jurists frequently mentioned social usages which did not display direct legal consequences. It was usual (Paul. D. 27,1,36pr. solere) to reward the testamentary guardian with a legacy, but if he was also a substitute heir, he was not expected to accept the tutelage. The Roman brokers, known under the Greek name of proxenetae, received compensation for negotiating contracts, but even if they successfully intervened in favour of a loan, as many of them regularly did (D. 50,14,2 ut multi solent), according to Ulpian they were not liable to the creditor as his mandators52.

Another of Ulpian's texts (D. 23,3,9,3) describes marital usages with the help of the empirical expression “as is commonly observed (vulgo fieri videmus) in Rome”. In particular the wife usually records (in libellum solet conferre) for evidentiary reasons the things which she customarily uses in her husband’s house (solet in usu habere). This acquires particular importance if, as mostly occurs, the husband assumes the responsibility for custody of these articles (plerumque custodiam eorum repromittit), because in such cases the wife may bring an action on deposit or mandate53.

50 On both texts see GIARO, Römische Rechtswahrheiten (supra n. 14) p. 303.
51 GIARO, Römische Rechtswahrheiten (supra n. 14) p. 309.
IV. Factual description of legal rules

It is evident that Roman jurisprudence sometimes adopts an empirical manner of speaking in regard to legal rules, substituting the deontic verb \textit{debet} with the factual \textit{solet}. Indeed, in the perspective of social expectations, which implies the normativity of practice\textsuperscript{54}, the two worlds of the normal and the normative are closely related, or even overlapping. For example, both Gaius (D. 13,6,18pr.) and Ulpian (D. 50,17,23) denied the existence of liability as regards the escape of slaves who are not usually kept under guard: \textit{custodiri non solent}. Such slaves obviously belong to the same category as a particular slave, for whom Paul (D. 6,1,21) states the liability of the defendant in the \textit{rei vindicatio}, since he ought to have been guarded: \textit{custodiri debuerit}\textsuperscript{55}.

Ulpian indicated the exceptions from the customary duty of mourning both in statistical (D. 3,2,11,3 \textit{non solent})\textsuperscript{56} and deontic versions (D. 3,2,11,1 \textit{non oportet}). However, substantially there is just as little difference between the expressions of Pomponius \textit{interponi debere} (Ulp. D. 21,1,21,2) and \textit{fieri solere} (Ulp. D. 21,1,21,3), related to the duty to offer guarantees (\textit{cautiones}), as between the locutions \textit{nocere debere} (D. 44,4,4,8) and \textit{repelli solere} (D. 44,4,4,10), referred by Ulpian to procedural defenses (\textit{exceptiones}). Finally, the phrases \textit{subveniri or succurrir solere} (PS. 5,12,4; Ulp. D. 39,2,15,22) and \textit{subveniri or succurrir debet} (Paul. D. 9,4,26,5; Pap. D. 27,3,20pr.) simultaneously describe procedural practice and the legal duty of the praetor.

The verbs \textit{solet} and \textit{debet} are also interchangeable in the language of other Roman jurists, for instance Neratius Priscus who employs the statistical expression \textit{solet praestare} and the deontic phrase \textit{praestare oportere} in a synonymous way (Ulp. D. 19,2,19,2), Julian who applies both types of expressions in the same sentence \textit{exceptionem … tran- sire solere, retro autem … reverti non debere} (Ulp. D. 44,2,9,2), Paul with his similar phrase \textit{removeri solere … neque enim debet quaeri} (D. 20,6,12,1) and Marcian with \textit{abolistio … postulari solet – accusatio … aboleri debet} (D. 48,16,1,8-10).

Moreover, the same rule of classical Roman law was often formulated both in terms of statistics and duty. As regards illegal orders issued by a master to his slave, the old Publius Alfenus Varus summarized their criminal irrelevance in the empirical sentence according to which it is unusual for a slave to remain wholly unpunished (D. 44,7,20 \textit{non in omnibus rebus … audiens esse solet}), but Labeo, in his turn, preferred the ought-sentence that a slave is not obliged to obey in everything (D. 47,10,17,7 \textit{nec in omnia … parere debet})\textsuperscript{57}. Anyway, no excuse will be received from a slave who obeyed the order to kill a man or to commit a theft.

Precisely equivalent are also various jurisprudential locutions describing the primacy (*melior condicio*) of the occupying party in some contractual actions, granted by the praetorian edict to the creditors of a slave against his master. This preferential position among a plurality of creditors is designated by Paul (D. 15,1,52pr.) in reference to the *actio de peculio* with the statistical expression *solet esse*, whereas by Gaius (D. 15,3,4) in reference to the closely related remedy of the *actio de in rem verso* with the deontic expression *esse debere*\(^{58}\).

Ulpian denies to freedmen any rights deriving from legal transactions accomplished by them during their slavery with the help of the empirical locution *non solet proficere* (D. 2,14,7,18), but Paul employs in the same context the normative phrase *proficere non potest* (D. 50,17,146). In a similar way, Ulpian describes the prohibition on legal acquisitions for third parties as a matter of actual usage (D. 43,24,3pr. *actio adquiri non solet*), whereas Paul (D. 45,1,126,2) concentrates upon their legal exclusion: *obligationem nullam adquirere possumus*\(^{59}\).

In reference to the right of deduction, granted by the praetorian law to the master even in case of his delictual claims against his slaves, the statistical expression of Pomponius *saepe fit* (D. 15,1,4,3) corresponds to the normative formula of Marcellus *non esse dubitantandum* (Paul. D. 33,8,9,1)\(^{60}\). In the same sense, the linguistic usage of classical Roman jurists, registered during the 2\(^{nd}\) century AD in the elementary work “Ulpiani regulae”, contrasts the dowry, which should be returned within a certain time following the termination of marriage (UE. 6,13 *a die reddi debet*), to the dowry which customarily is returned immediately: *praesens reddi solet*\(^{61}\). Both texts refer, obviously, to a legal duty of restitution.

The activity of the Roman praetor is especially often defined by classical jurists as a mere custom or nothing more then a jurisdictional practice. For instance, Ulpian (D. 4,8,17,6) approves in his edictal commentary the praetorian duty of accepting an unequal number of arbitrators elected by the parties to an arbitration agreement, because their majority can be easily found. Together with this legal rule Ulpian mentions, however, the factual usage (*usitatum est*) of referring only to two arbitrators who in case may be compelled by the praetor to select a third person having a casting vote.

Praetorian activity is qualified even then as a mere custom, when it simply consists in the execution of imperial statutes. In this sense, Ulpian (D. 2,15,8pr.) reports on the imperial constitution, known as *oratio divi Marci*, which required the praetorian authorization of every compromise on maintenance matters (*alimenta*), saying that in such cases the magistrate is accustomed to intervene: *solet intervenire*. Elsewhere the same jurist (D. 42,2,6,2) stressed, nevertheless, the praetor’s duty to follow the


\(^{60}\) Giaro, Rechtswahrheiten (supra n. 14) p. 323.

provisions of the same oratio related to the judicial acknowledgment of debt: *subsequi debere*62.

A rescript of the emperors Septimius Severus and Antoninus Caracalla, cited by Ulpian in his edictal commentary (D. 11,7,12pr.), describes the constitution of the right of way to a burial place (*iter ad sepulchrum*) simply as a matter of custom. Indeed, this right is usually requested from a neighbour who concedes it by means of a gratuitous grant: *peti et concedi solere*. However, against a neighbour unwilling to grant such an access right, the provincial governor has a legal duty to intervene from above: *compellere debet*63.

Similarly, Ulpian (D. 50,13,1pr.-1) mentions the usual governor’s jurisdiction over the salaries claimed by teachers of liberal disciplines (*ius dicere solet*), but he extends this competence to the professors of medicine expressly in terms of duty: *ius dici debet*. Furthermore, the factual locution of Paul (D. 5,1,49,1) *solent durare* signifies that the judges nominated by the governor remain in office under the rule of his successor. This norm of the provincial procedure was probably still in the making, because Paul corroborated it by reference to a recent *responsum* of Cervidius Scaevola64.

Even if the expression of Gaius *olim solebat* (G. 2,103; 4,48), exactly as the simple *solebat* of Suetonius (Aug. 32,3), indicates obviously legal rules which are meanwhile invalidated, the present time *solet* is often a signature of new regulations. Bygone innovations are mentioned by Gaius in the historical present in reference to the transfer of landed property, which was usually also allowed at a distance (G. 1,120-121 *in absentia solent mancipari*)65, and to the possessory interdicts, granted usually by the praetor in the course of his activity defined as *reddi* (G. 4,148) or *dari* (G. 4,154) *solet*66.

During the late Principate, present legal innovations were indicated by Ulpian with the help of the locution *hodie solet* (D. 4,4,7,2; D. 27,10,1pr.; D. 50,16,131,1) as well as by Hermogenianus with the help of *nunc solet* (D. 47,10,45) and by Marcian with the help of *solent hodie* (D. 48,8,3,5). With particular reference to the youngest procedure of the *extraordinaria cognitio*, Marcian (D. 47,19,1) and, on multiple occasions, Ulpian (D. 1,12,1,7; D. 14,1,1,18; D. 47,15,1,1; D. 48,19,28,2) also expressed themselves in a similar manner.

However, already in the year 56 AD the *senatus consultum Trebellianum* mentioned the actions „usually given“ (Ulp. D. 36,1,1,2 *quae dari solent*) by the praetor to the heir and against him, which were newly awarded to and against the fideicommissary. The same expression *dari solere* describes in Gaius the unquestionable legal rule (*certissima iuris regula*) regarding the non-transmissibility of penal

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actions to the heirs of the wrongdoer (G. 4,112; D. 50,17,111,1)\textsuperscript{67}. The expression is notably a praetorian equivalent of the verb \textit{competere} which traditionally referred, by contrast, to civil law remedies.

Similarly, a rescript of the emperor Gordian qualifies as an old legal rule (C. 9,2,6 \textit{vetus ius}) the exclusion of capital prosecution against the accused absents who usually are only subject to an official note (\textit{adnotari solere}) according to which they should be summoned\textsuperscript{68}. By means of an analogous empirical statement Roman jurists describe the doubtless penalization of some categories of criminals: in regard to the forgers of documents Paul employs the phrase \textit{poena adfici solere} (D. 48,10,16,2) and in regard to the delinquent slaves Ulpian uses an equally statistical locution \textit{in ludum dari solere} (D. 48,19,8,12)\textsuperscript{69}.

Significantly, the verb \textit{solet} is not necessarily considered by Roman jurists to be a specific signature of factually prevalent legal rules which emerge by way of induction from a large number of widely occurring events. Such a conclusion might have been correct in the case of the exclusive use of the verb \textit{solet} together with adverbs of higher frequency, such as “always” (\textit{semper} G. 1,20), which in reference to manumissions of the slaves above the age of thirty means the absence of further requirements of validity, as well as “mostly” (\textit{plerumque} G. 1,141) and “often” (\textit{saeppe} Gai. D. 48,19,29)\textsuperscript{70}.

Indeed, with the help of the expression \textit{semper solet} Gaius indicates also the praetorian custom of always carrying on the prohibitory interdicts by way of the prejudicial promise (G. 4,141), whereas with \textit{solet frequentissime} Ulpian (D. 27,2,1pr.) describes the practice of addressing the praetor in order to determine the place where children must be fed or reside. Finally, the frequent occurrence of the so-called manumission in transit is described by Gaius with the expression \textit{plerumque solent} (D. 40,2,7)\textsuperscript{71}. With a similar locution \textit{solent saepe} (D. 12,2,31) Gaius mentions the regular judicial practice to decide the lawsuit in favour of the party who swore an oath.

However, in several texts Ulpian stresses with the help of the verb \textit{solet} that some legal consequences are used to take place “not always” (\textit{non semper}), but only either “sometimes” (D. 47,10,7,2 \textit{interdum}) or anyway “not never” (D. 48,18,1,23 \textit{nec tamen numquam}). Indeed, \textit{solet} indicates also exceptions to a legal rule in which case it appears, by contrast, together with adverbs of lower frequency. Such adverbs are \textit{interdum} (Ulp. D. 47,11,6pr.; D. 49,2,1,4), \textit{nonnumquam} (Pap. D. 11,7,43; Mod. coll.1,12,1) and \textit{rado}, e.g. in the ulpianic phrase (D. 5,1,82) on the exceptional situation in which consuls appoint one of their attendants as arbitrator: \textit{nonnumquam solent ... quod raro ... faciendum est}.

\textsuperscript{68} Andreas Wacke, \textit{Audiatur et altera pars}, Festschrift Wolfgang Waldstein, Stuttgart 1993, pp. 392-393.
\textsuperscript{69} Franco Salerno, \textit{Ad metalla}, Napoli 2003, pp. 47, 77,103; for other texts see August Ubbe-lohde, \textit{Ausführliche Erläuterung der Pandecten. Bücher XLIII–XLIV2}, Erlangen 1890, pp. 222-223.
\textsuperscript{70} \textit{Saepius solet} in G. 2,155 signifies the admissibility of repeated sales of the bankrupt’s property.
\textsuperscript{71} William W. Buckland, \textit{The Roman Law of Slavery}, Cambridge 1908, p. 452.
In connection with adverbs deployed to indicate infrequency, such as perraro which means “extremely seldom”, the verb solet signifies the jurisdictional custom to grant a remedy sparingly. Ulpian aligns the factual timeliness of the extraordinary procedure in accordance with a frequency gradation (D. 42,1,2), specifying that the legal time is not always (non semper) observed, but sometimes (nonnumquam) adapted to the case, whereas judgments are very seldom (perraro) timely executed, except in questions of maintenance (alimenta) or relief granted to a minor under twenty-five years of age\textsuperscript{72}.

In another text of his edictal commentary, Ulpian stresses with regard to judicial decisions rendered by the emperor himself that he is very rarely inclined (D. 4,4,18,1 perraro solet) to permit restitution of the original condition. Finally, the same jurist describes the praetorian custom to summon an absent guardian (D. 26,10,7,3 solet evocari) and, if his continued absence makes him suspicious, to remove him directly from office. Exactly as in the text on the appointment of arbitrator by the consul (D. 5,1,82), Ulpian completes, however, this empirical report with a recommendation, namely adding that this measure should be applied very seldom (perraro … faciendum est), only after careful investigation.

According to Gaius the purchaser of a bankrupt’s estate, who regularly employs the fiction of being his heir, “sometimes is used to claim his due in another way” (G. 4,35 interdum … agere solet), i.e. applying the formula with substituted subjects\textsuperscript{73}. The similar phrase solet interdum prodesse signifies in Ulpian (D. 4,4,3,4) that a praetorian remedy, granted to the debtor, may sometimes be extended to his surety. According to the same jurist, a security given by the representative of the plaintiff for his trial ratification (D. 46,8,10 cautio de rato) is sometimes used (interdum solet) to be interposed by an extra-judicial agreement, namely when the representative enters some legal transaction on behalf of the principal\textsuperscript{74}.

In a stronger sense, Gaius mentions real actions to recover uncertain shares (G. 4,54 partes) as a remedy which is usually granted by the praetor only in rare cases: in paucissimus causis dari solet\textsuperscript{75}. In a similar context, Ulpian (D. 1,6,8pr.) refers to the persistence of the paternal power over all children excluding those who had been exceptionally released from it by customary reasons which are, nevertheless, defined as a matter of usage: nisi exierint … quibus causis solent. Therefore, it seems evident that the statistical manner in which legal rules and their elements are often presented in the Roman juristic discourse does not reduce them to empirical regularities.

\textsuperscript{72} Kaser, Hackl, Zivilprozessrecht (supra n. 64) pp. 384, 624 n. 3; Francesco Fasolino, Le ‘usuvae rei iudicatae’, Scritti Gennaro Franciosi, Napoli 2007, pp. 768-770.

\textsuperscript{73} Kaser, Hackl, Zivilprozessrecht (supra n. 64) pp. 342, 399.


\textsuperscript{75} Ingrid Cromme, ‘Vindicatio incertae partis’, Heidelberg 1971, pp. 19-20.
V. Factual interpretation of legal rules

The law making competence of Roman jurists transforms their descriptions of normal behaviour, formulated with the help of the verb *solere*, into the normative prescriptions. In the already mentioned interpretative rule of Paulus, according to which in unclear cases one usually considers what usually happens (D. 50,17,114 *inspicī solere ... quod plerumque fieri solet*), the former *solet* is distinctly normative, as opposed to the latter, whose empirical flavour is underlined by the adverb *plerumque*. Therefore, the reason for the statistical wording of the normative utterances of Roman jurisprudence is not their inductive-probabilistic origin, but only the summary indication of their content which can be easily completed on the strength of axiological criteria.

Normal behaviour becomes a normative standard in the following paradigmatic cases of the Roman law of contracts. According to Gaius, in the affairs of partnership the partner is liable solely for the same level of diligence, as he is used to (D. 17,2,72 *solet*) display in his own business. In reference to the same contract, Ulpian declares the loss of merchandise by shipwreck for blameless, if it was usual to transport it (D. 17,2,52,4 *solerent*) in this manner. According to Ulpian, the order of the arbitrator to appear out of town binds the parties only when he is really accustomed to (D. 4,8,21,10 *solet*) perform his duties in retired places.

The concept of the normal also determines normative standards of tort liability. Who digs pits in a usual place (Paul. D. 9,2,28pr. *ubi fieri solent*), is not liable for harm suffered by casual passers-by. By contrast (Ulp. D. 9,2,11pr.), a barber is liable for shaving his clients at a dangerous place where people usually (*ex consuetudine*) play ball or frequently pass by (*transitus frequens*). Ulpian (D. 9,2,7,4) excludes the Aquilian liability for killing a slave in a fighting competition, allowed only to the freeborn who solely are used to fight: *soltent certare*. On the other hand, Paul (D. 9,2,31) holds liable a pruner who throws down a tree branch even on a private place, because people generally pass by such places too: *cum plerumque ... vulgo iter fiat*.

The same adverb “mostly” (*plerumque*) signifies the prevailing trade custom, essential in the interpretation of the edict. Ulpian subsumes under the “merchandise” (E. 103 *merx*) also shop utensils which “mostly or even always” (D. 14,4,5,13 *plerumque ... immo semper*) come from the business. In a similar way he treats a “vessel” (E. 241.1 *navigium*) as including rafts whose use is mostly (D. 43,12,1,14) necessary too. Finally, he defines “summer water” (E. 251 *aqua aestiva*) as water mostly (D. 43,20,1,3) used in summer, and regards as “missing” (E. 17-24, p. 85 *rem abesse*) the things which were given back transformed, because their production price counts mostly (D. 50,16,13,1) for more than the substance.

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76 Tafaro, Debito (supra n. 55) pp. 221-222.
79 Some of these texts are analyzed by Andreas Wacke, _Incidenti nello sport e nel gioco_, Index 19 (1991) pp. 359-378.
The wording of many transactions is completed by Roman jurists with resort to normal conditions. According to Venuleius Saturninus, the formal promise to perform at a distant place without indication of time implies an average time which most men of the same rank as the debtor usually require to (D. 45,1,137,2 solent) reach this place\textsuperscript{80}. Labeo defines the crops “sowed by hand”, reserved in the sale of a landed property, not as permanently planted vines and trees, but as crops usually (lav. D. 18,1,80pr. solent) sowed every year\textsuperscript{81}. Ulpian supplies the court place, which lacks in the praetorian judging order, as a place where the assizes are usually (D. 5,1,59 solet) held\textsuperscript{82}.

Again, the old Trebatius Testa counts to the legacy of “provisions” (D. 33,9,3,1 penus) all the things which we use to eat (haec esse solemus), and the younger Aristo, active during the reign of Trajan (98-117 AD), also the vessel from which we use to eat (D. 33,9,3,2 in quibus esse solemus). Neratius specifies the “equipment” of a bequeathed shop (D. 33,7,23 instrumentum tabernae) according to the type of business usually transacted there: genus negotiationis solitum. Paul includes in the legacy of “things which are on land” also things absent at the time, but which nonetheless are usually there (D. 32,78,7 esse solent)\textsuperscript{83}; finally, Ulpian qualifies water as “aliment” if, in a given region, it is usually sold (D. 34,1,1 venumdari solet)\textsuperscript{84}.

With the help of such criteria, Roman lawyers also specify the application frequency of rules governing juristic interpretation\textsuperscript{85}, whether it concerns statutory law or legal transactions. Particularly as regards the praetorian edict, some interpretations are defined by means of the adverb “mostly” (plerumque) which stresses that they are accepted usually, but not necessarily always. Such interpretations are applied by Ulpian (D. 17,2,51pr.) to the unlikely action for theft against a partner, who is mostly presumed rather to lawfully enjoy the common property than to steal it; further to the meaning of the word “site” (locus), which usually denotes a parcel of land without a building (D. 50,16,60pr.); and finally to the use of the masculine gender which mostly extends to both sexes (D. 50,16,195pr.).

Separate rules are devoted to the interpretation of contracts. In this respect Proculus states that in partnerships we use always to consider (Paul. D. 17,2,65,5 semper enim servari solet) what is beneficial to the partnership rather than to one of the partners\textsuperscript{86}. Ulpian declares that the recognizable common intention of the parties is always followed (D. 50,17,34 semper); whereas Paul recommends the usual interpretation of unclear verbal contracts (D. 50,17,114 inspici solere) to be made mostly (D. 45,1,126,2

\textsuperscript{82} Wlassak, Judikationsbefehl (supra n. 64) pp. 85-86.
\textsuperscript{85} Giaro, Das romanistische Induktionsproblem (supra n. 42) pp. 384-385.
\textsuperscript{86} Giaro, Römische Rechtswahrheiten (supra n. 14) p. 399.
plerumque) according to their actual wording, only rarely (raro) accepting implied elements, such as a time limit or condition, and never (numquam) a person\textsuperscript{87}.

In a similar empirical manner, Roman jurists formulate their interpretation of wills. In respect of the testamentary conditions Ulpius Marcellus (D. 28,7,23) suggests to follow the numerically prevalent concept, based upon a statistical reasoning according to which a certain condition ought to be mostly taken in a given meaning: plerumque … ita accipi oportet. The same concept is occasionally supported by Ulpian (D. 28,6,24) who uses the somewhat more complicated, but in substance analogous expression plerumque credendum … nisi forte … quod vix credendum est.

\textbf{VI. Factual justification of legal rules}

The relation between the worlds of the normal and of the normative is obviously circular. Legal rules are indeed always posited in reference to states of affairs which, according to the remarks made by Celsus in his 5\textsuperscript{th} (D. 1,3,4) and 17\textsuperscript{th} (D. 1,3,5) book of “Digesta”, occur frequently (frequenter et facile) and do not merely happen in exceptional single cases (uno aliquo casu)\textsuperscript{88}. This topos of Greek and Hellenistic philosophy was borrowed by Roman jurists from a pupil of Aristotle, the renowned philosopher Theophrastus, who is expressly cited by Pomponius (D. 1,3,3) and Paul (D. 1,3,6). Elsewhere Paul (D. 35,2,63,2) stresses, moreover, that the rare cases of dearth cannot be assumed to be a criterion for determining the prices of foodstuffs.

In fact, Roman jurists readily resort to the frequency of social facts as justifying motive for particular legal rules. According to Africanus (Paul. D. 24,1,2), the customary prohibition of gifts between husband and wife is due to the prediction that such gifts would often (saepe) provoke matrimonial discords, ultimately transforming marriages into a venal matter\textsuperscript{89}. With a similar hint at their frequency (D. 24,1,60,1 saepe evenit) Hermogenianus, the last Roman jurist known by name, justifies the admissibility of gifts made upon the occasion of consensual divorce\textsuperscript{90}.

In the case of a soldier who intended to make an ordinary will, but happened to die before completing its formalities, emerges the question of its validity as military will. In resolving the question, Ulpian applies an analogy based on the practice of ordinary wills. As a matter of fact, given that most civilians are accustomed to (D. 29,1,3 plerique solent) add to their wills a so-called codicillary clause with the aim to preserve the will at least as codicil imposing trusts (fideicommissa) on intestate heirs, a similar intention must be assumed in reference to the soldier.

\textsuperscript{87} On both texts see Babusiaux, ‘Id quod actum est’ (supra n. 14) pp. 82-83, 102-103.
\textsuperscript{89} Henrike Schlei, \textit{Schenkungen unter Ehegatten}, Göttingen 1993, pp. 19-20.
\textsuperscript{90} Danilo Dalla, \textit{L’incapacità sessuale in diritto romano}, Milano 1978, pp. 251-255.
Certain other juristic solutions take sale practice into account. If, as mostly occurs (D. 19,1,38,2 *ut plerumque evenisse solet*), in the sale of a house no attention was paid to the surrounding water pipes, Celsus qualifies them as portion of the house. Again, if more items were handled with prices fixed separately, but the evident intention was to purchase or sell them together, as frequently occurs (D. 21,1,34,1 *plerumque accidere solet*) with actors slaves, four-horse teams or pairs of mules, Africanus concluded that there was a single contract of sale which implies joint liability for defects.

Basing upon the typical practice in partnerships, expressed with the adverb "mostly" (*plerumque*), Ulpian justified a smaller contribution of capital compensated through work. Indeed, it was common in Rome that a less wealthy partner made up his property deficiencies in this way (D. 17,2,5,1). A similar justification was given by Ulpian to uneven utilities and losses, since mostly (D. 17,2,29,1) the industry of one partner was of greater advantage to the partnership than the capitals invested by others. Finally, with resorting to the same statistical criterion, Paul (D. 17,2,10) excluded inheritances from the concept of profit (*quaestus*), decisive for the formation of partnership in general business, since inheritances derive mostly from a parent or a freedman, as if a debt were being repaid.

High frequency, indicated with the adverb *plerumque*, was referred to by Gaius as a reason of legal regulations, for instance in respect of the guardianship of women (G. 1,190) who were mostly deceived because of their recklessness, and in respect of agency without mandate (D. 44,7,5pr.), because people mostly went on a journey, as if they would return soon without anticipating any need for intervention in their affairs. Mostly recurring facts are pointed out as reasons of law making in numerous appraisals of the edict (*laudationes edicti*), pronounced by Ulpian on *protutela* (D. 27,5,1pr.), by Paul on *interrogationes* (D. 11,1,3) and by both on the *editum aedilicum*.

According to Ulpian, the dealer of slaves is obliged to notify their nation which was mostly of importance for the buyer (D. 21,1,31,21); moreover, it is forbidden to sell maliciously old slaves as more valuable novices, even if most of the sellers are used to doing so (D. 21,1,37 *plerique solent*). According to Paul (D. 21,1,44,1), if there are more slave dealers, in order to spare the buyer the necessity of litigating against several persons, he has the edilician action against any individual having the greater or equal share in the business, which corresponds to the mostly (*plerumque*) applied form of their partnership.

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95 Meissel, ibid., p. 113.
96 On both texts Renato Quadrato, ‘*Gaius dixit*’, Bari 2010, pp. 159-164, 219.
98 Cerami, Petrucci, ibid., pp. 316-318.
Some other legal regulations of the Roman slave trade were introduced, according to Papinian (D. 41,3,44pr.), on account of the constant and daily sale (propter adsiduam et cottidianam comparationem) of freemen bought as slaves. In this context the jurist stressed a difference with the situation of persons held mistakenly for legally adopted sons. Moreover, he defined this distinction a matter of public concern, since freemen were often (frequenter) bought as slaves, whereas the adoption procedure was neither as easy, nor as frequent (facilis frequens).

According to Ulpian, since the stipulation for double the price is customary (D. 21,1,31,20 adsidua) in the practice of the slave trade, the buyer of a slave is entitled to enforce it on the basis of an ordinary action on purchase, because matters of usage and custom (moris et consuetudinis) are implied in the actions of good faith. As far as the general law of sale is concerned, Gaius identifies the source of the guarantee (cautio) against the eviction of landed property in the custom of the region where the contract was concluded (D. 21,2,6 consuetudo regionis). With resort to the adverb plerumque Papinian (D. 48,5,23,4) mentions the lex Iulia de adulteriis which limited the right to kill an adulterer to the father of the woman, since his love shall mostly prevent him from precipitate action; similarly, Ulpian (D. 40,5,26,1) justifies the rescript of Antoninus Pius promoting the fideicommissary liberty which is mostly claimed too late, if at all. It is again Ulpian who supports the senatus consultum Macedonianum, stressing that loans granted to debtors of dubious solvency often enough (D. 14,6,1pr. saepe) have given occasion to crime, finally, Ulpian justifies the punishability of profiteers with their standing practice (D. 47,11,6pr. solent) to disturb the Roman grain supply.

In the same statistical style, the juristic collection of the late 3rd century AD, known as “Pauli sententiae”, declares parents and children, as well as patrons and freedmen, to be incapable of testifying against one another, because the personal propinquity mostly (coll. 9,3,3 plerumque) corrupts their veracity. Obviously such legal regulations, based on the criterion of the usual, were respectively modified in unusual cases. In this sense, Ulpian extended the delay for appeal, if contrary to the normal practice of the court (D. 49,4,1,7 ut fieri adsolet) the judge was absent directly following the delivery of his sentence.

In most legal reasoning, supported by hints towards daily trading practices, such empirical considerations are clearly revealed as being subsidiary to considerations of

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104 On both texts Kaser, Hackl, *Zivilprozessrecht* (supra n. 64) pp. 367 n. 54, 507 n. 58.
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a conceptual nature. In this way, Julian justifies the undoubted claim acquisition by somebody who awards a loan asking his future creditor to pay the money out to a future debtor (Ulp. D. 12,1,9,8 nec dubitari ... cum cottidie); Pomponius explains the duty of brokers (nummularii) to produce accounts with a very frequent reliance placed on their good faith (Paul. D. 2,13,9,2 non esse iniquum ... et frequentissime); finally, Ulpian approves a precarious tenure of own property, given previously e.g. in pledge (D. 43,26,6,4 cottidie enim ... et debet consistere)105.

In a famous text of Pomponius concerning the role of practice in the development of contractual liability (D. 13,6,13,2), Celsus grants me an action on loan for use against a freeman serving me in good faith as a slave to whom I have lent something. The justification is based on argument by analogy, because in the case of ordering him to do something I am entitled to an action on mandate. It does not matter that I originally lacked the intention to place my apparent slave under a contractual duty, for it mostly (plerumque) happens that a tacit obligation exceeds the intention of the parties, e.g. in case of the payment of undue106.

In another text, Pomponius decides that we retain the right of usufruct in a runaway slave, who acquires something for us, since in this way we are utilising him. Moreover, we often (D. 7,1,12,3 saepe) retain usufruct in slaves who remain in our possession, even without utilising them, e.g. if their services are worthless, because they are ill, small or old. The argument which crowns this reasoning addresses the conservation of a usufruct in a ploughed field which is so barren that it yields no crops107. Together with the previous one, this text belongs to the most serious, even if rare, Roman testimonies of inductive reasoning based on the frequency of particular legal regulations.

However, in the latter text, decisive is rather the argumentative convenience of the state of affairs examined by Pomponius than its frequency as such. Indeed, Roman jurists much more easily emphasize that a given practice is followed by many people or encountered in the daily trade with regard to previously existing valid legal rules. Such a relationship between law and practice is attested to particularly by Ulpian, who admits the possibility of establishing servitudes on factually separated and separately alienated parts of an immovable (D. 8,4,6,1 potest), as many people do: ut plerique faciunt108.

In two different works, Ulpian deals with the problem of betrothals between absent parties. In his Sabinian commentary he stressed the generally accepted legal rule that absent parties may be betrothed (D. 23,1,4,1 constat posse), adding only subsequently that this occurs daily: et hoc cottidie fieri. In his edictal commentary, on the other hand, Ulpian defined it (D. 23,1,18) as legally irrelevant whether betrothals

107 Giuseppe Grosso, Usufrutto e figure affini nel diritto romano, 2nd ed., Torino 1958, pp. 304-305; Lambrini, Elemento soggettivo (supra n. 23) p. 44 n. 38.
are contracted personally or by intermediaries, even if he added that in practice the latter is nearly always (fere plerumque) the case\textsuperscript{109}.

Some other texts of Ulpian contain clear phrases, such as potest ... et ideo plerumque ... convenire solent (D. 9,2,27,29) and ex lege ... admittitur ... inde solet (D. 38,16,3,9), which unequivocally depict a particular social usage as widely followed in practice, because it is legally permitted, but not vice versa. Correspondingly, in a late classical text attributed to Paul (D. 49,14,45,9) the juristic approval (non inique) of a recourse claim, advanced against a fiscal debtor by his surety, precedes the mention of the official custom to assist the latter: adiuvari solet\textsuperscript{110}.

A failing usage, by contrast, frequently derives from a legal prohibition. In a text of Ulpian, a father is liable for his son only if the son’s sureties are also used to be liable (D. 50,1,2,5 solent), but in case they are not. This negative practice (non solent) derives here evidently from both jurisprudential tradition and imperial law (et relatum et rescriptum est) which are, of course, valid legal sources\textsuperscript{111}. A similar picture offers the rule discussed by Venuleius (D. 40,12,44pr.), according to which freedmen can be bound to render services (operae) to their patrons only if they swear an oath following the manumission. For this reason, masters are used to (solent) exact from their slaves a religious oath which they should repeat as civil promise immediately after becoming free\textsuperscript{112}.

Hence, valid legal rules are not evaluated in the light of everyday practice but rather, conversely, such practice is evaluated as regards its conformity, or contrariety, with the rules. In this sense, Marcellus attributes most cases (D. 5,2,3 plerumque accidit) of undutiful will to a false pretext, whereas Gaius strongly blames such wills made by most fathers (D. 5,2,4 plerique) at the instigation of stepmothers\textsuperscript{113}, and finally Pomponius (D. 40,4,61pr.) decidedly opposes, in the wake of Julian, the testamentary practice of some masters (scio quosdam ... scribere solitos) to grant freedom to their slave only “when dying”\textsuperscript{114}.

There are many other juristic texts in which the current practice is subject to normative evaluation. Ulpian suggests that the funeral ceremonies, usually ascertained (D. 11,7,14,8 solent testari) as conducted out of mere moral duty, should be ascertained more fully (plenius testari oportet) in order to recover the funeral expenses from the heir. According to Paul the customary servitude of channelling water through pipes (D. 39,3,17,1 quae in consuetudine esse solent) must be carried out in a measure limited by the interest of the owner of the servient tenement: fieri possunt, ita tamen ...\textsuperscript{115}.

\textsuperscript{110} Georg Klingenberg, Der ‘fiscus’ im Dienste privater Rechtsdurchsetzung, Scritti Antonio Guarino, Napoli 1984, pp. 1711-1712.
\textsuperscript{112} Tomasz Giaro, Römische Rechtswahrheiten (supra n. 14) p. 321.
\textsuperscript{113} Serena Querzoli, I ‘testamenta’ e gli ‘officia pietatis’, Napoli 2000, pp. 156, 161, 172.
\textsuperscript{114} Ralf Backhaus, ‘Casus perplexus’, München 1981, pp. 80-81, 94-96.
\textsuperscript{115} Maria F. Cursi, ‘Modus servitutis’, Napoli 1999, p. 318.
The consciousness of a possible divide between valid law and its practical application is implied also in Ulpian’s question whether the amount usually set off (D. 25,1,5,2 *compensari solet*) as necessary expenses may still be recovered (*an condici possit*) once the entire dowry is returned without putting them into account. Furthermore, such a divide is testified to by imperial legislation. Even if the Augustan *lex Aelia Sentia* prohibited freedmen from paying off their services (*operae*) by offering “something” to the patron (Paul. D. 37,14,6,1; D. 38,1,39pr.), such a practice is attested in a rescript of the emperors Septimius Severus and Antoninus Caracalla: *solet … convenire, ut … aliquid praestetur, licet pretium non possit* (C. 6,3,1)\(^{116}\).

A similar contrast between the rule of the old *ius civile* and a new custom of imperial legislation is finally mentioned by Paul in his Sabinus commentary (D. 8,1,14,2). After having announced an ancient legal rule which excluded the servitude of watercourse (*aquae ductus*) between two tracts of private land separated by a public place (*imponi non potest*), the jurist nevertheless defines it as customary to petition the emperor (*peti solet*) in order to direct water across a public way, if it is possible without causing inconvenience to the public\(^{117}\).

**VII. Induction of legal rules from facts?**

Modern historians of Roman law sometimes mention the induction of legal principles from legal rules. Julian’s text about the principle *nasciturus pro iam nato …* (D. 1,5,26) serves as a typical example of this. However the jurist, whose “Digesta” fulfilled mainly didactic aims, intended only to elucidate its range of application\(^{118}\). His expression “in almost the whole civil law” (*in toto paene iure civili*) was a generalization which discharged Julian from the duty to enumerate precisely all such instances. The same role was played by the similar expressions of other jurists: *in con-pluribus causis* (G. 1,147), *in multis iuris partibus* (G. 2,289; Ulp. D. 6,2,1,2; Herm. D. 41,1,61pr.), *in omnibus fere causis* (Pomp. D. 40,4,40,1) as well as *in multis articulis* (Pap. D. 1,5,9) and *in omni fere iure* (Pap. D. 1,7,13; D. 28,2,23pr.).

Hence, alongside the temporal gradation of frequency, Roman jurists also knew a local one. This followed the pattern of legal consequences which materialize either in all (*in omnibus*) or only in some (*in quibusdam*) fields of law (*partes iuris*). With the former expression, Neratius attributes the universal validity to his distinction between mistake of law and mistake of facts (D. 22,6,2), whereas Ulpian declares a Roman citizen who did not return from captivity to all intents and purposes already


dead at the time of his capture (D. 49,15,18)\(^{119}\). By contrast, Paul recognizes legal personality to the dormant inheritance only in some “fields of law” (D. 41,3,15 pr. in quibusdam), whereas Hermogenianus, active almost a century later, in many of them (D. 41,1,61 pr. in multis).

Similarly, there are legal consequences which materialize only in some cases (Paul. D. 22,6,9 pr. in quibusdam causis), if at all. This version was already applied to a slave, confronted with an illegal order of his master, by Alfenus Varus (D. 44,7,20 non in omnibus ... audiens esse solet) and Labeo (D. 47,10,17,7 nec in omnia ... parere debet)\(^{120}\). The same pattern of restriction delimits the rule according to which an obligation ceases to exist in circumstances wherein it could not have begun. Paul qualifies the rule as not valid in all cases (D. 45,1,140,2 non in omnibus), because a co-owner cannot acquire a right of way for the benefit of land owned in common, but if a full owner, to whom such a right has been promised, leaves two heirs, the divided stipulation survives\(^{121}\).

Even less reasonable than the induction of legal principles from particular legal rules seems the inductive creation of the latter from bare social facts. Nonetheless, some historians of Roman law understand the above mentioned statistical formulations of ancient jurists as inductive-probabilistic presumptions, analogous to the rules of the English common law which are indeed often considered pure working hypotheses\(^{122}\). However, such apparently empirical, but in reality doubtless normative judgments of Roman lawyers indicate only summarily the normative content of the rules, without a closer consideration of exceptions.

In this manner, particular rules of conduct are also formulated by several lay authors. For example in his dialogue “On the Commonwealth”, Cicero describes the Epicurean rule that the wise man uses to avoid (rep. 1,11 non solere) politics, unless he is constrained by circumstances: sin autem temporibus cogeretur ... This means of course that he ought to avoid politics, the prescriptive character of the rule being denoted by the positive evaluation of its addressee as “wise”. In the same way in his textbook on rhetoric, Quintilian mentions the procedural rule concerning witnesses, usually bound to testify in a criminal trial (inst. 5,7,9 quibus ... denuntiari solet), even if the exemptions are well known\(^{123}\).

According to an identical scheme, without mentioning the exceptions, Gaius states that the procurator of the plaintiff is usually (G. 4,84 plerumque) obliged to give a guarantee, because his empowerment is often (saepe) unclear. Ulpian excludes

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\(^{120}\) See supra n. 57.


\(^{123}\) Giaro, Römische Rechtswahrheiten (supra n. 14) pp. 184, 313.
the appointment of an unwilling cognitor in an empirical manner (D. 3,3,8,1 \textit{non solet dari}), even if in the same context he describes a related figure of the administrator of the insolvent debtor’s property (\textit{curator bonorum})\textsuperscript{124} according to the normative pattern of rule and exception with the help of the deontic sentence \textit{neminem invitum cogendum … nisi …} (D. 42,7,2,3)\textsuperscript{125}.

In certain contexts, Ulpian clearly identifies the empirical frequency of application with the normative capacity of a legal rule to admit exceptions. Indeed, in several texts from his edictal commentary the main sentence, formulated in a statistical manner, is followed by exceptions expressed according to the dualistic scheme which opposes \textit{plerumque} (D. 13,6,5,3) to \textit{interdum} (D. 13,6,5,6-7, § 10) and to \textit{nonnulli casus} (D. 27,3,1,2), or by similar locutions, such as \textit{plerumque criminaliter agi … tamen … poterit civilitur agere} (D. 47,2,93) and \textit{non solent audiri appelantes nisi bi …} (D. 49,5,1pr.).

Venuleius Saturninus exempts the seller, evidently not liable for limited rights \textit{in rem} usually (D. 21,2,75 \textit{soleat}) passing together with the land to the buyer, from the converse responsibility for praedial servitudes vindicated from the latter by a third person, unless (\textit{ nisi …}) the land has been transferred as wholly free of charges\textsuperscript{126}. Finally, Paul (D. 17,2,65,5) completes the rule of Proculus on the predominant role attached to the interest of the partnership (\textit{semper … servari solet}) by the clause of divergent agreement \textit{si nihil … convenit}\textsuperscript{127}.

In conclusion, the reason for the empirical formulation of Roman legal rules lies primarily neither in their inductive origin nor in their disputable binding force. On the contrary, their validity is clearly beyond doubt, since the legal consequences of certain other unquestionable rules of law are also clothed in statistical formulation. In this manner, Gaius refers indeed to the Catonian rule (G. 2,244 \textit{quo tempore dies legatorum cedere solet}) and Ulpian to the rule that a contract of lease does not imply the ultimate transfer of ownership (D. 19,2,39 \textit{non solet locatio dominium mutare})\textsuperscript{128}.

Papinian (D. 20,5,2) subjects a pledge, bought by a surety of an insolvent debtor, to the right of subrogation due to the next creditor, since his purchase is usually made (\textit{fieri solet}) by operation of law. Marcellus (D. 24,3,57) and Paul (D. 33,2,5) cloth the expiry of the usufruct, following unfailing upon the death of its holder (Ulp. D. 7,4,1pr. \textit{constat}), in the statistical expressions governed by \textit{solet}. Ulpian (D. 28,3,8pr.) employs the locution \textit{rumpi solet} in reference to the old rule, already firmly recognized by Cicero (de or. 1,241 \textit{constat}), that a will was usually “broken” by the birth of posthumous heirs\textsuperscript{129}.

\textsuperscript{125} On all these texts see Giaro, Rechtswahrheiten (supra n. 14) pp. 315-316, 368.
\textsuperscript{126} Giaro, Römische Rechtswahrheiten (supra n. 14) pp. 334, 336.
\textsuperscript{127} Santucci, Socio d’opera (supra n. 77) p. 18.
\textsuperscript{129} On all these cases see Giaro, Rechtswahrheiten (supra n. 14) pp. 324, 334, 386.
In this context, a further aspect of factual considerations in Roman legal discourse must be addressed. The jurists refer namely quantitative or statistical concepts not only to the social origins of legal rules, but also directly to their frequency of application. Indeed, from this perspective the exceptionless rules are depicted as events which inevitably happen always, and the excluded exceptions as events which never occur. Similarly, legal rules subject to exceptions are described as events happening mostly and permissible exceptions are defined as events which rarely occur. Such utterances evidently express “ought” in the terms of “is”\textsuperscript{130}.

From this perspective, the circumstance that particular legal consequences never \((\textit{numquam})\) happen indicates a rule which is absolute in nature. Several rules of this kind are mentioned by Ulpian, e.g. the exclusion of the action to control rain water which never applies (D. 39,3,1,14) to the damage caused by the nature of the land\textsuperscript{131}; the exclusion of prescription of the property rights to a sole building without a ground (D. 41,3,26)\textsuperscript{132}; finally, the exclusion of impunity for any of several offences committed together by the same wrongdoer, e.g. theft and killing of the same slave (D. 47,1,2pr.)\textsuperscript{133}.

Paul also mentions some absolute legal rules, namely that the right of access to a burial place is never \((\textit{numquam})\) lost by failure to exercise it (D. 8,6,4) and that the transfer of property by delivery never occurs without a preceding just cause, such as sale (D. 41,1,31pr.). The rule, cited by Paul (D. 17,1,3pr.), according to which a contract of mandate may never \((\textit{numquam})\) worsen the original condition of the mandator, is completed by the observation that, conversely, his condition may sometimes improve: \textit{interdum melior, deterior vero numquam}\textsuperscript{134}.

The same scheme embraces events which occur frequently \((\textit{saepe})\) (Gai. D. 23,1,17; Ulp. D. 16,3,1,35) or mostly \((\textit{plerumque})\) (Iul. D. 46,8,22,8) as well as those which occur seldom or only occasionally, namely \textit{nonnullum} (Pap. D. 19,5,1,pr.; D. 38,2,16,7; D. 46,3,95,2), \textit{aliquando} (G.1,65; 1,176; D. 16,1,13pr.; UE. 16,1) or \textit{interdum} (Iul.-Afr. D. 21,1,34pr.; Gai. D. 41,1,9,5; Paul. D. 48,1,4). However, these adverbs often accompany imperative verbs which leave no doubt on their deontic nature: \textit{raro restituenda} (Ulp. D. 16,3,5,2) or \textit{raro accipiendum} (Paul. D. 22,6,9,3), \textit{nonnullum expectandam} (Ulp. D. 26,7,8), \textit{aliquando cogendum} (Gai. D. 3,3,12), \textit{interdum damnandus} (Paul. D. 10,4,12,4) or \textit{interdum permittendum} (Ulp. D. 4,4,9pr.).

According to Paul (D. 49,15,29), who comments on a very laconic maxim of the old Antistius Labeo, under the benefit of re-entering the borders \((\textit{postliminium})\) a war prisoner acquires by prescription anything that his slave has obtained as \textit{peculium},

\begin{itemize}
\item \textsuperscript{130} Cf. Pasquale Voci, \textit{Ars boni et aequi}, Index 27 (1999) p. 2.
\item \textsuperscript{131} Giaro, Römische Rechtswahrheiten (supra n. 14) p. 450.
\item \textsuperscript{133} Cf. Ulp. D. 44,7,60 = D. 50,17,130; Pasquale Voci, \textit{Azioni penali in concorso tra loro}, SDHI 65 (1999) p. 2-4.
\end{itemize}
because we are used to (solemus) acquiring property of this kind by prescription even without our knowledge. This rule also applies to the dormant inheritance (hereditas iacens) which usually is increased (augeri ... solet) by a slave forming its part.\footnote{Giaro, Rechtswahrheiten (supra n. 14) p. 432.}

One of the counterparts to the concept of the usual (solet) is the adverb “sometimes” (aliquando)\footnote{Cf. Dieter Simon, \textit{Aus dem Kodexunterricht des Thalelaios}, SZRA 86 (1969) pp. 374-375.}. For instance, according to Paul (D. 3,3,42,2) the obligation between the principal and the agent “usually” gives rise to an action of mandate which, however, “sometimes” does not lie, e.g. when we appoint an agent in his own behalf (in rem suam), and promise to comply with the judgment. Nevertheless, even if Pomponius (D. 18,1,8) at first absolutely excludes a sale without a thing sold (sine re), subsequently he “sometimes” recognizes such a construction.\footnote{Gehrich, Kognitur (supra n. 74) pp. 25-26; Babusiaux, ‘Id quod actum est’ (supra n. 14) pp. 214-215.}

Several Roman jurists oppose the adverb plerumque to interdum, as does Ulpian (D. 47,11,6pr.) in describing the penal practice of the province governor who mostly (plerumque) imposes on the grain speculators the prohibition of trade, but sometimes (interdum) punishes them with deportation.\footnote{Aldo Dell’Oro, \textit{I 'libri de officio' nella giurisprudenza romana}, Milano 1960, p. 175.} In some other contexts plerumque is opposed to nonnumquam. In this sense, Paul (D. 21,1,44pr.) stresses that a slave should not be added as an accessory to sale contracts, even if conversely things of greater value could be added as accessories to a slave whose peculium is mostly (plerumque) more valuable than he himself and sometimes (nonnumquam) the accessory slave (vicarius) is worth more than the principal.\footnote{Tomasz Giaro, \textit{Absurditätsargumente in der römischen Jurisprudenz}, OIR 11 (2006) p. 41.}