

**“History of Legal Concepts and Historical Individuality
of the Classical Roman Jurists”¹**

Conference at Montepulciano, Italy, from June 14 to 17, 2011

or

Should we really think of the fathers of the Civil Law system as interchangeable personalities?

Sebastian Stepan
Heidelberg University

“If we cannot among the classical jurists discover personalities of pronounced scientific originality, it is because none such existed.”²

Doing research on today’s Civil Law, one has always to take into consideration the fact that most parts of our modern Civil Law codes are strongly influenced by ancient Roman law. During the second and third centuries AD, Roman jurists developed a coherent inner system of law in myriads of single decisions, only a small part of which were preserved for later generations by Eastern Roman Emperor Justinian’s *digesta*, which itself was an important source for those who forged the outer systems of today’s Civil Law codes. The significance of this fascinating achievement for modern Civil Law alone could make us wonder what brilliant minds those classical Roman jurists must have been. Yet we might also take scientific interest in their individual personalities. In order to understand what led to a particular decision by a classical jurist, it could be useful to know his personal or economical background and what his personal beliefs or experiences were. However, according to *Schulz*, whose thesis has hardly been questioned for a long time, we are supposed to believe that the classical jurists were interchangeable³, that they didn’t have any scientific individuality.

In order to get a grasp on the question whether this postulate is still useful today, or whether it can be at all upheld considering latest research results, Italian, German and Spanish scholars gathered at the conference organized by professors Christian Baldus (Heidelberg), Massimo Miglietta (Trento), Gianni Santucci (Trento), Emanuele Stolfi (Siena), and Roberto Tofanini (Siena) in the medieval town of Montepulciano, surrounded by the beautiful landscape of Tuscany, to compare their findings.

The conference started off with quick overviews of how German research findings were received in Italy and vice versa in the past two centuries of Roman law research (*Between philology, philosophy and history of dogma: German Roman law research from an Italian perspective*, Prof. Gianni Santucci, Trento; *The country of esperienza giuridica: Italian*

¹ The original conference title in German and Italian read “Dogmengeschichte und historische Individualität/Storia dei dogma e individualità storica dei giuristi”.

² *Fritz Schulz*, *History of Roman Legal Science*, Oxford 1946, p. 125; see also *Fritz Schulz*, *Principles of Roman Law*, Oxford 1936, p. 106 ff.

³ Or “fungible personalities”, as *Schulz* translates from *Savigny*, *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft*, Heidelberg 1840, p. 157, in *Principles of Roman Law*, Oxford 1936, p. 106.

Roman Law research from a German perspective, Prof. Johannes Michael Rainer, Salzburg) as well as how Roman law research in Europe influenced legal science and legislation in South America (*Old Europe, new world? – Roman law research in Europe seen from a Latin-American perspective*, Prof. Patricio Carvajal, Santiago de Chile, presented by Adolfo Wegmann, Heidelberg).

Before plunging into the matter itself, we have to take into account that almost all information we may have about a jurist's individuality is to be drawn from what is conveyed to us by the Digest of Justinian. Yet our quest for a jurist's personality in the *digesta* is like wandering through a zoo, where we can only observe the species from far away through the bars of their cages, as Justinian's commission may or may not have altered the original texts of the jurists (*The encaged jurist*, Prof. Christian Baldus, Heidelberg). It is, however, not only the uncertainty of transmission of the original texts that constrains our view of the classical jurist. We may also be prejudiced by our own legal formation as well as by traditional methodological presuppositions. In this context one has to mention Schulz' thesis of "interchangeability" as well as that of "isolation"⁴, which postulates that the classical jurists had walled themselves off against any influence from other disciplines and had hence formed a pure and "isolated" Civil Law.

Our limitation to the sources leads us to the most obvious aspect of individuality: the linguistic one. Modern findings in linguistic science, however, suggest that when analyzing the texts of a particular jurist, no linguistic individuality can be attributed to him, but we can find an individual style (*Linguistic individuality*, Andreas Nitsch, Heidelberg).

In a second step, we examined the possible economic (*Economic and social context*, Prof. Valerio Marotta, Pavia), rhetorical (*The jurists and rhetoric*, Prof. Giovanni Cossa, Siena), cultural (*Cultural formation of the jurists*, Prof. Emanuele Stolfi, Siena) and political (*The political role of the jurists*, Prof. Javier Paricio, Madrid; *Law of the jurists, of the magistrates and of the princeps*, Prof. Enrico Sciandrello, Trento) backgrounds of the classical jurists, which may or may not have brought about a certain dogmatic individuality of a given jurist. The presentations on this topic lead to the conclusion that the classical jurists were probably not as isolated as previously assumed, but that the jurists were presumably exposed to the same influences, for example to the same kind of rhetorical formation, which thus did not lead to individualization.

Another aspect that could be regarded as an impediment to any form of individualization is the so-called "aktionenrechtliches Denken", the manner in which the classical jurists thought of all of their cases: the procedural view. It was found, however, that this aspect did not constrain their view in a way that would impede any formation of dogmatic individuality (*Procedure and Aktionendenken*, Prof. Ulrike Babusiaux, Zurich).

Recent source-related studies, however, have come to ambiguous results concerning the jurists' individuality.

For the late republican jurists Servius Sulpicius Rufus (*Methodical and dogmatic individuality by the example of Servius Sulpicius Rufus*, Prof. Massimo Miglietta, Trento) and Gaius Trebatius Testa (*Methodical and dogmatic individuality by the example of Gaius Trebatius Testa*, Prof. Alfonso Castro, Seville), the sources reveal methodological individualities, the latter expressly being considered an individual personality by Justinian's commission.

⁴ Fritz Schulz, *History of Roman Legal Science*, Oxford 1946, p. 84.

Whereas it is beyond doubt that Justinian's chancellery saw the classical jurists as individuals, we cannot know for sure that its members saw any methodical or dogmatic differences between them (*Justinian's chancellery and the non-interchangeability of the classical jurists*, Sabrina Di Maria, Bologna).

Individual forms of argumentation or dogmatic individuality are even accounted for in sources concerning the *divortium bona gratia* (*The development of the divortium bona gratia during the second and third century*, Francesca Nocentini, Siena) and the *bonorum venditio* (*Notes on certain decisions made by jurists of the Principate concerning the bonorum venditio*, Alessandro Cassarino, Siena).

In other cases, research did not lead to positive results regarding a jurist's dogmatic individuality (*Interpretation of D. 1.8.2 pr. between "social" history and modern dogmatics*, Alvise Schiavon, Trento; *"Arrae vel alio nomine", a responsum of Quintus Cervidius Scaevola between dogmatic and philological analysis*, Julia Gokel, Heidelberg).

Such individual traits of a certain jurist can – if they are verified – help in assigning a work to a given jurist, as it is in the case of the *Pauli Sententiae* (*Examples of current research efforts concerning the classical period and the history of Roman law research*, Iolanda Ruggiero, Siena). We should, however, not fall back into the habit of Roman law research of the late 19th and early 20th century, which abused claimed "individualities" or "characteristics" as a means to prove their theses (*The history of Roman jurists as a topic of Italian Roman law research between the 19th and 20th century*, Massimo Nardoza, Siena).

In conclusion, it must be said that the conference was a great opportunity for researchers from all over Europe to get together and share their ideas on this methodologically important topic. Special thanks go to the City of Montepulciano, which offered the conference a great setting in historic buildings and did never hesitate to supply the participants with its excellent wine stored in the cellars below the city. The matter itself, however, still has to be regarded as unsolved. Schulz' theory that no scientific individuality existed amongst the classical jurists could neither be verified nor completely refuted. The presentation and discussion of recent findings, however, enabled a more cautious handling of the matter in the future.