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The Origin of Trade in Hermogenian’s Thought

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At the beginning of his *Iuris Epitomae*, the jurist Aurelius Hermogenian - who was master of petitions and praetorian prefect under the Emperor Diocletian1 - explained how trade originated, with these words:

D. 1.1.5 (Hermog. 1 *iuris epit.*): This law of nations (*ius gentium*) created wars, separation of nations, birth of kingdoms, private property, masonry, sale and purchase, lease and all contracts, with the exception of those introduced by the domestic Roman law (*ius civile*).2

In the typical introduction to the general concepts of law,3 the textbooks of juridical science of the imperial age gave little indication as to what the state of the world was before the beginning of civilization. The first book of the Justinian’s *Institutiones*, which took up this same passage, only explained that the phenomena described by Hermogenian had been produced by customs and needs common to all human peoples. In addition, Justinian’s handbook extended the list of the obligations based on *ius gentium* mentioned by Hermogenian, adding companies, deposits, mortgages and “innumerable others”.4 Trade clearly appears as a human creation, fruit of *ius gentium*. But what does *ius gentium* mean? It may assume four main meanings.

In the first sense it could be identified with a branch of Roman private law, deriving from the jurisdiction of the praetor of foreigners (*praetor peregrinus*). This magistracy was established in 242 B.C., in order to incorporate in Roman law a spontaneous merchants law, diffused within

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1 Cf. E. Dovere. Studi sul titolo I delle Epitomi di Ermogeniano. Giappichelli 2001, pp. 9 ff. The author of the six books of *Iuris epitomae* was probably the same jurist who compiled the *Codex Hermogenianus*.

2 D. 1.1.5 (Hermog. 1 *iuris epit.*): *Ex hoc iure gentium introducta bella, discretae gentes, regna condita, dominia distincta, agris termini positi, aedificia collocata, commercium, emptiones venditiones, locationes conductiones, obligationes institutae: exceptis quibusdam quae iure civili introductae sunt.*


4 I. 1.2.2: “*ius autem gentium omni humano generi commune est. nam usu exigente et humanis necessitatibus gentes humanae quaedam sibi constituerunt: bella etenim orta sunt et captivitates securiae et servitutes, quae sunt iuri naturali contrariae. iure enim naturale ab initio omnes homines liber nasebantur. ex hoc iure gentium et omnes paene contractus introducti sunt, ut emptio venditio, locatio conductio, societas, depositum, mutuum et alii innumerabiles.*"
the Mediterranean.⁵

In a second sense, *ius gentium* may be considered a sort of international law, regulating relations with other political communities, both in peacetime and in war. It was partly based on custom and pacts and partly on the prescriptions and rites of the priestly college of the Fecials.⁶

In a third sense, ‘*ius gentium*’ could be understood as a set of transnational juridical principles that were common to all peoples, insofar as they were inspired by nature. It was not positive (i.e. man-made), but natural law, postulating a metaphysical foundation.⁷

Doctrines on natural justice actually circulated everywhere in the educated classes, spread by the various post-Socratic schools: Platonics, Aristotelians, Stoics. Above all, Cicero, in *De legibus*, the book of authority of Roman natural law,⁸ proposed the idea of an intrinsically rational - and therefore just - nature, whose rules prevailed on the law of the Republic. Paradoxically, the Roman jurists did not seem particularly interested in this “*commune ius gentium*”, opposed to the law used in each country, at least until the age of Hadrian. At that time the jurists, who defended a universalist vision of the Empire, began to appreciate this ideology. It was not just a useless philosophical view. On the contrary, it was able to favor the relationship with the other peoples of the Empire, so different in terms of culture and legal institutions. Therefore also the jurist Gaius, following Cicero, distinguished the proper law of the city (*ius civile*) from that of the nations, considering the latter the manifestation of natural order (*naturalis ratio*).⁹

Finally, *ius gentium* might be conceived as a different kind of law, interposed between natural law - that “*is always good an fair*” - and *ius civile*. So both *ius civile* and *ius gentium* were man-made and opposed to natural law, that was the only “true” one. Ulpian - as probably other jurists - characterized natural law in a neo-Pythagorean sense. In fact, he understood it as a set of rules common to men and animals.¹⁰

Cynics and Stoics were extremely radical in their praise of the original natural community. In the ten *Epistles* of Anacharsis - a well-known apocryphal epistolary of the second century - it was imagined that the legendary traveler of the 6th century BC., archetype of every “good

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⁹ Cic., *Leg.*, 1.7: “*ratio summa insita in natura*”; *Inv.*, 2.161: “*Naturae ius est, quod non opinio genuit, sed quaedam in natura vis insevit, ut religionem, pietatem, gratiam, vindicationem, observantiam, veritatem*”; Gai 1.1: “*Omnes populi, qui legibus et moribus reguntur, partim suo proprio, partim communi omnium hominum iure utuntur: nam quod quisque populus ipse sibi ius constituit, id ipsius proprium est vocaturque ius civile, quasi ius proprium civitatis; quod vero naturalis ratio inter omnes homines constituit, id apud omnes populos peraeque custoditur vocaturque ius gentium, quasi quo iure omnes gentes utuntur: Populus itaque Romanus partim suo proprio, partim communi omnium hominum iure utitur*”.
savage” ancient and modern, wrote to the authorities of the Greek world. He explained, for instance, to Cresus how property and commerce were both fruits of deception and violence. Only the Scythians had remained exempt from these original faults and faithful to the community life prescribed by nature. The people of Anacharsis not only did without property, war and politics, but also without commerce, techniques and currency, all considered as evils typical of the civilized societies.

The followers of the Second Stoa and of Roman Stoicism did not really postulate the abolition of property, money, commerce and slavery. No one was particularly keen to return to the primitive communism of the legendary Scythia. Thus, the true model of the ruling classes of the Empire was not the perfect cynical ascetic, but the “vir bonus secundae notae” (good man of second rate) of Seneca, capable of combining realism with the critique of existing social relations and current morality.

Despite the formal respect for philosophical principles, jurists had clear that the naturalis ratio was inevitably and systematically contradicted by man-made norms. The myth of natural law remained in the background, but as only a paradoxical regulatory ideal, which reaffirmed the need for rules to be rational. One of the most obvious cases of this conflict was slavery, which contradicted the principle of the original freedom of human beings. The same went for ownership, loan interest and trade. The main philosophical currents of the ancient world exhibited contempt for trade, especially retail trade, but not even the most dogmatic of the Stoics would have asked to outlaw this practice.

Hermogenian’s work does not seem to follow the Cynic-Stoic schemes. In the excerpt we are examining, there is no reference to naturalis ratio, no nostalgia of the golden age, no blame for the decadence of civilization. The law of nations produces order, even in the field of war. In another passage of the Epitomae he arrives to say dryly that law as a whole was introduced to regulate human interests: “Cum igitur hominum causa omne ius constitutum sit...” To use post-Socratic terminology, the final cause of law is the usefulness of men. It is true that, among its various meanings, constituere refers to man-made norms, generally based on legislation. But even for Cicero natural law had been “invented” (descriptum), just like the civil one. Invented by whom? Not by men, but by the “God legislator” of the Stoics. Even Jesus, stating that “the Sabbath was made for man, not man for the Sabbath”, uses the same topos.

15 Sen., Epist., 5.42.
16 D. 1.5.2 (Hermog. 1 iuris epit.).
18 Marc., 2.27.
Hermogenian doesn’t specify whether the law of nations is natural law or man-made law based on transnational costume. Does he imagine the emergence of law from the primordial chaos of a completely anarchical world? No, because he believes in natural law (“those which are not written”) and distinguishes it from the custom, that is a “citizens tacit agreement”.19

In the excerpt of Hermogenian the appearance of law seems to redefine institutes and activities such as trade or war itself which were present - albeit in an embryonic form - in the state of nature. His thesis could correspond to the Aristotelian’s version of the birth of commerce, more realistic and articulated than the cynical-stoic theory.

Plato recognized the usefulness of money and domestic trade exercised by merchants (kapeloi), both leading back to the division of labor.20 Aristotle also claimed that the city existed for exchanging services. It was not bad to use a measure of the value of things to be exchanged. But the natural and just form of circulation of goods was the exchange between equivalent values, aimed at maintaining autarchy. If money had been used only to be spent, or as a means for bartering, this would not been reprehensible. Even coined currency, although introduced by man-made law, did not in itself violate nature.21

Yet chrematistics (that is, the sector of oikonomia concerning the procurement of goods) did not stay within these limits. The natural exchange had been overwhelmed by a distorted use of money (nomisma), which was born to make bartering (allaghē) easier. But the adoption of this artifice had greatly facilitated the spread of bad chrematistics, that is, a form of exchange that involved profit (kerdos) for intermediaries and was aimed at accumulating money. Trade, which was an activity of exchange between non-equivalent goods, produced the professional figure of the merchant, and in particular of the emporos, who sought profit abroad as well. As it appears, for Aristotle, there was a chrematistics conforming to nature, making use of exchanges and even money, without being trade.

So, once money was invented for fostering interchange of goods, a new type of chrematistics appeared: trade. At first it was probably very simple trade. But then, with experience, it became a more astute art, discerning where and how to trade, in order to maximize profit…22

Real trade was established after the creation of the city and its laws, not before, which is

19 D. 1.3.35 (Herm. 1 iuris epit.).
20 Plat., Rep., II, 371b 11-14; Cic., Off., 1.42.151.
22 Arist., Pol., 1257b: πορισθέντος οὖν ἢδη νομίσματος ἐκ τῆς ἀναγκαίας ἀλλαγῆς θάτερον εἶδος τῆς χρηματιστικῆς ἔγνετο, τὸ καπηλικόν, τὸ μὲν πρῶτον ἀπλῶς ἰσος γινόμενον, εἶτα δὲ ἐμπειρίας ἢδη τεχνικότερον, πόθεν καὶ πῶς μεταβαλλόμενον πλείστον…
exactly what Hermogenian claims. In the Homeric poems, the Mediterranean peoples seem to have emerged only recently from the state of nature. The wise Phaeacians had been taken from the land of the Cyclops to Corfu only two generations earlier, by the son of Poseidon. The demigod had given them fortifications, houses and temples, divided the land and finally turned them into skilled navigators.

Homer., Od., 6.1-10: So there the constant and glorious Ulysses slept, overcome by fatigue and sleep. But Athena went among the people and in the city of the Phaeacians. They once lived in the vast Iperea, near the Cyclops, overpowering men who looted them and were stronger.

Nausithoos the demigod took them from there and set them up in Scheria, far from the men who eat bread. He surrounded the city with a wall, and built the houses, made temples to the gods and divided the fields.23

When he was writing his introduction to law, Hermogenian likely had quotations like this in mind narrating of a transition that was ongoing at the age of the Homeric warriors like Menelaus, who cultivated the land and was also merchant.24 In book VIII of the Odyssey, Ulysses reacted with disdain to the charge of being a merchant, and not a warrior. But in book XIV this famous liar convinced Eumaeus that he was a Cretan warrior who, after the Trojan war, had traded with Egypt for seven years, until he had been cheated by a Phoenician smuggler, who was more astute.25

As we have seen, for jurists some legal institutes were “natural”, others were iuris gentium, still others were grounded on the traditional Roman law. So the possessio was a situation of fact (naturalis), which constituted the original form of private belonging of things. Of this, the things common to all (res communes omnium), such as air or sea, were the last remain.26 On the contrary, the typically Roman dominium derived its origin “ex iure Quiritium”, that is from the most ancient legal system of the city.

23 ὃς ὁ μὲν ἐνθα καθεῦδε πολύτλας δίος Ὀδυσσεύς ὑπνω καὶ καμάτῳ ἀρημένος· αὕταρ Ἀθήνη· ἐν θεοειδής Ναυσίθοος σινέσκοντο, βίηφι δὲ φέρτεροι ἦσαν. ἀναστήσας ἄγε Ναυσίθοος θεοειδής, εἷσεν δὲ Σχερίῃ, ἑκὰς ἀνδρῶν, ἀμφὶ δὲ τεῖχος ἐλασσε πόλει καὶ ἐδείματο οἴκους καὶ νηὸς ποίησε θεων καὶ ἐδάσσατ’ ἀρουρας.


25 Homer., Od., VI, 4-10.

26 D. 41.2.1. (Paul. 54 ad ed.). The bibliography on common things common to all in Roman law is vast. A recent research is, for instance, D. Dursi. Res communes omnium. Dalle necessità economiche alla disciplina giuridica. Jovene 2017.
Obviously, barter was more archaic and close to nature than sale (*emptio-venditio*), which was a *iuris gentium* contract. There was a famous controversy between the legal school of the Proculians and that of the Sabinians on the difference between buying and selling and barter, that continued to be widely used in the Roman world.\(^\text{27}\) Here there seems to be an echo of a philosophical polemic between a “primitivist” and an Aristotelian position, which distinguished between different forms of exchange. Sabinus claimed that a slave delivered in exchange for a real estate was nothing more than the price paid to obtain goods. The Proculians (followed by Gaius) denied that the sale and the barter had the same social function, so they could not be protected by the same type of legal action.

\[\text{D. 18.1.1. pr. (Paul. 33 ad ed.): The origin of the sale is the barter. In fact, once there was no money and it was impossible to distinguish the goods on one side and the price on the other, but each exchanged things that were useless with things that were useful, according to circumstances and things. In fact it happens continuously that someone has too much and someone else is missing something. But since it was not easy that one had just what the other wanted, and vice versa, a matter was chosen whose value was permanently guaranteed by the public authority, which solved the problem of exchange through equality of the quantity. 2… Sale is a contract based on the law of nations, concluded by agreement, even between absent, or through a messenger or by letter.}^\text{28}\]

In an era in which money did not existed yet, it was impossible to distinguish between seller and buyer, or between goods and price. Men exchanged useless things against useful things, according to necessity. To facilitate this kind of exchange, it was then agreed to use the money, a general equivalent of constant value, guaranteed by public authorities. Therefore barter - said the Severan lawyer Julius Paulus - that had been practiced at least since the time of the Iliad (*“Homero teste”*),\(^\text{29}\) existed before the contract of sale and was in fact its origin. The contract of sale was introduced later by the law of nations as a new form of exchange.

In conclusion, we can imagine that in the Hermogenian thought, before the birth of political institutions and man-made law, there were conflicts but not war in the juridical and ritual sense. Barter was used, but not trade. Natural possession existed, but not the Roman concept of property, et cetera.

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\(^\text{27}\) Cf. W.V. Harris. *A Revisionist View of Roman Money*, in JRS, 2006;96, pp. 1 ff.

\(^\text{28}\) *Origo emendi vendendique a permutationibus coepit. olim enim non ita erat nummus neque aliquid merx, aliquid pretium vocabatur, sed unusquisque secundum necessitatem temporum ac rerum utilibus inutilia permutabat, quando plerumque eventit, ut quod alteri superest alteri desit. sed quia non semper nec facile concurrebat, ut, cum tu haberes quod ego desiderarem, invicem haberem quod tu accipere velles, electa materia est, cuius publica ac perpetua aestimatio difficillitatis permutationum aequalitate quantitatis subveniret… 2. Est autem emptio iuris gentium, et ideo consensu peragitur et inter absentes contratia potest et per numinium et per litteras.*

\(^\text{29}\) Homer., *II.*, VI, 234 ff.; VII, 472 ff.; D. 18.1.1.1 (Paul. 33 ad ed.).
Hermogenian’s list of the outcomes of leaving the natural state is opened, unsurprisingly, by war. It certainly accelerated the transformation, introducing slavery and individual property. But the jurist did not regret the abandonment of the state of nature. Isidore of Seville captured the deeper meaning of the excerpt from which we started. He reread it by mixing different meanings of the concept of *ius gentium*:

*Isid., Etym., 5.6.1*: The law of nations is the occupation of seats, the construction of buildings, fortification, wars, the capture of enemies, slavery, the redemption of prisoners, peace treaties, truces, the scrupulous respect for the ambassadors, the prohibition of marriages between people of different nationalities. And from this derives the expression “law of nations”, because this law is obeyed by almost all nations.³⁰

*Ius gentium* (whatever its foundation) “is” historical development, which has produced the birth of cities, their autonomy and the establishment of ordered international relations. Literally, the affirmation of the law of nations coincides with the process of civilization, in which war not commerce plays the main role.

Abstract

In a fragment of his *Iuris Epitome*, the Roman jurist Hermogenian states that the origin of trade was due to *ius gentium*, the “law of nations”. It was one of the aspects of the transition from the state of nature to civil society, together with war, private property and the law of obligations. This transition was still ongoing in the Homeric era. Hermogenian’s theory is linked to the Aristotelean theory that there is an essential diversity between “natural” exchange and trade.

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³⁰ QVID SIT IVS GENTIVM. [1] *Ius gentium est sedium occupatio, aedificatio, munitio, bella, captivitates, servitutes, postliminia, foedera pacis, indutiae, legatorum non violandorum religio, conubia inter alienigenas prohibita. Et inde ius gentium, quia eo iure omnes fere gentes utuntur.*