Cicero's Law

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Published by Edinburgh University Press

du Plessis, Paul J.
Cicero's Law: Rethinking Roman Law of the Late Republic.
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Chapter 4

Law’s Nature: Philosophy as a Legal Argument in Cicero’s Writings

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1. INTRODUCTION

Cicero’s reputation as a legal philosopher seems to be somehow discredited by his role as a politician and advocate. Despite admiration of his intellectual capacity, there is a prejudice that politics as well as legal practice require a day-to-day pragmatism incompatible with the aim of searching for a reliable, timeless truth. The move towards reading Cicero’s writings in context did not change the particular reluctance to believe in what Cicero says or – more importantly – to believe that Cicero himself believed in what he said. Given his different faces, one is prone to read his writings against the background of a multi-layered set of rhetorical, political or tactical functions forming his words and making them understandable in the eyes of a modern reader. As far as substance follows function in this sense, there is no place for a pure, abstract theory of law.

However, during the years of his political retreat after the Luca Conference, Cicero did develop a comprehensive and coherent theory of law and its nature. This theory, mainly found in his Laws and the Republic, is not – as often assumed – a theory contrasting man-made laws and natural law. It is a theory of law in the widest sense of the word, dealing with natura iuris, that is, the nature of law in general. This theory finds its origins in Stoic writings, especially in the oikeiosis doctrine; but Cicero amalgamates nomos and physis towards a new holistic understanding of law, which is not grounded in any dichotomy of leges and a higher-ranking ideal of natural law. For Cicero, law is nature – and what is not nature, is not law. Given this background, Cicero’s understanding of law goes beyond the idea of law as a specific tool among others to regulate society. Law has no function in this sense; it rather is the very essence of practical wisdom in a society of rational human beings. This practical wisdom is described as the highest form of human insight; it results from the very moment when gods and men join up to constitute a societas communis.

There is no evidence that Cicero’s legal philosophy strongly influenced legal practice in the long term; but I will try to show that (1) Cicero made use of truly philosophical arguments in legal practice and (2) the structure of legal practice was open enough to implement these reflections as specifically
The understanding of law as a closed doctrinal normativity fails to grasp the infinite and situational character of legal decision-making in the late Republic. There are a number of arguments, in particular in Cicero’s forensic speeches, which can clearly be understood against the background of his specific theory of the nature of law. Many of these arguments can be – and often have been – read simply as invectives or rhetorical tools. But a pure functional reading underrates their substantial plausibility, which grounds on their philosophical substance rather than on mere tactical aims.

2. CICERO ON THE NATURE OF LAW

It is commonly assumed that Cicero’s idea of ‘right’ and ‘wrong’ law is based on a juxtaposition of a divine category of natural law and a man-made category of positive law. This reading strongly reflects a modern distinction that dates back – inter alia – to the natural law doctrines of the early Enlightenment, but one can also find traces of this ‘dichotomist’ approach in philosophical thought before and within Cicero’s time. The antithesis of nomos and physis had broadly been discussed by the Sophists, in particular by Antiphon in his treatise peri aletheia; and also the Stoics, even though they tried to reunite nomos and physis in an all-embracing cosmic principle, did not aim at closing the theoretical rift between man-made laws and the principle of nature. However, there is no evidence about similar discourses on the relation of positive law and any higher-ranking laws in Roman law. An early example of a dichotomist understanding of natural and positive law can be seen in Cato’s speech for the Rhodians; but as with the distinction between ius naturale, ius civile and ius gentium, Roman law did not read any consequences into a conflict between these different kinds of law. Thus, a dichotomist reading of Cicero’s legal philosophy is not anachronistic with respect to its distinction between natural law and positive law; but it contradicts Roman law as far as it tries to establish a hierarchy among these laws.

1 In what follows, I will present aspects I have partly published earlier; cf. B. Forschner 2014: 21f. and B. Forschner 2015: esp. 52f., 60f., 71f.
2 Kenter 1972: 170; Nörr 1974: 25; Colish 1990: 98; Lintott 2002: 225f. Powell 2001: 17f., admits that Cicero ‘had in mind no systematic dichotomy between natural law and positive law’, but he still adheres to a dichotomic reading; cf. Powell, ibem, 37: ‘true law (….) is (…) law (…) consonant with natural justice’; 38: ‘definition of law (…) from which a set of general laws is supposed to be derived.’
6 Chrysipp, SVF 3.308; Diog. Laert. 7.128.
7 Cf. Gell. NA 6.3.45f.: ‘Ac primum ea non incallide conquisivit, quae non iure naturae aut iure gentium fieri prohibentur, sed iure legum rei alicuius medendae aut temporis causa iussarum[.]’
However, as will be demonstrated, Cicero’s position was even more unique than a superficial reading might suggest. At the very beginning of his *Laws*, Cicero lays out the purpose behind his treatise. Here it becomes clear that he is not searching for a definition of different sorts of law – for example natural law or positive law – or a hierarchic structure putting these laws in any relation to each other. Rather, Cicero is trying to develop an understanding of the nature of law – *natura enim iuris explicanda nobis est.* Thus the *Laws* should not be regarded as an attempt to challenge or renew the Roman perception of natural law. As we will see, the Roman sources dating from Cicero’s time do not provide any consistent natural law theory at all, and the term *ius naturale* does not appear in the *Laws* even once. Cicero’s approach turns out to be radical in the true sense of the word. He aims to investigate the source from which all law originates (*tota causa universi iuris ac legum*); a source that is not to be found in the praetorian edict or the Twelve Tables, but is to be derived from the *intima philosophia.*

Philosophy, as understood by Cicero, deals with the conditions and traits of a community as it exists among humans by nature. In this context, ‘law’ is described as the ideal – that is, natural – way of organising a human community. Therefore, understanding the true nature of law requires an understanding of the nature of men: *Natura enim nobis explicanda est, eaque ab hominis repetenda natura.* Albeit Cicero’s approach seems to be collective at first glance, his starting point is not the community, but the human being as part of this community. However, law – as Cicero sees it – is not a means to organise a community of men against their nature. It is not an external command forcing the man to set aside his natural desires, and its primary goal is not to discipline unregulated human interests by way of coercive power. Law rather emerges within the man as the very essence of his reason.

Cicero’s idea of human rationality is broadly based on Stoicism, in particular on specific aspects of the doctrine of *oikeiosis*. I will briefly shed some light on this philosophical background, even though the impact of Stoicism on Cicero’s concept of virtue is not surprising and is – by and large – common sense. What is more important is to consider how Cicero slightly changes the Stoic legacy and draws conclusions from his concept that a purely Stoic tradition would never have accepted.

For Cicero, human beings are the only living creatures among all others that are capable of sharing reason. However, reason is not primarily a human

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8  Cic. Leg. 1.17. For a different approach, see recently Atkins 2013: 169f.
10 From *radix* = root.
11 Cic. Leg. 1.17.
12 Idem: 1.17.
13 Idem: 1.17.
14 Idem: 1.18: ‘Eadem ratio, cum est in hominis mente confirmata et perfecta, lex est.’
trait. Nature in its entirety is ruled by the immortal gods;\(^{15}\) and the gods let men participate in reason as the highest among divine capacities.\(^{16}\) Reason serves as a hinge connecting human and divine thinking; it is the feature separating men from other living creatures by way of establishing a specific kinship and thus a cosmic community between men and gods.\(^{17}\)

It is important to see that Cicero, while claiming that all men are equal due to their reason, does not have in mind equality comparable to a Christian or a modern liberal understanding.\(^{18}\) For Cicero, the equality of all men is not grounded in their status as ‘persons’, who own an untouchable value simply \(qua\) being humans; and he does not even believe that all men succeed in gaining reason. He merely states that all men are equal with respect to their \textit{capacity} to gain reason.\(^{19}\) Through this capacity, however, all men are distinguished from animals merely in a formal – that is, a potential – sense.\(^{20}\) It is men’s duty to make use of this capacity by developing reason and bringing it to perfection. As nobody owns the skills to teach himself to cultivate and use reason, for the open-minded man divine nature serves as tutor: by seriously taking into account what he sees above him in the sky and around him on the hills and meadows, and by being responsive to natural – that is, divine – occurrences, man starts to communicate with the immortal gods.\(^{21}\) This communication will sharpen his understanding of ‘right’ and ‘wrong’, and will lead him to act in accordance with nature. On the highest level of \textit{ratio}, human nature gains perfection; here, human and divine reasoning converge.\(^{22}\)

According to Cicero, this sort of \textit{ratio} – which he calls \textit{recta ratio} – is the law.\(^{23}\)

Thus, human \textit{ratio} is of an evolving nature. There exists a broad range between those who gain \textit{ratio perfecta} (who are rather few) and those who gain a lower form of \textit{ratio}; and a few do not even possess any traces of rational insight – as we will see later, those are ranked on the level of animals or below. This idea of an evolving human rationality is rooted in the Stoic doctrine of \textit{oikeiosis}.\(^{24}\) Men and animals alike share a common instinct to preserve their own natural constitution and their community,\(^{25}\) and as a very first impetus, this instinct is inherent in all newborn creatures.\(^{26}\) But in the

\(^{15}\) Idem: 1.21.

\(^{16}\) Idem: 1.22.

\(^{17}\) Idem: 1.23–5.


\(^{19}\) \textit{Ex neg. Cic. Leg.} 1.18, 1.22, 2.11.

\(^{20}\) On this aspect, see B. Forschner 2014: 36.

\(^{21}\) \textit{Cic. Leg.} 1.26: ‘Artes vero innumerabiles repertae sunt, docente natura, quam imitata ratio ad vitam necessarias sollertter consecuta est.’

\(^{22}\) Idem: 1.23.

\(^{23}\) \textit{Cic. Rep.} 3.33; \textit{Leg.} 1.18.

\(^{24}\) Cicero’s affiliation with Stoic philosophy is strongly disputed in detail. For diverse approaches see Görler 2004: 240f.; Hirzel 1883: 488; Glucker 1988: 34f.

\(^{25}\) On the social aspect of these instincts see \textit{Cic. Fin.} 3.65; \textit{Stob. ecl.} 2.7.109.10 = \textit{SVF} III, 686.

\(^{26}\) Diog. Laert. 7.85.
case of human beings, a *logos* emerges in the course of their lives and overlies these instincts. Even though a newborn child is free of experience and behaves merely by instinct, it already has an unspecific capacity that enables it to develop human rationality later on.\(^{27}\) This capacity is understood by the Stoics as a prior grasp (*prolepsis*) of specific concepts, such as ‘useful’, ‘good’ and ‘bad’. The Stoic *prolepsis* can be compared to a very first sketch\(^{28}\) or a blank writing tablet.\(^{29}\) It does not provide the child with the capacity to understand a specific issue in detail and to reflect on it; but it enables it to collect impressions in a still undifferentiated way. Through experience, methodological study and habit the grown man will be able to structure his perceptions and to develop concepts to reflect his environment. On this developed level, man turns out to be a moral character. He leaves his animal starting-point of pure self-reference and opens his mind towards the world.\(^{30}\)

In Stoic writings, one finds different strands of arguments explaining how the capacity to gain reason became part of the human mind.\(^{31}\) Insofar as the Stoics take up a theological position, they consider the whole cosmos as a common home of gods and men imbued with divine reason. Based on their shared reason, gods and men constitute a well-ordered and just society.\(^{32}\) Here, the gods are seen as the source of human rationality. The Stoics also developed a more empirical approach, which is primarily grounded on the visible developments of newborn children and animals; and this approach seems not to be shaped by any divine metaphysics.\(^{33}\) But in the *Laws* (and, for instance, in contrast to *De Finibus*), Cicero associates himself with the theological strand of the Stoic heritage. This might also be for pragmatic reasons.\(^{34}\) Writing the *Laws*, Cicero pursued practical political aims. He did not intend to contribute to a purely academic debate, but he tried to save exactly this sort of *res publica, quam optumam esse docuit in illis sex libris Scipio*.\(^{35}\) Cicero’s ambitions as a politician were still (and again) high at this time, but in the aftermath of the Luca Conference he was forced by Pompey to adhere to the rules and end his fight against the reunited triumvirs. However, whereas the ‘official’ Cicero of this time is often regarded as a politically flexible or even slick academic thinker, he remained a strong and

\(^{27}\) Cf. Pohlenz 1959: 56.
\(^{28}\) Pohlenz 1959: 56.
\(^{30}\) M. Forschner 2008: 169–91, 174. For a purely sociobiological understanding of the *oikeiosis* doctrine, which denies that the Stoics made a categorical difference between men and animal, see Bees 2004: 200f. For a critical discussion of Bees’ position see B. Forschner 2015: 61f.
\(^{33}\) Schofield 1995: 191f.
\(^{34}\) On this aspect see B. Forschner 2014: 31.
\(^{35}\) Cic. Leg. 1.20.
dedicated republican. Believing that the Republic was suffering mainly from moral decay,\textsuperscript{36} he tried – for the first time in Roman history – to set out the intellectual preconditions on which a republican society depends. Cicero’s theological approach was perfectly compatible with religious belief in the late Republic, and it surely helped him to get noticed by his contemporaries.

As demonstrated, Cicero’s concept of the nature of law is based on Stoic references. According to Cicero as well as to (some) Stoics, gods and men constitute a community grounded on their commonly shared reason; both Cicero and the Stoics understand law as the highest reason (\textit{recta ratio}/\textit{ὀρθὸς λόγος}), which emerges when human reasoning meets with divine reasoning; and both believe that men own the \textit{capacity} to gain reason, but still have to develop reason over time. But despite these apparent similarities, Cicero’s understanding of law differs from the Stoic doctrine in a significant way. The Stoics, even though they believe in an all-embracing cosmic principle, never question the dichotomy of man-made laws (\textit{theses}) and the principle of nature (\textit{physis}).\textsuperscript{37} Cicero, however, does not define \textit{lex} in relation to – and thus as a potential counterpart of – \textit{ius}; but as source of all \textit{ius}: In \textit{Leg.} 1.19, \textit{lex} appears as \textit{exordium iuris} and, more specifically, as a yardstick to distinguish \textit{ius} and \textit{iniuria}.\textsuperscript{38}

Unlike the dichotomist Stoic approach, Cicero’s concept, as it appears in the \textit{Laws}, turns out to be holistic. Man-made laws are not measured against a higher-ranking natural law; they exist as law only if they are concordant with nature. Otherwise, they are not just seen as invalid law, but they do not count as law at all. This is a problem of the status of law, but it is also of terminological importance: identifying invalid law as law causes an \textit{error sermonis}, which easily makes one forget the true character of law.\textsuperscript{39} Cicero’s theory, as developed in the \textit{Laws}, does not only amalgamate \textit{lex}, \textit{ius} and \textit{natura}; it also neutralises the terminological dichotomy of \textit{theses} and \textit{physis}. Legal statutes inconsistent with nature must not be called law; they have to be removed from the legal discourse.

\section*{3. THE TYRANT: A MONSTER IN HUMAN DISGUISE}

Cicero’s concept of the nature of law is closely connected to his theory of human nature. Being the substance of \textit{summa ratio}, law is a product of the rational human mind. However, as not all men succeed equally in developing

\textsuperscript{36} Cic. \textit{Rep.} 1.69.
\textsuperscript{37} On this dichotomy in Stoic writings see Long 1996: 218. But see Lehoux 2012: 57f.
\textsuperscript{38} Cic. \textit{Leg.} 1.19: ‘Quod si ita recte dicitur, ut mihi quidem plerumque videri solet, a lege ducendum est iuris exordium. Ea est enim naturae vis, ea mens ratioque prudentis, ea iuris atque iniuriae regula.’
\textsuperscript{39} Idem: 2.8: ‘Videamus igitur rursus, priusquam adgreddiamur ad leges singulas, vim naturamque legis, ne quom referenda sint ad eam nobis omnia, labamur interdum errore sermonis, ignoremusque vim nominis eius quo iura nobis defnienda sint.’
rationality, the law inevitably stands on fragile ground. The legal consequences Cicero derives from the ‘evolving character’ of the human mind are illustrated by analysing his theory of tyranny.40

Cicero’s theory of tyranny is distinctively Roman, and it specifically reflects the problems that dominate the late Republic during the years of its crisis from 133 BC onwards. For the Greek world, the idea of tyranny is inextricably linked with the idea of absolute power. The Greek tyrant does not merely aim at ruling, but also owns the power to rule. This is the picture drawn by Plato and Aristotle,41 and it found its representation in tyrants like Cypselos, Peisistratos or Hippias. In contrast, the Ciceronian tyrant is less characterised through his real power, but rather through his intention to rule: For Cicero, tyrants are those, *qui etiam iam liberata iam civitate dominationes adpetiverunt.*42 Thus, Cicero’s concept marks a shift from the objective (that is, the real power) to the subjective (that is, the desire to rule): tyranny becomes detached from the institutions of the state; instead, it is primarily identified with aberrations of the human mind.43

There is strong indication that this concept has to be understood as an answer to the challenges the late Republic had to face during Cicero’s days. Verres, Catilina nor Clodius – all labelled by Cicero as tyrants 44 – ever reached a position of absolute power, but as far as Cicero believes, their conspiracies could have successfully subverted the foundations of the *concordia omnium bonorum.* And indeed: the Republic did not finally fail due to the revolt of a single powerful man, but because of the weakening of its structure through a remarkable number of widespread conspiracies and assaults. As Lintott rightly pointed out, the Republic was especially vulnerable in this regard because of its lack of a central police power.45 In addition, its extensive expansions and brutal internal conflicts – in particular in the course of the *bellum civile* and Sulla’s reign – lowered the loyalty of the members of the ruling class to the republican institutions.

To understand Cicero’s ‘subjective’ approach, this last – moral – aspect is of specific importance. As not all men succeed in developing reason, not all men are capable of taking part in legal discourse. Therefore, a community of men lacking developed reason will fail to exist as a community based on

40 On the following aspects, see B. Forschner 2014: 22f.
44 Verres: Cic. *Verr.* 2.1.82, 2.3.71 and 77, 2.5.103; Catilina: Cic. *Cat.* 2.14; Clodius: Cic. *Sest.* 125, 127; Cic. *Mil.* 18 (*usurpator*), 35, 80, 89.
45 Lintott 2004.
Even though these men might adhere to specific laws in a given case, their decision to act lawfully is not driven by the normative power of law, but by its coercive power. They fear the consequences of violating the law, but they are not motivated – as Kant would have put it – ‘by duty’. Their ignorance of the intrinsic value of law makes them prone to subvert the stability of the legal order: whenever political institutions break apart or fail to enforce the law, they will take advantage of this situation and ignore the legal provisions for their personal benefit – they only fear, as Cicero puts it, the presence of a witness and a judge, but in the dark they will follow their destructive interests: *Nam quid faciat is homo in tenebris qui nihil timet nisi testem et iudicem?*

Law is the substance of human rationality, but human rationality is also a precondition to save the stability of an existing legal order. Thus, a true legal community is not constituted through laws enacted and executed by a political authority, but is based exclusively on the minds of its members.

Given this background, it becomes clear why Cicero’s definition of tyranny rather concentrates on the tyrant’s *animus* than on his real power. On several occasions, Cicero describes the tyrant as a *belua*, that is, as a wild animal, or – as we will discuss later – as a *furiosus*. One might interpret this use of terminology purely from a rhetorical perspective. However, in Roman law, *furiosus* also appears as a synonym for a mentally disabled person.

It is interesting to observe that Cicero does not only make reference to an established legal terminology here, but that this terminology also reflects the anthropological dimension of his own concept of human nature (and thus of the nature of law). As a result of the evolving character of the human mind, people failing to train their mind and develop rationality differ from animals not by their mental capacity, but only by their human appearance. However, some of them even lack those instincts, which all living creatures equally share, like parental love or the instinct to preserve oneself and one’s community. They are ranked below animals; and being monsters in a human disguise, they are excluded from the natural world.

Killing a tyrant differs from killing a man. Just as law contradicting nature must not be called law, men lacking reason and instincts do not count as

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46 Cic. *Leg.* 1.42: ‘Ita fit ut nulla sit omnino iustitia, si neque natura est[.]’
47 Idem: 1.42. See also 1.40.
48 Cf. below fn.53.
49 Cic. *Mil.* 78.
50 Cf. Dunkle 1967: 151–71. See also May 1988: 129: ‘The speech is transmitted to us in an extraordinary rhetorical composition, often relying upon presentation of character for its effectiveness.’
human beings.\textsuperscript{54} Given that law is the highest form of reason, it can exist only among rational human beings. Therefore, the exclusion of the tyrant – be it through death or exile – is a necessary precondition for the existence of human community; otherwise, this community will not be able to survive as a legal order.

\section*{4. TYRANNICE AND LAW IN CICERO'S FORENSIC SPEECHES}

In what follows, it is demonstrated how Cicero applies these abstract theories in specific forensic speeches, in particular in the speech he delivered to defend Milo in early 51 BC against the charge of having murdered Clodius, the tribune of 59/58 BC and arch-enemy of Cicero himself. In contrast to a predominantly rhetorical reading of these speeches, it is shown that especially as an advocate, Cicero – at least in his later days – relied strongly on philosophical foundations. The following short remarks are not aimed at denying Cicero’s masterly use of rhetorical tools. But they intend to shift attention to an aspect of Cicero’s forensic speeches that often seems to be ignored.\textsuperscript{55}

When Cicero, in his speech in defence of Milo, paints his famous picture of Clodius as a tyrant, he has no mighty monarch in mind.\textsuperscript{56} Clodius is not a tyrant due to his absolute power, but due to his striving for \textit{dominatio}: his conspiracies never succeed, but he does not stop planning them;\textsuperscript{57} he never manages to govern, but he is still starving for power.\textsuperscript{58} Thus no successful \textit{usurpationes} make him a tyrant, only his intentions. In \textit{Mīl.} 19, Cicero clearly points out that the reason for punishing a tyrant is not grounded in his success, but in his malevolent purpose: ‘minus dolendum fuit re non perfecta, sed puniendum certe nihilo minus.’

The anthropological dimension of Cicero’s theory of tyranny becomes visible when Cicero calls Clodius not merely a tyrant, but also a \textit{furiosus}.\textsuperscript{59} Here, Cicero points at the defective structure of Clodius’ mind. Lacking both \textit{ratio} and social instincts, the tyrant is classed below animals; he is a mentally disabled person, detached from the overall community of natural beings. We can find similar patterns in an earlier portrait of Clodius developed by Cicero in his speech for Sestius: Clodius appears as a \textit{homo furibun-}

\footnotesize{\textsuperscript{54} Cic. \textit{Leg.} 2.16: ‘hunc hominem omnino numerari qui decet?’; \textit{Rep.} 2.48: ‘quis enim hunc hominem rite dixerit[.]’

\textsuperscript{55} The philosophically influenced readings of Cicero’s speech for Milo by Clark/Ruebel and Dyck are exceptions; cf. Clark and Ruebel 1985: 57–72; Dyck 1998: 228–9.

\textsuperscript{56} On the following, see B. Forschner 2015.

\textsuperscript{57} Cic. \textit{Mīl.} 37.

\textsuperscript{58} Idem: 88.

\textsuperscript{59} Idem: 78.}
dus ac perditus, and finally as a taetra immanisque belua. Being a belua, he is the opposite of a reasonable man; his character is bad by nature (natura improbus) and furiosus. Similarly, in his very first forensic speech in a criminal trial delivered in defence of Sextus Roscius in 80 BC, Cicero uses the distinction between those tied together by vis humanitatis and those whose bestiality outweighs even that of wild animals: through birth, breeding and the law of nature, wild animals still form some sort of community based on kinship – and thus, one might add, own the community spirit that the bad man lacks. Therefore, the bad man is not truly a man, but only looks like a man due to his human physical appearance. And, as Cicero claims in Pro Cluentio, by accusing her own son of having poisoned his father, Cluentius’ mother violated omnia iura hominum. She proved to be so brainless that she could not be called a human being; so brutal that she could not be called a woman; and so cruel that she could not be called a mother. Apart from her shape, she has totally lost her resemblance to a human creature.

Although the anthropological dimension of tyranny is present in Cicero’s speeches even at the beginning of his career, what is still missing is the link between this anthropological aspect and Cicero’s concept of the nature of law. It does not seem an accident that this connection finally appears in the Miloniana, which was written at the time Cicero started working on the Laws and had probably already finished parts of the Republic. As outlined in Leg. 1.40–2, the wicked man takes law for an external command, and led by self-interest, his decision to obey the law results from a personal cost–benefit analysis. The good man, in contrast, obeys law simply as it is law, that is, he recognises law as an internal command deriving from his own ratio. The same argument appears in Mil. 43 and 32: Here, Cicero takes the bad man’s hope of escaping punishment as the key to his criminal behaviour, with the consequence that, in certain cases, even trivial inducements might make him commit crimes. A virtuous man, by contrast, follows law for its own sake (non tam praemia sequi solera recte factorum, quam ipsa recte facta), and thus can overcome any temptation to act illegally, however great the external inducements might be. Clodius’ disrespect of the law ([Clodius], cui iam nulla lex

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60 Cic. Sest. 15.
61 Idem: 16.
63 Cic. Rosc. Am. 63: ‘Magna est enim vis humanitatis; multum valet communio sanguinis; rec- lamitat istius modi suspicionibus ipsa natura; portentum atque monstrum certissimum est esse aliquem humana specie et figura qui tantum immanitatem bestias vicerit ut, propter quos hanc suavissimam lucem aspexerit, eos indignissime luce privarit, cum etiam feras inter sese partus atque educatio et natura ipsa conciliet.’
64 Cic. Clu. 199: ‘at quae mater! [. . .] cuius ea stultitia est ut eam nemo hominem, ea vis ut nemo feminam, ea crudelitas ut nemo matrem appellare possit. atque etiam nomina necessi- tudinum, non solum naturae nomen et iura mutavit, uxor generi, noverca fili, filiae paelex; eo iam denique adducta est uti sibi praeter formam nihil ad similitudinem hominis reservavit.’
On Law

On Law, nullum civile ius [. . .]65 made it impossible for the legal system to deal with him: eius furores, quos nullis iam legibus, nullis iudiciis frenare poteramus [. . .].66 His assassination turns out to be the only way to save the legal – and thus natural – character of the Republic; it is a virtuous act.

As shown above, Cicero, standing in a Stoic tradition, believes that ratio is not a pure human trait, but connects human and divine reasoning at its highest level. This theological aspect is the key to understand the subtext underlying Cicero’s final remarks in Mil. 83–8. Here, Cicero claims that the immortal gods were involved in the assassination of Clodius, who had incurred their hatred many years before, when he attended the festivity of Bona Dea in January 61 BC dressed up as a woman. When the gods noticed Clodius approaching Milo and his entourage on the Via Appia in front of the shrine of Bona Dea, they decided to take advantage of this symbolic situation and put in Clodius’ mind the idea to ambush Milo. Clodius, lacking the intellectual capacity to understand the gods’ real intentions, attacked Milo and was killed when Milo’s slaves defended their dominus. Despite its rhetorical implications, this passage also entails the core elements of Cicero’s concept of tyrannicide. Being a tyrant, Clodius does not participate in the rational discourse of gods and men. The idea of attacking Milo does not appear as a product of his own reasoning, but was placed in his mind by the gods.

Cicero’s much-quoted dictum silent leges inter arma (Mil. 11) does not neglect the specific legal nature of the problem of tyrannicide. In contrast to its prevalent reading, it does not imply that in a state of emergency legal provisions forfeit their legitimacy and are substituted simply by power and politics. Rather, silere is to be understood as deafening silence, as an incorporated part of the law. If Cicero’s argument is read within its broader systematic context, the legal implication of silere clearly comes to light – the law grants tacitly the potestas defendendi: Silent enim leges inter arma [. . .]. Etsi persapienter et quodam modo tacite dat ipsa lex potestatem defendendi.67 Given that Clodius’ assassination is an act of summa ratio and – as Cicero states in Mil. 30 – ratio praescripsit legem, at least from Cicero’s own perspective his arguments to justify Milo must be seen as a legal argument: ‘if there was no defence in law for what he did, then I have no defence to offer’.68

In Mil. 88–9, Cicero highlights the responsibility of the homo privat us to defend the res publica by himself as long as the republic turns out to be incapable of repelling the tyrant ‘by its own laws’.69 Arguing from a positivistic standpoint and therefore identifying ‘law’ with law as enacted by authorised state institutions, one might assume that Cicero – paradoxically – is putting

65 Cic. Mil. 74.
66 Idem: 77.
67 Idem: 11.
68 Idem: 30: ‘Si id iure fieri non potuit, nihil habeo quod defendam’ (translation by Berry).
69 Idem: 89: ‘numquam illum res publica suo iure esset ulter.’
forward the idea of violating the law in order to save it. But for Cicero, law is not an official product of the state, but an individual product of the rational human mind. He rather seems to assert that in cases where state institutions fail to effectively use their legal power, the stability of the legal order depends on the commitment of ordinary citizens, who are willing to take advantage of their rights and duties. This reading is backed by the next section, where Cicero deals with the practical – rather than legal – limitations of the power of state institutions: the most crucial problem of keeping Clodius in check is caused not by legal restrictions, but by the consul’s lack of courage.\footnote{Idem: 88–9: ‘Senatus credo praetorem eum circumscripsisset. Ne cum solet quidem id facere, in privato eodem hoc aliquid profecerat. An consules in praetor coercendo fortes fuissent?’}

5. PHILOSOPHY AND LEGAL PRACTICE: A FEW SPECULATIVE REMARKS

So far, three questions have been discussed. First: can we find signs of a coherent theory of ‘law’ in Cicero’s writings? Does Cicero’s thinking merely reflect a discussion on the relation of different Rechtsschichten, like ius naturale and ius civile, as they are significant in Roman legal thought;\footnote{On the role of Rechtsschichten as a main trait of Roman law see most recently Babusiaux 2015: 37f. See also Kaser 1986: 90f.} or can we observe a more comprehensive approach, dealing with the general question: ‘what is law’? Second: given that Cicero developed a theory about the nature of law – how is this theory tied to his understanding of the nature of man? To ask more specifically: does Cicero’s concept of law imply any consequences for the subjective character of those constituting a human community based on law? Third: do we have to distinguish sharply between the speeches Cicero delivered as a legal practitioner and his theoretical approach on law developed in writings like the Laws and the Republic? Or can we find patterns appearing in both practical as well as theoretical contexts alike, suggesting that Cicero made use of his abstract concepts while arguing as an advocate?

The answer to this third question was that Cicero indeed applied arguments in legal practice, which can be understood against the background of his theoretical concept of the nature of law. Focusing on how Cicero deals with the category of the ‘tyrant’ respectively ‘tyranny’ in his forensic speeches, one can observe that he makes those references from the very beginning of his legal career onwards. However, the most coherent example of the use of philosophical arguments in legal practice is the speech for Milo, delivered by Cicero as he was gaining political and intellectual consolidation.

It is one thing that Cicero, according to his own concepts, takes his philosophical arguments as essential to his concept of law; it is another thing whether legal practice followed the same path. The general reluctance to
recognise Cicero as a serious lawyer is surely influenced by an understanding of Roman law as an abstract area of elitist discourse, which is seen as detached from religious and philosophical influences.72 Nowadays, this exclusive reading of Roman law is losing support, however strong it may have been in the past.73 Starting with Crook’s eminent studies in the late 1960s, the social and philosophical rootedness of Roman law has become an increasingly popular field of study. This does not only apply to the world of common law, where the burden of a practically relevant ‘doctrinal’ tradition of Roman law weighed less than in mainland Europe.

It surely goes too far to believe that from the late Republic onwards, Roman jurists can be categorised in accordance with specific philosophical schools. Even Behrends, whose controversial writings promoted this idea in the past, is currently claiming a rather indirect philosophical influence on Roman legal thought.74 But what is true, however, is that Roman jurists had recourse to terms and argumentative patterns that are equally known from the discourse of ancient philosophers. They do not make deep philosophical contributions, and their direct philosophical references seem to be short and sometimes superficial in comparison with writings like those of Cicero. Nor do they provide us with coherent theories on the nature of law or the relation between law and human rationality. But it is precisely the partly inhomogeneous character of their writings that demonstrates that legal discourse was open enough to integrate different strands of philosophical argument.

We will illustrate this assumption by shortly pointing at the use of *natura* resp. *ius naturale* in early and later classical texts of Roman jurists.75 Looking at definitions of the *ius naturale* in texts from the Digest and Gaius’ Institutes, we find the idea of a natural community between men and other animals;76 but we also find sources identifying *ius naturale* with *ius gentium*.77 The *ius gentium*, again, is (partly) seen as a law common only to all men by nature, and thus not shared by men and animals alike.78

The definition of *ius gentium* as a law *quod vero naturalis ratio inter omnes homines constituit*79 seems to be similar to Cicero’s understanding of law as the very essence of human reason. However, the text lacks any deeper explanation of the character of this *ratio*; in particular, it does not clarify how the

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72 Cf. Harke 2008: 3: ‘für die Gesamtsituation der römischen Reichsbevölkerung ebenso blind wie für religiöse oder philosophische Vorstellungen unanfällig[.]’
74 Even though he still adheres to his understanding of Roman legal discourse as a discourse of separate, conflicting schools of thought; cf. Behrends 2013: 432f.; Schermaier 2014: 110.
75 On the following, see B. Forschner 2015: 61f.
76 *Inst. Inst.* 1.2 pr.; *D. 1.1.1.3–4.*
77 *D. 1.1.9* (Gai. 1 inst.).
78 *Gai. Inst* 1.1.
79 *D. 1.1.9* (Gai. 1 inst.); *D. 41.1.1 pr.* (Gai. 2 rer. cot.).
ratio became part of the human mind. The naturalis ratio might indeed be understood as a Stoic/Ciceronian nata lex ad quam facti sumus. But it can also be understood as a reference to the basic ideas of the sceptic Academy, or to no specific philosophical school at all.

Ulpian, by contrast, takes natura for a genuine source of law. According to him, understanding the law does not require instinct, but peritia, that is, experience; and this experience is not only common to men, but to all animals. However, Ulpian does not draw any consequences from this position: In D. 9.1.1.3 (Ulp. 18 ad ed.), he claims that animals lack sensus and thus cannot do any wrong. Here, he seems to distinguish between instinct, experience and reason, and understanding of the law – that is, of the difference between ius and iniura – is not caused by experience, but by reason.

The inhomogeneous and sometimes superficial use of natura in the texts of the Roman jurists becomes particularly relevant when looking at their arguments supporting the right of self-defence. Like Justinian and Cicero, Gaius highlights that this right is grounded on the ratio naturalis. However, whereas Cicero develops a broad theory of the anthropological character of this ratio, Gaius’ texts provide no further hints clarifying his own concept: the ratio naturalis is simply taken for granted. Florentinus argues that a man is not allowed to threaten the life or physical integrity of another man, as there exists a natural kinship among all human beings; this, in turn, is the reason why every man has the right to defend himself against those trying to kill or violate him. The idea that natura inter nos cognitionem quandam constituit reminds one of the wording of Gaius’ definition of the ius gentium (ius, quod vero naturalis ratio inter omnes homines constituit), but it does not necessarily say the same: whereas the latter takes the ratio naturalis as a source of law (which conforms to Gaius’ view expressed in D. 9.2.4 pr. that the right of self-defence derives from the ratio naturalis), the former does not explicitly discuss the nature of law, but merely points at a specific tie unifying all men. If Florentinus had in mind a concept of the relation of human and legal nature, it did not survive in his text. Ulpian, finally, does not refer

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80 D. 1.1.1.3 (Ulp. 1 inst.): ‘Ius naturale est, quod natura omnia animalia docuit: nam ius istud non humili generis proprium, sed omni animalium, quae in terra, quae in mari nascuntur, avium quoque commune est.’

81 D. 1.1.1.3 (Ulp. 1 inst.): ‘Hinc descendit maris atque feminae coniunctio, quam nos matrimonium appellamus, hinc liberorum procreatio, hinc educatio: videmus etenim cetera quoque animalia, feras etiam istius iuris peritia censeri.’

82 D. 9.1.1.3 (Ulp. 18 ad ed.): ‘Pauperies est damnum sine iniuria facientes datum: nec enim potest animal iniuriam fecisse, quod sensu caret.’

83 D. 9.2.4 pr. (Gai. 7 ad ed. prov.): ‘nam adversus periculum naturalis ratio permittit se defendere.’

84 D. 1.1.3 (Florent. 1 inst.): ‘Ut vim atque injuriam propulsemus: nam iure hoc eventit, ut quod quiesce ob tutelam corporis sui fecerit, iure fecisse existimetur, et cum inter nos cognitionem quandam natura constituit, consequens est hominem homini insidiari nefas esse.’

85 Cf. D. 1.1.9 (Gai. 1 inst.).
to any philosophical background, but merely states that \textit{natura} grants the \textit{ius defendendi}.\footnote{D. 43.16.1.27 (Ulp. 69 ad ed.): \textquote{Vim vi repellere licere Cassius scribit, idque ius natura comparatur.}}

Looking at this selection of legal writings, a negative and a positive assumption can be made. Roman jurists do not, as Cicero did, reflect on the nature of law in a coherent way. Their use of \textit{natura} seems to be much more pragmatic and occasional, and even in writings of one and the same author one finds different – and contradicting – assumptions. They also neither follow Cicero’s idea that only law conforming with nature counts as law, nor do they develop a hierarchic understanding of natural law as a law outranking other laws. But what can be said positively is that Roman legal discourse did include philosophical elements; that Roman lawyers seem to believe in the justness of what they perceive as the ‘natural quality’ of human beings (and animals, to some extent); and that they were concerned with the legal effect of this natural quality. Moreover, they are using a terminology that is also to be found in Cicero’s philosophical texts, like \textit{natura}, \textit{naturalis ratio} and \textit{cognatio}.\footnote{For the use of \textit{cognatio} in Ciceronian texts see \textit{Leg.} 1.25, 1.26; for the use of \textit{naturalis ratio} see idem: 1.35.}

\section*{6. CONCLUSION}

Does Cicero’s use of philosophical arguments in forensic speeches contradict the legal discourse of his time? The question can only be answered with caution, as republican sources are rare. But with some certainty we can say that Cicero’s legal arguments derive from a philosophical background that is more complex and comprehensive than the philosophical splinters found in the texts of classical jurists. This, however, does not necessarily imply that his positions were incompatible with the way in which the Roman jurists argued. Cicero’s arguments might have been more grounded, but they were not foreign to Roman law. Like Cicero, the Roman jurists referred to a \textit{ratio} that is inherent in the human mind, and they put forward the idea of a \textit{cognatio} that binds all men (respectively all living creatures) together. And most importantly, they took these philosophical aspects to be legally relevant: \textit{natura} was an established topic in the legal discourse, and it did count as a source of law.

Claiming that Cicero was not a jurist seems to be right and wrong at once. It seems to be right as he does not appear as a \textit{typical} jurist: he shows less interest in the details of the \textit{ius civilis}, although he occasionally demonstrates a good knowledge of it; and unlike the jurists, he is strongly concerned with general reflections on the nature of law, the relation between law and society and the human preconditions of a lawful society. However, as the
above analysis of short passages from his forensic speeches demonstrates, Cicero also tries to bridge the gap between his philosophical ideas (that is, his understanding of the nature of law and its relation to human nature) and the rules and structures of legal practice. His theoretical approach does not lack practical relevance, but serves as breeding ground for legal arguments. These arguments accord with arguments found in the jurists’ writings, even though they frequently exceed them with regard to their philosophical substance.

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