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Preliminary Soundings on the Roman Origins of the Juristic Concept of "Possession"

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Summary

When we want to know about the origins of the principle of possession as criterium to qualify the standing of defendant in the Roman civil procedure, we inevitably encounter source problems. This article traces a strain of antiquarian informations. Out of the examinations appears that vindiciae or vindicta *had been ritual word denoting possession, and the Annalistic traditions around the tale of Verginia had had much to do with the problem. This cluster of traditions seems to have pertinence only to* causa liberalis*, but this is only for the reason that the vehicle of transmission was this procedure which had been differentiated from a common ritual. This ritual had been incorporated in the corpus of the Twelve Tables and had marked the birth of the civil procedure itself with those. Through the analysis of various versions of etiological myth for this ritual we can know also about what factors contributed to create this principle and this procedure and what it means.*

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The juristic term "possession " is recognized as a pillar of the Civil Law[1], while the Common Law too is not ignorant of this[2]. Above all, the concept of possession has a decisive role in the articulations of the civil procedure. It determines the standing of the defendant and so it is the commanding principle in the pre-trial (*in iure*). It defines the object of litigation. I'd like to call it "procedural possession", while the concept of possession in substantive law has a certain importance in particular in the field of

[1] M. Villey, *Le droit romain*, 9ed., Paris, 1993, p. 86:"un sens technique particulier que les profanes ne connaissent pas toujours". In fact, this concept can not be always understood easily in an extra-Western world like Japan. If it is yours, you may seize it. This is the common sense among us. Yet the principle of possession teaches that even if it is yours, if I hold possession of it, you may not seize it, and if you use force to take it, it is *a priori* unlawful and can be serious injury. We can understand soon that, if the concept of possession is not shared, the liberty of individual person is hard to take root. So, I think that it is vital to investigate the social foundations of this concept. This task would be trivial for the Westerns because this concept is too obvious and there remains only such a high level problem as the possession in the process of succession, though Eigenmacht and Selbsthilfe had been till recently praised for some years in Europe too (in particular in the Nazi era).

[2] We must reconsider F. Pollock et al., *An Essay on Possession in Common Law*, Oxford, 1888.

ownership (*dominium*)[3], in *traditio* etc.. The origins of the procedural possession concern the very foundations of the civil procedure and in consequence the Civil Law itself, almost the Roman Law itself. Nonetheless its origins are hidden in a profound obscurity. This article is a primordial tentative to investigate this field.

Naturally the origins of possession in substantive law have a consolidated theory. Still now it is generally accepted that it originated on the *ager publicus*. Possession was a central issue of the Nineteenth-Century Romanistic, and the theory of *ager publicus*[4] too prevailed as dominant across various fields of Roman history. Thus, as everyone knows, we have thought that possession started its career as an administrative protection for a *de facto* occupation of the public domain.

Yet, if we reconsider this theorem, we can soon conclude that it depends upon speculation rather than reliable sources[5]. I think that a Romantic image of *ager compascuus* as core of *ager publicus* is not sufficient to explain what is destined to be such a highly technical concept of later "possessio". I can't follow in this article the process of birth and consolidation of this theorem about the origins of possession, nor can I discuss the correlative theories of possession mainly flourishing in the so-called *Pandektenzivilistik.* But I'd like at least to try a first step of source analysis, even if it will be inevitably too sketchy.

To tell the truth, I was once in the past close to this field when I proposed a new

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[3] The origins of ownership have had numerous speculations at least since the Nineteenth Century. In the Romanistic field too there are even nowadays some important studies. Yet we can scarcely find mentions to possession in these speculations and studies. But the qualities of the various ownerships depend considerably upon their relationships with possession, for example whether they know the principle of possession or they are simple ideas of "mine".

[4] An interaction between Niebuhr and Savigny was decisive. As for the Niebuhrian side, A Heuß, *Barthold Georg Niebuhrs wissenschaftliche Anfänge. Untersuchungen un Mitteilungen über die Kopenhagener Manuscripte und zur europäischen Tradition der lex agraria*, Göttingen, 1981 is fundamental. Savigny incorporated the thesis of Niebuhr only in the third edition (1818, the first was in 1803) of his *Besitz* inserting the section 12a., and Niebuhr re-imported this in the later editions of his *Römische Geschichte* (2ed., 1830=3 ed., 1836, p. 172), but, I think, with a bit of irony.

[5] This is a symptom that only the contributions on *interdictum* and the praetorian activities in relatively later ages have been concrete in our doctrines. Among the many useful contributions, are indispensable at least, L. Labruna, *Vim fieri vero. Alle radici di una ideologia*, Napoli,1971 and G. Falcone, Ricerche sull'origine dell'interdetto *uti possidetis*, *Annali Palermo*, 44, 1996. According to Labruna, the connection of *interdictum* with *actio possessoria* appears in the turbulent situation of the last years of the Second Century BC, while Falcone dates this connection in the middle of the Fourth Century BC (*lex Licinia*). Both of them follow the Niebuhrian theorem, and Labruna's *actio possessoria* is a civil procedure, while Falcone's is a administrative regulation on the public domain.

stratigraphy of the sources about *lex agraria de modo agrorum*[6]. My argument was that the criterium[7] of confiscation of land was (the scale of the) possession of land (500 iugera etc.) *tout court*, neither limited to *ager publicus*, however nor directed to ownership, and *lex agraria* was put in force first for viritane distribution of land (this was the case for *ager publicus*)[8] since the last years of the Fifth Century[9] or the first years of the Forth Century, in the period, the end of which was *lex Licinia.* I added in a note a prediction that the principle of possession (to regulate holding the land) itself had been result of a immediately antecedent transformation of the Roman society. Now my task is to prove *prima facie* this prediction.

I abandoned the Nineteenth Century image of *ager publicus* in the previous article. So I concentrate efforts this time on the procedural possession. For I think that the substantial possession, first on the *ager publicus*, then in function of the concept of *dominium* (*traditio* etc.), was only corollary to the original conception born in the procedure though outside the court too the people had already begun to have that idea, and not *vice versa*.

Naturally this task is inseparably connected to that of reconstructing the whole change of the Roman society in that age, or the middle of the Fifth Century. Obviously I have to renounce it for the present, except some minimal references to other institutions. I limit our scope to the birth of the procedural possession. Doing so is methodologically precarious, but we must proceed step by step.

Yet, even if we limit the scope, we encounter other obstacles than the theorem of *ager publicus*. There is an influential thesis that the distinction between plaintiff and defendant, or the priority of the defendant holding possession, was established only in

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[6] A. Koba, Per una nuova stratigrafia delle tradizioni sulla legge agraria romana, *SDHI*, LXV, 1999, p. 269ff.

[7] I argued that, as is too obvious, possession is not occupation of any sort, but some qualified one, and so it contains a value to distinguish the facts, by which we can judge what ought to be confiscated and what ought to be respected. The limit of the space "500 iugera" means only that a certain scale *ipso facto* makes presume illegality of occupation, lack of quality necessary to be a possession.

[8] G. Tibiletti (Il possesso dell'ager publicus e le norme de modo agrorum sino ai Gracchi, *Athenaeum*, 26, 1948, 27, 1949) was the first footmark to innovate our understandings of *lex agraria* with his stratigraphy on the sources. He distinguished *lex agraria de modo agrorum* and *adsignatio viritim*. In the latter case *ager publicus,* or the designation of specific land as such, is functionally indispensable, but I think that in the former case it is not necessarily so. In any way, though Tibiletti had not negated a primitive collective domain of a rural community, he substantially separated it from the historical *lex agraria* and *ager publicus*, except some possible liaison of derivation.

[9] Koba, Nuova stratigrafia, p. 277, note 28.

the final years of the Republican age. Max Kaser proposed "relative ownership"[10] for which existed a civil procedure where there was no such distinction of the two parties. But this reconstruction was as much highly speculative as the theorem on *ager publicus*. More precisely speaking, it was based upon a speculative reading of one text, in Gai. Inst.. Our argumentation will accompany a refutation of this thesis, though we have already some nice criticisms[11] against it in the doctrines[12].

Naturally it is extremely difficult to demonstrate any origins in the Roman Archaic history, because we have no reliable source. Speculation can not be avoided. But we need a serious work of the source criticism, especially after the contributions of Arnaldo Momigliano[13]. We have a certain degree of possibility to concret source criticism. The following is based upon his distant but profound suggestions.

Let's overview our sources. Immediately we must say that it is not sufficient to trace the word "possession"[14]. We should distinguish the term and the concept. In occurence it is probable that long before the technical conceptualization there had been a story of the concept in the form of a concrete *exemplum*, *id est*, *récit* with its variations. A *terminus ante quem* of the conceptualization is the typology proposed by the great Mucii, of which we have a punctual figure in the Schiavone's work[15]. We see in the Ciceronian *Pro Caecina* a detailed picture of the possessorian action, but the discourse presupposed

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[10] M. Kaser, *Eigentum und besitz im älteren römischen Recht*, Köln, 1956

[11] D. Diosdi, *Ownership in Ancient and Preclassical Roman Law*, Budapest, 1970, p. 102ff.;A. Watson, *Rome of the XII Tables*, Princeton, 1975, p. 125ff.;P. Birks, The Roman law concept of dominium and the Idea of absolute ownership, *Acta Juridica*, 1985, p. 1ff.;A. Magdelain, Les XII tables et le concept de ius, in:O. Behrends et al., edd., *Zum römischen und neuzeitlichen Gesetzbegriff*, Göttingen,1987, p. 23 et passim. Recent challenge to re-estimate Kaser's theory by F. Giglio (The concept of ownership in Roman Law, *SZ*, 135, 2018, p. 76ff.) is a theoretical reflection (not offering new analysis on the sources).

[12] It is for me very strange that possession has been scarcely subject in these discussions too. Perhaps because Kaser had behind him had a tradition of some generations to reduce the importance of possession. But I'm convinced that it is this extremely delicate concept the custodian of the arcana of the Roman Law or the very idea of civil law.

[13] I can't reintroduce the entire works of Momigliano and his innovations of the methods on the Archaic Roman history in the 60's. Our issue is not too remote from his studies on Niebuhr. cf. A. Momigliano, G. C. Lewis, Niebuhr e la critica delle fonti, *Contributo alla storia degli studi classici*, Roma, 1955;Perizonius, Niebuhr and the character of early Roman tradition, *Secondo contributo*, Roma, 1960. This latter article contains his manifesto on the method of source criticism.

[14] The work of M. Lauria, *Possessiones. Età repubblicana*, Napoli, 1953 is sound as *pars destruens* through a rigorous terminology.

[15] D. 41. 2.3.23=*Iuris civilis libri* XVIII, F55, 56, Stolfi (E. Stolfi, *Quintus Mucius Scaevola*, Opera, Roma, 2014), cf. A. Schiavone, *Giuristi e nobili nella roma repubblicana*, Roma-Bari, 1987, p. 30ff.;"Commento" by Stolfi, *op. cit.*, p. 292ff..

already a long and complicated development of this procedure. The Annalistic sources seem to think that the possession had existed upon the public domain at least as early as the first years of the Republic. But my opinion[16] is that the term was not "*possessio*" but "*habere*" in the texts of the *lex agraria*, and the *terminus post quem* of the apparition of "*possessio*" is the so-called *lex agraria epigraphica* to be dated normally in a post-Gracchan year. This naturally does not rule out that "*habere*" meant the possession. In this case we are brought back to the first "real" plans of *lex agraria* in the 420's according to the Annalistic traditions, as I argued in the previous article. The problem is whether a procedural concept of possession had existed before it or not. Certainly the praetorian activities around the *interdictum* had much to do with the possession, or the possessorian actions, and it is *communis opinio* that the praetorian regulations on the public space preceded their interventions with *interdicta* in the civil procedures[17]. But this does not necessarily exclude that the concept of possession functioned without the independent procedure of *interdictum*, or with some prototype of it, and only in a second moment the civil procedure in its turn re-imported it from the regulation on the public domain, which had been derivative in its turn from the procedural possession, for its much higher version of the procedural articulation.

As for the origins of the civil procedure, one source has been dominant since its discovery in the Nineteenth Century. We are accustomed to image a primitive civil procedure called "*legis actio*" almost exclusively according to the contents reported by Gai. Inst[18], the very same source of the "relative ownership" theory. In this procedure nothing seems to suggest an existence of the concept of possession, nor of the distinction between plaintiff and defendant. This source seems to be very favorable to the "relative ownership" theory. But this source has not any date, because we don't know from what source Gaius collected this piece of his knowlege. Since the discovery we have believed in this tale "once upon a time" without any reliable source criticism possible[19]. We can't

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[16] See, my article cited *supra*.

[17] Labruna and Falcone disagree only about the age and the process of the coupling. I question whether or not there had been a praetorian interim sentence ("*decretum*" in the Annalistic expression:Liv. III, 44, 4) in the civil procedure to be united in future with a (as well) praetorian or aedilian administrative enforcement on the public space.

[18] cf. A. Schiavone, ed., *Diritto privato romano. Un profilo storico*, Torino, 2003, p. 81(T. Spagnolo Vigorita):"we owe almost exclusively to Gaius".

[19] However, for a while after the establishment of the Niebuhrian doctrine, there were some scholars to question about the birth of the procedural possession. For exmple E. I. Bekker, zu den Lehren von L. A. sacramento, dem Utipossidetis und der Possessio, *SZ*, 5, 1884, p. 149ff.. His interrogation on the historical process of overcoming the parity in the *legis actio*: "Die Herstellung derselben (priority of the defendant=possessor) erforderte Zeit, Erfahrung und Nachdenken;wie sie allmählich fixirt worden sind, durch Gewohnheit oder Gesetz, wissen wir nicht". The author dismisses a certain hypothesis

find in the doctrines any serious objection againt this belief[20]. Our reconstruction of *legis actio* has been thus isolated from the entire historiography about the Archaic Rome. So we must seek for a clue to integrate these informations into a historically probable source context.

1 *vindiciae*

1-1

Our first observation is very simple. Gai, Inst. IV, 16, as source of the actually diffused doctrine of *legis actio sacramento*, has a textual context to which few have acknowleged adequate importance[21]. Gaius, shortly after he has commenced a procedural *iter*, arrives at a point of divergence. The first category in the genre of *legis actio sacramento* is the more general one of "*si de libertate hominis controversia erat*"(IV, 14), competent on the litigation about personal liberty. The second category is "*Si in rem agebatur*". This is the canonical hypothesis of the scholars on *legis actio*, of which the most typical is the case of *rei vindicatio*. But the prototype is the first category, and so Gaius says "*deinde eadem sequebantur quae cum in personam agerentur*", though the two categories have a common structure. All this suggests that the so-called *causa liberalis* perhaps might be useful for our understandings of the origins of the civil procedure.

The second is a terminogical one. The *iter* of "*in rem*" is peculiar because in it the special rites should be observed while in *causa liberalis* the people automatically pass through them. The essence of these peculiar rites consists in the seizure, or an equivalent gesture of it, of the object of the litigation. When Gaius returns to a common *iter*, he confirms an act of the praetor who declares his acknowlegement of the fact that one of the parties is now keeping the object (viz. in *causa liberalis* without explicit ritual act of seizure, in *in rem* in consequence of a certain procedure of exchange to seize the object). This act is *vindicias dicere*. Keeping the object is called "*vindiciae*". Thus "*vindiciae*" is the key term. And Gaius says:"*id est interim aliquem possessorem constituebat*"[22]. That is, "*vindiciae*" for the "ancients" would have been an interim

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of Dernburg (who had mentioned the Twelve Tables and *causa liberalis*) as hasty.

[20] M. Kaser, *Das römische Privatrecht*, I, 2ed., München, 1971, p.19ff. is still representative even if this is already a little less primitivist than *Das altrömische Ius. Studien zur Rechtsvorstellung und Rechtsgeschichte der Römer,* Göttingen, 1949.

[21] Perhaps exept G. Franciosi, *Il processo di libertà in diritto romano*, Milano, 1961, p. 54ff..

[22] Bekker, *op. cit.*, p. 151 dismisses this phrase as "without any sense". E. Cuq, Recherches sur la possession à Rome, *NRH*, 18, 1894, p.13 thinks that this interim

possession now for us “the moderns”, the contemporaries of Gaius. We must remember that here Gaius is performing as an antiquarian. All this suggests that we must follow the term “*vindiciae*” rather than “*possessio*” in our research.

The third concerns the thesis of M. Kaser[23], which I already mentioned above. This thesis cites as its exclusive source the very text of Gaius that I am analysing. The text says: "*postea praetor secundum alterum eorum vindicias dicebat*". "*postea*" means “after the procedural step where the two *itinera* are split away”. So we are now in the *iter* of *in rem* leaving behind *causa liberalis*. And after an explication of *in rem*, “Then we have a common procedure” ("*deinde eadem sequebantur---*"). The *iter* of *causa liberalis* can omit these intermediary rites and it arrives directly at the *vindicias dicere*. Now, in the *iter* of *in rem*, the praetor gives *vindiciae* to the adversary of the one ("*secundum alterum eorum*") who first has claimed the object ("*qui prior vindicaverat*") accomplishing the gesture of *vindiciae*. The party "*qui vindicabat*" had accomplished certain formal act with a verbalized ritual, and then, however, the adversary party (*adversarius*) imitated it. And "*cum uterque vindicasset, praetor dicebat MITTITE AMBO HOMINEM*". The praetor orders that the object of the litigation be placed at the center (neutralizing force, not prejudice of claims, by ritual) . Both of two parties are obliged to perform a reciprocal and symmetrical act. Whence Kaser extracts the conclusion that there was no distinction between the plaitiff and the defendant, and so the sentence was limited only to proclaim a relative superiority between the two claims of legitimity. But we must say soon that the text knows the distinction between the two parties in its terminology, "*qui prior---*" and "*alterum eorum*". Then, we must not forget that this starkly ritualized phase is only transitory and so this can be a procedure to ascertain which of two parties the defendant is. Yet, why is the one to be defendant invited as well to repeat the same gesture to revendicate the object as well as the other to be the plaintiff? The act of "*qui prior---*" is composed of the two moments. The first moment "*Hunc ego hominem ex iure Quiritium meum*[24] *esse aio secundum suam*

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possession has nothing to do with neither the true possession protected by the *praetor* with *interdicta*, nor the distinction between the plaintiff and the defendant. He criticized Jhering, who had been, in my opinion, not precise but approximately right. It is very curious that Cuq adhered to "Zweiseitigkeit" of *legis actio* in the way that both *reivindicatio* and *contra-reivindicatio* were partial, so he presumed a symmetry of a couple of partialities.

[23] Kaser, *Eigentum und besitz*, p. 7ss.. The theory of "Zwiseitigkeit" had been a current since the second half of the Nineteenth Century in Germany, even if in a milder form than in Kaser.

[24] As for *Quirites*, there have been too many discussions. Even if we limit our scope to this expression “*ex iure Quiritum*”, we need to consider at least Magdelain and Nicosia. But it would exhaust given pages. I interpret this phrase temporarily as indicating a

causam" (IV, 16) revendicates the legitimacy ("*causa*" underlines it) to keep the thing. The second moment "*Sicut dixi, ecce tibi, vindictam inposui*" is enigmatic, but at least we may say that the language is more ritualistic and the rites belong to the genre of "*vindicta*" and "*vindiciae*" etc.. I might perhaps add that "*Sicut dixi, ecce*" ("for this purpose, now"[25]) has a nuance of challenge to indicate the position attained by him thanks to his demostration of capacity to accomplish a certain ritual ("I have claimed it, because I am ready to do it, I am qualified to do it). In fact a perfect, "*inposui*", follows it ("as a matter of fact, I am ready here"). The phrase means "I, as is evident in what I have pronounced, am now placed in a position to be able to challenge your position". Logically speaking, a challenge is directed to overturn the situation. "*vindictam inposui*" declares "I have overturned even if ritually, so albeit only virtually." He got the position of the challenger. Now the opponent must re-overturn this situation ritually and virtually, otherwise the ex-challenger would have deprived the adversary of position as the defender. So "*alter eorum*" tries to repeat the same gesture in the exact opposite direction to prove his position. Thus, we see now that there is no alleged relativity. Certainly in this preliminary phase of the procedure they are still examining the respective qualifications of the two distinct parties. Among the qualifications there is a common aspect, having possession, or having the qualification to be able to hold possession. So we find some moments in which symmetry prevails, but on the whole an asymmetricality is fundamental[26]. And we remark that *causa liberalis* does not need this complication. Obviously because in it the defendant is automatically defined in favor of the one who claims one's liberty against someone who maintains that he or she is his slave.

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legitimizing official and ritual context, visible for example in *mancipatio*. This legitimizing context forces a determinate morphology to both the parties, or in other words their morphological capacity authorizes (with *auctoritas*) their adherance to this context (ultimately political system).

[25] P. Noailles, Vindicta, *RHD*, 19, 1941, p. 37 proposes a different punctuation and integrates "*secundum suam causam*" to the part of "*sicut dixi*". Noailles was great in his attack on the whole school emphasizing the real force, and he underlined the verbal rituality. But ritual tense of the present confused him perhaps to presuppose a temporal monism. "*sicut dixi*" does not mean "as I am just saying now", but this perfect indicates two steps now and then, ritualistically first *causa* and then *vindicta*, but logically first *vindicta* and then *causa*. Noailles too recognized "la stratification du terrain juridique", but he interpreted it historically as "la couche primitive" and "la jurisdiction civile". But we stay here in the interior of one layer of the ritual. The phase of possession in the civil procedure does not represent a primitive stage opposed to a more recent stage of ownership.

[26] I confess I am anticipating the ritual process in the Verginian *exemplum iuridicum* that we'll see later. But no one can deny that the Verginian tale is the best illustration of this Gaian passage.

In fact, in the following second scene, an apparent symmetry is no more. The presumed plaintiff says:"*Postulo anne dicas, qua ex causa vindicaveris*". This is a strange locution because its terms are of "*causa*". There seems to be a relativity, for the presumed plaintiff questions the arguments of the adversary. This would be an attitude to be attributed to a defendant. But the reply says:"*Ius feci sicut vindictam inposui*". So, the adversary does not accept the very terms of the question, as if he says "that qustion is mine, because that position is mine". His terms are once more of "*vindiciae*". He affirms that he recovers the position of the defendant. If he were not able to reaffirm it, he should be fallen into the misery of the plaintiff. But he says "I could accomplish the whole necessary rituals".

The third scene is symmetrical. The key phrase is "*Quando tu iniuria vindicavisti*". The looser must pay for a tort. We have something similar to *sponsio*. But if we interpret "*vindicare*" as revendication, or as an act in the terms of *causa*, it is an error. We remain still in the language of *vindicta*. In the procedure both the parties have experienced the scene where they take the object by simulated force. So both have taken the risk to be illegal. The symmetry is simply due to this parity in the epilogue of reparation for injury (trespass upon possession).

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The Gaian text orientates us to investigate the surroundings of the word "*vindiciae*", while an almost prohibitive source problem of this text haunts us.

We have a text that might be suitable to resolve this problem if it were not so corrupted. Fest. s.v. vindiciae, p. 516 L collects at least the opinions of Cato, Lucilius, Cincius the antiquarian, Servius the jurist. Cato Maior Censorinus belongs to the caste of the traditional nobility and is a proto-antiquarian, not yet of the Varonian type. Lucilius is a poet of still genuinely republican inspiration. This Cincius must be antiquarian and not Annalistic writer. Servius Sulpicius Rufus is naturally the great jurist of multiple competences. The order may be chronological, and so this text perhaps serves to resolve the chronological problem of Cincius the antiquarian[27].

Festus, or perhaps Verrius Flaccus behind him, is uncertain of this misterious term "*vindiciae*". "*res eae, de quibus controversia est:quod potius dicitur ius quia fit inter*

[27] L. Cincius, RE, Nr. 3 (slightly later contemporary of Varro). This is not Cincius the Annalist (the end of the Third Century BC.). According to J. A. North, Why does Festus quote what he quotes?, in:F. Glinister et al., edd., *Verrius Festus & Paul*, London, 2007, p. 58, "The views of Cincius appear quite frequently in Festus" (55 examples). As for the intellectual climate of Cincius, cf. E. Rawson, *Intellectual Life in the Late Roman Republic*, London, 1985, p. 247ff.

eos qui contendunt." is ambiguous enough. For him *vindiciae* is the object of the litigation. But of which type ? "potius" mirrors existence of a controversy. We are not informed of what follows the virtual "*quam*". His preference is "*dicitur ius*". So he thinks of a full trial of the civil procedure. The "*quia*" clause is difficult. But it seems that the reason of his preference consists in the rites presupposing the presence of the two adversary parties in complete. We guess that the alternative is the rite of one party presence. So far.

The Cato's fragment collected here is attributed to a forensic oration "*In L. Furium de aqua*" (XIX, F6 Jordan) with other fragments. The isse is unknown, but "*de aqua*" suggests a rural space where the *boni viri* seen in his *De agri cultura* were active[28]. Even if "*secundum populum*" is difficult to interpret, "*praetores secundum populum vindicias dicunt*" indicates clearly enough a litigation forcalized to some *interdicta*. In this case "*secundum populum*" might distinguish from a civil one ("s*ecundum personam*"?) the case, the issue of which is a violation of the public order about *aqua publica*. A formal correspondence to "*praetor secundm alterum eorum vindicias dicebat*" in the Gaian text is conspicuous. Cato seems to say that it is for the people that the *praetor* presumes to give the position of defendant. The reason was presumably that the *aqua publica* should not be occupied or blocked by anyone, and so it must have primacy until it is proved that it is not *aqua publica*.

The fragment of Lucilius[29] can be understood in the same direction, though the syntax is uncertain. An analogous issue could be born in a sacred space. But the expression of "*Nemo hic vindicias neque sacra*" is such that we must read this "*vindicias*" slightly out of the rigorous procedural context. "No one could claim a possession here on the sacred soil too". We encounter here a substantial use of the term *vindiciae*, not possession.

From these fragments we can infer that "*vindiciae*" has commenced to enlarge its semantic field from the position of defendant to the possession in general. Naturally, so saying, we presuppose that the concept of possession in the constellation of juristic terminology had been operating through the word "*vindiciae*". The hinge of the two wings of this semantic field, the procedural one to signify the position of defendant and the substantial one to indicate a qualified occupation, was probably the praetorian

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[28] 4:"*vicinis bonus esto*".

[29] If Lucilius is a poet of aphorism in a republican pungent spirit, the defense of public and sacred domain against private occupation can belong to it. His friendship is a kind of republicanism. cf. W. J. Raschke, *Arma pro amico* – Lucilian satire at the crisis of the Roman citizenship, *Hermes,*115, 1987, p. 299ff.;E. Lefèvre, Lucilius und die Politik, in: G. Manuwald, ed., *Der Satiriker Lucilius und seine Zeit*, München, 2001, p. 139ff.;U. Gärtner, Lucilius und die Freundschaft, *ibid.*, p. 90ff. (*contra*).

activity around the *interdicta*. "*vindiciae*" had been a ritual word or a word compensating the rite. It seems that the lexical cluster around the verb "*possidere*" had not yet reached this semantic field.

However, I think that this usage of the word "*vindiciae*" then rapidly has lost its dominion, and has precociously become the object for the antiquarian research. Already for Lucilius "*vindiciae*" was perhaps a somewhat archaic word to evoke poesy. And the fragment of Cincius "*Vindiciae olim dicebantur illae, quae ex fundo sumptae in ius adlatae erant*" is enough to disclose his curiosity for an obsolete usage of words[30]. So his attention is concentrated on a ritual function[31] to represent the thing in the court. He is indifferent whether it represents the object of the litigation itself or an advantaged position of defendant.

On the contrary, the fragment of Servius, though very corrupted, reveals his technical interest. It insists upon the singular form "*vindicia*" ("*singulariter formato vindiciam esse ait*"), and contains a citation from the Twelve Tables, which seems to tell something about the obligation of the loosing party to pay some money. We saw this payment in the Gaian text too. Naturally Servius had an antiquarian erudition[32] as well as a juristic formation, and he was no less active in the antiquarian field than in the jurisprudence. So it is improbable that he simply accepted the traditional doctrine. He by himself discovered the Decemvirate phrase "*Si vindiciam falsam tulit*". Because he perhaps had a sympathy for the linguistic theory of *analogia* as is found in Varro[33], he didn't like too much the shift of the signification from the procedural one to the occupational one. For him perhaps the singular form is proof of the original meaning in the civil procedure, while the plural form is compatible with the use of the word for the units of occupation. For Servius, "*vindicia*" would be landmark of the archaic procedure of *rei vindicatio* ("*<q>ua de re controversia est, ab eo quod vindicatur*"). Servis as a jurist of prestige wanted to correct a too generic comprehension of the antiquarians who

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30 cf. C. Moatti, *La raison de Rome. Naissance de l'esprit critique à la fin de la République*, Paris, 1997, p. 138, 242.

31 The scholars often point out the relation of the prosperous antiquarianism to the political climate of the early Principate. I think we might add one more factor, that the Romans were far more ritualist than the Greeks, proportionately to the respective natures of the political system. The Roman ritualism and antiquarianism was sign of the political system still alive. So, the antiquarianism itself suffers from a certain sclerosis (even if its idiosyncrasy was accentuated) in the very years of the early Principate. A. Momigliano wrote:"But there was never another Varro-----erudition became compilation, and compilation led to summaries, excerpts, scholia---"(*The Classical Foundations of the Modern Historiography*, Berkely, 1990, p. 69).

32 cf. Schiavone, *Giuristi e nobili*, p. 128.

33 cf. F. Della Corte, *La filologia latina dalle origini a Varrone*, 2ed., Firenze, 1981, p.177ff.;J. Collart, Analogie et anomalie, in:AA. VV., *Varron*, Genève, 1962, p. 119ff.

were too inclined to accept the word usage to give meaning exclusively to the real estates.

The singular form induces association with the formula "*vindictam inposui*", though we ask whether "*vindicta*" and "*vindicia*" are functionally identical or not. It is certain that Servius wanted to reject with his singular form the antiquarian confusions which consider "*vindiciae*" as possessions of land even in the procedural context. For him it was not countable and so the singular form was more suitable, because it meant a decisive procedural moment. Obviously, even if Servius is polemical, the problem was not actual, for it was an only antiquarian issue. But it is logically possibile that behind this insistance lay a certain crisis for that procedural moment. The reason why he transferred the battle ground to the theoretical one, was perhaps that he was detecting difficult problems which obstructed to determine a clear point of this procedural moment (for example of *litis contestatio*) in his contemporary judicial organization.

1-3

We have an interesting text of Gellius (XX, 10):"*cum adversario simul manu prendere et in ea re sollemnibus verbis vindicare, id est "vindicia*""[34]. With this singular form, its source can be presumed to belong to a relatively recent layer of the juristic treatises of linguistic taste. Yet the text starts with a questioning the meaning of an ancient expression "*ex iure manum consertum*" found in the formula "*cum lege agitur et vindiciae contenduntur*". This shows that the narrator encountered in his antiquarian curiosity for the usage of words this plural form "*vindiciae*", and then he discovered instead the singular form when consulting some recent literature. The narrator posed the question to a renowned grammarian, but he sent it on the jurists, because he thought the problem was to be treated only by an expert, active in the praxis of legal advice (*rem enim doceo grammaticam, non ius respondeo*). The narrator points out that the same expression is found in *Annales* of Ennius as well. But the grammarian answers that Ennius too refers here to a legal term. The narrator himself consults the jurists or their treatises.

The answer he found was an anthropological view, what is almost identical to that of Cincius. One thing is that the exchange of the real physical forces is ritualized in the court and founds the civil procedure. Another thing is that the force (*manus*)[35], or seizure of a land piece, in the territory or far from the city center, or its gesture, is

[34] Fr. Hotman, *De Legibus XII Tabularum tripartita*, Pars III, starting from this phrase, arrives at the conclusion:"*Vindiciae autem nihil aliud tum fuisse, quam possessio*".
[35] As for "manus", P. Noailles, "manum injicere", *RHD*, 20, 1942, p. 1ff. is fundamental. The author insists on the rituality ruling out any factor of physicl force.

transformed into the verbal rite at the city center or in the court (*sollemnibus verbis*). But this juristic-antiquarian source confuses these two. It invents an improbable exegesis upon "*ex iure*", mixing the linguistic and the jurisprudence. This is a typical *bricolage* of the antiquarian, somewhat analogous to certain Varronian linguistic pseudo-explications of *analogia*. A centrifugal movement of "*ex iure*" is associated to a centrifugal expansion of the praetorian jurisdiction to the provinces, which forces the plaintiff to accompany the defendant to the place where lies the object of the litigation, then to return to the court dragging the defendant. The base of this interpretation is a naif logic which wants to explain a symbolic act by such a naturalistic reason as the distance, while the semiological function of the rite is in general more complex, sometimes quite arbitrary. In particlar, such an interpretation lacks a sense of criticism discerning the distinction between a poeticl expression "*ex iure*" to be perhaps read according to the theory of *anomalia* and a technical and ritual expression "*in iure*" to be applied in a mechanically rigorous way. The Stoics would have considered this type of explication as infantile [36]. "*aliquid stat pro aliquo*" is not valid [37]. This juristic-antiquarian source could cite the text of the Twelve Tables, and "*Si qui in iure manum conserunt*" is accepted as an authentic fragments of the Decemvirate Laws. But we remember that we find "*ex iure*", not "*in iure*", in the verse of Ennius. He opposes "*ex iure manum consertum*" to "*sed magis ferro*". That is, he says "outside the court, not a ritualized battle of force, but a true battle with arms". So we see here a reverse process of de-ritualization. Ennius returns from rite to myth. His poetical irony consists in resurrecting a frozen juristic formula and animating it in a vivid (perhaps etiological) myth.

In sum, this is a precious testimony of the situation of the antiquarian erudite sources around *vindicia*/*vindiciae* after the early Principate by the Antonine era. We find a complicated confusion. Two puzzles of labyrinth are entangled, "*vindicia*" or "*vindiciae*", "*in iure*" or "*ex iure*". The puzzles were born out of pastiche, as well as pseudo-theoretical explication, of "*vindicia*" in reference to force (*vis*) and judgement (*dicere*), perhaps canonical still in our literature[38]. It is highly probable that the couple of "*ex iure*" and "*vindiciae*" had been original. In such a case, "*ex iure*" had meant "*in iure*" in the later acceptation of the text of the Twelve Tables. This phrase had indicated

[36] cf. U. Eco, *Semiotica e la filosofia del linguaggio*, Torino, 1984, p. 27ff.
[37] Noailles, *op. cit.* proposed a distinction between "*manus iniectio iudicati*" and "*manus iniectio vocati*", which are not too present in the texts. So his concept of ritualization followed *aliquid stat pro aliquo* naturalist-wise.
[38] It is out of range for this article to examine the acceptances in the modern literature of this pseudo-theory or the text of Gellius itself. This is too familiar in the textbooks and the laymen citations.

probably that the simulated battle had to observe the rules of ritual ("ex" in the sense of authority), or a battle became ritual only through an observance of rules. Ennius, knowing this meaning, poetically played with multivocality of the word "*ex*". Yet his sophisticated gesture sheds at the same time light on the mechanism of ritualization, or myth-ritual relationship. He illustrated accidentally through a real and historical situation that the equivocality of "*vindiciae*" could not be sustained because the distance between the substantial and procedural possessions was now too much to keep union, along with an enormous development of the first, not allowing more a symbiosis. This conceptual distance would be represented by an image of the landholding being quite a long way off. But the procedural "*vindiciae*" as well had to be in its turn corrected into "*vindicia*" in order to recover its distinctive identity, as we saw in Servius, and consequently "*in iure*" was introduced as authentic wording, because the procedural "*ex iure*" had been taken over by a meaning perhaps derived from poetical origins[39] and certainly filled up with substantial possession. This pastiche makes us know about a transitional moment in which the substantial possession (even if there was not yet this word) took departure from the immediate context of the judiciary system. We can suppose that arriving at this stage the Romans could not maintain the usage of the word "*vindiciae*". In other words, "*vindiciae*" had originally been a hinge bridging between two conceptual worlds of procedural and substantial possessions (*ante litteram*). It is difficult to define the chronology of this juristic source[40]. But we certainly witness the decoupling of the substantial possession away from the dualism in the age of Gracchi, with prevailing of the word "*possessio*" in a new-fashioned *lex agraria*[41]. Thus "*vindiciae*" became an antiquarian and poetical word.

1-4

In contrast Gaius discovered a little more detailed procedural figure of "*vindiciae*" even in comparison with Servius. He did not need to insist on the singular form. He could use "*vindiciae*" in the procedural context. We can now question a little more specifically, from what source Gaius obtained this information. For, as we'll see soon, there must have been some vehicle of tradition besides the texts of the Twelve Tables (present in every step of these traditions), even if close to these. Servius too must have known this vehicle, but, because it had been disguised with another marker, he must

[39] As if the *anomalia* theory (arbitrarity) were proved.
[40] The text does not clearly reveal the chronology. "*Itaque id quod ex iureconsultis quodque ex libris eorum didici inferendum his commentariis exstimavi*" makes possible all kinds of conclusion. We must date a content we may characterize "tralatizisch".
[41] This was our hypothesis in the article previously cited.

not have become aware that it was the very source of what he was expert of. Perhaps Gaius reached this source.

"*vindiciae*", in its plural form, appears in *Enchiridion* of Pomponius (D. I, 2, 2, 24). Certainly the passage is in the orbit of the Twelve Tables. But the impression is slightly distant from what is given by the juristic-antiquarian traditions we saw above.

D. I, 2, 2 is not monolithic[42]. It has a tripartite structure. The three parts are in conflict against one another, rather than systematically integrated, and are not well-harmonized, though all the three depart from the origins of the respective subjects. The point of view of the first part is characterized by the sources of law, so it starts the narration with the *legis actiones* and then passes to their interpretations (though not forgetting to recall the very founding of the political system, viz. Romulus). Instead, the second part narrates from the foundation of the Republic, and then it traces the vicissitudes of the magistrates holding *imperium*. The third concentrates its attention on the history of the jurisprudence, where the first jurist was Coruncanius, as specialized member of the *nobiles*, and the role of Appius Claudius Caecus is drastically reduced, while in the first part he was decisive as the patron of Gn. Flavius publishing the rituals, viz. *legis actiones*, who has no presence in the third part.

And our text is placed amid in the second part, perhaps escaping an involvement in the contentions about the jurisprudence, visible in the first and third parts (the polemic around Ap. Claudius Caecus). We can imagine its source as essential recapitulation of the annalistic traditions, deprived of the etiological details. The second book of the Ciceronian *de re publica* belongs to the same genre. It was a fruit of the antiquarian, or philosophically learned[43], research of new look on the Annalistic materials, and an old

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[42] cf. A. Koba, Due indizi per la critica delle fonti dell'*Enchiridion* pomponiano, *Studi Senesi*, 129-3, 2017, p. 460ff.. Then we have now at last a serious work on this text:F. Nasti, Greek thought and Roman jurists:a preliminary survey on Pomponius's *Enchiridion*, in:A. Schiavone et al., edd., *Jurists and Legal Science in the history of Roman law*, London, 2021, p. 137ff.. Nasti hypothesizes that the first section is a Polybian derivation and the tripartite system (in particular the transition to the magistrates =the second section) is Aristotelian. The model might be such, but the content is rather mosaic. It is possible too that the incipit of the first section is of antiquarian strand of the "Publizistik" type where Polybius as well as *The Athenian Constitution* were poured in. But a concentration on *legis actiones* in the following has diverse flavour. Instead the enumeration of the eponymous magistrates in the second section is a preferred genre of the early Greek antiquarianism as is well known, even if the Aristotelian school gave some contributions for a further development, and the Roman Annalistic was *grosso modo* under this inspiration, in contrast to the Catonian *Origines*.

[43] cf. J. L. Ferrary, L'archéologie de *de re publica* (2, 2, 4-37, 63):Ciçéron entre Polybe et Platon, *JRS*, 74, 1984.

hypothesis of the Varronian current[44] can not be ruled out. In any way this is distinct from the juristic-antiquarian current we saw above.

The narrative arrives inevitably at the moment of the Decemvirate Revolution. It suddenly looses equilibrium precipitating to a brief but colorful etiology(abanndoning a dry line of publicistic antiquarianism). As if the author has discovered for the first time the curious origins of a rite. After the first good Decemvirate, the second and bad one leads to the revolution. There was a certain Verginius who triggered an explosion. He protested against Appius Claudius monopolizing *imperium* for the constitutional change, for this dictatorial magistrate deprived Verginius of the *vindiciae* of his daughter giving it to a certain Claudius, a puppet of the dictator himself, though he by himself had introduced in the Twelve Tables the rule to oblige the magistrate to give the *vindiciae* to her father in such a hypothesis. Verginius killed his own daughter in order to frustrate Appius to appropriate her. This tragedy evokes the indignations of the people and a revolution was inevitable.

It seems perhaps that this would be a simple *causa liberalis*, and no more than this[45]. But we confirmed the parallelism between *causa liberalis* and *legis actio*, in the Gaian text. We can read this Pomponian text in the same way. "*vindicias secundum eum dixisse*" tells that Appius has given *vindiciae* to the puppet. "*Secundum eum*" seems to mean simply "following the assertion of the puppet", but this is an expression of short circuit, and the real meaning is "following the mode which he requested". For the text distinguishes clearly two modes of obtaining *vindiciae*, "*secundum libertatem"* and "*secundum servitutem"*, the second of which was wanted by the puppet, and so by Appius Claudius. This *partitio* is perfectly corresponding to the divergence between "*in personam*" and "*in rem*" in Gaius[46].

If so, a hypothesis emerges. The source of this part thought very probably that this affair was the instituting *exemplum* of not only *causa liberalis* but also of *legis actio* or *rei vindicatio* and, in consequence, of the civil procedure *tout court*. *causa liberalis* and *rei vindicatio* had the same roots. The first qualification seems to prevail in the text. But it says that what should be qualified as the first (*causa liberalis*) was twisted to be qualified as the second (*rei vindicatio*) exactly by an arbitrary intervention of Appius

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[44] cf. M. Bretone, *Tecniche e ideologie dei giuristi romani,* 2 ed., Napoli, 1982, p. 225f.
[45] cf. Franciosi, *op. cit.*, p. 54.
[46] It is well recognized that *causa liberalis* and *legis actio in rem* share a common procedure (cf. M. Nicolau, *Causa liberalis*, Paris, 1933, p. 98). But historical relationship between them has not been much investigated, except Franciosi, *op. cit.*, p. 212f., who argued that *causa liberalis* is a late derivation of the general *legis actio in rem*. He refutes the existence of *causa liberalis* in the age of *Decemviri*. He presupposes the parity of the parties which *causa liberalis* inherits from *legis actio*.

Claudius. The text thinks that from the very first there had been a bifurcate procedure and the bifurcation itelf[47] means the birth of this procedure itself. Why does this source colour the possibly archetype *exemplum* of the civil procedure (or the *ius* itself) rather as *causa liberalis* than as *in rem*? Perhaps this is due to the fact that (the later differentiated) *causa liberalis* had conserved better the essence of this procedure than (the later differentiated) *in rem*. Though two branches were differentiated from a common archetype, the meaning of the *vindiciae* had been remembered more strongly in *causa liberalis* than in *in rem*, because rather there than here had been dramatically far more thrilling[48] the problem which of the parties retains the object in the interim phase. If the object is a daughter, what is the situation of *causa liberalis*, Appius Claudius can consume his object of carnal desire already in this interim phase. If the object is a simple thing, the recovery is possible either with restoration or with money.

We must add one more thing. The text says:"*quod ipse ex vetere iure in duodecim tabulas transtulerat*". This has been interpreted in the sense that the Twelve Tables were a compilation of various ancient rules. But it is evident that this phrase is related to the next:"*utpote cum Brutus, qui primus Romae consul fuit, vindicias secundum libertatem dixisset in persona Vindicis Vitellorum servi*". It was this at least which had been a direct *exemplum* to the Verginian tale. Naturally the Vindicius affairs were very political and exceptional, and had nothing to do with a civil procedure. So we can presume that, despite Pomponius, the Vindician *exemplum* had not contained any element of option between *in libertatem* and *in servitutem* or *in personam* and *in rem*. Notwithstanding Pomponius nominated the Vindician affair as *exemplum*. If so, we must guess that this source for Pomponius presupposes in substance a jurisdiction to be now differentiated at the moment of the Twelve Tables, and it considers that the civil procedure or the civil law itself (*ius*) was born from this differentiation[49]. The key moment was *vindiciae*. Probably its meaning was transformed drastically at this moment. The very pseudonymous form of "Vindicius" orders us to interpret in this direction. We are quite certain again saying that the vehicle of the antiquarian memory of the ritual origins sticked to the *exempla* of c*ausa liberalis*, which was perhaps the remainder left behind after the great independency of the civil procedure in the strict sense then highly differentiated and developped, though we can recognize various new

[47] We saw this attitude in Gaius too.
[48] My reference is Plautus, at least his *Rudens*.
[49] In other words, we may say also that this passage alludes to two diachronic layers, political system (the Republican Revolution) and civil procedure (the Decemvirate Revolution), just as otherwise Livy (or others too) is conscious of two diachronic steps Lucretia/Verginia.

phases as well of *causa liberalis* above all in Plautus, while in the civil procedure the origins were fallen into oblivion so that we saw the word *vindiciae* or *vindicta* given various confused explications, though the substance of its juristic moment was never forgotten.

2 Verginia

2-1

So, our historical analysis must be concentrated on the traditions around Verginia[50].

In the age of Cicero, the story of Verginia was not only much known, but also reproduced in various genres of literature (Cic. Rep. II, 63:*celebrata monumentis plurimis litterarum*). It is very probable that the core of the story had been Annalistic, because Cicero places the affairs "sixty years after" the Republican Revolution (De fin. II, 66), and Diodorus Siculus who is normally faithful to the old layers of the annalistic traditions records it even if briefly[51]. We saw also that Pomponius arranged this story according to the cronogical order of the eponymous magistrates.

Cicero gives two different names to father of Verginia(*Decimus Verginius*:Rep. II, 37, 62, *Lucius Verginius*:De fin. II, 20), and Diodorus did not like to name her. In the Ciceronian texts the derivation *virgo* > *Verginia* is emphasized, and a speculation "*virgo* > Verginia > Verginius" has more chances than the opposite that presupposes a derivation from the real patrician *gens* Verginii who were visibly present in the first republican years in the Annalistic memory. This father Verginius is very probably an *ad hoc* champion of the plebeian movement[52].

We are inclined to a hypothesis that this father had been substantially anonymous in the origins. An *exemplum iuridicum* usually has the parties named such as

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[50] The doctrines consider the Verginian *exemplum* as significant only for *causa liberalis* (cf. Nicolau, *op. cit.*, p. 99). While Franciosi, *op. cit.*, p. 7f. does not admit any source value to the text of Livy even for *causa liberalis*, Watson, *Rome of the XII Tables cit.,* p. 168f. denies even the nature of *causa liberalis* for this *exemplum*. The scholars have naturally discussed about the interim possession (cf. P. Noailles, Le procès de Virginie, *REL*, 20, 1942, p. 122 etc.), but they have considered it only as logical and technical consequence of the fact that *causa liberalis* was derivation from *legis actio in rem*. They have not been aware of decisiveness of this problem. *A fortiori*, they did not notice that this very story had created this decisive principle of possession and had illustrated the significance of *legis actio* itself, or the civil procedure itself. One of its reasons is that they have ignored the importance of the myth-ritual relationship in the sources, and of the source problems in their fields of research.

[51] Diod. Sic. XII, 24.

[52] This does not exclude a real existence of the plebeian Verginii, but this father needs not to be one of its members. At most he became such *a posteriori*.

Titus/Caius, Agerius/Nigerius etc.. In any way this story had been an insertion in the chain of the annalistic facts in which real names were recorded, even if every Annalistic fact was potentially an *exemplum*. If so, the story was not born in this year. It is possible that its formation was gradual, even if it can be dated *grosso modo* in these years or a little later. This heterogeneity of the story inside the Annalistic narration evokes a doubt why the formation of this rite was placed in this precise moment. We can guess that the Annalistic events around this date had been suitable as etiology, or etiological environment, of the rite. If so, this etiological reason is considerably credible, because it is very probable that they unanimously considered such a setting very cogent, and, if so, there must be a reality behind this type of solid conviction. We are not informed of any dissension about the chronology of the Verginian story.

2-2

In order to make an approach to this reality, however, we need to embark on an analysis on the level of myth[53] leaving the rite for a while. A rite has normally an etiological myth, and this myth also stands in relations to other myths. But we must face a complication. In our specific case, these myths are not distinguished from the political facts. Presumably in Greece the myths were transformed into such high literature as epic and lyric and tragedy, while the historical facts were investigated by a special critical examination. On the contrary, though the Roman Annalistic too narrates a sort of political history with a certain grade of attention to exclude false traditions, the tendency to make *exemplum* is so strong in the source materials that the Annalistic writers remain in half way between myth and history, and they conserved in their narration sometimes also direct mythical counterpart to specific rite as in the case of Verginia[54].

So, before analysing *exemplum iuridicum* and extracting its original form, we must survey on one set of traditions of etiological myth. Fortunately the tale of Verginia left three detailed versions for us besides the large part of them to be considered now lost. Our *exemplum iuridicum* probably constituted historical reality through the variety

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[53] A. Momigliano had pointed out the importance of analysis on these semi-mythical tales:Perizonius, Niebuhr, etc. *cit.,* p. 83f.. He added:"The story of Verginia presupposes many legal subtleties that cannot come from a poem". We think that this character derived from its original form of *exemplum iuridicum*, but it does not preclude some further literary development of etiology, if not in epic.

[54] Besides this genre there seems to have been no veritable Roman myth. We have only cult and etiology. If Dionysius realized that "Roman religion was substantially lacking in myth" (E. Gabba, *Dionysius and the History of Archaic Rome*, Berkeley, 1991, p. 120), this is due to such a peculiar relationship of myth/ritual.

and the tensions between diverse versions of its etiology, thus mediating social dynamism.

2-3

We have the Verginian tale in Livy[55] and in Dionysius[56], but there is another one, not at Rome but, at Ardea, in Livy[57]. This version casts on the scene an anonymous girl. Though, for the reason that its place is Ardea, it is not always counted as another version of the tale of Verginia, the coincidence with other versions is too evident.

In all three versions the girl is plebeian. It is interesting that Diodorus describes Verginia as a "noble" young girl[58]. We should not presume that the Diodorean version is always old and authentic[59]. While it is highly probable that "noble" means "*nobilis*" in the sense of the new patricio-plebeian aristocracy, it is possible that Diodorus adopts here a version following a literary cliché more diffused in Greece than in Rome, in which a young plebeian suitor for a patrician girl gets a successful result[60]. Given the unanimity among three main versions, it is ruled out that there existed a patrician girl version in Rome and in Latium. It was not an issue whether the girl was patrician or plebeian. Nevertheless, Diodorean version is not of no value. If this was *interpretatio Graeca*, it was not without reason. If we observe a presence of any version also in the sphere of Magna Graecia, we can assume a Greek influence. If in Rome there was no version of the patrician girl of Greek type and if we find here only the versions of the plebeian girl, this contrast is evidently pertinent. We can easily imagine that some

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55 Liv. III, 44ff.
56 DH, XI, 28ff.
57 Liv. IV, 9, 1ff.
58 "εὐγενοῦς παρθένου"
59 cf. E. Täubler, *Untersuchungen zur Geschichte des Decemvirats und der Zwölftafeln*, 1921, p. 140;J. von Ungern-Sternberg, The formation of the annalistic tradition:the example of the Decemvirate, in:K. A. Raaflaub, ed., *Social Struggles in Arcahic Rome*, 1986, p. 91ff.. *Contra* Ch. Appleton, Trois épisodes de l'histoire ancienne de Rome:les Sabines, Lucrèce, Virginie, *RHD*, 3, 1924, p. 620ff.
60 It seems that this type of traditions were connected with the girls' initiation (marriage) rites (cf. K. Dowden, *Death and the Maiden:Girls' Initiation Rites in Greek Mythology*, London, 1989). The traditions relating to the social overturn in the process of late archaic democratization contained often the tales of marriage of aristocratic girls with humble men and of dropping down to territory of aristocratic boys (the best analysis is P. Vidal-Naquet, Esclavage et gynecocratie dans la tradition, le mythe, l'utopie, in:Id., *Le chasseur noir*, 2 ed., Paris, 1981, p. 267ff.). We have this type of tales at Cumae, one of the epicenters of Greek impact on Rome. One of such tales, the daughters of Proitos and Melampous, was diffused in Magna Graecia too. cf. C. Montepaone, A. Koba, Il mito di Melampo come paradigma di "mobiltà" sociale (a proposito di Erodoto, IX, 33-35), in:C. Montepaone, ed., *L'incidenza dell'antico. Studi in memoria di Ettore Lepore*, Napoli, 1996, p. 357ff..

people in Rome adapted a genre of Greek tales for promoting a new version of the similar social transformation in their society, but they modified the original model very significantly. The modifying difference were presumably proportionate to that between the Greek and Roman versions of this tale), and such traditions, created in such a manner, were later discovered by the Greek historians, in an erroneous analogy, and then they were collected by Fabius Pictor etc. with correction, which poured in Livy and Dionysius[61].

If we direct our eyes to inner variation, we soon notice that, while two extensive versions of Livy and Dionysius have a clear point of view philo-plebeian, the tale of the Ardean girl[62] is firmly philo-patrician. At Ardea too, there was a plebeian girl who had two suitors, one patrician, the other plebeian. The patrician ("*nobilis*") boy is tempted purely by the beauty of the girl ("*nulla re praeterquam forma*"), as had been Appius Claudius (we read a similar expression in Livy[63]). This means that the patrician boy does want nothing other than the girl herself, nor her fortune nor her status. The "*optimates*" support him, while the plebeian boy is backed by the force of the plebeian men, in particular of the "*tutores*" who form a homogeneous union ("*eiusdem corporis*"), usually associated through an agnatic kinship, probably for the absense of father. Instead her mother is a great *arriviste*, and prevails over the whole affair. It is very logical that her choice is the patrician boy[64].

The conflict was going to be resolved in the court ("*uentum in ius est*"), where that mother was triumphant, but in the last moment the plebeian supporters did not accept the decision, and crashed the court by their military force ("*sed vis potentior fuit*"). Thus there was born a civil war. The plebeians invited the Volscians, and the patricians requested a military intervention of Rome. The victory of the patrician side was an assured thing.

In the Roman versions, the wickedness of the patrician ambition to acquire a plebeian girl is emphasized. There appears no triumphant mother. A male solidarity among the plebeians is praised. Their indignation will bring about a great revolution. The tale has no room for the Volscians. The main theme is father/daughter tie, and plebeian couple's

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61 This perspective is opened up, as is too well known, by Momigliano. A synthesis can be read in:Gabba, *Dionysius*, p. 9ff.

62 G. De Sanctis, *Storia dei Romani*, II, Torino, 1907, p. 47ff. saves this tradition, while E. Pais discards it as a "doublet" of the Verginian tale (*Storia critica di Roma*, II, Roma, 1915, p. 205ff.;*Ancient Legends of Roman History,* London, 1906, p. 185ff.).

63 Liv.III, 44, 4:*forma excellentem*. His motive is not ascendant but descendant. Appius desired nevertheless to snatch away the girl. This was a perverseness.

64 Liv. III, 44, 5:*nobilis superior iudicio matris esse, quae quam splendidissimis nuptiis iungi puellam uolebat*.

tragedy. Such is the fundamental antithesis.

However, we see soon that an aspect is shared. Though its nature is opposite, a nucleus is formed in both cases. The one was composed of mother/daughter/patrician young boy. The other was to be composed of father/daughter/plebeian young boy. Conflict of versions has a clear focus sharing an axis. We may suppose that an entity to be born is commonly viewed in perspective amid the controversy, and we expect that its subsistence will depend upon a tension between two vectors tugging from the opposite sides. If not, the antithesis of the versions might have not been conserved.

The Ardean version shows that an individualist patricio-plebeian marriage union, triumphant against the plebeian collectivism to be merged into a tribalism, could be more adequately represented on the side of the Allied Latin cities than at the center of Rome, as well as that these cities faced the same problem in linkage to the equivalent social upheaval at Rome. This angle of representation will have its vehicle of transmission in the milieux of Camillus in antithesis to Manlius Capitolinus, which will reach even till the traditions of Aenean cycle[65]. Ardea is toponomastically symbol of this strain of traditions. The equilibrium between two vectors is translated into a center/periphery relationship between Rome and Ardea. And Ardea metonymizes rather the mainstream.

2-4

Then we must analyze the differences between Livy and Dionysius in a more detailed way. A first glimpse is enough to make recognize that, while, as is usual, the Dionysian version is expanding in a dramatic style and with long speeches which belong to some tradition of Greek historiography, the Livian text is ritualizing with its succinct

[65] Liv. IV, 7, 10ff. refers to Licinius Macer who discovered some names of the eponymous magistrates who were not present in the *Fasti*, nor in the old Annalistic, when he consulted the treaty between Rome and Ardea (a. 444) and "*Libri Linteï*" in custody of the temple of Iuno Moneta. The affair is a secret pact between the Roman senate and the city of Ardea to give a privilege for the latter in the arrangements after her territorial conflict with Aricia. Ardea occupies a post of spear for the reform, and it conserves this role in the Camilus affairs (it offers him asylum) as well as in the Latin War. cf. A. Momigliano, Camillus and Concord, in:Id., *Secondo contributo*, Roma, 1960, p. 89ff.=*CQ*, 36, 1942. We must consider also an antithesis between the two Latins, those of Aricia (Diana Nemorensis) and those of Ardea (Iuno Regina), related to Iuno Moneta too. We stand automatically amid the traditions around Aeneas as well. cf. M. Sordi, *I rapporti romano-ceriti e l'origine della civitas sine suffragio*, Roma, 1960;Virgilio e la storia romana del IV secolo, *Athenaeum*, 42, 1964;*Il mito troiano e l'eredità etrusca di Roma*, Milano, 1988. It is possible that Licinius Macer was anti-Camillian and anti-Ardean/philo-Arician. He perhaps wanted to maintain some irregularity in the mandate to conclude the treaty. TMCP must have been already in their perspective, and the eponymous system must not have been so solid in these years.

narration which is otherwise very obscure. But the plot is the same even in some absurd and incomprehensible details. So these two historians were following the same bundle of sources. This cluster had surely contained different elements, ritual and narrative, and the individualities of two historians underlined respective preferred components found in the sources. Thus we can detect here a mixed herd of traditions even though we have substantially only one source at disposal.

For both historians, father Verginius is plebeian, and the fiancé Icilius is such too. Livy says that this Icilius was an ex-*tribunus plebis* (Liv. III, 44, 3:*tribunicio, uiro acri et pro causa plebis expertae uirtutis*), as if he were a type a little out of date, but according to Dionysius he was a son of a *tribunus plebis* (DH. XI, 28)[66], as if he were reborn fresh.

Livy prefers a qualified presence of mother of Verginia (*Perinde uxor instituta fuerat liberique instituebantur*). But for Dionysius she had been dead (28, 4: ἦν γὰρ ὁρφανὴ μητρὸς ἡ παῖς). So Appius Claudius can not but approach to the nurses (πρὸς τὰς τροφοὺς αὐτῆς γυναῖκας) tempting her utilizing the mechanism of reciprocity[67].

In Dionysius, a band of ruthless men (τῶν ἀνδιδέστατων) led by M. Claudius trys to seize the girl (ἐπιλαμβανέται τῆς παρθένου). This challenge is blocked by a crowd gathering up there (πολλοῦ συνδραμόντος ὄχλου). M. Claudius has recourse to the court (ἐπὶ τὴν ἀρχήν). According to Dionysius, soon appear "the men genealogically related to the girl" (οἱ συγγενεῖς τῆς κόρης), and they protest and accuse the act of snatching away the girl. First, maternal uncle (ὁ πρὸς μητρὸς θεῖος τῆς παρθένου) P. Numitorius, with his company(φίλους τε πολλοὺς ἐπαγόμενος καὶ συγγενεῖς), and then Icilius, nominated as fiancé by her father (ὁ πατὰ τοὺ πατρὸς ἐνεγγυημένος τὴν κόρην), with his powerful comrades (χεῖρα περὶ αὐτὸν ἔχων νέων δημοτικῶν καρτερά), comes up. But Livy arranges so that the nurse calls to the crowd. In the first phase some "*aduocati puellae*" must defend Verginia (44, 11). The male collectivity was not present till later, after the *decretum* of Appius (45, 4:*Adversus iniuriam decreti*), so not untill the Verginian side is fallen into echec because of the absence of father.

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[66] Livy denigrates Icilius directly as militant of the ancient plebeian movement, while for Dionysius he belongs to a new generation to form a conjugal unit individually even if they must be reintegrated in a traditional solidarity.

[67] We find in the Diodorean version too "χρήματα σι". So we can suppose that this element belongs to Greek color inside the Annalistic tradition. Political solidarity is opposite to reciprocity meaning corruption.

Numitorius and Icilius enter on stage as substitutes of him.

In the Dionysian version (XI, 29), in response to the protest of the collectivity, M. Claudius told a complicated story in which a baby came out to arrive in the hands of Verginius, with a curious supplement, not congruent, discussing on the postponement of trial and the interim problem. Numitorius refutes it with a substantial argumentation(30). Two issues, the temporary holding of Verginia and her final belonging, are mingled in both speeches. The Appian response to the first issue evokes indignation among the plebeians (31). Icilius, supported by this outrage, protests violently (31, 3ff.). His cause is completely political, alleging a violation of people's liberty.

Though Livy too probably follows a similar source, he arranges the affair a little differently[68]. In the first phase the still anonymous Verginian side immediately[69] claims a postponement of the trial for the reason of father's absence, not answering to the substantial arguments of M. Claudius (III, 44, 11f.). Thus the phase is specified as deciding the interim possession. In this phase, as I said, for the first time Numitorius and Icilius are on stage (45, 4). In substance Icilius is the sole speaker[70], and the issue is limited to the temporary holding of Verginia.

The most striking difference is to be found in the scene of Appian volte-face. Appius at last concedes the interim possession to the Verginian side. In Dionysius this volte-face is due to the collective pressure advocated by Icilius (32, 3)[71]. On the contrary in Livy he does so for the sake of father (46, 3: *Verginio absenti et patrio nominei et libertati*). Certainly in Dionysius too, Appius calculates to be able to take advantage of father's absence even in the trial postponed. And in Livy too, after the decision, a series of redundant layers, probably superimposed, follows to overturn the situation. And these

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[68] Gabba treated a general difference between Dionysius and Livy (*Dionysius*, p. 93ff.), but we'll point out a more specific one. The antithesis in all probability had existed among the sources, but their preferences too were not casual.

[69] In 44, 11, there is a discontinuity, as I'll discuss again. The Verginian side had been claiming the necessary presence of father, but this claim slipped meantime into another one aiming at the holding of Verginia's person. Logically speaking, i) an impossible presence of father causes an echec for ii) the standing (as defendant) of the Verginian side, and this results in iii) the conversion of interim possession to the Claudian side, what creates serious problem on the chastity of the girl. Neither in Livy nor in Dionysius is clear this logical chain. We suppose, already in some canonical version, a confusion had been accomplished.

[70] Probably already in the source Icilius had taken the role to defend the interim possession differently from Numitorius speaking for the substantial cause. For Dionysius too adopts this division of tasks, though he obscures this Icilius's task giving a generically political color to his speech.

[71] "χαρίζεσθαι δ' ὑμῖν βουλόμενος". A gesture ironically compromising versus the agnatic relatives.

layers suggest effects of collective pressures. Notwithstanding, the contrast at the point of Appian decision leaves no doubt.

In Dionysius a climax is whether they can or not call back this father in time from a military campaign (33). Appius hindered it with every means. Solidarity resisting to it was admirable. The Livian text is extremely obscure (46, 5-8). There is a vestige of multiple insertions in the tradition, suggesting that the solidarity of youth between city and soldiers abroad was converted to a relation of indirect support justifying Icilius's eligibility to defend the person of Verginia.

Dionysius concludes the tale with the trial (XI, 34) full of substantial arguments produced by the Verginian collectivity. This is much redundant because similar arguments had been exhibited in precedent phases too. But in Livy, in the day of sentence, the scene is totally ritualized without any agonical feature, any argumentation. The ritual presence of *matronae* is underlined so impressively (47, 1:*comitantibus aliquot matronis*;47, 3:*Comitatus muliebris plus tacito fletu quam ull uox mouebat*;47, 6:*circumstantibus matronis*;*ibid.*:*a globo mulierum*;48, 5:*filiam ac nutricem prope Cloacinae*;48, 8:*Sequentes clamitant matronae eamne liberorum procreandorum condicionem, ea pudicitiae praemia esse*?)[72]. This last part is evidenty linked to the cults of various Iunos whose temples will be constructed in the mid-republican period[73], as well as to the Aenean cycle of the traditions. And we'd like to remind that this cultual aspect is anticipated already in the introduction of this section in Livy (mother, nurse etc.). In any way here again we return to some neighborhood of Ardean cycle.

In sum, we find a vector antithetical to the other (the Ardean version), in its turn composed of two antithetical elements. An agnatic solidarity among the plebeian men and youth (Dionysius), and a texture interwoven well-articulatedly by cognatic conjunction (Livy). The first motive too is not discarded. It had been surely present in the original source. It evidently contributed to foster subsequent layers revendicating and reinforcing the interim possession of Verginia, even in the Livian ritualizing version.

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[72] These *matronae* are plebeians. But the patricians must not have renounced such a cardinal status (cf. N. Boël-Janssen, Le statut matronal, enjeu du conflit entre plèbe et le patriciat?, *REL*, 88, 2010, p. 106ff.), and so such a tradition as in Liv. X, 23, 3-10 was born. A certain patrician Verginia was excluded from the association of *matronae* for the cult of *Pudicitia* because she had been married with a plebeian. Cf. Ead., *La vie religieuse des matrons dans la Rome archaïque*, Rome, 1993, p. 278.

[73] As well as about the Aenean legend, we must wait for another occasion in order to discuss on this phase of history of religion. We have a rich literature.

2-5

These versions have a clear focus in a central issue. It's the nature of something represented by the new patricio-plebeian marriage union[74]. They considered this as structural core. And this subsists only in an extremely delicate balance of factors. For the simplicist Ardean version, this union is *sans appel* positive condemning the agnatic solidarity with its tribal linkage contiguous to Volscians. But even for this version the patrician boy should descend by the girl or rather by her mother, in contrast to Appian attitude to snatch away the girl to a profound haunt of his band. For the agnatic collectivity the formation of this unity means to be cut into fragments losing their proud horizontal solidarity[75]. If we consider the old patrician tendency to stick to a (even if different) sort of iron unity shown at Cremera and represented or condemned now by an image of unaccomplished or false articulation between Appius and Marcus Claudii, we must attribute the same echec to the side of the patricians as well as to that of the plebeians[76].

The tale of Verginia, being viewed as a whole, points out Achilles's tendon of this new articulation of the social structure. The autonomy of this newly created unity represented by the mixed marriage may be easily false. M. Claudius seems to be independent from Appius Claudius only in appearance, and it is not the Verginian side but the Claudian side that is a not articulated collectivity. A state of no articulation between judge (Appius) and one party (Marcus) has grotesque effects on the impression.

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74 This does not mean that the real unity was historically formed only through this type of union. We should not commit short circuit to haste to arrive at the thesis of the formation of the patricio-plebeian *nobiles* through marriage though we have such a tradition as the genealogy of Licinius Stolo.

75 The traditions about Siccius (Liv. III, 43;DH, XI, 25ff.) left a certain memory of fear that one might be cut away solitarily from the plebeian rank of solidarity. According to Livy, Siccius is dispatched for exploration with other soldiers, and he is killed by these in disguise of an ambush. According to Dionysius, on the contrary Siccius is tempted by offer of a secret task with a special remuneration, so a reciprocity undermines a solidarity. But it is possible that the very spirit of solidarity among the plebeians had been inspired by the first wave coming from Magna Graecia in the first Republican years, as Momigliano once emphasized, and, though once this spirit had been fallen out of date, the reaction contributed to give a precious element to the Twelve Tables. cf. M. Humbert, La c. d. libertà associativa nell'epoca decemvirale:ipotesi a proposito di XII Tab. VIII, 27, *Studi Santoro*, Palermo, 2010, p. 28ff.

76 Momigliano underlined since his early years the plebeian initiative in the reformation of the Roman society under the Greek influence (culminating article is L'ascesa della plebe nella storia arcaica di Roma (1967), in:Id., *Quarto contributo alla storia degli studi classici e del mondo antico*, Roma, 1969, p. 297ff.). I can add only one point. The temple of Ceres and the Ardean mother perhaps represent two different stages of the plebeian cultural revolution. Meantime a schism happened among the plebeians.

The Dionysian version and the Livian one are opposing themselves to one another. The issue is remedy to this ambiguity. The former says that the ancient solidarity, adapted to the new regime, should reinforce the independency of the newly created unity[77]. This would be the plebeian movement reborn. On the contrary, the latter highlights a peculiar mode of strengthening the solidity of the unity itself. This mode would be characteristically Roman and ritualistic by nature. This was the new rite said to be introduced by the Twelve Tables as I'll argue soon. Another cardinal element would be a moral firmness of mother, *matrona*, sanctioned by cults and religions.

In these versions it is not explicit that the real issue is territorial, or how a new territorial organization[78] attained is. But they certainly presuppose it, as various factors show, for example, the motif of descending of a patrician youth, unity to be created by a plebeian mother, the organization of *matronae* and its cultual forms, etc.. We can expect that one of the consequences of this social transformaion[79] will be a well-articulated land-holding, in contrast to that depending on some collective guarantee such as *clientela*[80].

The story of Verginia was presumably very actual and active in one time. It drove a structural change of the Roman society with efficacity. The Annalistic traditions date this change in the second half of the fifth century. I think we may give confidence to this date, for they think of an entire corpus of the traditions aiming all at the Twelve Tables. These are *in toto* the etiology of the Decemvirate Revolution. The story of Verginia itself is incorporated into this comprehensive etiology.

2-6

It is very probable that the stimulus for the Decemvirate legislation comes from the

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[77] J. Cels-Saint-Hilaire, Virginie, la clientèle et la liberté plébéienne:le sens d'un procès, *REA*, 93, 1991, p. 27ff. places the tale of Verginia in an immediate context of *conubium*, but both Icilius and Verginia are plebeians despite the Diodorean version, so we have here no tragedy of prohibited marriage between the two classes. The act to institute the authentic civil procedure and the problem of the mixed marriage are related in a not simple manner.

[78] I owe this problematic entirely to E. Lepore. So here "territorial" has a meaning very particular.

[79] There are innumerable theories proposing the vicissitudes experienced by the Roman society till the mid-republican years. Here we based our hypothesis on the contributions of Momigliano, and I'd like to be associated to the problem-setting of AA. VV., *Crise et transformation des sociétés archaïques de l'Italie antique au Ve siècle av. J.-C.*, 1990. But we renounce confrontation with other opinions.

[80] Speculation is inevitable. But it would be too rough to discuss on private ownership on land in general, even specifically in contrast to the collective one as by *gentes*. The criterium whether the concept of possession is functioning or not is one of the watersheds to determine the quality of the private ownership.

Greek world, or from Magna Graecia, exactly as the tale of Verginia itself was inspired by, and adapted from, the Greek counterpart. The recent studies recognizing anew the reformative significance of this legislation are convincing[81]. It is possible too that rather the plebeians were central to accept this impulse from abroad. The reason why the patrician initiative seems to be predominant in the traditions is that a complimentary counter-version was representative in the very plebeian vehicle of transmission. They needed logically a patrician wicked initiative, though both of two sides were theirs. In any way our hypothesis is that behind this legislation there was a total transformation of the Roman society mediated also by the Verginian complex of myth and ritual. And in this perspective, I think we must include among the related legislative tentatives at least *lex Valeria* and *lex Canuleia*.

As for the latter, the story of the Ardean girl is evidently an illustration of its intention. This law (or precisely *plebiscitum*) was a supplement of the Twelve Tables, though these seem to have contained prohibition of the patricio-plebeian *conubium*[82] and so we must suppose a very complex reality behind. I am not yet prepared to tackle this reality.

On the *lex Valeria*, even if I can add nothing serious to the rich literature, it is inevitable to discuss minimally, for the tale of Verginia is etiology for it as well. The reaction triggered *secessio*, and this *secessio* brought about *lex Valeria*. The key factor was plebeian solidarity. The Roman versions of the Verginian tale themselves represent indispensable plebeian solidarity balancing an instability of the newly created structure,

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[81] M. Ducos, *L'influence grecque sur la loi des XII Tables*, Paris, 1979 was a turning point. And we have now M. Humbert, ed., *Le dodici tavole:dai decemviri agli umanisti*, Pavia, 2005 and M. F. Cursi, ed., *XII Tabulae. Testo e commento*, Napoli, 2018, besides M. Humbert, *La loi des XII Tables. Edition et commentaire*, Rome, 2018, at last overcoming a sort of primitivism, and acknowledging to the Twelve Tables a status of Enlightened work to make the fundamental law, whose creation of positive institutions is discussed in a new dimension. I'd like to only add that the creation of the concept of possession was included in it, and I want to only know why this was so important.

[82] *conubium* in the Twelve Tables is a problem. M. Humbert, Le *conubium* des patriciens et des plébéiens:une hypothèse, C. Bontems, ed., *Nonagesimo anno, Mél. Gaudemet*, Paris, 1999, p. 281ff. thinks that the prohibition is a consequence of the rather recent closing of the patrician class, and the regulation was indulgent without effect. S. Tondo, Presupposti ed esiti dell'azione del trib. pl. Canuleio, in AA. VV., *Bilancio critico su Roma arcaica fra monarchia e repubblica*, Roma, 1993, p. 64 maintains that the mixed marriage had been possible but the patricians had to close the blood in order to prevent that the plebeians might get access to *auspicium*. If we take into accout the behaviors of Appius Claudius in the Verginian tale, we can guess, in addition, of the presence of an extremist wing of the plebeians advocating the solidarity. But nothing is certain.

even if it had to grow up still more considerably. This *lex Valeria*[83] is certainly related to *tribunicia potestas*[84]. It is plain that this power consists in a solidarity operative in emergence as in the case of Verginia, though it was going to be institutionalized. It is evident that this impact of reactionary solidarity created such criminal procedures as *provocatio ad populum*, prosecution by the tribunes and *vadimonium* (its *exemplum iuridicum* is the case of K. Quinctius)[85].

Naturally the solidarity and the protection of an individual are at odds. But at the same time a collision between these two could have been propulsion to create the new quality of society and the new institutions. It is understandable that the etiological function of the tale of Verginia is double and articulated syntagmatically into two parts, establishment of an institution and complimentary reaction to it[86], and this reaction too is to be institutionalized, its nature of rescue in emergence being intact[87]. We must

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[83] Too obviously we can not discuss here on the relationship between *provocatio ad populum* and *lex Valeria*, nor does it make sense to cite only a few contributions among the too vast literature. We can say at least as following. While the first *provocatio*, even if it's a real figure, does not have technical aspect, establishing only generically the public power on the basis of the people, the second one has acquired a specific function in the criminal procedure. This function is parallel to the interventions of *tribuni plebis* to block for a moment the prosecution, based upon *concilia plebis* or *comitia tributa*.

[84] Notoriously we have no convergence on the birth of *tribuni plebis*. The scholars swing between the first and the second *secessiones*, and some maintain a much later appearance. Here I opt temporally for the hypothesis that this institution was consolidated only with the second *lex Valeria* after the effects of the first *secessio* had been once extinguished and the plebeian movement had been once clandestine. This hypothesis is approximately identical with that of F. De Martino, *Storia della costituzione romana*, I, 1972, p. 343. And G. Poma, *Tra legislatori e tiranni. Problemi storici e storiografici sull'età delle XII Tavole*, 1984 traces well the political vicissitudes and she recognized the officializing of *tribunicia potestas* and *lex Valeria* as an ending. I regret only that she estimated negatively the Greek influence and the tale of Verginia.

[85] I'd like to have an occasion to investigate this field. For the present, I follow *grosso modo* B. Santalucia (his various works since *Diritto e processo penale nell'antica Roma*, Firenze, 1989) who is critical to a revisionist and primitivist trend.

[86] Perhaps we must see behind the seemingly absurd tradition of double legislation such a dynamism.

[87] These mechanical effects have two prerequisites. A political system including a judiciary system in which there is no room of corruption (illustrated by the adhesion of Appius and Marcus Claudii). Two dimensions are represented here by a patricio-plebeian dualism which is capable to be translated into that between city and territory. This second moment regards closely the classical problem what the *plebs* is. Here I have no space to discuss it except a few words on a recent very important work, T. Lanfranchi, *Les tribuns de la plèbe et la formation du République romaine 494-287 avant J.-C.*, Rome, 2015. Lanfranchi, with his conservative and sound source criticism, tried to reassess the tribunes in the first Republican years and placed them in the context of demographical movement in Italy, with his prosopography in a manner like Friedrich Münzer. I think only that he did not need to preclude the economic and

perhaps interpret the Decemvirate regime itself, which includes *lex Valeria*, as resulting out of a double process and a tension between them[88]. Due to this tension, there might have been in the Decemvirate legislation an aspect perceived as menacing for the plebeian sensitivity, and this aspect triggered *secessio*, and created *tribunicia potestas* in order to corroborate a mechanical balance.

2-7

In the second half of the Fifth Century, the term of possession did not yet exist, and in the civil procedure, fresh creature, *vindiciae* or *vindicta* had acquired vital importance in a ritual language. On the other side the principle of possession permeated the entire society in parallel to its transformation. And *lex agraria*, or perhaps *ager publicus* as well, was consequence of this principle. The concept of possession was not born on the *ager publicus*, but this was born on the concept of possession.

Because I discussed on *lex agraria* elsewhere, I here only recapitulate it from the point of view specific to this article. The complex of institutions *lex agraria* was emancipated from the myth of *ager publicus* already since G. Tibiletti and E. Gabba[89]. This is not a primitive common domain, but the land to be divided among *coloni*, in the viritane colonization. Early examples of the agrarian law were dismissed by Gabba's solid source criticism[90]. We encounter a real figure of *lex agraria* only since the end of the Fifth Century[91], a little earlier than the *lex Licinia de modo agrorum*. A second

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judicial factors other than the political rising of the peripherical people. The *plebs* is a complex reality in transformation and differentiation. I regret that Lanfranchi did not emphasize a shift in the age of the Decemvirate. The linkage with the societies of the Latin Allies and the surrounding peoples is not simple.

88 The observation of M. Humbert, La crise politique du Ve siècle et la législation décemvirale, in:AA. VV., *Crise et transformation cit.* p. 263ff. is very important. Humbert criticized a certain Romanists sticking to the norms of the Twelve Tables neglecting the whole plebeian movement and the historical situation.

89 Tibiletti, Il possesso dell'ager publicus *cit.*. As I referred, Tibiletti did not demolish the *ager publicus* theorem completely. His main line of argumentation was the distinguishing *ager occupatorius* from *ager compacuus*. Gabba (cited *infra*) succeeded it liquidating substantially that theorem in so far as it concerns the historical cases, even if he did not explicitly deny an ancient existence of *ager compascuus*.

90 For example, E. Gabba, Per la tradizione dell'heredium romuleo, in:Id., *Roma arcaica*, Roma, 2001, p. 228ff.(=*RIL*, 112, 1978); E. Gabba, Studi su Dionigi da Alicarnasso III (1964), in:*Ibid.*, p. 129ff.. We must discard anachronistic duplications attributed to the regal age and to the republican revolution (that of Sp. Cassius). In addition, cf. P. Botteri, La définition de l'*ager occupatorius*, *Cahier du Centre G. Glotz*, 2, 1991, p. 45ff.;E. Gabba, Storia e politica nei Gromatici, in:O. Behrends, ed., *Die römische Feldmeßkunst. Interedisziplinäre Beiträge zu ihrer Bedeutung für die Zivilisationsgeschichte*, Göttingen, 1992, p. 407f.

91 It was so shocking the flash of *lex Sempronia* that every halation was possible to

candidate for the role of *ager publicus*-like object had been the so-called *ager occupatorius*. But this is too demystified excellently by D. Mantovani[92].

The historical context of its emerging is clear. As E. Gabba noted, Rome had interest to a viritane colonization. She had to dismantle the existing occupations of conquered land and to furnish the veterans and their settlements with money ("*agri publici dividendi coloniarumque deducendarum et vectigali possesoribus agrorum imposito in stipendium militum erogandi aeris*"). These "*possessores agrorum*" are never those who occupied public domain, simply because Livy does not write "*ager publicus*". Probably they were ex-owners of the conquered land. The conflict between Ardea and Aricia had been prelude (Liv. III, 71, 4ff.=a.446). There emerges the agenda to reorganize the territory for the city where Rome intervened, in conformity to the new regime. The criterium was whether the occupations have a necessary quality or not. If not, those are to be confiscated to be distributed among the veterans. The good occcupants are confirmed, but have to pay *tributum* which will be financial resource for *stipendium* to the veterans[93]. The dissension about criterium causes tumult and almost civil war. Ardea was symbol of orthodox interpretation of the criterium, while Aricia and the Arician alliance was flag of plebeian counterbalancing with solidarity of soldiers viz. veterans. The former was more conservative, indulgent vis-à-vis ex-occupants of land in the allied cities. The latter claimed expulsion in order to have more room to be restributed. This contention produces such a Livian expression as:IV, 52, 2:"*si iniusti domini possessione agri publici cederent*" (a.410). "*agri publici*" does not give us any

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cause duplications, though, as Momigliano admits, there must have been a serious problem of *frumentatio* for settlers already in the very first years of the Republic. We can confirm that the Annalistic narration ceased to speak of *lex agraria* about in the year of 470. The chronological point of restart is the year 424 (Liv. IV, 36, 2). F. Serrao, Lotte per la terra e per la casa a Roma dal 485 al 441 a. C., in Id. ed., *Legge e società nella repubblica romana*, I, Napoli, 1981, p. 51ff. and A. Santilli, Le agitazioni agrarie dal 424 alla presa di Veii, *Ibid.*, p. 281ff. acknowledge the reality of the first agrarian laws. But Santilli did not look over an evolution in which TMCP come to assume the role to agitate the people with the hope to acquire land. E. Hermon, *Habiter et partager les terres avant les Gracques*, Rome, 2001 too noticed this *caesura*, but then interpreted it as sign of change in the character of *lex agraria*. The natures of sources are different as well ! A. Manzo, *La lex Licinia de modo agrorum. Lotte e leggi agrarie tra il V e IV secolo a. C.*, Napoli, 2001 tried to rehabilitate all the traditions but in vain (without discussing the source values).

[92] D. Mantovani, L'occupazione dell'*ager publicus* e le sue regole prima del 367 a.C., *Athenaeum*, 85, 1997, p. 578ff. concentrated his attention to "*novo more*" and "*in spem colendi*", weak points of Tibiletti, concluding that *ager occupatorius* is phantomatic.

[93] cf. E. Gabba, Esercito e fiscalità a Roma in età repubblicana, in Id., *Del buon uso della ricchezza*, Milano, 1988, p. 127. In these years the mechanism *tributum* - *stipendium* was born. cf. C. Nicolet, *Tributum. Recherches sur la fiscalité directe sous la république romaine*, Bonn, 1976.

illusion except some echoes of the Gracchan agrarian reforms. The meaning is simply the land destined to the division. "*iniusti domini*" is anachronistic too being affected by the wording of *dominium*. They are simply obstinate occupants of land. And use of the term "*possessio*" is scarcely justified except for the purpose to suggest that it is the principle of possession *ante litteram*, *id est* whether it is a well articulated piece of land or a big conglomerate, what mattered here in this age.

We must wait for the case of Veii as the first effective *lex agraria*, even if this also then fails because of the Gallian invasion. I suspect whether the first accomplished *lex agraria* was not *lex Licinia de modo agrorum*[94]. This time, *lex* was not *ad hoc*, but ι he law maker intended to organize the entire territory according to one criterium, represented in the sources as 500 *iugera*, even if this figure is dubious.

It is clear that *lex agraria* was guided by the same ideal as what we comprehend from the Verginian corpus of the mythical traditions. That is, the well-articulated and stable unity, *par exellence* of land, and a *prima facie* respect of it. They thought obviously that only this quality can weave the new social texture.

3 exemplum iuridicum

3-1

Let us now recontruct the original *exemplum iuridicum* out of the tale of Verginia, and so we'll return to a legal discourse. Two steps are necessary. First, we must take into accout that the common source itself despite the differences between Livy and Dionysius had been contaminated by an intrinsic narrative inclination of the Annalistic in contrast to a purely antiquarian source[95]. Nevertheless it is useful to measure the differences between Livy and Dionysius, because those are expected to be proportionate to the distance between the antiquarian core and the final contaminated Annalistic form, given the Dionysian disposition to amplify dramatic feature and the Livian bookishness to return to an archaic dry chronicle. Thus we can calculate the narrative bias upon the ritual. This is an operation to examine synchronic penetrations. Second, we need to peel out covering layers accumulated over a nucleus. This is a sheerly diachronic analysis on the text.

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[94] It is very recently that the ancient thesis in favour of ownership as object of restriction regenerated. cf. S. T. Roselaar, *Public Land in the Roman Republic*, Oxford, 2010, p. 104ff.. But this is not convincing for me.

[95] cf. A. Momigliano, Linee per una valutazione di Fabio Pittore(1960), in:Id., *Terzo contributo*, Roma, 1966, p. 55ff.;E. Gabba, Considerazioni sulla tradizione letteraria sulle origini della repubblica (1967), in:Id., *Roma arcaica. Storia e storiografia*, Roma, 2000, p. 25ff.

Let us for a moment review the Dionysian story. Not only M. Claudius but also Numitorius and Icilius had tendency to mingle two issues, interim and final, in one speech[96]. They repeat it in interim and final procedures. M. Claudius had already posited a false *aut aut* whether he retains Verginia (29, 4: δ ι ε γ γ υ ᾶ ν τ ὸ σ ῶ μ α) while waiting her father or the trial is immediate without him (29, 4: τ α χ ε ῖ α ν ----- τ ὴ ν δ ι ά γ ν ω σ ι ν). Correspondingly Numitorius, prefering the presence of father (30, 3: τ ὴ ν μ ὲ ν δ ί κ η ν τ ὸ ν π α τ έ ρ α ἀ π ο λ ο γ ή σ ε σ θ α ι), but for his inevitable absence, is forced to defend her body in interim phase (τ ὴ ν δ ὲ τ ο ῦ σ ώ μ α τ ο ς ἀ ν τ ι π ο ί η σ ι ν). The issue is at most one aspect of general procedural justice of father's presence at trial. We are not explained why this so necessary is. In any way the presence of father is his facultative right. This is sharply constrasting to the Livian presupposition that an emergency is born out of the rule that only father has capacity to defend. His presence is an urgent prerequisite. Without understanding this problem, the Dionysian story had to introduce father's absence awkwardly. In consequence the interim problem too appeared lacking organic integration to the context, and so principle, if any, was re-absorbed into a total justice discussed in a full range. Even when Appius Claudius admits the primacy of defendant and at the same time he says that father's absence modifies the rule into the opposite sense and brings a conversion of the interim possession from the defendant to the plaintiff (31, 1-2)[97], the formulation of this last logic, in this version, has no technical

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[96] P. Noailles, Virginie, p. 108:"il fait plaider les avocats au fond". Dionysius largely anticipates substance of trial in the phase before the interim sentence. Two parties argue in a full range. The argument of M. Claudius is simple. It is principle of belonging of an object (mine should belong to me:29, 1: κ ύ ρ ι ο ς α ὐ τ ῆ ς ; έ σ τ ὶ ν έ μ ή). He justifies his claim with a legitimate mode (ὅ ν τ ρ ό π ο ν) of acquisition (cf. D. 41, 2). His father possessed a pregnant female slave, who had been friend of Mrs. Verginius. The slave had promised to donate to her the baby to be born, while informing the master, M. Claudius, of a false fact that the baby was born dead. So the baby is his, thanks to a double principle (έ π ὶ τ ὸ ν κ ο ι ν ὸ ν ἀ π ά ν τ ω ν ν ό μ ο ν) of belonging, mother/baby, patron/slave. The reply of Numitorius is more articulated. He praises parentage. Father Verginius is brave soldier. Mother Numitoria has great virtue. Verginia has her fiancé Icilius, champion of the people. Fifteen years have passed without any problem, above all without any contention brought by M. Claudius. After this very substantial debate, comes out that procedural sentence.

[97] "έ κ ε ῖ ν ο μ έ ν τ ο ι δ ί κ α ι ο ν ἡ γ ο ῦ μ α ι , δ υ ε ῖ ν ὄ ν τ ω ν τ ῶ ν ἀ ν τ ι π ο ι ο υ μ έ ν ω ν , κ υ ρ ί ο υ κ α ὶ π α τ ρ ό ς , ε ἰ μ ὲ ν ἁ μ φ ό τ ε ρ ο ι π α ρ ῆ σ α ν , τ ὸ ν π α τ έ ρ α κ ρ α τ ε ῖ ν τ ο ῦ σ ώ μ α τ ο ς μ έ χ ρ ι δ ί κ η ς . έ π ε ὶ δ ' έ κ ε ῖ ν ο ς ἄ π ε σ τ ι , τ ὸ ν κ ύ ρ ι ο ν ἀ π α γ α γ ε ῖ γ έ γ υ η τ ὰ ς ἀ ξ ι ο χ ρ έ ο υ ς δ ό ν τ α κ α τ α σ τ ή σ ε ι ν έ π ὶ τ ὴ ν ἀ ρ χ ὴ ν ὅ τ α ν ὁ π α τ ὴ ρ α ὐ τ ῆ ς π α ρ α γ έ ν η τ α ι". Here is no intermediary step of justification found in Livy (see *infra*), "*neminem alium*

precision. The value sustained by the Verginian side is integrated into a political liberty. So only a fierce resentment of the people and Icilius's political speech representing this resentment (31) eventually overturns the Appian decision (32), as I already pointed out.

According to Livy (III, 44ff.), when M. Claudius seized the girl, immediately this action was ritualized in a language of archaic flavour "*manum iniecit*"[98]. At the same moment "*in forum*" acquires a certain ritualistic signification, which will be however soon cancelled by an etiological and so mythical expression:"*ibi namque in tabernaculis litterarum ludi erant*". This text is conscious of a tension between two levels of myth and ritual[99]. The substantial argument of M. Claudius, "*serva sua natam servamque"*, is only for turning away the affair from the collision of forces, and in fact M. Claudius says:"*nihil opus esse mutitudine concitata*". The girl had been freed from physical force ("*iam a vi tuta erat*"), when he passed over to the ritual ("*se iure grassari, non vi*"). He pretends to be an "*adsertor*". He accomplishes the ritualized act of *in ius vocatio* ("*vocat puellam in ius*"), as if, however, the girl herself is the defendant. Diffferently from Dionysius, Livy adopts the version in which it is M. Claudius who insisted on the court abandonning from the beginning the exercise of force.

And Appius the judge immediately demands for the Verginian side to produce "*auctores*"[100] who shall attend to Verginia ("*auctoribus qui aderant ut sequerentur*"). In parallel M. Claudius simulates to enter in trial for a while, but soon gives up it for an alleged reason of father's absence in the adversary side. We notice here that "*auctores*" corresponds to the sign to move on to the trial. This "*auctores*" will be replaced in multiple ways as "*spondentes*" or "*propinqui*", but we can receive a clear suggestion from the order of Appius that there is a pre-requisite to stand as defendant in the court. Evidently these side-beams have effect such that the problem of father's absence has been formerly introduced not too unnaturally even though some awkwardness remains as a script.

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cui dominus possessione cedat", fresh but incontestable at this historical moment, even for the Verginian side.

98 The scholars had considered the tale of Verginia as illustrating *legis actio per manus iniectionem*, and Appleton, Trois épisodes, p. 617 criticized it well (cf. Nicolau, *op .cit.*, p. 100ff.). Then this tale entered in the orbit of *causa liberalis*. As a matter of fact, I think, that action was exercised for *nexum*, and so the stratum is different.

99 I don't mean that Dionysius ignored this distinction. His reflections on rituals are in general very acute, in particular in the comparisons of Greek and Roman versions. Only that he was not too competent in the legal rites, what teaches us of the peculiarities of these.

100 cf. Cic. Caec. 10, 27. "*auctores*" is a factor anticipating morphologically the standing of the party.

A deliberately vague Verginian side (*aduocati*[101] *puellae*) does not meanwhile bring forward any substantial refutation, instead they limit their discourse immediately to the procedural problem. They say soon that the absence of her father requires a postponement of the trial[102]. The text commits one more slipp, because they immediately argue on the interim holding of the person of Verginia. This rupturing cliff[103] is really conspicuous. Superficially it is logical that a postponement creates an interim problem. But a sudden positing of the problem of postponement is quite unnatural, as is seen in Dionysius too (so perhaps canonical in the genre of Annalistic), even though in Livy such parallel signs as "*auctores*", "*aduocati*" etc. secretly compensate illogicalities. Evidently this is a setting for dramatizing the central issue of interim possession. And thus now emerges the crucial problem of the interim possession[104], which is translated into the "*fama*" of the girl (44, 12:*neu patiatur virginem adultam famae prius quam libertatis periculum adire*)[105]. Very differently from Dionysius, Livy from this point on never makes any party discuss about the substantial problem of the status of the girl.

So, we may conclude that Livy turned away to some degree from a narratological

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[101] "*aduocati*" is here not parallel to "*auctores*" because these should be adjuvant to father, not daughter. In any way this is not technical indicating an amorphous status of the Verginian side. But the term "*aduocati*" itself is another thing. This may stand in morphological orbit of civil procedural party (M. Kaser, *Das römische Zivilprozessrecht*, München 1966, p. 161f.). I don't know whether Livy deliberately used this term to distinguish such forms as *auctores* and *sponsores* from somehow more un-ritualistic ones or not.

[102] Noailles, Virginie, p. 125ff. with reason interprets this postponement as the means for introducing the intermediary sentence in the dramaturgy.

[103] I already have *supra* alluded to it as a proof of the same source used by Livy and Dionysius. The text is 44,11:*Aduocati puellae, cum Verginium rei publicae causa dixissent abesse, biduo adfuturum si nuntiatum ei sit, iniquum esse absentem de liberis dimicare, postulant ut rem integram in patris aduentum differat* and the following 44,12:*lege ab ipso lata uindicias det secundum libertatem, neu patiatur uirginem adultam famae prius quam libertatis periculum adire.*

[104] Appeleton, Trois épisodes, p. 601 says that, if father were not absent, the problem of the interim possession would not have emerged, because Verginia had been since fifteen years ago his daughter "paisiblement, publiquement". But this is a later acquisition by *causa liberalis* differentiated. Before this time, the principle of possession itself still had to be established. And it must have been possible for M. Claudius to grasp her *a priori* as his own slave thanks to his apparent and false articulation in the group around Appius (*clientela*). Father-daughter relationship, instead, was the very symbol of an authentic articulation, and then not symbol but real to be protected.

[105] According to Appleton, Trois épisodes, p. 600ff. this element is peculiar to *causa liberalis*. He was right on the real level or on the (diachronically most recent) surface of the text, but at the same time this element assumes a semiotic function to symbolize possession in a narratological dramatization, even if retrospectively, or on the diachronically lower, chronologically upper, layers.

necessity (liberated thanks to a forced and abrupt introduction of farther's absence) to a direction of reproducing ritual, at the very point where Dionysius went on expanding a debate on justice in a continuity between narratological and rhetorical. If so, we can presume that there had been a problem of the standing (that only father is eligible), a vital consequence of which had been interim possession, and then, in order to dramatize thrill and tension in this problem, father's inevitable absence and chastity of a girl were invented in the etiology.

And if we uncover this dramaturgy, we attain an *exemplum* where for the first time the standing as defendant was questioned as vital problem. So vital was it that the chastity of a girl depended upon it. This position of defendant meant an absolute advantage but was given not unconditionally. The condition was illustrated by the necessary presence of no other than father. What is the substance of this formal requisite? We have formulated a hypothesis in the previous section.

3-2

Yet, the Livian text seems to betray our hypothesis. It never reproduces linearly the exemplary case. Diachronic overturnings are accumulated at the very moment of great counterattack of the plebeians, in response to the perverted escalation of the interim sentence of Appius.

The decision of Appius in Livy is more specific. *Aduocati puellae* had anticipated the phrase "*secundum libertatem*". The Appian *decretum* as well is not lacking in the technical sophistication. It says that in the case of a revendicated liberty of person, (given implicitly that whoever can stand to defend this liberty[106]) whoever takes action for it holds the interim possession ("*in is enim qui adserantur in libertatem, quia quiuis lege agere possit, id iuris ess*e"), but in the case of a daughter only her father can do it, if the adversary is qualified ("*in ea quae in patris manu sit, neminem alium cui dominus possessione cedat*")[107]. We must not look over that on the adversary too a condition is imposed[108], what is never seen in the Dionysian text. This is the core of the *exemplum*

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[106] This is, as we all know, the key principle of *causa liberalis*, which will result in a ideal, *vindex libertatis*. *Rudens* of Plautus illustrates this idea.

[107] This reversed argument of Appius seemed "astuce profonde" (Appleton, Trois épisodes, p. 596). But the text, and so the etiology, premeditates a confusion of different diachronic strata, incarnated in the malice of Appius. Appeleton interprets it honestly in the sense that Appius rejected *causa liberalis* exactly because Verginia was under *patria potestas*. But this interpretation is too ingenuous.

[108] The merit of the Livian version is that it leaves us a technical formulation of this condition otherwise than in a narrative illustration with father-daughter relationship. *"neminem alium cui dominus possessione cedat"* is naturally a later anachronistic expression. "Even a veritable owner is inferior in so far as concerns possession*"* is

iuridicum, though the formulation is anachronistic. It is fundamental that even the Verginian side can not but accept this condition, though in Dionysius this principle itself is absurd. It is in order to clear this barrier, the entrance to trial, not to get the substance of trial as in Dionysius, that Icilius *et socii* must soon call back her father.

And the traditions will seek alternative satisfactions of this condition diachronically. The Appian logic is upside-down heaping up lower on upper. So the plebeian counter-attacks, correcting the absurdity, can convincingly and calmly accumulate diachronic antidotes. In fact, if everyone is eligible as agent for a person's liberty, it should be *a fortiori* so for a presumable daughter of a citizen. But Appius says that, though everyone is eligible for a person's liberty, for a daughter no one but her father can be eligible. This is pure non-sense. Appius is saying something logically absurd. The diachronic steps must have been such that first came a qualification of the standing *tout court* and then to this was added the next layer that, yet for a daughter, a presumable father had the standing as defendant unconditionally (maybe this had been an immediate exception imposed by the plebeian side), and finally was attained the comprehensive exeption that, if for a presumable free person, anyone was eligible. This final stage was called *causa liberalis*[109]. The Appian decree is fabricated in the narrative as something so perverse as to facilitate the counter-attack of this second layer or that final exception by the plebeian side, to which we see further ramified versions being attached.

Icilius tries to turn over the rule(45,4ff.), on the base of two foundations of liberty, *tribunicia potestas* and *provocatio*. The text of Livy indulges here a little[110]. Appius, though affirming that he does never concede to the political claims (46, 3:"*non petulantiae suae*"), admits finally the interim possession by the Verginian side in so far as "*Verginio absenti et patrio nomine et libertati*". Father's privilege illustrates the meaning of the standing in a synchronic opposition in the image though it represents logically a next diachronic layer.

On the text the scene is gradually transformed into that of searching after father, as

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tautology besides that the term "*dominium*" is later one as well as the word "*possessio*". But the phrase catches abstractly the essence of the pre-requisite for one to be able to acquire the standing.

109 M. Nicolau, *Causa liberalis*, 1933, p. 179ff. can be said to have seen only this phase neglecting the trunk of the tradition. Franciosi, *op. cit.* too, dating the birth of *causa liberalis* in the Fourth Century BC (the slavery was developed during the Samnite War), discarded the tale of Verginia.

110 While Appleton, Trois épisodes, p. 607ss. estimates the pressure made by Icilius, Noailles, Virginie, p. 109 attributes his intrusion to a confusion of Livy. For me, a diachronic piling up was translated into a mosaic of narrative.

the defendant in the trial. The text is once more twisted so that the "*sponsores*" are demanded (46, 7:"*cum instaret adsertor puellae ut vindicaret sponsoresque daret*"), and Icilius claims a satisfaction of condition ("*atque id ipsum agi diceret Icilius*"). Surprisingly the soldiers in the legion announce their indirect eligibility as gurantors. At last Appius concedes officially the standing to the relatives ("*vindicatur Verginia spondentibus propinquis*")[111]. In this part the text is in great confusion. This is construed to be a consequence of diachronic piling up of layers. I repeat, all these layers seem to stand by the side of the solidarity of Dionysian taste.

In Livy the trial is nominal[112]. The tale of Verginia exists only as *exemplum* for instituing a new preliminary procedure. And we thought that this must have been a reactive version. That is, this tale itself was created by the side repelling the introduction of a new procedure. Only that this reaction was constructive because it contributed to adjust its abuse to simulate falsely the qualification fulfilled. In other words the opposite side too accepts this new necessary qualification to be able to a party in this procedure in the court. Juristically speaking theirs was not refutation but exception. So in this point the Livian version is better than the Dionysian one.

In conclusion, it is probable that the original *exemplum iuridicum* was the following. Two parties litigate claiming ownership (still simple allocation or attribution[113]) for something. But before the trial, the standing was now requested. The standing was represented in a ritual form. A grasped the object X[114], and B took back it, with a

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111 These relatives must be agnatic.

112 The final sentence was in favor of M. Claudius, and this triggered the second *secessio*. While Dionysius described this sentence as long and substantial one, for Livy the sentence was laconic, whence had been born the thesis of a second interim sentence(F. Puchta, *Cursus der Institutionen*, I, 10 Aufl., 1883, p. 477, nt. 1 and A. Schwegler, *Römische Geschichte*, III, 1858, p. 52ff.). It is perhaps due to more importance in Rome of the possession than some justice of belonging that the procedure *in iure* had more weight proportionately to the scarcity of *apud iudicem* (trial). Roman Law is technical and scarcely political.

113 It is obvious that in Dionysius we listen to some notes of the basic concept of ownership in Greece, where the ownership was decided ultimately by the political system, in an archaic phase perhaps by some Hesiodic communities as was depicted about the early sales in:F. Pringsheim, *The Greek Law of Sale*, Weimar, 1950. It is dubious whether the Decemvirate found in the Roman territory such an ownership. The episode at Cremera suggests the inexistence at least of the community of Hesiodic type. So, even if under the *clientela* there must have been some types of individual attribution of land, the Decemvirate must have been obliged to experience virtually two steps in one moment, Greek type imported, and Roman idiosyncratic type engined with possession.

114 The starting point should be *manus iniectio* and *in ius vocatio*. But in this case we have encountered a difficulty. Who is summoned? Livy says as if Verginia herself was summoned (J. C. Van Oven, Le procès de Virginie d'après le récit de Tite Live, *TR*, 18,

simulated force. Both A and B were obliged to be a clearly articulated unity[115]. This status was represented by close relationship between A/B and X. It is presumed that A does not construct sufficiently compact unity with X because B is closer to it, so A is first intervening into the B-X relationship. This challenge of A should be repulsed by the counter-gesture of B to grasp X intimately[116]. This is an ordeal for B. Now this new qualification itself was barrier for B *et socii*, the plebeians. Their traditional solidarity was no more useful. On the other side A's qualification was false. The judgement on such a qualification is inevitably ambiguous because it is *par execellence* morphological. This factor justified a vast reaction to produce excetions by the side of B. It reinforced the newly born institution.

3-3

If we put this *exemplum iuridicum* once more in the context of a complex cluster of mythical traditions, we can say that a historical situation created the concept of the interim possession in ritual or procedure, and the people began to conceive something to be guarded through this institution, symbolized by the chastity of Verginia. Linkage with myth makes us suppose this value to be rooted in the social reality outside the procedure as well[117]. What should be guarded will be called "possession" in a later vocabulary.

1950, p. 172ff. tried to overcome this difficulty and to connect the tale to the text of Gaius. But the concept of possession was neglected as well as the stratification of various institutions.). This seemed to be contradiction. Yet we must consider that we are still in a stage where *in rem* and *in libertatem* are not differentiated. In so far as a person matters, the choice continued to be always problematic, as we can see in numerous scenes of Plautus and Terentius.

[115] *manus iniectio*, *mancipium*, *nexum* etc. are formally all absent in the tale of Verginia (except in a relatively later layer of "*patris manus*"). These elements were maybe derived from a stage of early differentiation of *in rem* where the formality was still vivid and the ambiguity of the personal liberty still remained (in particular in the field of debt). However, as P. Bonfante, Res mancipi e nec macipi, in:Id., *Scritti giuridici vari*, II, 1918, p. 1ff. strikingly shows, the idea of articulation of the unity and its core with the single head can be illustrated by the concept of *manus*. This is the same structure as what I identify behind the concept of possession, and I'd like to underline that this structure depends upon the new court and its rituality and publicity visible in *mancipatio*. This is one of the meanings of the tale of Verginia. Without such a ritualistic framework linked to a true political system, Bonfante's *signoria* would be a Cyclopic monster.

[116] We discussed in Gai.Inst. about a seeming symmetry and a delicate asymmetry.

[117] Another task is to investigate the antecedent phase before this change. One hint is available in a diachronic comparability with the Lucretian myth (Liv. III, 44, 1). A natural hypothesis would be that the republican political liberty (Lucretia) is modified into a civil one (Verginia). In the Verginian *exemplum* the existence of a judicial court is presupposed. Its corruption too is thematicized.

The corollaries of the birth of this value[118] are numerous. The civil procedure itself is a first corollary[119]. And *vice versa*. The concept of possession is logical consequence to civil procedure. The procedural examination of the standing (of the defendant) distinguishes civil procedure from other solutions (for example arbitration, transaction, ADR) of litigations. So the civil procedure has its criterium, as well as in the distinction of plaintiff and defendant, in the differentiation of the two stages, pre-trial and trial, *in iure* and *apud iudicem*[120]. The former will evolve to become *litis contestatio*. It is marvelous that this system, apparently very technical, has the same roots with the institution and the idea of the liberty of person.

We understand that possession is the principle to regulate the violence, for the criteria of *vis* are given by this conception[121]. Violence means collective force, that they can not fulfill formation of articulated unities, and the principle of possession liquidates this collectivity gradually through civil procedure prevailing. If the civil society signifies autonomous pacific state of it without any controlling power, its secret is the concept of possession.

There remains the problem of conformity[122] of our *exemplum iuridicum* to the

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[118] This conclusion is not so distant from what some scholars argue. Diosdi, *Ownership*, p. 48ff. depicts the history from gens to family, and to individual (the stage of the Twelve Tables), and L. Capogrossi Colognesi reached a similar conclusion (for example, Alcuni problemi di storia romana arcaica:ager publicus, gentes e clientes, *BIDR*, 83, 1980, p. 29ff.), even if he preferred the ownership to the possession, and *lex Licinia* to the Decemvirate legislation. A. Magdelain, Les XII Tables et le concept de ius, in:O. Behrends et al., edd., Zum *römischen und neuzeitlichen Gesetzbegriff, Göttingen, 1987,* p. 23 tried to recognize an absolute ownership in the structure of *mancipatio* and its publicity (*Quirites*) which, we think, the tale of Verginia certainly presupposes. I questioned only how about the problem of possession. It is certain that the Roman society overcame the territorial structure symbolized by Cremera and *gentes et clientes*, I prefer, rather with the concept of possession than by a generic ownership, though out of the new system springs a sort of ownership, without name, "*meum esse*".

[119] So we think that in a sense Civil Law itself, and, if speaking extremist-wise, Roman Law itself, was born, not in a prehistorical age but, in a historically specific age. I can dare to say it only being encouraged by the very Romans themselves.

[120] As for the birth of this dualism, there exists no contribution convincing. Among various speculations H. Lévy-Bruhl, *Recherches sur les actions de la loi*, Paris, 1960, p. 102ff. is interesting in assuming a *provocatio* (that would be *apud iudicem*) against a regal procedure with *sacramentum*.

[121] Labruna, *Vim fieri veto* is a milestone to have tackled this field of investigation. His research was directed to the situation dominated by violence in the Gracchan Age which necessitated *interdictum vi*. I guess that a transformation of the concept of possession and an ill function of it were involved in this great confusion, but it is out of question that the concept of possession itself had been a decisive firewall for violence not to extend. We must suppose that its evolved figure visible in *Pro Caecina* was only a final point.

[122] "*Si in ius vocat*" as the initial phrase of the Twelve Tables (Cic. De leg. II, 4, 9)

fragments or the fragmentary contents of the Twelve Tables, for example collected by Riccobono[123]. But it is impossible to accomplish here this investigation in front of too much literature[124] and too uncertain materials. I'd like to return here not too later.

4 Conclusion

We have arrived at a temporary conclusion that we can place the origins of the concept of possession in the age of *Decemviri*, indicated by the word of *vindiciae* or *vindicta*, with a charter myth of Verginia and its ritualized form as *exemplum iuridicum*. The birth of this concept accompanied that of the civil procedure *tout court*, defined by a necessary qualification imposed to the adversary parties, in particular the standing of the defendant, conceived according to the principle of possession, as criterium. It was a consequence of the total transformation of the Roman society in that age. But obviously its historical significance is enormous, actual even nowadays.

Naturally we need to corroborate this hypothesis with many investigations in many dimensions, on the Annalistic traditions, on the archaeological data, etc.. A detailed comparison with the Greek process of democratization is as well absolutely indispensable. We must trace later evolutions of this institution, in particular the step-up in the age of Appius Claudius Caecus, the appearance of specialized litigation on the possession and its combination with *interdictum*, the revolutionary change in the Gracchan age, the developped figure visible in the Ciceronian speeches, and that complicated problematic called *dominium*.

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coincides with the starting point of the Verginian procedure. Kaser, *Das römische Zivilprozessrecht*, p. 48ff. thought that *in ius vocatio* was valid only for *actio in personam* and for *causa liberalis,* of which an example was the initial step of the Verginian procedure. But, as I have argued, this differentiation can not be applied *a priori* to the Verginian *exemplum*.

[123] Noailles, Virginie, p. 110ff. traced well this corformity. He maintained that in the procedure there were two moments, first to expect a voluntary acceptance of the summon, and second to compel it by force if it is not accepted. But this is the case only when it begins to matter debt (*nexum*), where *condemnatio* justifies to treat a person as *res*, and so there is a need to seize a free debitor into slavery. I consider this phase as slightly later. In the litigation of Verginian type the summon is automatic with a Livian generic "*in ius vocatio*". The defendant wants to be present by all means because otherwise he loses his loved one.

[124] Recent studies, such as cited above (nt. 65), are very suggestive (above all, the article of R. Fiori on the civil procedure in:Cursi ed., *cit.*), therefore I'd like to return not too later in order to compare this analysis on the tale of Verginia with the results of these contributions (another reason is that these studies at last show a new level of source criticism even though different from the one that I have here practiced). I can add that above all Cursi, ed., *cit.* is representative of the directions to trace concrete historical evolutions after the Decemvirate legislation.