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**IUS NATURALE AND NATURALIS
RATIO. AN ATTEMPT OF SYNTHESIS?**

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IUS NATURALE AND NATURALIS RATIO. AN ATTEMPT OF SYNTHESIS?*

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1. Introduction

The first question to answer is why is it necessary to strive for a synthesis with regard to *ius naturale* and *naturalis ratio*? There are several misunderstandings, misconceptions, even distortions concerning *natura*, *ius naturale* and *naturalis ratio*, even to the extent that these notions are sometimes arbitrarily regarded as synonyms to one another, and only few bother to think whether they're truly synonyms; and if they designate the very same entity how come there are outright three expressions used to refer to them? Pleonasm of course is rather more common in any language than we first dare to imagine, however, with regard to legal terminology it is somehow different. When the different concepts behind each notion are blurred, no wonder that all some can say related to these notions is that they all stem from Greek philosophy. True. But these statements sound as if *ius naturale*, *naturalis ratio* and *natura* were second-rate elements of Roman legal thinking, though these are also useful in our understanding. Therefore the aim of this presentation is to reconsider these notions from a certain novel aspect.

Before starting out, it would be worthwhile to linger over the question how secondary literature approaches Roman law problems. We tend to say "the Romans thought", even despite the fact that we read passages in the Digest by this or that jurist. Therefore we fail to narrow our view saying that "Ulpian regarded this issue as follows", or "Paul deemed it so that"; just like we see many references to Sabinus, Labeo and other great characters of Roman history. It is important because just like today, opinions in the Roman times also diverge: they branch out to different directions, as each and every one could have a view to share. Therefore at this point I would say that instead of trying to find out an overall approach of *ius naturale*, *naturalis ratio* and *natura*, we should content ourselves with getting to know the concept of only one particular jurist at a time.

2. *Ius naturale* and *ius gentium*

Ius naturale and *naturalis ratio*, the two notions referred to in the title of this presentation find their common denominator in *natura*, and that is the background concept which causes some trouble. As thesis statements, it would be worth outlining the conceptual appearances of these notions. *Naturalis ratio* serves as the origin of *ius gentium* as characterised by Gaius at the beginning of his Institutes. *Ius naturale* is defined in the Digest by Ulpian (and a paraphrase of this text appears in the Justinian's Institutes as well). *Natura* makes its appearance here, in the passage describing *ius naturale* serving as the origin of this normative layer. As a consequence of this short outline, both *ius gentium* and *ius naturale* have to be mentioned first.

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2.1 To *ius naturale* via *ius*

There are primary sources to reflect that *ius* itself could stem from human activity; it could equally be the result of artificial formation, a postulate of man's will. However, it is said to be "equally" so, which means this activity (legislation, that is) and its result were equally received and accepted amongst other sources of *ius*: and this is the point in which the debates related to *ius naturale* lie. Even if merely the works of contemporary literature are taken into account for the sake of transparency, it swiftly turns out that there are authors who deem *ius naturale* as an existing entity; moreover they regard this entity to be superior to *ius civile*, *ius gentium* and to *ius praetorium*, and generally speaking to all man-made norms. In other words, the norms of *ius naturale* will serve as a determinant of any other norms with regard to the normative content. For authors adopting this view, the term "equally" is incontestably inherent to the statement above. Yet, there's another group of scholars who regard *ius naturale* a pure academic doctrine (*Lehrformel*), but in addition, they even insist that resulting from its academic character, it's nothing else but an empty formula (*leerformel*).¹ They interpret Roman *ius* as the order of a sovereign, and they tend to content themselves with formulating minimal requirements vis-à-vis such *ius*, which requirements are based on a formal concept of legality. However tempting it may be to at least try to deliver justice concerning this everlasting issue, we should guard against to try to solve this problem, and we would rather try resolving controversies, instead. It is common knowledge that legal sciences form a part of so-called "soft sciences", where different paradigms are free to flourish, and there's somewhat counter-productive to rank ideas and views in any hierarchy: the dichotomy of views must be accepted.² Regarding the Roman reflections concerning *ius naturale*, the text of the Digest gives a clear indication of the fact that the normative description of *ius naturale* stems predominantly from Gaius, Paul and Ulpian.³

2.2 The concept of *ius naturale* by Ulpian

A fundamental, repeatedly cited and widely analysed text at the beginning of the Digest outlines the concept of *ius naturale* according to which it is a kind of *ius* which *natura* teaches to all *animalia*.

Ulp. D. 1, 1, 1, 3 (1 inst.)

Ius naturale est, quod natura omnia animalia docuit: nam ius istud non humani generis proprium, sed omnium animalium, quae in terra, quae in mari nascuntur, avium quoque commune est. Hinc descendit maris atque feminae coniunctio, quam nos matrimonium appellamus, hinc liberorum procreatio, hinc educatio: videmus etenim cetera quoque animalia, feras etiam istius iuris peritia censer.

¹ A good example of this is given in the secondary literature by Max KASER: *Das römische Privatrecht*. Bd. 1. Handbuch der Altertumswissenschaft. München, C. H. Beck, 1971. 2. Aufl. 183., who believes that "[e]in bloßer Schulbegriff ohne höhere systematische Bedeutung ist auch *ius naturale*".

² To this suffice it to have reference to Tony BECHER – Paul TROWLER: *Academic Tribes and Territories. Intellectual Enquiry and the Cultures of Disciplines*. Society for Research into Higher Education and Open University Press imprint. Buckingham, Open University Press, 2001. 2nd ed. 33–36.

³ Correspondingly cf. René VOGGENSPERGER: *Der Begriff des *ius naturale* im römischen Recht*. Basler Studien zur Rechtswissenschaft, Heft 32. Basel, Helbing & Lichtenhahn, 1952. 62.

This excerpt is from Book 1, Title 1 “concerning *ius* and *iustitia*” of Digest, and a paraphrase of it, with minor formal alterations, was placed in Justinian’s Institutes.⁴ The very first statements related to this text pertain for the most part to its originality. With this regard suffice it to evoke the arguments by Perozzi, Beseler, or those by Albertario⁵ who all emphasise the interpolated character of the passage, as well as the support given by Voggensperger and Waldstein respectively⁶ when it comes to arguing for the substantial originality of this source. In this dispute it becomes clear that the representatives of the two opposing standpoints are practically barking up the wrong tree: basically they misinterpret one another’s views giving a typical example of taking essential question for important ones, and vice versa. According to the arguments by Perozzi, Beseler and Albertario (and partially even Kaser) the whole concept of *ius naturale* is absurd and nonsense from its very first principles because they regard Ulpian’s notion as a postclassical insertion, and they also take it for an object lesson reflecting a minority opinion of scholars of Greek philosophy. No doubt that such assertions are backed up by impressive language skills, incredible in-depth knowledge of the primary sources, and yet, despite the investment of all this immense intellectual potential they hastily pass along the fact (and therefore remain unaware of the consequence) that the substantial and structural originality of the text cannot still be doubted, as it is supported at several instances in the Digest.⁷

The way we see it, a first step towards the analysis of this text should be to examine how this excerpt fits the “surrounding” texts in the Digest, in other words the coherence of the context should be pointed out. At the beginning of the Digest, the renowned jurist, Ulpian first presents his approach of the notions *ius* and *iustitia* respectively, then with regard to *ius* his point of departure is to separate *ius publicum* and *ius privatum* from each other. In turn he describes their scope of applications; presenting the famous formula regarding *ius privatum* according to which “[p]rivatum *ius tripartitum est*”, which means that *ius privatum* consists of three parts.⁸ The connection between these *tria partes* could well be disputed, or even, it could be questioned if the term “*pars*” should stand for “*fons*” in this text.⁹ Our answer for this latter question is a positive “yes”. Even at this point it should be made clear that such a statement won’t corrupt the sources, because in the statement “*privatum ius tripartitum est*” the term “*tripartitum*” reflects a formal, or in other words analytical approach of the question what further *subdivisio* is enabled within the scope of *ius privatum* under the *summa divisio* of *ius* into *publicum* and

⁴ Cf. Inst. 1, 2 pr.: *Ius naturale est quod natura omnia animalia docuit. Nam ius istud non humani generis proprium est, sed omnium animalium, quae in caelo, quae in terra, quae in mari nascuntur. Hinc descendit maris atque feminae coniugatio, quam nos matrimonium appellamus, hinc liberorum procreatio et educatio: videmus etenim cetera quoque animalia istius iuris peritia censerit.* On these texts and on the role of *ius naturale* see also János ERDŐDY: Le rôle de *ius naturale* dans l’antiquité et dans la formation contemporaine. *Iustum Aequum Salutare*, III (2016)104–106.

⁵ Cf. Silvio PEROZZI: *Istituzioni di diritto romano*. Roma, Athenaeum, 1928. 91., and specifically footnote n. 2; Gerhard BESELER: *Beiträge zur Kritik der römischen Rechtsquellen*. Tübingen, Mohr, 1910. 131., and p. 143.; Emilio ALBERTARIO: Concetto classico e definizioni postclassiche del *ius naturale*. In: Roberto REGGI (ed.): *Studi di diritto romano*. Vol. 5. Milano, Giuffrè, 1937280. sqq.

⁶ See also VOGGENSPERGER op. cit. 64–65.; Wolfgang WALDSTEIN: Entscheidungsgrundlagen der klassischen römischen Juristen. In: Hildegard TEMPORINI – Wolfgang HAASE (ed.): *Aufstieg und Niedergang der römischen Welt*. II, 15. Berlin – New York, 197680., as well as p. 83.

⁷ Without trying to enumerate all sources, let us give some examples: Flor. D. 1, 1, 3 (1 inst.); Call. D. 1, 5, 24 (27 ad Sab.); Mod. D. 1, 7, 1 pr. (2 reg.); Paul. D. 4, 5, 7 pr. (11 ad ed.); Paul. D. 23, 2, 14, 2 (35 ad ed.); Tryph. D. 28, 2, 28, 1 (20 disp.); Call. D. 37, 4, 8, 7 (40 ad ed.); Paul. D. 38, 6, 4 (2 ad Sab.); Mod. D. 38, 10, 4, 2 (12 pand); Call. D. 50, 16, 220, 3 (2 quaest.). From the secondary literature cf. mainly Carlo A. MASCHI: *La concezione naturalistica del diritto e degli istituti giuridici romani*. Pubblicazioni della Università Cattolica del Sacro Cuore, Serie 2, Scienze giuridiche 53. Milano, Società Editrice “Vita e Pensiero”, 1937. 163–166.; VOGGENSPERGER op. cit. 64.; WALDSTEIN op. cit. 85–86.

⁸ Cf. Ulp. D. 1, 1, 1, 2 (1 inst.).

⁹ To this see also WALDSTEIN op. cit. 83.

privatum. Ulpian himself immediately gives the answer to this question pointing out that *ius privatum* comes into three parts containing *ius civile*, *ius gentium* and *ius naturale*. All this would be, however, a simple analytical proposition, a mere classification in the absence of a parallel substantive concept, without which the whole idea would be *Schuleinteilung*, an object lesson of classification – with an elegant reference to Kaser’s above cited term “*Schulbegriff*” concerning *ius naturale*. Still, all the previously enumerated sources show undoubtedly that the thesis statement “*privatum ius tripartitum est*” obtains its actual meaning due to the fact that all three *partes* receive their particular and peculiar content. It is all the more important, because (as Cicero points it out in connection with the interpretation of the concept of *res publica*) it is essential and paramount that the citizens aiming to achieve *utilitas communione* should be united by *iuris consensus*.¹⁰ This is the root, the reference point of *res publica* itself.¹¹ In the course of our scrutiny *ius gentium* is the element to be closer looked at. The jurist who lingers the most over the concept of *ius gentium* is Gaius.

2.3 The idea of *ius gentium* by Gaius

The starting passage of Gaius’ Institutes is closely linked with this Ciceronian idea.

Gai. 1, 1 (= Gai. D. 1, 1, 9 [1 inst])

„*Omnes populi, qui legibus et moribus reguntur, partim suo proprio, partim communi omnium hominum iure utuntur. [...]*”

Each and every *populus* governed by *leges* and *mores* make use partly of their own law, partly of the one which is common to all men. With such a grand opening Gaius introduces the subtle differentiation between *ius civile* and *ius gentium*, which notions cover two out of Ulpian’s threefold concept (*tria partes*). This is the point where the Ciceronian idea of *iuris consensus* is starting to take shape: these are the instrumental elements, or with another expression those carriers, through which *ius* is manifested. Taking all these considerations into account facilitate the understanding the fact that in the statement “*privatum ius tripartitum est*” the term “*pars*” is used, because it provides the substantial side of *fons*. Beyond the formal-structural interpretation of *ius*, a substantial delineation of the very same concept is indispensable: this is what makes even early Rome a rule of law state.¹² An approach relying exclusively on formal and structural foundations would surely reverse the connection between the goal and the means towards it. Many instances are known in history when such an idea resulted in catastrophic results, to say the least.¹³

¹⁰ As for Cicero’s view on *ius naturale* cf. for instance Gábor HAMZA: Bemerkungen über den Begriff des Naturrechts bei Cicero. In: Silvio ROMANO (ed.): *Nozione, formazione e interpretazione del diritto dall’età romana alle esperienze moderne*. Napoli, Jovene Editore, 1997:349–362.

¹¹ Cic. re p. 1, 39: *Est igitur, inquit Africanus, res publica res populi, populus autem non omnis hominum coetus quoquo modo congregatus, sed coetus multitudinis iuris consensu et utilitatis communione sociatus*. On this topic see in detail János ERDŐDY: The Topicality of a Papal Speech. References of Classical *ius naturale* in the Speech of Benedict XVI. In: Béla SZABÓ – Emese ÚJVÁRI (ed.): *Universitas „unius rei”*. Tanulmányok a római jog és továbbélése köréből. Debrecen, Lícium Art, 2014:126. Specifically in connection with the Gaian text cf. Reginaldo PIZZORNI: *Il diritto naturale dalle origini a S. Tommaso d’Aquino*. Bologna, 2000. 136.; regarding the link between Gaius and Cicero see also ERDŐDY op. cit.102.

¹² On this cf. János ZLINSZKY: *Állam és jog az ősi Rómában*. Budapest, Akadémiai Kiadó, 1997. 24.

¹³ When it comes to the presentation of *Interpolationenkritik*, some fundamental works by Kaser and by Wieacker should by all means be referred to; such as Max KASER: *Zur Methodologie der römischen Rechtsquellenforschung*. Sitzungsberichte der Österreichischen Akademie der Wissenschaften, Philosophisch-Historische Klasse 277, 5. Wien Graz, Verlag Böhlau, 1972. mainly 80. sqq., as well as 94. sqq.; Franz WIEACKER: *Textkritik und Sachforschung. Positionen in der gegenwärtigen Romanistik*. *Zeitschrift der Savigny-Stiftung für*

2.4 Natura and naturalis ratio

The logical next step in the course of analysis is to interpret the meanings of cornerstone terms of the cited passages: a closer look should be given to *natura*, *ratio* and their common derivative *naturalis ratio*.

The term “*natura*” is best examined in the works by Voggensperger, Pellicer and Schambeck.¹⁴ The term *natura* stems from the verb *nascor*, *nasci*, *natus sum*¹⁵, which is semideponent bears such meanings as “be born”, “stem from”, “originate”, “commence”, “be created”.¹⁶ Consequently, the fact that Schambeck links this term with the creation (*Schöpfung – Schöpfungsordnung*) is fully comprehensible.¹⁷ Interestingly, Pellicer starts his etymologic analysis from a farther node building up a connection with the nouns *natus* and *natio*, whence his conclusion to go back to the Indo-European root **gnā-*, from which all these words originate.¹⁸ This approximation is all the more important, because Pellicer pays specific attention to the nouns ending “-*ūra*” collecting their possible meanings. As a result, he points out in the end that this suffix pronounces the result of an activity, besides denoting the activity itself.¹⁹

The term *naturalis ratio* is most commonly translated as natural reason (or natürliche Vernunft, raison naturelle, ragione naturale). True as it may be that the above mentioned interpretation presupposes reason at least to a certain extent, however, secondary literature attributes such a connotation to the term “reason” as if this were mankind’s doing.

There is plenty of linguistic proof to support the term *ratio* as classical. Consequently, *naturalis ratio* could also be regarded as classical.²⁰ In addition, this assumption is also supported by the fact that Gaius uses this term on several occasions. As for the etymology of the word *ratio* it should be pointed out that Ernout – Meillet for instance is very useful on this issue. The primary meanings attributed to the word are in connection with accounting, counting, calculation, account, registration, and so forth. The word family is threefold: the verb *reor*, the participle *ratus*, and the noun *ratio*. This latter appears in the sources with various meanings. It is highly unlikely that the primary meaning for this word would have been “sense” abstractly. It would have rather designated something of technical nature; something related to accounting, measuring, accounting, account, evaluation. Examples are abundant mainly by Terence and Plautus.²¹

Rechtsgeschichte. Romanistische Abteilung, XCI (1974)1–40. Relating to this, issue another overview on the textual criticism could be cited here, cf. Arthur A. SCHILLER: *Roman Law. Mechanisms of Development*. Mouton, 1978. 62–72., specifically pp. 67–70.; and as for the method of *Interpolationenkritik* cf. e. g. Wolfgang KUNKEL – Martin Josef SCHERMAIER: *Römische Rechtsgeschichte*. Köln - Weimar - Wien, Verlag Böhlau, 2005. 14. Aufl. 218–221.; Peter STEIN: *Roman law in European history*. Cambridge, Cambridge University Press, 2001. 170.

¹⁴ Cf. VOGGENSPERGER op. cit. 61. sqq.; André PELLICER: *Natura. Étude sémantique et historique du mot latin*. Montpellier, 1966. 207–225.; Herbert SCHAMBECK: *Der Begriff der „Natur der Sache“*. Ein Beitrag zur rechtsphilosophischen Grundlagenforschung. Wien, Springer Verlag, 1964. 32–37.

¹⁵ See correspondingly Egidio FORCELLINI – Jacopo FACCIOLATI: *Totius Latinitatis lexicon*. Schneebergae, Schumann, 1945s. v. “*natura*”; Oxford Latin Dictionary s. h. v.; Alfred ERNOUT – Antoine MEILLET: *Dictionnaire étymologique de la langue latine. Histoire des mots*. Klincksieck, 1951s. v. “*nascor*”; SCHAMBECK op. cit. 32.

¹⁶ Cf. Henrik FINÁLY: *A latin nyelv szótára*. Budapest, Akadémiai Kiadó, 2002s. v. “*nascor*”.

¹⁷ SCHAMBECK op. cit. 32–33.

¹⁸ Cf. PELLICER op. cit. 59–60.; and see correspondingly FINÁLYS. v. “*gnatus*”.

¹⁹ PELLICER op. cit. 63–64.

²⁰ MASCHI op. cit. 236.

²¹ MASCHI op. cit. p. 237–238.

Interestingly, the Greek term λόγος and the Latin *ratio* are probably connected well before Cicero. However, it should be pointed out that these two terms are not perfect equivalent to each other. Due to rhetoric, three additional meanings are attributed to *ratio*: (a) an argument of defence; (b) argumentation as such; (c) reason as a capacity of the mind.

All these new meanings have their counterparty in the legal sources.²² When focusing exclusively on the term *ratio* in the sources of Roman law, more specifically its appearances in the Digest, examples come up with regard to the most typical meanings: an account or statement (cf. Ulp. D. 2, 13, 6, 3 [4 ad ed.]; Ulp. D. 1, 16, 4, 2 [1 de off. procons.]), foundation for law or conformity to law (Iul. D. 1, 3, 20 [55 dig.]; Paul. D. 1, 3, 16 [l. sing. de iure sing.]), and other instances could be referred to.

It would be interesting and rewarding to go through the secondary literature of this topic: Koschembahr-Łytowski, Bonfante, Pellicer, Maschi all added interesting and exciting contributions to this topic.²³

Yet, there is one author in secondary literature whose approach of *ratio* is unique. It is strongly opposed to the mainstream idea where *ratio* is “reason”, “raison”, Vernunft” or “raggione”, which apprehension comes mainly from the translation of the term itself. Wolfgang Waldstein in one of his works examined the existence of an order given by nature (naturgegebene Ordnung).²⁴ Within this scope he has reference to an excerpt by Cicero from his work on the laws, where an interesting application of *ratio* appears.

Cic. de leg. 1, 42

Iam vero illud stultissimum, existimare omnia iusta esse quae scita sint in populorum institutis aut legibus. Etiamne si quae leges sint tyrannorum? Si triginta illi Athenis leges inponere voluissent, et si omnes Athenienses delectarentur tyrannicis legibus, num idcirco eae leges iustae haberentur? Nihilo credo magis illa quam interrex noster tulit, ut dictator quem vellet civium nominatim aut indicta causa inpune posset occidere. Est enim unum ius quo devincta est hominum societas et quod lex constituit una, quae lex est recta ratio imperandi atque prohibendi. Quam qui ignorat, is est iniustus, sive est illa scripta usquam sive nusquam. Quodsi iustitia est obtemperatio scriptis legibus institutisque populorum, et si, ut eidem dicunt, utilitate omnia metienda sunt, negleget leges easque perrumpet, si poterit, is qui sibi eam rem fructuosam putabit fore. Ita fit ut nulla sit omnino iustitia, si neque natura est et ea quae propter utilitatem constituitur utilitate alia convellitur.

Now in this text there is a reference to *ratio*, where Cicero argues that there’s one *ius*; it’s been bound by human fellowship, and has been established by *lex*. Then, Cicero continues, *lex* is *recta ratio*. The point here is how the expression “*recta ratio*” is translated. Generally, right or correct reason stands here in most renderings. However, at this instance, Waldstein points out that translating *ratio* with “reason” narrows the sense of the term which may lead to misunderstandings. He asserts that there are many instances the context of which shows that the term *ratio* is highly likely to designate a predetermined order that men can comprehend via their reason, as capacity of the mind.²⁵

²² MASCHI op. cit. p. 239–241.

²³ Cf. respectively for instance J. de KOSCHEMBAHR-LYTOWSKI: *Naturalis ratio en droit classique Romain*. In: Emilio ALBERTARIO (ed.): *Studi in onore di Pietro Bonfante*. Milano, Treves, 1930. p. 469–498.; PELLICER op. cit. passim; MASCHI op. cit. passim.

²⁴ Wolfgang WALDSTEIN: *Zur juristischen Relevanz der Gerechtigkeit bei Aristoteles, Cicero und Ulpian*. In: Margarethe BECK-MANNAGETTA (ed.): *Der Gerechtigkeitsanspruch des Rechts. Festschrift für Theo Mayer-Maly zum 65. Geburtstag*. Wien, Springer, 19961–72.

²⁵ WALDSTEIN op. cit. p. 55., and see especially footnote 120.

In order to back up his statement, Waldstein point out that this sense is recurrent throughout the sources; then cites some primary sources by Cicero (Cic. de off. 1, 11; Cic. de leg. 1, 10–16) and a passage from Summa Theologiae. Unfortunately, there aren't plenty of source references to support his assertion. Yet, this meaning is backed up by Forcellini and to certain extent by Oxford Latin Dictionary as well.²⁶

3. An attempt of synthesis

After these considerations, Ulpian's concept on *ius naturale* should once more be taken into account. The point of departure is the recognition of the fact that no other jurist apart from him approached the topic of *ius naturale* so expressly, yet in such an abstract manner.²⁷ It is apparent that *ius naturale*, just like *ius civile* and *gentium* is a true source of *ius privatum*, as all three are called *ius* alike. All living creatures (*animalia*) are subject to this *ius*, whereas *ius civile* and *gentium* (as properly presented by Gaius) binds exclusively peoples, communities governed by *leges* and *mores*. Thus, it is apparent how these three *partes* or *fontes* of *ius* are levelled: there are even many who refer to the circles of subjects as batches to comprehend that neither the rules of *ius civile*, nor those of *ius gentium* would ever be able to refute or negate *ius naturale*. Not only does this mean that *ius naturale* would be an element or a source of *ius*, or more specifically of *ius privatum*, but it becomes a decisive factor of the inherent content of *ius* itself.²⁸ Therefore, Ulpian's threefold classification does not simply confine itself to bringing *ius naturale* within the framework of Roman *iuris prudentia* via providing a theoretical-conceptual foundation for this notion, but at the same time, it also declares the supreme and superior position of *ius naturale* at a time.²⁹ At this point it should also be emphasised that this idea is compatible with Ulpian's approach of *ius*. It doesn't necessarily mean that this attitude towards *ius* and *ius naturale* was a generally followed or even accepted concept. Nevertheless, this was a valid concept of *ius*, carried out by a prominent jurist of his times. Still, other prominent jurists might also have their own concepts, own approaches. Just like today, we experience a diversity of opinions on sensitive issues. None of these concurring opinions prevail; in fact they co-exist, representing different angles of the same problem.

The inherent content of *ius naturale* would be extremely profitable to survey, still (due to the lack of time) only one aspect is to be picked, namely the reference to the common nature of men and animals within the scope of *ius naturale*, and to a certain extent of *ius gentium* as well. As for the inherent content of *ius naturale*, Voggensperger emphasises that Ulpian differentiates between his three layers or circles of *ius* on the basis of the scope of their subjects: *ius naturale* is applicable to all living creatures, *ius gentium* is applied to peoples and *ius civile* is relevant in terms of states.³⁰ He then draws the conclusion that *ius naturale* was a kind of set of norms for Ulpian which stems directly from the animal instincts of human beings, and this set of norms is manifested through instinctive animalic or even brutish impulses and inclinations. This latter assumption is based on the several instances of the text, such as the union of male and female, or the procreation and rearing of children. However, as soon as we give a closer examination to Voggensperger's idea in comparison to the primary sources, it quickly turns out that his

²⁶ FORCELLINI – FACCIOLATIS. v. "ratio" II B, 3; Oxford Latin Dictionary s. v. "ratio" 11b, under "naturalis ratio".

²⁷ Correspondingly cf. VOGGENSPERGER op. cit. 65.

²⁸ A similar idea is presented by Aristotle in his Nicomachean Ethics; Arist. Eth. Nic. 1134b "τοῦ δὲ πολιτικοῦ δικαίου τὸ μὲν φυσικὸν ἐστὶ τὸ δὲ νομικόν, φυσικὸν μὲν τὸ πανταχοῦ τὴν αὐτὴν ἔχον δύναμιν, καὶ οὐ τῶ δοκεῖν ἢ μή, [...]". Additionally see on this Felix SENN: De la distinction du *ius naturale* et du *ius gentium*. In: Felix SENN (ed.): *De la justice et du droit*. Paris, Sirey, 192759; VOGGENSPERGER op. cit. 71–72; ERDŐDY op. cit. 105–106.

²⁹ Correspondingly cf. VOGGENSPERGER op. cit. 65.

³⁰ Cf. VOGGENSPERGER op. cit. p. 65–66.

description of the subjects of the three layers of *ius* is rather vague. This vagueness is the consequence of a misinterpretation (or rather over-interpretation) of the relevant texts by Ulpian and Gaius. This over-interpretation is clearly indicated by the fact that Ulpian's statement on *ius naturale* has nothing to do with the common nature of men and animals, or beastly instincts of men. All he states is that *ius naturale* as a set of norms is applicable to all *animalia*. Therefore, the link between the terms *animal* on the one hand, and *anima*, *animus* on the other gains elevated significance. Moreover, the way Voggensperger sees it, *ius gentium*³¹ is observed by all peoples („allen Völkern gemeinsame[s] Recht"), yet the Gaian text asserts instead that this set of norms is used by all peoples governed by *leges* and *mores* (*omnes populi qui legibus et moribus reguntur*).³² Similarly, *ius civile* is also observed by the very same subjects, thus the difference between these two latter set of norms cannot be found via the comparison of the subjects; the dissimilarity must lie in another factor. And this factor is the origin of these two: *ius gentium* comes from *naturalis ratio*, whereas *ius civile* is a result of human activity, thus its source is mankind.³³

When referring to the common nature of men and animals, Voggensperger thus emphasises that the union of male and female, the procreation and rearing of children, and other instinctive activities characterise both men and animals. In addition to this, however, men (as generally driven by reason) implement these instinctive activities to the legal sphere; thus all these become *matrimonium*, *educatio*. The way he sees it, the law of nature is interpreted here extensively: every living creature is subject to this law – regardless to the level of their intelligence.³⁴

It is Ulpian himself who tells men from animals from the point of view of *ius*, when he claims in one of his responses, *non enim potest animal iniuria fecisse*, precluding such an interpretation according to which men and animals were legally alike.³⁵ As a justification he reasons that animals lack intelligence (*sensu caret*). Interestingly, despite the recurring reference to *naturalis ratio* meaning natural reason³⁶, Ulpian declares in this excerpt that *animal sensu*, instead of asserting *ratione caret*.³⁷ Consequently, Ulpian seems to acknowledge two different kinds of *ius naturale*. The confusion again goes back to the works by Cicero who systematically melds these notions.³⁸ Most issues of misinterpretation with regard to *ius naturale* arise from

³¹ VOGGENSPERGER op. cit. p. 66.

³² It should be noted that Senn in his magnificent work interprets the approach of *ius gentium* that this set of norms is applicable to people forming a society, forming a nation; where this latter is a nice example of the *Meinungsklima* of the 1920s, yet by Roman standards it is fully unacceptable mainly due to its anachronism. In detail cf. SENN op. cit. 58.

³³ Voggensperger applies a proper phrase in the scope of the analysis of *naturalis ratio*, when he describes it as "die innere Logik der Dinge". Cf. VOGGENSPERGER op. cit. 104.

³⁴ Cf. VOGGENSPERGER op. cit. 66. Similarly, see also SENN op. cit. 65–69., whose view again clearly reflects the spirit of his times.

³⁵ Cf. Ulp. D. 9, 1, 1, 3 (18 ad ed.): *Ait praetor „pauperiem fecisse". pauperies est damnum sine iniuria facientis datum: nec enim potest animal iniuria fecisse, quod sensu caret*. See also SENN op. cit. 72; VOGGENSPERGER op. cit. 68.

³⁶ Cf. as "natürliche Vernunft" in German, "raggione naturale" in Italian, or "raison naturelle" in French.

³⁷ According to Forcellini, the noun *sensus* derived from the verb *sentio* is "*facultas animi, qua per corpus objecta sensilla percipit*", hence it overlaps the term αἴσθησις in Greek philosophy. The material or tangible references reflect this concept, whereas the abstract meanings start from the definition "[g]eneratim sumitur pro ipsa mente, ratione aut usu rationis", the example of which is the above cited Ulpian-passage. Cf. Forcellini s. v. "sensus".

³⁸ Cf. Cic. de fin. 3, 67: *Et quo modo hominum inter homines iuris esse vincula putant, sic homini nihil iuris esse cum bestiis*. Cic. de re p. 3, 18: *At nec inconstantiam virtus recipit, nec varietatem natura patitur, legesque poena, non iustitia nostra comprobantur; nihil habet igitur naturale ius; ex quo illud efficitur, ne iustos quidem esse natura*. Cic. de off. 3, 23: "*Neque vero hoc solum natura, id est iure gentium, sed etiam legibus populorum, quibus in singulis civitatibus res publica continetur, eodem modo constitutum est, ut non liceat sui commodi*

the fact that the jurists of classical times approached *ius naturale* as a set of norms in the context of a particular question, while Cicero (in the role of “der große Popularisator der stoischen Philosophie”) wanted to create an idol: he wanted to outline a natural law thinking as the uniform norm of the ever right, fair and just. A very good example of this is presented by the fact that he is the first one to refer to *ius naturale* as transcendent.³⁹

4. Conclusions

It is common knowledge that law is interpersonal. So was *ius* in Roman times. This interpersonal character means that *ius* flourishes in communities, and when it comes to human communities, there’s a segment which applies to those human communities regulated by *leges* and *mores*, and there’s such a segment that is applicable to all humans, as it does to all living creatures. This latter is *ius naturale*. To argue whether the rules of *ius civile* or *gentium* could be contrary to *ius naturale*, it’s simply trying to force open doors. The way I see it, we put the stresses on the wrong syllables. We’re still debating whether *ius naturale* exists or not. Yet, the question is not this, it’s plain to see. The question is rather about the actual inner content of each segment of *ius*. *Ius naturale* stemming from *natura*, from a “naturgegebenen Ordnung” is beyond human responsibility. But it’s not so in case of *ius gentium* and *civile*. It is a well-known comparison that *ius gentium* and *naturale* are separated for example on the basis of their attitudes towards slavery, as *ius gentium* accepted slavery, whereas *ius naturale* denied it. The way I see it, the main issue is about where we place the point of reference. It was so in Roman times and it is still today. There are some who say that *ius civile*, man-made law is the stove whence we start. Others claim that it is from *ius naturale* to start: from this departure point we can easily understand the role of *naturalis ratio* in the sense of order. When we say that something is normal, while something other isn’t, we say so, on the basis of a particular order, in the absence of which we wouldn’t be able to tell one entity from another. Yet, it is our capacity of the mind, our reason that can help us comprehend as much as possible. That’s the point where *naturalis ratio* comes in as a decisive factor. And via this Gaius’ assertion concerning *ius civile* saying *id ipsius proprium est*, it belongs to the community which created it, reflects our utmost responsibility for our law. We make it. Its content is up to us. Due to our capacity of the mind, it may result in a virtuous doing, or a bastardly deed. But anyhow, law is interpersonal. Like a board game.

causa nocere alteri [...]”. Mainly this latter phrase “*ius naturale, id est ius gentium*” is very ambiguous, and this isn’t its only appearance in primary sources. Given its doubtful and uncertain character, secondary literature is unable to properly evaluate this concept of uniting notion.

³⁹ Cf. VOGGENSPERGER op. cit. 74., as well as pp. 77–78. A good example of this could be Cic. de inv. 2, 161: *Naturae ius est, quod non opinio genuit, sed quaedam in natura vis inest, ut religionem, pietatem, gratiam, vindicationem, observantiam, veritatem*. Similarly, Cic. de off. 3, 27: *Atque etiam, si hoc natura praescribit, ut homo homini, quicumque sit, ob eam ipsam causam, quod is homo sit, consultum velit, necesse est secundum eandem naturam omnium utilitatem esse communem. Quod si ita est, una continemur omnes et eadem lege naturae, idque ipsum si ita est, certe violare alterum naturae lege prohibemur. Verum autem primum; verum igitur extremum*. These two texts are all the more important, because from their comparison a statement by Álvaro D’Ors becomes apparent, namely that he blames the whitewash of differences between *lex* and *ius* on Cicero, which also left improperly handled or misunderstood by secondary authors. In detail cf. Álvaro D’ORS: *Parerga histórica*. Pamplona, EUNSA, 1997. 116–117.