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REFLEXIONS ON THE ACTUAL REFERENCES TO IUS NATURALE IN THE DIGEST

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1. Preliminary remarks

It is widely known that *ius naturale* plays an important role[1] in Roman legal thinking, besides *ius civile*, *ius gentium*[2] and *ius praetorium*[3]. In accordance with a Ciceronian

[1] Its importance is clearly shown by Mayer-Maly, who claims that any reference to *ius naturale* occurs in Roman law when it is about such rules that are developed and unlocked my reason, or some elementary principles of justice. In detail see Theo Mayer-Maly: Reflexionen über ius I. *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung* CXVII (2000). 11.

[2] With regards to both normative layers, cf. Gai. 1, 1: *Omnes populi, qui legibus et moribus reguntur, partim suo proprio, partim communi omnium hominum iure utuntur: nam quod quisque populus ipse sibi ius constituit, id ipsius proprium est vocaturque ius civile, quasi ius proprium civitatis; quod vero naturalis ratio inter omnes homines constituit, id apud omnes populos peraeque custoditur vocaturque ius gentium, quasi quo iure omnes gentes utuntur.* See also Inst. 1, 2, 1: *Ius autem civile vel gentium ita dividitur: omnes populi qui legibus et moribus reguntur partim suo proprio, partim communi omnium hominum iure utuntur: nam quod quisque populus ipse sibi ius constituit, id ipsius proprium civitatis est vocaturque ius civile, quasi ius proprium ipsius civitatis. Quod vero naturalis ratio inter omnes homines constituit, id apud omnes populos peraeque custoditur vocaturque ius gentium, quasi quo iure omnes gentes utuntur.* As for the secondary literature, reference to the following papers will suffice: René Voggensperger: *Der Begriff des „ius naturale" im römischen Recht*. Helbing & Lichtenhahn, 1952.; Biondo Biondi: Lex e ius. *Revue International des Droits de l'Antiquité* XII (1965). 170–171.; Herbert Wagner: *Studien zur allgemeinen Rechtslehre des Gaius: ius gentium und ius naturale in ihrem Verhältnis zum ius civile*. Gieben, 1978.; Philippe Didier: Les divers conceptions du droit naturel à l'oeuvre dans la jurisprudence romaine des 2e et 3e siècles. *Studia et Documenta Historiae et Iuris* XLVII (1981). 205.; Wolfgang Waldstein: Bemerkungen zum ius naturale bei den klassischen Juristen. *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung* CV (1988). 710.; Max Kaser: „Ius honorarium" und „ius civile". *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung* CI (1984). 74.; Max Kaser: *Ius gentium*. Köln–Weimar–Wien, Verlag Böhlau, 1993.; Wolfgang Waldstein: Diritto consuetudinario e diritto giurisprudenziale a Roma. *Saggi sul diritto non scritto.* Padova, 2002. 182.

[3] Cf. Pap. D. 1, 1, 7, 1 (2 def.): *Ius praetorium est, quod praetores introduxerunt adiuvandi vel supplendi vel corrigendi iuris civilis gratia propter utilitatem publicam. Quod et honorarium dicitur ad honorem praetorum sic nominatum*. From the secondary literature, cf. for instance Fritz Schulz: *Classical*

statement on this topic, there are three pillars left to be closely examined, and linked: *populus*, *iustitia* and *utilitas communionis*.[4] The link that brings these together is *iuris consensus*, the content of which was clear to everyone. It contained the above mentioned *ius civile*, *ius gentium* and *ius naturale* – the normative layers of *ius*[5] in the Roman thought.

In order to see a bigger picture, it seems inevitable to make at least some references to the other normative layers of Roman law, besides *ius naturale*. It is clear from both the Gaian text, as well as its 6th century counterpart, that *ius civile* and *ius gentium* were considered as complements to each other: there are certain characteristics that are in common in both, while there are also some apparent and distinct differences between the two. As for the common feature of these normative layers, it should be pointed out that both appear in such communities which are governed by certain norms, namely *leges* and *mores* (*[o]mnes populi, qui legibus et moribus reguntur, partim suo proprio, partim communi omnium hominum iure utuntur*), where the former is related broadly to any written source of law (today referred to mainly as statutes, though) that was applicable to the totality of the community; while the latter designates inherited and prevailing customs of a certain place.[6] This primary statement of the source implies first and foremost that *ius* must exist around mankind (interpersonal characteristic) – and to this point one merely sees that *ius* applies to mankind, and mankind only. However, the principal difference between *ius civile* and *gentium* is that the rules of *ius civile* are enacted by the members of that particular community to which these very rules apply.[7] The rules of *ius gentium*, on the other hand, stem from *naturalis ratio*[8], and they are common to all nations that

Roman Law. Oxford, 1951. 103 sq.; Kaser (1984) op. cit. 72.; Joseph Plescia: The Development of the Doctrine of *Boni Mores* in Roman Law. *Revue International des Droits de l'Antiquité* XXXIV (1987). 277–279.; Tomasz Giaro: Über metodologische Werkmittel der Romanistik. *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung* CV (1988). 193.

4 On this approach cf. Cic. de re publ. 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*.

5 As for the use of *ius* instead of law or right, suffice it to refer simply to the title of Max Kaser's famous work: Das altrömische *ius* – even the title of which suggests that there are several differences between *ius* and Recht.

6 Cf. *Oxford Latin Dictionary.* Oxford, Clarendon Press, 1968. s. v. 'mos', especially 'mos[2]'.

7 Cf. Reginaldo M. Pizzorni: *Il diritto naturale dalle origini a S. Tommaso d'Aquino.* Bologna, 2000. 136.

8 As for *ratio*, the long-lasting debate should be mentioned, however, only *per tangentem*, as detailed reference to this debate would serve as a detour to the primary goal of the present scrutiny. Yet, an allusion to multiple significations of the aforesaid terminus is sufficient. Cf. *Oxford Latin Dictionary* op. cit. s. v. 'ratio', with special attention to 'ratio[5]' and 'ratio[12]'. It should, however, likewise be pointed out that the meaning" ground or reason for something usually appears in Latin followed by a genitive clause, which in case of the term *naturalis ratio* is clearly absent, as *naturalis* is an adjective in the nominative case. In addition to this, pure logic could equally evoked here; namely if *ratio* truly means reason and reason only, then the first logical question is where reason stems from, that is what source of reason can be named. At this point, we can see that reason presupposes an order, according

meet the primary condition, namely that of being such a community that is governed by statutes, as well as long-prevailing customs and traditions.[9]

At this point, it is highly interesting to switch to the scrutiny of *ius naturale* in the Roman thought. Preliminarily, it should hastily be pointed out that *ius naturale* and today's natural law do not totally serve as equivalents to each other. This is mainly because what we call natural law today is widely affected by many cultural and historical impacts that all came after the Roman era, therefore differences in approach surely occur. In addition to this, it is also important to underline that the concept and use of certain notions have changed since the Roman times – and this is especially true with regards to such an entity that is closely related to philosophy (and consequently, to a certain extent, a current ideology), the notions of which have been remodelled and refashioned since Plato's and Aristotle's age, whose impact on Roman thought (and not only legal thinking) cannot be denied.[10] As a consequence of all this, when referring to the Roman concept of natural law, the term *ius naturale* seems highly adequate, in order to point out all the subtle differences between the Roman and the contemporary idea of natural law.

2. The definition of ius naturale by Ulpian

After these considerations, it is interesting that should we search for citations related to *ius naturale* in the sources of Roman law, we will see clearly, that such references to *ius naturale* come into two parts. On the one hand those citations should be mentioned, where *ius naturale* is used as an explanatory or exemplificative means. On the other hand, there are some instances, where *ius naturale* is defined or circumscribed.[11] With this regard, it is enough to refer to the following text:

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to which some things, events and people are considered reasonable, or normal, whilst others are regarded otherwise. With regards to the issue about naturalis ratio cf. e.g. Paul A. Van der Waerdt: Philosophical Influence on Roman Jurisprudence? *ANRW* II, 36. 7. Berlin–New York, De Gruyter, 1994. 4880–4881.

9 Cf. Pizzorni (2000) op. cit. 136–137. These differences had some practical consequences in the everyday legal practice, too. In connection with this, suffice it to cite one passage from the Digest; Gai. D. 41, 1, 1 pr. (2 rer. cott.): *Quarundam rerum dominium nanciscimur iure gentium, quod ratione naturali inter omnes homines peraeque servatur, quarundam iure civili, id est iure proprio civitatis nostrae. Et quia antiquius ius gentium cum ipso genere humano proditum est, opus est, ut de hoc prius referendum sit*.

10 On this issue the best reference could be Pizzorni (2000) op. cit. Special attention should be paid to pages 29–88, focusing on the Greek approach of natural law, as well as 91–155, putting the Roman idea in the centre. As for the changes of the notional concept on the Medieval for instance see page 140, footnote 170 of the same work.

11 At this point, it is important to underline that besides the *term ius naturale*, there are some instances where *ius naturae* appears instead. On this, see for example Cic. de inv. 2, 161: *Naturae ius est, quod non opinio genuit, sed quaedam in natura vis insevit, ut religionem, pietatem, gratiam, vindicationem, observantiam, veritatem*. Cf. e.g. Ludovico Valerio Ciferri: Conoscenza e concessione del diritto in Cicerone. *Revue Internationale des Droits de l'Antiquité* XLI (1994). 143[6].

> Ulp. D. 1, 1, 1, 3 (1 inst.) = Inst. 1, 2
> *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.*

This is a very famous text amongst Roman law sources and it has got really much to offer – both with respect to its textual criticism[12], an concerning its inner content, not to mention its wider context in which it is put. This set of norms, the basic idea of which goes back to the peripatetic school[13], stem from *natura* itself, where *natura* as a general expression bears several meanings. Amongst these, the most important is that *natura* was considered as the power that governs the physical universe, consequently it appears as a *creator mundi*.[14] Again, *natura* occurs in many other instances, where it all designates a certain power of a certain kind. As such, it appears as the power that defines the innate character and feelings of humans.[15] Then it appears as the power that regulates all physical conditions and requirements, such as the life span of living entities or the physical properties of animals, plants and other natural products.[16] The disciples to whom it is taught are *animalia*, that is to all living beings. As a consequence, the Latin term *animal* should be considered here in a wide sense[17], even if Ulpian himself contradicts once to his very own statement, claiming that an animal cannot be guilty of wrongdoing, because it is deficient in

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12 Some authors even consider this text as a pseudo-Ulpinian natural law, which statement – with regards to the manifold appearances of any references to ius naturale – seems to be rather far-fetched. On this cf. Wagner op. cit. (1978) 64^2, 118^4, 136, 141, etc. Contrary to this assumption see Waldstein (1988) op. cit. 702–703. Wagner asserts in the end that this instance by Ulpian is nothing more than a postclassical edition and reformulation of an original text. In detail cf. Wagner op. cit. (1978) 135 sq. This statement is hard to contradict, though, as Waldstein himself humbly admits. Cf. Waldstein (1988) op. cit. 706–707, with further evidence on the genuineness of this *locus*. Honoré himself opts for the authenticity of this text. See Tony Honoré: *Ulpian. Pioneer of Human Rights*. Oxford University Press, 2002^2. 100.

13 On this see Laurens C. Winkel: Einige Bemerkungen über das ius naturale und ius gentium. In: *Ars boni et aequi. Festschrift für Wolfgang Waldstein zum 65. Geburtstag.* Stuttgart, 1993. 443. Correspondingly cf. Dieter Nörr: *Rechtskritik in der römischen Antike*. München, C. H. Beck, 1974. 80^{150}. Contrary to this idea see Honoré (2002^2) op. cit. 31.

14 Cf. e.g. Cic. nat. deo. 2, 29: *Natura est igitur, quae contineat mundum omnem eumque tueatur, et ea quidem non sine sensu atque ratione*. Lucr. 2, 168-171: "*[...] naturam non posse deum sine numine reddunt / tanto opere humanis rationibus atmoderate / tempora mutare annorum frugesque creare / et iam cetera [...]*".

15 Cf. Cic. Mur. 4: "*[...] quod natura adfert ut eis faveamus qui eadem pericula quibus nos perfuncti sumus ingrediantur [...]*".

16 Cf. e.g. Cic. Tusc. disp. 1, 47: "*nam nunc quidem, quamquam foramina illa, quae patent ad animum a corpore, callidissimo artificio natura fabricata est [...]*"; Lucr. 2, 713–714: "*[...] at contra aliena videmus / reicere in terras naturam [...]"*.

17 Likewise see Martin Schlag: Norm und Geltung. In: *Ars boni et aequi. Festschrift für Wolfgang Waldstein zum 65. Geburtstag.* Stuttgart, 1993. 324. Contrary to this assessment cf. Winkel (1993) op. cit. 448.

reason.[18] All things considered, it results from all that have been said that this law is not peculiar to the human race, but affects all creatures.[19]

A very similar idea appears in the Nicomachean Ethics by Aristotle, where he claims:

> Arist. Eth. Nic. 1134b
> "τοῦ δὲ πολιτικοῦ δικαίου τὸ μὲν φυσικόν ἐστι τὸ δὲ νομικόν, φυσικὸν μὲν τὸ πανταχοῦ τὴν αὐτὴν ἔχον δύναμιν, καὶ οὐ τῷ δοκεῖν ἢ μή, […]"

According Aristotle's view, the community-related justice (πολιτικός δίκαιος) is of two kinds: one is natural (φυσικός), while the other is such that is in connection with laws (νομικός). A rule of justice is natural that has the same power or authority (δύναμις) everywhere (πανταχοῦ), and does not depend on people's opinion or attitude. In other words, natural justice as something universally valid doesn't depend on whether people accept it or not. The parallelism between this Aristotelian approach and that of Roman jurists (especially Gaius, and – as a consequence – later on that of Justinian) becomes clear, when we again have reference to the comparison between *ius gentium* and *ius naturale* of the Roman thought. The former stemming from *naturalis ratio* is common to all nations governed by statutes and old traditions; as a result these traditions are for the most part reflected by the statutes of a human community – as this set of norms is specifically applicable to mankind only. The latter, namely *ius naturale*, is common to all living creatures of the world, mainly because it comes from *natura* instead of *naturalis ratio*. From all these considerations, it is apparent that there must be some kind of difference, though slight, between *natura* and *naturalis ratio*, even if *ratio* itself designates 'order', which is a foundation stone of a reason. At this point, a reference to Seneca could come in useful, as he creates a methodical classification of entities with regards to *genus* and *species*.[20] Continuing Seneca's thought, it is possible to say that living creatures (*animalia*) come into two parts: one of them contains those creature that fly the sky, live in the seas and on earth. To the other one only humans belong, as they are also *animalia*. The very profound difference between these two groups is that the former lack *ratio*, which is a specialty of the latter. *Ratio* here appears as a skill that enables our species to realise and understand the natural order (*naturalis ratio*), as a setting of the scene, where all

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[18] Cf. *Oxford Latin Dictionary* op. cit. s. v. 'animal'; 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 Pizzorni (2000) op. cit. 139 and footnote 169.

[19] Cf. Ciferri (1994) op. cit. 148.

[20] Cf. Sen. Ep. (6), 58, 8-15: "*[...] quaedam animam habent nec sunt animalia. Placet enim satis et arbustis animam inesse. Itaque et vivere illa et mori dicimus. Ergo animantia superiorem tenebunt locum, quia et animalia in hac forma sunt et sata. Sed quaedam anima carent, ut saxa. Itaque erit aliquid animantibus antiquius, corpus scilicet. Hoc sic dividam, ut dicam corpora omnia aut animantia esse aut inanima*".

entities are bound to exist. This approach supports the idea according to which *ius civile*, *ius gentium* and *ius naturale* should be considered as three concentric circles, or sets.

3. Appearances of the term "iure naturali" in the Digest

Amongst those texts, where *ius naturale* appears in an explanatory or exemplificative sense, those instances are to be cited here from the Digest where the term "*iure naturali*" occurs. This form is in the ablative case, consequently via this case *ius naturale* is interpreted as a means or an instrument by which something is carried out. A first set of sources refer to the issue of slavery, or more specifically the connection between *libertas* and slavery. The background for the whole treatise in the Digest is the Stoic opinion[21] according to which God has left all men free; nature has made none a slave. In Roman legal sources it is mainly Ulpian who bears witness of this very important fact.[22] The first text covers this topic from a general aspect, while the second one is more specific with this regards.

> Ulp. D. 50, 17, 32 (43 ad Sab.)
> *Quod attinet ad ius civile, servi pro nullis habentur: non tamen et iure naturali, quia, quod ad ius naturale attinet, omnes homines aequales sunt.*

In the scope of *ius civile*, slaves are regarded as nobody, therefore they are not considered as *personae*.[23] This is, however, not true with regards to *ius naturale*, because in this scope all men are equal, as a good indication of the aforesaid Stoic influence.[24] Honoré had a very clever idea in connection with this text, when he stated that there is a contraposition of what is natural and what is artificial, just like *ius civile* is.[25] It is very interesting that Lévy himself defends this text by Ulpian (besides texts by other authors as well) claiming that any reference to *ius naturale* in the issue of slavery is valid and congruent to other texts of the subject.[26]

> Ulp. D. 1, 1, 4 (1 inst.):
> *Manumissiones quoque iuris gentium sunt. Est autem manumissio de manu missio, id est datio libertatis: nam quamdiu quis in servitute*

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[21] Cf. Arist. Rhet. 1373b: "[…] ἐλευθέρους ἀφῆκε πάντας θεός: οὐδένα δοῦλον ἡ φύσις πεποίηκεν […]". On this see also Max Kaser: *Ius gentium*. Köln–Weimar–Wien, Verlag Böhlau, 1993. 75.

[22] Honoré (2002[2]) op. cit. 88.

[23] Kaser points out that *pro nullis haberi* refers to legal capacity. Cf. Kaser (1993) op. cit. 77[315].

[24] Ernst Lévy: Natural Law in Roman Thought. *Gesammelte Schriften I.* Köln–Graz, Verlag Böhlau, 1963. 11; Honoré (2002[2]) op. cit. 81, likewise 88.

[25] Honoré (2002[2]) op. cit. 79

[26] In detail see Lévy (1963) op. cit. 14.

> *est, manui et potestati suppositus est, manumissus liberatur potestate. Quae res a iure gentium originem sumpsit, utpote cum iure naturali omnes liberi nascerentur nec esset nota manumissio, cum servitus esset incognita: sed posteaquam iure gentium servitus invasit, secutum est beneficium manumissionis. Et cum uno naturali nomine homines appellaremur, iure gentium tria genera esse coeperunt: liberi et his contrarium servi et tertium genus liberti, id est hi qui desierant esse servi.*

The primary statement in this text is that *manumissio* in general makes part of *ius gentium*, or belongs to the set of *ius gentium*. Then there is a clarification that *manumissio* means a bestowal of freedom, the etymology of which goes back to the fact that *manumissio* was effectuated by a dismissal by the hand. The reason for this etymology is that anyone in servitude, is subject to the hand and to authority, but, once manumitted, he is liberated from that authority. At this point, it is becomes clear that *ius gentium* and *ius naturale* aren't equal – there are some differences between the two, which may stem from the fact that jurists accepted the philosophical approach according to which all men were born free.[27] As a consequence, Ulpian himself points out that *manumissio* takes its origin from *ius gentium*; since, according to *ius naturale manumissio* was not known, resulting from the innate freedom of all men, therefore slavery itself was unknown. As a consequence, it could be stated that slavery is a good example of such an institution that is contrary to *natura*, yet it was accepted by *ius gentium*, which came on *ius naturale*.[28] Thus, after slavery was admitted by *ius gentium*, *manumissio* also appeared, but merely as a benefit. A very interesting classification follows these statements. Ulpian underlines that according to *ius naturale* there is only one natural name (*nomen naturale*) for everybody, that is human (*homo*). In the scope of *ius gentium*, however, there are three kinds of names, as according to *ius gentium homines* come into three parts: they can be *liberi*, or freemen, in distinction to *servi*, that is slaves, and as a third class, there are *liberti*, or freedmen, who had ceased to be slaves. With this regards it is also very interesting to cites the Institutes of Gaius in this context, in which the jurist claims that men could be freemen and slaves. Freemen are divided into freeborn and freedmen: the former gain freedom by birth, while the latter by *manumissio* from slavery. Freedmen are divided into three classes; they can be Roman citizens, *Latini*, and *peregrini*, who are close to foreign people or even to enemies.[29]

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[27] Lévy (1963) op. cit. 11–12.; Kaser (1993) op. cit. 58.

[28] Cf. Honoré (2002[2]) op. cit. 80, who says *ius gentium* encroached on *ius naturale*. See also *Oxford Latin Dictionary* op. cit. s. v. 'inuado[4b]' for a slightly different approach.

[29] Cf. Gai. 1, 9–12: "*(9) Et quidem summa divisio de iure personarum haec est, quod omnes homines aut liberi sunt aut servi. (10) Rursus liberorum hominum alii ingenui sunt, alii libertini. (11) Ingenui sunt, qui liberi nati sunt; libertini, qui ex iusta servitute manumissi sunt. (12) Rursus libertinorum tria sunt genera: nam aut cives Romani aut Latini aut dediticiorum numero sunt [...]*". With regards to the text in the Digest see also Kaser (1993) op. cit. 78.

The third slavery-related text in connection with *ius naturale* is from Tryphoninus. The solution of the case in this fragment originates basically from the previously scrutinised *locus*.

> Tryph. D. 12, 6, 64 (7 disp.)
> *Si quod dominus servo debuit, manumisso solvit, quamvis existimans ei aliqua teneri actione, tamen repetere non poterit, quia naturale adgnovit debitum: ut enim libertas naturali iure continetur et dominatio ex gentium iure introducta est, ita debiti vel non debiti ratio in condictione naturaliter intellegenda est.*

In this case, there is a master who owed money to his slave. He then duly the slave, but only after his release from slavery. After this, he wanted to bring an action against his freedman, on the basis that he believed to have been able to do so. Yet, the jurist responded to the question raised that the former master cannot bring an action for the recovery of the payment, regardless to his belief of any kind. The reason for this is that the acknowledgment of debt is according to *ius naturale*, or – as the text puts it – it is about a natural debt. Tryphoninus then compares this *debitum naturale* to freedom that exists under *ius naturale*.[30] In contrast to this, he also mentions the domination[31] of persons as such that was introduced by *ius gentium*. His decision then is based on the fact which set of norms is considered (or he considered) as superior to the other. As a result of this evaluation, Tryphoninus claims that all questions in this case should be answered with reference to *ius naturale*.[32]

Another reference to ius naturale appears in the Digest in connection with family relationship.

> Mod. D. 38, 10, 4, 2 (12 pand.)
> *Cognationis substantia bifariam apud Romanos intellegitur: nam quaedam cognationes iure civili, quaedam naturali conectuntur, nonnumquam utroque iure concurrente et naturali et civili copulatur cognatio. Et quidem naturalis cognatio per se sine civili cognatione intellegitur quae per feminas descendit, quae vulgo liberos peperit. civilis autem per se, quae etiam legitima dicitur, sine iure naturali cognatio consistit per adoptionem. Utroque iure consistit cognatio, cum iustis nuptiis contractis copulatur. Sed naturalis quidem*

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[30] Such a *debitum naturale* is considered as a legally unenforceable *obligatio naturalis*. Cf. Wolfgang Waldstein: Entscheidungsgrundlagen der klassischen römischen Juristen. *Aufstieg und Niedergang der Römischen Welt* II, 15. Berlin–New York, 1976. 86.; Kaser (1993) op. cit. 77.

[31] As for the critical remarks concerning the term '*dominatio*' see Kaser (1993) op. cit. 77[314], with further literature.

[32] Something similar comes up in another text, in which Licinius Rufinus asserts that a *pupillus*, through borrowing money, won't render himself liable by *ius naturale*. Cf. Licin. D. 44, 7, 58 (8 reg.): *Pupillus mutuam pecuniam accipiendo ne quidem iure naturali obligatur.*

> *cognatio hoc ipso nomine appellatur: civilis autem cognatio licet ipsa quoque per se plenissime hoc nomine vocetur, proprie tamen adgnatio vocatur, videlicet quae per mares contingit.*

In this text Modestinus set out to give a brief definition[33] to *cognatio*, as a relationship. This among the Romans is understood to be twofold: some connections are derived from *ius civile*, while others from *ius naturale*. On the basis of these two kinds of relationships, Modestinus gives three possible combinations or possibilities as for *cognationes*.[34] These sometimes coincide, so that the relationship by *ius naturale* and *civile* is united. And, indeed, *cognatio naturalis* can be understood to exist without *civilis*. The best example of this could be the case of a woman who has illegitimate children.[35] This shows that the origins of *cognatio* – mainly from the aspect of hereditary succession – can be found in birth itself, therefore it is closely linked with *ius naturale*, too.[36]

Cognatio civilis, however, which is considered to be *legitima* at a time, arises through *adoptio* without *iure naturali cognatio*. Then *cognatio* can exist under both laws when a union is made by marriage lawfully concluded. As for the names of these different types of *cognationes*, Modestinus himself gives a transparent nomenclature: *naturalis cognatio* is simply designated by the term '*cognatio*', while *civilis* is styled agnation, which has reference to relationship derived through males.

There is another group of sources in which the term *iure naturalis* appears. These sources are connected to the law of property.

> Marci. D. 1, 8, 2, pr. – 1 (3 inst.)
> *(pr.) Quaedam naturali iure communia sunt omnium, quaedam universitatis, quaedam nullius, pleraque singulorum, quae variis ex causis cuique adquiruntur.*
> *(1) Et quidem naturali iure omnium communia sunt illa: aer, aqua profluens, et mare, et per hoc litora maris.*

Marcianus asserts that there are entities that are common to everyone by *ius naturale*, such as the air, running water, the sea, and hence the shores of the sea.[37]

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33 Gilbert Hanard: Observations sur l'adgnatio. *Revue Internationale des Droits de l'Antiquité* XXVII (1980). 172.

34 Cf. Kaser (1993) op. cit. 81.

35 Consequently, such children have no *pater legalis*. On this see also C.van de Wiel: Les différentes formes de cohabitation hors justes noces et les dénominations diverses des enfants qui en sont nés dans le droit romain, canonique, civil et byzantin jusqu'au treizième siècle. *Revue Internationale des Droits de l'Antiquité* XXXIX (1992). 337[33].

36 Lévy (1963) op. cit. 8.; Kaser (1993) op. cit. 65.

37 A paraphrase of this text is Inst. 2, 1 pr. – 1. Cf. Kaser (1993) op. cit. 108.; Wolfgang Waldstein: «Ius naturale» nel diritto romano postclassico e in Giustiniano. In: Umberto Vincenti (a cura di): *Saggi sul diritto non scritto.* Padova, 2002. 275 and footnote 159.

> Flor. D. 1, 8, 3 (6 inst.)
> *Item lapilli, gemmae ceteraque, quae in litore invenimus, iure naturali nostra statim fiunt.*

The sequel to the Marcianus text goes on with saying that precious stones, gems, and other similar objects which we find upon the seashore also at once become ours by *ius naturale*.

The very first experience is that neither Marcianus, nor Florentinus mention 'res' in their fragments, despite the fact that they are in the title "*De divisione rerum et qualitate*".[38] In addition to this, it is highly interesting that the modes of acquisition of property are governed either by *ius civile* or *gentium*. In these texts, however, both authors claim that the use of the entities mentioned by Marcianus on the one hand, and the occupation of the objects named by Florentinus on the other are ruled by *ius naturale*.[39]

> Gai. D. 43, 18, 2 (25 ad ed. provinc.)
> *Superficiarias aedes appellamus, quae in conducto solo positae sunt: quarum proprietas et civili et naturali iure eius est, cuius et solum.*

We say that houses form part of the surface of land where they have been erected under the terms of a *conductio.* The ownership of such buildings is granted to the proprietor of the soil, in accordance with both *ius civile* and *naturale*.[40] In these texts the most apparent issue is that the jurists consider *ius naturale* and *gentium* as synonyms. Such a change in interpretation may be due to the change of notions and the change of the notional background of the two sets of *ius*.

4. Results and conclusions

From all these considerations it becomes clear that there are explicit references to *ius naturale* in the Digest, which is one of the most important sources of Roman law. There is a hint of contraction of notions, namely that of *ius naturale* and *gentium* in some instances, however, from the definition of these sets of norms given by classical jurists it is doubtless that there are incontestable boundaries between the two. It was seen then that sources on *ius naturale* come into two parts. On the one hand there are some instances, where *ius naturale* is defined or circumscribed. On the other hand, there are some texts, where *ius naturale* is used as an explanatory or exemplificative means, mainly in the ablative case. Some of these texts are general with regards to

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38 Cf. Kaser (1993) op. cit. 108.

39 Lévy (1963) op. cit. 9.

40 Cf. Kaser (1993) op. cit. 102, also with reference to the principle *superficies solo cedit*, which Kaser himself denies to be ruled by *ius gentium*.

their contents, while others are more specific and refer to a particular case. Such cases are related on the one hand to the status of personae, while others are connected to the law of property. The background for all these is the fact that any reference to *natura* and *ius naturale* stems from Stoic philosophy, the influence of which was considerable, if not predominant, not only on law, but on all walks of life.

Resulting from such diversity, the direction of the research is defined. At this point, it could be a wise decision to restrict scientific interest to the appearances of *ius naturale* in the Digest. There are though other legal sources which should be scrutinised, also, there are non-legal sources to be analysed, and furthermore, there are many interesting expressions which are merely related to *ius naturale*. As a consequence, this paper is bound to be a first step in a very complex, but rewarding work to come.