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THE NATURAL LAW RULES OF IUS COMMUNE IN THE CROATIAN LEGAL SYSTEM

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1. Introductory remarks

The purpose of this paper is to analyse the significance and role of the natural law rules of the *ius commune* tradition in the contemporary law of the Republic of Croatia.

As it is generally known, the term *ius commune* denotes the legal system that was the source of law in almost entire Europe in the medieval and early modern times. That system was formed through the reception of Roman Law, i.e. the process of gradual acceptance of the rules of Roman law contained in Justinian's codification (*Corpus iuris civilis*) as a positive law and their integration with certain elements of canon law and customary laws, with the adjustment of these rules to the needs of life and legal practice of the aforementioned periods.[1] Although *ius commune*, after centuries of continuous validity, ceased to be a formal source of law in most European countries due to the passage of modern civil codes in the 19th and 20th century, in their very essence the aforementioned codes actually represented different codifications of received Roman law, i.e. the national variations of the common European legacy. Thus, in these codified forms the tradition of *ius commune*, with all the principles, institutes and solutions belonging to it, has continued to have a crucial impact on the overall European legal development to the present day.[2] Moreover, it should be

[1] For general information on *ius commune* as a legal system, see e.g. Francesco Calasso: *Introduzione al diritto commune*. Milano, Giuffrè, 1970. Helmut Coing: *Die ursprüngliche Einheit der europäischen Rechtswissenschaft*. Wiesbaden, Franz Steiner Verlag, 1968. Id: *Europäische Grundlagen des modernen Privatrechts*. Opladen, Westdeutscher Verlag, 1986. Manlio Bellomo: *L'Europa del diritto commune*. Roma, Il Cigno GG Edizioni, 1998. Brand on van Caenegem: *European Law in the Past and the Future*. Cambridge, University Press, 2002. 13 sqq.

[2] See e.g. Peter Stein: *Roman Law in European History*. Cambridge, University Press, 1999. 104 sqq.; Reinhard Zimmermann: The Civil Law in European Codes. In: David Carey Miller – Reinhard Zimmermann (eds.): *The Civilian Tradition and Scots Law. Aberdeen Quincentenary Essays*. Berlin, Duncker&Humblot, 1997. 259 sqq.

emphasised that the tradition of *ius commune* experienced its ultimate culmination during the period in which the idea of codification dominated, owing to the German Pandectist school, the doctrines of which significantly influenced the legislation, science and practice of private law in practically all European countries in the second half of the 19th century and in the 20th century. These doctrines still form the basis of the common European private law dogmatics.[3] In addition to that, in the most recent times the process of European integration and of rendering uniform the European legal system largely renewed the interest in *ius commune* as a predecessor of this process in itself, whereby Roman legal tradition, as a common denominator of the European legal culture, became an important factor in the formation of contemporary European identity.[4]

Within this context, the purpose of the paper is to analyse the significance of the natural law rules of *ius commune* for the contemporary Croatian law. Before focusing on the topic of *ius commune* as a source of law in the contemporary Croatian law system, it is necessary to briefly explain what exactly the notion of "natural law rules of *ius commune*" refers to in the context of this paper. It refers to maxims or brocards of natural law (*ius naturale*) contained in the sources of ancient Roman Law (*regulae iuris*) or formulated in the medieval and early modern Roman legal tradition on the basis of these ancient sources. These maxims are particularly important due to the fact that they concisely express the millenarian Roman and European experience in the field of natural law as *semper aequum ac bonum*, ranging from the fundamental legal principles to concrete solutions, and their content has been incorporated into the European law systems to a large extent to this day.[5]

Starting from the statement above, and bearing in mind the usual division of sources of law into direct and indirect sources,[6] the following part of the paper will

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[3] For general information on the German pandectistic doctrine in the second half of the 19th century and the creation of the Pandect law system see e.g. Franz Wieacker: *Privatrechtsgeschichte der Neuzeit*. Göttingen, Vandenhoeck&Ruprecht,1996. 430 sqq., with references to numerous further reading.

[4] For general information on Roman law tradition as a "common denominator" of European (private) law systems in the context of the creation of the European civil law legislation see e.g. Fritz Sturm: Droit romain et identité européenne. *RIDA,* Supplément au tome XLI (1994), 147 sqq.; Rolf Knütel: Römisches Recht und Europa. *RIDA,* Supplément au tome XLI (1994), 185 sqq.; Reinhard Zimmermann: *Roman Law, Contemporary Law, European Law. The Civilian Tradition Today*. Oxford, Oxford University Press, 2001.

[5] On the significance of Latin legal maxims as one of the basic elements of the European legal tradition and legalculture see *amplius* Andreas Wacke : *Sprichwörtliche Prinzipien und europäische Rechtsangleichung. Orbis iuris romani,* 1999/5. 174 *sqq*.; cf. Detlef Liebs : *Lateinische Rechtsregeln und Rechtssprichwörter.* München, Beck, 1991. 9 *sqq.; Janez* Kranjc: L atinski pravni reki [Latin Legal Maxims]. Ljubljana, 1998. 5 sqq; on the definition of *ius naturale* as the law which is *semper aequum ac bonum*, originally contained in Paul. D. 1, 1, 11, see e.g. Der Begriff des *ius naturale* im Römischen Recht, Basel, 1952. 85 sqq.; Wolfgang Waldstein: Entscheidungsgrundlagen der klassischen römischen Juristen. In: Hildegard Temporni – Wolfgang Haase (Hg): *ANRW*. Berlin–New York, Walter de Gruyter, 1976. 82 sqq.

[6] On the division in question, see Mira Alinčić et al.: *Obiteljsko pravo [Family Law]*. Zagreb, Narodne novine, 2007. 8 sqq.

prima facie briefly comment on the use of the natural law rules of *ius commune* as an indirect source of law, particularly in the legislative procedure of the Croatian Parliament and in the Croatian legal practice. Subsequently, the paper explores the possibility of treating the natural law rules of *ius commune* as a direct source of law in the contemporary Croatian legal system. The final part of the paper especially questions whether a more intense application of those natural law rules of *ius commune* that contain legal principles common to almost all European legal systems can contribute to a further Europeanization of the contemporary Croatian legal system.

2. Natural law rules of *ius commune* as an indirect source of contemporary Croatian law

In order to analyse the use of natural law rules of *ius commune* as an indirect source of contemporary Croatian law, the author has conducted a brief research of the use of these rules in the legislative procedure of the Croatian Parliament and in the Croatian legal practice. The fact that, in the process of passing a certain legal regulation, the legislator referred to a particular natural law rule of *ius commune* as its foundation does not mean that the rule in question thus obtained the status of a positive law *eo ipso*. However, in the case of application of the legal norm in question, judicial practice will indisputably be able to refer to the cited *ius commune* rule as its *ratio legis*, which is not an isolated case in the Croatian legal life, as this paper will show.

In this context, it should be emphasised that there are some cases in which the Cabinet of the Republic of Croatia as a sponsor of a bill or individual Members of Parliament in the legislative procedure directly refer to natural law rules of *ius commune*. Thus, for example, in the argumentation of the final version of the The Act on Ownership and other Real Property Rights of July 1996, the sponsor explicitly mentions the natural law principle *superficies solo credit* in the Latin language, explaining the necessity of its reintroduction into the Croatian real property law system with the reasons of "following the European legal tradition" and the needs of "entrepreneurship and market economy". The principle in question has been incorporated in the Art. 9 of the aforementioned Law.[7] The Supreme Court of the Republic of Croatia also explicitly used that rule of *ius naturale* in the Latin language.[8]

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[7] See the argumentation of the final proposal of the Act on Ownership and Other Real Property Rights, in: Mladen Žuvela (ed.): *Zakon o vlasništvu i drugim stvarnim pravima [The Law on Ownership and Other Real Property Rights]*, Zagreb, 1997. 312.; on the natural law character of the *superficies solo credit* rule, originally contained in Gai. 2, 73. see Maschi: *La concezione naturalistica del diritto e degli istituti giuridici romani.* Milano, 1937. 284 sqq.; Voggensperger (n. 5) 42 sqq.; Max Kaser: *Ius gentium*. Köln–Weimar–Wien, Böhlau 1993. 102 sq.; Wolfgang Waldstein: Naturrecht bei den klassichen römischen Juristen. In: Dorothea Mayer-Maly – Peter Simons (Hrsg.): *Das Naturrechtsdenken heute und morgen. Gedächtnisschrift für René Marcic*. Berlin, Duncker-Humblot, 1983. 245 sq.

[8] Rev-1584/1997-2.

The following parliamentary debate of an exceptional interest, during which the natural law rules of *ius commune* as a normative category were referred to, related to one of the central issues of the Croatian family law reform that has been conducted in the recent years: should the *mater semper certa* principle – rooted in the Roman and European legal tradition for almost two thousand years – continue to remain in force, or is it necessary to come up with a better solution more in tune with the time, taking into consideration the development of so-called reproductive technologies? Thus, during the debate on the regulation of the principle in question in the Family Act of 2003, one member of Parliament explicitly argued that "since Roman times and Roman law, the mother has been the woman who gave birth to the child", and that "the countries with a high level of democracy and rule of law have the legal definition of mother that is in accordance with Roman law".[9] With the Family Act of 2004, the legislator has, after a short period of experimentation with a different solution, accepted the understanding explained above, and restored the *mater semper certa* principle, thus confirming its exceptional ethical and legal vitality.[10] Within the context of this restoration, the Croatian family law doctrine explicitly mentioned that the *mater semper certa* rule is reintroduced in the positive law according to the natural law principle *de natura condere iura*.[11] Additionally, it is interesting to point out that the Constitutional Court of the Republic of Croatia directly referred to that natural law rule of *ius commune* in the Latin language.[12]

In this context, it is particularly interesting to point out *The Authentic Interpretation of the Article 3, Paragraph 1 of the Act on the Interest on Arrears* (The Official Gazette, No. 28/96), which interpretation was given by the Croatian Parliament at its session held on April 30, 2004. This interpretation literally emphasises the following rule of *ius commune* in which the concept of *natura* is included: "Ever since Justinian's *Digesta*, the interests are considered to be the fruit of the principal ("*Usura non natura pervenit, sed iure percipitur*"). But they are not inherent to the nature of the principal, than acquired by certain right as "*fructus civiles*".[13] The aim of the authentic interpretation was – using, *inter alia*, Justinian's *Digesta* as a legal source – to discourage the widespread practice of calculating interest on interest, i.e.

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9 Izvješća Hrvatskog sabora [The Croatian Parliament Reports] 2003/14. No. 373, 30.

10 On the aforementioned principle in the context of the reform of the Croatian family law, see Dubravka Hrabar: Što je s podrijetlom djeteta ako *mater non semper certa est* [What about the Origine of the Child if *mater non semper certa est*]. In: Dubravka Hrabar (ed.): *Obiteljski zakon. Novine, dvojbe i perspektive [Family Act. Novelties, Doubts and Perspectives]*, Zagreb, Narodne novine d.d., 2003. 23 sqq.; on the *mater semper certa est* rule, originally contained in Paul. D. 2, 4, 5, see Liebs (1991) op. cit. 118.; Kranjc (1998) op.cit. 150 sq.

11 See Dubravka Hrabar: Pobrkani lončići: Obiteljski zakon, majčinstvo i očinstvo [*Qui pro quo*: Family Act, Maternity and Paternity], Vjesnik (Herald), 11. July 2003.

12 U-I-11/1993; U-I-904/1995.

13 Narodne Novine [The Official Gazette of Republic of Croatia] 58/04. The rule in question is originally found in Pap. D. 6, 1, 62 pr.

to eliminate the economic practice that was contrary to the principle of prohibiting anatocism, i.e. against the rule *usurae usurarum non possunt*.[14]

The aforementioned examples are certainly not the only cases of referring to the natural law rules of *ius commune* in the parliamentary procedure and legal practice, however, they undoubtedly prove that the Croatian legislator or judge takes into consideration these *ius commune* rules as a relevant normative content. However, in order for that practice to expand to even wider and more precisely defined proportions with the purpose of improving the Croatian legal system, taking also into consideration its further Europeanization[15], it is our belief that it would be useful to attempt to answer the question of whether there is a positive legal basis for a direct application of the natural law rules of *ius commune* in the Croatian legal system.

3. The natural law rules of ius commune as a direct source of the contemporary Croatian law

In order to provide an adequate answer to that question, the only possible way is to start from the text of the *Act on the Application of Legal Rules passed before April 6th 1941* (*Zakon o načinu primjene pravnih propisa donesenih prije 6. travnja 1941. godine*) (hereinafter: ZNPP), which came into force on December 31st 1991[16]. According to the provisions of the ZNPP, legal regulations that were in force on April 6th 1941 are to be applied in the Republic of Croatia as legal rules in the relations that are not regulated by positive legal order of the Republic of Croatia, provided that they are in conformity with the Croatian constitution, and if they have been applied in the Republic of Croatia until the day on which the ZNPP came into force (Article 1-2 ZNPP). The basic *ratio* of the ZNPP is to fill in the legal gaps that exist in the legal system of the Republic of Croatia by the application of legal rules that were in force on the present-day territory of the Republic of Croatia on April 6, 1941.[17] The ZNPP actually defined that all legal regulations from all legal orders that were in force in Croatia on April 6th 1941 can become a subsidiary law if they fulfil the following three conditions: 1) that they were applied on the territory of the present-day Republic of Croatia until December 31st 1991; 2) that there is a legal gap on which an individual legal regulation can be applied; 3) that they are in conformity with the Constitution and the laws of the Republic of Croatia.

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[14] On the principle of prohibiting anatocism and the significance of the *usurae usurarum non possunt* principle in the context of the contemporary Croatian civil law, see Martin Vedriš – Petar Klarić: *Građansko pravo [Civil Law]*. Zagreb, Narodne Novine, 2003. 386 sqq.

[15] On the application of the natural law rules of *ius commune* as a manner of Europeanization of the contemporary Croatian legal system see infra under 4.

[16] *Narodne Novine* [The Official Gazette of Republic of Croatia] 73/91.

[17] On ZNPP see Vedriš–Klarić (2003) op. cit. 19 sq.; Nikola Gavella et al.: *Hrvatsko građanskopravno uređenje i kontinentalnoeuropski pravni krug* [Croatian Civil Law Order and Continental European Legal Family]. Zagreb, Pravni fakultet u Zagrebu, 1994. 170 sq.

Among these three conditions, only the meaning of the first of them seems to be disputable. In our opinion, the only sensible interpretation is that all the rules that were positive law on April 6th 1941 can be applied as a subsidiary source of law if they were in force at any period of time between April 6th 1941 (*dies a quo*) and December 31st 1991 (*dies ad quem*) on the territory of the present-day Republic of Croatia. Through the application of any other criterion, as it was explained in more detail elsewhere,[18] the ZNPP could not fulfil its purpose at all.

Taking into consideration the aforementioned context, it should be pointed out that no civil code has been passed yet in the Republic of Croatia, i.e. the civil law system is regulated by partial acts and thus fragmentised in the separate branches of law (real property law; the law of obligations; inheritance law etc.).[19] Therefore the systematic regulation of the general part of civil law as a common basis of all other civil law segments does not exist, which *eo ipso* encourages the debate on the possibilities of a more direct and extensive use of the rules of *ius commune*, including the natural law ones, especially as the general principles of law, than it is the case in the countries that have civil codifications.[20]

However, with regard to the central subject of the paper, i.e. the question of whether the natural law rules of *ius commune* can be a source of positive law in the Republic of Croatia, it is of far greater importance to consider the issue of whether the ZNPP enables the application of the *ius commune* rules as the valid law in any way?

3.1. The *ius commune* rules as "the principles of natural law" in the sense of § 7 ABGB

In the aforementioned context, the attention should primarily be drawn to § 7 ABGB. Briefly speaking, the said paragraph determines that "the natural law principles" should be applied as a source of law in all the situations in which a certain legal case cannot be solved by the mere application of positive legal regulations or methods. Since the contemporary Croatian regulations do not contain provisions what to do in the situations when a certain legal case cannot be solved in an indisputable manner by the application of positive law, it should be concluded that in such situations – based

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[18] See amplius Marko Petrak: Rimska pravna pravila kao izvor suvremenog hrvatskog obiteljskog prava [Roman Legal Rules as a Source of Contemporary Croatian Family Law]. *Zbornik Pravnog fakulteta u Zagrebu* [Collected Papers of the Faculty of Law in Zagreb], 2005/3–4. 602 sqq.

[19] On the need for the creation of the Croatian civil code see Nikola Gavella: Teze za izradu hrvatskog građanskog zakonika [Theses for the Making of the Croatian Civil Code]. *Zakonitost [Legality],* 1992/ 46. 751 sqq.

[20] For general information on *ius commune* rules that incorporate general principles of law and their function in contemporary private law systems see amplius Sandro Schipani: *La codificazione del diritto romano commune*. Torino, Giappichelli, 1999. 83 sqq., with references to further reading; cf. Fernando Reinoso Barbero: El derecho romano como *desideratum* del derecho del tercer milenio: los principos generales del derecho. *Roma e America. Diritto romano comune. Rivista di diritto dell'integrazione e unificazione del diritto in Europa e in America Latina* 1997/3. 23 sqq.

on the ZNPP – the § 7 ABGB, i.e. the "principles of natural law", should be applied. Bearing in mind the fact that the mentioned paragraph is still applied in the Austrian private law system[21], it is necessary to determine what are "the principles of natural law" in their substance. According to the older Austrian doctrine, the principles in question are largely contained in Roman law and *ius commune*[22]: *ius gentium* of the Romans actually represents natural law as such.[23]. Such an opinion was embraced by the Croatian doctrine until World War II, and it is of great importance to emphasise that in the context of the possible application of § 7 ABGB in the Republic of Croatia today. Thus, according to Ivan Maurović[24], the ABGB editors understood natural law as "*ratio naturalis*, which they considered as the immutable foundation of Roman Law and Austrian code".[25] It is not difficult to comprehend that Maurović took into consideration a well-known Gai's concept of *ius gentium*: "[…] the law that natural reason (*naturalis ratio*) establishes among all mankind is followed by all peoples alike, and is called *ius gentium* as being the law observed by all mankind".[26] The understanding that "natürliche Rechtsgrundsätze" from of § 7 ABGB are primarily natural law principles formed on the basis of the *ius gentium* rules in the ancient times and *ius commune* rules in the medieval and modern continental Europe, was once again – thus ending a long period of the domination of one-dimensional positivistic legal approach in the interpretation of the principle in question – convincingly advocated by Wolfgang Waldstein, one of the greatest contemporary scholars of Roman law.[27] Based on this short analysis of the concept of "principles of natural law" from § 7 ABGB, it should be concluded that the *ius commune* rules that contain

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21 On the application of § 7 ABGB in the contemporary Austrian legal system, see e.g. Theo Mayer-Maly: Die Natürlichen Rechtsgrundsätze als Teil des geltenden österreichischen Rechts. In: Dorothea Mayer-Maly – Peter Simons (Hrsg.): *Das Naturrechtsdenken heute und morgen. Gedächtnisschrift für René Marcic*. Berlin, Duncker & Humblot, 1983. 853 sqq., with references to further reading; cf. also Michael Schwimmann (ed.): *Praxiskommentar zum ABGB samt Nebengesetzen, Bd. 1.*, Wien, Orac, 1997. 58 sq.

22 See e.g. Leopold Pfaff – Franz Hofmann: *Commentar zum österreichischen allgemeinen bürgerlichen Gesetzbuche, Bd. I.* Wien, Manz, 1877. 206 sq.: "[…] überhaupt ist das röm Recht größentheils ein in seinen Folgerungen dargestelltes Naturrecht".

23 Cf. Joseph Unger: *System des österreichischen allgemeinen Privatrechts*. Leipzig, Breitkopf und Härtel, 1876. 67 sq.

24 On the life and work of Ivan Maurović (1873-1952), professor of Civil Law at the Faculty of Law in Zagreb, see Zlatan Stipković in: Gavella et al. (1994) op. cit. 46 sq.

25 Quote from Ivan Maurović: Nacrt predavanja o općem privatnom pravu. Prva knjiga: opći dio [An Outline of a Lecture on General Private Law, Book One: General part], Zagreb, Knjižara St. Kugli, 1919. 13.

26 Gai. Inst. 1. 1: […] *quod vero naturalis ratio inter omnes homines constituit, id apud omnes populos peraeque custoditur vocaturque ius gentium, quasi quo iure omnes gentes utuntur*; on the significance of Roman *ius gentium* for the contemporary European legal system, see Wolfgang Waldstein: *Ius gentium* und das Europäische *ius commune*. *Index. Quaderni camerti di studi romanistici*, 1998/26. 453 sqq.

27 See e.g. Wolfgang Waldstein: Vorpositive Ordnungselemente im Römischen Recht. *Österreichische Zeitschrift für öffenliches Recht* 1967/17. 1 sqq.; Waldstein (1983) op. cit. 239 sqq.

the principles of natural law can – based on the ZNPP – be a subsidiary source of law in the Republic of Croatia.

3.2. Natural law rules of *ius commune* as a source of the law valid on April 6th 1941 on the Croatian territories belonging to the former Hungarian legal area

It should, however, be emphasised that the ABGB did not regulate private law order on the entire territory of the present-day Republic of Croatia on April 6th 1941. In certain areas, to be more precise in Međimurje (Muraköz) and Baranja (Baranya), the Hungarian private law was in force at that time[28], based on Werbözy's *Tripartitum* from 1514, as well as on the numerous later regulations that together formed the *Corpus iuris Hungarici*, as a collection of the entire Hungarian law.[29] In the time of socialist Yugoslavia, owing to the acceptance of the legal-political principle of "the unity of law"[30], individual segments of Hungarian private law were applied as subsidiary law on the entire Croatian territory until the independence of the Republic of Croatia in 1991. Following Croatian independence, the judicial practice– based on the ZNPP – continued to apply certain rules of Hungarian private law as the subsidiary law (e.g. in the area of land-registry law), still using the principle of "the unity of law" as the relevant criterion.[31] In this context, it is interesting to note that the Republic of Croatia is the only state in which it is still possible to apply the *Corpus iuris Hungarici*, since private law regulations contained in the collection in question were derogated long ago in Hungary and Slovakia by the civil codes passed after World War II.[32]

Where lies the connection between the fact that the old Hungarian law can still be applied as Croatian *ius in subsidio* and our quest of a legal basis for the applicability of the natural law rules of *ius commune* in present-day Croatia? Although Hungarian law resisted the direct reception of Roman law for several centuries[33], the

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28 On the six different legal areas in interwar Kingdom of Yugoslavia, see Giannantonio Benacchio: La circolazione dei modelli giuridici tra gli Slavi del sud. Padova, CEDAM, 1995. 126 sqq.

29 On the origin, significance and structure of the *Corpus iuris Hungarici* see Mihajlo Lanović: *Privatno pravo Tripartita [*Private Law of Tripartitum]. Zagreb, Tipografija, 1929. 93 sqq; generally about the sources of Hungarian private law applied in certain areas of interwar Yugoslavia, see e.g. Ivo Milić: *Pregled madžarskog privatnog prava u poredjenju sa austrijskim građanskim zakonikom [*A Survey of Hungarian Private Law in Comparison with the Austrian Civil Code]. Subotica, Samozal, 1921. 7 sqq.

30 On the principle of "the unity of law", see Nikola Gavella: Građansko pravo u Hrvatskoj i kontinentalno-europski pravni krug [Civil Law in Croatia and Continental European Legal Family]. *Zbornik Pravnog fakulteta u Zagrebu* [Collected Papers of the Faculty of Law in Zagreb], 1993/43. 358 sq.

31 See Tatjana Josipović in: Gavella et al. (1994) op. cit. 130. n. 354.

32 Civil code was passed in Hungary in 1959, and in the Czechoslovakia in 1950; cf. Gábor Hamza: *Die Entwicklung des Privatrechts auf römischrechtlicher Grundlage unter besonderer Berücksichtigung der Rechtsentwicklung in Deutschland, Österreich, der Schweiz und Ungarn*. Budapest, Andrássy Gyula Deutschsprachige Universität, 2002. 139 sqq; 184.

33 On the reasons for resisting the reception of Roman Law in Hungary, see e.g. Imre Zajtay: Sur le rôle du droit romain dans l'évolution du droit hongrois. In: *L'Europa e il diritto romano. Studi in memoria*

Hungarian judicial practice and doctrine has from the second half of the 19th century onwards – due to the withering away of the feudal relations and consecutive failed attempts to pass a modern national civil code[34] – gradually elevated *ius commune*, including its natural law elements, to the level of a subsidiary source of law.[35] The Croatian doctrine between the two World Wars also supported the understanding that *ius commune* is a subsidiary source of Hungarian private law, and should be emphasised in the context of determining the scope of the possible application of the natural law rules of *ius commune* in the Republic of Croatia today. Thus, for example, Ivo Milić resolutely emphasises in the very beginning of his work *A Survey of Hungarian Private Law in comparison with the Austrian Civil Code* that where "[…] there are no positive regulations, the principles of *ius commune*, i.e. pandect law should be applied without hesitation, as they formed the basis of the Austrian civil code and […] Hungarian private law".[36] Such a situation with regard to the legal sources of the Hungarian private law did not change until April 6th 1941.

Within this context, it is also important to note that *Corpus iuris Hungarici* contained as its part the final title of the last book of Justinian's *Digesta* (D. 50, 17), which is entitled *De diversis regulis iuris antiqui*. This title, undoubtedly one of the most significant parts of Justinian's codification, contains 211 short fragments by Roman lawyers, summarising in the form of *regulae* the basic Roman legal principles on which the subsequent European legal culture and European private law systems were based to a large extent.[37]

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di Paolo Koschaker, Vol. II. Milano, Giuffré, 1954. 183 sqq.; György Bónis: Einflüsse des römischen Rechts in Ungarn. *Ius romanum medii aevi*, Pars V, 10, Mediolani, 1964, 1 sqq., napose 111 sqq; András Földi: Living Institutions of Roman Law in Hungarian Civil Law. *Helikon,* 1988/28. 364 sqq.

34 On various attempts, proposals and drafts of the codification of civil law in Hungary in the 19th century and the first half of the 20th century, see e.g. János Zlinszky: Die historische Rechtsschule und die Gestaltung des ungarischen Privatrechts im 19. Jahrhundert. In: *Studia in honorem Velimirii Pólay septuagenarii. Acta universitatis Szegediensis. Acta juridica et politica, Tomus XXXIII., Fasciculus 1-31 (1985).* 433 sqq.; cf. Ernst Heymann: Das ungarische Privatrecht und der Rechtsausgleich mit Ungarn. Tübingen, J.C.B. Mohr (Paul Siebeck), 1917. 9 sqq.; Hamza (2002) op. cit. 135 sqq.

35 On the gradual acceptance of *ius commune* as subsidiary law in the Hungarian private law system, see e.g. Gábor Hamza: Sviluppo del diritto privato ungherese e il diritto romano. In: *Ivris vincvla. Studi in onore di M. Talamanca*. Napoli, Jovene, 2001. 357 sqq.; cf. Heymann (1917) op. cit. 12 sqq; Földi (1988) op. cit. 366 sq.; Hamza (2002) op. cit. 134 sq.

36 Quoted Milić (1921) op. cit. 1; on the life and work of Ivo Milić (1881-1957), professor of Roman Law, Private International Law and Civil Procedural Law at the Faculties of Law in Subotica and Zagreb, see Magdalena Apostolova Maršavelski: Rimsko i pandektno pravo na Pravnom fakultetu u Zagrebu [Roman and Pandect Law at the Law Faculty in Zagreb]. In: Zeljko Pavić (ed.): *Pravni fakultet u Zagrebu II* [Law Faculty in Zagreb II]. Zagreb, 1996. 237.

37 On the title *De diversis regulis antiqui*, its structure, contents and significance in the European legal tradition, see amplius Peter Stein: The Digest Title, *De diversis regulis iuris antiqui* and the General Principles of Law. In: Ralph A. Newman (ed.): *Essays in Jurisprudence in Honor of Roscoe Pound*. Indianopolis–New York, The Bobbs-Merrill Co. Inc. 1962. 1 sqq., with instructions for further reading.

It is particularly interesting to note that *Digesta* 50, 17 also includes certain fundamental natural law principles, e.g. *secundum naturam est commoda cuiusque rei eum sequi, quem sequentur incommoda* (D. 50, 17, 10); *quod ad ius naturale attinet, omnes homines aequales sunt* (D. 50, 17, 32); *quae rerum natura prohibentur, nulla lege confirmata sunt* (D. 50, 17, 188, 1) or *iure naturae aequum est neminem cum alterius detrimento iniuria fieri locupletiorem* (D. 50, 17, 206).[38]

The aforementioned title of the *Digesta* was included in the very first edition of *Corpus iuris Hungarici* from 1581 by its editor, Hungarian humanist *Iohannes Sambucus* (János Zsámboki)[39], and thus the legal rules contained in it became a source of law in the Lands of the Crown of Saint Stephen. The rules in question continued to be an integral part of the Hungarian private law for centuries.[40] They were also undisputedly a source of law on April 6th 1941 on the Croatian territories belonging to the former Hungarian legal area (Međimurje, Baranja). Therefore we believe that they should be also treated as potential subsidiary law in the Republic of Croatia in the sense of norms of the ZNPP, including its natural law aspects.

Having in mind all of these facts, it can be concluded that the natural law rules of *ius commune* – under conditions determined by the ZNPP – could be applied as a source of contemporary law in the Republic of Croatia through two different "channels". Firstly, the *ius commune* rules that contain the principles of natural law are applicable based on § 7 ABGB. Secondly, owing to the fact that *ius commune* was a source of private law on April 6th 1941 in the former Hungarian legal area of Croatia, the entire corpus of the natural law rules of *ius commune* – including the *Digesta* 50,17 – can represent a potential source of contemporary Croatian law.

IV. Concluding remarks

Based on the conducted analysis, it seems that sufficient arguments were presented to support the statement that the natural law rules of *ius commune*, according to the provisions of the ZNPP, can have the status of a source of contemporary Croatian law.

Even though, in a formal sense, these rules only have the status of a subsidiary source of law, in terms of their content they can be of fundamental importance for the contemporary legal system, as a series of these rules contain the fundamental natural law principles on which a range of the most important legal institutes are founded. Thus, for example, the *superficies solo credit* rule as a basic principle of the Croatian real property law is relevant for the legal regulation of almost all institutes of the contemporary real property law, including those that did not originate under the Roman legal tradition (e.g. floor ownership, land-registry books etc.).[41]

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38 On the natural law character of these rules contained in *Digesta* 50,17 see e.g. Waldstein (1976) op. cit. 86 sqq.; Wolfgang Waldstein*: Saggi sul diritto non scritto*. Padova, CEDAM, 2002. 67 sqq.

39 See Mihály Mora: Über den Unterricht des römischen Rechtes in Ungarn in den letzten hundert Jahren. *Revue internationale des droit de l'antiquité (RIDA)* 1964/11. 413.; Hamza (2002) op. cit. 133.

40 Cf. Lanović (1929) op. cit. 96.

41 On the *superficies solo credit* rule cf. supra under 2.

Therefore the reception of the *ius commune* rules as a subsidiary law by the judicial practice and legal doctrine could contribute to a relevant extent to a correct interpretation and application of contemporary legal regulations, and the legal practice could directly apply the natural law principles contained in these rules to a much larger and more precisely defined extent than it was the case so far, especially in the situations where there is a need to fill in the legal gaps or provide a more precise interpretation of the existing legal norms[42].

Taking the comparative law perspective, it should be pointed out that such an application of *ius commune*, including its natural law aspects, represents by no means a *unicum* in the European or global context. Indeed, today *ius commune* represents a subsidiary source of law in a dozen European and non-European countries, and judicial practice in these countries often bases its decisions directly on the sources of that law, starting from Justinian's codification[43]. Additionally, in the countries in which *ius commune* no longer represents a source of positive law, the judicial practice frequently refers to the numerous *ius commune* rules, including the natural law ones, particularly in the meaning of legal principles[44]. In the aforementioned context, it is particularly interesting to point out that the EU judicial bodies, as well as

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42 Generally on the significance of the *ius commune* rules that incorporate the general principles of law see the literature mentioned under supra n. 20.

43 Thus with regard to the European countries, *ius commune* is a subsidiary source of positive private law in individual parts of the United Kingdom (Scotland, Channel Islands), Malta, San Marino, Andorra, and in a strictly limited scope in Spain and Germany. With regard to non-European countries, *ius commune* is *in subsidio* applied in the entire area of South Africa (South African Republic, Zimbabwe, Botswana, Lesotho, Swaziland, Namibia), as well as in Sri Lanka and Guiana; on *ius commune* as a contemporary positive law in the form of a survey according to individual countries of the world see Jeroen Chorus: Römisches Recht auf dem Südpol und anderswo. In: Johannes Emil Spruit: (ed.): *Coniectanea Neerlandica Iuris Romani. Inleidende Opstellen over Romeins Recht*, Zwolle, Tjeenk Willink, 1974. 139 sqq.; see also Evans-Jones (ed.): *The Civil Law Tradition in Scotland.* Edinburgh, The Stair Society, 1995. (for Scotland); Willem Zwalve: *Snell v. Beadle*. The Privy Council on Roman law, Norman customary law and the *ius commune*. In: Luuk de Ligt (ed.): *Viva vox iuris romani. Essays in honour of J.E. Spruit.* Amsterdam, Gieben, 2002. 379 sqq. (for Channel Islands); Michaela Reinkenhof: *Die Anwendung von ius commune in der Republik San Marino. Einführung in die Grundlagen und Erbrecht*. Berlin, Duncker & Humblot, 1997. (for San Marino); Fernando Reinoso Barbero: España y el derecho romano actual. *Labeo. Rassegna di diritto romano*, 1986/32. 310 sqq. (for Spain); Max Kaser – Rolf Knütel: *Römisches Privatrecht*. München, Beck, 2003. 14 sqq. (for Germany); Reinhard Zimmermann: *Das römisch-holländische Recht in Südafrika. Einführung in die Grundlagen und* usus hodiernus. Darmstadt, Wissenschaftliche Buchgesellschaft, 1983. (for South Africa); Marleen van den Horst: *The Roman-Dutch Law in Sri Lanka*. Amsterdam, Free University Press, 1985. (for Sri Lanka); Jan Smits: *The Making of European Private Law. Towards a Ius Commune Europaeum as a Mixed Legal System*. Antwerp–Oxford–New York, Intersentia, 2002. 139. (for Guiana).

44 See e.g. Jean Carbonnier: *Usus hodiernus Pandectarum*. In: *Festschrift für I. Zajtay*. Tübingen, J.C.B. Mohr (Paul Siebeck), 1982. 107 sqq. (for France); G. Micali: Il diritto romano nella giurisprudenza della Corte Suprema di Cassazione. *Giurisprudenza it.*, 145, Parte IV (1993) 489 sqq. (for Italy); Witold Wolodkiewicz: Czy prawo rzymskie przestało istnieć? Kraków, Zakamycze, 2003. (for Poland); cf. Samuel Astorino: Roman Law in American Law: Twentieth Century Cases of the Supreme Court. *Duquesne Law Review*, 2001–2002/40. 627 sqq. (for the USA).

international courts, have directly refered to the legal principles of *ius commune*, not excluding the natural law ones, in a relevant number of their cases[45]. Therefore it is indisputable that the Croatian legal practice can also creatively use the *ius commune* rules in concrete cases, especially those natural law rules that contain general legal principles, by the application of § 7 ABGB or the *Digesta* 50,17 in the sense of norms of the ZNPP.

Proceeding from the fact that the *ius commune* rules formulated as the Latin legal maxims represent a traditional concise expression of the very essence of the European legal tradition and culture[46], a final question arises: to what an extent could their more extensive application, including its natural law aspects, contribute to a further Europeanization of the Croatian legal system? In the recent detailed analyses of the application of the *ius commune* rules by the judicial bodies of the European Union, both in the cases of the existence of legal gaps in the European legal order, as well as with the aim of providing a more precise interpretation of its existing legal norms, it is particularly emphasised that a systematic application of those rules as general legal principles common to all national European legal systems that belong to the *ius commune* tradition represents, together with the different types of legislative acts, one of the ways to further harmonisation and/or unification of the European legal area[47].

In our view, one of the possible ways to improve the process of Europeanization of the national law systems is to recognize the harmonising effect of natural law rules of *ius commune* which are to be found in the judicial acts of the European Court of Justice or the European Court of Human Rights (e.g. *accesorium sequitur*

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[45] On the application of the Roman legal rules or *ius commune* rules and the legal principles contained in them by the judicial bodies of the EU see amplius Rolf Knütel: *Ius commune* und Römisches Recht vor Gerichten der Europäischen Union. *Juristische Schulung*, 1996/9. 768 sqq.; J. Michael Rainer: Il Diritto romano nelle sentenze delle Corti europee. In: Danilo Castellano (ed.): *L'anima europea dell'Europa*. Napoli, Ed. Scientifiche Italiane, 2002. 45 sqq.; Francisco J. Andrés Santos: Epistemological Value of Roman Legal Rules in European and Comparative Law. *European Review of Private Law,* 2004/3. 347 sqq.; on the application of these rules by international courts see e.g. Randal Lesaffer: Argument from Roman Law in Current International Law: Occupation and Acquisitive Prescription. *European Journal of International Law,* 2005/16. 25 sqq.; cf. Christian Baldus: *Regelhafte Vertragsauslegung nach Parteirollen im klassischen römischen Recht und in der modernen Völkerrechtswissenschaft: zur Rezeptionsfähigkeit römischen Denkens.* Frankfurt a. M., Peter Lang, 2000.

[46] Cf. Kranjc (1998) op. cit. 5.; Wacke (1999) op. cit. 174 sqq.

[47] See e.g. Knütel (1996) op. cit. 768 sqq.; Rainer (2002) op. cit. 45 sqq.; Santos (2004) op. cit. 347 sqq., which papers provide further analyses of the individual cases in which the *ius commune* rules were applied in the judicial practice of the EU; cf. also Wacke (1999) op. cit. 174 sqq., who particularly emphasises the role of Latin legal maxims and the legal principles contained in them in the process of the Europeanization of private law.

principale[48]*; mater semper certa*[49]; *neminem laedere*[50]; *superficies solo cedit*[51]; *ubi commoda ibi incommoda*[52] etc.) and to use them systematically in the national judicial practice. Such an approach could prove *in concreto* that there is "[…] ein Naturrecht, das die Rechtserfahrungen aller Kulturvölker sammelt, die Europa aufbauen geholfen haben".[53]

Therefore a possible wider scope of the application of the natural law rules of *ius commune* in the Croatian judicial practice would not simply represent a nostalgic quest for the hidden treasure of the European legal tradition, but a part of a long-term creative effort for the Europeanization of the contemporary legal orders on firm foundations of the common legal culture.

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48 See e.g. judgment of the Court of Justice, Case C-6/01; on the natural law character of the *accesorium sequitur principale* rule, originally contained in Ulp. D. 34, 2, 19, 13, see Waldstein (1983) op. cit. 245 sq.

49 See e.g. judgment of the European Court of Human Rights, Case *Johnston and others* v. *Ireland*, No. 9697/82; judgment of the European Court of Human Rights, Case *Kearns* v. *France*, No. 35991/04*;* on the *mater semper certa* rule cf. supra under 2.

50 See e.g. opinion of Mr Advocate General Tesauro, joined cases C-46/93 and C-48/93; Opinion of Mr Advocate General Trabucchi delivered on 3 April 1974, Case C-169/73; on the natural law character of the *neminem laedere* rule, originally contained in Ulp. D. 1, 1, 10, 1, cf. e.g. Wolfgang Waldstein: *Teoria generale del diritto. Dall' antichità ad oggi*. Roma, Pontificia Università Lateranense, 2001. 88 sqq.

51 See e.g. decision of the European Court of Human Rights, Case *Rogoziński and others v. Poland*, No. 13281/04; on the *superficies solo cedit* cf. *supra* under 2.

52 See e.g. opinion of Advocate General Trstenjak, Case C-467/08; opinion of Mr Advocate General Saggio, Case C-89/96; opinion of Mr Advocate General Mancini, Case C-316/86; on the *ubi commoda ibi incommoda* rule cf. supra under 3.2.

53 Cit. Paul Koschaker: *Europa und das Römische Recht*. München–Berlin, Beck, 1958. 346; cf. Wolfgang Waldstein: Über das Wesen der römischen Rechtswissenschaft. *Juristische Blätter*, 1966/88. 11.