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The System of Roman Law as Common Heritage of Mankind

El sistema del derecho romano como patrimonio común de la humanidad

Abstract: Roman law shows, from its origins, an obvious propensity for universality. That is clearly manifested, at the 'foundation' of the system, in the Constitutions with which Justinian accompanies the launching of the *Corpus Iuris Civilis*, but it undoubtedly goes back to the age of Romans' identification of *ius gentium*, at the basis of which we find the *naturalis ratio*. State-legalism has not been able to cut off this umbilical cord with Roman law and with the natural reason supporting it. Roman law, still in force though no longer effective, is the driving force underlying modern codification efforts and must be cherished by modern jurists as a common heritage of humanity. The preservation of its values, which revolve around the centrality of the human person (*bona fides*, *aequitas*, *libertas*, *voluntas*, etc.) is the challenge that all of us, as jurists, must be capable of taking up.

Keywords: Roman law; *ius gentium*; Romanistic juridical system.

Resumen: El Derecho romano, desde sus orígenes, muestra una clara propensión a la universalidad. Esta propensión se manifiesta claramente en la 'fundación' del sistema, en las Constituciones con las cuales Justiniano acompaña el lanzamiento del *CJC*, pero sin duda se remonta ya a la identificación por los romanos del *ius gentium*, en cuya base se reconoce la *naturalis ratio*.El estatual-legalismo no ha sido capaz de cortar este cordón umbilical con el derecho romano y la razón natural que lo sustenta. El Derecho romano, vigente aunque ya no eficaz, es el motor de las codificaciones modernas, y debe ser apreciado por los juristas modernos como un verdadero patrimonio común de la humanidad. La salvaguardia de los valores que este representa, que giran en torno a la centralidad de la persona humana (*bona fides, aequitas, libertas, voluntas*, etc.) representa el reto que todos nosotros, como juristas, debemos demostrar ser capaces de asumir.

Palabras claves: Derecho romano; *ius gentium*; sistema jurídico romanístico.

* This article has been translated from Spanish into English by Mariano Vitetta.

1. Universality of Roman Law in Space and Time: Justinian and the Recognition of the "System"

My purpose with this article, and which shall be clear from the first lines, is to emphasize the universal tendency of Roman law, from the moment the system is founded[1] and even up to our days.

As is well known, with the bilingual constitution *Tanta-Dédoken*, issued on December 16, 533 A.D., Emperor Justinian ordered the publication of the Digest, whose compilation formally started on December 15 three years before (see *Const. Deo auctore*). It contains the legal knowledge developed for many centuries by the Roman jurists.

Justinian's approach in the introductory constitutions clearly shows a detachment between the form in which he conceives the compilation that he was creating and the *modus operandi* of modern lawmakers: Justinian does not only focus on the welfare of the subjects of his own empire, but he also, and especially, focuses on the welfare of future generations.[2]

In fact, the emperor, already when commissioning the compilation, knew for sure the function it would serve: it was not only going to solve problems inherent in the teaching or systematization of legal materials, but it would also have to do with the larger project of building a temple for justice (*templum iustitiae*), almost like a "law citadel."[3]

Justinian specifies (*Const., Tanta,* 12) that his work is not aimed at proposing a perfect law for the use of his contemporaries, but it is mainly aimed at supporting men in the course of future centuries (*omni aevo tam instanti quam posteriori*).

> *Tanta,* 12: *Omnipotenti Deo et hanc operam ad hominum substentationem piis optulimus animis uberesque gratias maximae deitate reddimus, quae nobis praestitit et bella feliciter agere et honesta pace perpotiri et non tantum nostro, sed etiam omni aevo tam instanti quam posteriori leges optimas ponere.*[4]

[1] I make a conscious use of the Latin word *systema* (which is the equivalent of the Greek word *sústema*), already included in *Const. Dédoken,* 7, to designate the compilation (Latin: *consummatio/digestum*) made by Justinian. I will discuss the Romanistic juridical system, i.e., the set of principles, institutions, and rules connected with the expert work of Roman jurists and which, with evident signs of continuity and discontinuity, reaches through our days. On the individualization of the Romanistic juridical system and the Latin American juridical system, *see*—for all—Schipani (2007, pp. 3-15), summarizing the author's position, already expounded in several other (and more elaborate) articles; Esborraz (2006, pp. 5-56 and 2007, pp. 33-84). On the relationship between system and orders, *see* Catalano (2005) and, for a more recent development of this concept, Saccoccio and Cacace (2019 and 2020).

[2] On this, *see* Archi (1970).

[3] *See* Deo auctore 5: *oportet eam pulcherrimo opere extruere et quasi proprium et sanctissimum templum iustitiae consecrare* (it is necessary to set it out in a most handsome work, consecrating as it were a fitting and most hoy temple of justice, Watson, 1998, I, xliv). For the events that accompanied codification and the participation of jurists, it should suffice to see Archi (1970) and Cenderelli (2008).

[4] "We offered this labor also to Almighty God with pious intent for the preservation of mankind, and we gave abundant thanks to the Supreme Deity, who has vouhsafed to us both the successful conduct of war and the full enjoyment of honorable peace, and moreover the giving of the best laws, not merely for our own age but for all time both present and future" (Watson, 1998, lviii).

I believe that such statements point to the recognition by the emperor of a function that is almost ecumenical in its codifying effort, also reflecting that universalist tendency which is a peculiar note of Roman law since its origins. Justinian himself understands Roman law, codified by him in the Digest, as not limited in terms of geography[5] or time (*in omne aevum valituras*).[6] This is the reason why in the constitution *Deo auctore*, the emperor does not stop making reference to eternity as a measure of his entire legal work.[7]

Other hints support this reading of the constitutions introducing the Digest: especially, the many references made by the emperor in other parts of the *Tanta/Dédoken* on the value of the instrument for the future which is not going to be immediate;[8] in addition, there is the significant reference to *omnes orbis terrarum homines* in § 19 of the same constitution as addressees of its message.[9] Finally, it is noteworthy that the constitution is significantly addressed to all peoples (*omnes populos*) and not just to the subjects of one's empire.[10]

We can then easily conclude that in the mind of the emperor the sapiential heritage of Roman law, as built by jurists throughout the centuries, makes up an organic and systematic system[11] which is valid for the present, but also open and forward-looking. For such system, it is clear for Justinian himself that it is essential to recognize the existence of a law which is common to all the peoples inhabiting the *ecúmene*, whether known or still unknown, and that they may be found in a universalist perspective which the modern oppositions between the States and orders from which they stem make difficult, if not impossible, to understand.

2. *Ius civile/ius gentium*

2.1. *Multa iura communia*

All in all, the universality of the legal system developed by the wisdom of Roman jurists finds its roots well beyond Justinian's time.

Based on the sources, we can assert that Roman law is born, with the legal foundation of the *civitas*, as a law for the *cives romani:* actually, in the words of jurist Pomponious the Twelve Tables founded the city with the laws[12] and from the cities civil law (*ius civile*) started to flow (*fluere*), to be understood as *ius proprium civium romanorum.*[13]

[5] *See Tanta/Dédoken*, 24.
[6] *See Tanta/Dédoken*, 23.
[7] *See Deo auct.* 14: *ut codex consummatus et in quinquaginta libros digestus nobis offeratur in maximam et aeternam rei memoriam…* (in order that the complete work, divided into fifty books, may be offered to us in complete and eternal memory of the undertaking; Watson, 1998, I, xlvi).
[8] *See §§* 13; 18; 21; 22; 23.
[9] The difference with modern civil codes is that they are generally aimed at the citizens of the State-Nation.
[10] The Greek text of the Dédoken is even clearer on the point, as Justinian addresses the constitution to the people (*tò démo*) and to all the cities of the *oecuméne* known (*pàsai tàis tès oikouméne èmon pòlesin*).
[11] In the sense stated above, in note 1.
[12] *See* Pomp. l. s. *enchr.* D.1,2,2,4.
[13] *See* Pomp. *l. s. ench.* D.1,2,2,6; Gai. 1 *inst.* D.1,6,3. On these topics, it shall suffice here to make reference to Schipani (2011). Of course, Pomponious's words should not be taken literally, because *ius civile*, founded on the basis of customs, had an established presence even before

But soon afterwards, the recognition of commercial and financial practices in the Hellenistic world gave rise to the birth also in Rome, first by way of custom[14], of a certain kind of supranational customary law,[15] which would have established thanks to the efforts of the *praetor peregrinus*[16] as a system common to Romans and foreigners. This is the *ius gentium* understood as the law that *gentes humanae utuntur.*[17]

This is an absolutely essential part of the Roman juridical system. Cicero already vindicated the existence of *multa iura communia* among the Romans and neighboring peoples, both friends and enemies.

> Cic., *de off. 3,108: cum iusto enim et legitimo hoste res gerebatur, adversus quem et totum ius fetiale et multa sunt iura communia.*

According to Cicero, with *legitimus hostis* we would have in common both all of the *ius fetiale* as well as *multa iura communia.*[18] From this, two important consequences may be derived. The first consequence has to do with the possibility for each people (Romans and foreigners) to use their own law (*suis legibus uti*).[19] The second consequence is, instead, the recognition that the system is incomplete without the specification of a law applicable to non-Romans, i.e., a supranational law based on the common elements shared by Romans and pilgrims as men, regardless of the effectiveness guaranteed by the public power.[20]

2.2. The Recognition of *Ius Gentium*

The law that the Roman themselves call *ius gentium* and which derives from the commercial and financial practices applied in Rome when the commercial horizon of the Mediterranean opens up starts to be introduced in Rome starting in the 3rd century B.C., when it is expressly recognized thanks to the efforts of the *praetor peregrinus* starting in 242 B.C. This operates in accordance with (at least)[21] two different (but converging) guidelines.[22]

the Twelve Tables. On this topic, as well as on the relationship between the Twelve Tables and customs, see—for all—Grosso (1960, p. 84; also with reference to the opposition between laws and *ius civile*) and Serrao (1973 and 1987).

[14] *See* Frezza (1949) and also Lombardi (1947, pp. 14-15); Wagner (1978); Albanese (1978, p. 146).

[15] *See* Cardilli (2011, p. 192). On the distortion as to custom resulting from modern doctrines, *see* the excellent work by Gallo (2011, pp. 3-76; and 2012).

[16] Therefore, the myth must be dispelled that the *praetor peregrinus* would have created this "supranational law" by means of the creation of *ius gentium* rules and institutions, which only then would be transposed to the civil law: Fiori (1998-1999, pp. 165-198, and particularly pp. 195-198; and 2016, pp. 109-129); for the opposite opinion, *see* Franchini (2011, pp. 113-237), but with no decisive arguments.

[17] Ulp. 1 *inst..* D.1,1,1,4. This statement is common to many other sources, legal and non-legal; among the non-legal sources, *see* Isid., *Etym.* 5,6 (*… et inde ius gentium, quia eo iure omnes fere gentes utuntur*); for the many references to nature and natural law as the basis for this *ius gentium*, *see* below § 2.5.

[18] On the appropriate scope of *ius fetiale* mentioned here (set of legal and religious rules which are typically Roman) and on the possible identification of this *multa iura communia* with *ius gentium* (regarding which, *see* below in the text), *see* Catalano (1965, pp. 5-320); Turelli (2006, pp. 1-204; 2011, pp. 1-274; 2011, pp. 1-120).

[19] *See* Schipani (2011).

[20] On this point, *see* better below in the text.

[21] For classifications other than the one proposed here, and for our purposes, with less importance: Talamanca (1998, pp. 192-195) distinguishing between a descriptive or sociological meaning of *ius gentium* (as exemplified by *Gai.* 1,1) and a dogmatic or normative meaning (*Gai.* 3,93).

[22] For the multiple meanings with which scholars have interpreted *ius gentium, see* a quick summary in De Martino (1945, pp. 109-139). In addition, *see* Frezza (1949, pp. 283-308); Kaser (1993, pp. 3-13); but for the criticism, which is far from being unfounded, *see* Fiori (1998-1999, pp. 191-193), who believes that the distinction must not be understood as too rigid and certainly not in the original sense: at the origin there would have been "una originaria nozione giuridico-religiosa, al tempo stesso 'normativa' e 'teorica' in senso universalistico," from which only afterwards "una sorta di sdoppiamento" would have emerged; moreover, opposing the reconstruction of a "civilian reception" in the *ius gentium*

According to the first guideline, *ius gentium* is an actual *Völkerrecht* which is in force as a kind of *ius commune* among the peoples (we would now say: among the States); i.e., a kind of public international law *ante litteram.* However, precisely because it is based on the identification of elements that all men share, in force regardless of the existence of treaties, applicable to foreigners and even to enemies (including the hated Carthaginians), there is a clear difference between this *ius commune* and the modern concept of international law.[23]

Following the second guideline, *ius gentium* may be considered a kind of *ius* (predominantly private in nature)[24] which Romans considered *commune* among all men,[25] based on an element that unites all humanity and which is based on that *naturalis ratio* that many times the legal and non-legal sources use as the basis for this notion of *ius gentium.*[26] Here, due to evident reasons, I will only focus on the second of the two meanings, but not without noticing that the first aspect, which scholars have for so long considered almost secondary, is certainly not minor.

This is the *ius gentium* that Mario Talamanca calls descriptive or sociological, opposing it to the *ius gentium* that he calls dogmatic or normative, and which would be made up by the Roman *ius civile* that also applies to foreigners.[27]

2.3. The Universalist Propensity of *Ius Gentium:* Cicero

The two concepts of *ius civile* (understood as *ius proprium civium romanorum*) and *ius gentium* (in the already-mentioned private-law notion which is also descriptive and sociological) are different, albeit not unrelated, at least during the oldest period of Roman legal history.[28] Cicero, already retaking an opinion that he himself recognizes dates back to the *veteres*,[29] asserted that the *ius civile*, understood by him evidently in a general sense (*umfassend*),[30] also entailed the comprehension of the *ius gentium*, while the opposite was not true.

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of institutions emerging from the *iurisdictio praetoria, see* Lauria (1939, pp. 258-265).

[23] The literature on this point is very extensive. I only want to highlight, in the sense expressed in the text, after Catalano's basic contribution (1965, pp. 5-20 y 41-50), Gallo (2003, pp. 117-153); and also Fiori (2011, pp. 132-139). For a different opinion, *see* Falcone (2013, pp. 259-273).

[24] "Privatrechtliche *ius gentium*" is the label used by Kaser (1993, p. 12).

[25] Against the doctrinal trend that considered it a common universal law to all men (*see* citations in Kaser, 1993, p. 12) De Martino reacted (145, pp. 110-149), for whom *ius gentium* would only be the law that the Romans considered applicable to foreigners and, therefore, ordinarily defined as common as to them. On the contrary, according to Lombardi (1947, pp. 3-5) no source would demonstrate the meaning of *ius gentium* as a law that the Romans would have basically reserved for pilgrims. Now there is no doubt (for an opposite view, however, albeit without convincing arguments, *see* Randazzo, 2005, pp. 134-135 s.) that both concepts appear in the sources: *see* Guarino (1949, p. 122) and especially Talamanca (1998, pp. 191-227) (and above note 21 and below note 27). In any case, there is absolute rejection of the doctrinal line presenting the first concept as the technical one and the second one as the result of an abstraction made by jurists and philosophers: *see* Lombardi (1947, pp. 8-10).

[26] For the legal sources, *see* below in the text. For non-legal sources, *see*, *ex multis,* Cic., *de harusp. resp.* 32; Cic., *De off.* 3,23.

[27] Talamanca (1998, pp. 192-193). On this point, Fiori (2011, p. 137) remarks that at the time of Cicero, while the normative function of the *ius gentium* had been fruitful for a long time, conversely the process of translating the notion of *ius gentium* in philosophical categories was only starting.

[28] *See* Kaser (1993, pp. 14-15).

[29] In the following text, Cicero discusses *maiores*. There seems to be no doubt that in legal language (which Cicero cannot ignore) the term is a clear point of reference for jurists of prior generations, and in my opinion these are the persons Cicero is referring to in order to identify a concept (*ius gentium*) which he himself cannot recognize as not legal. For this opinion, *see* Grosso (1967, p. 57), De Visscher (1947-1948, p. 378), and Fiori (2011, p. 135). I know, however, that in the opinion of other scholars Cicero would generally refer to "our ancestors": *see* Lombardi (1950, p. 258); Schulz (1953, p. 73); Falcone (2013, p. 272).

[30] *See* Kaser (1993, p. 15), according to whom this effort by Cicero would also include some institutions of the *ius gentium*.

Cic., *De off. 3,69: Hoc quamquam video propter depravationem consuetudinis neque more turpe haberi neque aut lege sanciri aut iure civili, tamen naturae lege sanctum est. Societas est enim –quod, etsi saepe dictum est, dicendum est tamen saepius– latissime quidem quae pateat, omnium inter omnes, interior eorum, qui eiusdem gentis sint, proprior eorum, qui eiusdem civitatis. Itaque maiores aliud ius gentium, aliud ius civile esse voluerunt: quod civile, non idem continuo gentium, quod autem gentium, idem civile esse debet.*[31]

Cicero remarks in this text that some behaviors, even if not expressly prohibited under the law or the civil law, are prohibited under the law of nature. There is, in fact, a true societal link (which we could define as based on the *lex naturae*) connecting men among themselves, all men, at a level higher than that made up by the ***gens*** or the *civitas*. This is why, Cicero continues, the ***maiores*** recognized[32] the difference between *ius gentium* (which evidently includes all men, to the extent that it is based on the *lex naturae*) and the civil law (which only applies to some). *Ius gentium*[33] is common to all, and thus must include the civil law; the civil law does not apply to all, but only *iis, qui eiusdem civitatis sunt*[34] and, therefore, it cannot ontologically contain the first.[35]

I can state, following Cicero's discourse, that the *ius civile* includes within itself the *ius gentium* with all its rules, which are considered law among all peoples, especially as to institutions like purchase and sale, lease, among others.[36] This is how we get a notion of *ius gentium* as made up by a set of institutions, principles, and rules, considered in their positivity, concretion, and historicity, and which are common to all peoples,[37] precisely thanks to the *lex naturae*,

[31] "Although I see that this course of action, due to the depravity induced by custom, is not considered a shame for the inhabitants and is not prohibited under law or the civil law, however, it has been prohibited by the law of nature. In fact, society in general (even if we say this often, it has to be repeated more regularly) is what unites all men, closer than the men of the same nation, even more limited than that of men of the same city. Therefore, the ancient jurists wanted the *ius gentium* and the civil law to be different; the civil law does not necessarily identify with the *ius gentium*, but the *ius gentium* must be civil in nature."

[32] On this translation of *voluerunt, see* Lombardi (1947, p. 71).

[33] According to Beseler (1931, p. 336), the *debet* cannot be understood as a duty (*Sollen*), but as a conceptual clarification (*Begriffsnotwendigkeit*); conversely, for the interpretation of *debet* as an ought to be, after De Koschembahr-Lyskowski (1930, p. 487), *see* especially Lombardi (1947, p. 77); *see* also Gallo (1997, pp. 33-34); Talamanca (2003, p. 149) also focuses on a tension, resulting from the opposition between *lex naturae* and *depravatio consuetudinis*, between "le aspirazioni un po' indistinte che, nella sua ipostasi etico-politica, l'oratore si limita, in sostanza, ad enunciare" and the "positività degli ordinamenti". Moreover, that the concept of *natura* is twofold (it must be understood ontologically and deontologically) to the extent that it can be a double-edged sword is a clear matter for legal philosophers themselves: *see* Passerin d'Entrèves (1980, pp. 16-18), discussing the use by jurists of a legal and non-philosophical concept of *ius naturale,* in light of which the *ius naturale* did not seem "un sistema completo e bell'e pronto di norme, ma un mezzo di interpretazione."

[34] Regarding the possible dystonia caused by the lack of correspondence among the three levels of *societates* (*omnium inter omnes; eorum, qui eiusdem gentis sint [societas interior]* and *eorum, qui eiusdem civitates [sint] [societas proprior]*), and the *ius gentium-ius civile* dualism, *see* Falcone (2013, pp. 264-265). According to Lombardi (1947, p. 72), Cicero unified the *ius gentium* with the *societas omnium inter omnes* and the *ius civile* with the *civitas*, leaving behind the reference to the *gens*; conversely, according to Albanese (1978, p. 137) the *ius civile* would refer to the last two closest *societates*. According to Fiori (2011, p. 139), on the other hand, *ius gentium* is "l'insieme delle regole poste dalla natura in quanto accolte nell'ordinamento"; there is, then, a sphere of the *lex naturae* which is not accepted by the legal order, and is then only discussed by the philosophers; therefore, there can be no surprise about the disparity explained above: for Cicero, the *ius gentium* shall fall up to its "positive" content within the *societas omnium inter omnes*, while for the "form" in the *societas eorum, qui eiusdem civitatis sunt.*

[35] The passage continues with some examples and a famous list of *bonae fidei iudicia* (likely derived from Quintus Mucius), *see* Bona (1985, p. 253), which I decided not to discuss as they are not relevant to the argument I am developing. On this point, it is sufficient to refer the reader to Falcone (2013, pp. 259-273), discussing the literature on this topic.

[36] Fiori (2011, p. 138).

[37] *See* Gallo (2003, p. 119); but in the same sense, first Grosso (1949, pp. 397-403; and 1971, p. 12); on the opposite side, according to Falcone (2013, p. 263), who follows positions already held by scholars (*see* Albanese, 1978, p. 137; Anselmo Aricò, 1983, p. 692), the orator would try to identify the *ius gentium* in a narrow sense with *lex/ius naturae*, based on what is also read in other sections of the same book (the reference is to Cic., *de off.* 3,23).

mentioned at the beginning of the discourse, which, in a clearly universal sense, unifies all men.[38]

In other words, as brilliantly explained, Cicero's discourse reflects the following situation: within the *ius civile,* there are rules, institutions, and principles for the Romans, and rules, institutions, and principles common to all peoples; "queste ultime coincidono con la *lex naturae*, perché costituiscono quella parte delle *leges populorum* (per i romani: dello *ius civile*) che è tratta dalla *natura.*"[39]

The same connection, maybe even more solid, between *ius gentium* and nature is read in other passages by the same orator. It is not possible to cite them all here. I choose, among others, Cic., *De off.* 3.5.23.

> Cic., *De off.* 3,5,23 *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 causa nocere alteri.*

Cicero asserts that it is not lawful for anybody to harm others for their own advantage, not only following nature, i.e.[40] the *ius gentium*, but also under the *leges populorum* which singularly exist in the *civitates*.

Even at this point, if one is not willing to identify the *ius gentium with natura,*[41] there is no doubt that the derivation of one from the other must be admitted.

On the one hand, it is Cicero himself who discusses, while in more general contexts, a law which *non opinio genuit, sed quaedam in natura vis inseruit*[42] and that the law *in natura esse positum,*[43] where nature does not match a transcendent conception,[44] but it has to be connected with the concepts of reality, essence, normality,[45] understood not in a philosophical way, but as derived from the observation of the outer world, with the purpose of creating the legal

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[38] For a perspective which, in a clearly universalist manner, is open to all men and not just to the citizens (*cives*), the *societas omnium inter omnes* mentioned here is connected with the *oportere ex fide bona*, which Cicero does not discuss in detail in the same book (3.70), *see* Cardilli (2011, p. 195).
[39] *See* Fiori (2011, p. 138).
[40] Regarding the complex handwritten tradition on this *id est, see* Lombardi (1947, p. 81).
[41] Lombardi (1947, p. 82), according to whom (*see* also pp. 90-91), while for Cicero the *ius naturale* would be a "diritto che vige solo idealmente," the *ius gentium* would be a law that "vige positivamente." On the contrary, according to Albanese (1978, p. 37) and Anselmo Aricò (1983, p. 688), the passage would prove that Cicero equates *ius gentium* with *natura*, both of them representing the ideal law, as opposed to the positive law (*ius civile*, understood as "concreta traduzione in *mores e leges* dei principi formulati nelle teorie dei filosofi, soli e veri intepreti della legge di natura").
[42] *See* Cic., *De inv.* 2,161.
[43] Cic., *De leg.* 1,34. On the difference, in Cicero's thought, between the *ius civile,* which is *a natura ductum, accomodatum* etc. and the *ius natural*, which is *ex natura ortum*, *natura constitutum* etc., *see* Anselmo Aricò (1982, pp. 684-686).
[44] *See* Burdese (1957, p. 385), who understands the Roman *ius naturale* as "un diritto positivo ricollegato alla natura intesa come realtà di fatto, senza coltivare, o per lo meno senza utilizzare, in concreto, l'idea di un ordine ideale trascendente, che possa o debba servire di ispirazione al diritto positivo pensato come a quello contrapposto." This should not even be understood from a perspective oriented to a purpose, which would open up the path to identify not what the nature of man is, but "quella che, secondo le soggettive varianti che pure presso i giusnaturalisti allignano, dovrebbe essere tale natura," *see*, clearly, Talamanca (2003, p. 149).
[45] For example, Biondi (1950, pp. 129-158), for whom the term means for the classical period "quella realtà delle cose, quella necessità ineluttabile, che è presa in considerazione dal diritto," while an eschatological dimension would only be introduced by the Justinians (consistent with Burdese, 1957, p. 385, but *see*, for the opposing view, Robleda, 1979, p. 155).

order,[46] almost like a natural impulse of the human being,[47] based on the *recta ratio.*[48]

This would be some kind of natural law in the Aristotelian sense (*see* Arist., *Et. Nic.* 5,10); this is some kind of *lex naturae* which may be identifiable with the *recta ratio, naturae congruens, diffusa in omnes, constans, sempiterna.*[49]

2.4. The Universalist Propensity (Continuation): The Legal Sources

If we examine the testimonies of jurists as to the *ius gentium,* Gaius's words are especially meaningful (II century A.D.), in the first book of his institutions (Gai., 1,1,1), substantially gathered by Justinian also in D.1,1,9 (Gai., 1 inst.), in addition to his own Institutions (I.1,2,1) on which the influence of Cicero's passage cited above is also evident:[50]

Gai.,1,1,1 *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 civitatis est vocaturque ius civile, quasi ius proprium ipsius civitatis; quod vero naturalis ratio inter omnes homines constituit, id apud omnes peraeque custoditur vocaturque ius gentium, quasi quo iure omnes gentes utuntur. Populus itaque romanus partim suo proprio, partim communi omnium iure utitur.*[51]

In my opinion, the text is not interpolated.[52]

The meaning is easy to understand: all civil peoples, i.e., the peoples governed by laws and/or *mores*[53]—Gayo says—in part use their own law, in part use the law common to all men. The first one, the law each people

[46] Biondi (1935, pp. 139-144). Cicero himself reminds us that the law of nature is *non scripta, sed nata lex, quam non didicimus, accipimus, legimus, verum ex natura ipsa arripuimus, hausimus, expressimus* (an unwritten but natural law which we did not learn, inherit, or read; we just learned it by nature): *see* Cic., *Pro Milone*, 4.10: *This is vox naturae,* which is formed on the basis of everybody's consent (*consensus omnium*): *see* Cic., *Tusc. disp.* 1,15,35. And that Cicero, in reference to nature in this context, means basically man and his rationality is clear to me since *Cic., De finibus bon. et mal.*, 5,9,26: *…secundum naturam vivere, quod ita interpretemur: vivere ex hominis natura undique perfecta et nihi requirente… See* also Cic., De off. 1,22; 1,100; 1,128; 3,13; Cic., *Cato maior de senectute*, 5: *naturam optimam ducem tamquam deum sequimur eique paremus.*

[47] And the sophist Protagoras declared that "man is the measure of all things, of those that are, to the extent that they are, of those that are not, to the extent that they are not," *see* Prot., Fragm., 80 B 1 (Diels-Kranz); *see* Diogenes Laertius 9,8,51.

[48] Pizzorni (1985, p. 86).

[49] *See* Cic., *de rep.* 3,22,33 (which is known thanks to *Lactant., Div. Inst.* 6.8.6): *est quidem vera lex recta ratio naturae congruens, diffusa in omnis, constans, sempiterna, quae vocet ad officium iubendo, vetando e fraude deterreat;* Cic., *De leg. 1,18: lex est ratio summa, insita in natura, quae iubet ea quae facienda sunt, prohibetque contraria; tal lex naturae ante nata est quam scripta lex ulla aut quam omnino civitas constituta (ibidem,* § 19); but *see* also *Pro Mil.* 4,10; Cic., *De off.* 3,27; Cic., *De inv.* 2,161: *naturae ius est, quod non opinio genuit, sed quaedam in natura vis insevit;* Cic., *De fin. bon et mal.*, 3,71; but especially Cic., *De nat. deor.* 2,78 s.; 2,154: *Est enim mundus quasi communis deorum atque hominum domus aut urbs utrorumque; soli enim ratione utentes iure ac lege vivunt; on this point, see* also Albanese (1978, p. 139).

[50] *See* Kaser (1993, pp. 40-41), according to whom Gaius would not agree with the incorporation of the *ius gentium* in the *ius civile* (in a wide sense) as discussed by Cicero; in fact, I believe that Gaius's reasoning to distinguish a *ius ipsius civitatis* (for example, the Roman *ius Quiritium*) from the *ius gentium* based on natural reason is at a different argumentation level, which is not inconsistent by itself with Cicero's own construction, who is accused without grounds by the Austrian academic (Kaser, 1993, p. 15) of having made an assertion which cannot be shared by a jurist: *see* correctly Fiori (2011, p. 194)

[51] The law, in all peoples governed by laws and customs, is partly peculiar to them and partly common to all men. That is why the law each people gives itself is their own and is called civil law, as if we said the law of the city. That, however, which natural reason has constituted, among men, is equally observed by all peoples and is called *ius gentium*, i.e., law common to all peoples. Therefore, the Roman people recognizes a law of their own and a law common to all men. Gaius (trans. 1845).

[52] In turn, De Martino (1945, p. 23) believes that the text does not belong to Gaius, but to a post-classical epitomist. The hypothesis, though slightly supported, does not seem persuasive: *see* Lombardi (1947, p. 122); the same is true of Beseler's hypothesis (1928, pp. 319- 320) of considering based on Gaius all the references to the *naturalis ratio*. This hypothesis is expressly identified as "del tutto gratuita" by Arangio-Ruiz (1930, p. 518).

[53] In essence, all the peoples who do not live *more barbarorum*, we could say paraphrasing the expression of the author of *De bello hispaniensi*, 42 apostrophe, all those which do not use either the *ius gentium* or the *instituta civium romanorum: see* Lombardi (1947, p. 123); Anselmo Aricò (1983, pp. 571-574), in my view not in a persuasive manner, tries to contrast this sentence with the subsequent reference to *ius quo populi utuntur*, tying both concepts to the *ius publicum-ius privatum* diathesis with which the fragment starts.

have established for themselves is known as "civil law"; the second one, based on natural reason (*naturalis ratio*),[54] common to all men, is known as *ius gentium*, almost trying to highlight the community of its use among all peoples.[55] Here also, as in Cicero's previous passages, basing the *ius gentium on natura/naturalis ratio* means the natural logic unleashed from the reality of things: likewise, even for Gaius, the concepts of *ius gentium* and *ius naturale* end up being mirrored actually or virtually, as they match.[56]

These are reflections which most probably the Roman jurists borrowed from Greek philosophy (possibly through Latin writers, such as Cicero or Seneca). Therefore, it is not by chance that Justinian, in calling jurists priests (*sacerdotes*), expressly states that their mission is to be followers of the true philosophy (*vera philosophia*).[57]

The fact that Gaius thinks of *ius gentium* as twice connected with nature and naturalness (in the meaning described above) seems to have been proven (at least) by another passage, also by the same jurist, taken from *Res cottidianae.*

> D. 41,1,1 pr. *Gai. 2 de 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 referamus.*[58]

Gaius, in describing the forms of acquiring ownership, makes a distinction between the modes of owning in the civil law (including, for example, the *mancipatio*, the *in iure cessio*, etc.) and the modes of acquiring in the *ius gentium* (such as, for example, occupation, accession, etc.), which makes it necessary to start discussing them, as the *ius gentium* is older and inherent in mankind itself (*cum ipso genere humano proditum est*). In the jurist's mind, therefore, the *ius gentium,* invoked here, is undoubtedly a law molded in consistency with that nature, of which mankind is a central part.

Also, when discussing the issue in his own Institutions, Justinian clarifies well the sense to be given to the reference made by Gaius to the *ius gentium*.

[54] This is the link mentioned by many sources: *see* the texts cited by Albanese (1978, p. 138).

[55] According to Stein (1974, pp. 314-315), this meaning by Gaius of *naturalis ratio* meant "the common sense of all men, as opposed to some exclusive kind of reason which was the prerogative of a few," while Sabino would have adopted a different meaning of this expression, for which *naturalis ratione* is substantially equal "in a natural way." Basically, in Stein's opinion, with Gaius, the emphasis on the expression *naturalis ratio* would move from "nature" to "reason," paving the way for the next "deformation" of the concept in post-classical legal thought.

[56] Lombardi (1947, p. XII) remarks that, still in times of Gaius, jurists used the two expressions almost indistinctly: they generally go for the first one when they want to emphasize "l'aspetto concreto del vigere ovunque"; they choose the second one when they highlight the "naturalness" of a rule or institution; *see* also Grosso (1967, p. 102). According to Behrends (2002, pp. 197-323), whose opinion seems to be completely isolated among scholars, there would be a pre-classical conception of *natura/ius naturale* (which would also be reflected in Cicero's work) based on a natural-law philosophical trend, highlighting values and principles of mutual solidarity and a classical, skeptical-humanist conception, which is limited to the scientific and skeptical observation, based on what is considered man's individual interest, considered as a natural and rational animal.

[57] D. 1,1,1,1 Ulp. 1 *inst.: Cuis merito quis nos sacerdotes appellet: iustitiam namque colimus et boni et aequi notitiam profitemus, aequum ab iniquo separantes, licitum ab illicito discernentes, bonos non solum metu poenarum, verum etiam praemiorum quoque exhortatione efficere cupientes, veram nisi fallor philosophiam, non simulatam afectantes* ("Of that art we [jurists] are deservedly called the priests. For we cultivate the virtue of justice and claim awareness of what is good and fair, discriminating between fair and unfair, distinguishing lawful from unlawful, aiming to make men good not only through fear of penalties but also indeed under allurement of rewards, and affecting a philosophy which, if I am not deceived, is genuine, not a sham"; Watson, 1998, I, 1). For an interpretation of this "true philosophy" as "science of truth," which leads some Roman jurists in a way to "Nachfolger der griechisch-philosophischen Tradition." *See* Schermaier (1993, pp. 303-322); Waldstein (1995, pp. 607-617), summarizing many of his writings on the topic.

[58] "Of some things we acquire ownership under the law of nations which is observed, by natural reason, among all men generally, of others under the civil law which is peculiar to our city. And since the law of nations is the older, being the product of human nature itself, it is necessary to treat of it first."; Watson, 1998, II).

I. 2,1,11 *Singulorum autem hominum multis modis res fiunt: quarundam enim rerum dominium nanciscimur iure naturali, quod sicut diximus, appellatur ius gentium, quarundam iure civili.*[59]

Regarding Gaius's Institutions model, in the text of the imperial Institutions, the matching between *ius gentium* and *ius naturale* is—even—explicit. Obviously, the Emperor seizes the opportunity to appraise the "new" conception of naturalness and of natural law which is being accepted (*see* above and note 68), but it is significant that he believes that the connection between *ius gentium* and *ius naturale* is virtually automatic, as if all of this were a package inherited since the location of classical jurisprudence.

2.5. Differentiating the *Ius Gentium* from the *Ius Natural* Does not Affect the Universality of the Former

The *ius civile-ius gentium* pair only seems to be in crisis when, after some decades, Ulpian[60] coins the tripartite distinction between *ius civile, ius gentium,* and *ius naturale*.

D.1,1,1,2-4 *Ulp., 1 Inst. 2. … Privatum ius tripertitum est: collectum enim est ex naturalibus praeceptis aut gentium aut civilibus. 3. 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 istiu s iuris peritia censeri. 4. Ius gentium est, quod gentes humanae utuntur; quod a naturali recedere facile intellegere licet, quia illud omnibus animalibus, hoc solis hominibus inter se commune est.*[61]

The passage has been considered interpolated for a long time, trying to reduce Ulpian's trichotomy to a dichotomy consistent with that of Gaius: in fact, it was believed that Ulpian did not have the scientific capacity to innovate in such an original manner on this point.[62] Nowadays, the hypothesis does not seem persuasive,[63] also and especially considering that the same text is found, with little variation, in Justinian's Institutions.[64]

According to the Severian jurist, private law takes provisions from the natural law, the *ius gentium,* and the civil law; *ius naturale* is common to all men and animals

[59] "Things are done in many particular ways; in fact, the domain of some things we acquire by natural law, which, as we said, is called *ius gentium*"; translated into English based on the Spanish translation by García del Corral (1889, I, p. 31).

[60] Some scholars (*see* Pizzorni, 1985, p. 111; Robleda, 1979, p. 156), based on a text by Aulus Gelius (*Noct. att*., 6,3,45), support the possibility that the tripartite division by Ulpian was already known by Cato, but currently with the sources we have at hand it is not possible to study any deeper how Cato influenced Gelius's discourse (*see* also Schulz, 1953, p. 73).

[61] "2. There are two branches of legal study: public and private law. Public law is that which respects the establishment of the Romam commonwealth, private that which respects individuals' interests, some matters being of public and others of private interest. Public law is tripartite, being derived from principles of *jus naturale, jus gentium,* or *jus civile.* 3. *Jus naturale* is that which nature has taught to all animals; for it is not a law specific to mankind but is common to all animals–land animals, sea animals, and birds as well. Out of this comes the union of man and woman which we call marriage, and the procreation of children, and their. So we can see that the other animals, wild beast included, are rightly understood to be acquainted with the law. 4. *Jus gentium,* the law of nations, is that which all human people observe. That it is not co-extensive with natural law can be observed easily, since this latter is common to all animals whereas *jus gentium* is common only to human being among themselves. "; Watson, 1998, I, 1). The composition of the text is consistent with what is stated in *Fragmentum Dositheanum* (*see* FIRA II, 618), and thus no further analysis is required.

[62] *See* in consistency with this: Beseler (1913, pp. 131 and 143); Perozzi (1928, p. 91), who erases the references to natural law; Lombardi (1947, pp. 192-193), who instead removes the *ius Gentium*, Albertario (1924, pp. 169-170); Betti (1947, I, p. 13); Arangio-Ruiz (1985, p. 28); and De Martino (1945, p. 35).

[63] *See*, for example, Albanese (1978, p. 140).

[64] It should not be forgotten that he who wants to eliminate Ulpian's trichotomy is also forced to attack D.1,1,4 (see immediately below in the text) where that trichotomy is taken for granted. The hypothesis (Lombardi, 1947, 197-200) whereby the interpolator would be an unknown post-classical jurist, to whom the Justinians would have resorted to for both versions, does not seem very convincing.

also,[65] while the *ius gentium* is only common to *humanae gentes.*

The empirical reasons for the transition from bipartition to tripartition are explained by Ulpian himself in a paragraph that Justinians have disconnected a little bit from the one before, but which was originally part of the same narrative context, i.e., the first book of Ulpian's Institutions.

D. 1,1,4 pr.-1 Ulp. *1 Inst. Manumissiones quoque iuris gentium sunt. Est autem manumissio de manu missio, id est datio libertatis: nam quamdiu quis in servitute est, manui et potestati suppositus est, manumissus liberatur potestate. 1. Quae res a iure gentium originem sumpsit, utpote cum iure naturali omnes liberi nascerentur nec esset nota manumissio, cum servitus esse incognita: sed posteaquam iure gentium servitus invasit, secutum est beneficium manumissionis.*[66]

Even here the hypotheses considering that the text has been interpolated do not seem more convincing.[67]

The jurist of the Severan era, even if not ignorant that the *ius gentium* was based on natural reason, asserts that it is necessary to identify a narrower genus, the *ius naturale*, that nature taught to humans and animals,[68] because even if under natural law all men are born free, it is the *ius gentium* which introduced (*inter alia,* see below in the text) the institution of slavery.

Along the same lines, some years later, jurist Hermogenian, reasoning in a way that is repeated also in Justinian's institutions,[69] asserts that it is only thanks to *ius gentium* (here partially distinguished from *ius naturale*) that wars were introduced, peoples were divided, and limits for properties were introduced, etc.

D. 1,1,5 Herm. *1 iur. ep. Ex hoc iure gentium introducta bella, discretae gentes, regna condita, dominia distincta, agris termini positi, aedificia collocata, commercium, empriones venditiones, locationes conductiones, obligationes institutae: exceptis quibusdam quae iure civili introductae sunt.*[70]

[65] On this point *see* note 68 below.

[66] "Manumissions also belong to the jus gentium. Manumission means sending out of one´s hand, that is, granting of freedom. For whereas one who is in slavery is subjected to the hand (manus) and power of another, on being sent out of hand he is freed of that power. All of which originated from the jus gentium, since, of course, everyone would be born free by natural law, and manumision would not be known when slavery was unknown. But after slavery came in by the jus gentium, there followed the boon (beneficium) of manumission. And thenceforth, we all being called by the one natural name "men," in the jus gentium there came to be three classes: free men, and set against those slaves and the third class, freedmen, that is, those who had stopped being slaves"; Watson, 1998, I, 2).

[67] *See* Perozzi (1928, p. 100); Albertario (1924, pp. 169-170); Lombardi (1947, p. 207).

[68] The phrase *quod natura omnia animalia docuit* has always been subject to countless disputes, as it was considered absurd that the Severian jurist thought of a law in favor of animals: *see* Rosmini (1858, pp. 88-89), who believed that Roman jurists had fell prey to a misunderstanding; but then *see* Perozzi (1928, p. 103), who qualifies the phrase as "puerile e inutile"; Albertario (1924, p. 168) defines it as "scipita"; Arangio-Ruiz (1985, p. 28); Grosso (1967, p. 56), for whom the phrase would be a "vaga enunciazione teorica"; *see* also Albanese and Biondi, in several articles, repeatedly cited in these lines; for an opposing but current view, *see* Onida (2012, pp. 83-86), who rightly tackles the positions against him.

[69] *See* I.1,2,2.

[70] "As a consequence of this jus gentium, wars were introduced, nations differentiated, kingdoms founded, properties individated, estate boundaries settled, buildings put up, and commerce established, including contracts of buying and selling and letting and hiring (except for certain contractual elements established through jus civile)"; Watson, 1998, I, 2).

Such constructions, which separate for some specific aims the *ius gentium* from the *ius naturale* do not seem to be at the level to dismantle the equivalence between *natura* (or *ratio naturalis*) and *ius gentium* we have seen clearly emerge from the sources cited above. In any case, they reveal not so much that *ius naturale* was understood by jurists as a purely philosophical concept of peripatetic inspiration, and instead *ius gentium* has been perceived as a concept with a practical and legal meaning of stoic inspiration,[71] but rather show that the assimilation was perceived by them as not perfect, with proof of cases in which *ius gentium* deviated from that nature, which in any case was its foundation.[72]

In other words, the alleged collapse that exists, as per Ulpian (and also Hermogenian) in some cases, between *natura* and *ius gentium* does not seem to affect the foundation of the last one over the *naturalis ratio* which is its anchor and bastion.

3. The Universality Which Fosters *Ius Gentium* is Based on the Centrality of the Human Person

In light of what has been said so far, we can agree with the opinion of those who believed that the *ius gentium*, applicable *ad omnes gentes*, was in Roman times "la più importante manifestazione dell'idea universale nel campo nel diritto."[73] We can even extend to this the features of coincidence with the immutable *bonum et aequum*,[74] as to incorruptibility and immutability that Gaius and Paul relate to the *ius naturale.*[75]

I believe it is not correct to identify the foundation of this model, as well as the underlying universality, with a context

[71] This is Winkel's claim (1993, pp. 443-449).

[72] This is Biondi's position, which I share, as expressed in many of the articles mentioned above; on the point, *see* also, in the same sense, Nocera (1962, pp. 30-33).

[73] Biondi (1957, p. 192).

[74] And, therefore, it is the same law, if it is framed within the parameters of the *bonum et aequum,* which ends up matching the *ius naturale: see* Waldstein (2001, p. 101).

[75] *See* D.1,1,11 Paul., *14 ad Sab.: Ius pluribus modibus dicitur: uno modo, cum id quod semper aequum et bonum est ius dicitur, ut est ius naturale. Altero modo, quod omnibus aut pluribus in quaque civitate utile est, ut est ius civile* (The term "law" is used in several senses: in one sense, when law (jus) is used as meaning what is always fair and good, it is natural law (jus naturale); in the other, as meaning what is in the interest of everyone, or a majority in each civitas, it is civil law (jus civile)… *See* Watson, 1998, I, 2-3). Gai. 1,158 *Sed agnationis quidem ius capitis deminutione perimitur, cognationis vero ius eo modo non commutatur, quia civilis ratio civilia quidem iura corrumpere potest, naturalia vero non potest* (*Capitis diminutio* destroys the agnation right, but not the cognation right, because the civil law can destroy all civil, but not natural, laws; translation into English based on the Spanish translation 1845, pp. 57-58); D.4,5,8 Gaius., provincial edict, book 4: It is obvious that those obligations which are understood to hold good in natural law do not perish with the change of civil status, because a rule of civil law cannot destroy natural rights. Therefore, the action concerning the dowry, because it is framed with reference to what is right and just, continues to exist even after change of civil status. *See* Watson, 1998, I, 141).

that leaves "residui giusnaturalistici," as per the objection that Orestano had already raised against the creators of the so-called dogmatic method in the study of Roman law.[76] In my opinion, this is about recognizing and valuing the statement of Hermogenian, for whom '*hominum causa omne ius constitutum est*.'[77]

The centrality of the human person as the cornerstone of the entire system obviously leads to the recognition of some principles of behavior which are clearly universalist in nature, which the scientific preparation of the *iuris periti* was not late in identifying within the same system,[78] recognizing them as support columns: *humanitas, fides bona, aequitas, voluntas, libertas,* substantial equality, causality in contracts, *favor debitoris,* the fight against usury and usurers, etc., are common assets for the jurists of today, thanks to the recognition by the Roman jurists within the system.[79]

4. The System of Current Roman Law

4.1. General Roman Law

Based on the combination of all the elements described above, Romans already knew of the existence of a general law, which is as old as man, precisely because it is based on that *naturalis ratio* that jurists recognize as its basis.[80] With the statement made above, we can quote the phrase of a famous philosopher of law: "fu merito del diritto naturale se il modesto corpo di leggi di una piccola comunità contadina della penisola italica divenne la legge universale di una civiltà mondiale."[81]

The *iura populi Romani,* which have been our basis (§ 1), must be understood as the set of rules of the Roman people, which are prepared and re-prepared in a consistent system, in a *ius romanum commune*[82] in which the multiple contributions are consistent (*consonantia*),[83] based on the principles that inform and guide it[84] and of which "la definizione stessa del diritto è la sintetica prima

[76] Orestano (1963, pp. 420-425 and, particularly, pp. 460-465).
[77] *Hermog., 1 iur. epit.* D.1,5,2: *Cum igitur hominum causa omne ius constitutum sit, primo de personarum statu… dicemus* ("Therefore, since all law is established for men´s sake, we shall speak first of the status of persons and afterward about the rest [of the law], following the order of the edictum perpetuum and applying titles as nearly as possible compatible with these as the nature of the case admits"; Watson, 1998, I, 15).
[78] *See* Levy: "the jurists then called a rule natural when it seemed to them in conformity with either the physical condition of man or his normal conduct or expectation in social relation" (1949, p. 10). Along the same lines, *see* Riccobono (1954, p. 7), but—especially—Biondi (1957, pp. 177-205).
[79] *See*, for a summary, especially Schipani (2012, pp. 293-300).
[80] *See* Riccobono: "la universalità del diritto romano deriva dunque da quelle stesse fonti del ius gentium" (1954, p. 11).
[81] *See* Passerin d'Entrèves (1980, p. 20).
[82] Biondi (1984, pp. 533-534).
[83] On *consonantia* as an aggregation and systematization element of a primarily confusing collection, *Const. Imp. 2* states as follows*: et cum sacratissimas constitutiones antea confusas in luculentam ereximus consonantiam….*
[84] D. 1,1,6 pr.; Cic., *de off.* 3,69; Cic., *Phil.* 2,105 (*iura populi romani*). As to the general principles of law, a potential door for the incorporation of modern legal order for the recovery of the wisdom of Roman law, *see* Calore and Saccoccio (2014).

enunciazione"[85]: law is the system of what is good and equitable, paraphrasing the words of jurist Juventius Celsus (II century A.C.).[86]

In examining the legacy of Roman law, it is possible, and even necessary, to avoid the accidents (epiphenomena) and contingents associated with the society in which this has found its first conceptual elaboration, to identify those "dogmi generali," those aspects which are "non contingenti ma universali," which form its basis, those "valori particolari, ma permanenti, razionali e pratici insieme, e quindi descrivibili nel loro essere e nel loro divenire[87]." Without any doubt, a law based on "quelle consuetudini naturali delle popolazioni che si unirono a Roma e rimasero sempre attive e prevalenti" should necessarily be universal.[88] After clearing the field of the *idola temporis* and *loci,* "quello che perdura è l'esigenza che il diritto abbia a corrispondere alla natura umana, all'equità, alla giustizia"[89] so that Roman law can be rightly defined as "un pedagogo della ragione giuridica."[90]

And this is, in my opinion, the reason why a cultured and refined jurist like Woldemar Engelmann recognized in 1938 the possibility for the German courts to prefer Roman law over German law, even though Roman law was only subsidiary to the second one.[91] The universality of Roman law and its capacity to be the basis of modern law precisely result from its nature as law "indipendente da ogni costituzione politica.[92]"

4.2. The Transformations Caused by the Emergence of National States

There is no doubt that many events have contributed to obscuring the correct view of this deployment of events.

On the one hand, the self-focus of Roman law studies happened since the end of the 19th century and until the first half of the past century and had confined Roman law scholars to the position of almost philologists or literati; they were deprived, at least from the point of view of the rest of the world, of the authority of jurists which could but belong to them.[93]

This has led many scholars in our discipline to talk about an actual crisis of Roman law:[94] in my opinion, it is

[85] *See* Schipani (2012, p. 298).
[86] *See Ulp., 1 inst. D. 1,1,1,1: …nam, ut eleganter Celsus definit, ius est ars boni et aequi.* On the definition by Celsus, subject to intense debate in Roman law studies, here I want to mention at least Gallo (2010). At this point, it is not useless to evoke the words with which Emperor Justinian defined the study of law as the knowledge of human and divine things and the theory of the just and the unjust: *see* I.1,1,1 *Iuris prudentia est divinarum atque humanarum rerum notitia, iusti atque iniusti scientia.*
[87] *See* Gioffredi (1952, p. 252).
[88] *See* Riccobono (1954, p. 10); *see* also Behrends (2006, pp. 481-492 and particularly 511-514) for whom *ius gentium* (which he calls secondary) would provide support for a spiritual unity as a result of multiplicity, but without altering what he calls "formazioni statali," which, with full freedom, "elaborano ciò che è comune ed è per tutti vincolante, a partire dalle loro condizioni di volta in volta particolari."
[89] Passerin d'Entrèves (1980, p. 41).
[90] This is Rosmini-Serbati's famous statement (1841, p. 12), in which the author also asserts that: "la ragione per la quale il corpo del diritto romano è prezioso, si è per quella parte del diritto razionale, che in esso si trova dedotto e applicato con fina logica alle circostanze"; on this topic, *see* also Balestri Fumagalli (2003, pp. 40-45).
[91] *See* Engelmann (1938, pp. 7-9), according to whom in the German courts Roman law would seem way better, more just, more general, and more valued in the world; of course, this is an opinion hardly unquestionable in time: for a reconstruction that forms the basis of the *renaissance* of Roman law not as to the quality of rules, but as the single methodical discipline of autonomous legal thought and the derivation of the "correct" decision of the intellectual force of the concept, *see*, instead, Wieacker, 1967, pp. 45-50).
[92] Manthe (2007).
[93] The debate was between a "historical" (or we should say "historicist" and antidogmatic) approach, primarily advocated by Pietro de Francisci in several pieces of writing, among which, *see* de Francisci (1916, pp. 46-50; and 1923, 373-375; and, answering Betti, especially de Francisci 1931, pp 5-10; and 1940, pp. 281-285). But *see* also Branca (1950, pp. 131-155); and a more sharply "dogmatic" approach, advocated, among others, by Betti (1948, pp. 57-92, and especially: 1928a, pp. 129-150 and 1928b, 26-66; 1925, pp. 236-242). For moderation based on an "applicazione della dommatica alla ricerca storica," *see* Gioffredi (1952, p. 249); Grosso (1950, pp. 326-341); Burdese (1956, pp. 357-372).
[94] As early as 1939, Paul Koschaker, identifying the crisis of Roman law studies, anxiously invoked Savigny's comeback: *see* Koschaker (1938, 75-76); on the impact of this piece on Roman law studies, *see* Guarino (1955, pp. 273-282; 1980, 25-30); Beggio (2018), and the critical review by Varvaro (2018, pp. 381-392). On the crisis of Roman law, in addition to the pieces cited in the following note, *see* de Francisci (1949, pp. 69-100); Bader (1951, 3-22).

more a crisis induced by the method of study than by the subject matter itself. The just reactions, which emerged quickly, against this approach[95] have been controversial for having been absorbed (assuming that that is the situation now), and this has undoubtedly determined, as for the purposes here, a remarkable loss of sensitivity as to the key role which Roman law can and should play in the current legal environment.

On the other hand, the events of the last two centuries, during which we have witnessed the conquest of the state monopoly of law production, have had a profound influence. In its process of affirmation, the State-nation wanted to mark a"cesura rispetto ad una fase storica, che aveva esaltato una comune identità giuridica dei popoli europei, in cui sovrani, tribunali e giuristi ricevevano e applicavano il diritto romano a sostituzione o integrazione dei diritti locali, considerandolo manifestazione di una civiltà superiore e universale, rispetto a quelle autoctone."[96] The liberal States, due to their internal structure, proved to be characterized by a clear legal absolutism, which led to a division between the domestic order, based on their own sovereignty, and an international order which, lacking in effectiveness, is diluted in the crossed play of good and bad relations among absolutely sovereign States.[97]

It is necessary to recognize now that for more than a century a process has been going on for which the dogmatic force of law (and especially of Roman law), based on values such as the *bonum et aequum*, rationality, the role of jurists as priests, etc., has been absorbed by the authority of the State's legislation and that the imperativeness of the law has replaced the argumentative rationality of jurists.[98]

4.3. The Key Role of Jurists in Adapting to the Concrete Case

But Roman law is an umbilical cord which is virtually impossible to cut. Civil codes do not result from the legislator's mind or the application of a *Grundnorm* which is placed in an abstract manner above all other sources. Conversely, they are inserted in the system where they float, as the islands at sea. Based on this, as well as underlying any modern legal system, it is easy to recognize the system of Roman law. Although it inevitably requires continuing revision, it has clearly been the source of many of the principles of modern international law, so much so that, as recognized by Chilean Roman-law scholar (born in Venezuela) Andrés Bello (author, among other works, of the Chilean Civil Code), Roman law is undoubtedly the source of the modern law of peoples.[99]

This "natural Roman law," which has undoubtedly contributed to the foundation of the Europe our predecessors have transmitted to us, has certainly gathered the legal experiences of all the peoples that formed and still are a

[95] Among the many authors who oppose the nonexistence of such a crisis of Roman law, albeit with divergence and highly different considerations, *see* Biondi (1954, pp. 383-402; 1957, pp. 177-205; y 1962, 11-36); Branca (1950, pp. 131-155); Brasiello (1951, pp. 58-78).
[96] *See* Casavola (2006, § 6).
[97] On this point, *see* Schmitt (1950, pp. 7-10); d'Ors (1954, p. 457).
[98] *See* d'Ors (1954, p. 461).
[99] *See* Bello's words (1834): "Roman law is necessary to study the *ius gentium;* and if we have the noble curiosity to explore the institutions and laws of other nations and of consulting their jurisprudence, so as to take advantage of all that there is in them which is good and applicable to us, it is necessary for us to familiarize ourselves with Roman law, whose principles and language are those of all Germany, Italy, France, Holland, and part of Great Britain"; on this point, it is useful to read Ilari (1987, pp. 140-149).

part of it.[100] However, it must be understood as a dynamic and not a static phenomenon: it is a law which, as taught by jurist Pomponius, cannot exist (*constare* = be firm) by itself, but it needs a consistent filter in the daily critical re-elaboration of what is best for man,[101] which in any case is its gravitational center. This re-elaboration must necessarily be completed by the jurist (or actually the jurists) who do not live in an abstract world of rules, but in the specific society and are tasked with continuously adjusting the system's principles to concrete situations presented by life.

In other words, that which is based on Roman law, precisely because it is a system that places man and what is better for man constantly at the center, because it is based on a system of values universally recognized. It is an "open system" which is not aimed to be overcome, but to be renewed constantly, adapting to the multiform and changing reality it is applied to contingently.

The system of general Roman law must be constantly reinterpreted, and there is no doubt that all peoples that follow it make their own, big or small, contribution to the construction of what Justinian rightly defines as *templum iustitiae.*[102] An essential role in this process is played by the contributions of jurists from different parts of Western Europe, as well as of Latin America, and ultimately of the Far East (particularly, China)[103]: in this sense, Sandro Schipani rightly remarks that the universalist and systematic nature of Roman law was specifically appropriate for a country like China, which wanted to quickly move forward to codification and that is why it was assumed as part of the codification model that was set in motion[104] and attained in 2021.[105]

The different context, the position it is placed in and the contribution deriving from its assumptions widen the horizons of our jurists' capacities to see the problems and consistently choose the "best and most equitable" legal solutions.[106]

[100] Koschaker (1966, pp. 141-145; pp. 212-220; 347-350) expressly highlights that Roman law is the, if not most important, certainly the most significant part of the European culture; in the opinion of this scholar, Europe's decadence after the Second World War has also led to the decadence of the study of Roman law, but not in all countries alike.
[101] *See* Pomp. l. *s. ench*. D.1,2,2,13: *… constare non potest ius, nisi sit aliquis iuris peritus, per quem possit cottidie in melius produci.*
[102] *See* on this point: Biondi (1957, pp. 177-205).
[103] *See* Falcone (1979, pp. 143-156).
[104] Schipani (2009, p. 533). However, I want to remark that in China, by the end of the Qing period, a delegation made up by experts in private law from multiple foreign countries which were sent to study their legal and political system reported in 1906 that Roman law had to be explicitly considered as the source of the political and legal institutions of the European countries. The adhesion to the Romanistic law system is repeated by Yu Liansan, who in 1911, in an official document, explicitly emphasizes that "the civil law of all nations derives from the Justinian Code," which must in turn be the reference for China: *see* Colangelo (2015, pp. 175-201). For the modern events on the progress of the codification process in this country, and for a general framework, here is the reference to Zhai Yuanjian (2012, pp. 329-351); Xu Guodong (2013, pp. 334-342).
[105] On the Chinese Civil Code, *see*, in Italian, *Codice civile cinese e sistema giuridico romanistico* (Saccoccio and Porcelli, 2021), with contributions not only by some Italian scholars who have studied Chinese law, but also by some of the Chinese scholars who have compiled the Code.
[106] *See* Cannata (1999, pp. 50-54), who discusses the construction of a kind of "transnational" legal science, at least for the European legal systems; but, in his view, the purpose is not the unification of the positive laws that prevail there.

5. An Open Conclusion: Roman Law as a Supranational Value

It has been rightly stated that today the system of Roman law "non ha alcun vertice politico-istituzionale, per debole che fosse il vertice esistente nell'ultimo periodo della sua presenza; non ha alcuna giurisdizione che ne porti ad effetto il diritto, come era il pretore in Roma prima e il Tribunale imperiale poi."[107] The system of Roman law is exclusively in the hands of peoples tasked with enacting laws inspired in the principles of the system and in the hands of jurists, who, based on their authority, are tasked with verifying the consistency of the whole generated as a result.

It could be said that "l'universalità del diritto romano, a noi trasmesso dalla Codificazione del VI sec. post C. da Giustiniano, … sia da riguardare come un prodotto genuino di Roma e del popolo romano"[108] and that must be protected above all by jurists, those of our and the next generations.

The system of Roman law, when its deep structure is observed, does not impose itself, but it is received and opens up to dialogue with other legal experiences, to which it offers its own principles. Simón Bolívar, the great liberator, a hero of the Latin American independence, defines Roman law as the "basis of universal legislation";[109] while Chinese jurist Jiang Ping qualifies it as a "parte integrante della cultura dell'intera umanità";[110] Passerin d'Entrèves rightly believes in Roman law as a "comune patrimonio degli uomini…, legame che può superare le loro differenze e ridurle ad unità."[111] It would seem to be a kind of set of meta-historical values which solidifies in a concept that exceeds the categories currently in use of "state law," but also of "international law," proposing a model whose validity exceeds the limits of effectiveness, making of ius romanum something radically different from the modern concept of "law."[112]

Its recovery, its appraisal as a true communicating vessel of values, institutions, principles and rules,[113] is crucial for the purpose of "smascherare qualsiasi ordinamento, qualsiasi 'diritto', che non ponga l'uomo al centro della sua scala di valori. Recuperare aequitas e humanitas contro ogni barbarie. Costruire un diritto che sia sempre più equo e più umano, perché possa servire all'uomo, nel solco profondo della nostra alta tradizione giuridica comune, che ci mostra come il diritto possa e debba essere posto al servizio dell'umanità e dell'umanesimo"[114] are the challenges that the modern jurist must be able to face.

I believe that this is the true and most important legacy we can derive from the universality in Roman law as a common heritage of humankind, and that is the challenge we all, as modern jurists, must be capable of conquering.

[107] Schipani (2012, pp. 298-300); I believe that what Plachy writes is significant: "la forza vitale del diritto romano è una realtà culturale, più o meno indipendente dalle forze politiche" (1954, p. 480).
[108] Riccobono (1954, p. 3).
[109] *See* Bolivar (1821): "Roman law, as the basis of universal legislation, must be studied."
[110] Jiang Ping (1988, p. 367).
[111] Passerin d'Entrèves, who adds: "la tradizione giuridica romana insegnò al mondo occidentale a concepire il diritto come la sostanza comune dell'umanità, come uno sforzo incessante a realizzare *quod semper aequum et bonum est*" (1980, p. 25).
[112] *See* Catalano (1984, p. 533); *see* also note 23 above; the point has never been captured by some of the Roman law scholars who advocate a "historic" study of Roman law themselves; *see*, for example, the words of Biondi: "il diritto romano come ordinamento giuridico è morto e sepolto da secoli" (1962, p. 390).
[113] Schipani (2006, pp. 299-300).
[114] *See* Labruna (2004, p. 32).

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