The Theory and Institutes of Roman Law from a Historical Aspect

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— alapítva

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INTRODUCTION

Within the scope of this piece of work we aim primarily to show that the dual approach of Roman legal thinking as abstract or casuistic is basically simplifying. True as it may be that when it comes down to casual legal thinking in Rome, it could rather be considered casuistic than abstract: abstraction was somewhat far-fetched for the Roman thought. However, there came a moment in history, when Greek philosophy found its way to the very heart of legal thinking exercising strong influence on it. As a consequence, abstraction became daily practice, yet it was still far from the extent we face it day by day. Nevertheless, Roman jurists of everyday legal practice saw a bigger picture: certain values were to be enforced, values that were considered as the foundation stone for the state and the society. These cornerstone values were supposed to be realised via each and every casuistic decision or opinion of jurists. Consequently, their work served justice, served the continuous formation of the rule of law.

The first logical question is why we have reference to Roman thought anyway. The answer primarily lies in the fact that ancient Roman law serves as a perfect point of departure to getting to understand basic legal notions in its systematic way. The reasons for this are manifold, amongst which the followings are to be mentioned: **(a)** Roman law is no longer subject to change; **(b)** its terminology is expressive and meaningful; **(b)** its rules are all clear and logically built; **(d)** a dominant part of the legal systems in Europe stem from Roman law. All things considered, Roman law itself constitutes an all-European legal tradition, greatly influenced by Greek philosophy and later Christian thought.[1] Consequently, these three constituents together, namely Roman law, Greek philosophy and Christian thought could be regarded as the common cultural heritage of Europe.[2]

Amongst these three, Greek philosophy should be handpicked at this point. Philosophy in general is all the more important within the scope of any kind of intellectual activity, as it is supposed to provide the framework of thinking. For antique philosophers one of the main topics to discuss about: what could be considered as beautiful or just. The acquisition of new knowledge could be carried out via the inductive method, by means of intuition, or through any other methods. However, the common starting point for each scientific method is individual observation through one's instinctive reason. By means of this, cognition could be reached. This concept of cognition is clearly traceable in the Antiquities: Aristotle used the notions αἴσθησις and νοῦς, whereas Cicero dubbed these with the term *communis intellegentia*.[3]

Still, at this point, it should equally be emphasised that the Romans themselves were far from being theoretical thinkers for the most part. They were first and foremost practical thinkers who wanted to give a proper solution to one particular problem presented to them. True that the process of solution started with immediate experience, and their guideline during the whole process was intuition. This intuition arose from a kind of legal common sense.[4] As a result, philosophy for the Romans always meant Greek philosophy as *vera philosophia*, because all those who were involved in philosophy were seeking objective justice, and Greek philosophers held the affirmation that all human beings are capable of recognising justice.[5]

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[1] Similarly cf. Wolfgang WALDSTEIN: *Ins Herz geschrieben*. 2012. 25.
[2] See Peter STEIN: *Roman Law in European History*. CUP, 1999. 1-2.
[3] Wolfgang WALDSTEIN: *Teoria generale del diritto. Dall'antichità ad oggi.* Pontifica Università Lateranese, 2001. 33-41.
[4] WALDSTEIN (2001) 45-52.
[5] WALDSTEIN (2001) 101.

It is likewise interesting that Greek philosophy gained even broader grounds, when a *civitas augescens* was ascending. The needs of a growing, developing and socially more colourful society could only be met, when legal solutions themselves were based not only on preconceptions specific or even peculiar exclusively to the Roman thought, but covered an ampler public. To achieve this goal, Greek philosophy was the most obvious means to turn to, so that the intellectual background of legal solutions should be provided. With such an approach it is definitely clear why Peter Stein took Roman jurists as such experts who consider legal rules as merchandise in "kind of a legal supermarket".[6] Jurists were free in their choices, still they needed intuition and wit to serve justice with each and every one of their choices.

[6] STEIN (1999) 2.

LEGAL HISTORY WITHIN THE HISTORY OF THE ROMAN EMPIRE

1. Preliminary remarks

When looking up history books, encyclopaedias, dictionaries, companions on history and many other manuals and reference books, the very first definition to come across is the one placing the Roman Empire on a historical timeline. The Roman Empire is said to cover the history of Ancient Rome from the fall of the Roman Republic until the abdication of the last Western emperor. However, this approach is highly misleading as a result of the improper use of terminology.

When Roman Empire is mentioned, this term is referred to the historic phenomena of the different form of a state ruling the Italian peninsula, the Mediterranean and even the exotic territories of Asia Minor. In contrast to this, there's often talked about imperial age in the history of Rome, which designates a certain form of exercising power. From this aspect, taking into consideration the approach of legal history first and foremost, the forms of exercising power are to be cited as follows:

a) Roman kingdom (seldom: kingship), also referred to as the royal or regal age, era or period of Rome (753 BC – 510 BC)
b) Roman Republic or republican age, era or period (510 BC – 27 BC / 14 AD)
c) Roman imperial era (27 BC / 14 AD – 565 AD), which comes into two segments:
    i. the Principate (27 BC / 14 AD – 284 AD) and
    ii. the Dominate (284 AD – 565 AD).

2. The kingdom or the regal period

There're only fragmental pieces of information on the history of the Roman kingdom, and even the reliability of these sources are doubtful – to say the least. Some information belongs to the realm of legends and myths, the trustworthiness of others are not supported by archeologic proof. The first important event in the history of the kingdom was the foundation of Rome as a village or little town (753 BC) at a site which was a ford where the river Tiber was easy to traverse. Archeologic evidence shows that the influence of different cultural backgrounds is clear: Etruscan, Oscan, Sabellian and other people came together to avoid the consequences of having been eliminated from their original community, and formed a natural alliance of protection. Due to the two main forms of agriculture available that time, two kinds of communities had been formed one exercising crop cultivation, whereas others dealing with livestock production and herding. The differences in lifestyle resulting from these two main forms of production resulted in a need for legislation. During the regal period royal legislation (*leges regiae*, Laws of the Kings) reflects mainly sacral rules, as a consequence all regulations were supposed to lie on the authority of the Gods, whose peace was not to be disturbed. When this still happened so, sanctions or even punishments were aiming to conciliate, to atone for such misdeeds. In other cases, social peace was to be reinstated by means of reference to a long-lasting custom – these are the earliest remnants of customary law. The recognition of legislation as an artificial, exclusively human activity is the result of a subsequent development.

3. The Roman republic from a bird's-eye view

The history of the republic is characterised by two main features. One of them is a shift in the form of exercising power. Kings as monarchs of the regal period were substituted for magistrates. The role of the king was taken over by two *consul*s – they were two of them, so that they could mutually and continuously supervise each other's official activity. When we take a first look at the casual description of the history of the Roman republic, we get the impression from authors like Theodor Mommsen that a variety of magistrates as state officials were set up even from the very beginning of the republic. However, when a timeline of historic events are granted a closer look, it becomes apparent that the establishment of magistrates' offices has taken place gradually. When we link the establishment of each office with a particular event in (legal) history, it turns out very quickly that each office was set up when they were necessary to come to existence, because there was no other way to accomplish a certain task deemed essential from the point of view of the state. The most important magistrates were the followings:

a) *consules* (the holders of royal powers, being the highest civil and military leaders of the state);
b) *tribunus plebis* (a representative of the *plebs*, a segment of ancient Roman society; a counterparty to patricians, those who came first, when the City was founded);
c) *censores* (the guardians of *mores maiorum*; a set of complex rules and customs, which are erroneously regarded as moral rules, however they should rather be considered as traditions);
d) *praetors* (state officials dealing with *iurisdictio*, a specific activity of giving legal aid, both procedural and extra-procedural to Roman citizens).

The other important feature was (artificial) legislation, the result of which was the Law of the Twelve Tables (*leges XII tabularum*). This act is a good example of switching from purely sacral legislation towards a mixture of sacral, tribal and legislative measures. Sacral measures are taken when a strong emphasis on divine authority was inevitable to regulate a certain situation. These were mainly antagonistic conflicts in society resulting mainly from the two different lifestyles stemming from crop cultivation and livestock production with herding. Tribal rules facilitated the handling of social tensions of milder character (issues in case of exogamic marriages or other family-related disturbances, for instance). Purely legislative norms are artificial ones that the method of problem-solving is newly invented, thus there's no antecedent to these rules in the society. The best example of this is the regulation of the ancient civil procedure, which lacks any prior precursors.
An additionally important factor is the City's increasing power in the Mediterranean. Rome as a conqueror was extremely successful: first only the Italian peninsula was taken over, then they gradually gained influence in the Mediterranean and finally they ruled over Asia Minor, too. The first step towards this enormous extension was the conquest of Sicily (242 BC) as the first provincial. This led to rather complex social and economic change, referred to as the challenge of *civitas augescens*, the growing community or City. The importance of *civitas augescens* from a legal point of view can be found in the fact that social and economic changes bring about an urging need for alterations in legal rules and in the overall approach of legal issues.

4. Imperial Rome

The crisis of the Roman republic was a result of a certain democratic deficit in the representation of the people, which was a necessary outcome of a gradual rise of the Roman Senate taking over as a predominant authority of political decision-making. The escalation of the social and even economic issues ended up in a civil war. The attempted social and economic alteration by the Gracchus brothers, the military reforms carried out by Marius and even Sulla's dictatorship were all possible responses given to one very specific situation which is called shortly the crisis of the Republic. Despite the fact that this period was over-encumbered with continuous grievances, they are nevertheless important from the aspect of legal philosophy for instance, since such authors as Cicero devoted many works to the scrutiny of issues related strictly to the existence of state, law and human communities, the obligations of their members as citizens, their relation with the Gods, etc. not only did the crisis end up in a constant bloodshed, but it was also fruitful in Roman history as to redefine their very existence and place in the world, and rediscovering their very roots, in a social, economic and legal sense at a time. A great aid of such a redefinition and rediscovery was Greek philosophy, an unwelcome extravaganza of the former period, the acceptance and application of which changed the Roman way of thinking fundamentally. This change is traced in the introduction and a wider and wider application of deductive reasoning (top-down logic), as a counterparty of inductive reasoning (bottom-up logic), a way of thinking so atavistic in the Roman thought that its last remnants were still playing a decisive role in Emperor Justinian's codification.
The climax of the civil war was the reign of Julius Caesar, and subsequently the ruling of his adopted son, Octavian, later called Augustus. It was him who gradually turned the Republic into a kind of a monarchy referred to as Principate, in the framework of which most republican offices and institutions were maintained and even affirmed to a certain extent. These institutions were gradually done away with by the emperors to come, the most important ones being the following:

a) Augustus (27 BC – AD 14): introduced Principate.
b) Trajan (98 – 117): the Empire was the greatest under his rule.
c) Hadrian (117 – 138): the second founder of Rome, great reformer. From the aspect of legal history he is to be mentioned because of *Edictum Perpetuum* and *ius respondendi*.
d) Antonius Caracalla (188 – 217): he adopted *constitutio Antoniniana* (a.k.a *edictum Caracallae*), an imperial decree granting full citizenship to all free inhabitants of the Empire.
e) Diocletian (284 – 305): he changed the system of ruling, introducing tetrarchy, a division of the empire into four regions, each ruled by a separate Emperor.
f) Constantine I (306 – 337): he adopted Christianity as a *religio recepta* (Edict of Milan, 313), from when Christians were free to exercise their religion.
g) Theodosius I (379 – 395): by the decree "*Cunctos populous*" (Edict of Thessalonica, 380), he declared (the Nicene Trinitarian) Christianity to be the only legitimate imperial religion (as opposed to Arian Christianity, later regarded as heresy). In addition, after his death in 395, the Empire came into Western and Eastern parts (imperial schism).
h) Justinian I (527 – 565): famous for his visionary dream, *renovatio imperii*, the restoration of the Empire, one method of which was his codification.

The Western Roman Empire gradually began to disintegrate in the early 5th century as a result of Germanic migrations and invasions on the one hand, and from the narrowing commercial relations in the west. This trend ended up in the fall of the Western Roman Empire in 476, when Romulus Augustulus, the last of the Western Emperors was forced to abdicate to the Germanic warlord Odoacer. Still, the empire in the East, known nowadays as the Byzantine Empire existed until 1453 with the death of Constantine XI and the fall of Constantinople (today's Istanbul) to the Ottoman Empire.

ROME UNDER THE RULE OF LAW – IUS IN AN ABSTRACT SENSE

In order that such a guideline could exist in ancient Rome, it was paramount that Rome even from its very establishment should stand under the rule of law. This "rule of law" (not in the Anglo-Saxon sense of the term) is depicted by Livy as follows:

Liv. 1, 8

Rebus divinis rite perpetratis vocataque ad concilium multitudine quae coalescere in populi unius corpus nulla re praeterquam legibus poterat, iura dedit […]	When Romulus had duly attended to the worship of the gods, he called the people together and gave them the rules of law, since nothing else but law could unite them into a single body politic. (Benjamin Oliver Foster, 1919)

In his work entitled "The History of Rome" (*Ab urbe condita*), Livy asserts that the first thing for Romulus to deal with was the worship of gods, then he summoned all people to a meeting and gave them the rules of law. The reason for this latter act was that he realised very early that unification of the people can only be carried out via laws, where the term "law" is understood in a material sense, that is as a synonym for "act".
Besides law, however, military force was equally at hand, so that the y could come forward to protect themselves against any foe (cf. Livy 1,9: "*Iam res Romana adeo erat valida ut cuilibet finitimarum civitatum bello par esset* […]" – "Rome was now strong enough to hold her own in war with any of the adjacent states […]; Foster, 1919). Consequently, rules of law were essentially backed up by military force, that is the reason for the importance of military skills in connection with citizenship. In addition, it is worth mentioning even at this point that Roman history itself presents a neat framework of historic events: the way it all began, namely that the foundation of the city was carried out by means of law and military force, matches the exact process Emperor Justinian followed when establishing his own reign – law (codification) and military force (campaign to the Western wing of the Empire) were supposed to support or reinforce his efforts. These complex assets altogether fenced by law and military power are often referred to as *res publica*, which is frequently understood or even translated as the state, the republic, the commonwealth, and many other expressions.
As for the actual content of this *res publica*, a reference should be made to one of Cicero's work bearing the title *"De re publica"*, in which he puts it as follows:

Cic. re p. 1, 39

Res publica res populi, populus autem non omnis hominum coetus quoquo modo congregatus, sed coetus multitudinis iuris consensu et utilitatis communione sociatus.	The commonwealth is the affair of the entire people. But the people is not every association of men, however congregated, but the association of the entire number, bound together by law and rights and by the desire to participate in mutual advantages. (based on George Holland Sabine, 1929 and C. D. Yonge, 2009)

As it is seen from the text, in Cicero's book there's an equal sign between *res publica* and *res populi*. As a consequence, *res publica* is considered to be the people's affair, which raises the question what *populus* is after all. Cicero immediately emphasises that it does not mean any group of men, came together in any manner: what makes them *populus* is the fact *iuris consensus* which is a kind of a legal agreement or consensus, as well as *utilitas communionis*; what is beneficial for the public. These two make the difference between a state and a band of robbers. On this matter suffice it to have reference to a work by Augustine of Hippo, namely "The City of God against the Pagans" (*De civitate Dei*), where the bishop claims as follows:

De civ. Dei 4, 4, 1

Remota itaque iustitia quid sunt regna nisi magna latrocinia? quia et latrocinia quid sunt nisi parva regna? Manus et ipsa hominum est, imperio principis regitur, pacto societatis astringitur, placiti lege praeda dividitur.	Justice removed, then, what are kingdoms but great bands of robbers? What are bands of robbers themselves but little kingdoms? The band itself is made up by men; it is governed by the authority of a ruler; it is bound together by a pact of association; and the loot is divided according to an agreed law. (R. W. Dyson, 1998.)

The difference between the state and a band of robbers is apparent upon this latter text, for even a band of robbers may as well define any objective, however, in the absence of *iuris consensus* it is nothing more than small talk. Comparing the two texts, it also becomes clear that *utilitas communionis* is nothing more than the public welfare of the people. Still, it is common knowledge (and experience, too) that in case of interest-collision dire times may come, when sometimes even harsh decisions should be made – however hard these may be though, they must by all means meet and serve public welfare. This is the reason why even the Romans themselves regarded the constant quest made for *utilitas* as an art, but not in the sense contemporary English tends to use the term. In Latin it rather meant craftiness, practical techniques, professional or technical skills, sometimes even artistic ones, as well as artificial methods (cf. Oxford Latin Dictionary s. h. v.).
The next logical question covers the actual content of this *iuris consensus*. Amongst the relevant available sources the following ones are often cited.

Gai. 1, 1 = Inst. 1, 2, 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 populos peraeque custoditur vocaturque ius gentium, quasi quo iure omnes gentes utuntur.	The laws of every people governed by statutes and customs are partly peculiar to itself, partly common to all mankind. The rules established by a given state for its own members are peculiar to itself, and are called *ius civile*; whereas the rules constituted by *naturalis ratio* for all are observed by all nations alike, and are called *ius gentium*. So the laws of the Roman people are partly peculiar to itself, partly common to all nations.

Inst. 1, 2 pr.

Ius naturale est quod natura omnia animalia docuit. Nam ius istud non humani generis proprium est, sed omnium animalium, quae in caelo, quae in terra, quae in mari nascuntur.	*Ius naturale* is that which *natura* teaches to all *animalia*, for this law is not peculiar to the human race, but affects all creatures which deduce their origin from the sea or the land, and it is also common to birds. (Based on Scott 1932)

As for these texts, it should first be pointed out that the approach of the former, Gaian text is that of *divisio et partitio*, in the scope of which the jurist applies two *quid est definitiones*. As for the *divisio et partitio*, it should be noted that the common denominator for *ius civile* and *gentium* is the fact that both appear exclusively amongst all peoples (*omnes populi*) governed by laws or acts (*leges*) and customs (*mores*)? What makes the difference is the fact that these peoples, on the one hand, make use of their own, self-established law (*suo proprio […] iure*), and on the other hand, rely on what is common to all mankind (*communi omnium hominum iure*). It should hastily be pointed out that this *ius gentium* has nothing to do with Medieval *ius commune*. In the Institutes of Justinian, which was a textbook for jurists to come, ius natural is defined as something stemming from *natura* and common to all *animalia*, not referring merely to animals, but to all soulful creatures.

To sum it up, it could be stated that with regard to the actual content of Ciceronian *iuris consensus*, there are three normative layers which the Romans called *ius*. This term embodied both rights and duties at a time. What is in common in these normative layers is the fact that they either come from the people, in other words from a community, or from an entity above men. This is all the more important to emphasise as there is a normative practice called *ius praetorium*, the main characteristic of which was a practical approach to legally urging issues. At this point, it is enough to make a brief reference to *ius praetorium* with the remark that we will come to that later on. However, three abstract normative strata could be separated essentially from one another in Roman law:

(a) *ius civile:* rules established by a given state for (and by) its own members (*ipse sibi constituit*), hence peculiar to the people who formulate it (*id ipsius proprium est*). The form *ius Quiritium* was a special form of *ius civile* used exclusively in Rome.

(b) *ius gentium:* observed by all peoples alike, being established by natural order (*naturalis ratio*) amongst all nations. The term *ratio* should more specifically be understood as "order", instead of "reason". It is easy to apprehend that reason is only available where order prospers, otherwise we cannot talk about reason. For in the absence of order how can we tell reasonable from unreasonable?[7]

(c) *ius naturale:* comes from the nature (*natura*) itself, and in contrast to *ius gentium* it is common to all creatures in earth, sky and waters.

[7] Wolfgang WALDSTEIN: Sulla nozione di diritto naturale attraverso il diritto romano. In: *Saggi sul diritto non scritto*. Padova: CEDAM, 2002. 75.

So far *ius* was considered as a system of certain abstract normative strata, from which both the origin and the scope of application of each stratum is clearly traceable. *Ius civile* comes from the community, in other words, from the people itself, and is applicable to the very people who created those measures. *Ius gentium* stems from *naturalis ratio*, and its applicability covers all humankind. In contrast to this latter, ius natural finds its origins in *natura* and applies to all *animalia*, i. e. to living creatures. Comparing to this approach, a somewhat different concept is also to be taken into account. This concept was formulated by Papinian in the Digest:

Pap. D. 1, 1, 7 pr. (2 def.)

Ius autem civile est, quod ex legibus, plebiscitis, senatusconsultis, decretis principum, auctoritate prudentium venit.	*Ius civile* is that which is derived from statutes, plebiscites, decrees of the Senate, imperial constitutions, and the authority of learned men. (Based on Scott, 1932)

Pap. D. 1, 1, 7, 1 (2 def.)

Ius praetorium est, quod praetores introduxerunt adiuvandi vel supplendi vel corrigendi iuris civilis gratia propter utilitatem publicam. Quod et honorarium dicitur ad honorem praetorum sic nominatum.	*Ius praetorium* is that which the praetors have introduced for the purpose of aiding, supplementing, or amending *ius civile*, for the public welfare. This law is also designated honorary law, being so called after the "honor" of the praetors. (Based on Scott, 1932)

The two loci follow each other in the Digest: the principium of the fragment enumerates the material sources of *ius civile*, whereas the second circumscribes the conceptual elements of a normative practice which is referred to as *ius praetorium*. Despite the fact that it is also labelled as a segment of *ius*, it should emphatically be pointed out that *ius praetorium* is based exclusively on praetorian edicts: the principal means of exercising the power of jurisdiction. This was, however, merely a jurisdictional practice, the community approval of which was at best *a posteriori*, carried out by its constant application, compared to the sources of *ius civile* of the first text, which are all approved in advance. However, within the framework of his official practice, the praetorian practice was aiming to aid, amend or supplement the rules of *ius civile*. It should be noted, still, that the purpose of this activity was twofold. On the one hand, *ius civile* as both the aim and the object of pratorian activity, had always played a preponderant role. Yet, all these activities were carried out in order to serve public welfare, which is refered to by Papinian as *utilitas publica*, whilst Cicero addresses it as *utilitas communionis*. With this reference to public welfare and the remarkable parallelism of its notional concepts both in the definition of *ius pratorium* and in the descriptive depiction of *res publica* drives us to conclude that this whole praetorian activity of developing a certain legal practice corresponds with the general goal of the society itself. This approach culminates in the attitude of Marican, who claims that *ius honorarium* or *praetorium* is the living voice of *ius civile*.[8]

[8] Cf. Marci. D. 1, 1, 8 (1 inst.): *Nam et ipsum ius honorarium viva vox est iuris civilis.* See also WALDSTEIN (2001) 90 and 103.

Statutes / acts (*leges*): The history of Rome observed only a few statutes in comparison to today's abundance in legislation. When the lack of agreement arose in the community, the assembly of the entire people, the *comitia* was addressed. A draft of legislation was brought forward by a magistrate, the *consul* for the most part, posing a yes/no question to the *comitia*. This assembly then made a decision in that particular question compulsory to abide by the whole community. Debate at the *comitia* was inadmissible, exclusively a yes/no answer to the question raised was supposed to be brought forward. When a debate of the issue in question seemed to be inevitable, an informal assembly, the *contio* was called together. As for the yes/no votes, it should be noted that each citizen was bound to respond to the question raised either with the acronym "VR" (*uti rogas*, as you ask), or with „A" (*antiquo*, contrary), the appropriate letter being carved into a pottery shard, which is called ὄστρακον. After the approval of the *comitia*, the senate's authorising consent was also necessary to enact the draft. Then it was the drafting magistrate's task to see to it that the enactment should be displayed; even with a regulation that the wax tablets of the newly enacted statute should be put to display at eye level height.

A very good example of how legislation was carried out in Rome is the case of *lex Oppia* (215 BC), which was a *lex sumptuaria*, a statute passed to prevent inordinate expense in banquets, dress and funerals.[9] With regards to these *leges sumptuariae*, it should be remarked in general that in the course of antiquity it was considered the duty of the state to put a check upon extravagance even amongst private people, and among the Romans in particular, we already find traces of this in the laws attributed to the Kings, and also in the Twelve Tables.[10] This particular law, *lex Oppia*, was proposed by the tribune Gaius Oppius under the consulship of Quintus Fabius and Tiberius Sempronius, in the middle of the second Punic War. It enacted that no woman should possess more than half an ounce of gold, nor wear a dress of different colours (*vestimentum versicolor*), nor ride in a carriage (*iunctum vehiculum*) in the city or in any town, or within a certain radius of it, unless because of public sacrifices. This law was repealed twenty years later, mainly because as the war passed, the question was raised whether to do away with this law, since the circumstances had changed. Basically, two factions arouse, one arguing that the repeal of this law would be a mistake, as modesty (*pudor*) is a virtuous act, which used to be a characteristic of women as well.[11] On the other hand, the faction for the repeal of the law emphasised that there were other places than Rome, where ladies also wore ornaments (e.g. *sociorum Latini nominis uxoribus vident ea concessa ornamenta*).[12] Moreover, the leader of this second faction, Lucius Valerius also points out the difference between men and women, as the former are allowed to wear purple on their garments (*purpura vir utemur*).[13] As for their technical arguments, Cato referred mainly to the *exemplum maiorum*, which happens to be the primary reason why the ancestors passed no

[9] On this see also Gell. 2, 24, where *lex Fannia* and *lex Licinnia* are those explicitly mentioned. For further primary sources cf. e.g. Liv. 34, 1-8; Val. Max. 9, 1, 3; Tac. Ann. 3, 33, 34. Concerning the content of *lex Oppia* it is enough to refer only to the latest works in the rather rich secondary literature, such as e.g. Eliane Maria AGATI MADEIRA: La lex Oppia et la condition juridique de la femme dans la Rome républicaine. *Revue Internationale des Droits de l'Antiquité* LI (2004). 88-92; EL BEHEIRI Nadja: Jog és erkölcs egy korai római törvény tükrében [Law and Morals in the Reflection of an Early Roman Law]. *Jogelméleti Szemle* 2003/4 http://jesz.ajk.elte.hu/el16.html; PÉTER Orsolya: "Feminae improbissimae" A nők közszereplésének és nyilvánosság előtti fellépésének megítélése a klasszikus római jog és irodalom forrásaiban [The Assessment of Women's Public Appearance in the Sources of Classical Roman Law and Literature]. *Miskolci Jogi Szemle* 2/2008. 82-83.

[10] To support this, suffice it to refer to Table XI concerning the limitation of burial luxury, which could also be considered as an interest point of the Sullan law prohibiting such expenses (*lex Cornelia sumptuaria*, 81 BC).

[11] Cf. essentially Liv. 34, 2, 7-10; for the further arguments by Marcus Portius Cato cf. AGATI MADEIRA (2004) 93-96; PÉTER (2008) 83.

[12] Cf. Liv. 34, 7, 5-7.

[13] Cf. Liv. 34, 7, 2; AGATI MADEIRA (2004) 97.

such law before, as there was no extravagance to be restrained.[14] The motive for following the *exemplum maiorum* is that this can be regarded as such that guarantees the common welfare, the benefit of *res publica*. In contrast to these arguments, Valerius put stress on the existence of two different kinds of laws: he acknowledges that none of those laws passed as permanent institutions because of their enduring benefit, should be repealed (*perpetuae utilitatis causa in aeternum latae sunt, nullam abrogari debere fateor*).[15] Yet, there are laws demanded by the community itself in the case of a crisis: these are subject to change as conditions themselves change (*temporibus ipsis mutabiles esse*).[16] Consequently, laws passed in time of peace are frequently annulled by war, and vice versa: those passed in times of war are often repealed as peace returns (*quae in pace lata sunt, plerumque bellum abrogat; quae in bello, pax*).[17] His example is a similar situation when handling of a ship: while some means are useful in fair weather, there are others deemed applicable in a storm. The most important conclusion by Valerius is claiming that these two kinds of laws are so distinguished by nature (*haec cum ita natura distincta sint*).[18] This is the piece of argument that reminds us to *ius naturale* as a set of norms which stem from *natura*. Here a special reference to Cicero's description of *res publica* should be noted, mainly because when he wanted to outline the actual content of *utilitas communionis*, he did made reference to *natura* as well (cf. Cic. de off. 3, 30: "*[…] communis utilitatis derelictio contra naturam est […]*).[19] As a result, *utilitas* and *natura* are both placed on a common platform, which implies that all human communities, and therefore *utilitas communionis* or *publica*, are related to and stem from nature.

Plebiscitum: It is a name properly applied to any legal provisions passed at the *concilium plebis*, which was the assembly of the plebs. In the year of 287 BC, an act named *lex Hortensia* was passed the aim of which was to bring *plebiscita* to the very same binding as *leges* bore.

Imperial constitutions (*constitutiones principis*): An imperial constitution in its widest sense might mean everything by which the head of the state declared his will, either in a matter of legislation, administration, or jurisdiction. Materially, it is everything that the emperor has constituted in the form of a *decretum*, *edictum*, or an *epistola*. Gaius in his own Institutes points out that such a constitution has the force of law, therefore is considered a source of law, since the emperor himself possesses imperium which is granted to him by law (cf. Gai. 1, 5).

Senatus consultum: In the enumeration of the elements of *ius civile* the decrees of the Senate (*senatus consulta*) are also included. In fact, several *leges* were enacted during the reign of Augustus, and many of them were created even after his time. Still, it was under Augustus' rule, however, that *senatus consulta* began to gradually take the place of *leges*, a change which is also indicated by the fact that from this time on, these decrees were designated either by the name of the drafting consuls, such as SC Apronianum, SC Silanianum, or from the name of the Emperor, like in the case of SC Claudianum, SC Neronianum. True as it may be that many *senatus consulta* were enacted in the republican period; they were important sources of law for administrative or religious affairs, the suspension or repeal of laws in the case of urgent public necessity, the rights of the public treasury (*aerarium*), the treatment of the inhabitants of the Italian peninsula and those of the provinces. Besides legislation concerning the above mentioned topics, such decrees were slowly bringing within the sphere

[14] Cf. Liv. 34, 4, 7.
[15] Cf. Liv. 34, 6, 4.
[16] Cf. Liv. 34, 6, 5.
[17] Cf. Liv. 34, 6, 6.
[18] Cf. Liv. 34, 6, 7.
[19] Cf. Theo MAYER-MALY: Gemeinwohl und Naturrecht bei Cicero. In: ZEMANEK – HEYDTE – SEIDL-HOHENVELDERN – VEROSTA (ed.): *Völkerrecht und rechtliches Weltbild. Festschrift für Alfred Verdross*. Springer Verlag, 1960. 196 sq.; EL BEHEIRI (2003) supra.

of their legislation all matters that pertained to police, provincial matters, and all foreign relations. Their importance seems to have increased inasmuch as Augustus' decision to make it the primary, then the only legislating body, meant no great change.

Edicta: *Edictum* generally signifies any public notice made by a competent authority. Under the Republic it denotes specifically a rule promulgated by a magistrate, which was carried out by publishing the tables containing the rule on the album. The tables were to be placed in a conspicuous place, so that everyone could read them easily. An authority entitled to hand out an edict possessed the right to publish official rules, *ius edicendi*. This *ius edicendi*, the power of publishing edicts, belonged to the higher magistrates of the Roman people, but it was principally exercised by the two *praetors*, the *praetor urbanus* and the *praetor peregrinus*, whose jurisdiction was exercised in the city of Rome, as well as in the provinces, respectively. The former office was instituted in 366-365 BC by the *leges Liciniae Sextiae*, whereas the latter was set up in 242 BC, Sicily having become the first province. At this point it is worth mentioning that there was another magistrate (besides many other, though), the *aedilis curulis*, who also held the authority of promulgating edicts, based specifically on their office as superintendents of the markets, and of buying and selling in general. Accordingly, their edicts had primary reference to the rules of bargain and sale; therefore their practice had highly influenced the development of Roman law. As the office of a *praetor* was annual, the rules promulgated by a predecessor were not binding on a successor, yet he might confirm or adopt the rules of his predecessor, and introduce them into his own edict. Hence such adopted rules were called *edictum translatitium*, as opposed to *edictum novum*, rules invented and developed by the successor only. It might have occurred on several occasions that a newly elected praetor failed to regulate all possible events that were supposed to appear in his practice. Therefore, up to a certain point in Roman history, praetors were allowed to amend their edicts during the course of their office (*edictum repentinum*). A *lex Cornelia de edictis praetorum* (67 BC) was introduced to provide defence against the abuses of the edictal power, by declaring that the praetors should be bound to their edict promulgated at the beginning of their office. When several subsequent praetors decided on adopting rules from their predecessor, such an edict was called *edictum perpetuum*. It was called *perpetuum* not because the rules were fixed, but because each *praetor* adopted a certain practice already in force upon their entering into office, hence such practice became continuous. In 129 AD, Emperor Hadrian ordered one of the distinguished jurists, Salvius Iulianus, to make a compilation of edictal rules. Consequently, Iulianus made a body of law out of the edicts of praetors and aediles, as well as the edicts of the provincial governors. It entered into force bya *senatus consultum*, and from then on the body of the edict was unalterable.

At this point, it is important to have recourse to a fundamental means praetors often turned to whenever it was needed to make a rightful and just decision in an obscure case, and this means was good faith (*bona fides*). The reference to good faith finds its origins in the practice related to the debates of provincial inhabitants, where any reference to good faith resulted in the fact that any claim could be brought forward, regardless of the fact whether any civilian action was available or not. After a while it developed a meaning which designated all accordance with standards of honesty, trust, sincerity; therefore it meant a sincere intention to be honest. These intentions were backed up by the praetor under the form of *actiones bonae fidei*. In these processual formulae, judges were so instructed if certain requirements were met, they should grant the claimant everything due under good faith.

The opinion of jurists (*responsa prudentium*): First and foremost, with regards to the contemporary legal practice, it should hastily be pointed out that there's a huge difference between today's attorneys at law, solicitors and barristers, and *iurisconsulti* in Roman law. (It is to be noted that Hungarian terminology emphasises their expertise and professional attitude addressing them as legal experts, while in English, German or Italian speaking countries their

expertise is sooner mentioned as practical skills addressing them simply jursits / Juristen / giuristi.) An *advocatus* of Roman times was an orator whose eloquence and rhetorical skills were put to good use, whereas the role of a *tabellio* was to prepare and hand out written documents when needed. The origins of any activity of *iursiconsulti* stem from the practice of the pontifical college which, in the scope of the interpretation of law, applied analogy (*interpretatio pontificalis*, *ἀναλογία*) as a method: the similarity of the rule and the actual case served as a basis of the application of a particular rule. Secular jurisprudence commenced with the works of Mucius Scaevola, Manlius and Iunius Brutus, who were first to deal with *ius civile* as laymen at the beginning of the Republican age. The first to give public opinions and advice was Tiberius Coruncanius in the 3rd century BC, a plebeian consul (281 BC), who was distinguished both for his knowledge of the law and his eloquence. The definition of a *iurisconsultus*, as given by Cicero (De Or. I.48), is as follows:

Cic. de Orat. 1, 48, 212

"…quisnam iuris consultus vere nominaretur, eum dicerem, qui legum et consuetudinis eius, qua privati in civitate uterentur, et ad respondendum et ad agendum et ad cavendum peritus esset…"	Who is called a jurist? He is a person who has such a knowledge of the laws and customs which prevail in a state as to be able to advise, act and to secure a person in his dealings. (George Long, 1875)

The business of the early *iurisconsulti* consisted both in advising and acting on behalf of their clients (*consultores*) gratuitously. They gave their advice or answers (*responsa*) either in public places which they attended at certain times, or even at their own houses. Originally such advice pertained not only to matters of law, but from a wider aspect to anything else they were addressed with. Besides *respondere*, there are certain other activities as reflected by other sources of Cicero:

Cic. de leg. 1, 14

Summos fuisse in civitate nostra viros, qui id interpretari populo et responsitare soliti sint, [...]	There were many great men in our city who interpreted the civil law to the people, and responded to their questions. (E. J.)

Cic. de leg. 1, 17

Non enim id quaerimus hoc sermone, Pomponi, quemadmodum caveamus in iure, aut quid de quaque consultatione respondeamus.	In fact, in this conversation we do not investigate, Pomponius, what precautions we take in a case, nor which answer we give to legal questions (E. J.)

Cic. pro Murena 19

Servius hic nobiscum hanc urbanam militiam respondendi, scribendi, cavendi plenam sollicitudinis ac stomachi secutus est […]	Servius adopted the civil service, full of anxiety and annoyance, of answering, writing, cautioning (C. D. Yonge)

As seen in these excerpts by Cicero, the doings of *iurisconsulti* covered activities other than *respondere*. Besides these, we can see the words "*scribere*" and "*cavere*", where the former

referred to their employment in drawing up formal instruments, such as contracts or wills – just to mention some. In addition, their *cavere* activity ensured to protect against the other party's *dolus*. Additionally, an *agere* activity is also known, as a processual aid to the client. This referred to instructions given to the client himself or his *advocatus*: how to present the case to the magistrate or other official. Later, during the reign of Augustus, the *princeps* ruled that certain *iurisconsulti* should be given the right to *responsa* under imperial sanction (*ius respondendi*). Jurists, who had not received this mark of imperial favour, were not excluded from giving opinions, but the opinions of such jurists would have little weight in comparison with those of the privileged class. Those who obtained the *ius respondendi* from the *princeps*, would from this circumstance alone have greater authority, for formally their *responsa* were founded on the authority of the *princeps*.

It has already been mentioned how important *bona fides* was in the praetorial decision-making. With this respect, it is likewise remarkable and of great significance to render other elements influencing on legal decision-making – and not exclusively in praetorial practice. The above mentioned *bona fides* was referred to multiple times during the jurists'' *cavere* activity, whereas in the course of their *respondere* pursuit *ius naturale* and *rerum natura* were also paramount in some instances.
The approach towards the strata or layers of *ius* has already been dealt with. *Ius gentium* and *naturale* were equally examined and compared one to the other. At this point it is high time to step further and scrutinise these normative layers "in action". To do so, suffice it to cite a brief text from the end of the Digest by Celsus.

Cels. D. 50, 17, 188, 1 (17 dig.)

Quae rerum natura prohibentur, nulla lege confirmata sunt.	Whatever is prohibited by the nature of things cannot be confirmed by any law. (Scott, 1932)

If *ius civile – gentium – naturale* are to shape three concentric circles, where *ius civile* is the innermost, *ius gentium* is the middle and *ius naturale* is the outermost, it becomes clear that these layers are strictly connected in a sense that any rule on the level of *ius civile* must comply with the rules of *ius gentium* and *naturale* respectively. And a rule on the level of *ius gentium* should meet the requirements of *ius naturale*. The latter affirmation could be opposed by the fact that slavery is accepted by *ius gentium*, while *ius naturale* strongly denies that. Still – one may say – it exists on the level of *ius gentium*. To solve the seemingly conspicuous contradiction, it should be seen that slavery did not exist on the level of *ius naturale*, and each time all men are regarded as human beings. With regards to the original statement in the Digest, it should be pointed out that the order of nature after all constitutes an absolutely binding force; such a mandatory tie cannot be altered by any human measure. It is implied in the Latin text that the term used is *rerum natura*, a term which is often used in Latin literature. This *rerum natura* and *ius naturale* bear the very same thought in the background, though from a somewhat different aspect. With this regards we may have reference to the opinion of Theo Mayer-Maly who expressly pointed out that *natura* itself had a limitative character on the one hand.[20] Moreover, he also concluded concerning the notion of *rerum natura* that this term as a principle was referred to by the Romans, if exclusively one possible solution existed to a particular case.[21]
This idea could be very nicely backed up by a text by Gaius quoted here.

Gai. D. 7, 5, 2, 1 (7 ad ed. Provinc.)

Quo senatus consulto non id effectum est, ut pecuniae usus fructus proprie esset (nec enim naturalis ratio auctoritate senatus commutari	By this decree of the Senate it was not brought about that a usufruct of money should actually exist, for natural reason

[20] "Bei den römischen Juristen wird die Natur auffallend oft als Grenze des *ius* gesehen." Cf. Theo MAYER-MALY: Reflexionen über ius I. *ZSS RA* CXVII (2000). 11.
[21] "Auf die *natura rerum* beriefen sie sich dagegen, wenn aus irgendwelchen Gründen – sei es aus physiologischen, sei es aus sozio-kulturellen – für ein Problem nur eine Lösung denkbar schien." cf. MAYER-MALY *ibid.*

potuit), sed remedio introducto coepit quasiusus fructus haberi.	cannot be altered by the authority of the Senate; but where the remedy of security is introduced, a *quasi usufruct*us was created. (Scott, 1932)

With the establishment of usufruct, the problem is that money bears no fruit by nature. Yet, a decree of the Senate permitted the establishment of usufruct in such a case. Gaius underlines the limited character of legislation: the Senate can only widen the scope of the establishment of usufruct paving way to the application of the rule harmonising with *naturalis ratio*.[22] the Gaian opinion in the Digest reveals the connection between *naturalis ratio* and *senatus consultum*, thus it is not the formal nature of the sources of law which is taken into account, but the imperative character common to all of them, by which, however, neither *natura* nor *naturalis ratio* can ever be discarded.[23]

As regards *rerum natura* it could be stated regarding that whenever the Romans made reference to this notion, they asserted that the relevant elements of a particular case are in accordance with *rerum natura* (*in rerum natura est*), or even contrary to it (*in rerum natura non est*, *rerum natura non patitur*). This is the reason why these elements can or cannot be taken into consideration in the particular case; consequently they regarded this notion as a kind of axiom. The essence of these texts is composed of case by case fragments, and – as stated above – in each case the jurist only declares that a particular thing *in rerum natura est*, or not. For the most part, *rerum natura* goes hand in hand with unalterable facts (birth, death, family relations, place of birth, etc.) that actually cover the normative order, but the question is how these are connected? Reality defines the cornerstones of normative order, so that it is useful when the scope of the application of a certain norm should be decided about. And above all this, it is *veritas naturae* that guards the objectivity of these facts. This is the reason why *rerum natura* is considered a notion or principle of limitation, used mainly as a final reference. All things considered, *rerum natura* sets the scope of the application of man-made norms. Maybe the best example to support this latter statement is a very famous decision by Gaius.

Gai. D. 22, 1, 28, 1 (2 rer. cott.)

Partus vero ancillae in fructu non est itaque ad dominum proprietatis pertinet: absurdum enim videbatur hominem in fructu esse, cum omnes fructus rerum natura hominum gratia comparaverit.	The offspring of a female slave is actually not considered to be profit, and therefore belongs to the owner of the property. For it would seem absurd for a man to be classed under the term "profit", as *rerum natura* has prepared all profits for the benefit of the human race. (Based on Scott, 1932)

This text is often debated, and very much dealt with in the secondary literature. Without trying to have the slightest reference to any of the issues attributed to this text, it should be underlined how eminently conspicuous it is from the formulation in the text that *rerum natura* separates something which was common, therefore conceivable in Roman daily practice, from an approach totally strange to contemporary Roman thought. Additionally, the reference to this notion gives a nice example of what Mayer-Maly expressed concerning this notion, namely that it is referred to when only one solution was available to a particular problem.

[22] Cf. MAYER-MALY (2000) 13.

[23] Gian Gualberto ARCHI: „Lex" e „natura" nelle Istituzioni di Gaio. In: *Festschrift für Werner Flume I.* Köln, 1978. 7-8.

THE FIRST APPEARANCE OF LEGAL THINKING: THE MODEL OF THE CIVIL PROCEDURE LEGIS ACTIO SACRAMENTO IN REM

1. The theoretical-social background for *legis actiones*

The archaic Roman society was an artificial one: it was formed from the outcast members of different communities around the archaic city of Rome. From the very start of this ancient community, the state granted authority to each individual over the most basic means of production which were referred to as *res mancipi*. This enabled citizens to exercise their rights over *heredium* (a track of land dispensed from the *ager publicus*), slaves, the very basic servitudes and the four-footed animals of burden. The exercise of rights was dues to the fact that these assets were distributed to the citizens by the state, and their acquisition was mandatorily processed by formal and solemn mode of transfer (*mancipatio*, *in iure cessio*) witnessed by fellow citizens, which fact implied publicity. Consequently, the Romans used two expressions simultaneously, but with a different meaning when referring to power over a particular object in the scope of *ius Quiritium*. On the one hand, a citizen could say that the object '*meum est*' (it's mine) – used to indicate physical power regarding an object, and sometimes even humans. This term expresses a physical relation, just like today: we casually say 'my house, my children, my wife' implying certain bonds and without referring to any legal connections, though. The other frequent term was '*meum est ex iure Quiritium*' (it is mine on the basis of the law of the Roman people). As show, in this instance *ius Quiritium* refers to the law of *Quirites*, that is the Roman people (cf. above in connection with *ius civile*). When a citizen stated a right over an object on the basis of *ius Quiritium*, with this statement he asserted that the state itself – besides granting the particular asset to the citizen – backed up his acquisition in case of a debate concerning the right over the object. Therefore *meum est ex iure Quiritium* signified a legally admitted and protected (even from the background) authority over certain assets. That is the reason why this approach of valuables is considered to be the form of ancient ownership in Rome.

2. Questions to answer

At this point the most basic and logical question is why it was a special interest to the newly formed state to deal with the debates of private persons. Moreover, what kind of character did this strive have? Was it by all means of decisive and conclusive nature? Besides, it is also interesting to linger with the how this dispute-settling was actually carried out.
Many authors were trying to answer the first question, and their theories bear partial truth for the most part. It is true that behind each legally important debate there was an individual personal or financial damage. State interest in dispute-settling lies in the fact that any internal social or financial issues were weakening the state itself, which (especially at the beginning of Roman history) relied heavily on the military and financial contributions of the citizens. The state then relied on those citizens who were former outcasts in their original community, therefore if we say that they had a penchant for breaking the law, it's a gross understatement. Consequently, it was paramount for the state to express interest in settling even the pettiest disputes. However, the Romans clearly realised – even at a very early stage – that settling a dispute decisively could result in one of the parties being enraged with the one who made the decision. As a consequence, state interference in private disputes took a form of deciding about the admissibility of an official dispute (i.e. decision on the fact whether or not the state

backed up the claimant or not), and determining at a time the specific *ius* on the basis of which the dispute should be resolved. This gives the very first form of civil procedure, *legis action sacramento in rem* (l.a.s.i.r. for short), in the scope of which the claimant asserted that the object in question belongs to him *ex iure Quiritium*.

3. The steps of the process

The importance of l.a.s.i.r. and the questions pertaining to this procedure are related to the primary sources which cover this topic, all the more so, because these primary sources are partially contradicting to one another. On the one hand, there is a presentation of the procedure in the Institutes of Gaius (Gai. 4, 11-16), yet another key source is a work by Aulus Gellius (approx. 125 – 180 AD), whose "Attican nights" (*Noctes Atticae Libri XX*) is not at all a legal source, still it has several pieces of useful information specifically concerning ancient law. It is known that the archaic and the praetorian civil procedure came into two parts: the first was the *in iure* segment, in the scope of which the legal question was decided in front of a magistrate with the authority of jurisdiction; the second was the *apud iudicem* segment, where a layman judge decided the factual question. These were separated by the *litis contestatio*. On the basis of the secondary literature, the actual content of the *in iure* segment is at least dubious. The great and respected jurist of the 19th century, Rudolf von Jhering, in his work "*Scherz und Ernst in der Jurisprudenz*" (Leipzig, 1899., page 175sqq.) told the story of a veteran solider cast out from his land According to Jhering's view, the praetor obliged the claimant veteran to pay the sum of the *sacramentum* at the very beginning of the process, which view is majorly based on Gaius' account on how the l.a.s.i.r. was carried out. In contrast to this view, Gellius' account emphasises that the praetor as a magistrate with the authority of jurisdiction took part in the whole process *vindiciarum dicendarum causa*; in order to grant *vindiciae*, a temporary possession over the debated object. The person who obtained this temporary possession could be either one of the debating parties, or an independent third party called *sequester*.

3. 1 The *in iure* segment of the *l.a.s.i.r.*

The following steps occur in the scope of the *in iure* segment of the procedure. The first four of these is a kind of introductory phase, the aim of which is to clarify who the parties are, what the object of the procedure is and on what basis the claimant considers the object to belong to him *ex iure Quiritium*. The second three steps are those, where actual decision is made.

(a) *In ius vocatio* – invocation, in accordance with the Law of the Twelve Tables. Invocation was a public event, with the obligation for the one who called in his adversary to ensure all reasonable means to the other party to enable his presence.
(b) *Manus consertio* – identification of the object in question.
(c) *Vindicatio* – the one who called in his adversary presented his case. Logically, the one who called in his adversary, stated that the object in question belongs to him *ex iure Quiritium*. Then the adversary had the opportunity to react to this statement: he could counter the claim (*contravindicatio*), he could admit the claim (*confessus*), or he could remain silent (*indeffensus*). The procedure continued exclusively in case of the first reaction (*contravindicatio*).
(d) *Mittite ambo rem* – the object is taken from both parties for a moment
(e) *Caussam coiciunto* – both parties were entitled to present the basis of their statements, in order to back up their *vindicatio* with any reference to actual transactions or official

decisions. This was especially important, because this was the basis of the praetor's decision on the temporary possession of the object.

(f) *Vindicias dicere* – the praetor's decision about the temporary possession of the object
(g) *Sacramentum* – at this point any of the parties had the opportunity to address the other party to deposit a sum of sacramentum, claiming that the counterparty falsely claimed the object to belong to him *ex iure Quiritium*. This is the point from whence one can talk about claimant / plaintiff and defendant.

After this there was a limited period of time for the appointment of the layman judge in accordance with the regulations of lex Pinaria (472 BC): following the deposit of the *sacramentum* the procedure was pending for 30 days, the lapse of which both parties were bound to return to the praetor for the appointment of the judge. Meanwhile both parties should have present a bail or bondsman to secure their return and the preservation of the object. Then came the *litis contestatio,* where – in the absence of minutes of the meeting – witnesses were chosen from the public to ensure the presentation of events *in iure* to the judge.

3. 3 The *apud iudicem* segment

In this part of the procedure the main task of a layman *iudex*, or *arbiter* was to answer the factual question presented by the praetor with a "yes / no" response. This factual question referred to the deposit of the *sacramentum*, namely whose accusal of false statement was false or wrongful – as one object cannot belong wholly to two people *ex iure Quiritium* at a time. Therefore the decision of the factual question decided the legal issue as well.
There were several other kinds of legis actiones presented by Gaius, which all go back to this very first example of protection of private ownership, with minor changes made to this model.

A CLOSURE AND A NEW START: JUSTINIAN'S CODIFICATION

The codification by Emperor Justinian is not exclusively important for jurists, and not specifically for those dealing with Roman law: the job carried out by the experts of the East-Roman Emperor is part of the common cultural heritage of Europe, or even of the whole mankind. Given the circumstances amongst which the compilers were bound to work, it could even be regarded as a miracle, let alone the relatively short time frame of accomplishment. Though contemporary public opinion was thinking highly of this effort, it is beyond doubt that its impacts were clearly traceable even in its own era – this was such an element that anticipated its subsequent fate and survival, as well as its direct and indirect effects on the development of law in Europe and in the world. First and foremost, its historical context could be examined, so that its importance and historical, social and political impacts could be pointed out.

1.The historical background of the codification

The best sources of Roman law are the opinions of classical jurists (1st – 3rd century AD): these are the means to get a general outline of Roman legal rules and thinking, as well as a glimpse to see the bigger picture of the development of law. Imperial constitutions and Institutes (mainly those by Gaius and Justinian, though there are many others) are doubtlessly important sources of legal history, still *response* are all the more important, because these are responses given to actual cases. Suffice it at this point to merely refer to the role and importance of Augustus and Hadrian in granting *ius respondendi* to some jurists, establishing a path for eminent jurists to follow their practice backed up by imperial authority. As for direct legislative antecedents, two major legislative works can be referred to. Firstly, in the divided Empire, the Law of Citations (*lex citationis*) was very significant: it was an act issued in Ravenna, in 426 AD by Emperors Theodosius II (408 – 450) and Valentinian III (424 – 455), in the scope of which authority was given to the five outstanding jurists: Gaius, Ulpian, Paul, Papinian and Modestinus – all of whom were experts of the classical period. Quotations used by these jurists were also given authority. If there was a conflict between the opinions, the majority view would prevail. In the event of an even number of views on each side, the view of Papinian would be applied. If, however, Papinian remained silent on that particular instant, the judge would then be free to choose which solution to apply. In addition to this, the Theodosian Code should equally be mentioned, a compilation of the laws of the Roman Empire under the Christian emperors since 312, which compilation went into force in both the eastern and western parts of the Empire on 1st January, 439. (Besides, two further private-compilations are also to be listed here: the Gregorian Code containing constitutions from Septimius Severus to Diocletian, as well as Codex Hermogenianus containing exclusively the constitutions by Diocletian).

2.Preliminary works: Justinian's aim

The codification is a set of fundamental works on jurisprudence and legal practice of the Roman era, aiming to accomplish several goals at a time and summarising a more than a thousand year-long continuous development of law. Emperor, Justinian I (527 – 565 AD), whose almost megalomaniac dream was the *renovatio imperii*, that is the restoration of the Empire, an altogether ambitious, but just partly realised task, though. The emperor is said to

be the last Roman emperor who was a native speaker of Latin: his family roots go back as far as he could boast with Illyro-Roman or Thraco-Roman origins. His uncle, Justin I (518 – 527) adopted him – presumably prior to his coronation; probably in 518, thus he became the successor of his uncle on the throne. He became a close confidant to his uncle: he was made associate emperor in early 527, shortly before the decease of Justin I. as previously mentioned, his reign was characterised by a constant strive for the renovation of the Empire, that is to restore its fame, wealth and importance. This endeavour is referred to as *renovatio imperii*. Two simultaneous ways were given to achieve his aim: on the one hand, military activities were indispensable to take back the previously lost parts of the former Western Empire. In this, he could easily rely on his talented generals, Belisarius and Narses, and interestingly, in his times, his military achievements were more often remembered than his legislative works. Still, this legislative activity was the other way towards his aim to reunite the two divided empires, like a new Romulus. As the Eastern Roman Empire – similarly to its former Western counterpart, was a Christian realm, the Helleno-Christian thought served as a foundation for his new *Imperium Romanum*.

3. The codification

Besides his military campaign, the legislative work carried out by Justinian's jurists and officials bore extreme importance, as his aim was not only to compile, but also to unify the legislative body (*corpus iuris*) of the Empire. Several committees were set up to carry out this enormous task of compilation, led by two refined jurists and imperial officials, Tribonian and Theophilus. The jurists working in the committees were called compiler (named so after their activity), and their task was mainly to collect legal sources: *responsa*, constitutions, edicts – just to mention some. In addition to all these tasks, they were bound to free the compilations from any repetitions, controversies, while following strict professional principles in condensing and simplifying the texts at hand. Despite all their efforts, controversies, as well as illogical solutions sometimes occur, however, their numbers are counted by the dozens at the most, which – in comparison to the more than 9000 fragments of the Digest alone – is not an understatement to be considered as petty, or even insignificant. Moreover, it is often overlooked that the basis of this compilation covers roughly a thousand years; therefore inconsistencies are innate to a certain extent, for each different age requires different legal solutions. Compiling all these necessitate a very specific method to arrange such a huge amount of information: this was the method of *interpolatio*, in the scope of which seamless alterations were made on some texts, so that they could be fully comprehensible. To give an example of this, suffice it to have reference to the fact that the term *mancipatio*, which was an ancient and formally bound verbal act to acquire ownership of a tract of land, a slave, certain animals or even servitudes, was substituted for the expression *traditio*, as the former ancient term was just as senseless to a 6th century jurist as it is for a law school student today. There is one more relevant aspect of the whole codification process, namely the fact that the entire compilation was brought forward in Latin (except for the *Novellae* which was presented in Greek). This was all the more important, because the official language of the Eastern Empire was Greek (in spite of Justinian being the last emperor with Latin as a mother tongue) – one might as well say that it was a hazardous decision to incorporate law to a country in a language other than the official one. Still, Justinian had but two choices: either he invented something totally pristine and new, without any precursors, or he could rely on the already developed and used legal solutions. In case of choosing the first one, he would have had the prerogative to choose the language of his legislative work, which – in this case – would have been Greek. If, however, choosing the second option, he bought a package, as it were: since

with the ready-made solutions there came the language, which was Latin, as a matter of fact. As for the final results of all the works and efforts of the compiling committees, generally three basic "pillars" of this codification are to be mentioned. To these, one supplementary segment was added later. These "pillars" are as follows:

(a) *Codex Iustinianus* (529), containing imperial constitutions, forbidding any further reference to its predecessors (*C. Theodosianus*, *Hermogenianus* and *Gregorianus*). This original edition of the Code is not available, yet, in 534 Justinian issued a revised version of his Code (*Codex Iustiniaus Repetitae Praelectionis*), which is the currently used and cited version.

(b) *Digesta* (533) or also *Pandectae* (so titled after its Greek name, Πανδέκται, which means "all-containing". This contains *responsa*, that is the opinions or responses of (mainly classical) jurists, which responses, however, were given to single questions of "clients".

(c) *Institutiones*, or after its Greek name *Elementa* (533): a textbook, which was kind of a by-product of the Digest, despite the fact that strong reliance on Gaius' Institutes is conspicuous, and Justinian himself never made a secret of such a dependence. This textbook was used in the education of imperial officials.

(d) The supplementary addendum was the previously mentioned *Novellae*, in Greek, which contained all the novelties introduced by Justinian.

The importance of the codification is twofold: on the one hand, it compiles the legal practice of the earlier eleven centuries. Consequently, it is generally aiming to reach totality – even if it is far from being an overall collection. Besides this first aspect, the corpus of this codification served as a basis or even as a foundation stone to the legal scholars of the subsequent ages. Medieval canon and secular law, particular and royal jurisdiction relied equally on its results, as well as the *ius commune*.

2. 1 The Digest and the Institutes

The Digest – as previously shown – is a compilation of *responsa* of mainly classical jurists in 50 books. It was comprised using the works of 39 jurists; one third of the text stems from Ulpian; the oldest jurist referred to is Quintus Mucius Scaevola (140 – 82 BC), the latest is Archadius Charisius (4th century AD, a contemporary of Emperor Constantine). In order to avoid repetitions and contradictions, the Emperor authorised the committees led by Tribonian to prepare excerpts from the original texts chosen (*excerptio*), and to make minor alterations on the texts omitting outdated rules, if necessary (*interpolatio*). Despite all efforts, some texts are doubled in the Digest (*leges geminatae*), while others are placed under the wrong title (*leges fugitivae*). In these 50 books there are 432 *tituli*, titles in other words, which are arranged topically, and these titles altogether contain more than 9000 *fragmenta*. Fragments are shorter or longer texts; if it is the latter case, these longer texts are divided into paragraphs. The first division of the fragment is then called *principium* being the first one, standing on top. The Digest was the result of a three year-long continuous work, and parallelly, Theophilus and Dorotheus created the Institutes, a textbook consisting of 4 books, strongly dependent on the Institutes by Gaius, used in the education and training of court lawyers and imperial officials.

2. 2 The mass theory

It was a great mystery in the studies of Roman law, how a work similar to the Digest was prepared merely in three years, especially when one takes into consideration that the totality of the text was assembled by three committees. These committees functioned with 2 regular and fixed members each, with 11 lawyers (or solicitors / barristers) as special and temporary participants, though their aid was secondary and overall marginal. Thus, the setting of the three committees was as follows:

	Sabinus-mass	***edictum*-mass**	**Papinianus-mass, appendix-mass**
Head	Tribonianus	Theophilus	Constantinus
Associate	Dorotheus	Anatolius	Cratinus

Each committee elaborated their proportion of the overall material systematically; this approach left a clear trace on the final text of the Digest. This was the pattern noticed by a German jurist and legal historian Friedrich Bluhme (1797 – 1874) in 1820, who realised that the texts in each title could be regrouped in a way that the texts should form four different masses (*Masse*); thus his theory so named Mass theory (Massentheorie).
(1) Sabinus-mass: it contained excerpt from the commentaries added to the works of Sabinus,and to the commentary on *ius civile*;
(2) *edictum*-mass: these texts originate from the commentaries on the *edictum*;
(3) Papinianus-mass: these texts are based on the commentaries to the works of Aemilius Papinianus;
(4) appendix-mass: these texts cover other, unclassified excerpts.
Bluhme discovered a regularity, namely that the texts of the different masses in each title are arranged in a quantitative order, that is the texts of the mass come first which contain the most texts and so on. Additionally, it is also true that not all masses are necessarily represented in each title – it always depends on the fact whether there are opinions in a certain mass pertaining to that particular legal problem. Bluhme's theory gives a plausible explanation for the swiftness of the work carried out by the committees – he supposed that each committee had dealt with only one specific mass at a time.
It should also be noted that there are other opinions concerning the origins of the Digest. Some authors believe that prior works, so-called *prae-Digestae*, preparatory works should have existed simplifying the compilers' work (e.g. Hofmann, Arangio-Ruiz, Guarino, Wieacker). In 1970 two English experts Tony (Anthony Maurice) Honoré [1921 –] and Alan Rodger [1944 – 2011] carried out a joint-research in the scope of which they rethought Bluhme's original *Massentheorie*. They accomplished computer analysis to verify Bluhme's findings – resulting in an outcome to maintain and support the original idea, with some marginal corrections to rectify the overall picture.

CLASH OF REGULAE: "NASCITURUS PRO IAM NATO HABETUR" VERSUS "MULIERIS PORTIO" IN THE SOURCES

It is highly interesting that contemporary Roman law studies are bursting with cases in the scope of which secondary literature credits general meaning and validity to certain *regulae* or a *definitones*. This attitude can easily end up in letting a non-expert draw such conclusions that these *regulae* and *definitiones* were generally true, accepted and applicable throughout the history of Roman law, or at least during a major part of it. However, if we take a closer look at this complex issue, we can easily find out that the actual situation was much more nuanced. Consequently, this doesn't mean that the compact statements in the forms of *regulae* and *definitiones* weren't true, yet, it should also be taken into account that these concise assertions could better understood if they are analysed in-depth, and placed in their actual social-economic-political context. The approach described above is all the more important, because secondary literature has a tendency to regard Roman jurists as such people who were experts in casuistic, but who were not really fond of pure theory.[24] This leads to the famous notice of a Roman jurist concerning the dangers of *definitiones* themselves.

1. General remarks

As a mosaic in the Casa del Poeta Tragico of Pompeii warns possible intruders about the watchdog inside with the tag *"Cave canem!*", we might as well use it at this point as a guideline to refer to the hidden dangers of definitions in legal education, even if the phrase *"Cave definitiones!*" doesn't appear in the sources of Roman law. However, as the former can be seen in a display cabinet of the Museo Nazionale di Napoli, the latter can be observed in the Digest of Justinian.

> Iav. D. 50, 17, 202 (11 epist.)
> *Omnis definitio in iure civili periculosa est: parum est enim, ut non subverti posset.*

With regards to this text, a very widespread, and presumably not fully adequate, or even misleading interpretation should be pointed out. Generally this text is understood to refer to the dangers of definitions on the basis of the distortion of the original meaning of whatever is subject to definition.[25] In this passage, however, the form *subverti* is a passive *infinitivus*, while the form *coniuctivus praesens imperfectum* of the verb *possum, posse, potui* expresses possibility – the explanation of the subjunctive lies in the fact that the sub-clause is introduced by the conjunction *ut*. The predicate refers to the subject of the passive infinitive, that is to *definitio*. Consequently, the demolition and the destruction described by the verb *subverto*[26] refers to *definitio* itself. It would by all means be curious, however, if the essence of anything

[24] Cf. Andreas WACKE: Zum dolus-Begriff der actio de dolo. *RIDA* XXVII (1980). 354. See also essentially with a corresponding tone Ph. J. THOMAS: Alternative Paradigm for Roman Law. *RIDA* XLV (1998). 656-657.

[25] This approach is clearly traceable in the Hungarian literature, even in the current one, at that. Cf. PÓLAY 1988, 84; lately SIKLÓSI Iván: A nemlétező, érvénytelen és hatálytalan jogügyletek elméleti és dogmatikai kérdései a római jogban és a modern jogokban. [Theoretical and Dogmatical Questions of the Non-existing, Null and Void Transactions in Roman Law and in Modern Legislations] Doktori értekezés, ELTE ÁJK, 2013. 20. However, it should also be noted that in the English translations of the Digest, a totally different approach stands in the centre. Samuel P. Scott's translation for instance understands this passage as follows: "Every definition in the Civil Law is subject to modification, for a slight discrepancy may render it inapplicable". Consequently, it is obvious that the aforesaid approach, peculiar mainly to the Hungarian literature, cannot be universalised.

[26] Cf. *Oxford Latin Dictionary* s. h. v.

were even subject to change, because anyone says so. In other words, it is clear that black won't become white just because we expect it to be.

2. A regula and an actual case: regulations with regards to the foetus in Roman law

The actual case in question is a text by Ulpian, related to SC Plancianum (Ulp. D. 25,4, 1 pr. – 1 [24 ad ed.]), in which text the term *portio mulieris vel viscerum* comes up, which term is for the most part conveniently referred to merely under the form *portio mulieris*. It is common knowledge that in connection with the foetus' legal stance it is stated that even in its mother's womb it is deemed to be fully a human being, whenever the question concerns advantages accruing to it, when born. However, before its birth, its existence is never assumed in favour of anyone else, that is it cannot be of any benefit to anyone before its birth.[27] However, as Wolfgang Waldstein pointed out, there is a tendency in contemporary literature, in the scope of which the foetus is simply considered as the part of the woman, or the woman's body (*portio mulieris*).[28] A closer scrutiny of this topic can help us better understand the Roman rules related to the foetus.

3. References to the foetus in the primary sources of Roman law

It is generally stated with regards to the views of classical jurists concerning the foetus, that in the Digest, title 5 of the first book, which covers the issues related to the condition of men (D. 1, 5: *De statu hominum*), the foetus is on the one hard referred to as an entity already in existence, and on the other hand is considered as already born whenever it comes down to its particular interests.[29] Both two sources containing these pieces of information use the term *qui in utero est* or *sunt*. However, in addition to this phrase, there are further expressions that are frequently used as the one that designate foetus in the primary sources, consequently, manifold textual clusters could be formed to in which fragments covering any topic related to the foetus are to be grouped. In the Digest, there are several instances, where the foetus is referred to as *qui in utero est* – just as stated previously.[30] Another variation for this term is,

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[27] Cf. e.g. FÖLDI András – HAMZA Gábor: *A római jog története és institúciói.* [The History and Institutions of Roman Law] Budapest: Nemzeti Tankönyvkiadó, 2013[18]. 204. With this regards, it should, however, be noted that the origins of this rule go back to three sources at a time, namely Gai. 1, 147; Paul. D. 1, 5, 7 (lib. sing. de port.); Iul. D. 1, 5, 26 (69 dig.); Paul. D. 50, 16, 231 (lib. sing. ad SC Tert.). Yet, many authors underline that the term *nasciturus* cannot be found in the legal sources – at least not from this aspect. See for example Marianne MEINHART: D. 50, 16, 231. Ein Beitrag zur Lehre vom Intestat erbrecht des ungeborenen Kindes. *ZSS RA* LXXXII (1965). 193[18]; Max KASER: *Das römische Privatrecht I.* Handbuch der Altertumswissenschaft X. 3. 3. 1-2. München, C. H. Beck, 1971[2]. 271[21]. As for the expressions applied with reference to a foetus it is worthwhile to cite MEINHART 1965, 199; Bernardo ALBANESE: *Le persone nel diritto privato romano*. Palermo, 1979. 11, with special attention to footnote 17; PÉTER Orsolya: „Nasciturus pro iam nato habetur". A magzat pozíciója és a magzatelhajtás a római jogban. [The Stance of the Foetus and Abortion in Roman Law] *Jogtudományi Közlöny* 7-8/1991. 177.

[28] Waldstein pointed out that the term goes right back to Kaser himself. Cf. Wolfgang WALDSTEIN: Ist „der partus bloßer Teil des Mutterleibs"? In: Martin Josef SCHERMAIER – Johann Michael RAINER – Laurens C. WINKEL (hg.): *Iurisprudentia universalis. Festschrift für Theo Mayer-Maly zum 70. Geburtstag*. Köln – Weimar – Wien, Verlag Böhlau, 2002. 837.

[29] Cf. with this regards Iul. D. 1, 5, 26 (69 dig.) and Paul. D. 1, 5, 7 (lib. sing.de port., quae lib. damn. conc.) correspondingly.

[30] Paul. D. 1, 5, 7 (lib. sing.de port., quae lib. damn. conc.); Iul. D. 1, 5, 26 (69 dig.); Ulp. D. 1, 7, 15 pr. (26 ad Sab.); Ulp. D. 5, 2, 6 pr. (14 ad edict.); Pap. D. 12, 6, 3 (28 quaest.); Ulp. D. 28, 2, 4 (3 ad Sab.); Ulp. D. 28, 3, 6, 1 (10 ad Sab.); Ulp. D. 29, 2, 30, 1 (8 ad Sab.); Paul. D. 37, 4, 4, 3 (41 ad edict.); Gai. D. 37, 9, 5 pr. (14 ad edict. prov.); Ulp. D. 37, 9, 7 pr. (47 ad edict.); Paul. D. 37, 11, 3 (41 ad edict.); Ulp. D. 38, 8, 1, 8 – 9 (46 ad edict.);

when jurists mention the foetus as *quod in utero est*.[31] When these two groups are compared, it turns out that the starting pronoun is different (*qui – quod*). For the first look, it might seem that those jurists who tend to use *quod* as an introductory pronoun consider the foetus as a non-human entity, therefore they don't use the relative pronoun referring to human beings. However, a closer scrutiny and understanding of the prevalent use of the pronoun *quod* will result in a clearer picture on this topic.[32] Quod in Latin is sometimes used in the form id – quod. Both pronouns are neutral ones expressing basically what the Latin phrase *neutrum* originally means: *ne utrum*, that is none of the two, namely neither masculine, nor feminine.
Also, *venter* and *qui in ventre est* are commonly used forms to refer to the foetus.[33] Such a use of the noun venter could be all the more interesting, as it generally means abdomen or belly[34], still authors of non-legal sources prevalently use this term signifying embryo.[35] *Conceptus* again is widely referred to in the primary sources in the Digest: there are several instances of the use of this term designating a foetus.[36] There is one more set of terms which are highly interesting, and this is *animans*, *animax* and *animal*.[37] These terms are all the more interesting, because there are other texts in which they are referred to, but with a slightly different scope of meaning. On the one hand these terms are cited by Seneca, who – in his letters – treatises on the different forms of entities.[38] As Seneca puts it, "horse", or "dog" are considered as *species*. Therefore some common bond for all these terms must be discovered, one which embraces them and holds them subordinate to itself. And this could be "animal". And so there begins to be a *genus* "animal", including all the above terms. But there are certain things which have life (*anima*) and yet are not "animals". Consequently. it is agreed that plants and trees possess life, and that is why we speak of them as living and dying. Therefore the term "living" will occupy a still higher place, because both animals and plants are included in this category. Certain objects, however, lack life – such as rocks. This approach is also reflected in the definition of ius naturale. As it is commonly known, primary sources consider it as follows: "*Ius naturale est quod natura omnia animalia docuit*."[39]

Ulp. D. 38, 16, 1, 11 (12 ad Sab.); Ulp. D. 38, 16, 3, 9 (14 ad Sab.); Ulp. D. 38, 17, 2, 11 (13 ad Sab.); Ter. 50, 16, 153 (11 ad leg. Iul. et Pap.); Ulp. 50,16, 161 (7 ad Sab.). It should be mentioned that there are other relative clauses which refer to the foetus, such as *qui nasci speratur* (Paul. D. 50, 16, 231 [1ib. sing. ad sc. Tert.]), and *qui nondunt nati sint* (Ulp. D. 37, 9, 1 pr. [41 ad ed.]).

[31] Paul. D. 5, 4, 3 (17 ad Plaut.); Paul. D. 28, 2, 25, 1 (12 resp.); Ulp. D. 37, 9, 1, 2.14 (41 ad edict.); Paul. D. 45, 1, 73 pr. (24 ad edict.).

[32] Cf. *Oxford Latin Dictionary* s. v. 'quod'.

[33] *Venter* appears under Paul. D. 5, 4, 3 (17 ad Plaut.); Ulp. D. 10, 3, 7, 8 (20 ad ed.); Ulp. D. 28, 3, 3, 5 (3 ad Sab.); Ulp. D. 37, 1, 12, pr. – 1 (48 ad ed.); Ulp. D. 37, 9, 1, 6 (41 ad edict.); Ulp. D. 37, 9, 7 pr. (47 ad edict.), whereas *qui in ventre est* in Marc. D. 1, 5, 5, 2 – 3 (1 inst.).

[34] Cf. *Oxford Latin Dictionary* s. v. 'venter'.

[35] Cf. *Oxford Latin Dictionary* s. v. 'venter[4b]'.

[36] See Paul. D. 1, 5, 11 (18 resp.); Pomp. D. 1, 7, 14 (5 ad Sab.); Ulp. D. 1, 9, 7, 1 (1 ad leg. Iul. et Pap.); Ulp. D. 6, 2, 11, 2 (16 ad edict.); Paul. D. 37, 9, 10 (7 quaest.); Call. D. 48, 20, 1, 1 (1de iure fisc. et pop.); Ulp. D. 50, 2, 2, 2.4 (1 resp.); Cels. D. 38, 16, 7 (28 dig.); Ulp. D. 21, 1, 14, 1 (1 ad edict. aedil. curul.).

[37] Cf. Marcell. D. 11, 8, 2 (28 dig.); Ulp. D. 28, 2, 12, 1 (9 ad Sab.); Ulp. D. 38, 8, 1, 8 (46 ad ed.).

[38] Sen. Ep. (6), 58, 8-15: „[…] *equus species est; canis species est; ergo commune aliquod quaerendum est his omnibus vinculum, quod illa conplectatur et sub se habeat. Hoc quid est? Animal. Ergo genus esse coepit horum omnium, quae modo rettuli, hominis, equi, canis, animal. Sed quaedam animam habent nec sunt animalia. Placet enim satis et arbustis animam inesse. Itaque et vivere illa et mori dicimus. Ergo animantia superiorem tenebunt locum, quia et animalia in hac forma sunt et sata. Sed quaedam anima carent, ut saxa.*"

[39] Cf. Ulp. D. 1, 1, 1, 3 (1 inst.); Inst. 1, 2.

4. The term mulieris portio in the primary sources

As the Roman considered it, the foetus was of a transient or transitory nature: as not yet born, it wasn't considered a human being (*homo*, in the sources *in rebus humanis nondum est*), on the other hand, however, as a consequence of its conception it still objectively exists (*in rerum natura est*), and as an independent entity – that is independent from its mother.[40] In contrast to this point of view, there are some who consider the foetus as the part of the mother's body: even most manuals claim that in Roman law *nasciturus* was not considered as a human being. Though this approach also bears Roman roots, still it is worthwhile to give a closer look to the case where the term *mulieris portio* turns up.

4.1. The case

Ulpian is the one who describes the case in the Digest (Ulp. D. 25, 4, 1 pr – 1 [24 ad ed.]), which case is actually related to the reception of a custodian and the paternal recognition.

> Ulp. D. 25, 4, 1 pr – 1 (24 ad ed.)
> *(pr.) Temporibus divorum fratrum cum hoc incidisset, ut maritus quidem praegnatem mulierem diceret, uxor negaret, consulti Valerio Prisciano praetori urbano rescripserunt in haec verba: „Novam rem desiderare Rutilius Severus videtur, ut uxori, quae ab eo diverterat et se non esse praegnatem profiteatur, custodem apponat, et ideo nemo mirabitur, si nos quoque novum consilium et remedium suggeramus. Igitur si perstat in eadem postulatione, commodissimum est eligi honestissimae feminae domum, in qua domitia veniat, et ibi tres obstetrices probatae et artis et fidei, quae a te adsumptae fuerint, eam inspiciant. Et si quidem vel omnes vel duae renuntiaverint praegnatem videri, tunc persuadendum mulieri erit, ut perinde custodem admittat atque si ipsa hoc desiderasset: quod si enixa non fuerit, sciat maritus ad invidiam existimationemque suam pertinere, ut non immerito possit videri captasse hoc ad aliquam mulieris iniuriam. Si autem vel omnes vel plures non esse gravidam renuntiaverint, nulla causa custodiendi erit".*
> *(1) Ex hoc rescripto evidentissime apparet senatus consulta de liberis agnoscendis locum non habuisse, si mulier dissimularet se praegnatem vel etiam negaret, nec immerito: partus enim antequam edatur, mulieris portio est vel viscerum. Post editum plane partum a muliere iam potest maritus iure suo filium per interdictum desiderare aut exhiberi sibi aut ducere permitti. Extra ordinem igitur princeps in causa necessaria subvenit.*

4.2. The issue of SC Plancianum

The SC Plancianum, to which this particular case is related, falls under the issue of the already mentioned *senatus consulta de liberis agnoscendis*, despite the fact that it appears under the title "*de inspiciendo ventre custodiendoque partu*" in the Digest.[41]

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[40] On this topic it is worth taking into consideration Paolo FERRETTI: *In rerum natura esse in rebus humanis nondum esse. L'identità del concepito nel pensiero giurisprudenziale classico*. Milano, Giuffrè Editore, 2008. Previously see ALBANESE 1979, 11-12.

[41] Correspondingly cf. Otto LENEL: *Palingenesia iuris civilis. Iuris consultorum reliquiae quae Iustiniani Digestis continentur ceteraque iurisprudentiae civilis fragmenta minora secundum auctores et libros*. Vol. II. Lipsiae, Ex officina Bernhardi Tauchnitz, 1889. 650; Paolo FERRETTI: *In rerum natura esse in rebus humanis*

Even its proper spelling could be subject to debate (though in primary texts, the form Plancianum is exclusive), but which is more important at this point is its actual content: Kaser for instance describes the above mentioned case as the content of the SC Plancianum, while there are others who attribute a content related to lex Falcidia: Ulpian mentions once amongst the *senatus consulta* related to paternal recognition[42] (Ulp. D. 25, 3, 1, 10 [34 ad ed.]), while it makes its appearance in connection with the lex Falcidia by Modestinus (Mod. D. 35, 2, 59 [9 pandect.]). In the secondary literature, it was Albanese who expressly pointed out that there was for sure two *senatus consulta* in the history of Roman law with the very same name.[43]

4.3. Exegesis

In the time of the Divine Brothers, Marcus Aurelius and Lucius Verus, a husband named Rutilius Severus stated that his former wife was pregnant from him, therefore he claimed to be entitled to exercise his paternal rights over the child, and consequently he wanted to recognise the child as his. However, the former wife denied her pregnancy, as a result the husband claimed that a custodian should be appointed for the wife in order that the interests of the unborn child should be observed. The imperial rescript come forward with a totally new plan and a remedy, saying that if the husband persists in his demand, it will be most convenient for the house of a respectable woman to be chosen into which Domitia may go, and that three trustworthy and experienced midwives should examine her. Should all of them, or only two, announce that the wife seems to be pregnant, then the she must be persuaded to receive a custodian, just as if she herself had requested it. If she does not bring forth a child, her husband will know that he will incur dishonour, and that his reputation will be involved, and he will not unreasonably be held to have contrived this in order to injure his wife. If, however, all midwives, or their majority, declare that the woman is not pregnant, there will be no reason for the appointment of a custodian.[44]

In the first paragraph of this fragment Ulpian explains this unusual, but very original imperial decision giving a very detailed reasoning with regards to the verdict. Firstly, he point out explicitly that there's no place for the application of those *senatus consulta* in this matter that are related to the paternal recognition of a child (*senatus consulta de liberis agnoscendis*), which *senatus consulta*, however, are covered in depth in the previous title of the Digest. The reason for this inadmissibility of application is this: *partus enim antequam edatur, mulieris portio est vel viscerum*, in other words the child, before it is born, is a part or a portion of the woman, or of her entrails.[45] As a consequence, it turns out clearly that the use of the expression *portio mulieris vel viscerum* cannot by any means be generalised as a term used throughout ancient Roman history. As it is apparent from the case described above and the reasoning attached to it, this term is very likely a means of reasoning to establish the inadmissibility of a certain group of *senatus consulta*.[46] In addition to this, it is very interesting to refer to Waldstein's approach on this text, who underlines that the words used by Ulpian pertain to such a phase on the one hand, where the father is still not entitled to exercise any right whatsoever over the child, and another phase on the other hand, when the

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nondum esse. L'identità del concepito nel pensiero giurisprudenziale classico. Milano, Giuffrè Editore, 2008. 155.

[42] For a similar approach cf. KASER 1971[2], 346; Adolf BERGER: *Encyclopedic Dictionary of Roman Law*. New Jersey, Clark, 2010[8]. s. v. 'Senatusconsultum Plancianum'.

[43] ALBANESE 1979, 260[257]. As for the date of SC Plancianum see Plin. Epist. 10, 72-73. Cf. ALBANESE 1979, same place.; KASER 1971[2], 346.

[44] Similarly cf. WALDSTEIN 2002, 841; FERRETTI 2008, 156.

[45] Correspondinly WALDSTEIN 2002, 841; FERRETTI 2008, 156-157.

[46] See also FERRETTI 2008, 157.

child after its birth can be claimed from the woman.[47] Resulting from all that have just been said, it is empirically justified that those who hastily point out that the Roman considered the foetus as the part of the mother's body are far from being fully true, to say the least. Ulpian's reasoning, however, continues emphasising that after the child's birth (*postquam editus*), the father is eligible to demand that the child should to be presented to the father, or even to be separated from its mother.

4.4. The interpretation of mulieris portio vel viscerum in the text

In connection with the expression *mulieris portio est vel viscerum*, it could be highly interesting to linger with the meanings of some elements of the aforesaid phrase, namely that of *portio* and *viscera*.
In Latin *portio* means a ratio, a part or a portion.[48] As for *viscera*, it refers to the soft, fleshy parts of the body in contrast to the bones, skin for instance; also the innermost parts of the human body containing the vital organs, and especially the internal organs in the abdomen. Additionally, it can also designate a woman's womb.[49] At this point it could be worthwhile to underline that according to Waldstein the term *portio* can also mean "interest" in a certain context, moreover *viscera* may refer to anything that is the nearest and dearest to a particular person. It should hastily be noted that Waldstein's interpretation concerning *portio* isn't compliant with primary sources, it could however be accepted if interpreted in tandem with a Paulian text, namely Paul. D. 1, 5, 7 (lib. sing.de port.). In this text there's an allusion to the issue of *commodum*, and even if this text won't entirely support Waldstein's view, still the direction seems to be the same.[50]

> Paul. D. 1, 5, 7 (lib. sing.de port., quae lib. damn. conc.)
> *Qui in utero est, perinde ac si in rebus humanis esset custoditur, quotiens de commodis ipsius partus quaeritur: quamquam alii antequam nascatur nequaquam prosit.*

In connection with the issue of *quae liberis damnatorum conceditur*, Paul wants to clarify who could be considered as *liber*. In this context, the first sentence tells us that the foetus should already be considered to be *in rebus humanis*, whenever its own *commodum* is in question.[51] The term *commodum* may refer to any advantage, benefit, profit, advantageous situation, interest, as well as convenience.[52] For the better understanding of the expression *in rebus humanis esse* another text could be referred to, which text is often presented hand in hand with the prior Paulian text.

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[47] Cf. WALDSTEIN 2002, 846: „[…] die Worte Ulpians […] betreffen […] die Grenze zwischen der Phase, in welcher der Vater noch nicht eigene Rechte am Kind geltend machen kann, und der Zeit nach der Geburt, in der er das Kind nach eigenem Recht von der Frau herausverlangen kann […]".
[48] Cf. *Oxford Latin Dictionary* s. h. v.; FINÁLY Henrik: *A latin nyelv szótára*. [A Latin Dictionary] Budapest, Franklin-Társulat, 1884. s. h. v.; Hermann Gottlieb HEUMANN – Emil SECKEL: *Handlexikon zu den Quellen des römischen Rechts*. Jena, Verlag Gustav von Fischer, 1926. s. v. 'portio[3]'.
[49] Cf. *Oxford Latin Dictionary* s. h. v.; FINÁLY s.h.v. Concerning the manifold meanings of *viscera* see also WALDSTEIN 2002, 843 and 844, with footnote 20.
[50] Wolfgang WALDSTEIN: *Teoria generale del diritto. Dall'antichità ad oggi.* Pontifica Università Lateranense, 2001. 168. Additionally see Wolfgang WALDSTEIN: Zur Stellung des nasciturus im römischen Recht. In: *A bonis bona discere. Festgabe für János Zlinszky zum 70. Geburtstag*. Miskolc, Verlag Bíbor, 1998. 47 skk. To the postclassical origins of the word *viscerum* see Emilio ALBERTARIO: *Studi di diritto romano I*. Milano, 1933. 6[1].
[51] Cf. FERRETTI 2008, 163.
[52] Cf. HEUMANN – SECKEL 1926, s. h. v.; *Oxford Latin Dictionary* s. h. v.

> Iul. D. 1, 5, 26 (69 dig.)
> *Qui in utero sunt, in toto paene iure civili intelleguntur in rerum natura esse. nam et legitimae hereditates his restituuntur: et si praegnas mulier ab hostibus capta sit, id quod natum erit postliminium habet, item patris vel matris condicionem sequitur: praeterea si ancilla praegnas subrepta fuerit, quamvis apud bonae fidei emptorem pepererit, id quod natum erit tamquam furtivum usu non capitur: his consequens est, ut libertus quoque, quamdiu patroni filius nasci possit, eo iure sit, quo sunt qui patronos habent.*

As the jurist sees it, the still unborn are understood to be already in existence – by almost every provision of *ius civile*.[53] There are several examples given in the text to maintain this idea, such as for example estates legally descend to them, and if a pregnant woman is taken by the enemy, her child has the right of *postliminium*, and it also follows the condition of the father, or mother. Moreover, if a pregnant female slave is stolen, even after she may have brought forth in the hands of a purchaser in good faith, her child being stolen property cannot be subject to usucaption.[54] Consequently Julian recognises the foetus as a living creature[55], but there are no allusions whatsoever can be traced with regards to the differences between the legal stance of an already born person and a *nasciturus*. In comparison to the previously examined text by Paul, a very remarkable difference can be traced between the outer world in general which contains all existing entities as *in rerum natura esse*, and the human world (**res humanae*). Therefore a *nasciturus*, who is as a consequence, is still *in utero est* stands on the threshold: it exists already (*in rerum natura est*), though it doesn't enter the human world. It is merely on its way to get there – that's what the term *nasciturus* itself expresses. Thus, the view in secondary literature according to which the foetus' legal stance is a dependent or uncertain one is surely well-based: primary sources present manifold examples on this, the first indication of which could be the already cited Paulian text (Paul. D. 1, 5, 7 [lib. sing.de port., quae lib. damn. conc.]).[56] It is beyond debate that such a transient stance of a *nasciturus* demands increased protection and extra care – even by legal means, too.

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[53] Ferretti underlines that there is a possible parallelism between this fragment and a previously examined text by Celsus: Julian applies the term *in toto paene iure civili intelleguntur in rerum natura esse*, while Celsus uses the expression *quodammodo in rerum natura esse*. In this scope, there is a doubtless reference to actual existence, and also the restrictive nature of these expression refer to the dual stance of the foetus. In detail see FERRETTI 2008, 68-69. Concerning suspicions of interpolation cf. WALDSTEIN 2002, 848[28]. To this text see further ERDŐDY János: „Intelleguntur in rerum natura esse". A rerum natura kifejezés megjelenése és mibenléte a Digestában. [The Notion and the Meaning of *Rerum Natura* in the Digest] *Iustum Aequum Salutare* 2010/1. 160-161.

[54] Correspondingly see BESSENYŐ 2010[4], 212. Another source could be evoked here with regards to the foetus: Cels. D. 28, 5, 60, 6 (16 dig.). According to the case the following was stated in a will: "Let Titius be my heir to a third part of my estate, and Maevius be my heir to another third, and let Titius be my heir to the remaining third, if a ship should arrive from Asia within three months". According to Celsus, Titius will not immediately become the heir to half of the estate, for two heirs have been appointed. Consequently, Titius will either be an heir to half of it, or to two thirds, so that a sixth of the estate will be in abeyance, and if the condition should be fulfilled, Titius will be the heir to two thirds of the estate, but if it should not be fulfilled, the sixth will accrue to Maevius. If, however, Titius should die before the condition is fulfilled, and it should be fulfilled afterwards, the sixth of the estate which remained in abeyance will not accrue to the heir of Titius, but to Maevius; for Titius died when it was still doubtful as to whether he or Maevius would be entitled to the said sixth, since it could not be understood to have been given to him who was no longer in existence at the time it should have been allotted.

[55] On this see also PÉTER 1991, 177, where the term *in rerum natura esse* is interpreted as "natural entity".

[56] In addition cf. Mod. D. 27, 1, 2, 6 (2 excus.); Paul. D. 50, 16, 231 (1 ad SC Tertull.). To this see also FÖLDI – HAMZA 2013[18], 204; Joseph PLESCIA: The Development of the Doctrine of *Boni Mores* in Roman Law. *RIDA* XXXIV (1987). 292. It should however be noted that the conclusion drawn by Plescia, namely that Roman jurists in general considered the foetus as *mulieris portio vel viscerum* is inconsistent with the sources. It is also an erroneous assumption that the foetus was not regarded as as a legal entity, that is *homo*. In this respect suffice it to cite the differences between the expressions *persona*, *caput* and *homo*. Concerning *mulieris portio vel*

5. Conclusions

It is clear from all that have been said that ont he one hand the rule covering the defence of the interests of the foetus (originally *qui in utero est* [in Medieval terms *nasciturus*[57]] *pro iam nato habetur, quotiens de commodis ipsius quaeritur*) grants protection to the still unborn child on a theoretical basis. On the other hand, the principle of *mulieris portio vel viscerum* (generally not properly and fully quoted) was merely a particular means of reasoning in the scope of an actual case, in connection with the applicability of *senatus consulta* on the topic of paternal recognition of a child.[58] Consequently, similarly to the text in which Iavolenus alerts about the jeopardies of definitions (Iav. D. 50, 17, 202 [11 epist.]), we could even mention some jeopardies with regards to legal *regulae*, too. However, at this point I hasten to emphasise that such dangers do not refer to the actual content of a *regula*, but sometimes rather to the meaning or interpretation attributed to her by other authors.

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viscerum it should not be forgotten that there is only one single instance in the Digest (Ulp. D. 25, 4, 1, 1 [24 ad ed.]), where it appears – therefore any conclusions to generalise this term are anything but far-fetched. Cf. PLESCIA 1987, 293.

[57] In the secondary literature see e.g. NÓTÁRI 2011, 153.

[58] For more details see WALDSTEIN 1998, 41-61. Lately cf.Wolfgang WALDSTEIN: *A szívébe írva. A természetjog mint az emberi társadalom alapja*. Budapest, Szent István Társulat, 2011. 133 sqq.