



## СТАТИИ / ARTICLES

*RECTA RATIO\***Maria Kostova**RECTA RATIO**Мария Костова*

**Abstract:** *The article concerns the supposition that ratio naturalis has a pre-Stoic origin. The term ratio naturalis expresses the universal principle of rationality or mentalism. It was brought to light and included in Roman law for the first time probably by Gaius, and it was adopted by other Roman jurists.*

**Keywords:** *ratio naturalis, pre-Stoic ideas, Gaius, the principle of mentalism, iurisprudentia.*

The title *Recta ratio* comes from Cicero's passage about true law. We know this text through Lactantius: *Est quidem vera lex, recta ratio, naturae congruens, diffusa in omnes, sempiterna...* (Inst. div. VI, 8). The article concerns one of the very widely discussed topics in Roman law literature – the relation between *ratio naturalis*, *ratio civilis*, *ius naturale*, *ius gentium* and *ius civile*.<sup>1</sup> In this literature, the idea of its Stoic origins is the one which currently prevails in academic studies. I would like my article to present and add another view connected to the pre-Stoic origin of *ratio naturalis*. I am introducing philological arguments, as well as arguments based on modern science about principles which were known to ancient philosophers and jurists,

and which are discussed and adopted by some scholars nowadays.

The major meaning of the Latin word *ratio* is rate, assessment, appraisal, judgment and calculation.

Another well-known meaning is mind, thinking. These meanings are very similar to each other because thinking is a mental activity which includes some judgment and calculation. In fact, in every usage *ratio* contains a mental component.

In Latin juridical texts there are passages in which Roman jurists wrote about natural reason (*naturalis ratio*) and civil reason (*civilis ratio*).

Gaius [I. *De iure civili et naturali.*] 1... *quod vero naturalis ratio inter omnes homines constituit, id apud omnes populos peraeque custoditur*

\* This text was presented as a paper at SIHDA (Société Internationale Fernand de Visscher pour l'Histoire des Droits de l'Antiquité) conference in Krakow, 2018.

<sup>1</sup> Some of the most important works and authors writing on *ius gentium*, *ius naturale* and *ius civile* are H. Wagner, *Studien zur allgemeine Rechtslehre des Gaius*, Zutphen, 1978; M. Kaser, *Ius Gentium*, 1994; W. Waldstein, *Vorpositive Ordnungselemente im römischen Recht*, Österreichische Zeitschrift für öffentlichen Recht 17, 1967; *idem*, *Zur Bedeutung des Naturrechts in der Entwicklung des römischen Recht*, *Iustum Aequum Salutae* IV, 2008/4; *idem*, *Equita' e ragione naturale nel pensiero giuridico del I secolo d.c.*, *Testi e problemi del giusnaturalismo romano*, Pavia, 2007; G. del Vecchio, *Philosophie du droit*, 52–57, Dalloz, 2004.

*vocaturque ius gentium, quasi quo iure omnes gentes utuntur.*

Gaius viewed *ius gentium* as springing out of *ratio naturalis*, common to all mankind, which is still more clearly expressed in another passage: *Sed impuberes quidem in tutela esse omnium civitatum iure contingit; quia id naturali rationi conveniens est...* (G. I, 189). There he used the expression *omnium civitatum ius* as tantamount to *ius gentium* and as founded on *ratio naturalis*. Gaius called the same thing *ius gentium* and *ius naturale*. In other passages, he substantiated the acquisition of property, which was not regulated by Roman law, on *ratio naturalis* and *ius naturale* without any difference, thus rendering *ratio naturalis* and *ius naturale* equivalent (G. II, 65, 66, 69, 73, 79). More examples could be found:

Gaius II, 66. *Nec tamen ea tantum, quae traditione nostra fiunt, naturali nobis ratione adquiruntur, sed etiam quae occupando ideo adepti erimus, quia antea nullius essent, qualia sunt omnia, quae terra mari caelo capiuntur.*

69. *Ea quoque, quae ex hostibus capiuntur, naturali ratione nostra fiunt.*

Gaius also based *cognatio* on *ratio naturalis* and *agnatio* on *ratio civilis* which is purely a Roman institution: G. I, 156. *At hi, qui per feminini sexus personas cognatione coniunguntur, non sunt agnati, sed alias naturali iure cognati.*

Ergo, *ius gentium* and *ius naturale* are based on *ratio naturalis* according to Gaius' opinion.

*Ratio naturalis:*

- › *ius gentium (omnium civitatum ius)*
- › *ius naturale*

Paulus also wrote about *ratio naturalis*: Dig. 5.3.36.5 Paulus 20 ad ed. *Fructus intellegun-*

*tur deductis impensis, quae quaerendorum cogendorum conservandorumque eorum gratia fiunt. Quod non solum in bonae fidei possessoribus naturalis ratio expostulat, verum etiam in praedoniibus, sicut Sabino quoque placuit.*

Dig. 48.20.7 pr. Paulus l.S. de port., q. lib. dam. *Cum ratio naturalis quasi lex quaedam tacita liberis parentum hereditatem addiceret, velut ad debitam successionem eos vocando...*

Dig. 50.17.85.2 Paulus 6 quaest. *Quotiens aequitatem desiderii naturalis ratio aut dubitatio iuris moratur, iustis decretis res temperanda est.*

Peter Stein has argued that “it was Sabinus who introduced the term *ratio naturalis* into legal discourse, as a counterweight to what he regarded as the too legalistic reasoning (*civilis ratio*) of his opponent (Proculians)<sup>2</sup>, and that Sabinus used *ratio naturalis* with the meaning “in a natural way or in accord with the facts”<sup>3</sup>.

Paul A. Vander Waerdt wrote: “Gaius' understanding of *ius gentium* as a law established by *ratio naturalis* among all human beings is widely shared among later jurists, who regularly cite nature or natural law as the source of *ius gentium*.”<sup>4</sup> Vander Waerdt supposes that, within the juristic tradition, this interpretation of *ius gentium* originated with Gaius who appears to have been responsible for an important revision of the meaning of *ratio naturalis*. Vander Waerdt continued that “in making *ratio naturalis* the source of legal practices which are shared by all human beings, Gaius significantly alters the usage of his Sabinians' predecessors. In the first place, there is a shift in emphasis from the second word (*naturalis*) to the first word (*ratio*) in the phrase: for Gaius *ratio naturalis* now refers to

<sup>2</sup> P. Stein. Interpretation and legal reasoning in Roman law, 70 Chi.-Kent. L. Rev. 1539 (1995): Where there was no firm practice to follow, the Sabinians referred to the nature of things, a category in which, remarked Sabinus, “everything was certain”. I have argued elsewhere that it was Sabinus who introduced the term “natural reason” (*naturalis ratio*) into legal discourse, as a counterweight to what he regarded as the too legalistic reasoning (*civilis ratio*) of his opponent. The phrase is used in lay literature to explain, as natural, unusual events, which have been attributed by others to supernatural causes. It has been noted that in the dispute over specification, Sabinus justified his view that the new thing belonged to the owner of the material by an appeal to natural reason. <http://scholarship.kentlaw.iit.edu/cklawreview/vol70/iss4/7/>; **idem**. The development of the notion *naturalis ratio*. – In: Daube Noster. *Essays in legal history for David Daube*. Edinburgh, 1974, pp. 305–316.

<sup>3</sup> See the case about specification in Dig. 41.1.7.7 Gaius 2 rer. cott. *Cum quis ex aliena materia speciem aliquam suo nomine fecerit, Nerva et Proculus putant hunc dominum esse qui fecerit, quia quod factum est, antea nullius fuerat. Sabinus et Cassius magis naturalem rationem efficere putant, ut qui materiae dominus fuerit, idem eius quoque, quod ex eadem materia factum sit, dominus esset, quia sine materia nulla species effici possit:*

<sup>4</sup> P. A. Vander Waerdt. Philosophical Influence on Roman Jurisprudence? The Case of Stoicism and Natural Law. – In: *Aufstieg und Niedergang der römischen Welt*, II, 36.7, 1994, p. 4881.

the common reason of humankind as revealed in its practices.<sup>5</sup> There is no indication that earlier Sabinians appealed to the universality of a practice, as Gaius now does, as evidence of its naturalness.”<sup>6</sup> Stein and Vander Waerdts remark is interesting and important.

Gaius attributed the right of lawful self-defense to *ratio naturalis*, not to *ius naturale* or *ius gentium*.<sup>7</sup> However, there is no opposition between *ratio naturalis* and *ius naturale* or *ius gentium* here. The latter two are based on *ratio naturalis* according to Gaius’ opinion. In addition, the self-defense reaction does not belong only to humans. Each being has a self-defense reaction, even of fauna and flora, when there is some danger to them.

Vander Waerdtposes the following question: “Why Gaius himself refers to *ius gentium* in his account of slavery but makes no appeal to *ratio naturalis*?”. It is unclear how he would resolve the conflict which other jurists leave between the unnaturalness of slavery and its acceptance under *ius gentium*.<sup>8</sup> Vander Waerdts tries to appeal to the Stoicism philosophy and ethics. This could be explained as follows: *ius gentium* is based on *ratio naturalis* according to Gaius’ opinion, but *ius gentium* contains human practices. These practices could be good ones in accordance with equity and ethics, but they could also be bad ones such as slavery. This is supposedly the reason why Gaius referred to *ius gentium* in his account of slavery. Therefore, sometimes Gaius used *ius naturale* and *ius gentium* as equivalents of *ratio naturalis*, and other times their meaning is more specific which makes them a subcategory of *ratio naturalis*.

The scholars examine the question “Which theory or philosophy influenced Gaius, Paulus,

Ulpianus?”. Everybody thinks about Cicero, including me. He was a great mind of Antiquity. However, I don’t think only about his Stoic ideas and ethics like many authors do. Cicero was eclectic in his philosophical thinking. The next sentence in *De re publica* is very interesting: *audiamus communis quasi doctores eruditorum hominum, qui tamquam oculis illa videntur, quae nos vix audiendo cognoscimus qui natura omnium rerum pervestiganda senserunt omnem hunc mundum MENTE.* (De rep. I, 56)

Unfortunately, the following part of the text is missing. There is a big lacuna. The lacuna of Cicero’s work is filled in with a text by Lactantius known as the Christian Cicero, who wrote in *Divinae institutiones* about the Supreme God and what Thales, Pythagoras, Anaxagoras and other philosophers said about this god. This text is quite curious. Lactantius wrote:

*Thales Milesius dixit Deum esse MENTEM, quae ex aqua cuncta formaverit. Pythagoras ita definivit quid esset Deus: ANIMUS, qui per universas mundi partes, omnemque naturam commeanst atque diffusus; ex quo omnia, quae nascuntur animalia, vitam capiunt. Anaxagoras Deum esse dixit infinitam MENTEM, quae per se ipsam moveatur; Antisthenes multos quidem esse populares deos, unum tamen naturalem, summae totius artificem. Cleanthes et Anaximenes aethera dicunt esse summum Deum; Chrysippus naturalem vim divina RATIONE praeditam, interdum divinam necessitatem Deum nuncupat. Item Zeno divinam naturalemque legem. Aristoteles – in summum unam MENTEM mundo praeesse testatur.*<sup>9</sup> The conjecture is that Lactantius cites Cicero.

Gaius and a number of other 1st–3rd-century jurists were influenced not only by Stoicism, but also by Cicero and Greek philosophical

<sup>5</sup> See also P. Stein, The Two Schools of Jurists in the Early Roman Principate. *Cambridge Law Journal*, Jubilee Issue, 31 (1972 B) 9–31; Idem, The Development of the Notion of Naturalis Ratio, in: A. Watson (ed.), Daube Noster. Essays in Legal History for David Daube, Edinburgh, 1974, pp. 305–16.

<sup>6</sup> P. A. Vander Waerdts. Ibidem, p. 4881.

<sup>7</sup> Dig. 9.2.4 pr Gaius 7 ad ed. provinc. Itaque si servum tuum latronem insidiantem mihi occidero, securus ero: nam adversus periculum naturalis ratio permittit se defendere.

<sup>8</sup> Gaius. Inst. I, 52. In potestate itaque sunt servi dominorum. Quae quidem potestas iuris gentium est: Nam apud omnes peraeque gentes animadvertere possumus dominis in servos vitae necisque potestatem esse, et quodcumque per servum acquiritur, id domino acquiritur.

<sup>9</sup> <http://www.thelatinlibrary.com/lactantius/divinst1.shtml>; Lactantius. *Divinae institutiones* I, 5. Translated by Ph. Schaff: “Thales said that God was the mind which formed all things from water. Pythagoras defined the being of God, “as a soul diffused through all parts of the universe, and through all nature, from which all living creatures which are produced derive their life. Anaxagoras said that God was an infinite mind;

theories about the universal mind, I think.<sup>10</sup> In the passage cited above, Lactantius (or Cicero) mentioned nine philosophers. The first one is Thales (624–547 BC) who was the first natural philosopher in the Milesian School.<sup>11</sup> Pythagoras (570–495 BC) and Anaxagoras (510–428 BC) were pre-Stoic Greek philosophers. Anaxagoras introduced the concept of the cosmic mind as an ordering force moving and separating the original mixture which was homogeneous or nearly such.<sup>12</sup> Anaximenes of Miletus (586–526 BC) was a pre-Stoic philosopher too. Among these nine philosophers, only three were Stoics.

Thus, we should think that for Gaius and some other Roman jurists, *RATIO* is the main thing in law. This situation allows us to consider that Ulpian's definition of nature or *ius naturale*, where he included the phrase *natura omnia animalia docuit*, is probably not an interpolation:<sup>13</sup>

*Ulpianus I inst. Ius naturale est, quod natura omnia animalia docuit: nam ius istud non humani generis proprium, sed omnium animalium, quae in terra, quae in mari nascuntur, avium quoque commune est. hinc descendit maris atque feminae coniunctio, quam nos matrimonium appellamus, hinc liberorum procreatio, hinc educatio: videmus*

*etenim cetera quoque animalia, feras etiam istius iuris peritiam censeri.* (Dig. 1.1.1.3)

As a derivative and an equivalent of *ratio naturalis, ius naturale* could teach humans and also animals. Animals possess no mind like humans, but both are creations of the Universe. And what if the Universe is a “mental construction” as some Greek philosophers wrote?<sup>14</sup>

The passage in Iustiniani Institutiones is probably not an interpolation as well: *Sed naturalia quidem iura, quae apud omnes gentes peraeque servantur, divina quadam providentia constituta, semper firma atque immutabilia permanent: ea vero quae ipsa sibi quaeque civitas constituit, saepe mutari solent vel tacito consensu populi vel alia postea lege lata.* (Inst. I.2.11)

I agree with the translation and interpretation of the last two passages by M. L. Colish and A. A. Long, both famous professors of Classics and Philosophy.<sup>15</sup>

In this context, I would like to mention the Polish author Ignacy Koschembahr-Łyskowski and his work *Ratio naturalis w prawie rzymskim klasycznym*: “La ratio naturalis est donc la base pour l'application du droit positif. Le principe juridique ne doit pas être formé en méthode deductive par la déduction de «la volonté du légis-

Chrysippus speaks of God as a natural power endowed with divine reason; Cleanthes and Anaximenes assert that the air is the chief deity”

<sup>10</sup> As **Birks** and **McLeod** say Gaius was the inventor of the institutional scheme and of the genre itself. See **P. Birks & G. McLeod**. *Justinian's Institutes*. Ithaca–London, 1987, p. 16.

<sup>11</sup> See at <http://mathshistory.st-andrews.ac.uk/Biographies/Thales.html>

<sup>12</sup> See **H. A. Diels**. *Die Fragmente der Vorsokratiker* (The Fragments of the Pre-Socratics), 293–299. The work of arrangement, the segregation of like from unlike and the summation of the whole into totals of the same name, was the work of Mind or Reason (νοῦς). Mind is no less unlimited than the chaotic mass, but it stood pure and independent, a thing of finer texture, alike in all its manifestations and everywhere the same. This subtle agent, possessed of all knowledge and power, is especially seen ruling in all the forms of life; See also **L. Schmitz**. In *Dictionary of Greek and Roman Biography and Mythology*.

<sup>13</sup> See **E. Levy and E. Rabel**, *Index interpolationum quae in Iustiniani digestis inesse dicuntur* (Weimar, 1929) ad loc.; **A. P. d'Entrèves**, *Natural Law: An Introduction to Legal Philosophy*, Hutchinson University Library (ed.), London, 1951, 31; **P. Vander Waerdt**, op.cit., p. 4892. See the **Ph. Thomas** opinion in *Quo vadimus*. – In: *Legal Roots. The international journal of Roman law, legal history and comparative law*. 2015, 4: More recently, the chase for interpolations provided the argument denoting all other subsequent directions of Roman research irrelevant for modern and future formation of both law and jurist.

<sup>14</sup> According to the Stoics, the Universe is a material, reasoning substance, known as God or Nature.

<sup>15</sup> **M. L. Colish**. *The Stoic Tradition from Antiquity to the Early middle Ages*, vol. I: *Stoicism in Classical Latin Literature*. Leiden, 1985 (*Studies in the History of Christian Thought*, vol. 34); **A. A. Long**. *American Historical Review* 92 [1987] 1187–88, and **A. A. Long & D. N. Sedley**. *The Hellenistic Philosophers*, vol. 1, *Translations of the principal sources, with philosophical commentary*; vol. 2, *Greek and Latin texts with notes and bibliography*. Cambridge, 1987.



lateur», mais, au contraire il doit être formé en méthode inductive, de la nature des choses du cas donné, jugée dans les limites du droit positif.”<sup>16</sup>

I would like to remind about something very significant regarding the notion *prudencia* et *iuris prudentia*: *Ulpianus 1 reg. Iuris prudentia est divinarum atque humanarum rerum notitia, iusti atque iniusti scientia* (Dig. 1.1.10.2). *Prudentia* is from *prudens* and *prudens* derives from *providens*, *providere*. Cicero wrote: *esse deos, et eorum providentia mundum administrari* (de Div. 1, 111; 117) and through Nonius: *prudentia – ex providendo* (de Rep. VI, 1) – providential or divine.

The term *IURIS PRUDENTIA* was introduced by Roman jurists and this was the reason for Ulpianus to write: *Cuius merito quis nos SACERDOTES appellet: iustitiam namque colimus et boni et aequi notitiam profitemur, aequum ab iniquo separantes, licitum ab illicito discernentes, bonos non solum metu poenarum, verum etiam praemiorum quoque exhortatione efficere cupientes, veram nisi fallor philosophiam, non simulatam affectantes* (Dig. 1.1.1.1 Ulpianus 1 inst.).

For a long time I have been exploring how we could discover the universal principles which have found realisations in the system of law. This is very interesting for me because I think that the most important universal principles, discussed in ancient philosophy, are included and used in law, and that the Romans were the first to do it in their law. I have explored in my works the universal principle of motion, for example, and I suppose that it lies in the provision *ne/non bis in idem*.<sup>17</sup>

*Ratio* has to do with rationality or the principle of mentalism. This is another universal principle which we could find in law, particularly

in the most important term *iuris prudentia*. Ancient philosophers believed that GOD as MIND (*mens* or *ratio*) rules the entire world (Cic. De rep. I, 56).<sup>18</sup>

The universal principles are formulated by modern science, primarily by physicists. Let me please quote some modern scientists about the principle of mentalism:

The genial Max Planck (1858–1947): “I regard consciousness as fundamental. I regard matter as derivative from consciousness. We cannot get behind consciousness. Everything that we talk about, everything that we regard as existing, postulates consciousness.”<sup>19</sup> James H. Jeans (1877–1946), an English physicist, astronomer and mathematician: “Get over it, and accept the inarguable conclusion. The universe is immaterial – mental and spiritual.”<sup>20</sup> Richard Conn Henry, professor of physics and astronomy (1940): “Physicists are being forced to admit that the universe is a ‘mental’ construction.”<sup>21</sup>

Finally, I would like to quote M. Viroli who wrote in his book *History of Concepts*:<sup>22</sup> “The identification of politics and law and therefore of politics and *recta ratio*, which is the foundation of law, found in Coluccio Salutati (1331–1400)<sup>23</sup> its most eloquent advocate. He cites Salutati: “as Cicero has taught us, law is the rational norm of human life. Though we say that law is a human creation, in fact, true law comes from nature and as such, its origin is ultimately divine. No human law can be called a true law if it violates the highest norm of equity, which is the precept of eternal reason.”

In conclusion, I would like to point out that my main thought, which I stated through a short analysis of the relation between *ratio naturalis*, *ius naturale*, *ius gentium*, *ratio civilis* and *ius*

<sup>16</sup> I. Koschembahr-Lyskowski. *Ratio naturalis w prawie rzymskim klasycznym*. Warszawa, 1930, p. 47 (résumé en français). – [http://www.bibliotekacyfrowa.pl/Content/73948/PAd\\_44446\\_Koschembahr\\_Lyskowski\\_I\\_Ratio\\_naturalis\\_w\\_prawie\\_rzymskiem\\_klasycznym.pdf](http://www.bibliotekacyfrowa.pl/Content/73948/PAd_44446_Koschembahr_Lyskowski_I_Ratio_naturalis_w_prawie_rzymskiem_klasycznym.pdf)

<sup>17</sup> *Ne/non bis idem*. Origine del “principio”. – <http://www.dirittoestoria.it/11/rassegne.htm> 2014. We could discover in law also other universal principles such as the principle of correspondence, of compensation, of cause and effect, etc.

<sup>18</sup> Cf. Cic. De Natura Deorum 1.39 for the claim that god is the world’s ἡγεμονικόν.

<sup>19</sup> The Observer, London, January 25, 1931.

<sup>20</sup> The Mental Universe. Nature 436:29, 2005.

<sup>21</sup> Ibidem.

<sup>22</sup> M. Viroli. In: *History of Concepts: Comparative Perspectives*, ed. by I. Hampsher-Monk, K. Tilmans, F. van Vree, Amsterdam, 1998, c. 5, p. 68.

<sup>23</sup> C. Salutati. *De nobilitate legum et medicinae*. E. Garin (ed.), Florence, 1947, 168 sq.

*civile*, is about the supposition that *ratio naturalis* has a pre-Stoic origin. The term *ratio naturalis* expresses the universal principle of rationality or mentalism. It has been brought to light and included in Roman law by Roman jurists. This principle is discussed in different fields of modern science such as psychology, logic, philosophy, economics, physics, linguistic, artificial intelligence, international relations, etc. I think that *ratio civilis*, *ius gentium* and *ius civile* should be related to human rationality or irrationality. However, their basis – *ratio naturalis* and *ius naturale* – should be related to the rationality or mentalism of the Universe. I agree with the modern philosopher A. C. Grayling's quote about rationality that "...a good rationale must be independent of emotions, personal feelings or any kind of instincts. Any process of evaluation or analysis that may be called rational is expected to be highly objective, logical and 'mechanical'. If these minimum requirements are not satisfied, i.e. if a person has been, even slightly, influenced by personal emotions, feelings, instincts, or culturally specific moral codes and norms, then the analysis may be termed irrational due to the injection of subjective bias".<sup>24</sup>

I suppose that classical Roman jurists created law in accordance with universal principles. Modern scholars gradually discover and prove these principles which were known to ancient philosophers. Hence, the knowledge and application of these principles is probably the reason for Roman law to have existed for more than a millenium and to continue living today in modern law.

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<sup>24</sup> **Grayling, A. C.** *The Reason of Things: Living with Philosophy*. London: Weidenfeld & Nicolson, 2002 (the follow-up to *The meaning of things. Applying philosophy to life*).

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