

**Róbert Brtko**Comenius University in Bratislava  
e-mail: robert.brtko@flaw.uniba.sk

ORCID: 0000-0002-8352-6870

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## Gaius' Concept of The Law of Nations (*Ius Gentium*) and Natural Law (*Ius Naturale*)

### ABSTRAKT

#### *Ius gentium* oraz *ius naturale* według koncepcji Gajusa

W artykule, po krótkiej prezentacji sylwetki jurysty Gajusa i jego najważniejszej i najbardziej znanej pracy, *Gai Institutionum commentarii quattuor*, autor skoncentrował się na jego spostrzeżeniach dotyczących głównie *ius gentium* i jego związku z *ius naturale*. Na początku swojego podręcznika ten rzymski jurysta wyróżnił tylko dwa rodzaje prawa: prawo cywilne – *ius civile* i prawo narodów – *ius gentium* (Gai Inst. 1, 1). Gaius wyraźnie przywołał prawo narodów (*ius gentium*) we wspomnianym fragmencie w taki sposób, że odnosiło się do *naturalis ratio* – porządku naturalnego. Zdefiniował pojęcie *ius gentium* dwa wieki po Cyceronie. W przeciwieństwie do niego, który był bardziej filozofem niż prawnikiem i postrzegał *ius gentium* głównie w sensie abstrakcyjnym, Gaius wymyślił konkretną koncepcję *ius gentium*, która była wyraźnie oddzielona od pojęcia *ius civile*. *Ius gentium* było prawem wspólnym dla wszystkich narodów. Z drugiej strony *ius civile* to prawo, które dotyczyło tylko obywateli rzymskich. *Ius gentium* to prawo, które zobowiązuje Rzymian i cudzoziemców, ponieważ jego podstawą jest *naturalis ratio*.

Ponadto Gaius, charakteryzując *ius gentium*, zwracał uwagę na dwa elementy: a) wszelkie normy mają zastosowanie do wszystkich narodów; b) lub normy pochodzą z naturalnego rozumu (*naturalis ratio*). W ten sposób przedstawił dwie perspektywy na jedno i to samo *ius gentium*, które są wewnętrznie ze sobą powiązane. Pierwszy punkt widzenia jest konkretny, a drugi abstrakcyjny. Innymi słowy, Gaius przedstawił pewne instytucje prawne, które należą do obszaru *ius gentium* z konkretnego punktu widzenia, pozostałe z abstrakcyjnego punktu widzenia, który opierał się na tak zwanym *naturalis ratio*.

Jeśli chodzi o kategorię *ius naturale*, Gaius pod względem treści zidentyfikował ją za pomocą *ius gentium*. Więc *ius gentium* różni się od *ius naturale* tylko na podstawie punktu widzenia, przez który wyrażane są poszczególne standardy lub instytucje prawne. Jeśli normy prawne są wyrażone z konkretnego punktu widzenia (czyli w normach istnieje wyraźna wzmianka, że mają one zastosowanie do wszystkich narodów), wówczas mogą one zostać włączone do kategorii *ius gentium*. Jeśli są sformułowane z abstrakcyjnego punktu widzenia (czyli w normach jest wzmianka o ich pochodzeniu z *naturalis ratio*), mogą one zostać włączone do kategorii prawa naturalnego.

### ABSTRACT

The paper, after a brief presentation of *the classical Roman jurist* Gaius and his most important and best known work, *Gai Institutionum commentarii quattuor*, presents and analyzes his legal texts concerning mainly *ius gentium* and its relationship to *ius naturale*. At the beginning of his textbook, this Roman *jurist* distinguishes only two types of law: civil law – *ius civile* and the law of nations – *ius gentium* (*Gai Inst.* 1, 1). Gaius mentions the law of nations (*ius gentium*) explicitly in the above mentioned fragment in a way that he relates it to “natural ratio” – natural order or natural reason. Gaius defined the concept of *ius gentium* two centuries after Cicero. Unlike Cicero who was more a philosopher than a lawyer and perceived “*ius gentium*” mainly in an abstract sense, Gaius came up with the concrete concept of *ius gentium*, which was clearly separated from the concept of *ius civile*. *Ius gentium* is the law which is common for all nations. On the other hand *ius civile* is the law which concerns only Roman citizens. *Ius gentium* is the law which obliges both Romans and foreigners, because its basis is “*naturalis ratio*”.

In addition, Gaius, in characterizing *ius gentium*, gives attention to two elements: a) any standards apply to all nations; b) or standards come out of natural reason (*naturalis ratio*). Gaius in this way presented two perspectives on one and the same *ius gentium* which are intrinsically and therefore necessarily linked. The first point of view is concrete and the second one is abstract. In other words Gaius presented some legal institutions which belong to the area of *ius gentium* from the concrete point of view, the other ones from the abstract point of view, which is based on the so-called “*naturalis ratio*”.

As far as the category of *ius naturale* is concerned, Gaius, in terms of content, identified it with *ius gentium*. So *ius gentium* differs from *ius naturale* only on the basis of a point of view, which individual standards or legal institutions are expressed through. If legal standards are expressed from the concrete point of view (i.e. in standards there is an explicit mention that they apply to all nations), then they can be included in the category of *ius gentium*. If they are formulated from the abstract point of view (i.e. in standards there is a mention of their origin from “*naturalis ratio*”), they can be included in the category of natural law.

**Słowa kluczowe:** rzymskie prawo klasyczne, *ius gentium*, *ius naturale*, *ius civile*, jurysyta Gaius, Instytucje Gaiusa, jurysprudencja rzymska

**Key words:** classical Roman law, *ius gentium*, *ius naturale*, *ius civile*, Roman jurist Gaius, Institutes of Gaius, Roman jurisprudence

Jurisprudence in Rome flourished in the classical era, which lasted from the end of the first century BC to the middle of the third century AD, it means in the period which begins with a gradual decline of the republican form of government and ended with the onset of the Dominate. The peak period of Roman law is called the “Golden Age” of Roman law and did not fall within the period of the Roman Republic. It fell within the developed Empire era, in which lawyers with an excellent reputation and considerable influence operated.

Gaius, who was an established jurist, operated in this period, but there is not a lot of exact information about his personal life. The dates of his birth and death are unknown. He lived sometime in the second century AD in the reigns of the emperors Antoninus Pius and Marcus Aurelius. He did not hold public offices and neither was he granted “*ius respondendi*”. Although Gaius wrote many legal works (about 120–150 books), he was not famous among his contemporaries and later lawyers<sup>1</sup>. He was recognized in the following centuries. His most valuable work was “*Gai Institutionorum commentarii quattuor*”, which was an introductory textbook of legal institutions divided into four books and was discovered in 1816 in the chapter library of Verona. The writings of Gaius were popular in practice mainly due to the clear and easily accessible style<sup>2</sup>. The emperor Justinian included him in the category of the most respected legal authorities referring to him as “*noster Gaius*” – our Gaius<sup>3</sup>. On the other hand it

<sup>1</sup> G. Diodisi, *Gaius, der Rechtsgelehrte* (mit einer Bibliographie von R. Wittmann), «Aufstieg und Niedergang der Römischen Welt. Geschichte und Kultur Roms im Spiegel der neueren Forschung» II, 15/1976, p. 605-631; A. Alberti, *Ricerche su alcune glosse alle Istituzioni di Gaio*, Milano 1935, 173 p.; G.G. Archi, *Lex e natura nelle Istituzioni di Gaio*, [w:] *Festschrift für Werner Flume zum 70. Geburtstag*, Köln 1978, p. 3-24; M. Bastit, *La diversité dans les Institutes de Gaius*, „Archives de philosophie du droit” 1978, 23, p. 333-342; E. Betti, *Sul significato di “contrahere” in Gaio*, San Severino-Marche 1912, 51 p.; H. Wagner, *Studien zur allgemeinen Rechtslehre des Gaius. Ius Gentium und Ius Naturale in ihrem Verhältnis zum Ius Civile*, Zutphen, Holland 1978, 290 p.; J. Kodrebski, *Gaius i Pomponius jako nauczyciele prawa rzymskiego*, “Zeszyty Naukowe Uniwersytetu Łódzkiego” 1976, 108, p. 15-28.

<sup>2</sup> J. Kincl, *Gaius. Učebnice práva vo čtyřech knihách*, Plzeň 2007, p. 21-23.

<sup>3</sup> The emperor Justinian names Gaius three times. He describes his own Institutes to be put together from other institutes and treatises, but especially from the Institutes and Res Cottidianae of “our Gaius” (Praef. Inst. 6): in the Institutes themselves (IV, 18, 5) he quotes from the work of “our

is important to mention that writings of Gaius are not original that is why some Romanists (for example Jaromír Kincl) do not rank him among Roman first-rate lawyers<sup>4</sup>.

By presenting Gaius' legal texts found in his famous textbook (*Gai Institutionum commentarii quattuor*), the aim of the paper is to highlight the dichotomous nature of Roman private law, which (in our opinion) was the fruit of classical jurisprudence<sup>5</sup>. On the other hand Justinian's compilers (under the influence of the Christian religion) developed a trichotomy character of private law (*ius civile*, *ius naturale* and *ius gentium*), i.e. dividing it into three separate units<sup>6</sup>, whereby *ius gentium* was formally differentiated from *ius naturale*<sup>7</sup>.

Gaius at the beginning of his work – The Institutes writes about two kinds of law, he distinguishes civil law (*ius civile*) from the law of nations (*ius gentium*):

Omnes populi, qui legibus et moribus reguntur, partim suo proprio, partim communi omnium hominum iure utuntur: nam quod quisque populus ipse sibi ius constituit, id ipsius proprium est vocaturque ius civile, quasi ius proprium civitatis; quod vero naturalis ratio inter omnes homines constituit, id apud omnes populos peraeque custoditur vocaturque ius gentium, quasi quo iure omnes gentes utuntur [*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 jus civile; the rules constituted by natural reason for all are observed by all nations alike, and are called jus gentium. So the laws of the people of Rome are partly*

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Gaius" on the Twelve Tables; and, in describing the old course of legal study, he mentions that the first year's course consisted of six books of "our Gaius", viz. the Institutes and four separate treatises on a wife's property, guardianships, wills and legacies (Const. Omnem 1 – 16. XII. 533). "Noster Gaius" probably denotes only familiarity with Gaius' books. H.G. Roby, *An Introduction to the Study of Justinian's Digest. Containing an Account of its Composition and of the Jurists Used or Referred to Therein, Together with a Full Comentary on One Title (De Usufructu)*, Cambridge 2010, Chap. XIII, clxxv.

4 J. Kincl, V. Urfus, M. Skřejpek, *Římské právo*, Praha 1995, p. 32.

5 We are of the opinion that when pagan lawyers of the classical period distinguished the norms "ius gentium" and "ius naturale" on the one hand and the norms "ius civile" on the other hand (the dichotomy of law), they probably did not do so on the basis of higher moral principles but on the "naturalis ratio" base. This can be illustrated by the institute of slavery. Classical lawyers incorporated this institute into *ius gentium* because it was found in all nations and also because it was the fruit of "naturalis ratio", according to which war enemies who had fallen into captivity became slaves (Gai Inst. 2, 69) and who was born of a slave was born as a slave (Gai Inst. 1, 89). For this topic see G. Lombardi, *Sul concetto di „ius gentium“*, Roma, 1947, p. 277.

6 „(...) dicendum est igitur de iure privato, quod est tripartitum: collectum est enim ex naturalibus praeceptis aut gentium aut civilibus" (Iust. Inst. 1, 1, 4).

7 The Christian Justinian's compilers most likely introduced the trichotomy scheme of *ius privatum* in order to cope with certain needs and necessities of time, such as war, captivity and slavery: "Ius autem gentium omni humano generi commune est. Nam usu exigente et humanis necessitatibus gentes humanae quaedam sibi constituerunt: bella etenim orta sunt et captivitates secutae et servitutes, quae sunt iuri naturali contrariae. Iure enim naturali ab initio omnes homines liberi nascebantur" (Iust. Inst. 1, 2, 2).

*peculiar to itself, partly common to all nations ; and this distinction shall be explained in detail in each place as it occurs]* (Gai Inst. 1, 1)<sup>8</sup>.

Gaius mentions the law of nations (*ius gentium*) explicitly in the above mentioned fragment in a way that he relates it to “natural ratio” – natural order or natural reason. Gaius defined the concept of *ius gentium* two centuries after Cicero. Unlike Cicero who was more a philosopher than a lawyer and perceived “*ius gentium*” mainly in an abstract sense<sup>9</sup>, Gaius came up with the concrete concept of *ius gentium*, which was clearly separated from the concept of *ius civile*. *Ius gentium* is the law which is common for all nations. On the other hand *ius civile* is the law which concerns only Roman citizens. *Ius gentium* is the law which obliges both Romans and foreigners, because its basis is “*naturalis ratio*”.

Marcus Tullius Cicero (106–43 BC) distinguished *ius gentium* not only from *ius civile*, but also from natural law (*ius naturale*). According to Cicero *ius gentium* was the law which really applies to all nations, but *ius naturale* was the law which should apply to all nations. *Ius gentium* represented something concrete, while *ius naturale* something abstract<sup>10</sup>. The law which should apply to all nations was not so important for Gaius therefore he did not attach great importance to natural law in this regard.

For Gaius as a lawyer only those standards have meaning, which are binding in law and order. Therefore Gaius talks only about two kinds of law and he does not introduce a separate category of natural law in his textbook “The Institutes

<sup>8</sup> The English translation of The Institutes of Gaius was taken from the book *Gai Institutiones or Institutes of Roman Law by Gaius with a translation and commentary by the late E. Poste*, Oxford 1904.

It is useful to mention that this introductory part does not occur in the so-called Verona manuscript. This part is supplemented by the text of the Digest of Gaius (D. 1, 1, 9), which was also incorporated into the Institutes of Justinian (Iust Inst. 1, 2, 1).

<sup>9</sup> The similar opinion is also shared by the Italian Romanist Lombardi, G. Sul concetto di “*ius gentium*”, Roma: Istituto di Diritto Romano, 1947.

<sup>10</sup> For this topic see Cicero’s works: *De Officiis*, 3, 17; *De Officiis*, 3, 5; *De legibus*, 1, 15, 42; *De legibus*, 1, 6, 18-19; *De Legibus*, 1, 13, 35; *De legibus*, 15, 43; *Tusculanae Disputationes*, 1, 13, 30; *Tusculanae Disputationes*, 1, 15, 35; *Pro Milone*, 4, 10; *De Republica*, 3, 22, 33; *De Republica*, 3, 11, 19; M. Kasser, *Ius gentium*, Köln – Weimar – Wien 1994, p. 19-20.

There are not many Cicero texts related to the issue of *ius gentium*. In addition, these texts do not contain a definition of *ius gentium*, which causes doubts among Romanists and philosophers on whether Cicero separated or did not separate *ius gentium* from *ius naturale*. Most scientists such as Voigt, Hildenbrand, Brinz, Karlowa, Wlasak, Costa and others believe that Cicero clearly distinguished *ius naturale* from *ius gentium*. However, there are also those such as Fadda or Bögli who identify *ius gentium* with *ius naturale*. Others, such as Krüger, perceive *ius gentium* in Cicero’s works in a dual form: a) a set of specific standards that were common to all nations, b) a set of standards applied in Rome to settle disputes between Romans and foreigners. K. Rebro, P. Blaho, *Rímske právo*, Bratislava 2003, p. 64-65; C. Fadda, *Istituti commerciali del diritto romano*. (Lezioni), Napoli 1902-1903; H. Bögli, *Beiträge zur Lehre vom ius gentium der Römer*, 24, n. 1, Bern 1913, p. 33, 48, 61; P. Krüger, *Geschichte der Quellen und Litt. des römischen Rechts*, München – Leipzig 1912.

of Gaius". From the texts of Gaius the fact follows that the basis of "ius gentium" lies in the so-called "naturalis ratio" (natural reason or natural order), while the basis of ius civile lies in the specific will of an individual nation.

It is necessary to pay attention to the fact that Gaius in that text does not speak generally about the whole mankind, but he restricts it only to the civilized nations, which are governed by laws and customs ("qui legibus et moribus reguntur"). In this way from the concept of ius gentium there are excluded nations which have not achieved such a social life yet, which is regulated by standards. We can also see in the aforementioned text that Gaius draws attention to two elements while defining ius gentium, i.e.:

- a) any standards apply to all nations,
- b) or standards come out of natural reason (naturalis ratio)<sup>11</sup>.

These two elements cannot be viewed separately in the sense that they are independent of each other, but must be viewed as two different aspects of one and the same reality. Gaius in this way presented two perspectives on one and the same ius gentium which are intrinsically and therefore necessarily linked. The first point of view is **concrete** and the second one is **abstract**. This fact can be expressed also in this way that standards of ius gentium are those which are valid for all nations, because they come out of natural reason.

As we can see later, while defining various legal institutions with regard to ius gentium Gaius does not use a single criterion. Once he emphasizes the concrete point of view, another time he focuses on the abstract point of view. Gaius includes for example the legal relationship between slaves and masters in the area of ius gentium and he presents it from the concrete point of view:

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 [*Slaves are in the power of their proprietors, a power recognized by jus gentium, since all nations present the spectacle of masters invested with power of life and death over slaves; and (by the Roman law) the owner acquires everything acquired by the slave*] (Gai Inst. 1, 52).

<sup>11</sup> A. Burdese, *Il concetto di ius naturale nel pensiero della giurisprudenza classica*, "Rivista italiana per le scienze giuridiche" 1854, 8, p. 407-421.

<sup>12</sup> "Item in potestate nostra sunt liberi nostri, quos iustis nuptiis procreavimus. Quod ius proprium civium Romanorum est (fere enim nulli alii sunt homines, qui talem in filios suos habent potestatem, qualem nos habemus) idque divus Hadrianus edicto, quod proposuit de his, qui sibi liberisque suis ab eo civitatem Romanam petebant, significavit..." [*Again, a man has power over his own children begotten in civil wedlock, a right peculiar to citizens of Rome, for there is scarcely any other nation where fathers are invested with such power over their children as in Rome; and this the late Emperor Hadrian declared in the edict he published respecting certain petitioners for a grant of Roman citizenship to themselves and their children; though I am aware that among the Galatians parents are invested with power over their children*].

On the other hand legal relationships concerning for example power of pater familias over children (Gai Inst. 1, 55)<sup>12</sup> or power of husband over wife – “manus” – (Gai Inst. 1, 108)<sup>13</sup> are included by Gaius in the category of *ius proprium civium romanorum*”, it means in the area of civil law.

The institution of guardianship (*tutela*), which takes care of underage persons, is included by Gaius in the area of “*ius omnium civitatum*” in the way that he emphasizes both concrete and abstract points of view of this institution: Gai Inst. 1, 189:

Sed inpuberes quidem in tutela esse omnium civitatum iure contingit; quia id naturali rationi conveniens est, ut is qui perfectae aetatis non sit, alterius tutela regatur... [*The wardship of children under the age of puberty is part of the law of every state, for it is a dictate of natural reason that persons of immature years should be under the guardianship of another...*]<sup>14</sup>.

We are coming to the conclusion that some legal institutions, which belong to the area of *ius gentium*, were presented by Gaius from the concrete point of view, the other ones from the abstract point of view, which is based on the so-called “*naturalis ratio*”. In connection with this abstract point of view it is important to point out how Gaius as a lawyer understood a category of the so-called natural law. Here one question arises: to what extent did Gaius identify *ius gentium* with *ius naturale*? In our opinion this question is answered accurately by Gabrio Lombardi, who claims that *ius gentium* and *ius naturale* are identical from the point of view of the content. *Ius gentium* differs from *ius naturale* only on the basis of a point of view, which individual standards or legal institutions are expressed through. If legal standards are expressed from the concrete point of view (i.e. in standards there is an explicit mention that they apply to all nations), then they can be included in the category of *ius gentium*. If they are formulated from the abstract point of view (i.e. in standards there is a mention of their origin from “*naturalis ratio*”), they can be included in the category of natural law<sup>15</sup>. It is certain that this double point of view on one and the same legal reality is based on the previous philosophical conception of law, which differentiates *ius*

<sup>13</sup> “Nunc de his personis videamus, quae in manu nostra sunt. Quod et ipsum *ius proprium civium Romanorum* est” [*Let us next proceed to consider what persons are subject to the hand, which also relates to law quite peculiar to Roman citizens*].

<sup>14</sup> It is interesting that no reason – “*ratio*” (Gai Inst. 1, 190) refers to guardianship of women, who are at the age of “*perfectae aetatis*”, because “*apud peregrinos non similiter, ut apud nos, in tutela sunt feminae*” (Gai Inst. 1, 193).

<sup>15</sup> G. Lombardi, *Ricerche in tema di “ius gentium”*. Pubblicazioni dell’Istituto di diritto romano dei diritti dell’oriente mediterraneo e di storia del diritto – XXI, Roma 1946, p. 148; G. Lombardi, *Sul concetto...*, p. 128-130.

gentium from *ius naturale* in a clear and explicit way as we can see for example in the writings of Marcus Tullius Cicero<sup>16</sup>.

These facts can be seen in the particular texts from the Institutes of Gaius, which talk for example about ways of acquiring property: for example Gai Inst. 2, 65:

Ergo ex his quae diximus apparet quaedam naturali iure alienari, qualia sunt ea quae traditione alienantur; quaedam civili; nam mancipationis et in iure cessionis et usucapionis ius proprium est civium Romanorum [*Thus it appears that some modes of alienation are based on natural law, as tradition, and others on civil law, as mancipation, surrender before the magistrate, usucapion, for these are titles confined to citizens of Rome* .

The text does not mention the difference between *ius gentium* and *ius civile*, but it distinguishes between *ius naturale* and *ius civile*. The reason is that Gaius emphasizes more the abstract point of view than the concrete one while distinguishing a way of acquiring ownership. In following parts Gaius emphasizes even more the abstract point of view:

Gai Inst. 2, 66: Nec tamen ea tantum, quae traditione nostra fiunt, naturali nobis ratione adquiruntur, sed etiam occupando ideo res adquisierimus, quia antea nullius essent; qualia sunt omnia, quae terra mari caelo capiuntur [*Another title of natural reason, besides Tradition, is Occupation, whereby things previously the property of no one become the property of the first occupant, as the wild inhabitants of earth, air, and water, as soon as they are captured*].

Gai Inst. 2, 69: Ea quoque ex hostibus capiuntur naturali ratione nostra fiunt [*Capture from an enemy is another title of property by natural law*].

Gai Inst. 2, 70: Sed et id, quod per alluvionem nobis adicitur, eodem iure nostrum fit ... [*Alluvion is another natural mode of acquisition. Alluvion is an addition of soil to land by...*].

Gai Inst. 2, 73: Praeterea id quod in solo nostro ab aliquo aedificatum est, quamvis ille suo nomine aedificaverit, iure naturali nostrum fit, quia superficies solo cedit [*Again, a building erected on my soil, though the builder has made it on his own account, belongs to me by natural law: for the ownership of a superstructure follows the ownership of the soil*].

<sup>16</sup> R. Brtko, *Filozofickoprávne východiská prirodzeného práva v klasickom a justiniánskom období rímskeho práva*, Bratislava 2013, p. 69-70; R. Brtko, *Korene prirodzeného práva v starovekom Grécku*, [w:] *Ius romanum schola sapientiae*, Trnava 2009, p. 73-97. P. Bělovský, *Přirozené právo v díle M. Tullia Cicerona*, "Právněhistorické studie" 2009, 40, p. 60-63; L. Strauss, *Natural Right and History*, Chicago-London 1953, p. 15-17; R. Pizzorni, *Il diritto naturale dalle origini a S. Tommaso d'Aquino*, 2 ed., Roma 1950, p. 85.

Gai Inst. 2, 79: In aliis quoque speciebus naturalis ratio requiritur. Proinde si ex uvis aut olivis aut spiciis meis vinum aut oleum aut frumentum feceris, quaeritur, utrum meum sit id vinum aut oleum aut frumentum, an tuum. Item si ex auro aut argento meo vas aliquod feceris, vel ex tabulis meis navem aut armarium aut subsellium fabricaveris; item si ex lana mea vestimentum feceris, vel si ex vino et melle meo mulsum feceris, sive ex medicamentis meis emplastrum vel collyrium feceris, quaeritur, utrum tuum sit id quod ex meo effeceris, an meum. Quidam materiam et substantiam spectandam esse putant, id est, ut cuius materia sit, illius et res quae facta sit videatur esse, ideque maxime placuit Sabino et Cassio... [*On a change of species, also, we have recourse to natural law to determine the proprietor. Thus, if grapes, or olives, or sheaves of corn, belonging to me, are converted by another into wine, or oil, or (threshed out) corn, a question arises whether the property in the corn, wine, or oil, is in me, or in the author of the conversion; so too if my gold or silver is manufactured into a vessel, or a ship, chest, or chair is constructed from my timber, or my wool is made into clothing, or my wine and honey are made into mead, or my drugs into a plaster or eye-salve, it becomes a question whether the ownership of the new product is vested in me or in the manufacturer. According to some, the material or substance is the criterion; that is to say, the owner of the material is to be deemed the owner of the product; and this was the doctrine which commended itself to Sabinus and Cassius...*].

The above-mentioned texts dealing with natural law do not deny the thesis that both categories of law *ius gentium* and *ius naturale* are identical in terms of their content. Differences are reflected only in specific cases: a) if there is an emphasized aspect in a standard, which expresses consonance with *naturalis ratio*, then it is appropriate to talk about natural law b) if there is an emphasized aspect in a standard, which emphasizes the fact that the standard applies to all nations, then it is appropriate to talk about *ius gentium*.

Lawyer Gaius reflected the issue of *ius naturale* also into the form of so-called. naturalistic institutes, which were above the valid positive legislation. In particular, it was consanguinity (*naturalis cognatio*) and a natural obligation (*naturalis obligatio*).

Gai Inst. 1, 156: Sunt autem agnati per virilis sexus personas cognatione iuncti, quasi a patre cognati, veluti frater eodem patre natus, fratris filius neposve ex eo, item patruus et patrum filius et nepos ex eo. At hi, qui per feminini sexus personas cognatione coniunguntur, non sunt agnati, sed alias naturali iure cognati. Itaque inter avunculum et sororis filium non agnatio est, sed cognatio. Item amitae, materterae filius non est mihi agnatus, sed cognatus, et invicem scilicet ego illi eodem iure coniungor, quia qui nascuntur patris, non matris familiam secuntur [*Agnates are persons related through males, that is, through their male ascendants: as a brother by the same father, such brother's son or son's son; a father's brother; his son or son's son. Persons related through female ascendants are not agnates but simply cognates. Thus, between an uncle and his sister's son there is not agnation, but cognation: so the son of my aunt, whether she is my father's sister, or my mother's sister, is not my agnate, but my cognate, and vice versa; for children are members of their father's family, not of their mother's*].

We can see from this fragment that the term of natural law does not refer to the category of legal standards or legal institutions, but it refers to the factual bond, which is natural by its nature against the bond of legal nature. In this specific case there cannot be found the match between natural reason (*naturalis ratio*) and the hypothetical institution of *cognatio* of natural law. In this case we can find the real presence of natural reason in fact. *Naturalis ratio* characterizes the fact of blood relationship as *ius naturale* or as the natural bond. In the Institutes of Gaius the adjective “*naturalis*” (natural) means also factual. In this connection it is necessary to mention the texts of Gaius, which talk about: “*parentes naturales*”<sup>17</sup>, “*filii naturales*”<sup>18</sup>, “*liberi naturales*”<sup>19</sup>, and which point to those who are parents or children of certain individuals in fact.

The term “*ius naturale*” gets also value of the so-called “factual bond” in some places in the Institutes of Gaius:

Gai Inst. 1, 158: *Sed agnationis quidem ius capitis deminutione perimitur, cognationis vero ius eo modo non commutatur, quia civilis ratio civilia quidem iura corrumpere potest, naturalia vero non potest* [*Capitis deminutio extinguishes rights by agnation, while it leaves unaffected rights by cognation, because civil changes can take away rights belonging to civil law (ius civile), but not rights belonging to natural law (ius naturale)*].

From the text it follows that civil rights have a value of civil bonds, which are based on law. On the other hand natural rights have a value of natural bonds, which are based on nature.

<sup>17</sup> Gai Inst. 2, 137: “*Qua ratione accidit ut ex diverso quod ad naturalem parentem pertinet, quamdiu quidem sint in adoptiva familia, extraneorum numero habeantur; si vero emancipati fuerint ab adoptivo patre, tunc incipiant in ea causa esse, qua futuri essent, si ab ipso naturali patre emancipati fuissent*” [*And conversely in respect of their natural father as long as they continue in the adoptive family they are reckoned as strangers: but when emancipated by the adoptive father they have the same rights in their natural family as they would have had if emancipated by their natural father (that is, unless either instituted heirs or disinherited by him, they may claim the contratabular succession)*].

Gai Inst. 3, 31: “*Liberi quoque qui in adoptiva familia sunt ad naturalium parentum hereditatem hoc eodem gradu vocantur*” [*Children in an adoptive family are called to succeed their natural parents in the same order*].

<sup>18</sup> Gai Inst. 1, 19: “*Iusta autem causa manumissionis est ueluti si quis filium filiamue aut fratrem sororemue naturalem, aut alumnum, aut paedagogum, aut seruum procuratoris habendi gratia, aut ancillam matrimonii causa, apud consilium manumittat*” [*There is an adequate motive of manumission if, for instance, a natural child or natural brother or sister or foster child of the manumitter’s, or a teacher of the manumitter’s child, or a male slave intended to be employed as an agent in business, or a female slave about to become the manumitter’s wife, is presented to the council for manumission*].

Gai Inst. 2, 136: “*Adoptivi filii quamdiu manent in adoptione, naturalium loco sunt...*” [*Adoptive children, so long as they continue in the power of the adoptive father, have the rights of his natural children*].

<sup>19</sup> Gai Inst. 1, 104: “*Feminae vero nullo modo adoptare possunt, quia ne quidem naturales liberos in potestate habent*” [*Women cannot adopt by either form of adoption, for even their natural children are not subject to their power*].

See also Gai Inst. 3, 40, 41.

It is essential to mention one important text from the Institutes of Gaius, which concerns natural obligations and is unique, because it is not found in the Justinian's compilation.

Gai Inst. 3, 119 a: Fideiussor vero omnibus obligationibus, id est sive re sive verbis sive litteris sive consensu contractae fuerint obligationes, adici potest. Ac ne illud quidem interest, utrum civilis an naturalis obligatio sit cui adiciatur; adeo quidem, ut pro servo quoque obligetur, sive extraneus sit qui a servo fideiussorem accipiat, sive ipse dominus in id, quod sibi debeatur... [*A fidejussor; on the other hand, may be accessory to any obligations, whether real, verbal, literal, or consensual, and whether civil or natural. So that he may even be bound for the obligation of a slave either to a stranger or ...*].

This text is particularly important from the point of view of showing the conceptual meaning of the term “natural obligation” (*obligatio naturalis*). As in previous cases also in this text in our opinion the meaning of the adjective “natural” (*naturalis*) should qualify as “factual” in the context of the Institutes of Gaius.

So in the Institutes of Gaius we can see the contraposition of two categories of bonds: on the one hand there is a power relationship of law, which the Romans called *agnatio* and on the other hand there is a natural (blood) relationship, which was called *cognatio* by the Romans. Against the relationship of legal filiation there is the relationship of natural filiation. Against the civil obligation, which is accepted and protected by civil law there is the natural obligation, which came into existence in a factual way and thus it is an obligation existing in fact in spite of the fact that it is not accepted in law and order or it is accepted only partly. So when Gaius talks about natural obligation, it does not refer to a hypothetical natural law obligation or obligation of *ius gentium*<sup>20</sup>. In our opinion he perceives it as an obligation, which exists in fact, i.e. as a factual obligation, not secured by an action, which was not acknowledged by civil law, but from which certain legal consequences follow<sup>21</sup>. When Gaius speaks about natural law, he means by that legal standards and legal institutions with roots in natural reason (*naturalis ratio*), which is understood as a source of law. On the other hand when he talks about natural obligation (*obligatio naturalis*), he understands it as an obligation, which exists in fact and was not acknowledged by civil law<sup>22</sup>.

<sup>20</sup> J. Vážný, *Naturalis Obligatio*, [w:] *Studi Bonfante IV*, Milano 1930, p. 136; E. Albertario, *Studi di diritto romano III. Obbligazioni*, Milano 1936, p. 4-18.

<sup>21</sup> H. Siber, *Naturalis obligatio*, “Archivio giuridico” 1929, 102, p. 230; S. Perozzi, *Interpretazione di Gaio 3, 119a*, [w:] *Studi in onore Pietro Bonfante nel XL anno d’insegnamento. Volume. I*, Milano 1930, p. 75; F. Pringsheim, *Siber Heinrich, Naturalis obligatio, Besprochen von Fritz Pringsheim*, “Zeitschrift der Savigny-Stiftung” 1926, 46, p. 350-363.

<sup>22</sup> The issue of natural obligations is one of the topics which Romanists are divided on. For example, Otto Gradenwitz (1860–1935) and Silvio Perozzi (1857–1931) consider a natural obligation as a factual obligation not secured by an action that was not acknowledged by civil law and from which

In connection with our topic it is important to explain the meaning of the term “*naturalis ratio*” in the spirit of the Institutes of Gaius. What importance does Gaius attach to *naturalis ratio*? Pietro Bonfante presents *naturalis ratio* in general as a “logic of things, i.e. legal institutions”<sup>23</sup>. Or Carlo Alberto Maschi interprets *naturalis ratio* as a “natural foundation”, “consonance with nature”<sup>24</sup>. In connection with the fact how Gaius understood *naturalis ratio*, Gabrio Lombardi criticizes these explanations, because in his opinion they suppose the existence of a certain institution. According to Lombardi the above-mentioned “definitions” express the fact that with *naturalis ratio* it refers only to a logic of a certain institution or only to its consonance with nature<sup>25</sup>. It is true that Gaius in the following parts (a posteriori) of his Institutes uses *naturalis ratio* in the spirit of the above-mentioned explanations. On the other hand it is also true that these two explanations cannot be applied to the introductory passage – Gai Inst. 1, 1, where *naturalis ratio* is connected with *ius gentium*.

As we could see before, in this fragment of Gaius (Gai Inst. 1, 1) on the one hand there is *naturalis ratio* (as “a source” of law of nations) and on the other hand there is *populus* – *people* (specific will of an individual nation as “a source” of civil law). From the text Gai Inst. 1, 1 it follows that *naturalis ratio* does not suppose the existence of certain standards or institutions, from which many consequences follow or on which consonance with nature is judged. On the contrary Gaius at the beginning claims simply that for the whole mankind the natural order itself (*naturalis ratio*) states (constituit) what all nations have in common, i.e. *naturalis ratio* states the whole series of standards and institutions – *ius gentium*, which is observed equally by all nations.

In the end it is important to emphasize that Gaius as the classical Roman jurist in principle ignored a separate category of natural law understood as a summary of ideal standards, which should be observed. In spite of that fact he mentions natural law in concrete cases when he speaks about the law of nations from the abstract point of view. *Ius naturale* and *ius gentium* are identical from the point of view of the content, but *ius gentium* differs from *ius naturale* on the basis of a point of view which individual standards or institutions are expressed through. Besides *ius naturale* (which Gaius presents as a summary of

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only certain legal consequences could arise. Other Romanists such as Heinrich Siber (1870–1951) and Giovanni Pacchioni (1867–1946) see in the natural obligation of the classical period such an obligation that was protected by an action and based on *ius gentium*, because in the light of The Institutes of Gaius it was closely related to “*naturalis ratio*”; E. Albertario, *Studi di diritto romano. Obbligazioni*, Vol. III, Milano 1936, p. 57-69.

23 P. Bonfante, *Storia del diritto romano*, Vol. I, Roma 1959, p. 370.

24 C. A. Maschi, *La concezione naturalistica del diritto e degli istituti giuridici romani*, Milano 1937, p. 245.

25 G. Lombardi, *Sul concetto...*, p. 148.

standards and institutions, which are applied to all nations, because they come out of natural reason “naturalis ratio”). Gaius mentions *ius naturale* and *iura naturalia* within that meaning in order to refer to such bonds and relationships, which exist in fact and which are independent of the nature of civil law or civil law takes them into account only less. Gaius uses the adjective “naturalis” many times in order to express this material existence as for example he did in the case of specific obligations, which exist in fact, but they are not accepted in law and order directly.

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## STRESZCZENIE

### *Ius gentium* oraz *ius naturale* według koncepcji Gajusa

Gaius był klasycznym rzymskim prawnikiem, który żył w drugim wieku n.e., a jego najcenniejsza praca – *Institutiones* została napisana ok. 160 n.e. i był to podręcznik do nauki prawa podzielony na cztery księgi. Na początku Gaius odróżnił w niej prawo cywilne (*ius civile*) od prawa narodów (*ius gentium*). Dwa wieki po Ciceronie, Gaius zdefiniował pojęcie *ius gentium*. Według niego było to prawo wspólne dla wszystkich narodów. Z drugiej strony *ius civile* to prawo, które dotyczyło tylko obywateli rzymskich. *Ius gentium* było prawem obowiązującym zarówno w Rzymie, jak i dla wszystkich narodów, ponieważ jego podstawą jest *naturalis ratio*, podczas gdy podstawą *ius civile* jest specyficzna wola pojedynczego narodu. Gaius zignorował odrębną kategorię prawa naturalnego rozumianego jako podsumowanie norm idealnych. Mimo to wspomniał o prawie naturalnym w konkretnych przypadkach, gdy mówił o prawie narodów z abstrakcyjnego punktu widzenia.

## SUMMARY

*Gaius was the classical Roman jurist who lived in the second century and his most valuable work – The Institutes of Gaius, written about the year A.D. 160 was an*

introductory textbook of legal institutions divided into four books. In this work at the beginning Gaius distinguished civil law (*ius civile*) from the law of nations (*ius gentium*). Two centuries after Cicero Gaius defined the concept of *ius gentium*. According to Gaius *ius gentium* is a law which is common for all nations. On the other hand *ius civile* is a law which concerns only Roman citizens. *Ius gentium* is a law which is valid in Rome as well as for all nations, because its basis is *naturalis ratio*, while the basis of *ius civile* lies in the specific will of an individual nation. Gaius ignored a separate category of natural law understood as a summary of ideal norms. In spite of that fact he mentioned natural law in concrete cases when he spoke about the law of nations from the abstract point of view.