ON THE USELESSNESS OF IT ALL: THE ROMAN LAW OF MARRIAGE AND MODERN TIMES

Jakub Urbanik* **

> 'Ay', said the Muskrat, 'now I should like my book spirited back again, please'. 'Right' said the Hobgoblin. 'Here you are, sir'. '"*On the usefulness of everything*"' read the Muskrat, 'but this is the wrong book, the one that I had was about the *uselessness of everything*'. But the Hobgoblin only laughed. (Tove Jansson, *Finn Family Moomintroll*, ch. 6, (trans. Elisabeth Porch))

If only there were a Hobgoblin, I sometimes wish, who could spirit back the general consensus on the necessity of including Roman law in modern law curricula. Alas and alack, fewer and fewer scholars are convinced of this need. Many of us have therefore tried to adopt a Hobgoblin's personality and draw endless arguments in favour of our discipline out of the magician's tall hats. One of the recurring ideas would be the immortality of the values of a legal order invented by and for long-dead people. The pure *romanesimo* in Orestano's words has impressed itself on the minds of many.[1] Thus the Roman law we reconstruct – and teach – becomes the Platonic idea of law. Once held up as an attainable ideal, it now necessarily becomes a paradigm of law creation, or at least a source of criteria that will be of use to us when we scrutinise and criticise modern legal orders and their lawgivers.[2] In this essay, unavoidably brief and superficial given the space available, I shall examine only one example of such an approach and ask whether Roman views on the nature of marriage should influence current developments in the field. Chapter six

1 R. Orestano, *Introduzione allo studio del diritto romano*, Bologna 1987, 464-479.

2 See W. Wołodkiewicz on the imaginary effigy of Roman law in political speeches '"Prawo rzymskie" w wypowiedziach polskich parlamentarzystów' ('Polish parliamentarians on "Roman law"'), *Palestra* 9.10 (2008), 162-170.

* Assistant Professor of Roman Law and the Law of Antiquity, Faculty of Law and Administration, University of Warsaw.

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of a recent book by Wolfgang Waldstein[3] is the most recent work on this question.[4] Because the book itself deals with *natural law*, the most obvious point of departure for the author is the renowned passage from the very beginning of Ulpian's *Manual*:

> D. 1.1.1.3 (Ulpianus *libro primo institutionum*): *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 peritia censeri.* (Natural law is that which nature has taught all animals. And so it not only refers to the human species, but is common to all animals, whether born on earth or in the sea, and also to the birds. From it comes the union of male and female, which we call marriage, procreation of children and their rearing. We should observe therefore that other animals, including wild beasts, have experience of this law.)

Ulpian, as the Austrian author observes, regards marriage – intended of course as a union between a man and a woman – as the 'first example of an [legal] institution built on natural law'. Setting this pronouncement against a framework constructed *ad hoc* with reference to other Roman sources on natural law, (see Gaius, 1.158, Paul, D. 23.3.14, and Modestinus, D. 23.2.1, which I shall address below), has led Waldstein to a *natural* – pun intended – conclusion that the only possible type of marriage is a heterosexual and monogamous one. It would follow that anything else, even if superimposed by human law, would constitute a breach of natural law, and should therefore be avoided.[5] Thus a

3 W. Waldstein, *Ins Herz geschrieben das Naturrecht als Fundament einer menschlichen Gesellschaft*, Augsburg 2010, esp. ch. 6. This author's view is not isolated. For the sake of keeping this paper shorter I have not referred to the works of Maria Pia Baccari (see most recently 'Personas matrimonio y familia en el sistema romano. Contra los "abstractismos" y los individualismos contemporáneos', in: P. Resina Sola (ed.). *Fundamenta iuris. Terminologia, principios e interpretatio de Roma a la actualidad, XIV Congreso internacional y XVII Congreso Iberoamericano de Derecho romano (Almeria, 28-30 marzo 2012)*, Almeria 2013, 481-490, and *Matrimonio e donna* I, *Concetti ulpianei*, Torino 2012, *Concetti ulpianei per il "diritto di famiglia"*, Torino 2000), yet my results, *mutatis mutandis*, would be applied accordingly.

4 Yet it follows a path well marked by a number of distinguished scholars. See T. Giaro, 'Problemi romani e problemi romanistici in tema di matrimonio', in: Z. Służewska/J. Urbanik, *Marriage Ideal, Law, Practice Proceedings of a Conference Held in Memory of Henryk Kupiszewski*, Warsaw 2005, 83-110. In the same paper there is a very sound description of the tension between the law of Romans and the Romanistic tradition in general, taking as the point of departure Orestano's distinction (n. 1), 83-87. An important contribution to the discussion on marriage and natural law is to be found at 90-104, where another 'natural' aspect of Roman marriage is discussed. Adultery, a deed *per se* in conflict with marriage, just like theft, is a 'naturally' shameful act (D. 50.16.42, Ulpian, 57 *ad ed*. and Gaius 3.194). Interestingly, Giaro finally concludes that Roman jurisprudence seems often to have changed its stance on whether marriage should be classified as 'natural' or as based on positive law (103-104).

5 One is tempted to recall here Bertrand Russell's observation on marriage, family and state intervention in his *Marriage and Morals*, a fascinating book profoundly influenced by the novelty of the anthropological findings of that epoch. In the book he noted that State legislation on family matters paradoxically destroys its traditional – *natural* – structure. Russell cites such examples as children being removed from unfit parents, or the creation of job opportunities for women. No wonder that after the publication of this work the philosopher was deemed 'morally unfit' to take up a chair in New York.

reconstruction of the Roman law of marriage highlights a pattern any law of marriage should pursue. Before we proceed, let us observe one crucial feature of the Ulpianic definition of marriage that seems to have evaded most scholars. The jurist does indeed see that coupling and procreation originate in nature, but he also draws a sharp line between human and animal: the union of a man and a woman is what *we*, i.e. the *Romans*, call marriage. Nature does not know marriage.[6]

In what follows I shall first discuss the premises of such a reading of the sources and then suggest a possible alternative, hoping to find that we may learn something from Roman jurists.

1. *Ius naturale in* D. 1.1.1.3

In this part I shall not attempt a thorough analysis of the notion of Ulpianic natural law, which Waldstein did not do in his essay either. I shall only point out certain incongruences in his views and refer the Reader wishing to study the subject in more depth to the studies by eminent writers, most notably the recent and thorough one by Valerio Marotta (to be read together with the dissenting views of Antonio Mantello).[7] I daresay my superficial discussion of this point will suffice,[8] as I do not draw such rigid and far-fetched conclusions from this reconstruction as Waldstein has done.

Let us first examine the background against which Ulpian's statement has been examined. The first point of comparison is provided by a fragment of Gaius' *Manual*, untainted by any suspicion of a Justinianic intervention. This quality is of the utmost importance to Waldstein as he attempts to reconstruct the universal concept of natural law, proving it was common to Christians and heathens alike.

> Gaius 1.158: *Sed adgnationis quidem ius kapitis diminutione perimitur, cognationis uero ius eo modo non commutatur, quia civilis ratio civilia quidem iura corrumpere potest, naturalia vero non potest.* (And while an agnatic relationship is ended by a change in status, a cognatic relationship is not changed in this way, because a decision under civil law may destroy civil rights but not natural ones.)

6 See also on this point a perspicuous review of the first edition (1983) of Honoré's book by A. Watson, *Times Literary Supplement* 1983 as well as V. Marotta, '*Iustitia, vera philosophia e natura*. Una nota sulle *Institutiones* di Ulpiano', *Seminarios complutenses de derecho romano* 19 (2006), 285-334, at 330 (= in: D. Mantovani/ A. Schiavone, *Testi e problemi del giusnaturalismo romano*, Pavia 2007, 663-601). An innovative view on this point has been recently presented by R. Quadrato, '*Maris atque feminae coniunctio*: matrimonium e unioni di fatto', *Index* 38 (2010), 223-252. The author suggests that the Ulpianic axiom refers not only to legitimate marriage but also comprises factual unions. Quadrato's argumentation rightly points out the discrepancy between the social and legal view of marriage, I am less convinced by his main thesis. No matter, however, whether we accept it, or not, it does not contradict my point: the divergence between a union of animals and that of humans.

7 Marotta (n. 6), *passim* esp. 2. 'La tradizione stoica e ciceroniana e la definizione ulpianea di *ius naturale*' with a critical note by A. Mantello, 'Etica e mercato tra filosofia e giurisprudenza', *SDHI* 74 (2008), 3-78, at 48, n. 110 (= F. Milazzo (ed.), *Affari, finanza e diritto nei primi due secoli dell'impero. Atti del Convegno internazionale di diritto romano (Copanello, 5-8 giugno 2004)*, Catanzaro 2012, 27-127 at 80, n. 110).

8 I am not taking into account the original and interesting viewpoint of Sir Henry Sumner Maine, who basically dismisses the whole Ulpianic concept of *ius naturale*, and shows that only *ius gentium* and *ius civile* counted: cf. *Ancient Law, Its Connection with the Early History of Society and its Relation to Modern Ideas*, London/New York/Toronto (*The World Classics*) 1931, 43.

The problem with relying on this text for proof in this context is not even the questionable attribution of the same meaning to the term *iura naturalia* in Gaius' lectures as *ius naturale* is given in Ulpian's definition of the law. The Austrian author considers only the second part of the clause, which is indeed a striking maxim. Yet the author of the *Institutes* does not seem to have wanted to ascribe a general meaning to this phrase. It needs to be read in context, and its context is provided by a general description of the categories of free persons in the Roman *politeia*. Referring to the political laws *par excellence*, the *XII Tables*, and to the origin of legal guardianship, later abolished as regards women by the *lex Claudia*, Gaius explains to his readers the general difference between agnatic and cognatic relationships. The former concept stems from Roman-law provisions on citizenship. The latter concept, describing the real provenance of children and their blood relationship to their natural parents, can obviously not be altered by any human decree. Needless to say, no moral value could be attributed to this notion.

Similar reasoning could have prevented a misinterpretation of the reference to *nature* in a fragment of Paul's *Commentary on the Edict*, evoked in the same stream of argumentation:

> D. 23.2.14 (Paulus *libro 35 ad edictum*): pr. *Adoptivus filius si emancipetur, eam quae patris adoptivi uxor fuit ducere non potest, quia novercae locum habet. 1. Item si quis filium adoptaverit, uxorem eiusdem quae nurus loco est ne quidem post emancipationem filii ducere poterit, quoniam aliquando nurus ei fuit.* 2. *Serviles quoque cognationes in hoc iure observandae sunt. Igitur suam matrem manumissus non ducet uxorem: tantundem iuris est et in sorore et sororis filia. Idem e contrario dicendum est, ut pater filiam non possit ducere, si ex servitute manumissi sint, etsi dubitetur patrem eum esse. Unde nec volgo quaesitam filiam pater naturalis potest uxorem ducere, quoniam in contrahendis matrimoniis naturale ius et pudor inspiciendus est: contra pudorem est autem filiam uxorem suam ducere*. (If an adopted son is emancipated, he cannot marry the woman who was his father's wife, for she is still his step-mother. Likewise, if someone has adopted a son, he will not be able to marry his son's wife, who is still his daughter-in-law, even after the son's emancipation, for the woman was once this man's daughter-in-law. 2. Under this law, slaves' cognatic relationships must also be respected. Thus after manumission nobody may marry his mother; the same rule is observed in respect of a sister and a sister's daughter. On the contrary, one should say that a father cannot marry his daughter, once they are both released from slavery, even if it is uncertain whether he is the father. Neither may a natural father marry his daughter born out of wedlock, for in entering into marriage one should contemplate natural law and modesty. And it is contrary to modesty to marry one's daughter.)

Again, *ius naturale* seems not to have a decisively appraising value. Nature governs blood relations in humans as in beasts. Roman marriage – as devised by civic law – is inaccessible to people too closely related by blood, even if *ius civile* normally preferred the agnatic bond as the basis of various legal relationships. Let us observe that what prevents an incestuous union is unsurprisingly human *pudor*, not natural law. Note that the jurist's reasoning starts with an impediment (using the modern term) to marriage created by the previous legal bond: adoptive parenthood. Only later does he consider the opposite situation: the impossibility of marrying a blood relative where the relationship

cannot be recognised by civil law. The final example is the most telling: we well remember the famous Paulian saying that it is always certain who the mother is but fatherhood is presumed.[9] There is no marriage between slaves, and there cannot be a presumption of fatherhood among them. Similarly, there is no presumption of fatherhood in respect of children born out of wedlock to free people. Yet human modesty does not allow them to marry their fathers. Natural law, whether in the Ulpianic sense of a biological force (see further below), or as the Gaian *naturalis ratio*, the source of *ius gentium* would not be capable of preventing this.[10] Explaining the former is unnecessary, and the latter becomes obvious as we recall the Roman tolerance of endogamic unions in Egypt, which also demonstrates Roman acceptance of the exclusively civic character of *their* marriage. [11]

The next step in Waldstein's interpretation is to recollect the famous dictum of Modestinus:

> D. 23.2.1 (Modestinus *libro 1 regularum*): *Nuptiae sunt coniunctio maris et feminae et consortium omnis vitae, divini et humani iuris communicatio* (Marriage is a joining of a husband and wife, partnership of fates in all aspects of life, a communication under divine and human law.)

Waldstein firmly decides that Ulpian's acolyte must have elaborated on his master's definition of marriage. He is further quite convinced that *ius divinum* in this passage corresponds to *ius naturale* in D. 1.1.1.3; and that the Justinianic *Institutions* provide evidence of this, distinguishing as they do the immutable natural laws made by Divine Providence, and the always changeable human laws.[12] Even a quick glance at this clause reveals the differences between the divisions in IJust. 1.2.11 and D. 1.1.1. Leaving aside the obvious differences such as the binominal versus the trinominal division, and the absence of any allusion to the animal world in the Byzantine *Manual*, we cannot but be struck by the obvious contrast between the force of nature and the concept of the Divine Providence deeply rooted in Christian anthropology (which, by the way, confirms the authenticity of the Ulpianic text). How one might have identified these two, remains a mystery.

What then was the real meaning of *ius naturale* in Ulpian's introductory lecture on law? If one seeks a philosophical significance in it the answer will be provided by

9 D. 2.4.5 (Paulus, 4 *ad ed.*): [mater] *semper certa est ... pater vero is est, quem nuptiae demonstrant*.

10 Cf. Gaius 1.1: … *quod uero naturalis ratio inter omnes homines constituit, id apud omnes populos peraeque custoditur uocaturque ius gentium, quasi quo iure omnes gentes utuntur.*

11 Cf. the all-telling paragraph of the *Gnomon* drawing a visible line between the unions of the Romans and of the 'others': § 23 (iv 70-72) οὐκ ἐχὸν Ῥομαίοις ἀδελφὰς γῆμαι οὐδὲ τηθίδας, ἀδελφῶν | θυγατέρας συνκεχώρηται. Παρδαλᾶς μέντοι ἀδελφῶν συν|ελθόντων ⸂τὰ ὑπάρχοντα⸃ ἀνέλαβεν. (Romans are not allowed to marry (their) sisters or aunts, (but) are allowed (to marry) the daughters of brothers. Pardalas, in fact, has confiscated the property of siblings married to each other (I am following the reading of μέντοι suggested by J. Mélèze Modrzejewski in his edition of the *Gnomon* in P.F. Girard/F. Senn, *Les lois des Romains*, Camerino 1977 (7 ed. by V. Giuffré), 520-557, at 532, n. 31).

12 IJust. 1.2.11. *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.*

Ulpian's affiliation with one of the philosophical schools. The prevailing view of scholars is that the jurist's inclination was towards the Roman heritage of Stoa, a philosophical choice strengthened by his apparent inclusion in the intellectual circle of Julia Domna.[13] In this environment he may have also been exposed, as Frezza claims,[14] to the ideas of Neoplatonism. In arguing thus, Frezza refers to Ulpian's apparent adherence to this School's belief in the rational character of animals, proved by his allowing the *actio de pauperie* only where an animal was acting against its own nature.[15] Honoré agrees with this reasoning, stating that the same line of thought could have resulted in the Ulpianic idea of the natural-law origins of marriage, an institute known to animals through experience (*istius iuris peritia*), not instinct. This argument is not entirely convincing: as I have already stated above, it is not exactly what we find in Ulpian's text. It would be perhaps better to speak of the natural origins of coupling and procreation.[16] Finally, an all-governing law, common to all living things, may be an indirect echo of Pythagorean teachings, particularly those of Empedokles, as has been suggested by Mantello, who argues that Ulpian could have become acquainted with this ideology through the entourage of the *philosophos* empress.[17]

13 See T. Honoré, *Ulpian Pioneer of Human Rights*, Oxford 2002 (2 ed.), ch. 3 'The cosmopolis and human rights', esp. 80-83 with G. Crifó, 'Ulpiano. Esperienze e responsibilità del giurista', *ANRW* II.15 (1976), 708-789 (at 734-736), and others cited in n. 49.

14 P. Frezza, 'La cultura di Ulpiano', *SDHI* 34 (1969), 363-375, at 369-370, Idem, 'La persona di Ulpiano (a proposito del volume di Tony Honoré', *SDHI* 49 (1983), 412-422).

15 D 9.1.1.7 (Ulpianus *libro 18 ad ed.*): *Et generaliter haec actio locum habet, quotiens contra naturam fera mota pauperiem dedit ideoque si equus dolore concitatus calce petierit, cessare istam actionem, sed eum, qui equum percusserit aut vulneraverit, in factum magis quam lege Aquilia teneri*. Cf. Honoré (n. 13), 82. See also J. Mélèze Modrzejewski, 'Ulpien et la nature des animaux', in: *La filosofia greca e il dritto romano*. *Colloquio italo-francese (Roma, 14-17 aprile 1973),* Roma 1975, 177-199 (*Droit imperial et traditions locales dans l'Égypte romaine*, Aldershot 1990, no V), who, having analyzed the possible philosophical doctrinal trends underlying the Ulpianic enunciation, correctly points out how little practical meaning they had with reference to the *actio de pauperie* and *actio de pastu*. (cf. also Idem, 'Hommes libres et bêtes dans les droits antiques', in: L. Poliakov (ed.), *Hommes et bêtes. Entretiens sur le racisme. Actes du colloque*, Paris/La Haye 1975, 75-102 (= *Statut personnel et liens de famille*, Aldershot 1993, no I). Indeed, we should pay attention to the cautious introductory *generaliter*, before firmly stating that Ulpian, unlike Servius or Alfenus, would grant the action only if an animal acted contrary to its nature.

16 Honoré (n. 13), 82, *contra* Watson (n. 6), *cf.* also P. Birks, review of the same, *The Irish Jurist* 18 (1983), 151 ff.

17 Cf. A. Mantello, 'Il sogno, la parola, il diritto. Appunti sulle concezioni giuridiche di Paolo', *BIDR* 33/34 (1991/1994), 349-415, at 401-407, with an illustrative comparison with the beliefs of Philostrates (see *Vita Apoll.* 2.14) and evocation of the well-known fragment from Cicero's *de Republica* 3.18-19, in which he refers to the doctrine of the Pythagoreans: *Esse enim hoc boni viri et iusti, tribuere id cuique quod sit quoque dignum. Ecquid ergo primum mutis tribuemus beluis? non enim mediocres viri sed maxumi et docti, Pythagoras et Empedocles, unam omnium animantium condicionem iuris esse denuntiant, clamantque inexpiabilis poenas impendere iis a quibus violatum sit anima*. This view has been accepted by P.P. Onida, *Studi sulla condizione degli animali non umani nel sistema giuridico romano*, Tornino 2012 (2 ed.), Part I, ch. III: La natura degli animali e il ius naturale, published at *http //www.dirittoestoria.it/dirittoromano/Onida-Animali-parteI-capIII.htm*, where the reader will also find a summary of scholarship on the question.

Turning back to the Stoic influence: it would be represented by a belief in the equality of people, no matter whether free or slaves;[18] in the field of family relationships, by an admonition to stay with one's wife, whether for better or worse,[19] and, if Marotta is to be followed, by reference to the education of children in our key passage. All in all, it is probably safe to assume that the Tyrrhian jurist was influenced by many of the philosophical currents to which he was exposed in his intellectual circles.[20] If we read the whole of D. 9.1.1, we realise that perhaps we sometimes want to attribute too much modern rigour to ancient minds. Paragraph 3 in which Ulpian explains the meaning of the edictal *pauperiem fecisse* is clear proof that the jurist did not assign any reasoning power to animals, contrary to what was assumed in the interpretation in D 9.1.1.7.[21]

For the sake of argument, let us provisionally assume that the 'mainstream of [Ulpian]'s thought was Stoic'.[22] This also seems to have been Waldstein's view, obviously influenced by Cicero. It is extremely difficult to convey the essence and role of natural

18 Cf. D. 1.1.4 (Ulpianus, 1 *inst*.), cited and analysed *infra*, and D. 50.17.32 (Ulpian, 43 *ad Sab.*): *Quod attinet ad ius civile, servi pro nullis habentur non tamen et iure naturali, quia, quod ad ius naturale attinet, omnes homines aequales sunt.*

19 D. 24.3.22.7 (Ulpianus, 32 *ed.*): *Si maritus vel uxor constante matrimonio furere coeperint, quid faciendum sit, tractamus … An autem illa repudianda est, considerandum est. Et si quidem intervallum furor habeat vel perpetuus quidem morbus est, tamen ferendus his qui circa eam sunt, tunc nullo modo oportet dirimi matrimonium, sciente ea persona, quae, cum compos mentis esset, ita furenti quemadmodum diximus nuntium miserit, culpa sua nuptias esse diremptas quid enim tam humanum est, quam ut fortuitis casibus mulieris maritum vel uxorem viri participem esse? Sin autem tantus furor est, ita ferox, ita perniciosus, ut sanitatis nulla spes supersit, circa ministros terribilis, et forsitan altera persona vel propter saevitiam furoris vel, quia liberos non habet, procreandae subolis cupidine tenta est licentia erit compoti mentis personae furenti nuntium mittere, ut nullius culpa videatur esse matrimonium dissolutum neque in damnum alterutra pars incidat*. Cf. Honoré (n. 13), 81.

20 Cf. Mantello (n. 17), 407: 'nelle affermazioni ulpianee (sullo ius naturale) è possibile rintracciare solo cultura ufficiale, imperiale. Meglio, un pitagorismo funzionale e omogeneo a tale cultura, di stampo etico-morale. E nient'altro', cf. also A. Honoré, 'Ulpian, natural law and Stoic influence', published online at *http //users.ox.ac.uk/~alls0079/Stoic%20influence%202.pdf*, 9: 'philosophically-minded lawyers are not members of this or that school of philosophy. It is a mistake to attribute to a lawyer a system of philosophy rather than a set of values. The nature of the discipline requires lawyers to be eclectic, to compromise between different aims.'

21 D. 9.1.1.3: *Pauperies est damnum sine iniuria facientis datum nec enim potest animal iniuria fecisse, quod sensu caret.*

22 Cf. Honoré (n. 13), 82 and also Idem, 'Ulpian, natural law' (n. 20), *passim*. Another good reason to do so is that Long points out that '[even if] the Greek Stoics do not generally invoke law when speaking about strictly physical events and process … the Roman Stoic Seneca frequently does so' (A.A. Long, 'Law and nature in Greek thought', in: *Cambridge Companion to Greek Law,* Cambridge 2010, 412-430, at 424-426, with sources cited in n. 14, referring to the force of *lex mundi*, cf., e.g., *nat. quest*. 2.35.2 (the fates following their own *ius*, of which the first is order), 3.29.3 (*lex mundi*, which governs seasonal inundations, and the comparison between an infant already programmed to have the features of an adult at the point of its conception and birth and the universe necessarily following the path to its final doom), 6.32.12 (death as a component of *lex naturae*), 7.20.2 (miraculous conflagration not respecting laws of nature), 7.28.2 (*leges mundi* governing the movements of comets), and citing B. Inwood, 'Natural law in Seneca', *Studia Philonica* 15 (2003), 81-99).

law or natural reason in this school, given the scarcity and ambiguity of the sources.[23] The Stoic belief in a natural and meaningful order of the universe suggested a life in concordance, *homologia.* People should therefore live their lives performing appropriate actions, *katechonta*, which Cicero renders as *officia* (*fin*. 3.20). The appropriate actions are these to which people are naturally inclined, firstly preserving their own lives, as Cicero reminds us, but also, for example, procreation and avoiding pain. Living in this way would be living according to *nature* in the first, more superficial meaning of the term. Up to this point one could postulate a certain similarity between humans, and other animate beings (even inanimate things such as plants) populating the universe.[24] Yet, although people observe irrational nature as they observe themselves, they never copy it. In the hierarchy of beings in the universe, human reason and especially the reason of wise people is what is closest to God, so that it would be absurd to say that we ought to learn from animals.[25] Observing oneself as well as nature brings comprehension. Rational humans discover higher reason, which governs all nature, and understand that their lives should conform to this reason. It is this attitude – the desire to follow the nature of the universe – that converts *katechonta* as signposts into *katorthomata*, *recta officia*, or right actions. One should therefore not be surprised that a wise man sometimes prefers suicide to life (even if the preservation of life is seemingly a *katechonton*).[26] It is because in particular circumstances wise people choose service to the world rather than their own well-being.[27] Let us not forget, however, that in our humble existence we are all far from being wise, as Seneca reminds us.[28]

23 See, now for all, M. Frede, 'On the Stoic conception of good', in: Katerina Ierodiakonou (ed.), *Topics in Stoic Philosophy*, Oxford 1999, 71-94, his interpretation of Cicero, *fin.* 3.20-21 and the account of Stoic doctrine in D.L. 7.85-86. What follows has been chiefly based on this work as well as a very articulate elucidation, especially in regards to the normative function of nature, provided by Agnieszka Kacprzak, 'L'*actio aquae pluviae arcendae* ed il concetto labeoniano di natura', in: Mantovani/ Schiavone (n. 6), 271-298, at 282-285 (2.1. 'La normatività della natura nel pensiero stoico').

24 Cf. D.L. VII 85 (Chrysippus, *peri telon*).

25 Cf. D.L. VII 129 (= *SVF* III 367): Ἔτι ἀρέσκει αὐτοῖς μηδὲν εἶναι ἡμῖν δίκαιον πρὸς τὰ ἄλλα ζῷα, διὰ τὴν ἀνομοιότητα, καθά φησι Χρύσιππος ἐν τῷ πρώτῳ Περὶ δικαιοσύνης. (It is their doctrine that there can be no question of right as between man and the lower animals, because of their unlikeness. Thus Chrysippus in the first book of his treatise *On Justice*: trans. R.D. Hicks.)

26 Cf. D.L. VII 130 (= *SVF* III 757): Βίων δὲ τριῶν ὄντων, θεωρητικοῦ καὶ πρακτικοῦ καὶ λογικοῦ, τὸν τρίτον φασὶν αἱρετέον· γεγονέναι γὰρ ὑπὸ τῆς φύσεως ἐπί- τηδες τὸ λογικὸν ζῷον πρὸς θεωρίαν καὶ πρᾶξιν. εὐλόγως τέ φασιν ἐξάξειν ἑαυτὸν τοῦ βίου τὸν σοφὸν καὶ ὑπὲρ πατρίδος καὶ ὑπὲρ φίλων, κἂν ἐν σκληροτέρᾳ γένηται ἀλγηδόνι ἢ πηρώσεσιν ἢ νόσοις ἀνιάτοις. (Of the three kinds of life, the contemplative, the practical, and the rational, they declare that we ought to choose the last, for that a rational being is expressly produced by nature for contemplation and for action. They tell us that the wise man will for reasonable cause make his own exit from life, on his country's behalf or for the sake of his friends, or if he suffer intolerable pain, mutilation, or incurable disease: trans. R.D. Hicks.)

27 Cf. Frede (n. 23) and Kacprzak (n. 23), 284-285.

28 Seneca, *Ep*. 116.5: *Eleganter mihi videtur Panaetius respondisse adulescentulo cuidam quaerenti an sapiens amaturus esset "de sapiente" inquit, "videbimus; mihi et tibi, qui adhuc a sapiente longe absumus, non est commitendum ut incidamus in rem commotam, inpotentem, alteri emancupatam, vilem sibi*"... . Cf. also a postulate, stemming not only from the Stoics that in a community wise men should share women; sharing children and women being a perfect way to eliminate jealousy and adultery in society: D.L. VII 131 (*SVF* III 728).

The Stoic doctrine is morally indifferent to other natural happenings. Thus we find in its teachings admonitions to eat corpses,[29] and something quite useful in the context of this essay, i.e., a number of Stoic observations on human sexuality.[30] According to them it is permissible to have sexual relations with mothers, sisters and sons,[31] and a carnal act between males should not be viewed with contempt.[32] One may naturally question whether these passages reflect original Stoic thought and not the Cynic influence on Zeno or perhaps the negative views of later authors who derided and distorted the beliefs of the Stoics. Their authenticity may, however, be confirmed if we accept that the anti-Stoic opponents' possible emphasis on what was 'unnatural' were suggesting that the Stoics' beliefs were the reverse of what they really were. Chrysippus might have wanted to answer to that by pointing out that some behaviour is to be found even among animals, so it cannot offend nature. Otherwise we would have to assume that nature offends

29 D.L. VII 188 (*SVF* III 747.1-2): ἐν δὲ τῷ τρίτῳ Περὶ δικαίου κατὰ τοὺς χιλίους στίχους καὶ τοὺς ἀποθανόντας κατεσθίειν κελεύων. (In the third book *On Justice* (Chrysippus) at about line thousand (explains) the command to devour the deceased ones.)

30 On the sexual ethics of the early Stoics, see, most recently, Kathy L. Gaca, 'Early Stoic Eros: The sexual ethics of Zeno and Chrysippus and their evaluation of the Greek erotic tradition', *Apeiron* 33.3 (2000), 207-238 – even if the author seems to have read too much into the sources (e.g. D.L. VII 131, where she postulates sexual equality between men and women in sharing partners in the community).

31 D.L. VII 188 (*SVF* III 744): (Χρύσιππος) ἐν δὲ τῷ Περὶ πολιτείας καὶ μητράσι λέγει συνέρχεσθαι καὶ θυγατράσι καὶ υἱοῖς· τὰ δ' αὐτά φησι καὶ ἐν τῷ Περὶ τῶν μὴ δι' ἑαυτὰ αἱρετῶν εὐθὺς ἐν ἀρχῇ. (Again, in his *Republic*, Chrysippus permits coupling with mothers, daughters and sons. He repeats this in his work *On Things for their Own Sake not Desirable*, right at the outset: trans. R.D. Hicks, with some alterations) and Plutarchus, *de stoic. repugn*. 22, 1044f (*SVF* III 753): Καὶ μὴν ἐν τῷ τῶν Προτρεπτικῶν εἰπὼν ὅτι "καὶ τὸ μητράσιν ἢ θυγατράσιν ἢ ἀδελφαῖς συγγενέσθαι καὶ τὸ φαγεῖν τι καὶ προελθεῖν ἀπὸ λεχοῦς ἢ θανάτου πρὸς ἱερὸν ἀλόγως διαβέβληται", καὶ πρὸς τὰ θηρία φησὶ δεῖν ἀποβλέπειν καὶ τοῖς ὑπ' ἐκείνων γινομένοις τεκμαίρεσθαι τὸ μηδὲν ἄτοπον μηδὲ παρὰ φύσιν εἶναι τῶν τοιούτων· εὐκαίρως γὰρ πρὸς ταῦτα γίνεσθαι τὰς τῶν ἄλλων ζῴων παραθέσεις εἰς τὸ μήτε συγγινόμενα μήτε γεννῶντα μήτ' ἐναποθνήσκοντα ἐν τοῖς ἱεροῖς μιαίνειν τὸ θεῖον. (Moreover, having said in his book of *Exhortations*, that the having carnal commerce with our mothers, daughters, or sisters, the eating forbidden food, and the going from a woman's bed or a dead carcass to the temple, have been without reason blamed, he affirms, that we ought for these things to have a regard to the brute beasts, and from what is done by them conclude that none of these is absurd or contrary to Nature; for that the comparisons of other animals are fitly made for this purpose, to show that neither their coupling, bringing-forth, nor dying in the temples pollutes the Divinity.: trans. ed. W.W. Goodwin).

32 Sextus Empiricus, *Pyrrhoniae hypotyposes* III 199-200 (cf. *SVF* I 585): παρ' ἡμῖν μὲν αἰσχρόν, μᾶλλον δὲ καὶ παράνομον νενόμισται τὸ τῆς ἀρρενομιξίας, παρὰ Γερμανοῖς δέ, ὡς φασίν, οὐκ αἰσχρόν, ἀλλ' ὡς ἔν τι τῶν συνήθων. λέγεται δὲ καὶ παρὰ Θηβαίοις τὸ παλαιὸν οὐκ αἰσχρὸν τοῦτο εἶναι δόξαι, καὶ τὸν Μηριόνην τὸν Κρῆτα οὕτω κεκλῆσθαί φασι δι' ἔμφασιν τοῦ Κρητῶν ἔθους, καὶ τὴν Ἀχιλλέως πρὸς Πάτροκλον διάπυρον φιλίαν εἰς τοῦτο ἀνάγουσί τινες. 200. καὶ τί θαυμαστόν, ὅπου γε καὶ οἱ ἀπὸ τῆς κυνικῆς φιλοσοφίας καὶ οἱ περὶ τὸν Κιτιέα Ζήνωνα καὶ Κλεάνθην καὶ Χρύσιππον ἀδιάφορον τοῦτο εἶναί φασιν. (Sexual relations between men have been considered by us disgraceful, or better said unlawful, but they are said not to be disgraceful among the Germans, but customary. And they are said not to be formerly disgraceful among Thebans. Meriones the Cretan is also said to have been called this same, following the custom of the Cretans. Some admit as well that Achilles' love for Patrokles was ardent. Why wonder then, that the ones rooted in the philosophy of Cynics or the followers of of Zenon of Citium, Cleanthes and Chrysippus say that it is neither good or bad.)

itself. The deeds in question are therefore *per se* morally indifferent.[33] Yet, even if these examples are only pseudo-Stoic, they must still have been current in the cultural milieu of Ulpian and thus somehow have shaped his ideas on Stoic philosophy.

These ancient examples of natural behaviour already show how risky it is to speak of such behaviour in the context of the law. If we turn to modern experience, we see the dangers of such arguments even more clearly, as demonstrated by the most recent findings of socio-biology. Suffice it to recall a fascinating book by Vitus Dröschler on animal matching patterns, describing 'bizarre' sexual habits that are quite common in the animal kingdom.[34] This is why to argue that certain behaviour is natural and thus to imply that any other conduct is unnatural and should not be tolerated or allowed, is therefore truly hazardous. *There are more* 'unnatural' *things in heaven and earth … than are dreamt of in* our *philosophy*.

Now, if this is the doctrine embodied in Ulpian's works, tracing a link between his 'definition' of marriage and present-day discussions of the nature of this institution might prove rather difficult for Waldstein *et consortes*, who condemn the 2000 Resolution of the European Parliament exhorting the EU member states to 'guarantee one-parent families, unmarried couples and same-sex couples' rights equal to those enjoyed by traditional couples and families, particularly as regards tax law, pecuniary rights and social rights',[35] adding a comparison to the tyrannical *diktat* of the late Soviet Union.

2. *Ius naturale v. ius gentium*

In an article written a few years back, Laurens Winkel convincingly traces the possible origins of the famous Ulpianic saying on justice (*iustitia est constans et perpetua voluntas ius suum cuique tribuere*, D. 1.1.10), after meticulously reconstructing the paths and wildernesses through which the maxim may have reached Ulpian's *Manual*.[36] In the final part of the essay the scholar dismisses the Stoic view of *ius naturale* mentioned in

33 See Chrysippus *apud Plutarchum* cited *supra*, n. 31. I am grateful to Agnieszka Kacprzak for this proposition.

34 *Sie töten und sie lieben sich – Naturgeschichte des Paarverhaltens im Tierreich*, Hamburg 1974.

35 *Resolution on the Respect for Human Rights for Human Rights in the European Union for 1998-1999* EP Document A5-0050/2000, arts. 56-60. Cf. its condemnation by the Pontifical Council for the Family in a declaration dated 17.03.2000: 'This *Resolution* represents a grave and repeated attack on the family based on marriage, a union of love and life between a man and a woman from which life naturally springs', and Waldstein (n. 3), 110-112. I shall not discuss this author's argument, in the same context, in support of art. 209 of the *Austrian Criminal Code*, claiming it provided sufficient protection against the threat of paedophilia or pederasty (*sic!*). Note that this provision, now repealed, was deemed by the European Court of Human Rights to 'embod[y] a predisposed bias on the part of a heterosexual majority against a homosexual minority; these negative attitudes could not of themselves be considered by the Court to amount to sufficient justification for differential treatment any more than similar negative attitudes towards those of a different race, origin or colour.' (cf. *S.L. v. Austria*, s. 44). *Charta non erubescit*, sadly, by yet another example of the identification of homosexuality with paedophilia.

36 L. Winkel, 'Die stoische οἰκείωσις-Lehre und Ulpians Definitions der Gerechtigkeit', *ZRG RA* 105 (1988), 669-679. On the recent absence of a normative role for nature in Stoic ethics see T. Engberg-Pedersen, *The Stoic Theory of Oikeiosis Moral Development and Social Interaction in Early Stoic Philosophy*, Aarhus 1990, and a review of that work by A. Erskine, *The Classical Review* 42 (1992), 77-79.

D. 1.1.1.3, suggesting the (indirect) influence of Theophrastus and his teaching on the unity of the world of humans and animals. He sees the distinction between *ius naturale* and *ius gentium* in the passage as an echo of a sort of middle term between the Stoic and Peripatetic doctrines on the law.[37] This may very well be so. As Winkel observes, Chrysippus taught that the law of nations 'governed only human relations'.[38]

One thing should be remembered here: the relationship between the law of nature (whatever its content may have been) and human law in Ulpian's thought is not one of subordination or entailment. We need again go no further than Ulpian's *Manual* to prove this statement.[39]

> D. 1.1.4 (Ulpianus, 1 *inst*.) ... *Quae res* (sc. *manumissiones*) *a iure gentium originem sumpsit, utpote cum iure naturali omnes liberi nascerentur nec esset nota manumissio, cum servitus esset incognita: sed posteaquam iure gentium servitus invasit, secutum est beneficium manumissionis. Et cum uno naturali nomine homines appellaremur, iure gentium tria genera esse coeperunt: liberi et his contrarium servi et tertium genus liberti, id est hi qui desierant esse servi*. (Manumissions originate from the law of nations, since by natural law all people were born free and manumission was unknown, as slavery was unknown. And while we are all called by one natural name 'humans', under the law of nations three categories came into existence: freemen and their opposite, the slaves, and the third category: freedmen, that is ones who had stopped being slaves.)

All the Stoic-inspired teaching on the natural equality of humans did not imply a change in or even a negative evaluation of the human law of slavery. As Józef Mélèze Modrzejewski rightly observes, it had no impact on the ways the jurists, Ulpian included, described this institution.[40] Sir Henry Maine was right: it had no practical impact. Adolf Berger also denied it any juristic content.[41] Not to take this argument to extremes, let me mention just one more example. The Roman jurists knew perfectly well that many institutions that are essential to society, such as property, commerce and contracts were simply not found in nature but were nevertheless valuable.[42]

37 Winkel, (n. 36), 678.

38 See *supra*, n. 25.

39 Cf. also similar enunciations by Florentinus (D. 1.5.4.1), Tryphoninus (D. 12.6.64) and Marcianus (D. 40.11.2).

40 Mélèze Modrzejewski, (n. 15), 198-199 and Idem, '*Aut nascuntur aut fiunt*: les schémas antiques des sources de l'esclavage', *BIDR* 79 (1976), 1-25.

41 See above n. 8 and A. Berger, *Encyclopedic Dictionary of Roman Law*, Philadephia 1953, 530, s.v. *ius naturale* (on D. 1.1.1.4) 'The saying has no juristic content at all'. F. Schulz maintains a strictly sober and 'unphilosophical' view of the Roman jurisprudence in his *History of Roman Legal Science*, Oxford 1946, 69-71 (with regard to republican lawyers whose views are unrelated to Greek philosophy) and 135-136 (classical lawyers). He is also very sceptical of the content of D. 1.1.1.3 (p. 137: 'of some interest to the sociologist, it is of no value to the jurist'). *Contra* P.P. Onida, *Prospettive romanistiche del diritto naturale,* Napoli 2012, 83-90, esp. 85, who discussed but rejected the views of other critics (*ibidem*, nn. 4-7). Yet his arguments fail to disclose sound textual evidence, being of a more ideological nature.

42 See D. 1.1.5 (Hermogenianus, 1 *iuris epitomarum*). *Ex hoc iure gentium introducta bella, discretae gentes, regna condita, dominia distincta, agris termini positi, aedificia collocata, commercium, emptiones venditiones, locationes conductiones, obligationes institutae exceptis quibusdam quae iure civili introductae sunt.*

There is no need to dwell on the natural roots of things, because human law always takes over. Roman law may therefore still serve as a source of values, in spite of the various meanings it affixes to the law of nature. Needless to say, to someone advocating the eternal value of Roman law as just and equitable, this line of reasoning is double-edged.

3. The use and abuse of Roman marriage as model

Waldstein is not the first to rely on Roman marriage to justify its modern form, as has already been mentioned (n. 4). On the last pages of his perspicuous study Giaro depicts the fate of the Roman marriage model, reconstructed in modern times *secundum necessitatem*. For the sake of conciseness let me present just two examples, perhaps the most telling ones. With reference to the requirement of *conubium* and the fact that there was none between plebeians and patricians in ancient times, Rudolf von Jhering argued for marriage as a union within the same social group. By suckling the milk of plebeian mothers the children of mixed marriages would be imbued with ideas alien to and unfit for their own class. The prohibition of such marriages would have prevented such a disaster. The author of the *Spirit of Roman Law* did not have to look far to find what he believed to be an example from his own time: the ban on marriage between Jews and Christians.[43] It is easy to imagine what happened next: soon Wieacker would praise the re-emergence of the long-forgotten Roman *conubium* in the spirit and content of the Nuremberg racial laws on marriage and procreation.[44] This author's view on the possible natural-law roots of marriage is further illustrated by his admiration of the way in which the new National Socialist *Weltanschauung* placed family and marriage back in the role of servants in 'einem höherem Ordnungsgefüge'. This assessment is reinforced by his strong rejection of the traditional emphasis on the individual in marriage, and its contractual character, resulting, among others, in free divorce in the *natural law of the modern times*.[45]

No matter that the views of von Jhering and Wieacker may shock us, we cannot deny that they are correct in one important respect. Roman marriage may have been by nature heterosexual and monogamous, yet let us not forget that it was principally only accessible to citizens, and sometimes not even to all of them. The concept of *conubium* is

43 R. von Jhering, *Entwicklungsgeschichte des römischen Rechts*, Lepzig 1894, 62-64 with Giaro (n. 4), 108.

44 F. Wieacker, 'Geschichtliche Ausgangspunkte der Ehereform', *Deutsches Recht* 7 (1937), 181-182 (now in *Zivilistische Schriften* ed. Ch. Wollschläger, Frankfurt a/M 2000, 245-261, 254), where he, having acclaimed *Namensehegesetz* (23.11.1933), *Ehegesundheitgesetz* (15.09.1935) and *Blutschutzgesetz* (18.10.1935), respectively for ending morally inappropriate marriages, ensuring that Germans married not their blood enemies, but only those traditionally considered to be of suitable blood lines, proudly recalls: 'Das Konnubium mit den alten, rassisch mehr oder minder verwandten Siedlungs- und Schicksalsnachbarn des deutschen Volkes in Europa brüht auf den bekannten Überzeugungen des Nationalsiozialismus über das Verhältnis der europäischen Völker' and Idem, 'Der Stand der Rechtserneuerung auf dem Gebiete des bürgerlichen Rechts', *Deutsche Rechtswissenschaft* 2 (1937), 18 (now in *Zivilistische Schriften*, 232-233, both with Giaro (n. 4), 108-109.

45 Wieacker (n. 44), 178-179, 180 (= 245-246, 248-249).

as inherent in the nature of this Roman socio-legal institution as the difference in sex of those marrying and, possibly on a lesser scale, its contracting *liberorum quaerendorum/ procreandorum causa*.[46] As Volterra correctly observes: Modestinus' definition of marriage respects its social aspect rather than its legal prerequisites.[47]

Now, at the other end of the scale, let us consider Fritz Schulz' image of the Roman law of marriage. For him, as we well know, the very proof of Roman legal humanism was the concept of marriage as found in Roman law, 'being a free and freely dissoluble union of two equal partners for life'.[48]

Those who wish Modestinus' definition of marriage to serve as a model today are forgetting what it meant: exclusiveness and – God forbid! – that, with *affectio maritalis* as its founding principle, marriage could be freely dissolved. Álvaro d'Ors knew this well when he rejected Roman marriage as a possible model for modern unions. He favoured looking at canon law instead, sternly criticising the heathen mentality for which the 'real essence of *Love* was not accessible'.[49]

Yet is it really necessary to look back at the model of Roman marriage or any other past model, for that matter? Does this model, no matter how attractively reconstructed, necessarily suggest the marriage we should recognise today? Giaro rightly concludes:

> 'vi sono tante lezioni per lo storico del diritto antico: distinguere il passato remoto da quello prossimo, entrambi dal presente e questo dal futuro. Non confondere problemi romani, romanistici, storiografici e giuspolitici. E mai scambiare il mestiere del romanista con quello del filosofo del diritto, del *laudator temporis acti* o addirittura del profeta.'[50]

4. Results?

My aim in this paper has been to question whether a reconstruction of Roman marriage is of any use to its modern equivalent. Moreover, justifying our modern ideological choice with reference to Roman legal reasoning, no matter whether the reconstruction be accurate or not, puts the teaching of Roman law at risk. It may be that with changing social opinion we may turn to a solution different to the one we advocate with reference

46 See O. Péter, '*Liberorum quaerendorum causa*. L'image ideale du mariage et de la filiation a Rome', *RIDA* 38 (1991), 285-331, esp. s. iii 3, for a study of the history of the formula, which interestingly is predominately known from literary sources and evidences of legal practice (see P. Mich. inv. 508+2217+ *P. Ryl.* iv 612!) and only rarely found in purely dogmatic texts (cf. CJ. 5.4.9, Imperator Probus A. Fortunato [a. 276-282]).

47 Cf., inter alia, E. Volterra, *s.v.* Matrimonio (diritto romano), *Enciclopedia del diritto* xxv, Milano 1975, § 5, see also § 3 on requisites of marriage, section a) *conubium* (= *Scritti giuridici* iii, Napoli 1991, 223-304, at 250-251 and 231-232 resp.).

48 F. Schulz, *Classical Roman Law*, Oxford 1951, ch. 'Marriage', see also *Prinzipien des römischen Rechts,* Vorlesungen gehalten an der Universität Berlin von Fritz Schultz, Munich/Leipzig 1934, ch. 'Humanitas'.

49 Á. d'Ors, *Derecho privado romano*, Pamplona 1997 (9 ed.), § 219: 'La mentalidad pagana a la que resultaba inaccesible la verdadera esencia del Amor, no pudo alcanzar una concepción válida del matrimonio, y para el jurista moderno el derecho 'clásico', respecto a esta institución, es el Derecho Canónico'.

50 Giaro (n. 4), 110.

to Roman sources, yet still recall the Romanistic reasoning in the lost cause. It may mean that the teaching of Roman law will be declared to be the fifth column of reactionary forces and that there will be a call for its abolition and banishment from universities, such as I recall reading in the Comment Section of the leading Spanish newspaper, *El País*.

The whole issue becomes still more problematic if we even briefly consider the pace of social change in regard to marriage. It suffices to recall a fascinating anthropological debate on this issue between Robert Bruffault and Bronisław Malinowski in the 1930s. In an introduction to the published version of the original BBC broadcasts, Montague Francis Ashley-Montagu, who acted as midwife at these meetings, boldly challenged J.B. Watson's prophesy of the end of marriage within a generation: 'If there is one thing we can be certain of as anthropologists, it is that marriage will endure as long as human society endures'.[51] This may very well be true, as long as the definition of 'marriage' is appropriate for its epoch. While taking into account the views of both champions of anthropology but being aware of recent developments in Europe, the Americas and Australia, one is particularly wary of stating anything with 'certainty'.

Now, the Muskrat seems not to be a true follower of the philosophy of total renunciation. After all, he wanted his beloved book back. Neither am I able to renounce the usefulness of Roman law in modern times completely.

A first, modest conclusion may be trite. I daresay that whatever position we take on *natural law*, we shall all agree on it. Indeed, part of the usefulness of Roman law lies in teaching students how to think, how to apply proper algorithms of reasoning, how to study the technical paradigms of law making and the interpretation of law. In other words, a student may learn from the Romans how flexible and adaptable law has to be in order to meet the needs of the times, to survive and to continue to be useful. In his tireless marking of hundreds of examination papers, Laurens Winkel provides the best example of what practical use Roman law may be in the education of a young lawyer.

And if I were to add something more, in a spirit of contrariness I would ask the Reader to consider how a Roman magistrate would react to the changes and challenges of modern times. Is not *ius honorarium* the living voice of the law? The modern successors of the Roman *praetores* have shown how to pave the way for the legislator. The courts of the Canadian provinces recognised same-sex unions prior to the passing of the *Marriage Act*. The same thing happened in various South American countries, and most recently in a verdict of the Constitutional Court of the Federal Republic of Germany, bringing a step closer equality between same-sex registered partnerships and marriages.[52] The finding of the Supreme Court of Israel is perhaps the most interesting one. The judges, formally upholding the religious law on marriages, *de facto* recognised same-sex unions and granted them legal protection in the State of Israel,[53] following an earlier precedent in which heterosexual civil marriages contracted by Israeli nationals abroad had been

51 *Marriage, Past and Present A Debate Between Robert Briffault and Bronisław Malinowski*, ed. with introduction by M.F. Ashley-Montagu, Boston 1956, 8.

52 Cf. *BVerfG*, 2 *BvR* 909/06 of 7.5.2013, the Court notably has urged the law-maker to legislate further on the matter.

53 *HCJ* 3045/05 *Ben-Ari v. The Director of the Population Administration in the Ministry of the Interior*, *Israel Law Reports* 2 (2006), 283-328.

given *de facto* recognition.[54] This is a *modus corrigendi* of civil law of which the Romans might have been proud. But of course all this is also ideology – this time, I admit, my own. In any case, as the Gloss to D. 1.1.1.1 explains: (ius est) ars*: id est artificium, nam author iuris est homo, iustitiae deus, et quod subiicit, id est eius aequum et utile* – art: that is artifice, for the maker of law is man, but of justice, God, and it follows that law is equitable and useful for him.

Abstract

The paper discusses the postulated usefulness or otherwise of some Roman legal concepts today. It critically reappraises recent scholarly proposals that the Roman law of marriage serves as a model for modern regulation. Special attention is paid to the interpretation of D. 1.1.1.3 (Ulpian), and in particular to the meaning of the concept of ius naturale in this fragment, and its decidedly non-normative function.

54 *HCJ 143/62 Funk-Schlesinger v. Minister of Interior*.