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PART ONE

FROM THE *IUS*
GENTIUM TO
INTERNATIONAL
LAW

1 The *Ius Gentium*, a Roman Concept

1. A LAW FOR EVERY AGE

Every age has its law. *Cuius tempora eius ius* – one may say in the language with which Europe was built. In every age of history, the law has had its own language – Latin, German, French, and English mainly – and its own idiomatic way of generating concepts.¹

Law is life; it is experience. The words U.S. Supreme Court Justice Oliver Wendell Holmes uses to begin his well-known work, *The Common Law*, have gone around the world: “The life of the law has not been logic: it has been experience.”² As different sociological conditions arise, new forms of juridical–political organizations, laws, jurisprudence, and mechanisms for conflict resolution become necessary, and with them new ideas, new concepts, and new paradigms.

The Hellenic *polis*, the Macedonian Empire, the Roman Republic and the later Roman Empire, the medieval *Res Publica Christiana*, and the rise of nation-states are all responses to different times and places. Something similar may be said of the forms of organization and conflict resolution within

¹ The linguistic question is not insignificant. The issue posed by the historian Paul Vinogradoff in “The Foundation of a Theory of Rights” (1924), in *Collected Papers* (Wiley & Sons Ltd., London, 1963), has not lost currency: “Why is right contrasted with law in English, while *Recht* stands for both right and law in German, *ius* in Latin, *droit* in French, *Pravo* in Slavonic languages? Obviously, the nations of Continental Europe laid stress in their terminology on the unity of legal order – on the fact that it is constituted and directed by the general authority of the commonwealth.” On the meaning of the word “law” in different languages, *vid.* also Hans Kelsen, *Reine Rechtslehre* (2nd ed., Verlag Franz Deuticke, Vienna, 1960; reprint 1967), § 6, pp. 31–32.

² Oliver Wendell Holmes, *The Common Law* (Little, Brown & Company, Boston, 1881; reprint ed. Marc de Wolfe Howe, Harvard University Press, Cambridge, Massachusetts, 1963), p. 5.

the ambit of Islamic, Chinese, Japanese, or Hindu law.³ The structure and government of these political systems and their cultural worldview determined their idiosyncratic concept of law. Despite this, all stages in humanity's legal development have a common thread: the presence of relationships of justice among persons or groups needing rules to resolve disputes. The etymology of the word "justice" appears to confirm this juridical ethos: *ius stitium* – the cessation of claims. In this sense, "peace is the fruit of justice" (*opus iustitiae pax*).⁴

The various garments in which law – fundamentally a mediator of inter-group relationships – has been cloaked throughout history denote the various stages of the science of law, which developed in a particular fashion during the twilight of the Roman Republic and the dawn of the principate. Greek natural law (later developed by Roman jurists and in Christian thought); Roman *ius gentium*, as the source of inspiration in international relations; medieval *ius commune*; Islamic Siyar; vernacular variants of modernity, such as the German *Völkerrecht*, the French *droit des gens*, or, by the sixteenth century, the English "law of nations"; the *ius universale*, international law, and the interstate law (*Staatenrecht*) of the rationalist Enlightenment; and more recent descriptors, such as transnational law, the common law of humanity, or the law of peoples – all these mark intellectual efforts directed toward forming a more just intercommunitarian order.

However, the fact that each age is identified by its law does not mean that in the various legal systems, there are no common points, keys to mutual understanding, recurrent problems, or permanent solutions. This permanence imparts value and meaning to these historical projections and shows that although time may have had great influence in shaping new law, humanity remains the same regardless of the historical moment in which they live. This may be Greece's great contribution to law – adequately resolving the tension between change and permanence by finding a point of equilibrium that makes it possible to go forward without forgetting the past, and building without dismantling what has already been built.

³ A general overview of these legal systems can be found in H. Patrick Glenn, *Legal Traditions of the World* (2nd ed., Oxford University Press, Oxford, New York, 2004), or Werner Menski, *Comparative Law in a Global Context. The Legal System of Asia and Africa* (Cambridge University Press, Cambridge, New York, 2006). The work of John H. Wigmore, *A Panorama of the World's Legal Systems* (2nd ed., Washington Law Book Company, Washington DC, 1936) is a classic. Cf. also David J. Bederman, *The Classical Foundations of the American Constitution* (Cambridge University Press, Cambridge, New York, 2008).

⁴ Isaiah 32:17.

2. A WORD ABOUT DIKE

Although justice exists in all civilizations – especially in Israel, as an expression of the Covenant of Sinai⁵ – it was the Greek concept of justice that truly opened the doors to *ius gentium*, already a Roman construct, as we shall see.

In Greece, justice was personified by the goddess Dike, the daughter of Zeus and his second wife, Themis (sister of Eunomy and Eirene). Writing about Dike in the eighth century B.C., Hesiod⁶ tells how Dike, unlike Themis, who in the Homeric epics passes on the gods' mandate that must be followed, prosecutes earthly injustice by punishing the guilty and imposing a reciprocal equality – the correlation demanded between different people's actions.

This idea of justice as equality was elevated by the Pythagoreans to the plane of arithmetic and was symbolized by the numbers 4 and 9, which are the squares of an even and an odd number, respectively. This illustrated the relationships among justice, equality, the comparison of people's actions, the reciprocation of benefits, and the correlation between infraction and punishment – indeed, the idea of harmony and proportion.

Plato⁷ attributed the status of virgin to the goddess Dike to show her incorruptible nature.⁸ As mentioned by Aristotle in the fifth book of the *Nicomachean Ethics*,⁹ the antithesis between natural justice (*dikaion physikon*) and positive or conventional justice (*dikaion nomikon*) is fundamental in this regard. One finds the same thought in his *Rhetoric*¹⁰ and in the earlier thinking of Alcibiades, whose dialogue with his uncle Pericles appears in Xenophon's *Memorabilia*. In this work,¹¹ the Greek historian writes about the Socratic idea equating justice with law, but he understands the latter comprises written laws approved by citizens as well as unwritten laws that come from a divine lawgiver.

The conviction that nature (*physis*) transcends human will by limiting its decisions is the foundation for the universality of certain norms (*nomos*) applicable to all people at all times, just by virtue of their humanity.¹² What

⁵ Exodus 24:3–8.

⁶ Hesiod, *Teogonia*, 901.

⁷ Plato, *The Laws*, 943 a.

⁸ On Plato's thinking about law, *vid.* the extensive study by Harald Seubert, *Polis und Nomos. Untersuchungen zu Platons Rechtslehre* (Duncker & Humblot, Berlin, 2005).

⁹ Aristotle, *Nicomachean Ethics*, 1134 b.

¹⁰ Aristotle, *Rhetoric* I, 1368 b.

¹¹ Xenophon, *Memorabilia* IV-4, 19–24.

¹² On the contribution of Greek thought to law, *vid.* Erik Wolf, *Griechisches Rechtsdenken*, 3 vols. (Klostermann, Frankfurt-am-Main, 1950–1956); J. Walter Jones, *The Law and Legal Theory of the Greeks* (Oxford University Press, Oxford, 1956); Erich Berneker (ed.), *Zur griechischen Rechtsgeschichte* (Wissenschaftliche Buchgesellschaft, Darmstadt, 1968); Antonio

initially were contrasting terms – *physis* and *nomos* – over time became complements of justice – and of a Hellenic customary law (*hellenika nomina*) concerning prisoners of war, which the historian Thucydides described in his writings.¹³

Greek thought, like no other, recognizes a limit on free will imposed by nature, custom, reason, law, or religion. Sophocles' famous tragedy (442 B.C.), based on the myth of Antigone, is well known. In disobedience of Creon, the King of Thebes, Antigone fulfilled the religious mandate to bury her brother Polynikes, for whom the king had denied funeral rites. Several hundred other examples can be cited. Ultimately, Greek philosophy provided a permanent substratum on which Roman Law could be built; its principles continue to influence the most developed legal systems of our day.

3. CICERO, FATHER OF THE *IUS GENTIUM*

One of the virtues of Marcus Tullius Cicero (106–43 B.C.), educated in the Hellenism of the Stoa, was applying the Greek philosophical system to international relations, coining the expression *ius gentium* in the process. This concept and category of universal law went beyond the so-called *ius fetiale* produced by the priestly College of Fetials, whose sacred duties included overseeing international treaties and celebrating the rites preceding a declaration of war.¹⁴

Thus, we safely attribute *ius gentium* to this *homo novus* of the twilight of the republic. But we cannot forget that as early as the second century A.D., Aulus Gellius, in *Noctes Atticae*,¹⁵ recalled Cato the Elder's famous speech in favor of the Rhodians, which Tiro delivered to the Senate in 169 B.C. Cato argued that the intent to declare war on a people does not justify (*bellum iustum*) a declaration of war. Gellius' *verbatim* quote of Cato in paragraph 35 has led some to conclude that the reference to *ius gentium* in paragraph 45 (*quae non*

Truyol Serra, *Historia de la Filosofía del Derecho y del Estado I. De los orígenes a la Baja Edad Media* (12th ed., Alianza Editorial, Madrid, 1995), pp. 93–187, and Michael Gagarin and David Cohen (eds.), *The Cambridge Companion to Ancient Greek Law* (Cambridge University Press, Cambridge, New York, 2005), esp. pp. 412–430 of Anthony A. Long's contribution, "Law and Nature in Greek Thought."

¹³ Thucydides, *History of the Peloponnesian War* 3.52.

¹⁴ On this college, *vid.* for all, Franz Wieacker, *Römische Rechtsgeschichte. Quellenkunde, Rechtsbildung, Jurisprudenz und Rechtsliteratur* I (Beck, Munich, 1988), p. 216 with bibliography, Note 70. On the *ius fetiale*, Dieter Nörr, *Aspekte der römischen Völkerrechts. Die Bronzetafel von Alcántara* (Verlag der Bayerischen Akademie der Wissenschaften, Munich, 1989), pp. 12, 15, 35, 72, 75, 103, 116, 123, 126, 133, 136–142.

¹⁵ Aulus Gellius, *Noctes Atticae* 6.3.45.

iure naturae aut iure gentium) may also be Cato's. It is also possible that Tiro, one of Cicero's followers, may have used his master's terminology. Max Kaser's conclusion is that Tiro's authorship, based on the Ciceronian pattern, cannot be dismissed offhand.¹⁶

Cicero's reflections on the law of nations were not free from confusion.¹⁷ But this should surprise no one; concepts and terms need to be refined over time. Otherwise, they remain hidden and their use becomes haphazard or fleeting.

Nowhere in Cicero's many works does he clearly define *ius gentium*. The most significant mention is in *De officiis* 3.17.69, a work steeped in the Stoic humanitarian ideal. Cicero begins by saying that because of the degradation of social mores, certain things not forbidden by customs, statutes, or civil law are nonetheless punishable under the law of nature. After speaking of society in the broad sense as uniting all people with each other (*societas omnium inter omnes*), he refers to lesser societies made up of *gentes*, or those formed into cities. Finally, Cicero points out that the ancients desired two kinds of law: the law of nations and civil law – the former ideally being a part of the latter.¹⁸ As a matter of fact, the norms of the law of nations were applied not only by the *Praetor Peregrinus* but also by the *Praetor Urbanus*.

In Cicero's third book, *On Duties*,¹⁹ the expression *ius gentium* appears for the second time in connection with the now-classic rule that it is wrong to cause harm to another to obtain a benefit. Cicero considers the law of nations to be the juridical embodiment of nature (*natura, id est iure gentium*). For him, the *ius gentium* oscillated between the two great coordinates of human justice set down by the Greek philosophers and refined by the Roman jurists: *natura* and *fides*. People should follow nature as they follow a ruler; they should observe faith (*fides*)²⁰ as the cornerstone of justice.²¹

¹⁶ Max Kaser, *Ius gentium* (Böhlau, Cologne, 1993), p. 39.

¹⁷ In this vein, Gabrio Lombardi, *Sul concetto di "ius gentium"* (Publicazioni dell'Istituto di Diritto Romano, Roma, 1947), p. 61, complains of "la imprecisione terminologica e sistematica"; or Antonio Guarino, *Diritto Privato Romano* (12th ed., Naples, 2001), No. 13.1, who states that it is "estremamente confuso e contraddittorio, come spesso."

¹⁸ Cicero, *De officiis* 3.17.69: "itaque maiores aliud ius gentium, aliud ius civile esse voluerunt, quod civile, non idem continuo gentium, quod autem gentium, idem civile esse debet."

¹⁹ Cicero, *De officiis* 3.5.23.

²⁰ In *De officiis* 1.1.23, Cicero defines *fides* as the constancy and truth of what is said and agreed to: "dictorum conventorumque constantia et veritas." An overview of Roman *fides* is provided by Amelia Castresana, *Fides y bona fides. Un concepto para la creación del Derecho* (Tecnos, Madrid, 1991), and by Dieter Nörr, *La fides en el Derecho internacional romano* (2nd ed., Fundación Ursicino Álvarez, Madrid, 1996).

²¹ Cicero, *De officiis* 1.1.23.

In his *Tusculanae Disputationes*, Cicero draws a connection between *lex naturae* and *ius gentium*: What is accepted by all peoples is to be held as natural law.²² In his *De partitione oratoria*,²³ after analyzing the elements common to the law of nature – by influence of the *aequitas* belonging to *religio* – Cicero writes that what properly belongs to law (*propria legis*), as distinct from nature, is written down. Nevertheless – and here he follows the Greek model – there is also an unwritten law made up of the *ius gentium* and the *mores maiorum*, which is also binding. The force and effect of this unwritten law – a legacy of Greek thought – would flow from a tacit agreement among people.²⁴

Cicero makes use of this concept in some of his speeches: in *De haruspicio responso* (14.32), on the prohibition of appropriating things belonging to the immortal gods, and in *Pro Roscio Amerino* (49.143), when he cites cold weather as a reason for suspending wars. He also employs it in his dialogue *De re publica* (1.2.2), in a rhetorical question about human duties: *unde ius aut gentium aut hoc ipsum civile quot dicitur?* And he uses it again in *De oratore* (1.13.56), in a beautiful passage that alludes to the issues contained in his speeches.

4. THE *IUS GENTIUM* IN OTHER ROMAN WRITINGS

Two decades younger than Cicero, Sallust employed the expression *ius gentium* in his famous narration of Rome's war against Jugurtha, the King of Numidia, written about 40 B.C., four years after Cicero's *De officiis*. The Amiternian historian explains that the Roman people were militating against justice and the good when they forbade others to invoke the law of nations.²⁵ In a later passage dealing with the arrest of Bomilcar – a close friend of Jugurtha, at whose request Bomilcar killed Jugurtha's cousin and rival Massiva – Sallust indicates that the prosecution was motivated more by equity and good will than by the law of nations: *magis ex aequo et bono quam ex iure gentium*.²⁶

²² Cicero, *Tusculanae Disputationes* 1.13.30: "omni autem in re consensio omnium gentium lex naturae putanda est."

²³ Cicero, *De partitione oratoria* 37.130: "Atque haec communia sunt naturae atque legis, sed propria legis et ea quae scripta sunt et ea quae sine litteris aut gentium iure aut maiorum more retinentur."

²⁴ This tacit understanding of hereditary succession appears in Gaius 3.82: "quod tacito consensu receptum est"; Julian, *Digest* 1.3.32.1: "sed etiam tacito consensu omnium per desuetudinem abrogentur"; and the *Epitome Ulpiani* 1.4: "mores sunt tacitus consensus populi, longa consuetudine inveteratus."

²⁵ Sallust, *Jugurtha* 22.4: "Populum Romanorum neque recte neque pro bono facturum, si ab iure gentium sese prohibuerit."

²⁶ Sallust, *Jugurtha* 35.7. He mentions the *ius gentium* yet again in the *Fragmenta historiarum* 3.88.17.

Livy, however, offers further confirmation. He employs the expression *ius gentium* some forty times to refer, sometimes imprecisely, to the relationship between Rome and other peoples of the world through the *legati*, *foedera*. The prohibition of the maltreatment or killing of ambassadors,²⁷ the possibility of noxal abandonment of a legate who misbehaves on the territory where his mission takes him,²⁸ observance of the *foedera*,²⁹ and lawful defense against an armed attack not preceded by a declaration of war³⁰ are for him characteristic issues in the law of nations.³¹

We find *ius gentium* in Seneca³² and in Tacitus,³³ and again in the jurists of the second century: Celsus,³⁴ Gaius,³⁵ Cervidius Scaevola.³⁶ It is also found, in the beginning of the third century, in Papinian³⁷ and Triphoninus³⁸ – advisors to the Emperor Septimius Severus – and in Ulpian.

Of all these, one passage in Gaius and one in Ulpian deserve some attention because of the part they played in the history of the concept's subsequent development. Gaius speaks of *ius gentium* at the beginning of his *Institutes* (1.1.1) and contrasts it, as does Cicero, with *ius civile*. He says that civilized peoples – that is, those organized according to law and custom – govern themselves partly by their own law and partly by the law common to all people. The law proper to the city is civil law; the one established by natural reason among all people (*quod vero naturalis inter omnes homines constituit*) is called the law of nations because of its universal observance. Thus, *ratio naturalis* determines, in the abstract, what the law of nations is or could be, and

²⁷ Livy 4.17.4: “consulentium de caede ruptura ius gentium”; 4.19.3: “ruptus foederis humani violatorque gentium iuris”; 4.32.5: “cum hostibus scelus legatorum contra ius gentium interfectorum.”

²⁸ Livy 5.36.6: “contra ius gentium arma capiunt”; 5.36.8: “ut pro iure gentium violato Fabii dederentur”; 5.51.7: “quam gentium ius ab legatis nostris violatum”; 6.1.6: “quod legatos in Gallos – ad quod missus erat orator – contra ius gentium pugnaste.”

²⁹ Livy 4.19.3: “ruptor foederis humani violatorque gentium iuris?” Livy 42.41.11: “ex foedere licuit et iure gentium comparatum est.”

³⁰ Livy 42.41.11: “et iure gentium ita comparatum est, ut arma armis propulsentur.”

³¹ Livy 7.6: “turbato gentium iure comitia haberentur”; 8.5: “non legatus iure gentium tutus loqueretur”; 8.6: “quam ius gentium ab ira impetuque hominum tegeret.”

³² Seneca, *De ira* 3.3: “violatae legationes rupto iure gentium rabiesque infanda civitatem tulit.”

³³ Tacitus, *Annales* 1.42: “hostium quoque ius et sacra legationis et fas gentium rupistis”; and *Historiae* 4.32: “quibus ad supplicium petitus iure gentium poena reposco.”

³⁴ *Digest* 12.6.47: “quoniam indebitam iure gentium pecuniam solvit.”

³⁵ Gaius 1.1.1.

³⁶ *Digest* 43.8.4: “Respondit in litore iure gentium aedificare licere, nisi usus publicus impeditur.”

³⁷ *Digest* 17.2.51; *Digest* 39.5.29.2; *Digest* 41.3.45 pr. and *Digest* 48.5.39.2.

³⁸ *Digest* 7.1.62 pr.; *Digest* 12.6.64; 16.3.31 pr-1.

its enforced general application *inter omnes homines* makes it so concretely.³⁹ Thus would *ius gentium* and *ius naturale*⁴⁰ become synonymous, both derived from the *ratio naturalis*.

With Ulpian, however, Cicero's and Gaius' bipartite division becomes tripartite (*ius civile*, *ius gentium*, and *ius naturale*).⁴¹ According to Ulpian, the reason for this is that the law of nations would be common only to people, whereas the natural law would in general encompass animals as well (*quod natura omnia animalia docuit*).⁴² It would, to use Honoré's well-founded phrase, be "morally superior"⁴³ to *ius gentium*, which would be reserved for what is common to people (*hoc solis hominibus inter se commune sit*).⁴⁴

In fact, the application of *ius civile* throughout the Roman Empire, particularly under the Antoninian Constitution of A.D. 212, which extended Roman citizenship to all inhabitants of the empire, meant that the importance of the distinction between the law of nations and civil law would gradually fade.

After Ulpian, Aurelius Hermogenian takes up *ius gentium* in his *Liber Primus Iuris Epitomarum*⁴⁵: "under this law of nations wars were introduced; peoples were divided; kingdoms were founded; properties were separated; fields were bounded; buildings were erected; and purchases and sales, leases, and obligations, with the exception of those instituted by the civil law, were instituted." As the great Austrian Romanist Max Kaser rightly remarked, Hermogenian no longer knew what to do with the *ius gentium*.⁴⁶

Gaius' definition of *ius gentium* and its later three-way division by Ulpian were adopted in the sixth century by the Emperor Justinian in his *Institutes*⁴⁷

³⁹ Gaius 1.189 provides an example with respect to the guardianship of minors. He says that minors are under guardianship according to the laws of all cities, and that it is in keeping with natural reason that those who have not reached the age of majority be under the guardianship of another. We might also point to the matter of the acquisition of property by warlike occupation (Gaius 1.69) or by alluvium (Gaius 1.70).

⁴⁰ Cf. Gaius 1.56; 2.65 and 2.73.

⁴¹ *Digest* 1.1.1.2–4 and 6 pr.

⁴² *Digest* 1.1.1.3.

⁴³ Tony Honoré, *Ulpian, Pioneer of Human Rights* (2nd ed., Oxford University Press, Oxford, New York, 2002), p. 80.

⁴⁴ *Digest* 1.1.1.4.

⁴⁵ *Digest* 1.1.5.

⁴⁶ Max Kaser, *Ius gentium* (Böhlau, Cologne, 1993), p. 49: "... Hermogenian, weiß mit dem Begriff nichts mehr anzufügen."

⁴⁷ Gaius' definition is found in Justinian's *Institutes* 1.2.1 and is repeated in *Digest* 1.1.9, but suppressing the word *populus*: "omnes [populus] peraeque custoditur." Title II of the first book of Justinian's *Institutes*, *De iure naturali et gentium et civili*, also begins by employing the same expression as Ulpian's, namely that natural law is also applicable to animals: "*ius naturale est, quod natura omnia animalia docuit*." In *Institutes* 1.2.2., Justinian distinguishes natural law from the law of nations on the basis of its subject matter. Thus, captivity and slavery would come under the law of nations and not natural law because, according to him, all human beings are born free: "*iure enim naturali ab initio omnes homines liberi nascebantur*."

and *Digest*.⁴⁸ Later, these passed through the Byzantine Empire to medieval Europe with the discovery of the *Digest*.

In the West, Isidore of Seville (560–636) was the vessel transmitting Gaius' concept of the *ius gentium*. In his well-known *Etymologiae*, he says, following a heterogeneous list of institutions proper to the law of nations,⁴⁹ that this law is so called because it is in force among almost all peoples.⁵⁰ Isidore modifies Gaius' definition subtly by adding the adverb “almost” (*fere*) to distinguish it from the original concept of the *gens*.⁵¹ Moreover, he eliminates the mention of *commercium*. This, as Álvaro d'Ors rightly points out, implies “a decisive step for the formation of the modern concept of the law of nations as public international law.”⁵²

⁴⁸ Cf. Ulpian, *Digest* 1.1.1.2: “ex naturalibus praeceptis aut gentium aut civilibus.”

⁴⁹ Cf. Isidore of Seville, *Etymologiae* 5.6, where he mentions occupation of land; erection of buildings; fortifications; wars; prisoners; serfdom; restitutions; peace treaties; truces; the immunity of ambassadors; and the prohibition against contracting marriage with foreign persons. This list has similarities to Hermogenian, *Digest* 1.1.5, and *Institutiones* 1.2.2. Nevertheless, Isidore eliminates the mention of *commercium* and includes the prohibition against marriage to aliens (*conubia inter alienigena prohibita*).

⁵⁰ Isidore of Seville, *Etymologiae* 5.9: “Et inde ius gentium, quia eo iure omnes fere gentes utuntur” (and it is called the law of nations because it has force and effect among almost all peoples).

⁵¹ In this regard, cf. Juan de Churrua, *Las Instituciones de Gayo en San Isidoro de Sevilla* (Universidad de Deusto, Bilbao, 1975), pp. 27–28.

⁵² Álvaro d'Ors, “En torno a la definición isidoriana del *ius gentium*,” in *Papeles del oficio universitario* (Rialp, Madrid, 1961), p. 283: “un paso decisivo para la formación del moderno concepto de Derecho de gentes como Derecho internacional público.”