

Introduction

1. Research Subject

In one of his verses, Horace portrays *utilitas* as the mother of what is just and right (*Sat.* 1,3,98 *utilitas, iusti prope mater et aequi*). This poetic perspective highlights the profound influence that the concept of *utilitas* has had on legal thought. The term *utilitas*, signifying ‘utility’, ‘usefulness’, or ‘interest’, along with its derivatives, has been invoked in each epoch throughout the development of Roman law, appearing in both jurists’ writings and emperors’ constitutions¹. *Utilitas* permeated almost every aspect of the *ius Romanum*². To fully appreciate the extent of this phenomenon, consider that what we now define as ‘applying the law’³ was, in the Roman context, essentially ‘using the law’ or, more precisely, ‘making use of it’ as conveyed by the phrase *iure uti*. This phrase includes the verb *utor, uti* (‘to use’) from which the term *utilitas* is etymologically derived⁴.

- 1 The term *utilitas* and its derivatives appear 1226 times in legal sources, as illustrated by the Table 1 in the Tables, Charts, and Graphs section.
- 2 Recognition of the criterion under study is notably expressed by Italian scholars, such as F. B. Cicala in *Il concetto dell’“utile” e sue applicazioni nel diritto romano*, Milano-Torino-Roma 1910, p. 9, where he asserts: ‘il concetto dell’*utilitas* signoreggia in tutto il campo del diritto romano’ (‘the concept of *utilitas* dominates across the entire spectrum of Roman law’). Similarly, B. Biondi in *Il diritto romano cristiano. Vol. 2. La giustizia, le persone*, Milano 1952, p. 97, states: ‘Il diritto classico e tutta la sapiente elaborazione giurisprudenziale non sono altro che il sistema, l’organizzazione, la disciplina dell’*utilitas*’ (‘The classical law and all the erudite jurisprudential elaboration are nothing more than a system, organization and discipline of *utilitas*’). While these scholars underscore the pivotal role of *utilitas* within Roman law, their opinions remain somewhat generalized. See also *Handlexikon zu den Quellen des römischen Rechts*, H. G. Heumann, E. Seckel (ed.), Jena 1926, pp. 541–542 s. v. *utilis, utilitas*.
- 3 G. Aricò Anselmo, ‘*Ius publicum*’-‘*Ius privatum*’ in Ulpiano, Gaio e Cicerone, ‘AUPA’ 1983, vol. 37, pp. 456–457.
- 4 This verb is derived from the older form **oitor*, attested by inscriptions. Cf. e.g. CIL 14,3584 = CIL 1,586 *oitile* = *utile*, CIL 1,583 *oitiles ioudices* = *utiles iudices*, CIL 9,3513 = CIL 1,756 *oeti* = *uti*. On etymology of terms see *Dictionnaire étymologique de la langue latine*, A. Ernout, A. Meillet (ed.), Paris 1951, p. 757, s. v. *utor*; W. M. Lindsay, *The Latin Language: An Historical Account of Latin Sounds, Stems, and Flexions*, Oxford 1984, p. 309§ 155; *Etymological Dictionary of Latin and the Other Italic Languages*, M. de Vaan (ed.), Leiden–Boston 2011, pp. 647–648, s. v. *utor*.

A deeper contemplation of Horace's idea reveals a thought-provoking puzzle: although it is ideal when righteousness, justice, and utility align, suggesting that utility is the source of the other two may misrepresent their true relationship, particularly in law, where *iustitia* and *aequitas* should take precedence.

This study examines the relationship between this poetic phrase and legal reasoning, particularly in the context of how Roman jurists interpreted the law. The central focus is, therefore, on *utilitas*, which manifested itself both in their thinking about the law and in the law itself. The Roman jurists, as legal practitioners, not only inherently embraced this criterion in their thinking, but also consistently prioritized the demands of legal practice when conflicts arose between legal rules and practical necessities⁵. Although scholars have extensively studied the pragmatic approach of Roman jurists, the deeper role of *utilitas* in their legal interpretation is still underexplored. Existing literature often overlooks non-legal sources, particularly rhetorical ones, which could offer a more comprehensive and theoretical perspective on *utilitas*. On the other hand, jurisprudence offers a wealth of examples of its practical application. While reconstructing the jurists' thought forms the core of this study, they are also considered as co-creators of intellectual life, not just as an elite group⁶. This approach allows for synthesis of both of these perspectives, presenting a complete picture of what the term *utilitas* encompassed.

While this work briefly introduces these issues, it does not aim to analyze every aspect of *utilitas* within Roman law. The focus here is on the abstract category without any limiting qualifications. Therefore, the concept of public good signified by the term *utilitas publica*, which has already been extensively studied⁷, is discussed only to the

- 5 In this context, F. Schwarz writes about the dispute between *Denkrichtigkeit* and *Lebensrichtigkeit*, *Begriffsanwendung und Interessenwertung im klassischen römischen Recht*, 'Archiv für die civilistische Praxis' 1952, vol. 152, no. 3, p. 203. Similarly, M. Kaser, *Zur Methodologie der römischen Rechtsquellenforschung*, Wien-Köln-Graz 1972, p. 62. See also W. Rozwadowski, *Etiā clarum ius exigit interpretationem* [in:] *W poszukiwaniu dobra wspólnego: księga jubileuszowa Profesora Macieja Zielińskiego*, A. Choduń, S. Czepita (ed.), Szczecin 2010, p. 42.
- 6 P. Świącicka, *Formalność topicznego myślenia: problem 'reguł proceduralnych' dyskursu dogmatycznego rzymskich jurystów*, 'CPH' 2011, vol. 63, no. 2, p. 219, esp. n. 38 along with the literature cited therein. On elitism and influence of social factors (including origin) on the intellectual formation of jurists e.g. in W. Kunkel, *Die römischen Juristen: Herkunft und soziale Stellung*, Köln-Weimar-Wien 2001 and D. Mantovani, *Iuris scientia e honores. Contributo allo studio dei fattori sociali nella formazione giurisprudenziale del diritto romano (III-I sec. a.C.)* [in:] *Nozione formazione e interpretazione del diritto: dall'età romana alle esperienze moderne. Ricerche dedicate al professor Filippo Gallo*, vol. 1, S. Romano (ed.), 1997, pp. 617–680. See also M. Kuryłowicz, *Sacerdotes iustitiae* [in:] *Ecclesia et Status. Księga jubileuszowa z okazji 40-lecia pracy naukowej profesora Józefa Krukowskiego*, A. Dębiński, K. Orzeszyna, M. Sitarz (ed.), Lublin 2004, pp. 709–713. The wider context of the issue is presented in J. Pölonen, *The Case for a Sociology of Roman Law* [in:] *Law and Sociology*, M. Freeman (ed.), New York 2006, pp. 398–408 along with the literature cited therein.
- 7 On this issue e.g. A. Steinwenter, *Utilitas publica–Utilitas singulorum* [in:] *Festschrift Paul Koschaker mit Unterstützung der Rechts- und Staatswissenschaftlichen Fakultät der Friedrich-Wilhelms-Universität Berlin und der Leipziger Juristenfakultät zum 60. Geburtstag überreicht von seinen Fachgenossen*,

extent necessary to shed light on the role of *utilitas* in the jurisprudence interpretation of the law.

While the Romans owe the early stages of conceptualizing *utilitas* to the Greeks⁸, who referred to it as τὸ συμφέρον, ἡ ὠφέλεια, τὸ χρήσιμον, or τὸ καλόν⁹, this study incorporates Greek thought only insofar as it enhances understanding of the Roman aspect of this phenomenon. Given its significant place in the writings of Marcus Tullius Cicero, the initial time frame of the research is set at the Ciceronian period, namely the 1st century BCE. Earlier sources are referenced solely to provide historical or intellectual context for the events under examination.

This research delves into the works of Roman jurists¹⁰, focusing primarily on the classical law period. This standard time frame for studying the writings of Roman jurisprudence is dictated by the state of preserved sources. In the *Digest of Justinian*, which

vol. 1, M. Kaser (ed.), Weimar 1939, pp. 84–102; J. Gaudemet, *Utilitas publica*, 'RHD' 1951, vol. 4, no. 29, pp. 465–499; T. Mayer-Maly, *Gemeinwohl und Naturrecht bei Cicero* [in:] *Völkerrecht und rechtliches Weltbild: Festschrift für Alfred Verdross*, F.A. Frhr. v. d. Heydte, I. Seidl-Hohenveldern, St. Verosta, K. Zemanek (ed.), Viena 1960, pp. 195–206; G. Jossa, *L' 'utilitas rei publicae' nel pensiero imperiale dell'epoca classica*, 'Studi Romani' 1963, vol. 11, no. 4, pp. 387–405; Idem, *L' 'utilitas rei publicae' nel pensiero di Cicerone*, 'Studi Romani' 1964, vol. 12, no. 3, pp. 269–288; G. Longo, *Utilitas publica*, 'Labeo' 1972, vol. 18, pp. 7–71; T. Mayer-Maly, *Gemeinwohl und Necessitas* [in:] *Rechtsgeschichte als Kulturgeschichte: Festschrift für Adalbert Erler zum 70 Geburtstag*, A. Fink et al. (ed.), Aalen 1976, pp. 135–145; T. Honsell, *Gemeinwohl und öffentliches Interesse im klassischen römischen Recht*, 'ZSS RA' 1978, vol. 95, no. 1, pp. 93–137; P. Hibst, *Utilitas publica, gemeiner Nutz, Gemeinwohl: Untersuchungen zur Idee eines politischen Leitbegriffes von der Antike bis zum späten Mittelalter*, Frankfurt am Main-New York 1991; R. Scevola, 'Utilitas publica', I. *Emersione nel pensiero greco e romano*, Padova 2012; Idem, 'Utilitas publica', II. *Elaborazione della giurisprudenza severiana*, Padova 2012; B. Sitek, *Utilitas publica z perspektywy prawa rzymskiego i polskiego*, 'Themis Polska Nova' 2014, vol. 1, no. 6, pp. 21–35; J. F. Stagl, *Die Funktionen der utilitas publica*, 'ZSS RA' 2017, vol. 134, no. 1, pp. 514–527; Idem, *Camino desde la servidumbre: Escritos sobre la servidumbre en la Antigüedad, su derrota y la amenaza de su retorno*, Madrid 2021, pp. 83–102.

- 8 The analysis of *utilitas publica* was started from presenting Greek reflections by, e.g., A. Steinwenter, *Utilitas publica...*, pp. 85–88; J. Gaudemet, *Utilitas publica*, pp. 466–467; R. Scevola, 'Utilitas publica', I. *Emersione...*, pp. 11–285. See also P. Hibst, *Utilitas publica...*, pp. 122–131. G. Jossa, *L' 'utilitas rei publicae' nel pensiero imperiale...*, p. 392, maintains that Roman thought was impacted by the Stoic rather than Aristotelian influence up to the post-classical era. However, it is hard not to notice that the Stoic and Peripatetic vision of the issues analyzed here show many similarities. The problem of the common good and relationship between the benefits of the state and interests of individuals in the world of ancient Greece was carefully described by Scevola. The researcher devoted two large chapters to this problem (see 'Utilitas publica', I. *Emersione...*): 'Da Omero a Solone. La tradizione greca in materia di utilità nella sfera pubblica' (pp. 11–139) and 'Utilità e giustizia nel discorso pubblico della πόλις e nel pensiero della comunità universale' (pp. 141–285).
- 9 *Novum lexicon manuale Graeco-Latinum et Latino-Graecum*, B. Hederich, G. Pinzger, F. Passovio (ed.), Lipsiae 1827, p. 749, s. v. *utilitas*.
- 10 *Utilitas* in the imperial constitutions of the 4th and 5th century was discussed by M. Navarra, *Utilitas publica-utilitas singulorum tra IV e V sec. D. C. Alcune osservazioni*, 'SDHI' 1997, vol. 63, pp. 269–291. The meaning of this criterion in later sources was also briefly addressed by N. Rampazzo, *Quasi praetor non fuerit. Studi sulle elezioni magistratuali in Roma repubblicana tra regola ed eccezione*, Napoli 2008, pp. 497–506.

constitutes the basis of knowledge on this subject, there are excerpts from the writings of thirty-eight Roman jurists. This includes three from the Republican era and two from the times of the Dominate. The rest hail from the Principate period, and it is primarily these jurists, though not all, who make references *ad utilitatem* in the context under examination. However, considering the common practice of jurists quoting their predecessors, it is likely that some *ad utilitatem* references appeared in earlier jurists' writings¹¹.

Noteworthy references to *utilitas* also appear in Gaius' *Institutes*, a legal textbook from the 2nd century CE, as well as in *Pauli Sententiae*. The dating of the latter work, however, presents some challenges. Although based on the writings of Julius Paulus, a jurist from the late 2nd century CE, the work is believed to have been composed at the end of the 3rd century CE, placing it within the post-classical period according to commonly applied periodization among Roman law scholars¹². Here, a substantive approach guided the inclusion of certain excerpts from the *Pauli Sententiae* in this analysis. Thus, even though the majority of the jurisprudence sources examined here originate from the Principate, the research extends to the end of the 3rd century CE, marking a clear and definitive temporal boundary.

2. State of Research

The concept of *utilitas* in Roman law has garnered significant scholarly interest. This section provides an overview of existing research on this topic, setting the stage for defining the objectives of this work, which builds upon the insights gathered from these studies.

11 An example of such a reference can be found in Pap. D. 46,3,95,7. According to Papinian, Marcus Antistius Labeo and Lucius Plotius Pegasus held that the decision had to be adopted due to *utilitas* (*quod quidem Labeo et Pegasus putaverunt utilitatis causa recipiendum*). Later, the fragment is discussed in more detail. At this point, however, it should be noted that it is impossible to say whether the *ad utilitatem* reference came from the aforementioned jurists, or was a supplement introduced by Papinian. However, if the latter had been faithfully quoting the views of his predecessors, it could also entail at least a slight departure from the framework of the classical period, since Labeo was born at the end of the Republic (BCE). It should also be stated that in such doubtful situations, in the tables in the Tables, Charts, and Graphs section at the end of this study, the criterion of the author of the work from which the source was taken was considered decisive. Therefore, for instance, Labeo was not indicated as the author of this *utilitatis causa* decision even though it cannot be definitively ruled out that he nominally referred to this criterion.

12 Recently this opinion debated in I. Ruggiero, *Ricerche sulle Pauli Sententiae*, Milano 2017, assigning the *Sententiae* to Paulus or to his circle of disciples. Critically of this hypothesis in D. Liebs, *Ricerche sulle Pauli Sententiae* (= *Quaderni di Studi Senesi* 145), 'ZSS RA' 2019, vol. 136, no. 1, pp. 465–466. It is not the role of this study to participate in the debate on the periodization of the work. As it turns out, references to *utilitas* in the *Pauli Sententiae* and in fragments of Paulus's works preserved in the *Digest of Justinian* serve the same function. However, since other jurists also referred to *utilitas* in their decisions, it is difficult to draw definitive conclusions about authorship from this fact. Therefore, in the text and the statistics at the end of this study, decisions from the *Pauli Sententiae* are attributed to (Pseudo-)Paulus.

The focus begins with literature on a particularly distinct manifestation of *utilitas* in jurists' interpretation: the decisions taken *utilitatis causa*, namely for the sake of utility. Their essence is as intriguing as it is evident to scholars of Roman law. Ulrich Leptien describes them as *die grundsatzwidrige Entscheidungen* ('decisions contrary to the principle'), contrasting them with categories such as *System und Grundsatz* ('system and principle')¹³. Similarly, Max Kaser characterizes these decisions as exceptions to the rules or principles¹⁴. Marialuisa Navarra refers to them as decisions *che si discostano da regole di portata generale, e che possono essere in apparente contraddizione con il 'sistema'* ('which deviate from the general rules, and which may be in apparent contradiction to the system'), also highlighting the category of exception: *una soluzione che fa eccezione ad una regola generale* ('a solution that creates an exception to the general rule')¹⁵. Hans Ankum views these decisions as 'dogmatically indefensible solutions'¹⁶, sometimes referring to them as exceptions to the rules, seen as indefensible from a dogmatic standpoint¹⁷. Ankum employs various terms to elaborate on this, some describing the

- 13 On the *utilitatis causa* decisions, Leptien wrote his PhD thesis: *Utilitatis causa. Zweckmäßigkeitentscheidungen im römischen Recht*, Freiburg 1967 (in the mentioned context see pp. 237–240). Its fragment was then published as an article, 'Utilitatis causa'. *Zweckmäßigkeitentscheidungen im römischen Recht*, 'SDHI' 1969, vol. 35, pp. 51–72.
- 14 M. Kaser, *Das römische Privatrecht. 1. Abschnitt. Das altrömische, das vorklassische und klassische Recht*, München 1971, p. 212. Idem, 'Ius publicum' und 'ius privatum', 'ZSS RA' 1986, vol. 103, no. 1, p. 18.
- 15 M. Navarra, *Ricerche sulla 'utilitas' nel pensiero dei giuristi romani*, Torino 2002, p. 4. Cf. also p. 206: *la soluzione (...) in deroga a preesistenti regole di portata più generale* ('decision in deviation from the previously existing rules of a more general scope'). In this monograph the Italian researcher presents an extensive analysis of jurisprudence sources containing the expressions *utilitatis causa*, *propter utilitatem* and *utilitatis gratia*. She also prepared the tables illustrating the frequency of using the enumerated expressions in individual collections, including both jurists' decisions and imperial constitutions, as well as taking the presence of phrases in each jurist's works separately into account, p. 12. It should also be mentioned that the title of the monograph was noted as being too broad in relation to its actual content by H. Ankum, Navarra, Marialuisa, *Ricerche sulla utilitas nel pensiero dei giuristi romani*, 'ZSS RA' 2009, vol. 126, no. 1, p. 524, n. 5.
- 16 In 1968, Ankum published two influential studies on decisions made *utilitatis causa*: 'Utilitatis causa receptum'. *On the pragmatical methods of the Roman lawyers* [in:] *Symbolae iuridicae et historicae Martino David dedicatae*, vol. 1, J.A. Ankum, R. Feenstra, W.F. Leemans (ed.), Leiden 1968, pp. 1–31, and 'Utilitatis causa receptum': *sur la méthode pragmatique des juristes romains classiques*, 'RIDA' 1968, vol. 15, pp. 119–133. Leaving the specifics of the languages aside, both articles are basically similar in content. Later on, Ankum revisited the topic by entering into a discussion with Navarra. He contributed to the discourse by offering a detailed review and expanding upon the subject through two separate articles. See H. Ankum, Navarra, Marialuisa, *Ricerche ...*, pp. 524–536; Idem, *The functions of expressions with utilitatis causa in the works of the Classical Roman lawyers*, 'Fundamina: A Journal of Legal History' 2010, vol. 16, no. 1, pp. 5–22; Idem, *Utilitatis causa en los trabajos de los juristas clásicos romanos*, 'Revista chilena de derecho' 2016, vol. 43, no. 3, pp. 1121–1132.
- 17 The indicated pages contain either the author's initial thesis or his conclusions. See H. Ankum, 'Utilitatis causa receptum'. *On the pragmatical methods...*, p. 28; Idem, 'Utilitatis causa receptum': *sur la méthode...*, p. 132; Idem, *The functions...*, pp. 6 and 22; Idem, *Utilitatis causa...*, p. 1121.