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' constitutions[1]. *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 derived[4].

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 tuto 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 *oetiles 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 necessities[5]. 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 group[6]. 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 studied[7], 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, *Etiam 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. Święcicka, *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. Pölönen, *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 Greeks[8], who referred to it as τὸ συμφέρον, ἡ ὠφέλεια, τὸ χρήσιμον, or τὸ καλόν[9], 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 jurists[10], 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' writings[11].

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 scholars[12]. 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 principles[14]. Marialuisa Navarra refers to them as decisions *che si discostano da regole di portata generale, e che possono essere in apparente contradizzione 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 standpoint[17]. Ankum employs various terms to elaborate on this, some describing the

13 On the *utilitatis causa* decisions, Leptien wrote his PhD thesis: *Utilitatis causa. Zweckmässigkeitsentscheidungen im römischen Recht*, Freiburg 1967 (in the mentioned context see pp. 237–240). Its fragment was then published as an article, *'Utilitatis causa'. Zweckmäßigkeitsentscheidungen 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.

applicable law[18] (*dogmatic, strict law, rules of dogmatics, strict dogmatic rules, the rule*), and others describing the interpretation process (*strict* [*dogmatic*] *reasoning, formal interpretation, strict literal interpretation, strict rules of logic*)[19]. He uses these terms interchangeably, indicating no clear line between outright opposition to the rules and deviation from their strict interpretation. Lastly, Benjamin Spagnolo and Joe Sampson define them as decisions deviating from the general principle embodied in the term *ratio*, viewing this notion in terms of logic[20] corresponding not so much (or not solely) to syllogistic schemes but rather to the rationality of a decision understood as consistency with the general legal order and its principles[21].

As we can see, the vision of the nature of *utilitatis causa* decisions is consistent[22] – a rarity in itself. However, the effects of these decisions akin to the actions of an absolute ruler, invite a deeper examination of the role and significance of *utilitas* in legal interpretation. Here, researchers offer various perspectives.

Ankum filled the expression *utilitatis causa* with the needs of everyday life and legal practice (*les exigences de la vie pratique*; *the needs of legal practice*; *las razones prácticas*)[23].

18 One should bear in mind the opinion of T. Giaro, who argued that Roman jurists were guided not by a juridical concept of the validity of the law, but by an axiological one, *Geltung und Fortgeltung des römischen Juristenrechts*, 'ZSS RA' 1994, vol. 111, no. 1, p. 80.

19 The terms taken from H. Ankum, *'Utilitatis causa receptum'. On the pragmatical methods…*, *passim*. The analogous terms are used by the author in French and Spanish articles. For instance: *une interprétation stricte, un raisonnement logique, le droit strict, raisonnement dogmatique, les règles de la théorie et de la logique, argumentation purement logique, la règle* and *las reglas lógico dogmáticas, las reglas de la dogmática, las (estrictas) reglas de la lógica, las reglas dogmáticas estrictas, una interpretación estricta, una regla*.

20 Cf. also P. Stein, *Interpretation and Legal Reasoning in Roman Law*, 'Chicago-Kent Law Review' 1995, vol. 70, no. 4, pp. 1552–1553.

21 B. Spagnolo, J. Sampson, *Principle and Pragmatism* [in:] *Principle and Pragmatism in Roman Law*, B. Spagnolo, J. Sampson (ed.), Oxford-New York 2020, pp. 3, 5–6.

22 Obviously, certain terminological diversity is notable. Leptien refers to the concept of 'principle'. Ankum and Navarra, in turn, use the term 'rule'. On the other hand, Spagnolo and Sampson, like Kaser before them, use both of these terms. Leaving aside any discussions about the content of each concept and their mutual relationships, it should be concluded that when researchers write about rules and principles, they mean the applicable legal norms. Regarding the term 'legal norm', one should share Giaro's observation that the Romans did not know this concept. This term, as indicating the law recognized as binding, is a paraphrase but it facilitates contemporary discussions, *Geltung …*, p. 70.

23 See both translations of sources and the statements in Ankum's studies quoted above. Heumann and Seckel similarly translated this expression as *Rücksicht auf praktische Bedürfnisse, auf die Verkehrssicherheit, Zweckmäßigkeit, Handlexikon…*, s. v. *utilitas* sub 3. Similarly also P. Stein, *Interpretation…*, p. 1553, who translated the term *utilitas communis* as 'general convenience'. See also L. Lombardi, *Saggio sul diritto giurisprudenziale*, Milano 1975, p. 28, who claims that *utilitas publica* should be understood rather in the empirical sense of opportunity and experience than in the ideal sense of common good or social justice. Rampazzo writes that the jurisprudence uses the category under study to achieve practical effects more suited to the needs of the community. See N. Rampazzo, *Quasi praetor…*, p. 492.

Assuming that the operational style of Roman jurists leaned more towards the jurisprudence of interests (*Interessenjurisprudenz*) rather than to the jurisprudence of concepts (*Begriffsjurisprudenz*)[24], he concluded that these decisions had been a manifestation of the legal method[25], which he described as pragmatism. According to him, in cases where logical and practical arguments led to the same results, preference was given to the former. However, when there was a discrepancy between logic and practice, the latter prevailed[26]. *Utilitatis causa* decisions were supposed to exemplify this approach, where the reference to the criterion under study could either indicate the reason for a decision, or serve as an argument for its acceptance[27]. In the first case, the decision fell within the realm of *ius receptum* – law universally accepted by jurists – while in the second, it reflected divergent juristic opinions and ongoing debates (*ius controversum*[28]).

24 These methods are the result of reflection of German civil lawyers in the 19th and early 20th centuries. In accordance with the assumptions of *Begriffsjurisprudenz*, a mathematical and logical way of thinking was promoted, aiming to define terms so precisely that decisions could be derived from them through deduction. *Interessenjurisprudenz*, on the other hand, sought practical solutions. In each legal relationship it was therefore necessary to establish the interests of the parties, and only then to decide whether the norm was applicable or not. On the basis of the Roman law, attempts to apply these methods as well by Seidl, as discussed below. Cf. E. Seidl, *Moderne zivilrechtliche Lehren als Erkenntnismittel der Rechtsgeschichte* [in:] *Das deutsche Privatrecht in der Mitte des 20. Jahrhunderts. Festschrift für Heinrich Lehmann zum 80. Geburtstag*, H. C. Nipperdey (ed.), Berlin 1956, pp. 97–112; Idem, *War Begriffsjurisprudenz die Methode der Römer?*, 'Archiv für Rechts- und Sozialphilosophie' 1957, vol. 43, no. 3, pp. 343–366. See also F. Schwarz, *Begriffsanwendung…*, pp. 193–215. Kaser was against transferring these concepts to the Roman context. See M. Kaser, *Das römische Privatrecht…*, p. 212.

25 H. Ankum, *The functions...*, pp. 2–6. This is also confirmed by the titles of the works. However, given the difference in the number of the noun ('*Utilitatis causa receptum*: sur la méthode pragmatique des juristes romains classiques' and '*Utilitatis causa receptum*. On the pragmatical methods of the Roman lawyers'), it is difficult to say whether Ankum ultimately meant a method or methods.

26 Ankum aligns closely with the views of Rudolf von Jhering, one of the most prominent representatives of the jurisprudence of interests. Cf. R. von Jhering, *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung. Zweiter Theil*, Leipzig 1875, pp. 386–387, n. 528a: *die Jurisprudenz an hand der ratio iuris überall so weit vorschreiten soll, bis die utilitas in den Weg tritt und Protest einlegt* ('jurisprudence should develop on the basis of the *ratio iuris* everywhere until *utilitas* stands in the way and protests'). Jhering juxtaposes the terms *utilitas* and *ratio iuris* with each other and translates the former as *das praktische Bedürfnis* ('pracitical need', pp. 337, 365) and the latter as *das allgemeine Princip* ('general rule'; p. 337) or *die juristischen Consequenz oder Nothwendigkeit* ('legal consequence or necessity'; p. 365). See also T. Wischmeyer, *Zwecke im Recht des Verfassungsstaates: Geschichte und Theorie einer juristischen Denkfigur*, Freiburg 2015, p. 84.

27 In the first two studies by Ankum, this statement was the conclusion of the research. In the later ones, however, it was the starting point for a dispute with Navarra. See H. Ankum, *'Utilitatis causa receptum'. On the pragmatical methods…*, p. 28; Idem, *'Utilitatis causa receptum': sur la méthode pragmatique…*, p. 132; Idem, *The functions of expressions with utilitatis causa…*, p. 6; Idem, *Utilitatis causa en los trabajos…*, p. 1122. Alan Watson also shared a similar perspective on this view, *Narrow, Rigid and Literal Interpretation in the Later Roman Republic*, 'TR' 1969, vol. 37, p. 368.

28 See e. g. M. Bretone, *Ius controversum nella giurisprudenza classica*, 'Atti della Accademia Nazionale dei Lincei, Classe di Scienze Morali, Storiche e Filologiche' 2008, ser. 9, vol. 23, fasc. 3, pp. 755–879. Polish voice on that issue in P. Święcicka, *Prawo jurysprudencyjne jako prawniczy dyskurs argumentacyjny (zarys problematyki)*, 'ZP' 2011, vol. 11, no. 1, pp. 317–338.

This perspective, however, was not without its critics. Walter Selb opposed the characterization of pragmatism as a method underlying the renunciation of the system, proportion, and logic[29]. Leptien shared a partially similar perspective, contending that understanding the term *utilitatis causa* solely through such prism would exclude decisions aimed at implementing ethical values[30]. In essence, he accused Ankum's perspective of what Adam Szpunar, Polish civilian, regarded twenty years before him as the Achilles heel of jurisprudence of interests, describing this approach as follows: 'in the law, the teleological direction has undoubtedly fallen into one-sidedness, leading to a utilitarian view that forgets about the highest tasks of the law'[31]. So, while Leptien considered the category of *utilitas* to be pragmatic in its nature[32], he defined the *utilitatis causa* decisions somewhat differently than Ankum, referring to them as *Zweckmäßigkeitsentscheidungen/Zweckmäßigkeitsgründen*, namely decisions taken for teleological reasons[33]. According to him, these decisions were shaped to meet the requirements of practice, economy, society, as well as the world of values[34], and only as such did they justify deviating from a given rule.

A further distinction between the views of Ankum and Leptien on *utilitatis causa* decisions is that the former claimed that jurists were satisfied with the practical motive to justify their decisions, while the latter argued that they also needed a 'legal', namely dogmatic justification for their decisions. Leptien opined that *utilitas* was invoked to justify decisions that were more lenient than what would strictly adhere to binding legal rules, and he argued that for such a decision to be made, a solid dogmatic foundation should exist, preferably bolstered by other jurists' opinions. Thus, the reference to *utilitas* could not constitute the decision's foundation but rather served as an auxiliary instrument of legal argumentation[35]. He also claimed that one could refer *ad utilitatem*, as he put it somewhat enigmatically, 'in order to justify the interpretatively risky application of the written law' (*um eine auslegerisch riskante Anwendung des geschriebenen Rechts zu begründen*). However, he stated this phenomenon was rare due to the limited participation of statutory acts in the creation of the Roman legal order[36].

29 W. Selb, *Symbolae iuridicae et historicae Martino David dedicatae. Ediderunt J. A. Ankum, R. Feenstra, W. F. Leemans. Tomus primus: Ius Romanum. Tomus alter: Iura Orientis Antiqui* [review], 'ZSS RA' 1970, vol. 87, no. 1, p. 550.

30 U. Leptien, *'Utilitatis causa'…*, p. 62, n. 61. J. F. Stagl also claims that Ankum overestimated the practical aspect of the decisions, *Die Funktionen…*, p. 522, n. 60.

31 A. Szpunar, *Nadużycie prawa podmiotowego*, Kraków 1947, p. 6.

32 U. Leptien, *Utilitatis causa …*, p. 235: *bedeutet utilitas nichts anderes und nicht mehr als Zweckmäßigkeit, Nützlichkeit oder Nutzen* ('*utilitas* does not mean anything else and nothing more than purposefulness, usefulness or benefit').

33 Similarly F. Schwarz, *Begriffsanwendung…*, p. 197, who translated this term as *Zweckmäßigkeitsgedanke* ('teleological thought').

34 U. Leptien, *Utilitatis causa…*, p. 241; Idem, *'Utilitatis causa'…*, p. 72.

35 Idem, *Utilitatis causa*, pp. 18, 19, 239; Idem, *'Utilitatis causa'…*, pp. 63–72.

36 Ibid., pp. 52–53.

As per Kaser[37], *utilitatis causa* decisions were to form a kind of a subordinate rule (*die Unterregel*), applicable to particular subgroups of cases and justified by the unique circumstances of each individual case. He employed various descriptions to outline the nature of this category in this context. On the one hand, he characterized it as reflecting a special interest of the individual case (*das Sonderinteresse des Einzelfalls*), allowing for exceptions to principles or general rules[38] if justified. On the other hand, in his extensive article on *ius publicum* and *ius privatum*, where he dedicated significant attention to the concept of *utilitas publica*, he concluded that the use of *utilitas*, representing *utilitas publica* even if the adjective was omitted, indicated a reference to the general principle according to which each regulation should aim to be as useful as possible for social life while remaining fair and in alignment with adopted values[39].

Yet another interpretation was offered by Navarra, who, without further justification, defined *utilitas* as the value underlying the legal order[40], avoiding, nevertheless, ethical connotations with regard to the content of this criterion. Her analyses focus primarily on defining the practical need motivating the introduction of a decision. Thus, her perspective appears to be more case-specific, aligning with Leptien's views and differing from Ankum's vision of *utilitas* as more homogenous. Navarra also saw *utilitatis causa* decisions as more than mere pragmatism reflections. She viewed them as an expression of unification and stabilization tendencies within the legal system[41]. Thus, referring to *utilitas* was to be an expression of the pursuit of systematization and certainty of the applicable law, both for educational purposes and to ensure greater consistency in judicial decisions[42]. According to Navarra, the criterion almost never served as an argument, but indicated a specific legal solution had gained approval among jurists, signifying its transition from *ius controversum* to *ius receptum*[43].

However, as Ankum rightly pointed out, this thesis cannot be upheld, if only for linguistic reasons[44]. While the phrase *utilitatis causa receptum* appears in some sources, there are also passages where the argumentative function of *utilitas* is beyond doubt, whether due to the overall context, or the syntactic construction. For instance, the expression *utilitatis causa* is sometimes accompanied by the *coniugatio periphrastica passiva*. Thus, when Paulus writes that *sententia propter utilitatem contrahentium admit-*

37 M. Kaser, *'Ius publicum'…*, pp. 28, 33.
38 M. Kaser, *Das römische Privatrecht…*, p. 212.
39 M. Kaser, *'Ius publicum'…*, pp. 18–19.
40 M. Navarra, *Ricerche …*, p. 206 'valori dell'ordinamento, eminente tra i quali l'*utilitas*' ('values of the legal order, among which *utilitas* stands out').
41 This view could have been inspired by a PhD thesis by U. Leptien, *Utilitatis causa…*, p. 232.
42 M. Navarra, *Ricerche …*, pp. 208–209. See also R. Scevola, *'Utilitas publica', II. Elaborazione …*, pp. 378–379.
43 M. Navarra, *Ricerche…*, pp. 178–179, 183, 187–188, 207.
44 H. Ankum, *The functions of expressions with utilitatis causa…*, pp. 5–22; Idem, *Utilitatis causa en los trabajos…*, pp. 1121–1132.

tenda est ('the decision should be accepted for the utility of the parties')[45], it means the decision should be accepted but certainly not that it had already gained general acceptance[46]. Thus, this does not allow it to be considered part of *ius receptum*[47].

Certainly, the references to *utilitas* in jurisprudence writings extend beyond the scope of *utilitatis causa* decisions. Hence, Franz Wieacker included *utilitas* to the group of what he referred to as *offene Wertungen*, justifications for decisions that come from outside the legal order. According to him, *utilitas* was the equivalent of purposefulness (*die Zweckmäßigkeit*) and practicality (*die Praktikabilität*), although sometimes it could also carry an ethical message[48]. Tony Honoré also placed *utilitas* in the category of open arguments (*topoi* or *principles*). He viewed it as representing certain social values that, in the absence of any contrary reasons, supported adopting a particular solution, and only occasionally served to justify an exception to the rule[49].

As previously mentioned, Kaser considered *utilitatis causa* decisions as a special group of cases. In his view, *utilitas* (both on its own and with the adjective *publica*[50]), represented the abstract usefulness of the law (*die Nützlichkeit des Rechts*)[51] serving both to justify new legal institutions as well as to give grounds for resolving casuistic problems. In the latter case, *utilitas* paved the way for the correct interpretation according to the usefulness of the decision for the intended political and legal objectives[52].

One of the most critical assessments of *utilitas* was offered by Dieter Nörr. He argued that its meaning sometimes referred to the common good (*das Gemeinwohl*), and sometimes to the individual interest (*das Einzelinteresse*), but it was never more than an 'emotionally charged (empty) formula' – *die emotional geladene* (*Leer-*)*Formel* – serving as an attempt to justify the proposed decisions[53].

This statement may have prompted Thomas Honsell to explore the categories of 'common good' and 'public interest', of which *utilitas publica* was also a lexical expression[54]. He objected to considering it an empty formula, yet he emphasized that it did

45 Paul. D. 20,1,12.

46 This construction may also signal individual support for a proposed decision. Cf. e.g. Ulp. D. 35,3,3,10 (…) *et puto hoc probandum quod Pomponius, utilitatis gratia* ('and I believe that Pomponius' view should be accepted due to *utilitas*').

47 Ankum focused on this problem in two articles, which were a response to Navarra's study. See again H. Ankum, *The functions of expressions with utilitatis causa…*, pp. 5–22; Idem, *Utilitatis causa en los trabajos…*, pp. 1121–1132. Cf. also M.J. García Garrido, *Navarra, M., Ricerche sulla utilitas nel pensiero dei giuristi romani*, 'Iura' 2003, no. 54, p. 292, who found Navarra's hypothesis extremely interesting and equally difficult to prove on the basis of preserved sources.

48 F. Wieacker, *Offene Wertungen bei den römischen Juristen*, 'ZSS RA' 1977, vol. 94, no. 1, esp. pp. 6, 31.

49 A.M. Honoré, *Legal Reasoning in Rome and Today*, 'Cambrian Law Review' 1973, vol. 4, pp. 61, 66.

50 Ibid., pp. 17, 19, 32.

51 M. Kaser, *'Ius publicum'…*, p. 91.

52 Ibid., p. 24.

53 D. Nörr, *Rechtskritik in der Römischen Antike*, München 1974, pp. 136–138.

54 As he writes in *Gemeinwohl…*, p. 94: *Handelt es sich um Leerformeln und Scheinbegründungen?* ('Is it about empty formulas and apparent justifications?').