

11 November, 2020

## MEMORANDUM

**TO:** 2020 Roman Law Class

**RE:** *Ius gentium* and its relationship to the natural

Here are some thoughts that I put together for a discussion of the above topic. Bobby's paper will be based entirely on Gaius. The texts given here start with Gaius and broaden out.

1. *Ius gentium*/*ius naturale*/*naturalis ratio*/*natura generalities*

G.1.1 (=D.1.1.9): "All peoples who are governed under laws and customs observe in part their own special law and in part a law common to all men. Now that law which each nation has set up as a law unto itself is special to that particular *civitas* and is called *ius civile*, as being proper to the particular civil society (*civitas*). By contrast, that law which natural reason has established among all human beings is among all observed in equal measure and is called *ius gentium*, as being the law which all nations observe."

A basic text. Note that he then goes on to say that he will tag the *ius civile* and *ius gentium* throughout the book, a promise that Gaius at least partially fulfills. He does come back to it at the appropriate point. I think that Gaius's notion may be coherent, though it's not necessarily very precise, i.e., it's not international law; it's not animals.

Before we ask whether Gaius' notion is reasonably coherent, we ought to look at another famous definition of natural law. D.1.1.3: "*Jus naturale* is that which nature has taught to all animals; for it is not a law specific to mankind but is common to all animals—land animals, sea animals, and the birds as well. Out of this comes the union of man and woman which we call marriage, and the procreation children, and their rearing. So we can see that the other animals, wild beasts included, are rightly understood to be acquainted with this law. 4. *Jus gentium* is that which all human peoples observe. That it is not co-extensive with natural law can be grasped easily, since this latter is common to all animals whereas *ius gentium* is common only to human beings among themselves." In D.9.1.1.3 Ulpian tells us a bit more. He's dealing with *pauperies*, the ancient and primitive liability of animals: "*Pauperies* means damage done without legal wrong (*iniuria*) on the part of the doer, and of course an animal cannot do any legal wrong, as it is devoid of reason."

I am attracted to the view that the conflict on this between Ulpian and Gaius can be explained by differing influences of Stoic and Peripatetic thought. We need three more steps: (1) better placing of this in the existing literature, (2) proof that the Stoics really held this view about instinct, and (3) further elaboration to show that it was functional.

While we're on the topic of Ulpian's view of the natural law, we might take a look at D.1.1.6: ULPIAN, *Institutes*, book 1: "The civil law is something which on the one hand is not altogether independent of natural law or *jus gentium*, and on the other is not in every respect subordinate to it; so that when we make addition to or deduction from universal law (*jus commune*), we establish a law of our own, that is, civil law. 1. Now this law of ours is either ascertained by writing or without writing; as the Greeks say, τῶν νόμων οἱ μὲν ἔγγραφοι οἱ δὲ ἄγραφοι (of laws some are in writing and some are not in writing)."

Now at first glance this seems quite inconsistent with Cicero *De republica*: "There is in fact a true law—namely, right reason—which is in accordance with nature, applies to all men, and is unchangeable and eternal. By its commands this law summons men to the performance of their duties; by its prohibitions it restrains them from doing wrong. Its commands and prohibitions always influence good men, but are without effect upon the bad. To invalidate this law by human legislation is never morally right, nor is it permissible ever to restrict its operation, and to annul it wholly is impossible. Neither the senate nor the people can absolve us from our obligation to obey this law, and it requires no Sextus Aelius to expound and interpret it." Is it?

Now let's go back to Gaius' view of natural law. In the process we'll take a look at some other jurists; there's considerable cross-over here.

a. The things that flow from the nature of the thing, i.e. this is the way it is.

GI.2.67 a wild animal which escapes from our grasp recovers its natural liberty.

D.1.1.3 (above). It is in the nature of animals to have sexual intercourse, to procreate children, and to rear them.

D.49.8.3 it is in the nature of a judicial order that it be obeyed.

D.47.2.16 it is in the nature of a lawsuit that it be between 2 parties.

b. Use of the word to describe a natural deduction from a set of circumstances.

G.1.189. By natural reason *impuberes* are under guardianship.

D.50.17.10. In accordance with nature that he who enjoys the benefit should pay the expenses.

D.47.2.16. "That a head of household cannot proceed against his son for theft is not a ruling of the civil law as such; the very nature of the case makes it impossible; for we can no more sue those in our power than we can sue ourselves." The natural consequences of a civil law notion.

GI.2.70.<sup>1</sup> "Alluvial accretions to our land become ours, again by natural law. That is held to be an accretion by alluvion which a river adds to our land so gradually that it is impossible to estimate how much is being added at any particular moment; whence the common saying, that an addition is by alluvion if it is so added at any particular

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<sup>1</sup> Sed et id, quod per alluvionem nobis adicitur, eodem iure [sc. naturali] nostrum fit: per alluvionem autem id videtur adici, quod ita paulatim flumen agro nostro adicit, ut aestimare non possimus, quantum quoquo momento temporis adiciatur: hoc est, quod vulgo dicitur per adluuionem id adici uideri, quod ita paulatim adicitur, ut oculos nostros fallat.

moment; whence the common saying, that an addition is by alluvion if it is so gradual as to be invisible.”

GI.2.73.<sup>2</sup> “Furthermore, what a man builds on my land becomes mine by natural law, although he built on his own account, because a superstructure goes with the land.”

c. In contrast to the *ius civile*:

GI.2.65-66: “65. It appears, then, from what we have said, that alienation takes place sometimes under natural law, as where it is by delivery, and sometimes under civil law; for mancipation, *in iure cessio*, and usucapion are institutions confined to Roman citizens. 66. But it is not only those things that become ours by delivery that we acquire under natural law, but also those that we acquire by occupation (by being the first takers), because they were previously no one’s property, for example everything captured on land, in the sea, or in the air.”

D.12.6.13, the notion of the *naturalis obligatio* of a slave: “13. PAUL, *On Sabinus, book 10*: A slave can incur a natural obligation. Consequently, if someone pays on his account or if, as Pomponius writes, after manumission he himself pays from a *peculium* which he had license to administer, there is no recovery. It follows that a verbal guarantor accepted for a slave is liable and a *pignus* given for him is charged; further, that if a slave with license to administer his *peculium* gives a pledge as security for his debt, an *actio utilis* based on the action for *pignus* must be given.”

The recovery to which Pomponius refers is by way of the *condictio indebiti*, the recovery of money not owed. The text does not say that recovery may be had against the slave after he has been manumitted, but it suggests that it could be.

G.3.194 extraordinary text on the role of natural and civil law, fictions and legal realism, this is the discussion of the XII Tables provision on *prohibiti furti*, which the XII Tables had made into manifest theft.

“The fact that the statute enacts that in such case there is manifest theft causes some writers to say that theft may be manifest by statute or in fact: by statute in the case we are now discussing, in fact in the circumstances previously described. But the truth is that manifest theft means manifest in fact; for statute can no more turn a thief who is not manifest into a manifest thief than it can turn into a thief one who is not a thief at all, or into an adulterer or homicide one who neither the one nor the other. What statute can do is simply this: it can make a man liable to a penalty as if he committed theft, adultery, or manslaughter, though he has committed none of these crimes.”

2. Let’s now take an example of something that doesn’t quite fit into this scheme, the problem of the extension of inheritance to cognatic kin. As in many cases, it is best to begin with the end. JI.3.1.9 tells us that “the praetor, following natural equity, gives possession to [emancipated children] of the deceased merely as children, exactly as if they had been in his power at the time of his death, and this whether they are alone or whether they are *sui heredes* as well.” Later on (3.1.11) he says: “Adoptive [children] are not so well off as natural children in respect of rights of succession; for by the indulgence of the praetor the latter retain their rank as children even after emancipation, although they lose it by the civil

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<sup>2</sup> Praeterea id, quod in solo nostro ab aliquo aedificatum est, quamvis ille suo nomine aedificauerit, iure naturali nostrum fit, quia superficies solo cedit.

law; while the former, if emancipated, are not assisted even by the praetor. And there is nothing wrong in their being thus differently treated, because civil changes can affect rights annexed to a civil title, but not rights annexed to a natural title, and natural descendants, though on emancipation they cease to be family heirs, cannot cease to be children or grandchildren; whereas on the other hand adoptive children are regarded as strangers after emancipation ... ." Finally, in dealing again with descendants this time through the female line, he says (15, 16): "By the ancient law, which favoured the descent through males,, those grandchildren only were called as *sui heredes* and preferred to agnates, who were related to the grandfather in this way ... . But the Emperors would not allow so unnatural a wrong to endure without sufficient correction ..." and so they changed it. Later on he refers to "those had in their favour the provisions of the ancient law as well as natural right ... ." Interestingly, he does not apply this notion to cognates generally, and makes few changes there.

Gaius does not use the phrase "natural equity" at the same point, but he does say, 3.25 that "these inequities of the law [that an emancipated did not inherit with a child *sui iuris*] of the law have been amended by the Praetor's Edict." And in 1.158 he says, "By *capitis deminutio* the tie of agnation is ended, but that of congnation is unaffected, because considerations of civil law can destroy civil but natural rights." Paul in D.38.10.10.4 says "There is the same difference between agnates and cognate relatives as there is between a genus and its species; for a person who is an agnate is also a cognate, but a cognate is not also an agnate same way; for the one expression [derives from] civil and the other from natural law." In D.38.8.2 Gaius is made to say that "the proconsul, urged by natural equity, promises *bonorum possessio* to all cognate relatives called by reason of ties of blood to an estate, even though they fail at civil law." [Interpolationn of the phrase "natural equity" is strongly suspected.]

I have doubts as to where in this scheme the cognatic/agnatic problem belongs, but I am struck with how influential the idea has become by Justinian's time, and it is hard not to see here the greater influence of Greek ideas, which, by this time, had also become Christian ideas.

The question is whether Justinian was seeing something that wasn't already there, hinted at explicitly (Gaius and Paul, but not Ulpian, who describes what the praetor did as benevolent) and in any event clearly there implicitly. Thus, when we generalize about the praetorian moves we say that they were prompted by "natural equity," combining the equity notion that seems to have underlain the first move (children) and the "natural kin" notion that seems to have underlain the second (cognates and agnates). But there are already hints of this in Gaius. It's just that, assuming that "natural equity" is an interpolation, there's no evidence that any classical jurist put the two ideas together.

If we come to that conclusion we might also ask to what extent by Justinian's time Ulpian's, as opposed to others', definition of natural law was not playing a significant role. To set up one's kinship system this way is to focus on the act of procreation itself, i.e., to focus on what men have in common with animals.

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