GENERAL JURISTIC IDEAS

1. I want to turn now to some of the more general ideas which appear in juristic writing. All of these have a brilliant future, many in a form which would have been unrecognizable to the jurists. Some of these ideas also had a brilliant past. My focus here, however, is on how the jurists used these ideas. When we look to the abstractions of what is normally called "legal philosophy", such as definitions of justice, what the jurists say is pretty poor stuff, for three reasons: (1) It's totally unorginal; (2) it's inconsistent and the inconsistencies are unexplored; and (3) it's not operative when they come to do their task. This is a pretty standard criticism. I am perhaps a bit more indulgent.

2. The concept of justice:

   D.1.1.1.pr: "A law student at the outset of his studies ought first to know the derivation of the word *ius*. Its derivation is from *iustitia*. For in terms of Celsus's elegant definition, the law is the art of goodness and fairness (*ius est ars aequi et boni*)."

   An empty rhetorical phrase per Schulz; maybe a bit more than that; Celsus the definer, Javolenus on the danger of definitions (D.50.17.202 (p. X.9)): "Every definition in civil law is dangerous; for it is rare for the possibility not to exist of its being overthrown."; the focus on *ars*. This may be a juristic invention. Check article on this in Wieacker *Symposion 75*.

   D.1.1.10.pr–1: Iustitia est constans et perpetua voluntas ius suum cuique tribuendi. 1. Iuris praecepta sunt heac: honeste vivere, alterum non laedere, suum cuique tribuere. 2. Iuris prudentia est divinarum atque humanarum rerum notitia, iusti atque iniusti scientia. (A philosophical plaything: Schulz, Legal Science, pp. 135–6.) The definition of justice is Greek. It probably comes by way of Cicero's *De inventione* 2.53.160: "Iustititia est habitus animi ... suam cuique tribuens dignitatem," which is close to a translation of Stobaeus, *Eclog*. 2.59.4 (Stoic but it is not far from Aristotle.) What it lacks is Artistotle's notion of the distinctions among the different kinds of justice (e.g., commutatitive and distributive). The three precepts of the law come from Cicero's *De legibus* 1.6.18. Cicero in the *De finibus* helps us a little bit by saying that the Stoics say that to live honestly is to be consonant with nature. He also tells us that *alterum non laedere* is the opposite of *suum cuique tribuere*. The definition of jurisprudence seems to be derived from Greek sources without the intermediary of Cicero, so far as we know. It has little or no function with the jurists. If they had followed it, they would have written books like Plato's *Laws*, not what they did write. Cicero, *De legibus* "Law is the highest reason, implanted in Nature, which commands what ought to be done and forbids the opposite. This reason, when firmly fixed and fully developed in the human mind, is Law.

3. Political ideas of the jurists: *princeps legibus solutus*.

   D.1.3.31: Ulpian, bk. 13 on the *lex Julia et Papia*. "The emperor is not bound by statutes. And though the empress is not freed from statutes, the emperors, nonetheless, give her the same privileges as they have themselves." What did this mean in 200 A.D. when Ulpian wrote it? Book 13 not book 1. The "laws" plural could mean nothing more than the Julia and the Papia. Private vs. public. The emperor's powers of adjudication.

   The *lex de imperio Vespasiani* "(7): And that by whatever laws or plebiscites it has been recoreded that the deified Augustus or Tiberius <Julius Caesar Augustus> and <Tiberius> Claudius <Caesar Augustus Germanicus> were not bound, from these laws and plebiscites Emperor Ceasar Vespasian shall be exempt; and whatsoever things it was proper for the defied

Augustus or Tiberius <Juluius Ceasar Augustus> or <Tiberius> Caludius <Ceasar Augustus Germanicus> to do in accordance with any law or proposed law, it shall be lawful for Emperor Caesar Vespasian Augustus to do all these things." Might say a word about *regulae juris*.

4. Ius gentium/ius naturale/naturalis ratio/natura

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 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.

G.2.65 ff. alienation by natural law, i.e. *traditio*. Things acquired by natural reason, i.e., occupation. Natural liberty of the escaped animal. *Adluvio* (accretion) by natural law. *Naturali jure superficies solo cedit*. Summarize the following headings before doing the texts.

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

D.1.1.3: "*Jus naturale* is that which nature has taught to all animals; for it is not a law speific 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 it 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."; D.9.1.1 Ulpian and animals.

I am attracted to Mr. Kroger's 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.

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. Ne cum filio familias pater furti agere posse, non iuris constiutio set natura rei impedimento est, quod non magis cum his quos in *potestate habemus, quam nobiscum ipsi agere possumus.* The natural consequences of a civil law notion.

c. In contrast to the *ius civile*. Arrange this way:

The notion of the *naturalis obligatio* of a slave but enforceable against a surety and no *condictio indebiti* perhaps enforceable after manumission [texts in Forte paper in 1977].

D.12.16.13 (in materials, X.4), the problem of slavery

*G.3.194 extraordinary text on the role of natural and civil law, fictions and legal realism (p. II.A.68), 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 mmore 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."

5. Let me 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. J.I.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 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 congation 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 and the "natural kin" notion that seems to have underlain the second. 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.