Regulae Iuris and Legal Principles: Whence and Whither?

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Sometimes jurists arrive at *regulae iuris* or legal principles in a thoughtful way by abstracting or generalizing from particulars, and then apply them in a thoughtful way by considering their implications. Peter Stein described two ways in which he believed that the Romans did so in his classic, *De Regulae Juris*. One is the method of Aristotle in which first principles are found by abstraction and applied though deduction, although Aristotle himself believed that this was the method of theoretical rather than practical reason. Stein explained:

> 'We begin by accumulating experience . . . From the stage of experience we pass to the stage of science by finding the common element in the particular cases which have been observed.' Discovery of this common element is 'the method by which first principles are reached. . . . The final act of insight, whereby we are led on to recognise the principle which lies behind all the particular instances, is itself an act of intuition (üoúς)' This act of intuition, by which the first principles are grasped, makes deduction possible.[1]

Stein also described a method of generalization which he said was characteristic of the common law but also used by the Romans. After a number of particular cases are decided, a principle or rule is formulated which best explains their outcomes, although the rule is always subject to revision when cases arise which it cannot explain.

> In Anglo-American legal systems case law is based on decisions, and the rule that can be deduced from a decision is called the ratio decidendi. This is not necessarily the rule which was formulated by the judge who made the decision in question . . . . The finding of similarity and difference in the material facts [of the cases that have previously been decided] is the key step in the process of developing a rule of the common law. . . . 'A certain formulation may be adopted which provisionally sums up the effect of certain decisions . . . and is then discarded in favour of another formulation.'[2]

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1. Peter Stein, Regulae Iuris *From Juristic Rules to Legal Maxims* (Edinburgh, 1966), 34-36.

2. Ibid. 103-04.

I do not doubt that sometimes legal principles have been identified and applied in these thoughtful ways by the Romans and, more often, by their medieval and modern successors. In a more orderly world, it would be more often so. Here, however, I will consider instead some less thoughtful ways in which legal principles are identified and influence the law.

As Stein noted, many of the rules collected by Justinian's compilers in the final title of the Digest, *De diversis regulis iuris antiqui*, were lifted out of their original context. Sometimes one might charitably believe that the principle arose through abstraction or generalization. But sometimes the context has too little relationship to the scope of the principle. David Daube noted that Justinian's compilers extracted the famous principle "the prince is not bound by the law"[3] from a law of Augustus penalizing unmarried eligible bachelors.[4] He was not bound by that law. Medieval jurists did the same even when they could see the context from which they were extracting the principle. The glossators held that ultimate political authority belonged to the Holy Roman Emperor as successor of the Caesars, citing a Roman text that said, "I am the lord of the earth." In its original context, the emperor was contrasting the force of Roman civil law, which prevailed on land, with the law of the sea.[5] The standard gloss to the *Decretals*, an authoritative collection of papal letters, repeated: the emperor "is the *princeps* of the world and its lord."[6] The canon law adopted another principle which was used to limit this one: "that which touches all should be approved by all."[7] In its original context in Roman law, this phrase appeared as an explanation of why all the tutors had to give their consent for their responsibilities to be ended.[8]

The Roman jurists' descriptions of contractual consent illustrate another way in which some legal principles arose: they were presented as common sense explanations of more particular rules. Ulpian said (quoting Pedius), "there is no contract, no obligation that does not consist of consent, whether it is formed by the handing over of something or by the use of certain words . . . ."[9] He said that "it is obvious that there must be consent" in a sale before describing errors in price, in the type of

3. Dig. 1.3.31.

4. David Daube, "Interpolations in the Centos and Justinian" in *Flores Legum H.J. Scheltema Antecessori Gruningano Oblati* (Groningen, 1971), 45 at 45.

5. Dig. 13.2.9.

6. *Glossa ordinaria* to X 1.6.34 to *in Germanos*.

7. VI Regulae iuris Rule 29 (Quod omnes tangit, debet ab omnibus approbari).

8. C. 5.59.5 (necesse est omnes suam auctoritatem praestare, ut, quod omnes similiter tangit, ab omnibus comprobetur).

9. Dig. 2.14.1.3.

transaction, error in the physical object sold, and error in whether the object sold is gold or copper or wine or vinegar.[10] He did so without explaining what constituted consent or why only some Roman contracts were binding upon consent.

Other legal principles were taken from Greek philosophy although their meaning was not understood, or at least not explained. If copper was sold for gold, Ulpian said that consent was lacking because their *substantia* was different, although a sale was valid when wine had gradually soured to vinegar because their *ousia* or essence was much the same.[11] That explanation would not have made sense to a Greek philosopher. Modern scholars believe that when Gaius distinguished *contractus* from *delictus*, he borrowed Aristotle's distinction between voluntary and involuntary commutative justice.[12] Without exploring the implications of that concept, however, he then described the rules governing the particular contracts recognized at Roman law.[13]

Other principles were amateur philosophical speculations. The Romans distinguished between rules that applied to litigants regardless of their nationality such as the law of sales and others that applied only to Romans. The former belonged to the *ius gentium* and the latter to the *ius civile*. According to Justinian's revision of Gaius' *Institutes*, the *ius gentium* is the law "established among all men by natural reason."[14] The *ius gentium* emerged in response to human necessities; to it pertain such things as war, captivity, and slavery, since by the law of nature all were born free. "And by the *ius gentium*, nearly all contracts were introduced such as sale and purchase, lease and hire, partnership, loan for consumption and others without number."[15]

These principles did not arise through a thoughtful process of abstraction or generalization.. Neither were they applied by the Roman or medieval jurists by thoughtfully considering their implications. For the Roman jurists, as Stein recognized, general principles did not matter much

10. Dig. 18.1.9.
11. Dig. 18.1.9.
12. Reinhard Zimmermann, *The Law of Obligations Roman Foundations of the Civilian Tradition* (Capetown, Juta, 1990), 10-11; Max Kaser, *Römische Privatrecht* (München, 1959), 522; A.M. Honoré, *Gaius* (Oxford 1962), 100; Helmut Coing, "Zum Einfluß der Philosophie des Aristoteles aud die Entwicklung des römischen Rechts," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Rom. Abt.* 69 (1952) 24-59.
13. G. Inst. 3.88
14. I. 1.2.1. The same phrase appears in Dig. 1.1.9.
15. I. 1.2.1.

because their method was casuistic.[16] As I have described elsewhere,[17] they refined general concepts not by defining them, but by giving examples of their particular application. To explain consent, they put cases of copper sold for gold or vinegar for wine.[18] To explain negligence, they put cases of tree branches cut over public streets,[19] muleteers losing control of their animals,[20] and bear traps set in unexpected places.[21] To explain when possession was transferred, they put cases of goods delivered to someone's door[22] and land viewed from a nearby tower.[23] The premise was that one could discern the right result in a particular case even if one could not formulate the general principle that explains the result. It must be so, or the Roman jurists would not have been able to develop a law on which so much of our own is based.

For the medieval jurists, every text mattered because the texts were authorities, and the authority of a jurist rested on his mastery of these texts.[24] Sometimes the jurists pursued the logical implications of a text but often they did not. It was enough to cite the authority.

The general principles that were anchored in their authoritative texts often became important precisely when texts concerning specific applications were lacking. The Roman jurists said much more about private law than public law. The study of medieval political thought has been frustrating for modern scholars because it looks so little like the political theory to which we have become accustomed. There often seems to be no theory in the sense of a systematic development of principles and their implications. The reason is not the absence of principles. The glossators and commentators said that the emperor ruled the world, and so had ultimate political authority; that he was not bound by the law he had made; and that he ought at least consult on matters that concerned the interests of all. They disagreed about the scope of these principles, and yet, they did not resolve their disagreements by formulating competing theories.

In contrast, when the authoritative texts to govern particular matters were plentiful, the medieval jurists would state the general principles but

16. Stein, Regulae Iuris 102.
17. James Gordley, *The Jurists A Critical History* (Oxford, 2013), 7-18.
18. Dig. 18.1.9.
19. Dig. 9.2.31.
20. Dig. 9.2.8.1
21. Dig. 9.2.28.pr.; see Dig. 9.2.29.pr.
22. Dig. 41.2.18.2.
23. Ibid.
24. Gordley, *Jurists* 28-51.

allow them to be trumped by these texts. By juxtaposing the Roman texts mentioned earlier, Accursius concluded that all contracts give rise to an obligation upon consent according to the law established by natural reason, although the obligation was natural and not civil.[25] Whether he had expressed a new insight or merely clarified those of the Roman jurists, he had reached a conclusion which, at most, was only implicit in the texts. Nevertheless, neither he nor others questioned that only some contracts were binding on consent even though this conclusion seemed odd. As Jacques de Revigny said, "if a layman were to ask the reason for the difference it could not be given because it is merely positive law."[26] To explain when consent was absent, Accursius merely listed the types of errors that invalidated consent according to Ulpian.[27] The list included error in substance or essence but Accursius did not explain what these terms might mean.

Beginning in the sixteenth century, European jurists began to use principles in the manner to which we are accustomed: to explain and justify rules and doctrines. Yet their use of the principles just mentioned was not evenhanded. They used them when they could fit them into a larger theory and reinterpreted or disregarded them when they could not.

The late scholastics, writing in the sixteenth and early seventeenth century, explained as much as they could by the philosophical principles of their intellectual heroes Aristotle and Thomas Aquinas. For those philosophers, man is a social animal. Consequently, every society can establish a government endowed with political authority. Therefore, the emperor is not lord of the world. Vitoria said that "this contention is baseless,[28] Domingo Soto and Francesco Suárez that that contention is wrong,[29] and Luis de Molina that it is "obviously ridiculous."[30] Molina said that if the people establish a monarchy, it can impose whatever "laws that it wished to limit, extend or diminish his power . . . ."[31] The monarch is bound by such a law. In contrast, it was perfectly correct that *quod*

25. *Glossa ordinaria* to I. 3.14 pr. to *necessitate.*

26. Iacobus de Ravanis, *Lectura Super Codice* (published under the name of Petrus de Bellapertica, 1519) to C. 4.64.3.

27. *Glossa ordinaria* to D 18.1.9 to *aliquo alio.*

28. Franciscus de Vitoria, *De Indiis insulanis relectio prior* (2nd. ed.), no. 25, in *Relecciones Teológicas del Maestro Fray Francisco de Vitoria* 2 (Luis Alonso Getino, ed., Madrid, 1934), 348.

29. Domenicus de Soto, *De iusitia et iure libri decem* (Salamanca, 1553). lib. 4, q. 4, a. 2; Franciscus Suárez, *Defensio fidei catholicae et apostolicae adversus Anglicanae errores* (Coimbra, 1613), lib. 3, cap. 2.

30. Ludovicus de Molina, *De iustitia et iure tractatus* (Venice, 1614), II, disp. 30.

31. Ibid. V, disp. 3, no. 2.

omnes tangit, debet ab omnibus approbari. Bartolomé de Las Casas cited that principle to support the theory that governments derive their authority from consent: "free people or community accepting a burden had to give their free consent; all whom the matter touched should be called."[32] In 1775, the American colonists cited it in the controversy over taxation without representation.[33]

The late scholastics cited Roman law for the principle stated by Accursius: all contracts are binding by consent according to the law established by natural reason. Unlike Accursius, they concluded that the Roman distinction between nominate and innominate contracts was wrong. Molina said that "everything, indeed, concerning . . . nominate and innominate contracts that was invented and introduced by the pagans more subtly than usefully should be abolished."[34] The late scholastics cited Ulpian for the proposition that a consent was vitiated by an error is substance or essence. They gave this principle an Aristotelian interpretation: since what a thing is depends on its substance or essence, a person who made such an error literally did not know what he was doing.[35] In that case, how could it be, as Ulpian said, that wine and wine soured to vinegar had much the same essence? The answer, according to Molina, is that Ulpian was wrong. A matter of natural law, he explained, does not depend on the authority of a jurist, and so a jurist who is mistaken should not be followed.[36]

One can carry the story into the nineteenth century when what survived of the earlier Aristotelian approach to contract law was rejected in favor of will theory. Savigny, like the late scholastics, cited the Roman texts to show that contracts were formed by consent. He rejected the Roman distinction between nominate and innominate contracts. Unlike the late scholastics, he also rejected the principle that consent is vitiated by an error in substance or essence. He tried to explain Ulpian's examples by a different principle: a lack of agreement or *Übereinstimmung* between the will and a party's declaration of what he willed.

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32. Brian Tierney, *Studies on Natural Rights, Natural Rights and Church Law, 1150-1625* (Atlanta, 1997), 272-84.

33. Peter Landau, "The Origin of the Regula iuris 'Quod omnes tangit' in the Anglo-Norman School of Canon Law during the Twelfth Century," *Bulletin of Medieval Canon Law* 32 (2015), 19 at 20.

34. Molina, *De iustitia et iure tractatus* II, disp. 258.

35. Lessius, *De iustitia et iure* lib. 2, cap. 18, dub. 17; Molina, *De iustitia et iure* II, disp. 340, no. 15.

36. Molina, De iustita et iure II, disp. 340, no. 15.

I chose the legal principles that I have discussed in order to make a point. A principle need not arise through an intellectually respectable process of abstraction or generalization. If it influences the law, which it may not, the influence may not be due to an intellectually respectable attempt to explore its implications. Moreover, when such an attempt is made, a principle may triumph because it happens to fit a theory in which a jurist believes for reasons independent of the origin or authority of the principle. Principles that do not fit may be disregarded.

One might think that legal principles of this sort are useless. I disagree, despite everything I have just said. Such principles capture a truth, or more accurately, an aspect of the truth, that makes sense to us intuitively, regardless of its intellectual pedigree and independently of its specific applications. Contracts are made by consent. Yet, it is difficult to explain when and why. In the last five years, four leading treatises have been published by major academic presses that have one feature in common: they agree with that proposition but cannot explain consent in a manner that other contracts theorists will accept.[37] Even the proposition that a contract is invalid when a party made an error in essence passed into the German Civil Code[38] *faute de mieux*.[39] Legal positivists returned to the proposition that there must be some ultimate legal authority which is not bound by its own law, whether one ascribes this authority to parliament or to constitutional amendment or to a *Grundnorm*. Few today believe that any political authority is lord of the earth. Yet, especially during the Cold War, many pointed out how convenient it would be if it were so.

The way that the human mind works, it is often easier to see the appropriate result in a particular case than to formulate the general principle that explains the result. The work of the Roman jurists is a good illustration. Conversely, it is often easier to see that over some range of cases, a general principle must be correct although one cannot explain to what cases it should apply or the grounds on which it rests. In both cases, the truth grasped is partial but often we must make do with partial truths.

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37. Hanoch Dagan and Michael Heller *The Choice Theory of Contracts* (Cambridge, UK, 2017); Melvin Eisenberg *Foundational Principles of Contract Law* (Oxford, 2018); Peter Benson *Justice in Transactions: A Theory of Contract Law* (Cambridge, Mass., 2019); Peter Gerhart *Contract Law and Social Morality* (Cambridge, UK, 2021), (2012).

38. BGB § 138(2).

39. See Bernhard Windscheid, § 76a; James Gordley, *The Philosophical Origins of Modern Contract Doctrine* (1991), 190-97.