

THE ELEGANT BUT INDEFINABLE LEGAL ART

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D 1 1 1pr, *Ulpianus libro primo institutionum*: “Iuri operam daturum prius nosse oportet, unde nomen iuris descendat. Est autem a iustitia appellatum: nam, ut eleganter Celsus definit, ius est ars boni et aequi.”¹

There was a king who charged one sage at his court with the task of listing all animals living in the kingdom. The man accepted the work and began to list all things that he thought were animals, such as apes, cows, pigeons, butterflies and others. Of course, he did not list flowers, trees, algae and stones, because he was convinced that those were not animals. Yet he was not sure how to classify amœbae, corals, human beings and others. For a long time the sage poured over many books, but he could not find a solution. Then the king asked him for the results of his work. The sage thought of his starving children and feared losing his position. Then he had a brilliant idea: an animal is anything that I put on my list. And he added bushes, cars, stars, water and plenty of other items. If the sage is still alive, he is certainly still working for the king.²

This story comes to mind when one considers all the philosophers and legal scholars who have attempted over many centuries to define *ius*; especially when one reads the passage cited above in which Ulpian said that Celsus “defined” *ius* as the *ars boni et aequi* and did it *eleganter*. This statement is in fact very appealing, but as a definition it is questionable.

Let us now consider the issue.

a *Elegantia*

At the beginning it is expedient to bear in mind the Roman concept of elegance.

1 See, also, D 1 1 11, *Paulus libro quarto decimo ad Sabinum*: “Ius pluribus modis dicitur: uno modo, cum id quod semper aequum ac bonum est ius dicitur, ut est ius naturale. altero modo ...”

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According to Hans Wieling³ of the University of Trier, *elegantia* is an aesthetic, not a legal term. The positive connotation⁴ of *elegantia* is that of fine and graceful conduct. But when the Roman jurists said that a case had been judged *elegantiter*, they meant that the judgment was good and fair; and if they said that a jurist's opinion was *elegans*, it meant that he had handled the case accurately and properly.

Expressions like *elegantia*, *elegans*, *elegantissime* are recurring ones in Roman-law texts. They give the jurists' statements a special grace and tone, but express no more than a secondary aspect.

Thus when Ulpian used the adverb *elegantiter* in referring to Celsus' "definition", it is certain that he wanted to say that it was a fortunate assertion.⁵

b Art

Celsus was correct when he wrote that *ius* is an "art"; it is truly an art. Besides, the concepts of art and elegance are akin, since elegance is essential to art. Radbruch⁶ says that law and art need each other. Language, gestures, symbols, and other means of expressing the law require an aesthetic evaluation.

Yet law and art are sometimes sharply divided. The language of the law is dry and to the point when it commands people to do or not to do something. Its precepts are expressed in a harsh way. For example, the Twelve Tables prescribed: "Aduersus hostem aeterna auctoritas esto". Si pater filium ter uenumduit, filius a patre liber *esto*. Si membrum rupsit, ni cum eo pacit, talio *esto*. Patronus, si clienti fraudem faxit, sacer *esto*. Priuilegia *ne irrogato*. Hominem mortuum ... in urbe *ne sepelito neue urito*."

However, when in real life a lawyer has to prepare a case with reference to a legal text, he must use a very different tone. Melodious rhetoric is required so that art serves the law, which becomes quite elegant. Cicero reports that, in his boyhood, he and his companions used to recite the Twelve Tables from memory.⁷ They probably did it in monotonous voices, very different to the sounds of his passionate rhetoric against Verres or Catiline. In other words, whoever has to engage with the law must do it like an artist, whether poet, painter or musician.

The contrast between legal prescripts and the language in which the law is discussed is universal. It is enough to read the Bible to notice this difference. The Ten Commandments, for example, order in a direct manner: "you shall not commit adultery"; "you shall not give false testimony against your neighbour". However, we find classic

3 H Wieling "Eleganz und Sachzwang im Römischen Statusrecht" (2005) 11(1) *Fundamina (editio specialis Ex iusta causa traditum Essays in Honour of Eric H Pool)* 415-424.

4 Wieling (*idem passim*) also states the word's negative meanings: pretentious, arrogant, vain.

5 HA Ankum "Elegantia iuris" (1971) 28(1) *Revue de la Faculté des Droit de l'Université d'Ankara* 341-353 at 347. See, also, <http://auhf.ankara.edu.tr/dergiler/auhfd-arsiv/AUHF-1971-28-01-04/AUHF-1971-28-01-04-Ankum.pdf> (accessed 1 Sep 2013).

6 G Radbruch *Rechtsphilosophie. Studienausgabe 2* ed by R Dreier & SL Paulson (Heidelberg, 2003) at 103-105.

7 Cicero *De Legibus*.

examples of the elegant style of judges, kings, prophets and the like, when dealing with legal questions.

One is the famous judgment of Solomon when each of two women claimed a baby as her own;⁸ the dramatic tale of the chaste Susanna is another. This classic “courtroom drama” (although not in a courtroom) is a theatrical masterpiece demonstrating how to overcome the harsh commandment “You shall not commit adultery”, which proved fatal for many, especially women.⁹ These two stories teach the art of how to adapt the aridity of a legal precept to the flamboyance of reality.

Thus a lawyer must be not only a good logical thinker, but also needs the intuition and sensibility that dwell only in an artist’s soul, because life has various landscapes, some lyric, some tragic, some amusing, which compose the scenario in which the legal rule encounters the facts. To blend the two requires ingenuity and skill. The living reality to

8 1 Kings 3: 16 Now two women who were harlots came to the king, and stood before him. 17 And one woman said, “O my lord, this woman and I dwell in the same house; and I gave birth while she was in the house. 18 Then it happened, the third day after I had given birth, that this woman also gave birth. And we were together; no one was with us in the house, except the two of us in the house. 19 And this woman’s son died in the night, because she lay on him. 20 So she arose in the middle of the night and took my son from my side, while your maidservant slept, and laid him in her bosom, and laid her dead child in my bosom. 21 And when I rose in the morning to nurse my son, there he was, dead. But when I had examined him in the morning, indeed, he was not my son whom I had borne.” 22 Then the other woman said, “No! But the living one is my son, and the dead one is your son.” And the first woman said, “No! But the dead one is your son, and the living one is my son.” Thus they spoke before the king. 23 And the king said, “The one says, This is my son, who lives, and your son is the dead one; and the other says, No! But your son is the dead one, and my son is the living one.” 24 Then the king said, “Bring me a sword.” So they brought a sword before the king. 25 And the king said, “Divide the living child in two, and give half to one, and half to the other.” 26 Then the woman whose son was living spoke to the king, for she yearned with compassion for her son; and she said, “O my lord, give her the living child, and by no means kill him!” But the other said, “Let him be neither mine nor yours, but divide him.” 27 So the king answered and said, “Give the first woman the living child, and by no means kill him; she is his mother.” 28 And all Israel heard of the judgment which the king had rendered; and they feared the king, for they saw that the wisdom of God was in him to administer justice.

9 The story, told in the Book of Daniel (Greek translation) ch 13, takes place in Babylon. Susanna, the heroine, is described as a beautiful and devout woman. Yet two elders, who had been appointed as judges, lusted after Susanna. They hatched a plan to seduce her. They ran to her in the garden of her house where she bathed, told her how much they wanted her, and asked her to yield to them. They knew she had few choices. If she refused, they would accuse her of meeting a young man in the garden while bathing. Susanna lamented her situation. Yielding to them would be sinning against God; not yielding would be to sign her death sentence. She chose the latter, hoping they would be merciful. They were not. Everyone was shocked to hear their accusations but, because the accusers were men and respected judges, no one questioned their motives. Susanna was immediately condemned to death; when she protested her innocence no one listened. Then she cried out to God, who inspired the young Daniel to suggest that the two men be interrogated separately. And Daniel cried: “Don’t kill the innocent or the righteous.” They were each asked: “Under which tree did you see them together?” The first man said it was a clove mastic tree, which is a small bush. Daniel said God would send the angels to cut him in two. The other man said it was an oak tree, which is very large. Daniel said God would cut his head off. Upon hearing this discrepancy, the people knew their witness was false. They shouted for joy and praised God for saving those who trusted in him. Susanna was released and the men were put to death for giving false testimony against their neighbour.

which the law must be applied is kaleidoscopic, as the famous Justice Holmes described it, when he wrote:

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become.

We must alternately consult history and existing theories of legislation. But the most difficult labor will be to understand the combination of the two into new products at every stage. The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient; but its form and machinery, and the degree to which it is able to work out desired results, depend very much upon its past.¹⁰

A legal professional must be a virtuoso who displays most of his art when doing his job. He must do it elegantly, as the good Roman jurists did.

Peter Stein asserts that:

An opinion was elegant if it combined simplicity of application with an awareness of the realities of the situation. Elegance for the Roman jurist meant the technical mastery of the substance of the law, without any apparent effort or ostentation and directed towards improving the working of the law, such an effortless demonstration of professional expertise produces an aesthetic satisfaction in those who know enough about the subject to appreciate its quality.¹¹

Dealing with the law is like swordsman's art. The word "litigation", used to describe law-suits, means to *go to a fight*. That is what Frank¹² teaches when he states as follows:

'Litigation' derives from two Latin words, *litis* and *ago*. The first, *litis*, means contention, strife, quarrel. *Ago* means 'to go'.¹³ So, apparently, *litigo* – from which we get our word litigate – originally meant to 'to go to it' in a quarrel, or to carry on a quarrel, to dispute, to engage in strife, to brawl – and later, 'to go to law' in the sense in which that phrase is

10 Oliver Wendell Holmes *The Common Law* available online from Project Gutenberg at http://www.gutenberg.org/catalog/world/readfile?fk_files=3198728 (accessed 1 Sep 2013) Dec 2002 at 1; Rudolf von Jhering *Geist des Römischen Rechts* vol 3, 9 ed (Leipzig, 1906) in par 59 at 21) had already written some years before: "Sprengen wir die Felsen, in denen der Irrwahn uns gefangen hält. Jener ganze Kultus des Logischen, der die Jurisprudenz zu einer Mathematik des Rechts hinaufzuschrauben gedenkt, ist eine Verwirrung und beruht auf einer Verkennung des Wesens des Rechts. Das Leben ist nicht der Begriffe, sondern die Begriffe sind des Lebens wegen da. Nicht was die Logik, sondern was das Leben, der Verkehr, der Rechtsgefühl postuliert, hat zu geschehen, möge es logisch deduzierbar oder unmöglich sein. Die Römer hätten verdient in Abdera zu wohnen, wehn sie je anders gehalten und die Interessen de Lebens der Schuldialekt zum Opfer ebracht hätten."

11 "Elegance in law" (1961) 77 *Law Quarterly Review* 242-255 at 244.

12 J Frank *Courts on Trial* (Princeton, 1973) at 5.

13 The real meaning of *ago* is to drive/urge/conduct/act, not to go.

now popularly used. And *litigious*, referred to a person full of strife. Litigation, then, is strife. A law-suit is a kind of fight or combat.

Frank further cites a French judge who regards the modern legal process as just another kind of war, namely a “mimic warfare”.¹⁴

That seems to be what Jhering¹⁵ has in mind, when he urges people to fight for their rights with great enthusiasm. In his famous paper presented to the Viennese Society of Jurists on 11 March 1872, the quintessence of his speech was the statement that:

To disclaim a disrespected right is an act of cowardice that entails dishonour for the person and the greatest harm for the community; the struggle for the right is an act of ethical self-affirmation, a duty before oneself and the community.

c Definition of *ius*

A definition is a statement of the essence of a thing, which pierces the veil of the concept. It exposes the sense of a word or the nature of something, to permit the comprehension of an idea, by explaining the meaning of a term (it may be a word, a phrase, or other set of symbols). A sketch of an idea, illustrating its chief elements, shows its *genus proximum* and highlights specific differences from it and also distinguishes it from similar ideas. So the process includes both assimilation and a differentiation.

We cannot define everything. Some notions are incapable of being defined. As St Augustine wrote of time, he knew what it was, but if someone asked him what it was, he did not have an answer.¹⁶ Indeed, we can experience and measure seconds, minutes, hours, days, etcetera as time passes, but we cannot explain what time is. As Jesus said to Nicodemus: “The wind blows wherever it pleases. You hear its sound, but you cannot tell where it comes from or where it is going.”¹⁷

Similarly some things run through our minds but we cannot define them; and so it is with *ius*. All people know that their lives in society are lived within a legal framework: *ubi societas, ibi ius*, and vice versa.¹⁸ Everyone must comply with some rules, no matter who issued them, and knows that officials will constrain people to obey such commandments.

14 See Frank (n 12) at 8.

15 See J von Jhering *Der Kampf ums Recht* (lecture presented at the Wiener Juristischen Gesellschaft on 11 Mar 1872): “Das Preisgeben eines verletzten Rechtes ist ein Akt der Feigheit, der der Person zur Unehre und dem Gemeinwesen zum größten Schaden gereicht; der Kampf für das Recht ist ein Akt der ethischen Selbst-erhaltung, eine Pflicht gegen sich selbst und die Gemeinschaft.”

16 Augustine (of Hippo) *Confessiones* 11 14 17: “Quid est enim tempus? Quis hoc facile breviterque explicaverit? Quis hoc ad verbum de illo proferendum vel cogitatione comprehenderit? Quid autem familiarius et notius in loquendo commemoramus quam tempus? Et intellegimus utique cum id loquimur, intellegimus etiam cum alio loquente id audimus. quid est ergo tempus? Si nemo ex me quaerat, scio; si quaerenti explicare velim, nescio.”

17 John 3:8.

18 A Levi *Teoria Generale del Diritto* (Cedam, Padova, 1967) at 37-38, after professing not to know the origin of this aforism, adds: “Da quell’ aforismo si evince che la società è considerata, non come causa, bensì come condizione, necessaria e sufficiente, per il manifestarsi del diritto.”

Everyone knows that there are judges who decide disputes between conflicting parties, or inflict punishment on lawbreakers.

The knowledge of some rights and duties is also universal. Ulpian says that there are rights rooted in natural law of which the very animals seem to be aware. These rights appertain not only to human beings but to every creature born on earth or in the seas, and to the birds, as in the joining of a male with a female, which is called matrimony, the breeding and nurturing of the offspring.¹⁹ Of course, that is a metaphor signifying that some rights must be recognized even if no positive law affirms them.

But everyone is aware of the existence of positive laws that grant other rights besides the natural ones.

Furthermore we sense that laws, rights, duties and the like form an ideal conglomerate, but we cannot make a clear synthesis of this cluster.

For Jhering, the acceptance of a being (*Sein*) has to be related to the question of its rise and end. The acceptance of a body is tied to the question of its nature, quality, destination, powers, properties, and similarities or differences in relation to other bodies, and their connections or conflicts. The first task in researching a legal body is to ask whether it is autonomous or dependent on another. The indication of what a body is, is tantamount to its concept; and the concept grasps its essence and defines it, thus separating it from others, and giving it its own logical meaning. Therefore the concept contains the body's logical quintessence, its core or individual point. However, the perception and the formulation of a concept must not be confounded, since the perception may be correct while the definition may be incorrect. The Romans, who were at ease with their concepts, admitted that nonetheless their definitions were not always satisfactory.

The difficulty in defining the legal phenomenon is, firstly, its double profile.

Objectively, it is the rule enacted by a person or corporate body, having the power to create rules, in order to control the behavior of members of a community. In English, it is called *law*. It gives people a way of acting or a *facultas agendi*, which the English call *right*, and this constitutes the subjective aspect of the legal phenomenon.

When, throughout the centuries, legal thinkers tried unsuccessfully to solve the riddle of this double-faced sphinx which, like the god Janus, has two profiles, representing an

19 D 1 1 1 3, *Ulpianus libro primo institutionum*: "Ius naturale est, quod natura omnia animalia docuit: nam ius istud non humani generis proprium, sed omnium animalium, quae in terra, quae in mari nascuntur, avium quoque commune est. hinc descendit maris atque feminae coniunctio, quam nos matrimonium appellamus, hinc liberorum procreatio, hinc educatio: videmus etenim cetera quoque animalia, feras etiam istius iuris peritia censi." However, Hermogenian contradicts this rhetorical statement by Ulpian in asserting, in another place, that every right has been created on account of human beings (D 1 5 2, *Hermogenianus, libro primo iuris epitomatorum*): "Cum igitur hominum causa omne ius constitutum sit, ...". So animals cannot have any rights or duties, in spite of some hints in the Twelve Tables of their legal liability, to which Justinian refers in Inst 4 9: "Animalium nomine, quae ratione carent, si quidem lascivia aut fervore aut feritate pauperiem fecerint, noxalis actio lege duodecim tabularum prodita est." According to Suetonius and Dio Cassius, Caligula appointed his beloved horse Incitatus as a Roman consul and it is claimed that he intended to co-opt him as his priest (cf AA Barrett *Caligula The Corruption of Power* (New Haven, 1990). Nevertheless, it is not true that at Roman law the insane Emperor could ascribe to a horse any right to the said offices. EP Evans *The Criminal Prosecution and Capital Punishment of Animals* (New York, 1906) reports the ridiculous processes brought against animals in France during the late Middle Ages.

objective and a subjective front, the most they could do was picture a mosaic with its many aspects.

In Kelsen's²⁰ "pure theory of law", the essence of what, in a subjective sense, is called *right*, the dualism of law and right is suppressed. The subjective right is not different to the objective law, but it is the objective law itself, only in so far as it imposes a duty (*Pflicht*) on a subject and adverse consequences if the duty is disregarded; or an entitlement (*Berechtigung*) that continues to be available to the subject. When the subjective right is viewed as objective law, every ideological abuse is excluded. Most of all, the concept of law is not reduced to a special technical form.

The opinion of Levi²¹ is similar, since he upholds the logical primacy of the *diritto oggettivo*,²² asserting that there cannot be any legal subjective situation whose identity does not stem from the law. And the subject cannot have a right – or a legal position – that is not acknowledged by the law, or, in other words, is not protected or sanctioned by the law. This is so simply because the whole phenomenon of the law is a fact of life in society and an expression of the social will of that society. The rule of the *proportio* between subject and subject lies in the norm: the will of the subject is legal only and inasmuch as it is in accordance with the norm, namely inside the boundaries permitted by the norm.

The Swedish legal philosopher Carl Olivecrona has a peculiar view of the *law* and uses his own terminology to describe it. He says that legal rules prescribe certain patterns of conduct that must be observed in certain circumstances. To enforce submission to them and prevent contrary behavior, unpleasant consequences are attached to them. He calls the pattern of conduct *ideational element* or *ideatum* of the rule. The required conduct differs according to their destination. For the public as a whole the law prescribes certain behaviour under threat of a penalty or other sanction. To the police, public prosecutors, judges and other officials the rule enjoins that each one in his own way compels people to obey the legal rules. Two elements may be distinguished in the *ideatum* of a rule, namely the *requisitum* and the *agendum*. The *requisitum* represents the requirements to be met when the action is to be taken. The *agendum* is the action itself, in the sense of what the public authorities ought to do.

As to the *right*, Olivecrona states as follows:

We have a presentation of the object of a right – usually a physical object or the action of a person. To this we have a right, as we say. The word 'right' stands for nothing. But the word itself is *visually or auditively passed on to the mind*. These two presentations – the word and the object – make up the idea of a right.

We have, however, the illusion that the word 'right' signifies a power over the object, though a power which we can never grasp. The illusion stems from the emotional background. Under certain circumstances, especially in situations of conflict, the idea

20 H Kelsen *Reine Rechtslehre* (Leipzig & Wien, 1934) at 60-61.

21 Levi (n 18) at 93-98.

22 *Idem* at 93: "[N]ell'ambito di un ordinamento, il vocabolo 'diritto' può indicare, sia la lege, o norma, sia la pretesa soggettiva, o facoltà. Ciò è vero non pure per il latino o le lingue neo-latine (*ius, diritto, doit, derecho*), ma altresì per il tedesco (*Recht*)."

of possessing a right gives rise to a feeling of strength. When I am convinced of having a right, I am in some way more powerful than my opponent, even though he be actually stronger. My power is not an actual power but a 'must be power'. This means that the feeling of strength is 'objectivised'. It produces a floating idea that I possess some kind of power which is independent of, and elevated above, the actual power-situation. So the word 'right' seems to signify an unseizable power. It is used in this sense even when no emotions are actually engaged.²³

A well-known text of Paul's²⁴ seems to oppose law and a rule to each other, when he says that the rule describes briefly how something is, so that it is not the law which derives from the rule, but it is the rule which ought to arise from the law as it is.

In a passage cited above, Ulpian²⁵ traces the origin of the name *ius* to *iustitia*, which he says is the constant and perpetual desire to give to each person what belongs to him.²⁶ He also taught that the precepts of the law are the following: to live honestly, not to injure another, and to give to each person his due.²⁷ Thus we may infer that *ius* is the way to achieve *iustitia*, and for that reason the concept of *ius* is inseparable from concept of *iustitia*.

The best way to present a concept is allegedly through its symbol or allegory. In the words of Goethe: "The allegory transforms the phenomenon into a concept, the concept into a figure, so that the concept must be ever confined and fully kept in the figure and expressed by it."²⁸ According to him "[t]he symbolism transmutes the phenomenon into an idea, the idea into an image, so that in the image the idea remains forever effective and intangible and, though expressed in all languages, inexpressible".²⁹

The allegory of *Iustitia* is a classic case. It is envisaged as the figure of a standing woman, who wears a blindfold and holds a sword in her right hand and scales in her left hand. This means that she weighs the pros and cons fairly and equably, awarding or punishing impartially.

23 *Idem* at 184.

24 D 50 17 1, *Paulus libro sexto decimo ad Plautium*: "Regula est, quae rem quae est breviter enarrat. non ex regula ius sumatur, sed ex iure quod est regula fiat. per regulam igitur brevis rerum narratio traditur, et, ut ait Sabinus, quasi causae coniectio est, quae simul cum in aliquo vitiata est, perdit officium suum." Cf. also, J Dabin *Théorie générale du droit* (Dalloz, Paris, 1969) at 320, on the opinion of St Thomas, who defines justice as the virtue which has as its object the right of the other, so that the right *hoc sensu* is not only what is just but the very justices' rule, which, when it is written, is called law.

25 D 1 1 1pr, *Ulpianus libro primo institutionum*: "Iuri operam daturum prius nosse oportet, unde nomen iuris descendat: est autem a iustitia appellatum."

26 D 1 1 10pr, *Ulpianus libro primo regularum*: "Iustitia est constans et perpetua voluntas ius suum cuique tribuendi."

27 D 1 1 10 1, *Ulpianus libro primo regularum*: "Iuris praecepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere."

28 W Goethe *Maximen und Reflexionen* (Schriften der Goethe-Gesellschaft) (Weimar, 1907) no 1112: "Die Allegorie verwandelt die Erscheinung in einen Begriff, den Begriff in ein Bild, doch so, dass der Begriff im Bilde immer doch begrenzt und vollständig zu halten und zu haben und an demselben auszusprechen sei."

29 *Idem* no 1113: "Die Symbolik verwandelt die Erscheinung in Idee, die Idee in ein Bild, und so, dass die Idee im Bild immer unendlich wirksam und unerreichbar bleibt und, selbst in allen Sprechungen ausgesprochen, doch unansprechlich bliebe."

Chronos, or Old Father Time, carries the scythe that eventually cuts down everything. Both demonstrate what words cannot.

In conclusion, Celsus' choice of words was felicitous when he said *ius est ars boni et aequi*, but he gave no definition of *ius*.

Abstract

According to Ulpian the jurist Celsus defines *ius* as the *ars boni et æqui* and does this *eleganter*. There is no doubt about the *elegantia* of this assertion nor that *ius* is an *ars*. But this cannot be regarded as a definition. After analysing the meaning of words such as “*elegantia*”, “*elegans*” and “*eleganter*” in the Roman legal texts and focusing the art of dealing with *ius*, this paper confronts the hard task of defining it.