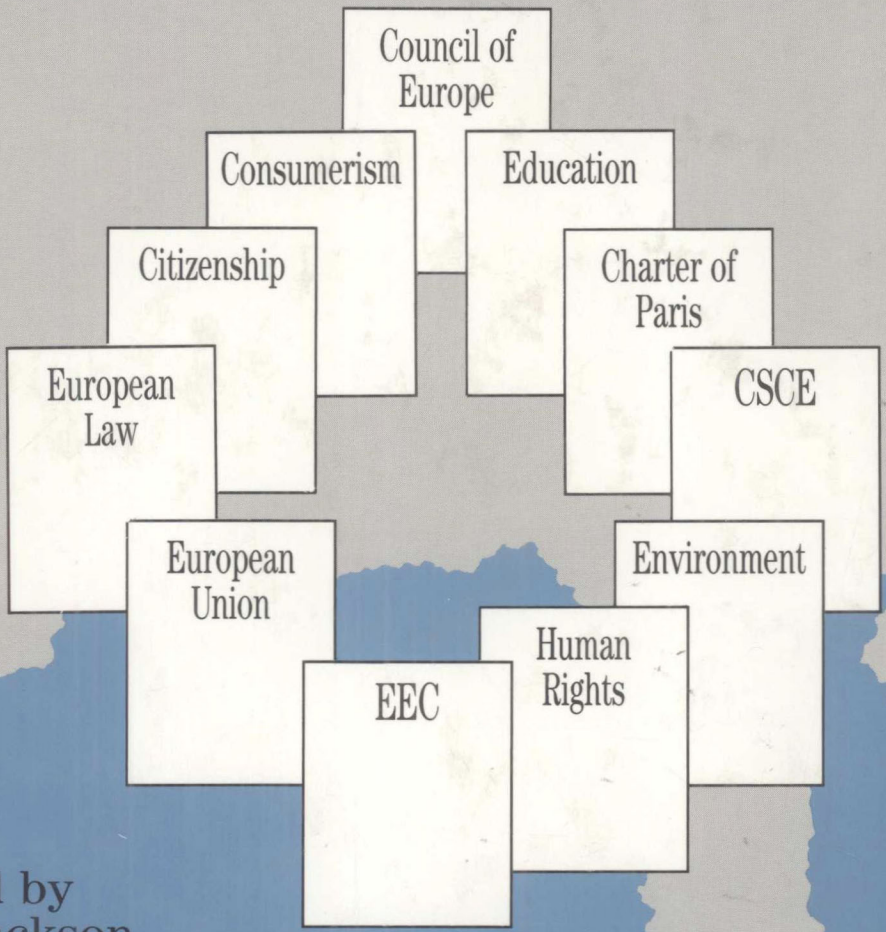
LEGAL VISIONS OF THE NEW EUROPE



Edited by
B.S. Jackson
and D. McGoldrick

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For The University of Liverpool

Legal Visions of the New Europe

Essays Celebrating the Centenary of

The Faculty of Law

University of Liverpool

edited by

B.S. Jackson and D. McGoldrick

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PREFACE

Europe, Europe, Europe

As the Faculty of Law at Liverpool University celebrates its Centenary in 1992-93, Europe faces an identity crisis. It is being challenged by a series of fundamental questions. What is Europe geographically, politically, environmentally, culturally, ideologically? With the ending of the Cold War, the revolutions in Central and Eastern Europe and the dissolution of the Union of Soviet Socialist Republics there has been much discussion about the "architecture" of the "*New Europe*". Much of the discussion has concentrated on political effects and consequences.[1] In undertaking this volume of essays we considered that a series of legal perspectives could make a useful contribution to the discussion on the shape of the "*New Europe*". Rather than impose a narrow aspect of European law for consideration the contributors were invited to present their perspective on the influence of Europe on one of their specialist fields of study. They were to analyze, as it were, the vision of Europe from their discipline. Implicit in this approach is that Europe has different meaning and form depending on the perspective of the viewer. The total reality (if there is such a thing) of the New Europe is the sum of these visions.

The essays in Part I take a historical perspective. Suggesting that our visions of the future are shaped by visions of the past Jackson examines some visions of European legal past. He compares and contrasts three models of European Law — *Ius Gentium*, *Ins Commune* and European Community Law. Campbell proceeds from the argument that change itself is the only constant feature of human affairs and institutions. He presents a scholarly examination of certain enduring legal problems relating to membership of a "Union" — from the "Personal Union between England and Scotland (1603-1703)" through to the "European Union" under the Maastricht Treaty of European Union (1992).

Europe is often viewed in a series of competing or cooperating institutional senses — primarily the European Community (EC), the Council of Europe (CE) and the Conference on Security and Cooperation in Europe (CSCE). Much of the debate on the New Europe is conducted in institutional terms.[2] The essays in Part II directly take this perspective. Garapon considers the integrative role of the European Court of Human Rights. Verhoeven analyses various institutional

1 See R. Lefeber, M. Fitzmaurice and E.W. Vierdag, *The Changing Political Structure of Europe* (Nijhoff: Dordrecht, 1991).

2 See R. Body, *Europe of Many Circles* (London: New European Press, 1990).

models for the development of a "Europe Unifiée". McGoldrick traces the development of the CSCE from "Process" to "Institution" in response to the increasingly rapid transformation of the political structure of Europe. More indirectly Chalmers' essay also has an important institutional perspective in relation to the European Community.

In Part III a series of social and economic perspectives on Europe are presented. Harris presents a penetrating analysis in a European context of the importance of social rights foryoung people, the meaning of social citizenship for youth, and progress towards social citizenship status for young people. Two contributions consider the position of particular groups under the European Convention on Human Rights. Millns takes a critical view of the limitations of a privacy analysis of the rights of homosexuals. Rowe assesses military justice in relation to the jurisprudence under the European Convention and finds it wanting.

Chalmers presents a considered analysis of the economic and constitutional issues raised by the growth of "new protectionism" by the European Communities in relation to international trade. His analysis is strongly informed by the principles and proposed safeguards of the General Agreement on Tariffs and Trade. Ost's contribution reflects the paradigmatic effect of the dramatically increased status of the environment as an economic and political factor in decision making.

Another concept of increasing contemporary importance is that of consumerism. Howells presents an analysis of the search in European Community law for the "proper standard" for consumer safety. In similar vein Jones critically examines the draft EC Directive on the Liability of Suppliers of Services in the context of medical malpractice. Finally, Bakker adds an educational perspective. His analysis of the Europeanization of law is amply confirmed by the other contributions to this volume.

The influence of Europe on almost all aspects of law is inescapable. Those influences range from the historical to the institutional to the variety of social and economic perspectives considered in this volume, and many others besides. Europe is constantly affecting, changing and permeating our perspectives on legal orders, normative standards, and fundamental social and economic concepts. Perhaps the most significant single message from this set of legal perspectives on Europe is that this permeation will continue whatever the ultimate fate of the Maastricht Treaty of European Union (1992).[3]

3 After the European Council meeting in Edinburgh in December 1992 the prospect of the Maastricht Treaty entering into force was favourable. See the Edinburgh Council Declaration.

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PART III: SOCIAL AND ECONOMIC PERSPECTIVES

PART I: HISTORICAL PERSPECTIVES

"'LEGAL VISIONS OF THE NEW EUROPE': *IUS GENTIUM, IUS COMMUNE*, EUROPEAN LAW"

by

BERNARD S. JACKSON*
Queen Victoria Professor of Law, University of Liverpool

Fasces	"Bundles of sticks with an axe protruding, carried by lictors before the chief Roman magistrates"[1]
Canon	The power of the word (the Bible, as mediated through the Church)
ECU	European Currency Unit — a notional unit of exchange unrepresented by its own currency

I. Introduction

When this book was first conceived, the predominant symbol of the movement towards European integration was the imminence of the single European market (SEM). Since then, our visions of Europe have become much more problematic. On the one hand, the identity of "Europe" has been thrown into question by the collapse of communism and the aspiration of central and eastern European states ultimately (and in the case of the former German Democratic Republic, immediately) to be integrated within "Europe".[2] On the other hand, the results of the Danish and French referenda, together with the near-collapse of the Exchange Rate Mechanism (ERM) in September 1992, cast increas-

* With thanks to my colleague Dominic McGoldrick for a number of suggestions and corrections; remaining infelicities are attributable to my own obstinance.

1 *Cassell's Latin Dictionary*, revd. J.R.V. Marchant and J.F. Charles (London: Cassell and Co. Ltd., 1957, 28th ed.), *ad loc.*

2 "Eurobarometer: Public Opinion and Europe", *European File* 9 (1989), 7: "Soviet leader Gorbachev has repeatedly proposed the eventual formation of 'One European House' under whose roof the European countries of East and West would live in some kind of peaceful cooperation." Quoted by Martin K. Elling, "The Emerging European Community: A Framework for Institutional and Legal Analysis", *Hastings International and Comparative Law Review* 13 (1989-90), 511-530 at note 127.

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ing doubt on who wishes to integrate, and at what level. We are thus faced, concurrently, by forces tending in diametrically opposite directions: political and monetary integration, perhaps on a federal model, on the one hand; decentralisation, perhaps to a "Europe of regions", on the other. Paradoxically, both of these forces, if taken to their logical conclusions, would reduce the significance of that entity which, in both international law and popular consciousness, has long been the organising focus of European identity: the nation state.

Both the geographical ambit and the political structure of the "*New Europe*" thus fall for discussion within this book.[3] So too does the notion of "Legal Visions". Visions are models of reality, and assist in both understanding and shaping that reality. Moreover, our visions of the future are shaped by visions of the past, but the latter are as much constructed *by us* as are the former: the past does not provide us with ready-made models; history is what we construct from the data of the past, not the data from which we construct it.[4] In this essay, I examine some visions of the European legal past, in the hope that this may assist in our evaluation of contemporary arguments over its future.

The phrase "Legal Visions" can be understood in several different ways: in the argument which follows, I oppose the traditional, conceptual version (our visions "of the law") with what may be termed a pragmatic[5] approach: our visions of the legal system in terms of the behaviour of lawyers and legal subjects. I begin, therefore, with some reflections on the structure of legal systems, from the viewpoint of modern legal theory.

II. Theoretical Perspectives

Lawyers come not only in different nationalities, legal cultures,[6] and degrees of sympathy and orientation towards European law; they are divided also according to function: principally (for our purposes) between legislators and administrators, judges, scholars, and practitioners. Each of these represents a profession with an identity different, one might even say distinctively different, from the others.

It is not the case that all concerned with the law belong to a single group,

3 See especially the essays of Verhoeven and McGoldrick in this volume.

4 See Campbell's essay in this volume.

5 In the linguistic sense: attending to the perspective of the users of a language (here, a legal language) rather than to the semantics (meanings) of that language taken in isolation from such users.

6 Cf. F. Wieacker, "Foundations of European Legal Culture", *American Journal of Comparative Law* 38/1 (1990), 1-29.

defined simply as lawyers by opposition to other groups with which they are seen to inter-relate. Not even a common legal education provides the basis for such an identity. A preliminary classification of such groups was made years ago by Georges Kalinowski, who found significant distinctions between the languages of legislators, of jurists, and of judges.[7] Van Caenegem has made a comparable distinction in relation to the medieval period: " ... medieval society became acquainted with the three main forms of law, judge-made law, legislators' law and professors' law."[8] To this tripartite classification, I would add two further categories: the practitioner, and the lay-person (meaning, here, non-lawyer) who is a legal subject. The differences between these groups are clarified by examining both the horizontal and vertical communicational relationships of each.[9]

Legislators (including here the executive arm, as involved in the preparation of both primary and secondary legislation) are seen as communicating vertically — but indirectly — to the public, through the transmission of general norms: duty-imposing (*devoir faire*) or right-conferring (*pouvoir faire*). But there is also a special form of horizontal discourse, communication amongst the legislators, which focuses particularly upon policy and the potential for implementation. This is a different policy discourse from that communicated to the public, for the purposes of political advantage. It is the disclosure of the former which provides, for the public, much of the fascination in the publication of political diaries.

At first sight, the structure of *judicial* discourse may appear similar. Here, too, the primary communicative function, as perceived by the public, is vertical: the communication of judgments, or court orders, from persons in authority to those subject to that authority. But whereas the vertical interaction between legislators and the public is indirect, that between judges and the public is direct. This is well captured by Kelsen's concept of "individual norms" (norms directed to individuals, rather than to the public in general).[10] The judge has to

7 G. Kalinowski, *Introduction à la logique juridique* (Paris: Presses Universitaires de France, 1965); see further B.S, Jackson, *Semiotics and Legal Theory* (London: Routledge & Kegan Paul, 1985), 276-282.

8 R.C. van Caenegem, *Legal History: A European Perspective* (London and Rio Grande: The Hambledon Press, 1991), 131.

9 More technically, these are distinct "semiotic groups", each sharing conventions of discourse peculiar to itself, and only fully internalised by members of that group. For the application of the concept to law, see B.S. Jackson, *Law, Fact and Narrative Coherence* (Merseyside: Deborah Charles Publications, 1988), 132-137.

10 H. Kelsen, *The Pure Theory of Law*, trld. M. Knight (Berkeley and los Angeles: University of California Press, 1967), esp. 236ff.

address the parties to the dispute directly: they are in the court, within eye-contact (even more so, when judicial wigs eventually disappear). But the judiciary, like the legislators, are defined as a professional group also by the nature of their internal (horizontal) discourse, orally and informally at the Inns of Court, more formally in the Law Reports.[11] Of course, some law reports are also read by some lawyers (particularly those who may find themselves addressing the bench). But for the average lawyer, the law reports do not constitute the primary source of their professional knowledge; they rely, instead, first and foremost on professional manuals and textbooks. While judges may take into account, within their internal discourse, the concerns of other groups within the legal universe — legislators and jurists, in particular — this is done from *within* the discourse of judicial culture.

When we turn to *juristic* (doctrinal) discourse, a more drastic change appears in the structure of their group identity. Whereas for legislators and judges, the vertical relationships might appear primary, the horizontal secondary, in the case of jurists this relationship is reversed. The primary audience of jurists is other jurists. Academic law, and legal theory, may on occasion impinge upon both legislators and practitioners, but it is seen as operating, for the most part, as a universe apart — a universe whose very existence, perhaps, is seen as a sign of the rationality (and thus legitimacy) of the other forms of legal discourse. It is noteworthy, in this context, that jurists, though charged with the education of future generations of lawyers, have no direct relationship with the general public, unlike each of the other three groups. Whereas the power attached to the vertical relationships of legislators and judges is explicit, that of jurists — in relation to students — is implicit, but the importance — and responsibility — of such a power relationship (more continuous, direct, and subtle than that enjoyed either by legislator or judge) is not to be underestimated.

Like the legislator and the judge, the *practitioner* is identified primarily in terms of vertical (hierarchical) relationships: those with the client. But this is a very peculiar form of hierarchy. While the recipient of legal norms (general or individual) is normally an *involuntary* receiver, the recipient of legal advice normally initiates the relationship with the practitioner, and purchases (or is entitled to) his or her services. It is the client who is the principal, the practitioner the agent. Nevertheless, the competence of the lawyer (her *savoir-faire*), together with the aura of professionalism communicated by legal appurtenances and behaviour, in effect reverse that formal hierarchical relationship. A number of socio-linguistic studies have shown, in recent years, the deployment of power, through the control of speech, within the lawyer-

11 See A.A. Paterson, *The Law Lords* (London: MacMillan, 1982), ch.5.

client relationship — in the office as well as in the courtroom.[12] The practitioner also enjoys horizontal communicative relationships: legal practice, whether contentious or non-contentious, regularly involves liaison with other lawyers, and is anchored within a discourse of professional practice, which encompasses not only legally prescribed forms and procedures, but also those ways of doing things sanctioned informally in the interaction and conversation of particular groups of lawyers.

It is worth stressing two aspects of the construction of lawyers' group identity, since it will bear importantly on the argument at a later stage. First, the discourse of lawyers is one of practice, not of general norms, individual norms, or legal concepts. Secondly, the legitimation of the lawyer, in the eyes of the public, has no such obvious source as that of any of the other legal groups: that of the legislator residing (in democratic societies) in the franchise; that of the judge residing in the concept of justice; that of the jurist residing in reason. No doubt the legitimation of lawyers is differently constructed within the horizontal and vertical forms of discourse. To an extent, there is an attempt to appropriate some of those other, more obvious sources. The lawyer, for example, is an "officer of the court". But the lack of an obvious locus of legitimacy for the lawyer has long been perceived both in literature (where we now encounter talk of the lawyer as the "hired gun") and in popular discourse. In considering competing Legal Visions of the New Europe, we must bear this problem in mind.

The legal identity of the layperson has partially been sketched already — by implication, as a recipient of legal norms (general and individual) and in the ambivalence of the relation to legal practitioners. But lay identity, constructed as the absence of legal expertise, does not necessarily entail social separation from or opposition to lawyers. Many laypersons have lawyers within the family or peer group. There are thus laypersons who, through the mediation of others, identify with lawyers without being a member of any of the above groups; while there are others who lack any such, albeit indirect, identification. We may hazard that those laypersons who identify indirectly with lawyers are more likely to interact personally with their lay counterparts in other European states (both occupationally and in leisure), while those who have no such indirect lawyer-like affiliations may tend to lack European links,

12 E.g. Atkinson, J. Maxwell, and Drew, Paul, *Order in Court* (London: Macmillan, 1979); A. Sarat and W.L.F. Felstiner, "Legal Realism in Lawyer-Client Communication", in J.N. Levi and A.G. Walker, eds., *Language in the Judicial Process* (New York: Plenum, 1990), 133-151; B. Bogoch and B. Danet, "Challenge and Control in Lawyer Client Interaction: A Case Study in an Israeli Legal Aid office", *Text* 4-1/3 (1984), 249-275.

too. But the lack of personal European links does not make Europe non-pertinent to lay national identity. Within the present century, many received their first direct experience of Europe through military service abroad. And for more recent generations, Europe remains a presence in their lives, through the media (which powerfully reinforces national identities, e.g. through "inter-national" sporting and other contests). Such different experiences of "Europe" on the part of laypersons is apt to generate very different reactions: the empathy engendered by personal interaction on the one hand, the nationalism produced by partial knowledge and the reification of the state on the other.

From a "pragmatic" viewpoint, a legal system consists in the totality of interactions sketched in relation to these five legal groups. But our vision of a legal system will rarely take account of such complexity. Rather it will select some aspects for emphasis in preference to others. It is in that sense that I maintained above that our visions of the past are as much constructed *by us* as are our visions of the future. In considering our visions of the legal systems of the past, therefore, we must ask which aspects are privileged (and, if possible, why). This may in turn provide some perspective from which to view the present situation.

The notion of European law, if not the name, is hardly a new one. Two historical models are especially prominent in the literature: the *ius gentium* of ancient Rome and the *ius commune* of medieval Europe. An initial hypothesis might be the following: (a) the traditional view of the *ius gentium* of ancient Rome privileges the role of the magistrate; (b) the traditional view of the *ius commune* of the Middle Ages privileges the role of the jurist; (c) the traditional view of modern European law privileges the role of the legislator. But in each case, the model sketched in this section may throw doubt on the adequacy of such an hypothesis, and prompt a more complex characterisation, which may in turn aid our vision of the possibilities inherent in the new Europe.

III. The Roman *Ius Gentium*

It is commonly said nowadays[13] that the Roman term *ius gentium* (lit. "law of nations"[14]) had both "practical" and "speculative" (or "theoretical") mean-

13 H.F. Jolowicz and B. Nicholas, *Historical Introduction to the Study of Roman Law* (Cambridge: Cambridge University Press, 1972, 3rd ed.), ch.6, note that the distinction between *ius gentium* and *ius civile* in the "theoretical" and "practical" meanings is not made by the Romans themselves; and see their argument with Lombardi at 105 n.7.

14 Jolowicz and Nicholas, *supra* n.13 at 104f. n.4, point out that the term does also occur

ings. The latter referred to a body of universal principle underlying different systems of positive law. Its earliest expression is found in the Institutes of Gaius, in the second half of the 2nd century A.D.:[15]

> 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 *jus civile*, civil law, as being that which is 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 *jus gentium*, as being the law which all nations observe.

By contrast, the "practical" meaning of *ius gentium* referred to that body of binding rules, originating in the operation of the formulary system by the *praetor*, by which disputes between citizens and non-citizens at Rome were adjudicated. *Ius civile* denoted those institutions and rules of Roman law which applied only to Roman citizens, *ius gentium* those institutions and rules of Roman law which were applicable also to non-citizens.[16] Characterizing the *ius gentium* as neither civil law nor a code of private international law, Jolowicz and Nicholas describe it as:

> ... a general system of rules governing relations between free men as such, without reference to their nationality. Much of this system of law, seeing that it was based on the edicts of Roman magistrates, was Roman in origin, but it was Roman law stripped to a great extent of its formal elements, and influenced by other, especially Greek, ideas. Thus the Roman contract of stipulation was one of the institutions extended in this way to foreigners, i.e. a foreigner can be bound and entitled under it, and it is not difficult to see why, for although the stipulation is what we call a formal contract, the forms required are the simplest imaginable, and the contract is useful for all manner of purposes.[17] Mancipation, on the other hand, with its elaborate ceremony, involving the use of scales and bronze and the speaking of set words, remains exclusively a transaction of the ius civile.[18]

By the late Republic the *ius gentium* covered many commercial dealings with

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in a text of Pomponius, D.50.7.18, in the sense of the law governing relations between states (public international law).

15 Gai. *Inst.*I.1, and as extracted in *Dig.*1.1.9. Cf. Justinian, *Inst.*I.II.1. Jolowicz and Nicholas, *supra* n.13 at 105, point out the basis of this distinction in Aristotelian thinking, adopted in part also by Cicero: *de Off.* 3.23; *Har. Resp.* 32.

16 Cf. J.A.C. Thomas, *The Institutes of Justinian* (Amsterdam: North Holland, 1975), 6-7.

17 Thus, according to Gaius 3.93: the verbal contract, *stipulatio*, was in general open to anyone and thus was *iuris gentium*; but use of the promissory verb, *spondere*, was confined to *cives* so that, in its *sponsio* form, *stipulatio* was *iuris civilis*.

18 Jolowicz and Nicholas, *supra* n.13 at 103-104.

non-citizens, and was less formalistic than the civil law. But its detailed provisions were Roman in character and treated as ordinary rules of law.[19] *Societas* and *mandatum*, for instance, may have been be contracts *iuris gentium* but their regulation was determined by exclusively Roman conceptions of the obligations deriving from *fraternitas* and *amicitia*.[20]

Modern commentators tend to privilege the "practical" meaning of *ius gentium* and disparage the "speculative". Thus Thomas endorsed the view of de Zulueta[21] that such references by Gaius to institutions as *iuris gentium* should be regarded as "just pieces of superficial comparative jurisprudence". We may see such an account as reflecting a rather domestic vision. For the "practical" *ius gentium* feels rather English — problem-solving by the lawyer, unaffected by grand theory — while the "speculative" meaning is viewed as a rather feeble distortion of Greek sources, something which would not even pass muster with the classically educated Englishman. Moreover, the linkage between them — the claim that the "practical" *ius gentium* was itself based on generally accepted principles (themselves, for Gaius, the product of *naturalis ratio*) — also jars with the traditional English vision of law (or lawyers): practical law (read: lawyers) does not need legitimation from a rather abstract theory (read: philosophers).[22]

But the author of the *ius gentium* was no ordinary lawyer. The *praetor* was (in both the Republic and the Empire) essentially a politician, the holder of an office for a single year within the hierarchy of the *cursus honorum*, and thus lacking any real professional interest in law application and reform. To a large extent, the text of the praetorian edict became traditional, subject to only minor modification from year to year. Moreover, the praetor would not normally act without professional advice, and his *consilium* would typically include those who came to be known as jurists.

The charge of "superficial comparative jurisprudence" levelled against the jurists writing about the *ius gentium* might be justified if all they did was to claim, on rather limited evidence,[23] that certain institutions were universal.

19 Cf. *Ius gentium*, Glossary to *The Digest of Justinian*, ed. T. Mommsen, P. Krueger and A. Watson (Philadelphia: University of Pennsylvania Press, 1985), Vol.I, p.xxi.

20 Thomas, *supra* n.16 at 7.

21 F. de Zulueta, *The Institutes of Gaius* (Oxford: Clarendon Press, 1946-53), II, 11.

22 Cf. P.S. Atiyah, *Pragmatism and Theory in English Law* (London: Stevens, 1987).

23 We cannot, of course, assess the sources Gaius may have had for making assertions regarding the (speculative) *ius gentium* origin of various institutions, but one example where there is some external support for his views relates to the "breeding rules" as between slaves and free persons. Gaius (1:78-84] compares the