CLASS OUTLINE — LECTURE 2

Modern Law School Courses and Justinian's *Institutes*

1. Property is about the relationships between legal persons with respect to things. Those things are mostly tangible or corporeal things. Much of the first-year property courses is about land, because our land law is particularly complicated, but it also may deal tangible things that are not land like wild animals or cars or a baseball that was hit into the stands at a ball game.
2. Contracts deals with legally enforceable agreements that folks make with each other. If I lend you $5, I expect to get it back, and I can sue you if you don't return it. But contracts can get a lot more complicated than that. Think of an agreement that two major coroporations make to engage in a joint venture.
3. Torts (the word means 'wrong'; it's not related to the word that means a cake) deals with law of private wrongs, like a punch in the nose or a car accident. It's related to criminal law, but it's not the same thing, because in criminal cases the state is suing to punish someone for something s/he has done, whereas in a tort case the injured party is suing for money compensation.
4. Family law is about marriage and divorce, children, and sometimes about other people who have limited legal capacity, such as those who have a mental disability.
5. Wills and trusts, the title is somewhat misleading, because it deals not only with wills and trusts but more generally with succession, what happens when someone dies. Not everyone who dies has made a will or a trust, and the law has rules about what happens to the deceased person's property if that person has not made a will or a trust.
6. Civil procedure is about how you go about bringing a case in court to vindicate a right arising from any one of the above.
7. The overwhelming majority of the text of Justinian's *Institutes* can be made to fit into one of the categories of the modern law-school courses that I described above, though in a few cases it may take some pulling and hauling to do so. The question is how do these categories interrelate and why is it that the Institutes deals only with these topics and not with the myriad of other topics that were part of the law of Justinian's time, or the myriad of other topics that are part of the law today.

The Structural Features of Justinian's *Institutes*

Ius vs. *lex*. This is not in the scheme of Justinian's *Institutes*. It's simply fundamental to the language. The only place where J. uses the word *lex* is where he is referring to statutes.

Justinian's *Institutes* (JI.1.1.4): "Of the study of law there are two positions, public and private. Public law is that which regards the constitution of the Roman state, private law looks at the interest of individuals."

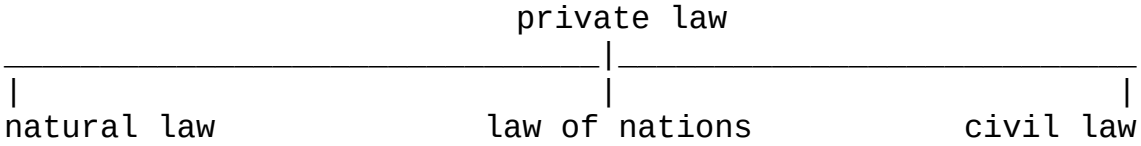
1. What's the problem with this distinction?
2. The best-known statement of the distinction is in D.1.1.2 (Ulpian):

"Of this subject there are two positions, public law and private law. Public law is that which regards the constitution of the Roman state, private law looks at the interest of individuals; as a matter of fact, some things are beneficial from the point of view of the state, and some with reference to private persons. Public law is concerned with sacred rites, with priests, with public officers."

3. The function of the public/private distinction may have been to make the jurists feel more autonomous.

4. Although the Roman-law texts that made the public-private distinction were known in the west after the fall of Rome and were well known from the 12th century on, but the western jurists made hardly any use of the distinction until the 16th century. That fact almost certainly tells us something about the development of the notion of the state in the west.

JI. 1.1.4 (continued) "Of private law then we may say that it is of threefold origin, being collected from the precepts of nature, from those of the law of nations, or from those of the civil law of Rome."



This is not structural. The third-century jurist Ulpian makes this three-fold distinction. The second-century jurist Gaius, on whom most of the *Institutes* is based makes a two-fold distinction, not separating natural law from the law of nations.

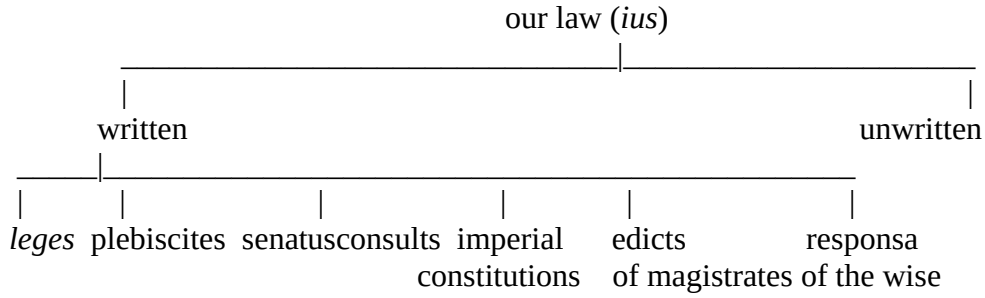
JI 1.2pr: From Ulpian: "The law of nature is that which nature has taught all animals; a law not peculiar to the human race, but shared by all living creatures, whether denizens of the air, the dry land, or the sea. Hence comes the union of male and female, which we call marriage; hence the procreation and rearing of children, for this is a law by the knowledge of which we see even the lower animals are distinguished."

JI 1.2.1: From Gaius: "The civil law of Rome, and the law of all nations, differ from each other thus. The laws of every people governed by statutes and customs are partly peculiar to itself, partly common to all mankind. Those rules which a state enacts for its own members are peculiar to itself, and are called civil law: those rules prescribed by natural reason for all men are observed by all peoples alike, and are called the law of nations."

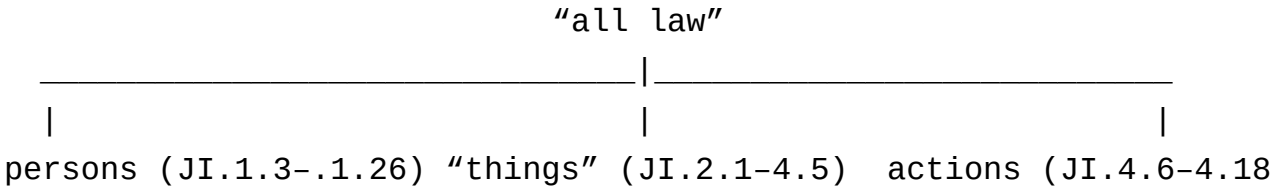
JI 1.2.2: "[By the law of nations] when wars arose, <and> then followed captivity and slavery, which are contrary to the law of nature; for by the law of nature all men from the beginning were born free. The law of nations again is the source of almost all contracts; for instance, sale, hire, partnership, deposit, loan for consumption, and very many others."

It is hard to exagerrate how much confusion these passages caused in later centuries. Modern scholarship, and to some extent Renaissance scholarship, suggests that the philosophical basis of Ulpian's views was Stoic, and those of Gaius, Aristotelian or Peripatetic. Be that as it may be, the Roman lawyers never thought that what was a matter of natural law could trump civil law. But as we saw from Gratian, in the last lecture, medieval lawyers did. Hence, the stakes were much higher for the medieval jurists.

J.I.1.2.3–11:



JI. 1.2.12: “The whole of the law which we observe relates either to persons, or to things, or to actions.”



This is structrual.. It gives us the outline for the rest of the work. The law of ‘things’ is broader than our ‘property’. It includes our property, but it also includes succession (our wills and trusts), and obligations (our contract and tort; what J. calls contract and delict).

What is the basis of this distinction? In modern terms the first category is capacity; the second category is substantive rights and duties; the third is remedies. Who, what and how vindicated.

Why is it problematic?

1. The legal realists of the first half of the last century taught us the danger of separating substantive rights from remedies. In Roman law, the sharp separation of the law of things from the law of actions was characteristic only of the institutional treatises and post-classical writing. The jurists of the Digest are acutely aware of the procedural implications of substantive rights and duties.
2. If we look at this trichotomy from a neo-Marxist viewpoint, we might say that its function of this is to create a false consciousness.

Book 1. Persons

JI.1.3pr: : “In the law of persons, then, the first division is into free men and slaves.”

JI.1.8pr: “Another division of the law relating to persons classifies them as either independent (*sui iuris*) or dependent (*alieno iure subiecti*).”

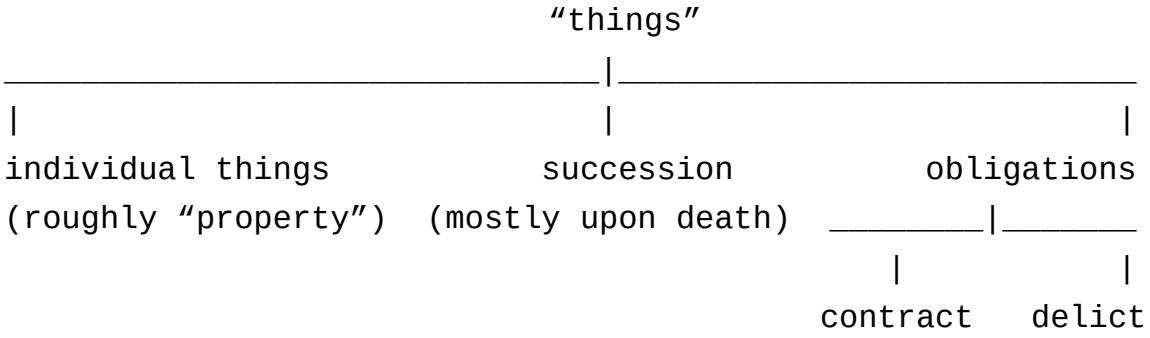
Bks. 2 and 3. “Things”

JI.2.1pr: “In the preceding book we have expounded the law of Persons: now let us proceed to the law of Things. Of these, some admit of private ownership, while others, it is held, cannot belong to individuals: for some things are by natural law common to all, some are public, some belong to a society or corporation, and some belong to no one. But most things belong to individuals, being acquired by various titles, as will appear from what follows.”

JI.2.9.6: “We proceed therefore to the titles whereby an aggregate of rights is acquired. If you become the successors, civil or praetorian, of a person deceased, or adopt an independent person by adrogation, or become assignees of a deceased’s estate in order to secure their liberty to slaves manumitted by his will, the whole estate of those persons is transferred to you in an aggregate mass.”

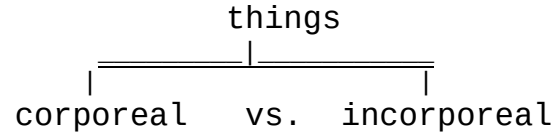
JI.3.13pr, 2: “Let us now pass on to obligations. An obligation is a legal bond, with which we are bound by a necessity of performing some act according to the laws of our State. . . . [T]hey are arranged in four classes, contractual, quasicontractual, delictal, and quasi-delictal.”

Books 2 and 3 are hence further subdivided:



Let’s try to burrow into the distinction between property and obligation, because it is clear that the middle category, succession, is in the middle because it contains both property and obligations. What separates property from obligation?

It is not function, much less physical characteristics; it is a distinction made in Book 4, the book on procedure, *in rem* vs. *in personam*. In our legal system it means 2 things – one procedural and one substantive. It is either a process that involves the seizure of a specific thing or a remedy involving a specific thing, or it is a right good as against the whole world. The distinction is a particularly troublesome one in a legal system like the Roman which doesn’t award specific restitution. The distinction is kept somewhat clearer in Roman law than it is in our system by the fact that a Roman action *in rem* focused on the plaintiff’s right not the defendant’s wrong. All corporeal things were subject to actions *in rem*. Some incorporeal things were, and those which were tended to be those that gave *in rem* rights, in the second sense of the term (good as against the whole world), in a corporeal thing, servitudes, usufructs, an entire heredity.

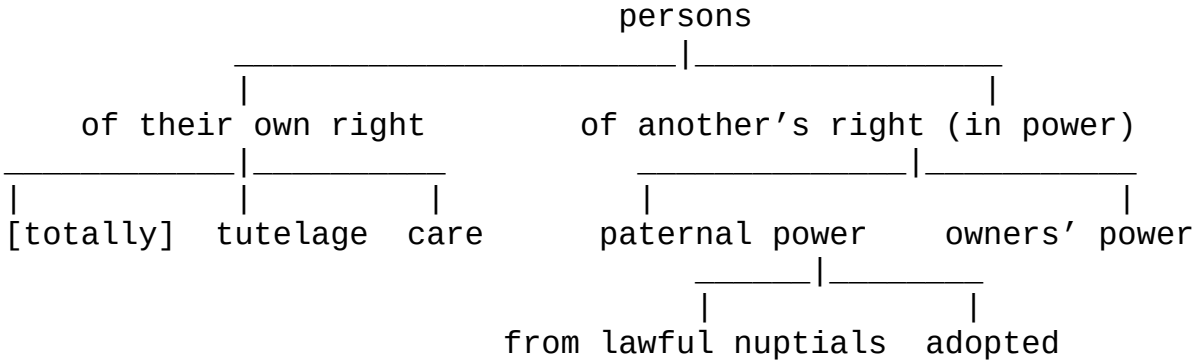


The first problem with the distinction is that all physical things are corporeal and all rights are incorporeal. This is a clue to J.’s understanding of ownership, i.e., it can only be of a corporeal thing. Further, incorporeal things includes obligations. BUT obligations cannot be conveyed. (GI.2.38–9, no parallel in JI. but it’s his rule too.) This is not quite true as we shall see when we get to succession *per universitatem*, but this eminently practical distinction forms the basis of 2+ books: things that can be conveyed singly, things that are conveyed in the aggregate, and things that cannot be conveyed singly.

Marriage, wild animals, and witnesses in Justinian’s *Institutes*

Marriage

Justinian's treatment of the law of persons in book 1 is subdivided as follows:

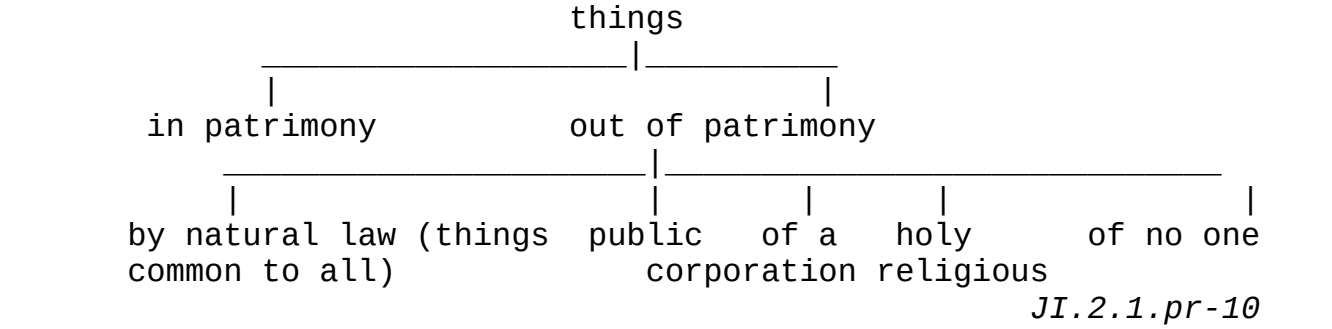


In considering those persons who are in paternal power from lawful nuptials, he says:

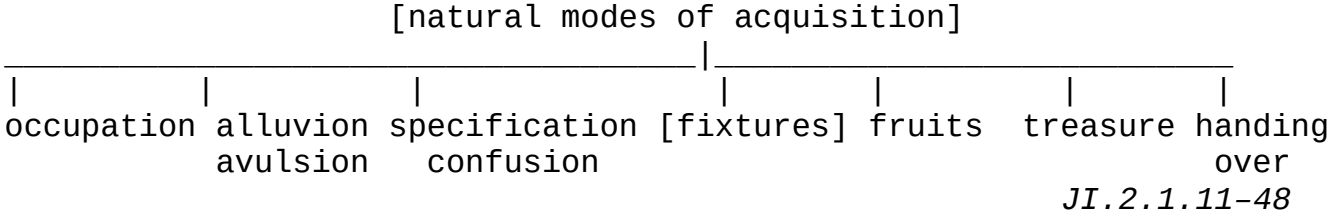
> "Roman citizens are joined together in lawful wedlock when they are united according to law, the man having reached years of puberty, and the woman being of a marriageable age [Other texts tell us that these ages are presumptively 14 and 12.] whether they be *sui iuris* or *in potestate* [all Roman children of whatever age were in the power of their fathers as long as the father was alive, unless the child were expressly emancipated.] provided that in the latter case they must have the consent of the parents in whose power they respectively are, the necessity of which, and even of its being given before the marriage takes place, is recognized no less by natural reason than by law. . . ."
>
> But if parental consent is required, what if the parent is insane? Justinian tells us that he has fixed an anomaly in the classical law. The next three paragraphs outline incest prohibitions. They are not particularly extensive, ascendants and descendants and very close collaterals. The final paragraph (no. 13) seems to suggest that Justinian recognized the concept of legitimation by subsequent matrimony. It has become controversial today as to what the law about this was in J.'s time. The topic was also controversial in the Middle Ages.
>
> In the first class we went through a number sources from the Christian Bible that had to do with marriage. Both this passage and those from the Bible are legacies from the ancient world on the topic of marriage. How do they differ?
>
> a. There's nothing about divorce in Justinian; there's a lot in the Christian. sources.
>
> b. Ephesians 5 calls marriage a 'sacrament'. Justinian, though he is a Christian, does not.
>
> c. JI makes kind of a fetish about parental consent. The Christian sources do not.
>
> d. The Christian sources, though they do not quite say this, seem to emphasize the role of sexual intercourse in the formation of marriage. JI does not.
>
> e. JI is secular, the Christian sources are not.
>
> f. We have a long and complicated story to go through before we can see where the 19th-century codes may be coming from on this topic.

Wild animals

The initial divisions of Justinian's law of single things in book 2 are schematized as follows:



JI.2.1.pr-10



JI.2.1.11–48

‘Occupation’ is a natural mode of acqusition of things that belong to no one (and, hence, are not in someone’s patrimony). Of occupation of wild animals J. has this to say:

“Wild animals, birds, and fish, that is to say all the creatures which the land, the sea, and the sky produce, as soon as they are caught by any one become at once the property of their captor by the law of nations; for natural reason admits the title of the first occupant to that which previously had no owner. So far as the occupant’s title is concerned, it is immaterial whether it is on his own land or on that of another that he catches wild animals or birds, though it is clear that if he goes on another man’s land for the sake of hunting or fowling, the latter may forbid him entry, if aware of his purpose. An animal thus caught by you is deemed your property so long as it is completely under your control; but so soon as it has escaped from your control, and recovered its natural liberty, it ceases to be yours, and belongs to the first person who subsequently catches it. It is deemed to have recovered its natural liberty when you have lost sight of it, or when, though it is still in your sight, it would be difficult to pursue it. It has been doubted whether a wild animal becomes your property immediately [when] you have wounded it so severely as to be able to catch it. Some have thought that it becomes yours at once, and remains so as long as you pursue it, though it ceases to be yours when you cease the pursuit, and becomes again the property of any one who catches it: others have been of the opinion that it does not belong to you till you have actually caught it. And we confirm this latter view, for it may happen in many ways that you will not capture it. Bees, again, are naturally wild . . . [skipping to the end of the section]. A swarm which has flown from your hive is considered to remain yours so long as it is in your sight and easy of pursuit: otherwise it belongs to the first person who catches it.”

Witnesses

There is nothing about witnesses in the *Institutes*. (The *Institutes* are based on a treatise written by Gaius in the mid-2d century AD, when there was little law on witnesses.) There are, however, titles on witnesses in both the *Digest* and the *Code*, both of which are included in full in Chapter 1 of the *Materials*, p, I–33 and I-35. By comparison with the title on marriage, the Digest title is very short. Why? What little material that there is is late. One can tell this by looking up the names of the jurists. Much of it seems to be context-specific, i.e., whether a conviction of adultery bars that person from testifying under the provisions of certain statutes passed in the

Augustan age. To the extent that there are general principles, they seem to be quite broad. E.g., the recript of Hadrian quoted in D.22.5.3.1: “You know best what weight to attach to witnesses, what their dignity and reputation is, who speaks simply, and whether they keep to a premeditated story, or give likely answers to your *ex tempore* questions.” While we cannot fully demonstrate it on the basis of the Code passages given here, the concern for fixed rules about witnesses seems to have increased in the later empire. Nothing, however, gives us a basic form of procedure for the use of witnesses. That is simply assumed. Hence, while the passages on marriage and wild animals gave us quite a bit of what we have in the 19th century codes, the Roman law on witnesses gives us relatively little.

The Western legal tradition

The lecture made two points about the 19th century: (1) That the structural features of JI are pretty obvious in all of the 19th-century codes. (2) That the specific provisions on wild animals, marriage, and witnesses show considerable influence from Justinian on the topic of wild animals, some on the topic of marriage, and none on the topic of witnesses. This is diachronic history with a vengeance, and I’m trying to wean you away from everyone’s tendency to do diachronic history, a tendency that seems particularly strong among lawyers, and to do synchronic history, history that seeks explanations for why things happened in the context of the times in which they happened. Why what happened in 19th century in the way that it did is an interesting story, but it can’t be part of the course, because we have to stop, pretty much, in the 17th century. That turns to be a lot to hold you responsible for. I want to give you some glimpses of what came after that, but I can’t, and won’t, hold you to it.

The fact is, however, that for good reasons or bad almost every country in the world, with the notable exception, and even here the exception is only partial, of China, has one version or another of a western legal system, be it continental civil law or Anglo-American common law, or sometimes a mixture of both. We have to be careful here, because many countries also have elements of other legal systems, such as the use of Islamic law (*sharia*) for family law and succession in many Islamic countries, but I think it is fair to say that the system of law, at least at the national level, in most countries of the world today is western.