WEEK 2

INTRODUCTION

The Code of Justinian was established by the Byzantine Emperor Justinian (482-565) in 533 and 534;[1] about seven years after his reign began. It is a collection of early Roman statutes which Justinian ordered to be condensed and clarified so that they could serve as a more effective legal system for his empire. The committee of lawyers appointed to this task drew up the laws into four categories: the Codex, which includes imperial decrees; the Digest, consisting of interpretations of court cases of the 100's and 200's; the Institutes, which serve as a guidebook for law students; and the Novels ("novel" in Latin means "new," in this case "new laws"), which contains laws set in place after the Code was published (in other words, laws that are "new" because they came after the Code was established). Justinian's law code was complete and effective, becoming a model for legal systems throughout the world and throughout history. Most modern codes use Justinian's *Corpus Juris Civilis* as their model.[2]

THE CIVIL LAW[3]

The Digest: Prologue[4]

The Emperor Caesar, Flavius, Justinianus, Pious, Fortunate, Renowned, Conqueror, and Triumpher, Ever Augustus, to Tribonianus His Quaestor., Greeting:

With the aid of God governing Our Empire which was delivered to Us by His Celestial Majesty, We carry on war successfully. We adorn peace and maintain the Constitution of the State, and have such confidence in the protection of Almighty God that We do not depend upon Our arms, or upon Our soldiers, or upon those who conduct Our Wars, or upon Our own genius, but We solely, place Our reliance upon the providence of the Holy Trinity, from which are derived the elements of the entire world and their disposition throughout the globe.

Therefore, since there is nothing to be found in all things so worthy of attention as the authority of the law, which properly regulates all affairs both divine and human, and expels all injustice; We have found the entire arrangement of the law which has come down to us from the foundation of the City of Rome and the times of Romulus, to be so confused that it is extended to an infinite length and is not within the grasp of human capacity; and hence We were first induced to begin by examining what had been enacted by former most venerated princes, to correct their constitutions, and make them more easily understood; to the end that being included in a single Code, and having had removed all that is superfluous in resemblance and all iniquitous discord, they may afford to all men the ready assistance of true meaning.

After having concluded this work and collected it all in a single volume under Our illustrious name, raising Ourself above small and comparatively insignificant matters, We have hastened to attempt the most complete and thorough amendment of the entire law, to collect and revise the whole body of Roman jurisprudence, and to assemble in one book the scattered treatises of so many authors which no one else has here before ventured to hope for or to expect and it has indeed been considered by Ourselves a most difficult undertaking, nay, one that was almost impossible; but with Our hands raised to heaven and having invoked the Divine aid, We have kept this object in Our mind, confiding in God who can grant the accomplishment of things which are almost desperate, and can Himself carry them into effect by virtue of the greatness of His power.

We desire you to be careful with regard to the following: if you find in the old books anything that is not suitably arranged, superfluous, or incomplete, you must remove all superfluities, supply what is lacking, and present the entire work in regular form, and with as excellent an appearance as possible. You must also observe the following, namely: if

1 Excerpted from a World Book article entitled "Law." Contributor: David M. O'Brien, Ph.D., Professor of Government, University of Virginia.

2 Excerpted from a World Book article entitled "Justinian Code." Contributor: Clive Foss, Ph.D., Professor, Department of History, Georgetown University.

3 Including the Twelve Tables, the Institutes of Gaius, the Rules of Ulpian, the Opinions of Paulus, the Enactments of Justinian, and the Constitutions of Leo; translated from the original Latin, edited, and compared with all accessible systems of jurisprudence ancient and modern. By S. P. Scott, A. M. (1932) [Copyright expired without renewal]

4 From *The Digest of Justinian*, C. H. Monro, ed. (Cambridge, Mass.: Cambridge Unversity Press, 1904).

you find anything which the ancients have inserted in their old laws or constitutions that is incorrectly worded, you must correct this, and place it in its proper order, so that it may appear to be true, expressed in the best language, and written in this way in the first place; so that by comparing it with the original text, no one can venture to call in question as defective what you have selected and arranged. Since by an ancient law, which is styled the *Lex Regia*, all the rights and power of the Roman people were transferred to the Emperor, We do not derive Our authority from that of other different compilations, but wish that it shall all be entirely Ours, for how can antiquity abrogate our laws?

The Institutes: Sources of Laws [1]

Justice is the set and constant purpose which gives to every man his due. Jurisprudence is the knowledge of things divine and human, the science of the just and the unjust…

The precepts of the law are these: to live honestly, to injure no one, and to give every man his due. The study of law consists of two branches, law public and law private. The former relates to the welfare of the Roman State; the latter to the advantage of the individual citizen. 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.

The law of nature is that which she 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. 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 people alike, and are called the law of nations. Thus the laws of the Roman people are partly peculiar to itself, partly common to all nations; a distinction of which we shall take notice as occasion offers…

Our law is partly written, partly unwritten, as among the Greeks. The written law consists of statutes, *plebiscites*, *senatus consults*, enactments of the Emperors, edicts of the magistrates, and answers of those learned in the law. A statute is an enactment of the Roman people, which it used to make on the motion of a senatorial magistrate, as for instance a consul. A *plebiscite* is an enactment of the commonalty, such as was made on the motion of one of their own magistrates, as a tribune… A *senatus consult* is a command and ordinance of the senate, for when the Roman people had been so increased that it was difficult to assemble it together for the purpose of enacting statutes, it seemed right that the senate should be consulted instead of the people. Again, what the Emperor determines has the force of a statute, the people having conferred on him all their authority and power by the *lex regia*, which was passed concerning his office and authority. Consequently, whatever the Emperor settles by rescript, or decides in his judicial capacity, or ordains edicts, is clearly a statute: and these are what are called constitutions.

The Laws of the Twelve Tables

Table I: Concerning the summons to court.

Law I.

When anyone summons another before the tribunal of a judge, the latter must, without hesitation, immediately appear.[2]

Law II.

If, after having been summoned, he does not appear, or refuses to come before the tribunal of the judge, let the party who summoned him call upon any citizens who are present to bear witness.[3] Then let him seize his reluctant adversary; so that he may be brought into court, as a captive, by apparent force.

1 From *The Institutes of Justinian,* B. Moyle, trans. 3rd ed. (Oxford: Oxford University Press, 1896), pp. 3-5.

2 Under the Roman method of procedure, until the thorough organization of the judicial system by the emperors, service of summons was always made by the plaintiff in the action. This was even sometimes done after the custom of regularly appointing court officials for that purpose had been established. —Ed.

3 Notification of the bystanders was made to show that the arrest of the defendant was to compel his appearance before the tribunal, a proceeding authorized by law; and not to insult him, or forcibly restrain him of his liberty, which might form the ground of prosecution for an illegal act. —Ed.

Law III.
When anyone who has been summoned to court is guilty of evasion, or attempts to flee, let him be arrested by the plaintiff.

Law IV.
If bodily infirmity or advanced age should prevent the party summoned to court from appearing, let him who summoned him furnish him with an animal, as a means of transport. If he is unwilling to accept it, the plaintiff cannot legally be compelled to provide the defendant with a vehicle constructed of boards, or a covered litter.[1]

Law V.
If he who is summoned has either a sponsor or a defender, let him be dismissed, and his representative can take his place in court.[2]

Law VI.
The defender, or the surety of a wealthy man, must himself be rich; but anyone who desires to do so can come to the assistance of a person who is poor, and occupy his place.

Law VII.
When litigants wish to settle their dispute among themselves, even while they are on their way to appear before the *Prætor*, they shall have the right to make peace; and whatever agreement they enter into, it shall be considered just, and shall be confirmed.

Law VIII.
If the plaintiff and defendant do not settle their dispute, as above mentioned, let them state their cases either in the *Comitium* or the Forum, by making a brief statement in the presence of the judge, between the rising of the sun and noon; and, both of them being present, let them speak so that each party may hear.

Law IX.
In the afternoon, let the judge grant the right to bring the action, and render his decision in the presence of the plaintiff and the defendant.

Law X.
The setting of the sun shall be the extreme limit of time within which a judge must render his decision.

Table II: Concerning judgments and thefts.

Law I.
When issue has been joined in the presence of the judge, sureties and their substitutes for appearance at the trial must be furnished on both sides. The parties shall appear in person, unless prevented by disease of a serious character; or where vows which they have taken must be discharged to the gods; or where the proceedings are interrupted through their absence on business for the State; or where a day has been appointed by them to meet an alien.

Law II.
If any of the above mentioned occurrences takes place, that is, if one of the parties is seriously ill, or a vow has to be performed, or one of them is absent on business for the State, or a day has been appointed for an interview with an alien, so that the judge, the arbiter, or the defendant is prevented from being present, and the furnishing of security is postponed on this account, the hearing of the case shall be deferred.

1 Litters were originally used exclusively by women and sick persons during the early ages of Greece and Rome. They, afterwards, in the time of the Empire, became a favorite mode of conveyance with the Romans, and especially with the wealthy nobles, who vied with one another in the profuse and costly decoration of their luxurious *lecticæ*, upholstered in silk, embellished with ebony, ivory, and lazulite, and glittering with precious stones and gold. The *sella*, one form of the litter, was almost identical with the sedan chair of the eighteenth century. The vehicle referred to in the text was probably a public one, like our cabs and carriages for hire. —Ed.

2 From this it will be seen that the office of defensor, or "defender," of the party sued was one of the most ancient recognized by Roman jurisprudence. Its duties were often undertaken without solicitation, through motives of friendship or compassion, or the influence of family ties; and, as the defendant's representative, he occupied the legal position of the former, including the unqualified assumption of all his liabilities arising from, or dependent upon the matter in litigation. —Ed.

Law III.
Where anyone is deprived of the evidence of a witness let him call him with a loud voice in front of his house, on three market-days.

Law IV.
Where anyone commits a theft by night, and having been caught in the act is killed, he is legally killed. [1]

Law V.
If anyone commits a theft during the day, and is caught in the act, he shall be scourged, and given up as a slave to the person against whom the theft was committed. If he who perpetrated the theft is a slave, he shall be beaten with rods and hurled from the Tarpeian Rock. [2] If he is under the age of puberty, the *Prætor* shall decide whether he shall be scourged, and surrendered by way of reparation for the injury.

Law VI.
When any persons commit a theft during the day and in the light, whether they be freemen or slaves, of full age or minors, and attempt to defend themselves with weapons, or with any kind of implements; and the party against whom the violence is committed raises the cry of thief, and calls upon other persons, if any are present, to come to his assistance; and this is done, and the thieves are killed by him in the defense of his person and property, it is legal, and no liability attaches to the homicide.

Law VII.
If a theft be detected by means of a dish and a girdle, it is the same as manifest theft, and shall be punished as such. [3]

Law VIII.
When anyone accuses and convicts another of theft which is not manifest, and no stolen property is found, judgment shall be rendered to compel the thief to pay double the value of what was stolen.

Law IX.

Where anyone secretly cuts down trees belonging to another, he shall pay twenty-five *asses* for each tree cut down.

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1 While the ordinary presumption certainly arises that no one can encounter a desperate malefactor in his house at night without incurring risk of serious injury; still, the Roman jurists, in enacting this provision, evidently had in view the prevention of homicide except when absolutely necessary, even under circumstances which might justify almost any violent act in the defense of life and property. Other lawgivers, generally speaking, did not recognize such nice distinctions. [The editor lists various examples of other laws on this point, including Jewish and American law, which we retain.]
With the Jews, homicide was not punishable when the culprit was killed under circumstances essential to constitute the crime known to us as burglary. "If a thief be found breaking up, and he be smitten that he die, no blood shall be shed for him; but if the sun be risen upon him, there shall blood be shed for him; for he should have made full restitution." (Exodus XXII, 2.)
In the United States [c. 1936, when this was written], killing is only justifiable where the crime could not otherwise have been prevented, and where force is employed. When an attempt is made to commit a secret felony, without violence, the right does not exist. It is different, however, where the precincts of a man's home are invaded in the daytime, or at night. "An attack on a house or its inmates may be resisted by taking life. This may be when burglars threaten an entrance, or when there is apparent ground to believe that a felonious assault is to be made on any of the inmates of the house, or when an attempt is made violently to enter the house in defiance of the owner's rights."
"But this right is only one of prevention. It cannot be extended so as to excuse the killing of persons not actually breaking into or violently threatening a house." (Wharton, *A Treatise on Criminal Law*, Secs. 629, 630, 634, 635.) —Ed.

2 This mode of punishment was considered especially ignominious by the Romans, and was usually inflicted upon traitors.
"The rock Tarpeian, Fittest goal for treason's race, The promontory whence the traitor's leap Cured all ambition." —Ed.

3 Various explanations have been suggested for the elucidation of this obscure passage. It has been supposed by some that a dish, perforated with two holes for the eyes, was carried by the thief to hide his face and conceal his identity; the girdle being intended for the removal of the booty. Others have advanced the theory that religious impostors, masquerading as members of the priesthood, passed the dish for the collection of money for alleged sacrificial purposes, and appropriated the amounts obtained to their own use. A few have maintained that the dish was employed to hold a piece of bread which had been subjected to certain magic ceremonies, and, for this reason compelled the thief to confess as soon as he had eaten it, a species of ordeal, as it were. The most plausible interpretation of the *furtum per lancem et licium refertum* is, however, that when the officer appointed for that purpose entered a house to seek for property which had been stolen, he was required to be naked, except for a girdle, and to hold a dish before his face, as a concession to the modesty of any woman he might encounter. The owner of the property was also entitled to make search under the same conditions. Nakedness was regarded as necessary in order to avoid anything being carried into the house which might afford ground for a false accusation. —Ed.

Law X.
Where anyone, in order to favor a thief, makes a compromise for the loss sustained, he cannot afterwards prosecute him for theft.

Law XI.
Stolen property shall always be his to whom it formerly belonged; nor can the lawful owner ever be deprived of it by long possession, without regard to its duration; nor can it ever be acquired by another, no matter in what way this may take place.[1]

1 This doctrine as set forth in the maxim "*Spoliatus debet, ante omnia, restitui*," is recognized by the courts of all civilized, and most semi-barbarous nations. —Ed.