Introduction

1. The Specific Outlook of Legal Theory

«Theory» is a Greek word meaning «contemplation[1]». To contemplate is more than just a mere look; moreover it represents a kind of look and a kind of vision. Contemplation is a look capable of reaching the background of things, of seeing what things are at their most intimate nature, with its value and meaning. Things show their inner reality when contemplated. Contemplation looks and provides the look of someone who can see in things far more than they physically appear. Enables this experience to approach things in an open-minded way, followed by a genuine desire to understand, which means to go beyond the purely empirical data, without implying at any time to abandon it. The empirical data and the human experience are always the starting point of all human knowledge. The experience is not complete if the information that it brings us does not imply a whole unit of meaning.

Therefore, we need this radical approach to the legal experience, able to embrace all aspects and manifestations that law offers. If the law, that the rights were only understood cumulatively, as an amount of quantitative data, branches and specialties, we would not have understood it properly. The understanding of law that the legal theory provides, is not reached until the law is seen as a complex whole, avoiding any kind of arbitrary simplifications. This comprehension of the law accepts it as plural and diverse, while unitary and organic. However, these plurality and diversity can only be adequately appreciated in its true measure from its unity and socio-historical organization. Otherwise the law would be seen as a broken and fragmented, meaningless pieces of a puzzle. Consequently, this would make us unable to understand neither the very essence of law, nor each and every one of the aspects and elements that form it.

A kind of perspective similar to this is assumed by Cicero, back in the first century B. C., within his dialogue *The Laws*: «We are not interested in this speech

[1] According to ARENDT (1993) «*Theoria* is the word given to explain the experience of eternity». (*La condición humana*, Paidós, Barcelona, p. 33).

how to prevent procedural safeguards or how to dispatch a query, either. Although it is an important issue, as is true, and cultivated by many authors not only before, but also now it has been signaled by a prominent authority; we must embrace this dissertation on the universal basis of rights and laws, in spite of that civil law (positive) is a small, say, a very small part of it[2]».

2. The Origin of the Law

In Cicero's words, «we must explain the nature of the law by deducing it from the human nature[3]». Obviously, Cicero is not trying to say that the right comes from human actions as a mere activity, but something else. What is meant, rather, is the need of deeply understanding human nature in order to fully understand what the law is. Therefore it is necessary to realize that without a prior understanding of the human nature, that what man is, it is either impossible a true understanding of the nature of law, since it is based on it. Hence, the first question Cicero puts is on the essence of human nature, and his answer is that man is a kind of sighted, shrewd, witty, and sharp, with memory, reason and full of advice animal, which was engendered by God with a very high status, indeed, privileged. Only he, among many breeds and varieties of animated beings, is involved with reason and thought, while all others are deprived of it. And what is more divine on heaven and earth, than his reason?».

Man is therefore a rational animal, as defined by Aristotle. But «the nature not only gave him a quick intelligence, but gave him some senses as guardians and messengers; his intelligence, not entirely clear and defined in many things, but certain in his comprehension of general principles of science; and gave him an appropriate and proportionate body shaped of human nature. Meanwhile nature crushed the other animated beings in order to let them graze, only man can walk and stand up straight, able to look at the sky as his former ancestors» home; and it set his face to express even the more innermost feelings... what we call «vultus[4]». But language is what should be emphasized among all that is in man, which stems from his rational nature and comes into being through words being «a principal instrument of human sociability[5]».

Due to our common sharing in this rationality, there is a great resemblance among fair and evil men: «The sorrows and joys, desires and fears invade the minds alike of all and, although being different views (...) who shall not estimate the courtesy, kindness, gratitude and appreciation for the received

2 CICERO, *Laws* I, V, XVII.

3 CICERO, *Laws*, I, V.

4 *Ibid.*, I, IX.

5 *Idem.*

benefits? And who shall not despise, neither hate the proud, the wicked, the cruel and the ungrateful?[6]». Thus, from this «common reason» can be concluded that «we are destined by nature to participate and interact each other and share a common law[7]». Sharing the same reason will lead us to share the same concept of law, for, as says Terence the poet, «nothing human is alien to me». All these considerations led to Cicero to assert the existence of a natural law common to all men, which was a kind of human law and divine one at once. It is a human law because «the law derives from the essence of human nature, it is the rational approach of a prudent man, on the question of defining what is just and unjust».

Here is the basis of solidarity among men, the natural society that exists between them. Solidarity leads men to share community life according to law and justice. Because the man wants justice he searches for unity with other men, but because of utility men grouped in towns and cities. The law and the laws of the people are formed in a blend of utility and justice. This couple is subdued to a serious risk, according to Cicero, because of human depravity of morals: they tend to cling to the first and despise the second one. Accordingly, Socrates used to curse the first who dissociated justice and usefulness[8]. This obliteration would mean to neglect a fundamental truth, which is expressed in the Pythagorean aphorism: «things are common for friends and friendship is equality[9]».

In short, the law is this political friendship that links us with other men in order to achieve our own perfection, thus it is founded in our nature, and does not merely consist of useful criteria based on human whim or conventions. This would be, for the author who has guided us in the Introduction, the true source of law: human nature. «And once we admit –and rightly, I think– that this is true, how can we ever be lawful in untying the laws and the right from nature[10]?»

3. Forms of Human Sociability: Family, Social and Political Life

Being stated that the research on the law and on the virtue of justice takes its origin in man's nature, it is necessary to deepen even more in those basic aspects that define his particular way of being, specifically with regard to his

6 *Ibid.*, I, XI.

7 *Ibid.*, I, XII.

8 *Ibid.*, I, XII.

9 Quoted by DIOGENES LAERCIO VIII, X.

10 CICERO, *Laws*, I, XIII.

purposes, i.e. to which tend men, and what do they naturally want. Surely we all agree that what the man is looking for or what he wants, before anything else, is happiness.

Happiness, therefore, can only exist and rest within a net of shared affections. Up to this moment it has not been explained what makes a man happy, but only the condition of sociability and affection that make possible happiness. Next question should be put at the kind of activity that is desirable for man in itself out of the idea of mean. Such actions appear to be in accordance to human virtues. Accordingly, to do what is noble and good is something desired by itself[11]. Man is considered virtuous, since, as Cicero observes, «virtue is nothing but nature refined and taken to its maximum development[12]».

The first area of human life of is the family. The family is the place where originally life is generated and brought up. Since the very act of procreation, primary care or the basic forms of education through feeding and clothing find their natural place within the family life. Above all, men live in their families the most intimate and exclusive affection, in form of parenthood and marriage.

According to Aristotle's political society, they should be truly considered –and not only by name– as the basis for social concern; if it would not be like that, social relations would be reduced to military alliances only different from those whose partners are away, turning out the law to be only a mere agreement and, as the Sophist Licophron said, a guarantee of rights that cannot make the citizens good and virtuous[13]. Considering the end of politics is to order the realm of the social life[14], like trade, individual rights and their guarantees; to organize the various offices, parties and entertainment; marriages, and all the stuff, in order to reach a good and happy life. Men can lead a political life when also bear the status of citizen. Citizens[15] are those who can join, with deeds and words, in discussing public affairs and the election of judges. Possibility of participation that, in the opinion of the ancients, was possible only by means of civic virtues and self-commitment to the common good[16].

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11 *Ibid.*, I, 1099a.

12 CICERO, *Laws*, I, VIII.

13 ARISTOTLE, *Politics*, III, 1280b.

14 «It is therefore clear that the city is not a community placed to prevent injustices and to overlook the reciprocal exchanges. These things, no doubt, if there are necessarily political, but not all of them because they are already political life». ARISTOTLE, *Politics*, III, 1280b 12.

15 «Citizen in general is involved in the governing and being governed; it is different in each regime, but at best is likely to obey than to command and to choose to live according to virtue». ARISTOTLE, *Politics*, III, 1284a.

16 «We believe, therefore, that friendship is the most important property in the cities». ARISTOTLE *Politics*, II, 1262b 6. And also, «the harmony seems to be a civil friendship». ARISTOTLE, *Nicomachean Ethics*, IX, 1167b.

Text Reading, Introduction

Introduction: Oliver Wendell Holmes, Jr. (March 8, 1841-March 6, 1935) American jurist who served as an Associate Justice of the Supreme Court of the United States from 1902 to 1932. Holmes helped move American legal thinking away from formalism and towards legal realism, as summed up in his maxim: «The life of the law has not been logic; it has been experience». His distinctive personality and writing style made him a popular figure, especially with American progressives, despite his deep cynicism and disagreement with their politics. His jurisprudence influenced much subsequent American legal thinking, including judicial consensus supporting New Deal regulatory law, pragmatism, critical legal studies, and law and economics. The Journal for Legal studies has identified Holmes as one of the three most cited American legal scholars of the 20th century.

Did you know that…? The Path of the Law is a vocational address delivered by Holmes at a ceremony of commencement of the academic year at Harvard Law School, where he studied and taught.

THE PATH OF THE LAW
By Oliver Wendell Holmes, Jr.
Harvard Law Review 457 (1897)

1. (...) I trust that no one will understand me to be speaking with disrespect of the law, because I criticise it so freely. I venerate the law, and especially our system of law, as one of the vastest products of the human mind. No one knows better than I do the countless number of great intellects that have spent themselves in making some addition or improvement, the greatest of which is trifling when compared with the mighty whole. It has the final title to respect that it exists, that it is not a Hegelian dream, but a part of the lives of men. But one may criticise even what one reveres. Law is the business to which my life is devoted and I should show less than devotion if I did not do what in me lies to improve it, and, when I perceive what seems to me the ideal of its future, if I hesitated to point it out and to press toward it with all my heart.

2. (...) There is another study which sometimes is undervalued by the practical minded, for which I wish to say a good word, although I think a good deal of pretty poor stuff goes under that name. I mean the study of what is called jurisprudence. Jurisprudence, as I look at it, is simply law in its most generalized part. Every effort to reduce a case to a rule is an effort of jurisprudence, although the name as used in English is confined to the broadest rules and most fundamental conceptions.
3. One mark of a great lawyer is that he sees the application of the broadest rules. There is a story of a Vermont justice of the peace before whom a suit was brought by one farmer against another for breaking a churn. The justice took time to consider, and then said that he has looked through the statutes and could find nothing about churns, and gave judgment for the defendant. The same state of mind is shown in all our common digests and textbooks. Applications of rudimentary rules of contract or tort are tucked away under the head of Railroads or Telegraphs or go to swell treatises on historical subdivisions, such as Shipping or Equity, or are gathered under an arbitrary title which is thought likely to appeal to the practical mind, such as Mercantile Law.
4. If a man goes into law it pays to be a master of it, and to be a master of it means to look straight through all the dramatic incidents and to discern the true basis for prophecy. Therefore, it is well to have an accurate notion of what you mean by law, by a right, by a duty, by malice, intent, and negligence, by ownership, by possession, and so forth. I have in my mind cases in which the highest courts seem to me to have floundered because they had no clear ideas on some of these themes. I have illustrated their importance already. If a further illustration is wished, it may be found by reading the Appendix to Sir James Stephen's Criminal Law on the subject of possession, and then turning to Pollock and Wright's enlightened book. Sir James Stephen is not the only writer whose attempts to analyze legal ideas have been confused by striving for a useless quintessence of all systems, instead of an accurate anatomy of one. The trouble with Austin was that he did not know enough English law. But still it is a practical advantage to master Austin, and his predecessors, Hobbes and Bentham, and his worthy successors, Holland and Pollock.

5. (…) We have too little theory in the law rather than too much, especially on this final branch of study. Let me now give an example to show the practical importance, for the decision of actual cases, of understanding the reasons of the law, by taking an example from rules which, so far as I know, never have been explained or theorized about in any adequate way. I refer to statutes of limitation and the law of prescription. The end of such rules is obvious, but what is the justification for depriving a man of his rights, a pure evil as far as it goes, in consequence of the lapse of time? Sometimes the loss of evidence is referred to, but that is a secondary matter. It is increasingly likely to come without the aid of legislation. Sometimes it is said that, if a man neglects to enforce his rights, he cannot complain if, after a while, the law follows his example. Now if this is all that can be said about it, you probably will decide a case I am going to put, for the plaintiff; if you take the view which I shall suggest, you possibly will decide it for the defendant.
6. A man is sued for trespass upon land, and justifies under a right of way. He proves that he has used the way openly and adversely for twenty years, but it turns out that the plaintiff had granted a license to a person whom he reasonably supposed to be the defendant's agent, although not so in fact, and therefore had assumed that the use of the way was permissive, in which case no right would be gained. Has the defendant gained a right or not? If his gaining it stands on the fault and neglect of the landowner in the ordinary sense, as seems commonly to be supposed, there has been no such neglect, and the right of way has not been acquired. But if I were the defendant's counsel, I should suggest that the foundation of the acquisition of rights by lapse of time is to be looked for in the position of the person who gains them, not in that of the loser. Sir Henry Maine has made it fashionable to connect the archaic notion of property with prescription. But the connection is further back than the first recorded history.
7. It is in the nature of man's mind. A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it. The law can ask no better justification than the deepest instincts of man. It is only by way of reply to the suggestion that you are disappointing the former owner that you refer to his neglect having allowed the

gradual dissociation between himself and what he claims, and the gradual association of it with another. If he knows that another is doing acts which on their face show that he is on the way toward establishing such an association, I should argue that in justice to that other he was bound at his peril to find out whether the other was acting under his permission, to see that he was warned, and, if necessary, stopped.

8. I have been speaking about the study of the law, and I have said next to nothing about what commonly is talked about in that connection-text-books and the case system, and all the machinery with which a student comes most immediately in contact. Nor shall I say anything about them. Theory is my subject, not practical details. The modes of teaching have been improved since my time, no doubt, but ability and industry will master the raw material with any mode. Theory is the most important part of the dogma of the law, as the architect is the most important man who takes part in the building of a house.

9. The most important improvements of the last twenty-five years are improvements in theory. It is not to be feared as unpractical, for, to the competent, it simply means going to the bottom of the subject. For the incompetent, it sometimes is true, as has been said, that an interest in general ideas means an absence of particular knowledge. I remember in army days reading of a youth who, being examined for the lowest grade and being asked a question about squadron drill, answered that he never had considered the evolutions of less than ten thousand men. But the weak and foolish must be left to their folly. The danger is that the able and practical minded should look with indifference or distrust upon ideas the connection of which with their business is remote. I heard a story, the other day, of a man who had a valet to whom he paid high wages, subject to deduction for faults. One of his deductions was, «For lack of imagination, five dollars». The lack is not confined to valets. The object of ambition, power, generally presents itself nowadays in the form of money alone. Money is the most immediate form, and is a proper object of desire. «The fortune», said Rachel, «is the measure of intelligence». That is a good text to waken people out of a fool's paradise. But, as Hegel says, «It is in the end not the appetite, but the opinion, which has to be satisfied».

10. To an imagination of any scope the most far-reaching form of power is not money, it is the command of ideas. If you want great examples,

read Mr. Leslie Stephen's History of English Thought in the Eighteenth Century, and see how a hundred years after his death the abstract speculations of Descartes had become a practical force controlling the conduct of men. Read the works of the great German jurists, and see how much more the world is governed today by Kant than by Bonaparte.

11. We cannot all be Descartes or Kant, but we all want happiness. And happiness, I am sure from having known many successful men, cannot be won simply by being counsel for great corporations and having an income of fifty thousand dollars. An intellect great enough to win the prize needs other food besides success. The remoter and more general aspects of the law are those which give it universal interest. It is through them that you not only become a great master in your calling, but connect your subject with the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law.

Questions

1. (Par. 3-4) What are the features of a true lawyer according to Holmes' view?
2. (Par. 5-7) What is your view on the case that Holmes puts?
3. (Par. 7) Explain the ultimate reason of Holmes on the case.
4. (Par. 9) Do you agree with the last statement quoting Hegel? Support your answer with reasons.
5. (Par. 4-5, 8-9, 10) What is the purpose of theory, according to Holmes?
6. (Par. 11) Explain with your own words this paragraph and support your own reasons against or in favour of the statement.

1

Persons, Things and Actions

Gaius' classical definition of right says that, «the right we use consists of persons, or things or actions». Moreover we will study that justice, rather than a theoretical value, is a world made of realities. In order to learn about it, we will focus on these notions and their connections along the first Lesson:

- Persona/persons.
- Res/things.
- Actio/actions.

1. Persona/Persons

Hermogenian holds that the man is the cause of all existing law, «*hominum causa omne ius constitutum est*». Let us consider its development through History: its roots and its contents.

What could be the origin of the word «person»? It has both Greek and Latin roots: *prosopa* (Greek), *personare* (Latín). The first one was an instrument which permitted a louder sound to the actors when performing plays at theatre. Its second meaning of person relates to the idea of *dignity*. In Ancient Rome that who was «person» was associated with the figure which in political terms means *citizen*, and in juridical sense is understood like *actor* (an individual able to hold legal actions and certain rights, what they called a person *sui iuris* like).

Christian Tradition has also a place in transforming the notion of person: it loses its only social connotation to acquire an ontological consideration, to say, a new, radical meaning which will drastically change not only the significance of the word but the ancient society, too. Some important dates related to the transformation of the notion of person, are:

- 313 AD. Edict of Milan given by Emperor Constantine I, giving freedom of religion to Christians.
- 451 AD. Council of Chalcedon, in which the concept of person is defined as according to Christ's: «…the Son [of God] and our Lord Jesus Christ is to

> be confessed as one and the same [Person], that he is perfect in Godhead and perfect in manhood, very God and very man, of a reasonable soul and [human] body consisting, consubstantial with the Father as touching his Godhead, and consubstantial with us as touching his manhood; made in all things like unto us, sin only excepted; begotten of his Father before the worlds according to his Godhead; but in these last days for us men and for our salvation born [into the world] of the Virgin Mary, the Mother of God according to his manhood. This one and the same Jesus Christ, the only-begotten Son [of God] must be confessed to be in two natures, unconfusedly, immutably, indivisibly, inseparably [united], and that without the distinction of ***natures*** being taken away by such union, but rather the peculiar property of each nature being preserved and being united in one Person and subsistence, not separated or divided into two persons, but one and the same Son»[17].

«A person is an individual substance of rational nature», tells us Boethius in the early VIth century. Later on, –XIIIth century– it will be Aquinas who gives a similar explanation on this notion by telling that a person is «what is most perfect in the whole of nature». The interesting point is that this perfection above mentioned, does not consist only in the general consideration of being rational, but furthermore being an individual *who subsists within it.*

Thus, we can conclude that personal dignity is based in this specific way of existence: an *individualized rational nature* (individual and different from all other living natures). The main characteristics that every human being has, according to this statement are:

– His own spiritual principle or soul (now on a philosophical outlook) which keeps him alive and in continuous self-development

– A self-conscious capacity

– A self-control capacity

2. Res/Things

This section intends to approach the juridical importance of the things, provided that they make human life possible. Why does this word, things, have such relevance as to be considered on the grounds of the Theory of Law? Should not it be more appropriate for a Physics Degree, or a common subject for

[17] SEE STEENBERG, M. (n.d.). *Monachos.net.* Retrieved July 12, 2012, from http://www.monachos.net/content/patristics/studies-themes/251-council-of-chalcedon-451-resource-materials: *http://www.monachos.net/content/patristics/studies-themes/251-council-of-chalcedon-451-resource-materials*

Engineering, or essentially for Furniture Design, at least? What have «things» to do with Law?

The philosopher Karl Schmitt conceives the value of things in a metaphorical way: he takes the action of «landing» as the one which creates the most radical title between persons and things, the ownership or property. This landing consists on that original control that men establish on the piece of earth in which they settle. Human settlement is not only a question of space moreover it has the power to build up a common world of things shared in community besides other things that become personally meaningful and/or individually valuable.

Firstly, the land ownership provoked the practice of what Romans called «ius gentium»: «Because of this right the wars happened, towns divided, kingdoms were established, properties were distinguished, lands were limited, houses were built, exchanges were institutionalized by selling and hiring; and appeared obligations» (Hermogenian).

Things and rights have been always firmly connected. Let us think why it happens. There is a fundamental classification of things within the Roman Law[18].

– *those things which belonged to the divine right*: Sacred-Religious-Saints
– *those things which pertained to the human right:* Public (belonged to the *res publica* or to the roman city) -Common (rivers, shores, sea) -Private (they were the only that could be sold)

Therefore, we know that all the things, from a legal outlook, can be classified within two aspects: Material (countable)-Immaterial (uncountable).

The origin of all legal relations on things can be communicative whereas conflictive. Provided any kind of exchange, rights on things come to existence. They have origin because of the exchange, the communication between people. When problems arise, the rights on things have to be defended by a third person able to judge and resolve impartially.

3. Actio/Actions

3.1. Actio in a Jurisdictional Sense

Roman jurisprudence gave the name of «*actio*» –from a jurisdictional point of view– to a predetermined behavior that the litigant parts had to perform facing a magistrate along the legal process. Each «action» established a type of demand for each occasion, according to its purpose and to the way of achieving

[18] DIGEST. I, VIII, I.

the right at stake. Each legal action involved the existence of «*actors*» (claimant, defendant) who performed their role along the process in the presence of a magistrate. Marco Antistio Labeon says «the act –*actio*– is performed through words or by facts»[19]. Depending on their purpose the actors could use the real actions to recover or to defend their properties whereas the personal actions were aimed to punish the person who had caused the damage.

The first «*actiones*» that took place in Rome, according to the ancient laws consisted of few strict ceremonies to resolve all kind of eventual conflicts. The work of the Roman Praetores[20] contributed to make these «*actiones*» more available to different cases, and therefore their number increased. That way began the Formulary Laws.

3.2. Human Actions

From a philosophical starting point, it is reasonable to base legal actions in human actions. Human actions are always the origin of all possible changes within reality. Generally speaking, the German philosopher Hannah Arendt points out that an action is always the origin of something, its beginning (the Greek word, *archein* means: to begin, to lead, to command); an action means also to put something into movement (which is the original meaning of the Latin word *agere,* to act).

Human actions are specifically different from those performed within the alive. Why? Only human beings can act (*agere*), in the sense that to act involves certain intelligence, a kind of decision absent in other living beings. This is directly connected with human rational condition, which is the cause of intelligence and freedom. Every action reveals the kind of man that achieves it: «the life of a man consists on his actions» says Aquinas. We could tell that, in a certain sense, we are what our deliberated acts are.

3.4. Action and Right

As a last point: What have human actions to do with ius/right? Dante Alighieri reveals in his work *On Kingdom* that ius/right is the adequate proportion between things and persons that comes established through the actions: «*Realis et personalis proportio hominis ad hominem*[21]».

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19 DIGEST. 50, 16,19.

20 Praetor, in ancient Rome (IV century B.C.), was originally a *consul*, and later a judicial magistrate. In 242 B.C. two praetors were appointed, the urban praetor (*praetor urbanus*), deciding cases to which citizens were parties, and the peregrine praetor (*praetor peregrinus*) deciding cases between foreigners. A principal duty of praetors was the production of the public games. T*he Columbia Electronic Encyclopedia.* (2004) Retrieved March 22, 2011, from http://education.yahoo.com/reference/encyclopedia/

21 ALIGHIERI, DANTE. De Monarchia, 2, V.

The right or *ius* (Latin), and the *actions* have mutual connections: The link between *ius* and *actio*n is explained by the fact that the laws configure the context in which actions are to be performed and moreover, give a kind of consistence to certain human actions, i.e. by punishing certain wicked actions, by making null or irrelevant some actions, or making them effective among certain persons, along the time. On the other hand, there is also an influence of actions on the *ius*: The right receives its formality from certain actions: an action is considered legal –among different things– when it is surrounded by certain human actions coming with it, i.e. the requirement of witnesses in certain cases like trials, marriages, solemn agreements; the sign required in written documents; the delivery of the thing in the case of a sale, etc.

A quite typical juridical action is called *restitutio*. The legal restitution consist of recovering the own property. The idea of restitution leads to an order that has to be permanently restored. This order is the aim of law.

The notion of *ius* or right essentially leads to a world of persons living by the means of things, a world made of facts and words (actions), a world that needs a balance among its elements. The individuals are the subjects of rights; the things and the external actions are the objects which are the basis of those rights. This juridical world reaches its meaning when men achieve the *proportio* already mentioned by Dante: that proportion which can make possible and preserve the common good.

Text Reading num. 1, Lesson 1[22]

Books and Titles of Justinian's Institutiones:

Liber Primus: Titulorum Conspectus.

I:I De iustitia et iure

I:II De iure naturali, gentium et civili

I:III De iure personarum

I:IV De ingenuis

I:V De libertinis

[22] http://www.thelatinlibrary.com/justinian.html (Latin).