

OUTLINE — LAW SECTION 1

Continental Legal History

<i>Period</i>	<i>Description</i>	<i>Politics</i>	<i>Roman</i>	<i>Canon</i>	<i>Customary/National</i>
450–1100	Early Middle Ages: primitive collections	Barbarian Invasions	Romano-barbarian Codes	Collections	Barbarian Codes
1100–1250	High Middle Ages: academic study	Feudalism, Feudal monarchy	CJC–glossators	Gratian→decretists Papal decretals	Coutumiers
1250–1500	Later Middle Ages: academic application:	National monarchy	CJC–commentators, <i>Consilia</i>	Decretalists→encyclopedic jurists	Coutumiers and statutes
1450–1550	Renaissance and Reformation: academic bifurcation	Absolutism	Humanists	Councils, <i>Consilia</i>	Codification of custom, Reception
1550–1750	Early Modern: bureaucracy and philosophers	Absolute monarchy	Natural law, <i>usus modernus pandectarum</i>	Papal bureaucracy, Handbooks	“Institutes” and statutes
1700–1900	Modern: codification	Revolution	Pandectists, Historical School	Pandectists →Codification	Codification

I. PERIODIZATION

1. A crude attempt to characterize each of these periods as a matter of legal history
 - 450–1100 age of the primitive collections
 - 1100–1250 age of academic study
 - 1250–1500 age of academic application
 - 1450–1550 age of academic bifurcation
 - 1550–1750 age of bureaucracy and philosophers
 - 1750–1917 age of codification
2. Any questions about the terminology (see the chart above)?
3. What was the main point of yesterday’s lecture about this?

II. WESTERN LEGAL TRADITION

If someone woke you up in the middle of the night and asked you what are the constituent features of the ‘Western legal tradition’, what would you say?

Basic Outline of European Codification

Allgemeines Landrecht für den preussischen Staaten (Prussian Civil Code; literally: ‘General Provincial Law for the Prussian States’) (1794)

Code Napoléon (Napoleonic Code) (1804)

Allgemeines bürgerliches Gesetzbuch (Austrian Civil Code; literally: ‘General Civil Law Book’)

(1811) (1st ed. 1786).

Codice di Diritto Civile (Italian Civil Code) (1865)

Código Civil (Spanish Civil Code) (1889)

Bürgerliches Gesetzbuch (German Civil Code) (1900)

Code Civil Suisse; Schweizerisches Zivilgesetzbuch (Swiss Civil Code) (1907)

III. THE NINETEENTH CENTURY CODES ON OUR PARTICULAR TOPICS

1. Wild Animals

a. The Napoleonic Code (1804)

[3. Of the different modes of acquiring property. General dispositions.]

711. Ownership in goods is acquired and transmitted by succession, by donation between living parties and by the effect of obligations.

712. Ownership is also acquired by accession, by incorporation, and by prescription.

713. Property which has no owner belongs to the nation.

714. There are things which belong to no one, and the use whereof is common to all.

The laws of police (*lois de police*) regulate the manner of enjoying such.

715. The right of hunting and fishing is alike regulated by particular laws.

b. The Austrian Code (1811)

[2. The law determining rights to things. 1. Of real rights. 3. Of the acquisition of property by occupancy.]

381. For vacant (*freistehenden*) things the title consists in the inborn liberty to take possession of them. The mode of acquisition is occupancy, by which one seizes a vacant thing with the intention to treat it as his own.

382. Vacant things can be acquired by all members of the State by means of occupancy, insofar as this right is not restricted by political laws (*politische Gesetze*), or insofar as some members do not have the privilege (*Vorrecht*) of occupancy.

383. This holds good especially in regard to the catching of animals. It is determined in the political laws, to whom the right of hunting or fishing belongs; how immoderate increase of the game will be checked, and damage caused by game will be compensated; how stealing of honey, which is produced by the bees of another person is to be prevented. The criminal laws determine how poachers are to be punished.

384. Domestic swarms of bees and other animals, which are tame or have been tamed, are not an object of the free catching of animals; on the contrary the proprietor has the right to follow them on the land of another person, but he must make up any damage caused to the proprietor of the land. In case the proprietor of a bee-hive kept for breeding has not followed the swarm within two days; or in case

an animal, which has been tamed, has remained away of itself for forty two days, every one can take and keep it on common ground and the proprietor on his land.

- c. The Italian, Spanish, German and Swiss codes are very close to the Austrian. The German is perhaps furthest away because it leaves the principle of occupancy to inference, but the Swiss returns to it. All seem fixated on bees.

2. Formation of marriage

- a. French civil marriage (there's no mention of religious). Takes place before M. le Maire. He reads the "aforementioned documents": the banns, any opposition to the banns and any renunciation, the birth certificates of the parties, the consents of the parents; then he reads 1.5.6 of the Code which begins "212. Married persons owe to each other fidelity, succour, assistance. 213. The husband owes protection to his wife, the wife obedience to her husband." He receives from each party his/her consent; he pronounces them husband and wife in the name of the law and makes up a marriage certificate, *sur-le-champ*. Parents have right to oppose the marriage of their children.
- b. The Austrian code seems to contemplate a religious marriage (with some preference in language being given to the Catholic), but the form is very similar to the French; so is the necessity for parental consent.
- c. The Italian is very similar to the French.
- d. The Spanish has a *renvoi* for Catholics to the canon law, with a provision about parental consent, though its absence is not invalidating.

42. The law recognizes two forms of marriage, the canonical which all who profess the Catholic religion should contract, and the civil, which shall be celebrated in the manner provided in this Code.
- e. The German provision is remarkably like the French despite differences in detail.
- f. The Swiss is even closer to the French.

3. Witnesses

The unity of the systems is less clear in the provisions concerning witnesses. What they do seem to have in common (at least a majority of them) is a list of people who can either (a) refuse to testify, (b) are incapacitated from testifying, or (c) can be "reproached" if they do testify. Blood relatives are the most commonly mentioned, but others (e.g. the one who has eaten at the expense of a party) are mentioned as well. The consequences (this is most clearly seen in the French provisions) have to do with a system of taking written depositions. The French provision says that the reproached witness's deposition is taken, but then if the reproach is "admitted" the deposition is not read.

Paul's Letter to the Romans

Paul of Tarsus was an observant Jew, who was not one of Jesus' followers during the latter's life. He violently opposed the early Christians, participating in efforts to suppress them. He experienced a conversion and became as ardent a Christian as he had earlier been an opponent of Christianity. He felt that he was called to a special mission to be the apostle of the Gentiles, to convert non-Jews to Christianity. He went on three missionary

journeys, preaching and founding churches in Greece and Asia Minor. The New Testament book called the Acts of the Apostles contains an extensive account of his activities. The letter to the Romans was written in winter 57–58 at Corinth on Paul's third missionary journey. Paul went from there to Jerusalem where he was imprisoned by the civil authorities and taken to Rome; he probably was released in 63, the point at which the the Acts of the Apostles ends. Traditionally Paul died a martyr's death in Rome in 67.

The letter to the Romans is perhaps the most theological of Paul's letters, certainly among the most polished. Its great theme is the relationship between Judaism and Christianity. Its immediate occasion may have been the problem of the mixed church in Rome and the tensions between Jewish and pagan Christians, but all we can sure of is that it is a letter of self-introduction.

The argument of the letter:

The anger of God against both pagan and Jew.

Why God is angry against the Jews is easy. They have the Law but they do not keep it, 2:21–2 (bottom of p. 13 of the *Materials*): “You preach against stealing, yet you steal; you forbid adultery, yet you commit adultery; you despise idols, yet you rob their temples.”

Why God is angry against the pagans is more complicated, 2:14–15: “Pagans who never heard of the law but are led by reason to do what the law commands, may not actually ‘possess’ the law but they can be said to ‘be’ the law. They can point to the substance of the law engraved on their hearts—they can call a witness, that is, their own conscience—they have accusation and defense, that is, their own inner mental dialogue.” But where are we to find this law, in the Torah? Yes, of course, but also (and this is the first big move in the letter):

The relationship of faith and law. 3:21:

“God's justice that was made known through the Law and the Prophets has now been revealed outside the Law ... to everyone who believes in Jesus Christ. ... [3:31] do we mean that faith makes the Law pointless? Not at all: we are giving the Law its true value.” But that might suggest that the Law is still in force. 7:1: “Brothers, those of you who have studied law will know that laws affect a person only during his lifetime. A married woman, for instance, has legal obligations to her husband while he is alive, but all these obligations come to an end if the husband dies. ... That is why you, my brothers, who through the body of Christ are now dead to the Law, can now give yourself to another husband, to him who rose from the dead to make us productive for God. ... The reason [8:1] therefore why those who are in Christ Jesus are not condemned, it that the law of the spirit of life in Christ Jesus has set you free from the law of sin and death. God has done what the Law, because of our unspiritual nature was unable to do.” But what is now law?

A new law for a new covenant. 13:8–9:

“Avoid getting into debt except the debt of mutual love. If you love your fellow men you have carried out your obligations. All the commandments ... are summed up in this single command: You must love your neighbor as yourself.” 13:1: “You must obey the governing authorities. Since all government comes from God, the civil authorities were appointed by God, and so anyone who resists authority is rebelling against God’s decision The state is there to serve God for your benefit. If you break the law, however, you may well have fear; the bearing of the sword has its own significance. The authorities ... carry out God’s revenge by punishing wrongdoers This is also the reason why you must pay taxes since all government officials are God’s officers”

Some themes.

1. The descending theory of power: “Since all government comes from God, the civil authorities were appointed by God”
2. The sword imagery: “the bearing of the sword has its significance.”
3. The notion of natural law: “Pagans who never heard of the law but are led by reason to do what the law commands”
4. Winnow out the essential from the Mosaic law.
5. The importance of authority but also freedom and equality.
6. The multiplicity of meanings of the word “law”

Some key dates in the legal history of Christianity:

30? — Crucifixion of Jesus

67 — Traditional death of SS. Peter and Paul

70 — First Roman destruction of Jerusalem

c.96 — Letter of Pope Clement I to the Corinthians

c.100 — approximate date of the last canonical books of the New Testament (though some of the epistles, e.g., 2 Peter, are almost certainly later)

132–35 — Bar Cocheba revolt (second Roman destruction of Jerusalem)

mid-2d century — Beginnings of the tradition of pseudo-apostolic canons known as the *didache* (teaching)

2d century — Scattered papal letters (later called ‘decretals’) concerning heresy and discipline

c.200 — Redaction of the *Mishna* at Jamnia

3d century — Continues papal letters concerning heresy and discipline

3d century — Earliest known local councils or synods (deal with Easter date, baptism conferred by heretics, those lapsed during persecutions, bishops suspected of heresy or irregularly promoted)

312 — Edict of Milan (toleration of Christianity)

325 — Council of Nicea (condemns Arius: Christ ‘of same substance’ as God the Father; disciplinary canons)

366–384, 384–399 — ‘Decretal’ letters of Popes Damasus and Siricius

381 — Council of Constantinople I (confirmation of Nicea; canons)

431 — Council of Ephesus (condemns Nestorius: Mary is ‘Mother of God’)

440–61 — Decretal letters of Pope Leo the Great

451 — Council of Chalcedon (condemns monophysites: Christ has 2 natures)

4th & 5th centuries — Many Western local councils (Rome, Gaul, Spain, Africa) promulgate canons on an ever-wider range of topics

c.500 — Redaction of the *Talmud* (in Babylon and Jerusalem)

IV. A ROMP THROUGH THE EARLY LEGAL HISTORY OF CHRISTIANITY

1. The relative absence of law in Christian writing of the apostolic period
2. A streak of antinomianism?
3. The importance of the letter to the Romans in this regard
4. The ‘council of Jerusalem’ (Acts 15; Galatians 2)
5. Why this seeming absence of law?
 - a. Jesus in opposition to the legalism of the Pharisees
 - b. Our own preconceptions of what law ought to be like: herewith of *kerygma* and *didache*
 - c. The mission to the gentiles
 - d. Preservation of unity, the concept of *koinonia*
 - e. Diverse ministries become pope, patriarch, bishops, priests, deacons, etc.
6. What happens to all of this in the fourth century? The role of councils and decretals.

7. Are we asking too much of law?
8. Summary: *nomos* and *kanon*.