

## CLASS OUTLINE — LECTURE 1

Medieval Studies 119  
Constitutional and Legal History of  
Medieval Continental Europe  
Prof. Donahue, Ms. Shadrina

Law 2165  
Legal History:  
Continental Legal History  
Prof. Donahue

### I. LECTURE 1A

1. Questions?
2. A quotation from Gratian of Bologna, *Concordance of Discordant Canons* d.a. D.1. Written around 1140, this may be greatest book about law written in the MA.

Humankind is ruled by two things, natural law (*naturale iure*) and customs (*moribus*). The law of nature (*ius naturae*) is what is contained in the Mosaic law and the Gospels (*lege et evangelio*), in which everyone is ordered to do to another what he wants done to himself and is prohibited from doing to another what he does not want done to himself. Whence Christ in the Gospels (Matthew 7:12): “Everything that you want other persons to do to you, do you also the same to them, for this is the law (*lex*) and the prophets.”

### II. PERIODIZATION

1. Much of European legal history is still written from a rather rigid national point of view. The periodization thus tends to be dictated by the periodizations of national histories. We are trying to do something different.
2. Periodization is important in any kind of history, but it is also a problem, because the way we organize may predetermine how we come out, what our overall points will be.
3. Look at the table immediately below.

### Continental Legal History

<i>Period</i>	<i>Description</i>	<i>Politics</i>	<i>Intellectual</i>	<i>Roman</i>	<i>Canon</i>	<i>Customary/National</i>
450–1100	Early Middle Ages: primitive collections	Barbarian Invasions	Monastic scholars	Romano- barbarian Codes	Collections	Barbarian Codes Capitularies
1100–1250	High Middle Ages: academic study	Feudalism, Feudal monarchy	Early scholasticism	CJC–glossators	Gratian–>decretists Papal decretals	Customals
1250–1500	Later Middle Ages: academic application:	National monarchy	Late scholasticism	CJC– commentators, <i>Consilia</i>	Decretalists –>ency- clopedic jurists	Customals and statutes
1450– 1550	Renaissance and Reformation: academic bifurcation	Absolutism	Humanists and reformers	Humanist jurists	Councils, <i>Consilia</i>	Codification of custom, Reception
1550– 1750	Early Modern: bureaucracy and philosophers	Absolute monarchy	Political theory; Mathematics	Natural law, <i>usus modernus pandectarum</i>	Papal bureaucracy, Handbooks	‘Institutes’ and statutes
1700– 1917	Modern: codification	Revolution	Enlightenment, Pandectists, Historical School	Pandectists –>Codification	Modern decretalists –>Codification	Codification

### III. THE CODIFICATION PHENOMENON.

1. At the beginning:
  - a. literacy
  - b. the beginnings of a realization that law belongs in separate category
  - c. realization of the connection between what we would call the state, and what they called different things, and the law
2. At the end:
  - a. a long period of professional development
  - b. sources of law proliferating and becoming unmanageable
  - c. person of power and/or genius
3. Taking Justinian, the Napoleonic Code, and the Uniform Commercial Code as examples of ‘end-codifications’, the differences may be more important than the similarities:
  - a. Justinian is a collection of texts, the Napoleonic Code and Uniform Commercial Code are systematic rewritings of the law.
  - b. The politics seem to be similar between Justinian and Napoleon but not Karl Llewelyn, the drafter of the UCC.
  - c. Justinian is legally conservative; Napoleon and Llewelyn are much less so.
4. ‘True codes’, i.e., codes that follow the model of the 19th European codes, are:
  - a. authoritative
  - b. exclusive
  - c. systematic

Applying these tests there is no Western code as opposed to a collection before the Prussian Civil Code of 1794; this is followed by the Napoleonic code of 1804, and by the Austrian Civil Code of 1811 (1st ed. 1786). Once these three codes had been promulgated, the ones that followed showed a considerable amount of influence from them, particularly from the French code.

5. At the end of the table above for Roman law, we have the great Roman collections: 529–533 A.D. They are going to become very important in our story. We’ll talk about them in the next class. In the rest of this class I would like to talk about another legacy of the ancient world: Christianity, beginning with a document: Paul’s letter to the Romans.

### IV. THE LEGACY OF THE ANCIENT WORLD: CHRISTIANITY

#### **Paul’s Letter to the Romans**

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, 2:21–22 (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 (JB): “Pagans who never heard of the Law (νόμον) but are led by reason (φύσει, *naturaliter* in the Latin Vulgate) 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. . . . on the day when, according to the Good News I preach, God, through Jesus Christ, judges the secrets of mankind.””

2:14–15 (NJB): 14. So, when gentiles, not having the Law, still through their own innate sense behave as the Law commands, then, even though they have no Law, they are a law for themselves. 15. They can demonstrate the effect of the Law engraved on their hearts, to which their own conscience bears witness; since they are aware of various considerations, some of which accuse them, while others provide them with a defence . . . on the day when, 16. according to the gospel that I preach, God, through Jesus Christ, judges all human secrets.

2:14–15 (NRSV)

<sup>14</sup> When Gentiles, who do not possess the law, do instinctively what the law requires, these, though not having the law, are a law to themselves. <sup>15</sup> They show that what the law requires is written on their hearts, to which their own conscience also bears witness; and their conflicting thoughts will accuse or perhaps excuse them <sup>16</sup> on the day when, according to my gospel, God, through Jesus Christ, will judge the secret thoughts of all.

Does this idea correspond to the Greek and Roman Stoic idea of natural law? Elsewhere, Paul suggests that God’s plan can be seen in creation (1:19) – that certain sins are ‘unnatural’, homosexual acts being among those mentioned (1:26), but also envy, murder, treachery, rebelliousness to parents (1:29–30). Whether Paul is thinking of the idea of natural law we need not get into, because it is clear that anyone who knew the Stoic idea of natural law would see the parallel.

But where are we to find this law “engraved on the hearts” of the pagans? in the Torah? Yes, of course. but also (and this is the first big move in the letter):

*The relationship of faith and law.* 3:21–3:31:

“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.

*The Christian is freed from the Law.* 7:1–8:1:

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”

### **Marriage: the *logia* on divorce**

Mark 10:9: “What God has united, man must not divide.”

Mark 10:11–12: “The man who divorces his wife and marries another is guilty of adultery against her. And if a woman divorces her husband and marries another she is guilty of adultery too.”

Luke 16:18: “Everyone who divorces his wife and marries another is guilty of adultery, and the man who marries a woman divorced by her husband commits adultery.”

Matthew 5:32: “Everyone who divorces his wife, except for the case of fornication, makes her an adulteress; and anyone who marries a divorced woman commits adultery.”

Matthew 19:6: “What God has united, man must not divide.”

Matthew 19:9: “The man who divorces his wife—I am not speaking of fornication—and marries another, is guilty of adultery.”

1 Corinthians 7:10–12: “A wife must not leave her husband—or if she does leave him, she must either remain unmarried or else make it up with her husband—nor must a husband send his wife away.”

Hypothetical reconstruction of the earliest form of the more common *logion*: “The man who divorces his wife and marries another is guilty of adultery.”

Mt. 19:3–12: “<sup>3</sup>Some Pharisees approached him, and to test him they said, “Is it against the Law for a man to divorce his wife on any pretext whatever?” <sup>4</sup>He answered, “Have you not read that the creator from the beginning *made them male and female* [Gn 1:27] <sup>5</sup>and that he said: *This is why a man must leave his father and mother, and cling to his wife, and the two become one body?* [Gn 2:24] <sup>6</sup>They are no longer two, therefore, but one body. So then, what God has united, man must not divide.”

<sup>7</sup>They said to him, “Then why did Moses command that a writ of dismissal should be given in cases of divorce?” <sup>8</sup>“It was because you were so unteachable” he said “that Moses allowed you to divorce your wives, but it was not like this from the beginning. <sup>9</sup>Now I say this to you: the man who divorces his wife—I am not speaking of fornication—and marries another, is guilty of adultery.”

<sup>10</sup>The disciples said to him, “If that is how things are between husband and wife, it is not advisable to marry.” <sup>11</sup>But he replied, “It is not everyone who can accept what I have said, but only those to whom it is granted. <sup>12</sup>There are eunuchs born that way from their mother’s womb, there are eunuchs made so by men and there are eunuchs who have made themselves that way for the sake of the kingdom. Let anyone accept this who can.”

Mishna Gitin 9:10, as reported in the Babylonian Talmud Gitin 90a (Soncino trans. modified by CD): “The school of Shammai say: a man should not divorce his wife unless he has found her guilty of some unseemly conduct, as it says, because he hath found some *unseemly* thing in her. [See Deuteronomy 24:1]. The school of Hillel, however, say [that he may divorce her] even if she has merely spoilt his food, since it says, because he hath found *some* unseemly *thing* in her. R. Akiba says, [he may divorce her] even if he finds another woman more beautiful than she is, as it says, it comes to pass, if she find no favour in his eyes. [Again, a reference to Dt 24:1.]” Dt 24:1 reads in the NRSV: “Suppose a man enters into marriage with a woman, but she does not please him because he finds something objectionable about her, and so he writes her a certificate of divorce, puts it in her hand, and sends her out of his house . . . .” The Hebrew is more ambiguous.

### **Marriage: Paul on divorce**

1 Cor. 7:12–15. If a brother has a wife who is an unbeliever, and she is content to live with him, he must not send her away; <sup>13</sup>and if a woman has an unbeliever for a husband, and he is content to live with her, she must not leave him . . . . However, if the unbelieving partner does not consent, they may separate; in these circumstances, the brother or sister is not tied; God has called you to a life of peace.

### **Marriage as a “mystery”**

Ephesians 5:25–33: “Husbands should love their wives just as Christ loved the Church and sacrificed himself for her to make her holy. He made her clean by washing her in water with a form of words so that when he took her to himself she would be glorious, with no speck or wrinkle or anything like that, but holy and faultless. In the same way, husbands must love their wives as they love their own bodies; for a man to love his wife is for him to love himself. A man never hates his body, but he feeds it and looks after it; and that is the way Christ treats the Church, <sup>30</sup>because it is his body—and we are its living parts. *For this reason, a man must leave his father and mother and be joined to his*

wife, and the two will become one body. [Gn 2:24] This mystery has many implications; but I am saying it applies to Christ and the Church. <sup>33</sup>To sum up; you too, each one of you, must love his wife as he loves himself; and let every wife respect her husband.”

### Two witnesses

Dt. 19:15: “A single witness will not suffice to convict anyone of a crime of any kind; whatever the misdemeanour, the evidence of two witnesses or three is required to sustain the charge.”

Mt. 18:16: “If your brother does something wrong, go and have it out with him alone, between your two selves. If he listens, you have won back your brother. If he does not listen, take one or two others along with you: *whatever the misdemeanour, the evidence of two or three witnesses is required to sustain the charge.* But if he refuses to listen to these, report it to the community; and if he refuses to listen to the community, treat him like a gentile or a tax collector.”

1 Cor. 13:1–2: This will be the third time I have confronted you. *Whatever the misdemeanour, the evidence of two or three witnesses is required to sustain the charge.* I gave you notice once, and now, though I am not with you, I give notice again, just as when I was with you for a second time, to those who sinned before, and to all others; and it is to this effect, that when I do come next time, I shall have no mercy.

As the translation shows, the italicized passages in Mt. 18:15–17 and 1 Cor. 13:1–2 are direct quotations in Greek of the Hebrew of Dt. 19:15.

To these should be added chapter 13 of the book of Daniel, a Greek addition to the Hebrew text, the story of Susannah and the elders. It is a wonderful law story about how to examine witnesses:

[In Babylon, Susannah, the daughter of Hilkiyah and the wife of Joachim, was the object of the lust of two elders of the people. They trapped her in her garden where she was taking a bath alone and told her that they would accuse her of being with a young man if she did not have sexual relations with them. She screamed, and the elders appeared before the people and accused her of committing adultery with the (fictitious) young man. As we pick up the story, Susannah, being led to execution, cries out to God for help:]

<sup>44</sup>The Lord heard her cry <sup>45</sup>and, as she was being led away to die, he roused the holy spirit residing in a young man named Daniel <sup>46</sup>who began to shout: “I am innocent of this woman’s death!” <sup>47</sup>At this all the people turned to him and asked, “What do you mean by that?” <sup>48</sup>Standing in the middle of the crowd he replied, “Are you so stupid, children of Israel, as to condemn a daughter of Israel unheard, and without troubling to find out the truth? Go back to the scene of the trial: these men have given false evidence against her.” <sup>50</sup>All the people hurried back, and the elders said to Daniel, “Come and sit with us and tell us what you mean, since God has given you the gifts the elders have.” <sup>51</sup>Daniel said, “Keep the men well apart from each other. “You have grown old in wickedness,” he said, “and now the sins of earlier days have overtaken you, <sup>53</sup>you with your unjust judgments, your condemnation of the innocent, your acquittal of the guilty, although the lord has said “You must not put the innocent and upright to death.” <sup>54</sup>Now then, since you saw her so clearly, tell me under what sort of tree you saw them lying under.” He replied, “Under an acacia tree.” <sup>55</sup>Daniel said, “Indeed, your lie recoils on your own head:<sup>1</sup> the angel of God

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<sup>1</sup> A play on words in the Greek.

has already received from him your sentence and will cut you in half.”<sup>56</sup> He dismissed the man, ordered the other to be brought and said to him, “Son of Canaan, not of Judah, beauty has seduced you, lust has led your heart astray!”<sup>57</sup> This is how you have been behaving with the daughters of Israel, and they have been too frightened to resist; but here is a daughter of Judah who could not stomach your wickedness!<sup>58</sup> Now then, tell me what sort of tree you surprised them under.” He replied, “Under an aspen tree.”<sup>59</sup> Daniel said, “Indeed! Your lie recoils on your own head: the angel of God is waiting with a sword to rend<sup>2</sup> you in half, and destroy the pair of you.”

<sup>60</sup>Then the whole assembly shouted, blessing God, the Saviour of those who trust in him.  
<sup>61</sup>They turned on the two elders whom Daniel had convicted of false evidence out of their own mouths. <sup>62</sup>As the law of Moses prescribes,<sup>3</sup> they were given the same punishment as they had schemed to inflict on their neighbour. They were put to death. And, thus, that day an innocent life was saved.

### **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 Nicaea (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 Nicaea; canons)

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

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<sup>2</sup> Another play on words in the Greek.

<sup>3</sup> Cf. Dt 19:16–21, which appears just after the two-witness requirement quoted above.

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)

## V. A ROMP THROUGH THE EARLY LEGAL HISTORY OF CHRISTIANITY

1. The relative absence of law in Christian writing of the apostolic period. Considering the cultural background of Christianity and the relatively early association of Christianity with Roman culture, this is a bit surprising. Perhaps we are looking for the wrong thing when we look for ‘law’. Jewish culture did not separate law from morality in the way that we do. A cultural explanation of the relative absence of law might focus on the influence of Greek culture on early Christianity.
2. A streak of antinomianism?
  - a. “Woe unto you lawyers” (Lk. 11:43, Mt. 23:4).
  - b. Opposition the early Christians to what was going on at Jamnia. That was going to lead to the Mishna and ultimately to the Talmud.
3. The importance of the letter to the Romans in this regard. The argument is theological: a Christian is not justified by the Mosaic law, a Christian is justified by faith.
4. The ‘council of Jerusalem’ (Acts 15; Galatians 2). Three related but separate issues about gentile converts: do the men have to be circumcised, do they all have to follow the Jewish dietary laws, and can Christians eat meat that has been offered up in a pagan sacrifice? The answer to the first question was no; the answer to the second question seems to have been a compromise by which the elaboration of the dietary rules was relaxed, though the rules about blood were retained, and the answer to third question seems to have been no. The very early church saw the need for something very close to what we would call legislation.
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*
6. Three initial concepts: (1) prophets, teachers, speakers in tongues are all mentioned in the sources; (2) people who had a connection with Jesus—those who were literally sent, the apostles, and those whom the apostles commissioned; (3), the elders, *presbyteroi*, the other group in the church of Jerusalem, who along with the apostles, and especially Peter, took the

decision on circumcision.. These become in a not much later age pope, bishops, priests, deacons, exorcists, porters, lectors and acolytes.

7. What happens to all of this in the fourth century? Acceptance by secular authority, particularly in a world that would have regarded the notion of separation of church and state as bizarre, automatically involved a number of things: It now became even more important to know who was in and who was out. The Greek councils and the struggle for orthodoxy involve a struggle for the loyalty of an empire. Councils also adopt *canons*, rules for administration. The decretal letters of the popes take on a vocabulary similar to the constitutions of the Roman emperors. When the Roman emperors abandon Rome, the pope takes on many of the functions of the Roman authority in Rome. Leo the Great, pope from 440–461, is the name most associated with this phenomenon, though it began earlier.
8. Are we asking too much of law? There will be a moment in our story, in the twelfth century, when the development of a genuinely religious legal system, or something quite close to that, will happen.
9. Summary: *nomos* and *kanon*. In the period of the apostolic church, law was associated with particular movement, indeed what was probably the dominant movement within Judaism. Christianity was founded in reaction to that movement. It also received its first strong intellectual influences from Hellenistic sources, and law, as we have said, was not the Greeks' long suit. The separation of law and morals, something that had a profound effect on the history of canon law and indeed on western law generally can probably be traced back to this period. The first examples of a peculiarly ecclesiastical law are not called *nomos*, the Greek word for law and also the word for *torah* in the Greek translation of the Hebrew Bible, they are called *kanon*, a curious word that means a rudder or a guide. This is not, I think, to suggest that they are any less binding, but to suggest rather that they are not the Jewish law by which, in some sense, the observant Jew believed that he was justified, nor the *nomos* of the Greeks, a word redolent of overarching philosophical ideas and with firm associations with secular authority. Law was to become more important in the life of the church; we can see this happening already in the late Roman empire. But the flowering of law within the church belongs solidly to the period that is the subject of this course.