OUTLINE — LECTURE 23

From the Napoleonic Code to the German Civil Code:
The pandectists, the historical school and the making of the BGB

Sketch of Events in the 19th century:
Industrial Revolution—Has arrived in England by the beginning of the century, but does not arrive in Prussia until mid-century
1830—Year of Revolution; division of Belgium and the Netherlands; expulsion of direct Bourbon line from France in favor of Louis-Philippe
1848–49—Year of Revolution; abdication of Louis Philippe eventually leads to establishment of Second Empire of Napoleon III (1852–1870); Frankfurt Parliament in Germany; ultimate humiliation of Prussia by Austria at Olmütz; political opposition of bourgeois and workers
1856—Congress of Paris, end of the Crimean War, status quo in Europe
1860—Unification of Italy under Victor Emmanuel by Carvour and Garibaldi
1870—First Vatican Council proclaims papal infallibility
1870–71—Defeat of France in Franco-Prussian War; collapse of Second Empire
1871—Unification of Germany under Kaiser Willhelm I by Bismark
1871–1883—Kulturkampf, anti-Catholic movement in Germany led by Bismark
1875—The Adoption of Civil Marriage in Germany
1883—Beginnings of Social Security system in Germany
1914—Outbreak of the Great War

A Century of Codification:
1804—Code Napoléon
1811—Austrian Civil Code (Allgemeines bürgerliches Gesetzbuch)
1865—Italian Civil Code (Codice civile)
1889—Spanish Civil Code (Codigo civil)
1900—German Civil Code (Bürgerliches Gesetzbuch)
1907—Swiss Civil Code (Code civile suisse)
1807—French Commercial Code
1861—German Commercial Code (redone 1900)
1862—Austrian Commercial Code
1881—Swiss Obligations Law
1882—Italian Commercial Code (unified with Civil Code, 1942)
1885—Spanish Commercial Code (1829)
1806—French Civil Procedure Code
1855—Spanish Civil Procedure Code (redone 1885)
1865—Italian Civil Procedure Code
1877—German Civil Procedure Code
1895—Austrian Civil Procedure Code
2011—Swiss Civil Procedure Code (previously codified on a cantonal level)
1917—Code of Canon Law of the Roman Catholic Church

**German Juristic Science—19th century:**

Kant, Emmanuel (1724–1804)

Hegel, Friedrich (1770–1831)

  - The Philosophy of Right (1821)

Savigny, Friederich Carl von (1779–1861)

  - Das Recht des Besitzes (The Law of Possession) (1803)
  - Vom Beruf unserer Zeit für Gesetzgebung u. Rechtswissenschaft (The Call of Our Time for Legislation and Jurisprudence) (1814)
  - Geschichte des römischen Rechts im Mittelalter (The History of Roman Law in the Middle Ages) (1815–1831)
  - System des heutigen römischen Rechts (A System of Modern Roman Law) (1840–1849)

Mommsen, Theodor (1817–1903)

  - Digesta (edition of Justinian’s Digest) (1868)
  - Römisches Staatsrecht (Roman Public Law) (1871–1888)
  - Römisches Strafrecht (Roman Criminal Law) (1899)

Jhering, Rudolf von (1818–1892)

  - Der Geist des römischen Rechts (The Spirit of Roman Law) (1852–1858)
  - Der Zweck im Recht (Purpose in Law) (1877–1883)

Gierke, Otto F. von (1841–1921)

  - Das deutsche Genossenschaftsrecht (The German Law of Associations) (1868–1913)
  - Deutsches Privatrecht (German Private Law) (1895–1917)

**Pandectists:**

Glück, Christian Friedrich von (1755–1831)

  - Ausführliche Erläuterung der Pandekten (Comprehensive Explanation of the Pandects) (1790–1830) (up to book 28, continued by others until 1896 thru book 44)

Puchta, Georg Friedrich (1796–1846)

  - Lehrbuch der Pandekten (Textbook on the Pandects) (1836)
Cursus der Institutionen (Course on the Institutes) (1841–1847)

Savigny (see above)

Windscheid, Bernhard (1817–1892)

Lehrbuch des Pandektenrechts (Textbook on the Pandects) (1862)

Dernburg, Heinrich (1829–1907)

Pandekten (Pandects) (1884)

Das bürgerliche Recht des deutschen Reiches und Preussens (The Civil Law of the German Empire and of Prussia) (1898)

**Windscheid and the BGB** (Windsheid Outline [W]; BGB Outline [B]):

[W]1. Concerning law in general (pp. 1:47–107)

[B]1. General Part

   [W]1. Sources of law
   [W]2. Interpretation and scientific treatment of law
   [W]3. Antitheses in law
   [W]4. Sphere of action of law

[W]2. Concerning rights in general (pp. 1:107–477)

   [W]1. Concept and species of rights
   [W]2. The subject of right (law);
      [W]a. The subject of law in general
      [W]b. Man as the subject of law;
      [B]1.1.1 Natural Persons
      [W]c. Legally relevant differences among men
      [W]d. The juridical person;
      [B]1.1.2 Juridical Persons

[W]3. Birth, extinction, modification of rights

   [W]a. In general
   [W]b. Legal transactions
   [B]1.3 Transactions in law
   [W]c. Illicit behavior
   [W]d. The influence of time on the birth, extinction and modification of rights

   [B]1.4 Limitations, terms for performance
   [B]1.5 Limitation

[W]4. Exercise, violation and guardianship of rights

[B]1.6 Exercise of rights, self-defense, self-redress, prohibition of malice
Appendix. Privileges.

[W]3. The law of things (pp. 1:477–908)

[B]3. Law of things
   [W]1. In general
   [B]1.2 Things
   [W]2. Possession
   [B]3.1 Possession
   [W]3. Rights in things in general
   [B]3.2 Rights to real property
   [W]4. Ownership
   [B]3.3 Ownership
   [W]5. Servitudes
       [B]3.4 Hereditary right of construction, 3.5 Servitudes 3.6 Right of pre-emption, 3.7 Burdens on real property
   [W]6. Emphyteusis and superficies
   [W]7. Law of pledge
       [B]3.8 Mortgage, ground rent, rent-charge, 3.9 Right of pledge upon movable things and upon rights

[W]4. Law of obligations (pp. 2:1–901)

[B]2. Law of debt-relations, obligations
   [W]1. Obligations in general
       [W]a. Concept of obligation
       [B]2.1 Nature of obligations
       [W]b. Object of obligation
       [W]c. Contents of obligation
       [W]d. Subject of obligation
       [B]2.6 Plurality of debtors and creditors
       [W]e. Birth of obligation
       [W]f. Change of obligation
       [B]2.4 Assignment of claim
       [W]g. Extinction of obligation
       [B]2.3 Expiration of debt-relations
   [W]2. Individual obligations
       [B]2.2 Relations of indebtedness arising out of contract
b. Obligations born of causes analogous to contract

2.7 Various relations of indebtedness

2c. Obligations born of delict and analogous cases

d. Other legal obligations

e. Responsibility for the obligations of others

2.5 Assumption of indebtedness

5. Family law (pp. 3:1–99)

4. Domestic (family) rights

1. Marriage

4.1 Civil marriage

2. Relationship between parents and children

4.2 Relationship

3. Guardianship

4.3 Guardianship


5. Right of inheritance

1. In general

5.1 Succession principles

2. Concerning the calling to an inheritance

5.2 Concerning the acquisition of an inheritance

3. Concerning the acquisition of an inheritance

4. The juridical status of an heir

5. Legacies

6. Appendix

5.1 Legal status of heir

5.2 Testament

5.4 Contract of inheritance

5.5 Obligatory Portion

5.6 Unworthiness of heirship

5.7 Renunciation of inheritance

5.8 Certificate of heirship

5.9 Purchase of inheritance

The so-called ‘exegetical school’ and the Napoleonic Code

Alexandre Duranton (d. 1866), professor at Paris, (21 vols.)

Raymond Troplong (d. 1869) magistrate and president of the cour de cassation (27 vols.)

Charles Demolombe (d. 1888) (31 vols.)
François Laurent (d. 1887), theoretician of the school Charles Aubry (d. 1883) and Charles Rau (d. 1877), professors at the university of Strasbourg (8 vols.)

19th Century Legal Thought and the Glossators

The glossators, as we have seen, looked to their text as authoritative. In this regard, they are no different from the pandectists of the 19th or the French exegetical school of the same period. Perhaps the major difference between the thought of all three and that of the English was that all three Continental schools looked to a single authoritative text. But the way in which the three schools looked to their text as authoritative was different. For the glossators the principal reason for looking to the *Corpus Juris* was as a source of arguments. Their principal product was logical-grammatical analysis of the text with a view to producing, *brocardia* and *notabilia*, which could then in turn be used in dispute for resolving questions. Out of these multiple disputes eventually a *communis opinio doctorum* would emerge. In this way some unity would be achieved, but it was a fragile unity, maintained only so long as the teaching tradition was maintained. It depended very little on political authority. It is for that reason that I have argued that important as the contributions of the glossators were to the political debates of the Middle Ages were we misunderstand their achievement if we focus too much on their political thought. The glossators have more in common with the rabbis of the Talmud than they do with either the pandectists or the exegetical school.

Looked at from middle distance and seeing their influence on Langdell’s formalism we tend to think of the principal contribution of the pandectists as system-building. But the pandectists were smart enough to realize that the *Corpus Juris* does not yield a necessary system. If a system was going to be created it had to derive its fundamentals from something more than just the text, and that something for most of the pandectists was history, not the modern type of history that Mommsen was practicing but a more global kind of history in which institutions were seen as emerging out of the spirit of the Roman people and then, somehow, transferred to the German. These institutions were not only visible institutions like marriage or courts but also institutions in the realm of ideas, like the concept of obligation or the concept of a legal transaction. It is hard to imagine how anyone could believe this if one didn’t also believe in Hegel, and when people ceased believing in Hegel, the idea began to fall down. One is reminded of Jhering’s trenchant criticism of the jurisprudence of concepts later in his life and his espousal of something much more like the modern sociological jurisprudence or jurisprudence of interests.

The exegetical school seems at first glance to be the least interesting. Everything proceeds from the will of the legislator. The function of the jurist is to determine that will, working within the four corners of the text. In must remind you that the school, far from being the most typically continental of the three, is probably the most typically English. Its ideas owe much to Bentham and its jurisprudence is probably better reflected in the thought of Austin than in that of the pandectists. Like the glossators, they made considerable use of logic and grammar. Unlike the glossators they had very little use for natural law. They are clearly the most positivist of the three groups. The *exegetical school* dominated legal thought in France and the Low Countries for about two-thirds of the 19th century. By the end of the century other ideas were coming to the fore. Influenced perhaps by the
pandectists but far more modern in their methods historical jurisprudence makes its appearance in mid-century France in a form that emphasizes what one might call an anthropological approach. The ancient world is studied not to see how it is the same as our own, but how it is different. But the exegetical school had done its work well, and it remains the dominant method used in interpretation of the Civil Code. Perhaps this century will see a departure; there are hints of it already, but that is, in some ways, a topic for the final lecture in the course.