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# LEGAL HISTORY: CONTINENTAL LEGAL HISTORY



## Tentative Proper Syllabus

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### SYLLABUS – 2d REVISE

In what follows Bellomo=Manlio Bellomo, *The Common Legal Past of Europe: 1000-1800* (Washington, DC: Catholic U. Press, 1995); Berman = H. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge [MA]: Harvard Press, 1983); K1500 = H.G. Koenigsberger, *Medieval Europe, 400-1500* (Harlow: Longman, 1987); K1789 = H.G. Koenigsberger, *Early Modern Europe, 1500-1789* (Harlow: Longman, 1987); *Documents* = C. Donahue, *Documents on Continental Legal History* (unpublished, first installment available in class or in Room 518 of Hauser Hall); RFG = O. F. Robinson, T. D. Fergus and W. M. Gordon, *An Introduction to European Legal History*, 2d ed. (London: Butterworths, 1994); van Caenegem = R. C. van Caenegem, *An Historical Introduction to Private Law* (Cambridge [Eng]: U. Cambridge, 1988); Vinogradoff = P. Vinogradoff, *Roman Law in Medieval Europe*, 2d ed. (Oxford: Clarendon, 1929); Watson = A. Watson, *The Making of The Civil Law* (Cambridge [MA]: Harvard Press, 1981).

Week

Assignment

Week 1

- [Lecture 1.](#) 1. Introduction to the course. A basic chronology of three legal traditions: Roman, Continental European and English. Introduction to Roman law. Bellomo, 1–26; van Caenegem, 1–15; RFG2 vi–x; RFG3 v–vii, 285–319.
- [Section 1.](#) 2. The structure of Roman law and of the European civil codes. RFG2 1–10; RFG3 1–11; Watson 1–38. Justinian’s *Institutes*; D.23.2; C.5.4; D.22.5; C.4.20; selected 19th-century European codes on marriage, wild animals, and witnesses (*Documents*, Parts I, XX). [Focus on the overall structure of Justinian’s *Institutes* (Outline for Lecture 2) rather than on the detail. In the case of the *Digest* and the *Code*, try to get a sense for how the material is organized. Try to think about “fundamental legal categories”: *ius* vs. *lex*, public vs. private, criminal vs. civil, persons vs. things vs. actions, property vs. contract vs. delict (tort). Then ask yourself how these categories are reflected in Justinian’s *Institutes* and in the 19th century codifications. Then try to figure out what the rules were about the capture of wild animals, marriage, and witnesses both in Roman law and in the 19th-century codes.] The legacy of the ancient world: Christianity. Paul’s letter to the Romans (*Documents*, Part II.A).
- [Lecture 2.](#) 3. Reflections on the distinction between “common law” and “civil law” and on what we mean by the “Western legal tradition.” The legacy of the ancient world: Roman law. RFG2 1–10; RFG3 1–11; Watson 1–38. Justinian’s *Institutes* (*Documents*, Part I.A). [Focus on the overall structure of Justinian’s *Institutes* and on the specifics about wild animals and marriage (there’s nothing about witnesses).] How the story came out. (*Documents*, Part XX). [Ask yourself about the overall structure and the rules about wild animals, marriage and witnesses in the 19th century codifications. Are the different codes more notable for their similarities or their differences?]

## Week 2

- [Lecture 3.](#) 4. Two “Barbarian” Law Codes—Aethelberht (*Documents*, Part III.A). [Ask yourself two questions: (1) What is the overall structure of this material? (2) What, if anything, does it have to say about wild animals, marriage and witnesses?]
- [Section 2.](#) 5. The basic structure of Roman law (cont’d). Justinian’s *Institutes*; D.23.2; C.5.4; D.22.5; C.4.20; selected 19th-century European codes on marriage, wild animals, and witnesses (*Documents*, Parts I, XX). [Review the first part of Assignment 2. After a week in the course are your thoughts on these topics any different?] New Testament extracts on marriage (*Documents*, Part II.B). Witnesses in the Bible (*Documents*, Part II.C). [K1500 1–66.]
- [Lecture 4.](#) 6. Two “Barbarian” Law Codes—Gundobad (compared with the *Lex romana burgundionum*) (*Documents*, Part III.B). [Same questions as Assignment 4.]

## Week 3

- [Lecture 5.](#) 7. Carolingian institutions and “feudalism.” Bellomo, 27–43; RFG2 23–70; RFG3 26–41; Documents on Continental feudalism (*Documents*, Part IV). [K1500 67–135.]
- [Section 3.](#) 8. The “barbarian” invasions. van Caenegem, 16–29; RFG2 6–25; RFG3 11–25; Vinogradoff 11–42. Two “Barbarian” Law Codes: Aethelberht and Gundobad compared. (*Documents*, Part III). The Collection in 74 Titles.

- (*Documents*, Part VI). [Same questions as Assignment 4.]
- [Lecture 6.](#) 9 . Eleventh-century reforms and a glimpse at *regnum* and *sacerdotium*, to the end of the 13th century. Berman 85–119, 273–332. Documents on the investiture controversy (*Documents*, Part V). [K1500 136–212.] The Collection in 74 Titles (cont'd). (*Documents*, Part VI). [The key question here is what is the relationship between the basically political arguments that are found in the literature surrounding the investiture controversy and the legal rules (most of which are derived from forged documents) found in the Collection in 74 Titles?]

#### Week 4

- [Special lecture.](#) 10 . Holiday, President's Day. The institutional history of the 12th and 13th centuries. Bellomo 61–88; RFG2 106–23; RFG3 129–168; Vinogradoff 71–96. [review K1500 213–80].
- [Section 4.](#) 11 . Eclectic sources of law: the Bible, Aethelberht and Gundobad, the Collection in 74 Titles (*Documents*, Parts II.B, III, VI). [Same questions as Assignment 4.] [This is an opportunity to review the types of sources of law at which we have been looking and at some of those at which we will be looking in the next couple of weeks, and, perhaps, to ask the question 'what is law'?]
- [Lecture 7.](#) 12 . The revival of academic law study: Roman Law. Bellomo 44–61, 89–117; RFG2 71–99; RFG3 42–58; Vinogradoff 43–70. Roman law glossators on wild animals (J.I.2.1.12–13, D.41.1.55) (*Documents*, Part VII). [We move here from the rather obvious politics of the investiture controversy to something that looks like 'apolitical' law. The question is 'is it'? Try to see how Accursius twisting the Roman text to make it say things that it probably does not say or, at least, does not say so clearly as he does.]

#### Week 5

- [Lecture 8.](#) 13 . The institutions of canon law. RFG2 122–152; RFG3 72–90. Substantive Canon Law. Marriage (J.I.1.10, D.23.2.5–6, Gratian C.27 q.2; Peter Lombard; selected decretals on marriage) (*Documents*, Part VIII). [Many have seen in these decretals a development in Alexander III's thought on the topic of the formation of marriage. Do you see such a development here?]
- [Section 5.](#) 14 . Wild animals and marriage in the glossators. *Documents*, Parts VII and VIII (selected decretals on marriage).
- [Lecture 9.](#) 15 . The revival of academic law study: Romano-canonical procedure. Witnesses (D.22.5, Gratian C.4 q.3, Tancred 3.6) (*Documents*, Part IX). Read van Caenegem, 30–114 (this takes us quite a bit further in time, but it provides a good overview of where we've been and where we're going).

#### Week 6

- [Lecture 10.](#) 16 . Marriage litigation in the High Middle Ages. Smith c. Dolling (1271–1272) (*Documents* Part XIV.A). *Adam Attebury c. Matilda de la Leye* (1271–72) (*Documents*, Part XIV.B).
- [Section 6.](#) 17 . Romano-canonical procedure on witnesses. (*Documents*, Part IX) *Smith v. Dolling* (1271–72) (*Documents*, Part XIV.A). *Adam Attebury c. Matilda de la Leye* (1271–72) (*Documents*, Part XIV.B).

- [Lecture 11.](#) 18 . *Coutumiers* and *fueros*. Extracts from the *Usatges de Barcelona* on witnesses, marriage, and wild animals (*Documents* Part X.A).

Week 7

- [Lecture 12.](#) 19 . Courts and *coutumiers* in France. Extracts from the *coutume* of Tourraine-Anjou and from Beaumanoir on witnesses, marriage and marital property, and wild animals (*Documents* Part X.B, C).

- [Section 7.](#) 20 . Marriage and marital property in the *Usatges*, Tourraine-Anjou and Beaumanoir. *Documents*, Part X. Reform and the “twelfth century renaissance”: England and France in the 12th and 13th centuries. [review K1500 213–80.]

- [Lecture 13.](#) 21 . Political ideas of the 12th and 13th centuries. Extracts from Bracton on kingship and from the glossators on sovereignty. (*Documents* Part XI)

Mar. 14 — Mar. 18. Spring vacation.

Week 8

- [Lecture 14.](#) 22 . The 14th and 15th Centuries—political and constitutional developments. Bellomo 118–61. [K1500 281–387.] The commentators. RFG2 100–121; RFG3 59–71, 107–24. *Documents*, Parts XII and XIII.

- [Section 8.](#) 23 . Political ideas of the medieval lawyers. Extracts from Bracton on kingship and from the glossators on sovereignty. (*Documents* Part XI). The formation of a persecuting society? Gandinus, *Tractatus de maleficiis*; (*Documents*, Part XII.C).

- [Lecture 15.](#) 24 . The commentators (cont’d). RFG2 100–121; RFG3 59–71, 107–24. *Documents*, Parts XII and XIII. Commentators on witnesses: *Tractatus de reprobatione testium*; Gandinus, *Tractatus de maleficiis*; Robertus Maranta, *Speculum Aureum*, (*Documents*, Part XII.A, C–D); *Decisio S.R.R.* (1574) (*Documents* Part XIV.E)

Week 9

- [Lecture 16.](#) 25 . Commentators on wild animals: Bartolus on D.41.1.1, .5 (*Documents*, Part XIII.A, B); Portius and Faber on J.I.2.2.11–13 (*Documents*, Part XIII.C–E).

- [Section 9.](#) 26 . Courts and case reports—14th through 18th centuries. Watson 39–52. the *Rota Fiorentina* (1780) (Gorla article) (*Documents*, Part XIV.F).

- [Lecture 17.](#) 27 . Commentators on marriage: *Decisio S.R.R.* (1360 X 1365) (*Documents*, Part XIV.C); Panormitanus, *Consilia* (15th c) (*Documents* Part XIV.D).

Week 10

- [Lecture 18.](#) 28 . “Renaissance” Europe—political, intellectual and constitutional developments. Bellomo 162–73. [K1789 1–94.] Humanists, humanism and the law. RFG2 280–310; RFG3 169–187. Pithou on the *Collatio*; Bodin on Political Theory ( *Documents*, Part XV).

- [Section 10.](#) 29 . Legal humanism. *Documents*, Part XV. Homologation of custom and reception. RFG2 311–352; RFG3 188–212; Watson 53–82. Coutumes de la prevoste et vicomte de Paris (*Documents*, Part XVI.C).

- [Lecture 19.](#) 30 . The *Grandes Ordonnances*. Decree, *Tametsi*; *Ordonnance* of Blois; *Ordonnance pour la procédure civile* (*Documents*, Part XVI.A, B, D (pp.

2–4, 5–6).

Week 11

- [Lecture 20.](#) 31 . The 17th and 18th centuries—political, constitutional and intellectual developments. RFG2 209–23 406–37; RFG3 249–67. [K1789 161–281.]
- [Section 11.](#) 32 . Intellectual developments and the law (Outline for Lecture 20). The institutes of national law (*Documents*, Part XVII).
- [Lecture 21.](#) 33 . Spanish scholastics, “elegant jurisprudes,” the natural law school, and the *usus modernus pandectarum*. Watson 83–98. The academics in action. Pufendorf on wild animals (*Documents*, Part XVIII).

Week 12

- [Lecture 22.](#) 34 . The academics in action. Pufendorf on wild animals (cont’d) (*Documents*, Part XVIII).
- [Section 12.](#) 35 . Domat and Pothier. Watson 99–125. Domat; Pothier on D.23.2; Pothier on the contract of marriage (*Documents*, Part XIX). Codification vs. Reform. Some thoughts on the French Revolution and the Napoleonic Code. The Napoleonic codes on marriage, animals and witnesses (*Materials*, Part XX). van Caenegem, 115–69.
- [Lecture 23.](#) 36 . The pandectists, the historical school and the making of the BGB. RFG2 261–92; RFG3 269–285; Watson 126–30. Windscheid (*Documents*, Part XX [Windscheid extracts]). The road away from codification?

Week 13

- [Lecture 24.](#) 37 . Final Lecture. The achievements and failures of the *ancien régime*. van Caenegem, 170–97. Take-home exam passed out.

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