

OUTLINE — LECTURE 24

Final Questions

1. The role of the organizational structure of the *Institutes*.
2. Byzantine law as an experiment in comparison.
3. The importance of homologation and systematization, the example of Spain.
4. Is it true that the Anglo-American jurisdictions did not codify?
5. The role of civil codes in Anglo-American jurisdictions.
6. The importance of the legal academy in both types of jurisdiction.
7. Are we greatly exaggerating the difference between the Anglo-American and Continental jurisdictions?

Final Lecture

The Differences Between Civil Law and Common Law

1. Viewed from c. 1750 the Continental European codifications do not seem to be inevitable, though we can certainly see, with the advantage of hindsight, things that happened that made codification possible. When codification came, the Anglo-American jurisdictions did not codify. Why?
2. According to Raoul van Caenegem (*Judges, legislators, and professors* [1987]) (with comments by CD), we can see the following differences between English and Continental law.
 - a. The ambiguity of the term ‘law’ in English—goes back to the Danes. Does it reflect any real ambiguity of thought?
 - b. The rule of exclusion—the supposed Anglo-American dislike of legislation. Can this really be said to be true any more?
 - c. Prosecution and verdict in criminal trials. The procedural distinctions in criminal law are important; whether they will remain is problematical.
 - d. Appeal: a recent development. This is a fact; the history suggests that its importance can be exaggerated.
 - e. English law is ‘a seamless web’ vs. the importance of the codes being perceived as a break with the past. This is a fact; our contemporary situation suggests that it may not be that important.
 - f. England is a land without a written constitution—but written constitutions are of quite recent origins in Europe. It is also not true of the United States.

- g. Consequences of parliamentary absolutism (no judicial review) (Germany has it; Belgium doesn't). Again, this distinction may be important but can hardly be called an Anglo-American vs. Continental distinction.
 - h. The haphazard Anglo-American development of substantive criminal law. This has largely been removed in the United States by the abolition of common-law crimes.
 - i. A law uncoded—rehearsal of the 19th c. codification debate and noting the influence of Roman law and of opposition to Bonaparte.
 - j. Jurists as dispensable. It is remarkable how many of these so-called fundamental distinctions are no older than the 19th century. Hence, it is not surprising that VanC spends the rest of the book on this last distinction.
3. Van Caenegem's possible explanation for the last:
- a. National spirit—in addition to all the usual problems with defining what we mean by 'national spirit', we have a chicken and egg problem.
 - b. Authoritarianism (the Continent) vs. democracy (England)—but English law is not democratic it is oligarchic.
 - c. Political explanation—the power of the judge or the legislator fits an oligarchic country, the professors' law fitted the chaotic situation of northern Italy, 16th–19th century Germany, Holland in the days of Grotius, France of the coutumes, what do these places have in common? In most weak central authority; in France where the central authority was strong it didn't get going until later than in England so there was no unified custom. After the exegetic school of the 19th century the professors take over again in the civil law countries.
 - d. The problem with this explanation is that it may fit England, but it doesn't really seem to fit the United States.
4. There's one more difference that I'd like to add one that I think is quite important: the first year of legal education. If we greatly exaggerate the extent to which law in practice in the Anglo-American jurisdictions is based on uncoded case law and the extent to which law in the Continental jurisdictions is based solely on the codes, we are not exaggerating at all what happens in the first year of legal education in the two types of jurisdictions. This leads lawyers in the two types of jurisdictions to think about different things when they first encounter a legal problem: Factual analogies vs. statutory analogies. If we are entering an era of 'decodification', legal education is going to have to change profoundly. That, however is not an historical question: let's go back to the historical question.
5. Alan Watson (*The Making of the Civil Law* [1981]) sees the following differences:
- a. Codification

- b. The role of the jurist
 - c. The style of deciding cases (relative absence of citation of previous cases; attempt to decide in strictly deductive fashion; bare recital of the facts; little or no consideration of policy)
 - d. Separation of civil from commercial law
 - e. Separate tribunals for administrative and private law
6. Watson's Roman-law thesis
- a. Now the interesting thing about this collection of differences is that all of them are derived from the influence of Roman law in Watson's estimation. Codification is the most complicated, but he sees it as a product of a complicated intellectual development, including the teaching of Roman law in a world that had no legal unity, homologation of custom, the institutes of national law, the development of the natural law school and in particular the Enlightenment. The role of the jurist is seen then not in political terms as Van Caenegem sees it, but in intellectual terms. Only the jurist knows the law. The style of deciding cases derives from the attempt to be timeless, to find a rationale that transcends time and place but is rooted in authority. The last two are derived from the nature of the *Digest* itself. As Watson sees it, a fundamental difference in system is caused by a fundamental difference in intellectual approach.
 - b. We might approach this in another way. We might ask the question whether the differences that turn out to be real are really fundamental. Is the real question not whether there are differences between the Anglo-American and Continental traditions but how both of those traditions differ from the way law developed in the non-Western world up until quite recently?

The Historical Question: Why did western law, and particularly Continental European law, develop in the way in which it did?: An eclectic approach

- 1. I am attracted to the notion that Watson offers that whenever one is dealing with an activity that is as cut off from the rest of society as much as law has been in the West since the 12th century, internal explanations of developments should be preferred to external ones whenever they are convincing. There is, however, in my view too much in the comparative history of Western law that cannot be explained internally that we can afford not to look around to what was going on at the time that the developments we are seeking to explain took place. Sometimes these exogenous variables are in the realm of ideas, and perhaps we should always look here first, since we are usually trying to explain a phenomenon that is of the order of intellectual. Sometimes the exogenous developments are political, and perhaps this is where we ought to look to second, because conscious legal change, at least in the west, has normally been promulgated by political organs. There is enough, however, that lies below the political in the realm of the social and economic that we cannot ignore developments in this area too. Finally, change is never the product of impersonal forces. Individuals make changes; individuals resist changes. Frequently we can't find out much about the individuals, but sometimes

we can, and sometimes what we learn about them helps to explain what is otherwise quite inexplicable.

2. Roman law, the *ius commune* generally, and movements in legal thought
 - a. The structure of the *Institutes* (internal development)
 - b. A small piece of Roman law about animals is brought to bear on a large variety of questions (internal development)
 - c. Romano-canonical procedure (internal development)
 - d. The consent theory of marriage and theology (external intellectual development)
 - e. Humanism and the move to natural law (external intellectual development)
3. The rise of the national territorial state (political development)
 - a. The use of the *ius commune* to bring customary law and customary jurisdictions to a single national rule—wild animals and witnesses
 - b. The power of the nation-state to pull down an element of the *ius commune* to the national level—marriage
4. The role of economic forces
 - a. Commercial law and the ‘law merchant’
 - b. Wild animals in terms of economic winners and losers
5. The role of social forces
 - a. Excluded witnesses
 - b. Family structure and changes in the law of marriage
 - c. The law of marriage and family structure within the system
6. When will exogenous forces prevail and when endogenous? The definitional problem for those who argue that exogenous forces play no role: the Roman law of sale in four different economies: Rome itself, medieval merchants, early modern production, 19th-century industrial production
7. The role of individuals
 - a. Those who have political power: Justinian, Alexander III, Louis IX, Napoleon
 - b. The intellectuals: Irnerius and Gratian
 - c. The practicing lawyers: Michel de l’Hôpital, Jean Baptiste Colbert, Henri-François d’Aguessau
8. The role of political theory
 - a. It is rarely the sole preserve of lawyers: John of Salisbury, Thomas Aquinas, William of Ockham, Marsilius of Padua, Jean Gerson, Niccolò Machiavelli, Jean Bodin, Thomas Hobbes, John Locke

- b. It is important within schools of lawyers: supporters of empire vs. supporters of papacy, the theorists of papal monarchy, conciliarists, *politiques* and *monarchomachi*, Spanish scholastics, the natural lawyers of the northern school
 - c. When democracy becomes a big issue, the lawyers will have to do something else with their political theories, but that is not a story that can be told under the rubric of medieval studies.
9. What will happen if there comes an ‘era of decodification’? That is not a question that an historian can answer.