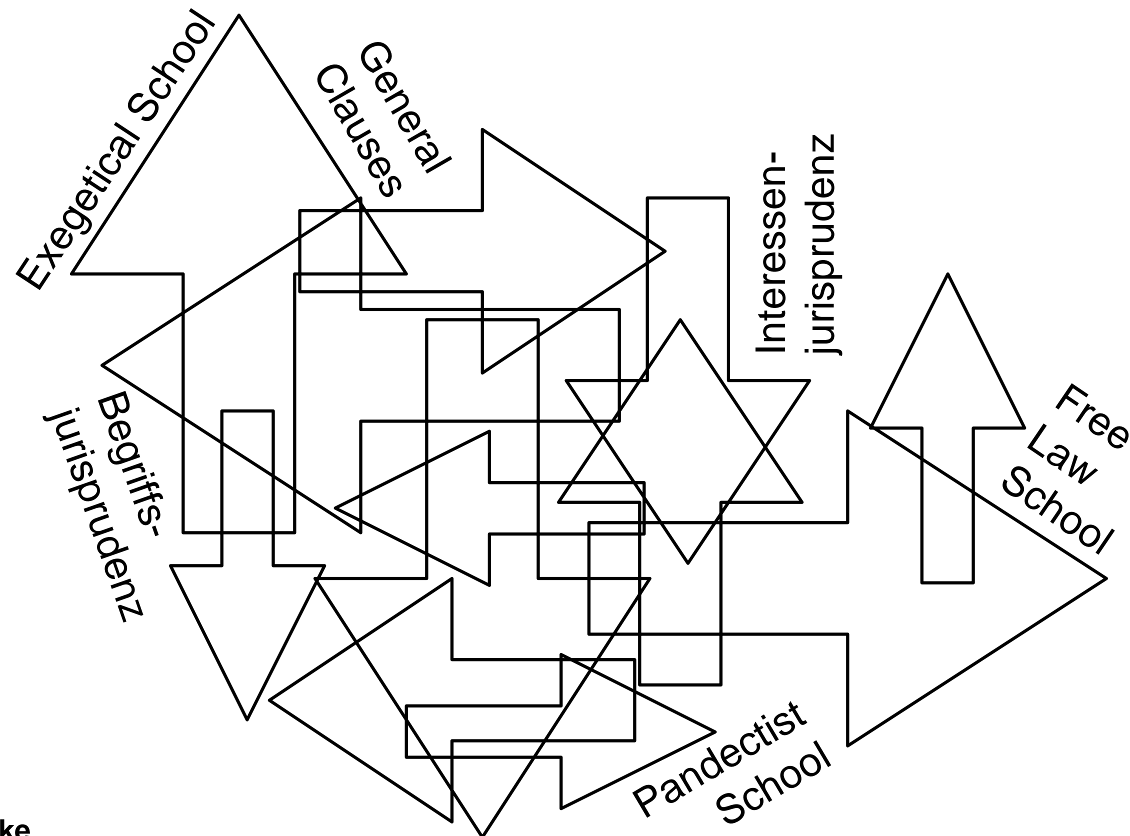
European Legal Thinking
Contrasting Concepts



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European Legal Thinking:

Contrasting Concepts

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Table of Content

Bibliography **3**

Table of Content **4**

Introduction **5**

Dialectical Approach 5

Topics Covered 5

Special Emphasis 5

Outline of the First Part **6**

French Legislation 6

German «Juristenrecht» 7

Swiss Pragmatism 8

Outline of the Second Part **9**

«Begriffsjurisprudenz» 9

«Interessenjurisprudenz» 10

General Clauses 11

Introduction

Dialectical Approach

The task of grasping complex ideas to their full extent calls for special forms of structuring and presenting one's chain of thought. The dialectical approach which I shall put to use in the paper at hand is characterized by its contrasting of conflicting or at least opposite positions in order to aim at synthesizing them.

In a first step, two main topics in the field of European Legal Thinking will be identified and contrasted.

In a second step, I will then in each case try to provide for a synthesis, by elaborating the approach opted for by the Swiss legal system in overcoming the contrasting concepts, thus introducing and elaborating a different possible approach, avoiding the pitfalls of either of the contrasting concepts.

Topics Covered

The specific topics in the field of European Legal Thinking which will be identified and elaborated are characterized by their taking root in the period and process of «Enlightenment» as well as representing the consequences and aftermaths of this influental development in European legal history.

More specifically, I will focus on contrasting the underlying influences, the ideas and developments, and the resulting effects of two major differences among the *Romanistic* and the *German legal family*.[1]

Special Emphasis

I will not elaborate on the German and Romanistic legal family only, but show existing connections and differences to the legal system, history, and characteristics of the Swiss Confederation.

The main reason for deciding to do so is not to be sought in national pride (although I will not deny that it was also a source of arguments in favor of that decision), but rather in the recognition of the special position of the Swiss Confederation in Europe.

Not only its special geographic position in the very heart of Europe and its long history of political independence and standing aloof of major European developments contribute to that special position: Peculiarities such as the variety of national languages, the federalistic state system, the directly democratic political system and the characteristics of its judicial system often provide for a refreshing and pragmatic – sometimes stretching the borderline towards *opportunistic* – approach to certain questions in the field of European Integration as well as in the area of European Legal Thinking.

Even though the approach to certain questions of legal theory taken by the Swiss Confederation can not always truly be called a *synthesis* of the contrasting concepts I will enumerate, it usually assists providing an unbiased aproach and seems therefore in my opinion worth of consideration.

T1 Zweigert / Kötz, 138

French Legislation	German «Juristenrecht»	Swiss Pragmatism

The theories formulated during the period of Enlightenment and the resulting developments in the legal field are influenced to a great extent by the existing social reality and the legal and and political environment.

In this first section, special attention will be drawn to the underlying influences of an existing class of jurists in a society upon the drafting and shaping of different perceptions of law in the Romanistic and German legal family.

French Legislation	German «Juristenrecht»	Swiss Pragmatism

In France, an organized and powerful class of practising lawyers contributed to the development of a unified code, and helped to maintain the traditional stock of juristic techniques. The class of lawyers, bound together by professional solidarity, was not one of theorists, but of practitioners:

> «They were not professors, but practitioners, attorneys, legal advisers, royal administrators, and judges.»[2]

The development of French legal thinking, in the period of Enlightenment and thereafter, retaining a strong «down to earth» appeal, it never got even close to the pitfall of German conceptualistic jurisprudence which often contributed much more thought, eloquence, and effort to the drawing up of watertight conceptual systems of legal thought than to the actual solution in reality of the legal problem in question:

> «One can also see marked differences when one asks which *legal virtues* are regarded as specially important in Germany and France. The ideal qualities of a German lawyer are expressed by such ideas as thoroughness, exactitude, learnedness, a strong tendency to tolerate academic disputes, the ability to construct concepts of law with which to master the variety of legal life.
>
> The French lawyer, especially the *avocat*, but also the judge, aims at clarity and brevity of expression, eloquence, style, effect, and form. This form is not something purely external, but structural in legal thought itself: "La forme donne l'être à la chose." French lawyers have no time for pedantry, for the "querelles d'Allemand", for the urge to be right in trivia irrelevant to the solution of actual problems.»[3]

The main source of law in France was considered to be legislation, not theoretical scholarship. One of the essential thoughts of that time was expressed in the idea of the *School of Exegesis* (to be considered later), that law and statute were identical, and that the other sources of law – especially scholarship – had only secondary importance.

The French legal theory of the period in question is therefore characterized by a deep distaste of theoretical conceptualism and a preference of relating to the actual legal problem in question. French legal thinkers appreciated the advantages of a Cartesian *mos geometricus* with its rational mechanical-mathematical style of reasoning without completely losing focus on the actual social problems at hand which had to be solved by legal arguing.

2 Zweigert / Kötz, 80

3 Zweigert / Kötz, 135

In Germany, law was for a long time seen as an «abstract set of rules simply imposed on society.»[4] Legal concepts were considered in abstraction from the conditions under which they had to be applied in real life – as a tribute to the technical merits of a sophisticated structure and abstract conceptual language.[5]

This led to the perception of law as «Juristenrecht» (juristic law): a concept of legal notions which could only be properly understood and applied by a special class of trained jurists:

> «[Law] leads henceforth a double life; in outline it continues to live in the common consciousness of the people, the more minute cultivation and handling of it, is the special calling of the order of jurists.»[6]

This «extensive scientific systematization of legal thought»[7] is mainly due to two influencing factors: The reception of the Roman law in Germany and the consequences thereof on one hand, and the specific characteristics of the existing class of jurists.

The reception of the Roman law in Germany lead to the development of a legal methodology known under the name of «Begriffsjurisprudenz», which will be considered in the second part of this paper. In this first section I shall only mention the consequences this reception brought upon legal methodology.

The German Pandectist School, produced by the Historical School of Law, aimed at a dogmatic and systematic study of Roman material. Its learning were deep, exact, and abstract:

> «In this way the application of law became a merely "technical" process, a sort of mathematics obeying only the "logical necessity" of abstract concepts and having nothing to do with practical reason, with social value-judgements, or with ethical, religious, economic, or policy considerations.» [8]

This way of legal thinking, prioritizing «conceptual calculus» over careful observation of social reality could only arise in a legal culture like the one of Germany, dominated by remote and theorizing professors.

In Germany, unlike in France, an organized and powerful class of practising lawyers lacked, no centralized judiciary helped to maintain the traditional stock of juristic techniques; the integration of legal life on the *political* and *practical* levels did almost not take place at all.

Only in such a situation, the Pandectist School could claim that by producing a method of studying law which was common to the whole of Germany it had at least brought about integration at the *theoretical* level. But it did not bother to seek out the real forces in legal life, did not ask what ethical, practical, or social justification for its principles there might be.

4 Hampstead, 564
5 Zweigert / Kötz, 159
6 Savigny, in Hampstead, 580
7 Zweigert / Kötz, 139
8 Zweigert / Kötz, 146

In France, the class of legal practitioners applied a Cartesian style of evaluation and arguing to legal topics without completely neglecting the basis in social reality.

In Germany, on the other hand, legal theorists in the line of «German Scholarship» concentrated on the ideal of a closed legal system with almost mathematical precision and applicable with logical deduction only. This German approach was greatly influenced by the reception of Roman Law and the evolving German Pandectist School.

In the Swiss Confederation, however, the situation differed from the one in France as well as from the one in Germany.

In Comparison to France, there lacked a class of trained and specialised legal practitioners. On the one hand, this fact is due to the federal system which allows for each of the 23 cantons of the Swiss Confederation to provide for its own legal and judicial system in a wide legal area. Even though there existed organized classes of legal practitioners in the respective states, that was not the case on national level.

After the fall of Napoleon and the end of the French occupation of the territory of the Confederation, Switzerland quickly reverted to being a loose union of relatively independent cantons but the Enlightenment idea of collecting the private law into a code remained, though now at the level of the canton, and led to the adoption by almost of all cantons of their own civil codes in the course of the nineteenth century. Still today, it is the law of the cantons which determines the courts structure and the law of civil procedure.

This dispersion had important consequences: In contrast to Germany, the legal field was in the hands of laymen to a great extent. There was never any question of the reception of Roman law as a whole, mostly due to the self-determination and independence of the Swiss Confederation:

> «Switzerland never really had a reception of Roman law and this meant in particular that the legal system never got into the hands of "learned" jurists and was not turned into an esoteric science as happened in the German Empire.»[9]

This characteristical lack of scholarly professionalism is still most noticeable today: Most judges of first instance at the courts of the cantons are laymen with the assistence of a specialist «Gerichtsschreiber» (clerk of court) especially for the drafting of the decision.

There are also no formal requirements one has to fulfil to be elected as a judge of the Supreme Court of Switzerland – not even a legal education or professional experience is required.

These conditions greatly influenced the character of the Swiss legal system, especially the manner of its civil code (Zivilgesetzbuch; ZGB), which will be considered more closely in the second section of this paper.

The Swiss peculiarities stated in this section lead to the conclusion that both the pitfalls of the French belief in centralized legislation and interpretation through practising *avocats* and the German admiration of detailed conceptual systems and interpretation through *legal theorists* locked up in their ivory tower could be avoided in the legal history of the Swiss confederacy, without having to miss the intellectual benefits of both methodological approaches.

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9 Zweigert / Kötz, 181

«Begriffsjurisprudenz»	«Interessenjurisprudenz»	General Clauses

Two main concepts of legal methodology can be identified in the nineteenth century, the notions of which can most accurately be grasped by their German denominations *Begriffsjurisprudenz* and *Interessenjurisprudenz*.

Under the notion of *Begriffsjurisprudenz* I will mention the *French Exegetic School* and the *German Pandectist School*, and then contrast it with the concept of the *Free Law School* (*Freie Rechtsfindung*).

«Begriffsjurisprudenz»

The legal concept of *Begriffsjurisprudenz* is inspired by the ambition to achieve a maximum of precision in descriptions and definitions of legal phenomena. The general aim of both legal Schools discussed lies in the overcoming of natural law by enlightened rational, scientific, even mathematically dense positivistic concepts.

Peculiarly enough, the two main schools of thought evolved on both sides of the great European border: On one hand the *French Exegetic School*, and on the other hand the *German Pandectist School*. They both show the same theoretical features and methodological consequences – but a very distinct origin of development indeed.

The French Exegetic School is characterized by subordination to statute, and mistrust of both case law and scholarship. It practised literal interpretation of the codes:

> «To understand the exact meaning of the codes, it was necessary to set out from the text, from the text alone, and not from its sources [...] ([The Exegetic School can be] fairly described as 'fetishism for written statute).»[10]

The rationale behind such a close reliance on the written statute is to be found in the belief that the codes correspond to the ideal image of law, fusing statute, law, and natural equity.The French Exegetic School thus answered a question most troubling to the French 19th century lawyers: How could the unbroken belief in rationalistic natural law theories be united with strict positivism? The answer provided is simple:

> «[T]he "general will" – *la volonté générale* – expressed reason; and the [code] law expressed *la volonté générale*.»[11]

The German Pandectist School did not refer to any indigenous written code – but to the Roman Law adopted through reception. The Historical School with its romantic idealisation of law as being rooted in historical processes led to the German Pandectist School. It is characterized by its strive for scientific purety, clear and clearly distinguished technical-mathematical concepts:

> «[T]he historical School of Law produced the Pandectist School whose only aim was the dogmatic and systematic study of Roman material. [...] For them the legal system was a closed order of institutions, ideas, and principles developed from Roman law: one only had to apply logical or 'scientific' methods in order to reach the solution of any legal problem.»[12]

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[10] Van Caenegem, 150

[11] Strömholm, 271

[12] Zweigert / Kötz, 146

Interessenjurisprudenz is a pragmatic answer to the shortcomings of the abstract conceptuality of *Begriffsjurisprudenz*:

> «"*Interessenjurisprudenz*" und – radikaler – die "*Freirechtslehre*" lösten sich von der Vorstellung des Rechts als eines abstrakten Begriffsgebäudes und lenkten die Aufmerksamkeit auf seine sozialen Grundlagen und Bezüge.
>
> Dem Zeitalter der 'Industriellen Revolution' mit seinen immer rascher sich wandelnden sozialen Verhältnissen konnte nur eine Rechtstheorie genügen, die eine flexible Rechtspraxis erlaubte.»[13]

The representatives of the *Free Law Movement* aimed at the destruction of the *Begriffsjurisprudenz*, by exposing the fiction of logically stringent legal decisions and calling instead for the taking of legal based not merely on the law but (also) on the given facts of social life:

> «In opposition to legal positivism, [the Free Law Movement] insisted that the decision of a legal case could no longer be derived from abstract and logical deduction, that statutes could no longer be considered the dominant source of law. [...]
>
> Specifically, the Free Law Movement sought to widen the circle of the sources of law, and in so doing it raised the question of what this meant with respect to the judge's relation to the law.»[14]

Enactments, the «free law» advocates held, neither could nor ought to provide more than a vast field, within which the solution was to be found, with great liberty for the judge to find the proper solution according to the «living law», i.e. legal and ethical convictions prevailing in the community (and shared by the judge).

On the one hand, the *Free Law Movement* brought legal theorists from a flight in esoteric conceptual spheres of legal theory back into a closer relationship with the factual state of affairs of legal decisions – it emphasized the factuality of law which had been neglected, even denied, by the strict notion of *Begriffsjurisprudenz*.

On the other hand, it also paved the way for the introduction of new fields of legal sciences, viz. sociology of law and criminology:

> «The true science of the law, wrote the German sociologist *Eugen Ehrlich* (d. 1922), is legal sociology; traditional jurisprudence is merely a technique, "the art of adapting the law to the special needs of legal science."»[15]

Further practical effects of the *Free Law Movement* are the introduction of the "general clause" of art. 242 in the German Code of 1900, and the art. 1 of the Swiss Civil Code (ZGB), which shall be considered in the next section which briefly elaborates these aspects of overcoming the tension between the two legal concepts discussed.

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13 Marx, 97

14 Schmitt , 55, note 47

15 Strömholm, 280

In the German Civil Code (Bürgerliches Gesetzbuch, BGB), traces from both the German Pandectist School as well as from the Free Law Movement can be found:

> «In language, method, structure, and concepts the BGB is the child of the deep, exact, and abstract learning of the German Pandectist School with all the advantages and disadvantages which that entails.»[16]

In the period of fast and deeprooted changes in social and moral attitudes of society, the Free Law Movement pointed out the inadequacy of the BGB in terms of adaptability to changes, which led to the introduction of *general clauses* in the BGB:

> «[§242 BGB] simply says in quite general terms that everyone must perform hist contract in the manner required by good faith (*Treu und Glauben*) in view of the general practice in commerce [...].
>
> [...] These general clauses have operated as a kind of safety valve, without which the rigid and precise terms of the BGB might have exploded under the pressure of social change.»[17]

While the BGB shows on the one hand the influence of the legal theories of *Begriffsjurisprudenz*, viz. in the strictly conceptualistic structure and language, it shows on the other hand as well the influence of the Free Law Movement and the consequences of its requirement of greater adaptability.

The Swiss ZGB, on the other hand, never had to struggle with the «original sin» of a conceptualistic reception of Roman law – it accepted the fact that any code of law was inherently incomplete, and provided for a very general and basic provision of how to fill such gaps in the codified law.

By doing so, the ZGB avoids on one hand the strict French approach of almost «servile» interpretation of the legislative statutes based on textual evidence, as promoted by the French Exegetical School, and on the other hand the rigid conceptuality and detailled accuracy of the approach of the German Pandectist School. The ZGB succeeds in avoiding these twin pitfalls by openly admitting the gaps in the law and entrusting the judge with the task of filling these gaps and giving him standards with which to proceed to the task (Art. 1, Par. 2-3, ZGB):

> «If no relevant provision can be found in a statute, the judge must decide in accordance with the customary law and, in its absence, in accordance with the rule which he would, where he the legislator, adopt. In so doing he must pay attention to accepted doctrine and tradition.»

This provision allows for a brief and popular language throughout the ZGB without leaving it vague:

> «The new code was drafted in a popular and clear *language*, had an easily comprehended, relatively open *structure*, and [...] made its statutory rules *deliberately incomplete* so that often it only sketched in an area within which the judge had to operate, using the standards of what was appropriate and reasonable and equitable.»[18]

As an appropriate closing to this paper, I would like to cite a phrase from Eugen Huber, drafter of the ZGB, expressing the hope that Swiss law, «as international law develops, gain respect of a quite different order from that *which* could be expected of cantonal laws, a law which, if it should ever come the the creation of a *European Code*, might have a not insignificant influence of the outcome.»[19]

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[16] Zweigert / Kötz, 150

[17] Zweigert / Kötz, 158

[18] Zweigart / Kötz, 178

[19] Huber, quoted by Egger, in *Vom Krieg und vom Frieden*, *Festschrift für Max Huber* (1944), 44