Teaching Constitutional History in the Benelux Countries

ALAIN WIJFFELS

1. *A personal introduction*

In the early months of 2005, I was preparing a new course on History of European Public Law which had just been introduced at the Law Faculty in Leiden. I was at the time also teaching in Belgium and a research fellow in France, and during term, my weekly routine would involve commuting between the three countries. It was a propitious time for working on European constitutional law in a historical and comparative perspective, as the member countries of the European Union were all faced, according to their own constitutional arrangements, with the endorsement of the draft European constitution. The procedures for ratification differed from one member state to the other: for example, whereas Belgium followed the standard procedure of a parliamentary debate and vote, in France and in The Netherlands, the authorities had opted for a referendum. A majority of French and Dutch voters rejected the draft constitution. The project was then abandoned as a formal constitutional instrument – paving the way for the Treaty of Lisbon and its further developments, but also to different policies: in France, for example, no government, whatever its political colour, has ever since risked a new referendum on issues of European integration, a cautious approach which, however, has fuelled further criticism on the democratic legitimacy of the Union. At the time of the 2005 debates, perhaps one of the most striking features of the discussions both among scholars and among wider public audiences, was how the approaches and emphasis on different issues varied from one country to another, although the debate was supposed to focus on the same text. Clearly, in different member states, both the population at large and even the narrower circle of scholars did not share identical views on the very concept of a constitution, or its legal and political significance. Therefore, in each country, whatever one's position towards the European integration process, citizens and scholars

GIORNALE DI STORIA COSTITUZIONALE / *JOURNAL OF CONSTITUTIONAL HISTORY* 47 / I 2024, pp. 111-126
ISSN 1593-0793 / ISBN 978-88-6056-925-7 (print) / ISBN 978-88-6056-926-4 (online) / eum - Edizioni Università di Macerata

(including legal academics) tended to view the draft constitution along the perception of the constitutional tradition in their own country. Such perceptions, needless to say, are strongly influenced by the political and constitutional history – if only during the citizens' own lifetime – of each country, and the general narratives on that history in school textbooks and in the media. Although the draft European constitution was supposed to be a common instrument of the Union and its member states, the citizens of each member state had a different idea of a constitution's nature and purpose, and held therefore different expectations of the constitution's impact on their political, social, economic and cultural life. A course on the history of European public law was therefore an invitation to consider from a comparative historical perspective to what extent the national constitutional traditions differed, and to what extent, beyond those differences, some common ground existed with regard to a shared constitutional culture.

2. *Teaching European constitutional history in the Low Countries*

In order to write a brief survey of the teaching on the history of public law today in the Benelux countries, some important restrictions have been necessary. Academic traditions, too, vary, not only from one country to the other, or, more generally today, as universities have been given more leeway to establish their own curricula, from one university to the other. In Belgium, until the end of the twentieth century, a system of national curriculum prevailed, which entailed that all law faculties had to provide the same core curriculum imposed by law; devolution has transferred powers in matters of higher education to the Communities, with diverging policies in the Dutch-speaking and French-speaking universities as a result. Since the 1960s, legal culture has also profoundly changed in the law faculties, but with significant differences in individual faculties[1]. These changes have affected the place of legal history. In the Netherlands, until the 1970s, law faculties had two main chairs in legal history, one in Roman law, the other in Dutch legal history. Since the 1970s, the trend was to size down the role of legal history and to have only one chair covering the subjects of both former chairs. Further cuts and reforms have reduced even more the place of legal history in most faculties. In Belgium, the old system of chairs has all but been abandoned: lecturers are appointed to teach a combination of subjects. In comparison to the Netherlands, legal history in Belgium, both in Flanders, in Wallonia and in Brussels, has better withstood the drift to marginalise it in the curriculum. Everywhere, of course, in spite of guidelines (usually defined at faculty level) for each taught subject, the specific contents depend largely on the interests and expertise of the individual lecturer. As everywhere else, legal education has witnessed during the last decennia of the twentieth century a decline of the share of private law (especially of the subjects governed by the country's civil code), which since the nineteenth century had often provided a 'general grammar' or even theory of legal methods. The overall result has been an accelerated atomisation of law as an academic discipline.

In general, legal history has maintained a propaedeutic role at the level of undergraduate studies (i.e., towards a bachelor's degree in law). In the Netherlands, when the subject is still part of the compulsory core curriculum, its contents depend largely on the lecturer's scholarly profile, which will determine to what extent ancient and perhaps later Roman law is taught, whether the course will focus more on private or public law[2], whether other more specific areas (e.g. commercial, economic, social, international… law) will be dealt with, how much attention will be given to 'external' legal history… In Belgium, the undergraduate curriculum still comprises in many cases substantial courses on (largely, ancient) Roman law, or a course on the history of private law (where the share on Roman law depends on the lecturer's inclination), and, separately, a course on legal history, which may focus in general on post-Antiquity or modern legal history, or more specifically on public law[3]. In addition, an (undergraduate) curriculum in law also sometimes includes (in Belgium, in particular) a (usually, compulsory) subject on the history of (public) institutions, or on modern political and parliamentary history. Both in the Netherlands and in Belgium, comparative legal history has made inroads in scholarship and teaching, but in variable degrees.

The present survey is limited to subjects which qualify formally in the law faculties' curricula as courses on legal history[4]. Roman law teaching is in most faculties where the subject is still taught mainly approached with an emphasis on private law[5] (in some French-speaking faculties, its official title is – translated – "Roman law foundations of private law")[6]. Whereas legal history courses are usually taught by lecturers with a legal education (in some cases combined with a separate degree in history), courses on political history and history of public institutions are often taught by historians, members of a history department outside the law faculty. For practical reasons, the latter are not included in this survey, although they may occasionally refer to issues of constitutional history. Similarly, constitutional history may appear as a feature of the courses on public or constitutional law[7], or in a variety of jurisprudential courses[8], but such features (which may vary from year to year) have also been disregarded in the present survey, except for the occasional example which may serve as a reminder that this overview could be expanded so as to mirror the degree of historical interest among lecturers who teach contemporary positive law[9].

Master's degrees offered by the law faculties vary even much more than the undergraduate curricula. The general trend has been to offer a range of more or less specialised master's degrees (sometimes as a stepping stone to a post-master master's degree). In general, legal history is either absent from such degrees, or occupies a somewhat marginal position. Provided academic staff is available and willing, legal history may be in some faculties the topic of a master's thesis, in competition with all other subjects of legal studies.

Increasing constraints have in recent years been imposed on all students who wish to register for a doctor's degree in a law faculty (requiring them to attend a number of taught courses on research methodology, conferences, formal presentations of interim results, etc.), but there is no specific teaching organised by the law faculties at post-master level on legal history. Despite

the lack of any legal-historical 'doctoral school' or similar arrangement, students at Belgian and Dutch universities still produce every year several doctoral dissertations of high scholarly quality on various topics of legal history. That research falls outside the ambit of the present survey[10].

The relatively marginal position of legal-historical subjects in the curricula of most universities is so far not echoed in a proportional decline of research and legal-historical fora (journals, conferences…) in the Low Countries, although, at present, the infrastructure for legal-historical scholarship is perhaps stronger in Belgium than in the Netherlands. The sharp decline of legal-historical departments within a generation in Dutch law faculties, together with the changes in programmes, shows that a relatively solid position today does not entail any guarantee for the near future.

The survey is based on information available on Benelux law faculties' websites (which, depending on the institutions, reflected the programmes for either 2022-3 or 2023-4)[11]. That information, a caveat for future university historians, often does not consistently give reliable details and its material support as a source is more than often unstable. I have therefore contacted, whenever the information was readily available, the colleagues who are in charge of the teaching as defined above and submitted a questionnaire. Predictably, the quality of the responses varied a great deal.

In addition to my original brief, I included the University of Luxembourg in the survey[12]. Somewhat in disregard of the criteria I have set out, I have included the College of Bruges[13].

3. *Constitutional history: not a specific subject?*

Roman law courses, where they survive, are as already noted mostly focused on private law[14]. This seems largely also the case where late Medieval and early modern civil law is discussed in courses on either Roman law or legal history[15]. General legal history courses may include aspects of constitutional history. The most promising framework for constitutional history are offered in a few universities where there is a course of History of public law on the curriculum. However, these courses (as most legal history courses everywhere) are all undergraduate courses. In the case of History of public law, the course mostly addresses freshers, sometimes during their first term: under the present circumstances, that implies that the vast majority of law students have very few historical bearings, and no legal background yet. The potential for addressing fundamental issues of constitutional history is therefore limited, at least if one admits that constitutional history cannot be properly understood without a contextual background consisting of several layers of political, economic, social and cultural history.

If the programmes of taught master's degrees in law faculties are anything to go by, history does not appear to be viewed as part of a lawyer's intellectual toolkit. Even the relative progress of comparative law in legal culture does not extend to any in-depth interest in the historical background of other legal systems, beyond a few stale clichés. Similarly, the tradition which called for a brief historical outlook as a set piece in the introduction of a doctoral thesis or a seminar paper appears to die out – probably for the best, as it typically rested

on bygone secondary literature and rarely informed the ensuing research on current issues of positive law.

The following (no doubt, not comprehensive) survey considers first to what extent constitutional legal history appears in the context of general courses on legal history. Subsequently, it provides examples from several curricula where constitutional history is dealt with from the vantage-point of other specific legal history courses.

3.1 *Constitutional history in the context of general legal history teaching*

By far most of the legal history courses are included in an undergraduate programme and do not require any prior knowledge of either law nor history. Belgian law faculties have maintained more often separate undergraduate courses on the history of private law and public law (in addition, sometimes, to compulsory courses on public institutions and on political history)[16]; Roman law courses are no longer compulsory (if available) in most programmes, but have sometimes been subsumed in the courses on the history of private law[17].

3.1.1 *External legal history*

The distinction between external and internal legal history is nowadays rarely referred to, though in some programmes, the course description does mention that it will discuss the "sources" of the law and their developments[18]. In so far as there has been a general shift from an abstract notion of "sources" to a more sustained attention for the political and social actors who produce norms acknowledged as authorities within the legal system[19], the issue is relevant for drawing the students' attention to the diversity of legal norms and their interaction, and thus to the limits of a codified constitution in defining or even hierarchising the law-making process. An introductory legal history course may create an awareness that the agents of that law-making process are variable over time and that non-legal factors determine the respective weight of the various agents.

3.1.2 *Modern and pre-modern legal history*

The period covered by general legal history courses varies greatly. Where specific Roman law courses survive, the assumption is that they will cover Antiquity, even though they mostly deal exclusively with private law topics[20]. Even when late Medieval and early modern Roman law (in the guise of *ius commune*) is part of the course description, the emphasis will tend to privilege private law developments[21].

Most general introductory courses on legal history omit Antiquity, or refer only briefly to ancient (almost always: Roman) law[22]. The Middle Ages also receive much less attention than a generation ago, but still hold some ground in a few Belgian programmes[23]. The early-modern period, in the areas of public law, retain more attention, not only in legal history subjects: some lecturers on jurisprudence, on state theory, and even constitutional law include chapters on major early-modern authors

who remain part of the canon of the history of political thought. Works by the same authors are also included in some legal history courses, but pre-modern constitutional practices appear to be more difficult to integrate into an undergraduate's introduction – unless perhaps for major monuments of constitutional history, such as the Joyous Entry of Brabant (1356) in Belgium, the Act of Abjuration (1581) in The Netherlands, and in a comparative perspective the English Bill of Rights (1689) and, at the hinge of early-modern and modern times, the Declaration of Independence and the early constitutions of the American Revolution. The courses on the history of public institutions, partly because they are often taught by historians, may on the other hand discuss more in detail aspects of the institutions' practice[24].

3.1.3 *Modern history*

Modern legal history, until a generation ago mostly confined to (the "long") nineteenth-century history, in the light of increasingly deep structural changes in all areas of the law since the Second World War, has caught up with the twentieth century, also because a growing number of legal historians have written their doctoral dissertation on contemporary history. For constitutional history, Belgian lawyers cannot ignore the changes which took place since the early 1970s, when devolution gradually transformed the country from an originally French-inspired early-nineteenth centralised unitary state into a complex federal state, a process which in the early decades of the twenty-first century is far from finished. Within a couple of two generations, this has contributed to provide Belgian lawyers with a sophisticated experience in the workings of complex polities. In comparison, the Dutch state (except for its construction of a small Commonwealth forming the Kingdom of the Netherlands, which associates The Netherlands with Caribbean countries)[25] has retained (in spite of its quasi-confederal structure under the Republic of the United Provinces) far more the features of the nineteenth-century state architecture, in spite of a formal overhaul of the constitution (in 1983[26]) and several other specific amendments since. Recent constitutional history has therefore become more of a shared ground between legal historians and constitutional lawyers in Belgium than in The Netherlands.

Courses on Parliamentary and Political History, which appear on the curriculum in several law faculties at undergraduate or graduate level, are more likely to inform students on some forms of constitutional practices (and hence possibly constitutional conventions) in modern times.

3.2 *Constitutional history in the context of specialised orientations or specific legal history courses*

Whereas, apart from minors and majors, and a more or less extensive choice of optional courses, the curriculum of the standard bachelor's degree in law in most faculties does not provide much room for specialisation, the programmes for a (first) master's degree in law tend to emphasise far more a specialisation, in Dutch faculties perhaps more than in Belgian univer-

sities. In many cases, the master's degree obtained after the bachelor's diploma will even specify the area of specialisation, avoiding the generic title of "master in law", although the introduction of English-spoken programmes is sometimes emphasised by granting the title LL.M., whether or not with the addition of some specialisation. The title is usually understood as an English abbreviation for Master of Laws, without any reference to Latin.

Many, if not most, of the specialised master's degrees have a strong insistence on vocational training, the exposure to legal practice and the acquisition of "skills". It is at this level that the absence or, at best, very peripheral availability, of legal-historical courses illustrates an academic legal culture where history is not deemed to play any part in legal methods and reasoning, whatever the area where law graduates will be working as legal professionals.

But for a few exceptions, the many specialisations of master's degrees linked to business law and economic law (despite a strong expertise in the history of business law built by new generations of legal historians in The Netherlands and Belgium) ignore legal history almost completely. In other areas of specialisation, the appearance of a legal history course on the master's curriculum, usually as an optional subject, often reflects a niche expertise of the lecturer who has succeeded in convincing the faculty authorities to take it on board. Remarkably, even when a faculty's curriculum includes for the master's degree a public law specialisation, such a specialisation only rarely offers a course approaching the subject of constitutional history.

Some orientations nevertheless have intersectional features which facilitate a dialogue with constitutional history[27]. This is obviously the case of public international law, all the more since both in The Netherlands and in Belgium, several scholars have established strong scholarly credentials in that field. In several universities, the history of international law is a course on the syllabus of international law specialisations, and in most cases taught by expert legal historians[28]. Constitutional history may only appear only tangentially in this context, but many of the issues which have been raised in international law over the centuries (Who qualifies as a subject in the law of nations? Is there a hierarchy between domestic law and international law? What jurisdiction can a polity claim over – and under – the high seas? …) also raise issues of constitutional law, and show that such notions as sovereignty, territory, legitimate rule… are not only key-notions in both international and constitutional law, but also linked as their meaning has varied in the *longue durée*[29].

European law, understood as the law of the European Union, is the specialisation of several master's degrees, but the history of EU law has not yet become part of mainstream legal-historical research in the Low Countries: it is still mostly regarded as part of the current foundations of EU law and therefore integrated in the narrative of current EU law developments[30]. A more sustained effort to consider the EU's constitutional issues in the EU's historical perspective (which requires to include the national constitutional developments in the member states) is offered at the College of Europe in Bruges[31].

Comparative constitutional law has become a successfully established ramification of comparative law approaches[32]. It

appears as a subject with its own course in some master's degree orientations in public law, but, it seems, chiefly without any major historical component, partly because the technicality or the diversity of issues and systems such courses take into account do not leave much leeway for historical digressions[33]. Nevertheless, it is obvious that comparative constitutional law and (modern) constitutional history share substantial common interests[34]. Whereas aspects of comparative constitutional law appear recurrently in undergraduate course descriptions, they may also occasionally be addressed as a particular theme in master's courses[35].

Fundamental rights have undergone important developments over the past half-century. Until approximately the 1970s, they were still mainly viewed within the framework of constitutional rights and liberties, with an incremental interest for social and economic rights. Human rights, however, were at best a backroom niche of constitutional law or a minor optional course. Only from the late 1970 onwards was the full potential of human rights, particularly those enshrined in the European Convention and expounded by the European Court of Human Rights, more systematically acknowledged in legal literature and legal education. Human rights now pervade practically all legal courses taught in the universities. The importance of human rights has inspired specialised master's orientations[36] and degrees. It has also fostered research on fundamental rights in the more distant past, but the ongoing, contemporary development of human rights (as a characteristic feature of our own *Zeitgeschichte*), including the populist backlash against some of its progress, has ensured that human rights have now become a specific theme in legal-historical teaching[37].

4. *Central themes and issues*

In the course descriptions of the law faculties, some central issues and themes are recurrent. Perhaps the most obvious theme, not only for the pre-modern period, but also for the history from the American and French revolutions onwards, is that of state formation. A runner-up would be the *rechtsstaat/état de droit*[38]. State formation is often closely linked in the syllabus with the advent of the separation of power doctrine, its different implementations, and the variable architecture of the *trias politica.* Several descriptions also refer to the need to contextualise constitutional developments through political, economic and social history[39]. (I have not come across explicit references to constitutional history from the viewpoint of cultural history, apart from the occasional reference to historical iconography or literature, but that may simply be due to the fact that such a link is not explicitly stated in the published descriptions, or that they may be subsumed under a different approach).

Most legal historians would agree that the formula "The past is a foreign country" is an understatement of their students' acquaintance with history, whether national, European, or "global". Yet, few lecturers consider that the lack of historical awareness among their addressees is an insuperable obstacle for discussing complex historical developments. One suspects therefore that although some students may

grasp the caveats with regard to the historical context of the events, developments and concepts under discussion, the communication between lecturers and their students inevitably entails a compression of the understanding of change and continuity. Despite repeated and highlighted warnings and disclaimers teachers may incorporate in their presentations, some notions are to some degree flattened in order to appear intelligible (and applicable) throughout successive periods. The result of this process is that in courses which deal effectively with constitutional history, one is never far away from constitutional theory, whereby notions and principles are given a minimal historical construction so as to avoid giving the impression of a-temporal abstractions. Hence various devices used for enhancing the historicity of different stages of development, such as including a broader political context of the period, or confronting the students with primary sources, which may be texts, images, or any artefacts which may help to call up the "spirit" of an age. Indeed, following a successful trend in other historical works, one could consider an ancillary textbook along the format of, say, "Constitutional History in 100 Objects". These objects could be useful props, but they will not entirely bridge the gap with the intellectual history which has woven many essential threads throughout Western – and worldwide – constitutional history.

5. *A personal conclusion*

Every legal historian experiences a personal itinerancy over the course of their career. When I started on my first doctoral dissertation, on the use of civil and canon law authorities in the practice of the higher courts during the transition from the Middle Ages to early modern times, I was expected to contribute to the historiography of the "reception" of Roman law, which was deemed to be primarily a development having affected private law. The source material quickly proved that a substantial proportion of the litigation and related arguments was concerned with the relations between public authorities at different levels of government, or with the relations between individuals or groups and a public authority. Later on, when I started teaching, due to the vagaries of faculty policies, my lectures on legal history gradually required a stronger emphasis on public law developments. I ended up teaching mostly the history of public law. During those years, my understanding of what was called either "learned law" (*gelehrtes Recht*) or *ius commune* when I was a student and a young lecturer, moved to a different approach. The very essence and purpose of legal studies, when universities with law faculties developed from the twelfth century onwards, was to elaborate a science of the art of good governance. That governance was primarily implemented through the action of political actors, and should therefore be understood as public governance. Roman law texts were studied, beyond the necessary understanding of the technical terms, notions and rules, in order to acquire a matrix of reasoning that could underpin the justification of a fair outcome for conflicts of interests, and thus the legitimacy of government. A ruler – whether a city, a territorial ruler, a clerical administrator or any other public authority – was legitimate if their rule appeared to be based on justice, perhaps the most central fea-

ture of good governance. Lawyers graduated from law faculties were expected to have acquired the expertise to formulate what a just policy or decision was in any specific circumstances, and became the indispensable auxiliaries of any political actor who wanted to ensure (or advertise) the legitimacy of their rule.

While academic lawyers did not have a monopoly in advising rulers how to achieve good governance, it is clear that fundamental constitutional principles – and even the essence of what is now referred to as constitutionalism – were developed by late-Medieval civil law based jurisprudence[40]. Since the later centuries of the *Ancien Régime*, jurisprudence has to a large extent lost its grip on the science and theory of government, and since the late eighteenth century, with renewed strength after 1945, the advent of democracy as the exclusively legitimate form of government has greatly undermined and destabilised the very foundation of the jurists' expertise in defining the principles of good governance. The marginalisation of the jurists' role in the upstream political decision-making process has been further sharpened by the insufficient capacity of legal science to integrate appropriately the normativities set out by modern social sciences[41].

Legal history is ebbing away from modern lawyers' legal culture. The presence of legal history courses in most of the law faculties' programmes, mostly as an elementary introductory subject, is misleading, because in general, apart from a niche course or paper in the master's curriculum, it is hardly taken up in the majority of courses in any area of positive law. At this stage, a priority ought to be to ensure that, towards the next generation, a sufficient number of young researchers are trained to work with the necessary historical expertise on primary sources from different periods. Once the thread of research founded on the historical sources of legal developments is broken, a point of no-return will be reached, and legal studies will effectively have operated a *tabula rasa* of any informed historical awareness. At present, however, the numbers and the academic level of young scholars who have undertaken a legal-historical doctoral research suggest that, unless dramatic cuts in the law curricula occur, the future of the discipline, and therefore the prerequisites for ongoing research and teaching on constitutional history, are secured for the next generation.

[1] These are some of the reasons why, unfortunately, I cannot offer a neat scheme of development of constitutional thinking as, for France, O. Beaud, s.v., *Constitution et droit constitutionnel*, in D. Alland, S. Rials (eds.), *Dictionnaire de la culture juridique*, Paris, Lamy PUF, 2003, pp. 257-266.

[2] Although there is (no longer) any strong ideological divide (as until recently in France) between public and private law either in The Netherlands or in Belgium, many law curricula, especially at the level of master's degrees, maintain a taxonomy which includes the distinction. More importantly, specialisation, at the latest from the master's programmes onwards, and the departmental organisation of law faculties enhances the self-identification of academic jurists as "private lawyers" (Fr. *privatistes*), "constitutional lawyers" (*constitutionnalistes*) etc. Most Belgian and Dutch legal historians tend to work in areas of both private and public legal history; in the law faculties where two courses are on the programme, they would usually view it as a convenient way of maintaining a stronger position for legal history in the curriculum overall.

[3] The only case of a course explicitly titled "constitutional law" I have come across (*viz.* "Histoire constitutionnelle et régimes politiques") is in Namur, where the course description suggests an overview of constitutional developments in England, the United States and France (the curriculum includes a separate course on the history of institutions in Belgium, which covers Belgian institutional history from the end of the Ancien Régime until the present day). The phrasing of titles in a syllabus should not be understood too literally: titles such as "history of public law" usually cover mostly constitutional history. In theory, "public law" covers both constitutional law and administrative law, but the history of administrative law (in contrast to, e.g., the situation in France) has so far not been widely developed in Belgian or Dutch legal-historical research, and is largely absent in teaching. Other areas related to public law, such as tax law, economic law, social law…, because they are closely linked to public policies, have intermittently received some attention, but without being permanently integrated in the syllabus. One notable exception is the course (at master's level) on History of social and economic law in Ghent, for which the lecturer has written a specific text-book (D. Heirbaut, *Het sociaal, economisch en fiscaal recht in België. Een beknopte geschiedenis*, Ghent, Academia Press, 2019). In Liège, the graduate course "Legal History, Special Questions" discusses the instrumentalization of history in the ideological underpinning of discourses touching on economic and social law.

[4] Only one faculty of canon law survives today in the Benelux countries, at the KULeuven. Long gone are the days when the late Mgr. W. Onclin would lecture *ex tempore* on the *Lex fundamentalis* draft when prompted by a curious student. However, the master's programme offered by that faculty offers two legal-historical courses governed by that faculty: "History of canon law – Sources and Institutions", which offers an opportunity to deal with quasi-constitutional aspects of ecclesiology from Antiquity until modern times; and a course "History of canon law – Thematic aspects", which offer some leeway to discuss quasi-constitutional issues in the context of the religious law of the Roman-Catholic Church.

[5] In Leiden, only the first week of the Roman law course deals with public law (information kindly provided by the course's main lecturer, E. Koops).

[6] The second-year course on Roman Law in Groningen is also an example of approaching Roman law from the perspective of present-day Dutch private law.

[7] A good example are the undergraduate courses on public law taught and constitutional in Liège, partly based on J. Stengers, *L'action du Roi en Belgique depuis 1831. Pouvoir et influence*, Brussels, Racine, 2008; the introductory course on public law requires freshers to read primary sources on political thought from Bodin onwards. Similarly, the master-course taught by the same lecturer (who also teaches at the KULeuven) on "Critical Analysis of major texts and speeches on public law" discusses textual sources from modern (mainly twentieth century) history. (I am grateful to J.-L. Gerkens for drawing my attention to these courses). In Tilburg, one vantage-point of the introductory course on Constitutional Law is the historical development of the democratic rule of law (*democratische rechtsstaat*), referring to M.C. Burkens, H.R.B.M. Kummeling, B.P. Vermeulen, R.J.G.M. Widdershoven, *Beginselen van de democratische rechtsstaat. Inleiding tot de grondslagen van het Nederlandse staats- en bestuursrecht*, Deventer, Kluwer, 2022, 9th edn. The course "Constitutional Law" in Utrecht takes the "historical roots of Dutch public law" as its starting point and refers to the "historical context and jurisprudential themes in order to explain constitutional doctrines (textbook: C.A.J.H. Kortmann, *Constitutioneel recht*, Deventer, Wolters Kluwer, 2021, 8th edn.).

[8] For example, the undergraduate course at UCLouvain "Legal Theory and Contemporary Legal Thinking" which addresses *inter alia* the issue of the relation between democracy and constitutionalism, and uses as its framework the period from the "liberal state" to the "welfare state". Saint-Louis (Brussels) is one of the few universities where

the once ubiquitous course on "Natural Law" has survived; the course also covers the historical evolution of natural law theories. In Leiden, the course "Practicum: History of Legal Philosophy and Ethics" invites the students to read extracts from work ranging from Antiquity to modern times, including reference works on constitutional history (e.g. Dicey). In Luxembourg, the course of Philosophy of Law on "Historical [Introduction] to the Theory of Liberal Democratic Law" is based on nineteenth- and twentieth-century political theories (using as its textbook: J. Van der Walt, *The concept of liberal democratic law*, London, Routledge, 2019); the general course "Introduction au droit luxembourgeois" includes an historical preamble.

[9] For an unpromising start, see the brief course description "History of law and institutions" at Mons for the academic year 2023-4, an uncommon pile of insignificant commonplaces. Entirely different is the approach in Luxembourg for the three parts of the course "Constitutional Law", *viz.* General Theory of the State and the Constitution, General Theory of the Constitutional Powers, and General Theory of Fundamental Rights, taught by a legal historian, which, in addition to the historical course on constitutionalism, adopt a strong historical approach.

[10] The most comprehensive announcements of public defences of doctoral dissertation in legal history at Belgian and Dutch universities since 2006 is to be found on the website http://www.rechtsgeschiedenis.be/ under "Rechtshistorische courant".

[11] For Belgium, in the Dutch-speaking Community, I have taken into account the law faculties in the universities of Brussels (VUB), Antwerp, Ghent, Hasselt, and Leuven (KULeuven). Leuven has campuses with (for our purpose, mostly undergraduate) courses in Kortrijk (KULAK) and Brussels (Campus Brussel), where legal history is taught along more or less the same lines as on the Leuven Campus, often by the same lecturers (and, with regard to the course "History of public law", using the same textbook). Hasselt, a relatively new university, has developed its autonomy over the years, but maintains some links with both Leuven and Maastricht. For the French-speaking Community, I have tried to cover the ground for the law faculties in Brussels, both the ULB and Saint-Louis (the latter recently part of a broader association within the UCLouvain), Liège, Mons (for law studies, so far operating as an outside campus of the ULB), Namur and Louvain-la-Neuve (UCLouvain). For the Netherlands, I have endeavoured to include the law faculties (or "schools") in Amsterdam, both the University of Amsterdam (UA) and the Free University (VU), Groningen, Leiden (and its outside campus in The Hague), Maastricht (which combines a Dutch-speaking curriculum with a distinct curriculum of its European Law School), Nijmegen, Rotterdam, Utrecht, and Tilburg. See also further on my references to the University of Luxembourg and to the College of Europe in Bruges. I have translated the titles of courses from Dutch or French into English, except when the original version was necessary; I mention if a course's original title in the syllabus is in English.

[12] References to the Luxembourg curriculum are all based on information provided by L. Heuschling, to whom I am most indebted for his extensive report on the background and the current state of constitutional history teaching at Luxembourg.

[13] For which I am indebted to S. Garben's information.

[14] In Luxembourg, a first-year course on Roman law has a conventional private law outlook. However, the second-year course on "Constitutionnalisme ancien et moderne en Europe/Ancient and Modern Constitutionalism in Europe" includes a substantial chapter on ancient Greek and Roman developments, with extensive reading suggestions to a.o. the works by Michel Humbert.

[15] The course European Legal History (in English) at Leiden focuses on public law developments in the section on early-modern history (my indebtedness to E. Koops for the information).

[16] The history of criminal law, a generation ago a popular subject with a distinctive (graduate) course in Dutch law faculties, is nowadays only sporadically taught. One exception is the legal-historical teaching in Tilburg, where the graduate course on "Legal History" draws on E.J.M.F.C. Broers, *Straf en schadevergoeding. Drie historische hoofdstukken*, Antwerp-Apeldoorn, Maklu, 2018 (3rd. edn.), E.J.M.F.C. Broers, *Van plakkaat tot praktijk. Strafrecht in Staats-Brabant in de zeventiende en achttiende eeuw*, Nijmegen, Ars Aequi Libri, 2006) and on Medieval literature (*Reynard the Fox, Karel ende Elegast)*.

[17] The description of the undergraduate course "Historical-comparative developments of private law" at Nijmegen, and of the first-year course "Legal History' at Groningen suggest that the teaching aims at confronting private Roman law with present-day Dutch civil law; the parallel undergraduate course "Historical-comparative developments of public law" in Nijmegen uses the vantage-point of codification as a vantage-point for discussing some themes of constitutional relevance, a feature also mentioned in the Legal History course at Groningen (connecting codification with such concepts as sovereignry, legality, separation of power). A similar approach is expressed in the description of the first part of the undergraduate

course "Legal History" in Liège: «Dans cette première partie, la dimension constitutionnelle du développement historique du droit privé sera mise en lumière, par exemple à travers le passage du droit privé de l'ancien régime aux codifications du dix-neuvième siècle, souvent inspirées par les nouvelles idées politico-philosophiques de la Révolution française». Codification is also mentioned as the "thread" for an historical contextualization of law in the description of the first-year course "Introduction to Jurisprudence" in Rotterdam.

[18] For example, the description of the course on History of Law and institutions at the ULB, and the History of law and institutions in the Middle Ages and Ancien Régime at Saint-Louis (Brussels). The course description for "European Legal History" in Tilburg refers with some emphasis to "external legal history" ("uitwendige rechtsgeschiedenis"); external legal history is also part of the package in the description of the first-year course at the VU Amsterdam.

[19] A unique example I came across in surveying the programmes is the course "Comparative Legal History of the Meuse-Rhine Euregion" in Maastricht, which approaches comparatively the law-making process and its underlying policies in the early-modern territories of the area including Gelderland, Cologne, Liège *et al.* Another legal-historical course focusing on pre-modern regional law is Introduction to Roman-Frisian Law" at the VU Amsterdam, which discusses private law topics.

[20] A course on "Roman Law and Society" taught in the history department at Nijmegen focuses on private law topics, and in the Law Faculty, I did not find any public law equivalent to the graduate course "History of European Private Law".

[21] But here again, one should quote Sportin'Life's motto "It ain't necessarily so": in Liège, the course "Legal History" refers to late-Medieval and early modern law developments as "private law's constitutional matrix".

[22] With notable exceptions, see the English title of the Maastricht undergraduate course: "Law in Europe, from Gaius until the EU"; the Dutch-speaking undergraduate programme no longer includes a distinct course on legal history, but historical features, including constitutional issues, are discussed in a general third-year course on "Foundations of the law" (I am indebted to B. van Hofstraeten for information not available on the university website); the textbook used in the first year's course in Ghent, although mainly focused on developments in the Belgian territories since the Middle Ages (including foreign influences from France and the United States), includes a substantial part on the political and external legal history of Roman Antiquity: G. Martyn (i.s.m. R. Opsommer), *Geschiedenis van het publiekrecht en van de politiek*, Bruges, Die Keure, 2022. In Hasselt, the legal history course starts in the Antiquity, but without discussing specifically constitutional history (again, my indebtedness to B. van Hofstraeten).

[23] Undergraduates at Saint-Louis (Brussels) have separate compulsory courses on the history of institutions and public law for (a) the Middle Ages and the *Ancien Régime* ; (b) modern times.

[24] Various forms of legal practice, though not necessarily constitutional practice, may be discussed in (graduate) courses which deal with the theme of "Justice", which is in particular understood as the administration of justice by the courts (and sometimes by executive bodies), see e.g. the course on "Advanced Questions of Legal History at the ULB (from the long-term vantage-point of the literature published in a Belgian legal journal), and the course "History of Justice" at Saint-Louis (focusing on various judicial and extra-judicial sources, including iconographic sources, relevant for understanding the court's practice since the Middle Ages).

[25] Which is the subject of a specific graduate course at Groningen: "Constitutional Kingdom Law" (referring in its reading materials to C. Borman, *Het statuut voor het Koninkrijk*, Deventer, Kluwer, 2012). In spite of a growing interest for (post-)colonial studies, I have not noticed specific courses on colonial legal history in the law faculties, though very occasionally, I have been informed that an historical outlook on the relations with a former colony is included in a course (e.g. in Tilburg – for which I am indebted to M. in't Veld).

[26] K. van Leeuwen, M. van Faassen, M. Scherer, *Over de Grondwet gesproken. Een selectie uit documenten van staatscommissies voor grondwetsherziening 1883-1983*, Hilversum, Verloren, 2020.

[27] Conversely, a general introductory (first-year) course on the History of Public Law may be informed by historical developments of international law, as in the course taught in Leuven (by R. Lesaffer, whose optional course on the History of International law for graduate students currently focuses on the law of war). In some law faculties (e.g. UCLouvain, UA), a course is offered on "History and Theory of International Law", but not necessarily taught by a legal historian; this also seems the case in Leiden (course "International Law in Context: Historical, Sociological and Theoretical Perspectives".

[28] The VU Amsterdam inherited a special chair on the history of international law. Its current manifestation is the course "Beyond Grotius. History of International Law and Diplomacy: Europeanisation and Globalisation". In

Ghent, the graduate course on "Historical Public Law" focuses on nineteenth-century and twentieth-century treaties and their impact on state formation and domestic constitutional arrangements (I express my indebtedness to G. Martyn for sending me abundant information and documentation about his courses in Ghent).

[29] The textbook used at the Flemish University of Brussels (VUB) incorporates the double vantage-point: the first part deals with international relations from the Middle Ages onwards, the second part gives an outline of the internal (national) developments in France, Germany, the United Kingdom, the United States, Russia and China: F. Dhondt, *Gestolde macht. Historische en vergelijkende inleiding tot het publiekrecht*, Brussels, VUB Press, 2021 (2nd ed.); I am much indebted to F. Dhondt, who provided me with detailed information and documentation about his teaching on constitutional history related topics.

[30] See, however, the course "History of European Integration" (in English) at Brussels, Saint-Louis (highlighting in its reading list D. Dinan (ed.), *Origins and Evolution of the European Union*, Oxford, OUP, 2006, and A. Moravscik, *The Choice for Europe. Social Purpose & State Power from Messina to Maastricht*; Ithaca, Cornell University Press, 1998). In Groningen, the first-year course on "Legal History" includes a discussion of the historical developments of the EU law and institutions, and of the European Convention of Human Rights.

[31] Of particular interest in the present context is the course "The Constitution(alization) of EU law" taught by S. Garben, with an emphasis on the democratic legitimacy a constitutional order may acquire over time through its constant implementation and development – the "constitutional moment" not being per se a codified constitution's formal adoption by a constitutional lawmaker or through a referendum at a given time in history –, an approach which ought to be followed also with regard to national constitutions, whether fully codified or not; see S. Garben, *The constitutionalization of European integration as a single, protracted 'constitutional moment' towards the establishment of EU final authority*, in M. Dani, M. Goldoni, A.J. Menéndez (eds.), *The Legitimacy of European Constitutional Orders. A Comparative Inquiry*, Cheltenham, Elgar, 2023, 259-281. However, the author also discusses features of the EU's normative process which betray a lack of democratic legitimacy: S. Garben, *The European Union and its Three Constitutional Problems*, in M. Avbelj (ed.), *The Future of EU Constitutiona*lism Oxford, Bloomsbury/Hart, 2023.

[32] In several curricula, a general introductory course on legal history for undergraduates is styled as "European Legal History" (or similar titles), indicating a departure from purely national legal history and comprising a legal-historical approach. I have noticed only one course formally encompassing in its title "Global Legal History" (in English), at Tilburg, a course considering moreover all periods from Antiquity until the present day (and drawing, according to the course description, on J. Klabber, *International Law*, now Cambridge, Cambridge University Press, 2021, 3rd edn.); the same global perspective (and transcending a Western perspective) also inspires the Tilburg course on the "History of International Law" (supplemented by other courses, such as "International Security in Historical Perspective", focusing mainly on post-World War II developments, but also partly based on current research by R. Lesaffer). I am indebted to M. in't Veld for informing me on the legal history courses in the English and Dutch curricula at Tilburg.

[33] The approach may depend on broader policy considerations. In Luxembourg, the law faculty (which had inherited a solid theoretical background from the Belgian input during the early years of Luxembourg's *Centre universitaire*) decided from 2014 onwards to engage into an approach styled as "transnationalization" (to some degree inspired by McGill comparative legal studies). For constitutional history, this means that even when national Luxembourg constitutional history is taught, such history avoids any national narrative, even when constitutional doctrines are often presented under the guise of a dubious, at times quasi-official historical narrative supposed to underpin constitutional doctrines. A broad comparative view offers the possibility to avoid the national narrative; see for a specific example: L. Heuschling, *Le discours sur la valeur consultative du référendum (art. 51 § 7 Const. Lux.). Une déconstruction historique*, in «Pasicrisie luxembourgeoise», n. 1, 2015, pp. 1-49, esp. pp. 3-4 : «Sur la question de la valeur du référendum s'est cristallisé au cours de l'histoire, plus précisément de 1948 jusqu'à ce moment crucial que fut le début du XXIe siècle, un discours dominant qui, par certains aspects, a pris la forme d'un lieu commun et d'une doxa. C'est le discours sur la nature (consultative) du référendum de l'art. 51 § 7 Const. […] Un premier trait caractéristique de ce discours concerne sa façon de mobiliser l'histoire, tout en se situant hors de l'histoire. Ce discours proclame qu'il est, à l'heure actuelle et depuis toujours, le seul discours à exister (la thèse de son exclusivité historique). Il n'y a pas, et il n'y a jamais eu d'autre interprétation alternative, soit radicalement soit sensiblement différente, à propos de l'article 51 § 7 Const. […]. L'histoire est ainsi mobilisée de

manière forte pour suggérer, à propos d'une construction intellectuelle, l'existence d'une sorte de bloc monolithique qui aurait traversé les âges, sans évolution, ni fracture. De là, il n'est qu'un pas à penser qu'aucune autre lecture n'est, en soi, possible. Or, ce discours qui se veut historique, en ce qu'il s'appuie sur l'histoire pour faire avancer un argument en dogmatique juridique – il s'agit de savoir, à l'heure actuelle, quel est le sens exact de cet article de la Constitution – est, profondément, *an*historique et même *anti*historique. Quant au fond du discours: à l'instar de nombre de doxas, il tend à essentialiser, naturaliser ou à déraciner de l'histoire une construction intellectuelle qui, pourtant, y est ancrée. Quant à la méthodologie employée : ce discours dominant mobilise l'histoire alors qu'en vérité, il ne s'appuie sur aucune étude sérieuse, scientifique, du passé» (I am grateful to the author for providing the reference and its background).

[34] Nevertheless, several curricula include a course on political history which focuses more specifically on the national developments, e.g. in Antwerp, the course description of "Political and Institutional History of Belgium and the Low Countries", at UCLouvain (first-year course "History of institutions", but in a broader context of Belgium's political, social and economic history); at Brussels, Saint-Louis, the course description for "History of Institutions and Law, Modern Times" is focused on Belgium, with some references to the original Belgian constitution's immediate Dutch and French predecessors; in Liège, the course "Belgian political history" starts in ancient times and refers to various political regimes which have ruled over present-day Belgian territories, an approach that offers an opportunity to address various theories on the formation of a political system (G. Grandjean, *Histoire politique belge*, Liège, Presses universitaires de Liège, 2024; idem, *Le principe d'égalité dans l'organisation de la société. Émile de Laveleye. Un intellectuel au service de la Cité*, Bruxelles, Larcier, 2020; C. Régnier, *La constitution au fil de ses versions*, Bruxelles, CRISP, 2022 2nd ed.). In Namur, the course "History of Belgian Institutions", from the end of the Ancien Régime to the present day, offers an opportunity to address issues of democratization and federalism. In Groningen, the graduate course "Parliamentary History and Political Constitutional Law" (in the Dutch law master's curriculum, specialisation Constitutional and Administrative Law) considers mainly modern Dutch political history (based on *inter alia* R.A.M. Aerts, *Land van kleine gebaren. Een politieke geschiedenis van Nederland 1780-2012*, The Hague, Boom, 2013, 8th edn., and P.P.T. Bovend'Eert and H.R.B.M. Kummeling, *Het Nederlandse Parlement*, Deventer, Wolters Kluwer, 2017, 12th edn.). The course "Political and Parliamentary History" at the VU Amsterdam also deals with modern Dutch history.

[35] For example, half of the graduate course "Legal History of History of Justice" at UCLouvain has dealt with modern, i.e. pre- and post-Brexit, constitutional developments in the United Kingdom – developments which have often provided an occasion for the courts and scholars to refer to more distant historical constitutional developments in the British Isles.

[36] Occasionally also a specialization of an undergraduate's degree : thus in Amsterdam (UA), the minor "Human Rights in Modern Society", which has a legal-historical course on "Human Rights and Democracy", partly based on M. Freeman, *Human Rights*, Cambridge, Polity Press, 2022 (4th ed.) and T. Akkerman, *Democratie. De Europese grondslagen van het moderne idee*, Apeldoorn, Het Spinhuis, 2010 (I am indebted to G. van Nifterik for his information on this course). Three French-speaking universities (Namur, Saint-Louis and UCLouvain) offer jointly a specialised master's curriculum in Human Rights.

[37] Human rights, with a more or less sustained historical interest, is of course also taught in specialized courses, and more general jurisprudential courses (e.g. in Amsterdam UA, where the course on the "History of Legal Theory" is partly based on L. Hunt, *Inventing Human Rights*, New York and Londen, Norton, 2008).

[38] For Leuven, see R. Lesaffer, *De rechtsstaat. Een constitutionele geschiedenis van het Westen*, Ghent, Owl Press, 2024 (forthcoming at the time when this article was written; the book will be based on the printed manual the lecturer used previously – information kindly provided by R. Lesaffer) a central theme in the book is the changing nature of the "rechtsstaat", which may contribute to understand the current tensions around the notion as a symptom of yet another transitional stage of its development.

[39] A special case is the course "Recent history of law, economy and politics" at the KULeuven, tailor-made for allowing K. Geens to pursue some teaching after his retirement, an acknowledgement of his achievements as Belgium's federal Minister of Finance, and subsequently a reformist Minister of Justice while he was a member of the Leuven law faculty (teaching company law). The course aims at establishing connections in modern Belgian, European and international history between the three terms mentioned in the course's title.

[40] In a recent paper, I have argued that Ernst Kantorowicz's rehabilitation of the phrase "Political Theology" (in *The King's Two Bodies*) might even more aptly

have been expressed by using the phrase "Political Jurisprudence" (*Médiévistique et "déméditerranéisation" du monde occidental dans l'œuvre d'Ernst Kantorowicz*, in : *Ernst Kantorowicz, un historien pour les juristes ? Actes du colloque organisé par l'Institut Michel Villey, Droit et Philosophie, Hors-Série*, n. 3, 2023, pp. 68-79).

[41] A slightly more elaborate argument on this theme in my paper : *Une très brève histoire du droit dans la civilisation occidentale (1000-2000)*, in «Annales de Droit de Louvain», n. 77/3, 2017 (= 2019), pp. 397-411.