MEDIEVAL STUDIES 119:
CONSTITUTIONAL AND LEGAL HISTORY OF MEDIEVAL CONTINENTAL EUROPE
Tentative Syllabus and Assignments
Spring, 2011

Prof. Donahue

Mr. Dorin

Requirements. There are four requirements for credit in the course: (1) a one-paragraph summary of the readings for each section turned in at the beginning of each section; (2) a short paper (no more than five double-spaced typed pages exclusive of notes); (3) an hour exam (Fri., Mar. 11); (4) a final exam (scheduled at the whim of the FAS Registrar). (We will consider allowing students to write a term paper in lieu of taking the final exam. More about this below under “papers.”)

Meeting times. This course is also listed as Law 42100A. The FAS students will meet together with the law students for lectures on Mondays and Wednesdays from 11:10 to 12:00 (Room Sever 102). The law students and FAS graduate students will meet for “Section” on Tuesdays from 10:40 to 12:00 in the Law School (Room Pound 201). There is a separate section for the undergraduates (time and place to be arranged; it’s listed below as if it were on Thursdays) and a separate “discussion class” for the undergraduates on Fridays from 11:10 to 12:00 (Room Sever 102). By and large, Mr. Dorin will lead the section and Prof. Donahue the discussion class, but in some weeks the reverse will be the case.

Prerequisites. None. See below under “Background.”

Work load. For a history course, the reading load is fairly light, but much of it is documentary material, and is thus relatively slow going. Give priority to the documentary materials. Almost all classes have documentary assignments, and those which do will devote a considerable amount of time to the documents. You’ll be lost if haven’t read them in advance. This is why we have both a section (Thursdays) and a “discussion class” on Fridays, both without the law students. You should bring the multilithed Documents (see below under “Readings”) with you to every class.

The key to keeping up with this course is preparation for each class, particularly with the documents, and attendance at classes and sections. Much of our time in class will be spent discussing the documents. When I have previously given this course, I have noted that students who read the documents and attended classes did well, even if they hadn’t done all the secondary reading.

The Course. This course is an attempt to discover how the distinctive features of the “civil” law of the European Continent arose and why these distinctions persisted. It is also an attempt to discover how the legal systems of Continental Europe developed and were influenced by a group of ideas about politics and public order that are frequently invoked today when we speak of the “Western legal tradition.” In order to do this we have to conduct a “Cook’s tour” of European legal history, to survey the sources and literature of the law from the fall of Rome (roughly 500 A.D.) to the emergence of the “natural law school” in the 17th century. That gives the course something of the quality of “if-this-is-Tuesday-it-must-be-Belgium.” We have attempted to give focus to the course by emphasizing three topics, the capture of wild animals as the foundation of “property,” the formation of marriage, and the rules about the use of witnesses in criminal and civil procedure. We wish there were a more strictly public-law topic that we could use as well, but no public-law topic has deep enough roots to allow us to trace it over this long period of time. Hence our examination of public law will have to come about as we unfold the history of institutions within which the law operated. We focus on France. We will also deal with Germany, Italy, Spain and the Low Countries, but France give us the backbone, while the other areas give us examples (as does England by way both of comparison and contrast). The rest of the European Continent will get only an occasional mention.
We will proceed largely by way of lecture, interspersed with examination of documents that are contained in Documents. These documents will largely carry the story of wild animals, marriage and witnesses. In each period we will ask two questions: (1) how does the way people were thinking about law in this period proceed from what had gone before and lead to what was to come next (a largely diachronic question)? And (2) how was the way that people were thinking about law in this period relate to the broader political, social and intellectual developments in the period (a largely synchronic question)? The ultimate question is comparative: why did Continental law develop its distinctive features?

Background. No one (including the instructors) comes to a course like this with all the necessary background information. We will try to say everything that we think you need to know to make sense out of what is going on, and so, we will assume that you do not have any of the relevant background. On the other hand, in a survey course as broad as this one, we can say things only once. For this reason, we would suggest, particularly if you have not taken a course in medieval and/or early modern European history, that you read a good textbook on one or both of these topics. In the past we have asked the Coop to stock H. G. Koenigsberger’s, Medieval Europe, 400–1500 (1987) and the same author’s, Early Modern Europe, 1500–1789 (1987). The books are now out of print, but second hand copies are readily available. Both books are a relatively quick read, particularly if you’re not trying to memorize kings and battles and dates. We have included the page numbers below at the relevant spots enclosed in square brackets at the end of the assignment.

If you have taken a medieval and/or early modern European legal history course someplace else or if you have had a European history course that devoted some time to legal development in the same periods, you probably should not take this course. There is a graduate reading course this semester (History 2080, formerly History 2126) for which you may be ready.

Readings. There is, unfortunately, no really good textbook in English of European legal history. In the past we asked the students to buy a relatively short paper-back: Manlio Bellomo’s, The Common Legal Past of Europe: 1000–1800. Raoul van Caenegem’s An Historical Introduction to Private Law is equally good, and slightly, but not much more, expensive; for this reason we did not ask the Coop to stock it. That was probably a mistake. When we went back over the course evaluations from the last time that Prof. Donahue offered the course, several students said that they thought that van Caenegem was more helpful than Bellomo. Hence, that is the book that we are asking you buy this year.

Neither Bellomo nor van Caenegem is really a textbook. Probably the best textbook in English is Robinson, Fergus and Gordon, An Introduction to European Legal History (2d ed., 1994) [RFG2], which is available in the Law School and Lamont. (There’s a third edition of RFG2 [RFG3], which is shorter and focuses more on the later period. It is available only in the Law School.) As an alternative to Bellomo and van Caenegem, we have listed below readings in number of different books, including both editions of RFG. One of them is a classic: Paul Vinogradoff’s, Roman Law in Medieval Europe. Two others are relatively new and controversial, Alan Watson’s, The Making of the Civil Law and Harold Berman’s Law and Revolution. Bellomo, Berman, RFG2, Vinogradoff and Watson are available at Lamont and Quad Library. All these books are on reserve in the Law School. (The Law School also has on reserve a couple of copies of the extracts from these books assigned for the course in “course-pack” form. Ask for the “Readings” for Donahue’s course.)

By and large, we think that the books other than RFG do a better job of covering the topics to which they refer than does RFG. On the other hand, some people really like a text book, and none of the books extracted is a text book, though Bellomo and van Caenegem come close. You should read either RFG or the extracts from the other books for class, and you might want to read what you haven’t read when you’re reviewing the course for the exam.
The multilithed Documents\(^1\) contains, as the name implies, a number of documents, legal sources in translation. These vary greatly in the length of their extracts. When they are long, we want you to get a sense for the overall structure; when they are short, you should focus on the detail. The Syllabus contains some notes as to what is important.

Outlines for most of the classes are posted on the course’s website: http://www.law.harvard.edu/faculty/cdonahue/courses/CLH/. We will probably be revising these as we go along, but you should bring them with you to class either in your computer or in paper form. Having this kind of material already written down saves you time in taking lecture notes.

Papers and Exams. There will be a short paper required for the course. It should be no more than five double-spaced typed pages exclusive of notes. It may analyze one or a couple of the documents in the Documents. The basic idea is to present an idea supported by evidence (primary sources please). You may do the paper any time during the semester. You should have chosen a topic no later than Thursday, March 24. You should turn in your first draft no later than Thursday, April 21. The final draft should be turned in before the beginning of exam period (Fri., May. 6).

There will be an hour exam for the undergraduates on Friday, March 11. (We will exempt from the hour exam seniors who are writing bachelor’s essays.) Basically, the hour exam will cover material in the first 23 assignments. There will be one question, which will almost certainly involve analysis of a document in Documents.

The final exam (to be scheduled) will be an “open book” exam and will contain two or three questions. The first will give you a document drawn from the Documents and will ask you to comment on the document and its significance. The second will call for a more wide-ranging essay. A possible initial question will ask for some identifications. In the past we have given this exam on a “take-home” basis and will probably do so this year.

If you wish to write a term paper in lieu of the final exam, you must take the hour exam and get our approval of your term paper topic. The term paper should cover material in at least two of major time periods of the course (e.g., early medieval and late medieval, or late medieval and early modern). It may trace the history of a particular idea or institution from one period to another or it may compare ideas and institutions in two different periods. In order to get our approval of a term-paper topic, you will need to have completed your short paper and to turn in a one-page statement or outline of what you plan to write about by Thursday, April 14. Students in the past who have taken the paper option in the past thought that it was fun but that it involved more work than taking an exam.

Offices. Prof. Donahue’s office is in Hauser 512 in the Law School. His assistant is Ms. Reader in Hauser 518, and his office hours are from 1:00–3:00 on Tuesdays, or by appointment. An appointment is usually not necessary for the regularly scheduled office hours, but there is a sign-up sheet on the door. Mr. Dorin, who will be teaching most of the sections, has an office in Robinson L-17. His office hours will be announced later.


\(^1\) Previous editions of this have been called Outlines and Documents. We did not include the outlines this year, because they change constantly and are better served up on the web.

A calendar follows the syllabus, which allows you to see at a glance the date, title of the class, and the assignment number.

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<th>Assignment</th>
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<td></td>
<td>2. 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?]</td>
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<td>Discussion 1.</td>
<td>3. The legacy of the ancient world: Christianity. Paul’s letter to the Romans (Documents, Part II.A).</td>
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<td>Week 2</td>
<td>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?]</td>
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<td>Lecture 3.</td>
<td>5. Two “barbarian” law codes—Gundobad (compared with the Lex romana burgundionum) (Documents, Part III.B). [Same questions as Lecture 3.]</td>
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<td>Section 1.</td>
<td>6. The “barbarian” invasions. van Caenegem, 16–29; RFG2 10–23; RFG3 11–25; Vinogradoff 11–42. Aethelberht and Gundobad compared. Documents, Part III.</td>
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<td>Discussion 2.</td>
<td>7. Reflections on “fundamental legal categories”: ius vs. lex, public vs. private, criminal vs. civil, persons vs. things vs. actions, property vs. contract vs. delict (tort). Justinian’s Institutes (Documents, Part I.A). [K1500 1–66.]</td>
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<td>Week 3</td>
<td>8. Carolingian institutions and “feudalism”. Bellomo, 27–43; RFG2 23–70; RFG3 26–41; Documents on Continental feudalism (Documents, Part IV). [K1500 67–135.]</td>
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<td>Section 2.</td>
<td>10. Eclectic sources of law: the Bible, Æthelberht and Gundobad, the Collection in 74</td>
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Week 4


Discussion 4. 15. Marriage in the glossators. (Documents, Part VIII).

Week 5
No lecture. Holiday, President’s Day.

Lecture 9. 16. 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 is a good overview for the hour exam, though it takes us quite a bit further in time).


Discussion 5. 18. How do we design a procedural system? Documents, Parts VI and IX.

Week 6

Lecture 11. 20. Coutumiers and fueros. Extracts from the Usatges de Barcelona on witnesses, marriage, and wild animals (Documents Part X.A).


Discussion 6. 22. How to read a case. Documents, Part XIV.A.

Week 7
Lecture 12. 23. 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).

Lecture 13. 24. Political ideas of the 12th and 13th centuries. Extracts from the glossators and early commentators on sovereignty. (Documents Part XI)

Section 6. 25. Usatges and Beaumanoir. Documents, Part X.

Hour exam. (Will cover Assignments 1–23, 25.)

Spring break.
Week 8
Lecture 15.  27.  The commentators. RFG2 100–121; RFG3 59–71, 107–24. Documents, Parts XII and XIII.
Section 7.  28.  Law and politics in the 13th century. Documents, Parts XI.
Discussion 7.  29.  The formation of a persecuting society? Developments in the law of witnesses: Tractatus de reprobatione testium; Gandinus, Tractatus de maleficiis; Robertus Maranta, Speculum Aureum (Documents, Part XII).

Week 9
Lecture 16.  30.  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)
Lecture 17.  31.  Courts and case reports—14th through 18th Centuries. Watson 39–52. Decisio S.R.R. (1360 X 1365); Decisio S.R.R. (1574); the Rota Fiorentina (1780) (Gorla article) (Documents, Part XIV.B, C, D, E).
Section 8.  32.  Courts and case reports (cont’d). Decisio S.R.R. (1360 X 1365); Decisio S.R.R. (1574); Panormitanus, Consilia; the Rota Fiorentina (1780) (Gorla article) (Documents, Part XIV.B, D, E)
Discussion 8.  33.  Marriage in legal theory and legal practice. Documents, Part XIV. Pay particular attention to Panormitanus, Consilium (15th c.) (Documents Part XIV.C).

Week 10
Lecture 18.  34.  “Renaissance” Europe—Political, intellectual and constitutional developments. Bellomo 162–73. [K1789 1–94.]

Week 11
Section 10.  40.  Compilations, proto-codification, codification. Documents, Parts XVI and XVII.
Discussion 10.  41.  The institutes of national law (cont’d). (Documents, Part XVII). Intellectual developments and the law (Lecture outline for Lecture 20)

Week 12

Lecture 23. 43. The academics in action. Pufendorf on wild animals (*Documents*, Part XVIII).

Section 11. 44. Domat and Pothier. Watson 99–125. Domat on marriage, wild animals, and witnesses; Pothier on marriage and wild animals (*Documents*, Part XIX).

Discussion 11. 45. The relation between abstract ideas and legal results. *Documents*, Part XVIII.

**Week 13**


Section 12. Review. No specific assignment.

**CALENDAR**

Mon., Jan. 24 = Assignment 1 Introduction to the course. Introduction to Roman law

Wed., Jan. 26 = Assignment 2 The legacy of the ancient world: Roman law. How the story came out

Fri., Jan. 28 = Assignment 3 The legacy of the ancient world: Christianity

Mon., Jan. 31 = Assignment 4 Two “barbarian” law codes—Aethelberht

Wed., Feb. 2 = Assignment 5 Two “barbarian” law codes—Gundobad

Thu., Feb. 3 = Assignment 6 The “barbarian” invasions; Aethelberht and Gundobad compared

Fri., Feb. 4 = Assignment 7 Reflections on “fundamental legal categories”

Mon., Feb. 7 = Assignment 8 Carolingian institutions and “feudalism”

Wed., Feb. 9 = Assignment 9 Eleventh-century reforms and a glimpse at *regnum* and *sacerdotium*, to the end of the 13th century. The Collection in 74 Titles

Thu., Feb. 10 = Assignment 10 Eclectic sources of law

Fri., Feb. 11 = Assignment 11 New Testament extracts on marriage

Mon., Feb. 14 = Assignment 12 The revival of academic law study: Roman law

Wed., Feb. 16 = Assignment 13 The institutions of canon law

Thu., Feb. 17 = Assignment 14 Wild animals in the glossators

Fri., Feb. 18 = Assignment 15 Marriage in the glossators

Mon., Feb. 21 = Holiday

Wed., Feb. 23 = Assignment 16 The revival of academic law study: Romano-canonical procedure

Thu., Feb. 24 = Assignment 17 Reform and the “twelfth-century renaissance.”

Fri., Feb. 25 = Assignment 18 How do we design a procedural system?

Mon., Feb. 28 = Assignment 19 Marriage litigation in the High Middle Ages

Wed., Mar. 2 = Assignment 20 *Coutumiers* and *fueros*

Thu., Mar. 3 = Assignment 21 The institutional history of the 12th and 13th centuries

Fri., Mar. 4 = Assignment 22 How to read a case

Mon., Mar. 7 = Assignment 23 Courts and *coutumiers* in France
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<td>= Assignment 24</td>
<td>Political ideas of the 12th and 13th centuries</td>
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<td>Thu., Mar. 10</td>
<td>= Assignment 25</td>
<td>Usatges and Beaumanoir</td>
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<td>Fri., Mar. 11</td>
<td>= Hour exam</td>
<td>(Will cover Assignments 1–23, 25)</td>
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<td>Mon., Mar. 14—Fri., Mar. 18</td>
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<td>Spring Vacation</td>
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<td>Mon., Mar. 21</td>
<td>= Assignment 26</td>
<td>The fourteenth and fifteenth centuries—Political and constitutional developments</td>
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<td>Thu., Mar. 24</td>
<td>= Assignment 28</td>
<td>Law and politics in the 13th century (Short paper topics must be chosen by this date.)</td>
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<td>Fri., Mar. 25</td>
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<td>Assignment 29 - The formation of a persecuting society?</td>
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<td>Mon., Mar. 28</td>
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<td>Commentators on wild animals</td>
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<td>Wed., Mar. 30</td>
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<td>Thu., Mar. 31</td>
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<td>Courts and case reports (cont’d)</td>
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<td>Mon., Apr. 4</td>
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<td>“Renaissance” Europe—Political, intellectual and constitutional developments</td>
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<td>Homologation of custom and reception</td>
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<td>Thu., Apr. 7</td>
<td>= Assignment 36</td>
<td>Humanists, humanism and the law</td>
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<td>Fri., Apr. 8</td>
<td>= Assignment 37</td>
<td>Legal humanism (Section will meet in the Root Room of the HLS Library)</td>
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<td>Mon., Apr. 11</td>
<td>= Assignment 38</td>
<td>The 17th and 18th centuries—Political, constitutional, and intellectual developments</td>
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<td>Wed., Apr. 13</td>
<td>= Assignment 39</td>
<td>The Grandes ordonnances. The institutes of national law</td>
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<td>Thu., Apr. 14</td>
<td>= Assignment 40</td>
<td>Compilations, proto-codification, codification. (Statement of term papers due.)</td>
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<td>Fri., Apr. 15</td>
<td>= Assignment 41</td>
<td>The institutes of national law (cont’d). Intellectual developments and the law</td>
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<td>Mon., Apr. 18</td>
<td>= Assignment 42</td>
<td>Spanish scholastics, “elegant jurisprudes,” the natural law school, and the usus modernus pandectarum</td>
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<td>Wed., Apr. 20</td>
<td>= Assignment 43</td>
<td>Pufendorf on wild animals</td>
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<td>Thu., Apr. 21</td>
<td>= Assignment 44</td>
<td>Domat and Pothier. (Last date for turning in short paper drafts.)</td>
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<td>Fri., Apr. 22</td>
<td>= Assignment 45</td>
<td>The relation between abstract ideas and legal results</td>
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<td>Mon., Apr. 25</td>
<td>= Assignment 46</td>
<td>Final Lecture</td>
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<td>Wed., Apr. 27</td>
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<td>No assignment Review.</td>
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<td>Fri., May. 6</td>
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<td>Final draft of short paper due.</td>
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