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Tamar Herzog, *A Short History of European Law: The Last Two and a Half Millennia*

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A SHORT HISTORY OF EUROPEAN LAW: THE LAST TWO AND A HALF MILLENNIA, by Tamar Herzog, Harvard, 2018, ISBN 978-0-67423-786-5, 296 pp, \$19/£16.

The book *A Short History of European Law: The Last Two and a Half Millennia (A Short History)* by Tamar Herzog is an important work on the foundations of Western legal culture, being of interest for readers on both sides of the Atlantic Ocean and beyond. It offers a comprehensive—while also brief—approach to the legal history of Europe from Roman times to the emergence and establishment of the European Union. That challenging approach is masterfully achieved by the author, since she highlights seminal events or landmarks that signpost the path followed: from Roman law, to *ius commune*, to the codification and later harmonization of the law. Needed references to the common law are also included in a timely manner by the author. The approach to the topics as followed by Herzog also includes valuable references to events in the U.S. and other American jurisdictions, hence showing how the shaping of law in Europe also benefited from events across the Atlantic, and vice versa. *A Short History* indeed offers a journey of discovery across time and space.

Comparative legal history is currently in vogue in Europe.¹ The discipline gained momentum when reconsidering teaching guidelines, and finds a precedent in, amongst others, the celebrated work of Paul Koschaker.² Furthermore, comparative legal history gained a place within the curriculum of European law schools, longing for the study of legal history with a compara-

1. See generally AGUSTÍN PARISE, OWNERSHIP PARADIGMS IN AMERICAN CIVIL LAW JURISDICTIONS: MANIFESTATIONS OF THE SHIFTS IN THE LEGISLATION OF LOUISIANA, CHILE, AND ARGENTINA (16TH-20TH CENTURIES) 25–55 (Brill 2017).

2. PAUL KOSCHAKER, EUROPA UND DAS RÖMISCHE RECHT (Biederstein 1947). An appraisal of that early work was included in Thomas Duve, *European Legal History—Concepts, Methods, Challenges*, in ENTANGLEMENTS IN LEGAL HISTORY: CONCEPTUAL APPROACHES, GLOBAL PERSPECTIVES ON LEGAL HISTORY 29, 38–39 (Thomas Duve ed., 2014).

tive approach. Accordingly, a comparative approach to legal history in Europe is reflected in the classrooms,³ in the literature,⁴ and in academic circles.⁵ There is a call for a similar approach in the Americas, and Herzog offers an exemplary reaction to that call in *A Short History*. In her work, it should be noted, Herzog invites a readership beyond Europe to explore the path towards the discovery of common roots.⁶

The methodology of *A Short History* should be commended. Each chapter introduces clearly the purpose pursued by the author, and all chapters fall under an overarching theme. Chapters succeed in referring in an adequate and balanced manner to names of actors, titles of products, and the most important shifts in paradigms. Chapters include a few explanatory notes when needed, while the use of internal cross-references is likewise commendable. Finally, chapters are enriched by a selection of recommended readings to further expand the universe of knowledge.

The introduction, entitled *The Making of Law in Europe*, presents an overview of the entire journey that lies ahead. From the start, the author alerts readers to the fact that “everything [has] to do

3. Van Rhee and van der Meer explain the teaching of legal history within the European Law School bachelor program at Maastricht University, where the study of legal history evolves beyond the borders of the Netherlands. See C.H. van Rhee & J.A.J.M. van der Meer, *Teaching European Legal History at Maastricht University in the Netherlands*, in HOW TO TEACH EUROPEAN COMPARATIVE LEGAL HISTORY 143 (Kjell Å. Modéer & Per Nilsén eds., Lund 2011) [hereinafter HOW TO TEACH EUROPEAN COMPARATIVE LEGAL HISTORY].

4. The literature has indeed developed during the past decades. See, e.g., O.F. ROBINSON ET AL., EUROPEAN LEGAL HISTORY: SOURCES AND INSTITUTIONS (3d ed., Butterworths 2000); RANDALL LESAFFER, EUROPEAN LEGAL HISTORY: A CULTURAL AND POLITICAL PERSPECTIVE (Jan Arriens trans., Cambridge U. Press 2009); JØRN ØYREHAGEN SUNDE & KNUT EINAR SKODVIN, RENDEZVOUS OF EUROPEAN LEGAL CULTURES (Fagbokforlaget 2010); UWE WESEL, GESCHICHTE DES RECHTS: VON DEN FRÜHFORMEN BIS ZUR GEGENWART (4th ed., Beck 2014); BART WAUTERS & MARCO DE BENITO, THE HISTORY OF LAW IN EUROPE: AN INTRODUCTION (Edward Elgar 2017).

5. Kjell Å. Modéer & Per Nilsén, *Introduction*, in HOW TO TEACH EUROPEAN COMPARATIVE LEGAL HISTORY, *supra* note 3, at 9.

6. The invitation was extended by means of a translation to the Spanish-speaking world. See TAMAR HERZOG, UNA BREVE HISTORIA DEL DERECHO EUROPEO: LOS ÚLTIMOS 2500 AÑOS (Miguel Ángel Coll Rodríguez trans., Alianza Editorial 2019).

with context (or, rather, contexts) which radically altered over time.”⁷ The pursuit for unveiling the context(s) requires the description of seminal developments only, featuring different jurisdictions at different times, whenever protagonists need to take the stage in order to help illustrate a line of argumentation. *A Short History* therefore joins the efforts that are being undertaken by several scholars and research institutes to reconstruct events that help attain legal and cultural repositories for future studies by developing valuable contexts.⁸ Readers can clearly perceive in the introduction that the work of Herzog invites them to explore the different contexts in which law evolved across time and space.

The first part, entitled *Ancient Times*, introduces the two main building blocks of the *ius commune*, in two chapters. On the one hand, Roman law, where the author includes necessary references to the role of main actors (*i.a.*, praetors, jurists) and developments (*i.a.*, adoption of different procedures, enactment of the *Corpus iuris civilis*) that resulted in the erection of that fundamental and influential legal system. On the other hand, Christianity, where Herzog provides valuable insights into its origins and early expansion. Further, attention is devoted to the interplay of Christianity with the other building block of the *ius commune*, namely Roman law. That gradual interplay would ultimately result in a “new Christianized understanding of Roman law, which initially was limited to the territories of the [Roman] empire, [and later] won primacy throughout much of European territory.”⁹ These two chapters adopt a pedagogical approach—which due to necessary simplifications—will be welcomed by readers.

The second part, entitled *The Early Middle Ages*, continues the journey after the fall of the Western Roman Empire. Again, in two chapters, Herzog describes the context in which law developed. The

7. TAMAR HERZOG, *A SHORT HISTORY OF EUROPEAN LAW: THE LAST TWO AND A HALF MILLENNIA 5* (Harvard U. Press 2018).

8. See, e.g., Agustín Parise, *Comparative European Experiences in Legal History and Constitutional Law (19th–20th Centuries)*, 18 *HISTORIA CONSTITUCIONAL* 411 (2017).

9. HERZOG, *supra* note 7, at 42.

account first points out that the apparent vacuum left by Roman law offered grounds for the early development of canon law, since the latter very often recurred to the former. Yet, as the author clearly depicts, Germanic elements soon percolated into the European fabric. The account then points to developments around the year 1000, when different types of feudal relations took the stage, within a context shaped by a power struggle between secular and ecclesiastical leaders. The resulting path, as stressed by Herzog, paved the way for the consolidation of canon law.

The third part, entitled *The Later Middle Ages*, is marked by the study of rediscovered Roman texts, first, in Northern Italy. Canon law and feudal law would also experience developments in that period, as is noted by the author. Ultimately, as explained in *A Short History*, “the combination of new sources, methodology, and environment created a novel system of law.”¹⁰ That new approach to law would soon spread across Europe. The third part also looks at the emergence of the common law in England. Again, the author provides valuable contextual information, to help explain the origins of a system that would eventually (and several centuries later) expand across the globe. Necessary references to writs and remedies, and to other procedural aspects, accompany the account that Herzog offers in her quest to depict effectively the context in which the common law was shaped. A final reflection invites readers to explore the extent to which the English experience can be considered exceptional. The answer arrives soon, when Herzog states that “*ius commune* and common law were perhaps not twins, but they were certainly siblings.”¹¹

The fourth part, entitled *The Early Modern Period*, deals with paradigmatic changes, in three chapters. A first paradigmatic change relates to events that erode the *ius commune*. Herzog points to the emergence of a *mos gallicus*, to the Protestant Reformation,

10. *Id.* at 81.

11. *Id.* at 115.

and to the new role of local customs. It is possible to note that the context indeed changes for the law in Continental Europe. A second paradigmatic change affects the common law during the Modern Period. A “particularly virulent period of religious, political, social, and economic strife”¹² is experienced in England, and eventually has an impact on the legal system. A number of reactions and counteractions were triggered, including efforts to: isolate the common law from the monarch; make the common law the law of the land, hence giving it a higher status or influence vis-à-vis, amongst others, canon law, feudal law, and equity; and confirm a solemn pact of loyalty to the monarch. Again, a final reflection invites readers to explore the extent to which the English experience can be considered exceptional. The answer this time is different, since the “myth of English exceptionalism held strong”¹³ during this period. A third paradigmatic change takes place within the context offered by the re-emergence of natural law. New territories were explored, following the early efforts ignited in the Iberian Peninsula, and the need to deal with *otherness* triggered new ideas and scholarly approaches. Herzog addresses the Spanish Scholasticism, also called Neo-Scholasticism,¹⁴ being important in defending the right to conquest and just war.¹⁵ Spanish Scholasticism was a unique production of minds, something not seen before in legal history. Careful attention is devoted to the ideas of Francisco de Vitoria in this part of *A Short History*, while Alberico Gentili and Hugo Grotius also attain a place of preeminence, when referring to developments in England and the Netherlands.

12. *Id.* at 131.

13. *Id.* at 151.

14. On the Spanish Scholasticism, see the brief account in Agustín Parise, *The Valladolid Controversy Revisited: Looking Back at the Sixteenth-Century Debate on Native Americans While Facing the Current Status of Human Embryos*, 1 J. CIV. L. STUD. 107, 120-124 (2008).

15. ANTONIO DOUGNAC RODRÍGUEZ, *MANUAL DE HISTORIA DEL DERECHO INDIANO* 34-53 (Universidad Nacional Autónoma de México 1994).

The focus is no longer exclusively on Europe, and transatlantic bridges start to be built.

The fifth part, entitled *Modernity*, offers an overview of two seminal revolutionary periods that shaped Western legal culture. On the one hand, the revolutionary endeavors of the Thirteen Colonies show how vernacular efforts were gestated in a context nurtured by European antecedents and Enlightened movements. Those vernacular efforts that resulted in the 1776 Declaration also had an impact in other parts of the globe, since a few decades later many new jurisdictions would emulate the North American revolutionary message and attain their own independence or adopt new constitutional texts. On the other hand, the events marked by the storming of the Bastille on July 14, 1789, show how revolutionary ideas had an impact on law and society. According to Herzog, this second revolutionary period “featured a radical transformation, perhaps the most radical transformation that European law has ever experienced.”¹⁶ These events indeed resulted in a new understanding of the law and required likewise changes in the existing social and political structures. Above all, the seminal revolutions addressed in this part were marked by innovation and by a rupture with preterit understandings.

The sixth part, entitled *The Nineteenth Century*, offers a place of preeminence to the codification endeavors that spread, starting at that time, across Europe and beyond. The account first focuses on the two seminal models provided by the French and German experiences. Valuable contexts are provided, such as the one offered by the interaction of Romanists and Germanists in the path towards the adoption of the BGB. The account then turns to the fate of codification in the common law world. The English experience is followed by that of the United States, with a special focus on Louisiana and New York. In the Southern state, there was oscillation between the adoption of continental European and common

16. HERZOG, *supra* note 7, at 183.

law ideas,¹⁷ and the author correctly points out that “developments suggest that there was more to the Louisiana story than what met the eye.”¹⁸

The epilogue, entitled *A Market, a Community, and a Union*, guides readers through events that followed WWII and that help explain the current status of the European Union. References are made to treaties and rulings, along with elaborations on the political context that accompanied those developments. Here, more references to the Cold War and the Eastern Bloc would have enriched the necessary context and would have helped to further understand the challenges currently faced by the harmonization of law in Europe. The book ends by placing the European story within a globalized world, a context in which a new paradigm “would [need to] recognize the power of groups and group solidarity as well as the persistence of inequalities and differences by unmaking the metaphors proposed by the French Revolution.”¹⁹

A Short History will be of value for the teaching of legal history both in Europe and beyond. Herzog is not writing exclusively for a U.S. audience, even when the first pages of the book may seem to indicate differently. Further, the work of Herzog may also be approached from other social sciences (mainly history) and from cultural studies at large. Subsequent editions of the book may consider the inclusion of maps and images, since for readers beyond Europe some locations and actors may be too remote or distant. Above all, *A Short History* offers a pleasant read, with sufficient level of depth and detail, while also smoothly guiding the readers across time and space, always ensuring that steps are short, firm, and easy to follow. Readers will benefit from the publication of this study by Herzog, one that

17. See generally Agustín Parise, *Codification of the Law in Louisiana: Early Nineteenth-Century Oscillation Between Continental European and Common Law Systems*, 27 TUL. EUR. & CIV. L.F. 133 (2012).

18. HERZOG, *supra* note 7, at 225.

19. *Id.* at 243.

offers an important contribution to the recent literature²⁰ on comparative legal history.

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20. *See, e.g.*, the very recent *COMPARATIVE LEGAL HISTORY* (Olivier Moréteau, Aniceto Masferrer & Kjell Å. Modéer eds., Edward Elgar 2019) (including contributions from authors from both sides of the Atlantic Ocean).