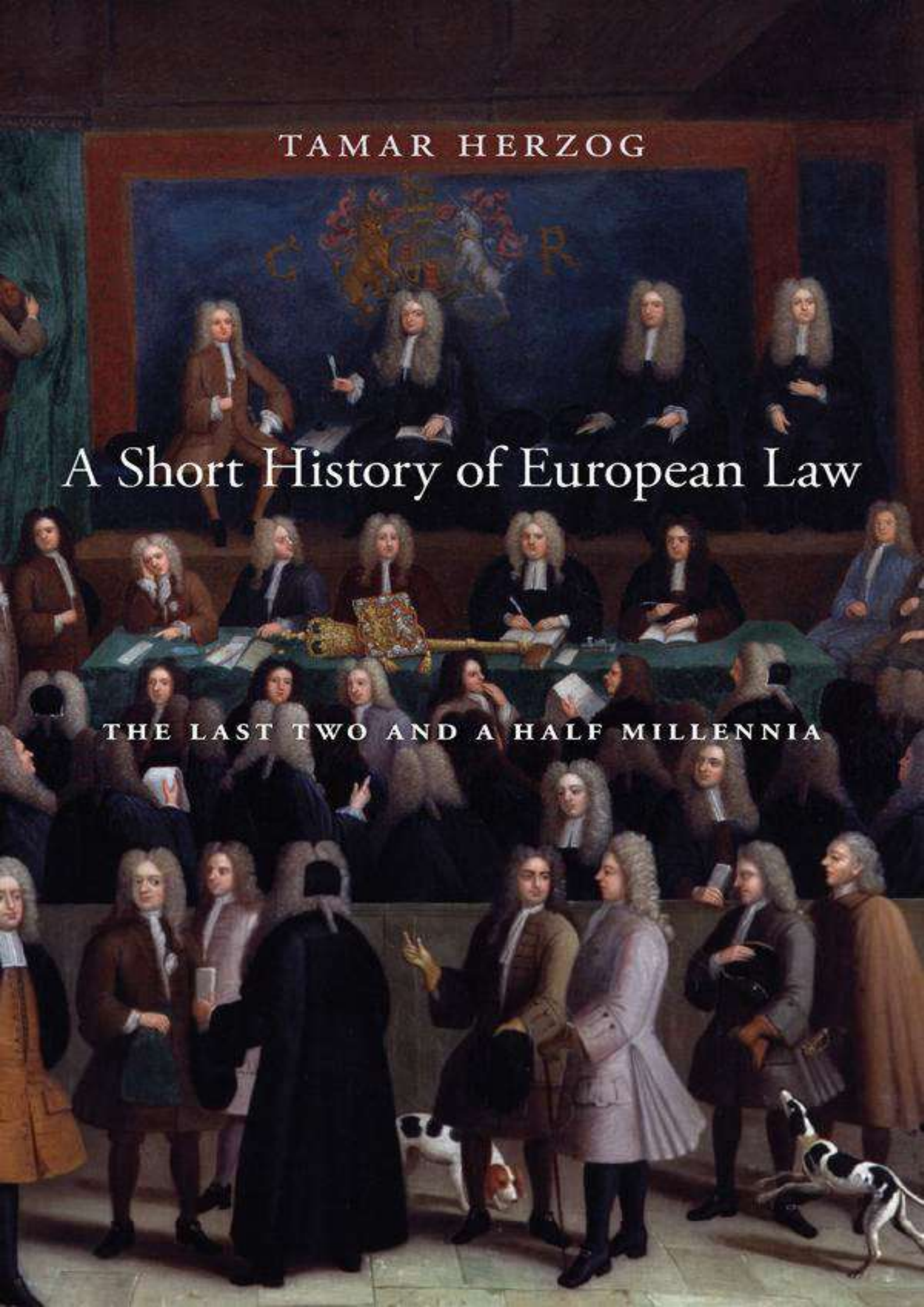
TAMAR HERZOG

A Short History of European Law

THE LAST TWO AND A HALF MILLENNIA



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Tamar Herzog

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Introduction

THE MAKING OF LAW IN EUROPE

A FEW YEARS AGO, an undergraduate student reported to me with excitement that she had just visited Washington, D.C., where she saw a copy of the great charter of liberties, the Magna Carta. Not wanting to dampen her enthusiasm, I asked myself how I could explain to this student that what she saw was a feudal document whose original intent had very little to do with what it came to symbolize, and whose importance was acquired over time because, centuries after it was enacted, it was given new meaning and a new role.

The question I first had to tackle was whether this mattered at all. Was it significant that an early thirteenth-century document such as the Magna Carta was misread by a twenty-first-century student? What would this student stand to gain had she understood what the Magna Carta really was and why and how it had come to acquire the status it now has? Was this history relevant to her present-day concerns? Was myth-breaking as important as myth-making? Is the past gone, or does it tell us something essential about the present and the future?

Understanding the thirteenth-century Magna Carta would entail remembering a feudal past in which powerful lords sought to protect their jurisdiction and property against an expanding monarchy. It would require imagining how society changed over time—mainly, how the privileges of a few barons became the rights of all Englishmen—and how, in the process, claims for rights limited what kings could do. Given its projection in the United States, this narrative would also include the story of how these ideas crossed the Atlantic and mutated. Within a larger history of European law, the explanation would have to engage with the question of not only why the Magna Carta acquired this

mythical status but also why similar feudal charters, abundant and frequent elsewhere in Europe, did not.

As a legal historian I know that what the Magna Carta currently stands for has nothing to do with the text itself and everything to do with how it was used and remembered. If my student knew this history, I reasoned, she might understand the past better, but she might also acquire a means to imagine differently her present and future. It could supply her with instruments to question narratives, understand the processes that led to their formation, and suggest where they could take us next.

The Magna Carta, of course, is not the only legal remnant that still determines our present or allows us to imagine our future. Plenty of other instruments, institutions, and texts inherited from the past fulfill the same role. As both relics of a time gone and important features of our everyday life, they give things certain meanings, they supply solutions, and they offer techniques through which to analyze and understand reality. Take, for example, "due process"—the obligation of courts to follow a particular procedure. Intuitively, many among us would consider it a relatively modern phenomenon linked to society's ambition to ensure the implementation of justice. Yet, due process, if not in name then at least in practice, was born long ago in medieval England. The story of its emergence is linked not so much to guaranteeing the right result (which it did not) but to the insistence that judges of common-law courts obey very strict procedural rules. Understanding why procedural rules became so important in English law and how, over the years and because of very odd transformations, they came to be seen also as instruments protecting litigants, would allow us to have a better grasp, for example, of why certain things were covered by due process while others were not, or why this set of rules developed in England rather than elsewhere.

Engagement with the past would also enable us to comprehend how European law came to refashion itself both as the epitome of reason and as a system with potentially universal applicability. The enormous influence European law has had around the globe could of course be explained by political and economic factors, but it also required an intellectual elaboration. Ancient Romans already linked community membership to law and both of these to the extension of political hegemony, but these links metamorphosed dramatically in the Middle Ages. The advent and propagation of Christianity allowed the projection of Roman law to new areas in Asia, Africa, and Europe. With

colonialism, new explanations were adopted to justify the imposition of European law on non-European territories and peoples. The same happened during the eighteenth-century revolutions and nineteenth-century construction of nation-states. Tracing the evolving need to explain the relevance of European law elsewhere would illuminate, for example, some scholars' criticism of contemporary international law, which they trace back to Europe and which they consider a European rather than a truly global human heritage.

Having taught legal history for some twenty years in both law faculties and history departments in various countries and universities in Europe and the United States (at the University of Chicago, Stanford, and now Harvard), I often felt the need for a short, useful introduction to European legal history that could be used to discuss the evolution of law over time. Weary of big surveys that were heavy on details but light on explanation or on tracing development and change, and unhappy with those that endlessly repeated stereotypes and misconceptions or were provincial in their outlook, I intentionally wrote this book with both my history and law students and my colleagues in mind. What would they need to know to appreciate both how foreign and nonetheless familiar the past was? In a field so abundant with nationalistic affirmations, which myths needed to be put to rest and how could this be done? How could one integrate the history of law in Europe in a single narrative that would allow for local variations while also respecting the profound unity across Europe, including England? How could one communicate the preoccupations of Continental legal history with which I grew intellectually (and which seeks to establish overreaching principles) to an audience more familiar with other types of legal history that are traditionally focused on concrete examples? How can a short book reproduce what we know and what we don't, what we are sure of and what we hesitate to affirm, and yet give a narrative of how things have changed over time and (sometimes) why they did?

This book attempts to answer some of these questions in manageable and clear language. Its main goal is to give readers useful instruments with which to understand both the present and the past. Rather than supplying endless details, it engages with the most essential elements required to rethink our own standards by indicating when and how they emerged and developed. Denaturalizing our present-day legal systems, it demonstrates that we reached these systems after a haphazard and complex progression whose trajectory into the future is far from evident. Today we might take it for granted that law is something that is created

and can be changed, but as I demonstrate in this book, this vision is a relatively recent invention. For many centuries, law was said to exist because it simply did, because it was spontaneously created by the community, or because God had handed it down. Even if these perceptions were untrue, in the sense that law was always made by someone somewhere, the fact that people believed them was of great significance to how they viewed, interpreted, or obeyed the law, to whom they listened, and why. If today we take it for granted that each country has its own law, this too is a relatively recent phenomenon, law in the past being embedded in communities that shared things other than political allegiance. Knowing which factors justified legal obedience and why they mattered is essential for understanding how law functioned historically, as well as how it does today.

To describe the complexities of the past and demonstrate its relevance to the present, in this book, which surveys almost two and a half millennia, I ask how in different moments in time Europeans constructed their legal systems, where they thought norms came from, who they allowed to make, declare, or implement these norms, and what the results were. Rather than describing specific legal institutions or rules, I am interested in deciphering how norms were generated, in order to indicate how they should be read and understood given their particular historical context. I am also keen on demonstrating that their comprehension may tell us something important about whom we came to be.

Throughout the pages of this book, I constantly engage with two major narratives that have accompanied most research on legal history. The first portrayed law almost as a given. Sensitive to how particular solutions changed over time, for example, how contracts were drawn up or what proving a case in court required in different periods, on most accounts it implicitly assumed that law was law. It was as if society had changed, and so had its rules, but law as a field of action and a depository of knowledge and techniques remained the same. For most authors, law included norms that people obeyed, as if where these norms originated, how they were comprehended, which other types of norms existed, and who implemented them and in which way mattered very little. This narrative often seemed to imply that it was almost inconsequential whether law was attributed to communal creation (as in customary law), God (as in canon law), legislators, or judges. Neither did it matter whether law aimed to innovate or maintain the status quo, or whether lawyers and jurists presumed to interpret it literally or believed

it represented a higher truth, which was not directly evident and which they sought to uncover.

As already indicated in my treatment of the Magna Carta, in this book I do the exact opposite. I describe the development of law in Europe as a phenomenon that involved not only choosing between rival solutions (as most scholars supposed) but also identifying basic assumptions regarding the rules themselves. Returning to the Magna Carta, to understand its meaning one has to comprehend, not only what it dictated, but also the normative system in which it operated. It is only by considering contemporary notions regarding the making, modifying, and imposition of rules that we can appreciate what the Magna Carta sought to institute. Its changing meaning over time was likewise linked to transformations not so much in the text itself (which remained surprisingly uniform despite constant copying and corrections) but in the legal contexts in which it was read. That it came to symbolize what it does today, in short, has everything to do with context (or, rather, contexts), which radically altered over time and which this book seeks to uncover and reconstruct.

The Magna Carta also teaches us that, in their quest to obtain certain goals, agents often played with continuity and change. They argued for continuity when they innovated, or they clamored for change when in reality they allowed for none. To understand the past, we need to know not only what happened but also how it was reconstructed, used, and comprehended both by contemporaries who lived through these events and by future interpreters who looked back to them in order to reform their present. Over the course of history, law was elaborated, re-elaborated, and reworked once again, as different individuals, communities, and institutions sought to identify, construct, reconstruct, manage, and re-manage different rules to regulate their activities.

If my first aim is to destabilize the idea that legal solutions changed but the legal framework (who imaged these solutions, who implemented them, which was their authority, and how they gained it) was inconsequential, the second narrative I wish to question is the presupposition that English common law and Continental law (also known as civil law) were utterly distinct. My own experience as a lawyer trained in a universe that used both of these legal systems and as a historian working in both Europe and the United States suggested that this separation could not be true. Instead of treating either one system or the other, as most legal histories do, or observing the specific instances and ways by which the two systems on occasions influenced one other, I

adopt an analysis that observes English and Continental law at the same time by using a similar methodology.

To do so, in my description of developments from the late Middle Ages to the present, I deliberately alternate between Continental and English law, with the intention of placing them into dialogue with one another. My aim is to showcase both what these systems shared and how they differed. Above all, I wish to demonstrate the degree to which, even when they took different paths, they were largely propelled to do so in response to similar developments and pressures. I also suggest that the paths they took were inspired by a common tradition that supplied not only questions but also a horizon of possible solutions.

Thus, I examine the formative period of Continental *ius commune* alongside common law, I analyze how both systems responded to challenges and changed in the early modern period, I compare their eighteenth-century mutations, and I scrutinize them throughout the nineteenth century and into the formation of the European Union in the second half of the twentieth century. Rather than being foreign to each other, as many previous authors concluded, I argue that English common law and Continental civil law formed part of a single European tradition from which they both drew and were enriched. They were, in fact, substantially much more similar than meets the eye.

I begin my analysis with Roman law because of its continuing presence throughout European history. Among the endless ways in which Roman law's hegemony is still felt today is our constant dependence on presumptions, which were a Roman invention allowing one to assume the existence of things without having to prove them first. Not only was the employment of presumptions a Roman technique, some of the presumptions we currently use originated in Roman times. Take, for example, the legal presumption that children born to a married couple are the natural offspring of both spouses. This presumption allowed parents to register their children without having to prove their descent, a function it still fulfills today despite scientific advances allowing us to prove ancestry. Constantly present throughout history, this presumption, however, could come to satisfy new needs. Used under radically different social conditions, in present-day Spain, for example, it authorizes the registration of a child born to a legally married gay couple as the natural offspring of both spouses.

Roman law is an important point of departure for European legal history not only because of its ongoing legacy but also because this legacy was eventually shared by most (if not all) Europeans. Penetrating

slowly, first with the expansion of the Roman Empire and then with the conversion to Christianity, it became the common stock in Europe most particularly after it was taken up by medieval scholars and reworked to fit contemporary needs. Forming the basis also for the initial development of English common law, its validity and influence were tested during the early modern period and were affirmed or denied with the coming of modernity. Over the course of this history, paradoxically, even those who rejected adherence to Roman law often argued their case by analogy to it.

The understanding of Roman law, of course, changed over the course of history, and so did its use. What it meant in the classical period had very little to do with how medieval jurists used it, or what English common-law lawyers and German nineteenth-century jurists made of it. Despite this huge variation in the way it was understood and incorporated, Roman law nevertheless maintained its prestige, and so did some of its basic methodologies and tenets. As usually happens, this interpretation and reinterpretation of the past enabled a creative engagement, not only with what had transpired in the past, but also with constructing the present and the future.

The constant invocation of Roman law also required as well as explained the permanent strain experienced in Europe between stability and universality, on the one hand, and dynamism and local responses, on the other. If Roman law supplied the backbone for a common European legal tradition, it could not solve the constant tensions between local and global, individual solutions and overreaching principles. These tensions were already present in Rome itself, where historians distinguished between law as practiced in the center and as followed in the provinces, but they continued throughout European history. It was precisely in order to overcome such tensions that in the eleventh, twelfth, and thirteenth centuries, efforts were made, in both Continental Europe and England, to create a unifying common law (Chapters 5 and 6). This *ius commune,* a term the English initially also used to designate their common law, was meant to cement and give coherence to a legal world that in reality comprised hundreds of thousands of local arrangements. Whether the search for commonalities succeeded, and to what degree, is part of the story I describe. Another is how the struggle for unification affected how communities were defined. Moving from personal associations (that encompassed people according to their relations with one another) to territorial jurisdictions (that imposed law on all those who inhabited a certain territory) and sometimes adopting midway solutions,

communities expanded or contracted according to the perceived sameness of members. Sometimes family was the factor that justified the imposition of a common law, but often as important were a shared religion, a shared subjection to a lord, the sharing of fields, or the maintenance of trade relations, to mention just a few examples.

The struggle to unite people under the same law was also taken up by the Church, whose authorities were the first to designate the law that was common to all Christians as a *ius commune.* Yet, if the Church played a major role in propagating Roman law (Chapters 2–4), it also affected European normativity in other ways. After the Roman Empire converted to Christianity, the distinction between secular and religious lost much of its saliency. This was particularly true in late antiquity and the early Middle Ages, but it continued to be a fairly accurate description of European law even in later centuries because of the omnipresence of canon law and the commanding role of Christian morality. At a certain moment in time, some European actors began searching for a system that would no longer depend on external authorities or traditions but instead would be self-explanatory. The reign of self-evident truth, where rules could be justified not because they had an authoritative foundation but because they made sense to those who created them, propelled what we now identify as modernity. But this modernity was not necessarily secular. In the minds of many of its eighteenth- and nineteenth-century proponents, human reason and a natural law that was said to be imposed by nature on humans could perfectly cohabit with a belief in God.

Modernity brought about major transformations, but regardless of the interesting question of whether these were revolutionary or not, legally, at least, these changes were often more radical in intent than in practice. In the end, their most pressing legacy was the belief in human agency and the conviction that humans were capable of improving themselves as well as their societies. Thereafter, law would come to exemplify the general drive to move away from the art of conserving a status quo (as has been the case before) to the art of innovating in order to create a seemingly better world.

Having started this book with Roman law, I end it with the establishment and growth of the European Union, which for me is both a point of arrival and a point of departure. To what degree can Europe today have a common law, and who are the agents and interests propelling such a legal unification? Are these processes of unification particular to Europe or do they also operate on a global scale? How can

the nation-state, invented in the late eighteenth century, cope with the challenges of both Europeanization and globalization?

To answer some of these questions and make some of these points, the individual chapters that follow each address a certain topic, as well as describe its evolution. In order to make the narrative clearer, I sometimes sacrifice chronology for the sake of illustrating better what I describe. I do so, for example, in Chapter 1, where I discuss provincial Roman law codes that were enacted after the empire converted to Christianity. Similarly, in Chapter 2, which describes the Christianization of Rome, I deal with some of the issues also covered in Chapter 3, which focuses on the early Middle Ages. In Chapter 6, where I study the foundational period of common law, I sometimes venture into the early modern period.

If chronology is complex, so is the geographical and political entity I identify as Europe. Evidently, over the course of the period I cover, Europe and the definition of what belonged to it were both invented and had greatly mutated. An idea rather than a continent, Europe changed forms and shapes and eventually ventured overseas to territories we now identify as colonial. The projection of European law was just as amorphous. During Roman times, parts of the Mediterranean and Asia were subjected to it, as were European overseas domains later on. By the eighteenth, nineteenth, and twentieth centuries, the legal tradition I describe as European reached its utmost expansion due to the growing hegemony of the Continent but also because elites around the globe chose to use and adapt European law to their own needs and desires. Because of this extension, some of the most important developments in European law happened outside the Continent, as when the law of nations was turned into natural law in the colonies, or as in the constitutional innovations introduced in North America. These not only were a consequence of European law, they also greatly modified it.

Precisely because I was looking to describe the most fundamental developments, rather than all developments, not all European countries feature equally. In my story, some parts appear as protagonists, whereas others are only mentioned in notes. The places and times I describe sometimes were chosen because of their importance, but more often they were selected because they illustrate some of the main arguments I wish to make.