Introduction

The History of Law in Europe: An Introduction is written for students and all those readers – whether legal students, scholars, lawyers, or the general public – interested in this essential aspect of European history. The book describes the different ways in which law has been understood in the context of Europe’s political, economic, social and cultural development. It does not seek to be encyclopedic. Rather, it aims to offer a synthesis of the key developments and most crucial points in European legal history.

Legal history as an autonomous academic discipline developed in nineteenth-century Germany, when Carl Friedrich von Savigny (d. 1861) advanced the idea that ancient Roman law had been the backbone of legal doctrine in Europe ever since, in the eleventh century, jurists at the law school in Bologna began methodically to study Justinian’s codification. While fundamentally correct, Savigny’s view of the past was hardly unbiased. He saw himself and his fellow German professors as the natural culmination, the zenith, of a succession of glorious periods of Roman legal doctrine: from eleventh-century Bologna to Humanist France and the elegant Roman-Dutch School. Savigny’s proposition also allowed Roman law to be identified with German history, right at a time when Germany as a unified state was coming into being. Bologna’s medieval university, which so many German students attended that they were organized as a separate Teutonic nation, had been actively sponsored by the German Emperor Frederick Barbarossa; the supreme court of the Empire, the Reichskammergericht, declared Roman law to apply on a suppletive basis starting 1495; and the Holy Roman Empire, entrenched in its German heartland, was seen as the natural successor to Ancient Rome.

Savigny’s views, though, did not go unchallenged. European scholars, also in Germany, underscored the historical importance of indigenous, non-Roman legal institutions. And with more than a little national chauvinism, English legal historians flatly denied any influence of Roman law, past or present, on their own legal system. On the Continent, Savigny was said to overstate the role of Roman law in history, since – it was argued – Roman law had not been applied directly by the courts and
generally had not been received to the extent that it had been in Germany. The largely Romantic trend to focus on the study of national legal history continued into the twentieth century, peaking during the paroxysm of nationalism between the world wars.

With the founding of the European Coal and Steel Community in 1951, which, step by step, evolved into the European Union that we know today, the national approach to European legal past gave way to a broader perspective based on families or traditions: a Continental family based on the *ius commune* (or Roman and medieval canon law) and the English tradition of “common law.” A third legal family, that of the Soviet republics, was often considered alongside the other two.

The fall of the Berlin Wall in 1989 marked yet another shift in the approach to European legal history. Suddenly Europe was much larger, as it naturally included the diverse legal traditions that had nearly been strangled under the Soviet yoke. This multiformity blurred the dichotomy of common law versus civil law systems and attracted interest in legal traditions that did not easily fit into the common or civil law families, such as those of the Scandinavian countries, Scotland, Greece, and the Balkans.

Where does this book stand, then, in the context of this scenario? First of all, as mentioned, it is meant to constitute a short introduction, not an encyclopedic overview of the legal traditions of every single European country. Aside from the titanic nature of such an enterprise, we seriously doubt that the sum-of-the-parts approach – a national one, after all – is necessarily the most enlightening. We shall be content if we manage to spark the reader’s curiosity and spur him to understand Europe’s legal past as a shared language, of which its different national laws – particularly on the Continent – are but dialectical expressions. While this focus on the shared language of law should not blind us to the importance of its local or national expressions, we argue that even these local and national expressions possess some common features that allow for a common understanding. In the book, when we describe items of local or national legal history, we do so in order to illustrate this more general point. They are offered as examples. As such, others could easily have been cited, but we believe that those chosen illustrate a certain point particularly well. Though we have tried to include examples from all over Europe, those from Western Europe predominate. We trust that the intelligent reader will, in any event, be able to place a certain local expression of the law in a useful framework.

Secondly, our narrative is built upon the pillars of the civil law and common law families. The export of these two traditions to countries and regions all around the world and their impact on today’s global legal
and economic relations, in and of itself justify this decision. It is true that there have been moments in history when, for example, the Vikings or Byzantines exported their customs to other places, or their economies were more powerful than the Western ones. For this reason we have included brief accounts of Scandinavian, Greek, and Eastern European law, but we have refrained from covering them comprehensively and separately. Hence, discussion of the Scottish “mixed” system is succinct, and falls in the chapter on the history of the common law.

Thirdly, even if recent scholarship has uncovered some cross-pollination of ideas between the civil and common law traditions, and concepts and institutions share similar features on both sides of the Channel, this separation is still largely valid, based on history stemming back to the twelfth century. Thus, we opted to make this divide structurally visible by addressing the common law separately instead of integrating it into each of the chapters, organized chronologically. We are aware that some readers might find this approach awkward, as at times they will be forced to check points appearing in previous chapters, but in a book so concise, and with the help of its index, we trust this will not constitute an insurmountable problem. Also, this approach helps to better explain why a legal system developed in England so different from that found on the mainland, in spite of the fact that around 1100 the picture was actually quite similar.

One of the other objectives of the book is to help lawyers and legal professionals, of today and tomorrow, to develop the ability to critically assess their own professional endeavors. The book examines the law in the changing historical contexts in which it was forged. The law, in effect, mirrors cultural and intellectual trends, and is never impervious to social, economic, and political processes. But this should not lead us to forget that law also possesses great autonomy, evolves according to its own internal dynamics, and is an active agent in shaping all the aforementioned areas. The structure of most of the chapters takes into account this dual role of the law as both a reflector and agent of history.

The work pays particular attention to the sources of law: the criteria upon which judges base their decisions. In the West the most important sources of law have always been four: jurisprudence, custom, court decisions, and legislation. These four elements constitute the axes of the arguments advanced in each chapter, with jurisprudence, perhaps, being assigned a slightly predominant role. Jurisprudence – the constant work of reflection and doctrine performed by legal scholars – is one of the most characteristic features of the European legal tradition, largely responsible for the very existence of the common tradition. In addition, readers who are not legal professionals will find in jurisprudence an
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easier way to recognize the legal world’s contributions to culture and thought. Slightly more emphasis is also placed on private law, which until the eighteenth century included criminal law, than on public or constitutional law. For a long time private law was seen as the only true, permanent expression of juridicity; public law is, indeed, more dependent on political thought and also on raw power struggles. As such, it is more volatile and unstable. However, we are confident that we have given political and institutional frameworks, and the political ideas behind them, their due.

The structure of the work itself is essentially chronological. It begins in Rome and ends in the early twentieth century. The decision to start with Rome, instead of Greece, is owing to our aim to focus on the law as a shared language. There may be memorable or remarkable cases of ancient Greek law, such as the Draconian laws, inspiring images of texts written in blood rather than ink, but, generally speaking, the ancient Greeks left no traces on the law as a common language. Only Roman law provided a shared legal vocabulary and grammar of that language. The texts upon which jurists would work for several hundreds of years, even after the collapse of the Empire, were purely Roman. It was in ancient Rome that law was first emancipated from religion, morals, and politics. Such is its enduring gift to mankind, and the basis for our own conception of what law is.

It may appear paradoxical to end this book short of the moment when law, as a shared language, seemed to receive an institutional embodiment through the founding of what was going to become the European Union in 1951. There are two reasons for this. The first is that we are all myopic. The great trends and key developments after World War II are still somewhat blurry. Yes, Europe has developed towards supranational integration, but as we write these very words the European Union is undergoing a deep identity crisis, visible in various problems, including the “Brexit,” the scaling back of the Schengen Agreement, and a deep financial crisis not unconnected to the common currency and the European Central Bank. Within a few years the European Union may be viewed as but an accident of history, like the former Soviet Union. And, yes, law has extended into new fields of interest, and it will continue to do so. But the language of the law remains essentially identical, as it builds on foundations, categories, and techniques that are centuries old. No transnational organization, no new area of interest has changed this. We thought it wise to leave analysis of the legal developments after World War II to the specialists in the relevant fields. The second reason is that an account of European legal history in the second half of the twentieth century could appear geographically limited, as developments
within Europe, particularly in legal thought, are increasingly influenced by non-European experiences, particularly – but not only – in the United States. Attempting to address this in a short chapter would create conflicts, in terms of consistency, not justified by the limited benefits that could be expected from such a necessarily eclectic endeavor.

We do not underestimate you, our dear readers. We are aware that we are asking a lot from you, particularly from those of you who are not immediately familiar with the outlines of a Europe-centered history. We have faced two challenges here. The first one is the book’s focus on the history of the sources of the law, with a slight emphasis on jurisprudence, which sometimes makes for a highly theoretical account. We provide examples to illustrate the text, but these typically refer to the formal sources themselves, not to substantive law. It would be fascinating to compare, for example, the historical evolution of non-contractual liability in civil law systems with that of the common law of torts, or the evolution of the civil law of obligations and contracts with that of the assumpsit and consideration in common law, or property law, family law, criminal law … However, addressing these topics and linking them to the general discussion would require such a level of detail that it would probably alter the book’s whole approach, and would hamper our communication with most of you. The second challenge was more practical. The book covers such a wide span of time, with so many different characters, concepts, and institutions, that it would take a lifetime to explain them all in detail. In the brief account that we envisioned, it was sometimes necessary to provide only the most concise information on certain concepts or characters. Footnotes are lacking too. We are aware that almost every sentence in this work is debatable, and might benefit from further refinement. Once again, though, including footnotes to introduce a nuance, or a reference to an authority, or an alternative standpoint, would hinder reading and inflate the size of the book, throwing up another barrier between its authors and the reader. We did include a select bibliography at the end of the book, with you in mind, curious reader, rather than critics or academicians. The works listed there refer you, in turn, to even more specialized books and articles.

No true teacher of the law can remain unmoved by Justinian’s brief, yet warm salutation. This book is dedicated to law students: those filling law school classrooms today, those who will do so tomorrow, and also those who did so in the past. Thanks to their efforts law in the West – a cornerstone of its freedom – retains the vigor of youth, even at the ripe old age of 2,500.