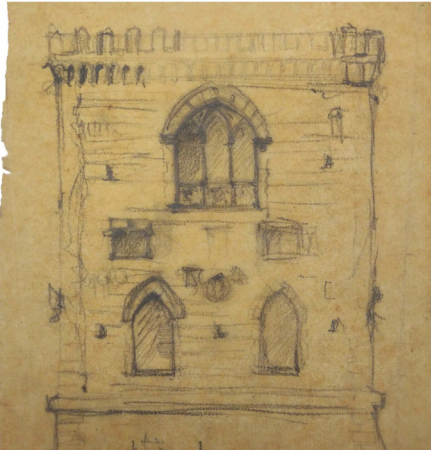


PRÁTICAS DA
HISTÓRIA

JOURNAL ON THEORY, HISTORIOGRAPHY,
AND USES OF THE PAST

N.º 9 - 2019



**António Manuel Hespanha
according to Tamar Herzog**

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Práticas da História, n.º 9 (2019): 133-138

www.praticasdahistoria.pt

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Tamar Herzog*

If I were asked to describe in one-word Prof. Hespanha, the term I would choose would be “giant.” Giant not in size (though the quantity and diversity of what he has published is truly and utterly astounding) but giant in stature. A true “maître à penser” as the French sometimes call it, Hespanha opened our eyes to new ways to understand the past. His work not only contributed to the accumulation of knowledge – many works do that— but it had transformed our understanding. It had become so influential and so widely followed that we now take for granted and as absolute truths many things, which he has put forward.

Hespanha’s scholarship proposed a major epistemological shift in the study of Old Regime Europe in general, Portugal in particular. Departing from anachronistic and ideological readings of the early modern state, which nineteenth- and early twentieth-century scholars presented as an antecedent to, or an early reiteration of, our present-day structures, Prof. Hespanha rightly suggested that such was never the case. Instead, the early modern state was a completely different creature. Already in his initial work, *As Vésperas do Leviathan* (1986), Hespanha proceeded to demonstrate this argument by observing the jurisdictional nature of Old Regime structures, the plurality of normative orders, the particularity of political bonds, the absence of clear political projects, and the inexistence of a monopolistic and central power. He then followed these leads in his later work, in which he insisted that the early modern state

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perhaps claimed power by demonstrating ceremoniously a might it did not have (as Foucault had argued), but that it also gained adherents by resorting to grace. The king, in short, was not only a menacing figure. He was also a consoling father. Prof. Hespanha equally insisted on the role of friendship to the development of early modern politics and law. He fully integrated into his considerations not only sources that we easily identify as “legal,” but also a plethora of other normative sources, which equally affected the way people behaved, made claims, justified their procedures, and solved their conflicts.

One of the central issues that had also preoccupied Prof. Hespanha was how and when was this Old Regime system replaced by a new design. The obvious response of most is the Enlightenment or even the French Revolution. Without discrediting such views, Prof. Hespanha described the philosophical, religious, social, and historical premises that both sustained and undermined the way legal thought and legal culture developed over time. Arguing against a teleological reading that would make the present a natural outcome of the past, he explored both continuities and ruptures. Particularly attentive to the tensions between universal and particular, erudite and popular law, as well as the role of jurists in the making and unmaking of the legal order, he suggested that one of the major struggles in history, which historians have often ignored, was over the authority to declare the law. This authority was disputed by different groups and people who presented law either as divinely mandated, as emanating naturally from social relations, or as dependent on human reason or will. The coming of the European Expansion, the Scientific Revolution, and the birth of states all conjured to justify an appeal to a natural law that would be universal, rational, and focused on individuals. In the process, Medieval persons who had a particular set of circumstances that made them juridically unequal became Modern abstract and equal individuals, devoid of particular conditions and law became subject to human decision-making processes. Under the new premise that emerged, legislation (expressing human will) became the most important legal source. These developments ushered a transition from a republic (the managing of common

things) and a community (as a grouping based on communion) to a society (an association). Nineteenth- and twentieth-century European law strove to realize many of these promises. It created constitutional regimes and modern citizenship and made property and contract central to all juridical and political relations. It also featured a unified law that was to be applied equally to all, that identified the social order with the state, and that sustained a positivism according to which legislation was the only valid source for legal creation.

Yet the new model was plagued with contradictions. It ignored the continuation of inequality, it dismissed law as a social fact believing it instead to be an independent or neutral sphere of knowledge, and it ultimately preferred will (legislation) to reason (juridical thought). Post-Modern currents criticized these moves for crediting themselves with upholding true and universal values based on a common rational or empirical thought and for believing that society could be organized independently of local context. Instead of continuing with a system they considered self-referential, Post-Modern critics called for relativism, pluralism, and heterogeneity, and for a revalorization of common sense and of sentiments. The degree by which these moves were successful, he argued, rests to be seen as they, too, were self-congratulatory as well as incredibly contradictory.

Transporting this analysis to colonial situations, from the 1990s onwards, Prof. Hespanha sought to transform also colonial studies. His propositions might seem obvious to us today but were extremely revolutionary when they were pronounced. They consisted in demonstrating, to cite his own words, that an Old Regime also existed in the tropics. Rather than insisting that all overseas phenomena were the result of colonial relations, he suggested that to study (and evaluate) colonialism we need first to remember what the early modern period was like. Colonialism, in short, certainly had its own characteristics, but it also shared many structural similarities with Europe. Thus, instead of assuming an opposition between the law of the metropolis and the local or native law, and instead of describing a unilateral imposition, we need to inquire on mutual influences that involved both violence

and acceptance between societies, which themselves were profoundly pluralistic.

Tightly incorporating legal with social and political history, Prof. Hespanha thus proposed an anthropological reading past, which vindicated both its complexity and its foreignness. And, while rescuing a forgotten past, these propositions were also geared towards giving us tools to understand better the present. As a scholar and a public intellectual, Hespanha interrogated the tensions between universal and particular, global and local, erudite and popular, theory and practice, institutions and doctrines. He asked how jurists can contribute to the reformulation of the present day political and juridical system, and what solutions they can propose to re-think the limitations of the models proposed by the French revolution and followed since. Legal history, he suggested, was a social science that needed to explain these larger contexts in which law operated, concentrating not on specific legislation, opinions, formulas, or documents but on the constellation of experiences that brought them about.

While what prof. Hespanha asked, studied, suggested, and affirmed was in itself utterly transformative, as admirable is his capacity to combine intellectual brilliance, intellectual integrity, and intellectual resourcefulness with clarity and simplicity. Like true great minds, his thinking is revolutionary without ever escaping to great formulas or complicated words. It is erudite without being overbearing, detailed without ever letting go of the main argument.

Dividing his work between a true passion for history and a profound knowledge of the law, Prof. Hespanha has trained two if not three generations of scholars. He had worked with dozens of students and colleagues and inspired many more. He is extremely well known outside Portugal, with a huge intellectual presence and following in France, Spain, Italy, Germany, South America, and the USA. His success at reshaping the fields of history, legal theory, and legal history on the global scale has recently been recognized by the American Society of Legal History, which made him an “Honorary Fellow.” According to the website of the society, this honor is given only to “distinguished

historians whose scholarship has shaped the broad discipline of legal history and influenced the work of others. Honorary fellows are the scholars we admire, whom we aspire to emulate, and on whose shoulders we stand.” It is the highest honor the society confers.

My own personal experience with Prof. Hespanha confirms all of the above. I met him some 30 years ago, when I was but a graduate student at the *École des hautes études en sciences sociales* in Paris. At the time, I was interested in writing a dissertation on the administration of justice in colonial Quito and, following the advice of a friend, I travelled to Lisbon to meet with Prof. Hespanha. I still vividly remember that meeting. What waited for me in Lisbon was an incredibly interesting conversation with an incredibly charismatic and congenial man. Prof. Hespanha urged me to re-think my dissertation topic, as well as my methodology. I remembered being both flattered and impressed. After all, he was willing to dedicate many hours to a foreign graduate student and was more forthcoming and more interested in my work than many of my professors.

Since that first meeting, I remained in close contact with Prof. Hespanha. We met in conferences in the USA, Brazil, Spain, France, Italy, and Portugal. I had given lectures to his students and invited him to talk to my own. We also regularly exchanged emails and often spoke on the phone. I have read practically almost every piece he has ever authored and I had witnessed how he has formed a coherent school that encompassed scholars practically from all corners of the earth. When I write, I have Prof. Hespanha on my mind. What would he say? How would he say? As I stated in the acknowledgements to my last book (*A Short History of European Law: The Last Two and a Half Millennia*. Harvard University Press, 2018) “I am particularly indebted to António Manuel Hespanha who, since my graduate-student days in Paris and over the last twenty-five years, has been an informal mentor and a true friend. There are endless ways in which Hespanha’s scholarship has informed, affected, and intersected with mine. This book is but one.”

What Prof. Hespanha asked, studied, suggested, and affirmed in his over 30 books and 150 articles was utterly transformative – there is

a “before” and an “after” the appearance of his publications. Yet, those who were touched by his scholarship and his presence mainly describe them as life changing. For all of them – me included – he was a source of inspiration for his combination of intellectual brilliance, wonderful sense of humor, and enormous generosity, commitment, care, and warmth. The most innovative, thoughtful, and ultimately most influential of continental and colonial legal historians, he will be sorely missed.

Referência para citação:

Herzog, Tamar. “Antônio Manuel Hespanha according to Tamar Herzog.” *Práticas da História, Journal on Theory, Historiography and Uses of the Past*, n.º 9 (2019): 133-138.