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The Denaturalization of Nordic Law: Germanic Law and the Reception of Roman Law

Johann Chapoutot¹

Introduction

In a novella taking place during the Second World War, Louis Aragon has one of his characters, a military judge, say:

I was a professor of Roman law. But to give priority to Germanic law, it is my point of view one has to erase all traces of Roman law from the modern world. Roman law as a basis for modern laws is a disgusting absurdity and contrary to the German spirit.

He adds:

In these times, our courts are still infested with Roman law, the Napoleonic code, Jewish laws ... Today, we would have never let off Dimitrov; he would have been found guilty ... according to Germanic law.²

This novella, entitled *Roman Law Is No More*, suggests a profound knowledge on the part of Louis Aragon of the debates, developments and in-fighting in the world of Nazi jurists. Let's pause straight away for a moment on the term *jurist*: The sources I have looked at are as much writings and reflections of academic experts on the matter as they are of the lawyers and vulgarizers of the party. These texts were as much composed by the intellectual elite of the academic body as they were by the functional elite of the regime's technocratic lawyer class, endeavouring to put their theory into practice, to formulate a new German law, which demanded from the outset a confrontation with 'Roman law' as it had been received in Germany in the course of the fifteenth century. Other sources, produced by educators charged with drafting vulgarizing contributions, in the press, or the ideological publications of the Party (NSDAP) and its sub-organizations (SA, SS, HJ etc.), are similarly invaluable. Most often legal teachers, their authors, were brought up in the culture, if not the cult, of Roman law, model and birth mother to national law: It was from these chains they wanted to liberate German law.

Roman law according to the Nazis: Article 19 of the NSDAP programme

The positions, stances and arguments of the opponents of Roman law under the Third Reich were not conceived within a single generation, but they emanated from a long and age-old dialectic, the debate between Germanists and Romanists, on which Olivier Jouanjan in his *Histoire de la pensée juridique en Allemagne* (Jouanjan 2005) has delivered the best French interpretation. In this debate, the National Socialist movement at its inception took its position in the context of a document that would mark its birth and its constitution. In the Nazi programme of February 1920, one comes across a slightly surprising article, which, by virtue of its theoretical nature, sits almost incongruously in between the catalogue of political and economic entitlements. Article 19 of the NSDAP programme effectively proclaims, 'We demand the substitution of a German common law for Roman law. Roman law serves a materialistic world order.' As one is at pains to believe this clause enlivened the debate and raised the spirits of the audience in the *Bierkeller*, its presence in such a document requires scrutiny. What are we to make of it?

Firstly, one can read in Article 19 the concurring echoes of the 'Germanist' jurists, according to whom there existed a Germanic law from the outset, already visible in Tacitus' *Germania*, and more explicitly present in the *Sachsenspiegel*.³ Hence, if a Germanic law existed then, it suffices to invoke that law to substitute it for Roman law. In the context of 1920, greatly enhanced by feelings of national humiliation after Versailles, in its Article 19 the NSDAP programme reinvigorated an old theme of German nationalism: the dichotomy between Germanity and Latinity. This dichotomy, this struggle, is a fundamental aspect of a specific 'Germanic' identity, for lack of a better term, during the Middle Ages: After the confrontation between the (Germanic) Holy Roman Empire and the (Roman) Holy See crystallized in the Canossa humiliation, Luther took up the fight against Rome again, while the German Protestant princes defied Vienna, Madrid and Catholicism, from the Schmalkaldic League up until the Thirty Years' War. The dialectic between Germanity and Romanity subsequently took the form of a war between the Germans and revolutionary and imperial France, between Ludwig of Prussia, where Fichte defended German freedoms, and the Gallo-Romanic tyrant Napoleon. The war continued with Bismarck, who in his *Kulturkampf* confronted papists, *ultramontani* and other political Catholics. In this period, humanists, writers, historians and poets worked on the reception, backed by German nationalism, of Tacitus's *Germania*, and exalted Arminius-Hermann, the free and rebellious Cherus, conqueror of Varus, his legions and Augustus.

For others, the text of Article 19 provided a link between Roman law and a 'materialist' vision of the world. What does 'materialist' signify here? For this, we have to look at the context of the article, or, in other words, we have to read the rest of the text. Moreover, the term *materialist* appears in another article from the programme, Article 24, which stipulates that the NSDAP 'opposes the Jewish materialistic spirit within and around us and is convinced that a lasting recovery of our people can only come about by an effort from within based on the principle: the common good before the individual good'. The key is in the wording 'Judeo-materialist': Roman law should

be seen as materialist, because it is Jewish, and the other way around. Here we touch on a *topos* reiterated over and over again in Nazi discourse: Only the Nordic spirit can reach the ideas as expounded in the immortal and sublime works of Plato, Bach and Kant. As pure representatives of the Nordic race, the Nazis are idealists in the face of the contemporary 'mammonism' of the Industrial Revolution, of liberalism, and of Marxism, as well as the other cultural avatars of the Jewish race pre-occupied with collecting material goods and realizing profits. Individualistic, egoistic and nomadic, the Jew as presented by the Nazis is incapable of conceiving of any interest other than the private one, of thinking about and valuing the common good. The last part of Article 24 as cited previously refers, among other things, to a supposed fundamental maxim of Germanic law, turned into a Nazi slogan repeated *ad nauseam*: *Gemeinnutz geht vor Eigennutz*, the common good before the individual good, the community before the individual.

From this point forward, the theoretical aspects of Article 19 are less surprising once one sees them from the Nazi standpoint that law is a culture, and it contains a conception of the world, of mankind and of the relations between members of the human race. Upon reading the NSDAP programme, one may wish that jurists had lent a helping hand in expounding the primary doctrinal corpus of the Nazi party. The German legal historian Peter Landau (Landau 1989: 10–22) has actually discovered conduits between the reflections of nineteenth-century German jurists and the NSDAP, singling out the notable figures of Johannes Lehmann-Hohenberg and Arnold Wagemann, two intellectuals, a professional jurist and a jurophile of sorts, who were precocious members of the young party.⁴ These two incense bearers of Germanic law inspired the programme of the *Deutschsozialistische Partei*,⁵ published on 31 May 1919, which states that the question of land and the ownership of land carries a fundamental importance. Among other things, it is land ownership which is the dividing line between Roman law and 'Germanic law' – the Nazi jurists did not cease to revisit this before crying victory over the enactment of the *Erbhofgesetz* in September of 1933:

The premier cause of our distress lies with our right of ownership over the earth
Therefore, we demand:

1. The free disposition of earth and land
2. The abolition of Roman law, dominant up until now, which is to be replaced by a German common law [*Deutsches Gemeinrecht*]. Our right of ownership of the earth rests within Roman law Roman law was introduced in Germany 400 years ago by the princes and the high members of the clergy; the people opposed it, without success. The people know well that this foreign law estranges them from their land and their other possessions. The Peasants' War,⁶ the first uprising from the community, was a bloody war against Roman law. Relentlessly the farmers demanded reinstatement of ancient Germanic law. Today, we state the same demand. It is only due to you, the people of Germany, that it does not remain ignored. This question is more important than anyone can fathom: it is the cornerstone of our future way of living and our existence [*Bestehen*]. Roman law was conceived in an era when

Rome, in all her decadence, was flooded with Jews. It is antisocial and protects private profit at the cost of the community. It is a law for knaves and the ill-willed. On that legal foundation, Germany always loses faced with the Jew. The facts confirm what we are claiming. This is the way the German people need to be provided with a law that corresponds to their race and their culture that respects the old principle: the common good takes precedence over the individual good. The profound greed, dishonesty and immorality that manifests itself in our market place, this Judaification of our people, is the fault of Roman law, just as our economy is transformed into an economy of pure interest – which has imparted its evil to the world in recent decades, and finally resulted in the war.

It is worth citing this text at length, just to show how much it inspired Article 19 of the NSDAP programme. Merely viewing this article shows that it contains several themes and structural obsessions of the German extreme right with respect to the law. In this text, one finds that the question of Roman law is connected to that of the land and its ownership. It is Roman law that, by introducing the principle of individual property, had separated the blood from the soil, and by doing so alienated land previously owned by the racial community. Like innumerable jurists, the authors of the text interpret the Peasants' War, a large-scale *Jacquerie* at once societal and eschatological with Thuringia as its epicentre, as an insurrection against Roman law and the introduction of its principles and categories.⁷ Thus, Roman law is presented as a war against the people, not only in the biological sense (the race) but also in a sociological sense (the community, the common people): Its extreme sophistication renders it inaccessible to the common people, who, instead of being protected by it, to the contrary turns them into its victims. Only the Jews are able to manipulate Roman law, by virtue of their well-known intellectual and moral degeneracy.

Roman law and the Nazi *Rechtswahrer*

The discourse of the Nazi *Rechtswahrer*⁸ is utterly replete with these themes, which I will now proceed to discuss. The first attack the Nazi jurists addressed to Roman law concerns the transformation of traditional Germanic law, with Roman law considered an alienation of this law, the cultural alienation of a race that does not recognize itself in the legal formulations it imposes. Nazi party lawyer Hans Frank, doctor of laws, *Reichrechtsführer* (overseer of the Reich's legal corps), minister without portfolio and later in 1940 governor-general of occupied Poland, writes, 'Popular Germanic law has become alien to us in the course of recent centuries. One has to conclude that the reception of Roman law has exerted an overall malicious influence over the development of Germanic law.' In effect, Roman law, in its principles and method, is 'incompatible with the feelings of how life should be led among the Germans. It is not true that what was good for ancient peoples remains good for the German people. We should be proud of ourselves in the field of law as well' (Frank 1935). Frank suggests

here that, with life being in a constant state of flux, popular law (*Volksrecht*) has to be as lively as the life of the people itself. One cannot impose on a living organism the mummified corset of a dead law, like Roman law, formulated in other times, in other circumstances, for other peoples. However, Frank concedes, 'Roman law was a remarkable law and [in it] one can see one of the major cultural monuments of mankind.' Academic and practising jurist alike pay tribute to Roman law for this, inasmuch as they offer it a first-class burial: the law is a monument to the human spirit, which without doubt has its place in a museum of the humanities.

Frank also maintains that the German people should be proud of their Germanic past instead of giving credence to the *Greuelpropaganda* making the Germanists into brute savages. The Nazi discourse aims to soothe: for a nation humiliated by the peace of 1919, its purpose is to reinstate the reasons for it to idealize itself and its history. Just as the Germans are not caricature barbarians, homage needs to be paid to Germanic law, desired as the foundation for the new law and as a substitute for Roman law. The alienation of the German peoples by Roman law has its historical causes. The Nazi jurists became its etiologists and diagnosed Roman imperialism to a greater degree than it had been. Roland Freisler, delegate secretary of state at the Reich's Ministry of Justice, later president of the *Volksgerichtshof*, certainly treats not only the Roman Empire in this sense in one of his many texts (Freisler 1938: 23-4) but also the Catholicization of the German realm, the French Revolution and Napoleon's Empire as some of the many avatars of this eternal imperialism.

The pillars and cornerstones of this Romanization of Germanic legal culture, if one wants to believe someone responsible for the ideology at the core of the Nazi party such as Alfred Rosenberg, were primarily the Church and the State (Rosenberg 1937: 567-8). Rosenberg incriminates those 'imperial doctors foreign to the people' (Rosenberg 1937: 567-8) (*kaiserliche volksfremde Doktoren*) who, educated *in utroque jure*, introduced the Roman law of suzerainty and individuality to Germanic legal culture. Rosenberg merely repeats the claims of anti-Romanist legal historians who exposed gaps in the process of reception of Roman law in the fifteenth century: To enrich themselves with the ownership of land, the Church and the State privatized what had been communal before, if not the land in general, at least that of the communities. The introduction of legal individuality (it is the individual who is the holder of rights, not the community, the *Gemeinschaft*) and private property had transformed the land, birth mother and property of the race, from its pure form: an immovable good quickly changed to a movable one through the demonic mechanism of sureties. The practice of mortgage had made the land into a pure paper title (*Wertpapier*) that usurers, bankers and other parasites had quickly turned into an object of speculation. Thus the injection of Roman law and its categories not only removed the *Volk* from its land, and separated *Blut* from *Boden*, but at the same time turned the soil into an abstract value, given over to commerce. As a jurist contemptuous of Roman law and its reception holds, one had in this manner 'replaced slavery to a master with slavery to the Jew and the usurer' (Jung 1934: 186).

The holy alliance between the usurer, the prince and the doctor of laws left Germans in the net of an intellectual construction from which they could no longer find their way out. This thesis became the creed for the National Socialist jurists, of whom the

lawyer Hermann Schroer testifies in his famous 1936 colloquium on the de-judification of the law:⁹ 'It's remarkable that, in German legal life, the creation of the law was passed from a man of the people to professional jurists, to scholars, in the middle of the 16th century, that is to say in an era where one can feel the direct influence of Roman law coming from the East (*oströmisches Recht*) and from the '*Schulchan Aruch*'¹⁰ of the Jews. The presence of these considerations in the works of Rosenberg nonetheless well shows that they were not limited to the legal profession but were made into the object of a larger campaign. If Rosenberg overall passes quickly over the law of land ownership and its alienation by Roman law, it is further developed by *Das Schwarze Korps*, the first weekly, then daily, journal of the SS, in an article entitled 'Two Types of Law' (*Zweierlei Recht*) (Petersen 1935). In this heavily circulated and widely read daily, the quoted article respectively (and supposedly) compares the laws of land ownership of the Romans and the Germans: The private property of the land with the Romans is juxtaposed to the communal ownership of the Germans, where the farmer is no more than the operator and the usufruct, because the actual owner is the community of the people. In Germanic legal culture, the farmer is thus subordinated to the *Gemeinschaft*. Roman law turned not only land into a good but also the land's inhabitants, which it turned into serfs, chained to masters and later to banks. The conclusion of Rosenberg and in the SS journal is the same: the 'Peasants' War' of 1525 was lawful, provoked by the malicious doctors of laws and strangers to their own race.

One may comprehend that, beyond even this question of the law of land ownership, the explicit juxtaposition between Roman and Germanic laws is one of two ways in which to view the world, where confrontation offers vast pedagogical perspectives. Moreover, one may conclude that the question is nothing but a scholarly matter, and that it acquired a didactic function important enough to figure in a teaching manual for SS officers:

Let us oppose again and again some maxims of our ancestors from Roman-Byzantine law that they have imposed upon us over recent centuries so that it became alien to our race, to demonstrate to what degree these foreign legal conceptions were – and it cannot be any other way – devastating to our thinking and our racial will: Roman-Byzantine law says: 'The owner may use his good according to his good judgment'. On this, Saxon law lays down: 'The common good goes before the individual good'. Roman law proclaims: 'The land is prone to cession on the same title as that for slaves or animals'. On this, Saxon law lays down: 'One cannot cede the land without the permission of the heirs' Or even: 'The law is codified in fifty books for all eternity'. Saxon law says: 'Written law cannot supersede the law of nature.'¹¹

What is noteworthy about the text, apart from the audience it addresses, is that it summarizes the essential features of the attacks that Nazi jurists addressed to Roman law. This entails, according to them, rendering a good as an absolute, conceived as a good in itself, an absolute good, that is to say not relative to its utility for the community, making it flawed. Roland Freisler, for instance, had long before conceived this argument in several of his texts:¹² Should the same legal regime be applied to a ball-

point pen, a car and the land? The abstraction is only suited for tired brains, corsets for the imagination in a stifling schematic nature! Roman law is subjected to criticism for its abstraction, its schematic nature, its separation from daily life, and on the basis of the *gesunder Menschenverstand*,¹³ in the same vein that 'positivism', 'normativism' and all these legal theories are the product of the Jewish tendency towards abstraction, the basis for which had been Roman law. Mixed in with his critical reproof of individualism and critique of the notion of a good, Hans Frank moreover takes up torts in Roman law: 'Roman law handed down to us the concept of legal personality as the titular of subjective and objective rights, much like the notion of a good' (Frank 1934a: 8).

On top of this abstraction foreign to daily life, Roman law is effectively at fault for its individualism, and these two aspects are connected, as the example of the law of land ownership shows. Roman law reasons from the individual, instead of the community, which is the principle and end of Germanic law. This fundamental difference is at its core the result of a difference in terms of the racial structure of the 'Roman' and Germanic peoples. This is the notion defended in 1933 by Rudolf Bechert of the University of Munich at a conference pertaining to commercial law and necessary reform of that law. Why were the Romans so prone to abstractions? The Roman Empire was 'international' (Bechert 1933: 81–2): It was applicable to all the races and cultures it absorbed on the basis of a legal discourse that all could comprehend. The Roman people were also a minority in this Empire, and since 'they were flooded with foreigners' (Bechert 1933: 82), it would not have been feasible to regulate the Empire by means of a '*völkisch*' (Bechert 1933: 82) law, but instead it was reigned over by a law that was '*individualistisch*' (Bechert 1933: 82): As the *Volk* could not have been the foundation and point of reference for the law, the individual became the smallest common denominator in what Rosenberg termed *racial chaos* when he speaks of Rome in late Antiquity.

The author maintains that he does not aim to 'underestimate the value of Roman legal thinking': The problem is not to establish a dichotomy between values (*Wertunterschied*), but to reiterate a difference of essence (*Wesensunterschied*) (Bechert 1933: 82), in the instance of racial make-up. The Germanic people, identical to one another and racially coherent, could conceive of a law that was the reflection of this purity and this coherence, a communal law, since this biological community existed, contrary to the Roman case.

Foreign to the Germanic–Nordic race and culture, Roman law could not purport to impose itself on them and mutilate them, like a normative bed of Procrustes. To German ears the adjective 'Roman' carried with it immutable connotations of polemic, imperialism and universalism. And it is precisely this claim that the Nazis were not willing to accept. Alfred Rosenberg then writes, 'We have constantly contested with Roman law its claim of universality; in the same vein, it is impossible to consider that that which was conceived there, in a village, can establish a rule for all states and all peoples' (Rosenberg 1936: 226). Like all laws, Roman law is particular, and not universal. Apart from being a cultural phenomenon, it is the creation, the outcome of a specific race and blood-line and cannot, on that basis, offer any kind of universal pretence. The Nazis assumed and argued for their own particularity: German (or Germanic) law is a creation of the German (or Germanic–Nordic) race. It has no

validity outside of the boundaries of that race. The law, like language, art and culture, is radically and irrevocably ethno-centric and as such non-transferable. The feeble attempts by the Romanists to save their discipline on the basis of Roman law providing access to a universal juristic language are ill-advised.¹⁴

Saving Roman law from itself

However, the Nazis did not all identically challenge the prestige of Roman law, and we will see that it is exactly this analysis in terms of race that rescues it from definitive downfall, making it possible, through their eyes, to save it *in fine*. In every text one can read the reluctance and the shame that overcomes the jurists in repudiating a Roman law with which they are familiar and which they were otherwise impressed with. Moreover, the existence or non-existence of Germanic law was evident for many jurists, who could do nothing but acquiesce in the statement by Houston Stewart Chamberlain, generally a convinced Germanophile, related to Wagner, and torch-bearer for nationalist-racist Germanic thought: ‘Roman law is as peerless and inimitable as Greek art. This teutomaniacal ridicule does not change that. We hear jokes about a “Germanic law” that we have been deprived of by the introduction of Roman law: there never has been a “Germanic law”, only a chaos of brutal and contradictory laws, one for each people.’¹⁵

Therefore, *in petto*, the notion subsisted that Germanic law may have been nothing more than a vain fantasy, as persistent as the Romanist image of a profession intimidated by the *maiestas* of the *Corpus Iuris*. Instead of repudiating Roman law wholesale, the Nazi jurists, except only for the most radical, wanted to find common ground with Roman law, in the form of its annexation by the Germanic-Nordic race and its culture. A small text composed in 1937 (most likely) by the association of National Socialist jurists, *Die Paragraphensklaverei und ihr Ende* (‘Slavery to the paragraph and its purpose’), explicitly shows the nuances. Certainly, the text concerns the ‘Roman law’ of ‘debt’ (*Schuldenmasse*) necessary for a bankruptcy. But how does it understand Roman law? The text takes pains to determine and distinguish it:

The ancient Romans were a juristically gifted people. They created a highly developed legal technique. But none of the ancient Romans were any longer around when it was attempted, in the 15th century, to replace the diversity of Germanic laws by a general legal system. In this era, there was nothing left but decadent late-Roman legal science, and it is this foreign legal science that became law in Germany The spirit of a decadent science from late Antiquity reigned intact for centuries.¹⁶

This passage suggests that Roman law was foreign not only to Germanic culture but without a doubt also to Roman culture itself, since the ‘Roman law’ inherited by Germany in the fifteenth century did not have anything in common with the ‘ancient Romans’ of its origins. This later law, formulated later on, is a ‘decadent’ law. A foreign principle had effectively been interjected between the Romans of its origins and the

Roman law inherited by the East, a racial principle that was foreign to Romanity itself: the law that it passed on to the Germans is a 'Judaified law'¹⁷ (*verjudetes Recht*).

Inherited Roman law is therefore a later law, passed on by an era of (cultural) decadence and (racial) degeneracy. In an ideological SS teaching pamphlet one can read that the mixing of the races, in Rome, had the effect of diluting the racist and elitist culture of the ancient Romans and replaced it with an ideology of the melting pot.¹⁸ For example, the Roman conception of citizenship had radically changed: the perversion of the legal tradition of the Romans through racial mixture succeeded in establishing that 'ink is thicker than water',¹⁹ that is to say that it became the stroke of genius, henceforth, that decided the status of a person, no longer his blood. By virtue of the Edict of Caracalla, the simple artifice of agreement and a decision made by free will from then on took over from the simple biological necessity that one could be born, but never become, a Roman: Selling citizenship cheaply at the auction of law had been a crime against the blood – naturalization as opposed to nature. The historians of Roman Antiquity were not only to be found among the jurists. Professor Fritz Schachermeyr specifically incriminated two jurists from the later Empire, Ulpian²⁰ and Papinian,²¹ two North Africans from the Levant, who had Orientalized and judaified Roman law (Schachermeyr 1944: 467). In this he was followed by Ferdinand Fried, who scolded the 'Phoenician-Jewish' (Fried 1937: 125) Ulpian, the 'Syrian' (Fried 1937: 125) Papinian, as much as Salvius Julian, of 'African' (Fried 1937: 125) descent and Julius Paulus, 'the most important of them all, who was also of true Semitic origin' (Fried 1937: 125). The historian referred to did not turn to racial expertise for fun or out of taxonomical pathology: All discourse has to be related to the race it emanates from. A political philosophy and a legal system are much like a work of figurative art or a musical genre, the expression of a world view dictated by race.²²

The Roman law inherited by Germany in the fifteenth century is therefore intellectually decadent, because it is biologically degenerate. This Roman law is effectively in essence, that is to say, by its essence, in itself, a 'Judaeo-Roman law' (*römisch-jüdisches Recht*) (Gundelach and Volkmann 1933: 80), as the SA publication confirms. This 'Judaeo-Roman' or 'Roman-Byzantine' law, as it is designated earlier on, is contagious, in the very medical sense of the word. The pamphlet title *Slavery to the Paragraph* effectively reveals the author and the beneficiary of this legal contamination, in posing the question *cui bono*:

Who profits from the law? Roman law, in its decadent form, as it was introduced in Germany, was auxiliary to a materialist perspective on the world. Disconnected from any and all relation to the race and the fatherland, from blood and from soil, it encouraged bourgeois-liberal as much as proletarian-Marxist materialism, which led to disastrous consequences, devastating for the race.²³

Individualist and materialist, Roman law had metastasized in contemporary legal constructions that the Reds (Marxists), like the Blacks (Conservatives), had employed to further their own interests. It is a constant of Nazi legal discourse that affirms the partisan character of the law and states that the law of the past, hostile to the *Volk* but expedient for left and right-wing factions, is no more. For the first time, Reinhard

Heydrich, head of the Security Service of the SS, congratulated himself that the outlaws, the enemies of the state (*Staatsfeinde*), were also the enemies of the people (*Volksfeinde*) (Heydrich 1936: 121–3). This dichotomy between Roman law at its origin and the crossbred law of Jewish thought is well-suited to distinguishing the good racial wheat from the degenerate chaff and allows for partial salvation of the Roman monument, free from external sediment and stratification.

Hans Frank himself, who we have read at the opening of this chapter as being frankly more binary and more clear-cut, often took a more conciliatory position in distinguishing between good and bad Roman law:

The battle that we are waging against Roman law does not concern the law of the original state of Rome. It addresses the falsification of Roman law we inherited several centuries ago in the guise of Roman-Byzantine law. (Frank 1934b: 3)

One can see all of the beneficence that he has in him joining ‘Roman’ with the epithets ‘Byzantine’, ‘Jewish’, ‘liberal’ or ‘late-’ to avoid demonizing a whole intellectual tradition to which the Nazi jurists were themselves attached. Basically, if Roman law at its origins is commendable, it is because of its racial tenets. Roman law is racially related to Germanic law, since it is a Germanic–Nordic law. What is confirmed by numerous historians of ancient Rome is projected here on the level of law: the original Romans were the Nordic populations that immigrated to the Mediterranean. Their cultural creations (law, State, Empire, military legions) are therefore to the credit of the Germanic race, where their creative genius is celebrated and their prestige enhanced. To demonstrate this, the work of German jurist Burkhard von Bonin is used in the programmatically entitled book *Vom nordischen Blut im römischen Recht* (1935), where one can read:

We have to consider Nordic biological strength as predominant in the most ancient elaborations of Roman law. This should not surprise us: once again, the Nordic armies and masses had emigrated to the south – which took place in the prehistoric era or later. (Von Bonin 1935: 4)

This original law, what is it? By a stroke of good fortune, little if anything of it is known, and the author, like so many others, can conveniently hide behind the Law of the XII Tables, from which by endless glossing one can retrieve the anthropological characteristics of Germanic law, from the superiority of the *paterfamilias* to the primacy of the common good, to the pre-eminence of the community, as well as from its military-like ethic of devotion to the city.

Conclusion

This easy annexation of Roman law at its origins, otherwise made easier since it is so poorly transmitted, did not force the Nazi jurists to reconcile themselves with the ‘Roman law’, which remained, due to its clerical, revolutionary, liberal aspects, the

antithesis of the principles and purposes of Nazi political action. The term *Roman law*, never clearly and seriously defined in the texts I have presented in this chapter, is nothing but a straw man set up for purposes of political condemnation and created, by means of which a sentimental connotation could be inferred with respect to all things Roman and the 1,000-year-long struggle between eternal Rome – in all its guises, Augustan, Catholic, Napoleonic – and ‘eternal’ Germany, that which the Nazis renounced under the terms of a liberal law, ‘bourgeois-liberal’ or ‘Judaean-liberal’: a normative system that, in their eyes, presented all of the evils of the post-revolutionary age, that is to say, individualistic, and as such the destroyer of the organic community of the *Volkstum*; abstract and therefore absurd; universalist and therefore ignorant of the essential particularity of all cultural creations. The *Kampf um das Recht*, the ‘battle for the law’ that the Nazi jurists aimed to take up, reveals something of fundamental importance from their perspective: In substituting one normative system for the other, they fulfilled the necessary conditions for a successful acculturation and the communal–biological new foundation of the Nordic race. Its purpose was to end the alienation of the German people done by the destruction of the grand normative systems that had violated and harmed it, international law post-Versailles certainly, but also liberal, positivist, normative post-Roman law, the law of the codification imported from revolutionary and imperialist France, as well as, in the greater scheme of things, the whole of Judaean–Christian ethics.

Notes

- 1 A first version of this contribution was published as a chapter in Chapoutot 2017.
- 2 Major Von Lüttwitz-Randau, a military judge and character in Aragon 1980: 366, 373.
- 3 The *Sachsenspiegel* (Saxon Mirror) is one of the first written codes recording customary law in German. It was formulated in the first half of the thirteenth century.
- 4 Johannes Lehmann-Hohenberg (1851–1925): professor of minerology at Kiel, and an amateur jurist, fought the codification of the Bürgerliches Gesetzbuch (BGB) and created the journal *Der Volksanwalt* (People’s Lawyer). This violation of the duty to remain neutral led to a disciplinary procedure, and he was barred from public service in the imperial administration. Heavily in debt due to some disastrous speculations on the housing market, he acquired a strong resentment against legislation on ownership and mortgages, evils he attributed to the bad influence of Roman law. Unlike him, Arnold Wagemann was a professional jurist. An administrative judge (*Amtsgerichtsrat*) in Bochum, he founded the *Bund für Deutsches Recht* and became close to the NSDAP in 1920. It was he who took up the debate on Germanic law at the time of the first NSDAP congress in Munich, on 31 January 1922. Already an author before the war (of *Unser Bodenrecht* (Jena, 1912) and *Geist des deutschen Rechts* (Jena, 1913), he denied the existence of private property, which he considered a Roman perversion, as he did with the concept of subjective rights and legal personality. The sole legal entities (*Rechtsträger*) are communities (*Volk, Familie, Schulen, Universitäten, Bauernhof*). Author of numerous essays on Germanic law and the need to reform the law (among others, *Deutsche Rechtsvergangenheit als Wegweiser in eine deutsche Zukunft* in 1922 and *Schafft Deutsches Recht!* in 1921), he

lived long enough to become a member of the *Akademie für Deutsches Recht*, created after the Nazis took power.

- 5 The German Socialist Party was formed in May 1919 by sympathizers of the anti-Semitic, nationalist and anticapitalistic far right. Many of the members of that party, dissolved in 1922, quickly joined the ranks of the NSDAP, which inherited its channel of publication, the *Völkischer Beobachter*, and some of its cadres, such as Julius Streicher, editor-in-chief and owner of the violently anti-Semitic journal *Der Stürmer*. Before 1922, dual membership was not uncommon.
- 6 The *Bauernkrieg*, 1524–25.
- 7 Cf., for example, Jung 1934: 183–7, 213–16: (184). ‘In the course of the Peasants’ War ..., they aimed to sideline the Doctors, jurists trained in Roman law. The struggle primarily concerned the laws of the community over land and soil that the Roman principle of individual ownership then threatened.’
- 8 The term *Rechtswahrer* (‘guardian of the law’) is a Germanism forged to contradict employment of the Latinism *Jurist(en)*.
- 9 On 3 and 4 October 1936 a colloquium entitled ‘The Jew in the Legal Sciences’ organized by the Association of National Socialist Jurists (NSRWB), under the presidency of Carl Schmitt, was held in Berlin. After a first session dedicated to the ‘struggle against the Jewish spirit in the legal sciences’, every half-day session involved examining Jewish influence and the means of eradicating it from different fields. The colloquium has become notorious in recent years, as an element of the indictment in the debate surrounding the role of Carl Schmitt in the Third Reich. Despite all of the well-intentioned anti-Semitism that it may have produced, Carl Schmitt was intellectually and politically marginalized by the jurists of the SS (Reinhard Höhn above all), who inferred that Schmitt’s *totaler Staat* was contradictory to the essence and purpose of the Nazi *völkischer Staat*.
- 10 Schroer 1936: 19. Hermann Schroer was a *Gauleiter* in the *Nationalsozialistische Rechtswahrerbund* (NSRB).
- 11 *Schulungs-Leitheft für SS-Führeranwärter des Sicherheitspolizei und des SD* (likely 1941), BABL/ RD 19/11: 106.
- 12 Cf. notably Freisler 1938: 18–19.
- 13 Literally ‘man’s rational feeling’, in the sense of ‘the people’s good judgment’.
- 14 Cf. notably the courageous and brilliant essay by the jurist Paul Koschaker, who defended Roman law on the basis of a European cultural community of which it was the foundation. This argument was a non-starter for the Nazis; if Europe existed, it is only founded on the racial unity of the Germanic–Nordic race: Koschaker 1938.
- 15 Chamberlain 1899: 194. Here, Chamberlain argues in the context of the debates surrounding the codification and redaction of the BGB.
- 16 *Die Paragraphensklaverei und ihr Ende* (1937): 8.
- 17 *Die Paragraphensklaverei und ihr Ende* (1937): 9.
- 18 Cf. Chapoutot 2008, particularly part III.
- 19 Chef der Ordnungspolizei – SS-Hauptamt (ed.). 1942. *Deutschland ordnet Europa neu* Heft 4 (Berlin), BABL / RD18/16: 17.
- 20 Domitius Ulpian was a Roman jurist who died in 228 AD. We do not know his exact place of birth nor Papinian’s for that matter.
- 21 Aemilius Papinianus was a Roman jurist who died in 212 AD during the reign of Caracalla. He was a Praetorian Prefect under Septimius Severus.
- 22 Cf. Chapoutot 2017, chapter 1 in particular.
- 23 *Die Paragraphensklaverei und ihr Ende* (1937): 9.

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