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The Arduous Path to Recover a Common European Legal Culture: Paul Koschaker, 1937–51

Tommaso Beggio¹

Introduction

The aim of this chapter is to describe Paul Koschaker's effort to recognize and restore the idea of a European legal culture which had found its main foundation in Roman law, and how the conception of this scholar developed during the 1930s and 1940s.² Koschaker's main idea consists in stressing the role of Roman law – and, in particular, of Roman law as it emerges from *Justinian's Digest* – as the basis of European legal culture.

This is the *Leitmotiv* that distinguishes the book that has been considered Koschaker's masterpiece: *Europa und das römische Recht*, published for the first time in 1947.³ We find, in any case, references to the topic of Europe and Roman law earlier in the long work that Koschaker published in 1938 under the title '*Die Krise des römischen Rechts und die romanistische Rechtswissenschaft*' (Koschaker 1938b), as well as in a few archival documents.⁴

This chapter will chronologically inspect the development of Koschaker's legal narrative on Europe and European legal culture, taking into account the different circumstances in which Koschaker explained his ideas, and what the aims of the author were. The starting point of the investigation will be *Die Krise des römischen Rechts und die romanistische Rechtswissenschaft*, which was the outcome of a long lecture held by Koschaker at the *Akademie für deutsches Recht* in December 1937, invited by the *Reichskommissar für die Gleichschaltung der Justiz* of the time, Hans Frank.⁵ After this, I will discuss some archival documents from the 1940s, found mainly at the *Universitätsarchiv Tübingen* and at the archive of the *Humboldt-Universität zu Berlin*. One of the main features of these documents consists in offering us a more direct depiction of Koschaker's ideas during the years of the Nazi regime, as well as of his approach towards the regime.⁶ Eventually, some aspects of his 'spiritual testament', *Europa und das römische Recht*, will be considered, together with a few passages from a letter that he sent, towards the end of his life, to his friend and colleague Salvatore Riccobono.⁷

Through a source-based reading of Koschaker's thought, this chapter will highlight the importance and influence of the ideas of the prominent scholar in the years to come, in order to recreate a common European legal space and identity based on the European tradition. In addition to this, it will be possible to take into consideration some striking inconsistencies which emerge from the documents from the time of the Second World War. These documents, in part still unpublished, are very significant because they reveal an idea of Europe sometimes likely to be too prone to indulge the ideology of the Nazi regime through a sort of adaptation of the role of Roman law.

Moreover, from a different perspective, the development of Koschaker's ideas on Roman law reconnects to a more general topic, namely the question of the 'use and re-use of Roman law'.⁸ It is well known that Roman law has been used in different contexts and with different aims over the centuries, mainly as a foundation of the European legal culture but also sometimes as a source of historical legitimacy from a political point of view, as in the case of fascism.⁹ Even if in many instances the study and use of Roman law has led to very significant goals, like in the case of the essential juridical contribution offered by the Pandect-science to the elaboration of a modern legal science (*Rechtswissenschaft*), nonetheless the extreme idealization of Roman law has sometimes provoked a misleading reinterpretation of Roman law itself. The result of this reinterpretation has thus been an excess of abstraction, an anachronistic understanding of Roman law, and the partial loss of its intrinsic historical-juridical meaning. The use of Roman law made by Koschaker under the Nazi regime can as well, even though only in part, be considered an example of this 're-use' of an idealized concept of Roman law.

Talking about Roman law at the *Akademie für Deutsches Recht*

In 1937, Koschaker had been invited to hold a conference at the *Akademie für deutsches Recht* in Berlin, an institution created in 1933 by the regime in order to promote 'German law' (a *deutsches Gemeinrecht*).¹⁰ The president of the Academy was Hans Frank.¹¹ At the time, Koschaker was professor of Roman law and comparative legal history (*Römisches Recht und vergleichende Rechtsgeschichte*) at the University of Berlin, where he had taken the chair that had been Ernst Rabel's, a Jewish professor ousted by the regime.¹² He had become, in the meantime, a member of the *Preußische Akademie der Wissenschaften* as well as co-editor of the *Zeitschrift der Savigny-Stiftung*.¹³ Without doubt, Koschaker was at the time one of the most prominent names in the field of Roman and ancient law, not only in Germany but also throughout Europe, and he could not be considered an opponent of the Nazis. In front of an auditorium composed of members and supporters of the regime (see Koschaker 1951: 105–25), he decided not to deal with Point 19 of the programme of the Nazi party, which directly attacked Roman law as the foundation of a materialistic and individualistic world order, and focused instead on other aspects of the crisis of Roman law that was at the time growing in Germany.¹⁴

The result of the conference was a long essay of almost ninety dense pages, in which Koschaker depicted the evolution of the European legal tradition, from the Middle Ages up to the 1930s. In the historical overview that he offered, the scholar constantly stressed the role of Roman law, trying to find the reasons for the crisis and some

Figure 6 Hans Frank (right, reading) with Heinrich Himmler, Joachim Von Ribbentrop and Rudolf Hess. Photo by Hugo Jaeger/Timepix/The LIFE Picture Collection/Getty Images.

solutions to the difficult situation that Roman law was facing in Germany at that time. As for the reasons of the crisis, it is important to underline that Koschaker found the causes of the decline of Roman law in the circumstances preceding the advent of the Nazi regime, and, in particular, in the so-called *Historisierung* of the study of Roman law. According to Koschaker, this trend was actually made up of two different sub-trends: the *Interpolationenforschung* developed during the nineteenth century by Gradenwitz, Lenel, Pernice and Eisele and the *antike Rechtsgeschichte* by Leopold Wenger.¹⁵

Koschaker's critique against these two trends was harsh and excessive, when compared, in particular, to the fact that Koschaker avoided ascribing any kind of responsibility for the crisis to the regime and to the new *Richtlinien für das Studium der Rechtswissenschaft*, developed in 1935 for the regime itself by Professor Eckhardt.¹⁶ Considering instead the solutions suggested by Koschaker, they can be summed up by the motto '*Zurück zu Savigny*' – back to Savigny – and based on the idea of an *Aktualisierung* of the method of the Historical School. This kind of proposal and the persistent opinion that it was necessary to rebuild 'bridges' between Roman law and the current law was criticized not only by some contemporary scholars but also by scholars years later.¹⁷ Recently, it has been argued that Koschaker was the representative of a so-called new (or second) Pandect-science.¹⁸ Even though this remark would deserve deeper investigation, as already mentioned, in this chapter I would, however, prefer to focus on the connection between Europe and Roman law as a foundation of the European legal culture, rather than on Koschaker's proposal to try and solve the crisis of Roman law itself.

The first thing to notice is that the content of *Die Krise des römischen Rechts und die romanistische Rechtswissenschaft* actually consists of a clear-headed and technical analysis of the development of the Roman law tradition in European history up to the crisis of the 1930s. In the first chapter, Koschaker dealt with a historical overview of Europe in order to delineate the foundation of a common cultural conception; the second chapter is dedicated to Roman law in the Middle Ages and the following centuries, leading up to the Historical School of Savigny. Finally, in the two remaining chapters, Koschaker faced the problem of the crisis of Roman law and proposed thereupon the solution of the *Aktualisierung*. In this work, Koschaker officially debated for the first time in his career not only the problems that Roman law was facing but also more interestingly, the – in his eyes – indissoluble pairing of ‘Roman law and Europe’. In order to stress the strong connections between these two terms, the author indulged in some imprecision in his historical depiction, which did not go unnoticed,¹⁹ and tended to disregard any kinds of events that could instil doubts in his narrative. In some passages, after reading the text, the reader can affirm that European legal history had given in to the needs to defend the role of Roman law, and it is clear that its historical development has been idealized by Koschaker.

What emerges in the end is Koschaker’s most important theoretical assumption: since Roman law is the main legal foundation of Europe and since Germany is one of the most important countries – or probably *the* most – in Europe and has to carry out a leading role in the continent, it is necessary that Roman law maintains a safe position in Germany and in German universities. Koschaker’s reconstruction presents both sharable and not sharable points and mainly focuses on describing the role of Roman law; references to Europe and European history are above all used to defend his conception of Roman law, and this is probably the reason why he did not examine some problematic passages related to European history in depth.²⁰ Furthermore, the author stressed the necessity to consider Roman law as the main foundation of a new European private law system.

There were two essential consequences that came about as a result of this work by Koschaker. First, he helped to revive the academic debate on Roman law, the reasons for its crisis and its role in history and in the future of Europe.²¹ Second, he presented in a nutshell the main argument of his conceptions, based on the idea of a tight historical connection between Roman law and European tradition. This assumption, which was the basis of his masterpiece, *Europa und das römische Recht*, gained huge success after the end of the Second World War.²² But we will discover in the next paragraphs, how – sometimes differently bound to the political contingencies – this argument developed, after the publication of *Die Krise des römischen Rechts und die romanistische Rechtswissenschaft*, in other works and documents by Koschaker.

Which ‘Roman law’ for the ‘*Neuordnung Europas*’?

Koschaker dealt with the topic of Roman law as a foundation of Europe in other documents and letters after the above-cited work on the crisis of Roman law. The way in which he adapted the idea of Roman law and Europe to the newly changed –

political and cultural – circumstances sometimes appears really surprising. One of the main problems, with regard to Koschaker's approach, consists of his constant tendency to accommodate his ideas on Roman law and its role – that remain more or less always the same in the course of time – to different social, historical, and, more importantly, political contexts. Connected to these kinds of problems is a document Koschaker likely wrote in 1941 regarding the reform of Roman law studies in German universities.

This only recently published document (Beggio 2018b) document entitled *Die Reform des romanistischen Rechtsstudiums in Deutschland. Eine Denkschrift* ('The reform of Roman law study in Germany. A memorial') is preserved at least in the archive at the University of Tübingen and in the *Humboldt-Universität zu Berlin* archive.²³ The document was sent to the *Rektor* of the University of Tübingen, Hermann Hoffmann,²⁴ as well as to the *Reichsminister für Wissenschaft, Erziehung und Volksbildung* of the Nazi regime, Bernhard Rust.²⁵ In addition to the manuscript, the University of Tübingen archive also preserves a copy of the letter written by Rust's substitute, who sent Koschaker's document to the dean of the *Rechts- und Staatswissenschaftliche Fakultät* of the University of Berlin, Hans Weigmann,²⁶ on behalf of the minister. The University of Berlin dean had the duty of introducing the document and discussing it with the other deans of the German law faculties, during the forthcoming conference of the Law faculties deans in July 1942.

Once again, the declared aim of Koschaker was to secure the role and the teachings of Roman law in German universities; what was partially new, when compared to the content of *Die Krise des römischen Rechts und die romanistische Rechtswissenschaft*, was the way he used his arguments to always interpret facts, ideas and events in order not to make the regime responsible for the critical situation. If in *Die Krise* Koschaker's analysis remained at a more historical and scientific level, in *Die Reform des romanistischen Rechtsstudiums in Deutschland* the author introduced more than just a few arguments that could be used in a political way.

It is necessary to stress that the Nazi regime struck a blow against Roman law not only through Point 19 of the party's programme but also through the reform of the law faculties' course of study. The first step in this direction had been represented by the *Justizausbildungsordnung* of 1934, followed by the reform of the *Studienordnung* of 1935.²⁷

Professor Eckhardt, the author of the reform and member of the Nazi party,²⁸ was a famous legal historian at the time and an open opponent of Roman law, in particular of Roman law as studied and retraced by Pandect-science, even if Koschaker seems to affirm the contrary in the document. In the *Grundgedanken* of the reform programme of 1935 Eckhardt wrote:

Noch immer lebt die deutsche Rechtswissenschaft in den Gedankengängen des römisch-gemeinen Rechts ..., die geistige Grundhaltung wird heute noch durch das Pandektensystem bestimmt. Diesem System gilt unser Kampf.²⁹

The immediate result consisted in marginalizing the role of Roman law in German law faculties. The course on Roman law held since 1900, *Geschichte und System des römischen Privatrechts*, had been replaced with a new one, *Privatrechtsgeschichte der*

Neuzeit. Before the reform, in addition to the course on Roman private law, there was a course *Römische Rechtsgeschichte*, but after 1935 the students were given the possibility of choosing between the classes on Roman law history and the new course '*Antike Rechtsgeschichte*', inspired by the new research trend of the same name inaugurated in 1904 by Wenger at the University of Vienna.³⁰ Koschaker tried to react to this situation by writing *Die Reform des romanistischen Rechtsstudiums in Deutschland*. Exactly like in his work on the crisis of Roman law, the author insisted on associating the critical situation with the decadence of Pandect-science after the enactment of the *Bürgerliches Gesetzbuch* (BGB), on the one hand, and on the emergence of the above-mentioned trend of the so-called *Historisierung* of Roman law (that is to say, the *Interpolationenforschung* and the *antike Rechtsgeschichte*), on the other. The text at page one reads:

Teils sind sie [Editor's note: the Roman law scholars in Germany] auf Grund einer noch zu erwähnenden Entwicklung reine Rechtsarchäologen geworden, die eine lebensfremde Wissenschaft vortragen, teils sind sie 'Auchromanisten', die römisches Recht im Nebenamte lesen, d. h. nicht aus eigenem Wissen und eigener Forschung, sondern auf Grund von Kompendien.³¹

Koschaker's critique was based on some scientific premises: Firstly, he considered the approach to Roman law of the *Historisierung* to be accountable for having destroyed the 'bridges' linking Roman law to the actual law in force in Germany. Secondly, and as a direct consequence of the first problem, this purely historical approach pushed away both the legal experts, who did not work at the University, as well as the students, who in the course of time lost their interest in studying a topic without any kind of connection to current legislation.³² As we can read in Koschaker's writing, at page five:

Die deutsche Romanistik aber – sie war um die Jahrhundertwende führend und ihr Beispiel hat die Entwicklung in anderen Ländern beeinflusst, flüchtete, um sich ein Feld ihrer Tätigkeit zu sichern, schon seit den letzten 20 Jahren des 19. Jahrhunderts in die reine Historie, die kein anderes Ziel kannte als das römische Recht als historisches Phänomen zu begreifen. ... Die Romanistik wurde auf diesem Wege immer mehr zu einer Wissenschaft für Spezialisten, Professoren und immer weniger zu einer solchen für alle Juristen.³³

And again, the text reads with regard to the law faculties' students:

Ein Recht aber, das man den Rechtsstudenten ausschließlich als historisches Phänomen vorstellt, darf nicht erwarten, ein besonderes Interesse der Studenten zu finden.³⁴

The way Koschaker tried to find and use arguments against the *Historisierung* in the document is very interesting. If it could be understandable to some extent to underline the risks connected to a study of Roman law being only of a historical nature, it is nonetheless not possible to accept the idea that almost the whole responsibility for the crisis of Roman law relapses only on the *Historisierung*.³⁵ It seems clear, while reading

the text, that this was a technique to try to discredit the above-mentioned trend in the eyes of the regime, not only from a scientific point of view but also from a political point of view. Koschaker seemed to affirm that both the *Interpolationenforschung*, as well as the *antike Rechtsgeschichte*, could not be considered more than ancillary parts of Roman law study; they could not actually play any kind of role in the construction of a new European private law, but it did not mean that Roman law as a whole, if properly studied, could not do it either. What is more, with regard to the *antike Rechtsgeschichte* and the choice, made by Eckhardt, to make this course an alternative to *Römische Rechtsgeschichte*, Koschaker affirmed that the decision had been taken only for nominal reasons, because in the name *antike Rechtsgeschichte* there was no reference to the unbeloved adjective 'Roman'.³⁶ Koschaker wrote that Eckhardt could not be considered responsible for this choice, because he could not have known what the *antike Rechtsgeschichte* actually was, since this was still at the time a vague programme. Apart from the fact that Wenger presented his theories and programme already in 1904 in Vienna and these theories then developed through many works and publications and an intense debate among Roman law scholars,³⁷ Koschaker included, it is immediately clear that the author resorted to complex sophistry so as not to hold Eckhardt responsible for his conscious choice.

These considerations are strictly connected with the statements by Koschaker on Roman law and Europe, and therefore it is now necessary to move to these other questions. According to Koschaker, Roman law had to be one of the main foundations of a new common European legal culture – he talked of a '*neues gemeinsames Recht*' and of a '*neue europäische juristische Kultur*' on page three of the manuscript. The reason for this statement lay in the fact that all the systems of private law of Continental Europe have been deeply influenced by Roman law, wrote the author, and this is the reason why it is possible to talk of a European legal – and historical – tradition. At the same time, Roman law represents a unique patrimony from a juridical point of view, because it ruled the Roman Republic, then the Empire, and eventually the *Dominatus*.³⁸ It also developed through many different political and social circumstances and, even if it was perceived at the time in Germany as a 'foreign' law, it was the most significant 'foreign' law of European legal history. It is interesting to read the exact words that Koschaker wrote:

Die Kenntnis keines anderen „fremden Rechts“ ist in dieser Beziehung förderlicher als diejenige des römischen Rechts, weil es in seiner langen Entwicklung sich fast mit allen denkbaren sozialen und wirtschaftlichen Systemen auseinander zu setzen hatte: dem primitiven Agrar-, dem imperialen Handels- und Verkehrstaat, dem Staatssozialismus.³⁹

Koschaker always referred mainly to private law, which he considered more important than public law, when he dealt with Roman law and the Roman law tradition.⁴⁰ However, private law in Europe could not (and still cannot) be thought of as separate from Roman law; it has been like this in the past, and it would be the same in the future. With regard to the situation in Germany, it was not correct to affirm that Roman law, inasmuch as it was individualistic and materialistic law, could not go along with a true national German law; the individualistic law which later merged into the BGB was not a Roman

one, but rather Roman law as interpreted by the *Pandektenwissenschaft*. Therefore, if someone was guilty of having established an individualistic and materialistic order that was the Pandect-science, in particular with its radical tendencies over its last years. It is a noteworthy fact that in 1936 Frank, at the *Istituto fascista di cultura* in Rome, changed the target of the Nazi regime's hatred, which was actually no longer the so-called Roman law of the Romans, but rather the Roman law of the Pandectists.⁴¹ Moreover, this stance on Pandect-science by Koschaker was partially contrary to the theory explained in *Die Krise* which was founded on the idea of the *Aktualisierung* of the method of the Historical School. We can notice, therefore, under this respect, a partial inconsistency in Koschaker's explanation under this respect.

In any case, since Germany was a leading country in Europe, it could not abandon Roman law and its teachings, because otherwise it would not have had the opportunity to exercise its power in the construction of a new common European law. Moreover, other countries where Roman law was still studied and highly considered, that is to say Italy, would have played the main role in this essential legal process. Koschaker was able in this way to bind Roman law not only to the legal tradition and to the history of Europe, which represented a less important aspect in the eyes of the regime, but also to the future of the new Europe. This is probably the most thorny and political argument in the whole narrative of Roman law and Europe depicted by Koschaker, not only in this document but also in all of his writings. Indeed, he did not hesitate to write on the sixth page of his document:

Denn das römische Recht hat, wie schon ausgeführt, auch in der Zukunft Aufgaben zu erfüllen, heute, da es sich um die Neuordnung Europas handelt, vielleicht mehr als früher. Dann es handelt sich um nichts Geringeres, als um die Wiederbelebung einer europäischen Privatrechtswissenschaft, für die das durch die Geschichte gegebene Ferment das römische Recht ist.⁴²

Furthermore, the text, on the same page, with regard to the question of the leading role of Germany in Europe, clearly reads:

Heute muß sie [Editor's note: Koschaker referred to 'die Aufgabe' to create a European 'Privatrechtswissenschaft', a task already carried out during the nineteenth century by the Pandect-science] in zeitgemäßer Weise – nicht etwa durch Wiederbelebung des Pandektenrechts – Hand in Hand mit dem befreundeten Italien neu in Angriff genommen werden. ... Die Deutschen werden zu den führenden Nationen des neuen Europa gehören und die deutsche Rechtswissenschaft wird zu sorgen haben, daß deutscher Geist bei dieser europäischen Privatrechtswissenschaft nicht zu kurz kommt. ... eine Neuorientierung tritt, die das römische Recht für die Bedürfnisse der Gegenwart verwertet und so wieder die Brücke von der Rechtsgeschichte zur Dogmatik des geltenden Rechts schlägt, die heute abgebrochen ist.⁴³

In order to secure a place for Roman law in German universities, Koschaker was even prepared to interpret Roman law and its teachings in accordance with the political programme of the *Neuordnung Europas*, conceived by Nazi Germany. It is at least

surprising that Roman law, the bearer of legal principles and the representative of the European legal and cultural tradition, could be at the same time the foundation of a new common legal science and legal order in a new Europe, which, at the time Koschaker was writing this text, seemed to be doomed to be dominated by a totalitarian regime.

It is clear that Koschaker desired to offer a depiction of Roman law and Europe which could be accepted by the Nazi regime and by Nazi supporters who held important roles in German universities at the time. Nonetheless, it seems a paradox to tie Roman law and its survival not only to political power but also to a political power of this kind. It is almost a betrayal of Roman law itself. Does it really make sense to 'sell out' the valuable legal principles of Roman law and the tradition it represented just to have a few hours more of teaching at the university? Or could it be considered instead a way, the only way possible, to defend some cultural values in such dramatic circumstances?

On these problems, it has been argued that Koschaker tried to recover the references to Roman law in order to support the expansive tendencies of Germany (Giaro 2001b: 31–77; Somma 2005: 282). He would have therefore used Roman law for nationalistic purposes and to affirm the necessity of a reunified Western Europe, in which Germany should carry out its unquestionable supremacy.⁴⁴ Both these judgements seem to be extreme, but they likely contain some truth. For example, it is not possible to deny that Koschaker thought of Germany as the leading country in Europe. It is true, however, that such a feeling was common not only to Koschaker's ideas but also to the ideas of many other German scholars at that time. To complete the picture of Koschaker's position with regard to Roman law and to the regime, it is now appropriate to refer to a letter, found in the archives at the University of Tübingen.⁴⁵ This document – a *Bescheinigung* (certificate) – does not further illustrate Koschaker's ideas, but gives us nonetheless some very interesting information about his activities at the beginning of 1945. In the certificate written on 17 February 1945, we can read that Koschaker was at the time a collaborator at the *Gesellschaft für europäische Wirtschaftsplanung und Großraumforschung*, directed by the *Reichsamtleiter* of the regime, Werner Daitz, and was working on a project entitled *Untersuchung über europäisches Recht*. The task of this commission was the elaboration of a new common law, fitting in with the *Neuordnung Europas*. Once again, Koschaker was working to connect his ideas with a project of the Nazi regime and, very likely, these ideas again involved the study of Roman law. Furthermore, this document could be proof that some of the concepts he explained in the document on the reform of Roman law study in Germany could have been embraced by the regime, who invited him to collaborate with the committee directed by Daitz, or, at least, that Koschaker's ideas were not considered somehow risky by the Nazis. If Koschaker was a member of such a board in 1945, it means that the regime did not consider him a genuine or dangerous opponent.

After the Second World War and towards *Europa*

This section aims to describe the last step of the scientific and intellectual development of Paul Koschaker's *Leitmotiv* on Roman law and Europe. A necessary part of this description is the publication of his masterpiece, a sort of manifesto for a Europe in

need of rebuilding: *Europa und das römische Recht*.⁴⁶ After the end of the Second World War, Koschaker became professor emeritus in 1946 and was invited as *Gastprofessor* to some German universities, as well as in Ankara.⁴⁷ While at his retreat in Walchensee, and despite being involved in the problems that the end of the war had brought about,⁴⁸ his train of thought returned to his previous reflections, expressed in *Die Krise des römischen Rechts und die romanistische Rechtswissenschaft*. Nonetheless, there is a big difference between the two works. In fact, *Europa und das römische Recht* was a cry of alarm in defence of Europe, of its cultural and legal tradition, that represented the outcome of the personal inner struggle felt by Koschaker, whereas in *Die Krise* he adopted a more technical and neutral approach to the topic. The brilliant narrative of his masterpiece leads the fascinated reader through an intense text of almost 400 pages, and it is easy to perceive the civil commitment of Koschaker, who tried to place the concept of Roman law at the centre of attention, in perfect harmony with the description of cultural and legal European history (Calasso 1962). From a scientific point of view, the work presents some stretches of interpretation, adequately underlined by Roman law scholars and legal historians.⁴⁹ In order to allow the description he had in mind, Koschaker was unable to leave the conception of 'continuity' in legal European history out of consideration. At the same time, the role of Roman law in this historical depiction changes unbearably easily from that of a *Kaiserrecht* during the Middle Ages to that of a *Professorenrecht* at the time of Savigny. In the first case, Roman law is closely connected with imperial and political power, whereas in the latter it survives thanks to its autonomy with respect to any sort of political power. Partially following Goethe's metaphor of the duck,⁵⁰ Koschaker described Roman law as a sort of monolithic system of rules and principles, never disappeared in European (i.e. in West European) history. The greatest value of the book does not lie in the solutions Koschaker suggested for restoring dignity to Roman law and its teachings, because they are the same as we can read in *Die Krise des römischen Rechts und die romanistische Rechtswissenschaft*.⁵¹ In the eyes of Koschaker, the only way to give Roman law back its prominence consisted in a strong connection between Roman law and the needs of the current legislation. Inherent is the risk of tying Roman law only to passing necessities, which could change from time to time, leading to the role of Roman law changing as well, according to social needs or established power. That is exactly what happens in Koschaker's historical depiction of Roman law: it survives only inasmuch as it is connected to the needs of political power, as it has been described on the previous pages, when dealing with the documents on the reform of the teaching of Roman law in Germany.

Furthermore, Koschaker's idea presumes that European private law has remained in some way fixed and has crystallized over the centuries in the countries of the so-called tradition of Civil law. Of no less significance such a conception of Roman law reduces it and its study not only to private law, but only to those single topics whose influence is more evident in modern law. These few remarks highlight some of the most evident weakness of Koschaker's theory on Roman law as a foundation of European legal culture. Nonetheless, it is essential to introduce and acknowledge the value of such a work. First of all, it is a work that was able to attain a huge symbolic importance. It spread the idea that Europe, the same continent where the tragedy of totalitarianism had taken place, still nevertheless had solid and safe cultural and legal foundations.

Koschaker was able to give Roman law a symbolic value, as well as a very practical and operational one. After the tragic experience that Europe had gone through, the scholar succeeded in interpreting the deep need and desire to find once again robust and secure foundations for the future of the continent, to offer certainty and safety and to push away the threat of regimes and dictatorships. According to Koschaker, the only way to obtain this result consisted in looking at the historical roots of Europe and its juridical tradition. Quite paradoxically, Roman law seems to be partly unhooked from eternal legal values and principles in Koschaker's depiction, but at the same time this is the reason why it is possible to use it again as a foundation of Europe, after the Second World War. Of course, it sounds strange if we think that Koschaker suggested the very same Roman law as a basis of the new Nazi Europe just a few years before.

We can anyhow appreciate how the conception of Roman law went partially through a further development in Koschaker's thought by analysing the letter he sent to Salvatore Riccobono on 31 March 1951, just a few months before he died. The letter is three pages long, typewritten in Italian, sent from Koschaker's house in Walchensee. After the description of the situation in Ankara, where he had been *Gastprofessor* for two years, and the comparison between the situation in Turkey and in Germany, we can read a very critical statement against the historical positivism (that he called '*positivismo storico*') and, what is more interesting, a clear assertion on the so-called eternal values of Roman law. Even if the topic seems to be already present, but not in a clear-cut way, in some pages of *Europa und das römische Recht*, and we can recognize a hint of it already in a letter sent to Riccobono in 1949, the text of the letter of 1951 represents the 'last step' of the development of Koschaker's depiction of Roman law. I want therefore to reproduce here a few words of the text of the letter:

La massima parte dei nostri romanisti sono aderenti ad un positivismo storico mentre si tratta di elaborare i valori eterni del diritto romano che consistono nei suoi concetti giuridici e la loro evoluzione che bisogna perseguire fin ai nostri tempi nei principali diritti positivi.⁵²

Koschaker did not neglect to stress once again on one of his most important points about Roman law, namely the need to constantly link its study with the necessities of the current legislation. Nonetheless, he also affirmed that if we want to follow this path, we need to understand the eternal values and principles of Roman law. This is the last proof that we have of Koschaker's conception on Roman law, its study and its role as a foundation of historical, as well as future European legal culture. Koschaker died just two months later, on 1 June 1951, in Basel, after having held the last lecture of his life in Zurich two days before.

Conclusion

The first remark one can move after analysing Koschaker's works, documents and ideas is that the depiction of European legal history and culture offered by this scholar is highly idealized.

As already stressed, Koschaker tried to offer a monolithic description of this history, in such a way that it could fit the representation of Roman law that he desired to offer and defend.

With regard to this problem, it is nevertheless interesting to read what Genzmer wrote in his review of *Europa und das römische Recht*, where he affirmed that Koschaker tried to find a way towards a new historically based European natural law through the so-called *Rechtsvergleichung*.⁵³ Genzmer's interpretation is very interesting and broadly correct, even though in this respect Koschaker's aim seems to be more restricted to practical purposes and is essentially focused on the need to restore a link between Roman law itself and the law in force in a certain historical period. Koschaker actually talked of a 'relatives Naturrecht' (a relative natural law), which is not speculative, nor founded on reason, but rather on the historical comparison between the private law systems which have contributed to the *Aufbau Europas* ('the building of Europe') (Koschaker 1947: 345–6). This peculiar idea, truthfully not less vague than Koschaker's proposal of the *Aktualisierung* of the study of Roman law, had in any case a dogmatic foundation – following therefore the *Leitmotiv* of Koschaker's approach to Roman law, more generally. What is more, it represented an attempt to find a third way between natural law and positivism, as a new basis for the European legal culture that had to be rebuilt. It could therefore seem that he has sought, through the elaboration of this concept – the *relatives Naturrecht* – to sum up the main arguments and themes of his ideas on Roman law and Europe and to present them in a way which was suitable for the new European necessities.

Furthermore Koschaker, in particular in *Europa und das römische Recht*, constantly chose to underline the cultural, historical, legal – and sometimes political as well – foundations of Europe and their link to Roman law. For this effort, Paul Koschaker without any doubt deserves our gratitude.

It is nonetheless clear that such a depiction risks becoming eventually distant from the actual historical development of Roman law and its reception in Europe and to reveal itself partially as an abstraction. From a scientific point of view, Koschaker's stances therefore show some inconsistencies; they are not always clear and do not offer any new concrete solution to the crisis that Roman law had since the beginning of the twentieth century been through. If it can be said that Koschaker was able to underline some essential problems regarding the topic of the crisis of Roman law, at the same time he was unable to offer them concrete or convincing answers. Nonetheless it is not possible to share the idea that Koschaker just created a myth and invented the 'fairy tale' of the European legal tradition based on the reception of Roman law.⁵⁴ What Koschaker actually created was rather a new narrative for Roman law. After the crisis it went through in Germany in the first decades of the twentieth century, also because of the hatred of the Nazi regime, it was necessary to build new narratives and ways of thinking and studying Roman law in order to restore its role and its teaching. Koschaker was one of the protagonists of this process in Germany, together with, among others, Schulz, Wieacker, Kunkel and Kaser. Unlike other scholars, he opted for the underlining of the cultural and historical value of Roman law as a heritage for the new Europe that had to be built on the ruins that remained after the Second World War. In this way, Koschaker contributed substantially to return to and revive the debate on Roman law, and he influenced many future generations of scholars as

well. Thanks to the publication of his masterpiece, *Europa und das römische Recht*, he provided a bridge between the pre-war European legal tradition that came from the previous centuries – which considered the role of Roman law in the history of the continent to be undisputed – and the scholars of a new Europe that had to be founded again. In Koschaker's eyes, all the values destroyed by totalitarianism could in this way be recovered.

It has nevertheless been correctly stressed that such a way of conceiving Roman law has to do with a conception of the topic *sub specie aeternitatis* (Mantello 1987: 53); in fact, if, on the one hand, Koschaker tried at times to underline the eternal value of Roman law, on the other hand, he somehow deprived it of content, and he simply linked it to the necessity of the law in force at the time. This is an evident limitation of Koschaker's stance on Roman law. Roman law thus becomes suitable for any kind of 'situation' and under any kind of conditions, including the foundation of the *Neuordnung Europas* as planned by the Nazi regime. This highly idealized – but at the same time partly empty – conception of Roman law is therefore ambivalent, just as Koschaker's approach to the regime could be considered ambivalent and opportunistic, as can be argued from the reading of the document written in 1942 on the *Reform des romanistischen Rechtsstudiums in Deutschland*. With regard to these ambiguities, it can be said that Paul Koschaker chose the only possible way he had to try to keep on dealing with Roman law under the Nazi regime. However, trying to bend Roman law to the necessity and the will of such a regime cannot be considered the best way to defend it.

It is in fact impossible to avoid asking how it could be possible that the kind of Roman law that in 1942 should represent a basis for the Nazi *Neuordnung Europas* could be the same Roman law that only five years later should again become a foundation for the new Europe freed from the fascist and Nazi regimes.

The transition from Koschaker's depiction of Roman law in 1942 and his ideas as presented in 1947, in *Europa und das römische Recht*, is probably the most evident case of the 'use and re-use of Roman law'⁵⁵ in his academic experience and works. It is clear that the depiction of Roman law that Koschaker proposed had to be very idealized in order to adapt it to two completely different contexts like these – the Nazi regime and the new Europe freed from totalitarianisms. This is probably the main weakness of Koschaker's approach; at the same time, however, this reconstruction of Roman law, this idea of its eternal linkage to the destiny of Europe, has influenced the studies of many scholars – not only in Germany – of the following generations.⁵⁶

It is in any case true that, despite the fact that his behaviour was not exempt from the above-mentioned ambiguities, Koschaker was actually more or less coherent with regard to his ideas on Roman law, since in 1947 he suggested once again the *Aktualisierung* as a solution for the crisis of Roman law. In this sense, one could ask if Koschaker defended Roman law and its teaching for itself, falling thus his arguments in a '*petitio principii*', rather than for its principles or what it actually historically represented. However, Koschaker was able, thanks to the publication of *Europa und das römische Recht*, to leave his work as a heritage for future generations and to recover and reinforce the idea of a common European legal tradition. Even if Koschaker's depiction can in part be criticized, in 1947 he placed the focus of attention on the meaning and importance of this historical–legal tradition founded on Roman law. In

this way, he was able to propose again solid cultural and legal roots for Europe after its collapse, the same roots that had been cut off by the Nazi regime.

Notes

- 1 This research has made been possible by the European Research Council under the European Union's Seventh Framework Programme (FP7/2007-2013) / ERC grant agreement n°313100 (Reinventing the Foundations of European Legal Culture 1934–1964).
- 2 Paul Koschaker was one of the most prominent scholars in the field of Roman law and Comparative legal history in the first half of the twentieth century. He was born in 1879, in Klagenfurt, and he died in 1951, in Basel. On his life and academic career, see Ries 1980: 608–9; Wesener 2004: 971–4. Further bibliography on Paul Koschaker can be found in Beggio 2017, 2018a.
- 3 Koschaker 1947. Noteworthy is the Italian translation of the book by Arnaldo Biscardi, enriched by a long introduction by Francesco Calasso; see Koschaker 1962.
- 4 Koschaker 1938b. With regard to the documents, I refer in particular to a letter and to a proposal of reform of Roman law study in German universities that I found at the *Universitätsarchiv Tübingen* and at the *Archiv der Humboldt-Universität zu Berlin* (see below, note 23, for more details on the documents).
- 5 On Hans Frank (*Karlsruhe, 1900 – †Nürnberg, 1946), see Willoweit 1989: 25ff. and Gruchmann 2001: 86–92, 434–48, 632–52 and *passim* with further literature.
- 6 It is not the aim of this chapter, however, to make a ‘posthumous process’, as we can find in works like, for example, Giaro 2000; Giaro 2001a: 159–87; Giaro 2001b: 31–76. On the sometimes harsh tones of these three works, see Sturm 2003: 352–62 and Guarino 2002: 10–17.
- 7 On Salvatore Riccobono (*San Giuseppe Jato, Palermo, 1864 – †Roma, 1958), see Varvaro 2013: 1685–8.
- 8 I’m here referring with this quotation to a recent work by Leo Peppe that offers a very interesting overview on the problem. See Peppe 2012.
- 9 On the use of Roman law under the Fascist regime, see Cascione in this volume.
- 10 The regime wanted to replace the German civil code – the *BGB* – with a new *Volks-gesetzbuch*, only based on the ‘true’, national, German law. See Hattenhauer 1983: 255ff; Somma 2005: 222–40 (with further bibliographical references); Garofalo 2009: 177–213.
- 11 On Frank see note 5.
- 12 Koschaker was professor in Berlin from 1936 to 1941, when he decided to accept the call to the University of Tübingen. On Ernst Rabel (*Vienna, 1874 – †Zurich, 1955), see Hofer 2003.
- 13 He became a member of the editorial committee in 1936 and he took the place that from 1935 had been Wenger’s.
- 14 This is the text from Point 19: ‘*Wir fordern Ersatz für das der materialistischen Weltordnung dienende römische Recht durch ein deutsches Gemeinrecht*’ (‘We demand substitution of a German common law in place of the Roman law serving a materialistic world-order’). The literature on Point 19 of the programme of the Nazi regime is vast, so it is enough to quote a couple of references here where other bibliographies can be found: Landau 1989: 10–24; Santucci 2009: 53–82.

- 15 In order to get an overview on the so-called *Interpolationenforschung*, see Santos 2011: 65–120.
- 16 The new guidelines written by Eckhardt, following the *Justizausbildungsordnung* of 1934 and preceding the reform of the *Studienordnung* of July 1935 (effective since October 1935), were openly directed against Roman law and, in particular, Pandect-science. See Frassek 2000: 294–361, 351–77; Mußgnug 2006: 300–2; Stolleis 1989: 177–97.
- 17 Levy 1939: 91–2; Grosso 1939: 505–20; Betti 1939: 120–8; Plachy 1939: 388–94. Although they are more than simply reviews of Koschaker's work, see Schönbauer 1939: 385–410; Pugliese 1941: 5–48; Guarino 1988: 43–4; Giaro 2001a: 159–87.
- 18 Giaro 2001c: 541 and 544–5. See also, more generally, Bretone 2004: 127–52. For a detailed analysis regarding these issues, see now Beggio 2018a: 191 ff. and 253 ff.
- 19 See note 17.
- 20 As we glean from Calasso, Koschaker's idea about the Middle Ages is unclear and unsatisfying, inasmuch as his approach to this era and its legal developments often seem to remain superficial. The perception we get reading the text is one of a conception of law during the Middle Ages as a by-product of ancient Roman law, which only reappears in its full lustre in the nineteenth century, thanks to Savigny and his School. See Calasso 1985: 105 and ff.
- 21 But this kind of debate had already begun years before in Italy and also in some other European countries. In *Die Krise* Koschaker referred, in particular, to a work by Georgescu on which he wrote a review as well: see Koschaker 1938a: 425–27. For the state of the art in Italy, see a brief overview in Santucci 2016: 63–102.
- 22 The importance of Koschaker's assumption and Koschaker's work can also be gathered from the two volumes dedicated to him, after his death: *L'Europa e il diritto romano. Studi in memoria di Paolo Koschaker* (1954).
- 23 The signature of the document conserved in Tübingen is: UAT, *Personalakten Jur. Fak.* 601/42. The signature of the one found in Berlin is: UA-HU: *Jur. Fak. Bis 1945, Nr. 518, Bd. 2, 35*. There are some differences between the two documents: the one found in Berlin is eighteen pages long, whereas the one from Tübingen is only twelve pages long, but the content is the same. All the following quotations from the manuscript refer to the one from the University of Tübingen archive and all the English translations of the quotations are my own.
- 24 See the letter from the director of the *Rechtswissenschaftliche Abteilung* of the University of Tübingen, Merk, to the dean of the faculty, sent on 21 May 1942 (UAT, 126/346a).
- 25 On Rust (*Hannover, 1883 – † Berend/Nübel, 1945), see Kraus 2005: 301.
- 26 On the Law Faculty at the University of Berlin under the Nazi regime, see Jahr and Schaarmschmidt 2005 and von Lösch 1999.
- 27 Author of the reform was Karl August Eckhardt (*Witzenhausen, 1901 – †Witzenhausen, 1979), professor in Legal history; for him, see Frassek 2008b: 1179–80. On Eckhardt's reform of university studies, see note 15.
- 28 He was a *SS-Sturmabführer*.
- 29 *Richtlinien für das Studium der Rechtswissenschaft*, 1935; on this point, see Mußgnug 2006: 301–2. The translation of the text is the following one: 'Still lives the German legal science in the way of thinking of the Roman common law .... The mental (spiritual) attitude is still nowadays determined through the *Pandektensystem*. Our fight against this system is necessary' (my translation). It is important to notice what Koschaker wrote in the document with regard to Eckhardt: *Prof. Eckhardt, ein*

Germanist von Namen, der Verfasser der Studienordnung, war und ist kein Feind des römischen Rechts. Er sah sich in der Frage des römischen Rechts einer schwierigeren Lage gegenüber als sie heute besteht ('Prof. Eckhardt, a renowned name in the field of German law, who was the author of the *Studienordnung*, was not and is not an enemy of Roman law. He found himself, with regard to the question of Roman law in a more difficult situation than the one which nowadays exists').

- 30 Wenger 1905. On Koschaker's position with regard to the *antike Rechtsgeschichte*, see Atzeri 2010: 191–222; Varvaro 2010–11: 303–15.
- 31 They [the Roman law scholars in Germany] have in part become pure 'Law archeologists' by reason of a development that has still to be mentioned, and they teach a science detached from the reality, in part they are 'Auchromanisten' ('also Romanists'), who read Roman law as a collateral job, that is, not on the basis of their own knowledge and research but rather on the basis of compendiums.
- 32 See Koschaker 1938b: 70–4 and the references in Guarino 1988: 43–4.
- 33 The German Romanistic – which was the leading one at the turn of the century and whose example has influenced the development [of Roman law study] in other countries – has however escaped into pure History to secure one branch of its study, since the last twenty years of the nineteenth century. But History did not know any other aim than the understanding of Roman law as a historical phenomenon. ... So the Romanistic became, in this way, even more a science for specialists, professors and even less a kind of science for all jurists.
- 34 In any case, a law that is presented to the Law Faculty students exclusively as a historical phenomenon may not expect to find a particular interest among the students.
- 35 For an incisive critique of Koschaker's point of view on the so-called *Interpolationenforschung*, see De Martino 1979: XIV–V in particular.
- 36 Indeed, it was just a formal nominal question, according to Koschaker.
- 37 On the harsh discussion between Wenger and Ludwig Mitteis (Wenger was a Mitteis' pupil during his years at the University of Leipzig), see Höbenreich 1992: 547–62 and Varvaro 2010–11: 305–7.
- 38 For this aspect, see the essential article by Pugliese 1941: 5–48. Considering that the article has been written in 1941 and represented a sort of 'indirect answer' to Koschaker's *Die Krise des römischen Rechts und die romanistische Rechtswissenschaft*, it is not impossible to think that some suggestions and critiques by Pugliese influenced Koschaker's later point of view.
- 39 The knowledge of no other 'foreign law' in this respect is more useful than the knowledge of Roman law, because it had to do with all the conceivable social and economic systems during its long evolution: the primordial rural State, the imperial State based on commerce and trade, the socialist State (sic!).
- 40 On this point, see Pugliese 1941: 5–48.
- 41 Frank 1936: 1–3. On this point, see Somma 2005: 292–7.
- 42 Thus Roman law still has tasks to fulfil also in the future, as it already accomplished tasks (in the past), and today probably more than before, since nowadays the question concerns the *Neuordnung* of Europe. Furthermore, it is something that has to do with nothing less than the recovery of a European Private law legal science, and Roman law, throughout history, is the specific ferment of this European Private law legal science.
- 43 Nowadays the task (i.e. the creation of a renewed European private law legal science) has to be tackled in an up-to-date way – not somehow through the revival of Pandect-science – hand in hand with the friendly Italy... Germans will belong to the leading nations of the new Europe and German legal science will have to take care

- that the German *Geist* does not suffer a loss in (the building of) this European private law legal science. ... A new orientation emerges which aims to use Roman law for the needs of the present day and so lays again a bridge from the history of law to the dogmatics of the current law in force, a bridge that nowadays is broken.
- 44 Giaro 2001b: 31–77; the idea of German supremacy in Europe appears clearly in Koschaker 1940.
  - 45 The document in question is a certificate attesting Koschaker's tasks at the beginning of 1945.
  - 46 See note 3.
  - 47 He obtained a *Gastprofessur* for Roman law in München (1946/1947), in Halle an der Saale (1948), in Ankara (1949/1950) and in Bonn (1951). See Müller 1982: 271–84. About the influence that Koschaker's teaching had in Ankara and in Turkish universities, see Apaydin and Franchi 2016: 277–300.
  - 48 Problems regarding, for example, his apartment in Tübingen, his library and other matters, are well described in the correspondence with his pupil Guido Kisch. See Kisch 1970.
  - 49 Calasso 1962; Wieacker 1949; Genzmer 1950: 595–611; Guarino 1955: 207–11.
  - 50 The metaphor was used by Goethe on the 6 April 1829, during one of his many conversations with Johann Peter Eckermann, who later published the texts. Goethe actually compared Roman law to a duck: just as the duck dives in the water and seems to disappear for a while, but then re-emerges from the water, so Roman law seemed to have disappeared in Europe for a certain period of time, but actually it was still there and thanks to Savigny it appeared again in all its lustre. See Eckerman 1836.
  - 51 Koschaker 1947: 337–54. I have found a different and partially inconsistent statement by Koschaker on the solution to adopt to fight the crisis of Roman law in a letter he wrote to his friend and colleague Salvatore Riccobono (I had access to this document, as well as to some other documents of Riccobono, thanks to the courtesy of Professor Mario Varvaro of the University of Palermo and of Riccobono's heirs that I desire in this occasion to gratefully thank). In this letter dated 31 December 1939, Koschaker wrote that he never affirmed the necessity of a revival of the methods of Pandect-science; rather, he suggested adopting an updated *mos italicus*. Koschaker's stance is actually no surprise, since he considered Salvatore Riccobono to be the most important proponent of this updated *mos italicus* against the new *mos gallicus*, that is to say the *neuhumanistische Richtung* (i.e. the *Interpolationenforschung* and the *antike Rechtsgeschichte*).
  - 52 The majority of our Roman law scholars adhere to a historical positivism, whereas it is a question of elaborating the eternal values of Roman law, which consist in its juridical concepts and in the evolution of these juridical concepts. We have to pursue these concepts up to the present day in the most important positive current laws.
  - 53 Genzmer 1950: 607–8. The author adds that Koschaker's programme was not actually new, because it returned to the ideas already suggested by Gustav Hugo (*Lörrach, 1764 – † Göttingen, 1844).
  - 54 Such a critique is very clearly expressed in Giaro 2001b, c. Over the last few decades a critical trend on the role of Roman law and its reception in European history has developed; according to this view, it is necessary to reduce or deny the importance of a European legal tradition. Such kinds of stances provoked fierce reactions among scholars, and the Romanists in particular, to defend the idea of the European legal tradition and the role of Roman law. Examples of these reactions are the works of Knütel 1994 and Baldus and Wacke 1995. These kinds of debates demonstrate at the same time how the problems raised by Koschaker in *Europa und das römische Recht* seventy years ago are still present.

- 55 On this point, see *supra*, page 160 and note 8.
- 56 Just to make a couple of the many possible examples, see Hattenhauer 1992; Zimmermann, Knütel and Meincke 1999. It is proper to underline, in any case, that there are many nuances in the way Koschaker's heritage has been received and followed by the scholars.

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