Tomasz Giaro

Victims and Supporters of Nazism vis-à-vis Europe's Legal Tradition. A New Episode in the History of the Third Reich?

Tomasz Giaro

Humboldt Foundation scholarship holder (1984–1985), employee of Max-Planck-Institut für Europäische Rechtsgeschichte in Frankfurt a.M. (1990–2006), associate professor in Frankfurt (1994-1995) and in Berlin (Freie Universität 1996), lecturer in Giessen (1999–2000), visiting professor in Katowice (2006–2008) and in Gainesville Florida (2010). He received the title of professor in 2009, and in 2011 the award of the Foundation for the benefit of Polish Science. Dean of the Faculty of Law and Administration of the University of Warsaw elected for a term of office 2016–2020 and 2020–2024.

✉ giaro@uw.edu.pl

https://orcid.org/0000-0002-5702-6135

Key words: Fritz Schulz, Fritz Pringsheim, Paul Koschaker, Franz Wieacker, Helmut Coing, Nazism, anti-Semitism, totalitarianism, Roman foundations of Europe, *Hi Hitler!*

https://doi.org/10.32082/fp.v0i6(62).459

1. Introduction

Judging by its title, the new monograph of Prof. Kaius Tuori (Helsinki), "Empire of Law",* published by Cambridge University Press, could have been a sequel to the same author's "The Emperor of Law", published four years earlier by Oxford University Press.[1] However, sometimes appearances deceive. In the large introduction (pp. 1–39) to his new "imperial" publication, Prof. Tuori explains its purpose in more detail. The book will namely explore the "idea of a shared European legal tradition as the dominant theory of understanding the past and the future of law in Europe during the postwar period" (p. 2).

The contours of this ambitious program, funded by such prestigious institutions of scholarship promotion as the European Research Council (ERC) and the Academy of Finland, are traced by two main research questions formulated by Prof. Tuori. Their correctness is essential, since false questions never generate good research. The first question reads: "How did the idea of the shared legal heritage of Europe emerge? What was the impact of totalitarianism and exile upon this process?", and the second: "How was the theory disseminated…? What legal, political and cultural factors contributed to its success?" (p. 2).

Prof. Tuori attributes the unparalleled historical success of the so-called European idea in legal

* Kaius Tuori, *Empire of Law: Nazi Germany, Exile Scholars and the Battle for the Future of Europe*, Cambridge 2020, pp. XVI & 313. Numbers in brackets, preceded by the abbreviations "p." or "pp.", refer to pages of this book.

1 K. Tuori, *The Emperor of Law. The Emergence of Roman Imperial Adjudication*, Oxford 2016.

history *prima facie* to the "combination of the two arguments about legal tradition, the universalist legal science and the nationalist tradition" (p. 7). To combine universalist with nationalist factors is undoubtedly a challenging task. However, the reader feels themselves first attracted by another intriguing aspect of the research project: a synergy of two apparently adverse groups of scholars: refugees of Jewish origin, on the one hand, and non-Jewish scholars, who as "Aryans" could calmly remain in Nazi Germany, on the other.

As far as exile is concerned, as claimed by Prof. Tuori, it "led to new ways of thinking" (p. 20). The theory of exile as a gratifying and rejuvenating experience, drawn from Theodor W. Adorno (pp. 62, 263),[2] is repeated very frequently (pp. 3–4, 23, 27–28, 31, 71–74, 83, 88, 109 etc.) which, nevertheless, does not necessarily warrant its correctness. However, it can already be noted that the observation of Prof. Tuori, according to whom the refugees tried not only "to gain recognition in their new environments", but also "to explain their personal experiences" (p. 88), looks awkward in most cases. How could the "experience" of being expelled from Nazi Germany as a scholar of Jewish origin be "explained"?

All these ideas, presented above in sketchy form, have already emerged in a new collective volume entitled "Roman Law and the Idea of Europe", co-edited by Prof. Tuori and described in his own words as the "culmination" of his recent FoundLaw project.[3] According to Prof. Tuori, a group of German émigré scholars of Jewish extraction, who had previously served in Germany as professors of Roman law, were indeed forced after 1933 to flee Hitler's totalitarianism, but still nevertheless managed to play a substantial role from abroad in the formulation of the European project for a postwar political integration (p. 3: "these exiles began to formulate a theory of a common European legal culture").

Prof. Tuori's somewhat inexact knowledge, reasoning and argumentation, which I have already questioned elsewhere,[4] reappears here again, in places almost approaching a slack version of the relatively new literary genre called "the alternate history of the Third Reich", but known also in its simpler variant under the heading "Hi Hitler!".[5] The latter phrase is a corruption of the original pompous Nazi salutation *Heil Hitler!* whose proper understanding requires knowledge of German language and history. Resorting to this bastardised form instead of the infamous original indicates similar concerns prompted by the corruption of serious historical research.

The genre of arts and literature defined here as "Hi Hitler!" has, to date, embraced above all the realms of popular – some say "trivial" – culture: novels, video, film, online games and graphics; a ready example being the internet lampooning of the original British poster of 1939 "Keep calm and carry on!" reimagined as "Keep calm and Hi Hitler!". Is the newest book of Prof. Tuori, "Empire of Law", the first (and obviously unintended) piece of this kind in the field of legal history? Anyway, the work exhibits, alas, the chief aim and function of works of the Hi-Hitler!-type: normalization and, in consequence, relativization of the Nazi past.[6]

The Hi-Hitler!-world is an imaginary place where the laws of logic and history are suspended or inverted. In one of the most famous works of this kind, the novel "Samuel Hitler",[7] it is the USA that is the centre of resentment toward Jews and which organizes anti-Semitic concentration camps, while Hitler is a German Jew who attacks Poland and Russia in order to protect local Jews. At the end, Samuel Hitler is transformed in a supercomputer and Germany wins WW II. But,

2 T. W. Adorno, *Scientific Experiences of a European Scholar in America*, (in:) D. Fleming, B. Bailyn (eds.), The Intellectual Migration, Harvard 1969, pp. 338–370; cf. A.C. Baert, *Adorno and the Language of the Intellectual in Exile*, New York 2019.

3 *Roman Law and the Idea of Europe*, ed. Kaius Tuori, Heta Björklund, Bloomsbury 2019, pp. X & 288.

4 T. Giaro, *The Culmination-Book. Trying to Make Sense of the Nazi Years*, "Studia Iuridica" 2019, vol. 83, pp. 7–26.

5 G. Schenkel, *Alternate History – Alternate Memory. Counterfactual Literature in The Context of German Normalization*, Vancouver 2012; G.D. Rosenfeld, *Hi Hitler! How the Nazi Past is Being Normalized in Contemporary Culture*, Cambridge 2015, pp. 5–7.

6 Cf. G.D. Rosenfeld, *The Fourth Reich. The Specter of Nazism from World War II to the Present*, Cambridge 2019.

7 Sissini [pseudonym of D.N. Chorafas], *Samuel Hitler*, Darmstadt 1973; cf. G. Schenkel, *Alternate History – Alternate Memory…*, pp. 64–81.

leaving this fiction aside, the contemporary world out there is also permeated in places with generous servings of "Hi Hitler!", among the consequences of which is that the death camps of WW II, forcibly planted by the Germans on Polish territory, might smoothly and effortlessly become "Polish death camps".

In a similar way, the nostalgic-apologetic writings of Prof. Tuori and his collaborators are home to the antinomical figures of homeless and frequently unemployed Jewish exiles who morph into influential giants of political thought and, on the other hand, the "Aryan" Nazis or their insipid supporters who, in this narrative, become prophetic masterminds in law and its history. But beyond any personal intention, both these *prima facie* contrasting, or maybe even outright antagonistic groups were in reality – according to Prof. Tuori – working hard hand in hand on the bright future of a free, democratic and liberal Europe. Should we believe that the Nazis were not so bad, after all?

Should we believe that the Nazis were not so bad, after all?

Moreover, the protagonists populating the earlier publications of the FoundLaw project remain mostly the same in Prof. Tuori's 2020 monograph with which we are presently concerned. However, the concepts appearing in my title – "victims" and "supporters" of the Nazi system – require a brief clarification. They are used in a standardized-typological sense and function. So it is renown that famous Roman lawyers Fritz Pringsheim and Ernst Rabel, classed and persecuted by the Nazis as "Jews", were more realistically viewed as archetypal Germans by culture, characterized in addition by a very patriotic attitude. The former was a fervent German nationalist, while the latter, originally from Austria, educated his children in an almost anti-Semitic spirit.[8] Both had also effective contacts with influential Nazi circles. Nevertheless, they eventually became victims of the German racial system.

An analogous distinction between personal disposition and objective social role must also be observed in respect of the Nazi supporters of various stripes, represented in the framework of legal history by such scholars as Paul Koschaker and Franz Wieacker.[9] Obviously, there existed differences between direct perpetrators, mere profiteers and those who gave exclusively passive support, even "despite themselves".[10] Nonetheless, we will not pause here to investigate these categories in depth, nor venture to decide who was a Nazi (and to what degree), and who was only a Nazi supporter (and to what degree).

In the present monograph of Prof. Tuori, the victims, i.e. the exiled legal historians of Jewish descent, along with the "Aryan" supporters of the regime allowed to remain and work as university professors in Nazi Germany, are treated primarily from a scholarly perspective; there is a particular chapter for every key figure whose core topics are identified and analysed in detail. Nonetheless, the results are hardly more convincing than those of the previous publications born in the framework of the FoundLaw project. In this review we will examine one by one all the German scholars credited by Prof. Tuori with having contributed to the invention of Europe's shared legal tradition.

8 On Pringsheim cf. T. Honoré, *Fritz Pringsheim 1882–1967*, (in:) J. Beatson, R. Zimmermann (eds.), Jurists Uprooted. German-speaking Émigré Lawyers in Twentieth-century Britain, Oxford 2004, p. 211, on Rabel cf. A.-M. von Lösch, *Verlierer und Versager*, „Jahrbuch für Universitätsgeschichte" 2000, vol. 3, p. 232.

9 T. Giaro, *Memory Disorders. Koschaker Rediscovered and Bowdlerized*, "Studia Iuridica" 2018, vol. 78, pp. 9–23; id., *A Matter of Pure Conscience? Franz Wieacker and his 'Conceptual Change'*, "Studia Iuridica" 2019, vol. 82, pp. 9–28.

10 T. Giaro, *Paul Koschaker sotto il nazismo: un fiancheggiatore 'malgré soi'*, (in:) Studi in onore di Mario Talamanca, vol. IV, Napoli 2001, pp. 159–187.

2. *Fritz Schulz?*

The best idea is to start with Fritz Schulz, following Prof. Tuori who makes him the protagonist of his first chapter, entitled "Legal Refugees from Nazi Germany and the Idea of Liberty" (pp. 40–86). Prof. Tuori associates the personality of Schulz with the idea of liberty, hence the chapter is focused on both correlated concepts of liberty and authority as elaborated by Schulz in his deservedly famous "Principles of Roman Law" (pp. 41, 50, 57). According to Prof. Tuori's explanation, as against "the Nazi politicization of law", Schulz (consistent with the role allotted to him by the thesis being advanced) ought to have promoted "the central role of legal science in maintaining the autonomy and humanity of law" (p. 40).

Prof. Tuori interprets Schulz against the background of Schulz's "Principles", published in English in 1936, only two years after the German original (*Prinzipien*), since at the time Schulz was already persecuted by the regime in his professional position, but was for the time being permitted to remain in Germany.[11] However, as usual, Prof. Tuori is interested above all in "examples of the transformative powers of exile" (pp. 71–72). Hence, he compares Schulz with other exiled scholars who were not necessarily Roman lawyers such as Hannah Arendt, Franz Neumann, Ernst Levy and Arnaldo Momigliano. They all "openly analysed the Nazi state", whereas (as Prof. Tuori fairly concedes) "observing a change in… Schulz is much more difficult" (p. 86).

As far as Ernst Levy is concerned, he was a Roman lawyer, but probably not the best example of the "open analysis" of the Nazi state, since he delivered only one lecture in the USA of a partially political nature, namely on the subject of natural law in Roman thought; moreover, this happened only a couple of years after the war concluded.[12] However, the protagonist of the story is Schulz, in whose works penned during exile Prof. Tuori spies the "clear reorientation of his scholarship from purely technical or discipline-internal debates to political argumentation" and an emergent project "to rephrase the European tradition of liberty through a new reading of the classical tradition" (p. 83).

Frankly speaking, I can discern in Schulz's war and postwar writings neither any attempt to reorientate his prewar scholarship towards "political argumentation" nor one to rephrase "the European tradition of liberty". Similarly, Franz Wieacker omits political topics in his detailed review of "Classical Roman Law", which was Schulz's main exile work along with his "History of Roman Legal Science".[13] Wieacker stresses only the latter's intention to assess the legal-cultural achievements of Roman law, including its evaluation from an ethical point of view (*als Ethiker das römische Recht… auch als rechtskulturelle Leistung bewerten*).[14]

This ethical evaluation represents, however, if I am not mistaken, something slightly but significantly different from "political argumentation". Political issues, ancient and modern, are equally absent from "History of Roman Legal Science".[15] In their obituaries of Schulz, published in 1958, neither of the most renown postwar Roman lawyers of Germany, namely Werner Flume and Max Kaser, touch upon any political aspects of his scholarly achievements. On the contrary; Flume dismissively cites the famous reproach of the German classicist Johannes Stroux crowned by the image of the "scene of destruction" (*Trümmerfeld*) left behind by the "hunters of interpolations" like Schulz. Kaser underlines, on the other hand, that after the emigration of Schulz his research radius was substantively extended by studies on English law, particularly on Henry de Bracton.[16]

Nonetheless, in scholarship this extension has never been treated as an intended movement of Schulz from juristic to political reflection. Anyway, already in

11 F. Schulz, *Prinzipien des römischen Rechts. Vorlesungen*, München–Leipzig 1934; id., *Principles of Roman Law*, New York 1936.

12 E. Levy, *Natural Law in Roman Thought*, "Studia et Documenta Historiae et Iuris" 1949, vol. 15, pp. 1–23; cf. J. Giltaij, *Reinventing the Principles of Roman Law*, pp. 88–89.

13 On both works see W. Ernst, *Fritz Schulz 1879–1957*, (in:) J. Beatson, R. Zimmermann (eds.), Jurists Uprooted. German-speaking Émigré Lawyers in Twentieth-century Britain, Oxford 2004, pp. 171–185.

14 F. Wieacker, *review of F. Schulz, Classical Roman Law*, „Gnomon" 1952, vol. 24, pp. 356–359.

15 A. Berger, *review of F. Schulz, History of Roman Legal Science*, "The Classical Journal" 1948, vol. 43, pp. 439–442.

16 W. Flume, *In memoriam Fritz Schulz*, „Zeitschrift der Savigny-Stiftung Romanistische Abteilung" 1958, vol. 75, p. 506; M. Kaser, *Fritz Schulz 1879–1957*, „Iura" 1958, vol. 9, p. 144.

Prinzipien of 1934 Schulz praised Laband's formalistic constitutional law as "a book on true Roman lines" (*echt romanistisches Buch*).[17] Moreover, in a lecture titled "The Invention of the Science of Law at Rome", given in Washington and Harvard in 1936, Schulz reconfirmed that the Roman jurists "isolated law… from the rules of religion, morality and custom, from the whole economic and social world".[18] The expert of the abovementioned extension, Horst Heinrich Jakobs, comments that for Schulz, as for Jakobs himself, in ancient Rome as today, legal science is possible only as "unpolitical science of private law" (*unpolitische Privatrechtswissenschaft*).[19]

According to Prof. Tuori, it is due to Schulz's work (in part already to *Prinzipien* and subsequently to "Principles") that Roman law could become "a counterpoint to the emerging Nazi legal order" (p. 84). Moreover, Prof. Tuori will identify in this work a whole series of Schulz's supposed clear counterpoints to Nazi legal ideology and practice: "freedom of law from politics instead of law as politics; citizenship based not on ethnicity but belonging; the continuity of law and legal tradition rather than revolution; the humanity of law and punishment against cruelty and inhumanity; the rule of law and security against terror and fear" (p. 85).

However, as far as the principle of freedom (*libertas*) is concerned, Schulz turned out to assume towards Roman law a quite unapologetic position. He stressed instead, in all probability rightly from the historical point of view, the substantial lack in ancient Roman law of legal guaranties which could have been invoked against the Roman State by its citizens.[20] On the other hand, as Schulz himself emphasized, his analysis was concentrated on "practical-juridical" (*praktisch-juristisch*) and "prosaic" (*nüchtern*) aspects;[21] contrary to the postwar monograph of Chaïm Wirszubski, Schulz never broached the subject of *libertas* "as a political right".[22]

Against this background, Prof. Tuori's conclusion that in exile "Schulz began to rephrase the European tradition of liberty through a new reading of the classical tradition" (p. 83), appears very surprising and remains yet to be proved. Unfortunately, Prof. Tuori is unable to indicate any specific passage in Schulz's writings where such a rephrasing or new reading could be found. It seems in any case that the concept of freedom adopted by Schulz in "Principles" is itself too anachronistic – it embraces in particular the 19th century free-will paradigm of the freedom of contract – to warrant further rephrasing in a contemporary sense or ascription of a new reading.[23]

Similarly uncertain seems the supposition, expressed by Prof. Tuori, that Schulz's "Principles" – or only the dedication of that work to his Jewish wife, Martha Schulz née Plaut[24]? – expressed something like "public opposition" to Nazi rule (p. 45). As a matter of fact, Prof. Tuori correctly observes that Schulz never mentioned the regime, with the possible exception of a single allusive reference to "recent political experience" in the conclusions of the book (pp. 49, 83).[25] Moreover, Prof. Tuori overlooks that under the heading "Nation" Schulz engaged in a fight, arm in arm with the Nazis and their – at least temporary – sympathizers such as Koschaker, against the so-called Orientalization, code word for Judaization, of later Roman law.[26]

The following phrases of Schulz, taken word for word from his "Principles", could as easily have been written by an author inclined towards Nazi ideology. This refers in particular to the German original *Prinzipien*

17 F. Schulz, *Prinzipien*…, p. 26; id., *Principles*…, p. 39.

18 F. Schulz, *The Invention of the Science of Law at Rome*, in: H. H. Jakobs, 'De similibus ad similia' bei Bracton und Azo, Frankfurt a. M. 1996, p. 101; cf. J. Giltaij, *Reinventing the Principles*…, pp. 59, 62.

19 H. H. Jakobs, *'De similibus ad similia' bei Bracton und Azo*, Frankfurt a. M. 1996, p. 111.

20 F. Schulz, *Prinzipien*…, pp. 110–111; id., *Principles*…, p. 163.

21 F. Schulz, *Prinzipien*…, p. 96; id., *Principles*…, p. 141.

22 C. Wirszubski, *Libertas as a Political Idea at Rome during the Late Republic and Early Principate*, Cambridge 1950, p. 170.

23 See M. J. Schermaier, *Fritz Schulz' Prinzipien. Das Ende einer deutschen Universitätslaufbahn im Berlin der Dreißigerjahre*, (in:) S. Grundmann et al. (eds.), Festschrift 200 Jahre Juristische Fakultät der Humboldt-Universität zu Berlin, Berlin–New York 2010, p. 692.

24 W. Ernst, *Fritz Schulz*…, pp. 118–119.

25 F. Schulz, *Prinzipien*…, 1934, p. 172; id., *Principles*…, 1936, p. 253.

26 T. Giaro, *Memory Disorders*…, p. 12; id., *The Culmination-Book*…, p. 14.

which, as compared to the English translation, contains always a dash of overstatement: "Jewish-Talmudic jurisprudence had no influence whatever on Roman Law" (*von einer Einwirkung der jüdisch-talmudischen Jurisprudenz… keine Rede*); "law which the Roman mind had made peculiarly its own" (*Recht… die ureigneste Schöpfung des römischen Geistes*); "no oriental influence whatever" (*von einem orientalischen Einschlag nichts zu spüren*).[27] In Prof. Tuori's treatment, these phrases are either overlooked, intentionally disregarded or their significance goes unappreciated.

All in all, the figure of legal historian Fritz Schulz repositioned as a master of (democratic) political argumentation does not belong to the reality of Roman law scholarship. He is rather a counterfactual denizen of the Hi-Hitler!-like narrative. If we search instead for his genuine scholarly innovations, it was doubtless the discovery of the axiological dimension of Roman law.[28] In fact, this body of law had been traditionally seen – also by Kaser in his obituary – in the aspect of its dogmatic perfection and "top-class performances (*Spitzenleistungen*) of juristic problem-solving."[29] However, most of the "politically relevant principles" (p. 46) analysed by Schulz in his book, such as Statutes and Law, Tradition, Nation, Liberty, Authority, Humanity, Fidelity and Simplicity, are nothing other than legal values of Roman society.

3. *Fritz Pringsheim?*

If anything, it appears even more challenging to reframe Fritz Pringsheim – another scholar of Roman Law decamping from Germany to exile in Britain – as a political writer. However, this is exactly what Prof. Tuori attempts in his chapter "Redefining the Rule of Law, Jurisprudence and the Totalitarian State" (pp. 87–123). This attempt is based solely on a single paper of Pringsheim's delivered at Cambridge on 27th October 1933 and published in an English scholarly journal in 1934.[30] According to Prof. Tuori, Pringsheim treats Hadrian's legal policy as an expression of "the ideas of equality, cosmopolitanism and the rule of law as opposites to Nazi policies" (p. 87).

In order to prove this proposition, Prof. Tuori devoted his own recent article entitled "Hadrian's cosmopolitanism and Nazi legal policy" to the abovementioned paper of Pringsheim's.[31] The validity of its conclusions depend upon the presupposition, to which Prof. Tuori subscribes, that in his article of 1934, Pringsheim used the method of "writing between the lines", known also as the method of "concealed references". In other words, he contends that Pringsheim engaged in a form of historical narration purposefully laced with indirect references to the current world. This is to make a virtue of necessity since, as Prof. Tuori rightly acknowledges, it cannot be directly determined from Pringsheim's text itself that it was written as "a criticism of anything contemporary" (pp. 93–94).

Of course, in the historical context of National Socialism, "cosmopolitan" was commonly regarded as a "code word for Jewish".[32] But the subject of cosmopolitanism could have had in this context further political implications. That would have been so, for instance, if Fritz Pringsheim in 1934 had followed the renown Greek sophist of the late 5th century BC, Hippias of Elis, and following him, embarked on timeless discussions about the prevalence of universal unwritten laws (*agraphoi nomoi*) over the mere positive law of this or that polity,[33] thereby more or less clearly marking out so-called Nazi law as likewise subordinate.

However, it is pure, speculative conjecture to assume that Fritz Pringsheim harboured such subversive intentions while giving his Hadrian-paper at Cambridge and redacting it for publication. The only thing assured

27 F. Schulz, *Prinzipien…*, pp. 89–91; id., *Principles…*, pp. 131–133; cf. M. J. Schermaier, *Fritz Schulz' Prinzipien…*, pp. 696–697.

28 Cf. J. Giltaij, *Reinventing the Principles…*, pp. 90–91.

29 M. Kaser, *Fritz Schulz*, „Iura" 1958, vol. 9, p. 144.

30 F. Pringsheim, *The Legal Policy and Reforms of Hadrian*, "The Journal for Roman Studies" 1934, vol. 24.2, pp. 141–153.

31 K. Tuori, *Hadrian's Cosmopolitanism and Nazi Legal Policy*, "Classical Receptions Journal" 2017, vol 9.4, pp. 470–486.

32 K. Tuori, *Narratives and Normativity*, "Law and History Review" 2019, vol. 37, p. 619.

33 Copleston F., *A History of Philosophy*, vol. I. *Greece and Rome*, Image Book 1993, pp. 89, 114; J. Brunschwig, *Hippias d'Elis, philosophe-ambassadeur*, (in:) K. Boudouris (ed.), The Sophistic Movement, Athens 1984, pp. 269–276; M. Ducos, *Les Romains et la loi. Recherches sur les rapports de la philosophie grecque et de la tradition romaine à la fin de la République*, Paris 1984, p. 261; A. Brancacci, *La pensée politique d'Hippias*, "Méthexis" 2013, vol. 26, pp. 23–38.

is that this paper "depicted Hadrian's Rome as an empire of peace, prosperity and law" (p. 94). But from the historical point of view, we must also remember that Emperor Hadrian, depicted by Pringsheim as a cosmopolitan advocate of order and peace,[34] was a highly idealised figure. In reality, Hadrian started his reign in 118 by putting four leading senators to death without a public trial, and ended his reign in 137 by executing another two.[35]

The legal aspects of this idyllic picture also embrace, besides cosmopolitanism, the rule of law, bureaucratisation of the legal professions and professionalisation of administration. "Needless to say" – but Prof. Tuori says it anyway – "these were things that the Nazis disliked" (pp. 95–96). This circumstance seems to Prof. Tuori a sufficient reason to qualify Pringsheim's short Hadrian-paper as a manifesto of political opposition. However, after having remarked at length on studies of Franz Neumann, Hayek, Leo Strauss and Kelsen (pp. 108–117), Prof. Tuori concedes honestly that "while many of the exiles became politicised…, in the case of Pringsheim the effect was… the opposite" (p. 117).

In fact, as was already mentioned, even the rather aloof Ernst Levy lectured in 1948 at the Natural Law Institute of Notre Dame University (Indiana) on natural law in Roman thought, although without reference to any understanding of natural law as a remedy against political tyranny (pp. 78–79). That Levy was aware of the limits of politicization is nevertheless clear, insofar as he did not regard ancient and modern dictatorial regimes as comparable, except in a highly impressionistic sense: in antiquity, Levy stressed pointedly, "mass extermination, deportation or expropriation of citizens was something not even imagined as a potentiality" (p. 79).[36]

Meanwhile, Fritz Pringsheim was continuing at the University of Oxford his eminently antiquarian research on the Greek law of sale (p. 117) whose problems had been occupying him since his habilitation thesis on purchasing with alien money (*Der Kauf mit fremdem Geld*).[37] Of course, Pringsheim was a very courageous person (he may have also underrated Nazi power or overestimated his own Nazi connections),[38] as testified by his open letter to Carl Schmitt, sent on 20 November 1933, shortly after Pringsheim's conference at Cambridge. In this letter, Pringsheim defended the universal value of Roman law, but also its being part and parcel of the national legal culture of Germany (pp. 102–103).[39]

Prof. Tuori underlines correctly that, after WW II, Pringsheim opposed the idea of the collective guilt of Germans; he furthermore showed tolerance even to colleagues who became Nazis (p. 119) and – it must be added – they did it without lifting a finger in defence of Pringsheim (or other Jewish colleagues). Included in this is of course Franz Wieacker, with whom Pringsheim not only "continued to collaborate" (ibid.), but who also benefited from the latter's protective impulses insofar as Pringsheim's testimonial contributed to Wieacker's avoidance of an unfavourable verdict before a denazification tribunal (*Spruchkammer*) in Göttingen which would have probably destroyed his academic career.[40]

However, let us come back to Prof. Tuori's leitmotif of a "shared European legal tradition" as a product not only of legal historians who remained in Germany throughout the Nazi years, but also of the exiled Roman lawyers of Jewish origin. Pringsheim's placement within such a project is even more incongruous than that of Schulz.[41] The latter's "Principles" at least awakened some general interest as a "defence of law in general" in addition to the defence of Roman law

34 F. Pringsheim, *The Legal Policy and Reforms of Hadrian*…, p. 91.

35 D. Liebs, *Hofjuristen der römischen Kaiser bis Justinian*, München 2010, pp. 7–8.

36 E. Levy, *Natural Law in Roman Thought*…, pp. 1–23, 22.

37 F. Pringsheim, *Der Kauf mit fremdem Geld. Studien über die Bedeutung der Preiszahlung für den Eigentumserwerb nach griechischem und römischem Recht*, Leipzig 1916

38 Cf. E. Bund, *Fritz Pringsheim 1882–1967. Ein Großer der Romanistik*, (in:) H. Heinrichs et al. (eds.), Deutsche Juristen jüdischer Herkunft, München 1993, p. 742; T. Honoré, *Fritz Pringsheim*…, p. 220.

39 F. Pringsheim, *Die Haltung der Freiburger Studenten in den Jahren 1933–1935*, „Die Sammlung. Zeitschrift für Kultur und Erziehung" 1960, vol. 15, pp. 533–534.

40 V. Erkkilä, *Conceptual Change of Conscience. Franz Wieacker and German Legal Historiography 1933–1968*, Tübingen 2019, pp. 148–152.

41 T. Giaro, *The Culmination-Book*…, pp. 11–12.

in particular (pp. 49–50). Moreover, we know that after having been dismissed, Schulz organised regular private scholarly meetings, frequented by Pringsheim, together with Martin Wolff and Gerhart Husserl,[42] which appears to provide indirect confirmation of Schulz's broader horizons and leader's talent.

But with all due respect, even if both Fritz Schulz and Fritz Pringsheim were important specialists in ancient legal history, that finding cannot be automatically extrapolated to the field of legal history as a whole, nor, *a fortiori*, to German legal scholarship as such.

countries[44] – appears both legitimate and demanding of an affirmative answer.

4. Paul Koschaker?

In terms of scholarly focus, Paul Koschaker was an essentially different scholar from both Schulz and Pringsheim with their consequent concentration on ancient Roman – and in the case of Pringsheim also Greek – law. In the chapter "The Long Legal Tradition and the European Heritage in Nazi Germany" (pp. 124–172), Koschaker is positioned by Prof. Tuori,

> **Neither Schulz nor Pringsheim spoke a word about Europe.**

Moreover, those of their works cited by Prof. Tuori as exemplars of their exile oeuvre were in fact published in 1934, five long years before their emigration from Nazi Germany. Both Schulz and Pringsheim remained namely in Germany until the spring of 1939. This chronological confusion created by Prof. Tuori evokes the illogicality, even absurdity, of his Hi-Hitler!-like narrative.

In consequence, the leading role of Schulz and Pringsheim in the project of the shared European legal tradition belongs to the realm of Prof. Tuori's fantasy. Neither Schulz nor Pringsheim spoke a word about Europe; moreover, they never resorted to the word "Europe" itself. On the other hand, as author of three weighty English monographs and textbooks, namely "Principles of Roman Law", "Classical Roman Law" and "History of Roman Legal Science", Schulz had doubtless impregnated the Anglo-Saxon world with Roman law scholarship. Hence, in reference to him, "the macabre question" of whether positive effects attended the exodus of Jewish scholars from Nazi Germany[43] – "Hitler's gift" from the viewpoint of host with Franz Wieacker, as a central figure in the creation of the idea of Europe's shared legal heritage. Be that as it may, Koschaker is an elusive personality; charged by some analysts with narrow Germanocentrism, by some others with a somewhat broader Eurocentrism,[45] and by still others with a clear "universalist-European tendency".[46]

Without citing a modest contribution of mine to the collective volume on German legal historiography between 1945 and 1952, Prof. Tuori presents Paul Koschaker, as I already had occasion to do some twenty years earlier,[47] as a discoverer twice over of the future of Roman law in new legal and political orders: "first in the Nazi reign and second in the new postwar Europe" (p. 124). However, stated with more precision, Koschaker demonstrated the indispensability of Roman law in no less than three juridico-political

42 L. Breunung, M. Walther, *Die Emigration deutschsprachiger Rechtswissenschaftler ab 1933. Ein bio-bibliographisches Handbuch*, vol. I, Berlin–Boston 2012, p. 410.

43 F. Ebel, *Exodus Berliner Rechtsgelehrter*, (in:) W. Fischer et al. (eds.), Exodus von Wissenschaften aus Berlin, Berlin–New York 1994, p. 136.

44 J. Medawar, D. Pyke, *Hitler's Gift. Scientists Who Fled Nazi Germany*, London 2000.

45 M. Petrak, *Ius europaeum or ius oecumenicum? Koschaker, Schmitt and d'Ors*, (in:) T. Beggio, A. Grebieniow (eds.), Methodenfragen der Romanistik im Wandel, Tübingen 2020, pp. 75–93.

46 J. Rückert, *Abschiede vom Unrecht*, Tübingen 2015, pp. 510–513.

47 T. Giaro, *Der Troubadour des Abendlandes*, (in:) H. Schröder, D. Simon (eds.), Rechtsgeschichtswissenschaft in Deutschland 1945–1952, Frankfurt a.M. 2001, pp. 69–70.

systems: firstly in Nazi totalitarianism, secondly in the developed democracy of postwar Western Europe, and thirdly in the so-called real socialism of Soviet type.[48]

We know with certainty that Koschaker participated actively in the Aryanising of Ernst Rabel's chair in Berlin and that the installation of Koschaker there, which ultimately took place on 30th March 1936, had bee planned long beforehand.[49] The best proof of this is the letter of 28th May 1935, directed by Dean Wenzeslaus Count Gleispach to the Imperial Ministry (*Reichsministerium*) of Science and Higher Education which recommends in no uncertain terms that both of the last Jewish law professors of Berlin, Ernst Rabel and Martin Wolff, be released from their positions. Afterwards, Gleispach wrote: "The new chair of Ancient Legal History would… offer possibilities, to achieve for our faculty an Aryan scholar of great scholarly reputation" (*arischen Gelehrten von großem wissenschaftlichen Ruf*).[50] This great Aryan scholar was evidently Gleispach's fellow countryman Koschaker.

However, Prof. Tuori, avoiding uncomfortable questions, limits himself to the sensitive remark that for Koschaker "the transition from Leipzig to Berlin was not easy" (p. 127). He may have more appropriately devoted a few lines to pondering the challenges arising out of the transition somewhat further afield – to the USA – undertaken by Rabel in circumstances permitting him to bring only a handful of scholarly works.[51] Is this paradoxical compassion bestowed by Prof. Tuori upon the profiteer in place of the Aryanization's victim, one more sign of the fictional Hi-Hitler!-narrative? So Koschaker took his "not easy" train from Leipzig to Berlin, while Rabel took an easy low-budget flight (or was it rather a ship?) to the USA; it is clear that given a luggage limit he could not take with him his many books!

According to Prof. Tuori, Koschaker's noble intention was to save Roman law from its miserable status as "a historical curiosity studied by philologists and historians together with Assyrian laws" (p. 138). Prof. Tuori discusses Koschaker's proposal of a well-known alternative solution, the approach to Roman law as "a living part of the contemporary legal tradition" (ibid.), but I dare to doubt that Koschaker ever wittingly applied the concept of 'legal tradition' as a methodological tool. By the time the American comparative lawyer John Henry Merryman popularised this category at the end of the 1960s,[52] Koschaker had long been dead and buried.

Anyhow, the remedy proposed by Koschaker for the crisis of Roman law in Germany was its neopandectistic "actualization" (*Aktualisierung*) as opposed to the neohumanistic "historization" (*Historisierung*) or, in more philosophical terminology, he promoted the applicative over the contemplative approach to Roman law.[53] Within the theory of *Aktualisierung*, ridiculed by Franz Wieacker with caustic wit as legal Adventism, legal history always occupies one of the earlier places in a sequence, compared by Wieacker to a medieval salvation picture cycle (*heilsgeschichtlicher Bilderzyclus*), being eternally under way to catch up with the actual shape of valid law.[54] In such manner, legal history was reduced to becoming a servant of legal dogmatics.

Prof. Tuori explains patiently, but unfortunately in a plainly counterfactual manner, that Koschaker's Europe was grounded in "cultural heritage and history". Moreover, Prof. Tuori insists in good faith that Koschaker, despite his "apparent Germanocentrism", never pursued "unity against foreign foes" (p. 172); furthermore, Prof. Tuori states that Koschaker's Europe "encompassed the whole European continent" (p. 133). Evidently, Prof. Tuori overlooked conspicuous Occidentalism directed not only against the Bolsheviks, but

48 On the Soviets see T. Giaro, *Der Troubadour des Abendlandes…*, pp. 53–54.

49 T. Giaro, *Memory Disorders…*, pp. 13–14.

50 A.-M. von Lösch, *Der nackte Geist*, Tübingen 1999, pp. 362–363, 391–392; R.-U. Kunze, *Ernst Rabel und das Kaiser-Wilhelm-Institut für ausländisches und internationales Privatrecht 1926–1945*, Göttingen 2004, p. 64.

51 G. Kegel, *Ernst Rabel 1874–1955*, (in:) S. Grundmann, K. Riesenhuber (eds.), Private Law Development in Context, Cambridge 2018, p. 119.

52 J.H. Merryman, *The Civil Law Tradition*, Stanford 1969; T. Giaro, *Modernisierung durch Transfer – Schwund osteuropäischer Traditionen*, pp. 275–281.

53 M. Petrak, *Ius europaeum or ius oecumenicum?…*, pp. 76–77.

54 F. Wieacker, *Über ‚Aktualisierung' der Ausbildung im römischen Recht*, (in:) L'Europa e il diritto romano. Studi in memoria di Paolo Koschaker, vol. I, Milano 1954, p. 533.

also against all countries of Eastern Europe, dismissively referred to by Koschaker as "a row of marginal eastern states" (*eine Reihe östlicher Randstaaten*). This position was advanced consistently by Koschaker not only before, but also during and after WW II.[55]

Even in the democratic postwar era – specifically in the year 1948 – Koschaker opines in a private letter to his disciple Guido Kisch that among all the nations of Eastern Europe, only the Czechs can be characterised without objection as Europeans. As the "congeneric" (*artverwandt*), they had been privileged already in the Nazi hierarchy of races and nations.[56] Now, swaggers Koschaker, oblivious to the evident continuity with the Nazi theory, the Czechs still "belong to Europe… much more than the Hungarians".[57] Koschaker embracing the whole European continent close to his heart belongs in the category of fictional events that happen only in the Hi-Hitler!-like narrative of Prof. Tuori.

In contrast to Prof. Tuori, nor do we feel entitled to ignore the image of the *Neger in Frac*,[58] a metaphorical figure put to use by Koschaker in a paper published on 15th May 1938 on the occasion of Hitler's visit to Italy. This picture was obviously chosen by Koschaker in order to exclude any suggestion that the reception of Roman law in Germany was a symptom of German inferiority towards Italians. Only a civilized nation (*Kulturvolk*) like the Germans, insists Koschaker, was able to borrow alien cultural property and transform it in its own spirit. The metaphor reveals in Koschaker not only an inferiority complex, but also a level of chauvinism worthy of his great compatriot forerunners Heinrich von Treitschke and Rudolf von Jhering.

The former, official interpreter of the Second German *Reich*, known as one of the *praeceptores Germaniae* (teachers of Germany), stressed in his "Politics" lectures, published posthumously in 1897, that the black race was from time immemorial a servicing one,[59] and the latter adopted a similar stance in the first volume of his famous book "Law as a Means to an End" (*Der Zweck im Recht*), published in 1877. Jhering denied that blacks (he used the more vigorous term *Neger*) possessed any "sentiment (*Gefühl*) of law", since they were accustomed to considering even the suffering of violence by human hand as a force of nature.[60]

After WW II, Koschaker obviously stops speaking about *Neger*, but he mentions instead the 'wild people' (*Wilde*) who have already acquired some legal concepts, but still lack the jurists necessary for the achievement of any higher socio-legal development.[61] And when immediately after the surrender of the German army people spontaneously recommenced saying "How do you do?" instead of the previously usual "Heil Hitler!",[62] Koschaker too proved himself to be accommodating and ceased signing his letters with the Nazi salute.[63]

5. *Franz Wieacker?*

In the next chapter, entitled "Reconfiguring European Legal Tradition after the War" (pp. 173–220), Franz Wieacker is depicted as "one of the so-called young lions of Nazi legal academia" who under the dictatorship tried to accomplish "legal reform based on the racialized order" and who only underwent a conversion to democracy in the postwar era (p. 173). The purpose of the chapter is precisely, as Prof. Tuori defines it, "to analyze the transition… from the Nazi period to the postwar era", as reflected "in Wieacker's thought" (p. 175). The reference to Wieacker's thought is essential, given the newest fashion to inquire into

55 Quote in P. Koschaker, *Europa und das römische Recht*, 4th ed., München–Berlin 1966, p. 350; further references in T. Giaro, *Der Troubadour des Abendlandes…*, pp. 40, 61–62.

56 I.J. Hueck, *'Spheres of Influence' and 'Völkisch' Legal Thought: Reinhard Höhn's Notion of Europe*, (in:) C. Joergess, N.S. Ghaleigh (eds.), Darker Legacies of Law in Europe, Oxford, Portland 2003, p. 61.

57 P. Koschaker, *Briefe aus den Jahren 1940–1951*, (in:) G. Kisch (ed.), Paul Koschaker. Gelehrter, Mensch, Freund, Basel–Stuttgart 1970, pp. 26–27; cf. T. Giaro, *Memory Disorders…*, pp. 15–16.

58 T. Giaro, *Memory Disorders…*, pp. 15–16.

59 H. von Treitschke, *Politik. Vorlesungen*, vol. I, Leipzig 1918, p. 274; vol. II, Leipzig 1898, p. 569; cf. T. Giaro, *Vor-, Mit- und Nachdenker des Madagaskar-Plans*, „Rechtshistorisches Journal" 2000, vol. 19, pp. 160, 162.

60 R. von Jhering, *Der Zweck im Recht*, vol. I, Leipzig 1877, p. 347; id., *Der Zweck im Recht*, vol. I, Leipzig 1884, p. 394; id., *Der Zweck im Recht*, vol. I, Leipzig 1893, p. 392.

61 T. Giaro, *Der Troubadour des Abendlandes…*, pp. 58–59.

62 P. Koschaker, *Selbstdarstellung*, (in:) N. Grass (ed.), Österreichische Geschichtswissenschaft der Gegenwart in Selbstdarstellungen, vol. II, Innsbruck 1951, pp. 118–119.

63 A.-M. von Lösch, *Der nackte Geist…*, p. 391.

what was happening in Wieacker's head without regard to what was happening in the world outside.[64]

In this context, Prof. Tuori assumes towards Wieacker's doings a position which may be defined as not entirely uncritical. He observes that in the postwar laudation marking Fritz Pringsheim's 70th birthday, Wieacker had recalled "how Pringsheim's reputation was not enough to protect him from Nazi persecutions".[65] According to Prof. Tuori, this strange phrasing

Koschaker stops speaking about *Neger*, but he mentions instead the 'wild people'.

"shows the mechanisms that Wieacker used to shield himself from personal involvement in the happenings of the day" (p. 178). In another context, Prof. Tuori stresses "how skewed Wieacker's moral compass was" (p. 209), but the references and quotes linked to this passage are unfortunately inexact, which impedes the reader's ability to decipher its precise meaning.

On the other hand, Prof. Tuori sometimes treats Wieacker's racial points of view with a clearly excessive indulgence. "His writings, both public and private, betray no trace of the anti-Semitism or racism that was prevalent in Germany" (p. 180), concludes Prof. Tuori, citing proudly the recent intellectual biography of Wieacker, written by Dr. Ville Erkkilä in the framework of the project directed by Prof. Tuori and funded by the European Research Council.[66] This scholar, as his mentor Prof. Tuori solemnly assures us, "does not report a single instance where anti-Semitism would have been present in Wieacker's writings" (p. 180 nt. 18).

As a matter of fact, Dr. Erkkilä does not report a single instance of Wieacker's anti-Semitic utterances, and probably, given his somewhat tangential study of historical sources, he indeed has knowledge of none. However, this does not mean that in reality, beyond the limits of Wieacker's mind, such instances do not exist at all.[67] Unfortunately they do, betraying in the worst case scenario Wieacker's enthusiastic collaboration and in the best, his mindless obedience to the racial legislation of the Nazis: the Law for the Protection of German Blood (*Blutschutzgesetz*) of 15th September 1935 and the Marital Health Law (*Ehegesundheitsgesetz*) of 18th October 1935.

Prof. Tuori emphasises that Wieacker followed in the steps of Pringsheim, writing exactly one year after his *Doktorvater* a similar paper on Emperor Hadrian, entitled simply *Studien zur Hadrianischen Justizpolitik*.[68] The paper contains, however – as Prof. Tuori correctly notes – no references to cosmopolitanism (or multiculturalism) which Pringsheim seemed to consider the main positive value of Hadrian's reign (pp. 105, 183, 271). Wieacker's Hadrian remains the same standard-Hadrian, who, in current Roman law textbooks, appears as the initiator of a centralizing imperial policy which was intensified in subsequent times.[69]

As far as shortcomings in Prof. Tuori's scholarly merits are concerned, I must count among them his ignorance of a considerable literary fact of the postwar period in Germany. It was a remark of a repentant and democratic Wieacker of the year 1976, made in a reflection on his 1935 Nazi-monograph: *Wandlungen der Eigentumsverfassung*. From the viewpoint of the "young legal historian and social critic of the early 1930s", Wieacker regrets the "opportunistic or

64 T. Giaro, *A Matter of Pure Conscience*…, p. 25.

65 F. Wieacker, *Fritz Pringsheim 70 Jahre*, „Juristenzeitung" 1952, vol. 7, p. 605.

66 V. Erkkilä, *Conceptual Change of Conscience*…, p. IX. The other funder was the Academy of Finland.

67 T. Giaro, *A Matter of Pure Conscience*…, pp. 14–15.

68 F. Wieacker, *Studien zur Hadrianischen Justizpolitik*, „Romanistische Studien. Freiburger Rechtsgeschichtliche Abhandlungen" 1935, vol. 5, 43–81.

69 A. Petrucci, *Corso di diritto pubblico romano*, Torino 2017, pp. 152–153, 228–229, 232–233, 236–237.

even static" character of the Nazi politics of property.[70] In the same breath, Wieacker excepts from blame the (principled and dynamic?) Nazi course of action referred to as "predation of its political opponents" (*Ausplünderung seiner politischen Gegner*).

The intended target of Wieacker's laconic statement is uncertain, given that Nazi political terminology mostly – but not necessarily always[71] – distinguished between Jews and political enemies,[72] with the latter including for instance communists, socialists or liberals. In this situation, in which "predation" (*Ausplünderung*) could perhaps be better defined as "robbery" (*Ausraubung*),[73] there seem to be only two possible solutions to the mystery. If Wieacker alluded merely to the leftist political enemies of the Nazis in a strict sense, then in omitting the Jews he forgot the Holocaust which was not only the biggest killing, but also the biggest theft or – if we need a more pregnant expression – assault and robbery in history of mankind.[74]

If, on the other hand, Wieacker was alluding to all enemies and opponents of the regime in a broad sense, including the Jews, why did he mention only plunder (*Ausplünderung*) – whether based on the Decree on the Confiscation of Jewish Property of 3rd October 1938 or on its simple taking – and not, above all, mass murder? Anyway, in either case Wieacker seems to downplay either the plunder of the Jews or their murder or both.[75] In this way, he may be considered as a forerunner of the current Hi-Hitler!-mentality which aims as a last resort to normalise the Nazi past and to belittle its crimes as acts of ordinary administration.

Wieacker's absent-minded reference to the mysterious *politische Gegner* aside, Prof. Tuori tries diverse explanations of the method by which Wieacker managed to reduce the weight of the persecution of Pringsheim and other Jewish colleagues. He may have considered it either "an unfortunate phenomenon" escaping his control or a case of "the will to belong" (p. 198). The latter category is borrowed by Prof. Tuori from the famous essay of Czesław Miłosz "The Captive Mind". In fact, Miłosz depicts such a will – in reference to communist rule – as "the great longing of the 'alienated' intellectual", and also mentions "the certainty that one belongs to the new and conquering world" as "the recompense for all pain".[76]

The demise of the Nazi state meant for many educated Germans the collapse of the Empire (*Zusammenbruch des Reiches*), hence an event that, according to a phrase from the obituary for Heinrich Lange, another German jurist who was at first very Nazi and then experienced a conversion into a true democrat,[77] hit everybody quite hard.[78] In this way the Nazi's new Europe was over and the old one, along with democracy and the rule of law, reappeared. At the same time, Wieacker's "will to belong" started to work very noticeably – observes sharply Prof. Tuori – "in the opposite direction" (p. 220). As Prof. Tuori realistically underlines, it was perhaps then this impulse that led not only Wieacker, "but also most of the legal academia to discover the shared roots of European legal science" (ibid.).

6. *Helmut Coing?*

In the chapter "The European Narrative and the Tradition of Rights" (pp. 221–262), Helmut Coing and his idea of the jurisprudential tradition of rights is supplemented with a thorough analysis of Prof. Reinhard Zimmermann as the main proponent of the "European narrative" on Roman law (p. 221). The respective roles of both gentlemen in terms of their being enemies of totalitarianism, and therefore placed

70 F. Wieacker, *Wandlungen der Eigentumsverfassung revisited*, „Quaderni Fiorentini per la Storia del Pensiero Giuridico Moderno" 1976–77, vol. 5–6, p. 842.

71 E. Frankel, *The Dual State*, New York 1941, p. 10 on Jews as opponents of the Third Reich.

72 G. Kegel, *Ernst Rabel 1874–1955…*, p. 120.

73 I. Loose, *Kredite für NS-Verbrechen: Die deutschen Kreditinstitute in Polen und die Ausraubung der polnischen und jüdischen Bevölkerung 1939–1945*, Oldenburg 2007.

74 M.J. Bazyler, *Holocaust Justice. The Battle for Restitution in America's Courts*, New York 2005, p. XI.

75 T. Giaro, *Vor-, Mit- und Nachdenker des Madagaskar-Plans*, „Rechtshistorisches Journal" 2000, vol. 19, p. 133; id., *Aktualisierung Europas*, pp. 156, 172–173.

76 C. Miłosz, *The Captive Mind*, New York 1955, pp. 7, 15.

77 W. Wolf, *Vom alten zum neuen Privatrecht. Das Konzept der normgestützten Kollektivierung in den zivilrechtlichen Arbeiten Heinrich Langes 1900–1977*, Tübingen 1998.

78 K. Kuchinke, *Nachruf auf Heinrich Lange*, „Neue Juristische Wochenschrift" 1978, vol. 31, p. 309.

by Prof. Tuori as the heroes of his monograph, is as unclear as, on the other hand, the division of labour on Europe's future between "native-born Germans" and "Jewish exiles". Coing is at least suspected of having been an NSDAP member (pp. 226–227); moreover, he doubtlessly belongs to the generation that embraced natural law immediately after WW II (pp. 227–228).[79]

We know, however, that in 1986, after his visit to South Africa, Coing, resuming the long scholarly tradition represented by Jhering and Koschaker, made explicit reservations concerning the advisability of the immediate concession of democracy to the "blacks" (*Schwarze*).[80] But efforts dedicated by Prof. Tuori to disquisitions about Coing's NSDAP membership are wasted. Even if Coing earned his doctoral degree at the University of Göttingen in 1935, and his habilitation at Frankfurt a. M. in 1938, in contrast to Wieacker, Coing never wrote anything which could be even remotely qualified as a masterpiece of Nazi legal literature. Quite the opposite; he only started his scholarly career after WW II by dismantling the Nazi jurisprudential structure with the help of legal philosophy.

The story of Prof. Zimmermann, who was born after WW II and 40 years later than Coing, is completely different. His sole encounter with totalitarianism was his seven-year long stay in South Africa.[81] He remained there as law professor at the University of Cape Town from 1981 to 1988 as the apartheid regime – while perhaps no longer flourishing – undoubtedly persisted, finally deteriorating into collapse at the beginning of 1990s. There is an obvious analogy between Nazi rule over Europe and apartheid of South Africa as totalitarian racial systems,[82] but we are not entitled to speculate whether Prof. Zimmermann went to Cape Town to – adapting freely from Adorno – live a good life in a bad society[83] or, on the contrary, to help human rights, freedom and democracy triumph.

Coming back to Europe, Prof. Tuori attributes to Prof. Zimmermann one important impact upon the development of European legal history: "It is notable that Koschaker's view of Savigny influenced that of Coing, who in turn inspired Zimmermann". This relay of great jurists is rounded out with Prof. Tuori's laudatory assessment of Prof. Zimmermann, which seemingly lacks sufficient justification. The latter is praised namely for being "the first to openly state that the history of Roman law in Europe is mostly about the reception of Roman law" (p. 154). According to Prof. Zimmermann, Prof. Tuori insists, the new private law of Europe should be molded by "the shared tradition of the reception of Roman law not ancient Roman law itself" (p. 249).

The discovery, ascribed to Prof. Zimmermann by Prof. Tuori in this celebrative manner, must be sadly reclassified as very modest, given the absolute impossibility to apply in the modern era "the ancient law itself". In fact, the reception of Roman law in Germany concerned late medieval Italian legal scholarship (*mos italicus*) and not ancient Roman law. This fact was already recognized by such authorities as Friedrich Carl von Savigny and Rudolf Sohm. The latter refuted the usual Germanist lament over the oppression of local laws by a foreign learned law, stressing the nature of the reception as "scientification" (*Verwissenschaftlichung*): "We received alien law, because we needed an alien legal scholarship".[84]

The approval of such insights by Nazi jurists of the *Kieler Schule*, such as Karl Michaelis and Georg Dahm,[85]

79 On Coing as a natural lawyer cf. R. M. Kiesow, *Coings Diktat*, "Myops" 2015, vol. 23, p. 9.

80 H. Coing, (in:) M. F. Feldkamp (ed.), *Für Wissenschaften und Künste*, Berlin 2014, p. 136; critical R. Zimmermann, review of H. Coing, *Für Wissenschaften und Künste…*, „Rabels Zeitschrift" 2015, vol. 79.1, pp. 222, 226.

81 R. Zimmermann, *Turning and Turning in the Widening Gyre… Gegenwartsprobleme der Juristenausbildung in Südafrika*, (in:) Gedächtnisschrift für W.K. Geck, Köln 1989, pp. 985–1021.

82 H. Adam, *The Nazis of Africa: Apartheid as Holocaust?*, "Canadian Journal of African Studies" 1997, vol. 31.2, pp. 364–370.

83 J. Butler, *Can one lead a good life in a bad life?*, "Radical Philosophy" 2012, vol. 176, pp. 9–18.

84 R. Sohm, *Die deutsche Rechtsentwickelung und die Codificationsfrage*, „Grünhuts Zeitschrift" 1874, vol. 1, p. 258; cf. T. Giaro, *A Matter of Pure Conscience...*, p. 24.

85 K. Michaelis, *Wandlungen des deutschen Rechtsdenkens seit dem Eindringen fremden Rechts*, (in:) G. Dahm et al. (eds.), Grundfragen der neuen Rechtswissenschaft, Berlin 1935, p. 24; G. Dahm, *Zur Rezeption des römisch-italienischen Rechts*, „Historische Zeitschrift" 1943, vol. 167, pp. 230–231, 248, 253.

but also by others, was all but sensational.[86] We read similar statements already in the first German edition of Wieacker's "History of Private Law in Europe",[87] published in 1952, the year of Prof. Zimmermann's birth. The knowledge of the circumstances which permit this process to be described as "shared" in the sense of its pan-European ubiquity, even if its modalities differed in various nations and countries, is rather old too. As early as 1866, Jhering noticed the commonality of one and the same legal source, the Justinianic *Corpus Iuris Civilis*, effective in most parts of continental Europe.[88]

An obvious analogy between Nazi rule over Europe and apartheid of South Africa.

The chronological difficulties of Prof. Tuori, who analysed works of Schulz and Pringsheim published in 1934 as exile works of refugees, become thereby once again evident. Moreover, Prof. Tuori celebrates Prof. Zimmermann as the discoverer of the relatively simple truth "that the history of Roman law in Europe is mostly about the reception of Roman law" (p. 154). Furthermore, Prof. Tuori thereby ignores that Coing not only "inspired" Prof. Zimmermann, but made even the same discovery somewhat earlier.[89] As a matter of fact, the title of one of his late publications, "From Bologna to Brussels" (*Von Bologna bis Brüssel*),[90] sums up Coing's original program dating back at least to the 1960s or maybe even to 1952, when he published his review of Ernst Robert Curtius' work *European Literature and the Latin Middle Ages* (*Europäische Literatur und lateinisches Mittelalter*).[91]

All in all, to grasp that the "shared" reception of Roman law in Europe was in no way the reception of "ancient Roman law itself", European legal historians needed neither the terrible experience of Nazism, nor exile, to say nothing about the subsequent events of WW II and the Holocaust. Prof. Tuori emphasises that since Germanic and German laws – in contrast to French or Anglo-Saxon ones – ignored a contractual conception of rights, it should have been substituted by tradition. In this sense, "the European legal history project may also be seen as" – Prof. Tuori allows himself here a dash of impertinence – "very much a German project" (p. 235).

However, as Prof. Tuori elaborates, Coing's version of European legal tradition differs from those of Koschaker and Wieacker respectively. Besides any legal elements, it includes "values and moral and philosophical foundations" (p. 236). Hence, as rightly stressed by Prof. Tuori, there is in Coing, similarly to Leo Strauss, much appeal to historical tradition (p. 247).[92] In this way, Coing laid the groundwork for "a third way for rights" as an alternative to the natural and the contractual (p. 261). Moreover, he is praised by Prof. Tuori for having presented "a balanced account of the rule of law", in whose framework natural law tradition accounted for questions of public law, and Roman law tradition for those of private law (p. 239).

86 T. Giaro, *Alt- und Neueuropa, Rezeptionen und Transfers*, (in:) T. Giaro (ed.), Rechtskulturen des modernen Osteuropa. Modernisierung durch Transfer zwischen den Weltkriegen, Frankfurt a.M. 2007, pp. 284–285.

87 F. Wieacker, *Privatrechtsgeschichte der Neuzeit*, 1st ed., Göttingen 1952, p. 126.

88 R. von Jhering, *Geist des römischen Rechts*, 2nd ed., Leipzig 1866, p. 14.

89 H. Coing, (in:) M.F. Feldkamp (ed.), *Für Wissenschaften und Künste…*, pp. 137–140.

90 H. Coing, *Von Bologna bis Brüssel. Europäische Gemeinsamkeiten in Vergangenheit, Gegenwart und Zukunft*, Bergisch Gladbach, Köln 1989.

91 K. Luig, *In memoriam Helmut Coing*, „Zeitschrift der Savigny-Stiftung Romanistische Abteilung" 2002, vol. 119, pp. 669–670.

92 Cf. also H. Coing, *La tradition juridique dans la construction de l'Europe*, in: L'Europa. Fondamenti, formazioni e realtà, Roma 1984, pp. 361–384.

Despite his "moral and philosophical foundations", as far as the problem of the eastern border of Europe is concerned, Coing, even if a couple of years younger than Wieacker, cannot be viewed as any more advanced from the perspective of legal history. Although under the Nazis Wieacker propagated the idea of the Germanocentric "new Europe",[93] in the middle of the 1980s he declared Russia's affiliation to Europe as "out of the question".[94] Coing, on the other hand, remained traditionally attached to the idea of Western Christendom and never extended Europe's border further eastward of typical countries of East-Central Europe: Hungary and Poland.[95] The interesting question of whether and since when Russian law became quintessentially European,[96] cannot be discussed in this context.

7. Conclusions

The influence of the Jewish émigrés upon the general return of Western European jurists to traditional theories of liberty, natural law, democracy, and human rights (p. 242) seems to fade somewhat towards the end of the book. In summing up, this return is attributed by Prof. Tuori in a multifaceted way to "a reaction to Nazi totalitarianism, American influence and self-definition against communism" (p. 248). In his "Conclusions" (pp. 263–272), Prof. Tuori resolves that the narrative of the shared tradition of European law and the idea of the legal heritage of Europe emerged during a long historical process which began in the 1930s (p. 263) and, more precisely, in the Nazi years.

Here, Prof. Tuori comes back to his fixed idea that it was exile that led the Jewish asylum seekers to change their ways of thought, since "exposure to new ideas, traumatic experiences and feelings of marginalization were powerful impulses for rethinking" (p. 265). However, according to Prof. Tuori, the narratives formed on the one hand by legal refugees of Jewish origin and, on the other, by true born Germans – or rather by "Aryan" legal academics who never faced expulsion – completed each other as "two parts of a whole": the former was founded on "liberty and scientific integrity", the latter on "culture and tradition" (p. 268).

Unfortunately, I am not sure whether the four value concepts cited above compose a meaningful and harmonious "whole". I can perfectly understand that the Nazis and their supporters did not hold "liberty and scientific integrity" in high esteem, but I cannot comprehend – maybe because I am biased – why people harbouring Nazi inclinations who, being possessed by the aim to always attain something "new",[97] and to do so in an incredibly brutal way that destroyed so much, should be characterised by their strong attachment to "culture and tradition". Moreover, the construction developed diligently by Prof. Tuori seems to contain some further blemish.

Specifically, I cannot identify any reasonable division of labour between Jewish legal refugees and "Aryans" who could remain in Germany and be assigned university chairs. The refugees Pringsheim and Schulz were typical representatives of the traditionally apolitical discipline of Roman law at the traditionally apolitical German university.[98] Like most specialists of this discipline, formed during the era directly following the promulgation of the BGB, they were exclusively "scholars of ancient Roman law".[99] Hence, it is irrational to compare them with genuine political thinkers Hannah

93 T. Giaro, *Legal Historians and the Eastern Border of Europe*, (in:) T. Beggio, A. Grebieniow (eds.), Methodenfragen der Romanistik im Wandel, Tübingen 2019, pp. 151–152.

94 F. Wieacker, *Konstituentien der okzidentalen Rechtskultur*, (in:) O. Behrends et al. (eds.), Römisches Recht in der europäischen Tradition, Ebelsbach 1985, p. 357; id., *Foundations of European Legal Culture*, "American Journal of Comparative Law" 1990, vol. 38, p. 8; cf. T. Giaro, *Der Troubadour des Abendlandes…*, p. 73.

95 H. Coing, *Common Law and Civil Law in the Development of European Civilization*, (in:) id., K.W. Nörr (eds.), Englische und kontinentale Rechtsgeschichte: ein Forschungsprojekt, Berlin 1985, p. 33; T. Giaro, *Europa und das Pandektenrecht*, „Rechtshistorisches Journal" 1993, vol. 12, p. 331.

96 M. Avenarius, *Fremde Traditionen des römischen Rechts. Einfluss, Wahrnehmung und Argument des 'rimskoe pravo' im russischen Zarenreich des 19. Jahrhunderts*, Göttingen 2014, reviewed by T. Giaro, *Russia and Roman Law*, „Rechtsgeschichte" 2015, vol. 23, pp. 309, 313–314, 317.

97 T. Giaro, *The Culmination-Book…*, p. 15.

98 W. Abendroth, *Das Unpolitische als Wesensmerkmal der deutschen Universität*, (in:) Universitätstage 1966. Nationalsozialismus und die deutsche Universität, Berlin 1966, pp. 189–208.

99 T. Giaro, *The Culmination-Book…*, pp. 14–15.

Arendt, Franz Neumann, Leo Strauss and Arnaldo Momigliano (pp. 4, 26, 38, 64–65, 71–74, 86, 243, 263).

However, assuming the stance advocated by Prof. Tuori that Koschaker and Wieacker were central in the process of inventing the shared European legal tradition (p. 2), one cannot ignore that both of them resided in Germany throughout the entire duration of the Nazi regime. Therefore, both spoke from its perspective; the former as a self-proclaimed advisor (and by no means an "opponent"),[100] the latter as insider. It is they who introduced the European perspective to German legal history: Koschaker did so based on old Europe or the Christian Occident, Wieacker on Nazi new Europe. Prof. Tuori differentiates neatly between Koschaker's idea of legal tradition based on textual continuity and Wieacker's conception privileging legal method (pp. 196–197).

Moreover, Prof. Tuori mentions anonymous "Roman law scholars" of the postwar era who rejected natural law, retaining as the only solid basis for legal science "history", represented by "the heritage of Roman law… embedded into the legal culture" (p. 123). Fitted in the company of such high values, Roman law seems to constitute for Prof. Tuori a kind of 'universal worth-indicator' of diverse legal systems. But is Roman law itself always a "good thing"? And what about the hard-hitting characterization of Roman jurists by a mid-19th century German lawyer, Julius von Kirchmann, as "obedient servants of the tyranny"?[101] Constitutionalism and democracy were, in Rome, traditionally weak,[102] so the military monarchy of the 3rd century did not fall of a clear blue sky.[103]

Nor is Europe as such always "a good". From this point of view, Prof. Tuori assumes a too-simple change in Nazi ideology. In his opinion, the original idea of the German blood community was loosened after the attack on the Soviet Union in 1941, as "the need for allies… prompted the invention of the *Neue* Europa" (p. 270). Since Nazis saw "Europe as a bulwark against… the menace of communism and racial impurity in the East" (p. 16), they combined *Mitteleuropa* – as Prof. Tuori correctly recognises – into a unified area dominated by the Germans with "the ideological threat of communism and a racial one of Slavic and other eastern people" (p. 129).

However, if a search for an initial date of the New Europe concept is reasonable, I still harbour some doubts whether the date 1941 (p. 270) is not too late.[104] As an unbidden advisor on Nazi foreign policy, Koschaker already extolled in his crisis-conference of December 1937 "European" or "Roman-European" legal scholarship, stressing that Roman law was not an exclusively German, but rather a European concern.[105] In his paper of May 1938 from the special issue of *Deutsches Recht*, the organ of Nazi Association of German Legal Professionals directed by Hans Frank and published on the occasion of Hitler's visit to Italy, Koschaker chased his outdated dreams of the "feeling for European culture" (*Kulturgefühl*) and "cultural community of the Christian Occident" (*christliches Abendland*).[106]

Much earlier, in 1934, Werner Daitz, economic consultant to the Nazi party, had prepared his "Memorandum (*Denkschrift*) on the Building of a Society for the European Economy of Large Areas (*Großraumwirtschaft*)". Other similar writings of his were in circulation during the 1930s, and the spiritual child of Daitz, the "Society for Planning the European Economy and the Economy of Large Areas" (*GeWG*), was, from September 1939, amplifying purely military efforts to subjugate the occupied Eastern European countries as German colonies.[107] This completely uncharitable

100 A widespread but undoubtedly misleading qualification followed by K. Tuori, *Narratives and Normativity…*, p. 625.

101 H.J. von Kirchmann, *Die Wertlosigkeit der Jurisprudenz als Wissenschaft*. Vortrag in der Juristischen Gesellschaft zu Berlin 1848, Darmstadt 1969, pp. 42–43; T. Giaro, *Aktualisierung Europas…*, pp. 107, 165.

102 S. Gordon, *Controlling the State. Constitutionalism from Ancient Athens to Today*, Cambridge MA, London 1999, pp. 86–115.

103 K.-P. Johne (ed.), *Die Zeit der Soldatenkaiser. Krise und Transformation des Römischen Reiches im 3. Jahrhundert n. Chr.*, Berlin 2008.

104 T. Giaro, *A Matter of Pure Conscience…*, pp. 22–23.

105 T. Giaro, *Der Troubadour des Abendlandes…*, p. 38 with exact quotes.

106 P. Koschaker, *Deutschland, Italien und das römische Recht*, „Deutsches Recht" 1938, vol. 8, pp. 183–184; T. Giaro, *Memory Disorders…*, pp. 15–16.

107 D. Majer, *Das besetzte Osteuropa als deutsche Kolonie*, (in:) Fritz Bauer Institut (ed.), Gesetzliches Unrecht, Frankfurt &

organization could count on the expertise of Paul Koschaker as a specialist in European law.[108]

Hence, Nazi Germany knew a lot of hegemonic discourse on Europe, conducted under the slogan of its restructuring (*Neuordung*),[109] long before the attack on the Soviet Union. The renewed colonization of Eastern Europe (*Ostraum*) by Germany, this time accomplished exclusively with 20th-century martial means, i.e. instruments of destruction, ran notoriously under the banner of occidental anti-Bolshevism.[110] But if some alternate history of WW II is allowed, then if, in 1917, Russia had rejected Bolshevism, the German aggression of June 1941 would have taken place equally, but only this time under the different slogan 'Germany defends its living space against the rotten Tsar's Empire'.[111]

All in all, the shared legal tradition of Europe seems to be to a certain extent a historical fact or, above all, historical conviction. However, the usual critical question, which cannot be examined here, runs: historical, to what extent? On the other hand, I am afraid that the real formation process of this tradition does not correspond exactly to the narrative presented and promoted by Prof. Tuori and his research team. With the biographies of Koschaker and Wieacker, as well as the culmination book co-edited by Prof. Tuori, the dehistorizing Hi-Hitler!-style was already evident in the efforts to excuse the protagonists or at least to reduce the weight of their misconduct.

In its turn, Prof. Tuori's Empire-book, in its general tendency, since not every intelligent observation of the author could be highlighted, confuses the historical chronology too easily. Furthermore, most omissions and errors of Prof. Tuori go in favour of the Nazi supporters. Hence, at least some of these men emerge normalised as apolitical professors, "interested only in scholarly things";[112] at the same time they are relativised as the joint progenitors of the European ideology of shared legal tradition. As Europe was being razed to the ground and its population exterminated, they were – in parallel with the Jewish refugees in the Anglo-Saxon world – simply working in Germany on their "part of a whole" (p. 268).

As Europe was being razed to the ground, they were simply working on their "part of a whole".

Counterfactual Hi-Hitler!-narratives are expected to replace the memory of real events with exculpatory fantasies serving to whitewash the reputations of those who supported the regime which sparked WW II with its unprecedented mass crimes against humanity.[113] The survivors and their scions are happy to live neither in Franz Wieacker's New Europe, nor in the *Führerstaat* or Great German Empire of his friend Ernst Rudolf Huber.[114] They marvel that in the spring of 1945, anybody should have witnessed the demise of the Third Reich as "a drastic disappointment".[115] And they rather follow Koschaker, who – in the bowdlerized version of Prof. Tuori – embraced to his heart the whole European continent.

New York 2005, pp. 111–134; T. Giaro, *Memory Disorders…*, p. 20.

108 T. Giaro, *Memory Disorders…* p. 20.

109 B. Kletzin, *Europa aus Rasse und Raum*, 2nd ed., Münster 2002, pp. 95–99.

110 T. Giaro, *Vor-, Mit- und Nachdenker des Madagaskar-Plans…*, p. 145.

111 T. Giaro, *Vor-, Mit- und Nachdenker des Madagaskar-Plans…*, p. 134.

112 T. Giaro, *A Matter of Pure Conscience…*, p. 21.

113 G. Schenkel, *Alternate History, Alternate Memory…*, pp. 182–183.

114 E.R. Huber, *Verfassungsrecht des Großdeutschen Reiches*, Hamburg 1939.

115 T. Giaro, *A Matter of Pure Conscience…*, p. 25.

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