TOMMASO BEGGIO

Paul Koschaker (1879–1951)

Rediscovering the Roman Foundations of European Legal Tradition

2. Auflage

Universitätsverlag
WINTER
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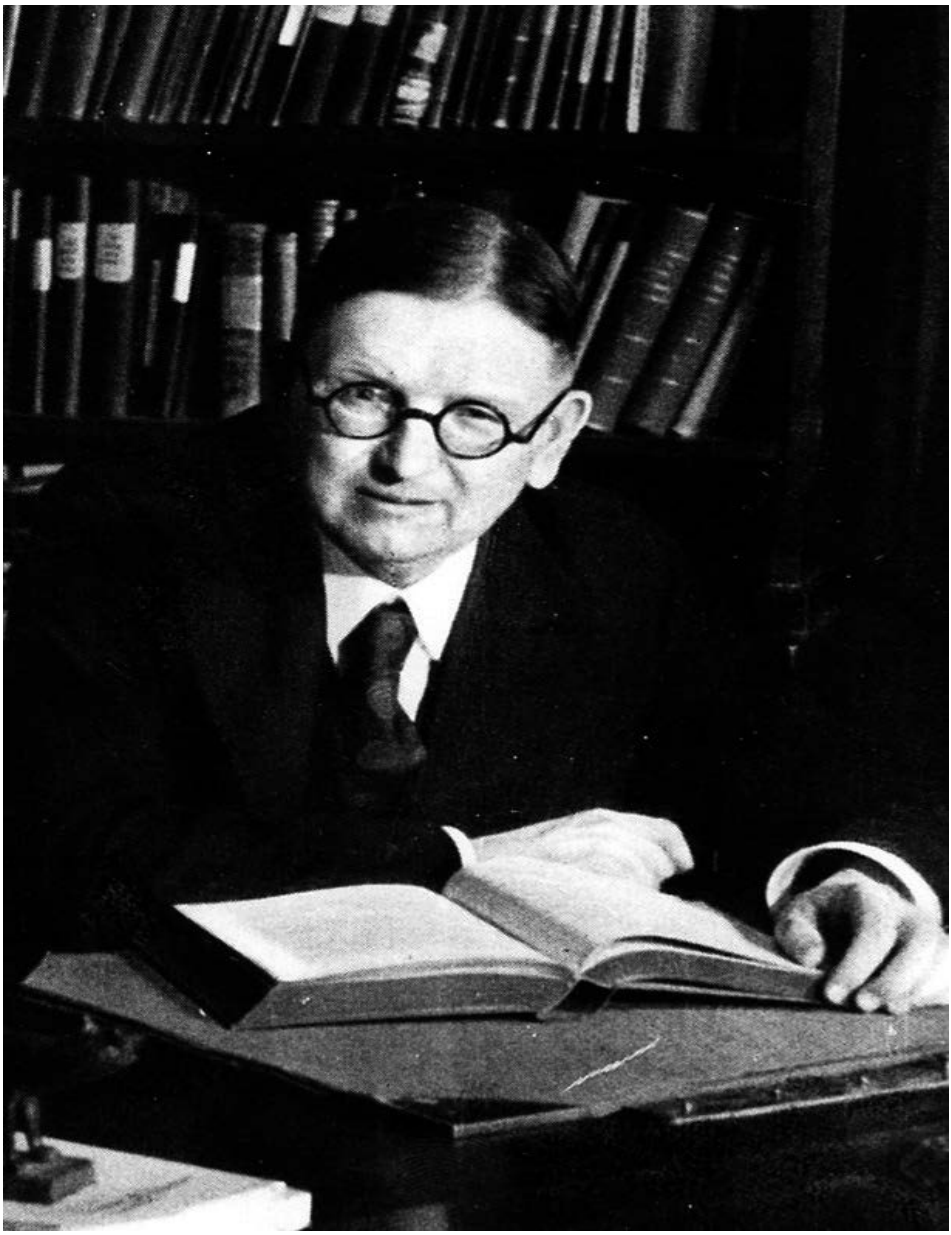
A mia madre Emanuela,
nel ricordo con amore

A mio padre Antonio,
alla sua amorevole presenza



Paul Koschaker (Klagenfurt, 1879 – Basel, 1951)
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„Nein, ich will's nicht gewünscht haben – und hab es doch wünschen müssen – und weiß auch, daß ich's gewünscht habe, es heute wünsche und es begrüßen werde: aus Haß auf die frevlerische Vernunftverachtung, die sündhafte Renitenz gegen die Wahrheit, den ordinär schwelgerischen Kult eines Hintertreppenmythus, die sträfliche Verwechslung des Heruntergekommenen mit dem, was es einmal war, den schmierenhaften Mißrauch und elenden Ausverkauf des Alt- und Echten, des Treulich-Traulichen, des Ur-Deutschen, woraus Laffen und Lügner uns einen sinnberaubenden Giftfusel bereitet."

Thomas Mann: *Doktor Faustus*

Table of Contents

Preface

This book has been conceived as part of a wider project, referred to as the "Reinventing the Foundations of European Legal Culture 1934-1964" – FoundLaw – project, funded by the European Research Council under the European Union's Seventh Framework Programme (FP7/2007–2013) / ERC grant agreement n°313100 and hosted at the University of Helsinki which has been my academic home from October 2013 until November 2017.

There are many people who have supported me along the way to achieving this work to whom I desire to express my gratitude.

First, I would like to thank Professor Kaius Tuori, Principal Investigator of the research project, who encouraged me over the four years of this research, who has supported me with remarkable patience, who has showed his friendly and open-minded character, giving me suggestions on my work, teaching me to explore new scientific perspectives, and guiding me throughout this period, while always giving me great academic freedom in how to go about my research. I am truly grateful to have been part of the wonderful group of people he has created around himself. To him, my sincere thanks.

During the four years of the project, I had the pleasure of getting to know and collaborating with my colleagues Doctors Heta Björklund, Magdalena Kmak, Ville Erkkilä and Jacob Giltaij. I have shared many significant moments with them working together and discussing our research field, and they have taught me to study my subject matter from diverse perspectives I was not familiar with before. I wish to thank them wholeheartedly for their scientific assistance and support, and, above all, for their friendship.

The work presented in this book began at the Faculty of Law of the University of Helsinki in the fall 2013, and continued from the fall 2014 until the end of 2017, at the Network for European Studies at the Faculty of Social Sciences of the same University. Thanks to Professor Pia Letto-Vanamo of the Faculty of Law and the Director of the Network for European Studies, Professor Juhana Aunesluoma, and all of its members for having welcomed me at the Network and given me the opportunity to work in a friendly setting.

Between June 2015 and July 2016 I had the fortune to spend one year researching at the *Institut für geschichtliche Rechtswissenschaft* of the *Ruprecht-Karls-Universität Heidelberg*. I wish to express my sincere gratitude to Professor Christian Baldus for his hospitality and generosity in sharing with me his ideas and suggestions, and for having involved me in several scientific enterprises that were fundamental to my growth as a Romanist. I would also like to extend this gratitude to all the collaborators and members and scholars of the Chair for Roman and Civil law of the University of Heidelberg.

My warmest thanks are also extended to Professor Massimo Miglietta of the University of Trento, *il mio Maestro*, who has always followed and guided me in my studies, offering his comments and assistance, since from the time I was a University student. He has also been equally important in teaching me how to study Roman law and in transmitting the passion for the fascinating world it represents, both through his words and example.

I would also like to express my sincere thanks to Professor Valerio Marotta of the University of Pavia, who was my tutor when I was a Ph.D. student, for his generosity in supporting my work, as well as for his suggestions and contribution in teaching me how to approach the study of Roman law in its multifaceted expressions.

There are two other important moments during my research that I should acknowledge, namely, my stays at the Faculty of Law at the University of Bergamo in May 2017 and at the *Institut für Römisches Recht* at the University of Cologne between June and July 2017, respectively. I would like to express my deepest thanks to Professors Antonio Banfi and Martin Avenarius for their kind hospitality and the opportunity they gave me to participate in edifying scientific discussion.

I am also greatly indebted to Professors Lorena Atzeri of the University of Milan, Pierangelo Buongiorno of the University of Münster, Cosima Möller of the *Freie Universität Berlin*, Marko Petrak of the University of Zagreb, Ditlev Tamm of the University of Copenhagen, Laurens Winkel of the University of Rotterdam and Doctor Aleksander Grebieniow of the University of Warsaw, for providing interesting suggestions and their enlightening reflection and insights into topics considered in this book.

Saara Uvanto of the University of Helsinki and Friederike Michael of the University of Cologne have significantly contributed to the transcriptions of the archival documents and their revision. I have also received an essential assistance in the editing process and the proofreading of the text by Dr. Heta Björklund, Dr. Mark Shackleton and Dr. Simon Towle. To all of them, a sincere thank you.

And finally, a special thanks to Doctors Filippo Bonin of the University of Cologne and Nicola Recla whose human support and scientific knowledge in those years were an incredibly precious asset for me.

Nor can I forget all the people who have, through their love, affection and patience, enabled me to achieve all of this: my father Antonio and my brothers Francesco and

Andrea, and my sister, Marta. It has at times been difficult to spend so much time away from them, but at the same time, this has allowed me to grow to understand of what their presence means to me. In many ways, they have helped me and have always been close to me, despite the physical distance. Without their support, I would not have been able to do what I have done.

Naturally, the responsibility for the views, opinions and errors in this book is entirely mine.

Verona, 15th February 2018

Tommaso Beggio

1 Introduction

1.1 A study on Paul Koschaker

Paul Koschaker (Klagenfurt, 1879 – Basel, 1951) is renowned as being one of the most influential legal historians and Romanists of the first half of the 20th century. Yet his extensive and eclectic fields of research included subjects such as the laws of antiquity, notably cuneiform law, and European legal history in addition to Roman law.[1] During his lifetime, Koschaker earned the reputation of being the "Founder of cuneiform law" and one of the most representative and pioneering figures advocating the Roman foundations of the European Legal Culture.[2]

This book will attempt to offer a novel interpretation of the works of Paul Koschaker, and the most relevant biographical and scientific aspects of his life, from his formative days as a student at the University of Graz until his death in 1951. Yet this work neither aims to be a simple biography about Koschaker, nor is it merely a work about his life during the Nazi regime. On the contrary, its purpose is to carry out a comprehensive investigation into the works of this great scholar within a wider historical, cultural and legal context based on Koschaker's legal and personal experiences. This broader perspective will examine events from the end of the 19th century up to the years immediately after the end of World War II, lending particular attention to the fate of Roman law and its study in Germany in the first half of the 20th century. Accordingly, this study will allow readers to understand the extent to which Koschaker's life and, above all, his legal stances were influenced by historical circumstances of that time, namely, the Nazi regime in Germany, as well as comprehend the emergent European narrative he depicted in his works at the end of the 1930s and during the 1940s.

One of the most important aspects of this investigation is that it has taken into consideration a very broad collection of archival sources, many of which are still unpublished, which enable us to gain a greater insight into events regarding Koschaker's

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1 For a complete overview on the bibliographical references on Paul Koschaker, see below, § 1.2.
2 See, respectively, below, chapter 2, § 1, and chapter 6, §§ 1 and 2.

life and the political and social conditions in which he lived and worked. Archival documents have been a major source of documentation for this work.[3]

Getting to know Koschaker means, first of all, coming to terms with a scholar who experienced and was a major contributor to the vast debate on Legal history and Roman law studies and the most significant changes that took place from the end of the 19th century onwards and, in particular, in Germany, after the enactment of the German Civil Code (BGB) in 1900.[4]

Koschaker grew up and studied in Austria, where the Pandectist approach heavily influenced the study and teaching of Roman law at the time.[5] This early experience forged his methods for studying Roman law and Legal history, in general. His ascent as a Roman law professor in Germany began in 1915, when he was appointed to the Chair for Civil and Roman law at the Faculty of Law of the University of Leipzig, one of the most prestigious German universities at the time. Just a few years later, the Nazi party would erupt and present its political programme, which made its outspoken attack on Roman law in its notorious Point 19.[6] In 1936, when the Nazi regime was already well established in Germany, Koschaker was appointed to the Chair for Roman law and Comparative Legal History (*Römisches Recht und vergleichende Rechtsgeschichte*) in Berlin, after his colleague and friend Ernst Rabel had been ousted, due to his Jewish origins, where he remained until 1941, when he eventually moved to the quieter Tübingen.[7]

The decision to study Koschaker is based on the fact that he was an emblematic character of German academia of his time: he was able to stay in the country during the Nazi regime, being neither a Jewish scholar nor a political opponent; as a Roman law

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3 On this point, see also below, 1.3.

4 For a first overview, see: Reinhard Zimmermann: *Heutiges Recht, Römisches Recht und heutiges Römisches Recht*, in: Reinhard Zimmermann/Rolf Knütel/Jens Peter Meincke: *Rechtsgeschichte und Privatrechtsdogmatik*, Heidelberg 1999, pp. 1-39. The questions will be dealt more in depth with in the following chapters: chapter 2, pp. 45 ff.; chapter 5, §§ 2 and 3.

5 See Zimmermann: *Heutiges Recht*, pp. 5 f. The question will be discussed below, chapter 2, § 3.

6 The text of Point 19 reads: "Wir fordern Ersatz für das der materialistischen Weltordnung dienende römische Recht durch ein deutsches Gemeinrecht." (We demand the substitution of German common law in place of Roman law which serves a materialistic world-order). On Point 19 of the programme of the Nazi party and on the causes of the crisis of Roman law, see below, chapter 5, §§ 2 and 9.

7 On Koschaker in Leipzig, see below, chapter 2, §§ 2, 3 and 5; on his life in Berlin, see chapter 3. On Ernst Rabel (1874-1955), whose methodological influence had been particularly relevant on Koschaker, see: Gerhard Kegel: *Ernst Rabel (1874-1955). Vorkämpfer des Weltkaufrechts*, in: Helmut Heinrichs/Harald Franzki/Klaus Schmalz/Michael Stolleis (eds.): *Deutsche Juristen jüdischer Herkunft*, München 1993, pp. 571-594; Zimmermann: *»In der Schule von Ludwig Mitteis«: Ernst Rabel rechtshistorische Ursprünge*, in: *RabelsZ* 65 (2001), pp. 1-38; Sybille Hofer: *Rabel, Ernst*, in: *NDB*. 21, Berlin 2003, pp. 64-65; David J. Gerber: *Sculpting the Agenda of Comparative Law: Ernst Rabel and the Facade of Language*, in: Annelise Riles (ed.): *Rethinking the Masters of Comparative Law*, Oxford and Portland 2001, pp. 190-208.

scholar he sought to defend his subject matter and its teaching in German universities. Moreover, he was neither a member nor a supporter of the regime and, nevertheless, he had an important academic career and was a highly esteemed professor in Germany throughout that period.

Koschaker's academic development in the field of Legal history and Roman law is also interesting in that he experienced the different periods and trends Roman law and Legal history research underwent in person and became a protagonist of many of the subsequent developments in the discipline. He was still a university student during the epoch of the late Pandect-science and its ensuing decline; he later witnessed the development of new methods in the study of Roman law, and, in particular, the increasing application and definitive establishment of the methodological approach known as interpolationism (*Interpolationenforschung*) and the emergence of the so-called *antike Rechtsgeschichte*.[8] At the same time, he can be considered as one of the pioneers of comparative legal history (*vergleichende Rechtsgeschichte*) research.

Interestingly, Koschaker played a prominent role in the debate between Romanists and Germanists, with the latter seeking to delegitimate the study of Roman law in Germany since before the enactment of the BGB as proponents of a true German law to substitute the private law system born from the works of the Pandectist.[9] From a methodological point of view, his scientific evolution appears as a steady transition towards the new emerging methods of Roman law research, and the methodology of comparative legal history in particular, yet he was firmly guided by a solid and consistent dogmatic perspective.

During his career, he would eventually be confronted by the exacerbation of the crisis of Roman law and its teaching during the thirties and the beginning of the forties, which he resisted by ardently defending the Roman law tradition. This ultimately made him one of the most important German Roman law scholars remaining in Germany during the crisis period. In fact, his name is indelibly stamped on that crisis through his work, *Die Krise des römischen Rechts und die romanistische Rechtswissenschaft*, published in 1938.[10]

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8 On the historical approach to Roman law study, the so-called *Historisierung*, also called *neuhumanistische Richtung* by Koschaker, see below, chapter 5, § 3.

9 The topic will be dealt more in-depth with below, pp. 81 f. and 180 ff. A first comprehensive overview can be found in Klaus Luig: *Römische und germanische Rechtsanschauung, individualistische und soziale Ordnung*, in: Joachim Rückert/Dietmar Willoweit (eds.): *Die deutsche Rechtsgeschichte in der NS-Zeit. Ihre Vorgeschichte und ihre Nachwirkungen*, Tübingen 1995, pp. 95-138. For a recent depiction of the Pandect-science (*Pandektistik* or *Pandektenwissenschaft*), see: Hans-Peter Haferkamp/Tilman Repgen: *Wie Pandektistik war die Pandektistik? Symposium aus Anlass des 80. Geburtstags von Klaus Luig am 11. September 2015*, Tübingen 2017.

10 Paul Koschaker: *Die Krise des römischen Rechts und die romanistische Rechtswissenschaft*, München und Berlin 1938. For an in-depth analysis of this work, see below, chapter 5, §§ 1-6.

Yet Koschaker should also be remembered for his eminent contribution to building a new European legal narrative after the end of the Second World War. Indeed, his work, *Europa und das römische Recht*[11] is considered to be equally – if not more – representative of Koschaker's thought and experience. This masterpiece was published in the aftermath of totalitarian devastation while Europe was still in ruins, and it ascribed to Roman law not only its historical and cultural role as having laid down the foundation stones for numerous European legal systems, but also underscored its importance in the rebuilding of Europe for the future. With the publication of this text, Koschaker offered a European message for the future generations. *Europa und das römische Recht* stimulated a huge debate among scholars about the meaning of Europe, its legal and cultural roots, its history, not to mention the role played by Roman law and its reception throughout European history. In a period when a new European narrative was emerging as a reaction to the tragedy of the totalitarian experience, Koschaker became one of the most important exponents of this discourse from a Legal history perspective. In this sense, he rediscovered the Roman foundations of the European legal culture, which had been undisputed until the rise of the totalitarian regime in Germany.

Koschaker's colleagues and friends published a two-volume tribute to him and his legacy in 1954,[12] which ensures that his name still remains strongly associated with the narrative on European legal history.

Yet a more complex set of issues underlie Koschaker's work and thoughts, which will be retraced and analysed in this book. In fact, Koschaker's opinions and stances were at the centre of and the key to interpreting several circumstances of this time, like, for example, the approach of the Nazi regime towards Roman law and its teaching in Germany, or further still, comparing Koschaker's stances with those of many other Romanists and Legal historians who lived in Germany, or were obliged to leave at that time. In this sense, this work attempts to go beyond a mere legal analysis of his thoughts and place Koschaker in the times in which he lived.

On the one hand, this inquiry seeks to compile the first comprehensive study on Koschaker by taking into account new and previously inedited documentary sources to fill the many gaps in current literature; on the other, it aspires to present a new method of historiographical research, which could be applied to further studies on past scholars.

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[11] Koschaker: *Europa und das römische Recht*, 1. Auflage, München und Berlin 1947. Further unrevised editions of the book followed in 1953, 1958 and 1966. The publisher of all the four editions was C.H. Beck (München and Berlin); the first one reports the Biederstein Verlag as publisher, but it was a deputy of Beck. On *Europa und das römische Recht*, see below, chapter 5, §§ 10-11.

[12] *L'Europa e il diritto romano. Studi in memoria di Paolo Koschaker*, II voll., Milano 1954.

1.2 A question of method

If our intention is to meet eye to eye with Koschaker on a deeper level and come to understand his motives for his behaviour, stances and opinions, then they can only be properly analysed and understood if they are studied within a broader ambit of his personal and scientific experience and the historical circumstances in which they occurred.

This research is not only a story of contexts, as was previously mentioned, rather it is also a study of contexts and sources themselves. The analysis and the use of the archival sources is the backbone for the reconstruction, which will attempt to be as impartial as possible, of events and opinions.

Collecting sources was the preliminary and most important pre-requisite for this study, the archival research for which took place in Germany, Austria and Italy.[13] I had also the opportunity to be given access to Riccobono's legacy, which is held in Palermo.[14]

The archival sources offered considerable new information about Paul Koschaker, as a significant part of the documents retrieved had not been previously studied or published. Many of them are handwritten, and had to be painstakingly transcribed,[15] before finally interpreting them.

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[13] I visited the following archives in person, which proved invaluable sources for documents used to carry out this research: the University archive in Heidelberg (hereinafter: UAH); the University archive in Tübingen (hereinafter: UAT); the archive and the library at the *Max-Planck-Institut für europäische Rechtsgeschichte* in Frankfurt am Main; the archive at the *Humboldt Universität zu Berlin* (hereinafter: UA-HU) and at the *Berlin-Brandenburgische Akademie der Wissenschaften* (hereinafter: ABBAW:PAW); the University archive in Graz (hereinafter: *Graz-Universitätsarchiv*). The *Institut für Rechtsgeschichte* at the University of Münster and its library were also consulted (I would like to warmly thank Professor Sebastain Lohsse and my friend Professor Pierangelo Buongiorno who kindly granted me access to Koschaker's personal books, still preserved in Münster). I would like to add a further archive to this list, which I contacted but I did not have the opportunity to visit, namely the *Bundesarchiv Berlin*. Documents from the University archive in Munich, Leipzig and Bonn and from the *Landesarchiv Nordrhein-Westfalen* in Duisburg and the *Staatsarchiv* in Vienna were consulted too. These archives were visited by my colleagues at the University of Helsinki who were also members of the research project "Reinventing the Foundations of European Legal Culture 1934-1964": Professor Kaius Tuori (Principal Investigator of the project), Doctor Ville Erkkilä and Doctor Jacob Giltaij.

[14] I would like to warmly thank Riccobono's heirs and Professor Mario Varvaro who kindly gave me the opportunity to have access to Koschaker's letters to Riccobono. On Salvatore Riccobono (1864-1958), one of the most eminent Italian Roman law scholars, whose scientific influence on Koschaker revealed itself at times to be decisive, see: Varvaro: *Riccobono, Salvatore sr.*, in: Italo Birocchi/Ennio Cortese/Antonello Mattone/Marco Nicola Miletti (eds.): *Dizionario biografico dei giuristi italiani (sec. XII-XX)*, II, Bologna 2013, pp. 1685-1688.

[15] On the transcriptions of the documents, see above the Preface. The diacritical marks used in the transcriptions are the following ones: the bar | has been used for the page change, whereas the brackets [ ] have been used to indicate missing letters or words, or also miswritten words or

Given that the aim of this book is to offer a comprehensive overview on Paul Koschaker and his work, it seemed appropriate to allow the sources narrate his personal and scientific experience, as far as possible. The dialogical form is one of the distinctive characters of the archival sources, which mostly represent the author's private opinions, such as in the case of the letters; others, however, are considered to be of public significance,[16] such as letters or memoranda sent by Koschaker to the Ministry of Science, Education and Popular Education (*Reichsminister für Wissenschaft, Erziehung und Volksbildung*).[17]

Generally speaking, the importance attributed to archival documents depends on whether they were intended for the public domain or private sphere.[18] Yet such sources often convey ideas and opinions about their author more truthfully than those contained in works for publication, precisely because the process of "selection of thoughts" is at times lacking, given that they were neither intended for publication nor for public scrutiny. The archival sources thus shed light both on personal events of Koschaker's life, as well as the emergence and development of his scientific discourse and stances.

A careful examination of the sources therefore enables us to draw the line between his scientific approach and personal opinions. A scant or partly accomplished analysis of the archival sources would on the contrary undermine the process of evaluation and lead to conjecture based on the author's personal convictions rather than a proper historiographical reconstruction of events.[19]

This approach to archival sources gives rise to further considerations. First, it is necessary to collect as many documentary sources as possible, which can prove quite difficult, above all if such a person did not leave any *Nachlass* (estate), as was the case with Koschaker. It was therefore necessary to reconstruct his life and career in order to discover, as far as possible, the connections that he had with other scholars and important people at the time. For these reasons, there may be areas of weakness in the collection of sources given the difficulties in discovering the links between Koschaker and certain scholars, or due to the limited accessibility to some sources, or again, the actual time limits available for carrying out the research.

Consummate caution should be taken before making final judgments about Koschaker in relation to certain circumstances, and this *caveat* has been followed throughout this

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parts of words. On the contrary, I have used the brackets with three dots […] to state that the document contains a part of text that has not been transcribed.

16 See on this aspect regarding the archival sources Aldo Mazzacane: *Alle origini della comparazione giuridica: i carteggi di Carl Joseph Anton Mittermaier*, in: *La comparazione giuridica tra Ottocento e Novecento. In memoria di Mario Rotondi*, Milano 2001, pp. 15-38, and pp. 18 f., in particular; Varvaro: *La storia del 'Vocabularium iurisprudentiae Romanae' 1. Il progetto del vocabolario e la nascita dell'interpolazionismo*, in: *Quaderni Lupiensi di Storia e Diritto* 7 (2017), pp. 251-336 and p. 259, fn. 30, for further literature.

17 See below, chapter 5, § 8.

18 Mazzacane: *Alle origini*, p. 19; Varvaro: *La storia del 'Vocabularium iurisprudentiae Romanae'*, p. 259.

19 Ibid.

research. In other words, this study has refrained from creating any narrative about Koschaker's life and thoughts unless it can be substantiated by hard facts.[20]

Specific criteria were adopted during the analysis of archival sources in order to be able to evaluate their reliability; in this respect, the documents written by third persons were distinguished from those written by Koschaker himself. Other important elements in evaluating the authenticity and weight given to the sources are the addressees themselves, the time they were written – whether they were from the period of the regime or not - as well as the context in which they were written. For instance, a letter sent to a revered colleague is more likely to reveal Koschaker's true opinions as opposed to a document sent to an official of the regime. However, this criterion alone is not sufficient to distinguish between the varying degrees of reliability of the documents; in fact, it should also be remembered that, often, scholars might have been close to members and even supporters of the regime itself.

Nonetheless, the documents written by Koschaker to ministries or members of the regime, are particularly important in their own right, albeit difficult to interpret at times, given the unenviable task of discerning that Koschaker really meant what he wrote, having considered the role of the addressee in the regime.

Moreover, the diverse styles, tones and registers adopted by Koschaker in his texts need to be analysed as further indicators discerning the true intent guarded by the archival sources. It is also very important to consider the time a document itself was written: in this respect, the degree of reliability changes with documents written after the end of the Second World War as opposed to those dating back to the time of the totalitarian regime; in fact, the texts written after the end of the War usually offered a retrospective reconstruction influenced by the conditions existing at that time or by the intent to describe past situations in a particular or personal manner. However, the handful of letters sent by Koschaker to his pupil Kisch, at the end of the Second World War and in the following years, do offer a true reflection on the feelings of their author.[21] In this case too, the addressee of these documents needed to be reviewed carefully. Kisch was one of Koschaker's pupils, who - as a Jew - had fled with part of his family to the USA to escape

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[20] The question is connected to the problem of "using due caution" in weighing the sources in historiographical research, in order to represent the past as ethically as possible. See, e.g., Ludmilla Jordanova: *History in Practice*[2], London 2006, pp. 87-104 and Jorma Kalela: *Making History. The Historian and Uses of the Past*, London 2012, pp. 24-49.

[21] Guido Kisch: *Paul Koschaker. Gelehrter, Mensch und Freund. Briefe aus den Jahren 1940 bis 1951*, Basel und Stuttgart, 1970. On Guido Kisch (1889-1985), see its autobiography: Guido Kisch: *Der Lebensweg eines Rechtshistorikers. Erinnerungen*, Sigmaringen 1975; see also: Heiner Lück: *Der Rechtshistoriker Guido Kisch (1889-1985) und sein Beitrag zur Sachsenspiegelforschung*, in Walter Pauly (ed.): *Hallesche Rechtsgelehrte jüdischer Herkunft*, Köln 1996, pp. 53-66; Wilhelm Güde: *Leben und Werk des Rechtshistorikers Guido Kisch (1889–1985)*, in: *Basler Juristische Mitteilungen* 1 (2010), pp. 1–24, and the entry *Kisch, Guido*, in: *Lexicon deutsch-jüdischer Autoren*, 14, München 2006, pp. 54-73.

the Nazi regime. These circumstances may have influenced the way Koschaker addressed his interlocutor as well as the content.

Not many documents were addressed to Koschaker by officials of the regime, yet those at our disposal are highly significant, since they offer the opportunity to discover or infer the opinions the regime had of him.

The archival documents are thus the main and most important sources in reconstructing and depicting the complex picture of Koschaker's behaviour and ideas within his lifetime. Of course, and with hindsight, they have to be construed in the light of cultural, political and historical facts and events of that time, as well as the sources studied by exegesis.[22] For this reason, every document presented and discussed in this work is supplied with an explanation and a comment, with the intent of leaving it up to the reader to develop further analysis and different opinions on it. Unless the documents at our disposal produce certain conclusions, it has been considered preferable to avoid any kind of unequivocal statements about facts or events. However, this approach should not be mistaken for an excessive reliance on *ars ignorandi*: interpretation and analysis of the sources are offered to the reader, every attempt has been made not to indulge in posthumous evaluations that are easily swayed by personal ideas to the detriment of the documents at our disposal. Such evaluations are typically made about scholars who are relatively close to us in time but who lived under very different circumstances, enduring great hardship, in particular, as is the case with recent European history. Often, what appeared most plausible seemed to be the best criterion to adopt in arriving at an opinion about certain events.

A limit that emerges from most studies on Koschaker relates to the fact that they focus only on some aspects of his life and his legal writing: ultimately, this does not allow for a clear understanding of the facts under evaluation. In particular, they tend to focus on his major publications at the time of the Nazi regime, neglecting the links with his previous works and the connections between his scientific stances and the pre-existing legal history tradition in Germany.

In this sense, the meticulous study of archival documents has at times corroborated the opinions of the majority of scholars, and often allowed for a deeper understanding of the facts. Accordingly, questions already raised in the available literature on Koschaker

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[22] The hermeneutic question is too vast and too far beyond the aim of this study to be properly dealt with in this work. An overview can be found in some recent works, like, e.g.: Georg G. Iggers/Q. Edward Wang/Supriya Mukherjee (eds.): *A Global history of Modern Historiography*, Harlow 2009. The problem of the position of the scholar towards the historical events to analyse has been recently discussed in: Dominick LaCapra: *Writing History, Writing Trauma*, Baltimore 2001, pp. 1-42; Hayden White: *Writing in the Middle Voice*, in: Hayden White (ed.): *The Fiction of Narrative: Essays on History, Literature and Theory, 1957-2007*, Baltimore 2010; John H. Zammito: *Post-Positivist Realism: Regrounding Representation*, in: Nancy Partner/Sarah Foote (eds.): *The Sage Handbook of Historical Theory*, Los Angeles 2013; Marek Tamm: *Introduction*, in: Marek Tamm (ed.): *Afterlife of Events. Perspectives on Mnemohistory*, London 2015, pp. 1-23.

have found new answers, and this research has paved the way for alternative interpretations to matters previously considered closed.

A meaningful example of this is offered by Koschaker's scientific stances, in relation to which a few well-established opinions have been developed through the historiographic studies on him. In Koschaker's works, it is apparent that his dogmatic approach, his interpolationist approach and his historical-juridical comparative method often overlap to such an extent that his methodological issues and definitions at times appear to be rather vague or not entirely consistent, especially with reference to Roman law.

Similar considerations can be made about his scientific opinions on the historical approach to the study of Roman law, when compared to his ideas about research in the field of laws of antiquity and, in particular, cuneiform law. It is plausible to affirm, therefore, that during his scholarly life Koshaker indeed had two different souls: the soul of the Roman law scholar, interested in ancient Roman law, and its reception in Europe, and the soul of the scholar who focused on laws of Ancient Near East.[23] Yet this clear-cut distinction fails to acknowledge the complexity of Koschaker's eclectic personality which deserves to be analysed in-depth. Understandably, his methodological stances developed over decades of time, and therefore his scientific approach cannot be properly understood without a comprehensive analysis of his academic and methodological experiences.

An exhaustive analysis of Koschaker's works is useful in shedding light on his concrete ideas and their development over the years; what is more, if this analysis is placed in the historical and cultural context in which he lived, it enables us to understand if, and to what extent, the external circumstances influenced his scientific production.

While archival documents are the most important sources for this research, they are not the only ones; Koschaker's works and publications about him represent two further sources. In this respect, Koschaker's texts should be evaluated according to two different criteria, namely, when they were written and published (before, during or after the end of the Second World War), and their typology, separating them into autobiographical and scientific works.

There is one particularly relevant source pertaining to the first group: Koschaker's autobiography, published in 1951.[24] It provides important information regarding many events of his life and, for example, Ludwig Mitteis' scientific influence on Koschaker during his stay in Leipzig.[25] When evaluating its content, however, it should be

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[23] This idea has been particularly supported by Manfred Müller: *Paul Koschaker (1879-1951). Zum 100. Geburtstag des Begründers der Keilschriftrechtsgeschichte*, in: *Altorientalische Forschungen* 9 (1982), pp. 271-284.

[24] Koschaker: *Selbstdarstellung*, in: Nikolaus Grass (ed.): *Österreichische Geschichtswissenschaft der Gegenwart in Selbstdarstellungen*, II, Innsbruck 1951, pp. 105-125.

[25] On Ludwig Mitteis (1859-1921), see Leopold Wenger: *Ludwig Mitteis und sein Werk*, Wien/Leipzig 1923; Walter Selb: *Mitteis Ludwig*, in: *Österreichisches Biographisches Lexicon*

remembered that Koschaker's autobiography was written after the end of the Second World War, in particular with regard to descriptions of the facts that took place during the Nazi regime; fortunately, some of the affirmations made in Koschaker's autobiography can be verified against the content of archival documents.

Research into his scientific works, on the contrary, took all his publications into consideration, and included those regarding the laws of antiquity and Roman law. This invites readers to consider a second important methodological question regarding this research: namely, the context in which Koschaker lived and worked.[26] Any statement, publication or event can assume a different sense or can be used to support a certain interpretation of the facts, when extrapolated from its original context. Koschaker's scientific works should therefore be analysed from two different perspectives: his personal background and scientific *milieu*, on the one hand, and the circumstances of the different periods of his life and, in particular, at the time of the Nazi regime, on the other.

The first perspective offers us the opportunity to understand Koschaker's education and ideas and how deeply the cultural and scholarly environment influenced him; the second allows us to understand if, and to what extent, the presence of the regime influenced his opinions and behaviour.

Just to take an example, Koschaker's methodological approach to the study of Roman law in *Die Krise des römischen Rechts*, published in 1938, was criticised for focusing predominantly on the links between Roman law and current law; this idea was interpreted by some scholars as offering legal basis for the expansionist aims of the Nazi regime. Yet, a comprehensive investigation on Koschaker's scientific experience and publications clearly displays the coherence of his dogmatic approach over the decades, whether before, during or after the end of the Second World War and would therefore negate that he offered his flank to the regime.

It is only by investigating how Koschaker's approach to Roman law study developed over time that we can understand if it was somehow influenced by the Nazi ideology, political or opportunistic considerations or not. On the contrary, by restricting the focus of our attention to single events and periods of time, we simply run the risk of not making unbiased judgments on Koschaker, whether as a scholar or person.

1815-1950, VI, Wien 1975, pp. 323-324; Selb: *Mitteis, Ludwig*, in: *NDB* 17, Berlin 1994, pp. 576-577.

[26] See, on this question: Quentin Skinner: *Meaning and Understanding in the History of Ideas*, in: *History & Theory* 8, 1 (1969), pp. 3-53; Skinner's extreme contextualism has been further developed and questioned in Mark Bevir: *Mind and Method in the History of Ideas*, in: *History & Theory* 36, 2 (1997), pp. 167-189; Peter E. Gordon: *Contextualism and Criticism in the History of Ideas*, in: Darrin M. McMahon/Samuel Moyn (eds.): *Rethinking Modern European Intellectual History*, Oxford 2014.

1.3 State of the studies on Paul Koschaker

Publications regarding Paul Koschaker are quite numerous, but in general they are also quite fragmentary. With a few exceptions, encyclopaedic entries and similar small works offer a brief overview on his life and scientific experiences;[27] one of the most complete reconstructions can be found in his autobiography.[28]

Beyond these works, the publication of the correspondence between Koschaker and his pupil Kisch deserves special mention.[29] Kisch was a legal historian of Jewish origins who escaped to the USA in 1935, where he found a post at the Jewish Institute of Religion in New York. He met Koschaker for the first time when they both were in Prague, where Kisch was born, studied and obtained his Doctorate at the Law Faculty, and where Koschaker was appointed to the Chair of Roman law in 1908.

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[27] Leopold Wenger: *Paulo Koschaker Sexagenario*, in: *Festschrift Paul Koschaker zum 60. Geburtstag*, III, Weimar 1939, pp. 1-23; Artur Steinwenter: *Paul Koschaker zum 70. Geburtstag*, in: *Anzeiger für die Altertumswissenschaft* 2 (1949), p. 68; Max Kaser: *Grazer Lehrer des römischen Rechts seit der Jahrhundertwende*, in: Wilhelm Danhofer (ed.): *400 Jahre Akademisches Gymnasium in Graz 1573-1973*, Graz 1973, pp. 122-125; Gunter Wesener: *Römisches Recht und Naturrecht*, in: Hermann Wiesflecker (ed.): *Geschichte der Rechtswissenschaftlichen Fakultät der Universität Graz* 9, Teil 1, Graz 1978, pp. 112-115; Gerhard Ries: *Paul Koschaker*, in: *NDB* 12, Berlin 1980, pp. 608-609; Müller: *Paul Koschaker (1879-1951)*, pp. 271-284; Gerhard Oberkofler: *Studien zur Geschichte der österreichischen Rechtswissenschaft*, Frankfurt a.M. 1984, pp. 315-318; Zimmermann: *Heutiges Recht*, pp. 21 and 37 ff.; Wesener: *Paul Koschaker*, in: Rafael Domingo (ed.): *Juristas universales*, III, *Juristas del siglo XIX. Da Savigny a Kelsen*, Madrid 2004, pp. 971-974; Michael P. Streck/Gero Dolezalek: *Paul Koschaker: Zum 125. Geburtstag am 19. April 2004*, in: *Jubiläen 2004. Personen-Ereignisse*, Leipzig 2004, pp. 31-34; Johannes Renger: *Altorientalistik*, in Jürgen Elvert/Jürgen Nielsen-Sikora (eds.): *Kutlurwissenschaften und Nationalsozialismus*, Stuttgart 2008, pp. 469-502; Wesener: *Paul Koschaker (1879-1951), Begründer der altorientalischen Rechtsgeschichte und juristischen Keilschriftforschung*, in Karl Acham (ed.): *Rechts-, Sozial- und Wirtschaftswissenschaftlichen aus Graz*, Wien/Köln/Weimar 2011, pp. 273-285; Georg Neumann: *Paul Koschaker in Tübingen (1941-1946)*, in: *ZABR* 18 (2012), pp. 23-36; Hans Neumann: *Koschaker, Paul*, in: Peter Kuhlmann/Helmuth Schneider (eds.): *Geschichte der Altertumswissenschaften. Biographisches Werklexikon. Der Neue Pauly Supplemente* 6, Stuttgart 2012, pp. 666-668; Gerhard Kleinheyer/Jan Schröder (eds.): *Deutsche und Europäische Juristen aus neun Jahrhunderten*[6], Tübingen 2017, p. 530. Particularly relevant are also some obituaries: Martin David: *In memoriam Paul Koschaker*, in: *TRG* 19 (1951), pp. 501-503; Pietro De Francisci: *Paul Koschaker (1879-1951)*, in: *SDHI* 17 (1951), pp. 384-388; Karl-Heinz Below/Adam Falkenstein: *Paul Koschaker* †, in: *ZSS* (RA) 68 (1951), pp. IX-XIX; Fritz Pringsheim: *Paul Koschaker* †, in: *Gnomon* 23, 6 (1951), pp. 358-360; Mariano San Nicolò: *Paul Koschaker* †, in: *Jahrbuch der Bayerischen Akademie der Wissenschaften* 1952, pp. 163-165; San Nicolò: *Paul Koschaker* †, in: *Almanach der Österreichischen Akademie der Wissenschaften*, Wien 1953, pp. 361-367; Wenger: *In memoriam Paul Koschaker*, in: *IVRA* 3 (1952), pp. 491-497; Below: *Paul Koschaker (1879-1951). In Memoriam*, in: *ZDMG* 104 (1954), pp. 1-44.

[28] Koschaker: *Selbstdarstellung*, pp. 105-125.

[29] Kisch: *Paul Koschaker. Gelehrter, Mensch und Freund*. The exchange of letters counts a total of 27 documents that they sent each other from 1st January 1940 up to Koschaker's death.

The letters contained in the epistolary represent a very important and, at the same time, characteristic source. They offer us a privileged insight into some aspects regarding Koschaker's life and private thoughts. Facts regarding his academic experience or events that took place in Europe and in Germany at the time are discussed too, but in a context that allowed Koschaker greater freedom in expressing his opinions and ideas. Nevertheless, some of the letters were sent after the end of World War II, and run the risk of reconstructing past events in retrospect, which could lead to their reinterpretation, even involuntarily, in the light of the changed times and conditions.

In any case, this correspondence between a scholar and his pupil, who became close friends over the years, allows us to see Koschaker in a different light: the traits of his personality clearly emerge and it is thus possible to discover the person beyond the scholar, his feelings, his qualities and flaws. Rather than attempting to be biographical, this epistolary elucidates some very interesting aspects of Koschaker's personal life and beliefs that are important to gaining a clearer understanding of his works and convictions.[30]

When reading the publications on Koschaker, it becomes immediately apparent that most works dealing with him tend to concentrate on single aspects or periods of his life; on the contrary, Giaro also painted a broader picture of Koschaker without writing a biographical work strictly speaking, as his book focused principally on challenging some of Koschaker's scientific and ideological stances.[31]

Typically, the years Koschaker spent in Berlin attracted great attention among the scholars for obvious reasons.[32] In Berlin he was appointed to the Chair for Roman Law and Comparative Legal History, which had previously been occupied by Rabel until 1935. He was thus given the opportunity to hold the so-called Savigny's Chair (*Lehrstuhl*

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30 See above, § 1.2, for a description of the different types of sources used for this research.

31 Tomasz Giaro: *Aktualisierung Europas. Gespräche mit Paul Koschaker*, Genova 2000. Of the same author, see also: Giaro: *Paul Koschaker sotto il Nazismo: un fiancheggiatore 'malgré soi'*, in: *Iuris Vincula. Studi in onore di Mario Talamanca*, IV, Napoli 2001, pp. 159-188; Giaro: *Der Troubadour des Abendlandes. Paul Koschakers geistige Radiographie*, in: Horst Schröder/Dieter Simon (eds.): *Rechtsgeschichtswissenschaft in Deutschland 1945 bis 1952*, Frankfurt am Main 2001, pp. 31-76; Giaro: *"Comparemus!" Romanistica come fattore d'unificazione dei diritti europei*, in: *Rivista critica del diritto privato* XIX, 4 (2001), pp. 539-568. Giaro's stances on Koschaker will be further analysed in the next chapters. On his work *Aktualisierung Europas* see the following reviews by: Antonio Guarino: *Sine ira et studio*, in: *Trucioli di bottega*, 8, Napoli 2002, pp. 10-17; Fritz Sturm: *Besprechung von T. Giaro, Aktualisierung Europas. Gespräche mit Paul Koschaker. Name, Genua, 2000*, in: *ZSS* (RA) 120 (2003), pp. 352-362.

32 See Below/Falkenstein: *Paul Koschaker* †, p. X; Below: *Paul Koschaker*, pp. 2 ff.; Müller: *Paul Koschaker (1879-1951)*, pp. 279 ff.; Giaro: *Aktualisierung Europas*, pp. 38 ff.; Renger: *Altorientalistik*, pp. 480 and 495 f. For reasons connected to the subject of her book, a few pages to Koschaker's years in Berlin are devoted also in Anna-Maria Gräfin von Lösch: *Der nackte Geist. Die juristische Fakultät der Berliner Universität im Umbruch von 1933*, Tübingen 1999, pp. 264 and 390-394.

Savignys)[33] and become a member of the Prussian Academy of Science (*Preußische Akademie der Wissenschaften*) and member of the Academy for German law (*Akademie für Deutsches Recht*). The latter was established by the Nazi regime and, when Koschaker arrived in Berlin, Hans Frank, Commissioner of the Reich for the Standardisation of Justice (*Reichskommissar für die Gleichschaltung der Justiz*) was its director.[34] Koschaker was also in touch with members of the regime in those years and he was invited by Frank himself to hold a lecture at the *Akademie für Deutsches Recht* in December 1937.

That period of Koschaker's life was considered as a turning point in his career.[35] Scholars who had first analysed the events that took place in Berlin tended to idealise Koschaker. His behaviour was described at times as heroic, as he had singlehandedly taken on the question of the crisis of Roman law in his lecture at the academy before an auditorium of members and supporters of the Nazi regime. Koschaker was repeatedly defined as a committed antifascist who decided to face the regime on the matter of Roman law before a Nazi institution. He was associated as a symbol of opposition to the Nazi regime; many of the events that happened in Berlin, for instance, the troubles that beset the Institute for Ancient Near Eastern Legal history (*Seminar für Rechtsgeschichte des Alten Orients*), or Koschaker's decision to leave the city and move to the quieter Tübingen, were interpreted as a sign of the regime's desire to remove one of its opponents.

This *communis opinio* was particularly popular and has remained such for decades, but it actually runs the risk of corroborating an idealised and apologetic narrative on Koschaker whilst failing to question his alleged heroic behaviour. As such, the true significance and value of his works was - and still is at times - confused with the value judgements attached to his conduct during the Nazi regime.

Counter reactions to this popular narrative on Koschaker are more recent.[36] Again, Koschaker's behaviour and works have been investigated, but from a different perspective

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33 See Below/Falkenstein: *Paul Koschaker* †, p. X; Giaro: *Aktualisierung Europas*, pp. 38 ff. and further below, chapter 3.

34 The events described in these pages regarding Koschaker's time in Berlin will be in-depth analysed below, see chapter 3. On Hans Frank (1900-1946), see Christoph Kleßmann: *Der Generalgouverneur Hans Frank*, in: *VfZG* 19 (1971), pp. 245-260; Dietmar Willoweit: *Deutsche Rechtsgeschichte und „nationalsozialistische Weltanschauung"* in: Michael Stolleis/Dieter Simon (eds.): *Rechtsgeschichte im Nationalsozialismus*, Tübingen 1989, pp. 25-42; Christian Schudnagies: *Hans Frank. Aufstieg und Fall des NS-Juristen und Generalgoverneurs*, Rechtshistorische Reihe 67, Frankfurt a.M. 1989, pp. 21-28; Lothar Gruchmann: *Justiz im Dritten Reich 1933-1940: Anpassung und Unterwerfung in der Ära Gürtner*[3], München 2001, pp. 86-92, 434-448, 632-652 and *passim*. On the *Akademie für Deutsches Recht*, see below, pp. 83 ff.

35 This kind of question has been in part already discussed in Tommaso Beggio: *Paul Koschaker and the Path to "Europa und das römische Recht"*, in: *ELR* 6 (2017), pp. 291-326.

36 See Giaro's works quoted above, fn. 31. Giaro's approach has been followed also by Alessandro Somma: *I giuristi e l'Asse culturale Roma-Berlino: Economia e politica nel diritto fascista e nazionalsocialista*, Frankfurt a.M. 2005; Somma: *L'uso del diritto romano e della romanistica*

that attempted to challenge the idealised portrait of the scholar. These attempts mainly determined, on the contrary, that Koschaker was (possibly) an involuntary supporter of the Nazi regime, and having formulated such an opinion, interpreted all events of his life as further evidence of this new scholarly perspective. *De facto*, it was necessary to re-examine such an eminent 20th century Roman law scholar from a new perspective, thus going beyond his idealised image, to gain a better understanding of the events concerning his life and their importance. Several decades had passed from those events and the facts could now be analysed with more emotional distance.

However, once again, only single aspects of his life or scientific stances were taken into consideration to substantiate the foregone conclusion that he was ideologically close to the regime, and by doing so, challenge his entire scholarly works and the ideas underpinning them.[37]

Both the above-mentioned stances towards Koschaker are well established and tend to offer black and white judgments on him; however, they are based on a smattering of standardised views based on partial research into the sources at our disposal which have ultimately led not only to a fragmentary reconstruction of the events of Koschaker's life, but also to a partial interpretation of his scientific opinions.

Moreover, less attention has been devoted by scholars to other periods of Koschaker's life, for example, the time he spent in Leipzig, which has attracted attention mainly in relation to his studies on cuneiform law.[38] The same can be said about Tübingen, from 1941 to 1946, which has only recently begun to attract some scholarly interest.[39]

In general, while great importance has been attached to the political role played by Koschaker during the time of the Nazi regime, or to the political events of his life and career, too often they have led to personalised and dogmatic opinions of Koschaker that have prevailed over the facts and, above all, the content of the sources.

On the contrary, from a methodological point of view, great attention has been usually paid to his dogmatic approach to the study of Roman law and at times Koschaker has even been described as the creator of a "second Pandect-science".[40] Very recently his method has been studied also by Winkler who compared Koschaker's stances mainly with Franz Wieacker's, and then also with the methods adopted by other Roman law scholars

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tra Fascismo e Antifascismo, in: Massimo Miglietta/Gianni Santucci (eds.): *Diritto romano e regimi totalitari nel '900 europeo*, *Atti seminario internazionale di diritto romano (Trento, 20-21 ottobre 2006)*, Trento 2009, pp. 101-125.

37 The attack against Koschaker's scientific stances aimed also to question the very idea of a European legal tradition based on Roman law and its reception. This question will be discussed in chapter 6, §§ 1 and 2, and chapter 7.

38 See, e.g., Müller: *Paul Koschaker (1879-1951)*, pp. 271-284; Renger: *Altorientalistik*, pp. 469-502; Wesener: *Paul Koschaker (1879-1951)*, pp. 273-285.

39 See Giaro: *Aktualisierung Europas*, pp. 65 ff. and, above all, Neumann: *Paul Koschaker in Tübingen*, pp. 23-36.

40 Giaro: *"Comparemus!"*, pp. 541 and 544 f.; Somma: *L'uso del diritto romano*, p. 113.

during the thirties and forties of the 20th century.[41] Winkler's research is particularly interesting, because it does not isolate Koschaker and his studies from the rest of the Roman law debate, rather it places him in the context of his time. Of course, the investigation is circumscribed and its purview relates only to certain aspects of Koschaker's methodology and is selective of his works, as the monograph is devoted mainly to the study on another highly important Roman law scholar of the 20th century, namely, Wieacker.[42] Yet again, this has inevitably led to a partial vision of Koschaker's scientific views and tended to emphasise his dogmatic approach; in this respect, Winkler partly agreed with Giaro and Somma's point of view.

The definition of Koschaker's approach as a sort of "second pandectist" pinpoints an aspect of his methodology, but it does not grasp the complexity of his stances, as will emerge from this inquiry on his publications. As the links with the methods of the pandectists have been often underlined, scholars have tended to pay less attention to his comparative approach, albeit with some exceptions,[43] or to the application of the tools of interpolationism in the works he published during the first three decades of the 20th century.[44]

This brief overview of the state of the studies on Paul Koschaker has clearly shown the need for a new comprehensive research on him, based on the sources now at our disposal.

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41 Viktor Winkler: *Der Kampf gegen die Rechtswissenschaft. Franz Wieackers „Privatrechtsgeschichte der Neuzeit" und die deutsche Rechtswissenschaft des 20. Jahrhunderts*, Hamburg 2014, pp. 135-256.

42 On Franz Wieacker (1908-1994), see: Okko Behrends: *Franz Wieacker 5.8.1908 – 17.2.1994*, in: *ZSS* (RA) 112 (1995), pp. XIII-XLII; Okko Behrends/Eva Schumann (eds.): *Franz Wieacker. Historiker des modernen Privatrechts*, Göttingen 2010; Joseph Georg Wolf: *Franz Wieacker (5. August 1908 – 17. Februar 1994)*, in: Stefan Grundmann (ed.): *Deutschsprachige Zivilrechtslehrer des 20. Jahrhunderts in Berichten ihrer Schüler. Eine Ideengeschichte in Einzeldarstellungen*, 1, Berlin 2007, pp. 73-86; Winckler: *Der Kampf*, and the recently defended doctoral thesis by Ville Erkkilä: *The Conceptual Change of Conscience: Franz Wieacker and German Legal Historiography 1933-1968*.

43 Müller: *Paul Koschaker (1879-1951)*, pp. 271-284; Zimmermann: *Heutiges Recht*, pp. 21 and 37 ff.; Guido Pfeifer: *Keilschriftrechte und historische Rechtsvergleichung – methodengeschichtliche Bemerkungen am Beispiel der Eviktionsgarantie in Bürgschatsform*, in: Adrian Schmidt-Recla/Eva Schumann/Frank Theisen (eds.): *Sachsen im Spiegel des Rechts, Ius Commune Propriumque*, Köln/Weimar/Wien 2001, pp. 11-37; Zimmermann: *Europa und das römische Recht*, in: *Archiv für die civilistische Praxis* 2 (2002), pp. 243-316 and *praecipue*, pp. 245 ff.; Lorena Atzeri: *La 'storia del diritto antico' e una lettera inedita di Paul Koschaker*, in: *IAH* 2 (2010), pp. 191-222.

44 For an overview on Koschaker's approach to the interpolationism, see Beggio: *La 'Interpolationenforschung' agli occhi di Paul Koschaker: la critica a Gradenwitz e alla cosiddetta 'neuhumanistische Richtung' e lo sguardo rivolto all'esempio di Salvatore Riccobono*, in: Martin Avenarius/Christian Baldus/Francesca Lamberti/Mario Varvaro (eds.): *Gradenwitz, Riccobono und die Entwicklung der Interpolationenkritik*, Tübingen 2018, pp. 121-155.

1.4 Research questions and outline of the book

This book aims to try to offer an answer, or at least lay down the basis for further discussion on a number of questions relating not exclusively to the events of Koschaker's life.

First of all, this research offers a comprehensive biographical reconstruction of Koschaker's work and academic experience, mainly based on the recently discovered archival sources, the first question being, therefore, whether it is possible or not to shed new light (or cast shadows) on events and periods of his life that have not previously been explored in-depth.

The second research question relates to Koschaker's main methodological postulates and how they developed over the years. The answer to such issues can only be found, as has already been mentioned, through a comprehensive analysis of Koschaker's scientific stances and works. During this study, additional questions will undoubtedly unfold, such as to whether or not a *trait-d'union* existed between Koschaker as a Romanist and as a Legal historian in the field of the laws of antiquity. And further still, what role was played by comparative Legal history in his methodological postulates and works?

It should be also remembered that Koschaker lived a significant part of his life, above all from an academic perspective, under the Nazi regime. Naturally, this raises the question of how and to what extent Koschaker's personal behaviour and scientific approach were affected by the emergence of the regime.

The third research question dealt with by this work relates to Koschaker's European narrative and the methodological postulates closely connected to it. It is important to understand them thoroughly so that we can ask, if and to what extent they contribute to contemporary European legal discourse and its future orientation.

These research questions are clearly intertwined and for this reason they will not be dealt with separately in the following chapters.

Questions regarding Koschaker's biography and methodological stances are among the preliminary research questions to be covered within the ambit of this research. For these reasons, the structure of this book has been organised according to a chronological criterion, with the aim of first setting out a biographical and academic setting. Within this framework, Koschaker's early scientific stances can be analysed at the beginning of his career (in chapter 2). Both his formative years at the University of Graz as a student, and later as a young scholar at various Austrian and German universities, as well as his main research interests at that time, namely, the laws of antiquity and, above all, cuneiform law, will be thus investigated. Specific attention will be paid to the long period he spent in Leipzig as a professor from 1915 to 1936. These years, which are considered as the happiest of his life by Koschaker himself,[45] were particularly meaningful from a scientific

[45] Koschaker: *Selbstdarstellung*, p. 115.

point of view. Koschaker was part of the so-called 'school of Ludwig Mitteis' and, at the same time, he was one of the pioneers of the new methodological trend known as comparative legal history (*vergleichende Rechtsgeschichte*).[46]

Essential biographical elements, the importance of which is also determined by Koschaker's scientific experience, emerge from the years he spent in Berlin, from 1936 to 1941 (chapter 3). Here, archival sources have been a highly precious aid in the reconstruction of many of the events surrounding his appointment to the Chair for Roman Law and Comparative Legal History at the University of the capital city, the establishment of an Institute for Ancient Near Eastern Legal history, and, above all, his decision to leave Berlin, a subject that deserves further attention thanks to the discovery of previously inedited documents preserved at the archives of the *Humboldt-Universität zu Berlin*.

The critical situation that Roman law teaching would actually encounter at the University of Berlin at that time will be carefully taken into consideration in this chapter, given that it is a decisive element in evaluating Koschaker's time spent in the capital.

Thanks to the results of this new analysis of the archival sources, it will be possible to gain a clearer understanding of Koschaker's reasons for moving to the smaller and quieter University of Tübingen, which will be analysed in chapter 4.[47]

Unpublished documents preserved at the University archive of Tübingen and a few recent studies[48] have enabled us to compose a new comprehensive overview of this period of Koschaker's life. Koschaker was a highly esteemed scholar at the time, as the documents for his appointment to Tübingen suggest; nevertheless, and despite the positive debut for his career at this University, Koschaker quickly began to encounter difficulties there, as had happened in Berlin. Some of them concerned Roman law teaching. For these reasons, questions connected with the teaching problems in German universities, as well as with Koschaker's approach to Roman law research and teaching, will be investigated in this chapter.

The final part of the chapter will deal with Koschaker's experience after the end of the Second World War: his appointment as the new Dean of the Law Faculty in Tübingen and his subsequent and partly unexpected *Emeritierung*; the difficulties of life in occupied Germany; Koschaker's disillusionment with the treatment he received in Tübingen at the time, and finally his experience as a visiting professor at other German universities and in Ankara.

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46 For an initial overview, see Ernst Rabel: *In der Schule von Ludwig Mitteis*, in: *The Journal of Juristic Papyrology* 7/8 (1954), pp. 157–161; Zimmermann: *»In der Schule von Ludwig Mitteis«: Ernst Rabel rechtshistorische Ursprünge*, pp. 1-38. Further bibliography on the 'school of Ludwig Mitteis' and on Rabel, Partsch and Wenger below: pp. 44 ff.

47 This chapter will deal with the period from Koschaker's appointment to Tübingen in 1941 until his death in 1951.

48 See, in particular, Neumann: *Paul Koschaker in Tübingen*, pp. 23-36.

The four above-mentioned chapters therefore provide the biographical basis with which to investigate Koschaker's scientific development; in this sense, they are a sort of necessary premise that eventually lay bare the analysis of his two main publications in the field of Roman law, *Die Krise des römischen Rechts und die romanistische Rechtswissenschaft* and *Europa und das römische Recht*. Their content, the methodological issues contained therein and the meaning of such works will be discussed in-depth in chapter 5.

The analysis of *Die Krise* will take into consideration the main scientific aspects of this work and the reactions of scholars to it both in Germany and beyond. It will examine the situation of Roman law and scholarly debate at that time, with specific regard to the approach of Italian scholars to these matters. Point 19 of the programme of the Nazi party, as well as Koschaker's opinion about the role it played in relation to the crisis of Roman law will be the subject of a separate paragraph.

This section of the book will also offer the opportunity for an in-depth study of the scientific premises of Koschaker's criticism of the so-called *Historisierung*, the historical approach to the study of Roman law, and consider his proposal to counter the crisis of Roman law, through the *Aktualisierung* of its teaching and an up-to-date *mos italicus*. This will allow us to assemble an unprecedented and almost comprehensive picture of Koschaker's methodological stances, which will be concluded by a study on *Europa und das römische Recht*; the latter will mainly focus on the novel elements of this work in comparison to *Die Krise,* as well as the development of Koschaker's conception on Roman law.

As has been already been mentioned, Koschaker was central to rediscovering and proposing a narrative on the European legal tradition and culture from the end of the thirties onwards: this narrative, together with what could be defined as Koschaker's scientific legacy, will be the subject of chapter 6.

Koschaker's contribution to the debate on Roman law methodology and comparative legal history, as well as - what has been described by Roman law scholars - his scientific limits, will be discussed in this part of the book.

The final chapter (chapter 7) will be devoted to some final remarks on Koschaker's conduct and scientific experience under the Nazi regime, as well as the controversies and dichotomies created by scholars about him over time; finally, consideration will be given to the significance and weight still carried by his ideas and works in contemporary Romanist methodological discourse.

2 From Graz to Leipzig (1897-1936)

2.1 The first steps of the "founder of cuneiform law"

Paul Koschaker was born in Klagenfurt in 1879, to an Austrian family of civil servants;[1] as he wrote in his autobiography, he considered himself to be the product of the "Germanization" of millions of Slavs by the superior German culture of the time.[2] According to Kunkel, Koschaker was part of that group of eminent jurists who were born under the Danube Monarchy (*Donaumonarchie*), which they perceived as their mother country, but at the same time, having been called to work in German universities while still young, they identified with Germany as their spiritual homeland (*geistige Heimat*) and they greatly contributed, with their research and studies, to the development of German jurisprudence.[3]

This feeling probably influenced Koschaker deeply throughout his whole life; in particular, the idea of German cultural supremacy – as a legacy of the Holy Roman Empire – over other European countries, except perhaps Italy, seems to distinguish his two most famous works on Roman law, *Die Krise des römischen Rechts und die romanistische Rechtswissenschaft* and *Europa und das römische Recht*.[4] However, this idea actually coloured almost all of his works, as we will see over the course of this analysis on Koschaker, as his thoughts were influenced by the concept of a superior rational order, and as a result his juridical depiction of Roman Law and of European Legal history were also repeatedly influenced by this same concept.

Even though Koschaker was one of the most prominent legal historians during the first half of the twentieth century, he began his university life studying mathematics at

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1 For a bibliography on Paul Koschaker, see above, § 1.2. His father was Theodor Koschaker, a civil servant who married Clementina Kamprath.

2 Koschaker: *Selbstdarstellung*, p. 105.

3 Wolfgang Kunkel: *Paul Koschaker und die europäische Bedeutung des römischen Rechts*, in: *L'Europa e il Diritto romano. Studi in memoria di Paolo Koschaker*, I, Milano 1954, pp. V-XII, and p. VII in particular. On Wolfgang Kunkel (1902-1981), see Dieter Nörr: *Wolfgang Kunkel 20.11.1902-8.5.1981*, in Dieter Nörr/Dieter Simon (eds.): *Gedächtnisschrift für Wolfgang Kunkel*, Frankfurt a.M. 1984, pp. 9-24 and Fritz Sturm: *Wolfgang Kunkel zum Gedächtnis*, in: *BIDR* 25/26 (1984), pp. 17-35.

4 Koschaker: *Die Krise*; Id.: *Europa und das römische Recht*.

the University of Graz in 1897, but after just one year he decided to change his branch of studies completely and switch to the faculty of Law.[5] The crucial meeting with Gustav Hanausek,[6] who at the time held the Chair of Roman law, instilled Paul Koschaker with a deep fascination for the subject.[7] Hanausek encouraged his pupil in his research on this topic and, at the end of Koschaker's studies at the university, helped him to get a study grant from the Austrian Ministry of Education (*Unterrichtsministerium*), so that his pupil could proceed in the study of Roman law.[8] Hanausek suggested that Koschaker went to Leipzig, where the best Law faculty within the German-speaking countries was at the time, according to Koschaker's words.[9] In any case, it is certain that during this period two very important and prominent professors held the Chair of Roman law and the Chair for Civil Law (*Zivilrecht*) in Leipzig, namely Ludwig Mitteis[10] and Emil Strohal respectively.[11]

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5 Koschaker: *Selbstdarstellung*, p. 107. Koschaker wrote in his autobiography, that he decided to change faculty according to a "Bedürfnis nach konkreter Anschaulichkeit".

6 Hanausek (1855-1927) was professor of Roman law in Graz since 1893; he was a Pandectist and he had a very dogmatic approach both to Roman law and to private law. Among his pupils, were Leopold Wenger (1874-1953), Mariano San Nicolò (1887-1955), Artur Steinwenter (1888-1959) and Julius Georg Lautner (1896-1972), in addition to Paul Koschaker. On Hanausek see the entry *Hanausek, Gustav*, in: *Österreichisches Biographisches Lexicon 1815-1950*, II, Wien 1959, pp. 173-174; Wesener: *Gustav Hanausek (1855-1927) und seine Schüler. Das Hanausek-Seminar*, in: Peter Mach/Matej Pekarik/Vojtěch Vladár (eds.): *Constans et Perpetua Voluntas. Pocta Petrovi Blahovi k 75. Narodeninám*, Trnava 2014, pp. 693-722. Beside Hanausek, there was another older professor of Roman law in Graz at the time, August Heinrich Tewes (1831-1913). On Tewes, see Wesener: *Römisches Recht*, p. 112; Id.: *Tewes (Heinrich) August von*, in: *Österreichisches Biographisches Lexikon 1815-1950*, XIV, Wien 2015, p. 274. On Wenger, see: Wesener: *Römisches Recht*, pp. 79-85; Gerhard Thür: *Leopold Wenger: Ein Leben für die Antike Rechtsgeschichte*, in Thür (ed.): *Gedächtnis des 50. Todesjahres Leopold Wengers (= Sitzungsberichte der Österr. Akademie der Wissenschaften*, phil.-hist. Kl., 741.), Wien 2006, pp. 1-4; Evelyn Höbenreich: *Der „Königsgedanke"*, in Thür: *Gedächtnis des 50. Todesjahres Leopold Wengers*, pp. 17-32 (= Ead., in *BIDR* 42-43 [103-104], 2000-2001, pp. 213-222). On San Nicolò, see: Wesener: *Römisches Recht*, pp. 116-119; Ries: *San Nicolò, Mariano*, in: *NDB* 22, Berlin 2005, pp. 430-431; Pfeifer: *San Nicolò, Mariano*, in: *Reallexikon der Assyriologie und Vorderasiatischen Archäologie [RlA]* 12, 1./2., Berlin/New York 2009, pp. 24-25; on Steinwenter: Kaser: *In memoriam Artur Steinwenter*, in: *ZSS* (RA) 76 (1959), pp. 670-677; Wesener: *Römisches Recht*, pp. 89-97; Id.: *Steinwenter, Artur*, in: *NDB* 25, Berlin 2013, pp. 233-235; on Lautner: Kaser: *Julius Georg Lautner* †, in: *ZSS* (RA) 89 (1972), pp. 518-520 and Wesener: *Römisches Recht*, pp. 102-104.

7 Koschaker attended classes on Roman law given both by Hanausek and Tewes, who by that time was already quite advanced in years. It is interesting to note that during the 1901 *Sommersemester* Koschaker also attended the course *Ergebnisse der Papyrusforschung* held by his future friend and colleague Leopold Wenger. See Wesener: *Römisches Recht*, p. 112.

8 Müller: *Paul Koschaker (1879-1951)*, p. 272. Koschaker obtained his Ph.D. on 25th June 1903, as corroborated by a document preserved at the archive in Graz: *Graz-Universitätsarchiv, Jur ex* 1904/1905.2 (1 p.): Grundbuchsblatt regarding Koschaker´s data, presumably filled in by himself.

9 Koschaker: *Selbstdarstellung*, p. 109.

10 On Mitteis, see above, p. 23, fn. 25.

11 On Emil Strohal (1844-1914), see Oberkofler: *Studien zur Geschichte*, pp. 336 ff. and 348 ff.; Wesener: *Österreichisches Privatrecht an der Universität Graz*, in Alois Kernbauer/Gunter

Both of them immediately influenced the young Koschaker (he was twenty-three at the time), who was deeply impressed by the course of exegesis of the Digest (*Pandektenexegese*) by Mitteis, as well as by the methodology adopted by Strohal, to whom Koschaker had always been grateful and from whom he had learnt to study law applying a dogmatic approach (*Rechtsdogmatik*).[12] It should be emphasised, however, that his first confrontation with Mitteis was not an endearing encounter for Koschaker, to such an extent that after having spent three months on the research Mitteis gave him, he decided to leave and go back to Graz. This happened in 1902. The topic that Koschaker was supposed to study, according to Mitteis, related to the so-called *leges Iuliae iudiciorum privatorum et publicorum*, but Koschaker was not at ease with such a theme,[13] which was too historical, in his opinion.[14] The choice of the topic for the *Habilitationsschrift*, that Koschaker had to write if he wished to obtain a professorship, was therefore quite hard, and it needed Hanausek to convince Koschaker to return to Leipzig, suggesting a new research

Wesener (eds.): *Geschichte der Rechtswissenschaftlichen Fakultät der Universität Graz* 9, Teil 4, Graz 2002, pp. 32-42; Wesener: *Emil Strohal (1844-1914). Über die Pandektistik zum neuen bürgerlichen Recht*, in: Martin Josef Schermaier (ed.), *Iurisprudentia universalis. Festschrift für T. Mayer-Maly zum 70. Geburtstag*, Köln/Wien/Weimar 2002, pp. 853-864; Martin Avenarius: *Strohal, Emil*, in *NDB* 25, Berlin 2013, pp. 570-571.

12 Müller: *Paul Koschaker (1879-1951)*, p. 272.

13 Koschaker, *Selbstdarstellung*, p. 109. Koschaker underlined how uncomfortable he felt with the first topic given to him by Mitteis as well as the fact that he was not a wonder boy (*Wunderkind*), like his friend Josef Partsch. He stressed that he was not able to deal with any kind of topic with equal success. The subject chosen by Mitteis for Koschaker, in any case, was quite popular at the time, given the resonance that it had obtained again after the publication of Moriz Wlassak's famous *Römische Processgesetze*, I and II, Leipzig 1888-1891, a work still deeply discussed by scholarship today. For a brief bibliographical overview, see Beggio: *'Per legem Aebutiam et duas Iulias sublatae sunt istae legis actiones': alcune considerazioni sull'evoluzione dei 'iudicia legitima' a partire dalla 'lex Aebutia'*, in: Luigi Garofalo (ed.): *Il giudice privato nel processo civile romano. Omaggio ad Alberto Burdese*, III, Padova 2015, pp. 83-140. It is an oddity that a number of Romanists who were born in and had studied and worked in the Austro-Hungarian Empire, like Mitteis, Wlassak and the younger Wenger and Koschaker, showed a special interest in topics relating to ancient Roman trials. This suggests a scientific community with tight links and a commonality of interests. On Wlassak (1854-1939), see Wenger: *Moriz Wlassak* †, in: *ZSS* (RA) 60 (1940), pp. IX-XLV; Wesener: *Moriz Wlassak (1882-1884)*, in Id.: *Römisches Recht*, pp. 60-66. On Josef Aloys August Partsch (1882-1925), see: Otto Lenel: *Josef Partsch* †, in: *ZSS* (RA) 45 (1925), pp. VII-XII; Rudolf Meyer-Pritzl: *Der Rechtshistoriker und Pionier der modernen Rechtsvergleichung Josef Partsch*, in: *ZEuP* 7, 1 (1999), pp. 47–74; Id.: *Partsch, Josef Aloys August (1882-1925)*, in *NDB* 20, Berlin 2001, pp. 78-79; Baldus: *Josef Partsch*, in: Rafael Domingo (ed.): *Juristas Universales. Vol. IV. Juristas del siglo XX. De Kelsen a Rawls*, Madrid/Barcelona 2004, pp. 76-80.

14 See Kunkel: *Paul Koschaker und die europäische Bedeutung des römischen Rechts*, pp.VI-VII: "[…] und dass er die ihm von Mitteis gestellte Aufgabe einer Untersuchung der augusteischen Prozessgesetze fallen liess, weil sie ihm 'zu stark historisch' war, dass er statt dessen aus eigenem Entschluss eine prozessgeschichtliche Arbeit mit ausgesprochen dogmatischer Fragestellung – das Buch über die *translatio iudicii* – schrieb. Er war – und blieb immer – in einem sehr entschiedenen Sinne Jurist."

project on a different topic to Mitteis, which the latter agreed to; hence, Koschaker was able to spend the academic year 1903/1904 there.

The new subject proposed by Koschaker was related to the topic of ancient Roman law civil procedure, exactly like the one previously suggested by Mitteis, but with a narrower scope, making it more technical and less historical. Koschaker's new research would now focus on questions regarding the *translatio iudicii*.[15]

After his second and more positive experience in Leipzig, working also as an assistant to Strohal who had a Chair in Civil law (*Zivilrecht*), Koschaker went back to Graz to finish the book that allowed him to get his *Habilitation* in 1905.[16] The result of Koschaker's effort was the publication of *Translatio iudicii. Eine Studie zum römischen Zivilprozeß*.[17] While writing it he was able to count on the help and comments of both Mitteis and Wenger.[18] The precise analysis developed by Koschaker in his book showed immediately his deeply dogmatic tendency in dealing with Roman law topics and, despite the success already achieved by the methodology of interpolationism,[19] there were no signs of textual criticism in the work.

The judgment written in February 1905 by Hanausek on his pupil's work – the *Habilitationsgutachten* – was more than favourable, since he referred to Koschaker as one of the best experts in the field of Roman law civil procedure (*Zivilprozess*).[20] Another

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15 For an overview of this subject matter, see: Max Kaser/Karl Hackl: *Das römische Zivilprozessrecht*, München 1996, pp. 11, 29 and 51; Antonio Guarino: *Diritto privato romano*[12], Napoli 2001, pp. 219 f.

16 Koschaker's *Habilitation* was confirmed on 7th April 1905. See the document of the Minister for Culture and Education (*Ministerium für Kultur und Unterricht*, *Graz-Universitätsarchiv, Jur. ex 1904/1905.16*).

17 Koschaker: *Translatio iudicii. Eine Studie zum römischen Zivilprozess*, Graz 1905.

18 Ibid., *Vorwort*.

19 On which see below, pp. 43 ff.

20 See Hanausek's evaluation of Koschaker's work for his habilitation (*Habilitationsgutachten*), pages 20-21: "Die eindringende Kenntnis der Quellen und der gesamten einschlägigen Literatur überrascht ebenso wie die Sicherheit, mit welcher Koschaker mit den subtilen Begriffen des römischen Zivilprozesses operiert und die Reife und Besonnenheit seiner Polemik und Beweisführung. Ich meine nicht zu viel zu sagen, wenn ich Koschaker trotz seiner Jugend schon jetzt für einen der besten Kenner des römischen Zivilprozesses halte […]." Hanausek's *Gutachten* contains a very detailed 28-page-long judgment on Koschaker's work. The document is preserved at the archive at the University of Graz: *Graz-Universitätsarchiv, Jur. ex 1904/1905.12 K 703*. See also Oberkofler: *Die Vertreter des römischen Rechts mit deutscher Unterrichtssprache an der Karls-Universität in Prag: vom Vormärz bis 1945*, Frankfurt a.M. 1991, p. 49.

very positive judgment on Koschaker's work came from Wlassak,[21] with whom Koschaker began a long-lasting friendship.[22]

Koschaker remained in Graz and held classes as a qualified university lecturer (*habilitierter Privatdozent*) until 1908, when he was appointed associate professor (*außerordentlicher Professor*) in Roman law at the University of Innsbruck.[23] An explanation for his call to Innsbruck lay partly in the publication of *Translatio iudicii*, but this was not the only reason. Koschaker had already begun to show a deep interest in the study of papyri and research into cuneiform law (*Keilschriftrecht* or, in plural, *Keilschriftrechte*) when he was in Graz. There he was influenced by the German translation of the Code of Hammurabi by Hugo Winckler in 1904[24] and by the presence at the university of the Semitic language scholar, Nikolaus Rhodokanakis (1876-1945).[25] Rhodokanakis himself taught Koschaker the Assyrian language.[26]

The term *Keilschriftrecht(e)* was actually coined some years later by Koschaker himself, who used it for the very first time, in the English translation ("Cuneiform law"), for an encyclopedic entry,[27] but he had actually already adopted the adjective *keilschriftrechtlich* before then and had offered an in-depth definition on the topic of this kind of research in a previous article.[28] This text was the written version of a speech he had given at the international congress of legal historians – *Internationales Historikerkongress* – in Oslo in 1928. On this occasion, Koschaker decided to change the name of the topic of his studies from Babylonian-Assyrian legal history (*babylonisch-assyrische Rechtsgeschichte*) to legal history in the field of cuneiform law sources (*Rechtsgeschichte im Bereiche der*

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21 Wlassak was one of the most important and influential Roman law scholars in the field of Roman legal trial (both in Roman private and criminal law). See now on this point Beggio: *A Obra Centenária. Moriz Wlassak, Anklage und Streitbefestigung im Kriminalrecht der Römer, Wien, 1917*, in: *Interpretatio Prudentium* II, 2 (2017), pp. 17-38.

22 Koschaker: *Selbstdarstellung*, p. 110. It is remarkable that in 1939, as a member of the Prussian Academy of Science (*Preußische Akademie der Wissenschaften*), Koschaker was the promoter of the motion to appoint Salvatore Riccobono and Moriz Wlassak (who died before the motion had been voted on) as "correspondent members" (*Korrespondierendes Mitglied*) of the same Academy. See below, p. 80.

23 Oberkofler: *Die Vertreter des römischen Rechts*, pp. 48-49.

24 Hugo Winckler: *Die Gesetze Hammurabis in Umschrift und Übersetzung*, Leipzig 1904. On Winkler (1863-1913), see Renger: *Die Geschichte der Altorientalistik und der vorderasiatischen Archäologie in Berlin von 1875 bis 1945*, in: Willmuth Arenhövel/Christa Schreiber (eds.): *Berlin und die Antike. Aufsätze*, Berlin 1979, pp. 151–192.

25 See Oberkofler: *Die Vertreter des römischen Rechts*, p. 49. On Rhodokanakis (1876-1945), see Fritz Freiherr Lochner von Hüttenbach: *Rhodokanakis, Nikolaus (1876-1945)*, in: *Österreichisches Biographisches Lexicon 1815-1950*, IX, Wien 1985, pp. 113-114.

26 Koschaker: *Selbstdarstellung*, p. 113.

27 Koschaker: *"Cuneiform law"*, in: *Encyclopaedia of the Social Sciences* 9, New York 1933, pp. 211-219.

28 Koschaker: *Forschungen und Ergebnisse in den keilschriftlichen Rechtsquellen*, in *ZSS* (RA) 40 (1929), pp. 188-201 and 198 in particular.

keilschriftlichen Rechtsquellen).[29] In 1933 and again 1935 he returned to the topic and decided to use the term *Keilschriftrecht* in the title of two further articles: *Fratriarchat, Hausgemeinschaft und Mutterrecht in Keilschriftrechten* and *Keilschriftrecht*.[30]
During the years spent in Graz, Koschaker published two important in-depth articles on Roman Egypt in the *Savigny-Zeitschrift*,[31] which were the result of his recent research on papyri. These two publications were quite impressive, not only for their quality, but also because they followed – at the time – a very important field of research on papyri, showing once more Koschaker's eclectic nature as a scholar. His call to Innsbruck was therefore well-founded, as it is extensively documented in the *Majestätsvortrag*, in which the need to have a follower of new research trends – the *Papyrusforschung* and the *Rechtsgeschichte im Gebiete der Antike* – was acknowledged as necessary also in Innsbruck, after other scholars – representative of the new trends – had been called to the University of Vienna and Graz.[32]

Yet it is curious to note that between 1907 and 1908, the Law Faculty of the University of Graz – at the suggestion of Hanausek and Wenger – put forward Koschaker's name as associate professor, although he did not get the chair. Later in July 1908, his name was suggested *ex aequo loco* together with those of Rabel (who was in Basel) and Pfaff (who was in Prague) by Wenger for the full professorship in Roman law.[33] On that occasion the Law Faculty decided to appoint Pfaff, paving the way for Koschaker's call to Innsbruck, which finally took place in August 1908.[34] Despite the need to secure a chair for Koschaker in Innsbruck, just less than a year later after having been appointed to the position at this university on 9th August 1908 – but the appointment did not become effective until 1st October 1908 – he was offered a position at the University of Prague,

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29 See also Müller: *Paul Koschaker (1879-1951)*, p. 274 and fn. 14; Renger: *Altorientalistik*, p. 479; Pfeifer: *Keilschriftrechte und historische Rechtsvergleichung*, p. 11; Mario Varvaro: *La 'antike Rechtsgeschichte', la 'Interpolationenforschung' e una lettera inedita di Koschaker a Riccobono*, in: *AUPA* 54 (2010-2011), pp. 303-315.

30 Koschaker: *Fratriarchat, Hausgemeinschaft und Mutterrecht in Keilschriftrechten*, in: *Zeitschrift für Assyriologie und Verwandte Gebiete* 7, 41 (1933), pp. 1-89 and Id.: *Keilschriftrecht*, in: *ZDMG* 89 (1935), pp. 1-39. One may compare, e.g., the title of a work by Koschaker of 1921 to understand the change in the use of the terminology: Koschaker: *Quellenkritische Untersuchungen zu den "altassyrischen Gesetzen". Mitteilungen der Vorderasiatisch-Aegyptischen Gesellschaft (E.V.)*, Leipzig 1921.

31 Koschaker: *Der Archidikastes. Beiträge zur Geschichte des Urkunden- und Archivwesens im römischen Ägypten*, in: *ZSS* (RA) 28 (1907), pp. 254-305; Id.: *Der Archidikastes. Beiträge zur Geschichte des Urkunden- und Archivwesens im römischen Ägypten*, in: *ZSS* (RA) 29 (1908), pp. 1-47.

32 Oberkofler: *Die Vertreter des römischen Rechts*, p. 49. In 1908 Ivo Pfaff was actually appointed as full Professor in Roman law in Graz: Wesener: *Römisches Recht*, p. 113. On Pfaff (1864-1925), see: Wesener: *Pfaff, Ivo*, in: *Österreichisches Biographisches Lexicon 1815-1950*, VIII, Wien 1983, pp. 23-24; Elisabeth Berger: *Pfaff, Ivo*, in: *NDB* 20, Berlin 2001, pp. 295-296.

33 On Rabel, see above, chapter 1, fn. 7.

34 Wesener: *Römisches Recht*, p. 113.

obtaining the full professorship in Roman law, together with Mayr, on 4th April 1909.[35] The Law Faculty at the University of Innsbruck attempted to oppose his call to Prague, sustaining that Koschaker's name would soon be suggested for the full professorship in Roman law.[36] However, the decision to have Koschaker in Prague had been already taken by the ministry and he moved there.

Koschaker held the chair at the Faculty of Law in Prague, which had been occupied by Pfaff until September 1908, having himself taken the place of Ludwig Mitteis in 1895.[37] It is curious to note that in 1909, Koschaker took over from Pfaff, who moved to Graz in 1908 (where he obtained the full professorship), the very university at which Koschaker had completed his *Habilitation*.[38]

Three names were put forward to find a replacement for Pfaff: Rabel, Partsch and Koschaker. There was a specific reason for the Faculty of Law choosing one of these three scholars. At the time when Mitteis was professor of Roman law there, he began an intensive and successful study of papyrology. It was a new trend, of which Mitteis was one of the main exponents.[39] Pfaff had continued in the footsteps of his predecessor, and it was therefore necessary to find an appropriate successor. Koschaker had already published two works based on the study of papyri in 1907 and 1908, regarding the *Archidikastes* in Roman Egypt.[40]

It is likewise certain that his interest in this subject matter and cuneiform law and the so-called *Rechte der Antike* increased considerably when he was in Prague.[41] In fact, it was just after his arrival in Prague that Koschaker, influenced by the studies and the book

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35 Oberkofler: *Die Vertreter des römischen Rechts*, p. 48. See also Id.: *Studien zur Geschichte*, pp. 310-315.

36 Oberkofler: *Die Vertreter des römischen Rechts*, p. 49. Oberkofler quotes the words written in the decree of the Law Faculty.

37 Oberkofler: *Die Vertreter des römischen Rechts*, pp. 46 f.

38 Koschaker was eventually preferred to Rabel. As mentioned above (fn. 13), it seems that there was a close-knit circle of Austrian Romanists that distinguished itself in scientific interests. They usually worked within quite a restricted number of universities, unless they were appointed for a professorship at a major German university.

39 Mitteis was a pioneer in the field of juridical papyrology to such an extent that Koschaker considered him the "father" of this branch of studies: Koschaker: *Selbstdarstellung*, pp. 111. Koschaker failed to mention another name that should be cited among the founders of the juridical papyrology, namely Otto Gradenwitz. The reason could lie in the fact that Koschaker did not particularly admire Gradenwitz and his scientific works, as can be seen in Koschaker: *Otto Gradenwitz* †, in: *ZSS* (RA) 56 (1936), pp. IX-XII. On Gradenwitz (1860-1935), see his autobiography in Hans Planitz (ed.): *Die Rechtswissenschaft der Gegenwart in Selbstdarstellung* 3, Leipzig 1929, pp. 41-88; Kaser: *Gradenwitz, Otto*, in: *NDB.* 6, Berlin 1964, pp. 702-703; Klaus-Peter Schroeder: *„Eine Universität für Juristen und von Juristen". Die Heidelberger Juristische Fakultät im 19. und 20. Jahrhundert* [Heidelberger Rechtswissenschaftliche Abhandlungen 1], Tübingen 2010, pp. 315-322.

40 See above, fn. 31.

41 Oberkofler: *Die Vertreter des römischen Rechts*, pp. 49 f.

on the *Griechisches Bürgscaftsrecht* recently published by his friend Partsch,[42] began the research that would lead to the publication of one of his masterpieces, *Babylonisch-assyrisches Bürgschaftsrecht*.[43] His intensive work in this field of study quickly contributed to building his reputation, and not only within the German-speaking academic milieu. Koschaker was considered one of the best comparative law scholars (*Rechtsvergleicher*) of his time, as well as the founder of cuneiform law studies. The memories regarding the years in Prague are, therefore, positively depicted by Koschaker himself in his autobiography:

> Prag war eine geistige regsame Stadt, wie auch die Čechen geistig und wirtschaftlich die Elite der slawischen Nationen Österreichs waren. Was die kleine deutsche Minderheit betraf, so ergab sich dasselbe schon daraus, daß sie zum großen Teil aus Juden bestand, deren Familien, schon seit langem in Prag ansässig, weitgehend assimiliert und hoch kultiviert waren, so daß die Juden als Träger des Deutschtums in Prag galten. Damit scheint es mir zusammenzuhängen, daß es keinen ausgesprochenen Antisemitismus gab. […] So war Prag reich für mich an persönlichen und anregenden Beziehungen, auf die hier einzugehen aber zu weit führen würde.[44]

During his period in Prague, Koschaker exchanged correspondence with Carl Christian Ernst Bezold, a renowned philologist, Orientalist and Semitist, who was working in Heidelberg at the time, and was known for his Akkadian language studies. We can infer that Koschaker discussed some texts written in Akkadian with him, from three letters conserved at the archive of the *Karl-Ruprechts-Universität Heidelberg*, one dated 2nd

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42 Josef Partsch: *Griechisches Bürgschaftsrecht*, Leipzig-Berlin 1909, with a review written by the same Koschaker, in: *ZSS* (RA) 30 (1909), pp. 414-419. See Oberkofler: *Die Vertreter des römischen Rechts*, p. 49 and Koschaker: *Selbstdarstellung*, pp. 112 ff. Koschaker and Partsch became friends when Koschaker went to Leipzig for the first time to study with Mitteis and Strohal. They are considered, together with a few other scholars, to be representative members of the School developed in Leipzig by the same Ludwig Mitteis. On this point, see below, pp. 44 ff.

43 Koschaker: *Babylonisch-assyrisches Bürgschaftsrecht. Ein Beitrag zur Lehre von Schuld und Haftung*, Leipzig-Berlin 1911. Josef Partsch defined this book as a fundamental text on comparative legal history, while Kunkel wrote that it represented a foundation stone for a new branch of the history of law. See Partsch: *Bespr. zu Paul Koschaker, Babylonisch-assyrisches Bürgschaftsrecht*, in: *Göttingische gelehrte Anzeigen*, Berlin 1913, pp. 13-14; Kunkel: *Römisches Recht und antike Rechtsgeschichte*, in: *Geist und Gestalt. Biographische Beiträge zur Geschichte der Bayerischen Akademie der Wissenschaften vornehmlich im zweiten Jahrhudert ihres Bestehens*, I, München 1959, pp. 249 ff. and 265.

44 Koschaker: *Selbstdarstellung*, p. 112.

October 1911, and the other two, 4th February and 25th August 1913.[45] At the time Koschaker was actually still working on his second major publication, which appeared a few years later, namely the *Rechtsvergleichende Studien zur Gesetzgebung Ḫammurapis*.[46]

Nonetheless, on 16th September 1914, Koschaker decided to accept the offer of the Chair as Professor of Roman law at the newly established University in Frankfurt am Main, since he wanted to work in a German university, although he actually remained there less than a year, seizing the opportunity to move to the Faculty of Law at the University of Leipzig in 1915. The short time spent in Frankfurt was remembered by Koschaker in his autobiography as one of the happiest periods of his life from a personal point of view, both for him and his wife.[47]

Yet he could not refuse such an important offer as an appointment in Leipzig.

2.2 The call to Leipzig

In the first decades of the twentieth century, the Law Faculty at the University of Leipzig was one of the most or, in Koschaker's words,[48] the most prestigious Law Faculty in the whole of Germany. Mitteis was a highly prominent name in the field of Roman law, as Emil Strohal was in the field of Civil law. Moreover, from 1911 onwards, another important Roman and Civil law scholar, Heinrich Siber, had held the Chair in Roman law, alongside Mitteis.[49]

The call to Leipzig was in part unexpected and even surprising for Koschaker: he had been appointed to such a prestigious university, despite his young age – as Koschaker was still only thirty-five – to a prestigious university, and what is more, he had the chair that had previously belonged to Strohal, who died in 1914.[50] Stranger still, the Law Faculty offered Koschaker the Chair in both Roman law and German Civil law (*Lehrstuhl für römisches und deutsches bürgerliches Recht*), even though civil law was not part of his field of research.[51] He pointed out that he had no intention of changing his branch of

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45 The three letters can be found in the University of Heidelberg archive (*Karl-Ruprechts-Universität Heidelberg, Universitätsarchiv, Heid. Hs. 1501, 113*). On Bezold (1859-1922), see: Mariano San Nicolò: *Bezold, Carl Christian Ernst*, in: *NDB* 2, Berlin 1955, pp. 212-214.

46 Koschaker: *Rechtsvergleichende Studien zur Gesetzgebung Ḫammurapis. Königs von Babylon*, Leipzig 1917, Vorwort, pp. V-IX.

47 Koschaker: *Selbstdarstellung*, p. 115.

48 Ibid.

49 On Siber (1870-1951) see Wieacker: *Heinrich Siber* †, in: *ZSS* (RA) 68 (1951), pp. IX-XXXII; Avenarius: *Siber, Heinrich Bethmann*, in: *NDB* 24, Berlin 2010, pp. 303-305.

50 See Below/Falkenstein: *Paul Koschaker* †, p. X.

51 See Müller: *Paul Koschaker (1879-1951)*, p. 273.

study from Roman law to civil law, but the faculty nonetheless acquiesced.[52] There was quite a stir, as well as criticism surrounding the appointment of such a young scholar to Leipzig, considering as well that Koschaker did not have so many publications at the time and, in particular, only one on Roman law, his *Habilitation* monograph.[53]
Koschaker could not, of course, refuse such a great opportunity, a true springboard to academic success, and moreover, he could again work with Mitteis.[54]

The decision to move to Leipzig was one of the most significant in Koschaker's life and, at the same time, the most satisfying. He wrote in his autobiography that the time in Leipzig, from 1915 to 1936, were the best years of his life.[55] During the 21 years he spent in Leipzig, Koschaker was offered a position in Munich and then in Vienna, but he refused them both.[56] The climate and people he found at Leipzig were highly receptive to his career and his studies, and it is worth analysing in depth the situation Koschaker found when he moved there. The initial settling-in period was not easy for him, both with regard to the city and to the faculty, mainly because of the First World War. Koschaker spoke guardedly of the strong tendency of Leipzig's citizens to throw themselves into political radicalism, with the consequence that the Saxon Social Democrats in Leipzig – before the Nazis came to power – were somewhat "more red" than everywhere else in Germany, and then, later, the "Browns" (the Nazis) were "more brown" than elsewhere.[57] A very positive aspect underlined by Koschaker, however, was the profound respect that the Ministry of Education had for the autonomy of the university until 1933.

Over time, the situation at the Law Faculty improved; Koschaker felt increasingly at ease and, in particular, well accepted by his colleagues, which he considered a great personal success.[58] The association between Koschaker and Mitteis also evolved from that of a teacher-pupil relationship into a true friendship, both personal and academic, which was also true for his friendship with Siber. As has already been mentioned, Mitteis had been one of the most influential Roman law professors in the German-speaking countries since the end of the nineteenth century. He was not only one of the pioneers of

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52 Koschaker: *Selbstdarstellung*, p. 115.

53 Ibid.: "Ich zählte 35 Jahre, hatte noch keinen wissenschaftlichen Namen und sollte an der ersten deutschen Juristenfakultät einen Lehrstuhl des deutschen bürgerlichen Rechts verwalten, von dem ich anerkanntermaßen nichts verstand. Indessen war die Leipziger Juristenfakultät bekannt, sich bei Berufungen nicht an herkömmliche Clichés zu halten […]." Beside the two important and long articles on the *Archidikastes* in Egypt, Koschaker before the call to Leipzig wrote another important text in the field of Ancient legal history: Koschaker: *Observations juridiques sur «ibila-ablum»*, in: *Revue d'Assyriologie et d'Archéologie Oriental* 11, 1 (1914), pp. 29-42.

54 Oberkofler: *Die Vertreter des römischen Rechts*, p. 50.

55 Koschaker: *Selbstdarstellung*, pp. 115 f.; he wrote about his years in Leipzig: "Ich habe in Leipzig 21 Jahre (1915-1936) die beste Zeit meines Lebens verbracht und auch mehrere Rufe an große Universitäten ausgeschlagen." See also Below/Falkenstein: *Paul Koschaker* †, p. X.

56 Ibid.

57 Koschaker: *Selbstdarstellung*, p. 116.

58 Ibid.

the study of papyri, but also one of the first Roman law scholars to understand the necessity avoiding the risk of Roman law becoming increasingly neglected through its imposed "splendid isolation". In 1891, Mitteis published a crucial work that indicated the new trend and direction that the research on Roman law should take: *Reichsrecht und Volksrecht in den östlichen Provinzen des römischen Kaiserreichs*.[59]

As Koschaker wrote many years later, Mitteis' book was groundbreaking and opened up new orientations for Roman law studies. Thanks to Mitteis' work, scholars began to deal with a huge number of new sources, in particular those coming from the Eastern provinces of the Roman Empire, and they opened their mind to studies, which had previously only been the domain of philologists, historians and theologists.[60]

At the same time, one must not forget that Mitteis had profoundly impressed Koschaker during his first period in Leipzig, as the former held a course in *Pandektenexegese* attended by around five hundred students. During his classes, Mitteis was able to combine the methodology of the study of interpolations (*Interpolationenforschung*) from a juridical point of view with a dogmatic approach, looking at the connections between ancient Roman texts and contemporary legislation currently in force.[61] Furthermore, he had been an influential – though not a radical – representative of the trend of interpolationism and thanks to him, in 1909, the work for the *Index Interpolationum* began.[62]

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59 Ludwig Mitteis: *Reichsrecht und Volksrecht in den östlichen Provinzen des römischen Kaiserreichs. Mit Beiträgen zur Kenntnis des Griechischen Rechts und der spätrömischen Rechtsentwicklung*, Leipzig 1891.

60 See Koschaker: *Europa und das römische Recht*[4], p. 299: "[...] So kam er dazu, seine Aufmerksamkeit diesen östlichen Provinzialrechten zuzuwenden. Als solche kamen in Frage das griechische Recht und orientalische Recht […]. Ein einzigartiges Material für das hellenistische Recht Ägyptens boten die gräko-ägyptischen Papyrusurkunden. Mitteis' Buch hat Epoche gemacth und der Romanistik neue Orientirungen gegeben. Er wurde Begründer der juristischen Papyruskunde, und unter dem Einfluß der von ihm inaugurierten Studien wandten die Romanisten ihr Interesse über das römische Recht hinaus auch anderen antiken Rechten zu, die bisher, sofern sie überhaupt beachtet wurden, Domäne der Philologen, Theologen und Historiker gewesen waren […]."

61 Koschaker: *Selbstdarstellung*, p. 110: "[…] Die Auswahl der Stellen, ihre Behandlung, die Interpolationenkritik ganz überwiegend nach juristischen Gesichtspunkten, die Verbindung der gewonnenen Resultate mit dem modernen Recht, das alles gewürzt durch echt Mitteis'sche Sarkastik ließen den geborenen Juristen erkennen und waren schlechthin meisterhaft. Ich hätte spätere romanistische Arbeiten ohne diese Vorbereitung niemals machen können. Daneben erhielt ich eine vortreffliche dogmatische Schulung durch Strohal […]."

62 *Index interpolationum quae in Iustiniani Digestis inesse dicuntur. Editionem a Ludovico Mitties incohatam ab aliis viris doctis perfectam*, curaverunt Ernst Levy/Ernst Rabel, I-IV, Weimar 1929-1935. See Francisco Javier Andrés Santos: *Brevissima storia della critica interpolazionistica nelle fonti giuridiche romane*, in: *REHJ* 32 (2011), pp. 65-120 and, in particular, p. 85 and recently Gianni Santucci: *«Decifrando scritti che non hanno nessun potere». La crisi della romanistica fra le due guerre*, in Italo Birocchi/Massimo Brutti (eds.): *Storia del diritto e identità disciplinari: tradizioni e prospettive*, Torino 2016, pp. 63-102 and, *praecipue*, p. 79.

Mitteis was able to influence the young Koschaker with respect to textual criticism (*Interpolationeforschung*), as explained in more depth below,[63] even if his pupil has usually been considered a representative of the so-called *Antikritik der Interpolationenforschung*, namely a critic of interpolationism.[64]

Mitteis' ability to bring together the dogmatic and pandectist approaches with new research trends and studies on papyri, not to mention his personal prestige and charisma, quickly led to the birth of the Mitteis School at the beginning of the twentieth century in Leipzig.[65] During the first two decades of the century, some of the most prominent Roman Law scholars and legal historians of the time spent several years at this school such as Hans Lewald,[66] Demetrios Pappulias,[67] Josef Aloys August Partsch,[68] Fritz Pringsheim,[69] Ernst Rabel,[70] Andreas Bertalan Schwarz,[71] Rafał Taubenschlag,[72] Egon Weiß,[73] Leopold Wenger,[74] Friedrich von Woeß[75] and, of course, Paul Koschaker, where they often worked together with one another.

Every Roman law scholar interested in the new trends of studies, focusing on the law of antiquity and the new – epigraphic, but, primarily, papyrological – sources, had to

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63 See below, chapter 5, § 3.

64 On this aspect, see Beggio: *La 'Interpolationenforschung'*, pp. 121-155.

65 On this School, see: Rabel: *In der Schule von Ludwig Mitteis*, in: *The Journal of Juristic Papyrology* 7/8 (1954), pp. 157-161; Zimmermann: *»In der Schule von Ludwig Mitteis«*, pp. 1-38, and 13 ff. in particular; Pfeifer: *Keilschriftrechte und historische Rechtsvergleichung*, pp. 11-37, and pp. 12-16 in particular, with further bibliography. Koschaker, however, never defined the group of scholars working together with Mitteis as a school, since there were no programmatic works that indicated the main features of the trend of studies. See Koschaker: *Europa und das römische Recht*[4], p. 295 and fn. 1.

66 On Lewald (1883-1963), see Below: *Lewald, Hans*, in *NDB* 14, 1985, pp. 411-412.

67 On Pappulias (1878-1932), see Koschaker: *Demetrios Pappulias* †, in: *ZSS* (RA) 53 (1933), pp. 650-651.

68 On Partsch see above in this chapter, fn. 13.

69 On Pringsheim (1882-1967), see Elmar Bund: *Fritz Pringsheim (1882-1967). Ein Großer der Romanistik*, in: Helmut Heinrichs/Harald Franzki/Klaus Schmalz/Michael Stolleis (eds.): *Deutsche Juristen jüdischer Herkunft*, pp. 733-744; Bund: *Pringsheim, Fritz*, in: *NDB* 20, Berlin 2001, pp. 728-729.

70 On Rabel see above in this chapter, fn. 33.

71 On Schwarz (1886-1953), see Kisch: *Erinnerung an Bertalan Schwarz. Ein Briefwechsel 1938-1953*, in: *Festschrift für Herbert Kraus. »Recht im Dienste der Menschenwürde«* (hrsg. vom Göttinger Arbeitskreis), Würzburg 1964, pp. 167-189; Gábor Hamza: *Das Muster der Internationalität des römischen Rechts: Der Lebenslauf von Andreas Bartholomeus Schwarz*, in: *Acta Juridica Academiae Scientiarum Hungaricae* 23 (1981), pp. 451-456; Id.: *András Bertalan Schwarz (1886-1953)*, in: *Journal on European History of Law* 3 (2012), nr. 1, pp. 58-61.

72 On Taubenschlag (1881-1958), see Henryk Kupiszewski: *Rafał Taubenschlag – hystorik prawa (1881-1958)*, in: *„Czasopismo – Prawno – Historyczne"* 38 (1986), pp. 111-155.

73 On Weiß (1880-1953), see Sybille von Bolla: *Egon Weiß* †, in: *ZSS* (RA) 70 (1953), pp. 518-521; Rafał Taubenschlag: *Egon Weiß*, in: *IVRA* 4 (1953), pp. 553-557.

74 On Wenger see above, fn. 6.

75 On Woeß (1880-1933), see Wenger/Rabel: *In memoriam Friedrich von Woeß*, in: *ZSS* 53 (1933), pp. 651-656.

associate with this School and get in touch with its new groundbreaking methodology. Almost every pupil and member in the Mitteis School tried to develop these new methodological approaches to the best of their abilities. In particular, two important trends developed within the School: the first was based on the comparative method as a means to study ancient law and Roman law (the so-called *vergleichende Rechtsgeschichte*). According to this trend – although scholars at times adopted different erspectives in their studies – this methodological approach sought to allow for the comparison with modern legislation, and in any case, did not call into question the supremacy of Roman law within the field of ancient laws. The most important representatives of the trend were Partsch, Rabel, Schwarz and Koschaker himself.

The second scientific trend, on the contrary, was much more focused on the comparative study of ancient legal history: in this case the comparative approach was not a means to gaining a better understanding of ancient laws in order to subsequently compare them then with modern legislation, but in fact to reach a better understanding of purely ancient laws, from a historical perspective. This very innovative way of studying Ancient and Roman law – thus defined merely as one of the laws of the past, even if a very prominent one – was suggested by Wenger. He expounded the new trend of the so-called *antike Rechtsgeschichte* at the University of Vienna in 1904, during the inaugural lesson of his course (the *Antrittsvorlesung*).[76] Wenger's idea and purpose consisted in saving Roman law from the "splendid isolation" into which it had fallen after the crisis of the Pandect-science (*Pandektenwissenschaft*) and the enactment of the German civil code (BGB). Since the use of Roman law as a foundation stone of modern legislation was no longer effective, it was necessary according to Wenger to study all the legal experiences of the past from a purely historical point of view. Roman law was thus seen as a historical-juridical phenomenon; it represented a very important legal experience but was one among other legal systems, such as Greek law or Babylonian law.

Wenger's proposal was harshly criticised by many scholars, including Mitteis and Koschaker himself. We can clearly understand how much Koschaker distanced himself from Wenger's stances on *antike Rechtsgeschichte* in a discussion with Riccobono.[77] In 1928, the eminent Italian scholar of Roman law at the University of Palermo and friend of Koschaker's decided to write an article to comment on and support Mitteis' criticism of Wenger's theory.[78] Mitteis had actually published an article ten years before, in which

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[76] Wenger: *Römische und antike Rechtsgeschichte. Akademische Antrittsvorlesung an der Universität Wien gehalten am 26. Oktober 1904*, Graz 1905. Wenger offered a shorter description of this new trend in 1930, in Wenger: *Wesen und Ziele der antiken Rechtsgeschichte*, in: Emilio Albertario et al. (eds.): *Studi in onore di Pietro Bonfante nel XL anno di insegnamento*, II, Milano 1930, pp. 464-477. On the *antike Rechtsgeschichte*, see below, chapter 5, § 3.

[77] On Riccobono (1864-1958), see above, p. 19, fn. 14.

[78] Salvatore Riccobono: *Punti di vista critici e ricostruttivi. A proposito della Dissertazione di L. Mitteis 'Storia del diritto antico e studio del diritto romano'*, in: *AUPA* 12 (1929), pp. 500-639

he intensely disapproved of *antike Rechtsgeschichte*.[79] In his text, Riccobono praised Mitteis' stance, arguing that not only Wenger but also Koschaker had to be considered representatives of this new research trend whose goal was to achieve a universal legal history (*Universalrechtsgeschichte*), to which Riccobono himself was so alien.[80] Koschaker remained surprised at having been compared to Wenger and replied sternly in an article that appeared just a year later in the *Savigny Zeitschrift*.[81] In consideration of

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and in particular, with regard to Mitteis' text, pp. 578-620. Riccobono's article followed the Italian translation of the text written and presented by Mitteis in 1917 to criticise the proposal of *antike Rechtsgeschichte*: Mitteis: *Antike Rechtsgeschichte und romanistisches Rechtsstudium. Vortrag, gehalten im Verein der Freunde des humanistischen Gymnasiums am 3. Juni 1917*, in: *Mitteilungen des Vereins der Freunde des humanistischen Gymnasiums Wien*, 18. Heft, Wien/Leipzig 1918, pp. 56-76. For a detailed description, see Varvaro: *La 'antike Rechtsgeschichte'*, pp. 303-315.

79 On the debate between Mitteis and Wenger, see also Höbenreich: *À propos „Antike Rechtsgeschichte": Einige Bemerkungen zur Polemik zwischen Ludwig Mitteis und Leopold Wenger*, in *ZSS* (RA) 109 (1992), pp. 547-562.

80 It seems quite evident that Riccobono's criticism, referring to the trend of *Universalrechtsgeschichte*, probably exaggerated matters, because there were still differences between the *Universalrechtsgeschichte* as suggested by Kohler, and the *antike Rechtsgeschichte* as conceived by Wenger. The true "father" of *Universalrechtsgeschichte* was indeed Josef Kohler, who explained his ideas in many works and in particular in Josef Kohler: *Rechtsphilosophie und Universalrechtsgeschichte*, in: Josef Kohler (ed.): *Enzyklopädie der Rechtswissenschaft in systematischer Bearbeitung*, Band I, 7. Aufl., München/Leipzig 1915, pp. 1 ff. and 14 ff. On Kohler (1849-1919), see: Günter Spendel: *Josef Kohler. Bild eines Universaljuristen*, Heidelberg 1983; Spendel: *Josef Kohler (1848–1919)*, in: *ZSS* (GA) 113 (1996), pp. 434-451; Hamza: *Comparative Law and Antiquity*, Budapest 1991, pp. 36 ff.; Fernando Gascó Inchausti: *Kohler, Josef*, in: Domingo (ed.): *Juristas Universales. Vol. III. De Savigny a Kelsen*, Barcelona/Madrid 2004, pp. 567-571; Pfeifer: *Keilschriftrechte und historische Rechtsvergleichung*, pp. 13-14 (with other literature), where Pfeifer writes on Kohler: "Kohlers erklärtes Ziel war eine Universalrechtsgeschichte der Menschheit, zu welcher die Rechtsvergleichung die Grundlage biete."; Atzeri: *La 'storia del diritto antico'*, pp. 191-222 and pp. 197 f., fn. 1-3, in particular.

81 Koschaker: *Forschungen und Ergebnisse in den Keilschriftlichen Rechtsquellen*, in: *ZSS* (RA) 49 (1929), pp. 188-201 and, in particular, p. 197 fn. 1. We can read in the footnote: "Riccobono hat in seiner schon mehrfach zitierten Schrift „Storia del diritto antico e studio del diritto Romano", die man als die eindringlichste und beste Kritik der heutigen romanistischen Rechtswissenschaft auch dann anerkennen wird, wenn man ihr nicht überall zu folgen vermag, S. 613 ff. die Arbeiten zum altorientalischen Recht als „antike Rechtsgeschichte" klassifiziert. Es ist nicht meine Absicht, zu diesem Begriffe Stellung zu nehmen, um so weniger als sein Urheber, Wenger, ihn demnächst neuerlich präzisieren wird. Wie ich aber über diese Studien denke, habe ich schon vor 17 Jahren im Vorworte zu meinem „Babylonisch-assyrischen Bürgschaftsrecht" (1911) ausgesprochen und ich habe bis heute keinen Anlaß gefunden, dem damals aufgestellten Programme untreu zu werden. Schon dort habe ich die Universalrechtsgeschichte, die Riccobono mit der antiken Rechtsgeschichte zu vermengen scheint, abgelehnt und nur die Berechtigung und Notwendigkeit der komparativen Methode anerkannt. Wenn ich heute unsere Wissenschaft auf die Bedeutung ihrer Quellen an sich gründe – selbstverständlich unter Berücksichtigung der komparativen Methode – und nicht bloß als Teil der „vergleichenden Rechtsgeschichte" werte, so liegt darin nur eine schärfere begriffliche Abgrenzung. Denn die vergleichende Rechtsgeschichte ist an sich keine Wissenschaft, sondern eine wissenschaftliche Methode. […]."

the good rapport between himself and Riccobono, Koschaker felt the need to clarify his position further, in the light of criticism received from Riccobono, and wrote him a letter on 22nd January 1930.[82]

Just a month later, on 23rd February 1930, Koschaker wrote a letter to Francis de Zulueta, at the time Regius Professor for Civil law at the University of Oxford, to express his deep scepticism towards Wenger's ideas on *antike Rechtsgeschichte*, which de Zulueta himself had recently criticised.[83] What is noteworthy is the fact that Koschaker had expressed his criticism towards the trend of *antike Rechtsgeschichte* since the early 1930s, but had done so in private, in writing two letters to colleagues, and it was not until 1937 and again in 1938, that he publicly began to refute Wenger's stances on the study of ancient laws.[84] Nonetheless, not only did Wenger partially modify his programmatic approach to the study of *antike Rechtsgeschichte* over the course of time,[85] but he also founded the *Institut für Papyrusforschung und Antike Rechtsgeschichte* in Munich, in 1909, and established the so-called *Beiträgen zur Papyrusforschung und Antiken Rechtsgeschichte*, giving the new subject matter an important place for publication.[86]

Wenger was not the only scholar who worked with Mitteis at his School in Leipzig who tried to find a way out of the "splendid isolation" of Roman law. As has already been mentioned, Partsch and Rabel attempted to do the same, albeit with a different approach and aims; both of them influenced Koschaker in his research.[87] Partsch and Rabel had a strong tendency to study ancient law through a comparative method, and Rabel himself

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82 Varvaro: *La 'antike Rechtsgeschichte'*, pp. 303-315. On this letter, see again below, chapter 5, § 7.

83 Francis de Zulueta: *L'histoire du droit de l'antiquité*, in: Gustave Glotz et al. (eds.): *Mélanges Paul Fournier*, Paris, 1929, pp. 787-805. Koschaker's letter was published and analysed by Atzeri: *La 'storia del diritto antico'*, pp. 191-222. On de Zulueta (1878-1958), see: Peter Stein: *Ricordo di Francis de Zulueta*, in: *Labeo* 4 (1958), pp. 238-241; Frederick Henry Lawson: *Zulueta, Francis de (Francisco María José)*, in: Edgar Trevor Williams/Helen Maud Palmer (eds): *The Dictionary of National Biography 1951–1960*, Oxford 1971, pp. 1097-1099, reprinted (with minor changes and additions) in Lawson: *Zulueta, Francis de (Francisco María José)*, in: Henry Colin GrayMatthew/Brian Howard Harrison (eds): *Oxford Dictionary of National Biographies, from the earliest times to the year 2000*, vol. 60, Oxford 2004, pp. 1021–1023; Atzeri: *Francis de Zulueta (1878-1958): An Oxford Roman lawyer between totalitarianisms*, in: Kaius Tuori/Heta Björklund (eds.): *Roman Law and the Idea of Europe*, London/New York, forthcoming.

84 Koschaker opposition to Wenger's proposal deserves, in any case, a more detailed analysis and will be considered again below, chapter 5, § 3.

85 Essential differences existed between the content of the lecture that he held in Vienna in 1904 and the text that he published 26 years later for the *Scritti Bonfante*; see: Wenger: *Wesen und Ziele*, pp. 465-477. We know from the letter that Koschaker sent to Riccobono in 1930 that he already received in advance from Wenger a copy of the text later published in the *Scritti Bonfante*, see Varvaro: *La 'antike Rechtsgeschichte'*, pp. 303-315.

86 Pfeifer: *Keilschriftrechte und historische Rechtsvergleichung*, p. 13.

87 On Partsch's influence, see Koschaker: *Selbstdarstellung*, pp. 112 f.; on Rabel's influence on Koschaker's research approach, see Koschaker: *Europa und das römische Recht*[4], pp. 344-346.

was considered one of the founders of the German comparative law (*Rechtsvergleichung*).[88] Even if both of them considered Kohler's *Universalrechtsgeschichte* an unreachable (and not completely sharable) target, they did not have the same severe approach towards this trend as Koschaker, who criticised it harshly.[89] Furthermore, one should also bear in mind the influential studies developed in Leipzig at this time by Fritz Pringsheim on Greek law and by Rafał Taubenschlag on papyri.[90]

This was the atmosphere in which Koschaker found himself when he left Frankfurt am Main and moved to Leipzig: it was the most favourable environment that he could have expected with regard to his studies at the time. However, another circumstance that was hugely influential for Koschaker's research at that time was his encounter with Benno Landsberger.[91] When Koschaker decided to accept the call to Leipzig, not only was the Law Faculty reputed to be one of the best in Germany, but there was the influential *Semitisches Institut* there too. Thanks to this Institute and the scholars who worked there, the University of Leipzig became the most important in Germany for studies in the field of *Keilschriftswissenschaft* during the twenties and thirties – until the Nazi racial legislation and reform of university study, together with the dismissal of Landsberger, led to its decline.[92] Koschaker held classes at the Institute, where he worked shoulder to shoulder with Landsberger and two other important professors: the Assyriologists Heinrich Zimmern and Franz Heinrich Weißbach.[93] Landsberger was an eminent – arguably the most eminent – Jewish Assyriologist and expert in Ancient Near Eastern studies (*Altorientalist*) during the 1920s and 30s; he was a pupil of Zimmern, *Privatdozent*

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88 Zimmermann: *»In der Schule von Ludwig Mitteis«*, pp. 1-38; Pfeifer: *Keilschriftrechte und historische Rechtsvergleichung*, pp. 11 ff.

89 As can be partly seen from the introduction of Koschaker: *Babylonisch-assyrisches Bürgschaftsrecht*, p. VIII and more clearly from Koschaker: *Forschungen und Ergebnisse*, p. 197 fn. 1. On Partsch and Rabel's methodology, see also Pfeifer: *Keilschriftrechte und historische Rechtsvergleichung*, p. 14.

90 In 1916 appeared both Fritz Pringsheim: *Der Kauf mit fremden Geld: Studien über die Bedeutung der Preiszahlung für den Eigentumserwerb nach griechischen und römischen Recht*, Leipzig 1916 and Rafał Taubenschlag: *Das Strafrecht im Rechte der Papyri*, Leipzig 1916.

91 On Landsberger (1890-1968), see Renger: *Altorientalistik*, p. 473 (with further literature); Joachim Oelsner: *Der Altorientalist Benno Landsberger (1890-1968): Wissenschaftstransfer Leipzig – Chicago via Ankara*, in Stephan Wendehorst (ed.): *Bausteine einer jüdischen Geschichte der Universität Leipzig*, Leipzig 2006, pp. 269-285. Landsberger presented his manifesto on the study of the Ancient Middle East in Benno Landsberger: *Die Eigenbegrifflichkeit der babylonischen Welt*, in: *Islamica* 2 (1926), pp. 335-371.

92 Müller: *Paul Koschaker (1879-1951)*, p. 276 and Id.: *Die Keilschriftwissenschaften an der Leipziger Universität bis zur Vertreibung Landsbergers im Jahre 1935*, in: *Wiss. Zs. der Karl-Marx-Univ. Leipzig*, Ges.- u. Sprachwiss. Reihe 28 (1979), pp. 67-86.

93 Id.: *Paul Koschaker (1879-1951)*, pp. 276-277. On Heinrich Zimmern (1862-1931), see Landsberger: *Heinrich Zimmern*, in: *Zeitschrift für Assyriologie und verwandte Gebiete* 40 (1931), pp. 133-143 (the journal would be renamed *Zeitschrift für Assyriologie und vorderasiatische Archäologie* in 1939); on Franz Heinrich Weißbach (1865-1944), see the entry in *Deutsche Biographische Enzyklopädie*, 10, München 1999, pp. 411-412, and Ronald Lambrecht: *Politische Entlassungen in der NS-Zeit*, Leipzig 2006, pp. 185-186.

in Leipzig from 1920, associate professor from 1926 to 1928, full professor from 1928 in Marburg – for a short time – and then again in Leipzig, until he was ousted in 1935 on account of his Jewish origins, and accepted the invitation to Ankara, leaving Germany just a few months before Koschaker moved to Berlin in 1936.[94]

During the years that Koschaker spent in Leipzig, a strong academic relationship burgeoned between him and Landsberger, and they both carried out research together and often taught together.[95] This scientific partnership led to the formation of a group of important scholars, both in the branch of Legal history, as well as in *Altorientalistik* (the field of studies on Ancient Near and Middle East), whose members were pupils of both Landsberger and Koschaker.[96] Thanks to Landsberger, colleagues from the *Semitisches Institut* and other experts in philological studies, Koschaker was able to develop an interdisciplinary approach to the study of ancient laws, and cuneiform law in particular, which he had deeply desired. Moreover, he was able to introduce the methodology of a jurist to a field of study which until then had been dominated by philologists and historians.[97]

It was, therefore, possible for Koschaker, from 1915 onwards, to improve his studies in cuneiform law and his language skills in Akkadian and Sumerian. After eleven years, the development of this field of studies and the prestige that Koschaker had acquired as a scholar of cuneiform law and *Altorientalistik* led to his decision to establish a new Institute. In fact, in 1926, he decided to use his influence to found a seminar for Near Eastern Legal history, the *Seminar für orientalische Rechtsgeschichte*, which was however later closed after the dismissal of Landsberger in 1935 and Koschaker's call to Berlin in 1936.[98] In any case, it was the first time that a single *Seminar* had been devoted specifically to the study of Ancient Oriental Legal history in a German university. Koschaker had succeeded in his aim of legitimising the autonomy of this field of research

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94 Renger: *Altorientalistik*, p. 473.

95 Müller: *Paul Koschaker (1879-1951)*, p. 277. Words that prove a true friendship between Koschaker and Landsberger emerge from the text of three letters sent by Koschaker to his pupil and friend Guido Kisch. See Kisch: *Paul Koschaker. Gelehrter, Mensch und Freund*, pp. 22, 41 and 46 (letters nr. 5, 14 and 17).

96 Renger: *Altorientalistik*, p. 473; Müller: *Paul Koschaker (1879-1951)*, p. 279. Pupils of both Koschaker and Landsberger included Martin David (1898-1986), Josef Klíma (1909-1989), Viktor Korošec (1899-1985), Julius Georg Lautner (1896-1972), and Herbert Petschow (1909-1991). On them see, respectively: Johann Albert Hans Ankum: *David, Martin (1898-1986)*, in: *Biographisch Woordenboek van Nederland* 4, 1994, pp. 311-314 (available also online); Richard Haase: *Dem Gedächtnis der Toten. Josef Klíma (16.11.1909 – 30.11.1989)*, in: *Archiv für Orientforschung* 36 (1989/1990), pp. 194-197; Marko Urbanija: Viktor Korošec (1899-1985), in: Detlev Groddek/Maria Zorman (eds.): *Tabularia Hethaeorum. Hethithologische Beiträge. Silvin Košak zum 65. Geburtstag*, Wiesbaden 2007, pp. 693-703; Müller: *Petschow, Herbert*, in *NDB* 20, Berlin 2001, pp. 270-271. On Lautner, see above, p. 34, fn. 6.

97 With regard to Koschaker's philological competence, see the *Vorwort* of Kaser: *Festschrift Paul Koschaker zum 60. Geburtstag*, I, Weimar 1939, p. VII.

98 Müller: *Paul Koschaker (1879-1951)*, p. 279.

and of giving it the equal status with other branches of the history of law, namely Roman law and *antike Rechtsgeschichte*.[99] Moreover, only a couple of years after his arrival in Leipzig, in 1917, he published another essential work in this field of studies: *Rechtsvergleichende Studien zur Gesetzgebung Ḫammurapis, Königs von Babylon*. This important book, dedicated to Strohal, who died in 1914,[100] was the result of a long period of work that began around 1906, which was then interrupted and eventually resumed around 1911, during the years that he spent in Prague. The main results of Koschaker's research were already at his disposal in 1913, when he decided to explain them at an international legal historians' congress in London.[101] Nonetheless, given the problems of publishing the work during WWI and his desire for it to reach a wide audience, Koschaker spent another three years contemplating his research and studying the new sources discovered in the meantime. If, according to the words of Partsch,[102] *Babylonisch-assyrisches Bürgschaftsrecht* represented a groundbreaking work, the new 1917 monograph continued this research trend, making Koschaker one of the most prominent young scholars in the field – he was at the time thirty-eight.

The titles of both these works reveal in any case, albeit indirectly, Koschaker's systematic tendency in his researches,[103] which was one of the distinguishing features of his studies, and which deserves, therefore, further analysis on the following pages.

2.3 Dogmatic approach and comparative method: Koschaker's two souls?

It is now appropriate to briefly focus on Koschaker's comparative legal history method during the first three decades of his academic career and, in particular, during the years he spent in Leipzig. As was mentioned earlier, Koschaker had been deeply influenced by Hanausek's dogmatic approach during the years at the university and immediately after, when writing his monograph to obtain the professorship. Although he was trained in the

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[99] Ibid.

[100] The publication was originally expected for the fall of 1914, but the onset of WWI forced Koschaker and the publisher to change their plans. This meant that Koschaker could consider the new material discovered in the meanwhile, as can be seen in the preface of the book. See Koschaker: *Rechtsvergleichende Studien*, pp. V f.

[101] The presentation was published in the proceedings of the conference: Koschaker: *The Scope and Methods of a History of Assyrio-Babylonian Law*, in: *Proceedings of the Society of Biblical Archaeology* 35 (1913), pp. 230-243.

[102] See above, p. 40, fn. 43.

[103] Whereas the publication of Koschaker: *Quellenkritische Untersuchungen* (see above, fn. 30) represented a significant attempt to follow the methodological approach of interpolationism through in-depth textual criticism and did not aim at a systematic description of the sources. It was quite unusual to opt for textual criticism with regard to cuneiform law sources. Koshaker's predisposition for textual interpolationism from around 1915 up to the end of the thirties. On this point, see below, 2.3.

traditionalist legal approach of Austrian universities at the the end of the 19th century,[104] by the twentieth century he came into contact with Ludwig Mitteis, and later with his School in Leipzig, where he had the opportunity to open up his research to the new methodological stances that had been developed there, beginning with the comparative legal history method.

At the same time, Koschaker was not indifferent to the new trend of interpolationism, in particular during the twenties. What emerged in relation to his method during this period can therefore be seen as a sort of syncretism, sometimes apparently inconsistent with other methods. A radical interpolationistic approach, for example, could not easily be combined with a dogmatic and systematic one. Nevertheless, it can be argued that his kind of syncretism was actually aimed at finding a more precise and refined metholodogical approach. In the course of refining this methodological stance, despite some fluctuations, Koschaker's approach reveals an inner cohesion, since it is always focused on a systematic – and ultimately dogmatic – depiction of the different legal institutions and legal experiences that he had studied. In this sense, the aim of Koschaker's research seemes unerringly to be the systematic reconstruction of juridical experiences of the past, whereas all the other possible methodological stances, and in particular the comparative legal history method, are merely methodological means to help scholars in their research (they are an aid, a *Hilfsmittel*). Yet the aim of Koschaker's methodological stances does not appear clearly and immediately in any of his works and therefore it seems proper to analyse this question further.

First of all, it is worth underlining that the interdisciplinary approach of Koschaker's method allowed him to create bridges spanning different fields of studies. Thanks to his talent, Koschaker was able to make linguistic analyses that were usually the realm of philologists, and in this way he opened up yet another new branch of studies, cuneiform law.[105] First and foremost, his contribution to the discipline was essential from a juridical

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[104] In Austria both where Roman and Civil law teaching at the universities had been strongly influenced by the Pandectistic's approach. A significant role with regard to the teaching in Austrian universities was played by Joseph Unger (1828-1913). On Unger, see Wilhelm Brauneder: *Unger, Joseph*, in: Brauneder (ed.): *Juristen in Österreich 1200-1980*, Wien 1987, pp. 177 ff.; Barbara Dölemeyer: *Unger, Joseph*, in: Michael Stolleis (ed.): *Juristen: Ein biographisches Lexicon. Von der Antike bis zum 20. Jahrhundert*, München 1995, p. 628 f.; *Joseph Unger*, in: Gerhard Kleinheyer/Jan Schröder (eds.): *Deutsche und Europäische Juristen aus neun Jahrhunderten*[6], Tübingen 2017, p. 461-464. On Roman law teaching and the influence of the Pandect-science in Austria, see also Zimmermann: *Heutiges Recht*, p. 5 f.

[105] See Kaser: *Festschrift Paul Koschaker*, I, Weimar, 1939, p. VII: "[…] so haben Sie [Koschaker] das weite Gebiet der keilschriftlichen Quellen der rechtsgeschichtlichen Betrachtung erschlossen. Denn Sie haben als erster Jurist die Sprache dieses Kulturkreises mit jener Sicherheit beherrschen gelernt, die bis dahin nur den Philologen zur Verfügung stand und ohne die ein scharfes Erfassen auch der rechtlichen Erscheinungen nicht möglich ist." See also Müller: *Paul Koschaker (1879-1951)*, pp. 271 ff.; Wesener: *Paul Koschaker (1879-1951), Begründer der altorientalischen Rechtsgeschichte*, pp. 273-285.

point of view. From the pandectist and dogmatic approach, typical of Hanausek, Strohal and, in part, of Mitteis, he learned how to use juridical concepts – *Begriffe, Begriffsjurisprudenz* and *Begriffsgeschichte* – in order to construct a legal order: his points of view, both regarding ancient laws and Roman law, had always been systematic. Every concept, every rule, every institution had to be organised and defined within a concept of legal order.

The related problem of definitions emerged at a very early stage, for example, with regard to the topic of cuneiform law. Koschaker underwent constant development from 1911 up to the end of the twenties concerning definitions of this branch of studies. At the beginning he referred to Babylonian-Assyrian law,[106] but the comparative approach led him to think that this nomenclature was too restrictive for the research field; he began, therefore, to use the term cuneiform law, *Keilschriftrecht*, in the singular, and then later *Keilschriftrechte* in the plural.[107] In this way, he was able to create an autonomous branch of studies, as he wrote in 1935: the laws in the field of cuneiform law sources, *Rechte im Bereiche keilschriftlicher Rechtsquellen*, were thus a legal-historical delimitable cultural complex presenting their own historical difficult issues and problems.[108] One of his pupils, Below, in a passionate text, full of sincere praise, and written in memory of Koschaker, talks of the foresight and profundity of Koschaker's universality (*Universalität*) in dealing with scientific problems. Koschaker had a peculiar awareness and sensitivity for the essential juridical manifestations (*Erscheinungsformen*) and was always able to create a lucid overall description of the results of his research.[109] In this respect, Koschaker's dogmatic imprint cannot be disregarded if we are to grasp his approach both towards the study of ancient law and, later, of Roman law. It is also likely that Koschaker's passion for mathematics further influenced his way of thinking, giving it a pronounced rational and logical character, and even as late as 1936, Koschaker referred to a mathematical example to explain an argument used in his text.[110]

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[106] Like, for example, in the major work Koschaker: *Babylonisch-assyrisches Bürgschaftsrecht*.

[107] The development of Koschaker's terminology in his works has already been mentioned above, § 2.1.

[108] Koschaker: *Fratriarchat, Hausgemeinschaft und Mutterrecht*, p. 37; Müller adds therefore that, according to Koschaker, "deren [of the *Rechte im Bereich keilschriftlicher Rechtsquellen*] Erforschung Aufgabe eines selbständigen rechtsgeschichtlichen Fachgebiets sein muß". See Müller: *Paul Koschaker (1879-1951)*, p. 275.

[109] Below: *Paul Koschaker,* pp. 1-44 and page 5 for the reference to Koschaker's capabilities. Below actually wrote: "[…] eine seltene Universalität in der Behandlung wissenschaftlicher Probleme, verknüpft mit Weitblick und Gedankentiefe, eminenter Kombinationsgabe, einem nicht häufigen Gefühl für das Wesentliche juristischer Erscheinungsformen und der beneidenswerten Fähigkeit, die Ergebnisse der Forschung in die Gestalt einer kristallklaren Darstellung zu bringen."

[110] Koschaker: *Was vermag die vergleichende Rechtswissenschaft zur Indogermanenfrage beizusteuern?*, in Helmut Arntz (ed.): *Germanen und Indogermanen. Volkstum, Sprache, Heimat, Kultur. Festschrift H. Hirt*, Heidelberg 1936, pp. 145-153; the quoted example is on page 148. Even though this paragraph focuses essentially on Koschaker's methodological

The other great tool that Koschaker introduced to the study of cuneiform laws was the critical textual approach to sources, in accordance with the methodology and scientific results of the trend of interpolationism.[111] This may seem somewhat strange if we consider that Koschaker was known as an opponent of *Interpolationenforschung*, and this apparent contradiction will be discussed in greater depth when dealing with Koschaker's stances on Roman law towards the end of the 1930s. It is sufficient, however, at this point to emphasise that he was fiercely opposed to the radicalisation of study of interpolations in Roman law when it developed as a hunt for interpolations (*Jagd nach Interpolationen*),[112] because he considered it a fatuous "philological-historical exercise" and an end in itself. It was Riccobono who influenced Koschaker's stance on interpolationism, to such an extent that Koschaker could affirm, at the end of the thirties, as well as later on, that a wise textual criticism patterned on Riccobono's example could actually be fruitful for the study of Roman law sources.

The alleged evolution towards textual criticism that took place during the late period of his academic career could alternatively be considered as a return to his origins. In fact, Koschaker clearly showed his acutely critical mind towards sources in his works on cuneiform law. This peculiar aspect of Koschaker's scientific talent clearly appears in the work he published in 1917, the above-mentioned *Rechtsvergleichende Studien zur Gesetzgebung Ḫammurapis*, and again, four years later, in his brief book *Quellenkritische Untersuchungen zu den „altassyrischen Gesetzen"*,[113] both published when he was in Leipzig. In his *Rechtsvergleichende Studien zur Gesetzgebung Ḫammurapis* there are many pages devoted to the problem of interpolations in the Code of Hammurabi, as transcribed by the authors of the "Law" (*Redaktoren des Gesetzes*), with the aim of understanding how these textual alterations could affect the original meaning and substance of the text. Also as in *Quellenkritische Untersuchungen zu den „altassyrischen*

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stances during the first three decades of the twentieth century, I find it necessary to refer sometimes to the 1936 text to offer a clearer overview of his ideas.

111 There is copious literature on Interpolationism (in German, *Interpolationenforschung*, or *Interpolationenkritik*, or *Interpolationismus*) and it is not possible to discuss it fully here. For a useful overview of the question, see Santos: *Brevissima storia*, pp. 65-120; Massimo Miglietta/Gianni Santucci (eds.): *Problemi e prospettive della critica testuale*, Atti del 'Seminario internazionale di diritto romano' (Trento, 14-15 dicembre 2007), Trento 2011; Dario Mantovani/Antonio Padoa-Schioppa (eds.): *Interpretare il Digesto. Storia e metodi*, Pavia 2014; Avenarius/Baldus/Lamberti/Varvaro (eds.): *Gradenwitz, Riccobono*; Varvaro: *La storia del 'Vocabularium iurisprudentiae Romanae'*, pp. 251-336.

112 This is the famous definition given by the philologist Wilhelm Gottfried Christian Kalb: *Die Jagd nach Interpolationen der Digesten: Sprachliche Beiträge zur Digestenkritik*, in: *Festschrift zum 25jährigen Rektoratsjubiläum Herrn Oberstudienrat Dr. G. Autenrieth in dankbarer Verehrung zugeeignet vom Lehrerkollegium des Kgl. Alten Gymnasiums zu Nürnberg am 1. Oktober 1897*, Nürnberg 1897, pp. 11-42.

113 Koschaker: *Quellenkritische Untersuchungen zu den „altassyrischen Gesetzen"*, Leipzig 1921.

Gesetzen", Koschaker carried out a meticoulous research of the interpolations (*Glossen*) that are present in the sources.

In the period of maximum expansion of textual critical studies, which developed rapidly and had already found eminent supporters in Italy as well, Koschaker did not therefore disdain the methods, tools, and teachings developed by *Interpolationenforschung*.[114] Not only did Koschaker introduce textual criticism – from a juridical and not purely a philological perspective – into a field of studies that had until then been the domain of historians and philologists, but he also adapted this scientific approach to the wider target of his comparative-systematic study. Textual criticism was thought of as a useful means – a *Hilfsmittel* – to acquire a better understanding of more complex juridical problems.

Koschaker's conception of textual criticism, influenced as it was by Riccobono, emerges clearly from a letter that he wrote to Riccobono on 22nd November 1930.[115]

> […] Ihre Zustimmung zu verschiedenen Punkten meiner letzten romanistischen Arbeiten ist mir ausserordentlich wertvoll. Sie wissen, wie hoch ich Ihre Arbeit einschätze, und ich möchte es immer wieder betonen, dass Ihre Weise, die Quellen zu sehen, erst der Interpolationenforschung wieder eine gesunde Basis gegeben hat und sie zu dem gemacht hat, was sie nur sein soll und kann, ein Hilfsmittel zur Erforschung rechtsgeschichtlicher Probleme, die man über die Interpolationenforschung vernachlässigt hat […].

As we can appreciate from the text, after having expressed his profound esteem for his colleague and friend, Koschaker wrote that he agreed with Riccobono's point of view on interpolationism. According to Koschaker, Riccobono had found a 'healthy basis' (*eine gesunde Basis*) for textual criticism and had distanced himself from its most radical tendencies; for his part, Riccobono had restored *Interpolationenforschung* to its proper role as a useful aid for research on the history of law.[116]

The comparative, historical-juridical and systematic approach Koschaker sought to adopt in studying comparative legal history (*vergleichende Rechtsgeschichte*) had already been

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[114] On the radicalisation of the approach of interpolationism, in general, see Santos: *Brevissima storia*, pp. 76 ff.; Santucci: *«Decifrando scritti che non hanno nessun potere»*, pp. 78 ff.; Varvaro: *La storia del 'Vocabularium iurisprudentiae Romanae'*, pp. 251 ff. With regard to the situation in Italy, see Talamanca: *La ricostruzione del testo dalla critica interpolazionistica alle attuali metodologie*, in: Miglietta/Santucci (eds.): *Problemi e prospettive*, pp. 217-239. See in the same volume the contribution on the reaction to *Interpolationismus* and its later development in Germany in Baldus: *La critica del testo nella romanistica tedesca a dieci anni dalla morte di Max Kaser*, pp. 121-138.

[115] The letter has been transcribed and analysed in: Varvaro: *La 'antike Rechtsgeschichte'*, pp. 303-315.

[116] On this letter, see also below, chapter 5, § 7.

well described in the preface of his *Babylonisch-assyrisches Bürgschaftsrecht*, which can be considered a kind of methodological manifesto of his early studies.[117] Many of his stances, as was explained in the pages of the preface to his monograph, would later be repeated and refined in other essays, such as *Forschungen und Ergebnisse in den keilschriftlichen Rechtsquellen* in 1929 and *Was vermag die vergleichende Rechtswissenschaft zur Indogermanenfrage beizusteuern?* in 1936.[118]

It is worth mentioning a few main passages from Koschaker's *Babylonisch-assyrisches Bürgschaftsrecht* to appreciate his ideas at this point in his scholarly career. First, Koschaker's research focused on private law institutions and this is a constant feature of his later studies as well. According to Koschaker, there could be no misgivings as to the primacy of private law over public law – and here Koschaker's opinion on this point was not limited to Roman law. The fact that he chose a specific juridical question for his monograph (the guaranty under Assyrian-Babylonian law) was motivated by his desire to offer a complete historical overview of its development; hence, it was possible to retrace the comprehensive historical and dogmatic depiction of the question analysed.[119] This kind of study would represent a step towards a more complete reconstruction of Assyrian-Babylonian legal history. The problem concerning the assumption of such a kind of study – not only the wider one, regarding a general Assyrian-Babylonian legal history, but the more circumscribed one regarding the guaranty studied by Koschaker – was the difficulty of legitimising it before other jurists.[120] In the light of what he would assert years later in criticising Wenger's *antike Rechtsgeschichte*, it seems remarkable that Koschaker sought legitimacy for his studies at that time by merely affirming that he was not the only one dealing with these kinds of matters, nor the first to do so, citing his predecessors, such as Kohler, and later Wenger, Manigk and Rabel.[121] Kohler had already begun to analyse Babylonian sources within his idea of a *Universalrechtsgeschichte*, but

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117 Koschaker: *Babylonisch-assyrisches Bürgschaftsrecht*, pp. V-XII.

118 Koschaker: *Was vermag die vergleichende Rechtswissenschaft*, pp. 145-153.

119 Koschaker: *Babylonisch-assyrisches Bürgschaftsrecht*, p. V: "Als ich im Fortgange der Untersuchung auch in die neubabylonischen Rechtsurkunden Einsicht nahm, ergab es sich, daß hier ein überaus reiches, erstklassiges Material zur Verfügung stehe, welches eine historisch-dogmatische Darstellung des babylonischen Bürgschaftsinstitutes ermögliche. So entschloß ich mich, den ursprünglichen Arbeitsplan zur Seite stellend, zu einer monographischen Bearbeitung der Bürgschaft, welche die Entwicklung dieses Rechtsinstitutes durch den ganzen Zeitraum babylonisch-assyrischen Kulturlebens verfolgen sollte."

120 Throughout his career Koschaker described himself as a jurist, and, in particular, purely a jurist, rather than a legal historian (*Rechtshistoriker*). Once again, with this somewhat rigid definition, he wanted to point out a question of method regarding the different approaches to sources of jurists and historians.

121 Alfred Manigk (1873-1942) was a Civil law scholar, see Oskar Kühn: *Manigk, Alfred*, in: *NDB* 16, Berlin 1990, pp. 35-36. On Kohler, Wenger and Rabel, see above, respectively: pp. 46, fn. 80; p. 32, fn. 6; p. 14, fn. 7.

this did not find much favour among jurists.[122] The studies of Wenger, Manigk and Rabel were, however, much more important than Kohler's, because they attempted – like Koschaker himself – to expand the range of sources that could be studied by the legal historians, including, of course, the sources of cuneiform law (*keilschriftliche Quellen*).

These modern approaches represented a new trend in Legal history studies and were welcomed with enthusiasm by jurists as well.[123] Another element that legitimised this branch of studies was the discovery of the Codex of Hammurabi, which opened up new perspectives into this field of Legal history.[124]

For the first time, as Koschaker wrote, the legal historian had at his disposal a huge number of new sources that could shed light not only on the law, but also on the history and culture of the Near East. In 1936 he wrote that since law is a function of its social enviroment ("das Recht ist eine Funktion seiner sozialen Umwelt"), the first duty of the comparative method should consist in retracing first the connections between a legal institution and its social milieu, and then the links between this milieu and the pertaining legal system (*Rechtssystem*).[125] Koschaker therefore borrowed Rabel's functionalist approach and tried to combine it with his strongly dogmatic stances.[126] In fact, this new material allowed the legal historian to study the relationships and possible transferences between different juridical experiences of the past, such as those between Assyrian-Babylonian law and Roman law.[127] However, these links should not be overemphasised, as comparative legal history (*vergleichende Rechtsgeschichte*) had not yet developed reliable criteria to demonstrate whether the correlation between two legal orders ("Übereinstimmung in zwei Rechten") demonstrated any clear indication of juridical borrowing from one system to another.[128]

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122 The fact that Koschaker also referred to Kohler's studies to legitimise his research, could have perhaps led Salvatore Riccobono to (incorrectly) consider Koschaker, along with Wenger, a supporter of *Universalrechtsgeschichte*.

123 Koschaker: *Babylonisch-assyrisches Bürgschaftsrecht*, pp. VI-VII. The works of the three authors quoted by Koschaker are: Wenger: *Römische und antike Rechtsgeschichte*, p. 27; Alfred Manigk: *Zur Bedeutung der assyrisch-babylonischen Rechtsurkunden*, in: *ZSS* (RA) 27 (1906), pp. 394-405; Rabel: *Die Verfügungsbeschränkungen des Verpfänders, besonders in den Papyri. Mit einem Anhang: Eine unveröffentlichte Baseler Papyrusurkunde*, Leipzig 1909, pp. 3 ff.

124 Koschaker himself collaborated on the new translation of Hammurabi's Code that should substitute Winkler's edition, see Paul Koschaker/Arthur Ungnad: *Hammurabi's Gesetz*, Band VI: *Übersetzte Urkunden mit Rechtserläuterungen*, Leizpig 1923.

125 Koschaker: *Was vermag die vergleichende Rechtswissenschaft*, p. 149.

126 On this point and on the differences between Rabel and Partsch on the one hand, and Koschaker on the other, see Kunkel: *Paul Koschaker und die europäische Bedeutung*, p. VII.

127 Koschaker, *Babylonisch-assyrisches Bürgschaftsrecht*, p. VII.

128 Ibid.: "[…] ferner aber lehrt gerade die vergleichende Rechtsgeschichte, daß selbst die weitgehendste Übereinstimmung in zwei Rechten noch nichts für eine Entlehnung beweist. Wir besitzen daher noh keine zuverlässigen Kriterien, die uns die Rezeption von unabhängiger Parallelentwicklung auf Grund gleicher oder ähnlicher kulturellen Bedingungen mit Sicherheit unterscheiden ließen."

Finally, Koschaker illustrated the main criteria of comparative legal history: its role consists of inquiring if, and to what extent, the same juridical principles held by different legal systems were characteristic of to the same or similar conditions and common cultural context and heritage. Koschaker's explanation is clearer if his text is quoted *verbatim*:

> […] als Teil der vergleichenden Rechtsgeschichte, soll sie [the study of Assyrian-Babylonian Law] uns lehren, ob und inwieweit gleichen Rechtssätzen auch gleiche oder verwandte Verhältnisse der Gesamtkultur entsprechen.[129]

At the same time, this methodology should teach that every historical-juridical event is not ordered according to a natural law, that such a process never repeats itself in an identical way at different times, since these kinds of events are tied not only to general cultural and economic contexts, but also to national factors (*der nationale Faktor*). The Historical School of Savigny and its proponents advocated the concurrence of the national "moment" in the creation of law, but they overestimated it to such an extent that it developed into a unilateral emphasis on nationalism, almost overlooking the cultural conditions which existed beyond juridical phenomena, according to Koschaker.[130] Comparative legal history can thus play an essential role, bridging the gap between the reconstruction of the transmission and tradition of law, as well as offering the opportunity to analyse sources that had already been studied from a different perspective. Furthermore, since the sources regarding ancient laws were usually incomplete and fragmented, this methodological approach offered an opportunity to fill in – at least partially – the lacunae in the sources of a specific ancient law (because "die Quellen eines Rechts sind in der Regel lückenhaft"), through the comparison between different legal systems and their respective legal institutions.[131]

In any case, this new approach would surely open the way for scholars to pursue new fruitful research questions. However, as Koschaker pointed out in his 1936 article, this method had to be used with due caution. Any scholar wanting to adopt the comparative

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[129] Ibid., p. VIII. See also Koschaker: *Forschungen und Ergebnisse*, pp. 190 ff.

[130] Koschaker: *Babylonisch-assyrisches Bürgschaftsrecht*, p. VIII: "[…] daß die historische Rechtsschule mit der einseitigen Betonung des Nationalismus in der Rechtsgeschichte weit über das Ziel hinausschoß, daß neben dem nationalen Moment den allgemeinen Kulturbedingungen mindestens dieselbe Bedeutung für die Rechtsentwicklung zukommt, ja, daß ihr Einfluß wächst, je weiter wir in der Geschichte des Rechts zurückgehen."

[131] Koschaker: *Was vermag die vergleichende Rechtswissenschaft*, p. 149: "Die Rechtsvergleichung kann hier helfen [with regard to the lack of sources of a certain law of antiquity], diese Lücken wechselseitig zu ergänzen, ja sie kann, was vielleicht noch wichtiger ist, dann, wenn kein ähnliches Rechtsinstitut in quellenmäßig gut gesicherter Umgebung erhalten ist, dazu beitragen, für die trümmerhafte Überlieferung eines anderen Rechts Fragestellungen zu liefern und Zusammenhänge aufzudecken, die sonst verborgen blieben."

legal history method is requested to be particularly careful. For Koschaker, the methodological approach was liable to be constantly influenced by the character of the scholar who is adopting it, and so it was preferable not to use comparative legal history at all rather than misuse it.[132]

Finally, the definition adopted by Koschaker to comparative legal history was based on the one given by his colleague and friend Rabel, who talked of the "Geschichte der Volksrechte und Rechtsgemeinschaften selber, insoweit sie sich der comparative Methode bedient".[133] Two elements are therefore essential, according to Rabel and consequently to Koschaker: a history of the laws of different populations and legal "communities" and the use of a comparative method. Koschaker added that this kind of research must focus first of all on the sources, giving that the already existing tools and results of comparative law are only a subsidiary means for a better knowledge of the different juridical situations. In any case, there is no place in Koschaker's representation of comparative legal history for a universal legal history, as was meant by Kohler.[134]

What is interesting is the possibility of finding similarities and perhaps influences between different ancient laws, as Koschaker illustrated with regard to a series of notable analogies between the Roman *stipulatio* and the Babylonian *Bürgschaftsrecht*.[135] It was also noteworthy that the results of comparative legal history research could be useful in studies of contemporary law, as the work of Strohal (defined by Koschaker as a "Schrift eines unserer führenden Dogmatiker") had illustrated.[136]

The final considerations in Koschaker's preface relate to linguistic questions, displaying once again his critical ability with regard to the sources and philological issues. He wrote that he used all the sources in the original language and the convenience of such a choice was self-evident ("Die Vorteile dieser Art der Quellenbenutzung sind so einleuchtend, daß über sie kaum ein Wort zu verlieren ist"). He also added that the jurist – and he insisted in drawing a clear difference between jurists, historians and philologists – cannot carry out this kind of study without the necessary language skills. However, jurists need – whether they have learned the languages of the sources or not – to collaborate with

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132 Ibid.: "Die Rechtsvergleichung ist ein empfindliches Instrument, bei dessen Gebrauch Fingerspitzengefühl notwendig ist und die Personlichkeit des Forschers stets eine entscheidende Rolle spielen wird. Schlechte Rechtsvergleichung ist schlimmer als keine."

133 Rabel: *Die Verfügungsbeschränkungen des Verpfänders*, p. 2.

134 Eventually, Koschaker clearly distanced himself from Kohler's approach. See Koschaker: *Babylonisch-assyrisches Bürgschaftsrecht*, p. VIII: "Unter vergleichender Rechtsgeschichte verstehen ich aber hierbei – und das sei mit Nachdruck hervorgehoben – nicht eine Universalrechtsgeschichte […]."

135 Koschaker: *Babylonisch-assyrisches Bürgschaftsrecht*, p. IX: "Als Romanist möchte ich besonders hervorheben, daß das babylonische Bürgschaftsinstitut eine Reihe beachtenswerter Analogien zur Entwicklung der Stipulation, wie sie unlängst Mitteis dargestellt hat, aufweist, Analogien, die vielleicht zum weiteren Ausbau der Lehre von Stipulation verwendet werden könnten."

136 Koschaker referred to Emil Strohal: *Schuldübernahme*, Jena 1910.

philologists. Collaboration and an interdisciplinary approach are essential to accomplish the very demanding task that a jurist alone can not fulfil without running a real risk of failing. It is not surprising, therefore, that from the end of the second to last page of the preface of his book Koschaker thanked many colleagues, in particular experts in Akkadian language (the first on the list is Rhodokanakis).[137]

The discussion of Koschaker's preface above is appropriate because it is representative of many methodological questions that will reappear in other works and other periods of Koschaker's career.[138] Some of these questions will be developed in more depth or will be analysed from different points of view – for example from the Roman law perspective – but this preface sums up almost all of the main problems of Koschaker's approach with regard to comparative legal history. Koschaker's conception of the comparative studies of the history of law developed over time, based on his needs to link it with the study of Roman law.

It has been recently affirmed, however, that from the 1930s on Koschaker decided to abandon the comparative method, at least as regards the possible influences and transfers between different legal orders and towards Roman law.[139] While it is true that Koschaker considered the studies on Ancient Near Eastern laws to be a separate branch – but this was the case throughout his entire career –, at a certain point, he ceased not to continuously search for potential connections between Ancient Near Eastern laws and Roman law.[140] Nonetheless, it is worthwhile investigating if Koschaker actually abandoned the comparative method and whether the soul of the Romanist was separate from the soul of the Orientalist or again, whether the two souls coexisted in the same person. To find an answer to this question it is necessary to analyse Koschaker's later works and methodological stances.[141]That said, some preliminary remarks can already be proposed.

The first impression that emerges analysing Koschaker's works during the period of time considered in this chapter is that, under Rabel's influence, he decided to suggest a new role for the comparative method. This became Koschaker's means to gaining greater knowledge of the juridical experiences of the past and thus Roman law. Koschaker's later urgency to secure the primacy of Roman law could appear – at least at the surface – as a partial abdication of the comparative method and study of Ancient Near Eastern laws.

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137 Koschaker: *Babylonisch-assyrisches Bürgschaftsrecht*, pp. XI f.

138 One can find many of the issues dealt with in the preface to *Babylonisch-assyrisches Bürgschaftsrecht* in the later article Koschaker: *Forschungen und Ergebnisse*, pp. 190 ff.

139 Atzeri: *La 'storia del diritto antico'*, p. 222.

140 He did not refuse at all, however, to compare institutions of Ancient Near Eastern laws and Roman law, as the long article he wrote in 1939-1940 proves, see Koschaker: *L'alienazione della cosa legata*, in: *Conferenze romanistiche tenute nella R. Università di Pavia nell'anno 1939 a ricordo di Guglielmo Castelli*, Pavia 1940, pp. 89-183.

141 For this reason, methodological issues and problems will be discussed in the next chapters as well; see, in particular, chapter 5 and 6.

The above-mentioned comparative method was considered to be an instrument for the study of the Legal history and of Roman law. The choice of adopting a different perspective (if it is truly a different one) at a certain point, was actually based on the different weight Koschaker attributed to Roman law from the thirties onwards, a problem clearly connected to the deep crisis it faced in Germany.[142] His methodological approach developed over time and adapted to different needs, but the basic ideas – and hence the role of the comparative method in the study of Legal history – remained the same.[143]

It is equally important to remember that at the time of his early studies on Ancient Oriental laws, there was a true flowering of this kind of research, following the discovery of a huge number of new sources. When this trend started to decline, with many scholarly publications arguing that the influence of these laws on Roman law was not so important, Koschaker could not be deterred from studying the subject, but he decided to devote less attention to the problem of the juridical transfers between legal orders.[144] Still in 1929, Koschaker wrote that the Oriental influences from the time of Constantine were undisputed and that many analogies existed between, for example, Roman law and Oriental and Greek law with regard to Private law institutes.[145] Perhaps more significantly, in 1911, the year of the publication of *Babylonisch-assyrisches Bürgschaftsrecht*, Koschaker acclaimed himself as a Romanist.[146]

It seems possible to assert, therefore, that Koschaker did not confine the comparative method from the thirties onwards, nor did he allow his two souls – the Romanist and its Orientalist counterpart – to live separate lives; rather he tried to redefine his methodological

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142 This will be clearly seen when dealing with Koschaker: *Die Krise*.

143 He still praised Rabel's methodology in Koschaker: *Europa und das römische Recht*[4], pp. 344 f.

144 In Germany the problem of the influences of Ancient Oriental laws was mainly considered under the perspective of the Jewish influence. At first, works by Spengler and then later Nazi ideology played an essential role in here. See Oswald Spengler: *Untergang des Abendlandes: Umrisse einer Morphologie der Weltgeschichte*, I (*Gestalt und Wirklichkeit*) and II (*Welthistorische Perspektive*), München 1918[1] and 1922[1]. On Spengler (1880-1936), see: Detlef Felken: *Spengler, Oswald Arnold Gottfried*, in: *NDB* 24, Berlin 2010, pp. 664-666. In Italy, Spengler's work was deeply criticised and, more generally, there was a less ideological approach to the topic of the Oriental influences on Roman law. Two important scholars in particular criticised Spengler's theories: Edoardo Volterra: *Antiche ricerche sul latino di Ulpiano*, in: *SDHI* 3 (1937), pp. 158-162; Id.: *Diritto romano e diritti orientali*, Bologna 1937 (reprint 1983), pp. 29-35, 51-81, 241-271; Riccobono: *Jurisprudentia*, in: *NDI* 7, Torino 1938, p. 497 (= *NNDI* 9, Torino 1963, p. 369); Id.: *Lineamenti della storia delle fonti e del diritto romano*, Milano 1949, p. 95, where Riccobono talked sarcastically of "favola dei giuristi aramei". For an overview of Riccobono's criticism of Spengler and the theories of the Oriental and Jewish influences on Roman law, see Varvaro: *Gli "studia humanitatis" e i "fata iuris Romani" tra fascio e croce uncinata*, in: *Index* 42 (2014), pp. 643-661 and, in particular, pp. 654-656, and 655, fn. 57, on the attempt of Germanists to delegitimise the study of Roman law.

145 Koschaker: *Forschungen und Ergebnisse*, pp. 192-194. Koschaker adopted in part a different perspective than Riccobono's, at the time, on the Oriental influences on Roman law.

146 Koschaker: *Babylonisch-assyrisches Bürgschaftsrecht*, p. IX.

approach in a new way, according to the emerging needs of the moment. A dogmatic approach often underlies Koschaker's works where elements from the interpolationist approach and the comparative legal history method are combined together. Not surprisingly, his methodological stances developed over the decades, and at times, one might prevail over the other depending on the aim he was pursing at that moment. Only a comprehensive picture of Koschaker's academic and methodological experiences and issues will allow the reader to gain a clear understanding of his assertions and approach. Nonetheless, it must be acknowledged that Koschaker's methodological definitions could appear at times rather vague, in particular when they referred to Roman law.[147]

2.4 On Koschaker's methodological issues

According to Koschaker, comparative legal history could not work without a parallel use of a proper dogmatic approach. Comparative methodology alone could not help to find the general principles of law that were needed to depict a coherent legal order. This kind of order had no links with a superior natural law and was on the contrary the result of comparison between different legal systems.[148] Through this comparison the common legal foundations of the single legal institutes (*Rechtsinstitute*), as applied in different times and by different populations, could emerge and be studied in order to find and retrace the general common principles they were based on.[149] As Koschaker wrote, the legitimacy of the comparative method was founded on the fact "daß auf denselben kulturellen, wirtschaftlichen und sozialen Verhältnissen unter verschiedenen Himmeln und zu verschiedenen Zeiten dieselben oder ähnliche Rechtssätze erwachsen."[150] At this

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147 The reasons for this remark will be explained in depth below, chapters 5 and 6.

148 For what he would later write again in 1936, see Koschaker: *Was vermag die vergleichende Rechtswissenschaft*, p. 148: "[…] auch jede Rechtsentwicklung, weil sie von Menschen getragen wird, nicht von Naturgesetzen beherrscht ist und somit nur einer geschichtlichen Betrachtung unterworfen warden kann."

149 Koschaker talked of "relatives Naturrecht" in Koschaker: *Europa und das römische Recht*[4], p. 346: "Es gibt aber auch ein relatives Naturrecht, und um ein solches relatives, d. h. europäisches Naturrecht handelt es sich hier, ein Naturrecht, das nicht spekulativ aus der Vernunft, sondern streng historisch aus der Vergleichung derjenigen Privatrechtssysteme gewonnen wird, die zum rechtlichen Aufbau und darüber hinaus der ganzen Kulturwelt beigetragen haben, an der Spitze das römische Recht, das die Verbindung zwischen diesen Rechtssystemen herstellt." See on this point below, chapter 5, § 11.

150 This is one of the main points of the comparative method. See Koschaker: *Forschungen und Ergebnisse*, p. 191: "Ihre Rechtfertigung [of the comparative method] findet sie bei vorsichtiger Bewertung nicht so sehr in etwaiger gemeinsamer Abstammung der Vergleichsrechte oder der Möglichkeit von Entlehnung unter ihnen, als vielmehr in dem nur eine Anwendung des Bastianschen Elementar- und Völkergedankens bildenden Prinzip, daß auf denselben kulturellen, wirtschaftlichen und sozialen Verhältnissen unter verschiedenen Himmeln und zu verschiedenen Zeiten dieselben oder ähnliche Rechtssätze erwachsen, wozu noch gewisse

point, two remarks should be added with regard to his stances: first, Koschaker did not only apply the comparative method to Ancient Oriental laws, but to any other legal system of the past that the he intended to analyse; second, the final aim of such a study was oriented towards the depiction of the development of the Private law systems (*Privatrechtssysteme*), in general, and, from the thirties onwards, their potential influence on European private law, in particular.

To summarise, a few final considerations can thus be offered on Koschaker's methodological issues. First, there was a clear-cut distinction between the study of Ancient Oriental laws and cuneiform law on the one hand, and *vergleichende Rechtsgeschichte* on the other. As such, comparison was and should remain only a scientific method and a useful tool, a *Hilfsmittel* or an *Instrument*, to study the history of law.[151] The study of Ancient Oriental laws, however, was a proper science (*Wissenschaft*) and within this science it was necessary to recognise the autonomy of the cuneiform law.[152] This was a bone of contention between Koschaker and his colleague and friend Riccobono when the latter defined Koschaker a follower of the trend of *antike Rechtsgeschichte* and *Universalrechtsgeschichte*.[153] Koschaker refuted the definition because his studies did not aim simply to compare ancient laws (Roman law included); on the contrary, his goal was the historical and dogmatic depiction (*historisch-dogmatische Darstellung*) of a legal order that aimed to investigate the development of legal institutes (*Entwicklung der Rechtsinstitute*) in each ancient law he dealt with, whether it was the Assyrian-Babylonian law, or Roman law, or any other ancient law.[154]

The titles of his 1911 and 1917 monographs, *Babylonisch-Assyrisches Bürgschaftsrecht* and *Rechtsvergleichende Studien zur Gesetzgebung Ḫamurapis* respectively, already suggest the approach used by Koschaker in analysing the corresponding subjects. In the first he dealt with a specific legal institution, the *Bürgschaftsrecht* (the guaranty), while in the second he tried to retrace Hammurabi's legislation (*Gesetzgebung*) as if it was a codification. It is clearly a very dogmatic approach, aiming to retrace a history of legal concepts (*Begriffsgeschichte*); Koschaker's way of focusing on legal institutions was therefore influenced in this respect by the typical approach of the Pandect-science and the so-called *Begriffsjurisprudenz*.

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allgemeine Triebe des Kulturmenschen kommen, die sich namentlich im Privatrecht im Sinne einer Entwicklung zu gleichen Rechtssätzen geltend machen, also in der Erkenntnis, daß in der Entwicklung eines Rechts neben individuellen, atypischen Faktoren auch solche typischer Natur in Frage kommen."

151 Koschaker: *Forschungen und Ergebnisse*, p. 197 and fn. 1: "Denn die vergleichende Rechtsgeschichte ist an sich keine Wissenschaft, sondern eine wissenschaftliche Methode."

152 Id.: p. 196: "Soll daher die Erforschung dieser Rechts- und Wirtschaftsquellen überhaupt eine Zukunft haben und unsere Erkenntnis ernstlich fördern, so muß sie als selbständiger Zweig der Rechts- und Wirtschaftsgeschichte anerkannt werden und nicht bloß als Hilfswissenschaft zur Geschichte der Rechte des klassischen Altertums."

153 See the remarks above, pp. 45 f.

154 Compare Koschaker: *Babylonisch-assyrisches Bürgschaftsrecht*, p. V.

The study of a single legal system should allow for the emergence of the principles on which the institutions are founded and comparison of two or more systems can lead to the recognition of the emergence of common principles; through this process the foundations of private law systems can be discovered. According to Koschaker, however, and despite his deep interest in cuneiform law, only the study of Roman law could fulfil a predominant role – and this was one of the main sources of disagreement with Wenger[155] – because it represented the cornerstone of European legal tradition and culture. While Wenger therefore desired to focus on a historical study of legal experiences of the past in itself, Koschaker sought to adopt this kind of research as a means to obtain a better understanding of the development of historical Private law systems and of the Roman (and consequently, as will be seen in the next chapter, the European one), in particular. In any case, the method of comparative legal history was to allow jurists to refine their own perspective and research questions: it illustrated that many elements of single legal orders, which were the expression of a national sentiment of a given and specific people (*Volk*), should not therefore be considered a peculiar aspect of a single national law.[156]

The main purposes of historical-comparative legal studies appeared only in part in Koschaker's early works, but it is still evident how strongly these aims are bound to his dogmatic approach. According to Koschaker, the dogmatic approach and the legal comparative method were not two separate elements; in fact, they were the two faces of the same coin, in which each single component was essential to create the whole complex methodology he applied in the study of the history of law.[157] To Koschaker, this kind of research on Legal history had to be developed taking into consideration the connections with modern law and the needs of modern legislations.[158]

Koschaker's approach will become even clearer when his position towards the crisis of Roman law in Germany is discussed.[159]

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155 Whereas the differences with regard to the methodological issues of *vergleichende Rechtsgeschichte* are sometimes not so clear.

156 Koschaker: *Was vermag die vergleichende Rechtswissenschaft*, pp. 152 f.: "Die heutige Zeit ist geneigt, das Recht jedes Volkes als etwas Einzigartiges zu betrachten, und sie hat damit recht, weil jedes Recht eine historische Individualität ist. Aber die Rechtsvergleichung ermöglicht eine Verfeinerung der Fragestellung. Indem sie gewisse typische Komponenten in der Rechtsentwicklung eines Volkes aufdeckt, zwingt sie uns allerdings, diese Teile von dem nationalen Sondergut abzuziehen."

157 See also Pfeifer: *Keilschriftrechte und historische Rechtsvergleichung*, pp. 15 f.

158 See Müller: *Paul Koschaker (1879-1951)*, p. 273: "[…] arbeitete Koschaker von dieser Zeit [since he became *Privatdozent* in Graz] an – das ist ganz wörtlich zu nehmen – an zwei Schreibtischen." Müller means that Koschaker focused on research on ancient laws, and Roman law in particular on the one hand, and on topics relating to modern German and Slavic law on the other. One may agree with this assumption, but it should be remembered that his research on Roman law had the aim of building bridges between the past and the present and it was not, to use Koschaker's own words, a work for antiquarians.

159 See below, chapter 5.

2.5 Koschaker's final years in Leipzig and the road to Berlin in 1936

The years in Leipzig were very important and fruitful to Koschaker's career.[160] He spent twenty-one years there, becoming one of the most prominent scholars in the field of cuneiform law and establishing solid connections with the professors at the Faculty of Law, as well as the *Semitisches Institut* and, later, the *Seminar für orientalische Rechtsgeschichte*. During his time at Leipzig, he was appointed Dean of the Law Faculty on no less than three occasions, in 1917-1918, in 1923-1924 and then in 1932-1933.[161] His reputation also grew in the field of Roman law, and he became one of the prominent personalities during the twenties and the beginning of the thirties, despite the small number of publications he had produced on this subject matter at the time.[162] His prestige was due, above all, to the eminent role that he had achieved in the study of cuneiform law and Ancient Near Eastern laws,[163] but he was also revered among Romanists as well: after all, he always considered himself a Romanist. At the same time, he was able to create links

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160 Koschaker: *Selbstdarstellung*, p. 117.

161 The mention of Koschaker as Dean of the Law Faculty in 1917-1918 and 1923-1924 can be found in Ulrich von Hehl (ed.): *Sachsens Landesuniversität in Monarchie, Republik und Diktatur*, Leipzig 2005, p. 531. For references on Koschaker's appointment as Dean of the Law Faculty also in 1933-1934, on the contrary, see: Thomas Henne: *Die Aberkennung von Doktorgraden an der Juristenfakultät der Universität Leipzig – Überblick zu den Ergebnissen des Projekts*, in: Thomas Henne/Anne-Kristin Lenk/Thomas Brix (eds.): *Die Aberkennung von Doktorgraden an der Juristenfakultät der Universität Leipzig 1933-1945*, Leipzig 2007, pp. 17-34 and, in particular, p. 25. The author refers to the documents he found in the "Personal- und Vorlesungsverzeichnisse fur das Sommersemester 1933 und das Winter Semester 1933/1934" that are preserved at the Library of the Stadtarchiv in Leipzig. Nevertheless, in the list of the deans of the Law Faculty at the University of Leipzig the name of Koschaker appears only for the years 1917-1918 and 1923-1924.

162 In addition to the monograph he wrote as his *Habilitationsschrift* in 1905, Koschaker published five other works on Roman law up till 1938: Koschaker: *D. 39,6,42 pr., ein Beispiel für vorjustinianische Interpolation*, in *ZSS* (RA) 37 (1916), pp. 325-327; Koschaker.: *Neue Forschungen zum römischen Zivilprozeß*, in: *Deutsche Literaturzeitung* 41 (1920), 361-368; Koschaker.: *Bedingte Novation und Pactum im römischen Recht*, in: *Abhandlungen zur antiken Rechtsgeschichte. Festschrift für Gustav Hanausek*, Graz 1925, pp. 118-158; Koschaker: *Demokratische Strömungen im römischen Zivilprozeß*, in: *Sächsiche Akademie der Wissenschaften. Berichte der Philologisch-historischen Klasse* LXXX (1928), 5. Heft, Leipzig 1929, pp. 1-2; Koschaker: *Zwei Digestenstellen*, in: *ZSS* (RA) 49 (1929), pp. 463-471; Koschaker: *Unterhalt der Ehefrau*, pp. 1-27; Koschaker: *Adoptio in fratrem*, in: *Studi in onore di Salvatore Riccobono*, III, Palermo 1936, pp. 360-376. Koschaker also wrote many reviews, mainly published in the *Zeitschrift der Savigny-Stiftung*.

163 See in particular Renger: *Altorientalistik*, pp. 479 f.

with colleagues from different countries, and in particular from Italy,[164] France,[165] but also the UK with de Zulueta,[166] and Arthur Schiller in the United States.[167]

In any case, an unpublished manuscript written by Koschaker in 1933, conserved at the library of the *Max-Planck-Institut für europäische Rechtsgeschichte*, in Frankfurt am Main, and entitled *System des römischen Privatrechts*, shows that he had decided to again focus on Roman law at the time and, in particular, on the teaching of Roman law.[168] The document reports the draft – with handwritten remarks and amendments – of a work that seems to be a textbook on Roman law in the style of the textbooks (*Lehrbücher*) of the pandectists.[169] A text thus conceived to offer a systematic depiction of Roman private law which would be was useful for his teaching purposes. In this respect, the manuscript offers a very traditional textbook on Roman law and further proof of the influence that the pandectistic method had on Koschaker, since the years of his studies at the University of Graz.

On reading this manuscript, it can also be inferred that some of Koschaker's ideas on Roman law teaching, as expressed from the publication of *Die Krise des römischen Rechts* onwards,[170] and, in particular, his emphasis on the dogmatic approach towards the subject matter, were still present at least at the beginning of the thirties. The same introduction of the manuscript, devoted to a historical depiction of Roman law reception in Germany, already elucidated, albeit very briefly, some of the topics Koschaker would

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164 Even though the first name that should be taken into consideration is of course Salvatore Riccobono's, Koschaker also established very good friendships with other Italian scholars, such as Emilio Albertario, see Koschaker: *Bespr. von Emilio Albertario, Studi di diritto Romano*, *Vol. III: obbligazioni, V: storia, metodologia, esegesi, Milano, Ant. Giuffrè, 1936 und 1937*, in: *ZSS* (RA) 58 (1938), pp. 427-437. Koschaker was a very good friend of both Riccobono and Albertario, even though the two were at academic loggerheads due both to academic questions and their different approach towards interpolationism. For an overview regarding their different stances on textual criticism, see Talamanca: *La ricostruzione del testo*, pp. 217-239 and Santos: *Brevissima storia*, pp. 87-96 with further bibliography.

165 One example is Paul Collinet (1869-1938), see Koschaker: *Paul Collinet* †, in: *ZSS* (RA) 60 (1940), pp. 330-334, where Koschaker's esteem and affection for his recently dead colleague clearly emerge.

166 Atzeri: *La 'storia del diritto antico'*, pp. 191-222.

167 As the correspondence between Koschaker and Schiller demonstrates. In 1932 and 1933 Koschaker sent two letters to Schiller that show an academic friendship between the two. The letters are conserved – uncatalogued – in a box (box nr. 4) under the name of Schiller at the Columbia University Library and are dated 3rd August 1932 and 14th November 1933. However, the correspondence between Koschaker and Schiller continued until at least 1949, as can be seen from a letter of that year written by Koschaker when he was in Ankara.

168 The signature on the first page of the document reads: Manuscr. 155 Q R. See pictures nr 1, 2 and 3 below, pp. 69 ff. On this manuscript see also Giaro: *Aktualisierung Europas*, p. 53.

169 Like, e.g., Karl von Czyhlarz: *Lehrbuch der Institutionen des römischen Rechtes*, Wien 1889, a work which deeply impressed Koschaker, who used it when he was a student at the University of Graz. As he wrote in his autobiography, the textbook was important both as a basis to study Roman law and from a pedagogical perspective. Koschaker: *Selbstdarstellung*, p. 108.

170 On which see below, chapter 5, §§ 1-5.

later devote his attention to in *Die Krise des römischen Rechts*. It is reasonable to affirm that from the 1920s Koschaker began to intensify his research on Roman law, given the death of Mitteis a few years before (in 1921) and the increasing numbers of publications on this subject matter.

Even though the situation was apparently still more than favourable for Koschaker in Leipzig at the time, with the advent of the Nazi regime in 1933 things began to change. Studies in the field of cuneiform law faced an imminent demise, as many of the scholars dealing with the topic were Jewish. Martin David, one of Koschaker and Landsberger's puils, and lecturer (*Privatdozent*) at the Faculty of Law at the time, went to the Netherlands in 1933 after losing his position at the university.[171] In 1935, Weißach and Koschaker's most important colleague at the *Semitisches Institut*, Landsberger, were ousted from their respective chairs too.[172] In just a few years Koschaker lost friends, colleagues and pupils, who were forced to leave the country to survive the violence of the regime, as he increasingly began to feel the results of *Nazifizierung* at the University of Leipzig.

Koschaker wrote in his autobiography, with regard to his last period in Leipzig, about the ousting of Landsberger and the call to Berlin:

> Der Nationalsozialismus hat das alles zerstört. 1935 wurde Landsberger durch Verfügung des sächsischen Reichsstatthalters Mutschmann zugleich mit manchen anderen Professoren entlassen. Ich fuhr nach Berlin, um mich beim Reichsministerium zu beschweren, und fand eine relative günstige Atmosphäre vor. Denn man war dort über Mutschmann wütend, natürlich nicht wegen der betroffenen jüdischen Professoren, sondern deshalb, weil nicht er, sondern bereits das Reichsministerium zu jenen Verfügungen zuständig war. […] Dafür bot man mir den vakanten romanistischen Lehrstuhl in Berlin an und stellte mir in Aussicht, Landsberger bei den vorderasiatischen Museen in Berlin unterzubringen, wo er in verhältnismäßiger Verbogenheit unbehelligt bleiben würde. Ich gestehe, daß dies ein sehr wesentlicher Grund für mich war, Berlin anzunehmen. Glücklicherweise erhielt Landsberger bald darauf den Ruf nach Ankara und tat weise, ihn anzunehmen.[173]

Thus in 1935, the negotiation for Koschaker's call to Berlin began. It was probably not easy to reach an agreement with Koschaker, but the process reveal, in any case, the high consideration the members of the Ministry had of him. Moreover, there was an impelling

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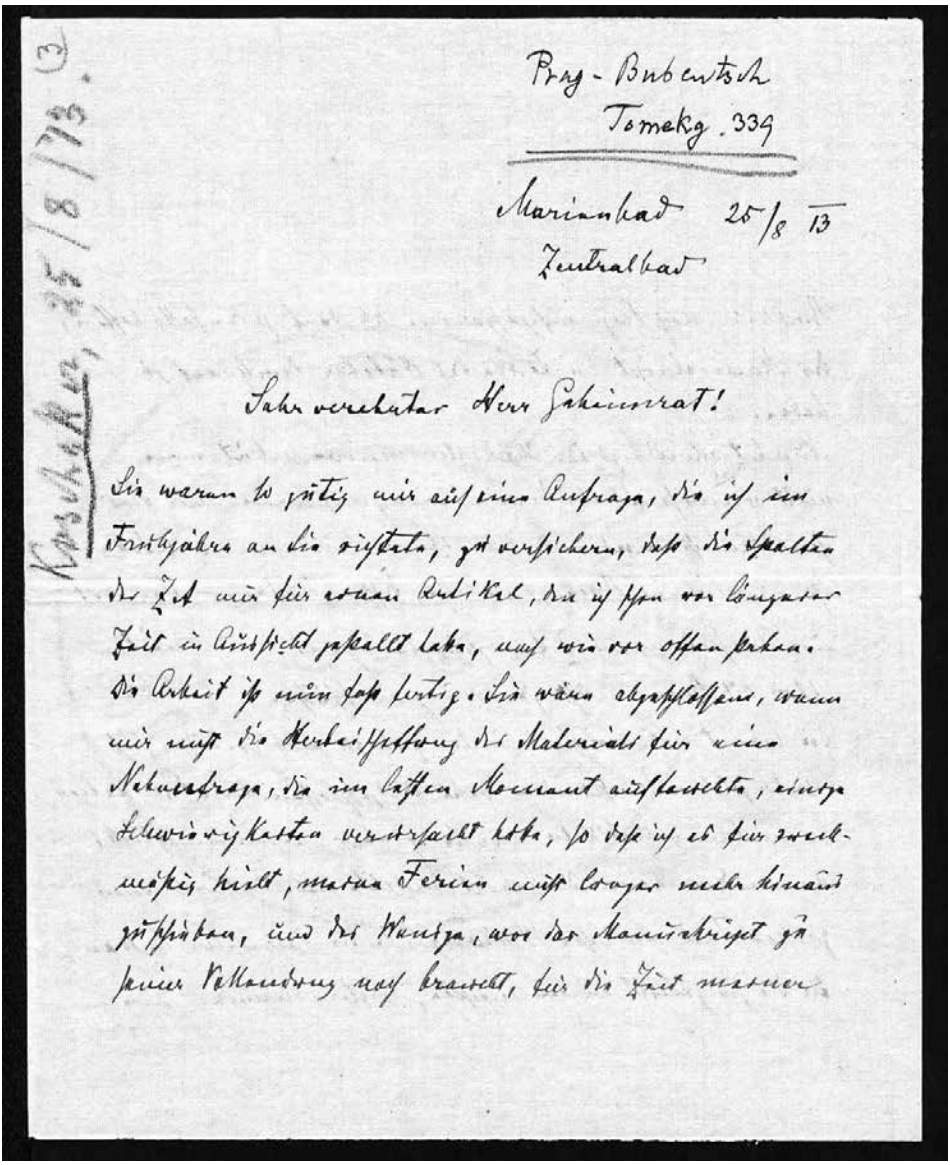
171 Müller: *Paul Koschaker (1879-1951)*, p. 278; on Martin David, see above, p. 49, fn. 96.
172 Ibid.: p. 278; Renger: *Altorientalistik*, pp. 476 ff.
173 Koschaker: *Selbstdarstellung*, p. 117.

need to find an eminent professor for the Chair in Roman law at the *Friedrich-Wilhelms-Universität* now that Rabel had been ousted.[174]

[174] See Lösch: *Der nackte Geist*, pp. 366-371 and 390.

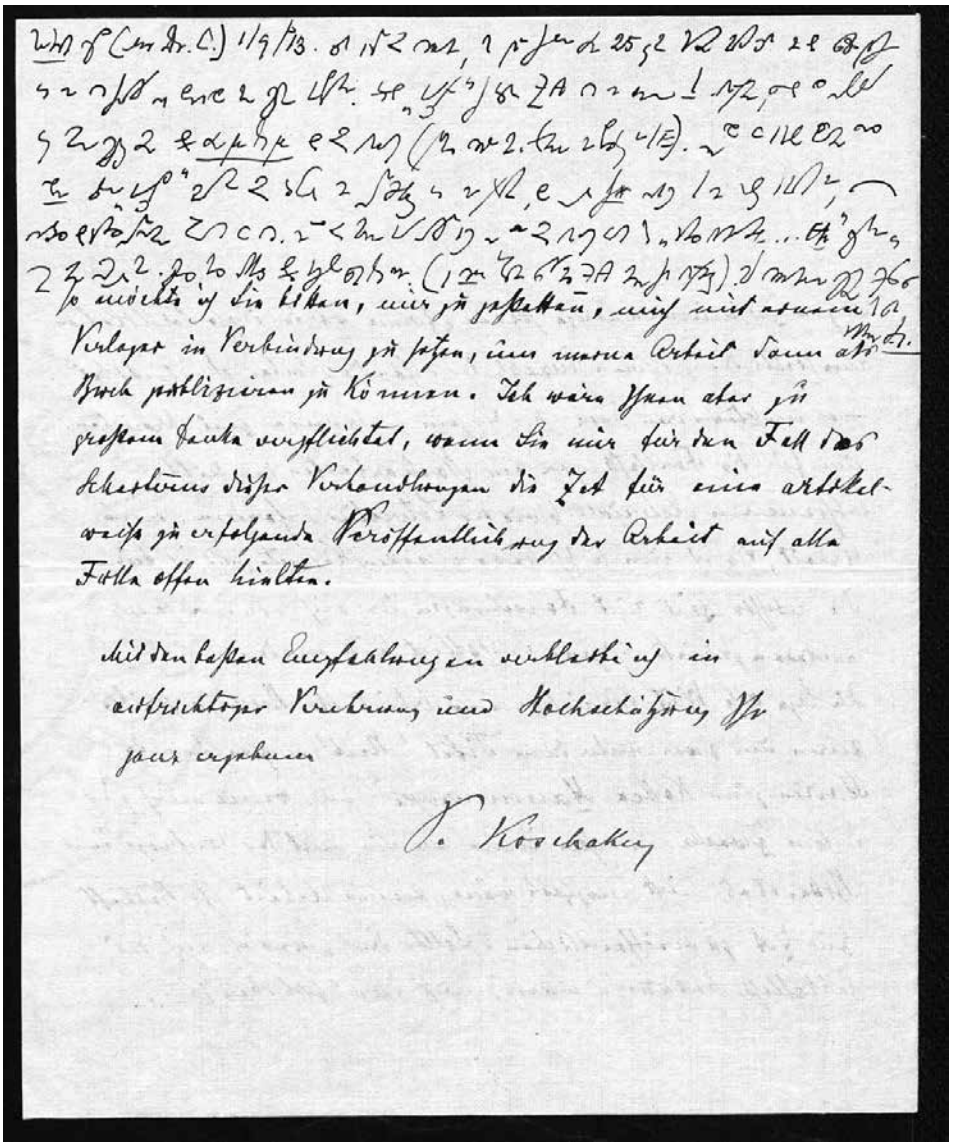


Prag - Bubentsch
Tomekg. 339

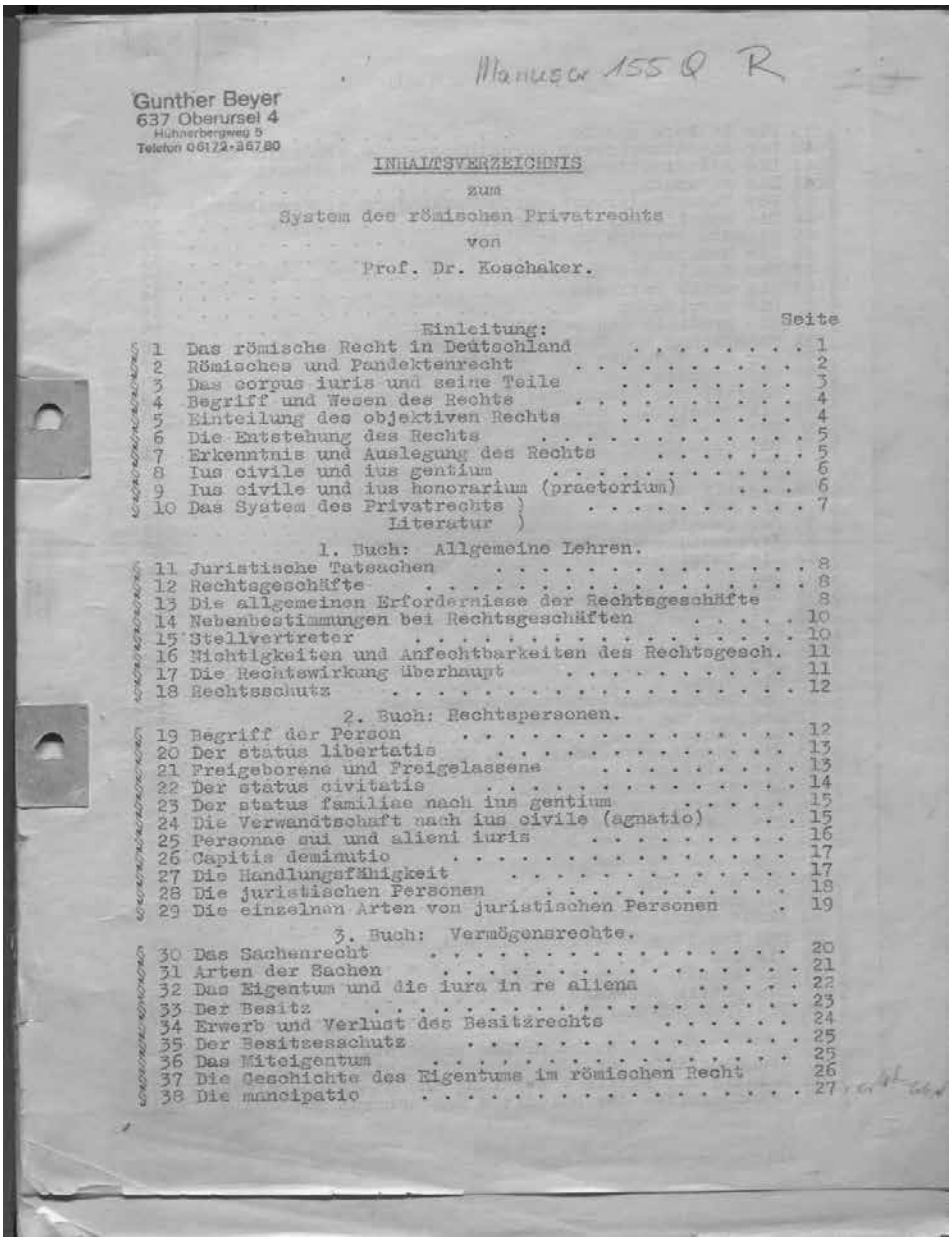
Marienbad 25/8 13
Zentralbad

Sehr verehrter Herr Geheimrat!

Sie waren so gütig mir auf meine Anfrage, die ich im Frühjahres an die richtete, gut versichern, daß die Spaltung der Zeit mir für einen Radikal, da ich schon vor längerer Zeit in Aussicht gestellt habe, auf wie vor offen stehen. Die Arbeit ist mir fast fertig. Sie wären abgeschlossen, wenn mir nicht die Herbeischaffung des Materials für eine Nebenfrage, die im letzten Moment auftauchte, etwas schwierig gemacht hätte, so daß ich es für zweckmäßig hielt, meinen Ferien nicht länger noch hinaus zu schieben, und die Wendung, wie der Manuskript zu seiner Vollendung noch braucht, für die Zeit meiner



Picture nr. 2: Letter by Koschaker to Carl Bezold, 25th August 1913
Fourth page (UAH, 1501-113)



Manuscr 155 Q R

Gunther Beyer
637 Oberursel 4
Hühnerbergweg 5
Telefon 06172-36780

INHALTSVERZEICHNIS

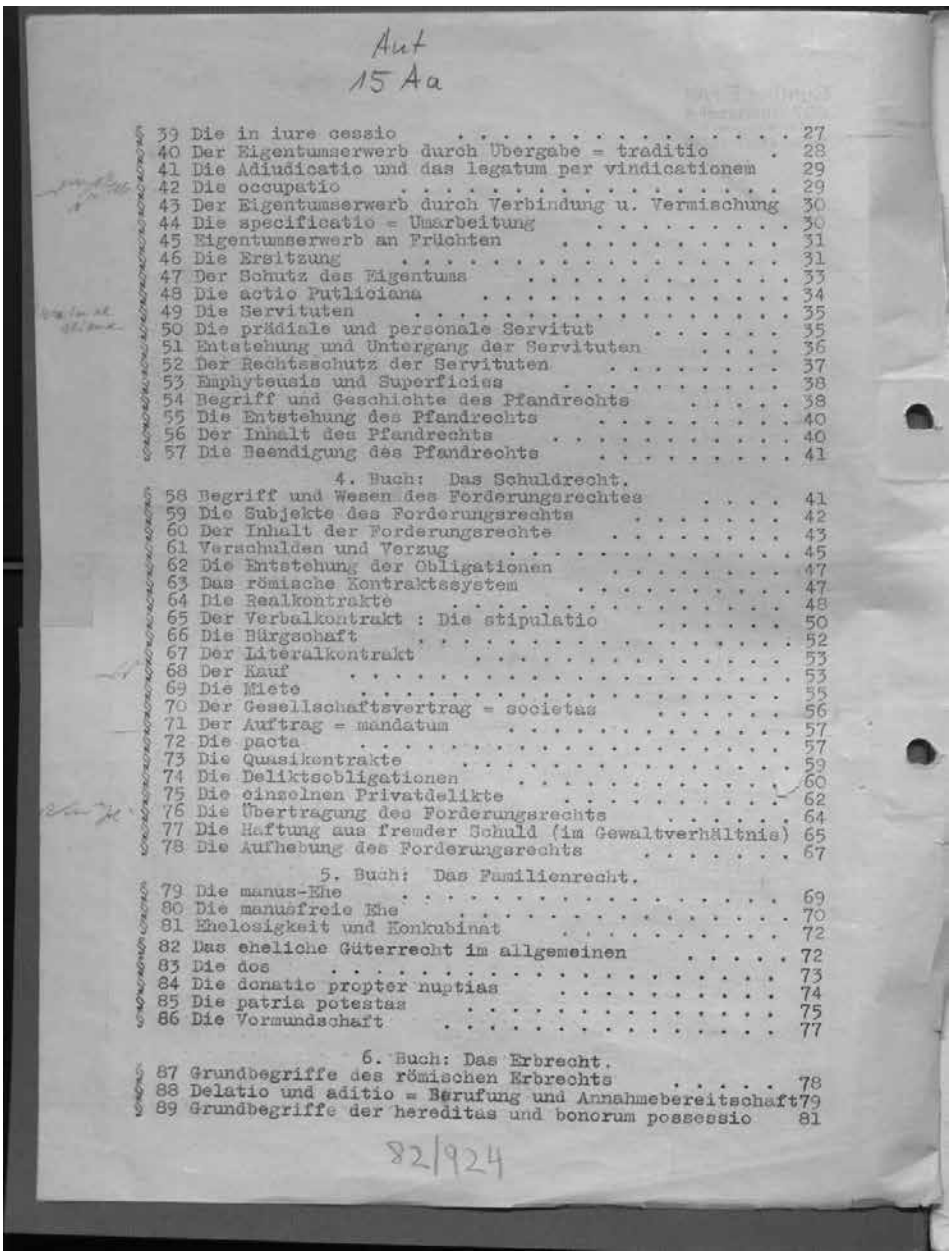
zum

System des römischen Privatrechts

von

Prof. Dr. Koschaker.

Picture nr. 3: Koschaker: *System des römischen Privatrechts* (library of the *Max-Planck-Institut für europäische Rechtsgeschichte*, Manuscr. 155 Q R). First page of the Table of Contents.



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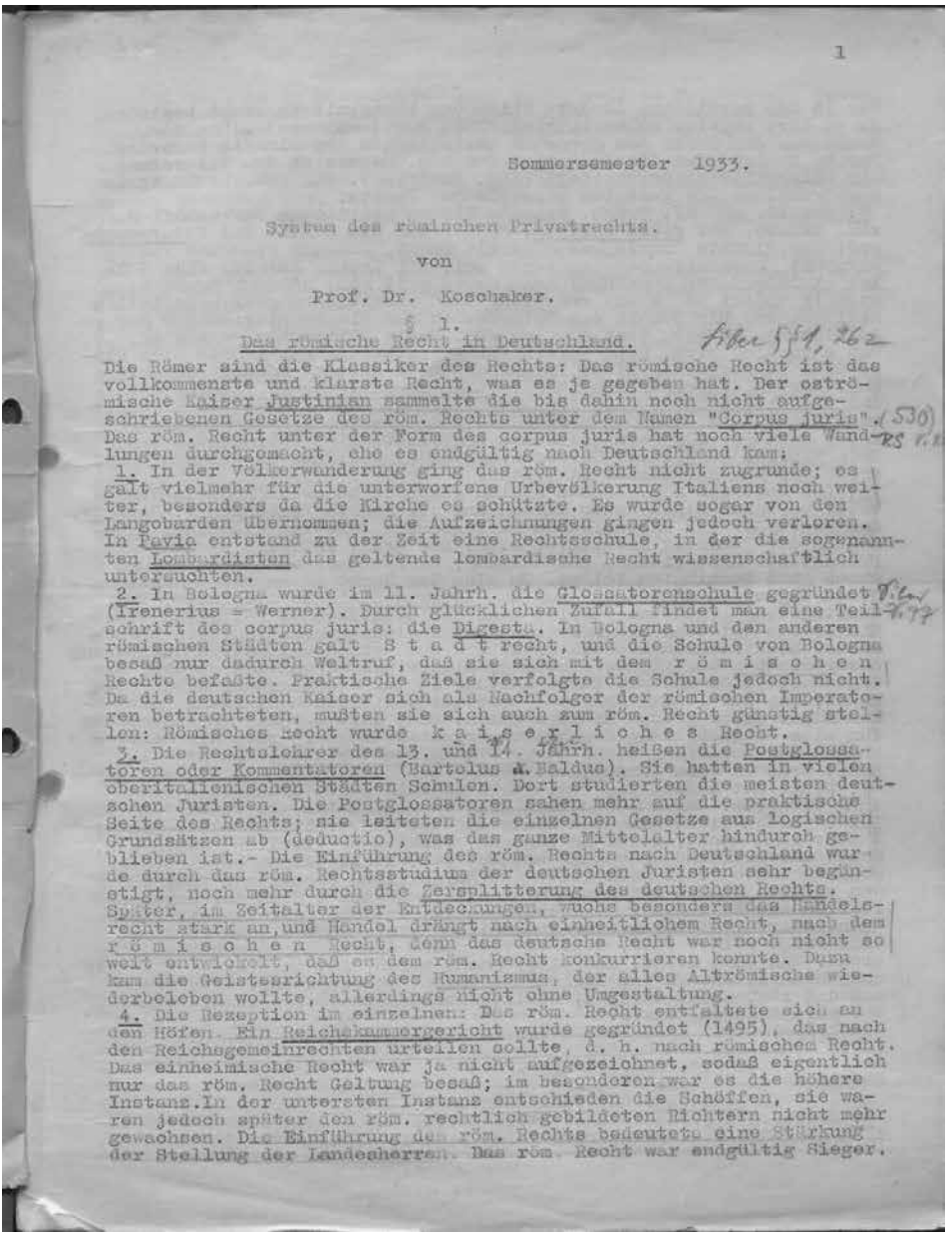
82/924

Picture nr. 4: Koschaker: *System des römischen Privatrechts* (library of the Max-Planck-Institut für europäische Rechtsgeschichte, Manuscr. 155 Q R). Second page of the Table of Contents



1

Sommersemester 1933.

System des römischen Privatrechts.

von

Prof. Dr. Koschaker.

§ 1.

Das römische Recht in Deutschland.

Die Römer sind die Klassiker des Rechts: Das römische Recht ist das vollkommenste und klarste Recht, was es je gegeben hat. Der oströmische Kaiser Justinian sammelte die bis dahin noch nicht aufgeschriebenen Gesetze des röm. Rechts unter dem Namen "Corpus juris". Das röm. Recht unter der Form des corpus juris hat noch viele Wandlungen durchgemacht, ehe es endgültig nach Deutschland kam:

1. In der Völkerwanderung ging das röm. Recht nicht zugrunde; es galt vielmehr für die unterworfene Urbevölkerung Italiens noch weiter, besonders da die Kirche es schützte. Es wurde sogar von den Langobarden übernommen; die Aufzeichnungen gingen jedoch verloren. In Pavia entstand zu der Zeit eine Rechtsschule, in der die sogenannten Lombardisten das geltende lombardische Recht wissenschaftlich untersuchten.

2. In Bologna wurde im 11. Jahrh. die Glossatorenschule gegründet (Irenerius = Werner). Durch glücklichen Zufall findet man eine Teilschrift des corpus juris: die Digesta. In Bologna und den anderen römischen Städten galt S t a d t recht, und die Schule von Bologna besaß nur dadurch Weltruf, daß sie sich mit dem r ö m i s c h e n Rechte befaßte. Praktische Ziele verfolgte die Schule jedoch nicht. Da die deutschen Kaiser sich als Nachfolger der römischen Imperatoren betrachteten, mußten sie sich auch zum röm. Recht günstig stellen: Römisches Recht wurde k a i s e r l i c h e s Recht.

3. Die Rechtslehrer des 13. und 14. Jahrh. heißen die Postglossatoren oder Kommentatoren (Bartolus u. Baldus). Sie hatten in vielen oberitalienischen Städten Schulen. Dort studierten die meisten deutschen Juristen. Die Postglossatoren sahen mehr auf die praktische Seite des Rechts; sie leiteten die einzelnen Gesetze aus logischen Grundsätzen ab (deductio), was das ganze Mittelalter hindurch geblieben ist.- Die Einführung des röm. Rechts nach Deutschland wurde durch das röm. Rechtsstudium der deutschen Juristen sehr begünstigt, noch mehr durch die Zersplitterung des deutschen Rechts. Später, im Zeitalter der Entdeckungen, wuchs besonders das Handelsrecht stark an, und Handel drängt nach einheitlichem Recht, nach dem r ö m i s c h e n Recht, denn das deutsche Recht war noch nicht so weit entwickelt, daß es dem röm. Recht konkurrieren konnte. Dann kam die Geistesrichtung des Humanismus, der alles Altrömische wiederbeleben wollte, allerdings nicht ohne Umgestaltung.

4. Die Rezeption im einzelnen: Das röm. Recht entfaltete sich an den Höfen. Ein Reichskammergericht wurde gegründet (1495), das nach den Reichsgemeinrechten urteilen sollte, d. h. nach römischem Recht. Das einheimische Recht war ja nicht aufgezeichnet, sodaß eigentlich nur das röm. Recht Geltung besaß; im besonderen war es die höhere Instanz. In der untersten Instanz entschieden die Schöffen, sie waren jedoch später den röm. rechtlich gebildeten Richtern nicht mehr gewachsen. Die Einführung des röm. Rechts bedeutete eine Stärkung der Stellung der Landesherren. Das röm. Recht war endgültig Sieger.

Picture nr. 5: Koschaker: *System des römischen Privatrechts* (library of the Max-Planck-Institut für europäische Rechtsgeschichte, Manuscr. 155 Q R). Page number 1 of the manuscript

3 Koschaker in Berlin (1936-1941)

3.1 A short premise

This chapter examines the period Koschaker spent as a professor in Berlin from 1936 to 1941, as explained in the Introduction.[1] The years in the *Reich*'s capital represented a decisive step in his career, since he had obtained the most prestigious chair in Roman law in Germany and, at the same time, other important accolades, such as his affiliation with the illustrious Prussian Academy of Science (*Preußische Akademie der Wissenschaften*) and the Academy for German law (*Akademie für Deutsches Recht*, no less important than the *Preußische Akademie der Wissenschaften* during the thirties in Germany), and, not least, the position of co-director of the *Zeitschrift der Savigny-Stiftung*. Moreover, his time in Berlin was a period in which Koschaker decided to focus his studies and teaching on Roman law much more than he had done previously. He felt somehow impelled to defend this important field of research that was beset by a deep crisis, particularly in Germany, from the beginning of the thirties, if not before. Even though, as will become clear in the following pages, he did not abandon the study of cuneiform law and the Near Eastern Legal history, nonetheless he decided to devote particular attention to Roman law. The events that took place in Berlin between 1936 and 1941 have led scholars to see these years as a turning point in Koschaker's life, creating two clear-cut narratives on him.[2] Based on the different interpretations of these events Koschaker can either be idealised as a Nazi opponent, or be seen as a supporter – perhaps despite himself – of the regime. Both these reconstructions, however, often seem to follow a preordained course. This chapter aims, therefore, through the analysis of archival materials, to give a more objective and less biased representation of this essential period in Koschaker's life and career. Accordingly, it will cover questions regarding his call to Berlin and all the events that took place over the five years that he spent in the capital, whereas his major publication of this period, *Die Krise des römischen Rechts und die romanistische Rechtswissenschaft*, and its content will be discussed separately in chapter 5.[3]

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1 See above, Introduction, § 1.4.
2 See above, Introduction, § 1.2.
3 Koschaker, *Die Krise*, on which see below, chapter 5, §§ 3-6.

3.2 Savigny's Chair in Berlin

As was discussed in the previous chapter, between 1935 and 1936, the last year that Koschaker spent in Leipzig, the situation at the University deteriorated. The increasing presence of Nazi supporters, the so-called *Nazifizierung*, the dismissal of Landsberger and Weißbach, the closure of the *Seminar für orientalische Rechtsgeschichte* – all these events made the situation in Leipzig completely different from the city it had been just a few years before. Thus, in 1935 when Koschaker received an offer to move to Berlin, he decided to negotiate the conditions for his move.[4] For one thing, he wanted to find a place for his friend Landsberger and he made this an essential condition in his negotiations. He underlined the fact that the position in Berlin would also mean holding the chair that had been Savigny's (*der Lehrstuhl Savignys*), namely the most prestigious chair in Roman law in Germany at that time, as well as the possibility of being admitted to the *Preußische Akademie der Wissenschaften* and the *Akademie für Deutsches Recht*.

To Koschaker, the move to Berlin was the precursor to the successful completion of a brilliant career. As Below and Falkenstein have pointed out, from this illustrious position he could defend Roman law in its struggle for existence (*Kampfexistenz*).[5] Scholars consider the period in Berlin and the events that took place there to be a fundamental turning point in Koschaker's life and academic experience.[6] For these reasons, it is necessary to retrace the events accurately in the following pages, making use of archival documents to gain a better understanding of the situation as a whole.

The documents at our disposal confirm that Koschaker managed to dictate several conditions to the members of the Ministry for Sciences and National Education (*Reichsministerium für Wissenschaft, Erziehung und Volksbildung*) before agreeing to move to Berlin. One demand was that he would keep working with Landsberger, and although Landsberger was not offered a position at the University, a minor appointment at the Near Eastern section of the National Museums (*vorderasiatische Abteilung der Staatlichen Museen*) was suggested. Koschaker seemed to find this proposal acceptable. Koschaker and Landsberger still had many research projects that they had begun together in Leipzig, and Koschaker, moreover, did not wish to abandon someone who was not

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4 A copy of the agreement (*Vereinbarung*) between Koschaker and the University of Berlin, dated 10th February 1936, is conserved at the archive at the University of Tübingen (UAT, 126/346a). The text of the agreement contains eight points with the conditions accepted by Koschaker to move to Berlin, where he obtained the Chair for Roman law and comparative legal history from 1st April 1936.

5 Below/Falkenstein: *Paul Koschaker* †, p. X.

6 On the two opposed narratives on Koshaker, see the Introduction above, § 1.2, with bibliography.

merely a colleague, but also a friend. Koschaker had to accept the compromise in order to secure a place for Landsberger in Berlin. As a Jew, it is difficult to imagine that Landsberger would have been able to survive in Germany in any case, at the time.[7] What remains unclear is how was it possible in 1935 for the *Reichsministerium* to propose that a Jew, who had been dismissed from the university in Leipzig, could get a job in the capital city, in even a marginal position. It would seem that the need to have a prominent professor in Berlin, as well as Koschaker's contacts with the Ministry of Education, could have led to this compromise in favour of Landsberger, at least provisionally. Renger argued that Walther Hinz,[8] who at that time was a consultant (*Referent*) at the Ministry of Education and on good terms with both Koschaker and Landsberger since his study days at Leipzig, could have played a decisive role in this affair. These suppositions appear reasonable, and the importance of Hinz's role in Koschaker's call to Berlin would seem to be confirmed by a letter written by Koschaker himself.[9] In the meantime, Landsberger received a call to take up a professorship in Ankara, which he accepted, leaving Germany for good.[10] Years later, in 1947, Koschaker wrote to his pupil Guido Kisch, himself a refugee:

> Meine Berufung nach Berlin haben Sie wohl noch erlebt? Ich ging, weil man mir bezüglich Landsbergers, der in Leipzig durch den Reichsstatthalter Mutschmann entfernt worden war, für Berlin allerlei Zusagen machte, die nicht gehalten wurden, und ich damals hoffte, mir die Zusammenarbeit mit Landsberger zu erhalten. Im übrigen war ich immer ungern in Berlin.[11]

From both a personal and professional point of view, Landsberger's absence in Berlin was significant. Another essential condition made by Koschaker was the creation of a seminar for Near Eastern Legal history (*Seminar für Rechtsgeschichte des Alten Orients*) at the *Friedrich-Wilhelms-Universität*.[12] The importance Koschaker attached to this

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7 This idea also emerges from the lines of Koschaker's autobiography. Koschaker believed that his friend and colleague could not have avoided the concentration camp. See Koschaker: *Selbstdarstellung*, p. 117: "Zweitens wäre Landsberger selbst wenn es ihm gelungen wäre, sich verborgen zu halten, doch auf die Dauer dem Konzetrationslager nicht entgangen."

8 On Walther Hinz (1906-1992), see Michael Grüttner: *Biographisches Lexikon zur nationalsozialistischen Wissenschaftspolitik (= Studien zur Wissenschafts- und Universitätsgeschichte*, 6), Heidelberg 2004, pp. 75 ff.

9 See Renger: *Altorientalistik*, p. 480. For a different reconstruction, see: Giaro: *Aktualisierung Europas*, p. 39.

10 And in fact, none of the eight points of the definitive agreement between Koschaker and the University of Berlin deals with Landsberger's position.

11 The letter was written on 27th November 1947. See Kisch (ed.): *Paul Koschaker. Gelehrter, Mensch und Freund*, p. 22 (letter nr. 5).

12 Müller: *Paul Koschaker (1879-1951)*, pp. 279 f. On the *Seminar* see also Lösch: *Der nackte Geist*, p. 264.

condition is apparent in a letter he wrote on 19th April 1940 (his birthday), to the Ministry for Science, Education and Popular Education, in which Hinz's name appears:[13]

> Bei meiner Berufung von Leipzig nach Berlin im Jahre 1935/1936 wurde mir die Errichtung eines „Seminars für Rechtsgeschichte des Alten Orients" mit einem Assistenten zugesichert. Die Aussicht, meine Studien in den Rechten des alten Orients in Berlin mit größerer Wirksamkeit durchführen zu können als in Leipzig, wo sie aus hier nicht zu erörtenden Gründen gestört worden waren, bildete ein nicht unwesentliches Motiv für mich, meinen Platz in Leipzig mit Berlin zu vertauschen. Die Unterrichtsverwaltung schien Interesse für meine Pläne zu haben. Sie hat, ohne daß ich darum gebeten hätte, veranlaßt, daß ein Teil der Bibliothek meines Leipziger Seminars für orientalische Rechtsgeschichte als Leihgabe in die vorderasiatische Bibliothek der Staatlichen Museen übertragen wurde, an die das zu errichtende Seminar angeschlossen wurde. Ich hatte ferner wiederholt Gelegenheit, mit dem damaligen Sachbearbeiter Herrn Dr. Hinz weitausgreifende Pläne zu erörtern, Berlin zu einem Zentrum der Studien vom alten Orient zu machen, Pläne, die ich in einer Reihe von Denkschriften näher ausführte. […].[14]

This letter, written in a resolute and self-confident tone, shows not only how decisive the foundation of the *Seminar* was for Koschaker, but also that he had plans to make the University of Berlin one of the main German and European centres for the study of the Ancient Near East. Since the reaction of the Ministry to this request was positive, and the university administration also decided to take part of the library from the *Seminar für orientalische Rechtsgeschichte* in Leipzig and move it to Berlin, the new institute eventually opened on 1st April 1936. Koschaker was appointed its director and a place for the *Seminar* was found at the Near Eastern section of the National Museums. The institute was connected both to the Faculty of Law and to the Faculty of Philosophy, since Koschaker wished to give an interdisciplinary imprint to this field of studies, even though its rooms belonged to the National Museums. The creation of the *Seminar für Rechtsgeschichte des Alten Orients* was a great personal and academic achievement for Koschaker, but he also needed to have other colleagues to help him carry out his projects and establish proper connections with scholars coming from other fields, in particular from philology and archeology.[15]

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13 The letter, written by Koschaker to ask the Ministry to close the *Seminar*, is in the *Humboldt-Universität zu Berlin* archives: UA-HU, UK Personalia K 274, Bd. II, Bl. 11-12. See also pp. 97 ff. below. The document is typewritten and three pages long (recto and verso).

14 This excerpt is taken from the first page of the letter.

15 Lösch: *Der nackte Geist*, p. 264.

Since Landsberger could not be at his side in Berlin, the other name that Koschaker had in mind for the study of Assyriology was Adam Falkenstein, who was at the time a young scholar of Sumerian at the University of Munich.[16] The proposal to appoint this scholar, who finally obtained a position as professor in *Assyriologie* at the Faculty of Philosophy in Berlin on 1st April 1937, was not without difficulty and once more reveals the influence Koschaker had at the Ministry and within his academic circle at that time. In order to bring Falkenstein to Berlin, Koschaker had to overcome both the opposition of his colleagues at the University of Munich and that of the *Führer der Dozentenschaft und des NS.-Dozentenbundes der Universität Berlin*. San Nicolò, at the time professor in Munich and with whom Falkenstein had collaborated, wrote two letters of protest over Falkenstein's appointment in Berlin, the second letter being signed not only by him, but by other colleagues at the university as well.[17]

The harsh disapproval of Professor Landt, the *Dozentenführer* at the University of Berlin,[18] was in part due to political considerations, since it was well known that the young scholar was at this time unfavourably disposed towards the Nazi regime.[19] Landt wrote that he was strongly opposed to Falkenstein coming to Berlin, since "sich nirgends politisch betätigt hat und einer politischen Betätigung wohl ablehnend gegenüber steht […]" and if this appointment was unavoidable, because Koschaker needed Falkenstein's support in Berlin, then the federation of professors and lecturers at the University would not have shared that responsibility ("würde der Dozentenbund die Verantwortung nicht übernehmen").[20] Nonetheless, Koschaker was able to impose his will, in this case, even if he had to face strong opposition from a supporter of the regime, and only his huge prestige helped him to uphold his cause at the Ministry.

Once Koschaker's conditions were accepted, he finally moved to Berlin on 1st April 1936, where he assumed the Chair in Roman law and comparative legal history (*Römisches Recht und vergleichende Rechtsgeschichte*) that had been Rabel's until 1935. As he wrote in his autobiography, he particularly appreciated two things there: the marvellous library and the opportunity to become a member of the *Preußische Akademie*

16 Müller: *Paul Koschaker (1879-1951)*, pp. 279 f.

17 Renger: *Altorientalistik*, pp. 495 f.

18 During the Nazi regime the *Dozentenführer* of each university had to take stance on any decision regarding the staff. On this point, see Renger: *Altorientalistik*, p. 470.

19 A detailed reconstruction of the events is given in Müller: *Paul Koschaker (1879-1951)*, pp. 279 f. Two years after his arrival in Berlin, however, Falkenstein decided to join the Nazi party. On Adam Falkenstein (1906-1966), see Dietz-Otto Edzard: *Zum Tode von Adam Falkenstein (17.9.1906-15.10.1966)*, in: *Zeitschrift für Assyriologie und Vorderasiatische Archäologie* 59, 1969, pp. 1-10.

20 The letter, reported already in Müller: *Paul Koschaker (1879-1951)*, p. 280 and fn. 40, is conserved at the archive of the *Humboldt-Universität zu Berlin*: UA-HU, Universitätskurator/Personalia F 8 [Personalakte A. Falkenstein].

der Wissenschaften.[21] The latter was at the time the most prestigious scientific institution in Germany, "ein Gremium von Zelebritäten", having succeeded in eclipsing, at least in part, the negative influence of the regime for a long time. According to Koschaker, although it eventually became impossible to escape this negative influence, it did not affect the life of the Academy as strongly as in other institutions.[22]

We learn from archive documents conserved at the Prussian Academy of Science, that the name of Koschaker for the "ordinary" membership ("zum ordentlichen Mitglied") was suggested by Heymann, Stutz, Wilcken and Meissner during the session of the *philosophisch-historische Klasse* of 19th November 1936, and in a following session, on 3rd December of the same year, the proposal was voted on and Koschaker obtained 17 white balls and no black ones (meaning that the proposal had been accepted).[23] After the vote of the *plenum* of the Academy on 14th January 1937 (43 white balls against only 2 blacks),[24] final confirmation came – as requested by the procedure – from the Ministry for Science, Education and Popular Education (*Reichs-und Preussische Minister für Wissenschaft, Erziehung und Volksbildung*) with a letter dated 18th February 1937.[25] Being a member of the *Preußische Akademie* was a source of pride for Koschaker – already member of the Saxon Academy of Science (*Sächsische Akademie der Wissenschaften*) since 1919 – a confirmation of his academic prowess and a further opportunity to give lectures before a prestigious audience. As Koschaker wrote in his autobiography, he gave numerous presentations and lectures at the Prussian Academy of Science, in which he had the opportunity to deal with and to discuss together with the other members the topics of his research.[26] At the same time, he strove for the appointment of his colleagues Riccobono and Wlassak as correspondent members

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21 Koschaker: *Selbstdarstellung*, pp. 117 f. With regard to the library, he wrote: "Meine Wünsche waren oft extravagant. Es kam aber in Berlin niemals vor, daß ein Buch, das ich brauchte, nicht vorhanden war. Was das bedeutete, weiß ich heute umso mehr zu würdigen, als ich es nicht mehr habe." Koschaker did not mention in his autobiography though that he also became a member of the *Akademie für Deutsches Recht*.

22 Ibid. Of course, this is what Koschaker wrote in his autobiography after the end of WWII. Even though it might be imagined that the *Preußische Akademie der Wissenschaften* had maintained a certain level of autonomy, it is nevertheless impossible to believe that life at the Academy was not deeply affected by the regime, for the simple reason that all members of Jewish origins were ousted.

23 ABBAW: PAW (1812-1945), II-III-73, foll. 9, 10 and 11.

24 ABBAW: PAW (1812-1945), II-III-73, fol. 12. To gain a majority it was necessary to obtain 31 white balls.

25 ABBAW: PAW (1812-1945), II-III-73, fol. 14. Dr. Eduard Schwyzer was appointed a member of the academy along with Koschaker. The communication of the designation took place two days later, see ABBAW: PAW (1812-1945), II-III-46, fol. 2. On Schwyzer (1874-1943), see: Rüdiger Schmitt: *Schwyzer, Eduard*, in: *NDB* 24, Berlin 2010, pp. 62 f.

26 Koschaker: *Selbstdarstellung*, p. 117: "So konnte ich in Berlin gut wissenschaftlich arbeiten, namentlich im alten Orient. Zeugnis dafür legen eine Anzahl von Vorträgen, in denen ich im Kreise der Akademie über meine Forschungen berichtete. Sie sind heute in den „Sitzungsberichten" und im „Jahrbuch" der Akademie begraben […]."

(*korrespondierendes Mitglied*) of the *philologisch-historische Klasse*; in fact, in 1939 Koschaker was the first endorser – along with Heymann, Stroux and Wilcken – of the request to confer that role on Riccobono. The plenary assembly voted favourably on the proposal on 25th May 1939 and Riccobono became a member of the Prussian Academy of Science.[27] However, Moriz Wlassak did not have the opportunity to join the Academy, since he died before the proposal of his name as a member by correspondence had been voted upon.[28]

3.3 The new co-editor of the *Savigny-Zeitschrift* and member of the *Akademie für Deutsches Recht*

1936 – the year of Koschaker's arrival in Berlin – coincides with another important stage in his academic career, namely his acceptance on the editorial board of the Roman law section (*Romanistische Abteilung*) of the *Zeitschrift der Savigny-Stiftung*. Since 1933, the year the Nazis seized power, all German journals went through the so-called *Gleichschaltung* imposed by the new regime. Some of them adapted very quickly to the new situation in 1933, others took a little longer, between 1934 and 1935, when the *Zitierverbote* of the so-called *Judenzitate* (the ban on quoting Jewish authors in journals and books) took effect.[29] Like all other German journals, therefore, the *Savigny-Zeitschrift* went through the Aryanisation (*Arisierung*). Still in 1933, two of the five chief editors were Jewish, namely Levy[30] and Rabel, Levy playing an eminent role within the editorial board. In 1934, their names appeared on the cover page of the journal, but the volume contained an explanation (*Erklärung*) at the end with two messages: the first explained that regrettably Rabel had had to leave the group of the chief editors, the *Gesamtredaktion* (under the message are the names of Levy, Heymann, Stutz and Feine)[31]; the second announced with regret and surprise the retirement of Levy, the

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27 ABBAW: PAW II-III, 222, foll. 1-4, and 8 and 11. For a precise reconstruction of the events, see Varvaro: *La 'antike Rechtsgeschichte'*, p. 311 and fn. 32.

28 Wlassak died on 24th April 1939.

29 For the precise description of the events, with further bibliography, see Thomas Finkenauer/Andreas Herrmann: *Die Romanistische Abteilung der Savigny-Zeitschrift im Nationalsozialismus*, in: *ZSS* (RA) 134 (2017), pp. 1-48. I would like to thank the authors, who allowed me to have a draft copy of the text before the final printing.

30 On Ernst Levy (1881-1968), see Wolfgang Kunkel: *Ernst Levy zum Gedächtnis*, in: *ZSS* (RA) 99 (1969), pp. XIII-XXII; Dieter Simon: *Levy, Ernst*, in: *NDB* 14, Berlin, 1985, pp. 403-404.

31 On Hans Erich Feine (1890-1965), see: Karl Siegfried Bader: *Nachruf auf Hans Erich Feine*, in: *ZSS* (KA) 51 (1965), pp. XI-XXXI; Anna Lübbe: *Die deutsche Verfassungsgeschichtsschreibung unter dem Einfluß der nationalsozialistischen Machtergreifung*, in Stolleis/Simon (eds.): *Rechtsgeschichte*, pp. 63-78 and, in particular, pp. 66 ff.; on Ernst Heymann (1870-1946), see: Heinrich Mitteis: *Ernst Heymann* †, in: *Deutsches Archiv für Erforschung des Mittelalters*, 8 (1951), p. 256; Lösch: *Der nackte Geist*, pp. 381 f.; Martin Otto: *Ernst Heymann (1870-1946)*,

Gesamtredaktion's main editor (*der geschäftsführende Redaktor*).[32] From the first months of 1934, therefore, the editorial board of the *Savigny-Zeitschrift* (*Romanistische Abteilung*) contained no Jewish members (the so-called *Entjudung*).

This sequence of events also concerned Koschaker. In March 1934, he had been requested to take the place of his close friend Rabel, who had resigned in January of the same year, but Koschaker refused to do so. Wenger therefore took Rabel's place.[33] With Levy and Koschaker as the main editors of the journal, along with Heymann, Stutz and Feine, there seemed to be a safe and cautious enough combination to calm the worries of the publisher Karl Rauch.[34] However, when Koschaker refused to join the editorial board, Levy also decided to stand down (he would have otherwise have remained). He considered Koschaker's decision to be a slap in the face ("*Schlag ins Gesicht*").[35] Kreller then took Levy's position and a new "Aryan" committee was formed. When Wenger was offered a position at the University of Vienna in 1936 and was forced to give up his position on the board,[36] the place was once again offered to Koschaker, who this time accepted it. The events connected with his appointment as a co-editor of the *Savigny-Zeitschrift* have been used as an indication that Koschaker was close to the Nazi regime, in other words, a supporter "despite himself".[37] However, it is clear from two letters Koschaker sent to Rabel that he feared being main co-editor of the journal with Levy because he himself had studied "non Aryan laws" and Levy was Jewish, potentially an unwelcome combination. According to Koschaker, in a short period both of them would be removed from their respective positions, and he wanted to protect himself.[38]

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in: Simon Apel/Louis Pahlow/Matthias Wießner (eds.): *Biographisches Handbuch des Geistigen Eigentums*, Tübingen 2017, pp. 137–139. On Ulrich Stutz (1868-1938), see: Lösch: *Der nackte Geist*, pp. 379 f.

32 Under this message the names of Kreller, Wenger, Heymann, Stutz and Feine are given, see: *ZSS* (RA) 54 (1934), *Erklärung*, p. 500. On Hans Kreller (1887-1958), see: Kaser: *Hans Kreller †*, in: *ZSS* (RA) 75 (1958), pp. XV-XXIII; Herbert Hausmaninger: *Kreller, Hans*, in: *NDB* 13 (1982), pp. 2 f.; Margarete Grandner: *Das Studium an der Rechts- und Staatswissenschaftlichen Fakultät der Universität Wien 1945–1955*, in: Margarete Grandner/Gernot Heiss/Oliver Rathkolb (eds.): *Zukunft mit Altlasten. Die Universität Wien 1945–1955*, Innsbruck 2005, pp. 290–312. Kreller had been a pupil of Mitteis in Leipzig, like Koschaker.

33 Finkenauer/Herrmann: *Die Romanistische Abteilung*, pp. 11-19. When Koschaker refused to take Rabel's place, Kreller was willing to do so. However, when Levy heard of Koschaker's decision, he resigned, meaning that Kreller took Levy's place and Wenger Rabel's.

34 Ibid., pp. 11 ff. and 16.

35 Ibid., p. 17. The authors quote a letter written by Rabel and sent to Koschaker on the 7th April 1934, as well as a letter that Rabel sent to Levy and another one that Levy sent to Rabel. The letters are conserved at the *Bundesarchiv* in Koblenz (BArch N 1691, Nachlass Ernst Rabel/1, p. 115).

36 The members of the committee were supposed to be professors at German universities.

37 Stated thus but without persuasive arguments in Giaro: *Paul Koschaker sotto il Nazismo*, p. 163.

38 Finkenauer/Herrmann: *Die Romanistische Abteilung*, pp. 17 f. Koschaker wrote the letters on 15th March 1934 and on 11th April 1934.

Finkenauer and Hermann referred to this conduct as the opportunism of a man interested in his career, who did not want to be compromised, and Koschaker's human weaknesses emerge from these events.[39]

Similar considerations can also be made with regard to the events surrounding his participation as a member of the *Akademie für Deutsches Recht* and the lecture he gave there in December 1937. This academy had been instituted in 1933 by the Nazi regime in order to promote German law (a "*deutsches Gemeinrecht*"),[40] its president being Frank, who was Commissioner of the Reich for the Standardisation of Justice (*Reichskommissar für die Gleichschaltung der Justiz*) in 1937.[41] Just one year earlier, Frank had been invited to give a lecture at the Fascist Institute of Culture (*Istituto fascista di cultura*) in Rome: clearly influenced by the theories on German law elaborated over the decades by scholars like Chamberlain, Leonhard and Wagemann, he explained that one may distinguish between an original "Roman law", which was still the unalterated law of a "Nordic population", and a "Roman law" of the later period, developed under the deleterious influence of Oriental laws (and the Jewish influence, in particular).[42] Moreover, according to the dominant trend of that time among Germanists,[43] it appeared from Frank's lecture that the target of regime's hatred was no longer the so-called "Roman law of the Romans",

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39 Ibid., p. 17: "Koschaker zeigt jedenfalls den Opportunismus eines karrierebewussten Mannes, der keine Neigung verspürte, sich an der Seite eines Juden zu kompromittieren. Der ihm mitunter bescheinigte Mut fand wenigstens hier offenbar kein Betätigungsfeld". The reference that the authors make to Koschaker's supposed courage occurs in Peter E. Pieler: *Das römische Recht im nationalsozialistischen Staat*, in: Ulrike Davy/Helmut Fuchs/Herbert Hofmeister/Judith Marte/Ilse Reiter (eds.): *Nationalsozialismus und Recht*, Wien 1990, pp. 427-444.

40 It is well known that the regime wanted to replace the German Civil Code – the BGB – with a new *Volksgesetzbuch*. See Hans Hattenauer: *Das NS-Volksgesetzbuch*, in: Arno Buschmann/Franz L. Knemeyer/Gerhard Otte/Werner Schubert (eds.): *Festschrift für Rudolf Gmür zum 70. Geburtstag*, Bielefeld 1983, pp. 255-279; Somma: *I giuristi e l'Asse culturale*, pp. 222-240 (with further bibliographical references); Luigi Garofalo: *Suggestioni per il giurista dai Quaderni e diari di Hannah Arendt*, in: *Studi in onore di Remo Martini*, II, Milano 2009, pp. 177-213.

41 On Hans Frank (1900-1946), see above p. 27, fn. 34.

42 Hans Frank: *Die Zeit des Rechts*, in: *DR* 1 (1936), pp. 1-3. On this point, see Somma: *I giuristi e l'Asse culturale*, pp. 280-281 and 292-297. The works by Chamberlain, Leonhard and Wagemann that I refer to in the text are: Rudolf Leonhard: *Roms Vergangenheit und Deutschlands Recht: ein Überblick über die Geschichte des römischen Staates in ihrem Zusammenhang mit dem gegenwärtigen Rechtsleben*, *eine Festschrift*, Leipzig 1889; Houston Stewart Chamberlain: *Die Grundlagen des neunzehnten Jahrhunderts*, München 1899; Arnold Wagemann: *Unser Bodenrecht. Eine kritische Studie*, Jena 1912; Id.: *Geist des deutschen Rechts*, Jena 1913; Id., *Deutsche Rechtsvergangenheit als Wegweiser in eine deutsche Zukunft*, Jena 1922. To obtain a broader overview of this topic, see Peter Landau: *Römisches Recht und deutsches Gemeinrecht. Zur rechtspolitischen Zielsetzung im nationalsozialistischen Parteiprogramm*, in Stolleis/Simon (eds.): *Rechtsgeschichte*, pp. 17-24; Richard Gamauf: *Die Kritik am Römischen Recht im 19. und 20. Jahrhundert*, in: *OIR* 2 (1996), pp. 33-61.

43 For an overview of the contrast between Romanists and Germanists in Germany, see Luig: *Römische und germanische Rechtsanschauung*, pp. 95-138.

but rather the Roman law as studied and developed by the pandectists.[44] Nonetheless, the hostility of the Nazi regime towards Roman law was unquestionable and Point 19 of the programme of the NSDAP represented an attack on it.[45]

When Koschaker was invited to talk at the *Akademie für Deutsches Recht*, he decided nonetheless to deal with Roman law and, in particular, with the crisis it was undergoing in Germany at the time. As Calasso pointed out, for the first time a German scholar had decided to talk about such a topic during an event organised by the Nazis and in a Nazi institution. Calasso, and many other scholars after him, did not hesitate to call Koschaker's lecture a turning point, because it represented a reaction against the regime and in favour of Roman law.[46] Nonetheless, Giaro has more recently stressed – with a touch of sarcasm, but also with good reason – that Koschaker did not attack the regime, otherwise the Gestapo would have arrested him.[47] Once again the dichotomy between the heroic idealised anti-Nazi scholar and the almost "unaware" Nazi emerges among scholars, with both representations going too far in their judgments. Even if it is true that the decision to deal with Roman law and its crisis in Germany on such an occasion may have caused consternation among the Nazi audience, it is nevertheless implicit that agreeing to speak before such an audience meant, at the same time, accepting the rules and procedures of the people who formed that audience. It is also necessary to remember

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[44] This was the official position expressed by the author of the reform proposal of the *Studienordnung* of the German law faculties, Karl August Eckhardt, in his *Richtlinien für das Studium der Rechtswissenschaft*, appeared in 1935. On Eckhardt (1901-1979), see Ralf Frassek: *Eckhardt, Karl August*, in: Albrecht Cordes/Hans-Peter Haferkamp/Heiner Lück/Dieter Werkmüler/Ruth Schmidt-Wiegand (eds.): *Handwörterbuch zur deutschen Rechtsgeschichte*, 2, Band I, Berlin 2008, pp. 1179-1180. On the above-mentioned reform, see Frassek: *Steter Tropfen höhlt den Stein – Juristenausbildung im Nationalsozialismus und danach*, in: *ZSS* (GA) 117 (2000), pp. 294-361; Id.: *Wege zur nationalsozialistischen „Rechtserneuerung" – Wissenschaft zwischen „Gleichschaltung" und Konkurrenzkampf*, in: Hans-Georg Hermann/Thomas Gutmann/Joachim Rückert/Mathias Schmoeckel/Harald Siems (eds.): *Von den ‚leges barbarorum' bis zum ‚ius barbarum' des Nationalsozialismus*, Köln 2008, pp. 351-377; M. Stolleis, *»Fortschritte der Rechtsgeschichte« in der Zeit des Nationalsozialismus?*, in: Stolleis/Simon (eds.): *Rechtsgeschichte im Nationalsozialismus*, pp. 177-197; Luig: *Römische und germanische Rechtsanschauung*, pp. 95-138.

[45] The literature on the topic is vast and I shall limit myself to quoting only a few recent works, where it is possible to find further bibliography: Antonio Mantello: *La giurisprudenza romana fra Nazismo e Fascismo*, in: *Quaderni di Storia* XIII, 25 (1987), pp. 23-71 and, in particular, p. 30; Landau: *Römisches Recht*, pp. 10-24; Simon: *Die deutsche Wissenschaft vom römischen Recht nach 1933*, in: Simon/Stolleis (eds.): *Rechtsgeschichte*, pp. 161-176; Luig: *Römische und germanische Rechtsanschauung*, pp. 95 ff.; Onorato Bucci: *Germanesimo e romanità*, Napoli 2004, pp. 87-112; Somma: *I giuristi e l'Asse culturale*, pp. 279-310; Santucci, *Diritto romano e Nazionalsocialismo*, pp. 53-82.

[46] Calasso: *Introduzione*, in: Koschaker: *L'Europa e il diritto romano*, Firenze 1962 (translated by Arnaldo Biscardi), now in Calasso: *L'Europa e il diritto romano. Alla memoria di Paul Koschaker*, in: Id.: *L'unità giuridica dell'Europa*, Soveria Mannelli 1985, pp. 104 and 119. See also below, chapter 5.

[47] Giaro: *Paul Koschaker sotto il Nazismo*, pp. 166 f.

that Koschaker was a member of the *Akademie für Deutsches Recht*. As in the case of his call to be a co-editor of the *Savigny-Zeitschrift*, *mutatis mutandis*, Koschaker's behaviour may appear as opportunistic and self-interested in assuring himself a safe and brilliant career; yet, in this case, his dedication to Roman law plays an important role as well. In any case, the circumstances surrounding the lecture at the *Akademie für Deutsches Recht* deserve further analysis, which will be carried out later in this book.[48] In fact, it is important not only to get closer to the content of the long essay that Koschaker published and based on the text of his lecture, to understand its meaning; it is also imperative to take into consideration reactions to his work, as they mainly appeared in Italy and in Germany.

3.4 The unpleasant period in Berlin

It is now appropriate to return to Koschaker's experience in Berlin. As Koschaker himself acknowledged in his autobiography, although his position at Berlin began well, the situation quickly deteriorated. Writing after WWII, Koschaker painted a grim picture of the time he had spent in the German capital from 1936 to 1941. His autobiography tells us that he had never felt at ease in Berlin, that he suffered from the huge size of the city, and, in particular, from the increasing presence of Nazis (*Nazifizierung*) at the University.[49] In a letter that he sent to his pupil Guido Kisch on 27th November 1947, he wrote:

> Im übrigen war ich immer ungern in Berlin. Immerhin 1936, da in der Universität noch beträchtliche Reste aus der Vor-Nazizeit vorhanden waren, ging die Sache noch leidlich. Aber die Nazis drangen immer mehr ein, selbst in der Akademie, dazu nach dem Abtreten Gleispachs, der ein großer Nazi, aber doch ein österreichischer »Gawalier« war, ein Dekan, der mir jede Schwierigkeit machte. Ich revoltierte. 1939 ließ mich der Nazirektor kommen, um mir in aller Form das consilium abeundi zu geben. Das Ministerium war aber dagegen, wie ich überhaupt bei den Parteibonzen einen gewissen Respekt hatte, weil ich ihnen, namentlich in der Frage des römischen Rechts, ruhig, aber entscheidend entgegentrat. Das waren sie von Professoren nicht gewohnt.[50]

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48 See below, chapter 5, §§ 2-6.

49 Koschaker: *Selbstdarstellung*, p. 118: "Persönlich habe ich mich in Berlin nicht wohl gefühlt. Das ist eine Feststellung, aber kein Vorwurf gegen die Berliner […]. Dazu kam die an der Universität der Reichshauptstadt besonders intensive Nazifizierung, die mich noch mehr vereinsamte als die Größe der Stadt für sich."

50 Kisch (ed.): *Paul Koschaker. Gelehrter, Mensch und Freund*, pp. 22-23 (letter nr. 5).

This passage cites the main reason for the difficult situation in Berlin as the increasing presence of supporters of the Nazi regime at the University. Although the situation was still acceptable in 1936, things quickly degenerated and Koschaker was soon burdened by many problems and complications mainly due to the behaviour of the Dean, Wenzelslaus Graf von Gleispach, and the *Rektor* Willy Hoppe.[51] According to Koschaker, Hoppe tried to make him leave his post at the University. In a letter sent to the Ministry for Science, Education and Popular Education on 10th October 1939, Hoppe inferred that if Koschaker was unable to adapt to a large university organisation, then he should perhaps find a place in a quieter university.[52] The hostility of Hoppe and Gleispach appears to be among the main reasons for Koschaker leaving Berlin a few years later. These developments might suggest that Koschaker was somehow ousted from his post or forced to leave it, whereas Neumann recently stressed that it remains unclear why he decided to accept the position at Tübingen in 1941.[53] Nonetheless, an analysis of some other documents in the following pages will show that Koschaker himself had complained about the working conditions in Berlin, and Hoppe's letter actually seems to be a reply to a complaint already filed by Koschaker.

Moreover, the letter sent by Koschaker to Kisch in 1947 revealed the oppressive climate felt by Koschaker at the University in Berlin due to the presence of members connected with the Nazi regime. In particular, the relationship with the Nazi sympathiser, Gleispach, was hard for Koschaker to digest and, according to Koschaker's own words, it was *Rektor* Hoppe who suggested he might consider leaving the University of Berlin in 1939 (he wanted to give him the *consilium abeundi*, as it is possible to read in the text of the letter). It is nonetheless worth mentioning that these words were written by Koschaker himself and, what is more, after WWII had ended. The letter sent to Kisch is a note that Koschaker wrote to his Jewish pupil, who had escaped to the US, and having faced the tragic loss of some of his family in the Nazi concentration camps. In the same letter, Koschaker affirmed that the *Parteibonzen* in Berlin, namely the representatives of the regime or, at least, its supporters, respected him, because he had taken a firm position against them on issues regarding Roman law and the need to teach it at German universities (Koschaker's reference to his stance on Roman law concerned the lecture he

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51 Gleispach (1876-1944) was Dean from 1935 to 1937; see the entry *Gleispach Wenzelslaus Graf*, in: *Österreichisches Biographisches Lexicon 1815-1950*, II, Wien 1959, pp. 7-8; Lösch: *Der nackte Geist*, pp. 256 f.; Hoppe (1884-1960) was *Rektor* from 1937 to 1942; see Klaus Neitmann: *Willy Hoppe, die brandeburgische Landesgeschichtsforschung und der Gesamtverein der deutschen Geschichts- und Altertumsvereine in der NS-Zeit*, in: *Blätter für deutsche Landesgeschichte* 141/142 (2005/2006), pp. 19-60.

52 UA-HU, UK Personalia K 274, Bd. I, Bl. 37.

53 For this hypothesis, see, even if it is not clearly stated in the text, Ries: *Paul Koschaker*, pp. 608 f., and also Aldo Mazzacane: *I tempi della 'Privatrechtsgeschichte'*, in: *Quaderni Fiorentini per la Storia del Pensiero Giuridico Moderno* XXIV (1995), pp. 563-576, and, in particular, p. 571.

had given at the *Akademie für Deutsches Recht* in December 1937).[54] Even though I do not wish to dispute the reliability of the core of Koschaker's description of the events of that period, it seems at least necessary to measure his statements against the information from other documents he wrote when he was still in Berlin, which illustrate his life at the University quite clearly, as well as the problems he had to face.

3.5 Life at the University in Berlin

The first document to be analysed here is a letter Koschaker sent on 29th May 1937 to the *Prorektor* of the University of Berlin, Hoppe; the same Hoppe would later become its *Rektor* in 1937.[55] The text is emblematic of the problems that Koschaker had constantly to face when dealing with the University administration, problems which particularly bothered him.[56] Koschaker sent the missive privately to the *Prorektor* to complain about the inconvenience caused by delays on account of compulsory bureaucratic procedures in order for him to be able to travel to Paris to attend the meeting of the *Société d'histoire du droit*. The letter begins as follows:

> Hochgeehrter Herr Prorektor ![57]
>
> Ich bitte Sie, diesen Brief als privaten betrachten zu wollen, weshalb ich ihn auch nicht im Dienstwege an Sie gelangen lasse. Es steht in Ihrem Belieben, ob Sie ihn ungelesen in den Papierkorb werfen oder seine Mitteilungen verwerten wollen. […] Es handelt sich um meine Reise zur Tagung der Société d'histoire du droit in Paris. Sie werden sich erinnern, daß ich etwa vor 2 1/2 Wochen dieserhalb bei Ihnen vorsprach. Sie hatten die Güte, sich mit dem Ministerialreferenten in Verbindung zu setzen und erhielten die Zusicherung umgehender Erledigung. In der Tat ist mir die Genehmigung des Ministers schon am 13. d.M. erteilt worden. Leider hat man Ihre weitere Bitte, Sie telefonisch von der Erledigung meines

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54 Koschaker used the term *Parteibonzen* in the letter that I have quoted to indicate followers of the Nazi regime. In this case it is highly probable that he intended to refer in particular to Nazi professors and scholars and Nazi members of the Ministry of Education. In any case, *Parteibonzen* was the common term used to refer to officials and members of the Nazi party during the regime.

55 UA-HU, UK Personalia K 274, Bd. I, Sonderheft: Auslandsreisen, Bl. 230-231. Typewritten three-page long (recto and verso) letter.

56 For the reference to the problems that Koschaker probably had when dealing with the organisational structure of a big university, see Hoppe's letter from 10th October 1939, above, p. 84.

57 With a space in the document after "Prorektor".

> Antrags verständigen zu wollen, nicht beachtet, sondern das Schreiben dem Dienstwege anvertraut, auf dem es erst 9 Tage später beim Rektorat einlangte. […] Aber alle meine Bemühungen, die ich gestern sofort nach Erhalt der Devisengenehmigung unternahm, mir bei Banken und Reisebüros das Reisgeld zu verschaffen, scheiterten, weil ich spätestens nächsten Montag hätte abreisen müssen. So habe ich nach Paris abgeschrieben.

Koschaker's principal grievance, which was written in a direct manner but with a degree of flattery, was that he would be unable to attend the meeting of the *Société d'histoire du droit*.[58] His French colleagues, who had a profound respect for him, understood his predicament, but Koschaker himself was acutely aware that he had lost an opportunity to reinforce important international relationships that had been built up over a long period of time. At the same time, German scholarship now was without representation at the conference and its reputation would consequently have suffered, whereas the Italian government decided to send to Paris "Nicht weniger als 5 ihrer [of the Italian *Wissenschaft*] besten Köpfe" – "No less than five of its best minds". Even though the Ministry of Education affirmed that it had taken into due consideration the need to give German scholarship proper representation at foreign conferences, it seemed to Koschaker that the bureaucracy, which was at the service of the Ministry, had considerably hindered this aim. Another element appears from the text of the letter, Koschaker already concerned about his role as "spokesperson" of the entire German scholarship in the field of Legal history, a feeling that he would reveal on other occasions too.

The letter continues:

> Gestatten Sie mir im Anschlusse daran noch folgende zu berichten. Die Société d'histoire du droit ist eine französische wissenschaftliche Gesellschaft. Aber sie besteht keineswegs aus Linksradikalen und Kommunisten. Auch was die Juden betrifft, so waren sie, soweit ich selbst Beobachtungen machen konnte, in einem viel | geringeren Prozentsatze vertreten als etwa früher bei deutschen Tagungen ähnlicher Art. Jedenfalls hat niemals ein sowjetrussischer Professor dort ein Referat erstattet. […] Es ist nicht Schuld der Franzosen, wenn zufolge meiner Absage die deutsche Rechtswissenschaft unvertreten bleiben wird. Leider muß ich auch befürchten, daß meine Absage, obwohl ich alles getan habe, einen solchen Verdacht zu zerstreuen, im Sinne einer gewollten Behinderung der deutschen Wissenschaft gedeutet wird. Endlich ist mir bekannt geworden, daß meine Reisen zu den Tagungen der Gesellschaft hier unfreundliche Kommentare hervorgerufen

[58] Judging from the tone of this letter, the relationship between Koschaker and Hoppe was good at the time (1937), marking therefore a difference with the situation described in the letter sent to Kisch on 27th November 1947 – see above, p. 83.

> haben sollen. Ich erfreue mich allerdings bei meinen französischen Kollegen eines gewissen Vertrauens. Aber dieses Vertrauen habe ich nicht von heute auf morgen erworben […]. Auf Grund dieses Vertrauens habe ich immer dahin zu wirken gesucht, in dem mir offen stehenden Kreise vertrauensvolle Beziehungen zur französischen Wissenschaft herzustellen. Aber belohnt werde ich dafür mit Verdächtigungen. Die Angelegenheit ist für mich erledigt. Ich selbst werde durch die mir durch die Umstände auferlegte Absage in meiner wissenschaftlichen Reputation nicht den geringsten Schaden erleiden. Man versichert mir, daß das Ministerium Gewicht darauf lege, die deutsche Wissenschaft bei ausländischen Tagungen angemessen vertreten zu sehen. Jedenfalls bedient es sich hierbei eines Verwaltungsapparates, der in hervorragender Weise geeignet ist, diese wohlmeinenden Absichten zu durchkreuzen. […].

In addition to the problems he had run up against with the university administration, Koschaker was aware that his connections with the *Société d'histoire du droit* had not been positively received at the University – probably by his colleagues, although this is not clear, since Koschaker only said: "meine Reisen zu den Tagungen der Gesellschaft hier unfreundliche Kommentare hervorgerufen haben sollen." In return for his academic endeavours, therefore, he had been treated with guarded suspicion. Nonetheless, it is possible to argue from the text that Koschaker could still count on the support of the *Prorektor*, who helped him to obtain the travel permit (*Reisegenehmigung*) and gave his aid during the entire procedure of his travel request. It is clear that his plans, in the end, had not been impeded by the Ministry, which gave him permission to travel. The difficulties were – most likely – bureaucratic rather than personal reasons. One may therefore conclude that his plans regarding participation in *Société d'histoire du droit* conferences encountered only partial hostility (the *unfreundliche Kommentare*) within the University or the Faculty.

Finally, the description Koschaker gave of the *Société d'histoire du droit* deserves a few words as well. It is not easy to say whether Koschaker, with this description, wanted to defend his position in the eyes of the *Prorektor* and the *Reichsministerium* and to secure the future possibility of obtaining further travel permissions. On the other hand, it does seem clear, however, that he offered a description of the *Société d'histoire du droit* in order not to irritate the regime and its representatives as well as to avoid any risk of being accused of being connected to Communists or to Jewish people.

A second interesting letter, dated 1st June 1939, illustrates other kinds of problems connected to the tasks that Koschaker had to conduct in Berlin.[59] The letter is addressed to the Ministry for Science, Education and Popular Education.

[59] UA-HU, Jur. Fak. 518, Bd. I. The letter is typewritten and three pages long (recto and verso).

The first half page concerns the appointment of a personal assistant to Koschaker's chair. As he had pointed out when negotiating the conditions of his move to Berlin, he wanted to secure a position for a personal assistant and a precise reference to this point had been underlined in the letter of 30th March 1936, regarding his call to Berlin.[60] Initially, after Koschaker had been officially appointed in 1936, Dr. Hellebrand obtained the post of Koschaker's personal assistant, but he was then moved to the University of Kiel by the Ministry in autumn 1937. After that, Koschaker no longer had a personal assistant. He sent a further request for an assistant in May or June 1938 – as he wrote in the letter – to the *Kurator* of the University and then, in the autumn of the same year, he wrote to the Ministry asking for a meeting with the person in charge of these decisions (the *Sachbearbeiter*), in order to try to find a solution, but he obtained no answer. Koschaker wrote in the letter that the position had originally been conceived to be in the interests of the assistant, who could thus have the opportunity to work on his research projects and perhaps write his *Habilitationsschrift*. As nothing happened after he had written to the Ministry for the first time in the autumn of 1938, Koschaker decided to send another letter. After the preamble, the text reads:

> […] Wenn ich mir erlaube den Antrag [auf][61] Wiederherstellung der Stelle zu erneuern, so bleibt dieser Zweck aufrecht. Erfahrungen von 3 Jahren in Berlin haben mir aber gezeigt, daß ich einen Assistenten auch zu meiner persönlichen Unterstützung brauche. Es ist einmal so, daß die Berliner Professur andere Anforderungen stellt als eine solche in der Provinz. Eine Anzahl von anderen Angelegenheiten treten hier an den Professor heran. Allein meine wissenschaftliche Korrespondenz ist [so][62] angeschwollen, daß ich fast jede Woche 3 Tage mein eigener Sekretär sein müßte, um sie zu erledigen. Vor allem aber sind es die furchtbaren Entfernungen der Millionenstadt, die zw[i]ngen,[63] einen großen und den besten Teil des Tages in den öffentlichen Verkehrsmitteln zu vertrödeln. Sich ein Buch au seiner Bibliothek zu holen, kostet fast einen halben Tag. Es ist begreiflich, daß unter solchen Umständen keine Zeit zur geistigen Konzentration bleibt, die die wissenschaftliche Arbeit erfordert. Ich habe wohl ein Dutzend von Entwürfen zu größeren oder kleineren Arbeiten liegend un[d][64] ich glaube in jeder von ihnen etwas Neues sagen zu können. | […] Daß ich mich persönlich in Berlin nicht wohl fühlen würde, habe ich gewußt und ich habe kein Recht, mich zu beklagen, wenn

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60 *Berufungsurkunde* of 30th March 1936. Koschaker was appointed in April 1936, but actually obtained the position at the University of Berlin in autumn 1936, as he wrote in his letter ("In der Tat erhielt ich die Stelle im Herbst 1936").

61 Corrected in the text.

62 The text reads "os" here.

63 Written "zweingen" in the text.

64 The "d" of "und" is almost illegible on the page.

meine schlimmsten Erwartungen in diesem Punkte übertroffen wurden, ich namentlich unter der durch die Ma[mm]uthdimensionen dieser Stadt[65] bedingten geistigen Isolierung leide, die die universitas literarum zur Fiktion macht. Indessen bin ich nicht zu meinem Vergnügen nach Berlin gekommen. Ich habe schon bei den Berufungsverhandlungen betont, daß ich hier gewisse Arbeiten machen wolle. Daß ich in meinem Hauptlehrfach, dem römischen Recht hier ein Trümmerfeld [verhindern][66] wollte, wie es kaum an einer anderen deutschen Universität besteht, hat schon die Erreichung dieser Ziele erschwert, weil ich dadurch mit lehramtlichen Aufgaben belastet wurde, mit denen ich nicht gerechnet hatte. Wenn ich aber meine Zeile deshalb nicht erreichen kann, weil ich bei meiner Arbeit beständig durch wissenschaftsfremde Dinge behindert werde, so würde allerdings mein Verbleiben in dieser Stadt auf die Dauer sinnlos werden. […] Ich habe mich [f]erner[67] immer viel wohler vorne im Schützengraben als unter den großen Herren im wissenschaftlichen Generalstab hinter der Front gefühlt, und ich weiß drittens, daß man einen wissenschaftlichen Namen nicht hat, um ihn zu besitzen, sondern um ihn täglich neu zu erwerben. Die Bewilligung der Assistentenstelle würde zwar die Quellen dieser Übel nicht verstopfen, sie würde aber die in den örtlichen Verhältnissen Berlins liegenden Schwierigkeiten wenigstens teilweise mildern. Ich habe einen jungen Assyriologen in Aussicht, der sich für die Stelle gut eignen würde […]. Sollte es aber nicht möglich sein[68], mir diese Teilerleichterungen zu gewähren, so würde ich es dankbar begrüßen, wenn in Erwägung gezogen werden könnte, ob es nicht besser wäre, mir ein anderes Milieu zu geben, in dem[69] ich zwar geringere wissenschaftliche Behelfe zur Verfügung, aber mehr Ruhe und Sammlung zur Arbeit hätte. Denn bei Fortdauer der jetzigen Verhältnisse, die mich seelisch |[70] zermürben, werde ich alsbald an der Grenze meiner körperlichen Kräfte angelangt sein, und [d]ann ist auch der Zeitpunkt nicht mehr ferne, da ich gezwungen sein würde, wegen Dienstunfähigkeit meine vorzeitige Verabschiedung zu beantragen.

A peculiar feature of Koschaker's way of writing is immediately apparent from the confidence with which he addressed the Ministry. It was no doubt his prestige and position at the university that allowed him to write so authoritatively about what concerned him. One might get the idea, reading the letter, that Koschaker considered

65 In the text there is no space between "dieser" and "Stadt".
66 The text has "vorhinden".
67 Thus in the text, without "f".
68 There is no space between "möglich" and "sein" in the text.
69 The text has "in|dem". The line is handwritten.
70 The word "seelisch" is repeated at the beginning of the new page.

himself an important professor, but he probably felt this importance had not been completely acknowledged either at the University or at the Ministry, and this fact irked him. The text gained momentum with a crescendo that culminated in his foreseeing the possibility of an early departure from his post. Moreover, in the letter some of the problems emerge that had deeply bothered Koschaker during his period in Berlin. First of all, he stressed that the role of a professor at Berlin required a wider variety of tasks than in a smaller provincial university. He complained, among other things, that he had to be "his own secretary" three days a week, almost every week, merely to reply to his academic correspondence.

In his complaint, a decisive aspect in Koschaker's eyes – somewhat surprisingly – were the distances it was necessary to travel in a huge city like Berlin. Travelling by public transport in the most favourable part of a working day meant not only loss of time but also prevented him from concentrating on his work. In fact, the reason for Koschaker sending the letter to the Ministry was actually connected with his work. When he agreed to move to Berlin, he underlined that he wanted to carry out some precise research projects, but the circumstances, over the years, seemed to impede his achieving realising them.

It is of interest to read that he did not accept the chair at the most prestigious university in Germany at that time merely for his own pleasure, but because he wished to prevent his subject matter, Roman law, from becoming a "field full of ruins". This sounds as if Koschaker had interpreted his new academic experience in Berlin as a historical mission to defend Roman law.[71] Since he had no chance to accomplishing this ambition, being burdened with diverse duties and tasks, which moreover had nothing to do with his research, it no longer made sense to remain in Berlin ("Wenn ich aber meine Ziele deshalb nicht erreichen kann, weil ich bei meiner Arbeit beständig durch wissenschaftsfremde Dinge behindert werde, so würde allerdings mein Verbleiben in dieser Stadt auf die Dauer sinnlos werden"). This resolute expression epitomised his actual feelings. The vanity of the great scholar also emerges a few lines later, when he described how necessary it was, if one wanted to have and preserve an academic name, to earn that prestige day after day by publishing and attending conferences. He expressed genuine disappointment that he had not had enough time to concentrate on the dozens of draft essays he had been working on. As he wrote, he was a man who liked to stay in the scientific trenches and not in the rearguard.

The appointment of a personal assistant was not the panacea to all the problems that he had described, wrote Koschaker, but it would at least alleviate them. Furthermore, he already had in mind the name of a young Assyriologist. If it was not possible to satisfy his request, he would be grateful if the Ministry would consider moving him elsewhere, so that he could find more tranquillity and concentration to work ("mehr Ruhe und

[71] Something, therefore, that sounds connected to his lecture at the *Akademie für Deutsches Recht*.

Sammlung zur Arbeit"). This reference to a quieter place where he would have had the necessary concentration to work alludes to Hoppe's suggestion, in the letter of October 1939 to the Minister, in which the *Rektor* suggested the possibility of moving Koschaker to a smaller university than Berlin. Hoppe's idea was probably a reaction to Koschaker's complaint and not something he had proposed on his own initiative.[72]

Koschaker's letter then clearly shows how disappointed he was about the situation that he had found at Berlin University and the city itself, the bureaucracy (he does not say this explicitly here, but it can be implied when read in tandem with the letter he sent to the *Prorektor* in 1937),[73] the many tasks he had and the lack of any kind of support. Counted together, these circumstances meant that he was not able to perform his scholarly work, affecting both his publications and the mission he had taken upon himself to defend Roman law from the crisis it was facing at that time in Germany. It was apparently much more important in Koschaker's eyes that this defence began from the chair that had been Savigny's in Berlin, where the situation was particularly critical.[74] Koschaker clearly stated that he had not been given the means to achieve his goal, but from the text of this letter, as well as from the letter of 25th October 1937,[75] there is no hint as to any particular political dislike of him by the representatives of the regime.

He reiterated his complaint only three months later, on 30th September 1939, in another letter again addressed to the Minister of Education of the Reich (*Reichserziehungsminister*).[76] The text is divided into three points, to pinpoint the different reasons for Koschaker's greviances in Berlin. In the premise to the three points, he wrote that he wanted to send the *Studienabschnitt* in advance to the Ministry, to free himself, even though only in part, of his duties; he explained, then, in more detail, the motives for sending the *Studienabschnitt* in advance, but he also used the opportunity to describe what further bothered him.

Under point number one, he stressed the fact that the working duties were too burdensome for him, unless he could get a *Semesterbeurlaubung*, a sabbatical from teaching and other activities at the university for a semester, as had been stipulated in the agreement concerning his position in Berlin and that had early been allowed him in 1938.[77] The aim of such a break was not for vacation, but to use it for "Forschungs- und Studienzwecke" (research and study purposes). He had been promised these research breaks, but since the war broke out this possibility seemed to have all but vanished. Nonetheless, Koschaker insisted on asking the Ministry for this concession. He added

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72 See above, p. 84.

73 See above, p. 85.

74 The need that Koschaker felt to defend Roman law and to do it from the chair that had been Savigny's is also underlined in Below/Falkenstein: *Paul Koschaker* †, p. X.

75 See above, pp. 85 f.

76 UA-HU, UK Personalia K 274, Bd. I, Bl. 39-41. Typewritten three-page long (recto and verso) document.

77 This condition is described under point nr. 7 of the agreement between Koschaker and the University of Berlin, see UAT, 126/346a.

that at his age – he was 60 years old at the time and had health issues;[78] his physical strength could have been negatively affected by excessive fatigue. Koschaker also complained once again about the huge size and chaotic life of Berlin, the "Millionenstadt", where large distances between different places caused him – who was born in a small town – stress.

Koschaker's text reads thus:

> Ich bin im laufenden Studienabschnitt mit 7 Wochenstunden und Übungen für Berliner Verhältnisse ziemlich angestrengt. […] Bei meiner Berufung nach Berlin wurden mir Semesterbeurlaubungen unter Fortdauer der Kolleggeldgarantie zu Forschungs- und Studienzwecken zugesichert. Ich habe von dieser Zusicherung erste[79] einmal im Sommer 1938 Gebrauch gemacht und es war meine Absicht, eine solche Beurlaubung für das normale Sommersemester 1940 zu beantragen. Der Ausbruch des Krieges hat die Ausführung dieser Absicht verhindert. Sollte ich nun aber im 2. Studienabschnitt das Programm eines normalen Wintersemesters nahezu pausenlos wiederholen müssen, so fürchte ich allerdings, das[s][80] dies bei meinem Alter und nicht mehr ganz gefestiger Gesundheit über meine Kräfte gehen würde, zumal ich als geborener Kleinstädter, der sich weder an die Entfernungen noch an das hastende Leben der Millionenstadt gewöhnen kann, die Arbeitsbedingungen in Berlin als sehr anstrengend empfinde. […].

Koschaker continued to explain, under his second point, that there were colleagues who could replace him during his *Semesterbeurlaubung*, since many German universities were closed at the time. He suggested the name of the *Dozent* Dr. Hellebrand – his personal assistant for more or less a year after Koschaker had been called to Berlin[81] – as his substitute. It is even more interesting, however, to read what he described under his third point (on the second page of the letter):

> 3) stelle ich den obigen Antrag nicht deshalb, weil ich beabsichtige mich im 2. Studienabschnitte dem Nichtstun hinzugeben. Wenn ich unter 1) darauf hinweisen mußte, daß ich die Berliner Arbeitsverhältnisse anstrengend empfinde, so liegt der

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78 Below: *Paul Koschaker*, p. 4, underlines as well the health problems Koschaker had at the time he was in Berlin. Below had been a student of Koschaker there, as we can read also in Guarino: *Cinquant'anni dalla «Krise»*, in: *Labeo* 34 (1988), pp. 43-56, and *praecipue* p. 43, now also published in Guarino: *Pagine di Diritto romano*, I, Napoli 1994, pp. 276-291, and, in particular, p. 276 (from which I quote in this text).

79 The original text reads "erst", with the final "e" separated.

80 Thus in the text.

81 See above, page 88, for the letter Koschaker sent to the Ministry on 1st June 1939.

> Grund nicht ausschließlich in meiner Lehrtätigkeit, sondern darin, daß neben dieser beständig eine sehr intensive Forschungstätigkeit einhergeht. Ich hab bei Kriegsausbruch mir erlaubt, neben meiner Berufsausübung meine Sprachkenntnisse im Englischen, Französischen und Italienischen zu praktischen Zwecken zur Verfügung zu stellen.

In this passage, Koschaker listed some of his working tasks and illustrated how the work at the university was connected with his research and the good relationships he had established with academics in other countries. He also mentioned that his knowledge of English, French and Italian had been available for practical purposes since the beginning of the war. It would be particularly interesting to discover some other details regarding this passage to see if the kind of willingness he had offered had led to a concrete collaboration with the *Reichsministerium* or some other colleagues at the University. However, since there is no other information about this question, it is not possible to draw any further conclusion on this point.

In the part of the text that follows, Koschaker explained that he still had very good academic connections with scholars in other countries, both in enemy and neutral States. He pointed out, of course, that relationships with enemy States would have to be interrupted. Thanks to his very good connections with other countries, however, German scientific research (*wissenschaftliche Forschung*) could be properly represented through the publication of essays and works, which had in any case nothing to do with military or political topics:

> Ich besitze sehr ausgedehnte und zum großen Teil auch ausgezeichnete Beziehungen wissenschaftlicher Art zum Auslande, nicht bloß zum jetzt feindlichen Ausland, Beziehungen, die heute natürlich ruhen müssen, sondern auch zum neutralen Ausland. Eine Arbeit […] wird demnächst in Italien erscheinen. […] Es scheint mir nicht ohne jede Be[d]eutung,[82] wenn die deutsche wissenschaftliche Forschung in der Kriegszeit im neutralen und mittelbar so auch im feindlichen Auslande sich zur Geltung bringt. Gegenstände von militärischer oder politischer Bedeutung sind bei meinem Forschungsgebiete ausgeschlossen.[83]

Koschaker wrote that in order to represent German scholarship properly abroad, it was necessary that his works should constantly remain of high quality. Therefore, he needed a period free from his working tasks and, above all, from teaching duties at the university. His essential aim that he had always had since he moved to Berlin was to carry out his

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82 The original text has *Beseutung*.

83 The word, originally written with one "s" instead of two, has been corrected in the letter.

research projects and in this way, he wrote, he could be much more useful to the University of Berlin than simply teaching:

> Zu diesem Zwecke gibt es aber kein anderes Mittel als die Güte der Leistung, und diese herauszubringen, dazu gehört Zeit und eine gewisse Ruhe, die ich bei einem durch Monate fast pausenlos durchgeführten Lehrbetrieb nicht finden kann. […] Meine Bitte geht daher in erster Linie dahin, mir durch Befreiung von meiner[84] Lehrverpflichtungen im 2. Studienabschnitt diese Ruhe zur wissenschaftlichen Arbeit geben zu wollen, und ich glaube in dieser Forschungstätigkeit, die mir für Berlin seit jeher im Vordergrunde stand, in der heutigen Zeit nützlicher wirken zu können als durch For[t]setzung meiner Lehrtätigkeit, die ich wahrscheinlich körperlich nicht aushalten würde und in der ich jedenfalls leichter ersetzbar bin als in der Forschung.

After little over one month, on 8th November 1939 Koschaker wrote another letter to the Ministry.[85] The reply was written on the reverse side 6 days later, on 14th November 1939 by *Rektor* Hoppe of the University of Berlin.[86]

First, Koschaker wished to clarify that he was unaware, when he wrote his previous letter in September,[87] that all requests for *Beurlaubungen* (leave of absence) at the University had been interrupted since the outbreak of the war, except those requiring sick leave. Koschaker, therefore, withdrew his previous request and presented a new one, a *Beurlaubung* in the second trimester of 1940, attaching a medical certificate and some further explanations:

> […] Als ich vor einigen Wochen einen Antrag um Beurlaubung für das zweite Wintersemester 1940 überreichte, war es mir unbekannt, daß alle normalen Beurlaubungen während des Krieges gesperrt sind und nur aus Krankheitsgründen in Erwägung gezogen werden können. Ich gestatte mir daher meinen ersten Antrag zurückzuziehen und ihn durch folgenden neuen Antrag zu ersetzen: der Herr Reichsminister[88] wolle mich im 2. Trimester 1940 bis zum 1. Februar 1940 beurlauben. Zur Unterstützung dieses Antrags lege ich ein amtsärztliches Zeugnis bei und gestatte mir, zusätzlich folgendes auszuführen.

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84 Corrected in the text and previously written "meinen".

85 In this case, the letter is addressed to the *Reichsministerium für Wissenschaft, Erziehung und Volksbildung*, whereas the letter of 30th September 1939 is addressed to the *Reichserziehungsminister*.

86 UA-HU, UK Personalia K 274, Bd. I, Bl. 42. Typewritten two-page long (recto and verso) letter.

87 See above, pp. 91 and ff.

88 With a handwritten correction in the letter.

> Ich war den ganzen Sommer durch wissenschaftliche Arbeiten außerordentlich angestrengt, Arbeiten, die mich auch den[89] Ferien nicht völlig losließen […]. Ich habe daher schon im Zustande der Überarbeitung das 1. Wintersemester begonnen, in dem ich mit 8 Wochenstunden zudem recht stark belastet bin. […] Zumindest brauche ich eine längere Ausspannung, als sie mir die mit 14 Tagen bemessenen Weihnachtsferien geben können. Ich muß aber auch bedacht sein, mich von den Vorlesungen zu entlasten, indem ich das romanistische Hauptkolleg im 2. Trimester ausfallen lasse. Das ist um[90] so eher möglich, als es gleichzeitig von dem Dozenten Dr. Hellebrand angekündigt worden ist. Die Erfahrung hat mich gelehrt, daß in Berlin mit seinen großen Entfernungen eine größere Vorlesungstätigkeit bei[91] gleichzeitiger[92] angestrengter Forschungstätigkeit mir[93] nur möglich ist, indem ich mich überarbeite. Es wäre mir aber contra naturam, wenn ich die Forschungstätigkeit aufgeben müßte. […] Außerdem bitte ich zu bedenken, daß ich bei meinem Alter nun mehr eine sehr beschränkte Zahl von Arbeitsjahren habe und es mir nicht leisten kann, auch nur eines davon preiszugeben.

The letter enumerates many reasons for his request for a *Beurlaubung,* as had already been specified in the previous letter of September 1939. Once again, Koschaker complained about the amount of work connected to his teaching duties and the fact that he could not devote enough time to his research, being so burdened with classes. He therefore needed more time after the Christmas vacations to rest and concentrate on his research activities (*Forschungstätigkeiten*). Since he had allowed his colleague academic leave during the second trimester, he argued that he himself deserved a longer break. Once again, the problem of the huge distances in Berlin is mentioned, a clear indicator that he had not grown accustomed to life of a big city. At the end, Koschaker added a further reason for his request, namely the few years remaining for him to work.

As mentioned earlier, the reverse side of Koschaker's letter contains *Rektor* Hoppe's reply, accepting Koschaker's explanations and recognising that a break from teaching was needed, at least temporarily:

> […] so kann ich auf Grund des beiliegenden amtsärztlichen Gutachtens verstehen, daß eine ordnungsgemäße Aufrechterhaltung der Lehrtätigkeiten des Prof. Koschaker zur Zeit nicht gegeben ist.

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89 With a handwritten correction in the letter.
90 With a handwritten correction in the letter.
91 With a handwritten correction in the letter.
92 With a handwritten correction in the letter.
93 With a handwritten correction in the letter.

What is noteworthy about Koschaker's letter is its polite yet resolute tone. The explanations offered in this letter, as well as those previously analysed, reveal Koschaker's displeasure and disillusion with regard to the situation in Berlin. No doubt Koschaker had had high expectations when he moved to the capital, believing that he could devote most of his time, in accordance with his preferences, to his research projects, whereas his position in such a large university entailed various other bothersome tasks. A sense of frustration emerged from his words, probably due to his perception that his role as a highly esteemed and eminent professor had not been respected enough. Koschaker's disenchantment was clear from the letters he wrote to the Minister – moreover, the situation was exacerbated by the fact that at that time his students were deserting his classes on Roman law.[94] Yet these reasons were not the only ones that deeply disappointed Koschaker during the five years he spent in Berlin, as will be explained in the following section.

3.6 The affair of the Institute for Ancient Near Eastern Legal history

Koschaker had considered the foundation of an Institute in Berlin for the study of the Ancient Near Eastern Legal history (*Seminar für Rechtsgeschichte des alten Orients*) an essential condition of his accepting the professorship in Berlin.[95] The possibility of continuing the studies he had worked on since the beginning of his career in Leipzig and establishing an Institute played a major role in Koschaker's decision. In fact, he wanted to make Berlin a world-renowned centre for the study of ancient laws, as Leipzig had been in the previous decades. He also wanted to develop new approaches to the teaching of the topic, reinforcing interdisciplinary academic exchange between the Faculty of Law and the Faculty of Philosophy. We have also seen that he would have liked his friend and colleague Benno Landsberger to join him in Berlin – even if not at the university – who finally left Germany in 1935 to take up a position at the University of Ankara. This was a setback, but Koschaker was nevertheless able to bend the Ministry to his will and bring another colleague to Berlin, Falkenstein, a respected young Assyriologist formerly at Munich, depite the protests of San Nicolò and the *Dozentenführer* of the University of Berlin. Thanks to his good connections with the Ministry for Sciences and National Education, and his international reputation as a scholar, Koschaker was able to achieve one of his major objectives without suffering any setbacks, namely, establishing the Institute for Legal history of the Ancient Near East, despite the fact that the subject focus

94 On this point, see below in this chapter, § 7.

95 See above in this chapter, § 2.

of the Institute would not be particularly appreciated by the Nazi regime.[96] However, as in other matters relating to Koschaker, things in Berlin began positively but quickly degenerated; the events regarding the *Seminar für Rechtsgeschichte des alten Orients* were no exception. Over the years, the Institute, which was located within the Near Eastern National Museums, and had Koschaker as its director, encountered numerous problems. The Institute lacked an assistant, and then after Falkenstein was moved to another university, the Institute and the University remained without a Chair in Assyriology. Added to this, there was a lack of space, and after the first year, funding cuts were made by the State Ministry of Culture (*Kultusministerium*).[97]

Koschaker's attempt to create a great centre for the study and teaching of Near Eastern Legal history, therefore, failed, and he decided to ask the Ministry to close the Institute he had so ardently desired. The promises made to have him in Berlin, as well as (or above all) his expectations, had come to nothing.

These events are clearly explained in a letter that Koschaker sent to the Ministry for Science, Education and Popular Education on 19th April 1940, already examined, in part, with regard to the discussion of the conditions for his position in Berlin.[98] After having quickly described the events that took place and stressing that he wanted to create a centre for the studies on Ancient Near East (*Zentrum der Studien vom alten Orient*) in the capital of the *Reich*, Koschaker listed the events that had taken place during the four years he had spent there. His bitterness is apparent from the first lines of the text:

> Erfahrungen von 4 Jahren haben mich gelehrt, auf diese Pläne zu verzichten, sie haben mir aber auch die Überzeugung beigebracht, selbst bescheidenere Ziele in Berlin nicht erreichen zu können. Die letzteren betreffen mein Seminar, das ich eben darum, weil es an die[99] vorzügliche vorderasiatische Bibliothek der Staatlichen Museen anschließen konnte, mit dem mehr als bescheidenem Etat von 250 RM im Jahre einzurichten vermochte. Vielleicht hätte es mehr Eindruck gemacht, wenn ich das Zehnfache verlangt hätte […].

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96 Koschaker was clearly aware of this fact, as we can see from the events regarding his appointment as coeditor of the *Zeitschrift der Savigny-Stiftung* and the letter he wrote to Rabel on 15th March 1934 and on 11th April 1934. See above, p. 80, fn. 38.

97 On this point, see Müller: *Paul Koschaker (1879-1951)*, pp. 280 f.; Lösch: *Der nackte Geist*, p. 264. Müller writes: "Der Grund dafür dürfte wohl darin zu suchen sein, daß beide Versuche, ein Zentrum für die rechts-, sozial- und wirtschaftsgeschichtliche Forschung und Lehre zum alten Orient zu schaffen, ohne dauernhaften Erfolg blieb, beide ein Opfer des Hitlerfaschismus wurden." This statement deserves further analysis, which will be carried out in the following pages.

98 See above, pp. 76 ff. The signature of the letter is: UA-HU, UK Personalia K 274, Bd. II, Bl. 11-12.

99 With a handwritten correction in the letter.

First of all, as we can see from the letter, Koschaker felt the need to complain about the general situation in Berlin, a situation that had forced him to abandon his goals and objectives, even his most modest ambitions at the time he had decided to move there. Another cause for complaint was the funding of the *Seminar*. In 1936, his first year in Berlin, the institute received 500 RM from the *Kultusministerium*, whereas from 1937 onwards the fundings were reduced.[100] At the time of writing, the *Seminar* received 250 RM per year. Koschaker clearly stated that this was a very small sum of money.

The letter then continues with three points in which Koschaker listed in resolute tones further reasons for his displeasure:

> Im übrigen registriere ich folgende Tatsachen: 1. Die mir bewilligte Assistentenstelle wurde, nachdem ihr erster Inhaber Dr. Hellebrand wegen anderer Verwendung ausgeschieden war, gestrichen, ohne daß man es der Mühe wert befunden hätte, mich davon auch nur zu verständigen. Nur durch Zufall[101] habe ich davon erfahren. 2. […] wurde ich im Herbst vorigen Jahres delogiert, weil der Raum für Zwecke des Luftschutzes beansprucht wurde. Meine anderweitige Unterbringung kann kaum noch als behelfsmäßig bezeichnet werden. Ich bin nicht überzeugt, daß sie die einzig mögliche Lösung │ war. 3. Ich habe immer betont, daß mein Seminar auf die engste Zusammenarbeit mit dem Berliner Assyriologen angewiesen sei. Leider ist das Ordinariat[102] für Assyriologie an der Berliner Universität seit Jahren unbesetzt. […] so habe ich mich um die Versetzung Falkensteins von München nach Berlin bemüht und sie schließlich, nicht ohne Schwierigkeiten, auch durchgesetzt. Falkenstein hat sich hier ausgezeichnet bewährt und praktisch die Assyriologie in Berlin in den letzten Jahren getragen. […] Unter solche Umständen wäre es das Gegebene gewesen, v. Soden für Berlin zu reklamieren oder Falkesteins Dienstantritt in Göttingen solange hinaus zu schieben, bis v. Soden für Berlin freigestellt[103] werden konnte.[104] Man hat es indessen für richtig gehalten, Falkenstein sofort nach Göttingen zu setzen, ohne für seinen Ersatz in Berlin besorgt zu sein. Es ist aber offenbar wichtiger, daß an der Univerität in Berlin, dessen Museen eine der größten Sammlungen vorderasiatischer und keilschriftlicher Denkmäler in der Welt besitzen, die Assyriologie bestmöglich vertreten sei als in Göttingen und daß die richtige Besetzung dieses Fachs in Berlin

100 Lösch: *Der nackte Geist*, p. 264.
101 With a handwritten correction in the letter.
102 With a handwritten correction in the letter.
103 With a handwritten correction in the letter.
104 Soden had joined the military forces, and Falkenstein, in the same year, had been called to Göttingen to take Soden's place. On Wolfram Freiherr von Soden (1908-1996), see: Walter Sommerfeld: *Soden, Wolfram Theodor Hermann Freiherr von*, in: *NDB* 24, Berlin 2010, pp. 524-526.

> keine Unterbrechung erleidet […]. Bedenken, die ich in dieser Richtung vorgebracht habe und denen sich der Herr Dekan der philosophischen Fakultät angeschlossen hat, kamen entweder zu spät oder blieben ohne[105] Eindruck. Jedenfalls liegt unter den gegenwärtigen Umständen mein Seminar auf dem Trockenen. Zwar besteht für mich kein Hindernis, meine Studie persönlich und privat fortzusetzen. Ich verfüge über aus- │gezeichnete Beziehugen nicht bloß zu deutschen, sondern auch zu ausländischen Assyriologen […]. Denn diese Studien, die ich vor 30 Jahren begründet habe, die Niemandem weh tun und selbstverständlich nur einen begrenzten Interessentenkreis haben, fanden nicht nur in Europa, sondern auch an den maßgebenden[106] wissenschaftlichen Stellen in der Türkei, in den Vereinigten Staaten und neuerdings auch in Japan Beachtung.

The first problem he spoke of related to the position of his personal assistant, which had remained vacant after his only assistant, Dr. Hellebrand, had been removed – by the university administration – to another occupation. This was exacerbated by the fact that no one thought it necessary to inform Koschaker of the University's decision. The second issue related to the room in which he worked and held classes at the *Seminar*: after the war had broken out, he had been moved to another office, because his previous one was now being used for air defence purposes. The new room, however, was not suitable for his work and he was not convinced that a better space could not be made available for him within the museum. The third and last point concerned the Chair in Assyriology at the University of Berlin. As we have already seen,[107] Koschaker encouraged Falkenstein to leave Munich and accept the Chair in Assyriology in Berlin, and he eventually succeeded in his aim despite some obstacles. Falkenstein proved an excellent scholar in Berlin, but in 1939 he was sent to Göttingen to replace Soden, who had previously held the Chair in Assyriology and Arabic Studies there, and was enlisted in the armed forces from 1939 to 1945. In the letter, Koschaker revealed his disappointment about the decision to move Falkenstein without having found someone to take his place in Berlin. Thus, in Berlin, a city which held one of the most impressive collections of Assyrian-Babylonian and Ancient Near Eastern monuments in the world, the Chair in Assyriology remained vacant and teaching of the subject had been abruptly interrupted. Although this was a huge loss for the city of Berlin and the University, it was not a major drawback for Koschaker himself, who was able to continue his studies on this topic thanks to his international relationships with other scholars. Koschaker made the point that this kind of research, of interest to and involving only a small group of scholars, "did no harm to anyone" ("Denn diese Studien…, die Niemandem weh tun…"). This clarification by

[105] With a handwritten correction in the letter.
[106] Originally written "maßge benden" and then handwritten as one word.
[107] See above, pp. 77 and f.

Koschaker no doubt wished to stress, in a missive sent to the Minister, that the studies he was conducting on cuneiform law would not prove to be a problem either to the regime or to anyone else.

If Koschaker's words so far appeared clear and determined, the last sentences of his letter are even more incisive:

> Hingegen ist es mir zweifelhaft, ob ich sie heute noch in einem Seminar, also sozusagen unter staatlicher Approbation fortsetzen darf. Ich habe zwar keinen Grund zu vermuten, daß sie von der Unterrichtsverwaltung mißbilligt werden oder gar die Absicht besteht, sie zu unterdrücken, aber ich stehe doch vor der Tatsache, daß man mir durch das Bestehen eines Seminars eine wissenschaftliche Verantwortung aufbürdet und mir auf der anderen Seite die Mittel verweigert, diese Verantwortung zu erfüllen. Ich gestatte mir daher zu beantragen, mein "Seminar für Rechtsgeschichte des alten Orients" aufzulösen und mich so von einem Titel zu befreien, den ich im günstigsten Falle nur als Ironie empfinden könnte. Ich tue diesen Schritt nicht leichten Herzens. Ich habe mein Amt in Berlin vor 4 Jahren mit Plänen ausschließlich wissenschaftlicher Natur angetreten. Es ist mir schmerzlich, heute für diese Pläne den Bankerott erklären zu müssen, gerade deshalb, weil dieser Bankerott mich persönlich vielleicht am wenigsten trifft. […].

First and foremost, Koschaker cast doubt on the fact that he was still allowed (he used the verb *dürfen*) by the Ministry to proceed with his activities at the *Seminar*. The following sentence was cleverly phrased in a formal style, but it sounded no less critical than the previous one. He explained that he could not imagine that someone at the Ministry desired to oppose or suppress the continuation of his activities at the *Seminar*; nonetheless, he had been burdened with the responsibility for the Institute, since he was its director, but without the necessary means to carry out these responsibilities. For these reasons he asked the Ministry to close the *Seminar* and release him from his title of director, which would otherwise sound somewhat ironic (the last sentence sounds even blunter in German: "und mich so von einem Titel zu befreien, den ich im günstigsten Falle nur als Ironie empfinden könnte"). It was very painful for Koschaker to send such a request to the Ministry, because it meant admitting the "bankruptcy" of the plans that he had harboured when he moved to Berlin. At the end he desired to stress, however, that he could not be considered responsible for this failure.

Koschaker's standpoint was resolute and compelling; the final part of the text almost appeared to be a provocation, considering whom the letter was addressed to. Of course, Koschaker was defending his own scholarly interests, but at the same time he would appear to denounce the faults of the Ministry and of the administrative offices, the inadequacy of the structures, the failure to comply with his requests, or rather the

fulfilment of the conditions he had set out – which the Ministry and the University of Berlin had approved – in order to accept the chair in Berlin. His self-esteem, as a person and as an eminent professor, had been hurt and his subsequent reaction was firm. Koschaker's letter suggested a lack of interest in, if not indeed something like disapproval of, his activities and his *Seminar*. His frustration and disappointment are therefore more than understandable, but it is also worth considering whether his expectations were perhaps too high when he moved to Berlin. Put bluntly, even if in 1936 the establishment of a *Seminar* for Ancient Near Eastern Legal history in Berlin had been plausible, after the war broke out it was inevitable that conditions would change. Koschaker's field of studies would only have been barely tolerated by the Nazi regime, since their interests would obviously focus on other aims. One should also remember that these events happened in Berlin, the capital of the *Reich*. Research that might has successfully been carried out undisturbed in a small city like Tübingen – where Koschaker became director of the Near Eastern Institute (*Orientalisches Seminar*) from 1941 onwards – would have met with disapproval in Berlin, the centre of Nazi government and propaganda. Moreover, the opposition of the Nazis to Roman law was in part based on theories about Oriental and Jewish influences on post-classical Roman law;[108] it seems clear, therefore, that a centre of studies on Ancient Oriental Legal history would not be readily accepted in Berlin. The fact that its creation was actually allowed in 1936 is probably proof of the prestige and important role that Koschaker had within Ancient Near Eastern Studies (*Altorientalistik*) and Roman law scholarship in Germany at this time.

On the same day Koschaker sent the letter to the Ministry for Science, Eduation and Popular Education, he addressed another typewritten one-page letter to the Dean of the Faculty of Philosophy (*Dekan der philosphischen Fakultät der Universität Berlin*), Franz Koch.[109] In this brief missive, Koschaker announced that he had officially requested the closure of the *Seminar für Rechtsgeschichte des alten Orients*. After having thanked Koch for the active and deep interest shown concerning the appointment of a new chair in Assyriology after Falkenstein had been moved to Göttingen, Koschaker wrote the following:

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[108] On this point, see below, chapter 5.

[109] UA-HU, UK Personalia K 274, Bd. II, Bl. 6. On Franz Koch (1888-1969) and his experience at the University of Berlin, see Wolfgang Höppner: *Der Berliner Germanist Franz Koch als ‚Literaturmittler', Hochschullehrer und Erzieher*, in: Gesine Bey (ed.): *Berliner Universität und deutsche Literaturgeschichte. Studien im Dreiländereck von Wissenschaft, Literatur und Publizistik*, Frankfurt a.M. 1998, pp. 105-128; Höppner: *Kontinuität und Diskontinuität in der Berliner Germanistik*, in: Rüdiger vom Bruch/Rebecca Schaarschmidt (eds.): *Die Berliner Universität in der NS-Zeit. Band II: Fachbereiche und Fakultäten*, Wiesbaden, 2005, 257-276.

> […] Sie werden es verstehen, daß ich nun Schluß machen möchte. Die Nachteile, die mir daraus erwachsen, werden gering sein gegenüber dem beständigen Ärger und den Enttäuschungen, die ich bisher hatte. […].

Koschaker appeared once again to be despondent about the problems connected with and caused by the creation of the *Seminar* and his blunt final sentence confirmed this impression: the harm caused by the closure of the Institute would, in any case, be less than the anger and disappointment he had endured.

During the summer of 1940, however, a new Dean, Hermann Grapow, a famous Egyptologist, was appointed to the Faculty of Philosophy.[110] On 4th November 1940, Grapow sent a letter to the *Rektor* of the University, Hoppe,[111] to complain about Koschaker's request to close the *Seminar*. Grapow wrote that he was sorry to hear that Koschaker had submitted such a request, but he also affirmed that, before any kind of decision could be taken, it was necessary to wait for the assignment of the new professor in Assyriology and for his opinion on this particular issue. Grapow also complained about Koschaker's direction of the *Seminar*:

> […] Denn Herr Koschaker hat sich bei seiner Begründung [of the *Seminar*] auf die assyriologische Seite des alten Orients beschränkt. Es gibt aber auch eine ägyptologische Seite, und auch aus Ägypten besitzen wir Rechtsurkunden, die auch vom juristischen her Beachtung und Untersuchung verdienen. Hätte sich herr Koschaker seinerzeit entschloßen, das Seminar auf der angedeuteten breiteren Basis aufzubauen, so wäre es vermieden worden, daß sich inzwischen in München ein Jurist der Rechtsurkunden aus dem alten Ägypten angenommen hat. Jedenfalls sollte die Ungelegenheit des Seminars noch einmal zwischen Herrn Koschaker, Herrn v. Soden und gegebenenfalls dem Unterzeichneten besprochen werden, bevor der Herr Reichsminister die Auflösung verfügte.

The new dean, no doubt disappointed that Koschaker had always focused on the close connection between his *Seminar* and the Chair in Assyriology, neglecting the Chair and professors for Egyptology that worked at the University of Berlin, seemed to ascribe the responsibility for the failure of the Institute mainly to Koschaker. This might indicate that the relationship between Koschaker and Grapow was by no means idyllic, or, to put it another way, between Koschaker and the scholars who studied Egyptology in Berlin at this time. Or possibly, it is simply evidence of the deep resentment felt by Grapow, who

[110] On Hermann Grapow (1885-1967), see Thomas L. Gertzen: *Die Berliner Schule der Ägyptologie im Dritten Reich. Begegnung mit Hermann Grapow*, Berlin 2015.

[111] UA-HU, UK Personalia K 274, Bd. II, Bl. 7-8. The letter is typewritten and two pages long (recto and verso).

considered that Koschaker had neglected his particular field of study. In any case, Grapow did not seem to be willing to accept that the Institute would be definitely closed, at least not until the matter had been discussed further with both Koschaker and Soden.[112]

Grapow's decisive reaction to the closure of the *Seminar* provoked a decision by the Minister on the question. Twenty-four days after Grapow had sent the letter to *Rektor* Hoppe, the Ministry for Science, Education and Popular Education decided not to accept Koschaker's request to close the *Seminar für Rechtsgeschichte des alten Orients*. On the contrary, there ought to be a discussion as proposed by Grapow involving Koschaker, Soden and Grapow himself. In a letter of 28th November 1940, addressed to Hoppe,[113] the Minister wrote:

> […] Das Gesuch des Professors Dr. Koschaker vom 12. September 1940 um Auflösung des Seminars für Rechtsgeschichte des alten Orients sende ich zwecks Herbeiführung der von dem Dekan der Philosophischen Fakultät vorgeschlagenen Aussprache anbei zurück. Ich verhehle nicht, dass ich grundsätzlich nicht geneigt bin, Einrichtungen, die einmal an der Hochschule oder in Verbindung mit ihr formell errichtet worden sind, ohne zwingende Gründe wieder aufzuheben. Es müsste dadurch zwangsläufig der Eindruck entstehen, als ob die Errichtung nicht genügend vorbedacht gewesen sei. […].

The Minister wrote that he would not agree to Koschaker's request and added that in the absence of compelling reasons he was not well disposed to abolishing institutes that had been created as part of the university. Otherwise, an impression might be given that such institutions had not been sufficiently thought through in advance.

The Dean of the *Rechts- und staatswissenschaftliche Fakultät* Hans Weigmann was aware of such events and the Minister's decision, and, as a consequence, decided to write a letter to the Dean of the Faculty of Philosophy on 9th December 1940.[114] In this very short letter, consisting of a few typewritten lines, he asked Grapow to consult with him with regard to the question of the *Seminar für Rechtsgeschichte des alten Orients*. Grapow's stand, therefore, succeeded, and Koschaker's petition was rejected. Just as his plans to create a great centre for the study of Ancient Near Eastern Legal history in Berlin had failed, so too, ironically enough, his attempt to close an institute that had been created

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[112] But Soden, as mentioned earlier, refused the chair in Berlin in 1940, as he had decided to join the armed forces. It has also to be remembered that Koschaker and Soden together became editors of the *Zeitschrift für Assyriologie und verwandte Gebiete* (then renamed *Zeitschrift für Assyriologie und vorderasiatische Archäologie* in 1939) in 1938.

[113] UA-HU, UK Personalia K 274, Bd. II, Bl. 9. The letter is typewritten and one-page long.

[114] UA-HU, UK Personalia K 274, Bd. II, Bl. 10. On Hans Weigmann (1897-1944), see Michael Buddrus/Sigrid Fritzlar: *Die Professoren der Universität Rostock im Dritten Reich. Ein biographisches Lexicon*, München 2007, pp. 432-433.

for him and for his studies came to nought. Koschaker's career in Berlin was at this point in evident decline. It was at the end of November 1940 when the Minister took his decision on the destiny of the *Seminar für Rechtsgeschichte des alten Orients*, and Koschaker was probably already preparing himself to leave the capital of the *Reich* for good.

3.7 Students and the teaching of Roman law

The various difficulties and problems that Koschaker had encountered after his arrival in Berlin resulted in a rapid lowering of his expectations concerning the prestigious chair that had once been Savigny's. As was noted above, as early as 1939 he suggested to the Minister of Science, Education and Popular Education that he preferred to be assigned to another quieter university: "[…] so würde ich es dankbar begrüßen, wenn in Erwägung gezogen werden könnte, ob es nicht besser wäre, mir ein anderes Milieu zu geben, in dem ich zwar geringere wissenschaftliche Behelfe zur Verfügung, aber mehr Ruhe und Sammlung zur Arbeit hätte."[115] The situation worsened quickly and in his autobiography he briefly explained his decision to move to Tübingen:

> Persönlich habe ich mich in Berlin nicht wohl gefühlt. Das ist eine Feststellung, aber kein Vorwurf gegen die Berliner, deren wie überhaupt des Preußentums Vorzüge und Tugenden ich immer um so höher schätze, als ich selbst nicht das geringste davon besitze. Dazu kam die an der Universität der Reichshauptstadt besonders intensive Nazifizierung, die mich noch mehr vereinsamte als die Größe der Stadt für sich. Es wurde mir gestattet, 1941 Berlin mit dem kleinen Tübingen zu vertauschen […].[116]

As was mentioned earlier,[117] scholars have often conjectured about the grounds for Koschaker's decision to leave Berlin for Tübingen. Some pointed to the increasing presence of the Nazis at the University ("*intensive Nazifizierung*"), portraying Koschaker as a determined anti-Nazi;[118] while others argued that the reasons for the move to Tübingen were ambivalent.[119] Koschaker's own words have been used to explain his

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115 Letter of 1st June 1939; see above, p. 88.
116 Koschaker: *Selbstdarstellung*, p. 118.
117 See above, p. 84.
118 See Müller: *Paul Koschaker (1879-1951)*, p. 282. It is clear, in this case, that the interpretation offered by Müller could have been influenced by the same words written by Koschaker in his autobiography.
119 See Below: *Paul Koschaker*, p. 4; Neumann: *Paul Koschaker in Tübingen (1941-1946)*, p. 24. The reasons leading to Koschaker's departure from Berlin are not clearly stated in Giaro:

actions, but a close analysis of Koschaker's actual correspondence offers a more complex picture of the reasons for his leaving Berlin.

In fact, numerous circumstances influenced the unfolding of events,[120] but one thing is certain: it was Koschaker's own decision to leave the *Friedrich-Wilhelms Universität*. Even though it is plausible that Koschaker was not popular among all his colleagues or members of the regime involved in the life of the University and the two academies in Berlin,[121] and some were lukewarm about Roman law and Ancient Near Eastern Legal history, there is in fact no actual proof of open hostility towards him.

The main issues emerging from the documents described and quoted above relate mainly to practical and bureaucratic questions, troubles connected to the heavy burden of teaching, some personal problems, such as his poor health, his personal dislike for the city, and his difficulty in getting used to the distances and life of Berlin. Koschaker also had a few issues with some of his colleagues, such as Grapow, but these largely centred on scientific or organisational questions. In addition, it should also be mentioned that on several occasions Koschaker was refused permission to collaborate on some scientific projects, such as in the case of the *Festschrift* in honour of Eduard Mahler, a Hungarian Jewish colleague.[122] Nonetheless, it is clear in this case that the reason for refusing permission was not borne of personal hostility against Koschaker, but rather on the Jewish origins of his colleague Mahler. In fact, there did not seem to be any particular political issue over Koschaker during the time he spent in Berlin, as a travel permit (*Reisegenehmigung*) from 3rd September 1937 would appear, at least in part, to confirm.[123]

The content of the typewritten document, a political report on Koschaker ("*Politische Beurteilung über den Professor Dr. Paul Koschaker in Berlin-Grunewald, Winklerstr. 13*"), reads:

> Das Urteil meiner Parteidienststellen über Koschaker ist nicht einheitlich. Tatsachen, aus denen die politische Unzuverlässigkeit des Koschaker herzuteilen wäre,[124] sind nicht bekannt geworden.

Aktualisierung Europas, p. 82, where the author seems to rely only on some of Koschaker's citations taken from a letter to his pupil Guido Kisch and his autobiography.

120 See Müller: *Paul Koschaker (1879-1951)*, p. 282.

121 This feeling emerges from a letter Koschaker sent to the dean, Weigmann, on 20th September 1941 (UA-HU, Jur. Fak., nr. 518, o. Blatt). In the text, Koschaker defined himself as one of the "difficulties" of his unsatisfied and, consequently, unpleasant colleagues ("unzufriedenen und daher unerfreulichen Kollegen"). See on this point Lösch: *Der nackte Geist*, pp. 393 f.

122 Ibid. Koschaker was later prohibited from collaborating on the project for "The Oxford History of Legal Science". On this project, see Wolfgang Ernst: *Fritz Schulz (1879-1957)*, in: Jack Beatson/Reinhard Zimmermann (eds.): *Jurists uprooted. German speaking Emigré Lawyers in Twentieth-century*, Oxford 2004, pp. 171 f. On Mahler (1857-1945), see: Kálmán Benda: *Mahler Ede*, in: *Österreichisches Biographisches Lexicon 1815-1950*, V, Wien 1972, p. 411.

123 UA-HU, UK Personalia K 274, Bd. I, Bl. 26.

124 The "e" at the end has been added later as a handwritten correction.

The words of the officer appointed to check Koschaker's political reliability show that there was no evidence to compromise his trustworthiness, although the judgment itself on Koschaker was not unanimous.

Once again, an interpretation of this document could suggest that, in certain cases, Koschaker came up against obstacles at the University. However, such impediments were mainly administrative rather than political in nature.

Yet it is clear that the situation regarding the *Seminar für Rechtsgeschichte des alten Orients* was complicated and frustrating for Koschaker. His work conditions grew worse over the years, and no doubt the Ministry – as well as a number of influential people at the University – were, at best, not very interested in the activities of the *Seminar*, and considered it of secondary importance. On the other hand, it was the Minister who authorised the establishment of the new *Seminar* in 1936 and the same Minister who had declared its opposition to closing it, despite Koschaker's letter of 28th November 1940 requesting its closure.

The complex reasons leading Koschaker to leave Berlin find further confirmation in a handwritten one-page letter he sent to the President of the Prussian Academy of Science on 30th September 1941.[125] Koschaker informed the President that from 1st October 1941 he would become Professor at the University of Tübingen, before briefly summarising the reasons for his move. The most important part of the text reads:

> […]. Die Gründe, die mich veranlaßten, diese fernerstehenden vielleicht ungewöhnlich erscheinende Veränderung zu erstreben, hier auseinanderzusetzen, würde zu weit führen. Sie liegen teils in Schwierigkeiten, die ich bei Ausübung meines Lehramtes im römischen Recht hatte, teils in bürokratischen Hemmungen bei Durchführung gewisser wissenschaftlicher Pläne. Zuletzt kamen gesundheitliche Erwägungen hinzu […].

On the same day, Koschaker sent a handwritten two-page letter (recto and verso) to the Director of the Prussian Academy of Science, informing him about his move and his new address in Tübingen. He also mentioned that the lecture to be given on 12th March 1942 still needed to be confirmed. The reply of the Director, a typewritten half-page letter was eventually sent on 5th November 1941; he essentially limited his reply to a confirmation

[125] ABBAW: PAW, III a, Bd. 62, Fol. 24. Concerning this letter, see also Müller: *Paul Koschaker (1879-1951)*, p. 282 fn. 50. Müller gives a different date for the letter, namely 20th September 1941. Looking closely at the text, the "3" of the date, though difficult to decipher, seems to be correct. In any case, the letter sent by Koschaker to the Director of the Academy on the same day acts as a reliable countercheck. See the following footnote.

of the lecture and to inform Koschaker that the President had still not replied due to illness.[126]

To conclude, a few final words should be devoted to the problem of the Roman law courses and their students at the University of Berlin. It has previously been stated how important it was for Koschaker to restore the role of Roman law and its teaching, in particular at the chair in Berlin.[127] This task was perceived by Koschaker more as a mission than a job,[128] and he deeply identified his persona as being representative *par excellence* of this 'duty',[129] which should begin with teaching at Berlin.

Two important sources substantiate the critical situation with respect to teaching Roman law in the second half of the 1930s in both Berlin and in Germany at large; two Italian Roman law scholars, Antonio Guarino and Emilio Betti, had both experienced the crisis in teaching - from the student's perspective in the case of Guarino, and from the perspective of the teacher in Betti's case.

The narrative provided by Guarino in a number of his essays is probably, for our purposes, the more interesting of the two because he was not only a student in Berlin in 1937/1938, but was actually one of Koschaker's students.[130] Guarino had the opportunity to attend Koschaker's classes and he described a situation in which he was part of a very

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126 ABBAW: PAW, III a, Bd. 62, Fol. 25. The text reads: "Sehr geehrter Herr Professor Koschaker, ich danke Ihnen für Ihren Brief vom 30. September 1941. Der Herr Präsident hat Ihren Brief vom selben Tag gelesen, kann ihn aber zur Zeit nicht beantworten, da er erkrankt ist. Nachdem die Semesterferien bei der Universität verschoben worden sind, verbleibt es bei der bisherigen Anordnung in der Leseliste, sodass Sie am 12. März 1942 Ihren Vortrag vor dem Plenum halten. Ich möchte Sie auch bitten, von einer Verschiebung möglichst abzusehen, da einige Vorträge wegen Erkrankung von Mitgliedern umdisponiert werden mussten, und dadurch gewisse Schwierigkeiten entstanden sind […]." Koschaker replied with a handwritten letter, one page long, on 14th November 1941, see: ABBAW: PAW, III a, Bd. 62, Fol. 28.

127 See above, in this chapter, § 2.

128 Below/Falkenstein: *Paul Koschaker* †, p. X; Giaro: *Aktualisierung Europas*, pp. 38 ff. See also Guarino: *Cinquant'anni dalla «Krise»*, pp. 276-277 and Id.: *L'Europa e il diritto romano*, in *Labeo*, 1, 2 (1955), pp. 207-212, now also published in Id.: *Pagine di diritto romano*, I, pp. 295-296.

129 See the words he used in his autobiography to describe his decision in December 1937 to defend Roman law and its teaching at the *Akademie für Deutsches Recht*: Koschaker: *Selbstdarstellung*, pp. 122 f., and further below, chapter 5, §§ 3-6.

130 On Antonio Guarino (1914-2014), an influential personality in Roman law, as well as a politically active senator in the Italian government (1976-1979), see Luigi Labruna: *Antonio Guarino*, Napoli 2015; Vincenzo Giuffrè/Luigi Labruna: *«Un identikit del Professore»* and Rosaria Mazzola: «*Elenco degli scritti storico-giuridici di Antonio Guarino»*, both in: *Omaggio ad Antonio Guarino centenario*, in: *Index* 42 (2014), respectively pp. 1-24 and 25-72. The articles by Guarino referred to in this page are: Guarino: *Cinquant'anni dalla "Krise"*, pp. 276-291; Id.: *L'Europa e il diritto romano*, pp. 295-299; Id.: *Redazionale*, in *Labeo*, 7, 3 (1961), pp. 289-290, now also in Id.: *Ultime pagine di diritto romano*, Napoli 2014, pp. 18-20; Id.: *Sine ira et studio*, p. 11.

limited group of loyal 'followers' of the scholar, along with Below and Erbe.[131] In addition to Koschaker's classes, they used to meet with him daily at the *Juristisches Seminar* to discuss questions regarding Roman law including the hatred of the regime towards the topic and the subject's dramatic situation in Germany.

Guarino wrote:

> Vi era un tema presente, addirittura incombente, su cui richiamava spesso la nostra attenzione Koschaker, ed era il tema dell'ostracismo, che il partito politico al potere aveva decretato al diritto romano ed al suo insegnamento nelle università tedesche. […] Fortunatamente questo programma drastico non si era ancora tradotto in una abolizione della disciplina didattica, ma era stata sufficiente ad allontanare gli studenti dal diritto romano la norma per cui le ore di lezione erano state ridotte a metà e l'esame relativo era stato soppresso. Ormai Koschaker svolgeva i suoi corsi solo, o quasi, per noi fedelissimi e presentiva il giorno in cui il diritto romano non avrebbe più avuto, nei paesi tedeschi, né discepoli né docenti.[132]

Guarino's gloomy picture confirmed Koschaker's perception that a darker future was yet to come for Roman law in Germany. Koschaker considered Italy to be the "Eden" for the study of Roman law, an idea also expressed in his *Die Krise des römischen Rechts und die romanistische Rechtswissenschaft*.[133]

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131 Guarino: *Cinquant'anni dalla «Krise»*, pp. 276 f.; in Id.: *L'Europa e il diritto romano*, p. 295, appears also the name of the Japanese Harada. On Walter Erbe (1909-1967), see Ludwig Raiser: *Walter Erbe zum Gedächtnis*, in: *In memoriam. Gedenkreden für Mitglieder der Rechts- und Wirtschaftswissenschaftlichen Fakultät der Universität Tübingen*, Frankfurt a.M. 1971, pp. 62-76; Ulla Galm: *Walter Erbe. Liberaler aus Passion*, Baden-Baden 1987; Jens Thiel: *Der Lehrkörper der Friedrich-Wilhelms-Universität im Nationalsozialismus*, in: Michael Grüttner/Heinz Elmar Tenorth (eds.): *Geschichte der Universität Unter den Linden 1810-2010. Band 2: Die Berliner Universität zwischen den Weltkriegen 1918-1945*, Berlin 2012, pp. 465-538 and on Erbe, in particular, pp. 503 ff.

132 The question was always present, if not actually a pressing issue, and one which Koschaker often drew our attention to, namely that this question consisted in the ostracism of the party in power towards Roman law and its teaching in German universities […]. This drastic plan fortunately had not already led to the abolition of Roman law as a subject matter at the universities. Yet the rule cutting the hours of teaching by half and deleting the final examination was sufficient to make students lose their interest in Roman law. At this point Koschaker held his courses almost alone, for us who were his group of loyal 'followers', and imagined the day, when there would be no more Roman law scholars and students in German universities [Editor's note: my tranlsation]. See Guarino: *Cinquant'anni dalla «Krise»*, p. 276.

133 Id.: *L'Europa e il diritto romano*, pp. 295 f. Guarino wrote: "Dal contatto quasi quotidiano con lui appresi che Koschaker aveva in Italia moltissimi amici, di cui amava spesso parlare. Ma sopra tutto egli considerava il nostro paese come la terra promessa, che dico, l'Eden dei romanisti, in considerazione dell'ampio respiro lasciato nelle nostre facoltà giuridiche all'insegnamento del diritto romano. […] la situazione di vero e tangibile disagio in cui si

Guarino provided us with the notion that Koschaker's crusade to preserve Roman law was a true mission for him, comparable to the courageous suffering of the Apostles.[134] Guarino's texts portrays Koschaker as a highly sensitive scholar, so passionate about Roman law that he exaggerated the extent of the crisis. Koschaker's commitment is reported as determined and noble in Guarino's essays, though at times it borders on idealisation.

Certainly, the teaching of Roman law was facing a deep crisis, as Betti's words confirm.[135] In 1937-38 Betti was invited by some German colleagues – among them Genzmer, Kunkel and Lübtow – to hold courses on Roman law in Frankfurt am Main, Bonn and Cologne, respectively.[136] Betti had first hand experience of some of the problems involved in teaching the subject in Germany, a situation deplored by Koschaker at the *Akademie für Deutsches Recht* at that time, and the Italian scholar was particularly disappointed by the lack of student interest in the study of Roman law.[137] It is no surprise, therefore, that such indifference was also a source of suffering for Paul Koschaker.

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trovava l'ormai sparuta schiera dei romanisti tedeschi aveva fatto, sul suo animo sensibilissimo, una presa tanto forte, da indurlo ad identificare nella crisi dell'insegnamento romanistico la crisi dello stesso diritto romano come scienza. A questo stato di cose, indubbiamente grave, ma ingigantito, ripeto, dalla sua passione di studioso, egli volle reagire con il sofferto coraggio di un apostolo."

134 Id.: *L'Europa e il diritto romano*, 296.

135 On Emilio Betti (1890-1968), a highly influential Italian Roman and private law scholars of the 20th century, see Salvatore Tondo: *Emilio Betti*, in: Birocchi/Cortese/Mattone/Miletti (eds.): *Dizionario biografico dei giuristi italiani (sec. XII-XX)*, I, Bologna 2013, pp. 243-245. Betti was also an important scholar in the field of hermeneutics. A committed supporter of the Fascist regime, Betti was a member of the commission appointed to the elaboration of the new Codice Civile of 1942, on which topic see recently Massimo Nardozza: *Tradizione romanistica e 'dommatica' moderna. Percorsi della romano-civilistica nel primo novecento*, Torino 2007, and the reviews by Emanuele Stolfi in: *StudiSenesi* 120, fasc. 2, (2008), pp. 361-377 and Baldus, in: *ZSS* (RA) 128 (2011), pp. 725-732. On Betti and the Fascist regime, see Cosimo Cascione: *Romanisti e Fascismo*, in: Miglietta/Santucci (eds.): *Diritto romano e regimi totalitari*, pp. 3-52; Massimo Brutti: *Emilio Betti e l'incontro con il fascismo*, Roma 2015. There is a further bibliography on Betti in the recent works of Stolfi: *Studio e insegnamento del diritto romano dagli ultimi decenni dell'Ottocento alla prima guerra mondiale*, in: Birocchi/Brutti (eds.): *Storia del diritto*, pp. 3-43 and, in the same volume, Santucci: *«Decifrando scritti che non hanno nessun potere»*, pp. 63-102. Many works by Betti were, after his death, edited by his pupil Giulano Crifò; among them, to obtain a wide overview of Betti's perspectives on hermeneutics and method, see Emilio Betti (edited by Giuliano Crifò): *Diritto metodo ermeneutica*, Milano 1991.

136 The German lessons held by Betti are entitled *Probleme der römischen Volks- und Staatsverfassung*, translated into Italian by Sandro Angelo Fusco: *Problemi di storia della costituzione sociale e politica nell'antica Roma* (*La cultura giuridica. Testi di scienza, teoria e storia del diritto*, 2), Roma 2017. Betti had already been invited to hold a series of lectures in Germany in 1936, as we can see from Betti: *Per la nostra propaganda culturale all'estero*, in: *Studi Giovanni Pacchioni*, Milano 1939, pp. 1-51, and 5-13, in particular.

137 Betti would also deal with these problems in Betti: *La crisi odierna della scienza romanistica in Germania*, in: *Rivista di Diritto commerciale* 37 (1939), pp. 120-128.

In a letter written on 22nd Feruary 1938 and sent to the *Rektor* of the University of Berlin, Hoppe, Koschaker made his most meaningful and determined statement on the condition of Roman law in Germany at that time.[138] The content of the letter relates to the reasons for Koschaker turning down the invitation to talk at the *Istituto di Studi Germanici* in Rome, even though he had received an authorisation to do so from the Ministry of Education. The text reads:

> Eure Magnifizenz!
>
> Sie hatten die Freundlichkeit zu genehmigen, daß ich einer Einladung des Istituto di Studi Germanici in Rom folgend dort einen Vortrag halte. Ich erlaube mir mitzuteilen, daß ich diese Einladung nachträglich abgelehnt habe. Es war meine Absicht über die Geschichte des Studiums des römischen Rechts zu sprechen, ein Thema, das man von dem Vertreter des römischen Rechts an der Universität der deutschen Reichshauptstadt am ehesten erwartet. Bei dessen Erörterung könnte ich an der deutschen Gegenwart unmöglich vorbeigehen. In einer Zeit aber, da das Studium des römischen Rechts in Deutschland und insbesondere in Berlin völlig darnieder liegt, da ich einen schweren Kampf gegen die völlige Teilnahmslosigkeit der Studenten gegenüber diesem Fach kämpfe, da ich mich des Gefühls nicht zu erwehren vermag, daß man dieses Studium, das einst eine große und ruhmreiche Tradition der deutschen Rechtswissenschaft war, nicht mehr schätz, vermöchte ich in Italien, wo man es als große kulturelle Errungenschaft pflegt und wertet, über ein solches Thema nicht ohne Bitterkeit zu sprechen. Eurer Magnifizenz dürfte es bekannt sein, daß ich mit Kritik an den gegenwärtigen Verhältnissen nicht zurückgehalten habe. Ich kann aber eine solche Kritik unmöglich öffentlich im Auslande üben.
> Unter solchen Umständen hielt ich es für richtiger zu schweigen und habe daher die Einladung aus Gesundheitsrücksichten abgelehnt. Das ist übrigens kein Scheingrund. Der Niedergang meines Fachs, der in Berlin katastrophal ist und mich praktisch zum Professor nur für Ausländer, d.h. überflüssig macht, ist eine Angelegenheit, die mir nahe geht. Ich vermag solche Dinge nicht abzuschütteln wie die Ente das Wasser. So haben im Laufe dieses Semesters meine Nerven sehr gelitten. Ich fühle mich in der Tat nicht so wohl, als daß ich die deutsche Rechtswissenschaft im Auslande und speziell in Italien so vertreten könnten, wie man es von mir erwartet und wie ich es von mir selbst verlangen müßte.

[138] UA-HU, UK Personalia K 274, Bd. I, Sonderheft: Auslandsreisen, Bl. 160. Typewritten two-page (recto and verso) letter.

The content of this letter is very clear and does not require detailed explanation. It represents Koschaker's perception and feelings concerning the crisis in the teaching of Roman law; yet two considerations deserve particular attention. First, it is clear that Koschaker saw himself as one of the most important exponents of Roman law in Germany; his chair in Berlin obliged him to confront the crisis and defend Roman law when attending conferences or giving lectures abroad. In the face of such a 'duty', as Koschaker perceived it, he could either travel abroad and explain the real situation in Germany, or renounce his attendance at conferences. No third way was conceivable. He was naturally aware that he could not openly criticise the academic situation in Germany while abroad, and this no doubt influenced his decision to travel or not. Overall, Koschaker's perception of his role emerges from the choice of the word "Kampf", expressive of his effort to "fight" the indifference of students to Roman law. The second consideration is that no significant barriers appear to have been placed in his way to hinder his academic activities, for the Ministry permitted him to attend conferences and explain his studies of Roman law. However, the general political situation in Germany gradually became the real impediment that restricted him from carrying out his duties. This situation gravely vexed him and eventually had repercussions on his health.

3.8 Leaving Berlin

To reiterate, Koschaker's judgment of his experience in Berlin was not positive as his rather high expectations were fraught with frustrations, in the end. He therefore decided to ask the Ministry of Education to relocate him to a different, smaller university, eventually resulting in his move to Tübingen, where he began his work as a professor of Roman law on 1st October 1941.[139] The bitterness and disappointment caused by the events in Berlin led him to hope for a more solitary and quieter academic life, during which he could devote his time to his research and ideas regarding the study of Roman law.

Despite the difficulties experienced at the University of Berlin, Koschaker was nonetheless able to write some very important works on differen topics over the five years from 1936 to 1941, but unlike the previous years from 1911 to 1936, he did not publish any monographs. On the contrary, he made a large number of minor publications and, in particular, reviews, mainly published in the *Zeitschrift der Savigny-Stiftung*, and if we

[139] See the letter to the President of the *Preußische Akademie der Wissenschaften* of 30th September 1941, above, p. 100, and the administrative order of the Ministry for Science, Education and Popular Education of 23rd September 1941: UA-HU, Uk Personalia K 274, Bd. II, Bl. 58. Compare also Koschaker: *Selbstdarstellung*, p. 118; Below: *Paul Koschaker*, p. 4. On Koschaker in Tübingen, see the following chapter.

exclude his major work of this period, *Die Krise des römischen Rechts und die romanistische Rechtswissenschaft*, there were few other significant articles.[140] Indeed despite the renewed and intense interest in Roman law and its crisis, Koschaker continued to work on cuneiform law and Ancient Near Eastern Legal history. He also published an article on legal history and comparative law, with a particular focus on Germany, a text that probably represents another step in the development of his ideas on the role of the comparative methodology in legal history studies.[141]

The ubiquitous academic esteem enjoyed by Koschaker at the time when he was a professor in Berlin is further confirmed by the two *Festschriften* in his honour, which both appeared in 1939. One contains contributions from the most influential legal historians and Romanists of the time,[142] and the other collects essays by the most important scholars in the field of cuneiform law and Ancient Near Eastern Legal history.[143] Nonetheless, as is evident from his letters, Koschaker was not satisfied with the limited opportunities he had to devote his time to research. When Koschaker finally received the call to move to the smaller and quieter, albeit very prestigious, university of the provincial city of Tübingen, this appeared to be a suitable solution for many of his problems, and he accepted without further ado.

Yet before concluding this section of the chapter, it is appropriate to mention two documents regarding Koschaker's replacement as professor of Roman law at Berlin. The documents in question are letters sent from the Dean of the Faculty of Law, Weigmann, to the Ministry for Culture, Education and Popular Education (*Reichsminister für Wissenschaft, Erziehung und Volksbildung*). The first text, dated 23rd September 1941,[144] and written a week before Koschaker officially began to work in Tübingen, is very

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[140] For the complete list of Koschaker's publications, see Below: *Paul Koschaker*, pp. 31-44. Among the most important works of this period, mention should be made of Koschaker: *Was vermag die vergleichende Rechtswissenschaft*, pp. 145-153; Id.: *Die Eheformen bei den Indogermanen*, in: *Deutsche Landesreferate zum II. Internationalen Kongreß für Rechtsvergleichung im Haag 1937. Sonderheft des elften Jahrgangs der Zeitschrift für ausländisches und internationals Privatrecht*, Berlin 1937, pp. 77-140; Id.: *Adoptio in fratrem*, pp. 361-376; Id.: *L'alienazione della cosa legata*, pp. 89-183.

[141] Koschaker: *L'histoire du droit et le droit compare surtout en Allemagne. Introduction à l'étude du droit comparé*, in: *Recueil d'Etudes en l'honneur d'Edouard Lambert*, I, Paris 1938, pp. 274-283.

[142] *Festschrift Paul Koschaker mit Unterstützung der Rechts- und Staatswissenschaftlichen Fakultät der Friedrich-Wilhelms-Universität Berlin und der Leipziger Juristenfakultät zum 60. Geburtstag überreicht von seinen Fachgenossen* (ed. Kaser), I-III, Weimar 1939. The speech in honour of Koschaker was written by Riccobono: *Messaggio augurale a Paolo Koschaker nella ricorrenza del LX. Compleanno*, in: *Festschrift Paul Koschaker*, II, pp. V-VI. For an interesting judgment on the different value of this *Festschrift* and the two volumes published posthumously in memory of Paul Koschaker, see Guarino: *L'Europa e il diritto romano*, p. 298.

[143] Theunis Folkers/Johannes Friedrich/Julius Georg Lautner/John Charles Miles (eds.): *Symbolae ad iura orientis antiqui pertinentes Paulo Koschaker dedicatae*, I-II, Leiden 1939.

[144] UA-HU, Jur. Fak. 518, Bd. I. The document is a two-page-long letter (recto and verso), typewritten.

interesting for two reasons: first, the dean listed the other candidates for the chair. The first alternatives, both considered at the same level, were San Nicolò and Wieacker.[145] The second options, also considered on the same level, were Kunkel and Genzmer, but they were defined by the Dean as somewhat "colourless" scholars if compared with the first two ("Diese [Kunkel and Genzmer] erscheinen ihnen [San Nicolò and Wieacker] gegenüber als Lehrer etwas farblos. Sicher sind sie Gelehrte von sehr gutem wissenschaftlichen Namen, das allein genügt aber, wie sich aus dem früher Gesagten ergibt, für die Bekleidung der Berliner Professur noch nicht").[146]

Secondly, the Dean referred to the need to take care of the teaching of Roman law, in particular in Berlin. If we had not known that these were the words of the Dean, we might suppose them to have been written by Koschaker himself. In fact, the text reads:

> Die durch die Wegberufung von Professor Dr. Koschaker freigewordene Professur muß nach Ansicht der Fakultät auch künftig für die Pflege des römischen Rechts bestimmt sein. Dieses bildet nicht nur den Gegenstand einer antiquarischen Wissenschaft. Gerade die neuesten Forschungen zeigen, daß das antike Recht in seiner Verbindung mit der gesamten Kultur auch für die Gegenwart große Bedeutung hat. Diese Erkenntnis ist zu vertiefen und auszuwerten. Die Berliner Professur ist in dieser Beziehung wie auch in anderen Richtungen besonders wichtig. Als Forscher[147] hat der Berliner Romanist die Möglichkeit und die Ausgabe, in enger Verbindung mit den übrigen in Berlin intensiv gepflegten Zweigen der Altertumwissenschaft zu stehen, vor allem mit der Akademie der Wissenschaften zusammenzuarbeiten. […].

It is impossible not to find analogies between the words used by the dean and those pronounced by Koschaker at the *Akademie für Deutsches Recht*, as we will see in chapter five. There are also similarities with Koschaker's statements on the role of a Roman law professor at the University of Berlin, as evidenced by his letter to the *Rektor* sent on 22nd February 1938. In 1941, therefore, the topic of the defence of Roman law teaching and of the significance of Roman law not only for the past, but also for the present and contemporary law, as well as from a more general cultural perspective, emerged clearly from a letter of by an important member of the University of Berlin. It seems reasonable then to question whether Koschaker could have influenced the opinion of other colleagues at the University with regard to Roman law and its role. At the same time, it would be

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145 On San Nicolò, see above, p. 34, fn. 6. On Wieacker (1908-1994), see above, p. 29, fn. 42.

146 On Kunkel, see above, p. 33, fn. 3. On Genzmer1893-1970), see Helmut Coing: *Genzmer, Erich*, in: Bernhard Diestelkamp/Michael Stolleis (eds.): *Juristen an der Universität Frankfurt am Main*, Baden-Baden 1989, pp. 200-207; Helmut Stubbe da Luz: *Genzmer, Erich*, in: *Hamburgische Biographie* V, Göttingen 2010, pp. 128 f.

147 Underlined in the text.

interesting to learn how influential Koschaker's lecture at the *Akademie für Deutsches Recht* in December 1937 had been. Yet since there are no other sources to assist us in the quest, these conjectures cannot be taken any further. It appears nonetheless clear that, even if Koschaker did not bring any direct influence to bear on other colleagues with regard to the topic of the teaching of Roman law, nevertheless his ideas were eventually understood and shared by some of his contemporaries at the University, and thus he was not completely alone in his "fight" to save Roman law.

The letter then dealt with the question of the role of a professor of Roman law at the University of Berlin both in Germany and abroad:

> Es handelt sich dabei natürlich nicht nur um das römische Recht, sondern um das gesamte antike Rechtsleben im Mittelmeerbereich. Er steht aber auch dem Ausland gegenüber an einer besonders sichtbaren und deshalb verantwortlichen Stelle. Mehr als seine Fachgenossen an den anderen Universitäten kann er die deutsche[148] Beurteilung des antiken Rechts vor der europäischen Wissenschaft zum Ausdruck bringen. Das gilt besonders auch gegenüber italienischen Forschern, die manchmal eine ausschließliche Zuständigkeit ihres Landes für seine Behandlung beanspruchen und es vielleicht einseitig dem italienischen Rechtsdenken und dem Gedanken des Imperiums dienstbar machen möchten. Aber auch der Lehrer[149] des römischen Rechts in Berlin habe besonders wichtige Aufgaben. Die deutschen Juristen müssen das römische Recht in den rechtlichen Auseinandersetzungen, die nach dem Kriege zu erwarten sind, beherrschen, um gegenüber ausländischen Juristen genügend gerüstet zu sein; das hat sich in der Zeit nach dem Kriege 1914 bis 1918 gezeigt. Nach dem jetzigen Kriege ist aber auch mit einem sehr starken Besuch auf Grund der Tradition ihres Landes gerade das römische Recht pflegen wollen. Ergibt sich schon hieraus, daß an die Person des zu Berufenden hohe Anforderungen gestellt werden müssen, steigern sich diese noch dadurch, daß sich das römische Recht an der Berliner Universität infolge der Verhältnisse der jüngsten Vergangenheit in ungünstiger Lage befindet. Es ist notwendig, die deutsche Studenten der Berliner Universität erst wieder an eine intensive Beschäftigung mit dem römischen Recht heranzuführen. Und es muß in Berlin in weiten Kreisen der Rechtwahrer[150], und gegenüber den politischen Stellen und den Behörden erst wieder dafür gesorgt werden, daß die Gegenwartsbedeutung des römischen Rechts Anerkennung findet. Es wäre hiernach also nötig, eine Persönlichkeit zu berufen, die viele hervorragende Eigenschaften in sich vereinigt […].

[148] Underlined in the text.
[149] Underlined in the text.
[150] Written in this way, i.e. without the "s" after "Recht-".

When the dean, Weigmann, referred to the critical situation of Roman law in Berlin and the utter lack of interest of students in this subject matter, it is once again possible to find significant analogies with Koschaker's approach.

Weigmann did not limit his considerations to the need to regain students' interest and, in general, that of jurists, he also stressed the urgency of representatives of the government and politicians understanding the role and the sense of Roman law for the present time. This is a striking assertion, infused with profound political significance and directly addressed to the Minister of the Nazi regime. The words used by the Dean, therefore, are more than noteworthy; it is nonetheless clear that in 1941, and after the famous speech given by Frank in Rome at the *Istituto fascista di cultura* in 1936,[151] the approach of the Nazi regime towards Roman law had partially changed. One should also consider the influence that some Romanists, including Koschaker, Kaser and Wieacker,[152] could have exercised with regard to these questions from 1937 onwards. In their works they urged Germanists, other jurists, and the regime to see Roman law as an essential foundation of European legal history, which could also prove to be necessary to build a new private law system, but it should be compatible with the idea of a new German legal order.

This kind of situation was the consequence, on the one hand, of a partially changed approach of the regime towards Roman law after 1936, while on the other, some Romanists began to adopt strategies of adaptation (*Strategien der Anpassung*).[153] These strategies were carried out by many scholars, and not only Roman law scholars, during the Nazi regime. They consisted in attempting to adapt the study of Roman law and Legal history so as not upset the regime. In this way, scholars could keep on working on their research – albeit in a somewhat "adapted" manner – without suffering any major consequences. For some of them, including Koschaker, this was a way to redeem Roman law from its crisis.

Lastly, the letter contains hints of another essential narrative of the time, namely the question of European cultural hegemony. The Dean referred to the tendency of Italian

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[151] See on this point below, chapter 5, § 2. The speech was then published in Frank: *Die Zeit des Rechts*, pp. 1-3.

[152] On Max Kaser (1906-1997), see Rolf Knütel: *Nachruf Max Kaser*, in: *NJW* 22 (1997), p. 1492; Giaro: *Max Kaser (1906-1997)*, in: *Rechtshistorisches Journal* 16 (1997), pp. 231-357; Zimermann: *Max Kaser und das moderne Privatrecht*, in: *ZSS* (RA) 115 (1998), pp. 99-114; Christian Wendt: *Kaser, Max*, in: *Der Neue Pauly*, *Supplemente*, 6, Stuttgart/Weimar 2012, pp. 646-647.

[153] On this phenomenon, see the essential work by Franz-Stefan Meissel/Stefan Wedrac: *Strategien der Anpassung – Römisches Recht im Zeichen des Hakenkreuzes*, in: Franz-Stefan Meissel/Thomas Olechowski/Ilse Reiter-Zatloukal/Stefan Schima (eds.): *Vertriebenes Recht – Vertreibendes Recht. Die Wiener Rechts- und Staatswissenschaftliche Fakultät 1938-1945*, Wien 2012, pp. 35-78.

scholarship in the field of Roman law to impose their way of thinking and their research trends on others, and to consider themselves the only scholars competent to study this topic, and Legal history in general. According Weigmann, such tendency was something that German professors, and the professor in Roman law at Berlin, in particular, had to fight, and even more so after the end of the war. These few words were the quintessence of an academic, scientific and cultural competitiveness between the two allies, Germany and Italy, which probably reached its climax with the events leading to the foundation of the Italian institute *Studia Humanitatis* in Berlin, in December 1942. On that occasion, Riccobono, who held the introductory speech at the inaugural conference, actually discussed the essential – if not predominant – role of Italian scholarship in the field of humanist studies, as the great interpreters of classical culture and of Roman law.[154] The words of the Dean have to be read, therefore, as a significant step along the way to cultural hegemony in Europe.

The letter ended with a request for the Ministry: given all the reasons explained in the previous lines, the Dean wrote that the faculty would be grateful for the rapid appointment of another professor who could take the chair in Roman law and then resume the classes.[155] The request would not be satisfied so quickly though, as is apparent from the second letter addressed to the Minister on 30th September 1942.[156] The date reported on the document confirms that a year and a week after dispatching the first request, the chair for Roman law was still vacant, given Wieacker's refusal to move to Berlin:

> Durch ein Ferngespräch mit Herrn Professor Dr. Groh habe ich erfahren, daß Professor Wieacker es abgelehnt hat, einem Ruf nach Berlin zu folgen und daß Herr[157] Reichsminister die Fakultät zu neuen Vorschlägen auffordern wird. Die Professur für Römisches Recht wird im kommenden Semester daher aller Voraussicht nach nicht besetzt sein. Die Fakultät bittet deshalb einen Dozenten vertretungsweise wenigstens mit der Abhaltung der Vorlesung über "Antike Rechtsgeschichte" (vierstündig) zu beauftragen. Diese Vorlesung ist seit dem Fortgang von Prof. Koschaker überhaupt nicht, in den letzten Semestern seines

[154] For a precise reconstruction of the events leading up to the foundation of the Italian Institute *Studia Humanitatis*, and the roles played by Salvatore Riccobono and the Italian government, see Varvaro: *Gli «studia humanitatis»*, pp. 643-661. The author writes on pages 660-661, with regard, in particular, to the interpretation to be given to Riccobono's speech, of a "Machtkampf fra due regimi totalitari che non nascondevano mire di egemonia culturale e che si scontravano sul terreno su cui andava misurato il valore da riconoscere alla cultura classica e al diritto romano".

[155] From the last two lines of the second page of the letter: "Die Fakultät wäre für eine recht baldige Berufung dankbar, damit der Unterricht des römischen Rechts in ihr [so in the letter, with "in" written on top before "ihr"] wieder aufgenommen werden kann."

[156] UA-HU, Jur. Fak. 518, Bd. I. This is a one-page typewritten letter.

[157] "Herrn" in the text, but the "n" has been taken out.

> Hierseins, infolge seiner mehrfachen Beurlaubungen, nur unregelmäßig gehalten worden. In der juristischen Ausbildung bedeutet das Fehlen dieser Vorlesung eine erhebliche Lücke, die sich in den Prüfungen, besonders bei der Doktorprüfung, immer mehr bemerkbar macht. Es scheint daher geboten, daß sie im kommenden Semester gehalten wird. Für die Vertretung schlage ich Professor Dr. W. Erbe in Jena vor, der als Referent am Kaiser Wilhelm-Institut für Ausländisches und Internationales Privatrecht während eines großen Teiles der Woche in Berlin ist.

The main concern with the Chair for Roman law, as emerges from the letter, was the teaching of *antike Rechtsgeschichte*.[158] The new course, based on Wenger's theories on the study of ancient laws, had been introduced into German law faculties after the reform of the *Studienordnung* that took place in July 1935, but became effective only in October of the same year, preceded by the so-called *Justizausbildungsordnung* of 1934.[159] After the reform, the students had the possibility of choosing between a previous course on Roman legal history (*römische Rechtsgeschichte*) and the new course on *antike Rechtsgeschichte*. Reading the text of the letter, one receives the impression that the *antike Rechtsgeschichte*, within a few years of the legal studies reform taking effect, had obtained a much more significant role than the Roman legal history course for practical reasons; namely, it was needed for the doctoral examination (*Doktorprüfung*). The Dean pointed out that the course had not been offered since Koschaker's departure from Berlin, and during the last semesters that Koschaker spent at that University the course had not been taught regularly, given the many leaves of absence that Koschaker had at that time. The name provisionally suggested for the course on *antike Rechtsgeschichte* was Erbe, who had been one of the few students to regularly attend Koschaker's classes on Roman law in Berlin.[160]

The two letters show evident concern about the position of Roman law in Berlin, but it is particularly significant that the second letter mainly focused on *antike Rechtsgeschichte*, a new course accepted and introduced by the regime, but already openly criticised by Koschaker in 1937-1938. These two archival documents can be thus interpreted as further proof of Koschaker's concern about the crisis of Roman law, in particular in the capital city, which represented one of the many reasons for his leaving Berlin for Tübingen.

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158 On *antike Rechtsgeschichte* see above, chapter 2, pp. 45 ff. On Koschaker's criticism of this research trend, see also below, chapter 5, § 3.

159 The reform of the *Studienordnung* of the law faculties will be further discussed below, chapter 5, § 8.

160 See above, pp. 107 f. and Guarino: *Cinquant'anni dalla «Krise»*, 276-277; Id.: *L'Europa e il diritto romano*, 295.

4 1941-1951: the years in Tübingen and after WWII

4.1 Introduction

If the period Koschaker spent in Berlin has often been considered the turning point of his career and, according to some scholars, the time he made a stance against the regime, the following years in Tübingen (1941-1946) have been depicted as a time in which he shunned any sort of notoriety and devoted himself to his research.

Compared with the years he spent in Berlin, the period in Tübingen represented an altogether different way of life. Whereas in the capital city he had an illustrious position at the university with both scientific and "political" notoriety, where he was a member of Germany's two most eminent academies – the *Akademie für Deutsches Recht* and the *Preußische Akademie der Wissenschaften* –, in Tübingen Koschaker sought a peaceful "retreat" from the battlefield.

Koschaker attempted to find a hideaway after the bitterness of Berlin. The documents covering his years in the capital clearly show that he encountered numerous setbacks and administrative difficulties at the university troubling him both personally and limiting his opportunities to pursue his research goals.[1] Koschaker wished to regain a peaceful life in a small provincial city. Fond of nature and the mountains, he had found it hard to adapt to the hectic life of the capital,[2] and he desired therefore a lifestyle that would be more conducive to his health, which had become increasingly poor.[3] Thus, he spent part of the time from the end of 1941 to 1947 at his house in the small village of Walchensee, in Oberbayern, by the lake of the same name, far away from the city life.

As with the happy years he spent in Leipzig, his experience in Tübingen began well too. However, again Koschaker's disappointment quickly increased, eventually turning to sorrow and frustration. Koschaker was still in Tübingen at the end of the war and there he became professor emeritus in 1946. The post-war years were difficult for him,

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1 It is not possible to accept representations of Koschaker as a martyr though, like in the case of Mazzacane, who saw him as a man "sfuggito alle persecuzioni"; see Mazzacane: *I tempi della 'Privatrechtsgeschichte'*, p. 571.

2 Wenger: *Paulo Koschaker Sexagenario*, pp. 1 ff.

3 See below, §§ 4,6 and 7.

accompanied by regret at not having been acclaimed a fierce anti-Nazi in Germany and at his university.

Koschaker's five years in Tübingen were also a period of deep scientific reflection, leading to the publication of his masterpiece *Europa und das römische Recht* in 1947, only a year after he became an emeritus professor. However, Koschaker did not publish many works during his time in Tübingen, perhaps because he wanted to concentrate on his studies on the laws of antiquity which he could not complete in Berlin, given the difficult situation he had to face at the *Seminar für Rechtsgeschichte des Alten Orients*.

Between 1946 and his death on 1st June 1951, Koschaker's reputation and satisfaction grew thanks also to the invitations he received to act as guest professor in many German universities and, above all, in Ankara, in Turkey. Since 1933, Schwarz, a Jewish Romanist and friend of Koschaker, had found refuge in Istanbul after being dismissed from the University of Frankfurt am Main.[4] His influence proved decisive in convincing Koschaker to accept the offer of a visiting professorship in Ankara.

A recent study has shed more light on Koschaker's experience in Tübingen,[5] but there is still much to be said about this period of his life. The aim of this chapter is principally to offer a full account of Koschaker's latter years, covering both the time that he spent in Walchensee and his experiences in other universities. One of the main questions concerning this period relates to the continuity, or discontinuity, compared to his time in Berlin. Another important aim of this chapter is scientific in nature, and seeks to make an analysis of Koschaker's approach towards the teaching of Roman law after his frustrating time in Berlin. In what ways did this experience influence his publication *Europa und das römische Recht*, and after 1947, how was his thinking affected by his time in Ankara? Finally, this chapter begins the discussion of Koschaker's scholarly development in his later years, followed by a more in-depth investigation in Chapter 5.

4.2 The call to Tübingen

In March 1941, Paul Koschaker received the timely call to *Eberhard-Karls-Universität* Tübingen.[6] Feeling overwhelmed by the events of Berlin, particularly the whole affair regarding the *Seminar für Rechtsgeschichte des Alten Orients*, he decided to accept the move to the small city of Tübingen in Southern Germany.[7] His bitterness clearly emerges

4 See the letter by Koschaker to Kisch from 21st August, 1948, in Kisch: *Paul Koschaker, Gelehrter, Mensch und Freund*, p. 41 (letter nr. 14).

5 Neumann: *Paul Koschaker*, pp. 23 ff.

6 See Koschaker's letter of 12th March 1941: UA-HU, Jur. Fak., Nr. 518, o. Blatt; decree of the *Reichsministerium für Wissenschaft, Erziehung und Volksbildung*: UA-HU, UK-Per. Nr. K. 274, Bl. 58. On these documents, see also Lösch: *Der nackte Geist*, p. 394.

7 Koschaker: *Selbstdarstellung*, p. 118.

from a letter that he sent to the dean of the Faculty of Law in Berlin, Weigmann, on 20th September 1941 in which he asked to draw a "veil of oblivion" over the short period that he had belonged to the Faculty.[8]

Koschaker initially welcomed the possibility of leaving Berlin and going to the smaller, but prestigious, University of Tübingen. However, the reactions of some members of the Faculty of Law at Tübingen were ambivalent about Koschaker's appointment. The post offered Koschaker had formerly been occupied by Kreller, a legal historian complicit in the Nazi regime. Since 1934 Kreller had been the main editor of the *Gesamtredaktion* of the *Zeitschrift der Savigny-Stiftung*, after the journal had undergone the so-called arianisation, *Arisierung*, and had been dean of the Faculty of Law at Tübingen since 1936.[9] When Kreller accepted a move to Vienna to take up the chair that had been Wenger's, the new dean of the Faculty of Law at Tübingen Hero Moeller suggested to Hermann Hoffmann,[10] the *Rektor* of the University, that Koschaker might replace Kreller. Moeller wrote a letter to Hoffmann, expressing the urgent need to find a new professor to hold the Chair for Civil and Roman law (*Bürgerliches und Römisches Recht*).[11] Moeller and the Faculty board were in joint agreement Paul Koschaker and felt quite confident that he would accept the call. As Moeller wrote in the letter, the situation compelled the faculty to make a quick decision about Kreller's successor in a very short time (why speed was so essential we do not know from this letter).[12] Franz Wieacker and Wilhelm Felgenträger were two other potential candidates, but the Ministry of Education informed the Faculty of Law at Tübingen that it was not possible to obtain their services (they were actually not "erreichbar für Tübingen").[13] Nonetheless, the dean seemed to be enthusiastic about the possibility of having Koschaker in Tübingen, as we can read in the text of his letter:

> Als Nachfolger [of Kreller] schlage ich im Einvernehmen mit dem Fakultätsausschuss Herrn o. Professor Dr. Paul Koschaker, Berlin, vor und bitte, angesichts der Bedeutung der Persönlichkeit und angesichts des Umstands, dass

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8 For this letter (UA-HU, Jur. Fak. Nr. 518, o. Bl.), see also above, p. 107, fn. 121.

9 On the events regarding the journal and the process of its *Arisierung*, see above, pp. 81 f. and Finkenauer/Herrmann: *Die Romanistische Abteilung*, pp. 1-48.

10 On Hermann Hoffmann (1891-1944) and Hero Moeller (1892-1974), see: Uwe Dietrich Adam: *Hochschule und Nationalsozialismus. Die Universität Tübingen im Dritten Reich*, Tübingen 1977, respectively pp. 78 ff. and 180 ff.

11 The three-pages long typewritten letter was sent by Moeller to Hoffmann on 4th March 1941 and it is conserved at the archive of the University of Tübingen, Personalakten Jur. Fak. 205/29. On this letter see also Neumann: *Paul Koschaker*, pp. 25 f.

12 Even though it is likely possible to deduce this reason from the letter that the *Rektor* Hoffmann sent on the same day to the *Kultminister* of Baden-Württemberg, on which see below, p. 125.

13 On Wieacker, see above, p. 29, fn. 42. On Wilhelm Felgenträger (1899-1980), see Franz Bauer: *Geschichte des Deutschen Hochschulverbandes*, München 2000, pp. 29 ff.

> wir glauben mit der Annahme des Rufes durch Herrn Professor Koschaker rechnen zu können, auf Nennung weiterer Namen verzichten zu dürfen [...]

Moeller then depicted Koschaker as one of the most important German scholars in the field of Roman law and the most representative "spokesman" of this subject, who was admired well beyond the German borders and, in particular, in Italy. Koschaker had actually rekindled the debate on Roman law and its role with the publication of *Die Krise des römischen Rechts und die romanistische Rechtswissenschaft* in 1938. In Moeller's words, he was:

> der anerkannt erste Vertreter des Römischen Rechts auf deutschen Lehrkanzeln, dessen Bedeutung in Deutschland und weit über Deutschlands Grenzen hinaus, besonders auch in Italien, uneingeschränkt gewürdigt wird.

The only problem that could emerge in connection with the call of Koschaker regarded his age: he would be 62 years old in a month and a half, and he could be considered too old to take the chair in Tübingen. Even though the faculty board took into consideration this aspect, it seemed possible to make an exception in this case, according to Moeller, given the tough personality of Koschaker and his scientific and personal qualities:

> Zu seinem 60. Geburtstag wurde ihm eine romanistische Festschrift in 3 Bänden, an der sich fast alle führenden Romanisten der ganzen Welt beteiligt haben, und eine orientalistische Festschrift überreicht. Koschaker ist, wie hieraus bereits hinreichend folgt, ein Gelehrter von überragender wissenschaftlicher Leistung. Er ist gleichzeitig ein Dozent von starker, nachhaltiger Wirkung auf seine Hörer. Koschaker ist eine Persönlichkeit von umfassender, eindrucksvoller Geistigkeit, dessen gelehrte Wirksamkeit auf eine Reihe anderer Wissenschaftsgebiete fruchtbare Ausstrahlungen ergeben hat und von dem für jede Universität, in deren Rahmen er tätig ist, die wertvollsten, lebendigsten Anregungen erwartet werden dürfen. […] Die Fakultät hat sorgfältig erwogen, ob es richtig sein kann, eine Persönlichkeit so verhältnismäßig vorgeschrittenen Lebensalters in Vorschlag zu bringen. Wir haben uns indessen davon überzeugt, dass es berechtigt ist, in diesem Falle eine Ausnahme eintreten zu lassen. Herr Koschaker ist ein Mann von grosser persönlicher Frische und eindrucksvollster Lebendigkeit, der sich in der Vollkraft seines Schaffens befindet.

There were no other potential candidates for the place in Tübingen, apart from the already mentioned exceptions of Wieacker and Felgenträger, that could be considered comparable to Koschaker in Moeller's eyes ("Alle andern etwa für Tübingen Persönlichkeiten können in

keiner Weise mit Koschaker im Vergleich gezogen werden"). His description must have sounded very persuasive to *Rektor* Hoffmann, to such an extent that he wrote a letter to the State Minister of Education (*Kultminister*) of Württemberg on the same day; a copy of this letter is held in the archive of the University of Tübingen to this day.[14] In this text Hoffmann explained to the minister the necessity for the faculty to proceed quickly concerning Koschaker's appointment, because two other chairs at the Faculty of Law at Tübingen were still vacant in the meantime. All the reasons adduced by the dean and the Faculty board to call Koschaker to Tübingen seemed to Hoffmann so convincing, he wrote in the text, that he highly recommended its acceptance:

> Die Gründe, die den Dekan und den Fakultätsrat bestimmt haben, ihren Vorschlag auf Professor Koschaker zu konzentrieren, sind auch für mich so überzeugend, daß ich den angeschlos- | senen Antrag mit nachdrücklicher Befürwortung weiterzuleiten in der Lage bin. Nach mündlicher Auskunft des Dozentenführers hat auch er keine grundsätzlichen Bedenken gegen diesen Vorschlag. Persönliche Gründe bei Professor Koschaker […] machen es wünschenswert, möglichst bald den Antrag an den Herrn Reichswissenschaftsminister gelangen zu lassen und über ihn eine Entscheidung zu treffen.

Apparently, the same *Dozentenführer*, Robert Wetzel, did not oppose the consensus over Koschaker.[15] Yet only one day after Hoffmann had sent his letter to the State Minister of Education, he received a missive from the same Wetzel expressing the following doubts about Koschaker's appointment:[16]

> Die Berufung Koschaker[s], die von der Fakultät so lebhaft verfochten wird, kann von mir aus weder mit Begeisterung begrüßt, noch auch – wenn es zur Zeit keinen besseren Weg gibt – grundsätzlich abgelehnt werden. Wenn tatsächlich der beste Kandidat, Professor Dr. Franz Wieacker, für Tübingen nicht erreichbar sein sollte, und wenn jüngere Kräfte auch sonst nicht zur Verfügung stehen, so muß man sich im Interesse einer fachlich guten Weiterbesetzung des Lehrstuhls mit Koschaker einverstanden erklären.

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[14] *Rektor* Hoffmann to the *Kultminister* in Stuttgart, 4th March 1941: UAT, Personalakten Jur. Fak., 205/29; typewritten two-page letter (recto and verso).

[15] On the role played by the *Dozentenführer* of each university during the Nazi regime, with regard to the decisions concerning the university staff, see above, p. 77, fn. 18. On Robert Wetzel (1898-1962), who had the role of headmaster (*Leiter*) of the *NS-Dozentenbund* and of the *NS-Dozentenschaft* at the University of Tübingen from 1938 to 1944, see Adam: *Hochschule und Nationalsozialismus*, pp. 70 ff.; 136 f.; 142.

[16] Letter of 5th March 1941, from Wetzel to Hoffmann, typewritten, one page long: UAT, Personalakten Jur. Fak. 205/29.

It would appear, therefore, that Wetzel had been somewhat forced by the situation in general to accept Koschaker's appointment, even though he was not convinced – or rather, he was not "enthusiastic" – and would have preferred Franz Wieacker, who had unanimously been considered the best option to take the chair that had been Kreller's by the other members of the Faculty. Wetzel did not desist from the attempt to make Hoffmann change his mind and he explained that it would have been better to appoint younger professors rather than Koschaker. The reason was essentially economic, for Koschaker's salary would have been a burden for Tübingen. This is why he had in mind two other names that were good alternatives to Koschaker, namely Coing and Erbe.[17] Wetzel seemed to be surprised that he did not hear any other information about them or the possibility of appointing either of them to Tübingen and he wondered why this was the case: "An solchen jüngeren Kräften wird mir noch Coing und Erbe genannt: was ist mit ihnen?"[18]

From another letter sent by Moeller to Hoffmann just two days after the letter sent by Wetzel, we can infer that the *Rektor* actually considered the two names suggested by Wetzel, i.e. Coing and Erbe.[19] Moeller's letter was a reply to Hoffmann's inquiry of the same day to gain more information about the two younger scholars. Both Coing and Erbe had been appointed respectively associate professor (*außerordentlicher Professor*) in Frankfurt a.M., and university lecturer (*Dozent*) in Berlin (although Erbe had been already called for the professorship in Jena).[20] After the description of their two careers, Moeller concluded as follows:

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17 On Helmut Coing (1912-2000), see Klaus Luig: *Helmut Coing*, in: *Juristen im Portrait. Verlag und Autoren in 4 Jahrzehnten. Festschrift zum 225jährigen Jubiläum des Verlages C. H. Beck*, München 1988, pp. 215-224; Thomas Duve: *Helmut Coing (28.02.1912–15.08.2000)*, in: *Revista de Historia del Derecho* 28 (2000), pp. 659 f.; Dieter Simon: *Zwischen Wissenschaft und Wissenschaftspolitik: Helmut Coing (28.2.1912– 15.8.2000)*, in: *NJW* 54 (2001), pp. 1029–1032; see also Coing's autobiography, edited by Michael-Frank Feldkamp, Helmut Coing: *Für Wissenschaften und Künste. Lebensbericht eines europäischen Rechtsgelehrten*, Berlin 2014, and Kaius Tuori: *Empire of Law: Nazi Germany, Roman law and the battle for the future of Europe*, forthcoming. On Walter Erbe, see above, p. 108, fn. 131.

18 The text of the letter then reads: "Bei einer Berufung Koschakers bitte ich noch auf die Frage der Bezüge besonders zu achten. Das Reichswissenschaftsministerium hält, soviel mir bekannt ist, immer noch an der geradezu unglaublichen Durchschnittsberechnung der Gehälter fest; für diese Rechnungsweise wäre ohne besondere Sicherung die Berufung Koschakers eine schwere Belastung für Tübingen".

19 Two-page letter from Moeller to Hoffmann of 7th March 1941: UAT, Personalakten Jur. Fak. 205/29.

20 It is interesting to note that Moeller, describing Coing's main field of research, namely the Reception (*Rezeption*) of Roman law in the municipal law of the city of Frankfurt, defined it as a "Randgebiet der Romanistik" (a fringe subject of Roman law studies).

> Beide Herren stehen am Anfang ihrer Laufbahn und können deswegen nicht mit Herrn Prof. Koschaker in Vergleich gezogen werden. Wir haben uns in unserem Ausschusse mit beiden Herren sorgfältig befasst, jedoch konnten wir sie nach Lage der Sache bisher nicht in nähere Erwägung ziehen.

The path to accepting Koschaker at Tübingen was at last open. Final explanations were made by the dean to the *Rektor* and on September 23, 1941, the administrative decree of the Ministry of Education was issued and at 62, Koschaker was appointed professor at the University of Tübingen.[21] Koschaker had already agreed with the faculty that he would be willing to teach Roman law, Civil law and Agricultural law (*Bauernrecht*).[22]

4.3 Negotiations and his arrival in Tübingen

As usual, negotiations had taken place between Koschaker and the Faculty of Law before he accepted the call. Some of the events that took place just before and immediately after Koschaker's arrival in Tübingen, including affair regarding Koschaker's *Emeritierung*, were recently meticulously reconstructed by Neumann using the archival sources conserved at the University of Tübingen.[23] The following period however, from 1942 to his *Emeritierung* in 1946, has often remained in the penombra, not only in Neumann's work, but also in the literature on Koschaker in general. For these reasons, the following pages will seek to try to shed light on this part of Koschaker's life insofar as is possible.

The agreement reached by Koschaker with the Faculty of Law is dated 4th September 1941, and a copy of it can be found at the archive of the University of Tübingen.[24] The decree of the Ministry for Sciences and National Education was issued on 23rd September of the same year and sent to the State Minister of Education in Stuttgart, Württemberg. Nonetheless, Koschaker began to be in touch with the University council (*Universitätsrat*) and with the dean, Moeller, well in advance, and during the summer of 1941 he discussed with them the problem of suitable accommodation in Tübingen. Finding a house in the city was hard at that time, given the effect that the war had on the housing market. The University was able to offer Koschaker an apartment on the first floor of one of the buildings reserved for its employees at *Brunsstraße* 31, where the professor for Pharmacy, Eugen Bamann, had lived until moving to Prague. Koschaker asked Hero Moeller for a guarantee that he

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21 UA-HU, UK-Per. Nr. K 274, Bl. 58.

22 See the letter sent by Hero Moeller to Hermann Hoffmann on 4th March 1941, second page; on the document, see above, p. 121 and fn. 11.

23 Neumann: *Paul Koschaker*, pp. 26 ff.

24 On the copy of the document containing the agreement (*Vereinbarung*) it reads at the top: "Abschrift zu WP 2817". The text is two pages long and typewritten: UAT, 126/346a.

would have Bamann's apartment in a letter sent to Moeller on 27th July 1941. He clearly explained that his decision to accept the chair at Tübingen depended on being given a firm reassurance about accommodation ("Ich möchte keinen Hehl daraus machen, dass von dieser Erklärung die Annahme der Berufung abhängt …").[25]

However, Koschaker tried to rent the apartment that had been Kreller's, but the negotiation seemed to be particularly difficult, as he was unable to obtain any kind of guarantee from the landlord, Herr Schick, about the possibility of remaining in the apartment after the end of the war. On the contrary, it appeared quite clear that Schick intended to repossess his apartment once the WWII was over.[26] For these reasons Koschaker wrote another letter to the University Council dated 7th August 1941.[27] As we can read in the text, Koschaker felt himself somewhat constrained ("gezwungen") to ask the University to offer him the first Professor's apartment to become free in the following months; he considered this condition to be an essential part of the agreement between himself and the University. From this document we can infer, therefore, that the University's original offer to give him Bamann's apartment did not completely satisfy Koschaker. Even though it appeared very difficult for him to find an arrangement with Schick, Koschaker decided continue negotiations for the apartment that had been Kreller's.[28] Eventually, he succeeded in obtaining this accommodation at *Hirschauerstraße* 9, in Tübingen.[29]

Koschaker's negotiation for the apartment was not the only question that he dealt with prior to his appointment being fully agreed upon. Another fundamental aim was to have as his assistant Below, one of the few students in Berlin at that time who had decided to write a Ph.D. under his supervision. Koschaker clearly wished to keep on working with Below and was no doubt mindful of his fraught experiences at the University of Berlin, where he only had an assistant for a brief period after his appointment, who was never

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25 Handwritten letter sent by Koschaker to Moeller: UAT, 126/346a. See also Neumann: *Paul Koschaker*, 26 and fn. 25, where the letter is quoted.

26 Schick did not agree with Koschaker on the conditions regarding the period of notice, namely nine months for him as landlord, three for Koschaker as tenant. See Emil Schick's two-page typewritten letter to Koschaker, dated 19th August 1941, in which he proposed new conditions to Koschaker: UAT, 126/346a.

27 Letter sent by Koschaker (from Walchensee) to the *Universitätsrat*, handwritten and two pages long: UAT, 126/346a. The text reads: "Haben Sie verbindlichsten Dank für Ihre beiden Schreiben. Ihr zweiter Brief v. 4. d. M. hat sich mit einem Schreiben von mir an Herrn Ministerialrat Bauer gekreuzt, in dem ich die Bitte stellte, daß mir unter allen Umständen eine Professorenwohnung, die der Verfügung der Regierung oder der Universität unterliegt, bei Freiwerden als erstem angeboten werde, wobei ich mir von Institutswohnungen, die für den Institutsdirektor bestimmt sind, absehe. Das bedeutet eine Erweiterung meiner ursprünglichen Forderung, die sich nur auf die Wohnung von Prof. Bamann bezog. Ich bin zu dieser Forderung gezwungen, da ich in dem Hause von Herrn Schick keine dauernde Bleibe habe und nach Kriegsende gekündigt werden kann. Herr Schick will ja das Haus selbst beziehen. […]".

28 Neumann: *Paul Koschaker*, p. 26. See again the letter from Schick to Koschaker sent on 19th August 1941: UAT, 126/346a.

29 Neumann: *Paul Koschaker*, p. 26.

replaced. Koschaker wanted to immediately secure this position and to suggest an appropriate candidate.

In a copy of a letter sent by Koschaker from his home in Walchensee to Moeller, dean of the Law Faculty, on 26th August 1941, we can see that Koschaker wished to facilitate Below's transfer to Tübingen.[30] The first part of the reproduced text related to an issue about teaching, namely the possibility of Koschaker holding classes on the BGB (the German Civil Code) and organising an exercise (literally *Übung*) on it for the students.[31]

Koschaker dealt with Below's position in the second part of the letter:

> […] mein Kandidat für die Assistentenstelle, Herr Below hat in Berlin seine Doktorarbeit eingereicht und soll im Winter ins mündliche Examen. Es ist unangenehm, dass er von mir nicht mehr geprüft werden kann. Ich habe daher erwogen, ob er nicht sein Promotionsgesuch zurückziehen und in Tübingen einreichen soll. Es besteht allerdings die Schwierigkeit, dass er in Tübingen 2 Semester studiert haben müsste und in Berlin bereits Befreiung von den Doktorgebühren hat. Von beide[n] kann auch in Tübingen wohl durch das Ministerium dispensiert werden. Ich wäre dankbar, von Ihnen zu hören, wie Sie sich zur Sache stellen. Schlimmsten Falles müsste Below seine Promotion in Berlin zu Ende führen. […]

Koschaker desired to have Below in Tübingen for two reasons: first, because his pupil had begun his Ph.D. in Berlin under his supervision and it would have been unpleasant ("unangenehm") not to have guided him until its conclusion. Second, Kochaker wanted him as his assistant. Some administrative obstacles stood in the way of Below finishing his Ph.D. at Tübingen, but it was possible to ask the State Ministry of Education and Culture (*Kultminister*) of Württemberg to relieve Below of his administrative duties in Berlin. Koschaker was therefore anxious to have Moeller's opinion on the matter.

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30 The document reproduces only part of the letter sent by Koschaker to Moeller; the last one sent to the Director of the *Rechtswissenschaftliche Abteilung* (Law department) of the Faculty, Professor Wilhelm Merk, a copy of part of Koschaker's letter for information. We can infer that only a section of the letter was transcribed from the suspension points preceding the first sentence. The one-page typed document is dated 29th August 1941, so it was sent three days after Merk had received Koschaker's letter: UAT, 601/42. On Merk (1887-1970), see Stolleis: *Geschichte des öffentlichen Rechts in Deutschland. Dritter Band, Staats- und Verwaltungsrechtswissenschaft in Republik und Diktatur 1914-1945*, München 1999, p. 292 and fn. 293.

31 "Ferner bitte ich Sie mir, den Bedarf an den notwendigen Vorlesungen aus BGB für den nächsten Winter und die Möglichkeiten seiner Deckung mitteilen zu wollen. Ich will nichts versprechen, aber vielleicht ist es möglich, dass ich etwas aus dem BGB übernehme, sei es auch nur eine Übung."

Moeller answered Koschaker's letter two days later.[32] Moeller's long reply deals mainly with bureaucratic problems, but offers hints on organisational aspects, some of them obviously connected with the ongoing war. Moeller explained to Koschaker that the Faculty was divided into two departments, the Law department and the Economics department, each headed by a director, Wilhelm Merk being responsible for Law. Some of the inquiries made by Koschaker would need to be discussed by Merk, or by Merk and the dean, where they related to Koschaker's questions on teaching. It is interesting to note that it was not possible for them to make decisions on the organisation of the courses and the classes before the beginning of the semester. Apparently, they did not know how many professors would be at the disposal of the Faculty, both because a couple of colleagues who had left Tübingen still had to be replaced, and because they had to take the needs of the *Wehrmacht* into consideration:

> Bezüglich der Gestaltung des kommenden Wintersemesters werden wir wahrscheinlich kaum wesentlich vor Beginn desselben zu einer Entscheidung kommen können. Über welche Kollegen wir verfügen können, hängt sowohl von dem Ergebnis der anderen Berufungen wie auch von dem Bedarf der Wehrmacht ab. […]
> Wie der Plan über mehrere Semester ge[s]taltet werden kann, lässt sich ja jetzt auch schwer sagen. Es hat sich gezeigt, dass man | mehr oder weniger genötigt ist, sich von Semester zu Semester durchzuwinden. An die bekannten Studienrichtlinien sind wir unter diesen Umständen nicht gebunden.

Once again, one can see how the peculiar conditions of the time influenced the life at the University and the teaching, in particular, to such an extent that the Law Faculty was not bound to the national guidelines (*Studienrichtlinien*).

The question of Below finishing his doctoral studies in Tübingen still remained. Moeller repeated to Koschaker what they had already negotiated with regard to his chair in Tübingen ("Bezüglich des Assistenten Below stimme ich im Sinne unserer Berufungsverhandlungen zu").

In order to be accepted as a Ph.D. student at the *Rechtswissenschaftliche Abteilung* (department of Law), Below had to send a formal application to director Merk. The place for him, therefore, both as a doctoral student and as Koschaker's personal assistant had to be ensured one more time.

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[32] Letter of 28th August 1941, Moeller to Koshaker, typewritten and three pages long: UAT, 601/42; this letter is also quoted in Neumann: *Paul Koschaker*, p. 27 and fn. 31.

Other matters discussed in Moeller's letter concerned such things as Koschaker's room in the *Juristisches Seminar*, where the contact person was Professor Hans Erich Feine,[33] and other small practicalities.

As explained by Moeller, it was also necessary to have Merk's opinion on Below's situation and this opinion eventually appeared on 17th September 1941.[34] The director of the Law department suggested that it was preferable for Below to conclude his Ph.D. in Berlin, since it was the University where he had begun his doctoral studies, especially if Koschaker wished to examine him. Merk's opinion was backed by Koschaker in a letter that he sent to him on 20th September 1941.[35] Koschaker agreed with the director that it was more convenient for Below to finish his doctoral studies in Berlin:

> Schönsten Dank für Ihr freundliches Schreiben v. 17. d. M. Ich bin ganz Ihrer Meinung, daß mein zukünftiger Tübinger Assistent Herr K. H. Below seine Promotion am besten dort vollendet, wo er sie begonnen hat, d. h. in Berlin. Ich habe ihm daher geraten, sich im frühesten Termin für Berlin zum mündlichen Examen zu melden. Ob ich ihn noch selbst zurufen kann, weiß ich nicht, ist vielleicht nicht wahrscheinlich, da ich zu diesem Zwecke von Tübingen nach Berlin fahren müsste, aber auch nicht so wesentlich.

Eventually, Below could apply for the post as assistant, and this was confirmed in another letter from Moeller to Koschaker dated 25th September 1941.[36]

The different kinds of negotiations led to the above-mentioned agreement of September 4th, 1941, a copy of which being conserved in the archives of the University of Tübingen, whereas the original document was sent to the Ministry for Sciences and National Education (*Reichsminister für Wissenschaft, Erziehung und Volksbildung*).[37] A quick look at the document is sufficient to retrace Koschaker's main conditions for accepting the Professorship at Tübingen. The text of the agreement (*Vereinbarung*) contains fifteen points regarding the working conditions on which Koschaker and the Law Faculty agreed.

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33 On Feine, see above, p. 79, fn. 31. On his period in Tübingen, see Stolleis: *Geschichte des öffentlichen Rechts*, p. 292 and fn. 298. On his role in the study of Constitutional Legal history in Germany under the regime, see Anna Lübbe: *Die deutsche Verfassungsgeschichtsschreibung unter dem Einfluß der nationalsozialistischen Machtergreifung*, in Stolleis/Simon (eds.): *Rechtsgeschichte*, pp. 63-78 and, in particular, pp. 66 ff.

34 Typewritten one-page letter to Koschaker: UAT, 601/42.

35 Handwritten two-page letter by Koschaker to Merk: UAT, 601/42.

36 One-page typewritten letter: UAT, 601/42. Moeller wrote: "Es wäre dann gut, wenn Herr Below möglichst bald sein Gesuch um Einstellung als Assistant unter Bezeichnung des in Betracht kommenden Zeitpunktes und unter Beifügung eines Lebenslaufes, eines polizeilichen Leumundszeugnisses sowie der sonst in Betracht kommenden Urkunden über seine Ausbildung hierher richten würde."

37 See above, p. 125.

First, Koschaker would be appointed full Professor and Director of the *Juristisches Seminar* in Tübingen. Other points concerned the salary, the reimbursement of costs involved in moving to Tübingen and authorisations to attend conferences or borrow books from foreign libraries. More interesting, however, are points nine to fourteen. Point nine allocated to the *Juristisches Seminar* the sum of 10000 RM, 500 RM being given in advance to Koschaker for studies connected to Roman law.[38] In point ten an extra sum of 1000 RM would be bestowed upon the Near Eastern Institute (*Orientalisches Seminar*), while the possibility of enlarging the library would be benevolently ("wohlwollend") evaluated in the future. To allow Koschaker to keep working on cuneiform law, he was given authorisation to borrow books from the Near Eastern Institute (*Orientalisches Institut*) in Leipzig and the University would cover the costs of the loans (point eleven).[39] The twelfth point referred to the post of assistant: there were three vacant places at the Law department at the time and one (Below) would be assigned as an assistant to Koschaker. The thirteenth and the fourteenth points concerned respectively the room reserved for Koschaker and the working place for his assistant within the *Juristisches Seminar*, as well as the decision to make one of the library personnel available to help transport the books that Koschaker needed.[40] Clearly, very good conditions were offered to Koschaker by Tübingen, and in addition would be given assistance in looking for an apartment as well as full support for the choice of Below as his assistant.

The dean, Moeller, seemed inclined to respect the conditions of the agreement from the beginning, as the case regarding Below had shown and as a letter that he had sent to the director of the University library on 27th November 1941 demonstrates. This document relates to the person in charge of bringing the books that Koschaker needed to his apartment. The so-called *Bibliotheksdiener* would be paid directly by the director of the Law department, as agreed.[41]

Returning again to the points of the agreement between Koschaker and the Law Faculty, it is significant that he was promised money both for his Roman law studies and

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38 Point 9 of the *Vereinbarung* reads: "Für das Juristische Seminar der Universität Tübingen werden Herrn Professor Koschaker aus dem für Zwecke der Rechts- und Staatswissenschaftlichen Fakultät bewilligten Gesamtbetrag von 10000 RM im Voraus 500 RM für die Zwecke des Römischen Rechts zugeteilt."

39 "Herr Professor Koschaker ist berechtigt, aus der Bibliothek des Orientalischen Instituts in Leipzig für seine Forschungen Bücher zu entleihen. Die Kosten dieses Leihverkehrs gehen zu Lasten der Universität Tübingen."

40 The fifteenth and final point is the only one which deals with a condition that would have taken place after the end of WWII, namely the *Schreibkraft* (a person in charge of writing on behalf of one or more professors): "Prof. Koschaker wird nach dem Kriege eine Schreibkraft im Turnus mit anderen Kollegen für höchstens 6 Stunden in der Woche zur Verfügung gestellt werden."

41 Typewritten half page-letter, from Moeller to the director of the University library, Professor Leyh, dated 27th November 1941: UAT, 601/42. On Georg Leyh (1877-1968), see: Walther Gebhardt: *Leyh, Georg*, in: *NDB* 14, Berlin 1985, pp. 434-435.

for his research into the laws of antiquity. After the arduous years in Berlin, when he eventually decided to ask the minister to close the *Seminar für Rechtsgeschichte des Alten Orients* (a request that was not accepted however), he now saw an opportunity to again devote part of his time to the study of cuneiform law and, above all, to acquire some money to further his research. In the quiet small provincial city of Tübingen, Koschaker expected he would find the concentration and calm needed for him to work effectively.

For all these reasons, he welcomed the change of university and the decision to move to Southern Germany. His first impression was very positive and we can appreciate his satisfaction about the decision to move to Tübingen from a letter he sent to Moeller on 11th September 1941, a short time before he left Berlin.[42] Koschaker first thanked the Law Faculty for having chosen him, since he was already 62 years old at the time, and then added:

> […] nehme ich an, dass ich mein Amt in Tübingen am 1. Oktober antrete. Damit ist es nun sicher geworden, dass ich zum Herbste d.J. in Ihren Kreis trete. Ich habe der Fakultät vor allem zu danken, dass sie den Mut gehabt hat, einen Mann in schon recht vorgerückten Jahren überhaupt vorzuschlagen. In der Tat kann ich Ihnen für mich keinen neuen Frühling in Aussicht stellen. Aber wenn ich manchen Ärger und manche Enttäuschung der letzten Jahre überwunden habe – und ich hoffe, dass mir dies in dem sympatischen Milieu Ihrer altberühmten süddeutschen Universität rasch gelingen wird –, so hoffe ich noch auf einen Alten-Weiber-Sommer und dieser kann unter Umständen recht warm sein. Jedenfalls wird es mein Bemühen sein, mein Bestes zu dem Ansehen Ihrer Universität beizutragen […].

Koschaker talked of the final years of his time in Berlin, referring to his irritation (or properly anger: "Ärger") and disappointment ("Enttäuschung") that, he hoped, he would be able to overcome once he was in Tübingen. This university, by contrast, provided the pleasant *milieu* of an old and renowned Southern German university.[43] He was, as he said, no longer in the springtime of his life, but he hoped to enjoy an "Alten-Weiber" summer

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42 The University of Tübingen archives contains a copy of the letter Koschaker sent Moeller. The copy, typewritten and one page long, is dated 12th September 1941, thus one day later than the original letter Koschaker sent to the *Rektor*, see: UAT, 126/346a. This text has also been quoted and discussed in Neumann: *Paul Koschaker*, p. 26.

43 It seems to be no coincidence that Koschaker talked of a Southern German university. As discussed at the beginning of this chapter, being born in Klagenfurt and having studied in Graz, moving to Tübingen meant coming back to a more familiar landscape and being closer to the mountains that he deeply loved. The environment in Tübingen seemed, therefore, to him to be more hospitable from many aspects. On this point, see also Wenger: *Paulo Koschaker Sexagenario*, pp. 1 ff.; Id.: *In memoriam Paul Koschaker*, p. 496, in which the author defines Koschaker an "Altösterreicher", referring to his origins.

and the actual conditions seemed to promise that this summer would be warm.[44] Although he was no longer young, he could nonetheless hope to spend a pleasant period in Tübingen, the working conditions seeming to be so promising.

4.4 The time in Tübingen: research and teaching

Koschaker often explained in his letters and documents that he did not have enough time for research when he was in Berlin.[45] This was one of the reasons why he decided to move to a smaller city and university. With regard to teaching, his aim in Tübingen was the same as it had been in Berlin: he wanted to recover the role of Roman law in university studies. Achieving this end was always more or less by the same means: the main course would focus on Roman private law and Roman private Legal history and it would be strongly influenced by the pandectist approach.[46] As Koschaker himself explained some years later in his masterpiece *Europa und das römische Recht*, the only way to try to capture the interest of students was to teach Roman private law (or Private Legal history in general), and compare the institutes, from a dogmatic point of view, with those of legal systems in force at the time, using a comparative method.[47] Koschaker further stated that the number of students increased sevenfold during his years in Tübingen, both in Roman law courses and in the Roman law-related exercises (*Übungen*).[48] While it is true that university attendance increased in general in Germany during these years, this alone is not sufficient to explain the exponential increase in the number of students of Roman law

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44 The "Alten-Weiber-Sommer" (Indian summer, or "old wives summer"), also known as "Altweibersommer", is in German-speaking countries the name that characterises a part of the year, normally at the end of September, when in some regions the weather is still warm as in summer; it is, therefore, a period just before the end of summer.

45 See above, pp. Chapter 3, §§ 4, 5 and 7.

46 See Giaro: *Aktualisierung Europas*, p. 84; compare Koschaker: *Europa und das römische Recht*[4], p. 346 f. and fn. 6.

47 Ibid. Koschaker wrote: "Hierbei wurde mir alsbald klar, daß ein Interesse an der römischen Rechtsgeschichte – anders als geschichtlich kann das römische Recht heute nicht gelehrt werden – nur durch das Medium des geltenden Rechts erreicht werden kann […]". Koschaker then expressed his satisfaction in finding the same approach in a relatively recent English book on Roman law, namely: William Warwick Buckland/Arnold Duncan McNair Baron McNair: *Roman Law and Common Law. A Comparison in Outline*, Cambridge 1936.

48 Koschaker: *Europa und das römische Recht*, p. 347 fn. 6: "Aber ich kann berichten, daß ich an einer süddeutschen Universität, wo ich seit der zweiten Hälfte des Krieges lehrte, aus sehr bescheidenen Anfängen die Zahl der ständig anwesenden Zuhörer in drei Jahren in Vorlesung wie in Übungen um 700% steigern konnte, eine Zunahme, die sich nicht bloß daraus erklären läßt, daß in dieser Zeit auch die absolute Frequenz der Universität stieg." Compare also the letter sent by Koschaker to *Rektor* Steinbüchel on 24th October 1946: UAT, 126/346a. See below, pp. 160 f. On Theodor Steinbüchel (1888-1949), see Andreas Lienkamp: *Steinbüchel, Theodor*, in: *NDB* 25, Berlin 2013, pp. 170 f.

courses held by him. The main explanation is the kind of classes that Koschaker was able to offer his students, a kind of teaching in which Roman law topics were closely connected to the BGB. As students often told him, they could gain a better understanding of the German Civil Code by attending his course.[49]

Koschaker, therefore, applied the same formula he attempted to use for his courses in Berlin, and this formula was nothing other than the *Aktualisierung* of Roman law study, as described in his work *Die Krise des römischen Rechts und die romanistische Rechtswissenschaft*.[50]

Two letters written by Merk, director of the Law department of the Faculty and Professor for Administrative and Tax Law, and sent to Koschaker in 1942, and one sent by Koschaker to Merk in the same year seem to furnish further confirmation of Koschaker's approach to the teaching of Roman law.

In the first letter, sent on 20th October 1942 – when Koschaker had already spent more than a year in Tübingen – Merk touched upon several matters, but two of them are particularly noteworthy.[51] The text is divided into three points; the second being a reply to a previous request sent by Koschaker on 11th October 1942, regarding the idea of organising special extra courses for soldiers on leave; this opportunity had not been considered by the Law department up to that moment, as we can read from Merk's answer:[52]

> 2) Zurückkommend auf Ihr früheres Schreiben vom 11. v. Mts.[53] bemerke ich, dass Sonderkurse für die beurlaubten Kriegsteilnehmer in der Rechtswissenschaftlichen Abteilung bis jetzt nicht in Aussicht genommen sind.

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49 Yet Koschaker continued to affirm that it did not mean that students actually learnt Roman law, because they did not have to study it and there was no mandatory examination at the end of the course. Koschaker: *Europa und das römische Recht*, p. 347 fn. 6: "Eines freilich vermochte ich nicht zu erreichen, daß die Studenten das römische Recht auch lernten […]. Das ist aber eine natürliche Folge des fehlenden Prüfungszwangs."

50 Koschaker: *Die Krise*, pp. 75 ff. On which see below, chapter 5.

51 Typewritten two-page letter (UAT, 601/42).

52 These kinds of extra courses had been later set up at the Law department though, as we can see in a certificate (*Bescheinigung*) Merk wrote on 13th September 1944 (UAT 601/42). The text confirms that a *Ferienkurs* for the soldiers on leave had been foreseen, on the base of a decree of the Ministry of Education, at the Faculty from 20th September 1944 for about fourteen days. For that reason, Koschaker had to come back to Tübingen. The document reads: "Herr Professor Dr. Koschaker hat im Auftrag der Rechts- und Wirtschaftswissenschaftlichen Fakultät vom 20. September auf etwa 14 Tage Ferienkurse für Kriegsteilnehmer, wie sie durch Erlass des Reichswissenschaftsministers vorgeschrieben sind, abzuhalten und muss deswegen nach Tübingen kommen."

53 Without space between "v." and "Mts." in the text.

The third point of the letter is the most interesting, since it shows what content Koschaker intended to contribute to the course on "Roman legal history" ("Römische Rechtsgeschichte") after the reform of the *Studienordnung*.[54]

At this point, it should be stated that after the reform of the study and teaching at the Law faculties in Germany that took place in July 1935, inspired by Eckhardt, Roman law courses changed in German Law faculties.[55] Since 1900, there had been two main courses on this topic in German universities: one was *Geschichte und System des römischen Privatrechts*, strongly influenced by the pandectist approach and focusing mainly on Roman private law, but it was also used as an introduction to the study of BGB. The other was *Römische Rechtsgeschichte*, which dealt above all with Roman legal history. Along with these two main courses, there was scope for additional optional courses and the so-called *Übungen* (literally "exercises", like small seminars on specific topics usually related to the two above-mentioned main courses). After the reform, the first above-mentioned course was replaced by the new *Privatrechtsgeschichte der Neuzeit*, a History of Private Law of the Modern Age (*die Neuzeit*),[56] whereas for the second course, students could choose between the pre-existing *Römische Rechtsgeschichte* and the new *Antike Rechtsgeschichte*, a Legal History course focusing on ancient laws.[57] Of the last two classes, the regime preferred "Antike Rechtsgeschichte", because there was no reference to Roman law in the name. In any case, *Römische Rechtsgeschichte* was conceived as mainly historically-based teaching (the topics being Roman public and criminal law, Roman procedural law and Roman legal history in general, with no or very little space for Roman private law).

Koschaker still wanted to use the content of the pre-existing courses, even if he had to adapt them to the new "labels" imposed by the reform of the regime. From Merk's

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54 On which see below, chapter 5, § 8, for further information. For an in-depth study of the reform, see Stolleis: *„Fortschritte der Rechtsgeschichte" in der Zeit des Nationalsozialismus?*, in: Simon/Stolleis (eds.): *Rechtsgeschichte*, pp. 177-197; Lösch: *Der nackte Geist*, pp. 284 ff.; Frassek: *Steter Tropfen höhlt den Stein*, pp. 294 ss.; Id., *Wege zur nationalsozialistischen „Rechtserneuerung"*, pp. 351 ss.; Mußgnug: *Die juristische Fakultät*, in: Wolfgang Uwe Eckart/Volker Sellin/Eike Wolgast (eds.): *Die Universität Heidelberg im Nationalsozialismus*, Heidelberg 2006, pp. 300-302; Klaus-Peter Schroeder: *Eine Universität für Juristen und von Juristen*, Tübingen 2010, pp. 134 ff.; Winkler: *Der Kampf*, pp. 136-161.

55 Karl August Eckhardt (1901-1979) was a professor of Legal history (a so-called *Germanist*), member of the NSDAP and *SS-Sturmbannführer*, and he published his *Richtlinien für das Studium der Rechtswissenschaft* (Guidelines for Legal Studies) in January 1935. On the content of his *Richtlinien*, see also below, chapter 5, § 8. On Eckhardt, see above, p. 82, fn. 44.

56 See the work by Franz Wieacker: *Privatrechtsgeschichte der Neuzeit unter besonderer Berücksichtigung der deutschen Entwicklung*[2], Göttingen 1967 (first edition: Göttingen 1952).

57 On the reasons that led the regime to reform the Roman law teaching and the courses at the Law faculty and, more in general, on the hatred of the regime for Roman law and the pandectists, see below, chapter 5, § 8. On the trend of study called "antike Rechtsgeschichte" developed by Wenger, see above, pp. 45 ff. for a first overview and, for further information, below, chapter 5, § 3.

letter, we can gain a better understanding of how Koschaker intended to proceed in practice:

> 3) Ich darf wohl annehmen, dass Sie in der von Ihnen angekündigten Vorlesung: "Römische Rechtsgeschichte (Grundzüge des römischen Privatrechts als Einführung ins europäische Rechtsdenken)" auch die Grundzüge der Rechtsgeschichte mit behandeln, etwa so, wie dies in dem Buche Jörs-Kunkel-Wenger[58] über römisches Recht geschehen ist. Ich hielte es für sehr wertvoll, wenn Sie einen entsprechenden Zusatz bei der Vorlesungsankündigen machen, damit sich keine Schwierigkeiten wegen der Behandlung dieser Vorlesung als: "Römische Rechtsgeschichte" im Sinne der Studienordnung und des Studienplanes herausstellen und die Studenten darüber im Klaren sind, dass es sich um diese nach dem Studienplan zu besuchende und bei der Meldung zur Prüfung nachzuweisende Vorlesung und nicht um eine daneben herlaufende Vorlesung handelt,[59] was ja nur für den Besuch Ihrer Vorlesung wünschenswert erscheint.

The text is very interesting, because it clearly shows that Koschaker wanted to use the course on Roman legal history to teach "the foundations of Roman private law as an introduction to European legal thinking". This was his way of linking Roman law to European legal history and culture in his teaching, based on the idea that he had already explained in *Die Krise des römischen Rechts und die romanistische Rechtswissenschaft* and that he would develop more deeply in *Europa und das römische Recht*. His conception of a Roman legal history course was thus radically different from the one as foreseen under the 1935 reform programme and the conception that characterises Roman legal history courses today, at least in Continental Europe.[60] The course was innovative in two different respects: first, it was connected to Roman private law and not public law, as one would have expected from a course on Roman legal history. It is not without significance that Merk referred to Jörs, Kunkel and Wenger's famous textbook *Römisches Privatrecht* (Roman private law) and not to any work dealing with the *Römische Rechtsgeschichte*. The second aspect related to the importance that Koschaker gave to the connection

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58 Merk very likely referred to Paul Jörs/Wolfgang Kunkel/Leopold Wenger: *Römisches Privatrecht*[2] (auf Grund des Werkes von Paul Jörs neu bearb. von Wolfgang Kunkel), Berlin 1935.

59 The verb "handelt" has been added at a later time.

60 Only focusing on the German and Italian panoramas as two of the most relevant, Roman legal history courses have usually been focused on the historical development of legal institutions and "public law" in Ancient Rome. In this respect, a clear example of the usual content of this course is offered by textbooks, e.g., Kunkel: *Römische Rechtsgeschichte*[1], Heidelberg 1947 (but then reprinted in various new updated editions). Textbooks on Roman legal history, usually under the title "Storia del diritto romano", have always been a very popular genre among Italian Romanists.

between Roman law and European legal tradition, which he considered the key to retrieving the role of Roman law in European history as well as in Law faculties. It is possible to infer, therefore, that both the courses taught by Koschaker in Tübingen dealt mainly with Roman private law and its reception in European legal tradition (since the other course was *Privatrechtsgeschichte der Neuzeit*, clearly a History of Private Law of the Modern Age). This tendency to underline the preminence of private law in order to explain the relevance of Roman law and make the topic interesting for students is typical of Koschaker's didactic approach. It is therefore interesting to note how his ideas were put into practice in his teaching.

The quotation from the letter also reveals that Professor Merk agreed with Koschaker's proposal; he also suggested that it would be better to specify that the course *Römische Rechtsgeschichte* dealt with the foundations of European legal thinking. The aim of such an explanation was twofold: on the one hand, he would avoid problems connected with a *Römische Rechtsgeschichte* course subsequent to the *Studienordnung* and the study plan (*Studienplan*).

As previously explained, the other course on the *Antike Rechtsgeschichte* seemed to be preferable in the eyes of the regime. The second point requiring additional clarification, was that it needed to be made clear to students that attendance at these classes was compulsory and proof of attendance needed to be provided when enrolling for the examination ("und die Studenten darüber im Klaren sind, dass es sich um diese nach dem Studienplan zu besuchende und bei der Meldung zur Prüfung nachzuweisende Vorlesung und nicht um eine daneben herlaufende Vorlesung handelt"). This appeared to be desirable for Koschaker's course.

Two other relevant documents should be now analysed, namely a letter from Koschaker to Merk and Merk's reply. Koschaker's letter was sent on 3rd November 1942.[61] The text is particularly meaningful as it helps to explain author's ideas on the teaching of Roman law after the reform of 1935. It also clarifies why Koschaker decided to hold a course on Roman legal history (*Römische Rechtsgeschichte*) which focused on private rather than public law.

The letter reads:

> Sehr verehrter Herr Kollege!
>
> Ich bestätige mit verbindlichstem Dank Ihr Schreiben v. 31.10 und fürchte allerdings, daß wir uns gegenseitig mißverstanden haben. Gestalten Sie mir daher einiger Worte zur Aufklärung: Die Vorlesung über "römische Rechtsgeschichte" war früher traditionell um solche über öffentliches römisches Recht, Zivilprozeß

[61] Handwritten two-page letter (recto and verso), sent from Koschaker's house in Walchensee, see: UAT, 601/42.

> und Quellengeschichte. Da sie heute die einzige ist, die noch gehalten wird, so wäre sie mit dem selben Inhalt ein Unding, wenn sie nicht auch das Privatrecht umfaßte. Sie ist aber auch in dieser Gestalt als Vorlesung von 4-5 Wochenstunden ein Unding, weil die Fälle des Stoffes den Dozenten zur Oberflächlichkeit geradezu zwingen würde. Das Privatrecht ist und bleibt aber vom römischen Recht die Hauptsache. Angesichts der mir zur Verfügung stehenden Zeit kann ich daher vom öffentlichen Recht nur das vortragen, was mir zum Verständnis des Privatrechts unbedingt notwendig ist […].

Koschaker commenced the letter by offering Merk an explanation, since there seemed to have been a misunderstanding between the two; in this letter, Koschaker reiterated that the *Römische Rechtsgeschichte* course had traditionally focused on Roman public law, Roman civil procedure and the history of Roman sources. However, he was faced with the problem - just as other Roman law professors in Germany were at the time - that the only course to truly focus on Roman law was now *Römische Rechtsgeschichte*. For these reasons, he had to teach private rather than public law during his classes; as he affirmed, it would have been absurd ("ein Unding") to insist on the previous content for this course. If he had still taught Roman public law and not private law, there would not have been an opportunity to teach the most important branch of Roman law ("Das Privatrecht ist und bleibt aber vom römischen Recht die Hauptsache"). Public law – or better, some of its aspects – could only be taught insofar they were helpful in gaining a better understanding of private law. It appears clear, therefore, that Koschaker himself somehow felt obliged to hold a course on Roman legal history using the content of the traditional Roman law classes, which focused on private law. This was not the only problem regarding teaching, however:

> Hierzu kommt ein zweites. Das römische Recht ist schwierig. Ihrer allgemeinen Bildung nach waren die Studenten noch niemals schlechter auf diese Vorlesung vorbereitet als heute. […] Die Erfahrung hat | mich gelehrt, daß ich nicht einmal in 6 Wochenstunden, die ich üblich lese, mit dem Privatrecht fertig werde. Deswegen habe ich in meiner Denkschrift eine wöchentliche 2-3 Stunden Vorlesung über römische Reschtsgeschichte, wenn auch nicht obligatorisch, vorgeschlagen, in der das öffentliche Recht zur Geltung kommen könnte. Die schon heute als nicht einmal empfohlene Vorlesung zu halten, käme vielleicht dann in Frage, wenn wir mit Erbe wieder einen zweiten Romanisten in der Fakultät haben, wäre aber auch dann ein gewagtes Unternehmen. Ich stimme Ihnen bei, daß heute die Vorlesung einfach als "römisches Recht" anzukündigen, so sympathisch und an sich dieser Vorschlag ist, nicht empfehlenswert wäre […]

The second problem related to the fact that university students now had less knowledge of Roman law as a subject. Not only was Roman law a tough topic ("*Das römische Recht ist schwierig*"), but student preparation had never been so poor. For that reason, and based on his experience, Koschaker was sure that he would not be able to deal with all the essential private law topics in his course, since he had only six hours a week at his disposal. Yet he did have a solution, as he had already suggested in his proposal on the reform of Roman law teaching in Germany.[62] His idea was to incorporate a further optional course on Roman legal history into the curriculum of the Law department (of two or three hours per week). During these classes he would have the opportunity to broach the subject of Roman public law. The idea to include these extra classes had never been taken into consideration up to that time, but it could be proposed by the Faculty if they called Erbe, thereby availaing themselves of a second Romanist. Koschaker was aware, in any case, that such a proposal would be a risky affair ("wäre aber auch dann ein gewagtes Unternehmen"). He also agreed with Merk that presenting a course simply called *Römisches Recht* was not advisable at that time, given the regulations contained in the new *Studienordnung* and the hatred of the regime towards Roman law.

Koschaker then concluded:

> […] in der Studienordnung steht nur römische Rechtsgeschichte, weshalb "römisches Recht" als nicht genügend betrachtet wird. Ich fasse zusammen: meine Studenten läsen bei mir recht viel von römischer Privatrechtsgeschichte, wenn auch stark ausgerichtet auf die Gegenwart, von dem öffentlichen römischen Recht unbedingt das, was sie zum Verständnis des römischen Privatrechts brauchen, und damit immerhin so viel, um ungefähr eine Vorstellung über das Werden und den Charakter des römischen Staats zu bekommen. Mehr kann ich nicht bieten, nicht weil ich es nicht will, sondern weil bei der Notlage des Fachs ich früh sein muß, den Studenten das absolut Notwendige im Privatrecht beizubringen, das sie für eine rechtswissenschaftliche Bildung brauchen. Für diese ziehe ich allerdings Unvollständigkeit bei einiger Gründlichkeit enzyklopädischer Oberflächlichkeit vor.

After reminding Merk that in the new *Studienordnung* for the Law faculties there was only room for Roman legal history, Koschaker summed up his thoughts; he taught his students mainly the history of Roman private law, albeit in close association with contemporary law of that time. As to public Roman law, it could be circumscribed to teaching what was necessary and useful to understanding private law. This would still allow students to gain a basic understanding of the main features of the Roman "State".

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[62] The text of this reform proposal of 1941 will be discussed in depth below, chapter 5, § 8.

Koschaker complained that he could not offer the students more than this, not because he did not want to, but because he needed to teach them all the fundamentals of private law, which were essential for their legal education. To achieve this aim, he preferred to omit certain topics rather than providing a wider but more superficial compendium of legal issues ("einiger Gründlichkeit enzyklopädischer Oberflächlichkeit").

Koschaker's style of writing makes the letter pleasant to read, yet between the lines his fine prose scarcely masked his concerns about teaching. In particular, his ideas seemed to reflect the situation he was now obliged to face: even though he gave Roman private law a preeminent role, nuanced with his strong pandectist method, it is equally true that the ancillary role to which he relegated Roman public law was affected by the general pervasive situation in German universities at the time.[63]

Merk replied to Koschaker's long letter on 10th November 1942,[64] focusing on the content of the courses that Koschaker had discussed in his letter:

> […] Ich bin in voller Übereinstimmung mit Ihnen darüber, dass in der Vorlesung über das römische Recht die Hauptsache das Privatrecht ist und dass bei der gegenwärtigen Sachlage vom öffentlichen Recht nur das mitbehandelt werden kann, was zum Verständnis des Privatrechts unbedingt notwendig ist. Bei der beschränkten Stundenzahl, die zur Verfügung steht, kann anderes gar nicht in Frage kommen und ich glaube, dass bei dem von Ihnen beabsichtigten Inhalt den Studenten überhaupt das nur denkbar Beste geboten werden kann.

Merk thought Koschaker was completely right in asserting that what really mattered in courses on Roman law was the study of private law ("die Hauptsache das Privatrecht ist"). Roman public law could be taught only insofar as it was absolutely necessary ("unbedingt notwendig") for the comprehension of Roman private law, just as Koschaker had said in his letter.

From the last lines of Merk's letter we can also infer that the other problem raised by Koschaker regarding the limited number of hours that he had at his disposal for his course could not find any solution at the moment; Merk's clear reply shows that no alternatives were possible. Koschaker's concern about the little time devoted to Roman law and to the education of the university students could not be assuaged. In addition to being a professor, Merk also had an administrative role as director of the Law department. He agreed with Koschaker on the way in which his course could be organised and Roman law taught – or perhaps he simply accepted Koschaker's proposal – but he did not seem to be willing or interested to engage in an effort to allow more hours of teaching for this subject.

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63 This question will be further discussed in chapter 5.

64 A page-long typewritten letter: UAT, 601/42.

In conclusion, the situation that Koschaker found with regard to the teaching of Roman law in Tübingen was better than in Berlin, where he found an expanse of ruins ("Trümmerfeld") and his approach led to some commendable results, like the increase of the number of students attending his classes; nonetheless, it was not an idyllic situation, nor could it be. The quieter university life of Tübingen offered Koschaker the possibility of organising his classes as he preferred and, in this respect, he found support from Merk, the Director of the Law department (Merk was close to the regime and cooperated closely with it). Koschaker's attempt to introduce new Roman law courses in Tübingen was praiseworthy; however, even though additional classes on Roman public law would not preoccupy the regime very much, Merk no doubt had little interest in heeding or following Koschaker's proposal. Perhaps this was because his proposal was against the *Studienordnung* in force at the time and partly because it is plausible that the teaching of Roman law was not considered a priority in German law faculties in the fall of 1942.[65]

As with Berlin, Koschaker was free to move within the confines allowed by the government and the University administration, but these confines were again too narrow for his liking. The improved situation in Tübingen with regard to teaching could not as such be considered as entirely satisfactory.

Regarding research, Koschaker moved to the new university with a clear intent of devoting more time to his studies and to keep working on cuneiform law, particularly after the frustrating experience of Berlin. We learn from his pupil Below that Koschaker learnt Arabic with Enno Littmann in Tübingen, because he wanted to be able to read the Koran in its original language.[66] Beyond that, his academic output during the years from 1941 to 1947, when he published *Europa und das römische Recht*, was not particularly prolific.[67] Two major articles appeared on cuneiform law, the first in 1942 and the second in 1944.[68] No monographs were published, either in the field of the laws of Antiquity or in Roman law. Yet Koschaker did publish a large number of reviews in the field of Roman law.[69] Koschaker was one of the co-editors of the *Zeitschrift der Savigny-Stiftung* during this time and up to 1944, and many of his reviews were published in this prestigious

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65 To the extent that can be inferred from Moeller's letter to Koschaker of 28th August 1941, in which the dean explained that some professors and persons working at the University would have had to join the *Wehrmacht* at that time and the situation became even more serious after the beginning of the Battle of Stalingrad (*Schlacht von Stalingrad*) in July 1942.

66 Below: *Paul Koschaker*, p. 5. On Enno Littmann (1875-1958), see Rudi Paret: *Littmann, Enno*, in: *NDB* 14, Berlin 1985, pp. 710 f.; Axel Knauf: *Enno Littmann*, in: *Biographisch-Bibliographisches Kirchenlexicon* 5, Herzberg 1993, pp. 134-136.

67 On this point, see also Neumann: *Paul Koschaker*, pp. 27 f.

68 Koschaker: *Zur staatlichen Wirtschaftsverwaltung in altbabylonischer Zeit, insbesondere nach Urkunden aus Larsa*, in *ZA* 47 (1942), pp. 135-180; Id.: *Drei Rechtsurkunden aus Arraphạ*, in: *Leopold Wenger. Ein halbes Jahrhundert rechtsgeschichtlicher Romanistik. Festschrift für Leopold Wenger*, I, München 1944, pp. 161-221.

69 Except for a work of 1942 classified by Below as a review plus article, see Below: *Paul Koschaker*, p. 42. For the list of Koschaker's reviews in these years, see Ibid.: pp. 41 ff.

journal.[70] Moreover, for Koschaker a review usually represented an opportunity to go well beyond a mere discussion of the book of another author, and writing a review was anything but a trifling task for him. In some of these reviews, for example, he had the opportunity to take a stance on essential methodological problems, such as interpolationism, or the role of Roman law and its teaching.[71] But in any case, notwitshtanding Koschaker's numerous reviews in this period, it seems fair to concur with Neumann that Koschaker did not publish so many works from 1941 to 1946.[72]

In this respect, several considerations spring to mind, first, in connection with his teaching; as explained before, Koschaker wished to devote time to teaching in Tübingen. It is reasonable to think that he spent a lot of time in this way, considering that he woul also be required to teach classes on Civil law and *Bauernrecht*, where necessary.[73] Yet his endeavours not only involved teaching itself, but also his attempts to improve its content at the Law department, which would have been very demanding for Koschaker. This could not be the only reason for the dearth of publications, since in other periods of his life he had been active in both teaching and publishing research. Neumann suggests that Koschaker's period in Tübingen represented a time to reflect deeply on Roman law, its teaching and its role in Europe.[74] Koschaker had discussed these topics at the *Akademie für Deutsches Recht* in Berlin in 1937, and this was followed by the huge debate raised by the publication of *Die Krise* in 1938. Some of these problems again arose in his memorandum on the reform of Roman law teaching in German universities in 1941. Step by step, the ideas that Koschaker would represent in his masterpiece, *Europa und das römische Recht*, were beginning to take shape.[75] His time in Tübingen, therefore, provided the necessary space for preparation, leading to his famous book on Roman law

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70 The journal was not published in 1945 and 1946. Heinrich Mitteis (1889-1952), the son of Ludwig and a famous Germanist, acted as the sole director of the three different sections of the journal from 1947 to 1953. In a letter to his pupil Kisch, dated 24th May, 1948, Koschaker explained that he had already resigned from co-directing the *Savigny-Zeitschrift* in 1944. See Kisch: *Paul Koschaker*, p. 29 (letter nr. 9). On Heinrich Mitteis, see Nikolaus Grass: *Mitteis, Heinrich*, in *NDB* 17, Berlin 1994, pp. 577-579.

71 On interpolationism, see Koschaker: *Bespr. von Emilio Albertario, Studi di diritto Romano, Vol. III: obbligazioni, V: storia, metodologia, esegesi, Milano, Ant. Giuffrè, 1936 und 1937*, in: *ZSS* (RA) 58 (1938), pp. 427-437, followed then by Id.: *Bespr. von Emilio Albertario, Studi di diritto Romano, II: cose – diritti reali – possesso. Milano, Ant. Giuffrè 1941*, in: *ZSS* (RA) 63 (1943), pp. 435-444. On the role of Roman law and its teaching, see Id.: *Bespr. von Guido Astuti, Studi intorno alla promessa di pagamento*, in: *ZSS* (RA) 63 (1943), pp. 469-477.

72 Neumann: *Paul Koschaker*, pp. 27 f.

73 A handwritten letter by Koschaker dated 4th May 1943 deals with the necessity of correcting a mistake regarding the description of the *Übungen aus dem bürgerlichen Recht für Anfänger* (Civil law exercises for beginners) given in the list of courses offered by the Faculty, see: UAT 601/42.

74 Neumann: *Paul Koschaker*, pp. 27 f.

75 Ibid.

in the history of Europe.[76] The tranquility of Tübingen proved to be the right place for Koschaker to gather his ideas.

With regard to cuneiform law studies, on the contrary, at that time in Tübingen there was no expert comparable to Landsberger or Falkenstein.[77] Furthermore, as Koschaker himself explained in a letter to the State Ministry of Education and Culture of Württemberg on 12th July 1943, it was difficult, and at times, forbidden, to obtain the most important literature on the topics that he wanted to study, since it mainly came from the US, England and France.[78] Koschaker also made it clear that he had little time to devote to this field, given his other research concerns.

Moreover, there were at least three other reasons why Koschaker wrote less during this period of his life. First, ill health had troubled him since his years in Berlin, and still plagued him.[79] Koschaker suffered from heart disease, particularly from 1942 onwards, as a letter he sent to the Württemberg State Ministry of Education and Culture asking for sick leave confirms.[80] A letter written by the dean, Moeller, on 10th September 1942, and two of Koschaker's letters reveal that he spent some time in June 1943 and April 1944 in Bad Teinach, a village between Tübingen and Baden-Baden, where to receive thermal treatments.[81] Koschaker's condition seems to have worsened, since he asked to be excused from duties during the winter semester 1945/46. This sabbatical period was granted to him by the State Ministry of Education and Culture of Württemberg on 22nd March 1945.[82]

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76 The writing of such a book required, of course, a long period of reflection that was highly demanding. It could also involve deep mental anguish. Calasso underlined that such a book, appearing just two years after the end of the war, might well have been the product of Koschaker's intellectual "suffering". On this point, see again below, chapter 5, § 10, and Calasso: *L'Europa e il diritto romano*, p. 106, in which the author referred to a "trauma psicologico"; see also Beggio: *Paul Koschaker and the Path*, pp. 325 f.

77 On Landsberger and Falkenstein, see above p. 48, fn. 91 and p. 77, fn. 19, respectively.

78 A copy of the letter was sent by Koschaker to the State Ministry of Education and Culture of Württemberg, see: UAT, 126/346a. The original letter, two pages long, is dated 12th July 1943. Koschaker asked for the possibility of using the 1000 RM originally allocated for the *Orientalisches Seminar*, as decided in the agreements concerning his move to Tübingen, for the *Juristisches Seminar*. Feine and Moeller responded favourably to Koschaker's request in letters dated 16th and 19th July 1943, respectively. See also Neumann: *Paul Koschaker*, p. 27.

79 See above, pp. 92 ff. and Below: *Paul Koschaker*, p. 4.

80 See the one-page typewritten letter from the State Ministry of Education and Culture, sent 22nd March 1945, allowing Koschaker a sabbatical semester (UAT, 601/42). See also the letter sent by Koschaker to the Minister of Education on 12th January 1945 (UAT 601/42; the text is discussed below, p. 153) and the letter that he sent to Kisch on 7th September 1950, in which he explained that he had suffered from cardiac problems for 55 years. Kisch: *Paul Koschaker*, p. 48 (letter nr. 18), and also below, p. 169.

81 Moeller's letter is typewritten and one page long, see: UAT, 601/42. The other two documents, handwritten, are dated 10th June 1943 and 3rd April 1944, see: UAT, 126/346a. Koschaker stayed overnight at the Hotel Hirsch.

82 On this document see also Neumann: *Paul Koschaker*, p. 28.

A second reason was that at the age of 62 Koschaker had decided to learn a new language, Arabic. This would of course have required considerable effort that would allow him to read and deal with new sources.

There were also further "sidetasks" that Koschaker fulfilled during these years: one of them is revealed by a certificate (*Bescheinigung*) written by the Law department Director, Merk, on 17th February 1945.[83] The text of the document reads:

> Der o.Professor der Rechte an der Universität Tübingen Paul Koschaker arbeitet im Auftrage der "Gesellschaft für europäische Wirtschaftsplanung und Grossraumforschung" (Präsident Reichsamtsleiter Gesandter W. Daitz) an einer wissenschaftlichen Untersuchung über europäisches Recht. Zu diesem Zwecke muss er die Ferien verwenden und will diese Arbeit in Walchensee (Oberbayern), wo er einen zweiten Wohnsitz hat, fördern. Dorthin wurde im Interesse der Sicherheit auch sein wissenschaftliches Material gebracht, so dass die Arbeit nur dort gemacht werden kann, umsomehr da mit Rücksicht auf die Kohlenversorgung dort die äusseren Arbeitsbedingungen für Professor Koschaker derzeit wesentlich günstigere sind als in Tübingen.
>
> Da Professor Koschaker in Walchensee nirgends Gasthausverpflegung haben kann, sondern eigene Wirtschaft führen muss, ist die Begleitung durch seine Ehefrau und seine Hausgehilfin Frl.Groter[84] erforderlich.

The document clearly states that Koschaker worked for the *Gesellschaft für europäische Wirtschaftsplanung und Grossraumforschung* directed by Werner Daitz in 1945.[85] The *Gesellschaft* (GeWG) was established in Dresden by Daitz on behalf of the Office for Foreign Affairs of the Nazi party (*Das Außenpolitische Amt*) in Semptember 1939. The main task of the GeWG consisted in planning a new European economic space that would

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83 Typewritten text, one page long: UAT, 601/42.

84 There is no space in the document between "Frl." and "Groter".

85 On the *Gesellschaft für europäische Wirtschaftsplanung und Großraumforschung*, see Jürgen Elvert: *Mitteleuropa! Deutsche Pläne zur europäischen Neuordnung (1918-1945)*, Stuttgart 1999, pp. 309 ff.; Daniela Kahn: *Die Steuerung der Wirtschaft durch Recht im nationalsozialistischen Deutschland. Das Beispiel der "Reichsgruppe Industrie"*, Fankfurt am Main 2006; Hansjörg Gutberger: *Raumentwicklung, Bevölkerung und soziale Integration. Forschung für Raumplanung und Raumordnungspolitik 1930-1960*, Wiesbaden 2017, pp. 100 ff. On Werner Carl Otto Heinrich Daitz (1884-1945), who had been a member of the Nazi party since 1931, see: Franz Neumann: *Behemoth. Struktur und Praxis des Nationalsozialismus 1933-1944* (German translation of the second enlarged English version: *Behemoth. The Structure and Practice of National Socialism*, New York/Toronto/London 1944), Köln 1976, pp. 216 ff.; Elvert: *Mitteleuropa!*, pp. 337 ff.; on Daitz's policy as director of the *Gesellschaft*, see: Dirk Van Laak: *Pionier des Politischen? Infrastruktur als europäisches Integrationsmedium*, in Christoph Neubert/Gabriele Schabacher (eds.): *Verkehrsgeschichte und Kulturwissenschaft. Analysen an der Schnittstelle von Technik, Kultur und Medien*, Bielefeld 2013, pp. 177 ff.

form part of the so-called *Neuordnung Europas*, under the control of the German government (*Großwirtschaftsraum*). Among the members of the executive council there were ministers of the government of the Third Reich and up to 1943 the president of the *Preußische Akademie der Wissenschaften*, Theodor Vahlen.[86] Carl Schmitt also figured among the eminent members of the so-called economic council (*Wissenschaftlicher Beirat*). [87]

Koschaker collaborated with this Nazi institution in 1945 in relation to research on European law. He would carry out this task during his holidays, which he spent in Walchensee as usual. For security reasons, the material he needed would be taken to him. According to Merk, the working conditions were more favourable there.

The significance of the short document in question is twofold: on the one hand, it shows how Koschaker could have been busy with some kinds of tasks that went beyond teaching or doing research for his own publications; as one may read in the text, he had to spend his holidays working for the GeWG. On the other hand, it also raises the question of Koschaker's position vis-à-vis the regime. This document reveals facts that are similar to those that emerged from the sources of the period when Koschaker was in Berlin. Can Koschaker be considered such a fierce opponent of the regime if he was still working for an organisation like the GeWG in 1945?

A valid response is that working for the GeWG did not necessarily make Koschaker a Nazi. Koschaker would have needed to adapt to the poltical situation[88] and his ideas would have been taken into consideration or even accepted by certain members of the regime. Even if Koschaker could be considered an opponent of the Nazis, at least theoretically speaking, nonetheless both he and his ideas were tolerated by this regime and deemed harmless. Alternatively, perhaps it could equally be argued that the regime was neither interested in him nor his scholarly interests given that he was still able to carry out research on European law for a Nazi government institution in 1945.

Based on the documents and information at our disposal, Koschaker's research and publications from 1941 to 1947 show that he had numerous responsibilities and was

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86 On Karl Theodor Vahlen (1869-1945), who became a member of the Nazi party in 1933 and had been the director of the Academy from 1939 to 1943, see Michael Grüttner: *Biographisches Lexicon zur nationalsozialistischen Wissenschaftspolitik*, Heidelberg 2004, pp. 176 f.

87 The literature on Carl Schmitt (1888-1985) is immense. For this reason, only a few recent works, where further literature is cited, will be given here: Paul Noack: *Carl Schmitt. Eine Biographie*. Berlin 1993; Reinhard Mehring: *Schmitt, Carl*, in: *NDB* 23, Berlin 2007, pp. 236-238; Id.: *Carl Schmitt – Aufstieg und Fall. Eine Biographie*, München 2009.

88 The problem will be further discussed below, chapters 5, § 8, and chapter 7. On this point, see the remarks by Somma: *I giuristi e l'Asse culturale*, p. 282: "Paul Koschaker tenta un recupero più ampio dei riferimenti al diritto romano, considerati come uno strumento attraverso cui avvalorare le tendenze espansionistiche tedesche […]". It does not seem possible, however, to radicalise the problem, as the author seems to do in his work, and affirm that Koschaker's study of Roman law had the ulterior aim of supporting German expansionist tendencies. This point will be analysed in depth below, chapter 6, §§ 1 and 2, and chapter 7.

engaged in various new and demanding research efforts. In addition, the fact that he much time in Walchensee, where he did not have the university library at his disposal, could go some way to explaining why he published fewer works than in previous years. However, his eclectic interests, from his passion for the laws of antiquity and its languages, to his study of Roman law in European history, continued to be among his research interests at the time.

4.5 Koschaker's pupils in Tübingen: Below, Wesenberg and Pescatore

During his professorship in Tübingen Koschaker had three main pupils. The first was Karl-Heinz Below, one of Koschaker's original students from Berlin, and who began his doctoral studies there with him.[89] As was previously explained, the documents dealing with Koschaker's arrival to Tübingen often referred to his request to have Below as his personal assistant, and Koschaker's efforts to this effect were noteworthy. Both the dean, Moeller, and the director of the Law department, Merk, welcomed Koschaker's proposal on the condition that Below finished his Ph.D. and defended his doctoral thesis where he had begun his doctoral studies, namely in Berlin. At the same time, they suggested that Koschaker should tell his pupil to send all the requisite documents to apply for the vacant post as soon as possible.[90] The Below affair, as the following pages will show, was complicated, though not due to any kind of administrative or personal opposition either towards Koschaker or his pupil.

In a letter sent by Moeller to Koschaker on 10th September 1942, Koschaker was perturbed about an unknown person from the Law faculty at Strasbourg contacting Below, probably with the intent of offering him a position there, without discussing the question in advance with any member of the Law department at Tübingen or with Koschaker himself.[91] The situation seemed to be somewhat strange, since Moeller was convinced that Below was satisfied with his position at the University at Tübingen and he had also offered to do everything that could be done to make it more comfortable for Below.

The text reads:

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89 On Below attending the Roman law courses that Koschaker held in Berlin, see above, pp. 107 f.

90 See above, pp. 127 ff. The first positive exchange of letters between Koschaker and Moeller took place on 26th and 28th of August 1941 (Koschaker's letter and the dean's reply, respectively).

91 Typewritten letter from Moeller to Koschaker (UAT, 601/42), on which see also above, p. 142. This same letter indicates that Koschaker had spent some time in Bad Teinach to undergo spa treatments there.

> Ich bedauere sehr, dass Sie in der Angelegenheit Ihres Assistenten so viel Ärger gehabt haben […]. Herr Below ist doch sicherlich auch mit seiner Stellung hier zufrieden. Wenn irgendwelche Möglichkeiten bestehen sollten, seine Stellung hier zu verbessern, so würde ich mich gern dafür einsetzen, soweit ich da irgend etwas zu tun befugt bin.
>
> Der Strassburger Herr – leider weiss ich nicht sicher, um wen persönlich es sich gerade handelt – hat zweifellos Wildwestmethoden angewendet. Es wäre richtig gewesen, wenn er sich spätestens gleichzeitig an Sie gewandt haben würde. Als Dekan kann ich wohl nichts unternehmen, weil keine formelle Handhabe dazu besteht. […] Vielleicht hat Herr Below Gelegenheit, in Strassburg anzudeuten, dass sowohl Sie wie auch der Tübinger Dekan doch einigermassen befremdet gewesen sind, dass man mit Herrn Below in schriftliche Beziehungen der fraglichen Art getreten sei, ohne zunächst Ihnen den Gedanken unterbreitet zu haben.

Moeller and Koschaker, unaware of what had happened, felt bewildered.

Yet, it is possible to get a clearer idea of this affair from another document, a letter sent by Moeller to Professor Georg Dahm from Strasbourg on 29th September 1942.[92] Moeller explained what happened to Koschaker and his assistant Below and that Koschaker had asked him to pursue the matter. From this text we understand that Moeller was able to recollect, after a recent meeting with Dahm, what Koschaker told him on 9th September – and then before Moeller's letter from 10th September discussed above – namely that Below had received a proposal from the dean of the Law Faculty in Strasbourg to take up the post of assistant there, "mit dem speziellen Auftrage, die dortige Seminarbibliothek auf dem Gebiete der modernen Rechtsvergleichung zu ordnen und zu organisieren" (with the specific task of sorting out and organising the Seminar library's section on modern comparative law).

For these reasons Moeller decided to ask Dahm to inform the dean in Strasbourg about these events and in case Strasbourg wished to get in touch with Koschaker, whose interests Moeller aimed to defend.[93] After a few days, Moeller received a letter from the

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92 Typewritten two-page letter (recto and verso): UAT, 601/42. On Georg Dahm (1904-1963), member of the Nazi party and of the SA since 1933, one of the champions of the *nationalsozialistische Strafrechtslehre* (national socialist Criminal law doctrine) and also member of the *Kieler Schule*, see Jörn Eckert: *Was war die Kieler Schule?*, in: Franz Jürgen Säcker (ed.): *Recht und Rechtslehre im Nationalsozialismus*, Baden-Baden 1992, pp. 37-70; Grüttner: *Biographisches Lexicon*, p. 37. On the Law faculty in Strasbourg at the time, see Herwig Schäfer: *Juristische Lehre und Forschung an der Reichsuniversität Straßburg 1941-1944*, Tübingen 1999.

93 "Ich darf annehmen, dass dortseits durchaus die Absicht bestanden hat, auch mit Herrn Koschaker in Beziehung zu treten. Gewiss wäre es nach Maßgabe der so besonderen Sachlage bei der Zusammenarbeit zwischen Herrn Koschaker und Herrn Below doch gut gewesen, noch vorher an Herrn Koschaker heranzutreten, dessen berechtigte Interessen ich hiermit wahren möchte und dessen eigene akademisch kollegiale Auffasungsweise in allen solchen Dingen ich

dean of the Law faculty in Strasburg that explained that Below himself had got in touch with the Faculty and with the local assistant, Dr. Bosch,[94] because he wished to leave Tübingen for health reasons, since he had contracted tuberculosis.[95]

The question, apparently clarified, was instead destined to go through further developments. A letter from Koschaker to Below, sent on 16th October 1942, explains what happened between his pupil and the Law faculty in Strasbourg.[96] The document clarifies that during a visit to Strasbourg, Below himself had expressed his concerns about remaining in Tübingen due to his health problems to the local assistant of the Law faculty, Dr. Bosch. Bosch talked with the dean of the faculty, Schaffstein, and during a later visit by Below to Strasbourg, he was offered a place as assistant there.[97] However, there was some misunderstanding between Koschaker and Below, since Below had apparently insinuated that he had received a formal request from the dean of the Law faculty in Strasbourg. This is why he had been criticised by Koschaker; on the contrary, Professor Dahm in Strasbourg maintained that all negotiations were still at a preliminary stage.[98] At the end of the first page, Koschaker tried to take a position on the entire affair:

> Ich bedauere die Entwicklung der Sache in Ihrem Interesse. Daß es mir leid tun würde, Sie zu verlieren, umsomehr als ich für Sie keinen Ersatz bekomme, kann ich nur wiederholen. Andererseits sollten Ihnen unsere bisherigen Beziehungen zur Genüge gezeigt haben, daß ich im Verhältnisse zu meinem Assistenten nicht oder auch nur überwiegend meine persönlichen Interessen in den Vordergrund stelle. Es wäre besser gewesen, wenn Sie mich von Anfang an von dem Stande Ihrer Verhandlungen genau in Kenntnis gesetzt hätten unter Hinweis auf Ihre gesundheitlichen Bedenken gegen Tübingen. […] Die Katalogisierungsarbeiten, die

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gar nicht genug rühmen kann." Note Moeller's words of praise for Koschaker's collegial way of thinking in all these kinds of matters.

94 On Friedrich Wilhelm Bosch (1911-2000), see Schäfer: *Juristische Lehre*, pp. 199 ff.

95 Typewritten two-page letter, sent on 2nd October 1942: UAT, 601/42. The dean of the Law Faculty in Strasbourg asked Moeller to agree with him that any member from Strasbourg could be considered responsible for unfair behaviour.

96 Handwritten three-page letter: UAT 601/42.

97 On Friedrich Schaffstein (1905-2001), member of the Nazi party from 1937 and of the *Kieler Schule*, together with his colleague in Strasbourg, Dahm, one of the most eminent supporters of the *nationalsozialistische Strafrechtslehre* (nationalsocialist Criminal law doctrine), see Eckert: *Was war die Kieler Schule?*, pp. 37-70; Manfred Maiwald: *Schaffstein, Friedrich*, in: *NDB* 22, Berlin 2005, pp. 541 f.

98 On this point the text reads: "Ob Herr Prof. Schaffstein mit Ihnen persönlich gesprochen habe, könne er bei der Fülle seiner Amtsgeschäfte sich nicht mehr besinnen. Es ist nicht leicht für mich Stellung zu nehmen. Ich hatte nach Ihren Mitteilungen angenommen, daß Ihnen vom Straßurger Dekan ein formeller Antrag gemacht wurde, - sonst hätte ich keinen Anlaß gehabt, sein Verhalten zu kritisieren -, und vielleicht waren auch Sie dieser Meinung, während nach dem Berichte Prof. Dahms die Angelegenheit sich noch im Stadium unverbindlicher Vorbesprechungen befunden hat, die natürlich vorerst geführt werden müssen."

> Sie noch in Tübingen zu machen haben, können kein Grund sein, Sie dort festzuhalten, und was den Index Interpolationum anlangt, so ist es zwar wünschenswert, aber nicht unbedingt erforderlich, daß Sie an demselben Orte arbeiten wie ich. Aber selbst wenn dem anders wäre, so würde das Interesse Ihrer Gesundheit vorgehen.

Koschaker indirectly criticised Below for the fact that he had not been informed from the very beginning, but ultimately, Koschaker felt sorry for his pupil given that Below's health was the prime concern in his decision to move to Strasbourg or not. Of course, Koschaker would be rueful about Below departing from Tübingen, for in addition to losing him, there would most probably be no replacement.[99]

The final lines of Koschaker's letter to Below deal with Below's decision to write his monograph for the *Habilitation* in Freiburg. Koschaker did not seem to be convinced that this was a good choice, as he would not have been able to supervise Below's work and take care of the preparation of his *Habilitation*. If Below went to Strasbourg, he would find a good Romanist in Dulckeit, wrote Koschaker, who could help him with his work.[100] This would not be the case in Freiburg, however. Therefore, if Below wanted to study and prepare in Tübingen before going to Freiburg for the *Habilitation*, he should feel free to do so, but he ought not expect any help from Koschaker:

> In Straßburg wären Sie zu einem vortrefflichen Romanisten, wie es Dulckeit ist, gekommen, der Ihre Habilitation hätte betreuen können. Ich bin dazu nicht mehr in der Lage. Ich könnte dies tun, wenn mir ein junger Romanist zur weiteren Ausbildung von einer anderen Fakultät geschickt wird. Hiervon abgesehen, muß ich es ablehnen, mich um eine Habilitation zu kümmern, die von einer anderen Fakultät geprüft wird […]. Sie können sich natürlich in Tübingen auf die Habilitation in Freiburg vorbereiten, aber Sie dürfen nicht erwarten, daß ich das Geringste tue, was als Übernahme einer wissenschaftlichen Mitverantwortung gedeutet werden könnte.

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[99] The reference to the *Index Interpolationum* is interesting; this very important work regarding the interpolations in Justinian's *Digest* had been inspired in Leipzig by the same Mitteis with whom Koschaker had worked. The preparation of the *Index*, however, was mainly down to the two editors, Levy and Rabel, the publication of the results beginning in 1929 and ending in 1935. See *Index interpolationum quae in Iustiniani Digestis inesse dicuntur. Editionem a Ludovico Mitties incohatam ab aliis viris doctis perfectam*, curaverunt E. Levy/E. Rabel, I-IV, Weimar 1929-1935. For a brief overview of this work, see Santos: *Brevissima storia*, p. 85. It would be interesting to gain more information on the kind of work that Koschaker was carrying out together with Below with regard to the *Index Interpolationum*, in particular because Koschaker, since the second half of the thirties, had become a strong critic of the *Interpolationenforschung*.

[100] On Gerhard Dulckeit (1904-1954), philosopher and jurist, see Kurt Ballerstedt: *Dulckeit, Gerhard*, in *NDB* 4, Berlin 1959, pp. 183 f. and Schäfer: *Juristische Lehre*, p. 103.

Koschaker also sent a copy of this letter to the dean, Moeller, as we can infer from the text that Moeller sent to Dahm on 20th October 1942.[101] In this letter Moeller explained to his colleague that there had been a misunderstanding and, therefore, he withdrew all his misgivings about the behaviour of the dean of Strasbourg, as stated in his previous letter to Dahm from 29th September 1942.[102]

Another document from the same year, dated 11th November 1942, sent from Koschaker to Moeller, attests that Below's health had got worse; he had tuberculosis and needed to ask for sick leave until Christmas 1942.[103] Koschaker expressed his deep sorrow for his pupil in this letter, who was still in Tübingen at the time and had not finished his doctoral thesis yet. Koschaker wrote that Below "mit seiner schon längst fälligen Promotion nun neuerlich zurückgeworfen wird." Koschaker also asked Moeller for a benevolent response to Below's request for sick leave.

A few other items of information about Below emerge from a couple of later letters. In a letter sent by Feine to Koschaker on 22nd November 1945,[104] Feine expressed his disapproval at Below's decision[105] to spend the winter semester in Freiburg. As Feine explained, it was not the first time that Below had said that he would be absent from Tübingen at the last moment. For this reason, his position as assistant had been cancelled for that winter and there was no certainty that he would be reinstated at the beginning of the following year.

Koschaker then had to find a person who could act as his assistant, as was stated in a letter sent to him by Feine on 16th January 1946.[106] At the same time, Feine hoped that Koschaker would return to Tübingen from Walchensee to hold his classes during the summer semester. At that time, Koschaker had almost retired in Walchensee and he was not always able to fulfil all his teaching commitments owing to his own health problems.

The last document to be taken into consideration with regard to Below is a letter by Koschaker to Feine; even though the letter had been sent on 27th February 1946,[107] it may well have been a reply to the one Feine sent to Koschaker on 6th February 1946.[108] At the

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101 Typewritten half-page letter: UAT, 601/42.

102 See above, p. 146.

103 Handwritten two-page letter (recto and verso): UAT, 601/42.

104 Typewritten one-page letter: UAT, 601/42.

105 We can indirectly infer that Koschaker also disapproved of Below's decision. The text reads: "Schon vorher war die Nachricht von Herrn Below bei uns eingetroffen, dass er diesen Winter in Freiburg zu bleiben gedenke. Auch ich bedauere das sehr, es ist freilich nicht das erstemal, dass er uns im letzten Augenblick für ein Semester im Stich lässt."

106 Typewritten one-page letter: UAT, 601/42.

107 Handwritten two-page letter (recto and verso): UAT, 601/42.

108 Typewritten half-page letter by Feine to Koschaker: UAT, 601/42. The short text states that Below had confirmed his intention to return to Tübingen. This meant he would be Koschaker's assistant in Tübingen again from April 1st, 1946. Koschaker's reply on 27th February shows how the situation changed very quickly. In Feine's letter two other questions were addressed to Koschaker: first, Feine wanted to know if Koschaker would allow his pupil to take his

end of the letter, Koschaker confirmed his willingness to hold a five-hour per week course on Roman law during the summer semester, as Feine had requested on 6th February. Once again, the text shows that Koschaker's pupil had decided not to teach Roman law classes in Tübingen during the summer. In response, Koschaker, apparently irked by Below's decision, wrote to the *Rektor* of Tübingen to inform him that post reserved for his assistant could be given to some other Chair that would need it. This passage of the text reads:

> […] Kurz, er hat dem Dekan in Freiburg mitgeteilt, daß er den ihm erteilten Auftrag, im Sommer eine romanistische Vorlesung neben seiner Tätigkeit in Tübingen zu halten, nicht aufnehmen könne. Damit hat sich mein letzter Brief an Sie erledigt und ich schicke Ihnen anliegend meinen Antrag an den Rektor, Below die mir vorbehaltene Assistentenstelle zu verleihen. In meiner Antwort gab ich Below zu verstehen, daß ich somit die Angelegenheit als erledigt ansehe und meine Wünsche sinerseits zur Folge [beten] würden, daß ich mich für seine Sache überhaupt nicht mehr interessiere.

The whole Below affair proved quite delicate, but the cause of the problems had been principally Below himself. Koschaker, who had initially shown concern for Below's position and health, eventually lost his patience with his assistant. At the end of the above-mentioned text we can also infer from Koschaker's harsh words that he was no longer interested in Below's affairs (his *Habilitation* in particular).

Developments concerning Wesenberg were much simpler.[109] A collection of documents conserved at the archive of the University of Tübingen show Koschaker's keenness for Wesenberg to conclude his work and complete his *Habilitation* with him in Tübingen. A letter by Koschaker, dated 2nd July 1943, whose addressee is unfortunately not indicated in the document, shows that Koschaker attempted to set a date for Wesenberg's *Habilitation*. In the meantime, Wesenberg divided his time between work in public administration and his teaching of Roman and Civil Law in Rostock, where the Chair had remained vacant.[110] Koschaker feared that the Law Faculty in Rostock would ask Wesenberg to stay for the winter semester meaning that he would run the risk of not completing his *Habilitation* in Tübingen, where he had been working on his monograph with Koschaker since the winter of 1941/1942. For these reasons Koschaker asked for the date of Wesenberg's qualifying examination to be fixed for around mid-October.

Habilitation in Tübingen; secondly, he asked if he would hold a Roman law course for five hours a week during the summer.

109 On Gerhard Wesenberg (1908-1957), see Kunkel: *Nachruf Gerhard Wesenberg*, in: *ZSS* (RA) 75 (1958), pp. 507-513; Fritz Schwarz: *Nachruf Gerhard Wesenberg*, in: *IVRA* 9 (1958), pp. 150-151.

110 Handwritten two-page letter by Koschaker (recto and verso), dated 2nd July 1943: UAT, 601/42.

The question had already been taken into consideration by the dean of the Faculty, Moeller, and the documents regarding Wesenberg had been forwarded to Merk.[111] From an exchange of letters between Koschaker and Merk that took place in October 1942, it is possible to infer that Wesenberg wished to have a period of research in Tübingen before commencing a new job in Belgrade, and that Merk had prepared and sent the documents to the dean.[112] The positive outcome of Wesenberg's (and Koschaker's) request was that he would spend some time in Tübingen, from the end of November 1942 to March 1943, where he worked on his *Habilitationsschrift*.[113]

Eventually, Wesenberg was able to complete his habilitation work on contracts in favour of third parties in Tübingen at the end of 1943.[114] Yet, the most interesting aspect of events regarding Wesenberg's examination was the content of his *Habilitationsschrift*. Koschaker's influence on this work seems clear, at least from a methodological perspective. His chosen topic focused on the development of contracts in favour of third parties not only in Ancient Rome, but also during the Middle Ages, through the elaboration of the Glossators and then of the Commentators, of the *usus modernus pandectarum* and up to the 19th century.[115]

The story of Pierre Pescatore, the third of Koschaker's most eminent pupils during his years in Tübingen, is in part different.[116] Pescatore was still a student when Koschaker

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[111] Typewritten one-page letter by Moeller to Koschaker, dated 18th September 1942: UAT, 601/42.

[112] Handwritten two-page letter by Koschaker to Merk, sent on 18th October 1942: UAT, 601/42. The reply by Merk in the letter sent on 20th October 1942, is analysed in the previous pages, see above, pp. 133 f.

[113] Letter by Koschaker, handwritten, one page long, dated 26th October 1942: UAT, 601/42. It is not possible in this case either to understand who the addressee was. A few further pieces of information on the course that led to Wesenberg's *Habilitation* in Tübingen can be found in a handwritten letter of Koschaker's, two pages long (recto and verso), dated 4th September 1943: UAT, 601/42, in which he tried to convince the dean, Moeller, to set the date for Wesenberg's examination in October of the same year. The dean replied on 18th September in a typewritten two-page letter (UAT, 601/42). From this document it emerges that Wesenberg had not already sent the dean his work at that time, whereas Koschaker had forwarded "ein imponierendes Gutachten" to Moeller.

[114] Gerhard Wesenberg: *Verträge zugunsten Dritter*, Weimar 1949.

[115] Koschaker's pupil's renowned work is Wesenberg: *Neuere deutsche Privatrechtsgeschichte im Rahmen der europäischen Rechtsentwicklung*, Lahr/Baden 1954 (then reworked from the second edition of 1969 onwards by Gunter Wesener and also translated into Italian and Spanish). One of the main features of the work is the part devoted to the history of legal dogmata (*Dogmengeschichte*). In this respect, it is again possible to see the influence of Koschaker's approach to the study of Roman law in European history on Wesenberg. Wesenerg also wrote a review of the two volumes in memory of Paul Koschaker which appeared in 1954, see Wesenberg: *Bespr. von L'Europa e il diritto romano, Studi in memoria di Paolo Koschaker*, in: *ZSS* (RA) 73 (1956), pp. 477-486.

[116] Pierre Pescatore (1919-2010) was born in Luxembourg and was one of the representatives of the government of this country during the negotiations of the Treaty of Rome. He served as judge of the European Court of Justice from 1967 to 1985. On Pescatore, see Ditlev Tamm: *The*

noticed him during his Roman law course in October 1943 while looking for a replacement for Below. This emerges from a letter written by Koschaker to Moeller, in which he praised the merits of the young Pescatore, adding that some other colleagues had a good opinion of him too. Eventually, he asked the dean if it would be possible to appoint him as his assistant, since Koschaker could not cope with the huge workload alone.[117] Feine, whom the dean had contacted about Koschaker's request, replied warmly on 20th October 1943,[118] explaining that Pescatore could be appointed as assistant upon completion of his *Referendarexamen*, namely from the 1st January 1944.[119]

The case of Pescatore is different from those of Below and Wesenberg as the latter neither became a Romanist nor a legal historian as was the case with Koschaker's other two pupils. Nonetheless, it is possible to affirm that thanks to his participation at the Treaty of Rome as a member of the government of Luxembourg and his brilliant career at the European Court of Justice, he indirectly represented another kind of link between the name of Koschaker and Europe.

4.6 The last years in Tübingen and the *Emeritierung*

Koschaker wrote a letter to the Minister of Education and Culture in January 1945, asking for sick leave, on account of the fatigue he felt due to his health problems,[120] to his age and to four years of hard work. As he said, he was now 66 years old, meaning that his

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History of the Court of Justice of the European Union Since its Origin, in: *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-Law – La Cour de Justice et la Construction de l'Europe: Analyses et Perspectives de Soixante Ans de Jurisprudence*, Den Haag 2013, pp. 9-35.

117 Handwritten two-page letter (recto and verso) by Koschaker to Moeller sent on 8th October 1943: UAT, 601/42. On the second page a few sentences dated 12th October have been added by Moeller, who forwarded Koschaker's letter to Feine, and there are also two remarks written by Feine on the same page, dated 20th October 1943. The text reads at the beginning: "[…] Ich habe nur einen Studenten, Peter [so in the text, instead of Pierre] Pescatore, der mir in der Vorlesung und Übung einen sehr guten Eindruck gemacht hat – wie ich dazu, haben auch einige Kollegen sehr freundlich über ihn geurteilt […]. Ich möchte ihn nun als Hilfsassistenten vorschlagen, weil ich unbedingt jemanden brauche, der mir bei der Arbeit in meinem von den übrigen Seminarräumen getrennten Seminar hilft."

118 Typewritten half-page letter from Feine to Koschaker: UAT, 601/42.

119 Koschaker could have two other persons at his disposal for the correction of student examinations: "Fräulein Oechslin wie auch Frl. Fritzle zur Verfügung stehen."

120 Koschaker attached a doctor's certificate testifying to his long-standing heart condition and he needed six-month sickness leave to recover. The copy of Doctor Wagenhäuser's certificate is dated 9th January 1945: UAT, 601/42. Koschaker wrote in his letter to the Ministry: "Ich verweise auf das beiliegende Zeugnis des Arztes, in dessen Beobachtung ich seit 3 Jahren stehe. Zwar leistet mein Herzmotor, wenngleich nicht mehr in normaler Weise, noch immer seine Arbeit, aber er ist beständig an der Grenze seiner Leistungsfähigkeit, so daß ich ohne schwere gesundheitliche Nachteile ihm keine außerordentlichen Leistungen mehr zumuten darf."

Emeritierung was approaching.[121] His request was strongly endorsed by the dean.[122] Koschaker clearly needed time to rest and quietly pursue his research, but shortly after, on 7th May 1945, Germany capitulated. The Nazi regime had come to an end, and on the same day, the dean of the *Rechts- und Wirtschaftswissenschaftlichen Fakultät*, Moeller, and the *Rektor* of the University of Tübingen, Otto Sickl, resigned.[123]

The Faculty decided to appoint Koschaker as the new dean, a role that he would occupy until 20th July 1946.[124] Taking on this new role was anything but easy for him, also on account of the fact that he was still in Walchensee in May 1945 and it took some months before he was able to move back to Tübingen. As he wrote in his letter to Guido Kisch on 27th November 1947:[125]

> Das Schlimmste kam aber erst 1945/1946. Ich war unglückseligerweise zur Zeit der Besetzung Tübingens durch die Franzosen hier, konnte erst nach Monaten zurück. Inzwischen war meine Wohnung durch die Franzosen requiriert worden, nachdem sie vorher von Deutschen tüchtig ausgeplündert worden war.

Not only was it difficult for him to return to Tübigen, because the Americans had withheld his pass due to some problems over connections with the French zone,[126] but his apartment in the city had been confiscated by the French, after it had been burgled by the

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[121] Typewritten two-page letter, sent by Koschaker on 12th January 1945: UAT, 601/42; on this document see also Neumann: *Paul Koschaker*, p. 29 and fn. 40.

[122] Typewritten one-page letter by Moeller to the *Rektor*, sent on 3rd February 1945: UAT, 601/42. According to the dean, Koschaker's lectures could be held by the two professors from Strasbourg who were in Tübingen at that time, Dölle and Erler. On Hans Dölle (1893-1980), who became a member of the Nazi party in 1937, see: Konrad Zweigert: *Nachruf auf Hans Dölle 1893-1980*, in: *RabelsZ* 44 (1980), pp. 421 f.; Martin Houbé: *Hans Heinrich Leonhard Dölle*, in: Mathias Schmoeckl (ed.), *Die Juristen der Universität Bonn im "Dritten Reich"*, Köln/Weimar 2004, pp. 137-158; on Adalbert Erler (1904-1992), see Hans-Jürgen Becker: *Adalbert Erler 1.1.1904–19.4.1992*, in: *ZSS* (KA) 79 (1993), pp. 559–561; Gerhard Dilcher: *Adalbert Erler 1.1.1904–19.4.1992*, in: *ZSS* (GA) 110 (1993), pp. 680–692.

[123] Otto Sickl (1897-1951) had been made *Rektor* on 1st November 1939. On Sickl, see Grüttner: *Biographisches Lexicon*, pp. 168 f.; Ernst Klee: *Das Personenlexicon zum Dritten Reich. Wer war was vor und nach 1945*[2], Frankfurt am Main 2007, p. 603.

[124] See the *Protokollbuch der Rechts- und Wirtschaftswissenschaftlichen Fakultät* dated 6th August 1946 (UAT, 315/72). On the decision to appoint Koschaker as the new dean, see the half-page typewritten letter sent by Feine to Koschaker on 26th July 1945: UAT 601/42.

[125] Kisch: *Paul Koschaker*, p. 23. On this letter by Koschaker, see also above, p. 83, and below, p. 158. This document has always been considered by scholars to be one of the preferred sources with regard to his experience in Tübingen. For a recent comment on this point, see Neumann: *Paul Koschaker*, p. 29.

[126] See the letter sent by Koschaker to the Faculty on 1st August 1945: UAT 601/42. Koschaker asked for some support to make it possible for his wife Helene and their housemaid Katherina Grober to come back to Tübingen too.

Germans.[127] In any case, Koschaker spent most of his time in his house in Walchensee, even though he could not gain access to all the books and literature he needed for his research when he was there.

Koschaker wrote an interesting handwritten letter in 1945 that offers us insights into his life at the time.[128] Unfortunately, it is not possible to trace who the addressee was, even though from the text it is reasonable to think that he was a member of the Law department of the Faculty in Tübingen.

The first lines of the letter read:

> Die Post von und nach Tübingen arbeitet jetzt nicht befriedigend (3-4 Tage). Daß ich über Below verärgert war, werden Sie verstehen. Die weiteren Aufklärungen, die er gab, lassen sein Verhalten verständlicher erscheinen. Er hätte aber mir seine Lage schildern sollen. Man hätte ihm auch in Tübigen helfen können. Mein weiteres Verhalten ist bestimmt durch die Nachricht, daß Pringsheims Rückkehr in Freiburg gewünscht wird. Daß er einer solchen Einladung folgt, ist mir sogar wahrscheinlich, wenn sich seine Stellung in Oxford, wie er sie mir von einigen Jahren, als er dorthin ging, noch in Berlin schliderte, und wesentlich verbessert hat. Wenn diese Rückkehr innerhalb der nächsten Jahre auch mir wahrscheinlich ist, hat Below m. E. sich bei Pringsheim zu habilitieren, und nicht bei mir.

The name of Below reappears in this document. It was apparent that at some point Koschaker had become angry with him once again, and Koschaker would not understand the reasons for Below's annoying behaviour until after receiving further clarifications from the latter. The problem was, Koschaker added, that if Below had talked to him earlier he would have found a more sympathetic ear in Tübingen. The precise nature of Below's troubles, however, cannot be inferred from the text.

The letter also tells us that Koschaker's colleague, Pringsheim, had been asked to return to Freiburg;[129] and his return to Germany was considered probable by Koschaker.

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[127] As Koschaker explains in a type-written two-page letter (recto and verso) to the State Ministry of Culture and Education of Württemberg sent on 6th October 1945 (UAT, 126/346a), his wife had become ill as a consequence of the troubles concerning their apartment in Tübingen. For this reason too, he had to ask for a period of leave of absence.

[128] Handwritten four-page letter (recto and verso), dated 2nd December 1945: UAT, 601/42.

[129] Koschaker explained in the text that Pringsheim himself had told him that he would have moved to Oxford, while they both were still in Berlin. Pringsheim actually returned to Freiburg at the end of the War, feeling it his duty to come back to his Homeland and participate in the reconstruction of the country. See Tony Honoré: *Fritz Pringsheim*, in: Zimmermann/Beatson (eds.): *Jurists uprooted*, pp. 105 ff. and p. 224, in particular; Jacob Giltaij/Ville Erkkilä: *An interview with Tony Honoré*, in: *fhi* (2015); the text can also be found online at http://blogs.helsinki.fi/found-law/files/2016/03/Giltaij-and-Erkkilä_An-interview-with-Tony-Honoré_2015.pdf.

For these reasons, according to Koschaker, Below ought to finish the work on his *Habilitation* in Freiburg with Pringsheim.

The letter then continues:

> Ich hoffe, im Sommer doch ein Unterkommen in Tübingen zu finden, und daher auch lesen zu können. Derzeit bin ich dabei, in einem Bericht an die Militärregierung meine Lage zu schildern, und hoffen, daß dies Eindruck macht. Aber da ich französisch schreiben muß, so wird es noch eine Weile dauern, ehe das Bericht fertig wird. An Arbeit fehlt es uns hier nicht und ich habe wieder das mir angenehme Gefühl, zu wenig Zeit zu haben. Derzeit diktiere ich mein Buch "Europäische Privatrechtswissenschaft und römisches Recht", das im Manuskript im Wesentlichen fertig ist, in die Maschine.
>
> Ich bin Ihnen sehr dankbar, wenn Sie für mich ankündigen: "Grundzüge des römischen Privatrechts als Einführung in das moderne Rechtsdenken" Mo-Fr. 9-10. Mit Rücksicht auf das kürzere Sommersemester werde ich um den Stoff halbwegs zu bewältigen, 6 Wochenstunden brauchen und hätte nichts dagegen sie auch anzukündigen.

Koschaker hoped to find accommodation for the summer in Tübingen and hold his classes there. He was willing to teach his course "Grundzüge des römischen Privatrechts als Einführung in das modern Rechtsdenken", foreseeing that he would have needed six hours a week to deal with the subject matter, since the summer semester was brief (it began in August that year). At that time, he was writing a report in French for the military government to explain his situation. As we can read, writing this report in a foreign language would take him a while. Yet, the most important information to be gleaned from the text is that he was working on a work entitled *Europäische Privatrechtswissenschaft und römisches Recht* and the manuscript was basically finished. Even though the title was a little different, it can reasonably be assumed that Koschaker was completing his masterpiece *Europa und das römische Recht* in December 1945.[130]

The letter then deals with some minor organisational aspects, mainly related to the lack of rooms at the *Juristisches Seminar*. As Koschaker had been informed by his assistant of that time, Kurth,[131] some of his colleagues had asked for rooms where they could work and also whether it was possible to use Koschaker's room, since he was not in Tübingen. Aware of the risk that some of his personal effects might be cleared out and

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[130] In another two-page typewritten letter, sent to the State Ministry of Culture and Education of Württemberg on 6th October 1945 (UAT 126/346a), Koschaker talked of a draft manuscript by the same title that he had to correct. On this letter, see also above, p. 150.

[131] The name of his assistant, Kurth, is confirmed for that period by another two-page handwritten letter (recto and verso) by Koschaker, dated 20th December 1945: UAT, 601/42.

that some of his personal things in his room needed to be protected, he consented to use of this space only in the case of extreme necessity. Yet his long text contains further information: Koschaker wanted to try to help an acquaintance who had been a judge for under the regime, Dr. Bernhardt from Dresden. In order to work in Nazi Germany, he had joined the party, even though he was not a national socialist, and therefore he had lost – at least temporarily – his job after the War and was at the time impecunious. He had asked the Ministry of Justice of Württemberg for a place, but the employment office offered him a job as a labourer instead (more precisely, as an *Erdarbeiter*) somewhere in Germany. Koschaker decided to intervene on his behalf and asked to have him as his assistant at the University. Bernhardt was not an academic, but had been a highly competent judge who had obtained a post as Counselor of the Court of Appeal (*Oberlandesgericht*) at the age of 40; Koschaker could clearly find work for him to do. He would need to prepare the documents to secure Bernhardt's place at the *Juristisches Seminar* and, above all, to get him away from the clutches of the employment office. Bernhardt was a good and honest man ("*ein anständiger braver Mann*"), and Koschaker could vouch for him:

> Da er 1937 in die Partei eintreten mußte, hat er zumindest vorläufig seine Stelle verloren und ist jetzt vollständig blank. Dafür, daß er gesinnungsmäßig kein Nationalsozialist ist, kann ich aufgrund langjähriger Bekanntschaft untertan. Er hat sich beim württ. Justizministerium schon im Oktober, bevor ich von seiner Anwesenheit in Bayern überhaupt wußte, um die Stellung eines juristischen Hilfsarbeiters zu bewerben. […] Inzwischen wurde er vom Arbeitsamt bedroht, der ihn irgendwo als Erdarbeiter einsetzen will. Für den Fall, daß seine Bewerbung beim württ. Justizministerium noch längere Zeit zu ihrer Erledigung brauchen oder gar abgewiesen werden sollte, dachte ich ihm vorübergehend zu helfen, indem ich ihn als Assistenten vorschlagen würde. Aber das ist noch nicht aktuell. Fürs erste handelt es sich darum, ihn dem Arbeitsamt zu entreißen. Dazu würde eine Erklärung auf einem amtlichen Papier oder mit Amtsstempel genügen des Inhalts, daß die Ernennung Dr. Bernhardts zum Assistenten bei dem juristischen Seminar in Aussicht genommen sei. […] Er ist kein Gelehrter, aber ein ausgezeichneter Richter, was dadurch bewiesen wird daß er, obwohl noch nicht der Partei angehörig, mit 40 Jahren Oberlandesgerichtsrat war. Derzeit ist er 53 Jahre alt. Daß er ein anständiger, braver Mann ist, dafür übernehme ich Gewähr.

Here one can appreciate Koschaker's concern over the destiny of someone he knew and how sympathetic he was towards him, even though the conditions of life were in general

very hard at the time.[132] In another letter dated 20th March 1946, Koschaker revealed the extent of his own suffering due to the shortage of food and how exhausted he felt. Given this, and the fact that he was now 67 years old, it was obvious to him that his teaching days were drawing to a close.[133] Koschaker complained about being undernourished (he talked of "Unterernährung") for six-and-a-half years and the miserable food rations – "Hungerrationen" – that people received in Tübingen (merely 1075 calories a day).[134] He also still had trouble with his accommodation. Yet despite all this, it was still possible for him to hold a Roman law course:

> Ich soll zufrieden sein, wenn ich meine romanistische Vorlesung durchhalte und möchte das gerne tun, weil es wahrscheinlich das letztemal sein wird, daß ich dieses Kolleg halte. Damit aber dürfte die Grenze meiner Leistungsfähigkeit erreicht sein.

Koschaker knew, however, that he had reached the limits of his efficiency and that the course for the summer semester would probably be his last.

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[132] Almost at the end, the letter reads: "Wir haben hier unglaublich schönes und noch sehr mildes Wetter mit wenig Schnee, weshalb das Wasser sehr knapp geworden ist. Die Wasserleitung arbeitet nur 2-3 Stunden im Tag. Gott verschone uns vom Feuer! […] die Kartoffeln werden dank der Hilfe einiger mitleidiger Sachen bis Ende März langen. Alles übrige ist sehr knapp, aber wenn wir von Krankheit verschont bleiben, so hoffen wir diesen Winter zu überleben." It is possible to compare this text to another of his letters, dated 20th January 1945 (UAT, 601/42): "Nach Einbruch strengen Winters hat seit einiger Tagen das Wetter zu Föhn umgeschlagen. Wir haben schon um 8 Uhr früh 10ºWärme und der Schnee schmilzt wieder. Die Kartoffeln, die wir nachgeliefert bekamen, sind leider zur Zeit des Frostes angekommen und erfroren. Die Sache hat ihren Vorteil. Zucker bekommen wir nicht, und da erfrorene Kartoffel süß schmecken, so haben wir glänzenden Ersatz für den fehlenden Zucker! Alles Gute für die Feiertage und mit herzlichen Grüßen und Dank zuvor."

[133] The handwritten letter is divided into two pages, even though the text is not long (UAT, 601/42). The text reads: "Ich mache nicht geltend, daß ich Kraft meines Lehrauftrags dazu nicht verpflichtet bin, wohl aber meine körperliche Leistungsfähigkeit. Nach 6½jähriger Unterernährung bin ich bei einem Alter von 67 Jahren nicht mehr so kräftig wie in Jüngeren und mußte in der letzten Zeit an Ermüdungserscheinungen, daß meine Leistungsfähigkeit zurückgegangen sei. Dazu 1075 Kalorien pro Tag, die man in Tübingen erhält. Da sind Hungerrationen. Die Sache ginge noch, wenn ich einen geordneten Hausstand hätte."

[134] On the problems connected to Koschaker's low pension of 350 RM and the difficulties in obtaining food after his *Emeritierung*, see his letter to Kisch from 27th November 1947. Kisch: *Paul Koschaker*, p. 24.

De facto, his role as full professor would have ceased at the end of September[135] and he became professor emeritus on 1st October 1946.[136] The events that took place regarding this moment of his life are well known, since the exchange of letters with Guido Kisch was published in 1970. In a letter dated 27th November 1947, Koschaker wrote about his *Emeritierung*:

> Anfang 1946 bekam ich vom Dezernenten einen Brief, der mir in unverhüllter Weise meine Emeritierung nahelegte. Entlassen konnte man mich nicht, weil ich politisch unangreifbar war. Der Grund war in der Tat ein zwingender. Ich war zwei früheren Nazis im Weg, die versorgt werden sollten. Für den einen genügt der Hinweis, daß er unter den Nazis Professor in Straßurg war. Der zweite (Erbe) war zwar nicht mein Schüler, aber ich hatte ihn als Schüler in Berlin von Rabel übernommen, ihn durch Doktor und Habilitation gebracht und in jeder Weise gefördert. Daß er bei der Partei war, hatte er mir verschwiegen. Nach der Kapitulation tauchte er in Berlin auf – er hatte unter den Nazis gute Karriere gemacht - und wurde dort von den Russen wegen seiner Zugehörigkeit zur Partei entfernt. […] So mußte ich als deklarierter Nazigegner, der schließlich auch einen gewissen Namen in der Wissenschaft hat, weichen zwei früheren Nazis, die weit weniger bekannt waren. So geschehen im Zeitalter der deutschen Demokratie und des deutschen Antifaschismus.

At the beginning of 1946 Koschaker received a letter from the head of department, in which his *Emeritierung* was openly recommended.[137] Indeed, the Faculty could not dismiss him because he was politically blameless, while two other scholars who were seeking positions at Tübingen were associated with the Nazi party. One such person was

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[135] Information from a copy of the typewritten letter sent by the *Staatssekretariat für das französisch besetzte Gebiet Württembergs und Hohenzollerns. Landesdirektion für Kultus Erziehung und Kunst*, dated 3rd September 1946: UAT, 601/42.

[136] See Kisch: *Paul Koschaker*, p. 23; Müller: *Paul Koschaker (1879-1951)*, p. 282; Giaro: *Aktualisierung Europas*, p. 99; Renger: *Altorientalistik*, pp. 480 f.; Wesener: *Paul Koschaker (1879-1951)*, p. 276; Neumann: *Paul Koschaker*, pp. 29 f.

[137] A very similar explanation emerges from a handwritten two-page letter (recto and verso) by Koschaker to his Faculty colleagues, dated 21st November 1946: UAT, 601/42. On the second page the text reads: "Aber ich muß doch folgendes sagen: ein Schreiben des Dezernenten vom Zweiten d. J. war ein consilium abeundi, der mir die Emeritierung nicht etwas als besondere Gunst gegenüber einem politisch kompromißreifen Professor nahelegte […]. Ich habe nicht den geringsten Zweifel, daß ich sofort hinausgeflogen wäre, wenn ich politisch um den geringsten Angriffspunkt geboten hätte. Da die nicht der Fall war, so mußte man auf die Emeritierung zukommen [...] und damit begründet werden könnte, daß ich nicht mehr fähig sei, anständige Vorlesungen zu halten. […]"

Erbe, who had made a good career under the regime, according to Koschaker's words.[138] Erbe had been considered Koschaker's pupil, but he had concealed the fact that he was a Nazi from Koschaker.[139] The other, as Neumann pointed out – and Kisch had earlier suggested – was a professor at Strasbourg, Dölle.[140]

It was a twist of fate for Koschaker that two former Nazis were appointed for a Chair at the University of Tübingen in 1946, precisely during a period when Germany was undergoing its denazification (*Entnazifizierung*). It was at this time that Koschaker, a self-proclaimed outspoken opponent of the Nazis, was recommended as a professor emeritus. As events transpired, Erbe would actually be the successor to Koschaker's Chair. Heinrich Mitteis had been designated by the Faculty as the only candidate for the post during the Faculty meeting on 25th/26th July 1946, but he accepted the Chair in Berlin instead.[141]

A new list of potential candidates was therefore prepared: in first place was Kunkel, in second place Genzmer, and third was Erbe.[142] However, Kunkel, who had already been appointed to the Chair at Heidelberg in 1941/1942 preferred to go there,[143] while

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[138] Koschaker's statement on Erbe being a Nazi are partly questioned by the contents of some archival documents preserved at *Landtagsarchiv* in Stuttgart and at the *Bundesarchiv* in Berlin (BA Berlin ZC 9011). These documents clearly show that Erbe and his wife had been put on trial for their dissident speeches against the regime and for having intercepted and listened to foreign broadcasts (indictable with high treason) after the assassination attempt against Hitler on 20th July 1944, but the trial had not finished at the end of World War II. See on these events Paul Feuchte: *Erbe, Walter*, in: Bernd Ottnad (ed.): *Baden-Württembergische Biographien*, II, Stuttgart 1999, pp. 107-110; Jens Thiel: *Der Lehrkörper*, pp. 503 f.

[139] As Koschaker explained, Erbe had been a pupil of Rabel, but he began to study and work with Koschaker when the latter moved to Berlin. He also wrote his *Habilitationsschrift* under Koschaker's supervision and he got the *Habilitation* in Berlin in 1940.

[140] See Kisch: *Paul Koschaker*, p. 23 fn. 14; Neumann: *Paul Koschaker*, p. 30 fn. 47.

[141] Grass: *Mitteis, Heinrich*, p. 578; on the faculty meetings for the call for Koschaker's replacement as well as those of two other professors, see the *Ausgang aus dem Protokollbuch der Rechts- und Wissenschaftlichen Fakultät*, dated 6th August 1946 (UAT 315/72; a copy of the document in French is attached too). A report on Heinrich Mitteis had been sent to the *Großer Senat* already on 31st July 1936. See also Neumann: *Paul Koschaker*, pp. 31 f.

[142] *Ausgang aus dem Protokollbuch der Rechts- und Wirtschaftswissenschaftlichen Fakultät*, on the first page. In the third attachment (*Anlage*) to the document, under the description of Kunkel, Genzmer and Erbe are quoted Koschaker's opinions on these scholars. The most interesting are those regarding Kunkel and Genzmer that read respectively: "K. steht unter den deutschen Romanisten in erster Linie. Wo immer er ein Problem des röm. Rechts anfasst….. erweist sich K. als ein origineller und gründlicher Denker, der die Wissenschaft fördert"; on Genzmer: "G. ist heute der erste deutsche Mediävist. […] Seine Darstellung der Entwicklung des Studiums des Römischen Rechts bis auf die Glossatoren in den Atti del Congr. ist erstklassig."

[143] See the letter by Kunkel to the dean of the *Rechts- und Wirtschaftswissenschaftliche Fakultät* of the University of Tübingen, typewritten and one page long, sent on 17th August 1946 (UAT, 315/72) that reads in the first lines: "Ew. Spectabilität und der Tübinger Fakultät danke ich für die grosse Ehre, die Sie mir dadurch erwiesen haben, dass Sie mich für die Nachfolge eines Mannes vom Range Paul Koschakers in Betracht gezogen haben. Der Fakultät ist wohl bekannt, dass ich erst in diesem Sommer, nach Ablehnung einer Rückberufung nach Bonn, mein Heidelberger Lehramt angetreten habe." On Kunkel in Heidelberg, see the exchange of letters between the latter and Levy in Dorothee Mußgnug: *Ernst Levy und Wolfgang Kunkel.*

Genzmer, who had been in Hamburg since 1940, became Dean of the Faculty there in 1946. This left only Erbe, who accepted the position as professor for Roman and Civil law. Erbe then was appointed Dean of the Faculty in the same year and later became *Rektor* of the University of Tübingen from 1948 to 1951.[144]

As a consequence of what he had endured, Koschaker replied negatively to a proposal from his Faculty colleagues to give lectures at Tübingen. His letter dated 21st November 1946, reads:[145]

> Sie werden aber verstehen, daß ich unter solchen Umständen in der Frage, ob ich eventuell noch einmal in Tübingen lesen soll und immerfort völlig zurückhalten muß. Aber nochmals Ihnen und den Kollegen herzlichen Dank für Ihr freundliches Gedenken.

Koschaker's frustration with events lends a bitter tone to his aforecited letter to Kisch in 1947 ("So geschehen im Zeitalter der deutschen Demokratie und des deutschen Antifaschismus"). But mention should be also made of the generally benevolent attitude of the members of the Faculty towards him.[146]

In a letter to the new *Rektor* of the University, Steinbüchel, on 24th October 1946, Koschaker confirmed that he had received all the documents regarding his *Emeritierung* and thanked Steinbüchel for his kind words.[147] An interesting aspect of the document is that Koschaker explained to Steinbüchel what happened when he was in Berlin with words that are very similar to those he used in his letter to Kisch, dated 27th November 1947.[148]

In any case, Koschaker fondly reminisced about his students and the time spent teaching in Tübingen:

Briefwechsel 1922-1968, Heidelberg 2005; see also Klaus-Peter Schroeder: *„Eine Universität für Juristen und von Juristen"*, pp. 146, 251, 321, 450 ff., 505, 555, 586-594.

144 Neumann: *Paul Koschaker*, pp. 31 f.

145 See below, p. 162, on this letter.

146 See, e.g., Stickl's short letter (half a page, typewritten) to Koschaker, sent by the *Rektor* on Koschaker's birthday, 19th April 1944: UAT 126/346a.

147 Handwritten two-page letter (recto and verso): UAT, 126/346a. The text begins: "Ich bestätige mit verbindlichstem Dank den Empfang der Urkunde über meine Emeritierung zum 1.10.1946 und füge die Empfangs-bestätigung diesem Schreiben bei. Ihnen, Magnifizenz, gebührt mein besonderer Dank für die so freundlichen Worte, die Sie mir zum Abschied widmeten."

148 This part of the letter to Kisch has been already discussed above, pp. 83 f. In the letter of 24th October 1946, Koschaker wrote: "1941 verließ ich Berlin mit consilium abeundi des nazistischen Rektors. Als ich schon in Tübingen war, erfuhr ich von der zuständigen Stelle, daß man alle meine sachlichen Wünsche erfüllt hätte, wenn ich nur nicht so ablehnend gewesen wäre."

> Seien Sie überzeugt, daß ich an meine Lehrsemester in Tübingen mit Dankbarkeit zurückdenke, insbesondere auch an die Studentenschaft, die es mir ermöglichte in 2½ Jahren die Besucherzahl der Vorlesungen mit Übungen meines im Parteiprogramm proskribierten Lehrfachs um 700% zu steigern.[149]

Koschaker expressed his gratitude for having been given a shelter in Tübingen where he could teach and do research,[150] and he went on to ask for a place to work at the *Juristisches Seminar*, having in mind to come to Tübingen two or three times a year and spend a couple of weeks there. Munich, close to Walchensee, where he had taken up residence since 25th February 1947,[151] was too much in ruins to work there.[152]

But another problem troubled Koschaker less than a year after he had become emeritus. Since he lived in Walchensee, in Bavaria, which was under the American rule, whereas Tübingen was under the French government, his remuneration as professor emeritus would no longer be paid by the University of Tübingen from 31st March 1947 onwards, according to a French regulation.[153] Nor was it clear which institution would be responsible for paying Koschaker's benefits. As Koschaker wrote in a letter sent to the State secretariat (*Staatssekretariat*) of Württemberg responsible for Education on 25th March 1947, the reduction of almost three quarters of his salary as emeritus made the *Emeritierung* a farce:

> Ich schliesse zur Wahrung meines Rechtsstandpunkts den Protest gegen die Kürzung meiner Bezüge als emeritierter Professor um fast 3/4 ihres Betrages an. Sie macht die Emeritierung zu einer Farce, weil sie die Mittel verweigert, meine

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149 On the huge increase in the number of students who attended his classes, see above, pp. 132 f.

150 "Umso dankbarer war ich für die Zufluchtstelle, die ich für Lehre und Forschung in Tübingen fand."

151 Neumann: *Paul Koschaker*, p. 33.

152 "2. bat ich um Zusicherung eines Arbeitsplatzes in meinem früheren Seminar. Meine wissenschaftlichen Arbeiten werden es erfordern, daß ich 2-3 mal im Jahre auf 2-3 Wochen nach Tübingen komme, um dort die Unversitäts- und Institutsbibliotheken an Ort und Stelle zu benützen. Das nahe gelegene München ist zu zerstört, als daß für die nächsten Jahre solche Arbeit in Bequemlichkeit durch-geführt werden könnte. Eine solche Bitte scheint überflüssig, da ich aufgrund der Emeritierung nur von den Vorlesungen befreit bin."

153 See the copy of the three-page typewritten letter sent by Koschaker to the *Staatssekretariat, Landesdirektion für Erziehung und Unterricht* on 25th March 1947: UAT, 126/346a. The text starts: "Ich erhielt von der Landesdirektion der Finanzen, Kassen- und Rechnungsabteilung ein Schreiben vom 15.3.1947, V-4, in dem mir eröffnet wurde, dass die Auszahlung meiner "Versorgungsbezüge", d.h. des Gehalts, das mir als emeritierter Professor zusteht, auf 31.3.1947 bis auf weiteres eingestellt werde. Begründet wird dies mit einer "in der französischen Zone allgemein gültigen Anordnung", für die weder ein Datum, noch die Stelle angegeben wird, wo man sie finden kann, wonach "Versorgungsbezüge" nur an diejenigen Versorgungsberechtigten bezahlt werden können, die im Landesgebiet wohnen, während ich nunmehr unseren ständigen Wohnsitz in Walchensee (Oberbayern), d.h. in der amerikanischen Zone habe."

> wissenschaftliche Arbeit fortzusetzen, welchem Zwecke die Emeritierung dienen soll.

Koschaker, however, would partly solve the problem of the benefits thanks to an invitation to act as visiting professor in Munich during the summer of 1947.[154]

Despite these events, he was able to hang on to some positive memories of his time in Tübingen from 1941 to 1944, as emerges from a letter written on 21st November 1946:

> Ich möchte Ihnen und meinen Fakultätskollegen für die so freundliche Erinnerung, die Sie mir bereitet haben, aus ganzem Herzen danken. Seien Sie überzeugt, daß mir Tübingen 1941-1944, obwohl sich allmählich auch hier der Krieg bemerkbar machte, eine wahre Oase war und ich es keinen Augenblick bedauert habe, von dem preußischen Zentrum an die Peripheria gezogen zu sein […].

Koschaker referred to Tübingen between 1941-1944 as an oasis, even though all around war raged, and he never regretted leaving Berlin (*das preußische Zentrum*) to move to the province. This opinion, as well as the one contained in a previous letter dated 24th October 1946, not only soften, but in part contradict the contrasting opinion expressed in the letter to Kisch dated 27th November 1947:[155]

> Ich war zunächst sehr gerne in dieser schönen Stadt [Tübingen], und doch muß ich heute zurückblickend sagen, daß es ein Fehler war. Man soll nie von einer großen an eine Provinzuniversität gehen, an der man als »Bonze«, der ich gewiß nicht bin, von den kleinen Leuten scheel angesehen wird. Das merkte ich alsbald, obwohl ich niemandem etwas tat.

In that letter, Koschaker defined his decision to leave the University of Berlin and move to Tübingen as a mistake. It was only initially that he felt comfortable in this small city, whereas later he understood that there he was considered an important man of the regime (*Bonze*) by narrow-minded people who looked upon him with malevolence. Koschaker felt particularly annoyed by this, probably because he had continuously attempted to emphasise through his works and letters that he had been a fierce opponent of the regime from the end of WWII onwards. He insistently highlighted his stance as an anti-Nazi and expressed sorrow that he could have been somehow considered close to the regime. For

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154 See below, p. 164.

155 See also the brief remark by Koschaker in another letter sent to Kisch from Ankara, dated 27th June 1949: "Ich bekam auch von allen möglichen Seiten Gratulationen, sogar von Tübingen, wo ich mich nicht gerade unter freundlichen Umständen verabschiedet hatte." See Kisch: *Paul Koschaker*, p. 45 (letter nr. 17).

reasons such as these, his time as professor emeritus wore him down. Yet despite the trouble that he had with his *Emeritierung*, the difficulties over his apartment and supplies – all problems that had litte to do with the University or the city of Tübingen – it is still true to say, though, judging from documentary evidence, that he did not find his situation in Tübingen too unpleasant until 1947. Over time, however, his judgment on this small provincial city and his experiences there seemed to become more uncompromising, to such an extent that he asserted in 1947, in his retrospective view, that moving to Tübingen had been a mistake ("ein Fehler").

In general, Koschaker suffered from many of the post-war hardships as other Germans had also done, but it is difficult to say whether these conditions somehow influenced his opinion of his years in Tübingen.[156] His bitterness is quite evident from another letter to Kisch dated 17th July 1948.[157] As Koschaker wrote to his pupil, he could not bear that persons who had previously been Nazis could now go ahead undisturbed as the new democrats, taking up important functions and posts, whereas he had been "thrown onto the rubbish heap" as if he was an old idiot.[158] On another occasion, again in a letter to Kisch, he stated that his situation had not been particularly fortunate under the Nazis, but the neo-Nazis "wearing the clothes" of the antifascists were even worse than the Nazis.[159] It appears likely that these negative remarks were mainly addressed to what happened in Germany subsequently, and did not affect his experiences during the years he spent in Tübingen. During that period Koschaker had found shelter for himself and his wife Helene,[160] devoting his time to teaching and scientific reflection, and eventually obtaining some degree of personal satisfaction.

156 Looking only at the archival sources, the answer to this question would be negative.

157 Kisch: *Paul Koschaker*, p. 36 (letter nr. 12).

158 "Was habe ich mit dieser Haltung erreicht? Von meinem Platze weggedrängt, nicht etwa durch die Nazis, sondern von »Demokraten« zugunsten früherer Nazis, von den anderen Universitäten auf den Mist geworfen als »alter Trottel« trotz meines Namens, während man bedenkenlos frühere Nazis einstellt, wenn sie nur jünger sind, mein Mobiliar verloren und was mit meinem Berliner Hause geschehen wird, wissen die Götter."

159 Koschaker to Kisch, letter from 10th April 1948: "Es ging mir unter den Nazis nicht gerade gut. Aber die Neonazis im Gewande von Antifaschisten sind noch schlimmer." Kisch: *Paul Koschaker*, p. 28 (letter nr. 8).

160 As he wrote in his autobiography, he followed his instinct for self-preservation. He was also unsure whether his nerves could have taken the hell of shelling that had began in Berlin in 1943. Koschaker: *Selbstdarstellung*, p. 118.

Koschaker was asked to act as visiting professor in Germany immediately after he became professor emeritus.[161] In spite of the complications with his *Emeritierung*, his prestige was still remarkable. He was firstly asked to give lectures in Munich in 1947.[162] In a letter sent by a colleague of Koschaker's in the Law department, whose name cannot be deciphered from the signature, the Faculty in Tübingen did not appear particularly pleased that Koschaker would hold a course in Munich during the summer of 1947.[163] Nevertheless, it is clear from the document that teaching in Munich would be a better solution for Koschaker than returning to Tübingen. Here, we should remember that Koschaker was living in American-controlled Walchensee at the time, and that the University of Munich would be paying Koschaker's benefits as emeritus.[164] Therefore, the Faculty at Tübingen was willing to accept any decision that Koscahker proposed on this question. However, had he not decided to go to Munich, the Faculty would have offered him the possibility of teaching a course in Roman law in Tübingen during the summer, but Koschaker eventually accepted the offer coming from the University of Munich.

After the invitation to Munich, another followed from Halle an der Saale for the summer of 1948 and later, from the fall of same year until August 1950, he was invited to Ankara. These two experiences were the most significant for Koschaker, who wrote to his pupil Kisch on 24th May 1948:

> Denn Frau Germania ist in Ansehung ihrer Universitäten zumindest in den Westzonen, wo man den Deutschen mehr freie Hand läßt, weitgehend renazifiziert. Natürlich sind diese Professoren alle tief überzeugte Demokraten und waren es seit jeher, Nazimokraten nenne ich sie. Wie es in der Ostzone aussieht, weiß ich nicht, werde

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161 Below: *Paul Koschaker*, p. 4; Müller: *Paul Koschaker (1879-1951)*, p. 282.

162 See the documents conserved at the Universitätsarchiv München, *Personalakte des akademischen Senats*, E-II-02093.1-7. The documents confirm that Koschaker was asked to give lectures in Civil law and Civil law procedure (E-II_02093.1) and that he received a housing benefit (E-II-02093.3) and was paid by the University of Munich for the course he held there (E-II-02093.6-7).

163 Typewritten half-page letter, dated 28th January 1947: UAT, 601/42; the signature is perhaps Feine's, although this is unlikely as Feine was removed from his post by the French government at the end of 1946.

164 See the typewritten half-page letter of the Ministry for Education and Culture (*Staatsministerium für Unterricht und Kultus*) of Bavaria, sent to the *Rektorat* of the University of Tübingen on 21st March 1947: UAT, 601/42: "Professor Dr. Paul Koschaker ist emeritiert, aber noch in der Lage, Vorlesungen zu halten. Er wäre bereit, an der Universität München zu lesen, wenn die Frage seiner Bezüge günstig geregelt wird. Ich bin nicht abgeneigt, ihn hier einzusetzen und für die Dauer des Einsatzes seine vollen Bezüge zu übernehmen". Compare also the copy of the letter sent by the dean, Erbe, to *Rektor* Steinbüchel on 17th April 1947: UAT, 126/346a. From the text it is possible to infer that the regulation regarding the payment of salaries and benefits to the people living in the American zone would shortly be changed, but there were no longer concerns for Koschaker at that moment, since he would be paid by the University of Munich.

> ich Ihnen aber vielleicht berichten können. Es wird Sie interessieren, daß ich wahrscheinlich in den nächsten Tagen nach Halle fahre, wo man mich unter sehr angenehmen Bedingungen eingeladen hat, für den Sommer eine Gastprofessur für römisches Recht zu übernehmen. Es ist die einzige deutsche Universität, die mir zu erkennen gab, daß sie mich als Nazigegner brauchen könne, und deswegen habe ich die Einladung angenommen. […] Im Herbst will ich dann auf ein Jahr einer Einladung nach Ankara folgen, um dort über römisches Recht zu lesen. Ich habe mich über diese Einladungen gefreut, aber faktisch bedeuten sie für mich unter den heutigen Verhältnissen in Deutschland doch eine Art Emigration.

Koschaker talked of the events that took place in the Western part of "Frau Germania" with disdainful criticism, where universities were undergoing renazification. Professors who were former Nazis were now the "new democrats", or what Koschaker called "Nazimokraten". Koschaker, once an esteemed professor, was now faced with what he proclaimed as a form of exile, having accepted the invitation to Halle and then to Ankara.[165] Nevertheless, the invitation he received from the University of Halle to hold a course on Roman law there in the summer was propitius. What sounds remarkable is that Halle was the only university in Germany that seemed to want him as a visiting professor and recognise him as an opponent of the Nazi regime. Koschaker considered the University in Halle as the best "kept" in Germany ("die beste verpflegte Deutschlands") and not only in Eastern Germany, even though its buildings had been partly bombed and the university library was ruined.[166]

After his experience in Halle, it was the time to move to Turkey. The establishment of Turkey as a Republic took place under Atatürk in 1923, and the consequent opening of the country to the West led to a reform in teaching at the University with Roman law introduced as a subject for the first time.[167] European scholars saw it an opportunity to find positions there, and for many of Jewish origins Turkey had represented a chance to escape from the brutality of the Nazi regime and find shelter. Thus, for example, Koschaker's colleague and friend from the years in Leipzig, Landsberger, fled the

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[165] In the letter to Kisch from 17th July 1948, Koschaker talked of a peregrination: "Jetzt in meinen alten Jahren, da ich hoffte, noch einige Arbeiten abschließen zu können, muß ich auf Wanderung gehen." See Kisch: *Paul Koschaker*, p. 36 (letter nr. 12).

[166] Letter by Koschaker to Kisch sent from Halle on 16th June 1948. Kisch: *Paul Koschaker*, p. 30 (letter nr. 10).

[167] Mustafa Kemal Pascha, since 1934 known by the name Atatürk (1881-1938), was the founder of the Turkish Republic, born after the fall of the Ottoman Empire. He was the first president of the Republic until his death. On the reform of teaching and the new role of the study of Roman law in Turkish universities from 1923 onwards, see Bahar Öcal Apaydin/Marco Franchi: *L'importanza e la metodologia del corso di diritto romano nella formazione del giurista dall'impero ottomano ad oggi*, in: Isabella Piro (ed.), *Scritti per Alessandro Corbino* V, Tricase 2016, pp. 277-300.

persecutions and found a post in Ankara.[168] Concerning Roman law, the most famous scholar who moved there during the Nazi regime was Andreas Bertalan Schwarz, who left Germany as early as 1933.[169] He taught both Roman law and comparative law in Istanbul, where he remained until his death in 1953. Afterwards, the course in Roman law was held by Giovanni Pugliese in 1954 and 1955.[170]

New doors of opportunity opened to Roman law scholars who moved to Turkey at that time: with their ideas, their methodology and their teaching they could influence new generations of young jurists and legal scholars and aim to lay down the foundations for the new legal thinking that would be developed in Turkey.[171]

Koschaker left Germany to teach in Ankara in the fall of 1948, with Schwarz playing a role in convincing him to depart for Turkey.[172] It was, however, unfortunate that his friend Landsberger had left the city the same year and before Koschaker arrived in Turkey.[173] Koschaker considered his experience in Turkey a positive one and he remembered the other professors and students there with gratitude, who above all, were so open to Roman law and such talented legal thinkers in general.[174]

In a letter sent from Ankara to his colleagues in the Faculty at Tübingen, a reply to the birthday wishes that he had received, Koschaker wrote:[175]

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168 On Landsberger, see above, p. 48, fn. 91.

169 On Schwarz, see above, p. 44, fn. 71; *adde* also Öcal Apaydin/Franchi: *L'importanza e la metodologia*, pp. 288 ff., for further literature.

170 Ibid. On Giovanni Pugliese (1914-1995), a very influential Italian Roman law scholar of the 20th century and a supporter of the comparative method in legal history studies, there is a vast literature. In these main works further bibliographies can be found: Andreas Wacke: *Giovanni Pugliese* †, in: *ZSS* (RA) 113 (1996), pp. 741-746; Letizia Vacca (ed.): *Diritto romano, tradizione romanistica e formazione del diritto europeo. Giornate di studio in ricordo di Giovanni Pugliese*, Padova 2008; Carlo Augusto Cannata: *Pugliese, Giovanni*, in: Italo Birocchi/Ennio Cortese/Antonello Mattone/Marco Nicola Miletti (eds.): *Dizionario biografico dei giuristi italiani (sec. XII–XX)*, II, pp. 1637-1640. On his experience in Turkey, see Giovanni Pugliese: *Lettera da Istanbul*, in: *Labeo* 1 (1955), p. 376.

171 Yet the Turkish Civil Code enacted in 1926 was based on the model of the Swiss Civil Code.

172 Letter to Kisch 21st August 1948. Kisch: *Paul Koschaker*, p. 41 (letter nr. 14). On 28th August 1948, Koschaker also wrote a handwritten two-page letter to Riccobono, saying he would leave for Ankara in October. In the same letter, he confirmed to his colleague that he would take part in the *Congresso internazionale di diritto romano e di storia del diritto* in Verona from 27th to 29th September of that year.

173 Kisch: *Paul Koschaker*, p. 41 (letter nr. 14): "Traurig macht es mich, daß just in dem Moment, da ich nach Ankara kommen werde, Landsberger, auf den ich mich persönlich und wissenschaftlich besonders gefreut hatte, die Stadt verläßt. Das Parlament hat seinen Lehrstuhl als Luxus aufgehoben und so geht er zunächst auf ein Jahr nach Chicago."

174 Koschaker: *Selbstdarstellung*, p. 118.

175 Handwritten one-page letter, sent on 1st May 1949: UAT, 601/42.

> Wenn ich das erforderliche Pathos besässe, könnte ich fast sagen, ich hätte hier eine Mission zu erfüllen, indem ich Hunderten von türkischen Rechtsstudenten, die Prinzipien des römischen Rechts beizubringen versuche.

Koschaker was now seventy, but still passionate about Roman law and its teaching. In particular, he seized the opportunity to teach the principles of Roman law to his Turkish students, and in this he was coherent with the scientific development of his ideas that culminated in the publication of *Europa und das römische Recht*. This is not the only publication in which Koschaker dealt with the need to teach the principles of Roman law, as a letter to his colleague and friend Riccobono shows.

The text, sent from Ankara on 11th April 1949 and handwritten in Italian, reveals his remarkable command of the language.[176] Koschaker apologised first of all for his late reply to Riccobono's letters.[177] In this dense four-page letter, he explained that he had been suffering from a sort of draining tiredness for some months, but had not – or apparently had not, we may add – any serious disease. His health problems, he felt, were probably due to the extremely cold winter in Ankara.

Koschaker discussed many different topics in his letter, some of them of particular importance to his conception of Roman law.[178] In one part of the text, he praised his Turkish students for their passionate interest in the study of Roman law. It was clear, he wrote, that they had no preconceptions about it (when compared to Germans)[179] and they were hugely respectful towards their professors. Furthermore, from his experiences in Ankara, Koschaker found confirmation for his ideas on the teaching of Roman law:

> […] Ho trovato, del resto, confermate le mie idee circa l'insegnamento del diritto romano. Va da sé che come fenomeno storico il diritto romano non può essere insegnato che storicamente, ma da punti di vista dommatica [sic!]. Ciò che importa sono i concetti romani, la connessione fra loro ed in quanta misura sono passati nei sistemi moderni, trasformati e nondimeno mantenuti in sostanza.[180]

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176 Varvaro points out on the basis of archival documents that Koschaker wrote to Riccobono in German until his *Emeritierung* in 1946; after he became emeritus, he wrote to his colleague in Italian. See Varvaro: *La 'antike Rechtsgeschichte'*, p. 312.

177 "Io sono un gran peccatore. Davanti a me sono le Sue lettere del 28. Dicembre 1948! e del 6. Marzo 1949, rimaste finora senza risposta."

178 For this reason, another part of the letter will be analysed below, chapter 5, pp. 242 ff.

179 "Così si può fare qualche cosa tanto più perché gli studenti turchi non hanno dei preconcetti contro il diritto romano."

180 My ideas on Roman law teaching have been indeed confirmed. Of course, Roman law as a historical topic should be taught with a historical approach, but from a dogmatic perspective. What really matters are the Roman concepts, their inner connections and to what extent they have been transmitted into modern legal systems, albeit transformed but nonetheless preserving their very essence. Therefore, I use as a basis [for teaching] the modern dogmatic legal system. History is everywhere (Editor's note: my translation).

This short passage sums up some methodological questions that have distinguished the development of Koschaker's approach to the study of Roman law over the decades. For this reason, these issues will be explored in more detail in the following chapter.[181] In Turkey Koschaker eventually had the opportunity to apply his ideas on teaching without any kind of obstacle and once again he remained persuaded that they were right. According to Koschaker, it was imperative to explain that the principles of Roman law represented the foundation stones of the Western legal tradition. Only for this reason was it possible to make a comparison between historical and modern legal systems. Given the vocation of educating young students to become the jurists of the future, Koschaker insisted on the fundamental value of the pedagogical role of Roman law. In exploring the Roman principles as a cornerstone also to future Western legal science and legal systems, Koschaker identified the mission of Roman law. He saw himself as the harbinger of this tradition and Roman law; he now had the opportunity to carry out his mission in Ankara, where the students were ready to hear his words. One of his Turkish pupils was Kudret Ayiter, who taught Roman law in Ankara after Koschaker up until 1982, his lectures being deeply influenced by the dogmatic approach of his master.[182] Ayiter also translated the German version of the textbook Korshaker prepared for his lectures into Turkish.[183]

Koschaker only wrote one other letter to Riccobono from Turkey, as far as we know, a postcard, handwritten and dated 10th June 1950. He simply mentioned his forthcoming journey to Naples on 26th June and then to Munich via Rome. He added that the American government had granted him a passport to visit Berlin, where he thought he might spend the festivities.[184]

Despite the very positive experience at the university and with the students, it was not easy for Koschaker to accustom himself to the weather in Ankara, as it is possible to infer from the letter to Riccobono from 11th April 1949, and further from a letter sent to Kisch

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181 See chapter 5, § 11.

182 On Kudret Ayiter (1919-1986), see Öcal Apaydin/Franchi: *L'importanza e la metodologia*, p. 292.

183 Paul Koschaker/Kudret Ayiter: *Roma Ozel Hukukunun Ana Hatları*, Yayınları İzmir 1993. I was able to get a copy of the original version in German of Koschaker's draft of the manuscript entitled *Grundzuege des roemischen Privatrechts als Einfuehrung in das moderne Privatrecht*. I will return to this work by Koschaker below, chapter 6, § 3. I would like to thank my colleagues Dr. Aleksander Grebieniow (University of Warschau) and Prof. Marko Petrak (University of Zagreb) for making available a copy of the text.

184 Koschaker had kept his house in Berlin after the end of the war. See his letter to Kisch from Ankara, dated 27th June 1949, Kisch: *Paul Koschaker*, p. 45 (letter nr. 17). Kisch wrote in footnote 32, *loc. cit*., that Koschaker meant his house in Leipzig, which was the one that only Kisch knew about. However, if we compare this letter with other documents, it seems reasonable to affirm that Koschaker really meant Berlin and not Leipzig. From the text we learn that he lost almost everything he had in Tübingen, with the exception of his library.

on 6th May 1949.[185] In this letter, he stressed once more the tiredness he suffered in Turkey, probably due to the climate and the freezing winter there. He was therefore taking into consideration the possibility of coming back to Germany in the fall, and there was moreover a serious dearth of scientific literature in Ankara, which made it harder to work there, although the Turkish people would have been really pleased to have him stay. In a letter sent to Kisch on 27th June 1949, Koschaker explained that he would return to Germany on 7th July and that he still had doubts about spending a second year in Ankara. His letter to Riccobono of 10th June 1950, and another letter to Kisch,[186] however, show that he did in fact stay longer.

A letter sent by Koschaker from Walchensee on 7th September 1950 reveals his retrospective thoughts on Ankara.[187] Koschaker first came back to Germany in July 1949, but he decided to return to Turkey in October of the same year where he renewed his contract with the university, but with a definite end date of 31st August 1950. This was the decision that Koschaker and his wife had taken, even though the faculty at Ankara would have liked to have kept him there for another year. His determination to come back to Germany was not due to homesickness, but because he felt the moment had come to end his teaching, though not his research.[188] It was important for Koschaker to retire while he was still a beloved professor and his retirement could be seen as a sad event:

> […] die Erwägung, daß man sich von öffentlicher Tätigkeit zurückziehen soll, solange man noch auf der Höhe der Leistung steht und der Rücktritt bedauert wird. Das war bei mir noch der Fall, und es gehört zu meinen schönsten Erinnerungen an Ankara, daß ich einer der beliebtesten Dozenten war, obwohl ich nur deutsch, allerdings mit einem ausgezeichneten Dolmetscher vortragen konnte […] Es ist ja begreiflich, daß sich Kollegen ärgerten, wenn sie hörten, daß ich noch im Mai, da sich die Studenten auf die Jahresprüfungen vorbereiten und die Vorlesungen meiden, statt der normalen 500, noch immer gegen 300 Zuhörer hatte, während jene 20-25 Leute hatten. Ich hatte aber noch niemals Studenten, die so dankbar

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185 Id.: *Paul Koschaker*, p. 42 (letter nr. 15). Koschaker wrote at the end of the letter: "Hier werde ich sehr gut behandelt. Aber auf die Länge der Zeit bekommt mir das Klima nicht. Nicht, daß ich krank wäre, aber ich habe seit Monaten mit beständiger Müdigkeit zu kämpfen, die mich zeitweise fast arbeitsunfähig macht. So werde ich wahrscheinlich zum Herbst kündigen und nach Deutschland zurückkehren, so wenig schön es dort ist und so gern mich die Türken länger behalten würden. Außerdem sind die wissenschaftlichen Arbeitsbedingungen zufolge Mangels an Literatur sehr schwierige."

186 Id.: *Paul Koschaker*, p. 46 (letter nr. 17).

187 Ibid.: pp. 46 ff. (letter nr. 18).

188 Kisch: *Paul Koschaker*, p. 47 (letter nr. 18): "[…] am 1. Juli dieses Jahres [1950] endgültig nach Deutschland zurückgekehrt, nicht weil meine Sehnsucht nach diesem Lande bei den heutigen Verhältnissen eine besondere große wäre, sondern weil ich den Zeitpunkt für gekommen erachtete, mich endgültig, und zwar diesmal freiwillig, vom Lehramte, nicht von der Forschung, zurückzuziehen."

> waren, daß ich ihnen die Elemente des juristischen Denkens beibrachte an Hand des römischen Rechts […]

Koschaker confirmed his very positive judgment of Turkish students in the text, expressing surprise that they would be so grateful to learn the principles of legal thinking through classes in Roman law. As he explained a few lines later, the students, influenced by the Islamic tradition, considered the professor to be like a demi-god.[189] He was one of the most appreciated and respected teachers there, even though he could teach only in German and therefore always needed an interpreter with him. Whereas all his other colleagues had only about 20-25 students in their classes as it was the examination period and students tended to avoid going to lesson then, he still had an attendance of almost 300 students with an attendance during normal term time of as many as 500. However, the poor libraries in Turkey still represented a problem and he had to use his summer holidays in Germany in 1949 working on and finishing a contribution to the *Festschrift Hrozný*.[190] When he returned to Turkey that same year he was extremely weary and the heart problem that he had had for 55 years, the result of rheumatism, ultimately led to heart failure.[191]

Koschaker's letter to Kisch, dated 10th March 1951, shows that his heart attack took place in spring 1950 during a journey from Ankara to Istanbul.[192] He was able to recover, however, and by May felt well enough so that in summer 1950 he travelled to Greece, then to Berlin for the 250th jubilee of the Academy of Berlin and eventually to the International Congress for Comparative Law (*Internationaler Kongreß für Rechtsvergleichung*) in London.[193]

After his experience in Turkey, Koschaker still had the will and strength to hold lectures and in January and February 1951 he was invited to Bonn, where he gave lessons

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189 Ibid.: "Sie lieben Debattieren über alles. Endlich noch die islamische Tradition, die aus dem hoca, »Lehre«, einen Halbgott macht. So hatte ich in der Türkei eine angesehene Position, wurde mit einem Respekt behandelt, wie noch niemals in meinem Leben."

190 Koschaker: *Eheschließung und Kauf nach alten Rechten, mit besonderer Berücksichtigung der älteren Keilschriftrechte*, in: Václav Čihař/Josef Klíma/Lubor Matouš (eds.): *Symbolae ad studia orientis pertinentes Frederico Hrozný dedicatae*, IV, Prag 1950, pp. 210-296.

191 Kisch: *Paul Koschaker*, p. 48 (letter nr. 18): "Aber jene Überarbeitung hatte leider Folgen. Seit 55 Jahren leide ich als Folge eines Gelenkrheumatismus an einem Herzfehler, den ich bisher kaum gespürt hatte und der sich zum ersten Male in Ankara, dessen reine und trockene Luft bei 900-1000 m Höhe mir sehr gut bekam, in Gestalt von sogenannten Dekompensationen der Herzfunktion bemerkbar machte."

192 Letter from Walchensee, sent on 10th March 1951; see Kisch: *Paul Koschaker*, pp. 53 ff. (letter nr. 22).

193 He added in the letter: "Immerhin waren diese Störungen Mahnungen, die mir zeigten, daß mir heute Alter und Gesundheit Grenzen setzen, und daß Lehramt *und* Forschung jenseits dieser Grenzen liegen." Kisch: *Paul Koschaker*, p. 48 (letter nr. 18).

on Comparative Law and a course on exegesis of the Digest (*Pandektenexegese*).[194] The period there was pleasant, as he explained in a letter to Kisch, and the Faculty had become completely free of Nazis and many of its new members were declared anti-Nazi.[195] After Bonn he went to Leiden for two lectures, and there he again met and spent some days at Martin David's house, although the burden of work had very negative consequences, leading to a second heart attack in about a year. His lectures obviously had to be postponed and he was quickly admitted to the local hospital in Leiden, where he was able to recover. Below wrote that this had been the first life-threatening heart attack – yet he had had another one a year earlier in Turkey – but the warning signs had not been sufficiently taken into consideration and he did not convalesce for long enough.[196] In fact, he gave two lectures just a week later, being the first German scholar to talk in front of Dutch colleagues after the end of the war.[197]

Koschaker was aware, however, that he needed a pause from work and travel. As he wrote to Kisch in March 1951, he deeply desired to have some rest during the summer, possibly in a health resort in the Rheinland ("Ich hatte seit mindestens sechs Jahren keine Ferien mehr und will dieses Jahr das erstemal im Juni seit langer Zeit mir in einem kleinen Badeort im Rheinland wieder eine Kur kohlensaurer Bäder gönnen").

This idea came too late however. Koschaker accepted an invitation to give two lectures in Zurich, where his pupil Lautner was,[198] on 29th and 30th May 1951, and in the afternoon of May 31st he and his wife reached Basel, where they spent the evening with his colleague and friend Hans Lewald.[199]

At half past five in the morning, on 1st June 1951, Paul Koschaker had a third heart attack and died.[200]

The scientific community was shocked at the painful news. Letters and messages were sent to the University of Tübingen from twenty-five other universities.[201] A funeral sermon

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194 Below: *Paul Koschaker*, p. 4. See also the documents preserved at the archives at the University of Bonn, regarding the appointment of Koschaker as a visiting professor and his remuneration (*Universitätsarchiv*, Uni-Bonn, 4413.1-6; 4413 PA. 1-3).

195 Kisch: *Paul Koschaker*, p. 54 (letter nr. 22): "Übrigens war auch Bonn sehr nett, die Fakultät nahezu völlig nazifrei und mit einer Reihe ausgesprochener Nazigegner besetzt."

196 Below: *Paul Koschaker*, p. 4.

197 Ibid.

198 On Lautner see above, p. 34, fn. 6.

199 See the letter by Helene Koschaker to Kisch, sent on 7th September 1951. Kisch: *Paul Koschaker*, pp. 60 f. (letter nr. 27). On Hans Lewald (1883-1963), see Karl-Heinz Below: *Lewald, Hans*, in: *NDB* 14, Berlin 1985, pp. 411 f.

200 Kisch: *Paul Koschaker*, pp. 60 f. (letter nr. 27).

201 See the folder "Ableben" at the university archive in Tübingen: UAT, 126/346a.

was held by Heinrich Mitteis in Walchensee.[202] Riccobono was informed of the fatal event by San Nicolò who sent him a letter from Munich on 19th June 1951.[203]

Many of the obituaries published after Koschaker's death were written by his pupils, displaying their admiration and affection for Paul Koschaker, both as a professor and as a human being. David and Below both spoke passionately about their mentor; in Italy Pietro De Francisci wrote Koschaker's necrologue.[204]

To conclude this chapter, it seems appropriate to quote the beginning of the obituary that appeared in the *Zeitschrift der Savigny-Stiftung* in 1951, written by Below and Falkenstein, which provides an idea of the very high esteem that Koschaker enjoyed:

> Seit dem Tode von Otto Lenel und Moriz Wlassak hat die deutsche Romanistik und damit die gesamte internationale wissenschaftliche Welt am 1. Juni 1951 einen ihrer schwersten Verluste erlitten. In den frühen Morgenstunden jenes Tages ist Paul Koschaker auf einer Vortragsreise in der Schweiz in Basel einem Herzschlag erlegen. Ein wahrhaft erfülltes Gelehrtenleben, über dem die Worte stehen „litteris in serviendo consumor", hat damit sein τέλος gefunden.[205]

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[202] Ibid. Koschaker had given the funeral oration for Heinrich Mitteis' father, Ludwig, in 1921.

[203] See Varvaro: *La 'antike Rechtsgeschichte'*, p. 311 fn. 31. In the legacy preserved by Riccobono's heirs and by Professor Varvaro there is a letter sent by Helene Koschaker to Salvatore Riccobono dated 6th July, but the year is missing; it is reasonable to think that the letter was sent on 1951, because Helene Koschaker thanks Riccobono for his warm and kind words on her husband's death ("für die so lieben, warmen Worte, die Sie mir zu dem unsagbaren Leid das mich getroffen hat, ausgesprochen haben.")

[204] David: *In memoriam Paul Koschaker*, pp. 501-503; Below: *Paul Koschaker*, 1-44; De Francisci: *Paul Koschaker (1879-1951)*, pp. 384-388. The text written by Josef Klìma three years later was not properly an obituary, but represents nonetheless a passionate recollection of Koschaker: Josef Klíma: *Zur letzten Begegnung*, in: *L'Europa e il Diritto romano. Studi in memoria di Paolo Koschaker*, II, pp. 596-601. For a list of obituaries see above, p. 25, fn. 27. On Pietro De Francisci (1883-1971), an eminent Italian Roman law scholar and Ministry of Justice of the Fascist regime from July 1932 to January 1935, see: Carlo Lanza: *De Francisci, Pietro*, in: Birocchi/Cortese/Mattone/Miletti (eds.): *Dizionario biografico dei giuristi italiani (sec. XII-XX)*, I, Bologna 2013, pp. 675-678; Id.: *La «realtà» di Pietro De Francisci*, in: Italo Birocchi/Luca Loschiavo (eds.): *I giuristi e il fascino del regime (1918-1925)*, Roma 2015, pp. 215-236.

[205] Below/Falkenstein: *Paul Koschaker* †, p. XIX.

5 Roman law at the time of the crisis: from *Die Krise* to *Europa und das römische Recht*

5.1 Introduction

Koschaker's experience in Berlin has been described in detail in the third chapter of this book, focusing on the events that took place at the University and, in particular, those leading to his decision to leave the city and move to Tübingen.

Yet a very significant episode that happened during Koschaker's period in Berlin was not analysed in that chapter, namely the lecture he held at the *Akademie für Deutsches Recht* in December 1937 and his subsequent publication of *Die Krise des römischen Rechts und die romanistische Rechtswissenschaft* in 1938. This particularly important passage in Koschaker's academic development will be the subject of this chapter together with the other scientific "steps" that followed, up to the publication of *Europa und das römische Recht* in 1947. The decision to deal with Koschaker's scholarly path from *Die Krise des römischen Rechts* to *Europa und das römische Recht* separately is based on some compelling reasons. First of all, the scientific and methodological continuity that forms background to both works: in this sense, *Europa und das römische Recht* could be considered as a development of the work published in 1938, in which the historical depiction and the crisis of Roman law were described in greater detail. Despite the differences between the two works, the main scientific issues display a clear continuity. Yet in the nine years between the publication of *Die Krise des römischen Rechts* and *Europa und das römische Recht*, Koschaker wrote numerous and diverse minor texts and also other documents, now preserved in several German archives, that offer a more comprehensive insight into his methodological approaches, and how he attempted to clarify or elaborate them from time to time, before finally achieving his scientific synthesis, as it appeared in *Europa und das römische Recht*.

In the following pages, the context in which Koschaker gave his lecture in Berlin will be analysed first, as well as the content of the publication that resulted from this lecture, and the reactions to his essay. This peculiar moment has often been considered by scholars to be the turning point in his personal and scientific experience.

Thanks to the lecture at the *Akademie für Deutsches Recht* and the publication of his work on the crisis of Roman law, certain scholars have tended to idealise Koschaker, seeing him as a fierce, almost heroic, anti-Nazi protagonist. On the contrary, the very same publication has been interpreted more recently in quite the opposite way by other scholars, alleging that Koschaker was ideologically close to the regime, if not an actual supporter of it. Both these perspectives will therefore be considered and analysed in an attempt to offer an alternative interpretation of the events, also drawing on the elements that have emerged in the previous chapters from the reading of the archival documents. Only by considering what happened in 1937 and 1938 within a correctly analysed and comprehensive vision, can the interpreter gain a better understanding of the facts, although this does not mean that it will always be possible to provide clear-cut judgments on them.

In addition, other publications and archival documents will be taken into consideration throughout this investigation to gain a clearer idea of Koschaker's concept of *Aktualisierung* and his goal of recovering the study and teaching of Roman law in Germany, on the one hand. On the other, a clear picture of Koschaker's viewpoint will emerge from the archival documentation as to the causes of the crisis of Roman law and to the role that could be attributed to the Nazi regime and to the famous Point 19 of the NSDAP program.

In the end, Koschaker's masterpiece, *Europa und das römische Recht*, will be discussed. Both the content of the work and the reactions of the scholars to this publication will be examined; a further aim of this part of the chapter is to consider the cultural and legal legacy left by this book. Koschaker was able to offer a European narrative in which Roman law and Europe were tightly intertwined together, and this narrative has influenced generations of scholars, despite the scholarly criticism it has aroused at times. Moreover, a discussion of Koschaker's cultural message will provide the opportunity to examine his methodological approach, as he himself summarised them in his concept of relative natural law (*relatives Naturrecht*). Interestingly, several of these scientific issues appeared in a couple of letters to his colleague and friend Salvatore Riccobono, which documents will be taken into account at the end of the chapter.

5.2 The crisis of Roman law

As was previously mentioned, it seems necessary to deal separately with a particularly significant episode that took place during Koschaker's period in Berlin, namely the lecture that he held at the *Akademie für Deutsches Recht* in December 1937 and the ensuing publication of *Die Krise des römischen Rechts und die romanistische Rechtswissenschaft* in 1938.

This peculiar event has often been considered by scholars to be a turning point in his personal and scientific experience. An in-depth analysis of the content of the lecture and

subsequent publication, in addition to the circumstances of that period are particularly useful in shedding light on this important passage of Koschaker's life.

After arriving in Berlin, Koschaker quickly became a member of both the *Preußische Akademie der Wissenschaften* and the *Akademie für Deutsches Recht*. The latter was founded by the Nazi regime with the aim of promoting a "common German law" (*deutsches Gemeinrecht*).[1] In fact, it was commonly known that the regime wanted to create a new German civil code abandoning the BGB,[2] considered to be the product of a liberal, bourgeois and individualistic legal system, modelled on the system elaborated by the Pandect-science (*Pandektenwissenschaft*), itself based on Roman law. The arguments against this system were set out in Point 19 of the NSDAP program,[3] as well as the draft reform inspired by Eckhardt and published in the *Richtlinien* of the State Ministry of Education and Culture (*Kultusminister*) in 1935, where it is possible to read: "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."[4]

By that time, the influential deputy of the Reich for the Standardisation of Justice (*Reichskommissar für die Gleichschaltung der Justiz*) and President of the *Akademie*, Hans Frank, had probably understood that the "fight" against the study of Roman law could be instrumental to fighting for the cultural hegemony in Europe as well. It was therefore important not to allow Italian scholars dominating this field of studies. Frank's stance was in part made possible by accommodating the theories on the Oriental and Jewish influences on late Roman law: it thus became possible to make a distinction between the still pure law of a "Nordic population" - namely drawn from Roman law from its origins until the first three centuries of the history of Rome - and a later law corrupted by Oriental and Jewish influences, known as classical and post-classical Roman law.[5] Accordingly, the most ancient part of Roman law could still be tolerated, while the Roman law as studied by the pandectists and their methodology would be subject to harsh criticism.[6] Moreover, the general tolerance of the *Akademie für Deutsches Recht* towards Roman law and Roman law scholars may have also come about on account of the influence

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1 See above, pp. 81 f.

2 On the regime's draft to replace the German Civil Code with a new *Volksgesetzbuch*, see above, p. 81 and, in particular, fn. 40.

3 On Point 19, see above, pp. 81 f. and further below, § 9.

4 *Richtlinien für das Studium der Rechtswissenschaft* of 1935. The *Richtlinien* (guidelines) were officially published by the *Kultusminister* on 18th January 1935. On this point, see above, p. 134. See also the work by Eckhardt on legal studies in Germany: Karl August Eckhardt: *Das Studium der Rechtswissenschaft*, Hamburg 1935.

5 See above, chapter 3, § 3.

6 On the attack of the Germanists on Roman law, in general, and then later on the pandectists and, therefore, on the individualistic law elaborated by the latter, see below in this chapter, pp. 180 ff.

of its president Frank, who, according to Guarino, adopted a paternalistic approach towards academics, in general.[7]

That said, such considerations should not lead one to think that Roman law had begun to make a recovery in Germany, rather it was possible to broach this subject without serious peril, provided of course due caution was taken in selecting the topics to be dealt with; in fact, some of them were "more acceptable" than others.[8] It is of note, in any case, that Roman law had been included, within the classification of the different branches of law introduced at the *Akademie für Deutsches Recht*, in the group "Roman law and foreign laws", to clearly separate it from German law. Hence, there was still the feeling that Roman law was a "foreign law", in some respects alien to the German nation and population.

In this context, Koschaker accepted the invitation to hold a lecture at the *Akademie für Deutsches Recht*, in December 1937. Guarino, who was in Berlin at the time, wrote that it amounted to a personal sacrifice for Koschaker himself.[9] Despite these words – which are perhaps partly the result of an idealisation of Koschaker – written by Guarino on Koschaker's decision to agree to speak at the Academy, it should not be forgotten that publishing a text in the Academy's series of works, at that time, would quickly result in it being widely accepted in the academic world, and not only in Germany. It is also important to remember that Koschaker was already a member of the *Akademie für Deutsches Recht*, so he had already "agreed", albeit ostensibly only for scholarly reasons, to be part of an institution founded by the Nazi regime. To talk of Koschaker's spirit of sacrifice in this sense might therefore arouse a degree of scepticism.

In order to ascertain what the aim of this work actually was, it is first necessary to take into consideration the content of Koschaker's lecture and publication.[10] The dense eighty-six page text is preceded by a brief but meaningful preface.[11] Therein Koschaker explained that this work should not be considered as learned research ("gelehrte Untersuchung"), rather as a confession ("Bekenntnis"), immediately underlining a certain degree of personal commitment to it. Furthermore, this text was defined as a manifesto ("Kampfschrift").[12] Here, it is worth

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7 Guarino: *Cinquant'anni dalla «Krise»*, p. 277.

8 Meissel/Wedrac: *Strategien der Anpassung*, pp. 35-78.

9 Guarino: *Cinquant'anni dalla «Krise»*, p. 277: "Con una buona dose di spirito di sacrificio, Paul Koschaker, che pure era personalmente alieno da ogni commistione con la politica, si adattò a seguire la via politicizzata dell'«Akademie für Deutsches Recht», dominata dal potente e paternalistico ministro Frank […]."

10 For an initial overview on some of the questions concerning Koschaker's work *Die Krise des römischen Rechts und die romanistische Rechtswissenschaft*, see Beggio: *Paul Koschaker and the Path*, pp. 291 ss. Koschaker published a very short text with the same title just one year after the publication of *Die Krise des römischen Rechts*, see: Koschaker: *Die Krise des römischen Rechts*, in: *Geistige Arbeit* VI, 8 (1939), pp. 5-7. The author further dealt with the issues concerning the crisis of Roman law in Koschaker: *Probleme der heutigen romanistischen Rechtswissenschaft*, in: *DRW* 5 (1940), pp. 110-136.

11 Koschaker, *Die Krise*, pp. III-IV.

12 Ibid., p. III.

pausing to consider why he wanted to define *Die Krise des römischen Rechts* as a "Kampfschrift". One interpretation is that Koschaker was dealing with Roman law before an auditorium of Nazis and Nazi sympathizers, and his decision could have been construed as an attack on the regime and its hatred towards Roman law. This interesting conjecture, however, goes too far and lends too much weight to the word "Kampfschrift". In fact, "Kampfschrift" does not refer to political opposition to the Nazi regime, which in any case would not have been possible in such circumstances, rather it represents Koschaker's own effort – or "fight" – to restore dignity to Roman law and its teaching.

It should also be noted that Koschaker wished to pre-empt two potential objections to his work. As he explained in the preface, firstly, by criticising the *Historisierung* of Roman law he was not recanting his past. Even though he was a well-known scholar in the field of cuneiform law and, more generally, the so-called laws of Antiquity, he wanted to distance himself from the historical trends of Roman law studies. Secondly, his battle was not merely limited to his own field of studies, for his effort was devoted to the defence of Roman law as laying the foundation stones of European legal culture.[13] The connection between these two terms thus emerged immediately from the initial pages of his preface, to explain that the aim of his work went well beyond the confines of Roman law as a subject matter in German universities.

In his text, Koschaker offered a fascinating depiction of the development and evolution of the European legal tradition from the reception of Roman law during the Middle Ages up to the 1930s. Moreover, in the first chapter,[14] after having described the meaning of Roman law for the jurists of his time, he made a historical excursus of Europe in order to delineate the foundations of a common cultural and legal tradition. Indeed, Koschaker expounded his idea of the so-called reception (*Rezeption*) of Roman law, as a European phenomenon closely linked with the conception of *imperium Romanum*. This *imperium*, to be conceived as a political power, which shifted from the Roman Empire to the Holy Roman Empire, was based on what Koschaker called *Romidee*. As the name suggests, *Romidee* referred directly to the idea of the ancient Holy Roman Empire as it developed in Europe over the centuries, from Charlemagne onwards, both as a political idea and, thanks to the foundation of universities, a cultural and juridical one. According to Koschaker, given the connection between Roman law, the *Romidee* and the concept of *imperium Romanum*, Roman law became the law of the emperor, the *kaiserliches Recht*, and one of the two main sources of legitimisation for

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13 Ibid.: "Ich kämpfe nicht für mein Fach, obwohl man dessen egozentrische Wertung bei einem Professor vielleicht verstehen und – belächeln würde. Nicht darauf kommt es an, ob es noch Professoren des römischen Rechts geben soll und ob sie Zuhörer haben. Nicht deshalb trete ich für das römische Recht ein, weil es ein merkwürdiges und interessantes Recht der Vergangenheit ist, sondern ich verteidige es, weil es im Laufe seiner Geschichte von fast 2½ Jahrtausenden ein wichtiger Faktor der europäischen Kultur geworden ist und heute noch ist, zumindest solange als es nicht durch etwas anderes ersetzt werden kann."

14 Ibid., pp. 1-16.

the Holy Roman Empire. Nevertheless, this Empire was not only founded on Roman law, since there was another essential and equally important cornerstone to its establishment, namely Christianity. It is also clear from this first part of Koschaker's work that he firmly believed in the idea of legal and cultural continuity in European history.

Koschaker's fascinating description proceeds in the second chapter,[15] where he masterfully depicted the development of the study of Roman law throughout Europe up to Savigny's Historical School and the Pandect-science and its decline, the enactment of the BGB and the emergence of the new trend of study (which Koschaker criticised vehemently), which he referred to as *Historisierung* or *neuhumanistische Richtung*, a new Humanistic tendency.[16] The most significant aspect of the second chapter is the constant reference to Roman law as a European issue; in particular, Roman law was described as the cornerstone of European jurisprudence and, therefore, inevitably seen as being closely related to European private law systems. According to Koschaker, only the most recent trend of *Historisierung* had succeeded in eroding the strong connection between Roman law and the modern European legal systems. Nonetheless, Koschaker insisted on the idea that Roman law was inextricably linked to a cultural *milieu* that was entirely European. Further attention will be given to this question later on in this chapter as it was one of the *Leitmotive* of his works from 1938 onwards, namely that Roman law was not only a legal phenomenon, but also a cultural and, of course, a European phenomenon.

Towards the end of the second chapter of *Die Krise des römischen Rechts*, Koschaker devoted a few pages to the influence of the new trend of Roman law studies abroad, and in Italy in particular, whereas in the final paragraph he dealt with Roman law in the Near and Middle East at that time.[17] In this last part of the chapter, the comparative method, which always pervaded Koschaker's approach to the study of Legal history and Roman law, clearly emerged, but in this case it was oriented towards a gaining better understanding of Roman law studies throughout the world. The third chapter also begins with a comparative study of teaching in general and, in particular, the teaching of Roman law at law faculties in England, France and Italy.[18] This comparative inquiry proceeds with an analysis of the role of Roman law in England and in the US, and concludes with the conditions of teaching in law faculties in Germany after the enactment of the BGB.

Koschaker also analysed the situation with regard to the students and the examinations in German universities, pinpointing students' aversion to Roman law classes. The criticism raised by Koschaker about the situation in German law faculties of the time with regard to Roman law afforded him the opportunity to again criticise the *Historisierung* of

15 Koschaker: *Die Krise*, pp. 16-54.
16 See also below, § 3.
17 Koschaker: *Die Krise*, pp. 42 ff.
18 Ibid., pp. 54-75.

Roman law, which he considered largely responsible for the students' aversion to this topic.[19]

In his fourth and final chapter,[20] among other considerations regarding the study of Ancient laws in general and the methodological approach of comparative legal history (*vergleichende Rechtsgeschichte*), Koschaker suggested reinstating Roman law and its teaching, which was perhaps best expressed through the motto *Zurück zu Savigny* (back to Savigny), based on the idea of an *Aktualisierung* of the study and teaching of Roman law through the updated method of Savigny's Historical School. The principal Roman law course at the universities was supposed to offer a dogmatic overview of the most important concepts and institutes of European private law tradition rooted in Roman law and its reception in Europe over the centuries. The final considerations, before his brief conclusion, related to the relationship between Roman law and national law. As to the prevailing situation in Germany at that time, Koschaker stressed in particular, that since the country was still part of Europe as it had been in the past, it could not reject Roman law, which had represented and continued to represent the thousand year old tradition of European private law systems as well as being part of a common European culture.[21] In this respect, Koschaker seemed to searching for a definition that would accommodate the coexistence of both Roman law and German law in Germany.

As has recently been stressed, from the content of Koschaker's work, one immediately notices that no attack is made either against Point 19 of the programme of the Nazi party or more generally, the cultural climate that had led to the crisis of Roman law in Germany.[22] Nonetheless, it is not surprising that Koschaker failed to criticise the regime in a lecture held at the *Akademie für Deutsches Recht* that had actually been founded by the Nazis. It seems self-evident that once a scholar had agreed to be part of such an academy and give a lecture there, any such scholar would have necessarily agreed to follow the path of the academy and, implicitly, abstain from criticising the regime, or on the contrary, be prepared to take serious risks. If one wishes to formulate an opinion about Koschaker's behaviour, attention should not be focused so much on the fact that Koschaker failed to openly criticise Point 19 of the Nazi party programme, but rather his decision to agree to talk at the

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19 The difficulties of teaching of Roman law in German universities and Berlin, in particular, had already been attested to in documents from the time he spent in Berlin, stating in fact that students preferred not to attend Roman law classes. See above, chapter 3, § 7.

20 Koschaker: *Die Krise*, pp. 75-86.

21 Ibid.: "Deutschland liegt in Europa […] Deutschland, zur nationalen Einheit gelangt, hat selbstverständlich Anspruch auf sein nationales Recht und es hat diesen Anspruch seit dem letzten Drittel des 19. Jahrhunderts in immer steigendem Maße verwirklicht. Es gehört aber auch zu Europa, und als Mitglied der europäischen Kulturgemeinschaft hat es Rücksicht zu nehmen auf diejenigen Bestandteile seines Rechts und in der Bildung seiner Juristen, die die Verbindung mit den anderen Nationen Europas herstellen. Für das Privatrecht ist auf Grund einer mehr als tausendjährigen Entwicklung dieses Bindeglied noch immer das römische Recht und ich wüßte nichts, wodurch es heute ersetzt werden könnte."

22 Giaro: *Paul Koschaker sotto il Nazismo*, pp. 166 f.

Akademie für Deutsches Recht in the first place. This point deserves more detailed analysis and will be discussed further in the following pages.[23] What is perhaps more surprising is that in the lecture no criticism is directed towards the Germanists' trend at that time, who had been strongly critical of Roman law[24] and promoted "pure" German law as the new foundation for private law in Germany, which would be carried out through the "nationalization" of German law.[25] In this respect, the affinity between the aims of the Germanists and those of the regime were clear and outspoken. The harsh criticism regarding, in particular, the law of contracts and property law formulated by the pandectists based on Roman law, was a very popular issue among Germanists at the time and it was shared by many representatives of the regime.[26] Probably for these reasons, Koschaker preferred not to attack the trends of the Germanists. Given the circumstances in which he found himself, his prudence is understandable, yet what is more dubious was

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23 See below, in this chapter, §§ 6 and 9, and chapter 7.

24 As a plausible result, Koschaker's proposal for the *Aktualisierung* was positively taken into consideration by the Germanist Claudius von Schwerin in his review of *Die Krise*, see Claudius von Schwerin: *Rez. von Paul Koschaker: Die Krise des römischen Rechts und die romanistische Rechtswissenschaft (1938)*, in: *DRW* 4 (1939), pp. 182-190. On Claudius Freiherr von Schwerin (1880-1944), a Germanist and a member of the Nazi party since 1937, see: Wolfgang Simon: *Claudius Freiherr von Schwerin: Rechtshistoriker während dreier Epochen deutscher Geschichte*, Frankfurt a.M. 1991; Id.: *Schwerin, Claudius Freiherr von*, in: *NDB* 24, Berlin 2010, pp. 77-79. On Schwerin's unfavourable stance towards Roman law, as was clearly expressed at the 5. Deutscher Rechtshistorikertag in 1936, according to whom the German law tradition for the Germanists was sufficient as a foundation for a new German legal system and they did not need any other legal tradition, see Gamauf: *Die Kritik*, p. 58; on Schwerin's stances, see also Joachim Rückert: *Privatrechtsgeschichte der Neuzeit: Genese und Zukunft eines Faches?*, in: Okko Behrends/Eva Schumann (eds.): *Franz Wieacker. Historiker des modernen Privatrechts*, Göttingen 2010, pp. 75-118, and, in particular, p. 85; Winkler: *Der Kampf*, pp. 220 ff.

25 Landau: *Römisches Recht und deutsches Gemeinrecht*, pp. 17-24; Luig: *Römische und germanische Rechtsanschauung,* pp. 95-138; Bucci: *Germanesimo e romanità*, pp. 77 ff. and 109 ff.; Mario Bretone: *Come l'anatra*, in: Bretone: *Diritto e tempo nella tradizione europea*, Bari/Roma 2004, pp. 127-152 and, in particular, p. 136; Giaro: *Paul Koschaker sotto il Nazismo*, p. 169; Giaro: *Der Troubadour*, pp. 31 ff.; Santucci: *Diritto romano e Nazionalsocialismo*, pp. 59 ff. On the Germanist viewpoint in Austria during the Nazi regime, see Thomas Olechowski: *Rechtsgermanistik zwischen Ideologie und Wirklichkeit*, in: Meissel/Olechowski/Reiter-Zatloukal/Schima (eds.): *Vertriebenes Recht*, pp. 79-106. Among the Italian scholars, it has to be mentioned the firm position taken by Riccobono against the scientific stances of trend of the Germanists, as we read in Salvo Randazzo: *Roman legal tradition and American Law. The Riccobono Seminar of Roman Law in Washington*, in: *Roman legal tradition* 1 (2002), pp. 123-144, and in particular p. 125, also published in Randazzo: *Tradizione romanistica e diritto statunitense: il Riccobono Seminar of Roman Law a Washington*, in: *BIDR*. 100 (1997), pp. 684-698. On the attempts of Germanists to delegitimise the study of Roman law, see Varvaro: *Gli "studia humanitatis"*, pp. 654 ff. and in particular p. 655, fn. 57.

26 A wide historical overview on this topic is offered in Karl Kroeschell: *Die nationalsozialistische Eigentumslehre. Vorgeschichte und Nachwirkung*, in: Simon/Stolleis (eds.): *Rechtsgeschichte*, pp. 43-61; Luig: *Römische und germanische Rechtsanschauung*, pp. 95 ff.

his strong criticism of Savigny's Historical School with regard to the relationship between Romanists and Germanists. According to Koschaker, the responsibility for the increasing tensions between Romanists and Germanist was ascribable to the approach of Savigny's School that led to an "excess of Romanism" ("Übersteigerung des Romanismus") and, as a consequence, to the inability of Romanists and Germanists to communicate with each other.[27]

Once again, the question might be legitimately raised as to how deeply Koschaker was committed to the statements he made, and by doing so, to what extent did he adapt his lecture and his writing to the cultural trend fostered by the regime? These kinds of questions emerge constantly when reading the text of *Die Krise des römischen Rechts und die romanistische Rechtswissenschaft* and one of the aims of this chapter is to attempt to uncover some answers.

Koschaker's work is particularly interesting then from a methodological perspective, and can be appreciated not only for its historical depiction of the Roman law tradition coupled to the need for a dogmatic approach to its study, but also for his use of a comparative method to affirm the European nature of Roman law. The interpenetration of a comparative legal history method in the study of legal history aimed at a systematically dogmatic reconstruction of juridical phenomena and institutes, and it is precisely this aspect that imbues the distinctive character of Koschaker's works from the beginning of his career. In *Die Krise des römischen Rechts*, however, Koschaker's approach entertained some specific features given the need to update (the so-called *Aktualisierung*) Roman law. Since these methodological issues are related to the crisis of Roman law and represent, in Koschaker's essay, a reaction to this crisis, it is now necessary to investigate the main considerations influencing Koschaker's perspective.

5.3 Koschaker's criticism of the *Historisierung* of Roman law

According to Koschaker, the causes of the crisis of Roman law in Germany during the 1930s did not lie in the approach of the regime or that of the Germanists towards Roman law. Even though he was contrary to the idea of any nationalisation of German law stripped of the influence from Roman law, as in the scientific proposals advocated by the Germanists, Koschaker did not attack their stances, at least not directly. His harshest criticisms were addressed to the *Historisierung* of Roman law itself (consisting of *Interpolationenforschung* and *antike Rechtsgeschichte*), as well as its tendency to make Roman law not simply a *Professorenrecht* (a fact that would not have represented a major problem in Koschaker's eyes), but rather reduce it to a subject for a small elitist group of

[27] Koschaker: *Die Krise*, p. 26.

professors, somewhat similar to the "initiates of a sect" as opposed to jurists interested in studying concrete matters. Koschaker's concern for the isolation of Roman law and Roman law scholars from the rest of the jurists clearly emerges from this criticism; at the same time, however, this criticism could be interpreted as being similar to the popular narrative of Germanists and representatives of the Nazi regime, which sought to attack the elitist position of Roman law and its scholars, deemed to be detached from the national sentiment of the German *Volk*. Yet it is also true that such deprecation from Germanists and the regime had already been made of the pandectists through the *Professorenrecht*. This kind of criticism levelled at the pandectists was not shared by Koschaker, however, since he still considered the Pandect-science a *Professorenrecht*, yet in a positive sense, insofar as it was to be construed as a manifestation of the autonomy of the jurists against political power; nonetheless, in Koschaker's eyes the pandectists were too inclined to theoretical abstractions.

In any case, it seems remarkable that before dealing with the problems connected to the *Historisierung* of Roman law, in his writing Koschaker should criticise (to some extent) the pandectists too. Indeed, he vacillated between positive and negative judgments about them, which now deserve greater attention.[28]

One of his first criticisms towards the pandectists regarded their approach to Roman law sources, since they completely neglected any kind of textual criticism; this negative judgment could appear to be somewhat inconsistent, if one takes into consideration his disapprobation of the so-called interpolationism.[29] A further criticism he made related to the pandectists' historical study of Roman law: in his eyes, their approach consisted in simply studying history and instrumentalising the results of the historical research to serve the needs of the present. Despite the name, "Historical School", scant attention was actually paid by them to true historical research, according to Koschaker.[30] Moreover, as was previously stressed, the pandectists had exacerbated the relationship between Germanists and Romanists.

It is also worth mentioning that Koschaker defined *Pandektenrecht* (the law elaborated by the pandectists) as the result of the studies of pandectists and, therefore, little more than the 'offspring upshot' of the capitalistic order of that time, which ultimately constituted a deplorable legal system as such.[31] Even taking into consideration the context in which

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28 Koschaker: *Die Krise*, pp. 23 ff., 25-27, 32 ff.

29 On Koschaker's stances on the interpolationism, see below, pp. 185 ff., and Beggio: *La 'Interpolationenforschung'*, pp. 121-155.

30 This criticism again sounds inconsistent in the light of Koschaker's approach to *Historisierung*, which is discussed in the following pages.

31 Under this respect, there are some similarities between Koschaker's critical position, on the one hand, and the ideas of Kaser, Schönbauer and Kreller who criticised the legal order that was born from the systematic elaboration of the *Pandektistik*. See Winkler: *Der Kampf*, pp. 176 ff. The author seems to disregard Koschaker's criticism towards the pandectists though. For an

Koschaker's ideas were expressed, it is nonetheless striking to see him adopting a position similar to that of the Nazi regime and the majority of the Germanists on the question of the liberal and capitalistic influences that would have affected the legal system developed by the pandectists. It is even more remarkable if we consider the scientific debt owed by the "Romanist" Koschaker to the Pandect-science, whose juridical ideas and concepts have always borne particular influence on his studies in the field of Roman law.[32] Nevertheless, he did defend at least one aspect of the "law of the pandectists", namely, that it was a German phenomenon. As he wrote:

> Man kann das deutsche Pandektenrecht und seine Denkformen bekämpfen, weil sie der Ausdruck der kapitalistischen Wirtschaftsauffassung ihrer Zeit sind, an deren Überwindung man arbeitet, nicht aber weil sie undeutsch sind.[33]

Koschaker therefore criticised and praised the pandectists at one and the same time. He stressed the German nature of the Pandect-science, despite the criticism of the regime and the Germanists, since it sprang from the "blood of German blood" and its doctrinaire *Begriffsjurisprudenz* was the main result of its German features (and German nature). Given the high esteem and reputation countenanced by pandectists throughout Europe, and since they firmly rooted their research in Roman law, they were representative of both German and European jurisprudence: they were European, to the extent that Roman law was a European phenomenon and represented the foundation of European legal culture and private law systems; and German in that their spirit was the national, German spirit embodied with the German national spirit of the people (*Volksgeist*). It was thus clear for Koschaker that European legal history represented a Roman-German phenomenon:

> Erstens, daß diese Pandektenwissenschaft uns nicht eine fremde, aufgezwungene Geistesrichtung war, sondern Fleisch von unserem Fleisch, Blut von unserem Blut, und vielleicht gerade in ihrem Hange zur doktrinären Begriffsjurisprudenz am deutschesten; zweitens, daß sie, weil auf der Grundlage des römischen Rechts erwachsen, auch europäisch war, der Repräsentant des juristischen Europa, der die Einheit der europäischen Rechtswissenschaft vertreten, verteidigt und erobernd weiter ausgedehnt hat. […] Niemals, weder vorher noch später, hat deutscher Geist auf die gesamte Juristenwelt einen solchen Einfluß ausgeübt wie damals […].[34]

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analysis of the Romanists' reactions and their scientific approaches to the study of Roman law after 1933, see Simon: *Die deutsche Wissenschaft*, pp. 161 ff.

32 See above, chapter 2, pp. 34 ff.

33 Koschaker: *Die Krise*, pp. 32-33, fn. 3.

34 Ibid.

This was not the only merit that Koschaker attributed to the pandectists, however. *De facto*, they succeeded in enhancing the German national spirit and give a European resonance to German scholarship. Moreover, the pandectists underlined the connections between Roman law and modern private law legislation. The importance of this approach was twofold: on the one hand, it stressed the role of Roman law as a necessary foundation of modern private law systems and showed the modernity of its principles and rules. On the other hand, this approach avoided reducing Roman law to a subject of antiquarian interest with no relevance to the present day. Following Koschaker's depiction, therefore, it seemed possible to "re-use" some of the methodological stances of the pandectists, although it was necessary to adapt them to the needs of the time: this was the meaning of his idea of *Aktualisierung*.

It stands to reason, therefore, that the approach of the *Historisierung* to Roman law met with Koschaker's criticism, since it appeared in complete contrast to his goal of the *Aktualisierung*. The emergence of this different historical trend of studies, however, did not represent a comprehensive explanation of the decline of pandectist science, according to Koschaker, but rather it was one of the results of this decline. Indeed, since the radicalisation of the dogmatic trends of the pandectists during the second half of the nineteenth century and, later, the enactment of the BGB, the pandectists seemed to have forsaken their understanding of their role within Roman law scholarship. Savigny and his followers took a clear stance against codification in Germany, but eventually they achieved exactly the opposite result, having themselves laid down the foundations of the German Civil Code.[35] Once German private law had found its identity through the BGB, the utility of the pandectist approach suddenly seemed to perish. By the second half of the nineteenth century, however, a historical trend began to develop within pandectist studies, namely the study of interpolations (*Interpolationenforschung*) – from which the term *neuhumanistische Richtung* was derived – since followers of this school wanted to discover the interpolations in the Justinian's compilation, just like the humanists of the

[35] On the renowned controversy between Savigny and Thibaut on the need for a codification for Germany, see Hattenhauer (ed.): *Thibaut und Savigny: Ihre programmatischen Schriften*[2], München, 2002. On the events that led to the codification in Germany, see also Zimmermann: *Heutiges Recht*, pp. 1-39. It exists a very vast literature on Savigny and Thibaut; for these reasons, some works will be here suggested, where it is possible to find further bibliographical references. On Carl Friedrich von Savigny (1779-1861), see: Dieter Nörr: *Savignys philosophische Lehrjahre*, Frankfurt am Main 1994; Id.: *Savigny, Carl von*, in: *NDB* 22, Berlin 2005, pp. 470-473; Matthias von Rosenberg: *Friedrich Carl von Savigny (1779–1861) im Urteil seiner Zeit*, Frankfurt am Main 2000; Benjamin Lahusen: *Alles Recht geht vom Volksgeist aus. Friedrich Carl von Savigny und die moderne Rechtswissenschaft*, Berlin 2013. On Anton Friedrich Justus Thibaut (1772-1840), see: Rückert: *Thibaut, Anton Friedrich Justus*, in: Stolleis (ed.): *Juristen. Ein biographisches Lexikon*, München 1995, pp. 610-612; Dörte Kaufmann: *Anton Friedrich Justus Thibaut (1772-1840). Ein Heidelberger Professor zwischen Wissenschaft und Politik.* Stuttgart 2014; Christian Hattenhauer/Klaus-Peter Schroeder/Christian Baldus (eds.): *Anton Friedrich Justus Thibaut (1772-1840). Bürger und Gelehrter*, Tübingen 2017.

sixteenth century. Moreover, from the beginning of the twentieth century another new research trend emerged alongside interpolationism, namely *antike Rechtsgeschichte*. After the influence of the pandectist movement had ceased, certain scholars thought it appropriate to retrieve Roman law from its "splendid isolation". Thus, for example, in the opening lecture of his 1904 course at Vienna, Wenger explained his project as the study of Roman law and ancient laws.[36]

Both these research trends (*Interpolationenforschung* and *antike Rechtsgeschichte*) were based on the premise that Roman law should be studied in depth from a historical perspective, in order to retrace the original texts (*Interpolationenforschung*) and to understand its role within ancient laws from a purely historical perspective (*antike Rechtsgeschichte*). In both cases, it seemed clear to the representatives of these trends that Roman law could no longer play any role as a foundation for private law legislation in the present time following the enactment of the BGB, and it was therefore necessary to transform Roman law studies into a purely historical research subject. Accordingly, Koschaker decided to rename the trend *neuhumanistische Richtung*.[37]

The risk of such new research trends was that the study of Roman law would be reduced to antiquarianism, stripping it of any connections with modern legislation and European private law systems. Yet Koschaker also saw two benefits to be gained from the *Historisierung* process: on the one hand, the interpolationism would reintroduce textual criticism to the study of Roman law sources, whereas it had been totally neglected by the pandectists. On the other hand, the scholars propounding the *antike Rechtsgeschichte*, thanks to the discovery of new sources - papyri in particular - emphasising legal contexts extraneous to the ancient Roman world, were able to enlarge the spectrum of studies on ancient laws. Nonetheless, interpolationists carried out research with the solo purpose of discovering textual modifications, in Koschaker's eyes, and in the absence of any wider or more systematic aim, they progressively undermined the authority of the Justinian texts, which ran the risk of being considered the product of the legal 'manipulation' of a post-classical 'legislator'. On the other hand, the representatives of *antike Rechtsgeschichte* challenged the centrality of Roman law among several other ancient laws: despite being considered a prominent legal experience, it was no longer the most important nor the only one that warranted academic scrutiny. In both cases, the scholars of these research fields tended unintentionally to belittle the prestige of Roman law.

At the same time, Koschaker did not acknowledge their status as 'schools', because in his opinion they were merely the result of the research of a few scholars interested in a certain methodological approach to the study of Roman law. Surprisingly, in the case of interpolationism, he named only four scholars: Gradenwitz, Eisele, Lenel and

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[36] See above, chapter 2, pp. 45 f., and also Wenger: *Römische und antike Rechtsgeschichte*; Id.: *Wesen und Ziele*, pp. 464 ff.

[37] Koschaker: *Die Krise*, pp. 37 ff.

Pernice.[38] It is somewhat strange, however, that he failed to consider the influence that the interpolationism had exerted both within and outside of Germany – in Italy, in particular – between the end of the nineteenth century and the first half of the twentieth century.[39] Moreover, Koschaker pointed out that the four scholars would have probably been neglected by Roman law scholarship, had the pandectists not faced a crisis in the late nineteenth and early twentieth century. This is clearly too harsh a judgment on a very influential trend in the studies of Roman law. The shockwaves of Koschaker's severe opinion can be found in his obituary of Gradenwitz, which appeared in the *Zeitschrift der Savigny-Stiftung* in 1936.[40] In this short text, Koschaker defined Gradenwitz as a talented specialist in the research of interpolations, though his failure to systematically organise and describe the results of his studies meant that some other scholars would not define him a true legal historian.[41] Nor did Koschaker spare Ludwig Mitteis, and the group of scholars who worked with him in Leipzig from his criticism, seeing him as a pioneer in studies that eventually led to *antike Rechtsgeschichte*.

In short, the *Historisierung* was therefore responsible for eroding one of the main legacies of the pandectists, namely the ability to show and create connections between Roman law and modern legislation. The upshot of this purely historical approach was twofold. On the one hand, jurists, private law scholars and legal experts began to neglect

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38 Ibid. On Gradenwitz see above, p. 39, fn. 39. On Fridolin Eisele (1837-1920), see: Lenel: *Fridolin Eisele* †, in: *ZSS* (RA) 41 (1920), pp. V-XIV; Joseph Georg Wolf: *Eisele, Hermann Friedriech Fridolin*, in: *NDB* 4, Berlin 1959, p. 409. On Lothar Anton Alfred Pernice (1841-1901), see: Bernhard Kübler: *Alfred Pernice* †, in: *Deutschen Juristen-Zeitung* 6 (1901), p. 451; Andreas Wacke: *Pernice, Alfred*, in: *NDB* 20, Berlin 2001, pp. 194-195. On Otto Lenel, see his autobiography: *Selbstdarstellung* in: Hans Planitz (ed.): *Die Rechtswissenschaft der Gegenwart in Selbstdarstellung*, 1, Leipzig 1924, pp. 132-152; Wenger: *Otto Lenel* †, in: *ZSS* (RA) 55 (1935), pp. VII-XII; Bund: *Lenel, Otto*, in: *NDB*. 14, Berlin 1985, pp. 204 f.; Zimmermann: *Heutuges Recht*, pp. 17 f.

39 Talamanca: *La romanistica italiana fra Otto e Novecento*, in: *Index* 23 (1995), pp. 159-180; Id.: *La ricostruzione del testo dalla critica interpolazionistica alle attuali metodologie*, in: Miglietta/Santucci (eds.): *Problemi e prospettive della critica testuale*, pp. 217-239; Santos: *Brevissima storia*, pp. 65-120; Varvaro: *La storia del 'Vocabularium iurisprudentiae Romanae'*, pp. 251-336.

40 Koschaker: *Otto Gradenwitz* †, pp. IX-XII.

41 Ibid., pp. XI f.: "So möchte man zweifeln, ob man ihn als einen Rechtshistoriker im strengen Sinne bezeichnen kann. Aber wenn sich so die Grenzen seines Talents abzeichnen, so war er doch innerhalb dieser Grenzen ein Master und darauf kommt es an". In the obituary Koschaker also stressed in an ambivalent way Gradenwitz's moral tension between his Jewish origins and his strong nationalistic feelings, depicting him as a very lonely man, *loc. cit.*, p. IX: "Einsam wie sein Leben war auch sein Tod. Nur wenige Freunde haben ihn auf seiner letzten Fahrt begleitet. Das Schicksal hat ihm eine ausgleichende, harmonische Natur versagt. Begeistert für Deutschland, ein glühender Verehrer Bismarcks empfand er seine jüdische Abstammung als innere Spannung, unter der er schwer litt". Yet see for a recent unbiased reconsideration on Gradenwitz's method and approach to interpolationism Baldus: *Eigenwillig und differenziert: Eine Lanze für Otto Gradenwitz*, in: Pirmin Spieß/Christian Hattenhauer/Michael Hettinger (eds.): *Homo heidelbergensis. Festschrift für Klaus-Peter Schroeder zum siebzigsten Geburtstag*, Neustadt a. d. W. 2017, pp. 295-304.

Roman law, considering it no longer useful and detached from the concrete legal needs of modern society. On the other hand, due to the reform of the *Studienordnung,* Roman law courses at the universities were no longer mandatory and end of course examinations in Roman law were abolished. Consequently, students developed scant or no interest in this field.[42]

It was necessary, therefore, to modernise Roman law courses at the universities to rebuild the bridges between Roman law and the modern private law system. Koschaker suggested adopting a systematic approach to the study of Roman law that would both display the legal concepts and the ideas enshrined by the European legal tradition. To achieve this goal, it was imperative to adapt the Savigny School's methodology to the needs of the present: this was Koschaker's idea of the *Aktualisierung* of the study and teaching of Roman law. At the same time, Koschaker considered indispensable to stress the importance of Roman law in the development of the European cultural civilisation (*Kulturgemeinschaft*).

5.4 Koschaker's proposal

It is now possible to return to Koschaker's proposal to restore dignity and prominence to Roman law in order to analyse the scholarly reaction to his work. His suggestion was essentially based on the idea of the *Aktualisierung* of the teaching of Roman law, as well as revising and updating the methods of the Historical School of Savigny. Within this methodological approach, a historical perspective to the Roman law research was only given a residual role, insofar it could be useful to gaining a better understanding of Roman private law concepts and their reception in the European legal history. Besides the dogmatic approach to Roman law studies, there was also space for a methodological aid (*Hilfsmittel*) in the form of comparative legal history (*vergleichende Rechtsgeschichte*).

It has been said that Koschaker thus created a sort of "second pandectist" trend,[43] combining his "slogan" about back to Savigny and the *Leitmotiv* of a shared European legal culture, despite the fact that according to Giaro, Koschaker had depicted the idea of

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42 Compare Betti's words in Betti: *La crisi odierna*, pp. 125 f.; Id.: *Per la nostra propaganda*, pp. 13 ff.

43 See Somma: *L'uso del diritto romano*, p. 113. I find Somma's suggestion, according to which, "Koschaker tentò un recupero dei riferimenti al diritto romano come strumento attraverso cui avvalorare le tendenze espansionistiche tedesche", somewhat questionable. A similar point of view can be found in Giaro: *Aktualisierung Europas*, pp. 37 ff.; Id.: *Der Troubadour*, pp. 31 ff. It is true that Koschaker tried to tie the destiny of Roman law to the destiny and role of Germany in Europe, but he probably adopted this position essentially because he considered it the only way to restore prominence to Roman law. This does not mean, of course, that Koschaker's point of view should necessarily be supported. Of a *Neubelebung des Pandektismus* (a new recover of pandectismus) talk also Bretone: *Come l'anatra*, p. 146; Winkler: *Der Kampf*, pp. 174 ff.

Roman law as laying the foundation stones of a common European tradition as a sort of "fairy tale". Giaro's statement on the common European tradition does, however, appear more as a provocation.[44] Although Koschaker's approach was in some ways positivistic and, in this respect, he did seem to propose a sort of "second pandectist", this criticism failed to acknowledge the complexity of the phenomenon. It would be easy, again, to say that in 1961 Guarino was right in writing in the *Redazionale* of *Labeo* that Koschaker's idea was only a "slogan" and a naive proposal ("ingenua proposta").[45] The author's criticism was harsh, albeit containing some truth, but he did not point out that ideas similar to those suggested by Koschaker were widespread among the Romanists and that the "ingenua proposta" had in any case influenced some of the future generations of Roman law scholars.

Yet there is a further aspect that merits attention. *Die Krise des römischen Rechts* did not in fact clearly describe Roman law as the bearer of intrinsic values or principles. Koschaker undoubtedly emphasised some of its main characteristics, for example, the importance of being Roman law a law created by the Roman jurists during the so-called classical period (*Juristenrecht*), or again the methodology used by Roman jurisprudence to elaborate the *regula iuris* that represented a useful model with which to build a new contemporary legal system and legal science to determine new rules. Nonetheless, Koschaker's reasoning on the importance of Roman law was often squandered on a general discourse based on a very generic idea of a common legal and cultural heritage. In this respect, Koschaker's description was at times lacking in clarity.

His ideas on the so-called *Juristenrecht* are a case in point. Koschaker stated that one of the main characteristics of Roman law as *Juristenrecht* lay in the fact that the work of jurisprudence was conceived as independent from political power.[46] From this point of

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44 More precisely, Giaro writes that it was "una favola di koschakeriana memoria". See Giaro: *"Comparemus!"*, pp. 541 and 544-545. Defining the idea of Roman law as a unifying foundation stone of European legal culture as a "favola di koschakeriana memoria" sounds like provocation, unless one wishes to ignore the historical evolution of law in Europe. Another point stressed by Giaro is, however, correct: many Roman law scholars and legal historians have a tendency to depict the history of private law as a question which pertains only to the Western part of the continent, or, in some other cases, as a question related to the idea of a "German-centric" Europe. On Koschaker's tendency to interpret the idea of Europe as founded on a couple of nations, Italy and Germany, with the latter predominating, see Calasso: *L'Europa e il diritto romano. Alla memoria di Paul Koschaker*, p. 111. In any case, the image of a Roman-German Europe emerges clearly from Koschaker's *Die Krise des römischen Rechts* pages.

45 Guarino: *Redazionale*, in: *Labeo* 7 (1961), pp. 288-290, now also published in Id.: *Berlino 1938*, in Id.: *Ultime Pagine di Diritto romano*, Napoli 2014, pp. 18-19.

46 This aspect will be underlined more clearly in Koschaker: *Europa und das römische Recht*[4], pp. 164-212. In particular, this work stresses not only the importance of the Roman *Juristenrecht*, but also the essential role of the school of Savigny, which resumed this method and this way of thinking about law. It was no longer a true *Juristenrecht*, but had become a *Professorenrecht*, the last bastion of Roman law. Álvaro d'Ors agreed with Koschaker's stance on the *Juristenrecht*. He also considered Koschaker's position as quite similar to that expressed in Carl Schmitt: *Die Lage der europäischen Rechtswissenschaft*, Tübingen 1950. See Álvaro d'Ors: *Jus Europaeum?*, in: *L'Europa e il Diritto romano: Studi in memoria di Paolo Koschaker* I, p. 452.

view, the procedure adopted by Roman jurists becomes both the instrument and the grounds legitimating its autonomy. According to Koschaker's description, however, *Juristenrecht* before, and *Professorenrecht* later, albeit apparently apolitical, needed to remain close to the centres of political power if they were to be implemented. Koschaker's conception, therefore, runs the risk of being self-contradictory, and consequently depicting *Juristenrecht* as deprived of autonomy, which was allegedly its primary characteristic. This could be implied form Koschaker's conception of Roman law, as it was written in *Die Krise des römischen Rechts*, which was not ultimately a value-based system. Roman law and the historical development that followed legitimise each other, and this argument would often "re-used" in the course of time, not because of the values and principles they represented, but on account of their usefulness for the present day[47] or because they are associated with other external factors. With regard to the latter point, it is sufficient to comment that Koschaker considered Roman law to be one of the foundation stones of Imperial law, the *Kaiserrecht* and, therefore, indispensable at the time of the Holy Roman Empire, whereas later it experienced a renaissance as the subject of the studies of Savigny and his School. [48]

What was essential for Koschaker, however, was that the reception of Roman law could take place in Europe because it was, first and foremost, a body of law and legal principles mainly created by jurisprudence and for those very reasons could represent the foundation of a new European legal science from the eleventh century onwards.[49] Yet what should be emphasised in this context, and which Koschaker failed to point out, is that the methodology and argumentation adopted by Roman jurists in creating their *regulae iuris* was so operational and refined that it was able to outlive the development of the single rules. Accordingly, the *regulae iuris* contributed to the formulation of a complete and complex "set of rules and principles", which came to represent the archetype for legal reasoning in the following centuries.[50]

The historical perspective narrated by Koschaker in *Die Krise des römischen Rechts* is ultimately apolitical and almost completely detached from any value-based premises; it describes a history of Europe that leads us in a *continuum* from the Holy Roman Empire

An analysis of the limits of Koschaker's conception of *Juristenrecht* can be found in Calasso: *L'Europa e il diritto romano. Alla memoria di Paul Koschaker*, pp. 108 f.

47 On the question of the "re-use" of Roman law, see Leo Peppe: *Uso e ri-uso del diritto romano*, in: *Diritto@Storia. Rivista internazionale di Scienze Giuridiche e Tradizione romana* 11 (2013), online at http://www.dirittoestoria.it/11/monografie/Peppe-Uso-ri-uso-diritto-romano.htm; the article is the *Introduzione* of Peppe: *Uso e ri-uso del diritto romano*, Torino 2012, pp. 1-20.

48 The contradiction with the idea of *Juristenrecht* as independent from political power is particularly jarring here.

49 Following Koschaker's reconstruction, here I am referring to Roman private law.

50 On the subject of the creation of the *regula iuris* and the legal methodology adopted by Roman jurisprudence, see Miglietta: *Giurisprudenza romana tardorepubblicana e formazione della «regula iuris»*, in: *Seminarios Complutenses de Derecho Romano* XXV (2012), pp. 187-243.

to the present without any real break.[51] If the history of the reception of Roman law is not that of the reception of legal rules justified by the principles and values that distinguished it, and if Koschaker tends to attribute its fortunate destiny to external causes, the question remains as to how Roman law was able to maintain such an important and prominent role at different periods and in different cultural and political contexts, and for which there can be no clear and definitive answer. Moreover, a few additional remarks can be made about the historical narrative as it emerges in the pages of *Die Krise des römischen Rechts*. First, since the history of Europe tends to coincide with the history of Germany, the events and destiny of Germany and the other States influenced by it are understood to be those of the whole of Europe.[52] In this respect, Koschaker proposes a German-centric idea of Europe and of the *ius commune europaeum*, without considering the different experiences across the continent and ignoring the fact that the countries of Eastern Europe are neglected, or are only considered as the "product" of the Western European tradition.[53] Indeed, it seems fair to point out that Koschaker's German-centric idea of Europe comes as no surprise, since it was a common and shared idea among German Roman law scholarship and legal historians in the first half of the twentieth century.[54]

Secondly, a further remark about Koschaker's historical reconstruction can be gleaned from Calasso.[55] According to Calasso, Koschaker's description of law in the Middle Ages is ambivalent, as his approach to this era and its legal developments is at times superficial. On reading his work, it appears that his idea was akin to one in which law was merely a by-product of ancient Roman law during the Middle Ages, yet not long after in the nineteenth century it reappears triumphantly thanks to Savigny and his school.[56] Despite

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51 This idea of continuity seems also to be obvious in the historical depiction of Europe given in Koschaker: *Europa und das römische Recht*. For a harsh criticism of this reconstruction and the myth of the "continuity", see Giaro: *«Comparemus!»*, pp. 541 and 544. Before Giaro, some critical remarks on this point already appeared in Calasso: *L'Europa e il diritto romano. Alla memoria di Paul Koschaker*, pp. 109 ff.

52 In this respect, Giaro's argument is correct; see Giaro: *«Comparemus!»*, pp. 540 ff. However, Koschaker's point of view changed to some extent in the last years of his life, in particular thanks to his experience as professor in Ankara from 1948 to 1950. See above, chapter 4, § 7, and also Koschaker: *Selbstdarstellung*, p. 118, on his time in Ankara, and p. 122, on his conception of Roman law as universal. Koschaker's partially new point of view emerges from two letters that he sent to Riccobono: the first on 11th April 1949, from Ankara; the second on 31st March 1951, from Walchensee, shortly before he died. On the first letter, see above, pp. 167 f.; on both the letters, see again below, pp. 243 f.

53 D'Ors: *Jus Europaeum?*, p. 472 is very critical of Koschaker on this point, but with convincing reasons.

54 Mantello: *La giurisprudenza romana*, pp. 23 ff.

55 Calasso: *L'Europa e il diritto romano. Alla memoria di Paul Koschaker*, pp. 105 ff.

56 Koschaker's conception actually recalls the often-cited sentence pronounced by Johann Wolfgang von Goethe (1749-1832) on 6th of April 1829, during one of his many conversations with the poet and friend Johann Peter Eckermann (1792-1854), 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

his faith in history and its importance, Koschaker does not seem coherent throughout his essay.[57]

Die Krise des römischen Rechts was praised in Italy and Germany, despite the fact that many scholars found Koschaker's approach to Roman history and Legal history, in general, somewhat questionable including from a methodological perspective. The following paragraphs will examine the reactions to Koschaker's work, in particular those of Italian scholars.

5.5 The reactions to *Die Krise des römischen Rechts und die romanistische Rechtswissenschaft*

In the years immediately after the publication of *Die Krise*, some reviews of the work and articles dealing with it appeared,[58] and although Koschaker's effort to restore dignity to

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. The original text reads: "[…] Auch das römische Recht, als ein fortlebendes, das gleich einer untertauchenden Ente sich zwar von Zeit zu Zeit verbirgt, aber nie ganz verloren geht und immer einmal wieder lebendig hervortritt, sehen wir sehr gut behandelt, bei welcher Gelegenheit denn auch unserm trefflichen Savigny volle Anerkennung zuteil wird." See Johann Peter Eckerman: *Gespräche mit Goethe in den letzten Jahren seines Lebens*, II, Leipzig 1836, Kapitel 123, p. 286. On Eckermann, see: Hans Heinrich Borcherdt: *Eckermann, Johann Peter*, in: *NDB* 4, Berlin 1959, pp. 289 f.

57 In this sense, see the remarks in: Cristina Giachi/Valerio Marotta: *Diritto e giurisprudenza in Roma antica*, Roma 2012, pp. 22 f.

58 Jürgen von Kempski: *Krise des römischen Rechts oder Grundlagenkrise der Rechtswissenschaft*, in: *Archiv für Rechts- und Sozialphilosophie* XXXII, 3 (1938/1939), pp. 404-409; Giuseppe Grosso: Rec. di KOSCHAKER, *Die Krise des römischen Rechts und die romanistische Rechtswissenschaft*, München/Berlin, 1938, in: *SDHI* V.2 (1939), pp. 505-520, now also published in Grosso: *Scritti storico giuridici*, IV, Torino 2001, pp. 101-116; Ernst Levy: review of *Die Krise des römischen Rechts und die romanistische Rechtswissenschaft* by Paul Koschaker, VI, 86 pages. Beck, Munich 1938, in: *The Classical Weekly* 33, 8 (1939), pp. 91-92; Betti: *La crisi odierna*, pp. 120-128; Plachy: Rec. di Koschaker, *Die Krise des römischen Rechts und die romanistische Rechtswissenschaft*, in: *Rivista di Storia del Diritto Italiano [RSDI]* 12, 2 (1939), pp. 388–394; Schwerin: *Rez. von Paul Koschaker*, pp. 182 ff.; more than a simple review is Giovanni Pugliese: *Diritto romano e scienza del diritto*, in: *AUMA* 15 (1941), pp. 5-48, now also published in: Pugliese: *Scritti giuridici scelti*, III, Napoli 1985, pp. 159-204; Odoardo Carrelli: *A proposito di crisi del diritto romano*, in: *SDHI* 9 (1943), pp. 1-20; Pierre Noailles: *La crise du droit romain*, in: *Mémorial des Études Latines, Offert par la Société des Études Latines à son fondateur Jules Marouzeau*, Paris 1943, pp. 387-415; see also the text, which appeared fifty years later, by Guarino: *Cinquant'anni dalla «Krise»*, pp. 276-291. Although it is not simply a review of Koschaker's work, see Ernst Schönbauer: *Zur „Krise des römischen Rechts"*, in: *Festschrift Paul Koschaker*, II, pp. 385-410. On the problem of the crisis of Roman law between the two world wars and the debate developed in Italy, see the historical reconstruction in Santucci: *«Decifrando scritti che non hanno nessun potere»*, pp. 63-102. In this essay, particular attention is paid to Betti's stances on the crisis and role of Roman law.

Roman law was greatly appreciated, certain critics were provoked by his work. Some of these critiques are still particularly significant and will be, therefore, in-depth discussed.

One of the first reviews, by Giuseppe Grosso, appeared just a year after the publication of Koschaker's work,[59] and stated very precisely that Koschaker had run the risk of contradicting himself. Grosso wrote that failing to consider or indeed showing indifference towards the history of Roman law was not the right way to understand its legacy.[60] He further pointed out that it was impossible to acknowledge the reception of Roman law and the development of jurisprudence based upon it as a "supporting structure" for the European framework – as Koschaker had done so – and then reject the wonderful "picture" represented by the process of the historical development of Roman law itself. This process had in fact given Roman law its historical mission.[61] The idea of the *Aktualisierung* proposed by Koschaker took the considerable risk of only valorising Roman law insofar as it was useful for the present — ultimately a positivist perspective. Nevertheless, Grosso did not disregard the importance of a dogmatic-systematic approach to the study and teaching of Roman law and, for these reasons, he indeed praised Koschaker's efforts, as well as his commendable attempt to defend Roman law on a more general level.

A more thorough analysis of Koschaker's assertions was attempted in an article written by Giovanni Pugliese in 1941, which amounts to more than a mere review of *Die Krise des römischen Rechts und die romanistische Rechtswissenschaft*[62]. Since Pugliese himself wanted to deal with the problem of the crisis of Roman law, he immediately acknowledged the importance of Koschaker's work as fundamental to reviving the debate on the subject.[63] As Pugliese correctly stated, when Koschaker mentioned the *Aktualisierung*

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59 Grosso: Rec. di KOSCHAKER, pp. 101-116.

60 Ibid., pp. 105-106 and p. 111.

61 Ibid., p. 105. Grosso wrote: "Nessuno che riconosca la recezione del diritto romano, e lo sviluppo della giurisprudenza che su di esso si fonda, come muro maestro dell'edificio europeo, come mette in risalto il K., potrebbe poi respingere, come vicenda storica altrui, il meraviglioso quadro che ci offre il suo processo di formazione e di sviluppo, che appunto gli ha impresso quella sua missione storica." See also on this point Grosso: *Premesse generali al corso di diritto romano*[1], Torino 1940, p. 50.

62 Pugliese: *Diritto romano e scienza del diritto*, pp. 159-204. The first two important reactions to Pugliese's work were by Betti, who embraced many of the suggestions that the first proposed, and, a few years later, by Guarino, who by contrast criticised the work. More recently, Garofalo discussed Pugliese's article in order to stress its importance in the enduring debate about the role of Roman law. See Betti: *Istituzioni di diritto romano*[1] I, Padova 1942, pp. X-XVI, now also in Betti: *Diritto Metodo Ermeneutica. Scritti scelti* (ed. Giuliano Crifò), Milano 1991, pp. 217-235; Guarino: *Il problema dogmatico e storico del diritto singolare*, in: *Annali di diritto comparato* XVIII (1946), pp. 1-54, now also in Guarino: *Pagine di Diritto romano*, VI, Napoli 1995, pp. 3-75; Luigi Garofalo: *Giurisprudenza romana e diritto privato europeo*, Padova 2008, pp. 167-238.

63 But the problem had already been taken into consideration by other scholars before Koschaker. In this respect, an important example is offered by Mario Lauria's article: *Indirizzi e problemi romanistici* (*Prolusione* of the course *Istituzioni di diritto romano* at the University of Padua, held in 1935), in: *Foro Italiano* 61 (1937), pp. 511-560, now also in Lauria: *Studii e ricordi*,

in his work, it is unclear as to precisely what he was referring by this concept. If it had been conceived as a return to the methodology of the pandectist school, this concept would not have been acceptable.[64] The second obvious limitation of Koschaker's reconstruction is that he only considered the German aspect of the crisis of Roman law ("l'aspetto germanico della crisi") and transferred the entire responsibility for it onto the *Historisierung* and the interpolationism. Pugliese claimed, correctly I think, that if we want to find meaning in the *Aktualisierung*, a historical approach inevitably needs to be adopted, otherwise the study of Roman law would run the risk of losing its significance. As such, Roman law would remain subordinate to pragmatic necessities, which change on a whim as the wind changes direction, allowing its role and use to be modified on the basis of changing social needs or of established power. Equally important, and for it to be really effective, Koschaker's reconstruction would need to rely on the assumption that European private law in all the countries of the so-called Western tradition of civil law has remained more or less static over the centuries; yet, of course, this is not the case. According to Koschaker's view, the study of Roman law should not only be circumscribed to private law sphere, but more precisely to single subjects where its influence is more evident in modern law.[65] Furthermore, if it can truly be argued that Roman law should only be studied to the extent that it is of practical value and for the purpose of interpreting contemporary legislation, this would presuppose a common identity or at least a great affinity between them. Another risk should also be added to the previous ones described above: if the study of Roman law was limited to the institutions of modern legislation directly influenced by it, then this branch of study would be totally irrelevant in those countries where the historical-legal

Napoli 1983, pp. 322-340; Betti: *Methode und Wert des heutigen Studiums des römischen Rechts*, in: *TRG* 15, 2 (1937), pp. 137-174; Valentin-Al. Georgesco: *Remarques sur la crise des études de droit romain*, in *TRG* 16, 4 (1939), pp. 403-433. Also in Germany the problem of the role of Roman law and its situation had already been discussed before 1937-1938. See for example Erich Genzmer: *Was heißt und zu welchem Ende studiert man antike Rechtsgeschichte?*, in: *ZAkDR* 3 (1936), pp. 403-408. For an overview on the German situation see Stolleis: *Fortschritte*, pp. 177 ff. From a wider methodological perspective, the problem had been already dealt with by De Francisci: *Dogmatica e storia nell'educazione giuridica* (*Prolusione* of the course *Istituzioni di diritto romano* at the University of Padua, held in 1923), in: *Rivista internazionale di Filosofia del diritto* 3 (1923), pp. 373-397, now in: Giuliano Crifò/Giorgio Luraschi (eds.): *Questioni di metodo. Saggi di Pietro de Francisci e di Emilio Betti*, Como 1997, pp. 7-32; Betti: *Diritto romano e dogmatica odierna* (*Prolusione* of the course *Istituzioni di diritto romano* at the University of Milan, held in 1927), now in Crifò (ed.): *Diritto metodo Ermeneutica. Scritti scelti*, Milano 1991, pp. 59-133, and also in Crifò/Luraschi (eds.), *Questioni di metodo*, pp. 33-96.

64 In this respect, therefore, we could actually talk of a "slogan", as Guarino did. Álvaro d'Ors's point of view on the idea of *Aktualisierung* is quite similar to that of Pugliese and Guarino. See Pugliese: *Diritto romano*, p. 163; d'Ors: *Jus Europaeum?*, p. 462.

65 On this point of view, see the criticism by Giaro: *«Comparemus!»*, pp. 542 ff. and 550 ff. Compare also Garofalo: *Giurisprudenza romana*, p. 168 and his comments on Pugliese's work.

development happened independently of Roman law itself.[66] Pugliese therefore concluded that if the destiny of Roman law studies was bound to the continuity of institutions and rules based on Roman law in contemporary legal systems and codifications, then the study of Roman law would inevitably be sentence to death. This fallacious idea not only represented in part Koschaker's main line of reasoning, but it was also shared by other scholars.[67] The very same idea of *Juristenrecht* would risk being deprived of its essential value if this conception were followed, leaving only façade that would have been subjugated to the will of the legislator. Koschaker's conception of Roman law and its reception does indeed seem to be heavily biased towards the generic idea of the cultural values that endured the centuries propagating a sort of myth of continuity.[68]

Some further comments should be dedicated to the remarks that Pugliese made on Koschaker's proposal and, more generally, the suggestions he made about the study of Roman law.[69] First, Pugliese considered it very important that the study of Roman law should not be restricted simply to Roman private law, arguing on the contrary that it needed to embrace the whole spectrum of law, including public and criminal law and, more generally, its history as well.[70] Otherwise, according to Pugliese, it would be impossible to understand the complexity of legal phenomena, the peculiarities of the Roman legal order and its development throughout the centuries. In fact, we cannot consider it to be monolithic legal *corpus* not having undergone any changes from one historical period to another. Koschaker seemed to disregard this point, at least in *Die Krise des römischen Rechts.* The main reason for studying Legal history and Roman legal history, in particular, as Pugliese wrote in his *Diritto romano e scienza del diritto*,[71] consists in the contribution

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66 Pugliese: *Diritto romano*, p. 165. Related to this problem, therefore, is Koschaker's idea of Europe developed by a Western or "German-centric" Europe.

67 Ibid., 166: "Ecco perché quando si connette la fortuna degli studi romanistici al permanere negli ordinamenti giuridici moderni di istituti modellati su quelli romani si destinano in sostanza quegli studi ad una fine irrimediabile. Questo il pericolo gravissimo dell'idea, che costituisce il filo conduttore del saggio del K. e che, come ho osservato, è condivisa più o meno esplicitamente da molti altri autori."

68 On the topic of the continuity, see Calasso: *L'Europa e il diritto romano: Alla memoria di Paul Koschaker*, pp. 111 f. See now also Winkler: *Der Kampf*, pp. 239 ff.

69 The long analysis proposed by Pugliese eventually led to the elaboration of some methodological suggestions that would have then represented the foundations of the trend of study that Pugliese introduced in Italy, the so-called "orientamento storico-comparatistico"; Pugliese's approach has generated a very long-lasting and articulate debate among Romanists that still continues today. However, for the purposes of this work an in-depth analysis of his approach would go beyond the aim of the present work. Nevertheless, a precise account of the current perspective of the debate in Italy can be found in Garofalo: *Giurisprudenza romana e diritto privato europeo*, pp. 173 ff. and in Carla Masi Doria: *La romanistica italiana verso il terzo millennio: dai primi anni Settanta al Duemila*, in: Birocchi/Brutti (eds.): *Storia del diritto*, pp. 179-204.

70 Pugliese: *Diritto romano e scienza del diritto*, pp. 164-166. The importance of this statement is self-evident.

71 Ibid., pp. 164, 166-168, 176, 200-202. On the essence and role of historical studies, see also Calasso: *L'Europa e il diritto romano. Alla memoria di Paul Koschaker*, pp. 120 f.

that they can offer to knowledge of the phenomenon of the complex essence of law.[72] In this sense, there are several similarities between Pugliese and the opinions expressed in Koschaker's *Europa und das römische Recht*, where the combination of historical-dogmatic study and comparative methodology are considered as the key to discovering and depicting the common principles of European private law systems.[73]

At the same time, Pugliese insisted that this kind of historical research required legal knowledge and constructive capabilities. One of the objectives of this type of study was to find general and universal legal principles; however, this statement should not be interpreted to mean that principles and rules were unchanging, and were also present in every piece of modern legislation. Legal history thus can and should maintain its theoretical role, but not independently of legal practice. Rather, a better understanding of the legal practice in its perpetual state of change can only be achieved thanks to a historical approach. For all these reasons, it appears that Roman law represents one of the cornerstones of European legal culture on account of the influence that it exercised over the centuries, as well as the *exempla* it can still offer, the formulation of legal reasoning as developed by Roman jurists and the legal techniques they used, as well as the substantial legal heritage that it has passed down. According to Pugliese, however, if it is claimed that only its utility should be considered in interpreting or employing it with regard to modern legislations, we diminish the cultural and legal application of Roman law, condemning it to a bleak future.[74] As Pugliese correctly stressed, there are many contingent reasons that justify the study of Roman law, but since they are temporary, they could only legitimise such study in certain periods and not others; hence it is imperative to research the profound and non-contingent causes that justify the study of Roman law, and Legal history more generally.[75] For the same reasons, Pugliese considered it necessary to stress the importance of history – legal history in particular – because it describes the legal

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72 Pugliese: *Diritto romano*, p. 166, claimed that: "Consiste nel contributo che essi possono recare alla conoscenza del fenomeno giuridico nella sua complessa essenza."

73 This point will be discussed in depth below, where the study will focus on *Europa und das römische Recht*, in this chapter, §§ 10 and 11. It seems probable, however, that the comparative approach to the study of legal history that was shared both by Pugliese and Koschaker could, at least in part, appease the methodological differences existing between the two scholars.

74 Pugliese: *Diritto romano*, p. 164: "All'origine delle osservazioni svolte dal K. sta l'idea [...] che le discipline romanistiche mirino solo alla comprensione ed alla migliore applicazione delle norme relative a quegli istituti giuridici moderni, di cui è dato riconoscere l'origine romana o di cui è più evidente l'affinità con istituti romani. Ora una simile idea, che è in realtà molto diffusa, è fra le più pregiudizievoli che si possano concepire per l'avvenire di quelle discipline." Similar considerations appear in Grosso: *Rec. di Koschaker*, pp. 106-107.

75 Pugliese: *Diritto romano e scienza del diritto*, p. 167. Of course, it is not easy to find these causes, as the long-lasting debate among scholars shows (see again Garofalo: *Giurisprudenza romana*, pp. 175 ff.). It is not within the ambit of this work to analyse this debate, suffice it to say that Pugliese's statements seem to indicate quite a clear difference of opinion between his point of view and Koschaker's.

experience throughout its continuing transformation.[76] His remarks in this long excerpt therefore led him to conclude that the proposal of the *Aktualisierung* suggested by Koschaker could not be deemed the proper means by which to restore dignity to Roman law and its study. Of course, Pugliese also recognised two particular values in Koschaker's work: first of all, Koschaker was able to underline once again the problem of the crisis of Roman law in a period during which not all scholars still considered it so profound and extensive.[77] Secondly, Koschaker also correctly identified that the crisis came from a time preceding the advent of the Nazi regime (even though its arrival had exacerbated the problem).

Even though Pugliese and Grosso represented, at least in part, two critical voices, as Italian Romanists nonetheless acknowledged the value of Koschaker's work and, therefore, did not attempt to diminish its relevance to the ongoing debate on Roman law and its crisis at that time.

A negative opinion on *Die Krise des römischen Rechts*, on the contrary, was made by another Italian scholar, Odoardo Carrelli.[78] The latter took a stance against Koschaker's *Aktualisierung* in the text of the introductive lecture (*prolusione*) to Roman law course which he never had to opportunity to present at the University of Messina in 1943, as he died during the war during service in the army, in the vicinity of Nola.[79] Carrelli was firmly convinced that Roman law was a historical discipline that could only be considered, studied and taught from a historical perspective. The fact that it was a historical subject justified why Roman law should be still studied and could represent one of the fundamental parts of the legal education of jurists.[80] One of the main problems faced by Roman law in the last twenty years, wrote Carrelli, was the widespread anti-historicism that had led to

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76 Pugliese: *Diritto romano*, p. 201. It is interesting to read what Pugliese wrote about the "eternal reasons" for studying Roman law on p. 202: "Ed ecco allora individuata la ragione eterna dello studio del diritto romano. Alcuni diritti dell'antichità, diversi dal romano, possono essere interessanti per la teoria generale del diritto ed io ne riterrei utile lo studio […]. Ma il diritto romano è senza dubbio fra i diritti storici la più ricca miniera di esperienze giuridiche ancora in notevole misura da sfruttare. Una parte del pregio del diritto romano dipende evidentemente dalle alte qualità dei giuristi [...]. Ma un'altra parte di quel pregio è conseguenza dei caratteri, che vorrei dire naturali del diritto romano: si tratta di un diritto che ha regolato ininterrottamente la stessa compagine politica durante oltre 1300 anni, di un diritto che si è espresso volta a volta da una repubblica oligarchica, da una democrazia, da un regime autoritario e illuminato e da una autocrazia [...]. Non si saprebbe immaginare un più vasto campo di osservazione per gli scienziati del diritto." On the contribution that Roman law could offer to the legal science ("*scienza del diritto*"), see the similar point of view of Grosso: *Premesse generali al corso di diritto romano*[1], p. 50.

77 See, for example, Schönbauer: *Zur „Krise des römischen Rechts"*, pp. 385-410, for an attempt to play down the crisis of Roman law.

78 On Odoardo (or Edoardo) Carrelli (1908-1943), see Guarino: *Redazionale. Odoardo Carrelli*, in: *Labeo* 19 (1973), pp. 281-282, now also published in Id.: *Pagine di Diritto romano*, II, Napoli 1993, pp. 166-168.

79 See Guarino: *Cinquant'anni dalla «Krise»*, p. 278.

80 Carrelli: *A proposito*, pp. 1 ff. and 13.

a crisis of the Roman legal history studies; this circumstance, however, was contingent, and the author eventually affirmed that it was not possible to actually talk of a crisis of Roman law.[81] Briefly stated, according to Carrelli, it was reasonable to affirm that there was no genuine crisis of Roman law in Europe, insofar as Roman legal history (note that Carrelli talks of "Storia del diritto romano" and not of "Diritto romano") would have been studied only as a historical topic. It is clear that Carrelli positioned himself in opposition to Koschaker, advocating a historical approach to Roman law and, therefore, he was contrary to the idea of its *Aktualisierung* to serve as a basis for modern legislation.

Carrelli's stance on Koschaker's methodological proposal was completely shared by Guarino a few years later, in his article *L'Europa e il Diritto romano*, appeared after the publication of Koschaker's *Europa und das römische Recht*.[82] According to Guarino, Koschaker's remedies for the crisis of Roman law were merely palliative.[83] Guarino, who defined the *Aktualisierung* as an naïve proposal ("ingenua proposta") or a "slogan" in 1961,[84] mitigated in part his criticism of Koschaker's methodological approach only fifty years after the publication of *Die Krise des römischen Rechts*.[85] Even though he continued to support Carrelli's point of view and was adverse to Pugliese's, he also concurred that it was necessary for the Romanists to find a language that made their works more comprehensible to modern legal scholars.[86]

Two more critical voices came from German scholars immediately following the publication of Koschaker's text: one of them, Ernst Levy, a Jewish scholar, was already

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81 Ibid. Carrelli talks of "ondate di antistoricismo affioranti nella vita europea dell'ultimo ventennio" that for sure hit Roman law studies too; nonetheless he added: "[…] ritengo per conseguenza che di una crisi del diritto romano non si possa parlare."

82 Guarino: *L'Europa e il Diritto romano*, pp. 295-299. The author affirms in the text that he had already expressed his ideas in previous works, and in particular in Guarino: *Storia del diritto romano*^{2}, Napoli 1954, pp. 44 ss.

83 Guarino: *L'Europa e il diritto romano*, p. 296. Carrelli was actually averse to any kind of "actualisation" of Roman law study and teaching. In this sense and with similar aims, see the clear words by Lauria: *Indirizzi e problemi romanistici*, pp. 324 ff. Lauria wrote this article in 1935, so before Koschaker's *Die Krise des römischen Rechts und die romanistische Rechtswissenschaft*. Nonetheless he made a penetrating criticism of any defence of Roman law that aimed to mainly retrace the connections between modern legislations and Roman law and, in this way, to underline the utility of the latter for the study and the development of modern law. Lauria actually denounced the fact that many Roman law scholars refused to acknowledge the importance of the "historical research", *loc. cit*., p. 324: "[…] evidentemente, non giustificano una scienza storica e partecipano anzi dell'errore che intendono combattere. Al pari di esso negano in pieno e disconoscono la ricerca storica, assegnando alle indagini limiti estrinseci e perciò arbitrarî, finalità scolastiche e perciò astratte."

84 Guarino: *Berlino 1938*, p. 18.

85 Guarino: *Cinquant'anni dalla «Krise»*, p. 279.

86 Ibid. The author also refers to his own writing Guarino: *Il problema dogmatico*, pp. 1-54.

a refugee in the US at the time when he wrote his review. The other Romanist was Ernst Schönbauer, a supporter of the Nazi regime.[87]

Levy harshly dismissed of Koschaker's proposal, which was essentially, but not entirely, based on a significant scientific disagreement. He actually considered it was not fair to burden the scientific trends grouped under the name of *Historisierung* with the entire responsibility for the crisis of Roman law, as Koschaker had done. Moreover, he found the criticism of the latter "pathetic":

> "It is pathetic to hear such a charge coming from a man who has devoted his life to those very two fields. It is all the more pathetic because in my opinion, that charge does not hold good. If it did, how should we account for the fact that, as the author admits, nowhere else in the world do courses in Roman law show so steep a decline as in Germany?"[88]

Levy pointed out that "Research work is one thing, class work another", to underline how incomprehensible Koschaker's point of view was in his opinion; the latter should have distinguished between research and teaching and admitted that the *Historisierung* of Roman law was a phenomenon involving only the study of the subject and not its classes.[89] Beyond the methodological disapproval, Levy seemed to reproach the fact that, between the lines, Koschaker did not clearly affirm that the crisis of Roman law was due to the Nazi regime, as he instead claimed in his review.

Levy's point of view is understandable for two reasons: first, because he was one of the victims of the Nazi violence; with regard only to Roman law, the regime had exacerbated a situation of crisis that already existed in Germany, but peaked from the second half of the thirties onwards. Through the persecution of the Jews and dissidents, the regime forced a huge number of people to flee including scholars, and among them, some of the best German Roman law scholars and legal historians.[90] Second, even though

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87 On Levy, see above, p. 79, fn. 30. On Ernst Schönbauer (1885-1966), see Theo Mayer-Maly: *Ernst Schönbauer zum Gedächtnis*, in: *ZSS* (RA) 84 (1967), pp. 627-630; Oliver Rathkolb: *Die Rechts- und Staatswissenschaftliche Fakultät der Universität Wien zwischen Antisemitismus, Deutschnationalismus, 1938 davor und danach*, in: Gernot Heiß/Siegfried Mattl/Sebastian Meissl/Edith Saurer/Karl Stuhlpfarrer (eds.): *Willfährige Wissenschaft. Die Universität Wien 1938 – 1945*, Wien 1989, pp. 197-232; Johannes Kalwoda: *Ernst Schönbauer (1885-1966). Biographie zwischen Nationalsozialismus und Wiener Fakultätstradition*, in: Thomas Olechowski (ed.): *Beiträge zur Rechtsgeschichte Österreichs* 2,2, Wien 2012, pp. 282-316; Meissel/Wedrac: *Strategien der Anpassung*, pp. 57-62.

88 Levy: *Review of Die Krise*, p. 91.

89 Ibid. Levy adds on the following page: "The trouble he [Koschaker] takes to discredit previous German romanistic training and to denounce it as "sick from within" appears to me almost as a fight against windmills."

90 See Stolleis: *Geschichte des öffentlichen Rechts in Deutschland*, Band 3: *Staats- und Verwaltungsrechtswissenschaft in Republik und Diktatur 1914 bis 1945*, München 1999, p.

Levy's reasons were briefly expounded, he correctly pointed out how Koschaker's criticism of the *Historisierung* appeared to be excessive; in this respect, Levy's point of view was similar to the opinion already discussed and shared by most Italian scholars.

Schönbauer's work, on the contrary, represented a sort of change of perspective rather than a critical review of Koschaker's *Die Krise des römischen Rechts*. He published his article in the second volume of the *Festschrift Paul Koschaker*, which appeared in 1939. Schönbauer, whose opinion on the crisis of Roman law differed to Koschaker's, thought it necessary to avoid any alarmism and to depict the crisis of the time as "one" of the various crises that Roman law had encountered in its history, in contrast to "the" crisis of Roman law, as Koschaker had named it.[91] Although he was not so negative towards Wenger and the *Historisierung* of Roman law, nor for that matter against a historical approach to the study of Roman law as Koschaker, Schönbauer showed a degree of scepticism towards the idea of the *Aktualisierung*, as the methodological tool with which come back to Savigny (*Zurück zu Savigny*).[92] Savigny and the contribution of the pandectists eventually led to the enactment of the BGB, an abstract and so unpopular (*unvolkstümlich*) code, according to Schönbauer, for which the pandectists fully deserved to be stigmatised.

The main problem though, according to him, did not consist in a choice between the historical and the dogmatic approach, between Wenger and the pandectists; he simply identified the temporary troubles faced by Roman law as due to the fact that the majority of the scholars in Germany had Jewish origins. They bore the brunt of the hatred of the regime for the subject (and so they had become the reason for this temporary crisis).[93] For a supporter of the Nazi regime like Schönbauer, the causes of the problems – as their solutions – were quite easy to find, since it was mainly a question of Aryan or not Aryan origins of Roman law scholars.

There is a final point of view on Koschaker's *Die Krise* that deserves further analysis: that is Betti's opinion. It has been previously explained that Betti spent many months in Germany, teaching Roman law in various universities – among others, Frankfurt am Main, Bonn and Cologne – as a visiting professor, invited by German colleagues, in 1937

253; Max Radin: *Cartas romanisticas (1923-1950)*, Napoli 2001, pp. 95 f., 105 f., 109 f., 114, 141 f.; Zimmermann/Beatson (eds.): *Jurists uprooted*; Winkler: *Der Kampf*, p. 166 ff., where further literature, and now also Kaius Tuori: *Exiled Romanists between Traditions: Pringsheim, Schulz and Daube*, in: Tuori/Björklund (eds.): *Roman Law and the Idea of Europe*, forthcoming.

91 Schönbauer: *Zur Krise*, pp. 384 f.

92 Ibid., p. 389.

93 Ibid., pp. 387 f.: "Denn um der historischen Wahrheit willen muß auch darauf hingewiesen werden, daß die Gegnerschaft, die im Nationalsozialismus so stark im Altreiche auftrat, zum Teil auch darauf beruhte, daß dort die führenden Vertreter der Romanistik nichtarischer Abstammung waren. In der Ostmark aber spielten die wenigen Nichtarier in der Romanistik keine größere Rolle; und den Studenten traten seit Jahrzehnten nationale Professoren des römischen Rechtes […] entgegen." On Schönbauer's passage on not Aryan Professors of Roman law in Germany, see Gamauf: *Die Kritik am Römischen Recht*, pp. 57 f.

and 1938.[94] Betti's aim consisted in teaching students the course on "antike Rechtsgeschichte", without neglecting the pandectist approach to the study of Roman law. Betti was particularly intolerant of the hatred for Roman law incited by the Nazi regime and the Nazi Legal scholars and considered necessary to recover the pedagogical role of Roman law in Germany.[95] As he had the opportunity to explain in a letter to Benito Mussolini on 4th November 1936, he, as all the Fascist intellectuals, desired to be the learned weapon of the regime ("l'arma dotta del regime") abroad.[96] The intent was to pursue an intellectual effort abroad for cultural supremacy, and this effort was to pass through the teaching of Roman law, both for its educational role for jurists and as the foundation for modern civil law.

Nevertheless, Betti experienced in person the lack of interest among German students in attending Roman law courses and denounced the critical situation one year before Koschaker, in an article published in the *Tijdschrift voor Rechtsgeschiedenis*.[97] In this text, as well as in the preface of the first volume of his *Diritto romano* published in 1935,[98] Betti suggested an approach to the study of Roman law that was very similar to Koschaker's proposal, which subsequently appeared in *Die Krise des römischen Recht* in 1938. Betti was convinced of the need for a dogmatic approach to the study of Roman law, as well as the need to rebuild a dialogue with Civil law scholars. Furthermore, the Romanists were supposed to enhance the educational role of Roman law for students and young jurists; lastly, Betti considered Roman law as an important legacy and an essential part of European culture.

There was, therefore, a basic agreement on the role of Roman law and its teaching between Betti and Koschaker, who had known each other well since the *Congresso internazionale di Diritto romano,* held in Bologna and Rome in 1933.[99] The main pillars of Koschaker's conception, as depicted in *Die Krise des römischen Rechts*, had already been similarly described, albeit more briefly, by Betti in his works. This explains why the latter's review of *Die Krise des römishen Rechts* appeared more like the continuation of a dialogue at a distance between the two scholars. In fact, it was Koschaker who first applauded Betti's stances in his *Die Krise des römischen Rechts*, affirming that the latter had rightly stated that the dialogue needed to be rebuilt between the Roman law scholars and the jurists who dealt with modern law, and any kind of antiquarian research should

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94 See above, pp. 109 f. and Betti: *Notazioni autobiografiche* (ed. by Eloisa Mura), Padova, 2014, pp. 33 ff.

95 Betti criticised the speech given by Hans Frank on Roman law and German law at the *Istituto Fascista di Cultura* in 1936; see Eloisa Mura: *Emilio Betti, oltre lo specchio della memoria*, in: Betti: *Notazioni*, pp. XLI f. On Frank's speech see above, pp. 81 f. and 115; see also Mantello: *La giurisprudenza romana*, pp. 36 f.

96 Betti: *Per la nostra propaganda culturale*, p. 14.

97 Betti: *Methode und Wert*, pp. 137-174; Id.: *La crisi odierna*, p. 125.

98 Betti: *Diritto romano I. Parte generale*, Padova 1935, mainly pp. VIII ff.

99 Id.: *Notazioni*, p. 29.

be dismissed.[100] Moreover, Betti correctly stressed Roman law as being part of the European cultural complex ("europäischer Kulturkreis") shared by European nations.[101] The only ostensible disagreement regarded the following aspect: Koschaker pointed out that Betti's manual on Roman law seemed to be simply an updated version of a Pandette's book (a typical pandectist textbook), revised according to the results of textual criticism.[102] Betti's work and approach could be considered legitimised in Koschaker's opinion only if Roman law was not considered as a mere phenomenon of the past, rather as an essential part of contemporary European legal culture.

Betti's reply in his review of *Die Krise des römischen Rechts* is clear: the divergence regarding the methodology to be applied to the study of Roman law could easily be overcome.[103] Betti himself was aware of the European nature of Roman law and he added a remark for Koschaker's consideration: the crisis of Roman law was nothing more than an aspect of the more general crisis of classical culture in Europe.[104] Betti, a fervid fascist, was worried about the crisis of the pedagogical role of the Christianity and classical culture in Europe at that time, and feared, somehow paradoxically, the emergence of a new barbarity.

What clearly transpires from reading the pages of Betti's review is his broader cultural perspective compared to Koschaker's, even though both scholars believed in the essential role of Christianity and Roman law as the basis of Europe. From a methodological perspective, even though Betti's conception was more refined than Koschaker's and rooted in a more elaborate philosophical background, both of them believed in a dogmatic-systematic approach to the study of Roman law, which was necessary for the study of the contemporary institutions of modern private law.[105] Accordingly, it would have been possible to recover

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100 Koschaker: *Die Krise*, p. 78, fn. 2: "[…] Wenn es seine Absicht ist (Diritto Rom. S. VIII, X) [Koschaker refers to the aforecited Betti: *Diritto romano* I], aus seiner Darstellung „alles zu entfernen, was tote Gewicht bloßer Gelehrsamkeit und rein antiquarischen Interesses ist", wenn er so „den Kontakt zwischen Romanisten und den Rechtswahrern des geltenden Rechts wiederherstellen" will, so sind dies Bestrebungen, die unsere Aufmerksamkeit, Interesse und Sympathie im vollen Maße verdienen".

101 Koschaker: *Die Krise*, p. 85.

102 Ibid., p. 77.

103 Betti: *La crisi odierna*, pp. 125 f.

104 Ibid., p. 127: "La crisi degli studi di diritto romano non è che un aspetto particolare di un problema più generale che concerne l'autorità e l'efficienza da riconoscere alla cultura classica nella nostra educazione mentale e nella cultura dell'Europa odierna. […] Ora nel più recente orientamento della cultura europea è insito un pericolo contro il quale è da porre in guardia: il pericolo che, indebolitasi l'influenza educatrice del cristianesimo nella vita etica, vada offuscandosi e perdendosi anche il lume e l'unità organica che l'antichità classica porta alla formazione mentale e morale degli Europei di oggi." In this respect, a similar point of view can be found in the review of *Die Krise* by Kempski: *Krise*, pp. 404 ff. On Kempski's writing see Stolleis: *Fortschritte*, pp. 183 ff.

105 Ibid., p. 126: "Il K. (79) caldeggia una esposizione dogmatico-sistematica delle teorie fondamentali del diritto privato sulla base del diritto romano: esposizione destinata a servire da introduzione nel pensiero giuridico europeo".

the useful function ("funzione utile") of Roman law through teaching and through the education of both law students and scholars. Besides the dogmatic-systematic approach, there was still room for comparative legal history as a means to discover the development of legal ideas and concepts of the Roman world, as well as those of other ancient civilisations.[106]

Betti seemed to focus on a broader contextualisation of common European classical culture and education, whereas Koschaker was more interested in European culture, to the extent that it was primarily connected with legal education. Nonetheless, the convergence of opinions between the two scholars still continues to be quite remarkable.

5.6 Final remarks on *Die Krise des römischen Rechts und die romanistische Rechtswissenschaft*

As was explained above, the lecture at the *Akademie für Deutsches Recht* in 1937 and the following publication of *Die Krise des römischen Rechts und die romanistische Rechtswissenschaft* have often been considered by many scholars as the main turning point in Koschaker's life and career, particularly with regard to his approach to the Nazi regime. Two main ideas developed about this period of Koschaker's life following his death in 1951. The first, which characterises the majority of the scholars, considered Koschaker a fierce opponent of the regime, fighting against it at least since 1937,[107] and underlined the importance of Koschaker's works in defence of the European legal culture. More recently a divergent opinion has developed, which tends to see Koschaker as a more or less involuntary supporter of the Nazi regime.[108] Both these views are well-established, even if

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106 Ibid.

107 See Julius van Oven: *Comptes Rendus Paul Koschaker, Europa und das römische Rechts. Fritz Schulz, History of Roman Legal Science*, in: *TR* 18, 1 (1950), pp. 68-79, and, in particular, pp. 72 f.; Calasso: *L'Europa e il diritto romano. Alla memoria di Paul Koschaker*, pp. 104 and 119; then see Noailles: *La crise*, pp. 387 ff.; Adolfo Plachy: *Il diritto romano come valore culturale nella storia dell'Europa*, in: *L'Europa e il diritto romano. Studi in memoria di Paolo Koschaker*, I, Milano 1954, pp. 477-492; Müller: *Paul Koschaker (1879-1951)*, pp. 280-284; Stolleis: *Die Rechtsgeschichte im Nationalsozialismus. Umrisse eines wissenschaftsgeschichtlichen Themas*, in: Stolleis/Simon (eds.): *Rechtsgeschichte*, pp 1 ff. and 4; Stolleis: *Fortschritte*, p. 181; Pieler, *Das römische Recht*, p. 444; Mazzacane: *I tempi della 'Privatrechtsgeschichte'*, p. 571. Koschaker has been described as a noble anti-Fascist beyond doubt (*über jeden Zweifel erhabener Antifaschist*) by Simon: *Die deutsche Wissenschaft*, p. 171. More recently see also Barbara Dölemeyer: *Rechtsgeschichte*, in: Dietmar Willoweit (ed.): *Rechtswissenschaft und Rechtsliteratur im 20. Jahrhundert. Mit Beiträgen zur Entwicklung des Verlages C.H. Beck*, München 2007, p. 1147.

108 See Giaro: *Aktualisierung Europas*; Giaro: *Paul Koschaker sotto il Nazismo*, pp. 159 ff.; Giaro: *Der Troubadour*, pp. 31 ff.; Somma: *I giuristi e l'Asse culturale Roma-Berlino*, p. 282; Somma: *L'uso del diritto romano*, p. 113. Even though he does not clearly take a position on this point,

they are essentially based on a few standard conceptions. Hence, it is now apt to consider *sine ira et studio* Koschaker's behaviour in front of the members and sympathisers of the Nazi regime at the *Akademie für Deutsches Recht*, and whether the text of *Die Krise des römischen Rechts und die romanistische Rechtswissenschaft* can be considered a sort of political manifesto or not.[109]

Koschaker himself used the following words to comment his lecture in his *Selbstdarstellung*:

> Ich sprach über das römische Recht und die Krise der romanistischen Rechtswissenschaft vor einem exklusiv nazistischen Auditorium […]. Man wird mir nicht zumuten, daß ich das Parteiprogramm frontal angriff. Das wäre Selbstmord nahe gekommen. Ich umging es vielmehr und rollte seine Front von hinten auf. […] Seither genoß ich bei den Nazis sogar einen gewissen Respekt. Ich möchte mich aber energisch verwahren, wenn man mein Verhalten als mutig bezeichnen sollte. Ich war nie mutig und hatte, als ich den Vortrag hielt, keinen Augenblick das Gefühl mutig zu sein oder irgend etwas zu riskieren. Denn für ein Kulturphänomen von der Größe und Bedeutung des römischen Rechts einzutreten und Unwissende aufzuklären, ist nicht Mut, sondern für einen Romanisten selbstverständlich.[110]

Apart from rhetorical and falsely modest tone of some of his claims, Koschaker's own words give a clearer idea of his actions than the interpretations offered by many scholars, even if they were written after the end of WWII. The two most important aspects of this passage seem to be the reference to the impossibility of criticising the Point 19 of the *Parteiprogramm* openly, because he was speaking before a Nazi audience; secondly, he admitted that defending Roman law was not a question of courage for a Romanist, rather it was natural (*selbstverständlich*). It is nevertheless implicit that agreeing to speak before a Nazi auditorium at that time meant adhering to the rules and beliefs of the participants and those of the Academy's Nazi director, the *Reichskommissar* Frank.[111] Therefore, it is possible to claim that *Die Krise des römischen Rechts* cannot be considered a political manifesto. In 1938, just one year after the lecture at the *Akademie für Deutsches Recht*, Koschaker did the same thing in Austria when, as a representative of German scholarship, he accepted an invitation to talk at a joint meeting of the Fascist and Nazi regime in which public officials and members of the two governments were present. In this case as well,

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Winkler seems to be very critical on the idealisation of Koschaker as an opponent of the regime, see Winkler: *Der Kampf*, p. 174 ff.

109 The aside *sine ira et studio* is a quotation from the title of Guarino's work of the same name, Guarino: *Sine ira et studio*, pp. 10-17. The original maxim is taken from Tac. *Ann*. 1,3.

110 Koschaker: *Selbstdarstellung*, pp. 122-123.

111 Guarino: *Cinquant'anni dalla «Krise»*, p. 277.

the outcome of his speech was a short publication that appeared in the *Schriften des NS.-Rechtswahrersbundes in Österreich*.[112] This work was mainly an excerpt of the lecture he held at the *Akademie für Deutsches Recht*, as Koschaker himself declared.[113] Yet this text represented a clearer attempt to connect Roman law and European legal history to Western Europe and Germany, in particular.[114]

These facts do not mean, of course, that he was a Nazi himself, but they do seem to demonstrate that Koschaker's main aim was the defence of Roman law and the necessity of acting to contrast its crisis, a crisis which had begun in the past and not under the regime, in his opinion. Moreover, it appears that he did not suffer any consequences as a result of this defence. Being worried about the situation of Roman law, in particular in Germany, and wanting to find a way to restore its dignity, Koschaker accepted the invitation to talk in front of what he called a "nazistisches Auditorium" and this opportunity to explain his ideas. Of course, having a publication based on a lecture given at the *Akademie,* and approved by the regime, undoubtedly meant that his work would have a wider appeal. Since Koschaker was not interested in resisting the Nazis themselves, we do not find any attack on the party programme in the text of *Die Krise des römischen Rechts*, but rather a cry of alarm at what was happening to Roman law and its teaching, with particular regard to the German situation. In this respect, Koschaker was resisting a more general cultural movement, without openly standing in opposition to it, which had begun well before the Nazi regime took the power;[115] the regime only exacerbated these conditions. In general, then, *Die Krise des römischen Rechts* is a less value-based and political work than *Europa und das römische Recht*,[116] and it is essentially a more technical essay on Roman law, its role in European legal history, its teaching and the crisis that affected it. At the same time, it should be remembered that it was part of that trend of works –

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112 Koschaker: *Deutschland, Italien und das römische Recht*, in *Faschismus und Recht*, Schriften des Ns.-Rechtswahrerbundes in Österreich, Wien 1938, pp. 19-22, also published in: *Deutsches Recht* 8 (1938), pp. 183-184. Koschaker dealt with the problems faced by German Roman law scholarship once more two years later, in Koschaker: *Probleme der heutigen romanistischen Rechtswissenschaft*, pp. 110-136.

113 This statement can be found in an opening footnote, from which it is also possible to infer that the lecture that he held at the *Akademie* had still not been published at that time. See Koschaker: *Deutschland, Italien und das römische Recht*, p. 19.

114 Id.: *Deutschland, Italien und das römische Recht*, p. 20, where the author affirmed the need to rebuild a European legal jurisprudence ruled by Germany and Italy also for the reason that Europe's borders were pushing from East to the West.

115 Even though he prudently avoided underlining the essential role played by the Germanists in the fight against Roman law – that they considered an alien, not truly German law – since the second half of the 19th century. On the harsh criticism of the Germanists towards Roman law, see Mantello: *La giurisprudenza romana*, p. 30; Landau: *Römisches Recht*, pp. 10-24; Gamauf: *Die Kritik*, pp. 34 ff.; Luig: *Römische und germanische Rechtsanschauung*, pp. 95-138; Bucci: *Germanesimo e romanità*, pp. 87-112; Varvaro: *Gli "studia humanitatis"*, p. 655, and the previous considerations above, in this chapter, §§ 2 and 3.

116 On which see below, in this chapter, §§ 10 and 11.

Krisenschriften – dealing with the crisis of Roman law and it did not represent, therefore, a single example of the genre (equally, it is not possible to consider all these works as political manifestos, *stricto sensu*).

It is thus tempting to think that a different standpoint should be taken, even if it seems obvious that the broad cultural values often involved in such works could in some way intersect with a set of problems that are at times political. For his part, Koschaker was completely aware that he could not engage in a political debate through his work if he wanted to maintain a position within the university and the academic world, as he certainly did.

Had Koschaker genuinely wanted to discuss Point 19 of the party programme critically, he could have probably made the same choice as De Martino, and openly challenged it, but only by taking serious risks in doing so given that he lived in Germany and not Italy.[117] Without wilfully intending to criticise him and, yet at the same time attempting to understand the difficult situation that he had to face in order to carry out his personal 'mission' in defence of Roman law, it is nonetheless reasonable to interpret Koschaker's behaviour as the decision of a man who had acquiesced to inevitable need to pursue a political path and trend in the academy and German universities. There is no evidence to substantiate the claim that he was a staunch supporter of the Nazi regime, but he had no desire to leave his country and the university, and by remaining, he was no doubt convinced that he could do something useful for Roman law and its teaching in German universities.

On the other hand, by considering his conduct at the *Akademie für Deutsches Recht* and, more generally, during the years he spent in Berlin, he cannot be portrayed as a hero

[117] Francesco De Martino: *Diritto e società nell'antica Roma* (ed. by Alberto Dell'Agli/Tullio Spagnuolo Vigorita), Roma 1982, pp. XVIII f. The conditions in Italy and in Germany were not the same in this respect. On De Martino (1907-2002), an eminent Italian Roman law scholar and leader of the Italian Socialist party between the sixties and the seventies, see Masi Doria: *Francesco De Martino*, in: Domingo (ed.): *Juristas Universales. Vol. IV. Juristas del siglo XX. De Kelsen a Rawls*, Madrid/Barcelona 2004, pp. 517-519. From a different perspective, a significant attempt to oppose to the idea of Roman law as an individualistic law was carried out in Germany by Max Kaser. The author referred to some concepts in his text, such as *Gemeinschaftsordnung* or *Führertum*, that were clearly borrowed from the Nazi scholarship. See Kaser: *Römisches Recht als Gemeinschaftsordnung*, Tübingen 1939. On the work by Kaser see Stolleis: *Gemeinwohlformeln im nationalsozialistischen Recht*, Berlin 1974, pp. 35 ff.; Stolleis: *Fortschritte*, pp. 186 ff.; Gamauf: *Die Kritik*, pp. 59 ff.; Paola Santini: *Illusioni, disincanti e impostazione scientifica: Koschaker, Wieacker, Kaser tra Roma antica e totalitarismo nazista*, in: Miglietta/Santucci (eds.): *Diritto romano e regimi totalitari*, pp. 83-99 and, in particular, pp. 94 ff. According to Gamauf, the references to concepts that were typical of the Nazi scholarship merely represent "shallow concessions", whereas the content of the text clearly explains how the criticism of the regime should be addressed to the pandectists and not to Roman law itself. A different opinion than Gamauf's on Kaser's work in Winkler: *Der Kampf*, pp. 176 ff. Kaser's *Römisches Recht als Gemeinschaftsordnung* has been also criticised at the time by Koschaker himself, see Koschaker: *Rez. Max Kaser: Römisches Recht als Gemeinschaftsordnung, Tübingen 1939*, in: *Deutsche Literaturzeitung* 62 (1941), pp. 323-327.

who fought against the regime. As to Koschaker's behaviour at the *Akademie für Deutsches Recht,* it might be appropriate to frame it with the words adaptation stratgies (*Strategien der Anpassung*):[118] like many others, Koschaker tried to adapt his life and career to the actual academic situation existing in Germany. One can certainly raise objections to his opportunism and perhaps the fact that he did not try to take a clearer stance against the regime in that case, but that certainly does not mean that he was a supporter of it.

In attempting to analyse the problem once more from a scientific perspective, it is apposite to add a few further remarks. Koschaker's stances on Roman law, as they have been described in *Die Krise des römischen Rechts*, do not seem to be an attempt to adapt the study of the subject to the hegemonic aims of the regime, from a methodological point of view.[119] It has been previously stressed that Koschaker had always considered a systematic-dogmatic approach that emphasises the links between Roman law and contemporary law imperative for the study of Legal history. Indeed, since his early works on cuneiform law, he had been deeply influenced by the pandectist approach of the scholars he studied with.[120] However, a further aspect of the above-mentioned adaptation strategy emerges in yet another respect: the effort to demonstrate that Roman law could represent the foundation of a modern private law system, as the one planned by the regime at that time. In this kind of narrative, an essential but albeit less clear role is attributed to the references to Europe and European culture: on the one hand, they could represent a bastion against the fury of the totalitarian regime; on the other hand, at time they appeared to be connected to the idea of a new Europe that needed rebuilding, in which Germany was supposed to take a dominant position.[121] In the background, there is the hint of a struggle for the cultural predominance in Europe too, the same flavour that characterised Riccobono's speech at the institute *Studia Humanitatis* in Berlin in 1942. Classical culture, and Roman law within it, was perceived as a means to carry out this cultural battle.[122]

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118 Meissel/Wedrac, *Strategien der Anpassung*, pp. 35-78.

119 This idea emerges on the contrary in Somma: *I giuristi e l'Asse culturale*, p. 282. Somma also observed that Koschaker's references to a return to Savigny aimed to support the nationalistic nature of his proposal. Yet it seems that the nature of Koschaker's proposal was European in nature, rather than a truly nationalistic one.

120 See above, chapter 2, §§ 1 and 2. Moreover, on the legal education in Austrian universities during the 19th century and at the beginning of 20th century, see Zimmermann: *Heutiges Recht*, pp. 5 ff.

121 On the so-called *Europaplänen* in the Third Reich, see Hans-Werner Neulen: *Europa und das Dritte Reich*, München 1987; Matthias Schmoeckel: *Die Grossraumtheorie. Ein Beitrag zur Geschichte der Völkerrechtswissenschaft im Dritten Reich, insbesondere der Kriegszeit*, Berlin 1994; Winkler: *Der Kampf*, p. 175 and fn. 80. Koschaker's point of view about Europe has been praised in Carl Schmitt: *Die Lage*, p. 14.

122 Varvaro: *Gli «studia humanitatis»*, pp. 660 f.

Another area of ambivalence emerges in Koschaker's text with regard to the pandectists. As was previously stressed, he alternated positive and negative judgments towards them in his publication; the criticism appears to be sometimes quite similar to the one adopted by the Germanists against Savigny's Historical School and its followers. In the end, however, Koschaker succeeded in adopting his motto "come back to Savigny" and updating the methodological issues of the Historical School itself, a claim that appears surprising for two reasons: first of all, because Koschaker himself made no attempt to avoid criticising certain aspects of the approach to the study of Roman law of this school. Secondly, because the regime had already manifested its aversion to Savigny, the historical school and the pandectists.

5.7 An up-to-date *mos italicus*

One of Koschaker's central ideas from the thirties onwards with regard to the study and teaching of Roman law was based on the criticism of the so-called *Historisierung* of Roman law. In *Die Krise,* Koschaker found fault with both the trend of the *antike Rechtsgeschichte* and the trend of the study of interpolations; his harshest disapproval was addressed to the *antike Rechtsgeschichte* – among whom he considered Ludwig Mitteis as a pioneer of this scientific trend –, whereas with regard to the study of interpolations he essentially disapproved of its radicalisation.[123]

In Koschaker's eyes, the *antike Rechtsgeschichte* was responsible for having transformed Roman law into a subject for antiquarians, removed from the needs of modern legislations and jurists. When considering the content of this partially distinct judgment on the *antike Rechtsgeschichte* compared to his opinion of the interpolationism, it should be remembered that, from the first decade of the 20th century onwards, Koschaker himself applied the new methodology developed by the interpolationists to many of his works.[124] What is more, he even adopted the tools of the interpolationism not only in his Roman law research, but also in his studies on laws of antiquity. Just to give an example, in more than one chapter of his publication *Rechtsvergleichende Studien zur Gesetzgebung Ḫammurapis*, Koschaker devoted several pages to the research of interpolations in the text. In the field of Roman law,

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[123] Koschaker: *Die Krise*, pp. 37 ff. and 42 ff. Nevertheless, see Koschaker's sharp judgment on the representatives of the interpolationism, in relation to which he acknowledged only four scholars, namely Gradenwitz, Lenel, Pernice and Eisele, loc. cit., p. 42: "Hätte sie [the *Pandektenwissenschaft*] noch gelebt, so wären Gradenwitz, Eisele, Lenel, Pernice so hervorragende Gelehrte sie waren, wahrscheinlich ebenso unbeachtet geblieben wie der nicht weniger bedeutende Italiener Alibrandi, oder als corruptores legum verurteilt worden wie weiland Antonius Faber." Only the decadence of the pandect-science allowed the emergence of the above-mentioned scholars, according to Koschaker.

[124] For an in-depth analysis of Koschaker's approach towards the *Interpolationenforschung*, see Beggio: *La 'Interpolationenforschung'*, pp. 121-155.

he offered a first sample of work focusing on the research of interpolations in 1917, but in other articles or reviews followed over the years, Koschaker demonstrated an inclination for the textual criticism thanks to his remarkable philological skills.[125]

As was previously pointed out, his approach towards the two trends of the *Historisierung* of Roman law began to change meaningfully from the thirties onwards. The first target of Koschaker's publicly negative remarks was the Interpolationism, which he attacked on the occasion of the obituary for Gradenwitz.[126] As he explained in the text, the Interpolationism had reduced itself trifling research into the interpolations contained in the texts of Justinian's Compilation, after its own radicalisation. The interpolationists thus paid no attention to the rationale that formed the basis of the textual alterations, nor for that matter, the distinction between formal and substantial alterations, or again the understanding of the historical development of the institutes that might have proved useful in comprehending the grounds for the interpolations they had discovered.

The Interpolationism only had reason to exist if the "deconstructive moment" of the research – i.e. the actual research into textual modification and the analysis of the text – was then followed by a "reconstructive moment", identifying the reasons for the interpolation and the dogmatic depiction of the institute or the legal rule. Koschaker considered this as the only really commendable method of proceeding.[127] As he wrote in a letter to Riccobono on 22nd January 1930, he considered the latter an example of positive textual criticism (the so-called "critica testuale") thanks to his works and his approach to the sources.[128] In his letter, Koschaker praised the Italian scholar who had identified the correct methodological basis for Interpolationism and given it the role that it deserved, namely that of an aid (*Hilfsmittel*) in the investigation of legal problems.[129]

Under these circumstances, it may appear strange that Koschaker generally reserved a positive judgment to the works of some non-German interpolationists,[130] and in particular Emilio Albertario.[131] In fact, Koschaker praised his Italian colleague and friend above all

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125 See Koschaker: *D. 39,6,42 pr., ein Beispiel für vorjustinianische Interpolation*, pp. 325-327; Id.: *Bedingte Novation und Pactum im römischen Recht*, pp. 118-158; Id.: *Zwei Digestenstellen*, pp. 463-471; Id.: *Unterhalt der Ehefrau*, pp. 1-27; Id.: *Adoptio in fratrem*, pp. 360-376.

126 See above, pp. 186 f. and Koschaker: *Otto Gradenwitz* †, pp. IX ff.

127 Koschaker judged very positively a work by Wlassak appeared in 1917, for example, since the author, despite his precise textual criticism towards the sources, did adopt a constructive approach. See Koschaker: *Bespr. von M. Wlassak, Anklage*, pp. 364-370.

128 On the text see Varvaro: *La 'antike Rechtsgeschichte',* pp. 303 ff. and above, pp. 45 ff.

129 "Sie wissen, wie hoch ich Ihre Arbeit einschätze, und ich möchte es immer wieder betonen, dass Ihre Weise, die Quellen zu sehen, erst der Interpolationenforschung wieder eine gesunde Basis gegeben hat und sie zu dem gemacht hat, was sie nur sein soll und kann, ein Hilfsmittel zur Erforschung rechtsgeschichtlicher Probleme, die man über die Interpolationenforschung vernachlässigt hat." See the transcription of the text in Varvaro: *La 'antike Rechtsgeschichte'*, p. 312.

130 See, e.g., Koschaker: *Paul Collinet* †, in: *ZSS* (RA) 60 (1940), pp. 330-334.

131 Koschaker: *Bespr. von Emilio Albertario, Studi di diritto Romano, Vol. III: obbligazioni, V: storia, metodologia, esegesi,* pp. 427 ff., then followed by Koschaker: *Bespr. von E. Albertario,*

for his approach that was not merely "deconstructive", and his capability to offer a dogmatic-systematic depiction of legal institutes. According to Koschaker, Albertario succeeded in developing a rational reconstruction of legal problems through his studies, after having analysed the texts of the sources. In his review of Albertario's *Studi di diritto Romano*, Koschaker wrote ineed that it was a brilliant work.[132] Despite the fact that stark controversy existed at that time between Albertario and Riccobono - the essence of which related to their divergent views of Interpolationism - it was commonly known that Albertario was one of the most radical representatives of the *Interpolationenforschung*, and not only within the Italian scenario.[133] In this light, therefore, the praise of Albertario's works might seem somewhat quirky, and it also makes Koschaker's approach to German interpolationists rather peculiar.

On the contrary, with regard to Koschaker's criticism of the *antike Rechtsgeschichte*, he had illustrated his scepticism towards this research trend well before the publication of *Die Krise des römischen Rechts*, albeit not publicly, but in two letters sent to Riccobono and de Zulueta, respectively, in January and February 1930.[134]

In his letter to Riccobono, Koschaker emphasised how Wenger's position on the *antike Rechtsgeschichte* had developed over the years to the point that it had definitively changed by the time of the publication of his essay for the *Studi Bonfante*, which was

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Studi di diritto Romano, II: cose – diritti reali – possesso. Milano, Ant. Giuffrè 1941, in: *ZSS* (RA) 63 (1943), pp. 435-444. On Albertario (1885-1948), see: Giovanni Negri: *Albertario, Emilio*, in: Birocchi/Cortese/Mattone/Miletti (eds.): *Dizionario biografico dei giuristi italiani (sec. XII-XX)*, I, pp. 23 f.

132 Koschaker: *Bespr. von Emilio Albertario, Studi di diritto Romano, Vol. III: obbligazioni, V: storia, metodologia, esegesi*, pp. 428 f.: "Obwohl solche Untersuchungen nicht durchgeführt werden können, ohne daß die Methoden rechtsgeschichtlicher Forschung zur Anwendung kommen, so überwiegt in ihnen doch stark das juristisch-dogmatische Element und mit Recht nennt daher der Vf. die Sammlung seiner Arbeiten nicht „studi di storia del diritto romano", sondern „studi di diritto romano", wie man es auch mit Interesse notieren wird, daß ihm das römische Recht wichtige Gesichtspunkte bei der Kritik von Urteilen italienischer Gerichtshöfe liefert." Among other aspects of Albertario's work, Koschaker found it remarkable that the choice of the title did not contain the words "storia del diritto romano", but only "diritto romano", which proved that Albertario refused the merely historical approach to the study of Roman law.

133 For an overview on Italian interpolationism, as well as on the controversy between Albertario and Riccobono, see Talamanca: *La ricostruzione del testo*, pp. 217-239; Santos: *Brevissima storia*, pp. 87-96.

134 He publicily expressed some remarks on the *antike Rechtsgeschichte* for the first time in Koschaker: *Keilschriftrecht*, pp. 1-39. The text was the result of two conferences held by Koschaker in Oxford between February and March 1934, probably invited by de Zulueta himself. See on this point Atzeri: *La 'storia del diritto antico'*, pp. 214 f. In this text, however, the harsh criticism expressed by Koschaker in *Die Krise des römischen Rechts* is absent; here, on the contrary, Koschaker suggested abandoning the concept of *antike Rechtsgeschichte* and replacing it with a *römische Rechtsgeschichte* (Roman legal history) that would include the study of a wider range of sources, papyri included.

acceptable in principle.[135] Over time, Wenger distanced himself from Kohler's stances and the idea of a universal legal history (*Universalrechtsgeschichte*) and eventually acknowledged the unique and leading role of Roman law among the laws of antiquity.

In his second letter dated 23rd February to de Zulueta, Koschaker agreed with the criticism of the former with regard to Wenger's stances, yet at the same time, he intended to secure a role for the comparative legal history as a useful means to forging a better understanding of the legal experiences of the past and compare them to those of Ancient Rome.[136] Koschaker also specified that he had never been a proponent of the *antike Rechtsgeschichte*, although he had delved into Ancient Near Eastern laws.[137] Further still, according to Koschaker,[138] De Zulueta was right in stressing that there had only been one jurisprudence in the history of law, namely Roman jurisprudence, and that Roman law had become the law of the *imperium Romanum*, as well as the basis of a European cultural civilisation (*europäische Kulturgemeinschaft*).[139] For all these reasons, Roman legal history would always be reserved a special place. These arguments have a natural affinity with the reasons adduced by Koschaker in his defence of the place of Roman law in European history during his lecture at the *Akademie für Deutsches Recht*.

Even if Koschaker had been studying the laws of antiquity, and cuneiform law in particular, his approach was different in two respects: first of all, he continuously offered a dogmatic depiction of the private law systems, in order to ascertain common principles and rules;[140] secondly, he never cast any doubt on the predominant role of Roman law

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135 Koschaker referred to Wenger: *Wesen und Ziele*, pp. 464 ff. Koschaker knew this text before its publication, thanks to his friendship with Wenger. It should be added that throughout his career Wenger attempted to refine his definition of the concept of *antike Rechtsgeschichte*, up to the point that the comparative study of legal experiences of the past was nothing but a stepping stone to understanding the great legal synthesis (*großer Zusammenschluss*) represented by Roman law. See again *loc. cit.*, p. 469 and also Leopold Wenger: *Diritto romano e antico*, in: *IVRA* 2 (1951), pp. 116-119. See for an accurate reconstruction of the development of Wenger's ideas in Atzeri: *La 'storia del diritto antico'*, pp. 206 ff.

136 Koschaker would repeat some of his critical remarks on Wenger's *antike Rechtsgeschichte* even in the contribution written as a tribute to Wenger for the *Festschrift* for his 70th birthday. See: Koschaker: *Leopold Wenger. Ein halbes Jahrhundert rechtsgeschichtlicher Romanistik. Ein Rückblick*, in: *Festschrift für Leopold Wenger, zu seinem 70. Geburtstag dargebracht von Freunden, Fachgenossen und Schülern*, München 1944, pp. 1-9.

137 Letter to de Zulueta, 23rd February, 1930, transcribed in Atzeri: *La 'storia del diritto antico'*, p. 219: "Ich selbst war, obwohl ich an sich als Orientalist diesen Begriff hätte begrüssen sollen, niemals ein Anhänger der antiken Rechtsgeschichte".

138 Koschaker refers to de Zulueta: *L'histoire du droit*, pp. 787-805.

139 Letter to de Zulueta, 23rd February, 1930: "Die Geschichte des römischen Rechts wird stets eine Sonderstellung haben, weil, wie Sie mit Recht bemerken, es nur eine römische Jurisprudenz gibt und weil es als Recht des *imperium Romanum*, der Grundlage der europäischen Kulturgemeinschaft, für uns ein besonderes Interesse bietet".

140 On the question of the possible influences of the Ancient Mediterranean and Near Eastern laws on Roman law, see the remarks by Volterra: *Diritto romano e diritti orientali*, pp. 66-81 in particular. For an overview of the approach of the Italian scholars toward the so-called *antike Rechtsgeschichte*, see Atzeri: *La 'storia del diritto antico'*, pp. 200 ff.

and its importance in European legal history. Hence, Mitteis' and Wenger's stances were not comparable and *de facto* the former insisted on teaching and studying Roman law according to pandectist criteria in Koschaker's opinion. On the other hand, in his critical essay on Wenger's *antike Rechtsgeschichte* Mitteis himself succinctly expressed the idea of the superiority of Roman law over other laws of antiquity.[141]

If the study of the laws of antiquity could assist legal history scholars in gaining a better understanding of Roman law itself, this result would be more than welcome, according to Koschaker; it was not acceptable, however, to entertain the idea that Roman law could be merely considered as one of the many laws of antiquity, as Wenger seemed to surmise in 1904. Furthermore, to introduce the study of a wide range of sources, including papyri or others from the Ancient Near East, it was sufficient to adopt a broad-based research program for Roman legal history studies.[142]

Ultimately, it can be asserted that Koschaker did not demonstrate an open hostility towards the *antike Rechtsgeschichte* until 1938, because until then he had not perceived it so pernicious. At the same time, despite being one of the founders of the branch of Ancient Near Eastern Legal history, and despite his admiration and friendship with Wenger, he had never been a proponent of the *antike Rechtsgeschichte*.

Things changed, however, after 1935, with the reform of studies at Law faculties in Germany.[143] The reform introduced the *antike Rechtsgeschichte* as a new course and alternative to Roman legal history course; given the context of widespread hatred towards Roman law in Germany, the new classes were soon preferred to those on Roman legal history, becoming one of the causes of the marginalisation of Roman law teaching in general.

To sum up, Koschaker considered the *Historisierung* of Roman law studies a problem for two main reasons: first of all, from a scientific perspective, because both the trends of the *Historisierung* tended to marginalise the essential role of Roman law in the development of European legal history and as a foundation stone of modern private law systems. Secondly, from a more practical perspective and in relation to academic policy, he considered it largely responsible for the decadence of Roman law studies and teaching in Germany.[144]

The two trends represented a new humanism, or a sort of new *mos gallicus*, according to Koschaker who also named them as *neuhumanistische Richtung*; as the humanists wanted to study Roman law from a historical perspective, the representatives of the *neuhumanistische Richtung* attempted to do likewise. Yet whereas the humanists were part of a more general European cultural movement, the scholars of the *neuhumanistische Richtung* were not privy to any European cultural circles and, on the contrary, they lost

141 Mitteis: *Antike Rechtsgeschichte*, p. 65.

142 Koschaker: *Keilschriftrecht*, pp. 35 ff.

143 On which see above, pp. 117 and 134 ff., and in this chapter, below, § 8.

144 Once more it has to be taken into consideration Levy's remark who considered Koschaker's criticism excessive, see Levy: *Review of Die Krise*, pp. 91 f.

the connection that had always existed between the Roman law scholars and the European legal science, thereby isolating themselves from the remainder of jurists.[145] Furthermore, their studies partly dismantled the authority of the Digest, which after many centuries had now begun to be considered as one of the many existing ancient legal sources.

As Koschaker wrote in *Die Krise des römischen Rechts*, the fallacy of most of the arguments used by the exponents of the ancient *mos gallicus*, and, *a fortiori*, its renewed version that appeared in Germany in the latter decades of the 19th century, had been already demonstrated by Riccobono.[146] It was thus imperative to contrast the new detrimental *mos gallicus* through the *Aktualisierung* of the methods of the historical school, as Koschaker asserted in *Die Krise des römischen Rechts*. Yet Koschaker's solution appeared to be somewhat different, if one takes into consideration other works and documents that he wrote in 1938 and subsequently, consisting primarily in the proposal to update the methods of the so-called *mos Italicus*.

Again inspired by Riccobono, Koschaker explicitly talked of an up-to-date *mos Italicus* (*zeitgemäßer mos Italicus*) in his review of a book by Bussi, *La formazione dei dogmi di diritto privato nel diritto commune,* which appeared in the *Savigny Zeitschrift* in 1938[147]. Koschaker's text offers further proof that his reviews often contained very significant scientific arguments, in which he proffered his own methodological stances and did not limit himself to commenting the works of other scholars. As such, the first three pages of Koschaker's review could be considered as a sort of scientific manifesto.[148] In the text, he sought to deal with the essential role played by the Commentators in the development of European legal history, once again influenced by Riccobono, as he affirmed.[149] In this case, the Commentators were the representatives of the *mos Italicus* – of which Riccobono was a devout supporter – and in many cases they succeeded in enhancing the legal concepts (*juristische Denkformen*) already developed by the Roman jurists. More importantly, however, the Commentators were particularly gifted at systematically depicting the legal system and they were also able to create a systematic legal jurisprudence (*eine systematische Rechtswissenschaft*) based on the *Rechtsdogmatik*.[150] Accordingly, the Commentators created the basis for the dogmatic elaboration of legal concepts of the pandectists that took place in the 19th century.

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145 Koschaker: *Die Krise*, pp. 37 ff.

146 Ibid., p. 38. Koschaker referred to the following works: Riccobono: *Fasi e fattori dell'evoluzione del diritto Romano*, in: *Mélanges de droit romain dédiés a G. Cornil*, II, Paris 1926, pp. 238-381; Id.: *La fusione del ius civile e del ius praetorium in unico ordinamento*, in: *Archiv für Rechts- u. Wirtschaftsphilosophie* 16, 4 (1922), pp. 503-522; Id.: *Storia del diritto antico e studio del Diritto romano*, in: *AUPA* 12 (1929), pp. 500-637.

147 Koschaker: *Bespr. von E. Bussi, La formazione dei dogmi di diritto privato nel diritto commune (diritti reali e diritti di obbligazione). Studi di diritto privato Italiano e straniero diretti da Mario Rotondi, vol. XXVII. Padova, Cedam, 1937*, in: *ZSS* (RA) 58 (1938), pp. 252-265.

148 On Koschaker's review see also Beggio: *La 'interpolationenforschung'*, pp. 121 ff..

149 Koschaker: *Bespr. von E. Bussi,* p. 252.

150 Id.: *Bespr. von E. Bussi*, pp. 252 f.

The Commentators were jurists and not historians, added Koschaker (indirectly criticising the historical approach to the study of Roman law),[151] and as such, they attempted to elaborate and improve the law of their own time on the basis of the *Corpus iuris*. According to Koschaker, the Commentators should therefore represent the model for Roman law scholars of his time: as jurists, the latter should be as able as the Commentators in extrapolating what is needed in modern legal science from Roman law sources and then teaching this methodological approach in the Roman law courses at the university.[152] This was the major aim Romanists should pursue and it could be achieved by combining it with the methods of the Historical School.

In this short text, Koschaker succeeded in refining his methodological proposal so that it could become clearer than the idea of an *Aktualisierung* of the scientific approach of the Historical School. Rather than a modern Pandect-science, he seemed to refer to a renewed *mos Italicus*. Nonetheless, it was not always easy to define the boundary between *Aktualisierung* and a contemporary *mos Italicus*, nor was it easy to fully understand its content. As was mentioned earlier, also due to the lack of clarity in his proposal for a return to the methodology of the Historical School, he met with some criticism among the Roman law scholars; the fact that Koschaker clarified his methodological issues in a review published in the same year as *Die Krise des römischen Rechts* evidently was not enough to prevent his proposal from receiving some negative remarks (perhaps also given the wider resonance obtained by *Die Krise* compared to the publication of the review).[153]

Koschaker's point of view was once more explained and defended in a letter to Riccobono on 31st December 1939.[154] This missive confronted the problem that affected Roman law in Germany at the time in the same way as his work *Die Krise des römischen Rechts*. Koschaker hoped for a change (*Wendung*) in the situation in Germany in 1940. Nonetheless, the extent of the crisis experienced by Roman law in German universities was still serious and this was due to the *Historisierung* of its studies. Koschaker considered it necessary to undertake a reform involving the final examinations for Roman law courses that were no longer mandatory following the recent reform of legal studies of 1935; yet, in reality carrying out such a new reform was unthinkable, since the war was still ongoing.[155] Once again, Koschaker focused on the problems faced by Roman law in

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151 Ibid., p. 253.

152 Ibid., pp. 253 f.: "Diese [the Commentators] haben aus den römischen Quellen das herausgeholt und weitergebildet, was sie für die Gegenwart brauchen konnten. Das war der mos Italicus […] für den in der Gegenwart Riccobono eine Lanze bricht."

153 He would restate his convictions in Koschaker: *Selbstdarstellung*, p. 121.

154 Handwritten four-page letter, now held in the collection of Riccobono's correspondence under the care of Professor Mario Varvaro.

155 On the first page, the text reads: "Freilich vorläufig hat sich die kritische Lage des römischen Rechts bei uns noch nicht gebessert, und solange der Krieg dauert, ist mit Reformen, die bei den Prüfungen noch notwendiger wären als bei den Vorlesungen, nicht zu rechnen. So sind bescheidene Erfolge, von dessen ich berichten kann, durchaus lokaler und persönlicher Natur.

Germany in his letter and they continued to be the same as those he had already expounded in his previous publications. Above all, he adamantly rejected the idea that such a subject matter had been reduced to the domain of University professors and was no longer useful for *Praktiker*, in other words, jurists and lawyers.

What he actually wrote is remarkable. Koschaker asserted that the criticism that *Die Krise des römischen Rechts* received had come about due to a misunderstanding and he was able to demonstrate the correctness of the research method that he had suggested in his forthcoming work entitled *L'alienazione della cosa legata*.[156] It is quite clear therefore that Koschaker was convinced of the validity of his ideas, even though the reaction of some Roman law scholars was not completely favourable, as can be seen below:

> Das ist vielleicht die krisenhafteste Erscheinung: das römische Recht bedeutet der deutschen Rechtspraxis nichts mehr, es ist zu einer bloßen Professorenwissenschaft geworden, nicht mehr Gemeingut aller Juristen.
> Ich kann mir nicht helfen, ich komme immer wieder auf die romanistische Wissenschaft als die letzte Ursache dieser krisen[haften] Entwicklung. Durch ihre einseitige Historisierung seitdem BGB hat sie sich der Masse der Juristen entfremdet. Man hat meiner Krisenschrift in Deutschland vorgeworfen, ich strebe die Wiederbelebung des Pandektenrechts an. Kein grösseres Mißverständnis ist denkbar. Das Pandektenrecht ist tot und kann | nicht wieder aufstehen. Was ich forderte, war ein zeitgemäßer *mos Italicus*, der unter Verwertung der Ergebnisse der modernen Rechtshistorie die Synthese mit dem geltendem Recht herstellt. Eine solche Orientierung, die durchaus keine Verdrängung der rechtsgeschichtlichen Forschung bedeutet, ist möglich und in ihrem Erfolge daran unabhängig, ob das römische Recht noch formelle Geltung hat.

Koschaker's explanation of his views is particularly interesting, but at the same time somewhat contradictory compared with what he wrote in *Die Krise des römischen Rechts*. Although in this piece he affirmed the imperative of a return to Savigny using the method of his school through the so-called *Aktualisierung*, in the letter to Riccobono, in contrast, he wrote that his proposal was different and the study and teaching of Roman law should therefore be based on a contemporary interpretation of the *mos Italicus*, since *Pandektenrecht*

Ich begann im Winter 1935/36 mit 3 Zuhörern, darunter 2 Ausländern, und halte im letzten Herbsttrimester – wir haben während des Kriegs 3 Studien abschnitte im Jahr – gegen 40 beständige anwesende Zuhörer, und zwar deutsche Studenten, da die Ausländer während des Kriegs fehlen. Ja noch mehr, ich konnte seit 3 Jahren das erstemal eine Pandektenexegese mit 4–5 deutschen Studenten abhalten, die ich mir herangezogen habe. Bisher war sie nur mit Ausländern möglich." It is possible to compare these statements by Koschaker with those he wrote about Roman law courses during his years in Tübingen. See above, chapter 4, § 4.

156 Koschaker: *L'alienazione della cosa legata*, pp. 89-183.

had died a definitive death.[157] Only a misunderstanding could have led other scholars to interpret his words in a different way. In fact, the methodology to be adopted was somehow comparative, based on a comparison between the study of legal history and the legal issues of the current laws in force. A sort of comparative legal history methodology, and therefore quite similar to the one that had inspired his early works on cuneiform and ancient laws. The aim of the approach suggested by Koschaker was to use the results of legal history studies oriented towards creating a synthesis (a *Synthese*) with modern law. This is what he calls a modern, contemporary *mos Italicus*.

He wrote further that he would offer a concrete example of his methodological approach through the publication of the long article *L'alienazione della cosa legata* that actually appeared in 1940, based on a conference held in Pavia in the previous year. It was then clear that Koschaker staunchly defended his ideas, despite the criticism that they had received from various circles.[158]

L'alienazione della cosa legata was a very refined essay with regard to Roman law and the exegesis of sources, and Koschaker dealt with the texts masterfully, including in his analysis of them from the perspective of the textual criticism. As has again been stressed by Pugliese, however, Koschaker decided to dedicate a large number of pages to discuss the topic in modern laws, to the extent that the work now almost seemed not to focus on Roman law. The references to Roman law only appear as a sort of long historical introduction, and therefore the text risked becoming a study of comparative modern law preceded by a section on Roman law.[159] The first piece, the Romanist part, with its learned study of Roman law sources, is therefore partly obfuscated by the remainder of the text. The problem, from a methodological perspective, consists in the risk of actually marginalising the role of Roman law, even if the intent of the author was exactly the opposite.

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[157] In this respect, Koschaker seems to be once more deeply influenced by Riccobono's stances and it is not impossible to think that through his words he also wished to praise the ideas of his highly esteemed colleague.

[158] On the third page the text reads: "In einer Abhandlung, die aus einem Vortrag in Pavia hervorgegangen italienisch in den „Conferenze romanistiche tenute nella R. Università di Pavia" demnächst erscheinen wird, habe ich für ein bestimmtes Problem (l'alienazione della cosa legata) zu zeigen versucht, wie man das römische für die Kritik moderner Gesetzgebungen verwerten könne […]".

[159] Pugliese, *Diritto romano e scienza del diritto*, p. 163, fn. 5. See Koschaker: *L'alienazione*, pp. 115 ff.

The main topics dealt with in *Die Krise des römischen Rechts* – Roman law and its crisis in Germany, its role as a foundation of Europe and for a new European legal science – were also discussed by Koschaker in another very important and as yet unpublished document.[160] The way in which he adapted the idea of Roman law and Europe to the newly changed – political and cultural – circumstances in this text is at times surprising. One of the main problems of Koschaker's approach, as it emerges from the pages of the document, relates to his tendency to accommodate his ideas on Roman law and its role – that remain more or less always the same in the course of time and throughout his various works – to different social, historical and, more importantly, political contexts.

The title of the document in question is *Die Reform des romanistischen Rechtsstudiums in Deutschland. Eine Denkschrift* (The reform of Roman law study in Germany. A memorial) which was probably written in 1941.[161] I have found two copies of the document myself at the University of Tübingen and at Humboldt-Universität zu Berlin archives, respectively.[162] The document had been sent by Koschaker to the Ministry for Sciences and National Education (*Reichsminister für Wissenschaft, Erziehung und Volksbildung*) of the Nazi regime, Bernhard Rust.[163]

In addition to the manuscript, a letter written by Rust's deputy is also conserved at the archive, who then forwarded Koschaker's document to the dean of the *Rechts – und Staatswissenschaftliche Fakultät* of the University of Berlin on behalf of the Minister. The dean of the University of Berlin was responsible for introducing the document and discussing it with the deans of the other German Law faculties, during the forthcoming conference of the Law faculty deans in July 1942. It therefore seems reasonable to presume that other copies of the document may have been kept on record in the archives of other German universities.

Based on the copy of the letter conserved at the archive at the University of Tübingen, it can also be inferred that the document had been discussed and positively evaluated at

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160 The document will be published for the first time, supplied with a critical edition of the text and a comment, in Beggio: *Paul Koschaker und die Reform des romanistischen Rechtsstudiums in Deutschland. Ein unveröffentlichtes Dokument*, in: *ZSS* (RA) 135 (2018), pp. 645-680.

161 Koschaker probably referred to this document when he wrote that he had sent a *Denkschrift* to the Ministry for Sciences and National Education in Koschaker: *Europa*[4], p. 312 fn. 2. See also Giaro: *Aktualisierung Europas*, p. 82.

162 The signature of the archive in Tübingen reads: UAT, Personalakten Jur. Fak. 601/42; the signature of the archive of the *Humboldt Universität zu Berlin* is: UA-HU, Jur. Fak. bis 1945, Nr. 518, Bd. 2, 35. Little information is given on the document from Tübingen in Neumann: *Paul Koschaker*, p. 28; the copy from Berlin is hinted at on the contrary in Lösch: *Der nackte Geist*, p. 391. In the transcribed parts of the text of this document, the bar | , that has been used for the page change in the other documents, indicates the line change.

163 On Rust (1883-1945), see Hans-Christof Kraus: *Rust, Karl Josef Bernhard*, in: *NDB* 22 (2005), p. 301.

the deans' conference in Weimar on 11th July 1942, and to such an extent that it was considered as a basis for the future new plane for legal studies ("Neugestaltung des juristischen Studiums"), which did not come to fruition, however.

Koschaker's idea of sending the minister a proposal for the reform of Roman law study was founded on his intent to secure the role and the teaching of Roman law in German universities. If one compares the content of *Die Krise des römischen Rechts* with this document by Koschaker, however, it is quite evident that the analysis in *Die Krise des römischen Rechts* was presented on a more historical and scientific level, whereas in the reform proposal, the author introduced several arguments with a more political orientation.

Just as was the case with his *Die Krise des römischen Rechts*, in this text the author insisted on associating the critical situation with the decadence of Pandect-science after the enactment of the BGB, on the one hand, and the emergence of the above-mentioned trend of the so-called *Historisierung* of Roman law, on the other.[164] From a scientific point of view, Koschaker considered the approach to Roman law of the *Historisierung* accountable for the demolition of the 'bridges' linking Roman law to the contemporary law in force in Germany. Second, and as a direct consequence of the first problem, this purely historical approach tended to distance both legal experts, who did not work at the universities, and students, who lost their interest in studying a topic that lacked any connection with contemporary legislation.

The problem of the critical approach by Koschaker to the *Historisierung* is therefore the same that has already been observed in *Die Krise des römischen Rechts*, in his review of Bussi's book and in his letter to Riccobono from 1939. It is possible to affirm that Koschaker demonstrated absolute coherence with his scientific premises over time. Once again, while it is understandable to some extent that the risks of studying Roman law from a purely historical approach should be emphasised, it is however unacceptable to claim that almost the whole burden for the crisis of Roman law should fall solely on the *Historisierung*. Koschaker seemed to assert that neither the Interpolationism nor the *antike Rechtsgeschichte* could actually play any role in the construction of a new European private law, yet this was not tantamount to saying that Roman law as a whole, if properly studied, could not do it either. According to Koschaker, Roman law had to be one of the main cornerstones of a new common European legal culture – he spoke of a "neues gemeinsames Recht" and a "neue europäische juristische Kultur" in the document.

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[164] In the first pages of both copies of the document it possible to read: "[t]eils sind sie [the Roman law scholars] 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." For a precise analysis of the content of the text, see Beggio: *Paul Koschaker und die Reform*, pp. 645 ff.

His reason for this was underpinned by the fact that all the systems of private law of continental Europe had been deeply influenced by Roman law, and this made it apt to speak of a European legal – and historical – tradition. At the same time, Roman law represented – and still represents – a unique patrimony from a juridical point of view. 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.[165]

With regard to the situation in Germany, according to Koschaker it was incorrect to affirm that Roman law, inasmuch as it was considered an individualistic and materialistic law, was incompatible with a true national German law; the individualistic law which was later incorporated into the BGB was not Roman law as such, but rather the Pandect-science's interpretation of Roman law.[166] Thus, if anyone had to answer for establishing an individualistic and materialistic order, then it was Pandect-science, in particular on account of its radical tendencies in more recent years.

In any case, since Germany was a leading country in Europe, it could not abandon Roman law and its teachings altogether, because otherwise it would not have had the opportunity to exercise its power in the construction of a new common European law. Moreover, in other countries where Roman law was still studied and highly regarded, that is to say Italy, it was supposed to play the main role in this essential legal process. And so it was, that Koschaker was able to bind Roman law not only to tradition and the history of Europe, which was 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 in all of his works. Indeed, he clearly stated this 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.

In order to secure a place for Roman law in German universities, Koschaker seemed almost prepared to interpret Roman law and its teachings in accordance with the political programme of the *Neuordnung Europas*, conceived by Nazi Germany. It would therefore

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[165] The document reads: "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."

[166] In this respect, see further, the scientific stances by Kaser, Kreller and Schönbauer; see above, p. 182, fn. 32, and Winkler: *Der Kampf*, pp. 176 ff.

appear surprising that Roman law, the bearer of legal values and the representative of the common European legal and cultural tradition, could be at the same time the lynchpin of a new common jurisprudence and legal order in their new Europe; it should be remembered that, at the time Koschaker was writing this text, Europe seemed doomed to be thwarted by a totalitarian regime.

It is of course clear that the depiction of Roman law and Europe offered by Koschaker in this document was influenced by the choice of the addressee of the text and he most probably considered this way of proceeding as the only possible way of attempting to promote Roman law and legal education in Germany. Nonetheless, it seems quite paradoxical to link Roman law and its survival to political power, but in particular to this genre of political power. Moreover, in this narration of the leading role that Germany was supposed to play in the nascent Europe, again echoes of the struggle for the cultural – and legal – supremacy in Europe can be found; hints of this struggle had already appeared in Koschaker's work from 1940, *Deutschland, Italien und das römische Recht*, which was very similar to an excerpt from *Die Krise des römischen Rechts*, where he actually suggested a form of collaboration between Germany and Italy.[167] On the Italian side, the voice of his revered colleague Riccobono would attract the support for the predominant role of Italy favouring classical culture in Berlin in 1942.[168] The German and the Italian regimes questioned both on what role to bestow upon Roman law and classical culture generally, and in particular what role they could play in Europe.

It is therefore understandable that the decadence of Roman law studies in Germany represented an alarming problem in Koschaker's eyes, after all German Romanists had been the most prominent in Europe for about a century.[169] He did not consider however – or at least such a kind of consideration does not emerge either from his publications or from his letters – that in Germany the problem had been exacerbated by the fact that many of the most eminent Roman law scholars had to flee due to their Jewish origins.[170]

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167 Koschaker: *Deutschland, Italien*, pp. 19 ff.

168 See above and Varvaro: *Gli «studia humanitatis»*, pp. 660 f.

169 Whereas in Italy Roman law studies were still flourishing under the Fascist regime, due to the importance that the latter gave to the myth of Rome and its imperial idea. This fact does not mean that the Italian Romanists, or at least some of them, did not try to adapt and re-use Roman law according to the desiderata of the regime. See on this point, Mantello: *La giurisprudenza romana*, pp. 23-71; Andrea Giardina/André Vauchez: *Il mito di Roma: da Carlo Magno a Mussolini*, Bari 2000; Somma: *I giuristi e l'Asse culturale Roma-Berlino*, pp. 263 ff.; Somma: *L'uso del diritto romano*, pp. 101-125; Cascione: *Romanisti e Fascismo*, pp. 3-52; Valerio Marotta: *Roma, l'Impero e l'Italia nella letteratura romanistica degli anni Trenta*, in Giovanni Cazzetta (ed.): *Retoriche dei giuristi e costruzione dell'identità nazionale*, Bologna 2013, pp. 425-460; Cascione: *The Idea of Rome: Political Fascism and Fascist (Roman) Law*, in Tuori/Björklund (eds.): *Roman Law and the Idea of Europe*, forthcoming.

170 On this point see also above, pp. 199 ff., and Winkler: *Der Kampf*, pp. 168 ff.; Wieacker: *Rez. Paul Koschaker*, p. 188.

In the light of Koschaker's stances on Roman law as they appeared in this document, a question should be raised, namely as to whether Koschaker's way of dealing with Roman law could be considered the only possible way of defending certain cultural values in such dramatic circumstances.

In some passages of the document, it actually seems that Koschaker wanted to defend Roman law as a way to affirm the necessity of a unified Western Europe, in which Germany would impose its unquestionable supremacy. It cannot be denied 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, but also to many other scholars at that time.

One could still ask if such behaviour should be considered courageous, since he sent a document dealing with Roman law to the minister of the regime in 1941, possibly risking reprisals for his conduct. The events of the years that he spent in Berlin have shown, however, that Koschaker was well aware of the limits within which he could express his opinions and defend Roman law, even before the regime. Even if he was not one of the most beloved scholars of the Nazis, he was nonetheless highly esteemed among German academics and well respected by the officials of the regime, as he himself explained in a letter to Kisch dated 27th November 1947.[171] Hence, he was probably able to use his prestige to express his opinions before the regime on the topic of Roman law teaching without paying the price for his ideas. It should also be added that the regime undoubtedly had more pressing matters to face between 1941 and 1942 than a reform regarding the teaching of Roman law in German universities; moreover, the main goal of the Nazis, which was to introduce a new civil code, actually failed in those years, due to the adverse circumstances Germany had to face, particularly after embarking upon the Battle of Stalingrad. Yet Koschaker's attempt certainly did not vex the regime.

Koschaker's desire to reinstate Roman law in Germany was remarkable, but in order to do so he agreed neither to criticise point 19 of the Nazi programme nor the reform of the Law faculties studies inspired by Eckhardt (which would not have been tolerable in such a document);[172] he also agreed to link Roman law to the necessities of the legal

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171 See above, chapter 3, § 4.

172 On Point 19 of the programme of the Nazi party, the text in the document reads: "Man macht dafür den Nationalsozialismus verantwortlich und in der | Tat fordert Punkt 19 des Parteiprogramms von 1920 "Ersatz für das der | materialistischen Weltordnung dienende römische Recht durch ein deutsches | Gemeinrecht". Das Pos[tul]at bedarf der Auslegung. Sicherlich verlangt | es nicht Abschaffung der romanistischen Vorlesungen, weil ein Parteipro- | gramm sich mit praktisch wichtigeren Dingen beschäftigt. Was gefordert | wird, ist vielmehr die Umgestaltung der Rechts-, speziell der Privat- | rechtsordnung." Koschaker clearly explained that the Point 19 could not be considered responsible for the crisis of Roman law and that the programme of a party usually deals with practical more important matters than the abolition of Roman law. And then on Eckhardt it is possible to read: "Prof . Eckhardt, ein Germanist von Namen, der Verfasser der | Studienordnung, war und ist kein Feind des römischen Rechts. Er sah sich | auch in der Frage des römischen Rechts einer schwieriger(en) Lage gegenüber | als sie heute besteht." Based on what Koschaker wrote in the document, Eckhardt was not an enemy of Roman law, and he also

system of that time and, hence, those of the Nazi regime. This is a patent limitation of Koschaker's stance on Roman law, which subsequently appeared having been adapted to fit 'situation' and under any conditions, including the foundation of the *Neuordnung Europas* as planned by the Nazi regime. Thus, his highly idealised conception of Roman law was ambivalent and by doing so Koschaker also ran the risk of reducing Roman law to that of a hollow vessel. Moreover, it seems credible that his considerations on the pernicious role of the *Historisierung* of Roman law found their origin in his scientific and methodological beliefs, but they also reveal a partly opportunistic approach to the matter on deeper analysis of the words used in his document. The attempt to shoulder the whole responsibility on the two trends of the Roman law scholarship clearly aimed to relieve the regime from any kind of responsibility.

Ultimately, it seems that the text attempted a sort of adaptation of Roman law, or perhaps better still, a "re-use" of it: it actually came to represent the new basis for a new legal system and jurisprudence in a Nazi Europe, after having been the cornerstone of European legal culture over the centuries.[173] Koschaker's stance is nonetheless comprehensible, as he was forced to deal with members of the Nazi regime, but the question indeed remains as to whether Roman law would have been recovered and salvaged, had it been subjugated to a totalitarian regime. However, it is not possible, from the documents in our possession today, to determine whether Koschaker's approach aimed to moderate the violence of the regime through his references to European law and tradition and European jurisprudence or not. And the point still remains that this kind of use and re-use of the concepts of Roman law and Europe ran the risk of devoiding them of their content and the principles and precepts they were based on, whether for legitimate, or opportunistic, unintentional reasons or otherwise.

Of course, today one can only conjecture upon this question and any attempt to do so would go far beyond the ambit of Legal history research. Yet doubts still remain, including with regard to the concept of Europe that repeatedly churned through the mill of Koschaker's narrative. In the case of his document as well, it is difficult to understand which idea of Europe he was referring to, as those of the Commentators or pandectists were not the same Europe as the Nazi regime had in mind.

As to the content of the reform proposal regarding the teaching of Roman law, Koschaker argued that it would no longer be possible to deal with all the essential topics of a course in Roman law, after the reform of the *Studienordnung* of 1935.[174] In

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added that if Eckhardt preferred to offer a new course on *antike Rechtsgeschichte* as an alternative to Roman legal history at Law faculties in Germany, the reason for this was to avoid using the spurned word "Roman" in the title of the new course.

[173] On the question of the use and re-use of Roman law see Peppe: *Uso e ri-uso del diritto romano*, pp. 1-20.

[174] As can be inferred from the documents available about Koschaker's time in Tübingen, Koschaker felt that it had become necessary to select the most important subject matters to be

Koschaker's opinion, it made no sense to give Roman law professors the possibility of teaching the outline of Roman private and procedural law ("Grundzüge des römischen Privat- und Prozeßrechts") in the course Roman legal history ("Römische Rechtsgeschichte"), because it would have led to a very superficial explanation of the subject content. Roman private law was undoubtedly the most important topic, since it represented the basis for the study of contemporary European private legal systems; Koschaker therefore suggested introducing a new formula, namely: "eine 5–6 stündige Vorlesung „Grundzüge des römischen Privatrechts als Einführung in das europäische Rechtsdenken" im 3. Semester (obligatorisch);" the new course proposed by Koschaker was quite similar to the systematic teaching of Roman private law, which already existed as an introduction to the study of the BGB prior to the reform of 1935. The clear difference, however, lay in the focus of the new course, which would be on European legal science and legal reasoning. Roman private law would still remain at its core and would provide a useful background to introducing students to further legal studies at European level. The lectures would again follow a more systematic-dogmatic approach, as had already been the case before 1935. This is actually one of the most incisive explanations of his ideas on Roman law teaching and probably one of his best illustrations of his concept of *Aktualisierung* of Roman law classes.

Yet there would also be space for other courses too, such as the Roman legal history ("Römische Rechtsgeschichte") or, alternatively, "Antike Rechtsgeschichte"; other smaller "Übungen" (literally "exercises") and some short courses, such as the "Pandektenexegese", would also be included in his reform proposal.

Koschaker's suggestions on how to reform the teaching of Roman law at German universities are not so surprising, as they indeed confirm his strong belief in an approach to Roman law teaching inspired by the Pandectist's school and therefore the need to emphasise the importance of Roman law to contemporary legal systems. It was the same approach that he himself had learnt and appreciated previously during his studies at the

taught at the university lectures. See above, chapter 4, §§ 3 and 4. The problem of a choice between important and "unimportant" Roman law subjects also emerges clearly from a review that he wrote in 1943, see Koschaker: Rez. *Guido Astuti, Studi intorno alla promessa di pagamento. Il costituto di debito I (aus Annali della facoltà di giurisprudenza dell'università di Camerino XI), Napoli, Dott. Eugenio Jovene 1937, 170 S.; II (aus Pubblicazioni della facoltà di giurisprudenza della R. università di Catania VII), Milano, Dott. Ant. Giuffrè 1941, XII u. 367 S.*, in: *ZSS* (RA) 63 (1943), pp. 469-477. On the first page of his review, Koschaker wrote: "Zu den Materien, die ich in der romanistischen Vorlesung nicht mehr zu erwähnen pflege, gehört das *constitutum debiti.* Ich halte mich dazu für berechtigt, weil mir die Materie nicht besonders wichtig erscheint." As he further explained, though, the problem consisted in the necessity to neglect many other matters that were a lot more important than the *constitutum debiti*, because there was no sufficient room during the courses to deal with them, given the limited amount of hours at the disposal of the Roman law professors.

university, before, and immediately after those years at the beginning of his academic career, thanks to Professors like Hanausek, Mitteis and Strohal.[175]

Some archival documents, conserved at the archive of the *Humboldt-Universität zu Berlin*, reveal that Koschaker's reform proposal received positive responses among his colleagues at the time. Moreover, it is interesting to note that the favourable reactions came not only from Roman law scholars, but also from professors for Civil law or German law and German legal history.

Hans Niedermeyer, a professor of German Civil law (*Bürgerliches Recht*) in Göttingen in that period,[176] expressed his agreement with Koschaker's proposal in a statement (*Stellungnahme*) dated 6th July 1942. The declaration is a five-page typewritten description of the reform suggested by Koschaker, to which Niedermeyer had made some additional remarks, which were in general favourable to Koschaker's arguments.[177] Further still, positive reactions were received from three professors at the University of Hamburg, namely Karl Haff (Chair for German law and German Legal history – *Deutsches Recht und Deutsche Rechtsgeschichte*), Leo Raape (professor for German Civil Law, International law and Roman law – *Bürgerliches Recht, Internationales Privatrecht und Römisches Recht*) and Erich Genzmer (professor for German Civil law and Roman law – *Bürgerliches und Römisches Recht*). The three scholars wrote their common statement on 8th September 1942.[178]

The last document found and preserved at the archive in Berlin is a handwritten comment on Koschaker's proposal by Ulrich von Lübtow, Professor of Römisches Recht, Bürgerliches Recht und Zivilprozessrecht in Rostock at the time.[179] In his text, Lübtow essentially agreed with Koschaker on his general guidelines for the reform and the need to retrace the links between Roman law and contemporary private law systems; it was

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175 It should be remembered that Koschaker had studied in Austria, where Roman and Civil law teaching at the universities had been strongly influenced by the Pandectistic's approach. On Koschaker as a student at the University of Graz and during his early academic years, see above, chapter 2.

176 On Hans Niedermeyer (1883-1964), see: Wieacker: *Hans Niedermeyer zum Gedächtnis*, in: *ZSS* (RA) 83 (1966), pp. 559-562.

177 UA-HU, Jur. Fak. 518, Bd. II, 292.

178 UA-HU, Jur. Fak. 518, Bd. II, 292. The document is typewritten. On Karl Haff (1879-1955), see Felix Haffner: *Haff, Karl Alois*, in: *NDB* 7, Berlin 1966, pp. 460 f.; on Leo Raape (1878-1974), see Hans Julius Wolff: *Leo Raape* †, in: *ZSS* (RA) 82 (1965), pp. 497 f.; Zimmermann: *Heutiges Recht*, p. 22; Ulrich Magnus: *Raape, Johann Friedrich Leo*, in: *NDB* 21, Berlin 2003, pp. 58 f.; on Erich Genzmer (1893-1970), see Helmut Coing: *Genzmer, Erich*, in: Diestelkamp/Stolleis (eds.): *Juristen an der Universität Frankfurt*, pp. 200-207; Helmut Stubbe da Luz: *Genzmer, Erich*, in: *Hamburgische Biographie* V, Göttingen 2010, pp. 128 f.

179 UA-HU, Jur. Fak. 518, Bd. II, 292. Lübtow's document dates back to 8th July 1942. For the transcription of the text of the handwritten two-page document I would like to warmly thank Professor Mario Varvaro of the Università di Palermo. On Ulrich von Lübtow (1900-1995), see Manfred Harder: *In memoriam Ulrich von Lübtow (1900-1995)*, in: *ZSS* (RA) 113 (1996), pp. 733-741.

necessary, therefore, to adopt both a dogmatic approach and a comparative legal methodology. Lübtow's stance can be partly distinguished from Koschaker's proposal with regard to the following aspects: first of all, he considered it not possible to deal with all the Roman law topics merely in a one-semester course; the course needed to be divided into two parts. More importantly, Lübtow considered Roman legal history a priority. In his opinion, it was necessary to gain a better understanding of Roman private law and also describe Roman cultural and economic history. Such a course would be extremely relevant from a political perspective, dealing with the development of public institutions in ancient Rome. Of course, it would be necessary not to deal with this subject as a question for mere antiquarians. This final comment reveals the extent of Lübtow's concurrence with Koschaker's point of view.[180]

The comments on Koschaker's proposal were positive, in general, as were the reactions at the deans' conference held in Weimar in July 1942.[181] It can therefore be asserted that Koschaker's ideas were widely acknowledged among German academia at the time, and probably not only within the restricted confines of Roman law scholars. The favourable responses to his proposal may also be indicative of a partially changed approach to Roman law teaching at German universities at the time, or an indication of Koschaker's prestige as a scholar, having dexterously expressed ideas and stances that were shared by many of his colleagues.

5.9 Koschaker and Point 19 of the NSDAP program

It now seems appropriate to provide a brief overview of Koschaker's approach towards Point 19 of the NSDAP program, before dealing with *Europa und das römische Recht*.[182] Roman law had clearly hit a crisis in Germany in the 1930s and 1940s; certain scholars, however, have considered the general mood of Romanists, and of Koschaker himself, at that time as too pessimistic;[183] after all, Roman law teaching had not been abolished despite regime's persecution of scholars of Jewish origins and their notorious disdain for the subject itself. Yet the conditions of Roman law in Germany under the Nazi regime,

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[180] Lübtow's documen states: "Eine solide Darstellung der Grundlinien des öffentlichen Rechts ist nicht nur politisch überaus lehrreich, besonders wenn sie stets auf die tieferen Zusammenhänge zurückgeht und reine Antiquaria beiseite läßt, sondern bildet auch die notwendige Voraussetzung für ein gründliches Verständnis des römischen Privatrechts." (words underlined in the document).

[181] See above, p. 217.

[182] See the text of Point 19 of the program of the Nazi party above, chapter 1, p. 16, fn. 6.

[183] See Oven: *Comptes Rendus Paul Koschaker*, pp. 68-79; Guarino: *L'Europa e il diritto romano*, p. 296 and, recently, from a more general perspective, Winkler: *Der Kampf*, pp. 162 ff. Guarino spoke of a critical situation, but Koschaker's tones were nevertheless exaggerated and due to his passion for Roman law.

and Roman law teaching in particular, were usually depicted as critical, if not tragic, including during the decades following the end of the World War II.[184] While it may be true that the situation was often made out to be worse than it actually was - and this happened both at the time of the regime and in later reconstructions of the events - on the contrary, there were also isolated attempts to understate the extent of the crisis. A well-known example of this was given by Schönbauer, who actually "confined" the ambit of the crisis to the Jewish origins of many Roman law scholars, on the one hand,[185] sustaining, conversely, that the reform of legal studies at German universities had fortunately allowed the course Roman legal history ("Römische Rechtsgeschichte") to remain in its original place.[186]

Schönbauer's point of view seems to be simplistic compared to the troubles faced by Roman law at the time. Overestimating his affirmations would mean losing sight of the context.[187] As to Schönbauer's statement that the "Römische Rechtsgeschichte" course had not been abolished by the 1935 reform, it should nonetheless be remembered that it was no longer mandatory and the course could be chosen as an alternative to the "Antike Rechtsgeschichte"; in reality, however, students repeatedly preferred the latter, as emerge from Koschaker's numerous documents. For these reasons, it can be asserted that while Roman law did not necessarily run the risk of being abolished under the regime, the

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184 See the depictions of the situation given by: Erich Döhring: *Geschichte der Juristischen Fakultät 1665 bis 1965 (Geschichte der Christian-Albrechts-Universität Kiel 1665-1965, 3.1)*, Kiel 1965, p. 229; Kunkel: *Der Professor im Dritten Reich*, in: Helmut Kuhn (ed.): *Die deutsche Universität im Dritten Reich*, München 1966, pp. 103 ff. and 126; Peter Bender: *Die Rezeption des römischen Rechts im Urteil der deutschen Rechtswissenschaft*, Frankfurt a.M./Bern/Las Vegas 1979, p. 12; Simon: *Die Deutsche Wissenschaft*, p. 164; Stolleis: *Fortschritte*, p. 173; Id.: *Geschichte des öffentlichen Rechts*, p. 355; Pieler: *Das römische Recht*, p. 443; Karl-Heinz Ziegler: *Max Kaser*, in: Schröder/Simon (eds.): *Rechtsgeschichtswissenschaft*, pp. 77-95, and, in particular, p. 79; Marc Foerster: *Wolfgang Kunkel*, in: Schmoeckel (ed.): *Die Juristen der Universität Bonn*, pp. 456 ff. and 493; Ralf Kohlhepp: *Franz Wieacker und die NS-Zeit*, in: *ZSS* (RA) 122 (2005), pp. 203-223 and p. 203, in particular. Further literature on this question in Winkler: *Der Kampf*, pp. 162 ff.

185 On Schönbauer's attempt to reduce the significance of the crisis of Roman law, see above, pp. 199 f., and Gamauf: *Die Kritik*, pp. 57 f.

186 Schönbauer: *Vom Bodenrecht zum Bergrecht. Studien zur Geschichte des Bergbaurechtes*, in: *ZSS* (RA) 55 (1935), pp. 183-225 and p. 183 for the reference. The author instead attempted to limit the extent of the crisis in Schönbauer: *Zur „Krise"*, pp. 385-410.

187 Nonetheless Winkler has recently underlined Schönbauer's statement regarding the fact that the course "Römische Rechtsgeschichte" was maintained in German universities even after the reform of 1935, considering it an indication that Roman law teaching had not suffered greatly under the regime, as many other scholars had affirmed on the contrary. See Winkler: *Der Kampf*, p. 163 f. Even if today, it is correct to attempt to analyse the events that took place under the Nazi regime in an unbiased way and avoid some of the exaggerated tones used to describe the problem at the time, these tones that have nonetheless influenced future generations of scholars, yet the question cannot be underestimated and Schönbauer's affirmation should be considered within the proper context. I would not give, therefore, excessive relevance to Schönbauer's statement.

intention of many of its exponents - and many scholars sympathising with it - was clearly to progressively marginalise Roman law and its teaching.[188] Once more, this does not mean that there was no possibility of teaching this topic or that Roman law scholars would have lost their places at the universities, as long as they were not Jewish; on the contrary, some of them were able to obtain prestigious positions.[189] They also continued publishing their works on a regular basis, but it has been shown that Roman law scholars tended to follow an adaptation strategy, which consisted in broaching subject that would certainly not bother the regime.[190] Moreover, the Dean of the Law Faculty at the University of Berlin indeed expressed his concern for the critical situation of Roman law teaching at the University of the capital city, in a letter dated 23rd September 1941, regarding the choice of Koschaker's successor at the Chair for Roman law, and so it seems fair to state that the problem was real.[191] At times, it may have been overstated, and perhaps the issue tended to regard more Roman law teaching than Roman law research, but it was real.

The various reasons that led to the critical situation of Roman law teaching in Germany at the time have already been taken into considerations in the previous chapters.[192] Point 19 was clearly not the only cause of this crisis, but it still represented the popular sentiment among the majority of German legal scholars and politicians. Landau has scrupulously demonstrated that it had been written on the example of Point 2 of the *Deutschsozialistischen Partei* (DSP, German socialist party) of 31st May 1919, meaning that the abhorrence for Roman law was not limited merely to the Nazi party and its supporters.[193]

Yet in my opinion, it cannot be denied that Point 19 exacerbated the crisis of Roman law after 1933,[194] since it gave clear political significance to pre-existing negative scientific and cultural approaches towards Roman law in Germany. In Point 19, the regime lashed out at Roman law in political terms attacking its legitimacy, as many

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188 Winkler underlines that the "Römische Rechtsgeschichte" was included as a topic in the planned "Aktion Ritterbusch" as well, as a "Teil einer generell gut vertretenen Althistorie". Winkler: *Der Kampf*, p. 165. Unlike Winkler, I do not think that the inclusion of Roman legal history within the study of a general ancient history necessarily proves that Roman law did not suffer any marginalisation under the Nazi regime. With regard to the "Aktion Ritterbusch", see the volume published after the pertaining conference in Berlin: Helmut Berve (ed.): *Das neue Bild der Antike. I. Band: Hellas. II. Band: Rom*, Leipzig 1942, and the review by Hans Kreller: *Das neue Bild der Antike*, in: *ZSS* (RA) 63 (1943), 510-516. Further, see Frank-Rutger Hausmann: *»Deutsche Geisteswissenschaft« im Zweiten Weltkrieg. Die »Aktion Ritterbusch« (1940–1945)*, Heidelberg 2007; Erkkilä: *The Conceptual Change*, pp. 90 f.

189 Winkler: *Der Kampf*, pp. 164 ff.

190 Meissel/Wedrac: *Strategien der Anpassung*, pp. 35 ff. Winkler correctly showed that Roman law scholars continued studying their subject matter and publishing works on the topic without encountering any difficulties, but he failed to highlight the aspect of the "adaptation", underlined on the contrary by Meissel and Wedrac.

191 See above, chapter 3, § 8, pp. 113 f.

192 See above, pp. 81 ff. and, in this chapter below, §§ 2 and 5.

193 Landau: *Römisches Recht*, pp. 15 f. See also Pieler: *Das römische Recht*, pp. 429 ff.

194 Stolleis: *Fortschritte*, pp. 170 and 176.

Germanists had already done so, including the likes of legal scholars Nicolai, Wagemann, Schmitt and many others. Nonetheless, Point 19 was usually interpreted by German scholars (not only Roman law scholars) as an attack on the Reception of Roman law or the Pandect-science, rather than Roman law itself.[195]

It is worth analysing Koschaker's perspective on Point 19 in this context. In *Die Krise des römischen Rechts* he did not devote a single word to the question, whereas in his proposal for the reform of Roman law teaching of 1941 he clearly affirmed that Point 19 could not be considered responsible for the crisis of Roman law, also for the reason that a political programme usually deals with practical, and more important matters.[196] Apart from the above-stated reasons that could have led to his making such a statement, where, of course, he was in part influenced by the addressee of his document, it stands to reason that Koschaker truly considered Point 19 not particularly significant.[197] Further evidence of Koschaker's beliefs are found both in an unpublished letter he penned in 1943 and in his work *Europa und das römische Recht*.

He wrote the letter on 20th November 1943 to Fritz Brüggemann, who was in Berlin at the time.[198] The latter had invited Koschaker, in a previous letter sent on 17th November of the same year, to write an article on European legal science, a topic that, according to Koschaker, would have allowed him to deal with the development of legal science, as such based on Roman law, in Europe from the 11th century onwards.[199] Koschaker concurred with Brüggemann's point of view on Roman law, as expressed in his letter, which was quite similar to Koschaker's stances, as explained in *Die Krise des römischen Rechts*. Koschaker, however, bemoaned the different point of view taken by leading academic circles of the time:

> Indessen sind diese Gedankengänge in Ansehung des römischen Rechts leider nicht diejenigen unserer leitenden Kreise. Die Ursache ist der unglückliche Punkt 19 des Parteiprogramms, der etwas ganz anderes meint als er sagt, aber doch vielen maßgebenden Leuten ein Brett vor den Kopf nagelt, und wenn Sie sich die Mühe

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195 This was also Carl Schmitt's point of view, as explained in Winkler: *Der Kampf*, p. 169. See also Carl Schmitt: *Aufgabe und Notwendigkeit des deutschen Rechtsstandes*, in: *DR* 6 (1936), pp. 181-185.

196 See above, p. 221.

197 Wieacker agreed with him, on the contrary Levy did not. See: Wieacker: *Rezension Paul Koschaker, Europa und das römische Recht*, in: *Gnomon* 21, H. 5/6 (1949), pp. 187-193, and, *praecipue*, p. 188; Levy: *review of Die Krise*, p. 92.

198 The two-page typewritten letter is preserved at the *Landesarchiv Nordrhein-Westfalen Duisburg* (Nachlass Carl Schmitt, RW 265-8125). On Fritz Brüggemann (1876-1945), a member of the Nazi party and Professor for History of Literature, see Christoph König/Birgit Wägenbaur: *Internationales Germanistenlexikon 1800-1950* III, Berlin 2003, pp. 280 f.

199 Koschaker wrote that this legal science was "die Mutter aller Rechtswissenschaft geworden, die weiterhin für die einzelnen Sparten des Rechtes namentlich seit dem 19. Jahrhundert entstanden ist."

> nehmen wollten, unsere neuste juristische Studienordnung zu lesen, so würden Sie aus ihr den ernstlichen Willen entnehmen, das Studium des römischen Rechts an unseren Universitäten totzuschlagen, womit freilich noch nicht gesagt ist, daß wir uns auch totschlagen lassen. […] In all diesen Punkten bin ich anderer Meinung, und wenn auch ich in meiner Ausdrucksweise vorsichtig sein würde, so könnte und wollte ich es nicht vermeiden, meinen Standpunkt mit aller Deutlichkeit zu vertreten, wie ich es schon in der oben genannten Schrift getan habe, die in den Publikationen der Akademie für deutsches Recht erschienen ist. […]

The importance of this letter is twofold: first, Koschaker wrote that the cause of the common leading opinion on Roman law in Germany at the time was Point 19 of the Nazi party programme. But he actually defined it as, "der unglückliche Punkt 19 des Parteiprogramms, der etwas ganz anderes meint als er sagt", thus implying that there was a difference between the unfortunate literal formulation and its true sense. The deleterious effects resulting from the interpretation of the text depended on the difference between what it really meant and what he actually said. Hence, its poor formulation was to be blamed for the loathing for Roman law it provoked and not the content of Point 19 itself.

One may thus assume that Point 19 could not be held responsible, or at most only indirectly, for the crisis of Roman law, in Koschaker's opinion. This confirms yet again his inner conviction about the role of Point 19, expressed in a letter sent to a colleague (who was a member of the Nazi party, however).

The second significant issue concerns Koschaker's words on the reform of the *juristische Studienordnung*: in contrast to the terms of his reform proposal of 1941, in this letter he clearly affirmed that the text of the reform, the *juristische Studienordnung,* had the serious intention ("der ernstliche Wille") of eliminating (literally to kill: "totschlagen") Roman law.[200]

Koschaker's stance is clear and illustrates all the differences between his real point of view on the reform of the legal study and the very cautious, perhaps opportunistic, approach that he adopted in writing his *Denkschrift* in 1941. At the end of the letter, Koschaker pointed out that he intended to clearly defend his stance, if he had to write the article for Brüggemann, albeit prudent about the language he would chose to express those opinions.

A second indication of Koschaker's ideas on point 19 emerges from the pages of his masterpiece, *Europa und das römische Recht*.[201] This work was published after the end of World War II and capitulation of the regime, hence there was no longer any need to refrain from criticising Nazism or adopt prudent language. Nonetheless, Koschaker did

[200] It is not possible to argue from the text of the letter, whether Koschaker's negative opinion involved the new *Justizausbildungsordnung* (JAO) of 1st January 1939 too or not.

[201] Koschaker: *Europa*[4], pp. 311-314. For an analysis of this work, see the following paragraph.

not change his judgment on Point 19, confirming yet again that what he wrote or affirmed at the time of the Nazi regime represented his real viewpoint and was therefore not for opportunistic reasons. In *Europa und das römische Recht,* he alleged that the formulation of the text of Point 19 was ambiguous;[202] then he added cuttingly that this point was in line with the previous points from 10 to 18 of the programme, as such influenced by a socialist perspective and a socialist spirit (*Geist*). Point 19 itself had to be read as a means of supporting a private law system influenced by a socialist spirit: in this context, it was comprehensible that the meaning of the demands made in Point 19 were entirely coherent with the programme of a national socialist party. It was reasonable to think, as Koschaker indeed wrote, that the aim of Point 19 was to challenge the BGB and the materialistic order that it represented, although this concept had never been explicitly declared. For these reasons, Point 19 was destined to remain an enigma, in Koschaker's eyes.[203]

Koschaker's explanation was criticised by De Martino some years later: the latter argued that the meaning of Point 19 was not obscure, as Koschaker himself had maintained with the above-mentioned interpretation in the pages of *Europa und das römische Recht*.[204] According to De Martino, the regime had used Point 19 – as well as the idea to fight Roman law and the materialistic order - as a pretext to undermine the very principles handed down by Roman law, in particular, those protecting individual freedoms. On the other hand, Wieacker found Koschaker's reasoning convincing, in his review of *Europa und das römische Recht*.[205] The latter wrote that Koschaker was right in not overestimating the effect of the regime's attack on Roman law; the real catastrophe, continued Wieacker, lay in that the majority of the most eminent German scholars were persecuted and expelled by Nazism on account of their Jewish origins, regardless of what they studied or taught.[206]

Koschaker was also convinced that many supporters of the regime followed the dictum of Point 19 only by dint of their obedience to the Nazi party, and not according to inner convictions,[207] which is nonetheless very difficult to prove. In any case, the Nazis did not oppress Roman law professors as such, yet this was not due to the liberal feelings of the members of the regime.[208] As Koschaker further added, they did not need to direct any violence towards Roman law scholars, as Roman law teaching was already facing a

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202 Ibid., p. 312: "Die Formulierung ist alles eher als klar."

203 Koschaker: *Europa*[4], p. 312: "So wird Punkt 19 des Parteiprogramms ein Rätsel bleiben, es sei denn, daß aus Parteiarchiven Akten über die Vorberatungen des Parteiprogramms bekannt werden, die Licht auf seine Entstehung werfen."

204 De Martino: *Diritto e società*, pp. XVII ff.

205 Wieacker: *Rezension Paul Koschaker, Europa und das römische Recht*, pp. 190 f.

206 Ibid., p. 191: "Die eigentliche Katastrophe des römischen Rechts in Deutschland 1933 lag in der Vertreibung der Mehrzahl der führenden Gelehrten – ohne Zusammenhang mit ihrer Fachrichtung."

207 Koschaker: *Europa*[4], p. 313.

208 Ibid., p. 314: "Um so beachtlicher erscheint die Feststellung, daß keinem Romanisten wegen seiner Wissenschaft von der Regierung ein Haar gekrümmt wurde".

crisis in Germany and it would have been unreasonable "große Mittel zu verschwenden, wo kleine denselben Dienst taten", namely, to use major instruments where the same goal could be achieved using lesser measures.[209] The reform of legal studies and the limitation of the numbers of hours and courses at the disposal of Roman law scholars, in addition to the abolition of the final examinations at the end of the course, had a devastating effect on Roman law in Germany, in Koschaker's opinion;[210] he also expressed this opinion to Brüggemann in the above-mentioned letter from 1943.

To conclude, two further considerations emerge from the analysis of Koschaker's opinion on Point 19. The first relates to the significance he attributed to its role, which seems somewhat underestimated, as some other scholars similarly thought at the time.[211] It is not completely convincing that its detrimental effects should merely be ascribed to the interpretations that followed from its poor formulation. It is on the contrary possible to acknowledge the political significance of Point 19, which most probably exacerbated what was already a critical situation for Roman law in Germany.

The second remark regards the consistency of Koschaker's opinions on the role of Point 19: they did not change, regardless of the occasion on which he expressed them. In this respect, he did not try to adapt his ideas to the changing circumstances, on the contrary, he staunchly defended them over the years and even after the end of the totalitarianism.

5.10 Koschaker's masterpiece: *Europa und das römische Recht*

Since 1936, when he moved to Berlin, if not earlier, Koschaker felt deeply involved in the critical situation that Roman law - and Roman law teaching in particular - was facing in German universities. The progressive decline of its importance as a subject matter for students and as a tool with which to study and comprehend contemporary law had led Koschaker to his initial reaction at the *Akademie für Deutsches Recht* in 1937. A few years later, in 1943, in a review of the book by Astuti *Studi intorno alla promessa di pagamento. Il costituto di debito*,[212] he further explained that he had been obliged to reduce the number of matters he covered during his Roman law classes, due to the limited number of hours at his disposal, and eventually he questioned whether it was possible to

[209] Ibid. It was true that Roman law teaching at the universities had been facing a crisis in Germany since the 1920s, when the number of students attending Roman law courses began to decline significantly. See Winkler: *Der Kampf*, pp. 170 ff.

[210] Koschaker: *Europa*, p. 315. Roman law definitely disappeared as an examination subject after the enactment of the *Justizausbildungsordnung* (JAO) of 4th January 1939.

[211] Some scholars have resumed Koschaker's point of view also in more recent years, see Stolleis: *Gemeinwohlformeln*, p. 31; Bender: *Die Rezeption*, p. 100.

[212] Koschaker: *Bespr. von Guido Astuti*, pp. 469-477.

consider any of the several Roman law topics available still "important" in Germany at that time.[213]

This sentiment continued to pervade Koschaker's outlook during the writing of his masterpiece, *Europa und das römische Recht*, which first appeared in its 1947 edition. As he wrote in the preface to this edition, he had begun to write and had also partly written this book when he was in Tübingen, during the "last quarter" of World War II.[214]

It has been previously mentioned that Koschaker wrote a letter on 2nd December 1945 (the addressee is unfortunately unknown), in which he explained that he was composing a manuscript on European private legal science and Roman law ("Europäische Privatrechtswissenschaft und römisches Recht");[215] all the evidence points to the fact that he was indeed referring to the book that he would have later named *Europa und das römische Recht*.

He further explained in the preface how difficult it was to get hold of the literature that he needed during the war, and also after the war, because many German libraries had been bombed and he was not able to borrow books from the libraries of other countries. He was grateful, however, to Heymann and Heinrich Mitteis for the help he had received in collecting the necessary bibliography, while writing his text.

Koschaker dedicated his work to his colleague and friend, Salvatore Riccobono, with the following words: "SALVATORE RICCOBONO dem unermüdlichen Vorkämpfer für das Studium des römischen Rechts und dem Freunde." The dedication of his most important book to Riccobono confirmed once more Koschaker's high esteem for his Italian colleague and paid tribute to their long-lasting friendship.[216]

Three further unchanged editions of the book were later published, in 1953, 1958 and 1966. The reason of the republished 1953 version was explained by Kaser, in the preface to the second edition.[217] The book was not easy to obtain outside Germany after his first publication in 1947. Yet Koschaker repeatedly affirmed that it was necessary to improve

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213 Ibid., p. 469: "Freilich will dies nicht viel besagen, weil der geringe Umfang der Vorlesung mich zwingt, noch viel Wichtigeres fortzulassen, wenn überhaupt die Bezeichnung „wichtig" für eine Materie des römischen Rechts in Deutschland heute noch als angemessen gelten darf."

214 Koschaker: *Europa*[4], p. XI.

215 See above, pp. 154 ff.

216 It was Riccobono who wrote the speech in honour of Koschaker the *Festschrift Koschaker* appeared in 1939, whereas Koschaker praised Riccobono once more in 1948, defining the latter a new Bartolus. See Riccobono: *Messaggio inaugurale a Paul Koschaker*, pp. V f.; Koschaker: *La convalida nel diritto romano e moderno*, in Guiscardo Moschetti (ed.): *Atti del congresso internazionale di Diritto romano e Storia del diritto*, Verona 27-28-29 – IX – 1948, III, Milano 1951, p. 348: "Così ci ha insegnato il nostro Riccobono. Mi si perdoni di usare come Tedesco il possessivo "nostro" per un giureconsulto, italiano di nascita e di carattere. Ma questo insigne giurista, propugnatore dello studio del diritto romano, appartiene, come Bartolo nel medio evo, non meno italiano che il Riccobono, a tutte le nazioni che stimano il diritto romano. Fra queste si annoverano recentemente di nuovo i Tedeschi [...]".

217 Kaser: *Geleitwort zur 2. Auflage*, in: Koschaker: *Europa und das römische Recht*[2], München und Berlin 1953, pp. VIII f.

his work and this was also the reason for his decision not to have it translated into Spanish at the time. In the meantime, requests for copies of the book, also outside Germany, increased, but Koschaker died on 1st June 1951 and did not have the opportunity to work again on and modify his text as he had intended. Helene Koschaker, his wife, was therefore hesitant when she was asked by the publisher to allow the publication of a second edition, since the book had not been revised as her husband had desired, but she eventually acquiesced. She then requested Kaser to write the preface; as Kaser explained, there was no other alternative than to publish an unchanged second edition of the book ("Ein anderer Weg als der des unveränderten Neudrucks aber steht nicht offen"). Significantly, he further pointed out that it would not have been possible to rework such a text, given that it so clearly expressed the spirit and lively personality of its author.

This remark by Kaser in fact grasps one of the most distinctive features of *Europa und das römische Recht*: in this work, the scientific elaboration and analysis blend with the personal and human perspective and sentiments of the scholar and individual, Paul Koschaker. Similar considerations were made by Calasso who talked, moreover, of a psychological trauma suffered by Koschaker, due to tragic image of the collapse of Europe, which had progressively turned into a problem of conscience: all these elements, according to Calasso, impinged upon the work and its narrative.[218] These circumstances indeed led Koschaker to producing a work where, at times, scientific clarity merged with the personal involvement of the author.

Despite the difficulties in obtaining a copy of the book outside Germany, as stressed by Kaser in the preface, his work quickly became the object of scholarly scrutiny, and not only of German scholars as the early reviews revealed.[219]

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[218] Calasso: *L'Europa e il diritto romano*, p. 106: "il trauma psichico provocatogli dallo spettacolo di un'Europa in decomposizione."

[219] The book was quoted by Arthur Schiller: *Review of History of Roman Legal Science by Fritz Schulz. Oxford: Clarendon Press, 1946*, in: *The Yale Law Journal* 57, 2 (1947), pp. 324-330. See then the reviews by: De Francisci: *Rec. Paul Koschaker, L'Europa e il diritto romano*, in: *Rivista italiana per le scienze giuridiche* II (1948), pp. 438-449; Reginald Parker: *Review of Europa und das römische Recht by Paul Koschaker*, in: *The American Journal of International Law* 42, 4 (1948), pp. 975-978; Percival Rivington: *Koschaker, Paul. Europa und das Römische Recht*, in: *Journal of Comparative Legislation and International Law* 30, 3 (1948), p. 119; Robert Warden Lee: *The Study of Roman Law*, in: *Journal of Comparative Legislation and International Law* 30, 3/4 (1948), pp. 119-122; Wieacker: *Rezension Paul Koschaker, Europa und das römische Recht*, pp. 187-193; Oven: *Comptes Rendus Paul Koschaker*, pp. 68-74; Genzmer: *Bespr. von Paul Koschaker, Europa und das römische Recht. Biederstein Verlag. München und Berlin 1947,* in: *ZSS* (RA) 67 (1950), pp. 595-611; Pringsheim: *Bespr. von Koschaker, Paul, Europa und das römische Recht*, in: *Zeitschrift für die gesamte Staatswissenschaft* 107, 2 (1951), pp. 371-376; Erwin Seidl: *Bespr. von Paul Koschaker, Europa und das römische Recht*, in: *Byzantinische Zeitschrift* 47 (1954), p. 172; D'Ors: *Jus Europaeum?*, pp. 449-476; René Filhol: *Comptes Rendus Paul Koschaker, Europa und das römische Recht, 2e éd.*, in: *Latomus* 15, 1 (1956), pp. 109-111; Werner Ogris: *Europa und das römische Recht von Paul Koschaker*, in: *Juristische Rundschau* (1967), p. 358.

After the second edition of the book, moreover, translations were published in Spanish and Italian, and later, in Dutch.[220]

It can be inferred from Koschaker's preface that the work had been conceived as a far-reaching historical depiction of Roman law in Europe from the time of its reception, as well as the development of a European legal science from the time of Charlemagne up to the 20th century, and finally, up to the crisis of Roman law. This in-depth description of European legal history was intended show the close connection between Roman law and Europe. These two terms, the European narrative on the reception of Roman law, together with Christianity, represent the two essential ideal cornerstones in Koschaker's reconstruction.

The work had been originally conceived, therefore, as an extensive development of the arguments already explained by Koschaker in his previous publication *Die Krise des römischen Rechts und die romanistische Rechtswissenschaft*. Yet the end of World War II, and the devastation of a large part of Europe contributed to Koschaker giving a broader meaning to *Europa und das römische Recht* over time, eventually leading to his open defence of European legal culture and appeal for its recovery and reconstruction. This is one of the peculiar features of the book, namely that *Europa und das römische Recht* deals not only with questions regarding European legal history, but with central cultural problems too. Koschaker fervently sought to retrieve Europe's pre-existing cultural and legal tradition that had been ravaged by totalitarianism and dictatorship.

Romanists and Legal historians have continuously highlighted the enormous value of Koschaker's work, as the fruit of years of thought and reflection on the role of Roman law and its reception into European history by one of the most talented legal historians of the 20th century.[221]

Scholars such as Wieacker and Pringsheim, and to a lesser extent Julius van Oven, criticised Koschaker's stance from a scientific and methodological point of view, since they considered a historical approach to the study of Roman law to be the only possible approach after the enactment of the BGB, as a means of investigating Roman law and its sources as they were in ancient Rome prior to the development of the legal stratifications of the following centuries.[222]

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[220] Koschaker: *Europa y el Derecho Romano*, translated by José Santa Cruz Teijeiro, Madrid 1955; Koschaker: *L'Europa e il diritto romano*; Koschaker: *Europa en het Romeinse recht*[1], translated by Theo Veen/Frank Soetermeer/Sylvia Ankum/Yvette Ankum and with an introduction by Robert Feenstra, Zwolle 1995. In Kaser's preface to the second edition, it is stated that Koschaker refused to let his book translate in Spanish, for the above-mentioned reason that he considered it necessary to improve the text and prepare a new edition. See Kaser: *Geleitwort*, p. VII.

[221] Wieacker: *Rez. Paul Koschaker*, pp. 187-193; Oven: *Comptes Rendus Paul Koschaker*, pp. 68-74; Genzmer: *Bespr. von Paul Koschaker*, pp. 595-611; Pringsheim: *Bespr. von Koschaker*, pp. 371-376.

[222] Oven's point of view is particularly interesting. The Dutch scholar agreed with Koschaker's proposal on the need to adopt a dogmatic and comparative method that allowed private law systems to be

Koschaker, on the contrary, again insisted on the responsibility of the *Historisierung* of Roman law for its crisis, in his work, as he had already done in *Die Krise des römischen Rechts*.[223] Despite the appreciable value of Mitteis' works, which allowed the Roman law scholars to study new fields of legal history and discover new sources, neither the *antike Rechtsgeschichte*, nor the Interpolationism, the two trends of the *Historisierung*, were true schools and they were not able to offer any real programmatic works for their research.[224] These arguments by Koschaker were not new, of course, and echoed the stance he had already taken in his 1938 publication. In any case, the difference of opinions did not impede Wieacker, Pringsheim and Oven, and many more scholars, from paying tribute to a book destined to become a key work on Roman law and its reception in Europe history.

Arguably, the message accompanying the work appeared to be almost more important than its content. This is not to belittle the legal value of the book as such, but more to underline the fact that the scientific and historical limits of its reconstruction are overshadowed by the significance of its learned narrative on the role of Roman law

described systematically, on the one hand; he further added, on the other hand, that he did not think, unlike Koschaker, that this approach was incompatible with the *Historisierung* of Roman law which he defined as the "einzige richtige, mögliche und wahre. Sie ist eine antiquarische Wissenschaft, muss aber von vollständig juristisch gebildeten Gelehrten getrieben werden". On Julius Christiaan van Oven (1881-1963), see Gerard Eduard Langemeijer: *Levensbericht J. C. van Oven.* In: *Jaarboek der Koninklijke Nederlandse Akademie van Wetenschappen, 1963-1964*, Amsterdam 1964, pp. 476-489; Robert Feenstra: *Oven, Julius Christiaan van (1881-1963)*, in: *Biografisch Woordenboek van Nederland* (BWN) 1, Den Haag 1979, p. 440. Oven had been professor for Roman Law and History at the University of Leiden since 1924 and he was called by Eduard Maurits Meijers (1880-1954) as co-editor of the recently established *Tijdschrift voor Rechtsgeschiedenis* since 1925/1926. Oven also played a decisive role in letting Fritz Schulz and his wife Martha escape from Nazi Germany in 1939. In the summer of the same year two other Jewish Romanists spent some time in Leiden, Edoardo Volterra and Fritz Pringsheim. Oven himself had a Jewish mother. On these events, see Pierangelo Buongiorno: *«Ricordi di anni lontani e difficili». Romanisti a Leiden nella lunga estate del 1939*, in: *Index* 44 (2016), pp. 479-490; on Fritz Schulz as a refugee in Leiden, before, and then in England, see Ernst: *Fritz Schulz (1879-1957)*, p. 122 ff.; Martin Josef Schermaier: *Fritz Schulz (1879-1957). Fritz Schulz' Prinzipien: Das Ende einer deutschen Universitätslaufbahn im Berlin der Dreißigerjahre*, in: Stefan Grundmann/Michael Kloepfer/Christoph G. Paulus/Rainer Schröder/Gerhard Werle (eds.): *Festschrift 200 Jahre Juristische Fakultät der Humboldt-Universität zu Berlin. Geschichte, Gegenwart und Zukunft*, Berlin 2010, pp. 683-700; Jacob Giltaij: *Fritz Schulz (1879-1957): Reinventing the principles of Roman law*, forthcoming. On Edoardo Volterra (1904-1984), see: Luigi Capogrossi Colognesi: *Volterra, Edoardo*, in: Birocchi/Cortese/Mattone/Miletti (eds.): *Dizionario biografico dei giuristi italiani (sec. XII-XX)*, II, Bologna 2013, pp. 2067-2069.

223 Yet he further added, in this work, that the *Historisierung* was a *Verlegenheitsprodukt* resulted from the crisis of the Pandect-science. Koschaker: *Europa*[4], pp. 294 f.

224 Ibid, pp. 294 ff. and 298 f. Wenger's works represented in part an exception, containing some guidelines on the methodology and the aims of the *antike Rechtsgeschichte*, according to Koschaker. See also above on this question, in this chapter, § 3.

tradition in Europe.[225] Indeed, Koschaker's message has been able to captivate and influence future generations of scholars.

The outline of the structure of the reconstruction of European legal history follows the content of Koschaker's work on the crisis of Roman law of 1938, as was previously highlighted; for these reasons, since the most important remarks on his historical depiction have been already made, when dealing with *Die Krise des römischen Rechts*, it is now more appropriate to focus on some other main arguments that come to attention in *Europa und das römische Recht*.

One of the first aspects to be considered relates to Wieacker's and Pringsheim's critical remarks that actually show the difference in perspectives adopted by the latter and Koschaker; moreover, this diverse perspective also reveals a different methodological approach and, ultimately, a different conception of Roman law. In their reviews, Wieacker and Pringsheim criticised Koschaker's attempt to link Roman law to the needs of modern legislation, on the contrary, defining the approach of the *Historisierung* as the only possible way to really know and understand Roman law and its sources.[226] According to Wieacker and Pringsheim, in particular, it was erroneous to link Roman law to utilitarian aims, as it ought to be studied from the perspective of being the greatest legal "experience" ever conceived, and still relevant to contemporary legal education and legal reasoning. Hence, Roman jurisprudence should be considered as an essential toolkit for the study of modern legal systems. Roman law should be studied *per se,* and also because the Romans had first made a science of law.[227] At the same time, both scholars considered it necessary to underline the different influences, namely those of the schools of the Eastern Roman Empire in the IV and V century AD, which led to a further evolution of Roman law, and came together in the Compilation of Justinian. According to Wieacker and Pringsheim, only a historical approach to the study of Roman law would enable scholars to understand this essential development. Wieacker also affirmed that it was thanks to the *Historisierung* of Roman law that Legal History (*Rechtsgeschichte*) was definitely conceived as a legal science, which represented the future of Roman law studies.[228] He then added whilst it was true that the crisis was real, as such, it regarded

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225 On this aspect see also the following chapter, §§ 1 and 2.

226 Wieacker: *Rez. Paul Koschaker*, pp. 190 ff.; Pringsheim: *Bespr. von Koschaker, Paul*, pp. 374 ff.

227 See also Pringsheim's reference to Andreas Bertalan Schwarz: *Pandektenwissenschaft und heutiges romanistisches Studium*, in: *Festgabe zum schweizerischen Juristentag 1928*, Zürich 1928, p. 93-124.

228 Wieacker: *Rezension Paul Koschaker*, p. 191. It is interesting to notice that a very significant "prediction" on the future of Roman law, that had to be studied by adopting a historical approach to inspire again interest in the students at the Law faculties, came from one of the most prominent pandectist, namely Bernhard Windscheid, who wrote: "Wenn die Herrschaft des *Corpus Juris* in Deutschland beseitigt sein wird, dann erst recht werden sich die Hörsäle der Lehrer des römischen Rechts füllen." See Bernhard Windscheid: *Das römische Recht in Deutschland*, in: Paul Oertmann (ed.): *Bernhard Windscheid, Gesammelte Reden und*

European culture and the so-called sciences of the spirit (*Geisteswissenschaften*) as a whole, and not only Roman law.[229] The difficulties encountered by Roman law were not a genuine crisis, rather a periodic event (*periodischer Vorgang*), similar to the decline it underwent during the Age of Enlightenment.[230]

It is clear that Pringsheim and Wieacker's approaches, on the one hand, and Koschaker's, on the other hand, were determined by different methodological stances.[231] Yet beyond this divergence, the scientific disagreement between the latter and Pringsheim and Wieacker should not be overestimated. The point is that through his work Koschaker sought mainly to focus on the cultural idea of Rome, the *kulturelle Romidee*.[232] It was the cultural value of Roman law and its reception as a foundation stone for the evolution of European legal history that really interested Koschaker. It is no coincidence that in numerous passages of the work, he underscored the close nexus between the role of Roman law and the role of Christianity in the history of Europe.

Despite the title of the book, *Europa und das römische Recht*, very little effort is devoted to the questions regarding what Roman law was and how it developed in ancient Rome or what it represented from a legal point of view. Instead Koschaker focused on Roman law as it emerged from the *Corpus iuris*.[233] This provided the basis for the systematic depiction of law that has been elaborated over the centuries, in a first incomplete attempt by the Glossators, later and much more in-depth by the Commentators who created the real foundations for the dogmatic reconstruction eventually developed by the Pandectists in the 19th century. Both the Glossators and the Commentators were influenced by the scholasticism in their exegetical methods and Koschaker grouped them together under the concept of *Juristenrecht*.[234] Koschaker's work, therefore, directed its focus on the elaboration of the dogmatic legal system developed in Europe, based on the study of the *Corpus iuris*. Hence, the conception of Roman law offered by Koschaker was highly idealised, whereas his depiction of European legal history was affected by the myth of continuity. Unlike Wieacker, Koschaker found a continuity between Roman law and

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Abhandlungen, Leipzig 1904, pp. 25-49 and, in particular, p. 48. On Windscheid (1817-1892), see Ernst Landsberg: *Bernhard Windscheid*, in: *ADB*. 43, Leipzig 1898, pp. 423-425; *Bernhard Windscheid*, in: Kleinheyer/Schröder (eds.): *Deutsche und Europäische Juristen*[6], pp. 472-476; Avenarius: *Bernhard Windscheid (1817-1892) – Der Spätpandektist und seine Wirkung auf das Rechtsdenken des europäischen Auslands*, in: *ZEuP* 25, 2 (2017), pp. 396-418.

229 Wieacker: *Rezension Paul Koschaker*, pp. 191 ff. A similar stance in Betti: *La crisi odierna della romanistica*, p. 127. Oven wrote that there was no crisis of Roman law, rather only a crisis of its teaching at the universities in some European countries: Oven: *Comptes Rendus Paul Koschaker*, pp. 71 f.

230 Wieacker: *Rez. Paul Koschaker*, p. 191.

231 See also Winkler: *Der Kampf*, pp. 230-255.

232 Koschaker: *Europa*[4], pp. 3, 45 ff. and 79. See also Genzmer: *Bespr. von Paul Koschaker*, p. 600; Pringsheim: *Bespr. von Koschaker*, p. 374.

233 Koschaker: *Europa*[4], pp. 55 ff.

234 Ibid., pp. 68 f. and 90.

the Glossators, first, and then between the latter and the Commentators; this continuity had been come about through the *Romidee* and granted that Roman law first and foremost had been the law of the Roman Empire, and later that of the Holy Roman Empire.

The sense of Koschaker's argumentation is twofold: on the one hand, he wanted to offer an overview of the above-mentioned topics that would reaffirm the role of the Romanist tradition in Europe. In this respect, Koschaker's work represented the first attempt to describe on such a broad scale the reception of Roman law as a European phenomenon and this is one of its highest merits.[235] To achieve this goal, he sought to explain this process not in detail, but with reference to the main ideas and questions that have from time to time affected Roman law reception in Europe, as well as its influence throughout continental Europe and beyond, in particular, in England. On the other hand, this was yet again the best description possible to suggest that a dogmatic approach to the study of Roman law was most appropriate and thereby offer a sort of programmatic proposal for the same.[236]

It is, therefore, no surprise both the criticism on the *Historisierung* and the fact that this work only to a limited extent touches questions regarding the "Roman law of the Romans" and its development, in particular from the post-classical period to Justinian. As a talented scholar, dealing with problems regarding the interpolations in the Roman law sources and with the laws of Antiquity during his career, Koschaker was clearly aware of the historical evolution of law in ancient Rome; yet the aim of *Europa und das römische Recht* was not to focus on these matters.

Another aspect that emerged from the book concerns the difficulty in comprehending at times whether Koschaker's point of view referred to Roman law research or Roman law teaching, or at times, to them both. This ambiguity seems to emerge from the remarks made by Wieacker and Pringsheim too, whereas Oven clearly distinguished the aspects regarding Roman law teaching from the others pertaining its study, in his comments.[237] Nonetheless, one can observe that a dogmatic approach pervaded both Koschaker's stances on teaching and research. The difference lay in the fact that it was possible for Roman law research to adopt the methodology of the historical approach as an ancillary tool in order to gain a better understanding of Roman law, as it was and it had developed over the centuries.

In any case, Romanist research should serve the aim of building up a systematic and dogmatic depiction of European private law systems, in Koschaker's opinion. One of the

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[235] See Genzmer: *Bespr. von Paul Koschaker*, p. 598. The author suggested to distinguish between the Wiederaufleben or Renaissance of Roman law (that took place in Italy, Spain and France) and the Aufnahme or Rezeption (Reception, that happened in The Netherlands, in Germany, in Austria and in other countries).

[236] On which see further, chapter 6, § 2.

[237] Wieacker: *Rezension Paul Koschaker*, pp. 191 ff.; Pringsheim: *Bespr. von Koschaker, Paul*, pp. 373 ff.; Oven: *Comptes Rendus Paul Koschaker*, pp. 71 ff.

risks run by his approach towards the study of Roman law allegedly related to the fact that Koschaker focused too heavily on needs and links to contemporary legislation, as has been already stressed during the analysis of *Die Krise des römischen Rechts*.[238]

5.11 *Juristenrecht* and relative natural law

Yet no criticism is capable of casting a shadow over the value of Koschaker's work, which is considered as one of the most important contributions to Roman law and its reception published since the end of World War II.[239]

Among the many topics dealt with in this book, two further elements deserve our attention. The first is the reference to *Juristenrecht* that appears in many parts of the work.[240] In Koschaker's eyes, first the Glossators, and later, and more importantly, the Commentators with the *mos italicus*, succeeded in laying down the basis for a creative European jurisprudence producing legal rules that were applied in several European countries. It had both a European significance and the legal principles and rules were drawn from a common source, the *Corpus iuris*.

Furthermore, their role was not only a theoretical, but also a practical one. They were able to analyse the Roman law sources and extrapolate what was needed by the current laws of their time. This style of *Juristenrecht*, a jurisprudential law, has been a source of law for centuries.[241] Yet in the 19th century, as a doctrinal source of law, it was replaced by *Professorenrecht,* which, according to Koschaker, served the aim of creating a system and the dogmatic pre-requisites for modern legislation, but lost its connection with legal practitioners (*Praktiker des Rechts*). The *Professorenrecht* was first created by the Historical School, and later elaborated by the Pandect-science, which in Koschaker's opinion, was the result of the influence of natural law on the Historical School, despite the fact that the latter seemed contrary to any natural law tendency.[242] Koschaker wrote that the Pandect-science was no more than the continuation of natural law appropriated by other means.[243] This set of circumstances led to a clear-cut scission between theory and praxis and to the prevalence of the theoretical elaboration of concepts, according to

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238 More or less openly expressed, this kind of criticism emerged also in Wieacker: *Rez. Paul Koschaker*, pp. 191 ff.; Genzmer: *Bespr. von Paul Koschaker*, p. 607; Pringsheim: *Bespr. von Koschaker, Paul*, pp. 373 ff.

239 Oven: *Comptes Rendus*, p. 68; D'Ors: *Jus Europaeum?*, p. 449 fn. 1.

240 Koschaker: *Europa*[4], pp. 164 f., 175 f., 181, 187 f., 194 f., 196, 207 and *passim*.

241 D'Ors: *Jus Europaeum?*, p. 452 agrees with Koschaker on the role of the jurisprudence. The same idea can also be found in Schmitt: *Die Lage*, p. 30 in particular.

242 Koschaker: *Europa*[4], pp. 269 ff. and 275 ff. On the Historical School, see the recent publication of Hans-Peter Haferkamp: *Die Historische Rechtsschule*, Frankfurt am Main 2018.

243 Koschaker: *Europa*[4], p. 269.

Koschaker. On the one hand, it meant that a true legal science (*Rechtswissenschaft*) was created for the first time and this legal science was of European significance, because it was founded on the study of Roman law. On the other hand, however, the replacement of *Juristenrecht* by *Professorenrecht* paved the way for a rupture between theoretical study and the practical application of law.[244] This rupture was still not definitive prior to the enactment of the BGB, and thanks to Savigny's influence during the 19th century; the pandectists were still interested in Roman law as a source of contemporary law at that time. It did become definitive, however, after the German Civil Code was issued and the decadence of the Pandect-science let the *Historisierung* definitely emerge.

Pringsheim was probably right in pointing out that Koschaker's criticism towards the *Professorenrecht* was exaggerated, since it was not possible to underestimate the role of Savigny and the Historical School and their influence in Europe outside Germany. Moreover, Pringsheim did not agree with Koschaker's opinion that *Professorenrecht* had led to a rupture between theory and praxis in law.[245] Koschaker's suggestion, however, was a return to *Juristenrecht* as opposed to positivism, on the one hand, and as a new bridge between the study of Roman law and Legal history and contemporary legislation, on the other.[246]

It is particularly interesting then that he should attempt to provide a comparative historical analysis of the social role of jurisprudence in different epochs, focusing initially on its role in ancient Rome, and then in continental Europe and in the Anglo-American world.[247] The legal-historical and social analysis of the phenomenon of *Juristenrecht* caused Koschaker himself to consider it as the means to recover the forlorn European legal tradition. By rebuilding European jurisprudence, it would again be possible to establish a *ius commune europaeum*, based on Roman law,[248] which led to the question of how to implement this project.

In his work, *Jus Europaeum?*, D'Ors pointed out that Koschaker's work was reminiscent of an up-to-date *mos italicus*, as a methodological tool with which to achieve his stated goal, and in this respect, he was influenced by Riccobono.[249] Koschaker's references to the role of the Commentators, as well as the pages he dedicated to the *mos italicus* in *Europa und das römische Recht*, might allow one to think that D'Ors was indeed correct in his observation. Yet it can also be observed that Koschaker offered a partly new proposal under the name of *relatives Naturrecht* (relative natural law). For some reasons, the majority of the scholars who commented and reviewed *Europa und das römische Recht*

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244 Ibid., p. 251.
245 Pringsheim: *Bespr. von Koschaker, Paul*, p. 375.
246 Yet Koschaker himself wrote that jurists and legislation should not be considered as antagonists, see Koschaker: *Europa*[4], p. 181.
247 Koschaker clearly explained his aim in the preface of the work, Ibid., p. X.
248 Calasso: *L'Europa e il diritto romano*, pp. 109 ff.
249 D'Ors: *Jus Europaeum?*, p. 465.

almost disregarded this point, with few exceptions.[250] It would therefore seem appropriate to devote further attention to this methodological stance as it probably represents one of the most interesting aspects of the work.

What does Koschaker mean with the seemingly contradictory idea of a relative natural law? He wrote:

> Ein absolutes Naturrecht kommt allerdings nicht in Frage. Es gibt aber auch ein relatives Naturrecht, und um ein solches relatives, d. h. europäisches Naturrecht handelt es sich hier, ein Naturrecht, das nicht spekulativ aus der Vernunft, sondern streng historisch aus der Vergleichung derjenigen Privatrechtssysteme gewonnen wird, die zum rechtlichen Aufbau Europas und darüber hinaus der ganzen Kulturwelt beigetragen haben, an der Spitze das römische Recht, das die Verbindung zwischen diesen Rechtssystemen herstellt; ein Naturrecht, das die Rechtserfahrungen aller Kulturvölker sammelt, die Europa aufbauen geholfen haben. Ihrer Natur nach werden solche Forschungen rechtsgeschichtliche sein, wobei allerdings Dogmen- und Begriffsgeschichte im Vordergrund stehen wird.[251]

Given that he was influenced by the methodological approach of Mitteis and Rabel,[252] Koschaker suggested combining legal history research with practical-dogmatic aims;[253] the former sustaining that the historical approach to the study of Roman law did not conflict with a dogmatic study of private law and of the BGB, whereas Rabel was able to elaborate a combination of history and dogmatic throughout a comparative approach.

Koschaker attempted to summarise the approach as follows: the comparative method would have allowed for an analysis of the different private law systems, but such investigation would need to be carried out both "horizontally", comparing contemporary laws, and historically, considering modern and ancient laws. In this comparative study,

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[250] Only a brief mention can be found in Oven: *Comptes Rendus Paul Koschaker*, p. 73; Pringsheim: *Bespr. von Koschaker, Paul*, p. 376. The point is analysed, on the contrary, in Genzmer: *Bespr. von Paul Koschaker*, pp. 607 f. and, more recently, in Zimmermann: *Heutiges Recht*, pp. 37 ff. Genzmer also added that Koschaker's methodological stance was not new, since it had been already suggested by Hugo. On Gustav von Hugo (1764-1844), see Luig: *Hugo, Gustav*, in: *NDB* 10, Berlin 1974, pp. 26 f.; Haferkamp: *Gustav Hugo zum 250. Geburtstag*, in: *ZEuP* 23 (2015), pp. 105-127; Id.: *Die Historische Rechtsschule*, Frankfurt am Main 2018, pp. 31 ff.

[251] Koschaker: *Europa*[4], p. 346.

[252] Ibid., p. 344 f. Koschaker quoted the following works as particularly inspiring for him: Mitteis: *Römische Privatrecht bis auf die Zeit Diokletians* I. *Grundbegriffe und Lehre von den Juristischen Personen*, Leipzig 1908; Rabel: *Die Haftung des Verkäufers wegen Mangels im Rechte* I: *Geschichtliche Studien über den Haftungserfolg*, Leipzig 1902. On Rabel's methodological approach, see the recent work by Gerber: *Sculpting the Agenda*, pp. 190-208.

[253] For a criticism of the practical-dogmatic aims of Roman law research see Wieacker: *Rez. Paul Koschaker*, pp. 188 ff.; Oven: *Comptes Rendus Paul Koschaker*, p. 69 ff.; Genzmer: *Bespr. von Paul Koschaker*, p. 607; Pringsheim: *Bespr. von Koschaker, Paul*, p. 372 ff.

Roman law should play the main role, since it represented the link between European legal systems, but equally, all the other historical systems that have contributed to the creation of the European legal foundations should be taken into consideration.

The perspective of the research should remain historical, because it would involve the study of legal systems of the past and therefore needed to make a historical comparison between institutes and rules. Yet such research should aim to retrace a history of legal dogmata and concepts, *Dogmen- und Begriffsgeschichte*, and hence be oriented towards a dogmatic and systematic depiction of European legal systems.

De facto, Koschaker's proposal could be considered as a benchmark for modern comparative legal history, since it combines comparative law and legal history. What is more, Koschaker clearly paved the way for a historical study, but again stressing the need to pursue a dogmatic aim: the difference between himself and the supporters of the *Historisierung* of Roman law still remained untouched. Any kind of legal research, in his opinion, should serve modern legal dogmatic aims such as the elaboration of rules for modern current laws: a historical study of Roman law thus was not legitimised for itself, even when it was able to display legal principles and the elements of legal reasoning. Koschaker's methodological stance on relative natural law also makes up the scientific perspective that led him to offer an idealised depiction of Roman law and its reception in European history clearer: a dogmatic and crystallised reconstruction of Roman law was the pre-requisite for research aimed at unearthing common principles and rules from the legal systems of the past, as well as those of contemporary law.

The narrative of European legal history offered by Koschaker in *Europa und das römische Recht* is thus strictly connected with his methodological proposal. Yet this methodological approach seems to allow Koschaker to overcome one of the main criticisms that his historical point of view on European legal history had repeatedly and justifiably received, namely that it was built on a German-centric idea of Europe.[254] The idea of relative natural law and a research into legal principles common to several European legal systems seems, indeed, not to be limited to Germany (and Italy, for historical reasons). Koschaker, on the contrary, opened the way to a wide comparative approach that also involved the Anglo-American world and took account of a genuine

[254] This criticism regarded primarily Koschaker's brief description of European legal history, as it appeared in *Die Krise des römischen Rechts und die romanistische Rechtswissenschaft*, see above, pp. §§ 2 and 3. For critical remarks on Koschaker's point of view, as it had been expressed in *Europa und das römische Recht*, see D'Ors: *Jus Europaeum?*, p. 475. In general, on Koschaker's German-centric depiction of European legal history, see Giaro: *Aktualisierung Europas*, pp. 144 ff.; Id.: *Der Troubadour*, pp. 31 ff.; Id.: *The East of the West. Harold J. Berman and Eastern Europe*, in: *Rechtsgeschichte* 21 (2013), pp. 193-197. Koschaker clearly stated that Europe was founded on Roman and German cultural elements in Koschaker: *Leopold Wenger*, p. 7.

transnational legal discourse.[255] Even though this process had not been entirely accomplished in the pages of *Europa und das römische Recht*, the basis for a transnational conception of Roman law, determined by its universal value, was already present in this work.

Further proof of Koschaker's methodological inclination for a more universalistic and less "German" concept of Roman law and its legal tradition can be found in two letters he sent to Riccobono, in 1949 and 1951.[256] The latter also stressed the universal value of Roman law, from a legal and, above all, a cultural perspective, in a letter sent to the Roman law scholar and U.S. refugee since 1936, Ernst Levy, just two years before the publication of *Europa und das römische Recht*, when the latter was appointed *magister* of the *Riccobono Seminar* in Washington D.C. for the 1944-1945 academic year.[257] Riccobono intended to emphasise the cultural universal value of Roman law as a bastion against the barbarity of recent European history that had led to the devastation of the continent. In any case, it became clear that both Riccobono and Koschaker shared a transnational approach to the role of Roman law and its principles at the time.

In the first four-page handwritten letter by Koschaker in Italian, sent to Riccobono from Ankara on 11th April 1949,[258] Koschaker replied to the previous letters received from his colleague, apologising for the delay in answering. He further complained about his recent poor health, blaming it on the freezing winter in Ankara.[259] After having commended the interest of Turkish students for Roman law and their high esteem of their professors, in general, Koschaker further wrote on the third page of the letter:

> […] Ho trovato, del resto, confermate le mie idee circa l'insegnamento del diritto romano. Va da sé che come fenomeno storico il diritto romano non può esser insegnato che storicamente, ma da punti di vista dommatica. Ciò che importa sono i concetti romani,[260] la connessione fra loro ed in quanta misura sono passati nei sistemi moderni, trasformati e nondimeno mantenuti in sostanza. Perciò prendo a base il sistema moderno e dommatico. Storia vi è dappertutto.[261]

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255 Similar remarks on Koschaker's work in Duve: *European Legal History – Concepts, Methods, Challenges*, in: Duve (ed.): *Entanglements in Legal History: Conceptual Approaches (Global Perspectives on Legal History vol. 1)*, Frankfurt am Main 2014, pp. 29-66.

256 The two letters, still unpublished, are in the legacy preserved by Riccobono's heirs and by Professor Varvaro in Palermo.

257 This letter appeared in Italian in Riccobono: *Messaggio*, in: *BIDR.* 49-50 (1947), pp. 1-5. See on it Randazzo: *Roman legal tradition and American Law. The Riccobono Seminar of Roman Law in Washington*, in: *Roman Legal Tradition* 1 (2002), pp. 123-143, and pp. 140-143, in particular. See also more recently Giltaij: *Fritz Schulz, Refugee Scholarship, and the Riccobono Seminar*, in: *Roman Legal Tradition* 12 (2016), pp. 1-19.

258 References to this letter above, pp. 167 f.

259 On the questions regarding Koschaker's health, in general, and during his final years, see above, chapter 4, § 7.

260 Underlined in the text.

261 For the translation of this excerpt from Koschaker's letter, see above, p. 167, fn. 180.

The content of this letter is focused on Roman law teaching, explaining again that the historical study of the topic should be carried out from a dogmatic perspective. From this perspective, more than the Roman rules as they were, are important the Roman concepts, the connections between them and how and to what extent they have been inherited from the modern legal systems. For his teaching purposes, Koschaker used the model (and, therefore, the modern institutions and concepts) offered by a modern dogmatic legal system. This approach is peculiar to a dogmatic stance and confirms Koschaker's beliefs. It would appear to be a comprehensible and useful choice for teaching reasons, although it could run the risk of being anachronistic, if applied to Romanist research, since it would require today's scholars to look for the institutes and rules of ancient Rome according to their modern depiction of them. Yet it would appear from the text of the letter that Koschaker intended merely to refer to Roman law teaching and not its study.

The second letter written by Koschaker was sent from Walchensee on 31st March 1951, just a few months before his death. The three-page letter is typewritten in Italian. After describing the situation in Ankara, where he had been visiting professor (*Gastprofessor*) for two years, and comparing the situation in Turkey to that of Germany,[262] Koschaker was highly critical of what he referred to as historical positivism ("positivismo storico") and, more interestingly, he made a clear assertion on the so-called eternal values of Roman law. By historical positivism, Koschaker intended the so-called *Historisierung* of Roman law, provided this kind of research had no other aim than the historical reconstruction of Roman law, where historical research was indeed an end in itself. Koschaker informed Riccobono that he had successfully demonstrated to Turkish students that the legal reasoning of the Roman jurists could be still used for the solution of modern legal questions. Nonetheless, Koschaker felt uncertain about the future of Roman law, because, as previously mentioned, the majority of Roman law scholars adhered to a historical positivism in their research. In Koschaker' eyes, on the contrary, it was essential to elaborate the eternal values of Roman law, based on its juridical concepts and their evolution.

[262] Koschaker stressed, in particular, the fact that, after a couple of months of Roman law classes, Turkish students knew the topic better than the German students: "Non s'è cambiato niente nell'attitudine degli student tedeschi dirimpetto al diritto romano sino dalla guerra. Sanno pochissimo della lingua Latina […]. D'altro canto credo che questi [the Turkish students], dopo un insegnamento di 2 – 3 mesi, conoscevano il diritto romano meglio che non i loro colleghi tedeschi."

He added that Roman law scholars needed to pursue these concepts and principles up to the present day in the major contemporary legal systems.[263] Koschaker wrote on the second page:

> Questo studio – va da sè – sarà storico e non intende di abolire gli studi storici, praticati prevalentemente finora, bensì di rimettersi accanto di loro collo scopo di formare una scienza giuridica generale, basata nelle linee fondamentali sul diritto romano, insegnata al principio degli studi giuridici e destinata a procurar agli studenti la capacità di pensare giuridicamente.[264]

It can be seen that Koschaker clearly affirmed the historical character of Roman law study, since a historical nature distinguished Roman law itself, but such study should not be exclusively historical. The need and aim of the Romanist research consisted in the creation of a common legal science. This approach was twofold: on the one hand, it served to offer students the tools for a historical approach to the study of legal systems, and, secondly, to allow them to comprehend the inner workings of legal reasoning. Roman law had always played a pedagogical role for the students, in Koschaker's eyes. Moreover, no other historical experience had been as important as that of Roman jurisprudence in the developments of the premises of legal reasoning.[265] On the other hand, Koschaker's methodological approach allowed Roman law scholars to seek for universal values and principles based on Roman law, as had been elaborated and transmitted over the centuries, which represented the foundations of modern legal systems. In this respect, Koschaker's approach seems to lose, at least in part, its "Germanocentricity" and offer the basis for a true transnational historical comparison, even if - according to Koschaker - it should necessarily be dogmatically-oriented.

This is the meaning of his last methodological proposal, the so-called relative natural law, which is tantamount to a sort of conceptual synthesis of his methodological stances. His historically-based natural law, which was not speculative, could be achieved only through the methods of comparative legal history (*vergleichende Rechtsgeschichte*) and

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263 "[…] 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."

264 This study, consequently, will be a historical study and it does not intend to abolish the historical research, mainly carried out so far, rather to place itself next to it in order to create a common legal science, founded on Roman law, taught at the beginning of the legal studies curriculum and aimed to offer the students the capability to develop their legal reasoning (Editor's note: my translation).

265 Similar considerations in Pringsheim: *Bespr. von Koschaker, Paul*, pp. 372 f. On the role of Roman jurisprudence in the creation of the *regulae iuris*, see Miglietta: *Giurisprudenza romana tardorepubblicana*, pp. 187–243.

served the aim of rebuilding European legal systems and, further still, a European legal science; this was his ultimate goal in retracing the links between Roman law and positive contemporary law, as well as determining which principles represent the cornerstones of European legal tradition.

6 Koschaker's legacy

6.1 The European message and its narrative

In his autobiography, Koschaker, reflecting upon his youth at the beginning of the 20th century, wrote that he did not see himself as an exceptional student.[1] In fact, he considered himself incapable of successfully completing any kind of Roman law topics, unlike his younger colleague and friend, Partsch. As a consequence, he had abandoned the study of the *leges Iuliae*, the subject Mitteis had suggested he should pursue for his *Habilitationsschrift*, and found another topic.[2]

Yet, despite himself, as the previous chapters of this book have shown, Koschaker's eclectic talent, both in the field of Roman law and the laws of Antiquity, as well as his scholarly contribution to these studies, were indeed exceptional. His cultural and scientific legacy will, therefore, be the subject of this chapter, paying specific attention to the contribution he made to the field of Roman law research.

One of the most important aspects of Koschaker's legacy is his narrative on European Legal history. Its importance is apparent from the two volumes published in a tribute to Koschaker in 1954.[3] This collection of essays was mainly inspired by Schwarz, a friend of Koschaker's who died in 1953, a year before their publication.[4] As Schwarz was therefore unable to write the preface to this work, this task was given to Kunkel.[5] As Kunkel wrote, both Koschaker and Schwarz had left an indelible mark on Roman law as the foundation of European legal culture.[6] These two volumes honouring Koschaker's works display the great admiration his colleagues had for him. In some cases, this respect for Koschaker bordered on veneration, acknowledging him as a genuine champion of European legal history and culture.[7]

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1 Koschaker: *Selbstdarstellung*, p. 109: "Ein Wunderkind war ich nicht."
2 See above on these events, pp.35 ff.
3 *L'Europa e il diritto romano. Studi in memoria di Paolo Koschaker*, I-II.
4 On Schwarz, see above, p. 44, fn. 71.
5 Kunkel: *Paul Koschaker*, p. V.
6 Ibid.
7 There is some criticism of the two volumes in Guarino: *L'Europa e il diritto romano*, p. 298. The author points to the limited number of contributions on Roman law, suggesting that these

As such, Koschaker's *Europa und das römische Recht* represented a new narrative on Roman law - a narrative that was deeply affected by the war and the crisis in Europe - above all in Germany. In the scholarly debate of the time, Romanists were searching for new methodological approaches to the study of Roman law, from its *Historisierung* to the introduction of the comparative method in Legal history. Koschaker suggested a way of restoring dignity to Roman law research and teaching by enhancing its European significance from a historical, legal and cultural perspective. In this respect, he pointed out the role of its reception in Europe rather than merely the value of Roman law itself. He offered, in fact, one of the most important narratives on Roman law of the 20th century.[8]

Koschaker's depiction rediscovered the European tradition – from the emergence of the *Studium* in Bologna in the 11th century up to the twilight of the Pandect-science – a legal tradition which was later abandoned with the rise of totalitarian ideologies. Koschaker's narrative underscored the imperative of re-inventing the links between the German Romanist tradition and its European character and, more generally, between the study of Roman law and its European mission. Koschaker saw the reception of Roman law as the cornerstone of his scientific discourse. Accordingly, the very study of the reception of Roman law represented bridge stepping stone between the "historical" Roman law of the Romans and Roman law perceived as the foundation of the modern European legal system. This European perspective gave historical weight to Koschaker's dogmatic approach.

Of course, Koschaker's conception of Roman law had its limitations, as Wieacker pointed out. The kind of study required to understand the "true" Roman law of the Romans was trifling, compared to the role of the reception of Roman law inherited from the Compilation of Justinian, according to Koschaker's description.[9] Nevertheless, Koschaker's European narrative sent out a resonant message, becoming a sort of manifesto for legal historians and Roman law scholars that transcended the scientific merits and shortcomings of Koschaker's idea of Roman law and European legal history.[10] Moreover, the message contained in *Europa und das römische Recht* was a call to Romanists not to neglect the

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two volumes would be less interesting to Romanists than the previous three volumes in Koschaker's honour, which were published in 1939.

8 For an overview on the diverse Roman law narratives at between the end of the 19th century and the 20th century and also on nowadays Roman law debate, see now Baldus: *Römisches Recht und heutige traditionale Gesellschaften*, in: *SDHI* LXXXIII (2017), pp. 637-643.

9 Wieacker: *Über «Aktualisierung» der Ausbildung im Römischen Recht*, in: *L'Europa e il diritto romano. Studi in memoria di Paolo Koschaker*, I, pp. 515-541 and pp. 519 f., where Wieacker also quoted other authors who clearly distinguished between the "historical reality" of Roman law and the "ungreifende geistige Welt seiner Tradition". See Biondo Biondi: *Prospettive romanistiche* (Pubblicazioni della Università Cattolica del Sacro Cuore, serie 2, 37), Milano 1933; Riccardo Orestano: *Diritto romano, tradizione romanistica e studio storico del diritto*, in: *Rivista Italiana per le Scienze Giuridiche* 87 (1950), pp. 156-264, now also in: Antonio Mantello (ed.): Orestano: *Scritti, Volume II*, Napoli 1998, pp. 879-989.

10 Similar considerations in Kunkel: *Paul Koschaker*, p. XI.

European role of Roman law and avoid its isolation from European legal history studies and the idea of European legal science in general.

In his preface to the second edition of *Europa und das römische Recht*, Kaser pointed out that Koschaker's work enumerated tasks and suggestions (*Aufgaben und Anregungen*) to legal historians around the world, regardless of their individual scientific approaches to the study of Roman law and legal history.[11] In *Europa und das römische Recht*, Koschaker's stance was firstly a *Warnungsruf*, a warning cry,[12] and at the same time a programme with which to recover the idea of a *ius commune europaeum*; it was necessary, therefore, to lay down the foundations of a new European legal culture and system. This message was shared not only by legal historians at the time, but also scholars from other fields, such as Carl Schmitt, who defined the role of a renewed European legal science in the sixth paragraph of his short essay *Die Lage der europäischen Rechtswissenschaft*, as the "letztes Asyl des Rechtsbewusstseins".[13]

In fact, one of Koschaker's aims was to prevent legal history from becoming detached from legal science – and also modern legal science – and reduced to a merely historical subject.

Koschaker's reaction was typical of jurists of his time,[14] - not only that of Romanists – against the recent years of totalitarian brutality, founded on the preservation of the European ideal and resistance against the usurpation of legal positivism. In the aftermath of the tragedy of the Second World War, Koschaker steered Europe towards a new future through the rediscovery of its legal and cultural roots and redefinition of its identity. Roman (private) law and its reception constituted the building stones for this enterprise.[15] It is no coincidence that the heading of the final part of the last chapter of *Europa und das römische*

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11 Kaser: *Geleitwort*, pp. VII f. See also Zimmermann: *Europa und das römische Recht*, in: *Archiv für die civilistische Praxis* 2 (2002), pp. 243-316 and *praecipue*, pp. 245 ff.

12 Koschaker: *Europa*[4], p. 352 f.: "Sollte aber trotzdem der Zeitpunkt gekommen sein, da das römische Recht seine geschichtliche Aufgabe erfüllt hat und reif geworden ist für die Vitrine des Museums, so ist man ihm eine Besinnung schuldig über das, was es in einer Geschichte von 850 Jahren für das Recht Europas geleistet hat und was mit ihm den Juristen aller Kulturvölker auch heute noch verloren geht, wenn es verschwinden sollte. So möchte ich mit dem Wunsche schließen, daß der Rechenschaftsbericht, den ich zu geben versuchte, mehr ein Warnungsruf als ein Nekrolog sein möge."

13 Schmitt: *Die Lage*, p. 29.

14 Of course, this European discourse had a resonance that went well beyond the circle of the jurists at the time. As Genzmer pointed out, it was no coincidence that within a few months both *Europa und das römische Recht* and a work by Curtius on European literature appeared. See Genzmer: *Bespr. von Paul Koschaker*, p. 596 and Ernst Robert Curtius: *Europäische Literatur und lateinisches Mittelalter*, Bern 1948. Curtius's work was reviewed by Helmut Coing: *Besprechung von Ernst Robert Curtius: Europäische Literatur und lateinisches Mittelalter, Bern Francke, 1948*, in: *ZSS* (RA) 69 (1952), pp. 530-533. On Curtius (1886-1956), see Heinrich Lausberg: *Curtius, Ernst Robert*, in: *NDB* 3, Berlin 1957, pp. 447-448.

15 See Kunkel: *Paul Koschaker*, pp. X f. and Duve: *European Legal History*, pp. 38 f.

Recht reads "*Die Zukunft Europas*" (the future of Europe).[16] Koschaker's work and ideas were part of a broader political European feeling that emerged after 1946.[17] His stances were a source of inspiration for new research on the *ius commune europaeum*, and in Germany and Italy his ideas were particularly appreciated in the post-war period.

A highly important interpreter of this mindset in Italy was Francesco Calasso, who wrote his well-known *Introduzione al diritto comune* in 1951.[18] Calasso made a significant contribution to the dissemination of Koschaker's works and ideas in Italy, also writing the introduction to the Italian translation of *Europa und das römische Recht.* However, he did criticise Koschaker's crystallised idea of legal development in Europe during the Middle Ages and attempted to oppose what he considered to be a misinterpretation - due to an excessively dogmatic approach - to the study of law of that epoch. Nevertheless Calasso, like Koschaker, underlined the role and value of the tradition of *ius commune* as the foundation of European legal culture. In this respect, it is significant that a posthumous collection of essays written by Calasso in the previous decades was published in 1985 under the title *L'unità giuridica dell'Europa*.[19] One of the eight essays comprising this work is the well-known introduction to the Italian translation of *Europa und das römische Recht*.[20] Despite some divergent scientific stances, it is clear that both Koschaker and Calasso were animated by a deep European spirit, feelings and beliefs as the basis for a scientific programme in order to send a cultural message that would inspire a European legal unity, whilst remaining coherent with the political projects for the establishment of a European Union.

Another legal historian whose stances were influenced by Koschaker's was Helmut Coing,[21] and whose ideas found concrete application in the creation of the *Max-Planck-Institut für europäische Rechtsgeschichte* in Frankfurt am Main in 1964.[22] Coing was the

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16 Koschaker: *Europa*, pp. 349 ff.

17 See Zimmermann: *Europa*, p. 245. The author also refers to Winston Churchill's speech at the University of Zürich in 1946, during which the former prime minister of Great Britain supported the idea of the creation of a United States of Europe. See also Winston S. Churchill: *Züricher Rede vom 19. September 1946*, in: Rolf Hellmut Foerster (ed.): *Die Idee Europa 1300-1946*, München 1963, pp. 253-257; Thomas Oppermann/Claus Dieter Classen/Martin Nettesheim: *Europarecht. Ein Studienbuch*[7], München 2016, p. 6.

18 Calasso: *Introduzione al diritto comune*, Milano 1951. On Francesco Calasso (1904-1965), see Piero Fiorelli: *Ricordo di Francesco Calasso*, in: *Rivista di Storia del diritto italiano* 40-41 (1967-1968), pp. 5-12; Ugo Petronio: *Francesco Calasso*, in: *Il contributo italiano alla storia del pensiero – VIII. Appendice. Diritto*, Roma 2012, pp. 749-753; Diego Quaglioni: *Storia del diritto e identità disciplinari: dalla caduta del Fascismo ai primi Anni Settanta*, in: Birocchi/Brutti (eds.): *Storial del diritto*, pp. 136-148.

19 Calasso: *L'unità giuridica dell'Europa*.

20 Calasso: *L'Europa e il diritto romano. Alla memoria di Paul Koschaker*, in: Calasso: *L'unità*, pp. 101-122.

21 Winkler: *Der Kampf*, pp. 238-247.

22 See Coing (ed. by Feldkamp): *Für Wissenschaften und Künste*, pp. 194-209. Emanuele Conte: *Storia per giuristi. Le discipline storiche nella formazione e nella cultura dei giuristi fuori d'Italia*, in: Birocchi/Brutti (eds.): *Storia del diritto*, pp. 226-241 and, in particular, pp. 227 f.

director of the Institute until 1980 and his scientific programme, under the influence of Curtius's work on European literature and the Latin Middle Ages, foresaw the study of European private law history, as the title of his first programmatic essay suggests.[23] Unlike Koschaker, Coing's perspective had been influenced by the natural law tradition, and his research proposal mainly focused on the role of the *ius commune*, rather than the role of Roman law and its reception, or further still, the role of a common European jurisprudence.[24] One of the aims of Coing's monumental programme was to collect all the sources of the *ius commune*, and this led to the publication of the *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte*.[25] To Coing, the collection of sources should be studied from a historical and comparative perspective in order to create a new *ius commune europaeum*, and both Coing and Koschaker believed in the legal continuity of European history, seeing Europe as an almost uniform cultural and legal phenomenon, mainly based on its *Rechtstradition*.[26] Both too believed in the dogmatic unity of European legal history, yet repeatedly with reference only to private law, and their aim was to rebuild a common private law system for the new Europe of the post-war era.[27]

Calasso and Coing represent just two examples of scholars who were influenced by Koschaker or, at any rate, couched European legal history in a similar frame, even if their scientific stance at times diverged from Koschaker's. Further examples of Koschaker's influence on Romanists and legal historians will be considered in the following paragraph.
It is now worth making a few further considerations on Koschaker's European message. Guarino wrote that Koschaker's greatest accolade was his emphasis on the essential role

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23 Coing: *Die europäische Privatrechtsgeschichte der neueren Zeit als einheitliches Forschungsgebiet*, in: *Ius Commune. Zeitschrift für Europäische Rechtsgeschichte* 1 (1967), pp. 1-33. On this work, see Duve: *European Legal History*, pp. 46 f.

24 Heinz Mohnhaupt: *Zur „Neugründung" des Naturrechts nach 1945: Helmut Coings „Die obersten Grundsätze des Rechts" (1947)*, in: Schröder/Simon: *Rechtsgeschichtswissenschaft*, pp. 97-128; Winkler: *Der Kampf*, pp. 243 ff.; Conte: *Storia per giuristi*, pp. 226-241 and, in particular, pp. 227 f.

25 Helmut Coing: *Handbuch der Quellen und der Literatur der neueren europäischen Privatrechtsgeschichte*, I-III (7 Teilbände), München 1973-1988.

26 On Coing's depiction of continuity in European legal history, see Coing: *Die europäische Privatrechtsgeschichte*, pp. 1-33 and Coing: *Europäisierung der Rechtswissenschaft*, in: *NJW* 15 (1990), pp. 937-941.

27 For an attempt to depict a doctrinal history of European private law, see Coing: *Europäisches Privatrecht* I, *Älteres Gemeines Recht (1500-1800)*; II, *19. Jahrhundert*, München 1985-1989. On this work see the review by Theo Mayer-Maly: in: *ZSS* (RA) 108 (1991), pp. 548-554. Winkler has recently underlined that Koschaker's and Coing's conviction about the dogmatic unity of European legal history represented one of the main differences between their perspective and Wieacker's; in Wieacker's eyes, the main feature of European legal history was its methods and not its legal doctrine. See Winkler: *Der Kampf*, p. 246.

played by Roman law as a contributing factor in European spiritual unity.[28] This aspect of Koschaker's work has been underlined many times throughout this book. From the second half of the thirties onwards, Koschaker continuously reiterated that Roman law was a key aspect of European legal culture. Guarino pointed out, however, that such an appreciation of Roman law was not sufficient reason to warrant its historical study, even though Guarino himself considered the historical study of Roman law from the foundation of Rome up to Justinian to be necessary.[29]

Guarino's opinion leads to a further consideration. Koschaker's European narrative is so focused on the role of Roman law reception in European history that it is not really possible to understand what he precisely meant by Roman law. Overall, his reconstruction is highly idealised and this has two main consequences: on the one hand, European legal history is described according to the ideal of continuity. On the other hand, Roman law runs the risk of becoming a vacuous concept devoid of content. Koschaker's stances were of course influenced by the circumstances at the time, which perhaps enhanced his tendency for idealisation. To Koschaker, the inner values, principles and legacy of Roman law meant that Roman jurisprudence founded a legal science based on a legal reasoning that had its own hermeneutic criteria. Roman law became to him a sort of undefined ideal which could be used as the cornerstone for the European *ius commune*. Moreover, Roman law, or better the ideal represented by Roman law, operated in Europe as a civilising and galvanising force, an idealised notion that could be repeatedly used and re-used in different contexts and situations. This was how Koschaker's scientific proposal purported to deal with Roman law, yet it might appear to be completely detached from its sources and thus any attempt to understand what Roman law actually was and represented in its own historical context. In this sense, the goal of the historical study of Roman law pursued by Koschaker might well appear to be an empty formula.

Koschaker also stressed the role of European jurisprudence from a dogmatic perspective, though he did not seem to consider the importance of the methods adopted by the jurists in different epochs of European history.[30] In fact, from Koschaker's perspective, it was no coincidence that the rebirth of Roman law during the Middle Ages was connected both to the role of the Glossators and, more importantly, to the fact that it had been the law of the

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28 Guarino: *L'Europa e il diritto romano*, p. 296: "È altissimo merito del Koschaker l'aver ribadito la grande importanza avuta dal diritto romano come coefficiente dell'unità spirituale europea […]."

29 Ibid.: "[…] ma non è per questo, non è affatto per questo che si giustifica la tesi, che pur condivido, della opportunità di studiare storicamente il diritto romano, cioè di ricostruirlo nella sua evoluzione millenaria da Romolo a Giustiniano. Questa tesi ha, invece, un fondamento del tutto autonomo: il diritto romano merita di essere studiato storicamente per l'intrinseco interesse che esso offre, e può essere utile in questa guisa non solamente all'unità spirituale europea, ma a quella mondiale." Guarino thus underlined the intrinsic value of Roman law in itself and expressed, in this passage, considerations very similar to Pringsheim's and Wieacker's, see above: pp. 236 ff.

30 Wieacker: *Über «Aktualisierung»*, pp. 514 ff.

Empire. Thus, some of Koschaker's stances risked depriving Roman law of its intrinsic value.

Of course, Koschaker's ideas on Roman law and European legal history were based on a programmatic perspective, and Koschaker's depiction has been influenced by this perspective in the end. However, my study of Koschaker's works demonstrates on the contrary that he was clearly aware of the necessity of studying Roman law also from a historical perspective, despite his strong criticism of its *Historisierung*. What is sometimes difficult to realise, based on Koschaker's approach, is the harmonious flow between his dogmatic aims and a historical approach to Roman law.

Koschaker's strong idealisation of the Roman law tradition and, consequently, European legal history, led to scholarly criticism that, as times seemed rather harsh. Although a less idealised perspective on European legal history would have been preferable, nonetheless the approach of those scholars who attempt to denigrate this legal tradition is not acceptable.[31] Koschaker's greatest acclaim was his recovery, or perhaps rediscovery, of this legal tradition, inspiring Romanists and legal historians alike to consider it again. Beyond the scientific limits of Koschaker's stance, he created a European narrative that is still today the subject of scholarly attention, stimulating widespread scientific debate and the desire to delve deeper into the European legal tradition.[32] Moreover, the very limitations of his stance could provide the spark for new research on this subject matter, with the aim of superseding Koschaker's efforts. When all is said and done, Koschaker's message is still alive today.

6.2 European narrative and methodology

Dealing with Paul Koschaker also means analysing the Roman law scholarship of his epoch. As has been shown in the previous chapters, he was a protagonist both during the time when the Romanists tried to react to the so-called splendid isolation of Roman law and during the period of its crisis. Koschaker elaborated his scientific approach to the study of Roman law over about four decades, while scholars like Mitteis, Rabel, Wenger, Schulz, Partsch and then Wieacker, Kaser and Kunkel, to name but a few, were attempting to find new methods to study Roman law and legal history. In this cultural climate, which was in part stimulated by the decadence of Pandect-science and the emergence of the *Historisierung* of Roman law, Koschaker insisted on a dogmatic approach to the study of

31 On this point see also below, chapter 7.

32 Though the author does not refer uniquely to Koschaker's stances, for the necessity to further study the European legal tradition, see Zimmermann: *Roman and Comparative Law: The European Perspective (some remarks apropos a recent controversy)*, in: *The Journal of Legal History* 16, 1 (1995), pp. 21-33 and 26 ff., in particular.

legal history. In this light, the idea suggested by some scholars that Koschaker had two souls as a scholar, the soul of a Romanist and that of an expert in the laws of antiquity, should be revised.[33]

Koschaker's research has always been distinguished on account of his systematic and dogmatic approach. At the beginning of his career, his studies on cuneiform law focused on private law. He outlined legal institutions and then compared them with those of Roman law and other European legal experiences or systems of the past, above all German laws. He sought to discover whether rules and principles elaborated through certain ancient laws had influenced Roman law and European laws, the ultimate aim of which was to gain a better understanding of the European private law system and its rules and legal concepts. Koschaker's focus changed in part at the beginning of the thirties, as he clearly began to assert that the influences of laws of antiquity on Roman law and German laws were not so significant after all.[34] His distinctive methodological approach was well described by Kunkel, who affirmed that Koschaker was the only legal scholar of his time to study papyrus and the laws of antiquity from a dogmatic perspective, thereby trying to reconstruct a *Dogmengeschichte* (history of legal dogmata) about the laws of antiquity. Koschaker was the first scholar to offer a dogmatic and systematic reconstruction of cuneiform law; in addition, he combined his systematic approach with an unrivalled philological talent, which allowed him to develop a deep understanding of the sources.[35] Yet, ultimately, Koschaker's scientific approach, or at least his main scientific aims, remained almost the same over the years, both towards the study of Roman law and the study of laws of antiquity.

The comparative approach Koschaker adopted, influenced by Rabel's method, in this respect, allowed him to combine the different fields of studies he dealt with.[36] Yet his approach, as it developed above all from the thirties onwards, ran the risk of being in part ahistorical and too dogmatic, as the criticism of some scholars suggested in relation to *Die Krise des römischen Rechts*.

The way to overcome this potential conceptual and methodological opposition appeared in another programmatic passage contained in *Europa und das römische Recht*, namely, through Koschaker's reference to relative natural law.[37]

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33 See above, pp. 50 ff. A similar question has been raised by Winkel with regard to the possibility to identify two souls in Wieacker, namely the soul of the Roman law scholar and the soul of the Legal Historian, see: Laurens Winkel: *Franz Wieacker. Romanist und Rechtshistoriker – zwei Seelen in einer Brust?*, in: Behrends/Schumann (eds.): *Franz Wieacker. Historiker des modernen Privatrechts*, pp. 213-221.

34 Koschaker: *Was vermag*, pp. 145-153; see also above, pp. 55 ff.

35 Kunkel: *Paul Koschaker*, p. VII. See also Pfeifer: *Keilschriftrechte und historische Rechtsvergleichung*, pp. 14 ff.

36 Kunkel: *Paul Koschaker*, p. VII.

37 Koschaker: *Europa*, pp. 346 ff.

Koschaker's proposal was particularly interesting, for a number of reasons. At the time of the publication of *Europa und das römische Recht*, there was, on the one hand, a significant revival of natural law thinking in Europe, considered as a bulwark and reaction against the tragedy of totalitarianism and violence of the State.[38] As has already been mentioned, Coing, among many others, played a major role in reproposing natural law principles in his legal narrative.[39] Catholic universalism, with its references to natural law and the links between the latter and Roman law, was another important contributing factor, as it is possible to argue from D'Ors' essay appeared in the first volume of *Studi in memoria di Paolo Koschaker*.[40]

Koschaker's European narrative was based both on Roman law and Christianity: in this sense, ancient Rome and the later Holy Roman Empire were conflated in his concept of Europe, which had been influenced by a Catholic universalistic idea. As such, his narrative aimed to retrace common European legal principles and values, and could therefore be interpreted as a sort of third way over and beyond the two above-mentioned trends of thinking, namely the natural law doctrine and Catholic universalism.

In Koschaker's opinion, legal principles and rules of the new European order ought to be derived from the legal and historical comparison between different private law systems – whose foundations were mainly based on the reception of Roman law - and eventually elaborated by a new European legal science detached from any political power, similar to Roman jurists in the classical era. Political power and the legislature should remain separate, since the latter should be again the result of the work of the jurists, a *Juristenrecht*.

This methodological slant proposed a combination of historical and comparative perspectives based on the systematic-dogmatic approach.[41] Even if the concept, which was used by Koschaker for the first time in 1947 might have appeared to be a completely new method, on the contrary, it was the result of the development of his scientific thoughts that had been honed and refined into the idea of a relative natural law; in other words, an apparently natural law-inspired approach, based in reality on the comparative legal history method.

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38 See Stolleis: *Reluctance to glance in the Mirror: The Changing Face of German Jurisprudence after 1933 and post-1945*, in: Christian Joerges/Navraj Singh Ghaleigh (eds.): *Darker Legacies of Law in Europe. The Shadow of National Socialism and Fascism over Europe and its Legal Tradition*, Oxford and Portland 2003, pp. 1-18 and p. 2, in particular.

39 This matter is way too vast to be dealt with in this work, the aim of this passage being only an attempt to contextualise Koschaker's proposal on relative natural law. Among Coing's publications, see in particular: Coing: *Die obersten Grundsätze des Rechts. Ein Versuch zur Neubegründung des Naturrechts*, Heidelberg 1947; Coing: *Grundzüge der Rechtsphilosophie*[1], Berlin 1950 (fifth edition: 1993[5]); Coing: *Naturrecht als Wissenschaftliches Problem*[1], Wiesbaden 1965. For a study on the connection of natural law and the emergence of human rights after WWII, see Samuel Moyn: *The last utopia. Human rights in history*, Cambridge MA 2010.

40 D'Ors: *Jus Europaeum?*, pp. 449 ff.

41 See above on the relative natural law, chapter 5, § 11.

In this respect, Koschaker was one of the pioneers and masters of comparative legal history. His approach and proposal were considered a programme by Romanists and legal historians that could be used to rebuild a systematic private law in a European perspective - based on the common shared principles of European legal tradition; the main tool used in the investigation and identification of these principles was the historical-comparative method. Koschaker's methodology inspired Roman law scholars like Kaser, who was one of the three greatest German Romanists of the post-war period, along with Wieacker and Kunkel, and maintained the dogmatic trend of Roman law research in Germany.[42] Koschaker also influenced his pupil Julius Georg Lautner, who again proposed Koschaker's formula with regard both to Roman law research and teaching in very similar terms to those used by Koschaker, in a famous work which appeared in 1976, four years after Lautner's death.[43]

Kaser, in particular, stressed the need for historically-based legal comparison to carry out studies on Civil law;[44] Kaser, like Koschaker, considered this approach of great value in recreating the link between legal history and modern current (private) laws and to avoid the isolation of dogmatic research from Legal history research. Moreover, just like Koschaker, Kaser wanted Roman law and Legal history to be part of modern legal science,[45] and their pedagogical role to be reinstated in the education of jurists, as had been the case until the beginning of the 20th century.[46]

Koschaker's methodology and European narrative have been a source of inspiration for more recent generations of legal historians and comparative law scholars in Germany and beyond, who have used his method and his proposals for a new systematic depiction of European private law to revive research aimed at discovering the common historical foundations of this European law. Koschaker's aim was also to build both a common

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42 Kaser: *Wege und Ziele der deutschen Zivilrechtswissenschaft*, in: *L'Europa e il diritto romano. Studi in memoria di Paolo Koschaker*, I, pp. 543-579.

43 Julius Georg Lautner: *Zur Bedeutung des römischen Rechts für die europäische Rechtskultur und zu seiner Stellung im Rechtsunterricht* (edited by Claudio Soliva/Bruno Huwiler), Zürich 1976. The work, written by Lautner, appeared posthumously. See the review by Wesener: *Bezpr. zu Julius Georg Lautner: Zur Bedeutung des römischen Rechts für die europäische Rechtskultur und zu seiner Stellung im Rechtsunterricht. Mit einem Nachwort von Max Kaser*, in: *Gnomon* 51, 8 (1979), pp. 801-803. On Lautner (1896-1972), see Kaser: *Julius Georg Lautner* †, in: *ZSS* (RA) 89 (1972), pp. 518-520; Wesener: *Römisches Recht*, pp. 102-104; Zimmermann: *Heutiges Recht*, p. 23.

44 Kaser: *Wege und Ziele*, p. 578. On Kaser's stance, see also Zimmermann: *Max Kaser*, pp. 99-114.

45 In this respect, codifications and, above all, the enactment of the BGB in Germany, "marked the end of the exalted status of the Roman law professor as the leader of the legal world". The quotation is taken from Zimmermann: *Roman and Comparative Law*, p. 22. See also James Q. Whitman: *The Legacy of Roman Law in the German Romantic Era. Historical Vision and Legal Change*, Princeton 1990.

46 Kaser: *Nachwort zu* Lautner: *Zur Bedeutung*, p. 209. Moreover, both Koschaker and Kaser correctly pinpointed that Romanists and legal historians are jurists and should remain jurists and that they cannot be mere historians.

frame of rules and principles as the basis for a new *ius commune europaeum* and a new European legal science.[47] Although it would not be reasonable to assume that every work dealing with the subject of European legal history has been influenced by Koschaker's stances, it would at the same time be difficult to completely overlook them. For any scholar who wishes to discuss such themes, Koschaker has been one of the first legal historians to depict them in depth. References to or from the impact of Koschaker's stances, as expressed in *Europa und das römisch Recht* in particular, still emerge more or less openly in the more recent studies focusing on the construction of a new European common law. Even if Koschaker had no direct influence on any of these studies, it is reasonable to argue that many of them have been inspired by Koschaker's ideas, which have been then interpreted in various ways.[48]

In fact, Koschaker's works and ideas were also the point of reference for scholars seeking to advance an alternative depiction of European legal history. Alternatively, they were a source of contention for those intent on revising his main assumptions either on historical and legal continuity, or on his imperative of adopting a dogmatic approach to the study of Roman law and Legal history.[49] Overall, Koschaker's message and narrative exerted a strong influence at the time they were first presented. Hence, it was necessary for any scholar dealing with the topics of Roman law reception, European legal history and the Roman law tradition to take them on board at some point in their hypotheses.

Yet Koschaker's influence was not only circumscribed to Roman law research. His scientific legacy included Roman law teaching methods as well. One of his most important battles to recover dignity to Roman law teaching was based on the idea of stressing the links between Roman law and modern current laws, as expressed by the

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47 In England, the fundamental importance of the Roman law tradition for European legal science has been underlined above all by Peter Stein: *The Character and Influence of the Roman Civil Law. Historical Essays*, London/Ronceverte/Hambledon 1988; Stein: *Roman Law in European History*, Cambridge 1999, pp. 1 f.

48 To name but a few, see, e.g.: Bruno Schmidlin: *Gibt es ein gemeineuropäisches System des Privatrechts?*, in: Schmidlin (ed.): *Vers un droit privé européen commun? Skizzen zum gemeineuropäischen Privatrecht*, Basel 1994; Rolf Knütel: *Rechtseinheit in Europa und römisches Recht*, in: *ZEuP* 2 (1994), pp. 244-276; Padoa-Schioppa: *Il diritto comune in Europa: riflessioni sul declino e sulla rinascita di un modello*, in: *ZEuP* 5 (1997), pp. 706-717; Zimmermann: *Heutiges Recht*, pp. 37 ff. in particular, with further bibliography; Zimmermann: *Roman Law, Contemporary Law, European Law: The Civilian Tradition Today*, Oxford 2001; Zimmermann: *Europa und das römische Recht*, pp. 243 ff.; Pascal Pichonnaz: *Les fondements romains du droit privé*, Genève/Zurich/Bâle/Paris 2008; Willem J. Zwalve/Boudewijn Sirks: *Grundzüge der Europäischen Privatrechtsgeschichte. Einführung und Sachenrecht*, Wien 2012. For a historical depiction, yet with a focus on present days too, see also Raoul Charles Van Caeneghem: *European Law in the Past and the Future. Unity and Diversity over Two Millennia*, Oxford 2002.

49 Criticism on a trend defined as a new pandectism (*Neo-Pandektismus*) arose in the nineties in the 20th century, see, e.g.: Pio Caroni: *Der Schiffbruch der Geschichtlichkeit: Anmerkungen zum Neo-Pandektismus*, in: *Zeitschrift für Neuere Rechtsgeschichte* 14 (1994), pp. 85-100; Bretone: *La 'Coscienza ironica' della romanistica*, in: Bretone: *Diritto e tempo*, pp. 235-257.

concept of *Aktualisierung*. This stance, when it referred only to teaching, found a broad consensus among Romanists of the thirties and forties in the 20th century, but it also influenced the approach to Roman law teaching in Germany for the coming decades.[50]

Koschaker's influence was highly relevant not only in Germany, Austria, Italy or the Netherlands, as is apparent from an initial analysis of his scientific legacy: the role he played in Turkey has already been mentioned,[51] and, in this sense, two further examples of his legacy outside these four countries is offered by Viktor Korošec and Marijan Horvat.[52]

Korošec was a pupil of Koschaker's and, later, a prominent Slovenian Roman law scholar and legal historian.[53] In the first edition of the first volume of his Roman law textbook, which appeared in 1936, Korošec applied the same method that Koschaker would have named *Aktualisierung* to the teaching of Roman law two years later in his *Die Krise des römischen Rechts*. In fact, Korošec repeatedly and systematically introduced references to the BGB, the ABGB and the Code Civil in his textbook on Roman law.[54] The volume, dedicated to Koschaker, is therefore a clear example of his influence on his pupil; moreover, it likely proves that Koschaker had adopted his methodological approach to Roman law teaching well before the publication of *Die Krise des römischen Rechts*. His proposal to retrieve Roman law teaching thus derived from his own personal experience, as he himself explained in numerous letters, and it was coherently taught to his students and pupils.[55]

Marijan Horvat, on the other hand, was an important Croatian Roman law scholar and legal historian, but not a pupil of Koschaker.[56] Nevertheless, he firmly believed that Koschaker, considered to be a follower of Riccobono's scientific method, was right in offering a systematic-dogmatic depiction of Roman law as an introduction to modern private law and in criticising its *Historisierung*. In a 1951 article, in particular, Horvat appeared to be a strong supporter of the *Aktualisierung* of Roman law teaching, as expounded by Koschaker, and like Koschaker he too opposed the merely historical

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50 See again Lautner: *Zur Bedeutung*. See also, for a point of view not limited to the situation in German universities, Zwalve: *De toekomst van het Romeinse recht*, in: *Ars Aequi* 42 (1993), pp. 455-459; Zwalve: *Teaching Roman law in the Netherlands*, in: *ZEuP* 5 (1997), pp. 393-404. See *contra* Ankum: *Stenen voor brood*, in: *Ars Aequi* 42 (1993), pp. 459-463; on the debate between Zwalve and Ankum, see Zimmermann: *Roman and Comparative Law*, pp. 21-33.

51 On Koschaker in Turkey, see above, chapter 4, § 7.

52 I would like to warmly thank Professor Marko Petrak of the Faculty of Law at the University of Zagreb for his suggestions concerning Koschaker's influence on Korošec and Horvat.

53 On Viktor Korošec (1899-1985), see above, p. 49, fn. 96.

54 Viktor Korošec/Gregor Krek: *Zgodovina in Sistem Rimskega Zasebnega Prava*[1], Celje 1936. The systematic references to modern private laws and codes are not present in the third edition of the volume, published after the end of WWII, in 1948.

55 See above, chapter 3, § 7, and chapter 4, § 4.

56 On Marijan Horvat (1903-1967), see Mile Boras: *Život i rad profesora dr Marijana Horvata. La vie et l'oeuvre du professeur Marijan Horvat*, in: *Zbornik Pravnog fakulteta u Zagrebu* 18 (1968), pp. 255-265.

approach to its study.[57] This essay was written when the communist regime was already well established in the former Yugoslavia, and is distinguished for the arguments used by Horvat. In fact, the author appeared not to follow Koschaker's stances in his attempt to legitimise the study and teaching of Roman law in his country; he argued that Roman law was the best legal system based on private property and could be used, therefore, to understand and study foreign capitalist private law systems. The outcome of Horvat's arguments was, however, quite similar to Koschaker's: basically, it was necessary to study Roman law to comprehend contemporary laws and legal systems (applied to capitalist systems in the case of Horvat).

Horvat's assistant Martin Vedriš wrote an obituary in memory of Koschaker in 1951, underlining Koschaker's utmost importance in the fields of Roman law, papyrology and cuneiform law, and seeing Koschaker as too independent a spirit to accept any sort of compromise with the Nazi regime.[58] The most impressive thing is that no other comparable obituary had been written about a German or Austrian scholar in Yugoslavia for decades, making the tribute to Koschaker's all the more exceptional.

These circumstances show that Koschaker's prestige was very high at the end of his career and after his death, and for decades he has been considered an authority and example to be followed both in the fields of Roman law and ancient laws and from a human perspective, and not only in Germany and Austria.

Moreover, Koschaker's influence cannot be reduced to the field of Roman law and his role in cuneiform law studies forgotten. Koschaker was able to introduce the methods used by jurists and legal historians to a branch that had previously been the domain of pure historians and philologists until the first decades of the 20th century. He succeeded in bridging the different disciplines, ancient history, legal history and philology, using his remarkable philological talent to analyse the sources. In the field of cuneiform law, an area of research which he himself forged, Koschaker adopted the dogmatic approach both to the study of cuneiform law and its ancient laws institutes, offering a noteworthy contribution to improving the quality of this kind of research from a juridical point of view as well as providing the first systematic depiction of the field. The numerous pupils who studied these subjects with him and the high respect they showed for him were also clear indicators of the importance of his role in the study of the laws of antiquity.[59]

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57 See Marijan Horvat: *Rimsko parvo u današnjem svijetu*, in: *Alma Mater Croatica* 5-6 (1942), pp. 180-188, also reprinted in: *Zbornik Pravnog fakulteta u Zagrebu* 52, 5 (2002), pp. 1073-1085; Horvat: *Rimsko pravo u našem pravnom studiju*, in: *Zbornik Pravnog fakulteta u Zagrebu* 2 (1951), pp. 97-118.

58 Martin Vedriš: *Paul Koschaker* †, in: *Sveučilisni list* 36-37 (1951), p. 6. Martin Vedriš (1919-1995) has been assistant at the Chair for Roman law at the University of Zagreb from 1947 to 1954, then professor from 1954 to 1990 and dean of the Law Faculty in the years 1975-1977.

59 See above, p. 112, fn. 143, for the collection of contributions written in Koschaker's honour by his pupils and colleagues in the field of laws of antiquity.

Koschaker's scientific legacy therefore appears to be important in many respects. First, his methodological stances had both a direct and an indirect influence on different fields of research – Roman law, comparative legal history and the laws of antiquity – with the result that, at time, he was able to propose new methods which have mapped out the future research developed by scholars in decades to come. His pupils represent further proof of his eminent role as a professor and his teaching ability and passion. Lastly, Koschaker symbolised an important trend in German Romanist and Roman law studies in the first half of the 20th century. Despite the criticism that has befallen his methodological approach at times, Koschaker has always been revered in the Romanist debate and, today, his works still contribute significantly to the modern methodological debate on legal history, Roman law and their role in modern research and teaching.

6.3 An unpublished textbook on Roman law

One of Koschaker's last works appeared in 1951, a review of a well-known textbook on Roman law by Paul Jörs, revised by Wolfgang Kunkel.[60] The content of the review is particularly interesting. Koschaker praised Kunkel's textbook, defined as an *opus novum* and not simply a new edition of Jörs's work. Koschaker considered Kunkel's *Römisches Privatrecht* to be the best textbook written by a German Romanist; it was a learned work analysing many sources in depth and numerous references to scholarly debates were presented in the footnotes. Koschaker added, however, that it would have been beneficial to publish an easier and more affordable textbook for German law students, since most students were not well off.[61] With this in mind, Koschaker wrote, he had decided to publish the text of the lectures he held in Ankara translated only into Turkish. He would not, however, publish them in a major European language, because publishing such a

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60 Koschaker: *Buchbespr. zu Römisches Privatrecht. Von P. JÖRS u. W. KUNKEL. Mit Abriß des römischen Zivilprozeßrechts von L. WENGER. 3. Aufl. (Enzyklopädie der Rechts- u. Staatswissenschaft II./III. Bd.). Springer Verlag, Berlin-Göttingen-Heidelberg 1949. XIV, 434 S.*, in: *NJW* 14 (1951), p. 554. After his death appeared two posthumous publications by Koschaker, namely: Koschaker: *Contributo alla storia ed alla dottrina della convalida nel diritto romano*, in: *IVRA* 4 (1953), pp. 1-89; Koschaker: *Bespr. zu Pierre Noailles †, I: 'Manum injicere', aus der Revue historique de droit française et étranger 1942, S. 1-34; II: 'Les procès de Virginie', aus der Revue des études latines 1942, S. 106-138*, in: *ZSS* (RA) 70 (1953), pp. 430-436. On Jörs (1856-1925), see Kunkel: *Jörs, Paul*, in: *NDB* 10, Berlin 1974, pp. 464 f.

61 Koschaker: *Buchbespr. zu Römisches Privatrecht*, p. 554: "Nachdem er [Kunkel] auch die Kunst seiner Darstellung in dem hier angezeigten Werk in hervorragender Weise unter Beweis gestellt hat, wäre niemand mehr als er berufen, den deutschen Rechtsstudenten auch ein schlichtes und zugleich für den Unbemittelten – dazu gehört die überwältigende Mehrheit – erschwingliches Lehrbuch des römischen Privatrechts zu schenken. Denn gerade er, dem die deutsche Romanistik das beste Handbuch, das sie heute besitzt, dankt, wäre über den Verdacht erhaben, durch ein solches Lehrbuch aus der Not eine Tugend zu machen."

work primarily intended for students and lacking in refinement might have ruined his scholarly reputation in his opinion.[62]

At the Library of the Law Faculty in Ankara, however, there is a copy of a manuscript by Koschaker, a textbook on Roman law, entitled *Grundzuege des roemischen Privatrechts als Einfuehrung in das moderne Privatrecht*.[63] The Turkish version of Koschaker's textbook was thus the translation of this unpublished manuscript in German.[64] This work could be considered as a sort of concrete legacy by Koschaker which allows us to have a precise idea on the approach he adopted to Roman law classes and their content.

The German manuscript, containing typing errors, mistakes and corrections, is 417 pages long and without a bibliography, list of sources or footnotes and references. It is clear, from the initial pages of the manuscript Koschaker used to address Turkish students, that he was referring to this work in his review of Kunkel's textbook and that this was the text Koschaker used for his lectures, held in German, but simultaneoulsy translated into Turkish by an interpreter in Ankara.

A glimpse at the table of contents and at the chapters of the book immediately displays a structure of the work consistent with Koschaker's convictions on the need for an *Aktualisierung* of Roman law teaching.[65] He devoted the first chapter to the meaning of Roman law for Europe and the world, to the role of Roman jurists and a history of Roman law from Justinian up to the present.

In the second chapter he dealt with the *Corpus iuris* and the different partitions of law in ancient Rome: *ius civile*, *ius gentium*, *ius honorarium*, to conclude eventually with a paragraph describing the Private law system. In the latter paragraph Koschaker stressed the nature of Roman private law, considered as a system – and not as a simple set of rules – based on the tripartition *res*, *personae* and *actiones* used in the Institutes of Gaius.

After these first two chapters, Koschaker organised his work into six "books", each "book" dealing with a main argument and divided into numerous chapters.[66] The structure

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62 Koschaker did not add any reference to the Turkish publication of his lectures. See Koschaker: *Buchbespr. zu Römisches Privatrecht*, p. 554: "Ich habe daher vorsichtshalber meine in Ankara gehaltenen Vorlesungen über römisches Privatrecht nur in türkischer Übersetzung veröffentlicht, weil eine Publikation in einer der großen europäischen Sprachen mich wahrscheinlich meine wissenschaftliche Reputation gekostet hätte."

63 I would like to warmly thank Doctor Aleksander Grebieniow (University of Warsaw) and Professor Marko Petrak (University of Zagreb) who allowed me to have a copy of the manuscript. I would also warmly thank the Library of the Law Faculty at the University of Ankara and Nurgül Kiliç who gave me permission to publish the pictures of the copy of the manuscript that can be found below, see pictures nr. 6, 7, 8 and 9. The signature of the copy reads: Ayniyat: No. 25971.

64 On the Turkish version of the Koschaker's textbook, Koschaker/Ayiter: *Roma Ozel Hukukunun Ana Hatları*, see above, p. 168 and fn. 183.

65 See pictures, below, pp. 266 f.

66 I. Buch. Allgemeiner Teil: Theorie der Rechtsgeschäfte; II. Buch. Personenrecht; III. Buch. Sachenrecht; IV. Buch. Obligationenrecht; V. Buch. Familienrecht; VI. Buch. Erbrecht.

of the textbook in these six "books" is based on the typical systematic of the Pandect-science's textbooks; in this sense, there is no difference from the common *Lehrbuch* of Roman law institutions usually written by the pandectists, which Koschaker himself used to study this subject matter. The interesting aspect, on the contrary, consists in the references to the BGB and the ABGB or, more generally, to modern law. The manuscript is thus an actual example of Koschaker's *Aktualisierung* of Roman law teaching in which the author concretely applied his new method and in which he used Roman law as an introduction to the study of modern private law. Yet, it should be noted that these references to modern laws are not as frequent as one might perhaps expect from a manuscript written for teaching purposes by Koschaker. Quite surprisingly, there are other examples of textbooks on Roman law, such as the work by Korošec, whose first edition was published in 1938, in which the method of the *Aktualisierung* found a more radical application.[67] The same article by Koschaker, *L'alienazione della cosa legata*, appears to be a closer application of the *Aktualisierung* of Roman law than his textbook.[68]

Ultimately, Koschaker's manuscript mostly belongs to the German tradition of textbooks on Roman law, with the real novelty lying in its emphasis on the connections between the latter and current legislation, and through the references made to modern private laws, and to German and Austrian civil codes, in particular. Furthermore, the structure of Koschaker's textbooks is similar to that of the manuscript of his *System des römischen Privatrechts* of 1933, preserved at the Library of the *Max-Planck-Institut für Europäische Rechtsgeschichte,* which also exemplifies Koschaker's scientific continuity in his approach to Roman law teaching.[69]

In this respect, however, Koschaker's innovative contribution cannot be considered so significant, because it is once again reminiscent of the pandectist approach, albeit updated (*aktualisiert*) to the changed situation in Germany, where the Civil Code had been enacted in 1900. In this respect, Koschaker's approach could be considered, at least in part, as a recovery of the methods of the Pandectists and laying down a bridge to the German tradition preceding 1900.

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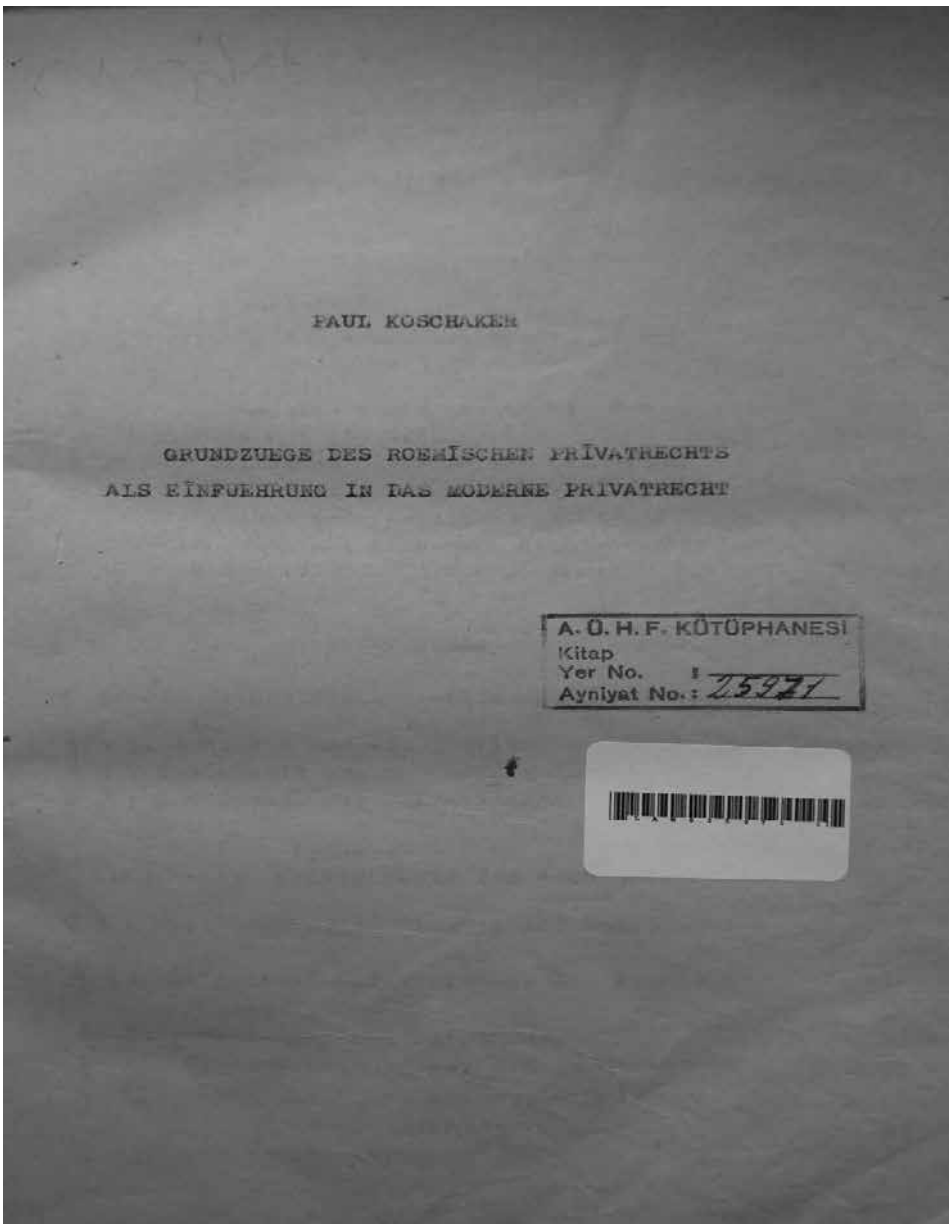
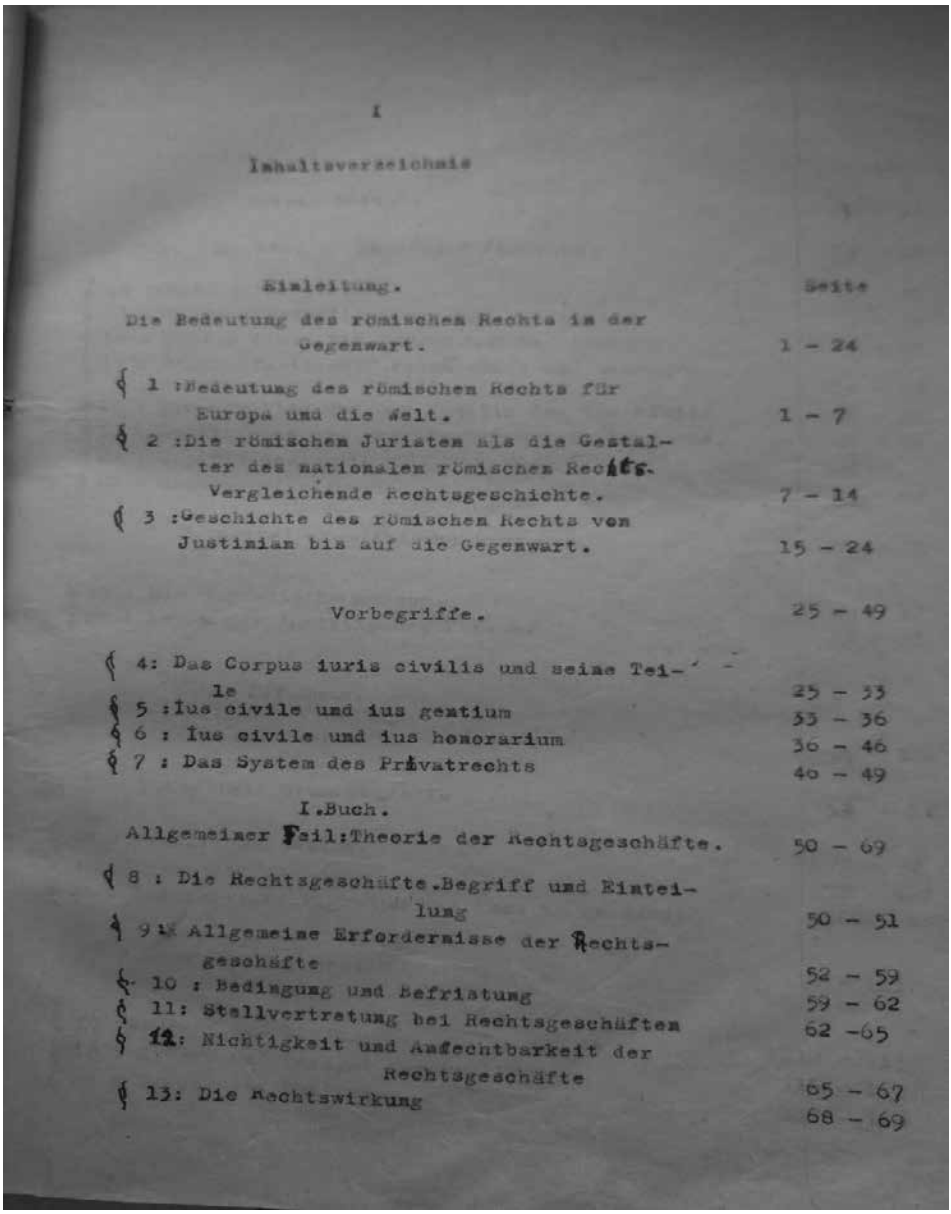
67 Korošec/Krek: *Zgodovina in Sistem Rimskega Zasebnega Prava*.
68 Koschaker: *L'alienazione della cosa legata*, pp. 89-183;
69 See above, chapter 2, § 5.



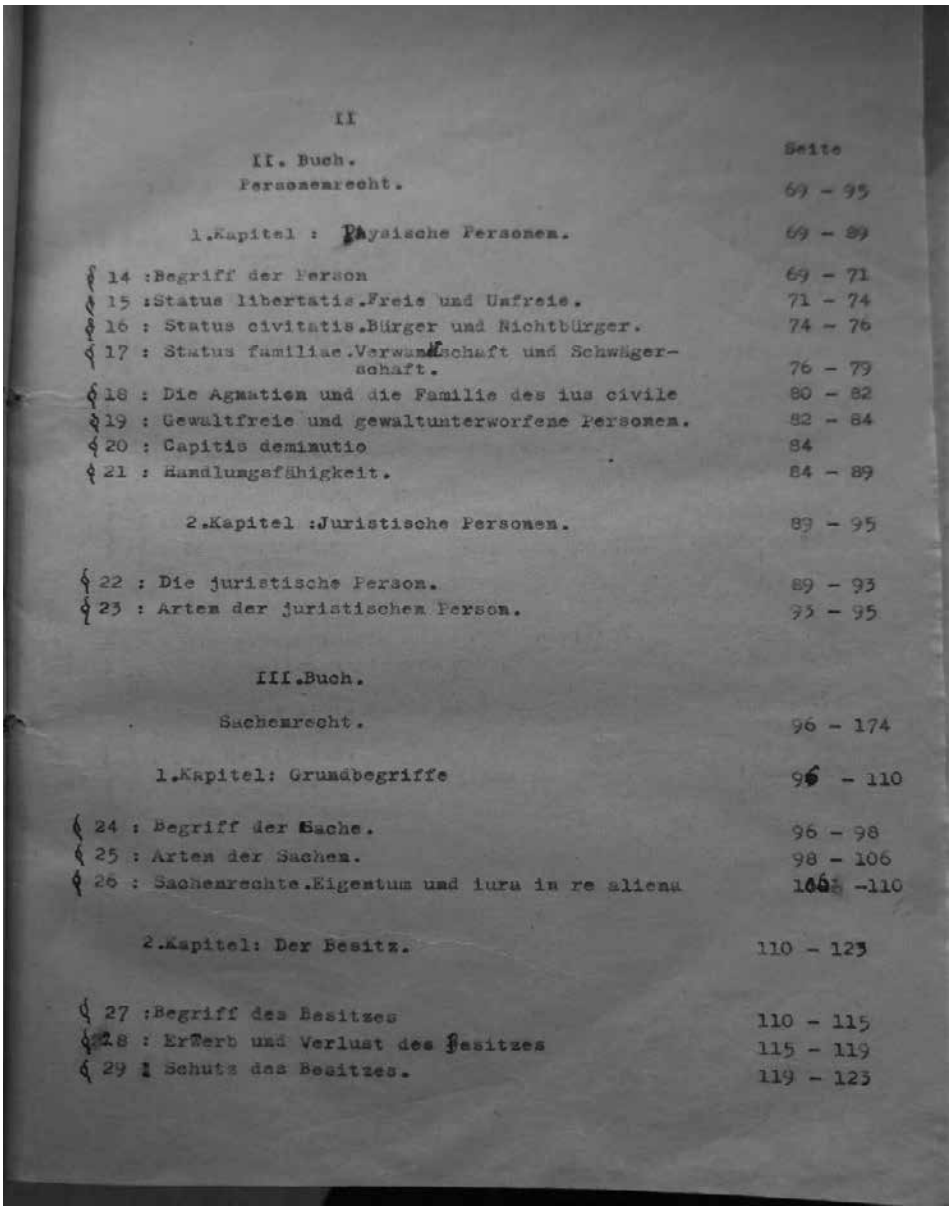
Picture nr. 6: Koschaker: *Grundzuege des roemischen Privatrechts als Einfuehrung in das moderne Privatrecht*.
Cover page (library of the Law Faculty – University of Ankara, Ayniyat: No. 25971)



I

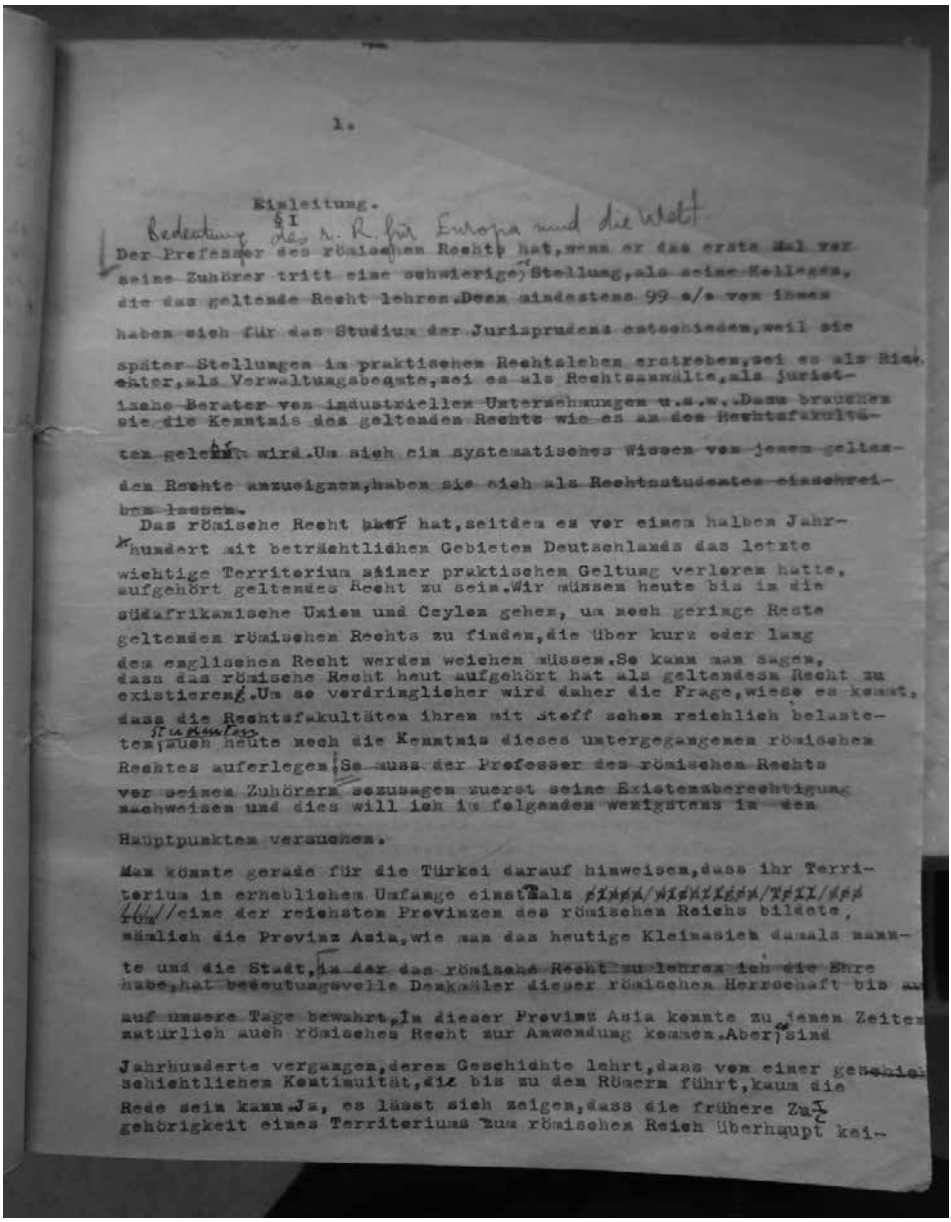
Inhaltsverzeichnis

Picture nr. 7: Koschaker: *Grundzuege des roemischen Privatrechts als Einfuehrung in das moderne Privatrecht*
First page of the Table of Contents



II

Picture nr. 8: Koschaker: *Grundzuege des roemischen Privatrechts als Einfuehrung in das moderne Privatrecht*
Second page of the Table of Contents



1.

Einleitung.

§ 1

Bedeutung des r. R. für Europa und die Welt.

Der Professor des römischen Rechts hat, wenn er das erste Mal vor seine Zuhörer tritt eine schwierige Stellung, als seine Kollegen, die das geltende Recht lehren. Denn mindestens 99 o/o von ihnen haben sich für das Studium der Jurisprudenz entschieden, weil sie später Stellungen im praktischen Rechtsleben erstreben, sei es als Richter, als Verwaltungsbeamte, sei es als Rechtsanwälte, als juristische Berater von industriellen Unternehmungen u.s.w. Dazu brauchen sie die Kenntnis des geltenden Rechts wie es an der Rechtsfakultäten gelehrt wird. Um sich ein systematisches Wissen von jenem geltenden Rechte anzueignen, haben sie sich als Rechtsstudenten einschreiben lassen.

Das römische Recht hat, seitdem es vor einem halben Jahrhundert mit beträchtlichen Gebieten Deutschlands das letzte wichtige Territorium seiner praktischen Geltung verloren hatte, aufgehört geltendes Recht zu sein. Wir müssen heute bis in die südafrikanische Union und Ceylon gehen, um noch geringe Reste geltenden römischen Rechts zu finden, die über kurz oder lang dem englischen Recht werden weichen müssen. So kann man sagen, dass das römische Recht heut aufgehört hat als geltendes Recht zu existieren. Um so verdrieglicher wird daher die Frage, wieso es kommt, dass die Rechtsfakultäten ihren mit Stoff schon reichlich belasteten Studenten auch heute noch die Kenntnis dieses untergegangenen römischen Rechtes auferlegen. So muss der Professor des römischen Rechts vor seinen Zuhörern sozusagen zuerst seine Existenzberechtigung nachweisen und dies will ich in folgenden wenigstens in den Hauptpunkten versuchen.

Man könnte gerade für die Türkei darauf hinweisen, dass ihr Territorium in erheblichem Umfange einst als [illegible] römische eine der reichsten Provinzen des römischen Reichs bildete, nämlich die Provinz Asia, wie man das heutige Kleinasien damals nannte und die Stadt, in der das römische Recht zu lehren ich die Ehre habe, hat bedeutungsvolle Denkmäler dieser römischen Herrschaft bis auf unsere Tage bewahrt. In dieser Provinz Asia konnte zu jenen Zeiten natürlich auch römisches Recht zur Anwendung kommen. Aber seitdem sind Jahrhunderte vergangen, deren Geschichte lehrt, dass von einer geschichtlichen Kontinuität, die bis zu den Römern führt, kaum die Rede sein kann. Ja, es lässt sich zeigen, dass die frühere Zugehörigkeit eines Territoriums zum römischen Reich überhaupt kei-

Picture nr. 9: Koschaker: *Grundzuege des roemischen Privatrechts als Einfuehrung in das moderne Privatrecht*
First page of the manuscript

7 Conclusions

Paul Koschaker was an extraordinarily eminent figure in the field of Roman law and legal history. This work has analysed the biographical aspects of his life together with his academic experience and his scientific work, in order to provide a truly comprehensive overview of this outstanding scholar. The investigation of the most important events in Koschaker's life has enabled me to create a framework within which to gain a much better understanding of his scientific and methodological postulates.

The archival sources have proved to be decisive in retracing significant and previously inedited passages of Koschaker's personal and scientific biography. They have shed light, above all, on many important and complex events that took place in the years he spent in Berlin and in Tübingen, demonstrating that it is perhaps best, in most cases, to avoid making partial or clear-cut judgments about them.

The letters preserved in many German archives and in Palermo have at times displayed Koschaker's true convictions and beliefs, in particular with regard to the situation of Roman law and its teaching in Germany. Yet this comprehensive study on Koschaker has demonstrated that it is possible to offer a more unbiased evaluation of him and his scientific stances. If one considers the entire experience of this scholar - beginning with his university life in Graz and, from a scientific point of view, considering the influence the Pandectist approach to Roman law had on him - and then proceeds with the events of the following years, instead of focusing on single facts and moments of his life and making hasty judgments about them, then an almost previously unknown and uncontemplated Koschaker will appear before you.

This research has tried to clarify the grey areas of Koschaker's life, in an attempt to understand if, and to what extent, his personal experiences and the surrounding environment influenced his choices and his scientific stances over the years. In this respect, researching the context in which Koschaker lived was essential to understanding the multifarious aspects of Koschaker's ideas. Moreover, from the previous chapters, the vitality of Roman law studies emerges, despite the periods of crisis faced during the thirties and the forties in Germany, as the role Koschaker played in it comes to the fore.

This inquiry has also focused on the impact of the Nazi regime on an illustrious scholar and his works, a scholar who lived as neither a member or supporter of the regime,

on the one hand, and yet was not forced to leave his position at the university or, worse, his country, as many refugee scholars had done, on the other.

In the case of Koschaker, it is plausible to talk of adaptation strategies, when referring to some events that took place at the time of the Nazi regime, but the resolute and single-minded scientific beliefs he developed over the decades must equally be acknowledged and remembered. The important and fascinating role played by Koschaker is further attested to by the continuos debate that his life and, above all, his publications have caused over time. His main work, *Europa und das römische Recht*, is still today a cause of intense scientific discussion.[1]

Yet, before concluding this work, a few final words on Paul Koschaker deserve our attention. The cue for these final remarks has been taken from the documents and materials analysed in the previous chapters, on the one hand, and by the recent critical stances of some scholars towards Koschaker, on the other hand.

The very positive tones used to describe Koschaker and his work by scholars after WWII have been already examined. As was explained earlier, some analyses have exaggerated in their portrayal of him as a symbol of fierce opposition to the regime. The prestige Koschaker acquired over the years, above all after the publication of *Europa und das römische Recht*, led many scholars to interpret any event of his life - including his behaviour under the Nazi regime - as a confirmation that he was a committed anti-Nazi or even see his conduct as heroic at that time. Many of his works, *Die Krise des römischen Rechts und die romanistische Rechtswissenschaft* in particular, have been read and interpreted in the same light. Certainly, many of Koschaker's scholarly contributions and texts have underlined the importance of Roman law and, above all, have offered a significant European message, and these aspects have inevitably and correctly been emphasised. Yet the problem remained that this kind of idealised depiction of Koschaker and his scientific work did not allow space for any reasonable doubt to emerge when analysing his personal and academic experiences. Only in recent years has there been a reaction to this scholarly trend.[2] The merit of this new approach consisted in stressing the need to abstain from any idealisation of Koschaker and reconsidering his behaviour from a new perspective and within the specific context of his time. But here too the tones often turned out to be too extreme, either too harsh or not completely unbiased, creating a sort of ideological contraposition between supporters of the idealised depiction of Koschaker and their scholarly antagonists.

Criticism of Koschaker has mainly focused on four aspects: Koschaker's behaviour under the Nazi regime and the consideration that he was more or less an involuntary Nazi supporter; his scientific stances at the time of the regime – an aspect strictly connected to

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1 See Gregor Albers, *Tagungsbericht des Seminars „Methoden der Romanistik: Woher? Wohin? 70. Jahre Paul Koschakers Europa und das römische Recht", Institut für geschichtliche Rechtswissenschaft, Heidelberg, 20.-21. Oktober 2017*, in: *ZEuP* 26, 3 (2018), pp. 705-708.

2 On these questions, see above, chapter 1, § 3.

the previous point; his methodological approach to Roman law in more general terms; and his idea of Europe and the Roman law tradition.[3] In the light of the research presented in the previous chapters of this book, each of these fours aspects will now be briefly summarised.

The first discussion point concerns Koschaker's personal and scientific behaviour at the time of the Nazi regime. It should be immediately stated that neither the idea of "heroic behaviour", nor that of the "supporter" of the regime, even "despite himself", could do justice to the personality of Koschaker.[4] Both these judgments attempt to offer a naïve depiction of a context that was on the contrary unenviably and almost unfathomably complex.

The archival documents analysed and regarding, above all, Koschaker's years in Berlin and, later, in Tübingen, demonstrate that he was neither ousted from his chair in Berlin nor forced to leave the city; at the same time, he did not suffer any consequence for his choice to defend Roman law and its teaching and for his stances that could apparently irritate the regime. Neither open hostility of the latter towards him, nor proximity of Koschaker to the regime emerge from the documents. Some of his requests were undoubtedly not favourably considered by the members or supporters of the regime, but in most cases Koschaker faced problems mainly due to administrative and organisational reasons.

Koschaker, then, was no hero, just as is the case with many other human beings, and from the depiction of his life and career, as they emerge from the documents at our disposal, it seems possible to talk of difficult choices, compromises, ambiguities, doubts and ordeals. Certain conduct may have appeared opportunistic at times, or as fostering his desire to conserve an important position in academia and not to jeopardise his career, if not his life. Some of his behaviour was contradictory too; he did not refuse, for example, to be a member of the *Akademie für Deutsches Recht*, most probably because he wanted to achieve an eminent role in German academia, but this choice did not make Koschaker's position different from that of many other scholars of that time. Nonetheless, he had many friends of Jewish origins at the university and he remained in touch with them, also after they had been forced to flee Germany. Again, Koschaker never openly opposed the regime, and the regime had little interest in persecuting a venerated professor, who in fact was appreciated by scholars regardless of whether they were supporters or opponents of the regime.

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[3] See Giaro: *Aktualisierung Europas*; Id.: *Paul Koschaker sotto il Nazismo*, pp. 159-188; Id.: *Der Troubadour*, pp. 31-76; Id.: *"Comparemus!"*, pp. 539 ff.; Somma: *I giuristi e l'Asse culturale*, pp. 282 ff.; Id.: *L'uso del diritto romano*, pp. 101 ff. At times critical on Koschaker's stances regarding the dogmatic approach to the study of Roman law and to his depiction of the European legal tradition, see Winkler: *Der Kampf*, pp. 239 ff.

[4] See also on this point Beggio: *Paul Koschaker and the path*, pp. 324 ff.

In general, Koschaker accepted or adapted to the situation existing in Germany from the thirties onwards, with the exception of his staunch defence of Roman law. One should also consider, whether some of Koschaker's choices were due to mere opportunism or they were the only feasbile positions to be taken under the Nazi regime at that time. What could be today judged as opportunistic behaviour was perhaps the only conceivable solution in the eyes of a person in Germany at that time who did not want to renounce to his work or run more serious risks.

All the above analysed elements should lead to the following considerations, in my opinion: first, it is generally not possible to make definitive judgments about Koschaker's behaviour, considering the difficult times in which he lived, or, at any rate, such evaluations should be made with due prudence. In any case, they should limit their remit to what actually emerged from the documented sources and can be reasonably considered reliable.[5]

Secondly, it is ultimately a question of sensitivity; anyone is free to examine the events of Koschaker's life and evaluate whether or not his behaviour was opportunistic and, if so, to what extent. It appears possible to affirm that in some circumstances Koschaker himself followed an adaptation strategy, was the case with other scholars at the time in German, Austrian and Italian academia,[6] expressing his ideas and defending his interests without irritating the regime and without compromising himself. There were also times, however, when he resolutely defended his opinions, regardless of the interlocutors he had before him or the circumstances he had to face. Lastly, even though his behaviour can be considered at times ambiguous or opportunistic, this does not mean that Koschaker was a Nazi supporter.

There is a sentence in one of Koschaker's letters to Guido Kisch, dated 17th July 1948, which in part expresses the complexity of the situation at the time of the regime. It concerns Koschaker's behaviour towards his colleagues of Jewish origins who were forced to leave Germany. It reads as follows:

> Es ist wirklich nicht leicht, ein Deutscher zu bleiben. Aber eine schöne und erhebende Erfahrung hatte ich doch: das Verhalten der deutschen Emigration,

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5 See on these questions the considerations already expressed in chapter 1, § 2.

6 Meissel/Wedrac: *Strategien der Anpassung*, pp. 35-78; see also Beggio: *Paul Koschaker and the Path*, pp. 321 ff., describing the situation in which the Italian scholars found themselves, after the Fascist regime issued the "regio decreto" of 28th August 1931. The decree imposed an oath of allegiance on all the scholars working in Italian universities. Of a total of more than 1200 professors, only 12 refused to swear this oath. On the oath of allegiance of 1931, see Helmut Goetz: *Il giuramento rifiutato. I docenti universitari e il regime fascista*, Firenze 2000 and Giorgio Boatti: *Preferirei di no. Le storie dei dodici professori che si opposero a Mussolini*, Torino 2001. The main point of the question regarding the oath of allegiance imposed by the Fascist regime is that not every professor who swore it was a Fascist. On the topic of the stances of Italian legal scholars towards the Fascist regime, see: Birocchi/Loschiavo (eds.): *I giuristi e il fascino del regime (1918-1925)*.

> unter ihr insbesondere meine jüdischen Kollegen, ein Verhalten, das zu erwarten, ich nicht berechtigt war, weil zwar nichts gegen sie, aber auch kaum etwas für sie getan habe.[7]

This brief excerpt from the letter offers in a few words further proof of the difficult circumstances at the time of the Nazi regime, when Koschaker could do little as his Jewish colleagues were forced to abandon their posts and flee their country and, even if he had no adverse feelings towards them, nonetheless he could do nothing to help them. This brief text aptly represents the dichotomy of his human condition at the time. Once again, it appears reasonable to affirm that Koschaker too was haunted by many contradictions and doubts, as were many other people in such dark times.

The second aspect concerns Koschaker's scientific stances at the time of the regime. His proposals for the study and teaching of Roman law would be instrumental in providing a scientific basis for the expansionistic aims of the regime and, according to some scholars, his depiction of Roman law could be conceived as having found approval among the Nazi regime.[8]

If our analysis is restricted to the publication of *Die Krise des römischen Rechts* and a few other works which appeared in the thirties and forties, this opinion may seem vindicated in some respects. However, in this case too, the situation was more complicated than appeared at first sight. A study of Koschaker's works from the beginning until the end of his career shows him often being coherent in his scientific beliefs. In particular, Koschaker's method has always distinguished itself for its dogmatic-systematic approach and for the attempt to find connections between ancient laws, above all Roman law and contemporary law.

It is true, however, that Koschaker's *Aktualisierung* formula – developed in the thirties – connected Roman law with contemporary law to such an extent that a historical perspective on Roman law was partly neglected. Its study and teaching thus appeared to focus mainly on the needs of modern private law. In this sense, the aim of historical research on Roman law, consisting in the attempt to understand what Roman law was, ran the risk of being fraught. However, for Koschaker it was possible to identify an idealised depiction of Roman law that could be adapted to the needs of the time, a depiction that could be used time and again in different circumstances.[9] Koschaker's arguments and proposals, however, were deeply affected by the crisis that Roman law

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7 Kisch: *Paul Koschaker*, p. 36 (letter nr. 12).

8 Giaro: *Aktualisierung Europas*. Of the same author, see also: Giaro: *Paul Koschaker sotto il Nazismo*, pp. 159-188; Id.: *Der Troubadour*, pp. 31-76; Id.: *"Comparemus!"*, pp. 539 ff.; Somma: *I giuristi e l'Asse culturale*, pp. 282 ff.; Id.: *L'uso del diritto romano*, pp. 101 ff.

9 In this sense, Mantello underlines the fact that Koschaker, despite not being a Nazi himself, used some arguments that were common to Roman law scholars who were very close to the regime, see Mantello: *La giurisprudenza romana*, p. 36. See also Giaro: *Comparemus!*, p. 563; Winkler: *Der Kampf*, pp. 174 ff.

was experiencing, not to mention his personal experiences as a university professor. The very stern criticism he addressed towards the *Historisierung* of Roman law was borne mainly of what he saw as the scientific incompatibility between this trend and his proposal to recover Roman law studies and teaching. Koschaker's point of view on these questions was in fact shared by many other scholars at the time - an approach that had been influenced by the 19th century German tradition. Precisely for these reasons, it cannot be asserted that Koschaker suggested a methodological proposal conceived with the precise aim of supporting the goals of the regime. On the contrary, such a proposal was the result of his scientific beliefs. Nonetheless, some of the arguments on which Koschaker's proposal was founded could be adapted to the needs of the regime, or at least coexist with its narrative.

This is what emerges, for example, from the document containing Koschaker's suggestions for a reform of Roman law teaching in Germany.[10] Yet, the fact that his methodological proposal hardly varied throughout the thirties, the forties and even after the capitulation of totalitarianism, should lead us to consider it as the cornerstone of Koschaker's scientific stances, regardless of the political circumstances at the time. Furthermore, in some cases, his narrative appears to have been in part adapted to the addressees and it seems reasonable question whether it is appropriate to talk of an adaptation strategy.[11] Finally, the fact that some aspects of Koschaker's proposal did not irk the regime or could even be interpreted favourably by it, does not equate to the fact that Koschaker intentionally developed his proposal for the regime rather than according to his scientific convictions and the need to recover Roman law and its role in legal studies.

These final two criticisms levelled at Koschaker that emerged over the decades concern his approach to the study of Roman law in general, and his idea of Europe and the European legal tradition. Both these topics have been discussed in the previous chapters, and only need to be briefly touched upon here.[12]

Koschaker's approach to the study of Roman law has been considered too dogmatic, a sort of second Pandect-science that runs the risk of neglecting historical research and comprehension of the subject, and of reducing its importance to its connections with modern current laws, narrowing the field of study to those private law topics which have concretely influenced modern private law systems.[13] Koschaker's strong criticism of the *Historisierung* of Roman law was not considered completely convincing either.[14]

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10 See above, chapter 5, § 8.
11 On these questions, see also above, pp. 206 f. and 226.
12 See above, chapter 5, §§ 2 and 3 and 10 and 11; chapter 6, §§ 1 and 2.
13 This risk was first pointed out by Pugliese: *Diritto romano*, pp. 164 ff., and, recently, by Giaro: *Comparemus!*, p. 563.
14 See above, chapter 5, § 3, 4 and 7.

Although Windscheid's optimistic prediction about the future of Roman law teaching and its historical study failed to materialise,[15] it appears nonetheless still necessary, nowadays, to cultivate the historical approach to romanist research with the aim of understanding what Roman law was (historical approach carried out by Romanists and legal historians, as such, jurists).[16] This kind of study forms the basis of any other scientific investigation regarding the reception of Roman law or its influence on contemporary law, or for that matter, how these phenomena should be correctly understood and interpreted. Apparently, Koschaker's approach to the sudy of Roman law as expressed in *Die Krise des römischen Rechts* only allowed room for an ancillary role to the historical study of Roman law. Yet, in this respect as well, it seems proper to take into consideration Koschaker's proposal concerning relative natural law as the keystone to interpreting his scientific stances. His methodological approach, as was summarised in his 1947 formulation, opened the way to a historical study of Roman law as Koschaker himself saw necessary, and indeed explained in two letters he sent to Riccobono in 1949 and 1951. The concept of relative natural law was programmatic in nature and could, therefore, be interpreted according to the personal inclination of any particular scholar, and in any case, could combine the dogmatic and the historical approach. Koschaker, following his methodological beliefs, predictably preferred to adopt a dogmatic perspective, but the broad formulation of the concept of relative natural law has not prevented scholars from adopting more historically-oriented approaches.

Yet beyond the natural inclinantion of any scholar towards a more historical or more dogmatic study of Roman law, it is the approach scholars adopted towards the sources themselves that made an enormous qualitative difference among the various Roman law works and studies. In this regard, a few contributions[17] suggest that Koschaker's tendency towards the *Aktualisierung* of legal institutions seemed to prevail over the content of the sources themselves, but otherwise he always displayed a remarkable and refined exegetical treatment of Roman law sources, including from a historical perspective. Moreover, it should not be forgotten that Koschaker had spent many hours poring over laws of antiquity and his historical approach to the study of these subjects is undeniable.

Throughout his academic career, Koschaker's dogmatic approach remained one of his main distinctive traits. Here, he was deeply influenced by the previous German Romanist tradition and was emblematic of one of the two most important trends of German Roman law scholarship at that time.

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15 "Wenn die Herrschaft des *Corpus Juris* in Deutschland beseitigt sein wird, dann erst recht werden sich die Hörsäle der Lehrer des römischen Rechts füllen". See above, p. 236, fn. 229 and Windscheid: *Das römische Recht in Deutschland*, p. 48.

16 Moreover, this kind of research should not necessarily be limited to Private law topics, as the study of public and criminal law are also important to comprehending the Roman legal experience as a whole.

17 In particular, Koschaker: *L'Alienazione*, pp. 89 ff.

The final considerations concern Koschaker's idea of Europe and European legal tradition. Most often, scholars on these topics have stressed the "Germanocentric" approach taken by Koschaker. This critical perspective was influenced by the idea of legal and cultural continuity, and the fact that Koschaker's historical reconstruction failed to take account of the legal history of Eastern Europe. Such criticisms are not a recent phenomenon, as scholars pointed to the limits of Koschaker's conception immediately after the publication of *Europa und das römische Recht*.[18] Undoubtedly, Koschaker's representation of Europe focused principally on the history of the Holy Roman Empire and Germany and, as a consequence, it ignored the development and influence of Roman law tradition in Central and Eastern Europe.[19] Yet we need to consider Koschaker's stances within their context: his Germanic idea of Europe belonged to the German cultural canons of his time. As far as his ideal of legal and cultural continuity is concerned, it has already been stressed that Koschaker's conception was deeply influenced by his systematic aims in the light of the reconstruction of European private law system and jurisprudence. This dogmatic legal continuity appeared to be a necessary scientific premise for his reconstruction. Koschaker's excesses in representing the historical continuity of European legal history had been already questioned by Calasso, who found, on the contrary, it more appropriate to make an in-depth study of the complex evolution of legal systems in Europe, above all in the Middle Ages.[20]

At the same time, research on Roman law reception among the various European legal systems, postulates, institutes and rules developed over the centuries from the 11th century up to the 20th century would certainly warrant casting doubts over Koschaker's enormous faith in the linearity of Roman law reception.[21]

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18 These remarks have been raised about Koschaker's idea of Europe, from different perspectives and with different tones, among others, by D'Ors: *Jus Europaeum?*, pp. 449-476; Calasso: *L'Europa e il diritto romano*, pp. 101-122; see also Harold Joseph Berman: *Law and Revolution. I. The Formation of the Western Legal Tradition*, Cambridge MA/London 1983; Giaro: *Comparemus!*, pp. 544 ff.

19 See, e.g., Radim Seltenreich: *Das römische Recht in Böhmen*, in: *ZSS* (GA) 110 (1993), pp. 496-512; János Zlinszky: *Das Recht, erhalten und neu belebt durch römisches Recht. Ungarns Verhältnis zum römischen Recht in der Vergangenheit und in der Gegenwart*, in: *TRG* 62, 1 (1994), pp. 61-79; Zimmermann: *Roman and Comparative Law*, p. 26; Giaro: *Paul Koschaker sotto il Nazismo*, pp. 170 ff.; Id.: *Der Troubadour*, pp. 31 ff.; Id.: *The East of the West*, pp. 193-197; Witold Wołodkiewicz: *Il diritto romano nei paesi del "socialismo reale" ed il cambiamento delle opinioni dopo il crollo del sistema totalitario*, and Gian Antonio Benacchio: *La "riscoperta" della tradizione civilistica nei Paesi dell'Est europeo*, in: Miglietta/Santucci (eds.): *Diritto romano e regimi totalitari*, respectively pp. 143-174 and 199-214. On the reception of Roman law and the influence of the Pandect-science in Russia, see Avenarius: *Fremde Traditionen des römischen Rechts: Einfluß, Wahrnehmung und Argument des "rimskoe pravo" im russischen Zarenreich des 19. Jahrhunderts*, Göttingen 2014.

20 See above, pp. 250 f.

21 See, for example, from different perspectives though, Calasso: *Introduzione al diritto commune*; Id.: *L'Europa e il diritto romano*, pp. 108 ff.; Wieacker: *Privatrechtsgeschichte der*

Although Koschaker clearly idealised the reception of Roman law in Europe, it is impossible to concur with the idea that Koschaker merely created a myth, making up a "fairy tale" of the European legal tradition to suit his needs.[22] Indeed, the Romanist tradition is not simply a monolithic dogmatic construction, rather it is based on legal methods, legal science and jurisprudence, namely cultural elements and dogmatic concepts which have influenced numerous countries in many different ways, including beyond the modern-day border of continental Europe.[23]

Behind the veil of his dogmatic approach and the myth of continuity, Koschaker himself never forgot to underline the cultural role of the Roman law tradition, even though he overemphasised its "civilising" effect in Western Europe. To conclude, it can be said that Koschaker's stances on Europe and the European legal tradition appear to have been influenced by the cultural climate of his time; for these reasons alone, they are worth discussing and reconsidering without being overinfluenced by ideological standpoints.[24] It is appropriate to consider once more, however, the programmatic value of Koschaker's stances on Europe as described in his masterpiece, *Europa und das römische Recht*: as such, they are not considered definitive statements on European legal tradition, rather they can be interpreted as catalysts for reflection and promote further considerations on this subject.

As Kaser wrote, the "programme" contained in Koschaker's work assigned the duties that Romanists and legal historians should carry out;[25] it was a cry of alarm and not an epitaph to Roman law and its legal tradition. Accordingly, it called on scholars to keep discussing the matters dealt with by Koschaker and it thus offered an opportunity to go beyond his scientific stances. This is one of the aspects that makes Koschaker's *Europa und das römische Recht* a true masterpiece of legal history.

Neuzeit; Id. (translated and annotated by Edgar Bodenheimer): *Foundations of European Legal Culture*, in: *The American Journal of Comparative Law* 38, 1 (1990), pp. 1-29; Paolo Grossi: *L'ordinamento giuridico medievale*[1], Roma/Bari 1995, in particular pp. 10 ff.; Id.: *L'Europa del diritto*[1], Roma/Bari 2007; see also the recent remarks in Winkler: *Der Kampf*, pp. 239 ff. and Duve: *European Legal History*, pp. 38 ff.

22 In this respect, Giaro talks of a "favola di koschakeriana memoria", see Giaro: *Comparemus!*, pp. 544 f. Nevertheless, the same Giaro talks of a European legal tradition, mainly based on canon law tradition, following the example of Berman's studies, in Giaro: *The East of the West*, pp. 193-197.

23 In recent decades and, in particular, at the beginning of the nineties, there was a significant attempt by some scholars to deny the importance, if not the existence, of the European legal tradition. For a description of this phenomenon and a reaction against it, see Christian Baldus/Andreas Wacke: *'Frankfurt locuta, Europa finita? Zur Reinen Rechtsgeschichtslehre in Band 12, 1993, des Rechtshistorischen Journals (RJ) und zu anderen Zweifeln am Gegenwart des Römischen Rechts'*, in: *Zeitschrift für Neuere Rechtsgeschichte* 17 (1995), pp. 283-292.

24 In this respect, it would be interesting to extend the research focus to public law, as some recents studies have done, to investigate if and to what extent it is possible to talk of a European legal tradition in this field too.

25 Kaser: *Geleitwort*, pp. VII f.

To conclude, by basing a large part of the analysis on Koschaker on archival documents and consider the context in which this scholar lived and worked, my aim was to avoid the pitfalls of making an ideological reconstruction, so that my personal views and judgements emerged as far as possible from an impartial evaluation of facts and conduct. Moreover, this investigation has sought to demonstrate that the application of this method to historiographic research can produce a better understanding of both the scientific work and personal events of a given scholar, particularly as the scholar in question lived under a regime where the risk of mixing scientific judgments with ideological preconceptions is particularly high.

Finally, this inquiry has tried to offer a new biographical and scientific reconstruction on Paul Koschaker, one of the finest Romanists and legal historians of the first half of the 20th century. Having undertaken a comprehensive investigation of Koschaker does not mean, however, that I have found all the answers to every question that has arisen in the course of this research. The complexity of the human events surounding Koschaker, in addition to the complexity of the situation that existed in Germany under the Nazi regime, has left many doubts and interesting points for further inquiry. For these reasons, this study has sought to raise questions rather than pursue unrelinquishing quest to find all the answers, in the belief and hope that such queries can and will stimulate further debate on the influence of such an undisputed master.

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Table of Names

Z

Table of Places

Table of Pictures

BEGGIO

Paul Koschaker (1879–1951)

Rediscovering the Roman Foundations of European Legal Tradition

The aim of this book is to investigate the life and work of Paul Koschaker (1879–1951), who was one of the most prominent legal historians in the first half of the 20th century. From the 1930s onwards, Koschaker is renowned for having attempted to reaffirm the authority of Roman law, which was experiencing a major crisis at German universities at the time, mainly due to the Nazi regime's disdain for this subject. Above all, he sought to emphasise the role Roman law played as the cornerstone of European legal tradition, as was masterfully depicted in his book *Europa und das römische Recht*. Yet Koschaker also had many other areas of interest throughout his career, including cuneiform law and comparative legal history. More specifically, this book attempts to provide the first comprehensive study of Koschaker's biographical experiences, as well as his scientific and academic stances, which have come to light as a result of the discovery and analysis of numerous previously unpublished archival sources.

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