The idea of Roman Law as a foundation of Europe after the Second World War in Paul Koschaker's work

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In this paper presentation I would like to focus on Paul Koschaker's conception of Roman Law as a foundation for a new European legal culture after the Second World War, with regards to his most famous works, *Die Krise des Römischen Rechts und die romanistische Rechtswissenschaft* and *Europa und das Römische Recht* in particular.

Koschaker considered Roman Law essential to try to rebuild a common European legal culture, and this is the reason why he tried to fight against the state of decadence of it – and of its teaching - in Germany. This scholar thought that the solution for the crisis of Roman Law could lie in recovering the methods and the perspective of the "Historische Schule" of Savigny ("Zurück zu Savigny!").

However, Koschaker's narration of European history and European law is depicted as a sort of *continuum* from the Holy Roman Empire to the XXth century, without any rest, and so it results sometimes idealized and unhooked to the development of the concrete events.

Furthermore, his point of view is deeply influenced by a positivistic stance and it risks to become utilitaristic: in this way, Roman Law seems to be important only with regards to its usefulness for the present time and not thanks to its intrinsic qualities.

In the end, I would like to investigate if Koschaker's proposal for the safeguard of Roman Law and its teaching and for the foundation of a new European legal culture could be really effective, or if it was based on a *petitio principii*, not fitting to this ambitious purpose.

The production of a creole African law and the recovery of an original

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When the British began their colonial venture into Southern Africa, they accepted the Roman-Dutch law of the Netherlands as the basic law of the new colonies. The various indigenous systems of customary law were either ignored or given only grudging recognition under a proviso that they were compatible with British ideas of public policy and natural justice. Even when the courts were willing to apply customary law, they nevertheless moulded it into the language, concepts and idioms of Western law thereby producing a creole version of the original. Since the adoption of a new democratic constitution in South Africa, however, this so-called 'official' customary law has been condemned as an imagined tradition of the African people, and in reality the imposition of colonial and apartheid governments. Courts and law-makers are now seeking to replace this law with a more authentic, 'living', customary law, one that reflects the people's actual life experience. In the process, it appears as if the living law is more likely to be aligned with the country's Bill of Rights.

Nationalism and European Constitutional Catholicism in the drafting of the Irish Constitution of 1937

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In 1937, the Irish electorate ratified a draft Constitution. This Constitution was the brainchild of the nationalist Fianna Fáil party and, in particular, its leader Éamon de Valera. Two particular elements of the Constitution warrant particular attention: the enshrinement of Irish nationalist ideology and catholic social theory in the Constitution.

The 1937 Constitution enshrined an autochthonous Irish nationalism in the early provisions of the Constitution. However, despite a European-trend towards enshrining nationalism in counterpoise to democracy, the Irish model was explicitly based on a democratic ideal. This did not, however, protect de Valera from charges of dictatorship. This paper explains how these arguments were undermined by the particularly Irish democratic nationalist model.

The Constitution was notable for its attempts to ensure that the human rights provisions were consistent with Roman Catholic social theory of the 1930s. Less remarked upon, however, has been the extent to which the drafting of the human rights provisions were influenced by contemporary continental constitutions.

The early drafts of the Constitution disclose a preoccupation with continental constitutions of the inter-War years. This paper aims to demonstrate the close textual linkages between the early drafts of the human rights provisions and contemporary continental Constitutions, with particular reference to the Portuguese Constitution of 1933, the Polish Constitution of 1921, and the Constitution of the German Reich of 1919. It will then explain the reasons why the final drafts of these Articles became more closely linked with papal encyclicals.

Making sense of the death of ethics in society. Franz Wieacker and the narrative of European legal thought

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Franz Wieacker (1908-1994) was one the most prestigious legal historians of his generation. His ideas of the reception and influence of Roman law during and after Middle-Ages are still often cited when the question of alleged European legal entity is being discussed. Unlike many of his colleagues Wieacker confirmed his status as a high profile researcher during the regime, and in opposite to most scholars who wrote according to the idée of National-Socialism, Wieacker also managed to successfully continue his scientific courier after the 2nd World War. Those two eras naturally shaped the course of Germany for subsequent decades, but they also shadowed and gave meaning to Wieacker's personal life for years to come.

I state that the memories of Nazi regime and chaotic years following the end of the 2nd World War likewise gave form to the scientific works of Wieacker. Deploying ideas of Paul Ricoeur and Jorma Kalela I interpret his scientific texts, and especially his famous book Das Privatrecht der Neuzeit , as kind of an existential historiography, where Wieacker by means of writing dealt and worked through the emotions, drastic changes and injustices he confronted during those dramatic times as an individual, scholar and German citizen. I try to show that despite Wieacker's superior knowledge and skill in the fields of Roman Law and European history, let alone the obvious scientific merits of Das Privatrecht der Neuzeit, the form of his view on European legal history was adjusted according to his personal identity.

History, Narratives and Law: An Albanian biography

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'We want Albania like Europe' (Ismail Kadare quoted in Adrian Brisku, Bittersweet Europe, 2013, p. 1).

This paper argues that the biography contributes to our understanding of totalitarianism, law and the idea of Europe. By appreciating the historical, legal and political narratives that underpin contemporary efforts made by a post-dictatorial state to address its past can provide clues about the country's vision of the future. My paper treats a rare case study, namely that of Albania and addresses the crimes of the Enver Hoxha dictatorship (1945-1991). This regime was an excellent example of totalitarian power, if we define such rule as near complete control of public and private life. The biography I am concerned with is that of the Albanian dissident Musine Kokalari and her 1946 criminal trial. By understanding law as a language and imagery of transmission, I regard Musine Kokalari's image from her trial as a legacy in terms of temporality and space. Legality possesses a temporal dimension, in the way that the law stands in relation to the past, the present, and the future. New understandings of law's crucial role in joining our past, present, and future can be discovered with the recognition that several mnemonical regimes operate alongside each other. While it could be maintained that the crimes of the former regime have been trivialised, and that the main discourse about the past is in large part dictated by key political actors, I argue that Albanian historical, legal and political narratives remain unfinished. Referring to Walter Benjamin's notion of 'here-and-now in a flash', we can ascertain what is remembered, forgiven, punished, or commemorated in an emerging Albanian discourse about its totalitarian history and future in Europe.

Fritz Schulz (1879-1957): Reinventing the principles of Roman law

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In this paper presentation, I shall focus on the works of Fritz Schulz, a professor of Roman law who was ousted from office at the advent of the Nazi regime. After his forced retirement in 1934, Schulz was to publish the work he is more generally known for, the *Principles of Roman law*. The *Principles of Roman law* actually is a series of lectures held by Schulz in 1933 at the University of Berlin, which effectively lost him the office there.

Every chapter of the book contains a discussion of a single ´principle´ of predominantly classical Roman law. Of course, these principles were not formulated as such by the Roman jurists, given the character of Roman law as primarily consisting of decisions in single cases. Yet, Roman legal scholarship has for a long time attempted to find and argue for the existence of general principles behind the development of Roman law.

With his *Principles*, Schulz appears to have been a watershed-moment in this tradition, seeing that later contributions often refer to the *Principles* in particular as their inspiration or point of departure. Therefore, by comparing some of the literature before and after its publication, the question central to this presentation shall be: in what measure should the *Principles* be seen as a continuation of -or a breach with- an earlier tradition of scholarship on the principles behind Roman law?

The Constitution of Europe according to Carl Schmitt and Alexandre Kojève

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European integration is a process of ongoing social, political, and legal constitution, constantly negotiated, contested, and reinterpreted. But if this project has been fluid ever since its inception, what is it really about? Is it an inherently European project or rather universal and global in its aspirations? Where do Europe's borders lie? What is the relationship between the Union and its constituent parts? Although the European integration process has unfolded for several decades, these questions still haunt politicians, scholars and the public opinion alike.

Carl Schmitt and Alexandre Kojève, two eminent legal scholars in a period that saw both the crumbling of Europe in World War Two and its re-emergence in the shadow of the Cold War, already raised fundamental questions about the constitution of Europe long before the European Union was conceived. However, they did so in radically different ways. While Schmitt notoriously celebrated German expansionism and dreamt of a European Großraum firmly positioned within a global power struggle, Kojève envisioned European unification as the first step towards a cosmopolitan world state, an état universel et homogène. But a closer glance reveals more ambiguous understandings of the constitution of Europe by both authors. Schmitt recurrently grappled with the various ways of constructing a federation of states on an equal footing, including, potentially, at the European level. Further, a unified Europe would not necessarily assume a dominant role in the world, given Schmitt's scepticism about universalist ideologies, but instead develop its particular political identity.

Kojève made the converse move. Despite his scholarly commitment to cosmopolitanism, as a diplomat he came to advocate a Großraum-like idea of a Southern European Empire latin led by France. Moreover, his own universalist theory led him to hail hegemonic powers, notably Stalin's Soviet Union, as carriers of a cosmopolitan world order wiping out the institutions of the ancient world, outdated and doomed by history.

As we read the positions of Schmitt and Kojève as part of a continuing dialogue, we will revisit the fundamental questions of Europe's constitution, its political borders, and its identity between universalist destiny and particular history, all of which still define its quest today.

Civil wars and legal ideologies: the cases of Finland and Spain

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My intention is – to put it in a general level - to explore how major civil conflicts affect legal cultural phenomena. It is well known and evident that civil wars put heavy pressures on the normal functioning of the administration of justice. Principles of rule of law at put aside in the name of the general purposes of winning the war. Political justice and political violence become generalized as the examples of Finland (1918) and Spain (1936-1939) demonstrate.

However these conflicts have also significant effects on both general and legal ideological level – depending also on the postwar situation in respective countries. Especially the Spanish experience shows how legal science and legal ideology are rapidly adapting to the needs of the totalitarian state (el Nuevo Estado).

It is interesting to focus the ideological aspects of the legacy of the conflict. In both counties a general ideology stressing the idea of the uniqueness of the national experience was constructed. The causes of conflict as well as what happened during the war and followed the outcome of the conflict are seen in a strongly nationalistic light. Even if the causes the wars were often related to foreign ideologies, the essential feature was that the essence of the conflict could not be seen in a wider comparative or universal context stressing common structural or ideological elements that might unite different conflicts.

Thus the experience from the countries in focus, seem to indicate that postwar legal ideologies tend to become increasingly nationalistic and distancing from ideas of common European past. This heritage (or burden) could not be seriously challenged before the establishment of a democratic state based on rule of law. This transition started in Finland after Second World War and in Spain after the advent of the Francoist regime (1975-).

International institutions and liberal legal reformism of the early 20th century: the issue of slavery and forced labour

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This paper explores a case of transnationalisation of what has been characterized as 'socially oriented law' in international practices of the interwar period. More specifically, the paper looks into the League of Nations' and ILO's categorization of 'slavery' and 'forced labour', to be contrasted from 'free labour', as expressions of the urge to transform colonial territories on the basis of social and economic goals. The 'new' interwar international law, epitomized in the League, was more pragmatist in orientation than the formalism of positivist international law of the pre- 20th century. Characteristic to it were, among other aspects, the idea of law understood as a (social) science, expert rule, and legal pluralism.

The norms and practices of international institutions, set up after the WW I so as to secure peace and progress, constitute an essential element of liberal European legal culture. These institutions are not only diplomatic forums but also epistemic communities or 'discursive arenas' where particular problems are universalized by 'disinterested' experts. In this way, law, understood broadly not only as norms but also as governance, practices and discourse, appears as a mediator of interests, independent from, or above of political power. This paper explores how slavery and forced labor were defined as problems by international institutions, to be distinguished from other colonial practices, thereby deemed legitimate. Who set the agenda, and on the basis of what kind of knowledge? How do the characterizations of slavery and forced labour under international law relate to the theory of international law?

This paper aims to demonstrate that the case of international regulation over slavery and forced labour stems from, and leads to the formal emphasis on states as sole actors of international law, somewhat distorting the character of 20th century colonialism and imperialism. Colonialism and imperialism was and is also about practices of actors beyond and above sovereign states – international organizations on one hand, and corporations on the other. International legal scholars are increasingly involved in soul-searching with regard to their doctrine's involvement in colonialism, but undertaking this endeavour through focus on legal formalism does not fully capture the complex and nuanced character of colonialism and imperialism.

The Instrumentalization of the Ancient Roman Law in Totalitarian Regimes. The Example of the Tripartition of status

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The expressions status libertatis, status civitatis and status familiae meet as often today in the textbooks of Roman law and most of the students familiar of Roman law and scholars of Roman law know them. The search of them from the sources of Roman law is almost fruitless. The expression status libertatis is during the history of Roman law and literature used four times. There can be added one status servitutis from a source of literature. The expression status civitatis is used, but not once with the meaning of status civitatis in this tripartition. The expression status familiae is not used at all; still it can once be found a status familiarum. (See Siimets-Gross 2010). These expressions appear to the literature first in 12th century. In 19th century Savigny analysed the existence of those expressions and come to the conclusion that these expressions were not used in Roman times. One can see that after the work of Savingy some of the scholars avoided using of these expressions until the years 20ties and 30ties of the 20tiest century. At that time prominent Italian and German scholars started to stress in there textbooks that this division was not only present in Roman law but also the expressions were used.

Fascism and Roman Law in Italy: Arangio-Ruiz as a Protagonist of the Purge

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Vincenzo Arangio-Ruiz, one of the most representative protagonist of the Italian school of roman law, during the terrible months between the fall of the Dictatorship and the referendum for the Republic, held some important political offices: specifically, he was Minister of Justice in the II Badoglio Government and twice Minister of Education first with Ivanoe Bonomi and then with Feruccio Parri. As minister, he had to face the dramatic problem of the purges in the world of school and especially of university. Moreover, during this period the "Academia nazionale dei Lincei", prevously abolished by the fascism and replaced with the "Accademia d'Italia", was also restablished. Both circumstances saw the involvement of Benedetto Croce, the great liberal philosopher, who was master and friend of our scholar. He suggested in a famous article, intervening on the matter of the purge and against the radical thought of Adolfo Omodeo, Rector of the University of Neaples, to remain sane, without take exemplary decisions or overindulge into revenge. Unfortunately, also the doctrine of roman law included some personalities who had preferred to remain silent over the regime or to support it unashamedly. Unlike nazi ideology indeed, which defended the overcoming of the juridical principles from the past through the abolition of roman law as subject and the diaspora of several professors, not only Hebrews, Italian fascism glorified the concept of "romanitas", althogh in a propagandistic sense, by receiving important tributes, not only as part of exchange but from sincere supporters as well. Among these we cannot forget at least the names of Salvatore Riccobono, Giorgio Betti e Pietro de Francisci: about the quite disputed trial of the last one worked Vincenzo Arangio-Ruiz, when he was minister.

Roman Law and Ideological Disputes in the Independent State of Croatia (1941-1945)

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As it is known, the significant ideological differences between Fascism and Nazism existed in regard to Roman Law, as legal foundation of private law in continental Europe.

The Independent State of Croatia (1941-1945) was part of Axis alliance, so these ideological differences were confronting each other in Croatia of the time.

The ideological opinion of ruling Ustashe movement on Roman Law were programmatically formulated by professor Ivsic in his writings "The Law in Ustashe Croatia", published in 1941. In the same way as Nazism confronted Roman Law to the German customary law, Ivsic confronts the Croatian customary law to it. He also considers that Roman Law and modern civil codes based on it promote individualism and materialism, with the destructive consequences for national life. Ivsic accepted in an epigone manner the view of Nazism.

The fascist point of view was supported by Vigevani, a member of Italian Institute in Zagreb, who wrote in 1942 the article "Ideal Foundations of Roman Law". The Roman "...treasury of historical and ideal traditions.." should make the basis of contemporary legislation. Greater opposition to the point of view of Nazism could hardly be imagined, but the Vigevani's idealizing discourse remains in the sphere of ideological propaganda.

Apart from direct ideological discourse, the science of Roman Law in Croatia reflected these disputes as well. Thus, for instance, the study by professor Horvat entitled "Roman Law in the Today's World", published in 1942, defied the"...completely false opinion.." of Nazism about the „racial corruption" of Roman Law. It may serve as a model of rational defence of scientific approach in complex ideological circumstances.

Starting from the aforementioned three writings, the aim of paper is to show to what extent totalitarian ideologies influenced continuity and/or discontinuity of the European legal tradition in Croatia during World War II.

Does the Empire strike again? James Bryce and the EU integration process

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Undoubtedly in the last years the use of the notion of Empire has been spreading in many fields of the public and the academic debate, especially those directly or indirectly related with the institutional and political pattern of the international community. For a long period this notion was marginalized in the official culture, as it was perceived intimately linked with the experience of European colonialism, but in the last years many intellectuals and scholars have found out that it could be a useful theoretical paradigm for the rationalization of many phenomena related to the institutionalization of the international community facing the challenge of globalization (see Zolo, 2004). Furthermore, a growing and qualified reference to the Medieval Empire model in the academic debate on the nature of the European Union can be noticed (see e.g. Agamben on Liberation 24/3/2013). This is true both from a geopolitical point of view and in order to achieve a meaningful description of the present institutional arrangement of EU. In the light of such an extended and specialistic use of the imperial metaphor, it is hardly surprising that also the President of EU Commission M. Barroso publicly declared that often he looks at the European Union as an Empire rather than as a super-state. In order to clarify these parallels, I will go back to the notion of Empire emerging from the corpus of works by James Bryce, the English legal historian, theorist and politician whose career developed between the XIX and the XX century. Indeed, the notion of Empire is central to James Bryce's thought not only as a tool for historical research: indeed, not only most of his reflections on the political and legal order of the Roman Empire arose from the comparison between the Roman and English imperial experiences, but he was (probably) the first to qualify the USA as an Empire. In Bryce's view, which he excerpted from Roman and English imperial history, the fundamental aim and feature of the imperial constitutional structure must be recognized in the coexistence of different nationalities and organized collectivities in a broader common legal framework. In his view, an Empire is nothing but a sovranational order, in which different political communities are kept together by some centripetal forces. However these do not consist in those coercive and hierarchical apparatus typical of modern Westphalian states structure, nor of the homogeneous implementation in the whole territory of the will of the subject by which resides the ultimate power; rather, they are represented by the share of a common law which could tie together different demands and practices, by adapting them to the common way of thinking of humanity, and by an inclusive identity, namely the common reference to an inclusive set of values.

Thus his universalistic model of empire is double-faced, since it deals both with the institutional arrangement of the polity and with the social and cultural background the latter is grounded on. Whilst clarifying these features of Bryce's notion of Empire, I will try to highlight the convergence of the brycian approach toward the Empire with some critical issues of the academical debate on the EU's constitutional nature and identity, especially those concerning constitutional pluralism, the nature of EU citizenship and of European identity. I will especially highlight the importance of law and legal culture in Bryce thought, as they seem the very focus both of his historical account on Roman imperial experience and of his analysis of the institutional issues emerging from political globalization: indeed, in the universalistic character of Roman legal culture Bryce found a possible model for the establishment of a modern (forthcoming?) imperial organization.

Law, Rights and Totalitarianism: A Critical Review of the Early 'Frankfurt School'

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It may not be too much of an understatement to say that the raison d'etre of the early Frankfurt School was to understand and explain the seemingly inevitable transition from liberal democracy though mass democracy to totalitarianism. This paper offers a critical review of their work with specific emphasis on the fate of law and rights in this transition.

Drawing on the thought of the early Frankfurt School (especially, Adorno and Horkheimer, Franz Neuman and Otto Kirchheimer), the paper begins by discussing the School's articulation of a generic concept of 'totalitarianism'. Having outlined its major contours, it moves on to examine the manner in which its emergence was linked to that of its immediate predecessors (liberal and mass democracy). It is in this context that the School's understanding of law, rights and legal subjectivity emerges. The paper argues that despite almost unanimous agreement among the School's theorists as to the defeat of law under totalitarianism, differences emerge regarding the emancipatory potential of law outside or beyond totalitarianism. Articulated through critical reflection of the two traditional mainstays of modern jurisprudence (positivism and natural law), the core of these differences, turns on the question of whether law contains within itself values that, although implicated in the development of totalitarianism, can nevertheless serve as an (albeit limited) challenge to it. The paper concludes by reflecting on the relevance of these debates for the present time.

Law as Protection, Law as Power: Legal Certainty and Threats to the State in Fascist Italy and England in the 1920s-30s

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This paper addresses the theme of totalitarianism and the history of European legal traditions by comparing the criminal law on threats to the State in England and Fascist Italy in the early twentieth century. It questions the context and extent of one of the foundational elements of totalitarian, specifically Italian Fascist, legal ideology, namely its purported opposition to liberal-democratic legal principles. Alfredo Rocco, Fascist Minister of Justice and key architect of the 1930 Italian penal codes, emphasised his rejection of post-Enlightenment liberal and democratic values, such as individual rights, equality and law's protective role, constructing his model of penal law in terms of State paramountcy and an understanding of legal certainty as guaranteeing State power. The paper focuses on the crime of vilification of the State in the 1930 Penal Code, which exemplified the Fascist erosion of legality through 'open-ended' concepts, but also showed the 1930 Code's continuity from the preceding liberal order's authoritarian tendencies. However, the paper challenges the specificity of this law under Fascism by turning to contemporaneous English law and the notoriously vague offence of seditious libel, which was used to repress political forces threatening the State's internal order. Like Italian law, this shows both an erosion of legal certainty and the law's continuity, although the English offence was a residue of authoritarian royal despotism. The paper thus argues that examining the law on threats to the State in Fascist and liberal-democratic law in this period problematises the extent of differences between their purported legal values and antagonistic identities, by highlighting the (apparently paradoxical) forces of repressive continuity and substantive proximity in relation to State security. The paper will thus suggest that this tension between historical narratives and legal praxis can offer an informative critical perspective on the representation of law's ideological foundations in Europe.

Historicism and Materiality in Legal Theory

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Current interest in a rapprochement between legal theory and legal history rests on a transformation of legal theory into a species of historicism, a mode of inquiry that emphasizes the tempero-spatial locatedness of its objects of attention, and examines the multiplicity of relations existing between object and context. Contemporary paradigms in historicism further contend that whatever the context in relationship to which the object of inquiry is situated, the outcome is indeterminacy – the irreducible contingency of alternative possibilities, paths taken and not taken.

Given the stranglehold that historicism has achieved in legal history, it is not surprising that its core contentions should be the drivers of revisionism in legal theory. However, alternatives should be considered. This paper will undertake a critique of historicism, and will then examine a rival philosophy of history that I will call "materiality." A less developed, more eclectic, standpoint, materiality stresses the impact upon the formation of law of technologies, artifacts, and material practices. Rather than collapse law into its context, it seeks to examine the fabrication of law's differentiation. Its potential is exemplified in work as varied as Cornelia Vismann's Files: Law and Media Technology (2000; trans. 2008) and Bruno Latour's The Making of Law (2002; trans. 2010). My main emphasis, however, will be on the species of historical materialism developed in the work of Walter Benjamin (1892-1940), where one finds both an intense stress on the materiality of an object of attention, and an understanding of historical perspective to entail much more than the derivation of the object's meaning from the circumstances in which it is located. If history promises to enliven our understanding of an object, we must recognize the object is not enlivened by the relationalities of its time, within which it allegedly belongs, but by the fold of time that creates it in constellation with the present, the moment of its recognition.

Soviet-Finnish Historiography and Interpretations of the Finnish Civil War in the 1920-1930s

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Correct interpretations of the past and the lost revolution of 1918 were an exceptionally sore spot for the Finnish communists residing in the Soviet Union. During the 1920s and 1930s Soviet-Finnish communists published thousands of pages of historiography concerning the Civil War. Those publications can be seen as antiquarian oddities of the past but the interpretations forged in the USSR survived longer and formed the foundations of the post-war communist understanding of the Finnish Civil War. This presentation deals with this peculiar, yet mostly forgotten sidetrack in the history of Finnish historiography by observing the communists' reasons for writing history and the settings in which the history was written. How did the Soviet-Finnish historiography evolve in the context of the Stalinist society?

My study is based on publications published in Finnish in the USSR and the abundant archival material concerning historiography found in the archives of the Communist Party of Finland. Examining the archival material reveals how the interpretations of the past were formed and for what purposes the history was written. I show that while the historiography of the Civil War originated from the need of learning from the past, by the mid-1930s the past was to be fit into frames set by interpretations and teachings that were not products of historical research but Stalinist party politics.

My presentation can be viewed as a case study regarding the relationship between a totalitarian ideology and historiography. Soviet-Finnish historiography in the inter-war period is also an interesting way to approach the development the "historical front" in the USSR as well as the Stalinization of the Finnish communism.