

Paul Koschaker and the path to “Europa und das römische Recht” (1936-1947)

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Abstract. – The aim of the present paper consists in analysing Paul Koschaker’s stances on Roman law and the crisis it faced in Germany during the thirties, as well as his academic experience, from 1936 till 1947. Actually 1936 represents the year when Koschaker obtained the prestigious chair for Roman law at the University of Berlin, whereas in 1947 his masterpiece, *Europa und das römische Recht*, was published. Nevertheless the article deals mainly with the content and the meaning of the work published by Koschaker in 1938, *Die Krise des römischen Rechts und die romanistische Rechtswissenschaft*. Since this text has been considered by the scholars either a political pamphlet against the Nazi regime, or an indirect academic support to the Nazi ideology, a detailed investigation of Koschaker’s work will be carried out, to understand if it’s actually possible to offer such a clear-cut judgments on this writing. The main stances suggested by Koschaker in order to restore dignity to Roman law will be discussed, paying attention as well to the reaction they caused among the scholars, the Italian ones in particular. Furthermore, some archival documents, in part still unpublished, will be analyzed to get a better understanding not only of Koschaker’s scientific and academic ideas, but also of his approach towards the regime. Eventually it will appear how it is necessary to adopt some prudence, when evaluating the behaviour and the ideas of a scholar who lived in such a dark age, like the one of the Nazi regime was.

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Keywords: *Paul Koschaker – Römisches Recht – Die Krise – NSDAP Parteiprogramm – Aktualisierung – Mos italicus.*

Summary: 1. *A methodological premise.* – 2. *A lecture at the ‘Akademie für Deutsches Recht’ in 1937.* – 3. *Between lights and shadows: the years in Berlin and the passage to Tübingen.* - 4.1 *Again on ‘Die Krise des römischen Rechts und die romanistische Rechtswissenschaft’: a question of content and methodology...* - 4.2 *...and a political question.* – 5. *Conclusions.*

1. *A methodological premise.* – This paper* considers the lecture given by

* The present work has been conceived within the “Reinventing the foundations of European legal culture, 1934-1964 (FoundLaw)” research project. In particular, it forms part of a wider research sub-project dealing with both the biographical aspects and the most important works of Paul Koschaker in order to depict his idea of Roman law, the European legal and cultural tradition, and Europe, and how these developed over the years from the thirties up to his death in 1951. Project website: www.foundlaw.org. Project code: 313100. The author wishes to express his gratitude for the support of the European Research Council, as well as that of the

Paul Koschaker¹ in 1937 at the *Akademie für Deutsches Recht*² and the work

Network for European Studies of the University of Helsinki (www.helsinki.fi/nes/english). The archival sources have been reproduced with kind permission of the *Universitätsarchiv Eberhard-Karls-Universität Tübingen* (UAT hereafter) and the *Landesarchiv Nordrhein-Westfalen Duisburg*; while for the correspondence between Paul Koschaker and Salvatore Riccobono, I would like to use this occasion gratefully to thank Riccobono's heirs and Professor Mario Varvaro of the University of Palermo, who kindly allowed me access to all the material collected and organized by the latter during my research stay in Palermo in July 2014.

¹ On Paul Koschaker (Klagenfurt, 1879-Basel, 1951), see the following works: L. WENGER, *Paulo Koschaker Sexagenario*, in *Festschrift Paul Koschaker*, III, Weimar-Böhlau 1939, 1-23; P. KOSCHAKER, *Selbstdarstellung*, in *Österreichische Geschichtswissenschaft der Gegenwart in Selbstdarstellungen*, II (Hrsg. N. Grass), Innsbruck-Wagner 1951, 105-125; P. DE FRANCISCI, *Paul Koschaker (1879-1951)*, in *SDHI*, 17, 1951, 384-388; K.-H. BELOW - A. FALKENSTEIN, *Paul Koschaker*, in *ZRG* 68, 1951, IX-XIX; J. KLÍMA, *Zur letzten Begegnung*, in *L'europa e il diritto romano: Studi in memoria di Paolo Koschaker*, II (a cura di F. Calasso), Milano-Giuffrè 1954, 596-601; W. KUNKEL, in *L'europa e il diritto romano: Studi in memoria di Paolo Koschaker* cit., III-XII; ID., in *Geist und Gestalt: Biographische Beiträge zur Geschichte der Bayerischen Akademie der Wissenschaften*, I, München-Beck 1959, 249-268; G. KISCH (Hrsg.), *Paul Koschaker, Gelehrter, Mensch, Freund: Briefe aus den Jahren 1940 bis 1951*, Basel-Stuttgart-Helbing&Lichtenhahn 1970; M. KASER, "Grazler Lehrer des römischen Rechts seit der Jahrhundertwende", in *400 Jahre Akad. Gymnasium in Graz 1573-1973*, Graz-Verlag des Akademischen Gymnasiums in Graz 1973, 122-125; G. RIES, v. *Paul Koschaker*, in *NDB*, XII, Berlin-Duncker&Humblot 1980, 608-609; G. WESENER, *Römisches Recht und Naturrecht (= Geschichte der Rechtswissenschaftliche Fakultät der Universität Graz, Teil I)*, Graz-Akademische Druck- u. Verlagsanstalt 1978, 112-115; ID., v. *Paul Koschaker, Juristas universales*, III, *Juristas del siglo XIX. Da Savigny a Kelsen*, Madrid-Barcelona-Marcial Pons 2004, 971-974 (with a list of necrology references); ID., *Paul Koschaker (1879-1951), Begründer der altorientalischen Rechtsgeschichte und juristischen Keilschriftforschung*, in *Rechts-, Sozial- und Wirtschaftswissenschaftlichen aus Graz* (Hrsg. K. Acham), Wien-Köln-Weimar-Böhlau 2011, 273-285; M. MÜLLER, *Paul Koschaker (1879-1951). Zum 100. Geburtstag des Begründers der Keilschriftrechtsgeschichte*, in *Altorientalische Forschungen*, 9, 1982, 271-284; G. OBERKOFER, *Studien zur Geschichte der österreichischen Rechtswissenschaft*, Frankfurt a.M.-Peter Lang 1984, 315-318; ID., *Die Vertreter des Römischen Rechts mit deutscher Unterrichtssprache an der Karls-Universität in Prag*, Frankfurt a.M.-Peter Lang 1991, 48-51; M.P. STRECK-G. DOLEZALEK, *Paul Koschaker: Zum 125. Geburtstag am 19. April 2004*, in *Jubiläen 2004. Personen-Ereignisse*, Leipzig-Leipziger Universitätsverlag 2004, 31-34; G. NEUMANN, *Paul Koschaker in Tübingen (1941-1946)*, in *ZABR*, 18, 2012, 23-36. Although from a different point of view, some other biographical information can be found in T. GIARO, *Aktualisierung Europas: Gespräche mit Paul Koschaker*, Genova-Name 2000, in particular 177 and following.

² The institution had been created in 1933 by the Nazi regime, in order to promote "German Law" (*das deutsche Gemeinrecht*), its president being Hans Frank, *Reichskommissar für die Gleichschaltung der Justiz* in 1937. On Frank, see D. WILLOWEIT, *Deutsche Rechtsgeschichte und „nationalsozialistische Weltanschauung“* in *Rechtsgeschichte im Nationalsozialismus* (Hrsg. M. Stolleis - D. Simon), Tübingen, Mohr Siebeck, 1989, 25-42; C. SCHUDNAGIES, *Hans Frank. Aufstieg und Fall des NS-Juristen und Generalgouverneurs*, Rechtshistorische Reihe 67, Frankfurt a.M.-Peter Lang, 1989, 21-28; C. KLESSMANN, *Der Generalgouverneur Hans Frank*, in *VfZG*, 19, 1971, 245-

that emerged from it, *Die Krise des römischen Rechts und die romanistische Rechtswissenschaft*, published in 1938. The main purpose is to evaluate Koschaker's position and stance with regard both to Roman law and its study and to his approach to the Nazi regime. At the same time, this paper attempts to understand if it's possible to go beyond the existing and very clear-cut trends regarding this scholar, offering a new portrayal of Koschaker, based especially – even if not entirely – on new archival sources that I had the opportunity to consult during my recent archival research in Germany and in Italy.

Two main ideas in particular about Koschaker's life, his works, and his approach to the Nazi regime developed over the years after his death in 1951. The first, characterizing the majority of the scholarship, whose most distinguished exponent was Francesco Calasso³, considered Koschaker as a fierce opponent of the regime, fighting against it at least since the speech he gave at the *Akademie für Deutsches Recht* in 1937, as well as underlining the importance of Koschaker's works in defending the European legal culture. The contrary trend, more recently developed, is inclined to see Koschaker as a more or less involuntary supporter of the Nazi regime⁴. Both these views are well-established, even if they are based essentially on a few standard conceptions and rather less on the sources. For this reason, assessing these points of view emerges as a problem of method, not least because the decision to use only some of the sources and to exclude others of course involves some pre-

260; L. GRUCHMANN, *Justiz im Dritten Reich 1933-1940: Anpassung und Unterwerfung in der Ära Gürtner*³, München-Oldenbourg 2001, 86-92, 434-448, 632-652 and *passim*.

³ See in particular F. CALASSO, *Introduzione*, in P. KOSCHAKER, *L'Europa e il diritto romano*, Firenze-Sansoni 1962 (translated by A. Biscardi), now in F. CALASSO, *L'Europa e il diritto romano. Alla memoria di Paul Koschaker*, in ID., *L'unità giuridica dell'Europa*, Soveria Mannelli-Rubbettino 1985, 104 and 119, but also A. 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 (a cura di F. Calasso), Milano-Giuffrè 1954, 477-492 and M. MÜLLER, *Paul Koschaker (1879-1951). Zum 100. Geburtstag des Begründers der Keilschriftrechtsgeschichte* cit. 280-284.

⁴ See T. GIARO, *Aktualisierung Europas. Gespräche mit Paul Koschaker* cit. (but on this work and on the often not unbiased and too harsh judgments on Koschaker that it contains, see A. GUARINO, *Sine ira et studio*, in *Trucioli di bottega*, 3, Napoli-A. de Frede 2002, 10-17 and F. STURM, *Besprechung von GIARO, Aktualisierung Europas. Gespräche mit Paul Koschaker. Name, Genua, 2000*, in *ZRG* 120, 2003, 352-362); ID., *Paul Koschaker sotto il Nazismo: un fiancheggiatore 'malgré soi'*, in *Iuris Vincula. Studi in onore di Mario Talamanca*, IV, Napoli-Jovene, 2001, 159-187; ID., *Der Troubadour des Abendlandes*, in *Rechtsgeschichtswissenschaft in Deutschland 1945 bis 1952* (hrsg. H. Schröder – D. Simon), Frankfurt a.M., Vittorio Klostermann, 2001, 31-76; A. SOMMA, *I giuristi e l'Asse culturale Roma-Berlino: Economia e politica nel diritto fascista e nazionalsocialista*, Frankfurt a.M.-Vittorio Klostermann 2005, 282.

judgements, and incomplete knowledge of all the sources may affect that judgement.

The aim of this work is to adopt a wider interpretation and research method founded on all the new documents found and consulted in Germany and in Italy. This kind of study will I hope help to create a more complete and unbiased portrait of Koschaker. The problem of the method adopted in studies on Koschaker requires that we consider all the sources at our disposal, recalling that not all of them are equally significant, being of different kinds and following diverse styles and registers. It is therefore important to consider how they diverge and what their degree of trustworthiness is. The other methodological problem is that the above mentioned trends are inclined to use modern concepts and points of view and to apply them in order to try to make evaluations and judgements *a posteriori*. For these reasons, the risk of distorting the interpretation of the documents is inherent to this approach. The present research therefore tries to distinguish itself, the aim being to supersede the method used by the existing research on Koschaker.

Dealing with such a remarkable scholar as Koschaker is of course very demanding, and not only because of his role in Roman law and legal history in general or because many important authors have already devoted so many essential works to him, analysing his ideas in depth, in particular on Roman law and Europe, but also because the role he played during the Nazi period makes it easy to fall into already-established opinions that have sometimes had a strong influence over the course of time on the scholars who have studied Paul Koschaker. Given this context, the aim of a document-based study such as this is to inquire whether a more complete picture of Koschaker's works, ideas, and life could be created and whether better knowledge of them could thus be obtained, suggesting new interpretations.

2. *A lecture at the 'Akademie für Deutsches Recht' in 1937.* – When Koschaker accepted an invitation to speak at the *Akademie für Deutsches Recht* in December 1937 and decided to deal with the topic of the crisis of Roman law and its teaching, it was the first time a German scholar had openly criticized the Nazi regime and, what is more, during an event organized by the Nazis, as Calasso pointed out⁵. The result of this conference was the famous work published by Koschaker in 1938, *Die Krise des römischen Rechts und die romanistische Rechtswissenschaft*⁶.

⁵ See nt. 3.

⁶ P. KOSCHAKER, *Die Krise des römischen Rechts und die romanistische Rechtswissenschaft*,

This moment represented a turning point, in the words of Calasso, and Koschaker's act was a courageous reaction against the regime, so much so that Plachy did not hesitate to depict his action as almost heroic⁷. Nonetheless, Giaro more recently defined Koschaker as a supporter of the Nazi regime 'malgré soi' (despite himself)⁸, focusing in particular on the fact that there was no attack made either on the regime or on the cultural climate that had led to it in this lecture and the ensuing text, and this was the only reason why Koschaker had not been arrested by the Gestapo⁹. First of all, we must admit that giving a lecture about Roman law in Germany in 1937 could well be a courageous action, considering the contempt of the regime for this subject. It is well known that paragraph 19 of the NSDAP *Parteiprogramm* represented a direct attack on Roman law, depicted as the cause of a materialistic legal order imposed against the will of the German people, and adverse to the real *Deutsches Gemeinrecht*. The text of the paragraph 19 was:

«Wir fordern Ersatz für das der materialistischen Weltordnung dienende römische Recht durch ein deutsches Gemeinrecht»¹⁰.

München-Berlin-Beck 1938. See the penetrating review of this work by A. PLACHY, Rec. di KOSCHAKER, *Die Krise des römischen Rechts und die romanistische Rechtswissenschaft* (1938), in *RSDI*. XII, II, 1939, 388-394.

⁷ A. PLACHY, *Il diritto romano come valore culturale nella storia dell'Europa* cit. 484-485. But see also P. NOAILLES, *La crise du droit romain*, in *Mémorial des études latines offert à J. Marouzeau*, Paris-Belles Lettres 1943, 391.

⁸ T. GIARO, *Paul Koschaker sotto il Nazismo: un fiancheggiatore 'malgré soi'* cit. 159-187.

⁹ *Ibidem*, 166-167.

¹⁰ On the many circumstances, that led to the hatred of the regime for Roman law, and on the contents of paragraph 19 of the Nazis *Parteiprogramm*, see A. MANTELLO, *La giurisprudenza romana fra Nazismo e Fascismo*, in *Quaderni di Storia* XIII, 25, 1987, 30; P. LANDAU, *Römisches Recht und deutsches Gemeinrecht. Zur rechtspolitischen Zielsetzung im nationalsozialistischen Parteiprogramm*, in *Rechtsgeschichte im Nationalsozialismus* cit. 10-24; O. BUCCI, *Germanesimo e romanità*, Napoli-ESI 2004, 87-112; A. SOMMA, *I giuristi e l'Asse culturale Roma-Berlino* cit. 279-310; G. SANTUCCI, *Diritto romano e Nazionalsocialismo: I dati fondamentali*, in *Diritto romano e regimi totalitari nel '900 europeo, Atti seminario internazionale di diritto romano Trento 2006* (a cura di M. Miglietta e G. Santucci), Trento-Università degli Studi di Trento, 2009, 53-82. Landau conveniently stressed that the drafting of paragraph 19 had been deeply influenced by the Socialist party's program, published in the *Münchener Beobachter* in 1919 by the founder of the party, Alfred Brunner, and by Rudolf von Sebottendorf. Among the other reasons which legitimized the attack on Roman law, two were particularly significant: on the one hand, it was considered as a kind of law influenced by the Jewish culture; on the other, it was conceived as the cause of the economic collapse of Germany. The idea of the influence of Judaism on Roman law and of the presence of the oriental jurists from the second half of the 2nd century A.D. onwards was actually widespread in those years, the work by Oswald Spengler being essential in spreading this notion. See O. SPENGLER, *Untergang des Abendlandes: Umriss einer*

On the other hand, it is also true that the Nazi regime had changed its attitude towards Roman law somewhat after the alliance between Germany and Italy. If we consider the long speech given by the German minister of Justice, Hans Frank, at the *Istituto fascista di cultura* in Rome in 1936, we see that the Nazi regime had changed the target of its hatred, which was no longer the so-called Roman law of the “Romans”, but rather the Roman law of the Pandectists. According to Frank, influenced in this respect by the theories of Chamberlain, Leonhard and Wagemann, the Roman law of the first 300 years was still the unadulterated law of a “Nordic population”¹¹. The same

Morphologie der Weltgeschichte, I (*Gestalt und Wirklichkeit*) and II (*Welthistorische Perspektive*), München-Beck 1918¹ and 1922¹. Spengler was openly criticised by E. VOLTERRA, *Antiche ricerche sul latino di Ulpiano*, in *SDHI*, 3, 1937, 158-163; *Id.*, *Diritto romano e diritti orientali*, Bologna-Zanichelli 1937 (reprint 1983), 29-35, 51-81, 241-271; S. RICCOBONO, v. *Jurisprudentia*, in *NDI*, 7, Torino-Utete 1938, 497 (= *NNDI*, 9, Torino-Utete, 1963, 369); *Id.*, *Lineamenti della storia delle fonti e del diritto romano*², Milano-Giuffrè 1949, 95; W. KUNKEL, *Herkunft und soziale Stellung der römischen Juristen*², Graz-Wien-Köln-Böhlau 2001, 251 and fn. 523. Riccobono sarcastically defined the theory of the so-called “Aramaic jurists” as a “fairy tale” («la favola dei giuristi aramei»). On this problem, and on the position of Riccobono with regard to Spengler’s theory, see the recent work by M. VARVARO, *Gli “studia humanitatis” e i “fata iuris Romani” tra fascio e croce uncinata*, in *Index* 42, 2014, 654-656 and then 655, fn. 57, on the attempt of the Germanists to delegitimize the study of Roman law.

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¹¹ See H. FRANK, *Die Zeit des Rechts*, in *DR*, 1936, 1-3. On this point, A. SOMMA, *I giuristi e l’Asse culturale Roma-Berlino* cit. 280-281 and 292-297. In addition to the alliance with Italy, another cause was decisive in bringing this change about: I refer to the so-called *Rassentheorie*. The German *Volk* had to be aware of having its own laws, founded on the will of the people (conceived as a homogeneous population, with regard to race); one of the most important exponents of this trend from a legal point of view, was the Nazi philosopher of law Helmut Nicolai. See H. NICOLAI, *Die Rassengesetzliche Rechtslehre: Grundzüge einer nationalsozialistischen Rechtsphilosophie*, München-Eher 1932. Many scholars, and in particular many legal historians, had already begun years before to deal with the topic and the problem of the law of the Nordic countries and populations, as opposed to and different from the law developed under influences coming from the Middle East. According to these theories, the same Roman law underwent at least two essential phases during the course of time: the most ancient and that at the time of the Republic was still a pure and unadulterated law, whereas it only changed at a later period under the influence of Middle East populations, the Jewish one in particular, and of despotic sovereigns, becoming corrupt and materialistic. These ideas were present in the works of Chamberlain, Leonhard and Wagemann. This kind of conception enabled the Nazis to create a close connection between the racial question and the foundation of a new German legal system. Furthermore, in 1920 the University of Jena founded the new *Institut für Rasse und Recht*. See R. LEONHARD, *Roms Vergangenheit und Deutschlands Rechts, ein Überblick über die Geschichte des römischen Staates in ihrem Zusammenhang mit dem gegenwärtigen Rechtsleben, eine Festschrift*, Leipzig-Veit 1889; H.S. CHAMBERLAIN, *Die Grundlagen des neunzehnten Jahrhunderts*, München-Bruckmann 1899; A. WAGEMANN, *Unser Bodenrecht. Eine kritische Studie*, Jena-Fischer 1912; *Id.*, *Geist des deutschen Rechts*, Jena-Fischer 1913; *Id.*, *Deutsche Rechtsvergangenheit als*

conference, which took place in Vienna in 1938, and whose outcome was published for the *Schriften des NS.-Rechtswahrerbundes in Österreich* under the title *Faschismus und Recht*, represented further proof of what we are claiming; the alliance between Germany and Italy had led to a different German attitude towards Roman law, and Koschaker had the opportunity to deal with this topic in Vienna again without suffering any consequences¹².

In my opinion, we cannot define Koschaker as a supporter of the Nazi regime, even if 'malgré soi', as Giaro wrote, but Giaro was right in stressing that Koschaker's work could not represent such a stern attack on the regime. In fact, in the four chapters of *Die Krise des römischen Rechts und die romanistische Rechtswissenschaft*, Koschaker dealt with the following topics: in the first, he offered a historical overview of Europe in order to delineate the foundation of a common cultural conception of it. The second chapter was dedicated to Roman law in the Middle Ages and the following centuries, leading up to the historical school of Savigny. In the two remaining chapters, Koschaker faced the problem of the decline of Roman law and its teachings, in particular in Germany in the most recent years, and he tried to suggest a solution, summed up by the famous motto "Zurück zu Savigny!" ("Back to Savigny!") and based on the idea of an "Aktualisierung" of the method of the Historical School. I am going to deal with Koschaker's suggestions to restore dignity and importance to Roman law in the pages which follow. What is important to underline now is that while Koschaker found the causes of the decline of Roman law in the circumstances preceding the advent of the Nazi regime, and in particular in the studies of the trends he renamed "neo-humanistic" (*die neuhumanistische Richtung*), the so-called school of interpolationism and the trend of the *antike Rechtsgeschichte*, he did not mention the well-known paragraph 19 of the *Parteiprogramm*. Koschaker was certainly right in stating that the problems of Roman law came from a previous time, even if it is

Wegweiser in eine deutsche Zukunft, Jena-Fischer 1922. To obtain a broader view of this topic, see P. LANDAU, *Römisches Recht und deutsches Gemeinrecht* cit., 17-24 and, more recently, S. FALCONIERI, *La legge della razza. Strategie e luoghi del discorso giuridico fascista*, Bologna-Il Mulino 2011, 19-46 and 135. On the pair "race-nation" and on the cultural prodroms of what happened in Germany during the first four decades of the XXth century, see S. RANDAZZO, *La penna e la spade. Fustel de Coulanges vs. Mommsen, una pagina dimenticata*, in *LR 4*, 2015, 321-341, and 333-341 in particular.

¹² P. KOSCHAKER, *Deutschland, Italien und das römische Recht*, in *Faschismus und Recht*, *Schriften des NS.-Rechtswahrerbundes in Österreich*, Wien-Landesgeschäftsstelle des NS.-Rechtswahrerbundes 1938, 19-22. This short article was based on the text prepared for the conference at the *Akademie für Deutsches Recht* of December 1937.

questionable to impute the fault for this situation only, or at all, to the school of interpolationism and to the *antike Rechtsgeschichte*¹³. It is well-known, in any case, that between the second half of the XIXth century and the first half of the XXth many scholars discussed the condition of Roman law and its teaching, trying to find solutions to the problem and new approaches to studying it. The school, that developed in Leipzig under Ludwig Mitteis and of which Koschaker was part¹⁴, sought to extend the spectrum of the study of Roman Law, directing its attention to other legal experiences of the past, Egypt and the Middle East in particular, in order to avoid the so-called “splendid isolation” that Roman law was going through at the time¹⁵. In this respect, the

¹³ De Martino persuasively criticized some of Koschaker’s stances on this point in F. DE MARTINO, *Diritto e società nell’antica Roma*, Napoli-Editori Riuniti 1979, XIV and XV in particular. Furthermore Giovanni Pugliese, whose work on Koschaker’s *Die Krise des römischen Rechts und die romanistische Rechtswissenschaft* will be analysed *infra* in this article, criticized Koschaker’s stance on *Interpolationenforschung*. See G. PUGLIESE, *Diritto romano e scienza del diritto*, in *AUMA* 15, 1941, 5-48 (now in G. PUGLIESE, *Scritti giuridici scelti*, III, Napoli-Jovene 1985, 159-204, and see especially page 164 on the *Interpolationenforschung*). On the interpolationism in Germany, including recent years, see C. BALDUS, *La critica del testo nella romanistica tedesca a dieci anni dalla morte di Max Kaser*, in *Problemi e prospettive della critica testuale. Atti del Seminario internazionale di diritto romano Trento 2007* (a cura di M. Miglietta e G. Santucci), Trento-Università degli Studi di Trento 2011, 121-138.

¹⁴ See G. PFEIFER, *Keilschriftrechte und historische Rechtsvergleichung – methodengeschichtliche Bemerkungen am Beispiel der Eviktionsgarantie in Bürgschaftsform*, in *Sachsen im Spiegel des Rechts, Ius Commune Propriumque* (hrsg. A. Schmidt-Recla – E. Schumann – F. Theisen), Köln-Weimar-Wien-Böhlau 2001, 11-37, and 12-16 in particular, with further bibliography. Among the other scholars of the school, we can mention Joseph Aloys August Partsch (Breslau, 1882-Genf, 1925), Leopold Wenger (Obervellach, 1874-1953), Ernst Rabel (Wien, 1874-Zürich, 1955) and Rafał Taubenschlag (Przemyśl, 1881-Warszawa, 1958).

¹⁵ The *antike Rechtsgeschichte* founded by Leopold Wenger, which provoked so much criticism at the time, was a reaction against the isolation of the studies of Roman law. The manifesto of the new trend called *antike Rechtsgeschichte* was presented by Wenger in L. WENGER, *Römische und antike Rechtsgeschichte. Akademische Antrittsvorlesung an der Universität Wien gehalten am 26. Oktober 1904*, Graz-Leuschner&Lubensky 1905. Koschaker became more and more skeptical and critical towards the ideas of his colleague and friend Wenger and finally criticized them publicly in 1937 and 1938, but he had actually already felt this many years before, as we see in a letter he wrote to Francis de Zulueta on 23rd February, 1930, found and published by L. ATZERI, *La ‘storia del diritto antico’ e una lettera inedita di Paul Koschaker*, in *Juris Antiqui Historia* 2, 2010, 219-222. The author conveniently underlines how Koschaker had abandoned the comparative method in 1930, but tried to accommodate both the spirit of the Romanist and that of the ancient legal historian; although they were not combined, they could live their own parallel lives. I think, however, it could be instructive to ask why Koschaker, who studied mainly “cuneiform” law in his earliest academic years, then turned wholeheartedly to the study of Roman law at some point; it could be likewise interesting trying to understand

project for the study of the *antike Rechtsgeschichte* presented by Wenger at the University of Vienna in 1904 had a similar aim, despite the severe criticism he received from many scholars, including Koschaker¹⁶. On the other hand, the silence of the latter about paragraph 19 of the Nazi *Parteiprogramm* seems quite meaningful because this text had been criticized by other scholars during the Nazi period. One of the most relevant example is the article by Francesco De Martino¹⁷, who affirmed that the nature of Roman law was not individualistic, thus going openly against the statements of paragraph 19. It is interesting reading what Francesco De Martino wrote almost forty years after

the real feelings he had towards the *antike Rechtsgeschichte*, at least before 1930. We cannot forget that he published his famous work, *Babylonisch-Assyrisches Bürgschaftsrecht*, in 1911, which Partsch defined as a fundamental text of comparative legal history; Kunkel also wrote that it represented a foundation for a new branch of the history of law. In any case, when Salvatore Riccobono in 1928 criticized both Koschaker and Wenger, with regard to the trend of the *antike Rechtsgeschichte* (or, more generally, of a *Universalrechtsgeschichte*), Koschaker responded firmly in a long footnote that appeared in an article published in 1929. He then felt the need to explain his position on such studies, writing a letter on 22nd January, 1930 (a month before that sent to De Zulueta) to Riccobono. See M. VARVARO, *La 'antike Rechtsgeschichte', la 'Interpolationenforschung' e una lettera inedita di Koschaker a Riccobono*, in *AUPA* 54, 2010-2011, 303-315. The article in question is P. KOSCHAKER, *Forschungen und Ergebnisse in den keilschriftlichen Rechtsquellen*, in *ZRG.* 49, 1929, 197 fn. 1, and it represented the reply to the criticism which appeared in S. 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, especially 578-620. The quotations about Koschaker's *Babylonisch-Assyrisches Bürgschaftsrecht* are in J. PARTSCH, *Bespr. zu KOSCHAKER, Babylonisch-Assyrisches Bürgschaftsrecht*, in *Göttingische gelehrte Anzeigen*, Berlin-Vandenhoeck&Ruprecht, 1913, 13-14; W. KUNKEL, *Römisches Recht und antike Rechtsgeschichte*, in *Geist und Gestalt* cit., 249 ff. and 265.

¹⁶ See the previous footnote. It has to be stressed, in any case, that Wenger's approach to the study of the so-called *antike Rechtsgeschichte* was actually very peculiar, at the beginning in particular. According to Pfeifer, the difference between Wenger and Koschaker was that the latter, combining the dogmatic approach and the comparative one, was able to legitimise the study of comparative ancient law. G. PFEIFER, *Keilschriftrechte und historische Rechtsvergleichung: Methodengeschichtliche Bemerkungen am Beispiel der Eviktionsgarantie in Bürgschaftsform* cit. 15-16. On the strong discussion on the *antike Rechtsgeschichte* between Wenger and Mitteis, whose school Wenger was part, see E. HÖBENREICH, *À propos „Antike Rechtsgeschichte“: Einige Bemerkungen zur Polemik zwischen Ludwig Mitteis und Leopold Wenger*, in *ZRG.* 109, 1992, 547-562.

¹⁷ F. DE MARTINO, *Individualismo e diritto romano privato*, in *Annuario Comparato di Studi legislativi* XVI, 1941, now in *Id.*, *Diritto e società nell'antica Roma* cit., 248-311. Max Kaser as well in 1939 affirmed that Roman law had no individualistic nature, describing it as a *Gemeinschaftsordnung*. Nevertheless it has to be underlined that the very idea of Roman law interpreted as a *Gemeinschaftsordnung* (a sort of common social and juridical order) was in this case systematic and organic to the ideology of the Nazi party. See M. KASER, *Römisches Recht als Gemeinschaftsordnung*, Tübingen-Mohr Siebeck 1939.

the first publication of the article quoted above in the Introduction to *Diritto e società nell'antica Roma*¹⁸, a volume in which the article appeared. De Martino wrote that he opted for the defence of Roman law against the attack of the Nazi regime, which saw Roman law as the law of capitalism, as its *Parteiprogramm* declared. Furthermore he stressed the necessity for everyone who understood the danger, against all the risks associated with the supremacy of Germany and the exacerbation of the fascist regime in Italy, to fight by whatever means they had, including at the cultural level¹⁹. Of course, this struggle implied a cultural struggle against the Nazi regime and in defence of the prominence of Roman law and of the European culture more generally²⁰. In this respect, we see a partial similarity between his stance and that of Koschaker²¹. In De Martino's piece, in any case, the reaction against the attack by the Nazi Regime is clear inasmuch as he himself wrote in 1979 that his analysis was in some way limited by this approach and not impartial at all – which explains why, he continues, he would not have written a text like that any more at the time, after almost forty years. Furthermore, defending Roman Law for the scholar also meant protecting those civil principles inherited from it, which were necessary to safeguard the free legal personality and, more generally, the right of freedom against the absolute power of the State (“il diritto della libertà contro il potere statale illimitato, cioè l'assolutismo”)²². Compared to this stance, Koschaker's position seems sometimes either to remain at a shallower level, or to have a different objective. Not disregarding the worth of his effort in defending Roman law and the European legal and cultural tradition²³, Koschaker wanted first of all to combat the idea of the nationalization of German Law, based in part on the “common” German law that survived the reception of Roman Law in Germany and the *BGB*²⁴. It is well-

¹⁸ F. DE MARTINO, *Diritto e società nell'antica Roma* cit. XVII-XIX.

¹⁹ *Ibidem*, XVIII and fn. 10. De Martino seems very skeptical about Koschaker's assertion in *Europa und das römische Recht* that the formulation of paragraph 19 was not clear, and I think that the Neapolitan scholar is completely right. To quote De Martino *verbatim*: «lo scelsi la difesa ad oltranza del diritto romano contro gli attacchi del nazionalsocialismo, che aveva scritto nel suo programma la lotta contro il diritto romano in quanto diritto del capitalismo».

²⁰ The author was, in any case, firmly convinced that Roman law did not have an individualistic nature.

²¹ But with regard to Koschaker, it is proper to specify that this kind of cultural struggle emerges more clearly in his *Europa und das römische Recht* than in *Die Krise des römischen Rechts und die romanistische Rechtswissenschaft*.

²² F. DE MARTINO, *Diritto e società nell'antica Roma* cit. XVIII-XIX.

²³ On which more broadly *infra*.

²⁴ See M. BRETONE, *Come l'anatra*, in *Diritto e tempo nella tradizione europea*, Bari-Roma-

known that in 1937 Hitler had decided to eliminate this code as soon as possible and to replace it with a new *Volksgesetzbuch*²⁵. The idea of a *Deutsches Gemeinrecht*, and thus of the “nationalization” of German law, had already been firmly propounded by the Germanists. Koschaker’s position was in any case only indirectly anti-Nazi, because he did not attack the regime itself, but rather the whole cultural approach to the topics of German law and Roman law, an approach already well developed during the XIXth Century, as we saw in the foregoing pages.

The aim of this long introduction on Koschaker’s lecture at the *Akademie für Deutsches Recht* consists, therefore, in trying to develop a clearer idea of Koschaker’s position under the regime, so as to avoid biased judgments and opinions about him in the tragic years of the Second World War. Some other circumstances that pertained at the time, in any case, now deserve to be analysed.

3. *Between lights and shadows: the years in Berlin and the passage to Tübingen.* – In order to try to describe Koschaker’s behaviour and approach during the Nazi regime, it could be useful to consider what happened in the years between 1936 and 1947, the date of the publication of his famous *Europa und das Römische Recht*²⁶. Nevertheless, I would like primarily to clarify a question. Koschaker grew up considering himself as the product of the “germanization” of millions of Slavs by the superior German culture and, in this respect, he was very conservative²⁷. At the same time, it has been stressed

Laterza 2004, 136, and T. GIARO, *Paul Koschaker sotto il Nazismo: un fiancheggiatore ‘malgré soi’* cit. 169. The same Salvatore Riccobono took a firm position against the trend of the so-called “Germanists”, as we read in S. RANDAZZO, *Roman legal tradition and American Law. The Riccobono Seminar of Roman Law in Washington*, in *Roman legal tradition* 1, 2002, 123-144, and in particular 125 (also published in Id., *Tradizione romanistica e diritto statunitense: il Riccobono Seminar of Roman Law a Washington*, in *BIDR.* 100, 1997, 684-698).

²⁵ See L. GAROFALO, *Suggestioni per il giurista dai Quaderni e diari di Hannah Arendt*, in *Studi in onore di Remo Martini*, II, Milano-Giuffrè 2009, 177-213 (= Id., *Giurisprudenza romana e diritto privato europeo*, Padova-CEDAM 2008, 117-155). Furthermore, on the topic of a new *Volksgesetzbuch*, see H. HATTENAUER, *Das NS-Volksgesetzbuch*, in *Festschrift für R. Gmür zum 70. Geburtstag* (hrsg. A. Buschmann - F.-L. Knemeyer - G. Otte - W. Schubert), Bielefeld- Giesecking 1983, 255-279; G. BRÜGGEMEIER, *Oberstes Gesetz ist das Wohl des deutschen Volkes: Das Projekt des «Volksgesetzbuches»*, in *JZ.* 1990, 24-28; A. SOMMA, *I giuristi e l’Asse culturale Roma-Berlino* cit. 225-262 (with other bibliographical references).

²⁶ P. KOSCHAKER, *Europa und das römische Recht*¹, München-Berlin-Biederstein 1947 (last edition: P. KOSCHAKER, *Europa und das römische Recht*⁴, München-Berlin-Beck 1966).

²⁷ «(...) die Germanisierung von Millionen von Slawen durch das alte Österreich auf völlig

that he had a strong affinity with Ludwig Mitteis, who was his professor during his years in Leipzig²⁸ and who had very strong national-conservative leanings²⁹. Nevertheless, all these elements could not be considered as indirect evidence that Koschaker was a supporter of the regime “despite himself” («*malgré soi*»)³⁰. I think that the cultural climate in which Koschaker grew up in could quite easily explain such ideological views and feelings³¹. Some other events, indeed, could be considered more significant. He did not hesitate, for example, to accept the call to the *Friedrich-Wilhelms-Universität* Berlin in 1936 for the post that until a few months before had been Rabel’s, ousted by the regime because he was Jewish³². It was quite clear that the influence of the Nazis at the university in the capital in those years was increasing. In this case, the account given by Antonio Guarino, who took a course given by Koschaker in Berlin in 1939 could prove interesting. The Italian scholar highlighted Koschaker’s displeasure with the Nazi ostracism of Roman law, given his personal aversion to any mingling with politics; nonetheless, as Guarino wrote, Koschaker did adapt to the politicized path of the *Akademie für deutsches*

friedlichem Wege einfach durch die Anziehungskraft der damals höheren deutschen Kultur». P. KOSCHAKER, *Selbstdarstellung* cit. 105.

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²⁸ Koschaker was in Leipzig first between 1903 and 1905 and studied with Ludwig Mitteis and the professor for *Zivilrecht*, Emil Strohal. See M. MÜLLER, *Paul Koschaker (1879-1951). Zum 100. Geburtstag des Begründers der Keilschriftrechtsgeschichte* cit. 272 and G. OBERKOFER, *Die Vertreter des Römischen Rechts mit deutscher Unterrichtssprache an der Karls-Universität in Prag* cit. 48-49. Koschaker wrote of 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». P. KOSCHAKER, *Selbstdarstellung* cit. 115-116.

²⁹ T. GIARO, *Paul Koschaker sotto il Nazismo: un fiancheggiatore ‘malgré soi’* cit. 162-163.

³⁰ *Ibidem*. Not only Giaro, but Alessandro Somma as well defines Koschaker as a supporter of the regime. See A. SOMMA, *I giuristi e l’Asse culturale Roma-Berlino: Economia e politica nel diritto fascista e nazionalsocialista* cit. 282-283. An idea that the author proposes again in A. SOMMA, *L’uso del diritto romano e della romanistica tra Fascismo e Antifascismo*, in *Diritto romano e regimi totalitari nel ‘900 europeo* cit. 113-114.

³¹ According to A. MANTELLO, *La giurisprudenza romana fra Nazismo e Fascismo* cit. 47-49, the same Fritz Schulz, who was clearly against the regime, remained nonetheless a very conservative and nationalist man, not so different from Koschaker in this respect (and we can probably affirm the same with regard to Otto Lenel and Fritz Pringsheim). On Fritz Schulz and his experience under the Nazi regime, see W. ERNST, *Fritz Schulz (1879-1957)*, in *Jurists uprooted. German-Speaking Emigré Lawyers in Twentieth Century Britain* (eds. J. Beatson – R. Zimmermann), New York-Oxford-OUP 2004, 106-203.

³² At the University of Berlin, Koschaker held the chair of *Römisches Recht*, but he also created a new *Seminar für Rechtsgeschichte des alten Orients*. See M. MÜLLER, *Paul Koschaker (1879-1951). Zum 100. Geburtstag des Begründers der Keilschriftrechtsgeschichte* cit. 271-284; G. NEUMANN, *Paul Koschaker in Tübingen (1941-1946)* cit. 24.

*Recht*³³. This was the same Koschaker who criticized the “*Arisierung*” of the University of Berlin from 1936 to 1941³⁴. At the same time, he was not exactly ousted from his office by the Nazi Regime, as Giaro reports³⁵, but began to feel uncomfortable in Berlin because of the “intensive Nazifizierung”³⁶ which took place at the University³⁷. He thus decided to accept the call to Tübingen in 1941.

Another very significant event happened in 1936, because he was appointed co-editor of the *Savigny-Zeitschrift*. This famous journal had been strongly “aryanized” – the so-called *Arisierung* – from 1935 onwards, following Levy and Rabel’s expulsion in the interim, and some of the other co-editors, like Hans Kreller (another pupil of Ludwig Mitteis), were firm supporters of the Nazi regime³⁸. Koschaker initially refused the role taken instead by Leopold Wenger, but later, when the latter left that place, Koschaker definitely accepted becoming co-editor; however, he marked in the course of time several disagreements with Kreller³⁹. Just a year later, in 1937, Koschaker accepted an

³³ A. GUARINO, *Cinquant’anni dalla «Krise»*, in *Labeo* 34, 1988, 43-44.

³⁴ P. KOSCHAKER, *Selbstdarstellung* cit. 117. On this topic, see also J. OELSNER, *Der Altorientalist Benno Landsberger (1890-1968): Wissenschaftstransfer Leipzig – Chicago via Ankara*, in *Bausteine einer jüdischen Geschichte der Universität Leipzig* (ed. S. Wendehorst), Leipzig, Leipziger Universitätsverlag, 2006, 269-285 and G. NEUMANN, *Paul Koschaker in Tübingen (1941-1946)* cit. 24.

³⁵ T. GIARO, *Aktualisierung Europas* cit. 82-83.

³⁶ P. KOSCHAKER, *Selbstdarstellung* cit. 118.

³⁷ There is an interesting letter written by Hoppe, the *Rektor* of the University of Berlin of the time, to the *Reichserziehungsministerium*, to which J. RENGER, *Altorientalistik, in Kulturwissenschaften und Nationalsozialismus* (eds. J. Elvert – J. Nielsen-Sikora), Stuttgart-Franz Steiner, 2008, 469-502 refers (but see also G. NEUMANN, *Paul Koschaker in Tübingen (1941-1946)* cit. 24): «Dazu schreibt dann der Rektor Hoppe an das Reichserziehungsministerium, wenn Koschaker nicht in der Lage sei, sich in den Betrieb einer Großstadtuniversität einzufügen, so solle man erwägen, ob er nicht an einer ruhigeren Universität besser am Platze sei» (see *Personalakte Koschaker* from the *Archiv der Humboldt-Universität zu Berlin*, Band I, Blatt 37, 10th of October, 1939).

³⁸ From number 55 of 1935 up to number 64 of 1944 we no longer find a Jewish scholar as co-editor of the *Romanistische Abteilung* of the *Zeitschrift der Savigny-Stiftung* (the journal was not published in 1945 and 1946). In 1935 indeed the co-editors were: H. Kreller, L. Wenger, E. Heymann, U. Stutz, H.E. Feine; in 1936 Koschaker replaced Wenger. On the events regarding the so-called *Arisierung* of the *Savigny-Zeitschrift (Romanistische Abteilung)* see TH. FINKENAUER – A. HERMANN, *Die Romanistische Abteilung der Savigny-Zeitschrift im Nationalsozialismus*, in print in *ZRG* 134, 2017 (I’d like to express my gratitude to the authors of the article, who kindly allowed me to receive a copy of the text beforehand).

³⁹ Koschaker will be the successor of Kreller at the University of Tübingen just five years later.

invitation to collaborate with the *Preußische Akademie der Wissenschaften*, an institution that had inevitably been influenced by Nazism at the time. Finally, in December 1937, the famous conference on the crisis of Roman law, whose outcome was *Die Krise des römischen Rechts und die romanistische Rechtswissenschaft*⁴⁰, took place at the *Akademie für Deutsches Recht*, created in 1933 by the Nazi regime, and whose president was Hans Frank⁴¹.

As we already saw, Koschaker eventually decided to move from Berlin to Tübingen in 1941⁴². In his autobiography, he wrote that he loved two things above all about the time he spent in Berlin: the marvellous library and the opportunity to be a member of the *Preußische Akademie der Rechtswissenschaften*⁴³. Nonetheless, he accepted the call to Tübingen because he never felt completely comfortable in the capital of the *Reich*⁴⁴. We can deduce some more information from a long letter that Koschaker wrote to his pupil and friend, Guido Kisch, in 1947⁴⁵, in which we read that after 1936 he ceased to appreciate the atmosphere that was growing at the university, and experienced some disagreements with other professors who were closer to the regime (whom he called “Parteibonzen”). Nevertheless, the decision to move to the small southern German city of Tübingen, although it seemed to be a

⁴⁰ See *supra*, nt. 5 and 6.

⁴¹ See *supra*, nt. 2.

⁴² Neumann, basing his reasoning on the documents about Koschaker found at the archive of the University of Tübingen (the same documents that I myself have had the opportunity to check) and on what Below wrote, explains that Koschaker’s decision to choose this city remains unclear. Nonetheless, we can get some information about Koschaker’s decision to leave Berlin from a letter he wrote to the president of the *Preußische Akademie der Wissenschaften* on the 20th of September, 1940: «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 this letter, see M. MÜLLER, *Paul Koschaker (1879-1951). Zum 100. Geburtstag des Begründers der Keilschriftrechtsgeschichte* cit. 282 and fn. 50. See also G. NEUMANN, *Paul Koschaker in Tübingen (1941-1946)* cit. 24, and nt. 14; K.-H. BELOW, *Paul Koschaker (1879-1951). In Memoriam*, in *ZDMG*, 104, 1954, 4. Below decided to have his *Habilitation* with Koschaker, as we see in the letter that Hans Erich Feine sent to Koschaker on 6th February, 1946 (UAT, Personalkten Juristische Fakultät, 601/42).

⁴³ P. KOSCHAKER, *Selbstdarstellung* cit. 117.

⁴⁴ *Ibidem*, 118: «Persönlich habe ich mich in Berlin nicht wohl gefühlt (...) Dazu kam die an der Universität der Reichshauptstadt besonders intensive Nazifizierung».

⁴⁵ G. KISCH (hrsg.), *Paul Koschaker. Gelehrter, Mensch, Freund: Briefe aus den Jahren 1940 bis 1951* cit. 22-23. The letter was written on 27th November, 1947, Koschaker having already become professor emeritus.

good idea at the outset, quickly revealed itself as not such a great choice. In Koschaker's own words:

Ich war zunächst sehr gerne in dieser schönen Stadt, und doch muß ich heute zurückblickend sagen, daß es ein Fehler war. Mann 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. Das schlimmste kam aber erst 1945/1946⁴⁶.

He suffered indeed many problems, in particular in coming back to Tübingen in 1945 after the French occupation⁴⁷, but in the same year he was appointed as the new dean of the Faculty of Law and in 1946 he received the "Emeritierung" and in any case the relationship between himself and the members of the University continued to be quite good⁴⁸.

As Neumann correctly pointed out⁴⁹, he wrote quite a few works during the years from 1941 to 1946. On the one hand, he clearly wanted to study the cuneiform law (*Keilschriftrecht*) in depth again, since he became the director of the "Orientalisches Seminar" and asked for permission to borrow books from the library of the "Orientalisches Institut" of Leipzig⁵⁰. In addition, Karl-Heinz Below was appointed as his assistant (he had already been Koschaker's assistant in Berlin). On the other hand, the years in Tübingen coincided in great part with the time between the publication of *Die Krise des römischen Rechts* and *Europa und das römische Recht*, whose first edition appeared in 1947. It is then reasonable to affirm that Koschaker probably undertook deep intellectual reflection on Roman law and its role, both in Germany and in more general terms as well, during these years. A possible clue to this appears in his "*Die Reform des romanistischen Rechtsstudiums in Deutschland: Ein Denkschrift*" of 1942⁵¹, which was sent to the *Rektor* of the

⁴⁶ *Ibidem*.

⁴⁷ As we see in G. NEUMANN, *Paul Koschaker in Tübingen (1941-1946)* cit. 29 and fn. 46, where the author furthermore refers to a letter of 1st August, 1945 preserved at the *Universitätsarchiv Tübingen* (UAT, 601/42) and dealing with the same problem. We find some other information about the situation in Tübingen and the occupation of Koschaker's own house by the French army in a letter he sent to Salvatore Riccobono on 6th October, 1946.

⁴⁸ P. KOSCHAKER, *Selbstdarstellung* cit. 118; G. NEUMANN, *Paul Koschaker in Tübingen (1941-1946)* cit. 29.

⁴⁹ *Ibidem*, 26-28.

⁵⁰ He got the authorization and the financial means to do it, as *Berufungsvereinbarung* WP No. 2817(a) (UAT 126/346a) of 4th September, 1941 shows.

⁵¹ UAT, 601/42. This document, still unpublished, has been the subject of a lecture I held at the *Institut für geschichtliche Rechtswissenschaft* at the University of Heidelberg for the

University of Tübingen⁵². Some of the ideas already expressed by Koschaker in *Die Krise* were resumed in this piece, particular attention being paid to the aim of securing the role and the teaching of Roman law in German universities. At the same time, the author dealt with the need to found a new European legal science, in which process he felt Germany would have had to play an essential role. Furthermore, the publication of *Die Krise* fostered a heated debate among the Romanists during those years, in particular the Germans and the Italians, and Koschaker felt the need to defend his point of view, as well as to rethink some of his stances at some point. This condition of things emerges from a letter he wrote to his greatly admired colleague and friend Salvatore Riccobono, the Italian holding the chair of Roman law in Palermo⁵³. Considering these elements, I think it is now appropriate to make some further observations about *Die Krise des römischen Rechts und die romanistische Rechtswissenschaft*.

4.1. *Again on 'Die Krise des römischen Rechts und die romanistische Rechtswissenschaft': a question of content and methodology...* – As already outlined in the previous pages, there are, therefore, two essential questions related to this very significant work. The first concerns Koschaker's attempt to restore dignity and prominence to Roman law. His suggestion was essentially based on the idea of the *Aktualisierung* of the teaching of Roman law, which was to be derived from an updated review of the methods of the historical school of Savigny. The idea was summed up by the well-known slogan "*Zurück zu Savigny!*". However, investigating the meaning of this idea more in depth shows that only some of Savigny's school's historical approach remains in Koschaker's concept, in which Roman law should fundamentally be used for practical purposes. What is more, the approach of Savigny and his school was in any case justified as responding to the contrary codification trend then in vogue in Germany. It has been said that Koschaker thus created a sort of "second Pandectistic"⁵⁴, combining his slogan about Savigny and the *Leitmotiv*

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Heidelberger Rechtshistorische Gesellschaft on May, 10th. It's my aim to deal soon and in-depth with this document in another work.

⁵² See the letter from the director of the *Rechtswissenschaftliche Abteilung* Merk to the dean of the Faculty, on 21st May, 1942 (UAT, 126/346a).

⁵³ Letter sent on 31st December, 1939, to Salvatore Riccobono. I will deal with the text in more depth *infra*, on pages 28-29.

⁵⁴ I find Somma's suggestion, according to whom «Koschaker tentò un recupero dei riferimenti al diritto romano come strumento attraverso cui avvalorare le tendenze espansionistiche tedesche», open to question. See A. SOMMA, *L'uso del diritto romano e della*

of the shared European (German?) legal culture, despite the role of Roman law as the foundation of a European common tradition being only a “fairy tale” created by Koschaker himself, according to Giaro⁵⁵.

Although Koschaker’s approach was in some way positivistic and in this respect he actually proposed a sort of “second Pandectistic”, this criticism does not grasp the complexity of the phenomenon. It would be easy, again, to say that Guarino was right in writing in 1961 in the *Redazionale* of *Labeo* that Koschaker’s idea was only a “slogan” and a naive proposal (“ingenua proposita”)⁵⁶. The author’s criticism was strict, despite containing some truth, but he did not point out that ideas similar to that suggested by Koschaker were widespread among the Romanists. We should also stress one point in particular, in my opinion. As a matter of fact, *Die Krise des römischen Rechts* did not represent Roman law as the bearer of intrinsic values. Despite Koschaker underlining one of its main characteristics, consisting in being a *Juristenrecht* during the classical period⁵⁷, the methodology used by Roman jurisprudence to

romanistica tra Fascismo e Antifascismo cit. 113. We find a similar point of view in T. GIARO, *Aktualisierung Europas* cit. 37 ff.; *Id.*, *Der Troubadour des Abendlandes. Paul Koschakers geistige Radiographie* cit. 31-76. It is true, that Koschaker tried to tie the destiny of Roman law to the destiny and the role of Germany in Europe, but I think that he 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 be shared in this respect.

⁵⁵ More precisely, Giaro writes that it was «una favola di koschakeriana memoria». See T. GIARO, “*Comparemus!*” *Romanistica come fattore d’unificazione dei diritti europei*, in *Rivista critica del diritto privato* XIX, n. 4, 2001, 541 and 544-545. We should in any case consider what Giaro writes in his article about the approach of some Romanists who take into account only the study of Roman private law rather than Roman public law as a foundation of European legal culture. Nonetheless, the author seems to be right in stressing Koschaker’s tendency to a new form of Pandectistic, but the point of view he opts for more generally is incomplete. Moreover, defining the idea of Roman law as a unifying foundation of European legal culture as a “favola di koschakeriana memoria” sounds like provocation, unless Giaro does not want to neglect the historical evolution of law in Europe. Another point stressed by Giaro is correct instead: many Roman law and history of law scholars depict the history of private law as a question regarding only 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 F. CALASSO, *L’Europa e il diritto romano. Alla memoria di Paul Koschaker* cit. 111.

⁵⁶ A. GUARINO, *Redazionale*, in *Labeo* 7 1961, 288-290 (now in A. GUARINO, *Berlino 1939*, in *Pagine di Diritto romano*, II, Napoli-Jovene 1993, 276-291).

⁵⁷ Koschaker stresses the importance of the classical Roman law, considering the period which supervened as a time of decadence, in P. KOSCHAKER, *L’alienazione della cosa legata*, in *Conferenze romanistiche dell’Università di Pavia (1939)*, Milano-Giuffrè 1940, 94 and 97.

elaborate the *regula iuris* should have represented a useful model on which to build a new contemporaneous legal system and to determine new rules, but nothing more⁵⁸. In any case, another feature of Roman law as a *Juristenrecht* is that the work of jurisprudence is conceived as independent of political power⁵⁹. From this point of view, the procedure adopted by the Roman jurists becomes both the instrument and the reason which legitimize its autonomy. In my perspective, however, the *Juristenrecht* before, and the *Professorenrecht* later appear to be more than independent, according to Koschaker's description: apparently apolitical to such an extent that he affirms that this kind of *Recht* is inclined to get close to the centres of political power. It stands to reason that this conception runs the risk of being contradictory, or, worse, of depicting the *Juristenrecht* as deprived of its autonomy, its primary feature. This outcome may result because Koschaker's conception of Roman law and its reception is not at all value-based in the end. Roman law and the historical development that followed then legitimize themselves, and could therefore be "re-used" in the course of time – not thanks to the values and principles they represented, but for the utility they would have nowadays; or, otherwise, because they are associated with some external circumstances: for example, Roman law having been one of the foundations of the *Kaiserrecht* under the Holy Roman Empire, or having been the subject of the studies of Savigny and his school⁶⁰. It is, in any case, clear to Koschaker that the reception of Roman law was fostered by its being, first of all, a law mainly created by jurisprudence and, for the same reasons, he could represent the foundation of a new

⁵⁸ It's interesting to read what Koschaker wrote in P. KOSCHAKER, *Europa und das römische Recht*⁴ cit. 290-311 and 310, in particular: the scholar states in these pages his disagreement with Wieacker's idea of Roman law as a sublime art of law and a unique legal experience, to be studied for its intrinsic qualities.

⁵⁹ This aspect will be underlined more clearly in P. KOSCHAKER, *Europa und das römische Recht*⁴ cit. 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 of law. It was no longer a true *Juristenrecht*, but had become a *Professorenrecht*, the last bastion defending Roman law. Álvaro d'Ors agrees with Koschaker's stance on the *Juristenrecht*. Furthermore, he considers the latter's position as quite similar to that expressed in C. SCHMITT, *Die Lage der europäischen Rechtswissenschaft*, Tübingen-Internationaler Universitäts-Verlag 1950. See Á. D'ORS, *Jus Europaeum?* in F. CALASSO (ed.), *L'Europa e il Diritto romano: Studi in memoria di Paolo Koschaker* cit. I, 452. An analysis of the limits of Koschaker's conception of *Juristenrecht* appears in F. CALASSO, *L'Europa e il diritto romano: Alla memoria di Paul Koschaker* cit. 108-109.

⁶⁰ The contradiction with the idea of a *Juristenrecht*, independent from the political power, is particularly jarring here.

European legal science, from the XIth Century onwards⁶¹. But what should be underlined, which Koschaker did not, is that the methodology and argumentation that Roman jurists adopted to create the *regulae iuris* was so operational and refined that it could survive the development of the single *regulae* so as to contribute to creating a complete and complex legal system, and to then represent the archetype of legal argumentation in the following centuries⁶². What we finally receive from Koschaker's depiction of Roman law and its reception in *Die Krise des römischen Rechts und die romanistische Rechtswissenschaft* is a loss of the qualities and values that distinguished it in favor of the role it played as the cultural basis of the European legal unit. Once again, Koschaker is always and only thinking about Roman private law. The historical narration, apolitical, and unhooked from any value-based foothold, describes a history of Europe that leads us in a *continuum* from the Holy Roman Empire to the present without a real break⁶³. 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 unite its lucky destiny to external causes, the question of why Roman law could continue to maintain such an important role at different times and in different cultural and political situations remains.

A few other remarks can be made about the historical narrative in *Die Krise des römischen Rechts und die romanistische Rechtswissenschaft*. First of all, since the history of Europe tends to coincide with the history of Germany, the events and the destiny of that and the other States that felt its influence are understood as those of the whole of Europe⁶⁴. In this respect, Koschaker

⁶¹ We are always following Koschaker's reconstruction, and therefore talking about Roman private law.

⁶² On the topic of the creation of the *regula iuris* and of the legal methodology adopted by Roman jurisprudence, see M. MIGLIETTA, *Giurisprudenza romana tardorepubblicana e formazione della «regula iuris»*, in *SCDR*. XXV, 2012, 187-243.

⁶³ This idea of continuity will then be very obvious in the historical depiction of Europe offered in P. KOSCHAKER, *Europa und das römische Recht* too. A very strict criticism of this reconstruction and the myth of the "continuity" in T. GIARO, «*Comparemus!*» *Romanistica come fattore d'unificazione dei diritti europei* cit. 541 and 544.

⁶⁴ In this respect, Giaro seems to this argue correctly; see T. GIARO, «*Comparemus!*» *Romanistica come fattore d'unificazione dei diritti europei* cit. 540 ff. It has to be underlined, in any case, that Koschaker's point of view changed in the last years of his life at least to some degree, in particular thanks to his experience as a professor in Ankara from 1948 to 1950. See P. KOSCHAKER, *Selbstdarstellung* cit. 118, on his time in Ankara, and 122, on his conception of Roman law as universal; furthermore, this partially new point of view emerges from two letters he sent to Salvatore Riccobono: the first on 11th April, 1949, from Ankara; the second on 31st

proposes a German-centric idea of Europe and of the *ius commune europaeum*, without considering the differing experiences across the continent and neglecting the fact that the countries of Eastern Europe are not considered in this way, or are considered only as a “product” of the Western European tradition⁶⁵. This remark concerns Koschaker’s historical approach and the fact that he does not always seem to be rigorous in his work⁶⁶. To clarify the issue, some passages in Koschaker’s reconstruction could support what we are affirming. First of all, he reserves a strict and not at all objective judgement for the school he renamed *neu-humanistische Richtung*, and in particular to the so-called *Interpolationenforschung*⁶⁷. It is probably overstated to ascribe the reasons for the crisis of Roman law almost entirely to the studies by scholars belonging to this school. There are at any rate some echoes of the ideas of Salvatore Riccobono, the Italian scholar, who influenced Koschaker’s views on the *Interpolationenforschung* considerably. It has been claimed that Riccobono believed in the virtue of Roman law *sub specie aeternitatis*⁶⁸; for these reasons, he could accept compromises with the Fascist regime if this could lead to the restoration of the dignity of Roman law⁶⁹. As we will see, there are some

March, 1951, from Walchensee, shortly before he died. On the universal value of Roman law, see also the letter that Salvatore Riccobono sent to Ernst Levy when the latter was appointed as *magister* of the *Riccobono Seminar* in Washington D.C. for the academic year 1944-1945. These appeared in Italian in *BIDR.* 49-50, 1947, 1-5. On this letter, see S. RANDAZZO, *Roman legal tradition and American Law. The Riccobono Seminar of Roman Law in Washington* cit. 123-143, and 140-143, in particular.

⁶⁵ Very critical on this point, but with convincing reasons, Á. D’ORS, *Jus Europaeum?* cit. 472.

⁶⁶ This kind of problem occurs not only in Koschaker’s *Die Krise*, but in *Europa und das römische Recht* too, and it has been underlined in the course of time by the scholarship. Recently, a remark in this sense has been made by C. GIACHI – V. MAROTTA, *Diritto e giurisprudenza in Roma antica*, Roma-Carocci 2012. We read on pages 22-23: «Recuperare al diritto romano piena cittadinanza tra le scienze giuridiche era l’obiettivo proclamato da Paul Koschaker, in un libro ineguagliato e, forse, ineguagliabile. (...) Nonostante la sua professione di fede nella storia e la straordinaria qualità dei suoi scritti, la visione del diritto e della scienza giuridica di Paul Koschaker è, di fatto, del tutto interna al positivismo e ai suoi miti» and again the authors talk of an «implicita, ma sostanziale, identificazione della storia con la mera erudizione. Paul Koschaker si muove, come quasi tutti i protagonisti della sua generazione, all’interno di una visione della scienza giuridica che poco o nulla può concedere – anche a dispetto dei propri desideri e delle proprie esigenze culturali – al diritto romano e alla sua storia». See also F. CALASSO, *L’Europa e il diritto romano. Alla memoria di Paul Koschaker* cit., 108-110.

⁶⁷ Koschaker, like many other scholars at the time, used to talk of a *Jagd nach den Interpolationen*, to which he was genuinely hostile.

⁶⁸ A. MANTELLO, *La giurisprudenza romana fra Nazismo e Fascismo* cit. 53. On Riccobono, see M. VARVARO, v. *Riccobono, Salvatore sr.* cit. 1685-1688.

⁶⁹ A. MANTELLO, *La giurisprudenza romana fra Nazismo e Fascismo* cit. 53, writes: «il “suo”

similarities between the Italian scholar and Koschaker in this respect. Moreover, Riccobono gave an inaugural lecture entitled *De fatis iuris romani* at the lecture hall (*die Alte Aula*)⁷⁰ of the University of Berlin on 7th April, 1942⁷¹ in which he insisted on trying to distinguish Roman law from the “tradizione romanistica” (the Roman law tradition), as if to say the Roman law scholarship developed over the centuries⁷². In particular, he thought that the origin of the crisis of Roman law came from the studies of the humanists⁷³. His argument, however, developed up until the trend of the *Interpolationenforschung*, which he criticized, albeit not to the same extent as Koschaker⁷⁴.

diritto romano non risulta modellato ad uso e consumo del fascismo, ma d'esso fascismo pare servirsi in quanto torni utile ad una «superiore» e, tutto sommato, «mistica» idea di scienza romanistica». In any case, as the author underlines, Riccobono's position on Fascism is not completely clear and easy to explain. Furthermore, on Riccobono's relations with the regime, see M. VARVARO, *Gli «studia humanitatis» e i «fata iuris Romani» tra fascio e croce uncinata* cit. 659 ff. Varvaro underlines on the one hand that some parts of the text of the lecture “*De fatis iuris romani*” cohered with the politics of Fascism (for example, Riccobono exalted the reform of the codes, describing Mussolini as the author of a new *Corpus Iuris*); on the other hand, the fact that Riccobono had been a member of the *Reale Accademia d'Italia* since 1932 and that he had held important public offices during the regime. We can moreover read Mantello's suggestions in connection with what Álvaro d'Ors wrote about Koschaker and Schmitt's idea of a *Juristenrecht*; for the Spanish scholar, the idea of exalting a kind of law created by jurisprudence and not by legislative power was, of course, a reaction against the absolutism of the state. This didn't mean that it also represented a genuinely liberal option: «Pero sería un grave error el confundir este anti-absolutismo con el liberalismo». See Á. D'ORS, *Jus Europaeum?* cit. 456.

⁷⁰ On the problem of the place where the inauguration of the new Italian Institute *Studia Humanitatis* actually took place, see M. VARVARO, *Gli «studia humanitatis» e i «fata iuris Romani» tra fascio e croce uncinata* cit. 651-653. Riccobono's lecture “*De fatis iuris romani*” was the opening one.

⁷¹ Then published in *BIDR.* 55-56, 1951, 353 ff. There was a previous publication, with a parallel translation of the text in German in S. RICCOBONO, *Vom Schicksal des Römischen Rechtes*, in *Studia Humanitatis. Festschrift zur Eröffnung des Institutes*, Berlin-Küpper 1942, 33-115. Leopold Wenger wrote an important review of Riccobono's work: L. WENGER, *Studia Humanitatis. Festschrift zur Eröffnung des Institutes. [Veröffentl. d. Inst. Studia Humanitatis.]*, Berlin, Helmut Küpper, 1942, in *Deutsche Literaturzeitung*, Jg. 46 (1943) Heft 23/24, 409-414.

⁷² This position doesn't seem far from what the *Reichskommissar für die Gleichschaltung der Justiz*, Hans Frank, said at the conference held in Rome in 1936 in explaining that the target of the criticism of the 19th paragraph of the *Parteiprogramm* of the *NSDAP* was not the original Roman law of the Romans, but rather the Roman law of the Pandectists.

⁷³ But on this point with regard to the Spanish tradition, see Á. D'ORS, *Jus Europaeum?* cit. 451, who writes: «Por otro lado, es curioso observar que las figuras más destacadas del romanismo español no fueron legistas, sino humanistas».

⁷⁴ Koschaker considered Riccobono as a model, for the way he dealt with Roman law sources and with the problem of interpolations in these sources. It has to be underlined in any case

Furthermore, there is a second remark which we can make on Koschaker's own historical reconstruction. As we glean from Calasso⁷⁵, Koschaker's idea about the Middle-Ages is not clear and not satisfying, insofar as his approach to this era and its legal developments often seems to remain superficial. The perception we obtain reading him is one of a conception of law at the time as a by-product of ancient Roman law, which only later reappears in all its lustre in the XIXth century, thanks to Savigny and his school. Despite trying to show his faith in history and its importance, Koschaker does not really seem coherent in his work. *Die Krise des römischen Rechts und die romanistische Rechtswissenschaft* was praised in Italy and Germany, but it was not possible in general for many scholars to ignore Koschaker's approach to Roman history and the history of law. For these reasons, some reviews of the work and articles dealing with this work, appeared in a few years⁷⁶, and, although his effort to restore dignity to Roman law was greatly appreciated, some critics were provoked by this piece of writing. Since two of these seem to me particularly significant, it is now appropriate to consider them.

The first review, by Giuseppe Grosso, appearing just a year after the

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that Riccobono, during the first years of his career, was a follower of the *Interpolationenforschung*, having studied in Germany with some of the most important proponents – among them, Gradenwitz – of this trend of studies. Both scholars, in any case, seemed convinced of the importance of the defence of the so-called *mos italicus*. See A. MANTELLO, *La giurisprudenza romana fra Nazismo e Fascismo* cit. 52 and ff., and Á. D'ORS, *Jus Europaeum?* cit. 449, 465 and 475. It is very interesting to see what Koschaker wrote to Salvatore Riccobono in the letter of the 31st of January, 1939 already quoted (see *supra*, p. 16; I will deal with this text again in the following pages): «Was ich forderte, war ein zeitgemäßer *mos Italicus*, der unter Verwertung der Ergebnisse der modernen Rechtshistorie die Synthese mit dem geltenden 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».

⁷⁵ F. CALASSO, *L'Europa e il diritto romano. Alla memoria di Paul Koschaker* cit. 105-108.

⁷⁶ E. 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, 91-92; E. BETTI, *La crisi odierna della scienza romanistica in Germania*, in *Rivista di Diritto commerciale* 37, 1939, 120-128; A. PLACHY, Rec. di KOSCHAKER cit. 388-394; although it is not simply a review of Koschaker's work, see E. SCHÖNBAUER, *Zur „Krise des römischen Rechts“*, in *Festschrift Paul Koschaker* cit. II, 385-410. On the problem of the crisis of Roman law between the two World Wars and the debate developed in Italy, see now the historical reconstruction by G. SANTUCCI, «Decifrando scritti che non hanno nessun potere». *La crisi della romanistica fra le due guerre*, in *Storia del diritto e identità disciplinari: tradizioni e prospettive* (a cura di I. Birocchi e M. Brutti), Torino-Giappichelli 2016, 63-102. In this essay a particular attention has been paid to Betti's stances on the crisis and the role of Roman law.

publication of Koschaker's work⁷⁷, very precisely pointed out the risk of Koschaker being contradictory. Grosso wrote that not considering or indeed showing indifference towards the history of Roman law could not be the right way to try to understand its legacy⁷⁸. He continued that no one who recognizes the reception of Roman law and the development of the jurisprudence based on it as a "bearing wall" of the European frame, as Koschaker maintains, could then refuse the wonderful "picture" represented by the process of the development of Roman law itself. This process actually gave Roman law its historical mission⁷⁹. In fact, the idea of the *Aktualisierung* proposed by Koschaker involves the considerable risk of evaluating Roman law only with regard to its utility for the present – which is, in the end, a positivistic position.

A more thoroughgoing idea of the meaning of such an assertion emerges from an article written by Giovanni Pugliese in 1941, the second piece of writing on which I wish to focus⁸⁰. Since the Italian scholar also wanted to deal with the problem of the crisis of Roman law, he immediately recognized the importance of Koschaker's work as essential to reviving the debate about it⁸¹. As Pugliese underlined, when Koschaker mentions the so-called *Aktualisierung* in his work, it is unclear what this actually consists of and, if it had been meant

⁷⁷ G. GROSSO, Rec. di KOSCHAKER, *Die Krise des römischen Rechts und die romanistische Rechtswissenschaft*, München-Berlin, 1938, in *SDHI*. V.2, 1939, 505-520 (now in G. GROSSO, *Scritti storico giuridici*, IV, Torino-Giappichelli 2001, 101-116).

⁷⁸ *Ibidem*, 105-106 and 111.

⁷⁹ *Ibidem*, 105. Grosso writes: «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».

⁸⁰ G. PUGLIESE, *Diritto romano e scienza del diritto* cit. (now in G. PUGLIESE, *Scritti giuridici scelti* cit., III, 159-204). The first two important reactions to Pugliese's work were by Emilio Betti, who embraced many of the suggestions that the first proposed, and, a few years later, by Antonio Guarino, who by contrast criticized the work. More recently, Luigi Garofalo resumed Pugliese's article in order to stress its importance in the enduring debate about the role of Roman law. See E. BETTI, *Istituzioni di diritto romano*¹, I, Padova-CEDAM 1942, X-XVI, now in E. BETTI, *Diritto Metodo Ermeneutica. Scritti scelti* (a c. di G. Crifò), Milano-Giuffrè 1991, 217-235; A. GUARINO, *Il problema dogmatico e storico del diritto singolare*, in *Ann. dir. comp.* XVIII, 1946, 1-54, now in A. GUARINO, *Pagine di Diritto romano*, VI, Napoli-Jovene 1995, 3-80; L. GAROFALO, *Giurisprudenza romana e diritto privato europeo* cit. 167-238.

⁸¹ But the problem had already been taken into consideration by other scholars before Koschaker. In this respect, an important example is offered by the article by M. LAURIA, *Indirizzi e problemi romanistici*, in *Foro Italiano* 61, 1937, 511-560, now in M. LAURIA, *Studii e ricordi*, Napoli-Jovene 1983, 322-340.

as a return to the methodology of the pandectist school, this concept would not have been acceptable⁸². The second obvious limit of Koschaker's reconstruction is that he considered only the German aspect of the crisis of Roman law – «l'aspetto germanico della crisi» – and devolved the entire responsibility onto the *Historisierung* and *Interpolationismus*. Pugliese claimed, correctly I think, that if we want to find a meaning for the *Aktualisierung*, and we want therefore to save it, we should adopt a historical approach, otherwise the study of Roman law loses its importance. It remains tied to passing necessities, which could change from time to time, and so its role could be modified according to the transformation of social needs or of the established power.

Of no less significance, to be really productive this idea as conceived by Koschaker must presume that European private law in all the countries of the so-called Western tradition of Civil law has remained somehow static over the centuries; but of course this is not so. Following Koschaker's argument, we should reduce the study of Roman law not only to private law, but more precisely to the individual topics whose influence is more evident in modern law⁸³. Furthermore, if we really think that Roman law should necessarily be studied only in a practical sense and for interpreting modern legislation, we should also suppose an identity or at least a great affinity between them. Another risk was related to the previous ones: if we limit the study of Roman law to the institutions of modern legislation directly influenced by it, this kind of study would make no sense at all in those countries where the historical-legal development happened independently of Roman law itself⁸⁴. Pugliese therefore wrote that if we tie the destiny of Roman law studies to the persistence of institutions and rules based on the Roman ones in the contemporary legal systems, we condemn the study of Roman law to its inevitable end. This dangerous idea represents not only the central idea of Koschaker's work, but is shared by many other authors as well⁸⁵. The same

⁸² 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 the *Aktualisierung* is quite similar to that of Pugliese and Guarino. See G. PUGLIESE, *Diritto romano e scienza del diritto* cit. 163; Á. D'ORS, *Jus Europaeum?* cit. 462.

⁸³ Under this point of view, see the criticism by T. GIARO, «*Comparemus!*» *Romanistica come fattore d'unificazione dei diritti europei* cit. 542 ff. and 550 ff. Also L. GAROFALO, *Giurisprudenza romana e diritto privato europeo* cit. 168 on this problem, commenting on Pugliese's work.

⁸⁴ G. PUGLIESE, *Diritto romano e scienza del diritto* cit. 165. Related to this problem, therefore, is the idea of Europe developed by Koschaker as a Western or "German-centric" Europe that already discussed in part (see *supra*, p. 17 and nt. 55).

⁸⁵ *Ibidem*, 166: «Ecco perché quando si connette la fortuna degli studi romanistici al

idea of a *Juristenrecht* could become useless following this conception, only its appearance remaining, being actually subordinated to the will of the legislator, even though it should have been seen as a means to combat the absolutism of the latter. Indeed, Koschaker's conception of Roman law and its reception seems to be based too much on the generic idea of cultural value that continued its existence through the centuries according to a sort of myth of continuity⁸⁶.

The long analysis proposed by Pugliese cannot be discussed here, because the methodological trend he introduced, the so-called "*orientamento storico-comparatistico*", has generated a very long-lasting and articulate debate, which still continues, and it is not possible to report it in these pages⁸⁷. Some further comment can however be devoted to the remarks he made on Koschaker's proposal and more generally on the suggestions he offered about the study of Roman law. First of all, Pugliese considered it very important that the study of Roman law was not restricted simply to Roman private law, it being instead necessary to evaluate the whole spectrum, including public law, criminal law and, more generally, its history as well⁸⁸. Otherwise it would be impossible to understand the complexity of the legal phenomenon, the peculiarities of the Roman legal order and its development throughout the centuries. In fact, we cannot consider it like a monolithic legal *corpus* without any difference from one period to another. Koschaker seems to disregard this point, at least in *Die Krise*. The main reason for studying legal history and the history of Roman law in particular, as Pugliese wrote in his *Diritto romano e scienza del diritto*⁸⁹, consists in the contribution that they can offer to knowledge of the phenomenon of the complex essence of law⁹⁰; at the same time, he insisted

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».

⁸⁶ On the topic of the continuity, see F. CALASSO, *L'Europa e il diritto romano: Alla memoria di Paul Koschaker* cit. 111-112.

⁸⁷ A precise account of the actual situation of the debate in Italy can be found in L. GAROFALO, *Giurisprudenza romana e diritto privato europeo* cit. 173 ff.

⁸⁸ G. PUGLIESE, *Diritto romano e scienza del diritto* cit. 164-166. The importance of this statement is self-evident.

⁸⁹ *IBIDEM*, 164, 166-168, 176, 200-202. On the essence and the role of the historical studies, see also F. CALASSO, *L'Europa e il diritto romano. Alla memoria di Paul Koschaker* cit. 120-121.

⁹⁰ G. PUGLIESE, *Diritto romano e scienza del diritto* cit. 166, claimed that: «Consiste nel contributo che essi possono recare alla conoscenza del fenomeno giuridico nella sua complessa essenza».

that this historical research needed a legal awareness and constructive capabilities. Merely observing this development in Roman law, from the foundation of Rome to the time of Justinian and later, provides a precise example of what Pugliese meant.

One of the objectives of this kind of research is finding general and universal legal principles; we cannot understand this statement, however, in a way that considers principles and rules as being unchanging, and being present and at the same time in every actual piece of legislation. Legal history thus can and should maintain its theoretical role, but this is not separate from legal practice. Rather, we can have a better understanding of the latter in its perpetual state of change only thanks to a historical approach. For all these reasons, it appears that Roman law represents one of the bases of European legal culture for the influence it exercised during the centuries, for the *exempla* it could still offer, for the foundation of legal argumentation as developed by Roman jurists and the legal technique they used, and for the huge legal heritage it has left. If we claim, nevertheless, that we should only consider its utility in interpreting or employing it with regard to modern legislation, we shrink the cultural and legal range of Roman law, condemning it to a dark future⁹¹. As Pugliese correctly stressed, there are many contingent reasons that could justify the study of Roman law, but since they are temporary, they could only legitimize such study at some periods and not at others; this means that it is necessary to study the profound and non-contingent causes that justify the study of Roman law, and the history of law more generally⁹². For the same reasons, Pugliese considered it necessary to stress the importance of history – the history of law in particular – because it describes the legal experience in its continuing transformation⁹³.

⁹¹ *Ibidem*, 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 G. GROSSO, Rec. di KOSCHAKER cit. 106-107.

⁹² G. PUGLIESE, *Diritto romano e scienza del diritto* cit. 167. Of course, it is not easy to find these causes, as the long-lasting debate among the scholars shows (see again L. GAROFALO, *Giurisprudenza romana e diritto privato europeo* cit. 175 ff.). It is not my concern to face this kind of debate now, but Pugliese's statements seem to indicate the quite clear difference between his point of view and Koschaker's.

⁹³ G. PUGLIESE, *Diritto romano e scienza del diritto* cit. 201. It is really interesting to read what Pugliese writes about the "eternal reason" to study Roman law on page 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

His remarks in this long piece led him therefore to conclude that the *Aktualisierung* as suggested by Koschaker could not be a means to restore dignity to Roman law and its study. Of course, Pugliese also recognized two particular merits in Koschaker's work: first of all, it stressed once again the problem of the crisis of Roman law, as already mentioned, in a period during which not all scholars still considered it so profound and vast⁹⁴. Koschaker also underlined correctly that the crisis came from a time preceding the advent of the Nazi regime (even though, as we have already pointed out, the latter had exacerbated the problem).

Die Krise des römischen Rechts und die romanistische Rechtswissenschaft and the proposal of the *Aktualisierung* provoked some criticism, as we have seen, in particular from Italian scholars, but Koschaker nevertheless held staunchly to his ideas. The main proof of this is the work he published in 1940, *L'alienazione della cosa legata*, in which he actually seems to apply the method he proposed⁹⁵. This was a very refined piece of writing with regard to Roman law and the exegesis of sources, but once again Pugliese stressed some limitations. First of all, Koschaker decided to set aside a large number of pages to deal with the matter in modern laws, and, in the end, the writing could seem not to be a romanistic one any longer. Secondly, the references to Roman law seem to become only a sort of historical introduction, and therefore what we finally get is a study of comparative modern law preceded by a section on Roman law⁹⁶.

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 "scienza del diritto", see the similar point of view of G. GROSSO, *Premesse generali al corso di diritto romano*¹, Torino-Giappichelli 1940, 50.

⁹⁴ So it was, for example, for E. SCHÖNBAUER, *Zur „Krise des römischen Rechts“* cit. 385-410.

⁹⁵ P. KOSCHAKER, *L'alienazione della cosa legata* cit.

⁹⁶ G. PUGLIESE, *Diritto romano e scienza del diritto* cit. 163, nt. 5. I think, moreover, that a methodological issue is inherent to this work by Koschaker, in that, he tried to stress the importance of the comparison on ancient laws (the so-called *Rechtsvergleichung im Gebiet der Rechtsgeschichte*) in his previous works and studies, in particular on cuneiform law. Something similar seems to happen with Roman law on the one hand, and with modern legislation on the other. In any case, this point deserves a more in-depth analysis, as well as the other question regarding Koschaker's studies, of why he decided to focus on Roman law much more than

In spite of the criticism, we can appreciate how much Koschaker thought that his idea was a sound proposal for restoring dignity to Roman law from another document as well⁹⁷. Koschaker sent a letter to his friend and colleague, Salvatore Riccobono, on 31st December, 1939, in which he explained his point of view once more. This document dealt with the problem that gripped Roman law in Germany at the time but, for a reason that is not clear, he hoped that there could be a “Wendung” in 1940. He continued by affirming that his *Die Krise des römischen Rechts und die romanistische Rechtswissenschaft* had been criticized, but that he was able to demonstrate the correctness of the method he suggested in the piece entitled *L’alienazione della cosa legata*. It is quite clear therefore that Koschaker was really convinced of his ideas, even though the reaction of some Roman law scholars was not favorable at all. In response to this criticism, he simply proposed the same “formula” again⁹⁸, adding a clearer reference to the *mos italicus*⁹⁹. A few remarks from this letter will better explain Koschaker’s point of view:

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*, das unter Verwertung des Ergebnisse der modernen Rechtshistorie die Synthese mit dem geltendem Recht herstellt¹⁰⁰.

before from a certain point of his career onwards. On this second question, it is more than plausible, in any case, that the crisis that Roman law faced during the thirties led him to such a choice.

⁹⁷ But we have to say that he will then reaffirm his beliefs in the *Selbstdarstellung* cit. 121.

⁹⁸ Some more proof of his ideas about the teaching of Roman law emerges from a letter by the director of the *Rechtswissenschaftliche Abteilung* of the University of Tübingen, professor Merk, to Koschaker, on 10th November, 1942 (UAT 601/42). Merk, replying to one of his colleague’s previous letters, demonstrates he is in agreement with Koschaker regarding the content of the course on Roman law: the «*Hauptsache*» was the «*Privatrecht*» and (Roman) public law could be studied only with regard to those elements that could be useful to gain a better understanding of private law.

⁹⁹ We note a partial change in two other letters he sent to Salvatore Riccobono, in 1949 and 1951, therefore after the publication of *Europa und das römische Recht* and the experience in Turkey.

¹⁰⁰ Letter by Paul Koschaker, sent to Salvatore Riccobono the 31st of December, 1939, and preserved in the collection of Riccobono’s correspondence nowadays at the disposal of Professor Mario Varvaro, at the Faculty of Law of the University of Palermo.

Koschaker's explanation of his views is interesting, but at the same time somewhat contradictory compared with what he wrote in *Die Krise des römischen Rechts und die romanistische Rechtswissenschaft*. Although in this piece he affirms the necessity to return to Savigny and the method of his school through the so-called *Aktualisierung*, in the letter to Riccobono he says that his proposal is different and the study of Roman law should therefore be based on an up-to-date interpretation of the *mos Italicus*¹⁰¹. Only a misunderstanding could have led other scholars to interpret his words in a different way. In fact, the methodology that should be adopted is a sort of comparative one, based on a comparison between the study of legal history and the legal issues of the actual law. It is a sort of historical-comparative methodology that which inspired his first works on cuneiform and ancient law. Aim of the approach suggested by Koschaker is a sort of use (*Verwertung*) of the results coming from the legal History studies, oriented to create a "bridge" (or, better, a *Synthese*) towards the actual law. This is what he calls a modern, up-to-date *mos italicus*.

4.2. ...and a political question. – It is now possible to discuss the other question regarding *Die Krise des römischen Rechts und die Rechtswissenschaft* namely whether the text could be considered a political pamphlet or not. We have already seen that a more traditional view considered Koschaker's behaviour in 1937 almost as heroic, given that he faced the regime at his conference at the *Akademie für Deutsches Recht*, whereas more recent studies take a partially or completely contrary view. At the same time, Koschaker himself commented on that episode 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 verwehren, 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 selbstverständlich¹⁰².

¹⁰¹ In this respect, Koschaker seems to be once more deeply influenced by Riccobono's ideas and it's not impossible to think that through his words he wanted to praise the ideas his very much esteemed colleague as well.

¹⁰² P. KOSCHAKER, *Selbstdarstellung* cit. 122-123.

Aside from some inevitable assertions that seem somewhat rhetorical and maybe false modesty, Koschaker's own words give a clearer idea of his actions than the interpretations offered by many scholars. The two main points of this quotation seem to be the reference to the impossibility of criticizing paragraph 19 of the *Parteiprogramm* openly, because he spoke before a Nazi auditorium; secondly, he admits that defending Roman law was not a question of courage for a *Romanist*, rather something "self-evident" («selbstverständlich»). It is nevertheless implicit the fact that agreeing to speak before a Nazi auditorium at the time meant accepting the rules and the path of the people who formed that audience as well. Therefore, I would like to now claim that we cannot consider *Die Krise* as a political pamphlet, and explain the reasons for this. We have already seen that accepting a lecture at the *Akademie für Deutsches Recht* in Berlin in 1937 meant accepting the political path of the Academy, directed by a Minister of the Nazi regime¹⁰³; and Koschaker did the same thing again just a year later in Austria. This fact doesn't mean, of course, that he was a Nazi himself, but it seems to demonstrate that Koschaker's main aim was the defence of Roman law and the necessity of combating its crisis, a crisis which started in the past and did not begin under the regime. 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 a "nazistisches Auditorium" and to use this chance to explain his ideas. Of course, having a publication based on a lecture given at the *Akademie*, and therefore accepted by the regime, would have meant his work would have had a wider reach. Since Koschaker was not interested in resisting the Nazis themselves, we don't find him writing an attack on the *Parteiprogramm*, but rather a cry of alarm at what was happening to Roman law and its teaching, with particular regard to the German situation. His opposition moved rather against the trend of the Germanists and their idea of a new German National law deprived of any influence coming from Roman law¹⁰⁴. In this respect, Koschaker was resisting a more general cultural movement and feeling, which had begun well before the Nazi regime took power; the latter only exacerbated these conditions.

Die Krise des römischen Rechts und die romanistische Rechtswissenschaft is a less value-based and political piece of writing than *Europa und das römische*

¹⁰³ A. GUARINO, *Cinquant'anni dalla «Krise»* cit. 44.

¹⁰⁴ Under this respect, we can maybe understand why Koschaker defined his text as a «Kampfschrift» in the *Vorwort* (introduction). See P. KOSCHAKER, *Die Krise des römischen Rechts* cit. I.

Recht, and in my opinion is essentially a more technical work on Roman law, its teaching and the crisis that affected it. There are no other peculiar purposes in this text, including at the broader cultural level. At the same time, we cannot forget that it was part of that trend of writings dealing with the crisis of Roman law and we could not indeed consider all those works as political pamphlets, *stricto sensu*. It's thus tempting to think that the standpoint should be different, even though it is then quite obvious that the broad cultural values often involved in such writings could in some way intersect a set of problems which may sometimes be political. What is more, however, Koschaker himself 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 explicitly did. If Koschaker really wanted to discuss paragraph 19 of the *Parteiprogramm* critically, he could have probably made the same choice as De Martino, and openly disapprove of it, as we have already seen¹⁰⁵. Without intending to criticize him, we might see in Koschaker's behaviour the decision of a man who accepted adapting to the political path and the trend in the academy, even though he (probably) very much did not believe in that political system; but desired, nonetheless, not to leave his country and the university, perhaps also because he might have been convinced that only thus could he do something useful for Roman law and its teaching in German universities.

A comparison could be traced between Koschaker's position and that adopted by many Italian scholars after the "regio decreto" of 28th August, 1931. The fascist regime imposed an oath of allegiance on all the scholars working in the Italian universities: those who did not accept had to leave their posts. Of a total of more than 1200 professors, only 12 refused to swear this oath. A few others were able to back out of this situation in other ways, as did Giuseppe Antonio Borgese, who decided to migrate to another country, or Gaetano Salvemini. The relevant fact notwithstanding is that not all the scholars who swore this oath were supporters of the regime; on the contrary, some were genuinely opposed to it. To take an example, Concetto Marchesi followed what Palmiro Togliatti suggested doing. Marchesi said that by remaining at his post he could realize "un'opera estremamente utile per il partito e per la causa dell'antifascismo." Other professors followed Benedetto Croce's idea, according to which they had to remain at the university to keep on teaching according to the principle of freedom («per continuare il filo dell'insegnamento secondo

¹⁰⁵ F. DE MARTINO, *Diritto e società nell'antica Roma* cit. XVIII-XIX. We must however admit that conditions in Italy and in Germany were not the same, under this respect.

l'idea di libertà»). Among these professors, one of the most famous is Luigi Einaudi, the second president of the Italian Republic¹⁰⁶.

Despite the attempts already considered to depict Koschaker as a supporter of the regime, it is quite evident that this definition doesn't fit with his figure, as emerges not only from his *Selbstdarstellung*, which is certainly not an impartial reference, but also from the archival documents, his letters to Guido Kisch, and his behaviour during those years more generally. At the same time, we cannot even represent him as a hero, fighting against a regime which did not like him but tolerated him insofar as he did not attack it directly, and also tried to involve him in some important initiatives because he was a well-known and esteemed scholar.

A document found at the *Universitätsarchiv Tübingen* proves that Koschaker was a collaborator at the *Gesellschaft für europäische Wirtschaftsplanung und Grossraumforschung*, directed by the Nazi *Reichsamtsleiter* Werner Daitz at the beginning of 1945, and working on a project entitled "*Untersuchung über europäisches Recht*"¹⁰⁷. This is very likely proof that the regime did not consider him as a genuine and dangerous opponent and that we cannot consider him as a hero fighting against it. So far as his effort was concentrated on attempting to restore dignity to Roman law and its teaching, avoiding any kind of fierce attack on the government, Koschaker could continue to remain at the university and benefit from some consideration from the regime itself as well. Of course, as the documents about his moving to Tübingen demonstrate¹⁰⁸, it is reasonable

¹⁰⁶ See H. GOETZ, *Il giuramento rifiutato. I docenti universitari e il regime fascista*, Firenze-La Nuova Italia 2000 and G. BOATTI, *Preferirei di no. Le storie dei dodici professori che si opposero a Mussolini*, Torino-Einaudi, 2001 on this topic. Gaetano De Sanctis's situation was more peculiar in that he refused to swear the oath of allegiance to the fascist regime and was a fierce opponent of it. Nevertheless, he continued as the director of the Classical Antiquities section of the *Enciclopedia italiana*, thanks to Giovanni Gentile, who firmly wanted him to remain. On Gaetano De Sanctis, G. BOATTI, *Preferirei di no: Le storie dei dodici professori che si opposero a Mussolini* cit., 38-39 and 46-64; V. MAROTTA, *Roma, l'Impero e l'Italia nella letteratura romanistica degli anni Trenta*, in *Retoriche dei giuristi e costruzione dell'identità nazionale* (a cura di G. Cazzetta), Bologna-Il Mulino 2013, 449-450.

¹⁰⁷ The document in question is a *Bescheinigung* written on 17th February, 1945 attesting Koschaker's tasks at the time (UAT, 601/42).

¹⁰⁸ I have found four letters at the *Universitätsarchiv* of Tübingen, dealing with the question of the appointment of Paul Koschaker as the successor of Hans Kreller. Two are by Hero Moeller, *Dekan der rechts- und wirtschaftswissenschaftlichen Fakultät Tübingen*, addressed to Hermann Hoffmann, *Rektor der Universität Tübingen* (UAT, 205/29). In the first, dated the 4th of March, 1941, Moeller explains why he agreed with the decision of the Faculty board to call Koschaker to Tübingen, considering the difficult situation they were facing at the time, and that the only two other potential candidates, Wieacker and Felgentraeger, were not "erreichbar für Tübingen".

to think that some other scholars could be preferred to him and it was probably better not to have him in one of the most important German universities, like that in Berlin¹⁰⁹. But Koschaker's works remaining at quite a technical or "cultural" level could not distress the regime at all in the end. Meanwhile, Koschaker probably thought that this was the only way that he could continue to maintain a position in a German university and keep on fighting for Roman law and its teaching. He probably decided to accept a path, and some compromises too, considering it as the only way to defend cultural values in which he really believed.

Testimony that this was the situation is offered by another letter, which Koschaker wrote in reply to professor Fritz Brüggemann (a strong supporter of the Regime)¹¹⁰, a few lines of which I transcribe here¹¹¹:

(...) 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 dem Kopf nagelt, und wenn Sie sich die Mühe 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. (...) Parallel mit dieser Grundeinstellung, aber weniger

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The second one was sent just three days later. There should have been a discussion at the Faculty of Law, following the choice of Koschaker, and it seems that the *Dozentenführer* Wetzel strongly supported two other names, Coing and Erbe. Moeller replies to the request made by Hoffmann in this second letter for more information about these two scholars, and affirms that both of them were just beginning their careers, and therefore not comparable with Koschaker. Indeed, Wetzel himself sent a letter to Hoffmann, on the 5th of March, 1941 (UAT, 205/29), complaining about the idea of appointing Koschaker. He wrote that if it was not possible to get the best choice, i.e., Franz Wieacker, then it would have been in any case better to call «jüngere Kräfte» (Coing and Erbe). We don't know why Wieacker was considered a better choice than Koschaker for Wetzel, even if we might suppose there were political causes. We actually see that the choice of younger scholars was due to economic reasons: the economic burden related to appointing Koschaker's would have indeed been a lot heavier for the faculty. The fourth letter was sent by Hoffmann to the *Kultminister* of Baden-Württemberg on the 4th of March, 1941, before receiving Wetzel's (UAT, 205/29). Hoffmann simply supported the name of Koschaker and asked the *Kultminister* to submit the request to the *Reichswissenschaftsminister* as soon as possible.

¹⁰⁹ See *supra*, nt. 37.

¹¹⁰ On Brüggemann, who was professor in Berlin at the time of the letter sent to him by Koschaker see C. KÖNIG – B. WÄGENBAUR, *Internationales Germanistenlexicon 1800-1950*, Bd. III, Berlin-de Gruyter, 2003, 280-281.

¹¹¹ Landesarchiv Nordrhein-Westfalen Duisburg, Nachlass Carl Schmitt, RW 265-8125. It is a letter written on 20th November, 1943.

gefährlich ist eine beklagenswerte Geringschätzung unserer eigenen großen Leistungen in der Rechtswissenschaft des 19. Jahrhunderts.

In allen 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.

This is a text in which Koschaker seems to express once again his point of view about the “Punkt 19 des Parteiprogramms”. His point of view in this letter is much clearer than in *Europa und das römische Recht* and he probably felt safer in expressing his ideas regarding that paragraph of the *Parteiprogramm* talking with a professor, even if he was a Nazi, which in any case was considered only from a scholarly point of view. Nonetheless, if we focus on the words “Die Ursache ist der unglückliche Punkt 19 des Parteiprogramms, der etwas ganz anderes meint als er sagt, aber doch vielen maßgebenden Leute ein Brett vor dem Kopf nagelt”, it is also possible to suggest another interpretation. It might actually seem that Koschaker, who is writing to a colleague who openly supported the regime, wants to imply that there is a difference between the unfortunate («unglückliche») literal formulation of the text of paragraph 19 and its real sense. If this interpretation of Koschaker’s statement is correct, it would mean that he was not ultimately disapproving of the substance of the program of the NSDAP, simply limiting himself to criticizing the poor formulation of paragraph 19 and the deleterious effects deriving from its restrictive and harmful interpretation¹¹².

At the same time, this letter shows that he wanted to insist on the defence of Roman law and all that the latter could represent but, we could then add, it seems that he accepted running risks only to a certain point. It was clear that resisting the dominant cultural trend of the time could represent an indirect criticism of the regime itself, but neither *Die Krise*, nor any other essential event of Koschaker’s life during those years could be depicted as an open attack. This is the reason why I don’t consider *Die Krise* as a genuine political *pamphlet* directed against Nazism, but rather an effort to depict a particular legal tradition and defend it. Considering *Die Krise* more closely, we could also add that it could have fitted perfectly into the cultural debate that took place under a different regime, the Fascist one. This is because the aim

¹¹² In this case, Koschaker’s point of view on paragraph 19, as expressed in this letter, could be somehow more similar to that we find in P. KOSCHAKER, *Europa und das römische Recht*⁴ cit. 311-314.

of the work was not to attack the regime as such, but – indirectly – because it supported and exacerbated a legal and broadly cultural trend that started in the previous century¹¹³. Neither the words “hero”, nor “supporter” of the regime, therefore, could do justice to the personality of Paul Koschaker, in my opinion. Both of them just try to simplify a situation that was not easy, to reduce its complex set of problems, whereas this situation seems to be really more complicated to understand. Compromises, ambiguities, difficult choices, and human doubts remain, together with the desire to defend Roman law and the heritage of the Western legal and cultural tradition in a way that is often difficult to understand and even more difficult to judge¹¹⁴.

What Calasso defined as the psychological “trauma”, that Koschaker faced probably emerged from the combination and the complexity of these sets of circumstances and derived from the collapse of Europe¹¹⁵; the same “trauma” that progressively turned into a problem of conscience¹¹⁶. These circumstances very probably instilled in Paul Koschaker the need to write what is considered his masterpiece, *Europa und das römische Recht*. But this is a work that deserves a separate study.

5. *Conclusions*. – The many significant events considered in these pages depict a very complex set of circumstances that Paul Koschaker faced over a period of time, from 1936 till the beginning of 1947, which was almost entirely dominated by the presence of the Nazi regime. As already stated at the beginning of this text, it is necessary to adopt some prudence, when evaluating the behaviour and the ideas of a scholar in such a “dark” age, if it is not possible to base our judgement completely on certain sources. In any case, from the documents at our disposal we can argue that Paul Koschaker’s conduct during those years was on a whole sometimes very ambiguous, both with regard to his stances on Roman law and its teaching, as well as to his academic life more in general. The ideas on Roman law and European legal tradition that he expressed in *Die Krise des römischen Rechts und die romanistische Rechtswissenschaft* were later repeated

¹¹³ As already stated, it seems proper to stress again that the cultural effort is much more present and intense in *Europa und das römische Recht*, than in *Die Krise des römischen Rechts und die romanistische Rechtswissenschaft*.

¹¹⁴ Once again, the comparison with the Italian experience of the university’s professors, who took an oath of allegiance to fascism even though they were not fascist, could help us in understanding Koschaker’s behaviour. See *supra*, p. 31.

¹¹⁵ F. CALASSO, *L’Europa e il diritto romano. Alla memoria di Paul Koschaker* cit. 106: «il trauma psichico provocatogli dallo spettacolo di un’Europa in decomposizione».

¹¹⁶ *Ibidem*.

over and over again, as well as used and adapted to different circumstances, sometimes in a very controversial manner, if not even reprehensibly. We can see it, for example, from the document on the reform of Roman law teaching in German universities written in 1942¹¹⁷. At the same time, it is not possible to disregard his huge effort in defence of Roman and European legal and cultural heritage, in which he deeply believed, as well as the essential influence Paul Koschaker had on the future generations who dealt with these topics. However, many questions regarding his opinions and concepts remain on the table, from a methodological point of view too, and this is the reason why they are still subjects of discussion.

His personal and academic behaviour is not easy to judge either. We have seen in the previous pages how some of Koschaker's choices may be at the least severely disputed – like, for example, accepting the chair for Roman law in Berlin in 1936, or the position of co-editor of the *Zeitschrift der Savigny-Stiftung*, after the harsh “*Arisierung*” that took place in 1935. Nonetheless, the documents that we possess don't show us that he has a close relationship to the Nazi regime, but rather an opportunistic one.

To conclude, we cannot avoid underlining the two sides of the coin emerging from this analysis. On the one hand, we have Koschaker's great value as a scholar and his inestimable effort to give prominence to the pair Roman law and Europe; even if criticized by other scholars, it is not possible to disregard the impact of his ideas, at least for the heated debate they produced. On the other, we find the ambiguities of the scholar, as well as of the man Paul Koschaker, which emerge constantly from the circumstances described in the previous pages and which appear sometimes criticizable. It seems that he was always able to understand to which extent he could express his ideas and defend his stances and his interests, without irritating the regime and without directly compromising himself with it. These human ambiguities distinguished of course not only Paul Koschaker, but also many other of his colleagues, who faced the hard experience of the regimes ruling in Europe at that time. Ambiguities that make of Paul Koschaker a peculiar and, for these reasons, very interesting figure, who is sometimes not easy to understand and to judge and whose twilight zones still deserve further in-depth studies, to try to see if it's possible to more shine a light on them¹¹⁸.

¹¹⁷ See *supra*, pages 15 and 16.

¹¹⁸ It's my aim trying to get access soon to the archive of the *Berlin-Brandenburgische Akademie der Wissenschaften*, to check if some other important documents regarding Paul Koschaker can be found, which can further help to retrace his academic relationships and his approach to the regime, as well as his scientific approach to the study of Roman law.