Roman Law in the 20th Century

From the Crisis to the Recovery of the Western Legal Tradition

LUDOVICA LOT*

Abstract: In this work I am going to discuss the role that Roman law has played within the academic environment throughout the 20th century. My analysis will focus primarily on the Italian and German scene, two nations that have tragically seen the rise of totalitarian regimes at the beginnings of the 1920s. Given the almost opposite attitudes in respect of Roman law in those two dictatorships, I will attempt to give an explanation over why the outcome was so different in two political situations that were not so distant ideologically wise. In order to do this, I am going to take into account different elements that have characterized these two experiences such as the law, the authors of the time and other societal aspects. Lastly, my work will provide an overview of the changes that arrived in Europe after the end of WWII and how Roman law principles still were involved, even if only marginally, in the establishment of the European Union and the re-creation of a common European legal tradition. The purpose of this article is to describe the role that Roman law has played throughout the last century and how easy it is for dictatorships to even invoke Roman law to support a propagandistic construction.

Keywords: Roman law; Crisis of Roman Law; Fascism; Nazism, Western and European legal tradition.

0. *Introduction*

Roman law is the architrave of the European legal tradition. From its creation onwards, Roman law has played a crucial role in the development of the civil law systems, with its influence extending also to the common law area. After the fall of the Roman Empire, the *ius commune*, a term that represents an "European Common law", began to develop from the core of the *Corpus Iuris Civilis*. Later on, this legal system also embraced the authoritative legal texts of the Catholic Church. Even though local laws were still applied, as they were retained to be part of the *ius proprium*, the study of Roman law was something very common and that was part of the knowledge not only of jurists, but of all well-educated people. The application of Roman law continued to be important, since it was considered superior to the ordinary local rules. This was because it provided more advanced and sophisticated rules than the ones that were generally

used by local tribes, which, instead, were based on rudimentary customary practices[1]. In this sense, Roman law also played a subsidiary role when those rules showed *lacunae* in some fields. Thus, the *ius commune* remained for centuries the primary focus of legal education at universities and the central topic of scholarly discourse on private law. Additionally, it was a widely discussed subject among the academics of different fields of study, like poets and artists.

During the 20th century Roman law started to assume a very different role as a propagandistic tool. On one hand, Fascism viewed Rome and its Empire as a model to emulate. Many measures were adopted by the regime in the name and as legacy of the Roman Empire. These type of initiatives were very distorted and, most of the time, the connection between the present and the past was forced, artificial and, practically, nonexistent. By contrast, Nazism took a very strong hostile stance towards Roman law, which came to be seen as the legal and cultural expression of the liberal State of the 19th century and the product of a legal order that was no longer purely German. The hatred of the Nazi regime towards Roman law was strongly linked to the proliferation of racial theories, which lacked any type of accurate legal basis. It also started to be assumed that classical and post-classical Roman law were corrupted by "oriental influences".

The purpose of this article is to provide the basis for a reflection on the relationship between law, history and ideology within the events that have occurred during the first part of the 20th century. The work is divided into three parts: the first two examine the differing approaches and contexts of the two far-right regimes with respect to Roman law and offer a

---

[*] Ludovica Lot graduated from the University of Trento in July 2025 and is currently studying European Law at the Utrecht University. She has performed an internship in the Italian law firm D'Agostini Group, specialised in IP rights, during the summer of 2024. She is now publishing her first article, "Roman law in the 20th century: from the Crisis to the Recovery of the Western Legal Tradition" which is a revised version of her bachelor's thesis supervised by professor Tommaso Beggio.

[1] Edgar Bodenheimer, *The Influence of Roman Law on Early Medieval Culture*, 3(1) Hastings International and Comparative Law Review 9, 16 (1979).

comparative analysis of the two. The final chapter examines Roman law within European legal culture after World War II and within the European Union, as well as the various forms of influence and inspiration it may provide for the modern supranational legal order.

My intent is to build a path which explores how the use of propaganda can blend easily into the law and the tradition of a nation; secondly, to understand whether the retrieval of Roman law principles still makes sense in a completely different historical and juridical context.

As for the methods applied to this study, this article not only analyzes the individual situations and circumstances involving the role of Roman law but also tries to investigate the elements of differentiation between the two regimes, as well as underline the causes that have led to divergent situations. The analysis is based on historical and legal sources with a particular focus, at least in the first two chapters, on the ideological interpretation of Roman law. The historical-juridical dimension tries to provide a sort of continuation between events that, even though completely different from one another, are part of the same shared history and are still related to our present.

1. *Chapter I*

1.1. *Overview*

It is crucial to highlight that when we are referring to the relationship between Roman law and a totalitarian regime[2], like Fascism, we are not simply alluding to the application of Roman law within the regime's legal system. Roman law did not affect society through legislative power

[2] When referring to a "totalitarian regime" within this article, I will be alluding to the definition provided by the Enciclopedia Italiana in its two versions, the first one being redacted by Giovanni Gentile, and the other by Mussolini under the heading "Fascism": «*partito che governa totalitariamente una nazione*» (see *Enciclopedia Italiana*, vol. XIV, pp. 847–51). The first section of the entry, titled *Doctrine* and signed by Mussolini, is divided into two parts: *Fundamental Ideas* (pp. 847–8) and *Political and Social Doctrine* (pp. 848–51), the first of which is attributed by many to Gentile.

nor was it involved in the judicial system or applied to dispute resolution between individuals.

Nevertheless, the relationship between Roman law and the regime involved culture, ideology or, more generally, all that Roman law symbolized from both a historical and political perspective. Elvira Migliario and Gianni Santucci in the book they edited, *Noi figli di Roma*[3], indicated the "reconstruction" of the Roman Empire put into place by Fascism as a "mythopoetic action": a fusion of myth and the idea of purposeful action[4]. Indeed, Mussolini consistently pointed to Rome as a myth and a part of the "Italian" past that, with all its principles, needed to be taken as a model for the modern Italian population. One of Fascism's core desires was to impose itself as the new manifestation of Rome and its direct descendant, utilizing propaganda as the main strategy to convey this message[5]. But what were the reasons behind this longing?

The first step of this complicated and troubled story can be traced back to the publication of the article Passato e Avvenire by Mussolini in the journal Popolo d'Italia on the 21st of April 1922[6]:

> «Roma è il nostro punto di partenza e di riferimento; è il nostro simbolo o se si vuole il nostro Mito. Noi sogniamo l'Italia romana cioè saggia e forte disciplinata e imperiale. Molto di quel che fu lo spirito immortale di Roma risorge nel Fascismo: romano è il

[3] Giovanni Santucci, Elvira Migliario, *«Noi figli di Roma». Fascismo e mito della romanità* at 11 (Le Monnier 2022).

[4] *Ibid.*

[5] *Id*. at 14.

[6] Benito Mussolini, *Passato e avvenire*, Il Popolo d'Italia (1922), available at https://bibliotecafascista.blogspot.com/2012/03/passato-e-avvenire.html (last visited March 29, 2026).

> Littorio romana è la nostra organizzazione di combattimento romano è il nostro orgoglio e il nostro coraggio: «Civis romanus sum»"[7].

It's possible to observe that Rome is evoked with a very nostalgic tone and that Mussolini was longing for its reconstruction under Fascism. The regime sought legitimation by underpinning continuity traits with the past, both political and institutional. Different aspects of the State were touched and modified to please Mussolini's view of restoration and to recall the greatness of the empire. However, Roman law were and formulated in a very confused manner, as they were trying to create the ideal shape that the Italian modern State was supposed to assume. Because of this, the ideological construction of the Fascist state relied heavily on the adoption of propagandistic measures. Just to name a few, the choice to adopt the fasces as a symbol of Mussolini's power, the quadrumviri leading the March on Rome and the assumption of the title "Dux" by Mussolini following that event, the creation of new celebrations, like the "Christmas of Rome" on the 21st of April. These and many others are just a few examples of the provisions adopted by the regime that primarily had a political-symbolic nature[8]. Other interventions aimed at creating a strong Roman-Empire-inspired cultural substrate that pervaded architectural forms and the educational system.

1.2. *Retrieving "Romanità"*

1.2.1. *The Reconstruction of the Third Rome in Its Many Facets*

Italy's restoration of Rome covered different aspects, such as architecture, culture, law and its society. The starting point was indeed the latter, which at the time was mainly composed of farmers, not really the

[7] Benito Mussolini, *Discorso del bivacco* (Camera dei deputati del Regno d'Italia, January 3, 1925), available at https://www.perlaretorica.it/reto/benito-mussolini-discorso-del-bivacco-16-novembre-1922/ (last visited March 29, 2026).

[8] See also Migliaro and Santucci, *Noi Figli di Roma* at 14 (cited in note 3).

image of a strong population of warriors that Mussolini wanted to promote. Fascism aimed to directly modify and influence the Italian lifestyle, especially with regard to the male population. The intention was for Italian men to identify with the figures of the *agricola* and the *miles*, depictions of discipline, order and masculine power, with them being a positive reinforcement of respect and tradition[9]. Those roles, that had been objects of mystification and protagonists of incredible stories, started to be transformed and used to promote the fundamental principles of family, war commitment and socio-political attitude.

In the meantime, the Fascist government was engaged in the promotion of new cultural centers. The most important in the field of Roman law studies was the Istituto Nazionale di Studi Romani. Led by Pietro Fedele and Luigi Federzoni, founded in 1925 and established to analyze the «*senso storico della funzione esercitata da Roma nel mondo nello svolgersi della civiltà*»[10], it would quickly become a place of meeting and discussion for scholars, politicians and many other figures that shared the desire to spread the myth of Rome. This was supported by other types of special events, such as the *"Mostra Augustea"*, organized in honor of Augustus' bimillenary in 1937, which proposed an analogy between the Principate of Augustus and Fascism. Many important scholars participated in this event, among them Salvatore Riccobono, one of the most prominent scholars within the Roman law field at the time[11].

The urbanistic renewal was also a fundamental part of this plan of reconstruction: according to Vittorio Vidotto in his book "Roma Contemporanea", the so-called "sventramenti" were a part of the rebirth of Rome

[9] *Id.* at 202.

[10] Donatello Aramini, *Nel segno di Roma. Politica e cultura nell'Istituto di studi romani* at 40-42 (Laterza 2016).

[11] See Salvatore Riccobono, *La fusione del ius civile e del ius praetorium in unico ordinamento*, 16(4) Archiv für Rechts- und Wirtschaftsphilosophie 503, at 503 (1922/1923); *La formazione di un ius novum nel periodo imperiale*, Atti del I Congresso di Studi Romani (Roma 1929).

and they included the creation of new public spaces for its citizens[12]. Only the vestige of antiquity should have been preserved. Mussolini wanted to maintain exclusively the architecture that was able to represent his own idea of Romanity. Everything that had been erected after the fall of the Roman Empire, except for a few Christian Temples, was deemed to be an improper alteration of the glorious ancient image of the Roman Empire and a representation of a period of political decadence[13]. This was retained to be a sort of liberation of antiquity's places: all the medieval buildings were destroyed to save the imperial forum and the ancient monuments. What characterized those actions was the mix of the need for a new, functional and modern urbanistic plan and the desire to celebrate the regime through the creation of monuments and ceremonial spaces. The climax of those projects was the inauguration of the *Via dell'Impero*, in 1932, which would later become the main theatre of Fascist parades[14].

Lastly, the regime had the urgency to combine Roman law and Fascist law, trying to show a sort of continuity between the two. The most striking outcome of this process of "Romanization of the law" was the reform implemented with Legislative Decree No. 1089 of May 17, 1928, and Consolidated Law No. 2 of September of the same year. This law reformed the structure and nature of the parliamentary assembly by giving it a "plebiscite character."[15] The previous law of 17th January 1926 provided

[12] Bruno Bonomo, Charles Davoine and Cécile Troadec, *Reconstruire Rome: la restauration comme politique urbaine, de l'Antiquité à nos jours* (Publications de l'École française de Rome 2024).

[13] Salsano, Fernando, *Il rinnovamento urbano nella Roma fascista* at 231 in B. Bonomo, *Reconstruire Rome* (Publications de l'École française de Rome 2024) 227, 231 available at https://doi.org/10.4000/1279y (last visited March 29, 2003).

[14] Alessandra Tarquini, *Il mito di Roma nella cultura e nella politica del regime fascista: dalla diffusione del fascio littorio alla costruzione di una nuova città (1922-1943)*, 95 Cahiers de la Méditerranée 139, 143 (2017).

[15] See also Santucci, Migliario, *«Noi figli di Roma»* at 23 (cited in note 3).

a Unique Text and a uninominal college[16]. The newest one instead supplied a unique national college and a single list of 400 deputies that leaving the electorate with only two options: approval or rejection. Two "plebiscites" were held in 1929 and 1934[17]. This was the only case in Europe of the modification of national elections into plebiscites, which historically had another function[18]. Given its evident Latin etymology, the use of this expression facilitated Fascist validation within the normative and statutory frameworks.

1.2.2. *Corporativism*

Another important experience in Fascist history was corporativism. Corporativism was essentially a political, economic and social system inspired firstly by the Christian experience at the end of the 12th century in which diverse groups called "corporations" played a vital role in the organization of society and in the decision-making over crucial aspects of the economic and political sides. Corporations were composed of merchants and artisans and aimed at the reduction of internal competition, the control of production, prices, sales and the supervision of professional training[19]. This system ensured quality production, fair remuneration, and

[16] The unicameral system, adopted by the Fascist regime in Italy, consists of a parliament with a single legislative chamber. In practice, this system eliminates the distinction between the Chamber of Deputies and the Senate of the Kingdom, simplifying legislation and concentrating power in the hands of a single assembly, subject to government control, information available at https://anpi-lissone.over-blog.com/article-14472952.html (last visited March 29, 2026).

[17] Carlo Buttafuochi, Mandato Camera per la Legislature XVIII del Regno (20.04.1929 - 19.01.1934), available at http://dati.camera.it/ocd/legislatura.rdf/regno_28 (last visited February 18, 2026).

[18] In ancient Rome, a *plebiscitum* was a resolution passed by the *Concilium Plebis* (Plebeian Council), an assembly composed exclusively of plebeians.

[19] Rolf Petri, *Sulle origini del corporativismo*, 8 Studi di Storia 13, 34-35 (Edizioni Ca' Foscari 2019).

controlled access to the profession, but also created a local monopoly that benefited guild members[20].

According to De Robertis[21], the primary point of diversification between the Fascist and Roman corporativism lies in the fact that the latter is the result of decadence, described as the attempt to get together to overcome difficulties. It must be noted how in ancient Rome physical work was seen as a degrading activity which was to be performed only by the slaves[22]. The original Roman *collegia* were composed of individuals who performed the same activity and pursued a common economic interest by forming alliances that sometimes acted like cartels[23]. This was a way to come together and to face struggles through alliances. Meanwhile, Fascist corporativism was presented as an exaltation of individualism[24].

Looking into the details, Fascist corporatism was the result of three different past experiences that merged together. The first one emerged after WWI and indicated corporativism as a form of revolutionary syndicalism. It campaigned for allowing the workers to have their own control over the production and having the possibility to participate directly in the economic policy. The second position came from Alfredo Rocco's theory, who derived his vision on corporativism from economic nationalism[25]. Rocco supported a form of state-controlled trade unionism aimed at surmounting internal class conflict through a corporative economic system centered on coordination and national unity. The third and final

[20] *Id.* at 35.

[21] Francesco Maria De Robertis, *Corporativismo Romano e Corporativismo Fascista* (Il Diritto del Lavoro 1934).

[22] Antonio Cavalli, *Il fenomeno associativo dai "collegia" antichi alle "corporazioni medioevali"*, 66 Rivista Internazionale di Scienze Sociali e Discipline Ausiliarie 149, 151 (1914).

[23] Koenraad Verboven, *Introduction*: *professional collegia*: *guilds or social clubs?*, 41 Ancient Society 187, 189 (2011).

[24] Massimo Miglietta, Gianni Santucci, Università degli studi di Trento. Dipartimento di scienze giuridiche, *Diritto romano e regimi totalitari nel '900 europeo. Atti del Seminario internazionale (Trento, 20-21 ottobre 2006)* at 26 (Quaderni del Dipartimento di Scienze Giuridiche, Università di Trento ed. 2009).

[25] Piero Barucci, Piero Bini and Lucilla Conigliello, *Le sirene del corporativismo e l'isolamento dei dissidenti durante il fascismo* at 45 (Firenze University Press 1st ed.2021).

stance was connected to the Italian-Catholic moderate tradition in economic thought, which criticized economic individualism but emphasized social solidarity based on personal relations rather than state coercion[26]. The actual gap between the theoretical formulation and the implementation under Mussolini is then so wide that finding a single ideological influence is quite difficult[27].

Yet, this experience can be considered as one of the weakest points of the measures adopted by the regime and it allowed the jurists to take divergent positions on it, at least in theory[28]. This was because after the agreement of the Fascist government with Confindustria of 1925, which eliminated all the non-Fascist unions and strengthened the employers authority, the result obtained was paradoxical[29]: even if Fascist unions had gained a monopoly, they lost real influence in factories, where it was gained by the employers. This made the corporative system authoritarian and state-controlled, but with limited influence on workers[30].

Yet, Fascism didn't miss the chance to vastly promote the connection between the Roman *collegia* and Fascist corporativism: the 1930s saw a proliferation of studies on the different forms of labor associations in ancient Rome. Most of the time, this research involved many scholars who had never even covered this topic before. Guarnieri-Ventimiglia for example, who lacked formal expertise in Roman law, found himself trying to associate Roman corporativism to the Fascist one, even though those two experiences should not be confused[31]. He attempted to convey the idea that Fascist corporativism was able to surpass the Roman experience thanks to the dialogue between the State and corporations. Yet, from a

[26] *Ibid*.

[27] *Id*. at 46.

[28] *Id*. at 26.

[29] Natascia Ridolfi, Ada Di Nucci, *Il Corporativismo: un paradosso della politica economica dello stato fascista*, 19 Pecunia 61, 64 (2014).

[30] *Id*. at 65.

[31] Miglietta and Santucci, *Diritto romano e regimi totalitari nel '900 europeo* at 27 (cited in note 24).

purely political perspective, the discussion of the real differences is missing.

The connection with the Roman empire was once again remarked at the Mostra Augustea della Romanità in 1937-1938, where the *collegia* were presented as the predecessors of modern corporations and a parallelism was traced between Mussolini and Augustus. Just as the second one had utilized the *collegia* for the benefit of the State, Mussolini, through the trade union law[32], organized the corporations and led them through the class struggle that characterized the industrialized States at that time[33].

1.2.3. *Roman Law as a Way to Justify Racism*

The racial issue was one of the main concerns at the basis of the Fascist and Nazi's ideologies and experiences. The discussion over race in Italy happened within the context of an "anthropological revolution" that aimed to produce a "new type of Italian". This new citizen model would be spiritually connected to its ancient Roman roots and, at the same time, would completely break the relation with the bourgeois individual[34]. In order to conduct this reform, two "preparatory" steps were taken. The first one was Mussolini's speech on the 25th of October 1938 to the Consiglio nazionale del Partito Fascista and the second was the anniversary of the Milizia volontaria per la sicurezza nazionale on the 1st of February of

[32] The Trade Union Law of the 3rd April 1926, enacted by the Fascist regime, had as its main objective the control and suppression of trade union freedom, institutionalizing the Fascist syndicate as the sole representative body of workers and prohibiting strikes and lockouts, information available at https://www.collettiva.it/rubriche/buona-memoria/quando-il-fascismo-cancello-la-liberta-sindacale-h733we75 (last visited March 29, 2026).

[33] Thomas Morard and Simone Ciambelli, *I collegia romani e il corporativismo fascista: scavare a Ostia ai tempi di EUR42* at 2 (paper presented at Incontri SAET - Tradizione dell'antico. Da Roma al Mare. Politica, archeologia, urbanistica (1900-1945), May 20, 2021).

[34] Paola Salvatori, *Razza romana* at 278 (Electa 2012).

the same year[35]. Both of these settings of ideological radicalization represented the perfect opportunity for Mussolini to address the regime's new racial policy.

The latter event was about the adoption of the new "passo romano di parata" as the official march for the Italian army[36]. Mussolini stated that this was the step meant to "fight the lazy rubbish of humanity"[37] and to rebuild another aspect of the connection to the strong Roman army which, by utilizing this type of step and posture/approach, was able to defeat the populations of the Gauls. This type of martial conduct within the army was actually unknown to the martial mentality of the Romans. From a political point of view, it was an imposition of principle of composure and martial rigor that was opposed to the decaying bourgeoisie values. It also indicated the need to power up the physical structure of the Italian population. In other words, it was the annihilation of the part of population that, according to Mussolini, contaminated the Italian race[38].

The speech to the Consiglio nazionale del Partito Fascista was instead centered around the substitution of the third person, in official correspondence and public relations, with the second person, both singular and plural. This shift would have represented a sign of opposition against the ceremonious manners of the bourgeoisie and its lifestyle. The speech to the Consiglio nazionale del Partito Fascista was exploited by Mussolini as the perfect context to talk about the new racial policy of the regime. The anti-semitic laws were published in 1938 alongside the "Manifesto degli scienziati razzisti", and, as a form of propaganda, the ancient Romans were depicted as a model: according to Mussolini, they were "razzisti all'invero simile"[39]. This is openly in contrast with many declarations

[35] *Id*. at 278.

[36] Andrea Giardina and André Vauchez, *Il Mito di Roma: da Carlo Magno a Mussolini* at 260, (Laterza 1st ed. 2016).

[37] Benito Mussolini, *Opera Omnia*, Vol. XXIX, (La Fenice 1959) at 52-53.

[38] Giardinia and Vauchez, *Il Mito di Roma: da Carlo Magno a Mussolini* at 267

[39] Opera, Vol. XXIX, 1959 at 190 (cited in note 37).

done by Mussolini on the same topic, in which instead the Romans were cheered for their capacity to integrate the stranger populations[40].

A parallelism was thus traced between the Romans and the modern Italians as representatives of stability and the sense of State, in addition to their rootedness in the land. The Jews, on the contrary, were like the Carthaginians, a symbol of individualism, nomadism and restlessness. Romans have never pursued persecutions of race like the modern States of the 20th century and even if prejudice against strangers were present, it was not a barrier to the social ascent[41]. Many foreigners at the time covered important positions within the army or had been adopted by noble families. Furthermore, marriages between different "races" were never prohibited in Rome and many were the emperors born in the provinces, like Adrian. This can be compared to the very "racist" behavior of the Greek population, that instead saw all the non-Greek as barbarians, unlike the Romans that tended to distinguish between "Roman citizen" and "not Roman citizen"[42].

But with the Jews it was different. Through their culture and the religion, they have always kept a rigorous exclusivism that has made them be perceived as something extraneous from Roman society. Many were the disorders that the Jews populations caused within the Palestine regions due to religious matters, as Jewish life was operated within three layers of law: the common law, which was the local Roman law applicable to everyone, the Jewry, which were special regulations created by local Roman authorities especially for the Jews and the Jewish Law, an internal Jewish law which was applied only when allowed by the Roman authorities[43]. The public authorities imposed punishment and limitations against them, but ancient Romans have never arrived at grave persecutions nor

[40] Giardina and Vauchez, *Il Mito di Roma* at 267 (cited in note 38).

[41] Paola Salvatori, *Razza romana* at 279 (cited in note 34).

[42] Giovanna Errede, *Il mito dell'appartenenza. Politeia greca e civitas romana a confronto*, 6(1) Materialismo Storico 165, 206 (2019).

[43] Amnon Linder, *The Legal Status of the Jews in the Roman Empire* in The Cambridge History of Judaism 128, 131-132 (Steven T. Katz ed., Cambridge University Press 2008).

exterminations. The repression of the Jewish revolts was firm, but not different from the ones committed against other rebel communities. It makes sense to talk about "judeopathy"[44], a sort of resentment against a community that doesn't want to be included in a bigger one that is open to embrace it. In conclusion, racial policies are a complete antithesis to Roman culture, the one of a population that used to celebrate its origins of migrants with the arrival of Enea.

1.3. *The Civil Code*

1.3.1. *The Italian Studies, the Third Way Between France and Germany*

The juridic field was not excluded from this reprise of Romanity: Roman law was considered to be incredibly important from a scientific and legal point of view. Through its figures in the scientific, educational, and academic spheres, Italy established a distinct field of study with its own representatives. The legal codification at the beginning of the 1930s was authoritarian and hierarchical, or in other words, Roman. This implied the involvement of Roman law scholars in the work of codification. This process had thus increased the role of Roman law at the Italian universities and created an important scientific dedication by several scholars to the study of Roman law.

The Italian legal model started to depart from the German and the French one. In Germany interpolationism started to develop under the influence of the German Roman law doctrine. The idea behind it was the reconstruction of the original texts of the Roman jurists before the intervention upon them by the Justinian compilers. The leaders of the movement, such as Lenel, Grandewitz, Pernice and Eisele, saw in them both

[44] The term "judeopathy" is utilized by Andrea Giardina in his work "*Il mito di Roma: da Carlo Magno a Mussolini*". In accordance with the interpretation given by Francesco Torchiani (see F. Torchiani, *Il fascismo e l'idea di Roma: note sulla recente storiografia*, 74(1) Il politico 201, 2009), it refers to "una sofferenza da contatto provocata da una comunità indisponibile all'integrazione su una maggioranza disposta a integrare".

great technical achievement and the representation of a pure and uncorrupted Romanity, not altered by oriental or Byzantine influences. This was obtained through the work of the Historical School (*Historische Rechtsschule*) and the Pandect-science (*Pandektistik*).

France was instead the symbol of the first massive and most important codification, namely the *Code Civil* of 1804[45]. Critics moved against both the models adopted by France and Germany, primarily for the improper recall to the greatness of Roman law that the two have dared to use. Particularly, a strong blame was directed towards the liberal and bourgeoisie's ideals that the French code represented[46]. In the journal Foro Italiano, the new fascist civil code is described as the first real Italian code that completely departs from the first Italian code of 1865. The 1865 code was flawed and described as liberal, individualistic and based on the Napoleonic Code, which made it unsuitable to truly reflect the Italian political, spiritual and racial identity[47]. These ideas would later bring about the new codification of civil law in Italy eventually completed in 1942, and presenting a strong structural and functional connection to its ancient Roman matrix[48]. Ultimately, the new civil code was portrayed as a synthesis of Fascist ideology, Roman law, and medieval Italian legal scholarship, forming the basis of a renewed national legal order[49].

The reprisal of civil law reflected this idea of hierarchy into the organizations of private relationships, family and enterprises. It must be said that two main figures from ancient Rome were used in the Italian Civil Code as legal concepts meant to influence the political asset and pervade the juristic spectrum, both in the civil and criminal field of law. Those figures are the *pater familias* and the *civis romanus*. They clearly reflect the idea of Mussolini himself, the father of five legitimate children (but many

[45] There had been a precedent codification attempt in Prussia, namely the Allgemeines Landrecht of 1794 that pursued the project of legal unification aimed at promoting the state identity of Prussia.

[46] As it will be discussed later, this resentment was already present in Nazis Germany

[47] Antonio Putzolo, *Panorama del codice civile fascista*, 66 Il Foro Italiano 41, 43 (1941).

[48] Migliaro and Santucci, *Noi Figli di Roma* at 206 (cited in note 3).

[49] Antonio Putzolo, *Panorama del codice civile fascista* at 43 (cited in note 47).

others were born outside of his marriage), a masculine figure who is fertile and authoritarian. These were the features that would be passed onto his heirs, like the award-winning Bruno[50].

1.3.2. *The Pater Familias*

The two previously mentioned figures became partially weaker. The *pater familias* used to have extensive powers in ancient Rome, and the typical family in Italy during Fascism attempted to get beck to this prototype. In Roman law, the *pater familias* was a man, freeborn and citizen, who didn't have any direct masculine ascendant in line or had been emancipated from whoever had over him the *patria potestas*. The *pater familias* was, therefore, *sui iuris*. He had three main powers: the *patria potestas* over his children and grandchildren, the *manus maritalis* over his wife and daughters in law and the *dominica potestas* over his slaves and the properties of the family[51]. The Italian norms created a favorable position for men, but the real pater familias was only a relish of the past gone by ages and his last real traces can only be found at the time of the Ancién régime, in what the French defined as the puissance paternelle[52]. The concept of "Patria Potestà" introduced by the article 220 of the Italian Civil code presented, instead, the right, and not the power, of the father to obtain obedience and reverence from his children. According to article 131 of the Italian Civil code, the father was in effect the head of the family in the Italian legal order but the tones that characterized the ancient *potestas* were limited to coercive measures applied for correctional aims[53].

[50] Bruno, Mussolini's third child, received many honors for his military service, like the gold medal for the aeronautical value.

[51] See Paul J. du Plessis, *Borkowski's Textbook on Roman Law* (Oxford University Press, 2020 1st ed. 2010). The *manus* happened only in the marriages *cum manu*.

[52] The authority of the family at the time was a matter of public order: theorists of political absolutism agreed in defining the paternal function as a magistracy that received its power from God through the intermediary of the king.

[53] Migliaro and Santucci, *Noi Figli di Roma* at 206 (cited in note 3).

The code of 1942 legibly expressed the superiority of the male figure, but small changes were already introduced after WWI, like the abolition of the marital authorization. This was a norm imposing women to ask the head of the family for the possibility to appear in court or to obtain the completion of acts of patrimonial disposition and that was not recovered in the code of 1942. The newly adopted concept of "buon padre di famiglia" pointed instead to a more standardized behavior of general decency. Surely in Roman law the reference was to the *pater* because it was the most common figure in society to take part in public life. Nevertheless, when women started to have their own capacity, it was obvious that the "good father" rules were also applicable to them as a manner to indicate universal decorum[54]. Still, it is important to remark that in this new code women were relegated to the position of mothers and were heavily excluded from the possibility to work. There were in fact many legislative measures adopted at the time to prevent women from being hired by listing the exclusive professions that could be exercised by them. They had the sole purpose to take care of their children and husband, and were not destined to take a part into public life and the world of work.

1.3.3. *The Civis and the "Relazione al Re"*

The second Roman model that was (mis)used by the regime was the one of the *civis*. Indeed, citizenship was one of the cornerstones of Roman law and ancient Rome. Rome was, like other political structures of antiquity, organized to grant some rights and a specific legal status only to its citizens, thus creating a difference between the ones born within the

[54] In his paper *Fascismo, guerra, Resistenza Le scelte delle donne*, Alberto Pantaloni explains the political action of the regime was characterized by a paternalistic protection that aim at the relegation of the woman to the exclusive role of mother. This strategy was influenced not only by the political scene, but also by the catholic church's belief and was fomented even more by the economic and military exigencies that the Regime needed to fulfill. Even if were many the initiatives of the Regime to promote the role of the women within society (like the "fasci femminili", the "massaie rurali"…) the final goal was to reinforce the public consent, and this association were always cautious to not promote any emancipationist impulses.

walls of the city and the ones that were not. A pivotal change was represented by the enactment of the Constitutio Antoniniana in AD 212 that granted Roman citizenship to (almost) all the inhabitants of the empire.

There is a fascinating document that explores the chanting of the Civitas Romana and its link to the civil code which is the "Relazione al Re" by Dino Grandi[55]. The document begins by specifying how the term 'Codice civile' does not originate from the designation used during the French Revolution which is, in fact, described in those passages as 'improper'. Grandi continues stating that legal naturalism and liberal individualism are not part of the Italian tradition and neither belong to the Italian race. According to Grandi the Italian tradition has always been characterized by the strong presence of the Roman State and the hierarchical discipline of the Roman Catholic Church. This code therefore was not the code of the *citoyen*, rather the code of the Italian fascist citizen who directly and actively participated in the actions aimed at the common good and at increasing the power of the Italian nation[56].

The *civis*, who was an active member of Roman society, is a central figure in Grandi's text. The parallelism traced between the post-revolutionary French citizen, in contrast to the legendary and invincible figure of the *civis*, becomes particularly evident. To Grandi the Italian Codice civile was neither the code of the bourgeoisie nor the code that provides rights to the citizens, since in the view of the autarchic civil code the individual cannot be conceptualized as separated from the state.

The main connection of the codes to Roman law quoted by Grandi lies in the reference to the Institutiones of the Roman jurist Gaius. The legal content found in the Institutiones was seen as pure and uncorrupted by later influences such as those of Emperor Justinian. Moreover, the *Institutiones* had not served as the direct model for the French codifiers and were not central to the Pandectist tradition. As a result, this heritage was suitable as a foundation for an authentically Italian legal identity. Gaius's definition refers to a *codex civile* that was intended specifically for use in

[55] This is a written relation presented by Dino Grandi to the King for the approval of the civil code.

[56] Migliaro and Santucci, *Noi Figli di Roma* at 210 (cited in note 3).

Rome itself and it was considered the true law of the Roman civitas, applicable only to those born within the city walls. Lastly, the Civil code recalls the division of private law that was provided by the Roman tradition, mainly based on the scheme offered by Gaius through the division into three main subjects, namely family (*familiae*), successions (*actiones*), property and obligations (*res*).

This exaggerated nationalistic politics and the oversimplified genealogy intended to offer a blatant and tenacious message: the *ius* of the *cives* was the law of the Italian population, meant for them only. The story of this legacy begins with the Roman civitas, continues through the Digest studies in the Italian universities, is shaped by the practical experience of jurists, and endures into modern times[57].

The denomination "Codice civile", according to Grandi, reaffirms a continuative and uninterrupted tradition which is at the same time Roman and Italian. Roman law was capable of shaping and adapting in accordance to the exigencies of the era in which it was applied. Grandi's work arrives at the disparagement of the model of Roman law developed by the French civil code and the Pandectistic school, neither of which represent the true Roman law of the Italian State. The law of the Codice Civile was supposed to be the correct one, due to his hierarchical and self-sufficient qualities that could also be seen as universal.

Yet, by the end of this study, it becomes clear that, despite all the references to the greatness of Roman law, none of it is truly preserved in the civil code. Although Grandi tried to support this idea, it had no influence on the final version of the code. The concept of *status civitatis* was entirely disconnected from its original meaning in Roman law[58].

[57] *Id*. at 212.

[58] In Roman law, this was the primary distinction between Roman and non-Roman citizens.

2. *Chapter II*

2.1. *Overview*

After discussing the Italian situation, the focus now shifts on Germany. The German system came from a very important tradition of studies in the field of Roman law. The research that had been conducted by German scholars during the 19th century was considered to be the most advanced and influential in the field of Roman law scholarship at the time. This result must be attributed mainly to the work of the Historical School (*Historische Schule*) and the Pandect-science (*Pandektenwissenschaft*). The publication of the BGB on the 1st January 1900 was indeed possible thanks to their doctrinal contributions as it would later become one of the most influential civil codes worldwide. Yet, the situation started to change gradually as the Nazi party began to acquire more and more power. The first public attack occurred at the Hofbräuhaus in Munich on the 25th February 1920 with the publication of the party's program of which the point 19 stated: "*19. Wir fordern Ersatz für das der materialistischen Weltordnung dienende römische Recht durch ein deutsches Gemeinrecht*"[59].

This point appears completely different if compared to the other twenty-four. The program had as principal themes more concrete "problems", such as the defense of the German population and its nation, the problem of the "strangers" and socialist vision contraposed to the solidarity of the folk's community.

The reason behind the choice to include such a demand can probably be explained by looking at the program of the socialist party of the previous year: the leader of the party at the time, Rudolf von Sebottendorf, was part of a secret antisemitic league called the "*Germanorder*" created in 1912. The previous socialist plan contained already arguments in favor of a "*Deutsches Germenreicht*", a term that can be translated as a "German common law" and was meant to replace Roman law, which was con-

[59] Nationalsozialistische Deutsche Arbeiterpartei (NSDAP), *Das 25-Punkte-Programm der NSDAP,* point 19 (1920).

ceived as an expression of capitalism and Judaism. In the Nazis' eyes, Roman law was totally impermeable to the needs of German society since its Judaic and capitalistic influences led to an inevitable individualistic corruption. This is the main ground on which the Nazis' campaign against Roman law moved on.

2.2. *German Law and the Abandonment of Roman Law*

2.2.1. *The Arguments Against Roman Law*

The program of the third Reich was very clear on this matter; German law should have been returned to the German people. Everything else that had been absorbed in 2000 years of history and that could have been put under the label of "Roman law" was to be eradicated. The concept of *Volk,* meaning community, is central to the Nazis' experience as that was characterized most of all, and certainly more than Fascism, by the "problem of the race". This theory was first issued by Oswald Spengler in the two volumes of his *Der Untergang des Abendlandes* between 1918 and 1923. The ideology was then reprised by the Nazi author Helmut Nicolai in the 1930s. Within this framework, society was conceived as a group in which people are united by blood. The German population, in particular, was supposed to share a pure Nordic blood that defined the so-called "Aryan race". The Aryan race has the inherent capacity to create values and principles that the State was tasked to implement. This thesis profoundly influenced the legal field, particularly after the publication of the theories by Helmut Nicolai called the "Legal theory of the German race"[60]. At that time in Germany a huge theoretical construction among the scholars regarded the conflict between the *Recht*, conceived as the principles of justice rooted in the German people, and *Gesetz,* the positive law produced by the liberal state[61].

[60] Helmut Nicolai**,** *Rasse und Recht: Vortrag auf dem Deutschen Juristentag des Bundes Nationalsozialistischer Deutscher Juristen am 2*, (R. Hobbing, 1933).

[61] Lawrence Preuss, *Germanic Law versus Roman Law in National Socialist Legal Theory*, 16 Journal of Comparative Legislation and International Law 275 (1934).

According to Nicolai's thesis, law was something intrinsic to human nature and that could directly influence the behavior of a person among the others into society. One of the most far-reaching implications of this view was that every race had its own legal system with its own different rules. Nicolai affirmed that mixed races, like Jews, were unable to take a just decision and distinguish what is good from what is bad[62]. According to him, only the pure breeds can truly know the law.

But this theory also specified something very interesting about Roman law: the Romans at the very beginning, were a Nordic and pure population. The problem arose when the "ancient Romans" decided to descend towards Italy and to mix with the inferior Mediterranean populations. This blending of blood caused a dilution of the pure Nordic elements[63]. But to Nicolai the real catastrophe that struck on Roman culture was the influx of the oriental races, particularly the Jews and the Syrians, which started to rule over the population thanks to their wealth. Due to this, the Roman empire soon became a soulless state ruling over a community that was no longer truly Roman[64]. The Great Roman Empire in this moment ceased to exist and the legal chaos of this situation was crystallized in the Corpus Iuris Civilis. To Nicolai this law, that does not derive from the *Volkstum*, is solely based on reason. The jurists transformed the legal norms into theoretical rules that were applied mechanically to each circumstance. German law, by contrast, had never been submitted to those corrupted laws and was still qualified to respond to the needs of its society through pure practical application[65].

---

[62] *Ibid.*

[63] *Ibid.*

[64] Helmut Nicolai, *Die rassengesetzliche Rechtslehre: Grundzüge einer nationalsozialistischen Rechtsphilosophie* at 7, (Eher, 1932).

[65] Preuss, *Germanic Law versus Roman Law in National Socialist Legal Theory* at 274 (cited in note 61).

The *individualistiche Ordung*[66], which derived from the corrupted Roman law, continued to exist even after the fall of the "Jewified, commercial world-empire"[67]. The rise of the positivistic school during the 19th century is in fact an outcome of the impact of those corrupted laws on German law. The positivistic law is abstract and mechanical, it corresponds to a command imposed from above that ignores the exigencies of the community. Yet this critique raised an inherent tension: if both liberal and National Socialist law appeared as commands imposed externally, how could the latter claim legitimacy?

The difference which legitimized Nazis law laid within the legal validity: Nazi law had a genuine popular foundation, meaning that it was the duty of the legislator to investigate the attitude of society, a living organism, and from that basis determine the content and direction of the law. Social conscience was capable of discerning right from wrong, but it required detailed guidance to address the technical, administrative and procedural aspects inherent in a modern state[68]. Everything that was not formulated by the National Socialist Party, which was the one and only interpreter of the community spirit, was classified as non-German and *"volksfremd"*. On the other hand, the repristination within the State of the *soziale Ordung*, the law based on the principles of German law and representing the "social law", was essential to avoid the same tragic fate of the Roman empire[69].

At the same time, the publication of the BGB on the 1st of January 1900 signaled the beginning of a deep crisis for the Pandectistic. Roman

[66] The *individualistiche Ordung* stand for a term that was used in the Nazi ideology to indicate the individualist tendencies that belonged to the "socialist state" and it was opposed to the *soziale Ordung*, which instead put in the center the common good of the society. For more information, see Tommaso Beggio, *Un commento alla proposta di riforma degli studi romanistici di Paul Koschaker in un documento di Ulrich von Lübtow*, 46 Index 593 (2018).

[67] Tommaso Beggio, *Un commento alla proposta di riforma degli studi romanistici di Paul Koschaker in un documento di Ulrich von Lübtow*, 46 Index 593 (2018).

[68] Preuss, *Germanic Law versus Roman Law in National Socialist Legal Theory* at 276 (cited in note 61).

[69] Beggio, *Un commento alla proposta di riforma* at 593 (cited in note 67).

law started to be perceived as lacking the practical relevance in daily life that used to characterize its study throughout the 19th century[70]. This pushed many scholars to focus on more historical aspects of Roman law, leading to the creation of the so-called "*Historisierung*". This trend was already initiated at the end of the 19th century by four big scholars, namely Gradenwitz, Lenel, Eisele and Pernice, who founded the *Interpolationenforschung*[71]. Parallel developments included the introduction in German universities of a new course on *Antike Rechtsgeschichte* by Wegner, which aimed to promote a comparative study of the legal systems of the ancient world from a juridical and historical perspective. So, already in those years it was evident that Roman law was losing its primacy in the academic scene, but certainly it was not disappearing[72].

This profound hate that later arose against Roman law led to the adoption of a reform of the legal studies in German universities inspired by Karl August Eckhardt, a prominent legal historian and member of the Nazi party[73]. The reform entered into force in 1935 and provided for many changes regarding the teaching of Roman law in the universities, in primis with the reduction of the hours dedicated to this subject and the abolition of the preparatory course of private roman law (*Geschichte und System des römischen Privatrechts*), that was preliminary to the study of the BGB[74]. Then, other mandatory classes were substituted by the new course, *Antike Rechtsgeschichte*, which gained both the favor of the student and the regime, likely because its title avoided any explicit reference to Roman law. But the most important measure that has signed the complete ostracization of Roman law in the academies was the choice to remove the mandatory exam at the end of the Roman law courses. Through these reforms

[70] *Id*. at 593.

[71] For more information, see *Gradenwitz, Riccobono e gli sviluppi della critica interpolazionistica*, (Martin Avenarius et al. ed., Mohr Siebeck 2018).

[72] Beggio, *Un commento alla proposta di riforma* at 593 (cited in note 67).

[73] *Id*. at 598.

[74] *Ibid.*

the students were not only pushed to move away from the subject, but were effectively led to regard it with suspicion, if not outright contempt[75].

2.2.2. *Carl Schmitt's Position on Roman Law*

Carl Schmitt was a conservative legal, constitutional and political theorist and is considered one of the most important critics of liberalism, parliamentary democracy and liberal cosmopolitanism. His work is seen as very controversial primarily because of his intellectual support and active involvement within the regime to such an extent that he can be considered the *Kronjurist* of *Nationalsozialismus*[76]. Schmitt joined the Nazis party in 1933. In the following period he aligned himself closely to the position of the regime in the respect of Roman law. He recognized Roman law as a foreign element that had infected the pure German law and that stood in opposition to the authentic juridical spirit of his nation.

The philosopher aimed at the purification of Nazi legal science from the "foreign" concepts as stated in his works, such as *Staat, Bewegung, Volk* of 1933, where he advocated the breaking of Christian and Roman models[77]. This position appears to be a clear contradiction if compared to his earlier intellectual trajectory. Before his accession to the party, Schmitt admired the Roman imaginary promoted by Fascism and would even describe himself as a "Roman". Thus, Schmitt originally believed that Roman public law should have covered a crucial role by influencing the development of modern juridical concepts. This was more evident particularly in his work *Die Diktatur* (1921), where he compared the Roman institute of *iustitium* with the English martial law[78]. Schmitt was also

[75] *Id.* at 599.

[76] Filippo Ruschi, *Carl Schmitt e il nazismo: ascesa e caduta del Kronjurist*, 9 Jura Gentium 124 (2012).

[77] Ville Suuronen, *Mobilizing the Western Tradition for Present Politics: Carl Schmitt's Polemical Uses of Roman Law, 1923–1945,* 47 History of European Ideas, 748 (2021).

[78] Luigi Garofalo, *Carl Schmitt: From Enemy to Friend of Roman Law*, 1 Saggi 12 (2020).

very connected to the Catholic tradition, so his conversion of thought and rejection of the Christian values in the mid-1920s appears surprising[79].

After 1933, Schmitt reframed his critique. He insisted that his campaign was not against all Roman law, but only against a specific form of its reception[80]. According to him, the true *Volksrecht* lived in the thought of the "greatest jurists of classical Roman law"[81]. This aligns with the opposition created by the regime against the "Jewish" science of Roman law towards the last years of the 1930s. Only the law of the post-classical period, a definition that in itself recalls something decaying, was spoiled and corrupted. This was the law that had been assimilated in Germany starting from the second half of the 15th century and which represented a "*Rechtswissenschaft*", meaning a juridical codified language that is not alive and that, alongside liberal constitutionalism, embodied the major invasion of foreign laws within Germany. The Nazi jurist's task was then to identify non-German legal elements and to attempt an overcome of this entire framework[82].

Over time, this foreign influence had also fostered a spiritual habit and a specific juridical way of thinking in the German culture that, according to the author, needed to be corrected in order to realign the German

[79] Suuronen, *Mobilizing the Western Tradition for Present Politics* at 750 (cited in note 77).
[80] *Id*. at 759.
[81] Carl Schmitt, *Aufgabe und Notwendigkeit des deutschen Rechtsstandes*, 182 (1936). This was a wide-spread narrative among Nazi lawyers and also propagated by Schmitt's patron Hans Frank. See, Johann Chapoutout, *The Law of Blood – Thinking and acting as a Nazi*, 53 (Belknap Press, 2018); Johann Chapoutot, *The Denaturalization of Nordic Law: Germanic Law and the Reception of Roman Law*, in *The Roman Law and the Idea of Europe* 113, (Kaius Tuori and Heta Björklund, Bloomsbury Academic 2019).
[82] The reception of Roman law in Germany was preceded by an ideological foundation according to which Roman law was the natural law of the Holy Roman Empire, that was seen as the direct successor of the Roman Empire. The widespread study of Canon law, which incorporated many Roman legal elements, further familiarized scholars with Roman concepts and by the 14th century numerous handbooks and glossaries were spreading the legal terminology of Roman law. See Charles S. Lbingier, *Reception of Roman Law in Germany*, 14(7) Michigan Law Review 562 (1916).

people with the "blood and soil"[83] ideology[84]. In his view, this stood in stark contrast to the "law and norm" orientation attributed to Jewish culture, portrayed as a tradition shaped by the absence of a state and marked by a tendency toward abstract legal reasoning. The rise of National Socialism in 1933 was seen by Schmitt as a liberation from the "foreign sickness", as the party would have been the only possible guarantor of the true German legal identity. Schmitt declared that Nazism would have been able to revive the glory of the *Volksrecht* that had been once realized by the ancient Romans. In an interesting passage by Schmitt: "The great times of legal science are by no means democratic ones nor times defined by the rule of law (*rechtsstaatliche*) in the sense of the liberal concept of democracy or rule of law (Rechtsstaat). To the authority of the famous Roman Juris consultus equipped with the jus respondendi belongs the authority of the Roman Cesar Augustus, the auctoritas Divi Augusti" (Dig. 2, 49) [sic] [85].

Although not explicitly stated, it is possible to comprehend the intention of Schmitt to underline how both the golden eras of the Roman empire and the flourishing days of Nazis Germany had been realized by a firm and strong ruler. This was also the reason behind the incredible success of the Historical school and Savigny during the 19th century: they had filled the void that was generated between the fall of monarchy and the victory of the national liberal movement. Nevertheless, Savigny didn't provide a law "useful" to the everyday practice of German society, but one asserved to the education of the bourgeoisie. This lack of genuine political unity might have, in the author's view, contributed to Germany's

[83] "The blood and Soil" ideology was a philosophy that was promoted by the Nazi party and that represented the dream of a purified social order, for more information, see Keith R. Swaney, *An Ideological War of 'Blood and Soil' and Its Effect on the Agricultur Agricultural Propaganda and Propaganda and Policy of the Nazi Policy of the Nazi Party* (1929-1939).

[84] Suuronen, *Mobilizing the Western Tradition for Present Politics* at 758 and 761 (cited in note 77).

[85] Carl Schmitt, *Die geschichtliche Lage*, 15–6 (Duncker & Humblot 9th ed., 1996).

susceptibility to liberalism, which he believed was driven by Jewish and Freemasonic influences.

Schmitt's anti-Roman discourse served two purposes: firstly, by distancing him from the historical imaginary of Rome, Schmitt is also detaching himself from the fascist model that he used to praise and secondly, it enabled him to openly criticize other scholars of his time, particularly Romanists, like F. Schulz and his work *Prinzipien des Römischen Rechts* (1934), that will be discussed later. This aligns with Schmitt's celebration of Jewish scholar's expulsions from Germany and his fierce support of the aryanization of Germany public life through the process of Gleichschaltung[86].

2.3. *Roman Law Scholars and the Regimes, Between Schulz and Koschaker*

2.3.1. *The Situation Inside the University*

The crisis of Roman law under National Socialism had profound repercussions within German universities. The regime was aware that, in order to influence the population's ideology, the role of cultural centers was decisive. A series of measures adopted throughout the 1930s were intended to expel Jewish scholars from administrative positions and, for those who tried to remain in Germany, working conditions became every day more difficult. Moreover, this systematic assault involved the journals and the newspapers. For example, from the editorial committee of the *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung*, the most relevant Roman law journal at the time, the two Jewish Roman law scholars Rabel and Levy were banished. Germany thus lost many of its most brilliant minds in the field of Roman law during those years either through dismissal or forced emigration. Those who remained had only a

[86] The Nazi term *Gleichschaltung* means "uniformization" and indicates the process of Nazification by which Adolf Hitler established a system of totalitarian control and coordination over all aspects of German society "from the economy and trade associations to the media, culture and education" (see https://en.wikipedia.org/wiki/Gleichschaltung, last visited March 29, 2026).

few options. One possibility was to openly oppose the Regime which would have definitely resulted in dismissal, deportation or worse. A second viable strategy consisted in pursuing Roman law topics seemingly irrelevant to the regime. This last choice, and perhaps the most hypocritical, involved the adoption of efforts to somehow "bend" the principles of Roman law in order to make them more compatible with the Nazi official doctrine.

A notable example of this latter scenario is Max Kaser's publication, whose views were similar to those of Schulz. Kaser[87] was a Roman legal scholar under the Regime who attempted to prove that Roman law was not inherently individualistic. Kaser referred to pivotal concepts within the National Socialist discourse, like "*Gemeinschaftsordnung*" (community order) or "*Führertum*" (leadership)[88], especially in his work *Römisches Recht als Gemeinschaftsordnung*, published in 1939. Kaser tried to adapt Roman law concepts to the terminology of the regime and its principles of race, population and law. He argued that the intrinsic nature of Roman law satisfied the concept of community that was so central for the regime. In this perspective, it was the duty of Nazism to preserve the purity of Roman law and to revive its ancient values that Pandectistic science altered in its attempt to conceal Roman law with the practical needs of society at that time.

2.3.2. *Fritz Schulz*

Born in 1879 in the Silesian region, Schulz's mother had Jewish origins, but his entire family converted to Protestantism. Schulz had a very important academic career during which he published several seminal works. In many of his publications he adopted a strong technical rigor to

[87] For more information on Max Kaser, see Paul du Plessis and Tommaso Beggio, *The teaching of Roman law in the 20th century: challenges and perspectives* (2024).

[88] Ulrike Babusiaux, *«Rechtsschichten». Ursprung, Kontext und Weiterwirken eines Begriffs im Werk Max Kaser*, 91 Quaderni della facoltà di Giurisprudenza 60 (Università di Trento, 2024).

the Roman law topics he addressed. His political contribution was significant too, as he had actively participated in the political developments of the Weimar Republic. His academic career reached its apex in 1931 when he obtained the chair of Roman law professor at the University of Berlin, the most coveted position for any German Roman law scholar in that period. Nevertheless, his years in the Capital city would be cut short after the advent of Nazism in 1933: the measures adopted to remove people of Jewish origins from public administration positions, added to his status of political opponent, led at first to his "relegation" to a minor university as the one in Frankfurt am Main in 1934 and later to his forced and premature retirement in 1935. He would then take the last ship to the UK before the start of WWII, where he remained until his death after facing many difficult years characterized by economic difficulties and professional displacement.

Among his major works *Prinzipien des römischen Rechts* (Principles of Roman Law), is an academic response to the intellectual climate of early National Socialism. At that time Schulz was regarded as one of the most prominent Roman law scholars in all of Germany and this work had been considered one of the few publications that tried to oppose the ideology of the regime. It was published in 1934 and is based on a series of lectures that the scholar intended to give at the Friedrich-Wilhelms-Universität zu Berlin the year before in the summer term, just several months after the Nazis party took the power and the Machtergreifung of the 30th January[89]. This would be the first of three books, but it remains the only one that has been published in Germany. The others were published later during his exile in Oxford: the first one being *History of Roman Legal Science*, that came out in 1946, and *Classical Roman Law* of 1951[90]. The second book was originally written in German but, ultimately, the released version was a translation of the German one.

[89] Renato Sedano Onofri, *Roman Law as Pamphlet: Fritz Schulz and the Prinzipien des römischen Rechts between Caesar and Hitler*, 3 Revista Brasileira de Estudos Políticos, 32 (2022).
[90] *Ibid.*

In Tuori's words, the Principles can be read as an implicit rebuttal to the regime's pursued eradication of the European heritage that had granted equality, tradition and the rule of law[91]. Schulz's principles appear to be counterpoints to the Nazis legal policies[92]. There are eleven principles illustrated in this work, namely: law and principles, isolation, tradition, nation, liberty, authority, good faith, humanity, fidelity and security. I will focus only on some of them, specifically the ones that I retain more fitting for the purpose of this article as they underline the contrast with Nazism legal ideology.

A first point regarded as a "stand" against the regime can be found in the preface of the book. Schulz dedicated his work to his wife Martha, something that usually would be retained to be a loving gesture but, in this context, might be interpreted differently, given the Jewish origins of the woman. But how could one of the most prominent Roman law scholars in Europe name a book about Roman law "Principles"? It is well known that the Romans didn't reason according to principles, rather, they used to analyze case by case the different legal situations and from there derive the general rule. The author explains that this choice was made out of his desire to describe the most characterizing aspects of Roman legal experience[93].

In the second chapter entitled *Statute and Law*, Schulz rejects the depiction of the Roman state as a cold "legislative machine". Even if it was not the main source of law, Schulz believed that the *leges* were an expression of the democratic will that was granted through popular assemblies. The production of law during the Republican and the classical periods was the result of a genuine casuistic approach to the legal problems generated by the ongoing discussion between the jurists and the magistrates. The Romans would prefer to cease the security of the law rather than the flexibility guaranteed by the case law[94]. In addition, customary law was

[91] Kaius Tuori, *Empire of Law: Nazis Germany, Exile Scholars and the Battle for the Future of Europe* at 39 (Cambridge University Press, 2020).
[92] *Ibid.*
[93] *Id*. at 40.
[94] *Ibid.*

an important part of the substrate of the legal order with the *mos* and *mores* that denoted the age-old customary origin of the legal principles[95]. The contrast with Nazis concepts relates to the idea that the regime had of the law. The law was supposed to be a direct representation of the society's needs, something that should have deviated completely from the law of the Liberal state, namely the "*Gesetzesstaat*" (the state of laws), that in this context is merely interpreted as an order imposed from the outside characterized by very formal administrative procedures lacking any sort of popular basis.

Another theme is the so-called isolation of the jurists, or *Isolierung*[96], a legal concept that according to Schulz impacted German law during the 20th century[97]. According to Tuori, Schulz sought the law as an independent tool completely detached from the economic and political condition of the state[98]. This approach directly conflicted with the National Socialist understanding of the jurist, who needed to be an interpreter of his own time, whose highest source of law was the will of the Führer. Schulz explains how Nazism subordinated law to political objectives. Meanwhile, in the Roman legal world there was an exclusion from the legal analysis of the social and economic contexts, meaning that the legal rules were secluded from the social function they served. Some fields of Roman society were regulated by the above-mentioned *officium*, which represented social norms that were retained to have the same binding legal force as law. Whatever happened within the domus or the marriage, for example, was completely personal and was not to be touched by any type of legal regulation. This contrasts with Schmitt and Nicolai's visions, which instead portrayed Roman society as guided solely by moral considerations rather than practical, economic or legal factors.

---

[95] Arthur Schiller, *Custom in Classical Roman Law*, 24 Virginia Law Review 271 (1938).

[96] The term Isolierung was introduced by Savigny and then later reprised by Schulz, it indicates the status of the jurist as detached from politics, religion and society. For more information, see du Plessis and Beggio, *The teaching of Roman law in the 20th century* (cited in note 87).

[97] Onofri, *Roman Law as Pamphlet* at 41 (cited in note 89).

[98] Tuori, *Empire of Law* at 47 (cited in note 91).

Another discussed concept was the nation. It is important to specify that it is improper to talk about a "Roman state" or a "Roman nation", as those are modern terminologies and they do not depict the Roman political nor juridical systems. As mentioned above, German law was theorized to be rooted in racial and unified communities that share both blood and cultural bonds. Contrarily, Roman law contemplated a universalistic empire united by a unique law that was enforced upon all the italic municipalities regardless of the origins. Schulz explains that a state is born in the moment in which a community begins to take part in its political and cultural destiny[99]. Being Roman was not something defined by the place of birth nor the composition of the blood. It was determined by the sense of belonging that was based on other factors, like common citizenship, material benefits, language and cultural life. If on one hand to Nazism the ethnic status was crucial, on the other the Romans were open to the possibility of accepting "*alienes*" or people from the lowest ranks (like the manumitted slaves) as citizens in accordance with merits, like education or participation in public life. The idea of a community that shares a common bond based on blood is something completely extraneous to Roman culture[100].

To conclude this brief analysis, I would like to discuss the principle of liberty. According to Tuori, Schulz presented Roman freedom as non-dominance[101]. This extended to both the public and private sphere, clearly opposing the Nazis' view, where the existence of the individual was completely negated within the State. This principle goes hand in hand with the one of authority, described as the capacity of the State to exercise its power vis-à-vis its citizens and, if necessary, limit their freedoms. The concept of *libertas* in Roman law had a constitutional value, as the author stated: "The individual was not free when he was a slave, a whole nation was not free when at its head was an absolute monarch or when it was subject to a foreign yoke"[102].

---

[99] Onofri, *Roman Law as Pamphlet* at 47 (cited in note 89).

[100] *Ibid*.

[101] Tuori, *Empire of Law* at 51 (cited in note 91).

[102] Friltz Schulz, *Principles of Roman Law* at 41 (Oxford University Press, 1936).

Tuori reports this freedom as having a legal value and not a factual one, as "it depended on the formal freedom possessed not only by the citizens, but equally "free" cities and communities"[103]. Areas like marriage and domicile were left completely outside the scope of State's powers. Without explicitly addressing contemporary politics, Schulz's account implicitly challenges a regime that subsumed the individual entirely within the state[104]. The Nazis' notion of freedom rejected the individual. Jurists like Schmitt defined the Nuremberg laws as an expression of freedom. This is absolutely deviated, as they placed to its core the protection and elevation of the German race which can never be equal to the foreign ones[105]. Schulz's reconstruction of Roman legal principles, by contrast, reaffirmed a tradition in which law, liberty, and authority were balanced within a framework resistant to ideological absolutism.

2.3.3. *Paul Koschaker*

Paul Koschaker[106] was born the same year as Schulz, but he followed a markedly different academic trajectory. Koschaker obtained the chair at the University of Leipzig in 1915, at the time the most important law faculty in the entire Germany, where he specialized in the study of cuneiform law. He mastered several ancient languages and entered into contact with many influential scholars and philologists of his time. Just like Schulz, he eventually reached the chair of Roman law and German civil law professor at the Friedrich-Wilhelms-Universität in Berlin in 1936, but his experience would be severely compromised by the provisions adopted by the regime against Roman law in those years. Koschaker didn't hesitate to accept the office even if just a few months earlier his own

[103] Tuori, *Empire of Law* at 50 (cited in note 91).

[104] *Id.* at 51.

[105] *Ibid.*

[106] For more information on Koschaker, see *Translatio iudicii* (1905); *Babylonischassyrisches Burgschaftsrecht* (1911); *The scope and methods of history of Assyrio-Babylonian law*, ecc. (1913); *Rechtsvergleichende Studien zur Gesetzgebung Hammurapis* (1917); *Fratriarchat, Hausgemeinschaft und Mutterrecht in Keilschriftrechten* (1933).

colleague and friend Ernest Rabel was removed from that same position and expelled from the direction of the editorial team of the *Zeitschrift der Savigny-Stiftung* due to his Jewish origins. It is questionable whether Koschaker took advantage of the situation to gain from the loss of other fellow scholars that occupied relevant positions. Yet, any evaluation must be situated within the broader context of the academic system in Germany at the time. The regime had created a very tense atmosphere in the academic scene, as all the universities and scientific journals faced an in-depth "*Nazifizierung*".

Yet, Paul Koschaker never really felt at ease at the University of Berlin and lamented immensely the disinterest shown towards Roman law by both the institutions and the students. At the very beginning the Romanist was filled with hope and assumed his new position as a sort of mission[107]. He wanted to transform Berlin into the new center for its cuneiform studies through the creation of the Seminar für Rechtsgeschichte des Alten Orients[108]. At the same time he wished to restore Roman law from the isolation it had been pushed into the previous years. None of these dreams were to be realized, leaving Koschaker in deep desolation and resignation.

Testimonies from contemporaries reveal his profound disillusionment. The Italian Scholar Antonio Guarino personally participated in a Koschaker's course. He would later describe the discomfort that the Austrian Roman scholar was experiencing[109]. Guarino stated: «Koschaker svolgeva i suoi corsi solo, o quasi, per noi fedelissimi e presentiva il giorno in cui il diritto romano non avrebbe piú avuto, nei paesi tedeschi, né discepoli né docenti»[110]. Even if certain concessions were granted to him, like the possibility of holding a seminar regarding oriental laws and the promise to have his own assistant, the regime never really accepted him and tried in multiple ways to move him away from Berlin. Rather than a

[107] Beggio, *Un commento alla proposta di riforma* at 599 (cited in note 67).
[108] *Ibid*.
[109] *Id*. at 600.
[110] Antonio Guarino, *Cinquant'anni dalla «Krise»*, 34 Labeo, 276 (1993).

direct political purge, his marginalization resulted from cumulative administrative and institutional pressures that left him feeling unsupported. Nevertheless, it would be Koschaker's own decision to determine his distancing from Berlin. He decided to present his request to be transferred to a more undisturbed facility to the *Reichsministerium für Wissenschaft, Erziehung und Volksbildung*. In 1941 he was relocated to the law faculty of Tübingen.

A significant moment in his intellectual engagement with the crisis of Roman law occurred in December of 1937 when Koschaker was invited to hold a conference at the *Akademie für Deutsches Recht* by Hans Frank, at the time the *Reichskommissar für die Gleichschaltung der Justiz*, thus one of the most prominent figures of Nazis Germany[111]. The topic that Koschaker decided to address at the Akademie was the crisis of Roman law.

Acknowledging this topic before an audience closely aligned with National Socialist legal policy was a delicate undertaking. The content of the conference would be then reported in his publication *Die Krise des römischen Rechts und die romanistische Rechtswissenschaft*, released in 1938. This work can't be professed by any chance as a direct condemnation of the regime, since at the time this type of attitude would have entailed grave personal consequences. What Koschaker reported as the reasons behind the crisis of Roman law had nothing to do with the regime's anti-Roman policies, with point 19 of the party's program or the Eckhart reform of 1935[112]. Instead, one of the first cracks of Roman law was identified in the new approach adopted by the scholars at the end of the 19th century, namely the Historisierung[113]. Notably, Koschaker aligned himself with a line of thought inspired by the school founded by L. Mitteis[114]. This

[111] Beggio, *Un commento alla proposta di riforma* at 599 (cited in note 67).

[112] Tommaso Beggio, *Paul Koschaker and the Path to "Europa und das römische Recht*, 6 Legal Roots (2017).

[113] See above, Chapter II, § 2.2.1.

[114] For more information, see Tommaso Beggio, *Alla "scuola di Ludwig Mitteis": gli studi papirologici e i nuovi orizzonti metodologici della romanistica di inizio Novecento* in *Lo studio*

new approach aimed to shift the focus toward various ancient cultures that predated Roman law, with particular emphasis on the legal traditions of the Middle East.

In 1941 Koschaker finally left the University of Berlin and accepted a position in Tubingen. His permanence into the city, even if constellated at the very beginning by many accomplishments, such as the appointment as Dean of the Faculty of Law in 1946 and the "*Emeritierung*" received in the same year, was still difficult for the scholar. The author likely used this opportunity to reflect more personally and broadly on the role of Roman law within German academia. A first potential part of this reasoning can be found in the proposal for the reform of the teaching of Roman law within the Universities in Germany, entitled "*Die Reform des romanistischen Rechtsstudiums in Deutschland: Ein Denkschrift*", a text of 1941. The work reported some of the concepts he had already expressed in Die Krise. Koschaker's reform program centered on two main objectives. Firstly, the restoration of the dignity of Roman law by making it a "living discipline" again. This process was called by the author "*Aktualisierung*" and would have left behind the historical content in favor of the adoption of an analytical clarity and systematical legal thinking of the Roman jurists. Methodologically there was an appeal to the "Return to Savigny", taking Savigny's focus on the internal development of the law that should have been filtered through the lens of modern legal science to bring Roman law to its technical excellence.

By praising the positive aspects of Roman legal science that could be reprised in modern times, Koschaker tended to neglect the substantive values that might justify its endurance in time. He strongly criticised Interpolationism, which he accused of being responsible for the transformation of the Roman jurist into a historian-philologist. Roman law destiny should not have been marginalized in universities, it could have contin-

dei papiri nei rivolgimenti metodologici della romanistica tra il 1860 e il 1960 (Christian Baldus et al. ed., Quaderni della Facoltà di Giurisprudenza dell'Università degli Studi di Trento 87, 2024).

ued to exist alongside the new course dedicated, more generally, to ancient laws and possibly be connected to the future legal system of the new Europe.

Koschaker was not proposing the great return of the Pandectistic, the introduction of external elements in German law and, certainty, he did not harbor the illusion of returning Roman law to the status it had in the previous century[115]. His true desire was the possibility for Roman law to gain once again a key position in pedagogical studies to influence the organizational and systematic juridical thought of the young students, not only to better understand the current law, but also to understand its possible development in a more European aspect[116]. It is possible to argue that the devastating delusion that the scholar had experienced in Berlin, the place where he was supposed to enjoy the climax of his career, brought him to have a more detached and colder outlook over the new existence of Roman law. Koschaker was then feeling the urgency, as the most important Roman law professor at the time, to bring out most of what survived of the Roman legal heritage.

The reform envisioned by the scholar would have been structured as followed: "*Grundzüge des römischen Privatrechts als Einführung in das europäische Rechtsdenken*", that would have not substituted but would have gone alongside "*Privatrechtsgeschichte der Neuzeit*". The latter course would have been introduced in the third semester and would have provided an expansion of the historical-juridical knowledge of the students. This and the course of «*1 stündige Übung 'Lektüre und Erklärung einfacher Quellen-stellen'*», introduced during the fourth semester, would have been mandatory, unlike the course of "*Römische Rechtsgeschichte*", which could have been an alternative to the course of "*Antike Rechtsgeschichte*"[117]. Thus, Koschaker designed an optional course about the exegesis of the pandects that the students could have taken to delve deeper into the Roman law

[115] Beggio, *Un commento alla proposta di riforma* at 607 (cited in note 67).
[116] *Ibid*.
[117] *Ibid*.

sources[118]. The scholar also pushed for the reintroduction of the mandatory exam at the end of the courses. Thus, this proposal was received by the Reichsminister für Wissenschaft, Erziehung und Volksbildung and then it was sent to the Deans of the Law faculties across Germany[119]. They were meant to discuss if the suggestion was actually viable, and even if it obtained some positive feedback, nothing was ever done.

2.4. *Differences with Italy*

The preceding analysis allows for a comparative assessment of the role played by Roman law within the Fascist regime in Italy and the National Socialist regime in Germany. Both systems are classified as totalitarian regimes, which share some structural features: the presence of a charismatic leader and the masses, the identification and persecution of a certain type of "enemy" (either a political opponent, as in the case of Fascism, or an entire ethnicity, as in Nazi Germany), the suppression of political pluralism and civic freedoms and the persuasive use of propaganda. Italy and Germany were devastated by WWI, with social tensions increasing in Italy and Germany being humiliated by the peace treaties imposed by France. Those countries were searching for some kind of comeback, as the aim of the regimes was to exploit the outcast to emerge in a system that rewarded individuals for their loyalty and that equally rejected the ideas and principles of the liberal state. Yet, despite these similarities, the two regimes adopted markedly different attitudes toward Roman law.

To understand the reasons behind those two opposing outcomes, it is necessary to look at the origins of the hatred for Roman law in Germany. The individualistic nature of Roman law was emphasized mostly by the Germanists who wanted to delegitimize the Pandect-science, liable for excluding the "true German law" from private law. This rejection of German law happened firstly in 19th century Germany, which quickly moved

[118] *Id*. at 608.
[119] *Ibid*.

from a still almost feudal system to a modern industrialized country eventually united only in 1871, and later with the enactment of the BGB. All the critiques against the Pandect-science, that was not just a legal movement but represented a specific ideology and culture, were often mainly instrumental and lacked any type of accurate legal basis. Some German law scholars, to give more strength to their stances against the individualistic order apparently created by the Pandect-science, started to support the racial theories. This is the way that led Roman law to become a symbolic target in broader debates over national identity, modernity, and liberalism.

Italy rejected the individualistic nature of the legal system as well, but the Italian Roman law scholars have never seen Roman law as something that had to be excluded from their legal system. Instead, they attempted to adapt it to the legal ideology of the regime. Some legal ideas like Betti's *negozio giuridico* were reconcilable with the needs of fascism and corporativism[120]. The Roman Empire was used, therefore, as a symbol of the greatness of Italy. The revival of Roman law was carried out primarily from a historical perspective. As stated by Gianni Santucci, the Italian Roman scholars were "*giuristi che nella ricerca storica celebravano l'importanza dell'eredità del diritto romano*"[121]. The Italian Roman law scholars were also accepted by Fascism, as they found themselves very close to the regime that allowed them to actively participate in political life and to promote activist culture. Fascism used the Roman law scholars and experts to gain legitimation and, on the other way around, the intellectuals were gaining a central role in the Italian cultural direction. Some of them, as discussed in the previous chapter, obtained political recognition while the majority was engaged in cultural initiatives.

This is certainly a crucial difference from the Nazis regime, which instead opted for the adoption of measures to limit the role of Roman law

[120] Tommaso Beggio, *Funzione sociale e meritevolezza del diritto privato*, 1 Storia metodo cultura nella scienza giuridica 371 (2022).

[121] Gianni Santucci, *Eccessi della critica interpolazionistica e crisi del diritto romano: Uno sguardo alle tendenze metodologiche nella romanistica degli anni Trenta* at 522, (Editoriale Scientifica, 2022).

within the academic scene. Roman law was a tool for propaganda which stood for the representation of the liberal state. It was something that had to be completely eradicated and marginalized. Italian Roman scholars, on the other hand, used Roman law as a tool to support the anti-liberal view, like in the case of Betti, who referred to the Roman Empire on multiple occasions as the perfect example of domination through violence. So, in Italy a very clear message needed to pass: Italians were the heirs of the Roman Empire and they should have embraced that past, that represented the eternity of the power of the Italic population. Fascism changed Roman law values without taking into consideration concrete historical data, with the "mito della romanità" becoming just a tool to promote strong images of command and authority.

The major characteristic of Roman law is the fact that it refers to a very vast and broad topic that contains within itself so many different experiences. This means that, for the purpose of propaganda, it was very easy for the two regimes to pick whatever argument they preferred and to use it to legitimize or delegitimize any type of topic they needed to. The hate of Germany for an individualistic law, unable to satisfy the exigencies of a pure race, is directly connected to this particular type of construction. If Roman law had stopped to be pure and had begun to be unfit for the German population, it was because of the influences of external and inferior races. If Roman law needed to be reprised and put at the center of a narrative focused on the authority, the Empire and the conquest, it was because that was the law of the true Italians, the heirs to a superior tradition. Those constructions are distorted, lack any type of scientific evidence and exist with the sole purpose of satisfying a political goal. This is a very important factor on which we should reflect the way governments can bend history and tradition so easily to make them fit into a reality that they idealize.

3. *Chapter III*

3.1. *Overview*

This concluding chapter turns to the revival of Roman law and the crucial role it played in the development of the European legal tradition of modern days. The fundamental part is to understand how Roman law was then used as a unifying intellectual and normative framework in Europe and the extent to which its legacy remains embedded in the European Union. From a historical perspective, Roman law was always present within the European legal system, as the study of the subject started around the 12th century. Five centuries after its enactment, Justinian's Digest became the most important legal source throughout Europe. The surviving portions of the Corpus Iuris Civilis that are known today derive from a Codex discovered in Pisa[122]. The recovery and dissemination of the code was a very slow process that took place over half of the 12th century.

The Digest was divided into three parts, *Vetus* (1–24.2), *Infortiatum* (24.3–38), and *Novum* (39–50). The complete Digest would be eventually supplemented by the *Institutiones* and the first nine books of the code, but it was primarily the Digest that offered a rich and rigorous legal tradition. The leading law school at the time was in Pavia: there, the jurists used for the first time the glosses to interpret the text. Yet, Bologna was the true birthplace of systematic study of the Corpus Iuris Civilis.

The turning point came with Irnerius, an Italian scholar who turned the teaching of the subject from practical training to an academic discipline. He introduced the marginal glosses over entire passages and this method became the hallmark for the glossators, a group of Bologna-based legal scholars. The Glossators regarded Justinian's text as perfect, almost sacred, and were firmly convinced that all possible legal problems could

[122] Peter Stein, *Roman Law in European History* at 43 (Cambridge University Press, 1999).

have been solved through the close interpretation of the Corpus Iuris Civilis[123]. Irnerius was then succeeded by many important scholars that, despite having different methods, were able to innovate the studies of their predecessors. The last successor of this dynasty was Accursius, who compiled over 96.000 glosses into the Glossa Ordinaria, the definitive commentary on Roman law for centuries. The maxim came to be accepted that "What the Gloss does not recognize, the Court does not recognize"[124].

During this time, the Church sought to consolidate its institutional authority that would have encompassed the entire Europe, where every member of the clergy would have been ultimately obliged to report to the pope[125]. However, Canon law lacked the structured and authoritative corpus that the civil law had in the Justininan's Corpus Iuris Civilis. It consisted in a disorganized collection of biblical excerpts, Church council decisions, papal decretals, and Church Fathers' writings. A decisive step towards systematization was the enactment of Gratian's work: the *Concordantia discordantium canonum* (later known as the Decretum). Gratian's text was able to provide commentaries and explanations to conceal the contradictory statements of Church law. Given the utilized approach, the Decretum had a suitable nature for the glossarial method[126]. Thus, also within Canon law, Roman law started to be seen as a valuable auxiliary source. An example is the Decretals of Gregory IX that contained eleven legal rules that mostly originated from Justinian's Digest or other Roman sources. Through this process, Roman law became an indispensable auxiliary source for Canon law, contributing to the emergence of a shared Roman-canonical procedural framework[127].

By the 13th century, Europe was characterized by a dual legal landscape. On one hand, the ancient Roman law system was partly administered by the church and at the same time taught in a universal language

[123] Stein, *Roman Law in European History* at 49 (cited in note 123).
[124] *Ibid.*
[125] William B. Ewald, *The Roman Foundations of European Law*, 29(2) Penn Law Journal (1994).
[126] Stein, *Roman Law in European History* at 46 (cited in note 123).
[127] Antoni Dębiński, *Church and Roman Law* at 89 (Wydawnictwo KUL, 2010).

within the universities. On the other, a multiplicity of different feudal laws and local customs continued to be applied by temporal courts. The passage was then simple: Roman law moved out of the universities and entered the courts of the secular rulers[128]. Both the civilists and the canonists were very aware of the need to obtain a developed legal procedure from the texts. This was not just an academic exercise that involved the generation of glossators that followed Irnerius. Bulgarus articulated foundational procedural principles, like the relationship between the judge, the defendant and the plaintiff and the placement of the burden of proof over the latter. Bassanius established that a judgement should have been rendered on the basis of judicial impartiality, not a personal opinion[129]. The involvement of the ecclesiastic courts was crucial for the development of a common procedure. In the 12th century the proliferation of manuals, initially solely based on Roman law, started to increase and, at the same time, canon law expanded through papal decretals, leading to the evolution of the Roman-canonical procedure. Civil law was thus adopted within the Holy Roman Empire because of its formal authority and technical superiority, as it offered an universal legal grammar for the interpretation and the gaps in local law[130].

This worked particularly well as the subjects began flocking into the emperor's courts. This model was followed then by the German princes that also established their own Roman courts. This led Roman law being taught in Germany as a genuine subsidiary source of the law, if there was the need to write a new institute or interpret a statute, everything was done by the lawyers trained in the universities that stuck firmly to Roman law. These reasons, alongside the *Aktenversendung*, a practice by which the most difficult cases were sent to the best trained Roman law professors to be decided, led to the quick expansion and reception of Roman law in Germany[131]. Moreover, since the professors had no expertise in the law of the provinces, they applied the principles of Roman law,

[128] Ewald, *The Roman Foundations of European Law* at 3 (cited in note 125).

[129] Stein, *Roman Law in European History* at 58 (cited in note 123)

[130] *Id.* at 63.

[131] Ewald, *The Roman Foundations of European Law* at 3 (cited in note 125).

starting the advancement of the *ius commune* that would then become a common law for the entire continental Europe. So, the *ius commune* was a fundamental part of the development of civil law, the system of all the modern European states.

3.2. *Building the Idea of Europe*

3.2.1. *From the Roman Empire to the European Union*

Drawing a direct comparison between the European Union and the Roman Empire would be anachronistic and erroneous. Nevertheless, one may wonder whether the EU could partly derive inspiration from the cultural and judicial heritage that the universalist Roman judicial-political order was able to create and establish in the entire old continent. Gerard Delanty expresses the so-called "dilemma of the European identity". On one side there are some universal values, which are seen as part of the western culture and are not exclusive to the European one, that lead to a common but weak sense of identity. On the other, there are numerous cultural specificities which are potentially exclusive and resistant to diversity. The challenge lies in reconciling inclusiveness with meaningful collective belonging.

In his article *Hadrian's cosmopolitanism and Nazi legal policy*, Tuori talks about the idealization, during the 1930s, of cosmopolitanism, with the emperor described as capable of pacifying the conflicts and to promote culture and balance within society. The Roman experience was the first one to create a centrally governed state that comprehended many different areas[132] and this multi-tiered system allowed the integration of different cultures without eliminating their local identity[133]. This is definitely

[132] Kaius Tuori, *Hadrian's cosmopolitanism and Nazi legal policy*, 4 Classical Receptions Journal 471 (2017).
[133] Gary Marks, *Europe and Its Empires: From Rome to the European Union*, 50(1) Journal of Common Market Studies 1, 7 (2012).

the big goal of European integration[134]. The governors were the ones in charge of imposing direct rules and maintaining order but were given instructions to always respect local customs and operate in accordance with the *lex provinciae*[135]. The Empire had also organized an extraordinary bureaucracy that comprehended detailed public land records and a tax collection mechanism across the entire Empire. Everything would then fall apart after the collapse of Rome, leaving the local communities isolated and self-sufficient[136]. This period of peace, that culminated during the "Golden Age" of the Pax Romana, was considered a solid basis for the development of an European unity.

Moreover, the construction of the idea of Europe was strengthened even more with the rise of the Byzantine Empire that blended the Oriental heritage with the European one, enriching its culture with values that have existed for thousands of years[137]. Thus, the religious factor has also constituted a decisive role in the formation of the idea of Europe as the spread of Christianity, which increased the universally applicable values and created a sort of sense of separateness with the other existing religions[138].

If compared to the type of accommodation pursued by the European Union, it is possible to see the clear attempt to reconcile scale with community diversity using states as building blocks. The European states have been separated for a long time, have entered into multiple conflicts against each other and, most of all, are formed by centralized governments which makes it difficult for them to be assimilated under a higher authority. The consensus-driven approach of the EU that has centralized control employs different means like minimal taxation and redistribution,

---

[134] Ivan Milotić, *New Frontiers: Law and Society in the Roman World* at 64 (Edinburgh University Press, 2013).

[135] Marks, *Europe and Its Empires: From Rome to the European Union* at 8 (cited in note 133).

[136] *Id*. at 9.

[137] Milotić, *New Frontiers: Law and Society in the Roman World* at 64 (cited in note 134).

[138] *Id*. at 65

legislation via directives and decision-making by unanimity and supermajority just to name a few. This structure, like the Roman Empire, sets up a multi-layered governance which strengthens integration while respecting national autonomy and identity. The European Union is not an Empire in a strict sense[139]: in some ways, it can be even considered the opposite of an Empire, since it doesn't have a central authority and it operates through multiple presidents and multilevel governance. Thus, it doesn't have any type of coercive power, which instead relies in the hands of the Member states upon laws.

In his paper, Marks examines the concept of assimilation as a central dynamic of imperial and supranational integration. This term refers to the encouragement of the community to adopt a dual identity based on voluntary integration. The whole procedure is based on a pressure between an Empire open to newcomers and cohesive communities, which are very wary and tied to internal norms and identity. Roman citizenship was something composed of values that went beyond social and cultural identifiers like race, language and religion. Just like Rome, the Union has pursued forms of "assimilation lite", meaning non-coercive and characterized by dual identity integration[140]. The true aim in both cases is not assimilation *per se*, but a byproduct of a broader political and legal integration. After WWII, the European countries saw each other as strangers and enemies as a common European identity didn't exist. European political culture started to emerge, however, there was still a lack of unified cultural or emotional base. Still, these days, just a small percentage of the population (about 10%) feels European first or exclusively European[141]. European public opinion plays a crucial role, and the expansion of cross-border experiences could help to adopt a dual national-European identity.

[139] Marks, *Europe and Its Empires: From Rome to the European Union* at 7 (cited in note 133).
[140] *Id*. at 14.
[141] *Id*. at 15.

3.2.2. *Koschaker's Role in European History*

After WWII, Koschaker decided to reinvent and reinterpret his work by focusing on a new narrative regarding the position that Roman law should have played in Europe. After the crisis that had characterized the subject in the previous years, this scholar tried to find to Roman law a new meaning and dignity by recalling its great significance from a historical, legal and cultural European perspective[142]. Before scrutinizing the core substance of Koschaker's masterpiece Europa und das römische Recht, it is necessary to underline that the content of his last work was not new to the ideas of the author. In fact, already within *Die Krise des römischen Rechts und die romanistische Rechtswissenschaft*, Koschaker mentioned the great role of prominence that Roman law should have had and discussed the position of Roman law as a unitary basis for Europe[143]. Koschaker's goal in this work was the attempt to save Roman law from the condition in which the study field was rotting at the time and to revive the «Ferment» for the «*Wiederbelebung einer europäischen Privatrechtswissenschaft*»[144]. This is a very controversial passage of *Die Krise*, as Koschaker tied the destiny of Roman law to the future of the new Europe which was destined to be led, as it was supposed to at that time, by Germany[145]. This shows how, already in 1937, the author was envisaging a renewed central position for Roman law, that was identified as the main legal foundation of Europe. This was intended to be extremely crucial especially in the light of a common European private law system.

[142] Kaius Tuori and Heta Björklund, *Roman Law and the Idea of Europe* at 162 (Bloomsbury Academic, 2019).

[143] *Ibid.*

[144] P. Koschaker, *Denkschrift* at 6. The *Denkschrift* was one of Koschaker's unpublished documents preserved within the archives of the Universitätsarchiv in Tübingen. The document appears in: T. Beggio, *Un commento alla proposta di riforma* at 601 (cited in note 67).

[145] *Id.* at 606.

In *Europa und das römische Recht*, published after the end of WWII in 1947, Koschaker's words are described as a sort of "warning cry" towards his colleagues. The author attempted to tell them that Roman law should have been placed at the center of the recovery and reconstruction of Europe[146]. The *Ius commune* should have been the first step to lay down the basis for a renewed European legal culture and legal system. Despite the title, Koschaker didn't focus on the development of Rome nor its standing from a legal point of view. Indeed, he centres on Roman law emerging from the Corpus Iuris Civilis. It was the work of the glossators and commentators that had permitted the creation of a dogmatic structure of the law. Their tradition, according to Koschaker, would then continue through the Pandetistic. The depiction of the continuity of Roman law is not correct and, mostly, is hyper idealized. But this argument perfectly fits the two points that Koschaker wanted to achieve: *in primis* it reaffirmed the importance of the Roman legal tradition across Europe, offering one of the earliest comprehensive accounts of its reception as a pan-European phenomenon and secondly it advocated for a dogmatic approach to Roman law studies, effectively proposing a programmatic framework for future legal scholarship.

A major point also discussed by Koschaker is the shift from *Justinianrecht* to the *Professorenrecht* that happened in the 19th century[147]. This more theoretical form of lawmaking developed by the Historical school and later the Pandectistics is identified by Koschaker also as one of the most important causes of the crisis of Roman law as discussed in the previous chapter, since this shift broke the bond between theory and legal practice. This moment is individuated in time with the publication of the BGB. A return to the Justianrecht would have consolidated, according to Koschaker, to a reconnection between legal history and modern legislation. He proposed a comparative historical analysis of jurisprudence's societal role across eras: from ancient Rome to continental Europe and the

[146] Tommaso Beggio, *Paul Koschaker Rediscovering the Roman Foundations of European Legal Tradition* at 237, (Universitätsverlag Winter 2nd ed., 2018).
[147] *Id.* at 239.

Anglo-American world. This analysis led Koschaker to champion Juristenrecht as a foundation for restoring a *ius commune europaeum*, a shared European legal framework rooted in Roman law[148]. To contribute to the systematic and dogmatic reconstruction of European private law, Koschaker advocated for a comparative method that would have developed both horizontally (comparison of the modern legal systems) and historically (a comparison with the ancient ones)[149]. This would have permitted Roman law to remain a central point for the common foundation of European legal systems.

Koschaker's work can be considered the basis of the modern comparative legal history, as for him the legal research should have served contemporary legal systems through the extraction of the principles of the past that could still be applicable. The conception of relative natural law, a new method discovered by Koschaker and introduced into this work, was used to idealize the construction of Roman law to uncover common principles shared across European traditions. This work has established the basis for transnational legal discourse that also included the Anglo-American tradition. Their shared transnational perspective underscores Roman law not just as a legal heritage, but as a cultural and moral framework vital to rebuilding a unified and principled Europe. The practical and symbolic significance that the author gave to Roman law shows the true primordial need that Europe was searching for at the time: stability. The continuity of Roman law chanted by Koschaker promotes eternal values and principles of a unified cultural tradition that not even war could break. It was fundamental for Europe to restart its shared tradition.

This work has left a substantial legacy to many authors in the second half of the 20th century, that were left, once again, scared, confused and unable to find a new way to approach Roman law. Underlining once again the historical, legal and cultural value of the subject and became, somehow, the manifesto for the romanists and legal historians of the time. Relevant will be the behavior adopted by Calasso that decided to spread

[148] *Ibid.*

[149] *Ibid.*

in Italy Koschaker's ideas. This will be the main topics of his book *Introduzione al diritto commune* of 1951 and a translation that will be published after *Europa und das römische Recht*. Even if the Italian author was quite skeptical about Koschker's crystallized view of legal development in Europe during the Middle Ages, he certainly recognized the genius of the German author and shared greatly the value that he gave to the tradition of the *ius commune*. Koschaker is the pioneer of comparative legal history, his works and commitment have brought a lot to the development and improvement of the comparative legal doctrine and continues to do so. Even today it serves as a reference point for anyone seeking an alternative interpretation of European legal history.

3.2.3. *The Emergence of the European Narrative After WWII*

Koschaker's portrayal of Roman law as a cohesive and adaptable foundation for Europe after WWII is extremely idealized and biased. His reconstruction is the result of the personal experiences that have been characterised by the endless pursuit, as seen in the previous chapter, of a solid restoration of Roman law's relevance. This objective inevitably influenced both the tone and the structure of his historical narrative. Thus, it has been pointed out how Koschaker's reconstruction of Roman law was strictly intertwined to the German tradition since it has been closely connected to the story of the Holy Roman Empire and Germany[150]. By doing so, Koschker has effectively failed to take into consideration the past cultural context of the Eastern Countries and has overestimated the continuity and linearity of the reception of Roman law. However, those facts shall not undermine in any way the importance of Koschaker's thesis. His work has played a pivotal role in restoring once again the centrality of Roman law within the European narrative. Roman law, as a matter of fact, was and still is capable of influencing the modern legal system in many different ways through its legal science, jurisprudence and dogmatic concepts[151].

[150] *Id.* at 250.

[151] *Ibid.*

Koschaker's work surely had an impact in the influence of the redefinition of Europe in the rediscovery of its identity. The ideas portrayed in this work are just a reflection of the common European sentiment that was being developed in those same years across the continent[152]. The impact of his thesis can be observed in the positions adopted by subsequent scholars like Calasso and Coing. The first one, being moved by Koschaker's declarations, has embraced the European spirit and beliefs that were supposed to "be the basis for a scientific programme in order to send a cultural message that would inspire a European legal unity"[153]. The latter would instead play a role in European legal history through the foundation of the Max Planck Institute for European History in Frankfurt in 1964. Coing's approach focused more on the role of the *ius commune* rather than the one of Roman law in a strict sense, as he aimed at the rise of a new *ius commune europeaum* through the historical and comparative study of sources[154]. To sum up, even though Koschaker's portrayal of Roman law has been faulty and, at times, imprecise, it has been surely a crucial point to provide a perspective on the reconstruction of Roman law over its core values and principles.

3.3. *The Principles of Roman Law in European Law*

3.3.1. *European Law and the Ius Commune*

The European movement and institutions, during the 20th century, have been described as attempting to form a new *ius commune* from the European private law perspective. This characterization, however, requires careful qualification. A major difference between EU law and the *ius commune*, according to Peter Stein, is the fact that the latter was adopted voluntarily because of its well established and recognized intellectual and technical superiority. Meanwhile European laws are usually

[152] *Ibid.*
[153] *Ibid.*
[154] *Id.* at 251.

imposed "from above" to preserve the sake of uniformity[155]. European law is mainly described as overly bureaucratic, something that could increase the distance between European legislation and the citizens.

The flexible rules and the principles created in the Roman law tradition, like the *ius naturale*[156], served as a moderating force against rigid law[157]. At first glance, European law seems to be breaching Roman concepts like contractual liberty, legal dualism and favoring the vigilant party. A closer examination, however, reveals enduring continuities, like the ever-lasting bond consolidated by shared values like *bona fides* (good faith) and *aequitas* (equity)[158]. A more tangible example is EU consumer law: its principal aim is to protect the weaker party in contracts by correcting the structural imbalances of bargaining power. Although the regulatory technique differs markedly from that of classical Roman law, the underlying normative objective resonates with Roman ideals of justice. The problem here stands within the strict positive approach that overregulates and alienates citizens. According to the Consumer Survey 2018, 2019 only 45,5% of the population understand their rights, meaning that the majority are unable to properly exercise them due to their lack of knowledge[159].

Over-regulation in consumer protection and over-reliance on legal protections can result in reduced public vigilance and in a decline of legal awareness. This generates mistrust within the public institutions that, according to Ivančík, could be corrected through the revival of *ius naturale* principles like the bona fide, applied case by case. This approach might restore a measure of flexibility and ethical orientation to private law, but

---

[155] Ján Ivančík, *Roman Principles – Foundations of the European Legal Culture and Their Position in the Changing World* at 62 (Vilnius University Press 2020).

[156] Jus naturale refers to natural law, a philosophical system of legal and moral principles that are purported to be based on human nature's fundamental ideas of right and wrong rather than on legislation or result of a judicial proceeding.

[157] Ivančík, *Roman Principles – Foundations of the European Legal Culture and Their Position in the Changing World* at 62 (cited in note 155).

[158] *Id*. at 63.

[159] *Ibid.*

it would also lead to the reduction of legal certainty. Mandatory protections like product liability remain essential, but caution and consumer responsibility, that align with principles built on the ancient Roman law rules of *vigilatibus iura scipta sunt*, the laws are written for those that take care of their rights, should not be abandoned.

In addition, a deep reminiscence of Roman law can still be found in the modern principles of private law. The Roman jurists created between the 4th century BC and the 4th century AD a legal culture rooted in reason and fair justice. Roman law remains the basis of modern legal education and identity. It is possible, therefore, to outline a "catalogue" of core legal ideas shared across the European legal systems that constitute the pillars of the core of European Private law, like *persona, dominium, obligation, contract* and *inheritance*[160]. Still, many concepts developed by Roman jurists, like the classical division between public and private law cannot be considered relevant in modern times. The complexity of global and digital economies requires frequent and deep state intervention into what were traditionally private legal spheres, blurring the line between public and private law far beyond Ulpian's framework.

In the words of Stain, European Union law can be somehow described as a renewal of a cultural legal unity which once covered the whole continent. The new interest in the "civilian tradition" has focused its researches over the development of the legal doctrines from Justinian's code to the modern codes, highlighting the legal notions created by Roman law that, to a certain extent, still survive to these days and have changed to adapt to the current needs[161].

3.3.2. *Roman Law Within the Findings of the ECJ*

The European Court of Justice represents the main judicial body of the Union and has existed since its very beginning. The court possesses

[160] Tommaso dalla Massara, *New Europe–Old Values? Reform and Perseverance: Can Roman Legal Tradition Play a Role of Identity Factor Towards a New Europe?* at 4 (Springer 2016).
[161] Stein, *Roman Law in European History* at 130 (cited in note 122).

many duties among which ensure the uniform interpretation and application of European law in the Member States. The case law of the Court has played a pivotal role in the influence of the legislation at both national and European level. Even if at first community laws were seen as part of International European Public law and their primary aims were mainly economical. At some point the institutions realized that, in order to secure the proper functioning of the internal market, it was necessary to intervene within the relations of the private subjects[162]. This led to a shift of focus over the rules that regulated the rapports between private individuals. In 1989 and 1994 a proposal was advanced by parliament: a new European *ius commune* that would have taken the form of a common private law codification. The venture was attempted by the Lando Commission that issued the Principles of European Contract Law. However, the ambitious project of an effective European Civil Code was never concluded. Even if this request is still pending, the pursuit of the unification of private law at European level has assumed different forms, one of which, still not much explored to these days, is the contribution of ECJ case law[163].

In the civil law systems case law is not properly considered a real source of law, although it has a certain impact over the formulation of legal rules. In the context of the Union, the decisions of the ECJ play an important role mostly because of the incomplete nature of the European treaties and the fragmentary character of secondary legislation. The Union is a relatively young system that needs to compensate for the nonuniformity of its legislative provisions through the implementation of the so-called "legal values" and general principles that mainly derive from the content of the European treaties and the common constitutional tradition of the Member States. The ECJ has to clarify, through the preliminary rulings, the context and the content of unclear European measures. Many of the court's legal maxims, included within the delivered judgements, contain ancient legal rules of the old Roman-Canonical *ius commune*, generally

[162] Francisco J. Andrés Santos, *Roman Law in Today's European Legal System*, 12 European Review of Private Law 347 (2004).
[163] *Id.* at 348.

written in Latin. Furthermore, they present a sum of a valuable rule or experience applicable to the decided case when there is no explicit rule available. An example are the expressions *"audiatur et altera pars"* and *"ne bis in idem"*. Those legal maxims are regarded as two of the most important principles of the judicial proceedings, namely that both parties must be heard at trial and is not possible to proceed twice on the same subject[164].

These rules per se do not provide any type of information regarding the outcome of the case. Their aim is to synthesize a legal concept and to identify the law in force within the European Union. This involves examining how EU courts apply the law in practice, especially in light of gaps in legislation and the current limitations of political and institutional efforts to unify European law[165]. Santos analyzes three possible ways to understand the role of the maxims in ECJ jurisprudence. Firstly, they can be intended as an expression of the Advocate General and judges' wills to prove their ability and knowledge in the civil law tradition or they can be supposed to be enunciations of the general principles of Community and national law applicable in specific cases. If we sustain this type of interpretation, it would be implied that there is no special meaning behind the use of these rules[166]. The author of this article does not retain that the first scenario is actually viable since, as it is underlined by Santos himself, the inclusion of the maxims would depend on personal knowledge of the jurists and, furthermore, their task would be limited to simple ornaments to decorate the outcome of the decision[167]. Moreover, this theory doesn't explain the vast use of these maxims nor clarifies their application in cases to express a general provision essential to the harmonization of European law in the court perspective.

The second possible explanation, more valid in my opinion, applies the principles in contemplation of general principles to supplement or interpret the European legal order in accordance with the articles 19 TEU, 217 and 288 TFEU. Those articles express respectively the capacity of the

[164] *Id.* at 351.
[165] *Id.* at 352.
[166] *Ibid*.
[167] *Id.* at 353.

ECJ to ensure the uniform application and interpretation of European law into the MSs and the legal capacity and legislative power of the Union. The court has a high discretion in identification and selection of the applicable principles, given that they are not inconsistent with Union law. The principles can generally be divided into three categories: principles universal and common to every legal order, principles of International Public law and the principles of European Union law. The latter can be derived from different sources, as stated in art 6(3) of the TEU: "3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law"[168].

Since it would be practically impossible to scatter each MSs legal tradition, it is obvious for the court to draw from their shared legal history. The *ius commune* embraces the common spirit of many rules in the different legal systems and through its simple formulation can provide clear and effective judicial solutions[169]. In this case the fact that the rules are delivered in Latin is a purely stylistic choice to fill the gaps of positive law, for they could be written in any other language. But it is impossible to deny that, at least in part, the spirit of the *ius commune* is still living in the current modern European legal system. The judges and the Advocate General express their desire to reconnect with the Roman-Canon law tradition, a tradition that somehow embodies a "*corpus iuris*" common to all the European civil traditions. The basic institutional structures of the MSs have not changed in the last three centuries, allowing the *ius commune* to be a potential base for the construction of European legal unity.

A practical example can be the Klomp case, where the ECJ referred directly to Roman law to support the continuity of the legal system. This was derived from the *lex specialis derogat legi generali* rule, formulated by medieval jurists, not Roman ones. However, similar reasoning is found in Roman legal texts such as Digest 1.5.24 and especially Digest 50.17.80,

[168] Art. 6(3), *Treaty on European Union* (TEU).

[169] Andrés Santos, *Roman Law in Today's European Legal System* at 351 (cited in note 162).

which prioritizes specific laws over general ones[170]. It is unsurprising that the Advocates General refer to Roman law maxims in matters of private law, given the shared foundations of continental Europe's civil law systems in Roman legal tradition. These references often encompass a range of private law principles, from foundational rules of contract law such as *pacta sunt servanda* to core doctrines concerning ownership rights[171].

4. *Conclusions*

To conclude, this work highlights the enduring and seminal role played by Roman law as a foundational basis for modern legal systems throughout the 20th century. This contribution wants to demonstrate how Roman legal principles, whether embraced or rejected, significantly shaped various political facets of both Fascism and Nazism. Fascism has always seen Roman law as a model and an inspiring ideal, something that needed to be achieved and that should have been pursued within the modern legal system that was considered its direct successor. Nazism, on the contrary, rejected Roman law and everything that it symbolically stood for. From my analysis, I conclude that the way in which Roman law was made part of the propagandistic message reveals much about the relationship of the two regimes with their past and their own intentions. Italy was trying to become what the Roman Empire was, looking at its "glorious" past that needed to be revived, while Germany was ready to destroy and forget everything that had been part of the history of the previous decades. Roman law has proven once again its flexibility, the way in which it could be adapted in each context, either in a good or in a negative way. Roman law is the core of the Western legal tradition, it has been used as a tool for reconstruction, but also as propaganda. Power rests with the people who decide what to see of Roman law, how it should be used and interpreted. But it is impossible to deny the importance of Roman law

[170] Ondrej Blažo, Róbert Brtko and Matúš Nemec, *Roman Law in the Legal Order of the European Union: Embellishment or a Genuine Source of Law?* at 162.
[171] *Id.* at 163.

and its principles, how still nowadays in a completely different and revolutionary legal context such as the European Union, they are still present and are capable of influencing the current enactment of legislation. Roman law has regained its relevance after the fall of the two regimes, on a continent that was devastated and with its nations that were now more distant than ever. The essence of our common legal tradition, that still is considered part of the general principles of the European Union, was retrieved and used as a fresh starting point.