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### **The Birth of European Legal History**

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The Oxford Handbook of European Legal History

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### **Abstract and Keywords**

The chapter explores the emergence of European legal history in the years after the Second World War through an analysis of Paul Koschaker's seminal work, *Europa und das römisches Recht*. Whereas the rise of a European discourse of legal history gels with European integration, the chapter argues that its roots are rather to be found in Koschaker's attempt to salvage the study of Roman private law from the crisis it had fallen into at German law schools during the interbellum. By highlighting the enduring role of the Roman legal experience for the formation of the European legal tradition, he hoped to give Roman law a new relevance for law students. The chapter further surveys the gradual widening of European legal history towards other subjects than Roman private law, in particular during the 1970s and 1980s.

Keywords: historiography, Roman law, Koschaker, Coing, German Historical School

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### I. Introduction

In his introduction to the Dutch translation of Paul Koschaker's *Europa und das römische Recht* from 1995, Robert Feenstra (1920–2013) related how he obtained a copy of the book back in 1947 when it was first published.<sup>1</sup> Through his mediation, a Dutch lawyer in the occupation forces in Germany collected some copies from the author and distributed them among legal historians in the Netherlands.<sup>2</sup>

It is tempting to read Feenstra's little reminiscence as a metaphor for the notion that European legal history was built on the ruins of national legal history and emerged from the destruction, which the extreme nationalism of Hitler's Germany had wrought. By the time Feenstra was writing, few questioned that the emergence of European legal history was just another aspect of western Europe's resurgence through its integration after the tragedy of the Second World War. Yet, to Paul Koschaker (1879–1951), the concern lay elsewhere. Koschaker was less concerned (p. 85) with the crisis of national legal history, and in particular the study of Germanic law, than with what he perceived to be the existential crisis of Roman law.<sup>3</sup> And although he was not blind to the discredit nationalism and national-socialism had brought to national legal history, his assessment of the causes of the crisis of legal history ran much deeper. According to him, it was not national-socialism which had caused the decay of legal history, and of its core area of study, Roman private law. At most, the Nazi party (NSDAP)'s attack on Roman law marked the nadir of a decline which was of legal history's own making and which was rooted in the ambivalence inherent in the historical programme of Friedrich Carl von Savigny (1779–1861). To Koschaker, the Second World War and German defeat were less of a watershed than hindsight would have it. Replacing a national perspective with a European perspective was not an end in itself, but a means to save Roman law from its self-destruction.

Inasmuch as Koschaker's *Europa und das römische Recht* can be considered the very birth act of European legal history as a new grand narrative and a subfield of legal history,<sup>4</sup> its roots are to be situated in the disciplinary self-reflection of a leading legal historian. Koschaker most certainly understood the potential contribution a European revision of legal history could make to the reassertion of Europe against the rising power of the United States and, particularly, the Soviet Union.<sup>5</sup> But it was only in the 1950s and 1960s, when European integration became a reality, and then again in the 1980s and 1990s, when European integration deepened and its reach expanded, that European legal history consciously restyled itself into an instrument of European integration.<sup>6</sup>

Nevertheless, all this does not diminish the foundational character of Koschaker's 1947 book for the discipline of European legal history. The book had an immediate impact. The 2,000 copies of the first edition were rapidly exhausted, necessitating a second edition. As this only came about in 1953, two years after the death of the author, this edition and the subsequent ones of 1958 and 1966 remained largely unaltered. The two-volume collection *Europa e il* (p. 86) *Diritto Romano*, which was originally intended as a

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*Festschrift* for Koschaker but only appeared in 1954 as a posthumous tribute, became an occasion for many legal historians to reflect on Koschaker's notion of European legal history and to some extent sealed his position as its founder.<sup>7</sup> Reviewers also had been quick to recognize the potential for innovation and the programmatic dimension of Koschaker's survey of Europe's legal history and the central role of Roman law therein.<sup>8</sup>

Koschaker's book had two dimensions, which stood at odds with one another but which together explain the impact the book had on the emerging field of European legal history. On the one hand, the book offered an attempt at a grand narrative for a European legal history. On the other hand, particularly in its latter parts which dealt with the later nineteenth and the twentieth centuries, it included a detailed and nuanced statement by the author about the crisis that Roman law as an academic subject had fallen into, and about its causes. This was largely restricted to Germany, and in this way truncated the European dimension of the narrative for the period after 1800. This historiographic reflection was concluded with a programmatic reflection on the way forward and a plea for a shift to a European perspective on legal history. This duality came from the book's antecedents. As the author explained in his preface, the origins of the book lay in his decision to return to the subject of the crisis of Roman law which he had previously dealt with in 1937–8, and it ultimately expanded from there.<sup>9</sup>

With this, the intellectual exercise that stood at the root of the book spanned the period from the mid 1930s to the aftermath of the Second World War. This explains why the German defeat and the discredit of the German Empire were not the driving determinant of Koschaker's plea for a turn in legal history. It also explains why Koschaker's endeavour remained deeply rooted in the German tradition of legal history going all the way back to Savigny. But whereas the European dimension became more of a purpose in its own right in the context of European integration over the 1950s and 1960s, it was exactly these German origins that sheltered the biggest impact of Koschaker's conception of European legal history: its narrow focus on law as the product of learned jurists, as well as on Roman private law which was considered to be European law's historic core. (p. 87)

## II. Koschaker, Europe and the Salvation of Roman Law

Paul Koschaker's turn to Europe stood at the centre of his mission to salvage Roman law as a field of study in German law schools. Koschaker had started to expound his thoughts and ideas on this subject when in 1936 he moved from Leipzig to Berlin to assume the position of chair of Roman law. Under the Nazi regime, Roman law had fallen into a precarious state and Koschaker saw it as his task, as the holder of the chair of Savigny, to make a stance for it. In 1937, he articulated his ideas about the crisis of Roman law and

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his proposed solution in a lecture at the Nazi Academy for German Law, which was published the following year.<sup>10</sup>

The Nazi regime's estrangement from Roman law dated back to the earlier days of the Nazi party, the NSDAP or National Socialist German Workers Party. Point 19 of the party programme of 24 February 1920 called Roman law a part of the 'materialist' world ordering and called for its replacement by a German common law. Through this article, or its later readings, Roman law was associated both with the individualism of the capitalist bourgeois order and with the materialism of Bolshevism. After its coming to power in 1933, the New Order indeed moved to weaken the regulatory position of Roman law in German law schools. In 1934, Roman law was barred from the list of mandatory subjects for the *Referendarexam*, which one had to take to enter the legal professions. Roman law could, however, be retained on the syllabus as part of the course on those legal systems which historically had influenced German law.<sup>11</sup>

The foundation of Koschaker's analysis of the crisis of Roman law and of its defence was his thesis that Roman law was not in jeopardy because of the Nazi party, but that the causes of its decay ran much deeper and had to be sought within the discipline itself. He minimized the attack of the Nazi party and regime on Roman (p. 88) law. The latter was of course a politic stance, and most likely the only possible strategy in the context of the 1930s, but, remarkably, Koschaker did not change his position in 1947 when it would have been safe to do. According to Koschaker, point 19 of the NSDAP programme was not much more than a casual jab at Roman law and the old bourgeois order of which it was a part, rather than a basis for a sustained strategy to dislodge Roman law from German academia. The point did not make sense, since the introduction of the German Civil Code at the beginning of the century had in any case put an end to the position of Roman law as an applicable law in Germany. Moreover, Koschaker could point out that the Nazi regime had not launched any campaign against the study of Roman law at German universities nor against its proponents, such as himself. The 1935 regulations on legal education had kept Roman law on the table, and had moreover introduced the history of modern private law as a new subject.<sup>12</sup>

A far greater cause for the relative demise of Roman law as an important subject of study at German law schools and as a focus of study in German legal scholarship had been the introduction of the Civil Code in 1900. In the years to follow, the systematic study of the new code replaced the study of Roman law as the basis of university teaching in private law.<sup>13</sup> Gradually, Roman law lost its position as the master subject of law, and was relegated to being a historical subject. Many German legal scholars, including several who had moved from the old Habsburg Monarchy to German law schools, as Koschaker himself had done, followed suit by surrendering Roman law as a basis for the dogmatic, systematic study of private law and turned it into an object of genuine, historical scrutiny. This historical turn in the study of Roman law in fact pre-dated the introduction of the Civil Code by two or three decades, but it really gathered speed in the decades after 1900 and, more particularly, after the First World War. It changed the scholarship of Roman law into a highly specialized and technical historico-philological exercise which focused

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on ancient, and particularly classical, Roman law to the neglect of its later revival and development. Legal historians delved deeply into the historical origins and context of ancient Roman law in particular and of ancient law in general, expanding towards the study of other ancient legal systems in the Mediterranean and in the Middle East. Koschaker, who had been a student of one of this movement's trailblazers, Ludwig Mitteis (1859–1921), at Leipzig, and was himself a leading scholar of ancient eastern Mediterranean law, acknowledged the importance and merits of this neo-humanist movement, as he called it. He did not hold it responsible by itself for the demise of the importance of the study of Roman law at law schools, but he did reproach Roman lawyers for the narrowness of their approach. Because Romanist scholars had exclusively chosen to study ancient—Roman—law as a historical object, they (p. 89) had estranged themselves from the needs, concerns, and interests of current law students, and marginalized themselves.<sup>14</sup>

However, Koschaker searched even more deeply into the German historiography of Roman law for the causes of its decay. His analysis went all the way back to the founding father of German legal history, Friedrich Carl von Savigny. Koschaker applauded Savigny and the Historical School for their foundational thesis that any legal system was the product of a historical process, and could only be understood by moving back through history to its roots. Only by understanding the origins and evolution of their legal system could legal scholars further develop and improve it. Thus, the study of legal history, and in particular of Roman law which stood at the heart of the common German legal experience, was the *conditio sine qua non* for the construction of a common German legal science which could overarch the many legal systems within Germany. Moreover, Koschaker genuflected to Savigny for his own legal-historical work, his groundbreaking and massive study of medieval Roman law.<sup>15</sup>

But in his analysis of the causes of the crisis of Roman law, Koschaker also pointed the finger at Savigny and the Pandect scientists who followed in his footsteps. Regardless of Savigny's own plea for the study of legal history and his own impressive work on medieval Roman law, the main thrust of his endeavour and that of German Pandect science had led to the instrumental use of the Justinian code for the construction of a systematic German science of private law rather than a historical study of the development of private law from the Roman era to the nineteenth century. Savigny and the Pandect scientists had not answered the call to trace the roots of private law institutions and doctrines back to their roots and to map the different steps in their historical evolution. Rather, in their ambition to construct a system of private law on the basis of some leading concepts and principles, they turned to classical Roman law, as retained in Justinian's collection. This they considered to be the purest expression of private law's timeless building blocks; they also attributed to it a level of systematization it truly did not have. Rather than following the historical line which connected German private law to its Roman roots, they had jumped beyond it. If Savigny had also devoted himself to the study of Roman law's rediscovery and revival in the Middle Ages—even if his work mostly focused on the glossators and neglected the latter parts of the Middle Ages—his followers had largely reduced Roman law to the classical and post-classical period. Thus they had

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cut the line between ancient Roman law and modern German private law. When the Pandect movement felt it had accomplished its work of constructing a German system of private law and moved to render its support to codification, the death bells rang over the study of legal history and Roman law as a central part of legal (p. 90) science. Locked within Antiquity after the historical turn, Roman law quickly lost its relevance for the understanding of contemporary law. Koschaker also blamed the ahistorical turn of the Historical School for the unnatural split between the Romanist and Germanist followers of Savigny. To Koschaker, the German legal experience had been informed by Roman as well as Germanic law. The split in the Historical School had contributed to the lock-up of Roman law in Antiquity and had left the post-Roman period to the Germanists. But the latter had also reduced their remit by focusing on the early Middle Ages and had neglected the last five centuries of German history.<sup>16</sup>

Koschaker sought to restore the position of Roman law at German law schools by returning to what he considered to be Savigny's original programme. This meant taking a middle route between the extremes of the Pandect scientists' instrumental use of Roman law, and the antiquarian approach of his own contemporaries. Koschaker saw a significant place for legal history in the dogmatic formation of lawyers through the study of the continuous progress of concepts, institutions, and doctrines from their origins to the present. In this story, Roman law, which had been the prime object of learned law since its rediscovery around 1100, would inevitably take pride of place. It also necessitated the turn to a European perspective. The continuous role of Roman law for the emergence of modern German private law could only be argued through the rediscovery and emerging study of Roman law in the late Middle Ages which started in Italy at Bologna, and through the story of its reception in different parts of western and central Europe, including Germany, from the fifteenth century onwards. For Koschaker, the study of European legal history offered the necessary framework for a continuous exploration of the dogmatic roots of German private law, as this law was just another example of the Europe-wide triple evolution of rediscovery-reception-national codification.<sup>17</sup>

### III. The Construction of a Grand Narrative

In his 1947 book, Koschaker not only expounded the reasons for adopting a European perspective, he also turned his hand at constructing a grand narrative of 'European' (p. 91) legal history which bridged the temporal gap between ancient Roman law and modern private law. His narrative hovered between a truly European perspective and the embedding of German legal history in a wider European setting. Koschaker did not see this as problematic. The story of the rediscovery, the incipient scholarly study of Roman law, and its spread over Europe between 1100 and the end of the Middle Ages was a truly European, or rather western European, one. From the fifteenth century onwards followed the stories of the divergent national reception of Roman law in the different leading

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countries of western Europe, and of its varying impact on legal scholarship and law, ending with different outcomes with regard to codification. For this period, European legal history became the juxtaposition, or at best comparison, of different national histories, but under the recognition that they all formed part of one European framework which was held together by the common cultural historical inheritance of Roman, Christian, and Germanic influences. For the period from the sixteenth century onwards, Koschaker's survey focused on Germany, with some substantial reflection on and comparison with developments in France and England.

The narration of European legal history which Koschaker laid out in his study was only original in its entirety, but not for its composing parts. The general outline of rediscovery-reception-codification was a familiar one, the composing parts of which had been studied by legal historians before. In terms of a European perspective, Koschaker could mainly draw on studies of medieval Roman law, its spread, and reception, which ranged from Savigny to his own time. In the twentieth century in particular, the subject had gained new traction among German scholars such as Emil Seckel (1864–1924) or Hermann Kantorowicz (1877–1940), as well as among other Europeans, such as Francesco Calasso (1904–65). This went as far as the point that it almost belied Koschaker's notion of the reduction of Roman law to Antiquity.<sup>18</sup> Koschaker also drew on recent general historical work on European history, in particular for the idea of the emergence of Europe as a cultural reality in the Carolingian era through the merger of Roman, Christian, and Germanic elements.<sup>19</sup> The Austro-German legal historian used this framework to explain the centrality of the 'Rome-idea' for Europe. Koschaker's claims about the (p. 92) Roman-Germanic identity of Europe fitted the agenda of the late 1930s German-Italian alliance and its self-styling as a bulwark against Slavonic Bolshevism.<sup>20</sup>

*Europa und das römische Recht* laid out a grand narrative of European history which was foundational to the discipline of European legal history. Whereas its roots were German, and whereas Germany, in particular the Federal Republic of Germany, would remain its stronghold for a long time, it quickly spread over western Europe. Although Koschaker's study only offered a rough sketch and was intended as a call for further research, it may be considered foundational for the master narrative of European legal history to the extent that some of the choices made in the book became common features of the new discipline.

Firstly, Koschaker's European perspective was in reality only a western European one. In the slipstream of the Belgian historian Henri Pirenne (1862–1935) and other historians, he considered 'Europe' as the cultural area which was born out of the synthesis of Roman, Christian, and Germanic elements under the Carolingian empire. Its heartlands were thus Italy, Germany, France, the Low Countries, and England. Over time, this 'Europe' expanded to the Iberian peninsula, central Europe, and Scandinavia.<sup>21</sup>

Secondly, in the narrative of the development of a European legal tradition, the rediscovery and the study of Roman law which started with the school of Bologna around the turn of the twelfth century were the primary movers. The medieval civilian tradition,



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its subsequent receptions in different western European countries, and the distinct impact it had on legal developments in these countries thus became the central object of scrutiny, debate, and contention among European legal historians.

Thirdly, the centrality of Roman law narrowed the narrative largely down to private law. The introduction of the history of modern private law as a course at German law schools under the legislation of 1935 offered a platform for elaborating Europe's legal history from the Roman times to the present within the confines of a private law discourse. This did not mean that subjects such as constitutional law, criminal law, or international law were more marginalized under the perspective of European legal history than they had been under the perspective of national legal history—rather the opposite was true—but they hardly informed, let alone formed, the master narrative.

Fourthly, in the tradition of Savigny, Koschaker underscored the role of learned jurists in the development and progress of law in Germany as well as in other countries of Europe. With this, he did not refer to legal scholarship as such. He singled out the fact that in most European countries, learned lawyers—whether they were educated at university or not—had held a significant impact on legal practice through their association to central power and the judicial, legislative, (p. 93) and administrative institutions of emerging states. To him, legal history was thus first and foremost the story of the progress of *Juristenrecht*, the law of jurists. Later, many European legal historians would further narrow the spectrum to legal scholarship before it was expanded again. Franz Wieacker (1908–94), who in 1954 wrote an authoritative survey of European legal history, greatly contributed to this through his indication of the scientific systematization of law as the main cause of its progressive development.<sup>22</sup> The trend also benefited from the fact that civilian scholarship by its very European nature lent itself much better to a Europe-wide study than did the history of its various receptions in legal practice in the different parts of Europe.

Fifthly, the narrative was construed around a timeline of successive schools and approaches to the study of law which was ultimately built on the triple division of medieval rediscovery, early modern reception, and codification in the eighteenth and nineteenth centuries. In this timeline, the period running from the fall of the Western Roman Empire to the rediscovery of Roman law and its incipient study around 1100 was casually dealt with as a period of decay and transition. Much later scholarly debate on this period turned around the question of the relative survival of Roman law in various parts of southern Europe. For the late Middle Ages and Renaissance, the three subsequent schools in the study of Roman law, that of the glossators (eleventh–thirteenth centuries), post-glossators or commentators (thirteenth–fifteenth centuries), and humanists (fifteenth–seventeenth centuries) dictated the pace of the narrative. From the end of the Middle Ages onwards, the focus moved to national receptions (fourteenth–eighteenth centuries), followed by a discussion of the Modern School of Natural Law (seventeenth–eighteenth centuries), the codification movement (eighteenth–nineteenth centuries), and the different legal schools of the nineteenth century. But overall, Koschaker's focus was on proving the continuity of the legal development from ancient

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Roman law to nineteenth-century private law jurisprudence in Germany. In the end, the story of the Europe's historical engagement with Roman law was designed to put Germany at its heart.<sup>23</sup> (p. 94)

# IV. The Growth and Expansion of European Legal History

In the three decades after the Second World War, European legal history gradually asserted itself as a field and approach among legal historians within and without Germany. The turn to a European perspective materialized in three different ways. First and foremost, it became the intellectual backdrop for much detailed discussion. Increasingly, studies on national or local developments were consciously or implicitly framed in the wider context of European developments. Under the influence of the work of Arnold Toynbee (1889–1975) and of Robert Curtius' study about the history of literature in Europe, Helmut Coing (1912–2000) strongly defended the view that national legal histories were part and parcel of wider European legal and cultural developments, a view that to some extent had already been promoted by Koschaker and Wieacker.<sup>24</sup> Secondly, from the mid 1950s onwards, more general surveys of European legal history were produced, first in Germany and then without. These reiterated the grand narrative of Koschaker while fine-tuning and expanding it. In 1954, two German scholars, Gerhard Wesenberg (1908–57) and Franz Wieacker published their surveys, both written to cater to the needs of the teaching of the history of modern private law. Wieacker's book quickly gained international repute and for a long time was considered the most authoritative statement of European legal history. Both authors predominantly focused on German legal history which they discussed in the context of wider European trends.<sup>25</sup> It took until the 1980s and beyond for surveys to appear which took a truly European perspective.<sup>26</sup> Thirdly, the (p. 95) mid 1950s to the late 1970s saw two major collective efforts in Europe to take the programme of European legal history further in a systematic and organized way.<sup>27</sup>

The first of these was the project known as *Ius Romanum Medii Aevi* (IRMAE). The series aspired to constitute a 'new Savigny'; to offer a new synthesis of medieval Roman law to bring together the results of over a century of research. It was a truly European collaboration which was set up within the leading Roman law network, the *Société d'Histoire des Droits de l'Antiquité*. The idea had been first tabled by the Dutch Roman lawyer Hendrik Richard Hoetink (1900–63) from the University of Amsterdam at the 1951 conference of the society. A year later, his more modest project was further expanded on by the Dutch legal scholar Eduard Meijers (1880–1954) from Leiden. The German legal historian Erich Genzmer (1893–1970) was engaged to become director of the project, aided by a board of legal historians from different European countries. The series was designed as a collection of studies covering the external history of Roman law from the fall of the Roman Empire in the West to about 1500. The individual studies were collected in 'parts' which were assembled into five 'volumes'. The first volume covered the period before the school of Bologna; the second, university education in Roman law; the third looked at the glossators; the fourth discussed the period from Accursius to the Bartolists;

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and the final volume covered the reception of Roman law in the different countries of Europe, as well as its impact on canon law.<sup>28</sup>

The second project came out of the Max Planck Institute for European Legal History, which was established at Frankfurt in 1964. Its founder and director Helmut Coing designed and edited a book series which surveyed and studied the sources and institutions of law in Europe. The series covered the period from 1500 to 1900 but also included a substantial volume on the late Middle Ages. Other than IRMAE, it was not restricted to the learned law or to Roman law, but also included canon law, legislation, and case law.<sup>29</sup> In the 1980s, Coing followed up with a two-volume synthesis on the doctrinal development of private law in Europe between 1500 and 1900. For the nineteenth century, he strongly insisted upon the similarities and connections between national developments in the different European countries.<sup>30</sup> (p. 96)

Over the decades, the five major features that had formed the backbone of Koschaker's grand narrative of European legal history and had been largely taken over by Wieacker fell subject to scrutiny, controversy, and change, but they were not fundamentally overhauled. However, one can speak of a gradual expansion of the purview of European legal history in several directions.

Firstly, there was a geographical expansion. Whereas Koschaker's study had been limited to western Europe and even to its leading countries, Germany, Italy (for the Middle Ages), France, and England, gradually a wider scope was taken expanding it to the south, east, and north. But the master narrative was still based on developments in western Europe.

Secondly, whereas the story of the discovery and study of Roman law continued to dominate, increasing attention was devoted to the study of canon law. In this, the German scholar Stephan Kuttner (1907–96) who migrated to the United States, and the institutes for medieval canon law which he founded at the Catholic University of America in Washington and later at Yale, played a crucial role.<sup>31</sup> The study of medieval canon law thus largely became a joint European–American undertaking. Canon law was granted recognition as the sister-branch of Roman law within the late medieval *ius commune*, but in most surveys its treatment remained ancillary and secondary to that of Roman law. For the period after the Middle Ages and the Reformation, it generally retained very little if any space at all in the grand narrative of European legal history.<sup>32</sup>

Thirdly, the narrative of commonality of scholarly developments for the early modern age was deepened by the introduction of the *usus modernus pandectarum* as a new stepping stone in the chronological narrative and by an enhanced attention to the Europe-wide impact of the Modern School of Natural Law.<sup>33</sup>

Fourthly, although the development of legal scholarship continued to form the backbone of the narrative, European legal history was gradually expanded to include more reflection on legislation, case law, and institutional developments.<sup>34</sup>

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Fifthly, the European perspective in legal history spread from private law to other branches of the law, albeit belatedly and hesitantly. Although constitutional historians had often been remarkably international and comparative in their (p. 97) approach during the nineteenth and early twentieth centuries, the history of public law was late to make its entry and to take its place in the new general narrative of European legal history that emerged around the Second World War.<sup>35</sup> Three causes explain this slow development. *Primo*, the focus on Roman private law and on the late Middle Ages stood in the way of giving public law its place as there existed no conception of an autonomous public law before the early modern age. *Secundo*, the rise of public law came with the emergence of the modern sovereign state, which sat badly with the idea of a European legal history. *Tertio*, for most legal historians who worked at law schools, private law was their primary concern in teaching and scholarship. The domain of institutional and constitutional history was rather left to political historians and historians of political thought.<sup>36</sup> From these fields originated the major progresses in the history of public law.<sup>37</sup> It was through the door of canon law and the papal monarchy that institutional and public law finally entered into the grand narrative of European legal history for the period of the late Middle Ages.<sup>38</sup> But in the end, it took until the 1980s before the first modern European constitutional histories were produced and until the 1990s before a first authoritative restatement of European legal history was made which took politico-constitutional matters as its guiding line.<sup>39</sup>

## V. Concluding Remarks

In the decades after the Second World War, European legal history developed and grew to the rhythm of Europe's political, institutional, and legal integration. For its proponents of the 1950s and 1960s such as Coing, the exploration of the common legal past of Europe was instrumental to the construction of a European legal (p. 98) science which in turn was considered as a necessary step towards greater European unity. When European integration deepened in the 1980s and 1990s, European legal history caught a second breath.

Nevertheless, for the man who is most credited for being European legal history's trailblazer, Paul Koschaker, European integration was far less a concern than was the salvation of Roman law. Although these origins of the European programme in legal history quickly slipped to the back of its representatives' minds, they were not without consequences. They help to highlight the fact that the turn from a national to a European perspective in legal history in the wake of the Second World War was less of a radical break than it might appear. Not only did Koschaker and his successors build on many of the scholarly achievements of previous generations of legal historians, they also shared their premises and a common mindset. The reduction of Europe to its western 'heartlands' and the focus on Roman law, on private law, and on legal scholarship were all parts of an inheritance which hark back to Savigny. Neither was the perspective of the

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nation state relinquished. Through the story of reception and codification, the rise of the state and of state law was recycled, albeit framed as a common achievement of European culture rather than as the achievement of a certain people as it had been before. And as was the case with many proponents of the wider project of European integration, European legal historians remained blind to the self-asserting and Euro-imperialist connotations of their project. After the demise of the colonial empires of Europe's nation states, Europe offered a new context to reaffirm the leading role of its legal traditions and institutions, including and above all the state, in world history.<sup>40</sup>

### Recommended Reading

Behrends, Okko, and Schumann, Eva (eds), *Franz Wieacker: Historiker des modernen Privatrechts* (Wallstein Verlag 2010)

Berman, Harold J., *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard University Press 1983)

Coing, Helmut (ed), *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte*, 9 vols (Beck Verlag 1973–88)

Coing, Helmut, *Europäisches Privatrecht*, 2 vols (Beck 1985–9)

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(<sup>1</sup>) Paul Koschaker, *Europa und das römische Recht* (Biederstein 1947).

(<sup>2</sup>) Robert Feenstra, 'Ten Geleide' in Paul Koschaker, *Europa en het Romeinse recht* (Tjeenk Willink 1995) vii.

(<sup>3</sup>) Regina Ogorek, 'Rechtsgeschichte in der Bundesrepublik (1945–1990)' in Dieter Simon (ed), *Rechtswissenschaft in der Bonner Republik: Studien zur Wissenschaftsgeschichte der Jurisprudenz* (Suhrkamp 1994) 12, 54–5.

(<sup>4</sup>) Thomas Duve, 'European Legal History—Concepts, Methods, Challenges' in Thomas Duve (ed), *Entanglements in Legal History: Conceptual Approaches* (Max Planck Institute for European Legal History 2014) 29, 38–9.

(<sup>5</sup>) Koschaker, *Europa* (n 1) 350–1.

(<sup>6</sup>) Klaus Luig, 'Helmut Coing (1912–2000)' in Stefan Grundman and Karl Riesenhuber (eds), *Deutschsprachige Zivilrechtslehrer des 20. Jahrhunderts in Berichten ihrer Schüler: Eine Ideeengeschichte in Einzeldarstellungen* (Walter de Gruyter 2007) 56, 64; Reinhard Zimmermann, 'Roman Law and Comparative Law: The European Perspective (Some Remarks apropos a Recent Controversy)' (1995) 16 *Legal History* 21. For a critical voice, Douglas J. Osler, 'The Fantasy Men' (2007) 10 *Rechtsgeschichte* 167.

(<sup>7</sup>) *Europa e il Diritto Romano. Studi in Memoria di Paolo Koschaker*, 2 vols (Giuffrè 1954).

(<sup>8</sup>) For example, Erich Genzmer in (1950) 67 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung* 595, 608; also A. Arthur Schiller in (1947–8) 67 *The Yale LJ* 324, 327.

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(<sup>9</sup>) Paul Koschaker, *Die Krise des römischen Rechts und die romanistische Rechtswissenschaft* (Beck Verlag 1938); Koschaker, *Europa* (n 1) vii.

(<sup>10</sup>) Koschaker, *Krise* (n 9); on Koschaker's life and thought, Tomasz Giaro, 'Der Troubadour des Abendlandes—Paul Koschaker's geistige Radiographie' in Horst Schröder and Dieter Simon (eds), *Rechtsgeschichtswissenschaft in Deutschland 1945 bis 1992* (Klostermann 2001) 31, esp 35; Wolfgang Künkel, 'Paul Koschaker und die europäische Bedeutung des römischen Rechts' in *Europa e il Diritto Romano* (n 7) vol 1, v. Also see Paul Koschaker's autobiography in *Österreichische Geschichtswissenschaft der Gegenwart in Selbstdarstellungen* (Innsbruck 1951) vol 2, 105.

(<sup>11</sup>) Peter Landau, 'Römisches Recht und deutsches Gemeinrecht. Zur rechtspolitischen Zielsetzung im nationalsozialistischen Parteiprogramm' in Michael Stolleis and Dieter Simon (eds), *Rechtsgeschichte in Nationalsozialismus: Beiträge zur Geschichte einer Disziplin* (Mohr 1989) 11; Dieter Simon, 'Die deutsche Wissenschaft vom römischen Recht nach 1933' in Michael Stolleis and Dieter Simon (eds), *Rechtsgeschichte in Nationalsozialismus: Beiträge zur Geschichte einer Disziplin* (Mohr 1989) 161; Michael Stolleis, *Gemeinwohlformen im nationalsozialistischen Recht* (J. Schweitzer Verlag 1974) 30-4; Raoul C. Van Caenegem, *European Law in the Past and the Future: Unity and Diversity over Two Millennia* (Cambridge University Press 2002) 95-102; Zoltan Vegh, 'Römisches Recht und Nationalsozialismus. Gedanken zum Universalität des römischen Rechtes' (2011) 2 *Journal of the European History of Law* 2.

(<sup>12</sup>) Koschaker, *Krise* (n 9) 70-3; Koschaker, *Europa* (n 1) 311-36.

(<sup>13</sup>) Reinhard Zimmermann, *Roman Law, Contemporary Law, European Law: The Civilian Tradition Today* (Clarendon Press 2001) 1-52.

(<sup>14</sup>) Koschaker, *Europa* (n 1) 290-310.

(<sup>15</sup>) Friedrich Carl von Savigny, *Geschichte des römischen Rechts im Mittelalter*, 5 vols (Mohr und Zimmer 1815-31).

(<sup>16</sup>) On the Historical School and its impact on nineteenth-century German legal science, Franz Wieacker, *A History of Private Law in Europe: With Particular Reference to Germany* (Clarendon Press 1995).

(<sup>17</sup>) Koschaker, *Krise* (n 9); Koschaker, *Europa* (n 1) esp 254-89 and 337-53.

(<sup>18</sup>) Francesco Calasso, *Storia del sistema e delle fonti del diritto comune* (Giuffrè 1938) vol 1; Hermann Kantorowicz, 'Die Epochen der Rechtswissenschaft' (1914) 6 *Der Tat* 345; K. Muscheler, *Hermann Ulrich Kantorowicz: eine Bibliographie* (Duncker & Humblot 1984); Emil Seckel, *Beiträge zur Geschichte beider Rechten im Mittelalter* (Verlag der Lauppischen Buchhandlung 1898) vol 1; Emil Seckel, 'Die Anfänge des europäischen Jurisprudenz im 11. und 12. Jahrhundert (unter Ausschluß der Kanonistik)' (1925) 45 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung* 391. See



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(<sup>19</sup>) Henri Pirenne, *Geburt des Abendlandes: Untergang der Antike am Mittelmeer und Aufstieg des germanistischen Mittelalter* (Pantheon Akademische Verlagsanstalt 1940).

(<sup>20</sup>) Giaro, 'Troubadour' (n 10) 44.

(<sup>21</sup>) Duve, 'European Legal History' (n 4) 32–6.

(<sup>22</sup>) This he did by drawing on Max Weber (1864–1920); see Duve, 'European Legal History' (n 4) 44; Franz Wieacker, *Privatrechtsgeschichte der Neuzeit unter besonderer Berücksichtigung der deutschen Entwicklung* (Vandenhoeck & Ruprecht 1954; 2nd edn, 1967) (hereafter Wieacker, *Privatrechtsgeschichte*). On Wieacker, Detlef Liers, 'Franz Wieacker (1908 bis 1994)—Leben und Werk' in Okko Behrends and Eva Schumann (eds), *Franz Wieacker: Historiker des modernen Privatrechts* (Wallstein Verlag 2010) 23; Peter Landau, 'Wieackers Konzept einer neueren Privatrechtsgeschichte: Eine Bilanz nach 40 Jahren' in Okko Behrends and Eva Schumann (eds), *Franz Wieacker: Historiker des modernen Privatrechts* (Wallstein Verlag 2010) 49; Martin Avenarius, 'Verwissenschaftlichung als sinnhafter Kern der Rezeption: eine Konsequenz aus Wieackers rechtshistorischer Hermeneutik' in Okko Behrends and Eva Schumann (eds), *Franz Wieacker: Historiker des modernen Privatrechts* (Wallstein Verlag 2010) 119; Joseph Georg Wolf, 'Franz Wieacker (1908–1994)' in Stefan Grundmann and Karl Riesenhuber (eds), *Deutschsprachige Zivilrechtslehrer des 20. Jahrhundert in Berichten ihrer Schüler: Eine ideeengeschichte in Einzeldarstellungen* (Walter de Gruyter 2007) 73.

(<sup>23</sup>) For a critical assessment of this *translatio studii* from the Italian late medieval jurists over French and Dutch legal humanism to modern German—and other nations'—jurisprudence which came to stand at the heart of the grand narrative of European legal history, Douglas J. Osler, 'The Myth of European Legal History' (1997) 16 *Rechtshistorisches Journal* 393.

(<sup>24</sup>) Helmut Coing, 'Rezension von Ernst Robert Curtius, Europäische Literatur und lateinisches Mittelalter' in Simon Dieter (ed), *Helmut Coing: Gesammelte Aufsätze zu Rechtsgeschichte, Rechtsphilosophie und Zivilrecht, 1947–1975* (Klostermann 1982) 120; Ernst Robert Curtius, *Europäische Literatur und lateinisches Mittelalter* (A. Francke Verlag 1948); Duve, 'European Legal History' (n 4) 40; Reiner Schulze, 'European Legal History—A New Field of Research in Germany' (1992) 13 *Journal of Legal History* 270, 272–4; Arnold J. Toynbee, *A Study of History*, 12 vols (Oxford University Press/Humphrey Milford 1934–61).

(<sup>25</sup>) Gerhard Wesenberg, *Neuere deutsche Privatrechtsgeschichte im Rahmen der europäischen Entwicklung* (Lahr 1954); Wieacker, *Privatrechtsgeschichte* (n 22).

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(<sup>26</sup>) For example, O.F. Robinson, T.D. Fergus, and W.M. Gordon, *An Introduction to European Legal History* (Professional Books 1985); Peter Stein, *Roman Law in European History* (Cambridge University Press 1999); Raoul C. Van Caenegem, *Geschiedkundige inleiding tot het privaatrecht* (Story-Scientia 1981), later published as *An Historical Introduction to Private Law* (Cambridge University Press 1992); Govaert van den Bergh, *Geleerd recht: een geschiedenis van de Europese rechtswetenschap in vogelvlucht* (Kluwer 1980).

(<sup>27</sup>) A third project was less self-consciously inscribed in the project of European legal history, but as a major achievement of comparative legal history surely contributed to it. These were the volumes on specific legal institutions from the *Recueil de la Société Jean Bodin pour l'histoire comparative des institutions* (Editions de la Librairie Encyclopédique 1936-).

(<sup>28</sup>) See *Ius Romanum Medii Aevi auspice Collegio Antiqui Iuris Studiis Provehendis Société d'Histoire des Droits de l'Antiquité* Pars I, 1 a-d (Giuffrè 1961) with Fernand De Visscher, 'Préface' 1; 'Einteilung des Gesamtwerkes' 11; Erich Genzmer, 'Enleitung' 119.

(<sup>29</sup>) Helmut Coing (ed), *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte*, 9 vols (Beck Verlag 1973-88) (hereafter Coing, *Handbuch*), see Helmut Coing, 'Einleitung' in *Vol. 1: Mittelalter (1100-1500): Die gelehrter Rechte und die Gesetzgebung* (Beck Verlag 1973) 1.

(<sup>30</sup>) Helmut Coing, *Europäisches Privatrecht*, 2 vols (Beck 1985-89); see also Helmut Coing, *Europäische Grundlagen des modernen Privatrechts: National Gesetzgebung und europäische Rechtsdiskussion im 19. Jahrhundert* (Gerda Henkel Vorlesung; Westdeutscher Verlag 1986). On Coing, Luig, 'Coing' (n 6).

(<sup>31</sup>) Andreas Hetzenecker, *Stephan Kuttner in Amerika 1940-1964: Grundlegung der modernen historisch-kanonistischen Forschung* (Duncker & Humblot 2007).

(<sup>32</sup>) For example, Manlio Bellomo, *The Common Legal Past of Europe, 1500-1800* (Catholic University of America Press 1995); Randall Lesaffer, *European Legal History: A Cultural and Political Perspective* (Cambridge University Press 2009); Stein, *Roman Law* (n 26).

(<sup>33</sup>) James Gordley, *The Jurists: A Critical History* (Oxford University Press 2013); Hans Thieme, *Das Naturrecht und die europäische Rechtsgeschichte* (Helbing & Lichtenhahn 1947); Wieacker, *Privatrechtsgeschichte* (n 22) 2nd edn.

(<sup>34</sup>) Coing, *Handbuch* (n 29).

(<sup>35</sup>) Michael Stolleis, 'Europäische Rechtsgeschichte—immer noch ein Projekt?' 1 (Clio@Themis. Revue électronique d'histoire du droit) <<http://www.cliothemis.com/Europäische-Rechtsgeschichte-immer>>.

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(<sup>36</sup>) Duncan Kennedy, 'Three Globalizations of Law and Legal Thought: 1850–2000' in David Trubek and Alvaro Santos (eds), *The New Law and Economic Development: A Critical Appraisal* (Cambridge University Press 2006) 19.

(<sup>37</sup>) For example, Ernst H. Kantorowicz, *The King's Two Bodies: A Study in Medieval Political Thought* (Princeton University Press 1957); Walter Ullmann, *Medieval Papalism: The Political Theories of Medieval Canonists* (Methuen 1949); Walter Ullmann, *Principles of Government and Politics in the Middle Ages* (Methuen 1961).

(<sup>38</sup>) Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard University Press 1983).

(<sup>39</sup>) Hans Hattenhauer, *Europäische Rechtsgeschichte* (C.F. Müller 1992); Raoul C. Van Caenegem, *Geschiedkundige inleiding tot het publiekrecht* (Story-Scientia 1985), later published as *An Historical Introduction to Western Constitutional Law* (Cambridge University Press 1995).

(<sup>40</sup>) Duve, 'European Legal History' (n 4) 38–9; Patrick Pasture, *Imagining European Unity since 1000 AD* (Palgrave Macmillan 2015) 185–95.

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