KAIUS TUORI[*]

FUTURES OF THE PAST: ROMAN LAW BETWEEN TOTALITARIANISM AND EUROPEAN INTEGRATION[**]

ABSTRACT. *Goethe famously described the influence of Roman law in European history by using a metaphor about ducks and the fact that they are there even when they are not visible. The purpose of this article is to explore the role of Roman law in the narratives of nationalism and legal reform during twentieth century totalitarianism. It traces how earlier criticism of Roman law was co-opted by the Nazi movement and its repercussions. While the attack on Roman law was unsuccessful, not least because of consistent support by Italian Fascists, the episode had a crucial impact on the position of Roman law after the Second World War. Like the duck in Goethe's metaphor, Roman law bounced back, experienced a resurgence party due to being attacked by totalitarian governments. As law not bound by the vagaries of the nation state, Roman law became an unlikely symbol of justice and shared legal tradition in Europe.*

[*] Professor of European Intellectual History, University of Helsinki. Director of the Centre of Excellence for Law, Identity and the European Narratives (eurostorie.org).

[**] The essay derives from my lecture given at the doctoral seminar at the Roma Tre law faculty on 13 October 2022. The written form seeks to preserve the feel of the oral presentation, while adding some references for documentation. This work has received funding from the European Research Council under the European Union's Seventh Framework Programme (FP7/2007–2013)/ERC grant agreement no. 313100 and from the Academy of Finland funded Centre of Excellence in Law, Identity and the European Narratives, funding decision number 312154. The essay is based on work in a lengthy research project funded by the ERC titled 'Reinventing the Foundations of European Legal Culture 1934–1964' (foundlaw.org). Its main product is the book, Kaius Tuori, *Empire of Law: Nazi Germany, Exile Scholars and the Battle for the Future of Europe* (Cambridge Studies in European Law and Policy, Cambridge University Press, 2020).

1. Introduction

Roman law has been a fixture of European legal history for close to three millennia, but that does not mean that it has been universally loved or even accepted during that time. In fact, criticism of Roman law is as much a staple of European history as Roman law itself. In his famous article, 'Long live the hatred of Roman law!', American legal historian James Q. Whitman discusses the manifold variations of the criticism of Roman law in European history. It was seen to promote greed, materialism, individualism and other vices, ranging from property absolutism to political absolutism.[1]

The purpose of this essay is to discuss the transformation of the role of Roman law in the more recent European legal history, from interwar totalitarianism to the present, through the debates over its significance. One of the high points of the criticism of Roman law was during the Nazi era in Germany where the ruling party declared as its aim the eradication and replacement of Roman law. This will serve as the starting point of the essay, indicative of the turbulence that a seemingly innocuous academic discipline would face during the twentieth century.

In my works, I have often resorted to narratives as explanatory models. When discussing historical events, the use of narratives enables one to discuss alternative explanations from various viewpoints and to engage with issues of historical interpretation. In this sense, a narrative is simply understood as a way to construct an explanatory framework or linkage between events and facts. In a sense, a narrative gives meaning to facts, it answers the question 'why'. My current project focuses on European narratives (in the plural) as a setting of narrative contestation. These European narratives often pit ideas such as European integration against entrenched notions of nationalism and communities that are thought to be natural either through ethnicity, language or common history.[2] What narratives do is convey abstract concepts such as values and ideals through examples, framing them as conflicts that are understandable on a human level.

In the current policy framework, the European Union envisions itself as an 'area

[1] James Q Whitman, 'Long Live the Hatred of Roman Law!' (2003) 2 Rechtsgeschichte - Legal History, 40-57.

[2] This is the Centre of Excellence in Law, Identity and the European Narratives (eurostorie.org).

of freedom, security and justice'.[3] This is not an empty statement, but official policy that is thought to guide the actions of the union. However, such a statement contains within itself a narrative, one of renouncing violence, intolerance, slavery, repression and cruelty, injustices of all kinds that have been amply present in the European history of the twentieth century. Without going into details of why and how such a policy was formed and what it actually entails, it may, without exaggeration, be said that this is the promise of Europe, the possibility of freedom, security and prosperity, that is one of the major attractive forces for the millions of migrants attempting to come here. At the same time, such narratives have been the object of criticism within Europe itself, by politicians who argue that justice and security are attracting too many migrants. While it may be argued that there is a failure built into this promise, it nevertheless contains a powerful message that gives meaning to the whole European enterprise.

It is a commonplace that the interpretation of the past is influenced by the present. This is in the theory of history divided between two main phenomena, presentism and projection. Presentism in its most basic format means that one selects from the past only ideas, values and terms that are important now, to us in the then present. In historical writing in general, this is seen as a grave mistake. In the writing of legal history or that of Roman law, it is more commonly known through labels such as 'Aktualisierung' and 'Reception'. Projection, in turn, means that one inserts into the descriptions of the past modern ideas and preoccupations, for instance in the form of anachronisms. What we will be doing in the following is observing how the various narratives of European legal history and Roman law played a role in contestations over the future of Europe and European law. How were ideals of law projected into the past of Roman law and conversely, how was Roman law seen as a model for the future?

[3] TEU 3.2; TFEU 67. There is a vast literature on the matter; see Maria Fletcher, Ester Herlin-Karnell, Claudio Matera, *The European Union as an area of freedom, security and justice* (Routledge, 2017).

2. Criticism of Roman law and legal innovation in Europe

In the recent historical works on Roman law, the history of Roman law has been tied to the history of Europe. Throughout European legal history, in debates about law and legal development, claims made using Roman law had numerous benefits. Roman law, due to its longevity, provided historical legitimacy, and due to its many incarnations, it could be used to support even opposing claims. Furthermore, Roman law had a Pan-European reach, meaning it could be utilized in almost every part of Europe. Finally, due to the cultural hegemony of the ancient Greco-Roman culture, Roman law could be incorporated into various civilizing narratives about development and Europeanization.[4]

In the historiography of the past decades, several different and competing narratives have been advanced on the roots of European legal integration. The most common of these is that integration was a reaction to the Second World War and its horrors, and that from this basis new rules began to be drafted to first implement the common market and then organically expanding to new fields. This is the economy-driven narrative that is usually described as neo-functionalist. A number of authors have contested this, arguing for an alternative narrative starting point in the Nazi conception of New Europe, a project mostly driven by the SS. In it, Germans sought to gain a wider legitimacy among allies and occupied countries alike by drawing up the idea of a New Europe that would emerge around Germany. Especially in France, they partnered with leaders of Vichy France, which had a considerable impact on the ideological content: a combination of Christian and cultural conservatism, opposition to communism and the labour organizations and the influences from the Anglo-American world. This is, curiously enough, a narrative that is now promoted by populist politicians and authors from Vladimir Putin to Victor Orban, who are critical of the implications that notions such as rights and justice have for the position of minorities. A third notion was that of the common legal heritage, advocated by people like Paul

[4] For a summary, see Reinhard Zimmermann, 'Roman Law in the Modern World' in David Johnston (ed), *The Cambridge Companion to Roman Law*, 2015; Kaius Tuori, 'Introduction' in Kaius Tuori and Heta Björklund (eds), *Roman Law and the Idea of Europe* (Bloomsbury, 2019).

Koschaker and later Reinhard Zimmermann. This narrative maintains that there exists an earlier form of legal community in Europe, one that still is present in the shared traditions of law and thus may be useful for the creation of a new European law.[5]

In their seminal book, *The Invention of Traditions* (1983), Eric Hobsbawm and Terrence Ranger argued that nationalism relies on traditions, some of which are actually invented.[6] The relationship between what has been called invented traditions and European law is fascinating, not least because law beyond the nation state often relies on a similar kind of use of tradition to establish legitimacy. In the case of European law or European tradition, this is linked with the construction of identity and belonging through a shared past. Simplistically put, one forms attachment to what is defined as a nation through various avenues, for example language or culture, but also through history. It is commonly argued that history or the idea of a shared past operates as a mode of legitimation, that a glorious history is an argument for a glorious future. However, what does law have to do with it?

This is a fundamental issue regarding constitutionalism and the construction of belief systems: What constitutes legitimacy? Is it based on a shared belief and agreement, such as money, or are we dealing with something else entirely? In the concept of the nation state, legitimacy of not only the state but in developed countries its legal system is also generally thought to be the result of the exercise of democratic power and, ultimately, popular sovereignty. The people as a self-governing unit legitimate their own forms of governance through their will (even Ulpian, Dig. 1.4.1, maintains that the power of the Roman emperor lies in the people, whose sovereignty was transferred to the emperor via the *lex regia*). When one moves beyond the national constitution and the limits of the nation state, there emerges what is called a sovereign moment. In this moment, the new supranational entity needs to be constituted, either by using the same kinds of legitimating instruments (such as the European Parliament) or by using

[5] Hagen Schulz-Forberg, Bo Stråth, *The Political History of European Integration: The Hypocrisy of Democracy-Through-Market* (Routledge, 2010). On the authoritarian narratives, see Christian Joerges and Navraj Singh Ghaleigh (eds), *Darker Legacies of Law in Europe* (Hart Publishing, 2003). On the Roman roots narrative, see Reinhard Zimmermann, *Roman Law, Contemporary Law, European Law: The Civilian Tradition Today* (Oxford University Press, 2001).

[6] Eric Hobsbawm and Terence Ranger, *The Invention of Tradition*. (Cambridge University Press, 1983).

the legitimacy of national governments to justify the new forms (*i.a.*, the European Council). These are both forms of external legitimation, derived from constitutional decisions that have legal validity. However, in order to build internal legitimacy, such measures are of little significance. Legitimacy comes from a belief that something is justified, and therein values, aims and belief systems are fundamental. Where do they come from?

Historian Ann Rigney has discussed this issue through the concept of politics of memory. She maintains that historical narratives become enmeshed with politics and thus political exigencies begin to drive the meanings that are given to historical events. This is especially true with regard to the forms of public memory, where certain figures and events are given memorials and these memorials are explained as commemorating a certain interpretation of history. The politics of memory is thus the politics of what is officially remembered and what is forgotten, and what meaning is given to history.[7] While traditional nation states may utilize a rich historical heritage, new entities such as Europe or the EU have to develop their own memory politics and shared history *ex nihilo*.

The meaning of the past for the present is a crucial part of the relationship between legal history and law. This is best explained by the disjunction between two modes of thinking about law, normative and contemplative. Normative legal thinking focuses on what the meaning of the text is and how the law should be applied in a case. Contemplative legal thought is free of such needs to find a solution to a question and may focus on the cultural, societal and other issues that the law may be involved in. Historical thinking about law is contemplative by its very nature. However, there are exceptions, especially in the common law countries, where historical inquiries into major cases may end up changing the law itself. For instance, in the second *Mabo* case (1992) in Australia, the overturning of the *terra nullius* doctrine threw the whole system of land tenure into chaos. In a similar way, such dualities of normative/contemplative nature become problematic when researchers have an active stake in the matter. I have always been wary of authors who dub themselves as researchers and activists, not because of a

[7] Ann Rigney, 'Remembrance as remaking: memories of the nation revisited' (2018) 24 Nations and Nationalism 240. On the difficulties of linking historical memories to entities such as Europe, see Ann Rigney, 'Transforming Memory and the European Project' (2012) 43 New Literary History 607.

dislike of the politics that they advocate themselves, but because these modes of thinking are diametrically opposite.

3. Paragraph 19 of the Nazi Party program and Italy

One of the major upheavals within the modern European legal traditions is the rise of totalitarianism in the interwar period which affected Roman law as well.[8] Previously sacrosanct beliefs about the role of law in society, such as the rule of law were contested and states took unprecedented steps to deprive people of citizenship and the protections of the law. The interwar period was, of course, a period of the rise of the big state; for instance, in the US, the rise of New Deal policies meant a whole new way of thinking about the role of law in enacting societal change. This use of law as a tool for political ends was nowhere as strong as in the authoritarian or totalitarian states of Europe.

Roman law had a curious history in this tumultuous era, which may be best illustrated by a brief comparison between Germany and Italy in the 1930s. In Germany, Paragraph 19 of the NSDAP party program (1920) stated: 'We demand that Roman Law, which serves a materialistic world order, be replaced by a German common law.' As has been discussed in numerous studies, the roots of this statement were in an earlier party program of a small communist party, from which they had been copied into the Nazi party program. What Roman law meant there was related to property relations; it signified law that protected property rights or property absolutism against appropriation. The Nazi officials later clarified their position towards Roman law, stating their approval of Roman militarism and expansionist policies as well as the emphasis that was given to the allegiance of citizens towards the state during the Roman Republic. In contrast, Hans Frank, the Nazi minister of justice, maintained that the Nazis only disliked later Roman law which had been corrupted by 'Semitic' influences and the Pandectist system that had been constructed upon them and continued to influence German law.

[8] Massimo Miglietta and Gianni Santucci (eds), *Diritto romano e regimi totalitari nel '900 Europeo* (Università degli studi di Trento, 2009).

However, Nazi ideas of legal reform were not mainly focused on Roman law, but rather the Nazi *Neue Rechtswissenschaft* or new legal science was based on antiformalism and ideas of replacing the BGB (*Bürgerliches Gesetzbuch*) with a people's law that would reflect Germanic ideas of communalism.[9]

In contrast, in Fascist Italy the history of ancient Rome was idealized, with Roman symbols such as the fasces and other insignia omnipresent in Fascist propaganda. As part of this, Roman law gained strong official support, while many Roman law scholars began to study themes related to Fascist doctrine such as corporativism. As a result of Italy's alliance with Germany, Nazi officials began to tone down their public opposition to Roman law. They found common cause in many other fields. As part of their report on the alliance, the New York Times declared that there had emerged a 'consensus of totalitarian regimes' in areas such as 'social justice and discipline' as well as the 'defence of the civilization of Europe and the world.'[10]

However, in all the authoritarian, totalitarian and quasi-totalitarian countries of Europe, the rise of political aims at the expense of law was linked with the diminishing respect for and understanding of the independence of law.[11] Both in Nazi Germany and in Fascist Italy, the idea of absolute legal protections granted to individuals by law were increasingly replaced by ideas such as dignity of a community, the protections granted to individuals as members of a group, such as an ethnic group or a professional group. This was the legal implication of a curious strand of corporativism which, in Germany for instance, sought to transfer the emphasis from citizens who had rights by law to focusing on members of the Germanic blood community who were accorded privileges as members of the blood community. Of course, similar policies of prioritizing political aims against legal formalities were also enacted in Soviet Russia.

[9]Peter Landau, 'Römisches Recht und deutsches Gemeinrecht. Zur rechtspolitischen Zielsetzung im nationalsozialistischen Parteiprogramm' in Simon Dieter and Michael Stolleis (eds), *Rechtsgeschichte im Nationalsozialismus* (Tübingen 1989); Gianni Santucci, 'L'ostilità nazionalsozialista al diritto romano', in Elvira Migliario and Gianni Santucci, «*Noi figli di Roma» Fascismo e mito della romanità* (2022) Quaderni di storia.

[10] Mario Varvaro, 'Salvatore Riccobono e l'esaltazione giusromanistica di Roma antica', in Elvira Migliario and Gianni Santucci, «*Noi figli di Roma» Fascismo e mito della romanità.*

[11] On the gradual eradication of the *Rechtsstaat*, see Jens Meierhenrich, *The Remnants of the Rechtsstaat. An Ethnography of Nazi Law* (Oxford University Press, 2018).

In all of the interwar countries where authoritarian movements took root, this meant that there was a deep-rooted distrust towards the kind of legal absolutism that Roman law represented. As law beyond the nation state, Roman law was, by its very nature, not pliant to the changing needs of the authoritarian rulers.

4. The turn towards integration and the resurgence of Roman law

The end of the Second World War marked a sea change in the history of Roman law, but also in ideas of European legal tradition. From the interwar crisis and the threats of abolition, Roman law resurfaced with a new lease of life. This is linked with the emergence of European legal tradition as a fundamental narrative of European legal integration. The idea of a European legal tradition is a curious narrative convergence of three different elements: 1) Roman law, 2) Human rights, 3) European integration.

The Europeanization of Roman law has its roots in the 1930s. Scholars such as Paul Koschaker, Franz Wieacker and Helmut Coing began to formulate the idea of law as a European tradition, and Roman law formed one of the key foundational elements. This was of course linked with the resistance towards Paragraph 19 of the Nazi party program, but also with the politization of law and the atrocities that followed. Koschaker's *Krise* (1938) and *Europa* (1947) bookended the war and envisioned what the role of Roman law in Europe was and what it could be: a cultural unity factor.[12] Wieacker's *Privatrechtsgeschichte* (1952) painted a picture of law and legal tradition as an enduring continuity from the Roman law tradition to modernity, where lawyers and their legal consciousness and method safeguard justice.[13] Coing, on the other hand, combined

[12] Paul Koschaker, *Die Krise des römischen Rechts und die romanistische Rechtswissenschaft* (Beck, 1938); *Schriften der Akademie für Deutsches Recht: Römisches Recht und fremde Rechte*, 1, Beck, München, Berlin, 1938, 1–86; Paul Koschaker , *Europa und das römische Recht,* Biederstein Verlag, München, (Beck, 1966 [1947]); Tomasz Giaro, *Aktualisierung Europas, Gespräche mit Paul Koschaker*, Genoa, Böhlau Verlag, 2000; Tommaso Beggio, *Rediscovering the Roman Foundations of European Legal Tradition*, Heidelberg, Winter Verlag, 2018.

[13] Ralf Kohlhepp, 'Franz Wieacker und die NS-Zeit '(2005) 122Zeitschrift der Savigny-Stiftung für Rechtsgeschichte Romanistische Abteilung 203; Viktor Winkler, *Der Kampf gegen die Rechtswissenschaft: F. Wieackers "Privatrechtsgeschichteder Neuzeit" und die deutsche Rechtswissenschaft des 20. Jahrhunderts*, Hamburg, Verlag Dr. Kovač, 2014; Ville

natural law and Roman law traditions as the key to European legal heritage, where the longevity of the tradition prevents rapid change and political perversion of the law.

The second element is that of rule of law and human rights as the fundamental European tradition. Again, this narrative was formulated by German exile lawyers and political theorists such as Franz Neumann, Ernst Fraenkel and Hannah Arendt, among others and law and rights. At the same time, the creation of the European Convention on Human Rights led to a novel kind of understanding of human rights as a particularly European tradition. As described by scholars like Marco Duranti, this was a development that was strongly favoured by both conservative politicians and religious groups, which wanted to have strong protections against the rampant powers of the state. Of course, the dangers of unchecked state powers were represented not only by Nazi Germany and the Holocaust, but equally by that of the Soviet bloc. Many have argued that the binding of state power was also seen as beneficial to curb socialist reform plans in the Western European countries as well. However, the turn to human rights and rule of law as European traditions was mainly due to the experience of the demise of the rule of law under totalitarianism. Especially in Germany, the collapse of the *Rechtsstaat* led many to ask what, if anything, remains when the legal system has been hijacked and corrupted. For Arendt, this was the conundrum that led to the question about rights to have rights. Although Neumann and Fraenkel were deeply sceptical of natural law thought, the Nazi notions of relative natural law or natural law applicable to the German blood community, were even worse.[14]

The third element, that of shared legal values and the European integration project is the creation of key drivers of the European project. There, persons like Pierre Pescatore, head of the European Court of Justice, and Walter Hallstein, the head of the Commission, wanted to build the legitimacy of European integration through the past, to present a common past that would complement their plans for a common future of Europe. Pescatore had worked as Koschaker's assistant at the university, while Coing

Erkkilä, *The Conceptual Change of Conscience: Franz Wieacker and German Legal Historiography 1933-1968*, Tübingen, Mohr Siebeck, 2019.

[14] Marco Duranti, *The Conservative Human Rights Revolution: European Identity, Transnational Politics, and the Origins of the European Convention* (Oxford University Press, 2017).

was a confident of Hallstein's. Both of them, but especially Hallstein, spoke the language of values, heritage and tradition as the roots of the European project. However, only from the 1990s onwards has the language of tradition been integrated into the European project.[15]

What do these narratives mean then? What is the significance of the idea of a shared European legal heritage? First, it maintains that there is a pre-existing tradition of law in Europe that forms a common basis for legal integration. This is naturally the civil law tradition, based on the foundation of Roman law, but it also contains links to moral imperatives, shared values and human rights that are seen to exist in Europe. They are, in a very concrete sense, norms beyond politics. They are also a sign of an existing unity for Europe. Second, the shared past contains the promise of future orientation, much like the shared past of a nation is the promise of a glorious future. The shared legal past of Europe reaffirms the unity that is already there, as a ready form for the future, legitimating and guiding integration. It is in a sense also a promise of rediscovering a past unity.

The unity of the past and the future are less odd than it may appear at first glance. Chinese president Xi claimed, when celebrating the centenary of Chinese archaeology that 'Historical and cultural heritages tell vivid stories of the past and profoundly influence the present and future.' This makes it important, according to *China Daily*, that archaeology 'provide strong support for promoting a fine traditional culture and strengthening people's confidence in Chinese culture'. Xi urged developing 'archaeology with Chinese features, style and ethos to better showcase the splendor of the Chinese civilization, carry forward the fine traditional Chinese culture and make new and greater contributions to realizing the Chinese Dream of national rejuvenation'.[16] This highlights how the emphasis on the past as the foundation of a national project and narrative is far from an exclusively European preoccupation.

While European countries have been wary of utilizing such nationalistic

[15] The emergence of the language of tradition and heritage in European law is actually an ongoing project of mine.

[16] Wang Kaihao and Cao Desheng, 'Xi highlights vital role of archaeology', *China Daily* | Updated: 2021-10-18 07:06 <www.chinadaily.com.cn/a/202110/18/WS616cac63a310cdd39bc6f6cb_1.html> accessed 22 November 2023.

rhetoric, this has not stopped actors such as identitarian movements from utilizing the past, even the classical past, as their own future of the past (see for example the group Identity Evropa, which uses hoplite weaponry as their insignia).

5. Projects and the notion of the new European private law

The theme of rediscovering a unity that was lost became one of the major points for the new interest in Roman law from the 1990s onwards. This trend was categorized under the label of neo-pandectism, a throwback from the Pandectistic tradition of Roman law in Europe, where its main value was that of law in force.

In addition to neo-pandectism, Roman law has also had cultural and even purely utilitarian uses. For representatives of Catholic conservatism, Roman law was one of the major fields representing law beyond the nation state, the others being natural law and legal philosophy. Roman law also had a vital connection with Christianity and the Christian legal tradition, most famously that of canon law.

Within European integration, especially in Eastern Europe, Roman law was given a role as a sign of Europeanness or belonging to a shared European tradition. For the accession of Eastern European countries to the EU, touting how one's legal tradition was part of the same European heritage was also a political argument for closer integration.

On top of these strands, one would need to remember that the majority of scholarship on Roman law was and is mostly interested in Roman law for its own sake. This strand of scholarship studies Roman law in its own context, at least explicitly, without any regard to its current meanings.

Within the twentieth-century history of Roman law in Europe, there are interesting continuities and break points. The first are modern codifications, the foremost of them being the German BGB, which transferred Roman law to the realm of history and jurisprudence and away from applicable law. The second is the rise of interwar totalitarianism, especially in Nazi Germany, which was hostile to the idea of law independent of politics. The third was the rise of European integration after the Second World War, which gave Roman law a new lease of life as a predecessor of

European legal unity, but at the same time proved to be dangerous as the fortunes of European legal integration changed. In all of these, Roman law and Roman lawyers adopted and overcame challenges, which is hardly surprising. Adaptation is one of the key components of the continuity of the Roman law tradition. Its survival is based on renewal and the continuation of studies.

It is clear that one of the key points in the longevity of the tradition of Roman law is the flexibility of arguments that make it possible to use different aspects of the law in different situations. Goethe famously wrote that Roman law is like a duck, sometimes visible on the surface, sometimes diving and invisible, but always there.[17] But what does the duck do?

Of course, Goethe was a polymath who penned authoritative studies in all kinds of fields from humanities to natural sciences. Ornithology was clearly not his forte because, if it was, Goethe would have known that ducks do not dive.

This is actually quite fitting, because most of the impact and continuing influence of Roman law was not hidden under the surface. Rather, it was evident and blatantly obvious like the tail end of a duck that remains on the surface while feeding. Legal concepts that derive from Roman law, as well as the basic tenets of legal doctrine in most European legal cultures are derived from Roman law.

Roman law is both rooted in the past and, through it, in the law in force today, but also as part of the future. Roman law was equally an inspiration for numerous projects on legal integration in Europe, such as the Common Frame of Reference or various others. It is unequivocally true that Roman law encapsulates ideas, concepts, basic doctrine and methods of legal thinking that are shared by most if not all European countries. Roman law is, what one scholar called, a European identity factor.[18]

Earlier, we discussed the difference between the normative and the contemplative modes of argumentation. This was, as part of the wider discussion on hermeneutics, the crux of a debate between Emilio Betti and Franz Wieacker. In it, Wieacker

[17] Johann Peter Eckermann, *Conversations with Goethe* (Dent, 1971) 313.

[18] Tommaso dalla Massara, 'Roman Legal Tradition as an Identity-Factor towards a New Europe: Five Pillars for the Future?' in Luigi Garofalo and Lihong Zhang (eds), *Diritto Romano fra tradizione e modernità*, *Atti del Convegno internazionale di Shanghai 13-15 novembre 2014* (Pacini editore, 2017).

maintained that, in jurisprudence, there is no true distinction between the historical and the normative, because legal interpretation is by nature always self-reflective and cumulative. However, as Betti points out, within legal history elements such as Roman law have qualities that guide development towards scientific order and rationality. Whether those qualities are built into the tradition and the sources or they are imprinted on them through the process of interpretation is a matter that depends on the historical rootedness of the understanding of legal concepts themselves.[19]

The question remains whether the shared past and the shared legal culture are in themselves indications for future direction.

6. *Conclusions*

The role of Roman law in European legal history is by no means confined to antiquity or even to the so-called Reception of Roman law up to the nineteenth century. Rather, Roman law operated even later as a source of historical legitimation and as an example. When authoritarian and totalitarian states in the interwar period sought to minimize the binding nature of law and its power to limit political actors, this tendency was turned on its head. Especially in Germany, the Nazi regime opposed Roman law, but also the general tendency to apply the ideas behind the rule of law, whereas the post-war European integration took the opposite path. European integration was specifically launched as a legal process, while human rights were raised as a great example of European values. Simultaneously, Roman law was raised as the foundation of the shared European legal tradition, which would not only bind European states together, but also guide their future integration.

[19] The main points are summarized in Emilio Betti, *L'ermeneutica storica nella prospettiva di Franz Wieacker*, Napoli, Jovene, Synteleia Vincenzo Arangio-Ruiz, 1964, 66-73.