

CRITIQUE

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**MEMORY DISORDERS: KOSCHAKER REDISCOVERED
AND BOWDLERIZED***

1. NO PROBLEMS, NO HISTORY

The French inventor of problem-centered historiography, Lucien Febvre, said very accurately that to ask a question portends both the beginning and the end of every historical work: *pas de problèmes, pas d'histoire*.¹ The main problem of Paul Koschaker's biography, written by the well-informed and promising Italian author, Tommaso Beggio, is that it neither formulates new problems nor treats seriously the old ones.

Beggio starts with Koschaker's principal university postings: Leipzig (33–72), Berlin (73–117) and Tübingen (119–172). Then he passes on to the crisis of Roman law (173–245) and Koschaker's legacy (247–276), followed by lists and tables (277–332). He provides interesting pieces of information which, however, concern sometimes relatively undisputed matters, e.g. Koschaker's role as the “founder of cuneiform laws” (33–41).

On the other side, Beggio disregards numerous problems which must have troubled Koschaker as an elderly conservative Austrian professor of Roman law in Nazi Germany. His academic life is depicted rather as a series of successes. Questions are absent. So with a level of surprise we contemplate the last sentence of the book: “this study has sought to raise questions rather than pursue an unrelinquishing quest to find all the answers ...” (276).

* Tommaso Beggio, *Paul Koschaker (1879–1951). Rediscovering the Roman Foundations of the European Legal Tradition*, Heidelberg 2018, p. 332. The numbers in brackets refer to the pages of this publication.

¹ L. Febvre, *Propos d'initiation: vivre l'histoire*, “Mélanges d'histoire sociale” 1943, Vol. 3.3, p. 8.

Since Koschaker's main success was attainment of the so-called Savigny chair in Berlin in 1936, Beggio should have mentioned another competition for a Roman law chair in Berlin – that held previously by Theodor Kipp. However, Beggio leaves it out. We might only speculate as to why. Was it because in this competition, which took place six years earlier, Koschaker was surpassed by two contemporaries, Ernst Levy (1881–1968) and the winner Fritz Schulz (1879–1957)?²

2. IT IS NOT EASY TO REMAIN A GERMAN

Among other bypassed questions there is first the national one. Koschaker was an Austrian who came from a Germanized Slovene family, a fact broadly illustrated in his autobiography,³ but unfortunately never mentioned by Beggio. Indeed, Koschaker's identity was that of a *Kulturdeutscher*, one who is German by culture.⁴ Hence, he suffered, to a degree, from an inferiority complex *vis-à-vis* the world of German legal science.⁵

It therefore comes as no surprise that he characterizes his call to the university at Frankfurt am Main, which took place in 1914, as “intensely longed for”.⁶ As a mere German by culture Koschaker found at the Nazified Berlin Law Faculty a common language with Wenzeslaus von Gleispach, a Nazi, but Austrian gentleman, who retired in 1937. By this point the next dean of the faculty, the German Hans Weigmann, was already giving Koschaker much trouble (83–84).

Only after the WW II, as the mental dissociation from Germany spread among Austrians, did Koschaker, now an “old” or “good Austrian”, declare himself as “not responsible for Nazism”.⁷ During the lightning wars in 1939, he apostrophized Germany as his *Vaterland*, whereas in 1940 he addressed Austria and the Sudeten district as “the newest provinces of Great Germany” (*Großdeutschland*).⁸

² A.-M. von Lösch, *Der nackte Geist. Die Juristische Fakultät der Berliner Universität im Umbruch von 1933*, Tübingen 1999, pp. 183–184; T. Giaro, *Paul Koschaker sotto il nazismo: un fiancheggiatore 'malgré soi'*, (in:) *Studi in onore di Mario Talamanca*, Vol. IV, Napoli 2001, p. 165.

³ P. Koschaker, *Selbstdarstellung*, (in:) N. Grass (ed.), *Österreichische Geschichtswissenschaft der Gegenwart in Selbstdarstellungen*, Vol. II, Innsbruck 1951, pp. 105–107, 119.

⁴ Giaro, *Paul Koschaker sotto il nazismo...*, pp. 163–164; *idem*, *Der Troubadour des Abendlandes*, (in:) H. Schröder, D. Simon (eds.), *Rechtsgeschichtswissenschaft in Deutschland 1945–1952*, Frankfurt a.M. 2001, p. 32.

⁵ T. Giaro, *Aktualisierung Europas. Gespräche mit Paul Koschaker*, Genova 2000, pp. 23–24, 27–28.

⁶ P. Koschaker, *Selbstdarstellung...*, p. 115.

⁷ T. Giaro, *Der Troubadour des Abendlandes*, (in:) H. Schröder, D. Simon (eds.), *Rechtsgeschichtswissenschaft...*, pp. 55, 73.

⁸ P. Koschaker, *L'alienazione della cosa legata*, (in:) *Conferenze romanistiche tenute nella Reale Università di Pavia nell'anno 1939*, Milano 1940, p. 90; *idem*, *review of Valentin-Al.*

In a 1948 letter to his disciple Guido Kisch, he starts to express his dissatisfaction: “It is not easy indeed to remain a German”.⁹

3. WAS KOSCHAKER DEAN OF THE LEIPZIG LAW FACULTY IN 1932–33?

The next question skipped by Beggio reads: was Koschaker from 1 November 1932 to 31 October 1933 the Dean of the Leipzig Law Faculty? The question is interesting since so-called Aryanising (*Arisierung*) had already commenced, despite the absence of any legal basis, by the beginning of 1933. It was an aspect of the forcible coordination (*Gleichschaltung*) of all cultural institutions, including university chairs, journals, etc.

In any event, we know that on 24 October 1933 someone by the name of Paul Koschaker attested his own recommendation, released in the capacity of dean at Leipzig, that professors accept the dissertation reports of non-Aryans (*Nichtarier*) only with reticence (*Zurückhaltung*).¹⁰ Beggio cites Thomas Henne’s confirmation of Koschaker’s identity as merely a dissenting voice (64 nt. 161) and insists that the lists of the deans of the Leipzig Law Faculty during the 1930s never mention Koschaker.

This circumstance has a certain weight, but directly after WW II there was some disorder in German university archives. Certain authors even stole from public libraries copies of their books written during the Third *Reich*. A similar ambiguity persists in the scholarly literature on Koschaker’s membership in the Nazi Academy for German Law (*Akademie für Deutsches Recht*). Some deny his membership,¹¹ but this time Beggio rightly does not share these doubts (9, 27, 73–74, 78–79, 81–83, 119, 175–176).

Returning to the matter of Koschaker’s deanship, there are further positive indications that are unfortunately omitted by the author. One of them concerns the forced retirement of the Director of the Institute of Labour and Social Law at the

Georgescu, “*Remarques sur la crise*”, “*Zeitschrift der Savigny-Stiftung Romanistische Abteilung*” 1940, Vol. 60, p. 296.

⁹ P. Koschaker, *Briefe aus den Jahren 1940 bis 1951*, (in:) G. Kisch (ed.), *Paul Koschaker. Gelehrter, Mensch, Freund*, Basel–Stuttgart 1970, p. 36; T. Giaro, *Aktualisierung Europas...*, p. 16; *idem*, *Der Troubadour des Abendlandes*, (in:) H. Schröder, D. Simon (eds.), *Rechtsgeschichtswissenschaft...*, p. 53.

¹⁰ T. Henne (ed.), *Die Aberkennung von Doktorgraden an der Juristenfakultät der Universität Leipzig 1933–1945*, Leipzig 2007, pp. 25–27; T. Giaro, review of “*Diritto romano e regimi totalitari*”, “*Zeitschrift der Savigny-Stiftung Romanistische Abteilung*” 2011, Vol. 128, pp. 708–709.

¹¹ M. Stolleis, *The Law under the Swastika. Studies on Legal History in Nazi Germany*, Chicago–London 1998, pp. 68–69.

Leipzig Law Faculty, Erwin Jacobi (1884–1965). He was dismissed as “half Jewish” in the summer of 1933 on the authority of the infamous Law on Restoration of the Professional Civil Service of 7 April 1933.

A short Internet-history of the Institute by Bernd-Rüdiger Kern states that on this occasion it was Dean Koschaker himself who assumed provisional management responsibilities (*Dekan Koschaker übernahm selbst die kommissarische Leitung*). Again, another publication recalls a report of 26 September 1933, submitted to the Ministry of Education and signed by the same *Dekan der Juristen-fakultät, Koschaker*, in which he stressed that, given the vacancies in public law, it was necessary to employ external teaching staff.¹²

4. ARYANISING THE „SAVIGNY-ZEITSCHRIFT ROMANISTISCHE ABTEILUNG”

Beggio gives only a summary treatment to the Aryanising of the journal *Savigny-Zeitschrift Romanistische Abteilung* (79–83). Ernst Rabel (1874–1955) resigned as a Jew from his co-editor post already in January 1934, but in mid-March Koschaker declined the invitation he had received to take up the vacated post. He refused to appear on the board alongside Levy who was Jewish, since a board composed of Koschaker as a scholar of ancient non-Aryan laws and “a man named Levy” could irritate the Nazis.¹³

From that time, Koschaker repeatedly tried to demonstrate that the so-called Orientalisation of later Roman law, i.e. its deterioration under eastern influence, did not imply its Judaisation (*Verjudung*), even if many investigators of the topic happened to be Jewish.¹⁴ So Koschaker defended Roman law against the stigma of Judaisation hand in hand with the Nazis. He overlooked that in doing so he accepted their axiology which considered Judaisation a stain to be removed.¹⁵ Moreover, he perceived himself as being at risk, since even mere research activity in ancient oriental law was sufficient to raise the suspicion of Jewishness.¹⁶

¹² B.-R. Kern, *Die Geschichte des Instituts für Arbeits- und Sozialrecht*, www.arbeitsrecht-fifa.de/instgeschichte.htm (accessed: 9.12.2018); I. Mikešić, *Sozialrecht als wissenschaftliche Disziplin: die Anfänge 1918–1933*, Tübingen 2002, p. 64 nt. 216.

¹³ T. Finkenauer, A. Herrmann, *Die Romanistische Abteilung der Savigny-Zeitschrift im Nationalsozialismus*, “Zeitschrift der Savigny-Stiftung Romanistische Abteilung” 2017, Vol. 134, p. 17.

¹⁴ T. Giaro, *Der Troubadour des Abendlandes*, (in:) H. Schröder, D. Simon (eds.), *Rechtsgeschichtswissenschaft...*, pp. 41–43, 62–63.

¹⁵ T. Giaro, *Paul Koschaker sotto il nazismo...*, pp. 179–180; T. Finkenauer, A. Herrmann, *Die Romanistische Abteilung...*, pp. 39–40.

¹⁶ P. Koschaker, *Selbstdarstellung*, (in:) N. Grass (ed.), *Österreichische...*, p. 120.

Levy, who viewed Koschaker's refusal as a "slap in the face", was replaced by an 'Aryan' Nazi, Hans Kreller. So in the event, Koschaker only assumed co-editorship of the *Savigny-Zeitschrift* in 1936, as Leopold Wenger transferred to Vienna and had to resign from the board, membership of which was reserved to residents of the *Reich* (80). Koschaker remained on the board until the end of the Nazi-era, although he happened to quarrel with Kreller over citations of Jewish scholars (*Judenizitate*).¹⁷

Nonetheless he held on, being repeatedly swayed to remain by the smooth-tongued (*ölig*) – such as he was described by Koschaker in a postwar letter – Ernst Heymann (1870–1946).¹⁸ Both Levy and Rabel remained absent from the postwar *Gedächtnisschrift* titled *Europa e il diritto romano. Studi in memoria di Paolo Koschaker*. The former made it even known that he explicitly refused to participate.¹⁹

Some younger German legal historians impute not only to Koschaker, but also to Hans Kreller and Leopold Wenger, such inglorious traits as careerist obedience and opportunism as well as lack of solidarity and civil courage.²⁰ In contrast, Begio abstains from evaluations, being satisfied with the commonplace ascription of such behavior to "Koschaker's human weaknesses" (81).

5. ARYANISING RABEL'S CHAIR AT THE BERLIN LAW FACULTY

Rabel was forced to leave the Faculty definitively on 31 December 1935 and Koschaker had already taken over his chair by 30 March 1936. Moreover, even as early as November 1935 Koschaker convened at Berlin a class in Roman Legal History. This quick succession was due to the Ministry of Science's policy priority of demonstrating that for every released Jew there would be a speedy replacement by an equivalent Aryan staff.

Koschaker benefited from the patronage at the Ministry of the Nazi-Germanist Karl August Eckhardt (1901–1979), who from October 1934 to June 1936 was Head of Department in the Division of Higher Education.²¹ Unfortunately,

¹⁷ T. Finkenauer, A. Herrmann, *Die Romanistische Abteilung...*, pp. 18, 24–26.

¹⁸ P. Koschaker, *Briefe aus den Jahren 1940–1951*, (in:) G. Kisch (ed.), *Paul Koschaker...*, p. 29.

¹⁹ D. Mussgnug (ed.), *Ernst Levy und Wolfgang Kunkel. Briefwechsel 1922–1968*, Heidelberg 2005, p. 251.

²⁰ T. Finkenauer, A. Herrmann, *Die Romanistische Abteilung...*, p. 19.

²¹ A.-M. von Lösch, *Der nackte Geist...*, pp. 405–426, 435–447; R. C. van Caenegem, *European Law in the Past and the Future. Unity and Diversity over Two Millennia*, Cambridge 2002, pp. 120–126.

so influential a person is passed over without mention by Beggio. He follows the narrative of Koschaker's 1947 letters, in which the teacher recounts to his pupil Kisch that in autumn 1935 he went to Berlin in order to intervene on behalf of Benno Landsberger, a Jewish Assyriologist dismissed from the University of Leipzig.

Koschaker was promised, first, "safety" for Landsberger by means of placing him in post at a Berlin museum and, second, a creation of a new Institute for Near Eastern Legal History (75–76). However, given that both Berlin Roman lawyers, Schulz and Rabel, were forced to retire on racial grounds by the end of 1935, Koschaker, who was teaching there since November, must have been fully aware of Rabel's fate. He bemoans instead the prospects of the Assyriologist Landsberger and in his autobiography describes Rabel's chair offered to him as simply "vacant".²²

Despite this neutral terminology, we see here our hero participating once more, albeit indirectly, in an Aryanising operation. Moreover, this behavior of Koschaker receives the full understanding of his biographer. The Berlin chair, taken over by Koschaker, is referred to by Beggio only once as Rabel's chair (77); rather, it is as a rule referenced under the name of its first holder, which was also Koschaker's own terminology: "Savigny's chair" (9, 26, 74, 92, 104).

However, this characterization of the chair may be doubtful, since Rabel, equally with his predecessor Josef Partsch (1882–1925), was professor both of Roman and Civil Law as well as Foreign and Comparative Law,²³ all disciplines which, except Roman law, did not yet exist in Savigny's times. Moreover, the chair had to be redesignated for Koschaker as the chair in Roman Law and Comparative Legal History (*Vergleichende Rechtsgeschichte*).²⁴ In any case, the chair, traditionally considered the noblest juristic chair in Germany, was for Koschaker, with his "human weakness", a tasty morsel.

6. THE CRISIS OF ROMAN LAW AND ITS REMEDIES

Such an accommodating attitude was promptly rewarded by the regime. Already in 1937, Koschaker entered the Prussian Academy of Sciences and was invited to give a lecture at the Nazi Academy for German Law. In the lecture (179–181, 202–207), Koschaker presented Roman law from the national German

²² P. Koschaker, *Selbstdarstellung*, (in:) N. Grass (ed.), *Österreichische...*, p. 117; T. Giaro, *Paul Koschaker sotto il nazismo...*, p. 165; *idem*, *Der Troubadour des Abendlandes*, (in:) H. Schröder, D. Simon (eds.), *Rechtsgeschichtswissenschaft...*, p. 35.

²³ R.-U. Kunze, *Ernst Rabel und das Kaiser-Wilhelm-Institut für ausländisches und internationales Privatrecht 1926–1945*, Göttingen 2004, p. 48.

²⁴ A.-M. von Lösch, *Der nackte Geist...*, pp. 367, 485.

perspective as a means not only to remain within the sphere of European culture, but also to reacquire global importance (*Weltgeltung*) in legal scholarship.²⁵

Beggio concedes that this gala lecture, delivered by Koschaker on 21 December 1937 in Berlin, “may appear as opportunistic and self-interested in assuring himself a safe and brilliant career; yet, in this case, his dedication to Roman law plays an important role as well” (83). Indeed, regardless of the plights facing the world, Koschaker’s position remains consistently stable: more Roman law! – before WW II as after.²⁶

He repeats this even on 30 September 1938, as the Munich Treaty gave license to Germany’s annexation of the *Sudetenland*. On this day, Koschaker, professor in Prague between 1909 and 1914, signs the introduction to *Die Krise des römischen Rechts*, a written version of the lecture, without any reference to the Czechoslovak tragedy.²⁷ However, Koschaker is not a cloistered scholar, innocent of worldly affairs. In a review appearing two years later, he already refers to Austria and the Sudeten district as “the newest provinces of Great Germany”.²⁸

7. THE EUROPEAN AXIS AND THE NEGRO IN A TAILCOAT

Another episode omitted by Beggio is Koschaker’s paper “Germany, Italy and Roman Law”. It was published on 15 May 1938 in the special issue of *Deutsches Recht* released on the occasion of Hitler’s visit to Italy,²⁹ two months after Austria’s *Anschluss* and two weeks before Hitler’s secret directive on the subjugation of Czechoslovakia. After having praised the “European mission” of the Rome-Berlin Axis, Koschaker refutes the old Germanist topos, embraced by the Nazis, on the reception of Roman law as “a national misfortune” of the Germans.³⁰

A strong culture always preserves its own identity, a thesis supported by Koschaker with the metaphor of a Negro in a tailcoat. All so-called ‘Negro jokes’ (*Negerwitze*) aside, the German Hereditary Farm Law of 29 September 1933 discriminated against those whose ancestors had “Jewish or colored blood”,

²⁵ P. Koschaker, *Die Krise des römischen Rechts und die romanistische Rechtswissenschaft*, München–Berlin 1938, pp. 33–36, 75, 85.

²⁶ P. Koschaker, *Europa und das römische Recht*, 4th ed., München–Berlin 1966 (1st ed. 1947), p. 289; T. Giaro, *Der Troubadour des Abendlandes*, (in:) H. Schröder, D. Simon (eds.), *Rechtsgeschichtswissenschaft...*, p. 57.

²⁷ T. Giaro, *Paul Koschaker sotto il nazismo...*, pp. 175–176; *idem*, *Der Troubadour des Abendlandes*, (in:) H. Schröder, D. Simon (eds.), *Rechtsgeschichtswissenschaft...*, pp. 45–47.

²⁸ P. Koschaker, *review of Valentin-Al. Georgescu...*, p. 296.

²⁹ T. Giaro, *Paul Koschaker sotto il nazismo...*, pp. 177–178; *idem*, *Der Troubadour des Abendlandes*, (in:) H. Schröder, D. Simon (eds.), *Rechtsgeschichtswissenschaft...*, pp. 40–41, 44–45.

³⁰ T. Giaro, *Der Troubadour des Abendlandes*, (in:) H. Schröder, D. Simon (eds.), *Rechtsgeschichtswissenschaft...*, p. 34.

and the Second Italo-Ethiopian War (1935–37) seemed to confirm unequivocally the inferiority of African people.

According to Koschaker, a Negro in a tailcoat looks barbaric: he and his tailcoat continue their separate existence unchanged (*Wenn ein Neger einen Frack anzieht, so ist dies eine Barbarei. Denn der Frack bleibt hierbei Frack und sein Träger ein Neger*). It means that only a civilized nation (*Kulturvolk*) may perform an active reception of a foreign good of culture which lifts the nation to a higher level.³¹ The paper remains disconcerting to this day, since it implies that the Nazis had only one blemish – their false resentment towards Roman law. After its removal, Koschaker would have no objections.

A faithful disciple of Koschaker, Guido Kisch, reprinted Koschaker's paper in his 1970 edition of their postwar correspondence. However, Kisch must have felt some embarrassment, since he deleted without *caret* not only mentions of the Negro, but also those of fascism and the Axis.³² Nevertheless, our faithful biographer does not enter into details, neither of Koschaker's original nor of Kisch's reprint (203–204).

8. ANTIQUATED IDEAS AND A PROPOSAL FOR LAW REFORM

The next issue skipped by Beggio is Koschaker's proposal to reform German family law, announced in a paper of 1939. Notoriously, Koschaker defended the traditional pandectist concept of property against its new "functional" version, propagated by a significantly younger German scholar who exhibited a much greater openness toward new doctrines, Franz Wieacker (1908–1994).

Koschaker, who generally avoided the new body of Nazi law, proposed however to introduce, in like manner to property, whose unitary concept was being dissolved, a varied blend of free and patriarchal marriage called *Muntehe*. The latter was promoted by Germanic ideologists in order to preserve fidelity and blood purity. Koschaker emphasizes cautiously that he abstains from a formal project, but limits himself to posing a question to be resolved by those better qualified for such a task.³³

Beggio discusses at length in an affirmative spirit Koschaker's methodological remedies against the crisis of Roman law (173–230). The antiquated method

³¹ T. Giaro, *review of "Diritto romano e regimi totalitari" ...*, p. 707.

³² P. Koschaker, *Briefe aus den Jahren 1940–1951*, (in:) G. Kisch (ed.), *Paul Koschaker...*, p. 68; T. Giaro, *Der Troubadour des Abendlandes*, (in:) H. Schröder, D. Simon (eds.), *Rechtsgeschichtswissenschaft...*, p. 73.

³³ P. Koschaker, *Über einige Probleme des Eherechts im Lichte der vergleichenden Rechtsgeschichte*, "Deutsche Rechtswissenschaft" 1939, Vol. 4, pp. 75–76; T. Giaro, *Paul Koschaker sotto il nazismo...*, pp. 182–183; *idem*, *Der Troubadour des Abendlandes...*, pp. 49–50.

of actualization of Roman law through a return to Savigny, generating a new Pandect-science (*Neopandektistik*), was criticized both during and after WW II (235). Wieacker caricatured it as legal “Adventism”, since in this framework, the doctrine of valid law constitutes inevitably the last chapter of legal history.³⁴

This antiquated method is accompanied by the old-dated concept of Europe presented in Koschaker’s postwar book *Europa und das römische Recht* (230–245). According to this “masterpiece” – so praised repeatedly by Beggio (18, 120, 132, 141, 155, 174, 228, 230–231, 275) – Europe is the territory of the reception of Roman law, i.e. the old German *Reich*.³⁵ Beggio admittedly concedes that Koschaker “failed to take account of the legal history of Eastern Europe” (274), but he forgets to add that Koschaker disregarded most Western countries as well.

His postwar-Europe is in principle the same old Romano-Germanic anti-Bolshevist Europe, recommended by Koschaker to the Nazis during the years 1935–39.³⁶ However, a subsequent theory, formulated in 1983 by Harold J. Berman, reflects better the realities of the late Middle Ages.³⁷ To mark the borders of Europe it relies not on the extension of Roman, but of canon law. Indeed, during the 13th century only the universal Church of Rome remained the undisputed power in Europe, considered a *respublica Christianorum*.

9. UNPLEASANT PERIODS, DIFFICULT TIMES

Koschaker was a moaner, who from hard interwar times passes seamlessly to the inconveniences of Berlin life³⁸ and dirty looks in Tübingen.³⁹ Beggio takes all this seriously, describing the period of 1936–41 in Berlin as “unpleasant” (9, 83).

³⁴ F. Wieacker, *Über Aktualisierung der Ausbildung im römischen Recht*, (in:) *L'Europa e il diritto romano. Studi in memoria di Paolo Koschaker*, Vol. I, Milano 1954, p. 533; T. Giaro, *Max Kaser 1906–1997*, “Rechtshistorisches Journal” 1997, Vol. 16, p. 312.

³⁵ P. Koschaker, *Europa und das römische Recht...*, p. 45; T. Giaro, *Der Troubadour des Abendlandes*, (in:) H. Schröder, D. Simon (eds.), *Rechtsgeschichtswissenschaft...*, p. 60.

³⁶ T. Giaro, *Der Troubadour des Abendlandes*, (in:) H. Schröder, D. Simon (eds.), *Rechtsgeschichtswissenschaft...*, pp. 40–41, 61–62; V. Winkler, *Der Kampf gegen die Rechtswissenschaft. Franz Wieackers “Privatrechtsgeschichte der Neuzeit” und die deutsche Rechtswissenschaft*, Hamburg 2014, p. 175.

³⁷ H. J. Berman, *Law and Revolution*, Vol. I. *The Formation of the Western Legal Tradition*, Cambridge MA–London 1983, pp. 204, 603–604.

³⁸ P. Koschaker, *In memoriam Paul Collinet*, “Zeitschrift der Savigny-Stiftung Romanistische Abteilung” 1940, Vol. 60, p. 333 (interwar); P. Koschaker, *Selbstdarstellung*, (in:) N. Grass (ed.), *Österreichische...*, p. 118 (Berlin).

³⁹ P. Koschaker, *Briefe aus den Jahren 1940–1951*, (in:) G. Kisch (ed.), *Paul Koschaker...*, pp. 23–24 (Tübingen).

What then were Koschaker's worries in this age of ongoing mass killings? We are expected to take pity on him because of his scarce means to employ assistants, the low number of students in his Roman law class, and his difficulties in visiting international events on legal history (85–96, 104–111).

Also, Koschaker's postwar years are depicted as neither easy nor pleasant. They were, so Beggio tells us, "difficult for him, accompanied by regret at not having been acclaimed a fierce anti-Nazi" (119–120). Koschaker's difficult times likewise make difficult his final evaluation: "it is generally not possible to make definitive judgments about Koschaker's behavior, considering the difficult times in which he lived" (270). Should biographers make only final decisions on the easy times and bright parts of life?

Beggio identifies a "proof of the difficult circumstances" in Nazi Germany in the fact that "Koschaker could do little as his Jewish colleagues were forced to abandon their posts and flee their country and, even if he had no adverse feelings towards them, nonetheless he could do nothing to help them" (271). However, this "complexity of the situation" (270) could have been eliminated by some simple solution, e.g. staying away from Aryanised legal journals and chairs. This way was chosen by several German jurists: Leo Raape, Ludwig Raiser, Ernst von Caemmerer and Werner Flume.⁴⁰

The second plea for Koschaker, made by his biographer, which is also the self-justification of the latter, constitutes the said complexity, namely "the complexity of the human events surrounding Koschaker, in addition to the complexity of the situation ... under the Nazi regime" (276), a "complex picture of reasons – or simply "complex reasons" – for his leaving Berlin" (105–106) and finally "complex events ... in Berlin and Tübingen" (267).

In fact, despite having some good points (e.g. his pacifism⁴¹), Koschaker obviously lacked character. He was always wanting to leave the Aryanised editorial board of the *Savigny-Zeitschrift*, but the "smooth-talking" Heymann each time managed to persuade him to remain.⁴² And he used to sign his Berlin letters in these complex times with the simple German salute *Heil Hitler!*, even though it was not strictly obligatory.⁴³

⁴⁰ W. Kunkel, *Der Professor im Dritten Reich*, (in:) H. Kuhn et al. (ed.), *Die deutsche Universität im Dritten Reich*, München 1966, p. 119; H. Göppinger, *Juristen jüdischer Abstammung im "Dritten Reich". Entrechtung und Verfolgung*, 2nd ed., München 1990, pp. 199–200; I. Schwenzler, *Development of Comparative Law in Germany, Switzerland, and Austria*, (in:) M. Reimann, R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law*, Oxford 2006, p. 85.

⁴¹ T. Giaro, *Der Troubadour des Abendlandes*, (in:) H. Schröder, D. Simon (eds.), *Rechtsgeschichtswissenschaft...*, pp. 48–49.

⁴² T. Finkenauer, A. Herrmann, *Die Romanistische Abteilung...*, p. 20.

⁴³ A.-M. von Lösche, *Der nackte Geist...*, p. 391; T. Giaro, *Aktualisierung Europas...*, p. 63; *idem*, review of "Diritto romano e regimi totalitari"..., p. 709.

10. TOWARDS “A MORE UNBIASED EVALUATION”?

“Unbiased” is one of the most frequently invoked incantations of Beggio (24, 186, 225, 267, 268), who is himself sure of having offered “a more unbiased evaluation” of Koschaker (267). Under this banner he controverts the simplified alternatives according to which “Koschaker can either be idealized as a Nazi opponent, or be seen as a supporter – perhaps despite himself – of the regime” (73).

This dilemma is rejected on the grounds that “both these judgments attempt to offer a naïve depiction of a context that was ... unenviably and almost unfathomably complex” (269). Beggio has invested much energy in justifying this conclusion (27–28, 82, 202). He concedes that Koschaker’s behavior may appear in a few cases as “opportunistic and self-interested” (83), but he firmly refuses to qualify him as “a Nazi supporter” (270).

However, a supporter *malgré soi* – my formula for Koschaker⁴⁴ – refers to an individual who supports an enemy unintentionally, e.g. dignifies him by accepting debate on his terms. Moreover, Koschaker seems sometimes to support the Nazis without reservation. His 1938 paper “Germany, Italy and Roman Law” was chosen to celebrate Hitler’s visit in Italy! And his 1939 paper on German family law backed to some extent the patriarchal model of marriage.

11. NON NECESSARILY A NAZI

Supported by Eckhardt and Gleispach, Koschaker was in September 1935 “joyfully saluted” by the Berlin Faculty,⁴⁵ and in 1936 the Ministry of Education started to fund the new Institute for the Legal History of the Ancient Near East, whose director Koschaker became (96–104). In exchange he extolled Romano-Germanic Europe as a counterweight to international Bolshevism. Moreover, he emphasized the lack of any necessity for conflict between Nazi ideology and Roman law.

In fact, Nazism saw itself as a European power and was vividly interested in proving its Occidentalism and proximity to the core of European culture.⁴⁶ In 1938, we learn from a message of Andreas B. Schwarz that Koschaker was still doing “very well”.⁴⁷ It is possible that shortly after the *Anschluss* he spoke some-

⁴⁴ T. Giaro, *Paul Koschaker sotto il nazismo...*, p. 159.

⁴⁵ A.-M. von Lösch, *Der nackte Geist...*, pp. 391–392.

⁴⁶ J. Laughland, *The Tainted Source: Undemocratic Origins of the European Idea*, London 2015, *passim*; T. Giaro, *Paul Koschaker sotto il nazismo...*, pp. 172–175.

⁴⁷ G. Kisch, *Forschungen zur Rechts- und Sozialgeschichte des Mittelalters*, Sigmaringen 1980, p. 458; T. Giaro, *Aktualisierung Europas...*, p. 63; *idem*, *Der Troubadour des Abendlandes*, (in:) H. Schröder, D. Simon (eds.), *Rechtsgeschichtswissenschaft...*, p. 53.

where in Austria – if we credit Beggio – “as a representative of German scholarship” at a joint meeting of Nazi and fascist lawyers (203).

In April 1939, as Koschaker received his *Festschrift*, the editors of *Deutsche Rechtswissenschaft* invited him to write its review.⁴⁸ This reconfirmed his distinguished position in the community of German legal historians. However, from the end of 1939 a two-front war becomes a fact. The political leadership loses interest in the legitimation of Germany through Roman law. Koschaker starts to backtrack, transferring to Tübingen.

However, in this sleepy townlet of scholars his troubles continued. He worked for the “Society for Planning the European Economy and the Economy of Large Areas” (*GeWG*). From September 1939, this Nazi organization amplified German aggression as manifested in the subjugation of national economies, first of all in Eastern Europe. Koschaker was there an expert in European law, which is certified for February 1945. Beggio lends his helping hand: this fact “did not necessarily make Koschaker a Nazi” (143–144); however that may be, it did make him a true Nazi collaborator.

12. REDISCOVERING EUROPE’S ROMAN FOUNDATIONS?

The return of the Occidentalist idea of Europe after WW II was predicted in the last years of the war by Carl Schmitt, who cited *Die Krise* of Koschaker as *la grande conférence*.⁴⁹ Beggio reports the citation (206 nt. 121), but overlooks that Koschaker’s Europe still lives and breathes his fascination for the old German *Reich*, which before the war constituted the common denominator for both national conservative and national socialist lawyers and historians.⁵⁰

In any event, Koschaker offers his scholarly expertise in European law once again. But despite this, German legal historians of the next generation, particularly Helmut Coing (1912–2000) and Franz Wieacker (1908–1994), extended the historic Europe much further eastward;⁵¹ whereas Koschaker, who after the war remained unchanged on this point, excluded all Eastern nations, except the Czechs.⁵²

⁴⁸ P. Koschaker, *Probleme der heutigen romanistischen Rechtswissenschaft*, “Deutsche Rechtswissenschaft” 1940, Vol. 5, pp. 110–136.

⁴⁹ C. Schmitt, *La situation de la science européenne du droit*, “Droits” 1991, Vol. 14, p. 120 nt. 1.

⁵⁰ T. Giaro, *Paul Koschaker sotto il nazismo...*, pp. 162, 184; *idem*, *Der Troubadour des Abendlandes*, (in:) H. Schröder, D. Simon (eds.), *Rechtsgeschichtswissenschaft...*, pp. 65–67.

⁵¹ T. Giaro, *Paul Koschaker sotto il nazismo...*, p. 185; *idem*, *Der Troubadour des Abendlandes*, (in:) H. Schröder, D. Simon (eds.), *Rechtsgeschichtswissenschaft...*, p. 73.

⁵² P. Koschaker, *Briefe aus den Jahren 1940–1951*, (in:) G. Kisch (ed.), *Paul Koschaker...*, pp. 26–27; T. Giaro, *Aktualisierung Europas...*, pp. 151–152.

Before the war, whilst complaining to the Berlin Vice-Rector about his difficult travel to the 1937 Paris meeting of the *Société d'Histoire du Droit*, Koschaker reports that such meetings were by no means congregations of Jews, who appeared less numerous there than in similar German meetings (86). After the war, he pursued his de-Jewification campaign, demonstrating the absence of any noteworthy Orientalization of Roman law and impugning the critique of the “general part” of German civil law by Jewish authors.⁵³

Nonetheless, today we face a revival of Koschaker, the cultivation of whose image continues and grows. Some scholars even believe that his program “invokes the power of law against every form of totalitarianism in Europe”.⁵⁴ This would cast Koschaker as a leader of subversive propaganda in Nazi Germany. In reality however, as long as it was possible, he supported the Nazis against the Bolsheviks in the name of the Occident.

Beggio has done a great deal of good work in legal history, but is it enough to say that both extreme images of Koschaker, as Nazi-opponent and Nazi-adherent, are false? Indeed, the question “what was he like then?” remains. And Beggio’s answer that he was “no hero, just as is the case with many other human beings” (269), sounds a bit trite, particularly in reference to a time when many human beings were killed en masse in German camps.

Beggio’s book is part of the research project “Reinventing the Foundations of European Legal Culture 1934–1964”, funded by the European Research Council. Does the subtitle “Rediscovering the Roman Foundations of the European Legal Tradition” suggest that even today’s Europe ought to retrieve these foundations through the muddy personage of Koschaker? I am afraid to (re)discover some more dirty stains in his biography. Hence, I would prefer another patron saint for European jurists, if we need any.

MEMORY DISORDERS

Summary

The biography of an Austrian specialist in Roman law, Paul Koschaker (1879–1951), who spent the Nazi-time as an elderly professor at important law faculties of Germany, such as Leipzig, Berlin and Tübingen, is reexamined. Recent attempts of image

⁵³ P. Koschaker, *Europa und das römische Recht...*, pp. 280, 297; T. Giaro, *Der Troubadour des Abendlandes*, (in:) H. Schröder, D. Simon (eds.), *Rechtsgeschichtswissenschaft...*, pp. 62–63.

⁵⁴ E. Otto, *Paul Koschaker – Der Begründer der systematischen Erforschung des Keilschriftrechts*, “Zeitschrift für Altorientalische und Biblische Rechtsgeschichte” 2018, Vol. 24, p. 4.

cultivation, which try to acclaim Koschaker the most courageous fighter against every form of totalitarianism in Europe and nearly the patron saint for European jurists, are proved unjustified.

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KEYWORDS

Paul Koschaker, Nazism, Aryanising, Ernst Rabel, Negro in a tailcoat, Guido Kisch, Society for Planning the European Economy and the Economy of Large Areas, Roman foundations of Europe

SŁOWA KLUCZOWE

Paul Koschaker, nazizm, aryzacja, Ernst Rabel, Murzyn we fraku, Guido Kisch, Towarzystwo Planowania Gospodarki Europejskiej i Gospodarki Wielkich Obszarów, rzymskie podwaliny Europy