

## Europeanization as a Challenge to Legal History

By Thorsten Keiser\*

### A. Introduction

A project concerning itself with the effects of the past on the European integration process must also raise the question of the emergence of guiding historical images in the course of this process. As the past is not objective truth, but a perception generated by various actors (*e.g.*, politicians, populist movements) as well as by history as a science in accordance with its own aims and rationality criteria, it appears in very different narratives. Many such historical images of Europe are generated by legal history. Since the Treaty on the European Union brought European integration a deeper, political dimension, a euphoria about Europe has broken out in legal history.<sup>1</sup>

Since then, “Europe” has advanced to become one of the most important reference points of legal historical research.<sup>2</sup> Whatever is European is therefore progressive. Increasingly frequently, a European focus is forced upon the thematic frameworks of congresses and publications. The reason for this is that the Europeanization of laws, which is seen as unavoidable, has led many legal historians to an apparently automatic perception: if Europe is to become a political union, legal historians, as specialists in foundations, must disclose the legal cultural roots of the new Community, and thus make an indispensable contribution to its further integration. The profession, which, in Germany at least, is rather marginalized academically and has been inserted into the practical aspects of legal education, sees its great chance of survival in this development. And, indeed, it seems obvious that the European unification process must raise new questions and objectives with regard to history in general. The reference to “bitter experiences” in the re-designed

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<sup>1</sup> Wolfgang Wiegand, *Back to the future?*, 12 RECHTSHISTORISCHES JOURNAL 277 (1993).

<sup>2</sup> NORM UND TRADITION 10 (PIO CARONI / GERHARD DILCHER, EDS., 1998).

Preamble of the European Constitution defines Europe as a project which considers itself to be an immediate reaction to the distress of almost the whole continent during the various dictatorships which emerged within its territory and the devastating effects of World War Two.

The Preamble lets the European nation states appear, first of all, as learning systems, which, because of the past, are well aware of the serious consequences caused by the collapse of democratic, open societies. There is no future without the conscience of the past – this is the message of the provision that opens the Charter of the enlarged European Union. In particular, legal history as a historical discipline practiced by lawyers rather than a branch of dogmatic legal science, has to acknowledge that it is seriously concerned about the challenges of the European project. This raises, first, the question of how legal history contributes to the common goal of creating a European constitutional identity, and second, how legal history as a science should react to the various challenges and new goals provided by the European integration process.

### **B. Legal History in Quest of European Foundations**

Thus, it was specifically in the year of Maastricht, 1992, that demands for a new European orientation in legal historical research became ever more emphatic. But, for legal history, Europe here means exclusively Rome, not Brussels. The institutional European unification process which has lasted for some 50 years now has not yet become an object of legal historical research.<sup>3</sup> The simple technical fact that, because of the dichotomy established in the nineteenth century and still relevant today between Germanists and Romanists, almost all legal historians in Germany are civil lawyers, and European law as a field for constitutional lawyers does not fall within the province of their subject, is not a sufficient explanation for this. The causes likely lie primarily in an academic self-perception of legal history, which is shared by scholars from all over the continent.

In order not to lose the connection with topical questions in legal science, legal history in the past set about searching for legal models that could act as guides in the Europeanization of law. Since legal history sees its role as upholding traditions, these models refer to Roman law, recognized alongside Christianity as an identity factor for the West. References to Roman law in the European context are relevant for legal history on at least three levels.

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<sup>3</sup> Reiner Schulze, *Das Entstehen des Europäischen Gemeinschaftsrechts. Eine Forschungsaufgabe der juristischen Zeitgeschichte*, 16 ZEITSCHRIFT FÜR NEUERE RECHTSGESCHICHTE 297 (1994).

First, Roman law appears in legal historical debates on Europe as the *ius commune*, often termed in this context, in its legal practical aspect, as *usus modernus pandectarum*. As a genuinely European phenomenon, some scholars set it paradigmatically at the centre.<sup>4</sup> The model nature of the *ius commune* is seen particularly at the level of lawyer education. A group of legal scholars able to communicate across borders using standardized professional Latin jargon and trained on the common basis of Roman law is to be a prototype for the cosmopolitan lawyers of the present as the bearers of the European unification process. At the same time, the Roman *ius commune* is diffusely stylized into a common tradition and is thus to become the pacemaker of European integration.<sup>5</sup> This overlooks not just the problems of actually transposing the cultural heritage into educational practice,<sup>6</sup> but also that calling the *usus modernus pandectarum* a model for European legal science needs, from a historical perspective, to be cut down in size. On the territory of the German Empire, at least, this very epoch was one in legal history in which Roman law lost its power to create unity. The increasingly rapidly growing territorial states on the lands of the old Empire sought to underpin their search for independence by opposing their native legal traditions to the Roman law which embodied the Habsburg central power as "Imperial Law". Conring discovered the *origines iuris Germanici*,<sup>7</sup> and the courts and magistrates in the Empire took recourse, in ways which were rather hard to grasp, to Roman and to local sources of law. This points to a phenomenon that is specifically topical today in relation to the EU: domestic law as a vehicle of regional tradition is opposed to the law of a super-ordinate state formation as a standard and a demarcation criterion for the statehood of the EU Member States.

Second, the Roman *ius commune* is to serve as a common cultural basis for a European civil codification, even if this is planned only for the remote future.<sup>8</sup> This stance ignores more than just the current legal policy reservations regarding a European civil code. Though legal history, in particular, has pointed out that the

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<sup>4</sup> Reinhard Zimmermann, *Das römisch-kanonische ius commune als Grundlage europäischer Rechtseinheit*, JURISTENZEITUNG 8 (1992).

<sup>5</sup> Reinhard Zimmermann, "Heard Melodies are sweet, but those unheard are sweeter ..." – *Conditio tacita*, implied condition und die Fortbildung des europäischen Vertragsrechts, 193 ARCHIV FÜR CIVILISTISCHE PRAXIS 121 (1993).

<sup>6</sup> Dieter Simon, *Römisches Europarecht*, 12 RECHTSHISTORISCHES JOURNAL 315 (1993).

<sup>7</sup> MICHAEL STOLLEIS / HERMANN CONRING, BEITRAG ZU LEBEN UND WERK (1983).

<sup>8</sup> Reinhard Zimmermann, *Roman Law and European Legal Unity*, in: TOWARDS A EUROPEAN CIVIL CODE 67 (ARTHUR HARTKAMP / MARTIJN HESSELINK / EWOUT HONDIUS / EDGAR DU PERRON / JAN VRANKEN, EDS., 1994); *id.*, *Roman Law and the Harmonization of Private Law in Europe*, in: TOWARDS A EUROPEAN CIVIL CODE 21 (3RD ED., 2004).

codification ideal has, for some time, no longer been achievable by nation states, some seem to trust in the EU for the attainment of this goal and fail to see that the current problems of modern societies (such as intellectual property rights and economic law in the broader sense), can derive little from the *ratio scripta* of the Pandects.

Third, references to Roman law were supposed to help to determine the cultural frontiers of Europe, which were supposedly identical to the area in which it was applied or received: *Ubi ius romanum, ibi Europa*.<sup>9</sup> This approach seems to be rather outmoded today, in German legal history at least, and it meets with new problems in connection with the eastward enlargement. Were Europe's eastern frontiers to be determined according to the area of influence of Roman law, then some of the membership candidates belonging to the Byzantine cultural area would have to be defined as being outside Europe.

This sketchy stocktaking of legal historical perceptions of Europe yields the following: as a fundamental science, legal history seeks to define the cultural foundations of Europe. It is based on a more or less unreflected academic theoretical programme which revolves around concepts as "tradition", "unity" and "culture" which are insufficiently defined or not defined at all.

What is rather neglected is a tackling of Europe's institutional process of unification. Most legal historians do not consider the exertions of institutional Europe as attractive objects of research. Instead, the various attempts made by historians to search for an overarching European history in order to overcome national histories, which are seen as obstacles to integration, by stressing common features of European unity are strongly applied by legal history as well. It has embarked on a mainstream of "*Integrationsrhetorik*" and develops its own "*Leitnarrative*" for Europe. As was described above, the most important of these is the reference to Rome, but there are also references to the "good traditions" of 1776, which spread in Europe in the aftermath of the French Revolution, Natural law (especially after the Second World War in Germany)<sup>10</sup> and to the *Code Napoléon*, which is celebrated this year as the great European model of codification, compatible with different traditions and legal cultures and a unifying product of legislation suitable for export. The scholars engaged in the seeking of good traditions use images of the past as shining examples, not as the new European Constitution does in its Preamble, as warning signs for what can happen if certain goals are not achieved. Despite all the criticism that can be raised and that has been

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<sup>9</sup> See PAUL KOSCHAKER, *EUROPA UND DAS RÖMISCHE RECHT* 2-4 (2ND ED., 1953).

<sup>10</sup> Arthur Kaufmann, *Die Naturrechtsrenaissance der ersten Nachkriegsjahre*, in: *DIE BEDEUTUNG DER WÖRTER* 105-132 (MICHAEL STOLLEIS / JOACHIM RÜCKERT, EDS., 1991).

raised here against the apotheosis of certain moments, or circumstances in European history from a scientific point of view, it has to be accepted that we need different forms of historical images. Identity cannot be created only in a negative way, by the use of appalling narratives. Integration requires both, the learning from bitter experiences and the learning from success stories which can serve as guidelines and examples for political conduct in the future. What counts for the memory of a single individual, who is reliant upon learning from positive and negative experiences, is also crucial for the memory of a collective entity, which is to be created by the contributions of historical science, too. Regarding this phenomenon, history in general, and legal history in particular, have to be aware of one danger, which is the creation of myth. In order to provide fruitful contributions to the process of creating a European memory, by emphasizing ideal European traditions (if this is at all possible), legal history has to be aware of the borderline between science and story-telling. It has to be aware of the fact that fiction is something different from the scientific treatment of sources, even if the results of historical research can, of course, never be objective and can never bring to the fore something like historical truth, according to Ranke's claim of reconstructing an event "*wie es eigentlich gewesen ist*".<sup>11</sup> The task of every historical discipline is to present and summarize sources by means of descriptions that are transparent to readers, and therefore leave a sufficient space for interpretation to everyone. If historical science renounced this fundamental requirement, it would lose its credibility.

### C. Legal History in Quest of Darker Pasts

The efforts made by legal history to discover darker sides of legal thought, or legal practice in the past, has often aimed at "*Vergangenheitsbewältigung*".<sup>12</sup> Even though this term is questionable, because what has happened can either be recalled or forgotten, but not be coped with in the sense of "*Bewältigung*", it expresses the underlying aim of many studies in legal history, especially after 1968. This consists of understanding the collapse of the rule of law and the devastating effects produced by it, in order to be able to avoid similar failures in the future. Apart from this, it consists of re-assessing the biographies of individual lawyers, in order to provide further information about what happened after 1945, when most of the lawyers from the era of dictatorship were still in office. The importance of historical studies of this kind is uncontested. The legal system in national socialist Germany,

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<sup>11</sup> See KARL-HEINZ METZ, *GRUNDFORMEN HISTORIOGRAPHISCHEN DENKENS* (1979).

<sup>12</sup> Helpful overviews are provided by PETER REICHEL, *VERGANGENHEITSBEWÄLTIGUNG IN DEUTSCHLAND* (2001), *VERGANGENHEITSBEWÄLTIGUNG DURCH RECHT* (JOSEF ISENSEE, ED., 1992) and *VERGANGENHEITSBEWÄLTIGUNG AM ENDE DES 20. JAHRHUNDERTS* (HELMUT KÖNIG, ED., 1998).

in particular, has been subject to numerous enlightening studies.<sup>13</sup> Italian fascism, too, is now starting to be examined from the point of view of legal history; for everyone,<sup>14</sup> other dictatorships, such as the ones in Spain or Portugal, are becoming subjects of interest. Technically speaking, "*Vergangenheitsbewältigung*" is not a classical issue of legal history, because it is, to some degree, more related to the present than to the past. Apart from this, it did not seem to be a European issue for a long time, but rather a matter of German domestic politics, which is also shown by the fact that "*Vergangenheitsbewältigung*" is not translatable into another language. When "*Vergangenheitsbewältigung*" was only a German problem and merely a task for German courts, things were very clear. A typical example for "*juristische Aufarbeitung*" is the Auschwitz trial that took place from 1963-1965.<sup>15</sup> Its anniversary was recently recalled with a well-received exhibition in Frankfurt.<sup>16</sup> The court has set itself the task of avoiding a repetition of the past and of supporting a new political beginning. The punishment of criminals was only one objective, which was at least as important as was the objective to cause a public debate. Historical facts became judicially relevant as the facts of a case; the borderline between judges and historians became sketchier in this trial than in many others, despite one difference: the past which was generated by the lawsuit had to be immediately followed by a value judgement, which clearly showed the distinction between justice and injustice. The distinction between the victims and the offenders was clear, and it was based on a huge social consensus.

Now, there seems to be a situation in which "*Vergangenheitsbewältigung*" no longer means an exclusive reference to the Holocaust. In Germany, some new aspects of the history of the Second World War are recently being discovered. Novels and historical studies in which Germans appear as victims begin to draw the attention of a larger audience.<sup>17</sup> The images of the past do not entirely change, but they become more complex when average Germans begin to appear as victims of bombing raids or as refugees, suffering persecution by the Russian army. Independently of whether they appear in a more scientific or artistic fashion, many of these historical contributions have nothing to do with an unreflected revisionism.

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<sup>13</sup> Michael Stolleis, *Die Rechtsgeschichte im Nationalsozialismus. Umrisse eines wissenschaftsgeschichtlichen Themas*, in: RECHT IM UNRECHT. STUDIEN ZUR RECHTSGESCHICHTE IM NATIONALSOZIALISMUS 57 (1994).

<sup>14</sup> Aldo Mazzacane, *La cultura giuridica del fascismo: una questione aperta*, in: DIRITTO ECONOMIA E ISTITUZIONI NELL'ITALIA FASCISTA 1 (2002).

<sup>15</sup> HERMANN LANGBEIN, DER AUSCHWITZ PROZESS VOL. I & II (1995).

<sup>16</sup> See the catalogue: AUSCHWITZ-PROZESS 4 KS 2/63 FRANKFURT AM MAIN (IRMTRUD WOJAK, ED., 2004).

<sup>17</sup> See, for example, JÖRG FRIEDRICH, DER BRAND (2003), and GÜNTER GRASS, IM KREBSGANG (2002).

Nevertheless, they are extremely welcome to some pressure groups as modifications of historical images, which allow Germans to present themselves as victims in order to legitimize their claims of compensation. The founding of a "Prussian Claims Society", which unashamedly borrowed its name from the "Jewish Claims Conference", has derived a driving force from recent changes in constructions of the past. This association skilfully redefines common patterns of "*Vergangenheitsbewältigung*". The eastern enlargement of Europe is a circumstance which might enhance their possibilities of obtaining compensation for their lost property. Referring to the Copenhagen criteria and, as soon as there is the possibility, to the European Constitution, the members of the association want to enforce their claims. In Poland, this is creating huge concern and brings old fears and animosities to the surface once more, while in Germany, large parts of public opinion are rather indifferent.

This shows how changes in historical constructions can be used as a means for legitimizing present claims and expectations, not to mention the general problem of the relationship between "*Vergangenheitsbewältigung*" and financial restitution. The case also shows that the European constitutional project strongly depends on a cautious treatment of Europe's past, because, as this case shows, it is still present and able to determine attitudes and actions. If images of the past are becoming more complex and complicated, because single national histories and their identities have to be brought together under one roof, then the role of historical science is increasingly important. Even if it cannot claim to be completely objective, it has to distinguish its constructions of the past from others which are derived from pressure groups or politicians. Its task is to provide serious information about the past, which is not motivated by political or economic interest.

#### D. Alternative Approaches

Recently, some attempts have been made to approach the issue of "European integration and legal history" from different frameworks than those that merely rely on seeking traditions. They came from Pietro Costa and his colleagues at the 'Istituto di Storia e Teoria del diritto' in Florence. In the recent volume of the *Quaderni fiorentini*, dedicated to "*L'ordine giuridico europeo, radici e prospettive*", Costa suggests a "*metodo diacronico*" to approach the subject.<sup>18</sup> This means an attempt to historicize the current legal phenomena regarding European integration. Answers were sought by comparisons of the political and juridical present of Europe with similar situations in the past.

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<sup>18</sup> Pietro Costa, *Pagina introduttiva*, in: 31 QUADERNI FIORENTINI PER LA STORIA DEL PENSIERO GIURIDICO MODERNO 1 (2003), like all the authors quoted in the following paragraph: Maurizio Fioravanti, *Il processo costituente europeo*, 273; Ugo Mattei, *Miraggi transatlantici. Fonti e modelli nel diritto privato dell'Europa colonizzata*, 401.

Following this objective, Maurizio Fioravanti sheds a new light on the genesis of the European Constitution, comparing it to the birth of the American Constitution in the 18th century. The message might be that the Americans have managed to overcome similar concerns that we have today, but that we will make it, too - "*historia docet*". We can think of other examples which could be the objects of historical comparisons on a vertical level, for instance, certain technical aspects of the German "*Reichsgründung*" in 1871, or some examples from the constitutional history of Switzerland, in particular, with regard to issues of federalism. From a methodological point of view, this has certain advantages, because it stresses functional aspects. Sovereignty and constitutional identity for example, are analysed by asking about their functions both in the past and in the present. In contrast to the seeking of traditions, this approach does not particularly rely on the aspect of continuity. Indeed, focussing on continuity can create problems because linear perceptions of history are the main conditions for the use (sometimes one might feel like calling it the misuse) of history as a political argument. If history is used for means of legitimization or compromising, it mainly achieves this goal by stressing, explicitly or not, the continuity of compromising circumstances. Clearly, I do not want to say that issues of continuity, such as the searching for "darker pasts" which continue to determine the present, should not be addressed. On the contrary, it has been shown in the previous project that the outcome of these approaches can be important and convincing if they are handled with care and awareness about the methodological instruments applied.

However, some contributions in the recent volume of the *Quaderni Fiorentini* deviate from the framework suggested by Costa: for instance, the contribution by Ugo Mattei. He seems to reject the relevance of the past in the process of European constitutionalization. He provokingly argues that the legal unification of Europe and the present European legal culture ignores the roots of European legal traditions and is solely determined by goals of market liberalization and efficiency, following examples from the United States. According to Mattei, the production of statutes in Bruxelles is mainly determined by transnational pressure groups, which operate at a global level. Legal education follows examples from the US and facilitates the reception of its legal standards and methods, which shows the undisputed hegemony of America. What remains outside the realm of European constitutionalization are institutions such as class actions, dedicated to protect minorities. Only what supports capitalism and market transactions enters Europe.

To summarise this, it can be said that there might be a European past in the books, but what counts in practice is the neo-liberal American present. This is, of course, open to discussion and many would express doubts about this point of view. But his radical assertion shows, however, that we should also ask at the outset of our research if the past does play a role at all in the process of European



constitutionalization. Even if it is obvious that the present European constitution presupposes a consensus about values which might have been created by something like a European legal culture,<sup>19</sup> the numerous references to it could be pointless in a time of general amnesia.

It is obvious that there can be no European constitution without Locke, Kant and 1789. But what importance do these possible objects of memory have for us? Are they still parts of national cultures of memory, or can they already be regarded as a common European heritage? What is the outcome of the desperate intellectual attempts to highlight the inter-relationships between all the aspects that try to describe European culture so far? Legal history also has to reflect upon its own capacities for the creation of memory and has to come to a realistic assessment of its possibilities of contributing to something like a collective memory. Therefore, it has to clarify, if, and in what way, its messages are perceived outside the closer scientific community. It has to become aware of the mechanisms that create the memory of a legal system. What "legal culture" means for us today is not only a question relevant to philosophy, but also to legal history.

#### **E. Conclusion**

This overview is a small contribution to show the importance of further research into legal history. Legal history as a scientific discipline has to read the Preamble of the new European Constitution as a request to think about defining – not all, but at least many – of its objects of research in a European perspective, which is not limited to seeking the foundations of Europe in Roman law. Important first steps in this direction have been made. But it will still take a lot of time and energy before legal history in Europe turns into European legal history, as a new academic discipline which would be an indispensable element of European constitutionalism.

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<sup>19</sup> For this concept, see PETER HÄBERLE, *EUROPÄISCHE RECHTSKULTUR* (1997).