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An Axiology of the European Legal Space

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1. Introduction

According to Franciszek Longchamps, law is a dual structure (intended and real), but enriched by a third factor in the form of basic human values; justice, governance, and humanism which are not something from outside the law but, in a certain sense, remain in the law because of it[1]. As indicated by Jan Zimmermann, a norm is always created and applied on the basis of certain values, and even the termination of its binding force also results from certain values[2]. A law cannot arise without values nor can it arise on the basis of false values and this is why addressing the axiology of law is essential[3] in the context of international law. This all leads to a conclusion that studying values and addressing the subject-matter of an axiology of law is necessary for the European legal space in order to specify its special nature, not only through a geographical lens, but primarily through the lens of the values it protects – this being why it was adopted as the fundamental objective of these reflections. Defining the European legal space and the related analysis of its axiological dimension and the context of legal regulations is not often the subject of analysis among legal scholars and commentators, even though an interest of the representatives of the above in the subject-matter of values described on the basis of the law of the European Union or the Council of Europe can be observed. In turn, very rarely does one encounter a context of research falling under a broader perspective of perceiving the values established and protected by the legal achievements of European international organisations, namely the Council of Europe (hereinafter: CoE), the European Union (hereinafter: the EU), and the Organization for Security and Co-operation in Europe (hereinafter: OSCE). Setting out the framework of reflec-

1 F. Longchamps, *Z problemów poznania prawa*, Wrocław 1968, p. 13.

2 J. Zimmermann, "Przedmowa", in: J. Zimmermann (ed.), *Aksjologia prawa administracyjnego*, Warszawa 2017, p. 19.

3 J. Zimmermann, "Przedmowa".

tions, they were narrowed down to the European legal space, recognising it as the normative space of the effect of European international organisations, that is the CoE, the EU, or the OSCE. A number of factors determined this, among which it is worth pointing to the regional diversification of *de facto* normative systems, the differences in the legal characteristics of the legal achievements of regional international organisations or the cultural differences between regions on a global scale. The term "legal space" instead of "legal system" was applied for the needs of this research. The latter, though appropriate for internal law and international law too, does not capture the essence of the issues. This is because it does not take into consideration the fact that the specific nature of legal norms created in Europe by states and international organisations causes these norms to function somehow autonomously while often overlapping.

Given the outlined research area, it was deemed necessary to define the basic terms which will form the core of reflections, namely: the concept of the European legal space, the axiology of law and Europe's legal culture.

2. *The Concept of the European Legal Space*

The concept of the European legal space is not only the attribute of the study of international law[4]. It is a term also used by other disciplines of legal studies, and, following them, other branches of the law, especially in the field of legal comparative studies of national systems against the legal systems formed by international organisations. Contrary to what one may believe, such a general and – it would seem – obvious category like the concept of the "European legal space" is not something about which legal scholars and commentators are in agreement in terms of its definition. It is best evidenced by a multiplicity of terms applied synonymously where it is difficult to find broader analyses in which authors would suggest a similar understanding of and approach to this concept, e.g. general European legal space, European legal order, the European system of the law, European international law, Europe's system of the law or European architecture (in a legal sense – author's note). However, in foreign literature one may encounter the following terms: European legal space, European legal area, European area law, European legal system or European law. Studying the practice of the application of specific terms referring to Europe's legal space, it is difficult not to notice a specific discretion of their application which, additionally, often does not have any justification in the context of defining (naming) the described (national or international) legal systems. The analysed views are based mostly on enumerations which point to entities who create legal norms in Europe, thus shaping the European legal space. Numerous, often contrary statements on the manner of defining the European legal space have been presented for many years within the circles of international law practitioners. This, however, has not resulted in developing a definition for this term. A multitude of approaches to the investigated subject matter has resulted in a diversity of positions. Their review leaves no doubt that in the European legal space there is talk about a narrower and broader meaning. In the narrower meaning, legal scholars and commentators suggest approaching the European legal space as 'national legal orders of European states' or as 'a system of the law of the EU'. In the broader meaning, it is suggested that it is defined as: 1) legal norms created by the EU and the CoE (the so-called European law in a broader meaning); 2) legal systems of European government international organisations in conjunction with legal norms of other international actors operating within Europe – in this approach it is jointly the law of European international organisations, that is the EU, the CoE, the OSCE and other European international structures, namely: the European Economic Area, the European Free Trade Association, and the UN Economic Commission for Europe; 3) another concept of defining

4 A broad analysis of the concept of the "European legal space" was done by the author in the monograph: I. Wrońska, *Pozytywna dyskryminacja kobiet w europejskiej przestrzeni prawnej* [Positive discrimination in favour of women in the European legal space], Białystok 2019, p. 21–36. The reflections presented in this paper were inspired by and based on research conducted in the said monograph. It needs to be noted that the presented classifications were described there in a broader aspect, primarily taking into account the specific nature of the legal international protection of human rights.

the European legal space in a broader meaning may be constructed in a similar way to the one above, where the additional element which forms part of it involves the fact that next to legal orders of European government international organisations and other international structures operating within Europe, the legal systems of European countries are also taken into consideration; 4) the broadest spectrum of definition comprises classifying many different legal orders, and not only international or European ones, namely: national legal orders of European countries, the EU legal order, the system of the CoE, the OSCE and other international structures operating within Europe, as well as international norms adopted by the European countries as part of their membership in other organisations or institutions, e.g. the UN or the World Trade Organization (it is the greatest scope of the legal "mosaic" that is permeating legal systems, national and international, including the strictly international one).

sphere of these organisations. A certain axiological order which is expressed in the values protected under the law of the CoE, the EU and the OSCE seems to provide this ground, outlining directions of the countries' development.

3. An Axiology of Law from the Perspective of the European Legal Space

Europe's identity is extraordinarily rich, both in the social and cultural sense, including in the meaning of the broadly-understood legal culture. The legal culture is a special phenomenon as it encompasses a catalogue of values whose axiological determinants are common on the one hand, while on the other often based on political, social and cultural differences. Against this background there often rises rather a fundamental question; what is value of the law? According to A. Peczenik, a philosopher of law, value is a certain ideal, that is, a criterion for assessment[5]. According to K. Pałecki, value is a social or individual "desired

A search for and analysis of values underpin an applicable law and acts of its application.

In these reflections, the European legal space is understood as legal achievements of European international organisations of the CoE, the EU and the OSCE. An analysis of European legal culture will be performed under this broad framework, where a number of historical, sociological and ideological differences or even contrasts between the countries of this space can be noticed. It needs to be remembered that the OSCE is an international organisation which is also composed of countries not located on the European continent (e.g. the USA or Asian countries, e.g. Mongolia, Uzbekistan, and Armenia). In this dimension, the European legal space from a geographical standpoint therefore has a relative character of the so-called Europeanness. Antecedents of this kind force a search for a common basis other than that of the geographical for the countries of the European legal space, confirmed in the legal and organisational

state" (position, determinants)[6], whereas L. Wittgenstein specifies the concept of value pointing out that value is a "state of affairs", which is either required or desired, pointing here to the following values: e.g. those of a moral, religious, philosophical, cultural, political, social or individual (personal) nature[7]. W. Lang assumes that "value" is an attribute given to a certain entity as a result of a positive assessment of this entity, performed on the basis of a specified assessment stan-

5 A. Peczenik, "Weighing Values", *International Journal for the Semiotics of Law* 5(14), 1992, p. 138.

6 K. Pałecki, "O aksjologicznych zmianach w prawie", in: L. Leszczyński (red.), *Zmiany społeczne a zmiany w prawie. Aksjologia. Konstytucja. Integracja Europejska*, Lublin 1999, p. 16.

7 L. Wittgenstein, *Tractatus Logico-Philosophicus*, Abingdon 2011, p. 5.

dard[8]. Each specific system of the law realises a particular value system meaning that it protects and multiplies these values[9]. A collection of such values rationalises and legitimises the law and is a criterion for its assessment, thus provides an axiological basis of the law[10].

Axiology as a study addresses the theory of values, investigating what is important for important states of affairs (e.g. justice, equality, family, freedom, money, love, etc.) This general study in a narrower meaning transforms into a detailed theory of values which forms part of individual scholarly disciplines, including the law and its individual fields[11]. Therefore, a search for and analysis of values which underpin an applicable law and acts of its application are also considered important for the development of legal studies[12]. With such an approach a field called axiology of law has developed and, in a stricter sense, one can talk about the axiology of individual branches of the law[13] including the European legal space. An axiology of law is a study with values laid down in the law (e.g. on social justice, equality of opportunities, solidarity, freedom, etc.). It is composed of a set of values relativised to evaluative values, included *implicite* or *explicite* in a given system of the law and principles and assessments to which the system of the law refers – such a set is called a moral base of the law[14]. The catalogue of values on which the axiological justification of norms is based is different yet adequately specific for any discipline of the law. Therefore, investigating the European legal space means establishing an axiological justification of legal norms in this system of the law. Therefore, one can suggest an axiological definition of the European legal space indicating that the European legal space is composed of a set of legal norms whose reason of validity involves the implementation of values by state actors and international organisations, the CoE, the EU, and the OSCE, established on the basis of legal norms as an effect of common consensus as to the need to protect these values. A definition adopted in such a way may be referred to the theory of the so-called storeys and mirror presented by J. Zimmermann, according to which a second storey is hung above each discipline of the law – an axiological storey, which should and does affect everything that occurs on the lower storey[15]. Gaining a thorough knowledge on each of the legal disciplines requires observation of these storeys in their mutual relations. Gaining a thorough knowledge on each legal institution, its sense and functioning, also requires looking at it from another side (one can say: "from the other side of the mirror" or "from the other side of the coin"), i.e. the axiological side. Coming not from the normative, but indeed from an axiological point of view, one can even say that the law is a set of values moulded into a normative language[16].

4. An Axiology of the European Legal Space

The European legal space is the result of the legal collaboration of countries in terms of the protection of the most important values of the law, and a common legal culture which is the result of an axiological compromise. Economic processes, the integration of European countries, the development of political, and social and cultural relations created the need to pursue a common firmament of legal axiology which can be specified as an axiology of law of the European legal space. The basis here is composed of common historical experiences, social and cultural values and a political, as a rule, unity of the European continent from the perspective of the objectives of the CoE, the EU and the OSCE.

8 W. Lang, "Aksjologia polskiego systemu prawa w okresie transformacji ustrojowej", in: L. Leszczyński (red.), *Zmiany społeczne a zmiany w prawie…*, p. 47; W. Lang, "Aksjologia prawa", in: B. Czech (ed.), *Filozofia prawa a tworzenie i stosowanie prawa*, Katowice 1992, p. 123–124.

9 J. Skorupka, *O sprawiedliwości procesu karnego*, Warszawa 2013, p. 183.

10 J. Skorupka, *O sprawiedliwości procesu karnego*.

11 J. Zimmermann, "Przedmowa", p. 19.

12 J. Zimmermann, "Przedmowa".

13 S. Fundowicz, "Aksjologia prawa administracyjnego", in: J. Zimmermann (ed.), *Koncepcja systemu prawa administracyjnego*, Warszawa 2007, p. 633ff.

14 Z. Ziembiński, *Teoria prawa*, Warszawa–Poznań 1978, p. 50; J. Skorupka, *O sprawiedliwości procesu karnego*, p. 184; W. Lang, "Aksjologia polskiego systemu prawa w okresie transformacji ustrojowej", in: L. Leszczyński, *Zmiany społeczne a zmiany w prawie…*, p. 47.

15 J. Zimmermann, "Przedmowa", p. 13.

16 J. Zimmermann, "Przedmowa", p. 13–14.

4.1. The European Union

As aptly pointed out by the president of the European Commission, J. C. Juncker, "Rule of law is not one of the possible options in the European Union. It's a duty" [17]. Therefore, it is worth demonstrating first and foremost what place is held by the rule of law in the legal order of the European Union. The preamble of the Treaty on the European Union[18] says that parties to this agreement draw inspiration from "the cultural, religious, and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality, and the rule of law". According to the preamble, the Member States confirm their "attachment to the principles of liberty, democracy, and respect for human rights and fundamental freedoms and of the rule of law". This means that Member States base their constitutions on these values[19]. At the same time, the Treaty recognises that "fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law" (Article 6(3))[20]. European legal order is therefore marked with constitutional pluralism, based on the foundation of respecting the "national identities" of Member States, "inherent in their fundamental structures, political and constitutional" (Article 4(2)). Article 2 TEU enumerates the rule of law next to the most important values on which the Union's system is based, such as respect for human dignity, freedom, democracy, equality, and human rights[21]. The significance of the values of Article 2, including the rule of law, sets the direction of interpretation and application of the law in all fields covered by the European Union's competence[22]. It is also important, as emphasised, for the interpretation and application of the Charter of Fundamental Rights, since any specification of the content of any of fundamental rights must never occur in violation of the values enumerated in Article 2 TEU[23]. In its opinion no. 2/13 of 18th December 2014[24] on the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Court of Justice of the EU states as regards Article 2 of the Treaty "(...) each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premise implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the law of the EU that implements them will be respected" (§ 168)[25]. Legal scholars and commentators point out that "the rule of law" entered in the catalogue included in Article 2 TEU is a necessary premise of the functioning of all the remaining values listed there. Therefore, it is justifiable to say that the risk of a collapse of the rule of law poses a threat to other values protected in the system of EU law. Therefore, such a position supports

> **European legal order is marked with constitutional pluralism.**

17 J.C. Juncker's State of the Union speech to the European Parliament of 13th September, 2017. https://ec.europa.eu/commission/priorities/state-union-speeches/state-union-2017_en (22.03.2020)

18 Treaty on the European Union (consolidated version) OJ C 326, 26.10.2012, p. 13–390.

19 L. Garlicki, "Wprowadzenie", in: W. Staśkiewicz (ed.), *Konstytucje państw Unii Europejskiej*, Warszawa 2011, p. 8ff.

20 Treaty on the European Union (consolidated version) OJ C 326, 26.10.2012, p. 13–390.

21 Ibidem.

22 Ibidem.

23 M. Safjan, "Rządy prawa a przyszłość Europy", *Studia i Analizy Sądu Najwyższego. Materiały Naukowe* 8, 2019, p. 33.

24 Opinion 2/13, EU:C:2014:2454–2475.

25 Ibidem.

a thesis that may be formulated that the values listed in Article 2 TEU (including the idea of the rule of law) cannot be limited due to national identity included in Article 4(2) TEU, the respect of which orders one to take into consideration its relationship with the principal political and constitutional structures of a Member State. In the area specified by Article 2 TEU there is no freedom of assessment on the side of the Member State allowing the opting out of these values under national solutions[26]. Paraphrasing Isaiah Berlin's words about us *inhabiting one common moral world* we can say that in the European Union we live in a space of common values which is indivisible and which may last on the condition that all participants recognise the universal application of these values[27].

4.2. The Council of Europe

The Council of Europe, as the oldest European international organisation, has been carrying out the so-called Idea of Europe the longest, adopting the protection of the most important values from the point of view of the functioning of the rule of law as its fundamental objective. In the preamble of the Statute of the Council of Europe[28], one can find the agreeing countries' unambiguous reaffirmation of "their devotion to the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy". Pursuant to Article 3 of the Statute, every Member of the CoE must accept the principles of the rule of law and the principles of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms; they must also collaborate sincerely and effectively in the realisation of the aim of the Council as specified in Chapter I, such as, in particular; "achieving a greater unity between its Members for the purpose of safeguarding and realising the ideals and principles which are their common heritage" (Article 1(a) of the Statute of the CoE). One also needs to note that all CoE Member States, including Poland, are parties to the Convention for the Protection of Human rights and Fundamental Freedoms, signed in Rome on 4th November, 1950[29]. This preamble also includes a declaration of the Governments of the signatory countries – Members of the Council of Europe, that they agree the content of the agreement "being resolved, as the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration of Human rights of 1948"[30].

4.3. OSCE

The rule of law appears in documents of the Organization for Security and Co-operation in Europe (OSCE), although they are not legally binding. Particular mention should be made here of the Charter of Paris for a New Europe, adopted by the Heads of States and Governments of the then Conference on Security and Cooperation in Europe held on 19th–21st November, 1990. Referring to the ten principles of the Helsinki Final Act (1975), the States of the Conference declared, under the chapter generally entitled "Human Rights, Democracy and the Rule of Law", their commitment to build, consolidate and strengthen democracy as the only system of governance. Noting

26 As pointed out by M. Safjan: "If the European Union is not able to protect the rule of law in any Member State, in consequence it will not be able to protect its values as a whole. The union is a solidary organism based on the principle of mutual trust, loyal cooperation and shared attachment to the same fundamental values. The rule of law is an inalienable premise of the protection and application of all other values. This is why the debate carried out today on the idea of the rule of law is of such fundamental significance for the future of the European Union". M. Safjan, "Rządy prawa a przyszłość Europy", p. 43; See more in: Editorial Comments, "Safeguarding EU values in the Member states – Is something finally happening?", *Common Market Law Review* 52(3), 2015, p. 625ff.

27 Isaiah Berlin's speech at the 3rd Congress: Foundation Européenne de la culture, published as: I. Berlin, "European Unity and its Vicissitudes", in: H. Hardy (ed.), *The Crooked Timber of Humanity*, Oxford 1990, p. 207.

28 Council of Europe, *Statute of the Council of Europe*, 5th May, 1949, ETS No.001.

29 Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4th November 1950, ETS 5.

30 Ibidem.

the importance and significance of human rights they recognised that the protection and promotion of these rights is the fundamental task of governments. Respect for them is the most important safeguard against an all-powerful state, and their observance and full implementation form the basis of freedom, justice, and peace. The democratic form of government is based, as set out in the Charter of Paris, on the will of the people expressed regularly in free and fair elections. The basis of democracy involves respect for the individual and the rule of law. The following section details the specific requirements addressed to the Charter's signatory states, in particular as regards equality before the law and fundamental freedoms and political rights, while guaranteeing effective legal remedies against violations of these rights at both national and international levels[31]. In order to secure the implementation of the Charter's provisions, the Conference states decided to institutionalise their cooperation to date, including the creation of the Office for Free Elections based in Warsaw, two years later renamed the Office for Democratic Institutions and Human Rights (ODIHR). The competences of this OSCE institution include i.a. monitoring the rule of law in the countries associated in the organisation[32].

5. The Legal Culture of Europe versus An Axiology of Law in the European Legal Space

The culture of a given society can be divided into material culture and non-material culture. Material culture is created by all kinds of tangible objects[33]. However, in the sociology of law, non-material culture is more important, i.e. the spiritual creations of society passed on from generation to generation[34]. Non-material culture is created, on the one hand, by a system of social values functioning in society, protected by social norms (legal, moral, unwritten or customary norms) and, on the other hand, by broadly understood social awareness in the form of human views on the surrounding world. The law is part of the non-material culture and therefore legal culture will also be part of a society's culture[35]. The norms of the law are an essential element of all norms binding in the state and shaping social order, and each society functions within a legal culture[36]. The behaviour of the addressees of the law in relation to legal norms is closely related to the state of an individual's legal awareness, and one of the most important elements of legal awareness consists in one's readiness to behave in a specific way in relation to the law, i.e. having the right attitude towards the law. Fundamentally, culture and the law are interrelated[37]. The law unequivocally influences culture, and vice versa; culture influences the law. The law is the most important component of culture and, at the same time, the most important cultural factor. In literature, the concept of legal culture is defined in various ways. A. Kojder describes it as the total normative patterns of behaviour and values related to these norms that are socially accepted, learned, and transmitted by means of conceptual symbols, either within one generation or from generation to generation, thus when this transmission between law and culture has features of certain permanence[38]. In K. Pałecki's definition, the author emphasises a set of socially performed symbolic actions, implementing patterns of symbolic actions contained in the law[39]. In S. Russocki's views,

31 Charter of Paris of 1990, https://www.osce.org/mc/39516 (20.03.2020).

32 According to the document adopted at the 1992 Helsinki Conference, ODIHR is a specialised institution that supports the countries participating in the Organisation to "ensure full respect for human rights and fundamental freedoms, to abide by the rule of law, to promote principles of democracy... and to build, strengthen and protect democratic institutions, as well as promote tolerance throughout society". https://www.osce.org/pl/odihr/13704 (20.03.2020).

33 S. Pilipiec, "Kultura prawna a prawo obywatela do ochrony słusznego interesu", *Studia Iuridica Lublinensia* 15, 2011, p. 146.

34 N. Goodman, *Wstęp do socjologii*, Poznań 1997, p. 39.

35 A. Gryniuk, "Kultura prawna a świadomość prawna", *Państwo i Prawo* 2, 2002, p. 21.

36 S. Pilipiec, "Kultura prawna a prawo obywatela do ochrony słusznego interesu", *Studia Iuridica Lublinensia* 15, 2011, p. 146.

37 S. Pilipiec, "Kultura prawna a prawo obywatela do ochrony słusznego interesu".

38 A. Kojder, "Kultura prawna. Problem demarkacji i użyteczności pojęcia", in: *Kultura prawna i dysfunkcjonalność prawa*, Warszawa 1988, p. 13–37.

39 K. Pałecki, "O użyteczności pojęcia kultura prawna", *Państwo i Prawo* 2, 1974, p. 73–74. See more in: K. Pałecki, "O pojęciu kultury prawnej", *Studia Socjologiczne* 2, 1972.

however, legal culture is a set of intertwined attitudes and behaviours – both individual and collective – as well as their effects in relation to the law, i.e. all obligations, rules and norms imposed, equipped with an appropriate sanction and systematically enforced by the appropriate authority of a given community, and resulting from the system of values shared by that community[40]. In J. Kurczewski's opinion, it has been pointed out that legal culture includes the expectations of individuals regarding the law and the judiciary, their legal intuitions and beliefs about their rights and obligations, as well as patterns of conduct in which their rights and obligations are fulfilled.[41] A broader understanding of legal culture is presented by S. Pilipiec who emphasises that the legal culture consists, on the one hand, of the legal order, which includes the system of binding law, divided into branches of law and, on the other hand, of the legal sense, the most important element of which is legal awareness, i.e. the whole knowledge of the law, a set of affective evaluations of the law, attitudes towards the law and postulates for changes in the existing legal system. Therefore, in the author's opinion, legal culture and the applicable law system will be part of the legal culture within the meaning of the culture of applicable law[42]. Of course, given the diversity of countries in terms of their political systems and forms of their governments, it should be stressed that there is no single global legal culture. As a result of historical development, different legal cultures have developed in different geographical regions.

> **There is no single global legal culture.**

Legal scholars and commentators indicate in their views that the European legal culture is characterised by three fixed, cumulative elements: personalism, legalism, and intellectualism[43]. The personalism of European legal culture lies in the primacy of the person as a subject, purpose and intellectual reference in the idea of law[44]. The legalism of legal culture, in turn, consists in the legislator's monopoly (legislative authority) to create and change the law and the need to make decisions on social relations and conflicts on the basis of general legal rules[45]. On the other hand, legalism assumes that the behaviour of actors should be strictly subordinated to the law, and relations between actors based on obligations and powers defined by law, understood as a set of rules. Legalism is supposed to implement important assumptions of the rationality of the law, including the postulate of justice, legal certainty or equality, which are to weigh important values that protect the law. Finally, the intellectualism of European legal culture boils down not only to the phenomena of "generalisation and abstraction", i.e. a certain form of "idealism", but above all it means *amor intellectualis*, which has constantly guided European legal thinking in the direction of substantive ordering, conceptualisation and non-contradictory compatibility of empirical legal materials[46]. The intellectualism of the European legal culture is a peculiar way of understanding the phenomenon of law, which is closely related to specific organisational structures

40 S. Russocki, "Wokół pojęcia kultury prawnej", *Przegląd Humanistyczny* 11–12, 1986, p. 16ff.

41 J. Kurczewski, "Prawem i lewem. Kultura prawna społeczeństwa polskiego po komunizmie", *Studia Socjologiczne* 2, 2007, p. 34.

42 S. Pilipiec & P. Szreniawski, "Kultura prawna w administracji", *Administracja. Teoria. Dydaktyka. Praktyka* 2(15), 2009, p. 56–57.

43 F. Wieacker, "Foundations of European Legal Culture", *American Journal of Comparative Law* 38(1), 1990, p. 20–29.

44 A. Jabłoński, "Stanisława Kowalczyka personalistyczna koncepcja społeczeństwa", *Roczniki Nauk Społecznych* 4(40), 2012, p. 57–79; K. Guzowski & M. Kosche, "Personalizm jako próba jednoczenia 'zwaśnionych' antropologii", *Horyzonty Polityki* 7(19), 2016, p. 57–77.

45 F. Wieacker, "Foundations of European Legal Culture", p. 23.

46 F. Wieacker, "Foundations of European Legal Culture", p. 25.

of the state and international organisations, resulting from the tradition of European thinking.

The legal order of the European legal space stems both from the culture of law proclaimed in states – i.e. values stemming from their constitutional traditions, civilisation and culture, which are not basically subject to relativisation – and from the culture of law of international organisations that create it, with all the accompanying acquis of international law. These three planes are coherent elements interacting with one another, providing an image of a common European legal space as a result. Such a legal structure in terms of values is reflected in the acquis of European international organisations, to which these states belong, where the fundamental value is the rule of law which generates further important values, i.e. the protection of human rights, democracy, and humanism. As M. Safjan stresses, Europe is essentially a "Union of law" and the rule of law is a paradigm of the European model; the construction of a common Europe from its very beginning[47]. The idea of Europe is older than the oldest written constitutions and is closely linked to the development of the concept of constitutions[48]. After all, the rule of law can be described as a "European project" also in the sense in which Homer contrasts those over whom law "rules" at assemblies with strangers who do not know this power[49]. For more than two millennia, Europe has not only been a geographical concept but, according to Strabon, a space "wonderfully equipped by nature to develop the excellence of people and governments".[50] Herodotus considered Europeans to be the most free of all because, unlike people in Asia, they are subject to the law, not to anyone's individual will[51]. The relationship between Mediterranean culture and democratic institutions remains one of the foundations of Europe's spiritual identity[52]. The idea conceptualising Europe, or – according to the terminology introduced by Richard Dawkins and Susan Blackmore[53] – the memetic category of Europe, is in fact subject to the natural law "inscribed" in the heart of Antigone, who has become a kind of symbol of judging the authority according to rules independent of this authority[54].

The axiology of common values in the European legal area is particularly evident in the protection of human rights as an important element of its legal culture. In the European legal space, the EU, the CoE and the OSCE have created the most sophisticated international legal and institutional framework for human rights in the world, based on equality and personal dignity as fundamental axioms of legal and human protection that coexist with the constitutional, cultural and religious traditions of the Member States. European standards for the protection of human rights bring clarity to the legal nature of various values that are included in the catalogue of axioms of the European legal area – in particular the rule of law and democracy which are a prerequisite for the legal protection of individual rights and freedoms. Although the catalogue of values contained in the acquis of the European legal space should be read in a comprehensive way, one should agree with the proposal presented by legal scholars and commentators that human dignity should always come first. It is to this value that other values mentioned in legal norms are subordinate, although they should be treated as complementary. In this sense, other values have a servile, infernal/inferior/internal position, rather than externalised in relation to the protection of "human dignity"[55].

As mentioned, the European legal space presents values set by the national laws of the States, the CoE,

47 M. Safjan, "Rządy prawa a przyszłość Europy", p. 32; See more in: L. Pech, "The rule of Law as a Constitutional Principle of the European Union", *J. Monnet Working Paper* 04/09, p. 53, https://jeanmonnetprogram.org/paper/the-rule-of-law-as-a-constitutional-principle-of-the-european-union (20.03.2020).

48 See more in: Ch.H. McIllwain, *Constitutionalism. Ancient and Modern*, Ithaca 1940.

49 Homer, *Odyssey, Book IX*, v. 112ff.

50 D. Hay, *Europe. The Emergence of an Idea*, Edinburgh 1957, p. 3; A. Pagden (ed.), *The Idea of Europe*, Cambridge 2002, p. 37.

51 Ibidem.

52 F. Braudel, *Morze Śródziemne. Przestrzeń i historia. Ludzie i dziedzictwo*, Warszawa 1994, p. 241.

53 R. Dawkins, *Samolubny gen*, Warszawa 1996, p. 262ff. See more in: S. Blackmore, *Maszyna memowa*, Warszawa 2001.

54 R. Piotrowski, "Europa a granice władzy ustrojodawczej", in: Ł. Pisarczyk (ed.), *Prawne problemy i wyzwania Unii Europejskiej*, Warszawa 2018, p. 13ff.

55 J. Barcik, "Wielopoziomowy konstytucjonalizm Unii Europejskiej a stosowanie praw podstawowych", *Przegląd Europejski* 2, 2018, p. 37ff.

the EU and the OSCE acquis, as well as the public international law of the States. The axiological foundations of the European legal space, resulting from its legal culture, thus determine the scope of implementation of the so-called postulate of a rational legislator, according to which there should always be a set of values in the background of every legal institution. Taking into account the acquis of the European legal space, it can be concluded that the activity of the EU, the CoE and the OSCE in the field of the promotion of the rule of law, democracy, human rights, and respect for legal and cultural traditions of the countries seems to be complementary due to the different objectives of these organisations, their different membership composition, and the legal nature of the adopted legal norms. A common axiological basis protects these values, leading to an increase in the rationality and functionality of law in the European legal space as a result. Its absence would make the process of law-making incomprehensible, unreasonable and accidental, and would be carried out according to the requirements of changing political conditions and the needs of a given moment[56]. Characterising the European legal space through the lens of values has even greater justification than the geographical (territorial) context. This makes it possible to highlight that the European legal area is a space of values. In this respect, it is not only the geographical, geopolitical or geo-economic space – it is primarily an axiological space, thus Europe is not only geography but, above all, values. Referring to the geographical criterion, however, it should be pointed out that the strict understanding of continental borders is blurred from the perspective of understanding of the European legal space as a space of Europe alone. As a result, there is a wider territorial expansion of its axiological values which it represents and protects, and which are valid geographically extensively outside Europe.

56 J. Skorupka, *O sprawiedliwości procesu karnego*, p. 184.

And although the countries of the European legal area have different interests, resources, capacities, cultural heritage, international influences and other factors, the legal culture of the different European countries is reciprocal and the values of the legal culture of the different European countries are intertwined, a result of which the members of the European legal space are united by a catalogue of common rights and obligations as well as common values.

6. *The Idea of "Good Law" in the European Legal Space*

The axiological values of the European legal space, through the promotion of the rule of law and democracy, pursue the idea of "good law", understood both as a just and efficient tool for regulating relations in society and as the art of applying what is good and fair (*ars boni et equi*), which has guided European legislation since the beginning of Western civilisation[57]. This is evidenced by the fact that among the criteria allowing for the verification of the quality of the law, traditionally, there are those that both demonstrate coherence, stability, efficiency and transparency, as well as those factors that place emphasis on axiological rationale in widely recognised and respected values[58]. The social axiological legitimacy of the law is achieved by reminding the subjects of the law of its social values such as justice and security, the law and its rationality (understood as its legitimacy, and the need for its creation and implementation, i.e. intentionality)[59]. The

Justice as the supreme value determines the form of law.

57 M. Kuryłowicz, *Prawo rzymskie. Historia, tradycja, współczesność*, Lublin 2003, p. 33ff.

58 S. Wronkowska, "Kryteria oceny prawa", in: E. Kustra (ed.), *Przemiany polskiego prawa (lata 1989–1990)*, Toruń 2001, p. 34. See more in: A. Łopatka, "Kryteria jakości prawa", in: *Jakość prawa*, Warszawa 1996.

59 A. Kociołek-Pęksa, "W poszukiwaniu optymalnego i idealnego aksjologicznego modelu regulacji prawnej – idea

concept of 'good law' includes the question of values that positively justify the legal order as just and the law as just[60]. Bearing in mind Radbruch's views and positions on the so-called concept of law in which he referred to the concept of 'good legislation', it can be pointed out that this is primarily linked to the concept of justice in the largo sense[61]. This idea consists of three elements. The first element of this triad is justice in the strict sense, emanating from the principle of equality which takes into account the principle of proportionality for the protection of social groups that require additional legal protection (e.g., women, the disabled, children, etc.). Thus, justice as the supreme value determines the form of law. It is indicated here that "the value of justice should be understood as a formal principle, defining the form of law, which occurs in the form of equal treatment of equal rights and unequal treatment of the unequal"[62]. Another element of the triad is purposefulness, i.e., the element of the idea that determines and creates the content of the law, understood as the expression of its substantive content. Individual values and goals of the law are created and determined both by the will of the legislator and in the ethical, social and cultural values of society[63]. Finally, (and without any hierarchy), the last element of the idea of good law is security. Since an analysis of security in a general sense leads to inevitable ambiguity[64], in this concept security is narrowed down to the category of legal security. Legal security – which is an expression of legal language – is synonymous here with predictability and legal certainty (understood as stability)[65]. Unlike justice, it is not treated as an absolute value, it is a material value for which the formal requirements of legal certainty are not sufficient. It is only the material legal understanding of legal certainty as its axiological acceptability and predictability (stability) of its validity, application, and enforcement that corresponds to the scope of the concept of legal certainty, making these concepts synonymous. Moreover, an important "good" legislation is the requirement of the permanence of the law, which does not mean the immutability of the law, but constitutes an obligation of the institutions creating the law to limit as much as possible the so-called "incidental legislation", calculated as an ad hoc effect in solving the problem[66].

The categories and limits of the values that the European legal space creates and respects are determined by the universal constitutional values of European and non-European countries (in the case of the OSCE), defining – irrespective of the controversy over their interpretation[67] – both the European constitutional identity and the constitutional identity of European countries. Constitutionalism functioning in the states of the European legal space realises the idea of good law regardless of how it is defined – *sensu largo* (a system of rule based on the constitution, the content of which corresponds to the standards applied by modern democratic states), or as or in the *strict sense* (the state in which "the constitution creates a legal framework and establishes guidelines for the activities of a diverse group of state bodies, specifies legal ways of taking over state power, introduces guarantees, and designates the limits of state interference in individual rights and freedoms[68]). The values of the European legal area set the course for the development of legislation, the interpretation of legal provisions and

prawa Gustawa Radbrucha", *Zeszyty Naukowe SGSP* 61(2), 2017, p. 115.

60 J. Oniszczuk, *Filozofia i Teoria Prawa*, Warszawa 2008, p. 323.

61 J. Zajadło, *Dziedzictwo przeszłości. Gustaw Radbruch portret filozofa, prawnika, polityka i humanisty. Współczesna Niemiecka Filozofia Prawa. Tom I*, Gdańsk 2007, p. 101–102.

62 J. Zajadło, *Dziedzictwo przeszłości…*, p. 323–324.

63 R. Tokarczyk, "Sprawiedliwość jako naczelna wartość i zasada prawa", in: M. Szyszkowska (red.), *Powrót do prawa ponadustawowego*, Warszawa 1999, p. 182–200.

64 J. Czapska, *Bezpieczeństwo obywateli, Studium z zakresu polityki prawa*, Kraków 2004, p. 7–8, 9.

65 M. Wojciechowski, "Bezpieczeństwo prawne", in: J. Zajadło (red.), *Leksykon współczesnej teorii i filozofii prawa. 100 podstawowych pojęć*, Warszawa 2007, p. 25–26.

66 L.M. Friedman, *Republika wyboru. Prawo, autorytet, kultura*, Warszawa 1993, p. 67–68.

67 D. Davis, A. Richter & Ch. Saunders, *An Inquiry into the Existence of Global Values*, Oxford–Portland 2015, p. 469ff.

68 M. Pietrzak, *Odpowiedzialność konstytucyjna w Polsce*, Warszawa 1992, p. 20.

the application of the law, thus promoting the development of a coherent legal order.

7. Summary

Europe is, in the general consciousness, much more than a geographical concept when it comes to the economy and politics[69]. After all, it is not only a pluralistic civilisation[70], shaped in a long process of development, and its name, fulfilling the role of the term "Christian world"[71]. Europe – in the light of the axiology of the European legal space – is in fact a kind of axiological category associated with this civilisation, expressing the affirmation of the rule of law, democracy, human rights, and an affirmation of freedom which does not ignore dignity and the common good, while at the same time reflecting the desire to make these values a reality[72]. The European legal space owes its identity to the diversity of international and systemic solutions, reflecting the diversity of historical experiences and traditions, co-creating culture – so captured in Cicero's words – "an inventor of laws, a teacher of good manners and order"[73]. Part of this culture is legal tradition based on the complexity of legal order, which has developed as a result of fundamental transformations, sometimes referred to as revolutions, but which have not destroyed the law but renewed it.[74] And it is just the complexity that "custom and equity are as much a law as codes and court orders"[75], which is a source of legal pluralism, that strengthens the pluralism of political life and co-creates an area of freedom in the European legal space[76]. The democratic identity of the European legal space is not determined by the uniformity of states' systemic solutions, but by their compatibility with the values reflecting the legal tradition legitimising state power in a democratic system. The cornerstone of this system is the principle of separation of powers, consubstantial to the guarantee of human rights that confirm the inherent and inalienable dignity of the individual[77].

> **An important "good" legislation is the requirement of the permanence of the law.**

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69 R. Piotrowski, *Sędziowie i demokracje europejskie*, Warszawa 2019, p. 60.

70 H. Kissinger, *World Order. Reflections on the Character of Nations and the Course of History*, London 2014, p. 11ff.

71 N. Davies, *Europa*, Kraków 1998, p. 31; A. Pagden (ed.), *The Idea of Europe*, p. 33ff.

72 R. Piotrowski, *Sędziowie i demokracje europejskie…*, p. 61.

73 M.T. Cicero, *Pisma filozoficzne*, Warszawa 1961, vol. III, p. 481.

74 H.J. Berman, *Prawo i rewolucja. Kształtowanie się zachodniej tradycji prawnej*, Warszawa 1995, p. 23ff.

75 H.J. Berman, *Prawo i rewolucja…*, p. 30.

76 R. Piotrowski, *Sędziowie i demokracje europejskie…*, p. 63.

77 R. Piotrowski, "Separation of Powers, Checks and Balances, and the Limits of Popular sovereignty. Rethinking the Polish Experience", *Studia Iuridica* 79, 2019, p. 78ff.

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The Limits of the Power of Judges

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1. Crisis of the elected democratic representation in Bohemia and Moravia

In the last decade, there has been a parliamentary crisis of the elected democratic representation. This is caused partly by the election system, which usually produces governments based mostly on a wide unstable coalition. A government´s average lifespan is less than two years.[1]

Petr Fiala sees the only solution in the change of the election system aiming at creating a stable political government: "If we do not do it… we should not wonder and be offended by the political performance (of both the government and the parliament), since it is simply not possible to do it much better in the existing system."[2] In 2013, President Václav Klaus said: "Not the power abuse, but weak governance has become the main problem of the Czech politics in the last more than fifteen years… The sticking point is also the election system contributing to the existence of weak governments… The system of proportional repre-

1 Since 1992, when the four-year parliamentary term and the subsequent governmental term was established, there have been 15 governments – the first government of Václav Klaus between 1992–96, the second government of Václav Klaus between 1996–98, the government of Josef Tošovský in 1998, of Miloš Zeman between 1998–2002, of Vladimír Špidla between 2002–04, of Stanislav Gross between 2004–05, of Jiří Paroubek between 2005–06, the first government of Mirek Topolánek between 2006–07, the second government of Mirek Topoloánek between 2007–09, of Jan Fischer between 2009–10, of Petr Nečas between 2010–13, of Jiří Rusnok between 2013–14, of Bohuslav Sobotka between 2014–17, the first government of Andrej Babiš between 2017–18, and the second government of Andrej Babiš from 2018 until now. However, only two governments were in power for the 4-year term anticipated by the Constitution – the first government of Václav Klaus and the government of Miloš Zeman. P. Fiala, *Politika, jaká nemá být*, Brno 2010, p. 18, 26–29.

2 P. Fiala, *Politika, jaká nemá být*, p. 28, 48.

sentation creates fragile and politically heterogenous coalitions that are exposed to permanent crises."[3]

Another fact is a permanent growth in medializing everything that relates to politics. Politicians have come under such scrutiny of media that only the very strong individuals realize their political visions. Others are trying to hide behind somebody else not to be seen. This pressure is purposefully aimed at the elected politicians. If a politician gets drunks, it is in the news immediately. If a judge does the same, it usually remains without notice or the affair quickly fades away. Judges are not the subject of such media pressure as politicians. Let me give you an example. Number of people in the academic sphere in Bohemia and Moravia acquired associate professorship or professorship in Slovakia. If a judge from highest courts or the Constitutional Court obtained this title that way, it is not the subject of public debate. If this title is acquired by an academician who is also a politician, immediately there are speculations as to whether it is a proper title. Of course, it is. It is usually the consequence of not-so-good relations in the domestic workplace.

The aforementioned leads to the loss of authority of the elected representation in the public sphere, that is to say of the parliament and the government, and to the transfer of authority to courts, namely administrative courts and the Constitutional Court. This trend is supported by the weak political representation itself and by taking the disputes over political direction – which should have been and should be decided primarily by the ballot boxes – to courtrooms, because the opposition regularly takes its loss in the Parliament to the Constitutional Court. An activist Constitutional Court does not hesitate to grasp the offered opportunity and enters, under cover of constitutionality protection, the political arena of the opposition against the coalition.

Lenin's words about the seizure of power by the Bolsheviks can be used here: "Power was lying on the street, so we picked it up. It is now picked up by the constitutional courts. The Constitutional Court is, however, only one of the state authorities with an indirect bond to the people as the source of power in a democratic state. Democracy may be weakened, but the government of elected is still its essence. And I see nothing better than democracy, at least for now."

The judiciary in a democratic state should not become a political tool in the sense of implementing the objectives of power of its representatives. If that happens, it is owing to the judicial activism, so to say owing to the judges themselves.

These are constitutionally conforming tools of strengthening the power of judges. There will always be power in the state. If the power of the parliament and the government, either formally or informally, weakens, it is transferred somewhere else – to the judges and central bank councils, which are the bodies not primarily established by elections.

Such a sceptical attitude towards judges can be found even in the New Testament in the Gospel according to Luke in Jesus´s words: *In a certain town, there was a judge who neither feared God nor cared about men. And there was a widow in that town who kept coming to him with the plea: "Grant me just against my adversary." For some time, he refused. But finally, he said to himself: "Even though I do not fear God or care about men, yet because this widow keeps bothering me, I will see that she gets justice, so that she will not eventually wear me out with her coming!*[4] It is a picture of a judge who acts well only to set himself free from a party in the dispute.

2. *Material core of the Constitution and cancellation of constitutional laws as an uncontrollable source of judicial power*

However, a new element joined the game – theory of the material core of the Constitution and attempts of some judicial courts at seizing the cancellation of constitutional laws without the explicit constitutional authorization. Even with the great factual power, the judges in continental law were considered interpreters, not establishers, of the law. The truth is that an interpretation may be very extensive but the judges were not those who grasped the roles of constitutional establishers. Material core of the law alone is nothing new. In the past, the states expressly recognised the priority of the right of God, which is still binding for the believers nowadays. The contents of the right of God

3 V. Klaus et al., *Česká republika na rozcestí. Čas rozhodnutí*, Praha 2013, p. 95, 96.

4 Luke 18, 2–5.

has been obvious for millennia and its interpretation cannot be arbitrary today. It is possible not to obey it, but then it is obvious that it is not obeyed. Even the pope as the Christ´s deputy on Earth, although there were popes with great powers, is only an interpreter, never the creator of the right of God. That is his limit, restriction of his power. If a pope does something bad, his position as the pope does not change the nature of the deed. Even Alexander VI, the famous Rodrigo Borgia, could commit sins against the right of God, but he did not have the power to pronounce his sins the right – he was not the creator of the right of God as the material core or the transcendental source of the human right.

However, the theory of the material core independent of the right of God is newly applied, whereas it is factually created with reference to unchangeable and perpetual provisions of the constitution by the judges. Especially the judges of the constitutional courts through appropriation of the power to cancel a constitutional act.[5] This way, they react to the fact that the human right may be changed anytime by the people and they search for its new transcendental basis. In the words of Ernst-Wolfgang Böckenförde: "A free, secularized state lives from the presumptions that it is not able to guarantee."[6] In the words of Petr Hájek: "… a person who lost God is left to the mercy of – a person."[7]

The creator of a rule is the master of the rule and the rule depends on them. A rule created by the people may always be changed by the people, although it pronounces itself to be eternal. A transcendental rule may only come from a transcendental legislator. If the transcendental source (creator) of a right is God, the judge is subject to it. If it is another material core (focus) of the constitution, it is created by the judge and the judge is superior to it, he plays the God himself. An attempt at a transcendental and thus unchangeable rule without God is an attempt at the third path in law. From the viewpoint of Christianity and Judaism, it is an idol, since there is no God other than the God, there is no other transcendental legislator.[8]

Power is tasty and its tastiness was described by Ladislav Mňačko, a famous Slovakian and Moravian writer born in Valašské Klobouky in Moravia. The judges enjoy it, too. Thus they have higher responsibility to prevent themselves from unlimited disposal of this power, prevent themselves in the gradual process of connecting the power to interpret the law with the power to create constitutional rules by making themselves superior to the democratic constitution-maker.

Judges should always be considered interpreters, not establishers, of the law.

3. *Democratic point of view*

There is no other legitimacy in secularized democracy than the consensus of the majority. Although the government of the majority has its problem points as any other government, it is the essence of democracy that cannot be removed without the state losing its democratic regime. In democracy, a citizen is the subject and object of the power. He/she is subject to the power but can wilfully co-create it, since he/she elects those who co-decide. During deciding by constitutional courts, central banks and similar institutions, a citizen is the object of the power, its vassal. He/she cannot participate in the decision-making.

5 Z. Koudelka, "Zrušení ústavního zákona Ústavním soudem", *Státní Zastupitelství* 11, 2011, p. 9–23.

6 E.-W. Böckenförde, *Recht, Staat, Freiheit. Studienzur Rechtsphilosophie, Staatstheorieund Verfassungsgeschichte*, 2nd ed., Frankfurt am Main 2006, p. 112; P. Holländer, *Ústavní změny. Mezi neurózou a surrealismem. Ústavné právo 20 rokov po páde komunizmu*, Plzeň 2011, p. 8–9.

7 P.P. Hájek, *Smrt v sametu*, Praha 2012, p. 85.

8 Z. Koudelka, "Transcedentální pramen práva", *Trestní Právo* 11–12, 2013, p. 10–21.

Most of the democratic states introduced the rigidity of the fundamental legal rules called constitutional. Thus, in order to create or amend them, it is not enough to have simple majority – qualified majority is required. This secures a wider consensus of the society over constitutional rules in comparison with the lower consensus necessary for the adoption of ordinary acts. This wider consensus is accompanied by higher stability of constitutional rules. Nevertheless, the determination of constitutional rules remains in the hands of the parliament as a representative group elected by the people or is decided directly by the people in a referendum or there are various combinations possible. Everything remains within democracy which, in its essence, does not and cannot have a different basis of the sovereign power than the people.

Democracy is based on trust in people, which is fully expressed in the words of Tomáš Garrigue Masaryk: "…democracy is an opinion of life, it lies in trust in people, humanity and humanness, and there is no trust without love and no love without trust."[9] The quality of a democratic government is dependent on the quality of the majority, which gave the power to govern to the power holders.[10] This quality either exists or does not exist, but the consent of the majority as the source of government in democracy cannot be replaced. Other sources of government are possible but not in democracy.

If we accept the existence of a legally undefined material core of the constitution and thus the possibility of cancelling constitutional acts by the Constitutional Court for other reasons than a defective procedure of their adoption, then in reality, the superior state body becomes the Constitutional Court which takes off people´s sovereignty and seizes it by itself. Constitutional judge Jan Musil said: "…adopted solution (cancellation of the constitutional act – author´s note), in my opinion, violates the subtle balance between the principles of democratic nature and lawfulness to the harm of the principle of democratic nature." Then he continues: "This trend is the expression of the elitist concept of the "law interpretation key holders", which has regularly repeated itself in human history. In my opinion, it is a destructive concept not leading to good endings." He also recalls Churchill´s comment describing democracy as the best of all bad governing models. The constitutional court gains the rule in the state, its sovereignty.[11]

The extent of performing the power based on the material core of the constitution depends only on the self-limitation of the Constitutional Court. That is in the situation when it is secured by the material core of the constitution, however, without its express defining by the constitution-maker, which leads to uncertainty as to the understanding of this concept by the Constitutional Court. The rule factually applies to each uncontrollable power holder. It can cancel whatever and explain it with the interpretation of the material core of constitutionality. Although, at first, each power holder argues with the necessity of a correct result before the correct process, it is only a question of time, when the result is arbitrariness. Radoslav Procházka talks about a "gospel over freedom, the protection of which stops being, in the regime of a preferred correct result before the correct process, perceived as the first and the fundamental reason of existence of a state".[12] American judge Learned Hand talks about the desire of some judges to be superior to the parliament: "I would have hopeless feeling, if I was to be ruled by a group of Platonic guards, even if I knew how to select them well, which I definitely do not know. If they were making decisions, I would lack the impulse contained in the possibility to live in the society, in which I at least have a theoretical participation in the administration of public affairs."[13]

9 K. Čapek, *Hovory s T. G. Masarykem*, č. 3: *Myšlení a život, kapitola Politika, podkapitola Demokracie*, Praha 1990, p. 328.

10 R. Procházka, *Ľud a sudcovia v konštitučnej demokracii*, Plzeň 2011, p. 55.

11 J. Musil, points 13, 17, 20 of part III. *Změna paradigmatu demokratického a právního státu* of his dissent standpoint to resolution of the Constitutional Court dated September 15, 2009, no. Pl.ÚS 24/09 in the matter of constitutional complaint against reduction of the term of Chamber of Deputies by a constitutional act.

12 R. Procházka. *Ľud a sudcovia v konštitučnej demokracii*, p. 7.

13 L. Hand, "The Contributionsofan Independent Judiciary to Civilization", *The Spirit of Liberty*, New York 1952, s. 73–74; R. Procházka, *Ľud a sudcovia v konštitučnej demokracii*, p. 98–99, 105.

If we replace the people with the Constitutional Court, we are replacing democracy with another regime.

Pavel Hasenkopf sees the doctrine of the material core of the constitution as deeply undemocratic: "The doctrine of the material core of the constitution itself is very problematic… This vague basis can be used to reason basically everything regarded by the Constitutional court as incorrect, and any time it is given opportunity to do so. This doctrine is deeply undemocratic, in its very essence… In other words, the judicial power exceeds the borders of its own powers to the harm of the constitution-holder.… And it is up to the responsibility of other state bodies not to make this approach, completely denying legal safeguards, a common method of legal interpretation."[14]

The popularity of the theory of material core of the constitution may also be supported by the disappointment from the practice of parliamentary democracy and party politics, as well as the efforts at attaching to some other non-elected human authority – Constitutional Court. However, there is only the people and God above constitution-maker in democracy. If somebody refuses God, only the people remain. If we replace the people with the Constitutional Court, we are replacing democracy with another regime. Trust in courts may lead to disillusion just as in the case of party politics. People-judges are as good or bad as people-deputies.

The USA example clearly shows how the Supreme Court restricted the rights of the people and supported slavery in the 19th century. This issue was decided by the people to the disadvantage of the court in the civil war of the North against the South subsequently. But even then, the Supreme Court promoted the preservation of racial segregation. In 1857, the U.S. Supreme Court used the case of Dred Scott, a slave, to determine that slaves are not part of the people and citizens who have the right to freedom and cannot claim any rights whatsoever, including court protection. In addition, it proclaimed the laws of the Congress which forbade slavery in some states unconstitutional, which was the second case of applying the court´s possibility to proclaim the act unconstitutional and annul it after the first case in 1803 (*Marbury* v. *Madison*).[15] After the war of the North against the South, constitutional amendments were adopted – the Thirteenth Amendment in 1865 forbidding slavery and serfdom, the Fourteenth Amendment in 1868 of equality of citizens and a regular court process, and the Fifteenth Amendment in 1870 forbidding election discrimination based on the race. In 1875, the Congress adopted an act on civil rights containing a ban on discrimination. A part of this act was proclaimed unconstitutional by the Supreme Court, when the court admitted that a black man might be refused a job in public accommodation. In its following decisions, it also admitted racial segregation in the education system, transport and other services. Its concept of equality was based on the statement that if there is segregation on railway, both the blacks and the whites must have the same services available, albeit separated first classes and sleeping cars.[16] The decisions of the U.S. Supreme Court made in the 19th century show that judges may fight with the democratic parliament based on the principles that we today see as unacceptable. Some anti-segregation decisions of the U.S. Supreme Court from the second half of the 20th century are only remedies of the preceding undemocratic acts of this institution. And it was the U.S. Supreme Court, which sanctified the mass internment of American citizens of Japanese origin during World War II for the reasons of their origin.[17]

The desire of those who are not able or willing to enforce their ideas by a regular change in the law and by defending their issues in elections, but only use their power regardless of the law, is aptly characterized by the statement of the Nazi legal theoretician Carl Schmitt: "We are changing the comprehension of

14 P. Hasenkopf, "Jak to bylo s ratifikací Římského statutu Mezinárodního trestního soudu", *Právní Rozhledy* 20, 2009, p. 732.

15 *Dred Scott* v. *Sandford*, 60 U.S. (19 How.) 393 (1857). H. Petrův, "Kruh americké koncepce rovnosti (Od diskriminace menšin k diskriminaci většiny)", *Právník* 10, 2008, p. 1085–1086; R. Procházka, *Lud a sudcovia v konštitučnej demokracii*, p. 5–6.

16 *The Civil Richts Cases*, 109 U.S. 3 (1883); *Plessy* v. *Ferguson*, 163 U.S. 537 (1896); *Mc.Cabe* v. *Atchison, Topeka&Santa FeRailway*, 235 U.S. 151 (1914); H. Petrův, "Kruh americké koncepce rovnosti…", p. 1089–1093.

17 *Korematsu* v. *United States*, 323 U.S. 214 (1944).

legal concepts… We are on the side of future things."[18] In other words, if I lack democratic majority to properly change a legal rule in the parliament, I give it new contents through the court. But what are those future things? And do we all want them or is it just a certain group of us?

An example is the introduction of same-sex marriages. Sometimes the advocates of their legalization take the road of a political fight through parliaments and referendums. This road led to success in catholic Ireland on the 22nd May 2015, when the referendum accepted the possibility of a marriage of two people regardless of their sex, or in Finland, where this requirement was legalized in February 2015. In some other countries, these efforts are taken by a court fight. When the defenders of this understanding of marriage lose their fight through political tools, they try to recover the change as their constitutional right.[19] The courts then change the comprehension of legal concepts. In 2015, the U.S. Supreme Court pronounced the prohibition of homosexual marriages practiced in some states of the American union unconstitutional.[20] Thus its close majority of 5 to 4 accepted the new concept of marriage as a union of two women or two men. I am positive that the originators of the American constitution in the 18th century would be surprised about what they are being told by the Supreme Court in the 21st century. In those times, other marriage than bond of a man and a woman was unthinkable. And are 5 people superior to the thousands of members of the U.S. Congresses and the member states, who have a constitutional right to a constitutional change? And do the judges stop there? Certainly not. It is only a question of time when somebody wants to recover polygamy. After all, the USA have experience with the polygamy of the Mormons. The fundamental life questions should be decided by a sovereign. Even some judges realize so. The Chief Justice John G. Roberts as the member of a disagreeing minority of judges stated to the advocates of the change: "They are not celebrating the Constitution. It does not have to do with it. (…)This court is not legislature. Whether a homosexual marriage is a good idea should not be our interest."[21] Justice Antonin Scalia wrote: "Today´s decision means that my ruler and the ruler of 320 million Americans from one coastline to another is the majority of nine lawyers of the Supreme Court. This standpoint expands the court powers in such a manner, of which the Constitution or the amendments did not even think. The practice of such constitutional revision of the unelected committee of nine, always supported by a great appraisal of freedom, robs people of the most important freedom enforced in the Declaration of Independence and won in the revolution of 1776 – the freedom to be their own rulers."[22]

> **It is only a question of time when somebody wants to recover polygamy.**

The sovereign in democracy is the people who can decide either directly or through their temporarily elected representatives. If the decisions are made by judges not elected by the people, who hold their offices for a lifetime or for a very long time, democratic quality

18 C. Schmitt, "Nationalsozialistisches Rechtsdenken", *Deutsches Recht*, 1934, p. 229.

19 B. Banaszkiewicz, *The New Wave of Interest in Marriage in Constitutional Law. Reflections on the Central European Experience*, Warszawa 2016.

20 Decision of the U.S. Supreme Court from the 26th June 2015. *James Obergefell, et al., Petitioners v. Richard Hodges, Director, Ohio Department of Health, et al.*

21 Introduction of the dissent standpoint of the Chief Justice John G. Roberts, p. 2, http://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf (10.12.2020).

22 Introduction of the dissent standpoints of justices Antonin Scalia and Clarence Thomas, p. 2, http://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf (10.12.2020).

given as the governing of the elected and the governing for time are reduced. Such change in the fundamental characteristics of the state is possible, however, it must be made by amending the constitution, not by violating pro-judicial interpretation of the judges as such.

4. Conclusion

Judges are people, their legal education does not make them any better, and even they are attracted by the power and try to adapt the rules to their advantages. That is corroborated by the President of the Constitutional Court in Brno, Pavel Rychetský, who let himself be reappointed not only the judge of the Constitutional Court in 2013, but also its President. This way, his act denied the reasoning of the finding of the Constitutional Court[23] preventing other court Presidents from repeating their functions. Rychetský´s words seem hypocritical after having himself reappointed the President of the Court: "I have been a long-term permanent opponent of the possibility to repeat the mandate of a judge of the Constitutional Court. I reckon it should last longer but should not be repeated."[24]

The assessment of judges and lawyers may suitably be used in the words of Jan Musil, a judge of the Constitutional Court in Brno: "The idea that lawyers may be those, who in the final instance manage to solve the dispute between the right and the wrong, is absolutely incorrect and rebut in history countless times…. Or did the lawyers prevent totality regimes from existing and working? Did not the judges assist in the crimes of fascistic and communistic justice?"[25]

"Judicial state" existed in Bohemia and Moravia in times of World War II, when the emeritus President of the Highest Administration Court, Emil Hácha, was the state President of the Protectorate of Bohemia and Moravia and Jaroslav Krejčí, who from 1938 and during the Protectorate had held the function of the President of the Constitutional Court, was the long-term Prime Minister between 1942–45. Great lawyers, poor politicians, who remained in their functions even after the Lidice massacre. Regretfully, judges often fight for democracy and human rights in the time when the state is democratic, not in the time when it is needed to go to the barricades. How odd are in this relation the words of the President of the Constitutional Court, Jaroslav Krejčí, from the times when he was its secretary, when in reaction to the prevention from a scientific research in Germany and to defend the legality of the Night of the Long Knives by Carl Schmitt[26], he stated: *It is natural that under such circumstances, when objective scientific work may not only be inconvenient, but also dangerous, decent*

> **Regretfully, judges often fight for democracy and human rights in the time when the state is democratic, not in the time when it is needed to go to the barricades.**

23 Část IV. výroku a část V.e, bod 65 of the reasoning of the finding no 294/2010 Coll. (Pl.ÚS 39/08). Z. Koudelka, "Funkcionáři justice a ústavnost", *Trestní Právo* 2, 2013, p. 4–9.

24 J. Rychetský, "Šéf Ústavního soudu Rychetský o soumraku civilizace a Zemanovi", *Parlamentnilisty.cz* 30.10.2013, http://www.parlamentnilisty.cz/arena/rozhovory/Sef-Ustavniho-soudu-Rychetsky-o-soumraku-civilizace-a-Zemanovi-291453 (10.12.2020).

25 J. Musil, *Změna paradigmatu demokratického a právního státu*, Bod 23, část III of his dissent standpoint to resolution of the Constitutional Court dated September 15, 2009, no. Pl.ÚS 24/09 in the matter of constitutional complaint against reduction of the term of Chamber of Deputies by a constitutional act.

26 C. Schmitt, "Der Fürer schützt das Recht", *Deutche Juristen-Zeitung* 15, 1934, p. 945.

lawyers become silent.[27] Neither he, nor others stayed silent as lawyers even after occupation in 1939 and collaborated with the Germans.

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27 J. Krejčí, *Problém právního postavení hlavy státu v demokracii*, p. 7.

Mirosław Michał Sadowski

Millennial Academics, and Gen Z Students: How the Generational Change will Affect Legal Education

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The past two decades have seen a generational change come to universities along with one of a technological nature; the very first digital natives in the form of Millennials with Gen Z soon following.[1] The purpose of this paper is to analyse the two somewhat similar, but often different generations and place them within the context of Polish and North American universities, with law faculties in particular, in order to answer the following question: What does this shift of generations mean for the future of legal education? In the first part of the paper the author introduces the two generations, contrasting them with previous ones. The second part of the paper is devoted to the issue of Millennials and Gen Z at university, particularly law school. In the final part of the paper the author applies the findings of two previous sections to the question of the future of legal education. Arguing that law faculties are unique entities within universities, he proposes a number of changes to the teaching of law which should be introduced if Millennials and Gen Zs are to truly find their place

1 This article was completed before the COVID-19 epidemic which forced schools and universities around the globe to close and introduce remote pedagogy. Academia should embrace this difficult time as a possibility to develop and introduce innovative techniques. As outlined below, there is much more to teaching using technology than simply sharing a presentation. Hopefully, the positive effects of the current situation will be here to stay. It should also be noted that the article was written from the viewpoint of generalization, while keeping in mind that all individuals are different. It needs to be acknowledged as well that any meaningful change requires cooperation between students and academia – just as students are required to adapt when they arrive at university, in the present day, academia needs to adapt as well.

within academia and be able to live up to their full potential as lawyers, be they practitioners or academics.

Introduction

The advance of new technologies, globalisation, and in the times of post-truth and fake news, education, and higher education in particular, has to confront a plethora of new challenges. In the meantime, often going unnoticed in the sea of changes, two new generations have arrived *ante* universities' *portas*: Millennials and Gen Z.[2] Born between 1980 and 2010, the two groups today constitute the majority of students and PhD students all around the world, with older Millennials already fully engaged in their academic careers. The purpose of this article is to investigate the two groups from the perspective of law school and identifying those traits which distinguish them from other generations and may seem at odds with the traditional rigour of academia in order to propose a number of changes which law schools can introduce in order to fully exploit the potential of the Millennials and Gen Zs.

Part One: Sketching out Millennials and Gen Zs

"Are we really that different?" – is a question that Millennials are often asked.[3] The answer, of course, is "yes, we are."[4] Being the first "digital natives,"[5] Millennials grew up being told that since they have greater access to education and innovative learning methods than any age group before them,[6] they are destined to be a generation of success. The "American dream" was supposed to be at their fingertips. However, the reality of the 21st century soon caught up with us, and the "American dream" started to seem less of a possibility, and more of a "fallacy, a scam, […] a fragile island, ready to break up any second by the enormous challenges"[7] of our times.

"Are we really that different?" – is a question that Millennials are often asked.

This chasm between the Millennials' expectations and the reality they have to face is perhaps one of the reasons why, as has been noted, "Millennials are altering the very social fabric of America and the world," and they "will change the world decisively more than any other generation. [They] will continue to disrupt how the world communicates – […] they will soon radically change higher education."[8]

Millennials, Gen Y, digital natives[9] – these are the three most popular expressions used to designate those born between 1980 and 1999. In their everyday lives, Millennials encounter Baby Boomers, i.e. people born between 1946 and 1964, and generation X, or Yuppies, i.e. those born between 1965 and 1979 on the one hand, and Gen Zs, i.e. those born between year 2000 and

2 There are no clear boundaries between the Millennials and Gen Z: throughout the article the author maintains the 1980–1999, 2000–2010 distinction, as proposed in various sources (see adequate references below). It should also be noted that when speaking about students, the author focuses on those who study below the PhD level, as these are the programs in need of a change what with PhD studies being highly individualised and focused on research.

3 Gallup, "How Millennials Want to Work and Live", *Gallup News*, p. 1, news.gallup.com/reports/189830/millennials-work-live.aspx (04.03.2020).

4 The author of this article is a Millennial.

5 C. Celi, "Millennials or Digital Natives. Consuming and Producing News from Activism", p. 1, academia.edu/12446952/Millenials_or_Digital_Natives_Consuming_and_producing_news_from_activism (04.03.2020).

6 B. Goldberg, "Re-Thinking the American Dream for the Millennial Generation", barrygoldenberg.com/blog/2014/5/20/re-thinking-the-american-dream-for-the-millennial-generation (04.03.2020).

7 B. Goldberg, "Re-Thinking the American Dream…".

8 Gallup, "How Millennials Want to Work and Live", p. 1.

9 C. Celi, "Millennials or Digital Natives…", p. 1.

early 2010s,[10] and Generation Alpha, i.e. those born from 2011 and 2015,[11] on the other. Millennials make up the largest population group in the history of the world, constituting about 1/3 of the total number of us.[12] And, just as every other generation, they share some common traits.

Millennials are 'Digital Natives'.

As noted by Seppanen and Gualtieri:[13]

> "If each generation has a personality, you may say that the baby boomer is the idealist, shaped by Woodstock, JFK, RFK, and MLK. Generation X is the sceptical independent, shaped by latchkeys, Watergate, and the PC. Generation Y is the connected, diverse collaborator, shaped by 9/11, texting, and the recession. It is therefore understandable that the stereotypical ambitious boomer workaholic may be critical of one who does not share the same ethics and values. The independent Gen Xer may not appreciate the team orientation and desire for seemingly constant feedback. At the same time, the social-minded Millennial may not understand the priorities of other generations."

To this brief description of the Millennials, several highly influential factors need to be added; increasingly widespread technology, a 'live' witnessing of significant global events such as terrorism, natural disasters, global warming, and political and economic problems, immersion in a culture that included working mothers, increasing gender equality in many parts of the world, and a strong pro-child disposition.[14]

Of these three, the most important factor clearly is technology. Millennials are neither 'Digital Settlers' more related to the 'analogue world' nor are they 'Digital Immigrants' who "learned how to email and use social networks late in life,"[15] but rather are 'Digital Natives' who "relate to information differently than their parents"[16] as few of them regard newspapers, magazines, or television as primary source of information, with 71% choosing the Internet as their main source.[17]

Large-scale research conducted by Gallup shows that Millennials use the Internet for a myriad of other activities, from managing finances to shopping and to taking classes.[18] Smartphones are, of course, extremely popular, and 80% of Millennials admit they "sleep with their cell phone next to their beds."[19]

The researchers stress that growing up with omnipresent technology has influenced the Millennial set of traits – so different than that of the previous generations. While, on the one hand, they are great at multitasking, i.e. they are "apt to switching tasks quickly enough to appear to be doing them simultaneously,"[20] on the other they are less engaged at work compared to other generations,[21] with most of them feeling 'indifferent' (but not entitled) to their job or company, looking for a position which makes them feel 'worthwhile'.[22]

10 S. Seppanen & W. Gualtieri, *The Millennial Generation. Research Review*, Washington DC 2012, p. 2.

11 D. Lavelle, "Move over, Millennials and Gen Z – here comes Generation Alpha", theguardian.com/society/shortcuts/2019/jan/04/move-over-millennials-and-gen-z-here-comes-generation-alpha (10.12.2020).

12 T. Erickson, *Plugged In. The Generation Y Guide to Thriving at Work*, Cambridge MA 2008, p. 7.

13 S. Seppanen & W. Gualtieri, *The Millennial Generation. Research Review*, p. 2.

14 T. Erickson, *Plugged In…*, p. 25.

15 J. Palfrey & U. Gasser, *Born Digital. Understanding the First Generation of Digital Natives*, New York 2008, p. 4.

16 J. Palfrey & U. Gasser, *Born Digital…*, p. 4.

17 Gallup, "How Millennials Want to Work and Live", p. 12.

18 Gallup, "How Millennials Want to Work and Live", p. 11.

19 S. Seppanen & W. Gualtieri, *The Millennial Generation. Research Review*, p. 6.

20 S. Seppanen & W. Gualtieri, *The Millennial Generation. Research Review*, p. 5.

21 Gallup, "How Millennials Want to Work and Live", p. 6.

22 Gallup, "How Millennials Want to Work and Live", p. 7.

Interestingly, perhaps due to the amount of (usually conflicting) information available, and also due to the 'parental support and encouragement' widely-acknowledged by Millennials, 61% of them cite their parents as the most influential entities in their lives, far in advance of public leaders (19%), the media (12%), and faith leaders and celebrities, who ranked as having minimal or the least influence.[23] Millennials are also less religious than the previous generations,[24] prefer to be regarded as politically independent from the typical liberal/conservative distinctions,[25] and are "much more tolerant of races and groups than older generations."[26]

Millennials seem socially liberal.

Also, while Millennials seem socially liberal, they generally have fewer sexual relations and are more likely to be sexually abstinent than older generations.[27] On the other hand, their economic views are similar to those of their elders.[28] This may be related to the fact that the Millennials are "more interested in extrinsic life goals and less concerned for others and civic engagement. They are described as overly self-confident and self-absorbed."[29]

The particularity of the Millennials may also be noticed in the way they work. The aforementioned Gallup research study identified five traits characteristic of the Millennials; the search for a deeper motivation than just salary; self-development over mere job satisfaction; the need for tutoring, being taught in a partner-like way by those higher in the hierarchy, instead of being simply told what to do or controlled; the need for a permanent, and not *ad hoc* assessment of the result, along with showing what should be improved; and regarding work as more than a simple job, but rather an important part of one's life, which cannot be reduced to a salary or working schedule.[30]

This often leads to clashes between Millennials and their employers, with the rise of the expression 'OK, Boomer' in recent years only one (albeit the most noticeable) manifestation of the many underlying intergenerational differences. To quote several of the remarks on Millennials made by those who employ Millennials, "working on a Friday night or Saturday is completely unappealing. […] Other generations may not have liked working evenings or weekends but they understood that it was required and did not question the expectation."[31] Millennials "are different in that they expect that if they do a good job they should be able to take time off. By contrast, older generations see the work-life balance as a privilege;"[32] moreover, they think that more flexibility should be given as to "where, when, and how they get work done. They expect that if they are getting all their work done, they should not necessarily have to be at their desk for the standard working hours."[33] As the authors of the report for the U.S. Chamber of Commerce's National Chamber Foundation wittingly remarked, "Gen Xers tried to achieve work-life balance; Millennials demand it."[34]

23 S. Seppanen & W. Gualtieri, *The Millennial Generation. Research Review*, p. 6.

24 Gallup, "How Millennials Want to Work and Live", p. 13–14.

25 Gallup, "How Millennials Want to Work and Live", p. 15–16.

26 S. Seppanen & W. Gualtieri, *The Millennial Generation. Research Review*, p. 4.

27 B. Duffy, H. Shrimpton & M. Clemence, *Ipsos Mori thinks Millennial. Myths and Realities. Summary Report*, London 2017, p. 26.

28 P. Levine, "Talking about this Generation", *Extensions* Summer, 2015, p. 7, 25.

29 S. Seppanen & W. Gualtieri, *The Millennial Generation. Research Review*, p. 5.

30 Gallup, "How Millennials Want to Work and Live", p. 2–3.

31 J. Diaz et al., "Managing Millennials. Engaging with the Newest Generation of Workers", *ExecBlueprints* 2014, p. 3–4.

32 J. Diaz et al., "Managing Millennials…", p. 8–9.

33 J. Diaz et al., "Managing Millennials…", p. 12–13.

34 S. Seppanen & W. Gualtieri, *The Millennial Generation. Research Review*, p. 25.

Generation Z, known also as Gen I and Gen Next,[35] consists of people born between 2000 and 2010, directly following Millennials. They are the first post 9/11 generation and who do not consciously remember the times before the 2008 financial crisis.[36] They share a number of similarities, but are also different than their predecessors. Gen Zs have been characterised by four distinct traits: integrity, tenacity, openness and care.[37] They particularly value humour, kindness, honesty and positive judgement,[38] and regard themselves as determined, driven and motivated.[39] They are also thought to be able to quickly process data, and are smarter and "more self-directed" than the previous generations,[40] valuing connection, stimulation and information.[41]

They are the most diverse generation to date, with 49% of them living in the US identifying as non-White, 52% of them seeing themselves as (at least) not-exclusively heterosexual and 81% arguing that gender distinctions have lost some of their influence.[42] This shift has been linked to the fact of Gen Z growing up in an increasingly diverse world, whereby people of various backgrounds and genders can be found in different positions and places.[43]

Technological advances play an even greater role in Gen Z's personal lives than they did with regards to the Millennials. They are second-generation digital natives, being born in the times of the smartphone and social media revolutions,[44] and since existing in the digital realm is as easy today as existing in the real world (and is perhaps even easier), many members of Generation Z cultivate two identities, one digital, another interpersonal,[45] with virtual communication often taking priority over that of face-to-face: as it has been noted, the former is used daily by 63% of Gen Zs, while the latter by a mere 35%.[46] This everyday dichotomy that Gen Zs live in is perhaps one of the reasons why they are not good at teamwork[47] and may also foster feelings of loneliness and alienation in the real, analogue world, ultimately leading to issues with interpersonal relations.

When it comes to their values and motivations, Gen Zs stress the need for financial stability, followed by meaningful work, family and relationships and happiness.[48] They want to do what is expected of them, while also making difference.[49] Contrary to Millennials, who preferred being recognised for the effort made, Gen Zs, who also value constant feedback, "find motivation through achievement," looking at successes as milestones for future goals which has been linked to their larger exposure to video games.[50] This attitude has its drawbacks, however, with Gen Zs prioritising what is useful for them over what might be needed.[51]

Gen Zs share the Millennials' ability to multitask but they seem, however, to have short attention spans, seemingly fully evolving into so-called 'clip-thinking', i.e. seeing the world and processing the information "not as a whole and logically coherent, but as a series of fragments, images, facts and isolated events,"[52] akin

35 C. Igel & V. Urquhart, "Generation Z, Meet Cooperative Learning", *Middle School Journal* 4(43), 2012, p. 16.

36 K. Moore, C. Jones & R.S. Frazier, "Engineering Education for Generation Z", *American Journal of Engineering Education* 2(8), 2017, p. 113.

37 C. Seemiller & M. Grace, *Generation Z. A Century in the Making*, Oxon 2019, p. 30.

38 C. Seemiller & M. Grace, *Generation Z...*, p. 29.

39 C. Seemiller & M. Grace, *Generation Z...*, p. 32.

40 C. Igel & V. Urquhart, "Generation Z, Meet Cooperative Learning", p. 16.

41 E.A. Cameron & M.A. Pagnatarro, "Beyond Millennials. Engaging Generation Z in Business Law Classes", *Journal of Legal Studies Education* 2(34), 2017, p. 318.

42 C. Seemiller & M. Grace, *Generation Z...*, p. 30.

43 K. Moore, C. Jones & R.S. Frazier, "Engineering Education for Generation Z", p. 113.

44 K. Moore, C. Jones & R.S. Frazier, "Engineering Education for Generation Z", p. 113.

45 C. Seemiller & M. Grace, *Generation Z...*, p. 31–32.

46 O. Vikhrova, "On Some Generation Z Teaching Techniques and Methods in Higher Education", *Information* 9A(20), 2017, p. 6315.

47 C. Igel & V. Urquhart, "Generation Z, Meet Cooperative Learning", p. 16.

48 C. Seemiller & M. Grace, *Generation Z...*, p. 32.

49 C. Seemiller & M. Grace, *Generation Z...*, p. 33.

50 C. Seemiller & M. Grace, *Generation Z...*, p. 33.

51 O. Vikhrova, "On Some Generation Z Teaching Techniques and Methods in Higher Education", p. 6316.

52 O. Vikhrova, "On Some Generation Z Teaching Techniques and Methods in Higher Education", p. 6316.

to one's Twitter feed. It has been noted that this generation "takes in information instantaneously [but] loses interest just as fast."[53] This gives them the ability to quickly sift through and analyse large quantities of facts,[54] but also poses a significant challenge in their higher education, the legal sphere in particular, which I will remark on further in this paper.

Part Two: Millennials and Gen Zs at Law School

Having analysed who Millennials and Gen Zs actually are and how they work, I would like focus to on examining their relationship with academia in general and law school in particular.

> **Millennials are going to be the most educated age group in world history.**

To begin with, it has to be noted that Millennials are going to be the most educated age group in world history.[55] In the UK, for example, around 40% of Millennials are expected to graduate, compared with around 34% of Generation X. In emerging markets, the intergenerational differences are even bigger, with China tripling their number of higher-educated citizens in the 2000s. As a result, the Millennials' impact on higher education will be greater than that of previous generations. Also, the current average age of university professors is 50, but since one in five Millennials go on to become educators, this is bound to change soon.[56]

Studies conducted at the early stages of their education have shown that Millennials score highly in IQ tests, displaying such traits as extroversion, self-esteem, self-liking, high expectations, and assertiveness.[57] While these may prove to be useful at university, since most Millennials regard themselves as 'special',[58] and 2/3 of them think they will have one of the top jobs once they graduate, most of them are clearly bound for disappointment, resulting in stress, anxiety, even depression, and ultimately lower self-reliance.[59]

A significant shift in the skills required by prospective employers may also be observed, as basic skills have become "those of rapidly searching, browsing, assessing quality, and synthesizing the vast quantities of information […] In contrast, the ability to read one thing and think hard about it for hours will […] be of far less consequence for most people."[60] This issue will have to be addressed by universities, particularly law schools.

It may be also observed that Millennials have a 'transactional' attitude to higher education, regarding it as a "necessary and expensive customer good." As a result, they expect professors to be "accessible and approachable," more akin to instructors or tutors than teachers, ready to answer precise questions about exams, and prepared to be challenged on the relevance of awarded grades. Such attitudes also result in the Millennials' expectations of a less formal aca-

53 E.A. Cameron & M.A. Pagnatarro, "Beyond Millennials…", p. 318.

54 E.A. Cameron & M.A. Pagnatarro, "Beyond Millennials…", p. 318.

55 B. Duffy, H. Shrimpton & M. Clemence, *Ipsos Mori thinks Millennial…*, p. 10.

56 B. Duffy, H. Shrimpton & M. Clemence, *Ipsos Mori thinks Millennial…*, p. 10.

57 S. Seppanen & W. Gualtieri, *The Millennial Generation. Research Review*, p. 9.

58 J.S. Palmer, "'The Millennials Are Coming!'. Improving Self-Efficacy in Law Students Through Universal Design in Learning", *Cleveland State Law Review* 3(63), 2015, p. 680.

59 S. Seppanen & W. Gualtieri, *The Millennial Generation. Research Review*, p. 9.

60 J. Anderson & L. Rainie, "Millennials Will Benefit and Suffer Due to Their Hyperconnected Lives", *Pew Internet*, pewinternet.org/2012/02/29/millennials-will-benefit-and-suffer-due-to-their-hyperconnected-lives (04.03.2020).

demic environment, one where there is also a place for their parents.[61]

Parents play a vital role in the lives of Millennial students. Whether or not we regard the accusations of 'sheltering' their Millennial children[62] as the truth, it has to be noticed that the parents of present-day students are highly involved in their offspring's lives; they regularly communicate with their children, often attend university orientation, and they take active interest not only in the financial but also the academic challenges their children face and by doing so, help them along the way.[63] This results in Millennials responding to grading and constructive criticism differently than previous generations;[64] seeing the professor as their partner, they expect him or her to positively inspire them to change, not shut their expectations with a bad grade.[65]

Millennials expect professors to be "accessible and approachable."

The biggest change to education, with regard to legal education in particular, is, however, caused by technology. The so-called soft skills, or "the ability to communicate effectively both orally and in writing, […] will become more valuable as technology intensifies the significant role of messages in the workplace"[66] and thus universities must respond and focus on their further development.[67] Various studies have confirmed that while online learning may be as effective as face-to-face methods, "the deficient technological ability of a large percentage of faculty" members makes any attempts to implement it unsuccessful.[68]

On the other hand, technology may pose certain dangers to the Millennials themselves. Library attendance has faltered in the last twenty years, as has the use of textbooks, since students find using online sources easier despite the fact that those sources are oftentimes unreliable.[69] Some of the researchers argue that the Millennials' brains have become 'rewired', with memories becoming "hyperlinks to information triggered by keywords and URLs […], as our brains are storing the keywords to get back to those memories and not the full memories themselves."[70] As noted above, Gen Zs are a step ahead with their 'clip thinking'.

It has also been found that students no longer pay attention solely to their lecturer and multitask during classes. Activities range from text messaging, instant messaging, to checking Facebook and email. As a result, they "disengage from the lecture creating a shift in focus that is oriented more towards an individual focus compared to a group focus maintained by class interaction by both students and professor."[71]

61 S. Seppanen & W. Gualtieri, *The Millennial Generation. Research Review*, p. 9.

62 J.S. Palmer, "'The Millennials Are Coming!'…", p. 683.

63 J.S. Palmer, "'The Millennials Are Coming!'…", p. 687.

64 J.S. Palmer, "'The Millennials Are Coming!'…", p. 683.

65 The partner-like communication between Millennials and their parents may also be one of the reasons why more law graduates today choose a career path different than a typical legal profession (see below for more information on this question), as they feel less pressured by their parents to do so.

66 B. Stevens, "What Communication Skills Do Employers Want? Silicon Valley Recruiters Respond", *Journal of Employment Consulting* 1(42), 2005, p. 2.

67 L.A. Gibson & W.A. Sodeman, "Millennials and Technology. Addressing the Communication Gap in Education and Practice", *Organization Development Journal* 4(32), 2014, p. 67.

68 L.A. Gibson & W.A. Sodeman, "Millennials and Technology…", p. 68–69.

69 K. Blackburn, L. LeFebvre & E. Richardson, "Technological Task Interruptions in the Classroom", *The Florida Communication Journal* 41, 2013, p. 111.

70 J. Anderson & L. Rainie, "Millennials Will Benefit and Suffer Due to Their Hyperconnected Lives".

71 K. Blackburn, L. LeFebvre & E. Richardson, "Technological Task Interruptions in the Classroom", p. 112.

Law school is a particular space within the university. Oriented at more than simply the passing of knowledge, but also at inculcating hierarchy[72] and shaping young minds so that they start thinking differently, indeed, 'like a lawyer',[73] it seems to be a particularly challenging place for Millennials and Gen Zs.

Some of the researchers argue that the Millennials' brains have become 'rewired', with memories becoming hyperlinks to information triggered by keywords.

As a study conducted by CLEST[74] shows, present-day students regard law studies as being too theoretical (73.73%); requiring too much learning by heart (72.13%); unable to teach creative thinking (60.54%); and as leaving them ill-prepared for a future job as a lawyer (53.46%).[75] Importantly, the study seems to confirm the Millennial traits, i.e. the need for self-development – 84.72% of the student respondents say they chose law studies because of an earlier interest in law, and 72.67% say it was because they want to help others – as well as the aforementioned high levels of self-awareness and aspirations of getting top jobs – the prestige of being a lawyer was noted as a motivation to begin law studies by 81.17% of the students. On the other hand, the possibilities of finding work were motivation only for 47.74% of the students, and were not for 42% – which seems to confirm the existence of a peculiar dichotomy between self-development and the realities of the job market.[76] It has to be noted that the study, while conducted in Poland, seems to resonate well internationally – when replicated during a class of Legal Education at McGill University (albeit on a significantly smaller scale), the results were strikingly similar.[77]

Gen Zs are only at the beginning of their academic road – the first of them are doing undergraduate studies at the moment – thus lack a proper assessment of their peculiarities at law school. However, the characteristics of this generation identified above will clearly play a major role in Gen Zs' interactions with higher education. Their clip thinking results in the need for explicit, step-by-step instructions[78] and high-volume verbal communication.[79] Technology is bound to remain the way Gen Zs communicate, learn and engage with each other – which poses a considerable

72 D. Kennedy, "Legal Education as Training for Hierarchy", in: D. Kairys (ed.), *The Politics of Law. A Progressive Critique*, New York 1990, p. 42–43.

73 E. Mertz, *The Language of Law School. Learning to "Think Like a Lawyer"*, Oxford 2007, p. 97–99.

74 Centre for Legal Education and Social Theory at the Faculty of Law, Administration and Economics conducts in legal education research. For more information see: http://clest.pl/research (08.07.2020).

75 A. Czarnota, M. Paździora & M. Stambulski (eds.), *Tiresome Necessity. Reasons for Starting The Law Studies in WPAE UWr and Their Assessment*, Wrocław 2017, p. 45.

76 A. Czarnota, M. Paździora & M. Stambulski (eds.), *Tiresome Necessity…*, p. 43.

77 Study conducted by the author and Azar Mahmoudi on 13 graduate (LLM and DCL) students, coming from different backgrounds (Canada, US, Poland, Italy, Denmark, UK, Iceland, China, India, Iran, Indonesia, Brazil) in legal education, taking the Legal Education class during the Winter semester 2019/2020 at McGill University's Faculty of Law. The study consisted of asking the students several of the questions from the CLEST study, whereby students had to choose from the same answers available to those surveyed by CLEST. Apart from one question, their replies corresponded with those given by students from WPAE. The results are available on request to the author.

78 O. Vikhrova, "On Some Generation Z Teaching Techniques and Methods in Higher Education", p. 6317.

79 O. Vikhrova, "On Some Generation Z Teaching Techniques and Methods in Higher Education", p. 6317.

threat in the times of fake news.[80] How they properly engage with sources will have to be stressed in their education. Unlike Millennials, Gen Zs learn in the most effective way "by doing and creating,"[81] posing further challenges to legal education.

Part Three: Why Law schools Need to Adapt – and How They Can Do It

Academics, with a focus on law professors in particular, often ask why should they adapt to the new generations. After all, whether in Europe or in North America, the methods of teaching law have been perfected by successions of scholars.[82] The very way this question is posed is symptomatic of the problem; times change, people change, and law faculties have to change with them. The traditional hierarchical structure[83] of the law school, which, in the 21st century seems anachronistic within most universities, needs to adapt. Neither Millennials nor Gen Zs will be able to fully live up to their potential in such institutions. New forms of governance, ones that include all interested students and not only those selected as representatives, should be pursued. Introducing online referenda, or at least opinion polls which would give an anonymous voice to many, could help encourage more students to speak up and bring law schools closer to their pupils and further away from established hierarchical frameworks of the past.

The way legal knowledge is organised and taught at law faculties is also connected to the question of hierarchy; the passing of knowledge as if it was some mysterious, magical wisdom, available only to the select few,[84] a general lack of student engagement in the educational process and[85] the requirement of memorising large numbers of provisions (in the case of Europe)[86] or cases (in the case of North America)[87] and reading various materials as the principal source only magnify the general lack of understanding of the present day when on the one hand the law changes rapidly, but on the other, legal texts may be verified at any moment with the help of various online databases. It has also been highlighted that present-day students may not have the "necessary skills to engage with the volume of information made available to them"[88] and need their professors' help in order to create meaningful connections and construct viable frameworks.[89] As Lidia Rodak and Michał Kiełb

The traditional hierarchical structure of the law school, which, in the 21st century seems anachronistic within most universities, needs to adapt.

80 O. Vikhrova, "On Some Generation Z Teaching Techniques and Methods in Higher Education", p. 6319.

81 E.A. Cameron & M.A. Pagnatarro, "Beyond Millennials…", p. 319.

82 T.C. Brickhouse & N.D. Smith, "Socratic Teaching and Socratic Method", in: H. Siegel (ed.), *The Oxford Handbook of Philosophy of Education*, Oxford 2009, p. 186–187.

83 D. Kennedy, "Legal Education as Training for Hierarchy", p. 40.

84 A. Czarnota, M. Paździora & M. Stambulski, "The Hidden Curriculum in Legal Education", *Krytyka Prawa* 2(10), 2018, p. 117.

85 A. Czarnota, M. Paździora & M. Stambulski (eds.), *Tiresome Necessity…*, p. 31.

86 L. Rodak & M. Kiełb, "Pamięciowa nauka prawa. W poszukiwaniu straconego czasu [Learning law by heart. In the search of lost time]", *Prawo i Więź* 4(2), 2013, p. 73.

87 P. Schlag, "Ten Thousand Cases – Maybe More. An Essay on Centrism in Legal Education", *Stanford Agora*, pdfs.semanticscholar.org/82a1/3fd77b898450731e9229d8c7cc3390f3dd84.pdf (03.03.2020).

88 K. Blackburn, L. LeFebvre & E. Richardson, "Technological Task Interruptions in the Classroom", p. 114.

89 K. Moore, C. Jones & R.S. Frazier, "Engineering Education for Generation Z", p. 122.

ironically observed, the contemporary legal education model "not only does not take the fact that we are living in the times of the Internet and legal databases into account, but also seems to ignore the invention of the printing press,"[90] which means it is completely incompatible with the digital natives' generation.

Technology is another area in which law schools are at odds with their present-day students. While learning through the use of the Internet is often not broadly used by academics due to their lack of necessary skills,[91] the most common form of the legal teaching remains the lecture[92] which leaves two generations of multitaskers in search of other stimuli – thus the students can be found checking their emails, sending messages or checking their accounts on social media during class.

Quite often the only aspect of law schools' digitalisation are PowerPoint presentations, usually distributed later by the lecturers online which, in turn, results in an even further disengagement of students from the class; if all the materials can be downloaded later, and the notes from a professor's course are also easily disponible, what is the point of listening?

Academia needs to realise that "the mere presence of the technology will not enhance the learning process unless used appropriately by instructors, and by students." Thus, "there is a need to rethink approaches to pedagogy, and the space in which teaching and learning take place."[93]

What can law schools do to adapt? First of all, they need to recognise "that distractions of all kinds are the norm now. Educators should teach the management of multiple information streams, emphasizing the skills of filtering, analysing, and synthesizing information."[94] A good lawyer needs these skills anyway, and they could prove particularly useful in the present-day.

One of the possible suggestions is the introduction of the so-called 'flipped classroom'. Instead of giving a lecture, the professor either records it, or prepares a presentation to post online, and the time spent in the classroom is devoted to "student collaboration and problem-solving assignments."[95] Also, since simulations and games "help learners visualize complex systems",[96] the concept of 'gamification', i.e. taking the game-like elements and integrating them into traditional frameworks has been created,[97] along with the idea of "providing authentic learning experiences instead of *lecturing* the facts"[98] in order to enhance student participation in classroom.

The contemporary legal education model is completely incompatible with the digital natives' generation.

Another concept, in the form of the idea of virtual mentoring, whereby students may pose questions and "anyone with the specific knowledge may respond," might be implemented, as present-day generations of students tend to "see mentorship as a method of learning rather than career advancement."[99] Likewise,

90 L. Rodak & M. Kiełb, "Pamięciowa nauka prawa…", p. 73–74.

91 L.A. Gibson & W.A. Sodeman, "Millennials and Technology…", p. 68–69.

92 A. Czarnota, M. Paździora & M. Stambulski (eds.), *Tiresome Necessity…*, p. 31–33.

93 K. Blackburn, L. LeFebvre & E. Richardson, "Technological Task Interruptions in the Classroom", p. 114.

94 J. Anderson & L. Rainie, "Millennials Will Benefit and Suffer Due to Their Hyperconnected Lives", p. 59.

95 L.A. Gibson & W.A. Sodeman, "Millennials and Technology…", p. 69.

96 Northern Illinois University, Faculty Development and Instructional Design Center, "Millennials. Our Newest Generation in Higher Education", *Northern Illinois University*, niu.edu/facdev/_pdf/guide/students/millennials_our_newest_generation_in_higher_education.pdf (04.03.2020).

97 L.A. Gibson & W.A. Sodeman, "Millennials and Technology…", p. 69.

98 Northern Illinois University, "Millennials…", p. 93.

99 L.A. Gibson & W.A. Sodeman, "Millennials and Technology…", p. 70.

the idea of shared knowledge could be introduced, one where not only an older individual 'imparts knowledge' on a younger individual, but also when "a younger individual teaches an older organizational member specific skills, such as utilizing social media or technology."[100] Classes conducted by students on the basis of the materials provided, at least in a part, by the professor, would encourage cross-generational relationships, and also demonstrate a university's 'flexibility and mobility',[101] providing the emotional connection highly valued by contemporary generations.[102] Also, since emails are regarded as old-hat technology by present-day students,[103] universities should find new ways to communicate with those students. Creating groups on instant communicators such as Messenger or WhatsApp which professors are a part of might help establish the 'here and now' communication channels that present-day students need.[104] The simple task of asking students to Google something during class may be a good way to diversify one's teaching methods,[105] as well as shift attention back to the matter in hand.

Another idea which may be used to better connect with present-day students is using basic tools which connect digital technology and tangible elements in the classroom, such as adequately chosen videos, pictures and props,[106] the creation of an academic version of a Ted Talk or carpool karaoke,[107] or even asking students to present short scenes posing and informing on such legal questions as "assault and battery, false imprisonment, trespass to land, etc."[108]

Moreover, the way students are assessed needs to change. The majority of students regard exams as things which do not verify their knowledge accurately.[109] What the universities should do is replace end-of-the-term exams with a wide variety of forms of assessment, in such a way which provides constant feedback and gives the student a greater opportunity for self-development[110] while maintaining high standards and considerable time investment required by legal education.[111] It also has to be noted that due to contemporary changes in the education system, many Gen Zs are already used to being systematically assessed[112] and it might be particularly difficult for them to adapt to the old law-school system.

Since emails are regarded as old-hat technology by present-day students, universities should find new ways to communicate with those students.

Some of the universities have already ventured into adapting to the changing educational environment by taking a variety of approaches such as mobile learning

100 L.A. Gibson & W.A. Sodeman, "Millennials and Technology…", p. 70.

101 L.A. Gibson & W.A. Sodeman, "Millennials and Technology…", p. 70.

102 E.A. Cameron & M.A. Pagnatarro, "Beyond Millennials…", p. 323–324.

103 O. Vikhrova, "On Some Generation Z Teaching Techniques and Methods in Higher Education", p. 6318.

104 O. Vikhrova, "On Some Generation Z Teaching Techniques and Methods in Higher Education", p. 6318–6319.

105 E.A. Cameron & M.A. Pagnatarro, "Beyond Millennials…", p. 324.

106 E.A. Cameron & M.A. Pagnatarro, "Beyond Millennials…", p. 321.

107 E.A. Cameron & M.A. Pagnatarro, "Beyond Millennials…", p. 322.

108 E.A. Cameron & M.A. Pagnatarro, "Beyond Millennials…", p. 323.

109 A. Czarnota, M. Paździora & M. Stambulski (eds.), *Tiresome Necessity…*, p. 45.

110 J.S. Palmer, "'The Millennials Are Coming!'…", 57 at 706.

111 S.I. Friedland, "Rescuing Pluto from the Cold. Creating an Assessment-Centered Legal Education", *Journal of Legal Education* 2(67), 2017, p. 609.

112 K. Moore, C. Jones & R.S. Frazier, "Engineering Education for Generation Z", p. 115–116.

programs and special learning apps for example.[113] These attempts have often failed, however, as the students today often "perceive a sharp contrast between their comfort level of technology and the technology comfort level of their teachers"[114] with some professors still 'resistant' towards the students using mobile devices in the classroom.

On the other hand, the use of various existing programmes and apps (such as Dropbox, Google Drive, Whiteboard HD, Quizlet, YouTube, ShowMe, Notability, Slack, Kahoot, Poll Everywhere, and Zoom among others) for creating, sharing and storing information, grading, or providing commentary by academics have been met by extremely positive responses from contemporary students.[115]

changes to legal regulations, have to understand the technological shift as well.

A final problem that law schools face in the present day which I would like to highlight in this paper is the question of the present-day's law students' future. The universities – and bar associations – need to realise that not everybody who leaves a law faculty's walls wants to be a lawyer. Last year in Poland, a thousand fewer candidates applied for various bar exams than the year before.[117] While a large majority of students surveyed in the CLEST study replied that they want to become lawyers after law school, many of them were also open to a career outside of the traditional realms of law: academia, opening one's own business, NGOs, public administration, politics, international organ-

What law schools need to keep in mind is that the key to success in teaching using new technologies has been linked to the concept of fluid learning.

What law schools need to keep in mind is that the key to success in teaching using new technologies has been linked to the concept of fluid learning. It is based on four points: interactivity; neutrality and portability – the accessibility of content on various platforms and the possibility of transferring it between them; breadcrumbs-like content – the creation of a variety of short content, e. g. two and a half minute videos which may be watched by students while queuing; and ubiquity – taking the students 'beyond traditional learning boundaries', e.g. to workplaces and museums, with the help of mobile devices.[116] Putting them to use requires a lot of effort from scholars, but is necessary to fully engage with present-day students. Law schools and law professors, so adept at keeping up with the

isations and corporations[118] were all entertained as career options by present-day law students.

This trend is not only limited to Poland; in the US, 44% of JD students surveyed echo their Central European counterparts in seeing law school as "a pathway for career in politics, government, or public service."[119] Also in this country, the number of corporate lawyers who ultimately choose a different career is on the rise

113 B. Fang, "Creating a Fluid Learning Environment", *Educause Review*, er.educause.edu/articles/2014/10/creating-a-fluid-learning-environment (04.03.2020).

114 Northern Illinois University, "Millennials…", p. 93.

115 B. Fang, "Creating a Fluid Learning Environment", p. 110.

116 B. Fang, "Creating a Fluid Learning Environment", p. 110.

117 S. Cydzik, "Spada liczba chętnych na aplikacje prawnicze. Tysiąc mniej kandydatów niż w zeszłym roku [The number of those who want to apply to bar courses is declining. A thousand candidates less than last year]", *Gazeta Prawna*, serwisy.gazetaprawna.pl/aplikacje/artykuly/1426689,aplikacje-prawnicze-adwokaci-radcowie-prawni-komornicy-egzamin-wstepny.html (03.03.2020).

118 A. Czarnota, M. Paździora & M. Stambulski (eds.), *Tiresome Necessity…*, p. 29–30.

119 Association of American Law Schools/Gallup, "Highlights from Before the JD. Undergraduate Views on Law School", *The Association of American Law Schools*, p. 3, aals.org/wp-content/uploads/2018/09/BJDReportsHghlights.pdf (03.03.2020).

and has resulted in the creation of a new position: people who help lawyers in their transition. Interestingly, just like in the case of students, some of the new jobs former lawyers undertake are in public administration, while others choose to set up their own companies.[120] The American Bar Association had already noticed this trend and in 2015 went on to publish a manual for lawyers who want to put their knowledge to a different use than practice.[121]

There are several reasons for this change. One of the major ones is, of course, the market; there are fewer jobs at law firms available then there used to be with 10% of law graduates less able to find work as a lawyer in the 2010s than in 2000s.[122] But it also needs to be said that the traditional law firm environment does not seem to be fully compatible with most of the Millennials (nor will it be compatible with Gen Zs in the future) due to the long hours, the lack of flexibility regarding one's schedule, and the distinct lack of any work/life balance do not seem particularly alluring to present-day generations, who tend to value their own well-being more than a big pay check. In addition, the salaries at the beginning of a legal career are also somewhat repellent; in Poland most of the people taking the bar course have to rely on familial financial help, as one third of them earns less than the minimum wage.[123] Moreover, since bar courses are increasingly seen as being unable to prepare its takers well-enough for a future job as a lawyer,[124] many graduates might ask themselves: why bother becoming a lawyer in the traditional sense?

The universities – and bar associations – need to realise that not everybody who leaves a law faculty's walls wants to be a lawyer.

Law schools, while often advertising themselves through the highlighting of the wide possibilities one has after completing a law degree,[125] do not adapt their curricula to reflect these changes and still focus mostly on preparing their students for a future bar exam. They usually propose only makeshift provisions such as reducing the number of students which not only endangers the very existence of some law schools,[126] but also leaves the main problem at hand unsolved in that the aspirations of many a law graduate have changed significantly. The faculties need to amend their curricula in such a way as to reflect these changes in the form of new courses, providing a broader application of legal knowledge as well as teaching how to use 'thinking like a lawyer' in other instances than 'working like a lawyer'. A larger number of creative projects during a law student's time in law school, as well as having meetings with graduates who have chosen a different-than-traditional path might also be a part of the law schools' response to this issue.[127]

120 L. McMullan Abramson, "The Only Job With an Industry Devoted to Helping People Quit", *The Atlantic*, theatlantic.com/business/archive/2014/07/the-only-job-with-an-industry-devoted-to-helping-people-quit/375199 (03.03.2020).

121 A. Impellizzeri, *Lawyer Interrupted. Successfully Transitioning from the Practice of Law – and Back Again*, Chicago 2015.

122 P. Hoey & M. Hoey, "An Expensive Law Degree, and No Place to Use It", *The New York Times*, nytimes.com/2016/06/19/business/dealbook/an-expensive-law-degree-and-no-place-to-use-it.html (03.03.2020).

123 M. Stambulski & W. Zomerski, *Tiresome Rite. Advocate and Legal Counsel Application in Poland*, Wrocław 2019, p. 64.

124 M. Stambulski & W. Zomerski, *Tiresome rite…*, p. 68.

125 P. Hoey & M. Hoey, "An Expensive Law Degree, and No Place to Use It", p. 119.

126 P. Hoey & M. Hoey, "An Expensive Law Degree, and No Place to Use It", p. 119.

127 O. Vikhrova, "On Some Generation Z Teaching Techniques and Methods in Higher Education", p. 6320.

Conclusion

While no one knows what the future holds, one thing is certain: universities have already changed due to technological shifts and they are bound to change further in the future due to Millennials and Gen Zs. What needs to happen at law schools today is for them to realise that the changes they need to make have to take place now, not only in academia, but also within the lawyers' associations – only then it will be possible to wholly reform the system of legal education in a way that accommodates both Millennials and Gen Zs. Academia already has great potential for change due to it being affected by young people – students and early-career researchers namely – on a daily basis. It needs to find a way, however, to tap into this resource and use it in a meaningful way.

In Poland's case, legal education scholars have already proposed a number of changes to better engage with the younger generations.

In Poland's case, legal education scholars have already proposed a number of changes to better engage with the younger generations; making a wider introduction of the Socratic method in teaching,[128] offering more interdisciplinary courses,[129] promoting moral competences among students[130] and the teaching of the critical thinking towards one's own and others' actions within the realm of law.[131] While all of these proposals merit wider discussion, they also fail in that the necessary changes should be structural and profound, and cannot be reduced to a simple introduction of new courses and the teaching of new competences – not to mention that the Socratic method might not be the best way to engage with the Millennials and Gen Zs.[132] They are, however, a step in the right direction.

American research into legal education has also argued for changes to the teaching and evaluation methods in law schools, centred around fostering the idea of self-efficacy, i.e. a belief in one's capabilities to succeed in a given assignment,[133] and the universal design theory which advocates teaching using not only verbal, aural and visual, but also tactile and kinaesthetic techniques.[134] The proposals include: changes to the grading system,[135] restructuring the way students are assessed,[136] employing various,[137] more flexible[138] teaching methods, providing students with necessary organisation skills[139] and effective ways of learning,[140] as well as meeting with the students on a regular basis for the purposes of evaluation.[141] Those who put forward these proposals, while encouraging, have to keep in mind that the main issue is to adapt law schools in such a way as to accommodate Millennial and Gen Z students, and not the other way around; faculties

128 L. Rodak & M. Kiełb, "Pamięciowa nauka prawa…", p. 74–75; 80–81.

129 L. Rodak & M. Kiełb, "Pamięciowa nauka prawa…", p. 80–81.

130 A. Czarnota, M. Paździora & M. Stambulski, "The Hidden Curriculum in Legal Education", p. 120.

131 A. Czarnota, M. Paździora & M. Stambulski, "The Hidden Curriculum in Legal Education", p. 122–123.

132 Introduction of the Socratic method in European teaching also raises the question of its suitability for teaching in civil law systems, whereby law studies require more theoretical and less practical knowledge from students.

133 J.S. Palmer, "'The Millennials Are Coming!'…", p. 690.

134 J.S. Palmer, "'The Millennials Are Coming!'…", p. 701.

135 J.S. Palmer, "'The Millennials Are Coming!'…", p. 704.

136 S.I. Friedland, "Rescuing Pluto from the Cold…", 108 at 606–613.

137 J.S. Palmer, "'The Millennials Are Coming!'…", p. 698–702.

138 J.S. Palmer, "'The Millennials Are Coming!'…", p. 702.

139 J.S. Palmer, "'The Millennials Are Coming!'…", p. 695.

140 J.S. Palmer, "'The Millennials Are Coming!'…", p. 696.

141 J.S. Palmer, "'The Millennials Are Coming!'…", p. 703.

should[142] remind students of deadlines, as well as be available and reachable at most hours of the day.[143] Also, simply advocating the use of PowerPoint and other visual aids in the classroom[144] as valid examples of new teaching methods cannot be regarded as such. Law schools need to think bigger.

Two hopeful examples of successful implementation of a more pro-Millennial/Gen Z approach to legal education have seen the use of wikis as a way of mobilising students to write and correct class notes as a group, taking turns in creating course outlines, which, once printed, may be later used by them during an exam,[145] and the introduction of a semi-flipped classroom whereby traditional teaching methods are enhanced by short videos created by academics for students who then may spend their classes engaging in various stimulating individual or group activities and are later assessed in the form of a quiz on an app.[146]

Whether academia chooses to change consciously or not, whether it decides to implement the ideas mentioned above, and create some solutions of its own or stagnate instead, its future will ultimately be determined by Millennials and Gen Zs. This is because they certainly are not going anywhere else; a large number of Millennials are professors already. And knowing Millennials, it will be sooner rather than later when they instigate change from within. After all, we are the future of legal education.

American research into legal education has also argued for changes to the teaching and evaluation methods in law schools.

142 Emphasis added by the author.

143 J.S. Palmer, "'The Millennials Are Coming!'…", p. 696.

144 J.S. Palmer, "'The Millennials Are Coming!'…", p. 701.

145 E.E. Johnson, "A Populist Manifesto for Learning Law", *Journal of Legal Education* 1(60), 2010, p. 54–55.

146 M. Castan & R. Hyams, "Blended Learning in the Law Classroom. Design, Implementation and Evaluation of an Intervention in the First Year Curriculum Design", *Legal Education Review* 1(27), 2017, p. 9–12.

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Małgorzata Pohl-Michałek

Various Perspectives Regarding the Effects of the United Nations Convention on Contracts for the International Sale of Goods

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The 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG) was adopted in order to provide uniform rules governing the international sale of goods. As of November 2020, UNCITRAL and the UN report that 94 States have adopted the CISG, with Portugal being the latest State to have acceded to the CISG.[1] This is an impressive number of Contracting States. The CISG applies to contracts for the sale of goods between parties whose places of business are in different States, where the States are CISG Contracting States (Article 1(1)(a)). Moreover, it applies to contracts for the sale of goods when the contracting parties have their places of business in different States and when the rules of private international law lead to the application of the law of a CISG Contracting State (Article 1(1)(b)). However, at the time of ratification, the prospective Contracting States are given the possibility of making additional reservations, including one set out in Article 95 CISG, which limits the application of Article 1(1)(b) of the Convention. Although there are some CISG Contracting States that initially applied the reservation but have since withdrawn it,[2] there are still a few Contracting States, including the United States, where reservations remain.[3]

1 Portugal accepted the CISG on 23rd September 2020, coming into force on 1st October 2021. See: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=X-10&chapter=10&clang=_en (10.12.2020).

2 Examples are: Canada and the Czech Republic.

3 The remaining Article 95 CISG Reservation States are: Armenia, the Lao People's Democratic Republic, Saint Vincent and the Grenadines, Singapore, Slovakia and the United States of America. On 16th January 2013, the Government of the People's Republic of China notified the Secre-

In addition, it appears there are still new Contracting States, such as the Lao People's Democratic Republic, which decided to make the reservation upon adopting the CISG.[4] This paper presents various approaches regarding the interpretation of the effects of the reservation set out in Article 95 CISG, which, in fact, challenge the principle of the uniform interpretation and application of the Convention's provisions. The author argues that the Article 95 CISG reservation leads to increased confusion and problematic conflict of law issues that bring more chaos than benefits.

Introduction

The creation and successful ratification of the United Nations Convention on Contracts for the International Sale of Goods (hereinafter: "CISG" or the "Convention"), was a 'uniform answer' to the diversity of the national legal systems and their respective trade laws. It was drafted with the aim of facilitating international transactions and providing a neutral and uniform set of rules that are specifically tailored to the needs of B2B international sales contracts.[5] To protect the uniformity principle, the Convention contains its own autonomous methodology of interpreting its rules, placing an obligation upon the adjudicator to recognise the Convention's international character and the need to observe uniformity in its interpretation and application.[6] Since the CISG came into force on 1st January 1988,[7] the number of CISG Contracting States has risen to an impressive 94 States,[8] which includes major trading countries such as China and the United States.[9] In this respect, the significant number of States that have ratified the Convention makes the CISG one of the most potentially-applicable instruments in international commercial contracts in B2B relations around the world. This is so because, once a State adopts and signs (ratifies) the Convention, the CISG provisions automatically become part of that Contracting State's national legal system, and therefore part of the domestic law of contracts of that State.[10] Accordingly, when the prerequisites for applying the Convention are met,[11] the courts seated in CISG Contracting States have to apply the CISG directly,[12] as a special part of the substantive sales law.[13]

The Convention applies to sale of goods contracts with an international aspect. The "internationality"

tary-General of its decision to withdraw its declaration made upon approval, with respect to the Article 95 CISG. Information is based on the official website: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=X-10&chapter=10 (26.10.2020).

4 The Lao People's Democratic Republic accepted and ratified the CISG on 24th September 2019.

5 I. Schwenzer & P. Hachem, in: I. Schwenzer (ed.), *Commentary on the UN Convention on the International Sale of Goods (CISG)*, Oxford 2016, p. 23, para. 14.

6 In accordance with Article 7(1) CISG: "[i]n the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade".

7 The CISG was signed at the diplomatic Conference in Vienna on 11th April 1980 and came into force as a multilateral treaty on 1st January 1988.

8 See: the official web page of the United Nations Commission on International Trade Law and the current status of the State's ratification of the CISG, available at: https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg/status (26.10.2020).

9 Within the European Community, 25 out of the 27 EU Member States have joined the CISG with the exception of Ireland and Malta.

10 Undisputed, see for example: P. Schlechtriem, in: P. Schlechtriem, I. Schwenzer (eds.), *Commentary on the UN Convention on the International Sale of Goods (CISG)*, Oxford University Press, Oxford 2005, p. 5; M.J. Bonell, in: C.M. Bianca & M.J. Bonell (eds.), *Commentary on the International Sales Law. The 1980 Vienna Convention*, Milan 1987, p. 56; A.E. Butler, *A Practical Guide to the CISG. Negotiations through Litigation*, New York 2007, para. 2.02.

11 The CISG applies solely to cross-border situations, when the territorial sphere of application (Article 1 CISG), substantive sphere of application (Articles 2–5), or its temporal sphere of application (Article 100 CISG) are fulfilled. The CISG is not to be applied when the parties decide to opt-out from its provisions by virtue of Article 6 CISG.

12 See: I. Schwenzer, in: I. Schwenzer (ed.), *Commentary on the UN Convention on the International Sale of Goods (CISG)*, Oxford 2010, p. 20, 24.

13 T. Kadner Graziano, "The CISG Before the Courts of Non-Contracting States? Take Foreign Sales Law As You Find It", *Yearbook of Private International Law* 13, 2011, p. 166.

of a sale of goods contract is determined "geographically",[14] meaning that the decisive factor will be the parties' place of business.[15] In this respect, Article 1 of the CISG sets out two situations where it applies. With respect to the first situation, which is described in Article 1(1)(a) CISG, the Convention applies to contracts for the sale of goods between parties whose places of business, at the time of concluding the contract,[16] are in different states, and where both those states are CISG Contracting States. With respect to the second situation, Article 1(1)(b) CISG allows the Convention's sphere of application to be extended to parties from the CISG non-Contracting States in situations when the rules of private international law lead to the application of the law of a Contracting State. The reference to a "Contracting State", in the language of the Convention, signifies a State that has ratified, accepted and approved the CISG.[17]

As far as Article 1(1)(b) CISG is considered, it has been subject to criticism, or rather concern, due to the fact that its provision considerably expands the CISG's sphere of application.[18] More specifically, during the Vienna Diplomatic Conference when the CISG was being negotiated,[19] the representatives of socialist countries expressed a concern that, for countries with such a system, an agreement to the rule expressed in the current Article 1(1)(b) CISG, would result in the exclusion of their special legislation that was enacted to govern international trade transactions in such countries.[20] Accordingly, it would mean that those countries would most probably not have ratified the Convention at the time in the 1980s, due to the effect that Article 1(1)(b) would have had on their special legislation.[21] As a result of the above, the drafters of the Convention decided to create the possibility of an additional State reservation, which is reflected in Article 95 CISG. Under that reservation: "[a]ny State may

UN Convention on Contracts for the International Sale of Goods (CISG) was a 'uniform answer' to the diversity of the national legal systems and their respective trade laws.

14 E.g.: I. Schwenzer & P. Hachem, in: I. Schwenzer (ed.), *Commentary on the UN Convention…*, 2016, p. 18, para. 2.

15 Where the parties have more than one place of business, see Article 10 CISG.

16 I. Schwenzer & P. Hachem, in: I. Schwenzer (ed.), *Commentary on the UN Convention…*, 2016, p. 29.

17 See: Article 91 CISG. However, a Contracting State may declare at the time of signature, ratification, acceptance, approval or accession that it will not be bound by Part II (the rules on the formation of the contract), or that it will not be bound by Part III of the Convention, thus such a State is not to be considered a Contracting State within paragraph (1) of Article 1 of this Convention in respect of matters governed by the Party that the declaration applies to (Article 92 CISG).

18 F. Ferrari, *Contracts for the International Sale of Goods. Applicability and Applications of the 1980 United Nations Convention*, Leiden 2012, p. 84; P. Huber, in: P. Huber & A. Mullis (eds.), *The CISG. A New Textbook for Students and Practitioners*, Munich 2007, p. 54.

19 United Nations Conference on Contracts for the International Sale of Goods took place in Vienna, from 10th March to 11th April 1980.

20 See: United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10th March – 11th April 1980 – Official Records, Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committee – United Nations Document A/CONF.97/19, 1981, p. 229, para. 80.

21 Ibidem, p. 229, para. 81.

declare at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by sub-paragraph (1)(b) of article 1 of this Convention." Thus the principal purpose of the reservation under Article 95 was to exclude the reserving State's obligation under public international law to apply the Convention by operation of Article 1(1)(b).[22]

The reason set out above as to why the Article 95 reservation was added to the final version of the Convention makes it clear that, at the time when the Convention was drafted, some countries might have had justified reasons for making such a reservation[23] – at least back then in the 1980s. In the case of China, it appears that no official reason for applying the reservation has ever been expressed,[24] although some authors state it was also due to a special enactment that China made in the 1980s. According to them, the enactment and subsequent reservation was done to protect "immature traders" from the rapid economic changes from a planned to a market-based economy.[25] However, given the years that have passed since that argument held water, and considering the great experience of Chinese courts and arbitral tribunals to resolve disputes where the CISG applies,[26] it has led many authors to discuss China's possible withdrawal from the Article 95 CISG reservation,[27] as it effectively did in the case of the Article 96 CISG reservation.[28] It seems that, on 16th January 2013, the Government of the People's Republic of China notified the Secretary-General of its decision to withdraw its declaration made upon approval, with respect to Article 95 CISG.[29] In the case of other countries that

22 See: CISG-AC Opinion No. 15, Reservations under Articles 95 and 96 CISG, Rapporteur: Professor Doctor Ulrich G. Schroeter, University of Mannheim, Germany. Adopted by the CISG Advisory Council following its 18th meeting, in Beijing, China on 21st and 22nd October 2013; U.G. Schroeter, "Backbone or Backyard of the Convention? The CISG's Final Provisions", in: C.B. Andersen & U.G. Schroeter (eds.), *Sharing International Commercial Law across National Boundaries. Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday*, London 2008, p. 440.

23 The Socialist countries at that times such as Czechoslovakia, German Democratic Republic. See also: M. Evans, in: C.M. Bianca & M.J. Bonell (eds.), *Commentary on the International Sales Law. The 1980 Vienna Convention*, Milan 1987, p. 655.

24 Pan Zhen, "China's Withdrawal of Article 96 of the CISG. A Roadmap for the United States and China to Reconsider Withdrawing the Article 95 Reservation", *U. Miami Bus. L. Rev.* 141, 2016, p. 155.

25 Ibidem. See also: Xiao Yongping & Long Weidi, "Selected Topics on the Application of the CISG in China", *Pace International Law Review* 20, 2008, p. 66. However, see: F.G. Mazzotta, "Reconsidering the CISG Article 95 Reservation Made by the United States of America", *International Trade and Business Law Review* 17(1), 2014, p. 443, fn. 7, which states that: "[t]he fact that the United States had made the Art. 95 reservation may also be a factor that influenced the [People's Republic of China] to follow suit and make such a reservation as well)."

26 See: an official database of CISG cases resolved by Chinese courts: http://www.cisg.law.pace.edu/cisg/text/casecit.html#china (26.10.2020).

27 See for example: Pan Zhen, "China's Withdrawal of Article 96 of the CISG…"; Xiao Yongping & Long Weidi, "Selected Topics…"; Li Wei, "On China's Withdrawal of Its Reservation to CISG Article 1(b)", *Renmin Chinese Law Review* 300(2), 2014.

28 On 16th January 2013, China deposited an instrument with the Secretary-General of the United Nations withdrawing its "written form" declaration, which took effect on 1st August 2013. See: https://www.cisg.law.pace.edu/cisg/countries/cntries-China.html (26.10.2020).

29 The China's withdrawal from the Article 95 CISG reservation is not entirely clear to the author for several reasons: firstly, due to the wording used on the official UN webpage on this matter: "The Government of the People's Republic of China notified the Secretary-General on 16th January 2013 of its decision to withdraw the following declaration made upon approval with respect to Article 11 as well as the provisions in the Convention relating to the content of Article 11: The People's Republic of China does not consider itself to be bound by sub-paragraph (b) of paragraph 1 of article 1 and article 11 as well as the provisions in the Convention relating to the content of article 11." This is rather unclear, as Article 11 CISG relates to issues regarding Article 96 CISG reservation and freedom of form requirement, thus does not relate to issues regarding Article 1(1)(b) CISG. Secondly, since 16th January 2013, following the literature on this matter, there are several articles where the authors gave China as an example of a country that retains its Article 95 CISG reservation. Thirdly, such a potential withdrawal is

still apply the Article 95 CISG reservation, the motives are vague.[30]

The other important trading country that, as a CISG Contracting State, decided to make an Article 95 CISG reservation is the USA. The recommendation for the reservation was given by the American Bar Association and is somewhat surprising to the author. Apparently the reservation was made in order to "…promote maximum clarity in the rules governing the applicability of the Convention"[31], as it was alleged that the rules of private international law, on which applicability under sub-paragraph (1)(b) depends, are subject to uncertainty and international disharmony.[32] In practice, however, the effects of the Article 95 CISG reservation have turned out to make things far from being clear, certain or even uniform in its interpretation or application. There is a dispute in the doctrine and case law as to the extent to which the discussed reservation narrows the Convention's application. This is due to the fact that the effects of such a reservation may vary depending on where the forum is situated: in a Contracting State that has not made such a reservation, in an Article 95 Reservation State, or in a non-Contracting State. As will be presented below, the reservation causes more confusion and disharmony in its uniform interpretation and application than any advantages it can possibly bring. The author will firstly present the mechanisms of the direct and indirect application of the Convention, and then will present various views with respect to the Article 95 CISG reservation, depending on where the forum is seated, following the concluding remarks.[33]

1. Article 1 CISG – direct and indirect application

An adjudicator seated in a CISG Contracting State, when hearing an international commercial case, has to determine the Convention's potential application while examining its personal,[34] territorial,[35] material,[36] and temporal[37] prerequisites. Moreover, the court should determine whether the parties' have used their right (autonomy) to exclude the Convention from its application under Article 6 CISG.[38] With respect to the territorial scope of application, two possible paths of application, direct and indirect, are presented in Article 1 CISG.

As far as the direct path of application is concerned, it is presented in Article 1(1)(a) and it reads: "[t]his Convention applies to contracts of the sale of goods between parties whose places of business are in different States:(a) when the States are Contracting States." In accordance with the above provision, the state

not indicated on the UNCITRAL's official webpage, thus in fact, presenting China as an Article 95 Reservatory State: https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg/status. On the other hand, following the wording of the official UN webpage, mentioning "sub-paragraph (b) of paragraph 1 of article 1" as withdrawn, the interpretation leads to a conclusion that the Article 95 reservation indeed lost its effect with respect to China on 1st August 2013 (by virtue of Article 97(4) CISG). See: China, fn 12 on: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=X-10&chapter=10&clang=_en#12.

30 E.g. the reservation made by Saint Vincent and the Grenadines and Singapore, as one author stated: "[i]t is, however, far less clear why some other countries have made such a reservation – the United States, Saint Vincent and the Grenadines and Singapore." G.F. Bell, "Why Singapore Should Withdraw Its Reservation To The United Nations Convention On Contracts For The International Sale Of Goods (CISG)", *Singapore Yearbook of International Law and Contributors* 55(9), 2005, p. 58–59.

31 The public statement of the reasons for the Article 95 declaration is found in Appendix B to the legal analysis accompanying President Ronald Reagan's 1983 message to the Senate: U.S. State Department's 1983 Letter of Submittal (S. Treaty Doc. No. 98–99, 98th Cong., 1st Sess. Appendix B, available at http://www.cisg.law.pace.edu/cisg/biblio/reagan.html, 26.10.2020).

32 Ibidem.

33 Some issues presented in this paper were partially discussed by this author at the "4th Sino-Polish Seminar on Comparative Law – The Theory and Practice of Contract Law" which was held between 25–26th April 2019 at the Chinese Academy of Social Sciences Law Institute in Beijing.

34 Article 1(1)(a) CISG.

35 Ibidem.

36 Articles 2–5 CISG.

37 Article 100 CISG.

38 In accordance with Article 6 CISG: "[t]he parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions."

courts seated in a CISG Contracting State[39] are to apply the CISG not as a foreign or international law, but as a unified part of its state law, applicable directly and autonomously.[40] Therefore, if a dispute arises and the prerequisites of the Convention's application are met, the state court of the CISG Contracting State should not give recourse to its domestic rules of private international law (conflict of laws rules), but should apply the Convention directly,[41] which is also supported by the official records[42] of the 1980 United Nations Conference. This is a result of the fact that courts seated in CISG Contracting States are bound by the rules of public international law[43] to apply the provisions of the Convention where the prerequisites of its application are met, in accordance with the principle of *iura novit curia*, i.e. even when the parties themselves are not aware of it[44] or fail to plead it.[45]

With respect to the second, indirect path of application, it is presented in Article 1(1)(b) CISG, which states that: "this Convention applies to contracts of sale of goods between parties whose places of business are in different States: (b) when the rules of private international law lead to the application of the law of a Contracting State." With respect to the understanding behind the notion "private international law" which is used in Article 1(1)(b), when the Convention refers to the PIL rules, it refers rather to the forum's domestic concept of PIL rules.[46] Accordingly, the PIL rules of the forum may be either merely the domestic PIL rules or uniform PIL rules[47] embodied in an international agreement (convention) or any other international act of a regional nature.[48]

Therefore, in the event of the indirect application of the Convention, it may also apply through the "gateways"[49] of PIL rules, namely by virtue of Article 1(1)(b), so when the PIL rules lead to the application of the law of a CISG Contracting State. For that reason, the PIL rules are essential, since they are a precondition for applying the Convention. As a result, Article 1(1)(b) CISG allows the Convention's sphere of application to be extended to parties from the CISG non-Contracting States, in situations when the PIL rules of a respective forum lead to the application of the law

39 A CISG Contracting State is a state that has ratified the Convention.

40 I. Schwenzer, in: I. Schwenzer (ed.), *Commentary on the UN Convention…*, 2010, p. 18; M. Bridge, "Uniform and Harmonized Sales Law. Choice of Law Issues", in: J.J. Fawcett, J.M. Harris & M. Bridge (eds.), *International Sale of Goods in the Conflict of Laws*, New York 2005, p. 916, para. 16.22.

41 See: I. Schwenzer, in: I. Schwenzer (ed.), *Commentary on the UN Convention…*, 2010, pp. 20, 24.

42 See: Official Records – Document A/CONF.97/C.2/L.7, p. 15.

43 The courts in the CISG Contracting States are "treaty-bound" to apply the Convention directly, See: M. Bridge, "Uniform and Harmonized Sales Law…", p. 917, para. 16.23.

44 With regard to Article 1(2) CISG: "[t]he fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract".

45 See also: M. Bridge, "Uniform and Harmonized Sales Law…", p. 917, para. 16.22; L. Spagnolo, "Iura Novit Curia and the CISG. Resolution of the Faux Procedural Black Hole", in: I. Schwenzer & L. Spagnolo (eds.), *Towards Uniformity. The 2nd Annual MAA Schlechtriem CISG Conference*, The Hague 2011, para. 3.1. See also: Germany 31st March 2008 Appellate Court Stuttgart (Automobile case), available at: http://cisgw3.law.pace.edu/cases/080331g1.html (26.10.2020).

46 F. Ferrari & M. Torsello, *International Sales Law – CISG in a nutshell*, Minnesota 2014, p. 79; F. Ferrari, *Contracts for the International…*, p. 72–75; See also: Italy 12th July 2000 District Court Vigevano (Rheinland Versicherungen v. Atlarex), available at: http://cisgw3.law.pace.edu/cases/000712i3.html; Italy 25th February 2004 District Court Padova (Agricultural products case), available at: http://cisgw3.law.pace.edu/cases/040225i3.html; Italy 26th November 2002 District Court Rimini (Al Palazzo S.r.l. v. Bernardaud di Limoges S.A.), available at: http://cisgw3.law.pace.edu/cases/021126i3.html (all 26.10.2020).

47 P. Huber, in: P. Huber & A. Mullis (eds.), *The CISG…*, p. 52; I. Schwenzer, in: I. Schwenzer (ed.), *Commentary on the UN Convention…*, 2010, p. 41, art. 1, para. 32.

48 E.g.: The 1955 Hague Convention on the Law Applicable to International Sales of Goods, the 1980 Rome Convention on the Law Applicable to the Contractual Obligations, or the Rome I Regulation on the Law Applicable to Contractual Obligations.

49 P. Butler, "Article 1 CISG – The Gateway to The CISG", *Victoria University of Wellington Legal Research Papers* 8, 2017, p. 379–395.

of a CISG Contracting State. Accordingly, it is feasible that the CISG would apply when just one or neither party has its place of business in a CISG Contracting State, but where the PIL rules of the forum lead to the law of a CISG Contracting State.[50] Naturally, this only applies as long as the other prerequisites of Article 1(1) CISG are fulfilled (sale of goods contract, parties with places of business in different states).

a choice to be made. At this point, it must be noted that, when the court hears an international case, irrespective of whether it will be the court seated in a CISG Contracting State or a CISG non-Contracting State, it will apply its own PIL rules.[55] If this is the case, as long as the other requirements of Article 1 CISG are met, and the PIL rules were to lead to the law of a CISG Contracting State applying, then the rules of

The principal purpose of the reservation under Article 95 was to exclude the reserving State's obligation under public international law to apply the Convention by operation of Article 1(1)(b).

The Convention may apply under PIL rules[51] either by virtue of an objective connecting factor, such as the law of the seller's place of business,[52] or the law that has the closest connection to the particular contractual relationship.[53] Furthermore, the CISG may apply via PIL rules by virtue of a subjective connecting factor,[54] i.e. through the parties choosing the law of the contract as the law of a CISG Contracting State, if the forum (and respective PIL rules) allow for such

the CISG would apply. The only difference to the above is that the court seated in a CISG Contracting State is bound by the provisions of the Convention. Therefore, such a court is bound to apply the provisions of Article 1(1)(b) CISG directly (provided that the State did not make a reservation under Article 95 CISG).[56] Conversely, a court in a CISG non-Contracting State is not bound by the rules of the Convention, and so is not bound to apply Article 1(1)(b) CISG directly. It would rather apply its own PIL rules), and if those lead to the application of the law of a CISG Contracting State, then that court should apply the Convention as a foreign law,[57] thus indirectly.

50 See: Official Records – Document A/CONF.97/C.2/L.7, p. 15, art. 1, para. 7; P. Schlechtriem, *Uniform Sales Law – The UN-Convention on Contracts for the International Sale of Goods*, Vienna 1986, p. 24.

51 Within the EU Community: Rome I Regulation (Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17th June 2008 on the law applicable to contractual obligations (Rome I). Rome I has been governing law in almost all of the EU Member States since 2009, with the exception of Denmark – where Rome Convention on the Law Applicable to Contractual Obligations applies.

52 E.g.: in accordance with Article 4(1) Rome I Regulation – Applicable law in the absence of choice.

53 E.g.: in accordance with Article 4(3) or 4(4) Rome I Regulation.

54 E.g.: in accordance with Article 3 Rome I Regulation (freedom of choice).

55 F. Ferrari, "PIL and CISG. Friends or Foes?", *Journal of Law and Commerce* 31, 2012–2013, p. 58.

56 Under Article 95 CISG: "[a]ny State may declare at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by sub-paragraph (1)(b) of article 1 of this Convention", which will be looked at in more detail below.

57 I. Schwenzer & P. Hachem, in: I. Schwenzer (ed.), *Commentary on the UN Convention…*, 2016, p. 19, para. 4; P. Huber, in: P. Huber & A. Mullis (eds.), *The CISG…*, p. 53; L. Spagnolo, *CISG exclusion and legal efficiency…*, p. 292–293.

2. A Forum Located in a Contracting State that is not a Reservation State

As a general rule, a court seated in a CISG Contracting State that has not made a reservation under Article 95 CISG, is bound to apply Article 1(1)(b) by virtue of the public international law. It can be imagined, however, that a court located in such non-Reservation State hears the case between the parties: one being from a CISG Non-Contracting State and the other from a Reservation State. Such scenario could potentially raise interpretational problems regarding the application and operation of Article 95 CISG, when the PIL rules of the forum (which is a Contracting State) would lead to the law of the Reservation State. In such situations, the court being bound with Article 1 CISG must examine whether the prerequisites for applying the Convention have been fulfilled. As in the given example, where neither party is from a CISG Contracting State, so the prerequisites to apply Article 1(1)(a) are not met, and consequently the court has to apply Article 1(1)(b) CISG. The scenario described above may potentially lead to two possible outcomes: first, to the domestic law of the Reservation State applying rather than the Convention, or second, to the rules of the Convention applying.

With respect to the first scenario, there are some voices in the doctrine stating that, when PIL rules of the non-Reservation State lead to the law of the Article 95 Reservation State applying, then the court, out of respect for the declaration made by the State whose law applies, should apply the domestic law of that State rather than the CISG.[58] This argumentation is supported by the view that the court directed to the 'foreign law' should apply it in a way in which the court of that other jurisdiction would apply it.[59] Some authors maintain that such an interpretation is favourable, as it prevents the parties from forum shopping.[60]

In line with the above interpretation, Germany, despite being a CISG Contracting State that did not make a declaration concerning the reservation in question, made a special interpretative remark instead,[61] leading to a similar conclusion as presented above. Accordingly, Germany holds the view that "parties to the CISG that have made a declaration under Article 95 are not considered Contracting States within the meaning of sub-paragraph (1)(b) of Article 1 of the CISG."[62] In addition, Germany "assumes no obligation to apply this provision when the rules of private international law lead to the application of the law of a party that has made a declaration to the effect that it will not be bound by sub-paragraph (1)(b) of Article 1 of the CISG."[63] Therefore, in line with the mentioned interpretative instruction, German courts hearing a case between a party seated in a CISG non-Contracting State and a party from an Article 95 Reservation State, when directed with its PIL rules to the second State's legal system – would not apply the Convention, but rather the domestic law of the Reservation State.[64] Although such an official interpretative declaration

58 P. Schlechtriem, in: P. Schlechtriem & I. Schwenzer (eds.), *Commentary on the UN Convention*..., 2005, p. 37, 933; J.O. Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention*, Boston 1991, p. 93; J. Ziegel, "The Scope of the Convention. Reaching out to Article One and Beyond", *Journal of Law and Commerce* 25, 2005, p. 66.

59 L. Spagnolo, *CISG exclusion and legal efficiency*, Alphen an den Rijn 2014, p. 15; M. Bridge, "Uniform and Harmonized Sales Law...", p. 922–923, para. 16.31.–16.32.

60 E.g.: P. Winship, *The Scope of the Vienna Convention on International Sales Contracts*, in: N.M. Galston & H. Smit (eds.), *International Sale*, Bender 1984, p. 1–27; Pan Zhen, "China's Withdrawal of Article 96 of the CISG...", p. 163; G.F. Bell, *Why Singapore Should Withdraw...*, p. 64.

61 Article 2 of the German statute introducing the CISG, 5th July 1989, Bundesgesetzblatt 586 (1989/II).

62 Germany, Electronic Library on CISG Database – Table of Contracting States, available at: http://www.cisg.law.pace.edu/cisg/countries/cntries-Germany.html (26.10.2020).

63 Ibidem.

64 Notwithstanding the interpretative instruction made by Germany, in a case heard before the German Appellate Court Düsseldorf, at the time when Germany was not yet a CISG Contracting State, the court applied the CISG to a contract between German buyer and an American seller, see: Germany 2nd July 1993 Appellate Court Düsseldorf (Veneer cutting machine case), available at: http://cisgw3.law.pace.edu/cases/930702g1.html (26.10.2020). In this respect see also F. Ferrari, *Contracts for the International...*, p. 90; F. Enderlein & D. Maskow, *International Sales Law. United Nations Convention on Contracts for the International Sale*

made by Germany appears to be a step towards avoiding interpretative confusion regarding the effects of the Article 95 reservation, nonetheless, such a declaration is incompatible with Article 7(1) CISG, and so should not be followed by the courts outside Germany.[65]

However, this approach towards the interpretation of the effects of the Article 95 CISG reservation seems to have been overtaken by the contrary opinion in this respect.[66] Accordingly, when the PIL rules of the court seated in a CISG Non-Reservation State would lead to the state law of the Reservation State, the court should apply the Convention.[67] The above reasoning is a consequence of two arguments. First, by the fact that a Contracting State is bound by the PIL rules to apply Article 1(1)(b) CISG. Second, the reservation made by one State has no *erga omnes* effect,[68] which means that a reservation made by one country cannot reasonably bind another non-Reservation State.[69] The same reasoning may apply to arbitral tribunals, which are not bound by the reservation.[70] The above argumentation is also supported by the CISG Advisory Council in their opinion, which states: "the Convention applies in accordance with Article 1(1)(b) even when the rules of private international law lead to the application of the law of a Contracting State that has made an Article 95 declaration, because such a declaration does not affect the declaring State's status as a 'Contracting State'."[71]

Another, independent argument that pleads for the last interpretation might be the wording of the Convention itself. The other, somehow related provision to Article 95 CISG, is the reservation under Article 92 CISG, which relates to the effect of a reservation with respect to Part II or Part III of the Convention. In accordance with Article 92 CISG, a Contracting State that "makes a reservation... of Part II or Part III of this Convention is not to be considered a Contracting State within paragraph (1) of Article 1 of this Convention in respect of matters governed by the Part to which the declaration applies." The wording of the two reservations (under Article 95 and Article 92 CISG), differs in relation to the Contracting States. Accordingly, in line with Article 92, the declaring State is not regarded as a Contracting State, while similar wording cannot be found in the Article 95 reservation. From the above, it can be concluded that an Article 95 Reservation State is still to be treated as a CISG Contracting State.[72]

Last but not least, at this point the case of the Netherlands should be given. The Netherlands did not make a reservation under Article 95 when becoming a CISG Contracting State. Instead, however, it made a specific interpretative remark in its domestic law as to its effects. Accordingly, the Dutch Implementing

of Goods, Convention on the Limitation Period in the International Sale of Goods, Commentary, New York 1992, p. 381.

65 Similarly: F. Ferrari, *Contracts for the International…*, p. 90, who in this line rightly criticises the decision rendered by the German Provincial Court of Appeal, applying CISG where the domestic law not the unified one) should have been applied. See: Germany 2nd July 1993 Appellate Court Düsseldorf (Veneer cutting machine case), available at: http://cisgw3.law.pace.edu/cases/930702g1.html; CISG-AC Opinion No. 15…, para. 3.17 (26.10.2020).

66 E.g.: F. Ferrari, *Contracts for the International…*, p. 89; G.F. Bell, *Why Singapore Should Withdraw…*, p. 63–64; I. Schwenzer & P. Hachem, in: I. Schwenzer (ed.), *Commentary on the UN Convention…*, 2016, p. 1263, art. 95, para. 3; M. Bridge, "Uniform and Harmonized Sales Law…", p. 979, para. 16; U.G. Schroeter, "Backbone or Backyard of the Convention?…", p. 446; F. Ferrari, "CISG and the Law Applicable in International Commercial Arbitration: Remarks Focusing on Three Common Hypotheticals", in: M.B. Andersen & R.F. Henschel (eds.), *A tribute to Joseph M. Lookofsky*, Copenhagen 2015, p. 58.

67 See also: F. Ferrari, *Contracts for the International…*, p. 90.

68 U.G. Schroeter, "Backbone or Backyard of the Convention?…", p. 446.

69 F. Ferrari, *Contracts for the International…*, p. 90; G.F. Bell, *Why Singapore Should Withdraw…*, p. 63–64; I. Schwenzer & P. Hachem, in: I. Schwenzer (ed.), *Commentary on the UN Convention…*, 2016, p. 1263, art. 95, para. 3; U.G. Schroeter, "Backbone or Backyard of the Convention?…", p. 446.

70 F. Ferrari, *PIL and CISG…*, p. 59.

71 CISG-AC Op. No. 15…, para. 3.14.

72 Some authors assume that, since the proposal of the Article 95 CISG reservation was made at the last minute, it was too complex and might have caused an omission in this respect. However, a proposal whereby Article 95 CISG reservation States would be considered as non-contracting States for the purpose of Article 1(1)(b) CISG was in fact rejected, See: L. Spagnolo, *CISG exclusion and legal efficiency…*, p. 16.

CISG Act[73] includes an explicit instructive provision whereby foreign courts situated in an Article 95 Reservation State who are directed to apply Dutch law by their own PIL rules, are requested to apply the CISG rather than the Dutch Civil Code.[74] Just as with the German interpretative instruction, the Dutch remark also has no binding effect upon foreign courts. Nevertheless, by making such an interpretative remark, the Dutch legislator made it clear that its legal system prefers the uniform solution over local Dutch law.[75] Therefore, if a court seated in an Article 95 Reservation State is directed by its PIL rules to apply Dutch law, and at the same time wishes to apply Dutch law in the way that the court in the Netherlands would, then that court should apply the Convention.

3. A Forum Located in an Article 95 CISG Reservation State

In a second possible scenario, the forum may be located in a Reservation State where interpretative problems may arise when one of the parties has its place of business in a CISG Contracting State and the other has not. It must be remembered, however, that where the prerequisites to the Convention's application are met via Article 1(1)(a), the possible issues arising from Article 95 CISG will not appear, thus will have no effect.[76] As mentioned before, the principal purpose of the Article 95 reservation was to exclude the reserving State's obligation under public international law to apply the Convention by the operation of Article 1(1)(b).[77] At the same time, however, the doctrine underlines that, "the courts of such a State [should not be prevented] from applying the Convention when their rules of private international law lead to the application of the law of a Contracting State".[78] As a result of the above, it is submitted in the doctrine that, although the courts in the Reservation States are not bound to apply the CISG by virtue of Article 1(1)(b), they should still apply the CISG when their own PIL rules lead to the law of a different (than the forum's) CISG Contracting State. This is the case because, in such situations the application of the Convention will not be led 'through the gates' of Article 1(1)(b), but by means of the forum's own PIL rules. Accordingly, when the PIL rules of the forum will be directed to a different CISG Contracting State – the court should apply the CISG as a part of that State's own law.[79] Consequently, the result of applying the CISG is reached exclusively by means of the forum's own PIL rules, thus without involvement of Article 1(1)(b) CISG.[80]

Conversely, a different situation appears when the PIL rules of the forum, i.e. a Reservation State, lead to that State's own law, thus the law of the forum. In that case, the court would most probably apply its own domestic law, and not the CISG.[81] It appears that this would be the only justifiable situation when the court should apply the Reservation State's domestic law instead of the CISG. This conclusion is substantiated by the reasoning presented in the Convention's *travaux préparatoires*, when presenting the reason behind the Article 95 reservation.[82] This line has been applied by state courts seated in the Reservation States.[83]

73 Article 2 of the Dutch Implementing CISG Act of 18th December 1991.

74 Although no case law in this respect can be found on the CISG database, nonetheless, this does not mean there is no case law that could present the Dutch line of reasoning where the PIL rules of other courts (seated in Article 95 Reservation States) would be directed to apply Dutch law.

75 F. De Ly, "Sources of International Sales Law. An Eclectic Model", *Journal of Law and Commerce* 25, 2005–2006, p. 11.

76 See for example: United States 15 June 2005 Federal District Court [New Jersey] (Valero Marketing v. Greeni Oy), available at: http://cisgw3.law.pace.edu/cases/050615u1.html (26.10.2020).

77 CISG-AC Opinion No. 15…, para. 1; U.G. Schroeter, "Backbone or Backyard of the Convention?…", p. 440.

78 Ibidem.

79 F. Ferrari, *Contracts for the International…*, p. 88–89; G.F. Bell, *Why Singapore Should Withdraw…*, p. 656.

80 U.G. Schroeter, "Backbone or Backyard of the Convention?…", p. 441.

81 F. Ferrari, *Contracts for the International…*, p. 88–89.

82 Accordingly, the signatory States that suggested the Article 95 CISG reservation during the Diplomatic Conference in Vienna, intended to be exempted from the duty to apply the CISG when the PIL rules lead the road to their own (reservation) domestic law. See: Official Records – Document A/CONF.97/C.2/L.7, p. 229, para. 82.

83 China, 20th July 1999, the Supreme Court of the People's Republic of China (Zheng Hong Li Ltd. Hong Kong v. Jill Bert Ltd. Swiss), available at: http://cisgw3.law.pace.edu/

In this respect, another individual approach is taken by Singapore, which is also an Article 95 CISG Reservation State. Singapore, in addition to the reservation itself, made an interpretative specification in its domestic law whereby, "the Government of the Republic of Singapore will not be bound by sub-paragraph (1)(b) of Article 1 of the Convention, and will apply the Convention to the Contracts of Sale of Goods only between those parties whose places of business are in different States when the States are Contracting States."[84] In accordance with the above, it appears that Singapore excludes the application of the Convention unless Article 1(1)(a) is met. A few US courts[85] have also applied a similar line of reasoning (only applying the CISG in Article 1(1)(a) situations), although this conclusion cannot be derived from the wording of the Article 95 reservation.[86]

4. A Forum Located in a CISG non-Contracting State

With regard to the discussed reservation, the last possible scenario is when the forum is located in a CISG non-Contracting State and its PIL rules lead to the law of an Article 95 Reservation State. In such circumstances, it must be highlighted that courts in the CISG non-Contracting States are not treaty-bound to apply the Convention.[87] As a result, the adjudicator is not bound with the provisions of the Convention, thus neither with Article 95 nor with Article 1(1)(b) CISG. The same applies to arbitrators seated in arbitral tribunals.[88] Nonetheless, when the PIL rules of the non-Contracting State would lead the court to the laws of a CISG Contracting State that has made the reservation, the question is whether that court would apply the CISG or the domestic – non-unified – state law of the Reservation State. In the spirit of this

The Article 95 CISG reservation leads to increased confusion and problematic conflict of law issues that bring more chaos than benefits.

cases/990720c1.html; China, 24th December 2004 CIETAC Arbitration proceeding (Medical equipment case), available at: http://cisgw3.law.pace.edu/cases/041224c1.html; United States, 22nd November 2002 Federal District Court [Florida] (Impuls v. Psion-Teklogix), available at: http://cisgw3.law.pace.edu/cases/021122u1.html; United States, 17th July 2006 Federal District Court [Washington State] (Prime Start Ltd. v. Maher Forest Products Ltd. et al.), available at: http://cisgw3.law.pace.edu/cases/060717u1.html (all 26.10.2020).

84 Sub-section 3(2) of the Singapore Sale of Goods (United Nations Convention) Act: "[s]*ub-paragraph (1)(b) of Article 1 of the Convention shall not have the force of law in Singapore and accordingly the Convention will apply to contracts of sale of goods only between those parties whose places of business are in different States when the States are Contracting States*." See: https://www.cisg.law.pace.edu/cisg/countries/cntries-Singapore.html (26.10.2020).

85 United States, 22nd November 2002 Federal District Court [Florida] (Impuls v. Psion-Teklogix), available at: http://cisgw3.law.pace.edu/cases/021122u1.html; United States, 17th July 2006 Federal District Court [Washington State] (Prime Start Ltd. v. Maher Forest Products Ltd. et al.), available at: http://cisgw3.law.pace.edu/cases/060717u1.html; United States, 22nd February 2011 Federal District Court [Kentucky (Princesse D'Isenbourg et CIE Ltd. v. Kinder Caviar, Inc. and Kinder Caviar, Inc. v. United Airlines, Inc.), available at: http://cisgw3.law.pace.edu/cases/110222u1.html (all 26.10.2020).

86 Such an interpretation was subject to right criticism in the doctrine, See: F. Ferrari, "Short notes on the impact of Article 95 reservation on the occasion of Prime Start Ltd. v. Maher Forest Products Ltd. et al.", *Internationales Handelsrecht*, 2006, p. 250.

87 See: T. Kadner Graziano, *The CISG Before the Courts*..., p. 174.

88 CISG-AC Opinion No. 15..., para. 3.19.

question, there are some authors that have recommended the application of the Convention, arguing that the application of the Convention in those cases is based not on Article 1(1)(b) CISG, but on the fact that the Convention is part of the domestic legal system of the applicable (foreign) law that was pointed to by the PIL of the forum.[89] There is at least one case that supports that reasoning, heard by the Appellate Court in Düsseldorf at the time when Germany was not yet a CISG Contracting State, though the outcome has come under some criticism.[90] The case was heard between a party from Germany and a party from the United States. The PIL rules of the forum led to the law of the USA, which at that time was already a CISG Contracting State and an Article 95 CISG Reservation State. Notwithstanding the reservation made by the USA, the court decided to apply the Convention. The above decision made by the Appellate Court in Düsseldorf is probably not to be repeated by any other German court, due to the interpretative remark made by Germany at the time of ratifying the Convention, as explained above.

On the other hand, however, there is a strong argument not to apply the CISG in the above described circumstances. This is due to the fact that, firstly, the court seated in the Non-Contracting State is not bound by the provision of Article 1(1)(b) CISG, and secondly, out of respect for the Reservation State's decision to make the reservation – will not apply the CISG.[91] As a case example, the Tokyo District Court held that the CISG, "should not be applied in circumstances where the forum is in a non-Contracting State, the forum has determined that the applicable law is that of a Contracting State that has made an Article 95 declaration, and the parties are from a non-Contracting and a Contracting State that has made an Article 95 declaration."[92] In the spirit of the above argumentation, some authors suggest not applying the CISG,[93] to which the present author is inclined to agree.

Conclusion

Taking into consideration the various approaches regarding the interpretative effects of the reservation under Article 95 CISG, it is clear that no agreement exists as to its uniform interpretation and application. The various perspectives presented in the doctrine and case law prove that the Article 95 CISG Reservation leads to problematic conflict of law issues that bring a lot of confusion in interpreting its effects. Such interpretations may not only depend on the particular forum where the case is heard, but may also depend on the particular court's interpretation in this regard, as even the state court decisions are not consistent in this respect. It appears that the initial motives for keeping the Article 95 Reservation have either lost their original grounds, or have no practical meaning, in particular in light of such a wide international acceptance of the Convention.

Given the diverse range of approaches to the interpretation of the Article 95 CISG effects, it is evident that uniformity in international law in this respect is infringed. It would be advisable for the remaining Article 95 Reservation States to withdraw their declaration of the reservation, which is possible under Article 97(4) CISG.[94] In addition, it is advisable for any potentially new CISG Contracting State that decides to

89 F. Ferrari, *Contracts for the International…*, p. 91.

90 G.F. Bell, *Why Singapore Should Withdraw…*, p. 62, fn. 38, where the author states: "[t]he court decided that the rules of private international law led to the application of a US law and erroneously applied the CISG notwithstanding the reservation the US had made." See the editorial remarks of Albert H. Kritzer available at: http://cisgw3.law.pace.edu/cases/ 930702g1.html (26.10.2020).

91 See: CISG-AC Op. No. 15, para. 3.18.

92 See: 2012 UNCITRAL Digest of case law on the United Nations Convention on the International Sale of Goods, Digest of Article 95 case law, para 5. For the decision see: Japan, 19 March 1998 Tokyo District Court (Nippon Systemware Kabushikigaisha v. O.), available at: http://cisgw3.law.pace.edu/cases/980319j1.html (26.10.2020).

93 See: T. Kadner Graziano, *The CISG Before the Courts…*, p. 174; P. Schlechtriem, in: P. Schlechtriem & I. Schwenzer (eds.), *Commentary on the UN Convention…*, 2005, p. 932, art. 95, para. 4; P. Huber, in: P. Huber & A. Mullis (eds.), *The CISG...*, p. 56; P. Winship, *The Scope of the Vienna Convention…*, p. 1–53.

94 In accordance with Article 97(4) CISG: "Any State which makes a declaration under this Convention may withdraw it at any time by a formal notification in writing addressed to the depositary. Such withdrawal is to take effect on the first

join the "CISG family" in the future, to abstain from making an Article 95 CISG reservation when ratifying the Convention, though this, unfortunately, did not happen in the case of very recent Member State – Lao People's Democratic Republic.

Last but not least, it is apparent that, due to the reservation in question, the operation of Article 1(1)(b) may depend on where either party is seated, or may depend on where the forum is situated. In this respect, it would be prudent for the contracting parties (or the advising lawyers) to pre-analyse the possible existence and effects of the reservation in a particular case. This is potentially an important but complicated issue, as it may not always be immediately obvious whether or not the Convention applies. Accordingly, if the parties intend to have their contract governed by the Convention, it is advisable to express that intention by virtue of a particular contractual clause opting for the CISG,[95] thus choosing the CISG on a (substantive) material law level.[96] If such a clause were to be validly incorporated into the contract, then regardless of the particular forum's interpretation regarding the reservation, it would still either way have to recognise that choice as having been made on a substantive law level. Conversely, if the parties agree not to have the Convention applied to their legal relationship, then it is advisable to make that intention explicit by introducing a relevant contractual clause expressly excluding the Convention.[97]

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day of the month following the expiration of six months after the date of the receipt of the notification by the depositary".

95 For example: 'this contract is governed by the law of State X, interpreted and supplemented by the United Nations Convention on Contracts for the International Sale of Goods (CISG)' or 'the rules of the United Nations Convention on Contracts for the International Sale of Goods (CISG) are incorporated in this contract to the extent that they are not inconsistent with the other terms of the contract and the laws of State Y'.

96 "Choice of law on a substantive law level" is nothing more than the expression of the parties' contractual autonomy. See e.g.: F. Ferrari, *Contracts for the International Sale of Goods*, p. 180–181; F. Ferrari, *The Sphere of Application of the Vienna…*, p. 38; P. Huber, in: P. Huber & A. Mullis (eds.), *The CISG…*, p. 65–66; E. Rott-Pietrzyk, "Swoboda stron w zakresie materialnoprawnego wyboru prawa modelowego (soft law)", in: *Rozprawy z prawa prywatnego oraz notarialnego. Księga pamiątkowa dedykowana Profesorowi Maksymilianowi Pazdanowi*, Warszawa 2014, p. 324.

97 This type of exclusion can be made by virtue of Article 6 CISG.

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All About the Money? Authorship and Copyright in Ancient Rome

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Introduction

What would a Roman have thought of the notion of copyright concerning a work of literature?[1] When there were, for example, more than one hundred plays attributed to Plautus before Varro made a choice and kept only twenty one of them,[2] we can bet he would have been quite surprised. The most problematic aspect from the point of view of the 21st century is that writers in ancient Rome did not always seek for money whereas nowadays authorship is mostly tied to the expectation of an income;[3] income that one's works must bring to an author, and income that their works must bring to a publisher which introduces the problem of exclusivity on one side and the question of copyright on the other.

In ancient Rome it was of course possible for a writer to earn money; the playwright who, for example, sold a play to a magistrate who wanted to have it performed at the *Ludi* he was sponsoring.[4] A second example is more complicated. When Statius was rewarded at the end of a lyrical competition by the emperor, he was thereby earning

1 On the notion of copyright and plagiarism in ancient times, see H.J. Wolff, *Roman Law. An Historical Introduction*, Norman 1951, p. 58 (there was no copyright then, which explains why people did not mind introducing some changes in the texts they were copying). See also A. Watson, *The Spirit of Roman Law*, Athens 1994, p. 17–19 on the different contracts of property. Some recent studies are much more focused on this topic, especially K. Schickert's *Der Schutz literarischer Urheberschaft im Rom der klassischen Antike*, Tübingen 2005: see her bibliography for older titles.

2 See W. Beare, *The Roman Stage. A Short History of Latin Drama in the Time of the Republic*, London 1950, p. 35–38 and J.C. Dumont & M.-H. Garelli-François, *Le théâtre à Rome*, Paris 1998.

3 Plagiarism in the academic world is another kind of situation, since it is a matter of title and not of money.

4 See J.C. Dumont & M.-H. Garelli-François, *Le théâtre à Rome*…

money with his poems. But the fact is it does not seem to have been common; many writers composed a work to ensure one's propaganda, to please friends, or to obtain glory which, therefore, meant immortality.[5] These authors did not earn any money with copies of their work whose circulation depended on a friend or a bookseller.[6] What about their rights as authors?

This paper aims to study the legal notion of authorship in ancient Rome concerning literary writings.[7] The period will be the Republic and the High Empire, from 240 BC to 117 CE. The first part shall deal with authors who earned their living with their literary output, while the second part shall focus on the authors who did not write to earn money and likely had a more subtle way to conceive their authorship as in the cases of Cicero and Pliny the Younger.

Writers in ancient Rome did not always seek for money whereas nowadays authorship is mostly tied to the expectation of an income.

1.1. To earn money by writing a work of literature, and even earn one's living, has probably never been easy in spite of some successes such as the adventures of Harry Potter or the complications of *Fifty Shades of Grey*. Was it easier in ancient Rome?[8] The beginning of Roman literature offers some early examples of authors who earned their living with their plays including Titus Maccius Plautus, be it his real name or a pen name such as Molière for Jean-Baptiste Poquelin. Plautus is said to have earned a lot of money thanks to his comedies. According to his biography, which sounds a bit like a novel sometimes, Plautus would have even managed to earn his living the same way after the loss of his entire fortune in maritime trade.[9] It seems it was really worth writing plays, but in actual fact, Plautus did not earn money solely as an author of comedies: he was an *actor*, i.e. the leader of a band of actors. He did not earn his living only by writing but also by playing roles in his own comedies.[10] He worked for magistrates who paid him to write a comedy for the games to come and there was also a contract between the magistrate who was in charge of some *Ludi*[11] and Plautus who gave exclusive rights to his play that it only be used on that occasion.

5 See E. Sage, "The Profits of Literature in Ancient Rome", *CW* 10, 1917, p. 170–172.

6 See E. Rawson, *Intellectual Life in the Late Roman Republic*, London 1985, p. 42–44 and G. Cavallo, *Libri, editori e pubblico nel mondo antico*, Roma 1992.

7 We are thankful to Sebastien Evrard (University of Lorraine) for convincing us to study this topic, since there is not much bibliography and it is probably because we stand here at the crossroads between classical philology and law. See V.R. Perrino, "Proprietà intellettuale nell'antichità: questioni teatrali", *Senecio*, Napoli, 2016, p. 34–77 on two aspects which we will not take into account here: firstly, the polemics among authors such as Terentius who was accused of using Greek models and abusing of the *contaminatio*, because these are literary polemics and not law, and then the copyright of sculptures and other works of art since we have chosen to concentrate on literature. See A. Plisecka, *Tabula picta. Aspetti giuridici del lavoro pittorico in Roma antica*, Padova 2011, p. 121–169.

8 Martial does not seem to think it was possible to earn one's living this way in Rome, cf. Martial 3.38.

9 Cf. Gell. 3.3.14.

10 See H. Leppin, *Histrionen. Untersuchungen zur sozialen Stellung von Bühnenkünstlern im Westen des Römischen Reiches zur Zeit der Republik und des Prinzipat*, Bonn 1992, p. 84–90 and J.C. Dumont & M.-H. Garelli-François, *Le théâtre à Rome*, p. 32–34. Contra G. Duckworth, *The Nature of Roman Comedy. A study in Popular Entertainment*, Princeton 1952, p. 74 who does not consider Plautus an *actor*. It is possible Plautus started his career as an author and actor, and later gave up managing.

11 See G.E. Duckworth, *The Nature of Roman Comedy*, p. 76–79: the *Ludi Apollinares* were to be organized by the *praetor urbanus*.

A better example of the financial situation of authors might be Publius Terentius Afer who never was an *actor*: he must have sold his first *opus*, *Andria*, to an *actor* whom a magistrate had asked to perform a comedy for some *Ludi*, another scenario being the actor recommended him to the magistrate who bought a play directly from him. This manager might have been L Ambivius Turpio, with whom Terentius was in touch.[12] But since, after his success, the poet was protected by what Pierre Grimal[13] called « le cercle des Scipions » (Scipio Aemilianus' circle of friends), did he need to sell his other plays?[14] The *Adelphi* which were performed in 160 BC at the funeral of Aemilius Paulus, the biological father of Scipio Aemilianus, were certainly a gift from the author to the man who had protected him.

1.2. Terentius also offers a transition between the independent author who earned money by selling a comedy or a tragedy and the poet who earned his living by writing for his *patronus*. In this situation there was no clear contract nor exclusive rights, and the case is then more complex which one can notice in the case of Ennius,[15] who belonged to the second generation of writers in ancient Rome. He lived in the house of several important families; his first patronus seems to have been Cato the Elder who had noticed him during a mission in Southern Italy and brought him to Rome. What was expected from a live-in poet for the price of this protection? Ennius praised the exploits of his protector, but he also entertained him and helped to educate his children. He gained some advantages in return, including Roman citizenship which a son of M. Fulvius Nobilior[16] had managed to obtain for him. This was an honour, but it was also a legal and financial advantage. Indeed, Cesar offered the *ius civitatis* as an incentive to convince some Greek doctors to come and work in Rome.[17] This financial advantage was bigger after the battle of Pydna in 168 BC than in 184 BC when Ennius became a *civis Romanus*, since the victory over the Macedonian king allowed for the reduction of taxes on Roman citizens at that time.

1.3. This might explain the case of another poet who enjoyed the protection of several members of Roman high society, namely Archias, who remains famous because of Cicero's speech in 62 BC during a trial.[18] Born in the city of Antiocheia, this Greek poet came to Rome around 103 BC, and his way of life is a good example of this exchange of services between an author and his protectors who took him into their home, as he composed some poems to praise Marius and Lutatius Catulus,[19] both consuls in 102 BC, and their victory over the Cimbers at Vercelli. He later obtained Roman citizenship thanks to the Luculli and became then Aulus Licinius Archias. This result has been attested since there was a contestation in a trial, but *when* it happened is much discussed and this might show how much Roman citizenship was a material advantage in those times, i.e. a reward for a live-in poet in exchange for his poems. A recent study[20] considers that Archias

12 G.E. Duckworth, *The Nature of Roman Comedy*, p. 72–73. See W. Beare, *The Roman Stage. A Short History of Latin Drama in the Time of the Republic*, p. 156–158, cf. Terence, *Hec.* 57 (the actor bought a play from the author) and *Eun.* 20 (the actor is paid by the magistrates).

13 See P. Grimal, *Le siècle des Scipions*, Paris 1975.

14 The comedy *Hecyra* raises a problem since the representation was interrupted twice before a third performance; the manager of the actors' band might have considered the play not good enough, but it seems he trusted the author to the end and considered the problem came from the audience. See W. Beare, *The Roman Stage. A Short History of Latin Drama in the Time of the Republic*, p. 157: the actor seems to have given back the manuscript to Terentius in order for it to be improved.

15 See J. Penzel, *Variation und Imitation. Ein literarischer Kommentar zu den Epigrammen des Antipater von Sidon und des Archias von Antiocheia*, Trier 2006, p. 29–34 (biography). The remains of his poems are to be found in the editions of Vahlen and O. Skutsch.

16 Marcus Fulvius Nobilior was consul in 189 BC. That year he took Ennius in his staff when going to Etolia. See A. Walther, *M. Fulvius Nobilior. Politik und Kultur in der Zeit der mittleren Republik*, Heidelberg 2016, p. 180–207 on his ties with Ennius.

17 See J. André, *Être médecin à Rome*, Payot, Paris, 1987 (2nd ed.), p. 140.

18 See A. Coskun, *Cicero und das römische Bürgerrecht. Die Verteidigung des Dichters Archias*, Göttingen 2010.

19 See F. Hinard, *Sylla*, Paris 1985, p. 43–46 on this battle and p. 151 on the suicide of Lutatius Catulus.

20 See A. Coskun, *Cicero und das römische Bürgerrecht…*: this version can already be found in E. Gruen, *The Last*

attained the citizenship of the city of Heraclea in the 90s BC thanks to Marcus Lucullus, the younger brother of the more famous Lucius,[21] during a trip from Sicily to Rome which might have been the usual yearly « tour du propriétaire » in the Sicilian estates or when returning after a mission on the staff of a governor. Then came the *lex Papiria* in 89 BC which granted Roman citizenship to the cities of South of Italy, and then Archias would have automatically become a *civis Romanus* immediately enrolled on the lists in 89 BC. But Cicero does not say any such thing in his speech:

> *Interim satis longo intervallo, cum esset cum M. Lucullo in Siciliam profectus, et cum ex ea provincia cum eodem Lucullo decederet, venit Heracliam: quae cum esset civitas aequissimo iure ac foedere, ascribi se in eam civitatem voluit; idque, cum ipse per se dignus putaretur, tum auctoritate et gratia Luculli ab Heracliensibus impetravit. Data est civitas Silvani lege et Carbonis: "Si qui foederatis civitatibus ascripti fuissent; si tum, cum lex ferebatur, in Italia domicilium habuissent; et si sexaginta diebus apud praetorem essent professi." Cum hic domicilium Romae multos iam annos haberet, professus est apud praetorem Q. Metellum familiarissimum suum.*[22]

It all might also be based on a somewhat dubious interpretation of Cicero who underlines the automatic consequence of becoming a citizen of Heraclea but does not say explicitly that the *lex Papiria* was enacted thereafter. Actually the chronology might be reversed; Archias got the citizenship of Heraclea after the law Papiria had been enacted in order to become automatically but indirectly a *civis Romanus*. This legal trick must have been used quite often to obtain Roman citizenship indirectly at a time when there was strong resistance in Rome to such awards. This abuse was proved extant by a law enacted in 65 BC to restrict it in the form of the *lex Papia de peregrinis*.[23] It does not change anything as far as our perspective is concerned, but it reinforces the idea that Roman citizenship was a great reward with legal and financial advantages for a live-in poet. It was a way to pay him, even if there was no written contract between him and his protectors. Archias indeed wrote an epic poem on Lucullus'operations against Mithradates.[24]

Roman citizenship was a great reward with legal and financial advantages for a live-in poet.

1.4. Each of these three cases offers a key to evaluate the situation of the poet Martial. Just like Plautus, he was a *civis Romanus*, and it wouldn't have been possible to reward him with Roman citizenship; he was more interested in other material advantages that he could obtain thanks to his poems. Just like Ennius and Archias, Martial had powerful protectors, but the big difference is the Principate; instead of two or three members of high society there was the *Princeps*, and Martial lived under the Flavians who wanted to reward intellectuals.[25] Quintilian enjoyed a public chair, i.e. a salary coming from the then Emperor Vespasian,

Generation of Roman Republic, Berkeley 1974, p. 267 after the presentation of Reizenstein (*RE* 20) in 1885. See also E. Badian, "Notes on Provincial Governors", *Studies in Greek and Roman History*, Oxford 1964, p. 79 who considers Archias became a *civis Romanus* only in 88 BC, which Coskun refuses.

21 On M. Terentius Varro Lucullus, see A. Keaveney, *Lucullus. A Life*, London 1992, p. 129 for a summary of his career (and p. 10 on Archias).

22 Cicero, *Arch.* 5–6.

23 See G. Rotondi, *Leges publicae populi Romani*, Hildesheim 1990 (1st ed. 1914), p. 377.

24 See A. Coskun, *Cicero und das römische Bürgerrecht…*, p. 25: Archias also helped to educate the two sons of Lucullus, *ibidem*, p. 66–67.

25 See H. Bardon, *Les empereurs et les lettres latines d'Auguste à Hadrien*, Paris 1940.

which amounted to 100,000 sesterces per year. The poet Statius, who won three times at the *Ludi Albani* after some competitions in the area of Naples, was granted rewards by the Emperor.[26] Martial was rewarded by Titus and Domitian,[27] firstly in 80 CE when he wrote the *Liber spectaculorum*.[28] He praises the two Princes for having given him the *ius trium liberorum*:[29]

> *Praemia laudato tribuit mihi Caesar uterque*
> *Natorumque dedit iura paterna trium.* (3.95.5–6)

In other poems he asks Domitian for a reward:[30]

> *Sic ego: sic breuiter posita mihi Gorgone Pallas:*
> *"Quae nondum data sunt, stulte, negata putas?"*
> (6.10.11–12)

While Martial complains, Minerva, who was Domitian's favourite goddess, answers that the reward will come. It does not mean Martial had no other protectors; like his concurrent Statius he was in touch with L. Arruntius Stella (cos. suff. 101 CE).[31] But the Emperor could offer much more money and also grant some social advantages in that Martial might have become an *eques Romanus* this way.[32] And when he offers a list of the gained advantages, we find two houses mentioned:

> *rumpitur invidia quod rus mihi dulce sub urbe est*
> *parvaque in urbe domus, rumpitur invidia.* (9.97.7–8)

Whether these two pieces of real estate were a gift from the Emperor or, not unlike the gift of a home in Spain which was given to him by a Roman lady, from another protector when Martial decided to leave Rome for good, we don't know, but these material advantages were certainly a reward for his talent as a poet.

Writing could also be financially rewarding thanks to some protectors; did Martial earn money another way with his poems? He seems to have been in touch with some booksellers who did not hesitate at that time to ask famous writers to give them a copy of their works:

> *Exigis ut nostros donem tibi, Tucca, libellos.*
> *Non faciam: nam uis uendere, non legere.* (7.77)

Quintilian too had to face such a request which he finally accepted, fearing a bad and incomplete copy of his works be disseminated.[33] His aim then was not to earn money, but to protect the integrity of his intellectual work along with his reputation. Martial's case sounds a bit different, because if he had refused Tucca, it seems there might have been an agreement with at least one other bookseller:[34]

> *Exigis ut donem nostros tibi, Quinte, libellos.*
> *Non habeo, sed habet bibliopola Tryphon.*
> *"Aes dabo pro nugis et emam tua carmina sanus?*
> *Non, inquis, faciam tam fatue." Nec ego.* (4.72)

26 See R. Nauta, *Poetry for Patrons. Literary communication in the Age of Domitian*, Leiden 2002, p. 195–199. Statius was defeated at the Ludi Capitolini in the early 90s CE; these games had been instituted by Domitian in 86 CE and happened every four years. This Prince had also instituted the *Ludi Albani* to honour the goddess Minerva: these games seem to have been annual (*ibidem*, p. 328–329), see R. Nauta, *Poetry for Patrons…*, p. 328–335.

27 Cf. Martial 4.27.

28 See the recent edition of K.M. Coleman, *M. Valerii Martialis Liber spectaculorum*, Oxford 2006, p. XLV–LXXX.

29 Cf. Martial 9.97. This advantage, granted by the prince since Augustus' reign, allowed one to be exempted of honorific and ruinous charges, for example.

30 Cf. Martial 4.27: *da, Caesar, tanto tu magis, ut doleat*.

31 See R. Nauta, *Poetry for Patrons…*, p. 211–212.

32 See W. Allen Jr, "Martial: Knight, Publisher poet", *CJ* 65, 1970, p. 345–357: since Martial writes he was a *tribunus*, the question is to know whether he got the tribunate because he was an *eques* or if he became *eques* thanks to his charge of *tribunus*. The difference is of some importance for us, since the second interpretation makes an imperial reward of the statute of *eques*.

33 Cf. Quintilian, *IO* 1 pr. 7 et 7.2.24.

34 See E. Rawson, *Intellectual Life in the Late Roman Republic…* and P. White, "Bookshops in the Literary Culture of Rome", in: W.A. Johnson & H.N. Parker (eds.), *Ancient Literacies. The Culture of Reading in Greece and Rome*, Oxford 2009, p. 278–279. Martial was in touch with four booksellers: Secundus (1.2), Pollius Valerianus (1.113), Atrectus (1.117) et Trypho (4. 72 et 13, 3). Atrectus and Secundus had their shop on the Argilete, which was the centre of book-trading in Rome: see T. Peck, "The Argiletum and the Roman Book-trade", *CPh* 9, 1914, p. 77–78 and E. Sage, "The Publication of Martial's Poems", *TAPhA* 50, 1919, p. 168–176.

Trypho was a very famous bookseller[35] in the 90s CE in Rome. Now, does Martial refuse to give his book to Quintus simply because he does not like this man who seems to think it is not worth paying some money and thus attributing real value to Martial's work, or does he refuse because he hopes to earn some money from the bookseller which would be close to modern notions of copyright? This is still impossible to determine. Still, a hint might be given by another poem:

> *Non urbana mea tantum Pimpleide gaudent*
> *otia, nec vacuis auribus ista damus*
> *sed meus in Geticis ad Martia signa pruinis*
> *a rigido teritur centurione liber,*
> *dicitur et nostros cantare Britannia versus.*
> *quid prodest? Nescit sacculus ista meus.* (11.3.1–6)

The brevity of the last sentence, which is very sharp, underlines the dissatisfaction of Martial though it was a sign his talent was recognized in every part of the Roman Empire. The question would be to decide whether the reader should take this sentence at face value, meaning that the kind of agreement between an author and a bookseller in Rome – where they both lived – could not exist in other places far away from the centre, or read rather more between the lines and then Martial seems to just feign disdain for this success. We might choose an intermediate interpretation; money in itself is not the most important factor but is used by the poet as a symbolic way[36] to assess how highly his talent was recognized.

How are we to understand, then, the numerous complaints about plagiarism one can find in Book I?[37] No less than eight poems are about this specific problem[38] which Martial seems to have met when he was already famous after three books,[39] at around 85–86 CE. Some *patroni* of the poet pretended to be the authors of his poems,[40] and Martial proffers two names: Fidentinus, and Celer.[41] Actually it was quite easy to be a victim of plagiarism in ancient Rome because of the different steps within the process of writing.[42] Firstly there was a time to write a first draft in solitude, then came the second step which saw a semi-public dissemination of the draft either by mail or via a lecture in front of a happy few who could give advice. The third step was to improve and modify the first draft. Then, finally, the author would read his final draft again in front of a larger audience in order to make it known.

All in all, no one could prevent someone from getting the work of a writer one way or another and organizing a *recitatio* while pretending to be the author of what he read. Martial could be very sarcastic about it:

> *Quem recitas meus est, o Fidentine, libellus:*
> *sed male cum recitas, incipit esse tuus.* (1.38)

The plagiarist could ask the author directly to read his poems:

35 See G. Cavallo, *Libri, editori e pubblico nel mondo antico…* and H. Blanck, *Das Buch in der Antike*, München 1992, p. 126–127.

36 See H. Zehnacker, in: H. Zehnacker & J.C. Fredouille, *Littérature latine*, Paris 1993, p. 309 on the provocative poet.

37 See S. McGill, *Plagiarism in Latin Literature*, Cambridge 2012, p. 74–113. The problem reappears once in Book II, cf. Martial 2.20: *Carmina Paulus emit, recitat sua carmina Paulus./ Nam quod emas possis iure uocare tuum*. Vitruvius had already complained about plagiarism and asked for legal protection, cf. *De Arch.* 7 pr. 3.

38 See M. Citroni, *M. Valerii Martialis. Epigrammaton Liber primus*, Firenze 1975, p. XXII–XXIII.

39 See J.P. Sullivan, *Martial. The unexpected classic*, Cambridge 1991, p. 15–24: Book I was published around 86 CE, so after the *Liber spectaculorum* had been written in 80, and after the *Xenia* and the *Apophoreia* (very often presented as books XIII et XIV) published in 84.

40 Another case of plagiarism was to let the poet which one protected present Martial's poems as his, cf. Martial 1.52.1–3 when he compares his verses to freedmen who would be enslaved again, which was forbidden by the *lex Fabia de plagiariis* (*Inst.* 4.18). See K. Schickert, *Der Schutz literarischer Urheberschaft…*

41 See the prosopographical results of R. Moreno Soldevilla, A. Marina Castillo & J. Fernandez Valverde, *A Prosopography to Martial's Epigrams*, Berlin 2019 and M. Citroni, *M. Valerii Martialis. Epigrammaton…*

42 See G. Galimberti Biffino, "Oralité et écriture dans la circulation littéraire. Le cas de Pline le Jeune", in: Y. Perrin (ed.), *Neronia VIII. Bibliothèques, livres et culture écrite dans l'empire romain de César à Hadrien*, Bruxelles 2010, p. 263–272.

Vt recitem tibi nostra rogas epigrammata. Nolo:
non audire, Celer, sed recitare cupis. (1.63)

If the author was his client, then an indelicate *patronus* could put him under pressure. Another solution was to attend a semi-public lecture and transcribe what had been read, and Martial mentions a very careful man whose memory was good enough to allow him to know the poems by heart:

Sic tenet absentes nostros cantatque libellos
ut pereat chartis littera nulla meis:
denique, si uellet, poterat scripsisse uideri;
sed famae mauult ille fauere meae. (7.51.7–10)

As the poet notes, this fan could have been a plagiarist, but since he was knowledgeable in the law too, *iure madens*, he used his memory just for pleasure to read the verses he enjoyed. Nevertheless, others would use their skills to make a copy in order to read it later and this is precisely what some booksellers did when an author refused to give them a copy of his work. A third way was to buy a copy in a bookshop.[43] Martial offers, quite cynically, a deal to a plagiarist:

Fama refert nostros te, Fidentine, libellos
non aliter populo quam recitare tuos.
Si mea uis dici, gratis tibi carmina mittam:
si dici tua uis, hoc eme, ne mea sint. (1.29)

Once again it might be just provocation, but Martial then underlines another interpretation of authorship, wherein the author sells his work – a novel, an essay, and even a dissertation sometimes – and gives the right to the buyer to pretend he wrote it without, essentially, being a plagiarist. "As long as I am paid, it is all right to play another part and give up my authorship", Martial appears to say, but it is not sure he really meant it. In another poem[44] he explains the indelicate should pay not only for the work, but also for the author's silence:

Aliena quisquis recitat et petit famam,
non emere librum, sed silentium debet. (1.66.13–14)

Martial does not seem to have been willing to keep silent, because even if his literary work was a way to attain rewards, authorship meant *fama* and *gloria*, which one can notice in the following poem:[45]

Ante fores stantem dubitas admittere Famam
teque piget curae praemia ferre tuae?
Post te uicturae per te quoque uiuere chartae
incipiant: cineri gloria sera uenit. (1.25.5–8)

Praemia should not be taken literally, but in association with the vocabulary of glory it is probably figurative; Faustina's reward will be fame.[46] It is worth noting that this preoccupation is already present in Book I, though much more important and concerning Martial himself in Book X, maybe at a time when he

It was quite easy to be a victim of plagiarism in ancient Rome because of the different steps within the process of writing.

43 See E. Rawson, *Intellectual Life in the Late Roman Republic*… and P. White, "Bookshops in the Literary Culture of Rome", p. 278–279. The bookseller got a text either by obtaining it from the author, or by transcription of a speech during a process, by someone he had sent or someone else who came to sell him his transcription. The first version of the *Pro Milone* seems to have been diffused that way.

44 See M. Citroni, *M. Valerii Martialis Epigrammaton*…

45 Pliny the Younger wrote the same kind of invitation to friends who were reluctant to diffuse their work, cf. *Epist.* 2.10.

46 See M. Citroni, *M. Valerii Martialis Epigrammaton*…

could no longer hope for rewards under the Antonine Emperors who were reluctant to favour him:

> *At chartis nec furta nocent et saecula prosunt,*
> *Solaque non norunt haec monumenta mori.'*
> (10.2.11–12)

These verses might remind us of some letters by Pliny the Younger once more, because they simply affirm what most Roman writers thought; writing allows one to escape annihilating death because literary work will remain for posterity with the glory of the poet. Nevertheless, we are not very far away from the law because of the *furta*: the thieves, probably to be understood as plagiarists here, don't matter when it is all about glory in posterity.

The importance of glory explains why Martial protests when some verses are disseminated under his name.

The importance of glory explains why Martial protests when some verses are disseminated under his name. There could be different ways and for different reasons; we'll not give too much importance to those verses which were forged in order to harm a friendship,[47] though calumny has something to do with the law, but we'll concentrate on the two other kinds of forgery. On the one hand, the easiest way was to compose a poem and pretend it was written by Martial:

> *Vernaculorum dicta, sordidum dentem,*
> *Et foeda linguae probra circulatricis,*
> *Quae sulphurato nolit empta ramento*
> *Vatiniorum proxeneta fractorum,*
> *Poeta quidam clancularius spargit*
> *Et volt videri nostra. Credis hoc, Prisce*? (10.3.1–6)

This could be a way to sell a book of poems to a bookseller he would not have taken otherwise. From Martial's point of view his reputation might suffer from the poor quality of these poems:

> *Procul a libellis nigra sit meis fama,*
> *Quos rumor alba gemmeus vehit pinna* (10.3.9–10)

The problem is not directly money-based, but rather one of reputation; a bad reputation could mean fewer rewards. On the other hand there were interpolations, i.e. books where his verses were mixed with the verses of someone else who then pretended Martial had written the whole book:

> *Quid, stulte, nostris versibus tuos misces?*
> *Cum litigante quid tibi, miser, libro?* (10.100.1–2)

Was it a question of money? It might have indeed been a way to earn money when selling to others a patchwork of verses which one would have heard in a semi-public lecture and of other verses to complete, mixed with the satisfaction of diffusing one's own work even if under another name. But once more Martial considers it from the point of view of *fama*. From a legal standpoint, Martial's poems might better be taken as a mix of old standards and of modernity leading to modern-day copyright because he was living in a time wherein there were professional booksellers.

2.1 This, then, sees us arrive at the case of the writers who did not try to earn money or any material advantage; as already mentioned, they aimed at defending their political choices, and at pleasing friends, which explains why Caesar or Pliny the Younger would never have had the idea to make money with their literary work. And then they did not earn anything when a copy of their work was diffused. What can one learn from a situation where authorship did not necessarily mean copyright? Cicero's is an interesting case which lies somewhere between hoping for glory and maybe

47 Cf. Martial 10.33.

being willing to earn money with his works, at least if we follow some interpretations.[48] The authorship of his speeches, treatises and letters is doubtless,[49] even if many people took part in the process of their creation. The first occasion was the choice of the topic; concerning the speeches it was a matter of political events. Once the speech had been read, Cicero could change it and we now know the version we have is quite different sometimes of what the audience heard.[50] The aim of the diffusion of these speeches was not to earn money; Cicero wanted to ensure the success of his position by making it clear in the provinces where people would have heard about the trial or the discussions in the Senate without having the details. Of course he also aimed at being admired…

to his being sent into exile by Clodius. This explains why Cicero officially denied being his author, though admitting the facts in a letter to Atticus:

> *Scripsi equidem olim ei iratus, quod ille prior scripserat, sed ita compresseram ut numquam emanaturam putarem. Quo modo exciderit nescio. Sed quia numquam accidit ut cum eo verbo uno concertarem et quia scripta mihi uidetur neglegentius quam ceterae, puto ex se probari non esse meam.*[52]

Cicero had multiple chances to be believed, considering the fact that many fakes were diffused…[53]

2.2. The treatises leave no place for contestation of authorship. It could start with the invitation of

What can one learn from a situation where authorship did not necessarily mean copyright?

This explains why there is almost never any argument about his authorship, except when suddenly an old invective *In Clodium et Curionem*[51] is diffused, precisely at the most embarrassing time for him due an *amicus* – the Latin word for a friend and political ally – who asked Cicero to write a treatise for him. For some of them – Caelius[54], Trebonius[55] or Dolabella[56] – the topic did not matter as long as it could be more or less related to them. Some relatives could be much more precise; Atticus suggests Cicero write a book on geography,[57] then later a letter which would be a political programme for Caesar.[58] In the same

48 See R. Sommer, "T. Pomponius atticus und die Verbreitung von Ciceros Werke", *Hermes* 41, 1920, p. 389–422. G. Cavallo, *Libri…* (and "Libri scribi scritture a Ercolano", *CronErc* 13, suppl., 1983) is convinced Atticus was an editor, like H. Blanck, *Das Buch in der Antike*, p. 125. *Contra* E. Rawson, *Intellectual Life in the Late Roman Republic*. Also J.J. Philipps, "Atticus and the Publication of Cicero's Works", *CW* 79, 1986, p. 227–237. Recently A. Dortmund, *Römisches Buchwesen um die Zeitenwende. War T. Pomponius Atticus (110–32 v. Chr.) Verleger?*,Wiesbaden 2001 who does not follow Cavallo, and M. Buckley, "Atticus, Man of Letters, Revisited", in: K. Sidwell (ed.), *Pleiades Setting. Essays for Pat Cronin on his 65th Birthday*, Cork 2002, p. 15–33.

49 There is an exception: the famous invective against Sallust, which is probably a fake written by students of a school for rhetoric: see R. Syme, *Sallust*, Berkeley 1964.

50 See J. Humbert, *Les plaidoyers écrits et les plaidoiries réelles de Cicéron*, Paris 1925.

51 Cf. Cicero, *Att.* 3.12.2 (July 58 BC).

52 Cf. Cicero, *Att.* 3.12.2 (July 58 BC).

53 Cicero mentions an epigram on the *lex Aurelia* which circulated under the name of his brother Quintus when this one was trying to be edile, though it was a fake, cf. *Q.Fr.* 1.1.8.

54 Cf. Cicero, *Fam.* 8.3.3 (June 51 BC). On Caelius (Cicero's student, praetor in 48 BC) see M. Dettenhofer, *Perdita Juventus*, München 1994 and P. Cordier, "M. Caelius Rufus, le préteur récalcitrant", *MEFRA* 106, 1994, p. 533–577.

55 This lieutenant of Caesar once asked Cicero to be a character in one of his treatises, cf. *Fam.* 12.16.4: see R. Etienne, *Les Ides de Mars*, Gallimard, Paris, 1973, p. 154–155.

56 Cf. *Att.* 13.10.2 and 14.2. Dolabella was Cicero's last son-in-law and an officer of Caesar: see M. Dettenhofer, *Perdita…*

57 Cf. *Att.* 2.4.3.

58 Cf. *Att.* 13.26.2.

vein as the speeches, it was not a matter of copyright nor money; it was quite often an intellectual challenge with almost a nationalist aspect, as the Latin language was expected to surpass the Greek one in all literary forms. Once the topic was chosen, there were other occasions to play a part, not to mention the help of the owners of big private libraries[59] such as Atticus who lent books[60] when Cicero asked for them, or Faustus, Sulla's son, who allowed him to come and work in his house,[61] and some relatives could intervene directly on the composition when making stylistic remarks or suggestions about the characters:[62] Sallust suggested a change[63] in the *De re publica* while Cicero read a first draft of this treatise for some friends in his villa in Tusculum.

2.3. The last sequence could sometimes be the most problematic. Indeed, once Cicero had finished writing, he sent the draft to his friend Atticus who owned a team of slaves very well-trained in copying,[64] in order to have a presentable version. Sometimes Cicero noticed a mistake about a name or even remembered he had already used the same preamble,[65] and then felt like modifying his draft. But some relatives may have come to visit Atticus and preview the work of Cicero in his house, not mentioning the boldness of those who managed to obtain a copy:

> *Scripta nostra nusquam malo esse quam apud te, sed ea tum foras dari cum utrique nostrum videbitur. Ego et librarios tuos culpa libero neque te accuso et tamen aliud quiddam ad te scripseram, Caerelliam quaedam <habere quae nisi a te> habere non potuerit. Balbo quidem intellegebam sat faciendum fuisse, tantum nolebam aut obsoletum Bruto aut Balbo incohatum dari.*[66]

Cicero was furious to see a perfectible – *incohatum* – draft diffused, and felt embarrassed that the addressee would not be the first – *obsoletum* – to read his work, because in ancient Rome the choice of the addressee was as important as the treatise if not more so. The author offered a literary work as a *pignus*, a pledge of good relationship and of political alliance, and what mattered then was the tie which was established and claimed between two names.[67]

3.1. Pliny the Younger[68] will be our second case. He belonged to political elites, became consul then governor of Bithynia-Pontus, and was much richer than Cicero. He also played the part of literary adviser within a circle of friends, and his letters are a precious testimony on authorship. It seems at first sight the process of writing is the same;[69] an author writes a first draft on his own, then asks for the point of view of some selected friends who can suggest some modifications, either during a *recitatio* or after it:

> *Verum haesitanti mihi, omnia quae iam composui vobis exhiberem, an adhuc aliqua differrem, sim-*

59 See E. Rawson, *Intellectual Life in the Late Roman Republic*…

60 He also helped from time to time when some chronological details had to be checked: see Y. Benferhat, "Quand il n'y a rien à transmettre: le droit de la propriété intellectuelle, Atticus et la diffusion des oeuvres de Cicéron", *Fundamina* 19, 2013, p. 1–11.

61 Cf. *Att.* 4.9 (55 BC): see H. Blanck, *Das Buch in der Antike*…

62 Cf. *Att.* 12.12.2 and *Att.* 13.16.1. Cicero explains the problem of characters in his treatises in a letter from June 45 BC, cf. *Att.* 13.19.3–5.

63 Cf. Cicero, *Q. Fr.* 3.5.1–2.

64 Those slaves are named in the letters: Musca (*Att.* 12.40.1), Pharnace (*Att.* 13.44.3 and 29.3), Anteus (*Att.* 13.44.3) and Salvius (*Att.* 9.7 and 13.44.3). The aim was to have copies without any typos, which happened quite often then, cf. *Q. Fr.* 3.5.6.

65 Cf. *Att.* 16.6 (preamble used twice) and *Att.* 12.6a.1 (a mistake about Aristophane).

66 Cicero, *Att.* 13.22.3 on Book 5 of *De Finibus* in 45 BC.

67 Appius Claudius wrote in 51 BC a *Liber auguralis* he dedicated to Cicero who was an augur like him, cf. *Fam.* 3.4.1: after the quarrels and critics about the Cilicia, it was time to be *amici* again. In 46 BC Trebonius wrote a book for Cicero, cf. *Fam.* 15.21.1–3. Long before that, in 54 BC Quintus Cicero invited his brother to write an epic poem for Cesar, cf. *Q. Fr.* 3. 7.6.

68 See N. Methy, *Les lettres de Pline le Jeune. Une représentation de l'homme*, PUPS, Paris, 2007.

69 See R. Winsbury, *Pliny the Younger. A life in Roman Letters*, London 2014, p. 16–22 and p. 168–169, and also G. Galimberti Biffino, "Oralité et écriture dans la circulation littéraire. Le cas de Pline le Jeune"…

plicius et amicius visum est omnia, praecipue cum affirmetis intra vos futura, donec placeat emittere.[70]

Intra vos is the condition put to the exchange; the draft must not be diffused, and the friend who asked for it must help to improve it, but only with suggestions which Pliny would take into account later:

Quod superest, rogo ut pari simplicitate, si qua existimabitis addenda commutanda omittenda, indicetis mihi.[71]

After the changes, the book was read within a wider circle of relatives who would discover it this way, and finally the author could take the decision to disseminate his work. The friends who had enjoyed his work got copies; Pliny would find his books in a bookseller's shop not only in Rome,[72] but also in Lugdunum.[73]

While the process of writing seems to be the same, the context was actually completely different because of a stable constitutional settlement under the Antonines which brought an end to the link between literary leisure and games of political alliances. Pliny the Younger shares his taste for literature with friends who belong to the same social circle of high administration. Another difference with Cicero is that all these literary works we hear of in Pliny's letters don't seem to have been published (except for Tacitus's monographs) or at least were not meant for posterity. The aim was not to write a long-lasting *opus*, but to amuse themselves and have fun by exchanging poems and sharing a mutual taste for literature. Quality is not to be searched for in the composition of the poem but in the ties which one is forging and keeping up by offering the poem.

3.2. Last but not least, a third difference is that things go much further among Pliny's friends, because the authorship seems to be diluted and even dissolved[74] during this friendly exchange of literary works. There are at least two examples of this, the first being when Pliny sends a draft with variants:

The authorship seems to be diluted and even dissolved during this friendly exchange of literary works.

Postea enim illis ex aliqua occasione ut meis utar, et beneficio fastidi tui ipse laudabor, ut in eo quod adnotatum invenies et suprascripto aliter explicitum. Nam cum suspicarer futurum, ut tibi tumidius videretur, quoniam est sonantius et elatius, non alienum existimavi, ne te torqueres, addere statim pressius quiddam et exilius, vel potius humilius et peius, vestro tamen iudicio rectius.[75]

The context might not be a literary game this time, but rather an administrative problem, which is suggested by the word *libellum* at the very beginning of the letter:

Libellum formatum a me, sicut exegeras, quo amicus tuus, immo noster – quid enim non commune nobis? –, si res posceret uteretur, misi tibi ideo tardius ne tempus

70 *Epist.* 3.10.2–5.

71 *Epist.* 3.10.2–5.

72 See P. White, "Bookshops in the Literary Culture of Rome"…

73 *Epist.* 9.11.2: *Bibliopolas Lugduni esse non putabam ac tanto libentius ex litteris tuis cognovi venditari libellos meos, quibus peregre manere gratiam quam in urbe collegerint delector.*

74 See A. Plisecka, "Accessio and Specificatio Reconsidered", *TR* 74, 2006, p. 45–60: writing a poem with four hands may remind us of the *mulsum* obtained by honey and wine both provided by a different owner. Who is then the owner of the result obtained with the disparition of each ingredient considered in itself? It seems to be a co-property. On the other hand, the case of the introduction of Pliny's verse in a bigger poetic work written by a friend of his may remind us of the insertion of a stone in a metallic work of art; the owner of the stone loses his ownership.

75 *Epist.* 7.12.4–5.

> *emendandi eum, id est disperdendi, haberes. Habebis tamen, an emendandi nescio, utique disperdendi. Ὑμεῖς γὰρ οἱ εὖζηλοι optima quaeque detrahitis.*[76]

If it is an administrative document which Pliny must prepare for a friend of friend who asked him to do so, it sounds quite natural that he would send a first draft to be sure everything is in order. But *libellum* might also be a literary work, which is the interpretation of A. Sherwin-White in his commentary.[77] And then this becomes a case of a piano for four hands so to speak, even if the friend has to chose between two variants written by Pliny who remains the only author.

The second case looks like that of a sampling nature, whereby Pliny sends something to a friend who is allowed to insert it, completely or in part, into his own literary work after having asked for it:

> *Epistulam tuam iucundissimam accepi, eo maxime quod aliquid ad te scribi volebas, quod libris inseri posset. Obveniet materia vel haec ipsa quam monstras, vel potior alia.*[78]

We can only presume the friend will use Pliny's work as a quotation, i.e. with the mention of Pliny the Younger, then the authorship of Pliny continues within a literary work written by another, not unlike a sample within a song nowadays. In any case what matters, then, is the friendship between the two men and not the authorship, for there is no robbery to speak of since Pliny agreed.

Conclusion

We have seen many ways to earn one's living as an author in ancient Rome, and quite a number of meanings concerning authorship. But whatever the case it should be clear that authors wrote most of all for posterity-and-glory-based reasons. Pliny encourages Octavius to present his poems to his friends in order to avoid someone else potentially pretending to be the author,[79] by reminding him that a literary work is a *monumentum*, i.e. a souvenir left to the others which allows one to escape from mortal condition. And with these words he is the heir of Cicero who wrote the same. Besides this tradition, one should not neglect the remarks of Martial who took a step forward toward modern times with copyright.[80]

We have seen many ways to earn one's living as an author in ancient Rome, and quite a number of meanings concerning authorship.

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76 *Epist.* 7.12.

77 See A. Sherwin-White, *The Letters of Pliny. A historical and social commentary*, Oxford 1966, p. 416–417.

78 *Epist.* 9.11.1: *Epistulam tuam iucundissimam accepi, eo maxime quod aliquid ad te scribi volebas, quod libris inseri posset. Obveniet materia vel haec ipsa quam monstras, vel potior alia.*

79 *Epist.* 2.10.3–4: *Enotuerunt quidam tui versus, et invito te claustra sua refregerunt. Hos nisi retrahis in corpus, quandoque ut errones aliquem cuius dicantur invenient. Habe ante oculos mortalitatem, a qua asserere te hoc uno monimento potes; nam cetera fragilia et caduca non minus quam ipsi homines occidunt desinuntque.*

80 Many, many thanks to Paul Du Plessis for helping me to improve the translation of this paper into English.

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Tomasz Giaro

Victims and Supporters of Nazism vis-à-vis Europe's Legal Tradition. A New Episode in the History of the Third Reich?

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1. Introduction

Judging by its title, the new monograph of Prof. Kaius Tuori (Helsinki), "Empire of Law",* published by Cambridge University Press, could have been a sequel to the same author's "The Emperor of Law", published four years earlier by Oxford University Press.[1] However, sometimes appearances deceive. In the large introduction (pp. 1–39) to his new "imperial" publication, Prof. Tuori explains its purpose in more detail. The book will namely explore the "idea of a shared European legal tradition as the dominant theory of understanding the past and the future of law in Europe during the postwar period" (p. 2).

The contours of this ambitious program, funded by such prestigious institutions of scholarship promotion as the European Research Council (ERC) and the Academy of Finland, are traced by two main research questions formulated by Prof. Tuori. Their correctness is essential, since false questions never generate good research. The first question reads: "How did the idea of the shared legal heritage of Europe emerge? What was the impact of totalitarianism and exile upon this process?", and the second: "How was the theory disseminated…? What legal, political and cultural factors contributed to its success?" (p. 2).

Prof. Tuori attributes the unparalleled historical success of the so-called European idea in legal

* Kaius Tuori, *Empire of Law: Nazi Germany, Exile Scholars and the Battle for the Future of Europe*, Cambridge 2020, pp. XVI & 313. Numbers in brackets, preceded by the abbreviations "p." or "pp.", refer to pages of this book.

1 K. Tuori, *The Emperor of Law. The Emergence of Roman Imperial Adjudication*, Oxford 2016.

history *prima facie* to the "combination of the two arguments about legal tradition, the universalist legal science and the nationalist tradition" (p. 7). To combine universalist with nationalist factors is undoubtedly a challenging task. However, the reader feels themselves first attracted by another intriguing aspect of the research project: a synergy of two apparently adverse groups of scholars: refugees of Jewish origin, on the one hand, and non-Jewish scholars, who as "Aryans" could calmly remain in Nazi Germany, on the other.

As far as exile is concerned, as claimed by Prof. Tuori, it "led to new ways of thinking" (p. 20). The theory of exile as a gratifying and rejuvenating experience, drawn from Theodor W. Adorno (pp. 62, 263),[2] is repeated very frequently (pp. 3–4, 23, 27–28, 31, 71–74, 83, 88, 109 etc.) which, nevertheless, does not necessarily warrant its correctness. However, it can already be noted that the observation of Prof. Tuori, according to whom the refugees tried not only "to gain recognition in their new environments", but also "to explain their personal experiences" (p. 88), looks awkward in most cases. How could the "experience" of being expelled from Nazi Germany as a scholar of Jewish origin be "explained"?

All these ideas, presented above in sketchy form, have already emerged in a new collective volume entitled "Roman Law and the Idea of Europe", co-edited by Prof. Tuori and described in his own words as the "culmination" of his recent FoundLaw project.[3] According to Prof. Tuori, a group of German émigré scholars of Jewish extraction, who had previously served in Germany as professors of Roman law, were indeed forced after 1933 to flee Hitler's totalitarianism, but still nevertheless managed to play a substantial role from abroad in the formulation of the European project for a postwar political integration (p. 3: "these exiles began to formulate a theory of a common European legal culture").

Prof. Tuori's somewhat inexact knowledge, reasoning and argumentation, which I have already questioned elsewhere,[4] reappears here again, in places almost approaching a slack version of the relatively new literary genre called "the alternate history of the Third Reich", but known also in its simpler variant under the heading "Hi Hitler!".[5] The latter phrase is a corruption of the original pompous Nazi salutation *Heil Hitler!* whose proper understanding requires knowledge of German language and history. Resorting to this bastardised form instead of the infamous original indicates similar concerns prompted by the corruption of serious historical research.

The genre of arts and literature defined here as "Hi Hitler!" has, to date, embraced above all the realms of popular – some say "trivial" – culture: novels, video, film, online games and graphics; a ready example being the internet lampooning of the original British poster of 1939 "Keep calm and carry on!" reimagined as "Keep calm and Hi Hitler!". Is the newest book of Prof. Tuori, "Empire of Law", the first (and obviously unintended) piece of this kind in the field of legal history? Anyway, the work exhibits, alas, the chief aim and function of works of the Hi-Hitler!-type: normalization and, in consequence, relativization of the Nazi past.[6]

The Hi-Hitler!-world is an imaginary place where the laws of logic and history are suspended or inverted. In one of the most famous works of this kind, the novel "Samuel Hitler",[7] it is the USA that is the centre of resentment toward Jews and which organizes anti-Semitic concentration camps, while Hitler is a German Jew who attacks Poland and Russia in order to protect local Jews. At the end, Samuel Hitler is transformed in a supercomputer and Germany wins WW II. But,

2 T. W. Adorno, *Scientific Experiences of a European Scholar in America*, (in:) D. Fleming, B. Bailyn (eds.), The Intellectual Migration, Harvard 1969, pp. 338–370; cf. A.C. Baert, *Adorno and the Language of the Intellectual in Exile*, New York 2019.

3 *Roman Law and the Idea of Europe*, ed. Kaius Tuori, Heta Björklund, Bloomsbury 2019, pp. X & 288.

4 T. Giaro, *The Culmination-Book. Trying to Make Sense of the Nazi Years*, "Studia Iuridica" 2019, vol. 83, pp. 7–26.

5 G. Schenkel, *Alternate History – Alternate Memory. Counterfactual Literature in The Context of German Normalization*, Vancouver 2012; G.D. Rosenfeld, *Hi Hitler! How the Nazi Past is Being Normalized in Contemporary Culture*, Cambridge 2015, pp. 5–7.

6 Cf. G.D. Rosenfeld, *The Fourth Reich. The Specter of Nazism from World War II to the Present*, Cambridge 2019.

7 Sissini [pseudonym of D.N. Chorafas], *Samuel Hitler*, Darmstadt 1973; cf. G. Schenkel, *Alternate History – Alternate Memory…*, pp. 64–81.

leaving this fiction aside, the contemporary world out there is also permeated in places with generous servings of "Hi Hitler!", among the consequences of which is that the death camps of WW II, forcibly planted by the Germans on Polish territory, might smoothly and effortlessly become "Polish death camps".

In a similar way, the nostalgic-apologetic writings of Prof. Tuori and his collaborators are home to the antinomical figures of homeless and frequently unemployed Jewish exiles who morph into influential giants of political thought and, on the other hand, the "Aryan" Nazis or their insipid supporters who, in this narrative, become prophetic masterminds in law and its history. But beyond any personal intention, both these *prima facie* contrasting, or maybe even outright antagonistic groups were in reality – according to Prof. Tuori – working hard hand in hand on the bright future of a free, democratic and liberal Europe. Should we believe that the Nazis were not so bad, after all?

Should we believe that the Nazis were not so bad, after all?

Moreover, the protagonists populating the earlier publications of the FoundLaw project remain mostly the same in Prof. Tuori's 2020 monograph with which we are presently concerned. However, the concepts appearing in my title – "victims" and "supporters" of the Nazi system – require a brief clarification. They are used in a standardized-typological sense and function. So it is renown that famous Roman lawyers Fritz Pringsheim and Ernst Rabel, classed and persecuted by the Nazis as "Jews", were more realistically viewed as archetypal Germans by culture, characterized in addition by a very patriotic attitude. The former was a fervent German nationalist, while the latter, originally from Austria, educated his children in an almost anti-Semitic spirit.[8] Both had also effective contacts with influential Nazi circles. Nevertheless, they eventually became victims of the German racial system.

An analogous distinction between personal disposition and objective social role must also be observed in respect of the Nazi supporters of various stripes, represented in the framework of legal history by such scholars as Paul Koschaker and Franz Wieacker.[9] Obviously, there existed differences between direct perpetrators, mere profiteers and those who gave exclusively passive support, even "despite themselves".[10] Nonetheless, we will not pause here to investigate these categories in depth, nor venture to decide who was a Nazi (and to what degree), and who was only a Nazi supporter (and to what degree).

In the present monograph of Prof. Tuori, the victims, i.e. the exiled legal historians of Jewish descent, along with the "Aryan" supporters of the regime allowed to remain and work as university professors in Nazi Germany, are treated primarily from a scholarly perspective; there is a particular chapter for every key figure whose core topics are identified and analysed in detail. Nonetheless, the results are hardly more convincing than those of the previous publications born in the framework of the FoundLaw project. In this review we will examine one by one all the German scholars credited by Prof. Tuori with having contributed to the invention of Europe's shared legal tradition.

8 On Pringsheim cf. T. Honoré, *Fritz Pringsheim 1882–1967*, (in:) J. Beatson, R. Zimmermann (eds.), Jurists Uprooted. German-speaking Émigré Lawyers in Twentieth-century Britain, Oxford 2004, p. 211, on Rabel cf. A.-M. von Lösch, *Verlierer und Versager*, „Jahrbuch für Universitätsgeschichte" 2000, vol. 3, p. 232.

9 T. Giaro, *Memory Disorders. Koschaker Rediscovered and Bowdlerized*, "Studia Iuridica" 2018, vol. 78, pp. 9–23; id., *A Matter of Pure Conscience? Franz Wieacker and his 'Conceptual Change'*, "Studia Iuridica" 2019, vol. 82, pp. 9–28.

10 T. Giaro, *Paul Koschaker sotto il nazismo: un fiancheggiatore 'malgré soi'*, (in:) Studi in onore di Mario Talamanca, vol. IV, Napoli 2001, pp. 159–187.

2. *Fritz Schulz?*

The best idea is to start with Fritz Schulz, following Prof. Tuori who makes him the protagonist of his first chapter, entitled "Legal Refugees from Nazi Germany and the Idea of Liberty" (pp. 40–86). Prof. Tuori associates the personality of Schulz with the idea of liberty, hence the chapter is focused on both correlated concepts of liberty and authority as elaborated by Schulz in his deservedly famous "Principles of Roman Law" (pp. 41, 50, 57). According to Prof. Tuori's explanation, as against "the Nazi politicization of law", Schulz (consistent with the role allotted to him by the thesis being advanced) ought to have promoted "the central role of legal science in maintaining the autonomy and humanity of law" (p. 40).

Prof. Tuori interprets Schulz against the background of Schulz's "Principles", published in English in 1936, only two years after the German original (*Prinzipien*), since at the time Schulz was already persecuted by the regime in his professional position, but was for the time being permitted to remain in Germany.[11] However, as usual, Prof. Tuori is interested above all in "examples of the transformative powers of exile" (pp. 71–72). Hence, he compares Schulz with other exiled scholars who were not necessarily Roman lawyers such as Hannah Arendt, Franz Neumann, Ernst Levy and Arnaldo Momigliano. They all "openly analysed the Nazi state", whereas (as Prof. Tuori fairly concedes) "observing a change in… Schulz is much more difficult" (p. 86).

As far as Ernst Levy is concerned, he was a Roman lawyer, but probably not the best example of the "open analysis" of the Nazi state, since he delivered only one lecture in the USA of a partially political nature, namely on the subject of natural law in Roman thought; moreover, this happened only a couple of years after the war concluded.[12] However, the protagonist of the story is Schulz, in whose works penned during exile Prof. Tuori spies the "clear reorientation of his scholarship from purely technical or discipline-internal debates to political argumentation" and an emergent project "to rephrase the European tradition of liberty through a new reading of the classical tradition" (p. 83).

Frankly speaking, I can discern in Schulz's war and postwar writings neither any attempt to reorientate his prewar scholarship towards "political argumentation" nor one to rephrase "the European tradition of liberty". Similarly, Franz Wieacker omits political topics in his detailed review of "Classical Roman Law", which was Schulz's main exile work along with his "History of Roman Legal Science".[13] Wieacker stresses only the latter's intention to assess the legal-cultural achievements of Roman law, including its evaluation from an ethical point of view (*als Ethiker das römische Recht… auch als rechtskulturelle Leistung bewerten*).[14]

This ethical evaluation represents, however, if I am not mistaken, something slightly but significantly different from "political argumentation". Political issues, ancient and modern, are equally absent from "History of Roman Legal Science".[15] In their obituaries of Schulz, published in 1958, neither of the most renown postwar Roman lawyers of Germany, namely Werner Flume and Max Kaser, touch upon any political aspects of his scholarly achievements. On the contrary; Flume dismissively cites the famous reproach of the German classicist Johannes Stroux crowned by the image of the "scene of destruction" (*Trümmerfeld*) left behind by the "hunters of interpolations" like Schulz. Kaser underlines, on the other hand, that after the emigration of Schulz his research radius was substantively extended by studies on English law, particularly on Henry de Bracton.[16]

Nonetheless, in scholarship this extension has never been treated as an intended movement of Schulz from juristic to political reflection. Anyway, already in

11 F. Schulz, *Prinzipien des römischen Rechts. Vorlesungen*, München–Leipzig 1934; id., *Principles of Roman Law*, New York 1936.

12 E. Levy, *Natural Law in Roman Thought*, "Studia et Documenta Historiae et Iuris" 1949, vol. 15, pp. 1–23; cf. J. Giltaij, *Reinventing the Principles of Roman Law*, pp. 88–89.

13 On both works see W. Ernst, *Fritz Schulz 1879–1957*, (in:) J. Beatson, R. Zimmermann (eds.), Jurists Uprooted. German-speaking Émigré Lawyers in Twentieth-century Britain, Oxford 2004, pp. 171–185.

14 F. Wieacker, *review of F. Schulz, Classical Roman Law*, „Gnomon" 1952, vol. 24, pp. 356–359.

15 A. Berger, *review of F. Schulz, History of Roman Legal Science*, "The Classical Journal" 1948, vol. 43, pp. 439–442.

16 W. Flume, *In memoriam Fritz Schulz*, „Zeitschrift der Savigny-Stiftung Romanistische Abteilung" 1958, vol. 75, p. 506; M. Kaser, *Fritz Schulz 1879–1957*, „Iura" 1958, vol. 9, p. 144.

Prinzipien of 1934 Schulz praised Laband's formalistic constitutional law as "a book on true Roman lines" (*echt romanistisches Buch*).[17] Moreover, in a lecture titled "The Invention of the Science of Law at Rome", given in Washington and Harvard in 1936, Schulz reconfirmed that the Roman jurists "isolated law… from the rules of religion, morality and custom, from the whole economic and social world".[18] The expert of the abovementioned extension, Horst Heinrich Jakobs, comments that for Schulz, as for Jakobs himself, in ancient Rome as today, legal science is possible only as "unpolitical science of private law" (*unpolitische Privatrechtswissenschaft*).[19]

According to Prof. Tuori, it is due to Schulz's work (in part already to *Prinzipien* and subsequently to "Principles") that Roman law could become "a counterpoint to the emerging Nazi legal order" (p. 84). Moreover, Prof. Tuori will identify in this work a whole series of Schulz's supposed clear counterpoints to Nazi legal ideology and practice: "freedom of law from politics instead of law as politics; citizenship based not on ethnicity but belonging; the continuity of law and legal tradition rather than revolution; the humanity of law and punishment against cruelty and inhumanity; the rule of law and security against terror and fear" (p. 85).

However, as far as the principle of freedom (*libertas*) is concerned, Schulz turned out to assume towards Roman law a quite unapologetic position. He stressed instead, in all probability rightly from the historical point of view, the substantial lack in ancient Roman law of legal guaranties which could have been invoked against the Roman State by its citizens.[20] On the other hand, as Schulz himself emphasized, his analysis was concentrated on "practical-juridical" (*praktisch-juristisch*) and "prosaic" (*nüchtern*) aspects;[21] contrary to the postwar monograph of Chaïm Wirszubski, Schulz never broached the subject of *libertas* "as a political right".[22]

Against this background, Prof. Tuori's conclusion that in exile "Schulz began to rephrase the European tradition of liberty through a new reading of the classical tradition" (p. 83), appears very surprising and remains yet to be proved. Unfortunately, Prof. Tuori is unable to indicate any specific passage in Schulz's writings where such a rephrasing or new reading could be found. It seems in any case that the concept of freedom adopted by Schulz in "Principles" is itself too anachronistic – it embraces in particular the 19th century free-will paradigm of the freedom of contract – to warrant further rephrasing in a contemporary sense or ascription of a new reading.[23]

Similarly uncertain seems the supposition, expressed by Prof. Tuori, that Schulz's "Principles" – or only the dedication of that work to his Jewish wife, Martha Schulz née Plaut[24]? – expressed something like "public opposition" to Nazi rule (p. 45). As a matter of fact, Prof. Tuori correctly observes that Schulz never mentioned the regime, with the possible exception of a single allusive reference to "recent political experience" in the conclusions of the book (pp. 49, 83).[25] Moreover, Prof. Tuori overlooks that under the heading "Nation" Schulz engaged in a fight, arm in arm with the Nazis and their – at least temporary – sympathizers such as Koschaker, against the so-called Orientalization, code word for Judaization, of later Roman law.[26]

The following phrases of Schulz, taken word for word from his "Principles", could as easily have been written by an author inclined towards Nazi ideology. This refers in particular to the German original *Prinzipien*

17 F. Schulz, *Prinzipien*…, p. 26; id., *Principles*…, p. 39.

18 F. Schulz, *The Invention of the Science of Law at Rome*, in: H. H. Jakobs, 'De similibus ad similia' bei Bracton und Azo, Frankfurt a. M. 1996, p. 101; cf. J. Giltaij, *Reinventing the Principles*…, pp. 59, 62.

19 H. H. Jakobs, *'De similibus ad similia' bei Bracton und Azo*, Frankfurt a. M. 1996, p. 111.

20 F. Schulz, *Prinzipien*…, pp. 110–111; id., *Principles*…, p. 163.

21 F. Schulz, *Prinzipien*…, p. 96; id., *Principles*…, p. 141.

22 C. Wirszubski, *Libertas as a Political Idea at Rome during the Late Republic and Early Principate*, Cambridge 1950, p. 170.

23 See M. J. Schermaier, *Fritz Schulz' Prinzipien. Das Ende einer deutschen Universitätslaufbahn im Berlin der Dreißigerjahre*, (in:) S. Grundmann et al. (eds.), Festschrift 200 Jahre Juristische Fakultät der Humboldt-Universität zu Berlin, Berlin–New York 2010, p. 692.

24 W. Ernst, *Fritz Schulz*…, pp. 118–119.

25 F. Schulz, *Prinzipien*…, 1934, p. 172; id., *Principles*…, 1936, p. 253.

26 T. Giaro, *Memory Disorders*…, p. 12; id., *The Culmination-Book*…, p. 14.

which, as compared to the English translation, contains always a dash of overstatement: "Jewish-Talmudic jurisprudence had no influence whatever on Roman Law" (*von einer Einwirkung der jüdisch-talmudischen Jurisprudenz… keine Rede*); "law which the Roman mind had made peculiarly its own" (*Recht… die ureigneste Schöpfung des römischen Geistes*); "no oriental influence whatever" (*von einem orientalischen Einschlag nichts zu spüren*).[27] In Prof. Tuori's treatment, these phrases are either overlooked, intentionally disregarded or their significance goes unappreciated.

All in all, the figure of legal historian Fritz Schulz repositioned as a master of (democratic) political argumentation does not belong to the reality of Roman law scholarship. He is rather a counterfactual denizen of the Hi-Hitler!-like narrative. If we search instead for his genuine scholarly innovations, it was doubtless the discovery of the axiological dimension of Roman law.[28] In fact, this body of law had been traditionally seen – also by Kaser in his obituary – in the aspect of its dogmatic perfection and "top-class performances (*Spitzenleistungen*) of juristic problem-solving."[29] However, most of the "politically relevant principles" (p. 46) analysed by Schulz in his book, such as Statutes and Law, Tradition, Nation, Liberty, Authority, Humanity, Fidelity and Simplicity, are nothing other than legal values of Roman society.

3. *Fritz Pringsheim?*

If anything, it appears even more challenging to reframe Fritz Pringsheim – another scholar of Roman Law decamping from Germany to exile in Britain – as a political writer. However, this is exactly what Prof. Tuori attempts in his chapter "Redefining the Rule of Law, Jurisprudence and the Totalitarian State" (pp. 87–123). This attempt is based solely on a single paper of Pringsheim's delivered at Cambridge on 27th October 1933 and published in an English scholarly journal in 1934.[30] According to Prof. Tuori, Pringsheim treats Hadrian's legal policy as an expression of "the ideas of equality, cosmopolitanism and the rule of law as opposites to Nazi policies" (p. 87).

In order to prove this proposition, Prof. Tuori devoted his own recent article entitled "Hadrian's cosmopolitanism and Nazi legal policy" to the abovementioned paper of Pringsheim's.[31] The validity of its conclusions depend upon the presupposition, to which Prof. Tuori subscribes, that in his article of 1934, Pringsheim used the method of "writing between the lines", known also as the method of "concealed references". In other words, he contends that Pringsheim engaged in a form of historical narration purposefully laced with indirect references to the current world. This is to make a virtue of necessity since, as Prof. Tuori rightly acknowledges, it cannot be directly determined from Pringsheim's text itself that it was written as "a criticism of anything contemporary" (pp. 93–94).

Of course, in the historical context of National Socialism, "cosmopolitan" was commonly regarded as a "code word for Jewish".[32] But the subject of cosmopolitanism could have had in this context further political implications. That would have been so, for instance, if Fritz Pringsheim in 1934 had followed the renown Greek sophist of the late 5th century BC, Hippias of Elis, and following him, embarked on timeless discussions about the prevalence of universal unwritten laws (*agraphoi nomoi*) over the mere positive law of this or that polity,[33] thereby more or less clearly marking out so-called Nazi law as likewise subordinate.

However, it is pure, speculative conjecture to assume that Fritz Pringsheim harboured such subversive intentions while giving his Hadrian-paper at Cambridge and redacting it for publication. The only thing assured

27 F. Schulz, *Prinzipien…*, pp. 89–91; id., *Principles…*, pp. 131–133; cf. M. J. Schermaier, *Fritz Schulz' Prinzipien…*, pp. 696–697.

28 Cf. J. Giltaij, *Reinventing the Principles…*, pp. 90–91.

29 M. Kaser, *Fritz Schulz*, „Iura" 1958, vol. 9, p. 144.

30 F. Pringsheim, *The Legal Policy and Reforms of Hadrian*, "The Journal for Roman Studies" 1934, vol. 24.2, pp. 141–153.

31 K. Tuori, *Hadrian's Cosmopolitanism and Nazi Legal Policy*, "Classical Receptions Journal" 2017, vol 9.4, pp. 470–486.

32 K. Tuori, *Narratives and Normativity*, "Law and History Review" 2019, vol. 37, p. 619.

33 Copleston F., *A History of Philosophy*, vol. I. *Greece and Rome*, Image Book 1993, pp. 89, 114; J. Brunschwig, *Hippias d'Elis, philosophe-ambassadeur*, (in:) K. Boudouris (ed.), The Sophistic Movement, Athens 1984, pp. 269–276; M. Ducos, *Les Romains et la loi. Recherches sur les rapports de la philosophie grecque et de la tradition romaine à la fin de la République*, Paris 1984, p. 261; A. Brancacci, *La pensée politique d'Hippias*, "Méthexis" 2013, vol. 26, pp. 23–38.

is that this paper "depicted Hadrian's Rome as an empire of peace, prosperity and law" (p. 94). But from the historical point of view, we must also remember that Emperor Hadrian, depicted by Pringsheim as a cosmopolitan advocate of order and peace,[34] was a highly idealised figure. In reality, Hadrian started his reign in 118 by putting four leading senators to death without a public trial, and ended his reign in 137 by executing another two.[35]

The legal aspects of this idyllic picture also embrace, besides cosmopolitanism, the rule of law, bureaucratisation of the legal professions and professionalisation of administration. "Needless to say" – but Prof. Tuori says it anyway – "these were things that the Nazis disliked" (pp. 95–96). This circumstance seems to Prof. Tuori a sufficient reason to qualify Pringsheim's short Hadrian-paper as a manifesto of political opposition. However, after having remarked at length on studies of Franz Neumann, Hayek, Leo Strauss and Kelsen (pp. 108–117), Prof. Tuori concedes honestly that "while many of the exiles became politicised…, in the case of Pringsheim the effect was… the opposite" (p. 117).

In fact, as was already mentioned, even the rather aloof Ernst Levy lectured in 1948 at the Natural Law Institute of Notre Dame University (Indiana) on natural law in Roman thought, although without reference to any understanding of natural law as a remedy against political tyranny (pp. 78–79). That Levy was aware of the limits of politicization is nevertheless clear, insofar as he did not regard ancient and modern dictatorial regimes as comparable, except in a highly impressionistic sense: in antiquity, Levy stressed pointedly, "mass extermination, deportation or expropriation of citizens was something not even imagined as a potentiality" (p. 79).[36]

Meanwhile, Fritz Pringsheim was continuing at the University of Oxford his eminently antiquarian research on the Greek law of sale (p. 117) whose problems had been occupying him since his habilitation thesis on purchasing with alien money (*Der Kauf mit fremdem Geld*).[37] Of course, Pringsheim was a very courageous person (he may have also underrated Nazi power or overestimated his own Nazi connections),[38] as testified by his open letter to Carl Schmitt, sent on 20 November 1933, shortly after Pringsheim's conference at Cambridge. In this letter, Pringsheim defended the universal value of Roman law, but also its being part and parcel of the national legal culture of Germany (pp. 102–103).[39]

Prof. Tuori underlines correctly that, after WW II, Pringsheim opposed the idea of the collective guilt of Germans; he furthermore showed tolerance even to colleagues who became Nazis (p. 119) and – it must be added – they did it without lifting a finger in defence of Pringsheim (or other Jewish colleagues). Included in this is of course Franz Wieacker, with whom Pringsheim not only "continued to collaborate" (ibid.), but who also benefited from the latter's protective impulses insofar as Pringsheim's testimonial contributed to Wieacker's avoidance of an unfavourable verdict before a denazification tribunal (*Spruchkammer*) in Göttingen which would have probably destroyed his academic career.[40]

However, let us come back to Prof. Tuori's leitmotif of a "shared European legal tradition" as a product not only of legal historians who remained in Germany throughout the Nazi years, but also of the exiled Roman lawyers of Jewish origin. Pringsheim's placement within such a project is even more incongruous than that of Schulz.[41] The latter's "Principles" at least awakened some general interest as a "defence of law in general" in addition to the defence of Roman law

34 F. Pringsheim, *The Legal Policy and Reforms of Hadrian*…, p. 91.

35 D. Liebs, *Hofjuristen der römischen Kaiser bis Justinian*, München 2010, pp. 7–8.

36 E. Levy, *Natural Law in Roman Thought*…, pp. 1–23, 22.

37 F. Pringsheim, *Der Kauf mit fremdem Geld. Studien über die Bedeutung der Preiszahlung für den Eigentumserwerb nach griechischem und römischem Recht*, Leipzig 1916

38 Cf. E. Bund, *Fritz Pringsheim 1882–1967. Ein Großer der Romanistik*, (in:) H. Heinrichs et al. (eds.), Deutsche Juristen jüdischer Herkunft, München 1993, p. 742; T. Honoré, *Fritz Pringsheim*…, p. 220.

39 F. Pringsheim, *Die Haltung der Freiburger Studenten in den Jahren 1933–1935*, „Die Sammlung. Zeitschrift für Kultur und Erziehung" 1960, vol. 15, pp. 533–534.

40 V. Erkkilä, *Conceptual Change of Conscience. Franz Wieacker and German Legal Historiography 1933–1968*, Tübingen 2019, pp. 148–152.

41 T. Giaro, *The Culmination-Book*…, pp. 11–12.

in particular (pp. 49–50). Moreover, we know that after having been dismissed, Schulz organised regular private scholarly meetings, frequented by Pringsheim, together with Martin Wolff and Gerhart Husserl,[42] which appears to provide indirect confirmation of Schulz's broader horizons and leader's talent.

But with all due respect, even if both Fritz Schulz and Fritz Pringsheim were important specialists in ancient legal history, that finding cannot be automatically extrapolated to the field of legal history as a whole, nor, *a fortiori*, to German legal scholarship as such.

countries[44] – appears both legitimate and demanding of an affirmative answer.

4. Paul Koschaker?

In terms of scholarly focus, Paul Koschaker was an essentially different scholar from both Schulz and Pringsheim with their consequent concentration on ancient Roman – and in the case of Pringsheim also Greek – law. In the chapter "The Long Legal Tradition and the European Heritage in Nazi Germany" (pp. 124–172), Koschaker is positioned by Prof. Tuori,

> **Neither Schulz nor Pringsheim spoke a word about Europe.**

Moreover, those of their works cited by Prof. Tuori as exemplars of their exile oeuvre were in fact published in 1934, five long years before their emigration from Nazi Germany. Both Schulz and Pringsheim remained namely in Germany until the spring of 1939. This chronological confusion created by Prof. Tuori evokes the illogicality, even absurdity, of his Hi-Hitler!-like narrative.

In consequence, the leading role of Schulz and Pringsheim in the project of the shared European legal tradition belongs to the realm of Prof. Tuori's fantasy. Neither Schulz nor Pringsheim spoke a word about Europe; moreover, they never resorted to the word "Europe" itself. On the other hand, as author of three weighty English monographs and textbooks, namely "Principles of Roman Law", "Classical Roman Law" and "History of Roman Legal Science", Schulz had doubtless impregnated the Anglo-Saxon world with Roman law scholarship. Hence, in reference to him, "the macabre question" of whether positive effects attended the exodus of Jewish scholars from Nazi Germany[43] – "Hitler's gift" from the viewpoint of host with Franz Wieacker, as a central figure in the creation of the idea of Europe's shared legal heritage. Be that as it may, Koschaker is an elusive personality; charged by some analysts with narrow Germanocentrism, by some others with a somewhat broader Eurocentrism,[45] and by still others with a clear "universalist-European tendency".[46]

Without citing a modest contribution of mine to the collective volume on German legal historiography between 1945 and 1952, Prof. Tuori presents Paul Koschaker, as I already had occasion to do some twenty years earlier,[47] as a discoverer twice over of the future of Roman law in new legal and political orders: "first in the Nazi reign and second in the new postwar Europe" (p. 124). However, stated with more precision, Koschaker demonstrated the indispensability of Roman law in no less than three juridico-political

42 L. Breunung, M. Walther, *Die Emigration deutschsprachiger Rechtswissenschaftler ab 1933. Ein bio-bibliographisches Handbuch*, vol. I, Berlin–Boston 2012, p. 410.

43 F. Ebel, *Exodus Berliner Rechtsgelehrter*, (in:) W. Fischer et al. (eds.), Exodus von Wissenschaften aus Berlin, Berlin–New York 1994, p. 136.

44 J. Medawar, D. Pyke, *Hitler's Gift. Scientists Who Fled Nazi Germany*, London 2000.

45 M. Petrak, *Ius europaeum or ius oecumenicum? Koschaker, Schmitt and d'Ors*, (in:) T. Beggio, A. Grebieniow (eds.), Methodenfragen der Romanistik im Wandel, Tübingen 2020, pp. 75–93.

46 J. Rückert, *Abschiede vom Unrecht*, Tübingen 2015, pp. 510–513.

47 T. Giaro, *Der Troubadour des Abendlandes*, (in:) H. Schröder, D. Simon (eds.), Rechtsgeschichtswissenschaft in Deutschland 1945–1952, Frankfurt a.M. 2001, pp. 69–70.

systems: firstly in Nazi totalitarianism, secondly in the developed democracy of postwar Western Europe, and thirdly in the so-called real socialism of Soviet type.[48]

We know with certainty that Koschaker participated actively in the Aryanising of Ernst Rabel's chair in Berlin and that the installation of Koschaker there, which ultimately took place on 30th March 1936, had bee planned long beforehand.[49] The best proof of this is the letter of 28th May 1935, directed by Dean Wenzeslaus Count Gleispach to the Imperial Ministry (*Reichsministerium*) of Science and Higher Education which recommends in no uncertain terms that both of the last Jewish law professors of Berlin, Ernst Rabel and Martin Wolff, be released from their positions. Afterwards, Gleispach wrote: "The new chair of Ancient Legal History would… offer possibilities, to achieve for our faculty an Aryan scholar of great scholarly reputation" (*arischen Gelehrten von großem wissenschaftlichen Ruf*).[50] This great Aryan scholar was evidently Gleispach's fellow countryman Koschaker.

However, Prof. Tuori, avoiding uncomfortable questions, limits himself to the sensitive remark that for Koschaker "the transition from Leipzig to Berlin was not easy" (p. 127). He may have more appropriately devoted a few lines to pondering the challenges arising out of the transition somewhat further afield – to the USA – undertaken by Rabel in circumstances permitting him to bring only a handful of scholarly works.[51] Is this paradoxical compassion bestowed by Prof. Tuori upon the profiteer in place of the Aryanization's victim, one more sign of the fictional Hi-Hitler!-narrative? So Koschaker took his "not easy" train from Leipzig to Berlin, while Rabel took an easy low-budget flight (or was it rather a ship?) to the USA; it is clear that given a luggage limit he could not take with him his many books!

According to Prof. Tuori, Koschaker's noble intention was to save Roman law from its miserable status as "a historical curiosity studied by philologists and historians together with Assyrian laws" (p. 138). Prof. Tuori discusses Koschaker's proposal of a well-known alternative solution, the approach to Roman law as "a living part of the contemporary legal tradition" (ibid.), but I dare to doubt that Koschaker ever wittingly applied the concept of 'legal tradition' as a methodological tool. By the time the American comparative lawyer John Henry Merryman popularised this category at the end of the 1960s,[52] Koschaker had long been dead and buried.

Anyhow, the remedy proposed by Koschaker for the crisis of Roman law in Germany was its neopandectistic "actualization" (*Aktualisierung*) as opposed to the neohumanistic "historization" (*Historisierung*) or, in more philosophical terminology, he promoted the applicative over the contemplative approach to Roman law.[53] Within the theory of *Aktualisierung*, ridiculed by Franz Wieacker with caustic wit as legal Adventism, legal history always occupies one of the earlier places in a sequence, compared by Wieacker to a medieval salvation picture cycle (*heilsgeschichtlicher Bilderzyclus*), being eternally under way to catch up with the actual shape of valid law.[54] In such manner, legal history was reduced to becoming a servant of legal dogmatics.

Prof. Tuori explains patiently, but unfortunately in a plainly counterfactual manner, that Koschaker's Europe was grounded in "cultural heritage and history". Moreover, Prof. Tuori insists in good faith that Koschaker, despite his "apparent Germanocentrism", never pursued "unity against foreign foes" (p. 172); furthermore, Prof. Tuori states that Koschaker's Europe "encompassed the whole European continent" (p. 133). Evidently, Prof. Tuori overlooked conspicuous Occidentalism directed not only against the Bolsheviks, but

48 On the Soviets see T. Giaro, *Der Troubadour des Abendlandes…*, pp. 53–54.

49 T. Giaro, *Memory Disorders…*, pp. 13–14.

50 A.-M. von Lösch, *Der nackte Geist*, Tübingen 1999, pp. 362–363, 391–392; R.-U. Kunze, *Ernst Rabel und das Kaiser-Wilhelm-Institut für ausländisches und internationales Privatrecht 1926–1945*, Göttingen 2004, p. 64.

51 G. Kegel, *Ernst Rabel 1874–1955*, (in:) S. Grundmann, K. Riesenhuber (eds.), Private Law Development in Context, Cambridge 2018, p. 119.

52 J.H. Merryman, *The Civil Law Tradition*, Stanford 1969; T. Giaro, *Modernisierung durch Transfer – Schwund osteuropäischer Traditionen*, pp. 275–281.

53 M. Petrak, *Ius europaeum or ius oecumenicum?…*, pp. 76–77.

54 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.

also against all countries of Eastern Europe, dismissively referred to by Koschaker as "a row of marginal eastern states" (*eine Reihe östlicher Randstaaten*). This position was advanced consistently by Koschaker not only before, but also during and after WW II.[55]

Even in the democratic postwar era – specifically in the year 1948 – Koschaker opines in a private letter to his disciple Guido Kisch that among all the nations of Eastern Europe, only the Czechs can be characterised without objection as Europeans. As the "congeneric" (*artverwandt*), they had been privileged already in the Nazi hierarchy of races and nations.[56] Now, swaggers Koschaker, oblivious to the evident continuity with the Nazi theory, the Czechs still "belong to Europe… much more than the Hungarians".[57] Koschaker embracing the whole European continent close to his heart belongs in the category of fictional events that happen only in the Hi-Hitler!-like narrative of Prof. Tuori.

In contrast to Prof. Tuori, nor do we feel entitled to ignore the image of the *Neger in Frac*,[58] a metaphorical figure put to use by Koschaker in a paper published on 15th May 1938 on the occasion of Hitler's visit to Italy. This picture was obviously chosen by Koschaker in order to exclude any suggestion that the reception of Roman law in Germany was a symptom of German inferiority towards Italians. Only a civilized nation (*Kulturvolk*) like the Germans, insists Koschaker, was able to borrow alien cultural property and transform it in its own spirit. The metaphor reveals in Koschaker not only an inferiority complex, but also a level of chauvinism worthy of his great compatriot forerunners Heinrich von Treitschke and Rudolf von Jhering.

The former, official interpreter of the Second German *Reich*, known as one of the *praeceptores Germaniae* (teachers of Germany), stressed in his "Politics" lectures, published posthumously in 1897, that the black race was from time immemorial a servicing one,[59] and the latter adopted a similar stance in the first volume of his famous book "Law as a Means to an End" (*Der Zweck im Recht*), published in 1877. Jhering denied that blacks (he used the more vigorous term *Neger*) possessed any "sentiment (*Gefühl*) of law", since they were accustomed to considering even the suffering of violence by human hand as a force of nature.[60]

After WW II, Koschaker obviously stops speaking about *Neger*, but he mentions instead the 'wild people' (*Wilde*) who have already acquired some legal concepts, but still lack the jurists necessary for the achievement of any higher socio-legal development.[61] And when immediately after the surrender of the German army people spontaneously recommenced saying "How do you do?" instead of the previously usual "Heil Hitler!",[62] Koschaker too proved himself to be accommodating and ceased signing his letters with the Nazi salute.[63]

5. *Franz Wieacker?*

In the next chapter, entitled "Reconfiguring European Legal Tradition after the War" (pp. 173–220), Franz Wieacker is depicted as "one of the so-called young lions of Nazi legal academia" who under the dictatorship tried to accomplish "legal reform based on the racialized order" and who only underwent a conversion to democracy in the postwar era (p. 173). The purpose of the chapter is precisely, as Prof. Tuori defines it, "to analyze the transition… from the Nazi period to the postwar era", as reflected "in Wieacker's thought" (p. 175). The reference to Wieacker's thought is essential, given the newest fashion to inquire into

55 Quote in P. Koschaker, *Europa und das römische Recht*, 4th ed., München–Berlin 1966, p. 350; further references in T. Giaro, *Der Troubadour des Abendlandes…*, pp. 40, 61–62.

56 I.J. Hueck, *'Spheres of Influence' and 'Völkisch' Legal Thought: Reinhard Höhn's Notion of Europe*, (in:) C. Joergess, N.S. Ghaleigh (eds.), Darker Legacies of Law in Europe, Oxford, Portland 2003, p. 61.

57 P. Koschaker, *Briefe aus den Jahren 1940–1951*, (in:) G. Kisch (ed.), Paul Koschaker. Gelehrter, Mensch, Freund, Basel–Stuttgart 1970, pp. 26–27; cf. T. Giaro, *Memory Disorders…*, pp. 15–16.

58 T. Giaro, *Memory Disorders…*, pp. 15–16.

59 H. von Treitschke, *Politik. Vorlesungen*, vol. I, Leipzig 1918, p. 274; vol. II, Leipzig 1898, p. 569; cf. T. Giaro, *Vor-, Mit- und Nachdenker des Madagaskar-Plans*, „Rechtshistorisches Journal" 2000, vol. 19, pp. 160, 162.

60 R. von Jhering, *Der Zweck im Recht*, vol. I, Leipzig 1877, p. 347; id., *Der Zweck im Recht*, vol. I, Leipzig 1884, p. 394; id., *Der Zweck im Recht*, vol. I, Leipzig 1893, p. 392.

61 T. Giaro, *Der Troubadour des Abendlandes…*, pp. 58–59.

62 P. Koschaker, *Selbstdarstellung*, (in:) N. Grass (ed.), Österreichische Geschichtswissenschaft der Gegenwart in Selbstdarstellungen, vol. II, Innsbruck 1951, pp. 118–119.

63 A.-M. von Lösch, *Der nackte Geist…*, p. 391.

what was happening in Wieacker's head without regard to what was happening in the world outside.[64]

In this context, Prof. Tuori assumes towards Wieacker's doings a position which may be defined as not entirely uncritical. He observes that in the postwar laudation marking Fritz Pringsheim's 70th birthday, Wieacker had recalled "how Pringsheim's reputation was not enough to protect him from Nazi persecutions".[65] According to Prof. Tuori, this strange phrasing

Koschaker stops speaking about *Neger*, but he mentions instead the 'wild people'.

"shows the mechanisms that Wieacker used to shield himself from personal involvement in the happenings of the day" (p. 178). In another context, Prof. Tuori stresses "how skewed Wieacker's moral compass was" (p. 209), but the references and quotes linked to this passage are unfortunately inexact, which impedes the reader's ability to decipher its precise meaning.

On the other hand, Prof. Tuori sometimes treats Wieacker's racial points of view with a clearly excessive indulgence. "His writings, both public and private, betray no trace of the anti-Semitism or racism that was prevalent in Germany" (p. 180), concludes Prof. Tuori, citing proudly the recent intellectual biography of Wieacker, written by Dr. Ville Erkkilä in the framework of the project directed by Prof. Tuori and funded by the European Research Council.[66] This scholar, as his mentor Prof. Tuori solemnly assures us, "does not report a single instance where anti-Semitism would have been present in Wieacker's writings" (p. 180 nt. 18).

As a matter of fact, Dr. Erkkilä does not report a single instance of Wieacker's anti-Semitic utterances, and probably, given his somewhat tangential study of historical sources, he indeed has knowledge of none. However, this does not mean that in reality, beyond the limits of Wieacker's mind, such instances do not exist at all.[67] Unfortunately they do, betraying in the worst case scenario Wieacker's enthusiastic collaboration and in the best, his mindless obedience to the racial legislation of the Nazis: the Law for the Protection of German Blood (*Blutschutzgesetz*) of 15th September 1935 and the Marital Health Law (*Ehegesundheitsgesetz*) of 18th October 1935.

Prof. Tuori emphasises that Wieacker followed in the steps of Pringsheim, writing exactly one year after his *Doktorvater* a similar paper on Emperor Hadrian, entitled simply *Studien zur Hadrianischen Justizpolitik*.[68] The paper contains, however – as Prof. Tuori correctly notes – no references to cosmopolitanism (or multiculturalism) which Pringsheim seemed to consider the main positive value of Hadrian's reign (pp. 105, 183, 271). Wieacker's Hadrian remains the same standard-Hadrian, who, in current Roman law textbooks, appears as the initiator of a centralizing imperial policy which was intensified in subsequent times.[69]

As far as shortcomings in Prof. Tuori's scholarly merits are concerned, I must count among them his ignorance of a considerable literary fact of the postwar period in Germany. It was a remark of a repentant and democratic Wieacker of the year 1976, made in a reflection on his 1935 Nazi-monograph: *Wandlungen der Eigentumsverfassung*. From the viewpoint of the "young legal historian and social critic of the early 1930s", Wieacker regrets the "opportunistic or

64 T. Giaro, *A Matter of Pure Conscience…*, p. 25.

65 F. Wieacker, *Fritz Pringsheim 70 Jahre*, „Juristenzeitung" 1952, vol. 7, p. 605.

66 V. Erkkilä, *Conceptual Change of Conscience…*, p. IX. The other funder was the Academy of Finland.

67 T. Giaro, *A Matter of Pure Conscience…*, pp. 14–15.

68 F. Wieacker, *Studien zur Hadrianischen Justizpolitik*, „Romanistische Studien. Freiburger Rechtsgeschichtliche Abhandlungen" 1935, vol. 5, 43–81.

69 A. Petrucci, *Corso di diritto pubblico romano*, Torino 2017, pp. 152–153, 228–229, 232–233, 236–237.

even static" character of the Nazi politics of property.[70] In the same breath, Wieacker excepts from blame the (principled and dynamic?) Nazi course of action referred to as "predation of its political opponents" (*Ausplünderung seiner politischen Gegner*).

The intended target of Wieacker's laconic statement is uncertain, given that Nazi political terminology mostly – but not necessarily always[71] – distinguished between Jews and political enemies,[72] with the latter including for instance communists, socialists or liberals. In this situation, in which "predation" (*Ausplünderung*) could perhaps be better defined as "robbery" (*Ausraubung*),[73] there seem to be only two possible solutions to the mystery. If Wieacker alluded merely to the leftist political enemies of the Nazis in a strict sense, then in omitting the Jews he forgot the Holocaust which was not only the biggest killing, but also the biggest theft or – if we need a more pregnant expression – assault and robbery in history of mankind.[74]

If, on the other hand, Wieacker was alluding to all enemies and opponents of the regime in a broad sense, including the Jews, why did he mention only plunder (*Ausplünderung*) – whether based on the Decree on the Confiscation of Jewish Property of 3rd October 1938 or on its simple taking – and not, above all, mass murder? Anyway, in either case Wieacker seems to downplay either the plunder of the Jews or their murder or both.[75] In this way, he may be considered as a forerunner of the current Hi-Hitler!-mentality which aims as a last resort to normalise the Nazi past and to belittle its crimes as acts of ordinary administration.

Wieacker's absent-minded reference to the mysterious *politische Gegner* aside, Prof. Tuori tries diverse explanations of the method by which Wieacker managed to reduce the weight of the persecution of Pringsheim and other Jewish colleagues. He may have considered it either "an unfortunate phenomenon" escaping his control or a case of "the will to belong" (p. 198). The latter category is borrowed by Prof. Tuori from the famous essay of Czesław Miłosz "The Captive Mind". In fact, Miłosz depicts such a will – in reference to communist rule – as "the great longing of the 'alienated' intellectual", and also mentions "the certainty that one belongs to the new and conquering world" as "the recompense for all pain".[76]

The demise of the Nazi state meant for many educated Germans the collapse of the Empire (*Zusammenbruch des Reiches*), hence an event that, according to a phrase from the obituary for Heinrich Lange, another German jurist who was at first very Nazi and then experienced a conversion into a true democrat,[77] hit everybody quite hard.[78] In this way the Nazi's new Europe was over and the old one, along with democracy and the rule of law, reappeared. At the same time, Wieacker's "will to belong" started to work very noticeably – observes sharply Prof. Tuori – "in the opposite direction" (p. 220). As Prof. Tuori realistically underlines, it was perhaps then this impulse that led not only Wieacker, "but also most of the legal academia to discover the shared roots of European legal science" (ibid.).

6. *Helmut Coing?*

In the chapter "The European Narrative and the Tradition of Rights" (pp. 221–262), Helmut Coing and his idea of the jurisprudential tradition of rights is supplemented with a thorough analysis of Prof. Reinhard Zimmermann as the main proponent of the "European narrative" on Roman law (p. 221). The respective roles of both gentlemen in terms of their being enemies of totalitarianism, and therefore placed

70 F. Wieacker, *Wandlungen der Eigentumsverfassung revisited*, „Quaderni Fiorentini per la Storia del Pensiero Giuridico Moderno" 1976–77, vol. 5–6, p. 842.

71 E. Frankel, *The Dual State*, New York 1941, p. 10 on Jews as opponents of the Third Reich.

72 G. Kegel, *Ernst Rabel 1874–1955…*, p. 120.

73 I. Loose, *Kredite für NS-Verbrechen: Die deutschen Kreditinstitute in Polen und die Ausraubung der polnischen und jüdischen Bevölkerung 1939–1945*, Oldenburg 2007.

74 M.J. Bazyler, *Holocaust Justice. The Battle for Restitution in America's Courts*, New York 2005, p. XI.

75 T. Giaro, *Vor-, Mit- und Nachdenker des Madagaskar-Plans*, „Rechtshistorisches Journal" 2000, vol. 19, p. 133; id., *Aktualisierung Europas*, pp. 156, 172–173.

76 C. Miłosz, *The Captive Mind*, New York 1955, pp. 7, 15.

77 W. Wolf, *Vom alten zum neuen Privatrecht. Das Konzept der normgestützten Kollektivierung in den zivilrechtlichen Arbeiten Heinrich Langes 1900–1977*, Tübingen 1998.

78 K. Kuchinke, *Nachruf auf Heinrich Lange*, „Neue Juristische Wochenschrift" 1978, vol. 31, p. 309.

by Prof. Tuori as the heroes of his monograph, is as unclear as, on the other hand, the division of labour on Europe's future between "native-born Germans" and "Jewish exiles". Coing is at least suspected of having been an NSDAP member (pp. 226–227); moreover, he doubtlessly belongs to the generation that embraced natural law immediately after WW II (pp. 227–228).[79]

We know, however, that in 1986, after his visit to South Africa, Coing, resuming the long scholarly tradition represented by Jhering and Koschaker, made explicit reservations concerning the advisability of the immediate concession of democracy to the "blacks" (*Schwarze*).[80] But efforts dedicated by Prof. Tuori to disquisitions about Coing's NSDAP membership are wasted. Even if Coing earned his doctoral degree at the University of Göttingen in 1935, and his habilitation at Frankfurt a. M. in 1938, in contrast to Wieacker, Coing never wrote anything which could be even remotely qualified as a masterpiece of Nazi legal literature. Quite the opposite; he only started his scholarly career after WW II by dismantling the Nazi jurisprudential structure with the help of legal philosophy.

The story of Prof. Zimmermann, who was born after WW II and 40 years later than Coing, is completely different. His sole encounter with totalitarianism was his seven-year long stay in South Africa.[81] He remained there as law professor at the University of Cape Town from 1981 to 1988 as the apartheid regime – while perhaps no longer flourishing – undoubtedly persisted, finally deteriorating into collapse at the beginning of 1990s. There is an obvious analogy between Nazi rule over Europe and apartheid of South Africa as totalitarian racial systems,[82] but we are not entitled to speculate whether Prof. Zimmermann went to Cape Town to – adapting freely from Adorno – live a good life in a bad society[83] or, on the contrary, to help human rights, freedom and democracy triumph.

Coming back to Europe, Prof. Tuori attributes to Prof. Zimmermann one important impact upon the development of European legal history: "It is notable that Koschaker's view of Savigny influenced that of Coing, who in turn inspired Zimmermann". This relay of great jurists is rounded out with Prof. Tuori's laudatory assessment of Prof. Zimmermann, which seemingly lacks sufficient justification. The latter is praised namely for being "the first to openly state that the history of Roman law in Europe is mostly about the reception of Roman law" (p. 154). According to Prof. Zimmermann, Prof. Tuori insists, the new private law of Europe should be molded by "the shared tradition of the reception of Roman law not ancient Roman law itself" (p. 249).

The discovery, ascribed to Prof. Zimmermann by Prof. Tuori in this celebrative manner, must be sadly reclassified as very modest, given the absolute impossibility to apply in the modern era "the ancient law itself". In fact, the reception of Roman law in Germany concerned late medieval Italian legal scholarship (*mos italicus*) and not ancient Roman law. This fact was already recognized by such authorities as Friedrich Carl von Savigny and Rudolf Sohm. The latter refuted the usual Germanist lament over the oppression of local laws by a foreign learned law, stressing the nature of the reception as "scientification" (*Verwissenschaftlichung*): "We received alien law, because we needed an alien legal scholarship".[84]

The approval of such insights by Nazi jurists of the *Kieler Schule*, such as Karl Michaelis and Georg Dahm,[85]

79 On Coing as a natural lawyer cf. R. M. Kiesow, *Coings Diktat*, "Myops" 2015, vol. 23, p. 9.

80 H. Coing, (in:) M. F. Feldkamp (ed.), *Für Wissenschaften und Künste*, Berlin 2014, p. 136; critical R. Zimmermann, review of H. Coing, *Für Wissenschaften und Künste…*, „Rabels Zeitschrift" 2015, vol. 79.1, pp. 222, 226.

81 R. Zimmermann, *Turning and Turning in the Widening Gyre… Gegenwartsprobleme der Juristenausbildung in Südafrika*, (in:) Gedächtnisschrift für W.K. Geck, Köln 1989, pp. 985–1021.

82 H. Adam, *The Nazis of Africa: Apartheid as Holocaust?*, "Canadian Journal of African Studies" 1997, vol. 31.2, pp. 364–370.

83 J. Butler, *Can one lead a good life in a bad life?*, "Radical Philosophy" 2012, vol. 176, pp. 9–18.

84 R. Sohm, *Die deutsche Rechtsentwickelung und die Codificationsfrage*, „Grünhuts Zeitschrift" 1874, vol. 1, p. 258; cf. T. Giaro, *A Matter of Pure Conscience...*, p. 24.

85 K. Michaelis, *Wandlungen des deutschen Rechtsdenkens seit dem Eindringen fremden Rechts*, (in:) G. Dahm et al. (eds.), Grundfragen der neuen Rechtswissenschaft, Berlin 1935, p. 24; G. Dahm, *Zur Rezeption des römisch-italienischen Rechts*, „Historische Zeitschrift" 1943, vol. 167, pp. 230–231, 248, 253.

but also by others, was all but sensational.[86] We read similar statements already in the first German edition of Wieacker's "History of Private Law in Europe",[87] published in 1952, the year of Prof. Zimmermann's birth. The knowledge of the circumstances which permit this process to be described as "shared" in the sense of its pan-European ubiquity, even if its modalities differed in various nations and countries, is rather old too. As early as 1866, Jhering noticed the commonality of one and the same legal source, the Justinianic *Corpus Iuris Civilis*, effective in most parts of continental Europe.[88]

> **An obvious analogy between Nazi rule over Europe and apartheid of South Africa.**

The chronological difficulties of Prof. Tuori, who analysed works of Schulz and Pringsheim published in 1934 as exile works of refugees, become thereby once again evident. Moreover, Prof. Tuori celebrates Prof. Zimmermann as the discoverer of the relatively simple truth "that the history of Roman law in Europe is mostly about the reception of Roman law" (p. 154). Furthermore, Prof. Tuori thereby ignores that Coing not only "inspired" Prof. Zimmermann, but made even the same discovery somewhat earlier.[89] As a matter of fact, the title of one of his late publications, "From Bologna to Brussels" (*Von Bologna bis Brüssel*),[90] sums up Coing's original program dating back at least to the 1960s or maybe even to 1952, when he published his review of Ernst Robert Curtius' work *European Literature and the Latin Middle Ages* (*Europäische Literatur und lateinisches Mittelalter*).[91]

All in all, to grasp that the "shared" reception of Roman law in Europe was in no way the reception of "ancient Roman law itself", European legal historians needed neither the terrible experience of Nazism, nor exile, to say nothing about the subsequent events of WW II and the Holocaust. Prof. Tuori emphasises that since Germanic and German laws – in contrast to French or Anglo-Saxon ones – ignored a contractual conception of rights, it should have been substituted by tradition. In this sense, "the European legal history project may also be seen as" – Prof. Tuori allows himself here a dash of impertinence – "very much a German project" (p. 235).

However, as Prof. Tuori elaborates, Coing's version of European legal tradition differs from those of Koschaker and Wieacker respectively. Besides any legal elements, it includes "values and moral and philosophical foundations" (p. 236). Hence, as rightly stressed by Prof. Tuori, there is in Coing, similarly to Leo Strauss, much appeal to historical tradition (p. 247).[92] In this way, Coing laid the groundwork for "a third way for rights" as an alternative to the natural and the contractual (p. 261). Moreover, he is praised by Prof. Tuori for having presented "a balanced account of the rule of law", in whose framework natural law tradition accounted for questions of public law, and Roman law tradition for those of private law (p. 239).

86 T. Giaro, *Alt- und Neueuropa, Rezeptionen und Transfers*, (in:) T. Giaro (ed.), Rechtskulturen des modernen Osteuropa. Modernisierung durch Transfer zwischen den Weltkriegen, Frankfurt a.M. 2007, pp. 284–285.

87 F. Wieacker, *Privatrechtsgeschichte der Neuzeit*, 1st ed., Göttingen 1952, p. 126.

88 R. von Jhering, *Geist des römischen Rechts*, 2nd ed., Leipzig 1866, p. 14.

89 H. Coing, (in:) M.F. Feldkamp (ed.), *Für Wissenschaften und Künste…*, pp. 137–140.

90 H. Coing, *Von Bologna bis Brüssel. Europäische Gemeinsamkeiten in Vergangenheit, Gegenwart und Zukunft*, Bergisch Gladbach, Köln 1989.

91 K. Luig, *In memoriam Helmut Coing*, „Zeitschrift der Savigny-Stiftung Romanistische Abteilung" 2002, vol. 119, pp. 669–670.

92 Cf. also H. Coing, *La tradition juridique dans la construction de l'Europe*, in: L'Europa. Fondamenti, formazioni e realtà, Roma 1984, pp. 361–384.

Despite his "moral and philosophical foundations", as far as the problem of the eastern border of Europe is concerned, Coing, even if a couple of years younger than Wieacker, cannot be viewed as any more advanced from the perspective of legal history. Although under the Nazis Wieacker propagated the idea of the Germanocentric "new Europe",[93] in the middle of the 1980s he declared Russia's affiliation to Europe as "out of the question".[94] Coing, on the other hand, remained traditionally attached to the idea of Western Christendom and never extended Europe's border further eastward of typical countries of East-Central Europe: Hungary and Poland.[95] The interesting question of whether and since when Russian law became quintessentially European,[96] cannot be discussed in this context.

7. Conclusions

The influence of the Jewish émigrés upon the general return of Western European jurists to traditional theories of liberty, natural law, democracy, and human rights (p. 242) seems to fade somewhat towards the end of the book. In summing up, this return is attributed by Prof. Tuori in a multifaceted way to "a reaction to Nazi totalitarianism, American influence and self-definition against communism" (p. 248). In his "Conclusions" (pp. 263–272), Prof. Tuori resolves that the narrative of the shared tradition of European law and the idea of the legal heritage of Europe emerged during a long historical process which began in the 1930s (p. 263) and, more precisely, in the Nazi years.

Here, Prof. Tuori comes back to his fixed idea that it was exile that led the Jewish asylum seekers to change their ways of thought, since "exposure to new ideas, traumatic experiences and feelings of marginalization were powerful impulses for rethinking" (p. 265). However, according to Prof. Tuori, the narratives formed on the one hand by legal refugees of Jewish origin and, on the other, by true born Germans – or rather by "Aryan" legal academics who never faced expulsion – completed each other as "two parts of a whole": the former was founded on "liberty and scientific integrity", the latter on "culture and tradition" (p. 268).

Unfortunately, I am not sure whether the four value concepts cited above compose a meaningful and harmonious "whole". I can perfectly understand that the Nazis and their supporters did not hold "liberty and scientific integrity" in high esteem, but I cannot comprehend – maybe because I am biased – why people harbouring Nazi inclinations who, being possessed by the aim to always attain something "new",[97] and to do so in an incredibly brutal way that destroyed so much, should be characterised by their strong attachment to "culture and tradition". Moreover, the construction developed diligently by Prof. Tuori seems to contain some further blemish.

Specifically, I cannot identify any reasonable division of labour between Jewish legal refugees and "Aryans" who could remain in Germany and be assigned university chairs. The refugees Pringsheim and Schulz were typical representatives of the traditionally apolitical discipline of Roman law at the traditionally apolitical German university.[98] Like most specialists of this discipline, formed during the era directly following the promulgation of the BGB, they were exclusively "scholars of ancient Roman law".[99] Hence, it is irrational to compare them with genuine political thinkers Hannah

93 T. Giaro, *Legal Historians and the Eastern Border of Europe*, (in:) T. Beggio, A. Grebieniow (eds.), Methodenfragen der Romanistik im Wandel, Tübingen 2019, pp. 151–152.

94 F. Wieacker, *Konstituentien der okzidentalen Rechtskultur*, (in:) O. Behrends et al. (eds.), Römisches Recht in der europäischen Tradition, Ebelsbach 1985, p. 357; id., *Foundations of European Legal Culture*, "American Journal of Comparative Law" 1990, vol. 38, p. 8; cf. T. Giaro, *Der Troubadour des Abendlandes…*, p. 73.

95 H. Coing, *Common Law and Civil Law in the Development of European Civilization*, (in:) id., K.W. Nörr (eds.), Englische und kontinentale Rechtsgeschichte: ein Forschungsprojekt, Berlin 1985, p. 33; T. Giaro, *Europa und das Pandektenrecht*, „Rechtshistorisches Journal" 1993, vol. 12, p. 331.

96 M. Avenarius, *Fremde Traditionen des römischen Rechts. Einfluss, Wahrnehmung und Argument des 'rimskoe pravo' im russischen Zarenreich des 19. Jahrhunderts*, Göttingen 2014, reviewed by T. Giaro, *Russia and Roman Law*, „Rechtsgeschichte" 2015, vol. 23, pp. 309, 313–314, 317.

97 T. Giaro, *The Culmination-Book…*, p. 15.

98 W. Abendroth, *Das Unpolitische als Wesensmerkmal der deutschen Universität*, (in:) Universitätstage 1966. Nationalsozialismus und die deutsche Universität, Berlin 1966, pp. 189–208.

99 T. Giaro, *The Culmination-Book…*, pp. 14–15.

Arendt, Franz Neumann, Leo Strauss and Arnaldo Momigliano (pp. 4, 26, 38, 64–65, 71–74, 86, 243, 263).

However, assuming the stance advocated by Prof. Tuori that Koschaker and Wieacker were central in the process of inventing the shared European legal tradition (p. 2), one cannot ignore that both of them resided in Germany throughout the entire duration of the Nazi regime. Therefore, both spoke from its perspective; the former as a self-proclaimed advisor (and by no means an "opponent"),[100] the latter as insider. It is they who introduced the European perspective to German legal history: Koschaker did so based on old Europe or the Christian Occident, Wieacker on Nazi new Europe. Prof. Tuori differentiates neatly between Koschaker's idea of legal tradition based on textual continuity and Wieacker's conception privileging legal method (pp. 196–197).

Moreover, Prof. Tuori mentions anonymous "Roman law scholars" of the postwar era who rejected natural law, retaining as the only solid basis for legal science "history", represented by "the heritage of Roman law… embedded into the legal culture" (p. 123). Fitted in the company of such high values, Roman law seems to constitute for Prof. Tuori a kind of 'universal worth-indicator' of diverse legal systems. But is Roman law itself always a "good thing"? And what about the hard-hitting characterization of Roman jurists by a mid-19th century German lawyer, Julius von Kirchmann, as "obedient servants of the tyranny"?[101] Constitutionalism and democracy were, in Rome, traditionally weak,[102] so the military monarchy of the 3rd century did not fall of a clear blue sky.[103]

Nor is Europe as such always "a good". From this point of view, Prof. Tuori assumes a too-simple change in Nazi ideology. In his opinion, the original idea of the German blood community was loosened after the attack on the Soviet Union in 1941, as "the need for allies… prompted the invention of the *Neue* Europa" (p. 270). Since Nazis saw "Europe as a bulwark against… the menace of communism and racial impurity in the East" (p. 16), they combined *Mitteleuropa* – as Prof. Tuori correctly recognises – into a unified area dominated by the Germans with "the ideological threat of communism and a racial one of Slavic and other eastern people" (p. 129).

However, if a search for an initial date of the New Europe concept is reasonable, I still harbour some doubts whether the date 1941 (p. 270) is not too late.[104] As an unbidden advisor on Nazi foreign policy, Koschaker already extolled in his crisis-conference of December 1937 "European" or "Roman-European" legal scholarship, stressing that Roman law was not an exclusively German, but rather a European concern.[105] In his paper of May 1938 from the special issue of *Deutsches Recht*, the organ of Nazi Association of German Legal Professionals directed by Hans Frank and published on the occasion of Hitler's visit to Italy, Koschaker chased his outdated dreams of the "feeling for European culture" (*Kulturgefühl*) and "cultural community of the Christian Occident" (*christliches Abendland*).[106]

Much earlier, in 1934, Werner Daitz, economic consultant to the Nazi party, had prepared his "Memorandum (*Denkschrift*) on the Building of a Society for the European Economy of Large Areas (*Großraumwirtschaft*)". Other similar writings of his were in circulation during the 1930s, and the spiritual child of Daitz, the "Society for Planning the European Economy and the Economy of Large Areas" (*GeWG*), was, from September 1939, amplifying purely military efforts to subjugate the occupied Eastern European countries as German colonies.[107] This completely uncharitable

100 A widespread but undoubtedly misleading qualification followed by K. Tuori, *Narratives and Normativity…*, p. 625.

101 H.J. von Kirchmann, *Die Wertlosigkeit der Jurisprudenz als Wissenschaft*. Vortrag in der Juristischen Gesellschaft zu Berlin 1848, Darmstadt 1969, pp. 42–43; T. Giaro, *Aktualisierung Europas…*, pp. 107, 165.

102 S. Gordon, *Controlling the State. Constitutionalism from Ancient Athens to Today*, Cambridge MA, London 1999, pp. 86–115.

103 K.-P. Johne (ed.), *Die Zeit der Soldatenkaiser. Krise und Transformation des Römischen Reiches im 3. Jahrhundert n. Chr.*, Berlin 2008.

104 T. Giaro, *A Matter of Pure Conscience…*, pp. 22–23.

105 T. Giaro, *Der Troubadour des Abendlandes…*, p. 38 with exact quotes.

106 P. Koschaker, *Deutschland, Italien und das römische Recht*, „Deutsches Recht" 1938, vol. 8, pp. 183–184; T. Giaro, *Memory Disorders…*, pp. 15–16.

107 D. Majer, *Das besetzte Osteuropa als deutsche Kolonie*, (in:) Fritz Bauer Institut (ed.), Gesetzliches Unrecht, Frankfurt &

organization could count on the expertise of Paul Koschaker as a specialist in European law.[108]

Hence, Nazi Germany knew a lot of hegemonic discourse on Europe, conducted under the slogan of its restructuring (*Neuordung*),[109] long before the attack on the Soviet Union. The renewed colonization of Eastern Europe (*Ostraum*) by Germany, this time accomplished exclusively with 20th-century martial means, i.e. instruments of destruction, ran notoriously under the banner of occidental anti-Bolshevism.[110] But if some alternate history of WW II is allowed, then if, in 1917, Russia had rejected Bolshevism, the German aggression of June 1941 would have taken place equally, but only this time under the different slogan 'Germany defends its living space against the rotten Tsar's Empire'.[111]

All in all, the shared legal tradition of Europe seems to be to a certain extent a historical fact or, above all, historical conviction. However, the usual critical question, which cannot be examined here, runs: historical, to what extent? On the other hand, I am afraid that the real formation process of this tradition does not correspond exactly to the narrative presented and promoted by Prof. Tuori and his research team. With the biographies of Koschaker and Wieacker, as well as the culmination book co-edited by Prof. Tuori, the dehistorizing Hi-Hitler!-style was already evident in the efforts to excuse the protagonists or at least to reduce the weight of their misconduct.

In its turn, Prof. Tuori's Empire-book, in its general tendency, since not every intelligent observation of the author could be highlighted, confuses the historical chronology too easily. Furthermore, most omissions and errors of Prof. Tuori go in favour of the Nazi supporters. Hence, at least some of these men emerge normalised as apolitical professors, "interested only in scholarly things";[112] at the same time they are relativised as the joint progenitors of the European ideology of shared legal tradition. As Europe was being razed to the ground and its population exterminated, they were – in parallel with the Jewish refugees in the Anglo-Saxon world – simply working in Germany on their "part of a whole" (p. 268).

As Europe was being razed to the ground, they were simply working on their "part of a whole".

Counterfactual Hi-Hitler!-narratives are expected to replace the memory of real events with exculpatory fantasies serving to whitewash the reputations of those who supported the regime which sparked WW II with its unprecedented mass crimes against humanity.[113] The survivors and their scions are happy to live neither in Franz Wieacker's New Europe, nor in the *Führerstaat* or Great German Empire of his friend Ernst Rudolf Huber.[114] They marvel that in the spring of 1945, anybody should have witnessed the demise of the Third Reich as "a drastic disappointment".[115] And they rather follow Koschaker, who – in the bowdlerized version of Prof. Tuori – embraced to his heart the whole European continent.

New York 2005, pp. 111–134; T. Giaro, *Memory Disorders…*, p. 20.

108 T. Giaro, *Memory Disorders…* p. 20.

109 B. Kletzin, *Europa aus Rasse und Raum*, 2nd ed., Münster 2002, pp. 95–99.

110 T. Giaro, *Vor-, Mit- und Nachdenker des Madagaskar-Plans…*, p. 145.

111 T. Giaro, *Vor-, Mit- und Nachdenker des Madagaskar-Plans…*, p. 134.

112 T. Giaro, *A Matter of Pure Conscience…*, p. 21.

113 G. Schenkel, *Alternate History, Alternate Memory…*, pp. 182–183.

114 E.R. Huber, *Verfassungsrecht des Großdeutschen Reiches*, Hamburg 1939.

115 T. Giaro, *A Matter of Pure Conscience…*, p. 25.

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Kaius Tuori

Reply to a Review on *Empire of Law*

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I do not normally respond to reviews, but when I do, I try to make it at least somewhat interesting. I know that responding and responses are supposed to be the way that scientific inquiry progresses, but the reality is very different. Malicious reviews tend to be written by either of two kinds of people; bitter emeritus professors vainly attempting to promote a long-dead research approach or ambitious young doctoral students desperately trying to make themselves and their theses relevant by trashing real or imagined competition. In either case, they are less interested in real scientific dialogue than your average internet troll.

As I said, I am making an exception here, because the reviewer has actually touched upon an interesting point but I will not go through the twenty pages of minor issues that were paraded before a no doubt increasingly bored reader. For the record, some of them I happily concede to be accurate, such as that there should be more references to post-WWII German literature or the instances where Wieacker uses racist terminology or overlooks Jewish victimhood. In other cases, such as excusing or minimizing the Holocaust, their claims are nonsensical.

What I would like to address here are two main issues, the very serious accusation of there being Nazi sympathies and the related issue of intellectual development and the transmission of ideas through extreme circumstances.

The reviewer makes a very direct accusation that the book is representative of the normalization of Nazi ideology and an apology of the Nazis themselves, using the notion of Hi Hitler! narrative to discuss this. This is consistent with their general attempt at provocation through the use of straw men argumentation. For those unfamiliar with this term, arguing against straw men means misconstruing your opponent's argument as a grotesque version of itself, an argument that fails by its own internal logic like a sand castle. A good example of a straw man article is the claim that I would have claimed that exile is "a gratifying and rejuvenating experience"! I am writing consistently about exile and depict it as a tragic and traumatic experience, not akin to a visit to the spa.

The evoking of this so-called Hi Hitler! narrative in this case is both ethically and morally dubious, a banalization of the events leading to the Holocaust. The reviewer is actually misrepresenting Gavriel

D. Rosenfeld's astute work, turning its main message on its head. Allow me to elaborate; Rosenfeld analyzes how, through instruments such as memes and comedy, the Nazis are humanized and their ideas given air time and how they are disconnected from the atrocities of the Holocaust.

What the reviewer is actually doing is making another misrepresentation; the removal of Nazis from the realm of man and turning them into space monsters. This 'monsterization' has a rich history, beginning with post-war Germans themselves, who placed culpability at the feet of the leading Nazis, especially Hitler himself, and presented themselves as victims. This tactic was used in a similar fashion by Nazi allies and collaborators abroad who sought to erase the fact that they were, in fact, willing collaborators and sought to benefit from Nazi Germany and its policies.

What this 'monsterization' obscures is that while there were truly monstrous characters, the very enemies of the human species, quite often there was a Jekyll and Hyde kind of quality to them. Rather than tormented beasts, they appeared to be surprisingly normal, kind to small animals and devoted family men. That these same people were also capable of indescribable cruelties and genocidal violence has prompted a veritable torrent of literature, beginning with contributions by the likes of Arendt, who memorably termed it the banality of evil.

For the apologists, most of the perpetrators of the Holocaust were simply following orders given by monstrous individuals and were thus free of blame. However, as recent studies have illustrated, there was significant leeway allowed, for instance to the people in the *Einsatzgruppe*, to not participate in the killings of women and children. For reasons that are not always clear but have to do with the social psychology of groups, most participated anyway.

Therein lies the rub. Should we believe that many of the Germans who were enthralled by the promise of the Nazi revolution were inherently good people who believed the ideas of the unity of the people and were later horrified of the turn towards mass killings and the Holocaust, or was the evil of Nazism in plain sight and those who followed it were themselves equally bad? This was, of course, the problem that Allied officials were faced with in the post-war denazification process. For reasons that had to do more with the sheer amount of people and the need to isolate and punish what they thought were the worst offenders, they chose the first option. The reviewer, seeing only black and white, is clearly opting for the inherent evil.

However, for historians, this is a false dichotomy. There is no analytical value in it. For us, the later observers, the interesting and consequential issue is that which made the Nazi ideology appealing and what legacies, intended or unintended, it has. This is also the issue that has real relevance today with the rise of various alt-right movements and populism; ideologies that utilize variants of the same strands of thought that formed the Nazi ideology.

The reviewer, seeing only black and white, is clearly opting for the inherent evil. However, for historians, this is a false dichotomy.

As James Whitman has demonstrated in his book on the linkages between Nazi thought and practices and the American racial or Jim Crow policies, ideas are not born in a vacuum. The practice of taking thoughts and concepts and twisting them to new, nefarious ends was the way Nazi thought operated. This linking of generally accepted conservative aims with more radical ideas was how oppression, separation, exclusion and, eventually, extermination of the other was sold to the Germans.

But understanding is the road to normalization and acceptance, the reviewer argues. This is another false claim. It does not distinguish between the internet trolls' practice of 'whataboutism' and analyzing his-

torical development. The practice of 'whataboutism' is an argumentation tactic employed to draw attention away from something by pointing to another alarming case. Thus, if you are accused of a crime, instead of defending yourself you point to the crimes of your accusers. How this works in historical discussions can be illustrated by the use of the Armenian genocide in relation to the Holocaust. The 'whataboutist' claim would be to say that the Armenian genocide illustrates how massacres and bad things happen and thus Holocaust was not that noteworthy. The analytical historical argument of linking the two would be to demonstrate how observation of the Armenian genocide and its use as ethnic cleansing were one of the historical examples which informed the planners of the Holocaust.

as for instance Wieacker did, from that of a traditionalist conservative to a radical Nazi reformer and back while all the time being convinced of one's own moral rectitude.

But, you ask, a Nazi is a Nazi, so what difference does it make? The damage painting almost all of German academia with the same brush does is that it allows truly nasty creatures such as Carl Schmitt, an unrepentant Nazi and a fierce anti-Semite, to escape within the crowd. Due to the continuing appeal of his ideas, especially his criticism of liberalism, Schmitt has gained an unprecedented following which repeatedly presents apologies and minimizations of his involvement in the Nazi movement and ideology. While Schmitt was ostracized from academia, it did not mean the end of his influence, as his students continued to occupy

Is entirely possible to make the intellectual passage, as for instance Wieacker did, from that of a traditionalist conservative to a radical Nazi reformer and back?

If we fail to analyse and to recognize the roots of Nazi legal thought and the way it combined elements from various sources, we are vulnerable to the way that similar ideas are being peddled under the guise of populism. Whether we like it or not, Nazi ideology had genuine appeal to the people not only of Germany but also elsewhere in Europe. The extremely disturbing fact that similar ideas are increasingly being presented today makes understanding this appeal relevant and, in fact, blaming the monstrous acts of the Nazis to the very monstrosity of Germans obscures the point that figures both on the political Right and Left are peddling – with great success – racist and xenophobic ideas that perpetuate the Nazi ideas of ethnicity and exclusion. It is through the exceptionalism of the Nazis, and the 'spacemonsterization' of perpetrators, that we are able to maintain the balance between good and evil in our worldview.

In this case, my aim has been to illustrate that it is entirely possible to make the intellectual passage,

important positions. In fact, as I write, only very few Nazi scholars suffered any real consequences between 1945 and 1968.

What I am arguing is that due to this continuity, there is a distinct danger in simply and lazily (and incorrectly) slapping a label on the period of 1933–1945 which says "Nazis! Do not open!". The danger is such because ideas created in response to Nazi ideology did not go away and neither did the people who created them; there is a resurgence.

We shall now go to my second point, the transmission and change of ideas and the impact of trauma. The learned reviewer raises numerous times the notion that the scholars are misrepresented. For the reviewer, Schulz and Pringsheim are apolitical scholars focused on the dogmatic study of Roman law, while Wieacker is a Nazi from head to toe and Koschaker is a German nationalist nostalgic of old empires. They are what they are, with little or no change. They are also all qualitatively different from "political scholars" such as Arendt

and Neumann. This notion of the eternal qualities of scholars in that their permanent essence is locked in their biographies, coherent and unchanging, is the second most troubling idea of the review.

This conviction of the essential unchanging qualities explains the incredulity that the reviewer has for the need to work through the traumatic experiences, and the wholesale rejection of the idea that strong personal experiences find expression in works of scholarship.

This is inconsequential for the reviewer: these are not their 'genuine' achievements as noted in obituaries. Even worse, there are inconsistencies in their examples, where some statements are not consistent of the idea of a liberal hero protagonist that the reviewer imagines the book represents. Hence, the absurd claims about Schulz's discussions on possible Oriental influence as Nazi propaganda reflect the reviewer's point of view. I wonder whether Schulz's rejection of Greek influences

The reviewer interprets the opinions of the people I research; Schulz, Pringsheim et al. as my own opinions and convictions.

For those who have yet to read the book, the main underlying idea was that certain ideas such as the shared European legal tradition have their roots in scholarship during the Nazi years both by persons such as Schulz and Pringsheim, who were exiled, and Koschaker, Wieacker and Coing, who stayed in Germany and with varying degrees participated in the Nazi regime. I trace the beginnings of this tradition to a couple of atypical works by Schulz and Pringsheim. They are enigmatic mixtures of old and new and their interpretation has troubled both contemporaries and the later world. What the reviewer claims is that these works are simply aberrations that have little significance, because they do not fit the profile that they have been given in the German legal tradition. This atypical nature is the point. Schulz and Pringsheim's are works that explain and explore the significance not only of the Nazi challenge but also the ramifications that it would have in the German and wider European legal tradition. Theirs were also some of the last works to be published in the brief window of time between the Nazi takeover of power and the silencing of authors of Jewish heritage in 1935 and the purge of scientific publications.

or rhetoric would be similarly construed as Nazi ideas. Similar strangeness ensues with Koschaker and his ideas about Eastern Europe, discussions which reflect contemporary concerns of the reviewer rather than the German-centred viewpoint of Koschaker himself. In all of these contemplations there is a strange notion that the reviewer interprets the opinions of the people I research; Schulz, Pringsheim et al. as my own opinions and convictions or is even a sign that I personally would accept and endorse them (such as the idea of the universal worth and validity of Roman law as a yardstick to which all legal systems should be measured against or the casual racism). That is not how historical writing works. My point is to understand the convoluted logic behind the emergence of one of legal history's most cherished myths and that requires understanding the logic of its creators.

All in all, the book attempts to explore the continuities and changes in the works of these authors, raising parallels and points of contention. What the reviewer would have wanted was an unambiguous narrative with a beginning and an end, with characters that suit the part they are assumed to have with no inconsistencies and human flaws. As such, I am afraid that no such clean narrative is there to be found.