

II

SEGMENTI DELLA RICERCA ANTICHISTICA  
E GIUSANTICHISTICA NEGLI ANNI TRENTA

SEGMENTI  
DELLA RICERCA ANTICHISTICA  
E GIUSANTICHISTICA  
NEGLI ANNI TRENTA

a cura di

**Pierangelo Buongiorno**  
**Annarosa Gallo**  
**Laura Mecella**

VOLUME SECONDO



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## *Grandi Opere*



SEGMENTI DELLA RICERCA  
ANTICHISTICA E GIUSANTICHISTICA  
NEGLI ANNI TRENTA

VOLUME PRIMO

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*Pierangelo Buongiorno, Annarosa Gallo e Laura Mecella*

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## PREMESSA

1. In quell'affascinante luogo delle regole e degli spazi che è, *ab antiquo*, la geometria, con la nozione di segmento sono indicate parti di linee rette definite da due punti. Eppure, affermava agli inizi di III secolo a.C. il matematico alessandrino Euclide, ciascun segmento può essere prolungato indefinitamente oltre i due punti che lo definiscono.

È in questo principio di per sé evidente, noto anche come secondo postulato euclideo (ma che è sostanzialmente ammesso anche dalle geometrie non euclidee), che risiede lo spirito con cui questo libro è stato immaginato, ideato, progettato: prendere le mosse da segmenti, più o meno ampi, delle numerose linee che giacciono nel piano delle nostre scienze, isolarli e provare a prolungarli, per quanto possibile, oltre i punti che li definiscono. Scoprendo così incidenze, parallelismi, complanarità e, nondimeno, le molteplicità di piani da cui ciascuna retta, proiettata nello spazio, è attraversata.

Se vi è stato un periodo a partire dal quale la geometria delle *Altertums-wissenschaften* si è svelata nella sua molteplicità di piani, è stato infatti proprio la prima metà del XX secolo, quando la raggiunta consapevolezza dello statuto epistemologico degli studi antichistici, tanto nel loro insieme quanto nella loro specificità, ha irrobustito da un lato l'identità propria delle singole discipline, dall'altro la dialettica di ciascuna di queste con un mondo agitato da profondi cambiamenti. Un'epoca non necessariamente di buon senso, nella quale studiosi perfettamente calati nelle società del proprio tempo furono sovente partecipi della vita e del dibattito politico: si pensi, a mero titolo di esempio, a figure come quelle di Vittorio Scialoja, Gaetano De Sanctis, o del fondatore dell'Istituto Italiano per la Storia Antica, Rettore della Sapienza e Ministro Guardasigilli Pietro de Francisci. Questi studiosi operarono attraverso ricerche spesso di altissimo profilo scientifico ma non necessariamente indirizzate soltanto a una ristretta cerchia di specialisti; tali lavori riuscivano infatti consonanti, e spesso armonici, con una società che era ancora in grado di intercettare il legato della cultura classica. Non era un fenomeno soltanto italiano: europeo, piuttosto, l'ultima eredità di quella *Welt von gestern* nostalgicamente tratteggiata da Stefan Zweig.

Gli anni Trenta, in particolare, ci rimandano a una dimensione in cui classicismo e modernità dialogano, si mescolano, si fanno parti coese di un insieme nuovo, in cui le radici classiche (soprattutto in Italia e in Germania) divengono

esibito fondamento del mondo che verrà. Questo dato è ben visibile in architettura: per limitarsi all'Italia (e tralasciando per esempio i progetti avveniristici di Albert Speer per la Berlino del Terzo Reich), si pensi al classicismo stentoreo del Foro Mussolini (oggi Foro Italico) di Enrico Del Debbio o, ancora, alla Minerva di Arturo Martini collocata dinanzi al razionalista Palazzo del Rettorato della città universitaria, a sua volta disegnato dall'Accademico d'Italia Marcello Piacentini.

Sempre Piacentini, che di questo linguaggio architettonico, presto denominato 'stile littorio', fu sin da subito il corifeo, sarà nel 1937 Presidente della Commissione esaminatrice del concorso per l'ideazione di un *Palazzo della Civiltà Italiana*, da collocarsi nel nascente quartiere EUR42, che avrebbe dovuto ospitare l'Esposizione Universale di Roma del 1942. Insieme con gli altri commissari, Piacentini vagliò il progetto di Giovanni Guerrini, Ernesto Lapadula e Mario Romano, noto anche come *Colosseo quadrato*. Un edificio a forma di parallelepipedo a base quadrata (originariamente dalla forma cubica) in travertino, caratterizzato da archi presenti su tutte e quattro le facciate, e che sulla testata di ciascuna di esse reca l'epigrafe, incisa in lettere capitali quadrate: «Un popolo di poeti di artisti di eroi / di santi di pensatori di scienziati / di navigatori di trasmigratori».

Si tratta, come è noto, della citazione da un discorso tenuto da Benito Mussolini il 2 ottobre 1935, in polemica con la Società delle Nazioni, per le minacciate sanzioni in conseguenza della guerra d'Etiopia.

Come ha ricordato a più riprese Emilio Gentile (per esempio nel libro *Il culto del littorio*, Roma-Bari 1998, 260), nel *Palazzo della Civiltà Italiana* «la rievocazione della grandezza del popolo italiano avrebbe conferito all'edificio un "attributo sacro"», tanto che un gruppo di architetti fascisti lo avrebbe definito «quasi tempio della Stirpe» italica.

È dunque solo in parte sorprendente la coincidenza di tempi fra la posa della prima pietra del *Colosseo quadrato* (avvenuta nel luglio del 1938) e il lugubre prologo della legislazione razziale, ossia la pubblicazione, il 14 di quello stesso mese e anno, del *Manifesto degli scienziati razzisti*. Se in un grande passato affondava le sue radici il futuro degli italiani, da questo – seguendo ormai la *raassistische Welle* tedesca – erano esclusi gli ebrei, additati adesso a nemici 'irreconciliabili' dell'Italia fascista.

La vicenda del *Colosseo quadrato* si pone insomma al crocevia del rapporto fra antichistica, classicismo e politica nell'Italia degli anni Trenta. Proprio l'iscrizione escerpita dal discorso di Mussolini dell'ottobre 1935 ci rimanda al tema dell'uso (e abuso) della storia come argomento di propaganda politica. Abusi e ricostruzioni finalistiche della memoria sono del resto strumenti retorici che storicamente sorreggono e hanno sorretto aggressioni perpetrate

ai danni di terzi, anche soggetti di pieno diritto e stati internazionalmente riconosciuti come sovrani. La retorica dell'impero di Roma raggiunse quindi la sua acme nell'Italia fascista all'indomani dell'aggressione all'Impero di Etiopia (*Mängästä Ityop'p'ya*): la conquista di una nuova colonia e la connessa (ri)fondazione dell'Impero riaffermavano, con prepotenza, la grandezza di Roma e dei suoi 'colli fatali'. Artatamente utilizzato a fini propagandistici, il mito dell'impero intendeva tentare di legittimare una situazione palesemente illegittima sotto il profilo del diritto internazionale. Con buona pace di imperatori santi ed eroi, poeti artisti e pensatori, scienziati, navigatori e trasmigratori, esso tuttavia non impedì alla Società delle Nazioni di condannare l'Italia come Paese aggressore, irrogando pesanti sanzioni economiche, tanto che l'Italia abbandonò presto quest'organizzazione intergovernativa. L'ingloriosa fine dell'impero fascista sarebbe giunta dopo meno di un decennio, spezzando – questa volta in maniera definitiva – le pretese 'continuità di Roma' (per usare un'immagine di recente richiamata da Antonio Mantello [da ultimo in Id., *Variae*, II, Lecce 2014, 83 ss.]).

2. Il rapporto fra 'romanità' (latamente intesa) e fascismo è oggetto dell'analisi storiografica da diverso tempo, tanto che negli ultimi tre decenni si è ormai assistito a una vera e propria 'esplosione' del tema (oramai quasi predominante su altre, possibili prospettive di indagine); scopo del presente volume è, pertanto, quello di provare ad ampliare lo sguardo, abbracciando l'antichistica nelle sue diverse branche e ricomprendendo, quindi, anche ambiti come l'orientalistica, la storia delle religioni e la storia dei diritti antichi, nel tentativo di ricostruire e analizzare gli indirizzi di studio, le linee di ricerca e i frammenti di biografie intellettuali sviluppatasi nel corso degli ultimi anni Venti e, soprattutto, degli anni Trenta.

I venticinque contributi confluiti nelle pagine che seguono ambiscono, naturalmente senza pretesa di esaustività, a cogliere alcuni profili e aspetti degli studi antichistici in Italia lungo un lasso di tempo che appare, a questo riguardo, periodizzante per diverse ragioni. Innanzitutto, perché questo fu il tempo del consenso al fascismo, anche da parte del mondo universitario. Un consenso forse talvolta estorto, di certo percepito come autoevidente: basti ricordare che nel 1931, a eccezione di pochi e limitati rifiuti, la quasi totalità degli accademici italiani prestò, per le più varie ragioni, giuramento al fascismo, pur essendo buona parte di quelli avversa a esso. Fra quanti, per ragioni di necessità, avevano giurato, l'espressione del non allineamento o del dissenso, a seconda dei soggetti interessati e per quanto le singole discipline lo consentissero, si sostanziò nella ricerca di temi di studio antitetici: *in primis*, la libertà (tema caro, ad esempio, anche a Gaetano De Sanctis, che fu tra i pochissimi a non giurare); *in*

*secundis*, qualora i temi trattati fossero espressione di quella specifica temperie politica e culturale, questi furono comunque affrontati in modo neutro e tecnico, senza alcuna enfasi propagandistica (per non fare che un paio di esempi, si pensi alla prima edizione del *Claudio* di Arnaldo Momigliano o al contributo dello studioso torinese su *I problemi delle istituzioni militari di Augusto* edito nel volume celebrativo del bimillenario augusteo).

A scandire questa periodizzazione, poi, altri due aspetti, su cui si è prima richiamata brevemente l'attenzione: in primo luogo la retorica della (ri)fondazione dell'Impero e l'esaltazione del suo fondatore – tema che si intreccia con le celebrazioni per il bimillenario augusteo – e poi ancora, l'inizio della stagione più vergognosa, quella della promulgazione della normativa razziale, che ebbe significative ricadute anche sulla comunità accademica.

Dal settembre del 1938, nel solco di quanto già era avvenuto in Germania e avverrà poi nei Paesi via via occupati e annessi dal sistema di potere nazista, si assistette anche in Italia alla marginalizzazione di studiosi di 'razza' ebraica. Scienziati giovani e meno giovani (professori, liberi docenti, assistenti e studenti) furono obbligati nel migliore dei casi all'emigrazione, divenuta talvolta definitiva anche con la fine della guerra, oppure a vivere ai margini di quel mondo in cui spesso si erano distinti; infine costretti, con l'aggravarsi della situazione bellica, dopo la firma dell'armistizio, a nascondersi oppure a finire deportati e assassinati insieme a molte altre migliaia di ebrei italiani. Un nome su tutti, nell'antichistica italiana: quello del grecista Mario Segre (su cui si veda ora F. Melotto, *Un antichista di fronte alle leggi razziali. Mario Segre, 1904-1944*, Roma 2022). La sua scomparsa ha lasciato nei nostri studi un vuoto incolmabile, soprattutto per le prospettive di ricerca che lo studioso torinese avrebbe potuto aprire se non fosse scomparso così tragicamente. Ma di lutti negli studi storici ve ne furono molti, su scala europea: si pensi solo alla morte di Friedrich Münzer in Germania o di March Bloch in Francia.

Prima però che ciò accadesse, pur a dispetto dell'espulsione dalle università o dell'impossibilità ad accedervi, del divieto di frequentare le biblioteche pubbliche e di firmare le proprie pubblicazioni, alcuni di questi studiosi, rimasti in Italia o emigrati altrove, cercarono di proseguire, con coraggio e determinazione, la propria attività scientifica, impegnandosi su ricerche già avviate o dedicandosi ad altre pur nelle mutate condizioni di lavoro, continuando così a contribuire al progresso del dibattito culturale. E nondimeno, non fecero mancare il loro impegno civile, anche imbracciando le armi nella lotta partigiana, come ci dimostra la vicenda, a suo modo esemplare, di Edoardo Volterra.

Nell'ambito del progetto PRIN 2017 *Studiosi italiani di fronte alle leggi razziali: storici dell'antichità e giuristi (1938-1945)*, i segmenti qui raccolti – frutto dello sforzo comune di autori diversi per formazione, interessi e provenienza

– mirano dunque soprattutto a presentare, attraverso frammenti più o meno ampi, le coordinate tematiche e scientifiche entro cui si mossero le discipline antichistiche e giusantichistiche negli anni Trenta, sullo sfondo di una più generale riflessione circa il rapporto fra le scienze antichistiche e gli effetti della legislazione razziale. Il focus è prevalentemente orientato sulla scena italiana, senza tuttavia rinunciare ad alcuni – ineludibili – confronti con esperienze straniere, con uno sguardo sempre attento ai processi di scambio osmotico fra dibattito scientifico e temperie politica.

3. Per ragioni espositive, i contributi sono articolati intorno a quattro aree d'interesse. La ricerca filologica e letteraria, innanzitutto. Nella parte dedicata a *Filologie e filologi* si pongono accenti sulla manualistica relativa alla letteratura latina e agli studi di letteratura greca, sulla vicenda umana e professionale di Angelo Fortunato Formiggini e su una figura complessa, a tratti tormentata, come quella di Albrecht von Blumenthal. Dalle analisi proposte emergono, in filigrana, alcune questioni cruciali per la comprensione dell'*humus* storico-culturale dell'epoca: il confronto con il mondo tedesco (condizionato dal dibattito contro il presunto ipertecnicismo d'Oltralpe e dalle polemiche intorno all'originalità o meno della letteratura latina); il legame, mai perfettamente lineare, tra saperi specialistici, insegnamento scolastico e divulgazione; l'impatto di esperienze di vita spesso molto sofferte sulla produzione scientifica.

Si tratta di temi che, non a caso, ricorrono in parte anche nella sezione dedicata alle *Storie di Greci e di Romani*. Gli studi di storia greca e romana negli anni Trenta sono stati già più volte indagati con riguardo prevalentemente alla figura di Arnaldo Momigliano; qui hanno invece per maggiore protagonista Gaetano De Sanctis e il suo dissenso manifestato nei confronti del regime fascista. Un dissenso che non soltanto porterà lo studioso romano, che nel 1931 aveva perso la cattedra, a prediligere esclusivamente gli studi sui Greci, campioni di *eleutheria*, ma anche a riconsiderare, sotto luce nuova rispetto ai suoi esordi, la figura di Pericle. Nondimeno, l'attenzione in queste pagine è rivolta anche agli interessi di alcuni suoi allievi, come Mario Attilio Levi e Piero Treves, entrambi colpiti dagli effetti delle leggi razziali, eppure il primo allineato al regime fascista, il secondo invece suo fermo oppositore. Allargando inoltre lo sguardo alla grecistica tedesca, si è cercato di esaminare il progressivo mutare della rappresentazione di Sparta e Licurgo, da Weimar sino all'apice dell'esperienza nazionalsocialista.

La parte dedicata a *Religioni, oriente, archeologia* estende l'orizzonte ad altri rami delle *Altertumswissenschaften*. Vi sono innanzitutto ritratti di storici delle religioni e quadri di sintesi sulle scienze orientalistiche, questi ultimi ricostruiti alla luce delle varie dinamiche accademiche e dei rapporti con il

regime fascista; si analizzano poi gli effetti del dibattito razziale sulla ricerca etruscologica, con attenzione rivolta soprattutto alla figura di Ranuccio Bianchi Bandinelli.

Del resto, come hanno dimostrato molti e preziosi contributi apparsi in volumi, anche molto recenti, sui rapporti fra archeologia e politica nella prima metà del XX secolo, la ricerca archeologica e storico-artistica visse – forse anche più intensamente di altre discipline antichistiche – fenomeni estremi tanto di dialettica profonda (si pensi, oltre a Bianchi Bandinelli, a studiosi come Paola Zancani Montuoro e Umberto Zanotti Bianco) come pure, talvolta, di connivenza con il regime fascista. La necessità era, palesemente, quella di costruire una retorica e una mitologia del potere, mescolando – spesso in maniera ideologica – dati archeologici, storici e giuridici. Da tempo è stata richiamata dagli studiosi l'attenzione sull'«invenzione» del saluto «romano»; in questo volume l'attenzione si concentra adesso sul fascio littorio.

Per parte sua, il tema del rapporto fra giusantichistica e potere politico eccede gli anni Trenta e diviene un *leitmotiv* della cultura italiana (non soltanto quella giuridica) fin dagli anni Dieci, quando un gruppo di romanisti, animati da fervori nazionalisti, si porrà a sostegno della linea interventista (si pensi, su tutti, a Pietro Bonfante) e poi percorrerà – anche ricorrendo a pratiche scientificamente incorrette, come fece per esempio Evaristo Carusi, su cui più che opportune furono le censure di Carlo Alfonso Nallino – le vie dell'epopea coloniale.

Questa fu una delle risposte alla perdita di centralità delle discipline romanistiche nel dibattito giuridico, nelle more di un processo avviatosi in Germania, e che portò da un lato agli eccessi della critica interpolazionistica (un metodo che influenzerà ancora gli esordi di uno studioso come Gabrio Lombardi, allievo del più spregiudicato fra gli interpolazionisti, Emilio Albertario), dall'altro (almeno in Italia) alla definizione di modelli atti a veicolare il riuso del diritto romano nei processi legislativi (su tutti il nuovo codice civile) e nella costruzione di branche specialistiche di nuova formazione, come per esempio il diritto agrario.

Il dibattito intorno al diritto agrario nel mondo antico, anche con le sue esplicazioni più tarde, fino cioè ad epoca bizantina, mostra tuttavia come *Dottrine, frontiere e maestri del diritto romano* (questo il nome della quarta parte dell'opera), superassero i confini strettamente nazionali, e come anzi proprio la romanistica italiana – al pari della tedesca – contribuisse a essere un faro in altre realtà nazionali: in Polonia, in Estonia, persino negli Stati Uniti di America (dove un ruolo essenziale fu giocato dal *Riccobono Seminar of Roman Law* di Washington DC, istituto fondato sotto gli auspici di Salvatore Riccobono). È per questa ragione che la prospettiva, in quest'ultima sezione, si fa più transna-

zionale, senza rinunciare allo spaccato di una realtà cosmopolita come Vienna, gloriosa sede di studi romanistici investita con tutta la sua forza dall'*Anschluss* del marzo 1938.

4. Per la complessità di temi, figure e linee di indirizzo che la caratterizzarono, sarebbe stata ferma intenzione di noi curatori presentare in questa raccolta (e i lettori non mancheranno forse di notarne l'assenza) anche una panoramica d'insieme sulla ricerca archeologica italiana negli anni Trenta. Di questo contributo si era fatto carico, con la passione e la dedizione che gli erano consuete, Marcello Barbanera. Uno studioso straordinario, entusiasta, strappato troppo presto alla vita, agli affetti, alla ricerca. Con la sua scomparsa, è sembrato doveroso, piuttosto che riassegnare il tema ad altri, lasciare in queste pagine una lacuna, quale segno di un vuoto profondo. E al ricordo del collega scomparso dedichiamo questo lavoro corale.

*Macerata, Roma, Milano  
estate 2022*

*P.B., A.G., L.M.*





BETWEEN NATIONALIST XENOPHOBIA, RACISM,  
AND COSMOPOLITANISM.  
THE ROMAN LAW EXPERIENCE IN VIENNA  
DURING AND AFTER THE ERA OF NATIONAL SOCIALISM

*Franz-Stefan Meissel – Caterina M. Grasl – Stefan Wedrac*

ABSTRACT: The history of Roman Law at the University of Vienna from the 1920s to the 1960s reflects the deep political crises of Austria as a mere «torso state» after World War I and the end of the multi-ethnic Habsburg Empire. Within the context of bitter battles between highly militarized opposing political parties (Marxist Social Democrats, Christian Conservatives and the Germano-nationalist/National Socialist «Third Camp») even before the outbreak of open civil war in 1933/34, Roman Law scholars such as Stephan Brassloff found themselves in the centre of antisemitic and xenophobic attacks. The attacks against Brassloff in 1925 combined suspicions against Roman Law as a «foreign legal system under Semitic influences» with personal persecution for political and racist motives. Brassloff was forced to temporarily resign from teaching as a consequence of a campaign instituted by National Socialist students. Along similar lines, attempts were made to end the career of Josef Hupka, a former Romanist who later turned to commercial law and in 1926 became the faculty's last Jewish dean before the Nazi takeover. Others, such as Franz Leifer, Slavomir Condanari, or Hans Kreller, attempted various «strategies of adaptation» – with varying degrees of success. Finally, Ernst Schönbauer tried to present Roman Law as highly compatible with National Socialist ideas of law and even engaged in high public functions. Schönbauer was appointed Dean of the Law Faculty in the Nazi period (1938-1943) and actively contributed to the deliberations for a *Volks-gesetzbuch* under the auspices of the Academy for German Law. The faculty's self-perception after the defeat of National Socialism is best captured by Leopold Wenger's vision of Roman Law as a «Global Legal System» which has risen «from the ashes like a phoenix». Wenger's optimistic characterisation can be seen as the expression of scholarly self-confidence and autonomy in a state still occupied by the Allies, opting for an interpretation of Roman Law as a stronghold for individual freedom.

SUMMARY: 1. Nationalist xenophobia and the persecution of Stephan Brassloff. – 1.1. section 19 of the NSDAP party programme. – 1.2. The university scandal surrounding Stephan Brassloff, 1925. – 1.3. On the fringes of Roman Law: Josef Hupka. – 2. Strategies of adaptation – Making Roman Law more Nazi-compatible. – 2.1. The «Crisis of Roman Law» and the reaction of Roman Law scholars. – 2.2. The direct impacts of the *Anschluss* (annexation of Austria into Nazi Germany) on the teaching of and research on Roman Law at the University of Vienna. – 2.2.1. Effects on staff. – 2.3. Franz Leifer. – 2.4. Slavomir Condanari. – 2.5. Hans Kreller. – 2.6. Ernst Schönbauer – Roman Law Professor and leading National Socialist. – 3. Epilogue: Like a phoenix from the ashes – Leopold Wenger and his cosmopolitan vision of Roman Law as Global law. – 3.1. Leopold Wenger – a short biographical sketch of the «Father of Antique Legal History». – 3.2. Wenger's post-war vision of Roman Law as «Global Law».

The history of Roman Law in 20<sup>th</sup> century European history can be seen as an array of «bright» but also «dark times»<sup>1</sup>. In this context, the era of National Socialism appears to be a particularly dark chapter; not only because many German-speaking scholars of Roman Law were persecuted for racist or political reasons, were forced to emigrate or were even murdered, but also because of the way the Nazis attacked the discipline of Roman Law itself. (This was quite different from the situation under Italian Fascism, where Roman Law was perceived as an integral component of the ideology of the regime<sup>2</sup>).

This paper will first deal with the rather exposed position of Roman Law in the light of several specific aspects of Nazi ideology, which will lead us also to a discussion of various aspects of the history of science during the early 20<sup>th</sup> century in the German-speaking countries. The second part of this paper will approach the effects of the annexation of Austria by the German *Reich* in March 1938 on the teaching of Roman Law and study the various strategies of adaptation to the totalitarian regime. The closing chapter is dedicated to the self-perception of Roman Law as cosmopolitan law after the defeat of National Socialism. Each part will be exemplified by the biography of one or more scholars from the Viennese law faculty: Stephan Brassloff and Josef Hupka as victims of Nazi persecution, Franz Leifer, Slavomir Condanari, Hans Kreller, and Ernst Schönbauer as a *Mitläufer*, hangers-on of Nazi ideology, or active National Socialist politicians, and finally Leopold Wenger as the representative of continuity and a new orientation towards academic research within a global scientific community.

## 1. *Nationalist xenophobia and the persecution of Stephan Brassloff*

### 1.1. *Section 19 of the NSDAP party programme*

Roman Law had the dubious honour of being singled out as an enemy in the official party programme of the National Socialist German Workers Party (NSDAP) of 1920. Section 19 explicitly called for the establishment of a German Common Law instead of Roman Law, which was characterised as serving the materialistic global dominance of financial capital (*Zinsknechtschaft*, literally: «interest rate slavery»)<sup>3</sup>.

<sup>1</sup> Cf. SPIEL 1989; cfr. MEISSEL 2008, 1.

<sup>2</sup> On the role of Roman Law in fascist ideology, cfr. e.g. MANTELLO 1987, 23; SOMMA 2002, 153; SOMMA 2005; CASCIONE 2009, 3.

<sup>3</sup> The following remarks are based on PIELER 1990, 427; LANDAU 1989, 11; GAMAUF 1996, 53 ff.; SANTUCCI 2009, 53; cfr. also a depiction influenced by Marxist thought in OBERKOFER, RABOFSKY 1985/86, 289.

Even from a contemporary point of view, this claim did not really make sense, given that Roman Law had been replaced by the BGB, which had come into effect twenty years prior to the publication of the programme. Attempts to trace the background of Section 19<sup>4</sup> lead to nebulous ideas that arise from the misconceptions of laymen rather than the expertise of legal scholars.

The NSDAP manifesto is based on handwritten guidelines drawn up by the founder of the party, Anton Drexler, who was a machinist employed at the *Reichsbahn*, as well as on political guidelines of the German Workers' Party (DAP) dating back to 14 December 1919. What would later become Section 19 of the NSDAP party programme can be found along with other slurs against capitalism and Judaism (which was presumed to be represented mainly by Social Democrats!<sup>5</sup>) in the chapter «Breaking of interest rate slavery» («Brechung der Zinsknechtschaft»). *Peter E. Pieler* has assumed that the initiators of the conjunction between so-called *Zinsknechtschaft* and Roman Law were two Nazi activists who did not have any background in law: the mechanical engineer and factory manager Alfred Brunner and another engineer, Gottfried Feder, who had also published on questions of finance.

Point 19 of the Party programme was influenced by an earlier manifesto of the German Workers' Party (DAP, founded by Alfred Brunner), which was published on 31 May 1919 and provides the first evidence of accusations against Roman Law. In this 1919 manifesto, the «replacement of Roman Law by German Common Law» is motivated as follows:

Today's land law is based on Roman Law, therefore, all damage in our public life is legal damage. Roman Law was implemented by princes and the high clergy 400 years ago; the people resisted in vain, indeed feeling that the ground had been cut from under their feet and that their rights were being taken away from them. The peasants' wars, the first social uprising, were a bloody fight against foreign law... Roman Law was created at the time of the decline of Rome, when it was overrun by Jews; it is antisocial, it protects private profit at the expense of the community. It is a law of the cunning and the clever. [...] Therefore, the German nation needs to be given a legal framework that adheres to the old principle: common good comes before self-interest. The deep-rooted greed, dishonesty, immorality, which is spreading in trade and commerce, the Judaization of our people, can be traced back to Roman Law<sup>6</sup>.

<sup>4</sup> On the early history of the NSDAP, see e.g. FRANZ-WILLING 1962; MASER 1965; BROSZAT 1984.

<sup>5</sup> LANDAU 1989, 15.

<sup>6</sup> Quoted in FRANZ-WILLING 1962, 173 ff.

Yet in a more figurative sense, the attack against Roman Law in the NS-DAP programme needs to be related to the German BGB of 1900, which in its basic structure and legislative style was the result of the Romanist branch of the German Historical School and more particularly its late Pandectist branch (Jurisprudence of Concepts). This idea of a «Farewell to the German BGB» (to quote a famous speech by State Secretary Schlegelberger from the Department of Justice during the Nazi period, «Abschied vom BGB») was a core element of National Socialist legal policy. Therefore, Section 19 combines two aspects that need to be analysed separately: first, there is a certain German Nationalist interpretation of the legal history of the 19<sup>th</sup> century in which Roman Law and Romanist jurisprudence are cast as a national catastrophe and the root of all evil. Second, there is an aspect related to legal policy that aims at «legal renewal» in a National Socialist and revolutionary way.

The National Socialist legal reform within the Hitler regime was to be conducted by the «Academy of German Law» in Munich, which was founded in 1934. The central issues approached by the Academy were the development of a *Volksgesetzbuch* which was the attempt of Third *Reich* jurists to replace the BGB by a civil law code that reflected the principles of National Socialism<sup>7</sup>.

The interpretation of Section 19 by National Socialists during the thirties of the 20<sup>th</sup> century can be seen from a 1936 doctoral thesis (in jurisprudence!) by one Paul Schmid, which is dedicated to «The implementation of the manifesto as interpreted today through the legislation of Hitler's cabinet» («Die Erfüllung des Parteiprogrammes in seiner heutigen Auslegung durch die Gesetzgebung des Kabinetts Hitler»):

The main difference between both legal frameworks [Roman and German *Jus commune*, authors' note] is the divergent assessment of the highest legally protected interest. It needs to be emphasised here that it is no longer the Roman Law of Nordic origin that we are talking about in this context but rather the Medieval Roman Law as the law of the declining empire, changed and transformed by Syrian and Oriental influences. This type of Roman Law, which invaded the *Jus commune*, considers individual interest the highest legally protected good but does not take into account public interest, the honour of the nation, and the race of the people<sup>8</sup>.

<sup>7</sup> On the creation of the *Volksgesetzbuch* within the framework of the Academy for German Law, cfr. SCHUBERT *et alii* 1988; cfr. also MEISSEL 1990, 682.

<sup>8</sup> SCHMID 1936; this doctoral thesis was supervised by Erich Genzmer during Hans Kreller's deanship in Tübingen.

Secretary of State at the Department of Justice Robert Freisler, who was later to become the dreaded presiding judge at the *Volksgerichtshof*, reasoned in a very similar manner:

A legal framework that had been self-contained for a thousand years in Roman-Greek-Byzantine circles of civilisation had, due to political circumstances, invaded Germany and had largely buried the old-established native law... The circle of civilisation from which this legal framework originated considered work not worthy of a free man and approached wage labour from the perspective of property rental. This legal system obtained its final formation in an era and circle of civilisation which were constituted by an unprecedented blend of peoples; it was effective during a period of intense mercantilisation of life...<sup>9</sup>

Criticism of Roman Law was thus based on the following topoi:

1. Roman Law was accused of privileging individual rights and particular interests instead of fostering ethnic community, common interest, and commitment to duty<sup>10</sup>.
2. The legal protection of property and the right to carry on business as envisaged by Liberalism («mercantilisation») were held responsible for disastrous social and economic conditions among large sections of the population, especially farmers.
3. Roman Law was seen as a «foreign» law which eventually succeeded in displacing the native German law, law «which is born with us»<sup>11</sup>. The development of Medieval Roman Law («Reception») is described as a national disaster.
4. The development of Medieval Roman Law («Reception») took place in late antiquity, conceptualised as a time of fall and decline dominated by oriental Jewish influences and ascendancy; for Rosenberg, it was the result of «a Syrian-Roman decay process»<sup>12</sup>. The National Socialists' rejection of Roman Law was not only motivated by xenophobic and nationalist ideas, but also merges seamlessly with the racism and antisemitism characteristic of Nazi ideology.

<sup>9</sup> FREISLER 1938, 23.

<sup>10</sup> For a detailed discussion of the academic roots of the antithesis «individualistic Roman versus socially-oriented German law» see LUIG 1995, 95.

<sup>11</sup> Cfr. the title of a 1920 pamphlet by Wagemann, published by the *Deutschnationale Verlagsanstalt* (German National Publishing Institution): «Vom Rechte, das mit uns geboren ist. Ein Weckruf für das deutsche Volk».

<sup>12</sup> ROSENBERG 1937<sup>17</sup>, 49.

5. Another topos is the supposed detachment of Roman Law from real life: Roman Law was conceptualised as a legal framework only accessible to scholars and legal experts due to its high degree of abstraction<sup>13</sup>.
6. Ultimately, the rejection of Roman Law also stems from resentment against the Roman Catholic church and the Holy Roman Empire, closely associated with the strictly clerical Habsburg dynasty<sup>14</sup>.

Roman Law scholars had to face up to the fact that the new regime had declared war on their specialist field when the National Socialists took power and began to systematically exclude Jewish teachers and students, but also other political dissidents, from the universities and to completely subordinate teaching and research to the *Führer* and the Party.

Individual professors of Roman Law, however, were faced with persecution long before the Nazi regime had come into existence. A particularly revealing example is the scandal surrounding Stephan Brassloff, which arose at the University of Vienna in 1925.

### 1.2. *The university scandal surrounding Stephan Brassloff, 1925*

The history of the University of Vienna after WW I reflects the deep political crises of Austria as a mere «torso state» after its defeat in the War and the end of the multi-ethnic Habsburg Empire. The first Republic of Austria is a fragile state that is torn apart by bitter battles between highly militarised opposing political parties (Marxist Social Democrats, Christian Conservatives and the Germano-Nationalist/National Socialist «Third Camp») even before the outbreak of open civil war in 1933/1934, which eventually leads to the period of Austrian Fascism from 1934 to 1938. The 1920s in Austria are characterised by a disastrous economic situation aggravated by the obligation to pay war damages, dangerously high unemployment, hyperinflation, and a shortage of even the most basic goods.

German-speaking people from the eastern parts of the former Habsburg Empire (quite often from the Jewish communities there) migrate to Vienna, the number of students rises dramatically, the influx of the eastern Jews directly leads to a fervent antisemitism particularly in Germano-Nationalist university circles. At a very early stage, proto-National Socialist ideas gain currency amongst lower-middle-class students, who aggressively attack not only fellow students but also professors of Jewish origin.

<sup>13</sup> On this topic, cfr. e.g. a propaganda publication by HIMSTEDT 1939<sup>3</sup>, 49; Himstedt states that one of the tasks of the «reorganisation of people's law» is the «overcoming of the type "jurist" by the characterful, nationally conscious guardian of the law who is a clear and unconditional follower of the *Führer*» (our translation).

<sup>14</sup> On the latter cfr. especially KOSCHAKER 1947, 327 ff.

It is within this climate of latent antisemitism that Roman Law scholar Stephan Brassloff, associate professor at the Department of Roman Law and Antique Legal History, finds himself at the centre of a fierce attack spearheaded by National Socialist students. In 1925, he was the victim of a veritable press campaign, obviously motivated by anti-Semitism and run by the representatives of Germanic students at the University of Vienna.

Brassloff embodies some of the above-mentioned enemy stereotypes: he was a brilliant jurist with a rather left-wing liberal mindset who was close to the Social Democrats; and he was a Romanist with Jewish roots who openly adhered to his Judaism.

Admittedly, his research as such and the fact that he was a Romanist must be considered as the less decisive factors for his persecution. Nevertheless, the university scandal around Brassloff clearly shows the intense influence and extent of antisemitic militantism at the University of Vienna. Let us first recall briefly the biography of Stephan Brassloff.

Stephan Brassloff was born in Vienna on 18 June 1875 as the son of the merchant Jacob Brassloff. He attended a German secondary school in Prague from 1885 to 1891, subsequently finishing his schooling in Vienna, where he took his final exams in 1893. Afterwards, Brassloff studied law at the University of Vienna from 1893 to 1897 and later moved to Leipzig in order to continue his studies with his former teacher Ludwig Mitteis. After his return, he earned his doctoral degree in 1898 (Dr. jur.) and gained his habilitation for Antique Legal History in 1903. Like many others, Brassloff studied under Ludwig Mitteis, whose research had a formative influence on Brassloff's own<sup>15</sup>. This is especially apparent in a paper (1902) on popular law in the eastern provinces during the high empire, which marks the beginning of Brassloff's rich and productive work in legal history. During the following years, Roman constitutional law was close to Brassloff's heart; an area of research to which he dedicated numerous publications in accordance with the new school of Antique Legal History (Leopold Wenger). In addition, Brassloff devoted himself to philological and epigraphic studies and later published several papers on topical issues in social law<sup>16</sup>. In 1919, he finally became associate professor at the University of Vienna – a position that he was to occupy for almost twenty years.

<sup>15</sup> Cfr. UAW (*Universitätsarchiv Wien*; Archives of the University of Vienna), estate of Hans Kreller: obituary Stephan Brassloff.

<sup>16</sup> Cfr. MEISSEL 2008, 7 ff.; for a brief biography of Brassloff, cfr. STAUDIGL-CIECHOWICZ 2014a, 282 ff.



Brassloff was part of the liberal Jewish bourgeoisie. According to his son, his family was part of the «Freud-Schnitzler-milieu»<sup>17</sup>, a social group whose members were predominantly of Jewish descent and which essentially shaped cultural life in Prague and Vienna around the turn of the century. After the dissolution of the Austro-Hungarian monarchy, Brassloff was very close to circles surrounding the liberal foreign minister, Ottokar Graf Czernin. Soon, he turned his attention to the Social Democratic party<sup>18</sup>. Brassloff's political stance is reflected in his scientific work; the major school Brassloff can be associated with is «social jurisprudence», the theory that was laid down by legal scholars and politicians such as Julius Ofner, Franz Klein, and Anton Menger. Brassloff's approach to social issues was not only a theoretical one, as

the have-not is affected by a lack of legal knowledge [...] more severely than the possessing class [...]. If it is the task of social policy to alleviate the differences arising from the class order, it cannot disregard the contrast that actually exists with regard to the possibility of obtaining legal instruction and representation<sup>19</sup>.

In keeping with this conviction, Brassloff was active in the Vienna municipal legal aid office as a volunteer. According to Heinrich Klang, with whom he was in close intellectual contact, Brassloff zealously dedicated himself to this activity and derived great pleasure from it<sup>20</sup>.

In 1925, the professorial chairs held by the Romanists Paul Jörs and Moritz Wlassak became vacant. Two in-house contenders seemed to be in line for succession. The candidates were Associate Professor Ernst Schönbauer, who was politically active as a Germano-Nationalist member of parliament, and Associate Professor Stephan Brassloff, who was known for his left-wing liberal convictions. Lectures delivered by Stephan Brassloff enjoyed great popularity among students due to his reportedly vivid and intellectually stimulating style. Like his teacher Mitteis<sup>21</sup>, he was wont to enliven his lectures with ironical

<sup>17</sup> *Institut für Geschichte der Juden in Österreich (Institute for the History of Jews in Austria)*, collection of memoirs (*Memoirensammlung*): interview with Friedrich Lothar Brassloff, 12/10/1984.

<sup>18</sup> Cfr. *ibidem*.

<sup>19</sup> BRASSLOFF 1933, 3.

<sup>20</sup> Cfr. UAW, estate Kreller: letter from Heinrich Klang to Hans Kreller, 20/10/1945.

<sup>21</sup> PARTSCH 1922, xix recalls that Ludwig Mitteis had «described the facts of his cases never with trivial jests but always with a delectable sense of humour». Cfr. also WENGER 1923, 4: «Not every word that popped up mischievously in his momentary joy in a successful coinage was always meant as sharply as it might seem to those who were wont to weigh every word thoughtfully even in cosy table conversation.» (our translation).

asides, which turned out to be his personal doom: as a professor who was neither close to the Roman Catholic nor to the Germano-Nationalist fraction, he was an easy target for assaults by the «Germanic students». Brassloff, a Jewish professor with liberal sympathies, could easily be branded as an exponent of immorality and lack of academic decorum. The fact that Brassloff's scientific work focused on the Syrian-Roman Law code and the «Romanised Eastern provinces» could be regarded as further proof of these allegations, although this argument resonated at best subliminally in the completely fictitious rumour that Brassloff had «immigrated from the East»<sup>22</sup>.

In 1925, newspapers close to the Germano-Nationalist camp started to publish articles criticising the allegedly «immoral statements» Professor Brassloff had made during his lectures. On 19 September 1925, the *Deutsch-Österreichische Tageszeitung*, a right-wing newspaper with close ties to university circles, even published a request by the Germanic students to report statements of this sort in order to fuel the campaign against Brassloff.

On 24 September 1925, Robert Körber, one of the leaders of the National Socialist students (and who after the *Anschluss* in 1938 would publish a book on the «Victory of race in Vienna, the empire's border fortress» [*Rassesieg in Wien, der Grenzfeste des Reiches*, 1939]) reported to the Academic Senate on behalf of the «Cultural Office of the Germanic body of students» (*Kulturamt der deutschen Studentenschaft*):

Before the holidays, it was repeatedly brought to the attention of the Germanic body of students that Prof. Brassloff allegedly made ambiguous statements and cracked filthy jokes... Utterances that were neither part of the contents of the lecture nor compatible with German notions of morality, according to the Germanic body of students<sup>23</sup>.

As pressure on Brassloff increased, he himself asked for the initiation of disciplinary proceedings against his own person in order to invalidate the accusations. The Canonist Rudolf Köstler was appointed as prosecutor in disciplinary matters, the professor of Germanic law Ernst von Schwind was appointed president of the disciplinary court.

After the defendant and witnesses had been heard, proceedings in January 1926 ended in a conviction. According to the ruling, Brassloff had indeed vio-

<sup>22</sup> For a general overview of the events described below, cfr. RATHKOLB 1989, 197; for a more detailed account see MEISSEL 2008.

<sup>23</sup> UAW, *Rektoratsakten* (rectory records, RA): ZI 104 aus 1925/26.

lated the dignity of the university. The sanction, however, was the mildest one possible: an official reprimand<sup>24</sup>.

Brassloff was forced to abstain from teaching for a year. When he resumed his teaching activity one year later, his reputation and career had been destroyed; Friedrich von Woess and Leopold Wenger were appointed to the two vacant chairs. When Wenger returned to the University of Munich after only one year, Ernst Schönbauer finally advanced to a full professorship.

The disciplinary court ruled that Brassloff's lectures were such as to «negatively affect professorial decency and dignity» and offend the moral sensibility of his audience due to their allegedly «erotic overtones». The statements «There is also compulsory exercise in matrimony» and «Virgins are wont to take out mortgages on their chastity» were labelled «extraordinarily obscene». By closely looking at the incriminating statements, it becomes clear that any reference to sexuality was seen as a taboo, but especially any allusion to the discrepancy between legal and social norms and the reality in the field of men-women relations. A particularly apt example is Brassloff's remark that engaged couples are obliged to maintain chastity towards each other, but that the opposite can be observed every evening in the Türkenschanzpark (one of Vienna's larger public parks).

Brassloff was not only insulted as «Mosaic» or «Asiatic» but also called a «representative of Bettauer morals for whom a Rotstock [*sic*] will be found». (Hugo Bettauer had been assassinated by Otto Rothstock in March 1925<sup>25</sup>). Brassloff and Bettauer, a proponent of women's rights and less hypocritical sexual morals, cooperated in levelling criticism against prevailing paternalistic principles in family law. With that said, the second inducement for attacks against Brassloff has been addressed: his commitment to social criticism.

This inglorious episode in our university history surrounding Stephan Brassloff clearly demonstrates that such personal exposure in interwar Austria could result in serious career disadvantages and public reprimands. After the annexation of Austria, National Socialist persecution hit Brassloff a second time; and this time the attack would prove deadly for the scholar: After the Nazi regime had seized power in Austria, Brassloff experienced all the horrors of racist discrimination. As a Jew, Brassloff was barred from taking the new oath of office with its pledge of allegiance to the Führer, leading to his dismissal from the university. On the 22 April 1938, right after the Easter holidays, the ministry of education ordered Brassloff – along with several other professors

<sup>24</sup> UAW, RA: ZI 104 aus 1925/26; for a brief overview of the proceedings, cfr. also STAUDIGL, CIECHOWICZ 2014b, 87 ff.

<sup>25</sup> On the life and works of Hugo Bettauer cfr. HALL 1978.

including the former Dean and professor of commercial and bills of exchange law Josef Hupka – to be suspended from office with immediate effect<sup>26</sup>. At the end of May, Brassloff was placed on the list of retired professors. This should not remain the only stroke of fate.

Since in 1938, all Jews were obliged to disclose their assets, Brassloff's possessions can be exactly reconstructed: in addition to savings to the amount of 1500 *Reichsmark*, the Romanist owned a library worth another 1500 *Reichsmark*, furniture, two golden rings, china dinnerware, and a painting<sup>27</sup>.

The narrowing of Brassloff's and his wife's opportunities from mid-1938 onwards proceeded in several consecutive steps. At the beginning of November, he had to vacate his apartment on Genzgasse in the 18<sup>th</sup> municipal district after the cancellation of his lease and move to a smaller apartment as a subtenant. Brassloff's financial situation deteriorated apace: hence, he put his library in storage with a haulage firm and donated major parts of his furniture to a school because he could not take them with him to his new apartment. The next incident that threatened his existence took place in March of the following year. On 21 March 1939, Brassloff's pension was cancelled on the order of the *Reich* Governor, forcing him to live off his savings from this time onwards. Another change of abode ensued; finally, he and his wife ended up living on Rossauer Lände in the 9<sup>th</sup> municipal district. Despite the fact that the rent there was evidently low, Brassloff's savings dwindled to nothing within three months<sup>28</sup>.

Afterwards, Brassloff was dependent on the support of the Jewish Community (*Israelitische Kultusgemeinde*) in Vienna. Together with his wife, Brassloff lived in reduced circumstances for another three years, until the National Socialist regime dealt him the ultimate blow: on 14 August 1942, the couple was deported to Theresienstadt on transport number 7. Otilie Brassloff died there soon afterwards<sup>29</sup>. When Heinrich Klang, who was deported a few weeks later, met Stephan Brassloff at Theresienstadt, the latter had already lost all will to live. A little more than half a year after his arrival, Stephan Brassloff died in the concentration camp of Theresienstadt on 28 February 1943.

<sup>26</sup> Cfr. UAW, RA: ZI 677/38, order of the ministry of education, 22/04/1938 Z 10606/I-1 c.

<sup>27</sup> Cfr. ÖStA/AdR (*Österreichisches Staatsarchiv/Archiv der Republik*; Austrian State Archives/Archives of the Republic), VVSt (*Vermögensverkehrsstelle*; Asset Transfer Office): registration of assets (*Vermögensanmeldung*) Stephan Brassloff, containing letter from Brassloff to the VVSt, 28/07/1938.

<sup>28</sup> Cfr. ÖStA/AdR, VVSt: registration of assets Stephan Brassloff, containing letters from Brassloff dated 05/11/1938, 04/04/1939 and 03/07/1939.

<sup>29</sup> Cfr. MEISSEL 2008, 5; also KÖRRER 1981, 17 f.

### 1.3. *On the fringes of Roman Law: Josef Hupka*

Another striking example of Germano-Nationalist and National Socialist attacks on scholars is that of Josef Hupka, who, like Brassloff, was a disciple of Ludwig Mitteis and had started his career as a Romanist<sup>30</sup>. Born in Vienna in 1875, Hupka had spent most of his childhood in Znojmo, where his father worked as a lawyer. There, he attended the German-language state secondary school, taking his final exams in 1892. Shortly afterwards, the family returned to Vienna, where Hupka took up law studies. He obtained his doctoral degree in 1897 and in the same year converted to Roman Catholicism<sup>31</sup>. After a brief stint as a trainee in his father's law office and some months at the *Finanzprokurator*, he followed his teacher Mitteis to Leipzig, where he wrote his first major work on the concept of direct agency in civil law (*Die Vollmacht: Eine civilistische Untersuchung unter besonderer Berücksichtigung des deutschen Bürgerlichen Gesetzbuches*, 1900).

After his return to Vienna in 1901, he habilitated for Roman Law (which at that time still encompassed modern civil law) and, one year later, for commercial and bills of exchange law. From that time onwards, Hupka's academic pursuits centred increasingly on the latter field; nonetheless, he retained a keen interest in Roman Law, occasionally teaching Roman Law courses and publishing a thought-provoking paper on the well-known antinomy between Julian (13 dig. D. 41.1.36) and Ulpian (7 disp. D. 12.1.18) («Der dissensus in causa und die moderne Textkritik», 1932) in the *Savigny Journal for Legal History*. The text is remarkable especially because of its stringent criticism of the excessive «hunt for interpolations»<sup>32</sup> in Roman sources practised by many of his contemporaries.

Hupka became full professor of commercial and bills of exchange law in 1915 as successor of Samuel Grünhut, and in 1926/27 was elected dean of the law faculty, making him the last professor of Jewish origin to hold this office before World War II. The appointment triggered virulent protests on the part of the Germanic body of students, who not only wrote a letter of protest to the Academic Senate but also demonstrated in front of the University's main entrance against the «illegal election of the Jewish professor Hupka» which was said to have «injured the German character of our university»: «Show by your

<sup>30</sup> For brief outlines of Josef Hupka's biography, cfr. MEISSEL 2008, 3-4; OLECHOWSKI 2014, 385 ff.; TASCHWER 2017a, 459; TASCHWER 2017b, 63; MEISSEL 2019a, 299. For a more detailed account of Hupka's life and works, see GRASL 2022.

<sup>31</sup> <http://data.matricula-online.eu/en/oesterreich/wien/01-unsere-liebe-frau-zu-den-schotten/01-59/?pg=293>; STAUDACHER 2004, 196 nt. 112; GAUGUSCH 2011, 340.

<sup>32</sup> Cfr. LENEL 1925, 17.

united stand that you are too proud to silently accept subjugation by the Jewry! *Be ready when the battle cry is heard for the inner liberation of the German people from foreign disgrace!*», a pamphlet exhorted<sup>33</sup>. Not surprisingly, the protests received extensive coverage in the daily papers, with the *Deutsch-Österreichische Tageszeitung* agitating as openly against Hupka as it had done one year before against Brassloff. In the end, however, Hupka – unlike Brassloff – weathered the storm as the Academic Senate declined to invalidate the election (albeit only on formal grounds<sup>34</sup>!) and the entire faculty of law rallied around Hupka in a public statement<sup>35</sup>.

Josef Hupka continued to teach at the University of Vienna until his enforced retirement in 1938. Like Brassloff, he had a keen eye for social injustice; moreover – and with an admirable disregard for possible personal consequences –, he was quick to publicly call out racial and antisemitic discrimination both at the university and beyond, making his lectures frequent targets for disruption by Germanic-Nationalist and National Socialist students during the late twenties and early thirties. Undeterred, Josef Hupka in 1932 became the only professor to publicly criticise the racist student regulations introduced by Dean Wenzeslas Gleispach. In an article he wrote for the *Neue Freie Presse*<sup>36</sup>, he decried the new regulations as unconstitutional, eventually providing key arguments for their overturning by the Austrian Constitutional Court<sup>37</sup>.

After the *Anschluss*, Hupka's fate parallels that of Brassloff: after losing his position at the university, his pension was likewise taken away in the following year. Unlike the Brassloffs, Josef Hupka and his wife Hermine attempted to flee National Socialist persecution by emigrating to the Netherlands. However, plans to continue to the USA or South America from there fell through. Eventually, the Hupkas were transported to Theresienstadt, where Josef Hup-

<sup>33</sup> Reprinted in *Vor neuen Krawallen auf der Universität*, in *Der Tag*, 06/11/1926, 5 (italics in the original). See also TASCHWER 2017a, 468 f. and TASCHWER 2015, 121 f.

<sup>34</sup> UAW, meeting minutes of the Academic Senate (*Sitzungsprotokolle des akad. Senats*, Prot. I, 19/11/1926, III/10.) Z. 93 aus 1926/27; records of the Academic Senate (*Akten des Akad. Senats*), Z. 93 aus 1926/27, letter from the Academic Senate to the Germanic body of students (*Deutsche Studentenschaft*), 23/11/1926.

<sup>35</sup> Cfr. *Vertrauenskundgebung des Juristischen Professorenkollegiums für Professor Hupka*, in *Neue Freie Presse*, 12/11/1926, 9 (see also e.g. *Eine Vertrauenskundgebung des Juristischen Professorenkollegiums für Professor Hupka*, in *Wiener Morgenzeitung*, 12/11/1926, 4; *Die abgeblitzten Radaustudenten*, in *Arbeiterzeitung*, 12/11/1926, 5; *Vertrauenskundgebung des Professorenkollegiums für Dekan Hupka*, in *Der Tag*, 12/11/1926, 7); cfr. also UAW, records of the Academic Senate (*Akten des akademischen Senats*) Z. 282 aus 1926/27, letter from Former Dean Gleispach to Rector Molisch, 17/11/1926.

<sup>36</sup> HUPKA 1930, 1 f.

<sup>37</sup> Cfr. LICHTENBERGER-FENZ 1990, 127 ff.; PAULEY 1992, 126. On the internal debates between the judges see in detail MARCUS 2004, 110 ff.

ka died shortly afterwards on 23 April 1944. He was the only full professor at the University of Vienna to die in a concentration camp<sup>38</sup>.

The most striking counterexample to Brassloff and Hupka is Ernst Schönbauer, the former colleague who had profited from the reprimand Brassloff had received in the 1925 events and who had later become full professor of Roman Law. Before we turn to his biography, however, we would like to briefly outline the ways in which Roman Law professors in the 1930s tried to adapt to the new intellectual climate and present a selection of biographies that show to which extent these strategies of adaptation turned out to be successful.

## 2. *Strategies of adaptation – Making Roman Law more Nazi-compatible*

### 2.1. *The «Crisis of Roman Law» and the reaction of Roman Law scholars*

Besides the ideology-based animosities against Roman Law and the personal persecution of Jewish scholars such as Brassloff, there was a third perceived threat to Roman Law, this time one originating within the discipline for reasons connected to the history of science. The Romanist Paul Koschaker summarised the reasons in a famous paper (which was delivered in December 1937 at the Academy of German Law!) in which he diagnosed a «crisis of Roman Law»<sup>39</sup>.

Koschaker, who achieved a high reputation in the field of cuneiform law<sup>40</sup>, argued against the historicisation and marginalisation of Roman Law and pleaded for the alignment of Roman Law with the history of legal concepts, dogmatic aspects, and comparative legal analysis as an «introduction to European legal thought»<sup>41</sup>.

<sup>38</sup> TASCHWER 2017a, 462 nt. 9.

<sup>39</sup> KOSCHAKER 1938. Koschaker was to elaborate on his main arguments in his later book *Europa und das Römische Recht* (1947). Surprisingly, it was the National Socialist Viennese professor Schönbauer who in his answer to Koschaker defended the philologic-historical orientation of the discipline. Cfr. SCHÖNBAUER 1939, 409: «I do not even want to pose the question whether we should cultivate the dogmatic side of our discipline, as Koschaker demands, or the historical side, as advocated by Wenger. I believe we should embrace both directions with a joyful heart.» (our translation).

<sup>40</sup> Cfr. KOSCHAKER 1911. Koschaker's career as a professor led him via the Universities of Graz (1905), Innsbruck (1908), Prag (1909), Frankfurt (1914), Leipzig (1915), and Berlin (1935), to Tübingen (1941), where he succeeded Hans Kreller. For details on Koschaker's time in Tübingen, cfr. BEGGIO 2018<sup>2</sup>; for a highly critical review of Beggio's biography see GIARO 2018, 9 ff.; for a more positive view, cfr. MEISSEL 2019b, 477 ff.

<sup>41</sup> Koschaker's actualisation theory gained renewed attention in the context of the increasing «Europeanisation» of legal studies in the EU member states; critical of this reception of Koschaker's work (in a thoroughly original way) GIARO 2000; GIARO 2001a, 31; GIARO 2001b, 161; critical of Giaro's viewpoint STURM 2003, 352 ff.; GUARINO 2005, 228 ff.

In fact, there can be no doubt that Roman Law suffered a loss of importance at the beginning of the 20<sup>th</sup> century in comparison to the prosperity it had enjoyed during the 19<sup>th</sup> century at the heyday of the Historical School. Roman *Jus Commune* did not only lose the character of a legal source; research and teaching also progressively turned towards the German BGB, and researching the sources that had led up to the BGB from a historical perspective became less and less attractive. The situation was similar to that in France after the Code Civil and Austria after the ABGB had come into effect: the new codification temporarily monopolised scientific resources. Costing them their former position of «Princes of private law» under the authority of the Pandectist School, the shift was a painful experience for those who represented the discipline of Roman Law: they had lost their privileged position and had to face up to the concomitant loss of prestige.

As a consequence of this development, a number of Romanist scholars abandoned the established perception of Roman Law as a dogmatic discipline, especially as the study of current law no longer required a profound knowledge of legal history. Already towards the end of the 19<sup>th</sup> century, a new school of Roman Law had emerged which can be characterized as neo-humanistic and philological-historical in its orientation. Exponents of the new school focused no longer on the ways Roman Law had shaped the current legal system but rather concentrated on «purely historical» research without any immediate practical application.

Besides classic Roman Law, other antique legal systems became the object of scientific attention and were investigated as part of a process of «historicization». Leopold Wenger (1874-1953), who was active in Vienna as a professor in 1904/05, in 1926/27 and then again from 1935 until he became an emeritus in 1938/39, provided the scientific framework for this enterprise with his conception of «Antique Legal History». These approaches generated high quality research which, however, could only be appreciated by a small group of specialists and remained incomprehensible and «esoteric» to the larger part of the legal community.

From a subject-specific point of view, several adaptation strategies can be discerned:

1. We have already described historicization as an evasive movement that had to relinquish all hope of a broad impact. From a scientific point of view, it was a productive approach but eliminated Roman Law scholarship from its pivotal position in law studies, pushing it towards a liberal arts-oriented «ghetto of elites».
2. Even Roman Law scholars who personally took an active part in the research agenda of Antique Legal History advocated a neo-pandectist ori-



entation as far as the core curriculum of legal studies was concerned. Especially in Austria, where the codification had already been established in the beginning of the 19<sup>th</sup> century, Roman Law was considered as an ideal introduction to the study of law. As a consequence, the teaching of Roman Law concentrated on its propaedeutic function with respect to modern civil law.

3. The current curriculum at the University of Vienna Law School carries this approach into the present day, with «Romanistic Foundations of European Private laws» playing an important part in the first year of studies. It is important to emphasise that this approach was embraced by practically every representative of Roman Law during the 20<sup>th</sup> century – even by scholars who are known for their profound historical and epigraphical scholarship such as Ludwig Mitteis (who as a law teacher pursued a distinctly dogmatic approach), Ernst Schönbauer (although with certain reservations), and Hans Kreller at a later period. Even the «founding father» of Antique Legal History, Leopold Wenger, explicitly declared himself an adherent of this tradition<sup>42</sup>.
4. In order to counter potential National Socialist attacks, scientific activity focused on those research fields that were least affected by the official party line. The focus was laid on early Roman Law, an era in which the alleged Jewish-oriental impact had not yet made itself felt<sup>43</sup>. In order to counter charges of egoism and disloyalty, the emphasis lay on *boni mores* and early Roman *fides*, the relevance of a sense of community<sup>44</sup> and the common good<sup>45</sup> in the Roman legal system, the parallelism of Germanic and Roman legal concepts, and even the «Führer principle» purported to

<sup>42</sup> Cfr. Leopold Wenger's «report on the importance of Roman Law in the legal curriculum at Austrian universities» (*Gutachten über die Bedeutung des römischen Rechts im juristischen Studienplan der österreichischen Universitäten*), evidently dating from the post-WWII era (UAW, *Personalakt* [personell file, PA] Leopold Wenger: type-written manuscript). Since Wenger mentions Austria's neutrality in its foreign relations, one can assume that he wrote the text shortly before his death in 1953.

<sup>43</sup> On the following cfr. also SIMON 1989, 167 ff., who highlights the following aspects: reinterpretation of the reception as scientification, downplaying of the «foreignness of Roman Law», emphasis on the ethical qualities of Roman Law, and a burgeoning interest in the earliest periods of Roman Law.

<sup>44</sup> Thus Ernst Schönbauer spoke at the German Legal Historians' Conference (*Deutscher Rechtshistorikertag*) in 1936 in Tübingen «of communal elements in the structure of the Roman legal system» («vom Gemeinschaftselement im Bau der römischen Rechtsordnung»); cfr. also KASER 1939; DE MARTINO 1941; WIEACKER 1941, 167 ff.; on this cfr. STOLLEIS 1989, 184 ff.; GAMAU 1996, 59 f.

<sup>45</sup> Cfr. the interpretation of *bona fides* as a relationship of mutual obligations based on solidarity in BESELER 1941, 138, which culminates in the claim that «Hitler's dictum that there

be characteristic of the reign of Augustus. Retrospectively, this choice of subject matter appears unduly opportunistic and related to this specific moment in history<sup>46</sup>.

5. At the same time, some embarked on a strategy of incorporation into the party and took on functions at institutions which were specifically established for «preservers of the law», namely the Academy for German Law (abovementioned) and also the *Kitzeberger Lager*, camps for junior researchers who were intended to be trimmed to the «new legal doctrine» by physical training<sup>47</sup>. Of course, this was a strategy which was open only to those who qualified for inclusion in racial terms.
6. The easiest way was taken by those who – due to their own (in some cases even illegal) membership in the NSDAP and official party posts – felt themselves called upon to authentically assess the requirements of National Socialist law in academic practice. The resultant breadth of personal opportunities will be explored below in relation to Ernst Schönbauer, who was dean of the law faculty during the Nazi era.

## 2.2. *The direct impacts of the Anschluss (annexation of Austria into Nazi Germany) on the teaching of and research on Roman Law at the University of Vienna*

The following subchapter addresses the specific impacts of the *Anschluss* on the Vienna law faculty. As a consequence of the academic reform undertaken by the Nazis, the subject of Roman Law experienced detrimental effects such as a reduction of teaching hours in the curriculum and the renaming of courses.

First of all, we need to take a brief look at the initial situation: as a consequence of the Thun-Hohenstein reform of the curriculum in the middle of the 19<sup>th</sup> century<sup>48</sup>, the share of legal-historical subjects in Austrian law studies was disproportionately large. Correspondingly, the range of courses in Roman Law offered during the winter semester of 1937/38, which were taught by professors Leopold Wenger and Ernst Schönbauer, associate professor Stephan

should be no distinction between law and morality has never and nowhere been fulfilled to the same extent as in the Roman *bonae fidei iudicium*.» (our translation).

<sup>46</sup> Cfr. SIMON 1989, 170: «It is easy to draw a picture of academic collaboration with National Socialism for the entire field of Roman Law studies working at the time.» At the same time, Simon puts this verdict into perspective by pointing out that some of the contributions published during National Socialism were also «guilelessly maintained relics of pre-fascist nationalist and *völkisch* tradition, but also long-standing innovations [...]» (our translation).

<sup>47</sup> On the *Kitzeberger Lager* see RÜTHERS 1988, 41 ff.

<sup>48</sup> LENTZE 1962; ENGELBRECHT 1986, 221 ff.; OGRIS 1999; SIMON 2007, 1 ff.

Brassloff, honorary professor Moritz Wlassak, and the external lecturers Franz Leifer (associate professor) and Slavomir Condanari, were comprehensive and diverse: Wenger's main lectures on concepts of Roman private law were held for six hours per week, and Schönbauer's lecture on Roman Legal History (including constitutional law, procedural law, and legal sources) was scheduled for four hours. For students in their second term, Brassloff offered a four-hour lecture on the second part of Roman legal concepts, including family law and inheritance law. A three-hour lecture offering an «Introduction to Austrian civil law on the basis of Roman Law» and «Roman judiciary and private litigation» were aimed at students in their third semester.

Concurrently with Schönbauer, Franz Leifer lectured on Roman Legal History («Constitutional law and legal sources»), excluding procedural law, on which Slavomir Condanari lectured for one hour per week («Selected passages of the 4<sup>th</sup> book of the Institutes of Gaius»). In addition, two-hour compulsory practical exercises were offered by the emeritus professor Moriz Wlassak (1854-1939) but also by Schönbauer and Brassloff as well as Leopold Wenger («Reading Greek and Latin legal documents»)<sup>49</sup>.

After one year, the course directory had changed drastically as a consequence of the academic reform implemented after the National Socialist takeover. The former technical terms were replaced by new classifications such as «history», «nation», «classes», «state», «legal relations» etc. «Recommended» lectures and practical exercises were marked with an X, «particularly recommended» lectures and practical exercises with a double X. In view of the Nazis' skepticism towards Roman Law, it is no surprise that only Germanic legal history (taught by Professor Rudolf Bartsch) received the particular recommendation expressed by the double X.

The titles of Roman Law lectures and practical exercises were slightly modified, the range was perceptively reduced. Instead of Roman Legal History, an outline of «Antique Legal History» (still taking up five hours per week!) was read by Wenger, in addition to a two-hour lecture on the «Antique history of family law». Condanari delivered a four-hour lecture on the «History of private law in the modern era». Schönbauer, however, still used the traditional title «Roman Legal History» (four hours). In this context, the entire discontinuation of Roman legal concepts attracts attention. All in all, teaching volume with regard to lectures had halved.

This was, however, not a development that was unique to the subject of Roman Law, but rather a consequence of the brutal bloodletting of the Viennese

<sup>49</sup> Course directory of the University of Vienna (*Vorlesungsverzeichnis*), winter semester 1937/38, 12.

faculty brought about by the regime change. This affected the entire law faculty, fifty percent of whose teachers were removed for racist or political reasons.

It is quite telling that the course directory had not only grown noticeably thinner but also omitted the lecturers' names for many courses. Schönbauer's lecture on the law of obligations, a term which was shaped by the pandectist school of law and decried later, was now replaced by «contract and tort». These developments continued during the summer semester 1939.

In 1940, the division of the academic year switches to trimesters; a law degree could now be obtained in just six semesters/trimesters and after passing the first state exam in law<sup>50</sup>.

It can be gleaned from the curriculum guidelines that a student was required to «become acquainted with the usual legal and economic essentials» during the initial two trimesters:

Lectures on race and tribe, ethnology and history, political advancement of the German nation, particularly during the past one hundred years, belong at the beginning of all studies in the humanities. At the same time, the student of law is introduced to the special tasks of his chosen field from a historical and political perspective.

In the Viennese curriculum, «Antique (or Roman) Legal History» with four- to five-hour lectures and one- to two-hour practical exercises is still remarkably well-represented during the fifth semester (respectively trimester); in addition, a three- to four-hour course on the «History of private law in the modern era» during the final semester relativises the reduction of lectures and practical exercises in Roman Law which has been outlined above. Somewhat counter-intuitively, the effects of section 19 of the manifesto on the actual restructuring of the curriculum were therefore distinctly less incisive than one might have expected.

After the war, Koschaker concluded «that the government would not harm a single hair on any Romanist's head because of his field of research, even if he sang the praises of Roman Law in public». The reason for the situation Koschaker described was the fact that the National Socialist regime had ceased to regard Roman Law as dangerous: «People of heretic opinions who did not

<sup>50</sup> Ordinance on Qualification for the Judiciary, the Public Prosecutor's Office, the Notary's Office and the Bar (*Verordnung über die Befähigung zum Richteramt, zur Staatsanwaltschaft, zum Notariat und zur Rechtsanwaltschaft*), 04/02/1939, German RGBl I 1939/2; on the legal framework for the study of law during National Socialism cfr. ZEPITSCH 1992.

attract large audiences or were even ridiculed by their hearers could be left unmolested»<sup>51</sup>.

### 2.2.1. *Effects on staff*

The relatively «harmless» effects that regime propaganda against Roman Law had on the daily routine of the university should not obscure the fact that the individual fates of Romanist scholars were very diverse during the National Socialist era, including personal persecution, deportation to concentration camps, and character assassination (as in the case of Stephan Brassloff). At the same time, representatives of Roman Law managed to occupy powerful offices in the administration of the university.

The occurrences in 1938 at Austrian Universities were part of an unimpeded and frictionless process of change including the restructuring of staff, a change in the University Constitution, and the creation of a National Socialist student body. The excitement and effectivity of this co-optation process – which was very often, in fact, a self-co-optation process – nevertheless still amazes. During the first stage in March 1938, the most important university officials were exchanged and afterwards, during the second stage in April 1938, Jews and those deemed «politically unreliable» were removed<sup>52</sup>. From the outset, the *Reichserziehungsministerium* (*Reich* Ministry of Education) officials, who arrived a few days after the *Anschluss* in Vienna, took an active part in the restructuring process. In addition, the reviving National Socialist alliances of lecturers and students played an essential part in identifying disagreeable individuals<sup>53</sup>. These «cleansings» affected 54 percent of professors university-wide and 50 percent – a total of 38 lecturers<sup>54</sup> – at the faculty of law<sup>55</sup>.

A comparison of lecturers in 1938 with 1941 makes obvious the shift in Vienna Roman Law scholarship that the *Anschluss* had brought about. In March 1938, five Romanists delivered lectures at the Faculty of Law: professors Leopold Wenger and Ernst Schönbauer, associate professor Stephan Brassloff, and lecturers Franz Leifer and Slavomir Condanari<sup>56</sup>. Three years later, in the summer semester of 1941, only (emeritus) professors Leopold Wenger and Ernst

<sup>51</sup> KOSCHAKER 1947, 314.

<sup>52</sup> Cfr. LICHTENBERGER-FENZ 1989, 3 f.

<sup>53</sup> Cfr. MEISSEL 1988, 198.

<sup>54</sup> For a detailed account of the Faculty of Law and Political Sciences, cfr. VETRICEK 1980 and WIESMANN 2001.

<sup>55</sup> Cfr. WEINERT 1983, 127 ff.

<sup>56</sup> Cfr. Course Directory of the University of Vienna (*Vorlesungsverzeichnis*), summer semester 1938; the renowned Romanist Moritz Wlassak was by that time no longer teaching at the University of Vienna.

Schönbauer (then dean of the faculty) delivered lectures on Roman Law and other subjects.

In the following sub-chapters, we will explore the different reactions and strategies a number of Viennese Romanists had to the *Anschluss*, and the direct and indirect effects these had on these individuals' careers and opportunities, closing with the «success story» of the Romanist scholar and National Socialist politician Ernst Schönbauer.

### 2.3. Franz Leifer

The Romanist Franz Leifer embodies a case in which the new regime initially, in 1938, seemed to extend opportunities in life but then drastically reduced them. Leifer was born on 14 November 1883 in Vienna, where he attended primary and secondary school. After having passed his final exams, he studied law, philosophy, and archaeology at the University of Vienna. In 1906, he obtained his doctoral degree in law. After a legal internship, he started to work at the *Finanzprokuratur* (lawyer and legal advisor of the Republic of Austria), to which he returned after a year of voluntary military service. Leifer obtained a six months' sabbatical to conduct Romanist studies with Ludwig Mitteis in Leipzig. In 1912, he was appointed legal prefect at the k.k. Theresian Academy, where he remained until the outbreak of World War I<sup>57</sup>, in which he served at the eastern and southwestern front. Leifer retired from his position at the Ministry of Finance on 1 January 1922, after having occupied different positions over the course of the past five years<sup>58</sup>. In 1917, he had habilitated for Roman Law during a leave of absence and was thenceforward continuously employed as a lecturer at the University of Vienna; in 1935 he was appointed associate professor.

His scientific work started with a paper on «The unity of the concept of authority in Roman constitutional law» (*Die Einheit des Gewaltgedankens im römischen Staatsrecht*, 1914), which provided the foundation for his habilitation thesis. Especially from the thirties onwards, he published studies on administrative bodies in Classical Antiquity and on problems of early Roman Law. Several papers were published in the Savigny Journal as well as other German and Italian journals, for instance on *mancipium* and *auctoritas*, Roman Law since Constantin, and the Vindex problem. Later contributions can be found in Pauly-Wissowa's specialist encyclopaedia of classical studies or were

<sup>57</sup> Cfr. UAW, PA Franz Leifer: CV written by Leifer, 07/08/1945; for a brief overview of Leifer's biography and career in Vienna, cfr. also STAUDIGL-CIECHOWICZ 2014a, 284 ff.

<sup>58</sup> UAW, PA Leifer: staff data sheet (*Stammbblatt*).

published in a printed version of his lectures on Roman Legal History and civil litigation after the war<sup>59</sup>.

The *Anschluss* did not seem to significantly restrict Leifer's opportunities in life – quite the contrary. He requested admission to the NSDAP in the early summer of 1938 and received a temporary membership number. In his request, he attempted to compensate for the lack of previous political engagement by emphasising that of his children: he stated that he had effectively protected his sons and daughter during the era of the NSDAP prohibition as they had associated with illegal political groups. Moreover, Leifer declared that National Socialist pamphlets had frequently been stored in his apartment and that his son Herbert had shot himself after a hopeless job search some weeks before the *Anschluss*<sup>60</sup>.

After Stephan Brassloff's compulsory retirement, Leifer assumed parts of his teaching duties at the university. In the winter semester of 1938/39, he was supposed to take an educational trip to Italy funded by the German Research Foundation but was prevented from doing so by the outbreak of war. On 3 November 1939, Leifer was eventually appointed extracurricular professor<sup>61</sup>. Barely a month later, it became apparent that Leifer did not come up to the Nazi regime's racist/racial requirements: he found his great-grandparents' and grandmother's baptismal entries – they had only been christened four years prior to his grandmother's birth<sup>62</sup>. Therefore, Leifer was considered a second-degree *Mischling* under the Nuremberg laws and felt compelled to resign from his extracurricular professorship. At the same time, he requested permission to keep his title<sup>63</sup>, which was granted by the *Reichserziehungsministerium* (Reich Ministry of Education) not least because he had already pointed out that he did not feel certain about his grandmother's descent when he received the certificate of appointment<sup>64</sup>.

On 15 January 1940, Leifer was conscripted into the *Wehrmacht* as a senior lieutenant. He briefly commanded a construction battalion at the French front but returned to Vienna for reasons of ill health; nevertheless, he received a promotion, advancing to head of the interpreting department of the *Wehr-*

<sup>59</sup> Cfr. KRELLER 1958, 63, also UAW, PA Leifer: sequence of writings, presumably dating from 1938.

<sup>60</sup> Cfr. ÖStA/AdR, ZNS: GA Franz Leifer, therein personal questionnaire (*Personalfragebogen*) no. 6120975, 14/06/1938.

<sup>61</sup> Cfr. UAW, PA Leifer: appointment letter from the Ministry of Education (*Reichserziehungsministerium*), 03/11/1939 ZI W P Leifer a (a).

<sup>62</sup> UAW, PA Leifer: letter from Leifer to the rector of the University of Vienna, 23/12/1939.

<sup>63</sup> Cfr. UAW, PA Leifer: letter from Leifer to Rector Knoll, 29/02/1939.

<sup>64</sup> Cfr. UAW, PA Leifer: letter from the curator of universities Vienna, 09/09/1941, ZI I a-Leifer Franz 8. 9. 41.

*kreiskommando* (military district command) XVII. Nevertheless, he was under continued surveillance by the Gestapo, and his dismissal was obtained on the occasion of his 60<sup>th</sup> birthday. Subsequently, the employment agency assigned him to the Julius Meinel AG, where he was employed until the end of the war<sup>65</sup>. After the war, Leifer resumed his activities at the university. He died on 5 August 1957 in Vienna<sup>66</sup>.

#### 2.4. Slavomir Condanari

Trieste, the large and lively seaport in the Austrian coastal region, gave me a view of the infinity of the sea from a young age but also of the diversity of foreign peoples; it opened up the barren beauty of the Karst to me<sup>67</sup>.

This pictorial description is the introduction to Condanari's autobiographical article on the occasion of his assumption of the office of rector at the University for Global Trade in 1969.

Slavomir Condanari was born on 22 March 1902 in Trieste. His father, Stanislaus Condanari, died soon after his birth; he was survived by his wife Anna (née Petrovic) and two sons. Anna Condanari shortly afterwards married the k.k. admiralty official Josef Michler; this is why Slavomir Condanari occasionally signed himself Condanari-Michler. Condanari received his primary education at the German primary school and at the German *Staatsgymnasium* (public secondary school) in Trieste<sup>68</sup>.

The path chosen by Condanari's family was far from unusual during the last decades of the monarchy. Slavomir Condanari's maternal ancestors came from an agricultural-catholic Slavonian milieu, his paternal ancestors originate from southern Dalmatia. The fact that the grandparental surname Condanar had been changed to Condanari in the generation of his parents indicates that the family had, at least superficially, become Italianised<sup>69</sup>. This is particularly likely in the light of the highly effective assimilating power the Italian nationality exerted on Slavic immigrants at the mid-nineteenth century. Furthermore, the fact that the Condanari children were eventually sent

<sup>65</sup> Cfr. UAW, PA Leifer: Franz Leifer's account addressed to the state department of finance (*Staatsamt für Finanzen*), 11/09/1945.

<sup>66</sup> Cfr. KRELLER 1958, 63.

<sup>67</sup> VÖWA Wirtschafts Kurier. Offizielles Organ des Verbandes österreichischer Wirtschaftsakademiker, 5 – 6/1969, 1.

<sup>68</sup> ÖStA/AdR, BMUK: PA Slavomir Condanari, therein CV ZI 19253-30.

<sup>69</sup> ÖStA/AdR, BMUK: PA Condanari, therein questionnaire for civil servants, dated 27/06/1939 enclosed in a letter from Schönbauer to the Ministry of internal and cultural affairs (*Ministerium für innere und kulturelle Angelegenheiten, MIKA*), 24/08/1939.



to a German-speaking school by their parents can be seen as indicative of a desire for social advancement that in the Habsburg Monarchy was typically associated with an orientation towards the German language on the part of non-German nationalities.

After World War I, Condanari's stepfather was expelled from the Italian-occupied Trieste territory as a German officer and the family moved from the coastal region to Graz – after a stopover at the refugee camp Wagna/Leibnitz where Slavomir Condanari finished secondary school, passing his final exams in 1920. After several years in the private sector, he continued his law studies, which he had begun in Graz, in Vienna, obtaining his doctoral degree in 1929<sup>70</sup>. From 1929 onwards, Condanari was already employed as a research assistant for both chairs of Roman Law. In this position, he habilitated in Antique Legal History and the history of the Jus Commune by submitting a paper on «The Early Venetian Collegantia» (*Zur frühvenetianischen Collegantia*)<sup>71</sup>.

Following a radical change in the political climate in three years previously, the Federal Ministry of Education felt compelled to check Condanari's political background when the law faculty requested the continuation of his employment<sup>72</sup>. The federal police administration stated that Condanari's name

admittedly appears on a list of National Socialist university lecturers, giving his date of admission to the party as 17 July 1931, but further inquiries did not produce evidence that the aforementioned has been active in furthering the aims of the NSDAP<sup>73</sup>.

Further evidence for Condanari's connections to National Socialist circles would only emerge after the *Anschluss*. When the faculty, the *Reich* Ministry of Science, Education, and Culture, and several party authorities undertook a more in-depth investigation of the research assistants<sup>74</sup>, the National Socialist University Teachers' League initially did not have any «political objections» against Condanari, who was giving a four-hour lecture on «private law history

<sup>70</sup> Cfr. UAW, staff data sheet (Stammbblatt) Slavomir Condanari.

<sup>71</sup> For details on Condanari's habilitation, cfr. STAUDIGL-CIECHOWICZ 2014a, 287.

<sup>72</sup> ÖStA/AdR, BMUK: PA Condanari: letter from the Ministry of Education (*Bundesministerium für Unterricht, BMU*) to the Federal Police Headquarters (*Bundespolizeidirektion*) Vienna, 27/09/1934 Zl. 23084/I/1.

<sup>73</sup> ÖStA/AdR, BMUK: PA Condanari: letter from the Federal Police Headquarters (*Bundespolizeidirektion*) Vienna to the BMU, 16/11/1934 Zl IV-12.641/34.

<sup>74</sup> Cfr. ÖStA/AdR, BMUK: PA Condanari: letter from the BMU to the dean of the Faculty of Law and Political Sciences, 29/08/1938 Zl 26365-1 a.

in the modern era»<sup>75</sup>. However, when Leopold Wenger suggested Condanari's advancement to associate professor in succession to Stephan Brassloff, this not only led to objections on academic grounds on the part of the faculty but also to a declaration on the part of the Ministry that the vacancy left by Brassloff was not intended to be re-filled<sup>76</sup>.

Meanwhile, a scholarship that Condanari had received from the German research community in Berlin between 1934 and 1936, continuation of which had allegedly been denied for political reasons, drew the attention of the National Socialist University Teachers' League. In effect, the research community had terminated the scholarship after it had been notified in 1936 by persons close to the National Socialist Teachers League that Condanari owned a sailing boat on the Adriatic Sea and a folding boat for use on rivers and could thus not be qualified as in need of financial assistance<sup>77</sup>.

The party authorities, however, did not give up and found a number of illegal National Socialists who reported that Condanari, admittedly, had been a member of the NSDAP and of the German Association of Public Servants (*Deutscher Beamtenbund*) before 1938 but had refused to pay his membership fees. Moreover, he was reported to be «insincere, unreliable as a friend, and not picky in choosing the means of fighting his opponents»<sup>78</sup>.

In addition, an assessment of Condanari's professional qualifications, which was requested from Schönbauer, showed unexpected changes. At the end of 1936, Schönbauer had reported on Condanari's work as part of the latter's habilitation proceedings and had emphasised his «comprehensive knowledge of the relevant literature and his diligent use particularly of the exhaustive but fragmented Italian literature»<sup>79</sup>. The report includes several critical comments but concludes with a positive assessment of Condanari's paper. In April 1939, Schönbauer arrived at a different conclusion, possibly influenced by investigations into Condanari's political past; he now casts the habilitation thesis in a predominantly negative light and criticises those aspects of Condanari's

<sup>75</sup> ÖStA/AdR, BMUK: PA Condanari: letter from Schönbauer to the MIKA, 24/10/1938 with a postscript by the NS Leader of the *Gau* University Teachers' League, 27/10/1938 ZI 765/1938.

<sup>76</sup> Cfr. ÖStA/AdR, BMUK: PA Condanari: letter from the MIKA to the Faculty of Law and Political Sciences, 09/01/1939 ZI IV-2-303219 a.

<sup>77</sup> Cfr. ÖStA/AdR, BMUK: PA Condanari: letter from Professor Dr. Menzel, *Reich* Ministry for Education (*Reichserziehungsministerium*) to the Commissioner of State (*Staatskommissar*) Professor Friedrich Plattner, 16/01/1939.

<sup>78</sup> ÖStA/AdR, BMUK: PA Condanari: letter from the NS University Teachers' League to Commissioner of State Plattner, 29/06/1939 ZI Doz/Ma/0629/5/39.

<sup>79</sup> ÖStA/AdR, BMUK: PA Condanari: report by Ernst Schönbauer concerning Condanari's habilitation thesis, 14/11/1936.

method which he had previously lauded: «The deficiency of his method lies in his overblown discussions of secondary literature which distract from the principal issues»<sup>80</sup>. Schönbauer recommends employing Condanari at another university in the *Altreich* and suggests that he could perform better if he were «isolated from Viennese social intercourse». The scanty source material<sup>81</sup> does not support a definitive conclusion, but the available documents indicate that Schönbauer on the one hand was not interested in Condanari's continued employment in Vienna and on the other hand that Condanari's unskilful dealings with illegal National Socialists, combined with his refusal to pay membership fees (one of the crucial aspects for the assessment of «illegals» after 1938), had damaged Condanari's standing.

During the summer semester of 1938, Condanari together with Franz Leifer took over the lecture formerly held by Stephan Brassloff, who had been removed from the university by this time; his further career, however, led him away from Vienna: first, he was appointed lecturer by an order of the ministry for education dating from 29 November 1939; one month later, the ministry ordered him to take over a free chair at the University of Innsbruck on a contractual basis<sup>82</sup>. In Innsbruck, Condanari did not only have to teach but also had to extend his professional qualifications, because until 1939, none of his publications – including his habilitation – had had any relationship to Roman Law. Up to this point, he had only produced some book reviews, an article on the influence of German law on Hungarian law, and a contribution to the *Festschrift* for Paul Koschaker<sup>83</sup>. After having published an additional article on Roman Law, Condanari was appointed associate professor in 1942. However, he took part in the Second World War as a paramedic from April 1943 onwards<sup>84</sup>.

Upon his return to the University of Innsbruck after the end of the war, Condanari was faced with an attempt by the «Committee of democratic students at the University of Innsbruck» (*Aktionsausschuss demokratischer Stu-*

<sup>80</sup> ÖStA/AdR, BMUK: PA Condanari: letter from Schönbauer to the MIKA, 06/04/1939 ZI 522/1939.

<sup>81</sup> There is neither a *Gau* file nor a military staff data sheet to be found in the AdR, nor is there a personnel file in the UAW.

<sup>82</sup> On this point cfr. the letters from the REM, 29/11/1939 ZI W P Condanari b and 19/12/1939 ZI W P Nr 3852 contained in ÖStA/AdR, BMUK: PA Condanari.

<sup>83</sup> Cfr. UAW, staff data sheets (*Personenstammlätter*): Slavomir Condanari, list of publications.

<sup>84</sup> Cfr. ÖStA/AdR, BMUK: PA Condanari: civil status form for the registration of civil servants and employees at the University of Innsbruck (*Personenstandesblatt für die Meldung von Beamten und Angestellten bei der Universität Innsbruck*), 23/06/1946 and the CV attached to this form.

dentem an der Universität Innsbruck) to prevent his continued employment. A letter written by the to the federal ministry of education reveals that the initiators were quite well informed about individual details of Condanari's political past but, in effect, could provide little substantial evidence for their claims. Other departments subsequently fared no better, not least because of the limited availability of sources and the contradictory details concerning his party affiliation that Condanari had provided in different questionnaires<sup>85</sup>.

After 1945, Condanari continued to lecture at the University of Innsbruck, was appointed tenured professor, and assumed the professorial chair for business and bills of exchange law in 1948<sup>86</sup>. Fifteen years later, when Condanari had risen to the office of dean of faculty, he switched to the University for Global Trade in Vienna, where he was – as mentioned above – elected rector in 1969. Slavomir Condanari died in Vienna on 27 December 1974.

### 2.5. Hans Kreller

The need to find a suitable successor to Leopold Wenger, who had retired in September 1939, occupied the faculty, official authorities, and the National Socialist German Lecturers' League until 1940. In addition to the Romanists Genzmer, Kaser, and Wieacker, the shortlist also contained the names of Kreller and San Nicolò. San Nicolò was rejected despite the absence of any political objections and the appointment of Hans Kreller, who was in Tübingen at that time, was considered. This was an appointment that was clearly motivated by considerations of professional expertise rather than political ideology<sup>87</sup>. The appointee was one of the most influential Romanists in the German-speaking world. Before dealing with several aspects of Kreller's conduct and activities during the Nazi era, a brief outline of his curriculum vitae appears called for.

Hans Kreller was born to factory owner Emil Kreller and his wife Julie in Saxon Zwickau-Schedewitz on 22 April 1887. He attended primary school and the lower forms of secondary school at Zwickau until the family moved to Dresden in 1898. He passed his final exams at a local secondary school in 1906, and subsequently studied law in Grenoble, Berlin, Freiburg/Breisgau, and Leipzig. In 1915, he obtained a doctoral degree from the Leipzig Faculty

<sup>85</sup> ÖStA/AdR, BMUK: PA Condanari: letter from the Committee (*Aktionsausschuss*) to Dr. Otto Skrbensky, head of department (*Sektionschef*) at the BMU, 06/12/1946; also the letter from the Federal Ministry of Internal Affairs (*Bundesministerium für Inneres, BMI*) to the BMU, 26/02/1947 Zl 23.733-2/47.

<sup>86</sup> On Condanari's post-WWII time in Innsbruck cfr. in detail LICHTMANNEGGER 1999, 37 ff.; for a very brief biographical sketch of Condanari – without mention of his National Socialist sympathies – cfr. STAUDIGL, CIECHOWICZ 2014a, 287 f.

<sup>87</sup> Cfr. RATHKOLB 1989, 205.

of Law. His dissertation centred on «Investigations into inheritance law on the basis of Graeco-Egyptian legal papyri» (*Erbrechtliche Untersuchungen auf Grund der graeco-ägyptischen Papyrusurkunden*). During World War I, Kreller was deployed at the Western front as a lieutenant and later as a senior lieutenant. In 1918, he married Elisabeth Kohlschütter; a marriage that lasted until 1946. After the end of World War I, Kreller habilitated at the University of Leipzig as a student of Ludwig Mitteis for the subjects of Roman Law and legal papyrology on the basis of his dissertation<sup>88</sup>. During the subsequent years, Kreller was associate professor for Roman Law and civil law in Tübingen (1921 to 1926) and tenured professor for Roman Law, civil law, and business law at the University of Münster (1926 to 1931), where he was also dean of the faculty. Afterwards, he returned to Tübingen as a tenured professor, where he also held the dean's office for several years. When he finally accepted the offer of a professorship in Vienna in 1940, he had already been executive editor of the Romanist department of the renowned Journal of the Savigny Foundation for several years and could look back on a multitude of scientific publications, one of the most recent ones being then his *Roman Legal History (Römische Rechtsgeschichte, 1936)*<sup>89</sup>.

Hans Kreller appears to be particularly interesting because his career path is characterised by partial adaptation to National Socialism as well as a successful continuation of his work at the University of Vienna after 1945.

When the decision was made in favour of Kreller's appointment in Vienna in August 1940, he had been a member of the NSDAP for slightly more than a month<sup>90</sup>. Such a late date of accession requires particular investigation. However, the situation with regard to sources is not significantly better than it is in the cases of the other Romanists dealt with in this paper. The only available accounts on Kreller's attitudes towards National Socialism are those written by himself after 1945. Although these need to be treated with due caution, they provide an interesting picture of post-1945 representations and perceptions of individuals' scope for action under National Socialism. In March 1946, Kreller drafted an explanation in which he states that he had been member of a pacifist organization, the so-called *Kriegsgegnerbund Leipzig* («Leipzig War Opponents' League»), at the beginning of the Twenties. According to this statement, this was a fact that he was careful to conceal after the National Socialist takeover. With reference to his party membership, Kreller offered the following rationale for his actions:

<sup>88</sup> Cfr. UAW, PA Hans Kreller: CV, 20/01/1947.

<sup>89</sup> UAW, PA Kreller: civil status form (*Personenstandesblatt*).

<sup>90</sup> Cfr. UAW, PA Kreller: civil status form (*Personenstandesblatt*).

After the first phase of the war had, from a German perspective, taken an unexpectedly favourable course, I was faced with the prospect that Hitler's dictatorship would continue for at least as long as the working time typically allotted to a scholar of my age. Thus, when I in my position as a full professor at the University of Tübingen in May 1940 [...] received from the local *Dozentenführer* (literally: university teachers' leader) a personal written invitation to belatedly apply for membership in the NSDAP [...], I had to decide whether by my refusal to bring down on my head a thorough investigation of my political stance including my pacifist past (of which there were official records) and thus grievously endanger my further activities in teaching and research, or to formally join the party, which entailed neither a commitment to the ideology propagated by certain National Socialist leaders, nor a personal bond to Adolf Hitler beyond that created by civil service law<sup>91</sup>.

Whether membership in the NSDAP did not, in fact, create a closer relationship to Nazi ideology and the *Führer* figure is certainly doubtful from a present-day perspective. According to Kreller, this was the only way he could continue to his work as one of the few remaining representatives of Roman Law. Moreover, he could not have got out of doing some work in the Unter St. Veit local group once a week<sup>92</sup>.

This account of Kreller's political stance was composed barely six months after the Special Commission at first instance assigned to the Public Office for Public Enlightenment, Teaching, and Education, and cultural affairs (*Staatsamt für Volksaufklärung, für Unterricht und Erziehung und für Kultusangelegenheiten*) had reached a result in § 21 Prohibition Act (*Verbotsgesetz*) proceedings according to which Kreller «would advocate for an independent republic at all times»<sup>93</sup>, so that he was not at the time of writing under an immediate threat of a negative verdict from this or a similar commission.

Apart from this, several other aspects of Kreller's self-portrayal are worthy of discussion. Indeed, the favourable course the war had taken until 1941/42 might have changed many people's perception of their personal scopes for action during the National Socialist era. Kreller was in all probability not the only one to have assumed that the Nazi regime would be securely entrenched for years to come. For this reason, it may not have appeared wrong to at least

<sup>91</sup> UAW, PA Kreller: «Declaration concerning my political attitude towards National Socialism» (*Äusserung über meine politische Einstellung zum Nationalsozialismus*), 11/03/1946.

<sup>92</sup> Cfr. *ibidem*.

<sup>93</sup> UAW, PA Kreller: decision of the Special Commission of the 1<sup>st</sup> instance (*Erkenntnis der Sonderkommission 1. Instanz*), Zl 7/45.

externally conform to the reigning ideology. However, his decision to join the NSDAP appears to have caused Kreller less of an inner struggle than he would like to make the readers of his statement believe. Dieter Simon's sharp criticism emphasizes that Kreller basically might not have had major compunctions about this step: «Kreller considered himself a representative of the *Interessenjurisprudenz*, which, given its basic orientation towards state authority, did not have major difficulties with totalitarianism»<sup>94</sup>. Moreover, although membership in the NSDAP was compulsory, his was not a mere serving of time; rather, Kreller was busy compiling surveys on the political reliability of many non-party members, passing them on, and also keeping a record of the «politically unreliable»<sup>95</sup>. He was thus part of the party's apparatus of injustice and informers and can, at the very least, not escape the responsibility of having collaborated.

Which freedoms Kreller created for himself through his cooperation with the regime is, on the other hand, a separate question. At all events, Kreller stood up for Roman Law both in content-related and in organisational matters, despite the ideologically opposing *Zeitgeist*. Accordingly, he immediately after his appointment in Vienna demanded that his department retain its funding in order to buy new books and fill the post of an assistant professor, as Roman Law had to keep up with international competition – a demand which Schönbauer endorsed wholeheartedly<sup>96</sup>.

Regarding its content, Kreller's introduction to his *Roman Legal History* (*Römische Rechtsgeschichte*), published in the book series *Outlines of German Law* (*Grundrisse des deutschen Rechts*) by the National Socialists Heinrich Stoll and Heinrich Lange, is a representative and much-noticed example of the image cultivation and external ideological adaptation of Romanist studies<sup>97</sup>. Especially notable is one part of the introduction that reads as follows:

As much as it is part of general education to be aware of certain facts of the religious history, art history, and literary history of Classical Antiquity, it is necessary in our political age to deal with the political and legal life of the Hellenes and Romans; for the ancient idea of the state, as the Führer emphasised in the closing speech of the Party Congress at the *Reich* Party Congress

<sup>94</sup> SIMON 1989, 162.

<sup>95</sup> Cfr. UAW, PA Kreller: protocol of the Communist party section Unter St. Veit (*Protokoll der Kommunistischen Partei Sektion Unter St. Veit*), 05/10/1945.

<sup>96</sup> Cfr. ÖStA/AdR, BMUK: Curator of Universities Vienna (*Kurator der wissenschaftlichen Hochschulen Wien*), file no. 1311, letter from the dean to the *Reich* Minister for Science and Research, 27/11/1940, Zl 1030/1940.

<sup>97</sup> Cfr. SIMON 1989, 162.

of Freedom in 1935, has been, along with Christianity, an important aid to our becoming a nation<sup>98</sup>.

This passage is identically reproduced in the second edition from 1948, basically just purged of its National Socialist character:

As much as it is part of general education to be aware of certain facts of the religious history, art history, and literary history of Classical Antiquity, it is necessary in our age of fundamental political decisions on our personal fate to deal with the political and legal life of the Hellenes and Romans; for the ancient idea of the state, as every scholar of European history will admit, has been, along with Christianity, an important aid to the political and social re-organisation of our cultural circle<sup>99</sup>.

On the one hand, what can be gleaned from this comparison is that introductions of this type are tentative, so they can be opportunistically coloured in the current state colours<sup>100</sup>; on the other hand, that the author Kreller did not feel qualms about letting Roman Law benefit from the political attitudes of the currently prevailing system. Furthermore, colleague Stephan Brassloff, who reviewed the first edition in the *Juristische Blätter* as early as 1938, noticed that Kreller

structured his book in accordance with the political and didactic guidelines laid down in the official curriculum. From these, he extracts the justification for the continued existence of Roman Law as a subject of study, which is indeed to be desired; in doing so, he lays particular emphasis on the connection between the German people and the leading Indo-Germanic peoples of the early Mediterranean world<sup>101</sup>.

After the war, the introduction of the first edition became a hot topic in the context of Kreller's «denazification». The author defended himself against personal attacks made with a view towards the aforementioned passage of the introduction as follows:

After it had required great effort to save a five-hour lecture for Romanist studies in the *Reich* curriculum of 1935, it was a daring step for publisher,

<sup>98</sup> KRELLER 1936, 2.

<sup>99</sup> KRELLER 1948<sup>2</sup>, 4.

<sup>100</sup> Cfr. SIMON 1989, 167.

<sup>101</sup> BRASSLOFF 1938, 85.



editor, and author to publish an outline of this kind. Thus, it had to be our aim to counteract in advance all accusations that our project was in opposition to the Party Programme, which at that time was regarded as a legally binding norm in the whole of Germany, by writing a suitable introduction. [...] I therefore had to expect that this introduction – in contrast to the contents of the book itself! – would be read very closely by the National Socialist authorities called upon to decide the fate of my book. For this reason, I thought it expedient to avail myself here as far as possible of a terminology that was both familiar and palatable to them. [...] I have not, moreover, made the claim that Adolf Hitler was the first to recognize the importance of the antique concept of the state for German history; however, I thought it permissible to invoke for this platitude an authority that a possible opponent could by no means ignore – the incriminating introduction was, so to speak, the price for the publication of the book [...]<sup>102</sup>.

Just as Kreller's incriminating membership in the NSDAP had been the price for his further Romanist activities, this introduction had made it possible for Roman Law to persist in the shape of a book during National Socialism. According to Kreller's post-war opinion, there had been no other course of action to preserve his pre-war opportunities in life. How Kreller saw his scope for action during the Nazi era and how he after the war justified his apparent adaptation to NS ideology is a colourful part of the Roman Law-related history of science during the National Socialist era.

After his successful continuation in office, Kreller eventually became dean of the Vienna Law Faculty in 1951/52 before he was appointed full member of the Academy of Sciences in 1954. On 14 February 1958, Hans Kreller died in Senftenberg near Krems<sup>103</sup>.

### *2.6. Ernst Schönbauer – Roman Law Professor and leading National socialist*

Ernst Schönbauer had been one of the two full professors of Roman Law at the University of Vienna since 1929; yet he was less known as a scholar than as a politician with close connections to National Socialism. He eventually became the first dean of the law faculty after the Nazis took power in 1938.

Ernst Schönbauer was born on December 29, 1885 in Windigsteig, in the northern part of Lower Austria<sup>104</sup>. He attended the local elementary school and

<sup>102</sup> UAW, PA Kreller: letter from Kreller to the BMU, 25/09/1947.

<sup>103</sup> Cfr. BOLLA-KOTEK 1959, 55.

<sup>104</sup> For a detailed account of Schönbauer's biography cfr. KALWODA n.d., unpublished manuscript kindly made available by the author; for a short biographical sketch, cfr. also STAUDIGL-CIECHOWICZ 2014a, 277 ff.

the secondary school in Waidhofen and Prachatitz, where he passed his final exams in 1906<sup>105</sup>.

Initially, Schönbauer studied classical and German philology at the University of Vienna but changed to the German University of Prague in 1908. After he got a doctoral degree in philology at the German University of Prague for his thesis on folk tales from the Waldviertel region («Waldviertler Schwankmärchen»), Schönbauer started law studies in Prague but later changed to Vienna.

There, he joined the military as a volunteer for one year but was dismissed a few months later for poor health. Shortly before being conscripted for unarmed service at the Ministry of Defense in 1915, Schönbauer finished his law studies and obtained a second doctoral degree. Several papers on mining law served as a basis for his habilitation in 1919; in 1924 he was appointed associate professor, in 1929 tenured professor<sup>106</sup>.

Schönbauer's specialised work in Roman Law began with extensive research on antique mining law. In 1912 and 1913, he was awarded the Samitsch Prize for his research on the *lex metalli Vipascensis*. Schönbauer published several papers on this subject which laid the groundwork of a pivotal paper on antique mining law, which was published as «Contributions to the history of mining law» (*Beiträge zur Geschichte des Bergbaurechtes*) in 1928/1929.

Presumably inspired by his own peasant descent, which he liked to emphasise with pride, he concentrated on questions of the law of landed property and published «Contributions to the history of Antique real estate law» (*Beiträge zur Geschichte des Liegenschaftsrechts im Altertum*, 1924). This research grew out of a scholarly environment shaped by Paul Jörs' papyrological seminar and showed Schönbauer's propensity towards juristic papyrology. Moreover, Schönbauer worked on public law aspects of papyrological sources as well as municipal constitutions. When his teacher Moritz Wlassak and Wlassak's teachings on procedural law faced major criticism at the end of the fifties, they were defended by Schönbauer. Unlike other professors of Roman Law, however, Schönbauer did not work on dogmatic questions of Roman private law<sup>107</sup>.

In addition to his scientific work, Schönbauer was highly active as a politician. In 1919, he participated actively in the constitutional and justice committee of the Austrian Constitutional Assembly as a nominee of the «Greater German Association» (*Großdeutsche Vereinigung*) and took part in peace

<sup>105</sup> Cfr. ÖStA/AdR, Ministry for education and art (*Bundesministerium für Unterricht und Kunst*, BMUK): PA Ernst Schönbauer, containing a CV dated 02/08/1945.

<sup>106</sup> Cfr. ÖStA/AdR, BMUK: PA Ernst Schönbauer, containing a CV dated 02/08/1945.

<sup>107</sup> Cfr. MAYER-MALY 1967, 627 ff.

talks for the Treaty of Saint Germain. From 1922 onwards, Schönbauer was a representative for the *Landbund für Österreich*, which had its origins in the «German-Austrian Farmer's Party» (*Deutsch-Österreichische Bauernpartei*) and parts of the «Greater German People's Party» (*Großdeutsche Volkspartei*)<sup>108</sup>. This farmer's party was dedicated to «ensuring the rural population's impact on public life». The party was corporatively (*ständisch*) constituted and aimed at «uniting all citizens who are mentally or physically active in agriculture and forestry». Their manifesto called for a union of Austria with Germany, whereas the party basically acknowledged the Austrian constitution. Another two core items in the manifesto were the party's «positive Christian foundation» as the «rural population preserves the highest degree of piety», and its positioning as an «antisemitic party» opposing «the Jewry as representatives of global big business».

The *Landbund* regarded itself as the only genuine farmer's party, purporting to be active in areas that were not addressed by other national corporations. From a geographic point of view, the *Landbund* was a phenomenon of the Austrian south: in the 1927 general elections, the *Landbund* won considerably more popular votes in numerous southern communities, especially in Carinthia and Styria, in comparison to the 6% it had averaged nationwide. Other heartlands of the *Landbund* were the predominantly rural regions of the southern Burgenland and north-eastern Lower and Upper Austria. Party officials were active in cooperatives, Carinthia had a *Landbund* Governor and the Styrian chamber of agriculture was presided over by a *Landbund* functionary. Schönbauer was responsible for constituency XXV (Burgenland) and took the view that only intense commitment in parliament could reinforce the aims of the *Landbund*. From 1927 to 1930, Schönbauer was a member of the Austrian parliamentary delegation preparing a new joint German-Austrian penal code. After the 1930 general elections, Schönbauer finally withdrew from active politics and resigned his seat as he seemed to have interpersonal issues with the Styrian Franz Winkler, an aspiring *Landbund* functionary<sup>109</sup>.

Henceforth, Schönbauer focused his attention on the university, where he was considered an important professorial member of the law faculty. In 1934, he was elected dean of the faculty but did not get the Minister of Education's approval as he had never been a member of the *Vaterländische Front* and was considered a National Socialist. Schönbauer's «illegal» National Socialist commitment has attracted some attention among historians, being open to a range of interpretations. First of all, we have to state that *Landbund* politicians, who

<sup>108</sup> Cfr. SEDLACEK 1996, 19.

<sup>109</sup> Cfr. HAAS 2000, 213.

in 1930-1934 declared their loyalty to the constitution and dissented from National Socialist agitations, nevertheless did not have substantial ideological divergences from the NSDAP, as is apparent from the *Landbund* manifesto. Therefore, numerous *Landbund* members occupied mid-level posts in the National Socialist regime and did not shy away from joining the party<sup>110</sup>. To this general observation can be added more solid evidence of Schönbauer's personal convictions: sources<sup>111</sup> indicate that Schönbauer had already joined the National Socialist party in 1934, the year in which federal *Landbund* President Franz Winkler agreed with a NSDAP representative in Zurich to place the *Landbund* under the control of NSDAP. Among other things, this agreement entailed that *Landbund* members were to be accepted as full members of the NSDAP. On this basis, Winkler for instance in 1938 asked for admission to the party with retroactive effect to 1934<sup>112</sup>. Clear evidence is missing in Schönbauer's documents and request for admission, but a parallel can be assumed. In fact, Schönbauer was undoubtedly active in National Socialist circles before 1938. He was a member and (according to his own statements) chairman<sup>113</sup> of the «Society for law and political science» (*Gesellschaft für Rechts- und Staatswissenschaft*), which was gathering National Socialist jurists (so called «preservers of law») and had Arthur Seyss-Inquart as its treasurer. Furthermore, he was cooperating with the regional NSDAP leader Josef Leopold<sup>114</sup>. According to Schönbauer, the «Society for law and governance policy» had requested an Aryan certificate from 1934 onwards. The society did not call itself National Socialist, but «spirit was more important than appearance at all times, the pith more important than the husk. And this pith and this husk were unmistakable»<sup>115</sup>. Certainly, Schönbauer acted as confidential informer for the National Socialists when he reported the meeting of Alfred Verdross and Otto Habsburg in Leuven to party comrades in the German *Reich*<sup>116</sup>. In his request for admission 1938, Schönbauer asserted he had made it clear to Engelbert Dollfuß in 1933 that he was «a member of the ideational Hitler-community»<sup>117</sup>. Such an imprudent declaration might be a complete fabrication for the

<sup>110</sup> Cfr. HAAS 2000, 314 ff.

<sup>111</sup> Cfr. ÖStA/AdR, Civil records NS era (*Zivilakten NS-Zeit, ZNS*): Gau record (*Gauakt, GA*) Ernst Schönbauer.

<sup>112</sup> Cfr. HAAS 2000, 301.

<sup>113</sup> Cfr. ÖStA/AdR, ZNS: GA Schönbauer, personal questionnaire (*Personalfragebogen*) 20/05/1938.

<sup>114</sup> Cfr. RATHKOLB 1989, 201.

<sup>115</sup> SCHÖNBAUER 1938, 6.

<sup>116</sup> Cfr. Schönbauer's letter reprinted in the appendix to WIESMANN 2001.

<sup>117</sup> Cfr. ÖStA/AdR, ZNS: GA Schönbauer, personal questionnaire 20/05/1938.

purpose of image cultivation, but the basic contents of Schönbauer's assertion might nevertheless be true.

Schönbauer's National Socialist pursuits and ideology from 1938 onwards are not debatable, formalities such as admittance to the party do not need to be discussed. Moreover, Schönbauer himself never called his NSDAP membership into question and states his reasons as follows:

I would like to reaffirm that it was neither anxiety nor existential fear that led me to join the party; but rather that I applied for admission into the party from a settled conviction. How else could I have continued my engagement in agrarian policy after the Landbund had been prohibited by the authorities in 1934?<sup>118</sup>

After the *Anschluss*, Schönbauer's career began to accelerate. The new regime did not restrict his opportunities in life but rather expanded them. On 18 March 1938, Schönbauer was appointed provisional dean of the law faculty as Heinrich Mitteis' successor and assumed this function in the course of the following days<sup>119</sup>.

Therewith, Schönbauer's work at the faculty started. His actions as dean call for a differentiated assessment, given that some of his actions appear contradictory. At first, Schönbauer's absolute confession towards National Socialism (described above) is striking. At the same time, Schönbauer strove to cut out a separate path for Viennese jurisprudence based on the study and examination regulations in force until 1938. Since all records directly pertaining to Schönbauer's deanship were destroyed when the dean's office was hit by a bomb in January 1945, posterity is largely dependent on subsidiary sources and Schönbauer's own statements.

In marked contrast to his Greater German attitude in politics, Schönbauer advocated for Austrian training and exam regulations, which caused major issues with his superiors<sup>120</sup>. Moreover, Schönbauer did not comply with the *Führer* principle that was decreed by superiors but acted in accordance with the Austrian procedural rules. As a consequence, he was given a harsh reprimand by the ministry of education<sup>121</sup>.

<sup>118</sup> UAW, PA Ernst Schönbauer: appeal against the decision of the special commission of the first instance, 30/01/1946.

<sup>119</sup> Cfr. UAW, RA: SZ 677 aus 1937/38, letter from the acting rector to the dean, 18/03/1938.

<sup>120</sup> Cfr. ÖStA/AdR, BMUK: PA Ernst Schönbauer, containing a CV dated 02/08/1945.

<sup>121</sup> Cfr. UAW, PA Ernst Schönbauer: appeal against the decision of the special commission of the first instance, 30/01/1946.

In his human resource policy, a clear strategy became apparent: Schönbauer was reluctant to enforce the placing on administrative leave of conservative-catholic professors who had been classified as «politically unreliable», postponing their removal for as long as possible and helping provide minor assignments, as in the well-documented case of Ludwig Adamovich. That was possible in his own department for Agricultural, Business, and Employment law, which was established in 1940. Schönbauer's line of argument for re-employing Adamovich was initially based on the assertion that Adamovich's potential for productive labour had been untapped for too long and that his pension was unjustifiably low due to peculiarities in service law. When this line of reasoning fell on deaf ears, Schönbauer emphasised that Adamovich had protected him from investigation and interrogation by the *Vaterländische Front* before 1938. As a result, Adamovich was admitted as administrative assistant on Schönbauer's sole responsibility<sup>122</sup>, although the leader of the National Socialist University Teachers' League (*Dozentenbund*) had presented the prospect of «inconvenient difficulties»<sup>123</sup> to the dean of faculty. In a similar way, Schönbauer advocated for Alfred Verdroß, Hans Mayer, and Wilhelm Winkler (later confirmed by biographical records<sup>124</sup>) until the resistance of his superiors made further interventions impossible. In any case, Schönbauer's actions are interpretable as special services rendered to members of his coterie or returns for assistance he had received during the *Ständestaat* regime. Moreover, it is important not to overlook the fact that there is no evidence that Schönbauer ever intervened on behalf of Jewish faculty members. Finally, one of Schönbauer's early acts during his deanship was his order that «all honorary professors and private lecturers who must be considered Jews have to eschew further academic activities»<sup>125</sup>.

Schönbauer's actions as dean from 1938 to 1943 are ambivalent: contrary to his avowed political allegiance to a «greater Germany», he took advantage of his extended sphere of influence by protecting former exponents of the *Ständestaat* and the catholic-conservative faction for as long as possible and attempted to preserve the independence of the Vienna law faculty. However, this should not conceal the fact that Schönbauer had been a staunch National Socialist and anti-Semite since his early political socialization. Accordingly, Schönbauer did not take a stand for Jewish colleagues. Even though there was

<sup>122</sup> For details, cfr. the correspondence in UAW, PA Ludwig Adamovich from 1940 (RA 1293 aus 1938/39).

<sup>123</sup> UAW, PA Ludwig Adamovich: therein RA 1293 from 1938/39, letter from the leader of the University Teacher's League (*Dozentenbundführer*) to Rector Knoll, 28/06/1940.

<sup>124</sup> Cfr. the relevant autobiographical sketches in GRASS 1952.

<sup>125</sup> ZEPITSCH 1992, 151 nt. 393.

considerably less room for manoeuvre on such issues – NS authorities were much less open to discussions about «race» than about «political unreliability» – such an attempt would not necessarily have been doomed to fail.

At the beginning of 1943, Schönbauer was considered for appointment as the new rector after having obtained the third most votes in a poll conducted among the professors. With reference to the tense staff conditions at his faculty, he declined<sup>126</sup>. Shortly afterwards, Schönbauer resigned from his position as dean<sup>127</sup>. After 1945, he was not readmitted to lecturing at the university but was still able to pursue his research activities at the Academy of Sciences. He died on the 3 May 1966 at the age of 81.

### 3. *Epilogue: Like a phoenix from the ashes – Leopold Wenger and his cosmopolitan vision of Roman Law as Global law*

#### 3.1. *Leopold Wenger – a short biographical sketch of the «Father of Antique Legal History»*

From a scientific point of view, Leopold Wenger, our final protagonist, was one generation older than Schönbauer; he was his teacher but also in 1926/27 and from 1935 onwards his immediate superior as full professor of Roman Law. Leopold Wenger was undoubtedly the most prominent professor for Roman Law at the University of Vienna from an international point of view.

He was born on 4 September 1874 in Obervellach, Carinthia. After having finished primary and secondary school in Villach, Wenger studied law at the University of Graz, where he obtained his doctoral degree in 1897. There, he qualified as a professor for Roman Law in 1901 and was active as associate professor from 1902 to 1904. His further career included several professorial chairs (Vienna 1904, Graz 1905, Heidelberg 1908) and led him to Munich, where he was professor from 1909 to 1926 and, after a short intermezzo as full professor in Vienna in 1926/27, again from 1927 to 1935. From 1935 until 30 September 1939, Wenger lectured and worked again at the University of Vienna<sup>128</sup>.

A formidable number of scientific honours and memberships is an indicator for Wenger's international reputation. For instance, he held six honorary doctoral degrees (including Harvard), was corresponding member of five European Academies of Science, and a full member of the Austrian Acade-

<sup>126</sup> Cfr. ÖStA/AdR, ZNS: GA Schönbauer, containing a report on the question of who would become rector by the Leader of the University Teachers' League Kurt Knoll.

<sup>127</sup> Cfr. UAW, PA Schönbauer: letter from Rector Pernkopf to Dean Schönbauer, April 1943. The exact date is illegible as the record was partly destroyed in a fire.

<sup>128</sup> For a brief biographical sketch of Wenger, cfr. STAUDIGL-CIECHOWICZ 2014a, 274 ff.

my of Science. Furthermore, he held the positions of «class secretary» (*Klassensekretär*) and president of the Bavarian Academy of Science<sup>129</sup>.

Wenger's scientific achievements are too extensive to be outlined here<sup>130</sup>; only three aspects of his work shall be mentioned in this paper. Initially, Wenger devoted himself to Roman civil procedure, especially in his habilitation thesis on the *actio iudicati* (1900) and in his course book, *Key concepts of Roman civil procedure (Institutionen des Römischen Zivilprozessrechts, 1925)*. His explorations of civil procedure are based on the work and research findings of Moritz Wlassak, which Wenger significantly extended and advanced.

The second subject which will be briefly mentioned here is juristic papyrology. As a student of Ludwig Mitteis, with whom he had worked during a research stay in Leipzig, Wenger was affected by the excitement about papyrology at the turn of the century. Starting with «Legal-historical papyrus studies» (*Rechtshistorische Papyrusstudien, 1902*), Wenger approached numerous relevant issues during the following years.

Wenger's own concept of «Antique Legal History» gained particular importance very early on. This discipline, which Wenger presented in his inaugural address in Vienna (1904), pursued the goal of looking beyond Roman Law and examining the legal systems of Classical Antiquity, creating a general view on antique judicial culture and allowing comparisons between Roman Law and other legal systems. By this universal historical approach, Wenger opened up new avenues of Romanist research which, although occasionally misinterpreted and criticized by his contemporaries, undoubtedly led to a representative new research field in Romanist studies during the 20<sup>th</sup> century<sup>131</sup>.

The political upheaval in the spring of 1938 initially did not have any impact on Wenger's position at university. Like many others, he took the oath on the *Führer* on 22 March<sup>132</sup> and continued to deliver his lectures until he reached the legal age of retirement in 1939.

Wenger's retirement requires thorough investigation as the relevant literature offers two divergent interpretations. Obituaries published after Wenger's death, particularly those by Erwin Seidl<sup>133</sup> and Max Kaser<sup>134</sup>, described a schol-

<sup>129</sup> Cfr. UAW, PA Wenger: staff data sheet (*Stammbblatt*).

<sup>130</sup> For a recent account of Wenger's extensive work, cfr. THÜR 2006.

<sup>131</sup> Cfr. on this topic Wenger's publication of his inaugural lecture «Roman Law and Antique Legal History» (*Römische und Antike Rechtsgeschichte, 1905*) and also his work on the sources of roman law (1953), in which he towards the end of his life elucidated the fate of his idea; for a recent discussion of this topic including developments after Wenger's death, cfr. THÜR 2005.

<sup>132</sup> Cfr. ÖStA/AdR, BMUK: PA Wenger, therein oath of office.

<sup>133</sup> Cfr. SEIDL 1953, 452 ff.

<sup>134</sup> Cfr. KASER 1954, xiii ff.



ar harried by the National Socialists and undergoing a veritable ordeal. Thus, Seidl refers to Wenger's «position full of thorns» after 1933 and emphasizes «injustices» and «molestation», until Wenger could seize the offer of a chair in Vienna (1935), where he was «roughly degraded» in the first half year of 1938, before retirement from the professorship «on 29/6/38»<sup>135</sup>. Thus, Wenger's students clearly describe him as a victim of persecution. Kaser agrees with Seidl's statements according to which Wenger felt the situation in Germany to be unbearable and was released from his duties a few months after the *Anschluss*, having not even attained the age of 64<sup>136</sup>.

The incorrect account of Wenger's «voluntary retirement», according to which he attempted to retire from his professorship as he «did not wish to continue his teaching under the Nazi regime», emerged in 1945 and had the clear goal of keeping Wenger employed at the University of Vienna.

It is entirely inappropriate to cast Wenger as a victim of National Socialist «cleansing», no matter how much the prominent Romanist may in his heart have rejected National Socialist ideology. In his investigation of the matter, Tomasz Giaro reveals several «dissenting opinions»<sup>137</sup>: Wenger's release had also been termed as «retirement» and could be ascribed to him having attained the age limit effective in the German *Reich*.

This would certainly have been the case in September 1939, when Wenger would actually have attained the statutory age limit of 65<sup>138</sup>. In Wenger's retirement document dated 29 June 1939, the *Führer* expressed «thanks and appreciation». Wenger himself retrospectively spoke of an «undeserved finale»<sup>139</sup> in Vienna, even though he was not considered hostile to the regime despite his contacts to catholic-conservative circles in Munich and had not been significantly restricted in his scope of action compared to his colleagues, as the sources show<sup>140</sup>. According to the course directory and his own statements<sup>141</sup>, Wenger continued to teach until his successor Hans Kreller took over; afterwards, he kept his lectures on papyrology<sup>142</sup>.

Some awards Leopold Wenger received during the Nazi regime also need to be mentioned in this context. In 1942 Wenger was awarded the golden

<sup>135</sup> SEIDL 1953, 454 ff.

<sup>136</sup> Cfr. KASER 1954, xvi f.

<sup>137</sup> Cfr. GIARO 1998, 591 ff.; see also GIARO 2000, 67 f.

<sup>138</sup> German Civil Servants' Act (*Deutsches Beamtengesetz*) of 26 January 1937 (dRGBl I 1937/39) § 68 Abs 1.

<sup>139</sup> WENGER 1952.

<sup>140</sup> Cfr. RATHKOLB 1989, 203.

<sup>141</sup> Cfr. UAW, PA Wenger, civil status form (*Personenstandsblatt*).

<sup>142</sup> Cfr. Course Directories of the University of Vienna (*Vorlesungsverzeichnisse*), summer term 1941, winter term 1941/42.

*Treuedienstehrenzeichen* (literally «badge of honour for loyal service»); in 1944, on the occasion of his 70<sup>th</sup> birthday, he received the Goethe Medal. In a letter of appreciation to the curator of Scientific Universities in Vienna dated 7 September 1944, Wenger expressed the hope of it being «granted to me to contribute to my nation's cultural wellbeing through scientific work at my beloved University of Vienna»<sup>143</sup>, which would indeed be possible for Wenger even after 1945. He continued to work at the university until the age of 78 and died on 21 September 1953<sup>144</sup>.

### 3.2. Wenger's post-war vision of Roman Law as «Global Law»

Although the individual fates of representatives of Roman Law were very diverse during the era of National Socialism, the Nazi takeover in 1938 was, nevertheless, a radical break in their biographies. Not all of them witnessed the new beginning after 1945 with relief and delight, yet for Leopold Wenger, the end of National Socialism gave reason for joy and optimism.

For Roman Law as a teaching subject, the end of the National Socialist regime brought about a «gratifying restitution of the excellent Austrian curriculum», as Leopold Wenger stated with obvious satisfaction in his «assessment of the importance of Roman Law in the legal curriculum of Austrian universities, especially in Vienna»<sup>145</sup> in the post-war era:

Thus, after the National Socialist programme, in typical ignorance of its nature, had frowned upon Roman Law, had eliminated it as a subject of examination, and had relegated it to a modest place at the end of the curriculum, Romanist studies have, after the end of this cultureless stage, been reinstated in their former position in our legal education.

From a didactic point of view, Wenger in his assessment emphasised the «legal-practical tendency in the cultivation of Roman Law»:

This significance is initially reflected in the process of finding the appropriate legal rule for a specific case. The finding of appropriate rule for a given situation is an art best taught by Roman Law. Initially, we face the result of an amazing development, of overcoming the illiberal national *Jus civile* in favour of the inclusive *Jus gentium* which brings peoples together. Here, in

<sup>143</sup> ÖStA/AdR, BMUK: PA Wenger, letter from Leopold Wenger to the curator of universities, 07/09/1944.

<sup>144</sup> GRANDNER 2005, 290 ff.

<sup>145</sup> WENGER, *Gutachten* (report). The following quotes are taken over verbatim from this source.

the ancient world, Roman Law accomplishes its great mission as global law for the first time. Here, it politically accomplishes the mission as the law of the former empire, of the *orbis terrarum*. This development of global law remained exemplary for the recurring international impact of Roman Law under different conditions.

In this mood of satisfaction on account of the end of National Socialist rule that clearly resonates from his assessment, Wenger highlights those qualities of Roman Law that can be related to legal ethics and that result from an orientation towards *aequitas* and *bona fides*: «Whoever has gone through this incomparable school, [...] will not become a slave to the letter of the law, an ossified literalist». Therefore, Roman Law «does not only create good jurists, but quite simply good people».

We used to have such a school of jurisprudence for teaching and practical application, and we can have it again, after the spectre of a legal system that only benefits its own people, of a principle that, once generalised, results in *bellum omnium contra omnes*, has vanished.

Wenger's statements at the end of his life bear witness to his undimmed optimism. Wenger fondly hoped for the cultivation of Roman Law as a contribution to the position of Vienna as a global university. In retrospect, the threats to Roman Law by National Socialist ideology can be seen as a mere episode of the history of science. But even in this moment of triumph, bitter overtones remain due to the immense human suffering endured by individual scholars such as Brassloff and Hupka, the two law professors killed in Hitler's concentration camps.

The National Socialist era was an unspeakably terrible episode not only for those who did not survive it – it also raises the question whether all those who have undergone the cultivation process of the classical school of Roman Law could rightfully be termed morally sound «good people».

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