HISTÓRIA DO DIREITO

Roman Law as Pamphlet:
Fritz Schulz and the Prinzipien des römischen Rechts between Cesar and Hitler[1]

Direito Romano como Panfleto:
Fritz Schulz e os Prinzipien des römischen Rechts entre César e Hitler

Renato Sedano Onofri[2]

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This work is dedicated to the memory of Mário José Bertotti (1955-2021), whose genuine intellectual curiosity will always remain an inspiring force.

2 Guest postdoctoral researcher at Humboldt University in Berlin with financial support from the Fritz Thyssen Foundation. ORCID: 0000-0003-1045-0091.

ABSTRACT

This paper argues that Fritz Schulz's (1879-1959) book *Prinzipien des römischen Rechts*, first published in 1934, in addition to being a scholarly piece on Roman law, also consists in a Roman-law-based statement against Nazism. The argument is articulated in three parts: the first one is dedicated to understanding the development of national socialist views on Roman law; the second one deals with the *Prinzipien* against the background of Nazi legal conceptions, trying to grasp how both the structure of the book and some of Schulz's word choices were not exclusively determined by Roman law scholarship, but also intended to debate with, and ultimately re-signify, Nazi misconceptions; the third and last part is dedicated to an overview of reactions on the *Prinzipien*, with an emphasis on the silence of potential Schulz allies. Two main conclusions are stated: *a)* the same framework that allowed the development of the Nazi legal doctrine also contained the elements of Schulz's reaction against it; *b*) Schulz's expulsion from his career and country creates long-term difficulties concerning the evaluation of his work, ignored in Germany for years, in comparison with that of others who, like Hans Kreller, could stay and eventually adapt their writings to post-1945 circumstances.

Keywords: Fritz Schulz; Prinzipien des römischen Rechts; National Socialism; Roman law

RESUMO

O presente articula a hipótese de que o livro *Prinzipien des römischen Rechts*, publicado por Fritz Schulz (1879-1959) em 1934, além de ser uma peça de literatura acadêmica no campo do Direito Romano, também constitui uma reação baseada em Direito Romano contra o Nazismo. O argumento é desenvolvido em três partes, sendo a primeira delas dedicada às origens da visão nazista acerca do Direito Romano; na segunda parte, abordam-se os *Prinzipien* contra o pano de fundo da doutrina jurídica nazista, procurando-se compreender como a estrutura do livro e a terminologia empregada por Schulz dialogam e, eventualmente, ressignificam concepções tidas como equivocadas na doutrina do Nacional Socialismo; a terceira e última parte é dedicada ao panorama das reações ao livro, enfatizando-se o silêncio a que eventuais aliados de Schulz estavam submetidos. Da investigação, extraem-se duas principais conclusões: *a)* os quadrantes intelectuais que viabilizaram o desenvolvimento da doutrina jurídica nazista continham também os elementos para a reação empreendida por Fritz Schulz; *b)* a perseguição e expulsão de Schulz de sua carreira e de seu país criam dificuldades para a correta avaliação de sua obra, ignorada por anos na Alemanha, em comparação a outros que, como Hans Kreller, puderam permanecer e ajustar a própria obra para que permanecesse relevante após 1945.

Palavras-chave: Fritz Schulz; Prinzipien des römischen Rechts; Nazismo, Direito Romano

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Wer hub es an? Wer brachte den Fluch? Von heut
Ists nicht und nicht von gestern, und die zuerst
Das Maß verloren, unsre Väter
Wußten es nicht, und es trieb ihr Geist sie
(Friedrich Hölderlin, *Der Frieden*)

Mieux maintenant la parfaite conformité d'apparence entre un petit bourgeois de Combrais de son âge et le duc de Bouillon me rappelait (...), que les différences sociales, voire individuelles, se fondant à distance dans l'uniformité d'une époque (Marcel Proust, *A la recherche du temps perdu : Sodome et Gomorrhe*, II, p. 74)

Introduction

Fritz Schulz's (1879-1959) *Prinzipien des römischen Rechts* (Principles of Roman Law) is an unconventional book, written in unconventional times. Although authored by a leading scholar in the field of Roman Law, the *Prinzipien* may not be approached exclusively through its scientific precision and correctness, since it is filled with political innuendo.

First published in Germany in 1934, the book was developed after a series of lectures given by Fritz Schulz at *Friedrich-Wilhelms-Universität zu Berlin* (now *Humboldt-Universität zu Berlin*) during the summer term of 1933. Schulz's ideas met the public only a few months after the *Machtergreifung* of January 30th, 1933, that is, the seizure of power by the *Nationalsozialistische Deutsche Arbeiterpartei* – the Nazi Party (NSDAP) led by Adolf Hitler (1889-1945).

The time proximity between the political events that took place in Germany in 1933 and the development of Schulz's lessons is not a mere coincidence. Both those events and Schulz's *principles* are, in a sense, results of the same process; both had a common intellectual framework and shared the same language. Nonetheless, the political orientation under National Socialism and the principles of law portrayed by Fritz Schulz are incommensurable.

At the time he was lecturing on the *Prinzipien* in Berlin, Schulz could be regarded as the most prominent Romanist of his generation – a generation that counted Ernst Levy (1881-1960) and Paul Koschaker (1879-1951) among its ranks. The *Prinzipien* were the last lectures of Schulz's career as a professor before he was forced by the Nazis to leave his position in Berlin. This circumstance provides us with a hint: what we actually access through the eleven *principia* – that is, as Schulz (1934, p. 1) explains, the eleven *beginnings* (*Anfänge*) from which Roman positive law flowed and which contained the foundations of law and justice cultivated in the classical period – is not only a comprehensive overview of Roman law in the spirit of Rudolf von Jhering[3], but also a Roman-law-based statement against the legal conceptions adopted by the national socialist worldview.

To understand how Roman law could be used for resistance against totalitarianism, one must insert Schulz's book in the context of its time. National Socialism made Roman law a

3 Rudolf von Jhering's *Geist des römischen Rechts* (The spirit of Roman law), whose first volume was published in 1852, is a constant discussion partner in Schulz's *Prinzipien*. See Schermaier (2010, p. 690).

political symbol for the legal order whose replacement was sought. However, this symbolism was not new *per se*, since it originated in the theoretical knots within the hegemonic private law paradigm at the turn of the 20th century. The overcoming of this paradigm, crystalized in German Pandectism, came about gradually through elements provided from within itself, which were combined in new and, in some cases, unexpected fashions[4].

The role of positivism might, in this case, offer a fruitful example. Gustav Radbruch (1878-1949) formulated the hypothesis according to which positivism made jurists defenseless against National Socialism. This idea may be seen as unsustainable since Rüthers' (2012) book on *unrestricted interpretation*, first published in 1968[5]. In fact, National socialist legal doctrine fought against positivism, taking advantage of decades of non-Nazi criticism of it. Schulz also debates with this critical literature, which ultimately led him to formulate, over Roman law material, a version of positivism capable of contradicting a legal theory that aspired to intervene in social life as a whole by making all of life's substance a legal matter.

The first task I must fulfill, then, is to try to understand how national socialist views on Roman law came into existence. Not only does this mean going back to the 19th century to get to know its predecessors, but also fundamentally going outside of Roman law scholarship to get acquainted with those who established that Roman law was a "cold", "individualistic" order that needed to be replaced by a German, "lively", "concrete" order. For, without the background of the legal thought taken over, processed, and rendered by National Socialism, as well as the role Roman law played in its rhetoric, Schulz's approach in the *Prinzipien* cannot be fully comprehended.

It becomes clear, at this point, that this is not a paper on Roman law, but the result of historic research concerning a book on Roman law. Its main argument – which is not in itself fully new[6] – consists in articulating Schulz's principles against the background of the Nazi legal science of his time. By doing so, I hope to make clear that the structure of the book, as well as some of Schulz's word choices were not determined exclusively by Roman law scholarship, but also intended to debate with, and ultimately re-signify, Nazi misconceptions.

For this purpose, I will leave Fritz Schulz and the *Prinzipien* almost untouched in the first part of the paper, while attempting to offer an overview of the development of the conceptions against which he reacts, comprehending also the Nazis' claims against Roman law; in the second part, the *Prinzipien* will be approached from the perspective of their dialogue with Nazi legal thought; in the third and last part, some of the reactions to Schulz's book will be analyzed in an attempt to grasp how the book was inserted and perceived at its time by foes and allies alike.

1. The National Socialist representation of Roman law

In this section, as already stated, I will not be primarily occupied with Fritz Schulz and the *Prinzipien*. Rather, I will attempt to outline the theoretical knots originated during the 19th

4 Here, the vocabulary is provided by Kuhn (2012) as read and adapted for cultural sciences by Conrad's (2006) analysis of the so-called *cultural turn*.

5 On this point, see also Walther (1998).

6 Werner Flume (1959, p. 21; 1958, p. 505) stated that the *Prinzipien* were an impassionate pamphlet (*Kampfschrift*) against the terror installed by the Nazi regime and an appropriate political act marked by Schulz's personality. More recently, Schermaier (2010) developed the same point.

century, which were eventually appropriated by the Nazi legal doctrine and its representation of Roman law[7]. By debating with the Nazi representation of Roman law, Schulz's book also expresses his position on this literature, whose discussion is crucial for interpreting the *Prinzipien*.

Roman law played a central role in the national socialist rhetoric. Indeed, the 1920 NSDAP program contained an explicit demand, formulated in its 19th point, to *replace* Roman law – which was no longer in force in Germany – with a *German common law*. This will be examined more closely below (section 1.2).

A look at German private law literature of the second half of the 19th century shows that this demand took advantage of a series of themes then worked up within the legal scientific paradigm, such as, for example, a discussion on the difference between the Roman and the Germanic concepts of property, which was ultimately radicalized.

Theories and themes first discussed in a given circumstance, generally within the parameters admitted by the field, might be "displaced" from their original knot as social, economic, technical, and political transformations occurred. They formed, in some cases, autonomous paradigms of their own, or were tied to other displaced themes, thus forming new wholes – Roman property became a battle horse against an economically liberal and juridically positivistic order[8].

1.1. Fragments floating over time and space

Processes like this could support the assumption that National Socialism did not arise out of nowhere. It articulated ideas debated in the public arena over decades and thus made common in every household. Although this framework might seem almost incomprehensible to us today, it was formed by then normal mentality factors (Senn, 2007, p. 408).

As the quote from Marcel Proust at the beginning of this text suggests, some thought structures at a given time transcend national and social boundaries and become familiar in various circles. It is interesting to note that the quote was made after an observation on anti-Semitism among French aristocrats in view of the *Dreyfus Affair*, an issue that is recurrently discussed in Proust's book[9]. Although many of his aristocratic and military characters are not particularly anti-Semitic, all of them are aware of the meaning and possible social consequences of displaying themselves as *dreyfusard*.

7 Stolleis (2006, p. 32) states that an actual Nazi legal doctrine did not exist. The main features associated with Nazi legal thought – for example, Carl Schmitt's concrete order doctrine or Helmut Nicolai's racial legal doctrine – never went beyond the status of rough drafts.

8 For an in in-depth look at this clarification model for scientific paradigm shifts, see Conrad (2006), already mentioned.

9 The *Dreyfus Affair* was a legal and political issue that took place in France from 1894 to 1906. Alfred Dreyfus (1859-1935), a republican French artillery officer trained at the Polytechnical School, was the victim of a miscarriage of justice, being then wrongly convicted for collaborating with German espionage. However, his innocence was proved after a review of the original case, which was prompted by evidence of the errors made since the beginning of the investigation. Among the motives underlying the false accusation made against Dreyfus were anti-Semitic ones. The writer Émile Zola wrote an open letter to the president of France, Félix Faure, which was published on January 13th, 1898, in issue 87 of *L'Aurore Littéraire, Artistique, Sociale*, under the strong title *J'accuse…!*, advocating for the review. About the *Dreyfus Affair*, see Arendt (2017, pp. 115-156). For an overview of Proust's portrayal of the *affair*, see Campos (2008).

One may also remember that, if France had Comte Gobinou and Édouard Drumont, the *Jewish issue* was discussed in Germany decades before the rise of the NSDAP in different intellectual circles, from Richard Wagner to Karl Marx[10].

This showcases how some features generally associated with National Socialism, such as racism and anti-Semitism, were spread – in fact, internationally spread – well before their appropriation by the Nazi movement (Senn, 2007, p. 408; 414-415).

That might also be the case with the crisis Romanists in Germany had to endure in the first decades of the 20th century. In his observations on this period, Paul Koschaker (1966, pp. 313-314) argued that Roman Law as an academic field was already irrelevant when the Nazis took a stand against it. The Nazis' aggressions could be seen, then, as the result rather than the cause of the crisis[11]. In this context, Simon (1989, p. 172-173) holds that a sense of continuity between Romanist research under the Nazis and the efforts undertaken during the previous decades is identifiable.

Indeed, the critique on Roman law and its depreciation in comparison to Germanic laws was far from being an original Nazi intellectual creation, as Whitman's (2003) critical approach on the "hatred Roman law" demonstrates. Carl Schmitt (1936a, pp. 181-182), himself advocating the need to get rid of Roman law and liberal jurists, points out to Georg Beseler (1809-1888), Julius von Kirschmann (1802-1884) and Otto von Gierke (1841-1921) as pioneers in this dispute. Veritably, Georg Beseler (1843, p. 42) characterized the reception of Roman Law in Germany as a "national misfortune" (*Nationalunglück*)[12]. Kirchmann (1848), in his speech about the worthlessness of jurisprudence as a science, considered that the law lived and developed itself autonomously through the people and not through its science, that is, not through the body of jurists occupied with Roman law, allegedly aliened from the character of the German people. Schmitt (1936, p. 182) perceived Kirchmann's ideas as a true manifest to German jurists of his own time.

In this context, still during the 19th century, the debate concerning the Roman and Germanic concepts of property became a central topic (Kroeschell, 1995, p. 253). It led to the idea that Romanist legal thought, present in Germany especially through Pandectism, did, in a manner contrary to the German spirit, endorse egoistic behavior aiming at private profits at the expense of collective interests – this is a point which Schulz later explicitly refuted, as we will see below (section 2.2.4). Opposed to this schema, a German conception of law was presented as a collectivist order.

10 Richard Wagner wrote in 1850, under the pseudonym K. Freigedank, an essay on *Das Judentum in der Musik* (Judaism in music), published in the *Neue Zeitschrift für Musik*. The text appeared again in 1869, now under Wagner's own name, in an extended brochure. About this topic, see Kiesewetter (2015). Karl Marx also occupied himself with the *Judenfrage*, as he reviewed two writings by Bruno Bauer concerning the Jewish political emancipation in the *Deutsch-Französischen Jahrbüchern*. Marx (1844) does not differentiate Judaism from Christianity when regarding the problem of constructing the State and its behavior towards the bourgeois society underneath it. He criticizes Bauer for looking at the matter from a theological standpoint. He proposes then, unlike Bauer's approach, moving away from the "Sabbath's Jew" to observe the "day-to-day Jew" (*der Alltagsjude*), pointing out that a Jew's worldly cult was haggling and his God, money. Judaism would be, then, recognized as an antisocial element, whose political emancipation would mean the emancipation of mankind from Judaism (Marx, 1844, p. 209).

11 In the sense of the text, Stolleis (2006, pp. 74-75). Lange (1934, p. 1493), in turn, when reviewing Fritz Schulz's *Prinzipien* from a Nazi standpoint, holds that the crisis began with the "national socialist revolution".

12 About the Nazi reading of Beseler's work, see Landau (2013, p. 328).

The construction of this antithesis, as later taken over by the Nazis, might be linked back to the work of Carl Adolf Schmidt (1814-1871)[13], who, in 1853, as a response to Rudolf von Jhering's first volume of *Geist des römischen Rechts* (The Spirit of Roman Law), published in 1852, wrote a piece entitled *Der principielle Unterschied zwischen dem römischen und dem germanischen Rechte* (The fundamental difference between Roman and Germanic Law) (Landau, 2013, pp. 334). Schmidt was the first Germanist to present the Roman and Germanic concepts of property as an opposing pair (Kroeschell, 1995, p. 255; Meder, 2017, p. 418).

Years later, Otto von Gierke (1841-1921) reformulated Schmidt's ideas – without explicitly referring to his work – to criticize the draft of the German Civil Code (*Bürgerliches Gesetzbuch* – shortened, BGB) (Luig, 1995, p. 94). Speaking to the Legal Society (*Juristische Gesellschaft*) in Vienna in 1889, with a lecture suggestively entitled *Die soziale Aufgabe des Privatrechts* (The social task of private law), Gierke (1948, p. 5) put forward that Roman law was fundamentally divided into public and private law, the former being marked by the sovereignty of an absolutist administrative order, and the latter by the sovereignty of the individual. This dichotomy was absent from early German history, as law was conceived as a unit and, therefore, without a sovereign State or sovereign individuals (Gierke, 1948, pp. 5-6; 1919, p. 8)[14].

The State and the law, according to this Germanic unit ideal, should be incompatible both with the atomization of society, endorsed by Roman law, as well as with the annihilation of all individualism, as propagated by socialism. Gierke (1948, p. 10) proposes, on the one hand, seasoning the individualism in private Law with "some drops of socialist oil", and, on the other hand, letting flow through public Law a hint of natural freedom[15]. In the end, this should mean that no right was free of duty[16]; land property, which, as conceived by Roman law, could only be exceptionally limited from the outside, should have no place in the future: a right to a piece of the planet should always serve a collective purpose and therefore be limited from within by its own nature (Gierke, 1948, pp. 14-16).

Fritz Schulz later argued this image of an individualistic and free of duties Roman property to be fundamentally wrong (see section 2.2.4 below). Nonetheless, it served Gierke to hold that the fight for a contemporary law – a law concerned with its social aspects – was also the fight to install a Germanic mentality – and, consequently, a fight against Roman law (Gierke, 1948, p. 12). The draft of the BGB, as seen by Gierke, could not heal the deep wound opened by the reception of a foreign order – he obviously meant Roman law –, which created a dichotomy between the mental world of German jurists and the national legal worldview (Gierke, 1889, pp. 1-2). The core of the BGB consisted, according to Gierke (1889, pp. 2-4), in a Pandectist compendium cast in legal paragraphs. Therefore, it took an antisocial direction, consecrating, through a strict formalism, a one-sided capitalistic tendency, which revealed the triumph of Roman legal conceptions over Germanic ones.

13 Kroeschell (1995, p. 256) also indicates that the common phrases used against Roman Law were taken from books by Schmidt and his followers.

14 This topic was later discussed, and its core idea fundamentally refuted, by Schulz. I will address it in more detail below (section 2.2.2).

15 Gierke formulates as follows: "Schroff ausgedrückt: in unserem öffentlichen Recht muß ein Hauch des naturrechtlichen Freiheitsraumes wehen und unser Privatrecht muß ein Tropfen sozialistischen Öles durchsinken!".

16 Kroeschell (1995, p. 258) indicates that Gierke's critique on the BGB found its place in article 153 of the Weimar Constitution, which stated in its 3rd paragraph: "Eigentum verpflichtet. Sein Gebrauch soll zugleich Dienst sein für das Gemeine Beste." Roughly translated, "property obliges. Its use should at the same time be at the service of the common good."

This identification of German private law with Roman law remained present in the Nazi rhetoric and was refuted by Schulz in the *Prinzipien.* In the following topic, I will discuss its role in national socialist literature and propaganda.

1.2. Until they are captured in a dangerously imaginative whole

Before moving on, it might be interesting to remember that, like Otto von Gierke, Heinrich Dernburg (1829-1907) also spoke in Vienna to the *Juristische Gesellschaft* while occupied with the critique of the BGB draft. He too gave a very suggestive title to his lecture: *Die Phantasie im Rechte* (The phantasy in law*)*. Although admitting that the methods of natural sciences were recognized as the most fruitful ones in jurisprudence, Dernburg (1894, p. 35) argues that they were not appropriated to grant the development of the law, since they were aimed at the study of physical occurrences. The evaluation of a legal occurrence, in turn, depended on the adequacy to its purposes, which are outside the experience, coordinating invisible forces in the sphere of the spirit. Therefore, this task could be better fulfilled by *phantasy* – something Schulz would explicitly contradict while laying the methodological grounds of his *Prinzipien* (see item 2.1 below) –, making pure dogmatism an unwanted feature at law schools, for law was not a herbarium from which one could learn by observing different types of legal sentences (Dernburg, 1894, p. 37)[17].

And there Dernburg (1894, p. 17) sees a reason why the reception of Roman law in Germany was disrespectful towards the phantasies of the German people: it threw away much of the old, poetic national law, which would have been worth preserving. He felt that, in his time, legislators were not less destructive than the doctors of the 16th century.

The definition of what a juridical occurrence closer to a German popular representation of life would look like, one may argue, was really a matter of phantasy. However, both Gierke and Dernburg signal, as other jurists before them (topic 1.1 above), the opening of a gap between the law in force and the representation of a genuinely German law. The thought that the legal substance was nationally alienated turned Roman law into a symbolic enemy.

The fact that the animosity against it went on after the enactment of the BGB reveals that, by targeting Roman law, one was not aiming the *Corpus Iuris Civilis* or Pandectism. This symbolism might be confirmed by the fact that the animosity against Roman law was carried on and intensified even after the enactment of the BGB, as the *corpus iuris civilis* lost its place as a source of law. It was assumed that the law then in force in Germany, as Gierke suggested, was directly derived from Roman law, making it an individualistic and materialistic order. This was ultimately explored by National Socialism and the annihilation of Roman law was explicitly declared as a political goal.

17 Dernburg's views seems to be related to a mechanical model of nature explanation, typical during the second half of the 19th century (Rheinberger, 2007, p. 15). In Germany, the epistemological debate concerning this model grew around the notion that the way consciousness works and thoughts are created could not be apprehended by natural sciences. Du Bois-Reymond (1872, p. 25) stated that, if, on the one hand, astronomy could predict exactly where a celestial body would be in a given period, on the other hand, nothing about the functioning of the brain could be clarified or predicted like these movements; since there were no mechanical causes, there would also be no mechanical effects to be studied within natural sciences. At the end, he states that what was left for the natural scientist, regarding the relation between the physical world the creation of thought, is to concede that it has always been and would always remain ignored – the author, then, closes his conference with the catchphrase *ignorabimus!* (Du Bois-Reymond, 1872, p. 36). Although not explicitly mentioned by Dernburg, Du Bois-Reymond's formulation might have been at the foundation of his representations of law as a product of phantasy to which the natural sciences' methodology could not say much.

This was expressed, as already stated, through the NSDAP program, originally published on February 25th, 1920 in Munich. The program's 19th point, in fact, voiced a demand for replacing Roman law, which only served the materialistic world order, with a German common law[18].

For Koschaker (1966, p. 312), the wording of point 19 was anything but clear. However, its meaning could be determined through its confrontation with the first 18 points of the program, which set socialistic demands. Supported by these demands, point 19 meant that a common private law, mastered by a socialistic spirit, should be put into force. And, indeed, Feder (1931, p. 8) clarifies that, in the future German empire, the German soil (meaning the land property), solely occupied by German nationals (*Volksgenosse*), should serve the residence and subsistence needs of the entire people[19].

The Nazi program, in harmony with Gierke's thought, assumed that German private law was impregnated with Romanistic content (Landau, 1989, p. 12). Therefore, as Schmitt (1936a, p. 182) later explained, the battle against Roman law was not fought only to abolish some legal clauses. Rather, it was a fight to reform the entire body of German jurists or, in other words, displace the Romanistic mentality.

Nicolai (1932, pp. 5-6), a Nazi legal theorist, held that point 19 of the NSDAP program was so generally formulated that every statute, every legal formulation, was affected by it, but none explicitly mentioned, since the replacement of the whole legal system was intended. So, in order to determine what it meant and how the German legal order should be affected by it, Nicolai explores the relationship between race and law in Roman and Germanic history. According to him, Roman patricians were originally Nordic-Germanic – however, the larger the Empire grew, the more prevalent the "race chaos" became, culminating in the dissolution of every natural bond through blood[20].

To reign upon such a "mass of races", the empire became a soulless State machine, as Gierke (1948, p. 5) had pointed out earlier. Only Rome's external power and violence could hold its population together. Lacking underlying moral binding, which could only result from a "community of blood" (*Blutsgemeinschaft*), Justinian's 6th century compilation favored individual activities aimed at material profits. Thus, a merchant, not an individual with a heroic spirit, would be favored by the legal sentences of a "Jewified" (*verjudet*) commercial empire (*Handelsweltreich*) (Nicolai, 1932, pp. 7-8)[21].

The author goes on to argue that the reception of Roman Law in Germany had caused not only the introduction of a spiritually alienated legal system, but also a racial mixture, a process intensified by capitalism and by the individualistic bourgeoisie. That gave Jews the opportunity to do in Germany what they had previously done in the Roman republic, as they infiltrated every legal institution, from the legal doctrine to the administration of justice. Then and now, he

18 Point 19 was written as follows: "Wir fordern Ersatz für das der materialistischen Weltordnung dienende römische Recht durch ein deutsches Gemeinrecht" (Feder, 1931, p. 21). The transcription was taken out of the 1931 edition of the program, supplemented by Gottfried Feder with an exposition on the party's official worldview.

19 *Volksgenossen, -genossinen* was employed by the Nazis both with a social meaning, indicating the member of a solidary community, as well as a racist meaning, indicating the community sharing the "German blood". See Schmitz-Berning (2010, pp. 660-664).

20 Koschaker (1966, p. 333) explains that underlying this depiction was the thesis of the degeneration of the Nordic-Germanic race through amalgamation with Mediterranean, Near-East and Semitic ideas. However, Schulz (1934, p. 90) holds that Roman law remained a creation of the Roman spirit, as I will explore below (2.2.3).

21 For an overview on the notion of *Verjudung*, see Schmitz-Berning (2010, pp. 630-632).

continues, this process cost the understanding of what law really is, since the State was turned into a legislative machine that took arbitrary decisions through parliamentary representation. A genuinely German legal system should do without legislation, relying on the customary law, which could be compiled in text, but not altered by a legislator (Nicolai, 1932, pp. 8-9).

That is why, despite the emptiness of its words, point 19 of the NSDAP program was read by Schmitt (1936a, p. 181) as a command loaded with first rank constitutional utterance directed to a certain portion of the German legal profession in order to change the entirety of the German legal system[22]. In this context, to make sense of this directive, one had to comprehend Roman Law as a symbolic enemy, since the then applicable law was portrayed as an unwanted heritance of Romanist mentality; the new order, backed up by a conjectural Germanic representation of law, should neither serve the capitalistic, materialistic world – and, therefore, the Jews that profited from the market –, nor be conceptualized under formalistic principles; it should rather be the denial of positivism through the scrutiny of concrete order, thus overcoming the dichotomies between legal and moral and between State and society (Schmitt, 2006, pp. 54-55)[23].

1.3. And then phantasies engender real-life consequences

The word phantasy, taken from Dernburg's (1894) intervention, is used here somewhat freely, envisaging, one has to admit, some pathetic and aesthetic effect. Nonetheless, it is difficult to think about another term to explain why Nicolai (1932, p. 10) would, after quoting a Psalm from the Bible, add a footnote to explain that the Holy Scriptures contained a lot of Nordic wisdom, which reached the Jews through the originally Nordic Persians.

Perhaps it was not phantasy – but surely not only scientific goals, either – that conducted the doctrine throughout the *crescendo* that culminated in a radical opposition between the Roman and German property theories. Kroeschell (1995, p. 254-255) argues that the Pandectists were fully aware that private property comprised limitations. If they were to insist on its absoluteness, it should be understood normatively, not descriptively. In their view, not only was inclination towards unlimited – if only in principle – property based on an appropriate interpretation of Roman sources, but it also went back to constitutional and political reasons, since shared property, in its feudal form, had been constitutionally abolished in many lands throughout Germany[24].

From this emerges that, even where the scientific substance was not solid enough, it sufficed to eventually bring up real consequences to the research, teaching activities and lives of many of those implicated with Roman law in Germany. In fact, as Dieter Simon (1989, p. 164)

22 In German, Schmitt (1936, p. 181) wrote: "Punkt 19 des Parteiprogramms ist eine verfassungsrechtliche Bestimmung ersten Ranges". Landau (1989, p. 13; 2013, p. 327) does not hold Schmitt's statement to be an exaggeration, as Koschaker's mitigating remarks concerning the Nazis' behavior towards Romanists may suggest. In fact, Koschaker (1966, p. 312-314) ironically writes that point 19 might not have won many electors to the NSDAP, except among students that had received bad grades on Roman law. He argues that Romanists were not taken seriously and therefore were left alone by the regime. Koschaker, then, does not assign to the party's program any normative or constitutional role, or he simply did not see the constitution the same way Schmitt did. Schmitt (1936a, p. 183) defines constitution as the total order of a nation, the order of the concrete orders. As he explains in an earlier book, it is not to be sought in a constitutional text, but in the concrete life of the people and the institutions (Schmitt, 2006).

23 Below (item 2.2.2), I will explore Carl Schmitt's conceptions more closely by confronting them with those of Fritz Schulz.

24 Kroeschell (1995, p. 254) lists under these constitutional texts the Constitution of St. Paul's Church (*Paulskirchenverfassung*) of 1848 and the *Prussian Constitution* of 1850.

puts it, the Romanist corporation had been doomed to extinction, even though the study regulations of January 18th, 1935 had reserved the same number of hours for Roman law history as for German law history. The problem, nevertheless, was the supporting role Roman law was doomed to play, due to the fact that the new study organization should serve the national socialist worldview. This meant overcoming the difference between public and private law by detaching the course of studies from the great legislative works, as well as disfiguring the systematics of private law, as seen in the BGB (Wolf, 2013, pp. 45-46).

In these circumstances, Roman law should serve exclusively as an introduction to the BGB, which was allegedly based upon Romanistic legal thought. Roman private law *per se* should no longer be taught, as it had to be integrated in the new subject of *Privatrechtsgeschichte der Neuzeit* (history of private law in modernity) (Simon, 1989, p. 165; Wolf, 2013, p. 47)[25].

Furthermore, the replacement of the BGB with a *Volksgesetzbuch* (a popular national code) was planned, and a specific committee of the Academy for German Law had actually held several meetings and carried out many conferences in order to outline the new legislation. Had the plan been successful, the permanence of Roman law as a minimally relevant academic field would have needed an entirely new justification (Simon, 1989, p. 165)[26].

The preservation or extinction of an academic domain is not a mere detail that might remain overlooked in a context full of human tragedy. This story contains its own human tragedy, for behind Roman law there are Romanists and, behind Romanists, there are names like Fritz Schulz, Ernst Levy, Herman Kantorowicz, Fritz Pringsheim, among others, that were expelled from their professions, had their families thorned and were ultimately evicted from their homeland.

Unwittingly, Simon (1989, p. 165) provides an example of how permanent the injuries to these persons and their field of studies were. He correctly states that, by the time the Nazis raised to power, a substantial number of the leading Roman law scholars were Jewish, subsequently listing the names of removed Romanists. Without disclosure, Schulz appears among them. Even though his mother was born Jewish, she converted to Protestantism in 1888, also changing her name from Clara to Clara Maria. This was the religion Fritz Schulz was raised in (Ernst, 2004, p. 107).

Notwithstanding, after the enactment of the *Gesetz zur Wiederherstellung des Berufsbeamtentums* – shortened, BBG, that is, act for the restoration of civil service – in 1933, Schulz was framed as "non-arian" (*nicht arischer Abstammung*). However, his place as a professor should be legally secured, since he had been serving since 1912, as he was called to the University of Kiel. That meant, according to the act, that, as a pre-war servant (*Vorkriegsbeamter*), he could not be sent into retirement (Schermaier, 2010, p. 686).

Maybe Schulz did not feel his position was in danger. Ernst (2004, p. 132, footnote No. 214) reports that, after listening to a broadcast, he questioned how Hitler could do any harm when he could not even properly master the German grammar. Another fact that might indicate this underrating was how he filled in the form to collect the data required by the BBG: applying

25 Stolleis (2006, p. 72) reports that, at this point, the need for this reform was felt long before the Nazis' demands.

26 The materials resulting from the work on the *Volksgesetzbuch* were compiled and organized by Werner Schubert (1988) as part of the series comprising the Academy for German Law's committees' protocols.

Nazi terminology, he simply wrote "paternally Arian, maternally Jewish" (*väterlischerseits arisch, mütterlische Seite jüdisch*) (Lösch, 1999, p. 185).

Shortly thereafter, his salary was, without legal basis, shortened and, on September 30th, 1933, he was ordered to leave his post in Berlin for another professorship (Ernst, 2004, p. 126; Schermaier, 2010, p. 686). It is problematic to state, nonetheless, that Schulz experienced his "catastrophe" – the term is employed by Ernst (2004, p. 122)[27] – for being Jew, since no grounds for the decision were provided, even though statutorily required (Schermaier, 2010, pp. 686-687).

As a Romanist, Schulz reached the peak of his academic career in Berlin, at 52 years of age, being then the "most distinguished professor of his age group covering both Roman and German private law" (Ernst, 2004, p. 122). The literature dealing with the 1933-1945 period in Germany is conscious about Nazi ideology continuing the intellectual framework *from before* its existence and then *being continued afterwards* in different ramifications of cultural life[28]. The confusion concerning the reasons why Schulz was persecuted might be related with the lack of reaction from his contemporary fellows against the expulsion of their colleagues (Simon, 1989, p. 171). Without implying that, under the Nazis, it would have been possible to act in any other way, one could feel enabled to perceive this misunderstanding as a sign of the perpetuation of the silence of Romanists from 1933 to 1945[29].

According to Ernst (2004, p. 123), the persecution of Schulz was "probably fueled by a mix of political and racial motives". On the political side, the *Prinzipien des römischen Rechts* might have boosted the mix and prompted its explosion in the hands of a professor who already had against him his half Jewish heritage and his engagement in political activities with the Deutsche Demokratische Partei (DDP), expressing democratic convictions despised by the NSDAP (Ernst, pp. 119-120 and 123). Schermaier (2010, pp. 698-699) also holds that, by teaching the lectures in 1933 and publishing the book in 1934, Schulz did not make his already precarious situation much easier.

As already stressed in the introduction, I will argue that the *Prinzipien des römischen Rechts* were not only a scholar piece on Roman Law, but also a statement against the National Socialist conception of law, which, nonetheless, explored the same scientific background – or *paradigm*, one may say. An attempt to grasp this relation demanded this somewhat long – and yet far from long enough – introduction on the main features of the intellectual framework of the time in which Schulz's ideas came about.

27 The same term is employed by Flume (1959, pp. 5-6) to indicate the experience of loss he and his family had to deal with after the passing of his father.

28 See, for example, concerning legal thought, Senn (1999; 2007); Rückert (1995); Simon (1989); Stolleis (2006). The continuity *forward*, that is, of the Nacional Socialist mentality after 1945, was the theme of a temporary exhibition organized by the German Historical Museum, in Berlin, from August to December 2021. The exhibition followed the fate, in the Federal Republic of Germany, of artists described as *unavailable* by the Nazi leadership in the "List of the Divinely Gifted" (*Gottbegnadeten-Liste*) of 1944.

29 During lectures on Roman Law in the summer term of 2021 at Humboldt University in Berlin, Dr. Andreas Fleckner shared the thought that if Fritz Schulz had not been persecuted by the Nazis, he would have had a place next to Friedrich Carl von Savigny and Theodor Mommsen in the canon of the *Berliner* Romanists. Werner Flume (1959, p. 7) seems to hold a similar opinion, as he reports that Schulz had the portrait of his master and friend Emil Seckel (1864-1924) on his desk until his last days, adding that, if the portraits of Savigny and Mommsen were also hung on the wall of his study, then his position in the newer history of science would be correctly displayed.

2. Fritz Schulz's *Prinzipien* as lessons on Roman law and reaction against National Socialism

Up until this point, I have tried to outline the legal intellectual environment in which the *Prinzipien* were conceived and with which they debate. I will now attempt to indicate how Schulz's book relates to it.

This framework was in development, as we have seen, for decades before the Nazis rose to power, and it was also the formative frame of Schulz's own intellectual life. If one cannot jump over one's own shadow, then it was arguably inevitable for him, as a Romanist, to deal with the questions posed in his discipline. How he did so is what led me to write the first sentence of this article: he wrote an unconventional book in unconventional times. This is the point I will now start to argue[30].

2.1. Nature and structure of the book

The book *Prinzipien des römischen Rechts*, published in 1934, is the first of Schulz's three general overviews on Roman law. It is also the only one among them to have been originally written in German, since the other two, *History of Roman Legal Science*, of 1946, and *Classical Roman Law*, of 1951, were written in English and published during his exile in Oxford, England. Nevertheless, as Flume (1959, p. 17) argues, one might read them as a unit, forming a trilogy connected through theme and method.

The *Prinzipien*, according to Flume (1959, p. 21), were written in less than a year, as the threat of losing his position at the university in Berlin hanged over the author. As already stated, the basis for the text was the series of lectures given during the summer semester of 1933, an important fact for understanding the nature of the work. For, as a series of lessons, it has an intrinsically didactical character.

On his memorial speech, Flume (1959, p. 24) portrays Schulz as someone who combined incomparably well the activities of researching and teaching. His teaching abilities would be therefore also visible in his works. The question concerning what Schulz is trying to teach in his *Prinzipien* does not fall out of purpose. He clarifies that, under the concept of *principles*, its elementary and guiding norms, rather than the basics of positive Roman Law, were to be presented. Instead, his efforts were directed to recognizing the fundamental views on Law and justice that guided those Romans occupied with the development of law (Schulz, 1934, p. 1). In a review of the book, Jalowicz (1936, p. 280) wrote that Schulz sought the *spirit* of Roman law and might even have chosen that title for his *Prinzipien*, had it not been appropriated by Jhering years before.

Schulz (1934, p. 1) states that such principles might have been difficult to read off the sources, for the Romans neither expressed, nor consciously handled them in the jurisprudence. But, unlike Dernburg, he does not assign to phantasy the role of a creative force for his investigation[31]. On the contrary, the foundations of law should be recognizable through the work of

30 Here, the main source is the 1934 German edition of the *Prinzipien*. The English translation, published in 1936, is also marginally referred to.

31 In the original, Schulz (1934, p. 1) wrote: "Gleichwohl handelt es sich hier nicht etwa um Phantasien."

Roman jurists, being revealed from concrete legal historical facts. Certainty concerning Romans' basic views and their mentality should be easier to achieve than knowledge of single events of Roman legal history, which could only be reconstructed through the battered (*trümmerhaft*) interpolated – and, therefore, insufficient – sources (Schulz, 1934, pp. 1-2).

It becomes clear, as Flume (1959, p. 17) states, that Schulz's concerns, not only in the *Prinzipien* but in the entire trilogy, are primarily methodological, since the legal solutions, in their singularity, matter chiefly as a means to grasp how Roman jurisprudence was practiced.

Schulz (1934, p. 2) notes that this venture was tackled only once in its full extent. Indeed, he asserts that it was Rudolf von Jhering, in the *Geist des römischen Rechts* (The spirit of Roman law), who did it in a groundbreaking manner. Other attempts, such as that by Carl Adolf Schmidt (1853), already mentioned above, fell short. The specialty of the enterprise might explain the uncommon structure chosen by the author for a didactical presentation of Roman Law history, despite some similarity with the first volume of Jhering's (1873) *Spirit*: a chapter, or a lesson, is dedicated to each of the eleven *beginnings* identified as principles. Dogmatic categories or common denominations for historical periods are far from the focal point, giving way to terms like "isolation" (*Isolierung*), "simplicity" (*Einfachheit*), "humanity", "fidelity" (*Treue*), through which the formation of Roman positive Law should be understood.

Given the animosity against Roman Law, it might have seemed expectable that new writings on this domain would attempt to justify themselves in the light of the new law and State orientations. This expectation was later articulated by Hans Kreller (1887-1958), to whom point 19 of the Party program put Romanists in a position to have to prove the worthiness of their field's tradition for the construction of law under the third Reich (Kreller, 1936a, p. 409). He himself attempted at self-justification, as he wrote a didactic presentation on Roman law history, whose first edition was published in the series "Outlines of German Law", edited by Heinrich Stoll and Heinrich Lange, two prominent Nazi academics[32]. Kreller (1936b, p. 1-3) affirmed the correspondence between his purposes and those reserved by National Socialism for his field. Even though the content of his book does not seem ideologically determined (Simon, 1989, p. 164), Kreller, at least as a formality, writes down his commitment with the established necessity to reform the study of Roman law according to Nazi plans.

Notwithstanding the fact that Kreller (1936b, p. 2-3) disagrees with the idea that Roman law had received oriental influences, as exposed by Nicolai (topic 1.2 above), he justifies its study not only with the Romanistic formation of the BGB, but also, in part, through racial reasons and the will of the *Führer*. The racial reasons were composed by the "evident fact" of the "blood relation" originally linking the Roman and Germanic populations, which had led Adolf Hitler to declare the Antiquity's idea of State, besides Christianity, an important resource in the historical constitution of the German people. In this context, however, Roman law should not be taught for a matter of *classicism*, but as a means to grasp how the legal problems of their time were solved – and here there is methodological proximity with Schulz's approach. Comprehending the law as an expression of the nation's life was the task required of national socialist jurists and which differentiated them from positivist "knowers of paragraphs".

32 A second edition was published in 1948, after Kreller had been submitted to the process of "denazification" (*Entnazifizierungsverfahren*) (see Pfefferle, 2014, p. 335). In spite of that, Simon (1989, p. 166) notes that, with some changes in writing, the introduction to the text, in which the commitment with the Nazi movement was contained, could be preserved in surprisingly numerous passages.

Schulz, in turn, completely renounces any such commitment. In fact, he takes the opposite direction, stating that Roman Law was his only object of study and was not put in the service of any other purpose. Even if an occasional comparison with either Greek or Germanic laws should take place, it would be for the sake of better comprehending the Roman principles (Schulz, 1934, p. 3).

One might even say that dedicating the work to his wife Martha was also a sign of Schulz's unwillingness to compromise with the Nazis. As Ernst (2004, p. 123) explains, Schulz might have gotten away with being "only half-Jewish". However, despite Martha's conversion to Lutheranism, she, and the couple's children, could not escape being targeted. Schulz was advised to divorce his wife, as others had done. However, not only did the couple remain married, but he also dedicated his following book, the *Prinzipien*, to his "dearest spouse, life's most faithful consort" (*coniugi carissimae, consorti fidissimae vitae*)[33].

2.2. Roman law in dialogue with National Socialism

This topic will be focused on identifying some of the dialogues established between Schulz and not only the Nazi legal thought, but also the literature that preceded it. It is arguable, in sight of the findings articulated here, that, through Roman law, Fritz Schulz was taking part in some of the heated discussions of his time in various branches of the legal science.

This shall demonstrate the insertion of the *Prinzipien* in the context of the stream of theories originated in the scientific entanglement of the 19th century and also how Schulz positioned himself in this scene. I have selected the four points below to make the indicated dialogues clearly noticeable. These are examples and, in addition to them, many others could be found. Nevertheless, these choices are not random. Below, I will attempt to understand if and in what sense Schulz takes part in the debate concerning positivism and the urge for a legal theory that could embrace society as a whole.

Further associations are undoubtedly not precluded. Nevertheless, I believe the selected points should suffice to prove my argument.

2.2.1. Role of statute in the development of classical Roman law

The second chapter, presenting the first principle of the book, is entitled "Statute and Law" (*Gesetz und Recht*). By itself, the title might be perceived as a challenge to some conceptions of the time, such as Nicolai's (1932), presented above (section 1.2), since it comes from an underlying difference between statute and law. This separation was seen by some as undesirable, owing to the fact that the legal system should be handled as a living unit, as Kreller's introduction (item 2.1 above) roughly outlines[34].

33 Flume (1959, p. 22) notes, in consideration of Schulz's behavior towards his own relationship with Martha, that he experienced the enthusiasm he held for the humanistic character of the classical law of marriage. Further context on the dedication of the book to Martha Schulz will be provided below, in section 3.1.

34 Below, in item 2.2.2, I will explore this issue in more detail.

From the beginning, Schulz makes it clear that the representation of the Roman empire as a soulless legislative machine is far from correct (once again, see section 1.2 above). By analyzing the sources of law and law development during the classical age, he states that the law-inspired Nation is not statute-inspired (*das Volk des Rechts ist nicht das Volk des Gesetzes*) (Schulz, 1934, p. 4; 1936, p. 7). The author argues that statute, understood in a broad sense to embrace "any general enactments of law by the State" (Schulz, 1936, p. 6), was not a major force in the advancement of law. In fact, Schulz (1934, pp. 4-5) sees that the rejection of codification and a strict reserve towards legislation – and therefore towards any kind of legal ordinance by the State – formed a principle according to which Romans handled statutes.

Even though the beginnings of Roman law history are marked by the XII Tables' codification, Schulz (1934, p. 5) highlights that it was an isolated fact brought out by the influence of Greek codifications. It took until the 5th century for a new codification to be seriously considered, resulting in Theodosius' failed attempt. As a matter of fact, the second Roman law codification took place at the end of its history, in the surviving east portion of the empire under emperor Justinian. This codification may be perceived as the result of the application of the Greek spirit to the Roman material.

Thus, the main role in the creation of legal rules was not directly played by the State through statutes, but by a jurisprudence-guided praxis of law (Schulz, 1934, p. 9). He holds that there is a correspondence between, on the one hand, the production of law during Rome's classical age and, on the other hand, Savigny's opinion about the task legislation should have among other sources of law, famously expressed in his work *Vom Beruf userer Zeit für Gesetzgebung und Rechtswissenschaft* (On the vocation of our times for legislation and the legal science), of 1814. According to Schulz (1934, p. 8-9), the grounds of Savigny's often criticized ideas might have been similar to those of the Roman's: codification induces to literal interpretation, distracting from consideration of the nature of things; it feigns concealment and completeness which it does not have; it demands abstract formulations of legal norms; and, finally, sets them too rigidly for the future. The collaboration between practice and jurisprudence at the creation of law, according to Schulz, following Savigny (1959, p. 79), might be designated with "*de*[*m*] *herrschende*[n]*, nicht ganz passend*[n] *Sprachgebrauch als Gewohnheitsrecht*", that is, such as in the dominant, but not fully appropriate usage *customary law*. However, the phrase should not be taken in its modern definition, for, in the classical period, customary law did not have the same force as statutory law (Schulz, 1934, p. 9-10).

Schulz's depiction of the sources of Roman law stands in vivid contrast with the image of a purely formalistic and rational legal order, only approachable through strict positivism. Indeed, he argues that, during the republican and classical periods, law was formed preferably gradually, hand in hand with case law, through the path of juristic discussion and in cooperation with magistrates, and not through rigid statutory rules or a binding customary law. He concedes that the immense elasticity of this legal system came at the expense of its certainty, which the Romans accepted (Schulz, 1934, pp. 11-12).

This approach cannot be reconciled with that of Nicolai (1932, p. 7), to whom the law as compiled by Justinian was the legal order of a *soulless State machine* lacking inner legal feeling[35]. It is also far from some Germanistic conceptions on the creation of the Roman legal

35 Earlier, Gierke (1948, p. 5) had referred to Roman public law as the administrative order of an absolutistic State machine.

order disseminated since the 19th century, such as Schmidt's (1853)[36]. Schmidt (1853, pp. 64-65) argues that Roman law was imposed through statute according to a model that was in fact the continuation of the pre-state form of subjective imposition of one's own will, now transferred to the Roman state. The law of the Greek and Germanic nations, on the other hand, was portrayed as the result of an objective principle, determining the formation of law from a moral conscience hanging above any sort of subjective force (Schmidt, 1853, pp. 47-48 and 68).

But, apart from such an extreme point of view, the opposition between Germanic and classical Roman law, from the perspective of their sources, as described by Schulz, loses some of its sharpness. One might even be tempted to argue that Nicolai's (1932, p. 8-9) use of Tacitus's quotation, *plurimae leges, pessima res publica*, holding that law, in German sense, should be ideally free from statute, could be applicable to Roman classical legal order.

This apparent approximation grows in significance if one looks at it against the national socialist background. Schulz's remark that the Romans were willing to give up security in order to keep the elasticity and the case-law-based formation of their legal order comes up on a collision course with Carl Schmitt's remarks in a book also first published in 1934 – the same year of Schulz's *Prinzipien*. Schmitt (2006, p. 27-28) argues that the stability and security of the 19th century were the features that enabled the emergence of legal positivism. In his opinion, however, Hans Kelsen (1881-1973) and the school of Vienna were representatives of a legal thought that politically turned norms or statutes against the nation's leader. The rule of law (*Heerschaft des Gesetzes*), in this context, is seen as a tool to destroy the concrete order of the king or *Führer* (Schmitt, 2006, p. 13).

In fact, National Socialism saw a contradiction between legal certainty and justice. The liberal State was portrayed as a statute-inspired legal order, under which any effort to reach material justice would give place to pure formalism in the name of legal security (Rüthers, 2012, p. 134). That is why, even though statutory reform was largely employed by the Third Reich[37], an anti-positivistic attitude providing the means to overcome the old order through interpretation was the preferable path. Schmitt (2006, p. 49), when dealing with this issue, declared himself convinced that the *general clauses* (*Generalklausen*) were a mechanism through which a new legal mentality could be enforced, provided that they were perceived not as mere correctives to positivism, but as a specific instrument of a new way of legal thinking.

2.2.2. Isolation as Roman legal principle

a) A matter of the time

As can be seen in Dernburg's (1894) and Gierke's (1948) speeches, legal positivism had been sensed as problematic since well before 1934, when Schulz's and Schmitt's books came

36 Schmidt's argument circled around the idea that Germanic law was founded over an objectivity principle, which determined a close connection between law and customs. On the other hand, Roman law was founded over the subjectivity of the will, as portrayed in Pandectist-liberal--fashion by Jhering. Schmidt's work contained anti-democratic conceptions and hostility against migration movements, since, according to him, respect for the objectivity principle required individuals to share a harmonized view of their customs (Landau, 2013, p. 333-335).

37 Concerning the reformations of Civil Law through statute during the national socialist rule, see Otte (1988)

out. Its insufficiencies towards the social matters of the times were sensed in different circles of legal thought and, thus, its critique, as I have just introduced above, was neither an exclusively German issue, nor a new subject introduced by National Socialism. In fact, as Duncan Kennedy (2006, p. 46 *et sqq.*) argues, the *social* became *globalized*, spreading from Germany and France and then developing simultaneously in many places, where it assumed different facets.

In Italy, for example, the first decades of the 20th century saw the arrival of an alternative approach to legal hermeneutics based on Benedetto Croce's philosophical thinking. With representatives such as Max Ascolli (1908-1978) and Tullio Ascarelli (1903-1959), the *idealismo giuridico* attempted to abbreviate the distance between written norms and the social reality underneath the legal order through a hermeneutic theory which recognized the role of interpretation in the creation of law[38].

In the German-speaking space, the crisis is marked by the so-called *Methodenstreit*, in which, similarly to the debate in Italy, the limits of interpretation and the role of judges in relation to statutory law were set in dispute. In 1903, with the publication of his work on the free finding of justice and free science of law, Eugen Ehrlich (1862-1922) sets the *Freirechtsbewegung* (free law movement) in motion[39]. Ten years later, however, Ehrlich's *Grundlegung der Soziologie des Rechts* (Foundations of legal sociology) triggered a controversy with Hans Kelsen, who reviewed the book for the *Archiv für Sozialwissenschaft und Sozialpolitik* in 1915. The antagonism between Ehrlich and Kelsen helps illustrate some of the colors of the debate. On the one hand, Ehrlich threw light on the "living law" (*lebendes Recht*) through legal sociology, while, on the other hand, Kelsen advocated a logical and formal theoretical approach to law[40]. It is significant that it took almost twenty years until Kelsen's *Reine Rechtslehre* (The pure theory of law) first appeared as a book – coincidently or not, also in 1934.

b) The image of German living *law*

In the context of the Ehrlich-Kelsen controversy, it becomes noticeable that the tension felt towards positivism acquired, at least in the German-speaking space, specially and dramatically in Germany, contours of a striving for a *living* law. Ehrlich's (1989, p. 81-82) main critique is of a methodological nature, as the author states the insufficiency of an approach that solely considers statutory and customary legal sentences as the subject matter of jurisprudence. He holds that the integration of concrete institutional frameworks is essential to the theory of sources, arguing that, without them, a significant part of the law in force would remain unknown. Ehrlich (1989, p. 415-417) calls for the investigation of the *living* law, apprehensible through modern legal documents (*moderne Rechtsurkunde*), especially court judgments and business documents.

But another book, also published in 1913, sets a very different tone. Consciously positioning himself halfway between scientific and popular literature, Arnold Wagemann (1858-?), in his *Geist des deutschen Rechts* (*Spirit of German law*), holds in a controversial and ideological fashion that *living* law should be reestablished as the very core of German law. By 1920, he was

38 For a critical overview of the historical development of *idealismo giuridico*, see Cossuta (2012)

39 Ehrlich's writings on the science of law have been compiled in a volume edited by Rehbinder (1967).

40 The texts of the controversy were later compiled in one volume. See Lüderse & Kelsen & Ehrlich (2003).

already aligned with the NSDAP and, according to Landau (1989, p. 18), his writings might be considered the main link between the academic Germanists and the legal portion of the party's program. As Rückert (1995, p. 180) argues, in fact, Nazi propaganda directed to and through the legal field could only exist based on an already existing Germanist literature, and Wagemann's work attempts to articulate this literature in a popular, spreadable fashion, favoring its circulation. This sort of popular writings cannot be disregarded, for it composes the background to comprehend the legal debates of the time (Rückert, 1995, pp. 185-186).

Indeed, even though it was published years before the foundation of the NSDAP, Wagemann's *Geist des deutschen Rechts* displays a historical representation of German law that continued to be a topic of the Nazi legal understanding after 1933 (see Rückert, 1995, p. 177-178). The title of the book immediately suggests Jhering's *Geist des römischen Rechts* and, although Wagemann (1913, p. III) declares himself unwilling to enter any competition with Jhering, the Romanist, an opposition against Roman law is explicitly intended. The book opens with the remark that Germans saw themselves as part of nature, while the Romans had the mistaken concept of turning nature into a servant. Therefore, their law did not lead to freedom, but to power, by creating a space of domination around individuals (Wagemann, 1913, p. 1).

The author advocates that nature and humankind are one. Nature appears to the human intelligence as two dichotomies, namely as transient and imperishable, as form and content. "Movement" (*Bewegung*) is the life creating force that determines different stages of evolution for diverse creatures (Wagemann, 1913, p. 3).

Law should, then, be based on the imperishable, not on the transient. Individual human life, unlike nature and the human considered as genus, is essentially transitory and, therefore, could not serve as the basis of law. By observing nature, it would become clear that the individual is of no relevance, since only the survival of the genus has significance (Wagemann, 1913, p. 6).

Nature is then portrayed as the original entity in which law should be found, contradicting the Roman conception, according to which the individual will stand in the center of essential legal categories (Wagemann, 1913, p. 15). Law, in this sense, instead of being created from scratch by reason, should be perceived with the sole help of human moral feelings and knowledge about nature, of human instincts and comprehension. For these abilities should suffice to provide the highest principle of law – and here comes Gierke again: there is no right without duty (Wagemann, 1913, p. 12)[41].

Wagemann (1913, p. 25 *et sqq.*) attempts to prove that this *natural legal sensibility* corresponds to the German understanding of law. German law, thus, had not been invented, but found in the eternal order (*ewige Ordnung*). In this sense, not only was German law the most appropriate order for the German nation, but it was also understood as the *right* order, apprehended through sensitivity from nature.

Two decades later, the motive of law as an order that is unconfined in the logical formality of legal sentences continues to be developed, as we see in Carl Schmitt's work, now with clearer national socialist colors. In his *Über die drei Arten des rechtswissenschaftlichen Denkens* (On the three types of legal scientific thought), originally published in 1934, Schmitt (2006) distinguishes normativism, decisionism and concrete-order-thinking, stating that legal positivism, as

41 Landau (1989, p. 20) indicates that many of Wagemann's approaches can be tracked down in the previous Germanistic legal literature, even though he does not quote them individually.

developed during the 19th century was a hybrid from normativism and decisionism. He intends to dispute positivism also in political terms, as seen at the end of section 2.2.1.

Schmitt proposes an institutional approach, in the sense that every normative order has a "concrete life" in the institution. The institution, thus, has its own normativity, which might be shaped through a norm (Rükert, 1995, p. 187). But the order itself is not created through norm, on the contrary: a norm is only a means whose regulatory function and validity is provided by the framework of a preexisting order (Schmitt, 2006, p. 11). On that account, the legal order is tied to concrete concepts not deriving from general rules (Schmitt, 2006, p. 19). The State, consequently, is conceived neither as a system of rules, nor as a sovereign decision-maker, for it should be seen as the "institution of institutions", as the "concrete order of concrete orders" (Schmitt, 2006, pp. 45-47). German legal history, as briefly narrated by Schmitt (2006, pp. 35-43), highlights the concrete-order-thinking as a German specific feature that does not correspond to positivism.

In such theoretical approaches lies a challenge to positivism. Indeed, Schmitt and Wagemann stretch the domains of law and jurisprudence until the level of *life* itself, since the validity of law as well as its content is determined from a framework lying outside the purely legal field. Living in *nature* or in the *concrete order*, law was everywhere to be found, meaning, therefore, that it could potentially extend its tentacles over all areas of social life.

Freed, to some extent, from the fetters of positivism, law might be steerable through interpretation while an appearance of normalcy is kept by the unchanged statutory substance. In fact, as Stolleis (2006, p. 23) states, in the day-by-day of National Socialism, law was mostly altered through the inobservance of the will of the original legislator and not through legislative activity. To a judge guided by the national socialist worldview, there were no longer methodological difficulties in overcoming the strict normativism by interpreting the law in force by means of *topoi* like the concrete order, the Führer's will, the needs of the national community and so on.

c) Schulz's approach to the matter in the Prinzipien

I want to argue, then, that Schulz, by identifying *isolation* as a principle of Roman law, might have had a contemporary problem in sight. Suggestively, he (Schulz, 1934, p. 13) opens the chapter with a quotation taken from Anaxagoras, which states that, at the beginning, all was one, but then the spirit came, separated things from one another and thus created order. In this excerpt, Schulz sees the description of an important task of science in general and especially of jurisprudence: to separate and distinguish.

The author acknowledges the dangers of losing sight of the whole when one is occupied with a small part of it. But, relying on Jhering, he states that legal science may not relinquish the art of analysis, if it intends to go beyond a merely descriptive role (Schulz, 1934, pp. 13-14)[42]. Since, in ordinary life, law appears embedded in the social community, the first fundamental separation should consist in the differentiation between juridical and non-juridical (Schulz, 1934, p. 14).

42 Like Jhering (1874, p. 39), Schulz (1934, pp. 13 and 14) uses the word *Scheidekunst* to refer to the process of analysis, with which the legal science could not part ways. *Scheidekunst* is an old German usage for *chemistry*.

However, this separation did not consist solely in a scientific methodological requirement. It corresponds to a Roman demand for freedom. Law should not penetrate every sphere of life. On the contrary, restraint was required for the creation and recognition of juridical norms. But, in this law-free space, Romans were not entitled to impose their will as they pleased, quite the opposite: there was a net of non-juridical relations, which composed the *officium*, whose density and strength might not be easily grasped in modern culture. These relations could be more binding than the utterance of a judge (Schulz, 1934, pp. 14-15).

Nevertheless, classical Roman jurists kept such relations out of not only the legal regulation, but also their consideration. Isolation implied that the economic and political circumstances which determined the formation of a given legal rule were also excluded from juridical consideration. Further, the economic functions of legal institutes were also out of juridical reach. If law, for example, did not regulate the *interna* of the marriage, jurists' writings also did not deal with them at all. Not even the wedding customs, which brought the marriage to existence, were described. Knowledge of the non-juridical *officium* was always presupposed and, without it, Roman law might become incomprehensible (Schulz, 1934, p. 16-17).

Schulz highlights with these remarks that the sole consideration of the legal sources is not enough to gain perspective on the social forces that acted upon Romans. If Roman jurists silenced, it meant that some affairs should not be regulated by law, for they were already the object of other sorts of social norms, or they should be kept out of the attention of the law, complying with the sense of dignity and decency (Schulz, 1934, p. 15), as well as with the imperative of freedom. By no means did a lack of legal regard lead to unlimited freedom and arbitrariness, since they were other non-juridical, equally binding relations.

Portrayed like this, Roman law loses some of the colors of individualism and arbitrariness. It is certainly not the same picture painted by Schmidt (1853, p. 195), to whom the Romans reckoned the duties of the *officium* exclusively as moral matters, whose observance was left to a person's conscience. It also reveals an outcome quite different from Nicolai's (1932, p. 11), to whom the Romans of later times considered the individual as a being with no relationships to other people, except the ones explicitly regulated through positive law; in the absence of such regulation, one was left in the domains of one's own desires.

But, once the legal field is isolated from ordinary life, the analysis, leading to isolation, continues within the legal field. Here, the sacral and worldly Roman law were separated from each other by the early Republican period. More significant, though, was the isolation of private law from public law (Schulz, 1934, p. 18).

The author seems to concede, at this point, to some Germanistic critics. Here we might recall Gierke's ideas (item 1.1 above), according to which the Roman differentiation between public and private law determined a double purpose for a person without considering that individuals are part of a higher whole (Gierke, 1948, p. 4). Schulz (1934, p. 19), in turn, states that the severance of the two branches, so closely bound together in ordinary life, had serious disadvantages, even though it might have been a useful factor in the development of Roman legal science (Schulz, 1936, p. 27)[43].

43 The last sentence, which highlights the advantages of isolating public law from private law in the development of the legal science, is not present in the original German edition of 1934. The English translation of this passage has a milder tone than the German original, for it reads "certain" instead of "serious" disadvantages (*schwere Nachteile*).

The difficulty identified by Schulz is namely the lack of a comprehensive presentation of a legal institute, since private lawyers did not deal with public law matters, even when they were implicated in the subject. A series of examples are offered, among which is private land property. Addressed from a pure private law standpoint, many limitations to its exercise were left out of consideration, which led to a much more liberal and individualist depiction of its regulation than it should be, if the influxes of public law in the matter were also pondered (Schulz, 1934, pp. 21-22).

The severing work did not end here, though, for differentiation and isolation also took place within private law. The authors of the classical period did not occupy themselves with the peregrine law. Consequently, the content of their expositions dealt almost exclusively with the law of the city of Rome, as practiced by Roman and, sporadically, Italic courts. Provincial law was, therefore, with few exceptions, almost fully out of sight (Schulz, 1934, p. 23).

Schulz, at this point, announces an important result of his rendition: the classical jurisprudence, through analysis and isolation, is predominantly occupied with Italic and Roman private law. Gaius's *Institutiones* bear witness to this by looking as though they would present the whole of Roman law; however, after completing the doctrine on legal sources, the author performs a *saltum mortalem*, suddenly landing in private law world, as if there were no law beyond its limits (Schulz, 1934, p. 23).

Isolation provided classical Roman law an almost logical coherence, making the jurists' writings have the effect of a mathematical demonstration, or, even better, of a natural law deduction[44]. But this natural law is not developed from some Greek speculative airiness: it is a Roman natural law, formed by rules arising from the nature of things and deducted according to a certain conceptual and axiological framework. It is also not a simple presentation of the positive, or statutory, law. Schulz (1934, p. 24) argues that the presentations were written in a manner that reveals, rather than an effort to prove its sentences, one to find them in the *ratio iuris* grasped from direct observation of nature.

What Schulz seems to argue here is that, contrarily to Adolf Wagemann and Carl Schmitt (on this topic, see item *b* above), a legal system does not need to penetrate ordinary life, breaking the limits between law and other normative spheres, to consist in the expression of a given culture and of the necessities of a nation. He argues, further, that this feature was not lost in Justinian's compilation. On the contrary, it was made even clearer (Schulz, 1934, pp. 24-25).

Approaching the end of the chapter, Schulz (1934, pp. 25-26) overviews the influence of the Roman isolation principle on modern jurisprudence, stating that the German legal science of the 19th century was strongly seduced by it. That is why in Germany public and private law were strictly separated from each other, and the leaning towards a law of nature appeared, despite the defiance this represented to the historical school's leaders. German jurists in the 19th century would also leave the non-juridical out of consideration, especially in private law. Schulz notes that the path to the changes of the 20th century started to be paved by the scholar who better understood the circumstances of the epoch: it was Rudolf von Jhering who, after recognizing that German jurisprudence was immersed in Roman orthodoxy, fought for the "purpose of the law" (*Zweck im Recht*).

44 At this point, Schulz (1934, p. 24; 1936, p. 36) refers to an excerpt of Savigny's *Vocation*, in which he states that there was no exaggeration in saying that the Roman jurists made calculations with their concepts. The excerpt is in Savigny (1959, p. 88).

Schulz closes the chapter on isolation provocatively, pointing out to the book entitled *Das Staatsrecht des deutschen Reiches* (The State law of the German Empire), by Paul Laband, as a last triumph of the Roman isolation concept, although Laband, academically speaking, was a Germanist. In the recension written by Gierke to the book, Schulz (1934, p. 26; 1936, p. 39) sees a rare occasion in which Roman and Germanistic principles confronted each other in the persons of two mutually "congenial" representatives – "congenial", though, is employed by Gierke (1883, p. 1000) in his review of Laband's work in a completely different context: he points out that no one might accuse an author of hiding in conscious self-limitation, as he sets himself to a for him *congenial* task aiming a for him reachable objective.

In his already mentioned *Über die drei Arten des rechtswissenschaftlichen Denkens* (On the three types of legal scientific thought), also published in 1934, Carl Schmitt (2006, pp. 40-41, footnote No. 27) limits himself to state that Gierke's criticism of Laband had failed and that his position was unclear, for, in his recension, Gierke held the separation of law from politics as the noblest task of jurisprudence.

2.2.3. Nation and *Jewification*

At first sight, the "nation" theme has, some proximity with analysis and isolation. For a nation is namely a group of people that politically differentiates and individualizes itself from other political communities (Schulz, 1934, p. 74). However, what constitutes the consciousness and the feeling of belonging to a community was, like isolation and ultimately its elimination, a question under debate at the time Schulz wrote the *Prinzipien*. The matter was set at the very core of national socialist worldview.

The opening lines of the respective chapter – "nation" appears as the seventh chapter and sixth principle of the book – suggest a different version of Rome as a world-community in comparison to that which we have seen above (item 1.2). We may remember, before exploring Schulz's argument, that Wagemann (1913, p. 25-26) portrays the beginnings of the expansion of Roman law as the subjugation by Rome of other italic municipalities. They then turned into the zone of dominance of a foreign legal order which replaced their own homeland's law. German law, in turn, was always homeland law, whose area of application did not exceed the municipality, even though it shared its main features with other Germanic communities mutually tied by economic interests.

In this picture, the Roman idea of community was not apt to create order, as it missed a fundamental feature of a nation. As already discussed, (item 1.2 above), this feature, would be the homogeneity of race and blood, which was seen as a precondition for the development of a nation's law. The Roman race "chaos", in turn, resulted in a purely individualistic order, whose sense of community was provided exclusively by the subjugation to a violent State power.

Thus, based on the race studies of the 19th century, a new concept of nation was formed. It no longer comprehended just historical and linguistic features, but it also incorporated a biological basis for identity (Seen, 1999, pp. 409-410).

Schulz (1934, p. 74), in his opening general remarks on the formation of national consciousness, refutes all of that. He places the shared language as an important, but not indispensable, factor; the essential is a common political and cultural destiny, constituting a historical destiny-community. If the will to build up a distinct political organization grows in a such a

community, then the national consciousness and the nation are born. Once this consciousness ceases to exist, though, the nation also disappears. This means that a biological, racial unity or relationship is neither required nor enough to create the national feeling.

The author goes on to deconstruct the representation of a Roman expansion purely based on violent subjugation. The growth of the Roman imperial nation during the first two centuries of the imperial age corresponded to a new feeling of belonging, although its members might have been very different from one another. The same citizenship was in force from Sicily to Judea, bringing with it material welfare and security, besides the common language, which could be Latin or Greek, and common cultural experiences, such as theater and literature (Schulz, 1934, pp. 74-77). In sight of that, throughout the empire people might have felt as if they were "blood-brothers" (Schulz, 1934, p. 75; 1936, p. 111).

As a cultural community, one might become Roman through education, and thus the empire enabled the rise of "provincial talents". They could go to the city of Rome to take part in political and cultural affairs without any disturbance of the *status quo*. However, that did not mean, according to Schulz (1934, p. 77-78), that the imperial nationality expanded itself through *denationalization*. At most, one might talk of *denationalization* in the same sense as one might speak of it during the foundation of the German Empire in 1871, as the Prussian, Bavarian and Swabian national feeling were absorbed by the German one.

At this point, Schulz (1934, pp. 77-78, footnote No. 24) disagrees with Jhering, to whom the historical mission of the Roman empire was the overcoming of the nationality principle and its replacement for a universal thought. Schulz argues that, without a national feeling, the Roman empire could not be hold together for so many centuries. He notes that neither Spain, Gaul, Britain nor the Eastern territories have ever declared themselves to be out of the Roman empire or nation. He then concludes, quite differently from Gierke, Wagemann or Nicolai, that the fall of empire was not a consequence of a lack of national feeling, but rather of a lack of national power (Schulz, p. 34, p. 78).

But even though the Greek superiority in philosophy and art was recognized, Rome developed, already around the two last centuries of the republic, the legend of its own providential mission: through weapons and law, organize and lead its world empire, create and secure the *pax romana* in which Roman-Hellenic culture should be cultivated (Schulz, 1934, pp. 79-80).

Any conceptualization of nation engenders the opposition to the non-national, to the foreigner. With the Romans, it was not different. The foreigner, at classical times, was designated as *peregrinus*[45]. Nonetheless, the Rome empire granted citizenship, as Schulz (1934, p. 83) explains, through birth and manumission with some indifference. This also meant that marriage between a Roman and a peregrine of whatever race or descent was not forbidden. This indifference could mean a political advantage, since the manumitted both increased the number of Roman citizens and were able to found numerous colonies (Schulz, 1934, p. 84; 1936, p. 124)

45 *Peregrinus* might be defined by negation, that is, a peregrine is one who is not a Roman citizen (Schulz, 1934, p. 81). Nevertheless, they were distributed into three different categories. Those under a magistrate authority, which was often the case in the provinces; those in the municipalities which had a *perpetual alliance* with Rome and, therefore, were granted independency from the standpoint of the law of nations; and, last, the peregrines that were outside the frontiers of the empire (Schulz, 1934, pp. 80-81). In a book released the year before the *Prinzipien* came out, but not mentioned by Schulz, Alfred Heuß (1933, pp. 4-5) argues, in opposition to a traditional line of interpretation, that Rome was not in a situation of constant war against the peregrines and that there was not a state of "natural hostility" – which seems to also be the position held by Schulz.

Schulz then moves forward to analyze the reception of foreign influences in the development of classical Roman law. Had Rome's concept of nation and its corresponding permissive attitude towards the spread of its citizenship enabled the denaturation of its civil law through foreign elements? By facing this matter, Schulz silently goes on to discuss the question, brough up especially by Germanistic literature, about the *orientalization* of Roman law, which ultimately implicates its so-called "Jewification" (*Verjudung*).

As we have seen above (item 2.2.2, *c*), the *isolation* principle might have been enough to discard such assumptions. From a nation standpoint, however, his first remark refers to the impossibility of providing a single, uniform answer in sight of the long history or Roman law, even when he restates the classical period as his only interest. Difficulties also arise from the need to keep in sight all the different law departments and possible influxes from different foreign sciences, such as philosophy and rhetoric. Another point to bear in mind should be that parallel developments of similar legal figures do not automatically imply their reception or an indication of their influence (Schulz, 1934, p. 85).

Despite these barriers, Schulz (1934, p. 85) follows his master Emil Seckel, categorically stating that, from the second century B.C. to the end of the second century A.D., the core of Roman law remained national and almost untouched by foreign thoughts and materials. He sees a growing resistance to foreign influences as the consciousness of Roman legal superiority augmented from the republic to the principality period. Even during the period in which Rome's public law made use of the Greek model, hardly any sentence in Roman private law might be securely reconducted to a Greek influence (Schulz, 1934, pp. 86-87). In this sense, Greek customs might have been more influential than its law (Schulz, 1934, pp. 87-88).

Greek philosophy and rhetoric, in turn, might have presumably gained more space amidst Roman jurists. The tendency towards more abstract and systematic presentation of law seen in the last century of the republic is, according to Schulz (1934, p. 88), certainly a Greek influence, like the doctrines of some jurists might have had Greek philosophical origin. But the author argues that the studies until that point did not allow a definitive conclusion on this matter, for they had not been carried out critically enough.

Turning to potential influences from the East, Schulz (1934, p. 89) is once again peremptory: if Roman law kept itself independent in relation to Greek-Hellenistic influxes, it had preserved itself even more decisively from Eastern-Hellenistic law. It is true that oriental religion made its way into the West, but that was not the case with law (Schulz, 1934, p. 90). Especially in consideration of Jewish-Talmudic law, Schulz holds that its similarities with the Roman order were most likely to result from Roman leverage, and therefore from the influence of Roman law on Jewish law, rather than the opposite (Schulz, 1934, p. 89)[46].

Also, the fact that emperors and jurists did not have italic origins should not be meaningful in determining any foreign influence over Roman law. Schulz (1934, p. 90-91) finds no evidence of oriental methods and doctrines in the classical writings, as well as in the constitutions until the *Severi* period.

46 Schermaier (2010, pp. 696-697) notes that Schulz's language at this point seems to indicate an acceptance of the Nazi racial ideology and a defense, on these terms, of the purity of Roman law. He holds that for wrong, justifying that the vocabulary might have been chosen to make the text comprehensible also for non-Romanists.

Schulz (1934, pp. 91-92) suggests a comparison between the 212 A.D. Edict of Caracalla and the reception of Roman law in Germany in the 15th century. In both cases, a certain confusion might have been the effect of issuing Roman law as unitary order in a territory in which it was not necessarily well known and practiced. In the Roman case, until Diocletian, a constant battle to popularize Roman against the peregrines' law was fought.

It is from Constantin onwards that oriental influences were clearly perceptible. But they are not portrayed as the cause of a complete denaturation of Roman law, for it kept its own movement. During the 4th and 5th centuries, however, this movement no longer led to national particularity of Roman law. To describe this epoch, Schulz (1934, p. 93) uses a set phrase widely repeated at his time: on the one hand, Roman law lost some of its italic character, while, on the other hand, it got close to the "popular legal worldview" (*volkrechtliche Rechtsanschauungen*). That might have been the case with the fusion of civil and honorary law and also with the milden of formalism at the conclusion of transactions. One may argue, then, that the destiny of Rome law during the decadence of the empire was much alike the pledge of the Germanistic literature of the time, which articulated the wish to move away from Romanistic formalism to a more popular shape of the legal order.

However, that does not mean that Justinian's compilation did not contain classical jurisprudence. On the contrary, Justinian and his helpers really grasped the classics and put aside postclassic miscomprehensions. Nevertheless, a complete purification and return to the status before the 4th centuries was not achieved and maybe not even attempted. Holding that also through decadence something good can be born, Schulz (1934, pp. 93-94) reports that Justinian tried to find a compromise between Diocletian, the Roman, and Constantin, the Greek; and there lay the strength and the weakness of his work.

2.2.4. Word choices as statements

The above identified similarity between the destiny of Roman law during the 4th and 5th centuries and the Germanistic pledge of which Nazi propaganda took advantage might be seen as a general strategy applied by Schulz. On the one hand, he demonstrates that classical Roman law was nothing like the portrait painted by National Socialism, thus removing the basis for point 19 of the party program (Stolleis, 2006, p. 78); on the other hand, by showing parallels between classical Roman law conceptions and the ideal depicted in Germanistic and propagandistic literature, he turns the accusations articulated in it into nonsense[47].

That might have been the effect desired when the author set freedom (*Freiheit*) and fidelity (Treue) as classical legal principles. Besides displaying some anachronism when referring to Roman law (Schermaier, 2010, p. 692), those concepts were traditional topics among Germanistic authors who would never conceive applying them to characterize Roman law.

47 Ernst (2004, p. 126, footnote No. 160) considers inappropriate the idea that Schulz might have defended Roman law by making it look *more Germanic*, as Stolleis (2006, pp. 77-79) argued. As stated in the text, it seems safe to assume that, in fact, Schulz worked with these approximations. However, it might be too simplistic to assume they were a mere *capitatio benevolentia* in sight of the certainly upcoming expulsion. In fact, it seems more plausible to read the *Prinzipien* as a Roman-law-based *counterprogram*, not as a defense of the academic discipline. It might also be argued that the features underscored by Schulz, which made Roman law appear *more Germanic*, were actually part of a broader range of historical concerns shared by both Romanists and Germanists, thus forming a common scientific ground for both disciplines.

Freedom was marked as characteristic of Germanic nations among German, French and English authors from the 16th to the 18th century, much under the impulse of the discovery of Tacitus' *Germania*. The theme ultimately became a political key-concept during the 19th and 20th century (Landau, 2013, pp. 329-330; Willoweit, 1995, p. 301). During the 19th century, the Germanic concept of freedom acquired a legal-historical conformation. Its core idea was that a German was not subjugated to any public authority, therefore being limited in his freedom of action only by moral and customs, as well as by the strength of another man[48]. The right to feud and, concerning private law, the capacity of self-defense were assumed as main features of Germanic law. Since children and women were not *men*, being therefore considered unable to defend themselves, this almost anarchical representation of freedom should be tempered by a protective social component (Landau, 2013, p. 331), which ultimately became predominant, as we have seen above (item 1.1).

Schulz, in turn, displaces the idea of freedom from the Germanic world to apply it to the Roman classical period. By doing so, he takes the features usually pointed out in Germanistic literature as proof of the Roman individualism and reclassifies them as elements of the Roman aspiration to freedom. In the first sentence of the respective chapter, Schulz (1934, p. 95) states that limitation is immanent to the Roman conception of freedom, which had never meant one could live exclusively on the authority of one's "own head" (*nach seinem eigenen Kopfe zu leben*). Free, in Roman sense, is the individual or the community not subjected to a *dominus*, being then self-determined (Schulz, 1934, p. 95).

The immanent limitation embedded in the concept of freedom might immediately recall Gierke's formulation, repeated by Wagemann, according to which every right, especially the land property right, should be limited from within. And indeed, if Schulz (pp. 99-102), on the one hand, concedes that Roman private law is, in fact, individualistically shaped, on the other hand, he points out that its concept of property is exactly the same as the German one (Schulz, 1934, p. 102). He underscores that, although the sources fail to provide a definition of the property right, its content is evidently legally limited: the Roman hostility against duties in property law is simply non-existent. These duties might have been invisible, as Schulz (1934, p. 103) argues, because of the isolation principle, which led to a sharp separation between different departments of the legal order. Therefore, by looking exclusively at private law literature, one might not apprehend a comprehensive overview of property regulation.

Nevertheless, private law did leave a wide free space for individual movement – much wider as in German law, as Schulz (1934, p. 104) states. However, this space is not filled with arbitrariness, for a dense net of non-juridical, *fidelity* duties was in force. How dear *Treue* (that is, fidelity) was to the Germanistic literature might be demonstrated by an excerpt taken, once again, from Gierke (1919, pp. 9-10), in a speech giving shortly after the end of the First World War[49]. According to him, fidelity was the highest moral concept among the Germans, which was also present in all legal relationships, providing them with devotion and strength. The Germa-

48 Both Landau (2013, p. 330) and Willoweit (1995, p. 306) indicate that the key formulation, which would reverberate throughout the century. was provided Karl August Rogge, who, in 1820, wrote a book entitled Über *das Gerichtswesen der Germanen*.

49 The original reads: "Die Treue war für die Germanen der oberste sittliche Begriff, durchflocht aber auch alle rechtlichen Beziehungen als ein in den Rechtsbegriff aufgenommenes Element, das ihnen Weihe und Festigkeit verlieh. So konnte auch der Staat sich nicht auf bloße Befehlsgewalt und Gehorsamspflicht gründen, sondern musste seinem Organismus Treuverhältnisse einbauen. Auch unser heutiger deutscher Staat kann den im germanischen Bewusstsein unaustilgbaren Gedanken der Heiligung des Rechtes durch die sittliche Macht der es durchdringenden Treue nimmermehr missen; (…)".

nic State, based on fidelity, was not founded over an appeal to a pure commanding force and obeyance duty, since its organism had to take advantage of these fidelity-based relationships. Gierke felt that the German State of his time could not do without fidelity, which sanctified the legal order.

Schulz (1934, p. 161), turning this same moral feature into a Roman legal principle, states that, if one notes how private relationships were influenced by duties of fidelity and friendship, it becomes clear that Roman individualism is a legend (*der "römische Individualismus" ist eine Legende*). In the footnote that closes the chapter, he refers to Biondo Biondi's *Romanità e Fascismo*, in which the author states that Roman individualism is a mere historical falsification. Schulz (1934, p. 161, footnote No. 73) adds that Roman private law was characteristically individualistic due to confidence in non-juridical bonds and on the authority of the *imperium*.

3. Two reactions to the *Prinzipien des römischen Rechts*

3.1. The foe got it

The argumentative strategies pointed out above did not go unnoticed among Schulz's contemporaries. Shortly after the publication of the book, Heinrich Lange wrote a recension detailing the incompatibilities between Schulz's ideas and Nazi doctrine. The review came out in December of 1934 in the *Deutsche Juristen-Zeitung*, directed at the time by Carl Schmitt.

Starting with some remarks on the role assigned to Roman law by the national socialist revolution, Lange (1934, pp. 1493-1494) goes on to remark that Roman law is an international science, in the sense that it is not German, not rooted in the German nation. Schulz's book had, according to Lange (1934, p. 1494), this international character, which one could recognize not only by its content, but also through the quotations put before every chapter. The knowledge on Roman law was more necessary than ever – and this might be the only point on which Lange agrees with Schulz, although for very different reasons –, since its elements should be well known in order to free German law from them. That is why Schulz is portrayed as a "pure dogmatist", who presents law in an unhistorical, positivist fashion.

Lange (1934, pp. 1495-1496) reiterates the Nazis' official view on Roman law in the same line of point 19 of the NSDAP program: public Roman law was, on the one hand, the instrument to squeeze out the provinces in favor of the world city, and, on the other, private law would enable self-serving gains. The phrase *civis Romanus sum* lost its racial content, as the empire became more dependent on foreign slaves and "Jewish trickiness. But those who, like Schulz, set nation, not ethnicity (*Volk*), in the center, had to close their eyes to Rome's racial decadence (Lange, 1934, pp. 1496-1497).

Lange (1934, pp. 1498-1499) also sees a sign of Schulz's positivism in the translation of *humanitas* as *Humanität* (humanity) and *fides* as *Treue* (fidelity). By doing so, one might bypass the deep gap between the Roman and the German essences. The Romans' strength lay in knowledge and cold calculation, whereas the Germans' lay in feeling. That is why law, among Romans, meant analysis and technique, while, among Germans, it meant bonds and order. This difference reveals itself clearly through the construction of an absolute property right, which was not only an expression of dogmatism, but also of materialism and individualism.

One Roman feature, though, could still be usefully observed by German jurists: the case--law-based formation of the legal order, in which one could recognize a "living law" (*lebendes Recht*) in opposition to rigid normativity. Schulz's book, nonetheless, could not deliver what was expected from the new German Romanistic, thus demonstrating the insurmountable gap between past and future (Lange, 1934, pp. 1499-1500).

Lange's review – if one assumes that it actually meets all the requirements to be called a review – is unequivocally biased. But, by portraying the *Prinzipien* as a declaration of hostility against the Nazi worldview, he is fundamentally right. Lange (1934, p. 1494) perceived that, from the dedication to the last sentence of the book, one feels the claws of hostility against the Nazi worldview. Schermaier (2010, p. 698) notes that Lange did not write "from the beginning to the end or from the first to the last page", but referred specifically to the dedication to Schulz's *Volljüdin* (fully Jewish) wife and the last sentence of the book. As Schermaier rightfully sees it, Lange's formulation shows he knew the personal circumstance of the Schulz family. Furthermore, he understood Schulz's last quotation of Goethe's *Maximen und Reflexionen*[50] as an insinuation that the Romans, who felt obligated to nation, tradition, fidelity, and authority, could have generated a legal practice that was different from that of then current times.

3.2. The allies were silenced

As Ernst (2004, pp. 123-125) notes, it was not just the Nazis who understood what Schulz's book was about. Friedrich Alexander Mann (1907-1991) and Werner Flume (1908-2009), both Schulz's assistants in Berlin, as well as Gustav Radbruch (1878-1949), expressed their perception of the book as a reaction against National Socialism. But, given the political climate in Germany and the real menace hanging over Romanists' heads (Stolleis, 2006, p. 70), these perceptions seemed to have remained for the most part private or were published after the end of the Nazi regime.

Not surprisingly, Lange was the only German jurist who reviewed the *Prinzipien* during the Nazi regime and for decades after it. Two other reviews appeared in Germany in 1935, but outside the legal circle. Artur Steinwenter (1888-1959), an Austrian legal historian, wrote a favorable review of Schulz's work for the *Historiche Zeitschrift* (Steinwenter, 1935). Matthias Gelzer (1886-1974), at the time, professor of Ancient History in Frankfurt am Main, published his recension at the *Gnomon*, a journal dedicated to ancient sciences in general (Gelzer, 1935).

It is a minor attention, if one considers Germany's Romanistic tradition and that the book in question was written by a German leading scholar of the field (see item 1.3 above). The consideration for the book outside Germany, conversely, even before its translation into English by Marguerite Wollf, was noteworthy: the *Prinzipien* were reviewed in France (Monier, 1935), Holland (Apeldoom, 1935), England (Buckland, 1935; Jolowicz, 1936)[51]; the English translation was also reviewed in the United States (Moll, 1937; Schiller, 1938).

50 The quotation states that the best we can take from history is the enthusiasm it raises (*Das Beste, was wir von der Geschichte haben, ist der Enthusiasmus, den sie erregt*).

51 In fact, Buckland wrote two reviews on the *Prinzipien*. A second one was released after the publication of the English translation (Buckland, 1938).

The mild reception of the book in Germany might be, at least partially, explained by the warning Schulz himself received from Hans Kreller in December 1934. Kreller, at that time editor of the *Savigny Zeitschrift für Rechtsgeschichte* (today *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte*), disclosed that, although Schulz's work would still be welcomed, his duty as editor was to secure the journal's German character. To achieve this, the person of the author should be taken into consideration and, therefore, preference should be given to the young generation, that is, those allied with the new State (Ernst, 2004, p. 133).

A couple of years later, Carl Schmitt articulated the role of German jurisprudence against the Jewish spirit. Besides cleansing the libraries and making sure books by Jewish authors should be confined to a special section, Schmitt (1936b, pp. 1195-1196) is also concerned with the quotation of their work: it would be irresponsible to invoke a Jew as authority, even as a purely scientific one; for this reason, the indication of the Jewish origins of an author was not a mere formality, but essential for the intended "exorcism". Relinquishing this procedure, the legal literature in Germany could not be "purified"[52].

Schmitt (1936b, p. 1196) recommends precaution at dealing with half-Jews, interrelated Jews, etc., for these subtleties were common Jewish methods to escape the core of the issue.

Schmitt's claim was that the "purification" of the legal science according to the Nazi world-view was not only enforced by the expulsion of Jews and opponents from universities and higher education institutions[53]. It also involved ignoring unwanted intellectuals who, eventually, would also fall into oblivion outside of Nazi or fascist circles.

It is arguable that, to some extent, considering the Schulz case, this procedure might have worked. And it is exactly a Romanist scholar who gives us this indication. Paul Koschaker (1879-1951), by making the point that Romanists were left in peace during the Nazi period because their discipline was irrelevant (Koschaker, 1966, p. 314), omits that he occupied in Belin the chair then vacant after the compulsory retirement of Ernst Rabel (1874-1855) for racial reasons (Giaro, 2018, p. 14); Schulz's fate must have been known by Koschaker, not only because they were contemporaries and fellows in the same field (Ernst, 2004, p. 122, footnote No. 137), but also because years before, in 1931, Schulz had ranked above Koschaker in the competition to succeed Theodor Kipp at Berlin (Giaro, 2018, p. 10).

Could Schulz's and Rabel's absences remain unnoticed? Or were they a forbidden theme? Simon (1989, p. 171-172) puts forward that Koschaker's attitude towards his persecuted colleagues might have been shaped by bystander effect, but that he was without a doubt antifascist. In this case, the second hypothesis seems the most likely, even for the period after 1945. Nevertheless, I am not able to provide a satisfactory answer at this point. What seems undeniable, in contrast, is that it takes generations to fill the ditch opened with that which was left unsaid by those who were silenced by an epoch.

52 At this point, Schmitt (1936b, p. 1195) recounts the drastic consequences inflicted on the German legal science by the *school of Vienna* under its Jewish leader Hans Kelsen. Schmitt accuses the members of the school of only citing one another.

53 On this matter, see Höpel (1998) and Grüttner & Kinas (2007).

Conclusions

Fritz Schulz died on November 12th, 1957, at 79 years of age. He passed away in Oxford as an English citizen. All of his four children emigrated and ultimately "made good"[54] – a fate that not all of those persecuted by the Nazis had the chance to aspire to.

Hans Kreller – who professed the ideals of the new German State and warned Schulz of his duty to emphasize the German character of the *Savigny-Zeitschrift* –, in turn, died unexpectedly on February 14th, 1958 – nearly three months later, but at an age about eight years younger than that at which Schulz had died.

Both obituaries, Schulz's and Kreller's, were published in the same volume of the Romanistic section of the *Zeitschrift der Savigny-Stifitung für Rechtsgeschichte*, for which Kreller served as editor in the turbulent period from 1935 to 1944. The memorial for Kreller was written by Max Kaser (1906-1997), while the one for Schulz was authored by his former assistant Werner Flume (1908-2009). This is a symbolic circumstance, for both the Romanists lived, in a sense, parallel lives. They practiced the same science, they were both occupied with fundamentally the same scientific problems – the ones pointed out by the paradigm practiced in their epoch –, they both dealt with National Socialism.

If it is true that Schulz could eventually escape to Holland and, later, to England and secure his own and his family's survival, it is also true that he lost most of his professional career and a great deal of his spiritual environment for none of his deeds. National Socialism was made, therefore, an undetachable feature of his fate.

If it is true that Kreller, already before 1933, had a scientific reputation and somehow managed to keep his work relevant in Nazi Germany, it is also true that only incidentally does Max Kaser mention Kreller's involvement with National Socialism in one short paragraph of the obituary. In it, he states that Kreller saved the *Savigny-Zeitschrift* from the violent Nazi repression against Romanism, not only securing the journal's existence, but also maintaining its quality. Kreller, as Simon (1989, p. 166-167) demonstrates, was able to stay and adapt his work to the circumstances after 1945 and, by doing so, detach his destiny from National Socialism to some extent.

Schulz's *Prinzipien* was a fruit of its time. Not only is it based on Jhering's heritage, as often mentioned, but it also debates with Schmidt and Gierke, and contradicts Wagemann, Schmitt and Nicolai, while deconstructing the false assumptions that made the wording of point 19 of the NSDAP program possible and comprehensible.

Going back to the premises expounded in the introduction to this article, I believed I have highlighted how different elements of an intellectual framework might be conceived without any immediate connection to their most dramatic consequences. It is possible to assume that, as Carl Adolf Schmidt wrote his reply to Jhreing in 1853, he could not predict that his words would, in the future, be integrated into a destructive ideology.

This goes to show that, concerning the legal field and how authoritarian ideas can take it over, the image of a "scientific revolution" in the Kuhnian sense might be taken *cum grano salis*. If, on the one hand, the conceptualization of normal science, practiced within the parameters

54 About Fritz and Martha Schulz's four children, see Ernst (2004, pp. 136-138).

of a paradigm, might still be a useful theoretical tool to grasp the internal movements that a scientific field goes through, on the other hand, the concept of revolution – with the notion of suddenness that is inherent in it – is not perfectly applicable.

In this context, the model of theoretical entanglements or knots, as described by Conrad (2006), seems to offer a better explanation on how, as generations change, jurists might be caught up – by criticizing strict positivism, or demanding a legal order that reflects the indissoluble relationship between human kind and nature –, without even realizing it, in the formulation of the *unjuridical paradigm*, as long as they continue to practice *normal science*. Schulz's case shows, however, that the possibility of perceiving *unjuridical* elements as such persists. Schulz himself was not swallowed by the wave of his time: he spoke the then common language, nevertheless stressing those meanings his epoch omitted.

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