The invention of the European legal tradition and the narrative of rights

Kaius Tuori
University of Helsinki, Finland

Abstract
Before the Second World War, the concept of Europe was a secondary moniker in a nationalistic world, which made the post-war rise of Europe and European legal heritage as concepts remarkable development. The idea of European integration was in part a post-war reaction to the ultranationalism touted by totalitarian regimes such as Nazi Germany or Fascist Italy. In a few years after the war, there emerged a new theory which argued that Roman law provided the foundation for a common European legal heritage, as well as a basis for future integration. This contribution explores the emergence of this idea and traces its history from the 1930s to the present, equally by scholars working in Europe and those who were exiled in the United States, arguing that with the rise of human rights instruments it created a foundation for the European narrative of rights that was a key part of the legitimation of European integration. This article demonstrates how these narratives of Roman law legitimated changing conceptions of European self-understanding and self-definition by engaging in a type of heritage discourse where the past was seen as a framework for the future.

Keywords
Europe, heritage, human rights, narrative, Roman law

Introduction
During the interwar years, concepts such as Europe were secondary to nation states as frameworks for legal thought. Much like early human rights thought, enthusiasm for the idea of a European tradition was the field of elite intellectuals such as the Count of Coudenhove-Kalergi who were ill at ease in the new Europe divided between nation states that focused on their own traditions and history (Gusejnova, 2016: xxvii–xxxi, 72–97). This relative marginalization made the post-war rise of the ideas of Europe and
European legal heritage both remarkable and consequential for European integration. Like the concept of human rights, after 1945 ‘Europe’ emerged as a transformational idea that would lead to a reconceptualization of much of the political and legal landscape. While the creation of the modern human rights regime may be seen as a reaction to the horrors of war and totalitarianism, the idea of European integration was in part a reaction to ultranationalist policies of totalitarian regimes such as Nazi Germany or Fascist Italy before and during the war. Although the link between a nation and its laws was one of the foundations of nationalist thought as exemplified in the works of German Romanticism from Grimm to Savigny, there emerged in a few years a new legal theory, which may be called the common roots theory, which claimed that Europe shared a common legal heritage that could form the foundation for its future integration.

This narrative of commonality has since become a mainstay in the self-definition of Europe, whether it is understood as the current European Union, the Council of Europe or the geographic entity known as Europe. When discussing challenges to the fundamental values of Europe, such as the rise of authoritarianism or populism, European political and legal leaders frequently refer to the shared values of Europe that are enshrined in principles such as the rule of law or legal protections such as human rights (on the difficulties inherent in the legal enforcement of values, see, i.a. Itzcovich, 2017). These are presented as fundamental traits of such crucial importance that they are not part of any system of opting out. They are described as the legacy, the heritage of the long historical tradition of Europe.¹

This article explores the emergence of this idea of a shared European legal tradition as the dominant theory of understanding the past and the future of law in Europe during the post-war period. It begins by tracing the role that was given by legal authors to Roman law as the foundation of European law and the shared legacy it provided. This construction drew together three previously separate narratives concerning: European legal history and the shared past; human rights; and European integration. Central figures in this transformation beginning from the 1930s and in some cases extending to the 1990s were the scholars Paul Koschaker, Franz Wieacker and Helmut Coing. Although they occupied different positions, all were instrumental in the resurgence of both the Roman legal tradition and the idea of a shared European legal heritage (Tuori, 2020). This article seeks to demonstrate that the notion of a common legal heritage is the product of a heritage discourse, whose actors utilized the language of rights and tradition to argue against totalitarian policies. This study maintains that this emergent discourse was historically contingent, insofar as the originally isolated strands of the Europeanist legal narrative gained new currency in the post-war period.

Narratives of Roman law were integrated with the changing conceptions of European self-understanding. Notions of European identity were transformed by the inclusion of exile scholarship, particularly scholarship produced by continental European scholars while they were exiled in the United Kingdom and the United States during the 1930s and 1940s. Ideas from Franz Neumann, Ernst Fraenkel, Hannah Arendt and others, who had revolutionized the conceptions of law and politics, democracy and authoritarianism, were also incorporated into the European narrative. With the nascent theories of human rights and natural law, the political and legal thought of exiles became a central tenet in the European tradition.
Earlier scholarship has discussed the European legal tradition as an historical fact, an explanatory label given to a long continuum of legal and historical developments within the geographical and cultural area known as Europe. It may be said that this European legal historical narrative has evolved into the dominant interpretation of legal development and the emergence of a European legal culture by the end of the twentieth century (Stein, 1999; Tuori, 2020: 7–20; Van Caenegem, 2002; Zimmermann, 2001). Some recent work has criticized this narrative, and explored its political, cultural and ideological implications (Joerges and Ghaleigh, 2003; Osler, 1997; Tuori and Björklund, 2019). While earlier research focused on academic debates, this article extends the inquiry to examine official documents relating to European integration and its legal dimension.

Methodologically, this study utilizes narrative analysis to study how events and texts are contextualized. Narratives are thus understood as stories that link together events in a sequence that gives history a perceived direction, motivation and meaning. This approach focuses on what could be described as narrative transmission, whereby discourses on heritage and tradition were adopted and adapted from various strands of academic discussion to the political sphere and to official documents. In this study, we approach narratives primarily as vehicles through which events and facts are linked together to form coherent stories that give meaning to and understanding of the world. Rather than analysing historical developments per se, this article therefore examines how the theory of shared legal roots evolved from its origins in the field of Roman law, from the modern perspective, an obscure area between ancient studies and modern law. By looking at how concepts such as European tradition and human rights were positioned historically, we shall analyse how they became, in the decades after the war, central parts of a new anti-totalitarian European self-understanding.

In the following, we will follow the invention and spread of the idea of a European legal tradition in three interlinked fields. The first was represented mainly by German legal historians such as Koschaker who developed the narrative during the 1930s. Second, European exile scholars in the United Kingdom and the United States began to posit human rights and the rule of law as the foundations of an anti-totalitarian Europe. Finally, we will explore how these historical and political notions became crucial in the European integration process and were included in the founding treaties.

The notion of a shared historical past rooted in Roman law that nonetheless permits different European narratives concerning community and belonging constitutes a normative realm of value statements. In turn, that realm relies on hierarchies to legitimate it. Legitimacy is established via a process of historical utilitarianism, in which tradition and usage are seen as signs of correctness and legitimacy, in what could be described as a logic of conservatism (Muller, 1997: 3–33). Inclusion, however, is less informative than absence. I argue that issues of class, gender and race are embedded in these discussions, but seldom openly debated. The creation of a certain tradition or heritage of Europeanness may be seen as a definitional process. Authors such as Koschaker, Wieacker and Coing instrumentalize parts of the historical past to create a sense of a linear development towards a shared community that includes certain things, persons and traits, but excludes others. The shared past of Europe that was and is lauded as forming the foundations of a united European legal culture is very much a past of upper-class white men, where the ‘others’, the non-white, non-male, non-elite, existed mainly as definitional others,
something that one could define Europe against. Gender, ethnicity and race were mere afterthoughts, if even that, in the attempt to construe a unity of white men despite national boundaries.

**Legal historians invent a common past**

The notion of a common European legal tradition emerged through a series of contingencies, many of which were almost completely unforeseeable. In Germany, the Nazi party (or the National Socialist German Workers’ Party (NSDAP)) added the so-called Point 19 to its party programme, which was copied from an earlier radical socialist party programme, and called for the abolition of the Roman law tradition. This copying of an earlier party programme meant that the opposition towards the Roman law tradition as the official NSDAP position was the result of a coincidence (Chapoutot, 2019: 115–6). Nevertheless, this hostility towards Roman law, which became state policy after the Nazi takeover of power in 1933, led to a counterreaction, as numerous legal scholars in Germany and elsewhere in Europe began to investigate the uniting factors of European jurisprudence (Tuori, 2020: 139–72 on the spread of the discourse throughout Europe before WWII). While their initial interest was in jurisprudence, legal reasoning and its development, they began to see the Roman law tradition as the foundation of all European legal cultures. The reason why this European turn took place is not readily apparent. Another serendipity was the connection between Roman law and Europe, since their connection is more based on tradition than geography or culture. Rather, the European dimension was a result of the competing European ideas from the 1930s to the 1940s, from the utopianism of Count Coudenhove-Kalergi to the Nazi idea of New Europe. This was possibly a result of a new kind of thinking about Europe that prompted authors to reconceptualize ideas such as tradition and heritage through a European focus. It is thus possible that the turn towards a European heritage was a consequence of these opposing ideas of Europe and European heritage which prompted scholars both in Europe and European scholars in exile to approach the issues through a European lens. In a multifaceted instrumentalization of discourses, Roman law scholars adopted concepts from early Europeanist discussions and reinvented their own discourses of tradition and Europe. This process played an important role in the formulation of the larger tradition of a shared European legal heritage (Tuori and Björklund, 2019).

The three main creators of the idea of a European legal heritage were Paul Koschaker, Franz Wieacker and Helmut Coing. These German law professors had a large European following. Already a senior professor in 1933, Koschaker directed a research group in the laws of the ancient Middle East at the University of Berlin. In his case, the Nazi influx at the university meant that valuable parts of his research group went into exile and his chosen topic of expertise became unfashionable. In reaction, he turned to the notion of the crisis of jurisprudence and then to the idea of Europe, attempting to explain the enduring significance of ancient law (Koschaker, 1938, 1951: 115–8, 1966 [1947]). In 1938, he publicly lectured on this material in front of a Nazi audience at the Akademie für deutsches Recht (Koschaker, 1938). He argued that ancient law was, after all, part of European tradition, a shared legacy that spanned all European legal cultures. Discussions of crisis were not limited to Roman law scholars. Husserl’s (1954 [1936]) research on the
crisis of European science, for example, was joined by various other works across the humanities. Koschaker was not unaware of this connection and made explicit references to this discourse (1966 [1947]: 2–4). In part, the sense of a crisis in science stemmed from the expansion of university access to students outside the traditional elites, but there was also a sense of the changes gripping the nature of science, of the rise of exact sciences and the diminishing role that classics, humanities and the old sense of civilization as an elite pursuit had in it. It may be said that complaints about the loss of culture and tradition not only derived, in part, from professors’ relative loss of status and the rise of the hard sciences, but also from the loss of exclusivity that had defined universities (Betti, 1939; Schönbauer, 1939: 364–5). When Koschaker published his main work, Europe and Roman Law (1966 [1947]: 2–4, 82, 337–53), his idea of Europe happened to coincide with the advance of European integration, a process that was deeply legal in nature, defined as it was by treaties, legislation and consolidation of the normative realm between nation states through the supremacy of the new European law (Hewitson and D’Auria, 2012; Stirk, 1989). The main point, according to Koschaker, was that because Roman law was a shared value, a kind of European natural law, it could be utilized to legally unify Europe (1966 [1947]: 346).

While Koschaker longed for the unity of the pre-1918 European empires and saw little value in the intense nationalism of the small states of Europe, Wieacker and Coing were of the war generation, whose childhood was defined by the war years. Both had grown up during the First World War, the Weimar crises and the early Nazi revolution. These experiences shaped their convictions about what Europe was and should be. Wieacker had been active in the movement of young Nazi lawyers to reform German law, but reversed course during the Second World War. Some of his Nazi era writings (Wieacker, 1937, 2000 [1935]) demonstrate enthusiastic support for new policies merging law and politics. Adopting the position of his exiled teacher Fritz Pringsheim, he had a change of heart and claimed that law was not purely an extension of politics, as argued by Nazis, but constituted its own tradition, a set of cultural beliefs and practices carried by lawyers. At one level, he refuted Koschaker’s claim that European unity was based on Roman law (Wieacker, 1954: 515–41, 531–3). Wieacker instead maintained that the European legal tradition originated in Roman law, but could not be reduced to it (1944a: 3–9, 1944b, 1967 [1952]). Rather, it was shaped by three millennia of development. Coing had barely begun his academic career before the war, unlike Wieacker having no publications that would be strongly influenced by Nazi legal thought. After spending the war years in frontline service, Coing became an advocate of natural law. According to him, the European legal tradition was composed of two main strands: the Roman legal tradition and the natural law tradition. Together, these integral parts shaped the European tradition of jurisprudence and legal thinking. The innovation of Coing’s (1947: 7) theory concerned the element of tradition. A main criticism of natural law is that it was singularly unsuited for opposing tyranny because if one replaced the higher good with another, as the Nazis had done by replacing justice with the will of the Führer, the whole point of natural law becomes moot. By tying natural law – and with it human rights and dignity – to centuries of tradition, it becomes eternal and unchangeable by unscrupulous dictators.

These early advocates for a European understanding of a legal tradition were deeply influenced by the inroads made by totalitarian policies in Germany and elsewhere into
legal science. Often, as in the case of Wieacker, because they had been actively involved. Owing to their experiences, these figures were convinced that the law should be shielded from political disputes but disagreed on how that could be done. Some, such as Koschaker, advocated for a return to the past, removing law from politics by tying it into tradition and the past. Others claimed that natural law (i.a. Coing), legal methodology (i.a. Wieacker) or legal culture (this strand may also be traced to Koschaker) were the means by which to prevent a totalitarian subsumption of the law. The emphasis on Europe and Europeanism was perhaps mostly a side effect of this escape from the nation state, a way of distinguishing law from national politics. The discourse of heritage and Europeanness provided, at least initially, a basis for a very particular discussion about the development of law within national legal contexts. However, the development of this argument forced not only Koschaker, Wieacker and Coing, along with a whole generation of legal scholars in Europe, to exit their narrow national confines. A narrative of European legal heritage preserved a particular tradition of scholarship for its later reception. As has been recently argued (Stråth, 2019: 281), though, a return to tradition was not an obvious choice. In the economic, social and cultural context of modernizing Europe, the whole notion of a return to tradition may have been deeply unpopular. Already in nineteenth-century Germany, scholars had abandoned attempts to use Roman law as a tool for legal modernization (Whitman, 1990: 151–228). Many reform movements consequently regarded it as a conservative attempt to prevent progressive legislative reform.

Although these scholars’ positions were largely informed by reactionary politics in Western Europe, the relevance of their arguments also applied to debates over events and policies in Soviet-occupied Eastern Europe. There, policies similar to the suppression of law to the will of politics continued under the emerging communist dictatorships (Erkkilä, 2020). Because communist parties were also gaining popularity in Western Europe, the intellectual and political challenge for Europe was both internal and external. Despite its apparently anachronistic normative claims, Roman law provided the discursive means to distance law from politics, by tying the former to a heritage and tradition that was distinct from the latter.

**Creating an anti-totalitarian Europe from abroad**

A narrative of shared European legal heritage crucially relied upon anti-totalitarianism. This ideal of legal tradition or heritage as protections against totalitarianism may be divided into two main strands. The first strand comprised the legal historians and Roman law scholars who were exiled from Europe, and the second strand the legal theorists, philosophers and others who followed the same route to the United Kingdom and United States. They shared a similar conviction that law should be separated from politics: be it in jurisprudence in general, or in issues such as human rights. This was a novel incarnation of the rule of law principle, which combined European and American thought (Tuori, 2020: 242–8). Most immediately, this anti-totalitarian conviction became popular in post-war Europe as it opposed (Nazi and Fascist) notions of justice expressed as the will of the leader. Equally importantly, it opposed Soviet policy, which demanded the submission of law to politics.

Coing’s optimistic view that natural law may counter totalitarian tendencies should be seen as part of a contemporary renaissance in natural law. Surprisingly, there was little
enthusiasm for natural law during the Nazi takeover of power. Among lawyers, two of the most vocal opponents of the Nazi regime, Ernst Fraenkel and Franz Neumann, were critical of the power of natural law in preventing atrocities, having witnessed the Nazi use of the concept of relative natural law (Morris, 2015). Their main works, Neumann’s (1944) *Behemoth* and Fraenkel’s (1940) *Dual State*, sought to demonstrate how the Nazi party circumvented and perverted the legal system. Of the two, Neumann became an advocate of the principle of the rule of law, which influenced legal scholars in both Europe and the United States (Kornhauser, 2015: 95–9). The early works of Fraenkel and Neumann both illustrate a belief in the system of *Rechtsstaat* (Meierhenrich, 2018), and how that was only gradually worn away by the events of the early Nazi rule. They both describe the gradual suppression of the legal system by Nazis and the way it was turned into an instrument of terror. In fact, Fraenkel notes how Nazi lawyers such as Beyerle developed their own conception of natural law, in which the strict legal protections of the rule of law were circumvented by references to the law of the German blood community and other abstract norms (Beyerle, 1939; Fraenkel, 1940: 109–50. On these, see also Liebrecht, 2018: 19–106; Wittreck, 2008: 35–55).

The idea of constitutional and procedural protections within a legal system, then, was replaced by the notion of human rights. Hannah Arendt, in her discussions on rights and tyranny, posed that to be viable, human rights fundamentally presupposes ‘the right to have rights’ (2017: 388), that the individual is recognized as a holder of rights within the legal system. Within the traditional legal systems of Europe, those rights were available to those within the political community. Those who were excluded from citizenship, such as the Jews under the Nazis, simply did not have ‘the right to have rights’. To counteract this threat, the new European human rights regime sought to enforce that foundational right, independent of national legislation, at least within Europe. Their main concern was securing political and other rights of classical liberty. This focus on liberty rights is one of the absences of the European Convention on Human Rights. It is silent on social, cultural and economic rights, as well as its own exclusive focus on classical liberty. One explanation for this silence focuses on the architects. Conservative politicians, such as Winston Churchill, wrote the convention as much against Soviet totalitarianism as against Nazism (Duranti, 2017: 350–8). It was Arendt (2017: 381) who most famously pointed out the lie of universalism at the heart of early human rights language. The fact that human rights were by and large coincident with the rights of white Westerners was foundationally exclusionary, a symptom of racialized biases (Chappel, 2018).

Despite these preconditions, the emergence of the Council of Europe and the European Convention of Human Rights immediately after the Second World War reveals the wholesale success of the narrative of rights and heritage. Discussions were presented explicitly as reactions to fascism. Speakers at the preparatory meetings included survivors of the Holocaust, while others spoke of the long tradition of democracy and the rule of law that extended from the classical antiquity to the present. These discussions presented the emerging new order as a restoration of an earlier tradition that validated human rights and respect for the individual. Much like the early human rights discourses, in which human rights were presented as axiomatic and only recognized in declarations and treaties, the discourse of heritage was about the renovation of the old within a new format and context. The narrative of heritage and tradition shares similarities with the narrative
of human rights. Both narratives presume the existence of pre-existing facts and share convictions which are reinforced and restated. This means that traditions and heritages are never being created or even brought forth. They exist irrespective of their written manifestations, being only highlighted by the attention that they gain.

The experience of Nazi Germany demonstrated the frailty of positive law in the face of unscrupulous actors in control of the modern state and its power. Thus, the conventional tools of civil rights – rights provided and guaranteed by the nation state – were seen as insufficient to prevent abuse. However, in the 1930s, European legal thinkers were sceptical about the notion of natural law. Resorting to basic principles risked futility if the very principles could be perverted. This situation led to an international campaign for supranational instruments that would curtail political influence by instituting guarantees for vulnerable groups, such as religious or ethnic minorities, and avenues for recourse in cases of alleged violation of those guarantees. While the United Nations had outlined guaranteed rights in its Universal Declaration of Human Rights, both progressive and conservative agents sought to establish a particularly European system that would reflect what they saw as European values (Duranti, 2017). This notion of human rights as both universal and particularly European was founded on the idea of a specifically European heritage of values. The European human rights system was seen to be safeguarding this European heritage, one that encompassed notions such as rule of law, human rights, minority protections and other guarantees. As a narrative, it positioned Europe at the vanguard and thus as a superior model. However, as Arendt (2017: 380–96) pointed out, this narrative had its dark side. Not only did colonial heritage divide the ‘civilized’ and the ‘barbarian’, it also privileged Europeans in the enjoyment of universal rights, despite their purported derivation from humanity itself.

Integration through legal history

The European narrative of rights, rule of law and legal heritage was utilized equally in other major processes, such as European integration. In it, actors mobilized the idea of a shared heritage as a justification and legitimation of a novel kind of community. In 1945, as European integration began to gain pace, the idea of a common legal heritage of Europe was slowly beginning to be included in the language of the founding treaties. This inclusion was partly the work of politicians who framed nascent European institutions, such as Robert Schumann, but behind them were influential intellectuals, such as Jacques Maritain. While the early treaties, such as the 1950 Schuman Declaration, or the 1952 Coal and Steel Union Treaty, operated purely on the language of economics and peace, this began to change when the cultural side of the integration became more pronounced in the 1970s. If the early integration was motivated purely by a functionalist notion of increased cooperation, this changed after 1973. In the Declaration of the European Community (Office for Official Publications of the European Communities, 1973), the notion of common heritage, shared fundamental values and human rights were inextricably linked as components of the European identity and thus as core definitional features of their unity. In this process, heritage and tradition provided the groundwork for such novel unity that intertwined cultural and legal heritage. Thus, European integration would
not have been the creator of a legal unity, but rather a safeguard of the shared values and
principles, the shared heritage of pre-existing rights and legal traditions.

The language of heritage and identity would not be embraced in official parlance
before the Single European Act of 1986. The Stuttgart (1983) *Solemn Declaration on
European Union* mentioned already ‘the awareness of a common cultural heritage as
an element in the European identity’ (1.4.3) and ‘Europe’s history and culture so as to
promote a European awareness’ (3.3). The Single European Act of 1986 marked a sig-
nificant breakthrough in the human rights and heritage front, as the treaty spoke of the
promotion of democracy through fundamental rights such as freedom, equality and
social justice, the European idea and the rule of law. Clearly, these elements were politi-
cally significant in the ideological battle against the Soviet bloc. Internally, they were
also central to the self-definition of Europe and the promotion of its values. Fundamental
rights, respect for human dignity and the elimination of racial discrimination were
declared to be part of the common cultural and legal heritage.11 In these declarations, the
idea of European heritage and human rights was expressed with reference to the European
Convention on Human Rights, but also to the UN Charter.

A similar language, but with even more references to be shared and common legal
heritage, is evident in the Maastricht treaty12 and subsequent treaties such as the 2007
Charter of Fundamental Rights of the European Union (2007/C 303/01). It is difficult to
establish what, if any, links there were with the drafting of the common heritage lan-
guage in the treaties and the emerging scientific discussion of the common legal heritage.
It is impossible to claim a causal link with any certainty. It is clear, however, that certain
individuals linked both worlds, such as Pierre Pescatore, European Court of Justice
judge, who was a scientific assistant to Paul Koschaker, or Walter Hallstein, president of
the European Economic Community and long-time force behind European integration.
Hallstein was a long-time friend of Helmut Coing and used to consult him on legal
matters (Duve, 2013: 9; Pescatore, 1970; Tamm, 2013: 20).

What is clear is that the language of heritage, values, identity and roots that was devel-
oped in legal studies began to appear in the documents of European integration from
1973 onwards, but their role becomes more and more central with the increased depth of
the integration process, as is evident in the profusion of the language of heritage in the
later treaties and other documents. It becomes apparent that this language was by and
large adopted as it had been discussed in the legal historical community and increasingly
taught at the leading European law schools as is evident in the publications, not simply
of textbooks but also of scientific works. This diffusion of the European narrative and the
European heritage in law in textbooks between the 1970s and 1990s is an interesting
phenomenon that would require a study of its own. The notion of European legal heritage
and its components, including the language of rights and tradition become slowly embed-
ded in the official language of European integration.

The link between European integration, human rights and European legal history is
neither straightforward nor without critics. While there are links in terms of persons and
ideas, the three legal reinventions were still best seen as parallel processes. Bo Stråth
(2019: 268–75) has pointed out that the integration project focused on the economy and
economic law, in keeping with ordoliberal and related principles. At the same time, the
human rights agenda of European integration was prompted by political concerns and
ideas of a new self-identification. Duranti has argued that ‘[h]uman rights offered a vocabulary ideally suited to such a reinvention of European traditions’ (2017: 350). The reinvention of the European legal narrative was closely linked to the human rights narrative but contained both independent aims and motivations. They were all projects that sought to imagine a unified European community that would serve distinct purposes. Despite different aims, they insisted not only upon a ‘new’ European past, but also laid the groundwork for a common future. All three narratives utilized the language of heritage and values in order to present this new future as a foregone conclusion.

**Conclusion**

The language of heritage, tradition and identity was not an obvious choice for the justification of European integration, mainly because it was by its very nature conservative. This language had been employed in conservative arguments against Nazi laws. However, in the emerging European integration, which itself was a supranational revolution of sorts, this idea of the role of tradition as a guide towards the future was less obvious. However, it worked mainly because it suggested that integration retrieved and demonstrated an existing unity, rather than instantiating a process to unify separate entities and cultures.

In this article, I have outlined how three initially separate strands of discussion – legal history, human rights and European integration – coalesced around a single narrative of European tradition. They did that for different and separate justifications, but all reinforced the idea that tradition, history and values were important in the creation of a European unity and the shared European understanding of law. The notions of European heritage and shared legal traditions were not only becoming features that could be used to define Europe, but also who should be considered European. Through its narrative analysis, this article has identified transmission of concepts and ideas between the different academic discussions and the official discourses relating to the European human rights system and to European integration. In the growing adoption and cooptation of a language of rights, the legal tradition of heritage both informs European self-understanding and visions for the future. In the policy sphere, founding documents of the European Union (EU) have enshrined issues such as human rights and the rule of law by invoking references to shared values and traditions. However, in the final instance, the discourse of heritage should not be seen as a historical discourse concerned with understanding the law and its history, but rather as a means for creating a sense of shared European legal heritage. This notion of a heritage, then, becomes more a kind of a political proposition than a value shared by people around Europe.

There remains the need for further examination of the actors behind this adoption of the language of heritage in the documents of European integration. Studies on the legal service of the European commission and the national representatives are only now being published, but early results confirm the findings of earlier studies on top level figures (Nicola and Davies, 2017). As is clear in the founding documents of European integration, narratives of legal heritage were accepted as accurate descriptions of actual conditions to the degree that they could legitimate notions for the normative development of European integration.
Acknowledgements
The author wishes to thank the editors, the audience at the conference and the anonymous reviewers of the journal for their helpful comments. He would also like to thank Dr Heta Björklund, Ms Iida Karjalainen and Mr Paul Behne for their invaluable assistance.

Funding
The author(s) disclosed receipt of the following financial support for the research, authorship, and/or publication of this article: This work has received funding from the European Research Council under the European Union’s Seventh Framework Programme (FP7/2007–2013)/ERC grant agreement no. 313100 (The ERC StG project Reinventing the Foundations of European Legal Culture 1934–1964) and from the Academy of Finland funded Centre of Excellence in Law, Identity and the European Narratives, funding decision number 312154, project number 313100.

Notes
1. The fundamental role of values lies in their inclusion in treaties, where they take on a legal significance, for example, TEU 2: The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail. TEU 6.3: ‘Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law’. See earlier The Single European Act, 1117, states that ‘respect for human dignity and the elimination of forms of racial discrimination are part of the common cultural and legal heritage of all the Member States’.
2. I have been particularly influenced by authors such as David Carr, Benedict Anderson and Frank Ankersmit, who all stressed how narrative has implications beyond the narrative form in how narratives shape our understanding of the world and events in it (Carr, 1998).
3. The use of narratives as a way of examining European integration history has been utilized earlier by, for example, Patel et al. (2018).
4. For an overview of Koschaker, see Beggio (2018).
5. For recent research on Wieacker, see Erkkiä (2018, 2019).
6. On the Nazi revolution in law, see Eckert (1992); Frassek (2008: 351–77, 358); Wiener (2013) and Winkler (2014: 13–4, 264–312).
7. On Coing, see Duve (2012, 2013: 9). In Coing’s (2014) autobiography, he describes how the experience of totalitarianism contributed to his growing acceptance of the notion of natural law.
8. For example, Pierre-Henri Teitgen recalled his time as a prisoner of the Gestapo and his family’s fate in the concentration camps. See Council of Europe/Conseil de l’Europe (1975: 48–50).
9. Treaty establishing the European Coal and Steel Community, pp. 17–120, p. 26: RESOLVED to substitute for age-old rivalries the merging of their essential interests; to create, by establishing an economic community, the basis for a broader and deeper community among peoples long divided by bloody conflicts; and to lay the foundations for institutions which will give direction to a destiny henceforward shared. Treaty establishing the European Economic Community (Rome treaty, 1957) pp. 217–18: ‘RESOLVED by thus pooling their resources to preserve and strengthen peace and liberty, and calling upon the other peoples of Europe who share their ideal to join in their efforts’.
10. The unity behind heritage, identity, culture and law was strongly and explicitly underlined in the declaration text itself: Defining the European Identity involves: — reviewing the common heritage, interests and special obligations of the Nine, as well as the degree of unity so far achieved within the Community, — assessing the extent to which the Nine are already acting together in relation to the rest of the world and the responsibilities which result from this, — taking into consideration the dynamic nature of European unification. The Nine wish to ensure that the cherished values of their legal, political and moral order are respected, and to preserve the rich variety of their national cultures. Sharing as they do the same attitudes to life, based on a determination to build a society which measures up to the needs of the individual, they are determined to defend the principles of representative democracy, of the rule of law, of social justice – which is the ultimate goal of economic progress – and of respect for human rights. All of these are fundamental elements of the European Identity. (Office for Official Publications of the European Communities, 1973: 118–22).

11. Single European Act, 1009: DETERMINED to work together to promote democracy on the basis of the fundamental rights recognized in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, notably freedom, equality and social justice; Single European Act, 1117 (Declaration against racism and xenophobia): ‘Whereas respect for human dignity and the elimination of forms of racial discrimination are part of the common cultural and legal heritage of all the Member States’.

12. European Union (2012: 13–45): DRAWING INSPIRATION from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law, RECALLING the historic importance of the ending of the division of the European continent and the need to create firm bases for the construction of the future Europe, CONFIRMING their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law.

References

Arendt H (2017) The Origins of Totalitarianism. New York: Penguin.

Beggio T (2018) Paul Koschaker (1879-1951): Rediscovering the Roman Foundations of European Legal Tradition. Heidelberg: Winter Verlag.

Betti E (1939) La crisi odierna della scienza romanistica in Germania. Rivista Di Diritto Commerciale 37: 120–8.

Beyerle F (1939) Der andere Zugang zum Naturrecht. Deutsche Rechtswissenschaft 4: 1–20.

Carr D (1998) Narrative and the real world: an argument for continuity. In: B Fay, P Pomper and RT Vann (eds) History and Theory: Contemporary Readings. Oxford: Wiley-Blackwell, pp. 137–52.

Chapoutot J (2019) The denaturalization of Nordic law: Germanic law and the reception of Roman law. In: K Tuori and H Björklund (eds) Roman Law and the Idea of Europe. London: Bloomsbury, pp. 113–26.

Chappell J (2018) Catholic Modern: The Challenge of Totalitarianism and the Remaking of the Church. Cambridge, MA: Harvard University Press.

Coing H (1947) Die obersten Grundsätze des Rechts: Ein Versuch zur Neu gründung des Naturrechts. Heidelberg: Schriften der Süddeutschen Juristen-Zeitung.

Coing H (2014) Für Wissenschaften und Künste. Lebensbericht eines europäischen Rechtsgelehrten. Berlin: Duncker and Humblot.

Council of Europe/Conseil de l’Europe (1975) Collected Edition of the Travaux Préparatoires of the European Convention on Human Rights, Vol. I: Preparatory Commission of the Council
of Europe, Committee of Ministers, Consultative Assembly (11 May–13 July 1949). The Hague: Council of Europe/Conseil de l’Europe.

Duranti M (2017) The Conservative Human Rights Revolution: European Identity, Transnational Politics, and the Origins of the European Convention. Oxford: Oxford University Press.

Duve T (2012) Von der Europäischen Rechtsgeschichte zu einer Rechtsgeschichte Europas in globalhistorischer Perspektive [From a European legal history towards a legal history of Europe in a global historical perspective]. Rechtsgeschichte Legal History. Zeitschrift des Max Planck-Instituts für Europäische Rechtsgeschichte 20: 18–71.

Duve T (2013) European legal history – global perspectives (Max Planck Institute for European Legal History Research Paper Series No. 2013-06, pp. 1–24). Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2292666

Eckert J (1992) Was war die Kieler Schule. In: F Säcker (ed.) Recht und Rechtslehre im Nationalsozialismus. Baden-Baden: Nomos, pp. 37–70.

Erkkilä V (2018) The Conceptual Change of Conscience: Franz Wieacker and German Legal Historiography. Tübingen: Mohr Siebeck.

Erkkilä V (2019) Roman law as wisdom: justice and truth, honour and disappointment in Franz Wieacker’s ideas on Roman law. In: K Tuori and H Björklund (eds) Roman Law and the Idea of Europe. London: Bloomsbury, pp. 201–20.

Erkkilä V (2020) Introduction. In: V Erkkilä and H-P Haferkamp (eds) Socialism and Legal History: The Histories and Historians of Law in Socialist Socialism and Legal History – The Histories and Historians of Law in Socialist East Central Europe. London: Routledge, pp. 1–21.

European Union (2012) Consolidated version of the treaty on European Union. Official Journal of the European Union 326 (1): 13–45.

Fraenkel E (1940) The Dual State: A Contribution to the Theory of Dictatorship. New York: Oxford University Press.

Frassek R (2008) Wege zur nationalsozialistischen ‘Rechtserneuerung’ – Wissenschaft zwischen ‘Gleichschaltung’ und Konkurrenzkampf. In: H Hermann, T Gutmann, J Rückert and et al. (eds) Von den ‘leges Barbarorum’ bis zum ‘ius Barbarum’ des Nationalsozialismus. Köln: Böhlau Verlag, pp. 351–77.

Gusejnova D (2016) European Elites and Ideas of Empire, 1917–1957. Cambridge: Cambridge University Press.

Hewitson M and D’Auria M (2012) Europe in Crisis: Intellectuals and the European Idea, 1917-1957. Oxford: Berghahn Books.

Husserl E (1954 [1936]) Die Krisis der europäischen Wissenschaften und die transzendentalen Phänomenologie: Eine Einleitung in die phänomenologische Philosophie. Den Haag: Martinus Nijhoff.

Itzcovich G (2017) On the legal enforcement of values: the importance of the institutional context. In: A Jakab and D Kochenov (eds) The Enforcement of EU Law and Values: Ensuring Member States’ Compliance. Oxford: Oxford University Press, pp. 28–43.

Joerges C and Ghaleigh NS (2003) Darker Legacies of Law in Europe: The Shadow of National Socialism and Fascism Over Europe and Its Legal Traditions. Oxford: Hart Publishing.

Kornhauser AM (2015) Debating the American State: Liberal Anxieties and the New Leviathan, 1930-1970. Philadelphia, PA: University of Pennsylvania Press.

Koschaker P (1938) Die Krise des römischen Rechts und romanistische Rechtswissenschaft. In: Schriften der Akademie für Deutsches Recht: Römisches Recht und fremde Rechte, vol. 1. München: Duncker & Humblot, pp. 1–86.

Koschaker P (1951) Selbstdarstellung. In: N Grass (ed.) Österreichische Geschichtswissenschaft der Gegenwart in Selbstdarstellungen, vol. 2. Innsbruck: Wagner, pp. 105–25.
Koschaker P (1966 [1947]) *Europa und das römische Recht*. Munich; Berlin: Beck.

Liebrecht J (2018) *Junge Rechtsgeschichte. Kategorienwandel in der rechtshistorischen Germanistik der Zwischenkriegszeit*. Tübingen: Mohr Siebeck.

Meierhenrich J (2018) *The Remnants of the Rechtsstaat: An Ethnography of Nazi Law*. Oxford: Oxford University Press.

Morris D (2015) *Write and resist: Ernst Fraenkel and Franz Neumann on the role of natural law in fighting Nazi tyranny*. New German Critique 126: 197–230.

Müller J (1997) *Conservatism*. Princeton, NJ: Princeton University Press.

Neumann F (1944) *Behemoth: The Structure and Practice of National Socialism 1933–1944*. New York: Harper & Row.

Nicola F and Davies B (2017) *EU Law Stories: Contextual and Critical Histories of European Jurisprudence*. Cambridge: Cambridge University Press.

Office for Official Publications of the European Communities (1973) *European identity – declaration of the European Community 14 December 1973*. Bulletin of the European Communities 12: 118–22.

Osler D (1997) The myth of European legal history. Rechtshistorisches Journal 16: 393–410.

Patel KK, Sianos A and Vanhoonacker-Kormoss S (2018) Does the EU have a past? Narratives of European integration history and the Union’s public awareness deficit. Journal of European Integration History 24: 143–66.

Pescatore P (1970) Fundamental rights and freedoms in the system of the European Communities. The American Journal of Comparative Law 18: 343–51.

Schönbauer E (1939) Zur ‘Krise des römischen Rechts’. In: *Festschrift Paul Koschaker mit Unterstützung der Rechts- und Staatswissenschaftlichen Fakultät der Friedrich-Wilhelms-Universität Berlin und der Leipziger Juristenfakultät zum 60. Geburtstagüberehreicht von seinen Fachgenossen*, vol. II. Weimar: Verlag Hermann Böhlau, pp. 385–410.

Stein P (1999) *Roman Law in European History*. Cambridge: Cambridge University Press.

Stirk PMR (1989) *European Unity in Context: The Interwar Period*. London: Bloomsbury.

Stråth B (2019) A genealogy of crisis: Europe’s legal legacy and ordoliberalism. In: K Tuori and H Björklund (eds) *Roman Law and the Idea of Europe*. London: Bloomsbury, pp. 261–84.

Stuttgart (1983, 19 June). Bulletin of the European Communities. June 1983, No 6. Luxembourg: Office for official publications of the European Communities. Solemn Declaration on European Union, pp. 24–9.

Tamm D (2013) The history of the court of justice of the European Union since its origin. In: Court of Justice of the European Union (ed.) *La Cour De Justice Et La Construction De l'Europe: Analyses Et Perspectives De Soixante Ans De Jurisprudence* [The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-Law]. The Hague: Springer, pp. 9–35.

Tuori K and Björklund H (2019) (eds.) *Roman Law and the Idea of Europe*. London: Bloomsbury.

Tuori K (2020) *Empire of Law: Nazi Germany, Exile Scholars and the Battle for the Future of Europe*. Cambridge: Cambridge University Press.

Van Caenegem RC (2002) *European Law in the Past and the Future: Unity and Diversity Over Two Millennia*. Cambridge: Cambridge University Press.

Whitman JQ (1990) *The Legacy of Roman Law in the German Romantic Era*. Princeton, NJ: Princeton University Press.

Wieacker F (1937) Der Stand der Rechtserneuerung auf dem Gebiete des bürgerlichen Rechts. Deutsche Rechtswissenschaft 2: 3–27.

Wieacker F (1944a) *Das Römische Recht und das deutsche Rechtsbewusstsein*. Leipzig: Barth.

Wieacker F (1944b) *Vom Römischen Recht. Wirklichkeit und Überlieferung*. Leipzig: Koehler & Ameland.
Author biography

Kaius Tuori is Professor of European Intellectual History at the University of Helsinki and was Director of the Academy of Finland Centre of Excellence in Law, Identity and European Narratives (2018–2025). A scholar of legal history involved in research projects on the understanding of tradition, culture, identity, memory and the uses of the past, he is the author of, i.a. Empire of Law: Nazi Germany, Exile Scholars and the Battle for the Future of Europe (Cambridge University Press 2020), The Emperor of Law: The Emergence of Roman Imperial Adjudication (Oxford University Press, 2016) and Lawyers and Savages: Ancient History and Legal Realism in the Making of Legal Anthropology (Routledge, 2014).