Empire of Law

European legal integration is often justified with reference to the inherent unity of European legal traditions that extend to ancient Rome. This book explores the invention of this tradition, tracing it to a group of legal scholars divided by the onslaught of Nazi terror and totalitarianism in Europe. As exiles in Britain and the US, its formulators worked to build bridges between the Continental and the Atlantic legal traditions, incorporating ideas such as rule of law, liberty and equality to the European heritage. Others joined the Nazi revolution, which promoted its own idea of European unity. At the end of World War II, natural law and human rights were incorporated into the European project. The resulting narrative of Europe, one that outlined human rights, rule of law and equality, became consequently a unifying factor during the Cold War as the self-definition against the challenge of communism.

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Empire of Law

Nazi Germany, Exile Scholars and the Battle for the Future of Europe

Kaius Tuori
University of Helsinki
This book is dedicated (with love) to Taina.
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Preface

Many of the human sciences have extensively long histories but few have as intimate connection with their own pasts as law. What this has meant is that in legal debates references to ancient legal texts have continued to be used as authoritative examples and arguments about contemporary developments. Thus, medieval jurists would refer to Roman jurists, early modern lawyers to the Romans and the medieval, continuing a self-referential chain extending to the present. While it has become fairly rare, though not unheard of, to see references to ancient Roman juridical writings in modern court cases, in literature this effect continues to this day. As a lawyer and as a historian, I have found this to be a wonderful example of the historical continuities in scientific research, rivaled only by philosophy and perhaps theology.

However, the fact that there is a sense of continuity of more than two and a half millennia, as there is in law, requires not only a memory of the past but also a sense of tradition and identity to bind together the past and the present. Calling something a part of the European legal tradition or the Western legal tradition includes a process of both inclusion and exclusion. Why we are prone to include some and exclude others depends on how we define tradition. Why are the laws of Hammurabi or other laws of the ancient Near East remembered and celebrated, but not as part of a shared past, a common tradition, as the Roman jurists are? What counts as tradition and how we redefine tradition are the key themes of this book.

This book marks the final end point of a long and happy journey that began in 2012. Many people have helped me along the way and the book has been immensely improved as a result. First of all, I would like to thank the European Research Council for their funding, which enabled me to compose a research group that for five years has scoured the
archives and discussed with me ideas of law, tradition and Europe. I am very much in debt to the FoundLaw (Reinventing the Foundations of European Legal Culture 1934–1964) team members, Dr. Heta Björklund, Professor Magdalena Knak, Dr. Tommaso Beggio, Dr. Ville Erkkila and Professor Jacob Giltaij. During the project, we shared an extraordinary cooperation and I have been in the fortunate position of using them as a sounding board and as a test audience. As part of the project, we have also shared access to archival materials, enabling each member to read and use each other’s archival notes and photographs (on the project, its other publications and source materials, see the website www.foundlaw.org or https://blogs.helsinki.fi/found-law). Alongside the project, we organized a series of workshops and conferences, where I have presented parts of my research and was enlightened by magnificent papers given by others. The organization of these workshops took place in collaboration with colleagues around the world, from Helsinki to Florence, New York, Rome and Stellenbosch. I would like to especially thank Professors Jacques Du Plessis (Stellenbosch), Bill Nelson (NYU) and Emanuele Conte (Rome).

I have been fortunate to have as my colleagues at the Faculty of Law the wonderful legal history people, many of whom participated in our conferences and workshops and gave important feedback. During the process of writing the book, I was hired by the then Network, now the Centre for European Studies at the University of Helsinki, a multidisciplinary research center where I was warmly welcomed by Professor Juhana Aunesluoma and Dr. Leena Malkki. During the final phases of the project, we put together with some of the project members and people from the network an ultimately successful application for an Academy of Finland Centre of Excellence, the “Centre of Excellence in Law, Identity and the European Narratives” (www.eurostorie.org). In the centers, this book has especially benefited from conversations with Drs. Timo Miettinen, Timo Pankakoski and Pedro Magalhães. A special thanks goes to Ville Suuronen and Adolfo Giuliani who read the entire manuscript and gave valuable comments.

The final stretch of the manuscript preparation was done at the Political Science Department of the University of California, Los Angeles, where I was a visiting associate professor for three months in

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2017–2018. I would like to thank Professor Anthony Pagden, my host, and all the wonderful colleagues, especially Mr. Mack Eason, for their hospitality and help in the process. The penultimate version of the manuscript was actually done with a laptop perched on top of a surfboard serving as a makeshift desk. For the final push, I am thankful for Professor Hans-Peter Haferkamp, who put the magnificent library of his institute, Institut für Neuere Privatrechtsgeschichte, Deutsche und Rheinische Rechtsgeschichte, at my disposal.

The Cambridge University Press was kind enough to accept the manuscript. My editor Tom Randall has moved the project forward from an idea to manuscript with unfailing precision. I would also like to thank the series editors of the Cambridge Studies in European Law and Policy, Laurence Gormley and Jo Shaw, for approving the book for their series.

Dr. Mark Shackleton has adeptly reviewed and corrected my text. The mistakes that remain are mine.

I have presented ideas and preliminary results in numerous conferences, including the annual conferences of the Société Internationale Fernand de Visscher pour l’Histoire des Droits de l’Antiquité, the American Society for Legal History, the Association of Ancient Historians annual conference and numerous larger and smaller meetings. Some of the research behind Chapter 3 has been published earlier.² I would like to extend my thanks to all who took the trouble to listen and comment, giving me feedback and helpful hints about where to look and what to search for.

Abbreviations

BGB Bürgerliches Gesetzbuch, the German civil code
DDP Deutsche Demokratische Partei
Dig. The Digest of Justinian
EEC European Economic Community
GWBB Gesetz zur Wiederherstellung des Berufsbeamtenums
MPI Max Planck Institute
NCO non-commissioned officer
NGO non-governmental organization
NL Nachlass
NSDAP Nationalsozialistische Deutsche Arbeiterpartei
OECD Organisation for Economic Co-operation and Development
OSS Office of Strategic Services
OUP Oxford University Press
POW Prisoner of war
RGBL Reichsgesetzblatt
SA Sturmabteilung
SDP Sozialdemokratische Partei Deutschlands
SPSL Society for the Protection of Science and Learning
SS Schutzstaffel
WASP White Anglo-Saxon Protestant