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THE CULMINATION-BOOK. TRYING TO MAKE SENSE OF THE NAZI YEARS*

1. THE COMPLETION OF THE FOUNDLAW PROJECT

Recently I have had the occasion to review in this journal two interesting biographies of eminent Roman law scholars of the German-speaking world, Paul Koschaker and Franz Wieacker.[1] Both monographs were fruits of the research project "Reinventing the Foundations of European Legal Culture 1934–1964" (FoundLaw), directed by Kaius Tuori in Helsinki and generously funded by the European Research Council under the European Union's Seventh Framework Programme (FP 7 / 2007–2013). Was this money of European taxpayers well spent? That is the uneasy question we will try to answer hereafter.

The subtitle of the project – "Rediscovering the Roman Foundations of the European Legal Tradition" – conveys its guiding idea with somewhat greater clarity. But of course, an expert audience is appreciative first and foremost of a new book constituting – as the editor and director of the project puts it – the

* *Roman Law and the Idea of Europe*, ed. Kaius Tuori, Heta Björklund, Bloomsbury 2019, X & 288 pp. The numbers in brackets refer to the pages of the book.

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

"culmination" of the project (X). The doubting part of my title "Trying to Make Sense of the Nazi Years" is provoked by the affirmative subtitle of Tuori's paper "Making sense of the Nazi years" (45–47). What has provoked such ventures is in part the insight that Nazism, to some extent, had the air of a well-organized and progressivist system; by way of example, one need only refer to the leisure organization "Strength through Joy" (*Kraft durch Freude*), the famous *Hitler Jugend*, and the "People's Car" (*Volkswagen*) project founded by the German Labour Front (*DAF*).[2]

As we know, Nazism had, at least in some measure, human or even comical sides which permit it to be normalized in contemporary culture.[3] It is this tendency that seems evident in the book edited by Tuori (and Björklund) which – in the editors' own words – "argues that a group of émigré scholars who fled totalitarianism had a crucial role in the formation of the European project that lead to integration after the war" (1). Whatever is meant to fall under the rubric "formation of the European project" – whether the origins of the European Union and its historical antecedents, or some later stage of European integration, say in the field of private law, or perhaps merely the "post-war manufacturing of common European legal history" (J. Giltaij, "Autonomy and Authority: The Image of the Roman Jurists in Schulz and Wieacker", p. 73) – the characterisation seems at first sight exaggerated.

However, according to Tuori, it was precisely the exiled German legal historians of Jewish origin, those asylum seekers of the 20th century who finally found shelter in Great Britain (Fritz Pringsheim, Fritz Schulz and David Daube), who were to assume the role of the first Europeanists of legal history. They were assisted by their colleagues who could continue to work on the Continent, either joining the Nazi regime or remaining – like Paul Koschaker, Helmut Coing and Franz Wieacker – apolitical in principle, in the development of the "idea of Roman law as an idealized shared heritage". In the postwar period, this notion of legal heritage stimulated a revival of Roman law "as the roots of European legal tradition" (2).

Tuori must have grasped intuitively the somewhat paradoxical nature of his project, since in the guise of justification he adduces in evidence similarly constructed narratives from other locales. In this way, classical culture and Roman law were "enthusiastically embraced by authoritarian nationalists", as demonstrated in Vichy France by the collaborationist activity of the ancient historian Jérôme Carcopino, or in Italy by numerous fascist writers, "but equally by the Europeanists seeking to find a counterpoint to the totalitarian ideas" (3). According

[2] N. Frei, *Wie modern war der Nationalsozialismus?*, "Geschichte und Gesellschaft" 1993, Vol. 19, pp. 367–387; R. Bavaj, *Die Ambivalenz der Moderne im Nationalsozialismus. Eine Bilanz der Forschung*, München 2003.

[3] G. D. Rosenfeld, *Hi Hitler!: How the Nazi Past is Being Normalized in Contemporary Culture*, Cambridge 2015.

to Tuori, as co-editor of the culmination-book, it touches upon three important debates concerning the intellectual history of Europe: "(a) the use of the past in totalitarian regimes, (b) the impact of émigré scholars upon postwar scholarship, and (c) the emergence of the European project" (7).

Let us concentrate on the most intriguing, even equivocal aspect: the part of the exiled scholars of Jewish extraction in the postwar European project. This implies skipping some otherwise interesting chapters, such as the rather general and abstract study "The Impact of Exile on Law and Legal Science" of Magdalena Kmak (pp. 15–34), as well as the chapters referring to scholars who were indeed strangers in Oxford, but did not count among German legal historians of Jewish origin, such as Lorena Atzeri's chapter on "Francis de Zulueta 1878–1958: An Oxford Roman Lawyer between Totalitarianisms" (pp. 53–71), and Dina Gusejnova's "Roman Law after 1917: Exile, Statelessness and the Search for Byzantium in the Work of Mikhail von Taube" (pp. 93–112).

Equally, we omit both chapters focusing on European countries other than Germany: "The Idea of Rome. Political Fascism and Fascist (Roman) Law" by Cosimo Cascione (pp. 127–143) on Italy and "Conceptions of Roman Law in Scots Law" by Paul J. du Plessis on Scotland. We omit finally the chapters "The Weakening of Judgement: Johan Huizinga and the Crisis of the Western Legal Tradition" by Diego Quaglioni (pp. 181–199), "The Search for Authenticity and Singularity in European National History Writing" by Stefan Berger (pp. 239–259), and "A Genealogy of Crisis: Europe's Legal Legacy and Ordoliberalism" by Bo Stråth (pp. 261–284). All these high-level papers address the crisis of the 1930s and its diverse remedies in an interesting way, but do not contribute to answering the main question formulated by Tuori.

2. PERSONAL PERSPECTIVES

From a personal point of view, we must first of all exclude David Daube, even if he now and then appears in the culmination-book (2, 7–8, 43–49, 53–55, 73, 202). This does not discount the fact that Daube, as an Orthodox Jew, was a rather peculiar personality in his original German environment. Evidently, what he once said about Walter Ullman (whom he helped to escape from Germany to England in 1938),[4] "one of our debts to Hitler: an undisputed career in Vienna would have been less productive", applies directly to himself too.[5] Ultimately, he never dis-

[4] R. C. van Caenegem, *Legal historians I have known*, "Rechtsgeschichte" 2010, Vol. 17, pp. 288–291.

[5] C. Carmichael, *Ideas and the Man: Remembering David Daube*, Frankfurt a.M. 2004, p. 124; ibid., pp. 71–73.

cussed this or that European project, any of which would probably have seemed to him parochial. Alan Rodger offers the perceptive hypothesis that Daube "would never … have considered that Roman law should be studied because it could be a foundation for some new European *ius commune*".[6]

We know that David Daube was not really a contemporary German law professor similar to Pringsheim and Schulz, but rather a scholar of ancient texts, committed fully to the cultural tradition of the Jewish people as the "people of the book".[7] He never studied topics of Roman law because some ancient institutions could be interpreted as forebears of modern ones. In a telling counterexample, the Polish Roman law professor of Jewish extraction, Raphael Taubenschlag, who escaped to America, wrote in 1945, even before the end of WW II, a paper entitled "The Plea of Superior Orders" with an expressive subtitle "A Discussion of the Trial of War Criminals".[8]

While by contrast, Daube writes much later, in 1956, a corresponding paper, limited to "The Defence of Superior Orders in Roman Law". Its only sentence beyond the scope of ancient law notes – citing Gentili and Grotius – that "the various positions taken up today already had their advocates".[9] In the contemporary "Forms of Roman Legislation", Daube draws comparisons with the "prophetic mentality" of the Bible, and not with the recommendations of the European Coal and Steel Community.[10] We may call this attitude apolitical. Daube used in fact to evaluate people as such and not as representatives of particular nations, countries, or parties. In this spirit – Carmichael recounts – Daube "never read about or discussed National Socialism … because he was determined that he and his children would not become prejudiced against Germans".[11]

Nonetheless, the somewhat awkward outcome of the FoundLaw project remains that such prominent Nazi victims as Fritz Pringsheim and Fritz Schulz are put on equal footing with perpetrators or profiteers of their expulsion like Wieacker and – at the end of the day – Koschaker who took over the prestigious chair of Ernst Rabel in Berlin, thus contributing to its Aryanisation.[12] However, this same levelling idea, characteristic of the project, features also in the contributions of its other participants such as Jacob Giltaij ("Autonomy and Authority", pp. 73–91) who places the exiled Roman lawyers Pringsheim, Schulz and

[6] A. Rodger, *David Daube 1909–1999*, (in:) J. Beatson, R. Zimmermann (eds.), *Jurists Uprooted. German Speaking Émigré Lawyers in Twentieth-Century Britain*, Oxford 2004, pp. 242, 244.

[7] A. Rodger, *David Daube…*, pp. 244–247.

[8] R. Taubenschlag, *The Plea of Superior Orders (A Discussion of the Trial of War Criminals)*, "New Europe", February–March 1945, pp. 23–25.

[9] D. Daube, *The Defence of Superior Orders in Roman Law*, "Law Quarterly Review" 1956, Vol. 72, p. 601.

[10] D. Daube, *Forms of Roman Legislation*, Oxford 1956, pp. 62–72.

[11] C. Carmichael, *Ideas and the Man…*, p. 157.

[12] T. Giaro, *Memory Disorders…*, pp. 13–14.

again Daube, on the same level as legal historians who could remain in Germany: Koschaker, Wieacker and Coing.[13]

Moreover, it appears that in legal history too all cats are grey at night. According to Giltaij, "the images of 'the jurist' Schulz and Wieacker present us with are similar if not the same" (81). By contrast, another contributor to the "Reinventing the Foundations of European Legal Culture 1934–1964" project, Ville Erkkilä, is ready to differentiate. He recalls, with serious countenance – as if he had to disclose an important state of affairs thus far unknown – that "unlike Fritz Pringsheim, David Daube and Fritz Schulz, he [Franz Wieacker] did not experience exile" (Erkkilä, "Roman Law as Wisdom", p. 202).

Why, when and by whom Wieacker, known either as "deeply involved in the Nazi movement" (Tuori, p. 40) or as a "Nazi sympathizer" (Giltaij, p. 73), or finally as somebody who at least potentially might have been qualified as a "supporter" of the Nazi movement (Erkkilä, "Roman Law as Wisdom", p. 202), should have been driven into exile during Nazi rule, remains highly unclear. We know only of temporary expeditions made by Wieacker, together with his mentor Carl Schmitt, to the capital cities of occupied countries: Paris in France and Budapest in Hungary, probably in order to proselytise for German culture.[14]

In a parallel paper, which appeared in "Law and History Review", Tuori corroborates his idea contained in the "Introduction" to the culmination-book, namely that there was a link between the exile of Jewish scholars and postwar European integration (7). In the paper, he baldly and directly defines the emergence of the "narrative of a shared European legal culture" as "a part of the process of exile".[15] However, I see rather those who remained in Germany: Koschaker, Wieacker and Coing, as entitled to the European laurels of this kind. Besides Koschaker, the only author who started his *opus magnum* under the European banner even prior to the end of Nazi rule was Wieacker with his "Privatrechtsgeschichte der Neuzeit", published in the first edition in 1952,[16] but inspired by the 1935 Nazi program of legal studies.[17]

In contrast, the Jewish exiles did not by any means contribute to European legal culture in Tuori's sense as a "shared" one. I have already stressed that the idea of Daube as a progenitor or even merely a forerunner of either a political European integration or a new European *ius commune* makes no sense at all. Nonetheless, all things considered, exactly the same must be said of Schulz and

[13] H. Coing, (in:) M. F. Feldkamp (ed.), *Für Wissenschaft und Künste. Lebensbericht eines europäischen Rechtsgelehrten*, Berlin 2014.

[14] V. Erkkilä, *The Conceptual Change of Conscience. Franz Wieacker and German Legal Historiography 1933–1968*, Tübingen 2019, pp. 102, 133.

[15] K. Tuori, *Narratives and Normativity*, "Law and History Review" 2019, Vol. 37.2, p. 606.

[16] F. Wieacker, *Privatrechtsgeschichte der Neuzeit*, 1st ed. Göttingen 1952; 2nd ed. Göttingen 1967.

[17] V. Winkler, *Moderne als Kriese*, *Kriese als Modernisierung*, "Forum Historiae Iuris" 2005, p. 13.

Pringsheim. They were, like most German specialists in Roman law during the era directly following the entry into force of the BGB, exclusively "scholars of ancient Roman law". As with Daube, they were both, as a rule, uninterested and incompetent in medieval and, *a fortiori*, later developments of Roman law.[18]

For Fritz Pringsheim, who unfortunately was not the subject of any of the contributions to the culmination-book, apart from the partial exception of the, alas, brief text of Hans-Peter Haferkamp ("Byzantium!", pp. 145–157), this picture of fidelity to ancient Roman law holds true without reservation. In his own personal reflections, Pringsheim, a front-line soldier and officer of the Wilhelmine Army, situated himself squarely as a pure text-investigator within the wider framework of legal history. As he conceded on his 75th birthday, "I am not sure that I have anything general to say … I lack a real philosophical sense and prefer to sit over texts and interpret them in such a way that the more general, the Spirit of Right, emerges".[19]

The limitation to the study of solely ancient Roman law is not so plain in the case of Fritz Schulz, who was also author of several remarkable Bractonian studies in addition to his last papers on the *quare*-method of the Bolognese glossators.[20] However, Schulz too would have been deeply surprised to see himself celebrated today as spiritual father of the neo-pandectist methodology or an honorary president of European Law Institute (ELI) in Vienna. Already Koschaker emphasized in his *Europa und das römische Recht* that the Nazis expelled from Germany only "representatives of the neohumanistic orientation, papyrologists" (*Vertreter der neuhumanistischen Richtung*, *Papyrologen*),[21] and not the practical neo-pandectists, authentic lawyers rooted to the native soil.

3. EMERGENCE OF THE "EUROPEAN PROJECT"

This project, whose vagueness was already adduced, is considered by the FoundLaw team a direct consequence of exile or maybe even, as affirms Tuori in the somewhat hazardous, previously cited formulation, "a part of the process of exile". Already some time ago legal historians noted that between the period of the Third Reich and postwar times there was no significant change of narrative[22]

[18] A. Rodger, *David Daube*..., p. 243.

[19] Quote in T. Honoré, *Fritz Pringsheim 1882–1967*, (in:) J. Beatson, R. Zimmermann (eds.), *Jurists Uprooted*…, p. 229.

[20] W. Ernst, *Fritz Schulz* 1879–1957, (in:) J. Beatson, R. Zimmermann (eds.), *Jurists Uprooted*..., pp. 114, 185–187.

[21] P. Koschaker, *Europa und das römische Recht*, 1st ed. Biederstein 1947; 4th ed. München-Berlin 1966, p. 368; cf. T. Giaro, *Aktualisierung Europas*, Genova 2000, pp. 39, 137.

[22] V. Winkler, *Moderne als Kriese*, *Kriese als Modernisierung*..., pp. 13–14, 22–23.

and that, on the contrary, there were clear symptoms of narrative continuity.[23] After the war, Western legal historiography had some valid reasons to continue the approach of the Nazi era; namely, the dominance of cultural nationalism in the wake of liberation from German oppression and the returning threat of Soviet communism.

As far as Germany is concerned, legal academics after 1945 remained the same as before. As late as 1993 the famous 'Maunz case' corroborated the proverb that you can't teach an old dog new tricks. It was particularly Wieacker who, representing a kind of business-as-usual approach, assumed the task of eliminating from German legal scholarship any idea of a cathartic Point Zero.[24] Moreover, in his review of Koschaker's *Europa*, published in 1949, Wieacker somewhat brutally, yet ultimately with complete accuracy, disqualified the reports about the sufferings of Roman lawyers in Nazi Germany as exaggerated; following Koschaker he declared them a "dramatization".[25] We leave undecided the question of whether he, sentenced in 1947 by a *Spruchkammer* in Göttingen as a follower or "fellow traveler" (*Mitläufer*) of the Nazis,[26] was the most qualified person to pronounce such a reductive judgement.

However, particularly in view of the annexation (*Anschluss*) of the "Federal State of Austria" to the German *Reich* as its *Ostmark* in 1938, Wieacker could have also taken into account two interesting Roman lawyers of Jewish origin: Stephan Brassloff (1875–1943) and Josef Hupka (1875–1944).[27] Both were professors at the Law Faculty of Vienna University and both victims of the infamous hybrid concentration camp and ghetto Theresienstadt (Terezín), located in the Protectorate of Bohemia and Moravia. Brassloff was deported there together with his wife in 1942 and already on 25 February 1943 had died there. Hupka fled together with his wife in 1939 to Zürich and, after their asylum bid had been declined, to Amsterdam, from where in 1944 they were deported to Theresienstadt; Hupka died there on 23 April 1944.

It is of utmost interest that as late as 1951, Pringsheim, in his review of Koschaker's *Europa und das römische Recht*, also expressed sceptical opinions – similar to those of his busy pupil Wieacker – on the opportunity of examining

[23] B. Rüthers, *Entartetes Recht*, München 1988, pp. 192–203; H. Rottleuthner, *Kontinuität und Identität*, (in:) F. J. Säcker (ed.), *Recht und Rechtslehre im Nationalsozialismus*, Baden-Baden 1992, pp. 241–254; K. Tuori, *Narratives*..., p. 608.

[24] J. Rückert, *Zu Kontinuitäten und Diskontinuitäten in der juristischen Methodendiskussion nach 1945*, (in:) K. Acham et al. (eds.), *Erkenntnisgewinne, Erkenntnisverluste*, Stuttgart 1998, pp. 144–155; J. Benedict, *Culpa in Contrahendo. Transformationen des Zivilrechts*, Vol. 1, Tübingen 2018, pp. 454, 472.

[25] F. Wieacker, *Rez. P. Koschaker, Europa und das römische Recht (1947)*, "Gnomon" 1949, Vol. 21, p. 190.

[26] V. Erkkilä, *The Conceptual Change of Conscience*..., pp. 148–152.

[27] T. Giaro, *Aktualisierung Europas*..., p. 90.

once more questions of Nazi rule.[28] According to Pringsheim – a protestant and frontline combatant of WW I unwilling to reopen the wounds of the Nazi era – the whole chapter XVII of Koschaker's *Europa* book about Roman law during National Socialism as well as the author's scattered observations on "racial questions", including the problem of the Orientalization of later Roman law,[29] were already superfluous. Moreover, they distracted – only two years after the end of the war – from the essential serious concerns of the book.

Coming back to what the culmination-book qualifies, albeit not very precisely, as the postwar "European project", we must regretfully question Tuori's assumption of a sudden emergence of Europeanist traits within German legal historiography after WW II. As a matter of fact, the new discipline of "Privatrechtsgeschichte der Neuzeit" was only a kind of reinvention of a past innovation, which was constituted by the old study program introduced on 18 January 1935 by the sworn Nazi Karl August Eckhardt. Wieacker, predestined as one of the probable executors of this program, defended it still as late as 1976 as "essentially not politically motivated".[30]

In this sense, Wieacker's "Privatrechtsgeschichte der Neuzeit", effectively published in 1952, had come into life, in its main idea, conception and structure, in a manner of speaking "before 1945".[31] In postwar Germany, this new course in the law curriculum was reborn with more occidental inclination, but its original name was not the same as in the English translation of Tony Weir, published in 1995 as "A History of Private Law in Europe with particular reference to Germany". The original Course was defined in German, in both editions of 1952 and 1967, as simply "Privatrechtsgeschichte der Neuzeit unter besonderer Berücksichtigung der deutschen Entwicklung".[32]

It is, however, doubtful whether we may consider Wieacker's 1952 work to stand with equal fidelity as a continuation of the reflection on legal history advanced by the exiled scholars during the Nazi period as it was of the themes developed during that same period by the regime supporters. The inspection of the works of the former, Pringsheim, Schulz and Daube, performed thoroughly by Tuori (pp. 35–51), shows that they became possibly more cosmopolitan and that they popularized Roman law studies in the English language as well as, consequently, in the Anglo-Saxon world. But, as Tuori (p. 45) correctly notes, we are not entitled to suppose that they dedicated their consideration and meditation

[28] F. Pringsheim, *Gesammelte Abhandlungen*, Vol. I, Heidelberg 1961, p. 63.

[29] P. Koschaker, *Europa und das römische Recht*..., pp. 311–336 of the 1966 edition, ibid. pp. 158–159.

[30] T. Giaro, *A Matter of Pure Conscience*..., p. 22.

[31] V. Winkler, *Moderne als Kriese*, *Kriese als Modernisierung*..., p. 13.

[32] J. Rückert, *Privatrechtsgeschichte der Neuzeit: Genese und Zukunft eines Faches?*, (in:) O. Behrends, E. Schumann (eds.), *Franz Wieacker*, *Historiker des modernen Privatrechts*, Göttingen 2010, pp. 75–118.

during and after WW II to new metaphysical topics such as the origins of totalitarianism, anti-Semitism or the experience of the Shoah.

It is rather the concept of Europe that changed since Nazi times. Although already the Nazis spoke readily about Europe, they mentioned by preference "new" Europe[33] with its "new order",[34] exactly as they spoke about "new" Germany, "new" German law, the "new" German State with its "new" tasks, "new" German jurisprudence, "new" legal science, etc. Prior to the Nazi era, Bismarck's *Reich*, which lasted until 1918, constituted the ideological basis in Germany for national liberal, national conservative, national radical, national socialist and many similar thinkers.[35] Hitler introduced into politics the vision of a *Germanisches Reich Deutscher Nation*, which combined elements of racism and living space ideology,[36] and Wieacker's friend Ernst Rudolf Huber adopted in his textbook of 1939 the since then popular term "Great German Empire" (*Großdeutsches Reich*).[37]

However, any analysis of the difference between a 'good old Europe', in the sense of the Occident (*Abendland*), and the new Europe of the Nazis, built upon the Schmittian idea of the Large Area (*Großraum*) as realized for example in the "Society for Planning the European Economy and the Economy of Large Areas" (*GeWG*), is lacking in the culmination-book. Indeed, the distinction itself is absent from the work. On the basis of such renown monographs as "Darker Legacies of Law in Europe", published by Christian Joerges and Ghaleigh Singh in 2003, Tuori (7) states only very generally, that "Nazi legal thought held many of the same ideas as the European integration". While this may be true, the European Union has not yet became, thank Goodness, a racial organization.

4. WHY WAS ROMAN LAW CONSIDERED JUDAIZED?

Already in 1934, Hans Frank, Head of the National Socialist Jurists' Association, President of the Academy of German Law and Reich Minister Without Portfolio, distinguished clearly that the Nazi battle against Roman law "does not concern the law of the original state of Rome. It addresses the falsification of

[33] *Das neue Europa. Beiträge zur nationalen Wirtschaftsordnung und Großraumwirtschaft*, Dresden 1941.

[34] A. Proelß, *Nationalsozialistische Baupläne für das Europäische Haus*, "Forum Historiae Iuris" 2003, pp. 1–33; R. Bauer, *The Construction of a National Socialist Europe during WW II*, Routledge 2020, pp. 95–149.

[35] T. Giaro, *Aktualisierung Europas…*, pp. 62, 157.

[36] E. Wadle, *Visionen vom 'Reich'. Streiflichter zur Deutschen Rechtsgeschichte zwischen 1933 und 1945*, (in:) J. Rückert, D. Willoweit (eds.), *Die Deutsche Rechtsgeschichte in der NS-Zeit*, Tübingen 1995, p. 245.

[37] G. Hamza, *Iura antiqua ac iura moderna*, Vol. I, Budapest 2010, pp. 317, 322.

Roman law we inherited several centuries ago in the guise of Roman-Byzantine law".[38] In 1936, at the *Istituto Fascista di Cultura* in Rome, this same Frank shifted the target of Nazi hatred, which now became defined as neither the Roman law of the later Romans nor the Roman law of the Byzantines, but rather as the Roman law of the *doctores juris* of the reception era.[39]

In his chapter "Exiled Romanists between Traditions: Pringsheim, Schulz and Daube", Tuori (pp. 38–40) shows awareness that the Oriental roots of Roman law were considered suspect from the racial point of view.[40] At the deepest level, this was driven by the nationalism of the 19th century and its need to invariably attribute great endeavours to one leading western nation. So the history of Roman law in the time of decline was rashly concretized as the history of racial decline.[41] Consequently, classical law could only be created by true Roman jurists during the age of the Principate in the West of the Empire. It was born without any polluting influence from the East and avoided the contaminations of the late imperial Eastern legislation.

Paul Koschaker fought the Orientalization doctrine, according to his own account, because it unfavourably influenced the appreciation of Roman law among the general public of Germany. In this framework, he stressed that Orientalization was coarsened by Oswald Spengler into Semitisation which, in its turn, was brutalized to Judaization. However, Koschaker clarifies that Orientalization does not automatically mean Semitization which, in its turn, does not mean Judaization (*Verjudung*).[42] From this utterance we can infer almost immediately that Koschaker readily admitted the Orientalization and Semitization of Roman law, but never its Judaization, which would be too serious a blemish on the Roman reputation.

Of course, in investigating the origins of the Judaization-theory, we must take into consideration newspaper, radio and poster propaganda, trivial literature, comics and the remaining fields of mass culture whose market was entirely monopolized by the Nazis. It was left to the author of a commendable study of the Nazi cultural revolution (*La révolution culturelle nazie*, Gallimard 2017), Johann

[38] H. Frank, *Neues Deutsches Recht – Rede vor dem diplomatischen Korps und der ausländischen Presse am 30. Januar 1934 bei einem Empfangsabend des außenpolitischen Amtes der NSDAP*, München 1934, p. 3.

[39] H. Frank, *Die Zeit des Rechts*, "Deutsche Rechtswissenschaft" 1936, Vol. 1, pp. 1–3; cf. M. Housden, *Hans Frank. Lebensraum and the Holocaust*, Palgrave Macmillan 2003, pp. 62–66.

[40] In the same sense J. Giltaij, *Reinventing the Principles*, p. 77 (SSRN: https://ssrn.com/abstract=3377309).

[41] V. Winkler, *Der Kampf gegen die Rechtswissenschaft…*, pp. 180–181.

[42] P. Koschaker, *Probleme der heutigen romanistischen Rechtswissenschaft*, „Deutsche Rechtswissenschaft" 1940, Vol. 5, p. 115; cf. T. Giaro, *Der Troubadour des Abendlandes*, (in:) H. Schröder, D. Simon (eds.), Rechtsgeschichtswissenschaft in Deutschland 1945–1952, Frankfurt a.M. 2001, pp. 62–63; id., *Paul Koschaker sotto il nazismo: un fancheggiatore 'malgré soi'*, (in:) Studi in onore di Mario Talamanca, Vol. IV, Napoli 2001, pp. 179–80.

Chapoutot, to unveil in his chapter "The Denaturalization of Nordic Law: Germanic Law and the Reception of Roman Law" (pp. 113–125) the huge amount of German popular literature of the Nazi period referring to the "Judaization" of Roman law and its desirable remedies.

Chapoutot cites Hermann Schroer's observation from the infamous Colloquium against the Jewish spirit in legal science organized by Carl Schmitt in October 1936 in Berlin. Schroer depicts the locus of Germanic law shifting "from the man of the people to professional jurists, to scholars, in the middle of the 16th century, that is to say in an era where one can feel the direct influence of Roman law coming from the East (*oströmisches Recht*) and from the *Schulchan Aruch* of the Jews" (p. 118).[43] This observation was soon adopted by the chief racial theorist of the Nazis, Alfred Rosenberg, in his passage on "imperial doctors foreign to the people" (*kaiserliche volksfremde Doktoren*).[44]

According to the anonymous brochure entitled, in English translation, "Paragraph-Slavery and its Purpose", published somewhere in Germany in 1937, "a foreign principle had effectively been interjected" between Roman law true to its origins and Roman law inherited from the East. This racial principle was foreign to Roman nature itself: "the law that it passed on to the Germans is a Judaified (*verjudet*) law".[45] Among those who expressed themselves on this theme with particular strength are included such scholarly and thoroughgoing anti-Semites as Ferdinand Fried (Ferdinand Friedrich Zimmermann) and Fritz Schachermeyr,[46] who accused Roman lawyers, beginning with Salvius Julianus, of having "Orientalized and Judaified" Roman law (Chapoutot, p. 121).

Of the same ilk was a manual for SS officers, likely published in 1941, which highlighted several points of contrast between the individualistic Roman-Byzantine and the collectivist Saxon law.[47] In this spirit, the doctrine of classical law, particularly popular in Germany since the end of the 19th century, anachronistically projected the ideals of Occidentalism and racial purity back onto ancient Roman jurisprudence. The reconstruction of classical law as a law long defunct, but distinguished nonetheless by its incomparably high level, sought to make of Roman law something like a gold standard. Current law could only hope to replicate, reproduce and imitate it. This move assured the hegemony of contemporary Roman lawyers over any mere private law specialist.[48]

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[43] H. Schroer, *Das Verhältnis des Juden zum Gesetz*, Berlin 1936, p. 19.

[44] A. Rosenberg, *Der Mythus des 20. Jahrhunderts*, München 1937, pp. 567–568.

[45] *Die Paragraphensklaverei und ihr Ende* (1937) p. 9.

[46] F. Fried, *Der Aufstieg der Juden*, Goslar 1937; F. Schachermeyr, *Indogermanen und Orient*, Stuttgart 1944.

[47] *Schulungs Leitheft fur SS-Fuhreranwärter der Sicherheitspolizei und des SD* (1941?), p. 106.

[48] T. Giaro, *Max Kaser 1906–1997*, "Rechtshistorisches Journal" 1997, Vol. 16, pp. 282–293.

The doctrine of Orientalization of Roman law, which in the meantime became a mere euphemism for "Judaization", did not disappear from the scholarly discourse of the Romanists overnight. Koschaker defended Roman law against this specter as late as 1947 in his popular monograph *Europa und das römische Recht*. His Italian friend Salvatore Riccobono, to whom Koschaker dedicated this monograph, delivered an opening speech during the war at the Italian Culture Institute *Studia Humanitatis* which pursued the same agenda. The speech was reproduced in 1951 in the *post bellum* volume of the leading Roman law journal of Italy, *Bullettino dell´Istituto di Diritto Romano.*

The speech was originally delivered by Riccobono in the capital city of Nazi Germany on 6 December 1942, as the situation on the Eastern front started to become precarious and defeat of the German ally seemed increasingly likely. Nonetheless, Riccobono, proponent of the autonomous historical model of "straight development" (*sviluppo rettilineo*), firmly defended Roman law of every age from any suspicion of Jewish – the allegation which in his view demanded the most vigorous rebuttal – and Eastern influence: *nihil in eo Hebraici iuris nihilque fere orientalium institutorum*.[49] Exactly the same formula was repeated in the version reprinted in the *Bullettino* almost ten years later.

5. WAS GERMAN ACADEMIA HOME TO SOME REAL NAZIS?

Upon closer examination, this question is more serious than it first appears, particularly since Erkkilä insists on drawing a neat demarcation between the German academic "legal scholars" and the "Nazis". According to Erkkilä, in the course of the pitiable process of de-Nazification, the former were "suddenly … accused of enabling the crimes" of the latter (211). This seems to exclude any overlapping membership between the two groups. But perhaps there are true Nazis among the German legal academics whose discovery awaits us? Among those enjoying a bad reputation of this sort are chiefly specialists in German law and Germanic legal history, particularly Hans Fehr, Hans Erich Feine and Claudius Freiherr von Schwerin.[50]

But we may count among them also another Germanist, Karl August Eckhardt.[51] This member of the SA and the NSDAP, was an SS-Sturmbannführer and personal friend of Himmler. Whilst at the Ministry of Education in 1935,

[49] S. Riccobono, *De fatis iuris Romani*, "Bullettino dell´Istituto di Diritto Romano" 1951, Vol. 55–56, p. 355; cf. T. Giaro, *Aktualisierung Europas*..., pp. 89, 143; M. Varvaro, *Salvatore Riccobono tra il 'genio di Roma' ed il fascismo*, "Bullettino" cit., 2019, Vol. 113, pp. 111, 114.

[50] R. C. van Caenegem, *European Law in the Past and the Future*, Cambridge 2002, pp. 103–112.

[51] R. C. van Caenegem, *European Law*..., pp. 120–126.

Eckhardt prepared the new Study Program for Law Faculties. During his de-Nazification in 1947, he declared to know nothing about the SS's participation in the persecution of Jews and characterised concentration camps as institutions aimed solely at re-educating 'asocial individuals' and criminals.[52] At the end of 1948, having handed over the bookstock of the SS Germanist Institute (*Deutschrechtliches Institut des Reichsführers SS*) to Hermann Conrad, chair of Germanic legal history at Bonn, Eckhardt asked him, what would he do when one day the SS claim the books back?[53]

Such colourful figures are missing from the pages of the culmination-book. Instead, we meet there as regime supporters mainly Roman lawyers, particularly the two who are our old acquaintances, the renown wheeler dealers Koschaker and Wieacker. Moreover, their portrayal in those pages is accompanied by the usual conflicting opinions on their attitudes and actions. Of Koschaker we learn, on one hand, that he was an opponent of the regime who "was effectively ousted from his office in Berlin" (Giltaij, "Autonomy and Authority", p. 73) and, on the other, that his "ideas were not considered somehow risky by the Nazis" (T. Beggio, "The Arduous Path to Recover a Common European Legal Culture: Paul Koschaker 1937–1951", p. 167).

About Wieacker, there are also ambivalent conclusions, in this case provided by one and the same author, the specialist in the world of his ideas, Ville Erkkilä. On one hand, we discover that "it is not accurate to categorize" Wieacker "as a supporter of National Socialism," but, on the other hand, that "he had to, and he was willing to, reconcile with some of the ideological streams of the Third Reich" (Erkkilä, "Roman Law as Wisdom: Justice and Truth, Honour and Disappointment in Franz Wieacker's Ideas on Roman law", p. 202). So the dish, not really gentle on the stomach, is seasoned from the start with the highest juristic values: Wisdom, Justice, Truth and Honour.

Notoriously, Pringsheim "was proud of Wieacker … whom he defended against the charge of slanting his scholarly work to gain favour with the Nazis".[54] However, as Wieacker, generally considered a "passive sympathizer" of the Nazis (p. 202), tried to invest his Nazi-friend Ernst Rudolf Huber with the chair of constitutional law at Freiburg in Breisgau in 1952, Pringsheim – as is renown – successfully blocked the move.[55] This did not prevent Wieacker going further. He consummated his role in the Nazification of German legal scholarship by making

[52] W. Proske (ed.), *Täter*, *Helfer*, *Trittbrettfahrer. NS-Belastete aus der Region Stuttgart*, Vol. 10, Gerstetten 2019, p. 159.

[53] G. Kleinheyer, *Die Rechts- und Staatswissenschaftliche Fakultät nach der Stunde null*, (in:) T. Becker (ed.), Zwischen Diktatur und Neubeginn. Die Universität Bonn im Dritten Reich, Göttingen 2008, p. 247.

[54] T. Honoré, *Fritz Pringsheim…*, (in:) J. Beatson, R. Zimmermann (eds.), *Jurists Uprooted*…, p. 227.

[55] E. Grothe, *'Strengste Zurückhaltung und unbedingter Takt'. Der Verfassungshistoriker Ernst Rudolf Huber*, (in:) E. Schumann (ed.), *Kontinuitäten und Zäsuren. Rechtswissenschaft und*

a significant contribution to the re-Nazification of the Law Faculty in Gottingen, which between 1953 and 1973 accommodated members of the *Kieler Schule*: Huber, Michaelis and Schaffstein.[56]

As a matter of fact, Wieacker deemed these old comrades of his no more responsible for the oppressions and atrocities committed by "the Nazis" than he was himself. After WW II he wrote a famous history of Western private law (*Privatrechtsgeschichte der Neuzeit*) understood as a history of European jurisprudence. The work, translated already in 1995 into English and openly admired by a whole generation of German and foreign jurists, continues to be praised as an apology of the juristic stance,[57] but it can also be described, conflictingly, as a history of juristic thought's failure to attain to its social duties or even of its material concealment of its own misconduct.

But among German legal academics, too many were involved to notice that there was something wrong.[58] Karl August Eckhardt was not alone in considering the death camps to be institutions of re-education and Wieacker's friend Ernst Rudolf Huber "could not see himself as having advanced the National Socialist cause".[59] During the Nuremberg trials, one of the Nazi's most brilliant lawyers and "the Butcher of Poland" Dr. Hans Frank,[60] remembered by way of exculpation that he had been "marginal to what had happened". However, maybe this is merely consistent with Frank's linguistic usage of "marginal", since according to one of his earlier statements "that we are sentencing 1.2 million Jews to death by starvation is just a marginal issue".[61]

In the culmination-book, Erkkilä, who also authored Wieacker's biography "The Conceptual Change of Conscience. Franz Wieacker and German Legal Historiography", yet again depicts his subject as a conservative erudite; a man concerned first of all with social justice, but who, in relation to the world 'out there', assumed principally the comfortable position of an uninvolved observer. In this context, Erkkilä notes that "Wieacker's tool for understanding and categorizing the social phenomena he personally experienced was always his ideas on Roman

Juristen im ‚Dritten Reich', Göttingen 2008, pp. 336–37, 340–41; V. Erkkilä, *The Conceptual Change of Conscience*..., pp. 255–57.

[56] E. Schumann, *Die Göttinger Rechts- und Staatswissenschaftliche Fakultät 1933–1955*, (in:) id. (ed.), *Kontinuitäten und Zäsuren*..., pp. 107–108; T. Giaro, *A Matter of Pure Conscience*..., p. 20.

[57] J. Rückert, *Geschichte des Privatrechts als Apologie für Juristen*, "Quaderni Fiorentini" 1995, Vol. 24, pp. 556–61.

[58] T. Giaro, *Vor-, Mit und Nachdenker des Madagaskar-Plans*, "Rechtshistorisches Journal" 2000, Vol. 19, p. 135.

[59] V. Erkkilä, *The Conceptual Change of Conscience*..., p. 137; cf. T. Giaro, *A Matter of Pure Conscience*..., p. 19.

[60] G. O'Connor, *The Butcher of Poland. Hitler's Lawyer Hans Frank*, Spellmount 2013; P. R. Bartrop, E. E. Grimm, *Perpetrating the Holocaust. Leaders, Enablers and Collaborators*, ABC-Clio 2019, p. 89.

[61] M. Housden, *Hans Frank. Lebensraum*..., pp. 237, 146.

law" (p. 201). In reading this depiction, one cannot help but gain the impression that Wieacker must have been a person who never came of age.

Erkkilä discusses in particular Wieacker's spiritual subjection to both of his mentors: first, until the end of the war, Carl Schmitt (204–209), and second, after the war, Hans-Georg Gadamer, whose possible opportunism in relation to the Nazi regime is treated with proper discretion (209–215). By contrast, Schmitt is counted by Erkkilä (210)[62] – together with the leading Nazi scholar of constitutional and administrative law, Ernst Forsthoff – among those young jurists who, first being entranced and then subsequently disappointed by Nazism, concentrated in their writings of the early 1940s on the 'pure core' of legal science and its eternal premises. Such a methodological twist would enable these young scholars to interpret law not according to Nazi whim, but to tradition, national culture and ideals of social justice (210).

Erkkilä provides an account of some disruptions of the "collegiality between Wieacker and Schmitt" lasting up until 1945 (p. 203), among which that provoked by disagreement as to the historical role of Roman law "must have been the most crucial" (206). In this field, Wieacker, the younger man by twenty years, tried in vain to convince Schmitt that although the divorce of Roman law from social reality could be typical for the age of the reception of Roman law, all in all it constituted an "external, late and misleading trait" (207). Erkkilä omits, however, another possible important point of friction between Schmitt and Wieacker. Whereas the latter, as Erkkilä argues elsewhere, was never a visceral anti-Semite,[63] the former had always remained a staunch supporter of this ideology.[64]

6. SOME RESOURCEFUL PROFESSORS

Ultimately, Erkkilä, whose humanitarian tendency to civilize historical Nazism we have already encountered in Wieacker's biography and criticized in this journal,[65] succeeds in finding a common denominator for all three thinkers, Schmitt, Gadamer and Wieacker. This resided in "their aim to fight against the positivistic ideas of law and society" (215). So the major villain was – insists Erkkilä in the wake of the prevailing opinion of German postwar legal scholarship – just legal positivism. "The legal havoc of the 1930s was a result of theo-

[62] Citing F. Meinel, *Der Jurist in der industriellen Gesellschaft. Ernst Forsthoff und seine Zeit*, 2nd ed., Berlin 2012.

[63] V. Erkkilä, *The Conceptual Change of Conscience*..., pp. 86–87; but cf. T. Giaro, *A Matter of Pure Conscience?...*, p. 20.

[64] D. Egner, *Zur Stellung des Antisemitismus im Denken Carl Schmitts*, "Vierteljahreshefte für Zeitgeschichte" 2013, Vol. 3, p. 345–361.

[65] T. Giaro, *A Matter of Pure Conscience?...*, pp. 9–28.

retical dogmatism … Legal positivism was to be blamed for the misreading and mal-development of law. With its 'cold' and 'heartless' approach, it had perverted the meaning of law" – Erkkilä maintains with obstinacy worthy of a better cause (211).[66]

The Holocaust as a consequence of "theoretical dogmatism" and a "heartless approach"? This big historical explanation is worth remembering. The same tendency to normalize the evil deeds and dark doings of the Nazi regime are revealed by Erkkilä's usage of the expressions "fascist" and "fascism" (202, 203, 204, 210) in direct reference to German Nazism.[67] This use of language puts a genocidal system on equal footing with the merely authoritarian regimes of Italy or Spain. Even if not strikingly democratic, they lacked, after all, the Nazis' mass-murderous ambitions.[68] It was precisely Nazism and Fascism that Wieacker himself differentiated when he mentioned – in his review of Koschaker's *Europa* – the prompt curtailment of German invectives against Roman law out of respect for (Italian) Fascism (*mit Rücksicht auf den Faschismus*).[69]

Among the final reflections of his insightful assessment of private law in Nazi Germany, Eugen Dietrich Graue mentions "resourceful (*einfallsreich*) professors" who "drew on pre-Christian and medieval institutions in order to expel the spirit of Enlightenment and tolerance forever from German courtrooms and lecture halls".[70] While contemplating this sentence the reader must bear in mind Wieacker's two-pronged embrace of Germany's return to the ancient Roman *connubium* in the modern anti-Semitic world and Koschaker's proposal for a partial reintroduction of patriarchally-rooted marriage – the medieval Germanic *Muntehe* – into the German law of AD 1939.[71]

The time for a developed juristic apologetic of the European jurist will eventually come during the Bonner Republic, namely in 1952 and 1967, but now we place ourselves thirty years earlier, in the Third Reich of 1937. What is needed now are apologetics in respect of the racial legislation, i.e. the Law for the Protection of German Blood (*Blutschutzgesetz*) of 15 September 1935 and the Marital Health Law (*Ehegesundheitsgesetz*) of 18 October 1935. This seemed to be fully in order, particularly in view of the fact that the institution of limited marriage capacity was known to ancient Roman law, which was, after all, "Wieacker's tool for understanding and categorizing the social phenomena he personally experienced" (Erkkilä, p. 201).

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[66] J. Rückert, *Geschichte des Privatrechts als Apologie*..., pp. 556–561.

[67] But see also J. Giltaij, *Reinventing the Principles*, p. 79 (SSRN: https://ssrn.com/abstract=3377309).

[68] W. Wippermann, *Totalitarismus-Theorien. Die Entwicklung der Diskussion von den Anfängen bis heute*, Darmstadt 1997, pp. 39–44.

[69] F. Wieacker, *Rez. P. Koschaker, Europa*…, p. 191.

[70] E. D. Graue, *Das Zivilrecht im Nationalsozialismus*, (in:) F. J. Säcker (ed.), *Recht und Rechtslehre im Nationalsozialismus*, Baden-Baden 1992, p. 123.

[71] T. Giaro, *A Matter of Pure Conscience?*..., pp. 14–15; id., *Memory Disorders*..., p. 16.

Even if we mention them together, Wieacker's failure is probably greater than Koschaker's. The former did not hesitate to put two central dogmas of liberal private law, i.e. private property and equality before the law, at the unqualified disposal of the Nazi lawmaker. Anyway, both Wieacker and Koschaker have supplied their modest – but absolutely voluntary – contribution as co-workers on the construction site of the Nazi temple dedicated to the worship of injustice, iniquity, plunder and mass murder. Complaints about the cold and heartless legal positivism of the Nazis, raised by Erkkilä by way of exculpation (211), seem to be an extraordinary blunder indeed.

However, I intend neither to limit the spiritual freedom of users and beneficiaries of European Union research funds, nor provide them with fragments of practical linguistic advice for daily application. Rather, I would like to close with an admonishment to legal historians. Historians should neither forgive nor forget, nor think too much in terms of practical consequences. We cannot first whitewash Wieacker's reputation, and only after this ablution pay tribute to his genial postwar oeuvre. As in the case of his mentor Carl Schmitt,[72] we face a double necessity: of reconsidering Wieacker's twelve-year long Nazi episode, but also of extending our knowledge of the scholar's postwar work.

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[72] O. Beaud, *Carl Schmitt*, *juriste nazi ou juriste qui fut nazi*, "Droits" 2004, Vol. 40, pp. 207–218.

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THE CULMINATION-BOOK. TRYING TO MAKE SENSE OF THE NAZI YEARS

Summary

Are we entitled to consider the exiled German legal historians of Jewish origin, Fritz Pringsheim, Fritz Schulz and David Daube, on equal footing with Franz Wieacker, Paul Koschaker and Helmut Coing as founding fathers of the shared European legal tradition? In this way, the asylum seekers would be equated with the perpetrators or profiteers of their expulsion. But first of all: have the exiled actually contributed something to this "shared" legal history?

KEYWORDS

Franz Wieacker, Carl Schmitt, Nazism, anti-Semitism, totalitarianism, racial legislation, *connubium*, Aryanising, Kieler Schule, *Muntehe*, Roman foundations of Europe

SŁOWA KLUCZOWE

Franz Wieacker, Carl Schmitt, nazizm, antysemityzm, totalitaryzm, ustawodawstwo rasowe, *connubium*, aryzacja, Szkoła Kilońska, *Muntehe*, rzymskie podwaliny Europy