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6

DIEGO LÓPEZ MEDINA

El proceso judicial europeo en América Latina: crítica de la Historia oficial y propuesta de nuevas perspectivas

80

CLÁUDIA TOLEDO

Judicial activism or judicial review:
distinction criteria and comparative analysis: Brazil, Argentina, Mexico,
Germany

106

TOMASZ GIARO

A Matter of Pure Conscience? Franz Wieacker And his “Conceptual
Change”

125

GIACOMO CAPUZZO

A Comparative Study on Algorithmic Discrimination between Europe and
North-America

158

ANNA PARRILLI

Religious Education in public schools and minority rights: a comparative
study of Italy and Turkey

174

ANDREA SEBASTIANI

Anatomy and terminology of business organizations: a brief comparison
and assimilation between Chinese and Italian companies

A MATTER OF PURE CONSCIENCE?
FRANZ WIEACKER AND HIS “CONCEPTUAL CHANGE”¹

*Tomasz Giaro*²

TABLE OF CONTENT

I. A HIGH-RISK BIOGRAPHY; II. LEGAL CONSCIOUSNESS; III. LEGAL CONSCIENCE; IV. RACISM: THE TESTIMONY OF WIEACKER’S WRITINGS; V. NAZISM: THE TESTIMONY OF WIEACKER’S CONDUCT; VI. DEFENCE STRATEGIES. *PERSILSCHEINE* AS HISTORICAL SOURCES?; VII. ALWAYS A SCHOLAR, ALWAYS THE SAME SCHOLAR?; VIII. REINTEGRATION OF THE NAZIS INTO THE EUROPEAN LEGAL TRADITION?; IX. WERE THE NAZIS PROGENITORS OF CURRENT LEGAL HISTORY?

Based on a recent biography of Franz Wieacker (1908-1994) two central questions are examined. Is it allowed to analyze a young, but already prominent German law professor of the Nazi era as a pure scholar whose identity remained unchanged from the times of Weimar to the Federal Republic of Germany? Is it plausible to treat the Nazis as progenitors of current European legal history, and in particular as founding fathers of European legal tradition?

I. A HIGH-RISK BIOGRAPHY

Are private letters, particularly letters politically exonerating their author or addressee, reliable? May we consider the so-called *Persilscheine* of the German denazification procedure following WWII a trustworthy historical source? Can a work purporting to be a “history of the ideas of German legal historian Franz Wieacker” (V), which focuses on the personal development of these ideas in Wieacker’s own thought, be seriously written whilst omitting the sole publication devoted to his scholarly activity and achievements during the Nazi era?³ If you would answer all these questions in the affirmative, you will no doubt consider the biography of Wieacker published recently by Dr. Ville Erkkilä a well-made piece of legal historiography.

Wieacker, whom I remember as an urbane elderly gentleman, and whose pupils and pupils’ pupils are today still active in the academy, is an extremely unrewarding object of historical study. On occasion, we encounter his name in connection with awkward propositions; for

¹ Ville Erkkilä, *The Conceptual Change of Conscience. Franz Wieacker and German Legal Historiography 1933–1968*, Tübingen 2019, p. XIII & 314. Numbers in brackets refer to pages of the book.

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³ R. Kohlhepp, *Franz Wieacker und die NS-Zeit*, Zeitschrift der Savigny-Stiftung Romanistische Abteilung 2005, vol. 122, pp. 203-223.

instance, that he made his scholarly career “under the Nazis, but not with the Nazis”,⁴ that his characterization of the reception of Roman law in Germany as ‘scientification’ (*Verwissenschaftlichung*) “was a courageous act, since it could have brought him ... dangerous censure from fundamentalist legal scholars backed by the SS” (125-126),⁵ and that the path of compromise—pursued by Wieacker in the Nazi era—seems compromising, but only “from today’s point of view” (*aus heutiger Sicht*).⁶

It was in the framework of the 1933 Nazi “revolution” that young legal scholars like Wieacker, his mentor Carl Schmitt, and Wieacker’s comrades Ernst Rudolf Huber, Ernst Forsthoff, Erik Wolf, Friedrich Schaffstein, Karl Michaelis, Georg Dahm and some others actively adopted “revolutionary” legal language aimed at the “legal renewal” (*Rechtserneuerung*) of German society and the German state (84). Dr. Erkkilä correctly observes that “Wieacker participated in ‘legal renewal’ with a notable contribution, and published regularly in journals whose ideological stance was unmistakably National Socialist” (86). Phrases recommending something like a “Durchordnung des deutschen Gesamttraums nach einheitlichen raumeigenen Gesichtspunkten”⁷ flowed easily from his pen.

However, in retrospect Wieacker presents himself rather as a victim of his own falsely invested belief in the seriousness of the Nazi renewal.⁸ So the reader is entitled to assume the existence of two Wieackers. The first being that depicted by his benevolent Jewish teacher Fritz Pringsheim in an exonerating letter drafted in 1947 at Oxford:⁹ unpractical, having only scholarly interests, and averse to party politics, and the other: a socially engaged protagonist of a racial ideology, apparently so committed that an orthodox adherent of that ideology, Hans Kreller, singled him out as one of the most energetic

⁴ J.G. Wolf, *Die Gedenkrede*, (in:) In memoriam Franz Wieacker. Akademische Gedenkfeier am 19. November 1994, Göttingen 1995, p. 23.

⁵ The quotation is prefaced by “Liebs asserts”, but I do not see anything similar in D. Liebs, *Franz Wieacker 1908 bis 1994 – Leben und Werk*, (in:) Okko Behrends, Eva Schumann (eds.), *Franz Wieacker. Historiker des modernen Privatrechts*, Göttingen 2010, p. 38.

⁶ O. Behrends, *Franz Wieacker 1908-1994*, *Zeitschrift der Savigny-Stiftung Romanistische Abteilung* 1995, vol. 112, p. XXV.

⁷ F. Wieacker, *Vielfalt und Einheit der deutschen Bodenrechtswissenschaft der Gegenwart*, Stuttgart-Berlin 1942, p. 9.

⁸ F. Wieacker, “*Wandlungen der Eigentumsverfassung*” revisited, *Quaderni Fiorentini per la Storia del Pensiero Giuridico Moderno* 1976-77, vol. V-VI, p. 842.

⁹ Cited by O. Behrends, *Franz Wieacker 1908-1994*, pp. XXVI-XXVII.

(*tatkräftig*) workers at the building site of the German legal community (*Neubau des deutschen Gemeinrechts*).¹⁰

As a historian of ideas, Dr. Erkkilä attaches much more importance to mere concepts than to brute social facts, which appears, for the reader-jurist, not as a particular shortcoming, but as relatively normal. The central concepts of the book are *Rechtsbewusstsein* or legal consciousness (65-176) and *Rechtsgewissen* or legal conscience (177-279). Both are frequently, though not always (234), treated by Wieacker as synonyms (283). Dr. Erkkilä characterizes Wieacker as a legal scholar whose commitment to the concept of legal consciousness was intense and continuous, and remained so in his post-war writings (73).

II. LEGAL CONSCIOUSNESS

Despite Wieacker's embrace of legal consciousness, the concept was not an invention of his, but of the great Savigny (67-69, 71, 179). However, it was also known to the 19th century Russian legal philosophers Kistiakovskij, Novgorodcev, Il'in and Petrażycki, who all tried to fill the gap between a retrograde legal order of the Tsar's Empire and its modern consciousness.¹¹ Both legal consciousness and legal conscience, qualified as "revolutionary", were subsequently introduced in the Soviet *Decree on Courts Nr. 1* of 1917. Thus, while the old law had been abolished *en bloc*, the war communism of 1918-1921 at least found some measure of expression in "legal consciousness" (*pravovoje soznanie*), abridged by the Bolsheviks to *pravosoznanie*.

Similarly to pre-revolutionary and revolutionary Russia, both ignored by Dr. Erkkilä, in the Germany of the 1930s legal positivism was harshly criticized and even condemned as immoral (69). Thus, the importance of legal consciousness in Wieacker's oeuvre is explained by the fact that he was always a strong anti-positivist. "The point of departure for 'new legal science,' and accordingly for the new *Studienordnung* (study program) was anti-positivism" (86). Already in a paper on the all-round renewal of German legal science, published in 1937, Wieacker pleaded for judicial anti-positivism based on the Nazi

¹⁰ H. Kreller, *Weitere Büchereingänge*, Zeitschrift der Savigny-Stiftung Romanistische Abteilung 1944, vol. 64, p. 463.

¹¹ R.S. Wortman, *The Development of a Russian Legal Consciousness*, Chicago, London 1976, pp. 225-234; A. Sproede, „*Rechtsbewußtsein*“ (*pravosoznanie*) als Argument und Problem russischer Theorie und Philosophie des Rechts, *Rechtstheorie* 35 (2004), Sonderheft Russland/Osteuropa, pp. 442-476; A. Walicki, *Legal Philosophies of Russian Liberalism*, Oxford-New York 1967, pp. 213-290.

worldview.¹² However, a question must be allowed: is the rule of law without a grain of positivism imaginable?

In the realm of legal history, Wieacker applied the concept of legal consciousness as a tool to describe the reception of Roman law in Germany which “separated the German legal consciousness and the administration of the state” (128) or, to put it—following Dr. Erkkilä—more bluntly, “the people and the state” (125). As a matter of fact, Wieacker embraced initially, together with the Nazis, the old Germanist topos on the reception of Roman law as a “national misfortune” (*Unglück*) of the Germans. As early as 1940 he characterizes it as a “real calamity” (*echtes Verhängnis*)¹³ and in 1941 laments: “Who could deny that the reception of alien law in Germany would become a calamity?”¹⁴

The concept of legal consciousness continued to be central for Wieacker during the post-war years. In the obituary for Andreas Bertalan Schwarz, a renowned civilian and Roman lawyer of Jewish origin, Wieacker called in 1954 for a renewed European *ius commune* as a protective means against any positivism, whether of “particularistic-national” or “totalitarian” origin.¹⁵ And in his famous 1976 reevaluation of his early doctrine of property,¹⁶ Wieacker traced the source of his juvenile illusions to an anti-positivist faith that the Nazi regime would really aim at a balanced restructuring of the German societal constitution.¹⁷

III. LEGAL CONSCIENCE

Within a common legal consciousness of the people (*Rechtsbewusstsein*), bound to time, place, and historically changing cultural principles, Dr. Erkkilä distinguishes (178) the sub-concepts of “social status” (*Stand*) and “learnedness” (*Bildung*). On the other hand, legal conscience (*Rechtsgewissen*) is an atemporal and non-spatial mental tool for use by juristic

¹² F. Wieacker, *Der Stand der Rechtserneuerung auf dem Gebiete des bürgerlichen Rechts*, Deutsche Rechtswissenschaft 1937, vol. 2, p. 25.

¹³ F. Wieacker, *Einflüsse des Humanismus auf die Rezeption*, Zeitschrift für die gesamte Staatswissenschaft 1940, vol. 100, p. 423; cf. M. Avenarius, *Verwissenschaftlichung als “sinnhafter” Kern der Rezeption*, (in:) O. Behrends, E. Schumann (eds.), Franz Wieacker. Historiker des modernen Privatrechts, Göttingen 2010, pp. 124-136.

¹⁴ F. Wieacker, review *Max Kaser, Römisches Recht als Gemeinschaftsordnung*, Zeitschrift für die gesamte Staatswissenschaft 1941, vol. 101, p. 171.

¹⁵ F. Wieacker, *In memoriam Andreas Bertalan Schwarz*, Zeitschrift der Savigny-Stiftung Romanistische Abteilung 1954, vol. 71, p. 606.

¹⁶ F. Wieacker, *Wandlungen der Eigentumsverfassung*, Hamburg 1935.

¹⁷ F. Wieacker, “*Wandlungen der Eigentumsverfassung*” revisited, p. 842.

experts (177). Legal conscience was grounded in ideas of “scholarly togetherness” or “communality” (*Kameradschaft*) and creative legal wisdom (*Schöpfung*, 178). However, legal conscience – as a form of specifically juristic wisdom – was situated within the legal tradition (183-184), even if it comprised equally the phenomenon of creative legal thinking (205).

Dr. Erkkilä considers Wieacker’s construction of the legal conscience of late republican Roman lawyers as a “point of reference” or “historical ideal” for subsequent legal cultures (226, 249). We know, however, that the Late Republic has produced very few works of juristic literature, so that Wieacker himself was forced to qualify his construction of the legal conscience of this period with the help of the somewhat paradoxical concept of the “pre-literary classic” (*vorliterarische Klassik*).¹⁸ This oxymoron was, on the one hand, rightly refused by Wolfgang Kunkel who, in reference to the notion of ‘classic’, required “something which I can see”,¹⁹ and, on the other hand, finally abandoned by Wieacker himself.²⁰

The concept of the ‘classic’ receives some clarification from the antagonism between vulgarism and classicism, both defined by Wieacker in 1954 as embodying “timeless style phenomena of high juristic civilizations” (*Hochkulturen*).²¹ However, in a more substantial sense, vulgarism also represents a “collapsed legal order” (162) or even the “destruction of a legal system” (172). Neither Wieacker nor Dr. Erkkilä ever queried the utility of the concept “classical law”, which downgrades all subsequent periods to postclassical or vulgar and all earlier ones to pre-classical. That’s just too bad according to a fatalistic Wieacker, as the concept of classical jurisprudence “is simply given to us”.²²

However, as we positively know, the legal classicism of the Late Roman Republic was not only “pre-literary”; it also lacked any relevant mechanism for the oral transmission of legal doctrines of that time: Homers of Roman jurisprudence are unknown. Nevertheless, phantasmal theoretic problems concerning the identification of phenomena usually considered classical, albeit already existing in times preceding the emergence of a classical literature, did not really perturb the German scholarly community in the 1950s when

¹⁸ F. Wieacker, *Vom römischen Recht. Zehn Versuche*, Stuttgart 1961, pp. 165, 173, 175.

¹⁹ W. Kunkel, *rec. Wieacker, Über das Klassische*, Zeitschrift der Savigny-Stiftung Romanistische Abteilung 1952, vol. 69, p. 467.

²⁰ F. Wieacker, *Römische Rechtsgeschichte*, vol. I, München 1988, p. 521; on this controversy cf. T. Giaro, *Max Kaser 1906-1997*, *Rechtshistorisches Journal* 1997, vol. 16, p. 284.

²¹ F. Wieacker, *Vom römischen Recht. Zehn Versuche*, p. 226.

²² F. Wieacker, *Vom römischen Recht. Zehn Versuche*, p. 164; cf. T. Giaro, *Max Kaser 1906-1997*, pp. 282-283.

Wieacker’s “classic” paper was first published. Of much greater relevance in the German legal discourse from the 1930s onward was the problem of the reception of Roman law. At that time, Wieacker initially adopted the view that “Germany was possessed by a hostile national mentality towards any influence of European (Roman) legal culture”; this was a mentality based on “an illusion of the foreign and arbitrary essence of the European legal tradition” (146). As we have already noted, Wieacker consequently qualified the reception of Roman law opportunistically as a “national misfortune” and a “real calamity” for the Germans. Only beginning with his writings of 1944, when the brochure “*Das römische Recht und das deutsche Rechtsbewusstsein*” was published, did the issue of the reception of Roman law in Germany come to be more neutrally characterized as a particular case (*Sonderfall*) of the relationship between European nations and the law of late Antiquity.²³

IV. RACISM: THE TESTIMONY OF WIEACKER’S WRITINGS

After the take-over of 1933, the empirical evidence for the Nazis’ anti-Semitism accumulated at an ever-accelerating rate (79). Nonetheless, Dr. Erkkilä sees no real connection between the anti-Semitic purges at the German universities during the 1930s and the careers of young legal scholars such as Wieacker. Dr. Erkkilä restricts himself to the conclusion that “the dismissal of Jewish professors left many chairs in different universities open, and competition for these vacancies was fierce”. In this situation, the poor young legal scholars of the Aryan race— concludes Dr. Erkkilä somewhat hastily— “had no choice but to toe the Third Reich line“ (84).

Connoisseurs of Wieacker’s scholarly oeuvre would no doubt be surprised by Dr. Erkkilä’s assertions that Wieacker did not participate “in the racist rhetoric of the Third Reich”, and also that his private letters contain “not a single racist remark, nor any signs of willingness to propagate fascist ideology” (87; sic! albeit that the epithet “fascist” suits better the totalitarianism of Italy).²⁴ Well, so we know that he abstained from racist remarks, but—it should be added—he also abstained from anti-racist remarks. However, let us leave the letters aside and examine Wieacker’s public utterances contained in his scholarly works.

²³ F. Wieacker, *Das römische Recht und das deutsche Rechtsbewusstsein*, Leipzig 1944, p. 8.

²⁴ F. Wieacker, *review of Paul Koschaker, Europa und das römische Recht*, *Gnomon* 1949, vol. 21, p. 191.

Not later than 1937, in the second issue of the new legal journal “Deutsches Recht” (the principal organ of the National Socialist Association of German Legal Professionals directed by Hans Frank), Wieacker published a paper dedicated to the historical origins of the Nazi marital reform. Here he approved of the infamous Nazi Law for the Protection of German Blood (*Blutschutzgesetz*) of 15 September 1935 and the equally ill-famed Marital Health Law (*Ehegesundheitsgesetz*) of 18 October 1935. In the same context he endorsed “*connubium* [using the Germanized form *Konnubium*] with the old, racially more or less related, settlement- and fate-neighbors of the German people”.²⁵

Moreover, also in 1937, Wieacker surveyed—in the theoretical law journal of Nazi Germany, “Deutsche Rechtswissenschaft”—the overall condition of legal renewal in the whole sector of civil law. Published as a quarterly of the *Akademie für Deutsches Recht*, and directed by the stalwart Nazi Karl August Eckhardt, the journal was considered the mouthpiece of the *Kieler Schule*. Here Wieacker welcomed wholeheartedly once again the return of the ancient institution of limited marriage capacity (*connubium*).²⁶ As far as can be discerned from Dr. Erkkilä’s extensive biography, both citations remain unknown to the author, or perhaps known but – alas! – judged irrelevant.²⁷

Probably for one of the above reasons both papers are absent from the scholarly bibliography of Franz Wieacker’s writings compiled by Dr. Erkkilä and found at the end of his biographical work (305-306). Interestingly enough, Wieacker probes the legal history of ancient Rome in a search for ennobling historical antecedents (*geschichtliche Ausgangspunkte*) of the Nazi marital reform instead of identifying it directly by its proper name: barbarism; a term which after the war he does not hesitate to use in reference to the Americans (155) or Bolshevists (189). Or he could simply have kept silent, which some German jurists succeeded in doing, including Leo Raape, Franz Böhm, Ludwig Raiser, Helmut Coing, Ernst von Caemmerer, and Werner Flume.

Apart from the enthusiastic welcome given by Wieacker to the resurgence of the *connubium* in its modern anti-Semitic form, he stressed the importance of considerations relating to worldview and race (*weltanschaulich-rasserechtlich*) and expressed his concern about the biologically correct constitution of the German racial body (*Volkskörper*).²⁸ Moreover, he

²⁵ F. Wieacker, *Geschichtliche Ausgangspunkte der Ehereform*, *Deutsches Recht* 1937, vol. 7, pp. 181-182.

²⁶ F. Wieacker, *Der Stand der Rechtserneuerung*, p. 18.

²⁷ Cf. by contrast O. Behrends, *Franz Wieacker 1908-1994*, pp. XXXII-XXXIII; R. Kohlhepp, *Franz Wieacker und die NS-Zeit*, pp. 214-215, 221-222.

²⁸ F. Wieacker, *Der Stand der Rechtserneuerung*, p. 18.

emphasized that following the *völkische Revolution* and a new *völkische* moral order,²⁹ the content of German family law was now predetermined by the ideological foundation of blood heritage and race (*Bluterbe und Rasse*).³⁰ The “biologically inferior” (*Minderwertig*) young individual must be segregated, since he is “not a utilizable member of the whole” (*ein nutzbares Glied des Ganzen*).³¹

Furthermore, racial accents are also present in Wieacker’s writings focused on Roman legal history. In this vein, he placed hope in a narrow cooperation reserved for “the new Europe” of the post-war time, cooperation which was expected to take place between nations related in blood and spirit (*nach Blut und Geist verwandt*).³² Moreover, with a view to his historical subject, Wieacker also mentioned “alien blood” (*fremdes Blut*) and habits that existentially subverted the specifically Roman orientation.³³ Finally, he referred to the so-called great ancient catastrophe affecting the Roman Empire in the 3rd century, which deprived Roman law of its proper national (*eigenvölkisch*) reality.³⁴

V. NAZISM: THE TESTIMONY OF WIEACKER’S CONDUCT

These anti-Semitic Nazi clichés are perhaps consummated by a statement given by Wieacker during a public conference at the University of Leipzig on 20 November 1943. At that time, Wieacker tentatively aggregated the (West)Slavic people within the European population—which can be contrasted with the approach of his antagonist Koschaker who relegated them to “the periphery or even outside Europe”³⁵—but situated them at a decidedly “simpler stage of development” (*schlichtere Entwicklungsstufe*). Not unexpectedly, this served to condemn them to receive condescending “instruction” (*Unterweisung*) from

²⁹ About the concept of *völkisch* cf. J. Schröder, *Rechtswissenschaft in Diktaturen: die juristische Methodenlehre im NS-Staat und in der DDR*, München 2016, pp. 43-45.

³⁰ F. Wieacker, *Geschichtliche Ausgangspunkte*, p. 178; other quotations in V. Winkler, *Der Kampf gegen die Rechtswissenschaft. Franz Wieackers “Privatrechtsgeschichte der Neuzeit” und die deutsche Rechtswissenschaft*, Hamburg 2014, p. 462.

³¹ F. Wieacker, *Zum gegenwärtigen Stand des Jugendhilferechts*, *Zeitschrift für die gesamte Strafrechtswissenschaft* 1939, vol. 58, pp. 66-67.

³² F. Wieacker, *Der Standort der römischen Rechtsgeschichte in der deutschen Gegenwart*, *Deutsches Recht* 1942, vol. 12, pp. 54-55; cf. R. Kohlhepp, *Franz Wieacker und die NS-Zeit*, p. 206.

³³ F. Wieacker, *Vom römischen Recht. Wirklichkeit und Überlieferung*, Leipzig 1944, pp. 162-163.

³⁴ F. Wieacker, *Das römische Recht und das deutsche Rechtsbewußtsein*, Leipzig 1944, pp. 8-9.

³⁵ P. Koschaker, *Europa und das römische Recht*, 4th ed., München, Berlin 1966, pp. 146, 325.

a mature people which in fact happened during the German colonization of Eastern Europe (*Ostkolonisation*).³⁶

During WWII Wieacker had a personal encounter with the aforementioned people. “His scholarly work was interrupted when Germany invaded Poland ...” and—Dr. Erkkilä recounts—“Wieacker was drafted” (99). He served from 1 September 1939 to the end of the month.³⁷ Oddly, Wieacker characterizes himself as a victim when referring in a letter to the German attack against Poland: “the progression of the war can put an end to my scientific work for an indefinite period... In practice the result would be that the editors cannot expect the delivery of my manuscript for two and a half years...” (100).

What a horrific prospect for the scholarly reading public of Germany! And what about Poland? In Poland some 100,000 civilians were killed by German armed forces during the 1939 September campaign, characterized by the indiscriminate and often deliberate targeting of civilian populations and by shocking barbarity, foretelling the German genocidal ambitions in Eastern Europe.³⁸ But let us return to inner-German problems during the years 1933-1945 and assume for the time being that despite living in a notoriously racial state,³⁹ Wieacker—as eagerly attested by Dr. Erkkilä—avoided taking an active part in its “racist rhetoric” (87).

However, even if merely as a man living through these times, Wieacker assumed at least the passive part of a witness to this spectacle of racist rhetoric organized by the Nazis. So we are entitled to enquire into his attitude towards the racist policy and practice so pervasive in his personal and professional surroundings.⁴⁰ Did he not notice the Aryanising of the law faculties at German universities, of editorial boards in legal journals, of courts, offices and corporations? Did he not complete the form for his personal Aryan certificate (*Ariernachweis*)? And during the *Reichskristallnacht*, did he not hear the glass breaking?

Dr. Erkkilä, whose indifference towards the real life problems of the period seems at times almost impressive, insists that according to Wieacker “the ‘racial element’ was irrelevant

³⁶ F. Wieacker, *Das römische Recht*, p. 37; the post-war editions do not contain this fragment (Wieacker, *Gründer und Bewahrer*, Göttingen 1959, pp. 9-43).

³⁷ D. Liebs, *Franz Wieacker 1908 bis 1994*, p. 28.

³⁸ J. Böhler, *Auftakt zum Vernichtungskrieg: Die Wehrmacht in Polen 1939*, 2nd. ed., Frankfurt a.M. 2006, pp. 241-247; T. Snyder, *Bloodlands: Europe between Hitler and Stalin*, New York 2010, pp. 119-123; R. Moorhouse, *First to Fight. The Polish War 1939*, Vintage 2019, p. 263.

³⁹ M. Burleigh, W. Wippermann, *The Racial State: Germany 1933-1945*, Cambridge 1991, passim; D.T. Goldberg, *The Racial State*, Wiley-Blackwell 2001, passim.

⁴⁰ D. Simon, *Franz Wieacker 5. August 1908-17. Februar 1994*, *Rechtshistorisches Journal* 1994, vol. 13, p. 9.

to science” (98) or, what’s more, even “incomprehensible” in the scientific context (284). In fact, Wieacker is depicted by Dr. Erkkilä as concerned exclusively with *Bildung* and *Stand* (54-59, 99), which means respectively “legal education” and “the legal estate” in the sense of the “guild of jurists” (130, 257). This may explain why an individual permanently occupied with such abstract topics was defined by the German security organs as politically ‘reliable’ (99).

And what about the German legal community of the Nazi-era? Did its members consider Wieacker as one of them? Hans Kreller, himself a Nazi ‘no ifs, no buts,’ still defines Wieacker as late as 1944 as one of the most energetic (*tatkräftig*) builders of the new German community law (*Neubau des deutschen Gemeinrechts*).⁴¹ Another committed Nazi, Heinrich Lange, counted Wieacker already in 1941 among the leading figures of the *Kieler Schule*.⁴² During the denazification procedure, Wolfgang Kunkel stressed that Wieacker “at least externally joined the row of authors which were labelled as national socialist.”⁴³

It is a fact, corroborated by Dr. Erkkilä, that Wieacker enjoyed a “firm position in the intellectual context of the *Kieler Schule*” (122, 91-92), albeit that a German paper devoted to the *Kieler Schule* and published in 1992, when Wieacker was still alive, does not mention him at all.⁴⁴ Wieacker participated also in the so-called *Aktion Ritterbusch* (96-97), officially known as the “War effort of the German humanities”. In this context he presented several early papers, written in the years 1934-36, which are considered to this day the most notable testament to the Nazi doctrine of landed property with its public commitments;⁴⁵ the apparent assimilability of this doctrine dissimulated in masterly fashion the particular political goals of the totalitarian state.⁴⁶

Dr. Erkkilä acknowledges the property question as “naturally fundamental” to the Nazi party, which clearly aimed “to build a totalitarian nation and demolish subjective, state-provided rights” (115). This danger was noted and the doctrine sharply censured in 1938

⁴¹ H. Kreller, *Weitere Büchereingänge*, p. 463.

⁴² H. Lange, *Die Entwicklung der Wissenschaft vom bürgerlichen Recht seit 1933*, Tübingen 1941, p. 11; cf. V. Winkler, *Der Kampf gegen die Rechtswissenschaft*, p. 464.

⁴³ V. Winkler, *Der Kampf gegen die Rechtswissenschaft*, p. 463.

⁴⁴ J. Eckert, *Was war die Kieler Schule?*, (in:) F.J. Säcker (ed.), *Recht und Rechtslehre im Nationalsozialismus*, Baden-Baden 1992, pp. 37-70.

⁴⁵ F.R. Hausmann, „*Deutsche Geisteswissenschaft“ im Zweiten Weltkrieg. Die Aktion Ritterbusch 1940-1945*, Dresden 1998, pp. 262-264.

⁴⁶ E.D. Graue, *Das Zivilrecht im Nationalsozialismus*, (in:) F.J. Säcker (ed.), *Recht und Rechtslehre im Nationalsozialismus*, Baden-Baden 1992, p. 121; T. Keiser, *Eigentumsrecht in Nationalsozialismus und Fascismo*, Tübingen 2005, p. 118; V. Winkler, *Der Kampf gegen die Rechtswissenschaft*, p. 485; apologetic J.G. Wolf, *Die Gedenkrede*, pp. 26-28.

by the Austrian Roman lawyer and long-serving professor within the German university system, Paul Koschaker. His “dogmatic understanding of historical development” may have been methodologically outdated (232), but nonetheless he proved to be – apart from early Nazi critics as Heinrich Stoll and Hans Würdinger⁴⁷ – the strongest critic of Wieacker’s theory of property.⁴⁸

Dr. Erkkilä elsewhere⁴⁹ attests that Wieacker’s “obligatory references to the *Führer* are few and notably perfunctory”. Clearly, Wieacker did not ape the practices of his Austrian colleague the legal historian Ernst Schönbauer, a staunch Nazi, who cited “our beloved leader” (*geliebter Führer*) no less than four times in a short speech of scarcely two pages.⁵⁰ However, Dr. Erkkilä omits an exception found in Wieacker’s critique of Koschaker. Wieacker trumpets⁵¹ that “[n]one other than our *Führer* ascribed this directly educational and contemporary value to ancient history”, after having denounced Koschaker’s actualization program as a “veneration of dead (*ausgelebt*) ideals” and “perpetuation of an outdated (*überaltert*) type of scholarship.”

VI. DEFENCE STRATEGIES. *PERSILSCHEINE* AS HISTORICAL SOURCES?

In 1946, Wieacker rejected as “monstrous” (*monströs*) and “outrageous” (*empörend*) the denunciations of Professor Ludwig Schnorr von Carolsfeld (of the University of Erlangen), with which the latter charged him in the denazification procedure (148). And as, thirty years later, he composed the essay in which he reconsidered his famous property-brochure, he managed only to formulate a naive rhetorical question: “Could the new property doctrine embolden the oppressions and illegalities of the Nazis?” (*Unterdrückungen und Rechtsbrüche des Regimes ... ermutigen*).⁵² The negative answer implied was expected to

⁴⁷ Cf. T. Keiser, *Eigentumsrecht*, pp. 15, 91-96, 128-143.

⁴⁸ T. Giaro, *Aktualisierung Europas. Gespräche mit Paul Koschaker*, Genova 2000, pp. 55, 75, 96-97, 115; id., *Der Troubadour des Abendlandes*, (in:) H. Schröder, D. Simon (eds.), *Rechtsgeschichtswissenschaft in Deutschland 1945–1952*, Frankfurt a.M. 2001, p. 49.

⁴⁹ V. Erkkilä, *Roman Law as Wisdom*, (in:) K. Tuori, H. Björklund (eds.), *Roman Law and the Idea of Europe*, Bloomsbury 2019, p. 208.

⁵⁰ J.W. Hedemann, *Bürgerliches Recht im Dritten Reich. Ein Vortrag mit einem Anhang: Die Akademie für deutsches Recht*, Berlin 1938, pp. 46-47.

⁵¹ F. Wieacker, *Die Stellung der römischen Rechtsgeschichte in der heutigen Rechtsausbildung*, *Zeitschrift der Akademie für deutsches Recht* 1939, vol. 6, pp. 405-406; R. Kohlhepp *Franz Wieacker und die NS-Zeit*, p. 205.

⁵² F. Wieacker, “*Wandlungen der Eigentumsverfassung*” revisited, p. 842; cf. V. Winkler, *Der Kampf gegen die Rechtswissenschaft*, p. 485.

diminish Wieacker’s share of responsibility in the process of making Germany a totalitarian state (14-15).

In this context, Wieacker found himself in the good company of several conservative legal scholars around Carl Schmitt whose disappointment in the early 1940s was characterized by Dr. Erkkilä as “genuine” when the whole legal renewal seemingly latent in the ideas promoted by the Nazis in the 1930s turned out to be a lie (134). This credulity of young albeit adult people may be attributable to the fact that in Germany – as Wieacker bitterly stated in his Jhering-brochure of 1942 – thinking is strongly informed by school and academy, resulting in a lawyer being essentially ill-qualified to perform the duties inherent to that status (*zum Geschäft des Denkens an sich nicht berufen*).⁵³

We notice a similar childish attitude in Wieacker’s closest friend, the constitutional lawyer Ernst Rudolf Huber (258-260), to whom in 1952—despite the general boycott to which he was subject directly after WWII—Wieacker, as Dean of the Law Faculty in Freiburg i.B., assigned teaching responsibilities in modern constitutional history. During the Nazi-era, Huber had proved very successful in legitimizing Hitler’s dictatorship as *Führerstaat*; so much so that he gained – alongside Carl Schmitt – the title of “crown jurist of the Third Reich”. Nevertheless, afterwards Huber “could not see himself as having advanced the National Socialist cause” (137).

Such defensive strategies also permitted Wieacker to ignore, even after WWII and probably against his better knowledge, the systemically totalitarian nature of Nazism. Being of this nature, the system had need not only of men in the streets wielding big sticks, but also required jurists, historians, and other intellectuals able to put the highest achievements of the European spirit to the service of Hitler and his clique. Depicting totalitarian transformations as inevitable or at least highly desirable, these jurists and intellectuals paved the way to discrimination, plunder, murder and, ultimately, genocide.⁵⁴ In Wieacker’s view, a concerned Dr. Erkkilä surmises, “denazification was a manifestation of the lack of a ‘conscientious’ legal culture” (286). So the legal conscience which, conversely, assisted the Germans in Hitler’s time – if we draw the conclusions which the insight appears to endorse – took its departure as soon as the barbarian armies of the Yanks and Bolsheviks arrived (155, 189). Moreover, the denazification was “a drastic

⁵³ F. Wieacker, *Rudolf von Jhering. Eine Erinnerung zu seinem 50. Todestag*, Leipzig 1942, pp. 7, 9-10.

⁵⁴ The classical investigation is M. Weinreich, *Hitler’s Professors. The Part of Scholarship in Germany’s Crimes against the Jewish People*, New York 1946; 2nd ed. Princeton 1999.

disappointment” also to Wieacker’s “network of colleagues” (289), such as Huber, Michaelis, and Dahm. In fact, Nazi communities, such as the lecturer academy of Frankfurt a.M., the *Kieler Schule*, and the law faculty at Leipzig, are remembered by Wieacker somewhat nostalgically (205, 261). Indeed, even some of the ‘credit’ for rebuilding them anew after WWII at the law faculty in Göttingen is attributable personally to Wieacker.⁵⁵

VIII. ALWAYS A SCHOLAR, ALWAYS THE SAME SCHOLAR?

Throughout the book, the defense of Wieacker, undertaken and accomplished by Dr. Erkkilä with expedition, follows a triple strategy. Dr. Erkkilä states on the basis of Wieacker’s publications and letters first that he was never a Nazi and absolutely not a racist (86-87), second that he belonged to the already mentioned circle of conservative legal scholars who already during the early 1940s “understood the hollowness, cynicism and unscientific nature” of the legal renewal deceitfully promised by the Nazis in the 1930s (134, 212), and thirdly that the Nazi content of Wieacker’s writings – even if there is any to be found – does not create difficulties for the approach of Dr. Erkkilä who “intended to go beyond such questions” (281).

It was not political ideology, insists Dr. Erkkilä, but rather Wieacker’s “strong personal understanding of the essence of social justice” that was “the prior point of departure for his writings” (282). Evidently, Dr. Erkkilä follows here the reasoning developed in Wieacker’s own 1976 reconsideration of his National-Socialist property doctrine, in which Wieacker identifies his earlier self as “the young legal historian and social critic of the early 1930s”.⁵⁶ But it is sufficient to recall the explicitly “racial” categorizations underpinning the writings collected above to see how much in these Nazi-era publications had to be modified by the post-war era Wieacker, often by judicious omissions.

Besides these racially begrimed fragments, this was also the fate of the warm welcome Wieacker had given in 1942 to the violent Nazi rejection of the idea of penal law, characterized by liberal jurists as The Great Charter of Freedoms (*Magna Charta*) of the criminal. The idea had been promoted by Jhering, but most notably Liszt, to whom we may even accredit the concept of punishment as protection, i.e. punishment endowed with

⁵⁵ V. Winkler, *Der Kampf gegen die Rechtswissenschaft*, pp. 474-476.

⁵⁶ F. Wieacker, „*Wandlungen der Eigentumsverfassung*” revisited, p. 842.

the purpose of establishing security.⁵⁷ While present in the “first edition” of Wieacker’s brochure, commemorating in 1942 the 50th anniversary of Jhering’s death,⁵⁸ this critique of humane penal law disappeared, for obvious reasons, from subsequent versions and editions.

In spite of all this, Dr. Erkkilä emphasizes that between 1933 and 1968 Wieacker’s personality endured unchanged: “the core of his scholarly identity remained the same from Weimar to the Federal Republic of Germany” (V, 289). Impressive, but it is a banal truth that the identity of the subject does not imply the identity of all his opinions. It is renown that Wieacker emphasized in the 1930s the cooperative nature of the old Roman partnership (*societas*), whereas during the 1950s and later he concentrated rather on its individualist-liberal features.⁵⁹ So what is to be understood by all this? That under the Nazis Wieacker gladly espoused the Nazi guff, even though he in no way sympathized with what he said?

Wieacker—this is the proud explanation of Dr. Erkkilä—“was first and foremost a scholar” (288). That sounds kind of familiar: “I am a theorist, a pure scholar and nothing but an academic”, so claimed his famous mentor Carl Schmitt in a radio interview already in February 1933.⁶⁰ And the benevolent Fritz Pringsheim defended his pupil in 1947 as unpractical, “interested only in scholarly things” (*wissenschaftliche Dinge*) and apolitical.⁶¹ Characterizing Wieacker as essentially a scholar may be correct. However, during the 1930s he also dabbled, in the capacity of co-author of the so-called Leipzig project of the People’s Code (*Volksgesetzbuch*), in National-Socialist legislation, albeit that in the postwar years he sought to reduce—supported by Dr. Erkkilä (207, 237)—the apparent weight of his own practical contribution.⁶²

Wieacker contested with noteworthy vigor the 1941 printed edition of the materials which mention him as a member of the commission established by the Nazi Academy of German Law for the preparation of the particularly hairy Book I of the People’s Code. The Book was entitled *Der Volksgenosse*, a concept which probably should be translated as “fellow

⁵⁷ T. Vormbaum, *A Modern History of German Criminal Law*, Springer 2014, p. 117.

⁵⁸ F. Wieacker, *Rudolf von Jhering*, p. 54.

⁵⁹ F.-S. Meissel, *Societas. Struktur und Typenvielfalt des römischen Gesellschaftsvertrages*, Frankfurt a.M. 2004, pp. 30-31.

⁶⁰ M.H. Wiegandt, *“Ich bin Theoretiker, reiner Wissenschaftler und nichts als Gelehrter”*: Ein Lebensbild Carl Schmitts, Juristische Schulung 1996, vol. 36, p. 778.

⁶¹ Cited by O. Behrends, *Franz Wieacker 1908-1994*, p. XXVII.

⁶² W. Schubert (ed.), *Akademie für deutsches Recht 1933-1945*, vol. III.1. *Volksgesetzbuch. Teilentwürfe, Arbeitsberichte und sonstige Materialien*, De Gruyter 1988, pp. 30-31.

German” or “national comrade”.⁶³ Dr. Erkkilä trusts Wieacker also in a more general sense: “despite the radical changes that the *Machtergreifung* and 1945 brought about, the core of his scholarly identity remained untouched” (289). Regardless of the book’s title, no place remains for any— not even conceptual—change of conscience.

The illusion of identity is not difficult to attain if we concentrate, in the manner of Dr. Erkkilä, on legal consciousness, legal conscience, or other related meta-concepts. Then the quality of positive law, valid in Germany between 1933 and 1945, becomes uninteresting. However, also Wieacker’s appraisal of the Imperial Legal Studies Ordinance of 1935 remained the same after WWII as it was before: In 1967 he still qualified this well-known creation of the sworn Nazi Karl August Eckhardt as “in its content essentially not politically motivated”; an evaluation that flew in the face of reality.⁶⁴ This fiction of identity eventually crumbled with the onset of the student revolt of 1968 (160-161, 265), which definitely strained Wieacker’s capacity of gradual self-modernization.

VIII. REINTEGRATION OF THE NAZIS INTO THE EUROPEAN LEGAL TRADITION?

It is perfectly true that the Nazi regime tried to present German law and its development as “essentially European”, but I cannot overcome some doubts regarding Dr. Erkkilä’s dating of this attitude to “after 1941” (125). This dating would be consistent with Dr. Erkkilä’s faith in the Nazis’ plan “to unite Europe under German rule against Soviet Russia“ (133); nonetheless, this plan was from the beginning totally unrealistic. Furthermore, other scholars indicate an earlier moment of intensification of German intellectual propaganda in Europe, namely the victory over Poland in September 1939.⁶⁵ And if we go back a couple of years into the deeper history, we will observe that Koschaker’s idea to employ Roman law as a means of validating the German presence in the center of European culture, and even of reacquiring for Germany global importance (*Weltgeltung*) in legal scholarship, was a notion that enjoyed its heyday in the period 1935-1940, hence during what was essentially the pre-war period.⁶⁶ After the outbreak of WWII, the obsolescence of Koschaker’s program to support the Nazis against the Bolsheviks in

⁶³ W. Schubert (ed.), *Akademie für deutsches Recht 1933-1945*, vol. III.1, pp. 17-18, 513.

⁶⁴ F. Wieacker, *Privatrechtsgeschichte der Neuzeit unter besonderer Berücksichtigung der deutschen Entwicklung*, 2nd. ed., Göttingen 1967, p. 555; contra E. Grothe, *Zwischen Geschichte und Recht. Deutsche Verfassungsgeschichtsschreibung 1900-1970*, München 2005, p. 199 and nt. 154.

⁶⁵ B.G. Martin, *The Nazi-Fascist New Order for European Culture*, Cambridge, London 2016, pp. 146-148.

⁶⁶ T. Giaro, *Memory Disorders*, *Studia Juridica* 2018, vol. 78, pp. 14-15, 19-20.

the name of the Occident became ever more apparent; it could be resuscitated—this time without ideological recourse to the Nazis – but only after the war.⁶⁷

Whether Nazi Germany was part and parcel of the European legal tradition remains controversial to this day. The prevailing opinion is inclined to qualify the Nazi-law as a perversion of legal order and accordingly as a blackout of legal history.⁶⁸ In any case, the period of Nazi rule appears—*toutes proportions gardées*—more comparable to another German dictatorship, namely the communist German Democratic Republic, than to the western systems which in Germany preceded and followed Nazism.⁶⁹ On the other hand, sober expositions of Nazi-law in the European context declare correctly that “from a formal perspective law was still made—and this law was applicable, even though its constitutional basis no longer existed”.⁷⁰

What up until now requires clarification is the extent to which we owe the consciousness of the European character of continental legal history, and not least the scholarly discipline of European legal history as such, not only to the Nazi-era in general, but also to individual Nazi legal scholars themselves. As a matter of fact, some statements of Dr. Erkkilä referenced above link these phenomena to certain Nazi political plans, which became official “after 1941”, to unite European nations under German rule for a kind of preventive war against Soviet Russia (125, 133). Were these intuitions of Dr. Erkkilä to prove correct, we would be obliged to acknowledge that the European Union was, in a certain sense, anticipated by the Nazis.

On the other hand, we must take into account another, and to a certain extent contrary, narrative of Dr. Erkkilä. He mentions namely Wieacker’s “courageous act”, consisting in his defense of the reception of Roman law in Germany as, *inter alia*, catalyzing the ‘scientification’ of local laws. Wieacker’s statement is praised as courageous by Dr. Erkkilä (who claims to follow in this respect Detlef Liebs),⁷¹ “since it could have brought him ... dangerous censure from fundamentalist legal scholars backed by the SS” (125-126). Fortunately, no dangerous censure occurred, the SS remained inactive, and we can try to shed some light on the entangled problem.

⁶⁷ T. Giaro, *Der Troubadour des Abendlandes*, pp. 73-76.

⁶⁸ H.-H. Jakobs, *Sehr geehrter Herr Canaris*, Myops. Berichte aus der Welt des Rechts 2012, vol. 14, pp. 9-16; F. von Hippel, *Perversion von Rechtsordnungen*, Tübingen 1955, passim.

⁶⁹ J. Schröder, *Rechtswissenschaft in Diktaturen*, pp. 118-119.

⁷⁰ Michael Stolleis, *Nazi Law and Nazi Non-Law*, (in:) H. Pihlajamäki, M.D. Dubber, M. Godfrey (eds.), *The Oxford Handbook of European Legal History*, Oxford 2019, pp. 1192-1213, citation p. 1196.

⁷¹ But the quotation is difficult to find.

IX. WERE THE NAZIS PROGENITORS OF CURRENT LEGAL HISTORY?

Contrary to the assumption of Dr. Erkkilä, the conceptualization of the Roman law reception as having a European character can be attributed neither to Wieacker nor to any other Nazi legal historian. Of course, Nazism did not come overnight, but had many precursors.⁷² However, for both questions concerning the reception: its nature as scientification and its European character, the dates are decidedly earlier. As early as 1874 the famous Rudolf Sohm elucidated the reception and in doing so denied the usual Germanist charges based on oppression of local laws by a foreign learned law; instead, he trained his attention on its character as *Verwissenschaftlichung*: “We received alien law, because we needed an alien legal science”.⁷³

Also the pan-European range of the reception was by no means discovered by the Nazis. As early as 1866, in the second edition of the first volume of “The Spirit of Roman Law”, Jhering noticed the commonality of one and the same code of law – the *Corpus Iuris Civilis* – in most parts of continental Europe.⁷⁴ In 1895, in the second volume of his monograph “*Die Lehre vom Einkommen*,” Leon Petrażycki placed in the balance against the anti-Romanist bias of the Germanists, the universal values of Roman law.⁷⁵ “Its reception across modern Europe—claimed Petrażycki in a Russian paper published in 1898—served in the realm of private law in great measure as a surrogate for progressive indigenous legislation”.⁷⁶

In 1900, the Roman lawyer Rudolf Leonhard, commenting on the codification debate in reference to the BGB, opposed the Germanists for their trenchant emphasis upon the national character of legal development and their associated tendency to overlook the common European movement of post-Roman law at the continental level.⁷⁷ In his rector’s inaugural address of 1920 in Berlin, the canon lawyer Emil Seckel appraised German legal scholarship of the 15th and 16th centuries as simply a “copy” of that already developed in

⁷² T. Giaro, *Vor-, Mit und Nachdenker des Madagaskar-Plans*, *Rechtshistorisches Journal* 2000, vol. 19, pp. 131-163.

⁷³ R. Sohm, *Die deutsche Rechtsentwicklung und die Codificationsfrage*, *Grünhuts Zeitschrift* 1, 1874, pp. 256-258, 268-273 (quotation p. 258).

⁷⁴ R. Jhering, *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung*, 2nd ed., Leipzig 1866, p. 14.

⁷⁵ L. Petrażycki, *Die Lehre vom Einkommen*, vol. II, Berlin 1895, pp. 575-76, 607.

⁷⁶ L. Petrażycki, *Zagadnienia prawa zwyczajowego* (Polish translation), Warszawa 1938, pp. 67-68.

⁷⁷ R. Leonhard, *Das neue Gesetzbuch als Wendepunkt der Privatrechts-Wissenschaft*, Breslau 1900, p. 26.

Italy.⁷⁸ As early as 1928, the American jurist Edmund Munroe Smith stated that “[t]he whole movement has been European” and affected “nearly all western and central Europe”, so that “in all the principal countries of Europe legal conditions were much the same”.⁷⁹

Dr. Erkkilä’s approach to original research on the ideas of Wieacker unfortunately forecloses—in dogmatic fashion—the question whether his texts of the 1930s “can be seen as an extension of National Socialist ideology” (281). Regrettably, this question cannot be so easily dismissed and, what is worse, it must be answered in the affirmative. Even an inquirer who limits his interest to what was happening in Wieacker’s head excluding the world outside, cannot segregate the man’s Nazi-inspired ideas from the humanitarian ones that continue to be affirmed as appropriate today. As a result, the reader is left without any plausible information about the content of German legal consciousness and legal conscience during the years 1933-45.

Franz Wieacker was a great legal historian, who counts among the founding fathers of the discipline of European Legal History. Dr. Erkkilä thoroughly examined his conceptual background, but some of the results must be adjudged false or at best mystifying, such as the phrase which adorns the last page of the book: “The end of the war and the consequent denazification process was a drastic disappointment to both Wieacker and his network of colleagues” (289). Does this mean that he and his network were drastically opposed to the war’s ending by unconditional surrender of the Third Reich? Probably yes, they were against it; but thank goodness they were unable to drop the atomic bomb.

⁷⁸ E. Seckel, *Das römische Recht und seine Wissenschaft im Wandel der Jahrhunderte*, Rektoratsrede Berlin 1920, Berlin 1921, p. 22.

⁷⁹ E.M. Smith, *A General View of European Legal History*, (in:) *Mémoires de l’Académie Internationale de Droit Comparé* 1928, vol, 1, pp. 198-99, 219, 228.

