CRITIQUE

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A MATTER OF PURE CONSCIENCE? FRANZ WIEACKER AND HIS "CONCEPTUAL CHANGE"*

1. 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?[1] 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 instance, that he made his scholarly career "under the Nazis, but not with the Nazis",[2] that his characterization of the reception of Roman law in Germany as 'scientification' (*Verwissenschaftlichung*)

* V. 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.

[1] R. Kohlhepp, *Franz Wieacker und die NS-Zeit*, „Zeitschrift der Savigny-Stiftung Romanistische Abteilung" 2005, Vol. 122, pp. 203–223.

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

"was a courageous act, since it could have brought him … dangerous censure from fundamentalist legal scholars backed by the SS" (125–126),[3] 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*).[4]

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 unmistaken National Socialist" (86). Phrases recommending something like a "Durchordnung des deutschen Gesamtraums nach einheitlichen raumeigenen Gesichtspunkten"[5] 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.[6] 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:[7] 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 (*tatkräftig*) workers at the building site of the German legal community (*Neubau des deutschen Gemeinrechts*).[8]

As a historian of ideas, Dr. Erkkilä attaches much more importance to mere concepts then 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

[3] 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:) O. Behrends, E. Schumann (eds.), *Franz Wieacker. Historiker des modernen Privatrechts*, Göttingen 2010, p. 38.

[4] O. Behrends, *Franz Wieacker 1908–1994*, „Zeitschrift der Savigny-Stiftung Romanistische Abteilung" 1995, Vol. 112, p. XXV.

[5] F. Wieacker, *Vielfalt und Einheit der deutschen Bodenrechtswissenschaft der Gegenwart*, Stuttgart–Berlin 1942, p. 9.

[6] F. Wieckaer, *„Wandlungen der Eigentumsverfassung" revisited*, „Quaderni Fiorentini per la Storia del Pensiero Giuridico Moderno" 1976-77, Vol. V–VI, p. 842.

[7] Cited by O. Behrends, *Franz Wieacker 1908–1994...*, pp. XXVI–XXVII.

[8] H. Kreller, *Weitere Büchereingänge*, „Zeitschrift der Savigny-Stiftung Romanistische Abteilung" 1944, Vol. 64, p. 463.

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).

2. 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.[9] 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 worldview.[10] 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 calam-

[9] 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" 2004, Vol. 35, Sonderheft Russland/Osteuropa, pp. 442–476; A. Walicki, *Legal Philosophies of Russian Liberalism*, Oxford–New York 1967, pp. 213–290.

[10] F. Wieacker, *Der Stand der Rechtserneuerung auf dem Gebiete des bürgerlichen Rechts*, „Deutsche Rechtswissenschaft" 1937, Vol. 2, p. 25.

ity" (*echtes Verhängnis*)[11] and in 1941 laments: "Who could deny that the reception of alien law in Germany would became a calamity?".[12]

The concept of legal consciousness continued to be central for Wieacker during the post-war years. In the obituary for Andreas Bertalan Schwarz, a renown 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.[13] And in his famous 1976 reevaluation of his early doctrine of property,[14] 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.[15]

3. 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 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*

[11] 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.

[12] F. Wieacker, review *Max Kaser*, *Römisches Recht als Gemeinschaftsordnung*, „Zeitschrift für die gesamte Staatswissenschaft" 1941, Vol. 101, p. 171.

[13] F. Wieacker, *In memoriam Andreas Bertalan Schwarz*, „Zeitschrift der Savigny-Stiftung Romanistische Abteilung" 1954, Vol. 71, p. 606.

[14] F. Wieacker, *Wandlungen der Eigentumsverfassung*..., Hamburg 1935.

[15] F. Wieacker, *„Wandlungen der Eigentumsverfassung" revisited*..., p. 842.

Klassik).[16] 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",[17] and, on the other hand, finally abandoned by Wieacker himself.[18]

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*).[19] 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".[20]

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 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.[21]

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

[17] W. Kunkel, *rec. Wieacker*, Über das Klassische in der römischen Jurisprudenz, „Zeitschrift der Savigny-Stiftung Romanistische Abteilung" 1952, Vol. 69, p. 467.

[18] F. Wieacker, *Römische Rechtsgeschichte. Quellenkunde*, *Rechtsbildung*, *Jurisprudenz und Rechtsliteratur*, Vol. I, München 1988, p. 521; on this controversy cf. T. Giaro, *Max Kaser 1906–1997*, „Rechtshistorisches Journal" 1997, Vol. 16, p. 284.

[19] F. Wieacker, *Vom römischen Recht. Zehn Versuche...*, p. 226.

[20] F. Wieacker, *Vom römischen Recht. Zehn Versuche...*, p. 164; cf. T. Giaro, *Max Kaser 1906–1997...*, pp. 282–283.

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

4. 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).[22] 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.

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".[23]

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*).[24] As far as can be discerned from

[22] F. Wieacker, *review of Paul Koschaker*, *Europa und das römische Recht*, „Gnomon" 1949, Vol. 21, p. 191.

[23] F. Wieacker, *Geschichtliche Ausgangspunkte der Ehereform*, „Deutsches Recht" 1937, Vol. 7, pp. 181–182.

[24] F. Wieacker, *Der Stand der Rechtserneuerung...*, p. 18.

Dr. Erkkilä's extensive biography, both citations remain unknown to the author, or perhaps known but – alas! – judged irrelevant.[25]

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*).[26] Moreover, he emphasized that following the *völkische Revolution* and a new *völkische* moral order,[27] the content of German family law was now predetermined by the ideological foundation of blood heritage and race (*Bluterbe und Rasse*).[28] The "biologically inferior" (*Minderwertig*) young individual must be segregated, since he is "not a utilizable member of the whole" (*ein nutzbares Glied des Ganzen*).[29]

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*).[30] Moreover, with a view to his historical subject, Wieacker also mentioned "alien blood" (*fremdes Blut*) and habits that existentially subverted the specifically Roman orientation.[31] Finally, he referred to the so-called great

[25] 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.

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

[27] 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.

[28] 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.

[29] F. Wieacker, *Zum gegenwärtigen Stand des Jugendhilferechts*, „Zeitschrift für die gesamte Strafrechtswissenschaft" 1939, Vol. 58, pp. 66–67.

[30] 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.

[31] F. Wieacker, *Vom römischen Recht. Wirklichkeit und Überlieferung*, Leipzig 1944, pp. 162–163.

ancient catastrophe affecting the Roman Empire in the 3rd century, which deprived Roman law of its proper national (*eigenvölkisch*) reality.[32]

5. 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"[33] – 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 a mature people which in fact happened during the German colonization of Eastern Europe (*Ostkolonisation*).[34]

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.[35] 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.[36] But let us return to inner-German problems during the years 1933–1945 and assume

[32] F. Wieacker, *Das römische Recht und das deutsche Rechtsbewußtsein*, Leipzig 1944, pp. 8–9.

[33] P. Koschaker, *Europa und das römische Recht*, 4th ed., München–Berlin 1966, pp. 146, 325.

[34] F. Wieacker, *Das römische Recht...*, p. 37; the post-war editions do not contain this fragment (F. Wieacker, *Gründer und Bewahrer. Rechtslehrer der neueren deutschen Privatrechtsgeschichte*, Göttingen 1959, pp. 9–43).

[35] D. Liebs, *Franz Wieacker 1908 bis 1994...*, p. 28.

[36] 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.

for the time being that despite living in a notoriously racial state,[37] 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.[38] 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 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*).[39] Another committed Nazi, Heinrich Lange, counted Wieacker already in 1941 among the leading figures of the *Kieler Schule*.[40] During the denazification procedure, Wolfgang Kunkel stressed that Wieacker "at least externally joined the row of authors which were labelled as national socialist."[41]

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.[42] Wieacker participated also in the so-called

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

[38] D. Simon, *Franz Wieacker 5. August 1908-17. Februar 1994*, „Rechtshistorisches Journal" 1994, Vol. 13, p. 9.

[39] H. Kreller, *Weitere Büchereingänge...*, p. 463.

[40] H. Lange, *Die Entwicklung der Wissenschaft vom bürgerlichen Recht seit 1933. Eine Privatrechtsgeschichte der neuesten Zeit*, Tübingen 1941, p. 11; cf. V. Winkler, *Der Kampf gegen die Rechtswissenschaft...*, p. 464.

[41] V. Winkler, *Der Kampf gegen die Rechtswissenschaft...*, p. 463.

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

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;[43] the apparent assimilability of this doctrine dissimulated in masterly fashion the particular political goals of the totalitarian state.[44]

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 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 Würdinger[45] – the strongest critic of Wieacker's theory of property.[46]

Dr. Erkkilä elsewhere[47] 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.[48] However, Dr. Erkkilä omits an exception found in Wieacker's critique of Koschaker. Wieacker trumpets[49] 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."

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[43] F. R. Hausmann, *„Deutsche Geisteswissenschaft" im Zweiten Weltkrieg. Die Aktion Ritterbusch 1940–1945*, Dresden 1998, pp. 262–264.

[44] 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.

[45] Cf. T. Keiser, *Eigentumsrecht...*, pp. 15, 91–96, 128–143.

[46] 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.

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

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

[49] 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.