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Tomasz Giaro
University of Warsaw
e-mail: giaro@uw.edu.pl
ORCID: 0000-0002-5702-6135

MORE BREAKING NEWS FROM NAZI TIMES: IS THE EUROPEAN LEGAL TRADITION SPURIOUS?*

Abstract

Is it plausible to treat the Nazi legal historians as progenitors of current European legal history? Is it in particular tenable to consider Franz Wieacker (1908–1994), one of the leading Nazi jurists, as the top founding father of this discipline? Is the European legal tradition spurious? We are able to pose these questions, but not to answer them unambiguously.

KEYWORDS

Franz Wieacker, *Kieler Schule*, European integration, European legal history, European legal tradition, Roman foundations of Europe

SŁOWA KLUCZOWE

Franz Wieacker, szkoła kilońska, integracja europejska, europejska historia prawa, europejska tradycja prawna, rzymskie podwaliny Europy

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1. EUROPEANISM DURING AND AFTER WORLD WAR II

"A thousand years will pass and still this guilt of Germany will not have been erased", said memorably Hans Frank at Nuremberg[1]. But history has soon denied this prophecy. The story of postwar Germany turned out to be no less dramatic than that of the Nazi times: overnight the enemy became the cold war ally. The Dachau trials, conducted in 1945–48 before the US military courts against the German war criminals, were stopped and by the close of the 1950s all prisoners had been released, whereas the ungrateful task of de-Nazification was devolved to the German authorities themselves.

In January 1951, General Dwight D. Eisenhower, the supreme commander of NATO, bestowed a declaration of honour (*Ehrenerklärung*) on the German soldiers, pronouncing that they had served honourably. Therefore, in late 1952 a similar declaration was issued by West German Chancellor Konrad H.J. Adenauer. In August 1953, he extended this honour to the veterans of the infamous *Waffen-SS*[2], who thereby became transmuted into the stuff of the clean *Wehrmacht* legend[3]. Nazi generals became generals of the Federal Republic of Germany; the alternative of NATO accepting 18-years-old commanders was a clear non-starter.

In April 1951, the European Coal and Steel Community, the precursor of the European Economic Community, was founded. This integration project facilitated from the outset the readmission of Germany among the so-called civilized nations. The result was not bad at all, compared to the Morgenthau plan of August 1944 which imagined the defeated Germany as a demilitarized and deindustrialized agricultural state with a population of peasants, gardeners, and craftspeople – more or less the same fate which in their great days the Nazi Germans planned for Eastern Europe[4].

But there was also the Europeanization of legal studies whose story is depicted by Kaius Tuori in his book *Empire of law*[5], published by Cambridge University Press in 2020. In the same year, the American Society of Legal History awarded Tuori the Surrency Prize for the best article from the preceding year's contributions to the "Law and History Review", published also by CUP. The article

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[1] M. Housden*, Hans Frank. Lebensraum and the Holocaust*, Palgrave 2003, p. 228.

[2] N. Cawthorne, *The Waffen-SS. The Third Reich's most infamous military organization*, Arcturus Publishing 2022.

[3] D.C. Large, *Reckoning without the past: The HIAG of the Waffen-SS and the politics of rehabilitation in the Bonn Republic, 1950-1961*, "Journal of Modern History" 1987, Vol. 59, pp. 88–89.

[4] T. Giaro, *Vor-, Mit- und Nachdenker des Madagaskar-Plans. Der Eiertanz um Schieders Protokoll, Erdmanns Urmanuskript und einzelne Äußerungen Conzes*, "Rechtshistorisches Journal" 2000, Vol. 19, p. 134.

[5] K. Tuori, *Empire of law: Nazi Germany, exile scholars and the battle for the future of Europe*, Cambridge 2020.

elucidated the message of the then still unprinted book[6]. It identifies the situation which changed Germany's national legal framework into a European one as arising at the earliest possible juncture and as having the most thoroughgoing effects.

According to Tuori, "the narrative of the shared tradition of European law" emerged "in a long process beginning from the 1930s", and particularly starting from the Nazi era[7]. The blemish of this concept is the anachronistic assumption that Europeanization is always a good thing; what about plunder organizations such as the "Society for Planning the European Economy and the Economy of Large Areas" (*GeWG*), based on Carl Schmitt's concept of *Grossraum*?[8]. What about the antimodern, anti-Jewish, anti-American, anti-Bolshevik European Writers' Union?[9]. And what about Hitler's related slogan:"Europe for the Europeans"?

On the other side, I am not going to brood once again over the undemocratic origins of the European idea, a quarter-century ago depicted in John Laughland's *The tainted source*[10]. Instead, I will analyze critically Tuori's claim to have discovered not only the roots of Nazi legal doctrine[11], but also the invention of the European legal tradition. I permit myself to regretfully question first and foremost the frequent terminological confusion between the European Community and the European legal tradition brought about by Tuori, but what makes me wary in a general way is his lack of respect for historical facts.

Although narratives are social facts themselves, they are dangerous because they reduce the past to (collective) opinions. For my taste, Tuori's narrative of the invention of the European legal tradition resembles too much a Brazilian telenovela. The actors are too many and the plot too convoluted; it begins with Fritz Schulz, belonging to the first generation of Roman lawyers in the mould of mere historians, and ends only with Reinhard Zimmermann, born in 1952. In this way, nearly every German Romanist from the post-codification cohort could have claimed his share in the Europeanization of the legal history discipline of the country.

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[6] K. Tuori, *Narratives and normativity: Totalitarianism and narrative change in European legal tradition after World War II*, "Law and History Review" 2019, Vol. 37, pp. 605–638.

[7] K. Tuori, *Empire of law...*, p. 263.

[8] T. Giaro, *Victims and supporters of Nazism vis-á-vis Europe's legal tradition. A new episode in the history of the Third Reich?*, "Forum Prawnicze" 2020, Vol. 62, pp. 82–83.

[9] B.G. Martin, *The Nazi-fascist new order for European culture*, Cambridge MA, London 2016, pp. 224–277.

[10] J. Laughland, *The tainted source*: *The undemocratic origins of the European idea*, 3rd ed., London 2015.

[11] K. Tuori, *Reply to a Review on "Empire of law"*, "Forum Prawnicze" 2020, Vol. 62, p. 89.

2. THE EUROPEANIST NARRATIVE AS PART OF THE EXILE PROCESS?

Originally, Fritz Schulz and Fritz Pringsheim, conservative German legal historians of Jewish extraction, forced to emigrate by the Nazis, occupy much space in Tuori's article on narratives and normativity[12], as well as in his monograph *Empire of law*[13]. Both exiles appear as equal counterparts to the core-Germans, those allowed to remain in Germany: Paul Koschaker (although only a German by culture)[14], Franz Wieacker, and Helmut Coing. Consequently, Tuori leaves no occasion to doubt that "the two strands of the narrative, the exile and the German, form two parts of the whole"[15].

It seems that both exiles, as British residents during the war, had abundant opportunity to divine the local legal culture's underlying Europeanness. But alas, they remained wholly uninterested even in so much as a shared legal culture of the continent based on the "European idea" rooted in Roman law. Tuori omits that Schulz, who after the war did not return from England, never mentioned Europe as political entity. What is more, both Schulz and Pringsheim can be qualified as representatives of the democratic anti-Nazi opposition, where Tuori situates them[16], only when read between the lines and *à clef*[17].

Both scholars adopted in reference to Roman law a stance of those educated immediately after the BGB codification which separated valid law from legal history. In consequence, Schulz and Pringsheim were interested in ancient law, and not in current or future private law of other European countries or any nascent community of them. They never uttered the name "European legal tradition", invented only in 1967 by Helmut Coing[18], even more so, they never mentioned English common law among its manifestations. This idea was formulated for the first time again by Coing in 1985[19].

Already after the war, Koschaker, the most convinced Europeanist among the German Romanists who raised the European banner even prior to the end of Nazi rule, expressed doubts about the political skills of the exiles. In his masterwork

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[12] K. Tuori, *Narratives and normativity...*, p. 607.

[13] K. Tuori, *Empire of law...*, pp. 40–86, 87–123.

[14] T. Giaro, *Memory disorders: Koschaker rediscovered and Baudlerized*, "Studia Iuridica" 2018, Vol. 78, p. 10.

[15] K. Tuori, *Empire of law...*, p. 268.

[16] K. Tuori, *Empire of law...,* pp. 83, 95–96.

[17] T. Giaro, *Victims and supporters...*, pp. 70–74.

[18] H. Coing, *Die europäische Privatrechtsgeschichte der neueren Zeit als einheitliches Forschungsgebiet: Probleme und Aufbau*, "Ius Commune" 1967, Vol. 1, pp. 1–33.

[19] H. Coing, *Common law and civil law in the development of European civilization: Possibilities of comparison*, (in:) H. Coing, K.W. Nörr (eds.), *Englische und kontinentale Rechtsgeschichte: Ein Forschungsprojekt*, Berlin 1985, pp. 31–41.

on Europe and Roman law, he asserted that the cohort of legal historians who emigrated during Nazi rule embraced exclusively scholars of ancient Roman law, i.e. the representatives of the neo-humanist orientation and papyrologists, who – in contrast to the good old (neo-)pandectists – were not authentic lawyers rooted firmly enough (*bodenständig*) to the native soil[20].

Although as "the main formulators of the new European narrative for legal history" are distinguished Koschaker, Wieacker and Coing, all of them Aryans who were allowed to remain in Hitler's Germany, Tuori assures us that "the narrative foundations laid by Schulz and Pringsheim were fused with cultural theories as well as earlier themes concerning the transmission of science"[21]. Frankly, I am unable to identify these narrative foundations or to discern a linkage between this unclear category and the transmission of science which appears in this context equally enigmatic.

Tuori even insists that this new European narrative is "a part of the process of exile". And going somewhat further: "The creation of a new narrative was clearly part of the exile process"[22]. However, from Tuori's later paper, dedicated to the invention of the European legal tradition[23], there has disappeared not only the particular importance of the exile problem, but also the equilibrium between the Jewish exiles and the core-Germans, whose work had been defined in *Empire of law* in an egalitarian and at the same time solidaristic way as "two parts of the whole"[24].

It looks almost like a tacit revocation of the original idea, when in this later paper Tuori promotes the core-Germans: Koschaker, Wieacker and Coing, to the status of "central figures" or "main creators" of the shared-culture theory[25]. In short, disregarding the neo-pandectist Koschaker and the unproductive Coing who did not register any scholarly output under Nazi rule, among Romanists remaining in Germany there emerges only one serious contender for the role of the top founding father of the Europeanist narrative: Franz Wieacker, even if he was sentenced in 1947 by a de-Nazification court (*Spruchkammer*) in Göttingen as a Nazi follower (*Mitläufer*).

[20] P. Koschaker, *Europa und das römische Recht,* 4th ed., München, Berlin 1966, p. 368.

[21] K. Tuori, *Narratives and normativity...*, pp. 630, 633.

[22] K. Tuori, *Narratives and normativity...,* pp. 606, 620.

[23] K. Tuori, *The invention of the European legal tradition and the narrative of rights*, "Journal of European Studies" 2022, pp. 1–15.

[24] K. Tuori, *Empire of law...,* p. 268.

[25] K. Tuori, *The invention...,* pp. 2, 4.

3. WALKING ON EGGSHELLS AROUND WIEACKER

During the Nazi times, his achievements were not always glorious. In 1937, he endorsed the infamous Nazi Law for the Protection of German Blood and the Marital Health Law of 1935, prominent Nazi statutes breaking the axiom of liberal civil law: the equality of all subjects. Not only did he laud the restriction of the marital community (*Konnubium*) to "racially related people", but he reinforced this passage by the emphatic praise of the extension of marital capacity from mere citizens of the German *Reich* (*Reichsangehörige*) to all ethnic Germans living abroad, the *Volksdeutsche*[26].

Unfortunately, Wieacker did not stop there. In another article, published in another juristic Nazi journal, "Deutsche Rechtswissenschaft", directed by an *SS-Sturmbannführer* and Himmler's personal friend, Karl August Eckhardt, and considered the mouthpiece of the so-called *Kieler Schule*, Wieacker voiced his opinions about "ideologic-racialist" (*weltanschaulich-rasserechtlich*) questions. He praised once more – concerned about the biologically correct constitution of the German racial body (*Volkskörper*) – the return of the long-lost ancient Roman *conubium* in the midst of the modernizing anti-Semitic "legal renewal" of the Nazis[27].

Moreover, in the same article Wieacker embarked on the interpretation of the racist Law for the Restoration of the Professional Civil Service (*Gesetz zur Wiederherstellung des Berufsbeamtentums*, in short *Berufsbeamtengesetz*) of 1933, the mother of all anti-Semitic Nazi legislation[28]. According to its ill-famed para 3 (*Arierparagraph*), all Jewish employees, except the WWI participants and servants of long seniority, were instantly to be dismissed. Wiecker took *positivistisch* stance on the Nazi statute, but *antipositivistisch* on the formally still binding Weimar Constitution, denying the wage claim of Jewish employees based on its Art. 131[29].

Back to the long-lost ancient Roman *conubium*, we can register the recent progress of Romanistic studies. Around a quarter-century ago, Okko Behrends, still ignoring Wieacker's party membership, rationalised his praise of the modern *conubium* as springing from "the desire for romantic immediacy and concreteness" (*romantische Unmittelbarkeit und Konkretheit*)[30]. How romantic! Tuori and

[26] F. Wieacker, *Der Stand der Rechtserneuerung auf dem Gebiete des bürgerlichen Rechts*, "Deutsche Rechtswissenschaft" 1937, Vol. 2, p. 182.

[27] F. Wieacker, *Geschichtliche Ausgangspunkte der Ehereform*, "Deutsches Recht" 1937, Vol. 7, pp. 17–18.

[28] F. Wieacker, *Geschichtliche Ausgangspunkte…*, p. 26.

[29] R. Kohlhepp, *Franz Wieacker und die NS-Zeit*, "Zeitschrift der Savigny-Stiftung Romanistische Abteilung" 2005, Vol. 122, p. 222.

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

his pupils, thank goodness not exceedingly numerous ones, either simply omit these utterances of Wieacker, or even maintain – in striking contrast with the facts – that he has never, privately or publicly, written such things[31].

However, besides the testimony of Wieacker's writings, there are also several testimonies of his conduct: before, in the course, and after the war. During this last period he provided namely a significant contribution to the re-Nazification of the Juristic Faculty at the GeorgAugust University of Gottingen, which between 1953 and 1973 accommodated no less than three prominent members of the *Kieler Schule*: Ernst Rudolf Huber, alongside Carl Schmitt another "crown jurist of the Third Reich" (who in 1952 at Freiburg in Breisgau had been efficiently blocked by Pringsheim), as well as Karl Michaelis and Friedrich Schaffstein[32].

Another source of juristic literature ignored by Tuori is Wieacker's reappraisal of his own 1935 essay on the Nazi politics of property. The position of young Wieacker was this time not romantic, but – as some exegetes will – "personalistic" (*personalistisch*)[33] or, maybe better: in contrast to the abstract pandectistic concept of ownership, "personalized"[34]. Old Wieacker follows, by contrast, the popular interpretation of the Hitler era as reposing on a kind of contest between the Nazis and the Jews with the bulk of Germans remaining uncommitted in the middle[35]… and with the anti-Nazi resistance growing day by day[36].

This image is inspired by a neat demarcation, emerging in a few legal historians, between the German academic "legal scholars" and the "Nazis"[37]. According to these historians, in the course of the pitiable process of de-Nazification, the former were "suddenly (…) accused of enabling the crimes" of the latter[38]. This seems to exclude any overlapping membership between the two groups. Wieacker regrets accordingly the "opportunistic" nature of the Nazi property politics, but surprisingly excepts from censure the "predation (*Ausplünderung*) of political opponents"[39].

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[31] K. Tuori, *Empire of law...,* p. 180.

[32] V. Winkler, *Der Kampf gegen die Rechtswissenschaft*, Hamburg 2014, pp. 474–76.

[33] J.G. Wolf, *Die Gedenkrede*, (in:) *In memoriam Franz Wieacker: Akademische Gedenkfeier am 19. November 1994*, Göttingen 1995, p. 28.

[34] J.G. Wolf, *Franz Wieacker 1908–1994*, (in:) S. Grundmann, K. Riesenhuber (eds.), *Private law development in context: German private law and scholarship in the 20th century*, Intersentia 2018, pp. 154–155.

[35] O. Bartov, *Defining enemies, making victims: Germans, Jews, and the Holocaust*, "American Historical Review" 1998, Vol. 103, issue 3, pp. 788–98.

[36] R. Hohls, K.H. Jarausch (eds.) *Versäumte Fragen*, Stuttgart, Munich 2000, p. 316.

[37] T. Giaro, *The culmination-book: Trying to make sense of the Nazi years*, "Studia Iuridica" 2020, Vol. 83, p. 18.

[38] V. Erkkilä, *Roman law as wisdom: Justice and truth, honour and disappointment in Franz Wieacker's ideas on Roman law*, (in:) K. Tuori, H. Björklund (eds.), *Roman law and the idea of Europe*, Bloomsbury 2019, p. 211.

[39] F. Wieacker, Wandlungen der Eigentumsverfassung *revisited*, "Quaderni Fiorentini per la Storia del Pensiero Giuridico Moderno" 1976–77, Vol. 5–6, p. 842.

Well, at least Wieacker remembers the Holocaust being not only the biggest mass killing, but also the biggest plunder in history. In a clause deploying a slippery slope argument, he mentions "confiscations which progressively accompanied oppression and eventually extermination (*Unterdrückung und schließlich Vernichtung*) of our Jewish fellow citizens"[40]. His paper started, though, with the rhetorical question whether such a subtlety as his property doctrine – by many considered the masterpiece of Nazi legal literature – could "embolden the oppressions and illegalities (*Unterdrückungen und Rechtsbrüche*) of the regime?"[41].

The answer expected by Wieacker was evidently negative. But we do not hesitate to contradict: Yes, in concomitance with other factors Wieacker's property doctrine certainly emboldened the Nazi oppressions ending with extermination, particularly if we understand Nazism as a collective deed or systemic phenomenon. In this way, the former leader of European legal historians appears as a forerunner of those who still today aim to normalize the Nazi past with the hope that the passage of time would belittle its crimes, changing them imperceptibly into acts of ordinary administration (of property?).

Is the European legal tradition a sham? What says our expert Tuori? As Europe's cities were being demolished and their populations eliminated, he sees Wieacker, with other Roman lawyers loyal to Hitler's Germany, simply continuing to work – in implicit partnership with his distant refugee brethren – on his "part of a whole"[42]. Of course, success has many fathers, but in assigning the European legal tradition's paternity to Wieacker, we must commemorate also his uneasy position amidst Germany's uncommitted majority which in the 1930s inadvertently stumbled into a quarrel between the Nazis and the Jews.

And the last question. Are the sources not only of the European economic and political integration, but also of the European legal tradition tainted? Tuori's image of the implicit partnership between the German legal historians and the exiles can be extended into the historical dimension. Wieacker was always the same, and so his appraisal of the Imperial Legal Studies Ordinance of 1935 remained the same after the war as it was before: In 1967 Wieacker still qualified this creation of the sworn Nazi Karl August Eckhardt as "in its content essentially not politically motivated"[43]. Thank God this evaluation was in Germany repeatedly denied[44].

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[40] *Ibidem*, p. 856.

[41] *Ibidem*, p. 842.

[42] K. Tuori, *Empire of law...,* p. 268.

[43] F. Wieacker, *Privatrechtsgeschichte der Neuzeit unter besonderer Berücksichtigung der deutschen Entwicklung*, 2nd ed., Göttingen 1967, pp. 555–556.

[44] A.-M. von Lösch, *Der nackte Geist*: *Die Juristische Fakultät der Berliner Universität im Umbruch von 1933*, Tübingen 1999, pp. 284–300; E. Grothe, *Zwischen Geschichte und Recht: Deutsche Verfassungsgeschichtsschreibung 1900–1970*, München 2005, p. 199; R. Frassek, *Juristenausbildung im Nationalsozialismus*, „Kritische Justiz" 2004, Vol. 37, pp. 85–96; R. Frassek, *Göttinger Hegel-Lektüre, Kieler Schule und die nationalsozialistische Juristenausbildung*, (in:)

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