

VILLE ERKKILÄ

# The Conceptual Change of Conscience

*Beiträge zur Rechtsgeschichte  
des 20. Jahrhunderts*  
106

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**Mohr Siebeck**

# Beiträge zur Rechtsgeschichte des 20. Jahrhunderts

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Thomas Duve, Hans-Peter Haferkamp, Joachim Rückert  
und Christoph Schönberger

106





Ville Erkkilä

# The Conceptual Change of Conscience

Franz Wieacker and German Legal Historiography  
1933–1968

Mohr Siebeck

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## Abstract

This is a history of the ideas of German legal historian Franz Wieacker. The broader aim of this study is to analyze the intellectual context in which Wieacker's texts were situated, thus the German legal scientific discourse from 1933 to 1968. In this study Franz Wieacker's texts are analyzed in the light of his correspondence and the broader social historical change of the twentieth century Germany. The study concentrates on the intertwinement of his scientific works with the contemporary society, as well as on the development of his personal perception of continuity and meaning in history.

The theoretical framework of this study derives from conceptual history and hermeneutics of historiography. As objects of analyze I have picked two concepts which Franz Wieacker often utilized in illuminating European legal history: *Rechtsbewusstsein* (legal consciousness) and *Rechtsgewissen* (legal conscience). These concepts were the key terms in his attempt to analyze the themes of justice and the rule of law in European history. In concrete terms, the change in the meanings of Wieacker's concepts *Rechtsgewissen* and *Rechtsbewusstsein* is being tracked in reference to paradigmatic changes in continental legal science and social historical development of Germany.

The analysis conducted in this dissertation proves Franz Wieacker's continuous and firm belief in the necessity of the distinct social position of legal scholars in society. The prestigious status of the 'juridical estate' was a premise for social justice. Furthermore, Wieacker's view on society was shaped by his unconditional trust on the values concerning learnedness and higher education. This preconception was due to his upbringing and attachment to the values of Weimar Republic *Bildungsbürgertum*, 'learned bourgeoisie'.

As a result, in the later scientific production of Franz Wieacker, the themes of 'communality' as the context of legal scholarship and 'elastic creativity' as the aim of legal science were significantly important. Wieacker explained the diverse social breaches and recent crises of Germany through a vast narrative of European legal culture, which he constructed with the means of concepts. Despite the radical changes brought about the National Socialist seizure of power of 1933 and the end of the Second World War in 1945, the core of his scholarly identity remained the same from Weimar to the Federal Republic of Germany.



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The project 'Re-inventing the Foundations of European Legal Culture 1934–1964' was my academic home from the autumn of 2013 to summer 2017. Thank you Tommaso Beggio, Heta Björklund, Jacob Giltaj, Magdalena Kmak and Kaius Tuori for your company, support, and constructive criticism. The project provided me the perfect academic setting for writing my book, but at least as significant are the memories of our common work, conference trips, and your friendship.

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to the theoretical world of historiography. Juha Siltala and Marja Jalava showed me that researching historiography was about people, flesh and blood, and convinced me that the study of historical scholarship was both interesting and important. Peter Fritzsche reminded me of what is truly meaningful in academic work. In the guidance of Martin Burke, Jani Marjanen and Johan Strang, I was able to balance between theory and practice.

The rich and innovative language of Franz Wieacker's letters is written down with a virtually incomprehensible handwriting. Furthermore, the texts and message of the transcribed letters, in addition to some quotes from his scientific texts, had to be translated in English. A task which would have been insurmountable for me, if it had not been Jörg Schöpfer, Heike Wessling, Markus Köhler, Salla Huikuri and Saara Uvanto who contributed to the transcriptions and translations of Wieacker's texts. Their help was decisive, but the flaws are naturally my own. Heta Björklund's editing skills and Mark Shackleton's proofreading were a priceless aid. Thank you Hadle Andersen, Tuomas Tepora, Tomi Rantamäki and Ville Yliaska for the conversations which might have seemed casual, but, with respect to research process, were vital. With Anette Alén-Savikko I was able to maintain a down-to-earth view on academic life, and a hope that, in the end, everything will go just fine. Jaakko Taipale. Our common journey from the warehouses of Ruokakesko, from the tough streets of Hakunila to the calm atmosphere of the University of Helsinki could be a subject of another study. Thank you my friend.

This has been a time consuming project. Often an extra hour for researching and writing was an hour away from what one understands to be the most important thing, but keeps on forgetting. I cannot thank enough my parents Arto and Paula for all their support. One of the good sides of this project was the fact that I came to realize how much your presence means to me. Salla, Thank you for everything. I could have not done it without you, but I would also be lost without you. My kids Jonatan, Ronja, Elia and Amos continue to give me more than I could have ever imagined. Maybe someday I will be able to help them as much as they have helped me. This book is, however, dedicated to my sisters, Elina, Jenni and Johanna who taught me, and still remind me, what is the value of simple and sincere attitude.

In Helsinki 14.12.2018

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## I. Introduction

This book is about the German legal historian Franz Wieacker<sup>1</sup> and the body of scientific writings<sup>2</sup> he produced during the years from 1933 to 1968. I study

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<sup>1</sup> Comprehensive biographies on Franz Wieacker include Okko Behrends, 'Franz Wieacker 5.8.1908–17.2.1994,' in *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung*, 112 (1995), XIII–LXII., Joseph Georg Wolff, 'Franz Wieacker (5. August 1908–17. Februar 1994),' in Stefan Grundmann (ed.), *Deutschsprachige Zivilrechtslehrer des 20. Jahrhunderts in Berichten ihrer Schüler. Eine Ideengeschichte in Einzeldarstellungen. Bd. 1.* Berlin, de Gruyter 2007, 73–86., Detlef Liebs, 'Franz Wieacker (1908 bis 1994) – Leben und Werk,' in Okko Behrends & Eva Schumann (eds.), *Franz Wieacker: Historiker des modernen Privatrechts.* Göttingen, Wallstein Verlag 2010, 23–48; So far the most thorough intellectual history of Wieacker is Viktor Winkler, *Der Kampf gegen die Rechtswissenschaft. Franz Wieackers "Privatrechtsgeschichte der Neuzeit" und die deutsche Rechtswissenschaft des 20. Jahrhunderts.* Hamburg, Verlag Dr. Kovac 2014. The above-mentioned *Franz Wieacker: Historiker des modernen Privatrechts* by Behrends & Schumann includes eight illuminating articles, from which the most relevant with respect to this work are Martin Avenarius, 'Verwissenschaftlichung als "sinnhafter" Kern der Rezeption: eine Konsequenz aus Wieackers rechtshistorischer Hermeneutik' (119–180), Joachim Rückert, 'Privatrechtsgeschichte der Neuzeit: Genese und Zukunft eines Faches?' (75–118), and Hans-Peter Haferkamp, 'Positivismen als Ordnungsbegriffe einer Privatrechtsgeschichte des 19. Jahrhunderts' (181–212). Articles concerning Wieacker's methodology include Joachim Rückert, 'Geschichte des Privatrechts als Apologie des Juristen – Franz Wieacker zum Gedächtnis,' In *Quaderni Fiorentini per la storia del pensiero giuridico moderno* 24 (1995), 531–562., Martin Avenarius, 'Universelle Hermeneutik und Praxis des Rechtshistoriker und Juristen. Die Entwicklung ihres Verhältnisses im Lichte der Diskussion zwischen Gadamer und Wieacker,' in *Juristische Hermeneutik zwischen Vergangenheit und Zukunft.* Baden-Baden, Nomos Verlagsgesellschaft 2013, 59–103., and Marion Träger, 'Methode und Zivilrecht bei Franz Wieacker (1908–1994),' in Joachim Rückert & Ralf Seinecke (eds.), *Methodik des Zivilrechts – von Savigny bis Teubner*, 2. Auflage 2012, 235–260.

<sup>2</sup> Among the most renowned monographs of Wieacker published during 1933–1968 are *Privatrechtsgeschichte der Neuzeit, unter besonderer Berücksichtigung der deutschen Entwicklung.* (Göttingen, Vandenhoeck & Ruprecht 1952), and its second revised edition from 1967 (Göttingen, Vandenhoeck & Ruprecht), which has been translated into English by Tony Weir: *A History of Private Law in Europe: With Particular Reference to Germany.* (Oxford, Oxford UP 1995), also *Textstufen klassischer Juristen* (Göttingen, Vandenhoeck & Ruprecht 1960). Article collections include *Vom römischen Recht. Wirklichkeit und Überlieferung* (Leipzig, Koehler & Amelang 1944) and *Gründer und Bewahrer. Rechtslehrer der neueren deutschen Privatrechtsgeschichte* (Göttingen, Vandenhoeck & Ruprecht 1959). A comprehensive collec-



changes in Wieacker's ideas, and the way these are reflected in his legal historical texts. Wieacker's legal historical works constituted an influential and essential contribution to contemporary knowledge of European jurisprudence in the past. Therefore, a larger task for this study, in which I utilize Wieacker's case, is to analyze the pre- and post-Second World War turmoil of German legal history – the scientific context in which Wieacker's texts were situated – and the manner in which common experiences shape historiography.

In order to scrutinize a change in the ideas of an individual scholar, I focus my study on concepts which are related to the themes of justice and the rule of law. I take these concepts more as mobile and transparent explications of ideas than practical models of jurisprudence. Thus, my starting point is the history of ideas – and following Jürgen Kocka's elaboration – I believe that scholarly thinking always appears in relation to actions and social circumstances.<sup>3</sup> In order to study the thinking or ideas of a given scholar, one needs to concentrate on the wider systemic triangle, where the ideas are influenced by the social situation and behavior. Conversely, the ideas of a given scholar cannot be distinguished from his actions, and the actions and thoughts together have an effect on the reality he lives in.<sup>4</sup> In a way, I study Franz Wieacker's texts like he himself studied legal

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tion of Wieacker's 1930s and 1940s articles are being compiled in Christian Wollschläger (ed.), *Franz Wieacker. Zivilistische Schriften (1934–1942)*. Frankfurt am Main, Vittorio Klostermann 2000. Outside the above-mentioned works, the texts which will be elaborately analyzed in this book include: *Das römische Recht und das deutsche Rechtsbewusstsein*. Leipzig, Johann Ambrosius Barth, 1944; *Vulgarismus und Klassizismus im Recht der Spätantike*, Heidelberg, Carl Winter Universitätsverlag 1955; 'Ursprünge und Elemente des europäischen Rechtsbewusstseins,' in Martin Göhring (ed.), *Europa, Erbe und Aufgabe. Internationaler Gelehrtenkongress Mainz 1955*. Wiesbaden 1956. S.105–119; 'Vom Römischen Juristen,' in *Zeitschrift für die gesamte Staatswissenschaft* 99 (1939), 440–463; 'Der Standort der römischen Rechtsgeschichte in der deutschen Gegenwart,' in *Deutsches Recht* 12 (1942), 49–55; 'Die Stellung der römischen Rechtsgesichte in der heutigen Rechtsausbildung,' in *Zeitschrift der Akademie für Deutsches Recht* 6 (1939), 403–406; 'Die Fortwirkung der antiken Rechtskulturen in der europäischen Welt,' in *Vom Recht*. Hannover, Niedersächsische zentrale für Politische Bildung 1963. A complete bibliography of Wieacker's works can be found in Okko Behrends, 'Bibliographie der Schriften Franz Wieackers,' in *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte* 112 (1995), 744–769.

<sup>3</sup> Jürgen Kocka, 'Sozialgeschichte zwischen Strukturgeschichte und Erfahrungsgeschichte,' in Wolfgang Schieder & Volker Sellin (eds.), *Sozialgeschichte in Deutschland*, Bd 1, Göttingen, Vandenhoeck & Ruprecht 1986, 67–88. Or as Quentin Skinner puts it, ideas reflect the larger domains of beliefs and desires in society. Quentin Skinner, 'Motives, Intentions and Interpretations,' in James Tully, *Meaning and Context: Quentin Skinner and his Critiques*. Princeton, Princeton UP 1988, 231–258.

<sup>4</sup> According to Aviezer Tucker, the history of historiography should concentrate both on published texts (the superstructure) and on the research process (the infrastructure). Aviezer

history: I emphasize the “material” conditions of the author, and analyze how these premises shape the meaning of his text.<sup>5</sup>

In Central Europe, the era from 1933 to 1968 was a turbulent, politically loaded, and even disturbing time. War, violence and scarcity, and on the other hand a sense of unity and meaningful national destiny generated strong emotional experiences also among the academics of the time. National Socialism demolished the previous practices of administration and law, challenging the contemporary ideas on subjective rights, communality and justice. After the Second World War, German society was physically in ruins, but also faced with an inevitable rethinking of the ideologies and values which defined the national community. Demarcation between individuality and social pressure, common values and personal space were topics which defined public discussion and identity in one way or another, not only in Germany, but throughout Europe.<sup>6</sup> Thus, common explanations of the world of human affairs became more fragile and possibly incompatible with the experiences individuals faced in their everyday lives. In the face of this ontological crisis, legal historiography, from its part, also had to provide answers to the questions of continuity and meaning not only in the realm of abstract history, but with respect to the essence of contemporary society. Franz Wieacker wrote some of his most influential works during this ideological turmoil and social disarray. Thus, an analysis of his academic works, which were written amidst changing norms and tumbling common assumptions, has to take this ambiguity not only into account but as a starting point.

An academic historical text is produced in a dialogue about the past between the author and his cultural meanings, where neither the culturally constructed meanings nor the identity of a scholar are rigid, permanent or emotion-free elements (let alone the entity of “the past”).<sup>7</sup> Consequently, I argue that historiogra-

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Tucker, *Our Knowledge of the Past: A Philosophy of Historiography*. Cambridge, Cambridge UP 2004, 6–8.

<sup>5</sup> e.g. Wieacker, *Zum System des deutschen Vermögensrechts. Erwägungen und Vorschläge*. Leipzig, Leipziger rechtswissenschaftliche Studien 126 1941, 5–13; Wieacker, *Die Fortwirkung der antiken Rechtskultur*, 81; cf. Florian Meinel, *Der Jurist in der industriellen Gesellschaft. Ernst Forsthoff und seine Zeit*. Berlin, Akademie Verlag 2012, 200–205.

<sup>6</sup> About the breaches and continuities in the public levels of German society in connection to identity formation (e.g. upbringing, masculinity or communality), see e.g. Georg C. Mosse, *The Image of Man: The Creation of Modern Masculinity*. New York, Oxford UP 1996, 155–180; Ute Frevert, ‘Vertrauen – eine historische Spurensuche,’ in Ute Frevert (ed.), *Vertrauen. Historische Annäherungen*. Göttingen, Vandenhoeck & Ruprecht 2003, 7–66; and Andrew Donson, *Youth in the Fatherless Land: War Pedagogy, Nationalism, and Authority in Germany, 1914–1918*. Cambridge, Harvard UP 2010.

<sup>7</sup> To say this in a slightly different way, historiography can be studied as an *aesthetic entity*. The aesthetics of historiography is a vast field which is being studied by numerous scholars. Here my theoretical approach is close to Hayden White’s theories, at least in the way that I am

phy, in addition to researching past sources and weighing them against a philosophy or methodology, as a representation *also* deals with the socially experienced emotions which its writer confronts in his surroundings as a member of a community. Franz Wieacker wrote not only about “the past” of the phenomena of the rule of law and justice, but concurrently conceptualized and commented on contemporary social and political events he witnessed at first hand, and which somehow affected the ideas of German rule of law and justice. In this book I concentrate on this intertwining of the personal view, cultural change and scientific tradition in Wieacker’s production.

I argue that the ‘intertwinement’ inside the historical text reveals itself in the metaphors and concepts used by the historian, and focusing on them enables me to grasp this complicated level in historiography. Despite the claims of historical scholarship, historians are not exceptionally able to discern between their subject matter, outer public influence, and personal orientation in their works. Rather, and this is often the case, historical writing resembles more a semi-conscious process, where the author’s ideas of significance are weighed against what one believes to be the socially acknowledged meaning. By semi-conscious I mean that usually for historians the process appears as if it is guided by the automatic, axiomatic and unquestionable principles of a methodology or paradigmatic truth, even though this process has rarely been explicated or even given much cognitive effort. Such principles seem to be attributed with affective meaning, and they are “true” because other options are perceived as untenable. As a finished aesthetic entity, a history, a narrative of and for a community, is “correct” because there cannot be other options.

I take as my starting point a conceptual historical approach in which concepts and metaphors are perceived as flexible and contested symbols in communal meaning production.<sup>8</sup> These terms and sayings manage to include the various and

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interested in the actual writing process of history (cf. Hayden White, ‘The Practical Past,’ in *Historiein* 10 (2010), 10–19). I have also been influenced by Frank Ankersmit’s analysis of the relation between the feeling and expression of the temporal (see Frank Ankersmit, *Meaning, Truth, and Reference in Historical Representation*. Ithaca, Cornell UP 2012, and ‘Historical Experience Beyond the Linguistic Turn,’ in Nancy Partner & Sarah Foot (ed.), *The SAGE Handbook of Historical Theory*. Los Angeles, SAGE 2013, 424–438). Nevertheless, in many cases I have found it useful to borrow from and refer to theorists of aesthetics such as Arthur C. Danto and Hans-Georg Gadamer, who, with different emphasis, illuminate the interplay of the subjective and object in cultural reproduction.

<sup>8</sup> See e.g. Reinhard Koselleck, *Begriffsgeschichten. Studien zur Semantik und Pragmatik der politischen und sozialen Sprache*. Frankfurt am Main, Suhrkamp Verlag 2006; Jan Ifversen, ‘About Key Concepts and How to Study Them,’ in *Contributions to the History of Concepts* 6 (2011):1, 65–88.

even contradictory opinions on the phenomenon they signify.<sup>9</sup> In other words, concepts and metaphors are the mediums which deliver the experience of the writer to the receiving end. They help, on the one hand, historians to present personal and credible arguments on a contested subject to a wider audience and, on the other hand, the wider audience to understand historians' claims at a personal level. To focus on the linguistic mediums, and perceive historical writing as a dialogue, enables the researcher to take into account the concurrent impacts of personal view, public influence and scientific tradition in the legal historiographical texts under scrutiny.

Such a stance is helpful especially when studying the continuities and discontinuities embedded in a given historiographical culture. Franz Wieacker, among many other legal scientists, wrote of matters which were anchored in concrete reality, such as 'property' and 'education.' Amidst the social and political turbulence of early twentieth-century Europe, the actual circumstances defining these entities changed rapidly, and so did the common meanings which were associated with them, as well as Wieacker's view on those phenomena. However, this study is not about tracking developments in legal definitions, since that was not the manner in which Franz Wieacker himself understood legal historical change. For him, legal historical analysis should not focus on legal language concerning "things," but on the mentality, perceptions and valuations related to those "things," and their change in time. To Wieacker, "things" were always mere (though important) particles of a wider cultural understanding regarding the rule of law and justice, and, in the end, a temporal change in those entities should be the primary interest of a legal historian.<sup>10</sup>

Wieacker explicated the abstractions of justice and people's understanding of the rule of law with the concepts of *Rechtsgewissen* and *Rechtbewusstsein*, 'legal conscience' and 'legal consciousness.'<sup>11</sup> Embedded in these two concepts were the common meanings which the contemporary time gave to "things," but

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<sup>9</sup> I, however, go even further than traditional *Begriffsgeschichte* in holding that concepts and metaphors are perfect and elemental cognitive tools in connecting the domains of the writer and his or her audience in the field of history. cf. George Lakoff & Mark Johnson, *Metaphors We Live By*. London: Chicago UP 2003; Gilles Fauconnier & Mark Turner, *The Way We Think: Conceptual Blending and the Mind's Hidden Complexities*. New York, Basic Books 2002.

Peter L. Berger & Thomas Luckmann, *The Social Construction of Reality: A Treatise in the Sociology of Knowledge*, Garden City, Anchor Books 1966.

<sup>10</sup> See e.g. Franz Wieacker, 'Entwicklungsstufen des römischen Eigentums,' in Helmut Berve (ed.), *Das Neue Bild der Antike*. Leipzig, Koehler & Amelang 1942, 156: "Die Art, wie eine Rechtswissenschaft das Eigentum bestimmt, kennzeichnet ihr Verhältnis zur sozialen Wirklichkeit und die Eigenart ihres Denkstils."

<sup>11</sup> A more detailed definition of the concepts of *Rechtbewusstsein* and *Rechtsgewissen* will be given in the methods chapter.

moreover, they also included the accumulated knowledge of preceding scientific tradition, and the personal valuations of the scholar utilizing them. *Rechtsbewusstsein* and *Rechtsgewissen* were frequently and widely used terms in German legal science from the 1930s to the 1960s, and they played a significant part in Wieacker's legal historical texts, but moreover, these concepts were tools with which Wieacker – and indeed many other legal scientists too – perceived his society and its change in time.

Concentrating on these two concepts and by following the lines of my theoretical framework, an intellectual historical study of a culture of writing about the past through the character of Franz Wieacker can be made. It also provides a stance in which the experience and historical view of Franz Wieacker are not unconditionally attached to the general historical development of Germany nor tied to the narrative of German legal scholarship. However, acknowledging the dialogical nature of historiography and the communal bind which concepts carry with them, necessarily places Wieacker within a certain group of scholars. His personal view of contemporary society was not a closed creed, but an evolving stance, which he and his circle of friends reflected. So, while studying the ideas in Wieacker's texts, I argue that I can comment on the assumptions, explanations and ideologies of a group (a community) of people, rather than on the mere axioms of one particular scholar. The research interest of this study, therefore, is concerned with the continuities and discontinuities in this culture of writing about the past.<sup>12</sup>

This study analyses the ideas of a scholar, and concurrently his relation to politics, the ideal of social good and the morality of science. Thus, and in addition, it also contributes to an understanding of Franz Wieacker's intellectual context. I study how a community of scholars once saw the definition of the abstractions of social justice and rule of law in the European framework as their own projects. Their definitions were transformed by the common experiences they faced, and the virtues appreciated by this material community characterized the

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<sup>12</sup> Here I lean on scholars like Axel Honneth (*The I in We: Studies in the Theory of Recognition*. Cambridge UK, Polity Press 2014, especially 201–216) and David Carr (*Experience and History. Phenomenological Perspectives on the Historical World*. New York, Oxford UP 2014), but also on classic social psychological studies, which insist that the interaction between the public and private spheres of society can be examined through the concept of a group. A group is an intermediary tool, concept and forum between the individual and society. (See e.g. Philip E. Converse, 'The Nature of Belief Systems in Mass Publics,' in *Critical Review*, 18 (1964), 1–74; Henry Tajfel, *Human Groups and Social Categories*. Cambridge, Cambridge UP 1981). Similarly, "culture" according to Benedict Anderson, is not *the* body of people sharing a language or ethnic origin, but the values to which an individual is attached and can perceive in concrete terms (Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism*. London, Verso 2006, 1–65).

form of the justice and rule of law they represented. In distinction to previous studies I am able to tie Franz Wieacker's understanding of the relation between scientific knowledge and society to the worldview of this legal scientific community. Wieacker's personal understanding of morality and justice in society and the corresponding beliefs of his closest colleagues were built upon similar premises. The intertwining of this shared belief, social change, and cumulative learnedness in scientific tradition shaped Wieacker's academic texts from the 1930s to the 1970s. The continuities and discontinuities in the ideas embedded in that body of scientific writings affect even today our common understanding of European legal heritage and the ideas of justice and the rule of law in continental legal history.

## 1. Historical background for the research and research questions

Franz Wieacker was a Romanist and legal historian, and sometimes it is hard to say which came first. He did not write solely on matters concerning Roman law and its heritage in the modern German (and European) legal system, for his texts contributed to discussions about legal hermeneutics, property and work law, as well as methodological questions, both before and after the Second World War.<sup>13</sup> In all these subfields of legal discipline, his writings either clarified or re-interpreted the existing body of knowledge. In his scientific texts, through those decades, the target was always the existing law, and he actively tried to have an effect on contemporary jurisprudence, judicature and even legislation. If there is a concise theme inside Wieacker's scientific works, it must be the question of justice, namely the problem of a just interpretation. "To search for the timeless idea of justice" from the history of European legal tradition is the research task that Wieacker explicitly formulated for himself in the first pages of his classic book *Privatrechtsgeschichte der Neuzeit* (1952).<sup>14</sup> Wieacker's ideas on the history and practice of that justice are groundbreaking and are still influential today. He was one of the most influential legal historians of twentieth-century Germany, and

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<sup>13</sup> Marion Träger, 'Methode und Zivilrecht bei Franz Wieacker (1908–1994),' in Joachim Rückert, Ralf Seinecke, *Methodik des Zivilrechts – von Savigny bis Teubner*, 2. Auflage 2012, 235.

<sup>14</sup> Wieacker, *Privatrechtsgeschichte* 1952, 8: "[Rechtsgeschichte ist] Geschichte schlechthin, gesehen unter dem übergeschichtlichen Gesichtspunkt der Rechtsidee und der Rechtserfahrung."

analyzing his texts means scrutinizing a theory which many other scholars have taken as a starting point or comparative model in their respective works.<sup>15</sup>

In the 1930s Wieacker established his status among the leading young legal scholars in Germany. He started his academic career as a scholar of Roman law, but soon moved on to more contemporary themes, and was renowned especially for his work on property law. Wieacker's works had an effect not only in giving a sophisticated and appropriate elaboration of the phenomenon of ownership in law, but through his writings he indirectly supported the National Socialist intentions to bend jurisprudence so that it echoed the fascist political ideology.<sup>16</sup> After the war, Wieacker's influence was again dual. His texts which concerned legal interpretation, and especially his thorough *History of Private Law in Europe (Privatrechtsgeschichte der Neuzeit)*, shaped the way in which continental legal scholars perceived the study of law. However, Wieacker's input on the larger paradigmatic shift when continental legal history started to emphasize continuities and kinship between the Roman legal tradition and European, namely United European, law, was also decisive.

The time frame of my study (1933–1968) takes us from the beginning of the Third Reich to the early Berlin Wall years and the student riots of the late 1960s. This frame leaves out some significant work Franz Wieacker produced and rules out a detailed study of the development of his scientific stance as a whole. I argue for this framing on the basis of the coincidence of several important events in the personal and public spheres of the scholar under scrutiny, in both the starting and end point of my time frame. In 1933 not only did Nazis seize power in Germany, but Franz Wieacker also took the first steps in his academic career.<sup>17</sup> In the 1960s the Berlin Wall was erected, Konrad Adenauer left his position, student riots escalated in 1968, and West Germany had to face its Nazi past in an unprecedented manner.<sup>18</sup> In 1967 the second revised edition of Franz Wieacker's magnum opus *Privatrechtsgeschichte der Neuzeit* was published. In this volume Wieacker concluded the results of his scholarly work of the last decades, and in a much more direct manner than in the first edition of 1952 he extended his analysis to the fields of historical meaning and interpretation. For Wieacker the late 1960s was

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<sup>15</sup> See e.g. Winkler 2014, 1–2; Dieter Simon, 'Franz Wieacker,' in *Rechtshistorisches Journal* 13(1994), 1–4.

<sup>16</sup> See Wolf 2007, 77 and Wieacker's influence on the 1937 reform of matrimonial law.

<sup>17</sup> Wieacker completed his doctoral dissertation in 1932 with the book *Lex commissoria. Erfüllungszwang und Widerruf im römischen Kaufrecht*. (Berlin, J. Springer 1932), and started to gain a good reputation among legal scholars towards the end of the decade. Liebs 2010, 34–35.

<sup>18</sup> Dirk A. Moses, *German Intellectuals and the Nazi Past*. New York, Cambridge UP 2006, 8–9.

an era of rethinking, not only in the scientific sense, but also with regard to his personal history. This becomes evident in the publication of the revised version of his 1935 article *Wandlungen in Eigentumsverfassungen*.<sup>19</sup> 1968 marked the ending of an era both to Wieacker personally and in more general terms to the Federal Republic of Germany. Since it would be impossible to cover Wieacker's whole career in this study, I consider the boundaries I have placed to be justified.

In this study I take Franz Wieacker's personal history and scholarly identity to be deeply intertwined with the more general social and scientific destinies of Germany, and argue that this connection is also evident in the ideas of his academic texts.<sup>20</sup> My purpose, however, is not to offer social historically derived causal explanations of the ideas of a single individual. Both before and after the Second World War, the view that Franz Wieacker had on society cannot be straightforwardly equated with any particular ideology, but it is obvious that the shifts in the material conditions and changes in the political sphere of the society were reflected in his works. Moreover, even the intellectual atmosphere, or "public opinion" if one prefers, itself is a very complex and multileveled phenomenon.

For example, National Socialism was neither a monolithic nor a completely thought out plan of actions for the German people. Rather, from the beginning it constituted two competing discourses: the harsh anti-Semitism of the NSDAP, and disguised ethnic fundamentalism directed towards "ordinary" Germans. No one had absolute mastery over this ideology. In other words, "National Socialism" was defined (one could say constructed) in interactive situations in the context of old clubs, committees, classes, gatherings, informal chats between neighbors, friends and relatives, etc., namely wherever people shared their experiences of recent social events.<sup>21</sup> Nevertheless, behind the communal meaning construction of the 1930s was the National Socialist party's ruthless greed for power. The unusual nature and success of the fascist revolution was due to its capability to persuade the old networks of the Republic to redefine themselves as National Socialist.<sup>22</sup> The Nazi demagogues utilized common emotions or intentions like political opportunism, fear, nationalistic euphoria or the mere wish to have an

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<sup>19</sup> Both the original article 'Wandlungen der Eigentumsverfassung' [1935] and "Wandlungen der Eigentumsverfassung" revisited' [1976/77], can be found in Christian Wollschläger (ed.), *Franz Wieacker. Zivilistische Schriften (1934–1942)*. Frankfurt am Main, Vittorio Klostermann 2000, 9–108; 475–491.

<sup>20</sup> Cf. Mark Bevir, 'Mind and Method in the History of Ideas,' in *History & Theory* 36 (1997): 2, 167–168.

<sup>21</sup> Claudia Koonz, *The Nazi Conscience*. Cambridge, Harvard UP 2003.

<sup>22</sup> Thomas Rohrkrämer, *A Single Communal Faith? The German Right from Conservatism to National Socialism*. New York, Berghahn Books 2007.



effect on one's local environment. They created an atmosphere and social possibilities where individuals motivated by those feelings could take a lead in stabilized or totally new, freshly established, networks and groups. These new champions of the "movement" were provided with the vocabulary and concepts of National Socialism, which they then interpreted in their own context and preached in their communities. The task of this standardized vocabulary and language was to disguise the harsh takeover of communal networks and present it as a strong and unified, unprecedented uprising of the *Volk*.<sup>23</sup>

Academia and jurisprudence were by no means immune to this phenomenon. The emphasis on *Führerprinzip*, enthusiastic but irrelevant deployment of the fashionable rhetoric and outright racist remarks in academic texts, were common traits in the legal scientific works following the National Socialist *Machtergreifung* [seizure of power].<sup>24</sup> The National Socialist revolution, however, did not as such change legal historical methodology. Of course, if one wanted to obtain grants, be promoted or even keep one's job, the research topics, questions and results had to follow a certain pattern. But this "paradigmatic change," like every other change, left free space for scholars to express themselves as scientists.<sup>25</sup> Despite the seemingly harsh demands of the National Socialist state on academic life, and especially on those studying Roman law, the party for the most part let the learned be, possibly because the Nazis were just not very interested in human sciences.<sup>26</sup> The majority of German scholars did not feel that they were involved in a theatrical pseudo-scientific game; it was relatively easy to contribute to the introduction of the "legal renewal," at least on the level of rhetoric, and ignore the already visible and alarming signs of injustice.

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<sup>23</sup> Koonz's account of Martin Heidegger as a new herald of the *idée*, gives an example how scientific language was jumbled with the new vocabulary as a nonsense, which power lied not in its verbal reasoning or deduction (which it didn't have), but in the ruthless and overwhelming message of fundamental change. Koontz 2003, 46–56; Stolleis writes of "centralized regulation of language". Michael Stolleis, *Law under the Swastika. Studies in Legal History in Nazi Germany*. Chicago, Chicago UP 1998, 12, 15, 45.

<sup>24</sup> About the lack of "legal philosophy" in National Socialistic law see Stolleis 1998, 20–21, also 35, 98; See also Bernd Rüthers, *Die Unbegrenzte Auslegung. Zum Wandel der Privatrechtsordnung im Nationalsozialismus*. 7. Auflage. Tübingen, Mohr Siebeck 2012, 91–111.

<sup>25</sup> Karen Schönwälder shows how historians absorbed new vocabulary to old scientific models and analyzed for example foreign policy from the same ground as before, now only in a more aggressive way. Karen Schönwälder, *Historiker und Politik. Geschichtswissenschaft im Nationalsozialismus*. Frankfurt, Campus Verlag 1997; cf. Stolleis 1998, 95–105; Georg G. Iggers, *Deutsche Geschichtswissenschaft. Eine Kritik der traditionellen Geschichtsauffassung von Herder bis zu Gegenwart*. Wien, Böhlau 1997, 320–328.

<sup>26</sup> Hans-Peter Haferkamp, *Die heutige Rechtsmissbrauchslehre: Ergebnis nationalsozialistischen Rechtsdenkens?*. Baden-Baden, Nomos Verlag 1995.

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