

**CRITIQUE**

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

**1. THE COMPLETION OF THE FOUNDLAW PROJECT**

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

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

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

<sup>1</sup> T. Giaro, *Memory Disorders. Koschaker Rediscovered and Bowdlerized*, “Studia Iuridica” 2018, Vol. 78, pp. 9–23; id., *A Matter of Pure Conscience? Franz Wieacker and his ‘Conceptual Change’*, “Studia Iuridica” 2019, Vol. 82, pp. 9–28.

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

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

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

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

<sup>2</sup> N. Frei, *Wie modern war der Nationalsozialismus?*, “Geschichte und Gesellschaft” 1993, Vol. 19, pp. 367–387; R. Bavaj, *Die Ambivalenz der Moderne im Nationalsozialismus. Eine Bilanz der Forschung*, München 2003.

<sup>3</sup> G. D. Rosenfeld, *Hi Hitler!: How the Nazi Past is Being Normalized in Contemporary Culture*, Cambridge 2015.

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

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

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

## 2. PERSONAL PERSPECTIVES

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

<sup>4</sup> R. C. van Caenegem, *Legal historians I have known*, “Rechtsgeschichte” 2010, Vol. 17, pp. 288–291.

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

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

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

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

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

<sup>6</sup> A. Rodger, *David Daube 1909–1999*, (in:) J. Beatson, R. Zimmermann (eds.), *Jurists Up-rooted. German Speaking Émigré Lawyers in Twentieth-Century Britain*, Oxford 2004, pp. 242, 244.

<sup>7</sup> A. Rodger, *David Daube...*, pp. 244–247.

<sup>8</sup> R. Taubenschlag, *The Plea of Superior Orders (A Discussion of the Trial of War Criminals)*, “New Europe”, February–March 1945, pp. 23–25.

<sup>9</sup> D. Daube, *The Defence of Superior Orders in Roman Law*, “Law Quarterly Review” 1956, Vol. 72, p. 601.

<sup>10</sup> D. Daube, *Forms of Roman Legislation*, Oxford 1956, pp. 62–72.

<sup>11</sup> C. Carmichael, *Ideas and the Man...*, p. 157.

<sup>12</sup> T. Giaro, *Memory Disorders...*, pp. 13–14.

again Daube, on the same level as legal historians who could remain in Germany: Koschaker, Wieacker and Coing.<sup>13</sup>

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

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

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

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

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

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

<sup>15</sup> K. Tuori, *Narratives and Normativity*, “Law and History Review” 2019, Vol. 37.2, p. 606.

<sup>16</sup> F. Wieacker, *Privatrechtsgeschichte der Neuzeit*, 1<sup>st</sup> ed. Göttingen 1952; 2<sup>nd</sup> ed. Göttingen 1967.

<sup>17</sup> V. Winkler, *Moderne als Krise, Krise als Modernisierung*, “Forum Historiae Iuris” 2005, p. 13.