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# Roman Law as Wisdom: Justice and Truth, Honour and Disappointment in Franz Wieacker's Ideas on Roman Law

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## Introduction

Franz Wieacker's *Privatrechtsgeschichte der Neuzeit* (1952) is a seminal legal–historical work on twentieth-century Europe from one of the greatest Romanists of our time. In this book Wieacker, with incomparable sophistication, knitted together his works and learning from preceding decades in order to illustrate not only the legal history of modern Europe but also the influence of Roman law in the Continent's destiny. While preparing his magnum opus, Wieacker lived through the social and political upheaval of Germany: National Socialism, the Second World War and the 'Point Zero' of post-war German society. Thus, *Privatrechtsgeschichte* is the end result of a decades-long interaction between the scholar, the tradition of Roman law and the disarray of social structures.

Wieacker's tool for understanding and categorizing the social phenomena he personally experienced was always his ideas on Roman law. With the help of this idealized form of thinking he attempted to explain new ideological streams, the shifting relations between politics and justice, as well as concrete changes in his position as a lawyer, scholar and citizen. In this chapter, I will review Wieacker's works as a means of making sense of the turbulent social reality of a scholar, not merely the jurisprudential context but also the feeling of social prestige and disappointment. In practice, my hermeneutical task is conducted via scrutinizing Wieacker's relation to two other theorists of the twentieth century, namely Carl Schmitt and Hans-Georg Gadamer. This chapter scrutinizes the meanings – on the one hand shifting and on the other hand enduring – that Wieacker attached to Roman law in the light of the social and historical circumstances which he faced as a lawyer, scholar and German citizen. Wieacker's relation to the thoughts of Schmitt and Gadamer are examples of different usages of the idea of Roman law and of the connotations associated with it during the turbulent twentieth century.

Like most of the prominent twentieth-century scholars of Roman law, Wieacker witnessed at first hand the collapse of traditional German society. But unlike Fritz Pringsheim, David Daube and Fritz Schulz, he did not experience exile. On the contrary, he was able to stay in totalitarian Germany, publish works dealing with Roman law and concurrently even advance in his career. It is not accurate to categorize Wieacker as a supporter of National Socialism, but he had to, and he was willing to, reconcile with some of the ideological streams of the Third Reich. However, after the Second World War, it was Wieacker who became perhaps the most renowned proponent of the idea of a pure and shared European legal heritage founded on Roman law (Winkler 2014; Behrends 1995).

It is difficult to overstate the influence of Wieacker's contribution to the discipline. Moreover, his works continue to have an effect in the fields of Continental legal history and legal hermeneutics. The shift in Wieacker's intellectual context – from an acknowledged scientist in a fascist society to a leading voice in the post-war search for sustaining the premises of European justice – seems to necessitate a similar abrupt change in the perennial principles guiding the scholar's research stance. In Wieacker's case, however, no such transformation took place. From his 1937 inaugural lecture 'Vom Römischen Juristen' to the second edition of his magnum opus *Privatrechtsgeschichte der Neuzeit* in 1967, his personal view on the essence of the fundamental virtues of liberty, communality and social justice did not really alter. Moreover, he never ceased to emphasize that within the European legal tradition these virtues were a reflection of the historical paragon of 'true Roman jurisprudence'.[2]

To Wieacker, Roman law in its purest form was an embodiment and expression of a superior model of thinking which had surfaced in the later Roman Republic. He perceived the jurisprudence of the later Republic as a result of a historically exceptional interplay between socially originated virtues and legal craftsmanship which produced authoritative, just norms for society. The legal reasoning of Rome's 'great jurists' managed to combine the collective 'experience' of jurists to their 'social reality' in an incomparable way (Wieacker 1939). In his legal–historical works he then further applied this principle of an ideal mode of thinking to the changing circumstances within the European continent, often dealing with questions of truthful legal interpretation and social justice.

The intellectual core in Wieacker's scholarship – belief in the organic constitution of society and distinguished position of legal scholars within societies – was not only concise but also easy to combine with various theoretical openings in the field of legal science (Wolff 2007). Wieacker did adjust this belief in congruence with contemporary social change and theoretical streams in legal disciplines. Thus, even if the core remained unchangeable, the sentiments, meaning and contemporary relevance, which Wieacker attached to 'true Roman jurisprudence' in his works, varied over time. Depending on his intellectual context, the audience and the political atmosphere, Wieacker presented the wisdom of Roman law either as an ultimate communal form to reach a socially sustainable and legally binding decision, or as a paragon for a style of thinking in achieving truth, or as a mental asset which uplifted those who expressed it to social prominence, or as a virtuous orientation which modern legal science had failed to follow.

Thus, during the years from the 1930s to the late 1960s there was no paradigmatic rupture in Wieacker's idea of Roman law. While emphasizing different aspects from the 'true great jurisprudence' of the late Roman Republic he was always able to present Roman law as significant in relation to actual and contemporary political and juridical issues, notwithstanding that the political constitution of German society changed between absolute polarities. Nor was this approach opportunism; rather, Wieacker sincerely believed in the superior rationality of legal thinking cultivated by Roman law which, to him, never became outdated as an administrative tool in the modern search for social justice.

Interest on the themes of 'social justice' and 'objective truth' connected Wieacker's works to the theories of Schmitt and Gadamer. Wieacker reflected and sharpened his view on the European legal past in relation to their works and borrowed to some extent from both of them, thus constructing his 'way' on principles which are often connected to Gadamer and Schmitt. In Wieacker's personal history the attachment first to Schmitt's work and then later to Gadamer's manifests a shift in his intellectual context. Schmitt's anti-parliamentarism and Gadamer's dialogical hermeneutics presented two opposites in the politics of legal science. Schmitt contributed significantly to the ideological 'battle' of National Socialist *Gleichschaltung* and provided a 'bourgeois façade' for the fascists in their attempts to transform Germany into a totalitarian nation (Mehring 2014; Stolleis 2004). Although Schmitt was later turned down by the administrative and political elite of the NSDAP, he never abandoned his revolutionary conservatism or his offensive on democratic society. Gadamer, on the other hand, has been considered as a thoroughly apolitical figure, and was later even criticized for acquiescing in the consensus over social emancipation (Mendehlson 1979). While the collegiality between Wieacker and Schmitt was intense from the 1930s to 1945, Gadamer's influence on Wieacker's texts is most evident from the 1950s onwards.

Wieacker, Schmitt and Gadamer shared common social premises. As scholars in Weimar Germany, they perceived a fundamental change in social circumstances which obliged them to rethink the tradition of legal science. All of them were convinced of the incapability of contemporary or previously upheld models of argumentation to meet the needs of a rapidly changing community. Wieacker, Schmitt and Gadamer evaluated contemporary legal theories (and in particular positivistic theories) as incapable of depicting the essence of post-imperial society and in guiding jurisprudence in a 'healthy' direction. Along the lines of genuine historical change which they were experiencing as German scholars and citizens, they sought to re-evaluate the relationship between human sciences and social reality. They asserted that the extent to which European jurisprudence and politics was ready to accept and utilize the traditional, yet newly discovered, way of communal knowledge production would very much define the destiny and the moral essence of the Continent. So, neither the theoretical constructions of respected scholars nor Wieacker's attachment first to Schmitt's concepts and later to Gadamer's thinking should be taken as a rootless play of ideas. The academic works of Schmitt, Gadamer and, in particular, Wieacker should be interpreted in relation to their context – the social disarray of Weimar and the consequent different phases of the social history of Germany.

## Carl Schmitt and Franz Wieacker: Honourable lawyers and justice as an institution

Wieacker's acquaintance with Schmitt started in the early 1930s and lasted for a decade.[3] Schmitt's writings and thoughts had a decisive effect on Wieacker's vision of historical meaning and the structuring of modern (German) society, which is most evident in Wieacker's earlier texts, and in a vaguer form even in his post-war works (Winkler 2014). Many of Wieacker's texts from the 1930s disclose a merger between 'fashionable' theoretical streams, contemporary jurisprudential and political need, on the one hand, and Wieacker's legal scientific scholarship, on the other. Although originally a Roman law scholar, in the years following the National Socialist *Machtergreifung* ('seizure of power'), Wieacker was commonly associated with the younger generation of legal scholars who, from a neo-Hegelian base, attempted to overcome the alleged – and factual – shortcomings of the then dominant positivist view of law (Meinel 2012).

In the early 1930s, Wieacker, like his peer group of young academics born in the first decade of the twentieth century, desperately pursued a permanent position as a professor, *Ordinariat*, in any decent German university with a law faculty. Wieacker and his generation comprehended the liberal Weimar social order as a perennial failure. Their scepticism was born in the collapse of the common German value system when the estates of Imperial Germany were replaced by inefficient Weimar parliamentarism, but was decisively strengthened through the social consequences of the 1923 hyperinflation and the looming threat of Bolshevik Revolution. In 1935, when Wieacker and Schmitt engaged for the first time in collegial correspondence, Wieacker was affiliated as a private docent with the University of Kiel and contributed to the teaching and writing of a loose group of young scholars known as the *Kieler Schule* (Winkler 2014). The *Kieler Schule* was not an insignificant institution in the legal scientific field, but occupied a distinguished place in the 'legal renewal' of the Third Reich. The *Schule* had been tasked by the new government with redefining legal education and the concepts of German legal science to meet the ideological standards of the fascist regime (Eckert 1992).

For this revolutionary conservative endeavour aligned with fascist interests, Schmitt was a convenient mentor. Thus, in their task the *Schule*, and Wieacker among others, leaned heavily on Schmitt's theory of the institutional nature of proper jurisprudence and law. Nevertheless, even Schmitt's contemporaries found it difficult to categorize his ideas. Depending on the interpreter, he appeared either as a consistent anti-positivist, revolutionary existentialist or as a political opportunist. In his 1930s works, Schmitt was concurrently socially conservative, intellectually provocative and explicitly racist. In 1935 Schmitt was at the height of his national career. He was widely cited, appreciated and referred to as *Staatsrat* or 'state-counsellor' (Mehring 2014). Although from his own perspective he was being ignored and sidelined in the bitter power struggles of German academia, to an outside observer he seemed to represent *the* epitome of a 'legal scientist of the Third Reich'.

In his works preceding the National Socialist *Machtergreifung*, Schmitt had attacked the hollowness of the positivist view on law and distinguished between the 'absolute', legitimate, constitution and written statutes. As a 'state-counsellor' of the

Third Reich he pushed his interpretation even further and turned the enlightened idea of democratic legislation upside down. To Schmitt, parliamentarism was a later aberration of the pure expression of the will of the people (Schmitt 1996 [1932]). In his search for proper premises for an authoritative, just decision, Schmitt returned to groups or units distinguished by their shared set of values. He maintained that these communities usually upheld a practice of pursuing social justice, which furthermore was impossible to evaluate by means of (positivistic) legal theory (Shapiro 2008: 19–36). Consequently, on the level of legal culture, the law-giver should take into account those interpretations of norms and social orders within the societies it sought to regulate (Schmitt 2004 [1934]: 20). In the social reality of a people, questions of scientific truth and legal justice were to be resolved by analysing the existence of these traditions.

This 'concrete-order thinking', so prominent in 1930s German jurisprudence, was perfected by Schmitt in his *Über die drei Arten des rechtswissenschaftlichen Denkens* (1934). Schmitt asserted that the jurisprudential 'concrete orders', juridical traditions, in the end safeguarded the justness of entire legal systems. Here, by jurisprudential tradition Schmitt actually meant the level of responsibility, dignity and influence which lawyers as a group possessed in a given society. The higher status and greater political power of the jurist class correlated with the 'justness' of the community. In comparing the legal cultures of France, Great Britain and Germany, Schmitt attempted to show that each distinct legal community had its own tradition, which remained superior to any attempt at imposing outside legal doctrines on its traditional practice. To Schmitt the British legal tradition was closest to a system which secured the achievement of social justice within the level of the nation. Schmitt took the view that, in Britain, lawyers were the actual law makers. They were in charge of implementing social justice, which they did according to the interpretation of the norms abiding within their order (Schmitt 2004 [1934]; Schmitt 1995 [1941]). British jurisprudence was guided by 'jurisdictional authority, hierarchy of offices, inner autonomy, internal counterbalance of opposing forces and tendencies, inner discipline, honour and official secrets'. Thus, it embodied a perfect 'example of concrete order thinking' (Schmitt 2004 [1934]: 88).

The tradition of jurisprudence in Britain was a 'concrete order', which was able to evade the factual state of conflict characteristic of modern communities (cf. Schmitt 1996 [1923]: 74–80). In the perspective of Schmitt's vast output, the idea of material 'concrete orders' was more or less a side effect. Indeed, he never used the concept again. It has also been noted that the concept in itself is more an example of outstanding rhetorical skill than a social-scientific breakthrough. Along with the rocketing status of Schmitt and enthusiastic deployment by his disciples, the concept quickly became a mere fashionable slogan, which was used to describe pretty much everything (Mehring 2014). Soon the actual explanatory value of the phrase was being exploited.

However, the 1934 book, and the concept within it, was crucial in that it shaped the presuppositions and ontological stances of a whole generation of young scholars, among them Wieacker, who – like so many legal scientists of his generation – was assured by Schmitt's revolutionary conservatism and fascinated by his aggressive yet sophisticated style of writing (Rüthers 2012: 99–101, 270–317; Müller 2003: 1–4; Meinel 2012: 36–47). Schmitt's untiring attack on the alleged incongruity between (positivist) legal science and social reality was, in its conservatism, an orientation which fitted

very well with Wieacker's perspective of German society. As a textbook representative of the bourgeois values of German *Bildungsbürgertum*, Wieacker witnessed at first hand the inability of modern society to maintain circumstances which it promised in its democratic ethos and interpreted this as a failure in the value-base of the legal system. As a young scholar, Wieacker experienced personally the obvious incoherence between the social reality of Weimar and dogmatic legal science.[4]

The experience of the distance between national values and law was a feature which provided common ground for young, conservative legal scholars in their attempts to textually contribute to and influence the National Socialist 'revolution'.[5] It has to be acknowledged that during the *Gleichschaltung* of German society, the NSDAP assigned to these young scholars the task of translating legal language to coincide with National Socialist ideology, while the young scholars perceived themselves as the vanguard and elite of the 'new stance' in legal science. Nevertheless, their pursuit of resolving the incongruence between law and reality – providing legal bases for social justice – was sincere. From the basis of their Weimar experience, the members of the *Kieler Schule* were convinced of the necessity for their 'legal renewal'. So, like Ernst Rudolf Huber and Ernst Forsthoff, Wieacker – leaning heavily on Schmitt's theories – outlined 'new' jurisprudence which would meet the consciousness of the German people (See Forsthoff 1933; Wolf 1934; Huber 1935). What distinguished Wieacker's contributions from most contemporary texts is the absence of racist rhetoric and a persistent adherence to antique (Roman) examples in legal–historical comparison.

Judging by their correspondence, it is clear that Wieacker appreciated Schmitt and sought his favour. There were, however, significant disagreements between them, of which the perception of the meaning given to Roman law might have been the most crucial. Schmitt was a vehement opponent of Roman law.[6] He saw Roman law as an arbitrary theoretical construction, which during its reception in Europe disturbed and overruled the natural, sacred and organic legal systems or orders of the Germanic kingdoms. To Schmitt, applied Roman law became a symptom of the process of 'scientification', where the traditional relation between the people and power had been misplaced. Needless to say, this point by Schmitt was backed up by the Nazi party, who as early as their party programme of 1919 had expressed their revulsion towards 'foreign' Roman law.

Wieacker, however, as a Romanist first and foremost, sought to prove that Roman law was not a hostile intruder but a tradition which had been 'Germanized' over the centuries, and thus its study was to analyse the foundations of the national legal system (Wieacker 1967: 8–24). The biggest practical obstacle blocking an agreement between Wieacker and Schmitt was the 'reputation' of Roman law. The nineteenth-century Pandectists had emphasized the dogmatic and hierarchical aspect within Roman law, which became a synonym for a stiff understanding and idea of jurisprudence, compressing the law as a collection of norms, unable to adapt to changing social reality. This picture was the precise target of Schmitt's attack; he defended law's dignity, tradition and sacredness against 'over-theoretical' constructions (Ojakangas 2009: 34–54). Wieacker was well aware of all this; thus his aim was to prove that Roman law was not an unnatural construction but actually in itself a concrete order. In his letter to Schmitt in 1935 Wieacker argued[7] that the alleged influence of Greek theories (which

was supposedly the reason for Roman law becoming distinct from social reality), far from being the defining *essence*, was an external, late and misleading trait in the entity of Roman law:

> [Greek systematization] produces a legal theory from a Greek model for the relationship of natural and civil law that is rather subordinate to classical Roman law. It leads on the other hand to a rationally and logically arranged survey of legal concepts that have been handed down, as they are self-evident to the Greek-educated Roman, and thereby make the somewhat archaic guild-like thinking style of the pre-classical lawyers (comparable to the English Inns of Court) much more interesting. In comparison, I think that the inner structure of the classic jurisprudence almost completely refused to give itself to these influences, and it maintained the ancient Roman style up to Julian's former revision of the Roman edicts.[8]

Wieacker described Roman law as being composed of living, organic edicts which resisted any attempts at theorization. On the contrary, as an entity it could be better described through its 'inner feeling'. Moreover, it was held together by the guild-like community of the late Republican lawyers, and their distinguished style of seeing the world. In his letter Wieacker drew a straight analogy between Roman lawyers as a class and the English Inns of Court. As presented above, to Schmitt these Inns of Court were the clearest example of a juridical concrete order. Wieacker likewise held that the relative social status which lawyers allegedly possessed in the Roman Republic, as an exclusive and coherent social unit, was both the result of and the key to their success in Roman culture. On the other hand, the evident failure of contemporary modern legal systems, in terms of their ability to connect the language of law to the 'life' of the people, was not a Roman trait. On the contrary, Roman law was an insurmountable example of the 'facts that have a real and independent existence in the legal world', and the Pandectists' failure was a result of later Greek corruption.[9]

In 1939 Wieacker elaborated this idea on the inner 'spirit' of the Roman lawyer class in his article 'Vom Römischen Juristen', where he described Roman culture as a seedbed for European legal ideas. It was lawyers who had cultivated the Roman mentality towards rational problem-solving and the idea of social justice, opposing and substituting the previous superstitious and violent worldview of pre-modern generations. The lawyers of the later Republic invented and practised the law as casuistic mind-setting, through which they were able to apply their internalized body of knowledge in different situations in order to reach a just result (Wieacker 1939: 440, 445, 448). Their achievement was not due to mere academic dogmatism. To Wieacker, Roman law was not based on a theoretical or conceptual construction but on a *phronesis*, a skill. This lawyering skill was a synthesis of lawyers' education and social status.[10] Even in ancient Rome, the intellectuals in general were usually capable of deciding and ruling according to their accumulated knowledge, a tradition which was a prerequisite provided by their Hellenistic education. But lawyers, in distinction from other educated, upper-class people, had the social, communal knowledge which enabled them to understand the meaning of justice in different circumstances. This

knowledge, which Wieacker later labelled as *Lebenskunde* ('science of life'), was a compilation of virtues, acquired first hand from their noble way of life. They served, experienced, and lived the law.

> Through military service and political speeches he [the Roman lawyer] is of the highest virtue, a legitimated public agent.… [He conducts] free service for the community that is exercised through expert opinion and instruction and of which the strictest guarantee is the predominant lack of fees. Just this distinguishes the 'honos' from the highest professions, especially the literate ones, even legally trained court speakers, who he looks down on with the cold contempt of the real expert.[11]

Thus the European legal tradition, descending from Rome, was based on the experience of law and on law (Wieacker 1939: 455–7; Avenarius 2010). But more than a knowledge of statutes, examples or texts, this knowledge, this experience, was based on a sense of virtuous social being appearing within a class of people. A true European legal tradition embedded the *authority* of both the law and lawyers.

Why, then, was Wieacker ready to accept Schmitt's polemic, and aggressive, approach to jurisprudence and why did he employ Schmitt's conceptualizations in his texts? Wieacker's 1930s works loyally repeated the 'fighting stance' towards the liberal order, but no signs of racist infiltration are evident in his methodology, while the obligatory references to the Führer are few and notably perfunctory. Nevertheless, Wieacker did agree with Schmitt that something was not right in the contemporary legal system in Germany. Judges did not have the power or the ability to decide according to the meaning of the law. They were content or obliged merely to follow norms but not to develop or interpret the law in a given case. Contemporary German jurisprudence lacked an acknowledgement of the traditional mindset of a lawyer, which had originated from the experience of the law. There was no space for *phronesis* in the mentality which now prevailed in German academia. In his letter to Schmitt of 1942, Wieacker agreed with the former's thoughts on the complete inability of the German legal system to meet the needs of the new world and to teach lawyers capable of securing the moral core of society.

> However one wonders if, in each German systematic-philosophical structure, the pervasiveness of magistrates with the role, which the basic political order assigns to lawyers, has not failed until now, due in fact to each systematic teaching approach. It is conceded that the systematic-normative approach of life is, for better or worse, characteristic of the Germans in their lives and deeds, as well as for government policy.[12]

It is important to notice that neither Schmitt nor Wieacker meant National Socialism when they wrote about the crisis in the legal system. Both placed the starting point of the crisis to times well before the Nazis and complained about the ongoing crisis long after 1945 (Wieacker 1967: 482). To them, the German system produced lawyers unable to work as a political 'estate' because of the systemic-philosophical ideology

which had nullified the space for individual interpretation and consideration. Wieacker and Schmitt agreed that educating young law students was the most important task in reviving German legal science and the status of lawyers along with it.[13] What the legal system needed was prestige, education and restoration of the priority of practical legal thinking.

Furthermore, in the 1940s Wieacker continued defining his idea of the spiritual heritage of Roman law in European legal history as appearing in the 'estates' of lawyers. In his article 'Das römische Recht und das deutsche Rechtsbewusstsein' (1944) Wieacker defended Roman law from the accusations of Germanistic legal scholars (not far from Schmitt) who blamed it as originally constituting the rift between the people's everyday reality and the legal system. Wieacker sought to prove that Roman law was not responsible for this twist of the modern world, but rather that, without Roman law and lawyers trained in Roman law, this distortion would have been far worse. He argued that the ethical sustainability of a particular judgement, happening in the reality framed by a collection of norms, depended on whether the given judge had applied *Rechtsgewissen* ('legal conscience') in weighing that particular case (Wieacker 1944: 42).[14] According to Wieacker, German lawyers were able to cultivate *Rechtsgewissen* ever since they obtained training in Roman law. This was a skill which enabled them to interpret existing norms and execute decisions, concurrently maintaining and cultivating righteousness in the reality of society. Again, *Rechtsgewissen* was not just about formal education. Wieacker asserts that whether an individual was further capable of using this mental tool depended on their personal moral stance and adjustment to the 'guild' of lawyers (Wieacker 1944: 24, 31–2, 41). A disinclination or inability to subordinate one's legal act to the virtues of the class resulted in bad decisions, injustice and oppressive laws. On the other hand, following, learning and contributing to the tradition stemming from Roman law not only provided ethically sustainable judgements but also cultivated the European legal heritage (Wieacker 1944: 28, 41).

## Hans-Georg Gadamer and Franz Wieacker: The hermeneutics of truth

From our perspective it is easy to argue that the assumption of power by the NSDAP and the resulting construction of a totalitarian nation after 1933 was in principle misunderstood by many legal scholars. Undoubtedly, the vast majority of academics concentrated on the abolition of the loathed Weimar Republic, welcomed social conservatism – which the new order appeared to bring about – and were delighted by the career possibilities which the expulsion of Jewish university staff offered for young scholars. Like Wieacker, many of the 'Aryan' scholars could not predict or accept the totalitarian reality into which the NSDAP turned German society. Their miscalculation is in one sense understandable, since not even legal scientists can foresee the future. At the same time, the general incapability to read and later to cope with the 'aberration of social justice' does tell us something about the then prevailing scholarly culture of legal science.

If one leaves aside anti-Semitism and appreciation of militant fascism – which were true and widespread motivators for some legal scientists – many, like Wieacker, sincerely believed that the new order would accept the lawyer-estate as its administrative trustee, and the 'guild' of legal scholars would in practice steer the moral consciousness of the nation. When the true nature of the fascist regime reached legal academia, many resorted to a form of apologetic existentialism.

Disappointed by National Socialism, scholars like Ernst Forsthoff and Schmitt in their writings of the early 1940s concentrated on the 'pure core' of legal science – unchanged premises, which would enable scholars to interpret and develop law according to tradition, national culture and ideals of social justice (Meinel 2012). These scholars tried deliberately to put aside their previous alliance with fascism – which at a rhetorical level had been presented as an attempt to revive an age-old idea of national 'social justice' – and instead turned their attention to the dilemma of 'objective truth'. Many legal scientists, Wieacker among them, focused on 'conscience' (see, for example, Welzel 1947).[15] This was a concept which, when employed in legal–historical and criminal law study, enabled a metaphysical and existentialist approach to jurisprudential questions.

In all of these approaches scholars reluctantly and indirectly concurred that the 'legal awareness of the people', on which scholars had built their 1930s explorations, was apparently indiscernible and an insufficient starting point for legal scientific research. Instead, academics started to distinguish their pure, 'conscientious' scholarship from the irrational political sphere and the oblivious will of the people. The 'people' was no more a source of inspiration and appeared as the opposite to scholarly views and thinking. Proper, scholarly wisdom was able to read the signs and circumstances of its time and analyse contemporary reality. 'Truth' was not with the people, but it could be extracted from the people by means of learned legal skill. Wieacker wrote to Gadamer in early 1945 in describing the people of Germany and Italy:

> The condition of the public of this country is so abominable. These people, without soul, without conscience and destiny in the good and the bad, without humour in the proper meaning of the word, without sentimentality, and without the need to see a new reality that is only visibly transcendent of their own souls behind their own reality – these people are peculiarly a comforting and exhilarating form, and also likeable in the everyday world. To understand the judgement 'here without conscience', I must use these words: instead of the soul, a bright cheerfulness, instead of responsibility, absolution, instead of the conscience, the law, instead of destiny, grace.[16]

The fact that Wieacker sent to Gadamer this letter – written in the front line in northern Italy – in which he expressed his disappointment with the idealized 'people', is in many ways revealing. During the last year of the Second World War, Wieacker was deeply tired of and cynical towards any nationalistic rhetoric. To Gadamer, such language had always appeared hollow, and in his philosophy he searched for historical meaning outside political history, national communities and ethnic distinctions. Not even Gadamer was uninfluenced by public opinion and the social reality of totalitarian

Germany, but he seemed to remain uninterested in the politics of human sciences. Indeed, the influence of National Socialism in his works is either non-existent or very well camouflaged (Hausmann 2008; Grondin 2003). As a student of Martin Heidegger, Gadamer's thoughts on history, philosophy, philology and law reflected the ideas of his teacher. Additionally, he further developed and fine-tuned Heidegger's theses on metaphysics to a universal science of interpretation and hermeneutics. During the Second World War Gadamer worked at the University of Leipzig, where Wieacker held the professorship in Roman law (Grondin 2003). This era marked the beginning of their friendship and connection which continued throughout the century. In Gadamer's massive output, the questions of legal application and historical interpretation link him to the theme of this compilation, which he frequently discussed with Wieacker in their correspondence (Avenarius 2013).

The 'Point Zero' of 1945 shook the foundations of German legal science. Due to the enormous influence of Martin Heidegger, the existentialist orientation in German legal science was already a significant stream in the 1930s, but war and disappointment had drawn increasing attention towards the ontological sides of law. So Gadamer's theory of truthful interpretation was a current reality for many legal scientists during the later war years. Nevertheless, the end of the Second World War meant that legal scientists had to redefine the 'existence' of, and provide justification for, their *own* scholarship and discipline. The de-Nazification of German universities put legal scholars into an unprecedented situation. Suddenly, they were accused of enabling the crimes of the Nazis. The academics reacted with denial and felt offended. Surely their project had nothing to do with politics. With growing determination, they struggled to prove that the legal havoc of the 1930s was a result of theoretical dogmatism, not academic opportunism. Legal positivism was to be blamed for the misreading and mal-development of law. With its 'cold' and 'heartless' approach, it had perverted the meaning of law (Foljanty 2013). The search for that 'meaning', of sustaining premises for just legal interpretation, became the purpose of legal science in the decades following the 'Point Zero' of 1945. However, this task had actually already started earlier, during the later years of the Second World War.

Similarly to Wieacker's work, there is no war-related, clear rupture in Gadamer's methodological approach before and after the Second World War. In Gadamer's understanding, a similar understanding of a particular source or historical phenomenon was always historically situated and affected by the prejudices of each interpreter. Gadamer based his theory of understanding on the preceding tradition of hermeneutics and historians. This meant that he also saw the interpretative work of a scholar taking shape in a hermeneutical circle where a particular event has to be understood as a part of, and deriving from, a larger entity. But unlike Schleiermacher or Willem Droysen, he emphasized the role of the interpreter's culture (Gadamer 2000; Froeyman 2014). A scholar always approaches a research question from a distinct worldview or perspective. Thus their understanding of a phenomenon in a past culture or alien language is determined by certain prejudices, which Gadamer named 'preconception' (*Vorurteil*). The prejudices of a given scholar are consequently shaped by the historical situation of its culture (Gadamer 2000: 277–84). Our understanding of the world, history and human activity is irreversibly bound to the history of long-term

effects, *Wirkungsgeschichte*, of their surroundings and culture. By this Gadamer did not solely mean specific social or political changes in the past of a particular community, but meaningful effects extending to the realms of understanding and interpretation (Gadamer 1986a: 115–17; Gadamer 2000: 297).

To Gadamer, humanist research was a dialogical task. He asserted that although scholars were always bound to their historical situation, their horizon was not fixed. This horizon could and should evolve and change along with the research process. Questions one poses as to the subject matter produce answers that speak of or appeal to the scholar. In turn, this produces more questions as to the phenomena or text under scrutiny (Gadamer 1986b: 57–65). For example, the research process in studying Roman law should take a form of a dialogue. This dialogue would incorporate the tradition – thus Roman law as events and interpretation – and the historical situation of the scholar. What clearly distinguished Gadamer from scholars like Emilio Betti and Wieacker, however, was his rejection of a complete and correct understanding (Betti 1962). An interpretative act could never reach the final meaning of a particular event or text. To him, the search for 'objective truth' was futile. A historical distance from the phenomenon one was analysing was in practice helpful, since time has a tendency to fade certain irrelevant opinions about a historical event. Nevertheless, the process of interpreting and reinterpreting history was a never-ending business. An objective truth about a distinct meaning or event was a 'phantom' that scholars kept on chasing (Gadamer 1986b: 65; Veith 2015: 119–22). Consequently there was no method that could lead a scholar to an 'absolutely correct' interpretation of history, or indeed law either (Gadamer 1986a: 107–10).[17] A lawyer or historian might reach an agreement between their heritage and a tradition whose understanding they pursued, but nonetheless all attempts at understanding were bound to the dialogical and incomplete process of truth-seeking.

After the war, Wieacker continued his involvement in the theme of the rightful application of law and frequently discussed Gadamer's ideas in his academic texts.[18] The correspondence between the two stayed irregular but continued. In a scholarly sense, Gadamer's phenomenal contribution to the post-war discussion on legal hermeneutics was naturally a reason in itself for Wieacker to take an interest in the former's ideas, but at the same time Gadamer's writings converged in an important way with some of Wieacker's arguments. Wieacker stuck to his 'existential' – originally 'Schmittian' – approach to law. In the end, and for Wieacker, law was the embodiment of the questions people presented to their *being*. In law, the achievements, as well as the limits of human understanding, became visible. Legal history was a tool to compare and understand different views and ways of thinking, not only in the legal sphere but also within the wider spectrum of different cultures.

In the first edition of *Privatrechtsgeschichte der Neuzeit* in 1952, Wieacker proposed that the task of the legal historian should be to track 'time-transcending legal ideas' (*überzeitliche Rechtsidee*), from the European past (Wieacker 1952: 8). Although he removed that conceptualization from the second, 1967 edition of *Privatrechtsgeschichte*, the tone even in the second edition of the classic book remained the same; every historical situation was unique and could not be reproduced in our present, but there resided a historical paragon of legal thinking that could serve as

a model for modern legal science. That 'time-transcending model' was naturally the 'great jurisprudence' of late Republican Rome. To Wieacker, the true brilliance of classical Roman lawyers was in the way they adjusted their knowledge to changing circumstances through method. In the end it was about interpreting the tradition in a new situation. It enabled Roman lawyers be in touch with reality, while concurrently conducting a just and correct interpretation (Wieacker 1939; Wieacker 1956). This congruence between thinking and reality was desirable, not sophistication in legal expression or universality of legal definition, as some Roman law scholars explained the continuing importance of Roman jurisprudence to modern legal science. Thus, to Wieacker, Roman legal sources presented a paragon for European legal cultures in the sense that they were a (pale) reflection of the superior legal skill and wisdom of Roman law.[19]

Gadamer's idea of a universally incomplete understanding not only diminished the value of classical Roman lawyers but also cast a shadow over Wieacker's whole reconstruction of European legal history. The problem concerned in particular Gadamer's idea of 'preconception' (Avenarius 2010). To Wieacker, the problem of interpretation in a particular legal case concerned the appropriateness or solidity of the methods deployed; a truthful judgement could be achieved only through certain, correct methods. The question of methodology also extended beyond jurisdiction and to the morality of legal science (Wieacker 1967). According to Wieacker, the post-war 'crisis of justice' was partly due to an incorrect interpretation of the law, that is, legal science (more precisely, legal positivism) had become disoriented in its methods. He wrote to Gadamer in 1965:

> This [crisis] could be related to the generally accepted discrediting and "unmasking" conducted by legal positivism. These things [methodology] are now in such disarray that the old fundamental relations between law and dogma are at the moment nothing but blurred.[20]

In *Privatrechtsgeschichte* Wieacker continued to study the form of legal wisdom which would enable just decisions despite historical and social confusion. With unprecedented explicitness he called this skill *Rechtsgewissen*. In comparison to his wartime writings, Wieacker linked *Rechtsgewissen* more closely to the long line of *European* legal tradition and to correct jurisprudential methods, but nevertheless it was the inner instinct of the judge that enabled him to accomplish a sound interpretation of the law and let justice happen. So in Wieacker's theory there was a connection between feeling and interpretation, and to be more precise, a just understanding could not be achieved by means of pure reason (Wieacker 1967: 619). Justice involved such sentiments as respect, modesty and dignity. Again, Wieacker wrote about the post-war 'crisis of justice' to Gadamer:

> Modern law does not seem to give such an experience [of prestigious relation to tradition] for today's lawyers. I cannot think of any other reason for this very peculiar phenomenon than particular disrespect on behalf of contemporary theories of interpretation against the authority of the word of law.[21]

Partly this idea of just, truthful interpretation was difficult to translate to Gadamer's hermeneutical model. To Gadamer, true interpretation existed in dialogue. When scholars engaged in discussion or reading, the quest for understanding was a dialectic one. A change occurred, in terms of both the understanding of the phenomenon involved *and* the scholar's own prejudices. The whole core of Wieacker's historical view was that a model of just interpretation had existed in the history of Europe and should also be used as such in contemporary society in order to correct 'the crisis of justice' (Wieacker 1967).

In the end the disagreement between Wieacker and Gadamer was about the nature of historical time. Gadamer was ready to abandon historical knowledge as 'beyond-temporal'; it had no pre-given direction. Written history was a series of acts of interpretation where people tried to understand their past and present. For sure there were some consistent elements in human beings that had remained unchanged through time, but in his view historical narrative was more about the present than the past. Wieacker's idea about history was, as Reinhard Zimmermann rightly asserts, distinctively constructive in its nature (Zimmermann 1995). Rather than identifying the possible divergent lines of development in European legal history, Wieacker emphasized the unity and similar features of different legal cultures distinguished by time and place.

In all his post-war works, Wieacker tried to re-establish something that the modernization process had broken or questioned. The majority of Wieacker's 1950s and 1960s works dealt with the rational mind of Europe and Europeans. History was an 'onward march' of rationality, and legal history worked as an 'iron ratio' which conserved the wisdom of past generations (Wieacker 1967: 619–25). The task for the modern legal historian was to find the appropriate sources, understand them correctly and then apply this wisdom to their present society. To Wieacker, this triumph of the will and reason was a fact in European history, which renewed itself in countless conditions and environments through history. The methodological superiority of the Roman lawyers over a superstitious and magical worldview was the first and most evident example of this historical direction.[22]

Why, then, did Wieacker pay such strong attention to Gadamer's thoughts, which rejected the existence of any particular 'correct' methodology in distinguishing a 'proper understanding' of legal history? To Wieacker, who consistently opposed any Gadamerian hesitation as to the possibilities of legal science to reach the ultimate truth about history and society, Gadamer's theory nevertheless offered support in his attack on the genuine nemesis: legal positivism (Betti 1962: 52). Gadamer emphasized the practical wisdom of adjusting and interpreting the law in differing historical situations as a means of achieving a solid interpretation. This wisdom was embedded in the idea of 'sensus communis'. This meant that a group of properly informed, learned people could reach a consensus, which could serve as a truthful and just decision in a particular situation. If the community of scholars was able to apply their common 'tact' and knowledge in a dialogical enquiry, their jurisprudence was in congruence with reality and truth. To Gadamer, the dialogical research process and decision-making should be directed by virtues, which were neither impulses nor calculations. 'Sensus communis' was close to conscience or ethos. Furthermore, in elaborating this 'sensus communis',

Gadamer used examples from the Stoic philosophers and Wieacker's presentation of the Roman world and 'conscience' of the guild of lawyers. Wieacker's *Rechtsgewissen*, practical legal wisdom and Gadamer's 'common sense' were different elaborations of the same phenomenon – legal wisdom – but to Wieacker, it was always associated with Roman law, and more precisely with the common knowledge and mentality of the guild of Roman lawyers.

## The multifaceted idea of Roman law in Franz Wieacker's academic texts

Different phases, multiple interpretations and a continuous attempt to bridge the domains of social reality and jurisprudence all appear in Wieacker's idea of Roman law. His view on late Republican jurisprudence was never complete, and he did not cease to compare and connect that idea to contemporary social events and new theoretical openings in legal science. The idea of Roman law offered a 'fixed position' from where he could observe and comment on historical change and legal scientific discourse. Likewise his engagement with the thoughts of Schmitt and Gadamer can be seen as different phases in his scholarly career. However, they are not hierarchical stages in a linear development of scholarly identity. Wieacker interpreted and re-interpreted Schmitt's and Gadamer's ideas, abandoned them and returned to them, whenever a changed social situation or paradigmatic change in legal science necessitated rethinking the core values of his scholarly principles. There was, however, such a core, which was both irreplaceable and irremovable. To Wieacker, the correct kind of jurisprudence was not only learned but also, and always, virtuous. What distinguished Roman law among other legal cultures and elevated it to wisdom was its strong relation and interdependence with the noble values of Roman society. Law should have been shaped by the feelings and qualities of dignity, piety, maturity and humility. Moreover, law should have been guarded and developed by a group of people who embodied those virtues. In Wieacker's historical view, Roman law was nothing less than that, whereas modern law was barely related at all.

Although the theories of Wieacker, Schmitt and Gadamer diverged in many places, they converge in their aim to fight against the positivistic ideas of law and society. Schmitt, Wieacker and Gadamer attempted to defend the humanist tradition against Cartesian and inductionist theories in jurisprudence, social sciences and philosophy. They saw this humanist tradition in very different ways but found their adversaries in academics and streams of thought (imaginary or real) from the field of positivistic induction and pure reason. Likewise, according to these scholars, those guilty of inconsistency between reality and science included scholars who disembodied scientific reasoning from traditional values and virtues.

Accordingly, Wieacker saw the legal and social turmoil of the twentieth century deriving from an ontological incoherence in society, an incoherence which was also the constitutive factor behind the tragic political events of the modern era. Political and legal tragedies were a symptom of a deeper imbalance in social relations and awareness. Thus his ideas on legal science and justice were 'resurrective' in the sense

that he believed that a simple misinterpretation of tradition had caused injustice in society. European legal tradition simply needed to be reminded again of its founding virtues in order to achieve social justice.

This construction of European legal history and legal–historical knowledge emphasized the meaning of law, further interpreted by legal scholars. Alongside this view, and contrary to the legal positivists, Wieacker maintained that, while interpreting the law, lawyers simultaneously created it and that their process of creation should be conducted unattached (and superior) to the political sphere. This view of European legal tradition put lawyers and legal scientists as the subjects, the makers, of not only law but history as well. At the same time, it emphasized the role of legal historians. Since European legal history was based and built on the experience, knowledge and interpretative acts of lawyers, reliable information about one's own legal reality could be obtained by comparing the legal experience of the present to that in the past.

## Notes

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2 Cf. Chapter 4 in this book.

3 Their relationship as colleagues may have started as early as 1933, but the first letter from Wieacker to Schmitt is from August 1935. See Franz Wieacker to Carl Schmitt on 13 July 1935, Nachlass Carl Schmitt, RW 265–17971/2, Landesarchiv Nordrhein-Westfalen, Duisburg.

4 See Franz Wieacker's letter to Erik Wolf on 18 April 1934, NL Erik Wolf 66/3044, Freiburg-Albert-Ludwig-Universitätsarchiv, Freiburg im Breisgau; also Wieacker 1936: 74–80.

5 Here by the 'network of young scholars', including Franz Wieacker, I mean the members of *Kieler Schule* – and especially Ernst Rudolf Huber – Erik Wolf and Ernst Forsthoff. These scholars not only were close professionally but also remained friends way up to the late decades of the twentieth century (Winkler 2014; Meinel 2012). Their 'orientation' was firmly fascist but less party oriented (Ralf Walkenhaus 1997).

6 See Fritz Pringsheim's open letter to Carl Schmitt (Pringsheim 1960: 532–8).

7 Wieacker to Carl Schmitt, 13 July 1935, Nachlass Carl Schmitt, RW 265–17971/2, Landesarchiv Nordrhein-Westfalen, Duisburg. The letter is more a review of Johannes Stroux's article 'Griechische Einflüsse auf die Entwicklung der römischen Rechtswissenschaft gegen Ende der republikanischen Zeit' (1934) that Schmitt had sent to Wieacker. In the text, Stroux asserts that Greek philosophy, and in particular the Stoic parts of it, had a decisive influence on Roman legal thinking even during the time of the late Republic. Wieacker rejected this claim as fundamentally inaccurate.

8 Wieacker to Carl Schmitt, 13 July 1935, Nachlass Carl Schmitt, RW 265–17971/2, Landesarchiv Nordrhein-Westfalen, Duisburg: 'dies System bringt einmal eine für das klassische römische Recht ziemlich untergebliche Rechtstheorie griechschen Musters über das Verhältnis von natürlichem und bürgereigenem Recht hervor. Sie führt auf der anderen Seite zu einer rationaleren und logisch durchgegliederten Erfassung

überlieferter Rechtsvorstellungen, wie sie dem hellenistisch gebildeten Römer selbstverständlich ist, und lokert dadurch den etwas zopfigen zünftlerischen Denkstil der vorklassischen Juristen (vergleichbar etwa dem englischen Inns) stark auf. Dagegen glaube ich, dass das innere Gefüge der klassischen Jurisprudenz sich diesen Einwirkungen fast gänzlich versagte und den altrömischen Stil bis zu Julians Ediktredaktionen wahrte.'

9 Wieacker to Carl Schmitt, 13 July 1935, Nachlass Carl Schmitt, RW 265–17971/2, Landesarchiv Nordrhein-Westfalen, Duisburg: 'Sachverhalts, die in der Rechtswelt eine reale eigenständige Existenz haben.'

10 Wieacker 1939: 449. 'Denn ein Präjudiz kann nur angewendet werden, wenn man den gemeinsamen Grundgedanken, das *tertium comparationis* erkennt. Dieser Grundgedanke kann mit unbewusster Anschauung angewendet, aber auch ausdrücklich als Regel formuliert und überliefert werden. Solche Regeln sind noch keine abstrakten Obersätze, sondern durch Anschauung und Erfahrung gewonnene Richtschnuren künftiger Praxis: wie Sprichwort, Wetterregel oder Rezept, zusammengedrängte Weisheit von Generation. Mit dem Auftreten dieser Regularjurisprudenz im 2.Jahrhundert beginnt das *Rechtswissen* um seiner selbst willen [.]'

11 Wieacker 1939: 447. 'Dem freien Dienst am Gemeinwesen, der durch Gutachtung und Unterweisung geübt wird, und dessen strengste Gewähr die überwiegende Unentgeltlichkeit ist. Eben dies dies unterscheidet den honos vom Erwerb auch höherer Art, besonders auch vom gebildeten, aber rechtskundigen Prozessredner, auf den er mit der stillen Geringschätzung des wirklich Sachkundigen herabblickt.'

12 Wieacker's letter to Schmitt, 25 August 1942, Nachlass Carl Schmitt RW 265–17971/5, Landesarchiv Nordrhein-Westfalen, Duisburg: 'Freilich fragt man sich, ob in jenem deutschen systematisch-philosophischen Typ die Durchdringung des Richteramts mit der Funktion, welche die politische Grundordnung dem Juristen zuweist, nicht bisher misslungen ist, und zwar eben wegen jener Gelehrt-systemalischen Betrachtung. Zuzugeben ist, dass die systematisch-normative Betrachtung des Lebens im Guten wie im Bösen auch für das Leben und Handeln, auch das politische Handeln der Deutschen bezeichnend ist.'

13 Wieacker to Schmitt, 25 August 1942, Nachlass Carl Schmitt RW 265–17971/5, Landesarchiv Nordrhein-Westfalen, Duisburg.

14 In 'Das römische Recht und das deutsche Rechtsbewusstsein' Wieacker describes *Rechtsgewissen* also as 'geistige technik' and 'Geistige Macht der Wissenschaft'.

15 Like Wieacker's, Hans Welzel's post-war works were grounded on the earlier texts and philosophical openings. See Loos 2004: 1118.

16 Wieacker to Hans-Georg Gadamer, 14 March 1945. Nachlass Hans-Georg Gadamer, Deutsches Literatur Archiv, Marbach am Neckar: 'So abscheulich der öffentliche Zustand des Landes ist, dieser Mensch, ohne Gemüt, ohne Gewissen und Schicksal im Guten und im Bösen, ohne Humor im eigentlichen Sinne und ohne Sentimentalität, ohne das Bedürfnis, hinter seiner Wirklichkeit eine neue, nur der Einzelseele sichtbare transzendierende Wirklichkeit zu sehen, – dieser Mensch ist sonderbarerweise ein tröstliches und erheiterndes Bild, und und auch im Täglichen sympathisch. Wie das Urteil "ohne Gewissen hier" zu verstehen ist, muss ich doch wohl ausdrücken: statt des Gemüts die helle Heiterkeit, statt der Verantwortung die Absolution, statt des Gewissens das Gesetz, statt des Schicksals die Gnade.'

17 Gadamer 1986a: 107–10.

18 In this dilemma he was not alone. The coup of National Socialism and their distorted fashion of interpreting and adjusting the legal system was a memory and a fact that

led legal historians such as Helmut Coing or Gustav Radbuch to rethink and re-evaluate the basis of the German legal system. See Coing 1950; Radbruch 1946.

19 Wieacker to Hans-Georg Gadamer, 14 July 1965. Nachlass Hans-Georg Gadamer, Deutsches Literatur Archiv: 'Den alten römischen Texten (für die dogmatische Auslegung) mit zunehmenden Zeitenabstand wirklich ein neurer, gerechterer Sinn sich entfalten kann; (wie im Abstand Hochgipfel hinter den vorgrelagerten Hügelketten aufsteigen).'

20 Wieacker to Gadamer, 14 July 1965. Nachlass Hans-Georg Gadamer, Deutsches Literatur Archiv, Marbach am Neckar: 'diese könnte zusammenhängen mit der allgemein akzeptierten Diskreditierung und "Entlarvung" des Gesetzespositivismus. Diese Dinge sind heute so in Unordnung, dass die alten Grundverhältnisse von Gesetz und Dogmatik heute nur in Trübung erscheinen.'

21 Wieacker to Gadamer, 14 July 1965. Nachlass Hans-Georg Gadamer, Deutsches Literatur Archiv, Marbach am Neckar: '… für die modernen Gesetze scheint der heutige Jurist eine solche Erfahrung nicht zu machen. Ich wüsste für diese sehr eigentümliche Erscheinung im Augenblick keinen anderen Grund anzugeben als die besondere Respektlosigkeit der heute herrschenden Auslegungslehren (Interessen – oder Wertungsjurisprudenz; teleologische, selbst "verfassungskonforme" Auslegung) gegen die im Gesetzeswort erscheinende Autorität.'

22 Franz Wieacker to Carl Schmitt, 16 May 1943, Nachlass Carl Schmitt RW 265–17971/6, Landesarchiv Nordrhein-Westfalen, Duisburg: 'Was ich im "Römischen Juristen" über die eigentümliche Rechtsontologie der Römer sage, nicht hinaus gehen, also keineswegs zugeben, dass die autonome, lebensheilige Geltung der überlieferterten und fachlich fortgebildeten Rechtsform in Altrom in die Bewusstseins-Kategorien des Magischen, Numinösen, des Tabu, Orenda und ähnlicher ethnologischer Hilfsvorstellungen fällt.'

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