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‘Byzantium!’ – *Bona fides* between Rome and Twentieth-Century Germany

Hans-Peter Haferkamp

Byzantium!

The constant looming contradiction between the personal ethical standard expected from those party to a legal action and the general interest in the enforcement of the imperative legal order ..., can only be solved in a satisfactory manner if the requirements of equity are not themselves regarded as changes to the objective law. If this necessary tension is simply removed, the result is a general equity that is at once mushy and totalitarian, as can be identified in Byzantine law, but also, in some respects, in the recent past. (Wieacker 1956a: 121)

In 1956, Franz Wieacker¹ drew a daring comparison between Byzantine law and National Socialism. This was in the context of a number of much-debated decisions of the *Bundesgerichtshof* in the years 1954 and 1955, in which the descendants of a farmer were awarded an inheritance against the express wishes of the deceased – by means of invoking *Treu und Glauben*² in Section 242 Bürgerliches Gesetzbuch (BGB). Wieacker highlighted the contradiction between ‘objective law’ and ‘equity’ and warned against a ‘totalitarian general equity’, which he delineated as a characteristic of both Byzantine and National Socialist law.

How did he arrive at this comparison between Byzantium and National Socialism, which seems somewhat puzzling today? Wieacker did not reference any sources at this stage, and thus seemed to expect that his contemporaries in 1956 remained as familiar with the idea of Byzantine equity as with the excessive application of general clauses within the ‘völkische Rechtserneuerung’. And indeed, there is a long story behind this notion.

Fritz Pringsheim: *Ius aequum* and *ius strictum*, 1921

In 1921, Romanist Fritz Pringsheim³ published a study on *ius aequum* and *ius strictum* in Roman law. He emphasized that classical jurists had not known this distinction and

that it only began to emerge in the Byzantine period. According to him, this equalled an evolution, which resulted in '*aequitas* being the sole ruler, to which *ius* must bow down'.⁴ In Pringsheim's view, *aequitas* prevailed over ancient Roman *ius*, which the Byzantines would from then on refer to as *ius strictum*. In this context, *ius strictum* would play the part of a narrow, limited, strict, grim, bitter and hair-splitting system of law, which had to be overcome (Pringsheim 1921a: 648).

At first glance, Pringsheim's study appears to form merely a part of a comprehensive reinterpretation of late Roman law. Pringsheim was a member of the circle around Ludwig Mitteis (Mitteis 1891; on this Zimmermann 2001: 14f; Winkler 2014: 63f). Along with other authors such as Eberhard Bruck, Joseph Partsch, Hans Lewald or Paul Koschaker, Pringsheim also endeavoured to distinguish Roman law from later influences. His focus on Byzantium emphasized the late victory of Greek philosophy: 'The great rivalry between Roman practical jurisprudence and Greek philosophy of law, which had waged for centuries, has been decided. The Romans' rough sense of reality yielded to the Greeks' theoretical speculation' (Pringsheim 1921a: 668).

Pringsheim was not alone in voicing the proposition that *aequitas* only assumed the Aristotelian function of correcting the written law in Byzantium. As early as 1898, Hugo Krüger had claimed that all prior mentions of *aequitas* in the *Corpus Juris* were interpolated.⁵ Hence, three things stand out particularly from Pringsheim's treatise: Notable is firstly the underlying emotional tone of Pringsheim's writing: It is clear that Pringsheim was sympathetic towards *ius*, but not towards *aequitas*. For him, the Greek *aequitas* became an allegory for the decline of Roman Law, a symbol of a cultural war between Greece and Rome.⁶

What surprises further is the harshness of the criticism with which Pringsheim's treatise initially met among his contemporary Romanists. None other than Riccobono objected that such a methodology in the interpretation of sources could be used to prove anything, including ape's descent from man (Riccobono 1926: 300). Early on, Pringsheim was accused of equally misconstruing the legal thought of both classical⁷ and post-classical Roman authors (Riccobono 1926: 286). Lastly, it is remarkable that Pringsheim's theories are today regarded as being largely incorrect.⁸

All this raises the suspicion that, like Wieacker in 1956, in 1921 Pringsheim construed his image of the contradiction between Byzantine and classical Roman Law with at least some regard to his present. His view on the ancient jurists was also a reflection of the judge in 1921. The last footnote of his article offered a hidden clue to such a backdrop. There, he referenced a 1911 article by Hungarian professor Géza Kifß titled 'The Interpretation of Statute Law and "Unwritten Law"'. In that article, Kifß drew a line from Roman jurists to the free law movement (*Freirecht*):

The modern 'Free Law jurist' can feel right at home. *Aequitas*, as a basis for the application of law, precludes an adherence to the letter of the law in principle The Roman jurist is not satisfied with the outcome of a logical interpretation, merely because it is logical in itself, or because it corresponds to the original will of the legislator; all these circumstances must also withstand the test of *aequitas*. (Kifß 1911: 430f)

Pringsheim evidently did not share this view and countered that it seemed 'strange' that Kiß 'of all things chose to depict the Byzantine form of *aequitas* in his historic investigation into Free Law as intrinsically Roman.' *Aequitas* had indeed served classical jurists as a pressure relief valve of sorts, which yet had not stepped up 'to surmount and dominate the *ius*'. Jurists who thought this way were 'Greeks and Christians, and thus not authentic jurists in the Roman sense of the word' (Pringsheim 1921a: 668).

Indeed, by refusing to equate free law with his ideal of the Roman jurist, Pringsheim swam against the current of dominant views of Romanist scholars at the time. Traditionally, the Roman *interpretatio* was regarded as 'a mediator between the law and *aequitas*' (Kipp 1909: 9). Joseph Kohler had referred to his Theory of Objective Interpretation, which attempted to free itself from the will of the actual historical legislator, as 'in line with the Roman understanding' (Kohler 1886: 1, note 2).

Pringsheim's treatise does not lay out why, in 1921, he believed this to be taking things too far. The mood in 1921 was not consistent. After the debates between 1905 and 1909, which had regarded free law very favourably, the mood had shifted slowly until 1914, by which time the optimism towards the ability of the judiciary as a motor of modernization had received its first cracks. Then again, it was precisely the ultimately dysfunctional legislation during the First World War, which had undermined the faith in the ability of the legislator. One authority, however, Pringsheim referenced covertly: Max Weber. Already in 1921, Pringsheim read Weber's '*Wirtschaft und Gesellschaft*' and referenced Weber precisely with regard to the latter's typologization of Roman legal thought.⁹ Weber had considered the role of the judge in relation to the written law since 1898 and his concept of rationalization without formalism sat quite comfortably with Pringsheim's ideal in 1921.¹⁰

Pringsheim: *Aequitas* and *bona fides*, 1930

In 1930, Pringsheim returned to the subject once again. Now however, he centred his discussion around one point in particular, which in 1921 had only formed one aspect of his consideration (Pringsheim 1921a: 651ff): the relationship between *aequitas* and *bona fides*. Now the contemporary dimension of his subject matter was evident. Pringsheim emphasized:

Modern legal doctrine wrongfully categorises *bona fides* under the notion of equity; there is a danger in all modern laws that mere equity become the basis for a legal claim, instead of *bona fides* being used to determine the extent of liability, a danger to replace the law with *aequitas*. Equity alone cannot form the foundation for a legal order.

By referencing the legal philosophy of Julius Binder and the widely read treatise of Max Rümelin on justice and equity, Pringsheim made clear that he regarded his own work as a contribution to contemporary debates on legal theory. Binder's legal philosophy of 1925 now idealized the very idea which Pringsheim had criticized as Byzantine. Binder emphasized 'that equity, by struggling against that which is perceived as strict, outdated

and ultimately unbearable, and by placing its own ideas in its place, thereby continually creates new law, which is law in itself, and falls under the idea of law'.¹¹ It was now Pringsheim's goal to clarify that equity, as it is understood in this context, had nothing to do with the ancient Roman concept of *bona fides*. *Bona fides* had, according to Pringsheim, never been a 'supra-legal authority', but a 'notion inherent in law', 'bridled' by the 'sober reasonableness; the practical rationality of the Romans' (Pringsheim 1961: 172). Pringsheim stuck with his ideal of Roman law: 'neither blurred equity, nor strict concepts, that is the Roman stance' (Pringsheim 1961: 162). And once again, Max Weber served as his authority. Pringsheim quoted Weber, 'The principles of fides, despite their informal character, by no means constitute vague products of emotion'.¹²

Why was it so important to differentiate between *aequitas* and *bona fides*? The reason was apparent. In the German Civil Code, the legislator had introduced the Roman concept of *bona fides* into Sections 242 and 157. Unlike *aequitas*, the concept of *bona fides* had thus been positively ratified by the legislator. If the concept of *bona fides* was now understood as equivalent to equity, the judge had consequently been authorized to openly use ideas of equity to sidestep the written law, namely *intra* rather than *contra legem*. All contemporaries in 1930 were very much aware of this danger.

In the 1920s, contemporaries observed that the number of cases in which courts based their verdicts on *bona fides* or good faith was increasing dramatically. The circumstances were the hyperinflation and the government's rigid position with regard to it, which caused a wave of litigation, the so-called revaluation decisions (*Aufwertungsrechtsprechung*) (see Nörr 1988: 55ff; Nörr 1996; Chlosta 2005: 42ff; Emmert 2001: 399ff), based on Section 242 BGB.¹³ In the most spectacular revaluation verdict in 1923, the *Reichsgericht* justified the revaluation of mortgage claims on the basis 'of the dominant position of section 242 BGB in the German legal system.' Furthermore, the *Reichsgericht* refused to apply existing laws when determining face values, since they would lead to results which were 'irreconcilable with good faith and equity'.¹⁴ When the government, which as a borrower benefitted from inflation (Geyer 1994), threatened to prohibit the practice of revaluation, the board of the Association of *Reichsgericht* Judges published a petition to the government (Vorstand des Richtervereins 1924: 90). The board of the Association referred to the 'great notion of good faith, which rules our legal system'. This notion was 'above any written law, above any express legal provision. No legal order, deserving of that honourable name, can exist without this concept. Consequently, the legislature cannot impede a result which is demanded by good faith.' The board of the Association had endowed Section 242 BGB with the power to bind the legislature against its will. Contemporaries perceived this notion as outrageous. It was a complete novelty.

Until 1933, however, it still remained merely an approach taken by only a number of judges who were members of the Association of *Reichsgericht* Judges. The president of the *Reichsgericht*, Walter Simons, clarified that, unlike the Association, the court officially rejected the idea that the judicature had the right to 'place itself above the sovereign legislator' (Simons 1924: 243). The idea that the notion of good faith could be expressed in a provision (Schröder 2012: 316), which could then enable the courts to control the legislator, remained a mere declaration.¹⁵ However,

it resulted in the emergence of an idea which, in 1925, caused Ernst Fuchs, himself an advocate of the free law school, to exult that 'good faith is the Archimedean point from which the ancient legal order has been lifted from its foundations' (Fuchs 1925/1926: 349).

Good faith began to be understood more and more as an intermediary between positive law on the one hand, and the deviating sense of justice on the other. In 1921, Max Rümelin described good faith as 'rules of conduct which are vivid in society. They are valid and fixed in common values, independent of any command of power by the state' (Rümelin 1921: 42). Thus, good faith was linked with the notion of a divided legal order: an antagonism between positive and sensed law. Ernst Heymann said (Heymann 1930: 132), 'The dark desire for a refined doctrine reveals itself through the strange emphasis on good faith and public policy in our jurisprudence. It is an unconscious and devastating appeal for a deeper philosophical understanding of law and justice.' Thus, a connection emerged between the notion of good faith and the rise of philosophical alternatives to positive law, which were characteristic of legal thought in Weimar (see Lepsius 1994).

In this sense, Pringsheim's fears appeared justified. There was a clear tendency to utilize *bona fides* as a supra-positive corrective, which replaced statute law with unconstrained assessments of equity. Yet it was precisely this, according to Pringsheim, which was at odds with Roman legal thought.¹⁶ Pringsheim's ideal Roman jurist came to his decision rationally, but was at the same time pragmatic in his views. He remained close to life, thinking and deciding in concrete terms, not abstract ones, creating law, not reproducing it (Winkler 2014: 69). He was not a mere mechanic but a custodian of the law, aware of the great responsibility this task entailed. Pringsheim's Roman jurist was the trustee of due process as 'the twin of freedom' and at the same time, he played an essential part in the development and modernization of the law.

The warnings of Hedemann, 1932–3

As early as 1921, another aspect emerged from Pringsheim's writing, which is harder to place into the context of contemporary debates. Pringsheim accused the Byzantine emperors of purposefully changing ancient laws under the pretext of *aequitas*. The fact that the 'selective interpretation ranging between *ius* and *aequitas*' by Constantine was reserved for the emperor was characteristic of this (Pringsheim 1921a: 645). *Aequitas* and *bona fides* were not merely opportunities for judges to make equitable case-by-case decisions; they were a means for the emperor to demonstrate the extent of his power: 'The absolute empire and *aequitas* meant that the authority of the emperor's will was no longer confined by *ius*' (Pringsheim 1921a: 668).

His treatise developed the old word of caution, that judicial application of *aequitas* would lead to legal uncertainty and arbitrary decisions, into the accusation of deliberate manipulation: The judge is exploited by the sovereign for the purpose of bending positive law to the latter's will. The issue was not that the judge consequently possessed greater freedom in his rulings, but that, instead of being bound by written law, he was thus bound to the individually dictated will of the sovereign. Behind the deceptive

appeal to individual justice was the will of the totalitarian ruler. This, interestingly, was not reflected in the situation in Weimar. Here, it was not primarily legislature which advocated an increased application of *aequitas* and *bona fides*, but the judiciary and legal academia. Nevertheless, this facet of Pringsheim's work was also picked up upon by his contemporaries.

In 1932, Justus Wilhelm Hedemann revisited the gloomy picture which Pringsheim had painted and transposed it into his contemporary reality: In his essay 'The Escape to General Principles', Hedemann stated that the relationship between *ius strictum* and *ius aequum*, or rather, *bona fides*, was 'the most important question for jurists in the 20th century' (Hedemann 1933: 3; see Wegerich 2004: 148f). Hedemann, a famous law professor from Jena, had worked on this topic for years and had, up to that point of time, been rather optimistic about the opportunities which general principles such as good faith would give to the judge (see Hedemann 1913: 40). But now, in 1932, and with reference to Pringsheim, he identified contemporary dangers: If the 'factor of flexibility' is merged with the 'factor of power', 'Byzantium will rise and decline will follow' (Hedemann 1933: 74).

Even if, in 1932, Hedemann did not yet write with reference to National Socialist Germany, he did nonetheless draw upon the example of another legislator who had sought to open up the formal law to unprecise general principles similar to *aequitas* or *bona fides*. His example was Russia: 'It is like the entire population of the country is torn in two. Classed, segregated by caste, religion, ideology, world-views – and one half states: We are the guardians of all matters moral and the rest of you are ignorant' (Hedemann 1933: 72). In Russia, he observed the use of 'general principles of law to an astonishing extent', with only 'the one (the ruling) class deciding upon the material content of those general principles' (Hedemann 1933: 73). Hedemann's words of warning regarding the political exploitation of general principles such as *aequitas* and good faith compounded into the prediction of a 'catastrophe for the legal order' (Hedemann 1933: 73). 'The cautionary tale of history' (Hedemann 1933: 76) that he identified in Pringsheim's work caused him to caution against a 'new kind of Byzantine equity' (Hedemann 1933: 75).

General principles as a political opportunity: National Socialism

When Hedemann's warnings from 1932 were published in 1933, the mood had shifted. An aspiring young professor and enthusiastic National Socialist by the name of Heinrich Lange now voiced his view on the matter. He, too, had read Pringsheim, but did not deem his analysis to be threatening at all. To Lange, Hedemann – as a 'dogmatist' – was still caught up in positivistic thinking, which was determined with regard to 'predictability, not by justice' (Lange 1933a: 2858; see Wolf 1998): 'The Byzantines are thus the object of contempt of legal scholarship; because they dared to nest in the temple of Roman law and yet displayed blatant disregard for its beauty through use of their blurred general principles' (Lange 1933a: 2858). Lange's own perspective on general principles was a lot more positive. To him, general principles

were 'cuckoo's eggs within a liberal legal order' (Lange 1933b: 5), a kind of loophole within the positivist illusion of a binding body of law. Law itself instead consisted of 'one aspect of life's general moral order. The principle of equity and good faith must therefore be regarded as the fundamental law of life within a community, from which all other laws can be derived' (Lange 1933b: 7). Crucial to this concept was that the principle of equity and good faith did not become the 'fundamental law of communal order' merely because it provided a legal way to overcome the provisions of the BGB. Lange 'charged' equity and good faith with National Socialist content.

Carl Schmitt replied to Hedemann in his famous 1934 lecture '*Über die drei Arten des rechtswissenschaftlichen Denkens*'. Schmitt also regarded general principles such as good faith as opportunity rather than risk. He saw them as an indication of 'the extent to which the age of legal positivism is over'; as 'signs of a revolution' and the dawn of a 'new way of legal thinking'. His meaning was made perfectly clear when he stated, 'As soon as concepts such as good faith no longer refer to an individualistic and bourgeois society, but to the interests of the people as a whole, the entire existing body of law is modified, without the need to change even a single positive statute' (Schmitt 1993: 49). The principle of good faith became a methodological vehicle for Carl Schmitt's 'konkretes Ordnungsdenken' (Schmitt 1993: 48). Schmitt had already pointed out the consequences this would have for the work of judges. He emphasized that 'the decision of the judge' would 'not be affected' by the application of a general principle. Rather, the application of the principle was not to be left to individual judgement, but would much rather be directly and exclusively determined by the fundamental principles of National Socialist ideology (Schmitt 1933: 2793f). This also referenced an argument made by Karl Larenz when considering Hedemann's fear of the judge as sovereign: While an earlier judge –

in times of ideological struggles – would constantly incense a part of the people against himself with every definitive statement made, he now can rely upon a ... consistent understanding of the law and the state among the whole of the people. The threat of arbitrariness resolves itself as the convictions of the '*Volksgemeinschaft*', the foundation of any judge's rulings, grow stronger and stronger.

Carl Schmitt exposed this idealization, an alleged unity of the law, the state and the people, as a vehicle of political power: 'Convictions and opinions in general are not ruling, leading and binding, except those of a certain kind of people. The National Socialist movement dominates in the contemporary German state. The meaning of *aequitas* and good faith must therefore be determined according to its principles' (Schmitt 1933: 2794). This was precisely what Hedemann had warned about: If the terms and notions of *aequitas* and good faith are politicized in order to serve as instruments of governance to one group of people, they can be used against another group.

Thus, a new understanding of equity and good faith was established. The purpose of the principle of good faith had changed from a pressure relief valve for the sake of individual justice to a political tool, through which the state was able to reinterpret the BGB in line with its ideology, without having to alter its wording at all.

Wieacker and legal form in the year 1956

Now, what does Franz Wieacker have to do with this story? As a student of Pringsheim he had affiliated himself with his teacher's interpretation of late Roman history as a process of decline as early as the 1930s. From 1937 on, he had defended Pringsheim's narrative against attacks by Romanists such as Ernst Schönbauer, Hans Kreller and Max Kaser (on this, see Winkler 2014: 181ff). My opening quote from Wieacker's 1956 commentary proved itself to be merely one aspect of Wieacker's comprehensive re-evaluation of these questions in the 1950s. It reveals that Wieacker, more so even than Pringsheim himself, linked antiquity and modernity. The picture of antiquity which he painted in this context remained remarkably consistent and always in line with that of Pringsheim. When Wieacker, in 1955, turned his attention once again to the Roman jurists in his piece '*Vulgarismus und Klassizismus im römischen Recht der Spätantike Antike*', his fundamental ideas had not changed. Of the two Byzantine risks, he was now however less concerned with the danger of a purely logical jurisprudence of concepts. His discussion was now dominated by Pringsheim's warnings regarding emotive arguments of justice. This was, as Wieacker laid bare, first and foremost a reaction to their prevalence in National Socialism. According to Wieacker, one had, 'for the purpose of furthering short-term interests, abandoned the classical traditions of permanent manifestations in legal practice'. The characteristic 'appeal to manifest sentiment and popular affections' had served 'with notable prevalence as justification for the evil practices within the imperial administration' and 'the relentless plundering of the traditionally wealthy'. He concluded, 'The jurist knows that this alliance between political interest and what is purported to amount to healthy public opinion has not remained the last in human history.'

While, in this instance, he considered the present day from the point of view of antiquity, in another article he turned the perspective around and considered the past from the point of view of the present day. In '*Zur rechtstheoretischen Präzisierung des § 242 BGB*', which was also published in 1956, he described, with reference to then current case law, his concern that 'the law is softened through the careless, even demagogic use of equity' as a 'gateway for arbitrariness, especially for political interests and political coercion'.¹⁷ He now openly attacked the age of National Socialism:

At least under the extraordinary circumstances of totalitarianism, these predictions have been proven to be accurate, by the tendency of the legislator to utilise preferably vague and, where possible, emotive general principles ('honourable', 'special hardship', 'in accordance with healthy public opinion') to grant himself the greatest possible freedom. (Wieacker 1956b: 197 (reprint))

This text closed with a word of caution on 'equity as mushy as it is totalitarian', a perception of equity which was seen as a 'characteristic of Byzantine law'. Byzantium remained an exemplary lesson, now associated with National Socialism. Once again, present day and history appeared closely linked. By placing the Byzantine in parallel to the National Socialist legislator, Wieacker, as was highly typical of the time, shifted the legal profession from the role of the perpetrator into that of the victim. It had been the

legislator, who had deprived the jurists of the rules which safeguarded stability. Thus, it was insinuated that the removal of the formal safeguards of private law had also resulted in the totalitarian submission of the legal profession. Wieacker thus adopted a particular version of the assertion initially formulated by Radbruch, that positivism had left the legal profession powerless after 1933.

The cautionary tale of Byzantium also served other functions, however, which point back to the contemporary discussions on methodology among legal scholars. Wieacker feared, much like Pringsheim back in 1930, the equating of good faith and equity.

Namely, if one were to labour under the misapprehension that the place of justice would here be filled instead by another, extralegal quality such as *caritas*, social welfare, the greater good or the benefit to society, one would already have succumbed to the most arbitrary form of judicial discourse (*Kadijurisprudenz*). It is thus preferable to leave discussions of equity aside once and for all. (Wieacker 1956b: 196 (reprint))

Wieacker thus objected to any notion to the effect that the judge was entitled to enforce a certain concept of justice against the written law. 'In the process, it is easily forgotten that even after the triumph over positivism, the judiciary remains the servant of statute and the law' (Wieacker 1956b: 197 (reprint)). He thus opposed Christian natural law, to which the *Bundesgerichtshof* had subscribed under its president Weinkauff in the 1950s, with Kant's 'irreparable destruction of the dream of a law of reason'.¹⁸ The same was true for the idea emphasized during National Socialism, namely that certain 'social norms', such as 'gesundes Volksempfinden', could be determined with certainty. Wieacker referred to such naiveties as 'the surrender of philosophical labour on an ethical problem' (Wieacker 1956b: 200 (reprint)). Wieacker thus suspected any appeal to the judicial sense of justice of being a disguised exercise of arbitrariness (cf. Wieacker 1958: 48 (reprint)).

On the other hand, Wieacker emphasized the 'voluntative elements' in every application of the law, which made 'every decision already an isolated element of creation of the law'. This applied particularly to *bona fides* in Section 242 German Civil Code:

Thus the application of the general principle, and thereby every decision based on section 242 BGB, contributes to the creation of developing and emerging law. Like single needle-pricks on a piece of cloth, it actually carries forward a line of development, the direction of which is not yet pre-determined. (Wieacker 1956b: 201 (reprint))

Subsequently, Wieacker outlined the role of a judge, whose methodological proximity to the pre-Byzantine Roman model could not be missed.¹⁹ Wieacker emphasized 'that consequently, the precepts governing the application of law (and thus its interpretation) are the object of a legal ethical art. The principles of this art are those of a practical form of conduct, of the art of decision-making; which preferably develop within the judicature itself' (Wieacker 1956b: 203 (reprint)).

Wieacker then secured the *officium iudicis* within a web of technical orientation. In his treatise '*Gesetz und Richterkunst*', he listed the fundamental elements: 'the explicit value judgement of the constitution' (Wieacker 1958: 52 (reprint)), universally acknowledged 'realities of the time' of the *ordre public*, recognized principles of judicial equity, such as *ius commune* principles like *venire contra factum proprium*, *tu quoque* and others. A frame of reference was established through legal scholarship and recognized customs of the court as 'experience of the judiciary itself' (Wieacker 1958: 54 (reprint)). In addition, he adopted Hans Welzel's concept, which assumed the existence of 'prerequisite logical structures' within reality.

Seeking the contrast to Byzantine equity once again, Wieacker asked to 'keep the development of the law in accordance with the traditions of the judiciary and with the consensus among those concerned as well as among fellow experts'. Thus, he had arrived at the ancient Roman ideal, which he had previously outlined in his treatise '*Vom römischen Juristen*' in 1939. Following Pringsheim, he had described the Roman 'law of jurists'²⁰ as a continuous stream of communication among independent professionals and experts, which gave rise to the 'professional technique ... by means of routine and of continuous tradition' (Wieacker 1939: 14 (reprint)). The 'routine of decision-making' (Wieacker 1939: 19 (reprint)) was decisive, in contrast to a philosophically rooted jurisprudence of sentiment: 'It is un-Roman to ask whether a decision is just in itself, as it arises from a far more powerful force; the constants interpretatio iuris civilis' (Wieacker 1939: 23 (reprint)). Whereas in 1939 he had cautiously stressed that the ideal of the Roman judge was neither 'repeatable' nor 'worth repeating' (Wieacker 1939: 36 (reprint)), in 1957 he candidly raved over the 'glory of the great Roman practitioners' (Wieacker 1957: 62) as an inspiration for the art of judicial decision-making. Antiquity and modernity remained linked.

Notes

- 1 Regarding Wieacker, see Chapter 4 in this volume.
- 2 *Treu und Glauben* ('good faith') is the German term for the *bona fides* of ancient Roman law.
- 3 See Chapter 2 in this volume.
- 4 Pringsheim 1921a: 645. Page numbers refer to the original text, not the reprint (see bibliography).
- 5 Krüger 1898: 18f; for a critical discussion, see Kipp 1909: 9f, n. 27.
- 6 'It is Roman Law itself which is meant to be overcome' (Pringsheim 1921a: 668).
- 7 Cf. Stroux 1926: 60, n. 104 (page number refers to the 1949 reprint, see bibliography).
- 8 For a reconsideration of Byzantine jurisprudence see Liebs 1987; for contemporary influences of Pringsheim's interpretation of Byzantium see Winkler 2014.
- 9 Cf. the reference in Pringsheim 1921b: 207, n. I: 'During proofreading, I consulted Max Weber's "Rechtssoziologie..."'
- 10 For a clarification of false interpretations, see Winkler 2014: 120ff.
- 11 Binder 1925: 407; for a critical view, see Pringsheim 1961: 172, n. 104 (reprint of the 1930 original).
- 12 Pringsheim 1961: 165, n. 57 (referencing Weber, *Wirtschaft und Gesellschaft*, 436).

- 13 Cf. my analysis in Haferkamp 2007: 327, marginal no. 57.
- 14 Entscheidungen des Reichsgerichts in Zivilsachen 1924, 88 (decision of 28 November 1923).
- 15 For the same conclusion, see Nörr 1996: 30; Rückert 1994; Rückert 1997.
- 16 Pringsheim 1933: 54 (page number refers to the 1961 reprint; see bibliography).
- 17 Wieacker 1956b: 197 (page numbers refer to the 1983 reprint; see bibliography).
- 18 Wieacker 1956b: 199 (reprint); for a more careful wording of an essentially identical viewpoint, see Wieacker 1958: 49ff (page numbers refer to the 1983 reprint, see bibliography).
- 19 See Chapter 4 in this volume.
- 20 Wieacker 1939: 8 (page numbers refer to the 1944 reprint, see bibliography).

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