Carl Schmitt's Diagnosis of the Situation of European Jurisprudence Reconsidered

Autonomy of Basic Elements of the Legal Order?

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Abstract

In a groundbreaking study published in 1950, *Carl Schmitt* highlighted the specific characteristics of European jurisprudence (*Europäische Rechtswissenschaft*), arguing that before the outbreak of World War I a common legal civilisation had existed in Europe of which little was left in the contemporary epoch. *Armin von Bogdandy* has recently taken up that evaluation, praising on his part the "autonomy" of legal concepts and institutions as the foundation of every legal order. He believes that the fragmentary ideas expressed by *Schmitt* can also be usefully resorted to within in the European integration process.

It is the central thesis of both authors that "jurisprudence" may constitute a zone apart from political battles, providing a kind of continuity and stability to a legal order. For *Schmitt*, that state of harmony in Europe came to its end through the hectic development of parliamentary law-making in the 20th century that led to mindless positivism. *Von Bogdandy*, on the other hand, focuses above all on the beneficial rationalising effect of general concepts that have emerged within the European integration process. He refrains from addressing the substantive standards emphasised by *Schmitt*, contenting himself with the technical advantages of concepts that clarify and systematise any legal order.

It is a big mistake to assume that the conceptual foundations of a legal system have a neutral nature and are exempt from the antagonisms of a pluralist society. *Carl Schmitt's* own intellectual trajectory, his distinction between the primary act of creating a constitution and its later implementation by a constitutional text, contradicts the theses he defended in his

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study of 1950. Yet, *Carl Schmitt* rejected the new doctrine of a democratic and liberal State as it had taken shape in 1949 in the Statute of the Council of Europe and the Basic Law of the Federal Republic of Germany. The fact that he ignored these acts of faith in a new Europe of human rights and fundamental freedoms sheds a full light on his aversion of democratic processes where, through dialogue in open confrontation, compromissory outcomes are sought. To him, the monarchical past of the 19th century represented, in accordance with his conservative views, the ideal state of affairs in a human polity. Since for him the distinction between friend and foe was an anthropological ground norm, he could not believe in peaceful consensus to achieve peace and security.

Torn apart by the vicissitudes of his own life, having trampled underfoot all the elementary standards of human decency, he is not a suitable messenger for the paradigm that jurists are the best guardians of the values having emerged by legal practices and teachings in a society. Those values need to be supported by the entire people to keep their decisive impact as living forces.

Carl Schmitt and *Armin von Bogdandy* have both addressed the autonomy of legal concepts and institutions. In substance, however, they have dealt with rather different subject-matters.

I. Introduction

In 1950, *Carl Schmitt*, who does not need to be introduced, published a concise booklet on "The Situation of European Jurisprudence".[1] At that time, only few years after the end of World War II, he found himself in an awkward position since, due to his close association with the power wielders of the Nazi regime, he had not been accepted again as a member of the academic community. No German university was prepared to offer him a professorship. Additionally, he had not been admitted to the Association of German Teachers of Constitutional Law after its re-establishment in 1949, which *Schmitt* resented as an act of humiliation.[2] By publishing the booklet *Schmitt* wished to demonstrate that he still had to be counted on as one of the main figures of constitutional theory in Germany and

1 *C. Schmitt*, Die Lage der europäischen Rechtswissenschaft, 1950. Later reproduced with an annex in *C. Schmitt*, Verfassungsrechtliche Aufsätze aus den Jahren 1924–1954 [Essays on Constitutional Law, ECL], 1958, 386 et seq. (annex 426–429).

2 See *P. Noack*, Carl Schmitt. Eine Biographie, 1993, 272.

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that he was ready to join the debate, from his own conservative viewpoint, about adequate constitutional structures for the future, a necessity given that the new democratic (West-)German State had just arisen from the ashes of the collapsed Nazi empire. In fact, he prepared four monographs at the same time[3] from which "The Situation of European Jurisprudence" is the one that more closely than the others pertains to the realm of juristic reasoning.

This study, although now dating back seven decades, has recently evoked considerable interest. Two prominent lawyers have devoted lengthy comments to *Schmitt's* endeavour to establish a balance sheet regarding the state of European jurisprudence at a point in time when a general re-orientation had to take place in view of the catastrophe that had been brought about, to the detriment not only of Europe, by the ruthless hegemonic expansionism of the Third Reich.[4] It is not easy to obtain a full understanding of *Schmitt's* thoughts since, although expressed in brilliant language, they avoid describing in detail what their specific subject matter is.

II. Objectives Pursued

1. It is not the intention of the present author to examine in detail the stocktaking effort by *Carl Schmitt* as to its factual correctness, nor will the following observations discuss whether a common law of Europe, a European "jurisprudence",[5] ever existed in fact. The aim is rather to appraise *Schmitt's* analysis as to its suitability for the political and historical conditions of the contemporary world of the 21st century. Can we learn anything from the gloomy picture drawn by *Schmitt*? In this regard, the two recent comments just mentioned differ significantly. The main issue is whether one should read *Schmitt's* line of reasoning in isolation or whether it should be placed into its concrete historical situation – the year 1950 in the Federal Republic of Germany with

3 Three of them were published in 1950 by Greven Verlag in Cologne: *C. Schmitt*, Donoso Cortés in gesamteuropäischer Interpretation; *C. Schmitt*, Ex Captivitate Salus; *C. Schmitt*, Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum.

4 *R. Mehring*, Carl Schmitts Schrift "Die Lage der europäischen Rechtswissenschaft", HJIL 77 (2017), 853 et seq.; *A. von Bogdandy*, The Current Situation of European Jurisprudence in the Light of Carl Schmitt's Homonymous Text, MPIL Research Paper No. 2020–08.

5 *C. Schmitt*, ECL (note 1), 390.

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its background in the years from 1933 to 1945. Mountains of learned articles and books have been written about *Schmitt's* intellectual and political trajectory. It might seem at first glance that nothing new can any longer be discovered in his writings. However, caution seems to be indicated and should explicitly be articulated when his advice is harnessed for the current situation of our polity.

2. *Schmitt* puts before the reader a vast panorama of reflections in retrospective about the historical and philosophical premises of legal science, elevated to the level of jurisprudence. Only a small segment of those reflections shall be reviewed in the present article, motivated by the observations of the two commentators presented in the following. *Armin von Bogdandy* believes to have found out that the concept of autonomy should be recognised and re-activated as a core element of constitutional theory. *Schmitt* himself is adamant in presenting and explaining these elements of extraordinary significance for the operation of a constitutional system but refrains from lengthy explanations. The first one of the relevant propositions is his reminder that it is the task of jurisprudence to maintain the "unity and consistency" of the law threatened by excessive normative production, in particular recourse to regulations instead of genuine parliamentary acts.[6] In fact, he rather simply equates legislation with positivism devoid of any true roots in society and lacking the inherent properties of rational justice, arguing that in modern times law is mostly too rapidly enacted without having the possibility to reach an appreciable degree of maturity.[7] As witness against excessive legalism by planned norm-setting he invokes *Friedrich Carl von Savigny's* preference for the unintentional emergence of law.[8] Accordingly, distancing himself again from law-making by governmental bodies, he assigns to lawyers the preservation of "rational humanity" "based on legal principles". Among the principles he mentions specifically are "respect for the human person, a sense for logic and consistency of concepts and institutions"; moreover "consciousness of reciprocity and a minimum of well-ordered procedures, due process of law" without which we cannot exist.[9] These elements are qualified

6 *C. Schmitt*, ECL (note 1), 407 et seq.
7 *C. Schmitt*, ECL (note 1), 400, 416 et seq., 422 et seq., 425.
8 *C. Schmitt*, ECL (note 1), 417, 423.
9 For earlier invocations of the positive characteristics of jurisprudence (*Rechtswissenschaft*) see *C. Schmitt*, Glossarium. Aufzeichnungen aus den Jahren 1947 bis 1958, 2nd ed. 2015, 147 (1 September 1948); 156 (7 November 1948); 169 (6 March 1949).

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> by him as the indestructible core of law, which to maintain and defend confers dignity to all engaged in that struggle.[10]

Schmitt had presented the main elements of his thoughts on the current state of European jurisprudence beforehand in a number of lectures held during the last years of the NS regime in major cities of nations either allied with the German Reich or friendly to it, and finally also in Leipzig a few months before the definitive end of the Nazi empire.[11] No easy explanation can be found for his departure from the strict lines of ideology dictated by the Nazi propaganda machine. In any event, in the published text of 1950 no hint can be found that might be understood as praise of the policies conducted under the National Socialist (NS) regime established by *Adolf Hitler*. Maybe *Schmitt* wanted to distance himself in good time from the evil empire, having become aware after the defeat of the German *Wehrmacht* in Stalingrad that the war had already been lost.

III. Recent Comments on Schmitt's European Jurisprudence

1. In a fairly critical article *Reinhard Mehring*[12] describes carefully the circumstances and conditions under which *Schmitt's* study arose. In particular, he points out that *Schmitt* wished to renew his reputation as the most brilliant strategist in Germany of conservative thinking.[13] *Mehring* elaborates at length on *Schmitt's* criticism of the degeneration of the law from a stable and well-balanced set of norms to an instrument of continually changing policies for the management of conjectural economic and social policies. He notes that *Schmitt* in that regard followed other voices that had already made a controversial perversion of legalism an essential argument of their rejection of the modern liberal State.[14] Lastly, *Mehring* deals extensively with *Schmitt's* insistence on

10 *C. Schmitt*, ECL (note 1), 422 et seq.
11 Bucarest, February 1943; Budapest, November 1943; Madrid, May 1944; Coimbra, May 1944; Leipzig, December 1944, *C. Schmitt*, ECL (note 1), 426.
12 Known in Germany as one of the leading specialists on the oeuvre of *Carl Schmitt*, see his biography: *R. Mehring*, Carl Schmitt. Aufstieg und Fall. Eine Biographie, 2009.
13 *R. Mehring* (note 4), 855.
14 *R. Mehring* (note 4), 866.

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the dualism of legality and legitimacy,[15] but without addressing the implications for a theory of democracy. From a scholarly perspective, *Mehring* provides the reader with a comprehensive assessment of the ideas *Schmitt* exposes in his study. In conclusion, however, he refrains from expressing himself on the relevance of those ideas in a long-term perspective, making it clear that essentially he sees "The Situation of European Jurisprudence" as a piece of legal history, outdated and without any significance for the constitutional theory of the modern democratic state.

2. *Armin von Bogdandy's* commentary on *Schmitt's* study takes a different approach. He also presents the reader with an account of the main concepts highlighted by *Schmitt*, criticising many of them as wrong and not sufficiently established, but tries to use them as a source of inspiration for a review of contemporary constitutionalism, characterising the study as "topical for our time".[16] This introduction of *Schmittian* ideas into the complexity of the political landscape of the 21st century will be the focal point of the following observations. Accordingly, some of the topics addressed by *von Bogdandy* will be left aside, in particular his presentation of *Aldo Sandulli's* theses[17] as well as his comments on *Hermann Mosler's* evaluation of the European integration process.[18] As hinted already in the title of his essay, not all the assumptions put forward by *Schmitt* find his approval.[19] In particular, he does not believe that one could ever speak of a European republic of scholars having given rise to a truly common law,[20] since jurisprudence always followed clearly distinct paths in different countries.[21] To him, in all

15 *R. Mehring* (note 4), 870. *Schmitt's* key piece on that distinction is "Legalität und Legitimität", 1932, reproduced in: C. Schmitt, ECL (note 1), 263 et seq., Annex 345–350 (1958).

16 *A. von Bogdandy* (note 4), 2.

17 *A. von Bogdandy* (note 4), 7 et seq. See *A. Sandulli*, Il ruolo del diritto in Europa. L'integrazione europea dalla prospettiva del diritto amministrativo, 2018.

18 *A. von Bogdandy* (note 4), 13 et seq. *H. Mosler* presented his concept of European law in his essay "Begriff und Gegenstand des Europarechts", HJIL 28 (1968), 481 et seq.

19 Most remarkably, in an essay of 2017 *von Bogdandy* states, with a clear negative accent, that *Schmitt* had even ventured to state that "the autonomous jurisprudence had become the last refuge of occidental rationality", *A. von Bogdandy*, Das Öffentliche im Völkerrecht im Lichte von Schmitts "Begriff des Öffentlichen", HJIL 77 (2017), 877, 897.

20 *A. von Bogdandy* (note 4), 10 et seq.

21 *A. von Bogdandy* (note 4), 12.

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European countries the relevant jurisprudence remained closely tied to specific national patterns of thought.[22] While in England common law unfolded as a treasure of legal principles under the care of the judiciary, France transformed itself during the 18th and the 19th century into a province of legislation where the creation of legal rules by legislative bodies through statutes became the standard way for the development of the law in positivist purity. Only in Germany did Roman law keep its decisive influence through the continued recognition of the "Pandects" as the applicable law in private relationships until the codified German civil law made its appearance on 1.1.1900 in the form of a Civil Code for the whole of Germany. In this regard, *von Bogdandy* finds *Schmitt's* passages about Roman law as one of the cornerstones of the common legal tradition irrelevant and overtaken by the course of time.[23]

On the other hand, *von Bogdandy* is particularly attracted by *Schmitt's* appreciation of jurisprudence as the true guardian of the specific European concept of law, viewed by him as a force guaranteeing durability and stability. He indeed speaks of a "magical attraction" of *Schmitt's* writings,[24] giving tacit approval to *Schmitt's* opinion that law should be free from political and economic rationalities and that law should properly be conceived of as a province of its own identity which keeps a considerable amount of autonomy *vis-à-vis* external impacts from the societal sphere.[25]

3. The reader must note that *Schmitt's* study touches upon a vast array of topics. His main focus is directed on comparative constitutional law, including many aspects of international public law and additionally of international private law (conflict of laws). His thoughts find their centre in the idea that over centuries European jurisprudence had created a province of legal rationality that is threatened by recent events or has already disappeared.

22 *A. von Bogdandy* (note 4), 12 et seq.
23 *A. von Bogdandy* (note 4), 18.
24 *A. von Bogdandy* (note 4), 5.
25 *C. Schmitt*, ECL (note 1), 422 et seq.

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IV. The Autonomy of Jurisprudence

The cryptic passages cited above are identified by *von Bogdandy* as the expression of a world vision that could give back to law the dignity which it has lost in the troubles of daily controversies where partisan interests clash with one another.[26] *Von Bogdandy* does not unreservedly embrace *Schmitt's* sketchy ideas, but he expresses his sympathy for a legal universe that is dominated and regulated by concepts that belong to a treasure of accumulated jurisprudential wisdom.[27] The leitmotiv for v*on Bogdandy* is the concept of autonomy that sets jurisprudence apart from other neighbouring disciplines such as history, philosophy or political science.[28] To him, the inherent logic of jurisprudence – or of law in general – makes it a province with its own *raison d'être*.

1. Definition of Jurisprudence

Jurisprudence is a term that has many meanings. It is ambiguously clear from a perusal of *Schmitt's* study what jurisprudence means to him. On the one hand, jurisprudence, or in the original German *Rechtswissenschaft*, is the art of handling, interpreting and applying normative prescriptions in a rational fashion according to specific rules of art.[29] Those rules belong to legal craftsmanship. On the other hand, the elements that *Schmitt* highlights pertain for their most part to the realm of substantive law, the basic concepts and rules that carry and sustain the architecture of a legal system. In this perspective, jurists are the authentic representatives of that art. They act as treasure holders and guards of that sublime body of ground rules that gave European jurisprudence its particular profile.[30]

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26 *A. von Bogdandy* (note 4), 5.

27 But see also his earlier more distanced assessment *A. von Bogdandy* (note 19).

28 *A. von Bogdandy* (note 4), 2, 5, 9, 26 et seq., 30.

29 *Black's* Law Dictionary defines jurisprudence as "[t]he philosophy of law, or the science which treats of the principles of positive law and legal relations". Essentially, the German term "*Rechtswissenschaft*" lacks the philosophical element which it owns in English. Curiously enough, *Black's* Law Dictionary does not mention another connotation of jurisprudence, name the sum total of the synthesised course of the decisions of the judiciary – or the highest courts – of a given country or some other organisation endowed with judicial bodies, *Black's* Law Dictionary, 6th ed. 1990, 854.

30 See his observations on the rise of jurists in the 16th and 17th centuries, in *C. Schmitt*, Ex Captivitate Salus (note 3), 70 et seq.

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a) In fact, it is in particular the European origin and contextuality that *Schmitt* focuses upon, attaching particular significance to that territorial and intellectual identification. It stands to reason that *Schmitt*, when glorifying the European jurisprudence, could not possibly have in mind the recent history.[31] To him that Europe of exemplary legal patterns was, *grosso modo*, the Europe as it existed before 1914, having attained its apex under the monarchical "*ancien régime*" in the first half of the 19th century where the "*Rechtsstaat*" was deemed to be grounded on specific substantive qualifications.[32] In fact, *Schmitt* says in straightforward terms that the revolutionary movement of 1848, by abandoning the concept of natural law deemed to have become obsolete, led to a rupture of the consolidated line of tradition.[33] Nowhere does he mention the constitutional foundations of the different European legal orders taken into consideration by him. In his view, the emergence of parliamentary law-making in accordance with the advance by democratic principles amounted to nothing else than the introduction of positivism, a deliberate distancing from the inherent virtues of authentic law. In any event, one can definitely exclude attributing a purely moral or political significance to the concept of jurisprudence in *Schmitt's* understanding. This concept pertains to the province of law, and there is no clue that *Schmitt* wanted to depart from that common meaning.[34]

b) *Von Bogdandy* engages in a more extensive interpretation of the key concept of jurisprudence according to *Schmitt*, explicitly stating his personal view.[35] In a dense passage he illustrates that concept by referring to a number of abstract sub-concepts such as state, sovereignty, public and private, and regarding the European integration process: primacy, direct effect, democracy, competence or pluralism, reiterating the centrality of the notion of autonomy.[36]. On the one hand, the elements listed by him may be harnessed as a technical toolbox for the efficient

31 Strangely enough, *A. von Bogdandy* (note 4), 10, assumes that European jurisprudence had also existed during the war.

32 See *J. Habermas*, Faktizität und Geltung, 1998, 169.

33 *C. Schmitt*, ECL (note 1), 398. The consideration devoted to 1848 are highly ambiguous.

34 Apparently, there exists a definite discrepancy between the German concept of *Rechtswissenschaft* and the English term "jurisprudence" with its manifold meanings.

35 *A. von Bogdandy* (note 4), 25 et seq.

36 *A. von Bogdandy* (note 4), 6, 9, 27.

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discharge of the challenges governmental authorities have to cope with and additionally as beacons for the intellectual ordering of the legal order; on the other hand they may be deemed to reflect basic guidelines for societal life in a democratic entity. However, *von Bogdandy* avoids discussing the substantive contents of these notions, contrary to *Schmitt* who viewed the concepts identified by him as the core elements of European jurisprudence. Strangely enough, *Schmitt* deemed them to be depoliticised, possessing a status of neutrality, thus drawing a distinction between the immutable foundations of a legal order and its fast-changing manifestations under the impact of time and history. In very few sentences, he manages to combine incompatible propositions. On the one hand, he argues against positivism, which he denigrates as "relative and time-bound",[37] yet, on the other hand, he contends that positivism ignores the substantive significance of law, "i.e. the political, social and economic sense of the concrete order systems and institutions".[38] In other words, legislation that responds to the actual needs of the population is contrasted with an alleged inner logic of the societal phenomena, decipherable only by higher intuition.[39] Following the line traced by *Schmitt*, *von Bogdandy* embraces indeed the ideal of a law that is placed above the battles in a pluralist society, blind to the simple fact that the ground norms of a polity can hardly be any more political.[40] To him, the propositions assembled under the term jurisprudence constitute a neutral zone between the propositions offered by social sciences on the one hand and the relevant legal rules on the other.[41]

2. *Congruence or Divergence?*

One does not perceive easily in what sense *von Bogdandy* really follows *Schmitt*. Some of the notions specifically mentioned by him are nothing else than instruments suited to obtain intellectual clarity and transparency within a legal system. The distinction between public and private sheds a light on a dichotomy that is structurally inherent in any such system even if not appearing under that name. According to the prevailing political philosophy, the borderline between the two segments may run in wildly

37 *C. Schmitt*, ECL (note 1), 388.
38 *C. Schmitt*, ECL (note 1), 389.
39 *C. Schmitt*, ECL (note 1), 388 et seq.
40 *A. von Bogdandy* (note 4), 27.
41 *A. von Bogdandy* (note 4), 28.

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different directions. The distinction does not prejudge the substantive outcome. Societies may opt for a thin governmental machinery in times when the market mechanism seems to satisfy all legitimate demands; when by contrast all of a sudden a crisis erupts the preference may again shift back to favour a governmental machinery with stronger powers of control and interference, an experience which Europe made in the spring of 2020 in connection with the corona crisis. Such multi-functionality is absent in many of the morally loaded concepts highlighted by *Schmitt*, like recognition of the human person or the rule of law:[42] They shape the substance of a legal system in its entirety.

After the summary overview of *Schmitt's* and *von Bogdandy's* interpretation of European jurisprudence, one has to note a fundamental divergence between these two interpretations notwithstanding a high degree of congruence or parallelism. Both protagonists claim for "jurisprudence" a reserved space within the legal order. *Schmitt* distances himself from the contemporary political environment by professing his predilection for "the good old order", while *von Bogdandy* declares his attachment to a number of concepts that apparently can be used as fungible pieces under any premises of the constitutional architecture. Thus, *von Bogdandy* is open for the future, while *Schmitt* sheds tears about paradise lost.

V. Assessment

With a view to a critical assessment, the ideological thicket used by *Schmitt* as inspirational resource cannot be ignored. Several reasons militate against acknowledging *Schmitt's* conceptual splinters as the core of a philosophy that should also permeate the jurisprudence of our days or provide it with a significant complement.

1. Disconnection of Jurisprudence from Its Political Context

Schmitt nourishes the nostalgic dream of an independent empire of law, having arisen during an *aurea aetas*, not affected by later vagaries of time and history, omitting to contextualise jurisprudence in the meanders, aberrations and success stories of European and German history. According to his vision, law must be divided into different classes. On the one hand, the

42 *C. Schmitt*, ECL (note 1), 422 et seq.

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broad majority of legal norms, be they national statutes or international conventions, are to be classified as purely positive law, produced under the pressures of antagonistic battles.[43] On the other hand, a number of basic tenets of a legal order have an autonomous existence, flowing from the intrinsic nature of law, not related to a specific law-making authority. This global construction has far-reaching consequences. It amounts to contending that the unwritten core of a legal order has its own *raison d'être*, independent of the political forces shaping it. This is a proposition that apparently stands in stark contrast to *Schmitt's* own constitutional theory according to which the basic constitutional determination, the decision of the *pouvoir constituant*, constitutes a quasi-divine act of creation that will put its hallmark on the legal order concerned in its entirety.[44]

The desire to disconnect the "true" jurisprudential law from its political environment wholly pervades *Schmitt's* study and becomes visible most remarkably in the omissions that characterise the study. First of all, it should be recalled that in 1950 a new era had already commenced in international relations, the era of human rights. Whereas before 1945 international public law had been understood as a regulatory network operating exclusively between and among States,[45] all of a sudden the individual emerged with specific entitlements that were designed to restrain the sovereign powers of States. As is generally known, the United Nations (UN) Charter enunciated in its first Article about the Purposes of the World Organization the promotion and encouragement of "respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion" (Article 1 para. 3).[46] Following up on this determination, the UN General Assembly adopted on 10.12.1948 the Universal Declaration of Human Rights as a universal ideal ("common standard of achievement"), applicable to all human beings and peoples, essentially opposable to governmental authority.[47] This delicate accord at world level, originally a non-binding instrument with no more than a po-

43 *C. Schmitt*, ECL (note 1), 388.
44 *C. Schmitt*, Verfassungslehre, 1928, 21.
45 See, e.g. *F. von Liszt/M. Fleischmann*, Das Völkerrecht, 12th ed. 1925, 1.
46 For *Schmitt*, the entire post-war legal order under the aegis of the United Nations was discredited because at the Allied Military Court in Nuremberg the accused were charged with having committed crimes against peace and genocide, offences that beforehand had not existed under positive international law, s. e.g. *C. Schmitt* (note 9), 173 (4 April 1949).
47 UNGA Res. 217 A (III).

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litical and moral meaning,[48] had a far-reaching impact on the legal systems of all countries of this globe. In Europe, the nations on the Western side of the "Iron curtain" joined to establish the Council of Europe, stating in the preamble of the Statute of this organisation:

> "Convinced that the pursuit of peace based upon justice and international co-operation is vital for the preservation of human society and civilisation;
> Reaffirming their devotion to the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy".[49]

This was a true proclamation of faith in the moral unity of Europe, expressing in simple and straightforward terms that Europe did have a common heritage which it intended to cultivate in its actual policies.[50] Although formally signifying a fresh start, the words enunciated in that preamble were nothing else than the re-affirmation of the cherished good old traditions that had been annihilated by a frenzy of hyperbolic national egomania, now brought into the realm of positive international law.

Relying to a considerable extent on the Universal Declaration and the values proclaimed in the Statute of the Council of Europe, the Federal Republic of Germany, at that time a West-German State, adopted in 1949 the Basic Law,[51] a constitutional instrument with a large catalogue of human rights, even before the conclusion of the European Convention on Human Rights.[52] Not a single word about these revolutionary changes is mentioned by *Schmitt*. Right at the beginning of his study he noted (in 1950!) that still "shortly ago" Europe had common concepts and institutions with a "direct political significance".[53] Obviously, he could not have ignored that when in 1950 he decided to publish his reflections on

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48 It needs to be observed only incidentally that the Universal Declaration found later its legal consolidation above all in the two universal human rights treaties of 1966, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

49 European Treaty Series No. 001, 5.5.1949.

50 Today, reference can be made to the even more explicit statement of faith contained in Article 2 of the 1992 Treaty on European Union.

51 The Basic Law came into force on 23.5.1949. *Schmitt* ridiculed the Basic Law in the most drastic fashion, see *C. Schmitt* (note 9), 168 (1 March 1949); 176 (25 April 1949); 196 (20 July 1949).

52 European Convention on Human Rights concluded on 4.11.1950.

53 *C. Schmitt*, ECL (note 1), 389.

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the situation of European jurisprudence Western Europe had engaged in a deep-going renovation process and that Germany lived fortunately under the protective umbrella of a constitution that was meant to safeguard the individual rights and freedoms of every person, irrespective of their sex, their race, their political opinions. With the Basic Law, the German legal order received its moral, political and legal centre, carried by a broad European consensus. It could not yet be foreseen in 1950 to what extent the new human rights would permeate the entire body of applicable law, reaching out far beyond the specific realm of constitutional law into all fields of law, including public, criminal and even private law.[54] The relevant jurisprudence of the German Federal Constitutional Court acted very soon in concert with the jurisprudence of the European Court of Human Rights[55] and the jurisprudence of the parent judicial bodies in the neighbouring countries.[56] It should be noted, in this connection, that the Basic Law had immediately been recognised by everyone with an open mind as a benchmark that was designed to restore a European standard of civilisation, brushing aside all the remnants of a despotic regime for which the only beacon had been the all-encompassing power of a racially defined State.[57]

Von Bogdandy acknowledges that all these developments could not be unknown to *Schmitt*. He calls it indeed "surprising" that the renewal of Europe is not mentioned at all in *Schmitt's* study,[58] interpreting the neglect of those determinative events in the legal architecture of the world, of Europe and in particular of Germany, as a consequence of the universalism

54 The ground-breaking nature of the *Lüth* judgment of the Federal Constitutional Court (FCC), 15.1.1958, Entscheidungen des Bundesverfassungsgerichts (BVerfGE) 7, 198, is well-known to every constitutional lawyer (English translation in: Decisions of the Federal Constitutional Court, Federal Republic of Germany, Vol. 2/Part I, 1998, 1). It held that the fundamental rights of the Basic Law have to be taken into account even when dealing with legal relationships between private persons. See now the judgment of the FCC, 6.11.2019, *Recht auf Vergessen II*, BVerfGE 152, 216, margin note 96.

55 For the extension of the rights under the ECHR into the field of private law the ground-breaking decision was the judgment in *Marckx v. Belgium*, Application No. 6833/74, 13.6.1979.

56 See, e.g. *C. Tomuschat*, Das Bundesverfassungsgericht im Kreise anderer nationaler Verfassungsgerichte, in: P. Badura/H. Dreier, Festschrift 50 Jahre Bundesverfassungsgericht, Vol. II, 2001, 245 et seq.

57 Reference should be made, e.g. to *G. Leibholz*, Der Begriff der freiheitlichen demokratischen Grundordnung und das Bonner Grundgesetz, DVBl 1951, 554 et seq.

58 *A. von Bogdandy* (note 4), 9.

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that suddenly had won the upper hand, marginalising the specific European aspects of the new border-transcending spirit of constitutionalism. Instead of welcoming this new spirit of universalism, which projected the European concept of liberal constitutional principles to the world level, in connection above all with the democratic spirit which at that time prevailed in the United States, *Schmitt*, in a stubborn spirit of nationalist parochialism, considered this development as a disturbance of the good old world order where States had been the only masters.[59] The extension of the former "European" international law appears to him as a "dissolution" of the spirit of that law into a "spaceless generality".[60] Obviously, the opening to the world amounted to a challenge, but a challenge to which Europe had to stand up in conformity with its own ideals. Instead, *Schmitt* regretted the disappearance of the former colonial empires.[61]

Schmitt's attitude of ignoring the renewal of the structures of the European landscape and of the German State in particular, through which the rule of law was to become a reality, cannot possibly be attributed to an erroneous belief by *Schmitt* that the new Basic Law would again inaugurate only a short stage in German constitutional history. There existed no objective reasons that were susceptible of suggesting that again *Otto Mayer's* famous adage: constitutional law perishes, administrative law remains,[62] could turn into reality. In any event, the reconstruction of Europe had already become an institutional reality that provided a firm basis for cherished European traditions. The tremendous gap in *Schmitt's* line of reasoning discredits his study entirely. It was no oversight, but a deliberate act of rejection of the new reality of a democratic Europe and a liberal Germany with true enjoyment of human rights for everyone.[63] The paramount importance of this extension of human rights-based constitutionalism escaped him entirely. He remained indissolubly attached to a concept of international law that confined itself to making available certain rules for the never-ending disputes between States where the indi-

59 See *M. Stolleis*, Geschichte des öffentlichen Rechts in Deutschland, Vol. IV: 1945–1990, 2012, 129.

60 *C. Schmitt*, ECL (note 1), 388.

61 *C. Schmitt* (note 9), 213 (25 November 1949).

62 *Otto Mayer*, "Verfassungsrecht vergeht, Verwaltungsrecht besteht", *O. Mayer*, Deutsches Verwaltungsrecht, 3. Aufl. 1924, Preface.

63 See *M. Stolleis* (note 59). See also *A. von Bogdandy* (note 4), 10.

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vidual had no proper standing. Human rights and the values underlying them were not a part of his legal cosmos.[64]

2. *Aversion of Parliamentary Democracy*

Indeed, as can be gleaned from the study itself and other writings,[65] *Schmitt* utterly disliked the quest for justice and truth through parliamentary methods and accordingly the outcomes of such controversial processes. On the one hand, he idealised parliament as the institution where, in public discourse through the exchange of relevant arguments, reasonable outcomes could be reached.[66] On the other hand, however, he concluded that under the conditions of our time all the preconditions for such a rational quest for objective truth had fallen apart. To him, statutory rules were just positive law, without any inherent substantive value, and common international treaties did not fare any better in his judgment.[67] Parliament had lost its place as the legitimate market place for public debates in society.[68] Accordingly he considered parliamentary disputes and struggles as a sign of decay and erosion, likely to affect the performance a State is required to deliver.[69] Symptomatic is his negative appraisal of countries in which Parliament "is split into diverse parties".[70] Instead, he believed in the traditional wisdom of institutions, in particular the amalgamating force of scholarly construction and judicial practice deemed by him capable to reveal the "objective reason" laid down in the relevant norms.[71] Jurisprudence represented "the unity of the law's will *vis-à-vis* a multitude of egoistic parties and fractions",[72] and *Schmitt* even ventured to state that

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64 Vainly does one look for the keyword "Menschenrechte" (human rights) in *C. Schmitt*, Der Nomos der Erde (note 3) from the same year.

65 *C. Schmitt*, Die geistesgeschichtliche Lage des heutigen Parlamentarismus, 10th ed. 2017. It should not be forgotten, on the other hand, that *Schmitt* praises the emergence of a body of *ius in bello* as humanisation of armed hostilities between States, see C. Schmitt (note 65), 123 et seq.

66 *C. Schmitt* (note 44), 315.

67 *C. Schmitt*, ECL (note 1), 388.

68 *C. Schmitt* (note 44), 319.

69 *C. Schmitt*, ECL (note 1), 402.

70 *C. Schmitt*, ECL (note 1), 402.

71 *C. Schmitt*, ECL (note 1), 402.

72 *C. Schmitt*, ECL (note 1), 403. Remarkably enough, *Schmitt* speaks here not of the intentions enshrined in a specific act of legislation, but of "the law's will" (*des Rechtswillens*), presenting "the law" as an independent power.

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"jurisprudence itself is lastly the legal source proper".[73] One may note, in this connection, that the inherent justice of the law as perceived by *Schmitt* in Roman law had never been tested with regard to the institutions of the Roman State. During the middle ages up to the modern times the rules as enshrined in the "Pandects" had stood the test of time only in the realm of private law.[74]

In conclusion, *Schmitt* did not trust the ordinary processes of norm production under a democratic regime. In many of his earlier writings, *Schmitt* had attacked the parliamentary system where the different groups of the population openly manifest their views and interests, having eventually to reconcile their opposing viewpoints through compromise solutions that do not fully satisfy anyone.[75] He went so far as to warn of a dictatorship of the majority that could destroy the artful equilibrium between the constitutional institutions by ruthlessly exploiting their actual position of power. Thus, he sees democracy threatened by a structural defect that cannot be remedied. To him, it is the effective functioning of the governmental apparatus that legitimises the exercise of public power.[76] Pluralism affects the regulatory power of the State in a pernicious way, depriving it of its sovereign authority. Without explicitly saying so, *Schmitt* believed that just and well-balanced solutions, if not emerging by autonomous creativity, could only be found through dictatorial command.[77] Significantly enough, he records the year 1848, the year when all over Europe the democratic principle made important strides forward and the first All-German Parliament (Constituent National Assembly, convening in the *Paulskirche* in Frankfurt) was elected, as the fatal breaking point.[78] Regarding the concept of European international law, he identifies the three decades from 1890 to 1918 as the final phase before a universal concept of international law came onto the stage.[79]

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73 *C. Schmitt*, ECL (note 1), 412.

74 See *C. Schmitt*, Der Nomos der Erde (note 3), 118.

75 *C. Schmitt*, Der Begriff des Politischen, 1963, 69.

76 *C. Schmitt*, Das Problem der Legalität, in: C. Schmitt, ECL (note 1), 440, 447.

77 Reference may be made to two landmark articles: *C. Schmitt*, Staatsethik und pluralistischer Staat, 1930, reproduced in: C. Schmitt, Positionen und Begriffe im Kampf mit Weimar – Genf – Versailles 1923–1939, 1988, 133 et seq.; C. Schmitt, Die Wendung zum totalen Staat, 1939, reproduced in: C. Schmitt, Positionen … (note 77), 146 et seq.

78 *C. Schmitt*, ECL (note 1), 398. The warning should be reiterated that the negative evaluation of 1848 is highly ambiguous.

79 *C. Schmitt*, Der Nomos der Erde (note 3), 200 et seq.

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On the other hand, *Schmitt* openly denied the possibility of taming a parliamentary majority by introducing fundamental rights as a check and barrier against legislative abuse.[80] The experiences of the Weimar Republic seemed to teach him that such legal devices are incapable of imprinting their hallmark on constitutional processes.[81] He went even so far as to perceive a contradiction between law-making power on the one hand and checks and balances, restraining that power, on the other.[82] The outcome, according to *Schmitt*, leaves no doubt: decision-making must be organised differently. Only an authoritarian power wielder is in a position to secure the unity and straightforwardness of governmental action,[83] according to *Thomas Hobbes*' proposition: *Non veritas, sed auctoritas facit legem*.[84]

3. *Schmitt's Self-Discreditation*

In fact, *Schmitt* had lived through the troubled times of the Weimar Republic not only as a passive observer but had become a main protagonist of the Nazi regime after *Hitler's* assumption of power. He had witnessed how difficult it can be in a divided people to achieve constructive solutions for complex problems. In his political naiveté, he may have believed that as soon as the "right" political tendencies had won for themselves a position of majority all the social antagonisms could be settled by one stroke of the pen. Famous in this regard is the article he published in 1934 after the murder of *Ernst Röhm*, a political competitor of *Adolf Hitler*, head of the ill-famed SA-storm troopers (Sturmabteilung, armed unit of the Nazi party), trying to justify this murderous act as the exercise of the sovereign powers of the *Führer* in whose person all the powers of the people had found their embodiment.[85] All the traditional guarantees of respect for the personality of every human being were simply declared moot and

80 *C. Schmitt*, Der Nomos der Erde (note 3), 305 et seq.

81 In his view, fundamental rights enshrined in a constitutional document amounted either to simple manifestos (programmes) or were reduced to irrelevance as re-affirmation of the principle of legality, see "Freiheitsrechte und institutionelle Garantien der Reichsverfassung", 1931, in: C. Schmitt, ECL (note 1), 140, 141; "Grundrechte und Grundpflichten", 1932, ECL (note 1), 181, 196, 202.

82 *C. Schmitt*, ECL (note 1), 305. Such negative evaluation cannot be found in *C. Schmitt* (note 44), 157 et seq.

83 For *Schmitt*, a State must first of all be able to wage war: C. Schmitt (note 75), 46.

84 *T. Hobbes*, Leviathan, 1651, Chapter 26, 3.

85 *C. Schmitt*, Der Führer schützt das Recht, 1934, in: C. Schmitt, Positionen … (note 77), 199 et seq.

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irrelevant. Once *Hitler* made a determination, all the "formalistic" guarantees yielded and lost their quality as barriers and checks against supreme governmental power.[86] Thus, *Schmitt* knew perfectly well how a legal system can be manipulated by an autocrat who manages to keep under his control the effective governmental power mechanisms, the police and the military. In such battles for political power, jurisprudence could play no role whatsoever.

Thus, through his personal life, his words and his deeds, *Schmitt* had discredited all the elements of jurisprudence praised by him as the backbone of a governmental entity. It was truly impossible for him legitimately to advocate a legal system founded on elementary concepts of human decency and mutual respect. In a manner lacking any trace of self-criticism, he self-pitied himself as a lawyer "stripped of his rights" ("*entrechteter Jurist*").[87] Not a single word of remorse can be found in his diaries; millions of killed Jews were just a fact of life and history.[88] Obviously, at the time of publication of his study he had not yet accepted the paradigms of the new legal order in Europe and in Germany. Instead of referring vaguely to some ground rules of moral conduct in society he could have evoked the lofty sentences of the Statute of the Council of Europe or the introductory first sentence of the Basic Law: "Human dignity shall be inviolable".[89] Obviously he did not recognise the vast potential inherent in these solemn statements, above all because he did not trust the usefulness of such proclamations enshrined in a treaty pertaining to a multilateral framework that in his view would constrain rather than emancipate the Federal Republic of Germany.[90]

4. Personal Guardianship

Closely tied to the question of the actual substance of jurisprudence the question must be answered who should be its guarantor. *Schmitt* focuses

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86 *C. Schmitt* (note 85), 200. For a comment see *R. Mehring* (note 4), 860.

87 *C. Schmitt*, Ex Captivitate Salus (note 3), 60. See also *C. Schmitt* (note 9), 201 (21 August 1949) where he poses as a victim of "ideocidium".

88 *C. Schmitt* (note 9), 202 (23 August 1949).

89 See *Schmitt's* inappropriate observations, *C. Schmitt* (note 9), 197 (23 July 1949).

90 All this has nothing to do with the undeniable fact that proclamations of paramount principles and human rights remain widely open for discussion and that eventually well-balanced outcomes can only be obtained in the case at hand by taking into account the relevant specific circumstances.

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on the legal teachings and practices as they had been evolved in the intercourse between legal scholars and practitioners.[91] This class of persons would consequently be called upon to stand up for the values inherent in jurisprudence, as guardians of a holy grail of justice and rationality. Obviously, it is rather delicate in a democratic society to grant a specific group of the population some kind of privilege in shaping the legal order. Jurists, above all judges, carry functionally a special responsibility in that regard since they are called upon, in their daily activity, to apply and implement the various components of the legal system. No one needs to be reminded of the fact that in Germany jurists in positions of responsibility, including the judges of the highest courts, did not show a clear attachment to the core values of humanity and justice during the years from 1933 to 1945.[92] It is a matter of common knowledge that *Schmitt* had been the most articulate despiser of the principle, identified by him as one of the core elements of jurisprudence, requiring that every human person be respected as equal and be treated with dignity and fairness. Against this background, which is exemplary and not anecdotal, it seems illusory to believe that the elements identified by *von Bogdandy* as forming, in their conjunction, a province of autonomy may stand apart from the political processes shaping the fate of the nation concerned. Within a polity there are no neutral zones that could be withdrawn from the impact of the ongoing political processes. Depoliticisation rather appears as a myth. No part of societal life can lead an existence outside the fundamental constitutional determinations about the basic substantive foundation and the relevant decision-making processes. Transparent governmental mechanisms require procedures capable of ensuring accountability. By contrast, a mystic cloud of autonomous concepts and institutions is susceptible of concealing the effective operation of the decision-making apparatus of the State, to the detriment of the individual citizen.

91 *C. Schmitt*, ECL (note 1), 396.

92 For careful empirical research into judges' conduct see the recent studies by *G. Sydow*, Geschichte der Verwaltungsgerichtsbarkeit in Baden, in: K.-P. Sommermann/B. Schaffarzik (eds.), Handbuch der Geschichte der Verwaltungsgerichtsbarkeit in Deutschland und Europa, Vol. 2, 2019, 143 et seq. (172); *M. Albers*, Geschichte der Verwaltungsgerichtsbarkeit in Hamburg, in: K.-P. Sommermann/B. Schaffarzik (note 92), 721 et seq. (775 et seq.).

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5. *Anachronistic Thoughts*

The fact that *Schmitt* did not become aware, after the end of World War II, of the changes that were brought about by the return to the fundamental principles of a liberal democracy, is after all more than a contingency. In particular, the German Basic Law of 1949 proclaimed its determination:

> "To promote world peace as an equal partner in a united Europe."

This was not a solitary move but found its backing from the very outset in a structural embedding at the European level. In the recent past, this amalgamation of the domestic legal order and the European framework has found a dramatic expression in the claim, by the German Constitutional Court, to enforce through the remedy of constitutional complaint not only the fundamental rights under the Basic Law, but also the rights enshrined in the European Charter of Fundamental Rights.[93] At the domestic level, from the very outset in 1949, mechanisms were established suitable to prevent any abuse of legislative power as feared by *Schmitt* in respect of a parliamentary system. The supremacy of the Basic Law protects the democratic order not only in respect of infringements by the executive and the legislative power, but additionally its paragraph 3 of Article 79 erects a protective wall against any attempts to modify the core principles of the Basic Law.[94] Furthermore, the fundamental rights under the Basic Law have seen a tremendous increase of their effectiveness by the establishment of the Federal Constitutional Court to which all citizens can bring their grievances through a constitutional complaint. All these innovations were destined to secure the rule of law in accordance with the new international and European spirit. Accordingly, the situation under the Basic Law was totally different in 1950 from the situation as it prevailed under the Weimar Constitution where the power of the legislature was indeed deemed to be boundless and where the fundamental rights of the citizens did not yet provide true and effective safeguards.

Thus, *Schmitt's* study rests on intellectual foundations and empirical findings that did indeed characterise the constitutional position under the Weimar Constitution but are absent from the Basic Law of 1949. *Schmitt* criticises positivism by arguing that it had totally left aside the substantive

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93 See FCC, *Recht auf Vergessen II*, FCC, 6.11.2019, BVerfGE 152, 216, margin notes 50–67.

94 To declare the very core of the constitution to be immutable is a direct consequence of *Schmitt's* distinction between constitution and constitutional law, see *C. Schmitt* (note 44), 23 et seq. 26.

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contents of the law, its political, social and economic dimension.[95] This assertion would require a careful investigation but from the very outset seems to lack any plausibility. The laws of the 19th century were not deprived of political meaning, but they emanated from a state where the conservative majority still took the view that the state should not intervene in societal matters, leaving it to the competing social interest groups to settle their disputes at the level of private law. *Schmitt* was in full agreement with the social order as it prevailed during the early decades of that century. Therefore, the practice of law of that epoch could appear to him as a perfect shape of society.[96] When popular demands for social welfare were articulated with greater insistence, such abstentionism lost its legitimacy. Governments were urged by the relevant social forces to tackle poverty and hunger, using for that purpose the measures of constraint at their disposal, in particular statutory law. The Government of the Imperial German Reich was one of the first in Europe to heed the calls from the lower levels of society, introducing important social reforms by way of legislation, in particular the regime of social security that guaranteed to everyone a life in dignity even in case of poor health,[97] and in particular a retirement system that secured a life in dignity after a hard life of work.[98] Such reforms cannot grow imperceptibly, they must be driven and sustained by societal forces and need implementation by laws that do not lose their dignity by responding to the wishes and needs of the less well-to-do classes of the population. Law does not have to acknowledge its own beauty,[99] but should invariably strive to satisfy the needs of the citizenry, those from whom all public power emanates. Thus, for the promotion of the public interest "positivism" i.e. the enactment of statutory rules, is indispensable.[100]

95 *C. Schmitt*, ECL (note 1), 388.
96 *von Bogdandy* is aware of the danger presented by a judiciary with a strong conservative orientation, *A. von Bogdandy* (note 4), 25 et seq.
97 Introduction of a health insurance system for workers in 1883.
98 Introduction of an old age pension scheme for workers in 1891.
99 See also *J. Habermas* (note 32), 189.
100 See *J. Habermas* (note 32), 168. A good example is also provided by the growth of administrative jurisdiction during the 19th century not only in Germany, see *K.-P. Sommermann/B. Schaffarzik* (note 92).

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VI. Concluding Observations

It is certainly not wrong to note that lawyers have in their professional realm constructed a toolbox of legal concepts that enormously facilitate legal discourse. The precision of these concepts helps overcome difficulties of mutual understanding. They make jurisprudence a field of social activity that may be understood as a coherent framework. However, as such jurisprudence remains a technical instrument, usable for any purpose and not geared to any specific public welfare goals. The elements identified by *von Bogdandy* as pertaining to the special circuit of autonomy have an important function in smoothing social interaction. However, no trust can be placed in them as pilot principles keeping a legal order on good course for the benefit of every member of the community.

Accordingly, to allocate a place of honour to the technical tools easing the operation of the legal system does not seem to be warranted. It is a great achievement of jurisprudence to have elaborated, within private law, concepts such as right and obligation, or, at the European level, concepts such as primacy and direct effect. These concepts have cut intellectual paths and have contributed to easing and demystifying legal discourse. But they have not reinforced the foundations of legal culture in Europe. Wherever true human values need protection, recourse must be had to the vast arsenal of norms and principles assembled under the roof of the relevant international instruments, the European Convention on Human Rights (additionally today the European Charter of Fundamental Rights) and the relevant national constitutions, in Germany the Basic Law. All of these instruments have firm democratic roots, within the European Union according to special procedures that had to be tailored to meet the complexity of a system of governance that is based on two different foundations, on the one hand the member States, on the other hand their citizens. The normative ground norms referred to permeate all legal orders within their jurisdiction, providing help and assistance to varying degrees. There is no need for autonomous concepts as pillars of stability. In any event, *Carl Schmitt* cannot be the guarantor of this vision of the legal world. He distrusted legislation by democratically elected parliamentary bodies and he never embraced human rights as the bulwark of human freedom, cherishing no other ideal than the might of governmental institutions and their unbridled power. This is no constitutional model for the needs of our time.

Schmitt's study on the European jurisprudence may have been carefully listened to by the different audiences to which he presented his views

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shortly before the end of the Nazi terror regime.[101] Yet, obviously he could not be appreciated as a messenger for a better future by looking back to a past that had revealed its deficiencies and shortcomings. Not a single thread of forward-looking optimism can be detected in his reflections. Still in 1950, *Schmitt* adhered to his ground axiom that States are opposed to one another in an antagonistic fashion as friends or foes. He must have believed that the friend/foe distinction was an immutable characteristic of human nature. From that perspective, it was illusory to believe that an international organisation like the United Nations or the Council of Europe could fare any better in attempting to secure peace and human rights in the world.

More than a decade ago, the European nations confirmed in the Treaty of Lisbon their common understanding of the values underlying the European Union (Article 2). This is a proposition forming part and parcel of the multilateral framework established by political consensus and supported by the democratic forces of the Member States of the Union. Thus, in the European Union the antagonism between positive law and a somewhat freewheeling legal framework of objective truth and justice safeguarded by scholars and the judiciary has been overcome. It is the burden and the prerogative of democratic societies, inherent in their right of self-determination, to define their political values and objectives through rational acts based on a careful weighing of all available options within the framework of general international law. They do not need a safety net of implicit legal principles in the background, guarded by anonymous wise men, although being aware that the legal rules adopted by them are closely related to, and supported by, firm moral principles.

101 *C. Schmitt*, ECL (note 1), 426.

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