Beiträge zum ausländischen öffentlichen Recht und Völkerrecht | 305

von Bogdandy | Mehring | Hussain [Hrsg.]

Carl Schmitt's European Jurisprudence

Nomos

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA - https://www.nomos-elibrary.de/agb

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA - https://www.nomos-elibrary.de/agb

Beiträge zum
ausländischen öffentlichen Recht und Völkerrecht

Herausgegeben von

der Max-Planck-Gesellschaft
zur Förderung der Wissenschaften e.V.,
vertreten durch Prof. Dr. Armin von Bogdandy
und Prof. Dr. Anne Peters

Band 305

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA - https://www.nomos-elibrary.de/agb

Armin von Bogdandy | Reinhard Mehring
Adeel Hussain [Hrsg.]

Carl Schmitt's European Jurisprudence

Nomos

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA - https://www.nomos-elibrary.de/agb

Die Deutsche Nationalbibliothek verzeichnet diese Publikation in der Deutschen Nationalbibliografie; detaillierte bibliografische Daten sind im Internet über http://dnb.d-nb.de abrufbar.

1. Auflage 2022

© Die Autoren

Publiziert von
Nomos Verlagsgesellschaft mbH & Co. KG
Waldseestraße 3-5 | 76530 Baden-Baden
www.nomos.de

Gesamtherstellung:
Nomos Verlagsgesellschaft mbH & Co. KG
Waldseestraße 3-5 | 76530 Baden-Baden

ISBN (Print): 978-3-8487-7168-4
ISBN (ePDF): 978-3-7489-1215-6

DOI: https://doi.org/10.5771/10.5771/9783748912156

Onlineversion
Nomos eLibrary

Dieses Werk ist lizenziert unter einer Creative Commons Namensnennung – Weitergabe unter gleichen Bedingungen 4.0 International Lizenz.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA - https://www.nomos-elibrary.de/agb

Preliminary Remarks

This book brings to fruition a long scholarly collaboration that began with Armin von Bogdandy's proposal to revisit Carl Schmitt's controversial and illuminating essay *The Situation of European Jurisprudence*, first published in 1950. On 4 November 2019, during a symposium held at the Max Planck Institute for Comparative Public Law and International Law in Heidelberg, the editors benefitted greatly from Joachim Rückert and Eberhard Schmidt-Aßmann's incisive feedback and their invaluable advice. Christian Tomuschat and Michael Stolleis, who harbour fundamental conceptual disagreements with Schmitt, agreed to contribute to this volume in the spirit of scientific discussion. When Stolleis first suggested to render his acceptance speech for the Meyer-Struckmann Prize of 2019 into a chapter for this volume, his illness and sudden death on 18 March 2021 were not yet foreseeable. We hope that his commitment to the heritage of European legal culture will reach a wider English-speaking audience through this volume and dedicate this volume to his memory.

The Situation of European Jurisprudence was Schmitt's first independent post-war publication. Schmitt would incorporate it as a critical piece in his 1958 *Verfassungsrechtliche Aufsätze* (Essays on Constitutionalism). Along with his Weimar publications – *Political Theology* and the *Concept of the Political* in particular – *The Situation of European Jurisprudence* is one of Schmitt's foundational works with the potential to encourage broad scholarly reflections, well beyond the limited historical context in which it emerged. Schmitt's essay is no longer confined to a "European" audience but addresses concerns that engage a global readership. Above all, we can glean from the work how Schmitt viewed his role as an intellectual. He saw himself primarily as a jurist and teacher of public law. *The Situation of European Jurisprudence* also constitutes a necessary introduction to Schmitt's later works, especially *The Nomos of the Earth*.

The following edition offers the texts from the 1950 edition (with the additions from 1958) in English translation. The translation is a reworked and extended version of Gary L. Ulmen's published in *Telos* in 1990. We want to express our gratitude to *Telos* for allowing us to use Ulmen's translation and comments.

Heidelberg and Leiden, von Bogdandy, Mehring, Hussain

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA - https://www.nomos-elibrary.de/agb

Inhalt

The Situation of European Jurisprudence 9
Carl Schmitt

The Historical Situation of German Jurisprudence 49
Carl Schmitt

Carl Schmitt Resurrected? 59
Walter Lewald

Savigny or Hegel? History of Origin, Context, Motives and Impact 65
Reinhard Mehring

Revisiting Carl Schmitt's The Situation of European Jurisprudence 87
Adeel Hussain

The Current Situation of European Jurisprudence in the Light of Carl Schmitt's Homonymous Text 113
Armin von Bogdandy

Carl Schmitt's Diagnosis of the Situation of European Jurisprudence Reconsidered 149
Christian Tomuschat

European legal culture – a building block for the future 173
Michael Stolleis

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA - https://www.nomos-elibrary.de/agb

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA - https://www.nomos-elibrary.de/agb

The Situation of European Jurisprudence*

Carl Schmitt

This lecture was held at Europe's most outstanding Law faculties and should have appeared in a Festschrift for Johannes Popitz's 60th birthday on 2 December 1944. For various reasons, the lecture is separated from the Festschrift and published as a standalone piece. But even in this shape, it remains dedicated to the memory of Johannes Popitz.

1. *The Historical Fact of European Jurisprudence*

Today, it may appear inadmissible and unscientific for a jurist to evoke European jurisprudence; not only because of Europe's inner political turmoil, which has torn Europe apart through two world wars, but also out of a formal and, seemingly, even a specific juristic reason. For a century now, positivism has dominated the theory and practice of our legal life. Positive jurisprudence reduces jurisprudence to valid positive norms, which it finds in existing state laws or in norms put in place by a prevailing will and defended through coercive measures. The formal validity of positive laws comes from established norms and behind those norms lurks the state's will to enforce itself. Due to the proclivity of legal positivism to the state, it can only envision a German, French, Spanish, Swiss or another singular national legal order. The absence of a pan-European state and a corre-

* The following is a reworked and extended version of Gary Ulmen's translation, first published as "The Plight of European Jurisprudence" in *Telos* 83 (1990), 35–70. For the purposes of this translation the first edition of Carl Schmitt, *Die Lage der Europäischen Rechtswissenschaft* (Tübingen: Internationaler Universitäts-Verlag, 1950) has been used. Ulmen's translator note reads: "Die Lage der europäischen Rechtswissenschaft (1943/44)", in Carl Schmitt, *Verfassungsrechtliche Aufsätze aus den Jahren 1924–1954: Materialien zu einer Verfassungslehre*, second edition (Berlin: Duncker & Humblot, 1973), 386–426. Although Schmitt distinguishes between *Recht* (right) and *Gesetz* (law) to demonstrate the transition from historical legitimacy to positive legality, in line with American usage both are translated as "law" because the distinction is contextually clear. Schmitt's notes have been completed and/or corrected.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

sponding European legal will, makes it impossible for legal positivism to speak of European law or a European jurisprudence; at best, one can conduct trivial scholarly expeditions into legal history and comparative legal studies. For these formalists, our subject matter would already have to be closed here.

Even within so-called private international law, which for Savigny still based itself in a European legal community, what he called a "recognised community of different nations",[1] contemporary legal positivism maintains that state law is the only viable grounding. When a judge of a particular country draws upon foreign law to decide a case with international links, the applicable private international law is only "according to its subject international, but steadily grounded in state law".[2] Since the latter part of the 19th century, new difficulties arose in international private law around the issue of the state's interest in the "ordre public". These accounts questioned a comprehensive European legal community that backed private international law and, owing to conflicts between state norms, reduced the community to a mere sum of precarious agreements.[3]

---

1 [Tr.] Carl Friedrich Savigny (1779–1861) was a jurist who promoted the German Historical School of Jurisprudence, which emphasised the historical limitation of law and pushed back against Rational Law (Vernunftsrecht). The full sentence from Savigny's preface reads: "If then a focus on nationality has become the trend of our times, then such a trend will be difficult to reconcile with a discipline [Roman Law] that rests on the premise that a recognised community of different nations exists." See : Carl Friedrich von Savigny, *System des heutigen Römischen Rechts, Bd. 8* (Berlin: Bei Veit und Comp., 1849).

2 Regarding this formulation of the question posed by the Greek jurist Fragistas, see my article, "Über die zwei grossen 'Dualismen' des heutigen Rechtssystems (1939): Wie verhält sich die Unterscheidung von Völkerrecht und staatlichem Recht zu der innerstaatlichen Unterscheidung von öffentlichem und privatem Recht?" in the *Festschrift* for Georgios Streit: *Melanges Streit,* edited by Stylianos Prodromou Sepheriades, et al. (Athens: Imprimerie Pyrsos, 1940). [Now reprinted in Carl Schmitt, *Positionen und Begriffe im Kampf mit Weimar – Genf – Versailles 1923–1939* (1940), second edition (Berlin: Duncker & Humblot, 1988), 261–71.].

3 The best historical overview of the essential features of private international law's development in the 19th century can be found in the works of Henri Donnedieu de Vabres: he writes that from 1804–1840 a tendency prevailed to apply one's own [state] law; from 1840–1874, personal statues and increasing consideration of the will of the involved parties; 1874–1904 another expansion of personal statute (but tied to citizenship and no longer to domicile), and simultaneously growing importance of the reservation of the ordre public. It has to be taken into account that an authority like Westlake [John Westlake (1828–1913), a leading student of international law, was one of the founders and editors of the *Revue de Droit International et de Legislation Comparée.* His early efforts were devoted to private

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

In emphasising the viewpoint of formal validity, this state-centred legal positivism denies the existence of a European international law. Until the end of the 19th century, what one called "international law" (Völkerrecht) was synonymous with European international law and even a "jus publicum Europaeum". But the positivist standpoint slices international law and state law into two distinct and isolated spheres; with state legislation on one side and international accord on the other. The positivism of domestic law corresponds to the positivism of international treaties. The separation of internal and external, of domestic law and international law, is so absolute—as Heinrich Triepel in his book "Völkerrecht und Landesrecht"(1899) alerted us—that formally there can be no conflict between them. One indeed still speaks of international obligations "transforming" into domestic law. These transformations, incorporations, extensions etc., are, however, only sham bridges over the gulf that separates inner and outer.

The dualistic theory that there is no connection between the inner and the outer, developed by Triepel in his 1899 book mentioned above on international and domestic law, is now generally accepted.[4] For "European jurisprudence", the topic of our discussion, this translated to an outright denial of its legal existence, even on the level of the law of nations: either the jurist engages with the legal framework of a particular country, where his gaze is directed exclusively inwards and thus rules out bridging the gulf between inner and outer, or he works with international law, that is with norms regulating the relationships between states. But even then international law is understood along the norms of positive law: as the will of individual states articulated through treaties, agreements and custom. Such agreements, however, can never constitute a concrete order. From a positivist perspective, it is mere coincidence that there happen to be European states joined by legal relations such as treaties and agreements. There is nothing legally peculiar in a formal sense, says the positivist, about treaties and agreements of one European state with other European states than agreements struck with a non-European state. After the European spirit developed a distinctly European international law from the 17th to

international law.] described the transition from domicile to "political nationality" as the greatest change since the 12th century. Along with the extension of the reservation for the ordre public, the 20th century has seen the "logical reflection of a hall of mirrors in the referring back" and the "cul-de-sac of the qualification theory".

4 Heinrich Triepel, *Völkerrecht und Landesrecht* (Leipzig: C.L. Hirschfeld Verlag, 1899).

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

the 19th century, the turn of the 19th to the 20th century has brought about the dissolution of this international law into unenumerable and indistinguishable relations between fifty to sixty states all over the world; international law was dissolved into a general arrangement lacking any spatial concreteness.

At best, such a positivism of treaties is only as valuable as those treaties between states and the internal laws on which they rest. From the standpoint of jurisprudence, it is nothing more than a normative fiction whose value, as in the case of the whole *Weltanschauung* of 19th century positivism, is relative and temporal. It intentionally ignores the material [as opposed to the formal] significance of law, i.e., the political, social, and economic meaning of concrete orders and institutions. For this reason, it cannot claim a monopoly on legal thought and thus cannot have the last word in this matter. A jurisprudential interpretation and systematisation must by definition consider the material content of norms and the specific meaning of institutions. Such an interpretation, however, provides us with a completely different picture from the formal-positive dualism of inner and outer. The European peoples find significant overlaps in the meaning and content of essential concepts and institutions. In this sense, there is a robust European legal community which, until recently, also had immediate political significance.

In the comity of nations, for the practical international law of the whole 19th century, membership in the community of international law was predicated on a specific and typically European juristic standard in codification, legislation, and justice. A state was considered "civilised" only if it subscribed to this common European standard. In the 19th century, non-European states were recognised as members of the community of international law only if they upheld this standard. Thus the theory of recognition in international law had a concrete meaning, which in 1884 Lorimer could justifiably consider the foundation of international law.[5] Bismarck was the "last statesman of European international law".[6] Since then, recognition in international law has dissolved into nihilistic

5 [Tr.] Lorimer (1818–1890) was professor of public law at the University of Edinburgh. One of the original members of the Institute of International Law, he was the only British jurist who spoke the continental language of natural law, which made him Britain's spokesman in relation to warring foreign states.

6 This characterisation is found in Julius Goebel, *The Struggle for the Falkland Islands* (New Haven: Yale University Press, 1927) 192. This book exceeds the theme of its title and is important for the history of European international law.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

opportunism—into an arbitrary, purely factual and tactical procedure.[7] As late as the 1922/23 Lausanne Conference (with respect to Turkey and the question of the abolition of so-called capitulations), the European powers held that, at least in principle, a state must conform to the European standard of right and justice to be recognised as completely sovereign.[8] On 12 January 1926, a commission convened in Peking to investigate extraterritoriality in China, claimed that in principle, the complete Europeanization of Chinese legislation and justice would suffice to insure the integrity of law in China.[9] The criteria establishing what actually constituted a "state" or whether a political entity was "ready for statehood" were derived from the normal concept of a European state.[10] What from a positivist perspective of "formal legitimacy" appears legally banal and as a coincidental aggregation of legal arrangements becomes from a substantively jurisprudential perspective a genuine European community characterised by a true common law, despite major differences between German, Anglo-Saxon, Latin, and various other legal realms.

In every legal discipline – civil law, trade law, criminal and trial law, tax law and economic law – there are numerous examples known to every expert in the field. The correspondence and interaction have an effect on

---

7 See the conclusion of Peter Stierlin's "Die Rechtsstellung der nicht anerkannten Regierung im Völkerrecht" *Zürcher Studien zum Internationalen Recht*, no. 3 (1940). On the significance of the Mexican Estrada Doctrine, 200. Lorimer's formulation "La doctrine de reconnaissance fondement de droit international," is found in *Revue de Droit International et de Législation Comparée*, Vol. XVI (1884) 333f.

8 Together with the end of "capitulations" [any of various agreements or conventions made originally by the Greek emperors at Constantinople and afterwards by the Porte granting special privileges and rights of extraterritoriality to foreign governments; hence any such treaty or convention], in Art. 28 of the Lausanne Treaty of July 24, 1923 there was a "Declaration on the Administration of Justice" put forward by the Turkish delegation. This was not ratified by the National Assembly in Ankara. Nevertheless, it led Turkey to adopt a codification of civil law that followed the prototype of the Swiss Civil Code of December 10, 1907. Further legislative reforms of civil law also followed the Swiss prototype, while the codification of criminal law in 1926 was almost word for word that of the Italian criminal code. The Turkish codification of criminal trial law held to German and Italian principles, whereas the codification of civil trial procedure followed the example of the Swiss canton of Neuchâtel.

9 Roy Hidemichi Akagi, *Japan's Foreign Relations, 1542–1936: A Short History* (Tokyo: The Hokuseido Press, 1936).

10 This can still be seen in the requirements for "statehood" as formulated by the Iraqi mission to the League of Nations. Compare Alfred von Verdross, *Völkerrecht* (Berlin: Julius Springer Verlag, 1937) 65.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

vital individual norms and legal institutions as well as on the systematic structure of the whole. The present law of individual European states was developed in an ongoing, internal European process of such inclusions and interactions. At the risk of exaggerating, it can be said that for a millennium, the whole legal history of the European peoples has been one of reciprocal receptions. The process of these receptions was not one of mindless and uncreative adaptation. Instead, it was often a process of fierce resistance to inclusion, which incorporated and refined legal understanding and flowed back to the received law. This kind of reception is both natural and organic. It resembles the borrowing of forms and motifs in art, music, and paintings. Here the words of a great 17th century master of German music [Sigmund von Birken] are appropriate: "Borrowing is allowed, as long as one gives something in return." All European nations have done so in their own way.

2. *The Science of Roman Law as the Carrier of European Jurisprudence*

The "reception of Roman law" is the great recurring event in the history of jurisprudence. It has determined many epochs of the jurisprudential development of all European peoples—not only those which have accepted it, but also those which have successfully resisted it, like England and the Scandinavian countries, whose common law has remained untouched by it. The European significance of the rebirth of Roman law in the Middle Ages and its influence in various countries and epochs are not the same as the "positive validity" of precepts and concepts found in the *Corpus Juris Justiniani.* The problem of the political or social utilisation of these precepts and concepts by political rulers or social classes raises questions beyond the scope of our concerns here. But a few remarks on the European significance of Roman law are in order because fortunately we need no longer concern ourselves with the practical and positive validity of pandect law or the perplexing question of the so-called subterranean transmission of Roman law in 19th century codifications.

For five centuries, the history of European jurisprudence has been a history of the science of Roman law. That is an astounding fact! What has been considered "law" in law schools, universities and juridical faculties since their founding in the 12th, 13th, and 14th centuries has been, along with canon law, above all Roman law. And it was taught in Latin, the language of Roman law, which for more than half a millennium has influenced and stamped the legal concepts in all European languages. In its various historical forms – of annotators, commentators, Romanists and

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

Pandectists – Roman law has been recognised as the essential, if not the only form of jurisprudence. As Sohm[11] has observed, the reception of Roman law in Germany was not the reception of a law but only of a jurisprudence. Here I cannot enumerate the many historical questions the reception of Roman law and jurisprudence have raised for each of the European peoples throughout many epochs. The impact of the science of Roman law was overwhelming, not only on the history of European jurisprudence but on the history of European science and the European spirit as a whole.

The struggle for and against Roman law is as old as its history – a struggle concerning its evaluation, its advantage or disadvantage to indigenous regional or national legal development. In all countries, this struggle has had its own particular history and its often unexpected fronts.[12] Especially after 1933, it raged in Germany and here too it engendered new perceptions and insights.[13] Given such a tremendously rich and varied legal history spanning three centuries, it is crucial to be specific when one discusses "the" Roman law.

---

11 [Tr.] Rudolf Sohm (1841–1917) was probably the most brilliant dogmatic jurist of his time. Working in a period in which the conflict between Romanists and Germanists was not as sharp as it had been, he was attracted to both Roman and Germanic law and, later in life, also to canon law, and achieved almost equal fame in all three.

12 The book by the Roman law expert at the University of Madrid, Ursicino Alvarez Suarez, *Horizonte actual del Derecho Romano* (Madrid: Consejo Superior de Investigaciones Cientificas, Instituto Francisco de Vitoria, 1944), is an encyclopaedia of Romanism containing a wealth of historical material on the subject. This work is also important with respect to the voluminous literature on the "crisis of Roman law." In addition to publications cited below, the writings of two young Romanists are important in this context. See Valentin Al. Georgescu, "Remarques sur la crise des études du Droit Romain," published in the collection of his juristic-philological writings, *Études de Philologie juridique et de Droit Romain* (Bucharest and Paris: Imprimerie nationale, 1940), 403; and Alvaro d'Ors Pérez-Peix, "Presupuestos críticos para el estudio del Derecho Romano," in *Ors Pérez-Peix, Theses et Studia Philologica Salamanticensia* (Salamanca: Colegio Trilingüe de la Universidad, Consejo Superior de Investigaciones Cientificas, 1943).

13 In this respect, Paul Koschaker's 1937 lecture: *Die Krise des römischen Rechts und die romanistische Rechtswissenschaft* (Munich and Berlin: Beck Verlag, 1938) is a document of great historical significance. The meaning of Koschaker's lecture is emphasised in a review by an authority on German legal history, Freiherr Claudius von Schwerin in *Deutsche Rechtswissenschaft*, 4 (1939) 182f. My view of Franz Beyerle's critical commentary "Schuldenken und Gesetzeskunst," in *Zeitschrift für die gesamte Staatswissenschaft*, 102 (1942), 210 note 3, is implicit in the following text.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

For example, it has generally been recognised that the old Roman law is a magnificent monument of a very old and sound peasantry. Bonfante, Siber, Wlassak, Westrup[14] and Wieacker have shed new light on many of its components, particularly family and inheritance law.[15] Every new European intellectual current has revealed new and unexpected aspects of Roman law. From the Middle Ages and the Renaissance to the present, every new epoch has found an inexhaustible wealth of new applications. Just as 18th and 19th century German pandect jurists created an elaborate system based on subjective right, so today one can praise classical Roman law for its flexibility and practicality (vouchsafed by the Praetor), and thus for its ability to provide a viable paradigm for modern labour law and commercial law.[16] As late as 1939, Koschaker[17] located the reason for the crisis of Roman jurisprudence in the fact that pandect law lost its relevance after 1900 when the German Civil Code became law.[18] Such an account, however, was too closely bound with a late 19th century academic jurisprudence struggling against legal positivism. By comparison, the 1811 Austrian Civil Code triggered no such crisis.[19] The present "cri-

14 [Tr.] Pietro Bonfante (1864–1932) wrote on the Code of Hammurabi, but especially on Roman law. Heinrich Siber (1870–1951) was a specialist on Roman constitutional law and German civil law. Moritz Wlassak (1854–1939) wrote prolifically on Roman and classical law. Carl Wium Westrup (1874–1958) was a specialist on Roman law.

15 Compare with the reference of Franz Wieacker [1908–1994] in "Entwicklungsstufen des römischen Eigentums" in *Das Neue Bild der Antike* 2 (Leipzig: Koehler & Amelang, 1942) 178; see also Franz Wieacker, *Hausgemeinschaft und Erbeinsetzung: Über die Anfänge des römischen Testaments* (Leipzig: T. Weicher Verlag, 1940); and Max Kaser, *Römisches Recht als Gemeinschaftsordnung* (Tübingen: J.C.B. Mohr, 1939).

16 Ors Pérez-Peix, "Presupuestos criticos para el estudio del Derecho Romano", *Theses et Studia Philologica Salamanticensis*, *op. cit*., 21f.

17 [Tr.] Paul Koschaker (1879–1951) was a specialist on Babylonian and Assyrian as well as Roman law. See his *Europa and das römische Recht*, fourth enlarged edition (Munich: Beck Verlag, 1966).

18 [Tr.] Cf., *The Civil Code of the German Empire: As Enacted on 18 August 1896, With the Introductory Statute Enacted on the Same Date (In Effect 1 January 1900)*, trans. by Walter Loewy (Boston: The Boston Book Co., 1909).

19 See Ernst Schönbauer, "Krise des römischen Rechts", in *Festschrift für Paul Koschaker, mit Unterstützung der Rechts- und Staatswissenschaftlichen Fakultät der Friedrich-Wilhelms-Universität Berlin und der Leipziger Juristenfakultät: Zum sechzigsten Geburtstag überreicht von seinen Fachgenossen* (Weimar: Hermann Bohlaus Nache, 1939), Vol. II, 386–87. [The Koschaker *Festschrift* has been republished: (Leipzig: Zentralantiquariat der Deutschen Demokratischen Republik, 1977), 3 Vols.] Savigny claimed that there was still a need for a historically grounded training even

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

sis of Roman law" does not appear as something specifically Romanist but rather as part of the general crisis of law and jurisprudence. One is reminded of the ironic wisdom of the old Goethe, who, in one of his often cited remarks in his conversations with Eckermann,[20] said that Roman law might be compared to a duck, which dives and often remains hidden under the water, but always resurfaces.[21]

All European nations participated in the "reception of Roman law," at least through their law faculties and jurisprudence. This is also true of countries such as England which, owing to the common law tradition, the resistance of particular interests or other reasons, did not experience a broad reception. There are many examples in English legal history attesting to the common European fact that for many centuries jurisprudence has been based on Roman law. To be sure, there were schools of national law in England that prevented Roman law from displacing common law. But Roman law had an impact through equity law and in other ways. Still in the 17th century, Roman law, as *jus gentium,* was actually applied to the law of the sea. It is enough to recall the influence of humanism and the great names connected with the chair of civil law instituted at Oxford by Henry VIII. Among the founders of modern international law, i.e., of law divorced from theology, two of these Oxford professors were outstanding: Gentili and Zouche.[22] This legal background also explains the

---

after the introduction of the codes (such as the Austrian, the Prussian or the Napoleonic), and that nothing was accomplished by believing that, because of them, the earlier law did not have to be known as thoroughly as before: "For the codes themselves are framed upon scientific principles, and can only be safely examined, purified, and perfected upon such." See Frederick Charles von Savigny, *Of the Vocation of Our Age for Legislation and Jurisprudence,* translated by Abraham Hayward, reprint of the 1831 London edition (New York: Arno Press, 1975) 158. Johann Jakob Bachofen made a similar point in his 1841 inaugural lecture.

20 [Tr.] J.W. Goethe, *Conversations with Eckermann* (1823–1832), trans. by John Oxenford (San Francisco: North Point Press, 1984), 255.

21 Suarez' work also provides well-formulated and well-documented examples. Salvatore Riccobono has championed the eternal validity of the structure of concepts of Roman law in Latin on 6 December 1942 in the auditorium of the University of Berlin. He did not mean ancient or classical Roman law but the *Corpus Juris Justiniani,* and he defended the commentators' *mos italicus* against the humanists' *mos gallicus.*

22 I am indebted to Lázsló Gajzágó for his work on Zouche, who represents one of the most splendid examples of the practical application of Roman law. Gajzágó's work on the origin of modern law was published in Hungarian in 1942. [László Gajzágó, *A nemzetkozi jog eredete, aimak romai es keresztenx osszefuggesei, kulbndsehben a spanyoi nemzetkozi jogi iskola* (Budapest: Stephaneum Nvmoda, 1942).] [Tr.]

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

pre-eminence of the English prize court judges in the Napoleonic age, in particular the sure instinct, the "nervous courage" and magnificent gesture with which Sir William Scott, later Lord Stockwell,[23] could expound a statute soon famous in one of the most celebrated judicial decisions in all legal history (the [Swedish convoy] case of "Maria" in 1799), namely that an English prize court judge applies not a national but a generally binding and recognised international law, and that a prize court judgment in London is no different from one handed down in Stockholm.[24]

Nevertheless, all over Europe, even in those countries where Roman law was not incorporated into common law, countless influential authors over many centuries introduced features of Roman law into the jurisprudence of all countries under such designations as "natural law", "rational law", "jus gentium", and "general legal theory". In so doing, they created an inventory of firm concepts, which was translated into all European languages. Through the work of all European jurists, Roman law became a *lingua franca* – the language of a jurisprudential community, a recognised model of legal thinking, and thereby a spiritual and intellectual "common law" of Europe, without which (even on the theoretical level) there could be no understanding among jurists of different nations.[25] The cultural edifice built by the European spirit stands on this common foundation created by a common European jurisprudence. Its significance is no less

---

Alberico Gentili (1552–1608) was a Protestant Italian jurist who sought refuge in England against religious persecution and became professor of civil law at Oxford in 1587. He contributed considerably to the formulation and establishment of the principles of modern diplomacy. Most importantly, he claimed that war should be subject to law and that such law must always be founded on right reason and consent. Although his *De jure belli libri tres* (1598) was soon eclipsed by Hugo Grotius's *De jure belli ac pacis,* the first and third books of which were based on Gentili's earlier work, Gentili was the founder of modern international law. Richard Zouche (1590–1661) became professor of civil law at Oxford in 1620. Acknowledging his debt to Gentili and Grotius, he produced "the first manual" on international law.

23 [Tr.] William Scott Stowell (1745–1836) became judge of the High Court of Admiralty in 1798.

24 Francis Piggott spoke of the "nervous courage" in his elaboration on this 1799 judgment in *Transactions of the Grotius Society*, Vol. III (1918), 101.

25 Joseph Franz Maria Partsch wrote: "With Roman law as part of the training in private law, jurists receive at once an introduction to the common principles of European civil law. Even today, the concepts of Roman law are throughout the world the presupposition for a type of common conceptual language." See Joseph Partsch, *Vom Beruf des Römischen Rechts in der heutigen Universität* (Bonn: F. Cohen Verlag, 1920).

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

than that of those great works of art and literature usually identified as the sole representatives of the European spirit. Thus even today the infinitely diverse "reception of Roman law" in every cultural sphere justifies speaking about the continuance of a European jurisprudence.

Other examples of this reception of Roman law can be mentioned only in passing. A whole system of concepts and institutions arose together with 18th and 19th century constitutional ideas and movements, which, in the wake of the 1830 and 1848 revolutions, spread to all European states and eventually to the whole world. A typical model of written constitutions developed, together with new fields of jurisprudence (e. g., a general theory of the state and a new administrative law). Meyer's system of administrative law,[26] strongly influenced by French administrative law, could be adopted by Orlando[27] in Italy because it was in line with that constitutional system. At the same time, and in close connection with the development of pandect law as well as with the reception of constitutionalism, there were numerous uniformities and reciprocities linked with the codification of civil law, criminal and trial law, criminal procedure and civil proceedings. A common mode of thinking crossed state borders, making it possible for every university-trained jurist of a European state to find his bearing in the legal world of any other state. This common development, also found in other modern arrangements such as commercial and labour law, obtains in some form or other in all European states. Nowhere can a European people elude this manifest community of European jurisprudence.

3. *The Crises of the Legislative State's Legality First Phase; 19th Century: The Possibility of a Distinction between Law and Legislator*

Despite this reception of Roman law, European jurisprudence is in a critical and challenging situation. Here I am not thinking of the repercussions of the world war, nor of the empty formulae of positivist fictions. I want to address what I would like to call the internal and immanent problem

26 [Tr.] Otto Meyer (1846–1924) published his major work on German administrative law in 1895–96. See Otto Meyer, *Deutsches Verwaltungsrecht*, third edition (Munich: Dunker & Humblot, 1924).

27 [Tr.] Vittorio Emanuele Orlando (1860–1952) was a jurist and political figure who wrote on electoral reform and constitutional law. Schmitt refers specifically to his major work on administrative law: *Principii di diritto amministrativo* (1890), fifth edition (Florence: G. Barbera, 1921).

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

of jurisprudence. Like every major scientific development, this crisis of jurisprudence has deeper causes. Here the poet's words are appropriate:

> Who lifted it? Who broke the spell?
> From today it's not and not from yesterday
> And those who first lost the measure, our fathers
> Did not know, and so it began.[28]

The crisis of European jurisprudence began a century ago with the victory of legal positivism. The great turning point was the 1848 Revolution. Our fathers and grandfathers abandoned an outmoded natural law and saw a significant step forward, from illusion to reality, in the transition to what they called "positivism". The Historical School had already struggled on somewhat false fronts against the old natural law, but its equally disputed doctrine of the scholarly sources of right, of customary law and international law, did not result in pure legal positivism on the part of the state. The essential turn in 1848 found its slogan in Windscheid's aphorism from his 1854 Greifswald university lecture: "The dream of natural law is over."[29]

Presumably, with this aphorism, the Romanist and Pandectist Windscheid considered himself very realistic and positivistic although, as a Romanist and Pandectist, he was hardly capable of an unadulterated legal positivism, and he certainly did not recognise the real danger. The style of

---

28 [Tr.] This stanza is taken from Friedrich Hölderlin's poem "The Peace" (Der Frieden). Hölderlin (1770–1848) was a poet and a key player in German Romanticism. The poem is reprinted in Friedrich Hölderlin, *Sämtliche Werke* (Leipzig: Insel Verlag, 1965), 233f.

29 In context, this aphorism does not appear so apodictic and positivistic as in the isolated slogan: "For us there is no absolute law. The dream of natural law is over, and the titanic endeavours of recent philosophy have not stormed the heavens." Walter Schönfeld has polemically transformed the phrase "dream of natural law" into "the dream of positive law" in the title of his article: "Der Traum des positiven Rechts", *Archiv für die zivilistische Praxis*, 15 (1932), 1ff, which is a significant contribution to legal history. But 19th century legal positivism was never a dream but only an optimistic, illusory, and ultimately only an agonizing "will to be realistic". [Tr.:] The work of Bernhard Windscheid (1817–1892) marked the end of an epoch in the development of law in Germany. The final achievement of dogmatic jurisprudence based on Roman law was his *Lehrbuch des Pandektenrechts* (Düsseldorf: J. Buddeus Verlag, 1862–1870), 3 Vols., ninth edition (Frankfurt: T. Kipp Verlag, 1906). From 1874 to 1883 he worked as a member of the Civil Code Commission. The criticism of the first draft of the code was in large part due to a revolt against Windscheid's Romanism, but the final draft owed much of its substance and terminology to him.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

legislation at that time made it almost impossible to anticipate what is so problematic today. Windscheid was not yet in a position to see the true critical question with that unsettling clarity possible since the First World War – the relation of jurisprudence to modern legislation.

Nevertheless, already in the mid-19th century there were strong signs of the critical situation ahead. The very title of a Berlin lecture delivered in 1847 and published in 1848 denied a scientific character and value to jurisprudence: "The Worthlessness of Jurisprudence as a Science."[30] The impact of such a title was all the stronger because the author was himself a renowned jurist, the state attorney Kirchmann, who later devoted himself primarily to philosophical works. Despite many references to the superiority of natural science, his account was by no means characterised by the naive transfer of positivist methods of the natural sciences to jurisprudence, such as found in other, later theses of the "unscientific character of jurisprudence",[31] and which motivated some 19th century jurists to abandon jurisprudence as a "science" so they could at least rescue it as an "art" or "technique." Efforts at refutation and intense discussions always return to Kirchmann's remarkable lecture, which indicates the extent to which his warning of a century ago still carries weight today.[32]

How did Kirchmann understand the worthlessness of jurisprudence? The answer lies in the aphorism: "Three revisions by the legislator and whole libraries became wastepaper." With a sharp alteration, this answer became a slogan: "A stroke of the legislator's pen and whole libraries became wastepaper." Another aphorism in the same vein made the point even more brusquely and less politely: "Positive law turns the jurist into a

30 [Tr.] Julius Hermann von Kirchmann, *Die Werthlosigkeit der Jurisprudenz als Wissenschaft* (Berlin: J. Springer Verlag, 1848). Cf. also *Die Werthlosigkeit der Jurisprudenz als Wissenschaft: Ein Vortrag, gehalten in der Juristischen Gesellschaft zu Berlin, von Staatsanwalt v. Kirchmann,* edited by H. E. Schroeder (Wittenberg in Mecklenburg: Pythia-Verlag, 1919). Kirchmann (1802–1884) was a philosopher and sociologist who entered the Prussian civil service. He rejected Hegel's dialectic, accepted Kant's critique of knowledge, and was inclined to positivism. As the author of several works on criminal and procedural law, however, he startled the legal world by proposing to free jurisprudence from obsolete methods, which he characterised as "unscientific." He specifically proposed to make law a real science by adopting what he called a "political" method.

31 Most radically in Anders Vilhelm Lundstedt's book, *Die Unwissenschaftlichkeit der Rechtswissenschaft* (Berlin: W. Rothschild Verlag, 1932). Lundstedt correctly sees the untenability of pure normativism (page 182).

32 *Die Werthlosigkeit der Jurisprudenz als Wissenschaft: Eine Rede des Staatsanwalts Julius Hermann v. Kirchmann aus dem Jahre 1847*, edited and introduced by Gottfried Neesse (Stuttgart and Berlin: W. Kohlhammer Verlag, 1938).

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

worm in rotten wood." Kirchmann meant that jurisprudence could never catch up with legislation. Thus our predicament becomes immediately apparent. What remains of a science reduced to annotating and interpreting constantly changing regulations issued by state agencies presumed to be in the best position to know and articulate their true intent?

The relation of enacted and written law to its analytic treatment by jurisprudence is an age-old problem. It is well known that the authors of the great codes were in general not favourably disposed to scholarly commentaries on their works, which were thought to be sufficiently clear. An independent, scholarly interpretation was considered suspect and was resented. Familiar examples are the more or less polite phrases used by the authors of the *Corpus Juris Justiniani* and the 1794 Prussian Civil Code to express their objections to the interpretative clarification of their work by legal scholars. But this is only the first and still quite harmless stage of the problem. I would venture to say that both the *Corpus Juris Justiniani* and the Prussian Civil Code are imbued with jurisprudence, if in very different ways. The former is more a collection of decisions of great jurists in the manner of case law, whereas the latter is more a systematic encyclopedia with definitions and classifications in the manner of 18th century natural law, which are written in such a way as to be accessible to all. In both cases, the "legislator" had become a legal scholar, and the struggle between legislation and jurisprudence evolved into a rivalry between two brothers with similar goals and similar means. The great French codifications from the time of Napoleon I and their numerous receptions in the most diverse countries, as well as the 1811 Austrian Civil Code and many other well-known codes, all evidence the possibility of a meaningful jurisprudence of written law.

In this respect, 19th century European jurists could still feel comparatively secure, since even after 1848 and for the rest of the 19th century the formulating and writing of laws, as well as the method and tempo of legislation remained closely related to jurisprudence. This was particularly the case with civil codes and trade law, but it was also true for criminal and trial law. The German codification of civil law, i.e., the 1896 civil code, was considered too "scholarly" and too much in the pandectic tradition. It was not regarded as an actual legal code because it appeared to be nothing more than a textbook and a "scholastic system".[33] The 1907 codification of Swiss civil law was more favourably received, but it too was the work of

33 See Beyerle, "Schuldenken und Gesetzeskunst", *Zeitschrift für die gesamte Staatswissenschaft, op. cit*., 213.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

a prominent legal scholar and professor of jurisprudence, Huber.[34] In the 19th century, commentaries on great civil codes were still written solely by jurists. What is most important is that the stroke of the legislator's pen, which transformed such writings into wastepaper and condemned the resulting commentaries to a similar fate, was not an everyday occurrence. On the contrary, it turned out that the sphere of jurisprudential interpretation and systematisation of positive law could be so extraordinarily wide that the positivism of existing state law need neither exclude an independent jurisprudential practice nor an independent legal science. The law itself, published in the authentic words of the official legal record – the authoritative text – appeared as a consistent, impersonal and objective entity in contrast to the mere contents and motives of the law in which the legislators' personal opinions were often evidenced in contradictory ways. Thus, there arose a sharp distinction between the law's objective meaning and the subjective intent of its many authors, the legislators. The intentions of the law and of the legislators, as the authors of the law, could conflict.

The distinction between objective law and its authors' subjective intent was of the greatest practical political significance in those countries in which the legislative body – parliament – was split into several different political parties. Here the legislator – the legislative body, parliament – constituted a problematic political unity. The law became the majority decision of a divided legislative body. This majority decision was in all important respects a difficult and often unclear compromise of heterogeneous party coalitions, i.e., a law created by shifting parliamentary majorities. That is the typical situation of legislators in a pluralist party-state. That was the case in Germany after Bismarck's resignation in 1890 (actually, such was already the case after 1878, because the German parliament no longer had a majority party after the National Liberals lost out). Thereafter, the majority was constituted through compromises from case to case

34 [Tr.] A law professor at Basel, Halle and Berne, Eugen Huber (1849–1923), wrote on medieval German law. Influenced by Rudolf Stammler, he wrote several works on the philosophy of law. But he is best known as the author of the Swiss Civil Code, which the government authorised him to draw up in 1892. See the *Schweizerisches Zivilgesetzbuch vom 10. Dezember 1907* (Berne: A. Francke Verlag, 1908). See *The Swiss Civil Code,* English version with vocabularies and notes by Ivy Williams (Oxford: Oxford University Press, 1925). Entirely his own work, Huber's code gave less weight to Roman law than to the 1900 German Civil Code. More than a mere unification of the laws of the cantons, it was a practical amalgamation of historical, social and ethical elements.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

and law to law, often on the basis of contradictory motives.[35] A similar problematic situation arose in other European countries, where it often led to obstruction crises in states with national and ethnic (*völkisch*) parties (such as Austria-Hungary). In such cases, the law had to be moulded into a unified and objective force, uprooted and made autonomous, so that its uniform "will" would not be destroyed by the internal antagonisms of the legislative body. The law as an impersonal and objective force isolated from its motives became a bridge over the abyss of internal political strife. Cleansed of all party-political antagonisms, the objective norm embodied, so to speak, the objective reason of political unity. However, along with juristic practice, jurisprudence became an important, indispensable agency of this objective reason, of this logical unity of the will of the law, which independently confronted the divided will of the many parties involved in legislation.[36]

An aphorism that might otherwise have appeared paradoxical and hyper-critical now acquires a very concrete and practical meaning: The law is wiser than the legislator. Great jurists have cited it, even in stronger language: The law is *always* wiser than the legislator.[37] Although rather

35 French democrats were quick to criticize this situation. See Maxime Leroy, *La loi: Essai sur la théorie de l'autorité dans la démocratie* (Paris: V. Giard and E. Briere, 1908), 324f.

36 The scholarly consideration of this distinction between the law and the author of the law began for the modern age with some theses of Carl Georg von Waechter in 1835. [cf. Bernhard Windscheid, *Carl Georg von Waechter* (Leipzig: Duncker & Humblot, 1880).] A few years later, Robert von Mohl published an article outlining all the arguments: "Über die Benutzung der ständischen Verhandlungen zur Auslegung von Gesetzen", *Archiv des Criminalrechts* (1843), reprinted in a collection of Mohl's articles: *Staatsrecht, Völkerrecht und Politik: Monographien von Robert von Mohl* (Tübingen: Verlag der H. Laupp'schen Buchhandlung, 1860–1869), 3 vols. [Robert von Mohl (1799–1875) has the distinction of having banished the phantom of a general German territorial public law and of having thereby fashioned a model system of public law. He was also a pioneer in administrative law. As a political figure, he occupied a position he characterised as that of an English Whig, a Frenchman of the Left Center, and an American Federalist. As a political scientist, he concerned himself with questions of the relation between society and the state.] With few exceptions, the voluminous literature beginning around 1900 on the theme of "the law and the judge", the whole *Methodenstreit* and the Free Law Movement led by practitioners of civil or criminal law failed to grasp the significance of constitutional questions. Here the shrinking horizon of civil law positivism revealed the dangerous naiveté resulting from the isolation of positive norms.

37 Rudolf Sohm wrote: "It should be kept in mind that the code is always better, wiser, clearer and richer in content than the ideas of the legislator, no matter

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

blunt, such an aphorism points to a restraint on the part of the legislator and allows the possibility of a jurisprudence which, while positivistically dependent on current law, still identifies an objectified meaning independent of its subjective motives. The distinction of law and legislator in the sense of the antithesis of the law's objective intent and the legislators' subjective interests allowed jurisprudence a significant flexibility for commentary and interpretation. In view of an increasingly problematic legislator, owing to an internally divided legislative body, the jurist acquired a new and independent authority and an almost legislative dignity. Jurisprudence came to represent the unity of the legal will as opposed to the multiplicity of egoistic parties and factions. As soon as it strayed from the narrow bridge of this positivism of the enacted norm it either fell into Jhering's[38] naturalistic utilitarianism or, like Liszt's[39] criminology, into a sociological positivism whereby its essence as jurisprudence was endangered from another direction.

---

how brilliant he is. This is the significance of jurisprudence – that it does not merely interpret the law but enriches and elaborates it. Our civil code, enriched and elevated by the potency of German jurisprudence, becomes still better and intellectually richer than the mind of its creator." See Sohm, "Die deutsche Rechtsentwicklung und die Kodifikationsfrage", in *Zeitschrift für das privat- und öffentliche Recht der Gegenwart,* vol. I (1874), 277. "The law is *always* wiser than its author." So wrote Max Ernst Eccius in his introduction to the last editions of *Preussisches Privatrecht,* following Franz Förster, seventh edition of the original and fourth edition of the new reworking (Berlin: G. Reimer Verlag, 1896–1897), 4 vols. Karl Binding also wrote that "The law is *often* smarter than the legislator." See Binding, *Die Normen und ihre Übertretung,* second edition (Leipzig: W. Engelmann Verlag, 1890), vol. I, 203.

38 [Tr.] Rudolf von Jhering (1818–1892) was the most encyclopedic mind of German law in the 19th century and combined jurisprudence with sociology. Not only did he focus on the individual, he made society the supreme concept of his consideration, whereby the state was in a subordinate position. Unlike most of his contemporaries, who were steeped in Roman law and attributed absolute powers of disposal to the owner, Jhering insisted that ownership must be subordinated to social needs. The motto for his celebrated work on Roman law was: "Through Roman law but beyond it." See Jhering, *Der Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung* (Leipzig: Breitkopf & Härtel, 1852–1865), 3 vols. Schmitt refers specifically to Jhering's most important work, where he argues that egoism is the unavoidable point of departure for all law. See Rudolf von Jhering, *Der Zweck im Recht* (Leipzig: Breitkopf & Härtel Verlag, 1877–1883), 2 vols.

39 [Tr.] Franz Eduard von Liszt (1851–1919) was the leader of the sociological school of criminal law.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

4. *The Crisis of the Legislative State's Legality Second Phase; 20th Century: The Motorised Legislator*

If in the 19th century the situation of jurisprudence was in many respects favourable, this changed after the First World War. After 1914 all major historical developments in all European countries contributed to the acceleration of legislation. The passing of new legislation became faster and more streamlined, the road to legal regulation shorter, and the role of jurisprudence accordingly smaller. War and its aftermath, mobilisation and demobilisation, revolution and dictatorship, inflation and deflation have, despite all other differences, led in all European countries to the same result – that the passing of new legislation has become simplified and accelerated. The trend consisted in ever new and broader authorisations, through which legislative bodies delegated authority to issue legally binding "decrees" and "directives" which displaced the law. Constitutional qualms with respect to authorisations [enabling acts and the like] accordingly increased because legislative bodies are, after all, constitutionally called upon to make laws and not to empower others to do so. As Locke, the philosophical founder of modern constitutional law, put it: "Make laws but not legislators." At the 1921 German Conference of Jurists, Triepel maintained that the "misfortune" of the displacement of law by decree had already begun in Germany with the enabling act of 4 August 1914. That was indisputably a prominent date in the transformation of the essence of law. Triepel read the following passage from a letter his great teacher, Binding,[40] had written to him shortly before his death: "The next great task is the battle against the directive in arrogating to itself the status of law."

Many jurists, working in less troubled legal areas, ignored the danger and were content with such aphorisms as "Public law passes, private law persists", without noticing that the basic concept of their own positivism – law itself – was in question. As a true jurist, not only of criminal but of constitutional law, Binding had a sure intuition for the structural transfor-

40 [Tr.] In addition to writing on the history of Roman and German law, Karl Binding (1841–1920) was also an outstanding theorist in penal law. Refuting the accepted vague notions that penal law prescribes behaviour, he showed in his "theory of norms" that the legal propositions by which the state demands obedience and guides individual action is independent of and logically prior to penal law, and that penal law is a secondary form of control with the sole function of determining the extent to which behavior contrary to norms involves punishability as a special legal consequence.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

mation of the concept of law as well as for the mortal danger facing all existing normativism. Nevertheless, this development proceeded apace in all countries and overcame all obstructions, especially affecting economy, finance, and taxation, i.e., the homeground of the formal and constitutional concept of law. In Germany the very first emergency tax decree of 7 December, 1923, immediately following the end of inflation, was promulgated not on the basis of an enabling act but on Art. 48 of the Weimar Constitution, i.e., as a dictatorial measure of the president, because an enabling act was not passed fast enough. At the end of 1923, this appeared to be nothing more than a minor and passing inconvenience because the two subsequent emergency tax decrees following the currency stabilisation could be tied to a formal enabling act (of 8 December 1923). At the 1924 Conference of the Association of Teachers of German Constitutional Law in Jena, the overwhelming majority was entirely blind to the structural transformation of the legislative procedure then in progress. The financial reform of 1925, the work of the Secretary of State, Popitz, was still the result of an orderly legislative procedure. A few short years later, however, the method of enabling acts was hopelessly out of control in Germany, and after July 1930, financial and economic regulations were in general enacted on the basis of Art. 48 of the Weimar Constitution, i.e., as dictatorial measures of the president.[41]

Compared to Germany, the Third Republic of victorious France appeared to adhere more closely to constitutional provisions. But legislative delegations proceeded apace. Of course, in the land of the legists and

41 For a comparative overview of the most recent developments in the delegation of legislative powers, see *Le nationalsocialisme allemand: Ses doctrines et leurs réalisation. Avertissement au lecteur par Eduard Lambert*, Institute of Comparative Law at the University of Lyon (Paris: Librairie générale de droit & de jurisprudence, 1938). With respect to the constitutional side of the question, Johannes Popitz wrote: "Even with the sharpest constitutional scrutiny, one must conclude that resort to Art. 48 [of the Weimar Constitution] hangs exclusively on the extent of an emergency. If the emergency is so great that something must be done so that the state will not financially collapse, then one should also not shrink from using Art. 48 to impose taxes. At the same time, however, it should be understood that such a step is only justifiable in the gravest of times, such as are hopefully behind us, and of course should only be undertaken with the greatest caution." See Johannes Popitz, "Die staatsrechtlichen Grundlagen des öffentlichen Finanzwesens", in *Recht und Staat im neuen Deutschland: Vorlesungen gehalten in der deutschen Vereinigung für staatswissenschaftliche Fortbildung im Namen des Vorstandes der Vereinigung,* edited by Bernhard Harms (Berlin: R. Hobbing Verlag, 1929), 2 vols.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

such great constitutional jurists as Esmein, Hauriou, and Duguit,[42] there were constitutional qualms. But even here, as in other countries, some limitations were meant to be added through artful distinctions of simplified legislation and authorised delegation whereby the constitutional conscience was to be appeased. All in vain! As in other countries, regardless of whether they were belligerents or neutrals, victors or vanquished, parliamentary states or so-called dictatorships, in France also the compulsion for legal regulations to accommodate the tempo of changing conditions was irresistible. The warning of England's Chief Justice, Lord Hewart, against the "New Despotism" (1928) changed nothing. As late as mid-May 1944, the troubling question of "Executive Powers" was raised in the English parliament without adding anything to what had already been debated in Germany, France or other European countries. What Kirchmann had predicted almost a century before, that jurisprudence could never catch up

42 [Tr.] Adhémar Esmein (1848–1913) was perhaps France's greatest legal historian. He began from perfected institutions and traced them back in order to determine their original features. Maurice Hauriou (1856–1929) was a jurist and sociologist who defended individualism and sought to base his doctrines on Catholic dogma. According to Hauriou, the state has no other function than to guarantee the natural rights and laws of an "individualistic order". In the political order, the idea of individualism implied the recognition of and respect for the supremacy and autonomy of the executive, whose staff forms an elite by reason of its ability and of the eminent value of its will. The people and their representatives in parliament should limit their activities to control the actions of the executive and not hamper his freedom to command. Hauriou's name became associated with a "theory of institution", concerned with permanent organizations which serve the collective interest and which as a whole constitute the individuality of the state. Schmitt considered Hauriou's "theory of institution" the first systematic attempt at a restoration of what he called "concrete order thinking" since the victory of legal positivism. See Carl Schmitt, Introduction to the second edition (1934) of *Politische Theologie: Vier Kapitel zur Lehre von der Souveränität*, third edition (Berlin: Duncker & Humblot, 1979), 8.; also Schmitt, *Über die drei Arten des rechtswissenschaftlichen Denkens* (Hamburg: Hanseatische Verlagsanstalt, 1934), 54–55. A jurist and political theorist, Léon Duguit (1859–1928) is known for his application of philosophical positivism to jurisprudence and political theory. His aim was to evolve a theory of law and the state based solely on experimental data. According to his objective concept of law, law exists as a body of rules not only arising from social relations but determined by them. The primary fact of law is thus not subjective right but the objective rule of law arising from social relations. This conception led Duguit to reject the German theory of law as a creation of the state – a sovereignty subject only to its own limitations. Since the state is merely a group of governing individuals, it has no right to sovereignty. The most complete development of Duguit's doctrines is found in *Traité de droit constitutionnel*, third edition (Paris: Boccard, 1927–1930), 3 vols.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA - https://www.nomos-elibrary.de/agb

with positive law, proved correct, and more so than anyone might have expected.

The legislative machine increased its tempo enormously, and the commentaries and interpretations of positivist jurisprudence could hardly keep pace. Long before the full unleashing of decrees, the scholarly and systematic commentaries of professors of jurisprudence were increasingly replaced by the practical commentaries of private lawyers or experts in the ministries (although a large number proved to have had a splendid legal training).

It has been said that the decree is "motorised law". Should jurisprudence then follow suit and seek to "motorise" itself? Every scholarly jurist immediately recognises the impossibility of such fellow-traveling. But the motorisation of law into mere decree was not yet the culmination of simplifications and accelerations. New accelerations were produced by market regulations and state control of the economy – with their numerous and transferable authorisations and sub-authorisations to various offices, associations and commissions concerned with economic decisions. Thus in Germany, the concept of "directive" appeared next to the concept of "decree". This was "the elastic form of legislation", surpassing the decree in terms of speed and simplicity. Whereas the decree was called a "motorised law", the directive became a "motorised decree".[43] Here independent, purely positivist jurisprudence lost its freedom of manoeuvre. Law became a means of planning,[44] an administrative act, a directive. Such a directive is issued by an authorised agency but not publicly announced and often only sent to those immediately concerned. It can be changed overnight or adjusted to rapidly changing conditions. Thus it no longer allows an independent third force to come between the directive and the issuer, between the measure and the one who orders it, as was still possible in the 19th century between law and legislator. One can perhaps rightly say that the law is wiser than the legislator. But it is something else to claim

43 See Karl Rieger, "Rückblick und Ausblick auf die Form der wirtschaftlichen Gesetzgebung", in *Ministerialblatt des Reichswirtschaftsministerium* (28 January 1941), 18. See also Werner Weber in *Zeitschrift für die gesamte Staatswissenschaft*, Vol. 102, 116f.; Kurt Emig in *Deutsche Rechtswissenschaft*, Vol. 7 (1942), 220f.; and Wolfgang Gähtgens, "Die rechtlichen Grundlagen der Waren-Bewirtschaftung", in Friedrich Dorn et al., *Probleme der gelenkten Wirtschaft,* edited by the Wirtschafts-Hochschule (Berlin: Walter de Gruyter Verlag, 1942), 52: "The directive as the most elastic form of legislation."

44 Georgios Demetriou Daskalakis deals with "the law as a planning tool" in his Berlin *Habilitationsschrift [Das Gesetz als Seinsordnung und Planverwirklichung* (24 January 1939)].

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

that a directive is wiser than the agency best informed about the concrete situation.

5. *Savigny as a Paradigm for the First Distancing from the State Legality*

These developments have created a critical situation for jurisprudence, which cannot enter into a race with the motorised methods of decrees and directives. It cannot keep up. Rather, it must become aware of the fact that it has become the last refuge of law. It must remember its own task and seek to safeguard the unity and consistency of law, which is being lost in the frenzy of legal impositions. Thus it must eschew excessive haste. It should retain its inner composure, calm observation and the most thorough research.

A grand example shows what can be accomplished when jurisprudence examines its own task and dignity. I mean the example of Savigny and his famous 1814 treatise: *Of the Vocation of Our Age for Legislation and Jurisprudence*.[45] Together with its 1816 sequel,[46] this treatise addresses directly our present problem – not in terms of its temporal theses but in terms of its fundamental standpoint, which is more relevant today than at the time it was written. In a deeper sense, it is also more relevant than Kirchmann's lecture with its positivistic, if not nihilistic denigration of the scientific character of jurisprudence.

If we speak of Europe, it is necessary to mention concrete names and to provide a list of great Europeans in order to give the concept some content and to distinguish it from an ambiguous program. Here few names are more deserving of being on such a list than Savigny. This family of imperial nobles in Lothringen came, as did Goethe and Baron vom Stein, from the old Reich. He was a famous and influential jurist and historian, at once the revitaliser of Roman law and a herald of the theory of the *Volksgeist*

45 Friedrich Carl von Savigny, *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* (1814). Reprint of the third edition of 1840 (Freiburg: Akademische Verlagsbuchhandlungen von J.C.B. Mohr, 1892); see the English edition, translated by Abraham Hayward: Reprint of the 1831 London edition (New York: Arno Press, 1975).

46 Friedrich Carl von Savigny, "Stimmen für und wider neue Gesetzbücher", *Zeitschrift für geschichtliche Rechtswissenschaft*, vol. 3, no. 1 (1816), included as an appendix to the second edition of *Vom Beruf unserer Zeit.* The article contains a discussion of other articles by Friedrich Justus Thibaut, Ludwig Feuerbach, B.W. Pfeiffer et al.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA - https://www.nomos-elibrary.de/agb

(spirit of the people) as the creator of law and language. He was the leader of a Historical School, which was by no means merely another school of Roman law. At the same time, he was the founder of modern international private law,[47] a scholar of enormous knowledge, a true aristocrat and a man of the world. Thus it is not an accident that Savigny was the first to provide an answer on behalf of jurisprudence in his 1814 treatise, which was an advance in his own time but is even more relevant today.

The dispute concerning Savigny's significance has never ended. His death in 1862 was marked by testimonials to a great personality. Rudorff wrote: "We will never see his like again",[48] and even Jhering was very respectful in his rather journalistic obituary. So long as the science of pandect law held its place, Savigny's name was sacrosanct. That changed with the new century. Thirty years ago, a representative of the Free Law Movement[49] asked "What is Savigny to us?" and the answers appeared to

---

47 Cf. Max Gutzwiller, *Der Einfluss Savignys auf die Entwicklung des Internationalen Privatrechts* (Fribourg: Kommissionsverlag/Universitätsbuchhandlung, 1923).

48 [Tr.] Adolf August Friedrich Rudorff (1803–1878) was a prominent legal scholar. See Rudorff, *Kritik der Schrift des Staatsanwalts v. Kirchmann über: Die Werthlosigkeit der Jurisprudenz als Wissenschaft. Von einem Lehrer dieser Wissenschaft (Berlin: Plahn Verlag, 1848)*.

49 [Tr.] The Free Law Movement was not satisfied merely with Jhering's critique of the intellectual foundations of legal theory and legal practice. It was much more concerned with a renewal of the methods of jurisprudence and juristic lawfinding. In opposition to legal positivism, it insisted that the decision of a legal case could no longer be derived from abstract and logical deduction, that statutes could no longer be considered the dominant source of law. It asserted that "free law" should not only be represented through judicial decision, through usage, but also through judicial ruling. Specifically, the Free Law Movement sought to widen the circle of the sources of the law, and in so doing it raised the question of what this meant with respect to the judge's relation to the law. Should he have the right to creative lawfinding only when the law is valid, or should he have the right to decide against the wording of a legal norm? This question was raised most radically by Hermann Kantorowicz in his 1906 pamphlet on the struggle for jurisprudence. See Gnaeus Flavius, a.k.a. Hermann Kantorowicz, "Der Kampf um die Rechtswissenschaft", in Kantorowicz, *Rechtswissenschaft und Soziologie: Ausgewählte Schriften zur Wissenschaftslehre*, edited by Thomas Würtenberger (Karlsruhe: Verlag C. F. Müller, 1962). In the wake of Nietzsche and Schopenhauer, Kantorowicz formulated his theory of free law in terms of feelings and the will, and saw the opening of a "voluntaristic epoch" of jurisprudence. He argued that conceptual jurisprudence – a creation of the Historical School – had succeeded in overcoming the metaphysics of natural law but then capitulated to its methods, that the task of free law was to overcome those methods but remain true to the historical conception.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

be increasingly negative.[50] The victories over Savigny celebrated by a few Germanists in the course of their old struggle with the Romanists were certainly only posthumous 19th century affairs and promoted a strange alliance between Germanist jurisprudence, of which Savigny himself was one of the founders, and heterogeneous Free Law jurists and sociologists with little Germanist inclination. Nevertheless, in recent years the negative evaluation of Savigny continues. There are increasingly charges that he and his theory are not sufficiently activistic, and complaints concerning his all too passive manner of pure contemplation. It is generally alleged, especially in regard to his 1814 treatise, that Savigny did nothing more than retard the codification of German civil law for almost a century, even though ultimately he could not prevent it. Thus he simply stood on the wrong side of the development of legal history; his "historical" tendency had only an antiquarian and reactionary meaning, because it stood in the way of the pressing historical development of the codification of state law. As a whole, his undeniable success is seen as short-lived, as the victory of a professor of jurisprudence over the legal experts of the high ministerial bureaucracy. Such could only appear as a Pyrrhic victory to a legal positivist, and one he regarded with the utmost suspicion.

This widespread opinion that only a positivist jurisprudence is feasible is a product of the late 19th century. In this narrowing [of jurisprudence] into mere technique, the progress of law is confused with the increasing promptness of the legislative machine. At that time, there still was no premonition of the constitutional problematic of the concepts of law and legislator, legality and legitimacy. One spoke of "law" as the most perfect thing in the world, and derogatorily dismissed Savigny as having denied legislation as a vocation of the age. That his 1814 treatise was an existential self-reflection of jurisprudence, that it was a great call to jurisprudence to be more than the guardian of state law, went unacknowledged, whereas his critique of state codification only sought to clarify jurisprudence as a

50 Hans Thieme, "Der junge Savigny", *Deutsche Rechtswissenschaft,* vol. 7 (1942), 53f. Cf. Hans Schneider, "Die Entstehung des preussischen Staatsrats 1806–1817: Ein Beitrag zur Verfassungsreform Preussens nach dem Zusammenbruch", *Zeitschrift für die gesamte Staatswissenschaft,* vol. 102 (1942), 480–529. Schneider investigated Savigny's participation in the legislative work of the Prussian Privy Council *(Staatsrat)* for the first time on the basis of archival sources. The great jurist appears almost as a passive mirror in which the opposing sides are balanced circumspectly to the point of a stalemate. [See Hans Schneider, *Der Preussische Staatsrat 1817–1918: Ein Beitrag zur Verfassungs- und Rechtsgeschichte Preussens* (Munich and Berlin: C.H. Beck'schen Verlagsbuchhandlung, 1952).].

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

vocation, to rescue the dignity of a legal estate, and to contain the dangers of mere positive law.

Above all, Savigny's theory of the sources of law had a thoroughly existential meaning, through which he placed new and strong emphasis on "source". Savigny and his specific concepts of "historical" and "positive" can be understood only by taking seriously the meaning of "source" in terms of its relevance for the existential struggle of jurisprudence. Law as concrete order must not be separated from its history. True law is not imposed; it arises from unintentional developments. It reveals itself in the concrete form of jurisprudence, through which it becomes conscious of its development. For Savigny, the jurisprudential concept of the positive is bound to a particular type of "source" protected by jurists. Law emerges from this "source" in a specific way, as something not merely legislated but given. The later positivism knows no origin and has no home. It recognises only causes or basic norms. It seeks to be the opposite of "unintended" law. Its ultimate goal is control and calculability.[51] For such a positivism, "source" is at best a non-binding metaphor for a validity imposed arbitrarily. In general, to speak of "source" must appear meaningless, if not ludicrous. But for Savigny, "source" is the true origin and true home of law. It is neither a cistern for a pre-scientific, discretionary system of law (cadi justice), nor a sewage system for schemes without spatial or legal boundaries.[52]

I would like to stay for a moment with Savigny's doctrine of the sources of law, because everything depends on achieving the proper perspective with respect to the state's monopoly of legality. Of course, the great scholar understood the various and sundry meanings of the "sources of law" and how they were being used, which he described in detail in his *System of the Present Roman Law.*[53] For Savigny, there were sources of law in the sense of legal institutions and accepted rules, and in the sense of purely historical "sources of jurisprudence". Today, that sounds trivial. But Savigny main-

51 This is expressed in the often cited aphorism of August Comte, the founder of positivism as a religion and a *Weltanschauung*, which postulates with almost typical naive legalism: "*voir pour savoir; savoir pour prévoir; prévoir pour régler*!".

52 "Schemes without spatial or legal boundaries" refers to Francisco Javier Conde's work. His theory of the three determinants of the concept of political reality – schemes, spatial delimitation, and law – is based on and developed from the great historical forms of the Greek *polis*, the *Imperium Romanum*, the *Civitas Christiana* and the modern state. See his *Theoria y systema de las Formas Politicas* (Madrid: Instituto de Estudios Políticos, 1944).

53 Friedrich Carl von Savigny, *System des heutigen Römischen Rechts* (Berlin: Veit & Comp., 1840), vol. I, chapters 2 and 3, 13ff.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

tained even-handedly that "in most cases both meanings coincide". He observed that most writers make no clear distinction between the "legal sources" of the *Corpus Juris* and 13th and 14th century German law books, and, with the same detachment, proceed to add: "We need not reproach these authors on this score." *Jurisprudence is itself the true source of law.* A given law is only its material, which it shapes and refines. Scholarly form, which it alone can provide, seeks to reveal the inherent unity of the material of law and thereby to engender "an organic life which transforms its material". Savigny understood the value of a good piece of legislation, but he knew, first, that a legislative act is only one of many manifestations of the law in concrete orders and, second, that the essence and value of the law lies in its stability and durability or, as Popitz once put it with a certain elegant skepticism, in its "relative eternity". Only then does the legislator's self-limitation and the independence of the law-bound judge find an anchor. The experiences of the French Revolution showed how an unleashed *pouvoir législatif* could generate a legislative orgy, and Napoleon's handling of law professors was a symptom of the connection of all these questions with the situation of jurisprudence. At that time in Germany, however, the alternative, a legal practice based on case law, was also hardly conceivable. Thus a jurisprudence based on this theory of historical sources was meant to become a specific authority, an autonomous agency of legal development, and the soul of a German jurisprudential estate. On the one hand, this development was conceived as a normal growth assured by continuous reference to such sources, which in turn guaranteed its continuity and protected its independence; on the other, the inexhaustible riches of the historical sources and their manifold applicability contained the potentiality for all necessary changes and renewals.[54]

---

54 One magnificant passage in Savigny's treatise reads as follows: "I now proceed to state the higher object, which is attainable by the same course. Let jurisprudence be once generally diffused amongst the jurists in the manner above-mentioned, and we again possess, in the legal profession, a subject for living customary law, consequently, for real improvement; the practice of our courts' justice was but a clumsy substitute for this customary law; the practice of law-faculties the clumsiest of all. The historical matter of law, which now hems us in on all sides, will then be brought under subjection, and constitute our wealth. We shall then possess a truly national law, and a powerful expressive language will not be wanting to it. We may then give up Roman law to history, and we shall have, not merely a feeble imitation of the Roman system, but a truly national and new system of our own. We shall have reached somewhat higher than to a merely sure and speedy administration of justice; that state of clear perceptiveness which is ordinarily peculiar to the law of young nations, will be combined with the

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA - https://www.nomos-elibrary.de/agb

In view of Savigny's lofty goal, the situation of European jurisprudence generally looks like this: England is the example for the rule of a *Rechtsstand* of practitioners. Here a legal fraternity finds the source of law in the "precedents" set, borne and vouchsafed by this same *Rechtsstand.* They provide the foundation of the jurist's professional existence as the preserver of the law. This "rule of law" is a closed order and, as such, constitutes the predominance of a status group independent of the state. It is neither normativism nor is it something that on the Continent was later called a *Rechtsstaat.* Essentially, it is not a creation of the state but an independent estate grounded in society. In this sense, it is a social, professional and, in its specific legal basis, an "estate" and not a "state." The historical counter-concept to this *Rechtsstand* is the Continental *Gesetzesstaat* [legislative state].[55] The land of the legists, France, provides the example of a positivist transformation of law into state codification. Here the typical source of law is an act of state. State and law belong together in a specific sense. The centralised *Gesetzesstaat* precludes an independent *Rechtsstand,* not to mention a "*Gesetzesstand*". In a *Gesetzesstaat* the judge becomes a state official applying state law, and stands opposed to a non-state "free" lawyer rooted in civil society. In Germany, however, the astounding attempt was made through Savigny to make jurisprudence the essential preserver of law. With Savigny, the English lawyers of a society grown rich and the French jurists of a centralised legislative state were confronted with the jurisprudential traditionalism of a European Reich. Savigny's idea of "source" is to be understood only in this existential sense, and not as a historical science or as a positivism of measures enacted in some way or other. Furthermore, it is to be understood only in the sense in which he himself used the words "historical" and "positive" – not in the sense of the later positivist conceptual transformations of the so-called Historical School.[56] This typical German effort – to make not a "positive"

---

height of scientific development." [*Of the Vocation of Our Age for Legislation and Jurisprudence, op. cit.*, 154f.].

55 Law (*Gesetz*) and state are corresponding concepts in legal history. There is thus only a *Rechtsstand* and only a *Gesetzesstaat.* "*Rechtsstaat*" is a term that arose in Germany shortly before 1848, in the critical period in which an unproblematic legal sphere split into legality and legitimacy – a distinction that today can be denied only by artificial means. The German language has often failed to provide adequate legal terms. Also the word "*Gesetzgeber*" [lawgiver or legislator] is unfortunate because it confuses the distinction between *setzen* [to enact] and *geben* [to give, in the sense of the given law].

56 Savigny's own characterisation of his "rigorous historical method of jurisprudence" should be recalled here because, unfortunately, it seems to have been

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

legal science but a historically aware jurisprudence the guardian of law and the core of a true *Rechtsstand* – foundered in and *on* the 19th century. However, this neither diminished its European significance nor destroyed its contemporary relevance.

To avoid any misunderstandings, it should be emphasised that I am not promoting any "Back to Savigny" movement. Savigny's 1814 call to jurisprudence is only a paradigmatic event, which should be kept in mind in order to understand correctly the present situation of European jurisprudence. We know that there is no such thing as a restoration of past situations. A historical truth is true only *once.* The concept of the historical is itself subject to transformations and reinterpretations; its realizations in various areas of intellectual life take many different forms. While state legal positivism in Germany at the turn of the 19th to the 20th century rejected every consideration of substantive problems as "unjuridical" and thereby deprived them of all intellectual impact, a Historical School in the economic and social sciences led by Schmoller[57] was able to significantly influence German conceptions of law and the state.

Quite apart from this internal transformation is the fact that today our knowledge of historical sources is infinitely wider and deeper than in Savigny's time, owing to the many crises we have experienced since then. The *sources* enriching the history of Roman law itself have been infinitely broadened; and our knowledge has not only been externally expanded

---

forgotten: "Its character does not consist, as some recent opponents have strangely maintained, in an exclusive admiration of its Roman law; nor in desiring the unqualified preservation of any one established system, to which, indeed, it is directly opposed, as has been shown by the above judgment on the Austrian Code. On the contrary, its object is to trace every established system to its root, and thus discover an organic principle, whereby that which still has life may be separated from that which is lifeless and only belongs to history." *Of the Vocation of Our Age for Legislation and Jurisprudence, op. cit.*, 137.

57 [Tr.] Gustav von Schmoller (1838–1917) was the leader of the so-called "younger" Historical School. Originally a student of the English school of classical economics and of the older German Historical School, particularly of Wilhelm Roscher, he first sought to cultivate the inductive method of the accumulation of historical and descriptive factual material and to develop economics as a social science by relating it to history, political science, sociology, etc. The concept of "justice" in the economic system was to be realised through a paternalistic policy of social reform furthered by the state and by all social groups. Social science was to illuminate the path to a more equitable distribution of income as the guiding principle of social reform and for the attainment of the objectives of social policy, which was the goal of the Verein für Sozialpolitik founded by Schmoller and others in 1872 and directed by him alone after 1890.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

but internally enriched with a new appreciation for anthropological and mythological problems. In the 19th century, Savigny's true heir was neither Puchta[58] nor Jhering but Bachofen,[59] even if he left the preoccupation of the age behind and withdrew to the fertile depth of mythological research.[60] At issue today is not some reactionary retreat, but rather the apprehension of a wealth of new knowledge which can become fruitful for jurisprudence and which must be acquired and used creatively. In view of this task, let the dead positivism of the 19th century bury its dead.

What is the secret of the extraordinary effect of Savigny's appeal to jurisprudence in Germany and in Europe? From which deep source sprang the power of such an appeal, which even today has not lost its impact? In order to avoid possible misunderstandings, I emphasise again that neither the content nor the logic in Savigny's 1814 treatise are convincing or compelling. Despite all its stylistic beauty, the attentive reader can readily notice the most blatant contradictions. Savigny proclaims the doctrine of an unconsciously developing, creative *Volksgeist*, and yet he is the founder of a Historical School in the narrowest sense, a "natural law of the historically given" (Max Weber)[61] – a tendency that ultimately led to an archaeological, philological and papyrological scholarship, which appeared as a peculiar anachronism and whose contact with the continuously growing and vital *Volksgeist* was, at best, indirect. Such intellectual epigones of Savigny

---

58 [Tr.] Jhering's teacher, Georg Friedrich Puchta (1798–1846), studied philosophy with Hegel, but subsequently came under the influence of Savigny and Schelling. He began teaching Roman and canon law in Erlangen and, in 1842, became Savigny's successor in Berlin. By formulating and arranging Savingy's ideas in a number of textbooks, he exerted a tremendous influence on his own and subsequent generations. Savigny himself accepted Puchta's views and formulae in his later works concerning the fundamental doctrines of the Historical School.

59 [Tr.] Johann Jakob Bachofen (1815–1887) studied law and legal history in Basel, Berlin (where he came under the influence of Savigny), Oxford, Cambridge and Paris, and upon his return to Basel was appointed to the chair of Roman law at the university. But he resigned in 1844 to devote himself to the history of art. His major interests, however, were in ancient Roman law and Greek antiquity, and it was in these investigations that he found numerous myths and reports of a very early matriarchate, whose origin he attempted to explain by collecting and comparing all the relevant material in the writings of the ancients.

60 Bachofen's marvelous autobiographical account of the years 1840–1854 was occasioned by Savigny's repeated entreaties. His friendship with Jhering lasted only a short time (1846–1851) and was for Jhering of no consequence.

61 [Tr.] Cf. Max Weber, *Economy and Society: An Outline of Interpretive Sociology*, edited by Guenther Roth and Claus Wittich (Berkeley, Los Angeles and London: University of California Press, 1978), Vol. 2, 867 (translation altered).

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

as Puchta should not alone be blamed for what followed. The failure lay already with Savigny and the dangerous word "positivism". The parallel between law and language, which Savigny used as a decisive argument, should have directed attention to German linguistic studies (*Germanistik*), which Savigny actually sought to do.[62] In Germany, the call for a return to the pure and critically proven sources of Roman law and to their Latin language seemed incompatible with the doctrine of the *Volksgeist.* Such objections have often been raised by critics. Today, the most prominent legal historians – Romanists and Germanists alike – maintain that both Savigny and his Historical School were "basically unhistorical", and that this is as true of their methods as of their objective.[63]

All these contradictions, which today come to mind in connection with Savigny's 1814 treatise, should neither be disavowed nor discounted. Clearly, it cannot be claimed that any overpowering content of his reasoning explains his overpowering success. The secret of Savingy's great external and internal impact lies in something else. His manifesto was the first deliberate distancing from the world of enactments. Its significance lies not in a type of argumentation but in an intellectual situation in which his main contention – his doctrine of the unconscious development of law – first gained historical significance, because it made jurisprudence the counterpole of mere positive legislation without abandoning law to the civil war slogans of natural law.

---

62 "The most important fact is and remains the history of Roman and canon law, which is the basis of our own. But we must acknowledge that, in scientific terms, Germanic law transcends German law; it comprises the law of all Germanic nations." See Savigny, "Stimmen für und wider neue Gesetzbücher", *Zeitschrift für geschichtliche Rechtswissenschaft.* Together with Savigny, Friedrich Eichhorn and Jacob Grimm were also important founders of the "Historical School". See the standard portrayal by Claudius Freiherr von Schwerin, *Grundzüge der deutschen Rechtsgeschichte* (Munich and Leipzig: Duncker & Humblot, 1934); fifth edition (Berlin: Duncker & Humblot, 1950), 255.

63 Cf. Koschaker, *Die Krise des Römischen Rechts,* and Schwerin, "Schuldenken und Gesetzeskunst", in *Deutsche Rechtswissenschaft*. Of particular interest here is the sharp critique by Beyerle ("Schuldenken und Gesetzeskunst," *Zeitschrift für die gesamte Staatswissenschaft*), which makes Savigny responsible for the fact that the 19th century German legislator lost the language of the people and spoke a scholastic language. However, Beyerle did not take note of the fact that a modern state law cannot be a "mirror" in the sense of medieval law books. Savigny was no doubt a master of the German language. Also in my view, the problem of what language and scientific terminology the modern legislator should use is not yet solved in Beyerle's article (he expressly permits scientific and technical terms for decrees and directives on page 210).

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

Thus Savigny's political failure after 1840 should not be seen as a refutation of his significance – as is often claimed. This failure, indeed a real fall, occurred when he left the firm ground on which he had become great and famous and entered a world that seemed to promise greater opportunities. He believed he should not go against the well-intentioned recommendations of his king, Frederick William IV. In 1842 he was appointed minister in charge of revising the law, and in October 1847, president of the Prussian State Council and State Ministry. Savigny's liberal enemies celebrated his misfortune with mockery and derision. Their triumph would have been even more vociferous had they been aware of the entire legislative activity of a man whose previous superiority consisted in denying his age's legislative competence and in referring it instead to jurisprudence. We know today that Savigny, shortly before the outbreak of the 1848 Revolution, hastened to simplify and accelerate legislation, even at the expense of the authority of the State Council, whose president he was.[64]

This was no doubt an unfortunate role, but one should not only look at it biographically. Through the benevolence of his king, Savigny became an ill-starred historical figure in the same way as Schelling, who in 1841 was summoned from Munich to Berlin. Schelling's Berlin lecture in the winter of 1841–42 (whose epochal significance as a symptom of decline was immediately recognised by Kierkegaard, Burckhardt, Engels, Bauer, Bakunin and Stirner) marked the beginning of the intellectual catastrophe of a generation and even a whole age of German idealist philosophy and theology. It was no accident that the misfortune of a generation and of an age of German jurisprudence began with Savigny's legislative activity, and that his *System of the Modern Roman Law* was readily torn apart by the young Lorenz von Stein[65] in line with the utter ruthlessness of a new

64 Hans Schneider uttered the following remark with respect to the simplification of the deliberations of the Prussian Privy Council: "Savigny on his own initiative created no other law of such significance in less time and with so little effort". See Schneider, *Der Preussische Staatsrat 1817–1918.* On Savigny's activities as minister of justice, see Adolf Friedrich Stölzel, *Brandenburg-Preussens Rechtsverwaltung und Rechtsverfassung dargestellt im Wirken seiner Landesfürsten und obersten Justizbeamten* (Berlin: F. Vahlen, 1888), vol. 2, 535ff.

65 [Tr.] Lorenz von Stein (1815–1890), along with Robert von Mohl, was the founder of the science of public administration. He was also one of the leading figures in the development of public finance in Germany. Although he began as a jurist, his significance rests on his social theories and his influence on German sociology.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

generation.[66] This was not simply the fate of one man and his private contradictions but a total historical and intellectual catastrophe in which the fate of a great German jurist paralleled that of a great German philosopher. It was a moment in the collapse of the old order and the emergence of new forces leading directly to 1848. Savigny's 1814 manifesto belonged to a totally different intellectual and historical moment. As jurists, we should not forget that in 1849, when the eighth volume of his *System of the Modern Roman Law* appeared,[67] dealing with the foundations of modern international private law, Savigny was again himself and had regained his European significance. This work made a greater contribution to the unbroken and creative power of jurisprudence than all the legal codifications of the following age.

Succeeding generations of positivists in the 19th and 20th centuries could not properly understand Savigny's appeal to jurisprudence, not even as a historical phenomenon. They were no longer in a position to distance themselves from the world of mere enactments; they were not even in a position to understand their own time. Secure in their positivism, they did not consider the possibility of existential crises resulting from the split of law into legality and legitimacy. They became unsettled only when enactment, which they had taken uncritically to be the firm basis of positive law, suddenly began to accelerate, and their dogma: "A law is a law" became as problematic as the aphorism: "A mark is a mark."[68]

But their positivist methods ruled out any real understanding of their situation. There were many reasons why Savigny's name was still mentioned with great reverence, his life still devotedly researched, and his achievement still highly praised. But a positivist age was no longer able to recognize the essential point: that in an extraordinary moment, and with genial insight, a representative of the European spirit had recognised that the transition to state legislation raised the danger of the mechanisation and instrumentalisation of law twenty years before this danger was discerned by the first analyst of the total crisis of Europe – the great French

---

66 Cf. *Deutsche Jahrbücher für Wissenschaft und Kunst*, successor of the *Hallischen Jahrbücher*, No. 92 (1941), 365f.: "The concept of the state demands a law of its own"; "The whole system of pandect law is based on a completely different interpretation of the principal concepts of private law than our own."

67 [Tr.] Translated into English with Notes by William Guthrie under the title: *Private International Law and the Retrospective Operation of Statutes*, second revised edition (Edinburgh: T.T. Clark, 1880).

68 [Tr.] Schmitt is here comparing runaway legislation to the runaway inflation in Germany in the early 1920s.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

historian, Alexis de Tocqueville, in *Democracy in America* (1835) – and a hundred years before it became generally known in a grave crisis and the bad news was spread by famous authors like Weber and Spengler.

Savigny spoke of the childhood, youth and maturity of a given people. It was an indication of youth if science guided legal life and safeguarded sources. He made his jurisprudence independent of theology and philosophy, as well as of the mere craft of lawmaking. This is the meaning of his "historical" tendency, of his return to Roman law and the genuine sources. In this, he went far beyond the temporal content of his account and far beyond the failure of his legislative activity to correctly discern the core of the historical situation of European jurisprudence.

6. *Jurisprudence as the Last Asylum of Legal Consciousness*

When we look at the sweeping horizons of European jurisprudence over many centuries, we can see that it has always been determined by two great oppositions: on the one side, to theology, metaphysics and philosophy; on the other, to mere technical craft. European jurisprudence developed as an independent science after the 12th century through its struggle with theology and in its separation from the theological faculties. Savigny defended jurisprudence against this side in that he recognised a danger to its inner autonomy in the philosophical natural law of the secularised theology of the 17th and 18th centuries as well as in Hegel's philosophy. At the same time, however, he opposed a positivism characterised by the mere passing of laws, by mere prescription, as a factor antithetical to jurisprudence; he recognised the danger of the legal positivism of Napoleonic codifications. To both he opposed the "positivism of the historical source" in order to rescue jurisprudence as much from mere philosophy as from "mere craft." Jurisprudence would cease to be an autonomous science with its own specific character if it surrendered of its own volition to theology and philosophy; it would be merged with other faculties, and the achievement of half a millennium would be lost. Jurisprudence would then no longer be "positive" in a historical sense – in the sense Savigny attributed to this multifaceted term. In succumbing to the mere legality of an enactment it would lose its dignity as a science. It would not even turn into a useful instrument of a technical enterprise that treats the world as the *tabula rasa* for schemes without spatial or legal boundaries. Then jurisprudence would not only have ceased to constitute a "faculty"; it would have lost its academic character. It would no longer

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA - https://www.nomos-elibrary.de/agb

belong to a university, providing this institution still had the meaning it acquired historically as a concrete order of European intellectual life.

European jurisprudence is the first-born child of the modern European spirit, of the "occidental rationalism" of the modern age. The modern natural sciences followed later. The first pioneers of this rationalism were the legists, who were great revolutionaries and shared the fate of all true revolutionaries. The "commentaries" to the *Corpus Juris* originated in a rebirth of Roman law in the cities of north and central Italy in the 12th and 13th centuries – in chaotic times which did not know the security ideal of the 19th century but which nevertheless made men aware of the absolute necessity of a jurisprudence based on scholarly sources. Through vehement struggles with church and theology in the 13th and 14th centuries, jurisprudence established itself as a "faculty" and maintained itself in the tumultuous circumstances of a feudal age at its close. The 16th century, which saw the blossoming of a humanistic jurisprudence, was also a time of bloody religious civil wars. Great jurists of this epoch became the victims of an intolerant fanaticism, whereby each side had its martyrs, such as Story[69] on the side of the old belief, Donellus[70] and Gentili on the side

69 [Tr.] The English martyr, John Story (1510–1571), became a lecturer on civil law at Oxford in 1535. Having apparently disavowed his Roman Catholicism after the accession of Edward VI, he gained notoriety as a member of parliament through his opposition to the act of uniformity in 1548, for which he was imprisoned by the House of Commons. Released soon after, he went into exile, but returned to England in 1553. He was one of Queen Mary's most active agents in prosecuting heretics, and one of her proctors at the trial of Cranmer at Oxford in 1555. He returned to parliament under Queen Elizabeth, but was imprisoned shortly in 1560. In 1563 he was rearrested, but managed to escape to Flanders, where he became a pensioner of Philip II of Spain. Authorised by the Duke of Alva in 1570 to exclude certain classes of books from The Netherlands, he was decoyed to a ship at Antwerp and conveyed to Yarmouth, where he was tried for high treason. Executed at Tyburn on 1 January 1571, Story was beatified by papal decree in 1886.

70 [Tr.] Donellus, the French jurist Hugues Doneau (1527–1591), was a Calvinist obliged to seek refuge in Geneva after the massacre on St. Bartholomew's Eve (1572). The following year he became a professor at Heidelberg and, after teaching at Leyden from 1579 to 1588, taught at Altdorf in Germany until his death. Second only to the French jurist Jacques Cujas (1522–1590) in the galaxy of illustrious 16th century French scholars of civil law, Doneau was one of the outstanding representatives of the reaction of Renaissance humanism to the aims and methods of the Bartolists or commentators. The *mos italicus* of the Bartolists, fundamentally an analytical-exegetical method with a fixed and complicated mechanism, gave expression to medieval scholasticism and the medieval belief in tradition and authority. In opposition to the *mos italicus,* French civil law evolved

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

of the new. During the 16th century religious wars, on St. Bartholomew's Eve in 1572, Bodin,[71] a typical jurist of this age, escaped death only by a miracle. No one can say that the intellectual courage, which belongs to jurisprudence as well as to every other science, failed it in this terrible time of religious civil wars.

Since the 19th century the situation of European jurisprudence has been determined by the split of law into legality and legitimacy. The danger the spirit of European jurisprudence faces today comes no longer from theology and only occasionally from a philosophical metaphysics, but from an untrammelled technicism which uses state law as a tool. Now jurisprudence must take a stand against the other side. The scholarly jurist is no theologian and no philosopher, but he is also no mere instrument of arbitrary prescriptions and endless enactments. We must now withstand a subaltern instrumentalisation, just as in other times we had to resist dependence on theology. We remain a science and a jurisprudence against both sides. That is the reality of our intellectual and spiritual existence, which we should not allow to be diminished by methodological, psychological or general philosophical arguments, because we fulfil a task which no other human activity can fulfil. We cannot choose the changing rulers and regimes according to our own tastes, but in the changing situations, we preserve the basis of a rational human existence that cannot do without legal principles such as: a recognition of the individual based on mutual

---

a method known as the *mos gallicus,* which developed two distinct tendencies in the study of pure Roman law along humanistic lines. Cujas became the leading exponent of the tendency developed by Guillaume Budé and Andrea Alciati, who applied an exegesis based on philology and history to the texts of Roman law. The second tendency was basically a method of synthesis as opposed to exegesis. First applied to Roman legal sources by Connanus and Douaren, it was elaborated and perfected by Doneau. He restricted his attention to Roman private law, and all his early studies were preparatory to his celebrated *Commentarii juris civilis,* composed of 28 books. Epoch making in the history of modern efforts to systematize Roman law, the final books were compiled by Doneau's pupil and friend, Scipio Gentili (1563–1616). In France, Doneau's writings and particularly his *Commentarii juris civilis* helped prepare the way for the *Code civil,* which was founded on Romanist material as well as on French customary sources. His influence persisted and left its mark on the scholarship of later centuries in all countries where Roman law was studied.

71 [Tr.] Schmitt always credited Jean Bodin (1530–1596) with being the theoretician of sovereignty. Together with Thomas Hobbes, Bodin was for Schmitt a kindred spirit, one of the two great founders of public law from the age of the religious civil wars. Cf. Carl Schmitt, *Ex Captivitate Salus: Erfahrungen der Zeit 1945/47* (Cologne: Greven Verlag, 1950), 63, 65 and 72.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

respect even in a conflict situation; a sense for the logic and consistency of concepts and institutions; a sense for reciprocity and the minimum of an orderly procedure, due process, without which there can be no law.[72] That we defend this indestructible core of all law against all destructive enactments means that we maintain a dignity which today in Europe is more critical than at any other time and in any other part of the world.

The traditionalism of English law practised by lawyers belonging to a legal estate was no longer able to respond innovatively to great new problems. The transformation of law into *state* legislation in the French style, and into a functional mode of *state* judiciary and administration, contained the danger of rigidity; and for Germany, the most highly industrialised country, the transformation involved the danger inherent in the spirit of mechanisation, runaway technology and mass society. The result was the increasing motorisation of the legislative machinery. The phrase "deadly legality" ("*légalité qui tue*") refers to the dangers of this dissolution of law under the avalanche of ever more legislation. Thus there remains for us only the resort to jurisprudence as the last defender of the unintentional origin and development of law.

When Savigny raised his voice in 1814, European jurists were still fascinated by Napoleon's codification – above all by the *Code civil.* In the pomp of this circumstance, most did not bother with the situation of French jurisprudence at the time, in particular the deplorable role of law teachers and professors. The hypnosis of the Napoleonic codifications was even stronger than the military and political success of the new caesar and outlasted his military and political collapse. France was the land of state jurists and of the most modern codifications of law. Typical for France was

72 *Due process,* which is crucial in the practice of American law courts, exemplifies the European origin of constitutional thinking and governmental forms in the US. See Hermann von Mangoldt, *Die geistigen Grundlagen des amerikanischen Verfassungsrechts* (Essen: Gesetz und Recht Verlag, 1938), 13. In our terminology, it is an *institutional guarantee,* which is no guarantee of the *status quo.* Since the time of the Hurtado case [Hurtado v. California (1884)], the Supreme Court determined that "due process of law" means a minimum of form and procedure and not simply what is traditionally considered to be the old procedure of common law. See John R. Commons, *Legal Foundations of Capitalism* (New York: The Macmillan Co., 1924) [See the reprint of this classic of economic history, with a prefatory note by Joseph Dorfman (Clifton, NJ: A.M. Kelley, 1974).], 33; Rodney Loomer Mott, *Due Process of Law: A Historical and Analytical Treatise of the Principles Followed by the Courts in the Application of the Concept of the "Law of the Land"* (Indianapolis: Bobbs-Merrill Co., 1926), 246.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

the alleged or actual pronouncement of the French jurist Bugnet[73] who, two generations before our German positivists, offered his listeners the cheap wisdom that for him there was no civil law but only a civil code.[74] The ruling opinion at the time was that French legal development, with its positivist transformation of law into state legislation, stood at the forefront of the progress of civilisation and humankind. Thus it was in France that the split of law into legality and legitimacy was first perceived.[75] Few, Tocqueville being one, recognised that this celebrated progress of civilisation was in reality nothing but a progressive centralisation, that the apparent progress of law served nothing other than this centralisation, that it signified the expanding framework for ever new devices of a legal enterprise which in fact only made the revolution permanent and embraced it as the only legitimate force superior to legality.[76] At least for a moment, the shock of 1848 opened many eyes. It is no accident that the terrible phrase, "*légalité qui tue*", the notion of deadly legality from which governments and peoples die, arose in France, the land of the legists, and just before the outbreak of 1848.

Immediately following the revealing shock of 1848, however, a positivist reaction and resignation set in, and the later 19th century "progressed" ever more toward increasingly asserting the legality of a given *status quo*

---

73 [Tr.] John Joseph Bugnet (1794–1866). Cf. Robert Joseph Pothier, *Oeuvres de Pothier, annotées et mises en corrélation avec le Code civil et le législation actuelle par Bugnet*, second edition (Paris: Cosse et Marchal, 1861).

74 Cf. Julien Bonnecase, *L'ecole de l'exégèse en droit civil. Les traits distinctifs de sa doctrine et de ses méthodes d'après la profession de foi de ses plus illustres représentants*, second revised and augmented edition (Paris: Boccard, 1924), 29 and 128.

75 Already in 1829 its significance was indicated by Lamennais.

76 A French jurist of European reputation, Hauriou, became a crown witness for us when he confirmed this connection in 1916, in the midst of the First World War. His view helped us recognize even more clearly Savigny's foresight and extraordinary importance for European jurisprudence. Hauriou said: "The revolution of 1789 had no other goal than absolute access to the writing of legal statutes and the systematic destruction of customary institutions. It resulted in a state of permanent revolution because the mobility of the writing of laws did not provide for the stability of certain customary institutions, because the forces of change were stronger than the forces of stability. Social and political life in France was completely emptied of institutions and was only able to provisionally maintain itself by sudden jolts spurred by the heightened morality." (*Principes de droit public a l'usage des étudiants en license (3eme année) et en doctorat ès sciences politiques* (Paris: Société du Recuil Sirey, 1916), XI. If the great French jurist then, in 1916, hoped to find a means of redress in the distinction of routine legislation and constitutional law, European constitutional experiences since 1919 have certainly dashed this hope.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

in defence of whatever measures were taken. This occurred not only in France, where the split between legality and legitimacy first appeared, but in all European countries, even in England. I need only mention the names of Bentham[77] and Austin,[78] but there are many examples and parallels to the articulation of the views of that French teacher of civil law [Bugnet] who turned away from law and retreated to the *securité* of the civil code and positivist normativism. For Germany, we have the crude example of Bergbohm's naive legal positivism.[79] But in Germany, there were still strong intellectual reserves, through which the name of Savigny could become a symbol. We dare not forget the origin of this symbol; we do not want to relinquish the chance of its future relevance.

More than a century ago, when Savigny wrote and published his 1814 treatise, the danger of an empty, legalitarian technicism was not as great as it is today, in the age of motorised laws and motorised decrees. So much greater and more admirable was the intellectual power then required to recognise the danger so early and to keep one's distance from an age which began with the split between legality and legitimacy and ended with the total transformation of historical into revolutionary legitimacy.[80] Only

---

77 [Tr.] Although Jeremy Bentham (1748–1832) is primarily known as a social philosopher, he was also a lawyer, and his most conspicuous success was in the reform of English law and judicial procedure.

78 [Tr.] The chief figure in English analytical jurisprudence, John Austin (1790-1859), systematised and completed – in English terms! – Hobbes' work. He insisted that laws, being commands, emanate from a determinate source, and that every duty implies a command. The keystone of his system is that every positive law is established by a sovereign person or body of persons with respect to members of an independent political society. He was less concerned with the historical origin of the principle of positive law than with its present authority.

79 Cf. Karl M. Bergbohm, *Jurisprudenz und Rechtsphilosophie: Kritische Abhandlungen* (Leipzig: Duncker & Humblot, 1892). [Tr.] Bergbohm (1849–1927) was a legal philosopher and international lawyer who became the arch champion of positivism in international law. He considered treaties and state law the only valid sources of international law and thus the only instrumentalities for its development. Although he opposed the doctrine of natural law, he recognised that jurisprudence needed a philosophical basis, which was the object of *Jurisprudenz und Rechtsphilosophie.* Only the first volume appeared, under the title "Das Naturrecht der Gegenwart".

80 "Revolutionaries who are unable to combine illegal forms of struggle with *every* form of legal struggle are poor revolutionaries indeed." (emphasis Lenin) See V.I. Lenin, "*Left-Wing*" *Communism, An Infantile Disorder* (Peking: Foreign Languages Press, 1970), 101–02. In this connection, see the philosophical presentation of Georg Lukács in "Legality and Illegality", in Lukács, *History and Class Consciousness: Studies in Marxist Dialectics*, translated by Rodney Livingstone (Cambridge

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

with this in mind does the arcanum of Savigny's manifesto become apparent. Whoever sees it will not misinterpret our invocation of the names of Savigny and Bachofen. In an age in which legality has become a poisonous dagger, with which one party stabs the other in the back, jurisprudence becomes the last refuge of legal consciousness. In a time of the utmost trials, jurisprudence is protected against the danger of falling back into a mere historical enterprise, as happened in the century of security. Even under the terror of the means of destruction modern science has put in the hands of every ruler, a jurisprudence thrown back on its own resources will know how to find the secret crypt in which the seeds of its spirit will be protected against every persecutor. It is this confidence – not some program for excavations and editions – that we are drawing from Savigny's treatise, which becomes for us a document of the first step away from legal positivism. European jurisprudence need not die a common death with the myths of the law and of the legislator. Let us remember our history of persecution, for our strength lies in our willingness to suffer. Then the genius will not leave us, and even the confusion of tongues will prove to be better than the Babylonian unity.

MA: The MIT Press, 1971), 256–71. Lukács' article is more relevant and significant today than most of the writings on the philosophy of law and natural law which have appeared since 1920 because he rightly posed the question in terms of the concepts "legality and legitimacy".

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA - https://www.nomos-elibrary.de/agb

The Historical Situation of German Jurisprudence*

Carl Schmitt

I.

A hundred years ago, Savigny denied his era the vocation for legislation.[1] Savigny did so, to prioritise the vocation for jurisprudence (*Rechtswissenschaft*)[2]. To this end, Savigny published his famous 1814 tract: "Of the

---

* [Tr.] This article was first published as "Die geschichtliche Lage der deutschen Rechtswissenschaft" in the journal *Deutsche Juristen-Zeitung* 41, no. 1 (1936), which had been aryanised in the turbulent years following the NSDAP's unsavoury march to power. Hitler's right-hand man for legal matters, Hans Frank, put Carl Schmitt in charge of the Deutsche Juristen-Zeitung in 1934. By then, it had become Schmitt's trademark to embed his arguments in an extensive exploration of a specific "Lage" (situation). We can find an early attempt in his 1923 essay "Die geistesgeschichtliche **Lage** des heutigen Parlamentarismus", and "Die konkrete Verfassungs**lage** der Gegenwart". Moving into the heated 1930s, we find "Unsere geistige Gesamt**lage** und unsere juristische Aufgabe" (1931) and "Die **Lage** der europäischen Rechtswissenschaft" (1943/44). The reason for Schmitt's frequent recourse to elucidate the underlying 'situation' has been convincingly explained by Hasso Hofmann: "if the factual existence of an order is a precondition for the normative validity of the legal order, but the factual order remains instable—a question, so to speak, of a specific situation—then it is the primary task of the public lawyer to elucidate the peculiarities of the historic situation's political dynamism." See Hasso Hofmann, *Legitimität Gegen Legalität: Der Weg Der Politischen Philosophie Carl Schmitts* (Berlin: Duncker & Humblot, 2002) 78.

1 [Tr.] The German compound word *Gesetzgebung* translates to "law-giving", which, according to Carl Schmitt, obfuscates in its original German the necessary distinction between "positing" law and "proclaiming/giving" law into the single term to "give". Some translators have employed the awkward term "law-giving" and overlooked Schmitt's disdain for the term. Schmitt preferred to work with "legislation" (Latin: legis-law and lator-bearer/bringer). See, Carl Schmitt, *Die Lage der Europäischen Rechtswissenschaft* (Tübingen: Internationaler Universitäts-Verlag, 1950) fn. 25.

2 [Tr.] Rechtswissenschaft is a peculiar German compound word that translates to "legal science", or "jurisprudence". The word "Recht", as a group of Oxford dons at the turn of the nineteenth century already accurately identified, had the "particular misfortune" of lacking a corresponding word in the English language; for most practical purposes it has been translated with "Law" or "legal". But the English word "Law" erases the distinction between "Gesetz" (lex, loi, legge) and "Recht"

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

Vocation of our Age for Legislation and Jurisprudence".[3] Today, we no longer deprive our age of the vocation for legislation but this does not mean that we have abandoned our vocation for jurisprudence. Out of the new communities, a new legal order and a new way of legislating is emerging. This new way of legislating is markedly different from the earlier method of codification.[4] It allocates significant tasks to jurisprudence.

The German people have found their national order of life (*völkische Lebensordnung*) through the Führer of the National Socialist movement. German law and its scientific teachings have to be channelled primarily through this trope. But the work of Germany's legal restoration is not just the concern of the legislative process. It places full responsibility on German jurisprudence. The situation of jurisprudence has to be profoundly transformed to meet these challenges. As a first step, it requires awareness of the role and condition jurisprudence played earlier. We need to understand how jurisprudence was shaped and determined through many centuries of German history.

(jus, droit, diritto). See.: J.K. Bluntschli, *The Theory of the State* (Oxford: Clarendon Press, 1892) VI. The reason "jurisprudence" has largely been used over "legal science" in this translation is that Carl Schmitt preferred the term in his French translations in contrast to the equally common "science du droit", which would be closer to "Rechtswissenschaft / legal science". On 16 May 1944, for instance, during a conference held in Coimbra, Schmitt, in an early translation of "Die Lage der europäischen Rechtswissenschaft", refers to it in French as "la situation présente de la jurisprudence"; but—perhaps consequently—when referring to Savigny's 1814 article "Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft" employs "science du droit". See Piet Tommissen, *Schmittiana: Beiträge zum Leben und Werk Carl Schmitts: Band VI* (Berlin: Duncker & Humblot, 1998) 263. In this short essay, Schmitt uses jurisprudence interchangeably with Rechtswissenschaft as we can see in the later part.

3 [Tr.] Translated as Friedrich Karl [sic] von Savigny, *Of the Vocation of Our Age for Legislation and Jurisprudence*, trans. Abraham Hayward (New Jersey: The Lawbook Exchange Limited, 2002). For the German original, see Friedrich Carl von Savigny, *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* (Heidelberg: Mohr und Zimmer, 1814). Carl Friedrich Savigny (1779–1861) was a jurist who promoted the German Historical School of Jurisprudence, which emphasised the historical limitation of law and pushed back against Rational Law (Vernunftsrecht).

4 See Carl Schmitt, "Kodifikation oder Novelle? Über die Aufgabe und Methode der heutigen Gesetzgebung", *Deutsche Juristen-Zeitung* 40 no. 15–16 (1935) 919.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

II.

At different times, jurisprudence reacts differently to the political order. As a norm, jurisprudence collaborates positively with the concrete order of its time and its nation. By using the word "positively", I am not invoking the legal positivism of the liberal legislative state. In such a state, legal positivism puts the law normatively into an opposition against the political leadership and if necessary against the legislator itself. It is typical for legal positivism to recall that the law is wiser than the legislator. In truly great times of jurisprudence, however, the law-protector is a living part of the order and status whose law he has to preserve. The law-protector is the *ratio ordinis* (system of order), and as far as the state represents mainly order, he is also the essential *ratio status* (reason of state) and the "vigenes disciplina" (the present discipline).[5] Great times of jurisprudence are hardly democratic. These are not times under the rule of law as understood by the liberal conception of democracy and the legal-state.[6] To the authority of the famous Roman Jurisconsultus, equipped as they were with the *jus respondendi* (right of responding), belongs the authority of a Roman Caesar Augustus, the auctoritas Divi Augusti (Dig. 2, 49).

At other times, jurisprudence has also used the law to fend against prevailing political conditions. In order to accomplish this, jurisprudence adopted a negative-critical attitude and claimed to "possess" the law. Jurisprudence then employed the law "dogmatically", in the proper meaning of the word, against the political leadership. This move reveals the real meaning behind the concept formation *Rechts-Staat* (legislative state). There is a valid intellectual case to be made for this move, for instance, to overcome the legality of a moribund, life and growth threatening status quo. It is also useful if the national legal order has to be defended from a foreign power's hostile takeover or if it is employed to cultivate the law-making ability in growing and nascent legal orders. But this dogmatist attitude can also hamper and subvert growth, which plays into the hands of individualists and internationalists, as was the case for much of nineteenth and twentieth-century liberal jurisprudence. It has rightly been said that the sociology of the nineteenth century is, in essence, only

5 This important concept is still fruitful today. Compare the 1897 Berlin PhD dissertation in law of Hans Meydenbauer with the title *Vigens ecclesine disciplina*. Keeping with its age of normative thinking, the thesis side-tracks the crucial question: why does a legal preserver have to be part of the concrete order he seeks to uphold?

6 Johannes Stroux, *Summa jus, summa injuria: Ein Kapitel aus der Geschichte der interpretatio iuris* (Leipzig and Berlin: B.G. Teubner, 1926) 5 note 2.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

an opposition science. This characterisation also fittingly describes a large part of this era's jurisprudence. During that time, a Jewish-Freemasonic led liberalism succeeded in propagandistically overpowering the concept of science. After conquering it, they employed it as a political weapon against the German state; "science" was now altogether just a term for opposition. The well-known antithesis of power and law, power and mind, politics and law, politics and mind, and even the antithesis of politics and jurisprudence primarily served to erode the concrete, existing orders of the German polity from the inside. It also aimed to undermine the greatest accomplishment of the German mind: the Prussian military and bureaucratic state. During this period, even entirely unconnected and species-hostile authors fashioned their works as unbiased scientific scholarship. Heinrich Lange has depicted this development of unjust incomprehension in two significant articles published in this journal.[7]

Jurisprudence adopted an unambiguously positive and outright oppositional attitude, which took another fateful third turn. This third turn had a severe impact on German legal history, without whose scientific findings the overall situation of German jurisprudence cannot be judged accurately. Instead of basing its authority on a robust political friend-enemy distinction from within the nation, jurisprudence often tries to replace the lack of a strong authority by championing a mere "legal community" as an *Ersatz* for an effective community. When jurisprudence is confronted with a political vacuum, it attempts to fill it from its side. Jurisprudence, therefore, turns into a political surrogate. This position has several advantages for jurisprudence. The number of trials that require juridical expertise increase, and legal doctrines acquire a greater significance. A specific kind of authority emerges. But let us not deceive ourselves: jurisprudence acts as a political surrogate. From the medieval ages until recent times, German legal history is crowded with examples that show precisely this process. For the past 500 years, our legal history has primarily been a reception history of foreign laws. Jurisprudence has been the main driver of this development.

In his essay "German Legal Development and Codification", Rudolph Sohm (1874)[8] has advocated the well-known thesis that the reception of

7 Heinrich Lange, "Deutsche Romanistik?", *Deutsche Juristen-Zeitung* (1934), 1493 and Heinrich Lange, "Der Verfall des Pesönlichkeitsgedanken", *Deutsche Juristen-Zeitung* (1935), 406. [Tr.] Heinrich Lange (1900–1967) was a German jurist. He joined the NSDAP in 1932 and was a critic of liberalism and the Weimar Republic.

8 [Tr.] Rudolph Sohm, "Deutsche Rechtsentwicklung und Kodifikation", *Zeitschrift für das Privat- und öffentliche Recht der Gegenwart* 1 (1874) 245–280. Rudolf Sohm

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

Roman Law was not just a reception of laws but of an entire jurisprudence. This sentence is of great significance and relevance, as is the whole essay of the young Sohm. It transcends the specific occasion for which it was written. With its gripping language and abundance of fresh thoughts, Sohm immediately captures today's reader. Sohm argued that in the century-old agony of the Roman Empire of the German Nation, jurisprudence in Germany helped fill a political vacuum. Legal science created a "communal German law", which, due to the lack of Germany's political unity, provided at least some semblance of a "legal community". Compared to the Pope and the territorial powers, the German Empire did not have the strength to utilise the overgrowth of might and reputation, which could have been absorbed into an imperial law; this overgrowth encouraged German particularism. Legal practitioners related what was said in the Corpus juris about the *princepes* to the regional landgrave and not to the Kaiser. For the law, a mere "scientific" communal law remained, with a *Reichskammergericht*, that had its seat in Speyer and (since 1693) in Wetzlar and that was condemned to reside more in a place like Dinkelsbühl[9] than a place with even a flimsy political leadership. When the confessional split of the German *Volk* became irrevocable, roughly since 1530, this Court was the German Volk's only collective representation as a united Reich. But the Court could neither bring about the political unity of the Reich nor satisfactorily unite Germany internally. On the contrary, in its three hundred years of operation, the Court was essentially a breeding ground for several political diseases, which have been rightly summed up as the German "touching need for legality".[10]

(1841–1917) was a German jurist and theologian. Most of his scholarly contributions concern Roman and Church law. He is said to have influenced Max Weber's concept of "charismatic authority".

9 After the court's demolition in Speyer, during the War of the League of Augsburg, only the townships of Wetzlar, Mühlhausen and Dinkelsbühl agreed to take in the Reichskammergericht against the advice of their town's authorities. This was discovered by Rudolf Smend who writes: "The place had to lie at the margins, away from consolidated territories. These territories had a strong dislike of the Court's three-fold religious exercise, and did not want to have such a foreign body within their borders. They feared that any contact with the Court could lead to a violation of their sovereignty." Rudolf Smend, in *Das Reichskammergericht, Erster Teil: Geschichte und Verfasssung*, (Weimar: Hermann Böhlaus Nachfolger, 1911).

10 The expression "touching need for legality" is gleaned from Rudolf Smend, who used it for the attitude of 16th century German Protestants (Ibid., 161). In 1541, Luther called the Reichkammergericht in Speyer the "devil's whore".

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

For most educated Germans, the memory of the *Reichskammergericht* is most commonly linked to the names of Goethe or Freiherr vom Stein.[11] It is not connected with the names of any jurists.[12] This is not to say, unfortunately, that the centuries where the political vacuum was filled through jurisprudence had no far-reaching consequences or aftereffects. During this dreary time, the rifts between theory and practice, law and politics, and the conception that private law and not public law was juridical took root. Nineteenth-century liberal individualism understood how to exploit these fissures. This trend has not changed in the twentieth century.[13] One can only hope that liberal individualism's last triumph manifested in *Preußen vs. Reich* and in the ruling of the *Staatsgerichtshof* in Leipzig on 25 October 1932.[14] The jurisprudence of the nineteenth century and the law programmes at German universities have provided the scientific basis and sanctified these ways of thinking. For centuries Germany was only a "legal community" and not a political unity. Due to this historical fact, the concept of a "legal community" remained deeply entrenched in German legal and political science until Reinhard Höhn[15] accurately recognised and overcame it.

---

11 [Tr.] Heinrich Friedrich Karl vom und zum Stein (1757–1831) was a Prussian statesman who introduced the Prussian reforms, a series of constitutonal reforms in the early 19th century, and paved the way for Germany's unification.

12 Aloys Schulte, *Der deutsche Staat; Verfassung, Macht und Grenzen 919–1914* (Stuttgart and Berlin: Deutsche Verlags-Anstalt, 1936) 161.

13 Rudolf Gneist says: "The bizarre constellation of our civil and criminal law and the narrow interest which the evaporated state-law offered to legal studies, injected in our jurists a strict separation between theory and practice. Judges and lawyer considered the whole of state-law as something belonging to theory." Rudolf Gneist, *Der Rechtsstaat* (Berlin: Verlag von Julius Springer, 1872) 140; another consequence of this can be seen in Albrecht Wagner in his Berlin PhD dissertation of 1935: Preußische Verwaltung und Justiz als selbständige Ordnungen, which ventures along the legal historical developments of Prussian laws regarding the conflicts the judicial inquiries into official acts in 1854.

14 The work of E. R. Huber is not only relevant for the legal historic connection but of utmost importance for the history of German jurisprudence. See Ernst Rudolf Huber, *Reichsgewalt und Staatsgerichtshof* (Berlin: Deutscher Rechtsverlag, 1932).

15 Reinhard Höhn, *Rechtsgemeinschaft und Volksgemeinschaft* (Hamburg: Hanseatische Verlagsanstalt, 1935). [Tr.] Reinhard Höhn was a German jurist. He joined the NSDAP and the SS in 1933.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

III.

The great success of Savigny's historical school at first glance seemed to be a total triumph of jurisprudence. The *Preußische Allgemeine Landrecht*, an admirable work of Prussian legislation and governance, was treated by the historical school with disdain. They saw it as a product of purely rationalist legislation. Legislative codifications were altogether regarded as clear indicators that the nation was getting old and losing its lifeblood. The legal scholar won over the legislator. But however great the success of this jurisprudential self-contemplation for establishing the dignity of jurisprudence might have been, the actual force of this historical jurisprudence ultimately rested on the fact that just like earlier jurisprudences, it too helped to fill a political vacuum. This explains historic jurisprudence's rise and its downfall. The other reasons for the school's downfall lie in its many self-contradictions. It had to fail. Historical jurisprudence stood between the end of the absolute monarchy and the victory of the national-liberal movement. Its most outstanding accomplishment was to squeeze a scientific system of a common German civil law into the temporal gap between these two constitutional systems. But its inner rifts are evident to us today.[16] Regarding the *Volksgeist*, the school reintroduced Roman Law. It spoke of organic growth and removed the idea of organic adaptation, which in Germany's legal history had evolved through a more rationalistic "usus modernus" (modern usage). The doctrine of a naturally evolving *Volksgeist* served to foster an academic and very antiquarian restoration of Roman Law. This battle was fought in the name of history. Historical jurisprudence wiped out the dominance of natural law theories. But it failed to promote a living customary law. This was the main reason that, after a short time already, its victory against natural law benefitted an emerging legal positivism. Legal positivism could assert itself unchallenged based on a liberal codification of laws. The theory of the *Volksgeist* in tandem with

16 Karl Larenz, *Rechts- und Staatsphilosophie der Gegenwart*, 2nd ed. (Berlin: Jünker und Dünnhaupt, 1935) 161 and Karl Larenz et al. (eds.), *Berichte über die Lage des Studiums des öffentlichen Rechts* (Hamburg: Hanseatische Verlagsanstalt, 1935) 58; Reinhard Höhn, *Rechtsgemeinschaft und Volksgemeinschaft*, 28; Hans Thieme, "Savigny und das Allgemeine Landrecht", *Deutsche Juristen-Zeitung* (1935) 220 and soon in Deutsche Juristen-Zeitung on the methods of the young Savigny [this article was later published as: Hans Thieme, "Zwischen Naturrecht und Positivismus. Zur Methode des jungen Savigny", *Deutsche Juristen-Zeitung* (1936) 153–160]; Günther Krauss and Otto von Schweinichen, *Disputation über den Rechtsstaat* (Hamburg: Hanseatische Verlagsanstalt) 80.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

the resurrection of historical meaning fell short of promoting blood and soil; it remained stuck in its concerns around "Bildung", namely the conventional civic *Bildung* of the nineteenth century.[17] The *Volksgeist*-theory led these Romance scholars away from the German Volk and straight into the arms of Roman historiography. The triumph of jurisprudence over the legislator turned out to be an illusory victory. The growing authority that jurisprudence acquired took place in a political vacuum and was thus only of surrogate nature. It was not genuinely durable.

Around 1830, the liberal movement won its first victory in the constitutional field. A "communal" or "general" German constitutional law stepped up beside the common civil law. This communal law was entirely invented by jurisprudence as well.[18] Here too, the creation was in reality only a reception of Anglo-French constitutionalism. There were several individual states on German soil. Through legal means, the liberal movement abstracted what the constitutions of these individual states had in common and labelled this abstraction as a German constitutional community.

According to an aptstatement by Joseph Held, the new legal discipline was "both a protest for the urge of state unity against the political fragmentation of the nation, as well as a lever of liberal freedom".[19] The scientific success proceeded in step with the political developments. All German universities endowed academic chairs for general constitutional law. In 1882, they were even cited by the Reichsgericht as a source of law (compare RGZ 7 p. 52). With the foundation of Bismarck's Reich, the political precondition for the legal sub-discipline lapsed. Their peak can probably be seen in Johann Caspar Bluntschli's "General Public Law".[20] By 1890, the victory of a "neutral" positivism in the field of public law had become evident. This victory enticed liberal constitutionalists to indulge in further jurisprudential abstractions. Jellinek went from a general German public law to a "Theory of the State in General". Published in 1900, Jellinek's book may well be regarded as the prototype of this movement. There are several intellectual moves in it. First, Jellinek endows liberal concepts

17 Compare Ernst Forsthoff, "Zur Rechtsfindungslehre im 19. Jahrhundert", 96, no. 1 *Zeitschrift für die gesamte Staatswissenschaft* (1936), 54.

18 See Carl Friedrich von Gerber, *Über öffentliche Rechte* (Tübingen: J.C.B. Mohr, 1913).

19 Joseph von Held, *Grundzüge des Allgemeinen Staatsrechts oder Institutionen des öffentlichen Rechts* (Leipzig: F.A. Brockhaus, 1868) 107f.

20 Johann Kaspar Bluntschli, *Allgemeines Staatsrecht* (München: Literarisch-Artistische Anstalt der Gotta'schen Buchhandlung, 1857).

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

with an abstract "generality". He then seeks to downplay universality by proclaiming that universal values are just humanity's values. We can see how liberal constitutionalism fashioned itself as purely juridical, purely scientific, and ultimately as solely "pure"; in turn, every non-liberal or national jurisprudence was disqualified as unscientific and therefore "impure".[21] There are some distinctive approaches towards a jurisprudential cognition of race in the writings of a few liberals with German blood, for instance in J.C. Bluntschli, but they were now being hounded. Bluntschli outlined his ideas in an interesting article on state theory titled "Race and Individual", which was published in his dictionary of the state.[22] Liberal constitutionalism attempted to capture public international law with the same method as well. This was much easier since the "public international law community" of the liberal civilisation and its corresponding legal theory of the Geneva League of Nations already rested on universal concepts and other fictions. From 1919–33 the scholarship around this type of peoples jurisprudence blossomed. Yet this was an imaginary bloom, as this was also the time of most dreadful injustice and saddest disorder in Europe and the whole earth.[23] It would, however, be unfair to equate the accomplishments of the *General German Public Law* of the years 1815–1866 with the status-quo jurisprudence of Versailles. The *General German Public Law* of the period 1830–1870 was liberal reception law of Western constitutionalism; compared to Versailles' Public International Law jurisprudence, it had a lot more scientific substance, just as the German Bund of 1815 was superior to the 1919 Geneva international community of states, concerning political, national, and legal substance.

IV.

In the *Führer*-state, jurisprudence is no longer required to fill a political vacuum. The traditional dualism of a constitutional monarchy and its "civil-legitimising compromise" of state and society, administration and ju-

21 Georg Jellinek calls the racial science a "hypothesis", which "willingly offers itself to anyone, who wants to dress his political and social agenda in a scientific cloak." Georg Jellinek, *Allgemeine Staatslehre* (Berlin: Springer, 1929) 80.

22 [Tr.] Johann Caspar Bluntschli, "Rasse und Individuum", *Deutsches Staats-Wörterbuch Band 8*, eds. Bluntschli et al. (Stuttgart und Leipzig: Expedition des Staats-Wörterbuchs, 1869), 474–80.

23 Carl Schmitt, *Nationalsozialismus und Völkerrecht* (Berlin: Junker und Dünnhaupt Verlag, 1934).

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

diciary, public and private law have been overcome. Jurisprudence stands unambiguously within the general order of the German national community, which manifests itself in new communities and robust institutions. With this move towards the *Führer*-state, all dualistic liberal antitheses of the battle of power with the law and the state with society have been overcome. The jurisprudential life of German legal scholars has established new institutions in the *Reichsrechtsamt* (legal commission of the Reich), the National Socialist Association of German Legal Professionals, and the Academy of German Law where the jurisprudential traditions are preserved. A renewal of the whole German *Rechtswahrertum* (German legal preservers) has been enabled through them.

Every significant jurisprudential discussion very quickly leads into basic *Weltanschauung* questions of law and jurisprudential concept formation. I agree with Paul Ritterbusch[24] when he says that today's actual task of jurisprudence is of a philosophical kind. I see in Karl Larenz's essay "Basic Question of the Legal Science", published by the law faculty of Kiel University, a further confirmation of this insight. It is self-evident that we do not understand philosophy or legal philosophy as a set of possible methodologies, theories of cognition, or something similar, as they were understood in the last century. The ideological deepening implied in the word "philosophical" strives towards the reality of the concrete order of life; it is a way of realisation, of being cleansed from every individualistic arrogance and all normativistic pretensions. This is how I also understand Roger Baco's sentence that a few chapters of Aristotle's works contain more jurisprudence than the whole *Corpus juris civilis*. Maybe we can add that a few chapters of Hegel's philosophy of law warrant a similar statement. Hegel's works contain more jurisprudence than the entire civil codifications of the 19th century and its associate legal scholars.

The political order of a national *Führer*-dom liberates us from engaging in this kind of dogmatism. It prepares us for a new scientific task. The Führer saves us from the sham authority of earlier reception science, as well as from the scientific antagonism towards the legislator that lurks behind rule-of-law positivism.

24 [Tr.] Paul Ritterbusch (1900–1945) was a German jurist, who mainly worked on the theorization of economic "space" theories. He joined the NSDAP in 1932.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

Carl Schmitt Resurrected?*

Walter Lewald

After a period of prolonged silence, Carl Schmitt has spoken again.[1] His recent paper concerns the situation of European jurisprudence. In his preliminary remarks, Schmitt claims that the text is the reproduction of lectures he had given "in front of several of the most outstanding law faculties of Europe".[2] We also read in the preliminary remarks the name of Johannes Popitz, who, as one of the martyrs of the 20 July 1944, is fondly remembered by the German people. Popitz is said to have been close to Schmitt.

Many charged memories are connected with Schmitt's name: we remember him, for instance, as writing a eulogy for Hugo Preuß, the creator

---

* [Tr.] This book review was published in the premier forum for German post-war jurisprudence, see Walter Lewald, "Carl Schmitt redivus?", *Neue Juristische Woche* [NJW] 3, no.10 (1950): 377. Carl Schmitt took this criticism to heart. As we read in Schmitt's *Glossarium* on 23 May 1950 in a note to Helmut Schelsky: "Do not write to this Dr. Lewald, this fine stifler. Non decet scriber ei qui vult proscribere". And again, on 3 June 1950: "Apart from that, Dr. Lewald article in the NJW has, in seemingly pleasing manner, answered the question who is legitimated to ban me from the German mind. Besides this result the article is only a cultural-historic document, that belongs to the same category as witch-hunt jurisprudence. It has prompted me to read once again, with great gain, Count Spee's *Cautio Criminalis* of 1631. Whoever claims of me, the author of Political Theology, in a legal journal, that I had succumbed to 'idolising the Anti-Christ', has put himself in the cultural-historic category. I have never idolised anyone, perhaps maybe, for a while, my wife Duschka. And she deserved it." See Carl Schmitt, *Glossarium: Aufzeichnungen der Jahre 1947–1951*, ed. Eberhard Freiherr von Medem (Berlin: Duncker & Humblot, 1991), 302–304.

1 Carl Schmitt, *Die Lage der europäischen Rechtswissenschaft* (Tübingen: Internationaler Universitäts-Verlag, 1950).

2 [Tr.] The lectures were held in 1944 and Schmitt intended them for Johannes Popitz's Festschrift towards the end of the year. On 3 October 1944, Popitz (1884–1944), who had served as Prussia's finance minister, was arrested and sentenced to death for his participation in the resistance cell that had plotted to kill Hitler. According to Schmitt's notes, he held his lectures in Bucharest, Budapest, Madrid, Leipzig and Coimbra in Hungarian, French, and German. See: Carl Schmitt, *Verfassungsrechtliche Aufsätze aus den Jahren 1924–1954* (Berlin: Duncker & Humblot, 2003) 426–427.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

of the Weimar Constitution. In his early days Schmitt still cared about the protection of this Prussian work. Before 1933, Schmitt even designated the role of the "guardian of the constitution" (the Weimar Constitution!) to the President of the German Reich. We remember him as an ardent supporter of a direct, plebiscitary democracy,[3] for coining the ominous friend-enemy-relationship[4], and also for theorising the "*Großraum* order of international law".[5] It is fair to say that the Nazis sustained their jurisprudence and political ideology with some of Schmitt's teachings. One could ask if this makes Schmitt the primary intellectual who paved the way for National Socialism. His leading role in the association of National Socialist Legal Professionals [NS-Rechtswahrerbund], Schmitt was *Reichsgruppenwalter*, makes one wonder if he was not altogether the chief legal advisor of the Third Reich.

There is irrefutable evidence for it. In early October 1936, during a speech held at the conference of the National Socialist Association of Lawyers, Schmitt gave one of the saddest aberrations of the German mind. In this speech, Schmitt revealed himself as an agitator for racial ideology, a particularly malicious false doctrine.[6] In an essay titled "The Constitution of Freedom", written in October 1935 for the "Nuremberg Rally of Freedom" (Reichsparteitag der Freiheit), Schmitt even celebrated the Nuremberg Laws.[7] The German Reichstag had just ratified these discriminatory laws on 15 September 1935. Schmitt applauded the laws by arguing that they established "freedom".

---

3 [Tr.] Carl Schmitt, Verfassungslehre (Berlin: Duncker & Humblot, 2017).

4 [Tr.] Carl Schmitt, *Der Begriff des Politischen: Text von 1932 mit einem Vorwort und drei Corollarien* (Berlin: Duncker & Humblot, 2015).

5 [Tr.] Carl Schmitt, *Staat, Großraum, Nomos. Arbeiten aus den Jahren 1916–1969* (Berlin: Duncker & Humblot, 1995).

6 [Tr.] The conference with the title "Judaism in Jurisprudence" was held from 3-4 October 1936. Carl Schmitt presented the research agenda, and concluded, after a number of anti-Semitic papers, with the following words:
"Jewish law presents itself as the path out of chaos. The polarity between a Jewish chaos and a Jewish jurisprudence, between anarchic nihilism and positivistic normativism, between a raw sensual materialism and an abstract moralism, has been established. This conference has greatly enriched a race-sensitive intellectual history. Its results can now be used widely in jurisprudential debates." Carl Schmitt, "Schlußwort", *Das Judentum in der Rechtswissenschaft: Ansprachen, Vorträge und Ergebnisse der Tagung der Reichsgruppe Hochschullehrer des NSRB am 3. und 4. Oktober 1936* (Berlin: Deutscher Rechtsverlag, 1936) 28.

7 Carl Schmitt, "Die Verfassung der Freiheit", *Deutsche Juristen-Zeitung* 40 (1935): 1133–35.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

It may thus be of little surprise that a loud choir raises the call: crucify him! But we should not jump to this conclusion quickly. We also hear Nietzsche's voice, a philosopher who remains powerful in the world of the mind, that "only those who change keep ties with me".[8] Nietzsche forcefully asserts that the mind has a right for transformation. How can we then, after hearing Nietzsche loud and clear, still find satisfaction in joining the zealots of the cleaning session and participate in mucking out the last traces of National Socialist jurisprudence from the past's Augean stable? Is it not better to altogether turn our backs to this stable and passionately push open the gate towards the future? We need minds that stand in the flow of time while claiming the right for transformation; or put more accurately, minds that are subject to this law of transformation.

Should we therefore simply forget what Schmitt said and wrote after 1933? And should we ban Schmitt – the mysterious Proteus – entirely from the realm of the German mind, where he dwelled on an imposing seat and with a mighty voice for such a long time. This view is widely popular. But it is wrong. I think we can very well listen to what Schmitt has to say today. Barring him from participation in the conversation of the spirit would make us part of the same sinister web of intolerance that Schmitt weaved in the years after 1933. We should listen to him, albeit with all the reserve and distance that our current situation demands.

In his latest book, Schmitt tracks the development of legal positivism up until it morphs into "the motorised lawmaker". Schmitt emphasises the dangers and pitfalls of this development. The key figure in his study is Savigny. For Schmitt, Savigny acquires an almost fateful significance in European legal and intellectual history. He writes that "in an extraordinary moment and with genial insight, [Savigny] recognised that the transition to state legalisation raised the dangers of the mechanisation and instrumentalisation of law". Schmitt marvels that Savigny pointed this out a hundred years before this view reached the mainstream.

But this argument is not new. In his work "Europa und das römische Recht", Paul Koschaker already convincingly established the central importance of Savigny for European legal history. I have discussed this point in a review of Koschaker's book that is published in NJW 49, 441. Schmitt simply repeats this argument in his own way. Unlike Koschaker, Schmitt is not a noble mind. Schmitt has a strong mind of a more Luciferian kind.

---

8 [Tr.] Friedrich Nietzsche, *Beyond Good and Evil*, eds. Rolf-Peter Horstmann and Judith Norman (Cambridge: Cambridge University Press, 2001) 179.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

With his intellectual powers, Schmitt has the rare ability to illuminate current intellectual trends with an instantaneous flash.

Already in 1936 Carl Schmitt had examined a related topic in his essay "The Historical Situation of German Jurisprudence".[9] The essay constitutes a good background to his current text. In *The Historic Situation of German Jurisprudence*, Schmitt offered an accurate contemplation of his period (for the year 1936). It is still a deplorably mediocre read. Schmitt's current text is worth reading, for the fact alone that it towers intellectually over his 1936 attempt. On top of it, he employs great stylistic form and says much that is essential and valuable. A few sentences from the present text deserve to be cited in full:

> "We cannot choose the changing rulers and regimes according to our own tastes, but in the changing situations we preserve the basis of a rational human existence that cannot do without legal principles such as: a recognition of the individual based on mutual respect even in a conflict situation; […] a sense for […] the minimum of an orderly procedure, due process, without which there can be no law."[10]

This sounds fair. But knowing Schmitt's past, one reads this sentence with astonishment. Schmitt is a conflicted personality. To uncover his driving force would require a much deeper psychological analysis. If we wanted to grasp his personality historically, we would tell the story of a morbid scholarly existence mixed with doses of satire, irony, and deeper meaning. Schmitt's story would serve well as a cautionary tale for all Germans on the tragedy of a self-assured, all-pangs-of-conscience-scoffing mind, which drifted on the wrong path of power-worship and ultimately crowned his work with the idolisation of the Antichrist. Or should we perhaps read Carl Schmitt's essay as the first articulation of a changed man?

Towards the end of his paper, Schmitt says that jurisprudence has become the last asylum for the legal conscience. This also sounds fair – yet, we again hear it with disbelief. The theme Schmitt discusses here is more important than the large sum of all assertions from him, however intellectually stimulating and witty. One would like to keep the childlike faith, of course, that universities are able to emerge as the guardians of the freedom of the mind, like an *ecclesia militants*, and to activate the mental and moral resistance against an oppressive political tyrant. But we should also think about cases where every branch of society is infected with a collective

9 A translation can be found in this volume.
10 Carl Schmitt, *Die Lage der Europäischen Rechtswissenschaft*, 29.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

moral shrinkage, a shrinkage that even spreads to the representatives of the sciences. Schmitt would be the wrong person to answer these questions. Yet, these questions do lurk in the background of his works and reveal something that is much bigger than a specific German problem. This problem exceeds the power of any single author – however ingenious he may be. It exposes the phenomenon of the division of a former unified ethical-logical conscience: a phenomenon in which the crisis, or even the fate, of modern Western Man lies determined.

Attorney-at-law Dr. Walter Lewald, Frankfurt am Main

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA - https://www.nomos-elibrary.de/agb

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA - https://www.nomos-elibrary.de/agb

Savigny or Hegel? History of Origin, Context, Motives and Impact

Reinhard Mehring

The book *The Situation of European Jurisprudence* is a good introduction to Schmitt's legal writings. Here the lawyer finds what she can effectively use as an antidote to over-specialised legal dogma: European *Bildung*, rhetorical conciseness, historical distance, broad lines, and topicality. In his endeavour to unearth a European constitutional standard in 1950, Schmitt was not yet able to anticipate the process of Europeanisation through the European Union. Like Savigny, he discussed Europeanization historically from the reception of Roman law. Schmitt's brief history of the instrumentalisation of "legality" and his reservations about the enormous "acceleration" of legislative procedure sound familiar and his concept of the "motorised legislator" may seem apt at first blush.[1] When he goes on to lament that "directives" are increasingly displacing laws, and ultimately the word "decree" is dropped, we associate this almost instantly with the "EU legitimacy crises" or "Donald Trump". The "motorisation" of the legal culture that Schmitt diagnoses could today also be regarded as "digitalisation".[2] Thus, Schmitt's sketch would already add a new "stage" to the development of legal thought for the twenty-first century. Schmitt's book provides seductively concise lines and keywords.

His writing seems, at first glance, to be politically unproblematic and to strike a current nerve. Schmitt avoids speculative answers and hermetic legal concepts, which have the tendency to burden the reception. Rather, his work has an unbroken fresh and stimulating effect. It is, therefore, possible to decontextualise Schmitt's work from its historical landscape and draw out its central themes as if it was published yesterday or today. Such a relatively unproblematic and uncomplicated, almost palatable approach should, however, urge caution in an author like Schmitt and initiate counter-hermeneutical efforts. *The Situation of European Jurisprudence*, like many of Schmitt's other writings, is a strategically placed conceptual Tro-

1 Carl Schmitt, *Verfassungsrechtliche Aufsätze. Materialien zu einer Verfassungslehre* (Berlin: Duncker & Humblot. 1958) 404.

2 See only Thomas Vesting, *Staatstheorie. Ein Studienbuch* (München: Beck, 2018).

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

jan. An innovative update of the writing thus necessitates a philologically sound historical contextualisation. Even with reference to Friedrich v. Savigny (1779–1861), the founder of the "historical school of law", Schmitt's paper *The Situation of European Jurisprudence* recommends "distancing" and strict historicisation. In order to give the subsequent academic updates free rein, I will undertake such a historicisation.

I. Editions of the Work

After 1942, as a result of the failing Russia campaign and the entry of the USA into the war, Schmitt was largely silenced by the National Socialist regime. At the end of 1942, his writing *Land und Meer* (Land and Sea) marked an exit from Schmitt's defence of National Socialist actions under international law and a renewed shift to an "apocalyptic" view of the present as a state of emergency. After 1945, Schmitt, as an author heavily burdened by National Socialism, was initially banned from publication. With the founding of the Federal Republic of Germany in 1950, however, he planned his journalistic "comeback". In the summer of 1949, *The Situation of European Jurisprudence* passed through the censor bureau of the French military authorities on behalf of the *Internationalen Universitätsverlag Tübingen*. It was already in print in December 1949 and appeared as an independent brochure in March 1950.[3] On 21 May, 1950, after a first review – published on 15 May – Schmitt noted, however, already somewhat disappointed, with anger and surprise: "European jurisprudence? Where is it and who is it? And if it still has honour, it is from me (Empedocles). Just don't write to this Dr. Lewald, the noble strangler. Non decet scribere ei qui vult proscribere."[4] Schmitt was referring to a negative review in the *Neue Juristische Wochenschrift,* under the title "Carl Schmitt redivivus". Walter Lewald (1887–1986), a Frankfurt based lawyer and since 1947 co-editor and "moral authority of the editorial staff", had taken the brochure as an opportunity to criticise Schmitt as a "pioneer of National Socialism" and "crown lawyer of the Third Reich".[5]

---

3 See Piet Tommissen, "Neue Bausteine zu einer Biographie Carl Schmitts", in *Schmittiana. Beiträge zu Leben und Werk Carl Schmitts 5 (1996)* 182–190.

4 "It is not proper to write to someone who wants to outlaw you", Carl Schmitt, *Glossarium. Aufzeichnungen aus den Jahren 1947 bis 1958*, Gerd Giesler and Martin Tielke (eds.), (Berlin: Duncker & Humblot, 2015) 230.

5 Lewald practised as a lawyer since 1921, first in Mannheim and from 1929 in Frankfurt. His wife survived the concentration camp Theresienstadt. Until 1974

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

Regarding the history of its origins, Schmitt states in the *Verfassungsrechtlichen Aufsätze aus den Jahren 1924–1954* (Essays on Constitutional Law from 1924–1954) that it was published several times as a "lecture" in Bucharest (19 February 1943), Budapest (11 November 1943), Madrid (11 May 1944), Coimbra (16 May 1944), Barcelona (7 June 1944) and Leipzig (1 December 1944) in German, Spanish and French and was originally intended to be published in December 1944 on the occasion of Johannes Popitz's 60th birthday. At that time, Schmitt spoke in front of a large academic and also political audience in the cultural-political "mission" of the National Socialist "Reich". He had to report on the events and the personal encounters and conversations, which have been preserved and edited, and so we have been instructed in detail about the framework and procedure. Schmitt held these lectures strategically in more or less friendly or sympathetic foreign countries. He did not appear as a representative of an occupying power, did not speak as a victor, and for this reason alone had to retract the Nazi mission of his lectures and argue "neutrally" as a scientist. His Budapest lecture was published in Hungarian in the journal Gazdaságy jog in 1944 and Schmitt's lecture was also written by himself. There are Hungarian, French and Spanish versions of the lecture, whereby the French version can be considered the first version.[6]

In 1950 Schmitt wrote: "This lecture, which was given in front of several of the most outstanding law faculties in Europe, was to appear in a Festschrift on the occasion of Johannes Popitz's 60th birthday on 2 December 1944. For special reasons, it is published here separately from the Festschrift. Even in this form, it remains dedicated to the memory of Johannes Popitz." Popitz had been Prussian Minister of Finance during the National Socialism and was arrested as one of the conspirators after the failed assassination attempt on Hitler on 20 July, 1944. He was executed on 2 February, 1945. With the dedication to Popitz, Schmitt places his text at an oppositional distance to National Socialism. He later dedicated his entire collection of constitutional law essays to the memory of Popitz. That the Festschrift was planned before 1945 is verifiable and can be traced to a typescript of the German printed version, which has been preserved in the estate of Rudolf Smend. A comparison between the versions before and after 1945 is therefore possible and shows that there are only minor

---

Lewald was a senior editor at the NJW. Hermann Weber, "Alfred Flemming und Walter Lewald", in *Juristen im Portrait. Verlag und Autoren in vier Jahrzehnten* (München: Beck, 1988) 337.

6 Christian Tilitzki, "Die Vortragsreisen Carl Schmitts während des Zweiten Weltkriegs", in *Schmittiana. Beiträge zu Leben und Werk Carl Schmitts* 6 (1998), 191–270.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

revisions and retouching. Schmitt's talk of "distancing", "asylum" and "crypt" of jurisprudence, for example, is a later addition in 1950. Above all, the typescript from 1944 contained a different conclusion, which can also be found in the French version published before 1945. Schmitt wrote, among other things:

> "I would like to conclude with a confession. The true secret of the great departure for jurisprudence that took place in 1814 lies in the alliance of a scientific spirit with an awareness of new, youthful strength awakened by the war. Thus, even in the sufferings of the present world war, new germs of scientific spirit will emerge. They will know how to find the mysterious silence that is part of their growth, even in the noise of material battles and air terror, and one day they will blossom and show their fruits. This trust, and not a program of excavations, is what I draw from Savigny's call to jurisprudence. The spirit of European jurisprudence will reflect on itself and the genius that did not abandon us in the horrors of earlier centuries will save us in this world war too."[7]

There was no strict overlap between the lectures of 1943/44 and the publication in 1950; at the same time, there was no intentional falsification of the text either. Schmitt toned down the hegemonic mission of his text and painted his recourse to Savigny with a conservative brush. In terms of copyright, we would today perhaps still speak of relative similarity of the 1950 version with the earlier versions.

---

7 Carl Schmitt, Widmung vom 11. Januar 1945, to Rudolf Smend in: Universitätsarchiv Göttingen, Nachlass Rudolf Smend, Cod. Ms R. Smend Y9. In Schmitt's French version it reads: "Je conclus sous l'impression immédiate de ma propre situation et de celle de mon pays. Je suis sûr que dans les souffrances et dans les terreurs de la guerre mondiale actuelle, naîtront de nouveaux germes de l'esprit scientifique. Même dans le bruit des batailles et sous la terreur des bombardements aériens ces germes sauront trouver le calme mystérieux indispensable à leur croissance, et ils finiront par s'épanouir au jour. Telle est la foi que je puise dans l'appel de SAVIGNY à la science du droit. Avec une intensité accrue, l'esprit européen prendra conscience de lui-même, et le génie, qui ne nous a jamais abandonné au cours des périodes terribles dans le passé, nous sauvera aussi de la détresse présente." Carl Schmitt, "La situation présente de la jurisprudence", in *Boletim da Faculdade de Direito da Universidade de Coimbra* 20 (1944), 603–621.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

II. Savigny in Schmitt's History of Jurisprudence

Schmitt always developed complex historical genealogies. He curated his canon against the mainstream. Roughly, we can distinguish three such alignments: a) modern state theory from Jean Bodin and Thomas Hobbes to Hegel b) "organic" state theorists from Hegel, Lorenz von Stein, Rudolf von Gneist, and Otto von Gierke to Rudolf Smend c) mechanistic-normative legal thinking from Paul Laband to Gerhard Anschütz and Hans Kelsen. In his conceptual history on *Diktatur* (Dictatorship), Schmitt works through these alignments. A strict canonization of these alignments begins in his 1922/23 work *Politische Theologie* and the *Geistesgeschichtliche Lage des heutigen Parlamentarismus* (Intellectual-Historical Sitaution of Contemporary Parliamentarism). Here, Schmitt positions himself alongside the "counter-revolution". Schmitt further elaborates on the difference between the "organic" and the "mechanical-normative" alignment in a booklet on *Hugo Preuß* and the *Stellung in der Deutschen Staatslehre* [Significance of German State Law] in 1930. Schmitt even thought about writing a history of German state-law from 1848. Schmitt sketched his view on the history of jurisprudence since 1933 only in an abbreviated form in his political-polemic writings. He marks this beginning in his 1934 booklet *Über die drei Arten des rechtswissenschaftlichen Denkens* [On the Three Types of Juristic Thought].

The well-known programmatic writing *Political Theology* had introduced the opposition of decisionism and normativism, Hobbes and Kelsen, as the beginning and end of modern constitutional thinking. In 1934, during National Socialism, Schmitt then added "concrete order and design thinking" with his paper *Über die drei Arten des rechtswissenschaftlichen Denkens*. Here he separated between norm and order and limited the norm sociologically to "a certain regulating function with a relatively small measure of self-sufficient validity independent of the situation of the matter".[8] Normativism was only the ideology of a "transport society",[9] the "concrete order" on the other hand was the "nomos" of a "people": the "form" of the "living conditions" in which "a people meet". With Hölderlin's *Pindar* translation, Schmitt cites the heroic Greek cult of his youthful Hölderlin generation. Hölderlin's late work was first discovered after 1900. The Stefan George disciple Norbert v. Hellingrath (1888–1916) published the authoritative

8 Carl Schmitt, *Über die drei Arten des rechtswissenschaftlichen Denkens*, Second ed. (Berlin: Duncker & Humblot, 1993) 11.

9 Ibid., 35.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

edition during the expressionist war decades before he fell as a soldier close to Verdun in 1916. A nationalistic Hölderlin and Hellingrath cult emerged, which celebrated Hölderlin as the antipode of Goethe and predecessor of the "tragic" twentieth century. In retrospect, Schmitt noted this in his glossary on 18 May, 1948:

> "Jugend ohne Goethe" [Youth without Goethe] (Max Kommerell), that was for us since 1910 a youth with Hölderlin; a transition from the optimistic-irenic-neutralising geniality to a pessimistic-active-tragic geniality. But it still remained in the geniality framework and even deepened it to infinite depths. Norbert v. Hellingrath is more important than Stefan George and Rilke.[10]

A younger generation broke with the heritage of the "bourgeois" nineteenth century, for which the name of Goethe – very abbreviating and erroneous – stood as a cypher. Therefore, it is not surprising that Schmitt's sudden and significant recourse to Hölderlin and the talk of the "Nomos", which is then found in his *Nomos of the Earth*, has a weighty and striking parallel in the work of Martin Heidegger. In Heidegger's work, too, the strong references to Hölderlin only emerge publicly at a late stage. But where Schmitt almost casually cites Hölderlin in 1934 only as a cypher for his search or longing for the "Nomos basileus",[11] the right of the lords, Hölderlin becomes Heidegger's central organon of his path to "Germania". But whereas Heidegger articulates his own conception of the "inner truth and greatness" of National Socialism with Hölderlin, as he put it in his notorious 1935 formulation, Schmitt, the jurist, continues to analyse legality and legitimacy. His later nomos speculations begin in 1934 with direct reference to *Pindar* and Hölderlin.

In 1934, Schmitt evokes the "nomos" as the "ur-word" of law, that unites all "legal thought patterns" into a singular whole. In the second part, he orders these thought patterns "in the law's historical development" and emphasises Germany's strong tradition of "institutional" order-thinking. Schmitt calls upon a German *Sonderweg* because of the strong confessionalisation. "In Germany, concrete and communal thinking never ended", he writes in his introduction.[12] This was partly due to the strength of the Catholic church and partly because of Martin Luther. Schmitt draws

10 Carl Schmitt, *Glossarium. Aufzeichnungen aus den Jahren 1947 bis 1958*, Gerd Giesler and Martin Tielke (eds.), (Berlin: Duncker & Humblot, 2015) 115.
11 Carl Schmitt, *Über die drei Arten des rechtswissenschaftlichen Denkens*, 12.
12 Ibid., 35.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

a line from Pufendorf and Kant to German idealism. In this context, he brings into conversation the role of Friedrich von Savigny and crowns him as the "paradigm of distancing". Schmitt writes:

> Savigny's historical school of law and its doctrine of customary law has long and successfully fought the spirit of positivist codification efforts and opened up new sources of legal history that have only gradually succumbed to foreign ideas. Schelling's great cosmic-natural-philosophical teachings on the organism, on world views and on myth did not have the same immediate success and did not have the same effect; but they too belong to the great overall achievement of the German spirit, in which the German people at that time reflected on their own dignity and strength in the face of a foreign invasion. All these currents and directions of German resistance found their systematic summary, their 'summa', in Hegel's philosophy of law and state. In it, the concrete order reawakens as a direct force, in a way almost unimaginable when looking at the development of legal and state theory of the 17th and 18th century, before its ultimate collapse occurred in the following generations.[13]

His text *Über die drei Arten des rechtswissenschaftlichen Denkens* (On the Three Forms of Jurisprudential Thinking) was published in May 1934. Schmitt's National Socialist dogmatic then transformed after the 30 June 1934 with the article *Der Führer schützt das Recht* (The Führer Protects the Law). This article marks the turning point and change of strategy in Schmitt's National Socialist apologetic writings: Schmitt buried his early hopes of National Socialism's constitutionality, swapped the lens of normalcy with the lens of an apocalyptic state of exception, and changed from a juristic-institutional justification of National Socialism to an anti-Semitist purpose. His key concept here was "direct" justice. He determined the "state's emergency laws" in the "state of exception" against the normalcy of the rule of law.

Schmitt writes: "The Führer protects the law from exploitation, when, in the moment of greatest danger, he employs Führer-dom to produce laws as the highest judicial authority directly." Schmitt buried the internal logic of legal codes and the distinctions between morality, politics, and law. He further recognised National Socialism as a person-driven "Führer-state". He connected this to his conceptual history of the rule of law concept and distinguished between a legalistic rule of law state and a personalistic

13 Ibid., 37f.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

"rule of justice state". He declared the rule of law concept redundant and emphasised:[14] "The rule of law state is a counter term to the rule of justice state."[15] Schmitt even writes: "In reality, it is the rule of law state that constitutes the counter term to a just state; it is a state that inserts "fixed norms" between itself and immediate justice of the individual case.

Close former companions like Waldemar Gurian and Franz Blei,[16] who were persecuted by National Socialism and emigrated, doubted at the time that the apologist of the "provisional dictatorship" could, after 1933, overlook the dictatorial and terrorist character of National Socialism. They seriously believed that Schmitt's apology of National Socialism was opportunistic and cynical and that Schmitt did not seriously believe in the "justice" of the "Führerstaat". It is indeed possible that Schmitt regarded the National Socialist "Führerstaat" at that time already as a dictatorial and terrorist Leviathan and, in any case, had little illusion about the legal security of this system. For this reason, in a second National Socialist aberration and fall from grace, he also radicalised the declarations of enemies in domestic and foreign policy, and wrote his most horrible texts in 1935/36. With the utmost cynicism, he now threw himself into the apologia of the terrorist state, marking the distinction between friend and foe along anti-Semitic lines.

Schmitt justified the Nuremberg Laws in an essay for the *Deutsche Juristen-Zeitung* with the outrages title *Die Verfassung der Freiheit*[17] [The Constitution of Freedom] and organised a conference on *Judaism in Jurisprudence*. Schmitt traced the intellectual history of anti-Semitism in his private notes and added to the strong nationalisation of his history of jurisprudence (as it for instance appears in *Über die drei Arten des rechtswissenschaftlichen Denkens*) in his 1938 Leviathan-book a strong anti-Semitic codification of laws: from Spinoza to Laband and Kelsen. He also mentioned the negative impact of political romanticism, which Schmitt rejected (barely mentioning Savigny) in his early 1919 work *Politische Romantik* (Political Romanticism). Schmitt even speaks of an "intellectual submission" to a new type of legal typos. In his analysis of 1936, *The Historic Situation*

14 Carl Schmitt, *Glossarium*, 130.
15 Ibid., 112.
16 Waldemar Gurian, "Entscheidung und Ordnung. Zu den Schriften von Carl Schmitt", in *Schweizerische Rundschau* 34 (1934), 566–576; Franz Blei, "Der Fall Carl Schmitt. Von einem, der ihn kannte", in *Der christliche Ständestaat*, 25. Dezember 1936, 1217–1220, at 1220.
17 Carl Schmitt, "Die Verfassung der Freiheit", in *Deutsche Juristen-Zeitung* 40 (1935), 1133–1135.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

of German Jurisprudence, which is translated in this volume, Schmitt still relativises Savigny's historical contributions:

> A hundred years ago, Savigny denied his era the vocation for legislation. He did so to prioritise the vocation for jurisprudence. To this end, Savigny published his famous 1814-tract: "Of the Vocation of our Age for Legislation and Jurisprudence". Today, we no longer deprive our age of the vocation for legislation; but this does not mean that we have abandoned our vocation for jurisprudence.[18]

Schmitt elaborates:

> The great success of Savigny's historical school at first glance seemed to be a total triumph of jurisprudence. The *Preußische Allgemeine Landrecht*, an admirable work of Prussian legislation and governance, was treated by the historical school with disdain. They saw it as a product of a purely rationalist legislation. Legislative codifications were altogether regarded as clear indicators that the nation was getting old and losing its lifeblood. The legal scholar won over the legislator. But however great the success of this jurisprudential self-contemplation for establishing the dignity of jurisprudence might have been, the actual force of this historical jurisprudence ultimately rested on the fact that just like earlier jurisprudences, it too helped to fill a political vacuum. This explains historic jurisprudence's rise and its downfall. The other reasons for the school's downfall lie in its many self-contradictions. It had to fail. Historical jurisprudence stood between the end of the absolute monarchy and the victory of the national-liberal movement. Its most outstanding accomplishment was to squeeze in a scientific system of a common German civil law into the temporal gap of these-between these two constitutional systems. But its inner rifts are evident to us today. Regarding the *Volksgeist*, the school reintroduced Roman Law. It spoke of organic growth and removed the idea of organic adaptation, which in Germany's legal history had evolved through a more rationalistic "usus modernus" (modern usage). The doctrine of a naturally evolving *Volksgeist* served to foster an academic and very antiquarian restoration of Roman Law. This battle was fought in the name of history. Historical jurisprudence wiped out the dominance of natural law theories. But it failed to promote a living customary law. This was the main reason that, after a short time already, its victory

18 Cite from translation in this volume, 49 f.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

> against natural law benefitted an emerging legal positivism. Legal positivism could assert itself unchallenged based on a liberal codification of laws. The theory of the *Volksgeist* in tandem with the resurrection of historical meaning fell short of promoting blood and soil; it remained stuck in its concerns around "Bildung", namely the conventional civic *Bildung* of the nineteenth century. The *Volksgeist*-theory led these Romance scholars away from the German Volk and straight into the arms of Roman historiography.[19]

Schmitt holds the historical school of law jointly responsible for the transition from natural law to legal positivism and, in contrast, professes "ideological deepening" and "recognition of essence". In the dispute between Savigny and Hegel, he seems to be clearly on Hegel's side at the time. However, he does not construct a strict opposition between Savigny and Hegel, system and history, which would also be difficult to represent objectively. Savigny already wrote:

> "A double sense is indispensable to the jurist: the historical one, in order to grasp the peculiarities of each age and each legal form, and the systematic one, in order to view each term and each sentence in a living connection with the whole."[20]

In 1814, Savigny did not reject the general task of jurisprudence for codification and systematisation, but denied––shortly after the end of the French occupation of Berlin, yet before the final defeat of the "military despotism" of Napoleon––regarding the question on how to deal with the Code Napoleon and the task of a national unification of laws, the aptness of the current moment to its "vocation" to codification. Savigny argued for a "strict historical method", to hit the "root" of an "organic principle",[21] that would allow for the "articulation of new forms".[22] Politically, as Schmitt knew, Savigny argues in 1814 in the interest of national unification, against the "despotisms" and the state's "arbitrariness" and in favour of the jurist's law and the national unity of legal education, because the "true legislator" Nomothet is missing.[23] However, Schmitt criticised the liberal, private-law and right-wing positivist narrow-mindedness of the

19 Cite from translation in this volume, 55.
20 Friedrich Carl von Savigny, *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* (Heidelberg: Mohr, 1840) 48.
21 Ibid., 117.
22 Ibid., 125.
23 Ibid., 159.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

late 19th century, which National Socialism was supposed to eliminate. Savigny's *Foundation of the Autonomy of the Law*, according to the Wieacker judgment, was certainly an attempt in "system formation".[24] However, Schmitt criticised the liberal, private-law and legal positivist narrow-mindedness of the late nineteenth century, which National Socialism was supposed to eliminate.

In 1936, he still seems to wish against Savigny a "doctrine of the *Volksgeist*" which systematically refers to "blood and soil" and thus argues biologically and "spatially" in territorial categories of revanchism and imperialism. While Schmitt's late work, as we find in *The Nomos of the Earth*, starts out from "space" or "soil" and defines law as a "unity of order and location", Schmitt never openly interpreted the "blood" of the "Volksgeist" in biological terms, but rather argued anti-Semitically in the scheme of his friend-foe distinction. Schmitt seriously saw himself "in the fight with the Jewish spirit in jurisprudence". While his National Socialist theory of the *Großraum* still had anti-Semitic connotations in 1941 and held "Jewish influence" responsible for the "development towards an empty concept of space", anti-Semitism literally receded in 1943/44 with the sudden revaluation and autobiographical identification of Savigny in the *Situation-* lectures, which Schmitt also recorded privately after 1945, as his post-war diary *Glossarium* shockingly demonstrates.

III. Structural Analysis of the Text

1. The Meaning of the Savigny Identification

The text *The Situation of European Jurisprudence* stand at the beginning of Schmitt's elaborations on the *Nomos of the Earth*. Schmitt considered the war lost. In parallel, he was writing a paper on *Donoso Cortés in gesamteuropäischer Interpretation* [Donoso Cortés in Pan-European Interpretation]. Very elastically, he swapped "Germany" with "Europe". But because his teachings on the *Großraum*, from 1939–41, had justified a middle-Europe under German influence, the semantic shifts were not too great. Nazi Germany had occupied large parts of Europe, and now the German academy wanted to be European.

24 Franz Wieacker, *Gründer und Bewahrer: Rechtslehrer der neueren deutschen Privatrechtsgeschichte* (Göttingen: Vandenhoeck & Ruprecht, 1959) 136ff.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

In any case, Schmitt mirrors the intellectual historical situation of the present with a whole cohort of thinkers around 1848: Donoso Cortés, Lorenz von Stein, Karl Marx, Bruno Bauer, Julius Stahl, Tocqueville, and finally Savigny. The Savigny recourse around 1950 is the first and most significant identification with a professional jurist found in Schmitt's work. It is important, however, that Schmitt not only identifies with the author of the "call" of 1814, whose role he saw negatively in his earlier writings, but also with Savigny as the "tragic figure" with his "tragic role" as the law minister and president of the Prussian Staatsrat (Prussian Privy Council) before 1848.[25] In so doing, Schmitt notes that Savigny soon found "back to himself and to his European greatness".[26]

It is not unlikely that the Prussian Staatsrat Schmitt, a Staatsrat with the blessings of Hermann Göring, found his way to Savigny through his studies on the history of the Staatsrat office.[27] He started with these historical inquiries when he was appointed Prussian Staatsrat in the summer of 1933. Soon he deployed his students Guydan de Roussel (1908–1997) and Hans Schneider (1912–2010) to this task. In 1939/40, Schneider wrote his *Habilitation* at the Handelhochschule (where Schmitt taught from 1928 to 1933) with Werner Weber on the history of the Prussian Staatsrat. Schmitt was already in close contact with Schneider. After 1945, Schneider taught in Heidelberg for a long time. His *Habilitation* focused on the history of the Prussian Staatsrat until 1848. Schneider also published an essay on the historical development of the Staatsrat up until 1817 during the war years.[28] Only in 1952 could Schneider publish his studies as a monograph. A glance into his 1952 book confirms that Schmitt could have found his parallel for the "tragic role" in the readings on Savigny.[29] In his own publication on Savigny in 1950, Schmitt points to the work of Schneider but hints at an intellectual dissent. Schmitt writes:

> Schneider investigated Savigny's participation in the legislative work of the Staatsrat for the first time on the basis of archival sources. The great jurist appears almost as a passive mirror in which the opposing sides are balanced circumspectly to the point of a stalemate.[30]

---

25 Carl Schmitt, *Verfassungsrechtliche Aufsätze*, 418.
26 Ibid., 419.
27 Dirk Blasius, *Carl Schmitt. Preußischer Staatsrat in Hitlers Reich* (Göttingen: Vandenhoeck & Ruprecht, 2002).
28 Hans Schneider, "Die Entstehung des preußischen Staatsrats 1806–1817", in *Zeitschrift für die gesamte Staatswissenschaft* 102 (1942) 480–529.
29 Hans Schneider, *Der preußische Staatsrat 1817–1918* (München: Beck, 1952) 102ff.
30 Carl Schmitt, *Verfassungsrechtliche Aufsätze*, 409f.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

If one reads Schmitt's elaborations in the version of 1952, it still conveys a sense of closeness between the two. It is not unlikely that Schneider reacted to Schmitt's criticism. But it is also possible that Schmitt wanted to hide his dependency on Schneider's Savigny scholarship with a critical remark. In the introduction to his monograph, Schneider claimed to have been the first to reconstruct Savigny in his *Hablitation* as a "tragic figure of the Prussian Staatsrat- and legal history".[31] This was because Savigny removed the independence of the Staatsrat office from the ministry and opted for a "radical simplification of the legislative process" and, in this way, helped "dissolve the Staatsrat office from 1817 onwards".[32] In Schneider, we already find Schmitt's talk of "tragic", "acceleration", and "hinderance". When Schmitt published his paper on the role of Savigny as a Staatsrat, Schneider's archival studies had not been published yet. It is likely that Schmitt just adopted Schneider's results and was moved by Schneider's work to a positive Savigny identification. It forms the core of his writing in *The Situation of European Jurisprudence*, and in this way, stands out from Schmitt's other reconstruction on the history of jurisprudence. From this Savigny identification, we can explain Schmitt's entrance into the history of Roman Law and his call for "a distancing from the legislative state's legality". It is the unique selling point and the core of the book *The Situation of European Jurisprudence* within Schmitt's various variants of the history of jurisprudence.

2. *On the Crisis of Legal Theory*

To clarify the booklet's train of thought: *The Situation of European Jurisprudence* is structured in six chapters, which Schmitt calls "stages": Schmitt starts from the historical premise that there is a pan-European jurisprudence of a European "common law" and labels it "concrete order", which was weightier than national particularities, especially the reception of Roman law and the "reception of constitutionalism" of Allgemeine Staatslehre (General State-theory).[33] After two chapters on Roman law, follow two chapters on the "crises of the legislative state's legality" in the 19th and 20th century.

31 Hans Schneider, *Der preußische Staatsrat 1817–1918* (München: Beck, 1952) 102.
32 Ibid., 108.
33 Carl Schmitt, *Verfassungsrechtliche Aufsätze*, 397.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA - https://www.nomos-elibrary.de/agb

Schmitt holds here the original position that the crisis of the nineteenth century's role of jurisprudence and jurists, first pungently articulated by Julius Kirchmann, was slowed down through the great codification efforts. Through codification, the law appeared as a systemic order and a relatively independent, objectively powerful and great unit against the intervention of the legislator. For the second phase of this crisis, Schmitt diagnosed the destruction of the legal form through what he calls "motorised legislator", which, with its transition to directives, jeopardises the law's general claim to validity. With original phrasings, Schmitt repeats the legal analysis of the destruction of the law's form, which already from the early 1920s was a legal theoretical motive in the burying of the "bourgeois rule of the state under the rule of law": Schmitt declared dictatorship as the way forward, because he held the transition from law to directives as irreversible. Schmitt held on to this perspective after 1933; his value as a jurist in National Socialism was not least in holding up this analytical perspective.

3. *"Division of the Law into Legality and Legitimacy"*

The last two chapters of Scripture formulate initial responses to the crisis diagnosis. More precisely, one could speak of behavioural maxims in dealing professionally with the "problem of legality". Since his early writing *Gesetz und Urteil* [Law and Judgement] of 1912, Schmitt had already reflected on the "discretionary" scope and the relatively independent role of the lawyer. Under National Socialism, he now pursued the political equalisation of the justice system and jurisprudence. With the *Situation*-lectures, however, he then positively reinterpreted the individual leeway of the lawyer as a form of "distancing". Several important students – including Forsthoff, Schnur and Böckenförde[34] – then translated these reflections after 1945 into new historical and ethical narratives on the task and role of the professional lawyer. Here, beyond the new formulations, lies an innovative contribution of the Savigny identification and writing beyond Schmitt's earlier versions of the history of jurisprudence.

34 See only Ernst Forsthoff, "Der Jurist in der industriellen Gesellschaft", in Forsthoff, *Rechtsstaat im Wandel. Verfassungsrechtliche Abhandlungen 1954–1973* (München: Kohlhammer, 1976) 232–242; Roman Schnur, *Die französischen Juristen im konfessionellen Bürgerkrieg des 16. Jahrhunderts: Ein Beitrag zur Entstehungsgeschichte des modernen Staates* (Berlin: Duncker & Humblot, 1962); Ernst-Wolfgang Böckenförde, *Vom Ethos des Juristen* (Berlin: Duncker & Humblot, 2010).

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

The fifth chapter of his book reads: "Savigny as a paradigm of first distancing from lawful legality". The wording of the title suggests that Schmitt should be inscribed as a paradigm of a second distance for the second stage of the twentieth century. However, it then remains deliberately unclear what exactly his jurisprudential answer to the diagnosed "problem of legality" was. In the brochure of 1950, Schmitt avoids to play out his basic and keyword of the "Nomos" as a legal-philosophical answer. This slogan is not mentioned once in the book. Instead, Schmitt speaks only of "sources of law".[35]

It has already been said that Schmitt referred not only to Savigny's appeal of 1814 but also to his "unfortunate role" as a "figure of misfortune", as well as to the "contradiction" that the critic of the codification of laws became the minister for law revisions. This identification with Savigny thus belongs to the broad field of autobiographical legends with which Schmitt sought to absolve himself of any political responsibility and guilt after 1945. Schmitt's *Staatsrat*-legend tells us, that Schmitt was a "statist hinderer" in the Prussian tradition, who in the beginning believed in the constitutionality of National Socialism and with his appeasement concept built strategically on Göring, but who, after the public state ordered murders on 30 June 1934 gave up this institutional-statist interpretation. The Staatsrat legend is thus connected to a statist legend, for which Schmitt, after 1945, sometimes pointed to his audience with Mussolini in the year 1936. The Staatsrat legend had, after 1945, not least the exculpating function, to distract from his continued National Socialist engagement at the side of his most important National Socialist mentor, Hans Frank (1900–1946), the law minister and later "Generalgouverneur" of Poland. Schmitt understood himself as a "devotee" of Frank up until late 1936.[36]

If the autobiographical legend and layer of meaning of the Savigny identification is emphasised here, Schmitt's contribution to Savigny research should not be relativised. But no matter how Schmitt sketches Savigny, it remains difficult to judge where he stood systematically in relation to him in 1950. He emphasises Savigny's teaching on the "sources of law", but does not adopt the teachings on the "Volksgeist", which never interested him.[37] Rather, Schmitt emphasises Savigny's teaching on the sources of laws in a simple sentence: "Jurisprudence is itself the true source of

35 Carl Schmitt, *Verfassungsrechtliche Aufsätze*, 411ff.
36 Carl Schmitt, *Tagebücher 1930 bis 1934*, Wolfgang Schuller (ed.) (Berlin: Duncker & Humblot, 2010) 310.
37 Carl Schmitt, *Verfassungsrechtliche Aufsätze*, 411.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

laws".[38] He explains: "The law is only the substance, which jurisprudence shapes and perfects: the scientific form, which it alone can give, searches for the unity under the law's substance, reveals and perfects it, and in so doing produces an 'organic life, that radiates back to the substance itself."[39]

It is certainly systematically true that institutionalised jurisprudence plays a decisive role in the legal culture and further development of law in a society. However, the legal policy tasks of Staatsrat Savigny were clearly different from those in Nazi jurisprudence. It is politically misleading, morally downright absurd and obscene to suggest such a parallel and equation. But Schmitt's autobiographical legend aims in this direction. The autobiographical reading is far clearer than the systematic yield. Schmitt does not explain his thesis of jurisprudence as a "source of law" systematically in detail, but distinguishes only three national cultures of jurisprudence as ideal-types: the English case law "practitioner", the French legist, and Savigny's "call" for historical distance, and he then adds some strong theses on the development according to Savigny. Schmitt adds a surprising thesis on the development after Savigny:

> In the 19th century, Savigny's true heir was neither Puchta nor Jhering but Bachofen, even if he left the preoccupation of the age behind and withdrew to the fertile depth of mythological research.[40]

Schmitt refers here to the legal historian Johann Jakob Bachofen (1815–1887) and his "wonderful self-depictions of the years 1840–1854".[41] In the preface of the *Nomos of the Earth* Schmitt writes:

> The connection with the mythical sources of legal historical knowledge goes much deeper than with geography. They have been made accessible to us by Johann Jakob Bachofen, whereby we do not want to forget many of the suggestions of the ingenious Jules Michelet. Bachofen is the legitimate heir of Savigny. He has continued what the founder of the historical school of law understood by historicity and made it infinitely fruitful.[42]

These references to Bachofen and the French historian Jules Michelet (1798–1874) are in the edition of 1950, as well as in the collected works, far

38 Ibid., 412.
39 Ibid., 412.
40 Ibid., 416.
41 Ibid., 416.
42 Carl Schmitt, *Der Nomos der Erde im Völkerrecht des Ius Publicum Europaeum* (Köln: Greve, 1950), Preface.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

more surprising than the Savigny reference. Both are otherwise hardly ever mentioned. While the mention of Michelet remains completely unclear, Schmitt's reference to Bachofen's self-portrayal and "Inaugural Lecture of 1841"[43] at least offers us a clue. In 1841, Bachofen took over a professorship for Roman law in Basel. The exact title of his programmatic inaugural address is: Natural law and historical law in their opposites. It replaces the "spectre" of an "eternal" natural law with the "*Volksgeist*" as the "original right of the people in the state". "We do not know any other", Bachofen added in italics.[44]

With Bachofen, Schmitt thus does not primarily refer to "myth" or "Mutterrecht", but he constructs a bridge to Savigny. In Bachofen, he found the programmatic rejection of an abstract natural law and a historical conception of jus gentium, the confrontation of continental European and "Roman" legal thought with Anglo-Saxon legal culture, an inclination towards constitutional law and a political reservation against a strong private law. Schmitt, however, did not clarify his doctrine of legal sources and turn to "mythological research", but only hinted that Bachofen had freed the doctrine of historical "sources" from the natural law and positivist prejudices even more than Savigny, thus opening a conversation behind the distinction of law and justice.

The *Situation*-brochure of 1950 is limited to the diagnosis of the problem and avoids a systematic response. It does not sketch out a strong legal concept of its own and, with its few hints, in itself hardly permits a reasonably consistent reconstruction of Schmitt's concept of law. Schmitt considered such a systematising approach to a "classic" to be fundamentally mistaken; he did not seek transhistorical "truths" from "classical" authors, but pleaded for a radically contextualising and historicising approach. He placed the meaning of a "classic" less in transhistorical truths than in the representation of a "crisis" or "situation". He received authors only selectively as representatives of key perspectives within the framework of his constitutional-historical overall view. He did not literally follow any author in claiming validity but read the works as a mirror of constitutional-political constellations. He did not blindly follow anyone. That is why he cannot be described as a "Hobbesian" or "Hegelian" – and certainly not

43 Carl Schmitt, *Verfassungsrechtliche Aufsätze*, 394 fn.

44 Alfred Baeumler (ed.), *Bachofen: Selbstbiographie und Antrittsrede über das Naturrecht* (Halle: Niemeyer, 1927) 55.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

as a "Savignian". In the Savigny chapter, Schmitt repeated: "A historical truth is only true once."[45]

In the last chapter of his text, Schmitt formulates his view of the situation with the polar key concepts of theology and technology, legality and legitimacy. In the *Nomos of the Earth* he emphasises that the European jurisprudence had arisen and is crushed "between theology and technology".[46] This formulation of the problem is also found in *The Situation of European Jurisprudence*. However, the repeated talk of a "splitting of law into legality and legitimacy" has a stronger effect there.[47] Schmitt links legitimacy with theology but legality with legal technique. In his opinion, the formalistic thinking on legality seizes the whole legal culture. The "motorised legislator" is then correlated with the "subaltern instrumentalisation"[48] of the fully absorbed legal practitioner and technician. Schmitt concludes with critical words on the "deadly legality" and "deadly law-making of the law".[49] He draws a distorted picture of the legal process and compares it to an automated and misanthropic subsumption-machine. This distorted image of "legal positivism" has today been exposed as a myth.

Unlike Savigny, Schmitt does not formulate a strong alternative to theology or technology, legality or legitimacy. His brochure is a crisis diagnosis without a strong response. In particular, it is not a clear statement on the own legal policy and the destruction of the mode of legality under National Socialism. Schmitt himself had forced the "splitting of the law into legality and legitimacy" under National Socialism by decoupling the "legitimacy" of the personality-centred "Führerstaat" from the mode of conventional legality. By positing "legitimacy against legality", Schmitt had opted for the legitimacy of Hitler against the legal security of the "bourgeois constitutional state". He now makes a self-criticism only to the extent that, beyond criticising the mode of legality, he renounces strong pretensions of "legitimacy" and moves "legitimacy" into the proximity of "theology" and the "civil war slogans of natural law".[50] Thus, while Schmitt first praised Savigny's jurisprudential "doctrine of legal sources", his writing actually concludes with a renunciation of legitimacy. This

45 Carl Schmitt, *Verfassungsrechtliche Aufsätze*, 415.
46 Carl Schmitt, *Der Nomos der Erde im Völkerrecht des Ius Publicum Europaeum*, Preface.
47 Carl Schmitt, *Verfassungsrechtliche Aufsätze*, 422–425.
48 Ibid., 422.
49 Ibid., 425.
50 Carl Schmitt, *Verfassungsrechtliche Aufsätze*, 418.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

was already criticised by Schmitt's student Ernst Rudolf Huber, his closest companion during National Socialism, in an impressive letter on 16 June, 1950.[51] While Schmitt discusses his criticism of legality in detail, his concept of legitimacy at the time, like the talk of the "Nomos", remains extremely unclear at the time.

Schmitt avoids in his situation-booklets any mentioning of the basic concept and keyword, with which he soon answers the "split of the law into legality and legitimacy": the talk of the "Nomos". Careful readers must have noticed this since the *Nomos of the Earth* was published in short succession. By leaving the question regarding legitimacy open, Schmitt virtually forced the reader to now examine the *Nomos*. With his diagnosis of the problem, he already revealed that a more comprehensive answer was due. The two legal publications of 1950 were to complement each other: *The Situation of European Jurisprudence* formulated the question (as a diagnosis of crisis), with its finding of the split between legality and legitimacy, to which the *Nomos of the Earth* gave a categorical answer with the evocation of the "Nomos". In doing so, Schmitt hinted that his speech of the "Nomos" went beyond the history of international law to somehow "mythological research" and also formulated a positive source of law.[52] Schmitt suggests that his speech of the "Nomos" somehow inherited Savigny's approach to grounding the "sources of law" anew. However, he does not carry this out systematically. Rather, the *Nomos of the Earth* tells only a decaying story of the "historical legitimacy" or the emergence and demise of modern classical, "non-discriminatory" international law.

IV. Hegel after all! Schmitt's turn of 1958

In 1950, Schmitt saw himself as the legitimate heir of Savigny and Bachofen. His Bachofen reference served not least to distance himself slightly from Savigny. Despite such reservations, it was surprising in 1950 that the vehement critic of *Political Romanticism* came so close to the historical school of law and Romanticism. Schmitt's long and weighty, almost exorbitant postscript in the constitutional essays then puts things right in 1958. Schmitt now explains in retrospect with his glossary that his reference to Savigny was intended as a friendly concession to Popitz. Schmitt paid

51 Ewald Grothe, *Carl Schmitt und Ernst Rudolf Huber: Briefwechsel 1926–1981* (Berlin: Duncker & Humblot, 2014) 365f.

52 Carl Schmitt, *Verfassungsrechtliche Aufsätze*, 416.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

tribute to Savigny to get closer to Popitz. In doing so, he never wanted to strictly follow Savigny's understanding and programme of methods and also rejected the narrowing of the continental European legal tradition in the history of private law. Schmitt sought tradition, even far beyond Bachofen, in the jus gentium. He did not advocate a strict disjunction of jurisprudence and philosophy; rather, Hegel represented to him the "development of concrete concepts from the immanence of a concrete legal and social order",[53] i.e. the "concrete thinking of order", which he paradigmatically associated with Hegel as early as 1934.

Final clarifications of minor contradictions are not possible here, especially since Schmitt's dense and polysemic text is opposed to systematisation. If Schmitt before 1933 professes his support for Hegel and on the other hand positions Savigny and Bachofen as alternatives, then obviously no simple homogenisation is possible. However, all these authors can somehow be assigned to the broad field of "German idealism". If Schmitt in 1958 confesses to Hegel again, very much against Savigny, for the formation of systems and a systematic approach, the reference to "Savigny as the paradigm of the first distance" is still not entirely negated. Schmitt approaches Savigny and Hegel in their political stance and effect; he concludes his glossary with the thesis "that the two opponents meet for me in the category of the katechon",[54] and answers with his keyword of the "katechon" or "restrainer". As much as Savigny and Hegel competed at the University of Berlin after 1815 in terms of methodology and university politics, Schmitt was able to place Savigny politically alongside or in Hegel's place in 1944 because he brought the two closer together in his conservative conceptualisation. Thus, he emphasises their agreement in the rejection of "open atheism"[55]:

> Both were real restrainers, katechons in the concrete sense of the word, delayers of the voluntary and involuntary accelerators on the way to complete functionalisation. The only question is which of the two was the stronger katechon. That depends on whether one considers the voluntary or involuntary accelerators to be the more dangerous. From the point of view of this question, it could be that Nietzsche's tantrum against Hegel went to the right address because Savigny only

53 Carl Schmitt, *Verfassungsrechtliche Aufsätze*, 427.
54 Ibid., 429.
55 Ibid., 428.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

> saw the voluntary accelerators and could easily be taken over by the involuntary ones.[56]

Schmitt could mean Nietzsche's aphorism "On the old problem: 'What is German?'" from the *Fröhliche Wissenschaft* [Gay Science]. There it reads:

> "Conversely, it is precisely the Germans – those Germans with whom Schopenhauer lived at the same time – who should be credited with having delayed the victory of atheism the longest. Hegel, in particular, was its delayer par excellence, with the grandiose attempt he made to persuade us towards the divinity of existence with the help of our sixth sense: the 'historical sense'."[57]

In Schmitt's reading, Savigny takes the place of Schopenhauer, another Berlin-based Hegel rival who is politically attributable to conservatism. Schmitt explains to the reader in 1958 in hermetically sealed and condensed reflections that the one-time revaluation of his position on Savigny, the statements on "Savigny as the paradigm of the first distance", were a direct response to conversations with Johannes Popitz. Schmitt politely withheld Hegel references in the planned *Festschrift* contribution, simply because Savigny and Hegel both met in the role of the "katechon" and the "tragedy" of conservatism in the history of the effects of the movement.

Schmitt did not oppose Popitz's strong recourse to Savigny with a Hegel reference, because he did not want to take a counter position in legal philosophy in Popitz's *Festschrift* contribution. Schmitt explains the occasional reference to Savigny and places it again in a "different Hegel line", in which he also liked to place himself since his early work, though after his early negative discussion of the right-wing Hegelian Julius Binder[58] he always kept his distance to the right-wing Hegelian school (among others Karl Larenz) and avoided any orthodox neo-Hegelianism. In his reception of Hegel, Schmitt emphasised *The Phenomenology of Spirit* and avoided any scholastic reference to the basic lines of the philosophy of law or even Hegel's "system" of the "absolute spirit". In his late work *Political Theology*

---

56 Ibid., 429.

57 Friedrich Nietzsche, "Die Fröhliche Wissenschaft", in *Kritische Studienausgabe Bd. III* (München: De Gruyter, 1980) 599.

58 Carl Schmitt, "Besprechung von Julius Binder: Rechtsbegriff und Rechtsidee", in *Kritische Vierteljahresschrift der Gesetzgebung und Rechtswissenschaft* 17 (1916), 431–440; reprinted in Carl Schmitt, *Über Schuld und Schuldarten: Eine terminologische Untersuchung. Mit einem Anhang weiterer strafrechtlicher und früher rechtsphilosophischer Beiträge, Second Edition* (Berlin: Duncker & Humblot, 2017) 174–180.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

II, Schmitt hinted at his political-theological concerns with Hegel.[59] He meant that Hegel's Christological doctrine of the identity of the Divine and human spirit opened the way to secular humanism and left-wing Hegelianism.

Already early on, Schmitt had noted this left-wing Hegelian reading of Marxism and Bolshevism, especially in the writings of George Lukács. While Schmitt's identification with Savigny in 1950 in the text *The State of European Jurisprudence* remains a unique strategic reference, the discussion of Hegel and left-wing Hegelianism is universal. Schmitt, however, only refers to this issue in his 1958 glossary and refrains from any strong systematic explications and thus preserves the complementary relationship that *The Situation of European Jurisprudence* formulates: the mere question for which *The Nomos of the Earth* wants to be the answer. Anyone wishing to follow Schmitt's critique of legality should not, in the current age of digitised, accelerated legal culture, overlook Schmitt's final, almost apocalyptic critique of legitimacy and the open "problem of legitimacy".

59 Carl Schmitt, *Politische Theologie II: Die Legende von der Erledigung jeder politischen Theologie* (Berlin: Duncker & Humblot, 1970).

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA - https://www.nomos-elibrary.de/agb

Revisiting Carl Schmitt's The Situation of European Jurisprudence

Adeel Hussain

Carl Schmitt's "The Situation of European Jurisprudence" stands out for the relatively scant scholarly attention it has received. Mostly, legal theorists have rejected it as a failed attempt to whitewash Schmitt's controversial role in the Nazi regime. Yet, the key concepts and themes that Schmitt developed in his booklet have remained relatively obscure. In the following, I attempt to close this gap. By looking at Schmitt's return to Savigny and Roman Law, I make the case that Schmitt's work constituted a mature fruition of his central ideas regarding legal positivism, jurisprudence, and the possibility of a common European legal order. To make this argument, I situate Schmitt's work in its historical context and, relying heavily on some of Schmitt's untranslated early works, shed light on his intellectual developments through different political regimes.

"Carl Schmitt's attack on legal positivism has not delivered the promised death blow", wrote the conservative jurist Franz Beyerle in an early 1951 review of *The Situation of European Jurisprudence*.[1] The only fighting chance jurisprudence had against positivism, Beyerle opined, was to attract jurists into their cadres of a "higher moral standard"; judges who would go beyond the "convenient methodological toolkit to reach decisions", and lawyers who would be "less intellectually mediocre".[2] Men and women of this calibre were rare finds in post-war Germany. Enrolling them into the legal profession was, therefore, Beyerle observed sadly, "very unlikely".[3]

What was Schmitt's spirited attack on legal positivism that Beyerle felt had fired in the wrong direction? In *The Situation of European Jurisprudence*, Schmitt suggested four straightforward propositions. First, that there is such a thing as a common European jurisprudence that transcends national legal orders. Second, that this European jurisprudence consists of

1 Franz Beyerle, "Carl Schmitt: Die Lage der europäischen Rechtswissenschaft", *Archiv des öffentlichen Rechts* 76 (1950/51) 503.
2 Ibid., 504.
3 Ibid.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

a "common vocabulary and language", which stems from Roman Law. Careful observers can, Schmitt insisted, still find traces of Roman Law in "occidental rationalism" and modern forms of constitutionalism. Third, that at least since the mid-nineteenth century European jurisprudence has been in deep crisis: legal formalism, the notion that a legal system is valid in and through itself, had eroded jurisprudence by the high-octane "speed in which laws are produced, which made it impossible for jurists to keep up with interpreting and commenting on norms". Fourth, Schmitt advised jurists that they should stop racing to catch up with the "motorised legislators"; instead jurists should distance themselves from their immediate political surroundings and, once detached, embrace the discipline as the "last asylum for legal conscience". As a real-life model for such a distancing, Schmitt dug out the nineteenth-century legal theorist Carl Friedrich von Savigny, one of the founders of the historical school of jurisprudence.

Beyerle took issue with Schmitt's call for distancing. He contended that when Schmitt first wrote his thesis as a contribution to the *Festschrift* of Johannes Popitz in 1944, it had made sense for jurisprudence to distance itself from Hitler's frequent use of the "Führerbefehle" [direct orders].[4] A close reading of Schmitt would even allow one to interpret the book as a veiled scholarly criticism of the Third Reich. But when Schmitt ultimately published *The Situation of European Jurisprudence* in 1951, Germany's intellectual climate had transformed entirely. There was no longer a totalitarian regime hammering out jurisprudence through executive orders. Beyerle, therefore, derided Schmitt's viewpoint as "blatantly wrong", "anachronistic", and – even though he seemed to have understood the arguments entirely – "just incomprehensible".[5]

By the time of the publication, Schmitt had retreated to his hometown of Plettenberg. Amongst his vast collection of legal and political tracts, *The Situation of European Jurisprudence* stands out for the relatively scant scholarly attention it has received. Largely, scholars have rejected it as a failed attempt to whitewash Schmitt's controversial role in the Nazi regime. Yet, the key concepts and themes that Schmitt developed in his booklet have remained relatively obscure. In the following, I attempt to close this gap. By looking at Schmitt's return to Savigny and Roman Law, I make the case that Schmitt's work constituted a mature fruition of his central ideas regarding legal positivism, jurisprudence, and the possibility of a common European legal order. To make this argument, I situate Schmitt's work in

4 Ibid., 503.
5 Ibid., 503.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

its historical context. Relying heavily on some of Schmitt's untranslated early works, I shed light on his intellectual development through different political regimes.

In the first section, I look at the promiscuous possibilities that Schmitt offered for jurisprudence to engage with but stay detached from different political forms. Here, I show how Schmitt structured his thoughts conservatively according to a law/power distinction. In the second part, following from that distinction, I render legible Schmitt's intellectual aversion to legal positivism. Finally, I argue that Schmitt's recourses to Savigny and Roman Law were not just convenient pathways to shed Nazi-guilt, though they were undoubtedly part of that as well. I highlight that Schmitt did not see the act of interpretating legal texts as a submission to the rule of the dead over the living. Instead, he held that interpretative acts endowed jurists with the power to shape and even set laws that could meet the legal and political challenges of the day. For Schmitt, these interpretative acts ensured continuity and legal certainty, two characteristics he rolled into the Eurocentric notion "occidental rationality".

I. Jurisprudence and Political Form

In the first decades of the twentieth century, as he ascended to the top of Germany's legal academy, Carl Schmitt contemplated at length the relationship between law and power.[6] This question was pertinent.[7] In the *Methodenstreit* (controversy over methodology), an academic dispute towards the late nineteenth century, German academics fought over questions of understanding, the place of theory in making sense of human action, the normative validity of statements and, more fundamentally, the nature of knowledge production itself. While the dispute initially flared up around questions on economics, it soon permeated the emerging disciplines of sociology and anthropology and centred on questions of causation and the

6 For Schmitt's early intellectual development, see Reinhard Mehring, *Carl Schmitt: A Biography* (Cambridge: Polity Press, 2014) 3–252; Jospeh W. Benderskey, *Carl Schmitt: Theorist for the Reich* (Princeton: Princeton University Press, 1983) 3–21.

7 Theodor Adorno, "Soziologie und empirische Forschung", in Max Horkheimer and Theodor Adorno, *Sociologica II: Reden und Vorträge* (Frankfurt am Main: Europäische Verlagsanstalt, 1962) 205–222.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

composition of events. In public law departments at German universities, it played out in debates over the inter-relationship of law to power.[8]

The apocalyptic urgency of these questions mirrored Germany's historical condition. The First World War had just unspooled a process that would soon consume several European empires and, in time, torch the Weimar Republic's ideologically-charged powder keg.[9] Critics of Germany's interwar liberal democracy parodied the formalist idea that laws stood in as neutral arbiters of socio-economic conflicts. Instead, they argued that laws were convenient placeholders for the interests of the rich. Defenders of the liberal democratic order, like the social-democratic legal scholar Hugo Sinzheimer, one of the authors of the Weimar Constitution, fought back hard against such accusations. During a speech on social-reform in Mannheim, Sinzheimer countered claims that liberal democracy necessarily translated to numb neutrality. Instead, he declared forcefully that "[t]he difference between my approach and the neutral approach, lies in the following: the 'neutral' legal science does not take seriously the foundations on which it rests. But I see it as my political duty that the conditions on which our science rests have to be discussed and confronted."[10]

More reactionary accounts supplemented the leftist charge that laws purely served the rich with the accusation that rootless cosmopolitan elites were exercising a strong, yet hidden, influence over the political system.[11] A legal order incapable of producing real justice was not worth following, let alone fighting for, their demagogic view went. This sentiment catalysed a widespread disregard for both legal methodology and legal procedure. One of the founders of Germany's Communist Party, Rosa Luxemburg, captured this spirit brusquely during a passionate meeting with her comrades, where she bashed the "bourgeois juridical system" for coercing the

8 See Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland: Band II, Staatsrechtlehre und Verwaltungswissenschaft 1880–1914* (München: Beck Verlag, 1992); *Der Methodenstreit in der Weimarer Staatsrechtslehre – ein abgeschlossenes Kapitel der Wissenschaftsgeschichte?* (Stuttgart: Steiner Verlag, 2001).

9 Christopher Clark, *The Sleepwalkers: How Europe Went to War in 1914* (London, Harper Perennial, 2014).

10 Hugo Sinzheimer, "Die Reform des Schlichtungswesen", in Hugo Sinzheimer, *Arbeitsrecht und Rechtssoziologie: Gesammelte Aufsätze und Reden Band 1* (Frankfurt and Köln: Europäische Verlagsanstalt, 1976) 12.

11 A selection of these positional essay is reprinted in Arthur J. Jacobson and Bernhard Schlink (eds.), *Weimar A Jurisprudence of Crises* (Berkley and Los Angeles: University of California Press, 2000).

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

"proletariat to submit itself to the yoke of capitalism".[12] The parties on the right went two steps further. In a series of fiery speeches given in the 1920s, Adolf Hitler rebuked Weimar's legal space as altogether "befouling [*Besudelung*] the nation's honour and greatness". Amidst jubilant cheers, Hitler hammered out a radically new vision: a peculiar system in which laws no longer encouraged the rights of the individual but regarded "the protection of race and community", as their only *raison d'être*.[13] Even after coming to power, Hitler stuck to this misguided view. For instance, on 1 April 1939, during a speech given in Wilhelmshaven, Hitler stressed the point again: "Providence created the German people. They were not created to obey a law which suits Englishmen or Frenchmen, but to stand up for their own vital right."[14]

Citing iron-clad economic laws regarding the dependence of norms and rules on class power, communists canvassed to strip Lady Justice's blindfold and force her to confront the harsh economic inequalities and the blatant legal favouritism that underpinned the lived experiences of Germany's working class. They hoped that by welding politics and social reality with the law, they would make it a lot harder for legal theorists and practitioners to plaster over workers' rights under the cover of legal dogmatism.

Leftists argued this mainly to hold at bay the constant peril of accidentally conjuring up a hazardous "political democracy", which they understood to mean a democratic system detached from the populace and therefore lacking any wholesome identitarian gasoline to keep the democratic engine running.[15] Right-wing detractors broadly endorsed this view. But

---

12 Mary-Alice Waters (ed.), *Rosa Luxemburg Speaks* (New York: Pathfinder Press, 1970) 79.

13 Adolf Hitler's speech "Judenparadies oder Deutscher Volksstaat" [Paradise for Jews or a Nation State of Germans?] was given on 27 April 1923 and is reprinted in Frank Boepple (ed.), *Hitlers Reden* (München: Deutscher Volksverlag, 1933) 59–63, quote from 61.

14 British Secretary of State for Foreign Affairs, *The British War Blue Book: Documents* (New York: Farrat & Rinehart) 59.

15 Wolfgang Abendroth, "Das Problem der innerparteilichen und innervebandlichen Demokratie in der Bundesrepublik", *Antagonistische Gesellschaft und politische Demokratie: Aufsätze zur politischen Soziologie*, Wolfgang Abendroth (Neuwied and Berlin: Hermann Luchterhand Verlag, 1967) 272; It is curious to note that Schmitt, in his 1923-book *Die geistesgeschichtliche Lage des heutigen Parlamentarismus* begins his genealogy with a lengthy citation by Pufendorf as well. Carl Schmitt, *Die geistesgeschichtliche Lage des heutigen Parlamentarismus* (Berlin, Duncker und Humblot, 1923) 20f.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

they were more outspoken in branding Weimar's rule of law as an elitist cosmopolitan ploy with a single purpose: to curb the authentic voice of *das Volk*. They accused Weimar of traducing the natural legal instincts of the German people. An incredibly crude spokesman of this view, the jurist Roland Freisler, lamented in the 1938 series *Schriften des Reichsverbandes Deutscher Verwaltungsakademien* that "our law has failed to meet the needs of the people. First, it was run over and subjugated by an ancient Roman-Greek-Byzantine legal order … and later, it was vandalised and infected by the egalitarian ideals of the French Revolution; which were, by their nature, foreign to our ways of being."[16]

The power dealings of the Versailles Treaty had made abundantly clear to the right that legal autonomy was a romantic delusion.[17] Versailles, they held, with its startlingly asymmetrical power balance had severely punctured the liberal theory of contracts and unmasked the petty Machiavellian power play behind the actions of the victorious powers. This view was also widely shared by leftist hubs throughout the Anglo-American world. Shortly after stepping down from his position at the British Treasury, the Cambridge economist John Maynard Keynes, who had participated at the Paris Peace Conference, fumed that the "insincerity" of the Treaty set it apart from all its predecessors in the history of "contractual justice of victors".[18]

Carl Schmitt was a realist at heart and open to both sets of arguments. But he resisted the move of the left to read domestic legal orders through the lens of economic power relations alone. On the other hand, Schmitt was also hesitant to subordinate the legal order entirely to the popular will, as the right demanded. "A large number of legal scholars have already determined that law is nothing but the expression of power", Schmitt penned in his Habilitation *Der Wert des Staates und die Bedeutung des Einzelnen* [The Value of the State and the Meaning of the Individual].[19] He acknowledged that power theory was seductive because it untangled some

16 Roland Freisler, *Nationalsozialistisches Recht und Rechtsdenken* (Berlin: Industrieverlag Spaeth & Linde, 1938) 23f; I owe this reference to Thomas Clausen, "Roland Freisler: An Intellectual Biography (1893–1945)" PhD. diss., (University of Cambridge, 2020).

17 Richard Evans, Coming of the Third Reich (New York: Penguin Books, 2005) 281–322.

18 John Maynard Keynes, *The Economic Consequences of the Peace* (New York: Harcourt, Brace and Howe, 1920) 63.

19 Carl Schmitt, *Der Wert des Staates und die Bedeutung des Einzelnen* (Tübingen: J.C. Mohr, 1914) 15.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA - https://www.nomos-elibrary.de/agb

tricky jurisprudential questions. "The big fish that have the proverbial right to devour the little fish and the ruling social class—whose members had long ago conquered the land's native population—who have the right to tailor laws to their specific needs, only possess this right because they have power."[20] Schmitt took this position to be the broad scholarly consensus amongst lawyers and non-lawyers in pre-Weimar Germany. "If we were to decide the relationship of law to power on a simple headcount of followers", notes Schmitt, "power theory would win easily".[21]

On 4 July 1948, roughly a year before he published *The Situation of European Jurisprudence*, Schmitt asked himself in pensive diary note: "Do I have the right to talk about power?".[22] He answered the question in the affirmative. Schmitt found that he had "experienced different forms of power…from close and afar".[23] In the aftermath of the Second World War, in which Germany's inflated nationalism brought about the catastrophic devastation of Europe, there was a tendency to vilify the concept of power as something altogether evil. "Power is not evil", Schmitt asserted; it was "just something alien; for the person who possesses it as well as for the person who is exposed to it."[24] There was a Divine quality to power, Schmitt contended. How could liberal democrats otherwise justify that the legitimacy of the legal order derived from the people? Schmitt reasoned that their assertion would always logically involve the reciprocal link of power (for instance the command of an officer) to powerlessness ("the people" against whom the order is directed but who, at the same time, legitimise the commander and the order democratically).[25]

Yet Schmitt remained unconvinced, feeling that proponents of raw power theory lacked a sophisticated conceptual understanding of "power". They showed little interest in distinguishing sovereign power from its more brutish relatives. "In such accounts, the power of the murderer over his victim and the power of the state over the murderer", Schmitt incisively dissected, "in essence, occupy the same conceptual category."[26] Schmitt mocked this lack of conceptual clarity and philosophical reasoning. "These people tell us", Schmitt continued, "that we can only tell apart the state's violence from the murderer's violence by their outer appearance. What dis-

20 Ibid., 15.
21 Ibid., 15.
22 Ibid., 157.
23 Ibid., 157.
24 Ibid., 157.
25 Ibid., 158.
26 Ibid., 16.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA - https://www.nomos-elibrary.de/agb

tinguishes these two forms of applied power, then, is how they are received by the masses, or by their severity and specific historical development."[27]

For Schmitt, legal theorists who endorsed power theory had shied away from the hard labour of conceptual thinking. Instead, Schmitt accused them, disparagingly, of having replaced conceptual thinking with a bucketload of random historical facts. For Schmitt, this approach to legal method required no substantive thought. One could not qualify them as academic arguments. 'Facts' could always be fed into any opinion. This shying away from conceptual work, for Schmitt, was something that power theorists shared with legal formalists. But they had more in common. Both viewpoints grounded laws in factual occurrences. Be it the fact of a particular sociological constellation of any given society, whose norms power theorists would deduce from its laws, or formalisms itching to set in stone a written code mythically born from the consciousness of a "just people" and a "just individual".[28] For Schmitt, such approaches revealed a conceptual weakness because he feared that scholars could pick facts at random to sustain any argument.

Many German thinkers shared Schmitt's reluctance to adopt raw power theory or legal formalism as convenient catchall solutions to explain away public law's intricate jurisprudential problems. The jurist-turned-sociologist Max Weber, one of Schmitt's teachers during his student years in Munich, broke down this problem to a straightforward equation: law = power + x. Weber defined power as "every possibility in a social relationship to enforce one's will, even against resistance, regardless of what the possibility is based on."[29] The x in Weber's equation was something to do with legitimacy and authority. Weber suspected that legitimacy could derive from a technical, administrative apparatus that was highly rational, for instance, the famed Prussian bureaucracy. For Weber, this explained why capitalism had first taken root in Europe and not elsewhere. In Europe, he argued, the legal system had grown more differentiated and abstract, which is to say, that the organisation of rules in society was relatively free from the direct influence of the Church or the political establishment. According to Weber, this process constitutioned a new form of rationality. Still, one could derive legitimacy through other means, too. For instance, one could endow a legal system with authority beyond rationality. In such

27 Ibid., 16.

28 Carl Schmitt, *Der Wert des Staates und die Bedeutung des Einzelnen* (Tübingen: J.C. Mohr, 1914) 18f.

29 Max Weber, *Grundriss der Sozialökonomik: III. Abteilung Wirtschaft und Gesellschaft* (Tübingen: Verlag von J.C.B. Mohr, 1922) 28.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

a scenario, it would take on the *Gestalt* of a more intimate relationship; say, the emotional affinity of the population with a charismatic leader in a dictatorship.[30]

Schmitt backed his assault on a purely formalist legal order with conceptual ammunition borrowed from Max Weber. Weber had argued that the Enlightenment had discredited value-rationality, which was prevalent in theological thought and had juxtaposed it against a new form of thinking he named "instrumental rationality". According to Weber, these two modalities of thought diverged in their assessment of value and reason. Value-rational thinking moved backwards from an ideal aim, for instance, a religious, ethical or aesthetic utopia, to specific measures that would help to move towards it slowly. The declared aim could, therefore, justify the means of this movement. Instrumentally rational decisions, on the other hand, derived their strength from recalibrating the means, which is to say that calculated expectations and conditions are turned into the sole arbiters to achieve any aim. Only the means could justify the declared aim.[31]

In a lengthy diary note, Schmitt approvingly cited Max Weber in the context of the structural transformation the legal order had undergone in the twentieth century. Weber was cautious of the dominance that instrumental-rational modes of thought enjoyed in modern societies, mainly when it came to arguments legitimising the legal order itself. Weber observed that "[c]onstituting the current legal order through instrumentally-rational forms of thought and framing it as a mere technical apparatus, devoid, as it were, of all meaningful sacredness, is the necessary fate and consequence of our current technological and economic developments."[32] Schmitt was in full agreement. In his typical self-assured manner, he scribbled next to Weber's quote: "I was the only person to publicly speak out against this mechanisation of the law – well before 1933!".[33]

But Schmitt disagreed with Weber fundamentally over their interpretation of the role of jurisprudence in the political sphere. Weber constructed jurisprudence mainly as an extension of his sociological reading of economics, whereas Schmitt, at least in his later stages, viewed jurisprudence

30 Max Weber, *Grundriss der Sozialökonomik: III. Abteilung Wirtschaft und Gesellschaft* (Tübingen: Verlag von J.C.B. Mohr, 1922) 93–99.

31 See: Max Weber, *Grundriss der Sozialökonomik: III. Abteilung Wirtschaft und Gesellschaft* (Tübingen: Verlag von J.C.B. Mohr, 1922) 13–45.

32 Max Weber as cited in Carl Schmitt, *Glossarium: Aufzeichnungen der Jahre 1947–1951*, ed. Eberhard von Medem (Berlin, Duncker & Humblot, 1991) 116.

33 Ibid.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

as the cradle of "occidental rationality"; a field that had the potential to restrain the state, technology, and the financial markets. Like Weber, Schmitt was fundamentally concerned with the course of modern European culture and civilisation. But while for Weber this was primarily a crisis triggered by modern capitalism, for Schmitt it was a crisis triggered by the modern state. Since in Schmitt's view, the contemporary capitalism of Western Europe aligned well with the intellectual currents of the liberal-bourgeois-capitalist age to escalate the crises of the modern state, Weber was correct in emphasising these aspects.

In contrast to Weber, Schmitt's focus in *The Situation of European Jurisprudence* was not on individual ethics but collective authority; not on a private initiative but a public institution of jurists; not on a formative spirit but a concrete form of organisation; not on economic correlations but political manifestations. Schmitt rejected Weber's march into the economic sphere and continued to think from the perspective of jurisprudence. He even proposed the field of jurisprudence as a restraining force against political excess. Only this explains Schmitt's scholarly endeavours to capture the state of exception, when the sovereign suspends the legal order, in a specific legal form.

II. From the Universal to the Particular and Back

Throughout his life, Schmitt was an ardent critique of positivism, both as a philosophical position and a legal doctrine. Much of his work is devoted to breaking what he considered positivism's misplaced universalist pretensions. One way of how Schmitt accomplished this was by reading positivism's emergence into a specific historical context. His main point of contention was the following: as a legal doctrine, positivism is very much rooted in the idea that laws derive from a transcendental source, despite its claims to the opposite. While in the case of natural law, this supernatural source derived from God, legal positivism promoted an ultimate recourse to rationality.

Consequently, both positivist and naturalist jurists could easily conceptualise the legal system as detached from any socio-economic or political contexts. Schmitt took issue with separating law from society. This abstraction, Schmitt predicted pessimistically, would fuel the belief that law was something universal. Soon enough, legal scholars began to regard positivism as something universal. They argued that it stood for a "pure science". Schmitt feared that these ideas of universality would revert to theological thinking that had dominated European jurisprudence for

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA - https://www.nomos-elibrary.de/agb

centuries. Claims for universality were chilly reminders for Schmitt that legal scholars had failed to secularise their concepts. This process of secularisation, Schmitt believed, was Europe's most decisive accomplishment. He credited secularism for taming warfare amongst European states and preventing a large-scale loss of life. Legal positivism's embrace of theological categories of universality, Schmitt feared, would undo this process. It could bring back wars of a much more gruesome amplitude. He also found that positivism fell short of enriching the legal conversation with cultural aspects of belonging. Mainly, legal positivism ignored religion and legal history.

After the turn towards positivism in the early twentieth century, the debating culture in the legal academy changed. The legal order widely came to be celebrated as the archetype of an exclusive instrumentally rational debating sphere. Some portrayed value-rationality altogether as a marker of backwardness. Ernst Cassirer, for instance, emphasised this point in *The Myth of the State*. In this book, Cassirer classified value-rational thinking as an outcome of "primaeval stupidity" and crowned instrumentally rational thought instead as the "peak-of-civilisation".[34] Cassirer had made an earlier attempt to capture the development of mythical thought in historicist terms. He traced it back to primitive totemic belief and slowly inched forward to highly developed enlightenment rationality.[35] In a letter to Hugo von Hofmannsthal and a subsequent article on linguistic sociology, the literary critic Walter Benjamin taunted Cassirer for what he saw as a desperate attempt to grasp mythical thought rationally. Cassirer's scholarly effort left Benjamin entirely "unconvinced".[36]

Like Benjamin's push-back from the humanities, Schmitt aimed to quash the positivist trend in the legal discipline. He did so by simply holding up a mirror. When examined closely, Schmitt argued, even the legality of the highly rational legislative state that legal positivists held so dear, was always based on something resembling value-rationality. For instance, the modernist belief that rationality could stand in as a metaphysical theory of a state's foundation, was, if pushed to its theoretical edge,

34 Ernst Cassirer, *Myth of the State* (New Haven: Yale University Press, 1946) 3f.

35 Ernst Cassirer, *Die Begriffsform im mythischen Denken* (Leipzig: B.G. Teubner, 1922).

36 Walter Benjamin, "Das Problem der Sprachsoziologie", in Walter Benjamin, *Gesammelte Schriften III* ed. Hella Tiedemann-Bartels (Frankfurt: Suhrkamp Verlag, 1972) 454.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

nothing more than a value judgement. Scientific rationality was thus just another intangible value.[37]

Schmitt further called into question positivism as a factual basis for a legal order. In his book *Staatsgefüge und Zusammenbruch des zweiten Reiches*, published in 1934, Schmitt traced the solidification of instrumentally-rational thinking in German jurisprudence historically.[38] Schmitt's criticism was fierce. For him, the Weimar constitution, which embodied both liberal and positivist trends, was just a "belated engagement" of a debauched bourgeoisie with an "already crumbling Prussian military state".[39] In other words, the Weimar constitution provided answers to the political and social questions of the time (parliamentary democracy and market capitalism respectively) that had not grown organically out of jurisprudence, but that had only crystallised as historical facts after the collapse of the Prussian state. This "posthumous victory" of liberal constitutionalism, Schmitt then concluded, was not a project for a sustainable future polity but rigidly "directed at the past". In Schmitt's resonant phrasing, it was "like the victory of a spectre over the shadow of its antagonist".[40]

According to Schmitt, employing the constitution as an apolitical core and hoping it would be able to bring people together as a nation was a project fated to lose steam. It even risked imploding with disastrous consequences. Schmitt thought such a construction of nationality had also diverged too far from the ethics and values of the Prussian military state. The Prussians, Schmitt marvelled, with their concept of honour, fatherland, and justice, could well justify their claim of political leadership and encourage national coherence. He found that the "dynastic feeling of evangelical Prussia" had for a while succeeded to stabilise a "national conservative power".[41] But Schmitt saw no such unifying potential in liberalism or other "philosophical social orders", merely the scaffolding for a trivial debating culture. Therefore, he denied liberal constitutionalism the ability to produce any sustainable political leadership. "The peak of liberal constitutionalism", Schmitt emphatically concluded, "is reached precisely when the will for political leadership is annihilated."[42]

---

37 See only Carl Schmitt, "Begriff des Politischen", *Archiv für Sozialwissenschaft und Sozialpolitik* 58, no. 1 (1927): 1–33.

38 Carl Schmitt, *Staatsgefüge und Zusammenbruch des zweiten Reiches* (Hamburg: Hanseatische Verlagsanstalt, 1934).

39 Ibid., 43.

40 Ibid., 43.

41 Carl Schmitt, "Donoso Cortés in Berlin (1849)", *Telos*, 2002 (155), 99.

42 Ibid., 49.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA - https://www.nomos-elibrary.de/agb

Following Weber's claim that rapid technological transformations and secularism had disenchanted the world, Schmitt feverishly searched for means by which the legal order might regain its former mature patina.[43] He hoped that such a re-enchantment might one day overcome the prevailing universalism that Enlightenment had created. Martin Heidegger thought along similar philosophical lines. On 3 November 1933, Heidegger addressed a group of German students at the University of Freiburg with the following battle-cry: "The Führer alone is the present and the future German reality and its law."[44] Both Schmitt and Heidegger promoted National Socialist ideology, by reifying law (and meaning) in the figure of a singular leader.[45] Yet as Reinhard Mehring has demonstrated, Schmitt's engagement with Nazism soured well before the end of the Second World War.[46]

In the later years of the Second World War, Schmitt focused more on a shared European legal legacy. He hoped that European jurisprudence would endure beyond the imminent breakdown of the Nazi regime. Schmitt mapped the European legal heritage from Roman Law, which he presented as an antidote to the modernist collapse into universalism. Roman Law for Schmitt undergirded not only the legal orders of Italy, France, Germany, and Portugal but also stretched much further to the East.

Schmitt left his "European jurisprudence" untied to any specific political form; instead, he argued that it could accommodate different state orders, from fascism to liberal constitutionalism. To make this point, Schmitt emphasised that European nations shared more than just their territorial proximity. They shared common values derived from the "rational" interpretive method through which they made sense of Roman texts. Their

---

43 Schmitt was enrolled at the University of Munich and it is likely that he attended Weber's lectures on "Science as a Vocation", during which Weber first developed his concept of disenchantment in the winter of 1918/1919. Max Weber, "Wissenschaft als Beruf", in *Gesammelte Aufsätze zur Wissenschaftslehre* (Tübingen: J.C.B. Mohr, 1922) 524–555.

44 Richard Wolin, *The Heidegger Controversy: A Critical Reader* (Cambridge, MA: The MIT Press, 1998) 47.

45 Carl Schmitt, "Die deutsche Rechtswissenschaft im Kampf gegen den jüdischen Geist. Schlusswort auf der Tagung der Reichsgruppe Hochschullehrer des NSRB vom 3. und 4. Oktober 1936", *Deutsche Juristenzeitung*, vol. 41, issue 20 (1936) 1193–1199.

46 Reinhard Mehring, "Carl Schmitts Schrift ‚Die Lage der europäischen Rechtswissenschaft'", in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* Band 77 (2017), 853–876.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

shared heritage allowed European states to enter into relatively peaceful relations with each other. They owed this peace to the stabilising balance of their shared legal orders, which Schmitt dubbed *jus publicum Europaeum*. For Schmitt, this legal order lasted from the creation of modern nation states to the beginning of the First World War.[47] Two conceptual shifts mark the era of the *jus publicum Europaeum* for Schmitt: the first is the "overcoming of civil war" and the second the "marginalisation of colonial wars".[48]

Yet the values Schmitt employed for constructing his *jus publicum Europaeum* were not meant to carry a political union. Roman law did not undermine or challenge national sovereignty. In Schmitt's telling, the national particularities of European states ran far too deep for such a project to work. Schmitt writes that the separate sovereign states "will prove to be better than a Babylonian unity."[49] In his theorisation, Schmitt was building on his concept of space; in this case, Europe as a cultural space. Nations that belonged to a shared cultural space could more readily come together in moments of crisis, which allowed them to control corrupting influences from beyond their borders. If they harmonised their values, European states could effortlessly fight back foreign influences that otherwise may threaten their normative essence.

When Schmitt declared that European jurisprudence had become "the last asylum of legal consciousness", he did so to pit the remaining European legal system against the rapidly expanding Anglo-American order.[50] Schmitt suspected that the new global order would have to implode at some point in its expansionist zeal to swallow the earth entirely. A forceful exploration of this argument can be found in one of Schmitt's lesser-known articles, written for the journal *Marine-Rundschau* towards the end of the Second World War. In this article, Schmitt elaborates on a vision of Europe that would pierce right through the American hegemonic world

---

47 On the development of *ius publicum Europaeum*, see Armin von Bogdandy and Stephan Hinghofer-Szalkay, "Das etwas unheimliche Ius Publicum Europaeum: Begriffsgeschichtliche Analysen im Spannungsfeld von europäischem Rechtsraum, droit public de l'Europe und Carl Schmitt", in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 73 (2013) 209–248.

48 "Was war der Kern des zwischenstaatlichen jus publicum Europaeum? Die Überwindung des Bürgerkrieges und die Ausgrenzung des Kolonialkrieges! " [What was the core of the interstate jus publicum europaeum? The overcoming of civil war and the marginalisation of colonial war!] in Carl Schmitt, *Glossarium*, 250.

49 Carl Schmitt, *Die Lage der Europäischen Rechtswissenschaft* (Tübingen: Internationaler Universitätsverlag, 1950) 14.

50 Carl Schmitt, *Die Lage der Europäischen Rechtswissenschaft*, 29.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

order. This vision, for Schmitt, required the "freedom-loving people" of Europe to "protect their historical, economic, and spiritual substance."[51] Only this would enable Europeans to weather American dominance stoically.

Schmitt's vision had severe practical repercussions. Though Schmitt refrains from overt anti-Semitism in *The Situation of European Jurisprudence*, the attacks against the indigenous European jurisprudence that he identifies came mostly from Jewish intellectuals. In a sinister speech that Schmitt gave to a group of Nazi jurists in 1936, he openly pointed his finger towards "Jewish jurists" for promoting a scientifically narrow and purely positivist conception of the law.[52] Somewhat obscurely for readers today, Schmitt viewed this as a Jewish ploy to distract from their historical guilt for the crucifixion of Jesus. With the scientific method, Jewish scholars could also game the legal playing field to their advantage. As a first step, they could frame their worldview as scientific, merit-based, and therefore as altogether 'just'.[53] Through Savigny, in particular, Schmitt saw himself vindicated.

III. Savigny, Representation, and Political Form

What do we need to know about Friedrich Carl von Savigny to make sense of Schmitt's turn to construct him as the saviour for European jurisprudence?[54] Law to Savigny was the labour of many generations and could thus not be at the whim of each passing generation. The legal order was the outcome of a nation's legal instincts carefully formed over long swathes of time. Savigny favoured historical continuity over breaks and ruptures in time. According to Schmitt, Savigny swooped into the methodological debates of the nineteenth century by advancing against

51 Carl Schmitt, "Die letzte große Linie", in *Marine-Rundschau* 8 (1943), fn 271 on page 527.

52 Carl Schmitt, "Die deutsche Rechtswissenschaft im Kampf gegen den jüdischen Geist. Schlusswort auf der Tagung der Reichsgruppe Hochschullehrer des NSRB vom 3. und 4. Oktober 1936", in *Deutsche Juristenzeitung*, vol. 41, issue 20 (1936) 1193–1199.

53 Carl Schmitt, "Die deutsche Rechtswissenschaft im Kampf gegen den jüdischen Geist. Schlusswort auf der Tagung der Reichsgruppe Hochschullehrer des NSRB vom 3. und 4. Oktober 1936", in *Deutsche Juristenzeitung*, vol. 41, issue 20 (1936) 1193–1199.

54 On Savigny's method see Joachim Rückert, "Friedrich Carl von Savigny, the Legal Method, and the Modernity of Law", in *Juridica International* XI (2006) 55–67.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

natural law the study of historical sources. Schmitt was not alone in his admiration of Savigny. The legal scholar Ernst Freud wrote an essay in the *Political Science Quarterly* of 1890, applauding Savigny for having turned a "dry and formal system of learning", into "a liberal science of infinite possibilities".[55] In Schmitt's words, Savigny had preserved and further developed the heritage of "half a millennium of European jurisprudence".[56]

European jurisprudence had fought bitterly against the dictates of the Church to establish itself as an independent scientific discipline.[57] Savigny cautioned that this autonomy had come under a new threat. Formalism had found its way into the legal academy disguised in 'naturalist' garbs. Savigny went further. Apart from shielding European jurisprudence from natural law and tending the wounds caused by scientific positivism with the balm of Roman historical sources, Savigny prophesied a ballooning of legislation. To him, this was the worrying next step of unhinged technological developments. By foretelling this historical process and by consequentially denying his age the ability to legislate, Savigny pressed for a more assertive role of jurists in determining norms. Jurists should become central players in interpreting rules and thus in producing laws.[58]

Schmitt viewed Savigny as the *katechon* of his age, calling out the bluff of Enlightenment's promise of "progress" and fiercely defending the independence and relevance of European law faculties. Schmitt is therefore quick to assert that Savigny's treatise was, above all, "the first document of the first step away from legal positivism".[59]

To make his argument, Schmitt somewhat overstated Savigny's impact. Savigny's concern was primarily to purge the exuberant Hegelianism storming into German legal faculties through the figure of Eduard Gans, a colleague of his at the Friedrich-Wilhelm-Universität Berlin. Gans regarded the study of the past as altogether crippling for youthful nations, which should instead focus on cultivating their distinct national spirit. He mourned every discovery of Roman manuscripts, even as his colleagues celebrated them. To him, such findings only translated into more useless hours spent in stuffy libraries. Some of Gans's criticism stuck. Gans was most persuasive when he emphasised the rights of the living over the rights

55 Ernst Freund, "German Historical Jurisprudence", in *Political Science Quarterly*, Vol 5 No. 4 (1890), 473.
56 Carl Schmitt, *Die Lage der Europäischen Rechtwissenschaft*, 29.
57 Carl Schmitt, *Die Lage der Europäischen Rechtwissenschaft*, 29.
58 Carl Friedrich von Savigny, *Vom Beruf unserer Zeit für die Gesetzgebung und Rechtswissenschaft* (Tübingen: J.C.B. Mohr, 1892) 3–54.
59 Carl Schmitt, *Die Lage der Europäischen Rechtwissenschaft*, 21.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

of the dead and the danger that any legal order could fall into paralysis when concerning itself overwhelmingly with the past. Gans could not keep up his energetic iconoclasm throughout his lifetime. In the third volume of *Das Erbrecht in weltgeschichtlicher Stellung* [Law of Succession in World History], the first two of which scathed against Savigny's historical school, Gans penitently wrote that "it feels like I am returning to my young love but as an old man…and the youthful force out of which the first editions were born has given way to a dry soberness, that does not even remotely resemble the spirit with which I began".[60]

Concerning the content of representation, Schmitt and Savigny were on the same page. They both believed that Canon Law inherited Roman Law's conceptual core. Both identified this core as occidental rationality. For both men, finding the proper administrative framework was critical to making use of this "rationality". In his early work *Roman Catholicism and Political Form*, Schmitt argued that the Catholic Church's administration had performed this task well. Closer to home, the office of the Prussian *Staatsraat* held a specific charm for Schmitt and Savigny for this very reason. Schmitt regarded the Staatsraat as the inheritor of occidental rationality, and the beacon to radiate "European civilisation" into all spheres of society. In Schmitt's own words: "form is the essence of law. Is form not the essence of matter? It is the law itself – its visibility, its externality, its publicity."[61] Form and representation, Schmitt and Savigny agreed, could bring about new institutions to reimagine old traditions and remodel them into a new project.

This insight goes a long way to explain Savigny's scholarly reception in his time. Two trailblazing academic heavyweights of late-nineteenth-century German legal scholarship, Carl Friedrich von Gerber and Paul Laband, both devout positivists and bitterly opposed to Roman law, held Carl Friedrich von Savigny in high regard. During Laband's inaugural lecture for the chancellorship of the *Kaiser-Wilhelms-Universität Straßburg*, held on 1 May 1880, Laband blamed Roman Law for arresting the development of Germany's unification. Laband scoffed that without Roman Law, Germany would have acquired unity a long time ago. For Laband, it was the "international and cosmopolitan scholarship" coming out of England and France that had awoken Germany from her dogmatic slumber. He credit-

60 Eduard Gans, *Das Erbrecht in weltgeschichtlicher Entwicklung: Eine Abhandlung der Universalgeschichte Dritter Band* (Stuttgart and Tübingen: J.G. Gotta'schen Buchhandlung, 1829) VI.

61 Carl Schmitt, *Glossarium: Aufzeichnungen der Jahre 1947–1951*, ed. Eberhard von Medem (Berlin, Duncker & Humblot, 1991) 235.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

ed France in particular for having birthed the discipline of constitutional law. And France had done so, Laband concluded, by consciously moving away from the Roman tradition.[62]

Carl Friedrich von Gerber agreed with Laband's basic premise that Roman Law had dominated German jurisprudence for too long. During an otherwise dry lecture at Tübingen University in late November 1851, Gerber berated Roman Law for being an "alien import" that never quite suited the "legal sentiments of the German people".[63] As opposed to "elevating the life of the mind", Roman Law had "destroyed it".[64] Gerber also brushed aside centuries of scholarship on Roman Law by declaring such efforts "small-minded sophistry".[65]

Given that he had just been promoted to the chancellorship of Tübingen University, one would have suspected that Gerber may have had an interest in toning down his tirade against Roman Law; if for nothing else than to keep the peace within his faculty staff. But that he could position himself so visibly against Roman Law reveals that the learned study of digests was quickly falling out of fashion and widely regarded as a stumbling block in the progressive march of the scientific revolution. However, and somewhat surprisingly, Gerber remained remarkably civil and generous towards Savigny. Gerber saw a "specific German individuality" in Savigny. As he concluded his speech, Gerber emphasised that Savigny's exercise to conquer Roman Law was not so much a reinterpretation of Roman Law, but the production of an entirely novel body of German Law.[66]

There is plenty of space to argue that Roman Law for Schmitt and Savigny translated to the imperative 'history matters'. For both men, historical artefacts needed thorough interpretation to be put to use in the current jurisprudential paradigms. For that matter, the opinions of the jurists making the interpretations far outweigh the sources that they were interpreting. Thus for both Savigny and Schmitt, the importance of Roman Law was not to declare it the "source of law", but establish "jurisprudence itself [as] the source of law."[67] For Schmitt, Roman Law was just the

62 Paul Laband, *Rede über die Bedeutung des römischen Rechts für das deutsche Staatsrecht* (Strassburg: Universitäts Buchdruckerei von J.H.Ed. Heinz, 1880) 32.

63 Gerber uses *Volksindividualität* (national individuality), Friedrich Carl Gerber, *Zur Charakteristik der deutschen Rechtswissenschaft* (Tübingen: Laupp & Siebeck, 1851) 9.

64 Ibid., 13.

65 Ibid., 16.

66 Ibid., 21f.

67 Carl Schmitt, *Die Lage der europäischen Rechtswissenschaft*, 23.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

"fabric" that jurists could "shape and refine".[68] It seems, therefore, that Schmitt and Savigny, like many conservative thinkers, sought to overcome the philosophical chaos of the modern age by way of re-subordinating the "real world" (or, in more philosophical terms, the current temporal-political order) to an older order. He derived this old order from a pre-modern golden age. In so doing, Schmitt used much creative license. There was also nothing new in this conceptual move. After all, the reinterpretation of old manuscripts tends to allow for plenty of interpretative freedom.

Hannah Arendt was clear-eyed about the creative license inherent in such acts of reinterpretation. During a speech at the American Political Science Association in the mid-50s, Arendt presciently observed that historiography amongst German thinkers altered historical reality similar to abstract philosophical approaches. Conservative reinterpretation of history, for Arendt, "is no less startlingly new, is no less 'deforming,' and does no less 'violence' to reality if judged by Alexandrine standards than is modern art's view of nature."[69] Schmitt agreed with this view. He believed that the victory of "the eternal" over "the temporal" was a victory of arguing for ends over means in the Weberian sense. When such a gesture was further cocktailed with a healthy dose of Hegelian historicism, it offered an ideal recipe to shake up any prevailing system of thought, with the legal order being no exception here. For Schmitt, this creative act of reinterpretation was also a convenient way to keep longstanding doctrines fresh.[70]

It is the same drive that moved Schmitt to side with the *Freirechtler*, an intellectual movement that sought to give more leeway to jurists by encouraging the recourse to undefined legal norms, like good faith and fairness (*Treu und Glauben*). *Freirechtler* argued for greater conceptual liberty of jurists and endorsed lawyers to adopt public sentiments as a source of law. They posited themselves against what they derogatorily labelled as the *Begriffsjurisprudenz* [jurisprudence of concepts] of legal positivism. Amongst German jurists, the term *Begriffsjurisprudenz* is heavily contested. It first emerged in an 1884 satirical book called *Scherz und Ernst in der Jurisprudenz* [Jest and Seriousness in Jurisprudence], written by Rudolf von Jhering. Here the protagonist travels through a "juristic concept heaven" to discover, amongst other things, an auditorium filled with exalted,

68 Ibid.

69 Hannah Arendt, "Concern with Politics in Recent European Philosophical Thought", in *Essays in Understanding: Formation, Exile, Totalitarianism* ed. Jerome Kohn (New York: Schocken Books, 1994) 434.

70 See Paul Kahn, *Putting Liberalism in Its Place* (Princeton: Princeton University Press, 2008).

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

pure concepts. He finds them "devoid of any meaningful relationship to real life".[71] Many legal positivists rejected this critique as attacking a straw-man. They argued that the purity-obsessed view of concepts was just a perverted branch of legal positivism and preferred to label it 'technical *Begriffsjurisprudenz*'.[72] There is, however, some agreement amongst legal positivist to use logical methods to bring legal concepts into a consistent, gapless, and systematic whole.

Schmitt showed his disdain for *Begriffsjurisprudenz* during a lengthy scholarly discussion on a curious legal case. On 8 April 1903, the highest German court, the *Reichsgericht*, decided over the validity of a falsified cheque.[73] Someone had added a single digit to increase the cash-out sum. The local court in Freiberg, where the case was heard first, declared the cheque valid for the original sum intended. At the appeal before the regional court of Dresden, a bench of three judges ruled that the cheque was altogether invalid. In the final appeal, the Reichsgericht ruled that the cheque was valid again. The court reasoned that there was no direct legal provision that fitted the case. Only Art. 75 of the *Wechselordnung* came close, but it only encompassed fake signatures on cheques, not altering the sum.[74] After consulting several expert witnesses, the bench reasoned anyone with a pen could easily cross out the falsely added digit. Therefore the cheque continued to be valid. In the court's language, the "integrity of the cheque" was still intact.[75]

For Schmitt, the lengthy trial and the court's logic were strong indications of how arbitrary court decision had become by relying on *Begriffsjurisprudenz*. Even the best hermeneutical extraction of written laws was prone to a certain arbitrariness. The lower courts had, with pretty much the same arguments, declared the cheque valid and invalid. Schmitt advised that lawyers and judges should properly understand such examples of arbitrariness. Instead, he scorned, jurists tried to hide such cases behind

71 See Rudolf von Jhering, *Scherz und Ernst in der Jurisprudenz: Eine Weihnachtsgabe für das juristische Publikum* (Leipzig: Verlag von Breitkopf und Härtel, 1884), 277–296.

72 Joachim Rückert, *Abschiede vom Unrecht: Zur Rechtsgeschichte nach 1945* (Tübingen: Mohr Siebeck, 2015), 320–278.

73 *Entscheidungen des Reichsgerichts: Entscheidungen in Zivilsachen* (Leipzig: Beit & Comp., 1903), 386–389.

74 See S. Borchard, *Die Allgemeine Deutsche Wechselordnung und die Ergänzung und Erläuterungen derselben betreffende Novelle* (Berlin: Verlag der Königlichen Geheimen Ober-Hofbuchdruckerei, 1865) 261–262.

75 *Entscheidungen des Reichsgerichts: Entscheidungen in Zivilsachen* (Leipzig: Beit & Comp., 1903) 388.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

the smokescreen of legal methodology and legal theory. Schmitt could also not restrain himself from offering his opinion on the cheque-case. The best path the court could have taken, Schmitt opined, was to explicitly declare that what made the cheque valid was not the correct interpretation of a written legal norm but merely the fact that the highest court had ruled in this specific way. Now other judges could simply follow precedent.

IV. Roman Law and Occidental Rationality

Before piecing together what occidental rationality signified for Schmitt, I will outline Schmitt's relationship with Roman Law. Like all students of German jurisprudence in the early twentieth century, Carl Schmitt studied Roman Law as a mandatory element to qualify as a lawyer. Without it, he could not have been admitted to the *Staatsexamen*, the bar examination in Germany. Schmitt took his Roman Law classes around the same time that he attended Max Weber's lectures in Munich. Connecting one to the other, Schmitt reframed Weber's distrust in Enlightenment rationality as one aspect of a more substantive paradigm shift that concluded with the supremacy of economic considerations as determining factors for all political decisions. Schmitt, therefore, saw little difference between Lenin and a free-market entrepreneur. For him, both ventured to bring about an "electrified earth."[76] Against these dominant worldviews that bickered over the "correct method of electrification", Schmitt proposed Roman Law.[77] He claimed, at the beginning of *Römischer Katholizismus und Politische Form* written during the Weimar years, that "the mythical power of Rome" was "stronger than any economic calculations."[78]

What Schmitt meant by this was that Roman Law and its encompassing rationality was substantively different from the interest-driven Enlightenment rationality that Weber explored. As one could see in Canonical Law, for Schmitt the legitimate successor to Roman Law's "occidental rationality", its concerns went well beyond economic thinking. "The rationalism of the Roman Church morally encompasses the psychological and sociological nature of man and, unlike industry and technology, is not concerned with domination and exploitation of matter."[79] Making all rational mo-

76 Carl Schmitt, *Roman Catholicism and Political Form* (London: Greenwood Press, 1996) 13.
77 Ibid.
78 Ibid., 3.
79 Ibid., 13.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

tives subservient to economics, Schmitt writes in another Weimar-era essay called *Die Politische Theory des Mythos* [The Political Theory of Myth], was a great mistake. Intellectuals of the nineteenth century could have prevented from falling into the trap of "scientific-technical rationalism", Schmitt argued, by sticking to broader rationality encompassing all spheres of life.[80] One political possibility that came with an all-spheres of life encompassing "occidental rationality" was the creation of political myths. Schmitt held these myths as essential to keep a political process humane. Following instrumental-rationality would, on the other hand, lead to "rationality-driven mechanical absence of myths."[81] This absence would only increase productivity, Schmitt feared, but it would not lead to vital scientific and political discoveries.

Schmitt saw the high point of "occidental rationality" materialised in the historical turn from the sixteenth to the seventeenth century. The turn from "theology to metaphysics," as he put it in his 1929 essay called *Das Zeitalter der Neutralisierungen und Entpolitisierungen* [The Age of Neutralisations and De-Politicisations].[82] In this "heroic time", Schmitt wrote, systematic-scientific thinking peaked with "Suarez, Bacon, Galileo, Kepler, Descartes, Grotius, Hobbes, Spinoza, Pascal, Leibniz, and Newton."[83] What these thinkers had in common was a characteristically "mythological" way of approaching the world. Their "cosmic-rational superstition", like their belief in astrology, ushered in the most vital shifts in scientific thinking.[84] Schmitt chastised Enlightenment thought for bringing this historical processes of discovery and innovation to a shrieking halt through its "humanism and rationalism."[85] What had happened, Schmitt mourned, was that thinkers like Immanuel Kant had replaced myth-enabling concepts like "dogma, metaphysics and ontologism" with stale pseudo-scientific ones like "critique, pure, and reason."[86]

For Schmitt, Roman Law was a carrier which safely transported occidental rationality to the Catholic Church, from where it disseminated into modern European jurisprudence. Therefore, Schmitt, similar to legal positivist of the nineteenth century, was not keen to lobby for an outright re-

80 Carl Schmitt, *Positionen und Begriffe: Im Kampf mit Weimar – Genf – Versailles 1923–1939* (Berlin: Duncker&Humblot, 2014[1940]) 18.
81 Ibid., 18.
82 Ibid., 140.
83 Ibid., 140.
84 See Carl Schmitt, *Verfassungsrechtliche Aufsätze aus den Jahren 1924–1954*, 495.
85 Ibid., 141.
86 Ibid., 141.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

turn of Roman Law in any substantive form. When looking at the broader intellectual history of the concept of Roman Law, Schmitt had once even labelled it as a "foreign raid," that had invaded Germanic jurisprudence in the late middle ages.[87]

During Nazi rule, Schmitt continued to write unfavorably about Roman Law. In *Die Lage der Deutschen Rechtswissenschaft* [The Historical Situation of German Jurisprudence], an essay he published in 1936, Schmitt criticised Savigny for having centred too much on civic *Bildung*. This insistence on education led Savigny "into the arms of Roman historiography." In so doing, Schmitt wrote at the time, Savigny had only won a sham victory over natural law and legal positivism. But the Historical School of Jurisprudence had utterly failed, according to Schmitt, to develop a "living customary law."[88]

In 1942, in the situation of European jurisprudence, when Schmitt identified occidental rationality as the substance that jurists should distil from Roman Law. To infuse life into the archaic scaffolding, according to Schmitt, jurists had to grasp the long history of occidental rationality. Already in his pre-Nazi works, Schmitt had outlined how European nation-states had inherited occidental rationality from Roman Law, filtered through the Canonical Law of the Catholic Church. In the sixteenth and seventeenth century, this occidental rationality had ushered in a period of lasting peace when secularised states came together under a new transnational European umbrella. For Schmitt, this European international law had ushered in "stability and duration", the two vital factors of occidental rationality.[89]

With the splintering of legitimacy from legality, as Schmitt observed in his book with the same title in 1932, jurists of the nineteenth century had offered blind submission to legality and forgotten that "legality was originally a substantive part of occidental rationality."[90] For Schmitt, no order could sprout out of this new technocratic understanding of legality, because jurists could no longer provide intellectual impulses to the field. They were entirely limited to a mere technocratic application of laws.[91] In this scenario, Schmitt warned, jurisprudence would lose its academic character which had historically defined Europe's concrete order and was

87 Carl Schmitt, "Aufgabe und Notwendigkeit des Deutschen Rechtsstands", 181.
88 Carl Schmitt, "Die geschichtliche Lage der deutschen Rechtswissenschaft", in *Deutsche Juristen-Zeitung* 41, no. 1 (1936).
89 Carl Schmitt, *Die Lage der Europäischen Rechtswissenschaft*, 24.
90 Carl Schmitt, *Verfassungsrechtliche Aufsätze aus den Jahren 1924–1954*, 346.
91 Carl Schmitt, *Die Lage der Europäischen Rechtswissenschaft*, 6.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

the repository of "occidental rationality".[92] If legal positivism's reading of legality were to become mainstream, Schmitt predicted, Germany was fated to run into orderless legislative chaos.

V. Conclusion

Schmitt's audience for his lectures on the situation of European jurisprudence in the 1940s was brimming with foreign political leaders close to the Third Reich. His address in Bucharest, for instance, was attended by the ruthless anti-Semite Mihai Antonescu, who at the time was acting as Deputy Prime Minister, Foreign Minister, and Propaganda Minister of Romania. Schmitt seemed to have had a great time meeting him, as can be gleaned from the dedication scribbled in a book that Antonescu presumably handed Schmitt after the lecture: "Prof. Carl Schmitt, in memory of our meeting, which I will never forget 18th February 1943, Bucharest". That there was proximity in their way of thinking about the past is visible from another dedication that Antonesco wrote. "Prof. Carl Schmitt as proof of a heartfelt admiration for the man who understands the centuries."[93] Despite Germany's looming defeat of the Second World War, which enticed Schmitt to distance himself from the Nazi regime, his reasons for this departure can be explained partly through his broader legal and political theory. Regarding Roman Law, Schmitt was against "a program of excavations". His was not an instruction manual to dig out and ponder over stacks of rotting manuscripts.[94]

Instead, Schmitt aimed to give jurists the confidence that their discipline could withstand adversary political regimes as well as methodological attacks that seek to circumscribe its influence on setting norms. To accomplish this task, Schmitt took the first step himself. In his post-war work *Der Nomos der Erde: Im Völkerrecht des Just Publicum Europaeum* [Nomos of the Earth: In the International Law of Jus Publicum], Schmitt explored how jurists could normatively justify the taking, division and exploitation of land in the post-war era.[95] He urged other jurists to continue thinking

92 Carl Schmitt, *Die Lage der Europäischen Rechtswissenschaft*, 29.
93 Mihai A. Antonescu, *Le fondement de la société des nations et la crise de cet organisme*, LAV NRW RW 265 Nr. 23058; Mihai A. Antonescu, La Rome antique et l'organisation international LAV NRW RW 265 Nr. 23059.
94 Carl Schmitt, *Die Lage der Europäischen Rechtswissenschaft*, 32.
95 Carl Schmitt, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum* (Berlin: Duncker & Humblot, 1950).

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

along such broader lines of structuring global order infused with "occidental rationality". While he may not have done this primarily to whitewash his Nazi past, Schmitt's proximity to the Nazi regime made him the worst possible proponent of this view.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA - https://www.nomos-elibrary.de/agb

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA - https://www.nomos-elibrary.de/agb

The Current Situation of European Jurisprudence in the Light of Carl Schmitt's Homonymous Text

Four critical topics in a misleading but insightful perspective

Prof. Dr. Armin von Bogdandy, Director at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg[*]

Abstract: The magical attraction of Carl Schmitt's texts likewise characterizes his piece *The Situation of European jurisprudence*. Probably no other text on this subject has enjoyed a comparable reception. The present article harnesses Schmitt's misleading but insightful perspective in order to discuss four critical topics: the very function and scope of European jurisprudence; the specific form of reason that it represents; its autonomy and methods; and, finally, the question of German hegemony in the European legal space.
Key words: Carl Schmitt, theory of jurisprudence, jurisprudential autonomy, jurisprudential reason, European legal scholarship, German hegemony

I. Programme and key statements

The magical attraction of Schmitt's texts is also inherent in his piece *The Situation of European jurisprudence (Die Lage der europäischen Rechtswissenschaft)*.[1] Probably no other text on this subject enjoys a comparable reception. Even 70 years after its publication, many gratefully take it up to inform, orient and position themselves.[2] In fact, it has a lot to offer: it

---

* Many thanks to Reinhard Mehring, Joachim Rückert, Martin Sattler, Eberhard Schmidt-Aßmann, Klaus Tanner, Georg Zenkert as well as the *Dienstagsrunde* for their valuable critique. Translated by Eva Neumann.

1 For an analysis of this attraction: Jannis Lennartz, *Juristische Granatsplitter* (Mohr Siebeck, Tübingen, 2018).

2 Cf. only Mauro Barberis, *Europa del diritto. Sull'identità giuridica europea* (il Mulino, Bologna, 2008) 15ff, 25: "rarely have the characteristics of European jurisprudential culture (…) been so clearly marked"; further Aldo Sandulli, *Il ruolo del diritto in Europa. L'integrazione europea dalla prospettiva del diritto amministrativo* (Franco-Angeli, Milano, 2018) 25; Agostino Carrino, "Europa und das Recht. Kritische

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

breathes the timeless topicality of a classic, conveys a low-threshold as well as a spectacular educational experience, suggests a downright world-historical self-affirmation of the Continental European mainstream, and all this in a supposedly safe distance from Schmitt's authoritarian and hegemonic ugliness.

With bold statements, memorable analyses, references rich in associations and masterly formulations, Schmitt once again succeeds in uncovering immensely productive, very Schmittian sightlines, which give jurisprudential insight even to those who reject his premises, his approach, his results and not least his ethos.[3] One can recognise Schmitt's genius by the fact that one is tempted to say: Like Savigny's *Vocation of our Age* for Schmitt's *The Situation of European Jurisprudence*, Schmitt's *The Situation of European Jurisprudence*[4] is topical for our time. Grasping the present by means of a generous interpretation of classical texts corresponds to a common approach in the humanities.

Based on Schmitt's text, four current topics are discussed. First: Why is the topic of *European jurisprudence* of interest at all (II.)? It is easy to suspect Europe-enthusiastic naivety or propaganda in the wake of transnational political or economic elites. Nothing is further from Schmitt's point. Instead, his writing recommends to take distance in order to bring to bear juridical reason against the rationalities of such elites. Autonomy is the keyword. This position still inspires today, as the example of Aldo Sandulli's take on financial markets will show. In the European legal space and particular against Brussels', Luxembourg's and Strasbourg's law making machines, national jurisprudence can no longer bring juridical reason into effect in isolation. Legal scholars of the European countries, unite!

Anmerkungen zu Carl Schmitts 'Die Lage der europäischen Rechtswissenschaft'" in Haller and others (eds), *Staat und Recht. FS für Günther Winkler* (Springer, Wien, 1997) 161ff; William E Scheuerman, "Motorized Legislation? Statutes in an Age of Speed" Archiv für Rechts- und Sozialphilosophie 88 (2002), 379ff; Translations listed in: Alain de Benoist, *Carl Schmitt* (Ares, Graz, 2010) 59ff.

3 Cf. only Reinhard Mehring, *Carl Schmitt. Aufstieg und Fall* (C.H. Beck, Munich, 2009) especially 200ff; Jürgen Habermas, *Der gespaltene Westen* (Suhrkamp, Berlin, 2004) 133ff, 187ff; Martti Koskenniemi, "International Law as Political Theology: How to Read Nomos der Erde?" Constellations 11 (2004), 492, 494; Robert Howse, "Schmitt, Schmitteanism and contemporary International Legal Theory", in Anne Orford and Florian Hoffmann (eds), *The Oxford Handbook of the Theory of International Law* (2016) 212 ff.

4 Carl Schmitt, *Die Lage der europäischen Rechtswissenschaft* (Internationaler Universitäts-Verlag, Tübingen, 1950) 21.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA - https://www.nomos-elibrary.de/agb

The second theme (III.) revolves around the question of how to understand *European jurisprudence*. Which disciplines, questions and approaches belong to this science and on what basis? Schmitt's understanding has many problems, but its holistic approach identifies a way in which today's *jurisprudence in Europe* can constitute itself as *European jurisprudence:* through the inclusion of national law. The determination of European jurisprudence also includes the question of identity-creating roots: Roman law or liberal constitutionalism. This leads to Schmitt's *Jus Publicum Europaeum*, the most influential conceptual innovation of the text. Its katechontic character is experiencing a remarkable renaissance in the current European jurisprudence, as will again be shown with Sanulli's take on financial markets.

The third part (IV.) explores Schmitt's *asylum*, i.e. the autonomy of European jurisprudence. Schmitt advocates an idea of autonomy that is deeply committed to the German jurisprudence of the 19th century, and much despised today. Here the approach will be defended as *doctrinal constructivism*. But even beyond doctrine, Schmitt makes a strong claim for autonomy in theoretical and even interdisciplinary jurisprudence.

The fourth point relates to the issue of German hegemony (V.). Schmitt's European jurisprudence rests on German jurisprudence and postulates it as the centre. This presumption is somewhat hidden in the text, perhaps because an idea of German hegemony had to appear far-fetched in 1950. Today, by contrast, many authors diagnose German hegemony in Europe, and quite a few even propagate it as necessary and desirable. A decreasing influence of British jurisprudence due to the Brexit could encourage a German jurisprudential hegemony. Against this ominous background, some features of the European legal research space are explored.

II. Autonomy as a core concern

1. The indispensability of jurisprudential reason

Today, the construction of a European jurisprudence is a political assignment; it is less science-driven but above all politics-driven.[5] The pivotal

5 This ties in with Armin von Bogdandy, "The past and promise of doctrinal constructivism: A strategy for responding to the challenges facing constitutional scholarship in Europe", in International Journal of Constitutional Law, 7 (2009), 364ff and Armin von Bogdandy, "Deutsche Rechtswissenschaft im europäischen

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA - https://www.nomos-elibrary.de/agb

point is creating a European research space as laid down in Article 179 (1) TFEU.[6] This Europeanisation of the Member States' research systems enjoys high political status due to the European Council decisions of Lisbon (2000) and Barcelona (2002). The core instruments are the European Research Council (ERC)[7] and its associated Executive Agency (ERCEA).[8] The main political impetus for a European jurisprudence and the corresponding tax payer's money is owed to the project of transforming the European Union into "the most competitive and dynamic knowledge-based economic area in the world".[9] Research as a whole, and thus jurisprudence, primarily serve economic growth.

Nothing is further from Schmitt's idea of a European jurisprudence than such servitude. Schmitt speaks from the hearts of many Eurosceptics when he denounces what interested circles propagate as progress towards

---

Rechtsraum", in JuristenZeitung, 66 (2011), 1ff; see Mattias Kumm, "On the past and future of European constitutional scholarship", in International Journal of Constitutional Law, 7 (2009), 401, 410ff; Alexander Somek, "The indelible science of law", in International Journal of Constitutional Law, 7 (2009), 424, 431ff; Michel Rosenfeld, "The role of constitutional scholarship in comparative perspective", in International Journal of Constitutional Law, 7 (2009), 361ff; Robert C Post, "Constitutional scholarship in the United States", in International Journal of Constitutional Law, 7 (2009), 416ff; Enrico Scoditti, "La scienza giuridica e i signori del diritto", in Foro Italiano, 135 (2012), Parte V, 241ff; Remo Caponi, "Diritto della scienza e scienza del diritto", in Foro Italiano, 135 (2012), Parte V, 244ff; Massimiliano Granieri and Roberto Pardolesi, "Ma i tre signori del diritto sono rimasti in due? ", in Foro Italiano, 135 (2012), Parte V, 247ff; Gianluca Grasso, "La scienza giuridica europea e le professioni", in Foro Italiano, 135 (2012), Parte V, 249ff; Giulio Napolitano, "Sul futuro delle scienze del diritto pubblico: variazioni su una lezione tedesca in terra Americana", in Rivista trimestrale di diritto pubblico, 60 (2010), 1ff.

6 See for more details: Álvaro de Elera, "The European Research Area: On the Way Towards a European Scientific Community?", in European Law Journal, 12 (2006), 559ff; Josef F Lindner, "Die Europäisierung des Wissenschaftsrechts", in Wissenschaftsrecht 19 (2009), Beiheft, 1, 7ff.

7 See initially Commission Decision of 2 February 2007 establishing the European Research Council, 2007/134/EG, OJ (EG) L 57/14 of 24.2.2007, now Commission Decision of 12 December 2013 establishing the European Research Council, OJ (EU) C 373/23 of 20.12.2013.

8 Cf. Commission Implementing Decision of 17 December 2013 establishing the European Research Council Executive Agency and repealing Decision 2008/37/EC, 2013/779/EU, OJ (EU) L 346/58 of 20.12.2013.

9 Council conclusions by the Lisbon European Council of 23–24 March 2000 (SN 100/1/00 REV 1), No. 5; Matthias Ruffert, in Christian Calliess and Matthias Ruffert (eds), EUV/AEUV (5th edn, C.H. Beck, Munich, 2016) Art. 179 AEUV, para 10.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

civilisation as mere centralisation.[10] "Taking a step back" is the slogan of his text. Schmitt diagnoses a deep crisis because jurisprudence has largely lost its autonomy: On the one hand, jurisprudence, as a mere study of statutes, only accompanies law making; on the other hand, it has surrendered to the rationality of other sciences.[11] In contrast, Schmitt insists on a jurisprudence that is autonomous from political and economic rationalities. Schmitt's inquiry into a European jurisprudence is therefore interesting today because it has an entirely different, even opposing focus than the scientific project of Article 179 TFEU.

With the autonomy of jurisprudence, a bastion of social reason is wavering. It is even considered by Schmitt to be the oldest realisation of Western reason: "European jurisprudence is the first born child of the modern European spirit, of the modern 'occidental rationalism'".[12] Unsuspicious observers like Mauro Barberis, Jürgen Habermas or Alexander Somek have a similar view.[13] Schmitt indeed justifies the necessity of this autonomy with arguments that, particularly in their pointed form, are alienating. This includes his claim that the jurisprudential work by legal scholars clears the legislation of party-political contradictions and thus expresses political unity in the first place.[14] If properly done, it would, arguably instead of the parliament, represent the unity of the legal will and thus the unity of the nation, against a pluralistic parliament with its selfish parties.[15] Hence, Schmitt's criticism of parliaments underlies his concept of sound jurisprudence. Schmitt does not go as far as to claim that jurisprudence can be a source of law in its own right. But it enjoys if rightly pursued, "almost legislative dignity".[16]

Now Schmitt writes these passages about the profession of jurisprudence in the past tense, as an analysis of the 19th century. Nevertheless, he seems to find the essence of sound jurisprudence in the programme of the Wilhelminian rule of law. For shortly thereafter, he writes in the present tense that contemporary jurisprudence should preserve the "unity

10 Carl Schmitt, *Die Lage der europäischen Rechtswissenschaft* (n 4) 31.
11 Carl Schmitt, *Die Lage der europäischen Rechtswissenschaft* (n 4) 28.
12 Carl Schmitt, *Die Lage der europäischen Rechtswissenschaft* (n 4) 29.
13 Mauro Barberis, *Europa del diritto. Sull'identità giuridica europea* (n 2) 10 ff.; Jürgen Habermas, *Discourse Theory and International Law*, <https://esil-sedi.eu/wp-content/uploads/2018/04/2013InterviewHabermas.pdf> (last visited 19 February 2020), 4; Alexander Somek, "The indelible science of law" (n 5) 424, 431ff.
14 Carl Schmitt, *Die Lage der europäischen Rechtswissenschaft* (n 4) 17.
15 Carl Schmitt, *Die Lage der europäischen Rechtswissenschaft* (n 4) 18.
16 Carl Schmitt, *Die Lage der europäischen Rechtswissenschaft* (n 4) 18.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

and consistency of law which has been lost due to the excess of statutory provisions".[17] And it is precisely with this task that he articulates what also Barberis, Habermas and Somek refer to as a specific juristic use of reason.

This traditional programme gains new splendour in characteristic Schmittian hyperbole. Schmitt sketches it with only a few, but memorable strokes: "a recognition of the individual based on mutual respect, which does not even cease in combat; a sense of logic and consistency of concepts and institutions; a sense of reciprocity and the minimum of an orderly procedure, a due process of law, without which there is no law".[18] These principles, which essentially correspond to the formal concept of the rule of law of the 19th century, form nothing less than "the basis of a rational human existence".[19] With this intensification, he inflates his set of methodological, institutional, procedural and content-related requirements to an understanding of the law that resembles natural law conceptions, and which is even more demanding than that of Lon Fuller.[20] In a "half pleading, half threatening exclamation"[21] jurisprudence becomes its last guarantor, the "last asylum of legal consciousness": It will, whispers Schmitt, "know how to find the secret crypt in which the seeds of its spirit will be protected from any persecutor".[22] However, there are no indications as to how legal scholars can get into this dark crypt and how they should move within it.

At this point, we will not consider how this conceptualisation of law and jurisprudence fits with other Schmittian texts and his political positions,[23] but rather why Schmitt's characterisation and crisis diagnosis find resonance today. Schmitt blames the "motorised legislator" in particular

17 Carl Schmitt, *Die Lage der europäischen Rechtswissenschaft* (n 4) 21.
18 Carl Schmitt, *Die Lage der europäischen Rechtswissenschaft* (n 4) 30.
19 Carl Schmitt, *Die Lage der europäischen Rechtswissenschaft* (n 4) 30.
20 Lon L Fuller, *The Morality of Law* (2nd edn, Yale University Press, New Haven and London, 1969) 33ff; on this point see Jutta Brunnée and Stephen J Topee, *Legitimacy and Legality in International Law* (CUP, Cambridge, 2010); on the natural law implications of this phrase also Michael Stolleis, "Carl Schmitt", in Martin J Sattler (ed), Staat und Recht. Die deutsche Staatslehre im 19. und 20. Jahrhundert, (List, Munich, 1972), 145.
21 Joachim Rückert, *Autonomie des Rechts in rechtshistorischer Perspektive* (Hennies & Zinkeisen, Hannover, 1988) 78.
22 Carl Schmitt, *Die Lage der europäischen Rechtswissenschaft* (n 4) 32.
23 In this regard: Reinhard Mehring, "Carl Schmitts Schrift „Die Lage der europäischen Rechtswissenschaft"", in Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, 77 (2017), 853, 862.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA - https://www.nomos-elibrary.de/agb

for the precarious situation of jurisprudence.[24] This includes not only parliament but all forms of executive law-making. The law-making by courts which so occupies our time, is thereby outside of his field of vision; it would certainly reaffirm his thesis. He understands the acceleration of law-making as part of general acceleration of societal change. In view of his reference to the economic orders, one can assume that he sees them mainly caused by the economy.[25] His positioning of jurisprudence is thus, not particularly original, fed by a conservatism critical of capitalism. But it is not limited to that. The fact that also Schmitt advocates this thesis of the value of internal juridical rationality in contrast to the inherent economic logic does not make it wrong. Rather, it touches a central point, especially for current European jurisprudence, which was born with the task of serving the development of a European market.

2. *Sandulli's re-embedding of the European financial market*

Aldo Sandulli, an administrative lawyer at the Luiss University (*Libera Università Internazionale degli Studi Sociali Guido Carli*) has recently taken up Schmitt's original theme, that jurisprudence can and should defy the hegemony of economic rationalities.[26] His starting point is not a conservative critique of modernity but rather the widely accepted social democrat-inspired formula of the end of *embedded liberalism*,[27] which today, even formerly decidedly neoliberal forces lament.[28] Sandulli examines whether and

24 This claim is not particularly original, as Schmitt himself shows in an impressive comparative law study, Carl Schmitt, "Vergleichender Überblick über die neueste Entwicklung des Problems der gesetzgeberischen Ermächtigungen (Legislative Delegationen)", in Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, 6 (1936), 252.

25 Cf. also Carl Schmitt, "Die geschichtliche Struktur des heutigen Welt-Gegensatzes von Ost und West", in Armin Mohler (ed), *Freundschaftliche Begegnungen. FS für Ernst Jünger zum 60. Geburtstag* (Vittorio Klostermann, Frankfurt a.M., 1955) 135, 155; with the same result Douglas Howland, "Carl Schmitt's Turn to Sovereignty in Jurisprudence", in Beijing Law Review, 9 (2018), 211, 227.

26 Aldo Sandulli, *Il ruolo del diritto in Europa. L'integrazione europea dalla prospettiva del diritto amministrativo* (n 2). Another important proponent of this view is Matthias Goldmann, "The Great Recurrence. Karl Polanyi and the Crisis of the European Union", in European Law Journal, 23 (2017), 272 ff.

27 For the conceptualisation see John G Ruggie, "International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic order", in International Organization, 36 (1982), 379ff.

28 Emblematic The Economist, "The New Nationalism", 19 November 2016.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

how European jurisprudence can contribute to a renewed *embedding* of the European financial market. He is thus concerned with a genuine contribution of jurisprudence to social integration: It is intended to counter the multiple forms of disintegration of European society which, especially in the last decade, have weakened the social fabric of many European states to such an extent that even the European peace project is beginning to waver. Against this, a jurisprudential contribution is needed, which gives effect to legal values throughout society.

Sandulli updates the central statements of Schmitt's text, helps to understand its continuing resonance and even outlines a more concrete plan of action. This *disembedded liberalism* is not a legal vacuum. On the contrary, Sandulli presents the further acceleration of law-making due to the dynamics of global capitalist socialisation. The density of international, European, and national legal regulation is likely to exceed even Schmitt's worst expectations. There is more and more law, especially for stabilising the financial market, and it is developed and applied far from jurisprudential reason.[29] This European law-making, rooted in economic rationality, has undermined the foundations of social integration in many Member States. Like Ernst-Wolfgang Böckenförde, Sandulli sees this law as hardly more than a mere appendix to the global financial market: "a technical-pragmatic construct of economic rationality".[30]

But Sandulli's sorrow, like that of Schmitt, goes beyond this practical loss. According to him, intellectually, too, jurisprudence has lost influence. This can be seen, for example, in the criteria of a society's self-evaluation, which are largely based on economic criteria. He argues that the same applies to the models for understanding the process of European unification. With the exception of federalism, European jurisprudence has not been able to present models of its own, but lives from the theories of other disciplines.

The issue is to break the intellectual hegemony of economic thinking and to create more space for the rationality of other societal spheres in order to strengthen societal integration. According to Sandulli, jurisprudence has a prominent role to play in this process.[31] In regained autonomy

29 See for a detailed reconstruction: Aldo Sandulli, *Il ruolo del diritto in Europa. L'integrazione europea dalla prospettiva del diritto amministrativo* (n 2) 59ff.

30 Ernst-Wolfgang Böckenförde, "Kennt die europäische Not kein Gebot?" in Ernst-Wolfgang Böckenförde, *Wissenschaft, Politik, Verfassungsgericht* (Suhrkamp, Berlin, 2011) 302.

31 Aldo Sandulli, *Il ruolo del diritto in Europa. L'integrazione europea dalla prospettiva del diritto amministrativo* (n 2) 188, 195.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

and the light of legal values, it should design patterns of order that mediate between the rationalities of other societal systems and thus serve reason. This programme of an autonomous jurisprudence primarily addresses European jurisprudence since, on the one hand, the malaise is mainly a problem of the market-oriented EU law and, on the other, national jurisprudence lacks the necessary scope. Jurisprudential autonomy as an instrument of societal reason against disintegrative rationalitiesis a distinctive and attractive vision for European jurisprudence today.

III. What is European jurisprudence?

1. Ingenious, devious, out-of-date: Schmitt's concept

The idea that European jurisprudence has an indispensable autonomous role, serves reason independently and has a task in *re-embedding* the European financial market speaks to the challenges of our time. But that doesn't make Schmitt its forefather. His concept of European jurisprudence is far from what today is and should be understood as European jurisprudence. This is, of course, due first and foremost to the fact that in 1950 there was no particular European law like today's EU law, i.e. a law common to the various European states, which forms the key to today's European jurisprudence.[32] For Schmitt, there was no equivalent either: His *The Situation of European Jurisprudence* rather claims the very end of the *Jus Publicum Europaeum*, a thesis he elaborates shortly afterwards in *Nomos of the Earth.*

We have to dig deeper. After all, Schmitt's book was published in the year of the Schuman Declaration.[33] Schmitt must have been familiar with the Statute of the Council of Europe of 5 May 1949, the first step towards a European public law in the context of the emerging East-West conflict.[34] The path towards European integration was widely discussed after the war and had received widespread attention since Churchill's speech in Zurich. It seems obvious for Schmitt to strengthen the topicality and relevance of his text, which was supposed to restart his career by establishing appropri-

32 Reinhard Zimmermann, "Europa und das römische Recht", in Archiv für die civilistische Praxis, 202 (2002), 243, 247.

33 On the political process leading to the declaration Luuk van Middelaar, *Vom Kontinent zur Union* (Suhrkamp, Berlin, 2016), 233ff.

34 Carl Schmitt, "Die geschichtliche Struktur des heutigen Welt-Gegensatzes von Ost und West" (n 25) 135, 137.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

ate references. Quite a few Nazis reinvented themselves after the world war as advocates of European integration.[35] It is surprising that no line of Schmitt's text acknowledges this post-war project.

The distance of his European jurisprudence from the European integration which carries today's European jurisprudence is presumably not due to the year of publication but to substantial reasons. His silence on post-war integration efforts seems deliberate. It should at least be understood as a distancing.[36] He probably saw these efforts in the light of his understanding of the Geneva institutions, i.e. as dark intrigues to the detriment of Germany. They were in fact part of the Western integration of the Federal Republic, for which he had no sympathy.

Schmitt builds his European jurisprudence on a completely different foundation, which is interesting for the current European jurisprudence, but primarily because of its problems. These can already be seen in the powerful statement of the title: the mere assertion that in 1950, five years after the Second World War, there was a European jurisprudence and that it even existed during the war. Schmitt had already presented essential parts of the text, including the title in 1942 and 1943.

He supports this claim with three arguments. The first is polemic and *ex negativo*: Schmitt identifies the negation of European jurisprudence with a narrow-minded legal positivist attitude.[37] His supporting arguments are much shorter. First of all, Schmitt claims that according to their meaning and content, essential legal concepts and legal institutions of the European peoples are conspicuously identical, both in terms of single norms and the "systematic structure of the whole", and this "in every single legal discipline".[38] He does not provide any evidence for this since the congruence is "familiar to every connoisseur of these disciplines". It follows, he

35 Symbolic is the transformation of the race theorist Hanno F. Konopath into the creator of the European flag, see Winfried Mogge, "Wir lieben Balder, den Lichten…", in Uwe Puschner and Clemens Vollnhals (eds), *Die völkisch-religiöse Bewegung im Nationalsozialismus* (Vandenhoeck & Ruprecht, Göttingen, 2012) 45, 56ff; Markus Göldner, *Politische Symbole der europäischen Integration* (Peter Lang, Bern, 1988) 58ff; the creatorship is disputed and is also claimed by Paul Lévy and Arsène Heitz.

36 Cf. his reception of Hans Peter Ipsen's comprehensive work *Europäisches Gemeinschaftsrecht*, in Carl Schmitt, "Die legale Weltrevolution. Politischer Mehrwert als Prämie auf juristische Legalität und Superlegalität", in Der Staat, 17 (1978), 321, 335ff, where Schmitt sees a political unity of Europe at best possible as "the by-(not to say: waste) product of a global political unity of our planet".

37 Carl Schmitt, *Die Lage der europäischen Rechtswissenschaft* (n 4) 7ff.

38 Carl Schmitt, *Die Lage der europäischen Rechtswissenschaft* (n 4) 9.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

continues, that there is a "very strong community of European law", "a true European community", "traits of a true common law", and this in all areas of the law.[39] Furthermore, he explains these similarities with an ongoing inner-European process of "encounters and mutual influences", a millennial "history of mutual receptions".

Thus the many national legal sciences miraculously merge into a European jurisprudence. The text virtually evokes an image of sugar cubes in a cup of tea. There may even be a European jurisprudence without legal scholars having to be aware of it. Once again, Schmitt lays out a sightline in which everything looks completely different. He creates an apparently descriptive, but in substance deeply normative concept with enormous implications, which he brings to the reader with historical reconstructions, but also with his magic formulations.[40]

A closer look, however, reveals that Schmitt's conceptualisation is hardly convincing, neither in the past nor at present. Firstly, it is not sufficiently complex since a science without institutions is hardly conceivable. Science is first and foremost an institutionalised societal practice. This should be obvious to Schmitt, the advocate of *concrete-order thinking*. He would have to anchor his European jurisprudence in such concrete orders, in institutions, journals, and not least, if it is to be a *European* science, in circumscribed spaces. However, Schmitt was not able to see such a European space in 1950, as is shown by *The Nomos of the Earth* published in the same year. In this respect, his conceptualisation in 1943, presented to law faculties in Greater Germany, had a completely different meaning and context.

This leads to the next weakness: One can hardly ignore the fact that five years after the end of the Second World War, many legal scholars from other European countries were not prepared to be merged into one scientific community with the many German legal scholars who were heavily burdened with their Nazi past. But this is the consequence of Schmitt's conceptualisation. The antisemitism in German jurisprudence was incompatible with the understanding of jurisprudence that Schmitt himself preaches in his text: "a recognition of the individual based on mutual respect, which does not even cease in combat" or "a sense of reciprocity and the minimum of an orderly procedure".[41] German jurispru-

39 Carl Schmitt, *Die Lage der europäischen Rechtswissenschaft* (n 4) 9ff.
40 In more detail Jannis Lennartz, *Juristische Granatsplitter* (n 1) 12.
41 Carl Schmitt, *Die Lage der europäischen Rechtswissenschaft* (n 4) 30.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

dence had to earn its recognition again after the Second World War.[42] Schmitt's terminological coup of *European jurisprudence* was intended to shorten this path but was unable to do so. No victim of the German war of aggression will accept the apologetic second sentence of Schmitt's text, according to which Europe "tore itself apart in two world wars".

For our time, Schmitt's conceptualisation is even less suitable. With his definition, there can be no European jurisprudence today, but only a global one.[43] Surely, his argument that many of the "essential legal concepts and institutions" can be found in all European legal systems has substance. But today this does not lead to a European, but to a global jurisprudence because they occur in almost all legal systems on earth. This even applies to China, i.e. the country which today is most likely to offer an alternative societal order to the "West" or the "global North".[44] Admittedly, these legal structures do not have the same societal depth and power everywhere, but rather compete with other forces: the power of large corporations, of political networks, of clan-like organisations, not least of organised crime. However, all this can also be found in European countries and does not change that the essential legal concepts and institutions originating from the European tradition today form global phenomena.

Now one could think that the third pillar of Schmitt's argument, the "ongoing inner-European process of encounter and mutual influence" would constitute a specifically European jurisprudence. Schmitt's text creates the atmosphere of a European republic of scholars, in which voices from all European nations participate and are heard. Certainly, a global jurisprudence would fail to meet this requirement because of extreme asymmetries.[45]

However, there is no European jurisprudence based on this argument either because the Schmittian European republic of scholars did not exist then or today. The legal reasoning, this heart of juridical reason, continues

---

42 Cf., for example, Felix Lange, *Praxisorientierung und Gemeinschaftskonzeption. Hermann Mosler als Wegbereiter der westdeutschen Völkerrechtswissenschaft nach 1945* (Springer, Heidelberg, 2017) 41ff.

43 Sabino Cassese, "La globalisation du droit", in Patrick Titiun (ed), *La conscience des droits. Mélange en l'honneur de Jean-Paul Costa* (Dalloz, Paris, 2011) 113ff.

44 Uwe Kischel, *Rechtsvergleichung* (C.H.Beck, Munich, 2015) 756ff, 774, 784ff.

45 César Rodríguez Garavito, "Introducción: Un mapa para el pensamiento jurídico del siglo XXI", in César Rodríguez Garavito (ed), *El derecho en América Latina* (Siglo XXI, Buenos Aires, 2011) 15; but things are starting to change, Michael Riegner, "Transformativer Konstitutionalismus und offene Staatlichkeit im regionalen Verfassungsvergleich mit Lateinamerika", in Jahrbuch des öffentlichen Rechts der Gegenwart, 67 (2019), 265ff.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

to be deeply influenced by the national context.[46] Even the science of 21st century European Union law is deeply segmented into national sciences.[47] Schmitt's own writing speaks volumes: It is a conversation within German jurisprudence. Certainly, it is garnished with foreign references which, however, hardly influence the course and content, but at best confirm them. Ultimately Schmitt builds a line "Friedrich Carl von Savigny – Carl Schmitt" on the horizon of Hegel's philosophy.[48]

In addition, it is hardly possible today to delimit processes of encounter and influence within Europe: The importance of US law faculties is too immense. Perhaps not in the research on Roman law, canon law or material criminal law, but probably on the crucial questions of the global economy, global order and global security, the key position of a handful of American institutions is "familiar to every connoisseur of these disciplines".[49] Sandulli even diagnoses this hegemony in the field of European law.[50]

Schmitt's conceptualisation of European jurisprudence is inadequate.[51] His at first sight so lucid conceptualisation develops, rightly seen, an all too glistening light. Some things can be seen too clearly, but above all, one is dazzled and threatened to suffer damage in rugged terrain.

46 András Jakab, *European Constitutional Language* (CUP, Cambridge, 2016) 83ff.

47 Daniel Thym, „Zustand und Zukunft der Europarechtswissenschaft in Deutschland", in Europarecht, 50 (2015), 671 ff; Armin Hatje and Peter Mankowski, „Nationale Unionsrechte: Sprachgrenzen, Traditionsgrenzen, Systemgrenzen, Denkgrenzen", in Europarecht, 49 (2014), 155ff; Bruno de Witte, "European Union Law: A Unified Academic Discipline", in Antoine Vauchez and Bruno de Witte (eds), *Lawyering Europe: European Law as a Transnational Social Field* (Hart, Oxford and Portland, Oregon, 2013) 114ff.

48 Carl Schmitt, *Verfassungsrechtliche Aufsätze* (Duncker & Humblot, Berlin, 1958) 427ff.

49 Mathias Reimann, "The American Advantage in Global Lawyering", in Rabels Zeitschrift, 78 (2014), 1ff.

50 Aldo Sandulli, *Il ruolo del diritto in Europa. L'integrazione europea dalla prospettiva del diritto amministrativo* (n 2) 193ff.

51 For instance, in 1990 Helmut Coing still saw European jurisprudence as a project for the future, Helmut Coing, "Europäisierung der Rechtswissenschaft", in Neue Juristische Wochenschrift, 43 (1990), 937ff.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

2. *Mosler's EEC reformulation*

And yet, we find in Schmitt's conceptualisation something important: it brings together the jurisprudential disciplines of domestic and supranational law. Schmitt's European jurisprudence is by no means only about public international law but encompasses all subjects and all national law: criminal law, private law, public law, all core subjects. This corresponds to his principled position that the distinction between international law and domestic law forms a mere "façade".[52] Schmitt's notion of jurisprudence seeks to reveal a juridical phenomenon, which the prevailing understanding at his time does not see. He offers a new perspective that ties in with old traditions of public law in the Holy Roman Empire of the German nation.[53]

At the end of the 1960s, Hermann Mosler conveys this idea to our world while avoiding Schmitt's problems.[54] The context of his conveyance is marked by a massive conflict of federal and antifederal forces in the EEC. The federal state-oriented politics of Commission President Hallstein found a counterpart in a centralist concept of European law. Art. 1 of the statute of the *Fédération Internationale pour le Droit Européen* (F.I.D.E.), founded out of the European institutions, equated European law with the law of the European Community,[55] as if the supranational organisation represented Europe alone. This federal impetus had met with considerable resistance, symbolised in Charles de Gaulle's positioning against Walter Hallstein.[56]

---

52 Carl Schmitt, *Die Lage der europäischen Rechtswissenschaft* (n 4) 8; Carl Schmitt, D*er Nomos der Erde im Völkerrecht des Jus Publicum Europaeum* (Duncker & Humblot, Berlin, 1950) 182.

53 Martti Koskenniemi, "Between Coordination and Constitution: International Law as German Discipline", in Redescriptions: Yearbook of Political Thought, Conceptual History and Feminist Theory, 15 (2011), 45; Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland*, Vol. 1 (2nd edn, C. H. Beck, Munich, 2012) 141ff; the focus of the Kaiser Wilhelm Institute for Comparative Public Law and International Law, as its name indicates, carries this tradition.

54 Hermann Mosler, "Begriff und Gegenstand des Europarechts", in Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, 28 (1968), 481, 484, 500; Hermann Mosler, "European Law – Does it exist?", in Current Legal Problems, 19 (1966), 168ff; the following observations are based on Armin von Bogdandy, "Was ist Europarecht?", in JuristenZeitung, 72 (2017), 589ff.

55 Regarding F.I.D.E. Antoine Vauchez, "The Transnational Politics of Judicialization", in European Law Journal, 16 (2010), 1, 10.

56 Luuk van Middelaar, *Vom Kontinent zur Union* (n 33) 107ff.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

Mosler now introduces into this debate a holistic term, as advocated in Schmitt's text, though not in a Schmittian exaggerating manner, but, following the style of the official Federal Republic of his time, cautiously, quietly, technocratically. Mosler's European law includes Community law (today EU law), the European Convention on Human Rights and all national implementing acts and autonomous acts of Member States "adopted with a view to the objectives of the European associations".[57] Mosler's concept has, regardless of his cautious articulation, a radical moment insofar as he, like Schmitt, "blows up" "the boundaries between international law and domestic law". Mosler's work reminds us of how Hans-Georg Gadamer tailored Martin Heidegger's ideas for the cautious Federal Republic of Germany, or "urbanised" them, as Habermas puts it.[58]

Mosler shows how groundbreaking Schmitt's holistic concept is but reconstructs it from the positive law on a comparative and community law basis. Unlike in Schmitt's case, the result does not cover all jurisprudence. A purely national jurisprudence remains possible, though it does justice to ever fewer legal questions. Mosler's conceptualisation takes up Schmitt's core idea of a legal science that transcends legal orders and has a European focus.

Now Mosler does not mention Schmitt's writing at all. However, he must have been familiar with Schmitt's concept, especially since he received his jurisprudential imprint at the Kaiser Wilhelm Institute for Comparative Public Law and International Law, where Schmitt was a scientific member. But Mosler was one of the most important legal architects of the alignment with the West in the post-war period, as legal advisor to Adenauer and Hallstein and as director of the newly founded Max Planck Institute for Comparative Public Law and International Law; later he became the first German judge at the ECtHR and even at the ICJ.[59] Schmitt quotes that support his own thinking could have been inappropriate on such a path in many respects.[60]

---

57 Hermann Mosler, "Begriff und Gegenstand des Europarechts" (n 54) 481, 500.

58 Jürgen Habermas, "Hans Georg Gadamer: Urbanisierung der Heideggerschen Provinz", in Jürgen Habermas, *Philosophisch-politische Profile* (Suhrkamp, Berlin, 1981) 392ff.

59 On Mosler's career and style Felix Lange, *Praxisorientierung und Gemeinschaftskonzeption. Hermann Mosler als Wegbereiter der westdeutschen Völkerrechtswissenschaft nach 1945* (n 42) 56ff, 120ff.

60 That was even Schmitt's own recommendation, Reinhard Mehring, "Carl Schmitts Schrift ‚Die Lage der europäischen Rechtswissenschaft'" (n 23) 853, 854.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

Certainly, there have been and still are other holistic conceptions that seek to overcome the separation of domestic and international law: Kelsen's monism, Jessup's transnational law and more recent concepts of a global law,[61] a common law of mankind,[62] a cosmopolitan law,[63] a world law,[64] a global domestic law.[65] However, thanks to the spectacular development of European transnational law (EU and Council of Europe), the vertical and horizontal opening of domestic legal systems, and their Europeanisation, Mosler's Europe-focused concept has a far higher reconstructive potential for existing law than those approaches. Only European law has overcome the stage of a theoretical sketch and produced a collectively advanced jurisprudence. The discourses within the framework of the International Society of Public Law demonstrate very concretely today how far it is to achieve something even approximately comparable on a global level.[66]

The inclusion of Member State law in the concept of European law is justified by its close connection with supranational law: Many aspects of the Member States' legal systems can only be understood together with the transnational elements of European law and are often functionally related to them. This applies not only to the implementing legislation of the Member States but also to autonomous legal acts: Article 23 of the Basic Law, Article 117 of the Italian Constitution, or Article 88 of the French Constitution do not implement Union law, but are nevertheless key provisions of the European legal unity. Moreover, horizontal links connect the legal operations of Member State institutions.[67] Even supreme and constitutional courts, usually the solitary top of the judiciary, have formed European networks, for example, the Conference of European

61 Hans Kelsen, *Reine Rechtslehre* (Deuticke, Leipzig und Wien, 1934) 129ff; Philip Jessup, *Transnational Law* (Yale University Press, New Haven, 1956); Benedict Kingsbury, Nico Krisch and Richard B Stewart, "The Emergence of Global Administrative Law", in Law and Contemporary Problems, 2 (2005), 15ff.

62 Clarence W Jenks, *The Common Law of Mankind* (Stevens, London, 1958).

63 Seyla Benhabib, "The Philosophical Foundations of Cosmopolitan Norms", in Seyla Benhabib and Robert Post (eds), *Another Cosmopolitanism. Berkeley Tanner Lectures 2004* (OUP, Oxford, 2006) 13ff.

64 Mireille Delmas-Marty, *Trois défis pour un droit mondial* (Seuil, Montrouge, 1998).

65 Jürgen Habermas, *Der gespaltene Westen* (n 3) 143, 159ff.

66 About their programme Joseph H. H. Weiler, "The International Society for Public Law", in International Journal of Constitutional Law, 12 (2014), 1ff.

67 Ingolf Pernice, "La Rete Europea di Costituzionalità – Der Europäische Verfassungsverbund und die Netzwerktheorie", in Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, 70 (2010), 51ff.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

Constitutional Courts.[68] Many national actors today also see themselves as European actors; they have a richer, more complex identity.[69]

This concept of European law thus identifies the European conglomerate of legal norms of different legal orders and articulates their close connection, high interdependence and dense interaction. On the one hand, such interconnectedness permits new forms of order, functional specialisation and meaningful division of labour, but on the other it generates numerous problems and even diverse conflicts. Mosler's concept of European law sets the interconnectedness of different European legal orders as constitutive, valuable, and as an expression of European unity.[70]

Thus, this holistic conceptualisation takes up a phenomenon around which numerous theories of European law revolve: compound (*Verbund*) concepts, be it of states, constitutions or administrations, most manifestations of European legal pluralism and network theories, European federalism or constitutionalism, liberal intergovernmentalism.[71] Although these theories differ in many respects, all of them consider the aforementioned legal orders to be so deeply intertwined that their interaction constitutes part of their respective identities. It appears as a characteristic feature and specifically European phenomenon. A discipline of European law and a European jurisprudence in the sense outlined here offer these theories a disciplinary framework.

3. *The roots: Roman law or liberal constitutionalism?*

Sandulli wants European law to tame financial markets. But is European jurisprudence not at its core shaped by private law and thus biased towards a free economy and perhaps even towards as free a financial market as

68 About the background László Sólyom, "Das ungarische Verfassungsgericht", in Armin von Bogdandy, Christoph Grabenwarter and Peter M Huber (eds), *Handbuch Ius Publicum Europaeum*, vol. VI (C.F. Müller, Heidelberg, 2016) § 107 para 11.

69 Cf. only Christoph Grabenwarter, "Zusammenfassung der Ergebnisse der vorangegangenen Sitzungen", in Verfassungsgerichtshof der Republik Österreich (ed), *Die Kooperation der Verfassungsgerichte in Europa. Aktuelle Rahmenbedingungen und Perspektiven* (Verlag Österreich, Vienna, 2014) 174ff.

70 Dana Burchardt, *Die Rangfrage im europäischen Normenverbund* (Mohr Siebeck, Tübingen, 2015).

71 On the German debate: Ferdinand Weber, "Formen Europas. Rechtsdeutung, Sinnfrage und Narrativ im Rechtsdiskurs um die Gestalt der Europäischen Union", in Der Staat, 55 (2016), 151ff.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

possible? Schmitt points in this direction because he locates the identity-generating roots in Roman law[72] and emphasises Savigny's creation of international private law as the key to European jurisprudence.[73] In this understanding, he is not alone.[74] Consider the programme of the Max Planck Institute for European Legal History in Frankfurt, founded in 1964. The founding director was Helmut Coing, a Civil and Roman Law scholar, and the Institute's journal was programmatically entitled *Jus Commune*.[75] The idea of a European *Jus Commune* characterised by private law as the heart of European law continues to be influential.[76] Ernst-Joachim Mestmäcker propagates a European private law society as the key to understanding the European construct.[77]

But this thesis of the primarily Roman law-shaped identity encounters doubts. Roman law is hardly present for most jurists anymore. It may still form a distant horizon, but it is hardly current in legal research. Only in very few countries is Roman law still a compulsory subject, and even there it plays a limited role and is scarcely used in research on current law. This applies not only to public law (including criminal law) but also to private law.[78]

Certainly, Schmitt does not identify Roman law as such as the root of a European jurisprudence, but its science, and he does not focus on specific legal institutions, but on "forms of thought", a "common vocabulary" and

72 So at least in this piece, Carl Schmitt, *Die Lage der europäischen Rechtswissenschaft* (n 4) 10ff; on Schmitt's changing relationship to Roman law Reinhard Mehring, "Carl Schmitts Schrift ‚Die Lage der europäischen Rechtswissenschaft'" (n 23) 853, 865.

73 More details Mauro Barberis, *Europa del diritto. Sull'identità giuridica europea* (n 2) 29.

74 Aldo Schiavone, *Ius. L'invenzione del diritto in Occidente* (Giulio Einaudi, Torino, 2017).

75 See Thomas Duve, "Von der Europäischen Rechtsgeschichte zu einer Rechtsgeschichte Europas in globalhistorischer Perspektive", in Rechtsgeschichte, 20 (2012), 18, 21ff.

76 Reinhard Zimmermann, "Das römisch-kanonische ius commune als Grundlage europäischer Rechtseinheit", in JuristenZeitung, 47 (1992), 8ff.

77 Ernst-Joachim Mestmäcker, *Recht in der offenen Gesellschaft* (Nomos, Baden-Baden, 1993) 60ff. The background is a concept by Franz Böhm, "Privatrechtsgesellschaft und Marktwirtschaft", in Jahrbuch für die Ordnung von Wirtschaft und Gesellschaft, 17 (1966), 75ff; see Christian Joerges, *Die Wissenschaft vom Privatrecht und der Nationalstaat*, EUI Working Paper Law No. 98/4, 106ff.

78 Reinhard Zimmermann, "The Present State of European Private Law", in American Journal of Comparative Law, 57 (2009), 479ff.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

a "recognised model of legal thinking".[79] So diluted and fluid are all of us forever children of the Christian Occident. But the roots of intellectual work are something different than the roots of a tree. The roots of intellectual work lie in the collection of texts that are constantly read anew and interpreted in the horizon of the present. This is no longer the case today with regard to Roman law, and its science has atrophied, too.[80] A vibrant, powerful source of disciplinary identity must flourish differently.

Such a source can be found in Schmitt's second, albeit subordinate, pillar of European jurisprudence: the constitutional ideas of the 18th and 19th centuries.[81] While in 1934, in his treatise *On the Three Types of Juristic Thought*, he had disparagingly regarded this source as "liberal normativism",[82] in 1950 Schmitt does not seem to have any difficulties in founding European jurisprudence subsidiarily herein.

Thanks to Art. 2 TEU, this constitutional basis is essential today for the legal foundation of the European legal space and thus shapes its jurisprudence.[83] It projects the Union as a liberal-democratic peace project. The values of Art. 2 TEU apply not only to the Union as a set of supranational institutions but also to the Union as an compound of its Member States. Art. 2 TEU articulates the standards which *any* act of public authority in the European legal space must meet. According to Art. 49 TEU, they constitute the key prerequisites for membership, rather than a system of market economy or economic performance. The expression "value" underlines their character as *last reasons*.[84] With Art. 2 TEU, all Member States make a fundamental statement as to who they are and what they stand for, what

79 Carl Schmitt, *Die Lage der europäischen Rechtswissenschaft* (n 4) 13.

80 Reinhard Zimmermann, "Europa und das römische Recht" (n 32) 243, 246.

81 Carl Schmitt, *Die Lage der europäischen Rechtswissenschaft* (n 4) 13; on the current role of the common constitutional traditions Sabino Cassese, "The 'Constitutional Traditions Common to the Member States' of the European Union", in Rivista Trimestrale di Diritto Pubblico, (2017), 939.

82 Carl Schmitt, *Über die drei Arten des rechtswissenschaftlichen Denkens* (Duncker & Humblot, Berlin, 1934) 10.

83 Paolo Ridola, *Diritto comparato e diritto costituzionale europeo* (Giappichelli, Torino, 2010) 8ff; Cesare Pinelli, *Alla ricerca dell'autenticità perduta* (Editoriale Scientifica, Napoli, 2017) 40. The big textbook by Karl Riesenhuber (ed), *Europäische Methodenlehre. Handbuch für Ausbildung und Praxis* (3rd edn, De Gruyter, Berlin, 2015) has, however, hardly any place for the constitutional foundations, cf. especially Karl Riesenhuber, "§ 1 Europäische Methodenlehre", Karl Riesenhuber, "§ 10 Die Auslegung".

84 Niklas Luhmann, *Gibt es in unserer Gesellschaft noch unverzichtbare Normen?* (C.F. Müller, Heidelberg, 1993) 19; cf. also Jürgen Habermas, *Faktizität und Geltung* (Suhrkamp, Berlin, 1992) 311ff.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

the logic of their institutional practices and the moral convictions of their citizens are, which Europe the Union is organising. In short: Art. 2 TEU codifies the understanding of the Union as a liberal-democratic community of values. All law is committed to this.

This is not juridical fiction, but consolidated legal practice. In a series of groundbreaking rulings, in particular Opinion 2/13[85] and the judgments in *ASJP*,[86] *Achmea*,[87] *L.M.*,[88] *Commission/Poland*[89] and *Wightman*,[90] the CJEU has added to the previous functional logic of EU law, its rationality of "effet utile", an axiological logic. The Court concretises the EU as a genuine "union of values", not least in order to defend its foundations against authoritarian developments.[91] Today Art. 2 TEU goes far beyond constitutional aesthetics,[92] constitutional kitsch[93] or mere pathos[94].

Of course, for a Schmittian understanding, this cannot be but a façade that conceals the true power structure. Art. 2 EUV postulates a positive norm, a European legal will, which, according to Schmitt, cannot exist without a European state: Schmitt's text even starts with this premise that there is no European legislator and European political unity.[95]

Also, the constitutional pluralism of the European legal space[96] is, according to Schmittian thought, a *contradictio in adiecto* or terminology that

85 CJEU, Opinion 2/13 *Accession to the ECHR II* (ECLI:EU:C:2014:2454), para 168.
86 CJEU, Case C-64/16 *Associação Sindical dos Juízes Portugueses* [2018] ECR I-117 (ECLI:EU:C:2018:117) para 30–32.
87 CJEU, Case C-284/16 *Slovak Republic v. Achmea BV* [2018] ECR 158 (ECLI:EU:C:2018:158) para 34.
88 CJEU, Case C-216/18 *PPU (Minister for Justice and Equality)* [2018] ECR I-586 (ECLI:EU:C:2018:586) para 35, 48, 50.
89 CJEU, Case C-619/18 *Commission/Polen* (ECLI:EU:C:2019:531) para 42, 47.
90 CJEU, Case C-621/18 *Wightman* (ECLI:EU:C:2018:999) para 62–63.
91 For more details: José Martín y Perez de Nanclares, "La UE como comunidad de valores: A vueltas con la crisis de la democracia y del Estado de Derecho", in Teoría y Realidad Constitucional, 43 (2019), 121, 126ff.
92 Joseph H. H. Weiler, "On the power of the Word: Europe's constitutional iconography", in International Journal of Constitutional Law, 3 (2005), 173.
93 Alexandra Kemmerer, "Verfassungskitsch ist keine Lösung", in Internationale Politik, 7 (2005), 36.
94 Ulrich Haltern, "Pathos and Patina: The Failure and Promise of Constitutionalism in the European Imagination", in European Law Journal, 9 (2003), 14.
95 Carl Schmitt, *Die Lage der europäischen Rechtswissenschaft* (n 4) 7; cf. also Carl Schmitt, "Die legale Weltrevolution. Politischer Mehrwert als Prämie auf juristische Legalität und Superlegalität", in Der Staat, 17 (1978), 321, 336.
96 Cf., for example, Miguel P Maduro, "Contrapunctual Law: Europe's Constitutional Pluralism in Action", in Neil Walker (ed), *Sovereignty in Transition* (Hart, Oxford and Portland, Oregon, 2003) 501ff; Daniel Halberstam, "Constitutional

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

conceals hegemonial interests. This thought cannot grasp the basic constellation of European law: a set of common constitutional principles and, at the same time, a protected diversity that prevents the formation of a state. Indeed, the European constitutional diversity is mesmerising: Republics and monarchies, parliamentary, presidential and semi-presidential systems, strong and weak parliaments, competitive and consensus democracies, those with strong and those with weak party structures, with strong and weak societal institutions, unitary and federal orders, strong, weak and missing constitutional courts, highly varying degrees of self-organisation of the judiciary and considerable divergences in the content and intensity of protection of fundamental rights, not least Ottoman, Catholic, secular, Protestant, anarcho-syndicalist, socialist, civic, postcolonial, or etatist constitutional traditions. Schmittian ideas of unity are not compatible with this. One cannot build contemporary European law with Schmitt, but very well against him. That makes him so insightful: a kite rises against the wind.

4. The science of European public law as katechon?

Art. 2 TEU grounds European jurisprudence on public law principles. The shaping of the social world, and thus a re-embedding of the financial markets, is incumbent on the collective, democratic process. Special expectations are placed on *European public law*.

Such a *European public law* is first and foremost a jurisprudential imagination, and, as the Latin expression *Jus Publicum Europaeum*, the most successful conceptual innovation of Schmitt's *The Situation of European jurisprudence*. What Schmitt understood by it, he monographically explained shortly afterwards in *The Nomos of the Earth in the International Law of Jus Publicum Europaeum*: a tremendous achievement of civilisation, thanks to the wisdom of European politicians, philosophers and jurists, crushed by American hegemony. It is to this book that we owe the prominence of the

Heterarchy: The Centrality of Conflict in the European Union and the United States", in Jeffrey L Dunoff and Joel P Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (CUP, Campridge, 2009) 326; Franz C Mayer and Hans M Heinig, "Verfassung im Nationalstaat: Von der Gesamtordnung zur europäischen Teilordnung? ", in Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer, 75 (2015), 7ff, 65ff.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA - https://www.nomos-elibrary.de/agb

expression today; it has almost become a jurisprudential common good.[97] It is used with various meanings but above all, that of a Eurocentric transnational law.[98]

Again, Schmitt's concept of European public law is as outdated as it is topical. Even according to Schmitt's own description, the term is outdated since it refers to a past legal phenomenon, i.e. precisely the European-centered international law which, according to his understanding, has disappeared, and the constitutional orders of the European states which sustain it and which are congenial to it. The decline of this order is Schmitt's greatest sorrow and is regarded by him as a sign, if not a cause, of the world's disorder. Schmitt's *Jus Publicum Europaeum*, however, is also outdated in terms of content insofar as it rejects the criminalisation of German war crimes and the post-war international legal order.

All in all, the order which Schmitt describes with the expression *Jus Publicum Europaeum* is, in almost all respects, the diametrical opposite of the idea of order which the Treaty on European Union establishes for today's European law. Today, the common European public law is not strictly intergovernmental and sovereignty-based law but opens up the Member States to supranational institutions and those of other Member States. It is placed under and behind the universal system of international law. And, of course, it pursues the idea of "eternal peace" almost constitutively, at least in the European legal space.

Nevertheless, Schmitt's text opens up a fruitful perspective on today's European public law. The new European public law that was emerging on

---

97 A detailed analysis of the history of the concept and its impact Armin von Bogdandy and Stephan Hinghofer-Szalkay, "Das etwas unheimliche Ius Publicum Europaeum", in Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, 73 (2013), 209ff.

98 Jochen Hoock, "Jus Publicum Europaeum", in Der Staat, 50 (2011), 422ff; Urs Saxer, Die internationale Steuerung der Selbstbestimmung und der Staatsentstehung (Springer, Heidelberg, 2010) 39ff; Jörn A Kämmerer, "Das Völkerrecht des Kolonialismus: Genese, Bedeutung und Nachwirkungen", in Verfassung und Recht in Übersee, 39 (2006), 397, 399ff; Rüdiger Voigt, *Weltordnungspolitik* (Verlag für Sozialwissenschaften, Wiesbaden, 2005) 57, 60; Grzegorz Adamczyk and Peter Gostmann, Polen zwischen Nation und Europa (Deutscher Universitäts-Verlag, Wiesbaden, 2007) 34ff, 38; Matthias Zimmer, *Moderne, Staat und Internationale Politik* (Verlag für Sozialwissenschaften, Wiesbaden, 2008) 45; Enzo Traverso, "Der neue Antikommunismus. Nolte, Furet und Courtois interpretieren die Geschichte des 20. Jahrhunderts", in Volker Kronenberg (ed), *Zeitgeschichte, Wissenschaft und Politik* (Verlag für Sozialwissenschaften, Wiesbaden, 2008) 67, 68; Achille Mbembe, "Nekropolitik", in Marianne Pieper and others (eds), *Biopolitik* (Verlag für Sozialwissenschaften, Wiesbaden, 2011) 63, 74.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

the horizon at the time and has now become a reality reproduces some of what Schmitt valued in the old *Jus Publicum Europaeum* and succinctly summarised: a clear geographical demarcation, a particular community of states, admission criteria in accordance with the dominant understanding of European statehood, a common basis of values, and last but not least comparable constitutional structures.[99]

Because of these elements, the concept retains topicality. It gained attraction at the very time when, after the fall of the Berlin Wall, the Western model of order advanced eastwards. An early example of the new use of the term is found in an 1991-essay where Peter Häberle draws attention to a common European constitutional law in terms of common constitutional principles.[100] It is no coincidence that various academic projects investigating such common European constitutional structures bear this name, such as the *Societas Iuris Publici Europaei* (SIPE) and the *Ius Publicum Europaeum* (IPE) project.[101]

Schmitt's spatial thinking, which underlies his notion of Europe, appears similarly outmoded and modern at the same time. On the one hand, it is based on the dark concept of land grabbing and served an imperialist territorial order (*Großraumordnung*), developed, among others, in the writings "Raum und Großraum im Völkerrecht" (1940) and "Völkerrechtliche Großraumordnung" (1941).[102] But there are conceptual parallels and perhaps even connections between German expansionist spatial thinking and European integration, which form a useful critical lens.[103]

What is even more important in terms of positive law is that the European Treaties make Schmitt's spatial thinking topical: they use the concept

---

99 Matthias Goldmann, "Hopes of Progress: European Integration in the History of International Law", in MPIL Research Paper Series, 26 (2018), 11.

100 Peter Häberle, "Gemeineuropäisches Verfassungsrecht", in Europäische Grundrechtezeitschrift, 18 (1991), 261, 263.

101 Heinz Schäffer, "Gründung einer Societas Iuris Publici Europaei (SIPE)", in Zeitschrift für öffentliches Recht 58 (2003), 405, 405ff; Hartmut Bauer, "Entstehung und Entwicklung der Societas Iuris Publici Europaei" in Rainer Grote and others (eds), *Die Ordnung der Freiheit, FS für Christian Starck* (Mohr Siebeck, Tübingen, 2007) 496ff; regarding the IPE project: < https://www.mpil.de/en/pub/research/areas/comparative-public-law/ius-publicum-europaeum.cfm > (last visited 19 February 2020).

102 Republished in Carl Schmitt, *Staat, Großraum, Nomos* (Duncker & Humblot, Berlin, 1995) 234ff and 269ff.

103 Christian Joerges, in Christian Joerges and Navraj S Ghaleigh (eds), *Darker Legacies of Law in Europe* (Hart, Oxford and Portland, Oregon, 2003) 168: "(a)ll the legal disciplines that later contributed to the legal conceptualization of the European Community had been infected by '*völkisch*' legal thinking in Germany".

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

of space to determine the shape of Europe. The idea that the European order is to be thought of in spatial terms, with borders and even territorially, has gained enormously in attraction in recent years and is one of the keys to the contours of today's Europe.[104] The jurisprudential processing of this idea can make progress by examining Schmitt's conceptualisation.[105]

The problems of Schmitt's *Jus Publicum Europaeum* and the potential of European public law in the context of European integration were farsightedly articulated by the Swiss international law expert Paul Guggenheim as early as 1954.[106] He branded the *Jus Publicum Europaeum*, "in terms of its material content", as "ideological". Although Carl Schmitt, as in Mosler's work, remains unmentioned, a response character to his *Nomos* is apparent. Guggenheim links this rejection with the prognosis that the newly born European Coal and Steel Community could lead to a genuine *Jus Publicum Europaeum*, which is situated between universal international law and the domestic legal orders of Europe. Guggenheim's concluding sentence identifies almost prophetically the transformative potential of this European public law: "It would be no small irony in world history, however, if the sovereign state of European origin, this most important factor in the political structure of the contemporary community of international law even today, were to be subjected to a structural transformation through the development of the jus publicum Europaeum."[107]

The transformative character of European public law is now widely recognised.[108] Aldo Sandulli wants to use this transformative power in connection with Schmitt's theme of unleashed capitalism for another enormous transformation task: that of re-embedding the European finan-

104 Kirsten Schmalenbach and Jürgen Bast, "Völker- und unionsrechtliche Anstöße zur Entterritorialisierung des Rechts", in Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer, 76 (2017), 245ff und 277ff, each with extensive evidence and convincing refutation of the critics of spatial thinking.

105 Oliver Simons, "Carl Schmitt's Spatial Rhetoric", in Jens Meierheinrich and Oliver Simons (eds), *The Oxford Handbook of Carl Schmitt* (OUP, Oxford, 2018) 777.

106 Paul Guggenheim, "Das Jus publicum europaeum und Europa", in Jahrbuch des öffentlichen Rechts der Gegenwart, 3 (1954), 1ff.

107 Paul Guggenheim, "Das Jus publicum europaeum und Europa" (n 106) 1, 14.

108 The iconic texts come from the US, Eric Stein, "Lawyers, Judges, and the Making of a Transnational Constitution", in American Journal of International Law, 75 (1981), 1; Joseph H. H. Weiler, "The Transformation of Europe", in Yale Law Journal, 100 (1991), 2403.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

cial market.[109] Sandulli already sees attempts to do so in current European public law, especially in European administrative law. Sandulli observes that it has real power: the structures of order developed by jurisprudence shape the political will. To advance the science, European public law must open itself up further and take a more interdisciplinary approach. It must lead the one-sided rationalities of the other sciences to a synthesis in the medium of law and the light of fundamental rights.[110] Jurisprudence, according to him, should take up insights and imperatives formulated above all by the economic sciences but process them in the light of fundamental rights, constitutional principles and the findings of other sciences in such a way that the common good and thus societal integration is promoted. Just as with Schmitt, jurisprudence holds the primary institutionalisation of societal reason, Sandulli even assigns it primacy over the other sciences (*interdisciplinarietà a primazia giuridica*).[111]

This positioning of European jurisprudence against the global financial markets evokes a Schmittian motif with the katechon, the restrainer of the Antichrist, "on the way to complete functionalisation", namely through "a system of mediation".[112] Sandulli avoids such apocalyptic terminology. Perhaps precisely for this reason, he can assign a more constructive role to jurisprudence as a "system of mediation", which goes even further than Schmitt's: the "mediations" developed by jurisprudence are even supposed to enjoy a juris-generative role as jurists' law, similar to legislation and judicial precedents.[113]

A truly juris-generative role is difficult to reconcile with democratic principles and might too reinforce fears of an overly powerful legal profession. But jurisprudence certainly has a role in the public sphere. The alienation of European citizens from the European institutions calls for texts that capture their time in thoughts and communicate them to their contemporaries. The Western tradition of conceiving both political and

---

109 Aldo Sandulli, *Il ruolo del diritto in Europa. L'integrazione europea dalla prospettiva del diritto amministrativo* (n 2) 152.

110 Aldo Sandulli, *Il ruolo del diritto in Europa. L'integrazione europea dalla prospettiva del diritto amministrativo* (n 2) 197–210, especially 209.

111 Aldo Sandulli, *Il ruolo del diritto in Europa. L'integrazione europea dalla prospettiva del diritto amministrativo* (n 2) 202.

112 Carl Schmitt, *Verfassungsrechtliche Aufsätze* (n 48) 429.

113 Aldo Sandulli, *Il ruolo del diritto in Europa. L'integrazione europea dalla prospettiva del diritto amministrativo* (n 2) 152. Such ambition is therefore not a "purely German" phenomenon see Christoph Schönberger, *Der „German Approach". Die deutsche Staatsrechtslehre im Wissenschaftsvergleich* (Mohr Siebeck, Tübingen, 2015) 47ff.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

societal issues in legal categories is alive and well, and texts of this kind support the societal prestige and legitimacy of the discipline. Schmitt, probably the most powerful jurist of the 20th century, is a reference point for such a programme.

IV. What is autonomy supposed to mean to us?

1. Doctrinal constructivism

A critical and, at the same time, constructive jurisprudence is needed. The critical approach can arise from different, even contrary, orientations. For Schmitt, the critical impetus comes from the *concrete orders*: Traditional, often authoritarian societal structures form the yardstick for his criticism of the development of positive law, which he understands as internal to the law.[114] In order to alleviate the pressure to innovate, Schmitt recommends "unintentional development",[115] which slows down transformational ambition as far as possible, entirely in keeping with a conservative understanding of order.[116] It is not difficult to extract from Schmitt's writing a project in which an autonomous conservative jurisprudence leads an autonomous conservative judiciary that stands in the way of reformatory politics. According to him, it is the tradition of institutions that gives social order its actual legitimacy.[117]

But the rejection of such conservatism should not overlook the real beauty of the operation: the acquisition of an internal critical dimension which is a hallmark of any good jurisprudence. The critical theory takes a decidedly progressive approach:[118] the critique can also be drawn from the

114 Cf. Carl Schmitt, *Über die drei Arten des rechtswissenschaftlichen Denkens* (n 82) 20: "the living together of the spouses in a marriage, the family members in a family (...), the civil servant in a state, the cleric in a church, the comrades in a work camp, the soldier in an army" (translation by the author).

115 Carl Schmitt, *Die Lage der europäischen Rechtswissenschaft* (n 4) 23.

116 This probably corresponds to the prevailing understanding of fundamental rights during the Weimar period, Klaus Tanner, *Die fromme Verstaatlichung des Gewissens* (Vandenhoeck & Ruprecht, Göttingen, 1989) 103ff, 134ff.

117 Douglas Howland, "Carl Schmitt's Turn to Sovereignty in Jurisprudence" (n 25) 211.

118 Rainer Forst and Klaus Günther, "Die Herausbildung normativer Ordnungen. Zur Idee eines interdisziplinären Forschungsprogramms", in Rainer Forst and Klaus Günther (eds), *Die Herausbildung normativer Ordnungen. Interdisziplinäre Perspektiven* (Campus Verlag, Frankfurt a.M., 2011) 11ff.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA - https://www.nomos-elibrary.de/agb

unfulfilled constitutional promises of liberal constitutionalism.[119] Whatever the political orientation: a critical-reconstructive approach is the common methodological slogan.

This leads to the question of which methodological programme should be used to carry out such a critical-reconstructive approach and what can be recommended to European jurisprudence. In his *The Situation of European Jurisprudence*, Schmitt emphasises autonomy as the guiding criterion. What this means, he leaves largely open. His few sketches suggest a rather formalistic, ultimately doctrinal understanding: working on the "unity and consistency of law",[120] "sense of logic and consistency of concepts and institutions".[121] This profile seems to confirm the traditional self-conception of doctrinal work.

Is that still to be recommended, especially to European jurisprudence? The most important institution for the Europeanisation of national jurisprudence, the European Research Council, seems to propagate a contrary agenda: Interdisciplinarity seems to be the shibboleth of good research.[122] Legal doctrine is considered by many to be outdated. Sandulli, for example, sees the current German "neo-constructivism, neo-doctrinalism and conceptual abstractivism" as highly dangerous, originating from the spirit that led to two world wars.[123] Not infrequently, doctrinal thinking is accused of pursuing an authoritarian project.[124]

It is true that authoritarian leanings can be deposited in doctrinal concepts. One of the most famous statements ever can be understood in this sense: Otto Mayer's "Constitutional law comes and goes, administrative law remains" of 1924.[125] It stands for the authoritarian persistence against a democratic development of public law.

---

119 So the programme in Jürgen Habermas, *Faktizität und Geltung* (n 84).

120 Carl Schmitt, *Die Lage der europäischen Rechtswissenschaft* (n 4) 21.

121 Carl Schmitt, *Die Lage der europäischen Rechtswissenschaft* (n 4) 30.

122 Thomas König and Michael E Gorman, "The Challenge of Funding Interdisciplinary Research: A Look inside Public Research Funding Agencies", in Robert Frodeman (ed), *The Oxford Handbook of Interdisciplinarity* (OUP, Oxford, 2017) 520.

123 Aldo Sandulli, *Il ruolo del diritto in Europa. L'integrazione europea dalla prospettiva del diritto amministrativo* (n 2) 197. He mentions in particular Reinhard Zimmermann and Armin von Bogdandy, 38ff, 207.

124 Michelle Everson, "Is it just me, or is there an Elephant in the Room?", in European Law Journal, 13 (2007), 136, 137ff.

125 Otto Mayer, *Deutsches Verwaltungsrecht*, vol. 1 (Duncker & Humblot, Berlin, 1924) Vorwort VI; on this Luc Heuschling, "Verwaltungsrecht und Verfassungsrecht", in Armin von Bogdandy, Sabino Cassese and Peter M Huber (eds), *Hand-*

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

However, public law doctrine does not necessarily have such an orientation. What matters beyond political convictions is described by Schmitt in *The Situation of European Jurisprudence* in beautiful clarity. "The situation of European jurisprudence has (...) always been determined by two opposites: to theology, metaphysics and philosophy on the one hand and the merely technical study of norms on the other".[126] In recent times, the necessity of distinguishing it from the social sciences has been added.[127] If jurisprudence tilts in one direction or the other, it would "be absorbed by other departments and surrender the result of half a millennium".[128]

What is defended and propagated by these observations? It is about the structuring of law through autonomous concepts. The positive legal material is transcended, but not by means of political, historical, sociological, economic or philosophical considerations, but by means of structuring concepts such as state, sovereignty, public and private, or, especially for the European legal space, primacy, direct effect, democracy, identity, competence or pluralism. Although the concepts often originate in other scientific contexts,[129] they are conceived as *specifically legal* and thus autonomous concepts, the treatment of which is, therefore, the sole responsibility of jurisprudence. Abstraction, conceptualisation and the structuring arrangement of huge amounts of material become key competences of jurisprudence.[130]

Thereby, jurisprudence creates an autonomous space for reasoning as an intermediate layer between normative statements from political theory, philosophy or theology, on the one hand, the positive legal norms in the direct access of politics and the courts, and social science findings on the

---

buch Ius Publicum Europaeum, vol. III (C.F. Müller, Heidelberg, 2010) § 54, para 13ff; Walter Pauly, "Deutschland", in Armin von Bogdandy, Sabino Cassese and Peter M Huber (eds), *Handbuch Ius Publicum Europaeum*, vol. IV (C.F. Müller, Heidelberg, 2011) § 58 para 11.

126 Carl Schmitt, *Die Lage der europäischen Rechtswissenschaft* (n 4) 29.

127 Carl Schmitt, *Die Lage der europäischen Rechtswissenschaft* (n 4) 18.

128 Carl Schmitt, *Die Lage der europäischen Rechtswissenschaft* (n 4) 29.

129 On the natural law aspects of the classical terminology in more detail Joachim Rückert, *Idealismus, Jurisprudenz und Politik bei Friedrich Carl von Savigny* (Gremer, Ebelsbach, 1984) 232ff.

130 In more detail using the examples of contract and company law Stefan Grundmann "Systemdenken und Systembildung", in Karl Riesenhuber (ed), *Europäische Methodenlehre. Handbuch für Ausbildung und Praxis* (3rd edn, De Gruyter, Berlin, 2015) § 9; Martijn W Hesselink, "A European Legal Method? On European Private Law and Scientific Method", in European Law Journal, 15 (2009), 20ff.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

other. From the specific professional competence regarding these concepts and structuring tasks flows the functional legitimation of the discipline thanks to the underlying premise that only conceptually permeated, i.e. rationalised legal material can provide adequate services for social order.[131]

Of course, today the cryptoidealistic conception of traditional doctrine is no longer convincing. Whereas in the past, "the" system and the jurisprudential concepts were understood to be inherent in the law, today they are known as instruments for the order and handling of the law. One is also more reserved in the view of how meaningful a system and jurisprudential concepts are for the applicable law, how much authority is inherent in them, how "striking" a corresponding reasoning is.[132] Schmitt's text is remarkably enlightened in this regard: the system appears more as a regulatory idea than as an ontological assertion. The proper task, and dignity, of jurisprudence, for Schmitt, is to "seek to preserve the lost unity and consistency of law itself".[133]

Not just in Schmitt's view such doctrinal work has a meaning, even a dignity. It makes the law learnable, manageable, controllable. Doctrinal thinking is by no means only comprehending and ordering, but can also be constructive and open new room for possibilities.[134] French jurisprudence shaped the beautiful expression of the *cathédrale juridique*.[135] "Doctrinal constructivism" could be a fitting description of this creative jurisprudence.[136] Eberhard Schmidt-Aßmann and Christian Bumke recently

---

131 Max Weber, *Wirtschaft und Gesellschaft* (5th edn, Mohr Siebeck, Tübingen, 1972) 825ff; Wissenschaftsrat, Perspektiven der Rechtswissenschaft in Deutschland. Situation, Analysen, Empfehlungen, Drs. 2005–12 (2012), 33.

132 Eberhard Schmidt-Aßmann, *Verwaltungsrechtliche Dogmatik. Eine Zwischenbilanz zu Entwicklung, Reform und künftigen Aufgaben* (Mohr Siebeck, Tübingen, 2013) 3ff.

133 Carl Schmitt, *Die Lage der europäischen Rechtswissenschaft* (n 4) 21 (emphasis added).

134 The idea of a purely descriptive jurisprudence is nevertheless still powerful, cf. only Michael Potacs, *Rechtstheorie* (2nd edn, Facultas, Wien, 2019) 95ff; on the corresponding jurisprudence in Central and Eastern Europe, András Jakab, "Ungarn", in Armin von Bogdandy, Pedro Cruz Villalón and Peter M Huber (eds), *Handbuch Ius Publicum Europaeum*, vol. II (C.F. Müller, Heidelberg, 2008) § 38 para 20 ff.

135 See Luc Heuschling, "Frankreich", in Armin von Bogdandy, Pedro Cruz Villalón and Peter M Huber (eds), *Handbuch Ius Publicum Europaeum*, vol. II (C.F. Müller, Heidelberg, 2008) § 28.

136 This section is based on Armin von Bogdandy, "The past and promise of doctrinal constructivism: A strategy for responding to the challenges facing constitutional scholarship in Europe" (n 5) 364, 376, 378.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

spelt out concisely how such doctrinal constructivism can be understood and practiced.[137] Robert Post confirms that this central role of doctrinal thinking creates an identity in contrast to US-American jurisprudence, in which a similarly determining role is played by the methodologically almost contrary orientation of the Economic or Policy Analysis of Law.[138]

Schmitt emphasises the autonomy of jurisprudence and assigns doctrine an almost world-historical role, which may surprise many doctrinal scholars. He is certainly not a representative of a narrow or rigid doctrinalism. Already his concept of *concrete order* implies an openness of jurisprudential, especially doctrinal work to the inherent logic of the facts.[139] According to his understanding of doctrine, insights from other sciences are relevant in doctrinal thinking.[140] Doctrine may sometimes degenerate into formalism or narrow textualism that is far removed from the problem but must not be identified with it.

2. *Lessons from Schmitt's theoretical research*

Jurisprudence goes beyond legal doctrine, as Schmitt shows. He cultivated a free thinking that speaks to many sciences and, as his singular reception in other sciences shows, is remarkably connectable. It should be emphasised that he regularly positioned himself as a legal scholar and his texts as jurisprudential.[141] Schmitt's *The Situation of European Jurisprudence* is also a pronounced jurisprudential text, but not a doctrinal one. It concerns the shaping of the concept of *European jurisprudence*. The programme is similar to that in *The Concept of the Political*, described there as follows: It "is

137 Eberhard Schmidt-Aßmann, *Verwaltungsrechtliche Dogmatik. Eine Zwischenbilanz zu Entwicklung, Reform und künftigen Aufgaben* (n 132); Christian Bumke, *Rechtsdogmatik. Eine Disziplin und ihre Arbeitsweise* (Mohr Siebeck, Tübingen, 2017).

138 Robert C Post, "Constitutional scholarship in the United States" (n 5) 416, 421; Thilo Kuntz, "Auf der Suche nach einem Proprium der Rechtswissenschaft", in Archiv für die civilistische Praxis, 219 (2019), 254, 279ff.

139 This sensitivity remains a demand: Oliver Lepsius, "Kontextualisierung als Aufgabe der Rechtswissenschaft", in JuristenZeitung, 74 (2019), 793.

140 In detail Eberhard Schmidt-Aßmann, *Verwaltungsrechtliche Dogmatik. Eine Zwischenbilanz zu Entwicklung, Reform und künftigen Aufgaben* (n 132) 21ff.

141 Reinhard Mehring, *Carl Schmitt. Zur Einführung* (4th ed., Junius, Hamburg, 2011) 146.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

intended to [...] define a framework for certain jurisprudential questions in order to structure a confused topic and find a topology of its concepts".[142]

Does jurisprudence represent a specific form of rationality beyond legal doctrine, too?[143] This question is twofold in Schmitt's *The Situation of European Jurisprudence*: On the one hand, it concerns the question of what is rational about a conception such as *European jurisprudence*, and on the other, it is about what Schmitt's postulate of autonomy means for the interdisciplinary research that is strongly demanded today. For both aspects, the answer is that what matters is practical fruitfulness in legal discourses. This confirms and even strengthens the postulate of autonomy of legal science.

First of all, regarding interdisciplinarity: it is central to Sandulli's task of hedging the European financial market with jurisprudential patterns of order. Jurisprudence cannot pursue such a task with legal *common sense* alone, but only by incorporating the insights of other sciences; interdisciplinarity is required. But must legal research then be subordinated to the knowledge-generating discipline? In fact, some understand jurisprudence as a subfield of social science research.[144] Schmitt's *The Situation of European Jurisprudence* points in the opposite direction: successful interdisciplinarity thus presupposes the autonomy of jurisprudence. Nothing else can be said for Sandulli, who even postulates a primacy of jurisprudence.

As *legal scholars*, Schmitt and Sandulli integrate findings from other sciences into their work, which they understand as *jurisprudential*. They thus claim an *internal* jurisprudential, an *intra*disciplinary space on which they practice *inter*disciplinarity. As academics who are legal scholars *qua* their education, institutional affiliation and identity, they draw on the research questions, methods and findings of other disciplines in accordance with the logic of their jurisprudential tasks and interests: from history, the history of political ideas and philosophy, economics, sociology, political science, theology. Such research does not abolish disciplinary boundaries but often pleases as a border crosser; Schmitt is a shining but also blinding and therefore dangerous example. Jannis Lennartz aptly refers to his work as *Juridical Shell Splinters (Juristische Granatsplitter)*.[145]

---

142 Carl Schmitt, *Der Begriff des Politischen. Text von 1932 mit einem Vorwort und drei Corollarien* (Duncker & Humblot, Berlin, 1963) 9.

143 The expression originates from Christoph Engel and Wolfgang Schön (eds), *Das Proprium der Rechtswissenschaft* (Mohr Siebeck, Tübingen, 2007).

144 So pronounced by Ran Hirschl, *Comparative Matters* (OUP, Oxford, 2014) 151ff.

145 Jannis Lennartz, *Juristische Granatsplitter* (n 1).

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

The *intra*disciplinary conceptualisation is an expression of jurisprudential autonomy, and it is of fundamental importance. Firstly, questions from the legal world – questions about the creation of law, the application of law, the construction of legal doctrine or legal criticism, but also, as in the *The Situation of European Jurisprudence*, questions about the scientific self-understanding – steer the interaction with other disciplines and the reception of their knowledge. Since these questions are alien to other research disciplines, their answers require a discipline-specific approach. And in view of the intradisciplinary nature, the formulation and monitoring of the standards for good research practice is primarily in the hands of other legal scholars.[146]

The relevant funding policy of the European Research Council, on the other hand, pushes jurisprudence to the questions, methods and standards of other disciplines.[147] Certainly, legal research that strives for interdisciplinarity may appear problematic from the perspective of the respective discipline. Only rarely does a legal scholar succeed in comprehensively processing the current state of relevant insights of other sciences, let alone penetrating and evaluating them in depth. Take the interdisciplinarity Sandulli has in mind: how can a legal scholar fully understand the current state of research on financial markets? The reception often takes place in a syncretistic, eclectic or reductionist manner. I recall various embarrassing situations in which a legal scholar proudly produces relevant findings, only to be informed by a specialist about the true complexity of the current research situation.

And yet, such a syncretistic, eclectic or reductionist approach can be understood as good jurisprudence. What is more, the less restrained approach can almost be understood as a trump card that allows legal scholars to fruitfully process findings from other sciences in the light of their own questions.[148] Such freedom does not mean a lack of standards: the relevant standards include a stated connection to correctly recorded results of relevant research, the traceability of the reasoning and the individual arguments, its internal coherence, an argumentative examination of other texts,

146 The DFG pursues a multidimensional approach to ensuring good scientific practice and develops abstract interdisciplinary guidelines as well as concrete subject-specific standards: https://www.dfg.de/en/research_funding/principles_dfg_funding/good_scientific_practice/index.html (last visited 19 February 2020).

147 Thomas König and Michael E Gorman, "The Challenge of Funding Interdisciplinary Research: A Look inside Public Research Funding Agencies" (n 122) 520.

148 Thilo Kuntz, "Auf der Suche nach einem Proprium der Rechtswissenschaft" (n 138) 254, 298.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

above all divergent approaches, accuracy and prudence in the presentation of relevant legal material.[149] If these criteria are summarised in terms of a theory of truth, a syncretistic understanding of truth emerges, which combines elements of correspondence, coherence and consensus theories of truth.[150]

A particularly important criterion for the evaluation of a theoretical text is its potential for doctrinal jurisprudence: Theoretical jurisprudence gains in truthfulness when it supports doctrinal constructions, which in turn prove themselves in the thicket of positive law and its operations.[151] Thus, theoretical research shows a parallel to processes in the natural sciences, in which a speculative theorem may stand at the beginning, which must be confirmed by sound empirical research.

The freedom of theoretical work, therefore, comes at the price of remaining dependent on other legal reasoning processes. The epistemic status of such a scholarly contribution is rather that of a hypothesis that must prove its value in more specific legal discourses. Therefore, theoretical jurisprudence alone can illuminate the thicket of legal normativity only to a limited extent. Anyone who relies on it alone when scientifically dealing with the law will easily miss the right path and get caught in a tangle of blind theories, ideological slogans or shaky speculations.

A similar picture emerges with regard to the formation of legal concepts, Schmitt's greatest strength. Law is a social construct, so that legal terminology has an almost ontological function. Legal terms are words that not only describe something but also establish a context of meaning and provide insights.[152] Often they shape the way jurists work, indeed

149 Many of these criteria are addressed by Helmuth Schulze-Fielitz, "Was macht die Qualität öffentlich-rechtlicher Forschung aus?", Jahrbuch des öffentlichen Rechts der Gegenwart 50 (2002), 1, 26ff.

150 See Jürgen Habermas, "Wahrheitstheorien", in Walter Schulz and Helmut Fahrenbach (eds), *Wirklichkeit und Reflexion, FS für Walter Schulz zum 60. Geburtstag* (Neske, Pfullingen, 1973) 211ff; Kuno Lorenz, "Wahrheitskriterium", in Jürgen Mittelstraß (ed), Enzyklopädie Philosophie und Wissenschaftstheorie, vol. 4 (Metzler, Stuttgart and Weimar, 1997) 594ff; Michael Glanzberg, *Truth*, Stanford Encyclopedia of Philosophy, <http://plato.stanford.edu> (last visited 19 February 2020); Martina R Deckert, "Recht und Wahrheit: Zum gegenwärtigen Stand der Diskussion Recht und Wahrheit: Zum gegenwärtigen Stand der Diskussion", in Archiv für Rechts- und Sozialphilosophie, 82 (1996), 45.

151 This includes legal policy or legal criticism, see Uwe Volkmann, "Wie die Theorie der Verfassung ihren Inhalt bestimmt", in Der Staat, 54 (2015), 35, 60.

152 On this understanding of the concept Reinhart Koselleck, *Vergangene Zukunft. Zur Semantik geschichtlicher Zeiten, Begriffsgeschichte und Sozialgeschichte* (Suhrkamp, Berlin, 2000) 119; Reinhart Kosellek, in Otto Brunner, Werner Conze

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

their legal, self and world relationship. Had Schmitt's conceptualisation of *European jurisprudence* become established since the 1950s as the relevant horizon of jurisprudential production and identity, the national silos of legal science that still characterise the landscape of legal research today would hardly have survived.[153]

The jurisprudential conceptualisation, like jurisprudential interdisciplinarity, must ultimately prove itself in legal practice. Schmitt's hyperbolic conceptualisation of European jurisprundence was, as has been shown, unsuccessful. Here, too, Schmitt's failure is insightful. Contrary to what Schmitt's *The Situation of European Jurisprudence* already claims on its first page, a European jurisprudence needs a European political will and a European legislator. In view of the vitality of this European will today and lively sources of European law, however, his petitum, an autonomous European jurisprudence, is ultimately an imperative of our time.

V. German hegemony?

Schmitt's *The Situation of European Jurisprudence* shows alarming parallels with his openly National Socialist paper *Die geschichtliche Lage der deutschen Rechtswissenschaft*, published 14 years earlier.[154] Admittedly, the text on European jurisprudence published in 1950 lacks any open justification for a German hegemonic claim to Europe. Nevertheless, it is evident that also in 1950, the "seeds of the spirit" of European jurisprudence owe their existence to German jurisprudence. Because on the one hand, Schmitt rejects both French and English legal thought as inadequate,[155] and on the other, he postulates only two legal scholars as examples of a European jurisprudence understood in the right way: explicitly Savigny and implicitly himself, Schmitt.

---

and Reinhart Koselleck (eds), *Geschichtliche Grundbegriffe. Historisches Lexikon zur politisch-sozialen Sprache in Deutschland*, vol. 1 (Klett-Cotta, Stuttgart, 1972) p. XIII, XXIII.

153 Helmut Coing, "Europäisierung der Rechtswissenschaft" (n 51) 937ff.; Daniel Thym, "Zustand und Zukunft der Europarechtswissenschaft in Deutschland" (n 47) 671ff; Armin Hatje and Peter Mankowski, "'Nationale Unionsrechte': Sprachgrenzen, Traditionsgrenzen, Systemgrenzen" (n 47) 155ff; Bruno de Witte, "European Union Law: A Unified Academic Discipline" (n 47) 114ff.

154 Deutsche Juristen-Zeitung 41 (1936), col. 15 ff; see Reinhard Mehring, "Carl Schmitts Schrift ‚Die Lage der europäischen Rechtswissenschaft'" (n 23) 853, 862.

155 Carl Schmitt, *Die Lage der europäischen Rechtswissenschaft* (n 4) 24ff.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA - https://www.nomos-elibrary.de/agb

Thus Schmitt's Europeanism is ultimately a covert nationalism. It is a well-known fact that Europeanism can be a mask for national aspirations for hegemony. Time and again, the aspirations for European integration have been interpreted as an attempt to create a large French-[156] or German-dominated area.[157] Already de Gaulle understood Hallstein's ideas of the EEC as an expression of classic German interest politics. During the financial crisis, a growing number of voices started pointing toward, in analytical and even normative terms, a German hegemony.[158]

Does today's European legal space provide a framework that allows Schmitt's intention to succeed? This question does not come out of thin air. From the legal work in the European institutions, non-German lawyers report that the "German legal mindset", formed by German jurisprudence, has enormous assertiveness. The professorial law of the Federal Constitutional Court shapes European discourses like no other national institution.[159] It should also be remembered that Sandulli sees European administrative law as a product of German administrative law.[160]

Germany is probably the country that invests the most resources in legal research. And, unlike the Netherlands and the United Kingdom, it restricts the use of these resources almost entirely to German citizens: the requirement of two German state examinations in law for professorial appointments casts long shadows. Research from Germany, even if it strives for a European perspective, is often deeply German in character and for this reason alone propagates German positions and ways of thinking. This is shown not least by this contribution: Christoph Schönberger describes its orientation as the "the glowing core of the 'German approach'".[161] But

156 Cf. "Aufzeichnung des Staatssekretärs Lahr, 6. August 1963", in Institut für Zeitgeschichte (ed), Akten zur auswärtigen Politik der Bundesrepublik Deutschland 1963, vol. 2 (Oldenbourg, Munich, 1994) 942.

157 John P McCormick, in Christian Joerges and Navraj S Ghaleigh (eds), *Darker Legacies of Law in Europe* (Hart, Oxford and Portland, Oregon, 2003) 140.

158 Christoph Schönberger, "Hegemon wider Willen. Zur Stellung Deutschlands in der Europäischen Union", in Merkur, 66 (2012), 1; Angelo Bolaffi, *Cuore tedesco: Il modello Germania, l'Italia e la crisi europea* (Donzelli, Rome, 2013); The Economist, "Europe's reluctant hegemon", 13 June 2013.

159 On these asymmetries Armin von Bogdandy, Christoph Grabenwarter and Peter M Huber, "Verfassungsgerichtsbarkeit im europäischen Rechtsraum", in Armin von Bogdandy, Christoph Grabenwarter and Peter M Huber (eds), *Handbuch Ius Publicum Europaeum*, vol. VI (C.F. Müller, Heidelberg, 2016) § 95 para 27ff.

160 Aldo Sandulli, *Il ruolo del diritto in Europa. L'integrazione europea dalla prospettiva del diritto amministrativo* (n 2) 165.

161 According to Christoph Schönberger, *Der „German Approach". Die deutsche Staatsrechtslehre im Wissenschaftsvergleich* (n 113) 2.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

in a legal space where the protection of national identity is a constitutional principle, this cannot be considered a hegemonic endeavour but represents a legitimate, albeit one-sided, proposal in the European marketplace of ideas.[162]

There is no German hegemony in this marketplace. If one takes Heinrich Triepel's understanding of hegemony as a basis, intellectual guidance is decisive.[163] If one looks at the publishers, the editorships and the authorships of the leading journals in the subjects I research (such as the Common Market Law Review, the European Law Journal, the European Journal of Constitutional Law, the European Journal of International Law, the Leiden Journal of International Law or the International Journal of Constitutional Law), one does not see leadership by German legal scholars, but rather decidedly transnational orientations.

There are certainly two fora that can be identified as German and which play a prominent role in the entire European legal space: the *German Law Journal* and the *Verfassungsblog*. But their idea and practice are a *European Germany* and not a *German Europe*. There is no better way to understand the deep logic of these fora than the harsh backlight from Schmitt's *The Situation of European Jurisprudence.*

162 Formulated as a research programme by Matthias Jestaedt, "Wissenschaft im Recht. Dogmatik im Wissenschaftsvergleich", in JuristenZeitung, 69 (2014), 1, 12.

163 Heinrich Triepel, *Die Hegemonie. Ein Buch von führenden Staaten* (Kohlhammer, Stuttgart, 1938) 8.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA - https://www.nomos-elibrary.de/agb

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

Autonomy of Basic Elements of the Legal Order?

Christian Tomuschat[*]

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

* Professor emeritus of the Faculty of Law at the Humboldt-University Berlin. Member of the Institut de droit international. President of the Court of Conciliation and Arbitration within the OSCE (2013–2019).

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

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.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA - https://www.nomos-elibrary.de/agb

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.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

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).

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA - https://www.nomos-elibrary.de/agb

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.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:01
Open Access – (cc) BY-SA - https://www.nomos-elibrary.de/agb

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.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:02
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

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.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:02
Open Access – (cc) BY-SA - https://www.nomos-elibrary.de/agb

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]

---

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.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:02
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

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.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:02
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

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.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:02
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

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.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:02
Open Access – (cc) BY-SA - https://www.nomos-elibrary.de/agb

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).

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:02
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

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

---

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.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:02
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

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.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:02
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

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.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:02
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

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

---

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.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:02
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

"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]

---

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.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:02
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

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.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:02
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

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

---

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.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:02
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

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.).

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:02
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

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

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.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:02
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

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).

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:02
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

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

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:02
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

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.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:02
Open Access – (cc) BY-SA - https://www.nomos-elibrary.de/agb

European legal culture – a building block for the future*

Michael Stolleis

I

Legal history does not provide a hand oracle of the future. Nobody believes any longer that studying the past leads to binding predictions for the future. Cicero's formula *Historia Magistra Vitae* has long since faded and only appears in speeches.[1] We can deduce nothing conclusive from history through the use of logic. Instead, history is an enigmatic "teacher", always new, with an uncertain course and open end. Yet we also know: all our knowledge comes from history, acquired bit by bit through experience, our "mother tongue", our relationships with others, and our morals and political convictions. We live from history when we cautiously feel our way into an uncertain future. This condition is our human and methodological paradox.

One of the most critical concerns for legal historians is the normative functioning of earlier societies. They ask about the permanent transfer of norms and their adaption to changing circumstances. So what are the older foundations on which Europe rests, and the consequences for its future internal configuration? What resonance space surrounds us, not only in the narrower Europe but in the entire Mediterranean region of antiquity, including what we call the "Middle East" or "Near East"? This resonance space is where our legal writing emerges. It is from here that the first systematic legal records relevant to us originate. European legal culture is based on the cultures from Babylon to Athens, but mainly it is based on Rome. Here I understand European legal culture to mean the sum of our collective ideas of right and wrong and all expectations and

---

* Lecture for the Meyer-Struckmann-Prize 2019 of the University of Düsseldorf on 27.11.2019. The text was slightly shortened.

1 Reinhard Koselleck, "Historia Magistra Vitae. Über die Auflösung des Topos im Horizont neuzeitlich bewegter Geschichte", in Hermann Braun and Manfred Riedel (ed.) *Natur und Geschichte. Karl Löwith zum 70. Geburtstag* (Stuttgart: Kohlhammer, 1967) 196–219.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:02
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

reactions to major and minor conflicts which have become self-evident and are to be solved through law.[2]

The new Europe that emerged after the Second World War was early on described as a mere "community of law". This meant both a shared space for human rights and a legal space for the economic community. The Declaration of Human Rights of the newly founded United Nations was followed by the European Declaration of Human Rights and the establishment of the Council of Europe with the Court of Justice in Strasbourg (1949). However, the vision of a "United States of Europe", as drafted by Churchill in 1946 (without England, of course), appeared at first to be immediately realisable only as an economic community. Over the decades, the perspective narrowed down to the law of the EEC to exchange goods and services, and later to the area of the common currency and the removal of internal European borders. After the Treaties of Maastricht, Amsterdam, Nice and Lisbon, this perspective gradually expanded from an economic to a political European Union in its present form. From the 1990s onwards, with the emergence of the Court of Human Rights in Strasbourg and the renewed focus on refugees, the human rights context of European law is once again becoming more prominent. In other words: We find before us a triple meaning of Europe, the economic area, the political union of the EU, and the legal space of human and civil rights. The fact that we can no longer distinguish one meaning from the other lies at the heart of the problem today.

To the old formula "Europe as a community of law" legal historians have added yet another. Since the 1950s, they have seen the unifying European element of this legal community primarily in Roman-Italian law of the Middle Ages and the early modern period. There had indeed been a shared culture of Roman law since the twelfth and thirteenth centuries (Italy, Spain, southern France, then Central Europe, including Poland, but excluding England). This so-called common law (*ius commune*) served as the basis of all Western European legal education well into the nineteenth century.[3] All national codes, the Code civil, the Austrian ABGB, the Italian, the German and the Swiss civil codes draw from this Roman legal substance, not to mention the many varied receptions, transfers or

2 See Stefan Kadelbach (ed.), *Europa als kulturelle Idee. Symposion für Claudio Magris* (Baden-Baden: Nomos, 2010) 71–81. The basic ideas of this text are also laid down there.

3 Paul Koschaker, *Europa und das römische Recht*, 4th edition (München: Beck, 1966); Franz Wieacker, *Privatrechtsgeschichte der Neuzeit*, 2nd edition (Göttingen: Vandenhoeck u. Ruprecht, 1967).

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:02
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

translations Roman Law received in Japan, Turkey, South America, and South Africa.[4]

This common legal culture of private law, it was thought, especially in the 1960s, had to be rediscovered and revived for the current benefit of Europe. Indeed, one could imagine many similarities between the present and the High and Late Middle Ages. There were no national borders back then, just a dense network of power relations between secular and religious authorities. The educational landscape from southern Italy to England, from Portugal to Poland was freely "accessible". Academic goals, methodology, subjects of inquiry and the wandering life of scholars were uniform. They impacted the style of a self-confident legal profession, which from the 14th century onwards defined the legal landscape of local administrations in cities, fiefdoms and kingdoms, as well as courts. This Roman-Italian law, its concepts and topoi of interpretation overhauled and permeated the many and varied indigenous laws (commercial laws and customs, village laws, town laws, professional and ethical laws). Following Max Weber, this process was later dubbed "scientificisation" or "professionalization", to emphasise the contours of the history of science and the sociology of knowledge.[5]

These processes found reflection in the law of the Catholic Church. This canon law had been summarised around 1140 in Bologna in the form of legal code, which was now applicable to all Catholic Christians in the areas of marriage law, ecclesiastical property law, procedural law, canonical penalties, monastic law, and so on. This canon law – itself a kind of descendant of Roman law but developed further by the "juristic popes" – also shaped the lives of Europeans from Norway to Sicily, from Poland to Spain.[6] It formed a parallel European legal order, which strongly bracketed "Latin Europe", including England,[7] by the way, and also the Lutheran

4 With new perspectives and suggestions: Thomas Duve, "Ein fruchtbarer Gärungsprozess? Rechtsgeschichtswissenschaft in der Berliner Republik" in Thomas Duve und Stefan Ruppert (eds.) *Rechtswissenschaft in der Berliner Republik* (Berlin: Suhrkamp, 2018) 67–120; more wide-ranging Thomas Duve, "What is global legal history?" in *Comparative Legal History* Vol 8, 2020, 1–37.

5 Franz Wieacker, *Privatrechtsgeschichte der Neuzeit* 2nd edition (Göttingen: Vandenhoeck u. Ruprecht, 1967) 124ff; With very serious objections Peter Landau, "Wieackers Konzept einer neueren Privatrechtsgeschichte: Eine Bilanz nach 40 Jahren" in: Peter Landau (ed.), *Deutsche Rechtsgeschichte im Kontext Euro*pas (Badenweiler: Wissenschaftlicher Verlag, 2016) 411–433.

6 Christoph Link, *Kirchliche Rechtsgeschichte*, 2nd edition (München: Beck, 2010) 42ff.

7 Reinhard Zimmermann, Roman Law, Contemporary Law, European Law: The Civilian Tradition Today (Oxford: Oxford University Press, 2001).

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:02
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

and Calvinist churches. I say this because the Lutheran and Calvinist churches continued to build on this legal foundation. The church side of public life was also "juridified" and "made scientific". The individual was given a clearly defined legal position, and there were precise rules of procedure and principles of procedural justice.[8]

The complex European legal world of the *ius commune*, feudal law and canon law has been broken up since the eighteenth century with the emergence of nation-states. These states insisted on their sovereignty, built territorial administrations, created tax systems, developed trade balances and – last but not least – ordered their judiciary and legal system for the first time, including the new codifications. Europe was thus the great hope of the legal historians of the post-1945 era, a longing for the restoration of a private *ius commune*, whether through the history of law or comparative law. However, we can leave the aspect of private law aside here. It concerns the foundations of European comparative private law and legal harmonisation. Today, however, the dynamism of these activities no longer stems from the legacy of Roman law. Instead, it comes from the interests of achieving greater uniformity in economic and commercial law, whether to reduce internal costs or to acquire a stronger position on the world market.

II

The historical foundations of European constitutional law, the *ius publicum europaeum*, are also of great practical importance. Even the founder generation of Europe after the Second World War thought about a future "constitution of Europe". They certainly did not envisage a transnational unitary state but rather a federal structure that would guarantee collective security, peace and freedom.

The building blocks for this novel architecture could only be taken from a set of basic rules or principles of European public law.[9] The basic principles of European public law had developed over centuries and had now spread to other parts of the world. They have been transformed – as is usual in the transfer of law – and they have adapted to different

8 Iole Fargnoli and Stefan Rebenich (eds.), *Das Vermächtnis der Römer: Römisches Recht in Europa* (Bern: Haupt, 2012).

9 Armin von Bogdandy, Pedro Cruz Villalón and Peter M. Huber (eds.), *Handbuch Ius Publicum Europaeum*, Vol. I-VI (Heidelberg, CF Müller, 2007–2016).

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:02
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

social conditions. In some cases, they have even changed their form and function. They are also still on the move in Europe and must be continuously adapted to new challenges, learned by new generations and tested in crises. But they give us a secure basic foundation.

1. This includes international law (*ius gentium europaeum*), which rose throughout Europe in the early modern period (sixteenth-eighteenth century). It made use of its ancient and medieval sources. Still, it was now modern in two ways: It first accompanied and "juridified" the conquest of the "whole" world (America, Asia, Africa) by the Spanish and Portuguese, the Dutch, the French and the English. It is undoubtedly the law of the conquerors, first euphemistically called "law of nations" and later "international law". However, it is becoming more and more universal through trial and error, wars and peace agreements. Since the sixteenth century, the *ius gentium europaeum* has been a source of hope for regulating intergovernmental issues in "war and peace". It consists of contract law or of internationally recognised fundamental principles which have gradually developed and consolidated.

2. At the same time, natural law, which is closely intertwined with international law, served as the rational theory of law for all communities in these European states. Out of natural law gradually developed an *ius publicum universale*.[10] This *ius publicum universale* offered the possibility of constructing relations of domination within a state, above all through the invention of the fictitious contract of domination and subjugation.[11] It made it possible to define the rights and duties of both the ruler and the subjects. The emerging modern state became a legal entity with its distinct borders and sovereignty. This legal structure could now also be described in a terminology that extended to both Christians and pagans. His propositions would apply, Grotius said, even "if one wickedly conceded that there was no God".[12] These propositions thus came to be known as *ius naturale*.

---

10 Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland*, *Vol. I, 1600 – 1800* (München: Beck, 1988) 291ff.

11 Harro Höpfl and Martyn Thompson, "The History of Contract as a Motif in Political Thought", in *American Historical Review* vol. 84, nr.4, 1979, 919–944.

12 Regarding Etiamsi daremus see Hugo Grotius, *De Iure Belli ac Pacis*, 1625, Prolegomena 11, see Hasso Hofmann, "Hugo Grotius" in Michael Stolleis (ed.), *Staatsdenker in der Frühen Neuzeit*, 3rd edition (München: Beck, 1995) 71; L. Besselink, "The Impious Hypothesis Revisited" *Grotiana* 9 (1988) 3–63. There is broad agreement that the formula is of medieval origin and that, in Grotius' view, it does not have the meaning of a secularisation of natural law which he later claimed. See Knud Haakonssen, *Natural Law and Moral Philosophy: From Grotius to Scottish Enlightenment* (Cambridge: Cambridge University Press, 1966).

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:02
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

Natural law shapes the fundamental lines of European constitutional thinking. It drew from the store of antiquity, above all from the "Politics" of Aristotle. This incomparably mighty work has since the Middle Ages been the source of repeated reflections. It has also provided the categories when thinking about the "state". For example: how does the state come into being and how can it be legitimised, what is the best constitution, what does "sovereignty" mean and who is the bearer of state power, what are its ties, who has the right to legislate, who is allowed to levy taxes and for what purpose?

This debate was European and non-confessional. It achieved what was to prove central to the pan-European consciousness: an understanding of the basic tenets of scientific policy, of the legal basis of legitimate rule and its limitation by higher norms, including the (of course highly controversial) right of resistance against the illegitimate ruler.[13]

This process gave rise to the modern catalogues of fundamental rights. These rights all flesh out "distances" and limits of state power.[14] The constitutional movement of the eighteenth and nineteenth centuries would have been inconceivable without this legal obligation towards the authorities, which to a certain extent became a matter of course. Without the doctrine of the *respublica mixta* and the practice of the phrase "*rex regnat, sed non gubernat*" since the sixteenth century, the separation of government and administration, and thus the modern doctrine of the separation of powers, would not have been accepted. Without the centuries-long practice of cooperative self-government and the basic idea of a social contract, there would be no modern democracy.[15] That the people should be the supreme source of legitimacy was formulated by Marsilius of Padua in the

13 Georg Jellinek, *Die Erklärung der Menschen- und Bürgerrechte. Ein Beitrag zur modernen Verfassungsgeschichte* (Berlin: Duncker & Humblot, 2016); Michael Stolleis, "Georg Jellineks Beitrag zur Entwicklung der Menschen- und Bürgerrechte" in Stanley L. Paulson and Martin Schulte (eds.), *Georg Jellinek – Beiträge zu Leben und Werk* (Tübingen: Mohr Siebeck, 2000) 103–116.

14 Christoph Link, *Herrschaftsordnung und Bürgerliche Freiheit. Grenzen der Staatsgewalt in der älteren deutschen Staatslehre* (Wien: Böhlau, 1979).

15 Kurt Kluxen, *Geschichte und Problematik des Parlamentarismus* (Frankfurt: Suhrkamp, 1983); Orazio Condorelli, Quod omnes tangit, debet ab omnibus approbari: Note sull'origine e sull'utilizzazione del principio tra medioevo e prima età moderne, in: Ius canonicum 53 (2013) 101–127; Peter Landau, "The Origin of the Regula iuris 'Quod omnes tangit' in the Anglo-Norman School of Canon Law during the Twelfth Century", in: Bulletin of Medieval Canon Law 32 (2015) 19–35 with further notes.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:02
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

fourteenth century.[16] Even if these beginnings cannot be read in terms of the modern democratic principle and the sovereignty of the people, it is here that streams of thought take their origin, which later, in quite different contexts, were to become dominant and historically powerful.

3. The old European foundations include not only the sovereign's legal obligation but also his responsibility for just social order. Again and again, the rulers were inculcated by the "*Fürstenspiegel*" (mirror of princes), virtue teachings, theological-moral tracts or commentaries on Aristotelian politics to the effect that their task was the common good, the "good order" or "good policy". This is to say an order which not only guarantees security and formal rights but also seeks a balance between rich and poor (*potens et pauper*), disadvantaged and favoured, high and low.[17] Whether justified as a commandment of charity, a set of practical ethics or a calculation for maintaining power, protection and care were among the elementary tasks of the ruler and the corresponding authorities. Based on this pre-modern canon of duties, a "welfare state" developed in Europe, which is either factually impossible or unknown in other parts of the world in this form of sovereign redistribution. In the context of the Industrial Revolution and the "social question", this canon gained further momentum. It ultimately led to the development of various forms of coping with typical life risks and unforeseeable incursions into one's life.[18]

III

All these factors hold Europe together as a "community based on the rule of law". A long tradition of human and civil rights, the protection of the individual and her dignity against attacks of all kinds, the fundamental trust in an independent judiciary, which is now also extended to interpret and protect constitutional norms, should continue to hold Europe together in the future. This fundamental trust also includes the law of contracts (*pacta sunt servanda*) and civil dealings with others. The fundamental principle of the *pacta sunt servanda* is to behave not as a bourgeois but as a citoyen, who has a say in decisions of "his" community. And this "commu-

16 Marsilius von Padua, Defensor Pacis (1324), Teil I, Kap. XV, §§ 2,3.

17 Thomas Simon, "*Gute Policey: Ordnungsleitbilder und Zielvorstellungen politischen Handelns in der Frühen Neuzeit*" (Frankfurt: Vittorio Klostermann Verlag, 2004).

18 Hans Maier, *Historische Voraussetzungen des Sozialstaats in Deutschland*, (Heidelberg: CF Müller, 2002); Michael Stolleis, *Geschichte des Sozialrechts in Deutschland* (Stuttgart: Lucius 2003) 13ff.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:02
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

nity" today is called not only *Heimat* (home)-community, federal state and state, but "Europe".

We are Europeans, whether we like it or not, we have developed our diverse cultures and languages from a common stock, we have fundamental convictions of law and justice within us (including, of course, the non-lawyers), we speak from European "experiences".

Our grandmothers and grandfathers, our parents and we have made these experiences: two terrible world wars, which have indeed been "German wars", quite independently of the question of guilt, the crimes committed by humanity in the twentieth century, above all the (still incomprehensible) Shoa, alongside the crimes of Stalinism, the expulsions, the suffering of the civilian population, of whatever nationality, language or origin. These were the "experiences" from which one thing was learned: Never again war! Never again racism! Never again violence!

The consequences of these experiences were: reconciliation, as far as possible, within Europe, peace and freedom, economic cooperation, the removal of barriers, the introduction of a common currency, and finally, the gradual establishment of a European constitution with institutions in Brussels, Strasbourg, Luxembourg and Frankfurt and the permanent growth of a European legal order.

This legal order, driven on the one hand by the institutions in Brussels and Strasbourg, and on the other reinforced and given priority by the European Court of Justice in Luxembourg, has now become a vast normative superstructure. Some see this legal order as a progression towards an "ever further integration" (as hoped for in the EU Treaty). In contrast, others increasingly deride it as a straitjacket limiting national sovereignty.

For years we have felt that there is no smooth path to ever further integration. The grumbling of the various oppositions is unmistakable. Let us recall the struggles in Ireland, the unresolved problem of Catalonia in Spain, Scotland's hopes for independence and the confusion surrounding "Brexit". Greece thought of leaving the Eurozone during the financial crisis, and toyed with the idea of a complete "Grexit". In France, the anti-Europeans became increasingly loud and threatening, and they have by no means disappeared. In Germany, a minority dares to call for a "Dexit" in all seriousness or to provoke. Flights into delusions of "Reich citizenship" or racist "identity" have also emerged. In Poland, Hungary, and other former Eastern Bloc states, displeasure with Brussels is growing, even though they have received and continue to receive much support from the EU. Others, such as the Balkan states (Northern Macedonia, Albania), are desperate to join the EU because they hope it will provide protection and economic prosperity.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:02
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

Let us stay with the problems for a moment – although I would prefer to spread a rosy glimmer of hope and dawn rather than a sunset.

We all know how different the understanding of the state is, even in core Europe. England has always looked at the continent from a distance. They always had reservations, remained independent, more committed to the Commonwealth than Europe. With all its peculiarities, England's system of government has consistently ruled out the possibility of a problem-free integration into Europe.[19] Today we see it every day. Since the Middle Ages, France has developed into a central state, decisively since Louis XIV. France formed its Third Estate, the bourgeoisie, into a "nation". To this day, France has also gone its way, strongly oriented towards a centrally ruled state economy. Italy, Spain, and Portugal also have their own histories and have drawn their consequences from fascism, Franqism, and Salazarism. In the Netherlands, Belgium, Norway, Sweden, and Denmark, we find parliamentary governments with monarchies, with which they have generally fared well as civil societies. But even there, the populist, right-wing, anti-European bacillus has taken hold.

So we have ancient and different "histories" in Europe, different understandings of state and constitution. Linked to this, we also find a different understanding of economics. We feel the tensions in the assessment of the ECB's monetary policy, in the question of "liability union" for ailing banks, in European economic policy towards the now aggressively operating USA, and towards China and Russia, each with their own massive interests.

Within the institutional structure of the EU, differences begin already with the question of whether there is a common European constitution. Those who closely bind the normative concept of a constitution to a state and a people may deny the existence or legitimacy of a European constitution.[20] However, those who see a constitution as the highest-ranking normative framework of a political actor with its own institutions have no difficulty with it. Europe has everything a constitution needs: a constitutional text (EU Treaty, Charter of Fundamental Rights), and its own institutions (legislative, executive, judiciary). They may be partially weak, but they are nevertheless functional. The Holy Roman Empire before

19 Felix Meinel, "Wer im Ausnahmezustand entscheidet, ist nicht souverän. Mehrheiten dringend gesucht: Das Urteil des Supreme Court verschärft den Grundkonflikt im britischen Verfassungsrecht", in *Frankfurter Allgemeine Zeitung* (Frankfurt), 26 September 2019.

20 So vor allem Dieter Grimm, *Die Zukunft der Verfassung II: Auswirkungen von Europäisierung und Globalisierung* (Berlin: Suhrkamp, 2012).

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:02
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

1806 also had an elaborate "constitution", which some were astonished by and even considered "monstrous". The Habsburg multi-ethnic state, the Russian Empire until 1917 and the Ottoman Empire each had their own "constitutions".[21]

Europe certainly does not have a relatively homogeneous European "peoples", no common language. It also forms an ensemble of economically "strong" and "weak" nations. And there is no European public sphere in the strict sense. But it has grown together, not only through wars but through a culture that is more than a thousand years old, with every conceivable form of exchange and influence. Wherever you look, in religions, literature, the arts, music, philosophies or everyday life – purely national cultural spaces do not exist today and never existed in the past.[22] Like everything that claims "identity", purely national cultural spaces are fiction! Intellectual currents have diffused in all directions to productive effect. The same is true of the dense network of common European beliefs and traditions in law and constitution.

But this net has large holes or gaps. The collapse of the "Eastern bloc" was a liberation for the entire western edge of the Soviet Union, for the Baltic States, Poland and Hungary, Romania and Bulgaria. When these states joined the EU (no other solution seemed possible), the EU naturally imported new problems: the differences between rich and poor, although always present in the West, now took on a new dimension. The communist legacy had been transformed but not dissolved; the networks of relations remained the same, the mistrust of democratic procedures, the everyday coping through "contacts", which is to say through corruption. The EU has undoubtedly underestimated the difficulty of integrating new states with a different history and structure. These differences show in the continuation of the clientele system and large-scale tax avoidance. New member states have also struggled harder with tensions between agricultural areas, many of which are still pre-industrial and the aggressive forces of globalisation.

21 Jana Osterkamp, *Vielfalt Ordnen. Das föderale Europa der Habsburgermonarchie (Vormärz bis 1918)* (Göttingen: Vandenhoeck & Ruprecht, 2020).

22 Michael Stolleis, "Wegenetz durch die europäische Kulturlandschaft. Plädoyer für einen gemeinsamen Bildungskanon" in Ronald Grätz (ed.) *Kann Kultur Europa retten?* (Bonn, BPB, 2017) 57–62.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:02
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

IV

What needs to be done at present, as I said, does not fall within the competence of the historian or legal historian. Nevertheless, the ordinary citizen can express his opinion. In the eighteenth century, the cautious expression used for this was "unprejudiced doubts!"

1. Almost all commentators believe that Brussels institutions have taken on too many subjects as "in need of regulation". A widespread feeling is that Brussels is covering Europe with a network of rules that could be left to either competition or national governments. These rules are added to the regulations already imposed by federal, state and local governments. In Germany rough estimate speak of 29,000 laws and regulations, excluding the DIN standards, which would make up a multiple of this.

As sensible and necessary so-called secondary European law is, for instance in the case of verifiable environmental damage (plastic waste) or dangers in cross-border transport (compulsory helmets, winter tyres, safety standards), it is essential to realise that the urge to regulate has gone too far. Brussels has paternalistically regulated EU citizens in the name of a common market, the harmonisation of living conditions, and health and energy savings. Examples of this are the famous Cucumber Bending Ordinance[23], which has now been abolished but is still practised by the trade, and the rules on banana clusters[24] (except Malta, where a tiny variety of bananas grow). A European ice-cream regulation also seems unnecessary, as does the harmonisation of legislation on jams, jellies, marmalades, and macaroons.[25] Nor do we need a Europe-wide reduction in the salt content of bread or protection against mould in French raw milk cheese.[26] There should be a vigorous transfer of powers back to the Member States in

23 GurkenVO Nr. 1677/88, abolished 2009.

24 BananenVO der EG Nr. 2257/94 v. 16. 9.1994.

25 In German law this can be found in the SpeiseeisVO v. 15. Juli 1933. Rejecting EU intervention early on was Franz Meyers as minister of the interior of NRW in the 127th session of the Bundesrat on 23 July 1954, where he criticised the "cookbook-like instructions for the production of these ice creams" and the "tendency towards full regulation". Today VO Nr. 1333/2008 Europaparlament und Rat v. 16.12.2008; Also see the German KonfitürenVO v. 23.10.2003, BGBl I, 2151 which bases itself on the EU directive.

26 Michael Stolleis, "Freiheit und Unfreiheit durch Recht" (Theodor Heuss Gedächtnisvorlesung 2010), 28.

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:02
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

these areas. If there is an unavoidable need for European regulation, the instrument of the directive will suffice.[27]

2. At the same time, however, Europe must strengthen its powers if it wants to preserve its internal peace and gain weight in world politics. Just a few keywords: national armed forces must be brought together into a European army much more vigorously than in the past. A shared security and defence policy are advisable not only for political reasons but also (incidentally) for financial reasons.

The same applies to the fight against "normal" crime and terrorism, tax fraud, and tax avoidance – all phenomena which, as we know, do not respect national borders. But the steps taken so far in police and security policy are going in the right direction, for example with the European arrest warrant, the development of databases, and Europol.[28] The same applies to protecting the environment, where Europe should take over the "major tasks" and the member states should focus on an adaptation. Finally, to put an end to the examples, immigration can no longer be solved nationally either. Nobody seriously believes that the migration pressure from the Middle East and Africa will ease in the coming years. Suppose Europe fails to agree on a single line and a straightforward practice, which includes burden-sharing, immigration policy will become not only a permanent bone of contention but Europe's real fissure. Given the influx of asylum-seekers, war refugees, and economic migrants, a return to national action challenges the effectiveness of European solutions. We have heard it spoken into the microphones a thousand times, ineffective but correct: the immigration problem, as a permanent problem, can only be tackled at a European level. Europe is "our space", which we have only recently liberated from border controls, customs barriers, and exchange offices!

3) Of course, there are also crucial arguments for the preservation of partly sovereign nation-states. Thinking in national categories is historically powerful; it will remain so, indeed probably become even more vital, the more the dynamics of globalisation affect everyday life. People want to preserve homeland and origin, national language and dialects, regional characteristics, traditional celebrations, and holidays. Our attitude to life depends on this. To ignore this would be a grave political mistake. All planned steps towards EU integration must therefore be confronted with

27 "Europa: in Vielfalt geeint! aus dem Umfeld der Münchner Europa-Konferenz e.V", Frankfurter Allgemeine Zeitung (Frankfurt) 26. September 2019.

28 Manfred Baldus, *Transnationales Polizeirecht. Verfassungsrechtliche Grundlagen und einfache-gesetzliche Ausgestaltung polizeilicher Eingriffsbefugnisse in grenzüberschreitenden Sachverhalten* (Baden-Baden: Nomos, 2001).

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:02
Open Access – (cc) BY-SA – https://www.nomos-elibrary.de/agb

the question: "What would happen if they were not implemented?" Often the answer would be: "Nothing to be alarmed about!"

Europe is an inescapable fact for all of us. Since ancient times we have been held captive by the myth of the princess abducted by Zeus and kept at the south coast of Crete. It is our destiny and living space. Wars and peace treaties have shaped and limited Europe. Paintings, writings, and thoughts produced the spirit of Europe. In Europe stand our museums and libraries with their treasures, our church towers and castles, our towns, and villages. Europe is where the intellectual foundations for the separation of powers, the rule of law, and democracy (including women's suffrage) were laid since Aristotle, Marsilius, Bodin, Hobbes, Locke, Kant, and Mill. It was here that human and civil rights were formulated and enforced in constitutions, adjudicated by truly independent judges. It was here that the welfare state as a guarantor of inner peace (paradoxically, with and against Karl Marx) emerged since the Industrial Revolution. Today we have Europe as a legally constituted community of states, cooperating both internally and externally, with open borders, a single currency, a common legal culture, and unique cultural wealth. Let us not give up on Europe but rather strengthen it with confidence. Let us be its citizens!

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:02
Open Access – (cc) BY-SA - https://www.nomos-elibrary.de/agb

https://doi.org/10.5771/9783748912156, am 12.10.2024, 09:24:02
Open Access – (cc) BY-SA - https://www.nomos-elibrary.de/agb