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

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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).

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]

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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

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

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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.

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.

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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.

## 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.

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.

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.

"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.

*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.

> 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.

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.

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

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.

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.

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).

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.

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.

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.

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.

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.

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.

> 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*

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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.

*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).