

# Carl Schmitt Resurrected?\*

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After a period of prolonged silence, Carl Schmitt has spoken again.<sup>1</sup> 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”.<sup>2</sup> 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

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\* [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.

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,<sup>3</sup> for coining the ominous friend-enemy-relationship<sup>4</sup>, and also for theorising the “*Großraum* order of international law”.<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup> The German Reichstag had just ratified these discriminatory laws on 15 September 1935. Schmitt applauded the laws by arguing that they established “freedom”.

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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 Hochschulelehrer 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.

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".<sup>8</sup> 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.

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

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”.<sup>9</sup> 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.”<sup>10</sup>

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 militans*, 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

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<sup>9</sup> A translation can be found in this volume.

<sup>10</sup> Carl Schmitt, *Die Lage der Europäischen Rechtswissenschaft*, 29.

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.

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