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

Four critical topics in a misleading but insightful perspective

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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

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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

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.

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

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

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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.

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.

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.

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

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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.

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.

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.

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.

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.

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.

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.

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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.

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]

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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.

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]

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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.

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.

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

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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.

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.

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.

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

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

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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.

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.

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

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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".

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.

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

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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.

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.

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.

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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-*

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

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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.

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

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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.

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.

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]

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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).

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.

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

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.

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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.

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

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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.

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.