The Historical Situation of German Jurisprudence*

Carl Schmitt

I.

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

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

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

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

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

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

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

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

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

II.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III.

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

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

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

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

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

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

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

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

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

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

IV.

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

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

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

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

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

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

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

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