The Situation of European Jurisprudence*

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

1. The Historical Fact of European Jurisprudence

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

6. Jurisprudence as the Last Asylum of Legal Consciousness

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

75 Already in 1829 its significance was indicated by Lamennais.

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

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

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

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

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

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

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

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

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