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ARTICLE

The Construction of European Society by European Lawyers: A Methodological Critique

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Abstract
Armin von Bogdandy's recent book is the latest of many attempts, both judicial and scholarly, to conceptualize the European Union as constitutional order founded on the rule of law. This article reviews Bogdandy's claim that through the processes of European integration European public law has been transformed from a state-centred law of the European powers into a normative structure of a democratic European society. Adopting a methodological critique, the article argues that contrary to his claim to be adopting a 'Hegelian and anti-Schmittian approach' Bogdandy's thesis owes more to Schmitt's method that he admits and more closely adheres to Kant's philosophical method than to Hegel.

Keywords Art. 2 TEU values · Rule of law · Constitutionalism · European society · Juridification · Carl Schmitt · Hermann Heller · Hegel

1 Introduction

The assumption that legal scholarship rests on dispassionate analysis has never been well grounded in the field of EU law. Scholars here often conceive their role not simply as that of explicating the EU's concepts and methods but rather as devising a mode of interpretation that is best able to realise the apparent telos of the project. And, as Art. 1(1) TEU states, that telos is to create 'an ever closer union among the peoples of Europe'. Commonly presented through the imagery of 'integration through law',[1] this method is underpinned by certain assumptions: that EU law must be conceived as an autonomous legal order that is elevated above the domain of power politics, that this autonomous system sits in a hierarchical relationship with domestic legal systems, and that, through a sleight of hand that returns us to a

[1] Pescatore (1974), Fritz (2020), Cappelletti, Seccombe and Weiler (1986), Byberg (2019).

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political register, the EU legal order is implicitly leading to the creation of a federal *political* structure.

In recent work reflecting on these methodological assumptions, Loïc Azoulai accepts their basic legitimacy but questions their efficacy.[2] Questioning whether the general method remains adequate to the task of realizing the project's purpose, he proposes some reorientation. Rather than conceiving the EU legal order as bolstering an evolving federal order, he suggests that scholars should now be conceiving the EU as a regime that is designed to advance the project of creating a European *society*. Having conventionally assumed that the 'ever closer union' could be constructed simply by empowering EU institutions without having regard to the supporting social infrastructure, EU legal scholars should now be attending to the task of developing 'a genuine programme for the social life of European individuals, assigning them roles, rights and identities matching the EU institutional projects'.[3] Specifically, they must devote themselves to the purpose of 'defining the European society as a community of liberal values'.[4]

Azoulai's plea has since been taken up by Armin von Bogdandy. His 2024 book, *The Emergence of European Society through Public Law*,[5] presents the case for advancing this societal project. Arguing that EU law must be interpreted in the light of its singular purpose, he specifies this as 'the transformation of European public law from the *state-centred law of the European powers* to the normative structure of a *democratic European society*' (p. 11). While European integration 'may not have produced a European state or people', he claims that 'it has helped create a European society', and, indeed, that 'all Europeans are today part of *one* society' (p. 1). Azoulai and Bogdandy agree that this claim must rest on Article 2 TEU, which declares that the EU is founded on 'the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities' and that these values 'are common to Member States in a society in which pluralism, nondiscrimination, tolerance, justice, solidarity and equality between women and men prevail'.[6]

In offering a critical appraisal of this argument, my focus will be restricted to that of its methodological foundations and because this method is most explicitly advanced in Bogdandy's book, my analysis will be mainly directed to that book's argument. This work, as the subtitle to the English version emphasises, adopts 'a Hegelian and anti-Schmittian approach'. Bogdandy justifies the claim that his thesis

[2] Azoulai (2016), Azoulai (2022).

[3] Azoulai (2022, 205–6).

[4] Azoulai (2022, 209).

[5] von Bogdandy (2024); all subsequent page references in the text are to this book. The book is an English translation of *Strukturwandel des öffentlichen Rechts: Entstehung und Demokratisierung der europäischen Gesellschaft* (Berlin: Suhrkamp 2022).

[6] It might be noted that while Azoulai recognises these as values of a *liberal* society, Bogdandy, more controversially, treats them as foundations of a *democratic* society. His argument is that while the institutional arrangements of member states' democracies might vary, the underlying values are shared and they provide the common constitutional core of European society. Despite the varied formulation, Azoulai and Bogdandy nevertheless seem in agreement because, ultimately, they seem to regard liberalism and democracy as interchangeable terms.

is Hegelian on the ground that it recognises that 'legal structures express social structures' (p. 11) and that, like Hegel, the book advances 'a transformational project', treats freedom as founded on intersubjectivity, presents constitutions as 'forms of mediation', adopts a method that 'is not abstract and deductive but historical and institutionalist', and is an exercise in reconstruction (p. 9). He further asserts that this account must be distinguished from that of Carl Schmitt, who is regarded as an adversary not just because he is 'such a compromised author' (p. 12) but also because Schmitt posited the centrality of the state, regarded reliance on society as being misconceived, and remains the most powerful exponent of the claim that there can be no European statehood with a common European public law, and no European democracy without a common European identity (pp. 12–13).

My objective will therefore be to assess the Hegelian and anti-Schmittian premises of the claim that the way EU law has developed results in the transformation of European public law into a normative scheme of European society. Its thrust will be to indicate that Bogdandy's argument rests much more on Schmitt than is conceded and, further, that it is not at all evident that its method is Hegelian.

2 The Looming Presence of Carl Schmitt

2.1 The Situation of European Jurisprudence

Bogdandy prepared the methodological foundation of his thesis by first reappraising the significance of Schmitt's 1943 lecture on the situation of European jurisprudence.[7] Schmitt's lecture was first delivered at a time when the Third Reich had extended its domination over most of Europe. Having seen that his teaching on the *Grossraum*, which offered a justification for Nazi Germany's domination of middle Europe, had effectively been realised, Schmitt presented an account of the development of European jurisprudence that effectively 'swapped "Germany" with "Europe".'[8] Arguing that European legal history was mainly a history of the reception of 'the science of Roman law', he explained that a crisis in jurisprudential thought began to emerge from the mid-nineteenth century, and it was mainly attributable to the growing influence of legal positivism.

Schmitt argued that the crisis reached its pinnacle during the first half of the twentieth century, a period in which the main jurisprudential contest was between the advancement of an elevated legal metaphysics on the one hand and the reduction of law to a technical functionalism on the other. Maintaining that neither could provide a robust foundation for legal authority, he indicated that its seriousness was a consequence of jurisprudence being 'the true source of law'.[9] Jurisprudence was struggling to perform its essential task of safeguarding the 'unity and consistency of law' owing to the fact that it could never keep up with the pace of legislation:

[7] Bogdandy, Mehring and Hussain eds (2022).

[8] Reinhard Mehring 'Savigny or Hegel? History of Origin, Context, Motives and Impact' in Bogdandy et al. eds, (ibid, 65–86, 75).

[9] Carl Schmitt, 'The Situation of European Jurisprudence' in Bogdandy et al., eds, (ibid. 9–47, 34).

jurisprudence could not 'enter into a race with the motorised methods of decrees and directives'.[10]

Arguing that 'true law is not imposed' but 'reveals itself in the concrete form of jurisprudence', Schmitt drew on the historical orientation of the school of Savigny to plead for a restoration of jurisprudence as 'the last refuge of legal consciousness'.[11] Jurisprudence, 'the first-born child of the modern European spirit', could be reaffirmed only by restoring a conception of law that signified the fusion of legality and legitimacy.[12]

Since Schmitt's lecture on the state of European jurisprudence resonates with so many of the themes that Azoulai and Bogdandy now invoke in their advocacy of the formation of European society through law, they are obliged to try and maintain a distance from Schmitt's argument. This seems implausible. Like Schmitt, they accept that:

(i) there is such a thing as a common European jurisprudence;
(ii) since 'European peoples find significant overlaps in the meaning and content of essential concepts and institutions' there exists a 'robust European legal community'[13];
(iii) a state acquires legitimacy (Schmitt says 'was considered "civilised"') 'only if it subscribed to this common European standard'[14];
(iv) the telos of European law cannot be grasped simply through the consideration of the multiplicity of 'motorised' regulations and directives;
(v) law cannot be understood if detached from society;
(vi) resurrecting the authority of jurisprudence depends on restoring the link between legality and legitimacy;
(vii) 'employing the constitution as an apolitical core and hoping it would be able to bring people together as a nation was a project fated to lose steam';[15]
(viii) re-enchantment requires abandonment of universal claims and restoring European values implicit in a common European history, which Schmitt called the *jus publicum Europaeum*; and
(ix) the task of explicating law is one for jurists not legislators.

Despite such widespread agreement, Bogdandy strains to distance himself from Schmitt's views. In an essay responding to Schmitt's lecture, he states that Art.2 TEU 'postulates a positive norm, a European legal will, which, according to Schmitt, cannot exist without a European state' and he emphasises that Schmitt asserts that 'a European jurisprudence needs a European political will and a European

[10] Schmitt (ibid. 30).

[11] Schmitt (ibid. 33, 47).

[12] Schmitt (ibid. 42).

[13] Schmitt (ibid. 12).

[14] Schmitt (ibid. 12). Bogdandy notes that the creation of a European society is 'a monumental civilizational achievement' (40).

[15] Adeel Hussain, 'Revisiting Carl Schmitt's The Situation of European Jurisprudence' in Bogdandy et al. eds (2022, 87–111, 98) (the quotation begins: 'According to Schmitt …').

legislator'.[16] But when we consult what Schmitt actually wrote—'The absence of a pan-European state and a corresponding European legal will, makes it *impossible for legal positivism* to speak of European law or a European jurisprudence'[17]—it is plain that Schmitt is not claiming what Bogdandy asserts, only that this is what legal positivism—a philosophy Schmitt rejects—requires.

Properly understood, the main theme of Schmitt's lecture is one that Azoulai and Bogdandy both accept and seek to advance. Schmitt argues that, under the influence of Roman law, 'all over Europe' jurists 'created an inventory of firm concepts' and 'a recognised model of legal thinking and thereby a spiritual and intellectual "common law" of Europe'.[18] This, most surely, is what Azoulai and Bogdandy now claim for EU law. The most significant deviation appears when Bogdandy asserts that although Schmitt's lecture invokes *European* jurisprudence, it actually propagates the cultural hegemony of *German* jurisprudence and it therefore advances a covert nationalism. The situation is different today, he maintains, because the project of advancing European jurisprudence now rests on the work of European institutions. This is undoubtedly so, it is not obvious that the highly influential role played by German jurists in propagating this message can be discounted.[19]

2.2 The Formation of European Society Through a Fundamental Political Decision

Once we appreciate what Schmitt is actually arguing, it is also clear that Azoulai and Bogdandy follow Schmitt in acknowledging that their claim about the formation of European society rests on a fundamental political decision.

In his study of the Weimar Constitution, Schmitt argued that the 'unity of the German Reich does not rest on these 181 articles and their validity, but rather on the political existence of the German people … The Weimar Constitution is valid because the German people "gave itself this constitution".'[20] Bogdandy now makes an analogous claim for the European constitution. He accepts that Schmitt's concept of a common European jurisprudence—a *jus publicum Europaeum*—'though problematic and outdated in many respects, remains topical' and that the critical point is that European jurisprudence has since undergone a 'structural transformation'. This transformation may have come about in stages but it most surely derives from certain fundamental political decisions. The first was effected by the elevation of 'the legal community to a political union' by virtue of adoption of the Maastricht Treaty and the second from the Union's subsequent conversion into a 'European society' by adoption of the Lisbon Treaty in 2007 (pp. 24, 39). For Bogdandy, the decision to create a distinct political society was formalised in Article 2 TEU, which 'codifies the understanding of the Union as a liberal-democratic community of values' and

[16] Armin von Bogdandy, 'The Current Situation of European Jurisprudence in the Light of Carl Schmitt's Homonymous Text' in Bogdandy et al. eds, (2022, 113–148, 132, 146).

[17] Schmitt in Bogdandy et al., eds (2022, 9–10) (emphasis supplied).

[18] Schmitt (ibid. 18).

[19] Note in particular the way that Bogdandy's claim builds on the work of Hallstein and Pernice: below: Sect. 3.1.

[20] Schmitt (2008, 65).

ensures that 'all law is committed to this'. And, to emphasise the point, he asserts that: 'The Court *concretises* the EU as a genuine "union of values", not least in order to defend its foundations against authoritarian developments'.[21] For Bogdandy, this basic political decision to found the regime has been mainly bolstered by the work undertaken by European lawyers to strengthen the concept of European law. In this way, 'Community law became a social structure' analogous to Schmitt's sense of a 'concrete order' (p. 27).

Azoulai is more circumspect. If not echoing Schmitt on 'the tyranny of values',[22] he at least recognizes that abstract liberal values may well prove problematic with respect to genuine social conflicts since a 'value-based conception of society inevitably carries with it preconceptions about how to live together, who should be part of the social fabric and who should not'.[23] This is because advancement of the concept of European society must inevitably require that decisions are to be taken with respect to 'matters related to processes of identification (sexual identity, collective identity, religious identity, family membership and social integration), processes of socialization (discriminations, migration and digital surveillance) as well as ecological concerns'.[24] And if this is left to the judiciary, he adds, it may result in the neglect of 'some genuine social and existential concerns'.[25] For Azoulai, this sets an ambitious agenda, not least because it directly raises the question: 'is the legal framework we have developed so far really reflecting the living and existential conditions of Europeans?'.[26]

Nevertheless, these considerations do not deflect Azoulai from his main theme. When he writes that 'European society must be defended',[27] it is not Foucault that we hear, but Schmitt.[28] When he writes that 'European society must be defended against a transnational cultural power, *Russia Today*, that puts itself at the service of a third country authoritarian regime which subjugated it', do we not hear the opening words of another of Schmitt's essays, that 'We in central Europe live *sous l'oeil des Russes*'?[29] Azoulai and Bogdandy advance the argument that a common European society is being formed through the agency of the law. Given the rifts and strains that we see both within and across European countries today, this is a rather tall order. But as Schmitt recognised, jurisprudence has often made use of the law 'to fend against prevailing political conditions.'[30] Schmitt acknowledged that this might lead to a 'specific kind of authority' emerging but, as he emphasised, 'let us

[21] Bogdandy, 'The Current Situation', (2022), 132.

[22] Schmitt (2018 [1959]).

[23] Azoulai (2022, 209).

[24] Azoulai (ibid. 212).

[25] Azoulai (ibid. 213).

[26] Azoulai (ibid. 213).

[27] Azoulai (ibid. 206).

[28] Foucault (2003), Schmitt (2004).

[29] Azoulai (2022, 209), Schmitt (2007 [1929], 80).

[30] Schmitt, 'The Historical Situation of German Jurisprudence' [1936] in Bogdandy et al. eds, (2022, 49–58, 51).

not deceive ourselves: jurisprudence acts as a political surrogate.'[31] Or, as he otherwise boldly put it, the 'great times of jurisprudence are hardly democratic.'[32]

Despite the anti-Schmitt rhetoric, Azoulai and Bogdandy's claim that a common European society is being formed rests on certain fundamental political decisions having been made. On this score, they are again following the logic of Schmitt's jurisprudence.

2.3 The Formation of a Federal State

Bogdandy nevertheless asserts that there is one vitally important point that distinguishes his argument from that of Schmitt: 'for Schmitt, public law without a state (and sovereignty) is either impossible or dystopian' because 'the nation state alone provides the consensus and loyalty necessary for a stable social order' (42). This would indeed appear to be a relevant point of difference, but does it carry much weight? Bogdandy undermines the significance of his own point by proceeding to claim that, notwithstanding his basic thesis about the formation of a European society, the EU has evolved in such a manner that it is, in an objective sense, now a federal state:

> There is much to be said for classifying today's European Union as a federal state if we employ the established concept of statehood. European public law would then be the law of that state; it would be state law, or *Staatsrecht*, to use a charged German concept. The European Union meets all the conventional elements of statehood: territory, citizens, and authority. (37)

This is both a surprising and highly ambitious claim. It is defended according to the conventional elements of statehood by reference to the EU's 'internal space of freedom', to the Lisbon treaty's placing of EU citizenship 'in the centre of European democracy' and—through the work of the institutions—to the development of authority at the European federal level (39). Bogdandy avoids discussion of sovereignty (*Kompetenz–Kompetenz*) and accepts that the EU lacks the means of physical coercion, but he does note the ability of Frontex, the EU's border management agency, to use force and, more generally, the duty of Member States to enforce Union law in ways that are similar to their enforcement of domestic law (39–40).[33]

Concluding that 'there are good reasons to conceive of the European Union as a federal state', Bogdandy asserts that, despite the objective evidence, 'there has not been a majority of Europeans ready to conceive of it in that way' and in a democratic society 'statehood by stealth is not desirable' (40). Nevertheless, in these circumstances, the distinction he draws between the formation of a European society and that of a European federal state remains unclear. Bogdandy favours the societal claim because it 'avoids continental nation-building with all its likely costs and

[31] Schmitt (ibid. 52).

[32] Schmitt (ibid. 51).

[33] On the coercive power of Frontex see: Ganty, Ancite-Jepifánova and Kochenov (2024).

possible dangers, not least violence', because it preserves 'the achievements of the nation-states while taming their deficiencies', and because 'despite being a collective singular similar to state, people, or nation' the concept of European society 'requires less homogeneity or identity' and therefore creates a Union that 'does not require a grand narrative or shared ideology'(40). Some might even feel that the societal claim is one that actually leads to the formation of a federal state by stealth.

From an objective jurisprudential perspective, there would appear not to be a great difference between Bogdandy and Schmitt on the conditions for the foundation of a state. In 2005, Bogdandy wrote that: 'A legally binding document is but a first step on the long and winding road from a political design for collective identity to a socially embedded institution that actually fosters such identity.'[34] He would therefore seem to be suggesting that, almost twenty years later, that stage has now been reached.

2.4 A European Federation?

Bogdandy sees this postwar evolution as one that Schmitt, being wedded to the idea of the state as the epitome of the modern political form, could have no conception. He thus states that 'after 1945, Schmitt had no constructive idea for Europe' and that the postwar European experience 'refutes Schmitt's uncompromising insistence on the nation state'(44). Yet this claim is considerably weakened not only by the almost complete absence of any substantive discussion of the role of constituent nation-states in the presentation of his argument about the emergence of European society but also by his failure to consider the organisational scheme of Schmitt's *Constitutional Theory*.

If the role—and indeed the relative power—of member states had formed any part of his argument, the best Bogdandy could have claimed for the current political configuration of Europe is not that it is now, in a purely formal jurisprudential sense, a federal state but rather that it is a federation. In failing to address that point, he overlooks the analysis of state formation that Schmitt presents in *Constitutional Theory*, the final part of which presents the 'constitutional theory of the federation'. Once Schmitt's argument on the federation is consulted, we see clear parallels with Bogdandy's thesis.

Schmitt explains that the federation is 'a permanent association that rests on a free agreement that serves the common goal of the political self-preservation of all federation members' and that this 'establishes a new *status* for each member', not least because it 'signifies the change of the new member's *constitution*'.[35] He emphasises that, 'even if the wording of not a single constitutional provision is changed', in a positive sense the member state's constitution has been altered.[36] Aiming to establish a 'permanent order', the federation externally protects its

[34] Bogdandy (2005, 314).

[35] Schmitt (2008 [1928], 383–4).

[36] Schmitt (ibid. 384).

members against 'every attack' and internally 'signifies enduring pacification'.[37] Precisely because of its public law character, Schmitt argues that federation law will 'always have precedent over Land (i.e. domestic) law' even if such conflicts occur 'in a very restricted field.'[38]

In terms that directly engage Bogdandy's thesis, Schmitt confronts the critical question of sovereignty, explaining that it is an essential aspect of the federation that 'the question of sovereignty between federation and member states always remains open.'[39] Given that Bogdandy recognises that the current position (with respect to his account of the federal state) 'need not remain the case forever', that 'the reactions to grave economic crises, civil strife, ecological catastrophes, or military aggressions' remain uncertain, and that 'drafts of continental statehood are on the table'(41), Schmitt's account of the federation seems best to fit Bogdandy's thesis. When Schmitt asserts that 'where the substantial homogeneity is absent the agreement on a federation is an insubstantial and misleading sham enterprise' and that 'the federation must be represented as a political unity',[40] does this not in fact directly replicate Bogdandy's claim about 'the emergence of European society through public law'?

Schmitt was already seventy years old by the time the Treaty of Rome entered into force and, despite his longevity, had died before Maastricht Treaty had been signed. It is therefore not so surprising that he did not engage in a critical assessment of this European project. He had nevertheless already in 1928 sketched its politico-legal outline.[41]

2.5 Bogdandy's Schmittianism

In common with the many scholars who have quietly made use of Machiavelli's teaching while denouncing the evils of Machiavellianism, Bogdandy rejects Schmitt's work in the course of advancing an ambitious argument that cannot avoid following many of Schmitt's claims. His project—to construct a common European political society advanced through the formation of a common European jurisprudence and founded on fundamental political decisions that are assumed already to have laid down the basic structure of a federal state (or at least a federation)—closely parallels certain essential elements of Schmitt's political jurisprudence.

There are undoubtedly elements of Schmitt's thought that Bogdandy rejects, including his anthropological assumptions about the human tendency to evolve through conflict and his conception of democracy as founded on an identity between rulers and ruled. But this should not divert us from seeing the obvious affinities. Bogdandy even goes so far as to employ political theology in support of his thesis.

[37] Schmitt (ibid. 385–6).

[38] Schmitt (ibid. 398).

[39] Schmitt (ibid. 390).

[40] Schmitt (ibid. 395, 400.).

[41] See Larsen (2021).

Focusing on the twelve values—strictly, six values and six principles—articulated in Article 2 TEU, he argues that since they form part of a single Treaty article, they should not be interpreted in isolation but be read as 'different aspects of one phenomenon, namely, the constitutional core of European democratic society' (91-2). For Bogdandy these twelve values are far from being random:

> Twelve represents the most symbolic number of all. It designates the closed circle; Israel was made up of 12 tribes; Christ had 12 disciples; celestial Jerusalem has 12 gates; and 12 stars, arranged in the shape of a wreath, form the crown of the woman of the Apocalypse. Article 2 TEU thus takes up the European flag's symbolism, whose 12 golden stars, arranged in a circle against a blue background, promise salvation.

He may have forgotten to include the 12 Tables of Roman Law—and indeed, the 12 months of the year, the twelve days of Christmas, 12 tone music, 12 bar blues … and Dante's 12 circles of Hell—but he most certainly affirms Schmitt's conviction that 'all significant concepts of the modern theory of the state are secularized theological concepts'.[42]

3 Bogdandy's Hegelianism

In *State, Movement, People*, Schmitt's pitch to sketch the constitutional theory of the Nazi regime, he declared that Hegel had 'died' on 30 January 1933, the date on which Hitler was appointed as Chancellor.[43] At that date, he was suggesting, Hegel's philosophy of state, directed towards the overcoming of feudalism and servitude and realising a modern liberal-democratic state, had itself been transcended. On this point, Bogdandy might be assumed to have clearly diverged from Schmitt. His basic thesis not only claims that contemporary European society has since evolved to take the form of a well-ordered system of mediations that finds its 'constitutional core' in Article 2 TEU values, but that this concept of society 'takes on the role of Hegel's concept of the state' (3). He further suggests that, in common with Hegel's account, his thesis is 'not abstract and deductive but historical and institutionalist'(9). Bogdandy boldly declares that this system of mediations transforms public law in two dimensions: first, that law itself has been transformed by the complex forces of European society and secondly that, owing to its 'transcendental normativity', the law can itself bring forth social change. And this, he maintains, 'is one interpretation of Hegel's famous … argument that the real is rational'(10).

This, I suggest, is a questionable reading of Hegel. Contrary to his claim, Bogdandy's thesis is abstract and not adequately grounded in the institutional structures on which his account must be based. Proposing that Hegel's theory needs updating, he argues that Hegel's conception of legal order as culture ('objective spirit') is superseded by legal principles and structures that express Art 2 values (10–11), a move that seems not at all Hegelian but more inspired by Kant's attempts

[42] Schmitt (2005 [1922], 5).

[43] Schmitt (1933, 31–32).

to dissolve the state into a cosmopolitan scheme. These limitations make his interpretation of 'the real is rational' particularly contentious. And, as I will argue, Bogdandy's thesis might indeed have a place in Hegel's philosophy but that far from elaborating the true Hegelian state, it presents an account of the state of necessity founded on universal egoism, an account that Hegel elaborates in his discussion of civil society.

To justify these claims, I must first briefly present an account of the book's arrangement, organised by reference to concepts (ch 2), principles (ch 3), institutions (ch 4) and scholarship (ch 5, jurists as lawmakers).

3.1 Concepts

Bogdandy's conceptual analysis begins by explaining how 'courageous and creative jurists' turned the 'amorphous law of the three founding treaties into a transformative force'(27). Of particular significance was Walter Hallstein's claim that the Communities had shaped a new legal field, a *Rechtsgemeinschaft*. As Hallstein expressed it, this community of law meant that: 'For the first time, the rule of law will supplant power and its manipulation, the balance of various forces, quests for hegemony, and the game of alliances' (cited at 27). This Kantian aspiration has since evolved and, in conjunction with political, economic, and social forces, has 'helped bring about today's European society' (27).

Bogdandy acknowledges that Hallstein's concept mainly served to legitimate the EEC as a supranational organization, 'answer[s] politicization with legalism', and 'does not capture the conflictual nature of today's European society'(28–29). Rather, it marked a stage in evolution that has since been overtaken: 'The Treaty legislator never enshrined the concept of the *community* of law but instead posited a much richer concept at the next critical juncture in the second threshold phase: the *rule* of law (Article 2 TEU)' (29).

This next stage, he suggests, identifies European law as 'more than Union law'. It signifies that the legal structure of European society rests on a multiplicity of legal orders: Union law, the law of the Council of Europe, and the national legal orders. Hence Ingolf Pernice's suggestion in 1996 that Europe had evolve into a constitutional union (*Verfassungsverbund*). And hence Bogdandy's claim that this legal ordering 'organizes European society but [is] not a European state'. It has created 'powerful European public institutions, but they are not considered state bodies' and therefore 'the tie that inextricably linked publicness to statehood' is cut (36).

What follows is a series of assertions in which it is declared that the private and the public have become 'constitutive of each other because they acquire substance only in their dialectic' (46), that 'public law can thus be constructed without a state' (48), that 'the Europeanization of administrative law may help institutionalize rationality beyond the states, thus serving a transnational common good'(49), that this executive orientation was soon superseded once the 'Treaty legislator constitutionalized and parliamentarized Union law and linked it to European

society'(54), a development that has transformed 'rule into an exercise of self-determination' (62).

These claims are assumed to overcome Hegel's critical distinction between state and society. It is a bold move, not least because for Hegel freedom is threatened once we can no longer differentiate between public and private and once society comes to colonise the state. Bogdandy's claims seem founded on the idea that society should no longer be conceived as a sphere of private autonomy; it somehow has been converted into a realm of equal freedom. Again, Art 2 is pivotal: 'a comparison between Article 2 TEU and Article 2 EEC Treaty reveals that European society has been transformed from a society of private economic relations into one of citizens' (94–5). Society must therefore be treated as itself a system of mediations. This societal constitution seems analogous to Hegel's account of civil society. But if the subject is now that of a societal constitution, how does it become transformative?

Bogdandy's answer is: by juridification. Juridification 'helps create a new language and new fora for publicly identifying structural deficiencies as well as for articulating possible solutions'(78). 'When it comes to European society', he maintains, 'I primarily see such deficiencies in certain Member States, be it because of weak public institutions or defects in their democracy'(73). But if 'transformative constitutionalism' operates to remedy such apparent systemic deficiencies, this most surely is not through societal processes: it requires the all too visible exercise of public (i.e. state) power. Far from being an exercise in 'self-determination', it must surely require an exercise of the power of domination.

3.2 Principles

One problem with the claim that Article 2 TEU establishes the ultimate legal grounds of European society is that these are highly abstract values and Hegel is distrustful of any attempt to erect political order on such abstractions.[44] Recognising this difficulty, Bogdandy first asks whether such values, which commonly are treated as ethical issues, are capable of being converted into legal norms. In claiming that they are, he notes that, since the values are set out in a legal text and have been applied in legal proceedings,[45] they have now become binding law. Political aspiration becomes fundamental law through juridification. Noting the 'inevitable difference between how the Treaty legislator characterizes European society in Article 2 TEU and what many citizens experience as their social reality', he recognises that if this gap becomes great 'the Union loses its credibility'(91). Quite how this is reconcilable with the claim that 'the Treaty legislator, by using the term value, suggests that the Article 2 TEU standards are deeply rooted in European society and the path of European integration'(89) is puzzling.

Bogdandy's main argument is that these values become binding principles because the European legislator in 2020 promulgated that the rule of law, evidently

[44] Hegel (1977, 356–359).

[45] CJEU, Opinion 2/17, *CETA* (EU:C:2019:341), para. 110: 'Th[e] autonomy [of the Union legal order] accordingly resides in the fact that the Union possesses a constitutional framework that is unique to it. That framework encompasses the founding values set out in Article 2 TEU…'.

now embedded in the conceptual framework of the EU, 'shall be understood having regard to the other Union values and principles enshrined in Article 2 TEU' (92).[46] This is reinforced by the 1973 Declaration on European Identity which, stating that 'the principles of representative democracy, of the rule of law, of social justice' are 'fundamental elements of the European identity',[47] establishes an intimate link between identity and principles' (97).

Once this concept of European identity was assumed to have been instituted to promote European integration, 'the dialectic of European and national identity was born' (97). Accepting that collective identity is essential for a functioning democracy, Bogdandy nevertheless suggests that traditional factors that determine such identity (shared language, history, and culture) are now anachronistic. In support, he invokes Hermann Heller who, he claims, asserted that 'a federal state will give rise to a collective identity if it establishes, through democratic means, the *social* rule of law' (135).[48] Advocating a rarefied conception of democracy that incorporates plural understandings of 'the people', Bogdandy advances the principle of compromise expressed by Kelsen as situated at its core and argues that a European democracy without a collective identity is 'theoretically plausible' (137–40).

Elaborating, Bogdandy argues that the ruling of the German Federal Constitutional Court in *Brunner,* in which the Court asserted that the principle of democracy instituted in the Basic Law imposes a constraint on further development of European integration, must be read as 'one of the biggest power grabs in the history of constitutional adjudication' (129). Although invoking Heller to justify his assessment, Bogdandy offers a rather strained interpretation of the work of this Hegelian jurist. Certainly, I cannot understand how Heller's 1929 defence of 'the legal regulation of the economy in the *Rechtsstaat*' as entailing 'a subordination of the means of life to the purposes of life' and thus 'the precondition for a restoration of our culture' can be read as providing a justification for the EU federal project.[49]

Heller was adamant in his belief that the 'transfer of power from the legislature to the judiciary' was 'politically questionable' and he railed against the belief 'in empty nomocracy, the utopia of eternal peace through irrevocable legalization of all individuality'.[50] 'In its purest form', he continued, 'this belief comprises the often unrecognized basis of a pure theory of law that Kelsen and his school advance, which sees the *Rechtsstaat* in every state and a democracy without leaders as the democratic ideal'.[51] The 'empty abstraction of this nomocracy', Heller further maintained, 'has contributed in no small measure to the support of dictatorship among a youth that looks for moral justification and is hungry for reality'.[52] Heller's defence of the social democratic state and his scepticism of the way in which the

[46] Article 2 of Regulation 2020/2092 of the European Parliament and of the Council of 16 December 2020.

[47] Declaration on European Identity, Bull. EC 12–1973, 118.

[48] Heller (1987 [1929], 131, 141).

[49] Heller, (ibid. 141).

[50] Heller, (ibid. 131–132).

[51] Heller, (ibid. 132).

[52] Heller (ibid. 132).

German judiciary wrongfully acquired an 'enormous increase in power' by claiming 'for itself the right to review the material content of all laws in accordance with the Reich constitution' was indicative of how the judiciary provides 'an effective security against the possibility that the popular legislature would transform the liberal *Rechtsstaat* into a social *Rechtsstaat*'.[53] Far from Heller offering support for Bogdandy's thesis, his argument once again suggests that Bogdandy's thesis owes more to Kant and Kelsen than to Hegelian method.

3.3 Institutions

Recognising that the focus on concepts and principles threatens to lead to the construction of what Heller calls a nomocracy, Bogdandy acknowledges that a Hegelian approach must elaborate a concrete order. This would require these concepts and principles to be embedded in authoritative institutions. But rather than making the effort to do so, a move that would require consideration of the powers and practices of EU member states, Bogdandy focuses exclusively on the institution of the judiciary. This is a controversial move and made doubly so because he asserts that 'constitutional adjudication exemplifies the sort of institution that, according to Hegel, 'uphold[s] and develop[s] earlier decisions'(170). His reference here is to § 287 of *Philosophy of Right*, which addresses the executive and which refers to the executive's role in 'the continued implementation and upholding of earlier decisions' (*das Fortführen und Imstanderhalten des bereits Entschiedenen*). By replacing 'upholding' with 'developing', Bogdandy claims that this reference 'jibes with a study on how courts have propelled societal transformation in light of the constitutional decision for a democratic rule of law' (171). This is quite a leap.

In making it, he explains and seeks to justify how courts have been converted into powerful institutions that 'propel transformations that are rarely constitutionally predetermined' and which 'shape and transform a society' (171, 175). The main technique for doing so is their creative powers of interpretation. Acknowledging that it is now 'evident to everyone that the constitutional text hardly ever determines a decision by a constitutional court' (176) and that this jurisdiction 'is political because it affects the general public, has tremendous leeway, and often connotes a specific worldview' (177), he notes how it is 'miraculous how the *Bundesverfassungsgericht* and the *Corte* extended their powers, establishing themselves as an engine of a democratic society' (179). Far from being what Heller would regard as a power grab, this is justified on 'the call for justice, established protocols of legal argumentation, the established meaning of the law, and, not least, the ethos of fidelity to the law'(180). The transformation is attributable, in short, to 'a general understanding that democratic societies do better with constitutional adjudication'(186).

One distinctive aspect of this global phenomenon is that in European society this jurisdiction is not 'governed by a single apex court (as in most societies) but is instead exercised by many institutions: the CJEU, the ECtHR, the Member States'

[53] Heller (ibid. 131).

apex courts, and, frequently, lower courts entrusted with this task by European law'. Through such interactions, 'the apex courts of the various legal orders interact not only with courts in their own legal order but also with other legal orders' apex courts, thereby weaving the very fabric of European society'(192). While the ECtHR and the CJEU pursue different mandates, with the former seeking 'to juridify power relations by means of human rights juridification' and the latter aiming 'to cultivate European unity', both have become 'actors of societal mediation', shaping 'general structures between competing societal forces'(218). 'It is hard to imagine that the European society invoked by Article 2 TEU would exist today', Bogdandy concludes, without their work: 'Even more so than the national constitutional courts, the CJEU and the ECtHR are protagonists of social transformation' (194). Precisely so, but quite what makes this a Hegelian analysis remains perplexing.

3.4 Scholarship

Bogdandy's final chapter returns to the theme that was the precursor to his book: the situation of European jurisprudence. The formation of European society requires the development of a pan-European jurisprudence and much of this work has been undertaken by constitutional court judges who are also professors of public law. Social structures, he claims, have been transformed by this legal scholarship.

This scholarly work achieves this objective by organising the legal material, explaining structures and identifying underpinning principles. By explicating these principles, jurists 'proactively link the law to changing social conditions, interests, and convictions' and by 'advocating new ways to conceive of principles, scholars can articulate new ideas, expectations, and demands voiced in society' (87). It is through this jurisprudential work that the European legal order is constitutionalised, a development that 'radiat[es] fundamental political decisions to all corners of the law'(87). And this is especially important not only because European law, empirically understood, is highly fragmented, but also because 'law framed by former political regimes persists in some of these corners' (87). It is this legacy that must be overcome.

Consequently, 'national legal scholarship must be Europeanized' (262). This is advanced in various ways, including the foundation of the European University Institute in Florence in 1972, the funding of Jean Monnet Chairs at many universities across Europe, and by the more general project of seeking to realise the intellectual hegemony of the type of jurisprudence that Bogdandy's book propagates. 'European society's jurisprudence', he concludes, 'is the work of professors' (256). It is the work of professors who conceive law as a hyper-rational conceptual system of abstract principles to which positive law and political action must bend the knee. What Heller would think of this is not in doubt. What it owes to Hegel is anyone's guess.

3.5 Is Bogdandy's Analysis Hegelian?

Hegel is a complex and often obscure philosopher but there are certain distinctive aspects of his political thought. One of the most basic is his scepticism of attempts to build a stable political order on abstract principles divorced from the historical experiences of a people. Yet this is precisely what Bogdandy seeks to do. Hegel believed that the constitutional order of a political regime cannot be found in some formal text that bears little relation to the lived experiences of a people. Abstract values such as are presented in art 2 TEU can command authority only if they are shown to be embedded in the common ethical life of the peoples of Europe. Given the social fissures that have been exposed in electoral results across Europe, this claim is questionable, and it is one that Bogdandy ignores. Instead, these values are assumed to be authoritative by virtue of ratification of the Lisbon Treaty by member state governments without consulting their publics.[54] Bogdandy objects to the formation of a European federal state by stealth, but his argument seems to promote the formation of a European constitution by stealth.

Of particular significance is the scheme of Hegel's *Philosophy of Right* in which civil society is distinguished from the state. Hegel acknowledges that the emergence of civil society is a product of the formation of a modern world in which the system of hereditary stratification embodied in feudalism is jettisoned. Yet for him this emerging civil society is marked by the triumph of universal egoism, a society in which individuals treat others as a means to their own ends. Further, he refers to this civil society as the external state, a state based on necessity (*Notstaat*) in which a governmental system designed to meet welfare needs may be established but that this system, bolstered by the legal order, operates primarily to support the established order of property and the operations of the free market.[55] This external state is not to be confused with Hegel's concept of the state founded on ethical life. Yet the external state, which Hegel argued would be 'unable to bind individuals into a cohesive and lasting community' because its claims of right and morality are merely one-sided abstractions, seems to be precisely the type of European society and associated state that Bogdandy's thesis is aimed at explaining and legitimating.

For Hegel, a constitution is not something that can be invented though formal promulgation by political elites; it must be expressive of the ethical life of those lived communities. Bogdandy's argument, by contrast, contains no examination of the cultural practices or collective institutions of member states, merely alluding to certain unspecified deficiencies in their democratic practices. In this respect, he uses philosophical argument to offer guidance of how the world ought to be. But as Richard Bourke has noted, Hegel was 'keen to spurn … the use of philosophy as a form of moral protest against politics'. It was, Bourke explains, 'Kant who appealed

[54] Except in Ireland, where it was rejected in a referendum in 2008 and only after holding a second referendum in 2009 was it accepted. Note that this Treaty was the technical successor to the proposed Constitutional Treaty which was rejected by the French and Dutch negative votes in their national referendums.

[55] Hegel (1952 § 183).

to conscience to convict existing conditions' and for that reason Hegel 'had been his foremost critic'.[56]

4 Conclusion

The project of constructing a European society through European law is the latest in a series of imaginative exercises by jurists seeking to realise the EU's telos of forging an 'ever closer union'. I have sought to show that this task, which has been most comprehensively elaborated by Armin von Bogdandy, owes more to Schmitt's method that he cares to admit and, presented as an abstract analysis of concepts and principles articulated by judges and jurists, more closely adheres to Kant's philosophical method than to Hegel's. What might nevertheless be noted is just how far Bogdandy's general argument is immersed in the distinctive philosophies of German scholars and in themes that are deeply embedded in a long tradition of German jurisprudential thinking. In concluding, it may be worth speculating on the degree to which his philosophical assumptions about the EU resonate with these traditions.

These traditions are related to the vexed question of Germany's *Sonderweg*. Germany's special path to modernity has been attributed to many cultural and historical factors, including: the lingering emotive influence of the Holy Roman Empire of the German Nation (*Heiliges Römisches Reich Deutscher Nation*); the consciousness of belonging to one extended nation notwithstanding the existence of many German states; the degree to which this powerful spirit of national feeling has been primarily fostered by princes, professors and pastors; the Protestant revolution being assumed to have obviated the need for political revolution; that when that revolution did come, it was not 1848 that was pivotal but Bismarck's 'revolution from above'; that when eventually Germany formed a nation state after 1866, so many of the professorial class expressed dissatisfaction at this *kleindeutsch* solution; that this state acquired a democratic foundation not as emancipatory movement but only as a result of this being thrust upon it following defeat in the First World War; that these conditions led to a fatal weakening of belief in the legitimacy of democracy; and finally to the postwar conviction that it was this deviation from the western pattern of modernisation that contributed to 'the German catastrophe.'

These issues, all of which are skilfully canvassed in Heinrich August Winkler's magisterial history of Germany,[57] bequeath a particular legacy. Winkler speculates on what might have 'replaced the mythology of the empire after it vanished along with the German Reich in 1945.' Was it, he asks, 'a particular "post-national" idea of Europe?' Did this not give rise to the belief that the postwar German mission sought the supersession of the nation and the nation state?[58] He quotes Christian Democrat politician Adolf Süsterhenn speaking in 1948:

[56] Bourke (2023, 239).

[57] Winkler (2006).

[58] Winkler (ibid. vol. 1, 2).

> The concept of the Reich, as it lived for a thousand years in German history, was the concept of an international, of a European entity. It was the term used to designate the Christian occident. And if I were to translate the concept of the Reich into the modern language of contemporary politics, I would have to call what was once called 'the Reich' now 'European Union' or 'European federation.'[59]

This became a powerful strain in postwar German political thinking, perhaps most prominently expressed in 1988 by Oskar Lafontaine, who argued that Europe is 'now the only greater unity into which it makes any sense for the Federal Republic to be absorbed.'[60] His was a vision of a trans-national unified Europe taking political form as a democratic state within which the nation could be merely a criterion of cultural, and not political, identity.

This seam of thought has become a powerful underlying conviction of many contemporary German public lawyers. In Bogdandy's work we see this in his rejection of state-based thinking: that is, his replacement of state with society (that is, the concept of the nation extended to Europe), in his marginalisation of the role of member states in the structural formation of the EU, and in his scathing assessment of state-based reasoning by domestic courts (with the Federal Constitutional Court's ruling in *Brunner* being criticised as constituting 'one of the biggest power grabs in the history of constitutional adjudication'). This state-based mode of thinking is replaced by the themes of 'revolution from above' given more precise form by the European judiciary, the pivotal role of university professors in shaping the idea of European society (a more cosmopolitan synonym for 'the German nation'), and the restoration of the language of the *Weltbürgertum*, albeit in a romanticised imagined community no longer of the German nation but of European society. Germany's *Sonderweg* is now being re-imagined as Europe's *Sonderweg*.

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[59] Süsterhenn, cited in Winkler, vol.2, 583.

[60] Oskar Lafontaine, *Die Gesellschaft der Zukunft. Reformpolitik in einer veränderten Welt* (Hamburg: Hoffmann und Campe, (1988); cited in Winkler (ibid. vol.2, 432).

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