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Luca Siliquini-Cinelli

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# The Age of ‘Depoliticisation’ and ‘Dejuridification’ and its ‘Logic of Assembling’: An Essay Against the Instrumentalist Use of Comparative Law’s Geopolitics

DR. LUCA SILIQUINI-CINELLI\*

**Abstract** While comparative law has become a key discipline, its instrumentalist use has turned out to be a powerful weapon: it is the ‘pen’ by which the identity of and differences in law’s geopolitics are continually written and rewritten. Given its attractive functionalist essence, comparative law is gaining increasing international credit as a way of developing newer theories of sovereignty and governance in a framework in which law is conceived of less as a set of rules and more as a symbolic *vestmentum* of global soft power. The present contribution critically investigates the relationship between distortive views of comparative law’s geopolitics and the intimate essence of the doctrine aimed at creating the ‘aspatial’, unbounded, illimitable (and hence intangible) liberal global order whose governance appears to transcend the idea and form(s) of law through which the ‘politicization’ and ‘juridification’ of modernity have been achieved in the last century. In doing so, it also addresses why such an alliance has made it easier to ‘discover’

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\* This contribution is based on a paper that I presented on September 19, 2014 at the Graduate Legal Research Conference *Divergence and Dissent in Legal Globalization*, held by Católica Global Law School (CGLS), Lisbon, and that I am due to present on October 25, 2014, at the Conference *De-juridification: Appearance and Disappearance of Law at a Time of Crisis*, IVR International Association of Legal and Social Philosophy, UK Branch, held at the Law Department, London School of Economics and Political Science (LSE). I would like to thank José Lobo Moutinho, Jan Dalhuisen, Gonçalo Almeida Ribeiro, and Tito Rendas for inviting me to CGLS, and Maksymilian Del Mar, Massimo Renzo, and Emmanuel Melissaris, who generously invited me to LSE. I am also indebted to the participants at both conferences who provided me with critically constructive comments, and to the editors of The Loyola of Los Angeles International and Comparative Law Review for their assistance throughout the publication process. I am particularly grateful to Danuta Mendelson for her valuable comments on an earlier draft.

and 'sell' the smooth and rectilinear land of the figuratively unspoken and unwritten as the *terra incognita* that lies over what is created by the constructivist political intervention(s) of the modern nation-state.

**Keywords** Global order; geopolitics, comparative law; legal scholarship; political theology

‘*Hen kai pan!*’  
Gotthold Ephraim Lessing  
1780

“[T]hat men can use their own knowledge in the pursuit of their  
own ends without colliding with each other  
only if clear boundaries can be drawn between their respective  
domains of free action,  
is the basis on which all known civilization has grown.”

Friedrich Hayek  
*Law, Legislation and Liberty*, [1973] 2013, 102

“[B]ut if ‘openness’ itself can result in the paralysis of the open-  
ness,  
then we are dealing with self-destruction.”

Leszek Kolakowski  
*Modernity on Endless Trial*, 1990, 162

“To reject the biological and symbolic dimension [of the law]  
leads to [the] insanity of treating humans  
as mere animals or as pure mind, subject to no limits that are not  
self-imposed.”

Alain Supiot  
*Homo Juridicus*, 2007 (2005), ix

## I. INTRODUCTION

This paper is concerned with the essence and perils of what I will define as the instrumentalist use of comparative law’s geopolitics. Its main claim is that this is an age in which the definition of the space by which law makes itself ontologically representable and tangible through its ‘annunciation’ is instrumentally manipulated by internal and external forces simultaneously. Yet it could be noted that this has always been the case in the West. As will emerge in due course, this contention would surely be correct. However, what contradistinguishes the current de-juridification of law’s regulative instances is the scale that the phenomenon has reached, as well as its post-historical and post-political es-

sence.<sup>1</sup> A powerful example of this is the impact on both political and comparative legal theory of the liberal doctrine aimed at creating the “aspatial,” unlimited, unbounded, and hence ontologically intangible economic global order. The World Trade Organization (WTO), the International Monetary Fund (IMF), and the World Bank have been actively working on this since the late 1990s. This doctrine’s final goal is the formal “depoliticisation” and “dejuridification” of the world. I have discussed this neutralizing trend elsewhere.<sup>2</sup>

Delving into this framework from a different, yet complementary, perspective, in this paper I criticize the liberal global-order project and the instrumentalist use of both political and comparative legal reasoning which supports it. In doing so, I investigate the threat posed by the creation of this totalizing dimension<sup>3</sup> for both the Schmittian “political” and “sovereign,” and for the rule of law.<sup>4</sup>

Section II begins with the description of the essence and features of universalized liberalism, its “logic of assembling” in Legendrian terms, and its implications for both political and legal theory. Section III explores why jurists (having been defined as the *militia legum* by Baldus<sup>5</sup>) found themselves deprived of the role of guardians of law’s uncanny presence because of the positivistic *dicta* of the artificial Leviathan that rendered “law” synonymous with “legislation.” Consequently, attention is paid to the reasons why a great deal of comparative legal scholarship is trying to reclaim its leading role by influencing and supporting the post-national, anti-state policies that perceive the deliberative law-making process (brought about by the French Revolution and its constructivist rationalism in Hayekian terms) as the obstacle to overcome, and the “cohabitation” of different national legal systems as the problem to be solved. In this paper I also explain why the success of the liberal global order doctrine is related to the global “aspatial turn” that legal and sociopolitical theories are undergoing, which is overcoming the classic idea of “space” as a “representative surface.” The conclusive

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1. Luca Siliquini-Cinelli, *Hayek the Schmittian, Contextualising Cristi's Account of Hayek's Decisionism in the Age of Global Wealth Inequality*, 24 GRIFFITH LAW REVIEW (forthcoming 2015).

2. Luca Siliquini-Cinelli, ‘Against Interpretation?’ *On Global (Non-)Law, the Breaking-up of Homo Juridicus and the Disappearance of the Jurist*, 8 J. CIV. L. STUD., (forthcoming 2015).

3. See ANDREW HURRELL, ON GLOBAL ORDER: POWER, VALUES, AND THE CONSTITUTION OF INTERNATIONAL SOCIETY 184 (2007).

4. For an introduction to the Schmittian political and sovereign, see CARL SCHMITT, POLITICAL THEOLOGY 63 (Univ. of Chi. Press ed. 2005) (1922) [hereinafter POLITICAL THEOLOGY].

5. ERNST H. KANTOROWICZ, THE KING’S TWO BODIES: A STUDY IN MEDIAEVAL POLITICAL THEORY 124 (Princeton Univ. Press 1957).

remarks are dedicated to the paradoxes of the instrumentalist and manipulative use of comparative law's geopolitics.

## II. THE LIBERAL GLOBAL ORDER PROJECT, ITS LEGENDARIAN "LOGIC OF ASSEMBLING" AND THE DISPLACEMENT OF THE SCHMITTIAN "POLITICAL" AND "SOVEREIGN"

The first claim of this paper is that, in this current period in the West, law is profoundly transformed by internal and global external forces simultaneously. Additionally, the definition of the space by which it makes itself ontologically representable and tangible through its signification is continuously manipulated for practical purposes.

This is not surprising. The West, as we know it today, is the product of an instrumentalist use of Western logic of memory, historicity of politics, and sociology of law. As a comparatist, I am profoundly interested in the postmodern and neorealist phases of this phenomenon and, in particular, the role that the instrumentalist use of comparative law's geopolitics plays in its current development.

It is my suggestion that the contemporary deliberative manipulation of comparative law and legal reasoning is intrinsically related to the doctrine that the WTO, IMF, and World Bank, have been actively working since the late 1990s that is aimed at creating an "aspatial," boundless, illimitable, and intangible global order based on a scheme of intelligibility opposed to that of the modern nation-state. In particular, through what Legendre defined as the "logic of assembling,"<sup>6</sup> which inevitably implies an *a priori* deconstruction, the liberal global order project is imposing the sterile, instrumentalist *officium* of global governance on us. This supra-national *dicta* aims at the mere administration of the world and transcends the idea and form(s) of law through which the "politicization" and "juridification" of modernity was achieved in the seventeenth and eighteenth centuries.<sup>7</sup>

Bearing in mind Kolakowski's inquiry into the perils of the liberal model of the 'open society',<sup>8</sup> it is reasonable to argue that, (notwithstanding Hayek's account of the necessity of boundaries to preserve the legal order)<sup>9</sup> the global *Oikoumene* scheme is ultimately based on liber-

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6. PIERRE LEGENDRE, *L'OCCIDENTE INVISIBILE* 41 (Medusa Edizioni ed., Paolo Heritier trans. 2009) (2004).

7. I therefore do not agree with Cohen's vision of a 'dualistic' global order. See JEAN L. COHEN, *GLOBALIZATION AND SOVEREIGNTY* 5 (Cambridge Univ. Press 2012).

8. LESZEK KOLAKOWSKI, *MODERNITY ON ENDLESS TRIAL* 162-75 (Univ. of Chi. Press 1998).

9. FRIEDRICH HAYEK, *LAW, LEGISLATION AND LIBERTY* 101-05 (Univ. of Chi. Press et al. 1973).

alism's (and, thus, romanticism's)<sup>10</sup> political sin, as expressed by Habermas's early work and Ackerman's expectations<sup>11</sup> –the belief that its endless negotiations can always be inclusive.<sup>12</sup> This is constantly implemented through the deliberative, instrumentalist and revolutionary use of law's geopolitics as imposed by the French Revolution and its constructivist rationalism.<sup>13</sup> The Schmittian 'sovereign' is displaced from this view, and not capable of any concrete intervention.<sup>14</sup> The recently renewed interest in theories suggesting that governments should cut their debt by selling their political and economic assets is testament to this<sup>15</sup> and makes it evident the extent reached by the 'civilized economy' and 'good economic governance' models.<sup>16</sup>

There is, however, a mistake and a paradox in this view. The mistake, as Paul W. Kahn correctly notes, is "to think that law without sov-

10. CARL SCHMITT, *POLITICAL ROMANTICISM* xvii (Guy Oakes trans., Transaction Publishers 1986) [hereinafter *POLITICAL ROMANTICISM*].

11. BRUCE ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (Yale Univ. Press 1980); JÜRGEN HABERMAS, *MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION* (Christian Lenhardt & Shierry Nicholsen trans. 1983); JÜRGEN HABERMAS, *BETWEEN FACTS AND NORM: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* (William Rehg trans., MIT Press 1996).

12. PAUL W. KAHN, *OUT OF EDEN* 53-60 (Princeton Univ. Press 2007) [hereinafter *OUT OF EDEN*]; PAUL W. KAHN, *POLITICAL THEOLOGY: FOUR NEW CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 175 (Columbia Univ. Press 2012); PAUL W. KAHN, *PUTTING LIBERALISM IN ITS PLACE* 37 (2006); *POLITICAL THEOLOGY*, *supra* note 4, at 63. In a quite approximate and unsatisfactory way, Schmitt, who was a (if not *the*) leading jurist and political theorist in Germany during the period after World War I, will always be remembered for his associations with the National Socialists (he joined the party in 1933 and left it in 1936), the prelude to which was the publication in 1921, of *Die Diktatur*, in which he argued in favour of commissarial forms of dictatorship to deal with extraordinary circumstances. For a compelling inquiry into the relationship that Schmitt had with the Nazi party, see *POLITICAL ROMANTICISM*, *supra* note 10, at ix–xxxv. To understand the growing interest in Schmitt's thought, see Luca Siliquini-Cinelli, *Legal Systemology and the Geopolitics of Roman Law: A Response to Stuart Elden's Critique of Carl Schmitt's Spatial Ontology*, 1 *PÓLEMIOS J.L. LIT. & CULTURE*, (forthcoming 2015).

13. David Dessler & John Owen, *Constructivism and the Problem of Explanation: A Review Article*, 3 *PERSPECT. POLIT.* 597, 604 (2005).

14. *Id.*

15. According to the IMF, non-financial assets such as land, subsoil resources, and buildings in the countries of the Organization for Economic Co-operation and Development (OECD) are worth around \$35 trillion. Additionally, state-owned enterprises are worth around \$2 trillion, and there is a further \$2 trillion in local government utilities and/or assets. For a discussion of the foregoing, see *The \$9 Trillion Sale*, *ECONOMIST* (Jan. 11, 2014), <http://www.economist.com/news/leaders/21593453-governments-should-launch-new-wave-privatisations-time-centred-property-9>; *Setting Out the Store*, *ECONOMIST* (Jan. 11, 2014), <http://www.economist.com/node/21593458/comments>. The predominance of economics over ideology and politics on the European continent is revealed, for instance, by the fact that in 2013, Euro-area governments were required for the first time to submit national budgets to the European Commission for judgment before final submission to national parliaments.

16. Siliquini-Cinelli, *supra* note 2.

ereignty . . . has solved the problem of perpetuating its own existence.”<sup>17</sup> The paradox is that, notwithstanding the mystifying soft nature of universalized liberalism as expressed by its administrative, rather than juristic and political essence, its effects are anything but legally neutral or apolitical.

Elsewhere,<sup>18</sup> I have asserted that the postmodern and neorealist phases of what I define as the “Europeanisation of Europe” and its tragic “statelessness fantasy” are nothing more than the continental paradigm of this project, and its current proof. In the same context, I also claimed that standard approaches to pluralist, insulated channels of post-national governance (“PNG”) fall short in providing the theoretical and practical elements that we need to understand why PNG is also the instrument used by the promoters of the intangible liberal global order. To overcome these limitations, I maintained that any study of the essence, structures, aims, challenges, and limitations of PNG should also investigate how this particular law functions (that is, how it makes itself visible and ontologically tangible through the process of its signification to become *the law*). This necessity is related to the fact that PNG is characterized, in my opinion, by the transcendence of Carl Schmitt’s “*nomos der Erde*,” which was about taking, sharing, and dividing spaces and resources in order to make forms of power and domain publicly visible.<sup>19</sup>

So the question arises: why are the breaking up of *Homo juridicus*<sup>20</sup> and the formally apolitical administrative *officium* of global governance taking place? Because the increasing predominance of econom-

17. KAHN, POLITICAL THEOLOGY: FOUR NEW CHAPTERS ON THE CONCEPT OF SOVEREIGNTY, *supra* note 12 at 56.

18. I have discussed this further in “Escaping the Cage: Why the Implementation of Pluralist, Insulated Forms of Post-National Subsidiary Governance Might Represent the Only Solution to the European Crises” paper presented at the 6th CEE Forum for Young Legal, Political and Social Theorists, Faculty of Law, University of Zagreb in May 2014, and in “The Lure of Post-National European Private Law as a Semi-Stateless Scheme of Intelligibility: A ‘Multi-Layered’, ‘Inter-Institutional’, ‘Networked’ Order or a ‘Semi-Hierarchical’ *Nomos*?” paper presented at the Law in a Changing Transnational World – A Workshop for Young Scholars, hosted in October 2013 by The Zvi Meitar Center For Advanced Legal Studies at The Buchmann Faculty of Law, Tel Aviv University.

19. The Greek term *nomos* is derived from another Greek term, *nemein*, which, depending on the context, means ‘to divide’, ‘to pasture’, ‘to distribute’, or ‘to possess’. See CARL SCHMITT, THE NOMOS OF THE EARTH IN THE INTERNATIONAL LAW OF THE JUS PUBLICUM EUROPEAUM 67 (Gary Ulmen trans., Telos Publ’g Press 2006) (1950).

20. See ALAIN SUPIOT, HOMO JURIDICUS: ON THE ANTHROPOLOGICAL FUNCTION OF THE LAW (Saskia Brown, trans., Verso 2007); Peter Goodrich, *Intersitium and Non-Law*, in METHODS OF COMPARATIVE LAW 213, 215 (Pier Giuseppe Monateri ed., 2012) [hereinafter *Intersitium and Non-Law*]; Peter Goodrich, *Law’s Labour’s Lost*, 72 MOD. L. REV. 296, 298 (2009). I have discussed this further in ‘Against Interpretation?’, *supra* note 2.

ics over politics, that is to say, the economic structure determines the political and legal one.<sup>21</sup> This seems to be confirmed, in Muir Watt's words, by the current "loss of relevance of territory in global economy."<sup>22</sup> More precisely, as Mazzucato writes, "[I]n most parts of the world we are witnessing a massive withdrawal of the State, one that has been justified in terms of debt reduction and – perhaps more systematically – in terms of rendering the economy more 'dynamic', 'competitive' and 'innovative'."<sup>23</sup> Yet it would be unforgivable not to specify that the process of dissolving the spatiality of identity, sensibility, and culture through the fight against the political and legal leading role of the sovereign nation-state is primarily related to the historico-geographical lesson(s) taught by modern capitalism.<sup>24</sup> In this sense, it should be noted that the map of domination of the world's representative spaces changed in the period between 1850 and 1914, after the revolutionary upsurge of 1848 that followed the depression sweeping out of Britain in 1846–1847.<sup>25</sup> The words of Alfred Marshall ("the influence of time is more fundamental than that of space"<sup>26</sup>), as well as Émile Zola's *La Terre*, and De Chirico's paintings of 1910–14 (specifically, *The Philosopher's Conquest*), and Martin Heidegger's *The Thing* and *The Question Concerning Technology* are testament to this. Stephen Kern asked in his *The Culture of Time and Space, 1880–1918*, what modernism is, if not the response to a crisis in the experience of space and time.<sup>27</sup> Paraphrasing Kern's words, we should ask what (in our neorealist global age and in the wake of the fall of the postmodern "bipolar system") the role of economics plays in influencing the essence and spatiality of law's geopolitics in terms of cultural signification.<sup>28</sup> As Marx

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21. Philip G. Cerny, *Globalization and the Changing Logic of Collective Action*, 49 INT'L ORG. 595, 596-97 (1995).

22. Horatia Muir Watt, *On the Waning Magic of Territoriality in the Conflict of Law*, in TOM BINGHAM AND THE TRANSFORMATION OF THE LAW: A LIBER AMICORUM 751 (Mads Andenas & Duncan Fairgrieve eds., Oxford Univ. Press 2009).

23. MARIANNA MAZZUCATO, *THE ENTREPRENEURIAL STATE: DEBUNKING THE PUBLIC VS. PRIVATE MYTH IN RISK AND INNOVATION 1* (Anthem Press 2013); see also SUPIOT, *supra* note 20, at 100-09, 145-84.

24. See DAVID HARVEY, *THE CONDITION OF POSTMODERNITY* 263 (Blackwell Publishing 1989) (writing that Gustave Flaubert explored "the question of representation of heterogeneity and difference, of simultaneity and synchrony, in a world where both time and space are being absorbed under the homogenizing power of money and commodity exchange.") See also DAVID HARVEY, *THE ENIGMA OF CAPITAL: AND THE CRISES OF CAPITALISM* (Profile Books 2010) [hereinafter *THE ENIGMA OF CAPITAL*].

25. HARVEY, *supra* note 24, at 263-64.

26. *Id.* at 265.

27. See *Generally* STEPHEN KERN, *THE CULTURE OF TIME AND SPACE* 11 (Harvard Univ. Press ed. 1983).

28. *Id.*

commented, the question is why and how the economic structure determines the political one.<sup>29</sup>

The relevance of my proposed analysis is made evident by the content of the *Doing Business* reports of 2004 and 2005.<sup>30</sup> The WTO members partly used these reports at the ninth ministerial conference, held in Bali in December 2001, to sign the first comprehensive agreement since the WTO was founded, involving an effort to simplify (*rectius*, dissolve) the procedures for doing business across borders and redesign the economic geography of the world market.<sup>31</sup> In writing the *Doing Business* series, the WTO, IMF, and World Bank called for the adoption of a *modus procedendi* that perceives (the) law as nothing more than an aspatial normative framework in which the only benchmarks that should be considered relevant are the legal sources, rules of interpretation, and the courts' organization. Furthermore, by adopting the "Law and Finance" approach promoted by Thorsten Beck and Ross Levine, which refers to the Economic Analysis of Law,<sup>32</sup> the *Doing Business* reports effectively asserted that the competition among different legal systems is ultimately won by those more capable of protecting institutional global investors by (also) reducing market(s') costs. Lastly, because Civil law systems tend to create institutions that implement the state's power<sup>33</sup>, the *Doing Business* reports suggested that such a result is best achieved and protected by Common law systems.<sup>34</sup> The "efficiency test"

29. *Id.*

30. See INT'L BANK FOR RECONSTRUCTION AND DEV./THE WORLD BANK, *DOING BUSINESS IN 2005: REMOVING OBSTACLES TO GROWTH* (World Bank, Int'l Fin. Corp., & Oxford Univ. Press 2005), available at <http://www.doingbusiness.org/~media/FDPKM/Doing%20Business/Documents/Annual-Reports/English/DB05-FullReport.pdf>.

31. The deal was the first 'success' of the Doha Round. The full package could add about \$1trillion to world trade by cutting the cost of shipping goods around the world by more than 10 percent, raising global output by over \$400 billion a year and giving developing nations more scope to increase farm subsidies. (NC HERE) For a recent inquiry into how global economic governance issues determine the trajectory of national politics, see Daniel D Bradlow, *A Framework for Assessing Global Economic Governance*, 36 B. C. INT'L & COMP L. REV. 971, 971-73 (2013). To understand why the IMF and the World Bank are buffeted by institutional crisis and policy conflicts, see WALDEN BELLO, *CAPITALISM'S LAST STAND?* 181-202 (Zed Books 2013).

32. Thorsten Beck & Ross Levine, *Legal Institutions and Financial Development*, (Nat'l Bureau of Econ. Research, Working Paper No. 10126, 2003), available at <http://www.nber.org/papers/w10126>.

33. For example, Common law systems promote a more market-centered political economy than Civil law systems. See John C. Reitz, *Comparative Law and Political Economy*, in *COMPARATIVE LAW AND SOCIETY* 105, 126-27 (David S. Clark ed., Edward Elgar Publ'g., 2012).

34. I use capital 'C' to refer to the Common law as a legal tradition. Common (with an up-percase c) law and common law are two different things: while the former is a legal tradition marked by a number of particular characteristics, the latter refers to only a part of the Common law (and includes elements of both case law and customary law).

adopted by both reports and according to which “wealth maximization becomes an explanation of the development of the (common law)”<sup>35</sup> make it clear that Gunter Teubner is wrong when he claims that global law “is a law whose ‘centre’ is created by the ‘peripheries’ and remains dependent on them.”<sup>36</sup> Importantly, both reports have been vehemently criticized by the French Capitant Report, published in 2006, because of their limited and superficial purview of enquiry and obvious paradoxes (*e.g.*, it was argued that Anglo-American law is inevitably classist, and that, as Monateri pointed out, the “Law and Finance” doctrine is nothing more than “inverted Marxism”).<sup>37</sup>

The French critique should be taken into serious account. Despite what may be suggested to the contrary, according to the WTO, IMF, and World Bank, the solution for rendering economies more “dynamic,” “competitive,” and “innovative” does not come from the implementation of the rule of law through its local representations and ways of legitimation and recognition.<sup>38</sup> Rather, the solution is the dissolution of the “spatiality” of the targeted legal systems (and identity of cultures underneath) and the essence of the “political” in Schmittian terms.<sup>39</sup>

Such a process is evidently part of the movement towards theories of (non-) sovereignty and governance in a global framework in which law is not only perceived as a set of rules, but also a relevant symbolic *vestimentum* of global soft power.<sup>40</sup> The substitution of local govern-

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35. Francesco Parisi & Barbara Luppi, *Comparative Law and Economics: Accounting for Social Norms*, in *COMPARATIVE LAW AND SOCIETY* 92, 93 (Edward Elgar Publ'g., 2012).

36. Gunther Teubner, ‘Global Bukowina’: *Legal Pluralism in the World Society*, in *GLOBAL LAW WITHOUT A STATE* 3, 12 (Gunter Teubner ed., Brookfield 1997).

37. PIER MONATERI, *GEOPOLITICA DEL DIRITTO* 27-34 (2013) as translated by the author.

38. *Id.* at 27-28.

39. *See id.* at 54-56.

40. *See id.* at 26-27. Scholarship on the global governance issue seems endless. For an introduction, see JAN KLABBERS, ANNE PETERS, AND GEIR ULFSTEIN, *THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW* (Oxford Univ. Press 2009); ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (Princeton Univ. Press 2004); Julian Arato, *Constitutionality and Constitutionalism Beyond the State: Two Perspectives on the Material Constitution of the United Nations*, 10 *INT’L J. CONST. L.* 627 (2012); Maksymilian Del Mar, *Beyond the State in and of Legal Theory*, in *CONCEPTS OF LAW: COMPARATIVE, JURISPRUDENTIAL, AND SOCIAL SCIENCE PERSPECTIVES* 19-41 (Seán Patrick Donlan & Lukas Heckendorn-Urscheler eds., Ashgate 2014); Nils Jansen & Ralf Michaels, *Beyond the State? Rethinking Private Law: Introduction to the Issue*, 56 *AM. J. COMP. L.* 527 (2008); Nico Krisch, *Global Governance as Public Authority: an Introduction*, 10 *INT’L J. CONST. L.* 976 (2012); Nicole Roughan, *The Relative Authority of Law: A Contribution to “Pluralist Jurisprudence”*, in *NEW WAVES IN PHILOSOPHY OF LAW* 254 (Palgrave MacMillan, 2011); CHARLES F. SABEL & JONATHAN ZEITLIN, *EXPERIMENTALIST GOVERNANCE IN THE EUROPEAN UNION: TOWARDS A NEW ARCHITECTURE* (Oxford Univ. Press 2010); Anne-Marie Slaughter, *Filling Power Vacuums in the Global Legal Order*, 36 *B.C. INT’L & COMP. L. REV.* 919 (2013); Anne-Marie Slaughter, *Sovereignty and Power in a Networked World Order*, 40 *STAN. J. INT’L L.* 283 (2004); Bas van der Vossen, *Legitimacy and Multi-Level Governance*, in *NEW WAVES IN*

ment with aspatial global governance is what we should delve into if we are to understand that what the liberal global-order project renders insignificant is the Schmittian “exception” together with the related notion of sovereign and democratic “friend/enemy” (or “us/them”) antithesis which makes politics possible.<sup>41</sup> In this sense, the recent referendum in which Switzerland decided to bring back strict immigration quotas for Europeans may be seen as a tentative step towards rediscovering the (democratic) significance of the democratic “friend/enemy” antithesis, and hence of politics, as opposed to the sterile administrative *vacuum* promoted by the universalization of liberal thought and Europe’s (tragic) “statelessness fantasy.”<sup>42</sup>

That the West is not capable of understanding the perils of this progression should not surprise anyone. While questioning the delusion of those holding Western values, Samuel P. Huntington claimed, “Western belief in the universality of Western culture suffers three problems: it is false; it is immoral; and it is dangerous.”<sup>43</sup> He then maintained that these problems are directly related to what he defined as the “global identity crisis.”<sup>44</sup> He was right. Yet his claim can only be fully understood if we bear in mind that Western civilization long ago stopped delving into the question of its identity and, through the adoption and incessant implementation of a deliberately shaped set of concepts, has always experienced the instrumentalist and manipulative creation, disruption, and recreation of its memory.<sup>45</sup> This means that the

PHILOSOPHY OF LAW, 233-53 (Maksymilian Del Mar ed., Palgrave Macmillan 2011); Peer Zumbansen, *The Law of Society: Governance Through Contract*, 14 *IND. J. GLOBAL LEGAL STUD.* 191 (2007).

41. According to Schmitt, to decide is to decide both for and against and inevitably implies the predominance of will over reason. See CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* 26-27 (Univ. of Chi. Press 2007) (1927) [hereinafter *THE CONCEPT OF THE POLITICAL*]. Similarly, Derrida claimed that “[n]o justice is exercised, no justice is rendered, no justice becomes effective nor does it determine itself in the form of law, without a decision that cuts and divides.” Jacques Derrida, *Force of Law: The Mystical Foundation of Authority*, in *ACTS OF RELIGION* 230, 252 (Gil Anidjar ed., Routledge 2010).

42. See Luca Siliquini-Cinelli and Béatrice Schütte, *Conceptualizing the Schmittian Exception in the European Union: From ‘Opt-out’ Procedure(s), to Indirect Forms of Secessionism*, 15 *CHICAGO-KENT JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW*, 1 (2015).

43. SAMUEL P. HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* 310 (Simon & Schuster, 1996).

44. *Id.* at 125.

45. The (sad) circumstance that the West has lost faith in the traditions and memories that have made it and its principles “have been falling into increasing disregard and oblivion” is the canon of Hayek’s inquiry into the constitution of liberty. See FRIEDRICH A. HAYEK, *THE CONSTITUTION OF LIBERTY* 1-8 (Routledge 2006) (1960). The most striking evidence of this phenomenon is that, paradoxically, the West does not even have geopolitical boundaries and thus cannot be properly defined in terms of “west” either. That the ontological disposition of Western

West, as we know it today, is the result of the literary reinterpretation and voluntary distortion of its historicity of politics and sociology of law for practical purposes.<sup>46</sup> In particular, the West has been built on

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(non-)culture has shifted from the Greece of Thucydides to the U.S. and, in part, the Eastern side of the Southern hemisphere is testament to this. On the (non-)identity of the West, see generally the monumental investigation conducted in MARTIN BERNAL, *BLACK ATHENA: AFROASIATIC ROOTS OF CLASSICAL CIVILIZATION* (Rutgers Univ. Press, 1987); *see also* SAMUEL ANGUS, *THE MYSTERY-RELIGIONS AND CHRISTIANITY: A STUDY IN THE RELIGIOUS BACKGROUND OF EARLY CHRISTIANITY* (Dover 1975) (1928); HANNAH ARENDT, *THE LIFE OF THE MIND* (1978); ALEIDA ASSMAN, *CULTURAL MEMORY AND WESTERN CIVILIZATION* (2011); JAN ASSMANN, *MOSES THE EGYPTIAN: THE MEMORY OF EGYPT IN WESTERN MONOTHEISM* (Harvard Univ. Press, 1998) [hereinafter *MOSES THE EGYPTIAN*]; JAN ASSMANN, *THE PRICE OF MONOTHEISM* (2010) [hereinafter *THE PRICE OF MONOTHEISM*]; JAN ASSMANN, *CULTURAL MEMORY AND EARLY CIVILIZATION: WRITING, REMEMBRANCE, AND POLITICAL IMAGINATION* (2011) [hereinafter *CULTURAL MEMORY AND EARLY CIVILIZATION*]; JAN ASSMANN, *RELIGIO DUPLEX: HOW THE ENLIGHTENMENT REINVENTED EGYPTIAN RELIGION* (2014); MARTIN BERNAL, *BLACK ATHENA WRITES BACK* (Duke Univ. Press 2006); ERIC BERNE, *BEYOND GAMES AND SCRIPTS* (1976); JONATHAN BOYARIN, *REMAPPING MEMORY: THE POLITICS OF TIMESPACE* (1994); FRANCIS M CORNFORD, *FROM RELIGION TO PHILOSOPHY* (Dover 2004) (1912); FRANZ V. M CUMONT, *ORIENTAL RELIGIONS IN ROMAN PAGANISM* (Echo Library 2008) (1911); SAMUEL HUNTINGTON, *WHO ARE WE?* (2004); *PERSONAL IDENTITY* (John Perry ed., 1975); MARY L. LEFKOWITZ & GUY M. ROGERS, *BLACK ATHENA REVISITED* (Univ. of North Carolina Press 1996); DAN P. MCADAMS, *THE STORIES WE LIVE BY: PERSONAL MYTHS AND THE MAKING OF THE SELF* (1st ed. 1993); W.O.E OESTERLEY & THEODORE H. ROBINSON, *HEBREW RELIGION: ITS DEVELOPMENT AND ORIGIN* (1930); EDWARD W. SAID, *CULTURE AND IMPERIALISM* (1st ed. 1993); MICHAEL ALAN SIGNER, *MEMORY AND HISTORY IN CHRISTIANITY AND JUDAISM* (2001); ANTHONY D. SMITH, *THE ETHNIC ORIGIN OF NATIONS* (B. Blackwell, 1986); SIR WILLIAM W. TARN & G.T. GRIFFITH, *HELLENISTIC CIVILIZATION* (Edward Arnold Pub. Ltd. 1966); CHARLES TAYLOR, *THE MALAISE OF MODERNITY* (1991); VICTOR TCHERIKOVER, *HELLENISTIC CIVILIZATION AND THE JEWS* (Baker Publishing) (1959); JAMES TULLY, *STRANGE MULTIPLICITY: CONSTITUTIONALISM IN AN AGE OF DIVERSITY* (1995); BERNARD WILLIAMS, *PROBLEMS OF THE SELF: PHILOSOPHICAL PAPERS 1956-1972* (1973); Michael S Roth, *We Are What We Remember*, *TIKKUN MAGAZINE* (Nov/Dec. 1994) available at [http://www.tikkun.org/article.php/nov1994\\_roth](http://www.tikkun.org/article.php/nov1994_roth);

46. Unfortunately, the scope of our study does not allow us to delve into this topic adequately. Yet the instrumentalist use of the 'exception' within the Christian creed is of particular interest here. Although Jesus emphasized the moral side of life in preference to the purely formal aspect of legal observance, he is never shown in conflict with current practice of the law. The single exception is the plucking of heads of grain on the Sabbath (see Luke 6:1-5). Yet, as David Flusser correctly writes, "[t]he general opinion was that on the Sabbath it was permissible to pick up fallen heads of grain and rub them between the fingers. According to Rabbi Yehuda, also a Galilean, it was even permissible to rub them in one's hand." DAVID FLUSSER, *JESUS 58* (Hebrew Univ. Magnes Press 3rd ed. 2001) (1968). It is clear that the essence of the manipulative distortion came from Jesus's disciples, who wrote the (no longer extant) documents in Hebrew; these were translated into Greek for the Alexandrian Jews, and then further elaborated through various stages of redaction until finally being employed by the Synoptic evangelists. In order to make the scene more vivid, the Synoptic evangelists added the statement about plucking the wheat as the act of transgression that confirmed Jesus's superior authority. Both this (unreal) episode and the "divine conflict" between God and the crucified Jesus as described in Moltmann's *The Crucified God* may be considered as the first Schmittian state of exception in political theology, from which Christianity, and hence the West as we know it today, originated. *See 'Against Interpretation?'*,

(and promoted through) memories that have always been seen as true because they were instrumentally arranged by their guardians. Hence, these memories are anything but “true” in absolute terms: as Jan and Aleida Assmann have persuasively claimed,<sup>47</sup> they just have to be kept alive as “pure and genuine memories”, independent from any historiographical legitimation (mnemohistory).<sup>48</sup>

This fanatic trend of Machiavellian creation, abolition, and change of the Western logic of memory forces us to ask ourselves on what basis the West knows itself and produces (and sells) its own cultural, sociopolitical and ontological image (or test, as Legendre would say<sup>49</sup>). Answering this question is not an easy task for at least two reasons. First, we live in a period in which even the topological and topographical notions, and local sensibility of presentification of the West, or of the values it promotes, are unclear. Second, the introduction of Christianity into Europe, and its further Hellenization and theologization,<sup>50</sup> produced the first major (violent and exceptional<sup>51</sup>) discontinuity in the Western evolution of both law and politics as they emerged from tribal social customs.

Only when we consider the blurriness of this scenario and unite it with history’s lessons about law’s need for spatial signifiers that the threat posed by the formal “depoliticization” and “dejuridification” of the world to the rule of law (which is a doctrine and not, as it may be contrarily suggested, a principle<sup>52</sup>) becomes evident. Seeing that the *Oikoumene* is characterized by the uniformity of politics, culture, and legislation, it may not be considered a territory in spatio-ontological

*supra* note 2.

47. See generally JAN ASSMANN, *MOSES THE EGYPTIAN*, *supra* note 45; *THE PRICE OF MONOTHEISM*, *supra* note 45; *CULTURAL MEMORY AND EARLY CIVILIZATION*, *supra* note 45.

48. The first historian who addressed the extinguishing of the individual through the experience of alienation of the historical consciousness was Leopold von Ranke. See Hans-Georg Gadamer, *The Universality of the Hermeneutical Problem*, in *PHILOSOPHICAL HERMENEUTICS* 32 (David E. Linge ed., Univ. of Cal. Press 2004) (1996). To understand how history has altered its position in relation to the document by making it a ‘monument’ through which memories are deliberately promoted, see generally MICHAEL FOUCAULT, *THE ARCHAEOLOGY OF KNOWLEDGE* (Routledge 2002) (1969).

49. Culture, according to Legendre, is the construction of a discourse, and its memory depends on our use of the geology of its texts. See Legendre, *supra* note 6.

50. For an introduction on the sociopolitical perspective of this topic, see generally FRANCIS FUKUYAMA, *THE ORIGINS OF POLITICAL ORDER* (Profile Books 2012). The Jewish simplicity, which still characterizes the Synoptic Gospels, disappears in John’s identification of Christ with the Stoic-Platonic logos (see Gospel of John, 1:1). The same applies to the Pauline epistles, which are widely recognized as the true ‘seed’ of Christianity.

51. See GEORGIO AGAMBEN, *STATE OF EXCEPTION* 52-64 (Kevin Attell trans., Univ. of Chi. Press 2005) (2003).

52. MONATERI, *GEOPOLITICA DEL DIRITTO*, *supra* note 37.

terms and, consequently, there is no need in it for a *nomos* in terms of “division,” “allocation,” and “appropriation” (*Nahme*) of rights, interests, obligations, and duties.<sup>53</sup> Lord Bingham’s lessons on the intrinsic relationship between the rule of law and the modern democratic state seem to confirm this suggestion.<sup>54</sup> Hence, to understand the “dissipation of the rule of law into the self-regulation of transnational corporations”<sup>55</sup> – that is, into a soft-networked (non-) dimension in which time and space do not exist – we should first understand that, as Kafka, Derrida, and Cacciari have persuasively demonstrated, the law can perform its regulative instances only when (and due to the fact that) the subject does not enter its open door. Given that it is ontologically impossible to enter the “open,” the effectiveness of the legal order (also) depends on the ontological and anthropological *constitutive force* of the boundary.<sup>56</sup>

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53. HANNAH ARENDT, *THE HUMAN CONDITION* 88-90 (Univ. of Chi. Press 1998) (1958); HANNAH ARENDT, *ON REVOLUTION* 179-186 (Penguin 2006) (1963); CARL SCHMITT, *THE NOMOS OF THE EARTH IN THE INTERNATIONAL LAW OF THE JUS PUBLICUM EUROPEAUM* (Gary Ulmen trans., Telos Publishing Press 2006) (1950); Carl Schmitt, *Großraum Versus Universalism*, in *SPATIALITY, SOVEREIGNTY AND CARL SCHMITT* 3 (Stephen Legg ed., Matthew Hannah trans. Routledge 2013). For a compelling investigation into the implications for the development of Western philosophy of the manipulative distortion of the term *oikonomia*, see GIORGIO AGAMBEN, *THE KINGDOM AND THE GLORY: FOR A THEOLOGICAL GENEALOGY OF ECONOMY AND GOVERNMENT* (Lorenzo Chiesa trans., Matteo Mandarini trans., 2011); ANDREA CAVALLETTI, *LA CITTÀ BIOPOLITICA: MITOLOGIE DELLA SICUREZZA* (2005). Finally, for a comparison between the economic global order and the infinite order of Hell, see GIORGIO AGAMBEN, *CHURCH AND KINGDOM* (Leland de la Durantaye trans., 2010).

54. In Lord Bingham’s words, the very essence of the rule of law is that “all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefits of laws publicly made, taking effect (generally) in the future and publicly administered in the courts.” TOM BINGHAM, *THE RULE OF LAW* 8 (Penguin 2010); see also BRIAN Z TAMANAHA, *ON THE RULE OF LAW* 35 (Cambridge Univ. Press 2004). According to the sociologist Seymour Martin Lipset, economic development, and in particular the economic effectiveness of the political system, rather than its law-applying and law-making procedures, is the principal “condition sustaining democracy.” In particular, while investigating the correlation between development and democracy, Lipset claimed that:

[i]n the modern world . . . economic development involving industrialization, urbanization, high educational standards, and a steady increase in the overall wealth of the society, is a basic condition sustaining democracy; it is a mark of the efficiency of the total system. But the stability of a given democratic system depends not only on the system’s efficiency in modernization, but also upon the *effectiveness* and *legitimacy* of the political system. By effectiveness is meant the actual performance of a political system, the extent to which it satisfies the basic functions of government as defined by the expectations of most members of a society, and the expectations of powerful groups within it which might threaten the system, such as the armed forces. . . . Legitimacy involves the capacity of a political system to engender and maintain the belief that existing political institutions are the most appropriate or proper ones for the society.

Seymour M. Lipset, *Social Requirements of Democracy: Economic Development and Political Legitimacy*, 53 *AM. POL. SCI. REV.* 69, 86 (1959); see also FUKUYAMA, *supra* note 50, at 458–83.

55. Goodrich, *Law’s Labour’s Lost*, *supra* note 20, at 309.

56. See GIORGIO AGAMBEN, *HOMO SACER* 49–62 (Kevin Attell trans., Stanford Univ. Press

Consequently, in the global *Oikoumene* of total uniformity, there is no need for the Schmittian “exception” either: the sovereign (and thus, political) relationship between the law and those it tries to protect by imposing and/or stimulating its respect makes no appearance.

Before turning to the intimate relationship between universalized liberalism and the manipulative use of comparative law’s geopolitics, I would like to specify that Schmitt claimed in 1922 that “[t]oday nothing is more modern than the onslaught against the political . . . [t]here must no longer be political problems, only organizational-technical and economic-sociological tasks.”<sup>57</sup> Seven years later, while arguing against what he called “liberal normativism,” Schmitt gave a compelling lecture in Barcelona on the essence, features, and perils of what he defined as the “the age of neutralization and depoliticization,” explaining why the “political” was in danger of disappearing as a human form of life because of the (terrible) fact that what he perceived as “sovereignty” was

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1998) (1995). The circumstance that even Lessig’s *invisible software code* needs to be drafted as a computer program by someone further demonstrates the law anthropological and ontological need for a tangible *signature*. See LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* (Basic Books 1999). For a comparison between the current global order and the Schmittian model of *Großraum* power, see Siliquini-Cinelli, *supra* note 12. It is not the case that the dissolution of the legal force of the boundary coincided historically with the rise of the “social” – that is, in Arendt’s words, “with the transformation of the private care for private property into a public concern”; this took pace “when wealth became capital, whose chief function was to generate more capital.” This circumstance, and the “transformation of immobile property into mobile property” broadly understood, is of pivotal interest for our inquiry because “[t]he emergence of society . . . from the shadow interior of the household into the light of the public sphere, has not only blurred the old borderline between private and political, it has also changed almost beyond recognition the meaning of the two terms and their significance for the life of the individual and the citizens.” See ARENDT, *THE HUMAN CONDITION*, *supra* note 53, at 68, 69, and 38. In this sense, it is worth mentioning that the global-order doctrine echoes two distinct historical moments of great importance: (1) the Sophists’, and in particular Protagoras’s, polemic against *nomos* in favor of nature, which led to the normativistic reinterpretation of *nomos* as mere “law” deprived of its spatial character (yet, while Schmitt would agree with the reconstruction, Heidegger would not); (2) the Stoic, and in particular Epictetus’s, understanding of “happiness” in terms of *europa biou*, a metaphor that indicates, in Arendt’s words, “a free-flowing life, undisturbed by storms, tempests, or obstacles” and that allowed them to “withdraw from the world while still living it.” See Schmitt, *Großraum Versus Universalism*, *supra* note 53, at 67–83; ARENDT, *supra* note 45, at 74 and 92. Teubner’s claim for the *invisible* boundaries of global law that “are formed not by maintaining a core ‘territory’ and expanding on a ‘federal’ basis as Kant perceived in terms of nation-states, but rather ‘by invisible colleges’, ‘invisible markets and branches’, ‘invisible professional communities’, ‘invisible social networks’ that transcend territorial boundaries but nevertheless press for the emergence of genuinely legal forms” is therefore misleading because, strictly speaking, global (non-)law has no boundaries at all. See generally Teubner, *supra* note 36, at 7. See also ZENON BAŃKOWSKI AND MAKSYMILIAN DEL MAR, *Images of Borders and the Politics of Legality and Identity*, in *LAW, SOCIETY AND COMMUNITY* 61, 77 (Ashgate 2014).

57. POLITICAL ROMANTICISM, *supra* note 10, at 65.

no longer a constituent part of our world (*Großraum*).<sup>58</sup> In particular, Schmitt argued that this depoliticization process involved four steps, “from the theological to the metaphysical domain, from there to the humanitarian-moral, and, finally, to the economic domain.”<sup>59</sup> Liberal democracy and “political relativism”<sup>60</sup> represent the final stage of this neutralizing trend. Schmitt built his considerations on Max Weber’s notion of the “demagification of the world” (*Entzauberung*) and the subsequent fight against the workings of bureaucracy as an instrumental and networked system of rational, and thus dehumanized relations.<sup>61</sup>

As Tracy B. Strong writes in the foreword to Schmitt’s *Political Theology*, according to Weber, “[b]ureaucracy is the form of social organization that rests on norms and rules and not on persons.”<sup>62</sup> It is thus a form of rule in which there is “objective discharge of business . . . according to calculable rules and without regard of persons.”<sup>63</sup> Importantly, although Schmitt insisted on a “sociology of concepts,” rather than a pure Weberian sociological approach, both Weber’s and Schmitt’s accounts may be considered early objections to central texts of contemporary liberalism, such as Rawls’s, *A Theory of Justice*.<sup>64</sup> In this sense, it should be kept in mind that even Hayek criticized the constructivist essence of the liberal global thought project. Hayek did so while analyzing the paradoxes of the creation of the so-called “social and economic human rights” through a compelling analysis of Franklin D. Roosevelt’s, four freedoms and the illusory content of the Universal Declaration of Human Rights 1948, which, according to Hayek, is based upon “the interpretation of society as a deliberately made organization by which everybody is employed.”<sup>65</sup>

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58. *The Age of Neutralizations and Depoliticizations*, in *THE CONCEPT OF THE POLITICAL*, *supra* note 41, at 82.

59. *Id.* at 82.

60. *POLITICAL ROMANTICISM*, *supra* note 10, at 42.

61. *Id.* at xxiii.

62. *Id.* at xxii.

63. MAX WEBER, *ECONOMY AND SOCIETY* 975 (Guenther Roth trans., Univ. of Cal. Press 1968) (1956).

64. The Schmittian inevitable political division is precisely what liberalism has denied by denying the place of the decision. In particular, Schmitt’s account stands in opposition to Hayek’s belief that “[t]he basic source of social order . . . is not a deliberate decision to adopt certain common rules, but the existence among the people of certain opinions of what is right and wrong.” Consequently, “[t]he ultimate limit of power is . . . not somebody’s will on particular interests but . . . the concurrence of opinions among members of a particular territorial groups on rules of just conduct.” See HAYEK, *LAW, LEGISLATION AND LIBERTY*, *supra* note 9, at 375–77.

65. *Id.* at 264.

### III. RATIONE IMPERII VERSUS IMPERIO RATIONIS

#### A. Comparative Law and the Liberal Global Order

This paper's second claim is that the instrumentalist use of comparative law's geopolitics has become a powerful tool in the neutralization of both the Schmittian "political" and "sovereign" pursued by the liberal global order project. To justify this claim, I contend that the increasing importance of the comparative method in our era is mainly due to the fact that it makes it possible to reveal both the "general" and the "special" in the legal systems it analyzes. More precisely, in our neorealist global age, comparative law has become extremely useful for at least three reasons. First, "it helps to identify the circumstances in which law changes, hence it uncovers the causes of legal development."<sup>66</sup> Second, "a uniform law cannot be achieved by simply conjuring up an ideal law on any topic."<sup>67</sup> Third, many examples of harmonization efforts that are preceded by a comparative survey exist.<sup>68</sup>

In other words, even if the comparative approach has old origins,<sup>69</sup> its value as a study and methodology still is because it is rooted in social comparison, an activity through which "we make sense of the world in which we live and even understand ourselves."<sup>70</sup> Hence, comparative law is able to dissolve unconsidered national prejudices, thereby helping us to uncover how cultures are presented through examining their legal

66. ALAN WATSON, *ROMAN LAW AND COMPARATIVE LAW* ix (Univ. of Georgia 1991); *see also* CLASSICS IN COMPARATIVE LAW (Tom Ginsburg, Pier Giuseppe Monateri & Francesco Parisi eds., 2014); PETER DE CRUZ, *COMPARATIVE LAW IN A CHANGING WORLD* (3<sup>rd</sup> ed., 2007); OTTO KAHN FREUND, *COMPARATIVE LAW AS AN ACADEMIC SUBJECT* (Clarendon Press 1965); HAROLD C GUTTERIDGE, *COMPARATIVE LAW* (Cambridge Univ. Press 1949); KONRAD ZWIEGERT AND HEIN KÖTZ, *AN INTRODUCTION TO COMPARATIVE LAW* (Tony Weir trans., 3<sup>rd</sup> ed., 1998).

67. Jan M. Smits, *European Private Law and the Comparative Method*, in *THE CAMBRIDGE COMPANION TO EUROPEAN UNION PRIVATE LAW* 33, 34 (Christian Twigg-Flesner ed., Cambridge Univ. Press 2010).

68. *E.g.* United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, S. Treaty Doc. 98-9 (1983), 1489 U.N.T.S. 3 [hereinafter CISG]. For an introduction, *see* MICHAEL BRIDGE, *SALE OF GOODS* (2<sup>nd</sup> ed., Oxford Univ. Press 2009); COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (Ingeborg H. Schwenzer ed. 2010); INGEBORG H. SCHWENZER ET AL., *GLOBAL SALES AND CONTRACT LAW* (Oxford Univ. Press 2010).

69. When describing the *polis* as a peculiar isonomy, Herodotus defines for the first time the three chief forms of government (rule by one, rule by the few, and rule by the many) in BOOK III 80–82. Later, both Plato and Aristotle compare the existing constitutions and forms of government to determine which one was the best. *See* PLATO, *THE REPUBLIC BOOKS I-III* (2<sup>nd</sup> ed., Hackett Classics 1992) (360 BCE).

70. David S. Clark, *History of Comparative Law and Society*, in *COMPARATIVE LAW AND SOCIETY* 1-36 (David S. Edward Elgar ed., 2012).

systems.<sup>71</sup> Also, a comparative glance assists in furthering international understanding (Lipset used to say that an observer who knows only one country knows no countries).<sup>72</sup> This is because the ideal task of the comparative legal scholar is to “be interested in the details of consciousness, dismantling the various mechanisms of meaning production, and casting irony over interpretive practices.”<sup>73</sup>

As the success of the *New Approaches to Comparative Law* (NACL) doctrine demonstrates,<sup>74</sup> comparative law is increasingly gaining international credibility as a way to develop new theories of sovereignty and governance in a framework where the law is perceived less as a positivistic set of rules and more as a symbolic *vestmentum* of global soft power. This growing perception is because of comparative law’s attractive functionalist or constructivist essence<sup>75</sup> or, in other words, to the circumstance that, as claimed by two of the most prominent comparatists, “[t]he basic methodological principle of all comparative law . . . is that of *functionality*.”<sup>76</sup> That is to say, comparative law may easily become an attractive device to achieve the desired result.

Unfortunately, while comparative law has become a key discipline, its instrumentalist use has turned out to be a powerful weapon; it is the “pen” by which the identity of and differences in law’s geopolitics are continually written and rewritten.<sup>77</sup> In other words, given that legal transplants can be directed not only at the positivistic content of the law, but also at the ways through which the content is created, destroyed, recreated, and generally administered, the impact of the comparative

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71. *Id.*; COMPARATIVE CONSTITUTIONAL LAW (Tom Ginsburg, Rosalind Dixon & Edward Elgar eds., 2011); H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD: SUSTAINABLE DIVERSITY IN LAW (4<sup>th</sup> ed., 2010); David S. Clark, *Aims of Comparative Law*, in ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW 57–65 (Jan M Smits ed., Edward Elgar Pub., 2006).

72. Lipset, *supra* note 54.

73. ‘Against Interpretation?’, *supra* note 2, at xix.

74. See Tamas Dezso Czigler, *E-Consumer Protection in the U.S.– The Same Jungle as in Europe*, 4 COMP. L. REV. 1 (2013).

75. Pier Giuseppe Monateri, *Methods in Comparative Law: An Intellectual Overview*, in METHODS OF COMPARATIVE LAW 7-24 (Pier Giuseppe Monateri ed., 2012); James Gordley, *The Functional Method*, in METHODS OF COMPARATIVE LAW: TRADITIONS AND TRANSITIONS 107-19 (Pier Giuseppe Monateri ed., 2012); Michele Graziadei, *The Functionalist Heritage*, in COMPARATIVE LEGAL STUDIES 100-30 (Pierre Legrand & Roderick Munday eds., 2003); see also EPISTEMOLOGY AND METHODOLOGY OF COMPARATIVE LAW (Mark Van Hoecke ed., 2004); PRACTICE AND THEORY IN COMPARATIVE LAW (Maurice Adams & Jacco Bomhoff eds., 2010); MATHIAS SIEMS, COMPARATIVE LAW (2014).

76. ZWEIGERT AND KÖTZ, *supra* note 66, at 34; *contra* GLENN, *supra* note 71, at 7.

77. MONATERI, GEOPOLITICA DEL DIRITTO, *supra* note 37. For a compelling introduction to the ‘perils’ of comparative law, see F H Lawson, *The Field of Comparative Law* 61 JURIDICAL REVIEW 16 (1949); ALAN WATSON, LEGAL TRANSPLANTS 10–15 (Univ. of Georgia Press 1993) (1974).

method of determining how cultures are mapped through the (legal) traditions that express them via definition of identities has become an issue that sociopolitical and legal scholars cannot take for granted anymore.<sup>78</sup>

This is further demonstrated by the fact that the ideal essence of the comparative method is currently affected by the growing use of “benchmarking and numeric calculus of performance by world institutional actors.”<sup>79</sup> In this way, through the adoption of a sterile and neutral methodology to which is attributed universal value because it overcomes the historicity of understanding and the anthropological component of the legal discourse,<sup>80</sup> the sovereign individual who *acts* is excluded from the law’s performative domain and replaced by the apolitical individual who *behaves*.<sup>81</sup> Thus, given the similarities between the world order pursued by the global governance project and Greimasian totalizing structuralism,<sup>82</sup> the increasing development of dehumanized arithmetical calculation (as well as legal language based on mechanical, and thus neutral, economic models) to support distortive theories of comparative law should lead us to take into pivotal account that “[t]he first essential step on the road to total domination is to kill the juridical person.”<sup>83</sup>

78. See generally PETER BIRKS, *MAPPING THE LAW* (Andrew Burros & Alan Roger eds., Cambridge Univ. Press, 2006); PETER BIRKS, *STRUCTURE AND JUSTIFICATION IN PRIVATE LAW* (Charles E.F. Rickett & Ross Grantham eds., Hart 2008); PETER BIRKS, *THE CLASSIFICATION OF OBLIGATIONS* (Oxford Univ. Press, 1997); MONATERI, *GEOPOLITICA DEL DIRITTO*, *supra* note 37; GEOFFREY SAMUEL, *A SHORT INTRODUCTION TO THE COMMON LAW* 103-04 (Edward Elgar ed., 2013) (2014); STEPHEN WADDAMS, *DIMENSIONS OF PRIVATE LAW: CATEGORIES AND CONCEPTS IN ANGLO-AMERICAN LEGAL REASONING* (Cambridge Univ. Press, 2003); Peter Birks, *Equity in the Modern Law: An Exercise in Taxonomy*, 26 U. W. AUSTL. L. REV. 1 (1996); Darryn Jensen, *The Problem of Classification in Private Law*, 31 MELB. U. L. REV. 516 (2007); Geoffrey Samuel, *Can the Common Law Be Mapped?*, 55 U. TORONTO L. J. 271 (2005); Igor Stramignoni, *Review Essay: Categories and Concepts: Mapping Maps in Western Legal Thought*, 1 INT’L J. L. IN CONTEXT 411 (2012).

79. Horatia Muir Watt, *Further Terrains for Subversive Comparison: The Field of Global Governance and the Public/Private Law Divide*, in *METHODS OF COMPARATIVE LAW* (Pier Giuseppe Monateri ed., 2012) 270, 273.

80. SUPLOT, *supra* note 20, at 59–77, 84–86, 94–109.

See also ARJUN APPADURAI, *MODERNITY AT LARGE* (1996); LAURA NADER, *THE LIFE OF THE LAW* (2002); LEGALISM (Paul Dresch & Hannah Skoda eds., Oxford Univ. Press 2012); Elizabeth Mertz and Mark Goodale, *Comparative Anthropology of Law*, in DAVID CLARK, *COMPARATIVE LAW AND SOCIETY: RESEARCH HANDBOOKS IN COMPARATIVE LAW* (Elgar, ed., 2012).

81. Ranke and Gadamer would agree with this, while Lévi-Strauss, whose intent was to create an all-encompassing science of communication that would include genetics, linguistics, and anthropology, would probably not.

82. For two recent accounts of how to deal with global legal pluralism, see KEITH C. CULVER & MICHAEL GIUDICE, *LEGALITY’S BORDERS: AN ESSAY IN GENERAL JURISPRUDENCE* (Oxford Univ. Press 2010); PAUL SCHIFF BERMAN, *GLOBAL LEGAL PLURALISM: A JURISPRUDENCE OF LAW BEYOND BORDERS* (Cambridge Univ. Press 2014).

83. HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 447 (1973).

In this regard, in addition to the *Doing Business* reports, the drafting of the Principles of European Contract Law (PECL) represents another useful example of how the comparative method can be used to neutralize the geopolitical relationship between the law's performative instances and those who live under its empire.<sup>84</sup> Unfortunately, by focusing solely on the positivistic dimensions and business implications of the PECL, private law scholars have never understood that providing a sterile set of principles through a mere comparison of national private law rules (and of those norms contained in the UNIDROIT Principles) annihilates both the political sensibility and sociology behind private law rules. This demonstrates that the PECL's drafters have produced the maximum expression of how the formal "depoliticization" and "dejuridification" pursued by the global-order project has negatively affected private legal reasoning on the continent.<sup>85</sup>

The significance of the PECL within the geopolitics of comparative law can also be shown by the reformation of the Israeli Civil Code, which is unusual, because Israel's is a hybrid legal order.<sup>86</sup> Throughout the recodification project, reference was made to the UNIDROIT Principles or the PECL.<sup>87</sup> Similarly, another example of the power and importance of comparative law in the shaping of national legal rules is the modernization of the German law of obligations.<sup>88</sup> The rules as they are now are the result of the influence of various forces including foreign law, comparisons between national legal cultures, references to international conventions, and model rules (such as the UN Convention on Contracts for the International Sale of Goods, the PECL, and the

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84. THE COMMISSION ON EUROPEAN CONTRACT LAW, PRINCIPLES OF EUROPEAN CONTRACT LAW, pts. 1 & 2 (Hugh Beale & Ole Lando eds., 2000). See also OLE LANDO ET AL., PRINCIPLES OF EUROPEAN CONTRACT LAW, pt. 3 (2003).

I agree with Maurice Adams and Dirk Heirbaut when they claim that "[t]he European Unification process is . . . very much built on the traditional constructivist ambitions of comparative law." Maurice Adams & Dirk Hheirbaut, *Prologomena to the Method and Culture of Comparative Law*, in THE METHOD AND CULTURE OF COMPARATIVE LAW (Maurice Adams & Dirk Hheirbaut eds., Hart Publ'g 2014).

85. INGERID S. STRAUME & JOHN F. HUMPHREY, *Introduction to DEPOLITICIZATION THE POLITICAL IMAGERY OF GLOBAL CAPITALISM*, 10 (Ingerid S. Straume & John F. Humphrey eds., NSU Press 2010).

86. Antonios E. Platsas, *The Enigmatic but Unique Nature of the Israeli Legal System*, 15 POTCHEFSTROOM ELECTRONIC L.J. 11, 15 (2012).

87. Pablo Lerner & Alfredo Mordechai Rabello, *A Civil Code for a Mixed Jurisdiction. Some Remarks on the Israeli Approach to Codification*, in LEGAL CULTURES AND LEGAL TRANSPLANTS GENERAL REPORTS TO THE XVIII<sup>TH</sup> INTERNATIONAL CONGRESS OF THE INTERNATIONAL ACADEMY OF COMPARATIVE LAW, 9-10 (Jorge A Sánchez Cordero ed., 2010).

88. Peter Schlechtriem, *The German Act to Modernize the Law of Obligations in the Context of Common Principles and Structures of the Law of Obligations in Europe*, OXFORD U. COMP. L. FORUM (2002), available at <http://ouclf.iuscomp.org/articles/schlechtriem2.shtml#fn1anc>.

UNIDROIT Principles).<sup>89</sup>

The foregoing should be investigated bearing in mind that, while comparative law has always been directly or indirectly part of the judicial process,<sup>90</sup> its instrumentalist use can influence the outcome of national court cases. This trend demonstrates full well the extent of the impact of the global-order project over classic, state-based hierarchical systems of legal authority. Its effects in terms of geopolitical and cultural signification should not, therefore, be taken for granted. For example, Lord Cooke of Thordon claimed, “the common law of England is becoming gradually less English [because] [i]nternational influences – from Europe, the Commonwealth and even the United States . . . are gradually acquiring more and more strength.”<sup>91</sup> In addition, with respect to EU law, article 340 (2) of the Treaty on the Functioning of the European Union deals with the liability of the EU for damage caused by its servants in the performance of their duties. The treaty explicitly refers to the “principles common to . . . the Member States.”<sup>92</sup> Yet these principles (and EU private law, broadly understood) are somewhat elusive, and mostly, not really tangible (as is usually the case with supranational phenomena). Not surprisingly, they are to be defined *ad nutum* by the European Union’s Court of Justice through the instrumentalist use of the comparative method.<sup>93</sup> Finally, the drafting of the European Convention on Human Rights (ECHR) was also influenced by the individualization of what have been described as the “common” traditions and experiences of various European countries.<sup>94</sup> This is a circumstance we ought not to underestimate. On the one hand, national supreme

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89. André Janssen & Reiner Schulze, *Legal Cultures and Legal Transplants in Germany*, 2 EUROPEAN REV. PRIVATE LAW 225, 238 (2011).

90. GUY CANIVET, ET AL., COMPARATIVE LAW BEFORE THE COURTS (2004); BASIL S. MARKESINIS, COMPARATIVE LAW IN THE COURTROOM AND CLASSROOM, 147-150 (Hart Publishing 2000); BASIL S. MARKESINIS & JOERG FEDTKE, ENGAGING WITH FOREIGN LAW (Hart Publishing 2009); Mads Andenas & Duncan Fairgrieve, *Intent on Making Mischief: Seven Ways of Using Comparative Law*, in METHODS OF COMPARATIVE LAW 25-60 (Pier Giuseppe Monateri ed., 2012); T.T. Arvind, *The ‘Transplant Effect’ in Harmonization* 1 INT’L & COMP. L. Q. 65, 66-7 (2010).

91. Robin Cooke, *The Road Ahead for the Common Law*, in TOM BINGHAM AND THE TRANSFORMATION OF THE LAW: A LIBER AMICORUM 688-89 (Mads Andenas and Duncan Fairgrieve eds., 2009).

92. Consolidated Version of Treaty on the Functioning of the European Union, 326/ 50, art. 340, 2012 O.J. 193.

93. Case 17-74, *Transocean Marine Paint Association v. Commission of the European Cmty.*, 1974 E.C.R. 01063. See also Kathleen Gutman, *The Evolution of the Action for Damages Against the European Union and Its Place in the System of Judicial Protection*, 48 COMMON MARKET L. REV. 695 (2011).

94. Paivi Leino, *A European Approach to Human Rights Universality Explored*, 71 NORDIC J. INT’L L., 455, 456 (2002).

courts are increasingly referring to the judgments delivered by the European Court of Human Rights ("ECtHR") to direct their reasoning.<sup>95</sup> On the other hand, the ECtHR has claimed the "authority to review even constitutional provisions. . . to assess their compatibility with the [ECtHR]."<sup>96</sup> Yet a real understanding of what Europe and the EU are, and what being a European signifies, is anything but beyond dispute. This is demonstrated by the "Europeanisation of Europe" being a "top-down" legitimizing political process rather than a 'bottom-up' one. These rights have always been conferred from above as a benefit, rather than exacted from below as a demand.<sup>97</sup>

What these examples prove is that, in dealing with the ideal essence of the comparative method and the anthropological and biopolitical human need for the law's performative instances, what makes the difference is *how* the guardians of a legal tradition decide to deal with its geopolitical and ontological *signatures* is critically important.<sup>98</sup>

### *B. Two Possible Reasons Behind the Distortive Use of Comparative Law's Geopolitics*

One way to explain the foregoing is that European academics are usually based at state universities and, even though their activity may be protected by the (constitutional) guarantee of "academic freedom", the survival of a significant amount of scholarship depends on the funding provided by international institutions, as well as global and transnational actors, to carry out projects whose guidelines are a priori determined. Arguably, this compromises the effectiveness of academic and institutional autonomy.<sup>99</sup>

I believe, however, that there is another reason behind the instrumentalist turn that comparative law and legal reasoning have experienced. I refer particularly to the artificial birth of the Leviathan, which has led to the positivist *dictum* that has rendered "law" synonymous with "legislation," or in other words, to the victory of the concept that law is a purely political instrument of the rational order (or *raison*

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95. See *Cadder v. HM Advocate*. [2010] UKSC 43, (Scot.), in which Lord Hope made reference to several judicial decisions through which the national law in France and Ireland was altered for the purpose of satisfying the well-known *Salduz* judgment.

96. Yaniv Rozani, *The Theory and Practice of 'Supra-Constitutional' Limits on Constitutional Amendments*, 62 INT'L & COMP. L.Q. 557 (2013).

97. See generally Luca Siliquini-Cinelli and Béatrice Schütte, *supra* note 42.

98. GIORGIO AGAMBEN, *SIGNATURA RERUM* (Bollati Boringhieri ed., 2008); *THE KINGDOM AND THE GLORY* (Lorenzo Chiesa trans., Stanford Univ. Press ed., 2011) (2007).

99. CARL SCHMITT, *THE LEVIATHAN IN THE STATE THEORY OF THOMAS HOBBS* 73 (George Schwab & Erna Hilfstein trans., Univ. of Chi. Press 2008) (1938).

*d'état*) imposed by the ruler.<sup>100</sup> This revolutionary break has deprived jurists of their role as guardians of the law's uncanny presence. With the exception of Germany, the birth of the modern European nation-state as an artificial and political creature has monopolized political action and restricted jurists to a reductive role, completely opposed to the prestigious role they had during the Middle Ages and Renaissance. In this sense, it is not surprising that the spread of theories and methods of comparative law aimed at transcending the political dominium of the Leviathan as a technically completed *magnum-artificium* (or *magnus homo*) took place alongside the so-called "international institutionalization of comparative law," which officially began with the constitutive meeting of the Académie Internationale de Droit Comparé in Geneva in 1924.<sup>101</sup> Its main achievements were obtained during the post-World War II period, particularly between 1949 and 1951 by American and European comparatists.<sup>102</sup>

The discovery and consequent application of the first paragraph of Justinian's *Digest* led the medieval glossators in a revolutionary move to displace the divine figure of the king and his dual function as "lord" and "minister of justice" (from *ratione Imperii* to *imperio rations*)<sup>103</sup> It was the discovery of the *Digest* that made it possible for the law to be taught and studied in the West as an independent science in the late 1000s and 1100s.<sup>104</sup> This is how what Goodrich has defined as the 'first revolution in interpretation' took place.<sup>105</sup> As Berman correctly writes, "[t]he law that was first taught and studied systematically . . . was not the prevailing law; it was the law contained in an ancient manuscript which had come to light in an Italian library toward the end of the elev-

100. *Id.*

101. Clark, *History of Comparative Law and Society*, *supra* note 70 at 28.

102. *Id.* at 29–31. While inquiring comparatists' discomfort with politics, David Kennedy has defined this trend, and its need for neutrality, in terms of a reaction to the "post-war trauma." See David W. Kennedy, *The Politics and Methods of Comparative Law*, in *COMPARATIVE LEGAL STUDIES* 345–437 (Pierre Legrand & Roderick Munday eds., 2003). On why and how this trend recalls the pre-positivistic approach of the natural lawyers, see James Gordley, *The Universalist Heritage*, in *COMPARATIVE LEGAL STUDIES* 31–45 (Pierre Legrand & Roderick Munday eds., 2003). For a critique of the "allegation that traditional comparative law obeys a secret political agenda of hegemony and domination," see Anne Peters & Heiner Schwenke *Comparative Law Beyond Post-Modernism*, 49 *INT'L & COMP. L. Q.* 800 (2000).

103. *Intersitium and Non-Law*, *supra* note 20 at 213.

104. For discussion of the idea that law began to be taught as a distinct science in the 1000s and 1100, see HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* (Harvard Univ. Press 1983).

105. Goodrich, *supra* note 20 at 303; see also *Intersitium and Non-Law*, *supra* note 20 at 213.

enth century. The manuscript reproduced” the Digest.<sup>106</sup> This is why, in commenting on Maitland’s considerations, Berman writes that the twelfth century was not *a* legal century but *the* legal century, “the century in which the Western legal tradition was born.”<sup>107</sup> Notwithstanding the subordination of reason (and mind, broadly understood) to theology,<sup>108</sup> Andrea da Isernia’s Latin locution “*raro principes iurista inventur*”<sup>109</sup> proves that it was in those crucial years, and not before, that the idea emerged on the continent that law’s mythical essence is “holy” and those who deal with it should be scientists whose *dominium* over the law’s performative instances allows them to gather together and constitute a new, separated holy *corpus*, namely the *militia legum* (or *militia literata* or, as Baldus defined it, *militia doctoralis*), to be ontologically compared to the *militia coelestis* of the Church and the armed aristocratic *militia* of the nobles (Sir Edward Coke, who claimed that the common law is the embodiment of the reasoning of many generations of learned men, would not agree with that).<sup>110</sup> This is probably one of the most powerful demonstrations that *the* law is the product of both the norm and decision.

However, the constructivist creation of the nation-state confined the *imperio rationis* and sovereign will of the continental jurist to a passive role by bringing back the mystic dimension of the *ratione Imperii* to the supreme level of law’s annunciation and administration.<sup>111</sup> The

106. HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 121-22 (Harvard Univ. Press 1983).

107. *Id.* at 120.

108. CHARLES WEBSTER, *FROM PARACELUS TO NEWTON: MAGIC AND THE MAKING OF MODERN SCIENCE* (Dover Publications 2005)(1982); SUPIOT, *supra* note 20, at 51-52.

109. CRISTINA CONSTANTINI, *LA LEGGE E IL TEMPIO: STORIA COMPARATA DELLA GIUSTIZIA INGLESE* (Carocci 2007).

110. The fact that, in his *INSTITUTES*, Coke claimed that the common law is “nothing but reason” should not confuse the interpreter. EDWARD COKE, *THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND*, (The Lawbook Exchange, Ltd. 18th ed. 1999). Given what is stated in John 1:1 (Ἐν ἀρχῇ ἦν ὁ λόγος, καὶ ὁ λόγος ἦν πρὸς τὸν θεόν, καὶ θεὸς ἦν ὁ λόγος), according to both the scholastic and humanist legal philosophers, reason is a natural faculty of the human mind given by God. Thus reason is not, as Coke understood it, the specialist feature of those ‘grave and learned men’ of English law. In Berman’s words, “for Coke, the artificial reason of the English common law was the unique reason, logic, sense, and purposes of the historically rooted law of the English nation, a repository of the thinking and experience of the English common lawyers over many centuries.” See HAROLD J. BERMAN, *LAW AND REVOLUTION, II: THE IMPACT OF THE PROTESTANT REFORMATIONS ON THE WESTERN LEGAL TRADITION* 243 (Belknap Press of Harvard Univ. Press 2006). Coke’s notion of both the common law and the Common law was accepted and developed further by Sir Matthew Hale, the creator of the historical theory of jurisprudence, which profoundly influenced Hayek’s thoughts on how law rises, evolves, and eventually dies. The fact that Hobbes considered Coke’s conception to be false and misleading is the key to understand the essence of the political *dicta* of the Leviathan over legal reasoning. *Id.* at 257–60.

111. See generally Schmitt, *Großraum Versus Universalism*, *supra* note 53.

state, through its officials, became the only guardian of law's uncanny presence and legal reasoning. From being the active protagonist of the stage, jurists figuratively became the passive part of the audience. Quoting Hayek's account of the role of the lawyer in political evolution, jurists became "an unwitting tool, a link in a chain of events that [they do] not see as a whole."<sup>112</sup> Kelsen's closing statements in *Pure Theory of Law* demonstrate this shift well. According to Kelsen, who was a neo-Kantian student of Rudolf Stammler, law is nothing other than the normative (self-supporting) domain of the state, and only the state's officials (among whom stands the judge) are entitled to decide what falls within the law's purview and what does not<sup>113</sup> (Schmitt, who insisted that "all law is situational law"<sup>114</sup> would not agree with that.) In the light of legal positivism's political sin, this means that there is no space for what is not realized, spoken, and written by the state (the word of the state is eternal, all else is fleeting), because, in Schmitt's words, all law "is simultaneously a problem of the existence of the state order."<sup>115</sup> Hence, it is no longer believed that "what is non-legal is always necessary to make law properly legal."<sup>116</sup>

To understand this shift fully, one should note that it was in the modern age, and not before, that the *mechanistic* philosophy of nature as the tool of self-assertion was adopted.<sup>117</sup> The fact that the individual, and thus *will* as opposed to *reason*, makes no appearance in that which is freed from any metaphysical reference such as scientific laws<sup>118</sup> is therefore anything but a coincidence.

Consequently, under the imperative will and *dominium politicum et regale* of the sovereign Leviathan,<sup>119</sup> civilian lawyers could no longer be considered the guardians of law's uncanny presence. Liberalism, focused on norms rather than power, and whose "horizon of explanation is framed by reason . . . and personal well-being"<sup>120</sup> rather than will, is aimed at eliminating the personal from the concept of law, has played a

112. HAYEK, LAW, LEGISLATION AND LIBERTY, *supra* note 9, at 66.

113. See generally HANS KELSEN, PURE THEORY OF LAW (Max Knight trans., Univ. of California, Berkeley ed., 1976).

114. POLITICAL THEOLOGY, *supra* note 4, at 13.

115. *Id.* at 26.

116. COSTAS DOUZINAS, RONNIE WARRINGTON & SHAUN McVEIGH, POSTMODERN JURISPRUDENCE 26 (Routledge 1993).

117. HANS BLUMENBERG, THE LEGITIMACY OF THE MODERN AGE 151 (Robert M. Wallace trans., MIT Press Paperback ed., 1985).

118. WEBSTER, *supra* note 109; see also OUT OF EDEN, *supra* note 12, at 33-35.

119. The Hobbesian sovereign is, it should be noted, the only one to preserve the features of the state of nature in terms of *ius contra omnes*. See SCHMITT, *supra* note 101.

120. OUT OF EDEN, *supra* note 12, at 53.

significant role in taking this shift farther.<sup>121</sup> Given the role that the normative thinking of the liberal tradition has played in this process, it is truly astounding that the drastic, manipulative change of the concept of law and of legal reasoning was first fully spotted in 1973 by Hayek, who vehemently claimed that “if the principles which at present guide [this] process are allowed to work themselves out to their logical consequences, law as we know it as the chief protection of the freedom of the individual is bound to disappear.”<sup>122</sup>

Notwithstanding his critique of Schmitt, and thus of the sovereign’s particularistic will in law and legal reasoning,<sup>123</sup> Hayek warned us about the perils of a dimension in which legal thinking is (instrumentally) governed “to such an extent by new conception of the functions of law”<sup>124</sup> that its evolution would (sadly) lead to the transformation of the system of abstract rules of just conduct into a system of mere rules of organization. To justify his claim, he maintained that

“[f]rom the conception that legislation is the sole source of law derive two ideas . . . the first of these is the belief that there must be a supreme legislator whose power cannot be limited, because this would require a still higher legislator, and so on in an infinite regress. The other is that anything laid down by the supreme legislator is law and only that which expresses his will is law.”<sup>125</sup>

To recap, the modern European nation-state, with the exception of Germany where universities maintained an effective role due to the absence of a unitary political model of state power,<sup>126</sup> has monopolized political action and restricted continental jurists to a reductive role completely opposed to the prestigious one they filled during the Middle Ages and Renaissance. As lawyers, we ought not to take the theoretical dimensions and practical consequences of this revolution for granted. Being an ideal object, law always needs a *corpus* to show and prove

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121. Kahn correctly notes that liberalism’s task may have its historical origins in the political efforts to free law from the king. KAHN, *POLITICAL THEOLOGY: FOUR NEW CHAPTERS ON THE CONCEPT OF SOVEREIGNTY*, *supra* note 12 at 5, 79, 132–37.

122. HAYEK, *LAW, LEGISLATION AND LIBERTY*, *supra* note 9, at 64.

123. *Id.* at 68. This critique seems, however, to lose its strength when Hayek himself argues, “[i]t is meaningless to speak of a right to a condition which nobody has the duty, or perhaps even the power, to bring about.” *Id.* at 262.

124. *Id.* at 64.

125. *Id.* at 87. The greatest promoters of this idea were Bodin, Bacon, Hobbes, and Austin.

126. The German exception has been carefully analyzed by MONATERI, *GEOPOLITICA DEL DIRITTO*, *supra* note 37. For an introduction, see *INTERPRETATION OF LAW IN THE AGE OF ENLIGHTENMENT* (Morigiwa Yasutomo, Michael Stolleis, & Jean-Louis Halpérin eds., Springer 2011). See also JAMES GORDLEY, *THE JURISTS* (Oxford Univ. Press 2013).

its historical existence.<sup>127</sup> Thus, in relation to the revolutionary process of insular signification of politics and law as expressed by the Schmittian link between localization (*Ortung*) and ordering (*Ordnung*), the new Leviathan, an exceptional creature to the Holy Roman Empire, needed a visible and tangible platform of ontological recognition and legitimation.<sup>128</sup> Such a platform was finally found in both the national constitutions and codes, whose aim was to protect the Civil law tradition in its various localizations through instrumentalist and constructivist approaches to law's sublimity.<sup>129</sup> Just as the noun "sculpture" needs a statue to present itself in a visible and tangible entity, the new artificial local *nomos* became nothing more than a "positive object" (or construction, or fact) that lacked any transcendent normative significance.

The foregoing may help our understanding of why it is possible to argue that the modern dimension of the Civil law tradition is composed of a particular mix of methods of education and instruction, as well as a narration of historical facts and memories. What legal scholarship underwent during the artificial creation of the continental nation-state was not just a change in its size (from being *Commune Europaeum*, as it became after the *Corpus Juris* was discovered, to being individualistic and encapsulated in the political *dominium* of the new local sovereign),<sup>130</sup> but also in its essence and purposes. The inevitable consequence of the revolutionary "aspatial turn" undergone by law and legal reasoning was that their tangible representations began to be instrumentally administered by politicians and bureaucrats to achieve contingent sociopolitical results, rather than to preserve their essence.<sup>131</sup>

In this way, the *juris periti* of continental Europe (with the exception of Germany) lost the leading role they had during the Middle Ages and Renaissance, and became mere officials of the sovereign state's *longa manus* (that is to say, of the parliament and judiciary).<sup>132</sup>

The artificial action of the modern continental European nation-state conceived by the constructivist, intentional approach to both sociopolitical and legal thought thus posed a genealogical-anthropological

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127. See HAYEK, LAW, LEGISLATION AND LIBERTY, *supra* note 9, at 35.

128. Luca Siliquini-Cinelli, *Imago Veritas Falsa: For a (Post-)Schmittian Decisionist Theory of Law, Legal Reasoning, and Judging*, 39 AUSTRALIAN JOURNAL OF LEGAL PHILOSOPHY 118 (2014).

129. See *id.*

130. See T. S. Eliot, *Tradition and the Individual Talent*, in THE SACRED WOOD 27 (Dover 1998) (1921).

131. See Schmitt, *Großraum Versus Universalism*, *supra* note 38, at 50-51.

132. *Id.* at 52.

problem for legal scholarship because the European nation-state forced legal scholarship to lose its guiding role (and prestige) as *militia legum*. Jurists went from being the custodians of law's uncanny presence, fostered by the activity of such academics as Irnerius, who studied and taught the Holy Roman Empire's "*corpus juris*",<sup>133</sup> to being neutral tools of a process of events that they neither led nor saw as a whole.<sup>134</sup> As a consequence, it became necessary to completely rethink the notion and essence of the *jurisprudencia* in terms that were unknown until that moment. The modern and positivistic dimension of law brought about by secularization meant that law and the law-making and law-decision processes became products of the affirmation of the rational *voluntas* of the "political" in Schmittian terms. All over Europe, law ceased to be the revelation of a *ratio juris*, or science of justice, discovered and taught by a few *juris periti*, and became synonymous with legislation as product of the deliberative will of the constituted political ruler (*auctoritas non veritas facit legem*).<sup>135</sup>

#### IV. CONCLUSION

Comparative law usually refers to the positivistic comparison of two or more legal systems, or the laws of those systems, on a particular issue. Its aim, it is usually maintained, is to find similarities or differences among various targeted legal systems. Yet, as this paper contends, comparative law is anything but about "taking pictures" and both its official and "occult" essences may also play an important role in the formation or destruction of a spatial (and, thus, geopolitical) ontology. This means that if we decide to apply Spencer Brown's logico-mathematical model to cultural constructions and distinctions,<sup>136</sup> comparative law may turn out to be a powerful tool for both protecting and neutralizing the anthropological and sociopolitical space between them.

Importantly, the practice of dissolution of boundaries finds a valuable ally in the misleading belief, in Hyland's words, that "all developed societies confront the same problems."<sup>137</sup> In this regard, to fully understand McEvoy's claim that one day, "it will be paradoxical to argue

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133. MICHAEL BERTRAM CROWE, *THE CHANGING PROFILE OF THE NATURAL LAW* 87 (Martinus Nijhoff ed., 1977).

134. See generally FREUND, *supra* note 66.

135. Hayek, *Law, Legislation and Liberty*, *supra* note 9, at 409.

136. Spencer Brown's *First Law of Construction* prescribes as follows: 'Draw a distinction. Call it the first distinction. Call the space in which it is drawn the space severed or cloven by the distinction'. See G. SPENCER BROWN, *LAWS OF FORM 3* (The Julian Press ed., 1972).

137. RICHARD HYLAND, *GIFTS: A STUDY IN COMPARATIVE LAW* 69 (Oxford University Press 2009).

against the harmonization and even the unification of the laws around the globe: legally, here will be everywhere,”<sup>138</sup> it should first be understood that the instrumentalist use of comparative law’s geopolitics is related to the fact that the notion of a spatial (and, thus, geopolitical) ontology is highly controversial. This is why, given the existential link between textual representation and legal domain, it is reasonable to argue that the double-faceted nature of law (that is, its practical discourse and theoretical ideal, as described by Peter Goodrich<sup>139</sup>) is constantly at stake when the comparative method is used to administer the geopolitical *signature* of law’s regulative instances.

Delving into this perspective, the foregoing has claimed that the manipulative use of comparative law’s geopolitics seems to be aimed at overcoming the political monopoly of legal reasoning as imposed by the artificial birth of the Leviathan. In fact, this distortive view of comparative law appears to be in line with the doctrine aimed at creating the “aspatial” and intangible sociopolitical, juridical and economic global order that transcends the current state’s political imposition and ontological dimensions. The deliberative law-making process brought about by the French Revolution and its constructivist rationalism are the obstacle to overcome, and the “cohabitation” of different national legal systems the problem to solve. If, as Arendt has persuasively claimed, the anthropological function of positive law is “to erect boundaries and establish channels of communication between men whose community is continually endangered by the new men born into it,”<sup>140</sup> then it is quite evident that what the liberal global-order project challenges is the delimiting *constitutive force* of the boundary, and thus of traditions. The fact that the global spatial turn that legal and sociopolitical theories are undergoing is aimed at overcoming the classic idea of space, as a representative surface, is testament to this.<sup>141</sup> The intangible “open,”<sup>142</sup> or He-

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138. SEBASTION McEVOY, DESCRIPTIVE AND PURPOSIVE CATEGORIES OF COMPARATIVE LAW, *in* METHODS OF COMPARATIVE LAW 144-65 (Pier Giuseppe Monateri 2012).

139. PETER GOODRICH, LANGUAGES OF LAW 108-09 (Weidenfeld & Nicolson eds., 1990); *see also* LAW AND IMAGE (Costas Douzinas & Lynda Nead eds., Univ. of Chi. Press 1999).

140. ARENDT, *supra* note 66, at 465.

141. For an introduction to this topic, *see* FRANZ VON BENDA-BECKMANN & KEEBET VON BENDA-BECKMANN ET. AL, SPATIALIZING LAW (Ashgate 2009); HARM DE BLIG, THE POWER OF PLACE (Oxford Univ. Press 2011); HARM DE BLIJ, WHY GEOGRAPHY MATTERS (Oxford Univ. Press, 2nd ed. 2012); Pietro Costa, *Uno ‘Spatial Turn’ Per La Storia Del Diritto? Una Rassegna Tematica* (A ‘Spatial Turn’ for Legal History? A Tentative Assessment), Max Planck Institute for European Legal History Research Paper Series No. 07, 2013.

142. GIORGIO AGAMBEN, THE OPEN: MAN AND ANIMAL (Kevin Attell trans., Stanford Univ. Press 2004) (2002).

gelo-Marxist post-historical dimension,<sup>143</sup> with its formal apolitical and legally neutral essence and instable non-substance, is what rests in front of us (with the understanding that *hen kai pan* – all is one<sup>144</sup>).

In an age in which, as Supiot noted, “[t]ime . . . must be a homogenous and quantifiable given [and] space must be continuous, cleared of any obstacle to the free circulation of goods, workers and capital,”<sup>145</sup> the “global governance-distortive comparative law” alliance has made it easier to “discover” the land of the figuratively unspoken and unwritten as the *smooth* and *rectilinear* territory that lies over what is created by the constructivist political interventions of the modern nation-state and where exceptions, or miracles, are no longer needed. The next phase (which is currently taking place) will be about forcing the global-order citizens to live in the totalizing *Oikoumene*, that is the “aspatial” and intangible *terra incognita* (to be intended as a new manifestation of Descartes’s *terra firma*<sup>146</sup>) in which spaces and identities are innocent and indifferent because they have been annihilated by the leveling and conformist demands of the global (open) society.<sup>147</sup> What Huntington describes as the “increased salience of cultural identity”<sup>148</sup> is anything but a spontaneous reaction to this trend of dissolution.

In addition to Mathias M. Siems’ claim that comparative law will inevitably be irrelevant in an age of totalitarian transnational convergence,<sup>149</sup> I perceive two other perils behind the universalization of liberal thought and its alliance with the manipulative use of comparative law’s geopolitics.

First, the world is mainly shaped and characterized by its sociology of law, historicity of politics, and logic of memory. The practical application of any theory that transcends the ontological and cultural dimensions of the world’s spatiality will turn out to be more painful than any legal or sociopolitical scholar could ever imagine.<sup>150</sup>

143. ALEXANDRE KOJÈVE, INTRODUCTION TO THE READING OF HEGEL (James H. Nichols trans., Allan Bloom ed., 1980) (1947).

144. Lessing’s statement should not be confused with that of Heraclitus. See Martin Heidegger, *Logos*, in EARLY GREEK THINKING 59–78 (David Farrell Krell & Frank A. Capuzzi eds Harper 1984) (1951).

145. SUPIOT, *supra* note 20, at 97.

146. The term “*terra firma*” was used by Hegel while describing Descartes’ achievement in individualizing the *cogito*. On the Descartes-Hegel dichotomy, see MARTIN HEIDEGGER, FOUR SEMINARS 27, 37 (Andrew J. Mitchell & François Raffoul trans., Indiana Univ. Press 2012) (1966).

147. See AGAMBEN, STATE OF EXCEPTION, *supra* note 51.

148. HUNTINGTON, *supra* note 43, at 129.

149. Mathias M. Siems, *Legal Originality*, 28 OXFORD J. OF LEGAL ST. 147 (2008); Mathias M. Siems, *The End of Comparative Law* 2 J. OF COMP. L. 133 (2007).

150. See generally PIERRE LEGRAND, FRAGMENTS ON LAW-AS-CULTURE (WEJ Tjeenk Will-

The second peril is related to the paradox of the methodology used by those comparative legal scholars who support the WTO's global revolution. In trying to reclaim the active role that the French Revolution and the Leviathan's artificial birth deprived them, legal scholars are using comparative law and legal reasoning in the same revolutionary way that was spread by constructivist rationalism to create, destroy, and recreate the sociopolitical and legal order for instrumentalist purposes. In other words, the promoters of the universalized liberalism are using the same constructivist methodology prompted by the Legendrian "logic of assembling," which inevitably implies an *a priori* deconstruction, and through which the political has imposed its will over a given territory. The only difference in this recursive Machiavellian trend lies in its current functionalist, apolitical, and legally neutral form.

To conclude, the lesson to be learned from the nullification of *Homo juridicus* is that, instead of acting in the way described in this paper, comparative lawyers should dedicate their efforts to discovering the "unofficial" or figuratively "impossible" which lies behind the objects of their inquiries. This should be done by combining traditional notions and unexplored conceits of law and legal reasoning through a multidisciplinary approach capable of understanding how cultures are not only "mapped" through the legal traditions that express them via definition of identities, but also how they are contaminated by distortive "processes of meaning production as social and political realities."<sup>151</sup>

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ink tras., Schoorddijk Institute 1999); LAWRENCE ROSEN, LAW AS CULTURE: AN INVITATION (Princeton Univ. Press 2006). *Contra*, Watson, *supra* notes 66 and 77; FAILURES OF THE LEGAL IMAGINATION (Scottish Academic Press 1988); COMPARATIVE LAW (Vandeplas 2003).

151. MONATERI, GEOPOLITICA DEL DIRITTO, *supra* note 37 at 22.