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HAYEK THE SCHMITTIAN

Contextualising Cristi's Account of Hayek's Decisionism in the Age of Global Wealth Inequality*

That capitalism, in all its variants, produces material inequality is beyond dispute. What is less clear, however, is not only whether Hayek's 'equality of opportunities' is immune to the inegalitarian trend, but also whether liberalism itself is the occult source of this outcome. This paper delves into this by offering a post-national contextualisation and partial critique of Renato Cristi's 1984 and 1998 scholarship on Hayek's decisionism. The aim is to investigate the relationship between liberal thought and wealth inequality in light of the global-order project and crisis in democratic decision-making procedures. This will uncover a clear zone of interaction between Hayek's notion of legal liberty and Schmitt's sovereignty that was not spotted by Cristi and that will shed new light on the dehumanising and inegalitarian essence of the universalisation of liberalism and its notion of 'civilised economy'.

Under conditions of superficial political equality,
another sphere in which substantial inequalities prevail will dominate politics.

–Carl Schmitt[1]

The Rule of Law produces economic inequality.

–Friedrich Hayek[2]

Draw a distinction. Call it the first distinction.
Call the space in which it is drawn the space severed or cloven by the distinction.

–George Spencer-Brown[3]

Introduction

The Author would like to thank the two anonymous reviewers for constructive comments on an earlier draft and Edward Mussawir and Tim Peters for their assistance throughout the review and publication process. The usual disclaimer applies.

[1] Schmitt (1988), p. 13.
[2] Hayek (2007), p. 117.
[3] Spencer-Brown (1972), p. 3.

In his work *Moses the Egyptian*, first published in 1997, Jan Assmann discussed the 'Mosaic distinction' between the mythical character of Moses (representing, for Assmann, monotheism) and the historical one of Egypt (polytheism). Assmann maintained that the difference between the two was the canon of the distortive process through which the guardians of the West have instrumentally created, destroyed, and recreated for millennia its (non-)identity.[4] In particular, delving into the notion of 'mnemohistory' as 'deconstructive memory', Assmann claimed that the interaction between Israel's purity and truth and Egypt's darkness and terror is represented by a 'vertical line of memory' whose starting point is Pharaoh Amenophis IV's monastic revolution.

Assmann opened his book with Spencer-Brown's first law of construction to clarify from the very beginning the specific comparative method that he adopted in his inquiry. As the title of this paper suggests, the same law and *modus investigandi* will be adopted here, with the aim of identifying a possible point of intersection between Hayek's notion of legal liberty and Schmitt's decisionism. This task was pursued more than thirty years ago by the philosopher Renato Cristi in a short but highly valuable study that has not received the attention it deserves.[5] While comparing Hayek's notion of the rule of law with the voluntarist component of Schmitt's thought, Cristi claimed that certain features that characterise the latter may also be found in the former. More precisely, Cristi's attention was caught by how both Schmitt and Hayek tried to achieve what might be defined as the 'depolicisation' of societal affairs. Unfortunately, while analysing this unifying sentiment over the principle of *political neutrality* and the reasons according to which '[t]he state should abstain from intervening in the affairs proper to civil society',[6] Cristi did not investigate properly other important elements that Schmitt's and Hayek's thought have in common. These include (*1*) the double-faced critique of legal positivism's political sin, aimed at demonstrating not only that *the* law is the result of both the norm

[4] Assmann (1998). This argument was further analysed and justified in other major works of his, such as *The Price of Monotheism* and *Religio Duplex*.
[5] Cristi (1984). There is, however, a broader literature on the problem of 'authoritarian liberalism'. For an introduction, see Scheuerman (2015), (1997).
[6] Cristi (1984), p. 532. Notably, Weber, as a liberal, was of the same view and made the distinction between 'economic power' and 'political power' the pillar of his critique of Marxist thought.

and the decision,[7] but also that the act of government cannot be encapsulated within a constructivist sociopolitical *dictum* once and for all;[8] and (*2*) the unavoidability of liberal inequality.

I have discussed the first point of interaction on other occasions. The last point, which Cristi did not consider in his 1984 paper and to which he only dedicated half a page in his monograph on Schmitt's critique of liberalism,[9] constitutes instead the focus of this paper. In particular, the project that I propose here is to reflect on why Cristi's comparison may be used to address the 'animality of man in post-history'.[10] I believe this can be done through a neorealist[11] contextualisation in light of free-market capitalism's, and thus, liberalism's, inequalities.

The necessity of conducting such an investigation is, I believe, self-evident and mainly related to the inegalitarian and dehumanising impact that the liberal global-order project is currently having on humankind. Elsewhere[12] I have argued that we are increasingly moving towards the global (non-)law era – that is, the unlimited and unbounded (non-)dimension of the global *Oikoumene* brought about by the universalisation of liberal thought. On those occasions I explained that in this aspatial condition we do not *act* but *behave* according to liberal mechanical schemes of interaction because what constitutes human uniqueness – our will-power – makes no appearance. In this sense, universalised liberalism and its notion of 'civilised economy' – and its accompanying assertion that governments should build or reform institutions to regulate economic activities according to rational global standards determined by outsiders[13] – produce instead a sort of a 'global Eden'. In this 'intangible open', we do not have sense of our living experience because we neither come to birth nor die as 'someone'. This is so despite liberalism's official aim of achieving perfect order and political freedom from the chaos that affect the *homo homini lupus* condition of the state of nature. The movement towards this sort of Kojèvean post-historical (that is, animal) condition is taking place through the formal 'depoliticisation' and 'dejuridification' of the world; that is, through the imposition of the

[7] Siliquini-Cinelli (2014).
[8] I discussed Hayek's view on this from the standpoint of legal ontology in Siliquini-Cinelli (2015a).
[9] Cristi (1998), p. 153. See also Cristi (1993), p. 287.
[10] Agamben (2004), p. 12.
[11] D'Agostini (2014).
[12] Siliquini-Cinelli (2015b-c).
[13] On what is usually known as 'good economic governance', in addition to the International Monetary Fund's codes of good practices, see Larsen (2002).

administrative and economic-oriented *ufficium* of global governance as opposed to that of local government. As a result, the Schmittian exception is displaced from view, and the jurist's anthro-sociopolitical function of interpreting normativistically and *norm*-alising our actions is no longer needed.

In the following pages Cristi's account will be contextualised within this critical perspective to demonstrate that the increase in inequality brought about by the (allegedly civilising) globalisation of trade finds a valuable ally in the dehumanising strategy pursued by liberalism and its universalisation.

That there is a tension between the formalism of liberalism and the concept and practice of the political is not new. Thus, some commentators would deem this contribution to be unnecessary. Yet if we are to understand fully what is happening to the Western notion of bio-sociopolitical and economic civilisation, we need to overcome the limits of (sometime opportunistic) accounts on liberalism's paradoxes and perils through a broad and multi-disciplinary perspective of inquiry which will transcend the boundaries of a mere comparison between liberal and decisionist thought. The same applies to the challenges brought about by the need for a post-human and yet political ethics,[14] which cannot be met without a juridical roadmap capable of promoting coherence and certainty.[15]

This is why this paper addresses the humanitarian façade that characterises the Westernisation of forms of sociality by discussing the thought of a philosopher with a strong interest in legal theory. The aim is to demonstrate that Schmitt's fight against liberalism's plans for formal homogeneity, and Hayek's admission that the rule of law (of which liberalism is a structural key component[16]) produces economic inequalities meet at a specific point—namely, our 'animality'—in so providing the interpreter with a clear roadmap to be pursued when uncovering why liberal thought does not lead to a 'juster world'. This claim will be expounded and supported bearing in mind Paul W Kahn's argument against the misleading nature of liberalism,[17] Thomas Piketty's *j'accuse* against global inequality,[18]

[14] Bunch (2014).
[15] Siliquini-Cinelli (2016).
[16] See Hayek (2007), p. 113. See also Hayek (2006), and Tamanaha (2004), pp. 32–42.
[17] Kahn (2008), (2010).
[18] Piketty (2014). Although praised by many, Piketty's method has been criticised by others. Most notably, see Bonnet *et al.* (2014).

and, notwithstanding their anti-Schmittian essence, Giorgio Agamben's reflections on the limits and paradoxes of Western politics since the fall of the Greek *polis*.[19]

This paper is structured as follows: I will first investigate the main features of Cristi's analysis with the aim of clarifying his claims for the post-national and globalised audience. Through the adoption of a critical *modus procedendi* which will reveal the limits of Cristi's account, I will then argue for the possibility of an additional point of interaction between Hayek's liberalism and Schmitt's decisionism, and for its relevance in addressing the totalising essence of the global-order project. Concluding remarks will follow.

Back to 1984 and 1998: Cristi's Innovative Comparison

Some commentators would probably deem the association of Schmitt's and Hayek's doctrines inappropriate and/or mystifying. At first glance, they would seem right, seeing that Hayek's main concern was to avoid any form of totalitarianism or collectivism, such as those prompted by communism and socialism, which in his view 'impress upon society a deliberatively chosen pattern of distribution'.[20] The whole elaboration of the theory of 'abstract rules of just conduct' is aimed at achieving this sociopolitical result. Arguing against the instrumentalisation of 'distributive' social justice,[21] which is rooted in the shift from 'value' to 'merit' in the logic of 'reward', Hayek developed the notion of 'purpose-independent' rules of just conduct. He defined those rules as those which

[19] As will emerge in due course, the politico-juridical roadmap that this paper argues for is diametrically opposed to the Messianic redemption put forward by Agamben. In this sense, to those who would argue against the combination of Schmitt's and Agamben's thought, I would respond by highlighting the role that for Agamben the identitarian bond assumes in the formation and survivorship of the state. See Agamben (2013), pp.85–7. On how Schmitt's politico-theological paradigm influenced Agamben see instead Liska (2013), p. 96. Furthermore, building on Kafka, Benjamin, Scholem and the Kabbalist tradition, Agamben contends that 'the Messiah will only come when he is no longer necessary', that is when the *katargēsis* will become operative. For this to happen, an absolute—that is, exceptional and sovereign—*act* of simultaneous 'potentiality' and 'actuality' is required. See Agamben (1998) pp. 44–48 and 57–58, (1999b), pp. 160–74, (2005), pp. 95–112, and (2013) pp. 34–40, 65, 83, 85, and 87, where Agamben writes that 'whatever singularity *wants* to appropriate belonging itself, its own being-in-language' (emphasis added). This may also shed new light on why, while describing the Heideggerian '*Ereignis*', Agamben avoids the term *behavior* and writes that the 'only foundation [of man] is his own *action*'. See Agamben (1999a), p. 135 (emphasis added) and (1998), p. 61. Finally, compare Agamben's analysis of the Augustinian 'origin of the Heideggerian use of the term facticity' with Arendt's description of St Augustine as the 'first philosopher of the Will'. See Agamben (1999c), p. 189, Arendt (1978), p. 88–110. See also Siliquini-Cinelli (2016), (2015c) and below n 109 and 117.

[20] Hayek (2004), p. 77. The whole *The Road to Serfdom* is dedicated to this issue. See Hayek (2007). It should be noted that Hayek's research was particularly influenced by Weber, who criticised the socialisation of the means of production, and by the fact that in the 1930s a great majority of American intellectuals were attracted to (egalitarian) socialism.

[21] Hayek (2007), p. 134, (2004), p. 82–89, and p. 829, and (2013), p. 197–266.

'delimit protected domains not by directly assigning particular things to particular persons, but by making it possible to derive from ascertainable facts to whom particular things belong'.[22] Hayek believed that, like society itself, these abstract rules arise, evolve, and eventually die through natural and spontaneous practice which must be distinguished from the mechanical and deliberative intervention and progression of governmental power. The spontaneous essence of this biological process[23] is proved, according to Hayek, by the fact that individuals 'had learned to observe (and enforce) rules of just conduct long before such rules could be expressed in words'.[24] This is why Hayek argues vehemently against the fallacy prompted by 'constructivist rationalism' – that is, the assertion that human institutions may be traced back to 'an original designer or some other deliberate *act of will*',[25] and of which the French sociopolitical and legal tradition represents the maximum expression.[26]

It is therefore of pivotal importance to note that it was Hayek himself who recognised that his liberal notion of the spontaneous order(s) of society was at odds with Schmitt's decisionism. Indeed, in Hayek's words, Schmitt's works are the best 'illustration . . . of the manner in which philosophical conceptions about the nature of the social order affect the development of law'.[27] Yet, as Cristi carefully noted,[28] Hayek recognised that Schmitt understood the misleading essence of the post-war form of libero-representative government developed on the European continent 'better than most people'.[29]

Although Hayek's praise of Schmitt's thought came in two short footnotes in 1960 and in the late 1970s,[30] the value of Cristi's comparative analysis ought not to be taken for granted. The origins of comparative analysis trace back to Heraclitus. As I shall argue, Cristi's account is another example of

[22] Hayek (2013), p. 203.
[23] Which ought to be compared to that of Ehrlich's 'living law', Esser's '*jus non scriptum*', and Agamben's 'form-of-life'.
[24] Hayek (2013), p. 71, and p. 75. See also Hayek (2013), p. 200.
[25] See n 24, p. 375. Emphasis added.
[26] Auhtor (2015a).
[27] Hayek (2013), p. 68. See also Hayek (2007), pp. 117, and 189–90.
[28] Cristi's innovative approach is acknowledged by McCormick in his monograph on Schmitt's critique of the liberal view of politics as technologisation. See McCormick (1999), pp. 14 and 303.
[29] Hayek (2013), p. 520.
[30] Hayek (2004), p. 423.

how the value of comparison as a study methodology still lies in the fact that it helps us to discover the 'unofficial', or figuratively 'impossible'.

Cristi, who has dedicated to the 'Schmitt-Hayek' encounter a chapter of his aforementioned monograph,[31] is right in claiming that Schmittian legal theory 'rests on the distinction between . . . normativism and decisionism'.[32] What intrigued Schmitt was indeed the secularisation of European life as a whole and its socio-geo-politico-theological emergence and dissolution. Schmitt has voluntarily chosen to deal with the 'detheologisation of public life' which took place through the emergence of Hobbesian decisionism as encapsulated in the artificial, exceptional birth of the modern nation-state. Along this line of inquiry, notwithstanding what may be thought to the contrary, the true sovereign cannot (per-)form his/her volition without the reference to a normative basis.[33] This is so because, in Schmitt's words, even though the 'exception frees itself from all normative ties and becomes in the true sense absolute', the exception itself 'is different from anarchy and chaos'.[34] The question is, then, what kind of legal order Schmitt had in mind when affirming his substantial conception of law as a way to make the state understand the necessity of using all *exceptional* self-preserving powers to avoid its own death.[35] Cristi answers this question correctly and notes that, in *Constitutional Theory*, Schmitt developed the notion of a 'liberal' legal order which, by being (also) based on 'private property and personal freedom',[36] may be seen as the 'just' (or 'ethical' in the Hegelian sense of the term) variant of the *Rechtsstaat,* rather than a variant of Dicey's doctrine of the rule of law.[37] Cristi also notes that in *The Constitution of Liberty*, Hayek adopted a similar view 'and acknowledged his debt to Schmitt'.[38]

Once we recognise the necessary relationship between norm and decision,[39] and thus understand the role of this *connubium* in rendering the law capable of keeping its sociopolitical regulative promises, something becomes evident. It is that in promoting the utopian belief in the always-

[31] Cristi (1998), pp. 146–68.
[32] Cristi (1984), p. 524.
[33] Siliquini-Cinelli (2015c).
[34] Schmitt (1985), p. 12. See also Kahn (2012), pp. 33–35, and 49.
[35] See n 34. See also McCormick (1997), pp. 249–89; Kahn (2012), p. 60.
[36] Schmitt (2008), p. 173. See also Cristi (1998), pp. 150–58.
[37] See also Seitzer's suggestion that with *Constitutional Theory* Schmitt 'locates his decisionism at the very core of the liberal constitutional tradition'. See Seitzer (1998), p. 281.
[38] Cristi (1998), p. 152. See also Hayek (2004), p. 425.
[39] Siliquini-Cinelli (2014).

inclusive capacity of perpetual negotiations, nineteenth-century liberalism has, as Cristi contends, specifically targeted the 'awareness of the voluntarist foundations that ground the rule of law'.[40] Importantly, Cristi further maintains that the instrumentalisation of parliamentary debate led to several consequences, such as the 'democratic erosion of the liberal distinction between the state and civil society' and the 'acceptance of the pre-eminence of democratic legitimation over monarchical principle'.[41] The predominant role assumed by the vote-buying strategies of liberal political parties (a sort of 'marketing' of political candidates in Schumpeterian terms[42]) over parliamentarism's founding principles, namely those of 'discussion' and 'publicity', represented the living proof of how 'the full expansion of market relationships . . . affected parliamentary functions'.[43] Both Schmitt and Hayek made similar claims in this respect. More precisely, according to Schmitt, during the Weimar Republic '[a]rgument in the real sense that [was] characterised for genuine discussion cease[d and i]n its place there appear[ed] a conscious reckoning of interests and chances for power in the parties' negotiation'. In such a situation, political parties made decisions 'behind closed doors' because 'what representatives of the big capitalist interest groups agree[d] to in the smallest committees [was] more important for the fate of millions of people, perhaps, than any political decision'.[44] Similarly, to Hayek, '[p]arliaments come to be regarded as ineffective 'talking shops', unable or incompetent to carry out the tasks for which they have been chosen'.[45] This is why the implosion of the Weimar Republic, which was forecast by Schmitt in 1923 and further discussed in 1932 cannot be understood fully without addressing the irruption of the value-neutral liberal technique into the value-oriented presentification of democracy, and thus, of distortive parliamentarism into the realm(s) of civil society.

Yet Schmitt did not limit himself merely to describing this disruptive process, but, as will be discussed below, also offered specific instruments to solve its deficiencies, such as the rehabilitation

[40] Cristi (1984), p. 525.
[41] See n 40, pp 526–27. See also Cristi (1998), p. 150.
[42] Schumpeter (2008), pp. 232–302.
[43] Cristi (1984), p. 528.
[44] Schmitt (1988), pp. 6 and 50. The second half of this critique of modern politics is to be found in *Roman Catholicism and Political Form*, published in 1923.
[45] Hayek (2007), p. 104. See also Hayek (2013), pp. 352–81. Hannah Arendt (1994) was of a similar opinion, as emerges from her report on the empty political character of the Bonn Republic.

of the figure of the *Reichspräsident* as a way to promote the direct democratic values of the Constitution and 'hook' the notion and use of public power to that of homogeneity (*Gleichartigkeit*) as the core of the democratic conception of equality. Hayek tried to pose an end to the state's political control over civil society and market relationships by pursuing the different path of the abstract rules of just conduct. In particular, Hayek paid a considerable amount of attention to spontaneous devolutionary processes prompted by the growing technological complexity of modern economies, which dictated a higher degree of 'local' economic decision. Indeed, Hayek claimed that the vast majority of information used in an economy is local in nature, dealing with local conditions and needs that are usually known by local actors. In this way, he first provided his explanation of the unworkability of socialist central planning, and then explained how it worked on the micro-levels of economic decision-making strategies.

In this sense, Cristi suggests, I think successfully, that the key to understanding Hayek's *soft* decisionism is first to investigate why, in supporting his views on the spontaneity of societal order(s), he 'traces his steps back to Hume',[46] and then to compare this choice with that of Schmitt to look at 'Hegel's conservative-liberal political philosophy'. In so arguing, Cristi ultimately claims that Hayek and Schmitt meet in their accounts for another two-sided reason: first, because 'after 1933 . . . Schmitt began to expand on the limitations of decisionism . . . [while] express[ing] the intention to move away from an exclusively decisionist phase',[47] and secondly, because 'Hayek's political theory envisages an individualist view of human liberty and a contractarian view of society [in which] decisionist elements are potentially incorporated'.[48]

The Limit of Cristi's Analysis in the Liberal Global Age

What matters for present purposes is that Cristi's first investigation of Hayek and Schmitt is dated 1984. At that time, the 'bipolar' age was still a reality, Schmitt and Hayek were still alive, and capital

[46] Cristi (1984), p. 534.
[47] Cristi (1984), pp. 529 and 531. Victoria Kahn shares the same view and argues for the possibility of a 'Schmittian apology'. See Kahn (2003).
[48] Cristi (1984), pp. 534 and 533 respectively.

was trying to escape the so-called 'stagflation' of the US economy by removing state constraints on growth and revising the structure of the tax system to favour private investments.[49]

The starting point for theorising about law is experience. Hence, any attempt to contextualise Cristi's analysis should commence by internalising fully the fact that we no longer live in the 'bipolar' dimension, but in that of the post-political[50] aspatial, boundless, and intangible globalised 'financialisation' that transcends both the spatial (*Ortung*) and juridical (*Ordnung*) component of any socio- and geopolitical order. This is the main feature of the global market (non-)dimension, which is characterised by the 'increasing reliance of capital on lending and investment in the financial sector to maintain profitability'.[51] For present purposes, it is of even more interest that this is the age of global (non-)law as a new form of *liquid* totalitarianism in which not only that which makes us human is displaced from view, but the vote-buying system described in the previous section has also reached, through the fusion of virtual capital and liberal rationality, a total penetration into the Schmittian concept of the political. Hence, Wendy Brown is right when arguing that the Western 'de-democratic' system of sterile administration is today structurally characterised by the merging of 'corporate and state power'. As a consequence, instead of representing the territorial regulative instances of their own people, 'contemporary states substitute for pursuits of the prestige of power a complex double role as actors within, facilitators of, and stabilizers for economic globalization'.[52] The anthro-bio-sociopolitical perils that this process poses to mankind are very clear to Agamben, who not coincidentally writes that 'popular sovereignty [is] by now an expression drained of all meaning'.[53] The fact that, according to Agamben, this is a moment at which '[t]hought finds itself, for the first time, facing its own task without any illusion and any possible alibi' should thus be investigated within this perspective.[54]

There is thus an urgent need to defeat the nihilism that characterises our *conditio inhumana* and the neutralising and inegalitarian impact of the liberal Westernisation of living standards. As lawyers, we

[49] Harvey (2011, Bello (2013).
[50] Žižek (1999).
[51] Bello (2013), p. 8.
[52] Brown (2012), p. 50.
[53] Agamben (2012), p. 4. See also Piketty (2014), pp. 459–60.
[54] Agamben (2000), p. 109. Siliquini-Cinelli (2015c).

may contribute by uncovering the disruptive force that lies beneath its humanitarian façade. Obviously, the alleged beauty of human rights policy would deserve an extended treatment, certainly more than can be provided here.[55] It will suffice to highlight that, as Piketty pointed out in his unconventional historico-political study on 'the conditions under which . . . concentrated wealth can emerge, persist, vanish, and perhaps reappear',[56] while promoting the dissolution of what makes us human, the 'new global economy has brought with it both immense hopes . . . and equally immense inequalities'.[57] This trend cannot be faced and defeated without an unconventional analysis addressing the reason(s) why, since the early 1970s, there has been a worldwide increase of wealth inequality. The focus of such analysis should be the nullification of the self in terms of formation and protection of identities as they are currently taking place within the encompassing and inegalitarian force of liberal mass democracy and trade globalisation. The suggested roadmap would lead us to the disruptive intrusion of liberal thought into parliamentarism and democratic decision-making procedures. This is precisely where, in partial contrast to Cristi, I believe Schmitt and Hayek ultimately meet.

Let me explain this suggestion further. In a recent book conceived to demonstrate that regulations and institutions have to be seen as real 'market forces'.[58] Joseph Stiglitz claims that much of the current inegalitarian trend in Western societies is primarily related to rent-seeking and is structurally due to a 'breakdown in social cohesion'.[59] To support his argument, Stiglitz further maintains that, far from being 'the result of the forces of nature, of abstract market forces', inequality is 'the result of government policies'.[60] The fact that Schmitt and Hayek made exactly the same point decades ago is testament to the fact that Stiglitz's analysis lacks originality. However, what is relevant here is that, probably unconsciously, Stiglitz has turned Schmitt's perspective upside-down. This emerges when Stiglitz suggests that 'societies with more economic inequality tend to have more political inequality'

[55] For an introduction, see Supiot (2007). Recently, see Kapur (2014).
[56] Piketty (2014), p. 262.
[57] See n 56, p. 471.
[58] Stiglitz (2013), p. 82.
[59] See n 58, p. 66.
[60] See n 58, p. 102.

because '[i]f economic power in a country becomes too unevenly distributed, political consequences will follow'.[61]

In fact, according to Schmitt, it is political inequalities, generated by the liberal belief in formal equality of all humankind, that produce all other forms of 'substantial inequalities', not vice versa. As he argues in *The Crisis of Parliamentary Democracy* when explaining the political component of the democratic conception of equality, all attempts 'to establish general human equality in the political sphere without concern for national or some other sort of homogeneity . . . cannot escape the consequence that political equality will be devalued'.[62] To claim an abstract general equality of all humans renders the sphere of the political, as expressed by the democratic 'friend/enemy' dichotomy, 'insignificant'.[63] As a consequence, all existential inequalities 'shift into another sphere, perhaps separated from the political and concentrated in the economic'.[64] This is unavoidable given that, as quoted above, '[u]nder conditions of superficial political equality, another sphere in which substantial inequalities prevail . . . will dominate politics'.[65] In this sense, if we agree with Schmitt that 'all democratic arguments rest logically on a series of identities'.[66] it appears clear that, acting as a 'social sedative', liberalism falls within the category of those techniques that have caused a misleading shift from *absolute* to *procedural* truths[67] that annihilate the political link between the law and the people's will.[68] As Kahn noted,[69] this alteration was achieved by posing the Rawlsian veil of Maya on both the sovereign's and people's eyes so that, in Schmitt's words, 'the self-identity of the concretely present people as a political unity'[70] could be successfully nullified.

So the question arises: How was this possible in concrete terms? The answer, I contend, is provided by the liberal notion of the rule of law which, as Hayek himself admitted in 1944 and again in 1960 when he clarified that '[e]quality before the law and material equality . . . are in conflict with

[61] See n 58, pp. xxxiii and 238.
[62] Schmitt (1988), p. 12, and pp. 9–13. See also Schmitt (2007), p. 54.
[63] Schmitt (2007), pp. 25–37 and 49.
[64] Schmitt (1988), p. 12
[65] See n 64, p. 13.
[66] See n 64, p. 26.
[67] See Agamben (1995), p. 55.
[68] Schmitt (1988), p. 13. See also Schmitt (2008), pp. 255 and 257.
[69] Kahn (2008), pp. 33, 38, and 174.
[70] Schmitt (2008), p. 55.

each other',[71] inevitably produces economic inequalities.[72] By targeting the sovereign (and, thus, political and identitarian) relationship between the law and those it tries to protect by imposing and/or stimulating respect for it, liberalism has created a *liquid* (non-)dimension of social interaction in which not only our uniqueness disappears, but all substantial inegalitarian processes must take place. This is so because, as Hayek maintained, in such an unstable scenario 'it is impossible to foretell who will be the lucky ones'.[73] This is what *equality before the law*, as formal equality of opportunities rather than results – the only form of equality in which Hayek believed and promoted – actually means.

The problem, however, is that such a notion of 'sterile' equality can be (and, in fact, has been) instrumentally manipulated over the last forty years by whoever controls access to credit. Both Piketty's descriptive analysis[74] and the recent data on the increase of the inegalitarian trend in the US since the early 1970s[75] are a powerful testament to this. For instance, internet companies' free access to financialisation and global credit schemes,[76] and the resulting market capitalisation, generate, in a recursive perpetual circle, subsequent market financialisation and capitalisation that both virtually and practically provide selective and unlimited control of resources.[77] This reveals that the drafter of the French response to the World Trade Organisation's and World Bank's *Doing Business* reports of 2004 and 2005[78] was right in claiming that the Law & Finance doctrine, which refers to the Economic

[71] Hayek (2004), p. 77.
[72] Although McDonald claims that the purpose of the anarchical revolution against the state 'is liberty, not equality' because of 'anarchists' belief that one must not seize the structures of power but abolish them', it can be safely said that anarchical theorists use what Bańkowski called the law's 'masked' inegalitarian attitude to reject any forms of legal authority as expressed by the social contract theory. See MacDonald (2012), p. 354, Bańkowski (1983), p. 271.
[73] Hayek (2007), p. 134.
[74] Piketty (2014), p. 438. The scope of this contribution does not allow to address public spending on medical care, welfare, and schooling. See however the UNESCO MGIEP's 2014 report on 'inclusive wealth', at http://mgiep.unesco.org/wp-content/uploads/2014/12/IWR2014-WEB.pdf, and Oxfam's forecast that by 2016 the wealthiest 1% will soon hold more net wealth than the remaining 99% out together, at http://www.oxfam.org/en/pressroom/pressreleases/2015-01-19/richest-1-will-own-more-all-rest-20166.
[75] Saez and Zucman (2014a-b). See also Kopczuk and Saez (2004) and Wolff (2010).
[76] These are known in economics as 'zero interest rates and quantitative easing', which not coincidentally, were described as a non-stop generator of inequality and high concentration of wealth by Rupert Murdoch in his speech at the G20 finance ministers' meeting held in October 2014 in Washington. For an introduction on the strategy pursued by internet monopolies, see *The Economist* (2014b).
[77] Which is one of the reasons why alternative 'unbanked' systems of financialisation are growing at a fast rate in poor countries. See *The Economist* (2014c). See also note 44, 91, 98, and 105.
[78] Siliquini-Cinelli (2015).

Analysis of Law, is nothing but an 'inverted Marxism'.[79] If we unite this information with Stiglitz's recognition that 'individuals consciously discriminate',[80] it becomes clear that, as Schmitt pointed out from 1923 on, Hayek's innocent equality of opportunities makes no appearance in the liberal global order because it is actually reverted into its opposite. This is why Žižek speaks of post-political 'racism' when he describes 'the reduction of the state to a mere police-agent servicing the (consensually established) needs of market forces'.[81] Moreover, this is why de Sousa Santos and Rodriguez-Garavito's argument for a 'counter-hegemonic globalisation' is aimed at reverting the current excluding and dehumanising condition in which 'by default or by design, those doing the imagining are the elites or members of the middle-class with the economic and cultural capital to count as ''stakeholders''.[82]

The central problem, then, is not that of 'production', but rather that of apolitical and legally neutral 'domination'. Sen makes the fascinating claim that the '[t]he [liberal] demand for seeing people as equals . . . relates . . . to the normative demand for impartiality, and the related claims of objectivity'.[83] We should admit, however, that while proposing the achievement of substantial freedom and general human equality in a perfect rule-of-law order, the universalisation of liberalism's neutralising essence has instead led to a *terra incognita* of chaos in which, instead of the alleged fascine of the self-regulating properties of the markets,[84] (non-)humans face the (fictionally institutionalised) *homo homini lupus* condition of the state of nature.[85]

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[79] Association Henry Capitant (2006). See also Siliquini-Cinelli (2015b).
[80] Stiglitz (2013), p. 86.
[81] Žižek (1999), p. 30. See also Arendt (1973), pp. 179–80.
[82] De Sousa Santos and Rodríguez-Garavito (2005), p. 9. This view falls within the old 'regional-global' trade deals dichotomy. Recently, see *The Economist* (2015c). See also the recent call for 'human development' made by Chile's president, Michelle Bachelet: http://www.economist.com/news/21631845-broader-approach-development-will-be-needed-2015-and-beyond-suggests-michelle. It is worth mentioning that the libero-behavioural approach to development pursued by the World Bank's World Development Report 2015 goes in the exact opposite direction. For a recent account, see *The Economist* (2015a-b).
[83] Sen (2009), p. 294.
[84] Polanyi (2002).
[85] Given that there are competing variants of liberalism, it is not surprising that, over the last few years, liberals themselves have tried to offer a remedy to their recursive and paradoxical thinking. The fact that Rawls himself before his death opted for a 'political' form of liberalism is a clear example. See also Mazzucato (2013), , Sen (1997), (1999), and (2009), pp. 253–90. Sen's theory has been applied, not without dispute and inconsistencies, to legal discourse as well. See Deakin and Supiot (2009) and Campell (2013). Finally, see the discussion between Sen and other scholars in *Jurisprudence*, (2014) (2).

Post-war neoliberals had to go through several steps to create and promote this *fictio* whilst endorsing the global-order project. One of the steps was the displacement of the Schmittian notion of democratic identity in terms of cultural signification. Once we acknowledge this, it emerges that Cristi was wrong to suggest that Schmitt's target was not liberalism but democracy because Schmitt felt that 'the advance of democracy within the Weimar republic fatally compromised the authority of [the] liberal state'.[86] What Schmitt thought is exactly the contrary – namely that, as Ellen Kennedy noted in her *Introduction* to *The Crisis of Parliamentary Democracy* and developed further in her *Constitutional Failure*, the liberal logic affected the work of parliament by displacing the democratic principle which informed, through Article 1, the political legitimation of the Weimar Constitution.[87] In doing so, the liberals' utopian belief in the inclusive capacity of endless conversations and non-performative negotiations posed an existential threat to what in *Constitutional Theory* Schmitt defined as 'the two principles of political form',[88] namely identity and representation. This thus leads democracy to 'destroy itself in the problem of the formation of a will'.[89]

What has been achieved is the destruction of the nation-state's greatest achievement as described by Agamben and Cavalletti, namely the hidden secularisation of naked or bare life, which was obtained through the utilisation of biopolitics as anthro-ontological legitimising *signature* of the Leviathan's authoritarian sociopolitical and legal claims.[90] The liberal intrusion of soft-networked schemes of post-national economico-managerial governance[91] into our sociopolitical life has indeed determined the breaking-up of the modern unification between naked life (that is, real 'people', or *zoē*) and political or public existence (that is, ideal 'People', or *bios*[92]). This fusion constitutes the canon of the scientific concept of population as 'force-people' coined by Botero.[93] and further investigated by Foucault. Building on Benjamin, Agamben thus argues that in an age such as ours, in

[86] Cristi (1984), p. 526. Similarly, see Cristi (1993), (1997), and (1998), pp. 80–81. Fernando Atria (2013), p. 107, makes the same interpretive mistake.
[87] See also Mouffe (1998).
[88] Schmitt (2008), p. 239.
[89] Schmitt (1988), p. 28.
[90] Agamben (1998), pp. 6, and 119–35. See also Agamben (2000), pp. 29–35, Cavalletti (2005).
[91] Siliquini-Cinelli (2015c). Hannah Arendt (1973), pp. 139, 126, and 138 had a more critical approach to Hobbes and claimed that it was his specific intention to pave the way for this incursion. C.B. MacPherson shared a similar view. See MacPherson (1962), (1987). See also n 44, 77, 91, 98, and 105.
[92] Bensaïd (2012), pp. 19 and 31. See also Straume and Humphrey (2011).
[93] Stangeland (1904), p. 105–7.

which the exception has become the rule because 'politics assume[s] . . . the form of an *oikonomia*, that is, of a governance of empty speech over bare life',[94] instead of claiming that 'there is nothing outside the law' we should rather understand that 'there is nothing inside the law'.[95] Yet the scission between *zoē* and *bios*, and thus the relativisation of the ethical purpose of the 'polity', has found a valuable ally in the 'contractions and aporias that [the concept of people] creates every time that it is invoked and brought into play on the political stage'.[96] The fact that such a delicate and yet powerful concept is 'the pure source of identity' means nothing other than that it has 'to redefine and purify itself continuously according to exclusion, language, blood, and territory'.[97]

In partial contrast with Cristi, I believe that Schmitt's attempt to re-establish, from the publication of *Die Diktatur* in 1921, the institutional link between identity of the 'People' and government of the 'people' must therefore be analysed within this perspective. Schmitt's notion of representative democracy based upon the political component of the democratic conception of equality, and in particular, of the plebiscitary *Reichspräsident*, is indeed the canon of his battle against what McCormick has defined as 'politics as technology'. It is well known that Schmitt's intent was to move towards the full conceptualisation of a unitarian politico-theological doctrine. It is also accepted that Schmitt's antiliberalism was aimed at displacing the distinction between *kingdom* and *government* urged by Peterson in 1935 when he denied the possibility and legitimacy of a Christian political theology in light of the Trinitarian mystery.[98] However, what matters here is that Schmitt 'hooked' such a theoretical roadmap to his substantive legal doctrine and opted for the substantial (rather than abstract) variant of egalitarian democracy rooted in the (moral-, aesthetic-, and economics-independent[99]) 'friend/enemy' unitary associative principle.

In this sense, despite Cristi's argument, the democratic attitude of Schmitt's belief in national homogeneity appears even more evident in two significant moments of the trajectory of his political

[94] Agamben (2011), p. 72. See also Agamben (1998), p. 120.
[95] Agamben (1999), p. 170. 'The entire planet', Agamben further maintains, 'has now become the exception that law must contain in its ban'. See also Agamben (2000), p. 113.
[96] Agamben (2000), p. 32.
[97] See n 96.
[98] After the publication, in 1928, of *Constitutional Theory*, whose content was focused on the distinction between kingdom and government in terms of *constituent* and *constituted* power (or *ordo ordinans* and *ordo ordinatus*), the final moment of this strategy will be reached with the publication, in 1972, of *Political Theology II*, which Schmitt specifically conceived as a response to Peterson's criticism. See also n 44, 91, 77, and 105.
[99] See n 105. Pluralism has never been, per se, Schmitt's target. See Schmitt (1999).

thought. First, Schmitt vehemently claimed that '[i]n democracy there is only the equality of equals, and the will of those who belong to the equals'. Schmitt maintained that this means that, despite liberals' view, 'democracy can exist without what one today calls parliamentarism'.[100] The second moment is represented by the writing of *Legality and Legitimacy* in which, building upon what he pointed out five years earlier in *Constitutional Theory*, Schmitt remarkably anticipated Nancy's fear that today '[d]emocracy has become an exemplary case of the loss of the power to signify'[101] and Hayek's complaint against the ability of the 'prevailing democratic institution . . . to operate as organized pressure groups'.[102] Indeed, Schmitt states clearly that the functional and value-neutral conception of law and political government as expressed by majority rule, is nothing but a form of anti-democratic (and, I would add, inegaliarian) oppression in which '[t]he democratic identity of governing and governed, those commanding and those obeying, stops. The majority commands, and the minority must obey'.[103] This is so because, '[i]f the assumption of an indivisible, national commonality is no longer tenable, then the abstract, empty functionalism of pure mathematical majority determinations is the opposite of neutrality and objectivity'.[104] Thus, '[t]he distinctive rationalism of the system of [liberal] legality is obviously recast into its opposite'.[105]

Conclusion

[100] Schmitt (1988), pp. 16 and 26 respectively.
[101] Nancy (2012), p. 58.
[102] Hayek (2013), p. 356.
[103] Schmitt (2004), p. 28. See also Schmitt (1999), p. 205.
[104] Schmitt (2004), p. 28.
[105] Schmitt (2004), p. 10. Schmitt joined the Nazi Party in 1933 after the publication of *Legality and Legitimacy*, and having claimed for ten years that sovereignty necessarily presupposes the need for homogeneity as expressed by the 'friend/enemy' dichotomy. From that moment (he was forced to leave the Party in 1936), Schmitt began elaborating on his decisionist identitarian and plebiscitary political theory from a different and more radical perspective, through which he eventually promoted a new representative political figure, namely the *Führung*, in the person of Adolf Hitler. Hitler, in Schmitt's words, represented indeed both the 'immediate present' and 'effective presence' of the true democratic sovereign and his authoritarian claim, therefore epitomising 'an absolute equality of species'. Thus, Agamben is surely right when he points out that, to support his argument against the liberal distortion of mass democracy, Schmitt was obliged to give a 'constitutional status to the concept of race'. See Agamben (2011), p. 78. This also emerges from the content of *The Leviathan in the State Theory of Thomas Hobbes*, which was published in 1938, and in which Schmitt, in partial contrast to his Weimar writings, offers a critique of Hobbes' decision to allow the privacy of belief and right of self-preservation. As mentioned, Arendt substantially extended this critical view. See also n 44, 77, 91 and 98.

Cristi's challenging comparison ought to be explored within the exigency of overcoming the limits of neoliberal anthro-socio-politico-juridical philosophies and bio-power theories in a *substantial* and law-oriented manner.

In 1946, Merle Travis recorded a song called 'Sixteen Tons,' about a coal miner who tells St Peter not to 'call' him because he owes his soul to the 'company store'. Not coincidentally, the song became incredibly famous in 1955, when Ernest Jennings Ford, known as Tennessee Ernie Ford, recorded a new version of it during a post-war era in which a 'civilised' economic lifestyle was increasingly penetrating the sovereign *dominium* of the political. More than fifty years later, in a short but dense book based on a speech that he gave at Notre Dame Cathedral in 2009, Agamben compared the totalising trend of the global economy to that which characterises the soul-bound condition to those (non-)living in Hell (cf. Psalms 16:10; Acts 2:27; Luke 16:23). In his words, 'according to Christian theology there is only one legal institution which knows neither interruption nor end: hell. The model of contemporary politics – which pretends to an infinite economy of the world – is thus truly infernal'.[106]

Agamben wrote this passage just after having referred to the current 'complete confusion' between 'juridification and commodification of human relations'.[107] Importantly, Agamben's powerful and threatening claim can be associated with what he had argued almost twenty years earlier, after the end of the 'bipolar age', and then further investigated up until his lecture. This is that the essence of men's present form-of-life, as 'life for which what is at stake in its way of living is living itself', reveals that '[c]ontemporary politics is the devastating experiment that disarticulates and empties institutions and beliefs, ideologies and religions, identities and communities all throughout the planet, so as then to rehash and reinstate their definitively nullified form'.[108] Although I share the premises of Agamben's thought and his bio-politico-theo-ontological reconstruction of the origins of the 'capitalist religion'[109] that informs our juridical commodification, I contend that the neutralising and inegalitarian trend at

[106] Agamben (2012), p. 41.
[107] See n 106, p. 40. See also *The Economist* (2014c).
[108] Agamben (2000), pp. 3 and 110 respectively.
[109] Agamben (2007), p. 81. See also, more broadly, (2011).

the centre of this paper can be reversed only if we rediscover what makes us special in our simultaneous uniqueness and *factum pluralitatis* in Arendtian terms.[110]

This is why a neorealist analysis of Cristi's account is of pivotal importance. Over the last few years, countless commentators have offered their views on the displacement of traditional politico-juridical categories. Sociopolitical and legal theorists, as well as philosophers are aware of the imperativeness of the challenge brought about by the global governance model of the liberal-corporate *lex mercatoria*. By way of an example, in asking '[w]hat can democratic rule mean if the economy is unharnessed by the political yet dominates it?',[111] Brown argues that democracy can take back its sovereign role only if it 'reach[es] further into the fabrics of power than it ever has and . . . give[s] up freedom as its price'.[112] Conversely, if we agree with Nancy that '[l]aw is something it has to invent while inventing itself',[113] we should perhaps say that the threats posed by the dissolving and inegalitarian impact of universalised liberalism can be neither understood nor faced without the reconciliation between law's mythical *essence* as continuous generation and our *existential* political freedom. As this paper has tried to demonstrate, our attempt would end in a zone of intersection between Hayekian libero-inegalitarian financial and free-market-capitalist *praxis* and Schmittian decisionist being (or, we may say, between *nomō* and *thesei*, mechanical administration of individuals as contracting units and value-oriented regulation of individuals' interaction as political beings-in-*there*).

To achieve such a revolutionary result under the domination of sterile, value-free global governance and (non-)law, that is in the age in which 'states are . . . understood as mere producers of an important good – regulation – that can be characterised as a cost of operations',[114] means that we must rediscover what constitutes human uniqueness and combine it with law's anthropological special domain and onto-sociopolitical regulative instances.[115] Agamben suggests that we need 'to abandon, decidedly, without reservation, the fundamental concepts through which we have so far represented

[110] Arendt (1998), pp. 7 and 175–247.
[111] Brown (2012), p. 54.
[112] See n 111, p. 53.
[113] Nancy (2012), p. 61.
[114] Catá Backer (2012), pp. 111–12.
[115] Bertea (2009), Croce (2014), Siliquini-Cinelli (2015c).

the subjects of the political (Man, the Citizen and its rights, but also the sovereign people, the worker, and so forth)'.[116] Notably, Agamben is committed to promote the formation of a Messianic community composed of 'singularities' without 'identities' which are freed from all presuppositions and merely united in their *mannerism*, that is in 'belonging' as 'being-*such*(-in-language)'.[117] To the contrary, I believe that this abandonment should assume the more realistic form of a profound critique of the form-of-(non-)life prompted by liberals' imperial strategy and the use that Bensaïd's 'champions of market economy' have made of it to achieve the greatest concentration of wealth ever witnessed.

Thus, instead of hiding behind the misleading 'humanitarian' façade of liberal globalisation and free-market capitalism, we should use Cristi's comparative investigation to opt for a critical and legally efficient approach to the dissolution of local living sensibilities and ways of cultural signification operated by the imposition of rationalist schemes of societal interaction and globalised market standards. Instead of opting for an 'intangible' post-human and yet political ethics[118] whose essence lacks coherence and certainty from a juridical point of view,[119] we urgently need to develop new perspectives on law's social significance while also arguing against the instrumental view of liberal law and society scholars.[120] The contextualised rediscovery of the crucial distinction between *social rules* and *legal norms*,[121] and thus of the essence of the institutionalising processes that render law properly legal within normative discourse and power theory, is a key component of this neorealist challenge against the liberal form of 'domination'.

When I first suggested that we are increasingly becoming (non-)humans who, in the post-historical global (non-)dimension, merely *behave* according to the mechanical and recursive schemes prompted by liberalism, I also claimed that what we need to face and defeat this trend is a call for *action* through

[116] Agamben (2000), p. 15.
[117] Agamben (2013), pp. 27–29, 67 and 87. See also Agamben (2007), pp. 55–60 and 73–92.
[118] Bunch (2014).
[119] Siliquini-Cinelli (2016).
[120] It is noteworthy that Roger Cotterrell has always been sceptical of the notion of 'culture' as a legal concept, which in his opinion should be changed with that of contextualised '(legal) ideology'. For an introduction, see Cotterrell (1995), (1997). I share Cotterrell's belief that '[s]omeone has to speak for the idea of law as a flexible, but distinctive and unifying, value structure', and that '[l]egal theory requires a sociologically-informed concept of community', in Cotterrell (2013), p. 21, and Cotterrell (2004), p. 1 respectively. See also Cotterrell (2006a), (2006b).
[121] Siliquini-Cinelli (2015c).

the *restitutio in integrum* of the will as *principium individuationis* – that is, as the faculty through which we (per-)form our volitions and define our uniqueness. Taking this one step farther in light of the foregoing discussion, and sharing Nancy's belief that '[p]ower isn't just an expedient for external use',[122] I now contend that whether or not we will be successful in this task against our unhuman condition (also) depends on the West's willingness to stop escaping from its own reality and responsibility. In this sense, the peculiar zone of interaction between Hayek's legal liberty and Schmitt's sovereignty which lies at the centre of this paper may also shed new light on the 'occult' double-sided source of Western politics as described by Agamben himself – the 'politico-juridical rationality' and the 'economic-governmental rationality'.[123]

This self-understanding enterprise appears to be absolutely peremptory considering that, in Bowden and Seabrooke's words, 'the workings of markets continue to be thought of as having a 'civilizing' effect on society',[124] as is demonstrated by the emphasis that the last G20, held in Brisbane in November 2014, put on trade.[125] The starting point of this neorealist *reformatio* of the liberal principle of 'civilised economy' and its related idea of 'good economic governance', both of which make 'the forces of divergence at the top of [the] global wealth hierarchy . . . very powerful',[126] should then be the current notion of Western civilisation as described in this paper. Cristi's investigation should serve as a roadmap whilst embarking upon this delicate enterprise.

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[122] Nancy (2012), p. 69.
[123] Agamben (2012), p. 4. See also Agamben (2011).
[124] Bowden and Seabrooke (2006), p. 3.
[125] See in particular the press conference of the WTO's Director General, Roberto Azevêdo: https://www.g20.org/news/transcripts/wto_press_conference_g20_international_media_centre_brisbane.
[126] Piketty (2014), p. 438. Piketty further specifies that the three percent of global private wealth (around 12.7 trillion dollars) is today owned by *Forbes* billionaires and sovereign wealth funds, and that, in light of the cost of petroleum and other data, the latter 'would own 10–20 percent or more of global capital by 2030–2040'. See Piketty (2014), pp. 458–59.

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