

# THE RULE OF LAW IN ATTIC AND (POST-)WESTPHALIAN POETICS OF SPACE

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## I. INTRODUCTION

Gary Ulmen's recent translation of Carl Schmitt's *The Nomos of the Earth* has not only furthered scholarly interest in Schmitt's legal theory,<sup>1</sup> but has also granted the geographical concept of space its proper place in legal studies. Schmitt shows how a "poetics of space" has actually created, recreated, and continuously creates the world map.<sup>2</sup> Myths and symbols create normative spaces and boundaries that make regulation possible.<sup>3</sup> The poetics of space is inherent in boundary-marked social relationships and political identities, and manifests itself in the *nomos*. For Schmitt, "*nomos* is the *measure* by which the land in a particular order is divided and situated; it is also the form of political, social, and religious order determined by this process; here, measure, order and form constitute a spatially concrete unity".<sup>4</sup> The *nomos* of modernity, the first *nomos* of the Earth, is ultimately revealed in the original (constitutional) act of spatial ordering according to the *ius publicum Europaeum*, the embodiment of Westphalian legality designed for the pacification of Europe's reformation. In other words, the distinctively modern 'space of normativity' is based on the myth that only sovereign states can select their political enemies, wage wars and end their wars through the symbolism of their legal treaties.

For Schmitt, the political future of Europe lay beyond Westphalia and its sovereign state, yet he did not find an alternative *nomos* to the "Westphalian poetics of space". Schmitt insists that regulation is only possible within a concrete territorial order like the Westphalian state; which implies that the borderless post-Westphalian alternative of 'spaceless universalism' is an unregulated and, hence, at least in Schmitt's dark vision, a very violent state of affairs. The cosmopolitan *nomos* destroys the spatial sense and, thus, abolishes territorial order and concrete political orientation. Any effort to safeguard the rule of law against the capricious will of men is therefore an effort to find some concrete earth-bound space

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<sup>1</sup> L. ODYSSEOS and F. PETITO, *The International Political Thought of Carl Schmitt: Terror, Liberal War and the Crisis of Global Order*, London, Routledge, 2007.

<sup>2</sup> M. DEAN, "A Political Mythology of World Order: Carl Schmitt's *Nomos*", *Theory, Culture and Society*, 2006, pp. 1-22; G. BACHELARD, *The Poetics of Space*, New York, Orion, 1964.

<sup>3</sup> P. FITZPATRICK, *The Mythology of Modern Law*, London, Routledge, 1992, p. 210.

<sup>4</sup> C. SCHMITT, *The Nomos of the Earth in the International Law of the Ius Publicum Europaeum*, translation [by G.L. ULMEN, New York, Telos, 2003], p. 70.

for the law; Schmitt's effort indeed. My aim is to try to reconstruct the poetics of two competing spaces -namely, Attica and Westphalia-, in Europe. I shall, thereby, unveil the displayed symbolisms and myths through which they are built as political and legal alternatives. At the same time, it will become clear how these two different spaces create, sustain and require two forms of rule of law.

In my reconstruction work of Attic and Westphalian poetics of space, I borrow Schmitt's perspective of space as being poetically created and sustained. I fully agree with him that Europe's rule of law is part of a common intellectual and moral heritage that not only defined modern normativity (Westphalia), but also prefigures the shape of future legislation in Europe. To find out the distinctive character of the modern *nomos*, I seek to find out: what the role of the term 'law' is, in Westphalian mythology of modern normativity; how the modern *nomos* coheres with sovereignty, through a comparison with Attic poetics; and how the modern *nomos* affects our views on actors, institutions, and constitutions. By making a comparison with Attica, my argument is that it is not fallacious to speak of different spaces of normativity. I do not share Schmitt's unconditional admiration for the Westphalian normative space. I, therefore, provide in the final paragraph, some suggestions, based on recent scholarly insights, of what the post-Westphalian alternative may be.

## II. ATTIC AND WESTPHALIAN POETICS OF SPACE

The role of 'law' in a theory of *modern* normativity can be most clearly understood by comparing it with that of ancient normativity. Such a comparison enables us to think in terms of legal alternatives; no legal order can be taken for granted. There is a tendency, a modern bias indeed, in legal thought that 'law' is the political will of the sovereign; hence, the identity of 'law' is fixated, in an eristic fashion, as Westphalian. My argument is that such a distinctively modern normativity makes legal studies blind to the poetics of space of which 'law' is a part. In Attic poetics, for instance, there is no such thing as sovereignty and the Athenian state is not a sovereign state. From an Attic angle, sovereign will is not so much 'law' as *arbitrary* will or lawlessness. In Westphalian poetics, the role of 'law' is the equivalent of the role of the sovereign; which is, as Schmitt like Bodin teaches, to contain Europe's creedal civil wars. In Attic poetics, the role of 'law' is the role of 'reason' (*nous*) itself; the highest faculty of human nature, which enables human beings to search for truth, law and self-understanding, as citizens, within the spatial boundaries of the city-state.

Throughout the ages, Attica and its Athenian city-state has been identified

as Europe's most important space of normativity. Since the Persian Wars, Golden Athens has been mythologised as the city of reason, from which the distinctively European, yet not modern, 'rule of law' as rule of reason has developed. Socrates, the mythical personification of reason, held that unless human -that is, Greek- conduct is regulated by reason, there can be no law, but only arbitrary will. The Attic space is shaped by the myth of *telos*; that attributes a share, responsibility and end of life to each rational animal or city-state citizen. The role of Attic law is to preserve and enforce this mythologised cosmological order. Breaking law in Attica, in other words, is breaking the rule of reason put in legislated forms, which is ignorance; ignorance of the self, of one's due end. Socrates did not disobey law that unjustly condemned him to death for corrupting Athens' youth. He could only realise his due end within the spatial boundaries of the Athenian *polis*. This political man of reason died in honour of Attic law that guides each citizen to his fulfilment as a dependent rational or political animal. His art of dying implies that it is better to die as an Athenian citizen than to live elsewhere as an Athenian stranger.

Schmitt emphasises that the Greek *polis*, as Europe's political community of thought and action, "lacked the idea of a common spatial order encompassing the whole Earth".<sup>5</sup> In Attic poetics, indeed, the world is divided between Europe and Asia. This division of the world in Europe and Asia was divinely ordained, as a distinction between (lawful) freedom and (lawless) despotism.<sup>6</sup> Attic poets provided the tragic displays of Asiatic law-breaking, particularly in family life, and aroused horror of incest, parricide, human sacrifice, the killing of children, *etc.* Though such lawless practices were not uncommon among the Greeks themselves -the Olympian gods themselves were lawless, while Agamemnon had sacrificed his daughter to get advantageous winds for his expedition to Troy-, they were identified with tribal barbarism and Asiatic despotism.<sup>7</sup> A daring Alexander the Great was able to cross borders only because he was imperially deified. His entry into Asia meant the destruction of the *polis*. The rule of Alexander destroyed the Attic rule of law as a rule of reason.

As it has been mentioned earlier, Attic poetics of space is constitutive for the European legacy and the rule of law *sui generis*, also in modernity. Max Horkheimer claims that the *only* valid rule of law for Europe is Attic rule of law and, therefore, seeks to transpose Athens' rule of reason to the

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<sup>5</sup> *Ibid.*, p. 55.

<sup>6</sup> M. MUNN, *The Mother of the Gods, Athens, and the Tyranny of Asia: A Study of Sovereignty in Ancient Religion*, London, University of California Press, 2006, p. 357.

<sup>7</sup> J. GRIFFIN, "The Social Function of Attic Tragedy", *Classical Quarterly*, 1998, pp. 39-61, at p. 48.

modern space of normativity. The “democratic state,” Horkheimer says, “should be like the idea of the Greek *polis* without slaves”.<sup>8</sup> Thus understood, the democratic state is based on Attic spatial ordering, not on a modern or national *nomos* of the Earth. For Horkheimer, the democratic state is the city of reason opened to let in the slaves and the barbarians, and transform them into law-seeking rational animals and citizens. In other words, the democratic state is a political and intellectual aspiration rather than a reality. For, the Greek *polis* and Attic spatial ordering -and, hence, reason and justice- can exist only because of slavery. Luciano Canfora insists that Europe’s Attic rule of law may make the Europeans free but not democratic. It makes Europe free only by denying freedom to its *Other*; Asia and the Third World. In the European battle between Greek freedom and democracy, Canfora notes, “freedom has won -in the rich world- with all the terrible consequences this has, and will continue to have, for the rest; democracy is postponed to some other era”.<sup>9</sup>

The myth of an Athenian (democratic) *polis* without slaves may be defined as unreal, but the Attic aspiration is nevertheless real in its consequences. If Horkheimer finds the mimetic representation of the modern democratic state in the city-state without slaves, he refuses to separate the role of law and the spatial ordering of the Attic heritage. But, *that* separation is precisely fundamental for Westphalian poetics of space and its *nomos* of the Earth. In Westphalian poetics, the role of law is to pacify the revolts and creedal civil wars of the reformation. In Westphalia, law is no longer *telos*, discovered in the *polis*; instead, it is imposed will power. The political end of life is now peace and prosperity; security, like the other animal species. While, in Attica, the greatest danger is self-delusion, for that is lawlessness, in Westphalia, the law is self-preservation in a chaotic, violent world that is filled with duals, feuds, vengeance, and plunder of warlords, robbers, bandits, pirates, rebels, and terrorists.<sup>10</sup> The political purpose of the sovereign state is to master such violence, contain civil war and enforce legal order in Europe.

Westphalia is the narrative of the politically imagined community of nationhood, the modern *nomos* and space of the sovereign state.<sup>11</sup> The image of the nation is mythologised by the sovereign king or people as the space of his own political will to contract peace and prosperity, which

<sup>8</sup> M. HORKHEIMER, quoted in M. JAY, *The Dialectical Imagination: A History of the Frankfurt School and the Institute of Social Research, 1923-1950*, London, Heinemann, 1973, p. 119.

<sup>9</sup> L. CANFORA, *Democracy in Europe: A History*, Oxford, Blackwell, 2006, p. 252.

<sup>10</sup> S.D. KRASNER, *Sovereignty: Organised Hypocrisy*, Princeton, Princeton University Press, p. 20.

<sup>11</sup> M. DEAN, “A Political Mythology of World Order”, *o.c.*, p. 11.

alone is law. In Westphalia, the rule of law becomes embodied in the national *Rechtsstaat*. Through this legal institution, the sovereign offers his subjects legal protection against the potential barbarism of their fellow subjects. The sovereign grants them the legal entitlements that enable them to acquire their own property and become economically independent of their masters. In his farewell to Attica, Thomas Hobbes claims that, given the horrific realities of Europe's creedal civil wars, such is the distinctively modern meaning of freedom in Westphalia. Free is the legal subject who is bound to the political will of his sovereign alone and is independent of his fellow subjects or alternative authorities.<sup>12</sup>

### III. NATURE AND NOMOS

In contrast with Attic poetics, in Westphalian poetics of space, the concepts of *nomos* and sovereignty cohere intimately. The nation is the spatial ordering of goods and people of the sovereign state; which shapes a distinctively modern political and moral orientation towards the world and its inhabitants. Sovereign governments build nations, through their laws, policies and regulations, as spaces of peace and prosperity, as safe havens for legal subjects. Sovereignty, as a legal concept, replaces the ancient (mythical) quest for natural (organic) *telos* or due end of life by the modern quest for security, for making peaceful and prosperous spaces. The Attic space is not peaceful, prosperous and safe. Attica was not wealthy, almost conquered by the Persians, defeated by the Spartans and actually conquered by Alexander the Great and the Romans. The Attic spatial ordering and *othering* implied, for city-state citizens, that they could realise their due end of life only if they would be rational enough to transcend their (slavish) vice of fear (of the Persians) in the *polis* by virile courage, so desperately needed in war. In the Westphalian space, this civic virtue is made redundant since the sovereign is responsible for beginning and ending war and peace.

In the modern poetics of space, it is believed that all earthly blessings are owed to the great sovereign; which discredits in advance any alternative principle of state building, such as subsidiarity or sphere sovereignty.<sup>13</sup> If an alternative principle does get the benefit of the doubt, then it is somehow combined with the sovereign rule, leading to an impossible marriage. The distinctive feature of sovereignty is that the state is

<sup>12</sup> T. HOBBS, *De Cive: Philosophical Rudiments Concerning Government and Society*, Oxford, Clarendon, 1983, p. 126.

<sup>13</sup> M.R.R. OSSEWAARDE, 'Three Rival Versions of Political Enquiry: Althusius and the Concept of Sphere Sovereignty', *Monist*, 2007, pp. 106-125; H. DOOYEWEERD, *Reformation and Scholasticism in Philosophy: The Greek Prelude*, Lewiston, Edwin Mellen, 2004.

*constitutionally independent* from other communities, including foreign states, the Church, families or dynasties, language communities and corporate enterprises. Sovereignty, John Loughlin stresses, “represents the autonomy of the political and, hence, provides the foundation of public law”.<sup>14</sup> Sovereignty is a *legal* doctrine that is originally grounded on the view of nature as a space of frightening savagery and barbarism, of fearful war and poverty. Such a portrait of nature, horror, indeed, alone justifies the birth of the sovereign state. For, only this monster (*Leviathan*) is able to tame wild animals that are called human beings and to keep them safely out of nature, in civilised conditions.

Given the Westphalian portrait of nature, reason is made dependent upon the sovereign and, thus, loses its Socratic meaning of truth or *telos* searching. In Attic poetics of space, reason tries to discern hidden laws that are cosmologically given. These laws are meant to govern Athenian citizens to take, allot, assign, share, divide and distribute land, to give each fellow citizen his due -his goods- in a spatially settled city-state.<sup>15</sup> In Attic poetics, Athenians are believed to be citizens by nature, bound to their land, their fatherland. The Athenian *polis*, that alone enables them to fulfil their political animality, is not outside but inside nature. The task of the legislator is to perfect human nature. The purpose of law is to assist citizens in exercising their civic virtues; which are, in the end, mimetic representations of the *nous*. In Attica, only virtuous action is rational; knowledge informed action. Thereby, the rule of law enables citizens to play their proper role in the city-state.<sup>16</sup> Carl Schmitt describes the Earth as the “mother of law”, as in her fecundity, mother nature contains an inner measure of justice.<sup>17</sup> Mother nature, he suggests, contains law within herself as a reward for labour. She manifests law upon herself in fixed boundaries and sustains law above herself as a public sign of justice.<sup>18</sup>

In a similar way, Alexis de Tocqueville provides an Attic, rather than Westphalian, narrative of American democracy. In his poetics of space, the puritan township is portrayed as a modern version of the Athenian *polis*. The township, as a legislative body, is therefore mythologised as

<sup>14</sup> J. LOUGHLIN, “Ten Tenets of Sovereignty”, in N. WALKER, *Sovereignties in Transition*, Oxford, Hart, p. 56.

<sup>15</sup> M. DEAN, “A Political Mythology of World Order”, *o.c.*, pp. 4-5; C.C.W. TAYLOR, “Nomos and Physis in Democritus and Plato”, *Social Philosophy and Policy*, 2007, pp. 1-20, at p. 6.

<sup>16</sup> C.C.W. TAYLOR, “Nomos and Physis”, *o.c.*, pp. 19-20.

<sup>17</sup> C. SCHMITT, *The Nomos of the Earth*, *o.c.*, p. 42.

<sup>18</sup> M. OJAKANGAS, “A Terrifying World Without An Exterior: Carl Schmitt and the Metaphysics of International (Dis-)Order”, in L. ODYSSEOS and F. PETITO, *The International Political Thought of Carl Schmitt*, *o.c.*, pp. 205-221, at p. 213.

‘natural’ and not the creation of sovereign will. Tocqueville mythologises the township as breathing “an air of antiquity and a sort of biblical perfume”. The township is “the sole association that is so much in nature that everywhere men are gathered, a township forms by itself [...]; it is man who makes kingdoms and creates republics; the township appears to issue directly from the hands of god”.<sup>19</sup> What is at stake here is that, in the Attic poetics of space, the justice of a communal order, including the democratic order of the New World, depends on the cosmology of a given (teleological) nature. Tocqueville, as the above quote shows, relies, not unlike Plato or Augustine, on theological symbolisation.<sup>20</sup> Schmitt notes that “all concepts of modern state theory are secularised theological concepts”.<sup>21</sup> This includes the rule of law, spatially bound to the Attic *nomos* of the puritan township. Every *nomos* is “based on sacred orientations”.<sup>22</sup> The *ground motive* of all *nomos* and any rule of law is religious, not national, although constitutions may be devoid of religious symbolism.<sup>23</sup>

In Westphalian poetics, on the other hand, the state is founded on the myth of the state of nature. Nature is no longer a liberating force of truth but, on the contrary, it is oppressive. The political program of the Westphalian state is to get out of nature, to master nature, through conventions. In the modern space of normativity, called nationhood, reason is no longer a divine gift or *nous* that is ‘naturally’ able to discover which constitution is best by ‘nature’, but reason is a technical or bureaucratic instrument for mastering brutal nature and its wild peoples. Hence, the sovereign state is the embodiment of reason, for it alone is able to prevent citizens from collapsing into their deplorable natural condition of poverty and violence. In Westphalian poetics, citizens are portrayed as the sovereign’s legal subjects living within the national territories; the safe havens of civilisation. Again, in the modern space of normativity, the rule of law cannot exist independently of the sovereign’s will to peace and prosperity.

In Westphalian poetics, the symbolism of nature does not disappear altogether. Though the fecundity of mother Earth does not attract the

<sup>19</sup> A. DE TOCQUEVILLE, *Democracy in America*, translation [by H.C. MANSFIELD and D. WINTHROP, Chicago, University of Chicago Press, 2000], pp. 33 and 57.

<sup>20</sup> E. VOEGELIN, *The New Science of Politics: An Introduction*, London, University of Chicago Press, 1987, p. 6.

<sup>21</sup> C. SCHMITT, *Politische Theologie: Vier Kapitel zur Lehre der Souveränität*, Berlin, Duncker and Humblot, 1979, p. 49.

<sup>22</sup> C. SCHMITT, *The Nomos of the Earth*, o.c., p. 70.

<sup>23</sup> H. DOOYEWEERD, *Reformation and Scholasticism in Philosophy*, o.c.

agrarian admiration that is symbolically represented (*mimesis*) in, say, Virgil's *Georgics*, sovereigns are irresistibly attracted to sea and air by maritime destinies and air forces.<sup>24</sup> The Westphalian belief that on sea there is no law but only piracy is the domain for Grotian mythology. Sovereign powers develop into commercial empires that fight their 'trade wars' on the sea; thereby, abiding by the law, the *ius publicum europaeum*, that states that no prosperous city may be destroyed.<sup>25</sup> For Schmitt, it is a meaningful sign that, in Westphalian poetics, the sovereign lawmaker is mythologised as Job's sea monster, the *Leviathan*.<sup>26</sup> In Schmitt's Westphalian tragedy, sovereign states are able to pacify the domestic chaos and civil wars of Europe's reformation only through the mastery of the seas, the new discoveries and conquests of newly discovered lands. Sovereign states were able to abide by the *ius publicum europaeum* only because their lust and violence found expression outside Europe.<sup>27</sup>

#### IV. AUTOS AND NOMOS

The modern Westphalian *nomos* of nationhood affects our views on actors, institutions and constitutions. In Westphalian poetics of space, nature and *nomos* are divorced. The sovereign creates the *nomos* that is meant to supersede the barbarous violence that is identified with the state of nature. This violence includes the political passions and civic activities of political animals who are portrayed as monsters; if the *Leviathan* is the metaphor for the sovereign state, it is not only the sovereign government or regulator but also the citizens or legal subjects who are monstrous. Therefore, in Westphalian poetics -and, hence, also for Schmitt-, (wo)man is naturally violent, selfish, vicious or sinful and, therefore, a dangerous being.<sup>28</sup> Accordingly, the purpose of Westphalian law, defined as the sovereign's will, is to control the devil existing in both government and citizen.<sup>29</sup> The sovereign is the actor that tames citizens by emancipating them from their battling communities; thereby, isolating their dangerous political animality. In the sovereign state, citizens withdraw from the polis and restrict their participation to the *oikos* or the family household that, in Westphalian poetics, is the domestic seat of self-control and discipline. It is within the *oikos* that naturally brutal beings become civilised. Also, it is in the *oikos* that the public idol of prosperity, a most important condition for

<sup>24</sup> C. SCHMITT, *The Nomos of the Earth*, o.c., p. 43.

<sup>25</sup> *Ibid.*, p. 203.

<sup>26</sup> M. DEAN, "A Political Mythology of World Order", o.c., p. 12.

<sup>27</sup> C. SCHMITT, *The Nomos of the Earth*, o.c., pp. 81 and 97-98; M. KOSKENNIEMI, "International Law as Political Theology: How to Read Nomos der Erde?", *Constellations*, 2004, pp. 492-511, at pp. 494 and 499.

<sup>28</sup> M. OJAKANGAS, "A Terrifying World without an Exterior", o.c., p. 211.

<sup>29</sup> M. KOSKENNIEMI, "International Law as Political Theology", o.c., p. 504.



the perpetual peace of Westphalia, is generated and sustained.

Because the sovereign acts to individualise or privatise citizenship, the relationship between the sovereign state and the humanist and civil value of autonomy is intimate. The sovereign controls his legal subjects by granting them autonomy from their communal authorities in the institutional form of legal rights that, in the sovereign state, are defined as entitlements or claims, usually valid within the space of nationhood. The first legal entitlement that the sovereign provides to his subjects is, of course, the right to own private property; which is the legal prerequisite for all autonomy from hierarchy. Thus, John Locke explains that “every man has a property in his own person” and that “the laws regulate the right of property”.<sup>30</sup> In the sovereign state, the laws regulate the rights of property, because the sovereign wills “the direction of a free and intelligent agent to his proper interest”.<sup>31</sup> In Westphalia, the *proper* interest –that is, rationality– is peace and prosperity that the nation owes to its sovereign. As has been mentioned above, in the sovereign state, reason, identifying the ‘proper interest’, is always coeval with the sovereign’s will to master the state of nature.

In Attic poetics, on the other hand, reason is not autonomous. Reason is developed through civic participation in the Greek *polis*, not through civil participation in the *oikos*, which is primarily the domain of slaves. Because the polis is not a convention but is inherent in (teleological) nature, Attic *nomos* is not independent of the myth of *telos*. The Athenian state’s purpose is to imitatively represent ‘nature’. This *mimesis* includes fighting just enemies, such as Cyrus and the barbarians, whose cosmology represents the unnaturalness of despotic lawlessness and falsehood.<sup>32</sup> Attic institutions, such as Athenian legislation, festivals and sacrifices, are the symbolic participation in the cosmos, in nature. Such cosmological symbolism portrays Attic spatial ordering. The city-state is the mimetic representation of nature, which the Athenians seek to safeguard against their just enemies, the barbarians who misrepresent nature in untruth and lawlessness.

In Westphalian poetics, nature is portrayed as a brutal condition devoid of wisdom. Because of this image of nature, reason loses its meaning of the nature-given truth seeker. In contrast with the Attic state, the sovereign

<sup>30</sup> J. LOCKE, *Two Treatises of Government*, Cambridge, Cambridge University Press, 1963, II, §§ 27 and 50.

<sup>31</sup> *Ibid.*, II, § 57.

<sup>32</sup> E. VOEGELIN, *The New Science of Politics*, o.c., p. 55; M. MUNN, *The Mother of the Gods, Athens, and the Tyranny of Asia*, o.c., p. 296.

state is not based on the myth of *telos*; meaning that citizens do not have to search for 'nature' or for things that are 'best by nature', as such reason is not able to stop Europe's slaughter. Reason, thus divorced from the myth of nature, becomes a technical attribute of violence control. In Westphalian space, reason is portrayed as a weapon used in the war against nature. Modern reason is personified in the autonomous subject who is able to make war upon his or her own lusts and vices rather than fighting others, who manages to subject his or her *oikos* activities to the 'proper interest' that the sovereign represents. The autonomy that the sovereign grants to his out-of-nature and out-of-community subjects is self-rule without nature-given laws, which is expressed in the self-ownership and civil participation in prosperity-generating *oikos* life.<sup>33</sup>

Autonomy requires the rational capacity to choose and, hence, awareness of options available in the *oikos*. In Westphalian poetics, these options are advertised in the modern *oikos* of civil society and the marketplace; ultimately the social domain of the bourgeois, the anti-citizen.<sup>34</sup> Civil society and the marketplace are portrayed as the peaceful and competitive spaces of autonomy, in which rule-abiding civilised subjects associate and negotiate with one another contractually and exercise their legal rights, to live together comfortably, safely and peacefully, in a legally secured enjoyment of their private properties. Ernst Troeltsch reconstructs the modern myth that such civil self-realisation in self-chosen associational options and struggles for self-recognition is what modern freedom in the Westphalian land is all about.<sup>35</sup> In Troeltsch's essay, German freedom is *oikos* freedom. It is a freedom that is realised through contractual association within the spatial ordering of nationhood, which becomes the object of pious devotion in the *oikos* acts of self-realisation. In the Westphalian poetics of space, chapters mimetically representing this autonomous 'non-political man', like the reflections of Thomas Mann, are constantly added.

The Westphalian poetics of space is highly effective in firmly establishing autonomy as its ruling myth. As autonomy is essentially a legally controlled will act, reason becomes a domestic(ated) *oikos* affair and, thus, deprived of its wider political city-state relevance. Westphalia turns political action,

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<sup>33</sup> R. DAGGER, *Civic Virtues: Rights, Citizenship and Republican Liberalism*, Oxford, Oxford University Press, 1997, p. 38.

<sup>34</sup> B. TESCHKE, "Debating 'The Myth of 1648': State Formation, the Interstate System and the Emergence of Capitalism in Europe; A Rejoinder", *International Politics*, 2006, pp. 531-573.

<sup>35</sup> E. TROELTSCH, *Deutscher Geist und Westeuropa*. Tübingen, Mohr, 1925; L. DUMONT, *Essays on Individualism: Modern Ideology in Anthropological Perspective*, London, University of Chicago Press, 1986, pp. 133-148.

including constitution-making, into a technical or administrative matter for the sovereign. In the policy documentation of Europe's sovereign governments, this pacification strategy is clearly visible in the slogan-like rhetoric of 'freedom of choice'. In the Westphalian space of normativity, the *liberum arbitrium* does not refer to the political choice between good and evil or to the rational choice for civic virtue. Instead, Westphalia limits the freedom of choice to the more profane activities of the non-political *oikos* man who chooses to act in accordance with the will of the sovereign; for instance, with a view to personal health, the Earth's environment or the alleviation of global poverty.<sup>36</sup>

## V. A POST-WESTPHALIAN EPISODE

The comparison between Attic and Westphalian poetics of space suggests that it is not fallacious to speak of different spaces of normativity. Distinguishing between Attic and Westphalian spaces is a useful heuristic device for uncovering the spatial dimensions of *nomos*. If Carl Schmitt teaches anything, then it must be that such dimensions -the *nomos* that creates territory, defines locality, marks places, separates backyards and defines households- are the groundwork of any constitution.<sup>37</sup> Any rule of law assumes spatial dimensions of political boundaries and demarcating borders, like territorial control or division between Greeks and Persians, Romans and barbarians, EU and migrants, friends and enemies of freedom. Space, indeed, is exclusive and it is precisely this exclusiveness of being Greek, Roman or European, which gives the political life of the state and ultimately political freedom or self-government, its concrete and intense and territory-bound significance of a lived experience of constitutional state building. Schmitt asks urgently whether there is "any space left for the rule of law after Westphalia".

Since the collapse of the *ius publicum Europaeum* in Congo 1885, and the resulting horrific realities of the world wars, the sovereignty principle has been discredited.<sup>38</sup> In the aftermath of the greatest war ever, Jacques Maritain offered his Attic alternative of the human rights of the United Nations for reconstructing Europe. Indeed, Maritain concluded that, after the brutal violence of the world wars, sovereignty "must be scrapped".<sup>39</sup> In the past decades of legal scholarship, however, the sovereignty principle

<sup>36</sup> A. MALPASS *et al.*, "Problematizing Choice: Responsible Consumers and Sceptical Citizens", in M. BEVIR and F. TRENTMANN, *Governance, Consumers and Citizens: Agency and Resistance in Contemporary Politics*, London, McMillan, pp. 231-256, at p. 243.

<sup>37</sup> M. DEAN, "A Political Mythology of World Order", *o.c.*, p. 7.

<sup>38</sup> C. SCHMITT, *The Nomos of the Earth*, *o.c.*, p. 239.

<sup>39</sup> J. MARITAIN, "The Concept of Sovereignty", *American Political Science Review*, 1950, pp. 343-357, at p. 357.

has been more often contested by sovereignists themselves, but this has not led to its rejection. Instead, it has been “reinvented”, “revisited”, or “transformed”.<sup>40</sup> Thus, the rationalisations of the peace and prosperity programme, the *Wirtschaftswunder*, can continue under a new post-national *nomos* of the Earth. In this new episode of space-making, the Westphalian myth eclipses.<sup>41</sup> Yet, its normative premises concerning the rule of law as sovereign will are far from dead and its consequences are still active in political and *oikos* life. Sovereignities are in transition towards “post-Westphalia”;<sup>42</sup> borders of nations are being reconstructed.

Schmitt admires Westphalian poetics for its geo-political boundary work of limiting space and excluding from territory. Through the sovereign’s spatial ordering, the friend-enemy dualism is preserved and political life is kept vibrant. In the new episode of the Westphalian poetics of space, however, the exclusivist myth of the European nation is replaced by the myth of an all-inclusive humanity. In this all-inclusiveness, the enemy and, hence, political vibrancy disappear. Schmitt makes it clear that the so-called post-Westphalian transcendence of the friend-enemy dualism in institutions like human rights is in fact a new *imperial* symbolism of Westphalian poetics. It is an imperialism that annihilates the enemy, the European other. For, in post-Westphalia, humanity is “*European* humanity”;<sup>43</sup> human rights are European rights.<sup>44</sup> Schmitt claims that “he who invokes humanity wants to cheat”. Attic poetics is destroyed when Alexander the Great crosses the line that separated Greece and Persia to rule the world. Westphalian poetics of space, including its *ius publicum Europaeum*, has destroyed the conciliation between borderless *cosmos* and *polis*.

In Attic poetics of space, the *nomos* of spaceless universalism, represented in world citizenship and shaped by Stoic cosmopolitanism, destroys the political life of the city-state and transcends Athens to reach Alexander the Great’s *cosmopolis* and the *imperium Romanum*.<sup>45</sup> Post-Westphalian cosmopolitanism replaces Westphalian nationalism to legitimise sovereignty transfers to a new empire, the European Union, which is

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<sup>40</sup> J. BARTELSON, “The Concept of Sovereignty Revisited”, *European Journal of International Law*, 2006, pp. 463-474.

<sup>41</sup> A. OSIANDER, “Sovereignty, International Relations, and the Westphalian Myth”, *International Organization*, 2001, pp. 251-287.

<sup>42</sup> R. FALK, “Revisiting Westphalia, Discovering Post-westphalia”, *Journal of Ethics*, 2002, pp. 311-352.

<sup>43</sup> C. SCHMITT, *The Nomos of the Earth*, o.c., p. 228.

<sup>44</sup> A. PAGDEN, “Human Rights, Natural Rights, and Europe’s Imperial Legacy”, *Political Theory*, 2003, pp. 171-199, at p. 172.

<sup>45</sup> E. VOEGELIN, *The New Science of Politics*, o.c., p. 91.

powerful enough to cross national borders. Robert Cooper identifies the European project as a kind of voluntary imperialism that is compatible with human rights and cosmopolitan values.<sup>46</sup> Ulrich Beck and Edgar Grande point out that “in the European Empire the concept of sovereignty is itself being transformed; *i.e.*, that sovereignty is developing into *complex, cosmopolitan sovereignty*”.<sup>47</sup> Namely, in post-Westphalia, the European nation-states transfer their sovereignty to the European Union to make their collective presence felt in the world. Jan Zielonka insists that this empire is not some “neo-Westphalian super-state” but a post-Westphalian “neo-medieval empire”.<sup>48</sup> The neo-medieval symbolism of post-Westphalia refers to spatial dimensions like polycentric regulation, overlapping jurisdictions, soft and flexible borders, multiple identities, various loyalties, diverse rights and duties, and divided sovereignty.

Supra-national hierarchies naturally have taken a keen interest in the subsidiarity principle and reinterpret it in a post-Westphalian fashion. Originally, the subsidiarity principle is an Attic principle of hierarchy, which dictates that higher authorities are to provide subsidiary assistance to lower authorities, in order to enable each citizen to fulfil his or her *telos*, rational or political nature, in the Athenian *polis*. The subsidiarity principle reflects the Attic cosmology of a hierarchically ordered nature, including the city-state. It is a teleological principle that enables Athenian citizens to govern themselves towards their given natural station, as discovered by the *nous*, through the exercise of the civic virtues in the *polis*. Thereby, their political nature finds its fulfilment in the Attic values of freedom or self-government and reason. The subsidiarity principle dictates that government belongs by ‘nature’ to the superior in mind; which means that the barbarians are naturally subjugated by means of superior thinking. The Westphalian state, on the other hand, cannot exist with such teleological or natural hierarchies. That state is mythologised as Job’s sea monster, born to stop Europe’s creedal civil wars.

The *Leviathan* may or may not divide sovereignty within his own state body. The sovereign may be responsible towards other communities and may even protect them. He may empower his subjects with his legal rights or transfer his sovereignty to other actors. But the sea monster only acts in such ways to materialise his will to peace and prosperity. His will alone is law. In Westphalian spaces governed by such will power, the Attic

<sup>46</sup> R. COOPER, *The Breaking of Nations: Order and Chaos in the Twenty-first Century*, London, Atlantic, 2003.

<sup>47</sup> U. BECK and E. GRANDE, *Cosmopolitan Europe*, Cambridge, Polity, 2007, p. 70.

<sup>48</sup> J. ZIELONKA, *Europe as Empire: The Nature of the Enlarged European Union*, Oxford, Oxford University Press, 2006, pp. v-vi.

meaning of subsidiarity and its relationship to a specific cosmology, including political nature, is obscured. In the Westphalian space of normativity, subsidiarity is reinterpreted as a bureaucratic tool or judicial formula for redistributing or (de-)centralising sovereign power.<sup>49</sup> As Merin Scattola and Paolo Carozza explain, “subsidiarity and sovereignty are antagonistic principles”.<sup>50</sup> Hence, (Attic) reason dictates that “the idea of subsidiarity leaves no room for sovereignty as such”.<sup>51</sup>

In sum, distinguishing between Attic and Westphalian spaces of normativity reveals that the current “sovereignties in transition” of post-Westphalia are mythologised within a distinctively Westphalian space of normativity, even though the Attic language of subsidiarity is often employed. It is through Westphalian poetics that the sovereignty principle is rethought within the global context of post-Westphalian empire-building and de-territorialised geopolitical reconfiguration. Thus, when Zielonka stresses that “Westphalian solutions are largely inadequate for coping with an enlarged EU” and that “it is time to recognise the neo-medieval reality and make it work”, he does seek to enter a new (neo-medieval) space of normativity and yet refuse to scrap the concept of sovereignty that is bound to the Westphalian *nomos*.<sup>52</sup> Instead, he urges his audience to finish the Westphalian chapter and drop their Westphalian measure or criteria of judgement –to borrow Benno Teschke’s words, to “abandon the fixation on ‘Westphalia’”-<sup>53</sup> to enter the new post-Westphalian episode in the Westphalian poetics of space making; the cosmopolitan neo-medieval turn in the building of a super multi-headed *Leviathan*.

## VI. A NEW POETICS OF SPACE?

The post-Westphalian episode transforms sovereignty, rather than transcending it. The rephrasing had to take into account the modern fact that there is no more a no-man’s land or more precisely a ‘no-European’

<sup>49</sup> A. DE BENOIST, “What is Sovereignty?”, *Telos*, 2000, pp. 99-118, at p. 116; D. HELD, “Cosmopolitanism: Globalisation Tamed?”, *Review of International Studies*, 2003, pp. 465-480, at p. 471; N.W. BARBER, “The Limited Modesty of Subsidiarity”, *European Law Journal*, 2005, pp. 308-325, at p. 325.

<sup>50</sup> M. SCATTOLA, “Subsidiarität und Gerechte Ordnung in der Politischen Lehre des Johannes Althusius”, in P. BLICKLE *et al.*, *Subsidiarität als Rechtliches und Politisches Ordnungsprinzip in Kirche, Staat und Gesellschaft*, Berlin, Duncker and Humblot, pp. 337-367, at pp. 361-362.

<sup>51</sup> P.G. CAROZZA, “Subsidiarity as a Structural Principle of International Human Rights Law”, *American Journal of International Law*, 2003, pp. 38-79, at p. 69.

<sup>52</sup> J. ZIELONKA, *Europe as Empire*, *o.c.*, p. 191.

<sup>53</sup> B. TESCHKE, “Debating ‘The Myth of 1648’”, *o.c.*, p. 567.

land where battles can legitimately be fought, where the thirst for power can be quenched. In the post-Westphalian narrative, sovereignties are sustained thanks to wars fought on a worldwide scale for the sake of humanity and human rights.<sup>54</sup> America's total war against the enemies of humanity – state or non-state actors, barbarians – appears in the post-Westphalian consciousness of spaceless universalism to be a perfectly reasonable and even laudable policy.<sup>55</sup> The poetics of post-Westphalia delocalises the rule of the law by negating the normativity of established spaces. The Westphalian appropriation of newly discovered land is replaced by the spaceless seizing of newly discovered markets, where lethal acts are justified in pursuit of desire.<sup>56</sup>

In Europe, a new poetics of space is being written as a radical alternative to America's post-Westphalian foreign policy of universal wars anywhere in the world, which follows from its self-understanding as the guardian of the worldwide *oikos*. Thus, Jürgen Habermas and Jacques Derrida picture a European space of normativity, safeguarded by the political community of the European Union, as the American or transatlantic post-Westphalian alternative of total war and market.<sup>57</sup> In most explicit terms, Alain Badiou points out that a radically new poetics of space must be understood as “a moment of resistance to the barbarous reign of the pure economy that supports a politics of war and fuels the devastation of consciousness”.<sup>58</sup> Europe's new poetics of space is mimetically represented in an alliance between France and Germany, the so-called ‘core’ Europe; which seeks to safeguard, through their rich philosophical and literary traditions, the European heritage and the rule of law, in a hostile world that is dominated by hegemonic corporate and military power. Ultimately, Europe's moment of resistance to American seizure is resistance, in thought and in action, to the conquests of universal markets, merciless slaughter and annihilation of enemies.

Badiou believes that the writing of a new poetics of space has become

<sup>54</sup> C. SCHMITT, *The Nomos of the Earth*, o.c., p. 296.

<sup>55</sup> T.H. PICKETT, “War, Power, and Supremacy: A Conservative Interpretation”, *Modern Age*, 2006, pp. 199–207, at p. 203; R. HOWSE, “Europe and the New World Order: Lessons from Alexander Kojève's Engagement with Schmitt's ‘Nomos der Erde’”, *Leiden Journal of International Law*, 2006, pp. 93–103.

<sup>56</sup> M. LOW, “The Constitution of Space: The Structuration of Spaces through the Simultaneity of Effect and Perception”, *European Journal of Social Theory*, 2008, pp. 25–49, at p. 27; T.H. PICKETT, “War, Power, and Supremacy”, o.c., p. 203.

<sup>57</sup> D. LEVY, M. PENSKY and J. TORPEY, *Old Europe, New Europe, Core Europe: Transatlantic Relations after the Iraq War*, London, Verso, 2005.

<sup>58</sup> A. BADIOU, *Polemics*, translation [by S. CORCORAN, London, Verso, 2006], p. 119.

possible because a new historical or dialectical moment for negating (post-)Westphalian poetics has arisen. The moment of resistance to post-Westphalia's total war and market alternative is a dialectical opportunity for bringing into the world a strikingly new spatial order; that is to say, for creating "the cultural renewal of European space".<sup>59</sup> Badiou's new poetics of European space is, first of all, a story about constructing a new political unity without spatial sovereignty. The "cultural renewal of European space", thus, demands a radically new understanding of the concept of 'rule of law'. This "newness", Badiou suggests, is what supports a dialectic of thought -primarily a dialectic between French and German philosophies and poetics- that, in his view, alone is able to negate and transcend the post-Westphalian episode towards a radically new *pluriversal* spatial order and corresponding *nomos*.<sup>60</sup> Badiou urges his audience to supersede their desires for security, to de-mythologise the Westphalian state of nature, kill their *Leviathan* and find themselves a radically new monster; "let's start with a new animal, a new historical animal, something that would not exactly be a nation, but would be anything other than a nation".<sup>61</sup>

Badiou suggests that the new and extraordinary violence of global terrorism and the Al-Qaeda myth may give birth to a new poetics of space in Europe. The total war on spaceless de-territorialised and invisible terrorism reveals that there are other wars than interstate wars. Moreover, these post-Westphalian wars cannot be concluded through the legal institution of the peace treaty. As one result, the total war on terrorism, as Alain de Benoist articulates so clearly, is a war that does not seek to defeat and unarm but annihilate the enemy, through distinguishing between terrorist bestiality and (civil) humanity, protected by prosperity and weapons of mass destruction.<sup>62</sup> In post-Westphalia, then, the distinction between war and peace becomes blurred. Post-Westphalian total war provides the image of the continued and omni-presence of the dehumanised or bestialised enemy. The enemy of civil humanity cannot be treated civilly, with Westphalian pacifying tolerance and civil respect for legal rights. The presence of the Guantanamo Bay camp is a mimetic representation of this impossibility of civility and legality in the war-zone of the Earth.

The tragic human history seems to teach that each era needs and creates its tyrant. In Attic poetics, Heraclites teaches that war is the father of all,

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<sup>59</sup> *Ibid.*, p. 120.

<sup>60</sup> *Ibid.*, p. 126.

<sup>61</sup> *Ibid.*, p. 130.

<sup>62</sup> A. DE BENOIST, "Global Terrorism and the State of Permanent Exception: The Significance of Carl Schmitt's Thought Today", in L. ODYSSEOS and F. PETITO, *The International Political thought of Carl Schmitt, o.c.*, pp. 73-96.



and king of all, because Attica could only be free through the enslavement of others, through being victorious in war. Only by excluding the conquered from the Greek *polis*, and including them in the *oikos*, is it possible for the victorious Athenians to achieve their given *telos* in citizenship, despite their human, all too human, limitations. In Westphalian poetics, creedal civil war is the father of all and its pacifier is king of all. Only by unlimited land-appropriation outside European territorial space, Schmitt teaches, is it possible to transform continental war into maritime rivalry in a sea or air battle. In the post-Westphalian episode, the total war on terrorism is the father of all and this war can no longer be concluded by defeating the enemy. A new poetics of space must give birth to a new monster and a new *nomos* and, thereby, scrap sovereign statehood, invent a new rule of law and change the identity of legal studies. Perhaps an enlarged European Union could become that new monster and 'core' Europe that new space of normativity.