RETHINKING EUROCENTRISM. EUROPEAN LEGAL LEGACY AND WESTERN COLONIALISM

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«When one says Eurocentrism, every self-respecting postmodern leftist intellectual has as a violent reaction as Joseph Goebbels had to culture — to reach for a gun, hurling accusations of protofascist Eurocentrist cultural imperialism. However, is it possible to imagine a leftist appropriation of the European political legacy?»[1].

With these words Slavoj Žižek started his a *Leftist plea for Eurocentrism* published in the far 1998 in *Critical Inquiry*. The article is very well known and produced, as it often happed for the works of the Slovenian philosopher, a huge and bitter debate that overcoming the borders of the philosophical and literature journals, landed on the newspapers' pages. Singaporean diplomats as Kishore Mahbubani, Spanish Philosophers as Santiago Zabala, postcolonial leading scholars as Walter Mignolo or Hamid Dabashi joined it[2].

Dabashi himself has recently published a book provocatively entitled *Can non Europeans Think?* where notwhithstanding the title the question is not wheater the Non Europeans can think but whether the European can read. His answer is extremely clear. Europeans cannot read because «they are assimilating what they read back into that snare and into what they already know – and are thus incapable of projecting it forward into something they may not know and yet might be able to learn».[3]

I do not want to reconstruct this debate nor discuss the different positions of Žižek, Mahbubani, Dabashi or Mignolo. The purpose of my paper is certainly more modest as well as is more modest its thematic dimension, the legal one, but certainly the processes of de-westernization, decoloniality

[1] Žižek, 1998, p. 988.
[2] Mahbubani, 2009; Zabala, 2012; Dabashi, 2013; Mignolo, 2013.
[3] Dabashi, 2015, p. 6 https://www.zedbooks.net/blog/posts/fuck-you-zizek/

and re-westernization involves by now every aspects of our intellectual as well as material life and obviously the legal aspects are not excluded.

Thus, taking seriously the question posed by Žižek and trying to convert it into legal terms my question could be how it is possible to appropriate the European legal legacy for writing a decolonialized history of international law? is this task possible also for a European legal historian? or is he, as Dabashi seems to suggest, stucked in his past with his dead white heroes?

In order to find an answer, we have critically to rethink the attitude of international lawyers (with very few exceptions) to identify the international law as a scientific and systematic discipline, in order to reconnect the international law and the colonial discourse, revealing the ambiguous relationships between two different stories that seemed for too long time to be different and doomed to run in parallel without ever meeting[4].

Paradoxically, in my opinion, the author who can better help us to get to this aim is one of the most eurocentric jurists of the XXth century (and in this case eurocentric can only be considered as a compliment): Carl Schmitt.

Within an intellectual itinerary that tried to overcome the decisionism of the twenties with an increased attention to the concrete dimension of the legal order and its gradual marginalization during Nazism, Schmitt, from the end of the thirties, made international law the main focus of his research[5].

How to overcome the dualism still prevailing in the German legal science between *Volksrecht* and *Landesrecht* without resorting to Kelsen's monism? And how to contain the political consequences of the abstract universalism and formal egalitarianism among States presupposed by that theory and which, according to Schmitt, had been employed to assert the complete Anglo-American supremacy? [6]

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[4] On the relationship between international law as scientific discipline and colonialism s. Nuzzo, 2012. S. always Anghie, 2005; Koskenniemi, 2001; more recently trying to overcome an Eurocentric perspective Becker Lorca, 2014.

[5] The first essays devoted to international law, were pubblished already at the mid of the twenties, s. especially Schmitt, 1925 and 1926. The interest of Schmitt toward international law increased during the 1930s, s. the articles edited by Manschke, 1995.

[6] Galli, 1996, pp. 864-889. On the Schmitt's approach to international law Carty, 1995; Carty, 2001; Koskenniemi, 2004; Carloni, 2008. Recently Minca, Rowan, 2016 and Howse, 2016, pp. 212-231, but focused exclusively on the interpretation of Schmitt offered by Koskenniemi, Kahn, Posner, Vermeulen and Butha.

To these questions Schmitt was trying to give an answer that could be functional to the political needs of Nazi Germany. Very schematically, we can say that his research was oriented towards two directions closely related with each other: the first aimed at overcoming the state perspective by identifying a new legal entity, the *Reich*, and a new spatial dimension, the *Großraum*, and the second devoted to the identification of a nomos, a legal foundational principle, that could not be simply identified with a law, through which establishing a relationship between *Ordnung* and *Ortnung*, ie a real connection between the legal system and its space of validity[7].

In 1950 these lines of research converged in an important book *Der Nomos der Er*de, finally in the spotlights of lawyers and legal historians thanks also a quite recent english translation[8]. However, they already appeared in two lectures given by Schmitt in 1943. The first one was held at the *Instituto de Estudios politicos* of Madrid and dedicated to the *Cambio de estructura del derecho internacional* [9]. A planetary war was under way and its meaning as its goal were very clear to Schmitt. It was at stake the *Nomos* of the earth, that is the fundamental principle of the distribution of the earth's space. Europe, caught between the Anglo-American capitalist imperialism and the Bolsheviks, had to respond to the global challenge that was launched not with sterile regionalist or localist reactions but it had to think itself as different global space. Spain was the starting point. Everything began in Spain and in Spain everything could have a new beginning. The Spanish conquest of a New World and the doctrine of Francisco de Vitoria had brought the scientific and cultural foundation of a new law of nations, producing the first change of the international law structure.

Few years later, after the end of the second World War the nationalistic and ultra-conservative Spain seemed to Schmitt the last bulwark. In a conference with the title *La unidad del mu*ndo, held again in Madrid in 1951, Schmitt expressed his desire for the coming of a «tercera fuerza», India, Europe, the British Commonwealth, the Hispanic World, the Arabian System or one more force that was not yet defined. It could break the «worrying dualism» – between East and West, communism/capitalism, enabling the

[7] Schmöckel, 1994, p. 124 ff.; Galli, 1996, pp. 864-877.

[8] Schmitt, 1950. The book was translated in English by Gl. Ulmen only in 2003.

[9] Schmitt, 1943.

opening of new macro-spatial perspectives and with them making the singling out of a principle for their balance possible[10]. This could lead to a (re) unification of the world and finally to the definition of a new international law. Nevertheless to re-form the unity of the world, also a new Christian philosophy of history was necessary. As new katechon it could overcome the dualism between the Marxist philosophy of history and the weak historical relativism of the capitalistic West trusted on progress and technique. Franco's Spain was the geographical space from which it was possible to start for the reconstruction of the European identity and where Schmitt defeated by history as he was, could find a reason of hope[11].

But let's go back to 1943 and to the second conference. Between 1943 and 1944 Schmitt gave another important speech, not directly concerning international law but strictly connected with his legal project. While Europe was burning he was in tour: Bucarest, Budapest, Madrid, Coimbra, Barcelona finally Leipzig, when the allied Forces had already landed in Normandie. The conference was devoted to *Die Lage der europäischen Rechtswissenschaft* and the polemical object was always the same: the legal postivism, as well as still the same was the main theme, that is the definition of law as *koncrete Ordnung*[12].

But to fight his battle Schmitt, this time enlisted as a new hero, Friederich Carl von Savigny and identified as a new text of reference *Der Beruf von unserer Zeit für Gesetzgebung und Rechtswissenschaft*, the great manifesto against codification written by Savigny in 1814[13]. If we think about it, the reference to Savigny and the celebration of the *Volksgeist* are not so suprising.

The world of Schmitt was collapsing and he saw the last asylum of the law (*Recht*) in science identifying in the jurist the gatekeeper of the rationale foundation of being men. Schmitt writes in the text published two years later that the jurists can not choose the regime and the changing holders of power, but may act as a source of law themselves. The law in fact, as Savigny

[10] Schmitt, 1950-1951.

[11] On the relationship between Schmitt and the Spanish legal historian, Alfonso García Gallo, s. Nuzzo. 2013.

[12] The text was published in German only in the 1950, Schmitt, 1959.

[13] See Bretone, 2003; Garofalo, 2007; Lievens, 2013.

had written, had an organic existence that was determined by the continuity between the past and the present and it was committed to the wise mediation of jurisprudence. In this way its positivity was free from the contingency of a political decision, not depending any more on the arbitrary will of a legislator, but on a metajuridical principle, the principle of necessity.

Schmitt obviously knew that a return to Savigny and the Roman law was impossible because «historical truth is true only once» (p. 73 of Italian translation). But in that moment of crisis Savigny was needed again. The history of European law was a common history based on mutual interactions and influences and the European identity itself had been formed in the relationship between *ius publicum europaeum* and the evolution of the European spirit. To rebuild the European legal identity you had to start from those who that spirit had intercepted and translated into legal concepts by providing an image of the lawyer and law that we continue to face.

At the same time historicism was necessary in order to re-read «in its historical evolution» the Schmitt's (and not Savigny's) idea of the law as a concrete order and to go beyond any empty legal formalism transfiguring the necessity in the sovereign decision. And yet, Savigny was used to retrieve the mythological dimension of law against the technicality of modernity. Not by chance in the introduction to the *Nomos of the Earth* Schmitt draws on Bachofen seeing him as the legitimate heir of Savigny and the historical school. He was the one who had understood that the historicity of Savigny was something else than the archeology and museology, but touched the very essence of legal science.

But there is one last point we have to emphasize because it finally leads us to the *Nomos* and the problem of international law.

Savigny, identifying in the people the original matrix of State and in its consciousness the origin of positive law, could rethink also the nature of international law, introducing an element of complexity into a representation that made its positivity descending from the consuetudinary and conventional character of international law and that consequently limited its efficaciousness to the States involved. Just like the internal law, international law was positive law and its positivity did not depend on the will of a political subject, but referred to a deeper dimension, a common juridical tradition made uniformized by roman law, by «affinity of race» and above all by a common religious background. Racial identity and Christianity

were, therefore, the boundaries of the international community and made it a homogenous space with its own law[14].

The Nomos of the Earth, therefore, does not represent an innovation in Schmitt's production. Mostly it is a systematic reinterpretation of previous works or ideas found in earlier works, as amended with the most embarrassing political and racial references[15].

But following the methodological guidelines outlined in *Die Lage der europäische Rechtswissenschaft*, the *Nomos* opens to the history and although it is not a book of legal history, contains in my view one of the most extraordinary history that has ever been written on international law. A history which, paradoxically, as I said considering Schmitt's positions, can help us to write a critical history of international law, making us see the dark side of Western legal discourse.

As a matter of fact the history of Schmitt described Europe's lost identity under the blows of Kelsen's formalism and legal universalism, whilst taking the relationship between *Ordnung* and *Ortnung* as a narrative archetype, it also expressed the wish of new amity lines and with them the wish for a new nomos and a new process of space subdivision.

The American claims of a new Western hemisphere, the equalization between colonial territories and national territories, the move with the peace conference in Paris from the European order to a universal one, the coming back to a discriminatory concept of war and to the pre-modern identification of enemy and criminal, had produced the dissolution of the inter European State system through which for four hundred years the international relationships were juridically organized. It had its protagonists in territorial States and its pre-condition was the discovery of a new world beyond the Ocean.

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[14] Nuzzo, 2012b.

[15] I think for example in addition to the two texts cited about to some works written at the end of the thirties as *Der Leviathan in der Staatslehre des Thomas Hobbes* (1938); *Völkerrechtliche Großraumordnung Interventionsverbot und für raumfremde Mächte. Ein Beitrag zum Reichsbegriff im Völkerrecht* (1939) or articles of the early forties in 1941 as *Das Meer gegen das Land* (1941) and *Staatliche Souveränität und freies Meer*. *Über den gegensatz von Land und Meer im Völkerrecht der Neuzeit*, whose arguments will return in the most famous *Land und Meer* (1942).

The voyages of Columbus led Europe to know a free and unlimited space that was ready to be textualized and occupied. The Bulls of Alexander VI were the instruments to get these aims. They took back the American territories and the Ocean within a legal text and justified their occupation by the Catholic powers. They fixed with the acts of land taking and land distributing, a «konkrete Ordnung», that is a founding principle to organize the political communities and to justify the positivity of the law (*Recht*).

As it is well known the pope gave the new lands to the Castilian sovereigns in order to spread the word of Christ and let the indigenous population came into contact with the Catholic religion. In this way he attributed a heavy moral obligation to Ferdinando and Isabella and configured a legal title that legitimized the Spanish presence in America in front of the natives as well as the other European powers. At the same time he defined the spatial limits of the Spanish dominion. The line traced one hundred miles west from the Azores and running from the North Pole to South Pole located two different areas. One was reserved to the expansion of the Spaniards, the other could be occupied by the Portuguese, and at the same time, through the opposition with the space of the *respublica christiana*, located the West Indies and marked them as an empty and not qualified spatial territories entity. Europe needed that empty space for its own existence[16].

But the *rajas* of Alexander VIth, according to Schmitt, were not sufficient for the definition of a new *Nomos* of the world. Marked on the Ocean, they did not know its alterity. They had a simply distributive function and presupposed the superior authority of the Pope that assured the unity of the respublica christiana[17].

The definition of a new order needed on the contrary a real revolution in the ordering of territorial spaces. It imposed the overcoming of that unity.

According to Schmitt it was possible only when England entered the game thanks to the a new «militant religion»: Calvinism[18]. The amity lines between England and France that appeared for the first time in a secret clause of the

[16] For a comparative analysis of the Spanish and Portugiese strategies of colonizazion s. Herzog, 2015.

[17] Ruschi, 2012, p. 250 ff.

[18] Schmitt (1997), p. 61.

treaty of Cateau Cambresis, produced the definitive disappearance of a world and defined the structure of the European international law. They ratified the existence of two opposite spaces: one, the European land, realm of law and peace; the other, the Ocean and the still unknown American territories. They were free from law and far from the international treaties, and appeared as real and permanent war theaters. Beyond the line anything could become possible now. Beyond the line there was no more peace and the agreements between European powers had no validity.

Spain and England had therefore taken two completely different choices: the first, defined by Burke as a great whale stranded on European beaches had opted for the land, the second, defined by Schmitt as an island that had become a fish had opted for the Ocean. These choices expressed two different territorial conceptions and two different legal systems, as well as equally different concepts of war and enemy. Schmitt depicted them assuming as an observation point the reflections of Francisco de Vitoria and Alberico Gentili. I can not discuss here the merits of Schmitt's thesis nor analyse both the polemic value of his interpretation about the use made by American jurists, and in particular by James Brown Scott, of the Victorian concept of just war and of enemy between the two world wars, and the ideological exaltation made of De jure belli of Gentili to contrast the Grotian tradition.

I must, however, remember that on the one hand with reference to the concept of occupation of American lands the distance between Vitoria and Gentili is much less than that revealed by Schmitt; on the other hand Schmitt himself, grounding his history of *ius publicum europaeum* on the concept of the *nomos*, pushes us to reconnect the Spanish and the English discourse and locate their lowest common denominator in the conquest.

The conquest and only the conquest allows the identification of a *nomos*, that is a constitutive principle capable of founding a new interstate system and a new global international law. The history of modern international law comes to coincide therefore with the European conquest of the Americas and can be told as a history of territorial occupation, the beginning of which, whatever perspective, we choose, the Spanish or English ones, is necessarily identified with a *landnahme* (land appropriation).

The taking of possession is in fact an *Ur-Akt*, that brings us back to Old testament and Palestina the *Ur-Land*. It is a deeply legal primitive act that is

at the same time free from any legal dimension and able to found a constitutive legal process, a concrete order that is in favour of someone because it is against someone else. Everything always comes from the occupation of the land. Its measurement, division and exploitation allow to define a new *Nomos*, making visible the political and social order of a people and at the same time constitute a radical title that may be validly opposed to anyone else that claims to same tract of land.

Beyond the stereotyped historiographical representations that for a long time polarized English and Spanish discourses on the conquest around the opposing principles of discovery and occupation and to which Schmitt had also contributed, at the foundation of their colonization strategies there is the identical awareness that the production of a new social space needed an efficient definition of the territory. Then there was a need for tracks that could indelibly qualify the membership of the new territories under the authority of the English and Spanish monarchs[19].

On one side clear texts that could connect, without any hesitation or misunderstanding, the land grants in favour of descubridores and pobladores, adventurers and commercial companies, to the graceful and original act of the sovereign; on the other side new practices, new techniques (bureocratic procedure for the distribution of the lands, populations, foundation of towns, cristianization of natives, economic exploitation of the lands) that would allow to fill the territories legally marked by the Castilian or Anglo-Saxon appropriative symbolism, and that would let the earth show forever the signs of the work of the colonists[20].

The pontifical bulls and the letter patents accomplished the first of these tasks.

In the same way of Alexander the Sixth, Elisabeth, assuming the Bulls as a legitimizing model, in her letters brought the right to grant license for exploring and occuping the American lands that were not already in the possession of a Christian prince within her especial grace, certaine science and mere motion. At the same time she identified in the occupation the guiding principle of her expansionist policy. Her polemical statement against the Spaniards is well known, according to which precription without

[19] Pagden, 1995. More focused on the legal aspects Ross, 2008 and Ross, 2013.
[20] Seed, 1996; Nuzzo, 2004.

possession is a little worth, as indeed we must not forget that all the English discourse on the conquest was grounded on the metaphor of planting[21].

In the early texts that tried to legally establish the presence of England in America, the *True Report* of George Peckham, and even more clearly the *Discourse of Western Plainting* by Richard Hakluyt, the British had to plant the seeds of religion and of Anglo-Saxon civilization and, transforming the American possessions with farming and animal husbandry, take possession of the entire American territory[22].

But colonization need also new practices, new forms of governance.

The English procedure of taking possession was completed by other acts, that were simbolically extremely relevant as the ceremonies of the rod and turf (in which Humphrey Gilbert took possession of New James Town in 1583) which expressly recalled the English feudal practices of immission of the new owner in the possession of a fief or a real estate; or others acts that had to transform the space visible as the fence of the occupied territory or building houses on it[23].

The approach is no different even if we look at the Spanish case. If in fact the donation of Alexander VI remains in the arguments of Spanish jurists the most important title for all the seventeenth century, the process of occupation could have been perfect only if the Bulls were followed by the autos de possession en forma and especially by the población of discovered places. The appropriation of American lands followed the paths of memory; recalled the Roman tradition of private law, the jurisprudence of ius commune, Germanic elements, feudal customs, and was based on a model which, although applied to the different geographical areas from time to time absorbed in the Christian legal imaginary, remained faithful to this original archetype[24].

For the Spanish and the English the territories legally marked by appropriative symbology had to be phisically filled, and the land always had to have traces of the work of the colonists. This would enable them to

[21] Tomlins, 2001.

[22] Williams, 1995, p. 151 ff.

[23] Mc Millan, 2006. On the relationship between sovereignty and property in the British imperialistic discourse s. Koskenniemi, 2017, pp. 355-389.

[24] Nuzzo, 2004, p. 114.

overcome that sense of insecurity that the huge American lands produced, and it would have met the promise of economic exploitation that the Indies evoked. Politically this would have dissolved any doubt about who was the new rightful owner in the event that the semiotic system established by the acts of possession and its theological legal prerequisite, the papal donation or the letters patent, were not understood nor accepted.

Three hundred years later another conquest *showed Schmitt the last great victory of ius publicum europaeum* and at the same time the beginning of its dissolution.

Between 1884 and 1885 the European powers and the United States met in Berlin in order to find a solution to the problems brought about by the scramble for Africa. Civilization as well as progress were the basis of the new European expansionist policy, the new values fit to transform a conquest into a mission[25].

By these aspects the signatory powers were able to express both the desire to identify the most favorable conditions for the development of trade and the guardianship of natives in a spirit of mutual cooperation, and the commitment aimed at defining the mode of acquiring and dividing the African continent, liberating, with the same spirit of mutual cooperation, the appropriate drive of Western foreign policy from any constitutional brake.

It being understood that all the nations involved had to fight slavery and to guarantee the natives as well as the European freedom of conscience and religious tolerance, they had essentially two aims: support the free trade; define the juridical regime of the African territories not yet occupied by the European powers.

Thus on one hand they stated the navigability of the Congo and Niger rivers and the neutrality of the territories along them. On the other hand they identified the principle of effectiveness as the criterion that should be used in the disputes on the future acquisitions of territories belonging to populations with different faith or a civilization considered inferior. At the same time, the lack of a state sovereignty exercised on a determined territory was considered the precondition that would legitimize those acquisitions.

[25] Koskenniemi, 2001, p. 121.

In Berlin the issue was to define whether the African territories could be considered as *res nullius*.

Vitoria, Gentili, but also Locke, Grozio and even Vattel could not help much the international lawyers of the end of the XIX century. If a deficit of sovereignty was the precondition to occupy a territory and no longer (or not only) the fact that it was not inhabited or economically used, it was necessary to separate the private law from the public law level. Only in this way it would be possible to sustain that the same one territory would be the object of a different evaluation according to the point of observation chosen, and accept that on the same place, at the same moment, a right of property might be exercised, but not a right of sovereignty.

The natives might have the right of property on the territories they occupy, but they do not have the right of exercise (according to Western standards) a sovereign power on their territory. They could not be considered States and a international subjectivity could not be recognized to them.

Nevertheless when they had to sell their lands, sign a treaty of protectorare or assist to an act of taking possession, were qualified as State enjoing full sovereignty (with great embarassement of the Western jurist) [26].

Also in this case, as already had happened for the American continent, Schmitt was interested in the conquest and not in the people conquered. But in any case his analysis focusing on the spatial dimension of international law has the advantage of letting us see the constant and deep link between international law and colonialism. Through the acknowledgement of the centrality of the appropriation process for the definition of a nomos, the conquest of the American continent can be thought togheter with the one of the African continent within a same legal framework.

I once again want to point out that this was not Schmitt's aim, since he was interested in analyzing how the last great act of European public interstate law revealed clear signs of a crisis without solution where the main responsible actors were the United States which in 1884 recognized the flag of the international Society of Congo even if it was not a State.

But as I said at the beginning of this paper my aim was to use Schmitt against Schmitt and against all those representations that hide the violence

[26] Nuzzo, 2017.

of the Western colonial project, behind refined geometrics of legal systems or conceptual forms.

So let's take Schmitt seriously and follow the logic of *Nomos*.

This allows us to discover that there are several threads that link the American and the African continents. Just think of the relationship between private law and public law, property/sovereignty I spoke of before and that in XVIIIth century America can be observed in the polemic use of the occupation of native territory by Anglo-American colonizers in order to claim rights of propriety and an autonomous politic space from the Crown; the official recognition of the principle of effective occupation by Spain with the Nootka convention (1790); and along with this the return to the principle of the original discovery by the jurisprudence of the American supreme court led by Madison (to whom we also own the introduction into the modern colonial discourse of the image of the ward inside a topic aimed at the identification of the native Americans as domestic dependant nations); or still the great controversy on Oregon starting in XVIII and ending only in 1846 to which the first work by Traver Twiss, one of the main charachter of the discussion on African territory, is dedicated[27].

But most of all Schmitt and his *Nomos* make possible to see the close link between the pre-modern colonial world and the modern one. The conquest of the American continent was not only a filter through which every colonial experience could be seen but, more generally, it reflects the way the relationship with the non-Western territories and non Western people could be thought of. It allowed the Western lawyers to build a discourse that rhetorically was grounded on their diversity, specialty or exceptionality that justified a return to the ancient regime, that is a normative regime, equally different, special and exceptional. It was a regime characterized by the principle of personality of the law in which the rules and the exceptions, rights and privileges, iura and facta were placed one upon the other until they became undistinguishable.

The capitulations, the settlements and the concessions in the East and the Far East, the introduction of the concept of hinterland or the sphere of influence, the transformations suffered by the protectorate in its transplant into Africa, the regime of mandates resorted to after the First World War

[27] Twiss, 1846; Fizmaurice, 2014, p. 209 ff.

and finally and more generally the distortions of the concept of sovereignty outside the borders of the West, were all severe and clear vulnus regarding international law. At the same time for the more sensitive lawyers they were also a sign of great energy forcing them to find solutions able to satisfy the needs of social life, legitimating both the organization of power free from the Rule of Law and the construction of a new law.

As a matter of fact international law was no longer the discipline where such solutions could be found. After the great theoretical discussion about the occupation of Subsaharian Africa that marked the legal debate at the end of the XIX century, the colonial issues started to leave silently the sphere of interest of international lawyers and together with the positivistic turn at the beginning of the new century, they entered the horizon of constitutional and administrative lawyers, and ministerial bureaucracy.

And so Western colonialism asked them the most embarrassing questions, threatening the unitary representation of the state legal system.

What were these territories? were they part of the metropolitan territory? which was the legal status of the people who lived there considering that through the filter of Western evaluation standards those territories could not be considered States for a deficit of sovereignty nor had they an international subjectivity?

The German lawyers proposed a paradoxical, but refined solution imagining that the African possessions where at the same time inside and outside the Empire, «völkerrechtlich Inland und staatsrechtlich Ausland»[28]. They were, therefore, subjected to the territorial sovereignty of the Empire, but were not territories of the Empire. In other words the metropolitan and the colonial territories had a different nature. But this difference mattered only within public law since for international law they both were both subjected to the State's exclusive sovereignty.

The overcoming of the principle of unity of the State territory thus did not mean to bring into question the exercise of a right of sovereignty, but only that the state exercises a different right on the metropolitan and the colonial territory. This is very well explained by an Italian lawyer, Romano, who assigned to the State the capability of assuming different forms according to the national or colonial space where it was about to act. In the first case the

[28] Bornhak, 1887, p. 9.

State acted in accordance with the separation of powers and the Rule of Law exercising on its territory a «special right», a subjective right on its own person. In the colony, on the contrary it assumed the feature of the «Ancient Regime State», that is the form of State that existed before the constitutional State exercising on the territory a right in rem with a public law nature. This meant in other words that within the metropolitan borders the territory was an essential, intrinsic element of the State – the State founded its existence and identified itself with it and therefore exercised a personal right over its own territory. In the colony this identification did not work, and the relationship between State and territory was again, in an analogy with private law, «an exclusive and complete domain of a subject on a material thing», allowing the State to exercise a right in rem over the colony[29].

In the same way in which the colonial territory was included as a difference inside the European legal space through the building of a transtemporary unit between pre-modern past and the colonial present, also its inhabitants were absorbed into the legal system of the State as another part of the metropolitan subject. Their absolute otherness, determined by racial differences and an unfillable cultural backwardness, allowed the overcoming of the principle of the territoriality of the law and the unicity of the legal subject, but never reaches the point of breaking a unitarian representation of the legal system. Confined together with the territory they inhabited in a time different to the one of the motherland their status could not be defined by constitutional law. At the time they had to live there was no constitution, there were no individuals, no rights but a family system dominated by the figure of the father and in which privileges and exemptions could be obtained only through a status. As matter of fact in premodern Europe only referring on the authority of the Father and his Law, that is only inside the disciplinant family relation, man, woman, child and servants could assume a status and be legally identified.

Outside the family and its disciplinary technologies there was no possibility to grow, to have access to any status and therefore to any form of institutionally recognized existence[30].

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[29] Nuzzo, 2012a, p. 271 ff.

[30] Costa, 1999, p. 36 ff.

Being it impossible to be real citizens and at the same time to be considered strangers, for them there was no other possibility than being qualified as colonial subjects. It was a definition in which the meaning of subject recalls the semantic of the Latin word subjectus that is of a person subjected to the authority of a father and of a law, to the authority of the colonizers and their legal administrative apparatus.

The incivility and backwardness of the African people didn't leave a way out and opened a normative circuit invented expressly for them. As a matter of fact a new law was destined to them, the colonial law, the theoretical premises of which, as we have seen, were not so new. It was a heterogeneous law due to the multiplicity of its elements and the diversity of its sources where there was no place for the rigid submission of the judge to the law, the law itself lost its quality of abstractness and generality as well as the principle of legal certainty did no longer work[31].

But above all it was a law mainly subtracted to parliamentary control and entrusted to the executive power and to the arbitrium of the colonial judicature. It had to regulate different normative levels proceeding towards the integration of different legal sources and the substantial sterilization (this is a Reinsch's terrible term) of the native law by translating/codifying it, by the filter of Christian morality and the public order[32].

In the representations offered by European lawyers between the XIXth and XXth century the natives seemed to be condemned to move along the border, to live in the uncertainty of a threshold, the legal and symbolic political line that divided and unified metropolis and colony and their different temporality. This border could however be crossed only very seldom: the naturalization was a dream very difficult to be realized and the natives seemed to live in Kafka's novel Before the law where there was a man from the country who spend his entire life hoping to enter the open door of the law but he was able only to see its light.

Anyhow may we trust in what the lawyers tell us? may we accept their representations? and how can we react to Schmitt's ultrapolitics, to his depoliticisization of international law through its militarization ?

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[31] Durand, 2014.

[32] Reinsch, 1902, p. 347.

Telling with Schmitt the history of international law as a history of territorial occupation allowed us to overcome the dialectic relation between inside and outside; metropolis and colony, we and the others, that was the premise of his reflection. Inside and outside are both inside the law. There is no outside of the law. Paradoxically his realism, his theory of nomos, let us see the paradox of the origin of law. In other words the law has no foundation outside the appropriative violence of the nomos. Behind the law there is therefore the void and this void, as Jacques Derrida wrote in accordance with Benjamin, is called violence[33].

Violence is a constituent element of the law. It is the other side of the law itself and it is indissolubly united to it. Recht and Un-Recht (right and wrong) are therefore together, but in order to function, as binary code of a social system as law is, their unity has to be hidden, has to disappear[34]. In order to be law the law must represent the violence of conquest as something that is outside the law; it must describe the colonized as negation and in this way construct the identity of the colonizer on the basis of the denied identity of the colonized; it can be imagined the existence of an international community grounded on a set of shared values as well as an international law that positively translates them because outside it there are heterogeneous communities unable to understand those values (and translate them legally); finally it may invent the exceptional normality of colonial law to consider the exception as the utmost hypothesis of the metropolitan legal system in order to suspend its constitutional asset and open the legal system itself to the violence of decision or of necessity.

At the beginning of this paper we asked if it was possible to appropriate the European legal tradition with the aim to write a decolonized history of international law. Finally I think that the question sends back to another, even more embarrassing question: can criticism be a criticism of itself?

Only a positive answer allows to write a conscious decolonized history of international law without recurring to ingenuous displacements in the research of a point of observation from a non-existing outside. And, for me, a positive answer is possible when the universal reason leaves place to an

[33] Derrida, 1992; Fögen, 2006, p. 99; Nuzzo, 2008, pp. 83-87.
[34] Luhmann, 1997, 1, p. 92 ff.

autocritic and ironic reason that incessantly deconstructs and reconstructs the European tradition without any founding claim.

BIBLIOGRAPHY:

Anghie A., 2005: *Imperialism, Sovereignity and the Making of International Law*, Cambridge, CUP

Becker Lorca A., 2014: *Mestizo International Law. A Global Intellectual History*, Cambridge, CUP

Bornhak C., 1887: *Die Anfänge des deutschen Kolonialstaatsrechts*, in "Archiv für öffentliches Recht", 2, pp. 1-53

Bretone M., 2003: *L'anatra giuridica. Meditazione sul diritto romano tra Savigny e Schmitt*, in "Materiali per una storia della cultura giuridica", 33,1, pp. 127-149

Carloni S., 2008: *Dal Grossraum al Nomos der Erde e retour: il pensiero internazionalistico di Carl Schmitt*, in "Rivista di filosofia del diritto", 85, 1, pp. 51-91

Carty A., 1995: *Inter-War German Theories of International Law: Hans Kelsen and Carl Schmitt. Some Psychoanalytical and Phenomenological Perspectives*, in "Cardozo Law Review", 16, pp. 1235-95;

Carty A., 2001, *Carl Schmitt's Critique of Liberal International Legal Order Between 1933 and 1945*, in "Leiden Journal of International Law", pp. 14, 25-76

Costa P., 1999: *Civitas. Storia della cittadinza in Europa*, vol. 1*., Dalla civiltà comunale al Settecento*, Roma-Bari, Laterza

Dabashi H., 2013: *Can Non-Europeans Think?* in "Al Jazeera", 15, 1, 2013

Dabashi H., 2015: *Can Non-Europeans Think?,* London, Zed Books

Derrida Jaques, 1992: *Force of Law: The "Mystical Foundation of Autority*, in L. Cornell et al., *Deconstruction and the possibility of Justice*, New York-London, Routledge, pp. 3-67

Durand B., 2014: *Introduction historique au droit colonial*, Paris, Economica

Fögen, M.T., 2006: *Das Lied vom Gesetz*, München, Carl Friedrich von Siemens Stiftung

Fitzmaurice, A., 2014, *Sovereignty, Property and Empire, 1500-2000*, Cambridge, CUP

Galli C., 1996: *Genealogia della poitica. Carl Schmitt e la crisi del pensiero politico moderno*, Bologna, Il Mulino

Garofalo L., 2007: *Carl Schmitt e la Wissenschaft des römischen Rechts. Saggio su un cantore della scienza giuridica europea*, in "Anuario da facultade de dereito de Universidade de Coruña", 11, pp. 299-323

Herzog T., 2015: *Frontiers of Possession. Spain and Portugal in Europe and Americas*, Cambridge, CUP

Howse R., 2016: *Schmitt, Schmitteanism and Contemporary International Legal Theory*, in A. Orford et al. (eds.) *The Oxford Handbook of the Theory of International Law*, Oxford, OUP, pp. 212-231

Koskenniemi M.: 2001: *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870-1960*, Cambridge, CUP

Koskenniemi M., 2004: *International Law as Political Theology. How to read the Nomos der Erde ?*, in "Costellations", 11, 4, pp. 492-511

Koskenniemi M., 20017: *Sovereignty, Property, Empire: Early Modern English Contexts*, in "Theoretical Inquires in Law", 18, pp. 355-389

Lievens M., 2013, *Carl Schmitt's Concept of History*, in J. Meierhenrich and S. Oliver (eds.), *The Oxford Handbook of Carl Schmitt*, Oxford, OUP, pp. 401-425

Luhmann N., 1997: *Die Gesellschaft der Gesellschaft*, Frankfurt am Main, Surkamp, 2 Bände

Mahbubani K., 2009: *Can Asian Think?*, Singapore, Marshall Cavendish

Maschke G. (hrsg.), 1995: *Staat, Großraum, Nomos. Arbeiten aus den Jahren 1916-1969*, Berlin, Duncker & Humblot

Mc Millan S., 2006: *Sovereignty and Possession in the English New World. The Legal Foundations of Empire*, 1576–164, Cambridge, CUP

Minca, C., Rowan, R., 2016: *On Schmitt and Space*, London, Routledge

Mignolo W., 2013: *Yes, we can: Non-European Thinkers and Philosophers*, in "Al Jazeera", 19, 2, 2013

Nuzzo Luciano, 2008: *Le anticamere del diritto. Ordine politico ed eclissi della forma giuridica*, Lecce, Pensa

Nuzzo Luigi, 2004: *Il linguaggio giuridico della conquista. Strategie di controllo nelle Indie spagnole*, Napoli, Jovene

Nuzzo Luigi, 2012a: *Alle origini di una scienza. Diritto internazionale e colonialismo nel XIX secolo*, Frankfurt am Main, Klostermann

Nuzzo Luigi, 2012b: *History, Science and Religion. International Law and the Savigny's Paradigm*, in L. Nuzzo and M. Vec (eds.), *Constructing International Law. The Birth of a Discipline*, Frankfurt am Main, Klostermann, pp. 25-50

Nuzzo Luigi, 2015: *Between America and Europe. The Strange case of Derecho Indiano*, in T. Duve, H. Pihlajamäki (eds.), *New Horizons in Colonial Spanish Law. Contributions to transnational Early Modern Legal History*, Frankfurt am Main, Max Planck Institut for European Legal History, pp. 161-192

Nuzzo Luigi, 2017: *Territory, Sovereignty and the Construction of Colonial Space*, in: M. Koskenniemi et alii (eds.), *International Law and Empire. Historical Explorations*, Oxford, OUP, pp. 263-292

Pagden A.,1995: *Lords of All the World: Ideologies of Empire in Spain, Britain and France, c.1500 – c.1800*, New Haven, Yale University Press

Reinsch P. S., 1902: *Colonial Government. An Introduction to the Study of Colonial Institutions*, New York, Free Port

Ross R., 2008: *Legal Communications and Imperial Governance: British North America and Spanish America Compared*, in C. Tomlins and M. Grossberg (eds.), *The Cambridge History of Law in America*, vol. 1, *Early America (1580-1815)*, Cambridge, CUP, pp.104-143

Ross R., 2015: *Spanish American and British American Law as Mirrors to Each Other: Implications of the Missing Derecho Británico Indiano*, in T. Duve Thomas and H. Pihlajamäki (eds.), *New Horizons in Colonial Spanish Law. Contributions to transnational Early Modern Legal History*, Frankfurt am Main, Max Planck Institut for European Legal History, pp. 9-28

Ruschi F., 2012: *Questioni di spazio. La terra, il mare e il diritto secondo Carl Schmitt*, Torino, Giappichelli

Schmitt C.,1925: *Der 'status quo' und der Friede*, in C. Schmitt (1940), *Positionen und Begriffe im Kampf mit Weimar, Genf, Versailles*, Hamburg, Hanseatische Verlagsanstalt, pp. 33-42;

Schmitt C., 1926: *Die Kernfrage des Völkerbundes*, in: C. Schmitt (2005), *Frieden oder Pazifismus ? Arbeiten zum Völkerrecht und zur internationalen Politik 1924-1978*, Maschke Günter (Hg) Berlin, Duncker & Humblot, pp. 73-128.

Schmitt C., 1943: *Strukturwandel des Internationalen Rechts*, in C. Schmitt (2005), pp. 652-670

Schmitt C., 1950-1951: *La unidad del Mundo*, in "Anales de la Universidad de Murcia", 9, pp. 343-355

Schmitt C., 1950: *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum*, Köln, Greven Verlag

Schmitt C., 1959: *Die Lage der europäischen Rechtswissenschaft*, in C. Schmitt (1985), *Verfassungsrechtliche Aufsätze aus den Jahren 1924-1958. Materialien zu einer Verffasungslehre*, Berlin, Duncker & Humblot, pp. 386-429

Schmitt C., 1995: *Staat, Grossraum, Nomos. Arbeiten aus den Jahren 1916-1969*, G. Maschke (Hg) Berlin, Duncker & Humblot

Schmöckel M. 1994: *Die Grossraumtheorie. Ein Beitrag zur Geschichte der Völkerrechtswissenschaft im Dritten Reich, insbesondere der Kriegszeit*, Berlin, Duncker & Humblot

Seed Patricia, 1996: *Ceremonies of Possession in Europe's Conquest of the New World, 1492-1640* Cambridge, CUP

Tomlins C., 2001: *The Legal Cartography of Colonization, the Legal Polyphony of Settlement: English Intrusions on the American Mainland in the Seventeenth Century*, in "Law and Social Inquiry", 26, 2, pp. 315-372

Twiss T. 1846, *The Oregon Question Examined in Respect to Facts and the Law of Nations*, London

William R. Jr., 1990: *The American Indian in Western Legal Thought. The Discourses of Conquest*, Oxford, OUP

Zabala S., 2012, *Slavoj Zizek and the Role of the Philosopher*, in "Al Jazeera", 25,12, 2012

Žižek S.,1998: *Leftist plea for Eurocentrism*, in "Critical Inquiry", 24, pp. 988-1009.