On Global Constitutionalism's Philosophical and Biopolitical Significance: The Case of Implied Legal Principles and Rules

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Global constitutionalism is a scholarly agenda characterized by a positive and normative component—the former taking the form of positive inquiry, the latter of normative thinking. Delving into this double-feature essence, this Article argues that global constitutionalism has a philosophical and biopolitical significance that escapes the rationalist purview of positive analysis. For the very same reason, however, an engagement with this "surplus" might benefit its normative potential. The Article shows this by drawing from the view which understands phenomenology as the negative (i.e., normative and non-positive) analytical method of philosophy conceived as ontology. More particularly, it shows that globalist discourse's philosophical and biopolitical significance can be grasped through a postnational phenomenology of authority and sovereignty's supra-logical negativity centred around the functioning of implied (i.e., negative and non-posited) legal principles and rules on the global and transnational scale. Using global constitutionalism's "domestic analogy" against itself, it sets out the conditions under which the operativity of such provisions creates a postnational "space" in which the modern secularisation of naked/bare life and political/public existence that Giorgio Agamben assigns to the negativity of the modern nation-state's constituting process recurs.

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Talking about Nothing is illogical.[1]

I. INTRODUCTION

In the words of Anne Peters,

> Global constitutionalism is an intellectual movement which both reconstructs some features and functions of international law (in the interplay with domestic law) as 'constitutional' and even 'constitutionalist' (positive analysis), and also seeks to provide arguments for their further development in a specific direction (normative analysis). The function of constitutional law normally is to found, to organize, to integrate and to stabilize a political community, to contain political power, to provide normative guidance, and to regulate the governance activities of law-making, law application, and law-enforcement. The desired constitutionalist elements are notably the rule of law, containment of political and possibly economic power through checks and balances, fundamental rights protection, accountability, democracy (or proxies such as participation, inclusion, deliberation, and transparency), and solidarity.[2]

What emerges from Peters's account is that global constitutionalism is a highly interdisciplinary scholarly agenda rather than a discipline of law in the strict sense of the term.[3] Further, Peters's definition makes it

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1. MARTIN HEIDEGGER, INTRODUCTION TO METAPHYSICS 25 (Gregory Fried & Richard Polt trans., 2000) [hereinafter HEIDEGGER, INTRODUCTION].

2. Anne Peters, *Constitutional Fragments: On the Interaction of Constitutionalization and Fragmentation in International Law* 11-12 (Ctr. for Glob. Constitutionalism, Working Paper No. 2, 2015), http://ssrn.com/abstract=2591370 [hereinafter Peters, *Constitutional Fragments*]; *see also* Anne Peters, *Global Constitutionalism*, MAX PLANCK INST., http://www.mpil.de/en/pub/research/areas/public-international-law/global-constitutionalism.cfm (last visited Sept. 16, 2017).

3. *See* JAN KLABBERS ET AL., THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW (2009); Anne Peters, *Global Constitutionalism*, *in* THE ENCYCLOPEDIA OF POLITICAL THOUGHT 1484-87 (Michael Gibbons et al. eds., 1st ed. 2015); David Held & Anthony McGrew, *Introduction*, *in* GOVERNING GLOBALIZATION: POWER, AUTHORITY AND GLOBAL GOVERNANCE 2 (David Held & Anthony McGrew eds., 2002); Christine Bell, *What We Talk About When We Talk About International Constitutional Law*, 5 TRANSNAT'L LEGAL THEORY 241, 243 (2014); Mattias Kumm, *The Legitimacy of International Law: A Constitutionalist Framework of Analysis*, 15 EUR. J. INT'L L. 907, 926 (2004); Anthony F. Lang Jr. et al., Editorial, *Interdisciplinary: Challenges and Opportunities*, 2 GLOBAL CONSTITUTIONALISM 1, 3 (2013); Aoife O'Donoghue, *International Constitutionalism and the State*, 11 INT'L J. CONST. L. 1021, 1021-23 (2013); Anne Peters, *The Merits of Global Constitutionalism*, 16 IND. J. GLOBAL LEGAL STUD. 397, 402 (2009).

clear that global constitutional discourse is characterized by a positive and normative component—the former taking the form of positive inquiry, the latter of normative thinking. Delving into this double-feature essence, I argue that global constitutionalism has a philosophical and bio-political significance that escapes the rationalist reach of positive analysis. If properly identified and addressed, however, this negative "surplus" might benefit global constitutionalism's "normative potential."[4]

Admittedly, global constitutionalism's philosophical and bio-political essence may be explored from several perspectives of inquiry. This Article suggests a possible pattern, namely, a postnational phenomenology of authority and sovereignty's negativity centered around a philosophical and bio-political assessment of implied legal principles and rules. This is done by drawing from the view that understands phenomenology as the negative (i.e., normative and non-positive) analytical method of philosophy conceived as ontology.[5] In particular, this Article shows that globalist discourse's philosophical and biopolitical significance can be grasped through a postnational phenomenology of authority and sovereignty's supra-logical negativity centred around the functioning of implied (i.e., negative and non-posited) legal principles and rules on the global and transnational scale.[6] Further, using global constitutionalism's "domestic analogy" against itself, it sets out the conditions under which the operativity of implied provisions can create a postnational "space" in which the modern secularisation of naked/bare life and political/public existence that Giorgio Agamben assigns to the negativity of the modern nation-state's constituting process recurs.

More specifically, the project that I propose here is to delve into the supra-logical, negative locus of authority and sovereignty by comparing the negativity of the modern constitutional project as described by Agamben to that which characterises the functioning of non-posited

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4. Antje Wiener et al., Editorial, *Global Constitutionalism: Human Rights, Democracy and the Rule of Law*, 1 GLOBAL CONSTITUTIONALISM 1, 2 (2012).

5. *See* MARTIN HEIDEGGER, THE BASIC PROBLEMS OF PHENOMENOLOGY 2 (Albert Hofstader trans., Ind. Univ. Press 1982) (1975) [hereinafter HEIDEGGER, BASIC PROBLEMS].

6. *See* BEYOND TERRITORIALITY: TRANSNATIONAL LEGAL AUTHORITY IN AN AGE OF GLOBALIZATION (Gunther Handl et al. eds., 2012) [hereinafter BEYOND TERRITORIALITY]; TRANSNATIONAL GOVERNANCE: EMERGING MODELS OF GLOBAL LEGAL REGULATION (Michael Head et al. eds., 2012); WILLIAM TWINING, GENERAL JURISPRUDENCE: UNDERSTANDING LAW FROM A GLOBAL PERSPECTIVE 22 (2009); NEIL WALKER, INTIMATIONS OF GLOBAL LAW 145 (2014); Roger Cotterrell, *What Is Transnational Law?*, 37 LAW & SOC. INQUIRY 500, 504 (2012); Gunther Teubner, *Transnational Economic Constitutionalism in the Variates of Capitalism*, 2 ITALIAN L.J. 219, 232-33 (2015); Peer Zumbansen, *Why Global Law Is Transnational: Remarks on the Symposium Around William Twining's Montesquieu Lecture*, 4 TRANSNAT'L LEGAL THEORY 463, 472 (2013) [hereinafter Zumbansen, *Symposium*].

norms in the global and transnational spheres. The aim is twofold. First, to show that authority and sovereignty's relationship with action renders them logically incomprehensible. Secondly, to show the importance for global constitutionalists of determining whether the performativity of such norms creates a "space"[7] in which the modern secularisation of naked/bare life and political/public existence described by Agamben recurs in the postnational dimension. The argument pursued by this Article is that this may in fact occur but only if certain conditions, which Agamben does not identify, are met. In the following pages it will indeed be seen that the biopolitical consequences that Agamben assigns to the formation of the modern nation-state recur in the postnational dimension every time the functioning of implied norms manifests itself as an expression of power, behaviour, and governance. To understand this, one needs to investigate anew the antitheses "action v. behaviour," "authority/sovereignty v. power," and "government v governance" from a phenomenological perspective of inquiry.

The early Martin Heidegger described phenomenology as the non-positive, analytical method of philosophy conceived as ontology.[8] Here, "ontology" means a peculiar form of thinking concerned with the "whatness" and "howness" of beings and phenomena. Drawing from this view, Steven Crowell maintained that all phenomenology is essentially *normative*.[9] This is due to the way in which the phenomenological process operates: the various meanings are disclosed to the subject through her response to the claims that are revealed by, and apprehended through, the process itself.[10] In sharing both views, I am of the further opinion that phenomenology's normativity reaches its zenith in the case of normative reasoning, that is, in a form of thinking in which the

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7. *See* SASKIA SASSEN, TERRITORY, AUTHORITY, RIGHTS: FROM MEDIEVAL TO GLOBAL ASSEMBLAGES 374, 383-84 (2006); Alexander Somek, *On Cosmopolitan Self-Determination*, 1 GLOBAL CONSTITUTIONALISM 405, 409, 412 (2012); Peer Zumbansen, *Comparative, Global and Transnational Constitutionalism: The Emergence of a Transnational Legal-Pluralist Order*, 1 GLOBAL CONSTITUTIONALISM 16, 22-23 (2012); Zumbansen, *Symposium*, *supra* note 6; *see generally* BEYOND TERRITORIALITY, *supra* note 6, Mathias Risse, *Taking Up Space on Earth: Theorizing Territorial Rights, the Justification of States and Immigration from a Global Standpoint*, 4 GLOBAL CONSTITUTIONALISM 81, 97 (2015).

8. GIORGIO AGAMBEN, THE USE OF BODIES 111 (Adam Kotso trans., 2016) [hereinafter AGAMBEN, BODIES].

9. *See* STEVEN CROWELL, NORMATIVITY AND PHENOMENOLOGY IN HUSSERL AND HEIDEGGER (2013). Consequently, the proposed analysis cannot be inscribed within the evaluative purview of "normative legal theory"—a term that refers to a field of study that is aimed at determining how law "ought to be" and does not concern itself with phenomenological questions. *See* Adrian Vermeule, *Connecting Positive and Normative Legal Theory*, 10 U. PENN. J. CONST. L. 387 (2007).

10. Vermeule, *supra* note 9, at 290.

normative essence of such claims is dependent on the *regulative* scope of our theoretical effort.

In this sense, the proposed phenomenological account of the way implied provisions operate is truly ontological. This is due to the fact that it transcends global constitutionalism's positive boundaries to enhance its normative potential. As such, it may be considered part of transnational (and global) legal scholars' renewed interest in "the 'ontology' of norms."[11] The present contribution does not, however, engage with this topic extensively. Rather, it simply introduces the need for the suggested study by outlining the reflections that have led me to conceive of it. Such a topic deserves extended treatment—certainly greater than can be provided here. As this paper is part of a larger project on the philosophical and biopolitical limits of positive analysis in global constitutionalism, it is hoped that what will be expounded in the following pages will initiate a communal effort from which academic debate may ultimately benefit.

Clearly, dealing with such multi-featured terms as "implied," "principle," and "rule" requires prudence, and the very nature of the philosophical and biopolitical engagement advocated here also needs to be properly defined. Hence, the theoretical and practical ambit of our concern will be delimited throughout the Article by unfolding a few, fundamental definitions and antitheses without which the call it makes cannot be heard (and eventually criticized).

What primarily requires clarification at this introductory stage, however, is that a phenomenological study of non-posited provisions can only serve to grasp global constitutionalism's philosophical and biopolitical significance if it also addresses the functioning of implied powers. The reason for this should be obvious: if a power is not explicitly regulated, it might well be that there is somewhere an implied legal principle or rule that either allows or prohibits its exercise. As Nico Krisch noted, this aspect is particularly relevant for the functioning of all those "transnational government networks which typically operate without a formal basis altogether."[12] Hence, it comes as no surprise that the exercise of implied powers by international organizations and judicial

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11 Dennis Patterson, *Transnational Governance Regimes, in* INTERNATIONAL LEGAL POSITIVISM IN A POST-MODERN WORLD 401, 415 (2014).

12. NICO KRISCH, BEYOND CONSTITUTIONALISM: THE PLURALIST STRUCTURE OF POSTNATIONAL LAW 18 (2010).

bodies has received considerable attention in public international law scholarship.[13]

Constitutionalists too have inquired into this matter at length, paying particular attention to the written and unwritten dimensions of fundamental charters. It is indeed usually accepted that certain powers and rights are granted and recognized by national constitutions in an implied way.[14] Common examples are the non-regulated, and yet tolerated, consuetudinary practices of institutional actors such as legislative bodies, or the lack of an express protection of the freedom of expression in the Australian Constitution and the Israeli basic laws on human rights.[15]

The similarity between the international and national spheres on this point poses the preliminary question as to whether the presence of silent normative phenomena at the global and transnational level ought to be considered as part of the dialectic between constitutional law and international law (and their shared positivist uncertainties[16]). I would suggest that this is not the case for two reasons. First, there is no analytically discernible correlation between the legitimacy and functioning of non-posited provisions at the national, international, transnational, and global levels. Secondly, it would be unproductive to inquire into the global and transnational matter of our concern by merely relying on the positivist conceptualisation that distinguishes between the

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13. *See* U.N. Charter art. 38, ¶ 1(b); JAN KLABBERS, AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW 60-81 (2002); DAN SAROOSHI, INTERNATIONAL ORGANIZATIONS AND THEIR EXERCISE OF SOVEREIGN POWERS 19-25 (2007); Dapo Akande, *The Competence of International Organizations and the Advisory Jurisdiction of the International Court of Justice*, 9 EUR. J. INT'L L. 437, 444-46 (1998); A.I.L. Campbell, Comment, *The Limits of the Powers of International Organisations*, 32 INT'L & COMP. L.Q. 500, 523-24 (1983); Jan Klabbers, *The Emergence of Functionalism in International Institutional Law: Colonial Inspirations*, 25 EUR. J. INT'L L. 645, 669 (2014); Niels Blokker, *Is the Authorization Authorized? Powers and Practice of the UN Security Council To Authorize the Use of Force by 'Coalitions of the Able and Willing,'* 11 EUR. J. INT'L L. 541, 542 (2000); Niels M. Blokker, *International Organizations or Institutions, Implied Powers*, OXFORD PUB. INT'L L. [OPIL] (Apr. 2009), http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e467; Karin Oellers-Frahm, *Judgments of International Courts and Tribunals, Interpretation of*, OPIL (Apr. 2013), http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e51; Thilo Rensmann, *International Organizations or Institutions, External Relations and Co-operation*, OPIL (Mar. 2009), http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1710; Kirsten Schmalenbach, *International Organizations or Institutions, General Aspects*, OPIL (July 2014), http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e499.

14. *See* COSTANTINO MORTATI, LA COSTITUZIONE IN SENSO MATERIALE (1940).

15. *See id.*; DAVID J. BEDERMAN, CUSTOM AS A SOURCE OF LAW 101-10 (2010).

16. Jack Goldsmith & Daryl J. Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791, 1801-02 (2009).

international and national spheres in an epoch such as ours, of pluralist and highly fragmented regulative phenomena.

From this it follows that a phenomenology of authority and sovereignty centered around the functioning of implied norms in the postnational dimension moves well beyond the boundaries of a mere legalistic understanding of customary constitutional and international law. More specifically, it requires us to abandon the "constitutional law/international law" axis in its entirety and reach the broader horizon of the "national/postnational" dualism that shapes the globalist imaginary. In other words, the path we are about to embark upon forces us to reconsider the perspectives from, and methodologies through which, we have come to form our insights into the "domestic analogy" that underpins the postnational dimension—and which, not coincidentally, philosophers and biopolitical theorists such as Michael Hardt and Antonio Negri vehemently criticise when describing global constitutionalism as "Lockean."[17]

A note of caution is, at this point, necessary. As discussed, the premise of the proposed account of implied provisions' negativity is Heideggerian, i.e., for present purposes phenomenology is understood as the analytic method of philosophy conceived as ontology.[18] More will be said about this in Part III below. For now it suffices to point out that the suggested movement from positive inquiry to normative thinking as negative, supra-logical reasoning requires us to depart from conceptual-metaphysical thinking. This might sound puzzling to some (if not many), particularly with respect to the peculiar use of the term "analytic" in the Western Legal Tradition and its association with positivist theories of law on the one hand, and philosophical reflections on the other. Thus Brian Z. Tamanaha writes that "[a]nalytical jurisprudence takes a *conceptual* or *analytical* angle."[19] Further, Tamanaha notes, "legal positivism [is rooted] in analytical philosophy."[20] Hence, my attempt to establish form of

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17. *See* MICHAEL HARDT & ANTONIO NEGRI, EMPIRE 7 (2000) [hereinafter HARDT & NEGRI, EMPIRE]. Similarly, but arguing from a socio-legal point of view, see CHRIS THORNHILL, A SOCIOLOGY OF TRANSNATIONAL CONSTITUTIONS: SOCIAL FOUNDATIONS OF THE POST-NATIONAL LEGAL STRUCTURE 32 (2016) ("To understand the constitutional law of global society, it is necessary to revise widespread accounts of classic constitutionalism.").

18. *See infra* Part III; AGAMBEN, BODIES, *supra* note 8, at 111.

19. BRIAN Z. TAMANAHA, A REALISTIC THEORY OF LAW 30 (2017).

20. *Id.*; *cf.* Andrei Marmor, *Farewell to Conceptual Analysis (in Jurisprudence)*, *in* PHILOSOPHICAL FOUNDATIONS OF THE NATURE OF LAW 209, 209-29 (Wil Waluchow & Stefan Sciaraffa eds., 2013). For an endorsement of conceptual analysis in legal thinking, *see* Kenneth Einar Himma, *Conceptual Jurisprudence: An Introduction to Conceptual Analysis and Methodology in Legal Theory*, 26 J. CONST. THEORY & PHIL. L. 65, 65-66 (2015). The project that I propose with this Article is incompatible with Joseph Raz's positivist view that "there is an

normative, non-positive, and non-conceptual analytical thinking might seem to be paradoxical, to say the least. The point, however, is that here the term "analytical" is used in a purely phenomenological, rather than jurisprudential, fashion.

The proposed intellectual effort will take some doing as under the influence of Plato's *Sophist* and what Aristotle called *Organon*, "[w]e [have come to] know rigorous thinking only as conceptual representation."[21] This is due to the way in which knowledge is produced by logical means, i.e., by metaphysically deactivating the factuality and ambiguity of beings and phenomena through a dialectical process that replicates them within a given framework of intelligibility.[22] The logical method is, however, ultimately problematic because of the naturally limited reach of conceptual thinking, which, as Henri Bergson showed, is due to the cognitive laws followed by our intelligence. The structural deficiency of conceptual thinking becomes manifest when we aim to provide a description of multi-facited terms such as "authority" and "sovereignty," both of which are at the center of this Article. More importantly, it does not let us appreciate that authority and sovereignty's relationship with action renders them a matter of experience rather than rational and logical understanding. To embark upon phenomenological-normative reasoning means therefore to challenge the role that logic plays in serving metaphysics' cognitive and structuring purposes.

This serves me to clarify another, fundamental point, i.e., that philosophically speaking, the term "negativity" has no pessimistic connotations. Rather, it refers to that which is neither posited nor cannot be posited because it has no ground-giving source, nor can it be provided with one. As such, negativities remain confined within the boundaries of the *nōtum*, never reaching those of the *cognitum*. Hence, they are a "nullity" that escapes any metaphysical structuralism, rational

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interdependence between conceptual and normative argument." *See* Joseph Raz, *Authority and Justification*, 14 PHIL. & PUB. AFF. 3, 27 (1985).

21. MARTIN HEIDEGGER, THE EVENT 34 (Richard Rojcewicz trans., 2013) (ebook) [hereinafter HEIDEGGER, EVENT]; *see* ROBERTO MANGABEIRA UNGER, KNOWLEDGE & POLITICS 80 (1975).

22. ERNST CASSIRER, THE PHILOSOPHY OF THE ENLIGHTENMENT 253 (2009) [hereinafter CASSIRER, ENLIGHTENMENT]; ERNST CASSIRER, THE PHILOSOPHY OF SYMBOLIC FORMS 124-25, 129 (John Michael Krois & Donald Phillip Verene eds., John Michael Krois, trans., 1998); COSTAS DOUZINAS & ADAM GEAREY, CRITICAL JURISPRUDENCE: THE POLITICAL PHILOSOPHY OF JUSTICE 43-45 (2005); HEIDEGGER, INTRODUCTION, *supra* note 1, at 198-99; Martin Heidegger, *Modern Science, Metaphysics, and Mathematics*, *in* BASIC WRITINGS 267-306 (David F. Krell ed., 1977); MARTIN HEIDEGGER, ON TIME AND BEING 4 (Joan Stambaugh trans., 2002); *see* MARTIN HEIDEGGER, THE METAPHYSICAL FOUNDATIONS OF LOGIC (Michael Heim trans., 2002).

schematism, and logical understanding.[23] The quote from Heidegger that opens this Article, and that (not coincidentally) appears in one of his major works against the metaphysical tradition of Western thought, serves to stress that this phenomenological feature ought to be approached supra-logically.[24] Importantly, notwithstanding the legacy of Kant's Aristotelian-Scholastic conceptualization of existence (or actuality) as a cognitive and logical "absolute position,"[25] it would be incorrect to think of negativities as something non-existent. Indeed, many examples may be given to prove that the opposite is the case. As will be seen in due course, action, authority, and sovereignty stand among them.

Further, negativities remain also outside the meta-theoretical purview of the positivist understanding of law's performativity. This is due to the fact that positivism is a reason-oriented theory of knowledge[26] concerned with the *ontic* rather than with the *ontological*. For our purposes, this is important, for two reasons: first, it helps us comprehend why, as mentioned earlier, the negative performativity of authority, sovereignty, and implied norms is, from a positivist point of view, a surplus that can only be reached via normative thinking; secondly, it explains why, as showed by the amount of scholarship on the so-called "paradox of sovereignty," negativities have always represented a conceptual challenge for politico-juridical theorists.

This is of particular interest for our analysis given that, as Jean L. Cohen has noted, neo-Kelsenian, and thus, positivist, global constitutionalists consider the new global legal system to "spell the end of sovereignty"[27]—and thus, I would add, of authority. Once such a

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23. *See* PAOLO VIRNO, SAGGIO SULLA NEGAZIONE: PER UNA ANTROPOLOGIA LINGUISTICA 50 (2013).

24. As Scott M. Campbell aptly noted when inquiring into Heidegger's phenomenological interpretation of facticity, "[t]he issue of nothingness is made thematic for the first time in *Phenomenological Interpretations of Aristotle: Initiation into Phenomenological Resea*rch[.]" SCOTT M. CAMPBELL, THE EARLY HEIDEGGER'S PHILOSOPHY OF LIFE: FACTICITY, BEING, AND LANGUAGE 9 (2012). It is worth adding, however, that in the English translation of *Being and Time*, the term "nothing" is rendered a "nullity," which is a term that Heidegger uses in *Introduction to Metphysics*. *See* HEIDEGGER, EVENT, *supra* note 21. Agamben efficiently translates it as "negativity" in his Language and Death. *See also* Heidegger's comparison of nihilism, nihil, and nothing in the second volume of his *Nietzsche*. 2 MARTIN HEIDEGGER, NIETZSCHE 52-62, 172-75 (David Ferrell Krell trans., 1984).

25. HEIDEGGER, BASIC PROBLEMS, *supra* note 5, at 55; *see id.* at 77-121, 179-83, 316.

26. MARTIN HEIDEGGER, HISTORY OF THE CONCEPT OF TIME: PROLEGOMENA 15 (Theodore Kisiel trans., Ind. Univ. Press 1985) (1979) [hereinafter HEIDEGGER, PROLEGOMENA]; *see* ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS 47-48 (Julian Rivers trans., Oxford Univ. Press 2002) (1986) [hereinafter ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS].

27. JEAN L. COHEN, GLOBALIZATION AND SOVEREIGNTY: RETHINKING LEGALITY, LEGITIMACY, AND CONSTITUTIONALISM 46 (2012); *see* HEIDEGGER, PROLEGOMENA, *supra* note 26, at 51, 59.

statement is combined with the above reflections on the normative essence of phenomenological inquiry, it indirectly points at the main strength of the research this Article promotes. The normative effort of our concern may indeed assist us in interrogating anew the supra-logical, negative locus of authority and sovereignty by uncovering what positivist thought has never been capable of grasping: their relationship with action.[28] Consequently, it may help us rediscover what constitutes the "historiticality" and "politicality" of human uniqueness in the post-historical and post-political age of reason-oriented behavioralisation,[29] and, thus, transform into a reality global constitutionalism's humanitarian potential.

This requires a two-step analysis. First, we need to determine whether there is an analytical similarity between the conduct of global and transnational actors under implied norms and the working logic of the modern constituting process as described by Agamben.[30] Secondly, in answering this interrogative, we need to ascertain whether, as mentioned above, this form of conduct creates a postnational "space" in which Agambenian biopolitics recurs.

This paper paves the way for conducting such research. In particular, Part II contextualizes Agamben's *Homo Sacer* project and reflections on Hobbesian stasis in light of global constitutionalism's agenda. As well, a philosophical and biopolitical evaluation of the operativity of non-posited norms ought to, it will be argued, use the strengths and weaknesses of Agamben's stasiology[31] as a standpoint. Part III outlines why global constitutionalist debate would benefit from an inclusion of philosophical and biopolitical questioning within its purview. Part IV argues that if it assumes the characteristic of (authoritarian and sovereign) action, the conduct of global and transnational actors under implied legal principles and rules does not reproduce the modern secularization of naked/bare life and political/public existence. This claim is substantiated by the unfolding of a few fundamental antitheses that lie at the core of the research this Article promotes. Taking the

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28. Luca Siliquini-Cinelli, *"Against Interpretation?" On Global (Non-)Law, the Breaking-Up of* Homo Juridicus*, and the Disappearance of the Jurist*, 8 J. CIV. L. STUD. 443, 466 (2015); Luca Siliquini-Cinelli, *On Legal Positivism's Word and Our 'Form-of-(non-)Living'*, 16 GLOBAL JURIST 211, 219 (2016) [hereinafter Siliquini-Cinelli, *Legal Positivism*].

29. Siliquini-Cinelli, *Legal Positivism*, *supra* note 28, at 485.

30. *See* GIORGIO AGAMBEN, STASIS: CIVIL WAR AS A POLITICAL PARADIGM (Nicholas Heron trans., 2015) [hereinafter AGAMBEN, STASIS].

31. *See id.* Even though Agamben specifies that he does not intend to develop a theory of stasis, the analogical, paradigmatic method of investigation he opts for renders his approach stasiological. *Id.*

discussion one step farther, Part V elaborates upon the notion of "implied legal principles and rules." The concluding remarks lay down a series of normative interrogatives that the proposed research inevitably generates.

II. GLOBAL CONSTITUTIONALISM AND AGAMBEN'S *HOMO SACER*: AGAMBEN'S POLITICAL ETHICS

As mentioned, the idea of developing a philosophical and biopolitical postnational phenomenology of authority and sovereignty centered around the performativity of implied provisions arose out of what Agamben argued in one of his most recent works, *Stasis: Civil War as a Political Paradigm* (*Stasis*).[32]

In this work, Agamben took a decisive step toward the completion of his twenty-year-long *Homo Sacer* project, which he ultimately concluded in 2016 with the publication of his latest monograph.[33] The whole project is aimed at extending the Foucauldian conception of biopower to pre-modern times by revisiting its basic assumptions, configurations, and historical purview.[34] Agamben's intention is indeed to demonstrate that our biopolitical and juridical inhuman condition commenced with the fall of the Greek *polis*, when our naked or bare life (that is, real "people," or *zoē*) has been simultaneously excluded from and included within the political or public sphere (that is, ideal "people," or *bios*). The sovereign, Agamben tells us, drawing from a long tradition of philosophical and politico-theological thought, is the one who decides on this exceptional operation.[35] Importantly, Agamben is of the opinion that the Church's founding fathers had a pivotal role in conceiving of and setting up this biopolitical process: by transposing the Pauline concept of the "economy of the mystery" into the "mystery of the economy" for regulative purposes, they have made the theological, non-epistemic "economic-managerial" paradigm the key component of the Western form of civilization.[36]

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32. *Id.*

33. AGAMBEN, BODIES, *supra* note 8, at 1.

34. JACQUES DERRIDA, THE BEAST AND THE SOVEREIGN 315 (Michel Lisse et al. eds., Geoffrey Bennington trans., 2009).

35. *See* GIORGIO AGAMBEN, HOMO SACER: SOVEREIGNTY AND BARE LIFE (Daniel Heller-Roazen trans., 1998) [hereinafter AGAMBEN, HOMO SACER]; GIORGIO AGAMBEN, THE KINGDOM AND THE GLORY: FOR A THEOLOGICAL GENEALOGY OF ECONOMY AND GOVERNMENT (Lorenzo Chiesa & Matteo Mandarini trans., 2011) [hereinafter AGAMBEN, KINGDOM]; GIORGIO AGAMBEN, THE STATE OF EXCEPTION (2005).

36. *See* AGAMBEN, KINGDOM, *supra* note 35.

Building on Erik Peterson *contra* Carl Schmitt while delving into the emptying essence of this strategy,[37] Agamben has further maintained that the modern, liberal nation-state inherits the same logic of the Trinitarian paradigm of the *oikonomia* as "activity of administration and management."[38] Hence, and contrary to what Michel Foucault had contended, biopolitics does not commence with the modern secularisation of naked/bare life and political/public existence; rather, modernity has just shown that what makes us biopolitical subjects is the separation, in the form of an inclusive exclusion, of the animal and the human within the human being.[39] Notwithstanding its humanitarian façade, Agamben argues that liberalism falls exactly within this phenomenon, embraces it, and pushes it farther.[40] As a result, in a dehumanized post-political age such as ours, in which "popular sovereignty [is] an expression by now drained of all meaning,"[41] instead of claiming that "there is nothing outside the law" we should rather appreciate that "there is nothing inside the law."[42] What remains in front of us is popular sovereignty's counterpart, namely state sovereignty, as embodied by the ruler's capacity to exercise its political and jurisdictional authority over its subjects' bodies.

To Agamben the situation is so compromised that we may only be saved by the formation of a Franciscan-type messianic community composed of "singularities" without "identities" which are freed from all presuppositions and merely united in their ethical *mannerism*, that is in a "belonging" and "appearing" that combines the "habitual-use-of-bodies" [43] to their "being-*such*(-in-language)." [44] To neutralize the

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37. *See* GIORGIO AGAMBEN, OPUS DEI: FOR AN ARCHAEOLOGY OF DUTY 21 (Adam Kotso trans., 2013) [hereinafter AGAMBEN, OPUS DEI]; *see* GIORGIO AGAMBEN, THE HIGHEST POVERTY: MONASTIC RULES AND FORM-OF-LIFE (Adam Kotso trans., 2013).

38. *See* Giorgio Agamben, *Introductory Note*, *in* DEMOCRACY IN WHAT STATE? I, 2-3 (2012) [hereinafter Agamben, *Note*]; AGAMBEN, KINGDOM, *supra* note 35, at 142, 261-87; GIORGIO AGAMBEN, PROFANATIONS 81 (Jeff Fort trans., 2007); GIORGIO AGAMBEN, THE TIME THAT REMAINS: A COMMENT ON THE LETTER TO THE ROMANS (Patricia Daily trans., 2005) [hereinafter AGAMBEN, THE TIME THAT REMAINS].

39. AGAMBEN, HOMO SACER, *supra* note 35, at 6; *see* AGAMBEN, THE TIME THAT REMAINS, *supra* note 38, at 71-115, 128, 131.

40. AGAMBEN, KINGDOM, *supra* note 35, at 284–85.

41. Agamben, *Note*, *supra* note 38, at 4.

42. GIORGIO AGAMBEN, MEANS WITHOUT END: NOTES ON POLITICS 113 (Vincenzo Binetti & Cesare Casarino trans., 2000); Giorgio Agamben, *The Messiah and the Sovereign: The Problem of Law in Walter Benjamin*, *in* POTENTIALITIES: COLLECTED ESSAYS IN PHILOSOPHY 160, 170 (Giorgio Agamben & Daniel Heller-Roazen eds., 1999).

43. AGAMBEN, BODIES, *supra* note 8, at 58.

44. *See* GIORGIO AGAMBEN, LANGUAGE AND DEATH: THE PLACE OF NEGATIVITY (Karen E. Pinkus & Michael Hardt trans., 1991); GIORGIO AGAMBEN, THE COMING COMMUNITY 50, 65, 83 (Michael Hardt trans., Univ. of Minn. Press 2013) (1990) [hereinafter AGAMBEN,

"complete confusion" between "juridification and commodification of human relations,"[45] Agamben argues (using Pauline exceptionalism) that we must use our biopolitical animalisation for our own benefit by bringing it to its *unthinkable* limits: The paradigm that the Western politico-theological tradition has used to render us what we are—biopolitical *sacrifice*—can only be deactivated by our ethical *profanation* of the factical experience of language as language.[46] This requires the movement towards a politics beyond biopolitics in the form of a Franciscan-oriented type of life centered around the *habitual* (that is, simultaneously "actual" and "potential") use of bodies that, in the form of a destituent potential, voids the "subject-object" dichotomy.[47]

As Agamben believes that the overcoming of biopolitics may only come through an end to civil war as the Western political paradigm, in *Stasis* he shows this by elaborating upon how the stasis was conceived and used in ancient Greece and by Hobbes.[48] Agamben's main argument is that "the people" has never been, and can never be, a real historical and political entity. Rather, the cohesive body politic we think of when using this term is best understood as a mere negativity that can never be posited. Thus, while other thinkers, such as Hardt and Negri, refer to the concepts of "the people" and "multitude" to distinguish between modern sovereignty and the current, post-modern global Empire,[49] to Agamben the multitude is the modern subject par excellence. Similarly, Agamben challenges the usual understanding, recently put forward by Paolo Virno, that "[t]he multitude, for Hobbes, is inherent in the 'state of nature' . . . that . . . precedes the 'body politic'"[50]: the creation of the Leviathan is, rather, a step in biopolitics' modern circular movement from the civil war

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COMMUNITY]; ANTONIO NEGRI & MICHAEL HARDT, COMMONWEALTH 43-44 (2009) [hereinafter NEGRI & HARDT, COMMONWEALTH]; HARDT & NEGRI, EMPIRE, *supra* note 17, at 413; ANTONIO NEGRI & MICHAEL HARDT, MULTITUDE: WAR AND DEMOCRACY IN THE AGE OF EMPIRE 339 (2004) [hereinafter NEGRI & HARDT, MULTITUDE].

45. GIORGIO AGAMBEN, THE CHURCH AND THE KINGDOM 41 (Leland de la Durantaye trans., 2012) [hereinafter AGAMBEN, CHURCH].

46. *Id.* at 108; AGAMBEN, COMMUNITY, *supra* note 44, at 50, 65, 83.

47. AGAMBEN, COMMUNITY, *supra* note 44, at 23, 30, 56-65, 269-73.

48. *See* AGAMBEN, STASIS, *supra* note 30.

49. HARDT & NEGRI, EMPIRE, *supra* note 17, at 344, 411; *see also* AGAMBEN, STASIS, *supra* note 30, at 388 (where it is said that Hobbes's "contractual constitution of politics . . . negat[es] the love of the multitude"); NEGRI & HARDT, COMMONWEALTH, *supra* note 44, at 41-42, 52.

50. *See* HARDT & NEGRI, EMPIRE, *supra* note 17, at 21; PAOLO VIRNO, A GRAMMAR OF THE MULTITUDE: FOR AN ANALYSIS OF CONTEMPORARY FORMS OF LIFE 22 (Isabelli Bertoletti et al. trans., 2004).

to the "disunited multitude" to the "people-king" paradigm, then to the "dissolved multitude," and finally back again to the civil war.[51]

Through the (authoritarian or contractarian[52]) formation of the modern city, the disunited multitude of the state of nature *exceptionally* constitutes itself into the people. However, when giving form and substance to the sovereign, the people contemporaneously and paradoxically disappears, leaving the scene to an entity that "has no political significance."[53] This entity is nothing but the dissolved multitude which, Agamben notes, not coincidentally does not figure in the city of the *Leviathan*'s cover.[54] This proves that, as Agamben has pointed out more recently, "the city is founded on the division of life into bare life and politically qualified life."[55]

The fact that in *Stasis* Agamben proposes, with minor adjustments, the thoughts and observations that he had expounded during two seminars he gave on American soil in 2001, is indicative of his commitment to uncovering the fictional character and perils of the "We the People" ideology that informs the modern political imaginary and republican construct. Hence, Agamben's short work is of pivotal importance for the correct understanding of his negative reading of biopolitics and the political, redemptive project that stems out of it.

More importantly for our purposes, however, Agamben's stasiology confronts us with the vexed question as to whether our understanding and use of such terms as "constitution," "constitutionalisation," and "constitutionalism" are in fact appropriate. Notably, all these terms have different meanings—especially in globalist theory.[56] Hence, I should

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51. AGAMBEN, STASIS, *supra* note 30, at 46.
52. *Id.* at 44.
53. *Id.* at 47.
54. *Id.* at 34.
55. AGAMBEN, BODIES, *supra* note 8, at 265.
56. Garrett Wallace Brown, *The Constitutionalization of What?*, 1 GLOBAL CONSTITUTIONALISM 201, 202 (2012); Ming-Sung Kuo, *The End of Constitutionalism As We Know It? Boundaries and the State of Global Constitutional (Dis)Ordering*, 1 TRANSNAT'L LEGAL THEORY 329, 331 (2010) [hereinafter Kuo, *End of Constitutionalism*]; Cormac Mac Amhlaigh, *Harmonising Global Constitutionalism*, 5 GLOBAL CONSTITUTIONALISM 173, 175-76 (2016); Alec Stone Sweet, *Constitutionalism, Legal Pluralism, and International Regimes*, 16 IND. J. GLOBAL LEGAL STUD. 621, 622 (2009); *see* Thomas M. Frank, *Preface: International Institutions—Why Constitutionalize*, *in* RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW AND GLOBAL GOVERNANCE, at xi (Joffrey L. Dunoff & Joel P. Trachtman eds., 2009); Thomas Vesting, *Constitutionalism or Legal Theory: Comments on Gunther Teuber*, *in* TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM 29, 34 (Christian Joerges et al. eds., 2004); THE TWILIGHT OF CONSTITUTIONALISM?, at viii, xiv (Petra Dobner & Martin Loughlin eds., 2010); Ming-Sung Kuo, *Taming Governance with Legality? Critical Reflections upon Global Administrative Law as Small-C Global Constitutionalism*, 44 N.Y.U. J. INT'L L. & POL. 55, 75-77

clarify that for the sake of the reflections expounded in this Article, I refer to global constitutionalism in both its positive and normative fashions as described by Peters, mentioned above. The need to combine the positive aspect with its normative counterpart is due to the fact that the shortcomings of the former may represent an opportunity for the potential of the latter, mentioned earlier.

It should also be noted that while Agamben's stasiological picture applies to both hierarchal and democratic states, his nihilistic approach to the modern constitutional project is specifically tailored to account for the inconsistencies of Hobbes's jusnaturalistic social contract theory and liberal political ideals and practice. The constitutionalisation of collective self-determination, political autonomy, democratic participation, and a shared notion of justice is displaced from Agamben's world. This is in contrast to the accounts of other political theorists, most notably those of Hardt and Negri, who offer an affirmative reading of the biopolitical production of the multitude by sketching the possibility of forming a new democratic sovereignty through it.[57] Agamben's analysis ought instead to be inscribed within that branch of scholarship that inquires into the sovereign's strategies for perennial self-preservation through the performativity of the "immunity-community" dialectic.[58]

III. THE LIMITS AND SIGNIFICANCE OF AGAMBEN'S PICTURE FOR GLOBAL CONSTITUTIONALISM

Agamben's analysis might be of assistance to decipher the emergence of alternative, spontaneous mechanisms of social legitimacy and recognition, as well as to contextualise the growing interest within global and transnational legal discourse in the increasing relevance of social movements' democratic power.[59] However, it is expected that some,

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(2011); *see also* CONSTITUTIONALISM, DEMOCRACY AND SOVEREIGNTY: AMERICAN AND EUROPEAN PERSPECTIVES 1-2 (Richard Bellamy ed., 1996).

57. *See* HARDT & NEGRI, EMPIRE, *supra* note 17; NEGRI & HARDT, COMMONWEALTH, *supra* note 44; NEGRI & HARDT, MULTITUDE, *supra* note 44.

58. *See* ROBERTO ESPOSITO, BÎOS: BIOPOLITICS AND PHILOSOPHY 46, 57-63 (Timothy Campbell trans., Univ. of Minn. Press 2008) (2004) [hereinafter ESPOSITO, BÍOS]; ROBERTO ESPOSITO, IMMUNITAS: THE PROTECTION AND NEGATION OF LIFE 9 (Zakiya Hanafi trans., Polity Press 2011) (2002) [hereinafter ESPOSITO, IMMUNITAS].

59. *See* FRITJOF CAPRA & UGO MATTEI, THE ECOLOGY OF LAW: TOWARDS A LEGAL SYSTEM IN TUNE WITH NATURE AND COMMUNITY (2015); Boaventura de Sousa Santos, *Towards a Socio-Legal Theory of Indignation*, *in* LAW'S ETHICAL, GLOBAL AND THEORETICAL CONTEXTS: ESSAYS IN HONOUR OF WILLIAM TWINING 115-42 (Upendra Baxi et al. eds., 2015); Ugo Mattei & Alessandra Quarta, *Right to the City or Urban Commoning: Thoughts on the Generative Transformation of Property Law*, 2 ITALIAN L.J. 303, 323 (2015); Ugo Mattei & Saki Bailey, *Social Movements as Constituent Power: The Italian Struggle for Commons*, 20 IND. J. GLOBAL LEGAL STUD. 965, 970-71 (2013); Steven Slaughter, *Transnational Democratization and Republic*

if not most, commentators would deem Agamben's account as unrealistic. And indeed, Agamben's biopolitical philosophy has been severely criticised over the past decade.[60] I too have outlined some of the inconsistencies of Agamben's reconstruction of the Western biopolitical machine and showed that his political intent to reach a political ethics beyond biopolitics risks reproducing, although in different forms, the same atrocities it aims to overcome.[61]

In this sense, and before outlining the relevance of Agamben's stasiology for global constitutionalism's agenda, it should be clarified that his reading of the Hobbesian stratagem is partly misleading as it obfuscates what renders authority and sovereignty truly such—i.e., their relationship with action. In particular, Agamben fails to grasp that at the root of Hobbes's plan for the preservation of property rights through the constitution of the Leviathan,[62] and thus of the modern secularization of bare/naked life and public/political existence, lies the substitution of (human, free, self-defining, and political) action with (animal, captivated, self-destroying, and post-political) behavior—a distinction that will prove fundamental for the purposes of our research.[63]

I will come back to this in Part III when outlining the relevance of the "action-behavior" and "authority/sovereignty-power" antitheses for the research this Article promotes, as well as the role that legal positivism has had in obfuscating them. For now, it will suffice to say that, being logic-oriented, Hobbes's positivism has never been able to reach the negativity of action, and thus, of authority and sovereignty. As Cassirer has persuasively showed, the philosophy of knowledge developed by Hobbes is based on a system of "causal definitions" in which there is no room for "the concept of not-being."[64] This also means, however, that in Hobbes's structural world-view there is no room for negativities either, and thus, for action. Needless to say, this is reflected in Hobbes's political philosophy, which places at the center of the formation of the

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Citizenship: Towards Critical Republicanism, 3 GLOBAL CONSTITUTIONALISM 310 (2014). More broadly, see DAVID M. KENNEDY, A WORLD OF STRUGGLE: HOW POWER, LAW, AND EXPERTISE SHAPE GLOBAL POLITICAL ECONOMY (2016).

60. For an introduction, see POLITICS, METAPHYSICS AND DEATH: ESSAYS ON GIORGIO AGAMBEN'S HOMO SACER (Andrew Norris ed., 2005); NEGRI & HARDT, COMMONWEALTH, *supra* note 44, at 4-6.

61. Luca Siliquini-Cinelli, *Hayek the Schmittian: Contextualising Cristi's Account of Hayek's Decisionism in the Age of Global Wealth Inequality*, 24 GRIFFITH L. REV. 687, 700 (2015); Siliquini-Cinelli, *Legal Positivism*, *supra* note 28, at 234.

62. HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 139-40, 157 (2d Eng. ed. 1958).

63. *See infra* Part IV.

64. ARENDT, *supra* note 62, at 19.

Leviathan the substitution of action with reason-oriented behavior, that is, a form of conduct that can be controlled for regulative purposes.[65]

It is not a coincidence that, while listing the essential elements for the correct formation and preservation of the *statum civitatis* as commonwealth, Hobbes added the particle "good" before "will."[66] Believing that humans' sinful nature is what introduced death among them, Hobbes captivated human action by setting a limit on its essence and performativity so that it could be transformed into behavior—a form of conduct that can be controlled.[67] In other words, the protection of Hobbes's new social construct demands the nullification of the self-asserting "I-*will*" through the compliance with what Kant, the philosophical father of capitalist reason and distribution of property rights,[68] would later define as the universal "categorical imperative" (I-will-and-can*not*). Hence, in Hobbes, law and reason converge to save life from itself through the "covenant of submission."[69] This interpretation of Hobbes's antagonism toward free will and our humanity provides further elements for appreciating why, in *Behemoth*, he directed his attack against the "horrible designs" through which the people's attitude toward Charles I had been manipulated.[70] As humankind is subject to superstition and easily deceivable through "impostures,"[71] the survival of the newly founded civilized polity requires that its subjects not be left free to judge. Humans' faculty of affirmation and expression *must* be limited, otherwise they will find themselves in a "fight against their natural and rightful sovereigns."[72]

Yet, notwithstanding the shortcomings of Agamben's reflections on Hobbes, it cannot be doubted some aspects of his *Homo Sacer* project have proven to be particularly insightful and have gained a prominent role in contemporary philosophical, biopolitical, and juridical theory worldwide. Agamben is therefore a chief representative of the capacity,

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65. Luca Siliquini-Cinelli, *Reflections on the Pactum in the Public and Private Spheres*, *in* 1 THE CONMSTITUTIONAL DIMENSION OF CONTRACT LAW. A COMPARATIVE PERSPECTIVE 289-322 (Luca Siliquini-Cinelli & Andrew Hutchison eds. 2017).

66. *See* THOMAS HOBBES, ON THE CITIZEN (Richard Tuck trans., 1998) [hereinafter HOBBES, CITIZEN]; THOMAS HOBBES, BEHEMOTH (Paul Seaward ed., 2010). Hence, as Agamben has noted, Hobbes's project is "not founded on a political will." AGAMBEN, BODIES, *supra* note 8, at 209.

67. Siliquini-Cinelli, *supra* note 65.

68. *See* WALTER BENJAMIN, CAPITALISM AS RELIGION (1921); IMMANUAL KANT, FUNDAMENTAL PRINCIPLES OF THE METAPHYSICS OF MORALS (Thomas Kingsmill Abbott trans., 2005).

69. CASSIRER, ENLIGHTENMENT, *supra* note 22, at 256.

70. HOBBES, CITIZEN, *supra* note 66, at 16, 26, 31, 41.

71. *Id.* at 41.

72. *Id.* at 43.

showed by the Italian school of thought, to grasp and decode efficiently the "articulation between life and politics"[73] initiated by the "French Theory" of Foucault and Deleuze.

From a globalist perspective, Agamben's account of the simultaneous construction and deconstruction of the modern body politic serves to put into question the very "national/postnational" dialectic[74] from which global constitutionalism as a field of research has emerged. The "structural similarities between national constitutional rights and international human rights"[75] are a good example. According to Agamben, the biopolitical violence that we experience daily is due to the modern nation-state's placement of biopolitics "at the centre" of its own "calculations."[76] Human rights are indeed commonly viewed as universal moral rights whose respect and enforceability are legitimated by virtue of human beings' humanity. In contrast to this conceptualization, Agamben identifies in the instrumentalist use of modern declarations of rights[77] the voiding of the distinction between bare life and its political counterpart. More particularly, Agamben writes, "Declarations of rights represent the originary figure of the inscription of [the] natural into the juridico-political order of the nation-state."[78] If this interpretation is correct, or at least plausible, we cannot but conclude that the human rights analogy[79] between the national and postnational scenarios is less reassuring than we have been led to think.

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73. *See* ROBERTO ESPOSITO, DA FUORI: UNA FILOSOFIA PER L'EUROPA 13 (2016).

74. The following are my choice among a multitude of sources on this subject. *See* AFTER PUBLIC LAW (Cormac Mac Amhlaigh et al. eds., 2013); GLOBAL LAW WITHOUT A STATE (Gunther Teubner ed., 1997); TOWARDS WORLD CONSTITUTIONALISM: ISSUES IN THE LEGAL ORDERING OF THE WORLD COMMUNITY (Ronald St. John Macdonald & Douglas M. Johnston eds., 2005); THE TWILIGHT OF CONSTITUTIONALISM?, *supra* note 56; Nancy Fraser, *Transnationalizing the Public Sphere: On the Legitimacy and Efficacy of Public Opinion in a Post Westphalian World*, *in* TRANSNATIONALIZING THE PUBLIC SPHERE (Kate Nash ed., 2014); BEYOND TERRITORIALITY, *supra* note 6; KRISCH, *supra* note 12; Kuo, *End of Constitutionalism*, *supra* note 56; Michel Rosenfeld, *Is Global Constitutionalism Meaningful or Desirable?*, 25 EUR. J. INT'L L. 177, 178 (2014); Symposium, *Constitutionalism in an Era of Globalization and Privatization*, 6 INT'L J. CONST. L. 31 (2008); *see also* Guy Lawson, *Trudeau's Canada Again*, N.Y. TIMES (Dec. 8, 2015), http://www.nytimes.come/2015/12/13/magazine/trudeaus-canada-again.html?_r=0.

75. Kai Möller, *From Constitutional to Human Rights: On the Moral Structure of International Human Rights*, 3 GLOBAL CONSTITUTIONALISM 373, 374 (2014).

76. AGAMBEN, HOMO SACER, *supra* note 35, at 6.

77. By this term Agamben refers to both national (i.e., Bill of Rights and Constitutional Preambles) and international restatements (i.e., treaties and universal charters). *Id.*

78. *See* AGAMBEN, HOMO SACER *supra* note 35, at 127; AGAMBEN, STASIS, *supra* note 30, at 6, 127.

79. JOHANNES MORSINK, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING AND INTENT 313 (1999).

The similarity between Agamben's and Hannah Arendt's thought on this point cannot go unnoticed. However, what separates them is that to Arendt, the constitution is not only the posited norm par excellencebut is also the ultimate source of government emanating from the authoritarian and sovereign, as well as self-reflexive and self-conscious, extra-normative decision of a community of subjects with a shared origin and destiny.[80] Agamben's philosophical and biopolitical genealogy, however, makes it clear that the act of constituting "the people" in ontological terms turns out to be the very thing that dissolves it.

This last point has important implications for the research this Article advocates. In particular, it serves to clarify that our analysis is not concerned with what happens at or to the national sphere once the international legal system promotes or adopts constitutional arrangements comparable to those introduced through the formation of the nation-state. Hence, and despite being of pivotal importance for global constitutionalism's project, the issue of whether this "national-to-global" transplanting process implies, in its multiple configurations (i.e., hard, soft, direct, indirect, inclusive, exclusive, etc.), the "de-constitutionalisation" of domestic political and legal structures[81] is currently not of interest to us. Nor is the much-debated question regarding the centrality of sovereign states in international/global law configurations.[82]

Rather, Agamben's claims inevitably direct our attention to the innermost essence of the analogy between the "national" paradigm and its "post-" variant which generated the "global constitutionalism" label in the first place. The reason being that the circular movement from the civil war, to the "disunited multitude," to the "people-king" paradigm, then to the "dissolved multitude," and finally back again to the civil war that Agamben describes in *Stasis* indicates that the distinction between modernity and what came after it—namely our global, transnational age—is in part misleading. Rather, they ought to be seen as just two

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80. Still today, the constitution is understood as the collective act of self-asserting existence. *See* HARDT & NEGRI, EMPIRE, *supra* note 17, at 194; Hans Lindahl, *Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood*, *in* THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM 9-24 (Martin Loughlin & Neil Walker eds., 2007).

81. *See* Anne Peters, *Compensatory Constitutionalism: The Function and Potential of Fundamental Norms and Structures*, 19 LEIDEN J. INT'L L. 579 (2006).

82. SASKIA SASSEN, LOSING CONTROL? SOVEREIGNTY IN AN AGE OF GLOBALISATION 89 (1996); Robert McCorquodale, *Human Rights and Global Business*, *in* COMMERCIAL LAW AND HUMAN RIGHTS 89, 93 (Stephen Bottomley & David Kinley eds., 2002); *cf.* HARDT & NEGRI, EMPIRE, *supra* note 17, at 336 (stating "[t]he decline of the nation-state . . . is a structural and irreversible process."); *see* COHEN, *supra* note 27.

periods of the biopolitical age whose inception occurred with the demise of classical Greece.

For the purposes of our discussion, then, the interrogative to be addressed is whether a philosophical and biopolitical engagement with the negativity of non-posited principles and rules on the global and transnational scale may cast new theoretical light on both legal scholars' dialectical reasoning and global constitutionalism's ambitions. Once the *constitution* of a global rule of law and (postnational, international, transnational, monistic, cosmopolitan, *etc.*) democratic community is approached from Agamben's account of stasis, we have no choice but to question the background assumptions and ideological (i.e., universal[83]) imaginaries that form the Western model of constitution making. In other words, Agamben's reflections on modernity's incapacity to create a political community increase "the considerable anxiety that accompany today's assertion of a world society, of global governance or global constitutionalism" that Peer Zumbansen has acutely asked us to consider when describing the methodological orientations that shape this field of study.[84]

Take global constitutionalism's democratic deficit, for instance.[85] What Agamben contends regarding the negativity of stasis makes it evident that the democratization of the global legal order runs the risk of never becoming a reality. For this to occur, global constitutionalism has to abandon as its normative model the constitutional organizing principles of an entity (i.e., the modern nation-state) which, if we follow Agamben's reasoning, has never existed as we are accustomed to conceiving of it.[86] Accordingly, once Agamben's picture is applied to the global scenario, it emerges that the democratic creation of a communitarian international law of "the people"[87] and of a global

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83. SASSEN, *supra* note 82.

84. Zumbansen, *Symposium*, *supra* note 6, at 275; *see* David Dyzenhaus, *Constitutionalism in an Old Key: Legality and Constituent Power*, 1 GLOBAL CONSTITUTIONALISM 229, 231, 243 (2012).

85. This was the topic of the workshop held at the European University Institute on 14-15 January 2016 and entitled "Global Constitutionalism Without Global Democracy." *See* HARDT & NEGRI, EMPIRE, *supra* note 17, at 311 (asking "Who represents the People in the global constitution?"); Luis Cabrera, *Diversity and Cosmopolitan Democracy: Avoiding Global Democratic Relativism*, 4 GLOBAL CONSTITUTIONALISM 18, 42 (2015); Wojciech Sadurski, *Supranational Public Reason: On Legitimacy of Supranational Norm-Producing Authorities*, 4 GLOBAL CONSTITUTIONALISM 396, 398 (2015).

86. *See* MARTIN LOUGHLIN, THE IDEA OF PUBLIC LAW 78 (2003); MORSINK, *supra* note 79; Yves Schemeil et al., *Delegation Without Borders: On Individual Rights, Constitutions and the Global Order*, 1 GLOBAL CONSTITUTIONALISM 455, 469 (2012).

87. JOHN R. MORSS, INTERNATIONAL LAW AS THE LAW OF COLLECTIVES: TOWARDS A LAW OF PEOPLE 1-2, 134 (Taylor & Francis eds., 2013).

democracy of national democracies[88] is confined to the realm of the practically impossible. The same may be said with respect to the constitution of a transnational democracy[89] or attempts to create and maintain a shared sense of global (as opposed to nationalist) socio-legal and sociopolitical self-determination.[90]

Arguably, Agamben's stasiology might also reinforce the new sovereigntists' criticism of transnational global governance.[91] Agamben's account seems therefore to be more in line with the so-called "cosmopolitan pluralism" paradigm—that is, with a vision that abandons such notions as "the people" and "collective will" and replaces the aforementioned "domestic analogy" with a reason-oriented standard for the formation of political and juridical principles.[92]

In any event, Agamben leaves us with the troubling task of ascertaining, two centuries after the Abbé Sieyes identified in "the people" ("the nation," in his words) the source of the constituent power,[93] to *whom* the act of constitution-giving is left.[94] This might shed new light not only on constitutionalism's paradox,[95] but also on *global* constitutionalism's commitment to promoting the formation and protection of a global community centered around the Westernization of living standards and a Western model of constitutional rights,[96] and thus legal values (liberty), form of government (democracy), and doctrines (the rule of law). For the very same reason, however, our understanding of, and approaches to, the challenges that inform global constitutionalism's agenda cannot be met without contextualizing what lies behind the signification of authority and sovereignty at the local and global levels—in other words, without addressing authority and

88. KOK-CHOR TAN, JUSTICE WITHOUT BORDERS: COSMOPOLITANISM, NATIONALISM, AND PATRIOTISM 25, 33, 201 (2004).

89. WALTER KYMLICKA, CONTEMPORARY POLITICAL PHILOSOPHY: AN INTRODUCTION 315 (2d ed. 2002).

90. THE THEORY OF SELF-DETERMINATION 4 (Fernando R. Tesón ed., 2016).

91. Seyla Benhabib, *The New Sovereigntism and Transnational Law: Legal Utopianism, Democratic Scepticism and Statist Realism*, 5 GLOBAL CONSTITUTIONALISM 109, 136 (2016); Michael Goodhart & Stacey Bondanella Taninchev, *The New Sovereigntist Challenge for Global Governance: Democracy Without Sovereignty*, 55 INT'L STUD. Q. 1047, 1047 (2011).

92. Mattias Kumm, *Who Is the Final Arbiter of Constitutionality in Europe: Three Conceptions of the Relationship Between the German Federal Constitutional Court and the European Court of Justice*, 36 COMMON MKT. L. REV. 351, 383 (1999); Mattias Kumm, *The Cosmopolitan Turn in Constitutionalism*, 20 IND. J. GLOBAL LEGAL STUD. 605, 628 (2013).

93. EMMANUEL JOSEPH SIEYÈS, WHAT IS THE THIRD ESTATE? 124, 126 (M. Blondel trans., S.E. Finer eds., 1964).

94. *See* Zoran Oklopcic, *Three Arenas of Struggle: A Contextual Approach to the Constituent Power of 'The People,'* 3 GLOBAL CONSTITUTIONALISM 200, 201 (2014).

95. *See* Lindahl, *supra* note 80.

96. KAI MÖLLER, THE GLOBAL MODEL OF CONSTITUTIONAL RIGHTS 1, 15 (2012).

sovereignty's negativity before it is "*posit*-ively" represented via constitution-making processes.[97]

This is why the negativity expressed by implied provisions represents an optimal case study for the development of a postnational phenomenology of authority and sovereignty within global constitutional analysis. The reason why such a theoretical endeavor ought to start from Agamben's reading of Hobbes is that its postnational contextualisation requires an engagement with two negativities whose phenomenological impulse has always been neglected by the metaphysical structuralism that informs the ground-giving logic of positivist legal theory.[98] These are the following:

(1) that which, in philosophy, informs action and distinguishes it from behavior; and
(2) that which characterizes (bio)political action, and consequently, authority and sovereignty.[99]

Prudence is, however, required here. Here, we are not concerned with what arises from, or is produced by, action. The reason for this is that action has no serviceability or instrumental determination whatsoever.[100] Rather, our focus is on what lies *behind* action and negatively defines its authoritarian and sovereign character. Indeed, it is action's negative authoritarian and sovereign properties that define the uniqueness of the subject who acts—be it an individual such as myself or the reader of these words, or a community such as a body politic. Thus, our phenomenology moves backwards from existence to essence. We will never be able to reach global constitutionalism's philosophical and biopolitical surplus through logical questioning, that is, through a methodology of inquiry that tries dialectically to hook an effect to a cause through judgement. This method of investigation would not let us comprehend that, as any negativity, authority and sovereignty remain confined within the boundaries of the supra-logical *nōtum*, thus never reaching those of the *cognitum*. Arendt, who correctly thought that the difference between action and behaviour lies in the former being its own end, failed to grasp this negative component of authority and sovereignty: her focus on what is posited (and thus, on the dialectic between subject

97. Clare Monagle & Dimitris Vardoulakis, *Introduction: The Negativity of Sovereignty Now*, *in* THE POLITICS OF NOTHING: ON SOVEREIGNTY 1, 4 (Clare Monagle & Dimitris Vardoulakis eds., 2013).

98. *See infra* Part V.

99. Siliquini-Cinelli, *Legal Positivism*, supra note 28.

100. Heidegger, *Letter on Humanism*, *in* BASIC WRITINGS, *supra* note 22, at 217, 222.

and predicate) eventually rendered her incapable of thinking of (bio)politics in philosophical terms.[101] We shall endeavour to take a different path from hers.

IV. PHILOSOPHY AND BIOPOLITICS IN GLOBALIST DISCOURSE

We should now ask ourselves why, as lawyers, we should even bother to approach global constitutionalism's normative potential through philosophical and biopolitical lenses. Some might object, with good reason, that there is no need for such analysis in an age in which theoretical efforts appear to be increasingly irrelevant. The significance of these questions for the healthy development of globalist analysis is evident: when expounding the fallacies of "legal scholarship, political science and normative theory" in addressing "the operations, functions, and normative challenges of transnational institutions," Armin von Bogdandy correctly stressed that "[t]he successful conceptualisation of emergent realities is necessarily slow and painstaking, especially when something important happens."[102] What von Bogdandy criticises is, in fact, a structural feature of all theoretical efforts: by being always preceded by practice, theory inevitably risks being confined to a secondary role.[103]

Yet the need to have a philosophical and biopolitical approach to global constitutionalism should be obvious. With respect to the former, this necessity is due to the fact that the very basic concepts and doctrines of the globalist ideal, such as constitution, human rights, democracy, and rule of law, are mental[104] constructs whose framing and use have serious practical implications. As is the case with all representations, these concepts and doctrines act as a filter through which we not only synthesize, but also determine the "actual" by deciphering through a given framework of intelligibility. A philosophical approach to global constitutionalist discourse and imaginary may therefore be of assistance in unfolding the phenomenological, and thus ontological, obstacles that ought to be unveiled and overcome to maximize its normative potential.

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101. Esposito arrives at the same conclusion through different reasoning. *See* ESPOSITO, BÍOS, *supra* note 58, at 150. It should be conceded, however, that Arendt never thought of herself as a philosopher. *See id.*

102. *See* Armin von Bogdandy, *The Past and the Promise of Doctrinal Constructivism: A Strategy for Responding to Challenges Facing Constitutional Scholarship in Europe*, 7 INT'L J. CONST. L. 364, 364-400 (2009).

103. GEORG WILHEM FRIEDRICH HEGEL, HEGEL'S PHILOSOPHY OF RIGHT 27-28 (2015).

104. MARTIN HEIDEGGER, THE FUNDAMENTAL CONCEPTS OF METAPHYSICS: WORLD, FINITUDE, SOLITUDE 14 (William McNeill & Nicholas Walker trans., Ind. Univ. Press 1995) (1983) [hereinafter HEIDEGGER, FUNDAMENTAL CONCEPTS].

In addition, one could also stress that by "concern[ing] everyone,"[105] philosophical questioning is in line with global constitutionalism's universal roadmap, and as such, should be seen favorably by those legal scholars who are involved in its promotion and advancement.

In this respect, I should specify that my use of the term "philosophy" is Heideggerian. Philosophy as phenomenology/ontology is neither a positive science nor a world-view.[106] Rather, it is an act of experience[107] that does not address phenomena by uniting cause and effect, as the rationalist essence of scientific methods of comprehension does. Nor does it aim at framing a constructivist, systemic world-view in which subject (*res cogitans*) and object (*res extensa*) coincide through judgement.[108] This is so notwithstanding what we have become accustomed to conceive of under the Platonic, metaphysical narrative that culminated in German idealism. Rather, "[p]hilosophy is philosophyzing,"[109] to be understood as the non-systemic questioning of the facticity of life,[110] which in turn depends on our ability to let our active and resolute, reflective and determinative thinking *think about* something.[111]

Philosophical inquiry is, then, the mental activity grounded on experience whose guiding ontological question (i.e., "What is a being?") leads to the phenomenological disclosure of the "aboutness" of things (i.e., "What is. . . ?") by investigating their "how." The fact that philosophy neither posits beings nor deals with posited ones[112] explains why it transcends the boundaries of positive analysis (as well as positive

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105. *Id.*

106. *Id.*; *see also* HEIDEGGER, BASIC PROBLEMS, *supra* note 5, at 1-11.

107. The philosopher, Nietzsche reminds us in *The Will to Power*, is not a man of knowledge. For a critique of the view that understands phenomenology as empirically led qualitative research, see generally JOHN PALEY, PHENOMENOLOGY AS QUALITATIVE RESEARCH: A CRITICAL ANALYSIS OF MEANING ATTRIBUTION (Routledge 2017) (2016).

108. *See* MARTIN HEIDEGGER, PHENOMENOLOGICAL INTERPRETATIONS OF ARISTOTLE: INITIATION INTO PHENOMENOLOGICAL RESEARCH (Richard Rojcewicz trans., Ind. Univ. Press 2008) (1985).

109. *See* HEIDEGGER, FUNDAMENTAL CONCEPTS, *supra* note 104, at 4; *see also* Heidegger, *The End of Philosophy and the Task of Thinking*, *in* BASIC WRITINGS, *supra* note 22, at 431.

110. MARTIN HEIDEGGER, PHENOMENOLOGICAL INTERPRETATION WITH RESPECT TO ARISTOTLE: INDICATION OF THE HERMENEUTIC SITUATION 25 (Michael Bauer trans., 2009) (According to Heidegger "[p]hilosophy also strands within the movement of facticity, since philosophy is simply the explicit interpretation of factical life."). For an introduction, see CAMPBELL, *supra* note 24, at 25-32, 44, 63.

111. MARTIN HEIDEGGER, THE METAPHYSICAL FOUNDATIONS OF LOGIC 20, 27 (Michael Heim trans., Ind. Univ. Press 1992) (1978). For an exemplary account of Heidegger's significance in legal reasoning and normative discourse, see OREN BEN-DOR, THINKING ABOUT LAW: IN SILENCE WITH HEIDEGGER 3 (2007).

112. HEIDEGGER, BASIC PROBLEMS, *supra* note 5, at 7-19, 321, 327.

law). It is this supra-logical essence that renders philosophical questioning the gateway through which we may develop a postnational phenomenology of authority and sovereignty's negativity centered around the functioning of non-posited provisions.

In regard to biopolitics, one could easily point at the political essence of constitutionalism as both an ideal and process. Further specification would, however, be required to justify the shift this research advocates from a purely political to a *bio*political context. Simply put, such a move is necessitated by the zone of interaction in which biopolitics and the humanitarian and individualizing intent that animates global constitutionalist discourse meet. Biopolitics is indeed that branch of philosophical and political thinking that focuses on the dynamics that shape the interplay among such concepts as life, politics, power, and the practical repercussions they have on humans' existence and interaction.

Given its broad purview, it is not difficult to see why Derrida believed that biopolitical thought had its inception with Aristotle's reflections on the concept of *politikon zōon*.[113] Yet, it cannot go unnoticed that the term "biopolitics" was in fact coined by Foucault, and that it was only after Foucault's writings of the mid- and late 1970s that this discipline came to be understood as that theoretical effort that investigates how systems of power, disciplinary regimes, and networks produce, regulate, and repress political existence and societal relations.[114]

Biopolitics is, then, a central category of philosophical and political thought concerned with those genealogies and manifestations of (bio)power that influence, shape, and direct (i.e., discipline and control) humans' participation in a regulative project. This is how, in biopolitical terms, human existence is formed. Examples include access to education, healthcare, justice, and other basic services, immigration, global wealth inequality, consumer protection, international human rights, technological advancement, foreign aid, and so on—all topics around which global and transnational law debate is centered.[115]

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113. *Id.*

114. Timothy Cambell & Adam Sitze, *Introduction-Biopolitics: An Encounter*, *in* BIOPOLITICS: A READER 1, 20 (Timothy Campbell & Adam Sitze eds., 2013). On the growing importance that the "individual subject" is assuming within globalist scholarship and practice, see GLOBAL CONSTITUTIONALISM 151-59 (Turkuler Isiksel & Anne Thies eds., 2013).

115. MICHEL FOUCAULT & ALAN SHERIDAN, DISCIPLINE AND PUNISH 149-56 (1991) [hereinafter FOUCAULT & SHERIDAN, DISCIPLINE AND PUNISH]; MICHEL FOUCAULT, THE HISTORY OF SEXUALITY 135-45 (1990-1998) [hereinafter FOUCAULT, THE HISTORY OF SEXUALITY]; MICHEL FOUCAULT, THE ORDER OF THINGS 399 (2001) [hereinafter FOUCAULT, THE ORDER OF THINGS]; HARDT AND NEGRI, EMPIRE, *supra* note 17; NEGRI & HARDT, COMMONWEALTH, *supra* note 44; ESPOSITO, BÍOS, *supra* note 58.

With this in mind, it should be clear enough that global constitutionalism is first and foremost a biopolitical agenda. Three considerations will suffice to substantiate this claim. First is the biological derivation of fundamental terms in globalist discourse such as "constitution" and "body politic." Second is the biopolitical significance that global constitutionalism's three pillars (i.e., human rights, democracy, and the rule of law) play in everyday life. Finally, there is the fact that Rosalyn Higgins criticised the "subject-object" antithesis and spoke instead of "participants" in the legal international framework.[116] Once combined, these factors indicate that any serious theoretical engagement with global constitutionalism's aims and methods *must* include biopolitical considerations to assess how and why the Western constitutional imaginary is transposed onto concrete living practices and settings in the postnational dimension.

To conclude, it might be said that philosophical thinking, as phenomenological inquiry into the facticity of life, acts as a gateway through which we may access the "whoness" of the world society that globalist analysis aims to constitute. On the other hand, biopolitical questioning may instead help us forecast the practical consequences that this endeavor exerts on its participants. To approach global constitutionalism's roadmap (also) through philosophical and biopolitical lenses may therefore, and *pace* Teubner,[117] increase not only global and transnational legal scholars' responsiveness to reality by enhancing their capacity to make sense of it, but also their ability to project and shape the future developments of this field of study.

V. THREE SUB-FIELDS OF RESEARCH

Agamben's merit is to have extended biopolitics' purview to pre-modern times and placed Hobbes at the center of the modern secularization of bare/naked life and political/public existence.[118] However, Agamben fails to grasp the post-historical and post-political essence of the Hobbesian construct, which, by replacing action with behavior, ultimately voids what renders authority and sovereignty truly such. The proposed research aims to show that the functioning of implied provisions on a global and transnational scale may prevent the reproduction of such phenomena. Simply put, this can only occur if their

116. ROSALYN HIGGINS, PROBLEMS AND PROCESSES: INTERNATIONAL LAW AND HOW WE USE IT 49 (1994) [hereinafter HIGGINS, PROBLEMS].

117. *Id.*

118. AGAMBEN, HOMO SACER, *supra* note 35, at 6, 127; AGAMBEN, STASIS, *supra* note 30, at 44, 46-47.

performativity is phenomenologically in line with that of authority and sovereignty, and thus deactivates the working logic of the Hobbesian stratagem. The subject's phenomenological encounter with implied provisions is therefore the core of our research. To substantiate this claim, the suggested research will develop through three sub-fields of analysis. These are "action-behaviour," "authority/sovereignty-power," and "government-governance."

A. Action-Behaviour

The reason why the "action-behaviour" dichotomy is paramount to philosophical (bio)political thinking is that action is a form of authoritarian and sovereign experience that arises out of nothingness. Phenomenologically speaking, action has no source, nor does it need a reason. Hence, whereas philosophical inquiry, being itself an act of experience, may access what renders action truly such, knowledge, with its focus on the metaphysical and scientific cause-effect relation, cannot. The self-defining properties of action depend indeed on its supra-logical negativity, or in other words, on its being phenomenologically spontaneous, free, non-posited, and thus groundless. To speak of "rational action" or "reason for actions," as many legal theorists, and particularly positivists, do, is therefore an oxymoron that reproduces the fallacy of metaphysical thought: action is never as rational, nor as predictable, as behavior is. From this it follows that every time we (try to) provide action with a reason, we are in fact inscribing it within metaphysical structuralism. As a result, action is transformed into behavior, as is the case with the formation of the Leviathan.

Unfortunately, international lawyers have failed to grasp what distinguishes action from behavior on phenomenological and (bio)political plane. This can be even said with respect to those accounts that recognize the importance of opting for an ontological approach to normative interrogatives.[119] The distinction between action and behavior is indeed not a *quantitative* but a *qualitative* one; that is, what matters is what lies behind (and what is thus *implied* by) the signification of our conduct, or, we might say, its anthropological and philosophical negativity. What defines behavior as opposed to action is therefore not the replication of our activities in a more-or-less systematic, coordinated,

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119. AGAMBEN, HOMO SACER, *supra* note 35, at 6, 127; AGAMBEN, STASIS, *supra* note 30, at 44, 46-47. It should be noted, though, that Piiparinen opts at the same time for an epistemological approach to the matter. And here is where the difficulty arises: the difference between action and behaviour can only be apprehended through an act of experience; knowledge cannot access it. *Id.* at 39, 41.

and consistent fashion (what Bergson would call "habit-memory"), but whether or not our conduct is grounded in something "other" than itself in the first place.[120] Thinking and willing are the two most powerful expressions of action's freedom and human (i.e., self-defining) character.

Conversely, any form of conduct that is captivated is behavioral.[121] Thus, Heidegger, notwithstanding his fight against any form of subjectivity, distinguished between human comportment as "acting and doing," and animal behavior as "being driven forward" by stimuli that captivate and nullify the subject's existence.[122] Arendt agreed with the basic assumptions implied by this view, and grounded her notion of human uniqueness in the belief that what distinguishes action from behavior is that the former is a form of political experience whose end (not to be confused with its goal and meaning[123]) lies within itself. Hence, although she distinguished "freedom of opinion and its expression,"[124] typical of the Greek *isonomia*, from the "the freedom inherent in action's ability to initiate something new,"[125] Arendt identified in the free movement of both "the substance and meaning of all things political."[126]

As discussed when outlining the dehumanizing properties of the Hobbesian form of state, among the self-annihilating incentives that characterize behavior stands reason. The fact that both philosophically and (bio)politically, action's "presentness" has no source, and as such, is qualified by its own negativity, means nothing other than that reason can neither access it nor dispose of it. Hence, Oren Ben-Dor correctly notes that "[t]he actuality of the actual is never reasonable, only distorted by it."[127] The paradox of sovereignty is the most vivid example one may give of action's authoritarian (i.e., supra-logical and supra-rational[128]) essence.

Conversely, rational behavior finds its originating source, or *causa instrumentalis*, in the purpose it aims to achieve, as Hobbes's project demonstrates.[129] This is why, in one of his major critiques of liberal thought, Paul W. Kahn has contended that "reason is not self-defining."[130] As reason is common to all of us—it does not let us authoritatively and

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120. Siliquini-Cinelli, *Legal Positivism*, *supra* note 28.

121. *See* HEIDEGGER, FUNDAMENTAL CONCEPTS, *supra* note 104.

122. *Id.*

123. ARENDT, *supra* note 62, at 193-94.

124. *Id.* at 127.

125. *Id.*

126. *Id.* at 129.

127. BEN-DOR, *supra* note 111, at 3.

128. On why the term "irrational" would be inappropriate for our purposes, see HEIDEGGER, INTRODUCTION, *supra* note 1, at 199.

129. Siliquini-Cinelli, *Legal Positivism*, *supra* note 28.

130. *Id.*; *see* PAUL W. KAHN, PUTTING LIBERALISM IN ITS PLACE (2005).

sovereignly experience what makes us human, and thus who we are as persons. The fact that rational behavior may lead to different, individualistic outcomes is not a good argument for claiming otherwise, as it is reason itself that determines those outcomes, not us. While humans are the animals who reason and speak, this merely defines human *qua* human; it does not define me, nor the reader of these words, nor anybody else. It only defines humankind as a species, thus helping the interpreter to differentiate it from its animal and vegetable counterparts. When we pursue our own interest, that is, when we let our attitude be determined by the outcome of a rational calculation (Heidegger, who believed in the inappropriateness of combining action with convenience,[131] would call it the "calculating self-adjustment of *ratio*"[132]), we do not actively decide who we are as persons, but merely dwell in what we should perhaps define as a procedural—as opposed to absolute—truth.

B. Authority/Sovereignty-Power

The Western conceptualization assigns to authority and power (or *auctoritas* and *potestas*, *augurium* and *regnum*) a common source[133] only as a way to operate a scission between them within their shared space: *de iure* authority is hooked to legitimacy, and *de facto* power to the material use of force.[134] While this analytical construct has old origins, it received new life in 494 AD, when Pope Gelasius I coined the well-known politico-juridical theory of the "Two Swords" to distinguish between spiritual authority and temporal power.[135] The dichotomy was then placed at the center of medieval theologians' attempts to separate efficient and instrumental cause, or what with Dante would become reason and force in relation to the Roman Empire.[136]

The modern understanding of *auctoritas* and *potestas* is, of course, very different from that of the Romans.[137] However, this dual conceptualization has exerted considerable influence not only on the

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131. HEIDEGGER, INTRODUCTION, *supra* note 1, at 217.

132. MARTIN HEIDEGGER, PARMENIDES 50 (André Schuwer & Richard Rojcewiz trans., Ind. Univ. Press 1992) (1982).

133. GIACOMO MARRAMAO, DOPO IL LEVIATANO: INDIVIDUO E COMUNITÀ 402 (Bollati Boringhieri ed., 2000).

134. *Id.*

135. PETER H. WILSON, THE HOLY ROMAN EMPIRE. A THOUSAND YEARS OF EUROPE'S HISTORY 28 (2016).

136. AGAMBEN, BODIES, *supra* note 8, at 70-72; *see* WILSON, *supra* note 135, at 28-29.

137. Nils Jansen, *Informal Authorities in European Private Law*, *in* AUTHORITY IN TRANSNATIONAL LEGAL THEORY: THEORISING ACROSS DISCIPLINES 191-201 (Roger Cotterrell & Maksymilian Del Mar eds., 2016).

development of postnational governance scholarship,[138] but also on that of philosophical and biopolitical evaluations of authority and sovereignty. More particularly, it informs those accounts that delineate the intensification—rather than the demise, as is commonly pictured by postnational legal theorists—of authority and sovereignty through an extension and modification of their range of action. These accounts represent an important step beyond Foucauldian biopolitics, whose aim was to highlight the movement from transcendental sovereignty (typical of pre-modern societies) to the disciplinary interventions of governmental biopower (proper to modern times, beginning from the seventeenth and eighteenth centuries).[139] On the contrary, scholars such as Agamben, Hardt, Negri, and Esposito describe, each in his own way, a situation in which life is continuously created, through processes of victimization, by sovereign and authoritarian instances at various levels of human interaction.[140] For these authors, authority and sovereignty have not disappeared from view; rather, governmentality, with its forms of production and control of biopolitical life, is their most powerful expression.

The proposed research abandons the usual conceptualisation that relates authority to theoretical legitimacy and power to physical conditions. The starting point of our study is indeed that authority and sovereignty are indiscernible from self-defining action and experience, and power from self-dissolving behavior and knowledge.[141] What socioeconomic regulative processes of behavioralisation—of which the desire for knowledge, standardization, and reach is a crucial component[142]—threaten is indeed our capacity to experience actively (that is, authoritatively and sovereignly) what defines us as persons and

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138. Rodney R. Bruce Hall & Thomas J. Biersteker, *The Emergence of Private Authority in the International System*, *in* THE EMERGENCE OF PRIVATE AUTHORITY IN GLOBAL GOVERNANCE 3, 4 (Rodney Bruce Hall & Thomas J. Biersteker eds., 2002). The current debate on the so-called "liquid authority in global governance" ultimately subscribes to this dichotomy by hooking authority to new (and yet, ultimately modern and post-modern) forms of societal dynamism and liquid institutionalism. *Cf.* Nico Krisch, Symposium, *Liquid Authority in Global Governance*, 9 INT'L THEORY 237, 244 (2017).

139. FOUCAULT & SHERIDAN, DISCIPLINE AND PUNISH, *supra* note 115; FOUCAULT, THE HISTORY OF SEXUALITY, *supra* note 115; FOUCAULT, THE ORDER OF THINGS, *supra* note 115.

140. HARDT & NEGRI, EMPIRE, *supra* note 17; NEGRI & HARDT, COMMONWEALTH, *supra* note 44; ESPOSITO, BÍOS, *supra* note 58; ESPOSITO, IMMUNITAS, *supra* note 58; and AGAMBEN, HOMO SACER, *supra* note 35; AGAMBEN, KINGDOM, *supra* note 35; AGAMBEN, OPUS DEI, *supra* note 37; AGAMBEN, MEANS, *supra* note 42.

141. Siliquini-Cinelli, *Legal Positivism, supra* note 28, at 218-19.

142. GIORGIO AGAMBEN, INFANCY AND HISTORY: ESSAYS ON THE DESTRUCTION OF EXEPRIENCE 15 (Liz Heron trans., Verso 2007) (1978); GERALD RAUNIG, FACTORIES OF KNOWLEDGE: INDUSTRIES OF CREATIVITY 46-52 (Aileen Derieg trans., 2013).

the world in which we live, either individually or as a community of political subjects. Once it is internalized that, to be truly such, action's self-asserting properties cannot but be authoritarian and sovereign, it emerges that global and transnational actors' conduct under implied norms might also give rise to authoritarian and sovereign instances, and thus represent the last spark of political action in a post-historical and post-political age. For this to occur, these subjects *must* act rather than behave when it comes to deciding whether to comply with an implied provision. In other words, their conduct must be the free, phenomenological expression of the above-described anthropological and philosophical negativity that characterizes action as a form of experience. Conversely, should their conduct be reason- or interest-oriented, it would be the same form of behavior and manifestation of power that characterizes the Hobbesian constitutional plan. In this case, the modern secularization of bare/naked life and political/public existence described by Agamben would recur in the global and transnational dimension.

The suggested roadmap forces us to realize that if we live in a post-historical and post-political age, it is because authority and sovereignty have been absorbed by power. International lawyers have not failed to grasp this.[143] What has been missed, though, is that this event has occurred because (free and self-defining) action and experience have been absorbed by (purposed-oriented and self-dissolving) behavior and knowledge. More importantly, scholars have failed to recognize the role that the incursion of the positivist tradition—that is, of a system of thought concerned with the empirical accessibility of the ontic[144]—into the legal domain has played in this process. This element is particularly relevant for the purposes of our discussion: it confirms that a postnational phenomenology of authority and sovereignty may enhance global constitutionalism's normative potential only if it is centered around *non-posited* norms. This is confirmed by the fact that, as mentioned earlier, the two philosophical and biopolitical negativities that interest us (i.e., that of the modern nation-state and of implied legal principles and rules) have always been neglected by positivist thought. I have elaborated on this elsewhere when showing why legal positivism's structuralism—of which the Hobbesian constitutional stratagem at the

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143. Martti Koskenniemi said it explicitly: "[Sovereignty] is merely a functional power possessed by a ruler or a government to rule a population for its own good." Martti Koskenniemi, *What Use for Sovereignty Today?*, 1 ASIAN J. INT'L L. 61, 65 (2011). Similarly, "political authority is judged [by] how well it fulfils its purposes" (sic). *Id.* at 66.

144. *See* HEIDEGGER, PROLEGOMENA, *supra* note 26.

center of this paper is the chief representative—has helped mold a societal model in which law is ostensibly and allegedly detached from politics, authority and sovereignty are absorbed by power, experience by knowledge, immanence by transcendence, and rationalism and objectification are used to neutralize conflicts and actions, in the direction of a passive "in-human" condition.[145]

Phenomenologically, however, implied provisions transcend both the contours of what is logically placed before us (i.e., the *positum*, which in legal reasoning would be the posited legal norm) and our systematic knowledge of it. To put it differently, they overcome the metaphysical (and, thus, mechanistic, organicist, and constructivist) relation between the subject (i.e., the actor) and the object (i.e., the norm) upon which the positivist, reason-oriented understanding of law as *scientia juris* is grounded.[146] That is why the functioning of implied norms and the authoritarian and sovereign political essence of action meet in a zone of indistinction: if properly comprehended, both their negativities deactivate the Hobbesian managerial construct.

Indeed, authority and sovereignty are not just always free from the dictates of reason and interest, or speculation and convenience, but their relationship with action renders them a matter of experience rather than rational and logical understanding. This is due to the fact that, as noted earlier, authority and sovereignty remain confined with the boundaries of the *nōtum*, never reaching those of the *cognitum*. Unfortunately, scholars have failed to comprehend this, believing instead that they can be known and represented, or accessed and posited. Such desire to conceptualize authority and sovereignty is the expression of the metaphysical approach to phenomena that seeks to make subject and predicate coincide through judgment. As the amount of scholarship indicates, an ultimate and all-encompassing framework of intelligibility cannot, however, be construed. This is not surprising: legal theorists' struggle to conceptualize authority and sovereignty and what they have been undergoing at the global and transnational levels will persist as long as the distinction between knowledge and experience is not rediscovered and the latter is placed at the center of authoritarian and sovereign instances. One could, however, object that my use of the term "experience" risks being itself conceptual, and thus that to operationalize authority and sovereignty in this way is not of great assistance. And indeed, we may avoid being trapped in recursive thinking only if we dissociate experience from any logical

145. *See* Siliquini-Cinelli, *Legal Positivism, supra* note 28.

146. *Id.*; *see also infra* Section V.C.

aspiration and let ourselves dwell in its inexpressible humanizing force as it *act*-ually happens (Heidegger would call it the "presentness of presence"[147]).

C. Government-Governance

Finally, a postnational phenomenology of authority and sovereignty centered around the performativity of non-posited norms requires a philosophical and biopolitical assessment of the passage from (negative and irreducible) "input" to (positive and interchangeable) "output" forms of legitimation and accountability. In short, the proposed research begs a philosophical and biopolitical contextualization of the shift from the phenomenological negativity of government to the positive working logic of governance.[148]

The movement from the former to the latter has been long studied by global and transnational philosophers and sociologists, as well as legal and political theorists. Rather than just indicating privatization, delegation, deregulation, and so forth, the dialectic between government and governance is usually inscribed within the fluid, interconnected, and pluralist emergence of the "social" as opposed to the static "private-public" distinction in Arendtian terms. The social is, according to this view, determined by the confusion between bourgeois ideology, civil society's influence over the government of the *res publica*, and the sovereign's political prerogatives.[149]

Over the past decades, a great many important accounts have been put forward with the aim of deciphering the essence of those forms of governance that operate with, without, within, or beyond classic governmental settings. Caught by the complexities of pluralist regulative phenomena and the need for innovation in rapidly changing environments, scholars have opted for a normative use of the social systems (or group theory) approach to show that governance configurations transcend the static, communitarian declension that characterizes any act of government. Thus, in a classic study on the subject, Robert O. Keohane and Joseph S. Nye Jr. hooked the working

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147. Hence Ben-Dor rightly notes that the "actuality of the actual is never reasonable." BEN-DOR, *supra* note 111, at 3.

148. The brevity of this Article does not allow me to address the emergence of the "postnational constitutionalism/postnational public law" antithesis within this shift. *See* Neil Walker, *Postnational Constitutionalism and Postnational Public Law: A Tale of Two Neologisms*, 3 TRANSNAT'L LEGAL THEORY 61, 62 (2012).

149. R. A. W. RHODES, UNDERSTANDING GOVERNANCE: POLICY NETWORKS, GOVERNANCE, REFLEXIVITY, AND ACCOUNTABILITY 9 (SAGE Pub. 1997) (2007).

logic of governance to that of globalizim and argued that the term refers to

> the processes and institutions, both formal and informal, that guide and restrain the collective activities of a group. Government is the subset that acts with authority and creates formal obligations. Governance need not necessarily be conducted exclusively by governments and the international organizations to which they delegate authority. Private firms, associations of firms, nongovernmental organizations (NGOs), and associations of NGOs all engage in it, often in association with governmental bodies, to create governance; sometime without governmental authority.[150]

According to Peer Zumbansen, "[T]he shift 'from government to governance' points to an irreversible transformation from hierarchically organized political regulation to a heterarchy of conflicting and competing regulatory models."[151] Larry Catá Backer too described governance as one of globalisation's main developments allowing "governance communities [to] produce their own constitutions, thereby existing autonomously from the government of the state, international organizations, and their public law frameworks, albeit in connection with them."[152] Similarly, according to Antonio Negri, "The passage from government to governance infringes the unitary regulation of the systems of public law."[153] Asking whether there is "a constituent power in the transnational context," Alexander Somek likewise suggested that what transnational "civic interpassivity lacks, in contrast to action in the Arendtian sense, is the power to grow beyond itself."[154] Hence, the postnational landscape does not require "public autonomy."[155] Other scholars one could mention in this respect are Henrik Enroth and Karl-Heinz Lauder. According to the former, contrarily to government, governance does not require the presence of collectivities.[156] The reason being that governance is "an art of governing premised on solving

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150. Robert O. Keohane and Joseph S. Nye Jr., *Introduction* to GOVERNANCE IN A GLOBALIZING WORLD 1, 12 (Joseph S. Nye Jr. & John D. Donahue eds., 2000) (ebook).

151. Peer Zumbansen, *Law After the Welfare State: Formalism, Functionalism, and the Ironic Turn of Reflexive Theory*, 56 AM. J. COMP. L. 769, 774 (2008).

152. Larry Catá Backer, *Governance Without Government: An Overview and Application of Interactions Between Law-State and Governance-Corporate Systems*, *in* BEYOND TERRITORIALITY, *supra* note 6.

153. Antonio Negri, *Sovereignty Between Government, Exception and Governance*, *in* SOVEREIGNTY IN FRAGMENTS: THE PAST, PRESENT AND FUTURE OF A CONTESTED CONCEPT 205, 217 (Hent Kalmo & Quentin Skinner eds., 2010).

154. Alexander Somek, *Constituent Power in National and Transnational Context*, 3 TRANSNAT'L LEGAL THEORY 31, 58 (2012).

155. *Id.*

156. Henrik Enroth, *Governance: The Art of Governing after Governmentality*, 17(1) EUR. J. SOC. THEORY 60, 65 (2013).

problems with no necessary reference to any kind of society or population."[157] Lauder has instead linked the emergence of governance with the formation and diffusion of the so-called "society of networks," that is, of a kind of society that lacks a centralised, "integrative 'control project'" and whose high degree of fragmentation represents the last step towards the disintegration of the liberal constitutional model.[158]

While authoritative, such categorizations of the "government-governance" dichotomy ought to be abandoned for the purposes of our study. This is because they do not help us appreciate that governance replaced government long before the emergence of our transnational, global age. Nor, for that matter, did this substitution occur during modernity's parable, as many commentators assume under the influence of Arendt's laments regarding the vanishing of authority as brought about by the penetration of the post-war "civilised" economic lifestyle into the domain of the political.[159]

What needs to be grasped is, rather, that the substitution of government for governance has occurred alongside the absorption of the negativity of action, experience, and authority/sovereignty by the positivity of behavior, knowledge, and power.[160] The post-political connotations of governance's bureaucratic and economico-managerial essence are the result of this dynamic phenomenon, which ought to be inscribed within the immunizing logic of the Western biopolitical machine.[161] In this sense, it is worth noting that neither does Agamben help us identify the exact occurrence of this shift, as in his scholarship he uses both terms interchangeably.[162] This particularly emerges when Agamben associates the administrative paradigm of the Western tradition

157. *Id.* at 61.

158. Karl-Heinz Lauder, *Constitutionalism and the State of the 'Society of Networks': The Design of a New 'Control Project' for a Fragmented Legal System*, 2 TRANSNAT'L LEGAL THEORY 463, 472-73 (2011).

159. This might explain global and transnational legal theorists' renewed interest in pre-modern forms of governance, such as those of the Roman Empire and the Holy Roman Empire. *See* Henrik Enroth, *The Concept of Authority Transnationalised*, 4(3) TRANSNAT'L LEGAL THEORY 336, 351 (2013); *see also* LUUK VAN MIDDELAAR, THE PASSAGE TO EUROPE: HOW A CONTINENT BECAME A UNION 223, 229, 252-73, 351-52 (Liz Waters trans., Yale Univ. Press 2013) (2009); WILSON, *supra* note 135.

160. Siliquini-Cinelli, *Legal Positivism*, *supra* note 28.

161. *See* ESPOSITO, BÍOS, *supra* note 58; ESPOSITO, IMMUNITAS, *supra* note 58.

162. AGAMBEN, HOMO SACER, *supra* note 35; AGAMBEN, KINGDOM, *supra* note 35; AGAMBEN, OPUS DEI, *supra* note 37.

crystallized by the Catholic Church's managerial activity with the governmental function pursued by biopolitics.[163]

Both the failure to institutionalize the rules that permeate global society's workings and the democratic deficit of global decision-making procedures and practices should therefore be seen as signals regarding the necessity of overcoming the boundaries of classical discourses on the movement from government to governance. A philosophical and biopolitical evaluation of the shift from (irreducible and negative) "input" to (interchangeable and positive) "output" forms of legitimation and accountability centred around the operativity of non-posited norms might prove to be profitable in this respect.[164] In particular, the suggested reappraisal of the subject would have to (1) verify whether the post-historical and post-political working logic of global and transnational governance schemes is in line with the basic kinopolitical concepts of our time; and in doing so, (2) ascertain what is the role of implied provisions in the shift from "*ante-factum*" to "*post-factum*,"[165] or from "policy-making" to "problem-solving" [166] mechanisms of legitimation and accountability on the postnational scale.[167]

Put differently, what needs to be determined is whether the performativity of non-posited norms is in line with the negativity of authoritarian and sovereign acts of government, or with the positivity of liquid systems of governance and kinopolitical configurations. With respect to the latter, I particularly refer to flows, junctions, circulations and recirculations, all of which void the same negative irreducibility of foundation[168] that characterises (political) action, and, thus, our human condition, authority, sovereignty, and government.

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163. AGAMBEN, STASIS, *supra* note 30, at 66-69. Yet it could be objected with good reason that Agamben's anti-Schmittian eschatology cannot but lead him to combine politics with administration. *See id.*

164. According to this model, political-juridical legitimation requires that the outputs be visible and discernible—something that can never occur with the negativity of authoritarian and sovereign instances. LUIGI PELLIZZONI, ONTOLOGICAL POLITICS IN A DISPOSABLE WORLD: THE NEW MASTERY OF NATURE 52 (2015).

165. James N. Rosenau, *Governance, Order and Change in World Politics*, *in* GOVERNANCE WITHOUT GOVERNMENT: ORDER AND CHANGE IN WORLD POLITICS 1, 4 (James N. Rosenau & Ernst-Otto Czempiel eds., 1992).

166. *See* Enroth, *supra* note 156, at 63.

167. It has been held that the European Central Bank is a perfect case study. *See* MIDDELAAR, *supra* note 159.

168. THOMAS NAIL, THE FIGURE OF THE MIGRANT 24, 26 (2015); *see* HARDT & NEGRI, EMPIRE, *supra* note 17, at 150 (who speaks correctly of the "anti-foundational" ideology of the world market, but fail to recognise its post-historical and post-political essence).

VI. A BRIEF OVERVIEW OF IMPLIED LEGAL PRINCIPLES AND RULES

The notion of implied legal principles and rules at the center of this Article refers to norms that absolve a regulative function negatively. As such, they can either fall within the purview of customary forms of regulation or grow on the basis of, and thus be implied by, enacted, "tangible" norms.[169] In any case, our focus here is not on the principle or rule as an ontic, i.e., posited, entity once it has come to life. Rather, what interests us is what lies *behind* the manifestation of the provision in question, i.e., its ontological presentification as brought by the phenomenological encounter between the somehow-yet-non-existing provision and the subject. The reason for this is that the principles and rules of our concern come to life at the very moment when the subject decides whether to comply with them or not. Our focus is then on the subject's response to the claims that are revealed to her during the phenomenological process itself. This explains why, as discussed in the introductory part, phenomenological inquiry is ultimately normative.

Hence, while such provisions exist for a variety of reasons, among which stand policy considerations, here we are interested in how they perform their instances. As mentioned in the introductory remarks, their phenomenological negativity has to be approached supra-logically. This inevitably requires an engagement with the metaphysical development of the Western legal tradition as epitomized by law's ongoing categorization as *scientia juris*.[170] The inception of such conceptualization is indeed to be found in the metaphysical and ontological metamorphosis from *ius* (negative) to *lex* (positive)—a distinction that is almost foreign to Anglophone lawyers.[171] This shift occurred along the structuralisation of thinking and language that Stoicism, and particularly Panaetius and Polybius, brought to Rome.[172]

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169. *Cf.* Consolidated Version of the Treaty on the Functioning of the European Union art. 352(1), Oct. 26, 2012, 2012 O.J. C326/47. For a discussion in international law literature, see generally Jan Klabbers & Silke Trommer, *Peaceful Coexistence*, *in* NORMATIVE PLURALISM IN INTERNATIONAL LAW (Jan Klabbers & Touko Piiparinen eds., 2013).

170. ANTONIO PADOA SCHIOPPA, STORIA DEL DIRITTO IN EUROPA: DAL MEDIOEVO ALL'ETÀ MODERNA 87-98, 149, 504-08 (2007); RODOLFO SACCO, ANTROPOLOGIA GIURIDICA 91-93, 99 (2007); *cf. Jurist*, OXFORD SHORTER ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES 1075 (3d ed. 1965) (the second definition of the term "jurist" is "one versed in the science of law").

171. Seán Patrick Donlan, *Aldo Schiavone, The Invention of Law in the West*, 1(2) COMP. LEGAL HIST. 291, 291 (2013) (book review).

172. ALDO SCHIAVONE, THE INVENTION OF LAW IN THE WEST 184, 204, 233, 241, 282, 294 (Jeremy Carden & Antony Shugaar trans., Harvard Univ. Press 2011) (2005). For a historical account of the Greek influence over Roman juristic practice, see PETER STEIN, REGULAE IURIS: FROM JURISTIC RULES TO LEGAL MAXIMS (1966).

The organicist thinking that characterizes this approach to law has profoundly shaped the development of Western legal thought, and reached its apex in the positivist tradition. As an example, one could mention the definitive loss of relevance of customs in Rome's post-classical period. Alternatively, one could point to the discourse over the legitimacy and validity of implied regularities that, starting from the rule in the Digest,[173] has kept jurists from Bulgarus to Marmor busy, passing through Pier delle Vigne, Revigny, Beaumanoir, Hobbes, Beyer, Gottlieb, Hugo, Puchta, Gierke, and Ehrlich to mention just a few.[174]

Hence—and bearing in mind law's need for comprehensiveness and unity—when using the term "implied legal principles and rules," I rely on a categorization that partly draws on Robert Alexy's non-positivist distinction between "principles" and "rules." More precisely, the research this Article promotes uses Alexy's conceptualization of principles as "optimization imperatives" and rules as "definitive imperatives." As Alexy himself put it:

> [T]he decisive point in distinguishing rules from principles is that *principles* are norms which require that something be realized to the greatest extent possible given the legal and factual possibilities. Principles are *optimization requirements*, characterized by the fact that they can be satisfied to varying degrees . . . . By contrast *rules* are norms that are always either fulfilled or not . . . . This means that the distinction between rules and principles is a qualitative one and not one of degree. Every norm is either a rule or a principle.[175]

While the proposed research subscribes to this content-oriented categorization, it differs from Alexy's Dworkinian approach with respect to the *form* of the rules in question, as those that concern us are never expressly enacted. Indeed, while Alexy concedes that legal principles might not be posited,[176] rules are, to him, always directly enacted by lawmakers.[177] However, once the adjective "implied" is added to Alexy's institutional model, its purview is inevitably narrowed down to encompass only those provisions—either in the form of a principle or a

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173. *Cf. Dig.* 1.3.32.1.

174. For an overview, see SCHIOPPA, *supra* note 170. *See also* BEDERMAN, *supra* note 15, at 16-26.

175. ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS, *supra* note 26, at 47-48.

176. Alexy upheld this view in his recent response to Larry Alexander's critique of the existence of legal principles. *See* Robert Alexy, *Comments and Responses*, *in* INSTITUTIONALIZED REASON: THE JURISPRUDENCE OF ROBERT ALEXY 319, 328 (Matthias Klatt ed., 2012).

177. ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS, *supra* note 26, at 44-110.

rule—that absolve a normative function silently by transcending the boundaries of traditional norm-creation mechanisms.[178]

From this it flows that the suggested categorization serves also to overcome the circuity of those accounts, such as HLA Hart's, Jeremy Waldron's, and Andrei Marmor's which distinguish between habits and social rules and then assign the "positive law" label to a particular set of customs and practices.[179] The difficulty with these conceptualizations is that they rely on a reductive, conventionalist-oriented theory of law that blurs the philosophical and biopolitical distinction between action and behavior, authority/sovereignty and power, and government and governance that the proposed research aims to rediscover and contextualize.

Only by abandoning such positivist construct can we comprehend why the operativity of implied provisions is the expression of a negativity that transcends any metaphysical structuralism, rational schematism, and logical understanding. On a practical level, this feature should also be assessed through the lens of the perennial indeterminacy of human life—something that positive analysis cannot grasp.[180] Few would assert that

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178. A note of caution. Some commentators would, with good reason, object here that legal rules can never be implied—or, to say it with Alexander, that they always have, by definition, a "canonical form." Alexy, *supra* note 176, at 328. This conceptualisation has old origins that go back to the essence of Western legal thinking, according to which legal rules are "tangible/visible" legal norms. Analytical jurisprudence, and particularly its logical thread as described by Ulfrid Neumann, represents the apex of this scientific approach to regulative phenomena. *Id.* at 3. Unfortunately, the scope of this Article does not allow me to unfold its assumptions and consequences. To prove that it has always been a constant in legal reasoning, however, one could point at the similarity between such a view and Paul's statement that a legal rule is always established by—and thus, meets in a zone of interaction with—an existent law ("Non ex regula ius sumatur, sed ex iure quod est regula fiat"; *Digest* 50.7.1).

179. *See* H.L.A. HART, THE CONCEPT OF LAW 15 (Clarendon Press 2012) (1961); ANDREI MARMOR, SOCIAL CONVENTIONS: FROM LANGUAGE TO LAW 156 (2009); Jeremy Waldron, *Cosmopolitan Norms*, *in* SEYLA BENHABIB, ANOTHER COSMOPOLITANISM 83-100, (Robert Post ed., 2006); *see also* BEDERMAN, *supra* note 15, at 170.

180. In the Introduction it was seen that positive inquiry is a system of knowledge concerned with the ontic. Peters, *Constitutional Fragments*, *supra* note 2. Here it should be further specified that this is due to the natural scientism that has been characterising the positivist tradition since its inception in the mid nineteenth century. HART, *supra* note 179, at 16-17. The aim of such positivists as Auguste Comte, Franz Joseph Gall, Pierre Simon de Laplace, Adolphe Quételet, Enrico Morselli, and Justus von Liebig was indeed that of framing a form of social physics centred on regularity, periodicity, and generalisation. According to this view, it is only through the systematic, analytical observation of phenomena that it is possible to, first, decipher and secondly, mould, the laws which govern human life and conduct. MARMOR, *supra* note 179, at 14. It was believed that the empirical criteria thus formulated may ultimately be used to promote the development of a stable, progress-oriented form of polity whereby co-operation is the rule, irregularities are removed, and conflicts neutralised. HART, *supra* note 179, at 15; MARMOR, *supra* note 179, at 156; Waldron, *supra* note 179, at 16. Objectification and

law-making officials are capable of foreseeing all the possible scenarios in which the powers regulated by a positive principle or rule will have to be exercised, and thus whether those powers are sufficient, or others will of necessity arise by implication—not to mention the impossibility of efficiently determining *how* those powers will need to be exercised.[181] Hence, as a matter of fact, the operativity of implied provisions is structurally related to what Fredrick Hayek defined as the fallacy of constructivist and rational approaches to reality, of which positive law is the juridical expression.[182] Of course, Hayek was not averse to planning, per se. Rather, he criticized "bad planning," as epitomized by the rationalist attitude towards social phenomena, for embracing the belief that "everything to which man owes his achievements is a product of his reasoning [and that] [i]nstitutions and practices which have not been designed in this matter can be beneficial only by accident."[183] Such a theoretical fallacy leads to "the fiction that all the relevant facts are known to someone mind, and that it is possible to construct from this knowledge of the particulars a desirable social order."[184]

This explains why the desire to control all determinations of human interaction through reason, or (bearing in mind the above) the desire to transform action into behavior and experience into knowledge, inevitably underestimates the role that uncertainty plays in human development. The question therefore arises as to whether the norms of our concern absolve a regulative function *evolutionarily*. Such a conceptualization might be of assistance for our purposes only if one bears in mind that these norms do not require a long period of time to manifest themselves and exercise their instances. This is of peculiar relevance for our purposes as it allows us to depart from international law's conventional approach to the subject. Indeed, it is commonly held that for a customary rule to exist on the international scale, "there must be a generalized state practice."[185] In particular, "[a]lthough the practice does not have to be universal, states that are particularly affected by the rule should adopt the practice and the practice should be consistent over time."[186] Yet, as

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rationalism were therefore conceived by such thinkers as the only instruments to avoid the repetition of revolutionary events such as those France witnessed in 1830-1831.

181. RONAL DWORKIN, LAW'S EMPIRE 245 (1986).

182. F.A. HAYEK, LAW, LEGISLATION AND LIBERTY: A NEW STATEMENT OF THE LIBERAL PRINCIPLES OF JUSTICE AND POLITICAL ECONOMY 520 (2013).

183. *Id.* at 11; *see* FRIEDRICH HAYEK, THE CONSTITUTION OF LIBERTY 28 (Routledge 2006) (1960) [hereinafter HAYEK, THE CONSTITUTION OF LIBERTY] .

184. HAYEK, THE CONSTITUTION OF LIBERTY, *supra* note 183, at 15.

185. Klabbers & Trommer, *supra* note 169, at 83.

186. *Id.*

Rodolfo Sacco has demonstrated throughout his scholarship on law's anthropological function, silent forms of compliance and non-compliance may indeed arise, evolve, and eventually die incredibly quickly.[187] On the other hand, though, this feature might lead to the contention that such provisions are in line with the view that understands international law as a process governed by decisions rather than as a system of rules.[188] While sound, this analogy can only assist our research if it is implemented by a wholly new approach to the operativity of implied provisions that moves from the abandons the rigid configuration that underpins international law's understanding of it.

From this it follows that under such a broad categorization fall all those principles and rules that, from an ontological and positivist point of view, may not be considered as part of a tangible body of recognition, but are nonetheless to be considered as part of the global and transnational juridical apparatus broadly understood. As the quote that opens this Article indicates, my use of the term "tangible body" is Accursenian,[189] as I refer to either a trans-, inter-, or national set of principles or rules, as well as a judgement, a directive, and so forth.

Finally, the implied precepts of our interest may either be substantive or procedural, and may give rise either to positive or negative duties, as well as presuppositions or implications, independently of any direct and indirect consequences that their compliance or non-compliance might determine. In other words, the "implied legal principles and rules" label groups together a heterogeneous set of implicit provisions that transcend the boundaries (and thus, the above-mentioned "space") established by constitutive instruments, and as such, may give rise to assumed, inherent, or implied powers. Needless to say, given that we are interested in the phenomenological negativity and spontaneity of the subject's conduct, this categorization also transcends the working logic of convention-based phenomena (which, not coincidentally, are at the center of contemporary legal positivists' arguments).

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187. SACCO, *supra* note 170, at 78, 139-41, 179, 201.

188. JEAN D'ASPRÉMONT, FORMALISM AND THE SOURCES OF INTERNATIONAL LAW: A THEORY OF THE ASCERTAINMENT OF LEGAL RULE 105 (2011); Rosalyn Higgins, *Policy Considerations and the International Judicial Process*, 17 INT'L. & COMP. L.Q. 58, 59 (1968). Within the international law literature, Sacco's paradigm finds a correspondent in that of Johann Wolfgang Textor. *See* HIGGINS, PROBLEMS, *supra* note 116.

189. Accursius, *Dig.* 1.1.10.1. "Omnia in corpore iuris inveniuntur" (trans.: "all things are found in the body of law").

VII. CONCLUSION

Philosophy as phenomenology is a form of supra-logical, normative thinking that deals with the ontological, i.e., with how things manifest themselves and operate. The normative character of the phenomenological process derives from the fact that the various meanings are disclosed to the subject through her response to the claims that are revealed by, and apprehended through, the process itself. As phenomenology addresses what lies *behind* things supra-logically, it is a *negative* intellectual endeavor. As such, it is opposed to *positive* inquiry, which deals with the ontic, i.e., posited things themselves through rational and logical questioning.

Drawing from this categorization, this Article has proposed a comparison between two negativities: the one which Agamben assigns to the creation of the modern nation-state; and the one which underpins the functioning of implied i.e., non-posited provisions. The argument pursued by this Article is that such comparison may assist scholars in developing a postnational phenomenology of authority and sovereignty. This would in turn make it possible for globalist discourse to reach global constitutionalism' philosophical and biopolitical significance and, thus, enhance its normative potential—something that cannot be done through positive analysis.

The necessity to undertake such comparison is due to the role played by the "domestic analogy" in globalist imaginary. More particularly, the creation of the modern nation-state as a term of comparison allows us to determine whether the postnational functioning of implied provisions creates the same biopolitical consequences which Agamben assigns to the secularization process.

As discussed, this may in fact occur, but only if certain conditions which Agamben does not identify are met. In particular, the Article has showed that the modern secularization of naked/bare life and political/public existence described by Agamben recurs in the postnational dimension every time the functioning of implied norms manifests itself as an expression of power, behaviour, and governance.

According to Cohen, "Constitutionalism . . . is not identical with or reducible to legalization, at least not from the qualitative normative perspective. To put this differently, constitutionalism is a discourse that carries a normative surplus over mere juridification."[190] The proposed research embraces this view and pushes it farther with the aim to show that (global) constitutionalism's normative surplus is ultimately

190. COHEN, *supra* note 27, at 11.

philosophical and biopolitical. This explains why the suggested form of normative thinking is capable of enhancing global constitutionalism's normative potential.

However, the supra-logical character of the proposed analysis raises several key normative questions that cannot easily be answered. To begin with, we should ask how the *legal* status of the principles and rules of our concern can be ascertained. If we assume that the transnational legal order is "*a collection of formalized legal norms*,"[191] can implied provisions be analytically categorised as forming part of it, despite their informal operativity? If we answer positively, it would mean that whatever law's claims might be (i.e., to correctness, objectivity, etc.), they also serve to legitimate the supra-logical performativity of non-posited provisions. But if that is the case, what would the obligatory character of such norms be? And how can it be assessed?

These questions pose subsequent ones, namely, whether a postnational phenomenology of non-posited norms would be at odds with global constitutionalism's institutional commitment to reconstruct (and, thus, *posit*) some features and purposes of international law as constitutional. In this sense, must implied legal principles and rules be formally considered as part of legal pluralism's transcendence of conventional approaches to legal phenomena? Do they support Brian Tamanaha's critique of social-scientific legal pluralism as lacking analytical value,[192] or do they enhance global legal pluralism's capacity to maintain a certain degree of indeterminacy between legal orders and thus produce (bio)political change?[193]

Moreover, are these implied legal principles and rules capable of construing (spatial, temporal, qualitative, and subjective) boundaries[194] (or borders[195]) as transnational positive norms do? What is their juridical reach? Can they be conceptualized as tolerated manifestations of transnational legal authority and therefore be considered as part of "*any legally relevant* shift of transnational power?"[196] Are they compatible with the paradigm of "constitutionalism as legitimacy,"[197] that is, with a

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191. Terence C. Halliday & Gregory Shaffer, *Transnational Legal Orders* 5 (U.C. Irvine Sch. L. Legal Stud. Res. Paper Series, No. 2015-56, 2015).

192. Brian Z. Tamanaha, *The Folly of the Social Scientific Concept of Legal Pluralism*, 20 J.L. & SOC'Y 192, 194 (1993).

193. Jeffrey L. Dunoff, *International Law in Perplexing Times*, 80 MD. J. INT'L L. 11, 29 (2010).

194. *See* Lindahl, *supra* note 80.

195. KEITH CULVER & MICHAEL GIUDICE, LEGALITY'S BORDERS: AN ESSAY IN GENERAL JURISPRUDENCE 2 (2010).

196. BEYOND TERRITORIALITY, *supra* note 6, at 8.

197. *See* Amhlaigh, *supra* note 56, at 177.

categorization that inscribes the various disagreements over the notion and meaning of global constitutionalism within the multi-faced essence of the Western constitutional tradition?

And depending on how these questions are answered, what would happen to "persisting *disagreement"* over international law's structure[198] and, thus, to our understanding and assessment of the intense processes of diversification and fragmentation—i.e., the pluralization of regulative sources and norm-setting bodies at the macro, meso, and micro levels, as well as of "regime shifting"[199] mechanisms—that shape the uncertain and liquid postnational architecture? Can their existence and functioning be considered as another sign of the "disorderliness, the pluralism, the uncertainty, the chaos, of all those rules and principles and institutions" that permeate the "mystery of global governance?"[200] Or, more optimistically, should the study of their performativity be seen as an opportunity to shed new light on how co-existing regulatory systems operate?

Further, should their supra-logical functioning be seen as an obstacle to the development of a much-needed conceptual framework for managing regime interactions and solving competence conflicts?[201] More broadly, how can it be ascertained whether non-posited provisions can play any role in the framing of a transnational theory of legality?[202] Given their peculiar negative, factical character, can they be considered as an expression of the rule of law, or of the *living* transnational rule *with* law?[203] Relatedly, what would be their impact on our "agreement on the

198. Anne van Mulligen, *Framing Deformalisation in Public International Law*, 6 TRANSNAT'L LEGAL THEORY 635, 637 (2015) (emphasis in original).

199. Eyal Benvenisti & George W. Downs, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, 60 STAN. L. REV. 595, 615 (2007); Michael Zürn & Benjamin Faude, *On Fragmentation, Differentiation and Coordination*, 13 GLOBAL ENVTL. POL. 119, 121-22 (2013).

200. David M. Kennedy, *The Mystery of Global Governance*, 34 OHIO N.U. L. REV. 827, 848 (2008).

201. *See* REGIME INTERACTION IN INTERNATIONAL LAW: FACING FRAGMENTATION 25-27, 35-39, 42-54 (Margaret A. Young ed., 2012) (citing contributions GUNTHER TEUBNER & PETER KORTH, TWO KINDS OF LEGAL PLURALISM: COLLISION OF TRANSNATIONAL REGIMES IN THE DOUBLE FRAGMENTATION OF WORLD SOCIETY 23–54 (Margaret A. Young ed., 2010)); *see also* Matthias Klatt, *Balancing Competences: How Institutional Cosmopolitanism Can Manage Jurisdictional Conflicts*, 4 GLOBAL CONSTITUTIONALISM 195 (2015); Peer Zumbansen, *Transnational Private Regulatory Governance: Ambiguities of Public Authority and Private Power*, 76 LAW & CONTEMP. PROBS. 117, 129-32 (2013).

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203. Ben Bowling & James Sheptycki, *Global Policing and Transnational Rule with Law*, 6 TRANSNAT'L LEGAL THEORY 141, 141 (2015) (first emphasis added).

meaning" of the international rule of law,[204] and, thus, on our analytical understanding of the obligations that the rule of law imposes on global and transnational subjects (including lawyers[205])?

Finally, what would be the fate of democratic ways of constructing a postnational legal framework underpinned by legitimate enforceability procedures and access to justice? Given the informal plane of implied provisions' operativity, will global and transnational public and private actors be able to meet civil society's expectations regarding the efficiency of norm-creating mechanisms and accountability schemes?[206] How can liability be ascertained for the damages caused by compliance or non-compliance with global and transnational implied norms?

These are just some of the normative questions the proposed phenomenological study raises. Whether we will be able to answer these (and further) interrogatives will determine the extent to which we can decode the regulatory dynamics of our age, and thus, enhance global constitutionalism's normative potential.

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206. CRAIG T. BOROWIAK, ACCOUNTABILITY AND DEMOCRACY: THE PITFALLS AND PROMISE OF POPULAR CONTROL 1 (2011); Robert A. Dahl, *Can International Organizations Be Democratic?*, *in* DEMOCRACY'S EDGES 19, 19 (Ian Shapiro & Casiano Hacker-Cordón eds., 1999); Anne Peters, *The Transparency of Global Governance*, *in* RECONCEPTUALISING THE RULE OF LAW IN GLOBAL GOVERNANCE, RESOURCES, INVESTMENT AND TRADE 3-10 (Photini Pazartzis & Maria Gavouneli eds., 2016); Eamon Aloyo, *Improving Global Accountability: The ICC and Nonviolent Crimes Against Humanity*, 2 GLOBAL CONSTITUTIONALISM 498, 517 (2013); Ruth Grant & Roberto O. Keohane, *Accountability and Abuses of Power in World Politics*, 99 AM. POL. SCI. REV. 29, 33 (2005).