

SECULARISATION OF THE POLITICS OF LAW: ON ROOTS OF LIBERAL DEMOCRACY

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Abstract

This paper offers a theoretical analysis of the interplays of secularization in the sphere of law and the sources of legality in liberal democracies. First section focuses on the sphere of law, and argues that not only its form and content, but also its enforcement has become secular. These surely happen simultaneously with secularization in a different yet related aspect of governance – namely, the practices of law-making. The following section argues that secularization in this particular area of who makes the law has taken place in conjunction with the rise of liberal, parliamentary, constitutional democracy that attributes the constituent power of the politico-legal system to the people. A direct effect of this is observable in the ways people identify (identity) with the politico-legal system and how the system represents (representation) the people have changed; this is extensively discussed in the last section.

Keywords: secularization, law, legality, liberal democracy, identity, representation.

1. Introduction

Discussions of secularization tend to diverge between two branches. The first discusses the process of secularization, in which context specific convergence (or divergence) of secular and religious practices have formed unique constellations of socio-political cultures. In this group, usually in reference the development of Western secular politics, with emphasis on various strains in it (for example, French vs. US), as well as structures in the post-colonial world (for example, the joint use of secular post-colonial constitutions and Sharia law), different evolutions of political systems depending on the religious culture of the region (multi-religious vs. one dominant religion) are subject to analysis. The second treats secularization as a feature of modernity, hence using secularization as an indicator of modernization. In this framework, secularization is portrayed as a violent demystification and disenchantment process in which identities, myths, customs and social imaginaries are uprooted and dissolved.¹ For the second group, secularization is still underway and keeps perpetuating violence (both symbolically and physically) on the individuals and the community.² These two branches of scholarship cannot be

1 Max Weber, *The Protestant Ethic and the Spirit of Capitalism*. (New York: Routledge, 2005).

2 Charles Taylor, *A Secular Age* (Cambridge: Harvard University Press, 2007).

clearly separated. Modernity, which has been a product of the Western world, has been in a turbulently exploitative relationship with colonialism, hence bringing a specific type of Western³ secularization with itself to the colonial world. This means, regardless of context, some areas of life have become secular.⁴

From the questions of multiple jurisdictions in Canada⁵ to United States Supreme Court decisions on the use of tax payers' money to fund religious themed displays in public spaces⁶ to debates about the Islamic veil in France⁷, recent debates on secularization focus predominantly on application.⁸ Although there doesn't seem to be shortage of diverse issues and cases, the literature is still predominantly constricted to the liberal, constitutional democratic framework. This is mainly because the attempts to understand how the modern (Western) state came to be usually presume that the current liberal, constitutional democratic form is the best and the most successful form of state. Consequently, instead of tracing the interplays of certain historical processes in the ongoing development of various political formations, these attempts treat the liberal, constitutional democratic form as completed and trace its attributes in history. This paper aims to undo this peculiarity. As such, it treats secularization as a constantly enduring, open-ended and incomplete historical process and address the lack of analysis in the literature of

3 I say Western because there are forms of secularization that have risen outside the Western world and are epistemologically radically different. Unfortunately however the destructive grip of colonialism has impeded, if not altogether prevented and eventually destroyed, these different forms of secularization. Genealogical studies of these forms of secularizations are more than necessary, but they are beyond the scope of this paper.

4 Although surely counter-conducts also exist. One only has to look at the roles of shamans and elders in various communities to see the non-secularized forms of conduct. Lowenhaupt Tsing, Anna. *In the Realm of the Diamond Queen: Marginality in an Out-of-the-Way Place*. (New Jersey: Princeton University Press, 1993).

5 Karena Shaw, *Indigeneity and Political Theory: Sovereignty and the Limits of the Political*. (New York: Routledge, 2008). Resnick, Larry. "Family Dispute Arbitration and Sharia Law". *BC Civil Liberties Association*. 2007. <http://www.bccla.org/othercontent/07Sharialaw.pdf> (accessed 2 13, 2010).

6 Thomas Van Orden v. Rick Perry, in his official capacity as Governor of Texas and Chairman, State Preservation Board, et al. 545 U.S. 677 (United States Supreme Court, June 27, 2005); Lynch, Mayor of Pawtucket, et al. v. Donnelly, et al. 465 U.S. 668 (United States Supreme Court, March 5, 1984).

7 Cecile Laborde, "Politics of Laicite." *Constellations* 2, no. 9 (2002): 167-183; Christian Joppke, "State neutrality and Islamic headscarf laws in France and Germany." *Theory and Society* 36, no. 4 (2007): 313-342.

8 Noah Feldman, *Divided by God: America's Church-State Problem--and What We Should Do About It*. (New York: Farrar, Straus and Giroux, 2006); Christopher L. Eisgruber and Lawrence G. Sager. *Religious Freedom and the Constitution*. (Cambridge, MA, USA: Harvard University Press, 2007).

the historical and genealogical evolution of secularization within the juridical codes of conduct and by treating.

Although the claim of this paper is historical, I aim to offer a theoretical analysis of the interplays of secularization in the sphere of law and the sources of legality in liberal democracies. For that, I will rely heavily on various political and juridical theories, but I will also use some genealogical and historiographical analysis. In the first section of this article, I focus on the sphere of law, and argue that not only its form and content, but also its enforcement has become secular. These surely happen simultaneously with secularization in a different yet related aspect of governance – namely, the practices of law-making. The following section argues that secularization in this particular area of who makes the law has taken place in conjunction with the rise of liberal, parliamentary, constitutional democracy that attributes the constituent power of the politico-legal system to the people. A direct effect of this is observable in the ways people identify (identity) with the politico-legal system and how the system represents (representation) the people have changed; this is extensively discussed in the last section.

2. Secularization of the Politics of Law

In *The Sacred Canopy*, Peter Berger defines secularization as “the process by which sectors of society and culture are removed from the domination of religious institutions and symbols”.⁹ Among other reasons, this transformation might be attributed to the negotiations between ecclesiastical and ‘worldly’ authorities over tax and property rights¹⁰ (1), or to the eventual success of scientific knowledge and technological sophistication gained through empiricism, as opposed to revelation, which have rendered “the central claims of the Church implausible”¹¹ (2), or to the need to govern and mediate religiously diverse societies (3). The first and the third are aspects of governance, whereas the second has major socio-cultural and political connotations. Coming together, they constitute one of the characteristics of modern governmentality.

For the purposes of this paper, I am going to focus on transformations that have arisen due to more practical needs (hence (1) and (3)). Specifically, these are transformations from the ecclesiastical to secular in three areas of law: i) secularization of the law-maker, ii) secularization of the form and the content of law, iii) secularization of application of law.

9 Peter Berger, *The Sacred Canopy: Elements of A Sociological Theory of Religion*. (New York: Anchor, 1990), 107.

10 Ibid.

11 Pippa Norris and Ronald Inglehart. *Sacred and Secular: Religion and Politics Worldview*. (Cambridge, UK: Cambridge University Press, 2004).

2.1 *Secularization of the Law-Maker*

With secularization of the law-maker, I refer to changes in the precept of sovereignty, which has descended from God to king, then to the parliament and eventually down to the people. In *Security, Territory, Population*, Michel Foucault gives an interesting account of the process, even though he does not use the term secularization. He starts with the pre-Christian era in which sovereignty was a spiritual bond between the shepherd and his flock:

this reference to pastorship allows a type of relationship between God and the sovereign to be designed, in that if God is the shepherd of men, and if the king is also the shepherd of men, then the king is, as it were, the subaltern shepherd to whom God has entrusted the flock of men and who, at the end of the day and the end of his reign, must restore the flock he has been entrusted with to God.¹²

Pastoral power, as Foucault calls it, has several specific characteristics. First of all, unlike the princely power that will be epitomized with Machiavelli, pastoral power is exercised “over a flock, and...over the flock in its movement from one place to another. The shepherd’s power is essentially exercised over a multiplicity in movement.”¹³ Second, as opposed to the impersonal nature of *raison d’état* of later centuries, pastoral power is exercised for the benefit of the sheep and the shepherd.¹⁴ Therefore, third, pastoral power functions for a specific end, which takes the people on whom the power is exercised as its focus.¹⁵ Consequently, this form of power has to consider each for the sake of all and all for the sake of each.¹⁶ Finally, in this paradoxical way pastoral power is an individualizing sort of exercise.¹⁷

In Foucault’s narrative, pastoral power is altered with the rise of more territory oriented form of government, the establishment of a hierarchical Church structure and, with these, transformation of the pastorate into

an art of conducting, directing, leading, guiding, taking in hand, and manipulating men, an art of monitoring them [men] and urging them on step by step, an art with the function of taking charge of men collectively and individually throughout their life and at every moment of their existence.¹⁸

12 Michel Foucault, *Security, Territory, Population*. (New York: Palgrave Macmillian, 2007), 123.

13 *Ibid.*, 125.

14 *Ibid.*, 127.

15 *Ibid.*, 129.

16 *Ibid.*

17 *Ibid.*, 128.

18 *Ibid.*, 165.

Note that Foucault is not talking about the individualizing power of the pastorate that was based on the contradiction between the each and the all. Instead, with the princely power, the purpose and the focus of power becomes “the higher unity formed by the whole.”¹⁹ Chronologically speaking, this coincides with the era of the *supplice* (or the pre-disciplinary era), which perceived the actions against the law (illegality) as predominantly being against the sovereign Machiavellian prince.²⁰ As such, even though religious and political practices created a well-blended mixture, they do not get intertwined within the body of the state “at least until 18th century.”²¹

In the 17th and 18th centuries, with the gradual rise of disciplines (disciplinary power), certain characteristics of the pastoral power began to be adopted into the political powers of the modern state.²² Most importantly, the population – or in the political theory terminology, the citizens - were expected to obey the state like they did to a pastor.²³ This process did not make the political power religious, but rather started to secularize the political theology. The rise of governmental rationality, or reason of state (*raison d'état*) continued to import religious symbolism and even religious practices into the political power, but at the same time, presumed “that the structures and values of the political order are neither innate nor revealed by God, but rationally fabricated by men.”²⁴ Religion did not disappear. On the contrary, it continued to appear in the theories of mercantilists, Physiocrats and classical liberals like Adam Smith,²⁵ albeit as the social and the moral dimensions of political economy. In this light, the framing of religious principles as the background to the neo-liberal economic policies in the 20th century is also no coincidence.

As Foucault reminds us, the rise of laissez-faire economics goes together with the rise of the concept of natural rights, a concept that challenged the divine right of kings and instead allocated the foundations of the political order in the ‘people’. As before, this constituency was not the flock of the pastoral power. Instead, depending on the tradition (French or British), they were either a group of individuals conscious of their vulnerability as individuals that were getting together to form a constituency through a social contract (*a la* Rousseau & Hobbes) or utility-

19 Ibid., 129.

20 Michel Foucault, *Discipline and Punish: The Birth of the Prison*. (New York: Vintage Books, 1977).

21 Foucault, *Security, Territory, Population*, 154.

22 Ibid., 165.

23 Ibid., 165.

24 Ulrich K. Preuss, “Constitutional Powermaking for the New Polity: Some Deliberations on the Relations Between Constituent Power and the Constitution.” *Cardozo Law Review* 14 (1993): 640.

25 Foucault, *Security, Territory, Population*. and even later, in neo-liberals Michel Foucault, *The Birth of Biopolitics* (New York: Picador Palgrave MacMillan, 2008).

maximizers who choose the certainty of political order over the instability of a state of nature (*a la* Hobbes, Locke, Hume & Mill).²⁶ Legal rights gained through the social contract and the establishment of constituency (or constituent power) adds to the secularization of political order as the people are entrusted with to the right and the power of making laws.

2.2 *Secularization of Form and Content of Law*

Entrusting the people with the rights and the powers to make law explicitly implies the man-made nature of the laws. This brings me to the next point I want to discuss, the secularization of form and content of law. Here I refer especially to legal positivism, which accepts the law as man-made and more importantly, conceptualizes law as a body separate from ethics and morality.²⁷

According to one of the most prominent critics of the legal positivist movement, Carl Schmitt, these two aspects of legal positivism (perceiving law as man-made and distinct from ethics and morality) is rooted in legal positivism's avoidance of the question of how to create order *ex nihilo*. Legal positivism, according to Hans Kelsen's *Pure Theory of Law*, considers only the "formal system of laws" and says little about initiation of order and sovereignty.²⁸ Moreover, in the liberal conceptualization of law, particularly in legal positivism, there is a strong aversion to arbitrary rule and despotism, which are "understood as a system that makes the particular or general will of the sovereign the principle of the obligation of each and all with regard to the public authorities."²⁹ In order to prevent the "[identification of] the obligatory character and form of the injunction of the public authority with the sovereign's will"³⁰ – that is despotism – the law-maker (and hence, the sovereign), is drawn "into the legal order so that he is eventually dissolved onto the rules of that order."³¹ This is, Foucault argues, one component to which the Rechtsstaat – or the rule of law – rose in opposition to at the end of the eighteenth and beginning of the nineteenth century.³² For Schmitt, on the other hand, this is

26 In *The Birth of Biopolitics*, Foucault discusses this binary in terms of radical approach (British) and revolutionary approach (French).

27 David Dyzenhaus, "The Genealogy of Legal Positivism." *Oxford Journal of Legal Studies* 24, no. 1 (2004): 39-67.

28 Carlo Galli, "Carl Schmitt's Antiliberalism: Its Theoretical and Historical Sources and Its Philosophical and Political Meaning." *Cardozo Law Review* 21 (2000): 1597-1617.

29 Foucault. *The Birth of Biopolitics*, 168.

30 Ibid.

31 David Dyzenhaus, "Now the Machine Runs Itself": Carl Schmitt on Hobbes and Kelsen." *Cardozo Law Review*, 1994: 10.

32 Foucault. *The Birth of Biopolitics*, 168.

nothing less than submitting “human interactions to an impersonal order of rule”³³ which has altered the form of law:

Laws must be abstract and general, independent, from the particular will of the legislator and independent, too, from the particular ends of particular people. Their ‘standing’ characteristic is indicative of their persistence and endurance. Laws, then, must be distinguished from measures, which are always concrete, particular and extemporary.³⁴

For the legal positivists, the conceptualization of law as abstract and neutral is due to the differentiation of the legal sphere from other spheres such as ethics, morality, society, religion, etc. However, for Schmitt, this is unrealistic. Law can never be as fully abstract, neutral and independent as legal positivists claim. Rather, during both its making and its application, law is influenced by multiple agents (people, judges and legislators), hence blurring the boundaries between the legal sphere and other spheres. To ignore the organic involvement of judges, for example, is to assume that judges are nothing more than “mere vending machines that mechanically dispense the law upon cases”.³⁵ Law, according to Schmitt, has a fluid nature; it is neither formal nor rigid and it evolves through decisions of agents involved in the process of its making and application.

This fluidity can be clearly seen in the US Supreme Court decisions in cases concerning, for example, the First Amendment. Although for some critiques of the Court, this is an obvious sign of inconsistency in jurisprudence and in the malfunctioning of the liberal legal system in general, I think it is more of an illustration of the difficulty (if not impossibility) of trying to separate politics and law. In many cases, judges’ views regarding the role of religion in public life plays as important a role in their decisions as the word of law.³⁶ Similarly, the political atmosphere of the era influences whether the issue is seen as worth taking to court or not.³⁷ Sometimes even the positivist aspect of law and law-making are challenged. Supporters of Alabama Chief Justice Roy Moore, who claimed, “they

33 Dyzenhaus, "Now the Machine Runs Itself", 10.

34 Renato Cristi, "Hayek and Schmitt on the Rule of Law." *Canadian Journal of Political Science* 17, no. 3 (1984): 521-535.

35 John P. McCormick, "Three Ways of Thinking "Critically" about the Law." *The American Political Science Review* 93, no. 2 (1999): 413-428.

36 High days of legal separationism vs. Rise of values evangelicalism. Feldman, *Divided by God*.

37 For example, Thomas Van Orden v. Rick Perry, in his official capacity as Governor of Texas and Chairman, State Preservation Board, et al. 545 U.S. 677 (United States Supreme Court, June 27, 2005).

were standing up for the law of God, not the law of the Constitution” are provoking examples of this attitude.³⁸

2.3 Secularization of Application of Law

The arbitrariness against which the rule of law has been enacted is embodied not only in the pre-disciplinary, Machiavellian prince. Although they have significant differences, certain aspects of the *Polizeistaat* overlap with despotism. Like the princely power, for which sovereignty is constituted by the conflation of the particular will of the Prince with the principles of public authority, for the *Polizeistaat* of the following centuries:

there is no difference of kind, origin, validity, and consequently of effect, between on the one hand, the general and permanent prescriptions of the public authorities – roughly, if you like, what we will call the law – and, on the other hand, the conjectural, temporal, local and individual decisions of these same public authorities – if you like, the level of rules and regulations.³⁹

Consequently, when the rule of law arises, it arises in opposition to despotism as much as to the police state.⁴⁰ The rule of law state, then, will be “a state in which the actions of the public authorities will have no value if they are not framed in laws that limit them in advance.”⁴¹

This is closely tied to the application of law, which in the *Rechtsstaat*, creates a distinction “between, on the one hand, universally valid general measures and in themselves acts of sovereignty, and, on the other hand, particular decisions of the public authorities.”⁴² As such, “the universally valid general measures” which are expressions of sovereignty – hence expressions of the constitutive power of the law-maker, that is the people, are differentiated from the decisions of the administrative

38 Feldman, *Divided by God*, 232.

39 Foucault, *The Birth of Biopolitics*, 168.

40 I am aware that certain authors may disagree with Foucault’s analysis here, and pose the rise of the *Polizeistaat* in opposition to the arbitrariness of the absolutist rule. For example, Marc Raeff, *The Well-Ordered Police State: Social and Institutional Change through Law in the Germanies and Russia 1600-1800*. (New Haven CT, USA: Yale University Press, 1983); David F. Lindenfel, *The Practical Imagination: The German Sciences of the State in the 19th Century*. (Chicago, IL, USA: University of Chicago Press, 1997). By doing so, however, those authors conflate the Machiavellian ‘princely power’ with the absolutist regime. I don’t think this is right. Without going into this much important and much technical debate, I will only say that the misunderstanding arises because of Foucault’s utilization of a historical text as a socio-political concept and the other authors’ approach to this utilization as pure historical phenomena.

41 Foucault, *The Birth of Biopolitics*, 169. Hence Schmitt’s criticism above.

42 Ibid.

measures.⁴³ Consequently, “every citizen has the concrete, institutionalized, and effective possibility of recourse against the public authorities.”⁴⁴ Then, the rule of law state is “not just a state that acts accordance with the law and within the framework of law [but also, it is] a system of judicial arbitration between individuals and public authorities.”⁴⁵

This necessitates another key promise of liberalism: Equality before the law. With respect to its application, this maxim translates into two distinct legal qualities: universal coverage of the rule of law, and singular redefinition of the individual as legal subject devoid of any other specifications (gender, ethnicity, title, etc.): First, “no man is made punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land.”⁴⁶ Second, “every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.”⁴⁷ Lastly, “the general principles of the constitution (as for example the right to personal liberty, or the right of public meeting) are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the Courts.”⁴⁸

Law, by law, is the highest power to be. The adoption of rule of law as a system of government bestows upon the law certain characteristics. To begin with, it is no longer solely a simple set of rules describing how the state works.⁴⁹ Rather, it is a comprehensive code of conduct.⁵⁰ Neither any action, nor any individual or entity, can exist outside the law. Extra-legality is simply (and supposedly) unthinkable. Whether prohibited or allowed, everything must be inscribed in the law. This converts law secondly into a social signifier. Lastly, in a widely heterogeneous society, universal equality promised by the rule of law supplies the population with the necessary social glue. It provides the myth of accountability of the system against injustices, repression and inequality. The second criterion in particular seems to promise equality before and by law, regardless of background (ethnicity, gender, class, etc.).

Note the similarities between the administrative roles of religion and law: Both have strong emphasis on equality, either before God or before/within the larger legal

43 Ibid.

44 Ibid., 170.

45 Ibid.

46 Albert V. Dicey, *Introduction to the Study of the Law of the Constitution*. (London: Elibron Classics, 2005), 183-184.

47 Ibid., 189.

48 Ibid., 191.

49 Carl Schmitt, *Legality and Legitimacy*. (Durham: Duke University Press, 2007).

50 Ibid.

mechanisms of the state. Both claim to be universal in the sense that both religion and law claim to cover everything and everyone who comes under their domain (whether within a specific territory of a state or between states, or within a specific community of believers). Both are social signifiers that disclose certain characteristics of the communities they exist in; and also reproduce these characteristics in the form of norms and/or codes of conducts through the practices they govern.

Surely, these similarities are not coincidental. However, they also shouldn't suggest a progressive reading of history in which through the secularizing grinds of modernity, the socio-political role of religion has been replaced by an objective and rational (science of) law. Instead, as I have argued with respect to the adoption of pastoral power practices (and concepts) into political power and the gradual secularization of the law-maker, these similarities I think rather point out the displacement of religion from its larger socio-cultural position as a code of conduct and the adoption of its practices into politics and law. Therefore, like before, this did not make the political power religious, but rather started to secularize the political theology.

On a different note, the adoption of the role of religion as the universal and abstract currency of conduct governing the socio-political relations into law is perhaps a part of the differentiation Casanova makes between the religious and the non-religious.⁵¹ Yet note that this transformation does not suggest a strict separation between the content of the religious and the non-religious. On the contrary, they are mixed notoriously often, especially on practical questions like who provides certain social services, how public funds should be allocated to the groups or structures that provide these services, and how much of the state power and authority will be delegated again to these service providers are issues of contestation. Although most liberal constitutional democracies have check and balance structures to enforce separation and disentanglement of the religious and the non-religious, the traditional role of religion and religious institutions as providers of certain social services, for example, marriage and divorce practices, some welfare and aid practices (feeding the poor, homeless shelters, natural disaster aid, etc.), education (religious and non-religious) and medical services - turn these issues into explicit battlegrounds for the religious and the non-religious authorities. Other issues like zoning regulations, taxation, vouchers and certain state regulations also become battlegrounds albeit less due to their content (whether certain services will be provided according to religious norms or not) and more due to their form (whether the religious role of the service or the provider of the service in question influence or change certain elements in the application of regulations

51 Jose Casanova, *Public Religions in the Modern World*. (Chicago: University of Chicago Press, 1994).

which wouldn't have been changed or influenced if the service in question was non-religious or provided by a non-religious organization).

In short, two different processes are unfolding at the same time: The first is the transfer of certain religious practices into the political power and the adjoining differentiation of the religious and the non-religious spheres. The second is the constant struggle between the religious and the non-religious over the allocation of public resources – that is, among other things, most importantly, money and physical and symbolic authority to regulate and decide on certain issues (although what these issues are also a part of the discussion). These two separate, yet deeply related struggles shape the constitution and the constituency of liberal, constitutional, parliamentary democracy and how they do so is the issue of the next section.

3. Politics of Identity and Representation in Liberal Democracy

Undeniably, law lays the foundation for liberal parliamentary democracies. However, it is important to point out that this foundational law is not any kind of law. As I have tried to show above, we are talking about a very specific type of law, one that has secular reasoning in its making and in its application. One can argue that the content is still open to discussion as the debates and decisions over gay marriage and abortion, for example, demonstrate. This, however, does not invalidate the point I am trying to make. Even if the subject-matter is seemingly religious or borders on the religious the way we discuss that subject matter has become largely secular.

In *Constitutional Theory*, Carl Schmitt notes that identity and representation are the fundamental characteristics of political unity⁵² and, like law, they are not static concepts.⁵³ If secularization has changed the law in certain ways to generate the rule of law system and lay the foundations of liberal democracy, then it must have changed identity and representation in fundamental ways as well. Note that I am not making a unilateral causal argument. I think the historical elaboration of identity (the ways in which people identify with their socio-political regime) and representation (the ways in which the socio-political regime represents the socio-cultural imaginary of the people) have been much more complicated than a unilateral causal argument of secularization can explain. That is to say, secularization has been one of the many processes of change that identity and

52 Carl Schmitt, *Constitutional Theory*. (United States: Duke University Press, 2008), 239.

53 Although why and how these concepts are not static are important points, that discussion is beyond the scope of this paper.

representation have gone through until the specific combination we see them in liberal, parliamentary constitutional democracy has occurred.

First, the strong tie between the two concepts: Any state form emanates from different articulations of identity and representation.⁵⁴ However, in no form we can find them purely and singularly; they always coexist. More importantly, political unity is produced through their performance.⁵⁵ In other words, relationships between identity, representation and political unity are reciprocal; identity and representation feed from political unity and political unity comes to existence via them. Then, as long as there is a political unity, identity and representation will have to be re-articulated and reproduced. This relationship is dynamic, and liberal democracy makes use of it by opening up various channels to enable the manifestations of changes amidst people.

Parliamentarism is probably the best way to absorb and reflect these simultaneous and continuous changes. It invests sovereignty in the people yet still assigns the parliament as the locus of lawmaking. As such, it asks for the citizens' obedience in return for letting them have a say in law-making. The assumption here is that by being involved in their making, citizens would identify with the laws. The law will be not only the fruit of their self-identification with the political order, but also their actualization via re-presentation within the political order:

[Identity:] There is no state without people and that a people, therefore, must always actually be existing as an entity present at hand. The opposing principle [representation] proceeds from the idea that the political unity of the people as such can never be present in actual identity and, consequently, must always be represented by men personally.⁵⁶

Perhaps as another indication of the secularization of political theology, note the Catholic character of this conceptualization of representation which allows something to 'make present' its true essence by 'representing' it."⁵⁷ However, in a parliamentary system, such re-'presentation' is not possible since both the representatives and the representation are subject to the interests of different factions, groups and identities.⁵⁸

This does not mean that performative aspect of the re-presentation of the political unity disappears. Instead, it gets enacted through the homogeneity between the

54 Carl Schmitt, *Constitutional Theory*, 239.

55 Ibid.

56 Ibid.

57 Duncan Kelly, "Carl Schmitt's Political Theory of Representation." *Journal of the History of Ideas* 65, no. 1 (January 2004): 113-134.

58 Carl Schmitt, *The Crisis of Parliamentary Democracy*. (Massachusetts: MIT Press, 1988).

represented and the representative. Aiming to level out any potential differences between the identities of the two, homogeneity makes present the represented (political unity) in the representative. Moreover, homogeneity enables a workable combination of identity and re-presentation in the parliamentary system: If one of 'us' represents 'us', our political unity will be actualized within him/her; and because there is total homogeneity between 'us' and our representative, full political unity will be achieved. As long as this is fulfilled, the political form of the state does not matter: "Where the people as the subject of the constitution-making power appear, the political form of the state defines itself by the idea of identity. The nation is there."⁵⁹

Note the secular form of the concept of homogeneity. Unlike the pastoral sovereignty of the shepherd or the territorial, pre-disciplinary sovereignty of the Prince, the basis of our union is not through some sort of deep philosophical or spiritual communion with and/or within our sovereign. Instead, the union is established on the basis of each one of us being alike with the every other. That is to say, with homogeneity, the emphasis is not on transcendence anymore but rather on identification. To add further nuance, note that the transcendence attributed to the pastor and to the Prince is such that the subjects as well as the sovereign are constructed through the reflections of each in the other. This double movement could be clearly seen in the gravure covering Hobbes' magnum opus. The Leviathan is neither an entity that is fully independent from its subjects, nor it is fully like them. He is created out of them. Subjects on the other hand become part of the sovereign entity only by being fully integrated into the transcendent body. Homogeneity, however, does not raise the dialectic of unity through transcendence. Instead, it epistemologically presumes that people who have commonalities can form a coherent unity given their individualities. The transformative force of secularization over identity and representation lie exactly on this re-articulation of the political unity. Even if the content of the commonness is religious, the form of entering into the unity has become secularized.

One may argue that homogeneity constitutes an extreme version of political unity. As its unnerving historical legacy suggests, the cult on the persona of the Führer is very much like a religion. It incorporates the metaphors of the sheep and the shepherd, if not employing explicitly religious vocabulary. Moreover, it attempts to construct political unity through the concept of *Volk*, which speaks more to the communitarian *Gemeinschaft* rather than the individualizing *Gesellschaft*. These counter-arguments, although valid, are again about the content of the relationship within the political unity. The transformation I have been talking about, however, happens at the form of the relationship subjects construct with their political unity.

59 Carl Schmitt, *Constitutional Theory*. (United States: Duke University Press, 2008), 239.

So even if the language and the imagery are religious, subjects are still expected to participate as individuals and not as parts and layers of the transcendent Leviathan. As such, even the totalitarian state-society is still a *Gesellschaft*. The political unity it has established still operates on and from the individual.

Could this form of identification – or more precisely, this specific interplay of identity and representation – come out in any form other than homogeneity? If not, how valid is it to talk about the secularization of political unity? Similarly, if through homogeneity we will not get too far from totalitarian state-society, then again, what is the point of talking about secularization of political unity?

4. Relieving the Tension

Before discussing some of the implications, let me summarize the processes I describe here. Starting around the 16th century law started to provide certain socio-political functions that were previously sought out in the religious sphere. Law became a code of conduct that governed socio-cultural and economic practices. Eventually it penetrated into almost every aspect of life, regulating everything from production to health. An abstract currency, it signaled both to the members of the community and to the outsiders how a specific political unity functions. This means that the law came to carry markers specific to the political unity it was born from. At the same time, through its own practice, law re-presented and re-produced the identity of the political unity.

Unlike religion, however, law emphasized its man-made characteristics. This laid the foundations for liberal parliamentary democracy. With the investment of sovereign authority in the people, legislation was delegated to the parliament, thus further secularizing the form of law. At the same time, the explicit involvement of the people – albeit through their representatives – pushed them to self-identify with their political unity.

But because social functions which were previously shouldered by religion have become secularized, the mythical aspect of political unity has disappeared. Given that the relation between identity-representation and political unity has been rearticulated through this foundational myth, its disappearance would imply either the fragmentation and the eventual decay of political unity or the loss of legitimacy in the bodies and structures to which the sovereign authority of the people have been delegated.

One way to respond to these scenarios has been to take up the path of the legal positivists who argue for the *Grundnorm*. Assumed to be the foundational norms and principles of the political unity, the *Grundnorm* constitute the basis for other laws. Nonetheless, as Schmitt argues legal positivists and the idea of the *Grundnorm*

fall short of answering foundational questions. Especially in the face of problems of inclusion, legal positivists are silent. Moreover, they assume that law could be neatly separated from politics, and that the *Grundnorm* will be able to answer the normative questions when politics hit a wall. However, as Schmitt points out, the liberal theory of law ignores the highly participatory nature of application of law around which questions of inclusion mostly revolve.

Another way to deal with the consequences arising from the secularization of political unity has been to construct a communion based on homogeneity of identity. Although this takes away the tension between identity and representation, the consequences of trying to achieve homogeneity through the “eradication of heterogeneity”⁶⁰ is too obvious to require any further discussion.

How to relieve the tension secularization has put on the political unity? An elitist-conservative critique of our analysis would perhaps say that the socio-political order is functioning well, given that those in the West are not living in failed states, our institutions are working and there is (relative) peace and stability. After all, there is some uneasiness, conflict and violence in any society. A legitimate state should be able to establish and keep order in the face of some resistance. Full integration of everyone into the *demos* is impossible and unrealistic. Any system is, by definition, exclusionary. Therefore, it makes more sense to make use of already existing boundaries between insiders and outsiders rather than trying to re-enchant political unity through homogeneity. Moreover, the boundaries societies have are products of a historical legacy and as such, they are a part of a societal identity. Their preservation and re-presentation in our sovereign bodies and laws would strengthen our unity.

In contrast, a liberal-Enlightenment critique would emphasize the construction of an identity that is really overarching and in which everyone may feel related. Through some society-specific settings, common symbols and concepts that more people relate to could be found. These, then, could be reinforced through and into the social imaginary. Law, especially constitutions, may help us re-organize our societies. Synchronized with the social imaginaries, the constitution may provide more active integration of various identities into the socio-political unity. A new myth around the constitution as the source and manifestation of our socio-political will could be constructed. This myth would constantly be reinvigorated through constitutionalist practices and it would seek to reinforce a constitutional identity through the social imaginaries.

The liberal-Enlightenment critique hopes to re-enchant political unity through the constitution. However, unlike the elitist-conservative critique, it does not focus on

60 Schmitt, *The Crisis of Parliamentary Democracy*.

boundaries as historical legacies and hence as an element of identity. Rather, the liberal-Enlightenment critique aims to perform the re-presentation of political unity in a body that is external to the political unity. However, in the long run, this overarching constitutional identity may end up not too different than a melting pot. Assimilationist tendencies may easily overcome the inclusionary aspects and consequently, the constitutional identity may come to embody, legalize and hence reproduce power relations within society. Moreover, the arguments for a higher normative role for the constitution with respect to state and society are not too different than the arguments for *Grundnorm*. As such, it has similar weaknesses.

Lastly, a Marxist critique would assert, amidst the discussions of the particular and universal, we seem to be missing the bigger picture. All these structures either function and/or at least presuppose the existence of the capitalist mode of production. As long as capitalism is sustained one way or the other, these clashes of identities will not end; power relations exist among identities because capitalism pushes our societies (at the collective level) and citizens (in the individual level) to competition, instead of cooperation. This criticism is valid, although it ignores the fact that capitalism does not account for every change these socio-political, cultural and legal structures go through. Certainly our identities have a 'capitalistic' side to them and they cannot be taken out of class relations for example, or their tight relation to the institution of property cannot be ignored. Yet capitalism is not the only transformative process; like secularization, it is one of many.

5. Conclusion

Limited or mixed government has always existed and we see an increased emphasis given to it throughout history. However, only with secularization of the law it has taken its present day liberal democratic parliamentary-constitutional form. As such, I think all of these criticisms have valid points. They all emphasize different yet related points about the transformative forces that shaped the preconditions of the current modern conceptions of liberal, parliamentary, constitutional democracies: Capitalism, or more generally, the mode of production, the content of political unity (insider-outsider relations, or more generally homogeneity-heterogeneity) and the form of political unity (position of law with respect to political unity).

In *The Birth of Biopolitics*, Foucault maps out the gradual intermingling of the economic practices, capitalism, with the formal practices, rule of law, which gave rise to neo-liberalism. In this paper, I have developed a preliminary theoretical exploration of how the juridical-economic convergence has shaped the tensions regarding the insider-outsider relations or homogeneity-heterogeneity that is the content of political unity. Now, given the increasing movement of people between borders, the establishment of supra-national institutions like the European Union, and the empowering yet also homogenizing aspects of global cyber culture and

global capitalism, this content is being significantly altered. In this respect, Justice Scalia's position about not using foreign law in interpreting the American Constitution, or similarly, debates around multiple jurisdictions – with respect especially to religious minorities – are very telling.⁶¹ In both cases, each seems to want to use what they identify as theirs and their conceptualization of what is theirs is strictly exclusionary.

In the long term, I think, it is inevitable for this exclusionist, conservative approach to political unity to steer away from problems. All around the world we are already seeing various manifestations of this including the rise of values evangelicalism to political Islam. The battle being fought is not on anything other than the spirit of lawmaking and all the implications that follows from the secularization of this 'spirit' that I have discussed above. The question that still remains is whether we should challenge capitalism, or rule of law – or perhaps neo-liberalism itself.

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