

---

# Islam, Law and Identity

---

Edited by

Marinos Diamantides  
and Adam Gearey

 **Routledge**  
Taylor & Francis Group  
a GlassHouse book

המרכז הבינתחומי הרצליה  
הספרייה

2008). However, a caveat may be necessary: the historical process which accounted for hybrid identities in pre-colonial Muslim contexts differed significantly from that in Europe, as well as from post-colonial Muslim-majority states. Specifically, government in the Christian West has operated as part of a particular economy of coordinated division between secular and religious institutions from very early on.<sup>9</sup> In this regard the relevant thesis recently articulated by Giorgio Agamben (2007) is likely to lead to further research in this direction. How can the agonistic duality between the secular and the sacred be understood in the Muslim context, rather than from that articulated by liberal constitutional arrangements?

### References

- Agamben, G. (2007) *Il Regno e la Gloria: per una genealogia teologica dell'economia e del governo*, Vicenza: Neri Pozza.
- Barry, B. (1995) *Justice as Impartiality*, Oxford: Oxford University Press.
- Barry, B. (2002) *Culture and Equality*, Cambridge: Polity Press.
- Bentley-Hart, D. (2009) *Atheist Delusions: the Christian revolution and its fashionable enemies*, New Haven, CT: Yale University Press.
- Blond, P. (ed.) (1998) *Post-Secular Philosophy – between philosophy and theology*, London: Routledge.
- Cohen, N. (2008) 'A cast iron case for a secular society', *The Guardian*, Sunday, 3 August 2008, available at [www.guardian.co.uk/commentisfree/2008/aug/03/race.equality](http://www.guardian.co.uk/commentisfree/2008/aug/03/race.equality)
- Grillo, R.D. (1998) *Pluralism and the Politics of Difference*, Oxford: Oxford University Press.
- Gutmann, A. (ed.) (1994) *Multiculturalism*, Princeton: Princeton University Press.
- Joppke, C. and S. Lukes (1999) *Multicultural Questions*, Oxford: Oxford University Press.
- Kymlicka, W. (1991) *Liberalism, Community, and Culture*, Oxford: Oxford University Press.
- Kymlicka, W. (2001) *An Introduction to Political Philosophy*, Oxford: Oxford University Press.
- Milbank, J., Creston Davies and Slavoj Žižek (eds) (2005) *Theology and the Political – the new debate*, Durham, NC: Duke University Press.
- Moller Okin, S. (1997) 'Is Multiculturalism Bad for Women', *Boston Review*, available at [www.bostonreview.net/BR22.5/okin.html](http://www.bostonreview.net/BR22.5/okin.html)
- Moore, K. (2010) *The Unfamiliar Abode*, Oxford: Oxford University Press.
- Motha, S. (2007) 'Veiled Women and the Affect of Religion in Democracy', *Journal of Law and Society*, 34 (1), 139–62.
- Parekh, B. (2006) *Rethinking Multiculturalism*, Basingstoke: Palgrave Macmillan.
- Williams, R. (2008) 'Address to Royal Courts of Justice', available at [www.archbishopofcanterbury.org/1575](http://www.archbishopofcanterbury.org/1575)

<sup>9</sup> This could be dated to the theological consensus on the triadic nature of God.

## Chapter I

### Transcendence and interpretation

#### Introductory notes on the theology of the rule of law

Lior Barshack<sup>1</sup>

While the core idea underlying the rule of law is debated among lawyers, there is general agreement on the operative implications of that contested idea. The rule of law is taken to constrain law-making and law-enforcing branches of government. The main imperatives addressed to the legislator are those of drafting general, prospective, consistent and clear laws. The law-enforcing branches are expected to act in conformity with pre-established law and to be able to adduce before the public evidence for their conformity with the law. The rule of law has been generally associated with liberal values such as negative liberty and fair notice. In his seminal treatise on the rule of law, written in the mid-thirties, Franz Neumann described the rule of law as historically anchored in the liberal ideas and economic interests of the bourgeoisie. While many of Neumann's observations remain definitive, the rule of law cannot be situated exclusively within the history of liberal ideas and reforms and seen as a response to distinctly liberal concerns. Rather, the various injunctions that are cited in the name of the rule of law are based on the proposition that the law originates outside the society in which it is in force. The rule of law is premised on the notion that ultimate law-making power does not vest among the living. This idea is neither distinctly liberal nor alien to the liberal tradition. Indeed, it is a fairly widespread if not universal idea which establishes continuity between liberalism and older worldviews, such as the monotheistic religions. I will argue that the relegation of ultimate law-making power outside society and the observance of the prescriptions that make up the formal aspect of the rule of law are inseparable institutional achievements. The absence of sovereignty depends on society's deference to the formal principles of the rule of law, which in turn depend on the projection of sovereignty outside society.

<sup>1</sup> The Radzyner School of Law, The Interdisciplinary Center Herzliya. Earlier versions of this essay were presented at the British Academy conference in Izmir, the faculty seminar of the Radzyner School of Law at the Interdisciplinary Center Herzliya, and a workshop on interdisciplinary approaches to the law organised by Michael Anderheiden and Stephan Kirste at the ZIF in Bielefeld. I am grateful to participants in the different discussions for their comments.

### I. Ancestral authority and the reconciliation of unity and plurality

The most immediate objection to the assertion I just made would be that the rule of law does not depend on the transcendence of sovereignty because immanent sovereignty can constrain itself and abide by self-imposed rules and principles. An alternative response would be to deny that the fiction of a sovereign subject, immanent or transcendent, has a role to play in an account of the rule of law. The 'abolition of sovereignty within the body politic of the republic' was praised by Arendt as 'perhaps the greatest American innovation in politics' (Arendt 1963: 153). In the following paragraphs, I will outline one view of the contribution of theological notions of sovereignty to our understanding of the rule of law. According to the proposed view, the relegation of ultimate law-making power to an external realm conditions the transformation of lawless founding violence into principled violence.

I will suggest that the problem of violence to which the projection of sovereignty is the response does not consist in the war of all against all described by Hobbes but rather in total social cohesion. It consists in excess of unity rather than diversity. In the apolitical state to which philosophers refer as the state of nature, individuals are not set against each other but disappear into a single collective body, which devours its individual organs and in which sovereignty is vested. The passage from state of nature to rule of law proceeds through the dispersion of social unity. The rule of law presumes the reconciliation of unity and diversity among individuals. Employing the metaphor of projection, it can be said that founding violence is overcome through the expulsion of the sovereign collective body outside the social. The idea that the sovereign unity of society lies outside society is one that can be intuitively grasped. The projection of unity makes room for individuality and diversity within the social. It also implies that the contours of the social body are superimposed upon society by a transcendent principle. In other words, it is not up to society itself to draw its own boundaries in the normal course of affairs. Thus, the absence of sovereignty prevents society from excluding parts of itself from the protection of the law.

The dependence of the rule of law on the projection of sovereignty is illustrated in Aeschylus' play *Eumenides*, one of the most illuminating literary investigations of the rule of law. The play charts the passage from archaic justice to legal disputation. Haunted by the furies (the *Erinyes*) for having murdered his mother Clytemnestra in order to avenge the blood of his father Agamemnon, the fate of Orestes is to be finally decided in court. Orestes is spared the torments inflicted by the *Erinyes*, the earthbound furies in charge of vengeance and retaliation. The passage from retaliation to legal resolution of disputes is accompanied by the transformation of the furies into *benevolent beings* (*Eumenides*) that guard the order laid down by the Olympian gods. The metamorphosis of the furies into benevolent beings can be read as an allegory

for the process of projection of sovereignty and the sacred (in particular, of the sovereign power over life and death) from the terrestrial sphere onto a superior realm with the foundation of a legal order.

In Greek mythology and in Aeschylus' play, pre-political deities such as the *Erinyes* pervade the realm inhabited by humanity and perpetuate a cycle of violence. These deities were contrasted by the Greeks with the Olympian gods and goddesses of the polis.<sup>2</sup> The terrestrial presence of the pre-Olympian deities leaves no space for rational human self-government and does not allow for legal regulation of social conflicts. The emergence of an independent temporal realm is signalled in the play by the transformation of the furies into protectors of the Olympian order and, before that happens, by Athena's refusal to settle the conflict between Orestes and the *Erinyes*, by her decision to found instead a human court for homicide, and by the status that she and Apollo receive in court. Athena and Apollo behave in court like ordinary mortals. Their sanctity is not allowed to interfere with the logic of the legal proceeding. In the conclusion of the trial Athena insists that her vote for the acquittal of Orestes should count like any mortal vote. Apollo plays an unspectacular role in court as a witness and advocate of Orestes. The story of the furies, the savage, relentless agents of archaic justice, records the projection of sovereignty outside the space inhabited by humanity. The furies cease to wander freely across the earth; they are renamed *benevolent beings* and integrated into the *polis* as guardians of the order presided over by the Olympian gods. The setting apart of the human realm from the superior realm of the gods, notwithstanding the gods' frequent intervention in human affairs, conditions the establishment of the rule of law.

Hobbes offers a different account of the process of projection through which peace and order are established. According to Hobbes, the pacification of the war of all against all is accomplished through the monopolisation of violence by an immanent sovereign, that is, by a living human being. Hobbes acknowledged the contribution of the rule of law to efficient government but stressed that

2 While classical scholars have often warned against simplifications and overstatements of the opposition between the two families of gods, the distinction between gods of the polis and pre-political gods has parallels in many religious systems. For example, in his account of Tallensi religion Fortes records a distinction between ancestors and the wild 'bush sprites'. The latter, in contrast to the ancestors, 'are not mystical agencies ritually incorporated in the total system of human social life and therefore having mystical rights to intervene in human affairs. There are no shrines or altars at which they can be approached. In short, they do not complement or even contrast with humanity; they simply negate all that is human, being totally lawless and without any moral capacity, such as is vested in the socially incorporated mystical agencies' (Fortes 1987: 260). On the primordial and implacable nature of the *Erinyes* in comparison to the Olympian gods, see Sewell-Rutter (2007) at 88. Sewell-Rutter lists a number of interpretations of the pacification of the *Erinyes* in Aeschylus' play which differ from the proposed interpretation associating pacification with the projection of sovereignty.

the sovereign is unbound by it. The Hobbesian sovereign exercises founding violence permanently. While Hobbes did not expect the sovereign to show respect for the rule of law in the first place, the reasons for which Hobbes' social design fails to tame the violence of the state of nature entail that immanent conceptions of sovereignty will fail to secure the rule of law even when they purport to do so.

Contrary to Hobbes' prediction, the war of all against all and the uncertainty of the state of nature are bound to persist as long as ultimate law-making power remains immanent and self-grounded. As long as power lacks an extra-social sanction it remains factional and retaliatory, even where man-made law wears the guise of generality and neutrality. Without a superimposed normative framework that dictates the scope of jurisdiction, and in which any claim to power must be grounded, officials and ordinary citizens alike will have no certainty as to who enjoys the protection of the law. Citizens will be as uncertain as they were in the state of nature, and civil war will be perpetuated. Only once a superimposed principle delineates jurisdiction and constrains the pleasure of the king can the law serve as a neutral mediator of disputes between factions.

Hobbes would concede the allegation that law and power remain in his account factional. His response to the intransigent partiality of power consists in urging citizens to erase any trace of individuality and difference and to form a single faction headed by the sovereign. By sacrificing their individuality citizens are likely to evade the wrath of the sovereign and somewhat improve their condition in comparison to the state of nature. Hobbes does not in fact ask citizens to renounce their innermost beliefs, only to pretend in public that they endorse the sovereign's.

Contrary to the Hobbesian scenario, the display of absolute unanimity would only heighten distrust among citizens and between subject and sovereign. It will fail to produce civic peace. This is illustrated in Hegel's reflections on Terror in his account of the French Revolution. Once the Revolution dissolved the objective social differences that made up the old regime, order could only be conceived in terms of absolute oneness. The demand of universal and absolute loyalty to a common cause, Hegel's account shows, escalates violence since every individual seems to constitute a separate faction. Every individual, as an individual, is suspected of conspiracy and deviance: '... subjective virtue, whose sway is based on disposition only, brings ... the most fearful tyranny' (Hegel 1944: 450).<sup>3</sup> While Hobbes, unlike the Jacobins, does not expect the sovereign truth to penetrate the minds and hearts of individual citizens, the imperative of complete outward accord would trigger suspicion and terror even without an expectation of 'subjective

virtue'. When the protection of the law depends on loyalty, overt or covert, and not on status bestowed by a superimposed principle, it is bound to be uncertain and to inspire both conspiracy and suspicions of conspiracy. Indeed, totalitarian regimes which followed several of Hobbes' recipes offered a spectre of uncertainty that approximated the Hobbesian state of nature more closely than any other regime.

It is thus questionable whether rational considerations of self-preservation will lead individuals to resign their natural freedom to an immanent sovereign as Hobbes asks them to do. In exchange for a complete waiver of autonomy, the members of Leviathan are subjected to a constant threat of denunciation and persecution. Immanent sovereignty entails terror. Furthermore, the dangers of immanent sovereignty are greater than what can be gathered on the basis of the Hobbesian assumption of man's self-preserving rationality. Historical evidence of senseless bloodshed in episodes such as civil wars, revolutions, interregna and carnivals suggests that the presence of sovereignty sets self-preserving rationality in abeyance.<sup>4</sup> Once sovereign, arbitrary power over life pervades society, ruthless violence is unleashed. The affirmation of life, on which the Hobbesian social contract is premised, can no longer be taken for granted. Violence is asserted for its own sake by a society which, as medieval and early modern society perceived itself during carnival, sheds its humanity and is temporarily given over to sinister powers.

Monopolisation of violence by an immanent sovereign can pacify the war of all against all only as a transitional measure. Violence will have to undergo two further, *interdependent* transformations which were rejected by Hobbes: it will have to become principled and impersonal, and to be grounded in a principle that is superimposed upon the living. The renunciation of sovereignty on the part of the living creates the social conditions which give rise to self-preserving rationality. It endows the subject's status as a subject of the law with determinacy. It allows for the accommodation, and legal regulation, of social divides within a single political body whose boundaries are superimposed upon the polity.

The Hobbesian account of the war of all against all in the state of nature is one among several possible points of departure for an account of the origins of sovereignty. According to an alternative line of thought, the political institution of sovereignty is meant to alleviate a condition of interpersonal communion rather than interpersonal strife. The state of nature can be conceived in terms of excessive unity rather than excessive division. Contrary to Hobbes' position, the role of the political is to overcome, not to generate, conformity. In the state of nature, with the absolute conformity which

<sup>3</sup> On Terror as the realization of abstract reason's tendency to eradicate any instance of particularity, see Hegel (1977) at 359–60.

<sup>4</sup> See, for example, Paravicini-Bagliani's account of ritual plundering in Rome prior to the election of a new pope; Paravicini-Bagliani (2000) at 99–107, 150–155.

characterises it, the group enacts its collective body. Since sovereignty vests in the collective body, the state of nature is one of immanent sovereignty. The presence of the collective body collapses boundaries between individuals as well as between the living and the dead, since the collective body is the common body of all generations.<sup>5</sup> I use the terms communal body and corporate body to designate the collective body in two different positions that it can occupy in relation to the social: the 'communal body' designates the collective body of all generations when it is enacted by the group while the 'corporate body' refers to the collective body once projected outside the social. When the group contains its sovereign unity, no room is left for the law as a mediator between alienated and antagonistic groups and individuals and between generations. Individuation and the rule of law depend on the projection of the sovereign collective body outside the social.

The two accounts of the social predicament to which the projection of sovereignty can be the response – oneness and fragmentation – are not as inconsistent as they appear. Excessive unity and excessive fragmentation are two sides of the same coin. Hobbes' depiction of atomisation and dispersal in the state of nature turns into a spectre of total social conformity. As Hegel's discussion of Terror shows, atomisation and uprootedness lead to absolute social uniformity which leads back to fragmentation and civil war. Arendt's comments on the loneliness of the individual in the midst of the totalitarian crowd expand upon Hegel's observations (Arendt 1973: 476). 'Groundless' individuals, namely, individuals whose identity is not solidly grounded in objective social and legal categories that are in turn anchored in transcendent authority, disappear into a collective body which then disbands and sets them against each other. The enactment of the collective body in transitional 'constitutional moments' makes society appear at the same time totally fragmented and totally unified. The presence of the sovereign collective body unleashes destructiveness and self-destructiveness which compel its projection. The projection of the collective body outside the social anchors the social order in an external foundation, a mythical reference which endows society with unity while allowing it to accommodate and adjudicate factional divides.

When projected outside the social, the collective body of all generations is personified by ancestral authority since ancestors are taken to extend through the bodies of their descendants across the generations.<sup>6</sup> The projection of the oneness of the group onto the realm of the ancestors means that communal bonds are loosened in favour of an overarching legal unity. Ancestral law comes to embody the unity of society in a way that allows for the reconciliation of unity and division within the social. By dispelling communal unity and ordaining

<sup>5</sup> On sovereignty, intergenerational communion and the body corporate, see Barshack (2006b) at 185 and Barshack (2009).

<sup>6</sup> On ancestors and the social body, see Fortes (1969) at 304.

interpersonal separation and a separation of powers, ancestral law establishes itself as the repository of any unity that can still be attributed to society.<sup>7</sup>

Traditional representations of the law in different media – learned, figurative, ritual, or oral-popular – point to law's origin in ancestral authority. Moreover, cultural representations of ancestors rarely omit references to their juridical capacities. Ancestors are depicted as sovereign in the lands inhabited by their descendants and as members of an ultimate tribunal whose infallible decisions are appropriately never fully predictable.<sup>8</sup> Mythical law-givers, founders of dynasties, and the founding fathers and mothers of modern nation states count among the more familiar instances of law-giving ancestral authority. While many of these figures are historical, their authority is embedded in narratives which display repetitive mythical patterns.<sup>9</sup>

The origin of the law in ancestral authority entails that behind the changing positive articulations of the law lies an ancestral law which binds all generations. I will refer to ancestral law interchangeably as eternal law, higher law or fundamental law, notwithstanding historical variations between these terms and possible analytical distinctions between categories of norms that claim an ancestral origin.<sup>10</sup> The eternity in question derives from the idea of corporate perpetuity, the potentially or fictively perpetual succession of generations, not from the metaphysical notions of eternity that informed Aquinas's philosophy of law. Eternal law is explicitly or implicitly recognised by legal systems in the official narratives of their origins. Such accounts legal systems have of their historical and normative foundations blend ancestral law and ancestral myth. Legal systems come into being through the postulation of an ancestral authority which vindicates the claims of a political centre for universal jurisdiction. The unity of law in a legal system is produced through

<sup>7</sup> On law as a national symbol, see Beaune (1991) at 245–65.

<sup>8</sup> In an essay on ancestral authority, Meyer Fortes gathered observations on the jural aspects of ancestral authority scattered throughout his extensive work. Fortes writes: 'The ancestors are the ultimate source of life both for the individual and, much more obviously of course, for the descent group which would not exist if there had been no ancestors. But this implies the converse: that ancestors have the sole right and power to terminate the life of an individual or of a corporate group, phrased often in terms of summoning the deceased as if before a judicial tribunal'. [...] 'Ancestors are projected as figures of authority to whom powers of life and death are attributed – judicial figures – rather than bountiful deities' (Fortes 1976: 1, at 12, 14). While the model of descent groups that is associated with the British school of structural anthropology does not apply to all societies, the general category of ancestral authority is much more broadly applicable. For an argument to that effect see, for example, Scheffler (1966) at 341–51. Fortes' remarks on ancestors as ultimate rulers exercising power over life and death derive from Freud and reflect Freud's considerable influence on his work.

<sup>9</sup> On analogies between legends that relate the achievements of different lawgivers, see Szegedy-Maszak (1978) at 199–209.

<sup>10</sup> On the history of the term 'fundamental law' and of other terms denoting types of higher law, see Thompson (1986) at 1103.

the imposition of a standard ancestral reference, the establishment of an official pantheon. Jurisdiction is a relationship between the subject and ancestral authority, a relationship in which the humanity of the subject is anchored since it is ancestral law which disperses the communal body and clears the temporal realm for habitation by the living.

Finley has observed that the idea of ancestral law recurs across civilisations and historical periods because it is rooted in the temporal structure of human existence. In an essay entitled 'The ancestral constitution' Finley remarked that the grounds of the ancestral constitution lie 'in the very nature of man, who alone possesses both memory and the prescience of inevitable death, leading unconsciously to a desire, a need, for something that will create a feeling of continuity and permanence' (Finley 1975: 34, at 47). While Finley's view of the ancestral constitution as a response to the temporal predicament of humanity is illuminating, it seems to me that he misconceived the nature of that predicament. According to Finley, the authority of the ancestral constitution stems from the continuity it forges between the generations and which alleviates the sense of transience and futility that besets human existence. Contrary to Finley's suggestion, I have argued that the primary role of ancestral law is to separate rather than connect the generations: ancestral law disbands the communion of the generations that takes place when society enacts its sovereign collective body (Barshack 2009). The temporal predicament of humanity consists in the arrest of time that results from the simultaneous presence of all generations in the 'state of nature' and in constitutional moments. Once the collective body is projected outside the social, the generations succeed each other in time instead of being simultaneously present. By transforming the communal into a corporate body ancestral law launches the flow of time.

A general point which can be raised in relation to the subject's fidelity to ancestral authority is that social aversion toward the law is as crucial to the rule of law as the love of law. The externality of law to the social can be preserved only if a tension between the law and social practices, modes of enjoyment and aspirations, is maintained. The rule of law is consistent with large-scale deviance and is conditioned by a fair amount thereof. One of the most reliable indications for the vigour of the rule of law in a society is the cultivation of certain forms of transgression accompanied by a measure of laxity in law enforcement. The rule of law is animated and sustained by regular instances of transgression on the part of citizens and, as we shall see, even branches of government. The following sections sketch an understanding of the rule of law that is centred on the idea of ancestral law, through a cursory overview of central questions in the theories of legislative, judicial and executive powers. I cannot even begin to do justice to the complexity of these questions in the present discussion. My aim is only to suggest how they can be approached from a perspective in political theology which, unlike Schmitt's, takes the rule of law seriously.

## II. Lawmaking

### A. Myths of immanent sovereignty (divine kingship and parliamentary sovereignty)

One of the guises in which ancestral law appears in different cultures is that of immemorial custom. The prominence of custom accounts for the arduous crystallisation of the modern concept of legislation. While modern notions of the rule of law regard custom with distrust and champion legislation as a source of law which can provide individuals with accurate information about their rights and duties in changing social conditions, the idea of custom captures the core of the rule of law, the view of the past as a legitimate source of constraints upon the living.

Historians of the common law debated the approximate point in history in which legislation had been distinguished from the articulation and application of existing custom. McIlwain famously argued that the concept of legislation was not clearly distinguished from application before the seventeenth century, and that until then parliament was regarded primarily as a court of justice (see, in particular, McIlwain 1910). Acts of parliament were perceived as articulations and restatements of existing custom devised for the instruction of lower courts. The debates to which McIlwain's claims gave rise reveal an underlying agreement over the prominence of ancestral, immemorial law. Some of his critics have argued that a concept of legislation as strictly distinct from mere application of custom emerged earlier than he thought. This critique does not challenge the idea of ancestral law because it is not contested that statutes, however sharply distinguished from judicial decisions, were still conceived as bound by higher law (see, for example, Plucknett 1962). Furthermore, the difficulties that beset the crystallisation of the modern idea of legislation attest to the tenacity of the idea of ancestral custom irrespectively of the precise or approximate date in which this conceptual crystallisation took place.

Another response to McIlwain's argument consisted in challenging the very notion of permanent custom which his account allegedly presupposed. Various critics have claimed that custom itself was ever-changing rather than stagnant, and that legislation, before being clearly distinguished as a separate source of law, formed part of the ongoing and varied activities through which custom recast itself.<sup>11</sup> This line of thought, too, only demonstrates the persistence

11 Plucknett writes: '... our common law is custom, and ... the various modes of legal change in the reign of Edward I were conceived (if this interpretation can be sustained) as being changes within that mass of fluctuating customary law ...' (Plucknett 1962: 10–20). See also Cheyette (1963) at 362. For Plucknett's initial critique of McIlwain, see Plucknett (1922) at 26–30. As McIlwain explained, he had never contested the fact that parliament made and changed law, only that it *conceived* of its role in terms of law-making.

of the idea of ancestral law. The all-inclusiveness and liberality of custom reveal the robust sense of continuity which was attributed to the law, and which was undisturbed by constant innovations and adaptations. In fact, the idea of ancestral law as a mediator between the generations implies legal continuity through change, a formula which captures each generation's simultaneous identity with and difference from all other generations.

In *The Concept of Law* Hart famously argued against theories of immanent sovereignty, such as Hobbes' and Austin's, that 'The statement that a new legislator has a right to legislate presupposes the existence, in the social group, of the rule under which he has this right' (Hart 1961: 58). The fallacy of Hobbes' theory consists in its attempt to perpetuate a state of divine kingship. A political authority that emanates entirely from personal charisma or naked power can only be short lived. It can exist in periods of foundation, transition or abrupt decline (De Heusch 1962: 215–63). While the divine king embodies the charisma of the founding moment, his successors derive their authority from an established principle. Authority comes to be vested in kingship as an office and loses its personal, private character.<sup>12</sup> Prototypically, the office of *pater familias* subjects its changing occupants to a law personified by the lineage founder and renders them mere guardians of the family's property and long-term interests. Similarly, the king is obliged to exercise his power as guardian of the interests of the realm as a cross-generational entity.<sup>13</sup> He is constrained by fundamental laws that safeguard the interests of future generations in the name of an ancestral authority that decreed the perpetuity of descent and of the realm.

See McIlwain's brief review of Gough's *Fundamental Law in English Constitutional History* in McIlwain (1955) at 109–10.

12 Historians have often traced the emergence of a system of offices – and, by implication, of the rule of law – to the Gregorian Reform. The separation between the temporal and spiritual realms in the Gregorian Reform secularised the royal body and turned kingship into an office. On the impersonalisation of authority, see Strayer (1970) at 6, Wolter (1997) at 17–36, and Hollister and Baldwin (1978) at 867–905. According to Cheyette, the distinctions between office/person, rule of law/rule of man, public/private crystallised in the second half of the eleventh century; see Cheyette (1978) at 143–78. For a wealth of illustrations of the secularisation and professionalisation of kingship in the course of the twelfth century, see Leyser (1982) at 241–67. See also Mayali (1992) at 129–49.

13 It has often been remarked that the theory that the divine right of kings exempted the monarch, in his various capacities, from subjection to higher law is not in tune with dominant views in the history of Western constitutional thought. The very idea of divine right implies that royal power is circumscribed by higher law. On medieval constitutionalism generally, see McIlwain (1947), chapters 4, 5. On the history of fundamental law in England, see Gough (1961) at 45, especially the claim that the medieval belief in the supremacy of natural law was shared by early modern lawyers. On inalienability, see Kantorowicz (1954) at 488–502. On fundamental law in France, see Lemaire (1907) and Giesey (1961). For a recent discussion, see Taylor (2001) at 358.

Hart's critique of Austin demonstrates that the rule that confers law-making powers upon a king establishes an intergenerational continuity that is characteristic of legal systems. Hart did not make the further step of recognising that in order to establish intergenerational continuity social rules have to be perceived as issuing from an ancestral, fictive authority which endows successive generations with a common identity. Hart also did not recognise that the rules that confer law-making power impose enforceable substantial constraints on that power. He admitted, however, that '... it is difficult to give general criteria which satisfactorily distinguish mere provisions as to "manner and form" of legislation or definitions of the legislative body from "substantial limitations"' (Hart 1961: 70, 75).

This is a statement which Hart makes in relation to parliaments and which equally undermines the theories of absolute monarchy and parliamentary sovereignty. Hart seems to concede here the familiar argument that any answer to questions such as 'What is the parliament?' and 'Who are its members?' will imply substantial limitations on legislative power in addition to limitations of manner and form. These substantial limitations stem from the cross-generational nature of the common good. Parliaments, like kings, derive their law-making power from rules and principles that establish intergenerational continuity and impose substantial constraints on the law-making powers of the living in the interest of other generations and of corporate perpetuity. The parliament, like other instances of temporal power, makes decisions about the common good for the foreseeable future and these must comply with ancestral law since the foreseeable future partakes of eternity.

Advocates of parliamentary sovereignty would respond that even if the existence of substantial constraints on law-making power is granted, the courts are not necessarily the best guardians of the ancestral constitution. The parliament's take on the demands of ancestral law and the interests of other generations, they would argue, should prevail. Contrary to such a position, I believe that the well-nigh universal idea of an ancestral constitution is inseparable from that of enforceable substantial constraints upon the law-making power of the living. In the first place, the very idea of ancestral law depends on, and in turn decrees, the waiver of institutional omnipotence, that is, a genuine division of powers between branches of government that secures the projection of sovereignty outside the social. The second reason is that a doctrine of parliamentary (or royal) sovereignty is interwoven into an entire network of principles, doctrines and conventions that forms the core of a legal tradition, of custom, or of an ancestral constitution. As such, it is interpreted and qualified in the light of other doctrines and principles. As I have briefly hinted above, due to the dynamic nature of intergenerational relations the ancestral constitution is not a stagnant law; its implementation involves an ever-innovative negotiation between legal principles, doctrines and conventions. Once a concrete doctrine of immanent sovereignty such as parliamentary sovereignty is subjected to continuous re-interpretation, it is

likely to become qualified due to the gradual crystallisation of its own underlying reasons and of competing principles, the incessant transformation of institutional configurations and the recurrence of hard cases. This argument was mounted in the debate on parliamentary sovereignty in Britain by Paul Craig and other public lawyers identified in recent years as the school of common law constitutionalism (CLC). T.R.S. Allan, Paul Craig and others have convincingly insisted on the seemingly innocuous proposition that the doctrine of parliamentary sovereignty is itself a doctrine of common law. Whether or not the rule of recognition differs from other legal rules in the ways indicated by Hart, it is interwoven into the fabric of the common law body of doctrine. As such, it might be challenged in certain circumstances, it can be asked to justify itself and it is exposed to limitations and qualifications.<sup>14</sup>

### B. Generality

According to Neumann, the generality of laws is the kernel of the rule of law and the source of the other dictates associated with it. Neumann regarded the prohibition on retroactivity and the separation between law-making and law-applying powers as institutional guarantees of the generality of law. He traced the advent of generality to the rise of competitive bourgeois society. Generality, he argued, expressed the bourgeoisie's interest and belief in open economic competition and enabled the spread of capitalism (Neumann 1986: 213). The roots of generality and of the maxims that derive from it can be seen as theological rather than economic. If constituent power dwells outside society, higher law and the ordinary laws that are deduced from higher law have to be general. A transcendent law-giver is blind to the personal circumstances of individual subjects and has no partisan stake in the feuds and rivalries that divide the group of his or her descendants. Higher law was fictively laid down by the ancestors at the beginning of time in order to govern the lives of their descendants ever after. It must be abstract and impersonal. Insofar as ordinary legislation is a concretisation of higher law, it should by and large partake of its generality and impersonality.<sup>15</sup>

14 Craig called for a renewed 'awareness of the need for principled justifications for the existence of sovereign power', an awareness revealed by the 'constitutional discourse of previous generations' (Craig 2000: 224). For an attempt to ground parliamentary omnipotence in the theory of the rule of recognition, see Goldsworthy (1999).

15 In tribal societies, ancestral law often comprises non-general norms which prescribe an allocation of territories or constitutional powers among particular, named clans. In such cases, the law records a founding treaty between the different clans which fixed certain allocations for perpetuity. Fortes describes how Tallensi law allocates offices among different groups of clans in a way that made sense of the founding myth of Tallensi. See Fortes (1968) at 53–88, 65, 78. The system of statuses and privileges that made up pre-modern European law can be largely understood in terms of the legal and political device of constituent distribution of resources among descent groups that are united under a single jurisdiction.

Once we shift the focus from the law-givers to the subjects of the law, the externality of sovereignty seems to entail generality because it entails *equality* among the subjects of the law. While criteria for the attribution of humanness are historically and culturally variable, they typically establish a relation to ancestral law which places humans in an equal position vis-à-vis the law. Individual bodies are humanised, that is, disentangled from the collective body, through the protection of ancestral law which endows each individual with a package of rights and entitlements that safeguard individuation. To have legal status means to enjoy equal rights by virtue of shared descent and the equal standing vis-à-vis ancestral law which descent implies.<sup>16</sup> The notion that all citizens should be treated with equal concern and respect is rooted in the position of the living before a law of which they are not the principal authors. It is beyond my present purpose to assess how thick this notion of equality is, but contrary to the view of legal philosophers of analytical bent generality is not only a logical feature of the language of the law.<sup>17</sup> It is inseparable from some notion of substantial equality. The Nuremberg laws, for example, while general in their formal structure – they did not refer to individual Jews by proper names – violated the thinnest conceivable notion of equality and hence the externality of sovereignty to the legal system. Leaving aside the question of their legal validity, the Nuremberg laws amounted to a manifestation of immanent sovereignty and were contrary to the rule of law.

According to Neumann, the prohibition on retroactive legislation derives from the idea of generality. Retroactive legislation can be more easily tailored to handle particular persons and events, implicating the law in retaliatory violence. Neumann writes: 'If law provides for an indefinite number of future individual cases, a retroactive law cannot possibly be law; because those facts already realized are computable, and therefore the law is confronted with a definite number of particular cases' (see Neumann 1986: 222). Cicero linked retroactivity to lack of generality in his implacable orations against Verres, a Roman provincial governor who was brought to justice in Rome for grave abuses of power. Cicero accused Verres of applying new rules of inheritance to past testaments in order to divert the course of one particular bequest.<sup>18</sup> Throughout history, retroactive legislation has been deemed abominable because it re-enacts retaliatory violence by collapsing the correlative impersonality of the makers and the subjects of the law. It has been considered tolerable only in certain dramatic constitutional moments, such as revolutions, in which the polity's break with its own past and the redefinition of the body

16 Descent is of course a symbolic rather than biological category. On equality as a fundamental feature of corporate descent groups, see Fortes (1969) at 304.

17 For an example of the analytical approach, see Marmor (2004) at 1, 11. For a critique of the thin, formalistic reading of the idea of equality contained in the rule of law, see Allan (2001). Allan bases his critique on political morality, not constitutional theology.

18 Cicero, *Second Speech against Verres*, Book I, sections 41–4.



politic allow the use of retroactive legislation. Even retroactive dispensations such as amnesties are typically limited to constitutional moments, such as interregna, declarations of independence, states of emergency, changes of regime, and inter- and intra-national reconciliations.<sup>19</sup>

### III. The rule of law in court: a note on the anthropology of interpretation

When applied to adjudication, the rule of law requires that courts derive their decisions from pre-existing law. The rule of law is often thought to entail the vague method known as judicial formalism. According to the formalist view of adjudication, crudely characterised, when courts decide cases they use a toolbox of distinctly legal reasons – for example, the obligatory force of precedent – whose operative consequences in each case tend to be straightforward and uncontroversial, and which are placed in relation to each other within the overall structure of a legal argument by a second-order legal rule, such as Hart's rule of recognition. While such a view of adjudication has little to do with reality, it plays a role in the self-understanding of participants in the judicial ritual and in certain justifications of judicial power. Formalism has been regarded as a component of the rule of law because it seems to draw the contrast between lawmaking and application with particular starkness and to guarantee in this way the generality and prospectivity of the law. It seems to provide a solid institutional anchor for the distinction between legislation and application which dispels sovereign presence. However, on closer examination the idea of absent sovereignty turns out to challenge rather than call for formalism. The absence of sovereignty renders every application of the law, in Dworkin's words, thoroughly interpretive.

The association of the rule of law with formalism is related to a view of judicial controversy as a hindrance to the rule of law. Several authors have argued against this assumption that interpretive controversy forms one of the essential manifestations of the rule of law. Dworkin's portrayal of the rule of law as a quest for the realisation of the political rights of parties to legal disputes implies the inevitability of interpretive controversies over the content and scope of rights.<sup>20</sup> Neil MacCormick suggested that argumentation should be viewed as a component of the rule of law since it reduces the arbitrariness of state power. Argumentation, for MacCormick, extends beyond traditional legal arguments to encompass almost any appeal to reason. The rule of law requires that defendants in criminal and civil proceedings be

19 On amnesties, see Gacon (2002).

20 As conceived by Dworkin, interpretation does not detract from the generality and prospectivity of the law because it does not involve judicial creativity of any sort; see Dworkin (1986) at 11–17.

given the opportunity to challenge legal certainties by appeal to a wide range of reasons in a way that detracts from the predictability of judicial decisions (MacCormick 1999: 163).

Martti Koskeniemi has observed that the kernel of the rule of law lies not in adherence to rules but in argumentation over how law's 'functional objectives' are to orient the application of rules: '... the rule of law ... relates to the way the law-applier (administrator, public official, lawyer) approaches the task of judging within the narrow space between fixed textual understandings (positivism) on the one hand, and predetermined functional objectives (naturalism) on the other, without endorsing the proposition that the decisions emerge from a "legal nothing" (decisionism)' (Koskeniemi 2007: 12). The rule of law is realised through the 'constitutional mindset of interpretation'. Adopting a Kantian perspective on law and autonomy, Koskeniemi claims that the underlying values of the Kantian worldview should orient the application of laws because constitutionalism and respect for law are grounded in that worldview. In other words, these values are inherent in the enterprise of law. He writes:

The Pietist search for self-improvement, *Bildung*, and spiritual perfection prepares a constitutionalist mindset from which to judge the world in a manner that aims for universality, impartiality, and all the virtues of the inner morality of law: honesty, fairness, concern for others, the prohibition of deceit, injury, and coercion. Though this is a vocabulary of moral regeneration, it is also the vocabulary of constitutionalism.

(Koskeniemi 2007: 33)

While I agree with Koskeniemi that certain values are inherent in legal interpretation, I shall argue that these inherent values do not derive from a Pietist understanding of moral regeneration, or from any other moral doctrine, but from the fiction of absent sovereignty on which interpretation in law (and elsewhere) is premised.

The persistence of interpretive controversy is a consequence of absent sovereignty. The externality of sovereignty compels a resort to interpretation and is in turn consolidated by practices of interpretation. Externality implies the existence of a layer of hidden meanings behind that of the legal materials haphazardly accumulated in the course of history. The fiction of a hidden law that infuses the entire legal system with life and meaning ties legal materials to their presumed absent origin, the source of their unity. Moreover, contrary to Hart's account of the standard legal case in *The Concept of Law*, no viable conception of the judicial role can spare judges the obligation to uncover the law that lies behind the surface. Hidden meaning has to be constantly mined in order to regenerate the authenticity of the text and of its message, which cannot rest solely on the circumstances in which the text originated. Interpretive controversy establishes the status of the text as a repository of higher

law and reason and makes possible the 'recovery of its 'proclamation', as Gadamer would describe the process. It endows the text with ever-renewed relevance and authority. In order to animate perpetual controversy, higher law must remain elusive and unfathomable. It can never be fully spelled out by the courts.

As 'priests of the law', judges are obliged to find answers to legal questions within established legal materials. Neumann argues compellingly that this conception of judicial authority is equally fundamental in continental and common law systems. The power of common law judges to set precedents, Neumann argues, is merely that of correctly applying existing precedents to novel situations. Continental and common law systems are equally premised on the fiction, championed by Blackstone and Montesquieu, that judges declare existing law.<sup>21</sup> However, existing law must remain perennially uncodifiable and controversial if it is to retain a link to its absent source of reason, legitimacy and vitality. Every court decision, as Dworkin argues, rests on a complex and contested interpretation of an entire history of a legal system. Viewed in light of the idea of corporate perpetuity, the goal of such synoptic interpretations is the articulation of an ancestral law that binds all generations.

The claim that courts are obliged to engage in a pursuit of higher law lends support to the conception of judicial review known as common law constitutionalism (CLC). According to CLC, modern constitutional judicial review is just a subcategory of a general inherent judicial power to review laws made by the living. Leading exponents of CLC, such as T.R.S. Allan and Paul Craig, find in Coke's judgements in *Dr Bonham's case* and other cases a prime illustration of their approach. Among the theoretical influences on CLC, Dworkin's has been particularly consistent. Allan and Craig ground CLC in the assertion that the common law is an embodiment of reason. Another possible ground for CLC – one which derives from the present understanding of the rule of law – is the assertion that the common law embodies ancestral law. The two arguments coincide if reason is understood in terms of a circumspect adherence to ancestral law and custom. Coke understood in this way the common law's claim to embody reason. Coke's view of the role of ancestral law and immemorial custom in common law illuminates the workings and claims of interpretation in many other, if not all, legal traditions. Craig seems to endorse today Coke's flexible association of reason

21 Both systems assume 'that the legal system is closed and that every decision is a mere application of a code, a statute, or of customary law' (Neumann 1986: 246). But in neither system, Neumann adds, can decisions be straightforwardly deduced from the law. Neumann challenges the presumed contrast between common and civil law: '... the belief that an appropriate clause in a statute or in a code can easily be found and as easily determined, is obviously a myth, as everyone knows who is even slightly conversant with Continental law' (Neumann 1986: 242).

and tradition.<sup>22</sup> Allan advocates a more ambitious account of the common law's intrinsic reason. He views disputation in court as a paradigm of rational public deliberation and implies that the principles that evolve in common law are the most philosophically defensible moral principles.<sup>23</sup>

As an ordinary feature of adjudication, interpretive controversy not only reflects the externality of sovereignty but reproduces and consolidates this externality. It dispels sovereign presence and underscores the boundary between the living and the dead. Interpretation can be viewed as a generative, *liminal* practice which postulates hidden meanings through the fabrication of controversy. Scant familiarity with learned discourses in law, religion or criticism suffices to confirm that interpretation not only responds to problems of meaning but amplifies and multiplies them. In literature and the other arts, as in theology and law, the purpose of interpretation is to set up a superior realm occupied by an absolute other who looms large behind the human author, and with whom readers communicate through the artwork.<sup>24</sup> The more intense the controversies over the meaning of an artwork or of scripture, the more abstract and elusive its divine author. The protestant idea that each believer is an authoritative interpreter of scripture pushes the correlation between the transcendence of the author and the plurality and individuality of interpretations to an extreme. Any centripetal move toward the sealing and reification of scripture, whether in literature, theology or law, leads to a centrifugal pressure toward dispersal of meanings. Any process of codification and canonisation is accompanied by a parallel elaboration and sophistication of interpretive tools.

By cultivating the differentiation between layers of meaning, practices of interpretation reproduce the corporate structure of society as a structure that is premised on the absence of the intergenerational, sovereign unity of the group. Without the critical construal of man-made law in the light of higher law, sovereignty would be re-appropriated by the living. The law would become incapable of safeguarding individual rights vis-à-vis a unified and unfettered community. The formal conditions of the rule of law, such as generality and prospectivity, can be secured for long only where man-made law is subject to interpretation in the light of ancestral law. At the same time, however, the *liminality* of interpretation implies that interpretation

22 Coke famously stated in *Dr Bonham's case* that 'when an act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such Act to be void'. Craig embraces a traditional common law model in which '[t]he common law was seen as being based on reason and principle, and could be fashioned to meet the challenges of a new age' (Craig 2000: 211, at 234). On the CLC school, see Poole (2003) at 435.

23 On the rationality of deliberation in common law courts, see Allan (2001) at 75–85, 290.

24 On art as a medium through which individuals contemplate the corporate unity of the group, see Barshack (2010).

occasions a moment of sovereign decision that violates the law's generality and prospectivity. The sovereign character of judicial decisions is already implicit in the claim that interpretive practices regenerate order by fabricating interpretive controversies. However solemn and sedentary, interpretation refounds the normative order through its suspension. The authority of the judiciary probably derives from the *liminal*, sovereign character of interpretation much as it does from the contradictory and more explicit fiction that judges apply existing law. The interpreter, like top executive power, occupies a *liminal* position between constituent and constituted powers, a point which has been elaborated in different ways in discussions of the place of paradox in the law.

The *liminality* of interpretation, like that of other activities, can be understood by reference to the idea of the collective body of the group. *Liminal* practices and activities render the sovereign, intergenerational unity of the group immediately present and then re-establish the normative order through repetition of the founding projection of sovereignty outside the social.<sup>25</sup> The enactment of the communal body implies the dissolution of the normative order as a network of boundaries among the living as well as between the living and the dead. The projection of the collective body re-establishes spatial boundaries among the living and temporal boundaries between the generations. Gadamer's notion of *fusion of horizons* captures the *liminal* experience of intergenerational fusion that occurs in interpretation: the distance between the present moment and the founding revelation, between the living and the dead, is suspended.

Needless to say, in interpretation *liminality* is highly domesticated. The interpreter's appropriation of sovereignty is tame because it takes place in the course of an engagement with a text that is accepted as authoritative.<sup>26</sup>

25 For an account of *liminality* in terms of the enactment of the intergenerational unity of the group, see Barshack (2009) at 553. On the *liminal* and hence paradoxical nature of the legal proceeding, see Barshack (2006a) at 145.

26 An account of interpretation as a *liminal* activity is consistent with a non-interpretive account of the preliminary process of identification of the authoritative texts to be interpreted. Contrary to Dworkin's claim that the rule of recognition itself is contested among judges, the demarcation of the site of interpretation has to be governed by formal criteria. The relation between the formal boundaries of legal scripture and the *liminal*, interpretive engagement with meaning can be explicated by analogy to the structure of rites of passage. In Van Gennep's well-known formulation, rites of passage consist of a succession of rites of separation, rites of transition and rites of incorporation. Interpretive controversy stands to the formal delineation of the legal text as rites of transition do to rites of separation. In other words, interpretation is preceded by a phase of 'separation' in which the law-applier enters the realm of law. A boundary is crossed between the secular and the sacred, between the realm of the living and the realm of the dead. Rites of separation in law and elsewhere are typically highly formalised. Legal form demarcates law from non-law, setting up a closed realm in which the interpretive quest for higher law can be launched. On the highly formal character of rites of separation in comparison to the subsequent stages of rites of passage, see, for example, Leach (1961) at 132.

Furthermore, the lawlessness of interpretation is domesticated through the introduction of guiding principles. Manuals of interpretation are devised to contain the interpretive encounter with the dead within a method, in terms of Gadamer's opposition between *truth* and *method*. Alongside methodological guidelines, legal interpretation is oriented by values that are intrinsic to any interpretive practice. Since interpretation is premised on the absence of sovereignty it is inherently loyal to the rule of law and to other institutional manifestations of society's renunciation of sovereignty. Competent interpreters produce interpretations that sustain the rule of law and concomitant principles, such as, the separation of powers, the separation between the sacred and the secular and the affirmation of temporal existence, and equality before the law. Interpretation is naturally oriented toward the introduction of novel distinctions and sub-distinctions and the delimitation of existing powers and ideas since differentiation and division consolidate the projection of the group's sovereign unity.

#### IV. Aside: the courts under fascism

Neumann concluded his treatise with a brief account of the rule of law under fascism and Nazism. Writing during its inception, Neumann succeeded in capturing the essence of the Nazi legal regime (as well as the uniqueness of Carl Schmitt's approach in 1934–5, unperturbed by the legal innovations even in comparison to the most enthusiastic Nazi jurists). Neumann noted the violation of standards of generality and prospectivity and the complete dissolution of the separation of powers. Nazi law, he observed, found in the will of the leader an immanent foundation.<sup>27</sup> Neumann pointed out a tension in the Nazi conception of the role of the judiciary: judges were expected to obey both the law and the tenets of National Socialism (Neumann 1986: 294–5). According to Neumann, the gap between the two expectations was largely bridged by a new conception of the law which transformed the judiciary into a bureaucracy carrying out written executive decrees, including retroactive and individual ones, and which postulated an ultimate identity between the law and the will of the leader.

The postwar literature on Nazi courts did not pursue Neumann's attempt to overcome the tension between formalism and teleology. Immediately after the war Radbruch famously drew a picture of Nazi courts as slavishly following formal methods of application of the law. In contrast to Radbruch's account, historians in recent years have argued that Nazi courts were not formalist

27 The authority of the law is immanent since 'Law is nothing but the will of the Leader' (Neumann 1986: 293), and since the Leader's own authority is immanent ('The identification of the people with the movement, and of the movement with the Leader is a trick used by every dictator who intends to justify his rule immanently, and not by invoking transcendental justifications' (Neumann 1986: 289).

enough and that they frequently deviated from the letter of the law in order to advance Nazi policies. The courts, it has been argued, were eager to promote the interests and spirit of the people and the homeland, and engaged in full-blooded political, teleological reasoning (Radbruch 1946: 1–11. On teleological reasoning, see Müller 1991).

Contrary to these competing explanations, the distinctive characteristic of courts in totalitarian regimes is neither excess nor shortage of formalism, but the refusal to consider formal and substantive arguments in light of each other. The collapse of the rule of law under totalitarianism cannot be explained in terms of the relative predominance of formal or substantive reasoning. It results from the impoverishment of the interpretive, controversy-generating mediation between different categories of considerations. The will of the people or the leader as the ever-present fount of the law implies an obscurity of meaning which leaves no room for interpretation. In non-fascist legal systems, interpretation ascertains the externality of sovereignty and subordinates both formal and ideological guidelines to higher law by attuning them to each other in a way that induces controversy. Interpretation consolidates the corporate structure of society and the independence of legal vis-à-vis political reasoning which cannot be secured by formalist procedures.

Formalism, no less than undisguised teleological reasoning, attests to the community's appropriation of sovereignty. Formalism can temper the manipulation of the law by the regime only where it serves as a prelude to interpretation. When formal rules are not applied in the light of underlying principles, their political manipulation outside and inside the court becomes all too easy. While blind formalism seems to be grounded in the ideas of absent sovereignty and separation of powers, it severs legal norms from their transcendent source of reason and authority and turns the law into an incarnation of a violent communal body. Moreover, formalism eventually becomes in itself an instance of teleological reasoning: divorced from underlying principles of reason, reified and idolised, the arbitrary legal form becomes an ultimate *political* end, an embodiment of the fall of reason and of holy inevitability.<sup>28</sup> Totalitarianism revels in form and often excels in adherence to formalities. Under fascism, form comes to epitomise the community's immanent sovereignty by expressing the complete sway of arbitrary forces over individual fates.

The rejection of interpretation is a general characteristic of a society that holds fast to its sovereignty. Hitler expected his artists to produce an unambiguous and transparent art which does not call for interpretation and therefore does not

presuppose transcendence.<sup>29</sup> In an essay entitled 'What National Socialism has done to the arts', Adorno writes: 'It is just this taboo of expressing the essence, the depth of things, this compulsion of keeping to the visible, that fact, the datum and accepting it unquestionably which has survived as one of the most sinister cultural heritages of the Fascist era . . .' (Adorno 1945: 373, at 381). True art, like real law, invites the subject to contemplate an absent sovereign body through the interpretive engagement with hidden meanings. Nazi art, by contrast, draws no line between the overt and the covert, surface and essence, society and its body, and relieves the subject of the burden of interpretation. It seeks to render the sovereign body, the common body of all generations, immediately present and withhold any reference to an absent ideal or goal. It is perceived uniformly by all members of the political community finding their oneness immediately present in it. A longer discussion may be able to demonstrate the actual contribution of fascist aesthetics to the collapse of the rule of law.<sup>30</sup> Insofar as the rule of law is premised on the absence of sovereignty, it is arguably consolidated by practices of artistic creation and interpretation.

## V. Legality and founding violence

In recent years, legal scholars occupying different theoretical standpoints have claimed that also in liberal democracies founding violence is neither renounced nor transformed in the course of normal politics. For some, the blame for the persistence of executive lawlessness is laid at the door of the idea of emergency: once emergency powers are recognised they cannot be effectively demarcated in time and space, and inevitably spill over into everyday government. For others, founding violence inheres in the ordinary operation of the state and cannot be eliminated through the curtailment or abolition of emergency powers. The latter view goes back to Benjamin's 'Critique of violence' [1921] where Benjamin introduced the distinction between founding and conserving violence in order to call it into question (Benjamin 1996: 236). Benjamin's distinction reminds us that the passage from the state of nature to political society is accomplished by means of utter violence. In order to preserve its authority over its citizens, Benjamin's discussion suggests, the state continuously terrorises them by means of unlawful and murderous violence.

Benjamin's 'Critique of violence' can be read as a socio-critical elaboration of the psychoanalytic and anthropological theme of the founding murder. Indeed, the persistence of founding violence is often expressed in terms of a

<sup>28</sup> Weber was wrong, in my view, to assert that 'formal justice is repugnant to all authoritarian powers, theocratic as well as patriarchal, because it diminishes the dependency of the individual upon the grace and power of the authorities' (Weber 1978: 812). On the worship of arbitrary fate in authoritarian religion, see Fromm (1950) at 35.

<sup>29</sup> On Hitler's notion of clarity, see Miller Lane (1968) at 189.

<sup>30</sup> On aesthetics and the rule of law, see Procaccia (2007) at 140.

permanent sovereign power over life and death.<sup>31</sup> Traditional examples of the power over life include capital punishment and the right to dispatch citizens to the battlefield. Judicial killing has been traced to ludic and sacrificial spectacles of manslaughter, such as the Roman arena games.<sup>32</sup> While such rituals have been suppressed in the civilising process, they arguably reveal the archaic roots of political authority in an arbitrary power over life. The lawlessness of the power over life has also been detected in apparently lawful executions. Benjamin noted that capital punishment cannot be fully understood in terms of conserving violence. Capital punishment allows the violence upon which the law is founded to resurface and re-establish the law (Benjamin 1996: 236, at 242). In the *Soirées de Saint-Petersbourg* Joseph de Maistre famously described the executioner as a spectre of divine wrath who grounds the social order in terror. Girard claims that the criminal sanction, even in its civilised and attenuated forms and irrespectively of its overt justifications, re-enacts founding sacrificial violence.<sup>33</sup>

Perhaps the most glaring instance of executive lawlessness is the fabulous imagery surrounding intelligence agencies and other secret branches of executive power. The mystique of the secret services, which has not received yet the scholarly attention that it deserves, plays a pivotal role in civil religion. Alongside its references to absent sovereignty and the rule of law, civil religion disseminates the idea of executive powers that lie beyond the reach and knowledge of the law. These powers are intimated in official communication and less subtly in espionage literature, a genre distinguished by its compounding of obscenities, sexual and political. Like the pardoning power, the power to appoint and command intelligence forces retains a distinctly personal character. Bond's license to kill is granted by the queen in person. In most types of regime, secret services are answerable directly to the head of the executive who occupies a *liminal* position between constituted and constituent power. The more power is personal and inscrutable, the more it approximates the sovereign, self-conferred and undivided power of the first, divine king, and the less constrained it is by the rule of law and the separation of powers. However legally regulated the secret services may have become in liberal democracies, they always maintain a direct link to a quasi-sovereign personal will which animates them. While the power to appoint and command special forces, like the pardoning power, may be recognised in the constitution, the personal nature of these powers places them in an intermediate position between constituent and constituted powers.

31 Influenced by Foucault's work on the power over life and death, Agamben (1998) couches the permanence of the exception in terms of a constant and arbitrary power over life. For a recent survey of the historical origins of the power of life and death, see Gaughan (2010).

32 On the political functions of the Roman games see Veyne (1976), Hornum (1993), and Clavel-Lévêque (1986).

33 On punishment as a rationalized form of sacrifice, see Girard (1977).

Advocates of the idea of absent sovereignty can hardly deny that founding violence infiltrates and punctuates ordinary state violence.<sup>34</sup> Sovereignty always retains some of the original unbridled character which preceded its pacification into a system of rules.<sup>35</sup> However, the residue of executive lawlessness does not refute the externality of sovereignty to society and the distinction between founding and conserving violence. Unlike founding violence, the residue of executive lawlessness occupies the margins of an established legal order, the periphery of the rule of law. While the lawlessness of founding violence is often overt, once a constitutional order is established the residue of founding violence is relegated to the crepuscular zones of political representation and civil religion. Under the rule of law only the arbitrariness of sovereign mercy is publicly conceded.

Moreover, the lawlessness of ordinary state violence consolidates in various ways the corporate, legal organisation of social life in the face of communal aspirations for the enactment of the communal body. The head of the executive, with its power of life and death, is placed between constituted and constituent powers in order to anchor the constitutional order in its externality. Furthermore, it is arguable that the imaginary power over life prevents the petrification and eventual disintegration of institutional structures by virtue of its lawless and unsettling nature.<sup>36</sup> Finally, the exercise of founding violence allows the state to confirm beyond doubt its exclusive possession of the power

34 The notion of the 'crypt' that Derrida borrows from the work of Abraham and Torok is apt to describe the residual presence of founding violence. An instructive analogy for the lingering of founding violence can be found in Nietzsche's account in *The Birth of Tragedy* of the role of the chorus as a residue of ritual, ecstatic presence and of the real within representation. Nietzsche's is one of many accounts of the disruptive but persistent presence of the negative in art; see Nietzsche (1967), section 8.

35 The limits of the judicial review of the executive sometimes reflect an implicit recognition of a sphere of executive lawlessness. Contrary to the position of certain authors, these limits cannot derive from a superior institutional aptness of the executive to make good decisions in certain areas. Even if such difference in competence is real, it cannot transform the executive into the final interpreter of higher law, a role which belongs to the judiciary. On institutional competence as the justification for judicial underenforcement of the constitution in certain areas, see Sager (2004). The difference between Sager's position and mine stems from a deeper divergence over the nature of the judiciary. While Sager regards the judiciary as 'partners' with other branches of government in the task of constitutional interpretation, many constitutional theorists view the judiciary as privileged 'agents' of higher law.

36 In a famous passage that would elicit perennial controversy Hegel remarked that war rejuvenates the state 'just as the blowing of the winds preserves the sea from foulness' (1821, section 324). Hegel also argued that the legal order *continually* grounds itself in the monarch's personal power, in a pre-legal moment which persists within the established constitutional order but which is largely confined to symbolic gestures. The personal aspect of political power, however inconsistent with the rule of law, is not unique to monarchy. It can also be found in democracies, for example in the pardoning power which often retains a distinctly personal character. The pardoning power should be understood as an extension of constituent power into normal politics.

over life. It demonstrates that the state's authority originates in a prepolitical undomesticated violence, and that its hold over that violence is both ongoing and exclusive. It shows that the constitutional/corporate order is not challenged by persistent unintegrated and undomesticated forces.

These considerations suggest that the somewhat paradoxical idea of permanent special forces reinforces rather than undermines the projection of sovereignty outside society. As long as the lawlessness of these forces is confined to a largely imaginary realm of 'mysteries of state',<sup>37</sup> it does not attest to the permanence of immanent sovereignty and founding violence. Contrary to appearances, the general literary fascination with lawless instances of power betrays the love for the rule of law, since the alternative to the mystique of the secret forces is the communal exercise of terror in full transparency. The rule of law is conditioned much as it is threatened by the lack of complete transparency.

## References

- Adorno, T. (1945) 'What National Socialism has done to the arts', in R. Leppert (ed) *Essays on Music*, Berkeley: University of California Press, 2002.
- Agamben, G. (1998) *Homo Sacer*, Stanford: Stanford University Press.
- Allan, T.R.S. (2001) *Constitutional Justice: A liberal theory of the rule of law*, Oxford: Oxford University Press.
- Arendt, H. (1963) *On Revolution*, New York: Viking.
- Arendt, H. (1973) *The Origins of Totalitarianism*, Orlando: Harcourt.
- Barshack, L. (2006a) 'Between ritual and theatre: judicial performance as paradox', in O. Perez and G. Teubner (eds) *Paradoxes and Inconsistencies in the Law*, Oxford: Hart.
- Barshack, L. (2006b) 'Constituent power as body: outline of a constitutional theology', *University of Toronto Law Journal* 56(3): 185.
- Barshack, L. (2009) 'Time and the constitution', *ICON: The International Journal of Constitutional Law*, 7(4): 553–576.
- Barshack, L. (2011) 'The constituent power of architecture', *Law, Culture and the Humanities* 7(2): 217.
- Beaune, C. (1991) *The Birth of an Ideology: myths and symbols of nation in late-medieval France*, trans. S. Ross, Berkeley: University of California Press.
- Benjamin, W. (1996) 'Critique of violence', in M. Bullock and M.J. Jennings (eds) *Selected Writings Vol 1 1913–1926*, Cambridge, MA: Harvard University Press.
- Cheyette, E.L. (1963) 'Custom, case law, and medieval "constitutionalism": a re-examination', *Political Science Quarterly* 78: 362.
- Cheyette, E.L. (1978) 'The invention of the state', in B.K. Lackner (ed) *Essays on Medieval Civilization*, Austin: University of Texas Press.
- Cicero, *Second Speech against Verres*, Book I, sections 41–4.
- Clavel-Lévêque, M. (1986) 'L'espace des jeux dans le monde romain: hégémonie, symbolique et pratique sociale', *ANRW* II.16.3.
- Craig, P. (2000) 'Public law, political theory and legal theory', *Public Law* 211: 224.
- De Heusch, L. (1962) 'Pour une dialectique de la sacralité du pouvoir', *Écrits sur la royauté sacrée*, Bruxelles: Editions de l'université de Bruxelles, 1987, 215–63.
- Dworkin, R. (1986) *A Matter of Principle*, Oxford: Oxford University Press.
- Finley, M.I. (1975) 'The ancestral constitution', in *The Use and Abuse of History*, London: Windus, 34.
- Fortes, M. (1968) 'Ritual and office in tribal society', in M. Gluckman (ed) *Essays on the Ritual of Social Relations*, Manchester: Manchester University Press.
- Fortes, M. (1969) *Kinship and the Social Order*, Chicago: Aldine.
- Fortes, M. (1976) 'An introductory commentary', in W.H. Newell (ed) *Ancestors*, The Hague: Mouton.
- Fortes, M. (1987) *Religion, Morality and the Person: essays on Tallensi religion*, Cambridge: Cambridge University Press.
- Fromm, E. (1950) *Psychoanalysis and Religion*, New Haven: Yale University Press.
- Fuller, L.L. (1969 revd edn) *The Morality of Law*, New Haven: Yale University Press.
- Gacon, S. (2002) *L'amnistie. De la commune à la guerre d'Algérie*, Paris: Seuil.
- Gaughan, J.E. (2010) *Murder Was Not a Crime: homicide and power in the Roman republic*, Austin: University of Texas Press.
- Giesey, R. (1961) *The Juristic Basis of Dynastic Rights to the French Throne*, Philadelphia: The American Philosophical Society.
- Girard, R. (1977) 'The unity of all rites', in *Violence and the Sacred*, Baltimore: Johns Hopkins University Press.
- Goldsworthy, J. (1999) *The Sovereignty of Parliament: history and philosophy*, Oxford: Oxford University Press.
- Gough, J.W. (1961) *Fundamental Law in English Constitutional History*, 2nd edn, Oxford: Oxford University Press.
- Hart, H.L.A. (1961) *The Concept of Law*, Oxford: Oxford University Press.
- Hegel, G.W.F. (1821) *Philosophy of Right*, trans. T.M. Knox, Oxford: Oxford University Press.
- Hegel, G.W.F. (1944) *The Philosophy of History*, trans. J. Sibree, New York: Wiley.
- Hegel, G.W.F. (1977) *The Phenomenology of Spirit*, trans. A.V. Miller, Oxford: Oxford University Press.
- Hollister, C.W. and Baldwin, J.W. (1978) 'The rise of administrative kingship: Henry I and Philip Augustus', *American Historical Review* 83: 867–905.
- Hornum, M.B. (1993) *Nemesis, the Roman State and the Games*, Leiden: Brill.
- Kantorowicz, E.H. (1954) 'Inalienability: a note on canonical practice and the English coronation oath in the thirteenth century', *Speculum* XXIX: 488–502.
- Kantorowicz, E.H. (1955) 'Mysteries of state. An absolutist concept and its late mediaeval origins', *The Harvard Theological Review* 48(1): 65–91.
- Koskeniemi, M. (2007) 'Constitutionalism as mindset: reflections on Kantian themes about international law and globalization', *Theoretical Inquiries in Law* 8(1): 9.
- Leach, E.R. (1961) 'Time and false noses', in *Rethinking Anthropology*, London: Athlone.
- Lemaire, A. (1907) *Les lois fondamentales de la monarchie française*, Paris: Thorin.
- Leyser, K.J. (1982) 'Some reflections on twelfth century kings and kingship', in *Medieval Germany and its Neighbours, 900–1250*, London: Hambledon Press.
- MacCormick, N. (1999) 'Rhetoric and the rule of law', in D. Dyzenhaus (ed) *Recrafting the Rule of Law: the limits of legal order*, Oxford: Hart.
- Marmor, A. (2004) 'The rule of law and its limits', *Law and Philosophy* 23: 1, 11.
- Mayali, L. (1992) 'De la *juris auctoritas* à la *legis potestas*. Aux origines de l'État de droit dans la science juridique médiévale', in J. Krynen and A. Rigaudière (eds) *Droits savants et pratiques françaises du pouvoir*, Bordeaux: Presses Universitaires de Bordeaux.

37 On the notion of mysteries of state, see Kantorowicz (1955) at 65–91.

- McIlwain, C.H. (1910) *The High Court of Parliament and Its Supremacy: an historical essay on the boundaries between legislation and adjudication in England*, New Haven: Yale University Press.
- McIlwain, C.H. (1947 revd. edn) *Constitutionalism: ancient and modern*, Ithaca: Cornell University Press, chapters 4, 5.
- McIlwain, C.H. (1955) 'Review of Gough's *Fundamental Law in English Constitutional History*', *The American Historical Review* 61(1): 109–10.
- Miller Lane, B. (1968) *Architecture and Politics in Germany, 1918–1945*, Cambridge, MA: Harvard University Press.
- Müller, I. (1991) *Hitler's Justice: the courts of the Third Reich*, Cambridge, MA: Harvard University Press.
- Neumann, E. (1986) *The Rule of Law: political theory and the legal system in modern society*, Leamington: Berg.
- Nietzsche, F. (1967) *The Birth of Tragedy*, New York: Vintage, section 8.
- Paravicini-Bagliani, A. (2000) *The Pope's Body*, Chicago: University of Chicago Press.
- Plucknett, T.F.T. (1922) *Statutes and their Interpretation in the First Half of the Fourteenth Century*, Cambridge: Cambridge University Press.
- Plucknett, T.F.T. (1926) 'Bonham's case and judicial review', *Harvard Law Review* 40: 30–70.
- Plucknett, T.F.T. (1962) *Legislation of Edward I*, Oxford: Oxford University Press.
- Poole, T. (2003) 'Back to the future? Unearthing the theory of common law constitutionalism', *Oxford Journal of Legal Studies* 23(3): 435.
- Procaccia, U. (2007) *Russian Culture, Property Rights and the Market Economy*, Cambridge: Cambridge University Press.
- Radbruch, G. (1946) 'Statutory lawlessness and supra-statutory law', *Oxford Journal of Legal Studies* 26(1): 1–11.
- Sager, L. (2004) *Justice in Plainclothes: a theory of American constitutional practice*, New Haven: Yale University Press.
- Scheffler, H.W. (1966) 'Ancestor worship in anthropology: observations on descent and descent groups', *Current Anthropology* 7(5): 541–51.
- Sewell-Rutter, N.J. (2007) *Guilt by Descent. Moral inheritance and decision making in Greek tragedy*, Oxford: Oxford University Press.
- Strayer, J.R. (1970) *On the Medieval Origins of the Modern State*, Princeton: Princeton University Press.
- Szegedy-Maszak, A. (1978) 'Legends of the Greek lawgivers', *Greek, Roman and Byzantine Studies* 19: 199–209.
- Taylor, C. (2001) 'The Salic law and the Valois succession to the French throne', *French History* 15(4): 358–77.
- Thompson, M.P. (1986) 'The history of fundamental law in political thought from the French wars of religion to the American Revolution', *The American Historical Review* 91(5): 1103–28.
- Veyne, P. (1976) *Le pain et le cirque*, Paris: Seuil.
- Weber, M. (1978) *Economy and Society*, G. Roth and C. Wittich (eds) Berkeley: University of California Press.
- Wolter, U. (1997) 'The *Officium* in medieval ecclesiastical law as a prototype of modern administration', in A. Padoa-Schioppa (ed) *Legislation and Justice*, Oxford: Oxford University Press.

## Shari'a, faith and critical legal theory

Marinos Diamantides\*

### I. Legal theory and the misleading obsession with Shari'a

Public discussion by Muslims and non-Muslims about 'Islam' has, for some time now, been dominated by polemics between Islamists – 'crusaders' with a crescent instead of a cross – and Islamophobes, the new antisemites. Two of the symptoms of this unholy alliance are the increased rhetorical identification of the 'Shari'a' with Islam; and the tendency to essentialise the 'civilisational' differences between, on the one hand, a 'European' culture that is presented as Greek and Christian (downplaying its Jewish and Islamic influences) and an 'Islamic' one, which is presented as essentially 'Eastern' and which could never have absorbed the influences of Greece and Christianity. In this second regard much too much commentary has been made on S. Huntington's approach to deserve further mentioning here. A more recent, and perhaps more disturbing, example, in France, was Sylvain Gougenheim's deeply flawed but widely publicised *Aristote au Mont-Saint-Michel – Les racines grecques de l'Europe chrétienne* (Gougenheim 2008). Focusing on the figure of James of Venice, the twelfth-century Greek who translated Aristotle's *Posterior Analytics* directly from the Greek (bypassing the Arabic translations), the book suggests that the much studied Arab/Muslim contribution to European enlightenment has been exaggerated and proposes, in its place, a mythical version of a Christianity that managed to become 'purely European' (specifically Greek and Norman with all Semitic elements excised), ecumenical and at peace with itself (forgetting the great schism in 1054 or the sacking of Constantinople). While this mythical Europe is presented as harmoniously incorporating its Greek and Christian heritage – the spirit of scientific curiosity and philosophical reflection embedded in a religious tradition that the Church sought to guarantee – the book presents a picture of the Arab/Muslim world as only superficially Hellenized due to two essential features: a

\* School of law, Birkbeck College, University of London. Email: m.diamantides@bbk.ac.uk