Stellenbosch Theological Journal 2021, Vol 7, No 1, 1–24
DOI: http://dx.doi.org/10.17570/stj.2021.v7n1.a16
Online ISSN 2413-9467 | Print ISSN 2413-9459

Love, the law and religion: *Dangerous liaisons*

Theo W.A. De Wit
Tilburg University, The Netherlands,
Stellenbosch University, South Africa
T.W.A.deWit@tilburguniversity.edu

Abstract

To the question "Are we as humans obliged to something because it is good, or because it is prescribed by God?", the Christian Church father Tertullian answered: we obey because of God's will. Today, many are inclined to give the first answer, and even to distrust people who follow Tertullian. In this article, however, the author demonstrates the continuing relevance of Tertullian's paradigm about reason/will in modern political philosophy: for example, in Thomas Hobbes' "decisionist" maxim: not truth, but the will of formal authority establishes the law. Or in the democratic combination of rational discussion and decisive majority will. This gives modern democracy the character of a ritual instead of a rational machinery: a kind of secular divine judgement.

Also another issue allows us to demonstrate the lasting actuality of Tertullian's paired concepts: the issue that a political community not only needs democratic *legitimacy*, but also national *unity*. Here also the relationship with the question of violence becomes relevant. The author presents four "dangerous liaisons" between love and rational justice. The basic intuition here is that we "not only want to live in a world which we are able to consider just, but in a reality which we experience as valuable in and of itself" (Paul W. Kahn). Love can strengthen rational justice, and vice versa; love can get in conflict with justice; justice can try to expand itself at the expensive of love; and – the other way around – love can drive us to the universal and transcend legal boundaries. As a conclusion, we can distinguish clearly between nationalism and patriotism. And second, we must admit that, while love will always destabilize law, the opposite is also true: we have to make calculations, so that justice can also destabilize love.

Keywords

Tertullian; reason/will (ratio/voluntas); justice; love; decision; the universal and the particular

1. Tertullian's model: reason and will

In his catechetical writing *De paenitentia* (203/204), the Carthaginian jurist and Christian theologian Tertullian (ca. 160–220) makes the following statement: "We as humans are not obliged to something because it is good, but because it is prescribed by God".[1] To us, formed by science and humanism, such a sentence has not only become incomprehensible, it is also nothing less than a provocation. How could human *ratio*, the rational insight into what is just and good, be squared against God's *voluntas* and the commandments and precepts that entails? Does this not smack of fundamentalism and the ultra-orthodox, that is to say, a "divine command theory" which could even serve to justify religiously sanctioned murder, the Dutch philosopher of law Paul Cliteur for instance wonders?[2] After all, fundamentalists are of the opinion that they have a *hotline* to God and divine will, and that this transcends human considerations and scruples. In his *Moreel Esperanto* (Moral Esperanto), Cliteur rightly points out that the core of Tertullian's model of thought may already be found in Plato, who in his *Euthyphro* has Socrates raise the following question: is the pious beloved by the gods because it is pious, or is it pious because it is beloved by the gods?[3]

I first encountered Tertullian's statement in the work of another jurist, namely in a writing by the German theorist of constitutional law Carl Schmitt on the different forms of juridical-scientific thinking. In this, he also discusses "decisionism". To a jurist of the decisionist type, we read in Schmitt, "not the precept as precept, but the authority or sovereignty of a last decision given as command is the source of all 'law', that is, of all norms and prescriptions which follow from it."[4] It is in this context that he

1 Tertullianus, *De paenitentia* 4.6, CSEL, Band 76, 149: "Neque enim bonum est, idcirco auscultare debemus, sed quia deus praecipit", quoted in Dieter Groh, *Schöpfung im Widerspruch. Deutungen der Natur und des Menschen von der Genesis bis zur Reformation* (Frankfurt am Main: Suhrkamp, 2003), 105.

2 Paul Cliteur, *Moreel Esperanto. Naar een autonome ethiek* (Amsterdam/Antwerpen: De Arbeiderspers, 2007), especially 1, "Religieuze ethiek", 21-219.

3 Cliteur, *Moreel Esperanto*, 95.

4 Carl Schmitt, *Über die drei Arten des rechtswissenschaftlichen Denkens* (Hanseatische Verlagsanstalt: Hamburg, 1934), 25 (my translation)

quotes Tertullian, however not without adding that this theologian cannot be considered a decisionist.

Prior to the decay of the ancient and Christian representations of a world order by the new natural sciences, Schmitt argues, "representations of an order as condition of decision always played along in this train of thinking. Thereby a pure decision (*Nichts als Entscheidung*) is again limited and integrated into order-thinking."[5] Divine decree, "as unfathomable as it may be, is, as long as one believes in God, always already "in order" and not a pure decision".[6] As a contemporary expert on patristics formulates it: God "has objectified his will towards the good in a norm", thus enabling humans, by following this norm, to be in communion with God.[7] According to Schmitt, this was still the case with Calvin's doctrine of predestination and Jean Bodin's theory of sovereignty in the Sixteenth century. Bodin's theory allows for the existence of arrangements and institutions such as families and estates as "natural" arrangements, while also the sovereign is viewed as a legitimate instance, namely the legitimate king.

According to Schmitt, only from the seventeenth century onwards, in thinkers like Thomas Hobbes, does one find truly decisionist thinking. In Hobbes, "right is identical to law, and the law is the command which decides the struggle for right: *auctoritas, non veritas facit legem*."[8] Not truth, but formal authority establishes the law. This authority is no longer representative of an order which precedes the state, but the answer to a concrete disorder, in Hobbes the "state of nature", an anarchic state of war or looming (civil) war.[9]

Below I will argue that the Tertullian tension between reason and will, *ratio* and *voluntas*, has in diverse ways remained present in our contemporary concept of democracy, nowadays perhaps even stronger than was the case in the period after the end of the Second World War. In this I want to hook on to an insight by the Italian philosopher Giorgio Agamben, who, in an essay

5 Schmitt, *Über die drei Arten*, 25.

6 Schmitt, *Über die drei Arten*, 26.

7 Groh, *Schöpfung im Widerspruch*, 88-114; 105 on Tertullian

8 Schmitt, *Über die drei Arten*, 27.

9 Schmitt, *Über die drei Arten*, 27-28.

on the "archaeology of the command", concludes that while historians of ancient philosophy agree on very little else, they all agree that the concept of "will" is foreign to classical Greek thinking. This concept only emerged with the Roman stoics, eventually finding its complete development in Christian theology.[10] Whereas in Greek thinking the concept *dynamis*, potency and potential, predominated, in Christian theology and modernity it is the concept "will" and the subject who wills: *homo volens*.

From the eleventh- to the fourteenth century, it strikes Agamben, theologians are truly possessed by the concept of "will", and specifically the dark side of God's almighty will: God "is able to not only incarnate himself in Jesus, but also in a worm, or – even more offensively – in a woman; he can doom Peter and save Judas; he can lie and do evil, destroy his whole creation, or – what theologians curiously enough found more upsetting and exciting than anything else – restore the virginity of a deflowered woman. Peter Damian's tract *De divina omnipotentia* for instance is largely dedicated to this theme."[11]

The decisionist God

In his study *Die Legitimität der Neuzeit* (The Legitimacy of Modernity, 1966) the philosopher and historian of ideas Hans Blumenberg takes us back to the dark middle ages in order to trace the origin of our modern notion of freedom.[12] In 1277 the bishop of Paris Etienne Tempier condemned a statement by the great theologian Thomas Aquinas, a mere three years after his death, and without explicitly mentioning his name. This statement held that it was only possible for *one world* to exist, a view already defended by Aristotle. To us nowadays, this thesis may sound somewhat exotic, but things become somewhat clearer once we take note of Tempier's reason for his rejection: it would restrict God's omnipotence (a generally accepted divine attribute).

---

10 Giorgio Agamben, "Archäologie des Befehls", in Friedrich Wilhelm Graf & Heinrich Meier (eds.), *Politik und Religion. Zur Diagnose der Gegenwart* (München: Verlag C.H. Beck, 2013), 241-259; 254.

11 Agamben, "Archäologie des Befehls", 256.

12 Hans Blumenberg, *Die Legitimität der Neuzeit* (Frankfurt am Main: Suhrkamp, Erneuerte Ausgabe, 1988). For an overview of this discussion , see Hermann Krings, "Woher kommt die Moderne? Zur Vorgeschichte der neuzeitliche Freiheitsidee bei Wilhelm von Ockam". *Zeitschrift für philosophische Forschun*g 41, no. 7 (1987): 3-19.

According to Blumenberg, we here witness a very consequential turn in the history of thinking. The attention of late-scholastic thinking was no longer primarily concerned with the humanly fathomable rationality of creation; as also stated by Agamben, these thinkers now became fascinated by the question of the possible meanings of all this absolute omnipotence and freedom.[13] God could also have created in a different way, his freedom means that he is not tied to his own creation – a thought we find in William of Ockham, the most brilliant theologian of the period after Thomas of Aquino.

This has frequently been called one of the most interesting events in our history of ideas: for the first time the new is conceived of as the product of pure freedom, and "order" as product of an unfathomable will. Naturally, the late-scholastics gave central place to God's freedom for religious and theological reasons, namely in order to duly emphasize God's free choice in his merciful intervention in favour of us (sinful) human beings. But in retrospect, this was the start of the modern history of freedom, even of revolution.

One for instance comes across Tertullian's conceptual pair "reason" and "will" in the scholastic distinction between God's "absolute power" (*potentia absoluta*) by which he could have done whatever he had pleased, and the ordered power (*potentia ordinata*), by which God does what he factually wills – that is to say, according to the existing order.

And indeed, Tertullian's statement *could* be read in such a way that the *will* of God is here being played out against the *rationality* of his commandments, just as later in Tempier and Ockham the freedom of God is opposed to the orderliness of his creation. We could therefore also speak of a "decisionist" representation of God.[14]

13 Blumenberg, *Die Legitimität der Neuzeit*, 178-179.

14 Avishal Margalith, "Political Theology. The authority of God", in Meerten ten Borg & Jan Willem van Henten (eds.), *Powers. Religion as a social and spiritual force* (New York: Fordham University Press, 2010), 51-62.

2. The democratic combination of rational deliberation and decisive majority will

But let us now take stock of the secular variants of these old distinctions and their meaning for our secular-democratic political order. In the first place we discover a remarkable "decisionist" doctrine within our democratic constitutional state. In our democracy new legislation comes about by means of deliberation, that is, an exchange of arguments which is concluded by a decision signalling the victory of majority opinion. Also here, *reason* is combined with a *will*, that of the majority.

Especially the non-technocratic conception of modern democracy has much interest for this element of will in parliamentary-democratic procedure. This notion regards the democratic system not as a rational machine which enables assertive individuals to co-exist effectively and without harming one another, but rather as a ritual which enables us to deal with human deficiency and the insurmountable differences between people.

Precisely where controversial issues are concerned (how to distribute social wealth, how to deal with vulnerable groups, aliens, and the enemy?) a (narrow) majority decision could appear as something arbitrary and contingent – a kind of "secular" ordeal.[15] And, according to this conception on democracy, precisely this makes things bearable for those who had lost the struggle concerning a specific law. For such a law is namely not the triumph of "truth" or "reason"; in the words of the Flemish philosopher Herman De Dijn, the decision which is eventually taken is "*always* somewhat of a verdict of chance".[16] In a multi-cultural society where the law is no longer, more or less, the expression of a shared morality, but where significant minorities exist in terms of culture and morality, the importance of this ritual-arbitrary moment increases. An outvoted minority here does not count as the "irrational" or "backward" part of society neutralized by a rational majority. In a mature democracy the majority refrains from

15 A secular ordeal: it looks arbitrary to accept a decision that was the result of a (very) small majority of the parliament. When such a democratic decision is nevertheless legitimate, it shows off that the democratic play is indeed a kind of ritual, and not the result of e strict rational discussion. Like an religious ordeal, it is a bit withdrawn from human reason.

16 Herman De Dijn, *Hoe overleven we de vrijheid?* (Kapellen/Kampen: Pelckmans/Kok Agora, 1994), 83.

triumphalism and minorities are able to – within determined procedural limits – continue cherishing the hope that the law may yet one day be amended in their favour.[17]

For these reasons, amongst others also the German political thinker Hermann Lübbe defends the "decisionist" moment in modern democracy against Jürgen Habermas, according to whom, within the play of democracy, the "power of the compelling argument" ought to always gain the upper hand. According to Lübbe, when we as citizens respect democratically taken decisions, we precisely do *not* need to do so because we endorse the content of these decisions, but because we accept the formal authority, that is, the will of the majority. Precisely the separation of truth and validity "unburdens us from the obligation of conscience to endorse the law on grounds of truth".[18] "Majority instead of truth" (*Mehrheit statt Wahrheit*), Lübbe summarizes his statement: precisely to keep the place of truth vacant, the majority is not entitled to demand consensus and "minorities are at liberty to suspect the truth of laying somewhere else".[19]

In my opinion, this notion implies an answer to the question concerning the status of the nowadays, once again, frequently averted "leading culture" (*Leitkultur*). *Leitkultur* is nothing but the incidentally reigning majority will, to which minorities are only bound by their obedience to the law. Whoever considers convinced deep down embracement of a homogenous *Leitkultur* as pre-condition for integration of newcomers, in the Tertullian dilemma, clearly chooses for the exclusivity of the *voluntas*: the opinions of newcomers themselves (*ratio*) are irrelevant, the majority culture is a priori leading, as the etymology of the Greek word *archè* in fact also confirms: *archè* namely means both "origin" and "beginning", as well as "leadership" and "command".[20]

---

17 De Dijn, *Hoe overleven we de vrijheid*, 83.

18 Hermann Lübbe, "Dezisionismus – eine kompromittierte politische Theorie", in *Schweizer Monatshefte* 55, no. 12 (1976): 949-960; 950.

19 Hermann Lübbe, "Mehrheit statt Wahrheit. Ueber Demokratisierungszwänge", in *Modernisierungsgewinner. Religion, Geschichtssinn, Direkte Demokratie und Moral* (München: Wilhelm Fink Verlag, 2004): 154-167; 157.

20 Agamben, "Archeologie des Befehls", 243.

I am myself of the opinion that, against the current tendency of many European political parties demanding cultural homogeneity and moral consensus, we need to hold high the classical-liberal *freedom to deviate*: we should embrace, not deplore the fact that *ratio* and *voluntas* do not coincide: *auctoritas, non veritas*.

3. Love and law

But there is a second question in current political philosophy which allows me to demonstrate the lasting actuality of Tertullian's paired concepts. There is growing consensus amongst political thinkers that a constitutional democracy not only requires democratic institutions and procedures to guarantee the *rule of law*, but also a certain unity and identity. In short: a political community not only has to see to democratic *legitimacy*, but also national *unity, patriotism* in some form or another: love for the own fatherland or constitution.

Nowadays this is first of all emphasized by a conservative thinker such as Roger Scruton,[21] but also by a communitarian such as Charles Taylor[22] and a leftist Universalist thinker such as Simon Critchley.[23] I will however here limit my discussion to the American philosopher of law Paul W. Kahn, because he provides the sharpest delineation of Tertullian's pair of concepts, and also because he clarifies its relationship with the problem of *violence*.[24]

---

21 Roger Scruton, "In defence of the Nation", in *The Philosopher on Dover Beach* (Manchester, 1990), 299-329; 300. Also see Scruton, "Conserving Nations", in *A Political Philosophy* (London: Continuum, 2006), 1-32; and Scruton, *The West and the Rest. Globalisation and the terrorist Threat* (London/New York: Bloomsbury, 2002).

22 Charles Taylor, "Nationalism and Modernity", in Taylor, *Dilemmas and Connections. Selected Essays* (Cambridge, Massachusetts & London, England: The Belknap Press of Harvard University Press, 2011), 124-145.

23 Simon Critchley, "The Catechism of the Citizen. Politics, Law and Religion in, after, with and against Rousseau". *Law and Humanities* 1 (2007):79-110; 79. For instance 82: 'I have come to this conclusion [that a democratic state needs a civil religion] with no particular joy, as someone with little enthusiasm (in the literal sense of the term) for religion, whether organized or disorganized.'

24 Paul W.Kahn, "Recht en liefde" Nexus 29 (2001):49-61. This text has only been published in Dutch, as Paul Kahn has confirmed to me by e-mail. He was friendly enough to send me a copy of the original English manuscript, "Law and Love". I will refer to this English version. Also see Paul W. Kahn, *Sacred Violence. Torture, Terror, and Sovereignty* (Ann

Like the previously mentioned thinkers, Kahn also emphasizes the importance of "warm" unity alongside "cool" legitimacy. And just like them, he points out a certain *lacuna* in the liberal theory of the modern political project, especially the theory of John Rawls who, with his *Theory of Justice* (1971), has for decades dominated Western political philosophy. This theory placed *justice* at the heart of the liberal state. Such a state holds the notion that legal rules need to be constantly viewed and revised in light of the demands presented by justice. Justice is also the objective of the constitution which lies at the foundation of every modern democratic state. Lastly, the recognition of *in*justice could in extreme instances also inspire revolution, or even, we may add, lead to acts of terrorism.[25]

This idea of justice itself appears as the realization of practical reason, and we rationally gain access to it by means of one or other variant of Rawls' famous *veil of ignorance*, which teaches us impartiality by requiring us to abstract from our specific situation. This reason promises to specify timeless and universal principles. That is why we say that the justice of the law is "blind"; it "subjects opposing assertions to the measuring rod of reason, without paying attention to the identity or character of the person presenting these statements". This implies, amongst others, that "morally depraved persons enjoy the same right to an honest process as the holiest amongst us."[26] According to Kahn, this has been the greatest achievement of the Enlightenment.

But here Kahn introduces a second theme from our Western inheritance, this time with Jewish and Christian roots, namely *love*, and tied to it, *sacrifice*. Us humans, he writes, namely "not only want to live in a world which we are able to consider just, but in a reality which we experience as valuable in and of itself".[27] This longing for meaning which arises from love, is irreducible to the problem of the (in)justice of the law, it transcends

---

Arbor: The University of Michigan Press, 2008); and Kahn, *Political Theology: Four New Chapters on the Concept of Sovereignty* (New York: Colombia University Press, 2011); Kahn, "Evil and European Humanism". *Yale Law Schoo*l, Faculty Scholarship Series 319 (2008), see: http://dfigitalcommons.law.yale.edu/fss_papers/319.

25 Kahn, "Law and Love", 4.

26 Kahn, "Law and Love", 5.

27 Kahn, "Law and Love", 5.

the boundaries of the law. It is the problem of the relationship between the universal and the particular.

"Love", writes Kahn, "starts when we feel ourselves so strongly connected to others that we are unable to view ourselves in detachment from them".[28] The movement from justice to love also opens the possibility of the movement from the rational contract to the sacrifice. Because I love my family, I not only place their welfare above that of others, but even above my own. In the end, sacrifice *denies* the autonomy of the self on which the ideal of legitimate juridical authority is based.

This is also the reason why one of the fathers of liberalism, Thomas Hobbes, had problems in legitimating the sacrifice of life in defence of the state under threat. Sacrifice has no place in Hobbes' rational construct of the state, for in this construction "compacts not aimed at protecting someone's own body, are empty".[29] (Self-)sacrifice on the other hand is based "in a conception of the self in which the subject understands his own identity as something which is not separate from the relationship to another."[30] Hence the convergence of love and death: love is always some kind of "death" of the autonomous self. And hence also that *evil* appears in the shadow of love: love compels us to draw boundaries, and without boundaries no enemies.[31]

4. Love and law: four dangerous liaisons and collisions

We are here clearly approaching a danger zone, for this self-conception threatens the liberal way of thinking which we – post-World War Two European citizens perhaps more so than Americans – are used to. Within this way of thinking we make sharp distinctions between

28 Kahn, "Law and Love", 6.

29 Kahn, *Sacred Violence*, 134: 'If the aim of the political community were to exit the domain of death that is the Hobbesian state of nature, a sacrificial politics would be a logical contradiction.' The quote from Hobbes at p. 199. See also Theo W.A. de Wit, "Pro patria mori. Sacrificing Life in Service of the Political Community", in J. Duyndam, A.M. Korte & M. Poorthuis (eds.), *Sacrifice in Modernity: Community, Ritual, Identity: From Nationalism and Nonviolence to Health Care and Harry Potter* (Brill: Leiden, 2016), 33-54.

30 Kahn, "Law and Love", 6; "Evil and European Humanism", 7-8: 'Love's object is not an internal state, but the well-being of another'.

31 Kahn, "Evil and European Humanism", 6.

public (contractual) reason on questions of justice on the one hand, and private love, non-political private loyalties (like religion) and individual representations of the good life on the other.

During the Salman Rushdie affair the following words from a Muslim were recorded by the Dutch news programme *Journaal*: "Islam is my life. Consequently, whoever damages Islam, is making an attempt on my life. I have the right to defend my life and therefore to kill the attacker – those who threaten Islam, and therefore my own life."[32]

To us liberal Europeans, such a deductive statement holds something recognizable as well as alien, unacceptable in fact. 'Recognizable' is the appeal to the principle of self-defence (our Hobbesian inheritance), 'alien and unacceptable' is the substance here given to the concept "life". It is not the autonomous self, the "buffered self" as Charles Taylor would have put it, the self which designs its own "life plan" (Rawls) who is speaking here, but a self who is from the very start inseparable from a narrative of a community which is worthy of dying and sacrificing others for.

As said, we here find ourselves in a danger zone, code orange or code red. Well then, many of the intellectual endeavours of liberal thinkers over the last few decades are expressions of their dismay at and irritation with the appearance or reappearance of this non-autonomous self in politics, a self that Kahn has linked to the *loving self*. After all, the whole project of a modern political ethics depends on the notion of an autonomous self that gives himself a rational law. I will attempt to disillusion them: the non-autonomous self will not disappear, it will always reappear, even in Europe. To this end, in the second half of my argument, I will phenomenologically sketch out four forms of liaison but also collision between "love" and "justice" in Kahn's sense of these terms. All of them are dangerous in some or other sense of the word, and in all instances the Tertullian tension between *ratio* and *voluntas*, rational justice and extra-rational love, has

32 Quoted in Marin Terpstra, "Het onduldbare dat verbindt. Over de verhouding tussen solidariteit en (on)verdraagzaamheid", in Theo de Wit & Henk Manschot (eds.), *Solidariteit. Filosofische kritiek, ethiek en politiek* (Amsterdam: Boom, 1999), 221-246; 222. I also follow him in his remarks with regard to what is both recognizable *and* alienating in this statement.

remained alive and well, even when in some moments they appear to be have been reconciled.

4.1 Love which strengthens justice, and vice versa

The first liaison between love and justice is the dramatic, but in a Europe after two world wars, also discredited model of *pro patria mori*.[33] This model could also imply a revolutionary politics, when *patria* is interpreted as the new *Heimat* (homeland) of a just and peaceful future society.

In various of his books, this is the model presented by Kahn as that of the sovereign nation state and its challengers.[34] Normally "this state places its citizens in a position in which the willingness to sacrifice their lives stands in a reciprocal relationship to the authorization to kill, the *license to kill*."[35] That is the sovereign ethos of the battlefield: the authorization to kill the enemy is only given to those who run the risk of being wounded or killed themselves. Killing, being killed: according to Kahn (but for example also Carl Schmitt[36]) this is a demand which only the state could make of its citizens – in other instances, it would simply be murder or suicide. The soldier not only defends sovereignty but also participates in it; he shares in the transcendental meaning occupied by politics.

This state could be challenged by a new sovereign instance, for example a revolutionary organisation striving towards a new, truly democratic (for instance Kurdish or Palestinian) state, a communist state, a caliphate, etc. Also such organisations demonstrate the reciprocity of killing and being killed characteristic of sacrificial violence. Even a non-violent revolution staged by a revolutionary movement cannot be successful "when at the threat of violence, the people withdraws from the public forum".[37]

---

33 See de Wit, "Pro Patria mori", 33-54.

34 In addition to *Sacred Violence and Political Theology also see Putting Liberalism in its Place* (Princeton: Princeton University Press, 2005).

35 Kahn, *Sacred Violence*, 132.

36 Carl Schmitt, *Der Begriff des Politischen. Text von 1932 mit einem Vorwort und drie Corollarien* (Berlin: Duncker & Humblot, 1963, 3. Aufl, 1991), 46: 'Der Staat als die massgebende politische Einheit hat eine ungeheure Befugnis bei sich konzentriert: die Möglichkeit Krieg zu führen und damit offen über das Leben von Menschen zu verfügen.'

37 Kahn, *Sacred Violence*, 138.

A few examples. A few years ago, I saw a somewhat formal-looking portrait of a neat Palestinian man with his wife and three young children in the paper. It could have been a photo of the couple on their wedding day with their bridesmaids. Then I read the caption: three days earlier, this man had blown himself up in a bus for the Palestinian cause, causing many Israeli deaths. The photo was a farewell portrait; to his community this man was a martyr, the photo was treasured as a holy relic. Kahn reminds us that "there has never been a universal condemnation of terror as form of waging war", and that in many parts of the world such a suicide-terrorist is held in great regard, as his actions had been driven by a love for his community or revolutionary movement.[38] Such a terrorist stands in shrill contrast to one who sows death and destruction without exposing himself to danger or injury.

Another example of the fusion of love and violent struggle may be seen in the Dutch movie *Bram Fischer* of film director Jean van de Velde. The film is about the South African advocate Bram Fischer who defended the accused in the so-called Rivonia trial – amongst whom were Nelson Mandela and Walter Sisulu. As known, the trial took place during Apartheid – the film is based on historical facts. Fischer himself was secretly a member of the ANC, the same revolutionary movement as the suspects who were accused of subversive and violent actions against the apartheid-regime. Also in this film for a certain period we witness the happy blending, transition and mutual fruitfulness of love and justice. Fischer's wife supported him wholeheartedly, aware that, given the dangerous nature of his adventure, she could lose him at any moment. Their mutual love is also more than a mere "private" affair, their love participates in the struggle for a new society and a new, post-racial constitutional state. Such a struggle is able to "transcend the law", for revolutionary action is neither legal nor illegal.[39] As far as the existing order is concerned, it is of course a matter of terrorism and criminal behaviour, but to the revolutionaries' one of justice

38 Kahn, *Sacred Violence*, 133.

39 J. Derrida, "Force de loi. Le 'fondement mystique' de l'autorité". *Cardoso Law Review* 11, nos. 5-6 (1990): 920-1045.

and a "homage to new gods", to use Kahn's phrase.[40] Here particularity and universality are going hand in hand.

In the same way, the soldier defending a democratic state is able to experience the contiguity between two forms of love: love for his wife, family and friends, and love for the democratic patria, as incarnated in his comrades. Naturally, this bond is always very fragile, threatened by the nature of the work (exposing oneself to the risk of being wounded or killed), but also by the vulnerability of patriotic love: one could lose this love, one could even feel betrayed by one's own country.

The earlier-mentioned philosopher Cliteur considers the well-known biblical tale of Abraham who almost sacrificed his son Isaac (Genesis 22: 1–13), as example par excellence of the "divine command theory" which according to him ought to be abandoned in favour of a rational, "autonomous ethics".[41] But agreeing with Kahn, I think that the scenario involving God, Abraham, Isaac and the angel continues to be played out today in every war we wage. Because both the soldiers and the societies which send them into combat are able to lose the faith upon which such sacrifice (of the self, of others) is based. When that happens, the sacrifice appears to be "nothing more than a senseless death of self-destruction and murder."[42]

It seems fair to assume that self-transcendence and doubt-free sacrifice may not even exist. "Even Abraham", states Kahn, "would have asked himself whether his sacrifice of Isaac was a loving or malevolent act. And was Isaac's faith big enough for him to regard his own sacrifice as an act of love instead of victimhood? Is this not exactly the same situation in which those young men we currently send forth to wage state wars are finding themselves in?[43] War is and remains a very doubt-filled undertaking. Would

40 Kahn, *Sacred Violence*, 136.

41 Cliteur, Moreel Esperanto, 37 and passim. See also P. Cliteur, "Biblical Stories and Religion as the Root Cause of Terrorism", in Mahmoud Masaeli & Rico Sneller (eds.), *The Root Causes of Terrorism. A Religious Studies perspective* (Newcastle: Cambridge Scholars Publishing, 2017), 1-27.

42 Kahn, "Evil and European Humanism", 15.

43 Kahn, "Evil and European Humanism", 15.

this change if we were to, henceforth, only ever start wars on the basis of *rational* convictions? I will return to that shortly in the third paragraph.

4.2 Love against law

The second model is a core narrative in the history of the West, the *conflict* between love and law. Here Sophocles' *Antigone* is the prototype. Both war and love, writes Kahn, stand "stubbornly on the other side of the law, and cannot be grasped separately from the experience of sacrifice".[44]

Sacrifice: the transformation of my body into the expression of some or other ultimate meaning, for example, love for my family, my friends, the revolution, but also for the survival of my democratic community, my *patria*. *My patria* namely also means: to this I belong, I view myself as part hereof – in the same way that the earlier-quoted Muslim sees himself as part of Islam. The point of convergence between love and fatherland can only be grasped once we accept that politics is not merely a means for protecting a private domain: it is just as much the domain of love as that of the implementation of the law. This is the "warm", "erotic" centre of the state.

But here we also run up against the birth of a potential *conflict* between love and politics. Sophocles' *Antigone* starts with the dead body of Polynices lying outside the walls of Thebes, and the new king Creon, on pain of execution, forbidding the burial of his body. Out of respect for family and religion Antigone asks for the body of her brother so that it could be cared for in accordance with traditional religious rituals. In the classical tradition of warfare, explains Kahn, defeat spelled the moment when all men were killed, women and children sold off as slaves and the city razed to the ground. The defeated, he writes, "are literally destroyed in order to demonstrate the emptiness of their religion".[45]

Nowadays of course we would call it genocide, but "the legal sanction on genocide has barely detracted from our impulse to destroy our enemies". Kahn illustrates this with the example of the United States' current "war on terror": "While a common criminal remains a member of society, the

44 Kahn, "Law and Love", 10.

45 Kahn, *Sacred Violence*, 146.

terrorist is denied such recognition. From the perspective of the sovereign, it would be preferable to let him 'disappear', to remove him from the human world of memory. That was undoubtedly the impetus behind the extra-legal places of detention created by the Americans after 9/11. It was the state's objective to permanently detain terrorists in the space of sovereignty, in other words beyond the walls of the law. To the United States, this space was Guantánamo".[46] To be an "illegal combatant" means being condemned to invisibility, one's martyrdom hidden from one's community. Thus, nobody for instance knows where the grave of Osama bin Laden is located. In short, there is no difference between Creon and the United States: "Just as Polynices is left behind to be consumed by animals and thus rendered invisible, the modern state renders terrorists invisible".[47]

Is this acceptable from a religious – for instance Roman Catholic – perspective? In an essay on the phenomenon of fundamentalism written in 1989, the German Catholic philosopher Robert Spaemann refers to Sophocles' famous tragedy. In this essay he makes a distinction between two forms of fundamentalism, *religious* or *ideological* fundamentalism, and *political* fundamentalism. According to Spaemann, all people are normally fundamentalists in the first meaning of the word, because to all of us there are causes which we deem "holy" and are reluctant to relinquish. In Kahn's vocabulary: this is because we are not only *rational*, but also *loving* beings.[48] People without such holy causes, thus Spaemann, are "bound to nothing", and therefore "capable of anything".

This first form of fundamentalism is a non-political attitude because the sphere of (democratic) politics is the sphere of mediation: there the demands of the absolute are broken – *auctoritas, non veritas*. If for instance one holds human rights to be the moral symbols of the absolute or *das Unbedinge* (the unconditional – Spaemann), one still has to accept that human rights cannot be "implemented", but at best be respected. Political fundamentalism on the other hand is a totalitarian and even

46 Kahn, *Sacred Violence*, 146.

47 Kahn, *Sacred Violence*, 146.

48 Robert Spaemann, 'Das Wort sie sollen lassen stahn'. Versuch über den Fundamentalismus. *Die Zeit* (22 Dec. 1989): 47-49.

somewhat nihilistic politics: every singular life is primarily valued from the perspective of political functionality.

On the basis of these considerations Spaemann sides with Antigone, to whom a religious duty existed to give a proper burial to her brother. "I am here to love, not to hate", she clarifies her demand. Creon's political considerations may well have been derived from the *raison d'état*, but herein lies his *hubris*, for his calculations fail to pay due respect to things older and more fundamental than the political system. Hence the conflict between religion fed by love and the calculations of political expedience. Thus, many Europeans *and* Americans oppose the "disappearing" of prisoners into Guantánamo Bay, for such a type of *raison d'état* clashes with the fundamental duties we owe to all people – as *imago dei*, us Christians would say. Agamben for instance, has been refusing to set foot in the United States since the start of these practices of "disappearing".[49]

4.3 The law against love, or: the expansion of rational justice

"Both justice and love drive us towards the universal", writes Kahn.[50] With the third and fourth models I will describe the implications of these tendencies. In the first place, the expansion of "justice" at the cost of "love". From the perspective of justice, nationality and the boundaries of a concrete political community are both irrelevant and irrational.

Behind Rawls' veil of ignorance, giving priority to one's family or loved ones could hardly be justified: don't other people have the same right to one's attention and means?

A statement Albert Camus made in 1957 during the Algerian War of Independence, namely that he "believed in justice, but would defend his mother against justice", is marked by irrationality according to this view.[51] In the same way the precepts of religion may appear to us as unjust and backwards – in the Netherlands for instance, *any* form of religious education given to children is nowadays liable to be attacked as a form of

---

49 See Rinse Reeling Brouwer, *Eeuwig leven. Agamben & de theologie* (Amsterdam: Sjibbolet, 2016), 31.

50 Kahn, "Law and Love", 13.

51 Albert Camus, quoted by Göran Rosenberg, "Europas viele Heimaten". *Lettre International* 118 (2017): 25-30; 27.

indoctrination and disrespect for the "autonomy" of the child. Moreover – one may also wonder behind the veil of ignorance – does not religion always becomes dangerous when it is coupled to the pretence that it is *more* than a matter of private preference or individual *design*? And in conclusion, *war* and the sacrifices it demands of course represent a failure of right and law, as well as a residue of irrationality.

In line with this way of thinking we could even construct a liberal philosophy of history in the direction of the progressive realization of the liberal *rule of law*, based on what Michael Walzer once referred to as the liberal "art of separation". After the separation of the household and the public forum (a Greek achievement) and after the decoupling of church and legislature (a pre-modern acquisition), our modern welfare state has separated the market from the bureaucracy of state.[52] Ultimately we then create the "new man", devoid of irrational bonds, in a world without war, nationality and politics, and of course also without sacrifices.

It was this universal perspective which Carl Schmitt already criticised ninety years ago, mainly because it was based on the elimination of the enemy as *legitimate* political figure. In our mission of creating a world without wars, in our "war on war" we pursue the last remaining enemies of humanity, these no longer portrayed as political rivals, but as irrational fanatics, criminals, terrorists and monsters obstructing and retarding the universal regime of the *rule of law*.[53] Back then Schmitt was already concerned about such a moralizing of enmity. Rightly so, I think, because nowadays we have a whole series of concepts which need to be referred to as "asymmetrical", for these are only unilaterally applicable: "terrorist", "fundamentalist", "rogue state", "enemy of humanity", "axis of evil", etc.[54] These concepts presuppose the position of arbiter and judge, and in a deeply

52 Kahn, "Law and Love", 7. See Michael Walzer, "The Art of Separation". *Political Theory* 12, no. 3 (1984): 315-330.

53 Schmitt, *Der Begiff des Politischen*, 37.

54 With regard to asymmetrical concept pairs, see Reinhart Koselleck, "Zur historisch-politischen Semantik asymmetrischer Gegenbegriffe", in Koselleck, *Vergangene Zukunft. Zur Semantik geschichtlicher Zeiten* (Frankfurt am Main: Suhrkamp, 1979), 211-260; and Kay Junge, Kirill Postoutenko (eds.), *Asymmetrical Concepts after Reinhart Koselleck. Historical Semantics and Beyond* (Bielefeld: Transcript Verlag, 2011).

divided world such as our own, cannot but function as a boomerang – dehumanization begets dehumanization.

Hence Schmitt's rejection of the idea of a "world state" (*Weltstaat*) and his scepticism towards a form of post-political *global governance*, a scepticism based on the fear of the "immense power" such global and technical centralization of control would entail.[55] The danger of such a model lies in the explosive effects of moralizing and criminalizing the enemy, in the end eventually of any form of solidarity with a particular community that could generate enmity. In my opinion, the biblical answer to this model may be that, in our historical strivings, it is not our task as humans to definitively separate the wheat from the chaff (Mt. 13: 24–30).[56] History *itself* will not judge itself.

4.4 Love which transcends legal boundaries

Does scepticism towards a world-wide regime of law – based on the perverse consequences such may ultimately hold – mean that for us Europeans it would be better to return to the good old nation state, to a "Europe of fatherlands", as some nowadays suggest? I think that we should hold on to the universal intentions of human rights and the Catholic social doctrine, not by striving towards a global expansion of rational justice at the cost of particular bonds ("love"), but conversely, by starting to view ourselves as loving and loved beings.

Once more Kahn can help us on our way. When I am unable to think of myself without my loved ones, then "I am also unable to accept that reason detached from love needs to serve as my guide in life".[57] Indeed, in the end I chose my wife not on the basis of justice – we fell in love

---

55 Schmitt, *Der Begriff des Politischen*, 58. Also see Hasso Hofmann's critical interpretation of Schmitt's argumentation, "Die Welt ist keine politische Einheit sondern ein politisches Pluriversum (54-58). Menschenrecht im politischen Pluriversum?", in Reinhard Mehring (eds.), Carl Schmitt, Der Begriff des Politischen. Ein kooperativer Kommentar (Berlin: Akademie Verlag, 2003), 111-122.

56 See Arnold Angement, "Die achsenzeitliche Wende und die christliche Ketzerbekämpfung. Oder die Unterscheidung von Person und Lehre", in: Jan-Heiner Tück (ed.), *Monotheismus unter Gewaltverdacht. Zum Gespräch mit Jan Assmann* (Freiburg im Breisgau: Herder, 2015), 124-148; especially par. IV, 131-133.

57 Kahn, "Law and Love", 9.

despite the stipulations of the law. (In my personal case: because she was originally a South African, we had to deal with a multitude of bureaucratic processes before we were allowed to live together). And why am I unable to explain why I love her based purely on her personal qualities? Kahn provides an interesting answer to such questions. He writes: "By means of the particular we reach the whole. We love the world which presents itself through the other. The object of our love binds us to the macro-cosmos".[58] Love relativizes the whole vocabulary of right, contract, the autonomous self which invests its will in something, etc., because love enables us to experience that we ourselves are not the source of value in the world; much rather it is a matter of "finding ourselves astonished by the value revealed by love".[59]

Thus, *heteronomy*: it is therefore not despite, but thanks to one's love of particular people, places and communities that one is able to feel oneself attached to other people who experience themselves as loving and beloved. And it is because of our "erotic soul" (Kahn) that we are bound to always feel discontent at the ordinary politics which separates citizens from non-citizens, friends from family, etc. Recently a military chaplain told me that the most precious memories of soldiers who had fought in countries like Afghanistan often concerned small incidents in dangerous areas: that they were able to return a child's toys, or help a woman retain her dignity, etc. In such moments it is as if in "loving the particular other, the entire world is redeemed", to put it in Kahn's words.[60]

From these experiences we are now also able to determine the distinction between nationalism and patriotism, or let's rather say between the nationalist Dutch politician Geert Wilders and the patriotic author Albert Camus. Whereas nationalism is concerned with repugnance and *hatred* towards the alien other, patriotism is a form of love which wants to bond with every political community wherever in the world where this love is experienced. That is why love is subversive, it will always "destabilize" (Kahn) the law, that is to say the concrete configuration of citizens and non-citizens, for to love, *sympathy* is the cardinal virtue. Let's remember

58 Kahn, "Law and Love", 14.

59 Kahn, "Law and love", 15.

60 Kahn, "Law and love", 15.

Antigone. In such manner also the love of Jesus of Nazareth was subversive and therefore unbearable. But – we have to add along *with* Kahn – what makes this world a tragic place is that the inverse is also true: the law will also always destabilize love. We need to make calculations on the basis of justice, sympathy cannot be our only virtue. In the Catholic tradition we would rather say: faith (in the sense of the classical *ubi caritas ibi Deus est*) cannot replace reason, and vice versa.

To return to Tertullian's model of reason (*ratio*) and will (*voluntas*): perhaps we always are struggling to try to find a combination of the two, of a particular will and a reason that is reaching out to the universal. As the reader will have noticed, for me, the fourth model is the most promising. We start as loving people, only to discover that our strivings for reaching out are finite.

Bibliography

Agamben, Georgio, "Archäologie des Befehls". In *Politik und Religion. Zur Diagnose der Gegenwart,* edited by Friedrich Wilhelm Graf & Heinrich Meier. München: Verlag C.H. Beck, 2013, 241–259.

Angement, Arnold, "Die achsenzeitliche Wende und die christliche Ketzerbekämpfung. Oder die Unterscheidung von Person und Lehre". In *Monotheismus unter Gewaltverdacht. Zum Gespräch mit Jan Assmann*, edited by Jan-Heiner Tück. Freiburg im Breisgau: Herder, 2015, 124–148.

Blumenberg, Hans, *Die Legitimität der Neuzeit*, Frankfurt am Main: Suhrkamp, Erneuerte Ausgabe, 1988.

Brouwer, Rinse Reeling, *Eeuwig leven. Agamben & de theologie,* Amsterdam: Sjibbolet, 2016.

Cliteur, Paul, *Moreel Esperanto. Naar een autonome ethiek,* Amsterdam/ Antwerpen: De Arbeiderspers, 2007.

Cliteur, Paul, "Biblical Stories and Religion as the Root Cause of Terrorism". In Mahmoud *The Root Causes of Terrorism. A Religious Studies perspective*, edited by Masaeli & Rico Sneller. Newcastle: Cambridge Scholars Publishing, 2017, 1–27.

Critchley, Simon, "The Catechism of the Citizen. Politics, Law and Religion in, after, with and against Rousseau". *Law and Humanities* 1 (2007), 79–110.

Derrida, Jacques, "Force de loi. Le 'fondement mystique' de l'autorité", *Cardoso Law Review* 11, nos. 5–6 (2000): 920–1045.

Dijn, Herman De, *Hoe overleven we de vrijheid?* Kapellen/Kampen: Pelckmans/Kok Agora, 1994.

Groh, Dieter, *Schöpfung im Widerspruch. Deutungen der Natur und des Menschen von der Genesis bis zur Reformation*, Frankfurt am Main: Suhrkamp, 2003.

Hofmann, Hasso, "Die Welt ist keine politische Einheit sondern ein politisches Pluriversum (54–58). Menschenrecht im politischen Pluriversum?". In *Carl Schmitt, Der Begriff des Politischen. Ein kooperativer Kommentar*, edited by Reinhard Mehring. Berlin: Akademie Verlag, 2003, 111–122.

Junge, Kay, & Postoutenko, Kirill, (eds.), *Asymmetrical Concepts after Reinhart Koselleck. Historical Semantics and Beyond*, Bielefeld: Transcript Verlag, 2011.

Kahn, Paul W., "Recht en liefde". *Nexus* 29 (2001): 49–61.

Kahn, Paul W., "Law and Love" (paper 2001, not published, see Dutch version)

Kahn, Paul W., *Putting Liberalism in its Place,* Princeton: Princeton University Press, 2005.

Kahn, Paul W., *Sacred Violence. Torture, Terror, and Sovereignty*, Ann Arbor: The University Of Michigan Press, 2008.

Kahn, Paul W., *Political Theology: Four New Chapters on the Concept of Sovereignty*, New York: Colombia University Press, 2011.

Kahn, Paul W., "Evil and European Humanism", *Yale Law School*, Faculty Scholarship Series 319, 2008, see: http://dfigitalcommons.law.yale.edu/fss_papers/319.

Koselleck, Reinhard, *Vergangene Zukunft. Zur Semantik geschichtlicher Zeiten*, Frankfurt am Main: Suhrkamp, 1979.

Krings, Herrmann, "Woher kommt die Moderne? Zur Vorgeschichte der neuzeitliche Freiheitsidee bei Wilhelm von Ockam". *Zeitschrift für philosophische Forschung* 41, no. 7 (1987): 3–19.

Lübbe, Hermann, "Dezisionismus – eine kompromittierte politische Theorie". *Schweizer Monatshefte,* 55, no. 12 (1976): 949–960.

Lübbe, Hermann, *Modernisierungsgewinner. Religion, Geschichtssinn, Direkte Demokratie und Moral*, München: Wilhelm Fink Verlag, 2004.

Margalith, Avishai, "Political Theology. The authority of God". *Powers. Religion as a social and spiritual force*, edited In Meerten ten Borg & Jan Willem van Henten. New York: Fordham University Press 2010, 51–62.

Rosenberg, Göran, "Europas viele Heimaten". *Lettre International*, 118 (2017): 25–30.

Schmitt, Carl, *Über die drei Arten des rechtswissenschaftlichen Denkens*, Hanseatische Verlagsanstalt: Hamburg, 1934.

Schmitt, Carl, *Der Begriff des Politischen. Text von 1932 mit einem Vorwort und drie Corollarien*, Berlin: Duncker & Humblot, 1963, 3. Edition, 1991.

Scruton, Roger. *The Philosopher on Dover Beach*, Manchester, 1990.

Scruton, Roger. *A Political Philosophy*, London: Continuum, 2006.

Scruton, Roger, *The West and the Rest. Globalisation and the terrorist Threat*, London/New York: Bloomsbury, 2002.

Spaemann, Robert, "Das Wort sie sollen lassen stahn". Versuch über den Fundamentalismus. *Die Zeit* (22 Dec.1989): 47–49.

Taylor, Charles, *Dilemmas and Connections. Selected Essays*, Cambridge, Massachusetts & London, England: The Belknap Press of Harvard University Press, 2011.

Terpstra, Marin, "Het onduldbare dat verbindt. Over de verhouding tussen solidariteit en (on)verdraagzaamheid". In *Solidariteit. Filosofische kritiek, ethiek en politiek*, edited Theo de Wit & Henk Manschot. Amsterdam: Boom, 1999, 221–246.

Walzer, Michael, "The Art of Separation". *Political Theory* 12, no. 3 (1984): 315–330.

Wit, Theo de, "Pro patria mori. Sacrificing Life in Service of the Political Community". In *Sacrifice in Modernity: Community, Ritual, Identity: From Nationalism and Nonviolence to Health Care and Harry Potter,* edited by J. Duyndam, J, A.M. Korte, & M. Poorthuis. Brill: Leiden, 2016, 33–54.