

# UNiversitas: Journal of Research, Scholarship, and Creative Activity

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Volume 2  
Issue 1 *Volume 1, Issue 1 (Spring 2006)*

Article 11

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3-2006

## Sovereign Right, Democracy and the Rule of Law

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### Recommended Citation

Golczewski, Artur (2006) "Sovereign Right, Democracy and the Rule of Law," *UNiversitas: Journal of Research, Scholarship, and Creative Activity*. Vol. 2 : Iss. 1 , Article 11.

Available at: <https://scholarworks.uni.edu/universitas/vol2/iss1/11>

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## Sovereign Right, Democracy and the Rule of Law

Part of the journal section "Forum: Falling into Medievalism"

Artur Golczewski, "Sovereign Right, Democracy and the Rule of Law"

In the often hotly contested contemporary critical discourse, the related notions of individual and social identity, values and viable conduct continue to be the bone of contention, as their competing rationales sanction radically distinctive existential frameworks. The present essay employs some of the methodological strategies of the genealogical analysis as progressively refined by Ernst Kantorowicz and Michel Foucault, and it aims to chart a trajectory of historical applications and effects of the theory of sovereignty as the organizing principle coordinating our legal and socio-governmental rationales of value and of individual and social conduct. The principle governing Kantorowicz's selection and consideration of the Medieval texts discussed here appears to reflect the concerns and objectives of the genealogical critique. My adoption of the genealogical approach to history enables an approach to historical and thus present events as succeeding shifts in the "régimes of truth" coordinating the constitution of "Man" as the subject and object of particular modes of rationality. By making those rationales intelligible one immanently subjects them to critical interrogations in terms of the effects of dis- and em- powerment that they produce.

Genealogy, then, as a powerful critical tool that can be used to identify the ideas and processes defining our existential space, is necessarily always political. Such identification, by permitting a critical (re)evaluation in terms of (dis/em)power(ment) grants its user a critical access to directly interrogate, negotiate and challenge the mechanisms of subjection and their operational principles. It seems a little surprising, however, that this open model of cultural critique would be rejected by the interests vested in the status quo, where the performance of cultural critique is relegated to a priestly function of a selected few who seem to speak in the name of truth and warn us against following un-truths. An example of such pastoral care is Daniel Punday's essay "Foucault's Body Tropes" where Foucault's genealogical notion of "the body as a site" is rejected as essentially untrue and leading to falsehood since it is a mere rhetorical construct derived from texts and not actual bodies and data where it differs from Freud's spatial model of the body to which Foucault is indebted. Punday dismisses the critical merits of Foucault's genealogical approach: "I will ultimately argue that we should place Foucault's body trope into the tradition of the body politic, and should recognize that contemporary critics encounter many of the same problems raised by the traditional trope" (510). Not only is Foucault's approach of little use, then, but if adopted, it might well lead us away from the true path of a sensible critique: "Foucault's claims about the rhetorical construction of his body site trope, then, are confusing and in many ways misleading." (516). In the concluding remarks of the essay the reader is warned against the most meaningful effect of genealogy: the opening of a critical access to a re-creation of a possibly more sensible social order: "What must be kept in mind, however, is that because the body-site trope participates in the tradition of the body politic, it always serves to create an image of the whole society." As a creation and thus being a mere fabricated fiction, as opposed to a truthful representation, a genealogical assessment of culture with its critical implications, as exemplified by Foucault's creative rhetoric, "may be helping to define society very much against their [the critic's] specific goals and

concerns” (525; authors emphasis). With a claim to truth as the de facto operational framework, it seems that this model of the figure of the critic, whose performance of cultural critique still rests with a prophetic insight via deeply felt concerns as to the true state and direction of society, is ready to lead its flock not toward created fictions based on texts, but toward the real realities of an existential space defined by the deeply felt sensibilities of the human nature.

The following analysis certainly considers the notions of the body and identity as constructs or fictions, but this fact does not diminish their very real and tangible effects of subjection. Their status as fictions, in fact, invites creation of realities that can be as real as they can be successfully imagined. One could be on the guard against them, protecting the flock (or one’s herd?) from being lured astray by fictions, or one can embrace the possibilities.

As articulated by Foucault, the founding concept of the theory of sovereignty, as the ideology of right, activates its operation as a governmental mechanism on the basis of the notion of, and access to, a universal truth (Truth). In the Medieval European feudal forms of social organization, principally not dissimilar to those already well developed in Pharaonic Egypt from where its conceptual framework derives, while each individual is endowed with a God-given soul, the access to Truth, salvation, or the final union with God could only come about through the guidance of the Church and the individual’s participation in its rituals. The Church held, as it were, the “key” to heaven as it monopolized the access to Divine Truth. The Pope, but also to a certain degree the King, claimed, and again not unlike the Pharaoh, a special access to divine Truth as God’s representatives on Earth, justifying his right to legislate the rules of individual ethical conduct and social organization. The individual, lacking such privileged access to Truth, was obligated not only to obey what was pronounced as divinely sanctioned law by those authorities, but was dependent on this legislation, understood as the revealed-by-God directives for individual and social conduct necessary for salvation. This system of a privileged proximity or access to divine Truth and its dispensation instituted the very foundation of the governmental mechanisms based on the Right of sovereignty, and it supported the fixed hierarchical organization of the feudal governmental mechanism.

Foucault, utilizing particularly Ernst Kantorowicz’s analysis of medieval political theology in *The King’s Two Bodies*, isolates the concept of royal sovereignty as the central endorsing principle of the discourses of law, and of the “rules of right,” that continues to be operational in the present:

In other words, I believe that the King remains the central personage in the whole legal edifice of the West. When it comes to the general organization of the legal system in the West, it is essentially with the King, his rights, his power and its eventual limitations, that one is dealing. Whether the jurists were the King’s henchmen or his adversaries, it is of royal power that we are speaking in every case when we speak of those grandiose edifices of legal thought and knowledge. (...) The essential role of the theory of right, from medieval times onwards, was to fix the legitimacy of power; that is the major problem around which the whole theory of right and sovereignty is organized (94-95).

The concept of sovereignty as legitimating the right to rationalize and legislate the ethical and legal rules of individual and social conduct could be understood as an effect of the concept of (T)truth. The sovereign’s legislative authority or right is derived precisely from the claimed privileged access to the knowledge of (T)truth.

As Kantorowicz demonstrates, the figure of the King in the West and the right of royal power continue the ancient tradition of maintaining a direct link between the King and the divine thus establishing the King's authority and the royal right and even duty to function as a divinely sanctioned pastoral figure and the medium of (T)truth. An anonymous Norman, writing around 1100 and referring to anointings of the Kings of Israel and to Aaron and the Israelitic high-priests, clearly ascribes divine sanction to royal power and deification of the royal person as granted by God's grace:

We thus have to recognize [in the king] a twin person, one descending from nature and the other from grace. (...) One through which, by the condition of nature, he conformed with other men: another through which, by the eminence of [his] deification and by the power of the sacrament [of consecration], he excelled all others. Concerning one personality, he was, by nature, an individual man: concerning his other personality, he was, by grace, a *Christus*, that is, a God-man (46).

What seems to be of significance in this early formulation of sovereignty, evident particularly in the first quote, and which Kantorowicz does not quite articulate, is the separation between human nature and divine grace. Human nature does not appear to possess, as of yet, the capacity to reach or receive the Truth by itself and must therefore rely on a mediator. This mediating role is reserved for kings and bishops who, as the anonymous Norman states,

are consecrated and sanctified for the purpose that ... they be saints; that is, outside the earth and outside the world be they set apart as mediators between God and the people, having communion in heaven and moderating their subjects on earth (88).

Kantorowicz provides numerous other examples of this royal function of mediation while also focusing on the slow transformation or re-location of the role of kingship from essentially liturgical, as Christ's representative, to a more secular, law-formative role of the supreme dispenser of justice. The king's communion with the Holy Spirit and thus access to Truth made him "the animate Law on earth," and served to transfer its divine sanction or sovereignty to the institution of the secular state as a whole and its legal system in particular.<sup>1</sup> The political consequences of the formulation of royal power as absolute, on the grounds of its divine sanction or sovereignty seem obvious, as total or unconditional obedience to it is demanded within the Judeo-Christian tradition. As Kantorowicz puts it:

Obedience toward tyrants was certainly opposed to Greek political thinking, though it does not seem to have disagreed with Jewish tradition: tyrants, like earthquakes and plagues, are a visitation of God and a form of punishment according to Philo (54, note 26).

The process of the secularization of the royal mediatorship, whereby the Truth and sovereignty found their final expression in jurisprudence, transformed the concept of rulership and the terms of legitimizing the right of royal power from Christ-centered to Law-centered. "The new ideal of rulership centered on scientific jurisprudence" worked effectively as a form of translation or application of Truth conceptualized as the universal "Law of Nature" to the "Positive Law" of the rules of social organization (126). The ideal of kingship grounded on the rule of law, while gaining in stability by being bounded by at least its own interpretation of the Law of Nature and becoming a legal institution, at the same time legalized or justified the subjection of the population to this system of deployment of the royal right as law. Another example of the consecutive re-location of the divine sanction from the ruling figure of the king onto the governmental state apparatus itself is a statement of Cynus of Pistoia: "Nor is it absurd that the empire should be derived from God and the people: the emperor is from the people, but the empire is

called divine from Go” (297). This transformation of the justification of governmental power coincided, and was in circular relation, with the shift or rather expansion of the location, and thus a mode of accessibility, of Truth from the realm of theology controlled by the Church into the realm of sciences of Nature. The Truth, then, became accessible no longer exclusively by divine Grace and direct contact with the Holy Spirit, but through knowledge of Nature as well. Kantorowicz only hints at the consequences of this shift:

However, the field of tension no longer was determined by the polarity of “human nature and Divine Grace”; it had moved towards a juristically formulated polarity of “Law of Nature and laws of man,” or to that of “Nature and man,” and, a little later, to that of “Reason and society,” where Grace no longer had a discernable place (142).

One of the implications of the inscription of Truth onto Nature would condition the formation of the scientific approach to Nature, framing the resulting knowledges, or the conception of the objectives of scientific epistemology, in terms of Truth. The sanction of the scientific investigation of nature as the search for the Universal Laws or Truth became the condition of possibility for the defining and/or evaluating of human nature which, as the principal creation, would be expected to manifest its rationality as total conformity in its relation to, or identity with, Universal Law or Truth.

With the pastoral figure of the King undergoing significant transformations in its relation to Truth, and thus in its role as legislative authority, the concept of Truth itself not only remained operational, but expanded its formative presence into law and science and thus its applicability to the rules of social organization by legally subjecting the population to its requirements. As the rule of law, and thus the state itself, was theorized as a divinely pre-ordained reality, consequently the organization of its population in conformity with the Law was of increasing cultural necessity. Kantorowicz also suggests this development:

Religious thought, which had profoundly influenced, or even determined, the concepts of government in an earlier phase, was carried over to the new orbit of public affairs in a seemingly scurrilous fashion – by comparing the sempiternity of the fisc [the fiscal viability of the state] to the eternity of God or of Christ (191).

The shift in the location of Truth from the religious into the secular realm or, perhaps more appropriately, their fusion, resulted, according to Kantorowicz, in a semi-religious form of statehood:

But this hallowing of the *status regis et regni*, of state institutions and utilities, necessities and emergencies, would have remained incomplete had not that new state itself been equated with the Church also in its corporational aspects as a secular *corpus mysticum* (192).

To Godfrey of Fontaines, a Belgian philosopher of the late thirteenth century, the state’s population as an organized community or the “mystical body” appeared not as a supra-natural foundation, but as a gift of nature. Kantorowicz carries this assessment to its logical conclusion:

(...) man is “by nature” – not “by grace” – also part of some mystical body, some social collective or aggregate, which Dante, a little while later, would easily define as “mankind” or *humana civilitas*, whereas others might define it, as need be, in the sense of *populus*, *civitas*, *regnum*, or *patria*, or as any other social community and corporation, the ends of which were “moral” *per se* (211).

In other words, the state, with its social and institutional structure, or the civil society, is projected as an expression of nature in general and human nature in particular, where Truth manifests itself in its moral values. Kantorowicz offers another example, that of John of Paris who, writing around 1300, “said that the king’s government ‘accords with nature,’ if he, or the dynasty, is constituted by the free will of the people” (296). The primary effect of this linking of the state’s mode of governmental rationality to the will of its population, as an expression of its moral nature and thus Truth, is that of its internal stability and therefore security of the location and modes of acquisition of its wealth. Already at this early stage of the development of “civil society” or “liberal democracy,” as it will be later called, its basic operational mechanism emerges as the population and human nature is theorized or theologized into assuming the role of the primary source of Truth and thus underwriting the state’s right to legislate the rules of conduct and the population’s obligation to obey its implementation.

The rise of the role of individual responsibility in the proper function of the state’s governmental apparatus or ethical civic life can already be observed in the *Divine Comedy*, where Dante, driven by his moral duty to serve in the name of Truth, finds himself in the terrestrial Paradise, whereas a Pope and some royalty are notably absent. While the individual representatives of the institutions of the Church and the State might fail in their knowledge or implementation of Truth, those institutions remain, for Dante, indispensable and divinely sanctioned pre-conditions of the cultural organization of a “civil society” that permits the attainment of Truth through the moral self-realization of human nature. Dante signals an intensification and extension of the “democratizing” effects of Truth as the individual, or the “citizen,” becomes morally compelled to participate in the service of social civility: a cultural organization where the governmental rationalization of conduct is secured as a continuing realization of the Truth of human nature. The measure of human value and the justification of state and royal power lies in their service to civil society, sanctioned as an expression of human nature and no longer as the right of royal sovereignty. Dante presents Virgil as the ideal role model for the ethics of conduct that could apply not only to the royal office, but also to the conduct of a citizen. Virgil, as the founder of the civic moral code of conduct, where the principal value of individual and social conduct was placed at the service of the governmental institution of the holy Roman Empire, crowns also Dante in the recognition of similar merits. The fact that Dante’s formulation of the civic ethics of conduct as the measure of cultural values found a long celebrated esteem and appreciation in the present liberal-democratic culture, could be regarded as a sign of its proximity to a legislative mechanism, advanced in the name of service of human nature or common humanity, that is currently operational.

The transformation of the mechanism of the medieval governmental rationale of the rules of conduct, roughly corresponding to the transition from feudal to capitalist system, could then be accounted for by the correlative double shift in the location and access to (T)truth. The expansion of the location of (T)truth, from its revelation by the Holy Spirit onto Nature in general and human nature in particular extended, correspondingly, access to Truth from a privileged pastoral figure onto scientific investigation. In a related shift, the governmental authority also expanded from the head representatives of the Church and State onto those institutions themselves, that is, onto the individual citizens representing or implementing the institutionally prescribed ethical values or norms of conduct. This is not to say that the governmental role of the pastoral figure disappears. On the contrary, in fact, as the access to the pastoral role is ‘democratized’ or rather institutionally conferred on selected individuals who define the discourse of (T)truth. This democratizing effect or the transition in the legitimacy of and thus access to power objectifies the individual as a medium of (T)truth that he/she is compelled to reproduce it as a self-expression in the form of ethical conduct, art, and/or juridical and scientific knowledge. At the same time, however, the individual’s subjection to it increases, as the individual, in order to gain access to the institutional exercise of power, must demonstrate his/her identity with, and submission to the proper norms of conduct. The extension of the institutional sanction of the sovereign

role of the individual acting as a medium of (T)truth production or rather revelation, prompts however, an intensified public scrutiny or surveillance aiming to verify the true sincerity or the genuineness of subjection of the individual's identity to the currently reigning meaning of (T)truth.

In *Discipline and Punish* (209), Michel Foucault charts a series of transformations in the cultural coordinates of rationalization of individual and social ethical identity and conduct as a subject of universal Truth. As it becomes apparent, to a substantial extent the conceptual configuration of this cultural mechanism of rationalization of values underwrites the present liberal-democratic forms of governmental rationality. This shift in the cultural conception of individual identity coincides, Foucault notes, with the Protestant Reformation and the transition from feudal to capitalistic forms of socio-cultural organization, giving rise to what he calls "the disciplinary society": The movement from one project to the other, from a schema of exceptional discipline to one of generalized surveillance, rests on an historical transformation: the gradual extension of the mechanisms of discipline throughout the seventeenth and eighteenth centuries, their spread throughout the whole social body, the formation of what might be called in general the disciplinary society.

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This essay underwent blind external review before being accepted for publication.

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<sup>1</sup> Kantorowicz discusses the subject in detail, see 107-143.



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