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Prof. Dr. Burkhard Berkmann,
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# *Prodding the Leviathan: A Brief Response to Russell Sandberg's Sociology of Religious Law*

Robert A. Yelle*

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*In a brief response to Prof. Sandberg, I highlight some of the difficulties inherent in maintaining the standard definition of secularism as the separation of church and state in a context in which religious law is granted legal recognition by the state. Rather than encouraging the further differentiation of spheres of authority or legal pluralism, such a recognition could, in some cases, be seen to call into question the founding gesture of secularism, in which the state was granted a clear monopoly over force and, with this, over positive law.*

Professor Sandberg has laid out a rich and coherent outline of his sociological approach to the internal law of religions. I cannot, in the brief space allotted, comment on every element of this outline. My response focuses instead on one aspect: the account of secularization as a differentiation between religious and state functions.

Before embarking, allow me to note that I am not a sociologist, but a historian and anthropologist of religion who has written on the history of secularization.[1] Accordingly, my observations will be more historical in nature. Sociologists of religion often begin from the standpoint of reflection on institutions and their interrelation. This is appropriate for the questions they address, such as the interaction between church and state, membership in religious groups such as churches, etc. Sociology is, after all, the study of groups.

Viewed from this perspective, secularism has often been defined as the separation of church and state. During the English Reformation, which as Prof. Sandberg rightly notes laid the foundation for many subsequent developments, there was a renegotiation of the traditional relationship between the Roman Catholic Church and the English crown. Earlier, this relationship had represented a version of the medieval "Two Kingdoms" doctrine, in which Papacy and Monarchy were separate, complementary, and overlapping.[2] Inaugurating the Reformation, Henry VIII asserted supremacy over the Christian church in England, effectively monopolizing authority over both civil and ecclesiastical matters. Following the wars of religion, room was made gradually for the tolerance of dissenting religious groups. A classic statement of the emerging liberal dispensation was John Locke's first *Letter Concerning Toleration* (1689),[3] in which he attempted to defend a clear division of labor between church and commonwealth, and between minister and magistrate. These ideas were influential in the American colonies, where freedom of religion was for the first time codified as law.[4] Thomas Jefferson's *Letter to the Danbury Baptists*, where he coined the formula that there should be a "separation of church and state," is a famous expression of this understanding of secularism.[5]

Prof. Sandberg's account of secularization, as well as of contemporary developments in the law of religions vis-à-vis the state, broadly speaking aligns with the traditional view of secularism as a separation between church and state. José Casanova, for example, argued that the main viable component of traditional sociological theories of secularization was the differentiation between church and state.[6] (When Casanova wrote, more than 25 years ago, it was already clear that the prediction that religion would decline or even disappear was false.) From this standpoint, there can be various permutations of this relationship of differentiation. Sandberg identifies five phases, including pluralism (i.e. the rise of multiple churches), and the re-convergence or de-differentiation between church and state, such as we may see in current courts of religious law.

The problem with defining secularization in terms of a separation or differentiation between church and state is, to my mind, twofold: 1) it highlights what was only a secondary development, namely the loss of coercive power by the church, or the rendering of religion as apolitical, while ignoring or minimizing what was primary or causal, namely the rise of a state monopoly over coercive power; and 2) it begins from a common-sense or natural-language understanding of what religion is, rather than arguing and defending a properly philosophical definition of religion in such a way that we might logically (rather than only in customary or culturally specific terms) ground the differentiation of religious institutions from other types of institutions.

Both of these challenges to the standard definition of secularization as a separation or differentiation of church from state were posed already in the mid-17th century by Thomas Hobbes, who argued in favor of a unification of civil and ecclesiastical power under the English sovereign.[7] Although sometimes described as an Erastian, Hobbes was far more

* Prof. Dr., Chair of Religious Studies, LMU Munich.

1 See, e.g., *Robert A. Yelle*, The Hindu Moses: Christian Polemics against Jewish Ritual and the Secularization of Hindu Law under Colonialism, History of Religions 49 (2009), 141-71; *Yelle*, Moses' Veil: Secularization as Christian Myth, in: Sullivan/Yelle/Taussig-Rubbo (eds.), After Secular Law (Stanford 2011), 23-42; *Yelle*, Imagining the Hebrew Republic: Christian Genealogies of Religious Freedom, in: Sullivan/Hurd/Mahmood/Danchin (eds.), Politics of Religious Freedom (Chicago 2015), 17-28; *Yelle*, 'By Fire and Sword': Early English Critiques of Islam and Judaism as 'Impostures' or Political and 'Unfree' Religions, Patterns of Prejudice 53 (2020), 91-108.

2 See, e.g., *Gelasius I*, Duo sunt, trans. J. H. Robinson, https://sourcebooks.fordham.edu/source/gelasius1.asp, last accessed: 27 October 2021.

3 *John Locke*, A Letter Concerning Toleration and Other Writings, ed. Mark Goldie (Indianapolis 2010).

4 See already *Georg Jellinek*, Die Erklärung der Menschen- und Bürgerrechte (Leipzig 1895). A good recent historical analysis is *Nicholas P. Miller*, The Religious Roots of the First Amendment: Dissenting Protestants and the Separation of Church and State (Oxford and New York 2012).

5 *Thomas Jefferson*, Letter to the Danbury Baptists (1802), https://www.loc.gov/loc/lcib/9806/danpre.html, last accessed: 25 March 2021.

6 *José Casanova*, Public Religions in the Modern World (Chicago 1994), 18-21, 36-39.

7 *Thomas Hobbes*, Leviathan, ed. Edwin Curley (Indianapolis 1994 [1651]).

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radical than this. He argued, both explicitly and esoterically, that religion was nothing other than a disguised form of politics.[8] And he contended that originally a church (*ekklesia*) was nothing other than a commonwealth assembled under a sovereign, thereby collapsing the church into the state.[9]

The standard liberal argument for the separation of church and state, for example as outlined by Locke, represented a rearguard defense against the Hobbesian position, as well as a reworking of the traditional Two Kingdoms doctrine. Recent historical research by Felix Waldmann and Jeffrey Collins shows that Locke was intensely engaged with Hobbes's arguments, particularly concerning the questions of religious toleration and ecclesiastical polity.[10] However, it should already be evident to a careful reader of the *Letter Concerning Toleration* that when Locke distinguishes a "church" from a "commonwealth," or when he insists that "there is no such thing under the Gospel as a Christian commonwealth," he is directly rebutting Hobbes on these points.

The success of Locke's formulation should not blind us to the strength of Hobbes's arguments. Not only did Hobbes more accurately define the central tendency of secularization – namely, the monopolization of authority and coercive power by the state; he also systematically undermined traditional understandings of religion, by redefining this in political terms.[11] Indeed, as long as we are looking at the purely political level, it is difficult to avoid Hobbes's evaluation of religious (and other) institutions as potential competitors with the state or commonwealth as the sovereign authority, and as creating the conditions for schism within the body politic. Locke's defense of religious toleration took this into account by redefining religion as an "inward persuasion" and thereby depoliticizing it.[12] However, this came at the cost of the church's coercive power.

What does any of this history have to do with Prof. Sandberg's account of the sociology of religious law, and of the transformations of religious legal systems as a result of secularization? First, it calls into question the emphasis on differentiation or separation as the distinctive characteristic of secularism. Such differentiation is characteristic most clearly of the Two Kingdoms doctrine, that is, of traditional Christian culture, and not of what came after. The distinctive characteristic of secularism is a monopolization of authority and coercive power by the state,[13] in relation to which the differentiation (and depoliticization) of religion arguably represents a secondary development. Rather than being pluralist, or differentiated, modern legal systems are characterized, above all, by *universalism*. In theory, at least, the same set of rules applies to everyone, equally. This is a major reason for the disappearance, cancellation, or non-enforcement of such older provisions as benefit of (Christian) clergy, Hindu caste laws, or disabilities applied to members of minority religious groups, such as Jews. Second, except where we can appeal to some customary definition of religion, it is difficult if not impossible to defend, in philosophical or logical terms, a clear distinction between religious and other types of institutions.

Prof. Sandberg appears to acknowledge this when he notes that now "ministers of religion are increasingly seen legally as employees" and that religious law courts have come to resemble their civil counterparts. A more radical case of assimilation or de-differentiation is the U.S. Supreme Court's decision in *Burwell v. Hobby Lobby*,[14] which ascribed religious freedom protections to a family-owned multimillion-dollar retail company (while disregarding its employees). If *Hobby Lobby* appeared to extend the definition of a church to a business corporation, the *Hosanna-Tabor* case similarly extended the definition of who counts as a minister in a religious organization.[15] Winnifred Sullivan's recent book, *Church, State, Corporation*, analyzes how contemporary jurisprudence has blurred the boundaries among these ostensibly distinct types of institutions.[16] Historically speaking, however, this phenomenon is not new,[17] and was already clearly recognized by Hobbes, who proposed a solution: namely, treating all such organizations equivalently, as different sovereign entities potentially in competition with one another.

Prof. Sandberg suggests that the rise of courts of religious law or "religious adjudication" is regarded as threatening because it "offends functional differentiation which sees law and legal adjudication

8 *Robert A. Yelle*, Hobbes the Egyptian: The Return to Pharaoh, or the Ancient Roots of Secular Politics, in: Moin/Strathern (eds.), Sacred Kingship in World History: Between Immanence and Transcendence (New York 2022), 223-48.

9 See esp. *Hobbes*, Leviathan, chap. 39.

10 *Felix Waldmann*, John Locke as a Reader of Thomas Hobbes's *Leviathan*: A New Manuscript, Journal of Modern History 93 no. 2 (2021), 245-82; *Jeffrey Collins*, In the Shadow of Leviathan: John Locke and the Politics of Conscience (Cambridge 2020).

11 See *Yelle*, Hobbes the Egyptian.

12 See *Yelle*, By Fire and Sword, for a related account of the depoliticization of religion in the late 17th century.

13 See *Britannica* online, s.v. "state monopoly on violence": "In his lecture *Politics as a Vocation* (1918), the German sociologist Max Weber defines the state as a 'human community that (successfully) claims the monopoly of the legitimate use of physical force within a given territory.'", https://www.britannica.com/topic/state-monopoly-on-violence, last accessed: 3 November 2021.

14 *Burwell v. Hobby Lobby*, 573 U.S. __ (2014)

15 Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 565 U.S. 171 (2012).

16 *Winnifred Sullivan*, Church, State, Corporation: Construing Religion in U.S. Law (Chicago 2020).

17 The problem of distinguishing churches from other social groups was inherited by the modern discipline of sociology of religion from two of its founders, Max Weber and Émile Durkheim, each of whom generalized the model of a church or community of worshippers by extending it to other social groups. Weber extended Rudolph Sohm's thesis that charismatic authority declined in the early Christian church though routinization and institutionalization. Durkheim conflated the model of tribal rituals, as a primitive church, with the French concept of civil religion and popular assemblies.

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[as] the proper business of the legal system only," and because it appears anomalous for religious courts to apply the same binary of legal vs. illegal that is applied by civil courts. I would like to suggest that the perceived problem with such religious courts may be instead that they threaten not differentiation per se but rather what is central to the modern system: namely, the state's monopoly over law and over coercive power, which in a system of positive law is required to give law its effect. Prof. Sandberg attempts to defend such religious courts as compatible with modern secularism by arguing that these "represent a further stage of functional differentiation where the voluntary organizations (religious and non-religious) perform functions which it was thought had become the preserve of the state." This seems to me to confuse further the meaning of the term "differentiation" by extending it to the condition of actual competition among religious and civil courts. The crucial caveat here is that as long as such organizations are truly voluntary then the possibility of competition with the state's monopoly over force is removed. We should recall that key to Locke's definition of a "church" was precisely its nature as a voluntary association and its lack of coercive power, both of which characteristics served to distinguish (or differentiate) a church from the state. Unless we maintain such a distinction between the functions of church and state – or in the case of *Hobby Lobby*, between a church and a business corporation – , we threaten this division of labor, and make it even more difficult to rebut Hobbes's charge that a church is nothing other than a political entity in disguise.[18]

18 A path to a more effective response to Hobbes may be offered by Niklas Luhmann's sociological systems theory, which Prof. Sandberg raises, but which unfortunately cannot be pursued here. Prof. Sandberg argues that "Whenever they [i.e. courts of religious law] produce communications based on the binary code lawful/unlawful then that, according to systems theory, is law." This explains why such courts are *law* courts, but it does not explain what makes them *religious*. What Luhmann regarded as characteristic of religious systems was their deployment of "the specifically religious code, the distinction between immanence and transcendence," rather than the distinction between legal and illegal. *Niklas Luhmann*, Die Religion der Gesellschaft, ed. André Kieserling (Frankfurt am Main 2002), 77 (my trans.). Would it be possible for both codes to be at play in one and the same system? That must remain, for now, an open question.

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