Secular Religions: Directions for Use.
Two Essays by Kelsen and Dworkin

> "When Woody Allen was told that he would live on in his work, he replied that he would rather live on in his apartment"
>
> (Ronald Dworkin, *Religion without God*, Harvard University Press, 2013, p. 149)

1) I hope the reader will forgive me for introducing the discussion of two major works with a joke. But the topic is so serious – necessarily also involving the great questions about faith and the other world – that lightening things up a bit was necessary. After all, Ronald Dworkin would agree with me, as Allen's joke is quoted in his *Religion without God* (2013) – one of the two works I wish to look at here. The other essay is Hans Kelsen's *Secular Religion. A Polemic against the Misinterpretation of Modern Social Philosophy, Science and Politics as "New Religions"* (1964), Springer, Wien-New York, 2012

In a nutshell, the theses are the following: religion is deeper than God (Dworkin), and religion is a meaningless concept without God (Kelsen). Given the radical opposition between these two claims, it is worthwhile to read the two essays synoptically. Whilst being very diverse in terms of method and argument, they seem to only converge at one crucial point: the irrepressible human need to reflect on the meaning of ultimate things. The surplus value, for the scholar, is the fact that the humans in question are called Kelsen and Dworkin. The humanity of the two emerges – more visibly in Dworkin, less so in Kelsen – because the subject, albeit addressed scientifically and *ex professo* (especially by Kelsen: it's impressive how many authors he engages with to argue his case), involves personal visions about the finiteness of human experience.

Both essays can be said to represent a sort of spiritual will. Reading the prefaces to the Italian editions of the two works, one notices a curious convergence: both Kelsen and Dworkin entrusted their manuscripts to someone else's care with a benevolent smile. Salvatore Veca – introducing Dworkin's book[1]– asked the author if he deemed it necessary to go through some controversial points of the text which they had discussed. Dworkin said he "didn't need to and that for him it was all clear." The answer was accompanied by a "sincere and weary smile." Dworkin then got sick and died soon after. Therefore, Dworkin only partly reviewed his essay, which results from the theses exposed at the Einstein Lectures he held in Berne in 2011. The author's smile also appears in the Italian edition of *Secular Religion,*[2] which comes with a picture of an older, smiling Kelsen. In a way, the book is a manifesto for a secular science (understood in a very broad sense), as well as an attack – strong but deeply cultured and well argued for – to the attempts to "theologize" politics and science, which were in vogue then just like today.

However, the story of Kelsen's work – the last great book that the author would complete – is far more complex and troubled. Before *Secular Religion*, Kelsen wrote a review of *The New Science of Politics*, a book by his student Eric Voegelin, also never published before. Kelsen grew increasingly interested in the topic, and the review became an autonomous text of about 400 pages, which was first titled "Defense of Modern Times", then "Religion without God?" (just like Dworkin's book, but with the significant addition of a question mark) and, finally, "Secular Religion".

Yet, Kelsen must have been harbouring significant doubts about the theses he was defending, because one day, out of the blue, he withdrew the drafts of the manuscript from the publisher. It was 1964, the publisher was University of California Press – Kelsen had been at Berkeley since 1942 – and for the

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[1] S. Veca, *L'ultima lezione di Ronald Dworkin*, in R. Dworkin, *Religione senza Dio*, il Mulino, Bologna, 2014.
[2] H. Kelsen, *Religione Secolare. Una polemica contro l'errata interpretazione della filosofia sociale, della scienza e della politica moderne come 'nuove religioni'*, Cortina, Milano 2014, edited by P. di Lucia and L. Passerini Glazel.

next nine years (that is, up to 1973, the year of Kelsen's death), the thinker did not change his mind: the book would only be published posthumously in 2012, under the authorization of the Hans Kelsen Institute of Vienna. "One day – said Kelsen with a smile – you can publish it." Kelsen was talking to the American sociologist Lewis S. Feuer, who was also at Berkeley and had vainly tried to convince the influential Czech colleague to publish the text; later, after Kelsen's death, it was Feuer who gave the first and decisive impulse to the authorization for publication.

There is another significant anectode to shed light on Kelsen's hesitation to publish the book. When a young American scholar – who had seen Kelsen correct the drafts – asked him about the book, Kelsen said it had been written by an "old man" and that he had withdrawn it because "the book was not worthy of him". What to say? Even the best of us can be wrong: read the book to see for yourself. As Di Lucia and Passerini Glazel noted[3], it is also possible that the uncertainties about the claims made in this book went hand in hand with uncertainties on the very topic of religion, which was probably very much present in Kelsen's life: born into a Jewish family, he converted to Catholicism, later moving to the Protestantism of the Augsburg Confession and, finally, to agnostic positions.

Conjectures aside, the relevance of the text is unquestionable: the theses and doctrines against which Kelsen directs his polemic were part of an intense debate – one that runs through the whole late twentieth century – on secularization and theology, essentially putting in doubt the irreversibility of the latter. "The question of whether and in what form religion will return to politics and theology to science (see Kelsen's Conclusion) has become relevant to an extent that was, perhaps, not even expected by Kelsen himself" [4]

Thought here turns to the religious fundamentalism that infests our era, to the many forms of religious extremism that are perhaps less obvious and certainly less bloody (think of the comeback of Christian conservatives in the United States, and the political significance that they have earned), and to the claims made by certain religions to affect public life. And, to get closer to the "theology without God," against which Kelsen protests, one cannot help thinking about the many nonchalant over-interpretations of the idea of "civil religion" that, like it or not, one witnesses nowadays. In these cases, as in others (infra, par. 4 b), the "theology without God" has established itself as a tool to undermine the separation of state and church – one of the main achievements of civilization and modern constitutionalism – by contaminating law and science with religious claims disguised in secular appearance.

2) Anyone interested in the issue of the relationship between law and religion, and that of the theoretical and institutional implications of the concepts of secularization, laity and political theology, should not miss the opportunity provided by the publication of the two texts I am discussing here. The subtitle of the present paper – paraphrasing a major title of another, very well-known work by Dworkin – could have been "Taking Religion Seriously." And indeed, more precisely: "Taking Law and Religion Seriously."

The issues tackled by Dworkin include religious freedom, the view of the meaning of life depending on whether one believes or not in the immortality of the soul, and the concept of "religious atheism". The latter (which would have made Kelsen cringe, understandably), for Dworkin, is useful to indicate those who "though they do not believe in a 'personal' god, nevertheless they believe in a 'force' in the universe 'greater than we are'".[5] Those "religious atheists" are further characterized by valuing everybody's life and experience. In the pages dedicated to the sense of the mystery for the marvels of the universe (that, according to Dworkin, even atheists feel), the author states, along the lines of William James: religion/mystery "adds to life an enchantment which is not rationally or logically

[3] P. di Lucia and L. Passerini Glazel, *Prefazione*, *ivi*, p. X, XVI.

[4] See *Nota introduttiva* by Richard Potz, *ivi*, p. IX.

[5] R. Dworkin, *Religion without God*, Harvard University Press, Cambridge, Mass. 2013, p. 2.

deducible from anything else. The enchantment is the discovery of transcendental value in what seems otherwise transient and dead".[6]

In spite of what the book's title might suggest, Dworkin's essay is not a defence of the value of non-monotheistic religions or, say, of their equal value before the law. "I do not argue in this book against the science of the traditional Abrahamic religions. I do not argue that there is no personal god who made the heavens and loves its creatures. I claim only that such a god's existence cannot in itself make a difference to the *truth* of any religious *values"*.[7] Truth and value are two keywords of Dworkin's thought. Indeed, the axiological level, always decisive for the author, is very evident also in this essay.[8] In terms of values, Dworkin sees no significant differences between those who have ethical beliefs based on faith in some god and non-believers with religiously unfounded ethical convictions. The point of contact between these people is that they both give the same (and positive) answer to the question whether there is an intrinsic value in life and, similarly, in the universe.

This is what Dworkin points out: the common certainty that there is a value in the life of each of us and in the universe. Hence a very dilated view of religious freedom, interpreted as the ethical independence of each individual, be they a believer or not.
"We should consider (…) abandoning the idea of a special right to religious freedom with its high hurdle of protection and therefore its compelling need for strict limits and careful definition. We should consider instead applying, to the traditional subject matter of that supposed right, only the more general right to ethical independence".[9]
This conclusion deserves at least three remarks.

First, Dworkin grasps a point that, many years before, had been developed by Hans Blumenberg, Kart Barth and Friedrich Gogarten, among others. Blumenberg, in particular, objected to the fact that secularization could be the metaphor of modernity: deriving *directly* from the modern age[10], secularization was not able to express its essence.[11] The absolute, originary metaphor of Modernity was rather the individual's self-determination. Blumenberg regarded the "*Selbstbehauptung*" – self-affirmation – as the true metaphor of modern times, as well as a Copernican revolution[12]: the "individual's ability to regain their destiny in an immanence without residues and, consequently, to affirm themselves as free productivity."[13] If one reads Dworkin carefully, one can see that secularization as the metaphor of modernity loses much of its allure, dissolving into what he defines "right to ethical independence" along with the very concept of religious freedom.

The second observation is critical: one could object that the general right to ethical independence is actually the ancient and noble right of freedom of conscience. There is no need, I believe, to turn any faith / personal vision of the universe, interwoven with more or less "religious spirit", into a claim of religious freedom. Freedom of conscience conceptually precedes that of religion. And, from the point of view of positive law, consciousness (genus) precedes religion (species). Think of Article 10 of the French Declaration of Human and Civic Rights, 1789: "No one may be disturbed on account of his opinions, *even religious ones*, as long as the manifestation of such opinions does not interfere with the

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6 *Ivi*, p. 11-12.
7 *Ivi*, p. 25, italics added.
8 S. Veca, cit., p. 11-12.
9 R. Dworkin, op. cit., p. 132.
10 Namely from Canon law : "The juristic act of secularization as the expropriation of church property was so practiced and so named" (*saecularisatio*) "from the peace of Westwalia onward. The canon-law use of *saecularisatio* designates the release of a cleric from the community and the obligations of his order into the status of a secular priest and the obligations of his order into the status of a secular priest". Hans Blumenberg, *The Legitimacy of the Modern Age* (1966), tr. R. M. Wallace, Mit Press, Cambridge Mss.-London, 1983, p.19.
11 *Ibid*, part. I (p. 3-124).
12 *Ibid*, p. 125 ff.
13 G. Marramao, *Potere e secolarizzazione*, Editori Riuniti, Roma 1985, p. XIX, analyses the debate between Blumenberg and, on the other side, Karl Löwith and Hans G. Gadamer.

established Law and Order).

The last remark has to do with the weakest point of Dworkin's thesis: the excessive emphasis on the concept of value, which both believers and non-believers grant -according to Dworkin- to life and the universe. The author's reconstruction here risks forgetting other people who do not share the religious sense of life or Dworkin's value-system. Consider, for instance, a nihilist atheist who's never been seduced by the mystery of life. Such a person would see no intrinsic value in life and the universe and *yet* might still have ethical views that make them feel responsible towards themselves and others. Humankind is much more heterogeneous than Dworkin seems willing to admit (at least in my understanding of his thesis, which seems to divide people into religious believers and religious atheists).

3) Kelsen's position on "religions without God", as I was saying earlier, couldn't differ more from Dworkin's. For Kelsen, just as it is impossible to imagine a religion without a god, it is impractical and misleading to use the concept of religion outside of the context of a divine revelation and the belief in the existence of a transcendent divine entity. Kelsen's polemic is certainly not directed against religion *per se*, but against "the attempt of various recent writers to interpret the most important work of social philosophy, especially philosophy of history, of modern times, in spite of their outspoken anti-theological tendency, as disguised or degenerated theology, and certain political ideologies of our time as secular religions".[14]

In the preface, Kelsen illustrates his intent very clearly: his aim is a veritable polemical attack (and the tone of the book is unusually vehement) against interpretations of philosophy and science tinged with political theology: "The author wants to show the fundamental misinterpretation in seeing theology in the thought of men who, like the philosophers of the Enlightenment, Lessing, Comte, Marx, Nietzsche, tried to emancipate human thinking from the bondage of theology. The misinterpretation is, in the author's opinion, dangerous: for it implies the view, consciously or unconsciously, that a social science or philosophy (and especially a science or philosophy of history) independent of theology can have no satisfactory results because it does not lead to the absolute values that can be based only on true religion and without which society and history are meaningless; that politics is by its very nature religion or cannot be separated from it; and that, consequently, the open return of science and philosophy to theology, the return of politics to religion, is indispensable.[15]

In a way, Kelsen's book is also a text on Enlightenment philosophy as part of a seminal debate of the late twentieth century, which marked the time when the philosophy of the Enlightenment was subjected to a severe critique. The most significant interpretative proposals of the Enlightenment criticized by Kelsen include those of Ernst Cassirer, Karl Löwith and Carl L. Becker (but the list is much longer). Compared to the philosophy of history (and progress) typical of the Enlightenment, Kelsen claims that there are two ways of interpreting history: according to some, the evolution of humanity reflects the realization of man's will. According to others, that evolution testifies to the realization of God's will. The first interpretation is the philosophy of history; the other is the theology of history. In "Philosophy of the Enlightenment", observes Kelsen, Cassirer rejected the traditional notion that the Enlightenment was a time of irreligious tendencies adverse to faith. For Cassirer, "the strongest intellectual forces of the Enlightenment do not lie in its rejection of belief but rather in the new form of faith which it proclaims, and in the new form of religion which it embodies."[16]
This is the prototype of secular religion that Kelsen criticized with all the dialectic energy he could muster. The idea that the Philosophes had demolished St. Augustine's Celestial City "only to rebuild it with more modern materials" contrasted completely with Kelsen's vision of science (and religion).

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[14] H. Kelsen, *Secular Religion. A Polemic against the Misinterpretation of Modern Social Philosophy, Science and Politics as "New Religions"* (1964), Springer, Wien-New York, 2012, p. 3.
[15] *Ibidem*.
[16] *Ivi*, p. 91.

The attempt to interpret the Enlightenment, as well as avowedly atheist and anti-religious ideologies such as communism or socialism,[17] in terms of "secular religions", religions of "secularized redemption" and millenarianism, is "dismantled" by Kelsen step by step, through various arguments. One of the most effective is that according to which an eschatological model cannot be secularized, since what a secular worldview denies is precisely the presence of a *éscathon*: something "ultimate", namely the condition that will be proper to man in the absolute end (absolute because predestined by God). Therefore, the concept of the *éscathon* – Kelsen reminds us – refers to a metaphysical idea of the future. But the future predicted by a secular philosophy of history is diametrically opposed to the Christian *éscathon*, which consists of a spiritual state of religious perfection: the state of salvation; on the contrary, what is foreshadowed by a secular philosophy of history is certainly not a spiritual state of religious perfection, but rather "an entirely temporal state of social welfare, a relative optimum of social organization achieved through the work of man without any religious implication."[18] A "secularized" eschatology is a self-contradictory term. It is based on these arguments that Kelsen rejects easy parallels such as, among others, those that combine Marx's prediction of a future communist society to the Judeo-Christian belief in God's kingdom.

Another key objection Kelsen raises against the use of forced parallels regards the claim to derive from the intensity of a "religious sentiment" the religious nature of a doctrine that should make that sentiment its own. "It is a logical fallacy to conclude, from the *intensity of the feelings* with which men cling to some ideas, anything about the *nature* of these ideas, so that a doctrine is a 'religion' if the intensity with which a man is convinced of its truth is the same as the intensity with which a man believes in the existence of an all-just and all-powerful God. Even a scientific doctrine, rejecting any presupposition of a transcendent, supernatural power, could then be presented as a religion". [19]

Bearing this idea in mind, it could be argued that a similar attempt -i.e. to read religion into the "hidden" structures of modernity- also characterizes, consciously or unconsciously, some courts' interpretation of concepts such as religion, belief, ideological conviction. Take the case of the European Court of Human Rights' jurisprudence (and European Commission, before 1998) on atheism and, more generally, on article 9 of the Human Rights Convention (Freedom of thought, conscience and religion). According to this jurisprudence, the word "belief" seems to cover groups such as atheists and agnostics,[20] as well as groups that have some religious elements but do not necessarily fall into the category of religion. As the Court pointed out in 1993, "freedom of thought, conscience and religion is one of the foundations of a democratic society within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned."[21].
In this view, religion becomes a "container" in which the autonomy and self-legitimacy of atheistic/agnostic/skeptical thought fade, thus becoming a subset of the broader category of religious thought and conscience.[22] This is exactly the exit option that Kelsen meant to criticize in his book. Considering atheism as a (secular) religion is, according to Kelsen, a further way of weakening the authority and self-legitimacy of modernity and modern thought. One of the most problematic aspects emerging from the decisions on article 9 HRC is the equation between religion and

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[17] See *ivi*, chapters 8 and 10.

[18] *Ivi*, p. 21.

[19] *Ivi*, p. 24.

[20] *Angeleni v Sweden*, App. N. 10180/72, 1 Eur.Comm. H.R. Dec.& Rep. 41, 1974.

[21] *Kokkinakis v Greece*, A 260-A (1993), European Court of H.R., 31.

[22] Paradoxically, even associations of atheists and agnostics want to regulate their relationships with the state on the basis of the same legal/constitutional proceedings provided by constitutions for regulating the state-churches relationships. For the Italian case, see, N. Colaianni, *Ateismo de combat e intesa con lo stato*, in *www.rivistaaic.it*, 4/2012; G. Di Cosimo, *Gli atei come i credenti? I giudici alle prese con un'atipica richiesta di intesa fra stato e confessioni religiose*, in www.rivistaaic.it, 1/2015; D. Bifulco, *Il disincanto costituzionale. Profili teorici della laicità*, FrancoAngeli, Milano, 2015, p.136-144.

political/philosophical "beliefs", i.e. the acceptance, by this jurisprudence, of politically/ethically motivated claims as "beliefs", rather than expression of thought or conscience. Consider pacifism, that has been interpreted as a belief even when not linked to a particular religion.[23] In doing so, "every action that a person takes, or position that he upholds, which is traceable to an ultimate "belief", would seem to be religious"[24]; one difficulty with this point of view is that it tends to turn everything into religion.[25]

Although the equation between religion and belief is not expressly told, it is nevertheless implied or, at least, not excluded in the European Commission and Court's reasoning. Dealing with two cases concerning neo-Nazi and fascist behaviors, the Commission avoided to make clear up whether some political "beliefs" fall within the concept of "religion and belief" under article 9. Still, the reasoning of the Commission can give rise to the impression that there is some scope for the incorporation of a wide range of both philosophical and political "beliefs" into the definition of "belief" in article 9[26]. In the case of X. v. Austria, the applicant (who had been convicted on charges of promoting neo-Nazi behavior) raised the issue of whether his conviction was in breach of article 9. The Commission assumed that the conviction was in breach of art.9, sect.1, but also held that the Austrian government was permitted, under art. 9, par. 2, to determine what laws suppressing neo-Nazism were necessary in a democratic society (in a later case of a man convicted of fascist activities, the commission dealt in almost identical fashion). As scholars noted, this seems to be the type of case that required the Commission to consider whether Nazism was a belief or it fall into thought or conscience (or outside the scope of art. 9 altogether). Although the Commission avoided any such discussion by moving directly to issues raised under article 9, 2 (thus having the possibility to claim that, as a belief, it could be restricted in a democratic society), yet this strategy seems to imply that Nazism (and Fascism) are "beliefs".
The aforementioned examples show that the decision of leaving the question of defining belief basically unsaid and unanswered, without distinguishing it from the concept of religion and opting for a strategy of elusion, has not only *not* helped to clarify the meaning of the wording of article 9, but also "increased the conceptual confusion in this area"[27], magnifying more than one misunderstanding.

Following Kelsen, we may say that this confusion derives from the tendency to find parallelism between problems of jurisprudence and theology. Although Kelsen himself thought that the search for parallelism in the questions raised in these different fields of knowledge is not an illegitimate scientific task, nonetheless he tried to demonstrate that the transformation of heuristic analogies (especially the analogy between religion and political "faith" or belief) into a thesis about the permanence of a historically secularized substance is not only illegitimate but misleading (from a cultural and scientific standpoint) and dangerous.

> In his vehement criticism of those theories having the tendency "to read into the most characteristic philosophical and sociological doctrine of our time (...) similarities with

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[23] EComHR, *Arrowsmith v. U.K.*, 12.10.1978, D.& R. 19 (1980), p.5 m.n.69. .

[24] J. H. Mansfield, *The Religion Clauses of the First Amendment and the Philosophy of the Constitution*, in *California Law Review*, 1984, vol. 72, p 851.

[25] The same difficulty is stressed by J. H. Mansfield, who argue that not every "belief" may be considered as religious for constitutional purposes. *Ibidem,* : the Author analyzes, some U.S. Supreme Court's decisions and notes : "As to what is religion for purposes of the first amendment, the answer remains in doubt. In United States v. Seeger (380 U.S. 163 (1965)), the Supreme Court, in interpreting statutory language that exempted religious conscientious objectors from military service, held that a religious belief is one 'based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent. The test might be stated in these words: A sincere and meaningful belief which occupies in the life of his possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition'(*id.*at 176).

[26] C. Evans, *Freedom of Religion Under the European Convention on Human Rights*, Oxford University Press, Oxford, 2001, p. 57.

[27] *Ivi*, p. 64.

theological speculations" [28] (such as those theories insisting on the parallelism between the Judeo-Christian belief in the Kingdom of God as a realm of a thousand year and Marx's prediction of the future communist society), Kelsen conceptualized a very interesting theoretical approach to the problem of defining religion, or, more precisely, to the problem of distinguishing the realm of religion and theology from different fields of knowledge.

4) I will now try to provide a few insights related to some topics debated today. This will show how Kelsen's and Dworkin's works are still very relevant and how their theses are part of very important discussions both for the law and for political theory.

4 a) Starting from what Kelsen writes about the "intensity" of the religious sentiment (see *retro*, nt. 19), one can note how, in U.S. courts, this is often taken as a useful criterion to judge a given behaviour as "religious". Judges often have to address the definition of the concept of religion, and over time they have given very different answers: some have said the problem cannot be tackled, others have, so to speak, "jumped in" *in medias res*. Oversimplifying for lack of space, one could say that the German constitutional law exemplifies the first position: in accordance with the idea that the state should be neutral in regards to religion, it tends to back away from defining religion and religious behaviour. Some scholars have openly criticized this strategy, [29] claiming that by so doing courts (and, namely, the federal constitutional Tribunal) have given up a political act (that of defining what is religion and what isn't), leaving it to sociology to address. According to these authors, this elusive strategy also implies giving up the function of conflict solving, which is of legal competence.
The U.S. jurisprudence (at least from a certain historical moment onwards) rather reflects the other approach. When it comes to defining religion (and behaviours deserving constitutional protection as expressive of religious freedom), courts have often stressed the person's sincerity or deep conviction as constitutive of religious freedom (beyond any mediation of religious denominations and their orthodoxies). This has led to a – very Protestant – defence of every *individual's* own approach to religion, regardless of the orientation imposed or suggested by the given confession.

4 b) I would now like to move on to the themes of "civil religion" and "constitutional deism". In relation to such arguments, the book by Kelsen, although written more than 50 years ago, hasn't lost a single iota of its relevance – just think of the "parallels" between theology, on the one hand, and politics and law on the other, which still accompany debates such as those just mentioned, often fuelling vagueness and confusion. All too often has the (European and American) discussion used – sometimes uncritically – the formula "civil religion", borrowing various symbols, rites and elements from the "true" religion (which, for these thinkers, is always the majority religion), transposing them into secular discourse. The aim – be it manifest and conscious or not – is to compensate for national identity, filling the gaps left open by a worn-out republicanism (that is, a shared ethics of the common good).
In this way, one ends up feeding, on the one hand, the confusion between religion and politics and, on the other, the feeling of exclusion of those who do not belong to any confession, or at least not to the majority one. In fact, the rhetoric of civic virtues, in which religion should act as the social glue, usually refers to the majority confession, certainly not to minority religions. Furthermore, this uncritical use of "civic religion" harms those willing to take "true" religion seriously (be it the majority one or not). Furthermore, the debate on "Constitutional deism" (that is, the set of religious references in the context of institutional ceremonies and practices: the reference to God on banknotes, the prayers on

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[28] H. Kelsen, op. cit., p. 5.

29 Cf., for instance, K.-H. Ladeur and I. Augsberg, *The Myth of the Neutral State: the Relationship between State and Religion in the Face of New Challanges*, in *German Law Journal*, 2/2007.

institutional occasions, the presence of the Ten Commandments in a public park, etc.) has fully entered the US jurisprudence, leading the courts to oscillate dramatically (and to betray, not infrequently, the separatist spirit of the First Amendment to the Constitution).
There are countless examples – both from the philosophical and from the legal sphere – showing how the theological-political confusion has significantly affected the path of secularization, Weber's disenchantment and the evolution of the legal principle of laity. The two books discussed here can help the reader visualize the theoretical trap surrounding such confusion, which has never stopped guiding (or rather, misguiding) the secular drive. In this sense, in addition to the books mentioned, I suggest one should look at Roberto Esposito's latest book, explaining why we keep coming back to Schmitt and the idea that "all significant concepts of the modern theory of the state are secularized theological concepts".[30]
Esposito explains this short-circuit of thought starting from the fact that we always are and always have been immersed in political theology: "The underlying obstacle to penetrate the horizon of political theology is that we are already in it." That is why that horizon "proves elusive – not because its front door is barred, but because we've been on the inside of it for time immemorial, before it closed behind us preventing us from going out. Hence the impossibility to place ourselves at a distance, which is the only way to acquire an analytical and critical outlook" (p. 5). Our extreme closeness to the topic in question has therefore made the concept of political theology resistant to critical analysis throughout the twentieth century. Well, the book by Kelsen represents an important attempt, and more explicit than ever, to move away from our proximity with respect to the theological-political confusion.

4 c) A court case reported by Dworkin, and become very popular in the US debate, effectively illustrates this problem. I am referring to the controversy between "evolutionists" and "creationists": that is, whether it is random mutation or divine creation that provides the best explanation of human life. In the US, says Dworkin, the teaching of biology classes in public schools has become a problem when a Pennsylvania school district ordered teachers to mention theories about the origin of life that reject Darwin's random-mutation theory of evolution and claim to provide evidence that human beings were created by a supernatural intelligence. A federal judge declared the order unconstitutional under the "establishment" clause. The principle that the government may not "establish" any religion (Us First Amendment) means indeed that the religious doctrine of one particular religion may not be taught in public schools as the truth. [31]
Dworkin's comment is interesting, but it leaves the reader a bit perplexed: according to the author (who refers here to Nagel's theses: see Note 33), such a case necessarily involves the individuals' preliminary beliefs in the existence or non-existence of God. "These two assumptions -that a god does or does not exist- seem on a par from the perspective of science. Either both count as scientific judgement or neither does. If relying on one judgement to mandate a curriculum is an unconstitutional establishment of a religious belief, then so is relying on the other."[32]
Now, as imperfect as Darwin's theory may be (it still has several gaps and open questions: see the interesting reconstruction made by Thomas Nagel[33]), it is still the only one that can be verified by human reason, contrary to the hypothesis of the intelligent design, which can hardly be seen as a "scientific judgment". Indeed, in that decision, Judge Jones dismissed the suggestion that the ID theory (Intelligent Design) could boast the status of science, based on the position of the scientific advisor called by the defence, according to which

30 C. Schmitt, *Political Theology. Four Chapters on the Concept of Sovereignty* (1922), The Mit Press, Cambridge, 1985, p. 36.
31 Kitzmiller v. Dover Area School District, 2005. R. Dworkin, op. cit., p. 126-128
32 R. Dworkin, cit., p. 128.
33 T. Nagel, *Public Education and Intelligent Design*, in *Philosophy & Public Affairs*, 36, n. 2, 2008.

that theory seems more plausible if one believes in God.
In the article cited, Nagel explains how the development of evolutionary theory is not at all based on the assumption of the impossibility of intelligent design; rather, it has set itself as an alternative ID, providing a surprising and enlightening story of how a "design" has been able to express itself without the intervention of a "designer". Part of the background of evolutionary theory would thus be based on the hypothesis of an alternative "design". For Nagel, like Dworkin, the only way to address the issue (even from a legal-constitutional viewpoint) without regard to religious postulates implies an admission that legitimate empirical evidence leads to different conclusions depending on one's religious faith. However, it seems to me that such conclusion clashes against the very conceivability of modern science: excluding divine intervention from the rank of the possibilities is the epistemological condition of modern science: a condition of scientific rationality resulting from the fact that intelligent design *cannot be proven*.

If Kelsen could take part in this debate, he might reply as follows: "Science does not deny the existence of a sphere that transcends the domain of what is available to scientific knowledge. True science is well aware of the fact that this domain (…) is surrounded by mystery. But science is forced to accept the fact that this secret is ultimately impenetrable to human reason, and that human reason is the only instrument capable of achieving scientific truth" (Kelsen, p. XVII, Preface to Italian edition).

Conclusions

Kelsen must have been perfectly aware of the slippery path he took by arguing so definitely that no religion is conceivable without any metaphysical belief in a god. The fact that he withdrew the manuscript from publication is perhaps not an insignificant detail; apparently, Kelsen came later –at least, according to his friend and biographer Rudolf Métall- to attach values to Huxley's and Russell's claims that religious feelings were possible without any metaphysical belief in a god.[34]
However deep his own doubts on his thesis could have been, we think that Kelsen's arguments are of crucial relevance for the problem we're discussing here, since the point that Kelsen makes is that some clear conceptual boundaries between the realm of theology and what pertains to science and philosophy must be traced, lest one think that the achievements of modernity are not of crucial relevance.[35] While opposing any attempt to discredit modern science and social philosophy as failed religion, Kelsen tried to secure "the legitimacy of modern times ex negativo, i.e. by refuting each and every attempt to de-legitimize the modern age known to him".[36]
The defense of modern reason and autonomy of science advocated by Kelsen in "Secular Religion" is very close in spirit to Hans Blumenberg's defense of the "legitimacy of modern age".[37] There is a thread tying these two works; if we walk along this red thread, the framework for a critique to the secularization thesis can be imagined. What I'm referring to, here, is not the sociological concept of secularization, i.e. the retreat of

[34] *Editorial Remarks*, by C. Jabloner, K. Zeleny and G. Donhauser, in H. Kelsen, Secular Religion, cit.p. XIII

[35] Therefore, rather than just forging judicial tests according to which the concept of religion and belief just needs some degree of intellectual "coherence and importance" (see for ex., X v. Germany, app. n.8741/79, ECommHR, D.&R.137,1981,; ECtHR, Campbell and Cossans v. U.K., 48, Eur.Ct. H.R. 1982 -parents' right to education), it is worth deepening the issue of defining religion (and/or belief) in a more sophisticated way.

[36] Ch. Kletzer, *Kelsen and Blumenberg: the Legitimacy of the Modern Age*, in King's Law Journal, vol 25, no. 1, 2014 p. 3.

[37] B. Thømassen, *Debating Modernity As Secular Religion: Hans Kelsen's Futile Exchange With Eric Voegelin*, in *History and Theory*, 53, October 2014, p. 439.

religious practices in contemporary societies, but the secularization in terms of history of ideas and in terms of legal understanding. In terms of history of ideas, the concept of secularization has been (critically) expressed in the following way : "the fundamental concepts of modernity, concepts which we in no way see connected to god or religion, actually are the same concepts which have played a fundamental role in a theological world-view, only that God does not exist any longer"[38]. This idea has very much affected the legal approach to the secularization/secularism paradigm. Although secularization has proven itself to be a powerful conceptual paradigm for understanding modernity and Western societies, legal thinking has often had the tendency to use the secularization paradigm quite uncritically; hence its tendency to take for granted that "all significant concepts of the modern theory of the state are secularized theological concepts"[39], and thus to assume that sovereignty, human dignity, progress, history, even normativity, are but a secularized version of theological concepts.[40] If so, there is no possibility of escaping from the soothing conceptual trap set by Carl Schmitt. The fact that the relationship between contemporary constitutionalism, secularization and secularism (-laity, meant as legal principle used in judicial decision making) remains somehow uncertain depends, probably, on the high degree of confusion with which the boundaries between the religious and non-religious domain have been conceptualized (in the field of history of ideas, as outlined by Kelsen) and, at the same time, quite uncritically translated in the legal domain.[41]

As a result, the relation between secularism, religion and constitutionalism remains uncertain, although constitutional law insists on secularism and on the possibility of a reason-based polity. [42] Ambiguities and uncertainties in the relationship between secularism and protection of religious freedom still characterize, indeed, a number of existing modern liberal constitutions. This happens both in constitutional systems allowing a state church (England, Norway, for instance), and in systems allowing churches to retain some privilege of public power (Italy, for example), but also in constitutions clearly inspired to a secular view. Scholars who pointedly stress the deep interrelationship between constitutionalism, secularism and Enlightenment, have outlined the contradiction between the conceptual bases of constitutionalism and what may be defined as *institutional* secularism, i.e. the types of constitutional treatment of religion actually in force in contemporary democracies.[43]

If it's true that constitutionalism exists only where political powers do not ground their public affecting decisions on transcendental concerns, if modern constitutionalism is

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[38] Ch. Kletzer, cit., p. 6.

[39] C. Schmitt, cit, see retro, nt. 30

[40] Critically, in this sense, Ch. Kletzer, cit.

[41] See for ex., Consiglio di Stato (High administrative Italian Court, 13 Feb.2006, dec. n. 556, p. 776), confirming on appeal the Tar Veneto (Administrative Tribunal of Veneto Region) decision (sect. III, 22 March 2005, dec.no. 1110, § 12.4) on the display of the crucifix in State school. According to the Tar Veneto, "it would be something of a paradox to exclude a Christian sign from a public institution in the name of secularism, one of whose distant source is precisely the Christian religion". The rationale, here, is that secularism has no conceptual autonomy, since it derives from Christianity and is bound with Christianity to an extent that can legitimate any kind of analogy and equivalence between what pertains to religion and what does not. Therefore, an undisputedly religious sign (the crucifix) becomes, first and foremost, a symbol of cultural identity, even a distinctive sign of secularism. The "astonishing cultural argument upheld by Italian administrative jurisdictions in order to positively rule on the legitimacy of the display of the crucifix in State school classrooms -and the related transfiguration of the crucifix into a national-secular symbol 'incorporated within the civil law"'- found unfortunately "his way to Strasbourg, though under different terms" (ECtHR, Lautsi v Italy, 18 March 2010, § 60) : A. Ratti, *Symbols of Contention in the ECtHR Case-Law: Rethinking the Relationship between Religion and Secularism*, in W. Gephart, J. Ch., Suntrup eds., *Rechtsanalyse als Kulturforschung*, II, Klostermann, Frankfurt, 2015, p. 279, 276.

[42] A. Sajó, *Constitutionalism and Secularism : the Need for Public Reason*, in *Cardozo Law Review,* 30, 2009, p. 2402.

[43] *Ibidem*.

therefore the necessary byproduct of the Enlightenment[44], why does that interrelationship remain so uncertain? I think that the answer to this legitimate question lies also in the ambiguities of the secularization theory : "however harmless it may present itself", this theory is principally "directed against the legitimacy of the modern age"[45].

The legitimacy of Modernity and the autonomy of law and science from religion and theology, powerfully conceptualized by Blumenberg (retro, nt.10-12) and Kelsen, should be emphasized, bearing in mind the opportunity to rethink the theory of secularization or, more precisely, to get rid of the way scholars and courts have the tendency, sometimes, to handle this theory, i.e. passively, as if it were a taken-for-granted, objective reality, rather than a cultural misunderstanding. "The illusion of a secularization of religious substances or functions can be understood as follows: we have assumed overextended questions from a previous epoch and are disappointed by the modern age insofar as we understand the latter as an inadequate catalogue of answers to these questions. The thesis of secularization thus is a mere symptom of an expectation which has been disappointed by overstretched questions. The solution consists in the insight that these questions are not our questions, that they are genuinely alien".[46]

This may be a valid reply to the "Böckenförde" well-known dilemma, according to whom "the libertarian secularized state lives by prerequisites which it cannot guarantee itself".[47] These "prerequisites" are to be found in the self-assertion of modern reason -in the way Hans Blumenberg designed it- and in a theory of knowledge (legal knowledge, as well), which at no point makes use of a divine point of view to legitimize itself (as Kelsen suggested)[48].

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[44] M. Rosenfeld, *Introduction: Can Constitutionalism, Secularism and Religion Be Reconciled in an Era of Globalisation and Religious Revival?,* in *Cardozo Law Review*, 30, 2009, p. 2333 ss.

[45] Ch. Kletzer, cit., p. 1.

[46] Ch. Kletzer, cit., p. 19.

[47] E.-W.Böckenförde, *Staat, Gesellschaft, Freiheit,* Suhrkamp, Frankfurt, 1976, p. 60.

[48] Ch. Kletzer, cit., p. 19