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Defining Religion and Belief: The Approach of The European Court of Human Rights

Daniela Bifulco

1. *Defining religion and belief for legal purposes. Preliminary remarks*

"Defining religion" is a topic which obliges the legal scholar to face a persistent theoretical dilemma, as old and deeply engrained in constitutional studies as it is in the European history itself. This dilemma is a daunting one and can be phrased in the following terms: does the ambition of defining religion and/or belief go beyond the principle of state neutrality in religious matters? Given that the secular constitutional state should avoid taking position on the definition of religion and the substance of religious "truth" (according to Locke, Hobbes and Kant, among others, this is a tenet of liberal thought), how far is the civil government supposed to go in defining religion? To what extent does a secular state have the power and legitimacy to define religion and distinguish the latter from the concept of belief?

The answer to this question is strictly bound up with our understanding of the concept of state neutrality[1] or state-church separation. However uncertain and full of historical happenstance and compromise, both separation and neutrality imply that "non-secular bodies shall not exercise secular power and, vice versa, secular bodies shall not exercise ecclesiastical power".[2] In other words, the "wall of separation" between church and state[3] means that,

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[1] Although the issue of defining religion (from a legal-constitutional standpoint) is related to the concept of state neutrality in religious matters, we will not focus but indirectly on the latter. Interesting remarks on the neutrality concept and the need to deepen it have been recently outlined by Ch. Möllers, *Grenzen der Ausdifferenzierung. Zum Zusammenhang von Religion und Politik im Demokratischen Rechtsstaat*, in *Religions-verfassungsrechtliche Spannungsfelder*, H.M. Heinig, Ch. Walter eds, Mohr Siebeck, Tübingen, 2015, p.13.

[2] A. Sajó, *Constitutionalism and Secularism : the Need for Public Reason*, in *Cardozo Law Review,* 30, 2009, p.2406.

[3] Jefferson's Letter to the Danbury Baptists. The Final Letter, as Sent To messers. Nehemiah

"ideally, the public sphere should be neither religious nor antireligious, but *a-religious*"[4]: from a constitutional standpoint, the liberal-democratic state (at least, the state "steeped in the normative order dictated by the Enlightenment") should at once be "both neutral with respect to religion, by neither favoring it nor disfavoring it within its (public) sphere of legitimate action, and also equally protective of its citizens' freedom *of* and *from* religion within the private sphere"[5].

Consequently, excessive legal-judicial inquiry into religious belief (i.e. into the meaning of religion or belief itself) is not deemed legitimate from the constitutional standpoint. Therefore, even when courts are asked to decide for themselves what is religion for constitutional purposes, "they should do so without assuming that religion has a specifiable essence".[6]

There is a certain amount of agreement among scholars that the effort of defining religion would be counter-productive, since it would be likely to create controversy[7] rather than consensus. There is no doubt that the

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Dodge, Ephraim Robbins, & Stephen S. Nelson, a committee of the Danbury Baptist association in the state of Connecticut.

"Gentlemen, The affectionate sentiments of esteem and approbation which you are so good as to express towards me, on behalf of the Danbury Baptist association, give me the highest satisfaction. My duties dictate a faithful and zealous pursuit of the interests of my constituents, & in proportion as they are persuaded of my fidelity to those duties, the discharge of them becomes more and more pleasing. Believing with you that religion is a matter which lies solely between Man & his God, that he owes account to none other for his faith or his worship, that the legitimate powers of government reach actions only, & not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," *thus building a wall of separation between Church & State*. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore to man all his natural rights, convinced he has no natural right in opposition to his social duties. I reciprocate your kind prayers for the protection & blessing of the common father and creator of man, and tender you for yourselves & your religious association, assurances of my high respect & esteem. Th. Jefferson Jan. 1. 1802." in www.loc.gov (Library of Congress, Washington D.C.). (emph.added).

[4] 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. 2334.

[5] *Ivi*, p. 2333

[6] K. Greenawalt, *Religion as a Concept in Constitutional Law*, 72, *California Law Review*, 1984, p. 815; according to D. Sullivan, *Advancing the Freedom of Religion or Belief through the UN Declaration on the Elimination of Religious Intolerance and Discrimination*, 82 Am. J. Int'l L. 487, 491-2, 1988, a too restrictive or too permissive definition of religion may itself turn out to be an interference with freedom of religion.

[7] See literature quoted by C. Evans, *Freedom of Religion Under the European Convention on Human Rights*, Oxford University Press, Oxford, 2001, p. 59. For an approach to the problem of defining religion from the standpoint of the "juridification of everything (in UK)", see J. A. Beckford, *The politics of defining religion in secular society. From a taken- for-granted institution to a contested resource*, in *The Pragmatics of Defining Religion. Contexts, Concepts and Contests*, Platvoet, Molendijk eds., 1999, p. 29, quot. by A. Reuter, *Was ist Religion? Das Recht als Forum definitionspolitischer*

concept of religion is a contested and divisive one: and to use a contested concept often means to use it aggressively and defensively [8]. To make a long story short, suffice it to say that, in the opinion of many scholars, no proper definition of religion exists (neither for constitutional[9] nor for sociological purposes[10]), the consensus on a generally accepted notion is missing and it is hardly likely to emerge from the scientific and judicial debate[11]. Also the Strasbourg Court ruled that "it is not possible to discern throughout Europe a uniform conception of the significance of religion in society, even within a single country such conceptions may vary".[12]

The absence of a generally accepted definition of religion in the legal perspective is actually a matter of fact; in the European context, indeed, such a definition can be found neither in the national legal orders of the member states nor in the Strasbourg Court's jurisprudence and, more generally, in the conventional system itself[13]. Beyond the European Convention on Human Rights, the absence of a definition of religion is notorious in international law as well : since religion has been too hard to define, the drafters of international instruments opted for "a catalog of rights in the sphere of religion under the heading freedom of thought, conscience, and religion. Freedom of belief and philosophical convictions are the other concepts which form part of the 'conflation of terms' in the sphere of religion. As such, international judicial bodies, including the ECtHR, are guided in their interpretation of religious exercise by some central principles and the catalogue of rights in their respective instruments" [14]

Some of the most relevant sociological studies help us to understand the intrinsic difficulty (or even impossibility) of defining religion: thanks to We-

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Arbeit am Begriff Religion, in *Religions-verfassungsrechtliche Spannungsfelder*, H. M. Heinig, Ch. Walter, eds., Mohr Siebeck, Tübingen, 2015, p. 65.

[8] A. Reuter, cit. p. 64.

[9] 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.

[10] See infra, note 15

[11] A. Reuter, cit., p. 61.

[12] ECtHR, 20/9/1994, Otto Preminger Institut v Austria, No. 13470/87, § 50 : similarly, "it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals", ECtHR, 7/12/1976, Handyside v UK, No. 5493/72, § 48.

[13] C. Evans, cit., p. 51, noting that "the drafters of the Convention do not seem to have given the issue much thought, leaving the main task of definition to the court and commission". Whereas in the UN the definition problem was much more debated: for ex., "the issue of whether atheism and agnosticism were included within the definition of religion or belief has been a vexed one in the UN".

[14] I. Cismas, S. Cammarano, *Whose Right and Who's Right? The US Supreme Court v. the European Court of Human Rights on Corporate Exercise of Religion*, in www.academia.edu, p. 11.

ber and Durkheim, i.e. authors who put at the center of their sociological work the study of religion, we learnt that the effort of finding the religion's essence, content or truth, can be misleading.[15]

It could be argued that the difficulty of defining religion is a natural consequence of the European history and Europe itself, i.e. a continent in which "a range of divergent constitutional structures, views and opinions can be found. Although the vast majority of the states are viewed as functioning liberal democracies (albeit to various degrees), the challenge of identifying a detailed list of common 'European' values in regard to religion and belief"[16] seems, therefore, not only a difficult one[17], but also an unattainable task.

Still, from a legal standpoint, the attempt of defining religion, distinguishing it from belief, is neither vain nor too abstract. The above mentioned dilemma is not just a theoretical one : the test of article 9 itself calls for an enquiry, since the distinction between *religion* and *belief* is to be found in the wording of article 9:

Article 9 - Freedom of thought, conscience and religion. : Section 1- Everyone has the right to freedom of thought, conscience and *religion*; this right includes freedom to change his *religion or belief* and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

Section 2- Freedom to manifest one's *religion* or *beliefs* shall be subject only to such limitations as are prescribed by law and necessary in a democratic society in the interest of public safety, for the protection of public order, health or morals, or for the protection and freedom of others.

Although the text does not add any further indications concerning the content of the distinction between *religion* and *belief,* nonetheless it tells us

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[15] "By separating the question of truth of religion from that of its symbolic structure and social function, Durkheim's sociology served as the foundation for later structural-functionalist analysis in anthropology as well in sociology. Weber, on his part, by abandoning the obsession of reducing religion to its essence and concentrating on the task of studying its most diverse meanings as well its social-historical conditions and effects, established the foundations for a comparative, historical, and phenomenological sociology of religion": J. Casanova, *Public Religions in the Modern World*, University of Chicago Press, Chicago, 1994, p. 18.

[16] P. Cumper, T. Lewis, *Introduction: freedom of religion and belief –the contemporary context*, in *Religion, Rights and Secular Society. European Perspectives*, P. Cumper, T. Lewis eds., Edward Elgar, Cheltenham-Northhampton, 2012, p. 15-16.

[17] *Ibidem*.

that such a distinction exists.[18] Whereas from the individual believer's perspective such distinction may be not a meaningful one, yet the distinction has been made in the wording of article 9 and should inform the decision-making of the Court. Courts have indeed "the job of applying the broad terms of article 9 to specific cases, and for such applications to be consistent and clear some type of definition is required".[19]

We couldn't think of a better answer to those asking why the legal scholar should intrude in an (apparently) philosophical issue such as defining religion (to legal purposes) and distinguishing religion and belief. This essay will discuss how the conventional system deal with this dilemma; more precisely, our aim is to show the close relationship between some decisions of the ECtHR and some theoretical profiles, concerning secularism and the thesis of secularization, which still hang -so to say- in mid-air, unresolved and, what is probably more interesting, still lack a complete conceptualization.

Apparently, our self-assigned task is an easy one. Indeed, generally both the ECtHR and (before 1998) the Commission have taken an expansive view of the definition of religion and its manifestation. Whereas "in many domestic systems, the issue of what constitutes religion has been a source of great controversy", the Commission and the Court have not entered into that controversy, "giving little consideration to creating a formal definition of religion or belief".[20] This generous approach –one may argue- could have paved the way to a liberal, inclusive and not divisive legal treatment of religious freedom. Rather, this long-standing willingness of the European Court to avoid dealing with the controversial issue of defining religion and beliefs, and to leave "some of the more philosophically taxing questions"[21] about religious beliefs unanswered, seems to have rather paved the way to controversial decisions. In more than one occasion, the ECtHR has herself engaged in what she warned states to avoid"[22], i.e. evaluating the legitimacy or reasonableness of the applicant's religious belief and, in doing so, concurring in defining religion.

Let us begin with a brief overview of the most significant Court and Commission's jurisprudence on the aforementioned issue (defining religion and belief) (*infra*, 2). After looking at the specific case of article 9, we will pro-

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[18] C. Evans, cit., p. 52.

[19] *Ivi*, p. 59.

[20] *Ivi*, pp. 55-56.

[21] P. Cumper, T. Lewis, cit., p. 15.

[22] I. Cismas, S. Cammarano, cit., p. 26.

vide some general remarks on the relationship between this jurisprudence and some theoretical profiles related to secularism and the thesis of secularization. We will come to the conclusion that some of the unsolved, ill-solved or unanswered aspects of the Strasbourg jurisprudence regarding religion and its definition have much to do with theoretical aspect of secularization thesis which still need to be deepened and clarified.

2. Religion *and* belief in the text of article 9 of the ECHR and in the interpretation of the European Court of Human Rights and Commission

In its constant case law, the Court considered that the word "religion" must be understood in a broad meaning and the word "belief" covers any ideological conviction.[23] Article 9 is indeed not restricted to "common" or "traditional" religions; both traditional religions and a variety of Christian denominations, as well as Buddhism, Hinduism, Judaism, Druids, Atheism, etc., were presumed by the Commission to be religions or beliefs.[24]

Also scholars have pointed out that the equivalence of religion, belief and ideological conviction is implied in article 9 : even though the freedom of belief is not explicitly mentioned in the first part of art.9 (1), nonetheless it is protected by this guarantee: indeed, in the second part of article 9 (1), which specifies the right to freedom to practice one's religion, "the freedom of 'belief', which is to be understood as the freedom of any ideological conviction, is listed together and on equal footing with the freedom of religion".[25] Therefore, irreligious and non-religious acts are also protected by art. 9.

Although article 9 does not distinguish between religion and ideological conviction with regard to the legal effects, the term "belief" has to be defined, since not every personal conviction can fall within the scope of art. 9[26]. While defining religion and belief, both the Commission (before 1998) and, then, the Court have not entered into that controversy, rarely claiming

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[23] Even more so if one considers the French version for belief "conviction": Ch. Grabenwarter, *European Convention on Human Rights-Commentary*, Beck-Hart-Nomos, München-Oxford-Baden Baden, 2104, p. 236, referring to ECommHR, Arrowsmith, 12.10.1978, D.& R. 19 (1980), p.5 m.n.69.

[24] C. Evans, cit., p. 55. However, "it is safe to assume that a religion includes a denomination, guidelines on how to live and a cult (indeed, the propaganda for Islamic political organization does not constitute an expression of a religious belief: ECtHR Zaoui v. SUI, 2001"): Ch. Grabenwarter, cit., p. 237

[25] Ch. Grabenwarter, cit. p. 240.

[26] *Ibidem*.

that something that is alleged to be a religion or belief is not.[27] Nevertheless, in some rare and exceptional cases the Commission did enter into the controversy, forging a rule according to which vague notions about what can be considered a religion is not enough. Therefore, when an action or behavior do not express some "coherent view on fundamental problems", i.e. when some basic level of intellectual/moral coherence is missing, the claim is not protected under Article 9.[28]

The idea that convictions have to attain a certain level of cohesion, and express a view of the world as a whole, is reiterated also by the Court: to amount to a conviction under art. 2 of protocol I, the belief in question, indeed, has to "attain a certain level of cogency, seriousness, cohesion and importance".[29]

A further example of this approach to defining religion or belief is the case of the church of Scientology, who "was accepted as falling under the protection of art. 9 with no discussion of the issues that have concerned domestic courts : the commission held that the church of Scientology had a right to pursue an action in its own right (in X and Church of Scientology v. Sweden, 1977), reversing the earlier opinion of the Commission (in Church of X v. U.K.)"[30]. Later, the Court "merely referred to scientology as an 'association' probably because one of the issues raised in the case was the refusal of Germany to recognize scientology as a religion". [31]

More recently, the same concern has led the Court to consider that "in the absence of a European consensus on the religious nature of Scientology teachings, it must rely on the position of the domestic authorities in the matter and determine the applicability of art. 9 accordingly".[32]

Following this path in its constant case law, the Court "does not find itself responsible to decide in abstracto whether or not a body of beliefs and related practices may be considered to be a "religion" within the meaning of art. 9 of the convention[33]: "it is not for the European Court to rule in abstracto as to the compatibility of domestic law with the Convention. (…) the Court (…) must confine its attention to the case before it".[34]

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[27] C. Evans, cit., p. 54.

[28] *Ibidem*, (referring to X v. Germany, app. n.8741/79, ECommHR, D.&R.137 (1981).

[29] ECtHR, Campbell and Cossans v. U.K., 48 Eur.Ct. H.R. 1982 (parents' right to education)

[30] C. Evans, cit., p. 55

[31] *Ibidem*, referring to Scientology Kirche Deutschland e. V. v.Germany, App. No.34614/89 A.

[32] Ch. Grabenwarter, cit., p. referring to Kimlya v. RUS, 2009, p. 238

[33] *Ivi*, p. 237.

[34] ECtHR, 25.11.1996, *Wingrove v U.K.*, n. 17419/90, par. 50.

In our opinion, the most problematic aspect emerging from the decisions on article 9 is the equation between religion and political/philosophical "beliefs", i.e. the acceptance by this jurisprudence of politically/ethically motivated claims as beliefs, rather than expression of thought or conscience. Take the case of pacifism, that has been accepted as a belief even when not linked to a particular religion.[35] 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"[36]; one difficulty with this point of view is that it tends to turn everything into religion. This same difficulty is stressed by some American scholars who argue that the US Constitution is not agnostic on religious questions, since it embodies a particular vision of human nature, destiny and life; therefore, not every belief may be considered as religious for constitutional purposes.[37]

Although the equation between religion and belief is not expressly told, it is nevertheless implied or, at least, not excluded in the Commission and

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[35] EComHR, Arrowsmith v. U.K. (see retro, nt. 23).

[36] J.H. Mansfield, cit., p. 851.

[37] *Ibidem*: "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 S.C., 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). The fact that in Welsh v. US (…) only a plurality opinion reaffirmed the definition of religion adopted in Seeger, with Justice Harlan concurring in the judgment on other grounds, may weaken the authority of the Seeger definition". The problem with the Seeger test, underlined by Mansfield, shares the same nature with the issue we have stressed in the text: the definition suggested by the Supreme Court tends to turn everything into religion and "so destroys the independent significance of the religion clauses. Every action that a person takes or position that he upholds is based upon some premise or other, which in turn is traceable to an 'ultimate' belief, and so would seem to be religious from the Seeger point of view. An alternative is to consider as religious only those beliefs that affirm the existence of a spiritual reality. If this definition excludes some philosophies, that, it may be said, is exactly what the constitution intended". The author's thesis is indeed that –p. 586- "the Constitution embodies a particular view of human nature, human destiny and the meaning of life. It is not neutral in regard to these matters. If "separation of church and state" requires a constitution that is neutral on these questions, then the US does not have a constitutional regime of "separation of church and state". There is a constitutional philosophy addressed to fundamental matters (…); "for the satisfactory resolution of problems under the religion clauses, it is necessary to explore a philosophy of the constitution regarding human nature", destiny and so on, "and that this is so even though the Constitution may in some sense separate church from state. (:…): if one need examples to convince those who insist that the Constitution is agnostic on religious questions and does not reject any religious beliefs, it should be enough to mention the belief that there exists a supreme being who commands government to inflict cruel and unusual punishments or the belief that there is a deity who is opposed to the idea that decision by majority vote is ever an appropriate way to resolve social problems" (p. 848**,** p. 857).

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 may 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[38]. 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 Evans 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".

3. *The need for a more sophisticated definition of religion*

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"[39], 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. We owe to Kelsen's last book ("Secular Religion") a powerful, theoretical effort aimed to criticize the unproblematic use of analogies between religion and different fields of knowledge, such as social theory, politics and philosophy. Although Kelsen himself thought that the search for parallelism in the

[38] C. Evans, cit., p. 57.

[39] *Ivi*, p. 64.

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 this comparative method, indeed, Kelsen saw two dangers: "first, the tendency to find affinities may induce (…) to overestimate similarities and to underestimate, even to ignore, essential differences between two phenomena, and, second, to see identity where there is only the appearance of an analogy owing to the use of the same terms (…) covering different meanings".[40] The similitude or the difference between the concept of religion, belief, ideology is precisely the issue with which Kelsen struggled in his last book, where he argues that no concept of religion can go without an idea of personal god. Since he considers the belief in God to be an essential element of religion, the notion of secular religion becomes a contradiction in terms.[41] For the same reasons, also doctrines such as Buddhism cannot be depicted as religious, because such a definition obliterates the difference between the belief in God and the philosophies which include no such belief or which even deny the existence of supernatural powers.[42]

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 theological speculations" [43] (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.

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 publica-

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[40] H Kelsen, *Secular Religion. A Polemic against the Misinterpretation of Modern Social Philosophy, Science and Politics as "New Religions"*, Springer, Wien-New York, 2012, p. 17.

[41] For a completely opposite approach, see Ronald Dworkin, *Religion without God*, Harvard University Press, Cambridge, Mass., 2013 (chap 1 "religious atheism, cap.3 "Freedom of religion", where Dworkin argues that there can be a religion even without God.).

[42] See for ex. H Kelsen, cit., p. 24-25, note 98.

[43] *Ivi*, p. 5

tion 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.[44]

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. Therefore, rather that forging tests according to which the concept of religion and belief just needs some degree of intellectual "coherence and importance" (retro, § 2), it is worth deepening the issue of defining religion (and/or belief) in a more sophisticated way.

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".[45] To support his point that both science and religion must remain within their boundaries, and to theoretically ground the attempt to combat a retrogression of science back to metaphysics and theology, Kelsen identifies a long list of the most prominent authors (such as Gerlich, Jonas, Löwith, Schmitt, Spengler, Voegelin, among the many others) who argue that "faith" is lurking behind the motivating forces and epistemologies of modernist "reason". Considering atheism as a (secular) religion is, according to Kelsen, a further example of attempting to the authority and self-legitimacy of modernity. While criticizing Raymond Aron's view that certain antireligious doctrines (such as Marxian socialism) be "secular religions" (since "a man is religious not only when he worships a divinity, but also when he puts all resources of his mind, all devotions of his will (…) in the service of a cause")[46], Kelsen writes: "It is a logic fallacy to conclude from *the intensity of 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 transcend-

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[44] *Ivi*, p. XIII (*Editorial Remarks*, by C. Jabloner, K. Zeleny and G. Donhauser).

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

[46] R. Aron, quoted in Kelsen, cit., p. 23-24

ent, supernatural power, could then be presented as a religion". [47]

Bearing this idea in mind, it could be argued that the same attempt to read religion into the "hidden" structures of modernity also characterizes the Commission and ECtHR's jurisprudence on atheism and article 9 HRC. According to this jurisprudence, indeed, the word "belief" seems to cover groups such as atheists and agnostics,[48] 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."[49].

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.[50] This is exactly the exit option that Kelsen meant to criticize in his book.[51] The defense of modern reason and autonomy of science advocated by Kelsen in his book is very close in spirit to Hans Blumenberg's defense of the "legitimacy of modern age".[52] There is a thread tying these two works; if we walk along this red thread, the framework for a critique to the secularization thesis will be provided (see *infra*, conclusive observations). What we are referring to, here, is nor the sociological concept of secularization, i.e. the retreat of religious practices in contemporary societies, neither the secularization in terms of history of ideas. What we wish to highlight is rather that jurists should handle the notion of secularization (which pertains to the sociology, the his-

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[47] H. Kelsen, cit., p. 24.

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

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

[50] 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. 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.

[51] There is also another and specular concern related to this solution, i.e. that religion could be abused as a façade to get privileges: see C. Evans, cit., p. 58-59, outlining the legitimate concern that "article 9 could be abused by, for example, prisoners who invent a religion or belief simply as a way of getting privileges to which they would be not otherwise be entitled".

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

tory of ideas and the history itself) with utmost care and overcome the temptation of uncritically translating this notions in legal categories.

The same caveat has recently been framed, in the same critical vein, 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". Our point is that this idea cannot be translated, *sic et simpliciter*, into the grammar of law, since this translation, or transposition, of religious concepts into the legal realm undermines both the autonomy and self-assertion of modern reason (see *infra*, conclusive observations). [53]

4. *The broader frame: the relationship between secularism and religion in contemporary constitutionalism*

Defining religion and belief form the constitutional standpoint implies facing the relationship between the idea and theory of secularization and the freedom of religion in contemporary constitutional democracies.

Far from having a mere theoretical relevance, this relationship is also deeply affected by the evolutions of the religious phenomenon in the contemporary era. Therefore, it is worth briefly providing some general remarks concerning these aspects, since the most problematic and controversial aspects of some ECtHR's decisions on religion reflect some more general theoretical problems. In doing so, we will show how the ECtHR's jurisprudence can be understood as a lens through which to perceive the impasses and roadblocks that recur in the conceptual frame of secularization theories and in the legal arrangements inspired –more or less consciously- by these theories themselves.

The first and more general impression that one could draw from the ECtHR's jurisprudence on art. 9 is that, as ever in the European history and constitutional experience, the nature of religion and the nature of the secular go hand in hand;[54] as some scholars have outlined, European society became, over the years, more secular without becoming less religious[55].

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

[54] G. Davie, *Understanding Religion in Europe: a continually evolving mosaic*, in *Religion, Rights and Secular Society,* cit., p. 260.

[55] Gorski Ph.S., *Historicizing the Secularization Debate: Church, State and Society in Late Medieval*

We may say with some confidence that the idea that constitutional democracies are facing an unprecedented religious diversity has definitely become a prevailing opinion in the current debate. Of course, this development does not leave the law unaffected, "insofar as European societies are facing a growing number of conflicts with religious background".[56]

This is doubtless true; still, to fully grasp this actual diversity and how it turns out to be an element of conflict, it is also worth remembering that Europe has a longstanding tradition of conflicts generated by religious diversity. In other words, the encounter with a religiously strongly differentiated landscape is not at all a recent phenomenon in the European context. Indeed, "the *very existence* of some European states can be traced back to violent conflicts that once had their origins in religious enmity. From the Great Schism between the Eastern Orthodox and Roman Catholic Churches in 1054 to the Protestant Reformation in the sixteenth century, events with a religious dimension have helped to shape the spiritual and political maps of Europe."[57] To make a long story short, we could say that one of the most peculiar recent event in the European context is that the effect of the increasing multi-religious landscape made Europeans "more aware of their Christian past and more concerned with its preservation"[58] ; and, at the very least, "this increasingly multi-religious landscape prompted conservative Christian and political leaders to emphasize the need for such a shift",[59]. Also some very well-known decisions of the ECtHR emphasize this need; take the Lautsi, Leyla Sahin v. Turkey and Dahlab v. Switzerland cases : in the Lautsi case, the Court's reasoning reveals how Christianity simultaneously represents a divisive factor and a shared identity (although the "shared identity" argument is much more emphasized in this decision), "both in the past as well as in contemporary Europe".[60] When deciding on the Islamic headscarf, the Strasbourg Court expresses a preventive conception of necessity, "which equates Islamic symbols with the threat of religious conflicts and which expands the authority of the state to repress even speculative

and Early Modern Europe, ca.1300 to 1700, in *American Sociological Review*, 2000, vol.26, p. 138 ss.

[56] D. Grimm, *Freedom of Religion in the Secular Costitutional State*, in *Costitutional Secularism in an Age of Religious Revival*, S. Mancini, M. Rosenfeld eds., Oxford University Press, Oxford 2014.

[57] P. Cumper, T. Lewis, cit., pp. 4-5.

[58] Marco Ventura, *The changing civil religion of secular Europe*, in *The Geo.Was.Int.'l rev*., 41, 2010, p. 960

[59] *Ibidem*.

[60] *Ibidem.*

risks of religious strife."[61] While formally applying the margin of appreciation's doctrine, the Court concretely seems to legitimize the assumption that the veil is inconsistent with Western values".[62]

The equation between Islamic symbols and the threat of preventive conflict could be understood as a rationalist critique of religious values per se and a purely secular vision of democratic politics. But still, in Lautsi this is no more the case; indeed, "when it comes to Christian religious values, their potential inconsistency with democracy, equality and tolerance is never in doubt".[63]

One may actually wonder why, on the one hand, the "passivity" of the crucifix –"though secularized and trivialized in its spiritual content – stands for a victory over secularism, on the other hand the Islamic veil is perceived, and even explicitly described, as a threat to the latter, as an anti-modern symbol, which stands for the immutability and backwardness of religion".[64]

This different reasoning (in the headscarf cases, from the one hand, and the crucifix-Lautsi case, from the other side: almost a double standards rule) reveals "a political theology of Christian democracy in which the identity of democratic values with an imagined Christian civilization tradition is unquestioned". The analysis, the language through which the competing values are framed and constructed, and the way the margin of appreciation is applied, "betray much about the extent to which Islamic religious practices are understood as intrinsic threat to public order and civil peace -regardless of whether the state limiting the rights has demonstrated this to be the case".[65]

Although immigration has brought to the surface new lines of conflicts, one should not forget, therefore, that for Western countries, formed by Christianity, the encounter with members of non-Christian beliefs (Islamic religion, above all), is "*an encounter with their own history*. For many centuries, Christian denominations confronted heretics and pagans with the same

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[61] N. Bhuta, *Two concepts of Religious Freedom in the European Court of Justice*, in www.euipapers (EUI LAW, 2012/33), p. 12.

[62] V. R. Scotti, *The Legal Treatment of Symbols in the Public Sphere: is There a Discrimination for Muslim Women's Claims?*, in *Religious Claims*, cit., p. 102.

[63] N. Bhuta, op. cit. On the role of judges –and, more generally, of law- in determining the meaning of religious symbols: Ch. Waldhoff, *Das Kreuz als Rechtsproblem*, in *Kirche und Recht*, 2011, pp. 153-174, and, contra, B.G. Scharffs, *The Role of Judges in Determining the Meaning of Religious Symbols,* in *The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classrooms*, Leiden, 2012, p. 35-58.

[64] 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.

[65] N. Bhuta, cit.

attitude" (i.e. western Europe "is torn between the postulate of assimilation on the one hand and an unconditioned acceptance of otherness on the other hand) (…) The history of these countries is full of crusades, inquisitions, ordeals, censorship, etc. It took a long time until a peaceful coexistence of the Christian denominations became a normality, before Christians and non-Christians enjoyed equal rights, and before a pluralism of ideas was regarded as legitimate. In order to understand the present situation, one has to realize that this historical development, which is interpreted as progress in the West, often appears as relativism or decadence to the immigrants. It is *this difference* that gives the current conflict its particular severity".[66]

After having remembered that the religious "diversity" is inherent in the European history itself, it is also worth noting that, undoubtedly, the processes of immigration and globalization have further increased the religious diversity, impacting on former legal structures; under these processes most of the previous constitutional models reveals shortcomings. Although during the last decade many Western legal systems have updated their law in matters concerning religious claims, the balance between equality (and unity of the state's law) and diversity (of religious freedom and rights) seems to be the persistent dilemma that constitutional democracies have to face : many legal instruments created for carrying out religious claims in secular states do not meet anymore the needs of multicultural societies, probably because those instruments have been tailored on the needs of the traditional beliefs.[67]

In his introduction to the section dedicated to "Defining religion in the first Amendment", Lawrence Tribe outlines that over the recent decades there has been a shift in religious thought from a theistic, transcendental perspective to forms of religious consciousness that stress the immanence of "meaning" in the natural order. Although this phenomenon is by no means limited to Christianity, is "perhaps most striking within a tradition so readily assumed to be theistic and transcendent".[68] One of the most important recent developments in the field of religion is the dramatic increase in the number of people who claim non-religious affiliation at all; nonetheless, this event does not reflect a turning away from faith. For this people, the conven-

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[66] D. Grimm, *Freedom of Religion in the Secular Constitutional State*, in *Constitutional Secularism in an Age of Religious Revival*, S. Mancini, M. Rosenfeld eds., Oxford University Press, Oxford 2014 p. 2 (emphasis added)

[67] F. Alicino, *The Relationship between Religious Law and State Law in Secular Constitutionalism,* in *Religious Claims…,* cit., p. 45.

[68] L.H. Tribe, *American Constitutional Law*, The Foundation Press, New York 1988, p. 1180.

tional understanding of religion as a distinctive body of norms, a moral and ritual set of practices, simply no longer reflects the norm.[69] Scholars have noticed that the most crucial divide in religious field, today, is not between particular religions, but between people who hold traditional, theistic beliefs, in whatever religion, and those who do not.[70] Now, the question of whether and how "those who do not" have right to constitutional protection (on the basis of religious freedom? Or of freedom of conscience? On the basis of a "cultural" approach?) has triggered an intense legal and judicial debate.

Some scholars have suggested that an analogical approach could lead to sound outcomes in determining whether non-traditional religious claims deserve constitutional protection; according to Greenawalt, for example, "in both free exercise and establishment cases, courts should decide whether something is religious *by comparison* with the indisputably religious, in light of the particular legal problem. No single characteristic should be regarded as essential to religiousness (…) ; determining whether questionable beliefs, practices, and organizations are religious by seeing how closely they *resemble* what is undeniably religious is a method that has implicitly used by courts in difficult borderline cases. …Matched with appropriate substantive standards of review, its use can lead to sound outcomes."[71].

This thesis seems to take for granted that a common consensus concerning the "indisputably religious" does exist; unfortunately, this assumption is far from being undisputed. We may perhaps agree that in "conventional understanding, the word religion implies a community of believers".[72] Nevertheless, it is also true that religion, as well as the idea of belief, play an essential role in the life of the individual, meant as a single unity and not necessarily as a part of a whole, i.e. of a community.

In any case, all of these changed circumstances in the understanding of the religious phenomenon made it inevitable that courts would modify the narrow understanding of "religion" that had characterized the early development of law. The idea of religious freedom -combined with the special

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[69] M.L. Movsesian, *Defining Religion in American Law: Psychic Sophie and the rise of the Nones*, in www.eui.eu/Projects/Religiowest, p. 2

[70] *Ivi*, p. 3.

[71] K. Greenawalt, cit., p. 753, p. 815 (Italic added).

[72] M.L. Movsesian, p.2: "And, as Tocqueville himself saw in the nineteenth century, it is precisely the communal aspect of religion that creates benefits for liberal democracy. Liberal democracy, Tocqueville wrote, inevitably leads to an apathetic individualism that weakens civic engagement …By encouraging people to think of themselves as members of a community, religion discourages such individualism ; by creating strong counterweights to the state, religious associations serve the cause of liberty.".

place of religion in the constitutional order- seems to demand a definition of "religion" that goes beyond the closely bounded limits of theism, and account for the multiplying forms of recognizably legitimate religious exercise. Although courts have abandoned their narrow, theistic view of religion in the free exercise analysis, they have not escaped the necessity of drawing some boundary around religion.[73]

Therefore courts, asked to determine what is a "religion" -and how it differs, for example, from the notion of "culture" or belief- have struggled to define a satisfactory borderline between the two concepts, reversing their decisions on more than one occasion.

When defining religion for legal purposes, the question arises whether courts should choose a meaning consistent with a conventional understanding, i.e. with the ordinary social-collective meaning of the term, rather than opting for the idea that "protecting religious freedom in order to honour personal dignity and autonomy provides no ground for limiting that freedom to the orthodox religions and believers".[74] In the second case, the notion of religion becomes a broader one, and personal autonomy becomes a powerful argument for protecting religious non-orthodox beliefs and practices.

In any case, the above mentioned changes in the sphere of religion require developing a far more complex idea of religion than merely its equation with religious "doctrine". Yet, this task -i.e. defining religion and belief- goes beyond the principle of state neutrality in religious matters. Facing this sizable challenge, courts show different reactions, depending, obviously, on the legal culture of each country. In North-American constitutionalism, for example, legal scholars, as well as courts, have the tendency to acknowledge that, in order to realize the goals of religious liberty, "religion" must be defined broadly enough to recognize the increasing number and diversity of faiths. Furthermore, Canadian and U.S. Courts often claim that religion must be defined from the believer's perspective, since excessive judicial inquiry into religious beliefs may constrain religious freedom.

This is, of course, an interesting way of protecting personal autonomy. Still, a solely individualistic understanding of religion, oversimplifies sometimes its societal function : indulging in a too individualistic idea of religion (i.e., conceiving religion as a merely private, irrational and extra-societal phenomenon), means forgetting the character of religion as a collective phenomenon (and, therefore, neglecting the Durkheimian legacy). The weak

[73] L.H., Tribe, cit., p. 1180

[74] R. Dworkin, *Religion without God*, cit., p. 114 (see nt. 41), quot.by M.L. Movsesian, cit., p. 12.

side of this approach is, perhaps, the under-evaluation of the cultural implications of religion (on a collective level) and the over-evaluation of religion conceived as a mere personal construction of identity. Another, quite different, approach to the same problem, is the one often followed by some liberal and secular states, premised on the idea that government should avoid taking position on the definition of religion and the substance of religious "truth".

If it is true that the state neutrality should serve to the purpose of protecting the secular principle –and, consequently, the division between state and the churches- and the religious freedom as well, it is also true that courts often use the state neutrality principle as an alibi, an exit-option in order to avoid addressing problems[75] (such as like the problem of defining "religion", distinguishing it, if necessary, from the concept of "culture"), which appear to be too complex for the law.[76] As a result, law has sometimes the tendency to relegate religion to sociological study and anthropology. "In this context, state neutrality merely functions as a *chiffre* for indifference. But this strategy of avoidance, though understandable in the light of the complexity of religious pluralism, undermines the law's function of conflict resolution".[77]

The evolutions of the religious phenomenon in secular and liberal states ask legal scholars and legal community to rethink the secular principle taking into account these evolutions, which are more and more blurring the distinction between "religion" and "culture".

5. *Concluding observations*

Likewise the member states, also the ECtHR has often used the state-neutrality principle as an alibi, an exit-option in order to avoid addressing taxing problems concerning religion, although, in this case, the exit-option is called "margin of appreciation margin".

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[75] K.-H. Ladeur, I. Augsberg, *The Myth of the Neutral State: the Relationship between State and Religion in the Face of New Challenges*, in *German Law Journal*, 2/2007, p. 144.

[76] Therefore some scholars suggest that only a religious authority can trace the distinction between -for example- religion and cultural habits; in the case of Italy, the problem of legal intervention for integrating Muslims into the liberal democracy, E. Pföstl, *Challenges to Legal Uniformity in Italy*, in Religious Claims …, cit., p. 96, suggests that "to have a guarantee for a relative seriousness of conscience-related claims and to distinguish purely cultural habits from seriously rooted matters of faith and discipline it would be necessary to establish a recognized authority acting for a religious group".

[77] K.-H. Ladeur, I. Augsberg, cit., p. 144.

Since the Strasbourg Court is an international court, it is bound, obviously, to the primary task of defining common standards for the protection and promotion of human rights. Nevertheless, the Court has never conceived of such a task as a denial of local values and cultural variety of member countries. The margin of appreciation doctrine has been functional to this willingness of the ECtHR to grant member states a certain degree of appreciation in the religious-secular field. While ruling that "by reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge ….to make the initial assessment"[78] as to enforcing of the Convention (and thus "to appraise and local needs and conditions"), the Strasbourg Court has allowed national decision-making bodies to have plural ways to address issues concerning freedom of religion and the relationship between State and religion.[79] But the lack of consensus -among the HRC States- as regards the notions of secularism, the concept of religion/belief, as well as the principle of secularism and state neutrality in religious matters, represents a very well-known obstacle on the way of the definition of common standards. This lack of consensus has been -and continues to remain- the rationale for the long-standing willingness of the European Court of HR to grant states a wide margin of appreciation as regards the protection of religious and secular values.[80]

The margin of appreciation is doubtless a useful mechanism, since it enables the ECtHR to take account of local sensibilities when making rules in particular cases; "yet its use can also result in the impoverishment of protection of minority faiths and may also mean that some of the more philosophically taxed questions about the accommodation of religious belief remains unanswered"[81]. In fact, "due to the supranational nature of the ECtHR and its sensitivity towards national legislatures, it happens that the Court rarely

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[78] ECtHR, 7.12.76, *Handyside v. United Kingdom*, n. 5493/72, par. 48

[79] A. Ratti, cit., p. 266.

[80] P. Cumper, T. Lewis, cit., p. 15-16.

[81] *Ibidem*. See for ex. Otto-Preminger (retro, nt. 12), 58: "…as in the field of morals, and perhaps to an even greater degree, there is no uniform European conception of the requirements of 'the protection of the rights of others' in relation to attacks on their religious convictions. What is likely to cause substantial offence to persons of a particular religious persuasion will vary significantly from time to time and from place to place, especially in an era characterized by an ever growing array of faiths and denominations. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements with regard to the rights of others as well as on the necessity of a restriction intended to protect from such material those whose deepest feelings and convictions would be seriously offended".

challenges a government's aim for interfering as illegitimate"[82]. Therefore, while religious and cultural pluralism has acquired a normative meaning within the ECtHR's jurisprudence -being intrinsically tied to democracy[83], such reverence to national difference has been increasingly interrogated.[84] Those who stress the crucial role that international human rights bodies can play as a remedy of some of the inherent deficiencies of the national system have warned that deference to local conditions, traditions and practices will inevitably expose human rights to the will of a ruling majority[85].

The debate on religious symbols, protection of religious freedom and secularism in the ECtHR is well-known; all this cannot be described here. Indeed, the brief reference to this debate has been meant just as a pretext to highlight some final remarks. The confusion on the concepts of religion and belief do not derive only from their being, per se, fuzzy concepts. We think that it derives, rather, from a conceptual misunderstanding related to the secularization thesis; because of this misunderstanding, the *religious* meaning of symbols -such as the crucifix- has been often trivialized by courts, i.e. translated in the grammar of secularization in a too immediate, or even superficial way. As already noticed (*retro*, § 3, p. 326-27), the problematic profile we're referring to has nothing in common with the secularization meant as a sociological concept; our point is very different from, say, the need of reformulation of the sociologic theory of secularization underlined by many scholars.[86]

Secularization is a concept that the law and the legal scholarship inherited in a quite passive way; in the same passive way, even the most brilliant among legal scholars have sometimes shown the tendency to take for granted that "all significant concepts of the modern theory of the state are secularized theological concepts.[87] If sovereignty, autonomy human dignity,

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[82] I.Cismas, S. Cammarano, cit., p. 26

[83] Kokkinakis v Greece (see retro, nt.49), 31, 35

[84] A. Ratti, cit., p. 267.

[85] *Ibidem*, quoting E.Benvenisti, *Margin of Appreciation, Consensus and Universal Standards,* in *New York University Journal of Law and Politics*, 1999, p. 843-847.

[86] According to J. Casanova, cit., p. 38, for example, the theory of secularization "should not start with the premise that there must be a fundamental tension (…) or conflict between a religious and a secular world view, between religious and secular humanist conduct. We may say with some confidence that currently, at least in America, (…) the majority of Americans tend to be humanists, who are simultaneously religious and secular (whereas religious fundamentalists and fundamentalist secular humanists are cognitive minorities)." Therefore," the theory of secularization should be reformulated in such a way that this empirical reality ceases to be a paradox".

[87] C. Schmitt, *Political Theology. Four Chapters on the Concept of Sovereignty* (1922), The Mit Press, Cambridge, 1985, p. 36.

progress, history, even normativity, are but a secularized version of theological concepts, there is no possibility of escaping from the soothing trap set by Carl Schmitt as outlined by Christoph Kletzer (see nt. 91, 92 and 53). The fact that the relationship between contemporary constitutionalism and secularism 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. As matter of fact, indeed, the relation between secularism, religion and constitutionalism remains uncertain, although constitutional law insists on secularism and on the possibility of a reason-based polity. [88]

A number of existing modern liberal constitutions are not clear on the relationship between secularism and constitutionalism. 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.[89]

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 therefore the necessary byproduct of the Enlightenment[90], why does that interrelationship remain so uncertain? We 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"[91].

The legitimacy of Modernity and the autonomy of law and science from religion and theology, powerfully conceptualized by Blumenberg and Kelsen (see *retro*, §3), should be rethought and emphasized, bearing in mind the opportunity to get rid of the way legal scholars and courts have the tendency, sometimes, to handle this theory, i.e. passively, as if it were a taken-for-granted, objective reality.

"The illusion of a secularization of religious substances of functions can

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[88] A. Sajo, cit., p. 2402

[89] *Ibidem*.

[90] M. Rosenfeld, cit., p. 2333.

[91] Ch. Kletzer, cit., p. 20.

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".[92]

This may be the path to follow in the attempt of finding a valid reply to the "Böckenförde" well-known dilemma, according to whom "the libertarian secularized state lives by prerequisites which it cannot guarantee itself".[93]

These "prerequisites" are to be found, we think, 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).

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

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