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ARTICLES

Kelsen, Secular Religion, and the Problem of Transcendence

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1 Introduction

The Board of Trustees of the Hans Kelsen Institut (HKI) has decided, after much hesitation, consultation and deliberation, to publish one more posthumous work by Hans Kelsen – a book he himself withdrew from the press several times, the last time in 1964 from the University of California Press, and after due payment of considerable compensations to the publishing house. The present text is published from the galley proofs with Kelsen's last alterations.[1] We do not know exactly why Kelsen withdrew the manuscript at the very last moment. There is some evidence that he eventually left the decision whether to publish it or not after his death, to some of his close friends, most notably Lewis Feuer. His daughter Maria has confirmed this to the HKI. But it was Richard Potz (the author of a brief Introduction to the edition) who finally convinced the HKI that the text should be published after new research of both the manuscript and the archives that were meanwhile trusted to the HKI. The main reason for accepting this proposal was that the trustees believed it to be topical (again), against the backdrop of contemporary developments in science, politics, and religion. These developments entail, first and foremost, an alleged 'return of religion' to the public domain in the USA and (to a lesser extent) Europe.

I will hardly, if at all, go into the history of the book now published, almost forty years after Kelsen's death in 1973. Nor will I dispute the somewhat remarkable decision by the HKI Trust to have this text published separately from the *Hans Kelsen Werke* and with a different publisher.[2] Also, and most emphatically, I am not about to write a review of Kelsen's book, the core of which is an elaborated critique of his former student Eric(h) Voegelin's account of Modernity. My focus will be on the general drift of Kelsen's argument and its relevance in our time. As I will find Kelsen's argument wanting in some (though certainly not in all) respects, I will assess the topicality of the book differently from the HKI Trustees. I will first briefly summarize Kelsen's main argument against what he calls 'secular religion,' which boils down to the negative thesis that 'secular transcendence' is an oxymoron, as is 'religion without transcendence' or 'religion without a God.'

1 Hans Kelsen, *Secular Religion: A Polemic Against the Misinterpretation of Modern Social Philosophy, Science and Politics as 'New Religions.'* Edited from the estate of Hans Kelsen by Robert Walter†, Clemens Jabloner and Klaus Zeleny (Wien/New York: Springer, 2011). References to this book in the text are by the siglum SR plus page number.

2 Note that I do not hold that it should *not* be published.

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Then I will show that in a very specific sense this thesis is untrue, and that there is scope for an alternative account of the relationship between politics and religion. Taking my cue from Rousseau's plea for a 'civil' rather than a 'secular' religion, I will defend that (1) 'transcendence' re-emerges in politics, not just as a figure of speech but as a conceptual presupposition of political discourse, and that (2) democracy institutionalizes this presupposition without committing itself to the ontological implications that Kelsen deemed so pernicious. In the last section I will even argue that such a 'thin' notion of transcendence is in the background of Kelsen's theory of law, in particular in his notion of 'the people' (underlying democracy) and in the idea of the Basic Norm (underlying his epistemology).

2 Kelsen and 'secular religion'

As said, the thesis of the posthumous book is primarily a negative one, as the word 'polemic' in the subtitle indicates. Kelsen rejects all attempts that purport 'to interpret the most important works 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"' (SR, 3).

Confronting Voegelin and others,[3] he fights the view that Hobbes, the Encyclopédie, Saint Simon and Proudhon, Comte, Marx, Nietzsche, and the lot, are all crypto-religious thinkers in denial. Such attempts do not just try to re-describe these works in their own terms, as if, for instance, Marxism or liberalism were peculiar phenomena. Nor do they purport to merely chart interesting analogies between religion and these works. Nor do they point out the continuities between, for instance, medieval Christian philosophy and modern metaphysics (as Heidegger did). Nor – and here I slightly push Kelsen's line of thought – do they simply take revenge on the 'maîtres de soupçon' (Ricoeur) of Modernity – Marx, Freud, Nietzsche. Their purpose, Kelsen diagnoses, is a specific type of orthodoxy. They hold, in a manifold of variations on the same theme, that a well-ordered political community is impossible without the concept of transcendence;[4] that any scientific or political enterprise since the Enlightenment tacitly presupposes the categories that only theology can provide; and that any deviant view is a heresy.

Far be it from Kelsen to defend, e.g., Marxism[5] or nihilism in every respect. He only defends it against the kind of attack that wants to turn it into disguised or

3 Throughout the book Kelsen explicitly mentions authors like Fritz Gerlich, Ernst Cassirer, Karl Löwith, the Dominican priest Antonin Gilbert Sertillanges, the Jesuit priest Henri de Lubac, the protestant theologian Reinhold Niebuhr, the catholic theologian Etienne de Gilson, and many more (see already the Introduction, SR 5ff). I'm not pretending at all that I am able to review Kelsen's critique on the basis of my own reading of these authors.

4 Richard Potz, in SR, VII.

5 One of the reasons why he might have withdrawn the 1954 review of Voegelin's book (125 pages) is that it could have been interpreted as a defense of Marxism in the era of stark McCarthyism. This is at least one reading of Voegelin's 'warning' to Kelsen after he had read the review, that its publication would harm Kelsen more than him. See the editorial remarks at SR XII.

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degenerated religion and/or theology. He does so on the basis of various arguments, now attacking the critics' wanting argumentations, now explaining what the authors under criticism really meant in the context of their respective oeuvres, now quoting their express denunciations of religion and theology. But his central tenet, repeated over and over again, is that secular transcendence is a self-defeating concept; that 'Parousia of reality' is an oxymoron, that a religion without a God is not a religion at all, etc.[6] He explains time and again that concepts like progress, perfection, redemption, salvation, sovereignty, and their ilk, are perfectly understandable in secular terms and should be assessed by secular criteria.

Let us concentrate on Voegelin as Kelsen's main antagonist. On the eve of the Second World War he had already published a small book on 'political religions,'[7] in which he argued that moral grounds are not solid enough to criticize 'evil' in the world, a fortiori totalitarianism as a form of evil. The source of political critique lies elsewhere. For evil ('das Luziferische'[8]) exceeds what is morally bad. It is not just a deficient mode of being, something negative, but rather a positive force that attracts and fascinates us. It can only be resisted if it is identified, first and foremost, at a level beyond our moral concerns, i.e., the level of religion. Religion is basically man's openness to what transcends his experience, as given *in* his experience.[9] Voegelin points to, in particular, the dimensions of hierarchy, community, and apocalypse. Here one will find the political pertinence of religion, indeed all genuine religion.

Around the middle of the twentieth century Voegelin made a further step. He argued[10] that not only the questions,[11] but also the answers of traditional theology had survived, though only as a sort of degeneration of authentic Christian doctrine. More in particular, he took the view that the answers of Modernity amounted to a renaissance of second-century Gnosticism. Gnosticism is considered an esoteric Christian heresy, preaching salvation through the pursuit of

6 SR 21 and passim. This is why I think that main thesis of SR can be summarized in a rather brief paragraph, even if the evidence that Kelsen submits in support of it is very elaborate indeed.

7 Erich Voegelin, *Die politischen Religionen* (Stockholm: Bermann-Fischer, 1939). The first edition was published in Wien, 1938, but Voegelin complains in the preface to the second edition that the publisher was a national-socialist, who did not much to sell it because (he says) it was critical of Nazi ideology. That others read quite a few passages as in support of the Führer cannot come as a surprise (cf. 56ff.).

8 Voegelin, *Die politischen Religionen*, 9.

9 Religion in a very broad sense ('In allen Richtungen, in denen die menschlichen Existenz zur Welt hin offen ist, kann das umgebende Jenseits gesucht und gefunden werden: im Leib und im Geist, im Menschen und in der Gemeinschaft, in der Natur und in Gott.' (Voegelin, *Die politischen Religionen*, 16-17; cf. 64).

10 Particularly in Eric Voegelin, *The New Science of Politics: An Introduction* (Chicago/London: University of Chicago Press, 1952), 107ff, from the chapter 'Gnosticism – the Nature of Modernity' onwards.

11 Cf. Hans Blumenberg's Re-occupation Thesis: 'What mainly occurred in the process that is interpreted as secularization (...) should be described not as a transposition of authentically theological contents into secularized alienation from their origin but as a reoccupation of answer positions that had become vacant and whose corresponding questions could not be eliminated.' Hans Blumenberg, *The Legitimacy of the Modern Age* (Cambridge, MA: MIT Press, 1966), 65.

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(mystical) knowledge that would sort out, ultimately, the dichotomy between good and evil as co-original and co-equal forces of creation. As Hans Jonas observed:

> '[all gnostic sectarianism of the first centuries A.D.] features an extremely *transcendent* (i.e., trans-mundane) conception of God and, related to this, an equally transcendent and outerworldly idea of the goal of salvation. Finally, they posit a radical *dualism* of ontic realms – God and world, spirit and matter, light and darkness, good and evil, life and death – hence an extreme polarization of existence; not just of human existence but of reality as a whole.'[12]

But Voegelin holds that this conception of transcendence is false. If the two forces are radically immanent to creation, gnostic mysticism basically claims to have access to transcendent reality after all, and to pursue a form of knowledge that encompasses reality *in toto*, thus absorbing a transcendent world into the immanent one.[13] This is why Voegelin believes that (1) Gnosticism is an epistemic pursuit rather than a truly religious faith, and (2) that it harbors a 'totalitarian' pretension leaving no scope for anything that would go beyond human knowledge.[14] Assuming that these basic features exhaust the definition of Gnosticism in terms of necessary and sufficient conditions, Voegelin reverses the order of argument. He aims to show that any theoretical endeavor

- that erases transcendent principles of world order;
- that pretends to explain the whole world by immanent laws of causation (in science);
- and that orders the whole world according to entirely immanent values (in politics),

must be gnostic in principle if not in practice. Moreover, he tries to show, by means of an 'internal' critique, that deep inside these theories there is hidden reference to a transcendent realm that is left unaccounted for. Thus he concludes that, in the final analysis, these theories are religious ideologies in disguise. By attributing secular, hence immanent values to what are, at bottom, transcendent variables, such theories are virtually totalitarian. They usher in the thought that man is justified in crowning himself as the great creator of the world *in toto*, and the king of its political order.

No less a critique of totalitarianism, Kelsen's project is a defense of Enlightenment; man should settle for the pursuit of partial and fallible knowledge in science, and for provisional and conditional authority in politics. Not the disguise of alleged 'gnosticisms' as heretic from the viewpoint of 'genuine transcendence' – Voegelin's project – is the best defense against totalitarianism, but the project of

12 Cf. Hans Jonas, *Het Gnosticisme* (Utrecht/Antwerpen: Het Spectrum, 1969), 46 [my translation; italics in the original].

13 Voegelin, *New Science of Politics*, 120 – the 'immanentization of the eschaton'.

14 Voegelin, *New Science of Politics*, 132: 'Totalitarianism, defined as the existential rule of Gnostic activists, is the end form of progressive [i.e., 'modern'; BvR] civilization.'

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Enlightenment. Science and democracy should therefore be regarded as established paradigms of the Modern Age. And when it comes to the danger of totalitarianism, one should fear a critique of secular religion à la Voegelin more than the secularization of religion. But why exactly?

3 Modes of transcendence

In the 1920s and 1930s, Kelsen had already taken issue with the radical thesis defended by Carl Schmitt, that 'all important political concepts of Modernity are secularized theological concepts.'[15] What is it, one may ask, that drove him to level such an extensive form of criticism against Voegelin and his fellow-travelers? A crucial part of the answer is offered by Thierry Gontier,[16] who argues that Schmitt and Voegelin hold radically different conceptions of transcendence.

> 'Thus, for both authors, political order revolves around a pole of transcendence. However, transcendence does not carry the same meaning for Schmitt and for Voegelin. For the former, it means essentially the radical heteronomy of a decision with regard to any form of legal rationality. For Voegelin, it refers back to the subsuming of the legal order to a higher ethical and metaphysical order in which its original meaning is to be found. The two political models are dependent upon radically different theological models. The decisionist political model of Schmitt analogically corresponds to the theology of the *potentia absoluta Dei*, the model for which may be found in late medieval Scotist and Occamist theologies. Voegelin, for his part, refers to a theology of Platonic inspiration in which the divine is understood not as radical otherness but as the transcendent good to which the human soul remains naturally open.'[17]

Note, then, that in Schmitt's model the decision is regarded as so absolute that it transcends any normativity. The problem is that, in spite of its transcendence, it has to register in the immanent world where it is to be obeyed and responded to by enactment of norms. It can only count as 'an intramundane realization of the divine.'[18] This again is precisely why, for Voegelin, this model does not articulate genuine transcendence. For him the relationship between religion and politics is not that of a structural analogy, but of a fundamental openness to what is all-encompassing good and true. Man in the polity is inherently geared to a realm of transcendence.

15 Carl Schmitt, *Politische Theologie. Vier Kapitel zur Lehre von der Souveränität.* 2nd edition (Munich/Leipzig: Duncker & Humblot, 1934), 43.

16 Thierry Gontier, 'From "Political Theology" to "Political Religion": Eric Voegelin and Carl Schmitt,' *The Review of Politics* 75 (2013): 25-43. I thank professor Gontier (Université de Lyon III) for his kind response to my query.

17 Gontier, 'From "Political Theology" to "Political Religion,"' 35.

18 Gontier, 'From "Political Theology" to "Political Religion,"' 36.

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> 'The "religious politics," if we may use that phrase, of Voegelin (...) designates a type of attraction of the political to a pole of transcendence, structured by the experience of transcendence present at the heart of the rational activity of mankind, and in particular of its communal activity. This experience preserves the finiteness of the political, preempts its self-constitution as a mundane theology (irrespective, moreover, of the precise institutional form), while conserving the fundamental restlessness of mankind and its openness to the question of foundational transcendence.'[19]

Schmitt, in turn, rejects such a model of transcendence as it hinges on a form of spontaneous anticipation of and participation in a transcendent reality. For him this is an extension of immanence rather than transcendence. So what for Schmitt is transcendent is immanent for Voegelin and vice versa. They remain perennial antagonists.

For Kelsen, both Schmitt's and Voegelin's projects are unacceptable as they both install a scission between the mundane and the sacred realm, or between historical time and eschatological time. In both models 'restoring genuine transcendence' means to restore the belief in a double reality, one perfect, one imperfect. It comes with splitting the whole of mankind in two; the redeemed destined to enter the perfect world and the rest destined to stay behind. It proposes to discriminate the latter from the former, at a stage as early as possible. It calls for drawing a dividing line by an appeal to divine authority, as well as for guardians who claim to be empowered by such authority to draw and defend this line. These guardians will acknowledge no reason whatsoever to hold back or to step back, as they will see themselves as the (sole) promotors of eternal truth and eternal peace. In other words, and to strike a chord preluding on Rousseau, they will reinstall 'the religion of the priests.'[20]

But in a way, for Kelsen it is easier to deal with Schmitt's than with Voegelin's model. Schmitt's conception pursues an incisive critique of Enlightenment by turning away from what Gontier calls its 'Promethean thoughts'[21]: the idea of man, indeed mankind, being at its own origin in knowledge and politics, e.g., by spontaneously (or mechanically) transforming social relationships into sovereign power. Voegelin's conception, on the other hand, particularly in disguising all sorts of Gnosticism, takes over the project of Enlightenment. He intends to enlighten Enlightenment, so to speak.[22] With that the advocates of 'secular reli-

19 Gontier, 'From "Political Theology" to "Political Religion,"' 43.

20 (J-J Rousseau 1762 [1964]) Jean-Jacques Rousseau, *Du contract social; ou principes du droit politique* (Paris: Gallimard, 1964 [1762]), IV, 8.

21 Gontier, 'From "Political Theology" to "Political Religion,"' 36.

22 Important arguments against seeing Voegelin as the protagonist of a 'revolt against Modernity' (T.V. McAllister's title) are offered in Hans-Jörg Sigwart, 'Crise de la modernité et démocratie moderne: l'interprétation néoclassique du régime civil occidental par Eric Voegelin,' in *Politique, religion et histoire chez Eric Voegelin*, ed. Thierry Gontier (Paris: Cerf, 2011), 89-110, who also submits (109) that Voegelin tried to achieve 'une équilibre, *à l'intérieur même des Temps modernes*, entre continuité d'une part et modernité et différenciation d'autre part.' The italicized phrase induces my formulation of 'enlightening Enlightenment'.

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gion' thesis form a fifth column undermining the very program that Kelsen subscribes to. Perhaps this explains why he so vigorously charges them out of his study, only to hesitate whether his annoyance should be sufficient reason to publish his attack.

Meanwhile, however, we are left with a serious problem about the conception of transcendence in a philosophical account of politics. Kelsen does not accept any model, neither Schmitt's nor Voegelin's. As these two models are radically different to the point where they become mutually exclusive, it is tempting to think that they exhaust the options. This remains to be seen. Is the scission between the two realms really inherent to the concept of transcendence? Is it possible to develop an alternative model? It seems desirable to try for at least two reasons.

1 One of the conceptual challenges posed by the resurgence of religious fundamentalism in Modernity is to articulate transcendent dimensions of the immanent world in ways that avoid the dichotomy between immanence and transcendence, i.e., without deleting either of these terms. Whatever may be said of Voegelin's project – its scope, its strategy, its results – it may be regarded as an effort to meet this challenge at the eve of twentieth-century totalitarianism. The project may have failed, for many of the reasons that Kelsen advanced. But it was not necessarily ill-directed.

2 Erasing the predicate 'transcendent' together with the idea of a world that supersedes the world humans live in, has proven to be an unsuccessful strategy. There are, and always have been, too many references in our experiences of the immanent world as we believe to know it, to an uncharted yet fascinating realm of potential meaning that we are tempted to call 'yet another world.' Such references may root in either our innermost self (Augustine's 'interior intimo meo')[23] or our outermost self (Aquinas's 'quodammodo omnia')[24], in either a singular or a plural self. But do they prompt the hypostatization of such realm as 'a world beyond our world'?

While the former reason is mainly reactive, the latter is much more proactive. So let me point, in the briefest of words, to some examples from very different regions of philosophy. The first one hails from esthetic experience, that crucially hinges on the apprehension of so-called depth-clues in, e.g., literature, painting, or music. The experience of such clues (which, in painting, may be lines, shades of color, scattered patches, etc.; in music, sounds, silences, 'groove,' etc.) carries sensitive spectators into a space or realm that is definitely different from but also correlate to their vantage point. But they will not be inclined (or be able) to disguise this realm as 'mere projection,' even if it is 'the intentional object of

23 *Confessions* III, 6, 11.

24 *Summa Theologica* I, 16, 3. Note the difference with Aristotle's definition of the soul as 'in some way all beings'; *De Anima*, III, 4, 429, b 30-31.

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[esthetic] perception.'[25] The second example I derive from contemporary philosophy of science, in particular Van Fraassen's '(...) introduction of relationality, perspective, intensionality, intentionality, and the essential indexical into the discussion of science,'[26] indeed into the core of this discussion, namely the *practice* of modeling and measurement. The conditions for relating theoretical models to specific empirical situations always entail an 'ineliminable residue of the annihilation of the ego,'[27] i.e., a vantage point from which indexicality unfolds and to which 'the world out there' is a correlate. The more this vantage point is taken for granted as 'given,' the lesser the possibilities to disguise it as a projection. But this does not entail that there exists a second world corresponding to our representations. A third example has to come from, indeed, religious belief. Voegelin was not at all wrong in referring to the 'universal,' or in any case wide-spread human feeling that some overwhelming experiences in life only make sense if they are articulated from a source beyond direct perception, more specifically a form of agency to which these events may be attributed, albeit obliquely. But for many of them, this does not necessarily imply the belief in a transcendent world. In many African religions, for instance, ancestors who passed away are very much present in the world their worshippers live in. In Buddhism, what transcends suffering and death is a way rather than a world, a path of self-transcendence.[28] The sense of direction needed to follow this path does not entail the projection of a world by any standard, as it is indicated by what one has to leave behind rather than what one desires to achieve.

These short notes suffice to show that there may be scope for a conception of transcendence that evades the pitfalls of hypostatizing a transcendent world. Kelsen is satisfied with reclaiming the immanent world in the name of Modernity, disqualifying all references to transcendence as 'projections.' But this critique may well miss the point of the relationship between politics and religion. I propose to explore an alternative by taking our cue from Rousseau's idea of a 'civil religion.'

25 Cf. Roger Scruton, *The Aesthetics of Music* (Oxford: Oxford University Press, 1997), 108. 'What in the world is a work of music? In one sense the work of music has no identity: no *material* identity, that is. For the work is what we hear or are intended to hear *in* a sequence of sounds, when we hear them as music. And this – the intentional object of musical perception – can be identified only through metaphors, which is to say, only through descriptions that are false. There is nothing in the material world of sound that *is* the work of music. But this should not prompt those metaphysical fantasies that lead philosophers to situate the work of music in another world, or another dimension, or another level of being.' More on this in Bert van Roermund, 'Muziek. Tussen lijf en wereld,' *Filosofie Magazine* 11-9 (2002): 42-48.

26 Bas C. van Fraassen, *Scientific Representation: Paradoxes of Perspective.* Oxford: Clarendon Press, 2008), 3.

27 Van Fraassen, *Scientific Representation*, 87, quoting Hermann Weyl.

28 Cf. George Grimm, *Die Lehre des Buddho. Die Religion der Vernunft und der Meditation.* Ed. M. Keller-Grimm and M. Hoppe, New Edition (Baden-Baden: Holle Verlag, 1957), 5, 15 and passim. Kelsen (SR 24 n. 98) describes Buddhism as '(...) an atheistic philosophy of being, and specifically an atheist doctrine about a morally perfect life – an atheist ethics.' Thus, he does not regard Buddhism as a religion for the reason explained above: in Buddhism there is no transcendent world, hence no transcendence. Kelsen's model of transcendence cannot accommodate self-transcendence, i.e., transcendence as movement rather than destination.

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4 Rousseau and 'civil religion'

To learn how transcendence and immanence may become intertwined in an account of politics in Modernity it is instructive to contrast the notion of a secular religion as explained above with a seemingly related idea of a civil religion as we find in Rousseau. Rousseau started out in a Kelsenian vein. One may remember his firm intention in the first chapter of the earlier version of the *Social Contract*,[29] the so-called *Manuscrit de Genève*. 'Let us start an investigation where the necessity of our political institutions hails from,' he says.[30] This is one of these 'won't go away questions' that Blumenberg's Reoccupation Thesis aimed at: why are there political institutions rather than no political institutions? It is the kind of question that the Middle Ages put on the table of thought and which they answered by the category of creation – creation from nothing. Antiquity did not know that question. For Antiquity, the political question was 'What is the best regime?' not 'Why are there regimes in the first place?' But the latter question, also called the problem of theodicy in Modernity,[31] is very much Rousseau's question. And he really goes for reoccupation when he adds: 'Let us leave aside [in this investigation; BvR] the pious lessons of the various religions; their abuse generates as many crimes as their use can impede. Let us call on the philosopher to answer a question that the theologian has treated only to the detriment of mankind.'[32] So much for religion and theology, as far as Rousseau is concerned. But as we know, this first chapter disappeared from the scene in the final version of the *Social Contract*, while Rousseau retained the famous, or infamous, chapter on civil religion (though in a rather different version). How, then, should we read this last chapter of the published text? Why did he welcome religion after all, especially after his proto-Kelsenian denunciation?

In my reading,[33] the *Social Contract* is a tale of numerous failures, not because Rousseau was a bad thinker, but because the matter itself, our political institutions, fail to make the kind of sense that could launch them into the realm of truth, at least in principle. Let me briefly list some examples:

– Sovereignty of all citizens cannot be represented, but it has to be represented in and by the government (CS II, 1 and III, 1).

29 Jean-Jacques Roussseau, *Du Contract Social; Ou Principes Du Droit Politique. Oeuvres Complètes*, Tome III (Pléiade). Ed. B. Gagnebin, M. Raymond e.a. (Paris: Gallimard, 1762 [1964]). Hereinafter CS, with the number of the book and the chapter.

30 'Commençons par rechercher d'où nait la nécessité des institutions politiques.' Vgl. t. III, 281.

31 By Patrick Riley, for instance. See his *The General Will Before Rousseau: The Transformation of the Divine into the Civic* (Princeton, NJ: Princeton University Press, 1982) and Bert van Roermund, 'De algemeenheid van de wet en de singulariteit van het individu bij Rousseau [The generality of law and the singularity of the individual in Rousseau],' *Rechtsfilosofie en rechtstheorie* 18 (1989): 19-34.

32 'Laissons donc à part les préceptes sacrés des Religions diverses dont l'abus cause autant de crimes que leur usages en peut épargner, et rendons au Philosophe l'examen d'une question que le Théologien n'a jamais traitté qu'au préjudice du genre humain.' T. III, 286. *Oeuvres complètes*, t. III (Pléiade), 286 [my translation; BvR].

33 Cf. Bert van Roermund, *Volksvertegenwoordiging. Rousseau's 'Maatschappelijk verdrag' in de spiegel van de rechtsstaat* (Leende: Damon, 2000).

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- Constituent power is with the people, but they do not understand what their long term interests are; nor are they able to speak with one voice (CS I, 7 and II, 6).
- The social contract gathers people under the 'supreme guidance' of the general will; yet the general will does not disappear altogether if and when the social bond is dissolved (CS I, 6 and IV, 1).
- And perhaps most of all: in order for a people to enjoy the benefits of legislation, the people should be already prior to the laws what they are to become yet by the laws. Hence the importance of what he calls 'les moeurs' – the most important laws of them all (CS II, 7 and 12).

Part of Rousseau's reasons for having a civil religion in the first place is certainly this, that one needs a force to set people in motion and to keep them going, a force that, like the Lawgiver, works by persuading rather than convincing people, as they are not able to understand the arguments for or against their own decisions. Since Ancient Athens (Alkibiades), politics has been the art of persuasion if not seduction, and religious discourse has been a rich source of persuasion, as Rousseau saw very well (CS II, 7).

But there is more to his proposal for a civil religion than this. The first dogma of the civil religion is that the social contract is sacrosanct, as the end of CS IV, 8 explicitly states. Thus, no religion should rank higher than the social contract. If there is to be religion in society, it should not determine the order of that society in the final analysis. In other words, it should yield to this negative overlapping consensus, *that what is most holy to us personally will not determine how we behave socially;* a consensus which goes against the grain of any religion worthy of the name. In still other words, Rousseau was the first to hold that no religion is worth fighting for; but freedom of religion is. And as all freedom, it presupposes mutual recognition of preferences. Indeed, religion for Rousseau becomes a matter of preference, which is not to say that, by the same token, it has no place in the public realm. That is an altogether different matter. As far as he is concerned it may have a functional place as it may bring people in the right 'mood' for socially desirable behavior. If such a preference is shared and if the social order is consented to by and large, religion may become even dominant in the public realm. But this will remain contingent on preferences being shared, not on the truth of one specific religion being favored by government. The motivational force of civil religion should be geared completely to this awareness and to the ensuing attitude of tolerance. Tolerance as part of civil religion embodies a principled ban on state religion. It teaches that a religious dictate about state order received by religious authority and promoted by state authority, is incompatible with that very state order. This was something very hard to swallow for religious authorities in Rousseau's time. And I suspect that some religious denominations find it very hard to swallow in our time. They are the ones we call fundamentalist.

This, however, is not the end of the line yet, as far as civil religion in Rousseau is concerned. Rousseau had to solve a problem much bigger than the relation between the political order and religion. As we know, Rousseau was in favor of relatively small societies; in any case he was very much against the idea of the one

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big society of mankind, an idea he called 'theological' in the *Manuscrit de Genève* (I, 2), as we saw. However, here, as elsewhere, he is not very concerned about consistency. In order to demonstrate how his view would work out in practice, he refers to a very big and complex society from a respectable past, the Roman Republic.[34] Perhaps the size of the polity was of less importance to him than the fact that, by stressing modest size, he could show that polities come in the plural, *pace* the theological idea of a singular society. In this respect, he was very consistent. But it left him with the problem how the boundaries between these multiple polities would come about. The social contract model suggests that they come about by people agreeing to pursue their interests in common. However, by the social contract it cannot be decided who are to be parties to the social contract. Therefore, in order to achieve a form of self-inclusion that is credible in the eyes of other potential partners to the social contract, agents should relate, and be taken to relate, to a point transcending this specific nascent society, from where one can capture the targeted polity precisely as a bounded whole. One could say that, from a third person viewpoint, this point is always a projection from within this society, hence not entirely beyond society. But the point is that this projection cannot be tested against immanent reality from a first person viewpoint, i.e., from the viewpoint of the agents involved in forming the society in question. It is correlate with their attempt to draw a line, from the inside, around the referent of the indexical 'we' – a pronoun that is always used in speech acts by speakers who can only speak as a representative bit or on behalf of this referent. Indeed, there is no "we" that can say "we."[35]

In our time, Claude Lefort[36] has submitted the plausible thesis that this is a general logic of 'the political,' and that this logic governs each and every epistemological appeal in ordinary political practice. This is what he calls 'the permanence of the theologico-political.' There is always this reference to what is beyond 'us,' be it divine creation, the invisible hand of the market, the 'innate,' hence self-evident rights of man, the course of history, or right reason itself. In Western culture this epistemology grew to a predicament in Modernity, when the Christian religion

34 CS, IV, 4.

35 As Bernhard Waldenfels (following Benveniste) observes in *Verfremdung der Moderne. Phänomenologische Grenzgänge* (Göttingen: Wallstein Verlag, 2001), 139-40.

36 Cf. Claude Lefort, *Essais sur le politique (XIXe-XXe siecles)* (Paris: Du Seuil, 1986); idem, *Ecrire. A l'épreuve du politique* (Paris: Calmann-Lévy, 1992); idem, *Le temps présent. Écrits 1945-2005* (Paris: Belin, 2007); for in-depth analysis see Bernard Flynn, *The Philosophy of Claude Lefort. Interpreting the Political* (Evanston, IL: Northwestern University Press, 2006); Donald Loose, *Democratie zonder blauwdruk. De politieke filosofie van Claude Lefort* (Best: Damon, 1997); Fernand Tanghe, F (1991). 'Claude Lefort over het symbolische van recht en macht,' in *Wat maakt de wet symbolisch?*, ed. Willem Witteveen, Paul van Seters and Bert van Roermund (Zwolle Tjeenk Willink, 1991), 171-96."; André van de Putte, 'Macht en maatschappij. Cl. Lefort over democratie en totalitarisme,' *Tijdschrift voor Filosofie* 49 (1987): 395-433; Philip van Haute, 'Totalitarisme en democratie. Beschouwingen naar aanleiding van het werk van Freud, Nancy, Derrida en Lefort,' in *Deconstructie en ethiek* (Wijsgerige verkenningen, 11), ed. Philip van Haute and Samuel IJsseling (Leuven/Assen: Universitaire Pers Leuven/Van Gorcum, 1992), 147-65; Bert van Roermund, 'Populismus und Demokratie: eine Kritik auf den Spuren Leforts,' in *Am leeren Ort der Macht. Das Staats- und Politikverständnis Claude Leforts*, ed. Andreas Wagner (Baden-Baden: Nomos, 2013), 143-66.

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gradually vanished as the commonly accepted ontological offer one could not refuse if it comes to transcendence. What to do with a logic of transcendence when ontological transcendence is no longer credible? This is where, according to Lefort, totalitarian and democratic ideologies dovetail along radically different lines. Totalitarianism transforms ontological transcendence into ontological immanence. It promotes the idea that the whole of society is incorporated in the body of a special individual or a special group, the Führer or the party, who has the right to command in virtue of representing the whole. Democracy chooses a different form of embodiment. It preserves the logic of transcendence in a symbolic order that returns every reference to a point beyond society to the individuals in society who make the reference. For instance, in general elections, where the common good of the whole is at stake, we are all asked, as individuals, to isolate ourselves from all others in a voting box, where nobody can check to what we refer in casting our vote. The will of all as the approximation of the general will, as Rousseau would say, is cast in the mold of specific institutions. But this institution of general elections is dependent as much on individual decisions as it is on the discourse of common good, public security, general welfare, national product, internal market, and all these references to a bounded whole that we use on a daily basis.

The question then is whether both totalitarianism and democracy give form and substance to the epistemology of transcendence without an ontology of transcendence. Here I submit that only democracy does. Totalitarianism, according to Lefort's account of things, does not. It trades transcendence for immanent inequality: the Führer or the Party are not beyond the polity. While being part of it, they exclusively represent the polity as a whole. They represent it, literally, in the flesh, thus lending it ontological substance. Critical questions about their credentials are silenced in pure mysticism. If Voegelin would have detected gnostic features in totalitarianism, he would have mounted a stronger argument, and found a co-combatant in Kelsen. Be that as it may, we may now understand why Lefort does not agree to Arendt's account of totalitarianism, to wit that for totalitarianism ideology is relatively unimportant as its goal '(...) is not persuasion, but organization, the accumulation of power without the possession of the means of violence.' Lefort, by contrast, pointed out that in a totalitarian conception the party '(...) is not the main organization in the social field; rather it presents itself as above all reason of its monstrous pretension to be an emanation of the people and also that which causes the people to be a unity, a people as One.' Arendt, says Lefort '(...) denounced the myth of the One without considering the scheme of a new symbolic order. That is the reason why she has not measured the abyss that separates two forms of society: totalitarianism and modern democracy.'

In this conception, transcendence and immanence become intertwined. They are the poles from where would-be members of a polity intercept each other's references, so that neither of them commits one to a hypostatized world either immanent or transcendent. At the same time these references are prompted by the very fact that immanence and transcendence remain opposite poles. They can

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only be mutually constitutive if they remain apart or, rather, antipodes.[37] Let us call this 'thin transcendence.' Thin transcendence shapes, for instance, the relationship between human rights and democracy, where Lefort largely shares Habermas's better known view, that the two are equi-primordial: they are each other's necessary condition, but they are also each other's opposite poles. Taken to its limits, democracy will not acknowledge pre-established human rights, nor is respect for human rights compatible with democratic curtailment. In this sense they are opposites. But then it requires democracy to decide on the substance of these rights, while without these rights transcending the permanent wheeling and dealing of democracy, democracy runs the risk of growing to totalitarian madness. In this sense they are mutually conditional.

5 Thin secular transcendence and Kelsen

In a Rousseauist tradition, I submit, Lefort has defended the thesis that 'secular transcendence' does make sense, in spite of Kelsen's argument against it. Though it might be regarded a very thin sense, it does not boil down to analogy and figurative speech. We really do draw that line, from the inside, in actual political practice, thus creating an immanent polity; and we really refer to a point beyond this very polity we call ours in order to draw it in ways that are credible to those we consider to be our co-agents. Of course, in performing this act of self-inclusion we also exclude. We make a distinction between 'we' and 'others.' Here I have to add two caveats in order to curb critical objections that may take inspiration from Kelsen, namely that I am tacitly introducing Schmitt into the discussion.[38] Firstly, I do not collapse the distinction between we and the others into the distinction between friend and foe, as Schmitt did.[39] Secondly, from the fact that we have to draw a line in order to act politically I neither infer that we are justified in drawing it nor that we are not justified. Drawing the line belongs to the realm of what Lindahl has called 'a-legality,' the realm that enables us to differentiate between the legal and the illegal. It means, in practice, that every inclusion of the other comes with the exclusion of yet another other.[40]

Another Kelsenian objection against my thin view of secular transcendence may be that it boils down to a 'just so' argument about the plurality of polities. The argument would stress that it is a mere fact that people belong to this particular polity rather than to another; and that there is nothing transcendent to it. The appeal to all polities is to overcome this sheer facticity wherever it can afford to do so, and open up to others. This is a fallacy. Without political decisions there

37 This is also why this model does not collapse transcendence into a set of transcendental conditions. Elaborating on this would exceed the limits of this paper.

38 Lefort certainly gives rise to this objection as he writes under the title 'Permanence du théologico-politique'.

39 Although it is tempting to refer to Prodi, drawing the line around the EU so as to exclude 'the friends of the EU' from 'the members of the EU'.

40 Cf. Hans K. Lindahl. ed., *A Right to Inclusion and Exclusion. Normative Fault Lines of the EU's Area of Freedom, Security and Justice* (Oxford/Portland, OR: Hart Publishing, 2009); idem, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (Oxford: Oxford University Press, 2013).

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are no boundaries; there are, at the most, blurred zones of transition between societies. But political boundaries are razor sharp, as all asylum seekers know; lines in the mathematical sense of the word, only length, no width. Without these boundaries there is neither production nor distribution of the common good; there is, at the most, charity. The very word 'afford' in the phrase above presupposes already a political decision taken from the internal perspective of a polity, excluding those who have to stay outside in the very attempt of including some more in.

But what would Kelsen say to Lefort's argument, which I summarized under the heading of 'thin transcendence'? The first thing to note is that his theory of democracy is very close to Lefort's indeed. Lefort's famous dictum that in a democracy 'the place of power is empty'[41] conveys the idea that no agent has an ontologically warranted right to political power, even if no polity can exists without leadership. All power in the polity is provisional and should yield to majority rule. Majority rule, however, makes democratic sense only if, as Kelsen would say, the majority is allowed to pursue its will on condition that it leaves a minority an institutionally warranted chance to become majority.[42] In other words[43] the majority principle in Kelsen's interpretation undergirds the best chances for a minority to come into power, and by this token, the best practice of democracy in Lefort's sense.[44] It takes recourse to a transcendent source of power without implying a transcendent world that would warrant such source. The reference to transcendent agency ('the will of the people') is inevitable but bounces back to the various interest and pressure groups that make up the polity in its immanence, only to bounce back once more to this transcendent will of the *demos* that cannot be represented. Thus, the 'demos' of democracy only exists in so far as it is represented by the representatives elected, even though it is conceived, by these representatives, as the source beyond all private interests which their mandate hails from.

The second thing is that, arguably, 'thin transcendence' – reference to a transcendent realm that is not ontologically warranted – is a fair characterization of what

41 Cf. various contributions to Andreas Wagner, ed., *Am leeren Ort der Macht. Das Staats- und Politikverständnis Claude Leforts*. Staatsverständnisse, 54 (Baden-Baden: Nomos, 2013), e.g., by Raf Geenens (cf. 64 note 51 for references to Lefort's work) and by myself at 150ff.

42 Cf. Hans Kelsen, 'Staatsform und Weltanschauung,' in *Die Wiener rechtstheoretische Schule*, vol. 2 (Vienna: Europa Verlag, 1968 [1933]), 1923-42, at 1929. Cf. ibid., 1940.

43 Those of Quoc Loc Hong, *The Legal Inclusion of Extremist Speech* (Nijmegen: Wolf Legal Publishers, 2005), 149ff.

44 Hans Kelsen, 'Zur Soziologie der Demokratie,' in *Die Wiener rechtstheoretische Schule. Schriften von Hans Kelsen, Adolf Merkl, Alfred Verdross.*, ed. H. Klecatsky, R. Marcic and H. Schambeck (Wien/Salzburg: Europa Verlag/Pustet, 1926), 1729-41, at 1737: 'In der Demokratie steht das Problem der Führerkreation im Mittelpunkt rationaler Erwägungen, Führerschaft repräsentiert keinen absoluten, sondern nur eine relativen Wert, der Führer gilt nur für eine gewisse Zeit und nur nach gewissen Richtungen als solcher; er ist im übrigen den Genossen gleich und untersteht der Kritik.' Cf. idem, 'Demokratie,' in *Die Wiener rechtstheoretische Schule. Schriften von Hans Kelsen, Adolf Merkl, Alfred Verdross*, ed. H. Klecatsky, R. Marcic and H. Schambeck (Vienna/Salzburg: Europa Verlag/A. Pustet, 1927), 1743-76, at 1763: 'Da Führerschaft in der Demokratie keine übernatürliche Qualität ist, sondern man zu Führer gemacht werden kann, ist Führerschaft auch nicht dauerndes Monopol eines Einzelnen oder einiger Weniger.'

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Kelsen's idea of the *Grundnorm* tries to convey. As Paulson has convincingly argued,[45] rather than being a 'ground' of legal cognition provided by transcendental argumentation,[46] the *Grundnorm* explicates the core of what legal scholars claim if and when they take a normative slant on legal norms from an epistemological viewpoint. They presuppose the validity of a highest norm, in virtue of which a legal order may be said to 'exist' as a *normative* order. Though Kelsen, initially, refers to this presupposition as a 'hypothesis,' I submit that this is misleading. In the strict sense of the word, hypotheses of legal scholars regard the content of the highest norm, i.e., the constitutional coherence of some specific legal order. The basic presupposition they adumbrate tacitly in doing what they do, i.e., in framing their hypotheses, is something entirely different. In a sense, it is a 'pragmatic' presupposition, but then it is the presupposition of a praxis that is geared towards acquiring reliable knowledge of a legal order qua order of norms. It is the praxis of an epistemic endeavor, for which there is no higher physical or moral 'reality' to turn to.[47] This is why Kelsen, at a later stage,[48] chose to refer to Vaihinger's notion of a 'fiction.' In Vaihinger's 'Philosophie des Als ob' a fiction is a discursive construct that is not only at loggerheads with reality, but also self-contradictory.[49] The idea of a 'highest norm' (i.e., a constitution) is indeed self-contradictory in virtue of Kelsen's own definition of a norm. It cannot derive its validity from a higher (power conferring) norm, as would be required for it to be a norm in the first place. Hence, it can only be valid in virtue of the shared presupposition that it is valid. In other words, the idea of the *Grundnorm* is a way of saying that legal argumentation and cognition are ultimately framed by this shared presupposition of the constitution being valid. Only against this backdrop legal scholars may reasonably agree or disagree on the 'right answer' to the juridical question 'If <A, B, C,...> is the case, what ought to be done by agents *X, Y, Z*, according to legal order L?'[50]

In sum, and once more, the idea of the *Grundnorm* expresses the reference to a normative vantage point that transcends the hierarchy of posited norms found valid in virtue of the competence by which they are set, and it intercepts such references by turning this point into the innermost presupposition of the agents

45 Cf., a.o., Stanley L. Paulson, 'The Great Puzzle: Kelsen's Basic Norm,' in *Kelsen Revisited. New Essays on the Pure Theory of Law*, ed. Luís Duarte d'Almeida, John Gardner and Leslie Green (Oxford: Hart Publishing, 2013), 43-62.

46 Of either Kantian or Neo-Kantian offspring.

47 Vgl. Hans Kelsen, *Reine Rechtslehre. Mit einem Anhang: Das Problem der Gerechtigkeit*. 2nd revised edition (Wien: Deuticke, 1960), 204: 'In der Voraussetzung der Grundnorm wird kein dem positive Recht transzendenter Wert bejaht.'

48 Most explicitly in Hans Kelsen, *Allgemeine Theorie der Normen*. Hans-Kelsen-Institut. Ed. Kurt Ringhofer and Robert Walter (Vienna: Manz, 1979), 206f.

49 Hans Vaihinger, *Die Philosophie Des Als Ob : System Der Theoretischen, Praktischen Und Religiösen Fiktionen Der Menschheit Auf Grund Eines Idealistischen Positivismus*. Mit Einem Anhang Über Kant Und Nietzsche. 8. Aufl., (Leipzig: Meiner, 1922) 24.

50 Further arguments on Kelsen's notion of validity in Bert van Roermund, 'Objectifying Legal Norm Claims: Validity and Self-Reference,' in *Kelsen Revisited. New Essays on the Pure Theory of Law*. Ed. Luís Duarte de Almeida, John Gardner and Leslie Green (Oxford: Hart Publishing, 2013) 11-42.

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attempting an epistemic take on such a hierarchy. And so, I submit, we find the most feasible account of transcendence in the polity at the very heart of Kelsen's theory.