DOI: http://dx.doi.org/10.5235/09615768.25.1.19 (2014) 25 KLJ 19–33

# Articles

# Kelsen and Blumenberg: The Legitimacy of the Modern Age

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*'You ought to φ'*
*'Says who?'*
*'Says I'*

## A. INTRODUCTION

To many it seems plausible, or at least inconsequential, to accept the idea that our concept of normativity is but a secularised version of a fundamentally theological idea. However, if this were the case, the existence, or, more importantly, the non-existence of God would be of the utmost importance. In this case our secular concept would indeed be incomplete and the commonly experienced difficulty of making sound sense of a statement like 'A ought to φ' would be down to the simple fact that without a divine legislator the 'oughtness' of such a statement would lack a sufficient objective grounding. It would hang in mid-air.

So for those of us who do not believe that God exists, or who think his existence or non-existence should not play a role in determining the range of things we ought and ought not to do, the secularisation thesis must be deeply troubling.

Now, the difficulty concerns not only normativity and validity, but all core concepts of the conceptual inventory of the modern age—autonomy, personality, reason, community, history and progress, to mention just a few. If they are but secularised versions of fundamentally theological concepts, then the prime theological fact—the existence of God—must be relevant for them. It is in this sense that the problems of the claimed secularisation of a theological estate and the problem of the legitimacy of the modern

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age are inextricably linked: the thesis of secularisation, however harmless it may seem, is a thesis principally directed against the legitimacy of the modern age.

Still, there is hardly a political theorist who has not at some point in his intellectual life alluded to or straightforwardly made the claim that some or all of our modern concepts are but secularised variants of originally theological concepts. Take Weber's thesis that modern capitalism is, at least in spirit, a secularised version of Calvinism's views on predetermination and salvation; or Marx's claim that the forms and institutions of our modern, liberal, democratic state are but secularised, and thus equally deficient, yet even more deceptive variants of an originally religious anaesthetic, lulling people into accepting prevailing injustice and that 'indeed, it is not the so-called *Christian* state, which recognises Christianity as its basis, its state religion … that is the perfected Christian state, but rather the *atheistic* state, the *democratic* state that is the perfected Christian state';[1] take Schmitt's claim that all significant concepts of modern theory of the state are secularised theological concepts; or Anscombe's claim that our modern normative vocabulary of moral duties and moral oughts is an illegitimate remnant of a theological system conceptually dependent on a now absent divine lawgiver; or the idea that the modern work ethos is a secularisation of Christian self-denial; or the idea that modern conceptions of equality are secularised version of equality before god; or the idea that modern concepts of human rights and universal human dignity are secularised version of the *imago dei* principle; or the idea that modern concepts of legitimate political domination cannot be derived from contractual grounds, from right and liberty but are all varieties of divine domination and cannot be explained otherwise; or Löwith's idea that the Marxist prophecy of the communist millennium is a secularised version of the last judgement and that all philosophies of history are secularisations of Christian eschatology; or Vögelin's claim that modernity is but an outgrowth of the greatest and most dangerous Christian heresies, namely Gnosticism. The list could go on and on.

Now, whatever judgement these theories—which are mostly presented *en passant* and rarely bear the weight of sustained argument—deliver on the legitimacy and applicability of our modern vocabulary, it remains a curious fact that arguments of this kind have a strangely satisfying and soothing effect on people who read a lot. The secularisation thesis reassures us that despite the fact that the modern age has to understand its own beginning as a harsh caesura with the past and, indeed, to define itself in opposition to antecedent ages, we can still muse on some deep undercurrents that intimately connect the modern age with the middle ages and antiquity.

All this taken together—(i) the intellectual lure and surface plausibility of the various secularisation theses, (ii) the seeming harmlessness of such rumination purely in the field of the history of ideas, and (iii) their inherent dangerousness—can help us understand what drove Hans Kelsen to write one of his strangest books, *Secular Reli-*

1 Karl Marx, 'On the Jewish Question' in J O'Malley (ed and trans), *Early Political Writings* (Cambridge University Press, 1994) 28, 38.

*gion*.[2] In this book Kelsen tries to secure the legitimacy of the modern age *ex negativo*, by minutely refuting each and every attempt to de-legitimise the modern age known to him; he consequently finds himself in the strange position of having to defend Nietzsche against Heidegger and Marx against Löwith. Of course, Kelsen himself was neither a Nietzschenean nor a Marxist. However, the attacks of Heidegger and Löwith must have appeared to him to be so dangerous that he found himself forced to defend at least the possibility of a Nietzschenean and Marxist standpoint.

As a piece of philosophic literature *Secular Religion* is so peculiar that Kelsen himself did not want to see it published in his lifetime.[3] That it appeared nonetheless is to be credited to the courageous decision of the Hans Kelsen Institute in Vienna, which made an undoubtedly difficult yet correct call. After all, apart from making some substantially interesting arguments, this work at least makes clear where Kelsen (who himself was not hostile to *analogies* of secularisation) stood on this matter, ie that he thought that a transformation of heuristic *analogies* into a fully fledged *thesis* about the permanence of a historically secularised essence is not only illegitimate but dangerous.

What remains unclear, however, is whether Kelsen in *Secular Religion* chose the *via negativa* for want of better alternatives or rather precisely because he was aware of the precarious state of the modern age, according to which any *positive* demonstration of its legitimacy has to be excluded as it would have to make reference to anti-modern tropes.

After all, asking for the 'legitimacy of modernity' already points squarely at the crux of the problem: asking for *legitimacy* requires as a possible answer some historical mediation, some genealogy, some continuity of whatever form. Legitimacy is a *diachronical* category. *Modernity*, in contrast, fundamentally denies the need for such a historical mediation. Asking for the legitimacy of modernity must therefore, if it does not want to end up in a paradox formulated as a question, be the question for how an age that denies the need for legitimation can be legitimate.

Now this is precisely the dilemma with which Hans Blumenberg struggled in his work *The Legitimacy of the Modern Age*,[4] which first appeared in 1966 and re-appeared in 1999 with extensive replies to critics. The problem he is tackling is the legitimacy of an epoch, which itself must not ask questions of legitimacy, as it would thereby be driven beyond its own horizon of justification, yet it is confronted with the question of

2 Hans Kelsen, *Secular Religion: A Polemic against the Misinterpretation of Modern Social Philosophy, Science and Politics as New Religions*, R Potz, C Jabloner and K Zeleny (eds) (Springer, 2012).

3 A discussion and assessment of the reasons Kelsen might have had for recalling the finished work from print can be found in the preface to *Secular Religion* and in Iain Stewart, 'Kelsen, the Enlightenment and Modern Premodernists' (2012) 37 *Australian Journal of Legal Philosophy* 251.

4 Hans Blumenberg, *The Legitimacy of the Modern Age*, Robert M Wallace (trans) (MIT Press, 1985). For an introduction see Laurence Dickey, 'Blumenberg and Secularization: "Self-Assertion" and the Problem of Self-Realizing Teleology in History' (1987) 41 *New German Critique* 151 (Special Issue on the Critiques of the Enlightenment); Robert Pippin, 'Blumenberg and the Modernity Problem' in *Idealism as Modernism* (Cambridge University Press, 1999); Robert M Wallace, 'Progress, Secularization and Modernity: The Löwith-Blumenberg Debate' (1981) 22 *New German Critique* 63 (Special Issue on Modernism).

legitimacy in the form of the thesis of secularisation. The thesis of secularisation thus sets the modern age a trap by setting up the alternative for it of either defending its own legitimacy and thus relying on counter-modern resources or not defending it and thus opening up the doors for counter-modern sources of legitimacy. A possible defence of modernity against its enemies thus cannot proceed in a straightforward manner but has to argue *obliquely*: either (i) one follows a *via negativa* and tries to refute each and every strategy of de-legitimation individually; or (ii) one demonstrates that these strategies of de-legitimation are all mistaken since they burden the modern age with questions which are at the same time unanswerable and non-pertinent.

In this paper I am going to try to demonstrate *cum* Blumenberg that Kelsen's Pure Theory is a legal theory, which both accepts and masters the challenge of producing a thoroughly *modern* legal theory. In this self-reflection and self-assertion in terms of a history of ideas the Pure Theory still stands unchallenged.

## B. THE CONTEXT OF SECULARISATION

Let us begin by introducing two concepts of secularisation which will not directly engage us in this paper. The first is a concept of secularisation that is used in *legal history*; in this context 'secularisation' can either mean the appropriation of ecclesiastic property by the secular powers or simply the on-going separation of state and church. The second is the concept of secularisation used in *sociology*, where it refers to the empirically perceivable retreat of religious practices in societies and the hollowing out of the relevance of religious norms of action.

We are not going to concern ourselves with these two forms of secularisation. What we are focusing on is a third concept of secularisation, which understands secularisation in terms of the *history of ideas*. The idea of secularisation here is the following: 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.

Attached to this idea of the inheritance of a conceptual universe, which is missing its dominant signifier, of a ship without a captain, are a host of ideas about the resulting illegitimacy of modernity. We can construct the following typology of de-legitimation consisting of increasingly pessimistic theses about the relation of the modern age and the theological universe:

(a) 'The modern age is *unthinkable* without Christianity.' This is the weakest form of a secularisation thesis, if it is to be considered a secularisation thesis at all. What it claims is simply that we can only understand the modern age in the light of its Christian antecedent.

(b) 'The modern age *was* incomplete.' According to this claim, secularised theological concepts used to form a part of the modern vocabulary and thereby threatened its legitimacy. However, in the meantime they have all been replaced by unsuspicious ones. People who hold this thesis would claim that in Kantian terms we live in an *enlightened age*.

(c) 'The modern age *is* incomplete but inherently completable.' This thesis claims that there are still theological concepts at the heart of the conceptual inventory of the modern age and that even though we might not have been able to jettison all of them, we are on the right track and principally capable of completing modernity. Modernity is a yet unfinished project. Again, in Kantian language: we live in an *age of enlightenment*.

(d) 'The modern age is a *mirage*.' According to this thesis the modern age is incomplete, yet inherently not completable. The secularised theological concepts that lie at its core are *both* essentially theological, *and* central and irreplaceable for the modern age. Modernity is thus a fundamentally incoherent project. We cannot complete modernity without overcoming it. Modernity thus pretends to be able to deliver something which it cannot deliver. It is a dead end, a *Holzweg*. Somewhere in history, we took a wrong turn. What we should do is give up this entire project of modernity and start anew.

(e) 'The modern age is *ruinous*.' The modern age is a ruin, ie the concepts and institutions of modernity are but the remnants of a formerly complete and comprehensive cultural and conceptual universe. There is something dead about modernity. GEM Anscombe, for instance, thinks that we have retained a concept of normativity which is oriented on a divine lawgiver and pointless without such a lawgiver.[5] While the divine lawgiver has vanished, the normative concepts dependent on him have remained. These concepts are thus empty shells, at best pointless, at worst confusing and harmful. We have to jettison these concepts and develop new ones derived not from a divine lawgiver but from facts about human psychology. Of course, a hundred years earlier Nietzsche pondered the same issue and came to the conclusion that it is not as easy to jettison these ideas. It will take another thousand years to come to terms with the fact that *God has died*. Our entire thinking, our language, our grammar, our epistemology is stung by the theological sting.

(f) 'The modern age is *deceptive*.' It is not only the case that modernity is incoherent and thus cannot be completed, it also pretends to be able to finally deliver truth and justice. All it does, however, is present us with old wine in new bottles. Marx, for example, argues that the modern liberal state and its ideas of justice are a mere secularisation of religious narratives of salvation. Both modern political justice and

5 See GEM Anscombe, 'Modern Moral Philosophy' (1958) 33 *Philosophy* 1.

religious salvation are imaginations, and whereas in religious thought true human satisfaction is postponed to the afterlife, in the modern secular state true human satisfaction is declared to have already been achieved, albeit in the abstract realm of rights, the rule of law and personality. These concepts are just as fictitious as is the idea of a Garden of Eden. Actually these modern, secularised concepts are even more devious as it is harder to see through their unreality. In any case they form part of a narrative, which serves the ultimate purpose of appeasing and anaesthetising people, and offering them 'political emancipation', in order that they do not demand actual human emancipation.

(g) 'The modern age is *heretic*.' It is not only the case that modernity is chimerical, ruinous and deceptive, it is also a *work of the devil* insofar as it is the outgrowth of the most dangerous of Christian heresies, namely Gnosticism. This is the view of authors like Vögelin.

Modernity carries within itself a certain reserve as concerns legitimation; its essence lies in rejecting the previous standards of legitimation as exaggerated and metaphysically overexerted. At the same time, however, it cannot, on threat of inconsistency, satisfactorily and conclusively demonstrate the illegitimacy of the previous, excessive standards of legitimation. Its demonstration of the illegitimacy of these standards can thus only ever claim a lesser degree of legitimacy than the criticised maintenance of the higher standards of legitimacy. Modernity thus must not sufficiently justify the unjustifiability of over-stretched campaigns of justification if it itself does not want to attract the charge of over-exerting its justificatory powers. This is why the modern age holds within it a deficit, a gap, which it can only fill by means of a simple *assertion*.

Accordingly, in his *Secular Religion* Kelsen tries to demonstrate the legitimacy of modernity negatively, by refuting *all* attempts to de-legitimise the modern age. This is what makes the book so troubling from an argumentative point of view. After all, a justification by refuting all possible refutations can at best only ever be provisional.

That Kelsen chose this strategy is even more surprising as in the Pure Theory one can find lines of argument which are less defensive and negative yet which do not gloss over the troubles inherent in defending the modern age. There are two lines of argument we are going to pursue here: one is the Kantian argument that demands a transition of a theocentric to an anthropocentric paradigm of validity; the second is a by and large Blumenbergian refusal to answer a question of legitimacy that relies on pre-modern criteria, a refusal which finds its expression in the Basic Norm.

## C. KELSEN AND KANT: THE ANTHROPOCENTRIC VIEW OF LAW

A kind of secularisation thesis can, of course, also be found at the heart of Kant's critical philosophy. To be sure, Kant does not attempt to undermine modernity, but aims to sketch out with more clarity and detail the contours of a completion of the modern project by highlighting the theological, pre-modern remainders in our everyday epistemological model and by indicating a way to rid ourselves of these remainders.

The point that Kant makes is that in our everyday model of knowledge we essentially rely on the idea of god as a regulative idea. Henry Allison put it as follows:

> By such a [theocentric] model I understand a programme or method of epistemological reflection, according to which human knowledge is analysed and evaluated in terms of its conformity, or lack thereof, to the standard of cognition theoretically achievable by an 'absolute' or 'infinite intellect'. By the latter I understand one that is not encumbered by the limitations of the human intellect, and which, therefore, knows objects 'as they are in themselves'. Such an intellect functions in this model essentially as a regulative idea in the Kantian sense. Thus the appeal to it does not commit one either to the existence of such an intellect or to the assumption that knowledge of this type is actually possessed by the human mind. The point is only that a hypothetical 'God's-eye view' of things is used as a standard in terms of which the 'objectivity' of human knowledge is analysed.[6]

Implicitly, we all carry within ourselves a model of knowledge according to which our representations of the world are true if and only if they correspond with the things as they actually are in themselves. It is hard for us to even conceive of an alternative model of truth and knowledge. However, only an absolute intellect has access to the things as they are in themselves, independently of our apperception. In our ordinary, everyday model of knowledge, and be it a thoroughly empiristic or naturalistic one, we thus implicitly refer to a divine point of view—a point of view, however, which we can never inhabit. Sceptical arguments, which deny the possibility of any access to truth, rest their plausibility precisely on this difference between a divine and human point of view. The refutation of the sceptic thus does not consist in the demonstration of a flaw in his argument, but in the rejection of the standards of true knowledge that he presupposes.

Conversely, the *Critique of Pure Reason* tries to develop a theory of knowledge purely from the human point of view, ie a theory of knowledge which at no point makes use of a divine point of view. The major task of such a theory consists in re-interpreting the object of knowledge from the thing in itself to a phenomenal object of cognition so that

> the cognitive structure of the human mind is viewed as the source of certain conditions which must be met by anything that is to be represented as an object by such a mind.[7]

6 Henry Allison, *Kant's Transcendental Idealism: An Interpretation and Defence* (Yale University Press, 1983) 19.

7 *Ibid*, 29.

Now, the Pure Theory, too, is an attempt to overcome the implicit and hidden theocentric convictions in our understanding of legal validity and to reach a thoroughly anthropocentric understanding of the positive law.

Let it be noted at this stage, however, that Kelsen, in contrast to Kant, was of the opinion that the category of the ought, just as the category of being, is not further analysable. As is well known, Kant, in contrast, tried to demonstrate in his Groundwork that 'I *ought* to φ' can only mean 'I already *want* to φ under the conditions of rationality'. 'I ought to brush my teeth' thus means: 'given that I *want* to look, smell and be healthy, and given that I am a rational agent and given that brushing my teeth is necessary for looking, smelling and being healthy, I already *want* to brush my teeth.' Similarly 'I ought not to steal' means: 'given that all wanting already means wanting to consider myself a free and rational agent in all of my acts and given that in wanting to steal I cannot possibly consider myself a free and rational agent, I already *do not want* to steal.'

It is equally well known that Kelsen thought precisely this 'condition of rationality' problematic. After all, rather than being a solution it is a formulation of the original problem and leads us back into metaphysics, since in this 'condition of rationality' God is used quite straightforwardly as a regulative idea. Kelsen thus accuses Kant of not having applied the same anti-metaphysical rigour in his practical philosophy as he used in his theoretical philosophy.

But if the 'ought' in 'A ought to φ' is unanalysable and the other elements in this statement are mere variables, how can such a statement ever be understood? According to Kelsen, such a statement can only be understood in its relation to other ought statements, ie statements which regulate the creation of norms and thus the mediation of is and ought. Viewed entirely from the human point of view, only man can be legislator, can be the mediator of is and ought. Only a norm, be it a legal or a moral norm, which authorises the creation of another norm, can illuminate the meaning of this created norm *as* norm. This is what Kelsen called the 'objective meaning' of a norm, ie the meaning of a norm which is only illuminated in the light of another norm, a norm that authorises its creation. This meaning is, to be sure, the only meaning of a norm. This means that in an anthropocentric model of validity no norm can be valid in isolation, no norm can be valid in and for itself. 'A ought to φ' thus means that A ought φ under the condition that 'A ought to φ' has been enacted by a competent organ (which could very well be a moral organ). More cannot be said about this if we do not wish to enter metaphysics.

The objective meaning of norms therein always already presupposes a basic norm. By *presupposing* the basic norm, however, it is not meant that whenever I want to furnish a norm with objective validity I only have to presuppose a fitting basic norm (as if it were an antecedent psychological act), but rather that, as soon as I pose the question of the objective validity, as soon as I have understood this question, I have already presupposed the basic norm. The presupposition of the basic norm is not a psychological act,

but a logical relation in the sense that the objective validity presupposes the validity of the basic norm.

## D. KELSEN AND BLUMENBERG: MODERNITY AS THE SECOND OVERCOMING OF GNOSTICISM

However, in isolation such a solution of the problem of validity in terms of *legal theory* remains sterile and leaves a feeling of dissatisfaction. This feeling of dissatisfaction, in turn, however, is not born out of a deficiency of this solution in terms of legal theory, but of a misunderstanding at the level of the history of ideas:

> By trusting that it had to give a definite answer to the questions raised by the overcoming of natural law, an answer that differs from the answer given by natural law, the prevailing doctrine in jurisprudence has fundamentally misunderstood the meaning of this overcoming of natural law, which does actually consist in rejecting all questions of the fundamental ground of validity of the legal order, for a further justification of the law by means of a higher order and in postulating the legal order as the highest order, i.e. as an order which cannot be derived from another order, as sovereign order.[8]

What Kelsen here alludes to is that the most basic question about legal validity cannot be solved by an *answer* but by a *rejection of the question*.[9] He thus hints at the transformation of a problem of legal theory into a problem of the history of ideas, a transformation, however, which he delivers neither in his *Pure Theory* nor in his *Secular Religion*.

To be sure, the performative act of 'a rejection of the question' alone cannot do all the work. What is needed is a theory of modernity that is sufficiently grounded in the history of ideas. And despite his efforts in *Vergeltung und Kausalität*,[10] in *Society and Nature*[11] and finally in *Secular Religion*, Kelsen has not delivered such a theory. It is Hans Blumenberg who produces what Kelsen only hints at: the rejection of the question has to be historically grounded and it can only be grounded in a demonstration that in these kinds of question the modern age asks something of itself, which it neither can nor has to ask of itself, that it expects an answer to a question, which is not its own question.

8 Hans Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts* (Mohr Siebeck, 1920) 88.

9 It may on a superficial reading appear that Hart has put forward a similar argument in his claim that asking whether the rule of recognition is valid is as pointless as asking whether the metre bar in Paris is actually one metre long. However, Hart's argument differs from Kelsen's. What he does is to invoke a convention, a collective stipulation, and to claim that such manoeuvres do not allow for the question of correctness. Kelsen and Blumenberg, conversely, try to resolve the question of the validity of the basic norm in terms of a history of ideas. See HLA Hart, *The Concept of Law* (Oxford University Press, 1961) 106.

10 Hans Kelsen, *Vergeltung und Kausalität. Eine soziologische Untersuchung* (WP Van Stockum en Zoon, 1941). See also Hans Kelsen, 'Causality and Retribution' (1941) 8 *Philosophy of Science* 533.

11 Hans Kelsen, *Society and Nature: A Sociological Inquiry* (Lawbook Exchange, 2009).

As the comprehensive, and rather exuberant, learnedness of Blumenberg's *The Legitimacy of the Modern Age* makes a detailed introduction to this work futile, all that remains for us is to do is to isolate the arguments relevant to our purpose. In this context Blumenberg provides at least three loosely connected arguments: (1) The secularisation thesis rests on an incoherent concept of 'world', a concept which, furthermore, is itself the result of a secularisation within Christianity. (2) The illegitimacy of the modern age is an illusion created by the secularisation thesis and the ideas of trans-epochal questions that come with it; the questions which the modern age asks itself in the discourse of secularisation are overblown, excessive questions which necessarily lead into error. (3) The modern age does not consist in the secularisation of Christian content, but in the self-assertion of man and his curiosity in a world which has been identified by Christianity as being godforsaken.

(1) The *concept of world* employed by the secularisation thesis — According to Blumenberg the idea of secularisation presupposes a concept of world which is highly problematic. He illustrates this by quoting Hannah Arendt:

> Whatever the word 'secular' is meant to signify in current usage, historically it cannot possibly be equated with worldliness; modern man at any rate did not gain this world when he lost the other world, and he did not gain life, strictly speaking, either; he was thrust back upon it.[12]

The main point here is the following: what we want to describe with the concept of secularisation, ie the loss of the 'other world' and the gaining of 'this world', itself has repercussions for our understanding of the concept of what a 'world' is. Secularisation thus cannot possibly be understood as a calm transition of an enduring essence or a unified function from an ecclesial into a secular hand. Thus, insofar as the secularisation thesis wants to convey more than just the loss of the influence of religion, the secularisation of a theological substance or function necessarily transforms this substance or function in such a way that we can no longer speak of a 'secularisation' of anything that remains constant. This highlights the fundamental contradiction in the secularisation thesis, which tries to claim two things at the same time: a radical change of world and an identity. Thereby it 'introduces into our understanding of history the paradox that we can grasp the modern age's basic characteristic of "worldliness" only under conditions that, precisely on account of this quality, must be inaccessible to us'.[13] In actual fact the secularisation thesis is not in earnest with the change of world but rather, in the name of functional and substantial identity, aims at revealing the change of world as a pseudo-change and wants to convict modernity's differences from the religious age of a fundamental deficiency.

12 Hannah Arendt, *The Human Condition* (University of Chicago Press, 1958) 320 cited in Blumenberg (n 4) 9.

13 Blumenberg (n 4) 10.

> The illegitimacy of the result of secularisation resides in the fact that the result is not allowed to secularise the process from which it resulted. For the hermeneutic function remains legitimate only as long as it lays open to self-consciousness what is hidden from it, convicts it of having been subject to the illusion of autonomous presence, and thus binds it to the newly disclosed dimension.[14]

Thus it is not the case that modernity was a secularisation of Christianity but rather that this, what we now call secularisation, is the emergence of a genuinely secular element from within Christianity (for instance of stoicism)[15] which was present in Christianity from the very beginning. This means that secularisation is not a renunciation of the essence of Christianity, but the very realisation and actualisation of it. 'What might appear to be a secularised reconstruction can always be the worldly original itself again.'[16]

Thus when we speak about modernity as a secularisation as a 'making worldly' of Christianity, we therein presuppose a very certain Christian sense of 'unworldliness'. Of course, the question is how precisely to understand this unworldliness. Blumenberg thinks that the platonic/neoplatonic concept of transcendence has superimposed the genuinely Christian un-worldliness with a spatial 'outer-worldliness'. This misunderstanding still determines our concept of secularisation: what has been outside this world is taken into this world. 'Only something, which by virtue of its descent or specificity is taken to be extraworldly, can be secularised (made worldly).'[17] Secularisation can thus only be understood as a kind of transformation of an essence from one world to the other. However, the Christian unworldliness was of a totally different kind: 'An interest in the world is not just put into question by the presence of an alternative; rather it is robbed of all meaning because no time remains for the world.'[18] Thus, the Christian unworldliness is an absolute one, a hermetic one, one which has no 'outer'. In the original Christian sense there is nothing there that can be secularised. It was only the deferment of the Parousia that made space for transcendence and thus also for a 'this world' (*Diesseits*). What made possible the acceptance of the further existence of world, a further existence which was fundamentally at odds with revelation, was not the idea that this, which ought to have happened, was projected into the future, but the claim that *it had already happened*, albeit on a different level. 'If one wished to characterise the process I have outlined as one of "secularization"—even though historically it does present itself

14 *Ibid*, 18.

15 Blumenberg here refers to Dilthey, who praised the Stoic tradition against Aristotle. According to Dilthey the following were of importance: 'the precedence that it gave to ethics and its instrumentalisation of physics for that end, its logic of hypothetical inferences, its anthropological model of the wise man as the invulnerable and inaccessible autarkic subject, the inaccessibility of consciousness to physical contingency and empirical uncertainty.' *Ibid*, 39.

16 *Ibid*, 39.

17 *Ibid*, 42 (translation altered by C Kletzer).

18 *Ibid*, 42 .

in an unexpected place—then in any case it would be not the secularization of eschatology but rather secularization by eschatology.'[19]

We can sum up as follows: the thesis of secularisation claims that an ecclesial content is transformed into a worldly content. However, by 'worldly' we make reference to a world which only emerged in Christianity as it became necessary to deal with the deferment of the Parousia. The secularisation thesis presupposes a two-world cosmos. This, however, is the result of a complex history. In order to speak of secularisation at all we need a concept of worldliness. This concept, which is assumed by the secularisation thesis to be simply given, is itself a result of an inner-Christian secularisation by eschatology, ie of the need to deal with the illegitimate continued existence of the world.

(2) *'Big' questions* — Blumenberg claims that Christianity itself was forced by the deferment of the Last Judgement to make place for a worldly world. Now, the modern age inherits, if not the world, then the space which was made available to it. With this space it also inherits the possible answers and with them the associated overblown questions of the Christian epoch.

> The modern age accepted problems as set for it that the Middle Age had posed and supposedly answered but that had only been posed precisely because the people thought they already possessed the 'answers'.[20]

In contrast to this we have to

> free ourselves from the idea that there is a firm canon of the 'great questions' which throughout history and with an unchanging urgency have occupied human curiosity and motivated our world- and self-interpretation.[21]

Rather, each epoch asks its own questions. By questioning the modern age in relation to its legitimacy we ask a question which does not belong to the modern age; we ask an anachronistic question, a question in the overcoming of which the modern age consists.

Now, the problem is that the modern age cannot get rid of this question of legitimacy simply by claiming not to be able to cope with the question, since 'every attempt at resignation with respect to the unknowable then meets with the reproach of being "positivist"'.[22] And it is precisely this reproach that Kelsen faces.

> Thus, as we know, the modern age found it impossible to decline to answer questions about the totality of history. To that extent the philosophy of history is an attempt to answer a medieval question by means available to a post-medieval age. In this process, the idea of progress

19 *Ibid*, 45.
20 *Ibid*, 48.
21 *Ibid*, 65.
22 *Ibid*, 48.

> is driven to a level of generality that overextends its original, regionally circumscribable and objectively limited range as an assertion.[23]

To speak of legitimacy of the modern age only makes sense when this legitimacy is contested.

If one, however, prefers to speak of 'functions' which remain constant throughout the epochs and which have been secularised in the modern age, then Blumenberg counters that Christianity had introduced so many functions which it could only fulfil by dubious operators like 'God' or the 'hereafter' and which have prompted questions which it neither could answer itself nor could be answered by the modern age. Blumenberg compares the situation here with Leibnitz's critique of Descartes:

> Through the radicalness of Descartes's doubt and the questionable perspicuity of its elimination he had introduced into the world a demand for certainty, which on account of the rigour of its requirements could not be fulfilled by him or by anyone else, but which could not be revoked and rejected merely on account of the impossibility of satisfying it.[24]

In analogy to that,

> the reoccupation that is the reality underlying the appearance of secularisation is driven by the neediness of a consciousness that has been overextended and then disappointed in regard to the great questions and great hopes.[25]

The illusion of a secularisation of religious substances or functions can be understood as follows: we have assumed overextended questions from a previous epoch and are disappointed by the modern age insofar as we understand the latter to be an inadequate catalogue of answers to these questions. The thesis of secularisation is thus 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.

(3) *Self-assertion* — The problem of the legitimacy of the modern age thus is that *legitimacy* and *modernity* exclude each other insofar as the former demands historic continuity and mediation, whereas the latter excludes such continuity and mediation. What we are thus looking for is a concept that reconciles both, a concept which presents the new beginning as a historic event in such a way that the historical mediation does not suspend the originality and the originality does not compromise the historical mediation. The concept that manages such a reconciliation is the concept of *self-assertion*.

23 *Ibid*, 48–49.
24 *Ibid*, 65.
25 *Ibid*, 89.

In this context Blumenberg distinguishes between self-empowerment and self-assertion. The former is 'to say that a rationalism has no need of historic justification, that it constructs itself autonomously from within itself and is indifferent to the conditions prevailing at the time when it is put into effect'. In contrast, self-assertion means 'to insist that the doubtful and in fact disputed claim made by this rationality to have substituted a standardised process for the contingency of history has a specific historical function'.[26]

Now, since self-assertion always has the character of a reply, so the modern age as an epoch has the character of a reply.

> Legitimacy becomes a subject of discussion only when it is disputed. The occasion for talk of the legitimacy of the modern age does not lie in the fact that this age conceives of itself as conforming to reason and as realising this conformity in the Enlightenment but rather in the syndrome of the assertions that this epochal conformity to reason is nothing but an aggression (which fails to understand itself as such) against theology, from which it has in fact in a hidden manner derived everything that belongs to it.[27]

Blumenberg here lays out in detail what Kelsen could have meant by the claim that the overcoming of natural law has to be understood in such a way 'that the question of the grounds of validity of the legal order as such, of a further justification of the law by means of a higher normative order has to be rejected'.[28]

In the context of legal theory these arguments lead to a reversal of the burden of establishing legitimacy and to a release of the abovementioned arguments from the burdens imposed on them by the history of ideas: positive law is valid as a sovereign order in and of itself and overstretched *demands* of validity are rejected just as *claims* of validity: that positive law is valid in and of itself does not mean that this validity carries with itself some transcendent meaning, some meaning which goes beyond this validity. The meaning of the legal norm X comes to light only via the norm Y that authorises its enactment. The illegitimacy of such a systematically conceived conception of validity does not already arise from the fact that such validity presupposes a basic norm. Rather the feeling of illegitimacy often accompanying such a foundation of validity is an illusion produced by coming to positive law with questions which were, first, originally directed at natural law and, secondly, could, in effect, not be answered by natural law.

## E. CONCLUSION

The law is thus valid only insofar as and because it is valid. This is the only possible answer to the question of the ground of validity both of the single legal norm and of the law as such. Any other answer would be engaging in metaphysics. The law therein

26 *Ibid*, 97.
27 *Ibid*, 97.
28 Kelsen (n 8) 88.

has a similar fate to the world as such, which is only insofar and because it is. This is unsatisfactory only to those who believe that the law owes us further answers. However, such further answers would be telling too much. They would not only tell us that the law is valid if it is valid, but that under certain conditions, conditions to be provided by the respective theory, the law *ought* to be valid, ie that it is already valid even though it is not yet valid.