Law and Religion in a Global Context 2

Dawid Bunikowski
Alberto Puppo *Editors*

Why Religion? Towards a Critical Philosophy of Law, Peace and God

Springer

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Law and Religion in a Global Context
ISBN 978-3-030-35483-1 ISBN 978-3-030-35484-8 (eBook)
https://doi.org/10.1007/978-3-030-35484-8

This Springer imprint is published by the registered company Springer Nature Switzerland AG
The registered company address is: Gewerbestrasse 11, 6330 Cham, Switzerland

To Nina and Matteo Michele

To Ignacy and Stanisław

Foreword

In recent years, multilateral cooperation and international institution-building have come under increased pressure. This affects a broad variety of political areas, from climate politics to arms control and from trade liberalization to human rights. The concomitant crisis of global institutions—such as the UN, the ICC, the WTO, and the WHO—has encouraged renewed attempts to look out for actors and agents who might contribute to filling the resulting gaps. Can religious communities play a stronger role in this regard? For decades, faith-based organizations, alongside secular civil society organizations, have cooperated in UN human rights forums and other international settings. And yet, new initiatives, like the "Faith for Rights" initiative taken by the UN Office of the High Commissioner for Human Rights (2017), indicate a growing awareness that much more needs to be done. At any rate, the potential of religious communities to mobilize broad support for peace, sustainable development, and human rights is back on the political agenda.

The renewed focus on religions as potential factors and actors in international political arenas does not find unanimous applause. Critics fear that dearly won "secular" achievement—secular standards and secular institutions in international politics—could thereby be jeopardized. Not least because this affects human rights, which are "secular" rights in the sense of not—or not directly—being based on specific religious presuppositions. However, the fact that all major international human rights instruments include the right to freedom of religion or belief demonstrates an acknowledgement that for many people, existential convictions and concomitant practices constitute an indispensable part of their individual and community-related identities. Freedom of religion or belief thus reminds us that the secularity, which defines the human rights approach, needs further qualification: it is an "inclusive secularity" rather than an ideology of purging the public sphere of the visible presence of religiosity. Indeed, freedom of religion or belief provides the positive normative basis of a secularity that aims at keeping public spaces and public institutions open for the rich diversity of human life.

The secular right to freedom of religion or belief presents challenges for all sides of the debate. It urges religious communities to come to terms with their own traditions of authoritarianism, narrow-mindedness, and intolerance. In particular,

those communities that wish actively to participate in international political forums have to acknowledge the existing and further emerging religious, ethical and political diversity, as well the norms and institutions, which back up the due respect for everyone's equal dignity and freedoms. Likewise, those who defend and promote the secular nature of international norms and institutions should recognize that from a human rights perspective, such secularity should not be mixed with policies of forced privatization of religiosity. To put it in a nutshell, secularity must mean openness rather than emptiness. This should especially guide international standards and institutions.

The contributions put together in this book come from a broad range of academic disciplines, and they represent quite different viewpoints. What they have in common in the aspiration to build bridges between religion and law, between spirituality and international diplomacy, and between religious heritages and future challenges. While such efforts of bridge-building are much needed, they cannot succeed without putting the presupposed pillars to a relentless critical scrutiny. May the book attract a broad readership in academia and way beyond.

Erlangen, Germany

Prof. Dr. Dr. h.c. Heiner Bielefeldt
Former UN Special Rapporteur
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Introduction: Philosophical, Legal and Political Significance of a Critical Assessment of God, Ethics and Religions

Dawid Bunikowski and Alberto Puppo

Abstract The moral discourse characterising the ethics of human rights is not enough, and – what is more important and the source of a real worry – it has demonstrated its incapacity of motivating human conduct. This invites us to a humble and serious multidisciplinary enterprise. The starting point of this book is to take such a shared feeling seriously. Is something religious? Is something grounded in God? Is it a sort of necessary element of our past and contemporary legal systems in order to achieve international peace? This book is an attempt to construct a form of interdisciplinary research in which the international legal scholar, the moral philosopher, the philosopher of religion, the theologian, and the political scientist can contribute to the construction of the necessary bridges; such bridges are necessary to understand the complex connection between religions and peace. Many scholars can protest against such a statement as "peace through religion". Their argument would probably be: religions have been and are the main cause of most wars. Such a reaction is precisely one of the reasons of this book. The disagreement with such scholars is not about the existence, as a social fact, of many domestic and international conflicts, today and in the past, in which the name of God is invoked by the belligerents. But have they the semantic monopoly about the use of the term "God"? Are they the more authoritative interpreters? What is really dangerous in religions? Is it God or people having misunderstood their task as commanded by (their) God? If it was necessary

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D. Bunikowski and A. Puppo (eds.), *Why Religion? Towards a Critical Philosophy of Law, Peace and God*, Law and Religion in a Global Context 2,
https://doi.org/10.1007/978-3-030-35484-8_1

to apply some label to our project, it would probably be “sacred legal philosophy”; to this end, a provocative title for the book could have been “Taking God Seriously”.

God, religion, law, ethics, and peace: legal philosophy is probably the best placed academic discipline to address the question of the complex relationship between such fundamental moments of our cultures; it is not because legal philosophy has some intrinsic advantage over other disciplines; its humble advantage is probably exemplified by the present book: it can only be envisaged from a legal-philosophical point of view. This is because this book is an attempt to construct a form of interdisciplinary research in which the international legal scholar, the moral philosopher, the philosopher of religion, the theologian, and the political scientist can contribute to the construction of the necessary bridges, but above all, can contribute to shed some fresh light on existing theoretical and normative constructions.

It is necessary to clearly highlight that the book is not about the construction of a political theology or a secular religion; if it was necessary to apply some label to our project, it would probably be “sacred legal philosophy”; to this end, a provocative title for the book could have been “Taking God Seriously”. The essence here is that in order to explain the legal phenomena, the concept of God could be considered as a fundamental conceptual tool. It is not just that, as it is very common, God is a legitimate moral source when the evaluation of the normative content of a given positive law is at stake; in our opinion, the relevance of God is not only normative but above all conceptual.

As Thornton Wilder, a well known American writer, writes in his famous novel *The Bridge of San Luis Rey* (1927), “[t]here is a land of the living and a land of the dead and the bridge is love, the only survival, the only meaning”.[1] Without leaving the land of the living, our book is to build bridges in order to understand others and to know and evaluate their convictions as well as their theories. It is to understand and create synergies between disciplines to bring about a collaborative advantage, something greater than the individual parts.

[1]It means that some people have to die (like in catastrophes such as the collapse of an Inca rope bridge in Peru) but others have to live, and no one knows why some have had to die and others are still alive. Nor sins neither ways of life matter here: no one knows why it is as it is (i.e. why some of us die in accidents), maybe only God knows it. In Wilder’s fictional story, there is a friar who witnesses the bridge accident. What the friar does is simple: he goes about inquiring into the lives of the victims, analyses their lives and sins and seeks cosmic answers to the question of why each of the victims had to die. The friar writes a book/long diary about the victims and their moral lives. But surprisingly, it appears that there is no logic in those deaths. Deaths and accidents are not about sins. Both good and bad (and, both young/old and poor/rich) people die, also suddenly while in accidents. So if there is not some sort of cosmic (or rational/logical) answer to the question of a (sudden) death, then what remains and where the truth is? Wilder claims that all what remains after us and our lives is love, not memory or memories. Memories disappear (because people forget people), but love lasts forever. Love remains in our good actions towards others. Love is the most important value. This is a very philosophical and, paradoxically, cosmic or mystical attitude.

1 A Legal-Philosophical Construction: Beyond Love and Naïve Cosmopolitanism

Our legal-philosophical construction is built on fertile ground nourished by at least three different kinds of philosophical insights: the reflection developed in the field of love and law, the introduction into the traditional legal-philosophical discourse of the concepts of God and religion, and the critical and historical reflection developed by international legal theorists.

1.1 Love and Law: God's Command to Love the Other

If—as lyrically suggested by Wilder—love is a key piece in the construction of bridges, it is perfectly understandable why in recent years three important books have been published on the topic of love and law.[2] Certainly, moving from inside the well consolidated field of law and religion, these three books put at the center of the legal analysis—practical as well as theoretical—the concept of love: "is there a place for love in the establishment and application of law? (…) Is there any role at all for love in law? And, if so, what is that role?".[3] That probably is the main question addressed. Of course, the word 'love' is extremely ambiguous and for that reason one of these books is explicitly dedicated to the concept of agape that, "[i]n contrast to the other forms of love, (…) is 'other-regarding care,' 'unclaiming love,' and 'universal benevolence'".[4] One feature of agapic love is extremely relevant when love is assessed from a legal perspective: "Divine Gift-love in the man enables him to love what is not naturally lovable; lepers, criminals, enemies, morons, the sulky, the superior and the sneering. Finally, by a high paradox, God enables men to have a Gift-love towards Himself".[5]

This is interesting, from a legal-philosophical perspective, for several reasons; first, because this kind of love is not *natural*; it is the object of a command to love, and not something natural. It is not a natural love and, because of this, one could suggest that the traditional theory of natural law would not be able to find a place for this kind of love. Agape and positive law seem then to share their subordination to an

[2] See the following edited books: Cochran and Calo (2017a); Babie and Savić (2018a); and the more recent monograph by Neoh (2019). This is not to say that before these books the topic was not important, but no doubt that its importance has been consecrated by them.

[3] Babie and Savić (2018b), p. 6.

[4] Cochran and Calo (2017b), p. 3, footnotes omitted. The concept itself of agapic love is also ambiguous as brilliantly reconstructed by Wolterstorff (2017), pp. 103 ff., where he distinguishes several types of agapism.

[5] Lewis (2010), p. 128, partially quoted by Cochran and Calo (2017b), p. 3.

act of will.[6] Natural law, in contrast, if based on love, could only take into account the natural expression of love: natural because it is produced by human sensibility, or natural because it is constituted and discovered by human reason. Agapic love is typically a commanded love, and this command seems to establish a strong unity between monotheisms.[7] As perfectly recalled by Cochran, "Jesus' teaching about agape was built on a foundation laid in the Hebrew Scriptures. He summarized the Mosaic Law as love of God and neighbor, quoting provisions of the Mosaic Law".[8] Secondly, it is not only a command but also a form of enabling to love; paradoxically, the command to love the Other also means the authorization to give to himself the Gift-love.

Such a paradox is not new for legal theorists given that, when approaching the ultimate foundation of a legal system, of its Constitution, many authors, including Kelsen[9] and Hart,[10] seem to invoke a fundamental norm[11] having a double dimension: it authorizes some first legal authority but at the same time it addresses a command to the legal supreme authority itself. In Kelsen's case such a paradox or, at least, ambiguity on the ultimate foundation of law generated a very long and endless debate.[12] Our opinion is that such kind of debate on ultimate foundations could learn a lot from a genuine and potentially secular reflection on the sources of the first command as God's command to love your neighbor as yourself[13]; a command that, in the case of the Old Testament, can also be interpreted as a norm enabling a people as the first historical international normative subject, on the one hand, and as the first international liable subject on the other hand. This is not to forget that the addressee of God's command was a given historical people; but the command to love does create a duty with respect to everyone and not only with community members. In this sense, the chosen people is chosen as universally liable.[14]

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[6] It is to note that some Christian's understanding of the working of the Holy Spirit would disagree with our characterization of agape. We thank Jessica Giles for pointing out this possible source of disagreement.

[7] See Peters (2005).

[8] Cochran (2017), p. 13.

[9] See, at least, Kelsen (1960).

[10] See Hart (1994).

[11] Paulus (2009), p. 74, clearly summarizes the function of a Constitution and the classical explanation of its authority: "In a formal understanding of the term, a constitution is the document or even point from which all other authority is derived; it is the center of a hierarchical system in which the lower rules derive their authority from higher ones, to the point where the constitution itself rests on an ultimate 'rule of recognition' (Hart) or *Grundnorm* (Kelsen) that can be derived only from extralegal sources of legitimacy, either religious (God) or civic (the *pouvoir constituant* or people power or constitutional moment)" (footnotes omitted).

[12] See at least Paulson (2012), where he discusses Raz's thesis on Kelsen and suggests that the "enabling" dimension is stronger than the "commanding" dimension. Our intuition is that the point is not to choose between these two dimensions, but to understand the way in which commanding and enabling can be unified as far as they are conceived under the light of the God's first command to men.

[13] See for instance Leviticus 19: 17–18.

[14] For this interpretation, see Cohen (1919).

More broadly, a more basic fact on love and law is taken for granted: "the revival of religion as a source of meaning and values for many people"; specifically, the influence of religious love seems to be at work to the extent that "every major religion offers its own approach to encountering the Other in a positive, constructive, affirming way".[15] This is particularly relevant today, because the Other is often conceived as a source of fear, that is, in an opposite way; in the battle between love and fear, fear seems to have gained the upper hand, and the politics of a large majority of States, affected by the problem of refugees or migrants, is clearly the legal-positive proof of that.[16]

The question of the Other is not only a topic inscribed in the discourses on love, law, and religion, but also a fundamental piece of contemporary moral philosophy, as the well-known second-personal ethics proposed by Stephen Darwall demonstrates.[17] Nevertheless, such a moral philosophy, even if mainly centered on the notion of respect, seems to ignore any religious dimension; it also gives relatively low importance to the religious-moral philosophy of the Other as, for instance, the philosophy proposed by Emmanuel Lévinas.[18] Love and religion scholars would say, probably with reason, that such absence is due to the excessive focus on the autonomy of the Self instead of the love for the Other: too much Kant and not enough Jesus!

However, the recent academic panorama has not been exclusively enriched by the above-mentioned books, flowing from the general field of law and religion.

1.2 Dworkin and Kelsen on Religious Atheism and Secular Religions

In some way surprisingly, two well recognized authors in the field of legal philosophy—Kelsen and Dworkin,[19] probably, the most influent legal philosophers of the 20th century—showed their concern about the relation between morality and religion on the one side, and between political theories considered as political theologies and religion on the other. In fact, their last and valedictory books—respectively *Secular Religion*, withdrawn by the author from printing in 1964 and published posthumously in 2012,[20] and *Religion without God*, published in 2013[21]—placed God and

[15] Babie and Savić (2018b), pp. 4–5.

[16] For a radical and critical postures claiming an authentic cosmopolitan politics on migrants, see Caraus and Paris (2018).

[17] See, at least, Darwall (2013a, 2013b).

[18] Barber (2008) insists on the difference between Darwall's and Lévinas' conceptions.

[19] See Kelsen (2011) and Dworkin (2013). Another proof of that is Jeremy Waldron—one of the more influential contemporary legal philosophers—who dedicated three lectures to *A Religious View of the Foundations of International Law.* See Waldron (2011).

[20] Kelsen (2011).

[21] Dworkin (2013).

religion around a table in which such topics were not usually invited. Both philosophers—the first, the symbol of legal positivism and, the second, the symbol of legal anti-positivism—shared a non-naturalist approach to law and, in the case of Dworkin, to ethics, so that they are not natural law scholars. In the same vein, the title of Waldron's last lecture dedicated to international law and religion does insist on the fact that *natural law is not enough.*[22]

Why are these publications relevant? The main reason is that the topic of religion has traditionally been absent from the theoretical debates dominating the legal-philosophical discourse.[23] In fact, one of the fundamental points of disagreement between positivistic and non-positivistic legal theories was the connection between law and morals. The silent "secular" agreement was that religion has nothing to say in order to elaborate a better explanation of legal phenomena. As recalled by Berman,

> [l]egally, religion has become the private affair of individuals; it has largely dropped out of legal discourse. And today it is not evident what new fundamental beliefs have replaced orthodox religious beliefs as a foundation on which our legal institutions rest. Consequently, our legal discourse, our network of legal values, lacks the power and vitality that it once had.[24]

From different perspectives, with different aims, both Dworkin and Kelsen contributed by pointing out the necessity, even beyond the field of law and religion, of an extension of the theoretical reflection on law. Kelsen addressed the following question: is the expression 'secular religion' meaningful? Is a religion without God conceivable? Or, is "religious atheism"—an expression used by Stanley Fish[25] while reviewing Dworkin's book—possible? Kelsen opposed any trends or tendencies towards a "new" de-secularization or theologization (of law and/or the state) as equating to the danger of totalitarianism and of rejection of the separation of state and religion; Dworkin, instead of this, opposed any trends towards seeing God ("a Sistine God") as a personal spiritual being. Although he appreciated the "religious attitude" to life, he definitely rejected religious institutions and the conceptual necessity of God.

What is really interesting is that in no way can Dworkin and Kelsen be considered as scholars belonging to the field of law and religion. The main intuition of the present book, as previously explained, is that there is a bridge under construction: the bridge potentially connecting the theoretical work characteristic of the law and religion field with the theoretical work traditionally developed by analytical, and especially positivistic, legal philosophy. What is clearly common is the reference to positive law as the object of such discourses. On the one side law and religion scholars focus on the way in which religion contributed, historically, to the fashioning

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[22] Waldron (2011).

[23] In their Introduction, Cochran and Calo (2017b), p. 1, recall that the majority of modern and contemporary legal theories "have also divorced law from the deeper sources of moral meaning that informed legal thought in the past".

[24] Berman (2003), p. x.

[25] Fish (2013).

of positive law,[26] as well as on the way positive law regulated and regulates religious matters. The more recent reflections on law and love do probably assume a stronger normative perspective, to the extent that they suggest that agapic love should exert a real influence on positive law in order to attend some very critical problem of contemporary societies.

On the other side a refreshed legal philosophy—that gives its place to the religious dimension—should try to rethink the very fundamental concepts assumed by legal theorists, such as the concepts of norm, legal subject or legal system, as potentially determined by religious concepts, the first of them is clearly the concept of God. To such extent, legal philosophy is not really interested in how religion can be regulated by law or in how religious contents are incorporated by positive law; its interest could rather be on the potential religious dimension of the foundation of law and legal language.[27]

The third field, clearly drawing a sort of permeable border between legal philosophy and law and religion discourses, is the theory and science of international law.[28]

1.3 The Questioned Secular Nature of International Law

International law, at least from a Kantian or Kelsenian perspective, is conceived as a cosmopolitan order, so that its understanding is, historically, linked to the universalist religions, and, conceptually, to the concepts of legal monism and humanity. It is a fact that the founding fathers of the international legal science were Spanish jesuits, such as de Vitoria or Suarez, trying to provide a legal justification of the conquest of America by the Spaniards, essentially grounded on the idea of natural universal rights[29]; it is also a matter of fact that the German legal science, first inspired by Lutheranism and then globalised by Kant, was the theoretical ground on which the

[26] In this sense, the following is an obvious and shared statement: "the legal systems of many (…) societies emerged from religious sources". See Babie and Savić (2018b), p. 5.

[27] On this aspect, see Waldron (2011).

[28] For an example of the mainstream global constitutionalist conceptions, see Runoff and Trachtman (2009); for a critical and historical perspective, focusing on the religious dimension, see Koskenniemi et al. (2017). See also Reed (2013).

[29] On the founders of international law, see, at least, Gomez Robledo (1989) and the very recent Keys (2017) reconstructing the theoretical contribution of the Salamanca School on the basis of the Augustinian *City of God.* According to Koskenniemi (2017), p. 8: "The link between the politics of human rights and Christian moral theology are obvious but insufficiently studied". By the way, there is the opposite opinion about the founders of modern international law and their justification of the colonisation process in America. This was expressed by Shaw (2008), pp. 22–23, according to whom, both Suarez and de Vitoria were "progressive": they perceived American indigenous peoples as "nations" and thought that there shall have been a "just cause" to make a war against these people. Our intuition is that these Spanish thinkers were not so progressive, in fact. However, there were brave people like the Dominican theologian and lawyer Bartolomé de Las Casas, who defended the colonised aboriginals.

contemporary international legal institutions have been conceived and progressively implemented. Both facts suggest that the separation between the religious or sacred dimension and the secular one has to be questioned, at least, when the nature of international law is at stake.

As said, our aim is to demonstrate that such reflection can only be interdisciplinary, to the extent that the legal international scholar, the legal philosopher and the law and religion scholars need to share their theoretical tools and approaches in order to provide a better and comprehensive understanding of the complexity of law, and specifically, of international law. For that reason we cannot accept, at least not without a serious assessment, a central presupposition of (secular) international constitutionalism, according to which, on the one hand, "public authority cannot be derived from a god" and, on the other, "the normative point of this holistic foundational construction of public authority is its reference to the idea of free and equal persons".[30]

Such a naïve idea of free and equal persons is implicitly questioned by one of the main purposes of the works included in Paul Babie and Vanja-Ivan Savić's edited book, that is, to "explore the rules which particular religions have adopted about how to treat and interact with non-members of their faiths".[31] Such interest is fundamental because it is grounded on the idea, opposed to the mainstream universalist ideas, that the concept of "non-member" is crucial. If, according to the Universal Declaration of Human Rights, we are all members of the same family, humanity, then it is impossible to take seriously into account the problem of "non-membership". The question is not, abstractly, to state that there is just one community—global, religious or whatever—but, concretely, to accept that there are borders, differences, conflicts (like rich people oppressing suffering poor people), and, at the same time, to question them in order to constructively and—from a messianic perspective: optimistically—rethink them.

Taking as a starting point the concept of love, the biblical agape, is a really provocative and refreshing way to think differently. International law, shaped as it is on the naïve conception memorialised in the UN Declaration of Human Rights words,[32] has demonstrated its incapacity to stop the states' policies based on fear. The reason of that is not that States are *bad*, or that, euphemistically speaking, they do not really comply with international obligations; the reason—as sharply captured by Berman's sentence quoted above—is that "our legal discourse, our network of legal values, lacks the power and vitality that it once had".

[30] Kumm (2009), p. 322. Such conclusion is not surprising when connected with the following premise: "the reason why neither Christian theology nor the idea of a sovereign nation should be the cornerstone of constitutional practice is that these tend to lead to pathologies that ultimately undermine both the values people care most about and the integrity of a constitutional practice that takes as basic *the idea of free and equals governing themselves*" (p. 314, emphasis added).

[31] Babie and Savić (2018b), p. 6.

[32] This naive conception is clearly at work even in one of the finest and most critical versions of global constitutionalism; see, for example, Kumm (2009), p. 314.

Nevertheless, despite the sharing of the inner project, it is plausible to remain skeptical about the real possibility that the "secular state law can encourage and support the achievement of a standard of 'good mutual living' for all".[33]

2 From the Myth of Secular Ethics to the Conceptual Necessity of God

Is a secular state really "secular"?[34] If the secular state is not really secular, it seems plausible to think that its way of encouraging the standard of 'good mutual living' could not be neutral at all. Not only the secularism of a secular state can be questioned; also, the same concept of State can be put under theoretical scrutiny. Before analysing how a secular state can promote "loving standards", it is therefore necessary to investigate both the notion of secularism and the notion of State. Both concepts have a long history and certainly have shared their last portion: the contemporary western constitutional State has been erected on the ground of a clear separation between secular and religious spheres on the one hand, and have established a strong protection of the freedom of religion on the other.

> The Christian evolution toward accepting the primacy of conscience over doctrine began with the Reformation, which in the name of conscience rejected important aspects of what had been until then traditional beliefs (…) received another powerful impetus from the Enlightenment, which granted reason absolute priority over belief, and found its political fulfillment in the American and French Revolutions' creation of a secular state where religion was a private and, from the state's perspective, decidedly secondary concern.[35]

Nonetheless, secularisation has been qualified as a Christian myth[36]; to the extent that "[while] religion certainly included what we would call interior states, like fear of God's justice or trust in his mercy, it was more often judged in terms of practice, more specifically, of ritual practice or worship",[37] it is understandable that the first secular effort was directed against its ceremonial aspect. Yelle's strong thesis—secularism as a Christian myth—is based on a very intriguing analogy, according to which "[t]he Christian identification of certain Jewish laws as 'ceremonial' anticipated the modern distinction between the 'secular' and the 'religious'".[38] Such a premise makes perfectly intelligible the following reading:

> [s]ecularism (…) reflected a two-pronged strategy. "Religion" was redefined as spiritual ("revelation and redemption") as opposed to the "old law" of Jewish ritual. Simultaneously, "law" itself was redefined as secular and positive—as a disenchanted, bureaucratic technology that excluded "mysticism" or Jewish mystery. These newly redefined concepts of

[33] Babie and Savić (2018b), p. 6.

[34] For a problematisation of the concept of 'secular', see Sullivan et al. (2011).

[35] Peters (2005), pp. 307–308.

[36] Yelle (2011).

[37] Peters (2005), p. 4.

[38] Yelle (2011), p. 28.

> "religion" and "law" were compatible with each other, as the one was spiritual, the other concrete and positive. They formed a new spiritual economy that was incompatible with the old one based on ritual.[39]

Using a similar approach, it is also possible to qualify the traditional conception of the modern secular State as a myth. Before analysing the relation between law, love and religion, it is probably useful to come back to the relation between law and State, with a particular focus on international law, and to investigate how secularism is also linked to religious traditions different from Christianism.[40] In plain words: if Christianity played a very central role in fashioning our modern fundamental concepts of secularism as well as of State, this fact should not hide how other religious traditions contributed to their genesis and, in the contemporary debates, how they can help to develop constructive criticism.

This enterprise is not new as is demonstrated by the monumental work by Harold Berman.[41] Among the several suggestive insights, one has to be briefly recalled. Religion has influenced not only the evolution of positive law and social institutions, but it has also contributed to the constitution of legal science, that is, to the methods used to describe and reconstruct positive laws. One of the more influential conceptions of legal science, proposed by Hans Kelsen, and grounded on the neo-Kantian transcendental method as refined by Hermann Cohen,[42] seems to lead to a double genetic link. Judaism as well as Protestantism seem to have conjointly contributed to the evolution of the German legal science; Berman exhaustively reconstructs how Lutheranism played an important role in the establishment of a new legal method, based on what is now a mainstream concept of a legal system:

> Lutheran legal philosophy is congenial to—and in fact in sixteenth-century Germany led to—a new legal science consisting of the massive classification and systematization of the rules of public and private law, coupled with a flexibility in their application based on conscience and called equity.[43]

Cohen clearly suggested that Protestantism and Judaism, idealistically integrated, or even assimilated, in the context of German idealism, can be conceived as a harmonic path in order to think of humanity as an ethical and legal concept. Cohen insists that "authentic Judaism is rationalist Judaism, a Judaism free of any mystical or superstitious commitments"; on the other hand, "Germanism is cosmopolitan, the

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[39] Yelle (2011), p. 34.

[40] On the role of Islam, see, in this book, Calo's chapter.

[41] Berman (2003).

[42] On the transcendental method that apparently Kelsen borrowed from Cohen, see Paulson (1992).

[43] Berman (2003), p. 99. It is interesting to note that, in contrast with the extreme formalist trend having characterized the continental legal science until, at least, the anti-formalist reaction of the second half of the 19th century, the formal systematisation characterizing the method described by Berman is coupled with the flexibility of the application of law, typical of the realistic jurisprudence. Legal systematisation was developed, for instance, by important natural legal scholars and political theorists as the Calvinist Johann Althusius (see pp. 125–126). More broadly, on the philosophical and theological aspect of Althusius' conception, see, in this book, Moraes and Menezes' chapter.

language and culture of the highest human ideals, of the culture of Kant, Goethe, and Beethoven".[44] Thus, it is necessary to add that:

> For Cohen, what is of central significance about the Reformation is that it had nothing to do with race or ethnicity but rather was purely concerned with the universality and purity of thought and culture. (…) Germany can become—or, for Cohen, is—the spiritual homeland for Jews all around the world. (…) Protestants, given their attachment to the Old Testament, must also recognize—at least if they are to have intellectual integrity—their spiritual kinship to the Jews.[45]

Related to this, more recently, Reut Paz demonstrated that German international legal science, having played a stronger part in the construction of contemporary international law and institutions, was fundamentally animated by Jewish legal thinkers.[46]

From Luther—and the method of continental legal science—to contemporary international legal theory, passing through the Cohennian religion of reason, it seems to us that a religion incompatible with a secular and scientific approach to positive law is only its superstitious and mystical component and not its inner and divine rationality. From another perspective, the legal knowledge itself seems to have been rooted in a religious path or, at least, it seems to have been nourished by the reflection on the normative meaning of the sacred text. Even if, according to Kelsen, it is meaningless to imagine a secular religion, it was—and it is—perfectly meaningful to develop a modest secular, that is, neither mystical nor dogmatically ritual, reading of the texts formulating the (assumed) will of God: the sacred texts.

In other words: a too strong secular claim cannot be really secular, precisely because of the risk of becoming a dogma; instead of this, a critical approach to the concept of God and a critical reading of the sacred texts, starting with the one common to all the monotheist traditions, can paradoxically be a fruitful ground in order to rethink the place of religion in our apparently secular legal cultures.

Such a fruitful starting point could be, paraphrasing the title of Alasdair McIntyre's famous book—*Whose Justice? Which Rationality?,*[47]—to focus on the following questions: Whose God? Which religion? And, above all: which relation does exist between God and religion? The purpose of the present book is obviously not to provide some answers to such disturbing questions but to make these questions clearer and to provide the necessary tools in order to avoid any prejudice or misunderstanding. Misunderstandings seem to have been a central feature of the legal-philosophical contributions, mentioned above.

In his above-mentioned book, Dworkin starts by announcing that the "theme of [his] book is that religion is deeper than God".[48] Such a statement is problematic to the extent that its meaning clearly depends on how God and religion are conceived. Accepting that in these very complicated matters there is neither an obvious nor a

[44] Erlewine (2016), p. 18.

[45] Erlewine (2016), pp. 21–22.

[46] See Paz (2012).

[47] MacIntyre (1988).

[48] Dworkin (2013), p. 1.

right answer, the need of clarifying how legal philosophy can introduce the concepts of God and/or religion seems to us to be of the first importance.

The evidence of how relative the answer transpires is provided by Hans Kelsen, who seems to have thought in an opposite way: a religion without God would be meaningless. But Kelsen was not so sure of how he conceived the concept of religion, and such a doubt probably justified his decision not to publish his book (at least during his life).[49]

Dworkin's approach to the idea of God seems unproblematically constructed on the existence of a belief in God, and his main point is that, even if we accept that the most important role played by God is to fill "the world with value and purpose", he thinks that "the conviction that a god underwrites value, however (…) presupposes a prior commitment to the independent reality of that value. That commitment is available to nonbelievers as well".[50] This last statement makes values autonomous with respect to the belief in God; to agree or disagree with it does depend on the meaning attributed to the belief in God. Is this a matter of faith? Is faith a matter of rational or irrational hope? Or: is the belief in God the belief in the existence of God as we can have beliefs on the empirical existence of whatever thing? Western philosophy has deeply questioned the concepts of belief and existence; philosophers of religion as well as theologians have particularly questioned if and how these concepts can be used with respect to God.

Dworkin's aim is to question the great divide between an atheist and a theist; his point is that, in moral matters, they can share a lot, even if they do not share belief in God: "they feel an inescapable responsibility to live their lives well, with due respect for the lives of others".[51] In this respect, Dworkin provides some interesting analysis of Spinoza,[52] a philosopher often cited by Einstein, who was considered by Dworkin as (paradigmatically) being both deeply religious and an atheist.[53]

The example of Einstein, one of the greatest scientists of the Western world, is very illustrative of a culture in which God and religion have been exposed to the hard criticism of the Enlightenment and, then, nihilism. Even if it is beyond the scope of this introduction to develop a deep analysis of Spinoza's atheism, it will be useful to sketch out some philosophical difficulties—incorporated in Dworkin's analysis—as the evidence of the need of a conceptual refinement.

The need of this short digression allows us to introduce the thought of the *Ostjude* Salomon Maimon, a radical secularist, considered, in Berlin during the last decades of the 18th century, as the *dark twin* of the very respected Moses Mendelssohn.[54] His reconstruction of Spinoza allows us to shed some light on the classic statement, affirmed or denied, about "the belief in the existence of God".

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[49] See Métall (1969), p. 91.

[50] Dworkin (2013), p. 1.

[51] Dworkin (2013), p. 2.

[52] Dworkin (2013), pp. 38–44.

[53] Dworkin (2013), p. 3. Dworkin points out how "Einstein often cited Spinoza as a predecessor: he said that Spinoza's god was his god as well" (p. 40).

[54] Biale (2011), p. 30.

Maimon noted, in contrast with the mainstream pantheistic interpretation of Spinoza, also adopted by Dworkin, that "far from reducing God to the world, Spinoza's God actually swallowed up the world. In other words, Spinoza was not an atheist, since he did not deny the existence of God but the existence of the world".[55] Such a conclusion is grounded on what Maimon thought about the above-mentioned statement:

> the statement "God exists" is no more meaningful than the statement "God does not exist". In this world, we mean by existence something that could or will go out of existence. Such a meaning cannot be applied to God; it is a category mistake (…) The existence of God is beyond rational proof since the very concept of existence cannot be predicated of God. Since both belief and disbelief in God's existence are self-contradictory, the philosopher cannot be an atheist.

This reference to Maimon is also interesting because he can be considered as the precursor, with respect to the concept of God, of Cohen's idealism[56]; according to Maimon, "[f]rom God's vantage point, there is no matter, only ideas. Thus, when we see something that seems to contradict the laws of nature, we are responding to our limited view of the world".[57] It is important to recall here the more salient feature of agapic love, its being not natural; when someone does not understand how it is possible to love what is (naturally) unlovable, we probably face the same limited view of the world.

3 God as Historical and Interpretive Moral Concept

The first obviousness resulting from the previous analysis is that in any historical and philosophical moment people arguing for or against religion and God have some actual experience and understanding of what religion and God are and should be.[58] To think about religion or God in the 13th or the 20th century is not the same; thoughts about God and religions in the context of a theocracy or of a secular state are not the same. Human images (of God) and ways of thinking (of God) change. Thus, the God of Abelard is not the same as the one of Al-Farabi but, maybe, also of John Paul II. Time and place matter.

Such an actual experience is both individual and social (or political): the public—political as well as academic—space can be occupied by religions or not, and/or dominated by a given religion or not. Depending on this first fact, individual religious experiences can acquire a strong autonomy with regard to the dominant religious culture, and so on. But, independently of which combination of individual and public

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[55] Biale (2011), p. 32.

[56] Biale (2011), p. 33. On Cohen, see *infra* and Puppo's chapter.

[57] Biale (2011), p. 34.

[58] In this sense, we agree with Dworkin (2013), p. 7, on the interpretive nature of the concept of religion: "'religion' is an interpretive concept. That is, people who use the concept do not agree about precisely what it means: when they use it, they are taking a stand about what it should mean".

religious experience occurs, the general historical context largely determines the concepts at work.

As suggested by Hermann Cohen,[59] the concept itself of a unique God, the master piece of any monotheism, was produced in a given historical context, i.e. during the division of the people of Israel among several tribes.[60] In order to preserve the unity of the people, the invention of the notion of a unique God was conceived as a guarantee of such unity.

On the opposite hand, if we take Nietzsche's famous statement "God is dead", a suggestive reading can interpret this statement as referring to the death of some (conception of) God, probably, the Christian one; probably, the Christian God venerated, with or without reason, by some typical bourgeoisie or old aristocracy.[61] Taking another example: when Gershom Scholem—in his lecture on *Nihilism as a religious phenomenon*[62]—reconstructs the history of nihilism as a religious phenomenon, it is relatively common to find the confrontation between a true God and a false God. So even nihilism can be interpreted not as a movement against God but against some conception of God.

Given such a background, the questioning of the relation between religion and, respectively, jurisprudence, God, and peace, does invite to the following methodological suggestion: in order to elucidate a possible role religion can play in the contemporary world, it can be useful to analyse religion by associating it with other concepts such as peace and jurisprudence.

Why peace? Because peace can possibly be considered as the most valuable promise of religions[63] and, certainly, the biggest worry in the contemporary world

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[59] Cohen (1919), ch. 1.

[60] It does not matter here whether other historical reconstructions are possible; nevertheless, one of them has to be mentioned. According to Freud (1939), the unique God was an Egyptian invention and Moses, who was also an Egyptian, after the disappearance of (his) monotheist Pharaoh, guaranteed the survival of monotheism by the election of the Israelite tribes living in Egypt with whom he engaged in the Exodus. Freud also explains that the God of monotheism was in fact two different Gods, the Egyptian Elohim and Yahveh, originally a local god of the Sinai peninsula. The unification resulted, not without some narrative incoherencies, from the sacred texts, that is, through a literary and a posteriori intervention. This explanation completely corresponds to what is usually registered by the interpreters of the Old Testament. See, for instance, Peters (2005), p. 12, who recognizes how, even if in some occasions "God is called Yahweh Elohim, perhaps 'the divine Yahweh,' (…) the two names often appear apart as individual names of God, with Yahweh usually translated into English as 'Lord' and the plural Elohim as 'God.'".

[61] See Schrag (2002), pp. 46–47.

[62] Scholem (1974).

[63] Someone could contest this statement, saying that some religions (like Islam) seek to become a dominant hegemony. By the way, also Jesus, the founding father of Christianity, was not—as he said—to bring peace to the world (see Matthew 10:34–35: "Do not think that I have come to bring peace to the earth; I have not come to bring peace, but a sword. For I have come to set a man against his father, and a daughter against her mother, and a daughter-in-law against her mother-in-law; and one's foes will be members of one's own household. Whoever loves father or mother more than me is not worthy of me; and whoever loves son or daughter more than me is not worthy of me"). Jesus demanded a radical change of life: deep spirituality, religious modesty, authentic faith and high moral standards stood against materialism, egoism, ritual hypocrisy and human pleasure. On

(e.g. because of some religiously motivated terror or violence, especially or recently in the Islamic world; *vide*: the Islamic State and, previously, Al-Qaida).

Why jurisprudence? Because, as expressed in the title of Kelsen's famous book, *Peace through Law*,[64] peace is usually understood as something achievable by international legal instruments. But what if we replace *Peace through law* by *Peace through religion*? Does law as an instrument for achieving peace incorporate some religious dimension? Is law, ultimately, a religious and normative construction oriented to peace, to the protection of humanity, in order to keep the human out of the violence of nature? Is the hope for peace rational, or just a question of faith? Is religion itself a question of faith or a rational choice? Is the relatively recent legal concept of "responsibility to protect" a secular expression of the oldest duty of men?

Peace through religion is an intriguingly interesting concept. First, is any law, or legal theory, inspired by the religious backgrounds of legal scholars or philosophers involved in building international law and organisations as well as domestic peaceful societies? Secondly, is peace possible to be made through religion? Or is religion about any exclusivity of *Truth* and therefore necessarily connected with violence and war?

As a stronger statement, one can claim that there is no peace without (some) religious thinking. This is to reverse the common sense view, according to which the cause of wars is often a religious conflict. It is the opposite, maybe. According to Lévinas,[65] the *Sein*—including the *Sein* of States—calls for its preservation, and violence and war are the only possible scenarios. If religion is conceived as a duty with the Other, as the command to love the Other, the most important human duty is to retain dignity in the Other. Eventually, another statement is that a religious approach understood in purely normativist terms, and potentially without any anthropomorphic and dogmatic conception of God, would be the only way to change the "ontological" eternal fight for the accumulation of "more Sein". Kelsen's pacifism could be interpreted in this way, too. On the practical side, one can claim that the factor generating international conflicts, in causal terms, is more about the way how the States or other organised political/military/religious groups treat people (migrants, refugees, minorities etc.) than religious differences.

Many scholars, acting in good faith, can protest against the statement "peace through religion". Their argument would probably be: religions have been and are the main cause of most wars. Such a reaction is precisely one of the reasons of this book. The disagreement with such scholars is not about the existence, as a social

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the other hand, he brought spiritual peace (see John 14:27: "Peace I leave with you; my peace I give you. I do not give to you as the world gives. Do not let your hearts be troubled and do not be afraid"). In this narrative, we have to remember that Jesus' concept of peace is different from the concept of worldly peace. Thus, Jessica Giles (2018) argues that, even if religions can be engaged as peacebuilding tools, this does not mean that religions promise peace. Nevertheless, we think that religions, at least the main and most important traditional religions, do promise peace. Religions bring love as a value, and peace is about the mutual respect and/or love demanded by religions.

[64] Kelsen (1944).

[65] This is a leitmotiv in Lévinas' thinking, even if often implicit, from 1934 to 1984. See Lévinas (1934, 1935, and 1984).

fact, of many domestic and international conflicts, today and in the past, in which the name of God is invoked by the belligerents. But have they the semantic monopoly about the use of the term "God"? Are they the more authoritative interpreters? What is really dangerous in religions? Is it God or people having misunderstood their task as commanded by (their) God?

Hilary Putnam, in his book *Jewish Philosophy as a Guide to Life,* evokes the thought of Wittgenstein about religion and the Enlightenment. According to Wittgenstein, in Putnam's words, "to consider religion as essentially "prescientific thinking", as something that must be simply rejected as nonsense after "the Enlightenment", is itself an example of a conceptual confusion [...], an example of being in the grip of a picture". Putnam's conclusion sheds a magnetic light on this book's *raison d'être*: "It is not that Wittgenstein was against enlightenment (without the capital E); it would be more accurate to say that he attacked the antireligious aspect of the "Enlightenment with a capital E" in the name of enlightenment itself".[66]

Thus, our project tries to doubly resist: the force of the "enlightened" anti-religious attitude on the one hand, and also the force of dogmatic religious attitudes on the other. How can such an ambitious task be achieved? First, by giving voice to different monotheistic traditions; secondly, and more importantly, by analysing religion under the several dimensions in which it determines our cultures: as a set of rituals, as a source of moral norms, as a universal project for peace, as a political discourse, etc. So how does this book start, continue and end?

The book starts with philosophy and ends with politics, from the most abstract theoretical speculation to the most practical political events: this path is probably also the path taken by Hermann Cohen when he moved from ethics to religion. It is interesting to note that, in Cohen's ethical reflection, religion and God were present from the beginning. But religions were essentially perceived as an obstacle for the construction of a critical ethics, and God was introduced as a mere methodological idea, necessary to guarantee, or constitute, the conceptual link between the *Sein* of the world and the *Sollen* of/for humanity.[67] Cohen's attitude is crystalline evidence of the difficulty posited by the relation between God and religions on the one hand, and by the relation between ethics and God on the other. More generally, Cohen is the perfect example of the difficulty to find a place, in a system of philosophy constructed on the basis of the Western rationalist culture, for God and religion, without losing the necessary critical approach. Cohen's movement from ethics to religion was progressive: first, he found a place for the concept of religion in his system of philosophy, and finally, he demonstrated the possibility of a religion of reason as opposite to a religion of myths.[68]

Following Cohen, what is wrong with ethics? Or, more precisely, what was wrong with ethics as ethics was usually conceived by philosophers until the beginning of the 20th century, when Cohen wrote? The main characteristics of Kantian ethics, for

[66] Putnam (2008), p. 11.

[67] See Cohen (1904), especially Chap. 9, "Die Idee Gottes".

[68] See, respectively, Cohen (1915, 1919).

instance, is that the ethical subject is unencumbered; the equality Kantian or Cohennian ethics, as well as, for instance, Rawls' theory of justice or the UN Universal Declaration of Human Rights,[69] grants among humans has a cost: the ethical subject cannot perceive the individuality of others; no real empathy or compassion is possible, if all the human and moral subjects are conceived as equal. How to take into account the others' poverty, the others' sufferance? The Old Testament mentions the widow, the orphan, and the foreigner as paradigmatic vulnerable subjects, imposing duties on all the other people. Today we would speak, generically, of vulnerable groups; on the top of the list, we could place refugees; without surprise, refugees posit the most difficult question for political communities. The response a national legal system could provide to the social problems generated by armed conflicts all around the world is probably the most significant response, a real proxy of the conception of law dominating in a given political community.

The shift from the universal ethic(s) to a universal religion, for example in Cohen, was precisely justified by ethics' incapacity to provide a concrete motivation in order to respond to the call of suffering individuals. As brilliantly reconstructed by Sophie Nordmann, it is a sort of dilemma: "To see, in the other, a suffering being, does mean to go beyond ethics; but if I did not see, in the other, a suffering being, I would not act ethically to establish, or restore, the ideal equality of all the members of humanity: such is the paradox in which, in Cohen's eyes, ethics is taken".[70] How to achieve, for instance, peace, if ethics cannot allow the experience of the extreme vulnerability of other people? In religions, exactly like in legal positive systems, concrete conduct is required, and the moral duty can be reinforced with the weight of punishment.

To what extent do religions and legal positive systems share this motivational aspect, from an ethical perspective? Where does the border between religion and law have to be drawn? Is religion a matter of principle and the law a matter of rules? Is religion a set of norms for human souls, and the law a set of norms for human bodies?

Any legal philosopher and/or theologian can answer these questions in several ways. In this introduction, it will be more than enough to put on the table a truism: both religions and legal systems are, even if not exclusively, cultural phenomena,[71] and any intention to improve the capacity of a given social and political culture to efficaciously face the most pressing crises affecting the contemporary world—including the environmental and refugee crises (but not forgetting other problems like financial or economic crises, persecution of minorities, natural disasters, religiously motivated terrorism and other issues)—has to deal with both. The moral discourse characterising the ethics of human rights is not enough, and—what is more important

[69] Rawls (1971).

[70] Nordmann (2017), p. 21.

[71] Some Christian legal scholars can argue that it would be more appropriate to write that religions "have cultural manifestations". Why? In this narrative, first, religions have an essential/fundamental and unchangeable core. Secondly, religions have an accompanying tradition which enables them to adapt over time according to the cultures in which they exist (see Giles 2018). According to this narrative, the ethical principles underlying political philosophy (or constitutional law) based on religion remain constant over time. As we can think, (moral) universalism and (epistemological/moral) objectivism might be involved in that way of thinking.

and the source of a real worry—it has demonstrated its incapacity of motivating human conduct.

This invites us to a humble and serious multidisciplinary enterprise. The starting point of this book is to take such a shared feeling seriously. Is something religious? Is something grounded in God? Is it a sort of necessary element of our past and contemporary legal systems in order to achieve international peace?

4 Peace Matters: Legal, Ethical and Theological Approaches

Part I of the book, **"**Peace through religion in moral philosophy and natural law", reflects an intuitive thought. The more spontaneous reference, when approaching the relation between religion and law, is to the great constructions of natural law theorists. In their conceptions, philosophical and theological aspects are often inseparable; nonetheless, that does not mean that the theological perspective cannot be distinguished from a legal or moral perspective or that some concept cannot be usefully exported from a theoretical framework to another in order to construct a better understanding of the relation between jurisprudence, God and peace.

Thus, in his general paper, *Dawid Bunikowski* (Chap. 2) focuses on jurisprudence understood as a science in Justinian's tradition: it is about both "divine and human things". Not only religious inspirations of chosen contemporary legal scholars (such as Patrick Devlin, John Finnis, Zenon Bańkowski and Norman Doe) are shown in the text, but also it is claimed that jurisprudence might be understood as "divine" at two levels: at the micro level (the level of regulation of life) and at the macro level (the regulation of the cosmos).

Giorgio Baruchello (Chap. 3) analyses Arthur F. Utz's Thomism. The author perceives domestic peace as social justice: so if there is domestic peace, then individuals may live freely and choose responsibly whatever life-plan each has. The Thomist conceptions of justice and social peace are discussed. It shall be noted that Utz was a major 20th-century Thomist, but his main works have remained unknown for the Anglophone reader. Utz confronted the idea of social justice with the liberal economic order.

Gerson Leite de Moraes and *Daniel Francisco Nagao Menezes* (Chap. 4) stress philosophical and theological aspects in the thought of Johannes Althusius. Althusius was a German jurist and Calvinist who was academically and politically active in the sixteenth and seventeenth centuries, in a time of social and religious turbulence, and has received less attention in recent times. To him, the main principles of a just society organised in an organic way were rights and the dependence of people on each other and on God.

In the last Chapter of this Part, *Diana Ginn and Edward R. Lewis* (Chap. 5) think of "living well together" and take "insights from a philosopher, a theologian and a legal scholar". The authors discuss the writings of the philosopher Charles Taylor,