

RELIGION, POWER, REASON: A LEGAL AND PHILOSOPHICAL REFLECTION¹

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***Abstract:** The dual decision by the European Supreme Court on Human Rights in the case of Lautsi against Italy has become emblematic of the difficulty that Europe has been going through when it comes to setting the role of religion in the public sphere. The decision of the first instance opted unanimously for the mandatory prohibition of displaying the Cross in Italian public schools. Who would dare to impinge on the required neutrality of State in a pluralistic society with regard to comprehensive doctrines of belief or reason? The latter decision of the Court² held that the cultural importance of the crucifix rather than its indoctrinating dimension would make the State's decision to maintain them acceptable. Should Europe instantiate its neutrality in such a surrealist way as to obligate the Scandinavian States to eliminate the cross from their flags?*

***Keywords:** European Supreme Court on Human Rights, the role of religion, public sphere, neutrality of State, pluralistic society.*

The situation seems to condemn us to aporia. Perhaps it is because, inadvertently, two very distinct aspects clash when trying to formulate a response to the question. In the context of Modernity, limiting oneself to considering whether or not a religion should exert power might lead to a wrong answer; one should also consider addressing another question: what is the extent of the relationship between rationality and religious faith? The idea of a neutral State arises as a consequence of demands of rationality which are set forth by modernity. The outcome could change, if instead of granting priority to the practical political problem (the exercise of power), we start by contemplating Reason as a starting point and consider its compatibility with religious belief.

Ethical non-cognitivism negates the possibility that reason has a basis in practice. The search for fair solutions would have nothing to do with reason, but rather with the emotional and the sentimental dimensions most closely related to volition. Without any decisive true or false answers, one ought to risk choosing blindly, without using any greater knowledge to narrow one's aim.³ Justice then becomes more of a moral, rather than

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³ The notion that practical issues admit of truth implies an assimilation of normative to descriptive propositions. The intuitionist attempt to grasp moral truths was doomed to failure because normative statements cannot be verified or falsified; that is, they cannot be tested in the same way as descriptive statements. In view of this, the alternative is a wholesale rejection of the idea that

a legal issue; its subjective nature removes it from the public sphere and secludes it to the private sphere. That should also be the obligatory destination of religion: to cloister itself in the catacombs of privacy. However, if anything categorizes religion it is the following strong connotation: its claim, almost insulting to some, that it represents universal truth⁴.

The incompatibility of this claim with non-cognitivism is obvious, but is it, in fact, incompatible as well with modern rationality? ⁵ Would it be condemned to violent fundamentalism?⁶ Harmony can be restored through the difference between that which can be verified and that which can be justified in practice. This refocuses the question of the justifiability of the tenets in matters of religion⁷.

The problem worsens because of the impact of Modernity in the public sphere, which, put precisely, revolve around the legal dimension of justice, based on its non-negotiable rationality; it matters not whether we speak of Grotius Natural rights or the fundamental rights of the current European Constitutions. Denying the rationality of that which is just would attribute a merely emotional and sentimental dimension to democracy, as does Rorty with more irony than force.

The possibility of Practical Reason implies admitting the existence of a logos, present beyond what is observable, towards which one's own behavior should be in harmony. Does this still make any sense in a culture, even as post-Kantian as can be, which presents itself as post-metaphysical?⁸. Only an affirmative answer can take away a reader

practical questions admit of truth –Jürgen HABERMAS *Diskursethik. Notizen zu einem Begründungsprogramm* in “Philosophische Texte. Band 3”, Frankfurt am Main, Suhrkamp, 2009, pp. 42 & 44.

⁴ Moral truths, as in the past, are embedded in religious or metaphysical worldviews; they share this strong claim to truth, even though at the same time, pluralism reminds us that comprehensive doctrines are no longer open to public justification. Metaphysics remains, even when eliminated from the public agenda, a basis for the ultimate validity of the morally just and ethically good - Jürgen HABERMAS *‘Vernünftig’ versus ‘wahr’ – oder die Moral der Weltbilder* in “Die Einbeziehung des Anderen” Frankfurt am Main, Suhrkamp, 1999, p. 107.

⁵ The concept of knowledge as representation is associated with the concept of truth as correspondence. When we let go of one we cannot hold on to the other. In line with a powerful intuition, truth is a property that propositions cannot lose: when a proposition is true, it remains true for ever and for all publics, not just for us. Justified claims could be proven to be false. Therefore, Kantian pragmatism has to explain the internal connection between truth and justifiability -Jürgen HABERMAS *Comentarios sobre Verdad y Justificación* en “La ética del discurso y la cuestión de la verdad” Barcelona, Paidós, 2003, pgs.78-80.

⁶ In the view of Islamic, Christian, or Jewish fundamentalists, their own truth claim is absolute in the sense that it deserves to be enforced even by means of political power, if necessary -Jürgen HABERMAS *Zur Legitimation durch Menschenrechte* in “Die postnationale Konstellation. Politische Essays” Frankfurt am Main, Suhrkamp, 1998, pp. 189-190.

⁷ If, as Tugendhat would say, ‘justification’ initially means no more than that the persons involved have good reasons for deciding on a common course of action; and all religious and metaphysical worldviews are good sources of ‘good reasons’” -Jürgen HABERMAS *Diskursethik. Notizen zu einem Begründungsprogramm* (cit. nt. 3) p. 71.

⁸ A philosophy that thinks postmetaphysically cannot answer the question: Why be moral? At the same time, however, this philosophy can show why this question does not arise meaningfully for communicatively socialized individuals. We acquire our moral intuitions in our parents’ home, not in school. And moral insights tell us that that we do not have any good reasons for behaving otherwise. For this it is not necessary that morality be able to answer the question of why be moral. The fact that we may do it with bad conscience attests that rational motivation, that is, motivation by means of reasons, is more than nothing, to be more precise moral convictions do not allow

from his amazement about Habermas' proposals on the role of religion in the public sphere⁹. The perplexity diminishes when one admits that treating an ethical proposal from a religious perspective does not necessarily detract from the rationality of its content. What would be unreasonable would be to substitute the confessional argument on authority with a secular one of non-authority, which would disqualify, without even a debate, any proposal having any religious content.

Paradoxically it could be the hermeneutic context, which, having mortally hurt metaphysics, would, in the end, serve as a foundation for the ethics of discourse¹⁰, which will in turn sustain a new practical rationality. Any such attempt will always be beset by doubts whether it could be accomplished without metaphysics¹¹.

The language of philosophy requires an objective prior and goals that, while serving as a reference¹², transcend us¹³; in contrast speaking about speech itself could be terribly boring. We should have to be in agreement with this approach, which seems to save us from having to resort directly to Kantian practice, and substitute it with intuitions¹⁴ duly argued¹⁵, which would come forth in various contexts; with regards to the

themselves to be overridden without resistance –Jürgen HABERMAS *Exkurs: Transzendenz von innen, Transzendenz ins Diesseits* in “Texte und Kontexte”, Frankfurt am Main, Suhrkamp, 1991, p. 144.

⁹ Specifically those set forth in the works featured in *Zwischen Naturalismus und Religion. Philosophische Aufsätze* Frankfurt am Main, Suhrkamp, 2005, to which we will refer later.

¹⁰ According to discourse ethics, a given norm can only aspire to be valid when all the persons affected by it manage to agree (or can agree) in so far as they are participants in a practical discourse in which the norm is valid –Jürgen HABERMAS *Diskursethik. Notizen zu einem Begründungsprogramm* (cit. nt. 3) p. 60.

¹¹ Without an ontological platform, truth is no longer an idea but rather a weapon in the fight for life. Human knowledge, which includes vision, intellection and moral conviction, can only put itself forward with the claim to truth if it is guided by relations between itself and being, just like when these relations present themselves to the divine abode. Compared with this particular traditional understanding, I will attempt to establish a modern alternative, a concept of communicative reason, which will enable us to save the sense of the unconditional without metaphysics –Jürgen HABERMAS *Zu Max Horkheimers Satz: ‘Einen unbedingten Sinn zu retten ohne Gott, ist eitel’* in “Texte und Kontexte” Frankfurt am Main, Suhrkamp, 1992 (2^a), pp. 119-120.

¹² As historical and social beings we find ourselves always already in a linguistically structured lifeworld –Jürgen HABERMAS *Die Zukunft der menschlichen Natur. Auf dem Weg zu einer liberalen Eugenik?* Frankfurt/M., Suhrkamp, 2002, p. 25. The *logos* of language embodies, therefore, an intersubjective power which precedes and underlies the intersubjectivity of speakers - Jürgen HABERMAS *Wie die ethische Frage zu beantworten ist: Derrida und die Religion* in “Ach Europa. Kleine politische Schriften XI”, Frankfurt, Suhrkamp, 2008, p.53.

¹³ In communicative action, we orient ourselves with aspirations of validity that we can only actually establish in the context of our languages and our ways of life, even when the performability or resolubility we implicitly assume of such aspirations looks beyond the provinciality of any specific historical setting. We are exposed to the movement of a transcendence from within, which is just as far from being at our disposal as is the relevance of the word we say to convert us in to lords and masters of the structure of language (or of *Logos*)” –Jürgen HABERMAS *Exkurs: Transzendenz von innen, Transzendenz ins Diesseits* (cit. nt. 8), p. 142.

¹⁴ As long as moral philosophy sets itself the task of helping to clarify daily intuitions, obtained by way of socialization, it will have to be coordinated, at least virtually, with the attitude of the participants in everyday communicative praxis –Jürgen HABERMAS *Diskursethik. Notizen zu einem Begründungsprogramm* (cit. nt. 3), p. 37.

¹⁵ Intuitively we know that we cannot convince someone, not even ourselves, of something if we

controversial issue of whether human embryos have rights¹⁶, republicanism¹⁷, Kant's categorical imperative¹⁸ or, as a consequence, the fundamentals of the ethics of discourse¹⁹.

Given the context, would religion be in a position to bring about any new contributions to public discourse? A negative answer could only come from a secular approach, which would disallow any religious discourse in public discourse, not even within the institutional channels of democratic suffrage, if it overlaps with the immanent world views, presented artificially as neutral.

One can look back in history so see the evidence of how fragile the attempt is. Francisco de Vitoria did not seem to stop bringing forth reasons, when interracial equality was a new concept, as is asking oneself today if a selenite recently landed is entitled to human rights. Would it have made sense to quiet the Spanish friar, accusing him of getting involved in politics and secluding him to its convent? It would probably seem discriminatory today not to grant him citizenship because of his religion, while recognizing that it was all learned from Grotius. It is not a very different approach from that of Rawls, who could probably not imagine that Martin Luther King would have fought his battle for civil rights if, before doing so, his religious convictions had been extirpated²⁰.

The European cultural context provides particularly rich examples. Habermas bears witness, not only generically, but personally, as well.²¹

When one forgets the game of practical reason, one forgets the calling to remain neutral, which is what made it possible to create a state of truce in the Europe immersed in

don't have the common starting point that we are paying heed to all the voices that may be relevant, that we are listening to the best arguments that are available given the current state of science and only the coercion without coercions springing from the best argument is determining the positions of affirmation or negation taken by the participants. –Jürgen HABERMAS *Zu Max Horkheimers Satz* (cit. nt. 11), p. 124.

¹⁶ On the one hand, under the conditions of a worldview pluralism, we cannot give the embryo 'from the beginning' absolute protection of life, a protection which is enjoyed by people who do possess fundamental rights. On the other hand, we hold the intuition that we cannot dispose of the prepersonal human life and convert it into a good, subject to competition –Jürgen HABERMAS *Die Zukunft der menschlichen Natur* (cit. nt. 12), p. 78.

¹⁷ Kantian republicanism, as I understand it, starts from a different intuition. Nobody can be free at the expense of anybody else's freedom"– Jürgen HABERMAS *'Vernünftig' versus 'wahr'* (cit. nt. 4), p. 126.

¹⁸ All variants of cognitivist ethics take their bearings from the basic intuition contained in Kant's categorical imperative. The moral principle is so conceived as to exclude as invalid any norm that could not meet with the qualified assent of all who are or might be affected by it. –Jürgen HABERMAS *Diskursethik. Notizen zu einem Begründungsprogramm* (cit. nt. 3), p. 57.

¹⁹ Regardless of cultural background, all participants in the discourse know quite well, intuitively, that there cannot be a consensus based on conviction, as long as symmetrical relations do not exist between the participants in the communication, that is, relations of mutual recognition, the taking on of the perspective's of the other, the common disposition to also consider one's own traditions through the eyes of a stranger, or a willingness to 'learn' from each other –Jürgen HABERMAS *Zur Legitimation durch Menschenrechte* (cit. nt. 6), p. 192.

²⁰ John RAWLS *Political Liberalism* New York, Columbia University Press, 1993, p. 247, p. 250, nt. 36.

²¹ I could not defend myself if someone said that my conception of language and of communicative action oriented toward mutual understanding nourishes itself from the legacy of Christianity – Jürgen HABERMAS *Ein Gespräch über Gott und die Welt* in "Zeit der Übergänge. Kleine politische Schriften. IX", Frankfurt am Main, Suhrkamp, 2001, p. 187.

religious wars. This would have been impossible without the cognitivist conviction that a natural right exists, which is the result of an undisguised creationist parting point²². This is why it would be erroneous to think that all Grocio had to share with us is a neutral immanent conception of existence²³. From this point of view, there are people who consider transcendent faith as a folk craving that is easily dispensed with, or even an irrational source of unavoidable and disturbing incentives to resort to violence. For Grocio an immanent vision of the world would be no more neutral than any vision based on transcendentalism; therefore considering it as an alternative would appear to him a blasphemous idea²⁴.

Grocian's Natural Law could be a *lingua franca*, facilitating a simultaneous translation which could have saved Europe from a violent Babel. The current aspiration would be to have a similar language in a post-metaphysical context²⁵, having as a platform an ethic, even though discounting the Natural Law²⁶, so that all involved move in the same universe of discourse and respect each other mutually as helpful participants in the search of the ethical-existential truth. In this context it will make sense, considering religion as a source of reason, to invite the faithful to translate their arguments and shared them with the

²² The moral commandments were ontotheologically justified at one time as parts of a rationally organized world. Moral judgments were true-false as long as the cognitivist content of morality could be shown with the help of descriptive statements. But since moral realism can no longer be defended by appealing to the metaphysics of creation and natural law (or equivalent), the normative validity of moral statements can no longer be assimilated into the truth validity of descriptive statements. The latter say how the world behaves while the former say how it should behave -Jürgen HABERMAS *Eine genealogische Betrachtung zum kognitiven Gehalt der Moral* in "Die Einbeziehung des Anderen" Frankfurt am Main, Suhrkamp, 1999, p. 52.

²³The guarantee of equal ethical liberties requires the secularization of state power, but it forbids the political overgeneralization of the secularized worldview. Insofar as they act in their role as citizens, secularized citizens may neither fundamentally deny truth-potential to religious worldviews nor deny the right of believing citizens to make contributions to public discussion in religious language. A liberal political culture can even expect that secularized citizens take part in efforts to translate relevant contributions from the religious language into a publically accessible language -Jürgen HABERMAS *Kulturelle Gleichbehandlung – und die Grenzen des Postmodernen Liberalismus* in "ZwischenNaturalismus und Religion. Philosophische Aufsätze" Frankfurt am Main, Suhrkamp, 2005, p. 322.

²⁴ Etiamsi daremus non esse Deum, aut non curari ab eo negotia humana" - Hugo GROTIUS *De iure belli ac pacis libri tres*, Prolegomena, 11: These things that we have said, would have their place even if we were to admit - which cannot be done without committing a great offence – that there is no God or that He does not take care of human affairs; and as the converse of what has been inculcated into us partly by reason and partly by constant tradition and, moreover, is confirmed by many arguments and miracles witnessed throughout the ages, the point follows that we must obey God Himself without reserve.

²⁵ Postmetaphysical thought differs from religion in that it recovers the meaning of the unconditional without recourse to God or an Absolute -Jürgen HABERMAS *Zu Max Horkheimers Satz* (cit. nt. 11), p. 125.

²⁶ As long as one was able to fall back on a religiously or metaphysically grounded natural law, the whirlpool of temporality enveloping positive law could be held in check by morality. But even ignoring that in pluralistic societies such integrating world-views and collectively binding ethical systems have disintegrated, modern law, by virtue of its formal qualities, resists the direct influence of a posttraditional morality that, so to speak, would be the only one available -Jürgen HABERMAS *Über den internen Zusammenhang von Rechtsstaat und Demokratie* in "Die Einbeziehung des Anderen" Frankfurt am Main, Suhrkamp, 1999, pp. 295-296.

agnostic²⁷, instead of sending him to the hell of the hopelessly irrational. First of all, to be a citizen it should not be required to practice apostasy, as would be the unavoidable consequence of the second hypothesis, which impoverishes the public debate. The State should not discourage the faithful and the religious communities so that they refrain from manifesting themselves as well in a political fashion. It cannot know if, to the contrary, the secular way of life (societies) would not be disconnecting and depriving themselves of important resources in the creation of reason²⁸.

For it to become a viable result in a post-metaphysical context, Habermas' vision considers it necessary to add a new post-secular approach of remarkable ethical depth. As a consequence the non-believer is invited to take on a demanding change of mentality²⁹. A secular mentality, concerned with stripping the citizen of his pluralistic religious garb and imposing on him a secular uniform, results, as in the 1900's for Rawls, for whom the non-public affairs would not make it easy to overlap consensually with public reason³⁰. It exceeds secularism when the agnostic abandons all magisterial pretension. Whilst in European countries with hegemonic faiths, invocations to equality are only approached with respects to treatment between faiths, for Habermas the requirement for equality will prevail by avoiding a generalized and unconscious discrimination for reasons of religion. Further beyond a *modus vivendi* opportunist, the idea is to leave an open sphere of mutual rational discourse. This will require the non-believer to assume a learning process that will bring him to translate its own unintelligible arguments to the believer³¹.

The logical consequence would be that no one should be surprised or bothered by the public presence of contributions which originate within religious traditions in our

²⁷ The constitutional state must not only act neutrally towards worldviews but it must also rest on normative foundations which can be justified neutrally towards worldviews – and that means in postmetaphysical terms. The religious communities cannot turn a deaf ear to this normative requirement. This is why those complementary learning processes in which the secular and religious sides involve one another come into play here –Jürgen HABERMAS *Ein Bewußtsein von dem, was fehlt* in “Philosophische Texte. Band 5”, Frankfurt am Main, Suhrkamp, 2009, p. 414.

²⁸ As a consequence, the liberal state that gives equal protection to all forms of religious life, must exempt the religious citizens from the excessive demand of making, in the public-political sphere itself, a strict separation between secular and religious reasons, as long as those citizens perceive it as an aggression on their personal identity –Jürgen HABERMAS *Religion in der Öffentlichkeit. Kognitive Voraussetzungen für den ‘öffentlichen Vernunftgebrauch’ religiöser und säkularer Bürger* in “Zwischen Naturalismus und Religion. Philosophische Aufsätze” Frankfurt am Main, Suhrkamp, 2005, pp.137 & 135.

²⁹ Instead of being something natural and implicit, the insight by secular citizens that they live in a post-secular society that is ‘epistemically adjusted’ to the continued existence of religious communities first requires a change in mentality that is no less cognitively exacting than the adaptation of religious awareness to the challenges of an ever more secularized environment. In line with the criteria of the Enlightenment which will make critically sure of its own limitations, the secular citizens must grasp their conflict with religious opinions as a ‘reasonably expected disagreement’. –Jürgen HABERMAS *Religion in der Öffentlichkeit* (cit. nt. 28), pp.145-146.

³⁰ According to Rawls' conception, the metaphysical doctrines and religious interpretations of the world can be true or false, as pointed out by –Jürgen HABERMAS *Versöhnung durch öffentlichen Vernunftgebrauch* in “Die Einbeziehung des Anderen” Frankfurt am Main, Suhrkamp, 1999, p. 85.

³¹ The secular awareness that one is living in a postsecular society takes the shape of post-metaphysical thought at the philosophical level. In both regards, the liberal state faces the problem that religious and secular citizens can only acquire these attitudes through complementary ‘learning processes’ –Jürgen HABERMAS *Religion in der Öffentlichkeit* (cit. nt. 28), p. 124.

society³², nor should it be difficult to detect them as the foundation, perhaps not consciously realized, of our consolidated views.

Practical rationality accepted, within a cognitivist context, only capricious discrimination would justify the exclusion of any proposal with potential religious content. To the contrary, practical rationality rejected, arguments cannot be appealed to; not even to justify the presence of a religion in the public sphere that has been granted determined to be disturbing or despicable. Within the confusion of sentiments, it would be natural to identify one's own position with common sense and convert it into a pagan civil religion³³, to deny the exercise of the fundamental right to freedom of religion³⁴ and grant the faithful, with generous tolerance, not without a certain degree of fundamentalism, the honorable privilege to expose their possible discrepancies with the majority view in the intimacy of their own homes.

Given such a model, European culture in the international context would have contributed little to the discourse on public ethics, based on a rigorous historical balance sheet. Instrumental rationality being the only performance criterion to judge truth or falsehood, it becomes nothing more than one more element in the history of reason, which would also include the contributions of the world's greatest religions³⁵. Any action to the contrary would be the equivalent of cutting oneself off from one of the most efficient resources of contributions to the public sphere³⁶. Instead of ignoring our history it would make more sense to accept the authentic origin of these cultural elements which undoubtedly make us proud.

This is an invitation without a doubt to a political debate on the presence of religion in the public sphere, and make it more attuned to positive secularism³⁷, discarding a secularism that is focused on reducing that which is rational to power using a non-cognitivist framework.

³² In the secular societies of the West, everyday moral intuitions are still shaped by the normative substance of so to speak decapitated, legally privatized, in particular by the contents of the Hebrew morality of justice in the Old Testament and the Christian ethics of love in the New Testament" - Jürgen HABERMAS *Eine genealogische Betrachtung zum kognitiven Gehalt der Moral* (cit. nt. 22), p. 16.

³³ This 'postmetaphysical' thought has remained deeply ambiguous. To this day it continues to be threatened by the possibility of regression into 'neopaganism'. In the wake of the postmodernist critique of reason, these neopagan figures of thought have become fashionable again. But in the context of Nietzsche's and Heidegger's critique of metaphysics, they acquire the connotation of a rejection of the universalistic meaning of unconditional validity claims -Jürgen HABERMAS *Ein Gespräch über Gott und die Welt* (cit. nt. 21), p. 186.

³⁴ Spanish constitutional jurisprudence which guarantees this right has already been analyzed in *Un Estado laico. Libertad religiosa en perspectiva constitucional* Cizur Menor, Aranzadi, 2009.

³⁵ Jürgen HABERMAS *Religion in der Öffentlichkeit* (cit. nt. 28), p. 154.

³⁶ However, if religious and metaphysical worldviews prompted learning processes, then both modes, faith and knowledge, together with their traditions based respectively in Jerusalem and Athens, belong to the history of the origins of the secular reason -Jürgen HABERMAS *Ein Bewußtsein von dem, was fehlt* (cit. nt. 27), p. 410.

³⁷ We dealt with this in *Laicidad y laicismo* México DF, Universidad Nacional Autónoma de México, 2010.