HOW (NOT WHAT) SHALL WE THINK ABOUT HUMAN RIGHTS AND RELIGIOUS ARGUMENTS? PUBLIC REASONING AND BEYOND

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Abstract: This paper addresses the question of how (not what) we should think about human rights and religious arguments. Thinking about this relationship is today particularly important, because conflicts over human rights in practice often turn around their theoretical problems. Should religious arguments be used to justify human rights? Or do we want human rights to be free from any partisan endorsement so as to avoid divisive interpretations of universal principles? Underlying these hard questions is the issue of justification in view of a plurality of cultural and religious traditions around the globe. If human rights can be transformed so as to defy the charge of Euro-centrism (of being parochially rooted in only one cultural and religious tradition), they need to creatively draw on, not pit themselves against, this plurality. This paper suggests a framework for such a positive and inclusive engagement with various cultures and religions that goes beyond the mainstream liberal model of "public reason".

Keywords: human rights; justification; *modus vivendi*; pluralism; public reason; secularism.

I. THE VOICE OF POLITICAL THEORY IN HUMAN RIGHTS DISCOURSES

What is it that political theory has to say about human rights? Given the many forms in which human rights discourses are (ab)used in global politics today – human rights can, that much has become clear over the last decades, be invoked for emancipatory as much as for imperialist causes – this question is far from trivial. The starting point of this paper will be that political theory, roughly and incompletely speaking, engages in two tasks when dealing with human rights. On the hand it attempts to address the issue of *justification*. Can human rights be justified, and if so, on what terms? The second challenge that

political theory needs to confront is that of *critique*: Do we need to criticize human rights as they are currently practiced, and if so, on what terms?

Although it is obvious that both tasks are intertwined – justification and critique inform each other in complex ways that would require further elaboration – the upcoming reflections will mainly focus on the first task. More specifically, I will try to think through the role that religious arguments can play in human rights discourses. As has been pointed out recently, the genealogy of human rights cannot be reconstructed in purely secular terms (Freeman, 2004). While religious arguments have, thus, historically played a formative role in, for example, the European natural rights tradition, the problem in the contemporary debate is how to conceive of the justification of human rights in view of the plurality of cultural and religious traditions around the globe. This is, in the eyes of many commentators, the great challenge human rights need to face up to: if human rights can be transformed so as to defy the charge of Euro-centrism, they need to be based on a pluralistic justification (Gregg, 2010; Santos, 2002).

Typically, the relationship between human rights and religious arguments is evaluated in a rather dichotomous fashion: Either religious arguments are euphorically invoked so as to support human rights (Stackhouse, 1981; 1998) or they are vehemently rejected so as to keep human rights untainted from any unenlightened ideology that might in fact breed divisive conflicts, instead of containing them (Henkin, 1998).[1] The goal of this paper is to show that such a dichotomous view is simplistic, and to offer a primer for a more differentiated account. I will try to realize this goal by arguing that, if we understand human rights as expressions of a discursive and dynamic *modus vivendi*, we will be better equipped to assess the appropriateness of religious arguments for human rights discourses. The advantage of the proposed conception of justification is that it allows for a historically informed, context-sensitive evaluation of the relationship between religious arguments and human rights. Therefore, the title of this paper already indicates where I would like to take the argument: What ensues is rather about *how* in general we should think about the relationship between human rights and religion than about *what* we should think about it more specifically. It is, hence, an exercise in establishing formally the conditions under which reflections on this relationship should take place, thereby complementing the work of those who have already started to examine this relationship in more concrete ways (Santos, 2009).

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[1] By "religious arguments" I mean concepts derived from religious doctrines. This definition, which is deliberately broad, leaves the question of exegetic authority wide open. While the question of who can decide over the extent of religious doctrines is undoubtedly important, I am in this paper more concerned with the function these arguments, once they are made, can fulfill in human rights discourses. However, as will become clear later on, I believe that religious doctrines are malleable and flexible in the sense that all texts (including sacred ones) are open to interpretive contestation and reform. This is the lesson, hinted at in the last section (V) of this paper, that Abdullahi Ahmed An-Na'im can teach us.

The paper has the following structure. Section (II) lays out the terrain on which the debate takes place, mapping the spectrum of (non-)justification in human rights discourses. The next step (III) will lead to an extensive discussion of the notion of "public reason". The purpose of this discussion is to explore whether "public reason" may help us make sense of how justifications work in human rights discourses. In response to the theories of John Rawls and Jürgen Habermas, section (IV) introduces a modified understanding of *modus vivendi* and suggests that this understanding can better inform the issue of justifying human rights. The last part of the paper (V) will examine this suggestion in a concrete context, namely with regard to an Islamic interpretation of human rights. Here, I finally turn to the relation between religious arguments and human rights, drawing on the work of Abdullahi Ahmed An-Na'im.

II. VARIETIES OF (NON-)JUSTIFICATION: FROM HYPER- TO ANTI-FOUNDATIONALISM

Before we move on to the main purpose of the paper, some conceptual clarification regarding the act of justification is needed. When political theorists discuss the issue of justifying human rights, they locate their standpoint on a spectrum of possible positions.[2] In order to see where the idea of a discursive and dynamic *modus vivendi* is placed on this spectrum, we should start by identifying the extremes.

On one extreme of the spectrum we can identify the notion that human rights need a stable fundament so as to work properly in the "real world". This view states that some sort of justification is absolutely essential for successful policies involving the expansion of human rights regimes. "Stable fundament" stands here for a particular kind of justification that can be labeled as universalist. A universalist justification claims to be valid across different cultures and traditions. One consequence of this universalism is that human rights are conceived as uniform and homogenous over time. There must be no variation in the way how particular cultures or traditions interpret and enact human rights – indeed, human rights need a stable fundament precisely so as to show where particular cultures and traditions *violate* the minimal standard set by human rights. Of course, there are various manners in which this stable fundament can be conceptualized: by referring to basic human interests, for example. The very concept of interest (and its protection) then provides a basis on which human rights can be normatively built.[3] Another route would be to anchor human rights in the idea of personal dignity, which occupies a pivotal place in much of post-Kantian theorizing (Donnelly 1982; Habermas 2010). Let us name this

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[2] For a useful overview of the main issues involved in justifying human rights see: Fagan (2005).
[3] To concentrate on the main theme of this paper, I am simplifying matters at this point. For, even if we only focus on "human interests" as a stable fundament for human rights, we are dealing with a number of positions that vary greatly in detail. See for instance the ideas expressed in: Griffin (2008); Nickel (2007).

extreme point on the spectrum of possible positions the *hyper-foundationalist* view of justifying human rights.

On the other extreme of the spectrum we can identify positions that radically call into question the importance of a stable fundament for human rights. So-called *anti-foundationalists* reject the suggestion that human rights need a justification in the universalist sense described above. What the proponents of this view suggest instead is that human rights be mainly, and perhaps exclusively, seen from the perspective of practitioners: of those who work in the field of human rights law and policy. Political theory has, on this account, close to nothing meaningful to say about human rights, as long as it maintains that its task is primarily to deliver a rock-solid justification.[4]

For the question of assessing religious arguments in human rights discourses, the deeper issue of justification is undeniably relevant. If one takes the hyper-foundationalist account to be correct, one has to prove beyond any doubt that religious arguments do indeed provide a stable fundament for human rights, that certain doctrines support the principled enshrined in human rights. Consequently, the challenge is to demonstrate in what ways religious arguments are not only compatible with, but even foundational of, those principles. On this account, the voice of political theory is a leading, even outstanding, one: without it, human rights would be lost. If one feels, on the other hand, more convinced by the anti-foundationalist approach, the very idea of a stable fundament appears problematic. Thus, religious arguments will be given relatively little attention, because any justification (no matter how it proceeds) is futile. Here, the voice of political theory is barely perceivable: without it, nothing would change for human rights.

Things get more muddled in the middle, between the extremes. While hyper- and anti-foundationalism mark the end points of the spectrum, the majority of philosophical positions lie in-between. All these positions start from the assumption that a justification of human rights can be useful for the practice of human rights in some respects, but they distinguish themselves from hyper-foundationalist approaches in that they reject universalist pretensions. They argue that it is feasible to proffer a justification for human rights without aiming for an a-historical, context-transcendent fundament. The reality of different non-Western cultures and traditions is here not taken as a insurmountable

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[4] However, anti-foundationalists seem to believe that other tasks are open to political theory, such as designing persuasive narratives about why human rights law and policy should become more acceptable around the world. The most important proponent of such an anti-foundationalist conception of human rights is undoubtedly Richard Rorty (1998). However, there are, just like in the case of hyper-foundationalism, many subtle variations of the idea that human rights need no deep philosophical foundation. See, for instance, the following standpoint, which differs starkly from Rorty's: Raz (2010).

challenge to the universality of human rights; rather, these cultures and traditions are seen as resources for deepening the concrete meaning of universality.[5]

What unites most positions that lie between the extremes of hyper- and anti-foundationalism is that they put special emphasis on the kind of agreement that is needed so as to secure a global culture of human rights. I believe that these positions are, by and large, more convincing than either the hyper- or anti-foundationalist view. Human rights can be justified, but not in the way hyper-foundationalists imagine, by appealing to a set of a-historical, context-transcendent principles. One commonly held assumption among liberal scholars is that, in the face of deep diversity caused, for example, by the clash of religious doctrines, the model of "public reason" formalizes this kind of agreement best. I want to suggest, hence, that a side-look at the debates on public reason and the place of religion in the public sphere can open up new perspectives for the topic we are more specifically interested in.

III. "PUBLIC REASON" AND THE PLACE OF RELIGION IN THE PUBLIC SPHERE

As a generic term, "public reason" is concerned with providing criteria for evaluating the validity of arguments circulating in the public sphere. To establish which reasons count as public is, thus, to separate acceptable from inacceptable justifications in deliberations among citizens. Since John Rawls's ideas have been framing the subsequent discussions, it will be useful to quickly highlight the key issues involved in his use of the notion.

Rawls's project in *Political Liberalism*, and generally in his later philosophy, is to offer a freestanding justification for a constitutional regime in which all citizens can be integrated equally.[6] "Freestanding" means that a political conception of justice must refrain from reaching out to any "comprehensive doctrine". The term "comprehensive doctrine" does not only encompass natural candidates for individual or collective visions of the good life, such as religions and ideologies, but also liberalism in the broad sense. The

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[5] Perhaps most prominently among these intermediary positions, we can recently witness the rise of a "practical" interpretation of human rights that distances itself from both the hyper- and the anti-foundationalist view on justification. Proponents of this practical interpretation agree with the anti-foundationalists about the futility of a deep philosophical justification. Instead of concentrating on a stable fundament, they take the current practice of human rights "as it is" in order to establish how human rights work in the international arena. Their function, it is widely argued, consists of limiting state sovereignty – the violation of human rights standards legitimizes the use of force across borders. Therefore, human rights are determined by the role they play in international relations, as yardsticks for assessing the legitimacy of humanitarian interventions. The best formulation of this practical interpretation of human rights can be found in: Beitz (2001; 2003). For another account of the relationship between human rights and intervention see: Tasioulas (2009). Another widely discussed proposal is to conceptualize human rights in terms of an "overlapping consensus" to which particular traditions and cultures can subscribe. See: Bielefeldt (1998); Twiss (1998).
[6] For a reconstruction of Rawls's idea of political liberalism see: Alejandro (1996).

astonishing assertion in *Political Liberalism* is that liberalism itself can be counted as such a vision of the good life.[7]

The freestanding conception of justice propagated by Rawls imposes on citizens a "duty of civility" (Rawls, 2005: 444). This duty expresses the obligation of every citizen to make independent use of two kinds of reasons: as a supporter of a comprehensive doctrine, for example as a believer in the precepts of Roman Catholicism or as a left-leaning activist, a person might hold multiple views on matters of communal significance. Nevertheless, these views must not, on Rawls's account, be offered as reasons in civic deliberations. Once they step into the forum of civic deliberations, citizens need to be willing to offer only those reasons for their decisions and actions that can be accepted by all other citizens, irrespective of which comprehensive doctrines they themselves may support.

There is one important disclaimer to add here, though: Rawls wants his ideal of public reason to be applied only to debates of highest importance, or what he calls debates about "constitutional essentials" and "matters of basic justice" (Rawls, 2005: 442). In response to sharp criticism of his earlier views on public reason, Rawls also makes it clear that citizens are in fact allowed to make use of their comprehensive doctrines in deliberative processes as long as they are willing and able to provide "in due course" arguments that can be shared by everyone. He refers to this revision as the "proviso" that specifies a wide view of public reason (Rawls, 2005: xlix-l). Further, Rawls introduces a crucial distinction between the "political forum" – encompassing judges and their decisions, the discourses of government officials and the announcements of candidates for public office – and the "background culture" of civil society. From this distinction it does not follow, however, that citizens who are formally situated outside the political forum should refrain from making use of public reason, as we shall see shortly.

The intuition behind the bracketing of comprehensive doctrines says that, given the fact of "reasonable pluralism" in modern democracies, i.e. given the simultaneous existence of equally justified views of the good, political liberalism "deliberately stays on the surface" (Rawls, 1985: 239). The strategy of public reason entails circumventing divisive conflicts that would, on Rawls's account, inevitably erode the fundament of society once debates about justice became dominated by a clash of idiosyncratic allegiances to particular values. To argue politically, as opposed to metaphysically, depends, thus, on the abstraction from one's deepest commitments.

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[7] This is the reason why Rawls conceives of political liberalism as a parsimonious and non-perfectionist version of thick liberalism. This idea is connected to what Rawls calls the priority of the right over the good. A right-based defense of justice as fairness claims to remain neutral towards the entirety of individual or collective visions of the good life.

Note that the requirement of reciprocal acceptability inherent in public reason stands in stark contrast to mere toleration, where not more than a fragile *modus vivendi* between different individuals or groups with their comprehensive doctrines is at stake. A *modus vivendi* offers, in Rawls's view, a solution to the problem of "reasonable pluralism", but it proceeds in the wrong way because it merely establishes a precarious equilibrium point between otherwise antagonized opponents. Instrumental rationality and strategic action are not enough to elucidate "society as a system of fair social cooperation between free and equal persons" (Rawls, 2005: 9). Public reason, on the other hand, aims at deepening the consensus on which diverse societies are built, for it engages all citizens in a conversation about normative foundations. This requirement of neutrality governing civic deliberations evidently has massive consequences for Rawls's interpretation of religion. The overarching question is: "How is it possible […] for those of faith, as well as the nonreligious (secular), to endorse a constitutional regime even when their comprehensive doctrines may not prosper under it, and indeed may decline?" (Rawls, 2005: 459)

Rawls stipulates that public reason circumscribes a space from which *all* comprehensive doctrines are excluded by the same token. Since secularism figures as a "comprehensive nonreligious doctrine" (Rawls, 2005: 452), public reason must not be mistaken for secularism. The translation of comprehensive doctrines into the register of public reason, thus, instigates a process through which each citizen is forced to leave her idiosyncratic allegiances behind and articulate her concerns through the common language of citizenship. As has already become clear, not only state officials such as judges, parliamentarians or candidates for public office are bound by the "duty of civility", but also ordinary citizens must in their debates over constitutional essentials and matters of basic justice refrain from advancing visions of the good life. Citizens need to act as if they were ideal legislators in the public sphere when holding officials in the political forum accountable (Rawls, 2005: 444).

Let us now turn to Habermas. The German philosopher grapples with Rawls's proposal by sorting out lessons that he deems more valuable than others. While Habermas shares, and indeed stresses, Rawls's focus on civic deliberations, he also sides with those who criticize Rawls for asymmetrically burdening religious people.[8] In what sense can it be argued that the "duty of civility" is unfairly disposed towards believers? On the one hand, Habermas claims, it is a matter of empirical observation to state that religious people cannot simply split their identity into one part governed by the principles of a comprehensive doctrine, and another part governed by the ideal of public reason. In opposition to Rawls, Habermas insists that it is not always possible for a

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[8] For representative criticisms see: Audi and Wolterstorff (1997); Weithman (2002).

believer to find widely accessible formulations for her positions that correspond to, and map on, the reasons originating in a comprehensive doctrine. It is overly demanding for, and therefore unfair to, the believer to always seek a duplication of her set of reasons, depending on where the discussion takes place. On the other hand, there is also a moral consideration that reveals why Rawls's insistence on public reason might be disingenuous:

> There is a normative resonance to the central objection, as it relates to the integral role that religion plays in the life of a person of faith, in other words to religion's 'seat' in everyday life. A devout person pursues her daily rounds by drawing on belief. Put differently, true belief is not only a doctrine, believed content, but a source of energy that the person who has a faith taps performatively and thus nurtures his or her entire life. (Habermas, 2006: 8)

In this passage, Habermas submits that the obligation to establish a split identity between private believer and public citizen underestimates the moral weight faith possesses. Recall that the duty of civility demands from all citizens to draw a parallel between public reason and comprehensive doctrine. This demand, however, might be doomed to fail if there plainly are no corresponding formulations for one's positions that would be publicly accessible. It is, thus, conceivable to imagine a genuine collision between religious values (or any other comprehensive doctrine) and public reason, because many believers support a specific policy regarding constitutional essentials and matters of basic justice on the grounds that their religion considers it authoritative. It might even be said that a crucial component of faith is precisely that *only* religious values can motivate and orient the believers' standing in civic deliberations.

The moral weight of comprehensive doctrines supplies a strong argument against excluding religious beliefs from the public sphere. The duty of civility advocated by Rawls could in the end lead to a disenfranchisement of religious people, and this would obviously diminish the stabilizing effect of civic deliberations. If religious people are asked to remain mute in the public sphere due to an inability to access public reason, their standpoints cannot become contributions in the process of ideal legislation. This danger of excluding religious people motivates Habermas to modulate Rawls's proposal in one significant respect.

> The liberal state must not transform the requisite institutional separation of religion and politics into an undue mental and psychological burden for those of its citizens

who follow a faith. […] Every citizen must know and accept that only secular reasons count beyond the institutional threshold that divides the informal public sphere from parliaments, courts, ministries and administrations. But all that is required here is the epistemic ability to consider one's own faith reflexively from the outside and to relate it to secular views. Religious citizens can well recognize this 'institutional translation proviso' without having to split their identity into a public and a private part the moment they participate in public discourses. They should therefore be allowed to express and justify their convictions in a religious language if they cannot find secular 'translations' for them. (Habermas, 2006: 8-10)

The crucial argument in this passage concerns the distinction between the "informal" and the "formal" public sphere. This distinction is pivotal to Habermas's double-tiered model of deliberation. Democratic *opinion-formation* takes place in the informal, weak public sphere that is characterized by disorder and fluidity. All types of arguments can be exchanged in this branch of the public sphere, because the channels of communication are completely unregulated. In contradistinction to the anarchic structure of opinion-formation, democratic *will-formation* is subject to more organizational restrictions. The main venues for democratic will-formation are located in the formal, arranged public sphere of the judiciary and the parliament. Although Habermas suggests that the informal and the formal public sphere rely on, and communicate with, each other, he conceives of them as distinct branches (Habermas, 1996).

It is the institutional threshold separating the informal from the formal public sphere that decides over the admissibility of religious beliefs. The state has to be unequivocally secular and firmly rooted in the repudiation of faith-based arguments. While Rawls wants to ban religious beliefs, just like any other comprehensive doctrine for that matter, from the public sphere in general, Habermas argues for the inclusion of believers' standpoints within the anarchic structure of opinion-formation. Respect for the equality of religious people commands such inclusion; further, it is of paramount importance for the society at large not to cut itself off from positive resources of meaning:

Religious traditions have a special power to articulate moral intuitions, especially with regard to vulnerable forms of communal life. In the event of the corresponding political debates, this potential makes religious speech a serious candidate to transporting possible truth contents, which can then be translated from the vocabulary of a particular religious community into a generally accessible language. However, the institutional thresholds between the 'wild life' of the political public

sphere and the formal proceedings within political bodies are also a filter that from the Babel of voices in the informal flows of public communication allows only secular contributions to pass through. (Habermas, 2006: 9)

The hope is that allowing religious beliefs in the public sphere would trigger processes of mutual learning from which all members of society might benefit. Such a learning process is necessary because today the modern world faces the threat of scientism: Recent debates about the freedom of will tend to be overshadowed by results generated from neurological research, and Habermas presumes that a scientifically restricted conception of personhood might narrow down the scope of civic deliberations. We need religious beliefs in the public sphere to counterbalance the "naturalistic self-objectification" fetishized by the natural sciences.

But religious beliefs can only flourish in the public sphere when they are seen as productive in the course of civic deliberations. More than mere toleration is required in a postsecular society. Once religious beliefs are permitted to inform and transform the debates in the public sphere, it would be a waste of resources if secular persons refused to take those beliefs seriously. Hence, Habermas insists that adaptive changes need to affect both religious and secular persons. Believers must become reflexive with regard to other religions and accepting of the secular foundations of the state. Non-believers, on the other side, must open themselves to the possibility that religious persons have in fact something meaningful to say in the public sphere. During this process all parties, consequently, have to cooperate in the informal, weak public sphere.

Let us recapitulate the argument about religion in the public sphere as it has been advanced by Habermas: At the heart of his approach lies a concern with both the legitimacy and the social cohesion of the constitutional state. Toleration based on indifference or ignorance is inadequate to address the challenges of deeply diverse societies. This becomes particularly evident in the context of contemporary Europe where past colonialism and present immigration put pressure on political systems to accommodate cultural differences. Habermas envisions the constitutional state as being based at once on private and public autonomy, on the liberal idea of basic rights and on the republican idea of democratic self-government (Habermas, 2001). Freedom of religion as a legal guarantee is, thus, a meaningful option only if the state enables its citizens to participate actively in the process of ideal legislation. It follows that civil society (the informal component of the public sphere) needs to be inclusive of, and responsive to, all members of a political community, while the state (the formal component of the public sphere) should promote the principle of absolute neutrality towards particular world views.

A social arrangement akin to a *modus vivendi* is structurally insufficient to tackle the fact of reasonable pluralism because it undercuts the requirement of public autonomy on which both Rawls and Habermas draw. The next section will address the issue whether Rawls's and Habermas's refutation of *modus vivendi* is indeed as plausible as it appears at first sight.

IV. DISPLACING POWER: WHAT IS WRONG WITH PUBLIC REASON?

One of the main characteristics of the discussions about the role of religion in the public sphere lies, as we have witnessed, in the assertion that tolerance as indifference and ignorance is insufficient to accommodate the concerns of believers in a democratic polity. The underlying charge is not so much that toleration is "repressive", as Herbert Marcuse has famously proclaimed, but rather that it fails to provide religious people with opportunities to refer to their profoundly felt convictions about controversial issues in the course of deliberations, without asking them to translate these convictions into the neutral language of citizenship. This failure to make voices heard can create a legitimacy deficit that might endanger the stability of the democratic polity, because, within a liberal framework, legitimacy can only be fostered through political autonomy, that is, through laws for which all citizens can claim authorship. A *modus vivendi* between different comprehensive doctrines would be too instable to secure social cohesion. What is, therefore, needed is an espousal of constitutional essentials and matters of basic justice "for the right reasons".

However, sceptics have argued that this focus on agreement "for the right reasons" might be fallacious, since it misconstrues the power relations pervading every political order. Against Rawls and Habermas, they have forcefully maintained that the ideal of neutrality on which public reason rests is both illusionary and dangerous. The ideal is illusionary, for the standards of reasoning according to which arguments in the public sphere are evaluated inevitably bear the hallmarks of power structures within a society. It is also dangerous, because the existence of power structures is covered up by the claim that public reason remains independent of, and even antithetical to, these power structures. The main contention of these sceptics is that, since all institutions and arrangements in the public sphere are imbricated with power relations, it would be incorrect to make legitimacy and social cohesion reliant on a conception of justice that is radically dissimilar from a *modus vivendi*. Following this train of thought, it is fruitless to seek to establish criteria for a just society, without taking into account the power relations that shape the very conditions under which these criteria are produced and brought to use.

This reflection gives rise to the need to reconsider the notion of *modus vivendi* as it is commonly conceived. Rawls and Habermas draw a very bleak picture of *modus vivendi* so as to make their alternative search for legitimacy and social cohesion for the "right reasons" appear more convincing. Duncan Ivison has explored the tension between public reason and *modus vivendi* in more depth with regard to the challenges that liberalism faces in the context of postcolonialism.[9] Ivison asks us to consider whether the ideal of public reason can help address the grievances of those who have been disenfranchised in the public sphere over a long period. In the postcolonial states that Ivison analyzes (Canada and Australia), aboriginal peoples are especially vulnerable to unfair treatment in, and orchestrated exclusion from, the public sphere. Nevertheless, appealing to the availability of public reason does nothing to alleviate the suffering of such minorities, as they usually lack the material and symbolic means to challenge and alter the conditions under which the public is negotiated. Another point of importance is that the Rawlsian scheme focuses too much on comprehensive doctrines as distinct systems of values, while the fact of the matter is that social, cultural and political identities intersect and converse with each other. Ivison then comes up with an insightful distinction between two ways of conceiving of *modus vivendi*:

> (1) *A simple or static modus vivendi*: The parties are motivated to comply with political norms only where it is in their interest to do so, where 'interest' is narrowly defined in terms of individual or group self-interest.
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> (2) *A discursive and dynamic modus vivendi*: The parties are motivated to comply with political norms where it is in their interest to do so, but (a) these interests include moral interests, and (b) over time, the demands and practices of social and political cooperation may come to be seen as fair and reasonable. However, the content of what is 'fair and reasonable' is always incompletely theorized and tied to the constellation of 'registers' or discourses […] present at any given time in the public sphere. (Ivison, 2002: 84-85)

Accepting the idea of a discursive and dynamic *modus vivendi* implies that the appeal to a freestanding justification of principles of justice must be modified in order to reflect the fact that what counts as public reason is itself a matter of societal and historical struggles. Supporters of a discursive and dynamic *modus vivendi*, thus, reject the idea of a freestanding justification, without giving up on the concept of public reason as such.

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[9] In fact, Ivison seems to have applied the revised notion of *modus vivendi* to a number of contexts, including the issue of citizenship and the history of political thought. See: Ivison (1997; 2000).

Citizens might accordingly be thought of as having different sets of preferences for endorsing a political regime or a social arrangement, yet power structures effectively have to be acknowledged as playing a role in shaping these preferences. If we rethink public reason in terms of a discursive and dynamic *modus vivendi*, we abstain from seeing these power structures as negative obstacles on our path to attain legitimacy and foster social cohesion. Rather, they are taken as constitutive of real politics. It is important to emphasize that this does not eradicate the possibility of consensus. The members of the public sphere might still arrive at some form of agreement over the "practices of social and political cooperation", but this concord always remains open to contestation and cannot be anchored in an abstract set of "right reasons".[10] Although Ivison maintains that the conflictual nature of public reason must be recognized, he does not side with proponents of agonistic democracy who are sceptical of any form of consensus (Mouffe, 1993; 2000; 2005). Agreement is in fact viable, yet the debate about fair terms of social and political cooperation remains by its very nature open-ended and contingent.

If we take this rejoinder from the outside of mainstream liberalism seriously, we manage to navigate between overly consensualist modes of public reason such as Rawls's and Habermas's, and overly conflictual views that deny the feasibility and desirability of agreement in general.[11] We can then scrutinize the relationship between power and justification, which is pivotal for the idea of public reason as well as for the discussion of religion, in a new and instructive light. If the attempt to eradicate power from the justification of a political regime or a social arrangement is conceptually futile, it becomes mandatory to analyze the existing power structures in their current configuration so as to comprehend which justificatory moves can hopefully be successful and which justificatory moves will probably fail.

V. HUMAN RIGHTS AS EXPRESSIONS OF A *MODUS VIVENDI*: NOVEL PERSPECTIVES FOR THINKING ABOUT RELIGIOUS ARGUMENTS

How do these insights about the shortcomings of "public reason" of the Rawlsian and Habermasian variety translate into the discussion around the relationship between religion and human rights? In the concluding section, I would like to explore what effect such a revised notion of *modus vivendi* might have for the justification of human rights. For a start, it should already have become clear why the debate around public reason bears

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[10] For more critique of public reason that resonates with Ivison's invective, see: Maclure (2006); Steinberger (2000).
[11] There are, however, other formulations of public reason that are closely related to the revised notion of *modus vivendi* I am pursuing here. I am particularly thinking of Henry Richardson's idea of a "deep compromise" as opposed to consensus, even if this proposal is based on a disavowal of "bare compromise" identified with *modus vivendi* (Richardson, 2002); For other moves in a similar direction see: Arnsperger and Picavet (2004); Bohman and Richardson (2009).

upon the justificatory engagement with human rights. As noted above, we are often confronted with two contradictory, and indeed dichotomous, views regarding the normative potential of religious beliefs: either they are, thanks to their sectarianism and divisiveness, deemed too dangerous to be considered candidates for justification; or they are optimistically, sometimes even enthusiastically, embraced in an attempt to craft an overlapping consensus between widely diverging visions of the good life.

Ultimately neither of these views is convincing. It would be more persuasive, or so I wish to argue, to conceive of the justificatory engagement with human rights by treading the middle path prepared through an altered notion of *modus vivendi*.[12] From the perspective of a discursive and dynamic *modus vivendi*, things look like this: while the access of believers to the deliberative process, with their own panoply of reasons, is welcomed, the search for an endorsement of human rights "for the right reasons" is canceled. Keeping in mind that all institutions and arrangements are entangled with power structures of some sort is of paramount importance for discussing the triangular relationship between religion, secularism and human rights. This implies that a specific type of justification of human rights, based on the presumption of neutrality and context-transcendence, must be discarded.

However, this dismissal of a specific type of justification does not collapse into the anti-foundationalism advocated by some postmodernists, such as Richard Rorty. To claim that human rights are to be understood as products of power structures does not necessarily imply that they are, from the viewpoint of non-Western cultures, alien tools of domination. The perspective of a dynamic and discursive *modus vivendi* rather obliges us to shift the analytical focus so that the now vacant place of a neutral and context-transcendent justification of human rights is filled with more complex and variable processes of deliberation. Religious beliefs can and will fulfill a variety of functions in this respect: they can and will be offered as genuine contributions in discussions about human dignity for instance, but they can and will also become argumentative weapons in the fight over which exegetic engagement with human rights should prevail. This polyvalence cannot be tamed by appealing to a translation proviso, wherever it may be located.

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[12] To be sure, Habermas's ideas are perceptive as regards the bonds between religion, secularism and human rights. The German philosopher takes the challenge of the postsecular condition seriously when he accuses rigid and uncompromising versions of secularism of obstructing the democratic enterprise of inclusion. His argument against those who merely stress the divisive potential of religious beliefs is forceful, because it encourages both believers and non-believers to acknowledge each other as equal partners in the deliberative process. Transposing Habermas's proposal to the debate about human rights means to make use of the idea of a translation proviso within the framework of human rights. The two-tiered conception of the public sphere could be interpreted as a blue-print for distinguishing between areas where all kinds of reasoning would be permissible and areas where only secular arguments would be allowed. This distinction would help secure a hard core of human rights, protected by the threshold of the translation proviso, to which believers and non-believers must adhere.

Power and justification are, therefore, intimately tied up with each other. Consequently, it is a matter of concretely examining local contexts so as to determine *how* power and justification cut across each other in given situations. This requires a context-sensitive approach. As an example for such a differentiated engagement with human rights and religious arguments, let us briefly hint at the work of Sudanese law professor Abdullahi Ahmed An-Naʿim.[13] An-Naʿim has, over the last 15 years, developed the most comprehensive proposal for exploring the positive synergy between religion, secularism and human rights. The idea that each element in this triangular relationship is simultaneously dependent on, and enabling of, all other elements figures at the heart of An-Naʿim's project. At first sight, this idea is, of course, controversial, because the standard notions of religion, secularism and human rights emphasize the divergences between these elements and pit them against each other. However, An-Naʿim intends to vindicate the universality of human rights in terms of an overlapping consensus to which various cultural traditions can subscribe without perceiving human rights as alien tools of domination. In order to reach this goal, An-Naʿim seeks to transform the standard notions of religion and secularism by showing that rows over whether human rights are universal or particular are futile: religion, secularism and human rights must be seen as supportive and accommodating of each other.[14]

In doing so, An-Naʿim is far from denying the potentially violent frictions between religion, secularism and human rights, surfacing for instance when religious regimes discriminate against minority groups; but he insists that the only way to salvage the claim of human rights would be to explore the universal within particular traditions. This is, on An-Naʿim's account, as much an empirical observation as it is a normative expectation. Only an internal dialogue between the precepts of human rights and different cultures will address the grievances of those who presume that the Western imprint on human rights has been overwhelmingly strong:

> I do not mean to suggest that human rights provide the answer to all problems of differential power relations, whether locally or beyond. Rather, my point is that human rights need to be 'owned' by different peoples differently, otherwise they will be perceived as simply another mode of Western coercion. In other words, legitimating human rights in local cultures and religious traditions is a matter of vital

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[13] An-Naʿim has published widely on human rights issues. His work can be seen as path-breaking in the sense that he tries to bridge the philosophical gap between religious hermeneutics and legal interpretation (An-Naʿim, 1987; 1989; 1991; 2000a; 2000b; 2001; 2005a; 2005b)

[14] In his latest book, An-Naʿim vindicates the concept of the secular state from an Islamic standpoint. The main claim of this book concerns the need for reforms from within those communities in which human rights standards are frequently violated (An-Naʿim, 2008).

importance for the survival and future development of the human rights paradigm itself. Religions must also be encouraged, from within, to provide moral underpinnings for fresh development of the paradigm in order to address emerging issues in differing contexts. The contribution of secularism to these critical developments must be to provide the political stability and communal security essential for negotiating a unique and dynamic relationship between human rights and religion in every setting internationally. (An-Na'im, 2005b: 68)

This passage is pivotal to the novel interpretation of human rights I would like to advance in this paper. The process of "owning" human rights in various cultural settings is one in which power structures are evidently present. Power structures condition the way how human rights are appropriated by various traditions and cultures. If we want to find out which justificatory moves will be successful and which not, we need to study theses concrete configurations of power, just like An-Na'im proposes in his comparisons of different Muslim countries (An-Na'im, 2008).

To return to the governing theme at the beginning of this essay, namely how to make sense of the voice of political theory in human rights discourses, let me finish with this observation: If we subscribe to the proposition that political theory must seriously engage the reality in which it operates, which is one of the implications of this paper, it follows that it has to reject both hyperfoundationalist self-aggrandizement and anti-foundationalist self-effacement. What emerges, then, is the horizontal vision of political theory as one among many, equally important voices, all of which are entangled in a conversation over theories and practices of human rights.

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