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**Dematerializing the traditional public square:
new challenges for religious freedom?**

1 - Almost forty years ago, Rev. Richard John Neuhaus highlighted the crisis of American democracy in a book entitled *"The Naked Public Square"*[1]. Linking the core of the American Constitutional experiment with its historical Christian origins, Neuhaus stimulated debate on enforcement of the First Amendment, arguing that strict interpretation of the Establishment clause had stripped the public forum of all popular values, leaving the public square empty.

According to Neuhaus this naked public square shook the foundations of the American political system, creating a fracture between two separate groups: the "secular, elitist and individualist" and the "religious, populist and communitarian"[2]. Neuhaus's analysis had a big impact on American public debate and could perhaps provide a key to understanding the current polarization of the American legal system. But despite the correctness of his analysis, Neuhaus could not provide a definition of the modern, physically deconstructed, public square.

In previous centuries, the concept of public square (or space) had been important to define the physical borders within which the political and democratic process took place. In ancient Greece, the public square - the *Agorà*- was the center of the political, commercial and religious life of the city, and physically and geographically embodied the idea of democracy that developed in Athens in the fifth century. Centuries later, the American democratic system borrowed an Algonquian word, *Caucus*, to describe "a private meeting of party leaders or local voters" that has been an important part of every U.S. presidential campaign. In both cases, the concept of a material physical space was necessary to describe how democracy comes into action. In ancient times, the public space was the

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[1] **R.J. NEUHAUS**, *The Naked Public Square. Religion and Democracy in America*, Eerdmans, 1984.

[2] **R.J. NEUHAUS**, *A Strange New Regime: The Naked Public Square*, in *The Heritage Foundation*, 8 October 1996 (*https://www.heritage.org/political-process/report/strange-new-regime-the-naked-public-square*).

town hall meeting, the legislative assembly or any other venue where public business was done.

The idea of public square/space has also been much discussed by sociologists and political philosophers over the ages. Max Weber offered a first, very broad definition, namely "the space that is available or open to every individual regardless of culture, religion and even social status"[3]. Philosophers subsequently began to reshape the theoretical dimension of the public space, arguing that it has to be open to all ideas and people of any social status. Hannah Arendt linked it with the idea of public freedom, noting that it is more than the "free will or free thought" that philosophers have traditionally discussed: since "the life of a free man needed the presence of others", freedom itself needed a place "where people could come together: the agora, the market-place or the polis, the political space proper"[4]. In other words, the public square is necessary to express public freedom that consists of "deeds and words which are meant to appear, whose very existence hinges on appearance"[5]. Exploring the development of this concept in social democracies, Habermas defined the public sphere as "the realm of our social life in which something approaching public opinion can be formed" and where "society engages in critical public debate"[6]. From a Constitutional point of view, this theoretical framework matches the famous analogy of the "free marketplace of ideas" developed by Justice Holmes in *Abrams v. United States* (1919).

Despite some differences (that concern slightly different concepts such as public "square", "space" or "sphere"), all these definitions help to frame the problem raised by Neuhaus. The public square always has distinctive characteristics bestowed by history, culture and the religious belief of the people who live in it. Since the public square is simultaneously the physical place of democracy and the theoretical place of public freedom, is it a fitting place to show or celebrate the historical religious traditions of a legal system? How can we reconcile the religious

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[3] See **M. WEBER**, *City* [1921], Free Press, Glencoe, 1958, mentioned by **A. NEGRI**, *infra*.

[4] **H. ARENDT**, *On Revolution*, London: Penguin Books, 1990, p. 31.

[5] *Ibidem*, p. 90.

[6] **J. HABERMAS**, (1989) [1962], *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*, translated by Th. BURGER, Cambridge Massachusetts: The MIT Press, 1989 [1962], p. 27.

heritage of a society with the need to ensure the fairness and impartiality of public debate?

2 - Scholars of law and religion know that this issue is hardly new. In recent decades, every legal system has offered different solutions to this problem, trying to reconcile religious heritage with the modern neutral (or secular) public square.

One of the solutions adopted to solve this problem was to deconstruct the public sphere into physical places and to investigate the specific functions each place plays in social interaction. Adapting the famous distinction between the political and institutional public spheres suggested by Jürgen Habermas[7], Silvio Ferrari formulated three categories of public place: *common space* (physical spaces such as streets or squares that people have to enter for their basic daily needs), *political space* (physical or metaphorical places where public debate and discussion occur) and *institutional space* (such as parliament, law courts and public offices where coercive deliberations occur)[8].

Dividing the public space into functional categories is useful to identify the specific rules that can be enforced in each: for instance, a ban on religious symbols in institutional spaces could be established to protect the neutrality and impartiality of the institutions, but a similar rule should not generally be adopted in the common space, where openness is vital to avoid segregating people who do not feel comfortable entering without manifesting their cultural belonging. In other words, legal systems could balance the need for neutrality with the recognition of cultural and religious heritage, combining different legal principles such as secularity, impartiality, identity, pluralism and personal or collective freedoms with the functional characteristics of each public place.

Deconstructing the public square has the evident merit of avoiding the dichotomy between a naked public square and a theocratic one. But to be really effective, this solution first needs to draw a clear line between public and private places, and then clearly define the proper features of each public space. In recent times this solution has become more

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[7] **J. HABERMAS**, *Religion in the Public Sphere*, 14 Eur. J. Phil., 2006, p. 1-1-25.

[8] **S. FERRARI**, *Religion in European Public Spaces: A Legal Overview*, in **S. FERRARI, S. PASTORELLI**, *Religion in Public Spaces. An European Perspective*, Routledge, New York, 2016, p. 139-159.
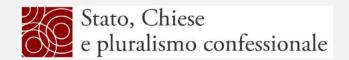
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problematical due to the digital transformation of society and de-materialization of the traditional public sphere.

Let us consider social networks, for instance. They clearly arose as private places and are still run by private companies. But today they are rapidly becoming the main public common place where people from all over the world share their needs, their experiences and ultimately their lives. After triggering interactions between billions of people, social networks then also started playing a significant role in the political arena, becoming the political public forum where electoral candidates could reach potential voters, but also interfere with electoral fairness by spreading fake news about their opponents. Lastly, although we cannot yet picture social networks as true institutional spaces, sometimes the policies adopted by their boards can impact the institutional life of constitutional systems. For instance -without going into the rightfulness of the decision- Facebook and Twitter's permanent digital ban on Donald Trump after the tragic assault on Capitol Hill generates constitutional and institutional outcomes, because it deprives an elected President of an important public forum[9]. Plus, the platforms themselves are introducing constitutional principles and institutional mechanisms, especially in the context of content moderation, as demonstrated by Facebook's Oversight Board. In other words, social networks are currently gathering all the features of common, political and institutional places in one private tool, raising new constitutional questions on the realm of contemporary and digital public space.

The new technologies are digitalizing the traditional public square, not only by replacing it with the social networks, but also by reshaping the boundaries of classical institutional places. During the pandemic, schools were closed in almost every country, and platforms like Zoom or MS Teams stepped in, dematerializing the concept of classrooms and transforming them into a mix of physical-personal and digital-institutional places. Let us suppose that a student is attending a lesson from his living room, where a big crucifix is hanging on the wall behind him. Is this display legitimate? Does the crucifix become part of the digital classroom or is it just part of the personal space of the student? Can the laws for physical school classrooms be applied to the intangible educational spaces of the pandemic?

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[9] See **E. CELESTE**, *Trump's social media ban: Reviewing the constitutionality of permanent digital punishment*, 10 March 2021 (*https://www.hiig.de/en/trumps-social-media-ban-reviewing-the-constitutionality-of-capital-digital-punishment*).

By dematerializing the physical borders of the traditional public square, the digital revolution is raising new challenges that scholars of law and religion need to address.

3 - In *Packingham v. North Carolina* (2017), Justice Kennedy defined internet for the first time as "the modern public square", arguing that today, "cyberspace in general […] and social media in particular" are "the most important places for the exchange of views"[10]. As the Court itself recognized, this statement raises issues about the "spatial limits" of the laws and principles established to ensure freedom of speech and religion.

The current symposium will address these issues, investigating the modern spatial ramifications of religion in traditional and non-traditional public squares. Specifically, Andrea Cesarini and Federico Colombo will consider the theoretical features, analysing the spatial borders of the principle of non-discrimination (Cesarini) and diachronic transformation of the form of State (Colombo). Giada Ragone will reflect on the legal impact of artificial intelligence, arguing that it raises new discriminatory questions that need to be addressed by specifically tailored laws. Greta Pavesi and Tania Pagotto consider the display of traditional religious symbols (crucifixes in Italian schools and eruvs in Canada and the United States, respectively) in relation to the private/public essence of the modern public square from national and comparative perspectives. Lastly, Alessandro Negri questions traditional laws established to regulate artistic censorship in the realm of social networks, proposing an "Archimedean point of equilibrium" between free artistic expression and the need to protect the moral standards of ordinary users of social platforms.

All the papers of this symposium reflect on the consequences of the digital revolution for the traditional public square in the spirit of the questions posed by Tom Wilkinson:

> «When we say "public [square]", […] we need to ask—who or what is this public? Who owns this space, what makes it public? […] This is the essence of democracy: the ability to question power, and the power to do so"[11].

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[10] *Packingham v. North Carolina*, 582 U.S. ___ (2017).

[11] **T. WILKINSON**, *Typology: Public Square*, in *Architectural Rev.*, 2 March 2017 (*https://www.architectural-review.com/essays/typology-public-square*).