



25th IVR World Congress
LAW SCIENCE AND TECHNOLOGY
Frankfurt am Main
15–20 August 2011

Paper Series

No. 101 / 2012

Series D

History of Philosophy; Hart, Kelsen, Radbruch, Habermas, Rawls; Luhmann; General
Theory of Norms, Positivism

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Habermas Revised

URN: urn:nbn:de:hebis:30:3-249593

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The Fascination of Authority and the Authority of Fascination Rationalization and Legal Theory in Habermas Revised

*Abstract: The requalification of Habermas' discussions on political philosophy and legal theory after the publication of *Zwischen Naturalismus und Religion* (2005), and his most recent texts and debates on religion and the public sphere, suggest a revision of the Habermasian theory of rationalization as it was firstly presented in *Theorie des Kommunikativen Handelns* (1982), especially on what concerns the processes of desecralization and the linguistification of religious authority. In search of contributing to this revision, this paper intends to focus on the problem of a supposedly "lost" aesthetic-expressive understanding of religious authority in Habermas's theory of rationalization, which may have contributed to a theory of law in *Faktizität und Geltung* (1992) that does not give satisfactory account to the aesthetical-expressive character of the modern understanding of legal authority. A better understanding of this special character, however, may contribute not only to the avoidance of fundamentalisms and new attempts of "aesthetization of politics", but also to a rational strengthening of the solidarity of the citizens of democratic constitutional states.*

Keywords: religious authority, theory of rationalization, fascination, communicative aesthetic rationality, legal authority

Introduction

This paper follows attempts of qualifying the impacts of Jürgen Habermas' most recent debates on religion and the public sphere on the modern understanding of *legal authority*.² During the period around the publication of *Zwischen Naturalismus und Religion* (2005), several of the author's essays, book chapters, conferences and critical exchanges were destined to revise the new influence of religious worldviews in the public sphere and their interplay with the "secular" language of public and political discourses.³

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² This study results from participation in the Seminar "Heiligkeit des Recht und Recht der Heiligkeit", promoted by Prof. Dr. Klaus Günther and Prof. Dr. Thomas M. Schmidt at the Law School the J. W. Goethe University, Frankfurt am Main, in the summer semester of 2010. The seminar had the overall objective to *re-examine*, with influence of Habermas' recent debates and studies on secularization in *The Theory of Communicative Action*, as well as many other philosophy of law studies, the relations between religion and the validity claim (*Geltungsanspruch des Recht*) of modern law. I thank Professor Klaus Günther for the comments and very thoughtful insights which helped me to work my way through the intricate theme of this paper.

³ See Habermas, Faith and Knowledge. *Süddeutsche Zeitung*, 15 October 2001; Habermas & Ratzinger, *Dialektik der Sekularisierung*, 2005; Habermas. "Again Religion and the Public Sphere: a Response to Paolo Flores d'Arcais". Published in *The Utopian*. Feb. 14th, 2009 (available at: <http://www.the->

Even though these discussions raise problems to the pluralism claims of constitutional States⁴, this study focuses on the revisions of Habermas' account of the *secularization* process they also suggest, and their effects on his theory of law and democracy.

It will be argued that the most important of these effects is the possibility of reconstructing the *aesthetical* and the *expressive cores* of modern legal authority, which would have been somehow "lost" within Habermas' theory of rationalization, and maybe for that reason not faced as a problem in *Between Facts and Norms*.

The argument will start with the aim to prove that Habermas' new works and debates on the new influence of religion in politics and the public sphere represent a *requalification* of his political philosophy and legal theory reflections, suggesting as well a revision of his theory of modernity as a theory of *rationalization* (I).

In a second moment (II), a comparison between Habermas' view on religious and traditional authorities and modern legal authority in *Between Facts and Norms* (1996) and in *The Theory of Communicative Action* (TCA, 1984-II:49), will highlight his use of the term "fascination" (*Faszinosum*), or "fascinating authority" (*faszinierenden Autorität*), as a way of distinguishing between traditional and modern authorities, or even as a criteria for identifying "modern" communicative actions as being freer than "traditional" ones (1992:41).

Moreover, if practical and cognitive rationalities are to be later on institutionalized respectively in the moral sanctions of natural law and in the instrumental sanctions of positive law, the absence of an analysis on how the *aesthetic* and the *expressive* characters of religious or traditional authorities influence the authority of modern law, motivates the last part of the paper (III) to set the grounds for a possible reconstruction of the "lost" aesthetic and expressive cores of the modern understanding of law.

I.

Chapters II and IV of *Between Naturalism and Religion* (BNR, Habermas, 2007:115-168 and 279-392), respectively entitled "Religious Pluralism and Solidarity of the Citizens of the State", and "Religious Tolerance as predecessor of cultural rights" mark the beginning of a new phase in Habermas' political and legal theories.

An analysis of both chapters shows that the basic premises of the discursive theory of law and democracy are not refuted, but *complemented* and *enhanced*, when Habermas faces

utopian.org/2009/02/000063.html. last access: 20/09/2010); and the forthcoming Mandieta and Van Antwerpen (eds), *The Power of Religion in the Public Sphere*, Columbia University Press (February 2011), which has a review available at: <http://cup.columbia.edu/book/978-0-231-15645-5/the-power-of-religion-in-the-public-sphere> (last access: 21/09/2010).

⁴ See Habermas, 2007:115-168 e 279-347.

the problem of the *pre-political bases* of the democratic constitutional states, such as religious worldviews, which have come to play a strong influence in recent national and international political scenarios.⁵

In the essay on chapter II, “Pre-political bases of the democratic state”⁶, this discussion begins by raising again the *Böckenförde dilemma*, formulated in 1976: *a free and secularized State lives on presuppositions that itself cannot guarantee*.⁷ Despite arguing against this statement, and defending that a post-positivist interpretation of the democratic procedure does not suffer from a “*validity deficit*” to be filled by an ethical substance (*Id.op.cit*:118), Habermas comes to consider normatively that the state should also protect the “cultural sources” on which it rests its ultimate integration potentials, namely, the “consciousness of norms and the solidarity of the citizens” (*Id.op.cit*:126).

Further in *BNR*, in the text “Religious Tolerance as predecessor of cultural rights” (cap. IV, ps. 279-300), the connection the new influence of religion in politics and the theory of law becomes clearer, when Habermas suggests that *cultural rights* - such as rights to *self-representation* and *public recognition* of determined religious or other cultural minorities in the public sphere - should *widen* the intersubjective interpretation of the legal concept *subject of rights* to an extent that socialized individuals can “form and stabilize their identity in the interior of a network of reciprocal recognition relations” (*Id.op.cit*:298-299).

This means that Habermas is not only worried anymore with how modern law should consider the “intersubjective nature of the political opinion and will formation processes” (*Id.*, 1999:116), one of the greatest challenges of *Between Facts and Norms*, but also that the rights which protect the *integrity of the individuals* have to amplified “to the point that they can *guarantee access to the contexts of experience, communication and recognition* through which a person can articulate a *comprehension of him or herself*, as well as develop and maintain a *singular identity*” (*Id.*, 2007:299)⁸.

⁵ Habermas gives as example of this new influence of religion in politics the rise of the fundamentalisms in the eastern world, the striving for the European countries to administer the cultural clashes between different religions and worldviews of co-citizens and migrants, or the religious core of the republicanism in the EUA, which helped the reelection of G. W. Bush despite the general knowledge of the falsely alleged existence of weapons of mass destruction in Iraqi, and its connections with Al Qaeda (Habermas, 2007:129-134).

⁶ Introduction to a discussion with Cardinal Joseph Ratzinger on January 19, 2004, originally published in *Information Philosophie*, Oct, 2004, pp. 7-15. Published as well in Habermas & Ratzinger (2005).

⁷ “Der freiheitliche, säkularisierte Staat lebt von Voraussetzungen, die er selbst nicht garantieren kann. Das ist das große Wagnis, das er, um der Freiheit willen, eingegangen ist. Als freiheitlicher Staat kann er einerseits nur bestehen, wenn sich die Freiheit, die er seinen Bürgern gewährt, von innen her, aus der moralischen Substanz des einzelnen und der Homogenität der Gesellschaft, reguliert“. Böckenförde, 1976, p. 60. Highlights not from the original.

⁸ Free translation from Brazilian version. Italic not from the original.

This shift on the concern of Habermas' theory of law from proceduralizing and institutionalizing the sovereignty of the people to *assuring the enabling conditions for processes of individuation through socialization*, can be seen as part of his recent movement towards developing a concept of human dignity that would be simultaneously crossed by both *individual and political autonomies*⁹ (*Id.*, 2009; 2009a). It can be interpreted as well as a more immanent incorporation of elements of Axel Honneth's social theory of recognition, such as in the use of the term *recognition politics* (*Id.*, 2007:299). The term was present only in the feminist movement discussion in *Between Facts and Norms* (1996:409-426), but not on the theoretical elaboration of the "legal form" (*Id.op.cit*:122-123) or the principle of democracy (*Id.op.cit*:127).

The need for a *new account* of the theory secularization is also one of the effects of this new shift in Habermas' theory of law, but it seems now to be only faced from "the outside", that is, in political and legal perspectives. In order to properly address this problem, however, one would have to endow the extraordinary effort of revisiting the whole *theory of rationalization* in *TCA*, because a revision of the theory of secularization is, above all, a problem of the *status of modern rationality*,

For the purposes of this paper, however, only a small part of this endeavor will be attempted, having as focus the problem of how Habermas works the *rationalization of the fascinating character of religious authority* in topics 2 and 3 of chapter V of *TCA*, and in which sense they led the absence of an aesthetical and expressive account of legal authority in *Between Facts and Norms*.

As will be argued in the last section, the connection between the need for this "step-back" reflection and the questions raised by this new shift in Habermas' theory of law can contribute to a *post-metaphysic account of the aesthetical and expressive* characters of legal authority, justifying the need for law to *incorporate immanently claims of individuation through socialization* present in political public spheres.

Moreover, this could be a way of allowing aesthetical and affective aspects of communication and experience contribute "post-metaphysically" to the motivation of the "sources of the solidarity" and the "consciousness of the norms" that both the legitimacy of law and social integration still depend upon.

⁹ "...given that the liberal state depends on a political integration of the citizens, one that cannot reduce itself in a simple *modus vivendi*, this differentiation of the modes of belonging [to a nation state or a religious community] cannot limit itself as a mere adaptation – absent from cognitive claims – from the religious ethos to laws imposed by secular society. On the contrary, the universalist legal order and the egalitarian morals of society have to be connected, from the inside, to the ethos of the community, in such a way that one thing can emerge consistently *from the other*." Habermas, 2007:127 (Highlights from the original. Free translation from Brazilian version).

II.

At first, Habermas suggests that one should deal with the problems raised by the new influence of religion in the public sphere “less dramatically”, by leaving it an open “empirical question” for communicative rationality, or a “*cognitive challenge*”. He does not deny, however, that the problem has also come to make philosophy and politics rethink the basis of *secularization* as a progressive and linear *rationalization* process (Habermas, 2007:121-128). This becomes clear with following reflection in *BNR*:

“Once *accepted the experience of a secularizing birth of potentials of meaning that were encapsulated*, it is possible to attribute to the Böckenförde theorem a less captious sense. (...) In the post-secular society, it is imposed the idea that the ‘modernization of public consciousness’ encompasses, in different phases, both religious and profane mentalities, transforming them reflexively. In this case, both sides can, when understand, in common, the secularization of society as a process of *complementary learning*, take seriously, for cognitive reasons, their contributions to controversial themes in the public sphere.” (*Id.op.cit*:126. First italic from us. Second italic from the original. Free translation from Brazilian version).

The importance of this revision of the theory of rationalization can be as well proved by the attention that Habermas gives to the theme in two of his most recent texts, published by the first time in the last of the five volumes of his *Studienausgabe*, organized by Suhrkamp Press in celebration of his 80th birthday. Especially on the text “Die Revitalisierung der Weltreligionen – Herausforderung für ein säkulares Selbstverständnis der Moderne?”¹⁰, these questions are raised as problems for Weber’s and Durkheim’s rationalization theories, which influenced Habermas’ own in *TCA*, as well as for the *fundamentals of political justice* (*Id.op.cit*:399-403).

Further in the same volume, on the seventy-page long “Von den Weltbildern zur Lebenswelt”¹¹, Habermas describes the modern differentiation of rationality and settles religion on the side of art, following science and morals or law (Habermas, 2009a:204). But despite not giving a deeper theoretical elaboration on the relation between the first two, this is a sign that maybe for the author religion has come to share with art the status of world images or worldviews of the lifeworld that can be seen as objectifications of aesthetic and expressive rationalities.

¹⁰ “The revitalization of World Religions. Challenges for a secular self-understanding of the modern? Free translation in. *Id.* 2009a:387-407.

¹¹ From the world images to the lifeworld”. Free translation from German original.

Following the threads of these debates, this section will first concentrate on how Habermas describes the authority of religious and traditional societies in comparison with modern institutions in *Faktizität und Geltung* (FG, 1992). This description will then demand a revision of a related discussion in the topics 2 and 3 of chapter V of *TCA*, when the processes of desecralization of religious authority and linguistification of religious worldviews were analyzed, with basis on Durkheim's sociology of religion and Mead's theory of symbolically mediated interaction.

This analysis aims to prove that for Habermas the *fascinating* character of "pre-modern" forms of domination seems to be somewhat "dissolved" in his account of the modern rationalization process, and that this would mean, despite the growing risks of dissent and disintegration, an irrefutable gain of autonomy for individuals of complex societies (Habermas, 1996:27).

If this impression is correct, first of all, Habermas would have difficulties to explain the masses' legitimation and acceptance of the authoritarianisms of the first half of the 20th century. This was one of the great concerns of the first generation of critical theory. In the well-known essay "The work of art in the age of its technical reproducibility" (1934-36), for example, Walter Benjamin highlighted how national socialism was organized upon an "aesthetization of politics"¹², and in *Dialektik der Aufklärung* (1947), Adorno and Horkheimer suggested how anti-semitism and fascism fed upon the remains of religious hate and intolerance that hid behind its operational forms.¹³

In a second moment, this supposed "dissolution" of the fascinating form of religious authority in Habermas' theory of rationalization, would then reflect in his most recent studies on the new power of religion in the public sphere and on the discursive theory of law. The new question that arises can be put in the following terms: can a "post-secular" society, or a "post-metaphysical" rationality afford to dismiss, in its present stage of reflexivity, a problematization of the *fascinating character of religious or traditional authorities* and its

¹² See the foreword and the epilogue of Benjamin (1975:9 and 34).

¹³ "It is very much improbable that the religious hostility that, during two millennia, impelled the persecution of the Jews has been entirely extinguished. Much on the contrary, the care with which anti-semitism renegades its religious tradition shows that it is still, even if as a secret, so profoundly deep-rooted in it, as if in another time the profane idiosyncrasy in the religious care. The religion has been integrated as cultural patrimony, but not abolished. The alliance between the enlightenment and domination impeded that its true part could have access to consciousness and conserved its reified forms. The two things come to benefit fascism: the uncontrolled nostalgia is canalized as a racist rebellion; the descendents of the visionary evangelists are converted, in the Wagnerian model of the Saint Grail knights, in conjured of the blood comfrey and in elite guards; religion as institution is, in part, confused in a direct and inextricable manner with the system and, in part, transposed in the show of the mass culture and the parades. The fanatic faith, from which vaingloried the chiefs and its followers, is no other than the ingrained faith that helped, in another time, the desperate to bare, only its content has been lost. It continues to feed upon solely the hate for those who do not share the faith. (Adorno & Horkheimer, 1985:164-165. Free translation from Portuguese version).

relations to the *present* understanding of law? Habermas' own words can give an answer to this question by posing another one, and hence justify the effort here to be attempted:

“The Enlightenment's polemical relationship with the secular power of religion has obscured the fact that post-metaphysical thinking has absorbed content from the Judeo-Christian tradition which is no less important than the inheritance of Greek metaphysics. And are we sure that this process of discursive absorption of religious content has been concluded? Can post-metaphysical thinking exclude the possibility that our religious inheritance might have semantic potentials which - when they offer profane truth contents - can develop an inspirational power for the whole of society?” (Habermas, “Again Religion and the Public Sphere”, 2009)

1. The fascination of authority in Between Facts and Norms

Given these preliminary reflections, the use of the word “fascination” in *FG* appears in the fourth topic of the second section of its first chapter (Habermas, 1992:39-41), when Habermas is comparing the *leveling* of the tension between facticity and validity of the modern lifeworld to that of what he calls “archaic” institutions of “tribal societies”.

Even though both levelings consist on the *non-problematization* of shared interpretations of the world, norms and personal expressions which stabilize behavioral expectations, they would maintain an important distinction: while on the modern lifeworld the non-problematization occurs because the certainties that involve everyday communication have the status of *background knowledge*, on the case of archaic institutions, this absence of problematization occurs because their authority exert such an imposing and mystic form of power over its addresses that their world images, values and expressions fuse in a “crystallized syndrome”, to an extent that its validity becomes as evident as objectified facts. This complex form of power is what Habermas calls “fascination” (*Faszinosum*) (Habermas, 1997-I:42-44).

At first, the obstacles for the problematization of archaic institutions are for Habermas caused by the *ritualistic and ceremonial* practices in which the narratives and norms are pronounced and shared. Secondly, Habermas retakes part of Durkheim's sociology of religion, which he more extensively analyzed in *TCA* (see next topic), to highlight how this authority provokes *ambivalent feelings* in the believers who contemplate *images and objects* that represents it. These feelings, a mixture of *enthusiasm and fear, veneration and dread, attraction and repulse*, can be considered the most important characteristics of the *fascination* exerted by this authority; that is to say, its contradictory meaning, which would “blind” de

judgment and provoke an acceptance such of its validity that the “social sanctions” which follow its violation become only secondary to the respect it alone obtains (*Id.op.cit*:43-44).

The fascinating character of religious authority has been also thoroughly described by the work of religion philosopher Rudolf Otto *The Idea of the Holy: an inquiry into the non-rational factor in the idea of the divine and its relation to the rational* (1917), which tried to understand rationally the contradictory feelings of the religious experience, as an experience of the “numen”, or the “numinous”, in clear dialogue with Kantian idealism.¹⁴ The well-known sentence “*mysterium tremendum et fascinans*” (“tremendous and fascinating mystery”) shows that fascination is here opposed to the “daunting” aspect of the numen, as a feeling that “captivates and transports him [the one who “trembles before the daemonic-divine”, as earlier stated. V. B.] with a strange ravishment, rising often enough to the pitch of dizzy intoxication; it is the Dionysiac element in the numen.” (Otto, 1923:31).

Aside from this binding and uncontrollable force of religious fascination, when Otto then relates it to its “profane” expressions, some connections with the *expressive* individuation claims of Honneth’s recognition theory, which Habermas seeks to incorporate in his theory of law, become clear:

“The ideas and concepts which are the parallels or ‘schemata’ on *the rational side of this non-rational element of ‘fascination’* are Love, Mercy, Pity, Comfort; these are all ‘natural’ elements of the common psychical life, only they are here thought as absolute and in completeness. But important as those are for the experience of religious bliss of felicity, they do not by any means exhaust it. (...) Bliss or beatitude is more, far more, than the mere natural *feeling of being comforted, of reliance, of the joy of love, however these may be heightened and enhanced.*” (1927:31-32. Our italics).¹⁵

Habermas also utilizes, other than *Faszinosum* and *faszinierenden* (respectively “fascination” and “fascinating”, as translated to English), the term *bannende*, which is translated by “spellbinding” in the English version of *FG* (1996:24). Interestingly enough, the translation of the corresponding verb *bannen* to English means at the same time *to avert* and *to ward off* - or in “religious meaning”, to “*ex-communicate*”, as to exclude someone from a certain religious community or practice, or even “to exorcise” a ghost – and *to captivate* and

¹⁴ Otto discussed directly with Kant in *The Philosophy Of Religion Based On Kant And Fries* (1931), and had as well an interesting contribution to the debate between natural sciences and religion with *Naturalism and Religion* (1913). For access to these works, see.

<http://www.archive.org/search.php?query=creator%3A%22Rudolf+Otto%22> (last access: 26/09/2010).

¹⁵ For more, see. Otto, R. 1923:31-41 (chapter “The Element of Fascination”). I thank Professor Klaus Günther for indicating this important reference to the study.

to charm. Moreover, when the same verb is read in “artistic meaning”, it also means “to capture”, as to capture an image when painting on a canvas.¹⁶

It is maybe for no other reason that Habermas then relates the fascinating and thus contradictory affective experiences of these archaic authorities to the ones *still today* produced by the *aesthetic* “shocks” of surrealism and other critical art forms, as worked by authors like Benjamin, Bataille or Leiris (*Id. Ibid*). Although only briefly cited in *FG*, this theme is analyzed by Habermas in the essay “Consciousness-raising or rescuing critique: the actuality of Walter Benjamin” (1975), as a possible critical use of an art that had lost its “aura” in modernity;¹⁷ maybe the same way as social authority would have lost its fascinating character.

What becomes clear, thus, is that despite consisting on an inebriating attraction that blocks or undermines rationality and critique, the fascinating character of archaic and religious authority was the element responsible for enabling the necessary *bonding relation* for societal integration; a bond grounded on a validity derived from contexts of communicative action which, although dependant on this fascinating element, limited self-interested action and dispensed instrumental external sanctions to be formed and stabilized. Nowadays, when the fascinating element of religious authority is read in more profane terms or analyzed in modern authorities, Habermas dislocates it from the religious to the symbolic domain of *aesthetic and expressive experiences*.¹⁸

As Habermas passes on to discuss the authority of modern law in *FG* (topic 5, section 2 of chapter I), however, he describes a process of complexification and differentiation in the passage of traditional to modern societies in which this fascinating element of archaic and religious authority, still present in medieval and absolutist law, gradually “fall apart”. And albeit liberating new possibilities for *rationality* and *action oriented towards mutual understanding* and rationality and action towards self-interested goals, in an ever more pluralized lifeworld, only the now somewhat “weakened” first two would have the ability to maintain the sources of social integration (Habermas, 1996:25-26).

¹⁶ See this translation in the electronic English-German dictionary *Dict.cc.* at <http://www.dict.cc/?s=bannen> (last access: 21.09.2010).

¹⁷ According to Duvenage (2003:22), this text is to date one of the most focused works of Habermas on aesthetics. This discussion will be retaken at section III. As will be seen in the next topic of the present section, Habermas also utilizes the concept of aura, with reference to Benjamin, to speak of the same phenomena of the fascination of authority in *TCA*.

¹⁸ “Benjamin, not unlike theorists of political religion, argued that the loss of tradition and the decline of religious authority constituted critical elements in the “auraticization” of fascism. In contrast to those theorists, however, Benjamin added another crucial element to the understanding of fascism’s approach to politics, an element that links fascism closely to the *l’art pour l’art* movement: the prevalence of form over ethical norms. It is the presence of this element, I will argue, that characterizes Italian fascism’s aestheticized politics”; Falasca-Zamponi (1997:10).

This diagnosis of the times over which Habermas rests the first premises of the discursive theory of law and democracy¹⁹, seem nonetheless now to be questioned by his new studies on the new influence of religion in the public sphere. The requalification of the theory of law that accompanies them are a clear sign of this questioning (see I).

As the analysis promotes now the “step-back” to the theses of rationalization and linguistification of the sacred in *TCA*, a critique of the passage from a fascinating authority to a moral authority based on linguistic understanding and grammatical speech will enable one to perceive the “lost” core of the *aesthetical* and *expressive* authority in Habermas’ theory of rationalization, which can possibly contribute to a better understanding of the requalification he now searches for his theory of law.

2. *The fascination of authority in The Theory of Communicative Action*

The second topic of chapter V of *TCA*, intitled “The Authority of the Sacred and the Normative Background of Communicative Action”, presents the fascinating character of religious authority in a dialog with Durkheim’s analysis of the passage from religious to moral authority. Habermas’ general intention with this (and the following) topic is to understand what kind of normatively guided interaction substitutes religious authority in the role of providing the social bonds, and thus, the integrative forces of modern societies.

After demonstrating how Mead’s theory of symbolically mediated interaction lacks a reflection on the formation of a social authority that is *not* based on the possibility of sanction of the “generalized other”, but on the *sense* of validity of reciprocally attributed norms (Habermas, 1987-II:64-69), Habermas’ seeks then in Durkheim’s theory of *religion* the pre-linguistic background of norm consciousness that formed the structures of an intersubjectivity whose integrating forces were present in the complex character of the norm’s *authority*.

In the discussion on the concepts of duty and inclination in Kant’s moral theory, Durkheim discusses the ritualistic and therefore “impersonal power of the sacred which reaches beyond all that is merely individual.” After that, Habermas continues in addend “b” of the topic, showing clearly the relation between the fascination and the *aura* of sacred authority:

“Further, the sacred arouses the same ambivalent attitude as moral authority, for it is surrounded with an aura that simultaneously frightens and attracts, terrorizes and enchants: ‘The sacred being

¹⁹ The very clear premises are: “The actors themselves *to come to some understanding* about the *normative regulation of strategic interactions*. (...) According to the above analysis, the type of norms required would have to bring about willingness to comply *simultaneously* by means of de facto constraint and legitimate validity.” (Habermas, 1996:26-27 italics from the original).

is in a sense forbidden; it is a being which may not be violated; it is also good, loved and sought after' (citing Durkheim. "Determination of Moral Facts. In. Durkheim, 1974:70). In the aura itself is expressed the untouchability of what is at the same time sought after, the closeness in the distance.(...) The sacred produces and stabilizes just the ambivalence that is characteristic of the feeling of moral obligation." (*Id.* 1984-II:49).

The search of Durkheim's sociology of religion to understand the symbolic background of modern morality is what gives Habermas the link from symbolically mediated interaction to grammatical speech acts, as an abstraction of content from the interpretative moment of religious understandings, to what would still stand as a possible medium of solidarity in profane communication: *performative language* (*Id.op.cit:50-57*)

Even though criticizing Durkheim's concept of collective consciousness as an overly uniform impersonal power "writ large", and therefore excessively linked to a philosophy of the subject approach, Habermas agrees that it is possible for interpretative understandings of the world and norms to stabilize and *steer* processes of individuation through cultic socialization practices. This tension between personality and intersubjectivity, which originates from the ambivalent feelings of a fascinating authority and is revealed through *symbolic individual expressions*, would have remained inside moral dilemmas, and further, in the ever more "instable" expressions of differentiated structures of grammatical speech (*Id.op.cit:57-62*).

It is then that Habermas makes the bridge to discuss the "three roots of communicative action", in a formal-pragmatic description of speech acts and already also "in the horizon of a modern understanding of the world". The "dissolution" of the fascination of religious authority and its concentration on practical discourse is initiated with this reasoning:

"The inter-relation between collective consciousness, on the one side, and, on the other side, norms that can be applied to specific situations and personality structures that can be attributed to individuals, remains unclear as long as the structure of reaching understanding in language has not been cleared up. Religious symbolism represents one of three *prelinguistic* [in the sense of propositionally differentiated language] roots of communicative action. Only in and through communicative action can the energies of social solidarity attached to religious symbolism branch out and be imparted, in the form of moral authority, both to institutions and to persons." (Habermas, 1984-II:61. Highlights from us).

The excursus on the three roots of communicative action promotes a reflection of the relations between forms of speech acts such as the assertoric, regulative or expressive utterances. It becomes clear, however, that the characteristics of sacred authority have been translated only to *moral* authority, leaving its world-disclosing and expressive functions out of the differentiation of rationality into grammatical speech acts (*Id.op.cit:62-64*).

The assertoric sentences mingle with regulative sentences, and the same way with expressive speech. Truth, justice and sincerity claims can be expressed with each others' speech acts. The content of the sacred character of authority, however, where rested the strong element of the fascination of authority once fundamental to actions towards binding with social norms, does not influence the expressions and attitudes towards the *description of the external world* and the possibility of its falseness, and the *expression of the internal world* and the eventuality of its insincerity or non-authenticity in performative speech acts (*Id.op.cit:65-70*).

This clear concentration of the sacred character of authority only to moral action, and the reduction of constative and expressive actions respectively to experiences of objects or events and confessions of personal experiences, are then led to another discussion on the influence of religion in truth claims in Durkheim.

With the substitution of the concept of collective consciousness for grammatical speech and the reconstruction of its three unavoidable performative validity claims, Habermas relates one to another. He privileges, however, the relations between truth and rightness, focusing expressive action more to *sincerity* than to *authenticity* (*Id. 1984-II:70-71*).

The aesthetic aspect of communicative action, translated in "dramaturgical action" in the first volume of *TCA* (*Id. 1984-I:90-94*), can reach a *public* for Habermas, but it is dealt only as sensitive or "'passionate' action in Feuerbach's sense", like confessions or even a *marriage* (relation to regulative action), which enables intuitive insights and raises sincerity and affective claims. It seems that even though released from the spell of *fascination* which reduced objectivating and expressive experiences to the practical character of sacred authority, aside from their critical aspect, their possible illocutionary powers - especially of *expressive* and *aesthetical* action - are not yet sufficiently described. (Habermas, 1984-II70-72):

But if in the first part of the excursus the binding force of the fascinating aspect of archaic authority is not properly translated to constative and expressive attitudes towards the world, in the end, it is again discussed and possibly considered in relation to the function of

influencing not only practical communication, but the *performative*, and thus, a *self-reflective* mode of communication in general:

“From a genetic standpoint, *the performative attitude can be understood, perhaps, as the result of a secularization and generalization of that emotionally ambivalent attitude toward sacred objects that originally secured the recognition of moral authority.* This transformation becomes necessary to the degree that the illocutionary components of speech acts are released from their symbiotic entanglement with archaic institutions and are differentiated so that assertoric and expressive sentences are also endowed with illocutionary forces, and in this way modalized and incorporated in communicative actions.” (Habermas, 1984-II: 75-76. Italics from us).

In the end, however, practical rationality still seems to have a certain priority over constative and expressive utterances, for it is linked to the *accountability* claim that every actor raises when performing communicative action. This accountability drives one to compare and change the three “modes” of communication, in order to depict from symbolically mediated interaction in general the underlying *norms* which should (or should not) guide social action. This attitude constitutes a *self-reflection* of the actor in relation to all three roots of communicative action (*Id.op.cit:76*). The necessity of a critique not only towards claims of moral authority but also towards *constative and expressive* speech, however, could reveal their particular performative and thus *illocutionary* powers.

3. The Rational Structure of the Linguistification of the Sacred

The following topic of *TCA* resumes more specifically the problem of how the social integrative forces of archaic and sacred authorities could be substituted by those derived from authority of achieved rational consensus in modernity²⁰. It is here that one can see precisely how Habermas relates the replacement of the fascinating aspect of authority for the “*binding/bonding*” power of criticizable validity claims as a liberation of the rational potential of communicative action, that is, as the possibility of a “freer” form of social interaction. This thesis is explained by an analysis of the development of the category of law in Durkheim’s *The Division of Labor in Society* (New York, 1933), and in the excursus on the problem of identity and the pressure of individuation claims in modernity in Mead’s social theory (*Id.op.cit:77-78*).

²⁰ From the original version, the concept of aura can also be seen as the fascinating aspect of authority: “Die Aura des Entzückens und Enschreckens, die von sakralen ausstrahlt, die *bannende* Kraft des Heiligen wird zur *bindenden* Kraft kritisierbarer Geltungsansprüche zugleich sublimiert und veralltägtlicht (Habermas, 1981-II:119. Highlights from the original).

Even though Habermas considers that both Durkheim and Weber saw the development of law as a process of *disenchantment* and generalization of sacred authority to one based on the “generality of the underlying interest” and the possibility of coercion, still, something of the sacred would have remained in the rational. The differentiation between criminal law (related to the ritualistic and “expiation” character of the sanction) and private civil law (related to the satisfaction of the legitimate interests of all involved), for instance, represented a *linguistification* process of sacred authority. They both presupposed, however, a form of morality that rested in the end in a discursive political will-formation, which kept the social integrative bond necessary for the general acceptance of the norm (*Id.op.cit:78-82*).

This generalization process that leads sacred authority to a discursive morality as the new source of social solidarity, is accompanied as well by a “growing individuation of individuals”, studied by Durkheim as expressions of individualism, respect for personality, individual dignity etc. These individuation processes, from which the aesthetical and expressive aspects of communicative action will be analyzed in III, are not seen only as “arbitrary free choice” among alternatives, but as “reflective self-understanding”. Morality, law and individuation take on in modernity respectively the functions of reaching understanding, coordinating action and socializing individuals, which belonged to sacred authority in traditional societies (*Id.op.cit:82-85*).

The unity of semantic social meaning once generated by religion as a form of *cultural knowledge, a cultural tradition and a worldview*, however, could only be recuperated in the *unity* of the illocutionary power of *all three forms speech acts combined*. This would mean, for Habermas, when he explicitly discusses for the last time in the topic the fascinating power of sacred authority, that

“The structural aspects of the development of religious worldviews, which Durkheim and Weber sketched in complementary ways, can be explained by the fact that the validity basis of tradition shifts from ritual action to communicative action. Convictions owe their authority less and less to the spellbinding power and the aura of the holy, and more and more to a consensus that is not merely reproduced but *achieved*, that is, brought about communicatively” (Habermas, *op.cit:89*. Highlights from the original).

But albeit religious worldviews differentiate out into *all three* specific claims of speech acts in modernity (*Id.op.cit:88*), as already discussed, their spellbinding power and the aura of authority that would be substituted by a communicatively achieved consensus have focus on

the *moral* discourse. It is morality, and not science or art, who would have inherited religion's "mantle", that is, the role of maintaining social integration in modernity (*Id.op.cit*:88-92).

For this reason, on what follows this topic in *TCA*, the dissolution of the spellbinding and auratic powers of religious and archaic authorities become evident, and it is possible to see how they reflect on the discursive demands of morals and legal communication as the instrumentalization and enforcement of law. But if the fascination of authority has also effect on the formation of religious worldviews and can nowadays be felt in the contradictory emotions towards critical art (*Id*, 1996:24), its connections with practical utterances are somewhat left aside as irrational relations to authority and law in modernity.

The example of the marriage, used by Habermas to show how the *expressive* speech act "I do" is at the same time a moral contract and can also be seen as a ritualized manifestation of a worldview (*Id.op.cit*:69-70), is as far as the author goes in his attempt to indicate the residual auratic core of a norm that has the form of an expressive utterance. On the other hand, the political public sphere, parliaments and courts, where the political will formation and decision making occur, are not seen as spaces where ritualized practices take place, and this suggests that they would not be influenced by that "archaic" spellbinding power.

In sections "C" and "E" of the topic, Habermas focuses on Mead's individuation theory, which can be generally summed as the socialization of individuals and the reciprocal "role-taking" practices that would occur through the use of the personal pronouns "I" (more authentic "ego-identity") and "me" (more socialized expression of ego-identity). This approach to communicative socialization enables one to visualize the inevitable projection of an ideal "communication community", revealed in the *accountability* claims that each individual raises to each other in everyday communication.²¹

Still, the claims of *self-determination*, *self-realization* and *autonomy* that also derive from these socialization processes are seen more as a possible critique of Kantian philosophy of consciousness with focus on the categorical imperative, than as to identify the heuristic potentials of its *negative* manifestations, such as expressions and verbalizations of injustice and discrimination experiences in the political public sphere (*Id.op.cit*:92-94).

The only time this type of analysis is implicitly mentioned, is when Habermas considers that:

²¹ "The structure of linguistic intersubjectivity which finds expression in the system of personal pronouns ensures that the child learns to play social roles in the first person. This structural pressure blocks the simple reduplication of group identity in the personality structure of the individual; it works as a pressure toward individuation." (Habermas, 1984-II:90).

“The universality of a moral norm can be a criterion of its validity only if by this is meant that universal norms express in a reasonable way the common will of all involved. This condition is not met merely by norms taking on *the grammatical form* of universal ought-sentences; immoral maxims, or maxims without any moral content, can also be formulated in this way.” (*Id.op.cit*:94).

This relates to an idea of a “negative morality”, and the empirical concept of *real communication community*, with which the ideal community contrasts in social philosophy analyses.²² The identity politics of ethnic groups are also mentioned as example of this type of individuation through socialization claims. As will be discussed on the second part of section III, these concepts could specially open venue for a discussion of the conditions of the use of *expressive* rationality in the political public sphere.

III.

This last section aims to raise some reflections on possible outcomes of this study, especially on what concerns the remaining aspects of the fascination of authority in aesthetical and expressive discourses, how they relate to moral and legal discourses and how they can contribute to a better understanding of modern law.

The underlying objective is to contribute to the avoidance of new attempts of aesthetization of politics, which in extreme cases can evolve to populism or fascist practices, and at the same time to suggest how aesthetic and expressive communications can collaborate with practical discourse to strengthen the solidarity of the citizens of the state. It is only with a similar endeavor that communicative action can be used in all its extent without threatening its social integration function with its own elements.

As became clear in the first two sections, the fascinating character of archaic authority highlighted by Habermas has connections with religion, aesthetics and also expressive practices that lead to individuation, or at least to the bondage of personality with collectivity in more symbolically integrated societies.

1. From the fascination to the aesthetics of authority

In terms of the *aesthetic* character of the fascination of authority as what remains from the religious and archaic symbolic orders, this “linguistification” process - in this case an “aesthetization” of authority – can be analyzed in an analogy with the loss of the aura of the

²² In a similar approach, but used to analyze experiences of *recognition*, see Honneth, *Das Ich im Wir*. Berlin: Suhrkamp, 2010; *Id. Disrespect: The Normative Foundations of Critical Theory*. 2007.

work of art by its reproducibility, as discussed by Benjamin in the seminal study published in 1937²³.

In this picture, it is interesting to notice that if for Habermas the aesthetic “shocks” of cinema, which provoke ambivalent feelings similar to those of the fascination of authority (*BFN*, 24), could lead to a possible emancipatory use of reproduced art (Habermas, 1975:297-332; Duvenage, 2003:24), the moment of possible emancipation through aesthetics would be as well involved by ambivalent feelings or this sort.

Fear and reverence, dread and attraction, disgust and seduction could hence be seen as the implicit and “lost aesthetic chores” – with emancipatory potentials - of critique and persuasion, misunderstanding and convincement in practical discourse, and falseness and truth in assertoric sentences. To understand these relations is to expand the scope of communicative action not only to the possibilities of its “breakdown” by its aesthetic features, but also to understand that consensus through language has at the same time an aesthetic element of attraction that can strengthen the social bonds of communicative action.

With the loss of authority’s “aura”, its substitution for consensus through language would then have to consider itself as an incomplete process. In this sense, the passage from the fascination of authority to the aesthetics of authority could be continued by the analogy with Benjamin’s reflections. With this analogy, one can consider that although the “authenticity” of the authority of consensus would not be measured anymore by its “cult value”, or its manifestation in ritualized practices, the bonding power of these practices would still be somehow maintained in its “exhibition value” (Benjamin, 1975:16-19), such as in the reproducible works of art.

In other words, the way authority becomes “visible”, or the form that it is *publicized* has extreme influence on the manifestation of the strong bonding potential that it still carries from archaic and traditional authority. If then, the “exhibition value” of legal authority could be read as a “publicity value”, the mere possible “free access” to this publicization in official newspapers cannot be considered alone as “good” or sufficient publicization, for example. The same can be said about parliament sessions and court judgments: the non-problematization of *how* they publicize law in these communicative spaces leaves this

²³ As Benjamin states in a footnote of the thesis IV of “The Work of Art...”, “As the cult value of image secularizes, the substratum that makes it a reality, which is given only once, becomes ever more indeterminate. The spectator inclines more every time to substitute the unity of the phenomena in the cult image for the empirical unity of the artist and his creative activity. The substitution is, without a doubt, never integral; the notion of authenticity never ceases to refer to something more than the simple guarantee of originality. (...) Despite all this, the role of the concept of authenticity in the field of art is ambiguous; with the secularization of the latter, authenticity becomes the substitute of the cult value.” (Benjamin, 1975:16. Free translation from Brazilian version).

important aspect of authority on one side to the aseptic and unattractive legal form, and on the other to the theatrical character of judgments by popular jury.²⁴

Along with this possible analogy with Benjamin's "The Work of Art...", several authors also read with distinct views the aesthetics of authority through Habermasian concepts of reason and communication.

The interesting work of Simonetta Falasca-Zamponi called *Fascist Spectacle* (1997) on the aesthetics of Italian Fascism, is a good example of how it is possible to utilize a dialogue between Benjaminian aesthetics and Habermasian pragmatic conception of intersubjective communication to understand relations between aesthetics and politics. In the introduction to the work, Falasca-Zamponi cites the pioneering studies of Emilio Gentile and George Mosse on the theme, which examined the aesthetics of the Nazi regime as a "sacralization of politics". Still, she argues along with Benjamin that fascism should be explained as well as an aesthetization of politics (Falasca-Zamponi, 1997:4-5).

In a similar approach, but also directed to psychology, art and anthropology, Susan Sontag in "Fascinating Fascism" (1975:15) deals with the fascination of Nazi aesthetics as a mixture of a history forged by propaganda with the cultic, bodily and symbolic aspects of an ideology that involves a "contention of impulses" such as those of fascination. According to Sontag, it is by controlling these drives, and at the same time influencing pornographic and sadomasochist culture that Nazi-fascist aesthetics attracted (and still attracts) people who would not even be tolerated by the Nazis themselves, like those with homo-affective sexual preference.

In a more specific critical theory approach, the work of Albrecht Wellmer develops a critique of Habermasian communicative rationality with Adornian concepts of rationality and aesthetics. In *Endgames* (1998), for example, Wellmer dedicates three important essays to the theme, and when discussing Adorno's conception of the "sublime" in modern art, finds in it the same ambivalences felt in the fascination of sacred authority as described by Durkheim through Habermas:

²⁴ In the case of popular juries, the interesting work of Ana Lúcia Pastore (2001) shows how the remaining fascinating power of authority is actualized in modern law, as has weak possibilities of rational critique: "Because the criminal justice system and, in its interior, the Jury, are systems of Power, they produce effects that are compared to the illusions created by theater, once the art of governing and scenic art are inseparable. During the trials, judge, prosecutor, defender and jury divide the position of 'princes'. While the first reigns sovereign and apparently neutral, the second strongly accuses, the third protects and the rest decide, in meditative silence. Like a god that parts in four and because of that grows stronger, the scene of judging dramas about life and death has as one of its most striking results the sacralization of the institution 'Justice' and reinforces the social etiquette and aesthetics" (Schriftmeyer, A. L. P., 2001:2. Free translation from Brazilian version).

“From an energetic point of view the sublime appears as shocking, shattering, moving, overpowering. If one understands the moment of aesthetic experience as one of a condensed presence, through which the temporal continuum of ordinary experience is suspended, the experience of the sublime may be characterized by an additional element of violence, a violence that bursts into the interior space of aesthetic distance, shaking up, dislodging or disquieting the subject, generating a tremor, a vertigo, loosening the confines of the experiencing ego.” (Wellmer, 1998:163).

In a dynamic point of view, however, Wellmer sees Adorno’s sublime in art as a “spiritualization of art”, and thus as an emancipatory experience, for it enables a “self-consciousness of spirit”. This opens venue for Wellmer to discuss a possible theory of intersubjective communication in Adorno’s aesthetics, which would lead to a more propositional and post-traditional conception of aesthetics, in the sense of loosening and opening communicative rationality to the experience of the “heterogeneous”, the “meaningless” and the “unspeakable” (*Id.* 1998:66-67).

In a similar direction, Bittar (2010) deals with the category of *mimesis* in Adorno’s aesthetics in an effort to understand its connection to authority and practical discourse. With aid on Honneth’s reception of the concept in “A Physiognomy of the Capitalist Form of Life: A Sketch of Adorno’s Social Theory” (Honneth, 2005), and with Aristotle’s substantial conception of ethics, Bittar relates the validity of the mimetic core of moral authority to an attitude that, for its virtue, and thus beauty, is due to imitation and repetition. The attraction and bond exerted by the norm on the subjects came from the virtues attributed to the actions that were norm-conforming. These actions should thus be intersubjectively maintained as tradition.

Duvenage also discusses the concept of *mimesis* in his *Habermas and Aesthetics* (2003), in order to suggest the limits and the new possibilities of communicative reason when facing the problem of aesthetic rationality. This insight is taken from Habermas’ reading of Benjamin’s incipient attempt at a “systematic theory of language” (Duvenage, 2003:22-27). On the end of the book, however, Duvenage also suggests possible openings of communicative reason to aesthetics by the latter’s *world-disclosing* function and its relation to *truth* claims, in a more Heideggerian oriented debate (*Id.op.cit*:120-141).

The relation of this “other voice” (and no longer “the other side”) of rationality with moral and practical problems would not only be present in the importance that images and testimonies have in deliberative will formations and in judicial cases, but also because the expressions of the individual’s existential self-understanding and affective-emotional identity

constitute part of the core of human dignity in post-traditional societies (*Id.op.cit*, pp. 137-141)²⁵.

This last example highlights the importance of distinguishing between aesthetic and expressive rationalities, which are normally considered synonyms, as one of the three differentiations of modern rationality in Habermas' works. This is so because the reflections on the *aesthetics* of authority seem to reach only to a point of enabling one to grasp the contradictory and tense remaining elements of fascination that still influence implicitly the legitimacy of the authority and law.²⁶ As already seen in the last topic, however, the only way to understand it "operatively" is perhaps in the discussions and problematizations over *how* authority exhibits and *should* exhibit, or communicate itself to its publics.

Therefore, it is on the concept of *expressive* rationality that this study will concentrate its last effort to elaborate on what would be left of the fascination of authority in the modern understanding of law.

2. *From the fascination to the expressive character of authority*

When decoupling the *expressive* from the *aesthetic* conception of reason within Habermas' communicative rationality, artistic manifestations are substituted by expressions of emotions, confessions and testimonies etc. With this distinction, it is possible to highlight the importance of this type of communication for a renewal of the possibilities of practical reason, a renewal which Habermas seems to be seeking for his theory of law when incorporating categories from Honneth's theory of recognition²⁷

Instead of focusing on the sincerity, "need-oriented" and individualistic claims of expressive rationality, like Habermas works in *TCA* (Habermas, 1984-II:62-76; *Id*, 1984-I:

²⁵ This reflection has aid on Seyla Benhabib's "extension" of the concept of aesthetic-expressive discourse", in Benhabib, S. "The utopian dimension in communicative ethics". In. D. Ingram and J. Simon-Ingram, (eds). *Critical Theory: The Essential Readings*, 1990: "the ego becomes an I only in a community of other selves who are also I's. Yet every act of self-reference expresses, at the same time, the uniqueness and difference of this I from all others". In formulating this view, Benhabib brings in aesthetic-expressive discourses, because modernity institutionalizes the discursive evaluation not only of moral and political issues, according to her, but also of aesthetic and expressive subjectivity (...). Consequently, the generalized other is therefore just as essential, according to Benhabib, as acknowledgement of the specificity of the concrete other" (Duvenage, 2003:140).

²⁶ This is also the first impression left by the important work by Derrida *The Force of Law. The "Mystical Foundations of Authority"*, which is cited by Habermas as "reductionist" aesthetic approach to law that he wanted to avoid in *Between Facts and Norms* (Habermas, 1996:xli). The element of mysticism present in law is analyzed by Derrida only in semantic levels, unraveling an important element of legal critique by the identification of non-logical (and also violent) elements present in law's authority (Derrida, 2002:240). The suggested idea of the "visibility of law" as a pragmatic aesthetic claim is however not faced by Derrida, and therefore, his analysis remains only as an element of dislocation and critique of law, and not as a more normative concept of the aesthetical core of legal authority which we have attempted to sketch here. We acknowledge, however, that a more precise comparison between this study and Derrida's recognized essay demands further research.

²⁷ See Habermas, 2007:279-347. See also section I of this study.

90-101), a more public conception of expressive utterances, like that which Duvenage depicts from Benhabib (Duvenage, 2003:140-141), would then form with aesthetic claims a “social space of reasons” that can be seen as an “expressive-aesthetic public sphere”. It is in this sphere that not only artistic and cultural contents are manifested, but also where the actors make self-representations of themselves, publicize their life stories and personal feelings. In these cases, public expressions of sentiments of injustice or misrecognition can enable processes of individuation through socialization, for they are connected to a possible “experience of the other” as radical as the Hegelian notion of experiencing the ego as the identity between the universal and the particular.²⁸

Therefore, expressions of the most authentic and sincere subjectivity of the individual, or the cultural identity of a collectivity that are publicized in this dimension of the political public sphere, can maybe generate an intersubjective bond to authority that derives from a kind of “negative solidarity”²⁹ that emerges when one sympathizes and has compassion for the *suffering of the other*.

In other words, the respect for a moral or legal principle is stimulated affectively when an individual identifies with the other’s experience of their violation. The intersubjectivity that is formed by this identification comes from the shared interpretations of justice which underlie and give meaning to the individual’s negative experiences of injustice.

Some of the dangers that surround the formation process of this negative solidarity are already faced by Honneth in the text “Anerkennung als Ideologie” (“Recognition as Ideology”, 2010:103-130), where the difficulties of raising criteria to distinguish a “moral” from an “ideological” (or “power-oriented”) recognition are discussed. In this complex sphere where material feelings of recognition or misrecognition are expressed and evaluated by moral discourse, the negative solidarity that emerges can be as well manipulated by a “heteronymous” construction of biographies, narratives and images of victims in the mass media, for example. In other words, the identification with the other can still be involved by the seducing aspects of fascination that remain within expressive discourses as well, such as in populist adhesion to certain policies or leaders, fundamentalist beliefs and practices or fanaticisms.³⁰

²⁸ For this Hegelian conception, which influenced the foundation of Habermas’ theory, see Habermas, 2006:20.

²⁹ I thank Professor Klaus Günther for suggesting in our discussions on this study the term “negative solidarity” as the last source of expressive communication which can enhance the solidarity of the citizens toward a critical legitimation of law.

³⁰ As Honneth highlights in the mentioned texts, the absence of empirical studies on the theme also makes it difficult to prove in the praxis of recognition the distinction between morals and power (Honneth, 2010: 108). This problem is being faced by a research project coordinated by Klaus Günther in the Institute for Social Research of the University of Frankfurt, intitled “Law, Struggle for Recognition as Victim”. For a publication of

Still, it is through this negative solidarity that expressive communication stimulates the publicization and consensus forming attitudes towards practical problems, unraveling this “lost source” of a possible solidarity of the citizens that could strengthen communicative approaches to the legitimacy of law.

Only when one problematizes the remaining aspects of the fascination of authority still present in law and in public spheres, this solidarity potential can escape the mist of a supposed “inevitable ideology” and become a legitimate source of communicative power.

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