The sense of the right to religious freedom in liberal democracies between accommodation and laicization. A study of the North American and Brazilian cases

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Abstract

This work intends to investigate the different conceptions—accommodation and laicization—that underlie processes of legislative regulation and judicial decision in matters of conflicts involving the right to religious freedom, in the legal systems of North America and Brazil. We will also investigate the potential for harmonization of legal in conflicts with other fundamental rights. The objective here is to build possibilities in order to establish a synthesis meaning for the right of religious freedom, in accordance with the democratic constitutional models of law to begin with, the recent modulations which allowed the fundamental right to religious freedom, especially from the edition of some US federal and state legislation, as well as from a set of decisions taken by Brazilian courts. As a corollary of these modulations, the article intends to assess the consequences that these new laws and judicial decisions caused in the legal system, through social and institutional democratic practices related to any fundamental rights. We used the dialectical method, since the idea and the foundation of the right to religious freedom follow a three-stage approach: thesis (religious freedom in its original sense and secularized conception), antithesis (right to religious freedom as a possibility to act in the exercise of belief, by claiming accommodation with other rights), and synthesis (the perspective to elaborate a proper sense to liberal democracies). Initial results indicate that both models based on secularization and accommodation can generate democratic and undemocratic meanings to the right of religious freedom; both models can either harmonize conflicting rights or escalate social antagonisms.

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Introduction

One of the battlefields of the twenty-first century will oppose fundamentalism to cosmopolitan tolerance. In a globalizing and globalized world, where information and images are routinely transmitted throughout the world, we are all regularly in touch with others who think, and live, differently from us. Cosmopolitans welcome this cultural complexity with satisfaction and embrace it. Fundamentalists see it as disturbing and dangerous. In a sense, sharing the reflection of Sakakibara (1995), we are witnessing “the end of the progressive era,” dominated by Western ideologies, and we are entering an era in which multiple and diverse civilizations will interact, compete, coexist, and accommodate each other. This global process of indigenization, using the expression from Ronald Dore (2001) when he refers to the trends of rejection of Western forms and values cultivated by colonizing nations of the North of the planet, is broadly manifested in the rebirth of religions and fundamentalisms in so many parts of the world.

Castells (2008) notes that we experienced in the last quarter of a century the advancement of powerful expressions of collective identity that challenge globalization and cosmopolitanism due to cultural uniqueness and people’s control over their own lives and environments. These expressions contain multiple meanings, are highly diverse, and follow the contours pertinent to each culture, as well as to the historical sources of the formation of each identity. They incorporate active-trend movements aimed at transforming human relationships at their most basic level, such as feminism and environmentalism. But they also include a wide range of reactive movements that dig their trenches of resistance in defense of God, the nation, ethnicity, family, region, and finally fundamental categories of millennial human existence, sometimes threatened by the combined and contradictory attack to technoeconomic forces and transformational social movements.

We can legitimately fuel the hope that on the ground of human relations, at the points that are susceptible to the incidence of religious aspects, a cosmopolitan perspective will eventually overcome, thus the tolerance/recognition of the other different from the predominant virtuous reference. However, the social dynamics of recent times show us some contrary movements, and the religious field has been a laboratory in which experiences have advanced negatively in this sense. In the first half of the twentieth century, intellectual elites generally assumed that economic and social modernization was leading to the withering of religion as an important element of human existence. The second half of that same century proved that these hopes and fears were unfounded. Economic and social modernization has taken on a global scale, and at the same time, a global revitalization of religion was produced, *la revanche de Dieu*, as Kepel named it (1994).

Distancing themselves from the libertarian, emancipatory, including original civilizing sense of religious freedom, as forged from the reformation, in which those who evoked the right to religious freedom did so with the sole intention of being able to carry out their worships and profess their belief, regardless of other forms of

institutionalization of faith and without a purpose of violence against the different in order to control or eliminate their way of being, contemporary religious movements have marched along conservative, active, and reactionary paths, and its engagement with politics has resulted in an inverse modulation of that original sense. What was a negative freedom, through which individuality was protected against the interventions of others who professed a different faith, and because of this difference could act violently seeking to prevent the exercise of faith or even aiming at eliminating the religiously different—it is never too much to remember the Night of St Bartholomew—now it has become an active freedom, which aggregates the possibility of limiting/excluding actions/modes of being of the other different because of certain religious dogmas evoked by those who exercise the right to religious freedom, as well as possibilities to avoid state actions aimed at curbing violations of fundamental rights or performing public interests depending on the exercise of the right to religious freedom.

At the same time, conservative and fundamentalist religious movements do not act simply to ward off the violence of those who intend to interfere in the exercise of their religious freedom, in an exclusively inclusive intention, but in a contrary way, they actively act not only to prevent the exercise of a distinct faith but also to curb ways of life that do not conform to their dogmas.

This new conservative, active, and exclusionary sense of religious freedom has been materialized through the pressures of fundamentalist religious groups, which have been normatively assured through the approval, within the rules of formal democracy, the absurdly undemocratic legislation in countries that are pleased to be examples of democracy, such as the USA and now, more recently, Brazil.

This work focuses on the relationship between the new conservative/religious fundamentalist movements and politics and more specifically on the imbrication of identity power and social control enclosed in these movements with the legal field and, consequently, on the normative repercussions generated from this projection referring to the contemporary sense of the fundamental right to religious freedom.

The discussion of this theme is of great importance in the Brazilian political and legal scenarios, especially due to a growing occupation of political spaces by representatives of fundamentalist religious movements, whose political agendas are dominated by highly moralizing and restrictive demands of individual behavior, especially related to issues linked to family, gender, sexuality, and public education. This importance is even more enhanced if we take into account the rhetorical potential of these neoconservative religious movements from the prominence that has been given to these issues in parliamentary discussions, from the space that has been occupied by such themes in the last election campaign held at our 2018 general election, as well as the scope that has been given to these discussions by the great media apparatus (radio, television, newspapers, and social networks) occupied and dominated by these religious groups.

The possibility of political and legal institutionalization in Brazil, as happened in the USA in recent years, of the demands arising from these movements is a very feasible situation, because religious representation in the National Congress is very significant, getting even more reinforced by the support that can be obtained from other conservative sectors with parliamentary representation (*v. g.*, ruralist bench and bullet bench), by a process of cross-mutual support in the defense of their interests that, by thematic

specificities, are not excluding. Thus, the analysis of the phenomenon of modulation of religious freedom occurred in the USA and all the civilizing setbacks this can represent is of fundamental importance so that we can find political and legal ways and technologies that prevent such a setback in terms of fundamental rights in Brazil.

For the development of the research we now report, the dialectical method was used, because every existence, every idea, and every institution follow a *démarche* in three stages, according to the famous triad: thesis, antithesis, and synthesis, or more precisely affirmation, denial, and denial of denial. Thus, it is from the dialectic of these social meanings of religious freedom that a new meaning (synthesis) of the right to religious freedom can emerge.

The fundamental objective of the work is to try to establish, within the frameworks of both a state and a society democratic rule of law, a humanistic, emancipatory, and effectively democratic meaning for the right to religious freedom, in order to establish it as a political and legal institution aimed at the reproduction of life and the broadest ways of exercising freedom.

Fundamentalisms and Violences

In a society where the processes of community interaction are increasingly disarticulated, which could give meaning to a life more symbolically committed to the collectivity and the other, the forms of extreme individualization of life reflect the different modalities of the isolated world projects and the sick narcissisms that constitute subjectivity and the way of operating of the vast majority of people in contemporary society. In Western society, since modernity, virtue does not necessarily need to be found in God, nor morality. The condition of individual rights subjects creates the conditions of possibility for each subject to fight for their happiness in their own way. Certainly, as Han (2014) will say, in a society in which the other is eroded, invisible, rendered null, and unimportant for the presence of itself, democracy tends to weaken its power, because there is no democratic support under the regime of the “self.” This emptiness is also an emptiness of itself, an excessive narcissistic void, which takes the other as a competitor and as an enemy and which makes it a permanent threat.

Certainly, in this scenario, religions arouse a sense of collective welcoming, shared presence, and a feeling/drive to be together that gives a place in the world for uprooted individuals. This is one of the roles of culture, and religion has occupied this space very prominently for centuries. Modernity threw the theme of religiosity into the private sphere and transferred to the individual the saga of producing, by himself, their own presence and belonging in the world. Secularization, for sure, did not end entirely with the representations and theological narratives, but evidently put the man in touch with the profanity of the world and imposed responsibility and decision-making. Freedom and contingency inaugurate a new time for the individual, who sees choices rising where previously there was only fate. In addition to a collective action, therefore, it is perceived from modernity, especially in the West, the strengthening of believing as an individualized act, as a fulfillment of a personal demand that reinforces and identifies itself with the also individual demand of the many other followers.

At this time of the “self” and the eroded “other,” the atomized subject, the few community projects, religions, and sects, notably in their most fundamentalist formats,

seem to offer an organized place, a pre-elaborate refuge, and a forever legitimized, confirmed, and unquestionable belonging, which is rapidly internalized as the identity of the adepts. They do not have to be questioned. They are ready. Its communicative strength constitutes subjects and elaborates common meanings that extend to almost all the spaces of the social life of its members. Adherence to a religion (in a fundamentalist way) or a sect frees the subject from the coercions of their identity and allows them to take refuge in the other and to be annulled among those with whom they identify, says Le Breton (2018). Obviously, religion has always done that, as well as other cultural manifestations do so. It turns out that, currently, this identifier process takes place in another way, less community (in the West) and reaffirming individual guidelines of satisfaction and presence of oneself in the other similar.

In fact, in the conveyor belt of the dynamics of consumption, a spiritual market has emerged offering a range of products that promise to numb pain and give meanings to things and safety in a world of instability. Individual religious action is now inquired as a possibility of consumption and promise of a better life, of a happy life, a kind of transcendental materialism, this is because, as Creston Davis points out (1996: 8), humanity is material, and thus, the material world cannot be amortized for a kind of withdrawal for ethereal transcendence, something like an immanent transcendence. This movement occurred not only in individual action but was prospected for political action, so that “religious fundamentalism unfolds, almost always, into a political fundamentalism” (Rocha 2014: 763). It is not surprising, therefore, that the moral themes, so strongly religious, invaded the political scene (even the Brazilian one) and are considered by conservative sectors of the society as central issues for the concertation of the State.

Fundamentalist tendencies promote a certain kind of detachment of the world and establish their own self-proclaimed dimension of transcendence, presenting their quiet certainties and truths that order the world and eliminate all kinds of complexity. They are totaling and have a response to the completeness of the facts. By simplifying the world, they offer a direction, guidance, and a firm explanation for the great issues of existence, “exactly there, where our societies have lost a part of that anthropological orientation that abandons the individual to a freedom without limits, but difficult to assume” (Le Breton 2018: 110–111). Self-awareness, the presence of the self, is abandoned by the filiation to a status of the group, which is rewarded, at least initially, by a sense of belonging and interior security that charges the price of rejection of the previous identity.

In fundamentalist religious experiences, individuals are enclosed around themselves, making it impossible for any possibility of openness to the other (Rocha 2014). There is no room for difference, for the strange. The forged community requires loyalty to cults, ideas, rites, and speeches, which cannot be understood and accessed by the surroundings without a risk to the integrity of the group. Religion, in this sense, becomes absolute in the face of fragile subjects with almost no awareness of themselves. In extreme postures, many identities of the subject undergo a total reduction to the identity of the group, which colonizes a significant part of the self-existence by theus-existence. It is common for this belonging to have repercussions on social habits, on the esthetics of clothing, on moralizing sexual speeches, on the concept of family, and on how to prospect the simple life in general.

Paradoxically, religions have gradually lost their ability to produce reactive and socially emancipatory actions and are not uncommonly franchised and controlled by conservative movements that deny or weaken their practices of otherness, imposing a destructive reformulation from its own interior, which denies the primordial meaning of the word religion, which is to re-bind. The Christian legacy, for example, which is full of revolutionary and even subversive passages, fundamental to the development of a policy of universal emancipation, has been unconstituted and replaced by a number of faith practices that, confusingly, articulate belief mechanisms totally centered on the self-centered subject and, at most, on the reaffirmation of the subject of the group itself (Žižek 2015). Religion works, therefore, as a promise of comfort, a possibility of encounter in a world of few offerings. The feeling of belonging of a fragile subject makes religion an absolute place, an idea that moves, seduces, manipulates, and satisfies a desire.

Another aspect of the individualization of the religious life can be noted in the very significant increase of new religions and the proliferation of the number of temples, especially neo-Pentecostals, which attest the importance of a type of market of faith that promises security, conquest, welcoming, and hope, usually for desperate people or people who strongly identify with worship, when no other institution is capable of such promises. In theory, everything can be requested, and everything can be achieved.

In a society where excessive and self-centered narcissism predominates, as Byung-Chul (2014a) points out, the subject is not able to recognize the other in their otherness and difference. The fundamentalisms, of all orders, in this context, offer more of the same, a possibility of stability, a fortress of identities that seeks in the other only the confirmation of oneself and that denies the constitutive capacity of their own surroundings. The community appeal offered by religion, in a secularized world, establishes a position of security, comfort, welcoming, and belonging, which almost always charges the price of abandonment of oneself and the total dedication to the cause. The power of loyalty to religion is directly proportional to its ability to give the individual a project, a place in the world, and a reason to live, without questioning their own uncertainties.

In any case, more or less radical, religious fundamentalisms (like all fundamentalisms) feed on a dangerous ambivalent game. They unite by separating and separate by uniting. They are reinforced by the denial of their opposite, who almost always turned into an enemy. They elect truths, promise a future, and fight the threats of the surroundings. They generate their own identity at the cost of the identities of their followers. Violence, contempt, and intolerance, because of all of this, become immunizing strategies of these religious communities that reinforce their ties by the evasion of the difference and the otherness.

This religious revitalization, according to Huntington (1996: 116), partly involved the expansion of some religions, which conquered new recruits in societies in which they had not previously had them. However, this author complements, to a much greater degree, religious resurgence resulted in people returning to the traditional religions of their communities, refreshing and giving new meaning to these same religions. In all these religions, fundamentalist movements dedicated to the militant purification of religious doctrines and institutions have emerged, as well as the reformulation of personal, social, and governmental behavior according to religious precepts (see the Brazilian case with the Bolsonaro government).

How to explain this global religious resurgence? There are distinct causes in countries and civilizations particularly considered. However, the number of causes is

not that large, and some can be considered general. Huntington (1996: 118–122) points to three major general causes for this contemporary phenomenon. First, it is important to highlight the most obvious, most visible and most powerful cause of the global religious resurgence, which should have caused the death of religion, but, paradoxically, did not: the processes of social, economic and cultural modernization that covered the world in the second half of the 20th century.. Former sources of identity and ancient authority systems have been torn apart. Second, in a broader way, religious resurgence around the world is a reaction against secularism, moral relativism, and self-indulgence, as well as a reaffirmation of values of order, discipline, work, mutual aid, and human solidarity. Third, in addition to the psychological, emotional, and social traumas of modernization, among other factors that stimulate religious revitalization are the retreat of the West and the end of the Cold War. With all this, religion takes the place of ideology, and religious nationalism replaces secular nationalism. These causes are, without any doubt, identified in the phenomenon of religious expansion in Brazil. But as much or more than the causes, what worries us and impels us to reflect on this topic is the flood of politics and laws in contemporaneity by such fundamentalist resurgences and the violence linked to them.

Two points must be highlighted here. Firstly, the influence of fundamentalisms on politics and law becomes quite clear when we see an unprecedented increase of representatives of religious organizations in the legislative branch. In Brazil, the share of evangelical representatives in the House of Representatives is growing bigger, as they seek more power and relevance. While in 1994 there were 21 evangelical congressmen, nowadays there are 105 of them and 15 senators, which stands for 20% of the house. But not all evangelicals belong to the “evangelical branch.” In addition to religious affiliation, the members of the bench share an affinity with so-called family values, including legislative proposals restricting the rights claimed by women’s, black, indigenous, and LGBTI + movements, among others.¹ On the other hand, legislative proposals from the religious bench and the political measures of the Executive Authority under the influence of religious groups can be interpreted as genuine violence against minority groups, many of them fitting perfectly into the typology of human rights violations for religious reasons, as foreseen in the Report on Intolerance and Religious Violence in Brazil (2011–2015), prepared by the Special Secretariat for Human Rights of the Ministry of Women, Racial Equality, and Youth and Human Rights (Brasil, 2016).

Most of these types of religious violence reflect the parallax nature of violence, which requires a focus between its different levels in order to be understood. The daily violence originating from fundamentalisms, when diluted in discourses and practices of approaching God as carriers of a great vision of cosmos organization and of one’s own existence, is veiled by its transcendental justification as uncontrollable and almost natural powers, while in reality it must be experienced as violence. The typology presented above allows us to perceive a paradox linked to religious violence. As Žižek warned (2014), the most obvious signs of violence that come to mind are acts of crime and terror, civil confrontations, and international conflicts. But we must take a step backwards, freeing ourselves from the fascinating deception of directly visible “subjective” violence, which is exercised by a clearly identifiable agent. The step backwards

¹ <https://congressoemfoco.uol.com.br/legislativo/veja-quaes-deputados-e-senadores-fazem-parte-da-bancada-evangelica/>

allows us to identify a violence that underlies our own efforts to combat violence and promote tolerance (2014: 17). In addition to subjective violence, it is important to point out two forms of objective violence: “symbolic” violence, embodied in language and its forms, and “systemic” violence, which consists of the often-catastrophic consequences from the regular functioning of our economic and political systems and which may include the religious system (2014: 17).

Žižek’s lesson is extremely important for a proper understanding of those silent manifestations of religious fundamentalist violence, as they seem a “legitimate” exercise of fundamental rights. The problem presents real seriousness when such world views (with high potential for violence, although not understood as such by the ones who manifest it) affect the others’ human rights by originating conflicts between rights, the solution of which hangs on actions from the public authorities. When it comes to talking about the individual who disrespects others’ religious values, by claiming that his belief is superior and dominant, we have not only an attack on the individual right to religious freedom but also an opening door to more complex problems, such as violence, discrimination, bullying, aggression, fanaticism, hatred, xenophobia, and even armed conflicts—phenomena that constitute a violation of others’ human rights.

More and more exposed in the media, such conflicting situations pose two major questions: (a) “What are the limits of religious freedom in democratic societies?” and (b) “In the face of judicial demands generated by social conflicts and violence resulting from different interpretations of the sacred texts by different religious groups, what are the most democratic positions of the public powers, especially the Judiciary, in the solution of such disputes?”. More and more exposed in the media, such conflicting situations pose two major questions: (a) “What are the limits of religious freedom in democratic societies?” and (b) “In the face of judicial demands generated by social conflicts and violence resulting from different interpretations of the sacred texts by different religious groups, what are the most democratic positions of the public powers, especially the Judiciary, in the solution of such disputes: to try accommodate different religious views of the world or to adopt a secularized posture in the face of such conflicts, imposing standards of behavior and social relationships established in the constitutionalized political projects?”

If in relation to violent actions of terror perpetrated by fundamentalist radical groups, the strategies adopted by national states are truly war tactics, the same cannot be said in relation to fundamentalist actions carried out within the landmarks and the rules of the game of democracy, constitutionalism, and the rule of law. In the latter case, fundamentalisms slowly erode the fundamental values and institutions of these forms of political and legal organization that, badly or well, have ensured, amid setbacks, unquestionable civilizing advances since the beginning of modernity, such as the right to religious freedom.

What has happened in these cases where fundamentalisms are installed through the normalization carried out within the political and legal normality of a country, as in situations placed by American laws that we will soon analyze, is what can be defined as structural couplings, which, at the same time, has happened between religious structures, political structures, and legal structures, materializing by numerous interstructurals transfers of values, rules, and resources from the religious to the political plan—through positions at the Parliament assumed by agents from religious corporations—and from the political to the legal plan, through numerous legislative and judicial

positivations of highly moralized values structuring the religious system, making them legally essential and ensuring the socialization of political actions of social control intended by the religious systems. These couplings are not new, having even occurred events of almost total overlap or confusion between different systems. Let us take as a quick example the absolute European monarchies, in which there was a close link between the State and religion, by a constant projection and intersection between the operations of one system in relation to the other. Sin and non-sin, typical operations of the religious system that differentiate it from other social systems, by transferring intersystemically to the political and legal systems, end up encoding themselves in the field of lawfulness/lawfulness, characteristic operations of the legal system.

The legal systems between accommodation and laicization

As two major theoretical positions, accommodation and laicization have dominated the debate about the interpretation and application of the right to religious freedom, especially when there are tensions between this and other fundamental rights. Accommodation, sometimes referred to as condescension, advocates that the First Amendment promotes a beneficial relationship between religion and government. Accommodation has evolved from an interpretive method to a set of constitutional procedures, applied whenever the Supreme Court faces government issues with religion.

Jurists generally adopt either one of the approaches—secularism, strict separation, or accommodation—to interpret the establishment of the First Amendment and the free exercise clauses relating to religion. Secularism was defined as opposition to religion in the public arena. In *Everson v. Board of Education* (330 US 1 - 1947), Judge Hugo L. Black wrote that separatism affirms a “high and impregnable wall of separation” between church and state. On the other hand, separatists consider that any law concerning religion violates the First Amendment. In turn, accommodation is based on the belief that government and religion are compatible and necessary for a well-organized society. The accommodationists claim that in the First Amendment, the authors intended to promote cooperation between government and religion, not neutrality or hostility by the government towards religion. They argue that, since the establishment clause prohibits the Congress from creating laws about “an establishment” rather than “the establishment” of religion, the government should not show preference among religions or between religious versus non-religious. According to the accommodationist interpretation, the First Amendment allows government actions that promote religion, but not religious institutions.

Accommodationist arguments are often presented when the Supreme Court considers public observance of religious holidays, symbols, and religious practice in public schools. Several American judges were accommodationists, including Byron R. White, William H. Rehnquist, Antonin Scalia, and Clarence Thomas.

Most critics of accommodation are secularists, such as Leonard Levy. Scholars like him argue that the Bill of Rights authors’ original intention was not to accommodate religion and government, but to prevent each of them from influencing the other. They reject the accommodationist position that the choice of the word “one” in “an establishment” of religion is critical to understanding the establishment clause. Separatists believe that a detailed exploration of the First Congress reveals the founders’ desire to

erect a “separation wall” between religion and government. Critics argue that condescension introduces sectarian struggle into politics, contrary to the objective of the First Amendment. They believe that the doctrine of accommodation to religion would inevitably confuse government and religion, by eventually damaging both.

The Supreme Court generally applies a combination of five constitutional tests or doctrines when addressing issues of religious accommodation. The first one of them is the triple Lemon test, which was articulated in *Lemon v. Kurtzman* (403 US 602 - 1971), by which the legislation has a secular purpose, not promoting or inhibiting religious practice, thus not creating an excessive governmental intertwining with religion. On the second doctrine, courts try to “balance” the interests of the state with individual practice, as established in *Sherbert v. Verner* (374 US 398 - 1963), which allowed women to receive unemployment insurance after being fired for refusing to work on Saturday. According to the third one, courts consider it a direct or indirect burden on religion, as in *Braunfeld v. Brown* (366 US 599 - 1961), as well as in *Sherbert v. Verner*. On the fourth, courts may consider whether the state has a compelling interest in restricting religious beliefs, such as pacifism, as in *Gillette v. United States* (401 US 437 - 1971), or exempting churches from property taxes, as in *Walz v. Tax Commission* (397 US 664 - 1970). On the fifth one, courts apply strict scrutiny to any law or statute that offers direct or indirect benefit to religious institutions.

The great counterpoint to accommodation is laicization. The word “Laïcité” appeared in France in the 1880s, at the time of the debates on the laicization of public education Ferdinand Buisson, one of the main collaborators of Jules Ferry (father of the new school laws that instituted free, secular, and compulsory education) considered it a “necessary neologism”. In his entry “Laïcité”, written in the *Dictionnaire de Pédagogie*, Buisson says: “The secular state is a neutral state among the cults, independent of all clergy, far from any theological conception”. (Zuber 2010: 161). Despite its specificity, secularity (Laïcité) is a term that designates a very changeable reality that crosses several domains of reflection or action from the philosophical and legal to historical and sociological domains. It manifests itself in the relations between the different religions and also between religion(s), State(s), and civil society.

Far from thinking of secularity as a French exception, the French case is one of the historical constructions of secularity, and there are others spread around the world. However, since it has its historical importance and originality, the French case has exerted influence on other models of secularity, and it is paradigmatic for the understanding of secularization effects regarding the legal regulation on the exercise of religious freedom in its multiple manifestations.

The French laicization process was based on three political principles defined in the course of the nation’s history: the first principle enunciates the politician’s autonomy. Power is not the emanation of divine will, but the representative of a community of citizens for their own government. The second principle postulates the ineluctable privatization of the religious. The republican system does not call freedom of conscience into question, but churches should only be subject to private law. The third principle affirms the state’s primacy over civil society. The citizen must participate in the elaboration of a collective identity, which cannot be built but in the beginning of the immediate belonging and under the auspices of reason (Zuber 2010: 162–163).

This secular model theorized by the philosophers of the Age of Enlightenment has been applied since the French Revolution; nowadays, it conflicts with the challenges of

the contemporary world. With the globalization of products and ideas, the growing relativism of values—a characteristic of western society since the 1960s—also includes the French society. The values proclaimed by the traditional Republic model have been increasingly contested by a growing part of the population. The main pillars of secular ethics—Progress, Nation, and Reason—lose their relevance. New battles arise to mobilize the concept of secularity in an unprecedented way (the fight for the sanctity of the school and the defense of women’s rights are two examples).

The exaltation of differences and more weight on individualism also make it increasingly difficult for everyone when it comes to submit to an abstract and unifying norm, whose costs are borne by powerfully centralized republican institutions. The debate on secularism was reactivated in France several years ago, and it has drawn attention of several other places in the world, in this uncertain context of late modernity marked by the polytheism. However, the adversary of secular republicans has radically changed: it is not the structural anti-modernism conveyed by the clerics of the Roman Catholic Church, but the religious and individual zeal of young Muslim women who flaunt in an uncomplicated way their religious belonging in public spaces. The dialectic on recent debates is characterized by the opposition between a secularity that guarantees the emancipation of the individual, carried by the republican discourse, and the demand for a secularism neutrality respecting freedom of conscience, which would be equivalent to a complete absence of the State in religious affairs.

Throughout the debates on secularism that marked the 19th and 20th centuries, the crucial issue was always the school, where future citizens should have been formed. The war of two school models resulted in freedom of teaching. But this centenary struggle quickly became obsolete due to the appearance, in 1989, of a phenomenon that was unprecedented and disturbing for many of the actors of the school quarrel: the claim known as the “Islamic veil” (Gaspar and Hosrokhavar 1995). The “Islamic veil case” dominated the public debate on the secularism, from 1989 to the prohibition of religious symbols in primary and secondary education, in 2004.² New actors were introduced to the debate, such as militants of different feminist currents, who associated in a new (but lasting) way the binomial secularity/defense of women’s rights. The debate over the possibility of extending the association contract to Muslim schools has taken place recently, with no particular mobilization from the public opinion.

The debate on *Laïcité* and women’s rights in France was intensified with the approval, on July 13, 2010, of the law that imposed a ban on wearing the veil in public spaces. Without ever evoking the term “integral veil,” the seven articles of the proposed law provide for a ban on “face concealment” in all places open to the public and on the public highway, in the metropolis, and in the overseas departments. After a moratorium of 6 months of so-called mediation, a fully veiled person will incur either a fine of 150 euros or the obligation to attend a citizenship training course. A 30,000 euros fine (or 1-year imprisonment) is provided for a person who has forced another to conceal his face. Before being adopted, the draft law must be examined by the Constitutional Council,

² Law of March 15, 2004, framing, in application of the principle of secularism, the use of symbols or robes manifesting a religious belonging in schools, colleges and public high schools. Available on: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT0000000417977&dateTexte=>. Acces on 11th November 2020

and there are no guarantees it will tend to the government's side. Some legal experts are afraid France will be condemned in this matter by the European Court of Human Rights.

The reference to the major French legal principles, reinforced by the need to conform to international conventions rule—which France has acceded to—nevertheless shows the difficulties encountered by the political promoters of a law based on an authoritarian and limiting concept of the public freedoms of French secularity, which is more and more often forced out of its splendid hexagonal isolation. Secularism, the historical and particular form to construct the rule of law, must now take into account international rules for the ongoing defense of human rights in an increasingly globalized and culturally multifaceted world.

Before analyzing some paradigmatic judgments of the American and Brazilian Judiciary Powers, we point out that this debate between accommodationists and laymen materializes as the discursive background, by which different meanings have been presented to the right of religious freedom, besides possible tensions with other fundamental rights. Judicial decisions are a very fertile ground for the institutionalization of such arguments. What we seek below is to verify whether the option for one view or another—accommodation or secularization—can enhance or not the exercise of religious freedom and, at the same time, soften tensions with other fundamental rights.

The doctrine of accommodation in the jurisprudence of the religion clauses

The US legal system gives primacy to individuals' freedoms in relation to laws seeking to restrict them without any acceptable justification, after all, only in exceptional situations is the restriction of civil rights (freedoms) allowed. In this federative legal system, the State is obliged to demonstrate the need to restrict the individual right by completing requirements imposed by law.

However, it did not always occur this way, since the recognition or not of freedom of belief and religion was analyzed casuistically by the American Courts, without clear criteria of when and how freedom would be guaranteed. This situation caused seemingly conflicting decisions and legal uncertainty. In the *Wisconsin v. Yoder* case (406 US 205 - 1972), the US Supreme Court considered invalid a determination of the State of Wisconsin, which ruled mandatory the school attendance to the Amish, who refused, for religious reasons, to send their children to schools.

In the *Sherbert v. Verner* case (374 US 398 - 1963), a citizen of the State of South Carolina, adept of the Seventh-day Adventist Church, pleaded for payment of a benefit foreseen in norms from that state ("South Carolina Unemployment Compensation Act"), since he could not get a job because his religion did not allow him to work on Saturdays, considered "sabbatical day." According to the norm, those eligible for benefits were the people who were able and available to work but have not succeeded in relocation on the market for a justifiable reason, although job offers were made by the government department in charge or directly by employers. The benefit was denied by the government, and this administrative decision has been ratified by the Justice of that State. The Supreme Court, however, considered that the decision handed down by the South Carolina Court hurt the free exercise of the appellant's religion.

This decision was reviewed by the State Court, which reformed the decision of the local Court because it understood that the exclusion of benefits to a person cannot be based on the religion (or its precepts) that he or she follows. However, in the precedent

Employment Div., Dept. of Human Resources of Oregon v. Smith (494 US 872 - 1990), the Supreme Court reversed the decision of the Supreme Court of the State of Oregon, which recognized the right of two people, who followed the precepts of the *Native American Church*, to receive benefit due to unemployment. In this case, individuals were fired because they used a substance (*peyote*), which is prohibited by state law, in religious ceremonies. The local Court considered that the refusal of the payment of the benefit would affect the right to the free exercise of religion. The Supreme Court, in return, understood that the free exercise of religion did not have the intended scope. It stated that the Court's decisions never recognized someone's right, under the excuse of the free exercise of religion, not to submit to valid legal commands issued by states prohibiting a specific conduct.

Faced with this tangle of contradictory decisions, two important movements occurred at the legislative level generating a new movement of structural coupling between religious, political, and legal systems: one at the federal level, with the edition of the Religious Restoration Act, and another within the limits of states, with the approval of various state laws, some in total divergence with the federal law, and what is even more serious, enabling discriminatory actions by fundamentalists against minorities and, in particular, against the LGBT group.

At the federal level, in direct response to the decision given in the case Employment Div. of Human Resources of Oregon v. Smith, the American Congress approved the *Religious Freedom Restoration Act (RFRA)* in 1993, in which parameters were established to examine whether or not a particular act is compatible with the person's free exercise of religion and whether this act violates that right. This bipartisan legislation aimed at restoring and encoding the Americans' rights to religious freedom has started to require that even laws with general applicability should be strictly adapted to meet a convincing interest of the government in circumstances in which the free exercise of religion may be affected. The act was considered applicable to both states and the federal government until 1997, when in the case of the city of Boerne v. Flores, the Supreme Court ruled that the RFRA was an unconstitutional intrusion into the authority of the State and was invalid when applied to the State law.

This Religious Freedom Restoration federal law, in short, provides a test of "rigorous scrutiny" for the courts, whose central idea is not to burden or restrict the exercise of a person's religious freedom unless it demonstrates that the burden or restriction enhances a compelling interest of the government and as long as the act restricting this freedom is done through less restrictive means.

Since the entry into force of the RFRA, a movement of religious accommodation has taken place in the American legal system. Although the Supreme Court violated some provisions of this law as they applied to states, *Burwell v. Hobby Lobby Stores* (573 US 2014) ruled that three closed companies, whose owners had religious objections, were exempted from funding certain forms of contraception under the Protection and Affordable Care Act of 2010 (better known as Obamacare), which they considered abortifacient.

The US Supreme Court reconsidered in 2014 this case (*Burwell v. Hobby Lobby Stores*), when it ruled that privately held companies qualify as people under the federal RFRA regime and, therefore, may declare a RFRA claim valid. This case is paradigmatic when it comes to understanding the Supreme Court's position on the importance of the right to religious freedom and its extension.

The question that was raised by this lawsuit was whether the Religious Freedom Restoration Act of 1993 allows a for-profit company to deny its employees the health coverage of the contraception to which employees would be entitled to according to the religious objections of the owners of the company.

The Supreme Court concluded that the Congress intended the RFRA to be read as applicable to corporations, since they are composed by individuals who use them to achieve the desired outcomes. As the requirement for contraception forces religious corporations to fund what they consider abortion, which goes against their declared religious principles, or faces significant fines, a substantial burden is created which is not the least restrictive method to satisfy the interests of the government. In fact, there is a less restrictive method in the form of the Department of Health and Human Services exemption for non-profit religious organizations, which the Court considered possible and mandatory to be applied to for-profit corporations such as Hobby Lobby. Furthermore, the Court held that this decision applies only to the contraceptive mandate in question and not to all possible objections to the Affordable Care Act for religious reasons, as feared by the main dissent.

With the same sense of accommodation, in *Zubik v. Burwell* (578 US 664 (2016)), the Court sent similar cases to lower courts, after apparently finding a way for individuals to receive contraceptive coverage without involving religious providers who were against it.

Equal Employment Opportunity Commission v. Abercrombie and Fitch Stores, Inc., 575 US 664 (2015) is another case related to religious accommodation. Here, the Supreme Court ruled that an employer could be responsible for violating Title VII of the Civil Rights Act of 1964 by refusing to hire an individual who wore a scarf or veil on her head, even if the employer did not specifically ask if she was wearing it for religious purposes.

In an effort to further clarify the RFRA, Congress approved the Religious Land Use and Institutionalized Persons Act (RLUIPA) in 2000, providing that state and local zoning laws cannot impose a significant burden on religious institutions. The Congress also amended the RFRA in 2003 to clarify that it applies only to federal laws and those of Washington, D.C., Puerto Rico, and any other US territories or possessions.

On the other hand, due to the high degree of autonomy that the member States of the American federation have, there have been a series of legislative actions by the State Houses of Representatives and Senates, sometimes with the aim of strengthening the terms of the federal RFRA, sometimes to create new paths that could ensure more conservative political actions, but which, in essence, in the latter case, only aimed to reinforce a discriminatory culture on race, gender, sexual orientation, or gender identity.

Prior to the decision in the case of *Boerne v. Flores*, the states of Connecticut and Rhode Island had already taken steps to copy the Federal Religious Freedom Restoration Act. From 1994 to 1997, no other state enacted a law to restore freedom, but after the decision over *Boerne v. Flores*, states became more active. Between 1998 and 2000, nine States promulgated RFRAs. Four States enacted acts of restoration of religious freedom between 2002 and 2009, six have done so since 2010, and 11 other states have been considering religious freedom projects since 2015. Some, such as Alabama and Illinois, explicitly mention *Boerne's* decision in their preambles. Others, such as Arkansas and South Carolina, reiterate the original purpose of federal law.

All acts of restoration of the religious freedom from the states contain language similar to that from the federal act in relation to a basic test to consider the interest of the government versus the burdens that may restrict the right to religious freedom, but

the RFRAs of the states contain exclusive provisions beyond this basic principle. For example, five States—Alabama, Connecticut, Missouri, New Mexico, and Rhode Island—do not require the burden or restriction of religious freedom to be “substantial”.

In practice, many of these US State laws have allowed people or corporations, in the name of the exercise of their religious freedom, according to the dogmatic canons of their congregations, to restrict or violate the civil rights of others people, such as companies who refuse to provide their services to same-sex couples. Like this, for example, were the cases of Hobby Lobby that refused to offer contraceptive methods to their employees, or the case of a Christian baker who argued that he should have the religious freedom to refuse to make a cake for a gay couple’s marriage, same reason presented by florists, photographers, and a pizzeria in Indiana (Zauzmer 2018).

From a legal perspective, what can be seen is that some of these State laws, such as the Indiana RFRA, limit the possibilities of state intervention in relation to the exercise of religious freedom, thus allowing the enhancement of a kind of private hermeneutics of the extension of the exercise of religious freedom, a situation that gives individuals or corporations a wide space of definition of what they believe to be a legitimate and constitutional extension of the exercise of their religious freedom, whether or not they violate the civil rights of third parties, and gives them the possibility to refuse compliance with state commandments, which must, in order to generate obligations to believers, be proven as essential or substantial by the State itself.

Such situations of manifestation and political and legal institutionalizations of religious conservatism raise three issues of the highest importance for the public, political, and constitutional debate: first, we are experiencing the construction of a new sense for the right to religious freedom, with great potential for excluding rights of others, especially minority groups, totally detonating from the original meaning proper to liberal constitutionalism, in which freedoms prevail in a context of balancing the rights of all citizens, which is important that the exercise of the right by one cannot imply exclusion from the right of another; second, the adequacy or not of this new meaning of religious freedom to societies governed by democratic constitutions, in which the freedoms, tolerance, and dignity of the human person largely prevail; and third, the tension generated by such fundamentalist exclusionary postures in relation to other rights of parts of the population that do not commune in the same faith and which, therefore, adopt other ways-of-being repudiated by fundamentalists.

The concerns raised in these three issues come out in a practical way in the last of them, because little relevance would have the debate about a new sense of religious freedom or in relation to its democratic adequacy or not, whether this new way of exercising this freedom did not achieve third party freedoms and ways-of-being, in a classic model of shock and fundamental rights tensioning.

The decisions rendered by the US courts, in federal and state legislation, formally shelter the idea of accommodating the different forms of manifestation of the right to religious freedom; they also hide an enormous potential for conflicts between rights, especially with regard to legislation and positive decisions at state level.

The Brazilian judicial power decisions and the establishment of an emancipatory secular sense of the right to religious freedom

In Brazil, religious freedom is protected in constitutional and infra-constitutional levels in a very similar way to the US constitutional system, but on the infra-constitutional level, the protection is quite timid, with the sole Law n. 7.716/89, modified by the Law n. 9.459 /97, which provides, among others (race, color, ethnicity, and national origin), crimes resulting from discrimination or prejudice of religion. Still in the embryonic phase, there is, in this way, a bill proposed in 2015, proceeding in the House of Representatives, which seeks to establish the Legal Statute of Religious Freedom.

If at the national legislative level, the lack of an infra-constitutional legislation has not contributed to giving more precise contours to the right of religious freedom, in the judicial context, some judgments already carried out on trial and some actions still pending judgment, especially in terms of constitutionality control, have fixed and must still modulate quite consistently some horizons of meaning to the right to religious freedom. Some cases are very representative in terms of the implementation of fundamental rights, especially when we refer to the collision of other fundamental rights with the right to religious freedom, a decision-making set that gives a very good meaning to this right in the Brazilian legal system.

In the group of actions already with transit in court, it should be noted that among the historical trials of the Supreme Court is MS³ 1.114, from 1949—probably one of the first trials whose object was the religious freedom—filed in favor of D. Carlos Duarte Costa, founding Bishop and Head of the Brazilian Catholic Apostolic Church of Rio de Janeiro, former Bishop of Maura of the Roman Catholic Apostolic Church, in order to be guaranteed to him and the components of his church the free exercise of his religious worship in public places and temples, as well as the activities in the school maintained by the Association of Our Lady Girl, once prevented by the Police, characterized this fact, according to has been alleged, as violation of liquid and certain right guaranteed by the Constitution, whereas the freedom to religious worship.

Due to the opinion of the General Counselor of the Republic, approved by the President of the Republic, the worship of the Brazilian Catholic Apostolic Church was prohibited in public places, because they consider to have no proper worship of this Church and cause confusion between their religious practices, priestly robes, and insignia with those existing in the external solemnities of the Roman Catholic Apostolic Church, constituting an imitation of these, consequently violating the freedom of this latter Church. In this case, public order prevailed in denial of freedom of worship.

Nowadays, the Supreme Court, at the ADI⁴ 5257/RO, gave very precise contours on the theme of state secularism when judging unconstitutional a state norm of the State of Roraima that formalized the Bible as a base book of doctrinal source, because it was implicit the violation of the principles of state secularism and the freedom of belief. The

³ Kind of writ of mandamus to guarantee a certain and determined right. There are some types of lawsuits which, before the Federal Supreme Court, constitute precedents that must be followed by all public powers. This is the case of the decisions that become the object of protracted decisions in the actions of the constitutionality control system. In the particular case of MS 1.114/1949, there is no such obligation because this type of action, at first, does not have this effect.

⁴ Kind of judicial action of the Brazilian legal system to provoke the control of constitutionality by the judicial power.

Supreme Court recognized that the Brazilian republic had consecrated in its very beginning, in a normative scope, the respect to the freedom of belief, and it was under this distant influence that the Federal Constitution of 1988 made clear in its text the protection of that same freedom under the various nuances of this right. This way, the officialization of the Bible as a doctrinal source base book to support principles, uses, and customs of communities, churches, and groups in the State of Rondônia implies unconstitutional discrimination between beliefs, besides characterizing violation of the required neutrality of the State by the Federal Constitution. Thus, the unconstitutionality of articles 1th and 2th of the Law n. 1. 864/08 of the State of Rondônia was recognized.

Relating the themes of freedom to expression and religious freedom, the ADI 2566/DF questioned the constitutionality of the § 1 of art. 4th of Law n. 9.612, of February 19, 1998, which has the following content: “§ 1 - Proselytizing of any nature is prohibited in the programming of community broadcasters”. The Supreme Court recognized the unconstitutionality of this legal provision underlying the decision on the grounds that freedom of expression represents both the right not to be arbitrarily private or prevented from expressing its own thought and the collective right to receive information and to know the expression of other people’s thinking. The Supreme Court stated in this trial that, because it is an instrument for the guarantee of other rights, the set of decisions of the Court recognizes the primacy of freedom of expression. Regarding the central point of the relevant constitutional issue, it has been available to the Supreme Court that religious freedom is not only experienced in private but also in the public space and includes the right to try to convince others, through teaching, to change religion. From this, proselytizing is recognized by constitutional set of decisions as inherent to freedom of religious expression, a meaning that was constructed as a corollary of the understanding that political freedom presupposes the free manifestation of the thought and the formulation of persuasive speech and the use of critical arguments and that the consensus and informed public debate presuppose the free exchange of ideas and not just the dissemination of information. The Supreme Court understood that the article 220 of the Federal Constitution expressly consecrates the freedom of expression in any form, process, or vehicle, a hypothesis which includes the community broadcasting service and which, depending on this, violates the Federal Constitution, the prohibition of the transmission of proselytizing speech in the service of community broadcasting.

Also enclosing a controversy between the right to religious freedom and the right to free manifestation of thought, the judgment, by the Second Panel of the Supreme Court, of the Ordinary Appeal in Habeas Corpus (RHC 146.303/ RJ), on 03/06/2018, set limits to the freedom of religious manifestation by denying the blocking of criminal proceedings that would have been motivated by consistent conduct in public attacks of one member of a religion to another. The Second Panel of the Supreme Court established that the right to religious freedom is, to a large extent, the right to existence of a multiplicity of religious beliefs/disbeliefs, which bind and harmonize—for the survival of all the constitutionally protected multiplicity of faiths—in the so-called religious tolerance. It is necessary to distinguish between religious speech (which is centered on one’s own belief and the reasons of belief) and the speech on the belief of

others, especially when it is done in order to attack it, to demean, or to despise it (or its followers). One is typically the representation of the right to freedom of religious belief; the other, in a diametrically opposite sense, is the attack on the same right.⁵

Another issue with great constitutional relevance related to the right to religious freedom, and which had an important repercussion on the delimitation of the meaning attributed to this right by the Brazilian Supreme Court, was decided in the ADI 4439/DF. Involving the harmonization, on the one hand, of three groups of constitutional norms, the one providing religious education, the one providing religious freedom and the one establishing the principle of secularity of the State, and, on the other hand, their concert with the infra-constitutional norms that discipline the provision of public education, this ADI, judged in 2017, was subject to article 33, caput and §§ 1st and 2nd of Law n. 9.394/96 (Law on the Guidelines and Bases of National Education – “LDB”),⁶ and article 11, § 1st of the “Agreement between the Government of the Federative Republic of Brazil and the Holy See on the Legal Statute of the Catholic Church in Brazil” (“Brazil-Holy See Agreement”), approved through Legislative Decree n. 698/2009 and promulgated through Decree n. 7.107/2010.⁷ Basing its decision on respect for the secularity of the State/religious freedom and on equal access and treatment to all religious confessions, the Supreme Court judged this direct action unfounded, declaring the constitutionality of these normative provisions, affirming, as a consequence, the constitutionality of confessional religious education as an optional discipline of the normal schedules of public elementary schools. The Supreme Court understood in this case that the interpretation of the Brazilian Magna Carta, which, maintaining our Republican tradition of broad religious freedom, consecrated the inviolability of belief and religious cults, must be performed in its double meaning, to (a) protect the individual and the various religious confessions of any state interventions or commandments and (b) ensure the secularity of the State, providing total freedom from state action in relation to dogmas and religious principles. In this case, the Supreme Court interpreted that the binomial secularity of the State/consecration of religious freedom is present to the extent that the constitutional text (a) expressly guarantees the willingness of enrollment for religious education, consecrating, even the duty of the State of absolute respect for agnostics and atheists, and (b) implicitly prevents the government from artificially creating its own religious teaching, with a certain state content for the course; as well as prohibits the favoring or hierarchization

⁵ In a similar case, during the trial of RHC 134.682, the first STF (the Brazilian Superior Court of Justice) decided the opposite of what was previously decided in RHC 146.303. In the latter case, the first group decided that “Religious freedom and freedom of expression are fundamental elements of constitutional order and must be exercised in compliance with other fundamental rights and guarantees, therefore not presenting conducts that characterize discrimination. With regard to freedom of religious expression, the proselytizing discourse is an essential part of the integral exercise in universal religions. In such a way, the purpose of reaching a fellow citizen through persuasion configures intrinsic behavior to such religions. In order to achieve such an objective, it is not illicit in itself to compare diverse religions, even with a certain hierarchization or animosity between them.

⁶ Law n. 9.394/96 - Law on Guidelines and Bases of National Education

⁷ Decree n. 7.107/2010 - Agreement between the Government of the Federative Republic of Brazil and the Holy See Article 11. (...) §1st. Religious, Catholic and other religious confessions teaching, with optional enrollment, is a course in the normal schedules of public elementary schools, ensuring respect for the religious cultural diversity of Brazil, in accordance with the Constitution and other current laws, without any form of discrimination.

of biblical and religious interpretations of one or more groups to the detriment of others.⁸

Equally related to freedom of religion, belief, and worship is the controversy over the possibility of fixing religious symbols of certain religions or sects in buildings and public places. This matter has already been addressed internationally by the European Court of Human Rights in the important and recent *Lautsi v. Italy* case, definitively ruled in 2011, in the way that States that ratified the European Convention on Human Rights have a freedom of action on whether or not to maintain the crucifix in buildings of the public authorities and that a case of violation of religious freedom is not configured. In the opposite direction, the Federal Constitutional Court of Germany ruled it in 1995. This same theme was the subject of a recent administrative decision of the Judiciary Council of the Court of Justice of Rio Grande do Sul, which, by provocation of a non-governmental and non-religious entity, decided to remove the crucifixes from the buildings of the Judiciary State Power (Sarlet 2016, p 267).

As in the cases of the Religious Freedom Restoration Acts of the American States, as well as in the courts that gave a deeply more conservative and exclusionary meaning to the right to religious freedom in the USA, also in Brazil, the understanding of the meaning of this right carries, in most cases, conflicts and tensions between fundamental rights. Thus, there are, for example, cases in which these conflicts may justify restrictions on the exercise of religious freedom when exercised for the purposes of practicing healing and exploiting public credulity, especially when these actions involve a crime or affect the rights of third parties or collective interest. In Brasil, restrictions such as those mentioned above were imposed, by the Supreme Court, in the decisions of RMS⁹ 16.857/69 and RHC 62.240.

Also important for the understanding of these hermeneutic directions of the right to religious freedom are the controversies that feud a friction between freedom of conscience and belief and the rights to life and health, as risen in the case of members of the fundamentalist Christian religious group “Jehovah’s Witnesses” whose dogmatic principles prohibit blood handling and, consequently, transfusions. If in the case of minors, the State intervention is legitimate, in the event of a contrary manifestation from parents or guardians in relation to the authorization of the medical procedure seen as indispensable, in the case of capable adults, the legitimacy of the state intervention to enable this type of medical action is questionable. In the latter case, there is no doctrinal and jurisprudential orientation with a consensus as there is in the case of minors (Leite 2011).

Another rumored issue that feeds a conflict between fundamental rights and reveals part of the meaning that is given to religious freedom in Brazil concerns cases involving animal sacrifice as an expression of religious freedom and worship. In Brazil, the most frequent hypothesis is the one that involves the Afro-Brazilian rituals of Candomblé and Umbanda, where animals are repeatedly sacrificed. Regarding this practice, the Court of Justice of Rio Grande do Sul ruled that, based on the abstract and concentrated

⁸ It is important to say that this decision was almost tied—6 magistrates voted for and 5 against it. This division materializes the polarization of arguments based on accommodation and laicization, whenever controversial issues regarding the right to religious freedom come to the court. Although Brazilian courts have cherished the thesis of laicization of the State in the application of this right, many judges and jurists have an accommodating view on it.

⁹ Kind of judicial appeal in a writ of *mandamus*

control of constitutionality, the constitutional legitimacy of the State law admits the practice of slaughtering animals for religious purposes, as long as considering the aspects on public health and the prohibition of cruelty to animals (Brasil 2005). In this case, one of the judges (Araken de Assis) used the precedent *Igreja de Lukumi Babalu Aye v. Cidade de Hialeah* (508 US 520 - 1993), from the US Supreme Court. In this trial, the US Supreme Court ruled that the local bills passed in Hialeah, Florida, which prohibited animal sacrifice, violated the free exercise clause. The texts of these laws and the way they operated showed they were not neutral and generally applicable, but aimed at the Santeria religion, in which animal sacrifice is an important ritual. In a unanimous decision, the Court proclaimed they violated the Free Exercise Clause, since the ordinances intended to persecute or oppress a religion or its practices.

In defense of religious freedom, in a clear expression of the original meaning of this right as a negative freedom, the Court of Justice of the State of São Paulo, in partially judging the appeal 990.10.085770–3, determined, due to offense to the freedom of belief, the obligation to make consistent the exclusion of a website for hosting electronic games with religious characters, which included an important Islamic prophet, taking part in scenes of violence, supporting the decision by the need to constitutional protection of freedom of worship which is broad in order to avoid discriminatory or prejudiced practices. However, it refused the request for collective moral damage.

Regarding the actions still pending judgment that may also modulate the meaning of the right to religious freedom in our legal system, three cases to be decided by the Supreme Court will certainly have an important effect on the meaning that can be given to the right to religious freedom. The first one refers to the judgment of the general repercussion in the EA¹⁰ 979742 RG/AM. The relevant constitutional question to be defined as an extraordinary appeal concerns whether the exercise of religious freedom can justify the funding of health treatment by the State. The decision appealed through the extraordinary appeal condemned the Union, the State of Amazonas, and the Municipality of Manaus to fund a surgical procedure unavailable in the public system, due to the religious conviction of the patient prohibit blood transfusion. The second case, also related to the judgment of a general repercussion with existence already unanimously recognized by the Court in the extraordinary appeal 859376 RG/PR, has as its relevant constitutional question the definition of whether it is possible, in the name of the right to freedom of belief and religion, to exclude the obligation imposed to all related to civil identification. This second case was originated from a prohibition of the use of religious habit that covers the head or part of the face in a photo of a driver's license and civil identification document. In the Appeal with Necessary Review 5009191-49.2012.404.7005, the 3rd Panel of TRF4 has already decided on the permission of the national driver's license issue with photograph in which nuns present themselves with religious habit, since the infra-legal norm preventing the use of clothing or accessory that covers part of the face or head in the photo used for the document cannot mitigate the constitutional guarantee to religious belief, besides the use of religious clothing does not prevent the perfect physiognomic recognition of the driver. The decision appealed through the extraordinary appeal recognized the right to use religious habit in a photograph of driver's license and civil identification document, ruling out the administrative norm of the State of Paraná that prohibited the use of clothing/accessory item that covers part of the face or head in the photo. This issue, as mentioned

¹⁰ Kind of judicial appeal to the Supreme Court.

earlier, is one of the controversial topics that forced the creation, at the federal level, of the Religious Freedom Restoration Act in the USA in 1993.

The third pending process—ADI 3.714—hosts a constitutionally relevant issue concerning the right to objection/excuse of conscience for religious reasons theme that have often appeared as the heart of conflicts submitted to the Judiciary. It is under discussion in this ADI the (un)constitutionality of the State Law of São Paulo n. 12142 of December 8, 2005, more specifically § 1st of art. 1st.¹¹ The decision of this ADI will probably gather a set of decisions involving the theme of conscience objection, with repercussion on different concrete factual supports. In the Regimental Appeal in Suspension of Anticipated Injunction (SAI¹² 389 AgR/MG), whose central object of the request was the restoration of the effects of the decision of the Court a quo (TJ/MG) that would enable the participation of Jewish students in the National High School Exam (ENEM) on an alternative date to the *Shabat*, based on the allegation of non-observance to the fundamental right to religious freedom and the right to education, the Supreme Court anticipated a tendency of judgment in relation to this theme. By decision of the presidency given in the event of counter-caution, from the perspective of the risks that anticipated injunction is capable of causing to the public order, the Court understood that the designation of an alternative date for the performance of the examinations is not revealed in harmony with the principle of isonomy, becoming a privilege for a particular religious group.

From this decision-making set of the main Brazilian courts, it should be highlighted that the meaning given to the right to religious freedom totally meets a democratic constitutionalism, since it prioritizes the idea of freedom, without, however, neglecting a necessary social control by the State, in the way of possible intervention, in order to ensure the non-violation of third parties' rights. It should also be stressed that our courts have sought to carry out, in the cases of conflicts of rights, an exercise of weighting and proportionality that has established, by the positive results, a democratic and emancipatory normative framework when it comes to confronting the right to religious freedom to other rights as or more important as the life and health of the parties linked to the conflicts. Without reassembling the original liberal interpretation of this right, our courts have, parsimoniously and harmoniously, combined, from a secular perspective, the private/individual aspect with the public/collective aspect that the interpretations of this right demand from a constitutional model of State, law, and society that we call as democratic Rule of Law.

In recent times, several themes with moral theological roots have occupied the center of debates in public spaces of political decision, due to the political growth of ultraconservative neo-Pentecostal religious groups and their alliances with president Bolsonaro and, as a consequence, the expansion of decision-making policies for those groups in the construction of government policies. Issues such as abortion, homosexuality, religious instruction, and the targeting of school curricula from radical conservative premises, as well as the appointment of religious leaders to high government positions, have occupied the political

¹¹ Art. 1st - The public examination or selection process tests for public positions and the entrance examinations for public and private universities will be held from Sunday to Friday, at a time between 8 am and 6 pm.

§ 1st - When the application of examinations in accordance with the "caput" is not possible, the organizer entity will be able to carry them out on Saturday, and the candidate who claims the reason for religious belief should be able to do so after 6 pm.

¹² Kind of judicial appeal to discuss secondary issues in a legal process.

agenda as never before in the country's political life. Faced with such matters, the Brazilian Judiciary (either by state or Supreme Courts) has been successful in protecting the right to religious freedom while minimizing conflicts and tension with other fundamental rights, when exercising freedom of belief is at one of the poles of the struggle.

Permanently seeking to synthesize dialectically a democratic sense of religious freedom

Trying to unravel these contradictions related to the right to religious freedom, resulting from political and legal manifestations based at times on the idea of accommodation, at times of secularization, claims, among other paths, an understanding of the meaning, contents, limits and historical functions that constitutionalism conferred to religious freedom.

First of all, we need to understand the liberal historical meaning from religious freedom, because in it lies a strong moral foundation of modern freedoms. Using Matteucci's words,

El constitucionalismo moderno o, mejor, los albores del liberalismo están estrechamente unidos a la batalla y a la victoria del principio de la tolerancia religiosa, entendida no como mera concesión desde arriba sino como um verdadeiro y auténtico derecho del individuo a la libertad religiosa, en el cual reside el verdadeiro germen de la moderna libertad política. (1998, p. 56)

In terms of legal institutionalization, from a democratic liberal constitutionalist perspective, on which lies the historical foundations of modern religious freedom and most negative freedoms, both freedom of conscience and religious freedom, like other fundamental rights, present a dual subjective and objective dimension. As subjective rights, they ensure either the freedom to confess (or not) a faith or ideology and generate rights to protection against disturbances or any kind of coercion from the State or individuals. As fundamental elements of the objective legal-state order, such freedoms underlie the religious and ideological neutrality of the State, as the presupposition of a free political process and as the basis of the Democratic Rule of Law (Hesse 1995: 167 *apud* Sarlet 2016: 265).

This raises the question of the content/meaning of religious freedom as a fundamental right. Religious freedom must also be understood as a fundamental right in a broad sense, which decodes, within its subjective and objective dimension, as a differentiated complex of legal effects and subjective legal positions. As a subjective right, religious freedom operates both as a right of defense, therefore negative in nature, and as a right to factual and legal services ("positive right"), although the subjective dimension cannot be reduced to a single type of negative or positive positions (Weingartner Neto 2007: 72).

In its condition of negative right, religious freedom unfolds, in a first approximation as to its content, in a freedom of belief, which refers to the individual faculty of opting for a religion or changing religion or belief, whereas the freedom of worship, which is related to the externalization of belief, relates to rites, ceremonies, places, and other aspects essential to the exercise of freedom of religion and belief (Soriano, 2002: 12–

13). Freedom of association and religious organization is also included in the protection of religious freedom, in a way that the State is prohibited, in principle, to interfere in the sphere of religious associations (Santos Júnior 2007: 59).

As it generally happens in the field of rights of freedom, religious freedom also assumes the condition of a simultaneously negative and positive freedom, since it ensures the power not to profess any belief or practice any worship or ritual (negative freedom of non-exercise), as it ensures that the State and third parties (individuals) do not prevent—except within the limits of the constitutional order itself—the exercise of the various manifestations of religious freedom (positive freedom).

Regarding the problem of the tensioning of these fundamentalist exercises of religious freedom with other fundamental rights, it is necessary to make it clear that as a modality of freedom of expression (manifestation of thought) and especially of freedom of conscience, which is broader, religious freedom, although as such not subjected to the express legal reserve (art. 5th, VI), the Federal Constitution establishes that freedom of conscience and belief is inviolable, and the free exercise of religious cults is ensured, finds limits on other fundamental rights and in the dignity of the human person, which implies, in the case of conflicts, careful weighting and attention, among other aspects, to the proportionality criteria (Sarlet 2016: 266).

What is seen in some State laws and in some American judicial decisions, with a clear accommodationist basis, is a (re) construction of the original sense of religious freedom, which is totally distant from any libertarian, humanist, and democratic sense, typical liberal constitutionalism. The negatives from the side of American fundamentalists to carry out some actions that may go against the ways-of-being and the wills of people who do not commune with their faith, nor do they adopt their everyday ways-of-being, represent not only a clear violation of the rights of these people or groups but a total denial of the principles that underlie any democratic society, which, in the case of the USA, becomes a historical irony for a country that proclaims itself as one of the cradles of democracy and freedom.

These Christian fundamentalist manifestations currently materialize an extreme version that the search for divine grace (and its distribution by an omnipotent God) is absolutely free, as a kind of reissue of the protestant conception of relations between individuals and their God, which is an entirely private matter, regardless of any configuration or public institutionalization.

Although the First Amendment of the American Constitution, upon receiving Locke's teaching in his Letter Concerning Toleration "that no man can adapt his faith to the dictate of another" (s.d.: 18), discards any attempt of community prediction in the sphere of divine grace, it cannot be disregarded that it creates, on the other hand, a religious egalitarianism, through a kind of complex equality rule, erecting a barrier that generates delicate distributive effects in terms of rights and the exercise of citizenship. From a religious perspective, they can recognize the ecclesiastical hierarchy they want, and such recognition depends only on them, not legally imposing or obliging themselves to anything. However, from the political and legal scenario, the barrier favors equality between believers and non-believers, between saints and libertines, and between redeemed and condemned, because all are equally citizens and have the same set of constitutional rights.

Just as it was said by Locke, what is in tension in these situations of Orthodox Christian fundamentalist manifestations is the claim to the salvation of the soul, by

obtaining divine grace and the civil interests of citizens guaranteed through a complex equality by the democratic constitutional texts. Although the democratic Constitutions of Law clearly adopt the Christian teaching set out in Matthew 22:21 that “to Caesar what is Caesar’s, to God what is God’s”, it cannot be concluded that any action or omission is valid in the name of the exercise of religious freedom, especially in the face of violation of the civil rights of third parties. The purpose of the constitutional barrier exposed in the First Amendment is, among others, the containment of divine grace, the containment of the right to religious freedom—especially when we talk about tensioning between rights—and not its distribution. We can elect, at the private level, the cult or religion that is most appropriate to our faith, however, in the public space of manifestation of our social actions, actions directed to others as Max Weber defines, we cannot exercise the right to religious freedom in any way. If so, we will soon be watching private confessional schools deny enrollment or expel individuals who take their homosexuality publicly; or private utility companies, whose majority of shareholders or partners profess some more orthodox faith, such as public transport companies, deny access to their vehicles to individuals who have a way-of-being or practice some kind of conduct that is not accepted by the owners of these corporations.

Even absolutely private companies or corporations engaged in some kind of activity that has nothing to do with concessions or public delegations cannot, in the name of the belief or religion of their partners or shareholders, deny rights to people or groups whose ways-of-being or actions are not in accordance with their creeds. Private property and free initiative, two fundamental pillars of Western countries’ economic constitutions, were never rights to be exercised freely in an absolute way. Whether the integrity of the environment can limit the execution of the purposes of a private company, with much more power can fundamental rights of human people do so. If a company that violates the environment may have its operating license revoked by the public authorities, it would be no different with a restaurant that denies access to gays or lesbians to its commercial spots.

American Christian fundamentalists and judges and legislators who have decided or created legislation that supported discriminatory actions in the name of religion or, out of ignorance, are unaware, or intentionally despised, the passage of Locke’s fragment, in his Letter Concerning Toleration, when he says that:

no private person has any right in any manner to prejudice another person in his civil enjoyments because he is of another church or religion. All the rights and franchises that belong to him as a man, or as a denizen, are inviolably to be preserved to him. These are not the business of religion. No violence nor injury is to be offered him, whether he be Christian or Pagan. (s.d.: 18)

In the Brazilian case, although religious groups have increasingly managed to be represented in the Chamber of Deputies and in the Federal Senate and, as a result, pressured by the approval of new bills with a conservative moral basis, the Judiciary Branch has guaranteed through judicial decisions, with secular foundations, the existence of an emancipatory, liberating, and non-conservative sense of religious freedom, very close to what Locke already advocated at the end of the seventeenth century in his “A Letter Concerning Toleration”.

The comparison between phenomena of institutionalization of political and legal solutions in conflicts involving religious freedom, which bring fundamentals and meanings that are totally different—the American accommodationist, the Brazilian, and the French secularized—in countries whose political framework is also based on liberal democratic regimes, leads us to consider (although with a certain relativism) that it is typical of democracy not to institute conditions of definitive synthesis, but processes of reinvention of the sense of human rights, very close to a negative and aporhetic dialectics, as advocated by contemporaries of the Frankfurt School. Accommodation or secularization can generate concrete situations for violations of other human rights due to the exercise of the right to religious freedom, depending on the meaning that can be attributed to it. While in Brazil, the concept of secularism used by the courts has harmonized factual situations in which religious freedom is at stake, in France, secular-based laws and decisions have fueled conflicts, as in the case of the veil restraint law. These differences result from a series of factors that the limits of the present work prevent us from pondering.

Final considerations

Much of the humanity seems to obey an almost inevitable tendency to seek absolute foundations of legitimacy for some of its own reflections, conflicts, and actions. When it comes to the issues surrounding the exercise of beliefs and cults, this trend seems to be even more pronounced. The outcome of violence from those totalizing worldviews is deeply known throughout history, and much of it has been justified in the name of God. Modern constitutionalism emerged as a secularized political and juridical alternative to such absolute foundations, constituting new legitimizing parameters of social relations, such as the sovereignty of the people—the germ of democracy and the rule of law—as well as forms of political and juridical organization that prioritized consensus, rights, guarantees, and protections against dictatorships of majorities.

The influence of political theologies on political-practical actions is not new in countries where religion remains as the foundation of politics, as is the case with most States with predominantly Muslim denominations. What has surprised us is the emergence in the USA of a moralizing movement, with fundamentalist Christian bases and strong institutional projection in the political and legal fields, with impressive legislative results if we consider the potential for exclusion and violation of civil rights. This phenomenon is repeated with similar intensity in contemporary Brazil, once it gained special power in recent years during Bolsonaro's government. The result is often, on the one hand, the creation of norms that regulate the social control of behavior of individuals and groups, with highly conservative and excluding consequences and, on the other hand, the appearance of serious conflicts in the Houses of Parliaments and in courts, motivated by their basis for religious freedom.

In these institutionalized places of public decision-making, the solutions that have been drawn to such conflicts move their arguments through two distinct poles of reflection: accommodation and secularization. These conceptions, at first, seem to be totally exclusive of each other, but as a matter of fact, they are not. Any of them can generate situations of tension of rights even more severe when applied to a conflictive situation (see the case of French secularism and the question of the veil in public

places), or even the American accommodation in the various issues previously mentioned here, especially those related to the State Restoration Acts. On the other hand, it can harmonize fundamental rights within democratic normality and legitimacy, as in judicial decisions in Brazil based on the secular basis, or the Federal Law for the Restoration of Religious Freedom in the USA.

Thus, the dialectic between accommodation and secularization is not the problem in itself for the (re) construction of the sense of the right to religious freedom in countries of liberal democracy, but, among others, to the political conditions in which decisions are made. Political arrangements which sustain ultraconservative governments tend to demand more damaging institutional positions to the harmonization of fundamental rights every time the exercise of religious freedom comes into play. That is the way it has been in France and in the USA. From these political situations, new meanings for the right to religious freedom have emerged, absolutely at variance with any conception of democracy. This is due to the emphasis that has been given on the possibility of intolerance with different ways of being imposed by circumstantial majorities, which have guided agendas of customs in an unstoppable way in recent years. In the Brazilian case alone, this phenomenon has been driven by an exponential expansion of the evangelical bench in the National Congress, a fact whose origin stems, to a greater extent, from the expansion of neo-Pentecostal religions and sects, with a high degree of proselytism in their discourses and narratives and with no control over the financing and investment of their financial assets by the public authorities.

In spite of these contexts of widening fundamentalisms and structural couplings between religion and politics, not everything is darkness. The Brazilian Judiciary, in successive absolutely democratic interpretations of the Federal Constitution, has guaranteed the widest space of freedom, tolerance, equality, dignity, and respect among the ones who are different.

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