

“Laicidade” in Brazil as a booster to religious freedom¹

“Laicidade” no Brasil como impulsionador da Liberdade religiosa

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ABSTRACT

This text is a starting point for the construction of a research project on religious freedom comparing legal systems of countries with an official religion, such as the United Kingdom, Costa Rica and Israel, and countries without one, such as Brazil, the USA and France. Considering the premise that a country should strive for effective human rights, the study begins an analysis of the scope of the duty of a country with no official religion to ensure religious freedom (positive and negative liberties). For this purpose, the authors make use of the Brazilian experience, with its “laicity”. There is a difficulty in translating the expression “laicidade”, due to language barrier and special connotations in Brazilian constitutional law. Therefore, the authors describe its three main characteristics (autonomy, cooperation and religious freedom) drawn from a recent Brazilian Supreme Court precedent. What is unique about the concept of “laicidade” is that it allows a secular state to cooperate with religious faiths, regardless of the prohibition of having an official one. This insight paves the way for future dialogues with other countries, including nations that, despite having their own official religion, are capable of working together in harmony with other religious faiths to guarantee the effectiveness of their human right.

KEYWORDS:

Human rights, secular state, laicity.

RESUMO

Este texto é um ponto de partida para a construção de um projeto de pesquisa sobre liberdade religiosa comparando sistemas legais de países com uma religião oficial, como o Reino Unido, Costa Rica e Israel, e países sem uma religião oficial, como Brasil, EUA e França. Considerando a premissa de que um país deve lutar por direitos humanos efetivos, o estudo inicia uma análise do escopo do dever de um país sem uma religião oficial para garantir a liberdade religiosa (liberdades positivas e negativas). Para tanto, os autores fazem uso da experiência brasileira, com sua “laicidade”. Há a dificuldade em traduzir a palavra “laicidade” devido à barreira da língua e conotações especiais no direito constitucional brasileiro, razão pela qual descrevem suas três principais características (autonomia, cooperação e liberdade religiosa) extraídas de um precedente recente do Supremo Tribunal Federal. O que é único no

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conceito de “laicidade” é que ele permite que um Estado secular coopere com as crenças religiosas, independentemente da proibição de ter uma religião oficial. Essa visão abre caminho para futuros diálogos com outros países, incluindo nações que, apesar de terem sua própria religião oficial, são capazes de trabalhar em harmonia com outras religiões para garantir a eficácia de seus direitos humanos.

PALAVRAS-CHAVE:

Direitos humanos, Estado secular, laicidade.

Our role, at this stage, is to raise issues that will justify an academic partnership between American, Brazilian, and British colleagues. What information about religious freedom as a human right would we have to contribute to one another?

The common ground between us seems to be the search for the effectiveness of freedom of religion as a human right, even though the relationship between state and religious authorities in Brazil and the US is different from the one between state and religious authorities in the United Kingdom.

As human rights entail negative and positive rights (negative and positive liberties), we may wonder: what would be the extent of the duty to guarantee religious freedom in a State that has no official religion? And what about a country with a State religion – until what point should authorities act to protect its citizens’ beliefs, especially those from different religious groups?

In other words, what insights can be drawn from the experience of a confessional State / to strengthen the effectiveness of the right of religious freedom in Brazil and the US? And what good can one learn from the experience of a non-confessional State for the effectiveness of religious freedom in the United Kingdom?

When starting a comparative study on this subject, the first obstacle we find is the existence of a language barrier. It’s a common difficulty in dealing with comparative law, which academics often refer to.

In the Brazilian legal system, the term “Estado laico” is used to indicate the non-confessional relationship between the state and religions. However, we are not sure that there is a reliable translation of this kind of relationship into other languages.

Each nation has a set of historical, social and cultural circumstances that enable unique ways of understanding the non-confessional relationship between the State and religions. Thus, alongside the expression “Estado laico”, there are others like neutrality, secular State and laïcité that are used as synonyms. But we don’t think such expressions represent the same idea.

For example: neutrality would be simply the attitude of maintaining a distance from parties in a conflict, including religious ones. This expression is mentioned in many geo-legal contexts, such as decisions by the Italian Constitutional Court, the U.S. Supreme Court, and the European Court of Human Rights.

‘Secular State’, in English, is an expression often associated with the idea of secularity. A State is officially neutral in matters of religion, supporting neither religion nor irreligion, maintaining distance from the religious sphere - never interacting with them.

The French word laïcité has no exact translation into other languages. When employed in English, it directly evokes the French system of relations between the state and religions throughout the centuries. That is why there has been a recent effort to explain it as: laïcité du combat (anti-religious) and laïcité ouverte (separation with recognition of the role of religion in public life).

These terms do not relate exactly with the type of relationship between the Brazilian State and the religious groups that coexist. We usually use the word “laicidade” to describe our experience. It derives from the Spanish word “laicidad”.

In short, the term “laicidade” indicates a non-confessional State capable of associating the public interest with state measures of cooperation with religious groups to guarantee the effectiveness of freedom of religion and beliefs.

The Brazilian Constitution of 1988 expressly points out the separation between State and religion in art. 19. It prohibits public authorities "to establish religious cults or churches, to grant them, to hinder their functioning or to maintain relations of dependency or alliance with

them or their representatives." Therefore, Brazil doesn't have an official religion. However, in the same clause, State collaboration with religious groups and its leaders is foreseen in case of "public interest".

So, we can see that while the Constitution declares that Brazil is a non-confessional State, it also allows, in case of 'public interest', some sort of state collaboration with different religious groups.

There are other constitutional rules that confirm that the state can collaborate with religious groups.

Art. 210, §1, guarantees religious education in public schools;
In art. 213 there is a possibility of allocating public resources to confessional schools;
Art. 226, §2 points out that "religious marriage has civil effects."

In the tax law, the Constitution grants tax immunity in favor of religious entities. In art. 150 it prohibits public authorities from imposing taxes on religious temples.

Moreover, the main rule in the Brazilian Constitution regarding religious freedom (art. 5, item VI) guarantees freedom of belief and free exercise of religious cult, pointing out that all places of worship must be protected. It includes protection from the state.

Finally, religious assistance in civil and military group hospitalization centers (art. 5, item VII) is predicted as a fundamental right.

As we can see, there is surely a formal and legal separation between State and religion, but it does not imply a strict separation between the state and religious groups. The Brazilian State does not exclude religion as a relevant social factor in the public sphere, as its constitution adopts, in certain cases, an attitude of cooperation with churches and their representatives.

The Brazilian Supreme Court on September 27th, 2017, ruled on the subject about the limits of the intersection between state and religion. It was a case involving religious education in public schools (Ação Direta de Inconstitucionalidade No. 4439).

The Court held that religious teaching in public schools, as a non-compulsory subject, must be confessional. That means that classes about religion are to be taught by people who will expressly teach about faith.

But how can we understand that a non-confessional state allows confessional teaching in public schools?

The basic argument of the decision was that the Constitution guarantees that students will have full exercise of their right to religious education. And it only happens when the subject [of Religion] is taught in accordance with the principles of their own religious beliefs.

Considering that the foundation of religious teaching is the ‘dogmas’ of faith, the public power could not artificially create a “neutral” religious teaching. It could end in mischaracterizing the subject. And as the Supreme Court stated: “Neutrality does not exist, because the teachings and lessons are fundamentally based on ‘dogmas’ of faith, which cannot be replaced by general narratives, merely descriptive, neutral and contradictory.”

They also expressly pointed out that the binomial “Laicidade do Estado”/Effectiveness of Religious Freedom, regarding religious education, was maintained in democratic constitutional law.

The separation between State and churches does not prevent Government from collaborating with religious entities. As predicted in art. 19 of the Constitution, there was "a constitutional intention to ensure the interrelationship and complementarity between the “laicidade do estado” and religious freedom."

In this sense, by combining the constitutional provision of the matter and the recent precedent of the Court, it is possible to identify the Brazilian experience: although the State does not have an official religion, it recognizes the relevance of the religious dimension for individuals, be it privately or publicly. And, as a result, the government can and should collaborate with religious confessions when there is a public interest.

In Brazil, therefore, there is an effort implied in State actions that not only tolerates or permits religious expression in the public space, but actively operates towards its effectiveness.

An initial analysis of the so-called Brazilian “Estado laico”, thus, points to three main characteristics regarding “laicidade”:

- (1) autonomy. The State should not be confused with religion. There is an independence of the political and the religious spheres, even though they are communicable;
- (2) cooperation. The State acts not only in the sense of not interfering in the religious beliefs and cults of the individual, but also enables the expression of the same beliefs and cults in public spaces. It is possible to collaborate with religious groups, as long as there is no discrimination of one religion against another;
- (3) religious freedom. The State recognizes the relevance of spirituality both to the individual and in a social context. As a consequence, it constitutionally ensures that all citizens are free in religious matters and can seek and express their beliefs in private and public spheres.

In our view, the main insight that can be drawn from the Brazilian experience is the adoption of the principle of State cooperation with religion. As we saw, it is implied in the Constitution and was recently ratified by the Supreme Court.

Public authorities can act at a legal, social or financial level to enhance the development of religious groups. And then make the right to religious freedom possible for everyone, without distinction.

The fact that certain prerogatives of public law are granted to religious groups does not mean there is a confusion between political and religious powers or entities.

There are some questions that ~~still~~ remain in the Brazilian legal system. Questions about the level of effectiveness of religious freedom by adopting State cooperative measures for the benefit of religious groups. For instance:

What should be the State's cooperation mechanisms?

How can we ensure that cooperation measures are applied equally to all religious groups?

When does a state measure cease to be considered a cooperation to become a subsidiary to only one religion?

This talk is a mere invitation to future dialogues about the importance of cooperative measures to guarantee freedom of religion. It would be fruitful to discuss how a State with an

official religion, like the UK, sees cooperative measures as a tool to promote religious freedom, especially when it comes to other religious confessions.

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