Religious Liberty and Rule of Law in Constitutional State: the Portuguese Experience[1]

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1. The importance of Religion to Man and Society

I. It is not necessary to go very far if one wishes to justify the importance of the religious phenomenon in human activity, something that even the most convinced atheist dares not deny.

From the anthropological standpoint, it is nowadays scientifically proven that *homo sapiens* coincided with the appearance of *homo religiosus* and, therefore, it is easy to understand that mankind goes hand in hand with religiosity.

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[1] Text of the Conference, held at Buenos Aires, in 28th of April, 2008, in the international congress "Religious Liberty, the source of all liberties", organised by CALIR – Argentine Council for Religious Liberty.

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This is why since primitive times and until current times the presence of religion – of any sort – has remained constant and, consequently, it is possible to affirm that religiosity is an integral part of mankind and that, symmetrically, without mankind there is no religiosity.

II. But if religiosity is an unequivocal attribute of mankind, considered individually, it is equally present at the level of the organisation of society, in the relationships that are established between people within the context of the various groups they belong to.

This means that religion transcends the individual and reaches vast spheres of the collectivity in its most diverse manifestations, from the nuclear family to the international community, encompassing, on its way, the State itself.

Hence it is not too daring to assert that religion is also inherent to man's sociability and that the latter, in his inter-individual relationships, is similarly guided by criteria of a religious nature.

III. It is but a short step from the importance of religion in society to the necessity of its being regulated by law, given that it is the law's responsibility to lay down guidelines for the establishment of relationships between individuals and groups in each and every sphere of community life.

If religion is not restricted to the individual dimension and is also present in collective manifestations of human sociability, then the law, since its ultimate end is to secure justice and ensure security in social relations, has a regulatory role to play with regard to it. For that purpose it can count

on the application of sanctions using a coercive political power that shall be at its service.

It is a fact that the law imbued in the social order is not always and necessarily assisted by such constraining protection. However, it is not less true that the Law of the State – which is the most reliable sector in the protection of human society organised under the form of a State – is the law better characterized by its power of coercion, which enables it to impose, by force if necessary, compliance with the law and to repress any breach thereof.

2. The evolution of the relations between the State and Religion

I. Despite the fact that the State and the Law nowadays deal with religion in a respectful manner, it is worthwhile to provide a brief description of the historical evolution of those relations.

It should be noted, by the way, that the present status is the result of enormous efforts, of all kinds, being deployed and that there are still unsolved issues.

We shall naturally mention more frequently the Christian religion as it has accompanied the development of the State – fundamentally euro-centric in Western culture – within which framework many of our present political and constitutional institutions have seen the light of the day and grown.

Such predominance cannot signify, of course, that other religions, in some cases with higher numbers of adherents and in respect to which a growing interest and appreciation have lately arisen, should be ignored.

II. It is quite clear that, practically since the first beginnings of the State, religion has always played a central role along with other defining elements of the State.

For instance, in classical antiquity several experiences took place that showed a variety of possible relations between religion, the State and the Law:

- In the Eastern State, up to the apogee of ancient Greece, there is a predominance of States originating directly in religion – theocratic monarchies – in the sense that the religious function was vested in the kings, sometimes adored as gods, as was the case in Mesopotamia, Egypt or Israel, although each with different specific characteristics;
- In the Greek and the Roman States, within their professed polytheistic religions, theocratic conceptions were also dominant, evolving, in the case of Rome, into the divinisation of the emperor himself.

III. With the passage of time to the Middle Ages and the predominance of the Christian religion in Europe, political power and religious power gradually developed structures of their own and, consequently, they progressively became distinct.

This, however, did not inhibit their mutual interference on the basis of two models that would succeed one another due to several historical and political factors:

- In a first phase, the Byzantine caesaro-papism, in the Eastern Roman Empire, with the dominance of the emperor over the Christian religion, he who would be the heir to the caesaro-papism of the Western Roman Empire in its last phase, when the Christian faith from being merely tolerated would become the official and regulated religion of the Empire;
- In a second phase, the mediaeval hierocratism, where notwithstanding the claims of the theory of the two swords – temporal power and spiritual power – in the relationship between the State and the Church, the standpoint of the spiritual power would prevail at the end.

IV. In the Modern Age, born with the Renaissance and the Discoveries, and intent on the rediscovery of classical humanism, the religious division of Europe takes place, and the religions become state religions, thus paving the way for the State, since it has an official religion, to make laws of a religious nature.

Simultaneously this was also going to be, in Europe, a period of growing assertion of the sovereign power of the State itself, which would lead to absolute royal power, in which the Christian religious faiths, in their various divisions, would play an important role as a political element of a new concept of state power.

3. The predominance of the model of republican secularism

I. Only in the Contemporary Age did the foundations of secularism, where there is separation between State and Churches, or generically speaking between the Law, State and Religion, take root.

Yet this period is far from linear since several distinct experiences run through it:

- *The experience of North-American secularism* where the State, in a climate of religious pluralism, sociologically induced by the diversity existing in the former colonies of North America, collaborates with the religions and recognises and accepts them in the public space;
- *The experience of French secularism* where the State assumes the role of the “enemy” of religion, bent on suppressing its traces, in a fight that is essentially political against the dominant religion, the Catholic Church;
- *The experience of soviet secularism* where the State persecutes religion as an “obscurantist” manifestation - “the opium of the people”, in the words of Karl Marx – and considers it an ally of the bourgeoisie, obstructing the road to communist society and man.

II. Consequently, nowadays, *the model of the separation between State and Churches, and also between the Law and Religion*, is spreading, albeit according to different schemes:

- *Cooperative separation*, where the State, pursuing identical aims, collaborates with religious faiths in activities undertaken by the latter;
- *Neutral separation*, where the State does not intervene in any activities jointly with religious faiths.

III. *There are undeniable advantages in the model of separation between State and Churches* since some principles and guidelines arise from it that are of benefit to all:

- *The liberty (freedom) of religion and conscience* – if the State remains silent on the matter, then each individual and group is free to choose his/her religion, to practice it, to leave it and to join it again according to the criteria of each of the religions at issue;
- *The principle of equality in the treatment of religions* – if there is no official religion, then there are no unfavourable treatments but only the acknowledgement of a social and human reality with whom the State may collaborate for certain purposes;
- *The democratic principle* insofar as the separation between state and religious faiths prevents the political power from becoming the prey of any religion, all party political groups

being allowed to gain and exercise political power regardless of their religious allegiance.

4. The evolution of the Relationship between Portuguese Constitutionalism and Religion

I. It goes without saying that the formation and evolution of the Portuguese State could not but be sensitive to these fundamental vectors in the appearance of the various models of relationship between law and religion, in particular roman catholicism.

That presence was felt at the very moment of the birth of Portugal, in two distinct historical events:

- When the future first King, D. Afonso Henriques, after the battle of Ourique in 1139, received a divine Christian revelation and gained the courage to fight the "sarracens"; and
- When Pope Alexander III, in 1179, conferred the title of *rex* to that same D. Afonso Henrique by the Papal Bull *Manifestis probatum*.

Hence, during the entire pre-constitutional period and with some rather unedifying episodes along the way, such as those which occurred at the time of the Marquês de Pombal, Portugal went from mediaeval hierocratism, first, with the Pope intervening in many internal affairs, such

as the discovered territories and the Treaty of Tordesilhas, to, at a later time, after the advent of the absolutist State.

II. Curiously, during the first constitutional age, in the 19th century, no significant changes arose from the Constitution of 1822, the Constitutional Charter of 1826 and the Constitution of 1838. The system continued to be one of official religion albeit with progressive but timid attempts at introducing some tolerance for other religions. Thus:

- In the Constitution of 1822, Article 19 stipulated as one of the duties of the Portuguese the need to "…venerate religion…";
- In the Constitutional Charter of 1826, Article 6 established that "All the other religions shall be permitted to foreigners, who shall be allowed to worship in their homes or in houses to that effect which shall not take the exterior form of a temple";
- In the Constitution of 1838, Article 3 asserts, "The State's religion is the Roman Catholic and Apostolic Religion".

III. The scene underwent a radical change when the Revolution of 5 October 1910 proclaimed the republic and headed towards a secular model of religious persecution, the victim of which was to be the main religion, i.e. the Catholic Church.

The Constitution of 1911 enshrined in its apparent simplicity a model of secularism, of neutral separation between State and Religion, with its Article 3(4) and following laying down several provisions to that effect.

Yet the implementation of the significant Separation Act, enacted before the framing of the Constitution of 1911, was going to attest the actual presence of a model of true persecution against religion, aimed against the Catholic Church.

Political practice, as well as some ordinary laws passed at the time, pointed indeed in that direction: they joined in a frenzied attack against the Catholic Church, whose properties were confiscated and religious orders dissolved. The part that some radical freemason groups played in these attacks was decisive.

IV. With the inauguration of the "Estado Novo" regime after the military coup of 28 May 1926, a new course was steered, that of reconciliation between the State and the Catholic Church. Formally the principle of secularism was applied, but in practice a more favourable treatment was accorded to the latter religion.

The principle of the separation between State and Religious confessions was going to be enshrined in Article 46 of the Constitution of 1933 in the following terms: "Without prejudice to the provisions of the concordats concerning the "*Padroado*" [patronage of missions], the State maintains the regime of separation with regard to the Catholic Church and any other religion or cults practised within the Portuguese territory…".

Yet this regime of separation coexisted with the particular treatment granted to the catholic faith, not only in practice but also as a result of the celebration of the Concordat of 1940, and not to mention the subsequent evolution of the wording of the Constitution, which, in the new Article 45

introduced by the Constitutional reform of 1951, defined the Catholic faith as "…the religion of the Portuguese Nation…".

V. In the wake of the 25 April 1974 Revolution, known as the Revolution of the Carnations and following the adoption of the Constitution of 2 April 1976 (CRP), a new model emerged that kept to the line of separation between State and religious faiths, but where the first acknowledges and protects the latter.

On the plane of the fundamental rights, the liberty of conscience and religion, both from an individual and a collective viewpoint, is extensively dealt with and enshrined in this Constitution.

At the level of the organisation of political power, the State is declared to be non-confessional – the Portuguese State does not have a religion – and the separation between State and Churches is raised to the status of material limit of constitutional reform.

5. The present Constitutional and Legal System of Cooperative Separation between State and Religion

I. The other dimension that is similarly present in the republican principle embodied in Portuguese Constitutional Law corresponds to the application of the *model of cooperative separation* between political power and religious phenomenon.

This is a matter that is equally relevant from the standpoint of the CRP, which does not refrain from setting out various rules and principles in that respect:

- *At the level of the safeguarding of fundamental rights,* it asserts the freedom of religion and conscience with several tiers of protection (Article 41 of the CRP); and
- *At the level of the political organisation*, this issue has been elevated to the rank of material limit of constitutional reform (Article 288(c) of the CRP).

The sub-constitutional legislation, on the other hand, has complemented the guidance drawn up by the Constitution with the Religious Liberty Act (LLR), as well as a large amount of complementary legislation generically applicable to all religions; furthermore, a new concordat between Portugal and the Holy See was signed on 18 May 18 2004.

II. In what concerns the fundamental rights, the core precept consists in the positivisation of the *liberty of conscience and religion*; in its first paragraph it stipulates “Freedom of conscience, religion and worship is inviolable” (Article 41(1) of the CRP).

This fundamental right irradiates from there to other specific spheres where the importance of religious activity is equally felt:

- On an *individual basis* through the free activity of people in the manifestation of their religious faith, either in private or in public, in worship or any other pertinent manifestation;

- On an *institutional basis* through the free establishment of religious associations and their liberty of organisation and activity that may benefit from the protection of the State and the legal order.

III. The organisation of political power, for its part, is in accordance with the notion of separation between political power and religious phenomenon. Identification between or, even worse, fusion of these two spheres of collective life is impossible.

In various fields where it operates, the State is expected to be guided by *religious neutrality*:

- *In the media*: “Freedom is guaranteed to each denomination to teach its religion and to use its own media to carry out pertinent activities”(Article 41 (5) of the CRP);
- *In public education and culture*: “The State shall not plan education and cultural development in accordance with any philosophical, aesthetic, political, ideological or religious precepts” (Article 43(2) of the CRP);
- *In public education*: “Public education shall be non-denominational” (Article 43(3) of the CRP).

And to confirm the foregoing, in addition to the principle of non-interference of religion with the organisation of political powers, it is expressly stipulated with respect to the material limits of constitutional

reform "The laws revising this Constitution shall respect: … The separation of Churches and State" (Article 288(c) of the CRP).

IV. A reading of the LLR confirms entirely everything we have said since it rests on two structuring principles of the model of cooperative separation between State, Law and Religion:

- On one hand, the principle of separation: Article 3 asserts that "The Churches and other religious communities are separated from the State and free in their organisation and exercise of their functions and worship";
- On the other, the principle of cooperation, under which, as may be inferred from Article 5 of the mentioned law, "The Portuguese State shall collaborate with the Churches and the religious communities based in Portugal having regard to their degree of representativity and in view namely of promoting human rights, enhancing the integral development of each individual person and fostering the values of peace, liberty, solidarity and tolerance".

V. With regard to sub-constitutional legislation, the enactment in 2001 of the LLR should be underlined. It updated the Religion Law in Portugal, revoking Law No 4/71, which formerly provided guidance on the matter at issue.

The Religious Liberty Act consists of 69 articles organised in the following eight chapters:

- Chapter I – *Principles*
- Chapter II – *Individual rights of religious freedom*
- Chapter III – *Collective rights of religious freedom*
- Chapter IV – *Status of the Churches and religious communities*
- Chapter V – *Agreements between religious bodies corporate and the State*
- Chapter VI – *Commission for Religious Liberty*
- Chapter VII – *The Catholic Church*
- Chapter VIII – *Complementary and transitional provisions*

VI. There are many relevant innovations to be underlined in this LLR that deserve high praise:

- The innovation in the employment status of workers who profess a religion, whereby the respective days of rest and worship are upheld;
- The acknowledgement of the civil effects, in general terms, of religious marriage;
- The institutionalised and organised acceptance of religious assistance attesting to a public interest in this matter on the part of the State;
- The protection of the religious cultural goods and the town-planning concerns over the location of Church goods.

Selected Doctrinal Bibliography

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