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THE MOST CONTROVERSIAL ISSUES REGARDING RELIGIOUS' RIGHTS, INCLUDING ANIMAL SACRIFICE

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RESUMO: Este artigo analisa algumas questões muito controversas relacionadas com a liberdade de religião, dentre eles devem o confronto entre este direito fundamental e da protecção dos animais. Basicamente, a controvérsia está sempre em discussões religiosas, de modo que o autor decidiu escolher as questões consideradas as mais polêmicas. Além disso, analisa a objecção de consciência e a liberdade de religião, confronto entre liberdade de expressão e os direitos religiosos, como a extirpação do clitóris em algumas tribos do continente africano, a Igreja Adventista do Sétimo dia e as obrigações do trabalho, a proibição da transfusão de sangue pelos fiéis da religião Testemunhas, e último mas não o pior, o sacrifício de animais e a liberdade religiosa.

Palavras-chave: Constituição. Liberdade religiosa. Conflito entre direitos fundamentais. Sacrifício animal.

ABSTRACT: This article analyze some very controversial issues related to freedom of religion, and among all of them must be indicated the clashing between this fundamental right and the protection of the animals that has to be enforced. Basically, controversy is always in religious discussions, so that the Author decided to choose the issues that figured out to be the most controversial ones. Besides, analyze the

conscientious objection and freedom of religion, clash between freedom of speech and religious rights, clitoris extirpation in some tribes of the african continent, the seventh day adventist church and job's obligations, blood transfusion and the Jehovah's witnesses religion and least but not last, animal sacrifice and freedom of religion.

Keywords: Constitution. Freedom of Religion. Clash between fundamental rights. Animal sacrifice.

SUMÁRIO: 1. Introduction - 2. Constitutional Interpretation, Freedom of Religion and Animal Sacrifice - 3. Conscientious Objection and Freedom of Religion - 4. Clash between Freedom of Speech and Religious Rights -5. Conclusion

1. INTRODUCTION

Firstly I would like to justify the title of this paper.

Basically, controversy is always present in religious discussions, so that I decided to choose the issues that I figured out to be the most controversial ones.

Therefore, I will go over six very controversial issues related to freedom of religion: 1) conscientious objection and freedom of religion; 2) clash between freedom of speech and religious rights; 3) clitoris extirpation in some tribes of the African continent; 4) the Seventh Day Adventist Church and job's obligations; 5) blood transfusion and the Jehovah's Witnesses religion; and least but not last, 6) animal sacrifice and freedom of religion.

As long as it is possible to be, each issue that will be investigated here will have to be analyzed with the necessary relationship that has to be made between each one of them and animal sacrifice, except the last one because it is obviously related to animal sacrifice.

As it is already demonstrated, the issues chosen to be discussed in this article have a lot to do with the day-by-day life of millions of individuals throughout the whole world.

Therefore, this is the reason for making an analyze of the problems faced by every single person who comes to make an option towards a religion or even decides to deny any kind of belief – which is a behavior that is also protected by the Brazilian Constitution of 1988 and by the United States' Constitution of 1787.

However, before analyzing each issue as shown, it is practically an obligation to make some statements in terms of constitutional interpretation.

So, the first duty is to making an investigation of how the constitutional interpretation may provide solutions for clash of freedom of religion – including freedom of liturgy and animal sacrifice - and others fundamental rights.

Science has unique scope: providing better conditions of life for the human being.

This is the goal of this article, and I hope that the ideas which I decided to discuss here may be responsible for improving and bettering life conditions of everyone who is whiling to exercise religious rights, even though exclusively in order to deny the existence of any superior being or God.

2. CONSTITUTIONAL INTERPRETATION, FREEDOM OF RELIGION AND ANIMAL SACRIFICE

When someone decides to interpret the constitution, there will be much more difficulties than interpreting the law it self.

Constitution is a human creation that formally provides the organization of society by the constitutional provisions that prescribes who, when and how one may exercise political and judicial power.

As being so, there must a relevant difference between interpreting constitutional provisions and interpreting the law, especially because, in this case, there is no provision related to state's organization.

Beyond that, constitution also provides a special protection of fundamental rights, which tend to have a clash one against another.

Therefore, it seems that everyone who is whiling to making an adequate constitutional interpretation ought to adopt a method for interpreting fundamental rights in order no to forget the clash that exist between them. Elsewhere, the constitutional interpretation must be held in such a way that provides harmony in the constitutional system.

ROBERT ALEXY has stated that every constitution has constitutional principles and constitutional rules. Constitutional principles are the ones that are completely possible to ponder over in order to conclude which one will have more weight in a certain case. In the other side, the constitutional rules are those that do not have the opportunity to be balanced.¹

According to RONALD DWORKIN, constitutional rules differ from constitutional principles because they are characterized as *all-or-nothing fashion*. “The difference between legal principles and legal rules is a logical distinction. Both sets of standards point to particular decisions about legal obligation in particular circumstances, but they differ in the character of the direction they give. Rules are applicable in an all-or-nothing fashion. If the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing for the decision”.²

In terms of freedom of religion, including animal sacrifice, one has to imagine a scale, in which are located two different fundamental rights that are also clashing.

Pondering over each fundamental right means that in a certain case that is examined by the judge there will be the necessity to give more weight to a fundamental right than to the other, according to the circumstances of the case that is being judged.

But before pondering over fundamental provisions one is obliged to harmonizing them.³

For instance, in Brazil, there was a very interesting case judged by the State Judicial Court of São Paulo.

The Public Prosecution filed a class action law suit in order to impeach religious ceremonies all night long as to protect the fundamental right of the neighbors for resting and sleeping.

Before the judge delivered the decision, an interesting agreement came up: the religious group agreed to cover the walls of the church with cork, and it was responsible either for protecting the

right of liturgy and also the right of the whole neighborhood for resting and sleeping.

In terms of animal sacrifice it is not correct to establish any type of harmonization as long as it can be noticed that the life of the animals and the right of liturgy are totally incompatible. If the Court protects one, the other will remain unprotected.

However, it is still possible to ponder over these fundamental rights, which means that different weights may be given for each constitutional provision when the judge decides a certain case related to clash between freedom of religion and animal sacrifice.

3. CONSCIENTIOUS OBJECTION AND FREEDOM OF RELIGION

One of the most important ways of expressing one's belief is by demonstrating what is called “conscientious objection”.

In this case, the person has the fundamental right to exercise the freedom of religion as not to be submitted to legal obligation, like serving the army.

Meanwhile, the problem is to defining what may be considered religion or a legitimate excuse for not being submitted to a general law that enforces an obligation.

The Supreme Court has held that “the test of belief’ in a relation to a Supreme Being’ is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clear qualifies for the exemption”.⁴

Thus, according to the Supreme Court, a legitimate objection can also be related to any conviction and not only the belief of the existence of a supreme being.

This is a very interesting decision because it does not establish any kind of condition in order to recognize one's belief. As shown, all that is necessary is merely someone declaring the belief and also pointing that this very same belief is, indeed, responsible for occupying in the life of the believer a very important position. And that is all.

Making a relationship between this decision of the United States' Supreme Court and animal sacrifice, it is possible to conclude that the liturgy of some religious groups that includes animal sacrifice has to be at least considered as an exercise of a fundamental right based on a legitimate religious option.

Hence, there will be an exclusive way to solve the hard problem of the clash of fundamental rights: pondering over freedom of religion and the environmental constitutional protection.

4. CLASH BETWEEN FREEDOM OF SPEECH AND RELIGIOUS RIGHTS

One of the most controversial issues related to freedom of religion is the clashing between these individual rights.

Indeed, the believer has the tendency to try to convert others into his/her religion and usually makes use of the freedom of speech to do so.

The problem is that the very same fundamental right that provides an individual freedom to convert someone is simply the very same that prescribes limits to the exercise of this fundamental right, as long as the person which the conversion is directed to also have the individual freedom to criticize it and to make a conversion back to the believer.

So, in many circumstances it is totally unlawful to use the freedom of speech to spread religious values.

For example, in 2012 US Presidential Election, a Senate Candidate, Murdouch said this: “Pregnancy after rape. God intended that to happen”.

I must go over this statement.

When a public officer or either someone that is running for a public office says anything in favor of religious beliefs, this is undoubtedly an offense to the establishment clause, which is a protection foreseen in the First Amendment of the Constitution.

Religious leaders obviously have the right to spread their ideals, but politicians do not, especially those who are responsible for enacting legislation.

Under the very same basis, there is no possibility for anyone who is running for a public office (or is already elected) to declaring some statement in favor or against any religious liturgy that includes animal sacrifice.

As long as animal sacrifice is a representation of a certain liturgy, and as long as the United States is a secular state, it is absolutely forbidden to making a statement in order to establish or to criticize religious groups.

Beyond that, it is also necessary to notice how religious beliefs are so strongly responsible for creating a violent atmosphere between believers of all kind. Those who are in Congress, in the Executive branch or any other relevant public office is not supposed to acting as any other believer. This is the duty for every single person that decides to be the President of the United States, an area representative, a senator

A. Clitoris Extirpation in some Tribes of the African Continent

As known, some tribes from Ethiopia and even other countries from the African continent do extirpate babies' clitoris as a requirement of the religion so that the future woman will never be confounded to a prostitute.

But, indeed, it may be considered that this tradition can also be explained as an attempt for the male to exercise control over the female sexual activity.

However, it's been known as a consequence of religious beliefs.

In order to solve this dramatic problem, I must go over two tendencies in International Law that are in opposite sides: *universal* and *cultural* grounds.

The universal ground states that a human right has to be enforced in any place of the world, no matter if there are cultural traditions which try to repel them.

Yet, the cultural ground sustain that a human right must be ponder over the community values and traditions.

It is obvious that the acceptance of one or the other ground will make a dramatic change of the solution for this problem.

My idea is that there will be a principle that will surely clarify the situation: the reversibility of choice's principle.

What does it mean?

It simply means that no one can be forced by anybody to make a non reversible choice and – obviously -, no one can make a non reversible choice for the individual.

In the case of clitoris extirpation, what we have is situation that someone is making a non reversible choice for the baby, and this cannot be accepted.

Likewise, no one has the power to hinder someone from attending classes in school for religious beliefs, as usually happens in the Middle East. Recently, for example, a teenager called Malala Yousafza was shot in the head for going to school. This horrible situation exposes the Taliban cowardice.

But it is time to ask again: Did God want that to happen? Senate Candidate might have a response for that...

B. Seventh Day Adventist Church and Job's Obligations

Another problem must be referred: is the Seventh Day Adventist Church believer obliged to work from Friday 6 pm until Saturday 6 pm?

I understand that it ought to be solved by the analysis of the possibility for the employee to work extra hours in others days to compensate the absence from Friday night until Saturday 6 pm.

Thus, if the company can do and refuses to do so, the worker can file a lawsuit under the basis of unreasonable treatment from the employer.

C. Blood Transfusion and the Jehovah's Witnesses Religion

Herbert Hart, that happens to be one of the most important scholars in England, states that some cases are really hard to solve. He names them as *hard cases*.

Here we are facing one of the *hardest case* of all: Can the Jehovah's Witnesses believer refuse blood transfusion in spite of that represents a threat to his/her life?

As I said this is the hardest to solve...

I will tell you about a situation that happened to me when I went to Rio de Janeiro in 2009 for a lecture and this will show how hard it is...

After finishing my talk a young woman came to me and we had this following conversation:

- Hi Professor Manoel, congratulations for your lecture, but I don't agree with everything that you said...

- What was that you don't agree?

- The balancing that you sustained between freedom of religion and life, especially when you referred that Jehovah's Witnesses do not have the right to choose for death!

- Yes, I'm positive about that...

– But what kind of life do you think we are going to have after the blood transfusion? Do you think we are obliged to have a life without dignity?

This dialogue made me think over and over and over...

In fact, today, I sustain a very different point of view I used to...

Now I do think that a person has the fundamental right of freedom, which eventually may conduct the person to death. It is not a choice for death. It is a choice for freedom. Mankind has showed throughout history that sometimes when there's a clash between freedom and life, the individual has preferred to die instead of losing the liberty.

D. Animal Sacrifice and Freedom of Religion

The main subject of this article deals with animal sacrifice.

Indeed, there are many religious groups – specially those which are related to Africa's religious traditions – that usually use animals in the liturgy in order to worship gods of Santeria (United States), Voodoo (Central America), Candomblé and Umbanda (Brazil).

As it is already shown, the Africa's religious tradition has a lot to do with *polytheism*, which means that not only the belief itself but also the liturgy of theses religious groups are strongly based on the worshipping of many gods. Therefore, animal sacrifice may be an authentic representation of one's belief and it is generally expressed in the liturgy.

In Brazil, especially in the State of Bahia, it is very common to see dead chicken mixed with candles in the streets as a real image of animal sacrifice. However, it is not rare also to see sheep and bull heads spread over the streets.

So, how the Brazilian Law System treat the very controversial problem concerning animal sacrifice?

At first, it is necessary to point the Brazilian legislation related to environmental protection, which is the Act of Environmental Crime (9.605/1998). The article 32 prescribes that everyone who abuses, hurts or mutilates wild, domestic or domesticated animals will be charged by the Public Prosecution and will be condemned until to one year prison.

The Brazilian Supreme Court has delivered a very interesting decision related to animal sacrifice in so called “Farra do Boi”, a tradition that used to happen in the States of the south of the country, which consisted in these following proceedings: one bull was chosen to be sacrificed by the individuals that decided to take part of the event. The animal ran nearly the people while they started to mutilate and hurt the bull until death.

The Brazilian Supreme Court decided to forbid this kind of cultural representation, stating that there should be preservation of the environment and also that the behavior of those individuals was not reasonable. In addition, Justice FRANCISCO REZEK, writing for the Court, also stated that there was being cruelty against the animals.⁵

Nevertheless, the Brazilian judicial system does not seem to associate animal sacrifice to cruelty when deals with religious matters.

Indeed, there is no decision in Brazilian courts that has charged any individual because of animal sacrifice, including any decision from the Brazilian Supreme Court, because, as we could notice, the decision that was delivered by Justice REZEK is totally based on the environmental protection and is a result of the clash between cultural tradition and animal protection.

Other conclusion that may be a result of the decision: there is no basis related to Animal Right. Thus, the Animal Rights Doctrine will have an authentic struggle in order to convince the Brazilian judges about the existence of animal rights.

In addition to this resistance to animal rights in Brazil, presumably this total absence of judicial decision in this particular case might have a lot of to do with anthropological and sociological backgrounds, as long as religious problems have to be solved according to some knowledge that is not automatically available for the judges.

Consequently, the best and more adequate decision in terms of clash between animal sacrifice and religious traditions is the one that is able to put together law matters, anthropological backgrounds and sociological basis.

Thus, religious traditions express a moment in the civilization evolution process.

No one can defend that the liturgy of Africa's religious groups will be the same forever. The antagonism between animal protection and freedom of liturgy will certainly conduct to the balancing of these fundamental rights.

Nevertheless, it has to be emphasized that almost every Africa's religious groups is willing to making animal sacrifice nowadays.

Hence, judges are simply obliged to establishing standards for decision making in order to achieve an adequate interpretation for this controversial issue.

In the United States, the Supreme Court has held that animal sacrifice is authorized.

It happened when the Court delivered a decision in *Church of the Lukumi Babalu Aye, Inc. v. Hialeah* (508 U.S. 520 [1993]).

Before analyzing the Supreme Court's decision, it is necessary to go over the facts related to the case.

The Santeria Religion uses animal sacrifice as one of its principal forms of worship. By doing so, animals are killed and then cooked and eaten in accord with Santeria rituals. The religious group then decided to establish a house for worship, a school, a cultural center, and a museum in the city of Hialeah, which happens to be located in the State of Florida. However, the city adopted an ordinance prohibiting ritual sacrifice of animals. The Court decided that the Hialeah law was not neutral because its clear object was to prohibit a religious practice. Also, the decision found the law unconstitutional because the government could achieve the goals of safe and sanitary of animal remains without targeting the Santeria religion.⁶

Some considerations ought to be made towards this decision.

Firstly, the basis for denying the constitutionality of Hialeah's law is exclusively related to its non neutral character. Therefore, if the law is able to be confirmed after the strict scrutiny test, it will not be considered unconstitutional.

From my point of view, if the law had inserted prohibition for hunting animals, probably the Supreme Court would not have decided that it was against the Constitution.

Moreover, the decision did not face sociological and anthropological basis, as it was practically obliged to do as a consequence of the variety of circumstances that surround freedom of religion.

After this brief investigation of *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, it is possible to conclude that the American Supreme Court did not give a blank-check for all religious groups that are involved with animal sacrifice in the United States.

The decision strictly confirmed the unconstitutionality of Hialeah's law under the basis of its non neutral character. Thus, any other law that comes to be analyzed by the Supreme Court in the future may be considered constitutional, as long as its content does not interfere exclusively in the free exercise clause.

The last comment that has to be made concerns the lack of sociological and anthropological backgrounds that were not examined in the decision, which is also responsible for not solving the controversy under the basis of the necessity to ponder over fundamental rights that are in clash.

5. CONCLUSION

- 1) Controversy is always present in religious discussions;

2) Constitution is a human creation that formally provides the organization of society by the constitutional provisions that prescribes who, when and how one may exercise political and judicial power;

3) In terms of freedom of religion, including animal sacrifice, one has to imagine a scale, in which are located two different fundamental rights that are also clashing;

4) In terms of animal sacrifice it is not correct to establish any type of harmonization as long as it can be noticed that the life of the animals and the right of liturgy are totally incompatible. If the Court protects one, the other will remain unprotected;

5) According to the American Supreme Court, a legitimate objection can also be related to any conviction and not only the belief of the existence of a supreme being. This is a very interesting decision because it does not establish any kind of condition in order to recognize one's belief. As shown, all that is necessary is merely someone declaring the belief and also pointing that this very same belief is, indeed, responsible for occupying in the life of the believer a very important position;

6) In many circumstances it is totally unlawful to use the freedom of speech to spread religious values, especially when this fundamental right is exercised by someone that is running for a public office or which is already nominated;

7) The Seventh Day Adventist Church believer is not obliged to work from Friday 6 pm until Saturday 6 pm as long as it is possible for the employee to work extra hours in others days to compensate the absence on these days. Thus, if the company can do and refuses to do

so, the worker can file a lawsuit under the basis of unreasonable treatment from the employer;

8) In terms of blood transfusion of Jehovah's Witnesses Religion, it is correct to conclude that a person has the fundamental right of freedom, which eventually may conduct the person to death. It is not a choice for death. It is a choice for freedom. Mankind has showed throughout history that sometimes when there's a clash between freedom and life, the individual has preferred to die instead of losing the liberty;

9) There are many religious groups – specially those which are related to Africa's religious traditions – that usually use animals in the liturgy in order to worship gods of Santeria (United States), Voodoo (Central America), Candomblé and Umbanda (Brazil);

10) There is no decision in Brazilian courts that has charged any individual because of animal sacrifice, including any decision from the Brazilian Supreme Court, because the decision that was delivered by Justice REZEK is totally based on the environmental protection and is a result of the clash between cultural tradition and animal protection;

11) Other conclusion that may be a result of the decision: there is no basis related to Animal Right. Thus, the Animal Rights Doctrine will have an authentic struggle in order to convince the Brazilian judges about the existence of animal rights;

12) In addition to this resistance to animal rights in Brazil, presumably this total absence of judicial decision in this particular case might have a lot of to do with anthropological and sociological backgrounds, as long as religious problems have to be solved

according to some knowledge that is not automatically available for the judges;

13) The best and more adequate decision in terms of clash between animal sacrifice and religious traditions is the one that is able to put together law matters, anthropological backgrounds and sociological basis;

14) No one can defend that the liturgy of Africa's religious groups will be the same forever. The antagonism between animal protection and freedom of liturgy will certainly conduct to the balancing of these fundamental rights;

15) The most important conclusion about *Church of Lukumi Babalu* is that the Supreme Court did not give a blank-check to religious groups in order to accomplish animal sacrifice in its rites, but delivered a decision concluding about the unconstitutionality of the law under the basis of its non neutral character.

¹ ALEXY, Robert. **Teoria dos Direitos Fundamentais**, tradução de Virgílio Afonso da Silva, São Paulo: Malheiros Editores, 2008, p.48

² DWORKIN, Ronald. **Taking Rights Seriously**, Cambridge: Harvard University Press, 1978, p.24.

³ GOMES CANOTILHO, José Joaquim. **Estudo sobre Direitos Fundamentais**, São Paulo. Coimbra: Revista dos Tribunais/Coimbra Editora, 2008, p.43

⁴ See *United States v. Seeger*, 380 U.S 163, 164-165 [1965], also see *Welsh v. United States*, 398 U.S. 333 [1970]).

⁵ Supremo Tribunal Federal, RE 153.531/SC, j. 6, 3rd, 1997.

⁶ CHEMRINSKY, Erwin. **Constitutional Law – Principles and Policies**, New York: Aspen Publishers, 3rd edition, 2006, pp. 1260/1261.