Free to Teach: State Limits and the Protection of Private Schools Religious Liberties

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ABSTRACT: .The article compares and analyzes three countries - Australia, Brazil and the United States of America - and the way they approach the issue of religious pluralism in private schools, investigating which limits should be imposed on the State to protect the religious freedom of certain civil associations - particularly private schools. When considering the idea of pluralism from a Calvinist perspective, limits are proposed to the State that give private schools the possibility of operating in the religious sphere independently, without interference by the State that seeks to reduce the ethos proposed by the school. It is concluded that private schools should have the freedom to combine their ordinary school schedule with their religious vision.

KEYWORDS: Religious freedom; Education; Private schools; Pluralism.

Introduction

Human societies are complex. They are a compound of different associations formed by many individuals, each with their own set of rules, standards, and values. There can be no proper study of the law in the modern State without such an understanding. Yet, it is common to see the drive for social uniformization and attempts to cluster plural associations into an all-encompassing, totalizing State.

Although much has been said about pluralism in general[1], religious or confessional expressions of pluralism bring new and specific challenges. With a multiplicity of religions and religious views, it is hard to understand

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[1] Arend Lijphart, *Democracy in Plural Societies: A Comparative Exploration* (New Haven: Yale University Press, 1977); Peter Berger, *To Empower People: The Role of Mediating Structures in Public Policy* (Washington DC: Aei Press, 1989); James W. Skillen and Rochne M McCarthy,

the proper boundaries of the State and its responsibility towards administering a flourishing political community that allows for individuals to practice and pursue their own religion. Hans-Martien Ten Napel says that 'no legitimate liberal democracy is feasible without there being the type of protection of religious freedom offered by the right to freedom of religion or belief as it has historically developed'[2]. Thus, it is fundamental that one carefully assesses the limits of the State in treating the many religious views and practices held by its citizens.

The primary focus of this paper is to analyse the State's limits according to 'structural pluralism' and investigate what limits ought to be imposed on the State to protect the religious freedom of certain private associations – particularly, of private schools. Considering 'the diversity of organizational competencies and social responsibilities'[3], the study proposes limits to the State that allow for private schools to operate independently in the religious sphere, without interferences from the State that aim at curtailing the private schools' proposed ethos. This means, generally speaking, that private schools should have the freedom to conjugate the teaching of the regular academic agenda with the school's religious view.

Historically, and in different countries, private schools face increasing restraints upon their religious freedom. Recently, in Australia, a religious discrimination bill has been analysed and debated in the Parliament[4]. The epicentre of the current discussions arose from the Ruddock Report on Religious Freedom[5]. The Report supposedly advocated a 'right to discrim-

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Political Order and Plural Society (Grand Rapids: Eerdmans, 1991); Michael Novak, *Democracy and Mediating Structures* (Washington D.C.: Aei Press, 1980); and Fred Dallmayr, *Achieving Our World: Towards a Global and Plural Democracy* (Maryland: Rowman & Littlefield, 2001) are just few examples.

[2] Hans-Martien Ten Napel, *Constitutionalism, Democracy and Religious Freedom: To be Fully Human* (London: Routledge, 2017) 6.

[3] James W. Skillen, *Recharging the American Experiment: Principled Pluralism for Genuine Civic Community* (Grand Rapids: Baker Books, 1994) 83.

[4] *The Discrimination Free School Bill 2018* (Cth), lapsed at the end of Parliament in 2019. However, there is a new Bill related to religious freedom of educational institutions on its second reading debate: https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6821

[5] Phillip Ruddock, *Religious Freedom Review: Report of the Expert Panel* (2018): https://www.ag.gov.au/RightsAndProtections/HumanRights/Documents/religious-freedom-review-expert-panel-report-2018.pdf .

inate' for religious private schools. Despite scholarly voices calling for a more nuanced interpretation of the Report[6], politicians seemed troubled with the supposedly 'right to discriminate' given to religious institutions and proposed a law reform that could potentially diminish the religious freedom of such organisations[7].

In Brazil, the so-called 'school without political party' bill has triggered several discussions about the interference of the State in private school education. The proposed law intends to prohibit teachers of both public and private schools from promoting ideological, moral, religious or political statements and opinions[8]. The original idea was to promote freedom of conscience and beliefs and to foster the plurality of thought in schools. However, the bill potentially places burdens on the capacity of private schools to teach their doctrines, thus impoverishing the principle of plurality of associations[9]. This scenario is illustrative of how government actions directly restrict freedom of belief in Brazil.

In the United States of America, there have long been discussions about the limits of the State concerning religious institutions. Since the drafting of the Constitution, there has been much debate about the relationship between the Church and the State. Particularly when it comes to the development of rules and regulation for religious private schools, the Supreme Court has played a vital role. Cases such as *Everson v Board of Education*[10] and *Hosanna-Tabor Evangelical Lutheran Church and School v EEOC*[11] were decisive in establishing a strict separation between Church and State,

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6 Chris Merritt, "Academics denounce Ruddock approach to religious freedom," *The Australian* (online), 15 October, 2018. https://www.theaustralian.com.au/nation/nation/academics-denounce-ruddock-approach-to-religious-freedom/news-story/c7527f3a29341667dacd097f9185cffe

7 *Discrimination Free School Bill 2018* (Cth): https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=s1147 #, and, more recently, the Religious Discrimination Bill 2021 (Cth): https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6821

8 School Without Political Party Bill [Escola sem partido], *Projeto de Lei No. 246/2019 (Bra). PL apensado ao PL 867/2015*: https://www.camara.leg.br/proposicoesWeb/fichadetramitacao?idProposicao=2190752.

9 Richard J Mouw and Sander Griffioen, *Pluralisms and Horizons: An Essay in Christian Public Philosophy* (Grand Rapids: Eerdmans, 1993).

10 330 U.S. 1 (1947).

11 565 U.S. (132 S. Ct. 694) (2012).

which includes allowing religious organisations to freely administer their own staff without falling short on antidiscrimination laws. US Supreme Court cases like these reveal the importance of a clear understanding of the limits of the State according to a pluralist constitutional theory[12].

A constitutional comparison between Australia, Brazil and the United States of America sheds light on how different countries deal with similar issues, but in different practical and legal contexts and from distinct perspectives. It also demonstrates that in a plural constitutional democracy the State must have clear limits in order to avoid its overwhelming interference in, for example, private schools' religious liberties.

1. Pluralism and the Separation Of Church and State in Australia, Brazil and the United States of America

1.1. The Idea of Pluralism and its Manifestation as a Limit to the State

Pluralism can be understood in multiple senses. One of its facets consists of a theoretical formulation that sees it as a social structural principle, intrinsic to every society. Sander Griffioen and Richard Mouw call it 'associational pluralism', where civil associations and organizations constitute the structure of society[13]. James Skillen, in the same sense, refers to it as 'structural pluralism'[14].

Structural pluralism proposes that the State should not encroach on other societal associations, such as churches, families and private corporations. However true that the State has a specific function within society, it is not an all-encompassing sphere. Other associations have their own particular sets of rules that are not under the tutelage of the political State[15]. In respect to Church and State, for example, '[t]he sovereignty of the State

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12 *Cantwell v Connecticut 310 U.S. 296* (1940); *Wisconsin v Yoder 406 U.S. 205* (1972); *Agostini v Felton 521 U.S. 203* (1997); *Burwell v Hobby Lobby Stores, Inc. 573 U.S.* (134 S. Ct. 2751) (2014); *EEOC v Abercrombie & Fitch Stores, Inc. 575 U.S.* (135 S. Ct. 2028) (2015), are few examples.

13 Mouw and Griffioen, *Pluralisms*.

14 Skillen, *Recharging*.

15 Guillaume Groen Van Prinsterer, *Le Parti Anti-Revolutionaire et Confessionel dans l'Église Réformée des Pays-Bas* (Amsterdam: H Höveker, 1860) 19.

and the sovereignty of the Church exist side by side, and they mutually limit each other'[16].

This relationship between the different societal spheres and their interactions in ways that respect their individualities was of particular interest to Abraham Kuyper, a Dutch politician and reformed theologian. There are, according to his theory, several orbits of authorities in a social environment, each with sovereign powers to propose and obey its own laws in subjection to its own governing institutions[17]. The different spheres are to be treated equally insofar as they have distinct core set of rules that are independent from each other.

Such a pluralist system informed by Kuyper's theory (and its further developments)[18] acknowledges that different associations have constant interactions and will, eventually, limit each other. Consequently, the State does not have the possibility of usurping other spheres of their fundamental competencies and functions. As Kuyper acknowledges, the State has only the responsibility of acting:

> 1. Whenever different spheres clash, to compel mutual regard for the boundary-lines of each; 2. To defend individuals and the weak ones, in those spheres, against the abuse of power to rest; and 3. To coerce all together to bear personal and financial burdens for the maintenance of the natural unity of the State[19].

Notwithstanding the possibility of the State interfering in other spheres, Kuyper says it must not exercise the above unilaterally. As he points out, 'the rights of the citizens over their own purses must remain the invincible bulwark against the abuse of power on the part of the government'[20]. Notably, the State could not become the passive arbitrator postulated by the classic liberals; neither the all-present 'giant' in the statists' ideologies[21]. Limits are necessary.

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16 Abraham Kuyper, *Lectures on Calvinism* (New York: Cosimo Classics, originally published in 1931, 2009) 107.

17 Abraham Kuyper, *Sphere Sovereignty* (Speech at the inauguration of the Free University, Amsterdam, 08 March 1880) 4-6.

18 Renato S M Costa, 'A Sphere Sovereignty Theory of the State: Looking Back and Looking Forward', *International and Public Affairs* 3(1) 13-19, 2019.

19 Ibid, 97.

20 Ibid.

21 Koyzis, *Political Visions and Illusions*.

The State is only sovereign to the extent that the other associational spheres are sovereign[22]. If the State starts to subject everything to its will, or if it commences to oppose 'any self-government of private persons or corporations and thus, under the guise of maintaining law and order, to destroy all self-determination and all genuine liberties', individual and associational freedom will end[23].

There are, therefore, limits on the spheres of State, Church, family, corporations, and others. It is precisely these boundaries that are so precious for a pluralist society to function properly. A political community that values diversity and freedom will learn how to respect the boundaries of each sphere, and thus avoid the entanglement of the different types of associations. One of the effects of these limits, in terms of the relationship between Church and State, is the restriction on an imposed uniformity of religion or religious beliefs. Private associations are free from States' interferences in promoting their own set of rules and beliefs.

1.2. Separation of Church and State

Throughout history, human societies have experienced interesting interactions between the religious and political realm. In the Christian and Muslim traditions, for example, religious rules can be confounded with civil rules and pragmatically govern both 'secular' and 'religious' social experiences[24]. In Western culture, accordingly, religion has played a primary role in the development of States, of the law and of human rights[25]. Although Western societies did not develop linearly, they faced the continuous tensions between the spheres of Church and State.

The notion of a separation between Church and State can be traced back, in our Western tradition, to Augustine, the Bishop of Hippo, and his celebrated City of God. Since the conversion of Constantine to Christianity in 312 and the promulgation of the Edict of Milan in 313, the Roman Empire had implemented the roots of religious tolerance. Ac-

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22 Kuyper, *Lectures*, 91.

23 Ibid, 22.

24 Nicholas Aroney, "Divine Law, Religious Ethics, Secular Reason," *Political Theology* 14 (5): 670-685, 2013.

25 John Witte Jr, "Law, Religion and Human Rights," *Columbia Human Rights Law Review* 28, 1-31, 1996.

cording to the Edict of Milan, people had the 'freedom to follow whatever religion one wished', and a 'public and free liberty to practice their religion or cult'[26]. Just a few years later after the Edict, Augustine formulated his 'two kingdoms doctrine'. In it, not only did he depict an image of two cities, related to the spiritual and temporal dimensions of life, he saw that they both intersected and overlapped[27]. As John Witte Jr and Joel Nichols explain, it was crucial for Augustine that 'the spiritual and temporal powers that prevailed in these two cities remained separate in their core functions'[28].

Years after Augustine's death, the idea of the 'two powers' still drove the comprehension of a necessary separation between Church and State. Although this notion has been continuously contested throughout history[29], it was only with the Protestant Movement that the separation between the two spheres began to gain its current contours.

Although some aspects of the Reformation nationalised religion (such as the Anglican with the institution of the Church of England), a notion that the State 'bears the sword which wounds; not the sword of the Spirit, which decides in spiritual questions'[30] increased exponentially, notably in the Calvinistic and Anabaptist contexts, influencing several nation-states in Europe and, especially, North America.

The new understanding of the separation of Church and State meant that the latter "should not favour any one religion over another nor favour secular beliefs and organizations over religious ones – nor religious beliefs or organizations over secular ones. It should not advantage or disadvantage any religious tradition over others, nor either religion as a whole or secular beliefs as a whole"[31]. Conceptually, the idea of separation between Church and State became vital to that of religious freedom.

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26 Lactantius, *De Mortibus Persecutorum* (trans ed JL Creed, 1984) 71-73.

27 Saint Augustine, *The City of God* (Cambridge: Cambridge University Press, 1998) Book XIX.

28 John Witte Jr and Joel A Nichols, *Religion and the American Constitutional Experiment* (Oxford: Oxford University Press, 2016) 11.

29 Sidney Z Ehler and John B Morrall, *Church and State Through the Centuries: A Collection of Historic Documents with Commentaries* (New York: Biblo and Tannen, 2nd ed, 1967).

30 Kuyper, *Lectures*, 106.

31 Stephen Monsma and Stanley Carlson-Thies, *Free to serve: protecting the religious freedom of faith-based organizations* (Ada: Brazos Press, 2015) 151.

From these principles, many constitutional democracies nowadays expressly or implicitly establish a scission between Church and State as a means of protecting religious freedom. The Australian Constitution, for example, affirms that the Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, as well as the fact that no religious test shall be required as a qualification for any office or public trust under the Commonwealth. Section 116 of the Australian Constitution reflects the US Constitution of 1787. The relationship between Church and State and the idea of religious tolerance was crucial to the making of the North American federation. Indeed, the First Amendment to the American Constitution is commonly seen as bulwark of a liberal constitutional democracy. Also following the North American tradition, the Brazilian Constitution guarantees the freedom of belief and the free exercise of religion-related activities, including special protection to faith-based institutions and exemptions to both individuals and religious associations in the practice of their attributions.

1.2.1. The United States of America's Example: the First Amendment to the Constitution

"Religion or the duty we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force or violence"[32]. This was the spirit that permeated the debates during the elaboration of the United States of America Constitution of 1787, and that later led to the implementation of the First Amendment to the Constitution. James Madison, the author of the draft version of what became the First Amendment, saw religion as a matter to "be left to the conviction and conscience of every man", thus resting outside the State's scope[33].

With the understanding that religious freedom is "an unalienable right"[34], the First Amendment to the US Constitution established that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech,

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[32] *Virginia Declaration of Rights* 1776 (US), article 16.

[33] James Madison, "Memorial and Remonstrance against Religious Assessment." (1785) apud Monsma and Carlson-Thies, *Free to Serve*, 99.

[34] Ibid.

or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances"[35]. In Thomas Jefferson's famous words, since "religion is a matter which lies solely between Man & his God", the First Amendment ended up "building a wall of separation between Church & State"[36].

Jefferson's idea of a rigid schism between Church and State was adopted in *Everson v Board of Education*[37]. As defined by former US Supreme Court Justice Potter Steward, the North American Constitution protects the freedom of each one "to believe or disbelieve, to worship or not worship, to pray or keep silent, according to his own conscience, uncoerced and unrestrained by government"[38]. This perspective of a strict separation between the Church and the State "requires government to minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance"[39]. It has been said that "the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere"[40].

Johan van der Vyver sees two dimensions to religious freedom in the First Amendment[41]. The first, an associational dimension, includes "(i) the right to practice one's religion, in association with other members of the religious community, and (ii) the right to form, join and maintain religious associations"[42]. The second dimension, the institutional one, consists of a group-right that "requires of the State not to interfere in the internal af-

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35 Legal Information Institute, "First Amendment" (2013) *Cornell University Law School* https://www.law.cornell.edu/constitution/first_amendment.

36 Thomas Jefferson, "Jefferson's Letter to the Danbury Baptists – The Final Letter, as Sent on January 1, 1802." *Library of Congress* (USA) https://www.loc.gov/loc/lcib/9806/danpre.html.

37 330 U.S. 1 (1947).

38 *Justice Steward's dissenting opinion in Abington v Schempp* 374 U.S. 203, 320 (1963).

39 Douglas Laycock, *Religious Liberty* (Grand Rapids: Eerdmans, 2010) 13.

40 *McCollum v. Board of Education* 333 U.S. 203 (1948), Justice Hugo Black at 212.

41 Also, for a comprehensive study on 'First Amendment institutionalism' with a sphere sovereignty perspective, see Paul Horwitz, "Churches As First Amendment Institutions: Of Sovereignty and Spheres" *Harvard Civil Rights-Civil Liberties Law Review* 44: 79-131, 2008.

42 Johan Van Der Vyver, "Constitutional Protection and Limits to Religious Freedom." *Second ICLARS Conference*, Santiago de Chile, 10 September (2011).

fairs of religious institutions"[43]. This second dimension is of paramount relevance for the current study.

In *Meyer v Nebraska*[44], the Supreme Court of the United States for the first time analysed the standard of religious liberty in reference to the First Amendment[45]. However, since the First Amendment's text is only directed to the Congress at a national level, the case was not resolved exclusively via religious freedom grounds. Only with *Cantwell v City of Griffin*, a few years later, did the Supreme Court start to apply to constituent states and local laws the 14th Amendment's due process of law clause, which coupled the claim for religious freedom under the First Amendment[46].

Another crucial case was *Everson v Board of Education*[47]. In *Everson*, a Supreme Court majority held that the meaning and scope of the First Amendment concerns with the protection of individual's religious freedom against the actions of the State, here included both the national and the state and local levels. Thus, just as a broader application was given to the free exercise clause of the First Amendment in *Cantwell*, "[t]here is every reason to give the same application and broad interpretation to the 'establishment of religion' clause" in this case[48].

> The free exercise clause, the *Cantwell* Court declared, protects "[f]reedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose". It "safeguards the free exercise of the chosen form of religion," the "freedom to act" on one's beliefs. It protects a "plurality of forms and expressions" of faith, each of which deserves equal protection under the law. "In the realm of religious faith, and in that of political belief," the Court wrote, "sharp differences arise". […] Similarly in *Everson*, the Court reiterated each of the first principles that the founders had incorporated into the establishment clause. "The 'establishment of religion' clause of the First Amendment means at least this," Justice Black wrote. No federal or state government (1) "can set up a church" – a violation of

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43 Ibid.

44 262 U.S. 390 (1923).

45 Witte Jr and Nichols, *Religion*, 112.

46 310 U.S. 296 (1940).

47 330 U.S. 1 (1947).

48 Ibid, 14-15.

> the core establishment principle; (2) "can force or influence a person to go or to remain away from church against his will or force him to profess a belief or disbelief in any religion" – a violation of liberty of conscience; (3) can "punish [a person] for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance" – a violation of both liberty of conscience and religious equality; or (4) "can, openly or secretly, participate in the affairs of any religious organizations or groups, or vice versa" – a violation of the principle of separation of church and state"[49].

In the United States of America, therefore, both the free exercise of religion and the prohibition of an established religion by the State are corollary to the separation of Church and State. The primary protection of religious freedom emanates from the First Amendment to the Constitution, which virtually erected a wall of separation between the Church and the State.

1.2.2. Brazil: Article 5 of the Constitution

Historically, only one of the seven Brazilian Constitutions attributed an official religion to the state. Since the Constitution of 1891, the Brazilian state became 'secular', not having an institutional religion attached to it[50]. In its origin, the dissociation of Church and state came with "the idea of religious tolerance and the prohibition on the state against imposing an official religion on the believer's private realm"[51].

The current Constitution establishes religious freedom as a "fundamental right", although not as clearly as the First Amendment of the United States:

> Freedom of conscience and belief is inviolable, and it is secured the free exercise of religious worship, and guaranteed, in the form of the law, the protection to places of worship and its liturgies. […] No one will be restricted of their rights because of religious belief or philosophical or political con-

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49 Witte Jr and Nichols, *Religion*, 114-115.

50 Uadi Lammêgo Bulos, *Direito Constitucional ao Alcance de Todos* [Constitutional Law at Everybody's Reach] (São Paulo: Saraiva, 2010) 303.

51 J J Gomes Canotilho, *Direito Constitucional e Teoria da Constituição* [Constitutional Law and Constitutional Theory] (Coimbra: Almedina, 2005) 383 (Free translation).

> victions, unless if this right is invoked to refrain from complying with a legal duty imposed to all […][52].

The Brazilian "Bill of Rights" is entrenched in its Constitution as a so-called "stone-clause" ("*cláusula pétrea*"), meaning that the "fundamental rights and freedoms" are protected from any changeability pursuant to their abolition[53]. This does not mean, however, that religious freedom, as expressed in the Brazilian Constitution, is considered an absolute right[54]. Albeit "fundamental", the tenets and particularities of religious freedom are always subject to restrictive interpretation by the Supreme Court. Because of legislative techniques that purposefully delimit the scope of the fundamental rights and freedoms, it would be a mistake to believe that, despite being a "stone clause", freedom of religion is interpreted as absolute.

As Thiago Rafael Vieira says, the Brazilian Constitution appreciates the holistic character of religion in an individual's life[55]. It aims at protecting religious freedom integrally in consequence of the specific socio-political structure of Brazil. Indeed, according to a literal and structural interpretation of the text of the Constitution, the Brazilian State should protect the religious institution's exercise of religion without interfering in its organisation[56].

José Afonso da Silva claims that the constitutional text aims to protect religious freedom in three realms: freedom of belief, freedom of worship, and freedom of religious organisation[57]. One of the means towards assuring such religious liberty is via tax exemptions[58], despite the possibility of intersections between Church and State in other areas:

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52 *The Federative Republic of Brazil Constitution 1988*, Article 5, VI and VIII (Free translation).

53 Alexandre de Moraes, *Direito Constitucional* [Constitutional Law] (São Paulo: Atlas, 2003) 39.

54 José Cretella Junior, *Curso de liberdades públicas* [Course of public liberties] (São Paulo: Forense, 1986) 91.

55 Thiago Rafael Vieira, 'A Previsão Constitucional do Direito Religioso no Brasil e sua Autonomia Constitucional' ['The Constitutional Provision of Religious Freedom in Brazil and its Constitutional Autonomy'] *Dignitas* I(1) 11-23.

56 Gilmar Ferreira Mendes, Inocêncio Mártires Coelho and Paulo Gustavo Gonet Branco, *Curso de Direito Constitucional* [Constitutional Law Course] (São Paulo: Saraiva, 2010) 511.

57 José Afonso da Silva, *Curso de Direito Constitucional Positivo* ('Course of Positive Constitutional Law') (Malheiros, 23rd ed, 2004) 248.

58 *The Federative Republic of Brazil Constitution 1988*, Article 150, VI, b.

> The constitutional system embodies, even expressly, joint action measures promoted by the public authorities and the religious denominations, and recognises as official certain acts practised in the ambience of religious services, such as the extension of civil effects to religious weddings[59].

The generalisation in the treatment of religious freedom in the Brazilian Constitution evinces some issues, one of them being that, although the Constitution is extensive and detailed in many aspects, when it comes to the relationship between the Church and State it is incapable of projecting and regulating all possible interactions. Matters where religion and other social and governmental activities intersect are imprecisely treated in the Constitution. As a result, the contours of the State's interference in Church matters are continuously analysed by Brazilian Courts.

In some cases, the Brazilian Supreme Court has held that the matters brought before the Court usually concern the organisation of a religious institution. Thus, it has set aside its competence to review such cases[60]. Nonetheless, the Supreme Court still faces the issue of the flexible boundaries of state in matters of religion, which are the result of general and abstract legislative definitions (such as the notions of order, peace, or the infringement of laws and costumes)[61].

In Brazil, therefore, the recognition of religious freedom is closely linked to the interpretation of state's limits given by the Courts, although there are general and structural provisions in the Constitution concerning the separation between Church and State.

1.2.3. Section 116 of the Australian Constitution

Although most of the influence on the interactions of Church and State in Australia originally came from England, which, as seen, had a nationalised religious tradition, starting with the national administration of 1833 Australia began to lay the ground for an actual scission between Church and State[62]. The context in which the Australian Constitution of

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59 Mendes, Coelho and Branco, *Curso*, 513 (Free translation).

60 As an example: RE 80.340, RTJ 81/471, Supreme Court of Brazil.

61 RHC 62240 (1984); ADI 2646 (2003); ADI 2857 (2007); ARE 1014615 (2017); RHC 168.353 (2019), all from the Supreme Court of Brazil.

62 Michael Hogan, "Separation of Church and State: Section 116 of the Australian Constitution" *The Australian Quarterly* 53(2): 214-228, 1981.

1901 was approved was more pluralist than when the colonies were first settled[63]. The political setting during the Constitution's drafting was also reasonably similar to the one in the United States of America, and there is to a certain extent a relationship between the First Amendment to the US Constitution and section 116 of the Commonwealth of Australia Constitution 1901[64]. Section 116 states that "[t]he Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth".

Michael Hogan assents that this section "is not a guarantee of the separation of church and State or a guarantee of religious freedom in Australia"[65]. He argues that the separation of Church and State, as well as the protection of religious belief in Australia, is but a myth.[66] His view is supported by a narrow interpretation given by the High Court of Australia in the few cases that appeared before the Courts concerning section 116. Notwithstanding, the Constitution still provides the underlying aspects of separation between Church and State and religious protection in Australia[67], albeit limitedly, as follows from the interpretation given by the High Court.

The first case related to religious freedom in Australia before the High Court was *Krygger v Williams* (1912)[68]. In this case, the High Court of Australia analysed an appeal made by Mr Krygger after he had failed to render compulsory military training as demanded by the Defence Act 1903 (Cth). The unsuccessful appeal was determined by the Court's limited approach

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[63] Sir George Grey's speech at the Federal Convention, reproduced in the Western Mail on 11 April 1891, demonstrates the new pluralist religious environment in Australia. Although he did not refer to the content of section 116 of the Constitution, his thoughts thereby expressed were consistent with the text of proposition later approved <https://trove.nla.gov.au/newspaper/article/33065065>.

[64] Clifford L Pannam, "Traveling Section 116 with a U.S. Road Map." *Melbourne University Law Review* 4 (1963) 41.

[65] Hogan, *Separation*, 222.

[66] Ibid, 225-226.

[67] Luke Beck, "Clear and Empathic: The Separation of Church and State under the Australian Constitution." *University of Tasmania Law Review* 27(2) (2008): 161-196.

[68] *Krygger v Williams* 15 CLR 366 (1912).

towards the literal meaning of section 116. In the words of the Chief Justice Samuel Griffith:

> To require a man to do a thing which has nothing at all to do with religion is not prohibiting him from a free exercise of religion. It may be that a law requiring a man to do an act which his religion forbids would be objectionable on moral grounds, but it does not come within the prohibition of sec 116, and the justification for a refusal to obey a law of that kind must be found elsewhere. The constitutional objection entirely fails[69].

In later cases as Jehovah's Witnesses[70] and Scientology[71] the High Court maintained its understanding, stating that "freedoms guaranteed by law are not absolute"[72]. Still, although the most recent decisions recognised religious freedom as essential to a free society[73], the High Court acknowledges that section 116 provides "important safeguards for religious freedom for Australians"[74]. The liberties must, however, observe some boundaries "that are reasonably necessary for the protection of the community and in the interests of social order"[75].

While some scholars argue that section 116 effectively promotes religious freedom only for the private or individual realm[76], Nicholas Aroney proposes that both an analytical reading of the text and the case law point

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[69] Ibid, at 369.

[70] *Adelaide Company of Jehovah's Witnesses Incorporated v The Commonwealth* ('Jehovah's Witness case') 67 CLR 116 (1943).

[71] *Church of the New Faith v Commissioner of Pay-Roll Tax* (Vic) ('Scientology case') 154 CLR 120 (1983).

[72] Robert French, *Religion and the Constitution* (Speech to the WA Society of Jewish Jurists and Lawyers Inc, Perth, 14 May 2013).

[73] Mason ACJ and Brennan J in *Scientology* case at 130.

[74] *Attorney-General (Vic) (ex rel Black) and Ors v Commonwealth and Ors* ('DOGS case') 146 CLR 559 at 609 (1981).

[75] *Jehovah's Witness* case at 155.

[76] Joshua Puls, "The Wall of Separation: Section 116, the First Amendment and Constitutional Religious Guarantees." *Federal Law Review* 26 (1998) 139; Stephen McLeish, "Making Sense of Religion and the Constitution: A Fresh Start for Section 116" *Monash University Law Review* 18 (1992); Wojciech Sadurski, "Neutrality of Law Towards Religion." *Sydney Law Review* 12 (1990).

to a communal as well as a personal dimension to religious protection in Australia[77]. Aroney says:

> [R]easoning about the proper scope of freedom of religion ought not to begin with narrow and deductively individualist presuppositions about its nature, foundations, and scope. Such assumptions are not true to the underlying social reality of religious faith and practice, and they risk capture by interests that would subject all of civil society to secularist values in a manner that is quite contrary to the importance of religious freedom as a fundamental human right[78].

Genuine protection of religious liberty can only exist where both the individual and the associations are encompassed in such a freedom clause. This is a corollary of pluralist constitutionalism that understands and respects the limits of each societal sphere[79].

1.3. Concluding Notes

It is controversial to support the protection of religious freedom when many see "privatization of religion as a precondition of modern secular and democratic politics"[80]. Micah Schwartzman opposes to the current status of religious freedom in society[81]. Brian Leiter similarly argues that the State should be "irreligious", "areligious" or "secular", not carving out "protections that encourage individuals to structure their lives around categorical demands that are insulated from the standards of evidence and reason we everywhere else expect to constitute constraints on judgement and action"[82]. According to them, religious freedom "threat[s] the very foundations of our constitutional order"[83].

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[77] Nicholas Aroney, "Freedom of Religion as an Associational Right." *University of Queensland Law Journal* 33(1) (2014) 158.

[78] Ibid, 185.

[79] Ten Napel, *Constitutionalism*.

[80] José Casanova, "The Secular, Secularizations, Secularisms." In *Rethinking Secularism*, edited by Craig Calhoun, Mark Juergensmeyer and Jonathan VanAntwerpen (Oxford: Oxford University Press, 2011) 60.

[81] Micah Schwartzman, "What If Religion Is Not Special?" *University of Chicago Law Review* 79 (2012): 1351-1427; and "Religion as a Legal Proxy." *University of San Diego Law Review* 51 (2014): 1085-1104.

[82] Brian Leiter, "Why Tolerate Religion?" *Constitutional Commentary* 25 (2008) 25.

[83] Schwartzman, *Religion*.

Andrew Koppelman[84], Thomas Berg[85], and other scholars[86] disagree. Confining of religious freedom to a private realm is inconsistent with human nature. As Vorster puts it, "[t]o be fully human means to cradle the spirituality of one's religion and to build one's life on the foundation that the religion offers"[87]. The proposition that a person can segregate her religious beliefs from any other action in life would render social life unfair and inequitable[88].

The free exercise of religion implicates that one can establish her self-definition in the political, civic and economic life, as she sees fit[89]. Opposing religious freedom erodes individual liberty in its essence. Such a path is dangerous and may lead to totalitarianism. To argue against religious freedom is to stand against diversity in opposition to personal speech. Inasmuch as plurality weakens, civil liberties decrease[90]:

> When the government pushes out of society the religious caretaker and pretends it can become one itself, it diminishes all freedoms. It is not only because the government cannot do this efficiently, it is because when it names itself the caretaker it also falsely claims to be itself the source of all rights[91].

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84 Andrew Koppelman, "Religion's Specializes Specialness" *University of Chicago Law Review Dialogue* 80 (2013): 71-83.

85 Thomas C Berg, "Secular Purpose, Accommodations, and Why Religion is Special (Enough)." *University of Chicago Law Review Dialogue* 80 (2013): 24-42.

86 Michael W McConnell, "Why Protect Religious Freedom?" *Yale Law Journal* 123 (2013): 770-810; Mark L Rienzi, "The Case for Religious Exemptions – Whether Religion is Special or Not." *Harvard Law Review* 127 (2014): 1395-1418; Witte Jr and Nichols, *Religion*.

87 J M Vorster, "Current Options for the Constitutional Implementation of Religious Freedom." In *Freedom of Religion*, edited by A van de Beek, Eduardus Van der Borght and Bernardus Vermeulen (Leiden: Leiden and Boston, 2010): 155–179.

88 Nicholas Wolterstorff, "The Role of Religion in Decision and Discussion of Political Issues" in Robert Audi and Nicholas Wolterstorff, *Religion in the Public Square: The place of religious convictions in political debate* (Maryland: Rowman & Littlefield, 1997): 105-108.

89 Justice Anthony Kennedy in *Burwell v Hobby Lobby Stores* 573 US 125 (2014), concurring opinion, 2.

90 Roger Trigg, *Equality, Freedom, and Religion* (Oxford: Oxford University Press, 2012).

91 Kristina de Bucholz, "Religious Liberty is About Who We Are" in Monsma and Carlson-Thies, *Free to Serve*, 68.

2. Religious Freedom and Private Schools: Analysis of Cases and Public Policies

Ten Napel argues that "the cup of religious freedom is indeed gradually becoming half empty rather than half full"[92]. What once was deemed as the "first freedom" is now becoming a "second-class right"[93]. An area where such a reality is evident is education. However, before considering the case law, legislation, and public policy in Australia, Brazil, and the United States of America, it is necessary to acquire a basic understanding of the educational system in each of the three countries.

2.1. An Overview of Private Education in Australia, Brazil, and The United States of America

There is a similar tendency in Australia, Brazil and the United States of America in relation to their application of laws towards private schools, especially in the case of confessional education institutions. Each of the three countries allocate responsibilities for education differently within their federal systems.

In Australia, the states are primarily responsible for the administration and financing of private education. Despite significant contribution by the Commonwealth, especially via "tied grants"[94], most of the regulation concerning education still resides within the states[95]. The focus of the states, however, is public education, while the Commonwealth is the primary provider of funding to private education in Australia[96].

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92 Ten Napel, *Constitutionalism*, 7.

93 Mary Ann Glendon, "Religious Freedom: Yesterday, Today and Tomorrow." *The 2015 Cardinal Egan Lecture* (2015) <www.magnificat.com/foundation/pdf/M_A_Glendon_2015.pdf>.

94 Anthony R Welch, "Ties that Bind? Federalism in Australian Education." *Education in Australia, New Zealand and the Pacific* (London: Bloomsbury Academic, 2015).

95 Jack Keating, "A New Federalism in Australian Education: A Proposal for a National Reform Agenda" *Education Foundation* (2009).

96 David Gonski, 'Review of Funding for Schooling', Final Report, December 2011 ('Gonski Report').

Private education can be roughly divided into the Catholic and the Independent schooling systems[97]. The first category embodies those religious schools organised and administered by the Catholic Church, where scientific education is coupled with the promotion of religious values and beliefs. Independent schools often also aggregate religious ethos to their didactics, as well as formulate curriculum and implement distinct characteristics in relation to, for example, staff hiring.

Both in the Catholic and the Independent schooling systems, a variety of education providers are legally free to teach in accordance with their ethos. Thus, in Australia, private schools are generally free to offer education in accordance with their particular confessional orientations, although the State lays down fundamental requirements in relation to curriculum and assessment, and also evaluates student performance through standardised testing.

Furthermore, the Australian State may also drive private school conduct by means of financial coercion. Although the Commonwealth has no constitutional powers to control education, section 96 of the Australian Constitution provides that "the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit". This provision created the possibility for the State to "tie" the payment of substantial amounts to private schools if they comply with particular education policies[98].

The Brazilian education system is similarly divided into public and private schools[99], with the latter being regulated by national-driven norms and policies[100]. Private schools are divided into four categories according to the National Education Guidelines and Basis Law: "private in the strict sense", confessional, communal and philanthropic[101]. This highly nationalised education system in Brazil impedes innovation in some teaching-related aspects of private schooling, such as rules about curriculum and staff administration.

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97 Trevor Williams and Peter Carpenter, "Private schooling and public achievement in Australia." *International Journal of Educational Research* 15(5) (1991): 411-431.

98 Welch, *Ties that Bind.*

99 *The Federative Republic of Brazil Constitution* 1988, Art 206, III.

100 ADI 1.266/BA, Supreme Court of Brazil (2005).

101 *Federal Law* No. 9.394/1996 (Bra).

Although private schools are supposed to be legally freer than public schools, the State objects to the inclusion of "non-laic" teachings in their educational methodologies. In practice, Brazilian legislation suffocates private schools by prohibiting them from promoting other values and belief systems contrary to that of a "secular" State. Even confessional schools (that are pedagogically allowed to teach their doctrines) are subjected to intense State regulation. Such schools do not have the freedom to implement particular ethos in their affairs about staff selection, and since the Brazilian State also provides an annual national education testing, curriculum is standardised and confessional schools are unable to bring innovations to it.

As a result, private education in Brazil is burdened not necessarily by financial mechanisms as in Australia, but rather by overwhelming State regulation. The Brazilian education system thus constrains private schools in ways that undermine their freedom to teach by their core values and beliefs.

The education system in the US is essentially decentralised, trusting to local boards the governance of schools. There is less governmental influence in its system than in the other two countries. Nevertheless, growing State legislative intervention in schools has been reshaping the North American education system[102].

Private education in the United States of America is divided into three major categories that include Parochial schools, Independent schools and non-sectarian for-profit private schools. The first are private educational institutions affiliated with religious entities that have the freedom to promote their confessional beliefs[103]. Independent schools are also able to include in their curriculum their philosophy and religious ethos. The main difference between these two types of schools is their administration, since a board of trustees, and not a religious institution, administers the latter[104]. Additionally, both of them are eligible for receiving public funding, while the third category, usually referred to as the 'non-sectarian pri-

[102] Michael Heise, "The Political Economy of Education Federalism" *Cornell Law Faculty Publications, Paper 64* (2006).

[103] Robert Kennedy, "Religious Private Schools." *Thought Co* (online), 21 March, 2019. https://www.thoughtco.com/nonsectarian-and-religious-private-schools-2774351.

[104] National Association of Independent Schools – NAIS (USA) https://www.nais.org/about/about-nais/.

vate school', is an organisation that does not receive any external financial contribution from the State.

The way the system works in the United States of America gives more autonomy to schools' administration, including concerning curriculum and staff. Despite the increasing claims for a more interventionist State in matters of education[105], the school system in North American federalism provides less intervention and, thus, more freedom for private schools to promote their religious beliefs.

2.2. Private School's Religious Freedom: Cases, Laws and Public Policies

2.2.1. United States of America

The religious freedom of private schools in the United States of America is slowly weakening, despite recent faith-based organizations' victories before the Supreme Court[106]. Mary Ann Glendon suggests that:

> As freedom of religion comes into conflict with claims based on nondiscrimination norms, abortion rights, and various lifestyle liberties, the freedom of religious entities to choose their own personnel, and even to publicly teach and defend their positions on controversial issues, is coming under increased attack[107].

Most cases concerning education judged by the US Supreme Court specifically relate to public schools[108]. Nonetheless, an overview of those cases, coupled with some constitutional provisions, should enlighten the current status of religious freedom in private education in the United States of America.

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105 See the graphic in *Brittany Corona*, 2014. "Nearly 50 Years of Growing Federal Intervention in Education, Explained in One Picture" The Daily Signal (online), 11 June, 2014. https://www.dailysignal.com/2014/06/11/federal-government-intervention-education-continues-grow/.

106 Ten Napel, *Constitutionalism*, 34.

107 Mary Ann Glendon, "The Harold J. Berman Lecture. Religious Freedom—Second-Class Right?" *Emory Law Journal* 61 (2012) 978.

108 *McCollum v Board of Education* 333 U.S. 203 (1948); *Engel v Vitale* 370 U.S. 421 (1962); *Stone v Graham* 449 U.S. 39 (1980), are just few examples.

In 1987, the US Supreme Court decided the *Amos* case[109], where a building engineer was dismissed by a local Latter-Day Saints Church due to his lack of qualification to be a member of the church. *Amos* laid grounds for the understanding that religious organizations were exempt from anti-discrimination laws when hiring and firing staff based on their religion.

Amos served as guidance for later cases before the US Supreme Court involving schools. In *Hosanna-Tabor Evangelical Lutheran Church v Equal Employment Opportunity Commission et al.*[110], the United States Supreme Court unanimously held that a religious school did not have to comply with anti-discrimination laws when firing a teacher. The ruling, at first, seems favourable for the private school's religious freedom rights.

The part of the decision concerning the religious freedom claim, however, was based on two features that could be overturned if applied in different scenarios. First, a member congregation of the Lutheran Church-Missouri Synod operated the school, which meant that the Court saw the private school as an extension of the religious activity of the church and not as an independent 'secular' educational activity. Additionally, the teacher who sought reappointment was a 'called teacher' and not a 'lay teacher', meaning that the position required her to have theological qualification to enable her to be a religious minister to the children.

These two nuances of the case made the US Supreme Court rule in favour of the religious school. However, without these features results might have been different. This is because the decision was grounded on both the establishment clause, which 'prevents the Government from appointing ministers', and on the free exercise clause, which prevents the State from 'interfering with the freedom of religious groups to select their own'[111]. The school won the case mainly due to these features, that is, it was regarded as a religious institution, and the teacher had had ministerial training as part of her teaching qualification.

Michael McConnell, in comparing *Hosanna-Tabor* with another Supreme Court case called *Employment Division v Smith*[112], affirms that 'the

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109 *Corporation of Presiding Bishop v Amos* 483 U.S. 327 (1987).

110 565 U.S. (132 S. Ct. 694) (2012).

111 Ibid.

112 *Employment Division, Department of Human Resources of Oregon v. Smith* 494 U.S. 872 (1990).

Free Exercise clause provides far greater protection to the "faith and mission" of religious institutions than to individual acts of religious exercise'[113]. The idea is that although legislatures often create exemptions to religious employers from certain staff-hiring rights, other institutions that do not have a primary religious character are usually deemed to be outside of such religious freedom protection[114].

This legal scenario has repercussions for private schools. It means that for-profit or non-confessional education institutions, albeit declaring that they follow a particular religious ethos, do not necessarily enjoy the benefit of legislative exceptions that are meant to protect their religious freedom. 'According to this view, organizations the faithful have created in order to carry out their religious duties do not have religious freedom rights'[115]. This reasoning is also evident in the *World Vision* case[116].

The *World Vision* case came before the United States Court of Appeals for the Ninth Circuit because of the dismissal of three employees based on religious grounds. By a narrow two-to-one margin, *World Vision*'s religious freedom rights prevailed. The Court found that, despite not being a 'religious institution' in its core, the humanitarian assistance organization had its roots in a Christian worldview that informed all of its actions and values. In the opinion of the Court, *World Vision* enjoys the benefit of the legal exemptions because it 'is organized for a religious purpose, is engaged primarily in carrying out that religious purpose, holds itself out to the public as an entity for carrying out that religious purpose, and does not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts'[117].

It is relevant to observe that despite World Vision's victory, the Court imposed several qualifications. Although World Vision was not a religious institution in and of itself, the Court understood that World Vision's primary concerns related to carrying out religious purposes in all of its activities. The

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113 Michael McConnell, "Reflections on Hosanna-Tabor." *Harvard Journal of Law and Public Policy* 35 (2012) 836.

114 Witte Jr and Nichols, *Religion*, 234.

115 Monsma and Carlson-Thies, *Free to Serve*, 19.

116 Silvia Spencer, *Vicki Hulse and Ted Youngberg v World Vision.* U.S. Court of Appeals for the Ninth Circuit (No 08-35532) (2010).

117 Ibid.

Court thus created a new framework for the comprehension of religious institutions in accordance with *Hosanna-Tabor*. The dissenting judgement in the *World Vision* case, however, adopted an even narrower approach:

> […] we ask only whether the primary activity of a purportedly religious organizations consists of voluntary gathering for prayer and religious learning. […] The vast majority of World Vision's work consists of humanitarian relief […]. In short, World Vision is nothing like a church[118].

Such an approach only protects religious belief that has been institutionalised. However, for many believers that own schools, this is not the case. In order to receive protection such associations would have to demonstrate that their primary functions relate to common religious exercises, such as worship and doctrinal teaching conceived narrowly.

Private schools have the fundamental goal of instructing children in the many theoretical sciences. Many religions believe, however, that children are to be instructed according to their ethos, which means that sciences, mathematics and languages must be taught in a manner that is complimentary to their inner and religious growth[119]. When the State requires that only 'confessional' or, namely, 'religious' schools can teach in this manner, it abrogates the religious freedom of other types of private schools. Those private schools that are not necessarily 'confessional', but still have some religious values underlying their activities, lose their capacity to teach according to their ethos.

In *Hobby Lobby*[120], the US Supreme Court faced such an issue of non-religious but faith-based organizations claiming stronger protection of their religious freedom. This time, however, the institution was a for-profit business. In this case, the Court defended the right of the for-profit organization to object to the compulsory provision of contraceptives for their employees, as required by the US Department of Health and Human Services. This recent case is unique in its protection of religious freedom for private non-religious faith-based organizations. Nonetheless, even in victory, there is still reason for concern.

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118 Ibid, from the dissenting judgment of Judge Marsha S Berzon, 12597-12599.

119 *Proverbs* 22:6; and, Hasan Ibn Al-Fadl Al-Tabarsi, Makarim Al-Akhlaq [Nobilities of Character] (2014) 484.

120 *Burwell v Hobby Lobby* 573 U.S. (134 S. Ct. 1811) (2014).

As Monsma and Carlson-Thies argue, *Hobby Lobby* was a close five-to-four decision, and the four dissenting judges denied that a for-profit institution should be able to 'impose' on employees their own beliefs, arguing that religion should be exercised only in private[121]. Moreover, the specifics of the case led the US Supreme Court to analyse whether society valued more 'the religious freedom rights of deeply religious persons and the businesses they have founded or the ability of their employees to obtain birth control free of charge'[122], which does not reach the main issues concerning the protection of religious freedom for non-religious institutions. Paul Horwitz, with the same caution, described it as 'the *Hobby Lobby* moment', alluding to the fact that other circumstances also dictated the Court's decision[123].

A problem with the reasoning in this case is that religious freedom is conceived as a 'right to discriminate' instead of as a positive right to manifest or practice a particular faith's worldview. Non-confessional private schools with a religious ethos are in danger of having their religious freedom rights pragmatically abrogated. Although recent cases in the United States identify non-religious institutions as possible repositories of religious liberties, there is a sense in which private schools' liberties exist only insofar as they are administered or related to a Church or to the measure that they exercise Church-like activities (i.e. worship, humanitarian and social care, and doctrinal teachings).

2.2.2. Australia

Similar discussions of religious freedom have happened in Australia. A somewhat recent report on religious freedom has reinitiated several debates about the religious school's so-called 'right to discriminate'.

The *Ruddock Report on Religious Freedom* supposedly demonstrated that faith-based educational institutions could legally implement discriminatory measures to select staff members and students on religious grounds[124]. The Report promoted religious freedom in the sense usually referred to in Australia, that is, in a negative sense, where such a liberty is composed of

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121 Monsma and Carlson-Thies, *Free to Serve*, 56-57.

122 Ibid, 57.

123 Paul Horwitz, "The Hobby Lobby Moment" *Harvard Law Review* 128 (2014): 154–189.

124 Ruddock, *Report*.

mere exemptions to discriminate against others[125]. Religious freedom, therefore, in the terms evinced by the Report, is not a right to promote particular dogmas and religious values.

Submissions to the Ruddock Report demonstrated the desire of selected groups to extinguish any exemptions-based protection to the freedom of faith in Australia. Such groups' submissions wished to see removed the little protection that antidiscrimination exemptions give to religious organisations in the legislation[126]. 'In its narrowest form, this campaign would make it unlawful for religious bodies (schools in particular) to refuse to employ people who are in sexual relationships outside of marriage (whether gay or straight) on the basis that such relationships are contrary to the teaching and practice of the religion'[127]. In wider forms, the attempts were to wind back the rights of any institution to make decisions based on religion, thus undermining the framework of religious freedom protection in Australia[128].

A major problem concerns the fact that the Expert Panel in Ruddock's Report concluded that only religious or confessional organisations are entitled to such exemptions-based protection[129]. By making recommendations exclusively towards the rights of 'religious schools' to 'discriminate in relation to the employment of staff, and the engagement of contractors' if such discrimination is founded on religious grounds[130], the Report limited the scope of religious freedom protection uniquely to religious schools. Moreover, it also ended up minimising the need for a different approach to the protection of religious freedom in Australia[131].

A possible consequence of such a limited conceptualisation of religious freedom may be that legislation will override the antidiscrimination exemp-

125 Ibid, 'Australian Government response to the Religious Freedom Review' (December 2018).

126 E.g. *Sex Discrimination Act 1984* (Cth), cited in the 'Australian Government response to the Religious Freedom Review' (December 2018), 3.

127 Mark Sneddon, "Religious freedom, true tolerance and the right to be wrong" *Zadok Perspectives* 139 (2018) 21.

128 Ibid.

129 Ruddock, *Report*, 49 at 1.165.

130 Ibid, 2.

131 Michael Quinlan, "The chimera of freedom of religion in Australia." *News Weekly* (online) February, 2019. https://www.e-ir.info/2019/01/21/the-chimera-of-freedom-of-religion-in-australia-reactions-to-the-ruddock-review/

tions, leaving small or no space for faith-based institutions to promote their religious ethos. In 2018, Senator Richard Di Natale proposed the Discrimination Free Schools Bill, which aimed to remove all the antidiscrimination exceptions from both the Sex Discrimination Act 1984 and Fair Work Act 2009 in relation to all kinds of educational institutions[132]. Even though existing freedoms are narrow, there are proponents of even greater restriction on the religious freedom for private schools in Australia.

This idea of mere "protection by exemptions"[133] correlates with the High Court's narrow interpretation of section 116. In addition, such protections are weakened to the extent that they are limited to religious organisations and places of worship, and not to other faith-based associations, such as the independent private schools.

Christian Youth Camps v Cobaw Community Health Services[134] demonstrates a similarly narrow approach towards religious freedom. The case concerned a situation in which a Christian institution that owned a Youth Camp refused to rent its property to an organisation that supported young people with same-sex attraction. The Youth Camp institution based its denial on exemptions contained in the Equal Opportunity Act 1995 (Vic). The Victorian Court of Appeal decided in accordance with the literacy of the legislation, which stated that the "exemptions apply to conduct 'by a body established for religious purposes'"[135], thus affirming that the Christian Youth Camp refusal on religious grounds was unlawful. Since the Christian Youth Camp was not an entity established for religious purposes, the Court understood that it discriminated against the organisation that intended to rent the property.

Both the Ruddock Report and the Australian case law reveal the shaky grounds on which religious freedom in Australia stands. The lack of positive protection in the Australian legal system potentially diminishes religious institutions' liberty to act freely according to their ethos. Such a limited view of religious freedom imposes on all faith-based organisations, including in-

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132 *Discrimination Free School Bill 2018* (Cth). https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=s1147#.

133 George Williams, *Protecting Religious Freedom in a Human Rights Act* (Lecture at the Religious Freedom after Ruddock Conference, University of Queensland, Brisbane, 6 April 2019).

134 VSCA 75 (2014).

135 Ibid.

dependent private schools, a more substantial burden than other non-religious institutions, since they have to submit to regulatory measures that may contradict their core beliefs in other to continue existing.

Patrick Parkinson, among other scholarly voices, calls for a more appropriate interpretation of the Ruddock Report and of freedom of religion as a whole. He proposes that religious organisations should have positive rights to manifest or practice their religion rather than "rights to discriminate"[136]. In Parkinson's opinion:

> Faith-based organisations such as religious schools and hospitals, for the most part, do not want the retention of the 'right to discriminate' against people on the basis of certain characteristics, but rather the right to choose staff who adhere to the faith with which the organisation identifies — or at least, who will uphold the ethos and values of the organisation[137].

Parkinson and Joel Harrison also argue that the ability of religious institutions, including schools, to select staff and members is necessary for their functioning and organisation[138]. There is a logical principle underlying their argument. If faith-based institutions are unable to promote their values and beliefs, they might as well cease to exist[139].

Applying such a perspective to non-religious private schools, it is impossible for an independent educational institution to follow specific religious directives and, at the same time, to dissociate their 'religious' activities from their 'secular' ones[140]. To think otherwise is to 'oppress'[141] faith-based organisations by trying to fit them into a 'discrimination exemption' box.

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136 Merritt, *Academics denounce Ruddock*.

137 Patrick Parkinson, "Courting religious voters in the 2019 federal election." *ABC Religion & Ethics* (online), 3 April, 2019. https://www.abc.net.au/religion/courting-religious-voters-in-the-2019-federal-election/10966804.

138 Joel Harrison and Patrick Parkinson, "Freedom beyond the Commons: Managing the Tension between Faith and Equality in a Multicultural Society." *Monash University Law Review* 19 (2014): 438-442.

139 Monsma and Carlson-Thies, *Free to Serve*, 16-17.

140 Gwyneth Pitt, "Religion or Belief: Aiming at the Right Target?" In *Equality Law in an Enlarged European Union: Understanding the Article 13 Directives*, edited by Helen Meenan (Cambridge: Cambridge University Press, 2007) 202, 222–223.

141 John Finnis, "Equality and Differences." *American Journal of Jurisprudence* 56(17) (2011) 37.

Private schools, and other private institutions, even if openly confessional, should have the positive right to promote religious beliefs and values in accordance with the faith their directors or owners confess. The kind of corporation or the association's legal form should never imply a restriction on the proclamation of the institution's religious beliefs, even in the exercise of 'secular' activities. Both Independent and Catholic schools should be protected against discriminatory legislation and have the right to exercise all their functions (and not only the primary ones) in accordance with their religious (or non-religious) ethos.

The protection of religious freedom exclusively through discrimination exemptions is unsatisfactory when it comes to the holistic religious worldviews of religious people, companies and associations. Indeed, religious freedom in Australia is far from being a right for all people. Quite the contrary, and if the trend is confirmed, it is increasingly becoming nothing more than a narrow exception given to religious entities in an anti -religious legal environment.

This call for a real protection of the freedom of religion in Australia also includes a shield against the State's financial interference. The underlying idea is that schools of any category should be treated equally, independently of their *ethos*[142]. When funding education, the Commonwealth and states should abstain from imposing restrictive measures to the proclamation of religion by private schools. The use of 'tied grants' as means of funding private schools can be dangerous insofar as it regulates actions and directs the beliefs of private schools.

2.2.3. Brazil

The situation in Australia concerning religious freedom is not unique. The Brazilian legislation is very rigid when it comes to allowing private educational institutions that are not 'confessional' to teach accordingly to a particular religious ethos. Also, most of the religious liberties in Brazil are related to exemptions rather than positive rights. Moreover, the com-

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142 'Parity, not privilege' (slogan of Abraham Kuyper's political party campaign) mentioned in "The Point of the Kuyperian Pluralism." Comment (online) 2013. https://www.cardus.ca/comment/article/the-point-of-kuyperian-pluralism/.

plexity of the laws and sometimes the inconsistency between them increasingly erode religious freedom for many faith-based organisations, including private schools.

Apart from the Constitution, which dedicates ten articles exclusively to the organization of the federal education system, the Federal Law No. 9.394/1996 (National Education Guidelines and Basis Law) is the most important statute on education in Brazil. Although it establishes fundamental principles of education, there is no express right to religious freedom in the educational realm. There are general references to the freedom of thought, to a pluralism of ideas or toleration, but no religious liberties are guaranteed to schools[143]. The only exception found in this statutory provision is the recently inserted article 7-A, which allows students to be absent from classes due to religious grounds[144].

Being a civil law country, contrary to the other two countries here analysed, Brazil's legislation is comprehensive and detailed. Because of such a wide range of laws, decrees and codes, there is also a significant focus on public policies to regulate the general aspects of the statutory legislation. It is surprising that no religious freedom exemptions or faith-related rights are promoted. There is virtually no specific or widely applicable provision on religious freedom for students, staff or private schools in the Brazilian legislation.

As said before, private schools can be 'confessional', because they are administered by a religious institution and promote their religious ethos in accordance with their faith. However, the other private schools, and specifically the schools that are 'private in its strict sense' are usually impeded from promoting similar faith beliefs. These schools are hindered from any liberty in promoting religious ethos. A private school is either 'confessional' or 'secular'.

The lack of regulation concerning religious freedom in Brazil, apart from the constitutional reference to such a right, exposes how religious liberties are assessed on a case-by-case basis. As an illustration of such an unclear legal environment, in 2015, a 'private in its strict sense' school

143 Federal Law No. 9.394/1996 (Bra), Article 3.

144 Which derived from the *Federal Law No. 13.796/2019* (Bra).

with clear faith-based standards was brought before the Prosecutor's Office of the State of Pernambuco for a preliminary investigation on the grounds that they distributed pamphlets against the so-called 'gender ideology'[145]. The school was accused of not following the National Education Guidelines and Basis Law because it was discriminating against people on the basis of gender and, in doing so, potentially committing a crime[146]. More recently, another school in the same state was criticised for publicly confronting a 'diversity campaign' by a multinational burger company[147]. The former, however, is considered a religious school, and would have certain protection under the Brazilian legislation. Although the first mentioned matter was settled administratively, it demonstrates how 'private schools in its strict sense' in Brazil do not enjoy the same array of liberties as other categories of schools. If a school is not 'confessional' its religious freedoms are in constant danger.

Since there is no legislation directly protecting private schools' religious liberties, and since many cases concerning faith-based organisations are not brought before the Courts, it is difficult to ascertain the practical effect on private schools generally. Nevertheless, the idea that secular views and non-religious ideologies are the only ones that should be promoted in private and public schools (confessional schools excepted), raises serious questions about religious freedom in the Brazilian education sphere.

This state of affairs has led some groups to advocate for clearer procedures to ensure religious freedom in the Brazilian system. The 'School Without Political Party Bill' that is currently being discussed in Congress, for example, requires an 'impartial' teaching environment for both public and private schools. According to the program, no ideological or religious teaching is allowed, either in the public or private education systems, without a clear statement regarding the school's ethos being given to the stu-

145 PP Nº 37/2015 – 22ª Promotoria de Justiça de Promoção e Defesa da Cidadania e do Direito Humano à Educação (BRA).

146 According to the Brazilian legislation, private associations and corporations can commit crimes, which are either punishable by the imprisonment of the directors and owners or by pecuniary and other rights-limiting penalties.

147 https://www.diariodepernambuco.com.br/noticia/vidaurbana/2021/06/escola-religiosa-de-camaragibe-critica-campanha-lgbtqia-da-burger-kin.html

dents' parents[148]. The bill also prohibits the proclamation of any political doctrine or ideology that might be contrary to the moral and religious orientations of the parents[149].

All in all, religious freedom and private education are two intersecting instances of life. For countries like the ones mentioned above, religion and education do not easily dwell together. Despite some minimal protection to religion in the public square, usually in the realm of education faith doctrines are relegated to specific areas of particular schooling categories. Teaching systems are ruled by 'secular' beliefs, if not by anti-religious ones. This is a dangerous place for a pluralist constitutional State to be.

3. Some Considerations about the Limits of the State in Regulating Private Schools' Freedoms

The State should have as many limits as necessary to guarantee the sovereignty of the other associations in their own sphere. This is significant to the situations of Australia, Brazil and the United States of America concerning private schools' religious freedom. Private associations must have protection against the State in respect of their ethos.

The legal scenario in Australia, Brazil and the United States of America suggests that freedom of religion depends more on the nature and scope of the power of the State rather than the authority of each school within its own sphere. In the three countries, non-governmental spheres of life have their rights and freedoms exercised only insofar as the State allows it or sees fit. The inconsistent jurisprudence in the United States of America Supreme Court, the narrow interpretation given to section 116 by the Australian High Court and the lack of legislative protections in Brazil demonstrate an exorbitance of powers given to the State to say what religion is, who can exercise it, and when should it be used by private schools. The problem with this scenario to a pluralist society is evident.

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148 *School Without Political Party Bill* [Escola sem partido], Projeto de Lei No. 867/2015 (Bra). http://www.camara.gov.br/proposicoesWeb/fichadetramitacao?idProposicao=1050668. Article 3, paragraph 1.

149 Ibid, Article 3.

Inasmuch as the State requires or allows religion to be exercised only in particular environments or by specific categories of private associations, religious freedom is restrained. If the State adds to its role that of shaping the limits of other spheres, including private schools, then it assumes a greater role than the one it should have:

> When the government pushes out of society the religious caretaker and pretends it can become one itself, it diminishes all freedoms. It is not only because the government cannot do this efficiently, it is because when it names itself the caretaker it also falsely claims to be itself the source of all rights[150].

The question is, then, to what extent the State's regulation of private schools is too much? According to sphere sovereignty, the State has a vital role in maintaining the harmony of society, especially by using its coercive powers to 'compel mutual regard for the boundary-lines of each' sphere, defending 'individuals and the weak ones' against abuses and requiring all to bear financial and personal burdens for the sake of the maintenance of the State[151]. This does not mean, however, that the State can freely interfere with the rules of other spheres. Even when interacting with other spheres, the State ought to do so limitedly. As Kuyper puts it, only when the other sphere accepts such interference can the State act on it[152].

All in all, the golden rule is that the State should not interfere in other spheres. Specifically, it must not require faith-based organisations to repeal their religious ethos from their teachings or in the administration of their affairs. The State has no authority to say who can or cannot be hired in a private school, or what can or cannot be said inside a private school classroom. If private schools as faith-based organisations fulfil their educational goals by submitting themselves to religious-founded rules, no interference of the State is needed.

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150 Kristina A de Bucholz, "Religious Liberty is about Who We Are" in Monsma and Carlson-Thies, *Free to Serve*, 68.

151 Kuyper, *Lectures*, 97; and, Richard J. Mouw, "Some Reflections on Sphere Sovereignty", in *Religion, Pluralism, and Public Life: Abraham Kuyper's Legacy for the Twenty-First Century*, edited by Louis E Lugo (Grand Rapids: Eerdmans, 2000) 89-90.

152 Kuyper, *Lectures*.

The moment the State absorbs the task of defining what religion is, and who can exercise it, as it is happening in Australia, Brazil and the United States of America, it assumes a far greater sphere of power than it should have. Private institutions, if either faith-based or not, should not have to depend upon the State to approve their codes of conducts, values or standards. The limits of the State are externally delineated by the boundaries of the other societal orbits, sovereign in their own spheres.

Ultimately, a solution to cease the State's interference in private schools is the 'independence [for each] in their own sphere'[153], as suggested by sphere sovereignty.

4. Conclusion

Constitutional pluralism exists on the basis that individuals and associations are active participants of society and continuously share their thoughts, beliefs and values in the public square. To cherish diversity means to allow different spheres of life to act in accordance with their ethos, and to promote unity means to acknowledge that all spheres have internal limits that must be respected so that society can function properly. Unity in diversity is thus fundamental for healthy social development.

Many times, however, the State grows in its power in such ways that it becomes like an 'octopus', with its tentacles potentially reaching all other spheres of life[154]. The moment this happens, when the State becomes uncontrolled, individuals' and private associations' liberties and rights are at stake.

The religious freedom of private associations is threatened by the overwhelming presence of the State in all areas of life. In countries like Australia, Brazil and the United States of America, increasing control of the State over minimal aspects of religion ends up restricting private associations' (or schools, for example) freedom. Although the three countries have developed constitutional guarantees to protect the interference of the State in religious matters, the governmental impulses for controlling all aspects of life breaks through such barriers.

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153 Kuyper, *Lectures*, 94.

154 Ibid.

In Brazil, although the relevant legislation is extensive and detailed, no real protection of private schools' religious freedom is provided. The Supreme Court of Brazil has dealt with cases related to religious freedom of individuals, but no consistent legal framework exists that protects private schools' educational liberties. In a nutshell, if the school does not fit in the category of a confessional school, then its religious standards are wholly disregarded. In practice, non-confessional private schools in Brazil are obliged to follow secular instructions in relation to curriculum, staff hiring and administration.

Australia, in a similar way, has not yet recognised a positive right of religious freedom to faith-based organizations, which leads private schools not to have protection when it comes to administering particular issues concerning their religious ethos. The Ruddock Report demonstrated the consolidation of a narrow view of the protection of religious freedom in Australia. All in all, faith-based schools are increasingly targeted as having a 'right to discriminate' against others, and this will potentially restrict future developments of religious freedom in Australian private educational institutions.

In the United States of America, the Courts are on the verge of limiting the scope and the meaning of religion, which will affect many faith-based organizations that are not purely 'confessional'. In general, the trend suggests that the First Amendment's provisions that once were highly esteemed are now under attack. Recent judgments evince a growing rejection of some actions that are deemed discriminatory from a secular perspective, thus reducing the scope of action to all kinds of institutions, including private schools, even when acting on the grounds of religious convictions.

To avoid State interference in these areas, sphere sovereignty proposes a theoretical matrix that combines the reality of structural pluralism with the protection to rights and freedoms of private associations. This pluralistic view asserts that all spheres must be considered equally sovereign. The State, therefore, is limited in its scope and cannot interfere with other associations' matters. Private schools and other spheres are protected from the interference of the State in their decision-making processes, organisation, and in the dispensation of their values and beliefs.

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Livres para Ensinar: Limites do Estado e a Proteção da Liberdade Religiosa das Escolas Particulares

RESUMO: O artigo compara e analisa três países- Austrália, Brasil e nos Estados Unidos da América - e a forma como abordam a questão do pluralismo religioso em escolas privadas, investigando quais limites deveriam ser impostos ao Estado para proteger a liberdade religiosa de certas associações civis - particularmente das escolas privadas. Ao considerar a idea de pluralismo a partir de uma perspectiva Calvinista, propõem-se limites ao Estado que ensejem às escolas privadas a possibilidade de operarem na esfera religiosa de maneira independente, sem interferências por parte do Estado que busquem reduzir o ethos proposto pela escola. Conclui-se que escolas privadas devem ter a liberdade de conjugarem sua agenda escolar ordinária com a sua visão religiosa.

PALAVRAS-CHAVE: Liberdade religiosa; Educação; Escolas privadas; Pluralismo .